

# China, Regional Trade Agreements and WTO Law

Francis SNYDER\*

*China's policy towards regional trade agreements (RTAs) will have a major impact on the international trading system, the debate about regionalism and multilateralism, and the policy of the WTO concerning RTAs. This article analyses China's RTAs, identifies many reasons underlying them, and proposes a three-fold typology for China's RTAs: economic integration agreements, standard regional trade agreements with other countries in the Asia-Pacific region, and bilateral free trade agreements with non-Asian countries. It then compares rules of origin, safeguards, and dispute settlement mechanisms in selected RTAs and evaluates them from the standpoint of WTO law. The article concludes, first, that the basic three-fold typology helps us to understand the objectives, organisation, and operation of China's RTAs and their relations to China's domestic structures, policy processes, legal and political culture and international and regional policies. Second, China's RTAs are generally WTO-compatible since they are drafted in the shadow of WTO law, even though WTO law does not always provide a detailed normative template. Finally, China has the challenge and the opportunity of contributing to the development of a new role for the WTO in managing RTAs.*

## 1. INTRODUCTION

This article examines China's regional trade agreements (RTAs), proposes a typology of China's RTAs and evaluates certain significant features of these agreements in the

---

\* Professeur de droit public, Université Paul Cézanne Aix-Marseille III [Centre d'Études et de Recherches Internationales et Communautaires (CERIC) UMR CNRS 6201]; Centennial Professor, Law Department, London School of Economics; Professor, College of Europe, Bruges; EU Jean Monnet Chair *ad personam*. A preliminary version of this article was presented at the Colloque International sur 'Le commerce international entre bi et multilatéralisme', organized by the Association Internationale de Droit Economique (AIDE), the Unité mixte de recherche (UMR) de droit comparé de Paris Université Paris 1 – CNRS and the Centre d'étude et de recherche en droit international (CERDIN) of Université Paris 1, Paris, France, 27-29 Mar. 2008. I am grateful for comments and discussion. I also thank Professor Zeng Lingliang and K.L. Thirayakinant for helpful comments and K.L. Thirayakinant, Wu Qianlan and Magda Salykova for research assistance. For financial support, special thanks are due to the Law Department, London School of Economics and to the China Scholarship Council, Ministry of Education, People's Republic of China for awarding me a Chinese Culture Research Fellowship in 2006-2007 and my hosts Tsinghua Law School, Tsinghua University and its Dean, Professor Wang Chenguang. Part of the research was also conducted during periods as Visiting Professor at the University of Macau and as Guest Professor at Peking University Law School. My thanks go especially to Dean Zeng Lingliang in Macau and to Dean Zhu Suli, Dean Li Ming and Professors Shao Jingchun and Song Ying at PKU. I am solely responsible for any errors of fact, interpretations and conclusions in the article.

light of WTO law.<sup>1</sup> The People's Republic of China (PRC, China) is one of the largest, most populous and most economically dynamic countries in the world today.<sup>2</sup> As of July 2007, it had a land mass of more than 9.3 million km<sup>2</sup> and a population of more than 1.3 billion, or a population density of 141.7/km<sup>2</sup>. Its population accounts for 20.02% of the world's population. Its arable surface, however, is only 1.3 million km<sup>2</sup>, or about 14% of its total area, making a population density for arable surface of 953.8/km<sup>2</sup>. Since the beginning of its 'opening up' and reforms in 1978, China's growth rate has averaged about 10% per year, based largely on foreign direct investment (FDI) and exports.<sup>3</sup> As of 2006, trade in goods accounted for 70% of GDP, FDI for about 40% of GDP and multinational enterprises for about 60% of merchandise trade.<sup>4</sup> In the same year, China was the world's fourth largest economy, accounting (in 2005) for 14% of world GDP on a purchasing power parity (PPP) basis. Per capita income in China has grown correspondingly from USD 293 in 1985 to USD 2,025 in 2006.<sup>5</sup> GDP per capita as of 2007 was estimated at USD 5300, or in terms of purchasing power parity a national total of USD 7.043 trillion; in PPP terms, China was second in the world behind only the USA.<sup>6</sup>

China 'has more contiguous neighb[or]s than any other country in the world'<sup>7</sup> Relations between China and other Asian countries are therefore long-standing and complex. Before the end of the Qing dynasty (1644–1911), China's relations with its neighbours formed a Sino-centric world order, with China at the centre, and manifested in a tributary system. According to the late Professor Wang Tieya, they did not involve

<sup>1</sup> Consistently with general usage in the literature, the terms 'regional trade agreement' and 'RTA' are used to encompass both agreements involving a specific region and bilateral free trade agreements (FTAs) involving two countries. See Jo-Ann Crawford and Roberto V. Fiorentino, 'The Changing Landscape of Regional Trade Agreements', World Trade Organization, Geneva, Switzerland, Discussion Paper No. 8, 2005, pp. 3–4, according to whom (at p. 3) FTAs account for 84% of all RTAs in force, with partial scope agreements and customs unions each making up 8%. They also state (at p. 4 n. 12) that increasingly RTAs are concluded among countries which are not geographically contiguous, even though the term 'RTA's is not technically correct in this situation. The preference for FTAs is due to their speed of negotiation, flexibility and selectivity: see Robert V. Fiorentino, Luis Verdeja and Christelle Toqueboeuf, 'The Changing Landscape of Regional Trade Agreements: 2006 Update', Regional Trade Agreements Section, Trade Policies Review Division, World Trade Organization, Geneva, Switzerland, Discussion Paper No. 12, 2006, at p. 6. See also, for example, Rahul Sen, "'New Regionalism' in Asia: A Comparative Analysis of Emerging Regional and Bilateral Trading Agreements involving ASEAN, China and India', *Journal of World Trade* 40, no. 4 (2006): 553–596 at pp. 555 n. 4.

<sup>2</sup> 'China is a civilization pretending to be a state', wrote Lucian Pye twenty years ago: Lucian W. Pye, 'China: Erratic State, Frustrated Society', *Foreign Affairs* 69, no. 4 (Fall 1990): 56–74, republished as Ch. 11, pp. 233–256 of Lucian W. Pye, *The Spirit of Chinese Politics* (Harvard University Press, 1992 [original publication in 1968, without Ch. 11] (hereafter Pye, *Spirit*); the quotation is from p. 235.

<sup>3</sup> See Horst Siebert, 'China: Coming to Grips with the New Global Player', *The World Economy* 30, no. 6 (2007): 893–922.

<sup>4</sup> Razeen Sally, 'FTAs and the Prospects for Regional Integration in Asia', European Centre for International Political Economy, Brussels, *ECIPE Working Paper*, 1 (2006):1–23, at p. 3.

<sup>5</sup> The statistics are given by The World Bank Group, 'China Data Profile', <<http://devdata.worldbank.org/external/CPPprofile.asp?PTYPE=CP&CCODE=CHN>>, visited 2 Apr. 2008; The World Bank Group, 'China Data and Statistics', <<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/EASTASIPADIFIC...>>, visited 3 Apr. 2008; The World Bank Group, 'China Quick Facts', <<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/CHINAEXTN/0,,contentMDK:20680895~pagePK:1497618~piPK:217854~theSitePK:318950,00.html>>, visited 3 Apr. 2008;

<sup>6</sup> Central Intelligence Agency, *The World Factbook – China*, available at <[www.cia.gov/library/publications/the-world-factbook/geos/ch.html](http://www.cia.gov/library/publications/the-world-factbook/geos/ch.html)>, visited 19 Mar. 2008.

<sup>7</sup> Harold C. Hinton, 'China as an Asian Power', in *Chinese Foreign Policy: Theory and Practice*, eds Thomas W. Robinson & David Shambaugh (Oxford: Clarendon Press, 1994, reprinted 2006), 348–372 at p. 352. Central Intelligence Agency, as n. 6 above, reports 22,117 km of land boundaries, including fourteen countries and two regional borders (Hong Kong and Macao).

state-to-state relations, but rather relations between superior and subordinates, based on cultural ascendancy, manifested in gifts, marriages and other forms of interaction, and symbolized in the kowtow.<sup>8</sup> After the Opium Wars, foreign powers imposed unequal treaties on China and carved up southeast Asia into states. Not surprisingly, a strong conception of national sovereignty and an overriding concern for security, social stability and protection of sovereignty are among the foundations of China's regional policy today.<sup>9</sup>

Recently, two eminent Chinese specialists on Asia summarized China's general foreign policy strategy as being 'to secure and shape a security, economic and political environment that is conducive to China concentrating on its economic, social and political development'.<sup>10</sup> They discerned four underlying concepts: make China a great power again, ensure China's security, practice self-restraint (*buyao dangtou*: do not seek leadership<sup>11</sup>) and 'behave as "a responsible great power" (*fuzeren de daguo*).<sup>12</sup> In their view, Chinese practice is based on maintaining "an active great power diplomacy" (*daguo waijiao*), cultivating friendly relations with its neighbours, cooperating more in regional economic affairs than in binding regional security arrangements, and being selective in assuming international responsibilities.<sup>13</sup>

Both strategy and practice are profoundly informed by China's specific political and legal culture and its distinctive policy-making process. Concerning political culture, a leading scholar of China's foreign policy has described China's approach to regional and international relations since 1949 as being based on a focus on the specific situation and possible changes in it, the use of metaphor and simple generalization, an orientation that is 'distinctively actor-oriented (state-centred in most cases) and relation-oriented', and moralist thinking.<sup>14</sup> 'Taking sides' in such relations is fundamental, but '[w]hether or not these countries' domestic political system is to China's liking or not is of little relevance', and in regional policy 'the emphasis [is] on relationships rather than regional issues themselves'.<sup>15</sup> Chinese political and legal culture has also been characterized by reliance 'upon ethics more than law, upon moral consensus more than judicial procedure, upon

<sup>8</sup> See Wang Tieya, 'International Law in China: Historical and Contemporary Perspectives', *Recueil des Cours de l'Académie de Droit International de La Haye* 221 (1990-II): 205-262. See also Li Zhaojie (James Li), 'Traditional Chinese World Order', *Chinese Journal of International Law* 1 (2002): 20-58.

<sup>9</sup> On the legacies for contemporary relations, see (on the tributary system) Wang Gungwu, 'China and Southeast Asia: The Context of a New Beginning' and (on unequal treaties) Harold C. Hinton, 'China as an Asian Power', in Robinson and Shambaugh (eds), as n. 8 above, pp. 187-204 and pp. 348-372, respectively. See also Seán Golden, 'Socio-cultural Aspects of the Relationship between the EU and East Asia, with particular reference to China', *Asia Europe Journal* 4 (2006): 265-294.

<sup>10</sup> Zhang Yunling & Tang Shiping, 'China's Regional Strategy', in *Power Shift: China and Asia's New Dynamics*, ed. David Shambaugh (Berkeley: University of California Press, 2005): 48-68 at p. 48.

<sup>11</sup> Often translated as 'never seek hegemony', this originated with Deng Xiaoping, and was perhaps first expressed in his talk on 'Realize the Four Modernizations and Never Seek Hegemony', 7 May 1978, in *Selected Works of Deng Xiaoping*, Volume II (1975-1982), translated by The Bureau for the Compilation and Translation of the Works of Marx, Engels, Lenin and Stalin under the Central Committee of the Communist Party of China (Foreign Languages Press, Beijing, 1984, 2nd edn 1995), pp. 122-123 at p. 123.

<sup>12</sup> Zhang Yunling & Tang Shiping, as n. 10 above, at pp. 48-49; the quotation is from p. 49.

<sup>13</sup> *Ibid.*, pp. 48-68 at pp. 49-51; the quotation is from p. 49.

<sup>14</sup> Wang Jisi, 'International Relations Theory and the Study of Chinese Foreign Policy: A Chinese Perspective', in *Chinese Foreign Policy: Theory and Practice*, eds Thomas W. Robinson and David Shambaugh (Oxford: Clarendon Press, 1994, reprinted 2006), 481-505. The quotation is from p. 492.

<sup>15</sup> *Ibid.*, at p. 492.

benevolent government more than checks and balances' and a blend of pragmatism and ideology, such as nationalism.<sup>16</sup> The second element is the Chinese policy process. For present purposes, its most significant characteristics can be summarized in terms of the conjunction of two features. The first is 'fragmented authoritarianism',<sup>17</sup> defined recently as the deep jurisdictional cleavages that separate functionally specific clusters of related bureaucracies (*xitong*) and the complex relationships between central and local governments.<sup>18</sup> The other lies in the great importance of personal relationships, or *guanxi*,<sup>19</sup> both within organizations and cutting across bureaucratic lines and central-local relations. These distinctive yet interrelated elements, so crucial in Chinese domestic policy-making, continue to influence China's relations with its neighbours.<sup>20</sup>

Regional economic cooperation is an important part of China's current foreign economic strategy.<sup>21</sup> 'Global economic multilateralism and regional economic multilateralism are "the two wheels of one cart"'.<sup>22</sup> Applied in the Asia-Pacific region, this entails 'seeking comprehensive cooperation and partnership relationships with all regional states'; showing that China is a responsible power by 'shoulder[ing] responsibilities ... and demonstrat[ing] its benign intentions by exercising self-restraint and displaying willingness to be restrained'; maintain a 'peaceful rise' (*heping jueqi*) without seeking hegemony, regardless of other powers, as long as its essential interests are not threatened;

<sup>16</sup> *Ibid.*, at pp. 488-491. On Chinese legal culture, see for example, Pitman B. Potter, *The Chinese Legal System: Globalization and Local Legal Culture* (London: Routledge, 2001).

<sup>17</sup> The term 'fragmented authoritarianism' was coined by Kenneth G. Lieberthal, 'Introduction: The "Fragmented Authoritarianism" Model and Its Limitations', in *Bureaucracy, Politics and Decision-Making in Post-Mao China*, eds Kenneth G. Lieberthal and David M. Lampton (Berkeley: University of California Press, 1992), 1-30. See also Kenneth Lieberthal & Michel Oksenberg, *Policy Making in China: Leaders, Structures and Processes* (Princeton: Princeton University Press, 1988); Andrew C. Mertha, *The Politics of Piracy: Intellectual Property in Contemporary China* (Ithaca and London: Cornell University Press, 2005).

<sup>18</sup> Mertha, as n. 17 above, p. 27. On the relations between 'functional systems' (*xitong*) and ministries, see A. Doak Barnett (with a Contribution by Ezra Vogel), *Cadres, Bureaucracy and Political Power in Community China* (New York and London: Columbia University Press, 1967), 6-10.

<sup>19</sup> See for example, Pye, *Spirit*, as n. 3 above; Lucian W. Pye, *The Dynamics of Chinese Politics* (Cambridge MA: Oelgeschlager, Gunn & Hain, 1981).

<sup>20</sup> For example, see Rosemary Foot, 'China in the ASEAN Regional Forum: Organization Process and Domestic Models of Thought', *Asian Survey*, 38, 5, May 1998, pp. 425-440. On the conjunction of hard realism and strategic culture in Chinese foreign policy, see the still informative articles by Alastair Iain Johnston, 'Cultural Realism and Strategy in Maoist China', in *The Culture of National Security: Norms and Identity in World Politics*, ed. Peter J. Katzenstein (New York: Columbia University Press, 1996), 216-268; and Michael Yahuda, 'How much has China learned about interdependence?', in *China Rising: Nationalism and Interdependence*, eds David S.G. Goodman & Gerald Segal (London: Routledge, 1997), 6-26; and, though more dated, Robert A. Scalapino, 'China's Multiple Identities in East Asia: China as a Regional Force', in *China's Quest for National Identity*, eds Lowell Dittmer & Samuel S. Kim (Ithaca: Cornell University Press, 1993), 215-236.

<sup>21</sup> See Li Guanghui, 'China - ASEAN FTA necessary and beneficial', *China Daily*, 27 Oct. 2006, p. 4. The author is a researcher with the Economic Research Institute, Ministry of Commerce, People's Republic of China. For a broadly complementary view of China's relations with the WTO, see Sun Liang & Zhang Xiangchen, 'Redefining Development, Reimagining Globalization: The WTO and China's New Economic Vision', *Journal of World Trade* 41, no. 6 (2007): 1275-1295. For the chronological development of all Asia-Pacific FTA projects to 2005, see Dent, as n. 22 above. *New Free Trade Agreements in the Asia-Pacific* (London: Palgrave Macmillan, 2006), Appendix A, pp. 260-277. On their thematic content, see *id.*, Appendix C, pp. 287.

<sup>22</sup> Jianwei Wang, 'China's Multilateral Diplomacy in the New Millennium', in *China Rising: Power and Motivation in Chinese Foreign Policy*, eds Yong Deng & Fei-Ling Wang (Lanham, Maryland: Rowman & Littlefield, 2005), 159-200, at p. 167, quoting Zhang Baili, 'Strengthening the Economic Integration between China and East Asia', in *The Thinking of the New Century*, ed. Ling Rong (Beijing: CPC Central Party School Press, 2002), 104-105. See also Cheng-Chwee Kuik, 'Multilateralism in China's ASEAN Policy', SAIS Working Paper Series, WP/05/03, Paul H. Nitze School of Advanced International Studies (SIAS), Johns Hopkins University, Washington, DC, Oct. 2003.

open its domestic market as part of regional integration; and participate actively in regional multilateral institutions.<sup>23</sup> Zhang Yunling and Tang Shiping themselves summarize China's practice of its regional strategy as 'participate actively, demonstrate restraint, offer reassurance, open markets, foster interdependence, create common interests, and reduce conflict'.<sup>24</sup>

Focussing on China's RTAs, this article makes three basic arguments. First, China's RTAs fall into three main categories: economic integration agreements, regional trade agreements in the narrow sense, and bilateral free-trade agreements. This tripartite typology provides a useful way of understanding China's RTAs; by extension, it may help to make sense of the increasingly complex array of RTAs in international trade relations today. Second, China's participation in RTAs has multiple objectives.<sup>25</sup> They include building 'Greater China', security,<sup>26</sup> search for energy and natural resources, technology transfer, investment protection, and international or regional geopolitical strategy (or a combination of these reasons), which are often, if not usually, more important than trade liberalization alone. Only selected examples can be given here for reasons of space,<sup>27</sup> but they should suffice to make the essential point. Third, on the whole China's RTAs today are consistent with WTO law. The paper analyses rules of origin, safeguards and dispute settlement mechanisms in each of the three types of RTAs. Though often different from WTO law, and sometimes going beyond it, China's RTAs are substantially based on WTO law, integrate WTO law to a considerable extent and for the most part are drafted with a view to WTO-consistency.

The remainder of the paper consists of two main parts. The next part (Part 2) presents several of China's most important RTAs in outline and suggests a typology of China's RTAs. While seeking to give as comprehensive a picture as possible, it focuses in detail on the Mainland – Hong Kong Closer Economic Partnership Agreement (CEPA), the ASEAN-China Free Trade Agreement (ACFTA) and the China-Chile Free Trade Agreement (CCFTA) and to some extent the China-Pakistan Free Trade Agreement (CPFTA). The following part (Part 3) compares several aspects of these RTAs and considers them in the light of WTO law. It concentrates on three significant, often distinctive features of

---

<sup>23</sup> Zhang Yunling & Tang Shiping, as n. 10, at pp. 52-54; the quotations are from p. 52.

<sup>24</sup> Zhang Yunling & Tang Shiping, as n. 10 above, at p. 54; they state expressly (at p. 64, n. 37) that '[T]his is our own description and is not in the official Chinese diplomatic lexicon'.

<sup>25</sup> This is not unique to China: see for example, Jo-Ann Crawford & Roberto V. Fiorentino, as n. 2 above, p. 16, which identifies such factors as economic, political and security considerations, deeper economic integration in areas not available under the WTO system, defensive strategies in order to avoid being left out of regional arrangements, and the creation of regional or international alliances. Some authors maintain however that the main purpose of RTAs is trade liberalization: see Elma Darlini Sulaiman (Attorney General's Chambers, Brunei Darussalam), 'WTO and Regional Trade Liberalisation: Implications on ASEAN', p. 9, available at <[www.aseanlawassociation.org/9GAdocs/w3\\_Brunei.pdf](http://www.aseanlawassociation.org/9GAdocs/w3_Brunei.pdf)>, visited 22 Feb. 2008. It is likely that different countries have different reasons, and in particular that those of small countries differ considerably from those of large countries.

<sup>26</sup> For a list of China's bilateral security partnerships in Asia and elsewhere as of 2005, see Bates Gill, 'China's Evolving Regional Security Strategy', in *Power Shift: China and Asia's New Dynamics*, ed. David Shambaugh (Berkeley: University of California Press, 2005), 247-265 at p. 253 Table 24.

<sup>27</sup> For further discussion, see David Shambaugh (ed), *Power Shift: China and Asia's New Dynamics* (Berkeley: University of California Press, 2005); John Wong, Zou Keyuan & Zeng Huaqun (eds), *China – ASEAN Relations: Economic and Legal Dimensions* (Singapore: World Scientific Publishing Company, 2006).

RTAs, namely rules of origin (ROOs), safeguards and dispute settlement mechanisms. It also briefly discusses the 'noodle bowl' phenomenon potentially posed by China's RTAs. These two parts thus are typological and comparative respectively; they are also complementary in offering different perspectives which cannot be gained simultaneously from a single analysis.<sup>28</sup> A brief conclusion (Part 4) summarizes the discussion.

## 2. CHINA'S REGIONAL TRADE AGREEMENTS IN OUTLINE

China so far has notified nine regional trade agreements (with six different partners) to the WTO (see Table 1),<sup>29</sup> has signed another concerning only goods which has entered into force, is currently involved in negotiations on seven other RTAs and is considering negotiations on at least another seven RTAs/FTAs. In all, 'the initiative, overarching strategy and negotiating motor come from Beijing'.<sup>30</sup> China also participates in a number of other regional arrangements. This paper concentrates mainly on agreements which have already entered into force. They can be divided into three groups: economic integration agreements, such agreements with Hong Kong and Macao (2.1), 'standard' RTAs, such as the regional framework agreement with the Association of South East Asian Nations (ASEAN) and agreements directly related to it (2.2), and bilateral free trade agreements with individual sovereign states, namely Chile and Pakistan (2.3). The last section also mentions agreements now being negotiated or being considered with other sovereign states.

### 2.1. ECONOMIC INTEGRATION AGREEMENTS WITH HONG KONG AND MACAO AND RELATED AGREEMENTS

China has concluded agreements with Hong Kong and Macao. These agreements are economic integration agreements. Compared to standard RTAs, they are designed to promote deeper integration between mainland China and its two Special Administrative Regions. Initially they aimed also to strengthen the economies of Hong Kong and Macao, then suffering from a severe downturn. Their longer term goals include the integration of Hong Kong, Macao and also Taiwan with Mainland China to establish a 'Greater China Economic Circle'.<sup>31</sup>

<sup>28</sup> This sense of complementarity is drawn from the work of the physicist Niels Bohr, as discussed by Freeman Dyson, 'Working for the Revolution [Review of Gino Segrè, *Faust in Copenhagen: A Struggle for the Soul of Physics* (Viking, New York, 2007)], *The New York Review of Books*, LIV, 16, 25 Oct. 2007, pp. 45-47 at p. 47: 'Two descriptions of nature are said to be complementary when they are both true but cannot both be seen in the same experiment'.

<sup>29</sup> See 'Regional Trade Agreements Notified to the WTO and in Force as of 15 Mar. 2008, <[www.wto.org/english/tratop\\_e/region\\_e/a\\_z\\_e.xls](http://www.wto.org/english/tratop_e/region_e/a_z_e.xls)>, visited 15 Apr. 2008. This accounts for nine different agreements with six different partners, for example, there are three ASEAN-China agreements on Framework Agreement, goods and services respectively.

<sup>30</sup> Sally, as n. 4 above, at p. 8.

<sup>31</sup> See *China News Agency*, 5 Jul. 2003, cited in Jianyu Wang, 'China's Regional Trade Agreements: The Law, Geopolitics and Impact on the Multilateral Trading System', *Singapore Year Book of International Law* 8 (2004): 119-147 at p. 130, n. 77. In 2003 an offer of a CEPA was extended to but refused by Taiwan: see Wang at p. 130.

Under the principle of ‘One Country, Two Systems’, Hong Kong and Macau are Special Administrative Regions (SAR) of China.<sup>32</sup> As agreed by the People’s Republic of China and the United Kingdom in the 1984 Sino-British Joint Declaration,<sup>33</sup> Hong Kong reverted to Chinese sovereignty on 1 July 1997. Similarly, Macao, following the terms of the 1987 Sino-Portuguese Declaration on the Question of Macao,<sup>34</sup> became a Special Administrative Region (SAR) of the People’s Republic of China on 20 December 1999. As Special Administrative Regions, Hong Kong and Macao retain authority over their trade, customs and other international economic relations and are individually Members of the WTO separate from the People’s Republic of China. The Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA) was signed on 29 June 2003, the Annexes<sup>35</sup> were signed on 29 September 2003 and the CEPA came into effect on 1 January 2004. Further details were agreed on 27 August 2004 in a Record of Consultation on Further Liberalization.<sup>36</sup> The Mainland and Macao Closer Economic Partnership Arrangement (CEPA)<sup>37</sup> was signed on 18 October 2003 and entered into force on 1 January 2004. Both were notified to the WTO on 12 January 2004 under Article XXIV GATT for goods and Article V GATS for services. The following paragraphs discuss first the China – Hong Kong CEPA and then briefly the China – Macao CEPA.

The Mainland – Hong Kong CEPA covers trade in goods, trade in services and trade and investment facilitation.<sup>38</sup> It aims to promote joint economic prosperity and to facilitate further development of economic links between the two and other countries and regions.<sup>39</sup> Its objectives are to strengthen trade and investment cooperation and promote joint development by progressively reducing or eliminating tariffs and non-tariff

<sup>32</sup> The first part of this paragraph is based on Francis Snyder, *The European Union and China, 1949-2008: Basic Documents and Commentary* (Oxford: Hart Publishing, 2009), Ch. 8.

<sup>33</sup> Joint Declaration of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong, signed in Beijing on 19 Dec. 1984, available at <www.hkbu.edu.hk/~pchksar/JD/jd-full1.htm>, visited 24 Nov. 2007.

<sup>34</sup> Joint Declaration of the Government of the People’s Republic of China and the Government of the Republic of Portugal on the Question of Macao, signed in Beijing on 13.4.1987, available at <www.Macau99.org/mo/e\_doc\_declaracao.html>, or <www.imprensa.Macau.gov.mo/bo/i/88/23/dc/en/>, visited 24 Nov. 2007.

<sup>35</sup> Annex 1: Arrangements for Implementation of Zero Tariff for Trade in Goods, including Table 1 List of Hong Kong Origin Products for Implementation of Zero Import Tariff by the Mainland; Annex 2: Rules of Origin for Trade in goods, including Table 1: Schedule on Rules of Origin for Hong Kong Goods Benefitting from Tariff Preference for Trade in Goods; Annex 3: Procedures for the Issuing and Verification of Certificates of Origin, including Form 1: Certificate of Hong Kong Origin (CEPA); Annex 4: Specific Commitments on Liberalisation of Trade in Services, including Table 1: The Mainland’s Specific Commitments on Liberalisation of Trade in Services for Hong Kong, and Table 2: Hong Kong’s Specific Commitments on Liberalisation of Trade in Services for the Mainland; Annex 5: Definition of ‘Service Supplier’ and Related Requirements; and Annex 6: Trade and Investment Facilitation.

<sup>36</sup> Record of Consultations on Further Liberalisation under the Mainland – Hong Kong Closer Economic Partnership Arrangement, available at <www.ipd.gov.hk/eng/news/news/Record\_of\_Consultations\_on\_Further\_Liberalization.pdf>, visited 10 Mar. 2008.

<sup>37</sup> In Portuguese: Acordo de Estreitamento das Relações Económicas e Comerciais entre o Continente Chinês e Macau.

<sup>38</sup> For texts, see the official Hong Kong website for CEPA : <www.tid.gov.hk, visited 3 Mar. 2008. For an early survey from Hong Kong perspectives, see Edith Terry (ed), *Pearl River Super Zone: Tapping into the World’s Fastest Growing Economy* [by the Staff and Contributors to the *South China Morning Post*] (Hong Kong: SCMP Book Publishing, 2003). For an evaluation from the standpoint of foreign companies, focusing mainly on ROOs for goods and services, see Stéphanie Thomas, Nicolas Hyacinthe & Maryline Sadowsky, ‘Accord de libre-échange entre la Chine et Hong Kong: Quelles perspectives pour les entreprises de pays tiers’, *Revue de droit des affaires internationales* 1 (2005): 77-85.

<sup>39</sup> Mainland – Hong Kong CEPA, Preamble.

Table 1. RTAs Notified by China to 14 April 2008

Name of RTA	Signatories	Date of Entry into Force	Date of WTO Notification	Related WTO Provisions	Coverage	Type of Agreement	Miscellaneous
Asean-China	Brunei, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand, Viet Nam, China	01 Jul. 2003	21 Dec. 2004	Enabling Clause	Framework Agreement: outline the objectives and lay down the framework of Asean-China relationship.	EPA: Partial Agreement (Framework Agreement)	Only set out objectives in the relationship btw Asean and China; and set out timeframes for future integration
China-Hong Kong	China, Hong Kong	01 Jan. 2004	12 Jan. 2004	Art XXIV, GATT	Most tariffs eliminated; tariff quotas, NTBs, AD, CVM barred, but safeguard measure allowed; trade-investment cooperation/promotion/facilitation	EPA: Economic Integration Agreement	Aim to integrate mainland and Hong Kong
China-Hong Kong	China, Hong Kong	01 Jan. 2004	12 Jan. 2004	Art V, GATS	Enhance market access; liberalization for service suppliers; mutual recognition of professional qualifications; financial cooperation; cooperation on tourism	EPA: Economic Integration Agreement	Aim to integrate mainland and Hong Kong
China-Macao	China, Macao	01 Jan. 2004	12 Jan. 2004	Art XXIV, GATT	Most tariffs eliminated; tariff quotas, NTBs, AD, CVM barred, but safeguard measure allowed; trade-investment cooperation/promotion/facilitation	Economic Integration Agreement	Aim to integrate mainland and Macao
China-Macao	China, Macao	01 Jan. 2004	12 Jan. 2004	Art V, GATS	Enhance market access; liberalization for service suppliers; mutual recognition of professional qualifications; financial cooperation; cooperation on tourism	EPA: Economic Integration Agreement	Aim to integrate mainland and Macao



Asean- China	Brunei, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand, Viet Nam, China	01 Jan. 2005	n/a	Art XXIV, GATT	Tariffs reduction/ elimination; ROO; allow AD, CVM, SG, GATT general exceptions	FTA	Recognition of China's market economy status
Chile-China	Chile, China	01 Oct. 2006	20 Jun. 2007	Art XXIV, GATT	Tariffs reduction/ eliminations; ROO; allow AD, CMV, SG, GATT general exceptions; agricultural export subsidies; cooperation on science and technology, education, labour and environmental standards, SMEs, IPRs, investment, mining and industrial cooperation	EPA	
China- Pakistan	China, Pakistan	24 Nov. 2006 (signed, not yet in force)	n/a	Art XXIV, GATT	Tariffs reduction/ elimination; ROO; allow AD, CVM, SG; set out SPS and TBT requirements; trade-investment cooperation/promotion/ facilitation	FTA	
Asean- China	Brunei, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand, Viet Nam, China	01 Jul. 2007	n/a	Art V, GATS	Enhance market access and national treatment; mutual recognition of standards/ criteria/authorization/ licensing/certification of service suppliers; recognition of professional qualifications; allow SG, security exceptions and GATS general exceptions;	FTA	

barriers (NTBs) on substantially all trade between Mainland China and Hong Kong, progressively achieving liberalization of services trade through reduction or elimination of substantially all discriminatory measures and promoting trade and investment facilitation.<sup>40</sup> The basic principles include abiding by the 'One Country, Two Systems' principle and being consistent with rules of the WTO.<sup>41</sup> The CEPA also recognizes China as a market economy, by providing that Section 15 (anti-dumping) and Section 16 (countervailing measures) of China's WTO Protocol and paragraph 242 (Textiles Specific Safeguard Clause, TSSC) of the Working Party Report on China's Accession do not apply to trade between the Mainland and Hong Kong.<sup>42</sup> The CEPA establishes a Joint Steering Committee composed of senior representatives or officials designated by the two sides, together with Liaison Offices and if necessary working groups.<sup>43</sup>

Concerning trade in goods, Hong Kong is to continue to apply zero tariffs to goods of Mainland origin. The Mainland is to apply zero tariffs to certain listed Hong Kong goods as from 1 January 2004<sup>44</sup> and to all other Hong Kong goods as from 1 January 2006 at the latest.<sup>45</sup> Neither side is to apply NTBs inconsistent with the WTO to goods imported and originated from the other side.<sup>46</sup> Neither is to apply anti-dumping measures or countervailing measures to goods from the other.<sup>47</sup> Rules of origin and safeguard measures for goods are discussed later.

Concerning trade in services, the Mainland – Hong Kong CEPA provides for the progressive reduction or elimination of restrictive measures against services and service suppliers.<sup>48</sup> Further liberalization may be achieved through consultation.<sup>49</sup> The CEPA includes specific rules of origin for services. Services suppliers of other WTO Members that are juridical persons and established under the laws of either the Mainland or Hong Kong are entitled to preferential treatment granted by the other side under CEPA, as long as they engage in 'substantive business operations' in the former side.<sup>50</sup> GATS, notably Article V(6), does not clearly define 'substantive business operations'. Annex V of CEPA requires, however, that '[t]he nature and scope of the services provided by a

<sup>40</sup> Mainland – Hong Kong CEPA., Art. 1.

<sup>41</sup> Mainland – Hong Kong CEPA., Art. 2.

<sup>42</sup> Mainland – Hong Kong CEPA Art. 4, which states inter alia that 'The two sides recognise that through over 20 years of reform and opening up, the market economy system of the Mainland has been continuously improving, and the mode of production and operation of Mainland enterprises is in line with the requirements of a market economy ...'

<sup>43</sup> Mainland – Hong Kong CEPA., Art. 19(1), (2).

<sup>44</sup> Mainland – Hong Kong CEPA, Art. 5(1). See Annex 1, Arrangements for Implementation of Zero Tariff on Goods, and Table 1, List of Hong Kong Origin Products for Implementation of Zero Import Tariff by the Mainland. The Annexes are an integral part of the CEPA: Mainland – Hong Kong CEPA, Art. 21.

<sup>45</sup> Mainland – Hong Kong CEPA, Art. 5(2). On implementation, see Annex 1, Arrangements for Implementation of Zero Tariff on Goods. Such measures are extremely important in view of the high level of intra-industry trade between Mainland China and Hong Kong: a useful, though rather dated, indication is Xiaoling Hu & Yue Ma, 'International Intra-Industry Trade of China', *Review of World Economics* 135, no. 1 (March 1999): 82-101.

<sup>46</sup> Mainland – Hong Kong CEPA, Art. 6(1).

<sup>47</sup> Mainland – Hong Kong CEPA, Arts 7 (anti-dumping) and 8 (countervailing measures).

<sup>48</sup> Mainland – Hong Kong CEPA, Art. 11. The timetable is given in Annex 4, Specific Commitments on Liberalization of Trade in Services.

<sup>49</sup> Mainland – Hong Kong CEPA, Art. 11(2).

<sup>50</sup> Mainland – Hong Kong CEPA, Art. 12(2). Qualifying business operations are stipulated in Annex 5, Definition of 'Service Supplier' and Related Requirements.

Hong Kong service supplier in Hong Kong should encompass the nature and scope of the services it intends to provide in the Mainland.<sup>51</sup> The supplier must have been registered in Hong Kong and engaged in substantive business operations for three years or more; the period is five years for construction and engineering services, banking and other financial services, insurance and related services and air transport services.<sup>52</sup> These restrictive rules of origin are consistent with Hoekman and Newfarmer's hypothesis that 'a country with "regionally dominant but non-globally competitive service providers" would be inclined to adopt restrictive rules of origin for services'.<sup>53</sup> These rules on 'substantive business operations', it has been argued, are not fully compatible with Article V(6) GATS.<sup>54</sup>

CEPA grants Hong Kong service providers preferential treatment compared to those granted to other WTO Members under China's WTO timetable, or treatment going beyond China's WTO obligations.<sup>55</sup> Measures are adopted to strengthen cooperation in banking, securities and insurance; this includes relocation of the international treasury and foreign exchange trading centres of Mainland banks to Hong Kong, the development of their activities through acquisitions and 'the full utilization of financial intermediaries in Hong Kong during the process of reform, restructuring and development of the financial sector in the Mainland'.<sup>56</sup> Mainland tourists from Guangdong Province are allowed to visit Hong Kong individually,<sup>57</sup> and other measures are designed to strengthen cooperation in tourism.<sup>58</sup> Mutual recognition of professional qualifications is encouraged.<sup>59</sup> The Agreement also provides for trade and investment facilitation, including customs clearance facilitation, commodity inspection and quarantine, food safety and quality and standardization, electronic business, transparency in laws and regulation and other matters.<sup>60</sup>

The Mainland – Macao Closer Economic Partnership Arrangement (CEPA) is virtually the same, though narrower in coverage and with minor textual differences not relevant here.<sup>61</sup> The parties have supplemented the basic Mainland China– Macao CEPA

<sup>51</sup> Mainland – Hong Kong CEPA, Annex 5, Art. 3.1.2(1).

<sup>52</sup> Mainland – Hong Kong CEPA, Annex 5, Art. 3.1.2(2).

<sup>53</sup> The quotation is from Adrian Emch, 'Services Regionalism in the WTO: China's Trade Agreements with Hong Kong and Macao in the Light of Article V(6) GATS', *Legal Issues of European Integration* 33, no. 4 (2006): 351–374 at p. 377 n. 99, citing Bernard Hoekman & Richard Newfarmer, 'Preferential Trade Agreements, Investment Disciplines and Investment Flows', *Journal of World Trade* 39, no. 5 (2005): 949–973 at p. 967.

<sup>54</sup> Emch, as n. 53 above.

<sup>55</sup> For examples, see Jianyu Wang, as n. 31 above, at p. 123.

<sup>56</sup> Mainland – Hong Kong CEPA, Art. 13; the quotation is from Art. 13(3).

<sup>57</sup> Mainland – Hong Kong CEPA, Art. 14(1).

<sup>58</sup> Mainland – Hong Kong CEPA, Art. 14(2), (3).

<sup>59</sup> Mainland – Hong Kong CEPA, Art. 15(1).

<sup>60</sup> Mainland – Hong Kong CEPA, Art. 17 and Annex 6, Trade and Investment Facilitation.

<sup>61</sup> See Mainland and Macao Closer Economic Partnership Arrangement (CEPA). CEPA was signed in the Chinese language, and only the Chinese text is authentic. The full text used here is a courtesy translation, which can be found at the website of Macao Economic Services, <[www.economia.gov.mo/](http://www.economia.gov.mo/)>, visited 5 Mar. 2008. There are minor differences concerning financial cooperation (Art. 13), areas of cooperation (Art. 17). A summary of the Mainland – Macao CEPA may be found at <[www.imprensa.Macau.gov/edicoes/en/dse/cepa/](http://www.imprensa.Macau.gov/edicoes/en/dse/cepa/)>, visited 5 Mar. 2008.

each year to liberalize further trade in goods and services, most recently on 2 July 2007.<sup>62</sup>

In sponsoring the development of the two CEPAs, China has promoted both labour-intensive production and high-tech knowledge-intensive industries, leading to a distinctive regional economy composed of extremely diverse forms of transnational economic linkages.<sup>63</sup> One example is the link between FDI and foreign trade in the Pearl River Delta, embracing Hong Kong, Macao and the neighbouring Mainland Chinese province of Guangzhou.<sup>64</sup> Building on CEPA,<sup>65</sup> the Pan-Pearl River Delta Regional Cooperation Framework (PPRD Cooperation Framework Agreement) was signed in Guangzhou on 3 June 2004 by Hong Kong, Macao and neighbouring provinces in mainland China. It involves '9+2' members, namely Hong Kong, Macao and nine Chinese provinces: Guangdong, Fujian, Jiangxi, Hunan, Guangxi, Hainan, Sichuan, Guizhou and Yunnan. This area accounts for 20% of Chinese territory, one-third of China's population and more than 35% of China's economic output.<sup>66</sup> The Agreement is based on voluntary participation, market orientation, openness and fairness, complementarities and joint prosperity. Cooperation is projected in ten areas, including infrastructure, enterprise and investment, information development, tourism, commerce and trade, agriculture, labour, science, education and culture, environmental protection and health and disease prevention.<sup>67</sup> So far, the parties have held four PPRD Regional Cooperation Forums. At the second session, held in Chengdu, Sichuan Province, the intellectual property rights and administration authorities of the governments of 9+2 signed the Pan-PRD Intellectual

<sup>62</sup> See the following English courtesy translations: Supplement to CEPA (signed on 29 Oct. 2004) <[www.economia.gov.mo/web/DSE/public?\\_nfpb=true&\\_pageLabel=Pg\\_CEPa\\_CEPa\\_II&locale=en\\_US](http://www.economia.gov.mo/web/DSE/public?_nfpb=true&_pageLabel=Pg_CEPA_CEPa_II&locale=en_US)>; Supplement II to CEPA (signed on 21 Oct. 2005), <[www.economia.gov.mo/web/DSE/public?\\_nfpb=true&\\_pageLabel=Pg\\_CEPa\\_CEPa\\_III&locale=en\\_US](http://www.economia.gov.mo/web/DSE/public?_nfpb=true&_pageLabel=Pg_CEPa_CEPa_III&locale=en_US)>; Supplement III to CEPA (signed on 26 Jun. 2006), <[www.economia.gov.mo/web/DSE/public?\\_nfpb=true&\\_pageLabel=Pg\\_CEPa\\_CEPa\\_IV&locale=en\\_US](http://www.economia.gov.mo/web/DSE/public?_nfpb=true&_pageLabel=Pg_CEPa_CEPa_IV&locale=en_US)>; <[www.economia.gov.mo/web/DSE/public?\\_nfpb=true&\\_pageLabel=Pg\\_EETR\\_CEPa\\_S&locale=en\\_US](http://www.economia.gov.mo/web/DSE/public?_nfpb=true&_pageLabel=Pg_EETR_CEPa_S&locale=en_US)>, Supplement IV to CEPA (signed on 2 Jul. 2007) (New) <[www.economia.gov.mo/web/DSE/public?\\_nfpb=true&\\_pageLabel=Ln\\_ET\\_AP&locale=en\\_US#](http://www.economia.gov.mo/web/DSE/public?_nfpb=true&_pageLabel=Ln_ET_AP&locale=en_US#)>, all visited 5 Mar. 2008.

<sup>63</sup> Robert Ash, 'China's Regional Economies and the Asian Region: Building Interdependent Linkages', in *Power Shift: China and Asia's New Dynamics*, ed. David Shambaugh (Berkeley: University of California Press, 2005), 96-131 at pp. 97-98.

<sup>64</sup> For detailed statistics on the origins of regional FDI in China in 2002, see Ash, as n. 63 above, at p. 107 Table 15.

<sup>65</sup> In other words, on use of the two CEPAs by manufacturing firms and service providers in Hong Kong and Macao as well as Mainland China. For firm-level priorities concerning law and public policy, see Chyau Tuan & Linda Fung-Yee Ng, 'FDI and Industrial Restructuring in Post-WTO Greater PRD : Implications on Regional Growth in China', *The World Economy* 27, no. 10 (2004): 1609-1631, which (at p. 1616) found that manufacturing firms accorded more importance to industrial policy for selective industries, whereas services firms emphasized government policies to increase competition.

<sup>66</sup> See 'Overview of Pan - Pearl River Delta Regional Cooperation', available at the website of the Macao Special Administrative Region Economic Services, <[www.economia.gov.mo/web/DSE/public?\\_nfpb=true&\\_pageLabel=Pg\\_EETR\\_9\\_2\\_S&locale=en\\_US](http://www.economia.gov.mo/web/DSE/public?_nfpb=true&_pageLabel=Pg_EETR_9_2_S&locale=en_US)>, visited 5 Mar. 2008. See also Yue-man Yeung, 'The Pan-PRD and ASEAN-China FTA as Agents of Regional Integration in Pacific Asia', Keynote address, Forum on A Tale of Two Regions: China's Pan-PRD and ASEAN, Gold Coast Hotel, Hong Kong, 4 Nov. 2005, available at <[www.hkpri.org.hk/passagesPDF/others/Speech/2005/Prof.%20Yeung%20Speech.pdf](http://www.hkpri.org.hk/passagesPDF/others/Speech/2005/Prof.%20Yeung%20Speech.pdf)>, visited 20 Mar. 2008. Yeung concludes (at p. 10) that currently Guangdong and Hong Kong are 'presiding' over the conjunction of Pan-PRD of 9+1 and ASEAN-China FTA of 10+1.

<sup>67</sup> See 'Summary of the Pan - Pearl River Delta Regional Cooperation Framework Agreement', available at the website of the Macao Special Administrative Region Economic Services, <[www.economia.gov.mo/web/DSE/public?\\_nfpb=true&\\_pageLabel=Pg\\_EETR\\_9\\_2\\_T&locale=en\\_US](http://www.economia.gov.mo/web/DSE/public?_nfpb=true&_pageLabel=Pg_EETR_9_2_T&locale=en_US)>, visited 5 Mar. 2008.

Property Cooperation Agreement.<sup>68</sup> Its basic principles included ‘administration by law: All parties shall adhere to the principles of “one country, two systems” and “administration by law”, and strive to create an ordered and structured environment for intellectual property protection’.<sup>69</sup> They agreed on various forms of cooperation, including economic integration and intellectual property protection:

The nine provinces/regions shall cooperate to remove barriers of local protectionism; to enhance communication and coordination among authorities enforcing intellectual property protection within the region; to establish a uniform, effective and regulated system in intellectual property protection; and where appropriate, to step up communication and cooperation with the authorities of the SARs enforcing intellectual property protection so as to improve the overall protection of intellectual property within the region.<sup>70</sup>

The Agreement does not mention WTO or the TRIPS Agreement.

## 2.2. STANDARD RTAs: ASEAN-CHINA FRAMEWORK AGREEMENT AND RELATED AGREEMENTS

Between 1991 and 2001 world trade increased by 177%, while East Asian intraregional trade increased by 304%, due mainly to the rise of China.<sup>71</sup> Imports and foreign direct investment (FDI) from other Asian countries flowed into China, which became a major importer of intermediate goods from the Asian region and a major exporter of finished products to the world, especially the USA and the European Union.<sup>72</sup> This new ‘triangular trade pattern’<sup>73</sup> resulted in diversion of FDI to China from other countries, such as the ASEAN Member States. However, it also led to outward investment from China and, under Jiang Zemin’s ‘going abroad’ (*zou chuqu*) strategy, to processing abroad, for example in ASEAN countries, with materials imported from China (*dailiao jiaogong*).<sup>74</sup> Approximately 60% of FDI in China between 1991–2001 came from other Asian countries, as compared to about 10% from each of the USA, EU and Japan.<sup>75</sup> The resulting economic transformation had profound implications for China’s domestic economy and its participation in the East Asian region. In fact, Robert Ash hypothesises that ‘regional

<sup>68</sup> Pan-PRD Intellectual Property Cooperation Agreement (Courtesy Translation), available on the website of the Hong Kong Government Intellectual Property Department at <[www.ipd.gov.hk/eng/pub\\_press/press\\_releases/agreement\\_eng.pdf](http://www.ipd.gov.hk/eng/pub_press/press_releases/agreement_eng.pdf)>, visited 5 Mar. 2008.

<sup>69</sup> Pan-PRD Intellectual Property Cooperation Agreement, Art. 2(4).

<sup>70</sup> Pan-PRD Intellectual Property Cooperation Agreement, Art. 4(5).

<sup>71</sup> Hideo Ohashi, ‘China’s Regional Trade and Investment Profile’, in *Power Shift: China and Asia’s New Dynamics*, ed. David Shambaugh (Berkeley: University of California Press, 2005), 71–95 at p. 72.

<sup>72</sup> To the extent that ‘the major reason why China manages to record a [trade] surplus with the EU is because it is used as a processing platform by a number of (primarily foreign, Asian) firms. In other words, the EU trade deficit is actually a deficit vis-à-vis the whole of East Asia rather than vis-à-vis China’: Bernadette Andreosso-O’Callaghan and Françoise Nicolas, ‘Complementarity and Rivalry in EU–China Economic Relations in the Twenty-First Century’, *European Foreign Affairs Review* 12 (2007): 13–38 at p. 18.

<sup>73</sup> See Guillaume Gaulier, Françoise Lemoine & Deniz Ünal-Kesenci, ‘China’s Integration into East Asia : Production Sharing, FDI & High-Tech Trade’, Working Paper, Centre d’Etudes Prospectives et d’Informations Internationales, No. 2005–09, Jun. 2005, available at <[www.cepii.fr/anglaisgraph/workpap/pdf/2005/wp05-09.pdf](http://www.cepii.fr/anglaisgraph/workpap/pdf/2005/wp05-09.pdf)>, visited 20 Mar. 2008.

<sup>74</sup> Ohashi, as n. 71 above, at pp. 76, 79–89

<sup>75</sup> Andreosso-O’Callaghan and Nicolas, as n. 72 above, at p. 24.

trade patterns in China reflect the emergence of transnational economic axes', and they also engage China in the broader international economy.<sup>76</sup> Based largely on international production networks, this is what Baldwin calls 'Factory Asia'.<sup>77</sup>

RTAs have structured and supported these economic changes, just as economic changes in China and its region have underpinned and legitimated RTAs. These are not economic integration agreements under the umbrella of 'One Country, Two Systems', but rather RTAs in the strict sense, focused on regional cooperation between neighbouring sovereign states and oriented to trade and economic matters, among others. They include integration across land borders as well as overseas.

China has concluded numerous RTAs and other regional agreements. First, China is a party to the Central Asian Regional Economic Cooperation (CAREC) Programme. Initiated in 1997, CAREC focuses on transport, energy, trade policy and trade facilitation among China, Afghanistan, Azerbaijan, Kazakhstan, Kyrgyz Republic, Mongolia, Tajikistan and Uzbekistan.<sup>78</sup> Second, China is a founder member of the Shanghai Cooperation Organisation (SCO), an intergovernmental organization established on 15 June 2001 and comprising China, the Republic of Kazakhstan, the Kyrgyz Republic, the Russian Federation, the Republic of Tajikistan and the Republic of Uzbekistan. Though its first objective is mutual security, the SCO also includes economic and trade cooperation;<sup>79</sup> it thus is an example of 'functionalism upside down', in which successful cooperation concerning security 'spilled over' to other areas.<sup>80</sup> Third, China is a party to The Strategic Framework for Action on Trade Facilitation and Investment in the Greater Mekong Sub-Region (GMS). The other countries involved in the GMS scheme are Cambodia, Lao People's Democratic Republic (Lao PDR), Myanmar,

<sup>76</sup> Ash, as n. 63 above, at p. 99.

<sup>77</sup> Richard Baldwin, 'Managing the Noodle Bowl: The Fragility of East Asian Regionalism', Centre for Economic Policy Research, Discussion Paper Series, No. 5561, Mar. 2006, available at <[www.cepr.org/pubs/dps/DP5561.asp](http://www.cepr.org/pubs/dps/DP5561.asp)>, visited 12 Mar. 2008. On the role of production networks in East Asian regional integration, see Henry W.C. Yeung, *Transnational Corporations and Business Networks: Hong Kong Firms in the ASEAN Region* (London: Routledge, 1998); and Mona Haddad, 'Trade Integration in East Asia: The Role of China and Production Networks', World Bank Policy Research Working Paper No. 4160, 1 Mar. 2007, available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=969237](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=969237)>, visited 20 Mar. 2008.

<sup>78</sup> See 'Central Asian Regional Economic Cooperation – CAREC, on the website of the Asian Development Bank, <[www.adb.org/Carec/](http://www.adb.org/Carec/)>, visited 17 Mar. 2008; Ministry of Commerce of the People's Republic of China, Department of International Trade and Economic Affairs [in Chinese], <<http://gjx.mofcom.gov.cn/aarticle/af/ak/200610/20061003499223.html>>, visited 14 Mar. 2008. For a brief overview of China's energy policy in the region, see Marie Jégo, 'Menacé par la Chine, Gazprom veut rester maître du gaz en Asie centrale', *Le Monde*, vendredi 21 mars 2008, pp.14. See also.

<sup>79</sup> See the SCO website: <[www.sectsc.org/html/00026.html](http://www.sectsc.org/html/00026.html)>, visited 19 Mar. 2008. For the Declaration on the Establishment of the Shanghai Cooperation Organisation, see <[www.sectsc.org/html/00088.html](http://www.sectsc.org/html/00088.html)>, visited 19 Mar. 2008. A Framework Agreement on economic cooperation was signed on 23 Sep. 2003, and a follow-up plan was signed on 23 Sep. 2004. See <[www.sectsc.org/html/00030.html](http://www.sectsc.org/html/00030.html)>, visited 19 Mar. 2008. Mongolia, Pakistan, India and Iran have observer status. India and Pakistan are potential candidates for membership, according to Wikipedia: <[http://en.wikipedia.org/wiki/Shanghai\\_Cooperation\\_Organization](http://en.wikipedia.org/wiki/Shanghai_Cooperation_Organization)>, visited 19 Mar. 2006. For an overview of EU, Chinese and Indian policies in the region, see Emilian Kavalski, 'Partnership or Rivalry between the European Union, China and India in Central Asia: The Normative Power of Regional Actors with Global Aspirations', in *Europe, India and China: Strategic Partners in a Changing World*, ed. Francis Snyder (Brussels: Bruylant, 2008), 231–252.

<sup>80</sup> Jianwei Wang, 'China's Multilateral Diplomacy in the New Millennium', in *China Rising: Power and Motivation in Chinese Foreign Policy*, eds Yong Deng and Fei-Ling Wang (Lanham, Maryland: Rowman & Littlefield, 2005), 159–200 at p. 179.

Thailand and Vietnam.<sup>81</sup> Focussed mainly on infrastructure, GMS has been described as not an FTA but rather ‘a regional integration initiative mainly driven by market integration as opposed to formal integration’.<sup>82</sup> Fourth, China, together with Bangladesh, India and Myanmar, signed on 17 August 1999 the Kunming Initiative, a Track II or non-governmental sub-regional organization. Pioneered by the Chinese province of Yunnan, it appeals, at least rhetorically, to a pre-colonial Asian reality in which the area was ‘a few centuries ago much more integrated culturally, politically, and economically’ than is the case today.<sup>83</sup> Fifth, China participates in the Tumen River Area Development Programme (TADP) or Greater Tumen Initiative (GTI), involving part of Northern China. In addition to China, it comprises the Democratic People’s Republic of Korea (DPRK), Mongolia, the Republic of Korea and the Russian Federation. It focuses on energy, environment, investment, transport and tourism.<sup>84</sup> All these agreements exemplify a pattern of RTAs as a device for increasing integration across land borders.

Sixth, China participates in the ASEAN Regional Forum (ARF), which was established in Bangkok on 25 July 1994 and is concerned mainly with political and security matters.<sup>85</sup> Seventh, together with Japan, South Korea and the ASEAN Member States, China is a member of ASEAN + 3 (APT), which was crystallized by the 1997-1998 Asian financial crisis, played an important role in resolving the SARS crisis in 2003 and provides for cooperation on trade, foreign affairs, investment and finance.<sup>86</sup>

Eighth, among other regional arrangements, China has since 12-14 November 1991 been a member country in Asia-Pacific Economic Cooperation (APEC).<sup>87</sup> Ninth, it also plays an important role in the Asia-Europe Meeting (ASEM), consisting of ASEAN

<sup>81</sup> See ‘Strategic Framework for Action on Trade Facilitation and Investment in the Greater Mekong Sub-Region’, available on the Mofcom website at <<http://tradeinservices.mofcom.gov.cn/en/b/2007-10-10/6577.shtml>>, visited 17 Mar. 2008.

<sup>82</sup> Stefano Inama, ‘The Association of South East Asian Nations – People’s Republic of China Free Trade Area: Negotiating Beyond Eternity With Little Trade Liberalization?’, *Journal of World Trade* 39, no. 3 (2005): 559-579 at p. 560. For a recent overview, see Mya Than, ‘China and CLMV Countries: Relations in the Context of the Mekong Sub-region’, in *ASEAN-China Economic Relations*, ed. Saw Swee-Hock (Singapore: ISEAS [Institute of Southeast Asian Studies] Publishing, 2007), 269-294.

<sup>83</sup> See Julien Levesque, ‘The Kunming Initiative: Going Beyond Governmental Reluctance’, Art. no. 2473, 14 Jan. 2008, available on the website of the Institute of Peace and Conflict Studies (IPCS), New Delhi, at <[www.ipcs.org/printWhatsnew.jsp?action=showView&kValue=2473&status=article](http://www.ipcs.org/printWhatsnew.jsp?action=showView&kValue=2473&status=article)>, visited 19 Mar. 2008. For official documents, see Online Burma/Myanmar Library, available at <[www.burmalibrary.org/show.php?cat=2144](http://www.burmalibrary.org/show.php?cat=2144)>, visited 19 Mar. 2008. See also P.V. Indiresan, ‘The Kunming Initiative’, *Frontline*, 17, 7, 1-14 Apr. 2000, pp. 98-102, available at <[www.thehindu.com/fline/fl1707/17070980.htm](http://www.thehindu.com/fline/fl1707/17070980.htm)>, visited 19 Mar. 2008; Ramtanu Maitra, ‘Prospects Brighten for Kunming Initiative’, *Asia Times*, 12 Feb. 2003, available at <[www.atimes.com/atimes/South\\_Asia/EB12Df04.html](http://www.atimes.com/atimes/South_Asia/EB12Df04.html)>, visited 19 Mar. 2008.

<sup>84</sup> See the Greater Tumen Initiative website at <[www.tumenprogramme.org/index.php?id=1](http://www.tumenprogramme.org/index.php?id=1)>, visited 19 Mar. 2008. On energy, see also Stephen Chen, ‘Plan for energy hub in Inner Mongolia’, *South China Morning Post*, Thursday, 3 Jan. 2008, p. A4.

<sup>85</sup> Other participants are Australia, Bangladesh, Brunei Darussalam, Cambodia, Canada, European Union, India, Indonesia, Japan, Democratic Peoples’ Republic of Korea, Republic of Korea, Laos, Malaysia, Myanmar, Mongolia, New Zealand, Pakistan, Papua New Guinea, Philippines, Russian Federation, Singapore, Thailand, Timor Leste, United States, Vietnam. See the Asian Regional Forum website, at <[www.aseanregionalforum.org/AboutUs/tabid/57/Default.aspx](http://www.aseanregionalforum.org/AboutUs/tabid/57/Default.aspx)>, visited 19 Mar. 2008.

<sup>86</sup> See Richard Stubbs, ‘ASEAN plus Three: Emerging East Asian Regionalism?’, *Asian Survey* 42, no. 3 (2002): 440-455. On ASEAN+3 and SARS, see Lai Hongyi, ‘Regional Cooperation in Epidemic Prevention: China and ASEAN’, in *China – ASEAN Relations: Economic and Legal Dimensions*, eds John Wong, Zou Keyuan & Zeng Huaqun (Singapore: World Scientific, 2006), 59-73. See generally the website of the US-ASEAN Business Council, at <[www.us-asean.org/ASEANOverview/asean+3.asp](http://www.us-asean.org/ASEANOverview/asean+3.asp)>, visited 15 Mar. 2008.

<sup>87</sup> See the APEC website, <[www.apec.org/](http://www.apec.org/)>, visited 12 Mar. 2008.

plus Three (China, Japan, Korea) and the European Union Member States.<sup>88</sup> Some of these regional arrangements are less directly concerned with trade. Finally, China is involved in other potentially overlapping arrangements. For example, the EU and China are negotiating a Partnership and Cooperation Agreement to replace the outdated 1985 EEC-China Trade and Cooperation Agreement.<sup>89</sup> At the same time, alongside the Trans-Regional EU-ASEAN Trade Initiative (TREATI), its regional agreement on regulatory cooperation with ASEAN,<sup>90</sup> the European Union (EU) is currently negotiating an FTA with ASEAN.<sup>91</sup> How these agreements will be related remains to be seen.

The most ambitious of China's multilateral RTAs from the standpoint of economic and trade relations, however, is the ASEAN-China FTA (ACFTA). The remainder of this part focuses on ACFTA. A Framework Agreement on Comprehensive Economic Cooperation between the Association of South East Asian Nations and China was signed in Phnom Penh, Cambodia, on 5 November 2002.<sup>92</sup> It entered into force on 1 July 2003 and was notified to the WTO under the Enabling Clause on 21 December 2004. Its signatories, in addition to China, were the ASEAN Member States: Brunei, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. The Framework Agreement set out the objectives, the normative and economic framework and the timetable for future cooperation among the parties. It was the first RTA signed by China outside Greater China (the Mainland, Hong Kong, Macao, Taiwan) and also the first RTA signed by all Members of ASEAN.<sup>93</sup> The Parties agreed to establish an

<sup>88</sup> See for example, H.E. Wen Jiabao, Premier of the State Council of the People's Republic of China, 'Strengthening Partnership Through Increased Dialogue and Cooperation', Speech at the Fifth Asia-Europe Meeting, Hanoi, 8 Oct. 2004; and H.E. Wen Jiabao, Premier of the State Council of the People's Republic of China, 'Strengthening ASEM Economic and Financial Cooperation to Promote Common Development', Speech at the Opening Ceremony of the Sixth ASEM Finance Ministers Meeting, 26 Jun. 2005; both reprinted in Francis Snyder, *The European Union and China, 1949-2008: Basic Documents and Commentary* (Oxford: Hart Publishing, 2009).

<sup>89</sup> See Antoine Sautenet, 'The Current Status and Prospects of the "Strategic Partnership" between the EU and China: Towards the Conclusion of a Partnership and Cooperation Agreement', *European Law Journal* 13, no. 6 (2007): 699-731; Zeng Lingliang, 'A Preliminary Perspective on Negotiations for an EU-China PCA: A New Bottle Carrying Old Wine, or New Wine in Old Bottles, or Both?', *European Law Journal* 14, no. 5 (2008) [in press at time of writing].

<sup>90</sup> See the website of the European Commission, Directorate-General for Trade, at <[http://ec.europa.eu/trade/issues/bilateral/regions/asem/index\\_en.htm](http://ec.europa.eu/trade/issues/bilateral/regions/asem/index_en.htm)>, visited 18 Mar. 2008. TREATI is concerned mainly with food safety and product standards but includes trade facilitation as a horizontal issue.

<sup>91</sup> See 'Report of the ASEAN-EU Vision Group: Transregional Partnership for Shared and Sustainable Prosperity', Ha Noi, Viet Nam, 10 May 2006, available at <[http://trade.ec.europa.eu/doclib/docs/2006/may/tradoc\\_128860.pdf](http://trade.ec.europa.eu/doclib/docs/2006/may/tradoc_128860.pdf)>, visited 21 Mar. 2008. For a comparison of ASEAN and the EU, see Laurence Henry, 'The ASEAN Way and Community Integration: Two Different Models of Regionalism', *European Law Journal* 13, no. 6 (Nov. 2007): 857-879.

<sup>92</sup> On the negotiations, see Lu Bo, 'ASEAN-China Free Trade Agreement: Negotiation, Implementation and Prospect', in *ASEAN-China Economic Relations*, ed. Saw Swee-Hock (Singapore: ISEAS [Institute of Southeast Asian Studies] Publishing, 2007), 86-111. For an overview of the general legal framework of ASEAN-China relations, see Zeng Lingliang, 'ASEAN - China Relations: An International Law Perspective', in *China-ASEAN Relations: Economic and Legal Dimensions*, eds John Wong, Zou Keyuan & Zeng Huaqun (Singapore: World Scientific, 2006), 33-55, who prior to the ASEAN-China Agreement on Goods and the Agreement on Dispute Settlement Mechanism (see below) argued (at p. 51) that 'at present, the overall legal regulation of China-ASEAN relations has not reached the stage of a legal regime'. For a case study of ACFTA from the standpoint of political economy, see Dent, as n. 21 above, pp. 159-164.

<sup>93</sup> Wang, as n. 31 above, at p. 125; Dent, as n. 21 above, p. 159. Wang argues in another article that, from the standpoint of international law, the ASEAN-China FTA is not an agreement between ASEAN and China, since ASEAN does not have international legal personality, but rather a group of bilateral agreements between China and each of the ten ASEAN Member States; see Jianyu Wang, 'The International Legal Personality of ASEAN and the Legal Nature of the China-ASEAN FTA', in *China-ASEAN Relations: Economic and Legal Dimensions*, eds John Wong, Zou Keyuan & Zeng Huaqun (Singapore: World Scientific, 2006), 111-131.



ASEAN-China FTA (ACFTA)<sup>94</sup> for ASEAN 6<sup>95</sup> and China by 2010 and for the newer ASEAN Member States<sup>96</sup> and China by 2015.

ACFTA is expected to have a major impact on the Asia-Pacific region and the international trading system generally. According to the report of the experts' group which suggested its creation:

[T]he establishment of a F.T.A. between ASEAN and China will create an economic region with 1.7 billion consumers, a regional G.D.P. of about US \$2 trillion and total trade estimated at US \$1.23 trillion....[T]he removal of trade barriers between ASEAN and China will lower costs, increase intra-regional trade and increase economic efficiency. The establishment of an ASEAN-China F.T.A. will create a sense of community between ASEAN Members and China. It will provide another important mechanism for supporting economic stability in East Asia and allow both ASEAN and China to have a large voice in international affairs on issues of common interest.<sup>97</sup>

However, the possibility of increased trade does not necessarily mean greater economic integration. China and ASEAN countries currently export similar products,<sup>98</sup> so they may compete in both domestic ASEAN and foreign markets in the short run, though not perhaps in the long run.<sup>99</sup> In addition, some economists argue that ACFTA, like previous similar South East Asian schemes, are unlikely to achieve substantial trade liberalization, because its rules do not provide for effective implementation of commitments.<sup>100</sup> Nonetheless, between mid-2005 to mid-2006 China's imports from ASEAN increased by 20.4%, its exports to ASEAN increased by 23.4% and the increase in trade volume for products on which either party has a comparative advantage ranged between 46.6% (China's import of rubber from ASEAN) and 60.2% (China's export of knitted

<sup>94</sup> In order to avoid confusion with the Central American Free Trade Agreement (CAFTA), this paper refers to the ASEAN-China Free Trade Agreement by generally accepted abbreviation ACFTA, instead of the abbreviation CAFTA (China-ASEAN Free Trade Agreement) used by some authors.

<sup>95</sup> Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Thailand.

<sup>96</sup> Cambodia, Lao PDR, Myanmar and Vietnam.

<sup>97</sup> ASEAN-China Experts Group on Economic Cooperation, 'Forging Closer ASEAN-China Economic Relations in the Twenty-First Century', p. 2 (point 11), available on the ASEAN Secretariat website at <www.aseansec.org/asean\_chi.pdf>, visited 10 Mar. 2008.

<sup>98</sup> For detailed analysis, see Jose L. Tongzon, 'ASEAN-China Free Trade Area: A Bane or Boon for ASEAN Countries', *The World Economy* 28, no. 2 (2005): 191-211.

<sup>99</sup> On the short-run/long-run distinction, see David Roland Holst & John Weiss, 'ASEAN and China: Export Rivals or Partners in Regional Growth', *The World Economy* 27, no. 8 (2006): 1255-1274. John Wong states that China and ASEAN (minus Singapore) are currently 'more competitive than complementary', even though about half of China's exports go to the Asia-Pacific region, which in turn provides about 75% of China's FDI: see John Wong, 'China-ASEAN Relations: An Economic Perspective', in *China - ASEAN Relations: Economic and Legal Dimensions*, eds John Wong, Zou Keyuan & Zeng Huaqun (Singapore: World Scientific Publishing Company, 2006), 17-32; the quotation is from p. 28. See also Zhang Haibing, 'China and Southeast Asia Cooperation: New Developments and Challenges', in *China into the Hu-Wen Era: Policy Initiatives and Challenges*, eds John Wong and Lai Hongyi (Singapore: World Scientific Publishing Company, 2006), 541-556, especially p. 553; and Chen Wen, 'ASEAN-China Trade Relations: Origins, Progress and Prospect', in *ASEAN-China Economic Relations*, ed. Saw Swee-Hock (Singapore: ISEAS [Institute of Southeast Asian Studies] Publishing, 2007), 67-85.

<sup>100</sup> See Inama, as n. 82 above, especially pp. 561-562, which also (at p. 567) emphasizes that the real deadline for tariff reductions for sensitive goods is 2018. In fact, Dee argues that comprehensive regulatory reform is more important than RTAs in achieving real income gains in the region: see Philippa Dee, 'East Asian Economic Integration and its Impact on Future Growth', *The World Economy* 30, no. 3 (2007): 405-423. Sally argued in 2006 that the Asian FTAs are too weak to foster regional economic integration and need more focus on the WTO: Sally, as n. 4 above.

clothes to ASEAN).<sup>101</sup> For ASEAN, a close link with China is designed to ensure continued economic dynamism,<sup>102</sup> and many economists consider that ACFTA is based on 'a naturally integrated economy'<sup>103</sup> and will bring economic benefits to both ASEAN and China.<sup>104</sup>

The Preamble of the ACFTA Framework Agreement reaffirmed the rights, obligations and undertakings of the parties under the WTO and other agreements and recognized the 'catalytic role that regional trade agreements can contribute towards accelerating regional and global liberalization and as building blocks in the framework of the multi-lateral trading system'.<sup>105</sup> The general objectives of the Framework Agreement were to:

- (a) strengthen and enhance economic, trade and investment cooperation between the parties;
- (b) progressively liberalise and promote trade in goods and services as well as create a transparent, liberal and facilitative investment regime;
- (c) explore new areas and develop appropriate measures for closer economic cooperation between the Parties; and
- (d) facilitate the more effective economic integration of the newer ASEAN member States and bridge the development gap among the Parties.<sup>106</sup>

The Agreement provided that Parties agreed to enter into negotiations to eliminate duties and other restrictions on substantially all trade in goods between them, except, where necessary, those restrictions permitted under Article XXIV(8)(b) GATT.<sup>107</sup> Article 6 established an Early Harvest Programme, under which tariffs on specific products would be eliminated according to an agreed timetable before the ACFTA was fully implemented.<sup>108</sup> According to the Agreement, these commitments under Articles 3 and 6 shall fulfil the WTO Agreements to eliminate tariffs on substantially all trade

<sup>101</sup> Susan Ning and Ding Liang, 'China's Free Trade Agreement (FTA) Policy and its Recent Developments', *King & Wood China Bulletin* 2006, Special Issue, Oct. 2006, pp. 1-7 at p. 2, available at <www.kingandwood.com/UploadFiles/China%20Bulletin%202006%20Special%20Issue328.pdf>, visited 14 Mar. 2008.

<sup>102</sup> See John Wong, 'China-ASEAN Relations: An Economic Perspective', as n. 100 above.

<sup>103</sup> Kawai argues that foreign trade and FDI have created a 'naturally integrated economy' in the region: Masahiro Kawai, 'East Asian Economic Regionalism: Progress and Challenges', *Journal of Asian Economics – International Journal* 16, no. 1 (2005): 29-56.

<sup>104</sup> See, for example, Qiu et al who argue that, overall, ACFTA will have positive effects for both ASEAN member countries and for China: Huangang Qiu, Jun Yang, Jikun Huang & Ruijian Chen, 'Impact of China-ASEAN Free Trade Area on China's International Agricultural Trade and Its Regional Development', *China & The World Economy* 15, no. 4 (2007): 77-90.

<sup>105</sup> ASEAN-China Framework Agreement, Preamble.

<sup>106</sup> ASEAN-China Framework Agreement, Art. 1.

<sup>107</sup> ASEAN-China Framework Agreement, Art. 3(1). Whether or not the Framework Agreement met this condition, expressed in Art. XXIV(8)(b) GATT, would have been clearer if the Agreement had been notified to the WTO under Art. XXIV GATT rather than under the Enabling Clause (Decision of 28 Nov. 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (L/4903), which does not address this issue expressly. See the Enabling Clause at <www.wto.org/english/docs\_e/legal\_e/enabling\_e.doc>, visited 20 Mar. 2008. I am grateful to K.L. Thirayakinant for this point.

<sup>108</sup> See ASEAN-China Framework Agreement, Art. 6, Annex 1, Annex 2.

between the Parties.<sup>109</sup> In fact, China made by far the most concessions, so that one author described the EHP as ‘almost entirely one-sided’.<sup>110</sup>

Future negotiations on trade in goods were to include but not be limited to, inter alia, rules of origin (ROOs), modification of a Party’s commitments under the agreement on trade in goods based on Article XXVIII GATT, non-tariff measures including quantitative restrictions on imports or exports as well as ‘scientifically unjustifiable’ SPS and TBT measures, safeguards based on GATT principles, disciplines on subsidies, anti-dumping and countervailing duties based on existing GATT disciplines and facilitation and promotion of effective and adequate IPR based on existing WTO and other relevant disciplines.<sup>111</sup> WTO provisions on modification of commitments and trade remedies were to apply to products in the Early Harvest Programme and ‘be superseded and replaced by the relevant disciplines negotiated and agreed by the Parties under Article 3(8) of this Agreement once these disciplines are implemented’.<sup>112</sup> Regarding services, future negotiations were to be directed to ‘progressive elimination of substantially all discrimination between or among the Parties and/or prohibition of new or more discriminatory measures ... , except for measures permitted’ under Article V(1)b GATS and expansion in depth and scope of services trade liberalization beyond those undertaken by the Parties under GATS.<sup>113</sup>

Other provisions of the Agreement also drew on or potentially affected the rights and obligations of the Parties under WTO law.<sup>114</sup> ASEAN as such is not a WTO Member. Nine of its Member States are WTO Members: Brunei Darussalam, Indonesia, Malaysia, Myanmar, Philippines, Singapore and Thailand were founding Members on 1 January 1995; Cambodia joined the WTO on 13 October 2004; and Vietnam became a Member on 1 January 2007. Laos is not yet a Member of the WTO.<sup>115</sup> China was to accord Most-Favoured-Nation (MFN) status ‘consistent with WTO rules and disciplines’ to all ASEAN Member States, including those not WTO Members.<sup>116</sup> The general exceptions to the Framework Agreement drew selectively on Article XX GATT, allowing exceptions for the protection of national security, protection of articles of artistic, historical or archaeological value, the protection of public morals or the protection of human, animal or plant life or health.<sup>117</sup> Within one year after entry into force, the Parties were to establish appropriate formal dispute settlement procedures and mechanism, pending which any disputes concerning the interpretation, implementation or application of the Agreement

<sup>109</sup> ASEAN-China Framework Agreement, Art. 3(6).

<sup>110</sup> Alyssa Greenwald, ‘The ASEAN-China Free Trade Area (ACFTA): A Legal Response to China’s Rise’, *Duke Journal of Comparative and International Law* 16 (2006): 193-217 at p. 198.

<sup>111</sup> ASEAN-China Framework Agreement, Art. 3(8).

<sup>112</sup> ASEAN-China Framework Agreement, Art. 6(3)(d).

<sup>113</sup> ASEAN-China Framework Agreement, Art. 4(a), (b).

<sup>114</sup> On the relationship between WTO rules and aspects of the ASEAN-China Framework Agreement concluded on 4 Nov. 2002, see Zeng Huaqun, ‘WTO Rules and China-ASEAN FTA Agreement’, in *China-ASEAN Relations: Economic and Legal Dimensions*, eds John Wong, Zou Keyuan & Zeng Huaqun (Singapore: World Scientific, 2006), 93-109.

<sup>115</sup> See the WTO website, at <[www.wto.org/English/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/English/thewto_e/whatis_e/tif_e/org6_e.htm)>, visited 3 Apr. 2008.

<sup>116</sup> ASEAN-China Framework Agreement, Art. 9.

<sup>117</sup> ASEAN-China Framework Agreement, Art. 10.

were to be settled amicably by consultations and/or mediation.<sup>118</sup> Article 13(2) of the Framework Agreement states that ‘Except as otherwise provided in this Agreement, this Agreement or any action taken under it shall not affect or nullify the rights and obligations of a Party under existing agreements to which it is a party’.<sup>119</sup>

Several subsequent agreements amended or elaborated the Framework Agreement. First, on 6 October 2003 in Bali, Indonesia, the same Parties agreed a Protocol to Amend the Framework Agreement. Though mainly concerned with the Early Harvest Programme, it incorporated into the Framework Agreement the ROOs applicable to products covered by the Early Harvest Programme.<sup>120</sup> It also inserted into the Framework Agreement a new Article 12A, as follows:

Nothing in this Agreement shall prevent or prohibit any individual ASEAN Member State from entering into any bilateral or plurilateral agreement with China and/or the rest of the ASEAN member States relating to trade in goods, trade in services, investment, and/or other areas of economic cooperation outside the ambit of this Agreement. The provisions of this Agreement shall not apply to any such bilateral or plurilateral agreement.<sup>121</sup>

Second, on 29 November 2004, meeting in Vientiane, Lao PDR, the same Parties signed an Agreement on Goods, as they had committed themselves to do in the Framework Agreement.<sup>122</sup> The Agreement on Goods came into force on 1 January 2005. It defined more clearly relations between the Framework Agreement and WTO rules. It aligned the Framework Agreement according to WTO rules in most areas. For example, it provided for national treatment on internal taxation and regulation; Article III GATT was incorporated into and became an integral part of the Goods Agreement.<sup>123</sup> Similarly, Article X GATT on transparency was incorporated into and became an integral part of the Agreement.<sup>124</sup> The Parties also agreed and reconfirmed their commitment to abide by WTO rules on *inter alia*<sup>125</sup> non-tariff measures, TBT measures, SPS measures, subsidies and countervailing measures, anti-dumping measures and IPRs.<sup>126</sup> Similarly, they agreed not to maintain quantitative restrictions unless otherwise permitted under WTO rules.<sup>127</sup> With regard to each Party’s obligations and commitments, each Party was to ensure observance by regional and local governmental bodies in its territory and by non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities within its territory.<sup>128</sup> A Party in serious balance

<sup>118</sup> ASEAN-China Framework Agreement, Art. 11.

<sup>119</sup> ASEAN-China Framework Agreement, Art. 13(2).

<sup>120</sup> Protocol to Amend the Framework Agreement, Art. 3.

<sup>121</sup> Protocol to Amend the Framework Agreement, Art. 4.

<sup>122</sup> Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People’s Republic of China [hereinafter ASEAN-China Agreement on Goods].

<sup>123</sup> ASEAN-China Agreement on Goods, Art. 2.

<sup>124</sup> ASEAN-China Agreement on Goods, Art. 4.

<sup>125</sup> Other provisions of WTO Agreements on goods not specifically mentioned or modified by the ASEAN-China Goods Agreement apply, *mutatis mutandis*, unless the context requires otherwise: ASEAN-China Agreement on Goods, Art. 7 (2).

<sup>126</sup> ASEAN-China Agreement on Goods, Art. 7(1).

<sup>127</sup> ASEAN-China Agreement on Goods, Art. 8(1).

<sup>128</sup> ASEAN-China Agreement on Goods, Art. 15.

of payments and external financial difficulties or threat thereof could adopt restrictive import measures in accordance with GATT 1994 and the BOP Understanding of GATT 1994.<sup>129</sup> The general exceptions to free trade in goods reiterated those of Article XX GATT.<sup>130</sup>

In some other respects, however, the Agreement on Goods diverges from WTO rules or includes provisions which modify the current treatment of China under WTO law. For example, the Agreement contains a reciprocity clause concerning tariff reductions for both normal and sensitive products.<sup>131</sup> It also provides specific ROOS. Trade in goods, as trade in services, is subject to a special dispute settlement mechanism. Both ROOS and the ADSM under the Agreement are discussed later. Finally, of great importance to China, each of the ten ASEAN Member States agreed to recognize China as a full market economy (MES: market economy status). More specifically, they agreed not to apply as from the date of the signature of the Agreement Sections 15 and 16 of the China WTO Protocol and paragraph 242 of the Working Party Report in relation to trade between China and each of the ten ASEAN Member States.<sup>132</sup>

Third, a corresponding Agreement on Services was signed in Cebu, the Philippines, on 14 January 2007 and entered into force on 1 July 2007.<sup>133</sup> With certain exceptions, it closely resembled the GATS. It did not apply to government procurement.<sup>134</sup> Article III and Article III bis GATS were, *mutatis mutandis*, expressly incorporated as integral parts of the Agreement.<sup>135</sup> Most other provisions followed GATS provisions *verbatim*, without express reference. For example, Article 7 on monopolies and exclusive service suppliers simply reiterated Article VIII GATS. The GATS Annexes apply to the Agreement, *mutatis mutandis*.<sup>136</sup> The Agreement differed, however, from GATS in several respects.<sup>137</sup> For example, its Preamble recognized the right of the Parties to regulate and introduce new regulations on services to meet national policy objectives, and their particular need to exercise this right because of differences among the Parties in the development of services regulation.<sup>138</sup> The Parties, not the WTO Services Council, were to review results of negotiations on disciplines concerning domestic regulation, pursuant to Article VI.4 GATS.<sup>139</sup> With regard to WTO disciplines, the Parties agreed and reaffirmed their commitments to abide by the WTO agreements relevant and applicable to trade in services,

<sup>129</sup> ASEAN-China Agreement on Goods, Art. 11.

<sup>130</sup> ASEAN-China Agreement on Goods, Art. 12.

<sup>131</sup> ASEAN-China Agreement on Goods, Annex 1 [normal goods], Annex 2 para. 6 [sensitive goods]. For an assessment which concludes that 'at the present the ACFTA looks more like a bundle of bilateral deals on few tariff lines rather than [sic] an FTA', see Inama, as n. 82 above, at pp. 567-571 (quotation from the last page).

<sup>132</sup> ASEAN-China Agreement on Goods, Art. 14.

<sup>133</sup> Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People's Republic of China [hereinafter ASEAN-China Agreement on Services].

<sup>134</sup> ASEAN-China Agreement on Services, Art. 2(2).

<sup>135</sup> ASEAN-China Agreement on Services, Arts 3, 4.

<sup>136</sup> ASEAN-China Agreement on Services, Art. 28(1).

<sup>137</sup> See also the endnotes to the Agreement.

<sup>138</sup> ASEAN-China Agreement on Services, Preamble, last recital.

<sup>139</sup> ASEAN-China Agreement on Services, Art. 5(4). The review procedure is laid down in Art. 27.

but subject to any future agreements agreed by the Parties.<sup>140</sup> The increasing participation of Cambodia, Lao PDR, Myanmar and Vietnam was to be facilitated through negotiated specific commitments, including 'appropriate flexibility for opening fewer sectors, liberalizing fewer types of transactions and progressively extending market access in line with their respective development situation'.<sup>141</sup> In services negotiations within the ACFTA, the Parties are to endeavour to achieve commitments going beyond those in the GATS.<sup>142</sup> On application and extension of commitments, China was to make a single schedule and apply it to all ASEAN Member Countries,<sup>143</sup> and each ASEAN Member Country was to make its individual schedule and apply it to China and the rest of the ASEAN Member Countries.<sup>144</sup> In regard to services, as with goods, the ACFTA thus resembles a bundle of bilateral agreements.

The ASEAN-China FTA Framework Agreement includes an Agreement on Dispute Settlement Mechanism (ADSM), discussed later.<sup>145</sup> The ADSM applies to both the ASEAN-China Goods Agreement<sup>146</sup> and the ASEAN-China Services Agreement.<sup>147</sup>

### 2.3. BILATERAL RTAs: FREE TRADE AGREEMENTS WITH INDIVIDUAL SOVEREIGN STATES

In addition to these RTAs with its neighbours in the Asia-Pacific region, China has signed or is negotiating numerous FTAs with non-neighbouring sovereign states. The FTA between China and Chile<sup>148</sup> was signed on 18 November 2005, entered into force on

<sup>140</sup> ASEAN-China Agreement on Services, Art. 15.

<sup>141</sup> ASEAN-China Agreement on Services, Art. 17.

<sup>142</sup> ASEAN-China Agreement on Services, Art. 21(1).

<sup>143</sup> ASEAN-China Agreement on Services, Art. 22(1).

<sup>144</sup> ASEAN-China Agreement on Services, Art. 22(2).

<sup>145</sup> See Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People's Republic of China.

<sup>146</sup> ASEAN-China Agreement on Goods, Art. 21.

<sup>147</sup> ASEAN-China Agreement on Services, Art. 30.

<sup>148</sup> For an overview of China-Chile relations, see General Directorate for International Economic Affairs, Ministry of Foreign Affairs, People's Republic of China, 'China-Chile', available on the website of the Chinese Ministry of Foreign Affairs, and for documents, see Ministerio de Relaciones Exteriores de Chile, Dirección General de Relaciones Económicas Internacionales, <[www.finprc.gov.cn/eng/wjb/zzjg/ldmzs/gjlb/3478/default.htm](http://www.finprc.gov.cn/eng/wjb/zzjg/ldmzs/gjlb/3478/default.htm)>, <[www.direcon.cl/index.php?accion=china\\_esp](http://www.direcon.cl/index.php?accion=china_esp)>, both visited 20 Apr. 2008. During the negotiations, Chile's Ambassador to China was quoted as saying that 'Chile is a good platform for Chinese firms to penetrate Latin American markets', in addition to the fact that Chile was considering to grant China market economy status (as was done): see Zhang Jin, 'FTA talks switched to fast track', *China Daily*, 27 Aug. 2004. Xinhua News Agency reported that 'China is Chile's second largest trading partner, with copper contributing to 30% of China's imports from Chile. Statistics from the International Copper Association (China) show that 50% of China's imported copper comes from Chile': 'China, Chile put free trade agreement into effect', *People's Daily Online*, 1 Oct. 2006, available at <[http://english.peopledaily.com.cn/200610/01/eng20061001\\_308052.html](http://english.peopledaily.com.cn/200610/01/eng20061001_308052.html)>, visited 17 Mar. 2008. Among the numerous benefits for Chile is guaranteed market and prices due to strong Chinese demand: see Chinamining.org, 'China's copper demand to buoy prices in long run', *Interfax-China*, 22 Feb. 2008, available at <<http://chinamining.org/News/2008-02-22/1203643602d9132.html>>, visited 20 Mar. 2008. As of 2005, China had a trade deficit with Chile, so the FTA may serve to correct the imbalance and provide further market access in Latin America: see Agata Antkiewicz & John Whalley, 'China's New Regional Trade Agreements', *The World Economy* 28, no. 10 (2005): 1539-1558 at pp. 1552. The China-Chile relationship goes beyond economics. Chile was 'the first Latin American country to establish diplomatic relations with China; the first Latin American country to support China's seat at the United Nations; the first Latin American country to finish bilateral negotiations on China's accession to the WTO; the first Latin American country to recognize the full market economy status of China; and the first Latin American country to negotiate and sign a FTA with China': Ning & Ding, as n. 101 above, at p. 2, citing MOFCOM, 'Minister Bo Xilai Answering Questions of the Press on the Signing of the China-Chile Free Trade Agreement', <<http://boxilai2.mofcom.gov.cn/aarticle/speech/200511/20051100876121.html>>, 25 Nov. 2005.

1 October 2006 and was notified to the WTO under Article XXIV GATT, Article V GATS and the Enabling Clause on 20 June 2007.<sup>149</sup> An FTA between China and Pakistan was signed on 24 November 2006 and was notified to the WTO under Article XXIV GATT and Article V GATS on 21 January 2008 but has not yet entered into force. China has signed an agreement with Thailand; an early harvest arrangement was implemented in October 2003.<sup>150</sup> China has initialled framework agreements with New Zealand<sup>151</sup> and Australia.<sup>152</sup> In addition, it is also negotiating agreements with Bolivia,<sup>153</sup> the Gulf Cooperation Council (GCC: Saudia Arabia, Bahrain, Kuwait, Oman, Qatar, United Arab Emirates),<sup>154</sup> Iceland,<sup>155</sup>

<sup>149</sup> See World Trade Organisation, WT/REG230/N/1, Committee on Regional Trade Agreements, Notification of Regional Trade Agreement, 28 Jun. 2007.

<sup>150</sup> For a list of Chinese bilateral agreements as of 2005, see Gill

<sup>151</sup> See Ministry of Commerce, China, and Ministry of Foreign Affairs and Trade, New Zealand, 'A Joint Study Report on a Free Trade Area between China and New Zealand', available at <www.mfat.nz>, visited 10 Mar. 2008.; also available as 'Joint Study on the FTA between China and New Zealand', at <www.bilaterals.org/article.php3?id\_article=995&var\_recherche=china>, visited 3 Apr. 2008. This also provides relevant other documents. See also 'China, New Zealand end FTA talks', *People's Daily*, 15 Oct. 2006. New Zealand was the first developed country to agree on terms of China's accession to WTO and the first to agree on China's market economy status. For China, the negotiations with New Zealand were the first such FTA negotiations with a developed country. See also 'New Zealand – China Free Trade Agreement: Frequently Asked Questions', available at <www.mfat.govt.nz/Trade-and-Economic-Relations/Trade-Agreements/China/0-faqs.php>, visited 17 Mar. 2008.

<sup>152</sup> On 25 Oct. 2003, China and Australia signed a Trade and Economic Framework Agreement establishing a basis for a feasibility study on an eventual FTA. For the text, see Bilaterals.Org, at <www.bilaterals.org/article.php3?id\_article=6894>, visited 10 Mar. 2008. It was notified to the WTO as being under negotiation on 23 May 2005 under the RTA Transparency Mechanism: see 'Regional Trade Agreements: Early Announcements made to the WTO under the RTA Transparency Mechanism', available at <www.wto.org/english/tratop\_e/region\_e/early\_announc\_e.xls>, visited 15 Apr. 2008. On the contents of the China-Australia and China-New Zealand framework agreements, see Antkiewicz and Whalley, as n. 148 above, at pp. 1546–1551. *China Daily* reported that FTA negotiations started after Australia recognized China's full market economy status. Australia was the second developed country to do so, after New Zealand. Australia is also a major source of China's iron ore imports. As of 2005, China was 'Australia's third largest trading partner, second largest export market and second largest origin of imports'. See Hu Xiao, 'Agreements pave way for China-Australia FTA', *China Daily*, 19 Apr. 2005, p. 2. On Australia's signature of a memo recognizing China's market economy status, see also Ning and Ding, as n. 101 above at p. 3. Australia also supports China's 'One China policy' and opposition to independence of Taiwan. Strategic concerns are often considered more important than market access to both China and Australia: see Tim Colbatch, 'Why we want an FTA with China', *New Age* (Melbourne), 17 Aug. 2004, reporting on a conference sponsored by the Australian Department of Foreign Affairs and Trade. From the Chinese perspective, this includes access to Australia's natural resources, such as LNG and uranium: see Thomas Orr, 'The China-Australia Free-Trade Negotiations: Implications for South Africa', Centre for Chinese Studies, University of Stellenbosch, available at <www.ccs.org.za/downloads/7ACFTA%20Exec%20Summary.pdf>, visited 18 Mar. 2008.

<sup>153</sup> General Directorate for International Economic Affairs, Ministry of Foreign Affairs, People's Republic of China, 'China-Chile', available on the website of the Chinese Ministry of Foreign Affairs,

<sup>154</sup> In July 2004, China and the GCC signed the Framework of Economic, Trade, Investment and Technological Cooperation between China and the Gulf Cooperation Council. Aims include 'to diversify China's energy oil imports and help Gulf nations reduce US dominance in the region': see Jia Heping, 'FTA to help diversify China's energy sources', *China Business Weekly*, 15 Jul. 2004. See also Ministry of Commerce of the People's Republic of China, Department of International Trade and Economic Affairs [in Chinese], <http://gjs.mofcom.gov.cn/aarticle7af/ak/200505/20050500088391.html>, visited 12 Mar. 2008.

<sup>155</sup> See 'China and Iceland', *China Daily*, 26 Aug. 2003; 'China and Iceland agree to start FTA feasibility research', *China Daily*, 18 May 2005; 'Feasibility study on the China-Iceland FTA ended', 26 Jul. 2006; (source: Network Centre, Ministry of Commerce, People's Republic of China; 'China, Iceland Upbeat on FTA Talks', *China Daily*, 5 Apr. 2007. China and Iceland have had diplomatic relations since 1971. Iceland supported China's bid to resume its seat on the UN Security Council. Iceland has a geographically strategic position. It was also the first European country to grant China market economy status. Areas of cooperation include geothermic energy and aviation. On beginning of negotiations, see the website of the Ministry of Commerce of the People's Republic of China, Department of International Trade and Economic Affairs [in Chinese], <http://gjs.mofcom.gov.cn/aarticle/af/ak/200612/200612039457215.html>, visited 12 Mar. 2008.

India,<sup>156</sup> Malaysia<sup>157</sup> and Singapore.<sup>158</sup> It is considering entering into agreements with Costa Rica,<sup>159</sup> Norway,<sup>160</sup> Peru,<sup>161</sup> South Korea<sup>162</sup> and the Southern African Customs Union (Botswana, Lesotho, Namibia, South Africa, Swaziland)<sup>163</sup> and possibly Brazil<sup>164</sup>

<sup>156</sup> China is now India's main source of imports, ahead of the USA. However, it has been argued that strategic factors are equally if not more important than trade considerations. First, an India-China FTA would help to open up US and EU-led RTAs to Chinese and India products. It could also promote an 'alternative template for FTAs', focussing on trade integration rather than on labour standards or intellectual property rights 'which are integral parts of the US FTA template that the US may want eventually to turn into the WTO template': see Arvind Panagariya, 'An India-China Free Trade Area?', *Economic Times*, 20 Apr. 2005. See also 'India, China plan world's largest FTA', 8 Apr. 2005, available at <<http://us.rediff.com/money/2005/apr/08fta.htm>>, visited 17 Mar. 2008. For further information about negotiations between China-India and China-New Zealand, see the website of bilaterals.org, at <[www.bilaterals.org/rubrique.php3?id\\_rubrique=100](http://www.bilaterals.org/rubrique.php3?id_rubrique=100)>, visited 5 Mar. 2008.

<sup>157</sup> Peng-Hong Cai, 'East Asian New Regionalism and China', PowerPoint presentation prepared for the Third Annual CEPIL-IDB Conference, Washington DC, 9-10 Feb. 2006, available at <[www.iadb.org/intal/aplicaciones/uploads/ponencias/Foro\\_BIC\\_CEPIL\\_2006\\_01\\_Penghong.pdf](http://www.iadb.org/intal/aplicaciones/uploads/ponencias/Foro_BIC_CEPIL_2006_01_Penghong.pdf)>, visited 25 Mar. 2008. The author is Research Professor at the Institute of Asia-Pacific Studies, Shanghai Academy of Social Sciences (SASS).

<sup>158</sup> Marking the launch of negotiations, see 'Singapore, China agree on bilateral FTA', Singapore, 26 Aug. 2006, available at <<http://news.webindia123.com/news/Articles/Asia/20060826/433126.html>>, visited 17 Mar. 2008. For the feasibility study by a joint expert group, see Ministry of Commerce, China, and Ministry of Trade and Industry, Singapore, 'A Joint Study Report on a Free Trade Agreement between China and Singapore', available at <[www.iesingapore.gov.sg/wps/wcm/connect/resources/file/ebf07d479d475cf/Joint\\_Study\\_Rpt\\_on\\_a\\_CSFTA.pdf?MOD=AJPERES](http://www.iesingapore.gov.sg/wps/wcm/connect/resources/file/ebf07d479d475cf/Joint_Study_Rpt_on_a_CSFTA.pdf?MOD=AJPERES)>, visited 17 Mar. 2008. On progress of negotiations, see the FTA website of the Singapore Government: <[www.iesingapore.gov.sg/wps/portal/lut/p/kcxml/04\\_Sj9SPykssy0xPLMnMz0vM0Y\\_QjzKLN4g3C\\_UBSYGY5oFm-pFoYo4YImah3jAxX7-hYSBhCna9Hfm6qfpC-t36AfkFuaGhoRLkjADmmdVkl/delta/base64xml/L3dJdyEvd0ZNQUFzQMvNEIVRS82XzBf0DBF?WCM\\_GLOBAL\\_CONTEXT=/wps/wcm/connect/FTA/Singapore%27s+FTAs/Ongoing+Negotiations/China](http://www.iesingapore.gov.sg/wps/portal/lut/p/kcxml/04_Sj9SPykssy0xPLMnMz0vM0Y_QjzKLN4g3C_UBSYGY5oFm-pFoYo4YImah3jAxX7-hYSBhCna9Hfm6qfpC-t36AfkFuaGhoRLkjADmmdVkl/delta/base64xml/L3dJdyEvd0ZNQUFzQMvNEIVRS82XzBf0DBF?WCM_GLOBAL_CONTEXT=/wps/wcm/connect/FTA/Singapore%27s+FTAs/Ongoing+Negotiations/China)>, visited 17 Mar. 2008.

<sup>159</sup> China is Costa Rica's second trading partner after the United States. Recently it cut diplomatic relations with Taiwan in favour of the PRC. See 'Costa Rica, China begin talks on free trade', *New Post India*, Thursday 10 Jan. 2008, available at <[www.bilaterals.org/article.php?id\\_article=10918&var\\_recherche=china+and+costa+rica](http://www.bilaterals.org/article.php?id_article=10918&var_recherche=china+and+costa+rica)>, visited 3 Apr. 2008.

<sup>160</sup> Norway has recognized China's market economy status: see Ministry of Commerce of the People's Republic of China, Department of International Trade and Economic Affairs [in Chinese], <<http://gjs.mofcom.gov.cn/aarticle/af/ak/200703/20070304500802.html>>, visited 14 Mar. 2008.

<sup>161</sup> See Ministry of Foreign Trade and Tourism, Peru, and Ministry of Commerce, People's Republic of China, Feasibility Report, China-Peru Free Trade Agreement (FTA), 'Peru - China Free Trade Agreement Joint Feasibility Study', available on the website of the Peru Ministry of Foreign Trade and Tourism, <[www.mincetur.gob.pe/newweb/Portals/0/Peru-China%20JFS%20Final.pdf](http://www.mincetur.gob.pe/newweb/Portals/0/Peru-China%20JFS%20Final.pdf)>, visited 17 Mar. 2008.

<sup>162</sup> In 2002 China became Korea's largest export market, ahead of the United States. See 'China expresses interest in FTA with Korea', *Korea Herald*, 4 Aug. 2005. Negotiations began in 2005. However, the liberalization of trade in agriculture, textiles and manufactured products remain sensitive issues. See 'China-ROK talks have many hurdles', *China Daily*, 13 Dec. 2006, available at <[http://english.peopledaily.com.cn/200612/13/eng20061213\\_331954.html](http://english.peopledaily.com.cn/200612/13/eng20061213_331954.html)>, visited 17 Mar. 2008.

<sup>163</sup> See Laroushka Reddy, 'A China - SACU FTA: What's in it for SA?', *South African Foreign Policy Monitor*, August-September (2004): 1-2, which states (at p. 1) that 'The primary reasons for China's eagerness to enter into a ... FTA with ... SACU, particularly SA [South Africa], is to secure more predictable market access for its global exports and to obtain much-needed natural resources'. The article points out that steel and iron exports from South Africa to China increased by 173% from 2002 to 2003, and those of non-ferrous metals by 123% (id.). See also Ron Sandrey, 'The SACU-China FTA', 17 Mar. 2005, available at <[www.tralac.org/scripts/content.php?id=4917](http://www.tralac.org/scripts/content.php?id=4917)>, visited 17 Mar. 2008; Gus Mandigora, 'The Proposed SACU-China FTA: Opportunities and Threats for SACU's Manufacturing Sector', *tralac*, available at <<http://rta.tralac.org/scripts/content.php?id=4924>>, visited 17 Mar. 2008.

<sup>164</sup> In 2001 Brazil became China's largest export market in Latin America, and China became Brazil's largest export market in Asia. There is considerable cross-investment. In addition, Brazil has recognized a 'One-China Policy, has no official relations with Taiwan and 'does not recognize the Dalai Lama as a political representative': see 'China, Brazil strengthen relations', *Gov.cn*, Tuesday, 29 Aug. 2006, available at <[www.gov.cn/misc/2006-08/29/content\\_372510.htm](http://www.gov.cn/misc/2006-08/29/content_372510.htm)>, visited 17 Apr. 2008; see also . However, there appears to be little real progress toward an FTA so far. On relations between 1974-2004, see 'Major events in China-Brazil relations', *China Daily*, 11 Nov. 2004, available at <[www.china-daily.com.cn/english/doc/2004-11/11/content\\_390570.htm](http://www.china-daily.com.cn/english/doc/2004-11/11/content_390570.htm)>, visited 17 Apr. 2008. For an assessment of relations between China and Brazil between 1999-2006, see Alexandre de Freitas Barbosa and Ricardo Camargo Mendes, 'Economic Relations between Brazil and China: A Difficult Partnership', Dialogue on Globalisation, Briefing Papers, FES Brazil, Friedrich Ebert Stiftung, January 2006, available at <<http://library.fes.de/pdf-files/iez/global/50190.pdf>>, visited 17 Apr. 2008. A sign of various tensions is that in 2004 the President of Brazil agreed to recognize China as a market economy for purposes of anti-dumping law, but this has yet to be approved by the Brazilian parliament.



and Japan.<sup>165</sup> The following discussion concentrates primarily on the China-Chile FTA but mentions briefly the FTA between China-Pakistan FTA.<sup>166</sup>

The China-Chile FTA recites in its Preamble the Parties' belief that the FTA will contribute to the expansion and development of trade under the WTO multilateral trading system.<sup>167</sup> It establishes a free trade area<sup>168</sup> to encourage expansion and diversification of trade, eliminate barriers to trade, promote conditions of fair competition in the FTA, create dispute resolution procedures and establish a framework for further cooperation.<sup>169</sup> The Agreement is to be interpreted and applied in the light of its objectives and according to customary rules of public international law.<sup>170</sup> Concerning relations to other agreements, the Parties reaffirm their existing rights and obligations with respect to each other under the WTO Agreement and other agreements to which both countries are parties.<sup>171</sup> The FTA provides for national treatment in accordance with Article III GATT, including its interpretative notes, which is incorporated into and made part of the FTA, *mutatis mutandis*.<sup>172</sup> Geographical indications are protected consistently with the TRIPS.<sup>173</sup> Special provisions on suspected counterfeit trademark or pirated copyright goods are based generally on TRIPS.<sup>174</sup> The Parties agree to work together toward an agreement in the WTO to eliminate agricultural subsidies.<sup>175</sup>

The WTO SPS Agreement is considered to be an integral part of the FTA.<sup>176</sup> Concerning the TBT Agreement, the Parties reaffirm their existing rights and obligations under the TBT Agreement and agree to apply the principles in the WTO TBT Committee on Principles of the Development of International Standards, Guides and Recommendations with relation to Articles 2.5 and Annex 3 TBT.<sup>177</sup> The FTA provisions follow closely those of the TBT, and definitions of Annex I TBT apply to the FTA.<sup>178</sup> If a Party does not accept a technical regulation of the other party as equivalent, it is required to give reasons on request.<sup>179</sup>

<sup>165</sup> See 'The Report of the Joint Study Group on the Possible Trilateral Investment Arrangements among China, Japan and Korea', 23 Dec. 2003, <[www.meti.go.jp/policy/trade\\_policy/jck/data/041129ifdi-e.pdf](http://www.meti.go.jp/policy/trade_policy/jck/data/041129ifdi-e.pdf)>, visited 14 Mar. 2008.

<sup>166</sup> For an overview as of China's RTAs/FTAs as of 2006, see Ning & Ding, as n. 101 above. As of Mar. 2008, see the website of the Ministry of Commerce of the People's Republic of China, Department of International Trade and Economic Affairs [in Chinese], <<http://gjs.mofcom.gov.cn/af/af.html>>, visited 12 Mar. 2008, which lists China-ASEAN Agreement on Services, China-Chile FTA, China-Pakistan, China-Korea Free Trade Agreement Feasibility Survey, APEC, Strategic Framework for Action on Trade Facilitation and Investment in the Greater Mekong Sub-Region and Feasibility Study on Free Trade Agreement with Norway.

<sup>167</sup> Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Chile (hereinafter China-Chile FTA), Preamble.

<sup>168</sup> China-Chile FTA, Art. 1.

<sup>169</sup> China-Chile FTA, Art. 2(1).

<sup>170</sup> China-Chile FTA, Art. 2(2). The FTA is done in Chinese, Spanish and English which are equally authentic texts, but in case of conflict the English text prevails: China-Chile FTA, Art. 121.

<sup>171</sup> China-Chile FTA, Art. 3.

<sup>172</sup> China-Chile FTA, Art. 7.

<sup>173</sup> China-Chile FTA, Art. 10.

<sup>174</sup> Compare China-Chile FTA, Art. 11, and Arts 51-59 TRIPS.

<sup>175</sup> China-Chile FTA, Art. 12.

<sup>176</sup> China-Chile FTA, Art. 56(1).

<sup>177</sup> China-Chile FTA, Art. 63(2).

<sup>178</sup> China-Chile FTA, Art. 71(b).

<sup>179</sup> China-Chile FTA, Art. 65.

In addition to specific dispute settlement institutions (discussed later), the China-Chile FTA establishes several institutions. Borrowing from the WTO model, it creates a Committee on Trade in Goods, a Committee on SPS Measures and a TBT Committee.<sup>180</sup> It establishes a Free Trade Commission, consisting of representatives of the parties, to supervise implementation of the FTA and to resolve disputes concerning interpretation and application of the Agreement.<sup>181</sup> Each party is also required to establish an office to provide administrative assistance to arbitral panels and perform other functions as directed by the Commission.<sup>182</sup> The Trade and Economic Mixed Commission, originally created by the 1971 China-Chile Trade Agreement, is incorporated into the FTA.<sup>183</sup>

The FTA also establishes a framework for cooperation in numerous fields,<sup>184</sup> including economic cooperation,<sup>185</sup> research, science and technology,<sup>186</sup> education,<sup>187</sup> labour, social security and environmental cooperation,<sup>188</sup> small and medium-sized enterprises,<sup>189</sup> culture,<sup>190</sup> intellectual property rights,<sup>191</sup> investment promotion<sup>192</sup> and mining and industrial cooperation.<sup>193</sup> It is broader in scope than the Mainland-Hong Kong CEPA or the ACFTA. In dealing with investment, for example, it goes beyond the WTO agreements.

A central part of the FTA is cooperation in the field of mining. The FTA aims to encourage government agencies, research organizations, private companies and other research organizations to conclude direct arrangements supporting cooperative activities or joint ventures, to focus on areas of mutual and complementary interest, and to build on existing arrangements such as intergovernmental protocols or association agreements between copper companies.<sup>194</sup> Areas of cooperation include but are not limited to bio-mining, mining techniques and mining productivity.<sup>195</sup> Envisaged activities include promotion of public/private sector partnerships and joint ventures and technology transfer,<sup>196</sup> an important objective in China's RTAs.<sup>197</sup>

These provisions suggest that the search for natural resources is a significant factor underlying China's RTAs, especially (but not only) with non-neighbouring

---

<sup>180</sup> China-Chile FTA, Art. 13 (Committee on Trade in Goods), Art. 58 (SPS Committee) and Art. 69 (TBT Committee).

<sup>181</sup> China-Chile FTA, Art. 97. The representatives of the parties are the Chinese Ministry of Commerce (MOFCOM) and the Chilean General Directorate of International Economic Affairs (DIRECON).

<sup>182</sup> China-Chile FTA, Art. 98(1).

<sup>183</sup> China-Chile FTA, Art. 96. The full title of the 1971 Agreement is Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Chile. It was signed in Santiago on 20 Apr. 1971.

<sup>184</sup> China-Chile FTA, Art. 194.

<sup>185</sup> China-Chile FTA, Art. 105.

<sup>186</sup> China-Chile FTA, Art. 106.

<sup>187</sup> China-Chile FTA, Art. 107.

<sup>188</sup> China-Chile FTA, Art. 108.

<sup>189</sup> China-Chile FTA, Art. 109.

<sup>190</sup> China-Chile FTA, Art. 110.

<sup>191</sup> China-Chile FTA, Art. 111.

<sup>192</sup> China-Chile FTA, Art. 112.

<sup>193</sup> China-Chile FTA, Art. 113.

<sup>194</sup> China-Chile FTA, Art. 113(1).

<sup>195</sup> China-Chile FTA, Art. 113(2).

<sup>196</sup> China-Chile FTA, Art. 113(3).

<sup>197</sup> See Ning and Ding, as n. 101 above, at p. 6.

sovereign states. As of March 2008, China was the world's largest consumer of copper.<sup>198</sup> Its demand was increasing because of the appreciation of the Renminbi (RMB), new investment in power grid construction and increased demand in the air-conditioning and automobile industries.<sup>199</sup> However, it produced only 20% of its requirements, relying for the rest on imports, including 80% on spot trade, subject to fluctuations. In addition, world copper producers are increasingly being integrated, placing buyers in a difficult position,<sup>200</sup> when China's copper imports (in 2006) were reported to have increased by 80% compared to the preceding year.<sup>201</sup> Chile is the largest world's largest producer of copper. In 2000, it produced about 35% of the world's copper, which in turn accounted for 40% of Chilean total exports by value.<sup>202</sup> In such circumstances, the China-Chile FTA can perform an integrative function, 'locking in' purchaser and supplier through a trade agreement, thus replacing vertical integration through ownership or horizontal integration through inter-company contract. It serves as a hedge against price fluctuations and a guarantee of supply in an increasingly competitive market.

One aim of IPR cooperation in the China-Chile FTA is to build on the foundations of existing international agreements to which both China and Chile are parties, including the TRIPS Agreement and the principles in the Declaration on the TRIPS Agreement on Public Health, adopted at the November 2001 Doha Ministerial and the Decision on the Implementation of paragraph 6 of the Doha Declaration, adopted on 30 August 2003,<sup>203</sup> and now incorporated into TRIPS as Article 31bis. Other aims of IPR cooperation include to promote technological innovation, to achieve a balance between IPR and the legitimate interests of other users and to encourage the rejection of practices which restrain competition.<sup>204</sup>

The China-Pakistan FTA<sup>205</sup> is very similar to but more limited in scope than the China-Chile FTA. It also illustrates other important roles of RTAs in China's

<sup>198</sup> According to *The Economist*, 'China has swallowed up over four-fifths of the increase in the world's copper supply since 2000': Leader: 'The New Colonialists', *The Economist*, 15 Mar. 2008, p. 13. Nevertheless, RTAs aside, it is important to maintain perspective. *The Economist's* recent special report on China's search for raw materials argues that '[f]or all the hue and cry, China is still just one of many countries looking for raw materials around the world': see 'A ravenous dragon: A special report on China's search for raw materials', *The Economist*, 15 Mar. 2008, pp. 1-18 [after p. 60], at p. 4. This part of the special report deals mainly with the political implications, arguing [at p. 4] that 'concerns about the dire consequences of China's quest for natural resources are overblown'.

<sup>199</sup> See 'China's copper demand to buoy prices in long run', <[www.chinamining.org/News/2008-02-22/1203643602d9132.html](http://www.chinamining.org/News/2008-02-22/1203643602d9132.html)>, updated 22 Feb. 2008, visited 20 Mar. 2008. It is commonly reported, in the press and by word of mouth in Beijing, that more than 1,000 new cars appear on the streets of Beijing every day: see for example Yongfeng Feng of the China Guangming Daily guest posting for the Worldwatch Institute, 23 Oct. 2007, on the website of Envirostats!, at <<http://envirostats.info/2007/10/24/0511/>>, visited 20 Mar. 2008.

<sup>200</sup> See 'Resource shortage challenges China's copper industry', on the website of Chinamining.org, sponsored by the China Mining Association (CMA), updated 14 Mar. 2008, at <[www.chinamining.org/News/2008-03-14/1205458306d12119.html](http://www.chinamining.org/News/2008-03-14/1205458306d12119.html)>, visited 20 Mar. 2008.

<sup>201</sup> 'A ravenous dragon: A special report on China's search for raw materials', *The Economist*, 15 Mar. 2008, pp. 1-18 [after p. 60], at p. 6.

<sup>202</sup> See the website of Global InfoMine, 'Chile at a glance', <[www.infomine.com/countries/chile.asp](http://www.infomine.com/countries/chile.asp)>, visited 20 Mar. 2008, and of Mbendi-Information for Africa, at <[www.mbendi.co.za/indy/ning/sa/cl/p0005.htm](http://www.mbendi.co.za/indy/ning/sa/cl/p0005.htm)>, visited 20 Mar. 2008.

<sup>203</sup> China-Chile FTA, Art. 111(1)(a)

<sup>204</sup> China-Chile FTA, Art. 111(1)(b), (c), (e).

<sup>205</sup> Free Trade Agreement between the Government of the People's Republic of China and the Government of the Islamic Republic of Pakistan (hereinafter China-Pakistan FTA).

international and regional policy. In addition to its free trade provisions,<sup>206</sup> its objectives include strengthening mutual friendship between the parties.<sup>207</sup> The FTA is of strategic importance for both Pakistan and China concerning both their mutual neighbour India and Central Asia in general. In addition, while unlike the China–Chile FTA it does not envisage cooperation in a broad range of fields, it does include a specific chapter on investment. The national treatment principle applies to investors of the other party, without prejudice to domestic laws and regulations.<sup>208</sup> Neither party is to expropriate, nationalize or take similar measures against investments of investors of the other party except for public interest, under domestic legal procedure, without discrimination and against compensation.<sup>209</sup> These provisions are especially significant for China, which has invested heavily in development projects in Pakistan’s Balochistan province. In addition to a lead and zinc mining project, the investments are reported to include USD 230 million in the Saindak copper project and the Gwadar port.<sup>210</sup> The Gwadar deep-sea, year-round port is strategically located between the Middle East, Southeast Asia and Central Asia,<sup>211</sup> ‘giving ... [China’s] westernmost regions access to the high-seas highways of the global economy’.<sup>212</sup> Its construction is part of a larger development plan, including international trade routes to Xinjiang and Central Asian countries and the development of a Trade Energy, Transport and Industrial Corridor linked to Gwadar Oil City.<sup>213</sup>

The China–Chile and China–Pakistan FTAs exemplify the third type of RTA that China has concluded. They differ from the other types in their specific combination of legal form, general objectives and sometimes reasons for conclusion. They are bilateral agreements, as are the two CEPA (except that Hong Kong and Macao are not States), rather than multilateral agreements (in form) such as the ACFTA agreements. They involve non-neighbouring sovereign states, thus differing from both other types of RTAs.

<sup>206</sup> See ‘China, Pakistan sign free trade agreement’, *People’s Daily Online*, 25 Nov. 2006, available at <[http://english.peopledaily.com.cn/20061124/eng20061124\\_324918.html](http://english.peopledaily.com.cn/20061124/eng20061124_324918.html)>, visited 10 Mar. 2008.

<sup>207</sup> China–Pakistan FTA, Art. 2(1)(a).

<sup>208</sup> China–Pakistan FTA, Art. 48.

<sup>209</sup> China–Pakistan FTA, Art. 49(1), Art. 49(2) provides for compensation.

<sup>210</sup> See Philip Sen, ‘China–Pakistan FTA’, *Journalism by Other Means*, available at <[www.philip-sen.com/othermeans/2006/11/chinapakistan\\_fta.html](http://www.philip-sen.com/othermeans/2006/11/chinapakistan_fta.html)>, visited 4 Apr. 2008. On the Saindak project, see <[www.pakistan.gov.pk/divisions/ContentInfo.jsp?DivID=49&cPath=768\\_775&ContentID=4172](http://www.pakistan.gov.pk/divisions/ContentInfo.jsp?DivID=49&cPath=768_775&ContentID=4172)>, visited 4 Apr. 2008.

<sup>211</sup> See Tarique Niazi, ‘Gwadar: China’s Naval Outpost on the Indian Ocean’, *The Jamestown Foundation, China Brief*, on the website of the Association for Asian Research, <[www.asianresearch.org/articles/2528.html](http://www.asianresearch.org/articles/2528.html)>, visited 4 Apr. 2008. See also ‘Gwadar Port’, *Gwadar News and Business Source*, <[www.gwadarnews.com/gwadar-port.asp](http://www.gwadarnews.com/gwadar-port.asp)>, visited 4 Apr. 2008; and ‘Gwadar’, *Wikipedia*, <[www.en.wikipedia.org/wiki/Gwadar](http://www.en.wikipedia.org/wiki/Gwadar)>, visited 4 Apr. 2008.

<sup>212</sup> John W. Garver, ‘China’s Influence in Central and South Asia’, in *Power Shift: China and Asia’s New Dynamics*, ed. David Shambaugh (Berkeley: University of California Press, 2006), 204–225, at p. 209; see also Map 2 on p. 210.

<sup>213</sup> See Sajid Chaudhry, ‘Gwadar Oil City : Pakistan, China to sign agreements in early 2008’, *IntelliBriefs*, 17 Oct. 2007, available at <<http://intellibriefs.blogspot.com/2007/10/gwadar-oil-city-pakistan-china-to-sign.html>>, visited 4 Apr. 2008; Zafar Bhutta, ‘PM’s visit to China: Pakistan–China relations to be further strengthened’, *Daily Times (Pakistan)*, Sunday, 27 Jan. 2008, visited 4 Apr. 2008. BBC News reported that China has provided much of the total funding of USD 1 billion dollars for the controversial port project, which some describe as ‘China’s first foothold in the Middle East’, and also that [t]he surrounding region is home to around two-thirds of the world’s oil reserves’: see ‘Pakistan launches strategic port’, BBC News, Tuesday, 20 Mar. 2007, available at <[http://news.bbc.co.uk/2/hi/south\\_asia/6469725.stm](http://news.bbc.co.uk/2/hi/south_asia/6469725.stm)>, visited 4 Apr. 2008. On the reaction of India, see for example, Abdus Sattar Ghazali, ‘India Alarmed As Chinese Built Gwadar Port of Pakistan Becomes Operational’, <[www.countercurrents.org/ghazali080208.htm](http://www.countercurrents.org/ghazali080208.htm)>, visited 4 Apr. 2008; and B. Raman, ‘Gwadar, Hambantota & Sitwe: China’s Strategic Triangle’, South Asia Analysis Group, Paper no. 2158, 6 Mar. 2007, available at <[www.southasiaanalysis.org/%5Cpapers22%5paperCpaper2158.html](http://www.southasiaanalysis.org/%5Cpapers22%5paperCpaper2158.html)>, visited 4 Apr. 2008.

Unlike the CEPA or the PPRD agreements, they are not designed to promote deeper integration as part of the building of 'Greater China'. Nor are they oriented toward regional cooperation, unlike the ACFTA and similar accords. Their bilateral character sometimes means that relations between the parties are more limited, so that it may be easier to distinguish certain principal, non-trade objectives than in the case of the two other types. These bilateral agreements with non-neighbouring sovereign states are more properly designated as FTAs rather than as RTAs.

### 3. CHINA'S RTAS AND WTO LAW

How are these three types of China's RTAs – economic integration agreements, RTAs and FTAs – related to WTO law?<sup>214</sup> WTO law supplies a general multilateral legal framework within which, and the normative background against which, these RTAs are concluded. In particular, Article XXIV GATT, Article V GATS and the Enabling Clause provide ways of integrating into and subordinating RTAs to WTO law. Viewed from another perspective, RTAs may refer to these and other articles of the WTO agreements, but their authors know that in most instances WTO law does not really have teeth, except for the politically important symbolism of reporting RTAs to the WTO and the potential political and legal utility of the practice. Second, WTO law may provide a template for specific provisions, institutions or procedures of RTAs. Most RTAs are concluded 'in the shadow of WTO law', not only in the normative sense that often WTO law supplies the criteria for evaluating their legality under international trade law, at least in principle, but also in the sense that RTAs copy, draw upon, improve upon or consciously go beyond the WTO agreements. They are not necessarily 'based on' the WTO agreements, in that they 'conform to' the WTO agreements, or even that they 'bear a reasonable relationship to' the WTO agreements, but nevertheless they frequently are drafted against the background of WTO agreements.

This does not mean that RTA provisions are the same as WTO provisions, or that they are necessarily compatible with WTO provisions. To what extent do China's RTAs differ from WTO law? To what extent are they compatible with WTO law? This second main part of the paper seeks to answer these questions, at least in a preliminary way.<sup>215</sup>

---

<sup>214</sup> Most authors consider China's RTAs to be WTO-consistent in general. Usually they focus on one RTA or on elements of selected RTAs. For example, Kong considers ACFTA to be compatible with WTO, cf Kong 848-851, mainly on the basis of an analysis of Art. XXIV GATT and Art. V GATS (compare his analysis with Emch) and general consistency in terms of being oriented toward trade liberalisation and establishing a trade framework: based on rules: Qingjiang Kong, 'China's WTO Accession and the ASEAN-China Free Trade Area: The Perspective of a Chinese Lawyer', *Journal of International Economic Law* 7, no. 4 (2004): 839-861 at p. 848-851. See also Zeng Lingliang, as n. 92, and Zeng Huaqun, as n. 115 above; Sen, as n. 2 above, at pp. 568.

<sup>215</sup> There does not appear to be any comprehensive analysis of relations between East Asian RTAs and WTO law. On the Korea-ASEAN FTA, however, see Won-Mog Choi, 'Legal Analysis of Korea-ASEAN Regional Trade Integration', *Journal of World Trade* 41, no. 3, (2007): 581-603. An earlier article by the same author deals mainly with WTO rules on RTAs: see Won-Mog Choi, 'Regional Economic Integration in East Asia: Prospect and Jurisprudence', *Journal of International Economic Law* 6, no. 1 (2003): 49-77. On ASEAN Member States and ASEAN, see Tran Thi Thuy Dong, 'Aspects juridiques de la participation des Etats de l'ASEAN à l'OMC', thèse pour le Doctorat en Droit Public, Université Paul Cézanne Aix-Marseille III, Aix-en-Provence, 25 Jun. 2007.

In order to examine relations between China's RTAs and WTO law, it focuses on specific normative, institutional and procedural aspects of China's RTAs. With respect to each of the three types of RTAs, it concentrates on three critical issues: non-preferential rules of origin (ROOs),<sup>216</sup> safeguards and dispute settlement mechanisms.

### 3.1. NON-PREFERENTIAL RULES OF ORIGIN

Each of the three types of China's RTAs has specific rules of origin (ROOs) (see Table 2). The following paragraphs discuss the Mainland-Hong Kong CEPA and the Mainland – Macao CEPA (3.1.1.), the ASEAN-China FTA (3.1.2) and the FTAs between China and Chile and between China and Pakistan (3.1.3):

#### 3.1.1. CEPA

The Mainland – Hong Kong CEPA contains specific ROOs.<sup>217</sup> Table 3 shows the main rules for non-originating goods. Goods not wholly obtained in one side are deemed to originate in that side only if they have undergone substantial transformation in that side.<sup>218</sup> The criteria for 'substantial transformation' are complex. They 'may' include manufacturing or processing operations, change in tariff heading, 30% value-added content,<sup>219</sup> other criteria or mixed criteria.<sup>220</sup> About 73% of product codes adopt processing criteria,

Table 2. Summary of Rules of Origin in China's RTAs

WTO	Transition period: disciplines, specific criteria for CTC, <i>ad valorem</i> , manufacturing or processing (Article 2(a) RO; objective of harmonization: last substantial transformation (Article 9(1)(b) RO
HK CEPA	Substantial transformation = manufacturing or processing operations, or CTC, or value-added content (30%+final operations), or other methods agreed by both sides, or use of two or more of above
ACFTA	40% content; full cumulation 40%; product-specific rules for sufficient transformation
Chine-Chile FTA	Cumulation 40%, except listed product-specific rules

<sup>216</sup> For a comparative survey, see World Trade Organization, Committee on Regional Trade Agreements, 'Rules of Origin in Regional Trade Agreements: Background Survey by the Secretariat', WT/REG/W/45, 5 Apr. 2002, available at <<http://docsonline.wto.org/DDFDdocuments/t/WT/REG/W45.doc>>, visited 23 Mar. 2008. (Low symmetrical) ROOs are sometimes considered to be among best practices for RTAs: see Michael G. Plummer, "Best Practices" in Regional Trade Agreements: An Application to Asia', *The World Economy* 30, no. 12, (2007): 1771-1797.

<sup>217</sup> Mainland – Hong Kong CEPA, Art. 10; Annex 2, Rules of Origin for Trade in Goods; and Table 1, Schedule on Rules of Origin for Hong Kong Goods Subject to Tariff Preferences for Trade in Goods. On implementation, see Annex 3, Procedures for the Issuing and Verification of Certificates of Origin.

<sup>218</sup> Mainland – Hong Kong CEPA, Annex 2, Rules of Origin for Trade in Goods, Art. 2(2).

<sup>219</sup> 'Total value of raw materials, component parts, labour costs and product development costs exclusively incurred in one side being greater than or equal to 30% of the FOB value of the exporting goods, and that the final manufacturing or processing operations should be completed in the area of that side': Mainland – Hong Kong CEPA, Annex 2, Rules of Origin for Trade in Goods, Art. 5(4).

<sup>220</sup> Annex 2, Rules of Origin for Trade in Goods, Art. 5.

Table 3. *Mainland – Hong Kong CEPA ROOs*

Classification	Products	General Rule	Type of Criterion	Specific Rule	Criteria	Definition of Criteria
non-originating		Article 4	minor processing treatment	Articles 4(1),(2),(3)	(1) processing or treatment for transportation or storage, (2) processing or treatment to facilitate packaging and delivery, (3) processing or treatment such as packaging or display for distribution and sale	
originating		Article 6	simple operations not sufficient to confer origin			
	wholly obtained	Article 2(1)	wholly obtained	Article 3	list	
	not wholly obtained	Article 2(2)	substantial transformation: Article 5	Article 5(2)	manufacturing or processing operations:	the principal manufacturing or processing operations carried out in the area of one side which confer essential characteristics to the goods derived after the operations'
				Article 5(3)	change in tariff heading	'processing and manufacturing operations of non-originating materials carried out in the area of one side and resulting in a product of a different four-digit tariff heading' ... [under the HS system]. Moreover, no production, processing or manufacturing operations will be carried out in countries or territories other than that side which will result in a change of the four-digit tariff heading'
				Article 5(4)	value-added content	the total value of raw materials, component parts, labour costs and product development costs exclusively incurred in one side being greater than or equal to 30% of the FOB value of the exporting goods, and that the final manufacturing or processing operations should be completed in the area of that side'
other				Article 5(5)	other criteria	other methods agreed by both sides
	specific rules	Article 7	origin of energy, factory, machinery etc. not taken into account	Article 5(6)	mixed criteria	use of two or more of the above criteria
		Article 8	accompanying packaging, parts, spare parts etc. classified with goods for customs purposes not taken into account			

which was the existing Hong Kong rule; about 16% adopt the change of tariff heading criterion; and about 11% adopt the 30% value-added content rule. More flexible rules apply to piece-knitted textile garments, with different processes applying to manufacture from yarn and to manufacture from knit-to-shape panels; to favour goods from Hong Kong, China and Hong Kong 'reach[ed] a consensus to relax the origin rules for some of the goods being produced in Hong Kong'. These rules for piece-knitted garments are based on Hong Kong's bilateral agreements with the US and the EU, respectively.<sup>221</sup> From the standpoint of WTO law, the approach is consistent with WTO law, namely that 'substantial transformation' "is a general criterion that has to be further technically defined and expressed by the adoption of different methodologies to determine origin that could be (a) the change of tariff classification, (b) *ad valorem* percentages under the revised annex K of the Kyoto convention".<sup>222</sup> However, the inclusion of 'other criteria' or 'mixed criteria', to be used by agreement of the parties, renders the criteria particularly opaque. To this extent, it would appear to diverge from the spirit and the principles of the WTO Agreement on Rules of Origin. Article 2 of the WTO ROOs Agreement states that 'Members shall ensure that: (a) when they issue administrative determinations of general application, the requirements to be fulfilled are clearly defined'.<sup>223</sup> As yet there is no agreement in the WTO on harmonization of rules of origin, but one of the basic principles on which the work programme is based is that 'rules of origin should be objective, understandable and predictable'.<sup>224</sup>

Under the Mainland China – Macao CEPA, the parties agreed in 2005 to expand the criteria on rules of origin. They supplemented 'the substantial transformation' criteria with 'other additional conditions by providing that: 'If the substantial transformation criteria ... are not adequate for determining origin, additional conditions can be used (such as brand requirement, etc.) upon agreement by both sides'.<sup>225</sup> It appears that such condition has not been added to the Mainland – Hong Kong CEPA. This change enlarges considerably the range of products originating in Macao. Though it could not be incompatible with WTO ROOs, because the latter are not yet in existence, it is not clear that it is consistent with the orientation of WTO proposals. It also moves farther away from a 'substantial transformation' test or a change of tariff heading test.<sup>226</sup>

---

<sup>221</sup> Po-Chuen Lam, 'Country Report: Hong Kong, China', Asian Development Bank Regional Seminar on Rules of Origin, 2004, p. 3, available at <[www.adb.org/Documents/Events/2004/Rules\\_of\\_Origin/roo\\_hkg.pdf](http://www.adb.org/Documents/Events/2004/Rules_of_Origin/roo_hkg.pdf)>, visited 4 Apr. 2008.

<sup>222</sup> Inama, as n. 82 above, at p. 574

<sup>223</sup> WTO Agreement on Rules of Origin, Art. 2(a).

<sup>224</sup> WTO Agreement on Rules of Origin, Art. 9(1)(c).

<sup>225</sup> See Supplement II to the Mainland and Macao Closer Economic Partnership Arrangement, amending Art. 5 of Annex 2 of CEPA, Rules of Origin for Trade in Goods, 21 Oct. 2005.

<sup>226</sup> See also William E. James, 'Rules of Origin in Emerging Asia-Pacific Preferential Trade Agreements: Will PTAs Promote Trade and Development', Asia-Pacific Research and Training Network on Trade Working Paper Series, No. 19, Aug. 2006, pp. 33-24; a revised and edited version of this paper is published as 'Rules of Origin in Emerging Asia-Pacific Preferential Trade Agreements: Will PTAs Promote Trade and Development', in *Trade Facilitation Beyond the Multilateral Trade Negotiations: Regional Practices, Customs Valuation and Other Emerging Issues – A Study by the Asia-Pacific Research and Training Network on Trade*, ed. ESCAP (New York: United Nations, 2007).



### 3.1.2. ASEAN-China FTA

The ASEAN-China FTA Goods Agreement also provided for ROOs.<sup>227</sup> Table 4 shows the ACFTA ROOs. Products not wholly produced or obtained in a Party are deemed originating and eligible for preferential treatment if they meet criteria laid down for not wholly produced or obtained products, cumulative rules of origin or product specific criteria.<sup>228</sup> A product is deemed originating under the first category either if not less than 40% of its content originates from any Party, or if the total non-ACFTA value of materials, part or produce does not exceed 60% of the FOB value of the product provided that the final process of manufacture is performed within the territory of a Party (the ACFTA content rule).<sup>229</sup> 'Party' means the individual parties to the Agreement.<sup>230</sup> A product is deemed as originating under cumulative rules of origin if it is used in the territory of a Party as materials for a finished product eligible for preferential treatment and where working or processing of the finished product has taken place, provided that the aggregate ACFTA content of the final product is not less than 40%; the ROO allow full cumulation among the parties.<sup>231</sup> Finally, a product which has undergone sufficient transformation in a Party is treated as originating in the Party; such product specific rules were to be negotiated starting January 2004,<sup>232</sup> and a first package was endorsed by the ASEAN-China Trade Negotiating Committee in June 2005.<sup>233</sup> Certain operations or processes were deemed to be minimal and not taken into account.<sup>234</sup> Packing may be treated separately for ROO purposes if customs duties are assessed on the packing separately from the product;<sup>235</sup> otherwise no packing is to be considered as having been imported from outside the ACFTA.<sup>236</sup> Accessories, spare parts and tools are ignored, provided that they are classified and collected customs duties with the goods by the importing Party.<sup>237</sup> Unless otherwise provided, the origin of power, rule, plant, equipment, or machines and tools used to obtain the product, or materials used in manufacture which do not remain in the goods, are considered neutral elements and not taken into account in determining the origin of the product.<sup>238</sup> These rules are clear and precise and would not appear to raise any problems of incompatibility with WTO law.

<sup>227</sup> ASEAN-China Agreement on Goods, Art. 5. For a critique of these rules, see Inama, as n. 82 above, at pp. 571-578. For a comparison of ROOs in Asia-Pacific FTAs up to 2005, see Dent, as n. 21 above, Appendix E, p. 289, which includes ACFTA and HKCEPA.

<sup>228</sup> ACFTA ROO, Rule 2.

<sup>229</sup> ACFTA ROO, Rule 4.

<sup>230</sup> ACFTA ROO, Rule 1.

<sup>231</sup> ACFTA ROO, Rule 5.

<sup>232</sup> See ACFTA ROO, Attachment B 'Product Specific Rules'.

<sup>233</sup> See Association of Southeast Asian Nations, Secretariat, 'Attachment B: Product Specific Rules, Ref. No. BEI-Dir. /SEOM/ Voi.2/04, 7 Jul. 2005, available at <[www.thaifta.com/trade/china/seom\\_%20letter.pdf](http://www.thaifta.com/trade/china/seom_%20letter.pdf)>, visited 15 Apr. 2008.

<sup>234</sup> ACTFA ROO, Rule 7.

<sup>235</sup> ACFTA ROO, Rule 9(a).

<sup>236</sup> ACFTA ROO, Rule 9(b).

<sup>237</sup> ACFTA ROO, Rule 10.

<sup>238</sup> ACFTA ROO, Rule 11.

Table 4. ACFTA ROOs

Classification	Products	Rule	Type of Criterion	Criteria
non-originating	products having undergone only minimal operations or processes, or otherwise not meeting the criteria for originating products	Rule 7	minimal operations or processes	operations or processes, by themselves or in combination, considered to be minimal and not taken into account in determining whether a good has been wholly obtained in one country; ensuring preservation for purposes of transport or storage; facilitating shipment or transportation, packaging [excluding encapsulation, which is termed 'packaging' by the electronics industry] or presenting goods for sale
originating	wholly obtained or produced	Rule 3	wholly obtained products	list of products considered as wholly produced or obtained in a Party [Party means individual Members of the Agreement]
	not wholly produced or obtained, provided eligible under Rule 4, 5 or 6	Rule 4	not wholly produced or obtained	(i) not less than 40% of content originates from the Party; or (ii) if the total value of materials, part or produce originating from outside the territory of a Party (I.e., non-ACFTA) does not exceed 60% of the FOB value of the product so produced or obtained provided that the final process of the manufacture is performed within the territory of the Party (ie ACFTA content = at least 40%)
		Rule 5	cumulative rule of origin	used in the territory of a Party as materials for a finished product eligible for preferential treatment under the Agreement and where working or processing of the finished product has taken place, provided that the aggregate ACFTA content (I.e., full cumulation, applicable among all Parties) is not less than 40%
other	specific rules	Rule 6	product specific criteria	undergone sufficient transformation in a Party; Product Specific Rules determining which goods shall be considered to which sufficient transformation has been carried out were to be negotiated starting January 2004
		Rule 9	treatment of packing	
		Rule 10	accessories, spare parts and tools	
		Rule 11	neutral elements	

### 3.1.3. *China-Chile and China-Pakistan FTAs*

The China-Chile FTA provides specific ROOs. A good is deemed to originate in China or Chile if it is produced in the territory of one or both Parties, using non-originating materials that conform to a regional value content (RVC) not less than 40%, except for various listed goods which have specific rules with a higher RVC.<sup>239</sup> Numerous operations, including simple assembly or parts to constitute a complete article, are deemed to be insufficient working or processing to confer origin.<sup>240</sup> Accumulation is permitted between the two Parties.<sup>241</sup> A set composed of originating and non-originating products is regarded as originating if the value of non-originating products does not exceed 15% of the total value of the set.<sup>242</sup> Accessories, spare parts and tools presented as part of the good on importation are disregarded if classified and invoiced with the good.<sup>243</sup> Similarly, under the China-Pakistan FTA, , products not wholly originating or produced in the territory of a Party are deemed to be originating if not less than 40% of its content originates from a Party.<sup>244</sup> Products which have undergone sufficient transformation in a party are also considered to originate in the Party.<sup>245</sup> Neither of these agreements raises special problems of compatibility with WTO law.

## 3.2. SAFEGUARDS

Safeguards constitute a second important element of RTAs which potentially raise a question of compatibility with WTO law. Table 5 summarizes safeguards for the three main China RTAs. The following paragraphs discuss the Mainland – Hong CEPA (3.2.1), the ACFTA (3.2.2) and the China-Chile and China-Pakistan FTAs (3.2.3) in more detail.

### 3.2.1. *CEPA*

Under the Mainland – Hong CEPA, safeguard measures may be applied if implementation of CEPA causes a sharp increase in the import of listed products which causes, or threatens to cause, serious injury to the other side's domestic industry producing like or directly competitive products. After giving written notice, the affected side may temporarily suspend concessions and, on request, promptly begin consultations to reach

<sup>239</sup> China-Chile FTA, Art. 15. Annex 3 gives the product-specific requirements. On the calculation of RVC, see Art. 17. See also Art. 18.

<sup>240</sup> China-Chile FTA, Art. 19.

<sup>241</sup> China-Chile FTA, Art. 20.

<sup>242</sup> China-Chile FTA, Art. 22. A set is defined in General Rule 3 of the Harmonized System as goods consisting of at least two components belonging to different tariff headings.

<sup>243</sup> China-Chile FTA, Art. 23.

<sup>244</sup> China-Pakistan FTA, Art. 15.

<sup>245</sup> China-Pakistan FTA, Art. 17. See the Annex for product specific criteria for sufficient transformation.

Table 5. Safeguards in China RTAs Compared

WTO	WTO Safeguards Agreement
HK CEPA	Either party may maintain or adopt measures consistent with WTO rules
ACFTA	Parties retain Article XIX GATT and SG rights; ACFTA safeguards may be taken during transitional period; ACFTA incorporates WTO SG except for various quantitative restrictions
CHINA-CHILE FTA	Bilateral safeguards in form of suspension of duty reduction or increase in duty for one year allowed during transitional period; parties retain rights and obligations under WTO SG
CHINA-PAKISTAN FTA	Bilateral safeguards allowed during transitional period (five year period in the first phase of customs duty reduction or elimination); parties retain their rights and obligations under the WTO SG; no bilateral safeguard can be maintained if a global [WTO] safeguard is in place

an agreement.<sup>246</sup> In contrast to other China RTAs, no maximum duration for safeguard measures is specified. Except as otherwise provided in CEPA, any action taken under it shall not affect or nullify the rights and obligations of either side under other existing arrangements to which it is a contracting party;<sup>247</sup> this includes the WTO Agreements.<sup>248</sup> However, the Parties are 'to endeavour to refrain' from taking such restrictive measures which could affect the CEPA.<sup>249</sup> Compared to the WTO Safeguards Agreement, this is a skeleton text, reflecting the particularly close relations between the parties and the specific context. In general, the text is consistent with the WTO Safeguards Agreement, except that no maximum duration is specified for safeguard measures. In addition, the Mainland – Hong CEPA expressly provides that consistency with WTO rules is a basic principle of the CEPA.<sup>250</sup>

### 3.2.2. ASEAN-China FTA

The ASEAN-China Framework Agreement provided that WTO safeguards rules were to apply to the Early Harvest Programme until replaced by other disciplines agreed by the parties.<sup>251</sup> Under the ASEAN – China Agreement on Goods, parties which are WTO Members retain their rights under Article XIX GATT and the WTO Safeguards Agreements.<sup>252</sup> China has agreed to grant non-WTO ASEAN Member States the same

<sup>246</sup> Mainland – Hong Kong CEPA, Art. 9. In addition to references to WTO concerning specific matters, the Mainland – Hong Kong CEPA provides that the CEPA, including Annexes, shall not affect the ability of the either party to maintain or adopt 'exception measures consistent with the rules of the WTO'. This appears to refer to exceptions under Art. XX GATT.

<sup>247</sup> Mainland – Hong Kong CEPA, Art. 20(1).

<sup>248</sup> Mainland – Hong Kong CEPA, Art. 18.

<sup>249</sup> Mainland – Hong Kong CEPA, Art. 20(2).

<sup>250</sup> Mainland – Hong Kong CEPA, Art. 2(2).

<sup>251</sup> ASEAN-China Framework Agreement, Art. 8(3)(d).

<sup>252</sup> ASEAN-China Agreement on Goods, Art. 9(1).

rights.<sup>253</sup> During the transition period for specific products,<sup>254</sup> a party could initiate safeguard measures under the Goods Agreement if, as an effect of the Agreement, or 'if as a result of unforeseen developments and of the effects of the obligations incurred by the Party', 'imports ... increase in such quantities, absolute or relative to domestic production, and under such conditions as to cause' 'serious injury' to 'domestic industry ... that produces like or directly competitive products'.<sup>255</sup> This follows almost verbatim the Article 2(2) of the WTO Agreement on Safeguards. ACFTA safeguards are limited to an increase in the tariff rate to the WTO MFN tariff rate applied to the product at the time the measures is taken;<sup>256</sup> this is more narrowly drafted than the WTO Safeguards Agreement<sup>257</sup> but nonetheless consistent with it. Such a safeguard measure could be maintained for an initial period of three years, with an eventual extension of one further year,<sup>258</sup> which is a shorter period than that provided in Article 7 of the WTO Safeguards Agreement. These provisions apply during the transitional period for specific products; after that, WTO rules apply.

ACFTA safeguards thus essentially adopted the WTO Safeguards Agreement rules, which *mutatis mutandis* were incorporated into and became an integral part of the Goods Agreement, except for the quantitative restrictions in Article 5 and for Articles 9, 13 and 14 of the WTO Safeguards Agreement.<sup>259</sup> Note, however, that the ACFTA does not contain any express equivalent of the WTO Safeguards Agreement 'substantially equivalent level of concessions' requirement;<sup>260</sup> this would be embraced in the general provision to the effect that parties retain their WTO rights. In addition, in seeking compensation under the WTO SCM Agreement for an ACFTA measure, the Parties must seek the good offices, not of the WTO Committee on Safeguards, but rather of either AEM-MOFCOM (ASEAN Economic Ministers – Ministry of Commerce of China) or SEOM-MOFCOM (ASEAN Senior Economic Officials Meeting – Ministry of Commerce of China), as appropriate, which is to be replaced by the permanent body once established.

<sup>253</sup> ASEAN-China Framework Agreement, Art. 9.

<sup>254</sup> ASEAN-China Agreement on Goods, Art. 9(2), which also provided that the transition period for a product was to begin from the date of entry into force of the Agreement (1 Jan. 2005) and end five years from the date of completion of tariff elimination/reduction for the product.

<sup>255</sup> ASEAN-China Agreement on Goods, Art. 9(3).

<sup>256</sup> ASEAN-China Agreement on Goods, Art. 9(4).

<sup>257</sup> Compare WTO Agreement on Safeguards, Arts 5-7.

<sup>258</sup> ASEAN-China Agreement on Goods, Art. 9(5).

<sup>259</sup> ASEAN-China Agreement on Goods, Art. 9(6). Art. 5(1) of the WTO Safeguards Agreement provides that if a quantitative restriction is used, it shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury. Art. 9(1) SG provides special dispositions for developing country Members. Art. 13 SG establishes and provides for the Committee on Safeguards. Art. 14 SG provides that the provisions of Arts XXII and XXIII GATT 1994 as elaborated and applied by the DSU shall apply to consultations and settlement of disputes under the SCM Agreement.

<sup>260</sup> See WTO Agreement on Safeguards, Art. 8.

### 3.2.3. *China-Chile and China-Pakistan FTAs*

The China-Chile FTA contains specific rules on trade remedies. A bilateral safeguard measure in the form of suspension of duty reduction or increase in duty may be taken during the transitional period.<sup>261</sup> Tariff rate quotas or quantitative restrictions are not permissible safeguard measures.<sup>262</sup> The measure may be applied for one year, with an extension not exceeding a further year. If the transitional period for a product is more than five years, a second safeguard measure may be imposed, provided that a period equal to the previously imposed measure has lapsed. However, no safeguard measure may be imposed under the FTA on a product that is subject to a measure under Article XIX GATT and the WTO Safeguards Agreement.<sup>263</sup> Investigations are to follow Article 3 of the Safeguards Agreement, which is incorporated into and made part of the FTA.<sup>264</sup> The party whose goods are subject to safeguards may request consultations with a view to obtaining 'mutually agreed trade liberalizing compensation in the form of concessions having substantially equivalent trade effects or equivalent to the value of the additional duties expected to result from the measure.'<sup>265</sup> If within forty-five days from the request the parties cannot agree on compensation, the exporting Party may suspend the application of substantially equivalent concessions. However, the right of suspension cannot be exercised for the first year of a a safeguard measure, if measure has been taken as a result of an absolute increase in imports and conforms to the FTA provisions.<sup>266</sup> These provisions apply during the transitional period for specific products.

These transitional-period safeguards provisions thus track very closely those of the WTO Safeguards Agreement, which alone applies after the end of the transitional period. The China-Chile FTA safeguards provisions differ from those in the Mainland-Hong Kong CEPA and the ACFTA. The China-Chile FTA follows more closely and expressly the text of the WTO Safeguards Agreement. This is likely to be due to the fact that the objectives and the contexts of the China-Chile FTA are radically different from those of the CEPA and the ACFTA. It is notable that the latter two agreements do not provide expressly for compensation or, failing that, for suspension of concessions, though such provisions would apply to the extent that the WTO Safeguards Agreement applies. In any event, despite these bilateral safeguards provisions, the parties under the China-Chile FTA maintain their rights and obligations under Article XIX GATT and the Safeguards Agreement, the ADA and the SCM Agreement.<sup>267</sup> Action taken under Article XIX GATT and the Safeguards Agreement, or antidumping actions under the Article VI

---

<sup>261</sup> China-Chile FTA, Art. 44.

<sup>262</sup> China-Chile FTA, Art. 4482(b)(ii), n. 4.

<sup>263</sup> China-Chile FTA, Art. 45.

<sup>264</sup> China-Chile FTA, Art. 46(1).

<sup>265</sup> China-Chile Art. 49(1).

<sup>266</sup> China-Chile FTA, Art. 49(2). On concessions and suspension, compare Art. 8 SG.

<sup>267</sup> See China-Chile FTA, Art. 51(1) on Art. XIX GATT and the Safeguards Agreement and Art. 52(1) on the ADA and the SCM Agreement.

GATT and the ADA, or countervailing actions under Article VI GATT and the SCM Agreement are not subject to FTA dispute settlement provisions.<sup>268</sup>

The China-Pakistan FTA contains, *mutatis mutandis*, broadly similar provisions on safeguards. Bilateral safeguard measures, consisting of suspension of duty reductions or increase of customs duty, are permitted during the five-year transitional period for the first phase of customs duty reduction or elimination; the parties are to determine the transition period for the second phase.<sup>269</sup> Parties maintain their rights and obligations under Article VI GATT and the ADA and under Article XIX GATT and the WTO Safeguards Agreement.<sup>270</sup> No bilateral safeguard measure can be taken against a product subject to WTO safeguards.<sup>271</sup> Actions taken under WTO law are not subject to the dispute settlement provisions of the FTA.<sup>272</sup>

### 3.3. DISPUTE SETTLEMENT

Dispute settlement mechanisms (DSMs) in RTAs may be compared along several dimensions. Schneider has proposed that the main factors to be taken into account in designing DSMs are jurisdiction, institutional features, binding effect and enforcement, standing of non-state actors, enforceability of awards in national courts and transparency of procedures.<sup>273</sup> Another approach, centred on the dichotomy between diplomatic and judicial forms of dispute settlement,<sup>274</sup> asks to what extent the DSM is independent of governments. It focuses on elements such as whether decisions are based on consensus, the involvement of government officials, government control over appointments, the existence of a permanent roster of panellists, the terms of reference for panels and the extent to which the dispute-settler is empowered to give detailed proposals for resolving the specific dispute; all indicate the extent to which the DSM approaches or avoids a judicial form of dispute settlement. The distinction between interstate dispute resolution and transnational dispute resolution is a similar but more abstract prism for capturing many of the same issues,<sup>275</sup> though transnational dispute resolution is of course not necessarily equivalent to judicial dispute resolution. A third method concentrates on the relationship of the DSM to the WTO. It asks, for example, 'whether an RTA party may bring a matter before an RTA tribunal when the matter involves both the RTA and the WTO

<sup>268</sup> See China-Chile FTA, Art. 51(2) on Art. XIX GATT and the Safeguards Agreement and Art. 52(2) on the ADA and the SCM Agreement. On dispute settlement, see the China-Chile FTA, Ch. X.

<sup>269</sup> China-Pakistan FTA, Art. 27.

<sup>270</sup> China-Pakistan FTA, Art. 25(1) [anti-dumping] and Art. 26(1) [safeguards].

<sup>271</sup> China-Pakistan FTA, Art. 2227(3)(i).

<sup>272</sup> China-Pakistan FTA, Art. 25(2) [anti-dumping] and Art. 26(2) [safeguards].

<sup>273</sup> A.K. Schneider, 'Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations', *Michigan Journal of International Law* 20 (1998-1999): 697-773.

<sup>274</sup> The classic exposition in international trade law is John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* 2nd edn (Cambridge MA: MIT Press, 1998), 109-111, aspects of which are revisited in John H. Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law* (Cambridge: Cambridge University Press, 2006), 134-156. For an empirical study, see James McCall Smith, 'The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts', *International Organization* 54, no. 1 (Winter 2000), 137-180.

<sup>275</sup> See Robert O. Keohane, Andrew Moravcsik, & Anne-Marie Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational', *International Organization* 54 (2000): 457-488.

Agreement', 'whether an RTA party may bring a matter before a WTO panel while the same matter is pending before an RTA tribunal', and 'whether an RTA party may resort to a WTO panel after it receives an unfavourable award by an RTA tribunal'.<sup>276</sup> These approaches overlap and are not mutually exclusive. Drawing on these approaches selectively, the following paragraphs seek to illuminate and compare the DSMs of the Mainland – Hong Kong CEPA (3.3.1), the ACFTA (3.3.2) and the China-China FTA and the China-Pakistan FTA (3.3.3).

### 3.3.1. CEPA

Under the Mainland – Hong Kong CEPA, the functions of the Joint Steering Committee (JSC) include resolving disputes that may arise during the implementation of the CEPA.<sup>277</sup> The JSC consists of senior representatives or officials designated by the two sides,<sup>278</sup> hence is an intergovernmental body. The CEPA does not include detailed procedural dispute settlement procedures. It provides simply that the two sides shall resolve any problems through consultation in the spirit of friendship and cooperation, and that the Steering Committee shall make decisions by consensus.<sup>279</sup> There is no express reference to recourse to the WTO DSU. The Mainland – Hong Kong CEPA DSM thus embodies a diplomatic form of dispute settlement, based on negotiation, and is not a judicial body, even when decisions are made by the JSC. It resembles good offices, conciliation or mediation under the WTO DSU.<sup>280</sup> It is characterized by a relative lack of legalism, in the sense of the existence of legal obligations, the precision with which obligations are defined, and the delegation of dispute settlement to a third party.<sup>281</sup> The structure of the DSM reflects the close cooperation, political and economic integration and limited social and cultural distance between the parties.

### 3.3.2. ASEAN-China FTA

The Agreement on Dispute Settlement Mechanism was agreed, together with the Goods Agreement, in Vientiane, Lao PDR, on 29 November 2004.<sup>282</sup> The Agreement applies to disputes arising under the Framework Agreement and its annexes; 'unless the context otherwise provides', the expression 'Framework Agreement' includes all future instruments agreed pursuant to it.<sup>283</sup> The latter wording includes both the Goods Agreement

<sup>276</sup> Seung Wha Chang, 'Regional Trade Agreements and the WTO: WTO Consistency of East Asian RTAs', 12-13 Sep. 2005 PowerPoint presentation, available at <<http://project.iss.u-tokyo.ac.jp/crep/pdf/ws05/5pp.pdf>>.

<sup>277</sup> Mainland – Hong Kong CEPA, Art. 19(3)(3).

<sup>278</sup> Mainland – Hong Kong CEPA, Art. 19(1), (2).

<sup>279</sup> Mainland – Hong Kong CEPA, Art. 19(5).

<sup>280</sup> WTO DSU, Art. 5.

<sup>281</sup> See Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, & Duncan Snidal, 'The concept of legalization', *International Organization* 54 (2000): 401-419.

<sup>282</sup> Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Cooperation Between the Association of Southeast Asian Nations and the People's Republic of China [hereafter ADSM].

<sup>283</sup> ADSM, Art. 2(1).



and the Services Agreement, each of which also provides expressly for the application of the ADSM to disputes arising within their scope.<sup>284</sup> The ADSM may be invoked in respect of measures by central, regional or local governments or authorities.<sup>285</sup> A party may request consultations if it considers that another party's failure to carry out its obligations under the Framework Agreement results in the nullification or impairment of any benefit accruing to it directly or indirectly under the Framework Agreement, or results in the attainment of any objective of the Framework Agreement being impeded.<sup>286</sup> If consultations fail, the complainant may request the appointment of an arbitral tribunal.<sup>287</sup> The arbitral tribunal consists of three members, unless otherwise provided or agreed.<sup>288</sup> Each party appoints one arbitrator and 'shall endeavour to agree on an additional arbitrator who shall serve as chair'. If they cannot agree and both are WTO Members, they shall request the WTO Director-General to appoint the chair and must accept the appointment. If one party is not a WTO Member, the appointment is to be made by the President of the International Court of Justice and must be accepted by the parties.<sup>289</sup> Procedures under the ACFTA DSM bear a strong resemblance to those of the WTO DSU.

Dispute settlement by the arbitral tribunal combines elements of both the panel phase and the Appellate Body phase under the WTO DSU. The function of the arbitral tribunal is to make an objective assessment of the dispute, including the facts and the applicability of and conformity with the Framework Agreement.<sup>290</sup> The terms of reference of the arbitral tribunal are very similar to those of WTO panels.<sup>291</sup> Proceedings are also similar to those of WTO panels.<sup>292</sup> Unlike the WTO, all proceedings are conducted in English, and all documents submitted for use in the proceedings must be in English.<sup>293</sup> Provisions for third party participation are virtually the same as in the WTO system.<sup>294</sup> The arbitral tribunal is to make its decision in accordance with the Framework Agreement and the rules of international law applicable between the parties to the dispute;<sup>295</sup> the latter would include WTO law. However, the arbitral tribunal is expressly mandated to take its decision by consensus; if this is not possible, it may decide by majority opinion.<sup>296</sup> Most importantly, the decision of the arbitral tribunal is final and binding on the parties to the dispute;<sup>297</sup> there is no appellate body.

---

<sup>284</sup> The inclusion of these two agreements in the Framework Agreement clarifies Art. 2(5)-(7), because these articles refer to the Framework Agreement but not to the Goods Agreement or the Services Agreement.

<sup>285</sup> ADSM, Art. 2(4).

<sup>286</sup> ADSM, Art. 4(1).

<sup>287</sup> ADSM, Art. 6(1).

<sup>288</sup> ADSM, Art. 7(1).

<sup>289</sup> ADSM, Art. 7(3).

<sup>290</sup> ADSM, Art. 8(1).

<sup>291</sup> Compare Art. 8(2) ADSM and Art. 7 DSU.

<sup>292</sup> Compare Art. 9 ADSM and Arts 12-16 DSU.

<sup>293</sup> ADSM, Art. 14.

<sup>294</sup> Compare Art. 10 ADSM and Art. 10 DSU.

<sup>295</sup> ADSM, Art. 8(3)(b).

<sup>296</sup> ADSM, Art. 8(5).

<sup>297</sup> ADSM, Art. 8(4).

The character of the decision of the arbitral tribunal is formulated in terms which reiterate *verbatim* Article 19 DSU.<sup>298</sup> Compensation and suspension of concessions or benefits are available as temporary measures in virtually the same terms as in the WTO system.<sup>299</sup> Throughout the proceedings, the parties are encouraged to settle the dispute themselves, either through consultation or mediation at any time<sup>300</sup> or by the development of a mutually satisfactory solution within the framework of arbitral tribunal proceedings.<sup>301</sup> If the parties agree, conciliation or mediation may continue at the same time as the arbitral tribunal proceedings;<sup>302</sup> these provisions are similar to those in the WTO DSU.<sup>303</sup> The ADSM does not contain any specific provisions analogous to Article 25 DSU concerning resort to arbitration, as the arbitral tribunal can be considered to be a form of arbitration.

The ADSM itself provides for relations between the dispute settlement under the ADSM and dispute settlement under the WTO. In addition to the procedure for appointing a third arbitrator if the parties cannot agree, three provisions directly concern relations between the ADSM and the WTO dispute settlement system. First, Article 2(5) states expressly that, subject to Article 2, paragraph 6, nothing in the Agreement shall prejudice any right of the Parties to have recourse to dispute settlement procedures under any other treaty to which they are Parties.<sup>304</sup> Second, Article 2, paragraph 6, provides that once dispute settlement proceedings have been initiated 'under this Agreement or under any other treaty to which the parties to a dispute are parties concerning a particular right or obligation of such parties arising under the Framework Treaty or that other treaty', only the forum chosen by the complainant is to be used.<sup>305</sup> Third, Article 2(7) states that these provisions do not apply where the parties to a dispute expressly agree to the use of more than one dispute settlement forum concerning the particular dispute.<sup>306</sup> Hence the complainant's choice of forum governs, even when the parties agree to use more than one forum in a particular dispute. If both the ADSM and the WTO DSU are chosen, there are no provisions regulating relations between the two DSMs and their eventual outcomes.

---

<sup>298</sup> Article 8(1) ADSM provides as follows: 'Where an arbitral tribunal concludes that a measure is inconsistent with a provision of the Framework Agreement, it shall recommend that the party complained against bring the measure into conformity with that provision. In addition to its recommendations, the arbitral tribunal may suggest ways in which the party complained against could implement the recommendations. In its findings and recommendations, the arbitral tribunal cannot add to or diminish the rights and obligations provided in the Framework Agreement.'

<sup>299</sup> Compare Art. 13 ADSM and Art. 22 DSU.

<sup>300</sup> ADSM, Art. 5(1).

<sup>301</sup> See ADSM, Art. 8(3)(a).

<sup>302</sup> ADSM, Art. 5(2).

<sup>303</sup> Compare Art. 5 ADSM with Art. 5 DSU, and compare Art. 8(3)(a) ADSM with Art. 11 DSU [on the function of panels; there is no analogous provision concerning the WTO Appellate Body, which is concerned only with points of law].

<sup>304</sup> ADSM, Art. 2(5).

<sup>305</sup> ADSM, Art. 2(6). The complainant is deemed to have selected a forum when it requests the establishment of, or referred a dispute to, a dispute settlement panel or tribunal in accordance with the ADSM or any other agreement to which the parties to a dispute are parties: ADSM, Art. 2(8).

<sup>306</sup> ADSM, Art. 2(7).

The ADSM under the current ASEAN-China FTA contrasts sharply with the DSM of ASEAN itself as of late 2004. Originally, a Protocol signed in Manila on 20 November 1996 established a DSM for ASEAN.<sup>307</sup> In addition to consultations and good offices, conciliation or mediation, it provided for dispute resolution by panels, reporting to the Senior Economic Officials Meeting (SEOM), with an appeal to the ASEAN Economic Ministers (AEM). The basic outlines of the system were roughly inspired by the WTO DSU, but the direct involvement of national government officials meant that, unlike the WTO, it was much more diplomatic than judicial. Eight years later, the ASEAN Protocol on Enhanced Dispute Settlement Mechanism, signed in Vientiane on 29 November 2004, replaced the 1996 Protocol.<sup>308</sup> Modelled closely on but improving on the WTO system,<sup>309</sup> it established an Appellate Body to hear appeals from the already existing panels on issues of law. The Appellate Body was to be composed of seven persons, appointed by the ASEAN Economic Ministers but not affiliated with any government.<sup>310</sup> Appellate Body reports, as with panel reports that were not appealed, were to be adopted by the Senior Economic Officials Meeting (SEOM) according to a negative consensus rule.<sup>311</sup> However, geared toward a region which is much more heterogeneous than the EU Member States historically and in terms of culture, politics, economics and law,<sup>312</sup> even as late as 2004 the ASEAN's own Dispute Settlement Mechanism did not have implementing regulations and had never been used.<sup>313</sup>

In these circumstances, the ASEAN-China FTA ADSM differs from both the 1996 and the 2004 ASEAN DSMs. It is essentially a system of arbitration, rather than a diplomatically based system similar to the 1996 ASEAN DSM or a more judicially based system similar to the 2004 ASEAN DSM. Overall, it is also slightly more diplomatic and less judicial in character than WTO dispute settlement. Though dispute settlement institutions

<sup>307</sup> <[www.aseansec.org/16654.htm](http://www.aseansec.org/16654.htm)>, visited 20 Mar. 2008.

<sup>308</sup> ASEAN Protocol on Enhanced Dispute Settlement Mechanism, available on the ASEAN website at <[www.aseansec.org/16754.htm](http://www.aseansec.org/16754.htm)>, visited 20 Mar. 2008. See also J. Vander Kooi, 'The ASEAN Enhanced Dispute Settlement Mechanism: Doing It "the ASEAN Way"', *New York International Law Review*, (2007), 13 et seq.

<sup>309</sup> For comparisons of the ASEAN DSM and WTO DSM, see Yan Luo, 'Dispute Settlement in the Proposed East Asia Free Trade Agreement: Lessons Learned from the ASEAN, the NAFTA, and the EU', in *Regional Trade Agreements and the WTO Legal System*, eds Lorand Bartels & Federico Ortino (Oxford: Oxford University Press, 2006), 419-445 at pp. 431-435; Tran Thi Thuy Dong, as n. 215 above, pp. 442-467.

<sup>310</sup> ASEAN Protocol on Enhanced Dispute Settlement Mechanism, Art. 12, available on the ASEAN website at <[www.aseansec.org/16754.htm](http://www.aseansec.org/16754.htm)>, visited 20 Mar. 2008.

<sup>311</sup> See ASEAN Protocol on Enhanced Dispute Settlement Mechanism, Art. 9(1) on panel reports and Art. 12(13) on Appellate Body reports, available on the ASEAN website at <[www.aseansec.org/16754.htm](http://www.aseansec.org/16754.htm)>, visited 20 Mar. 2008.

<sup>312</sup> See Pan Zhengqiang, 'What the Asia-Pacific Can Learn from the European Integration', Online Info-Dienst Ausgabe 4/2004, Konrad-Adenauer-Stiftung e.V., Länderbüro China, 20 Jul. 2004, available at <[www.kas.de/proj/home/pub/37/1/year-2004/dokument:id-5120/index\\_print.html](http://www.kas.de/proj/home/pub/37/1/year-2004/dokument:id-5120/index_print.html)>, visited 9 Dec. 2004. See also Ray Barrell & Amanda Choy, 'Economic Integration and Openness in Europe and East Asia', paper presented at the ASEM Symposium on Multilateral and Regional Economic Relations, Tokyo, 25 Mar. 2003, pp. 9-12, available at <[http://66.102.1.104/scholar?hl=en&lr=&q=cache:thOH2De7oZAJ:netec.mcc.ac.uk/adnetec-cgi-bin/get\\_doc.pl%3Furn%3DR:ePEc:nsr:niesrd:214%26url%3D%26www.niesr.ac.uk%252Fpubs%252Fdp%252Fdp214.pdf+economic+integration+and+openness+in+europe+and+east+asia](http://66.102.1.104/scholar?hl=en&lr=&q=cache:thOH2De7oZAJ:netec.mcc.ac.uk/adnetec-cgi-bin/get_doc.pl%3Furn%3DR:ePEc:nsr:niesrd:214%26url%3D%26www.niesr.ac.uk%252Fpubs%252Fdp%252Fdp214.pdf+economic+integration+and+openness+in+europe+and+east+asia)>, visited 20 Mar. 2008; Paul De Grauwe & Zhaoyong Zhang, 'Introduction: Monetary and Economic Integration in the East Asian Region', *The World Economy*, (2006), 1643-1647; Ramasaranya Chopparapu, 'The European Union: A Model for East Asia?', *Asia Europe Journal* 3 (2005): 133-136; William Pesek, 'Asian euro? Don't hold your breath', *International Herald Tribune*, Saturday-Sunday, 10-11 May 2008, pp. 10, 11.

<sup>313</sup> See Greenwald, as n. 110 above, at pp. 202-209; the quotation is from p. 208.

were not mentioned explicitly in the ASEAN-China Experts Group Report,<sup>314</sup> its shape is due most likely to the preferences of China. In this particular respect, however, the ADSM is very significant. It represents, according to one author, the first trade agreement in which China has agreed 'to resolve bilateral and regional trade disputes through formal mechanisms'.<sup>315</sup> In addition, if it works effectively, the ADSM will also represent a novel departure from the 'ASEAN way' consensus method of settling disputes.

### 3.3.3. *Chine-Chile and China-Pakistan FTAs*

The China-Chile FTA establishes a distinctive dispute settlement system, which applies to avoidance or settlement of all disputes between the parties concerning interpretation or application of the FTA or when a party considers that the other party's measure is inconsistent with the FTA or the other party has failed to carry out its FTA obligations.<sup>316</sup> Consultations form the first phase of the dispute settlement procedure.<sup>317</sup> If these fail, a party may request a meeting of the Free Trade Commission for recourse to good offices, conciliation or mediation.<sup>318</sup> The Free Trade Commission consists of representatives of the parties, namely officials from the Chinese Ministry of Commerce (MOFCOM) and the Chilean Directorate General for International Economic Affairs (DIRECOM).<sup>319</sup> Such a request may also be made following consultations on disputes concerning sanitary or phytosanitary measures and technical barriers to trade.<sup>320</sup> If this does not resolve the dispute, either party may request the establishment of an arbitral panel.<sup>321</sup>

The arbitral panel is composed of three members, one designed by each party and one by common agreement or otherwise by the WTO Director-General.<sup>322</sup> Panelists must be independent of the parties and not take instructions from them.<sup>323</sup> The chair of the arbitral panel must not be a national, resident or employee of either party, or have dealt with the matter in any capacity.<sup>324</sup> Members of the panel must comply with a code of conduct

<sup>314</sup> The Experts Group Report only states (at p. 28) that 'the framework should create the necessary institutional mechanisms to ensure effective implementation of the framework' and calls (at p. 29) for the 'Establishment of appropriate institutions between ASEAN and China to carry out the framework of cooperation given its comprehensiveness and the high level of integration to be achieved between ASEAN and China': ASEAN-China Experts Group on Economic Cooperation, 'Forging Closer ASEAN-China Economic Relations in the Twenty-First Century', p. 2 (point 11), available on the ASEAN Secretariat website at <[www.aseansec.org/asean\\_chi.pdf](http://www.aseansec.org/asean_chi.pdf)>, visited 10 Mar. 2008.

<sup>315</sup> Wang Jiangyu, 'ASEAN-China Free Trade Agreement: Legal and Institutional Aspects', in *ASEAN-China Economic Relations*, ed. Saw Swee-Hock (Singapore: ISEAS [Institute of Southeast Asian Studies] Publishing, 2007), 112-145 at p. 131, which appears to use the term 'formal' to mean highly institutionalized, normatively oriented third-party dispute settlement.

<sup>316</sup> China-Chile FTA, Art. 80.

<sup>317</sup> China-Chile FTA, Art. 82.

<sup>318</sup> China-Chile FTA, Art. 83. The text refers to Commission, which according to Art. 5 of the FTA refers to the Free Trade Commission established under Art. 97.

<sup>319</sup> China-Chile FTA, Art. 97.

<sup>320</sup> China-Chile FTA, Art. 83(2).

<sup>321</sup> China-Chile FTA, Art. 84(1).

<sup>322</sup> China-Chile FTA, Art. 85.

<sup>323</sup> China-Chile FTA, Art. 85(7)(c).

<sup>324</sup> China-Chile FTA, Art. 85(6).

in conformity with the rules in WTO document WT/DSB/RC/1.<sup>325</sup> The China-Chile DSM thus is more independent of the parties, thus more likely to be more legalistic and more judicial than the DSM of CEPA or ACFTA. The function of the arbitral panel is to make an objective assessment of the dispute, including an examination of the facts and the applicability or and conformity with the FTA.<sup>326</sup> If it concludes that a measure is inconsistent with the FTA, it shall recommend that the responding party bring the measure into conformity with the FTA and may suggest ways of implementing the recommendations.<sup>327</sup> However, it cannot add to or diminish the rights of obligations provided under the FTA.<sup>328</sup> On receiving the final report, the parties are to agree on the resolution of the dispute,<sup>329</sup> and whenever possible to eliminate the non-conformity.<sup>330</sup> In other words, there is no appeal. Disputes concerning the existence or consistency with the FTA of measures taken within a reasonable time are to be referred to an arbitral panel, whenever possible the original arbitral panel.<sup>331</sup> On request, a non-complying party must enter into negotiations with a view to reaching a mutually satisfactory agreement on any necessary compensatory adjustment.<sup>332</sup> In case of non-agreement, the complaining party, after giving notice, may suspend benefits of equivalent effect if the arbitral panel has decided that the respondent has not implemented the recommendation within a reasonable period of time.<sup>333</sup> Compensation and suspension of benefits are temporary measures;<sup>334</sup> the FTA follows the WTO DSU in this respect. Overall, the procedures are similar to those under the ASEAN-China ADSM.

The China-Chile FTA provides expressly, but not extensively, for relations between its DSM and that of the WTO and also for relations between the FTA and domestic law. When a dispute arises under the China-Chile FTA, another FTA to which both countries are parties or the WTO agreement, the complainant is entitled to select the forum.<sup>335</sup> Once the complainant has requested a panel under one of these agreements, the forum is to be used to the exclusion of the others.<sup>336</sup> The FTA does not deal specifically with possible recourse to another forum following a loss in the first forum. The FTA dispute settlement provisions do not apply to actions under Article XIX GATT and the Safeguards Agreement, Article VI GATT and the ADA, or Article VI GATT and the SCM Agreement. In contrast to the CEPA and ACFTA, the China-Chile FTA

---

<sup>325</sup> China-Chile FTA, Art. 85(7)(d). The document is the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, adopted in 1996. See World Trade Organization, *WTO Analytical Index: Guide to WTO Law and Practice*, vol. 2, 2nd edn (Cambridge: Cambridge University Press for the WTO, 2007), 1347-1351.

<sup>326</sup> China-Chile FTA, Art. 86(1).

<sup>327</sup> China-Chile FTA, Art. 86(2).

<sup>328</sup> China-Chile FTA, Art. 86(3).

<sup>329</sup> China-Chile FTA, Art. 92(1).

<sup>330</sup> China-Chile FTA, Art. 92(2).

<sup>331</sup> China-Chile FTA, Art. 92(5).

<sup>332</sup> China-Chile FTA, Art. 93(1).

<sup>333</sup> China-Chile FTA, Art. 93(2).

<sup>334</sup> China-Chile FTA, Art. 93(3).

<sup>335</sup> China-Chile FTA, Art. 81(1).

<sup>336</sup> China-Chile FTA, Art. 81(2).

provides expressly that neither party is entitled to provide for a right of action under its domestic law against the other party on the ground that a measure of the other party is inconsistent with the FTA.<sup>337</sup>

The China-Pakistan FTA DSM is very similar,<sup>338</sup> with two exceptions. The provisions concerning choice of dispute settlement forum are in substance the same as those in the China-Chile FTA.<sup>339</sup> One exception, however, lies in the fact that private rights can be dealt with under the FTA DSM procedures.<sup>340</sup> The striking exception concerns investment disputes.

Under ACFTA and the China-Chile FTA, the settlement of investment disputes follows the same procedures as other disputes. The China-Pakistan FTA however has special provisions for investment disputes<sup>341</sup> as an exception to its general dispute settlement rules.<sup>342</sup> Concerning investment, different procedures apply to disputes between the Parties, on the one hand, and to disputes between investors and one Party, on the other hand.<sup>343</sup> Specific provisions concern other obligations<sup>344</sup> and periodic consultations regarding investments.<sup>345</sup> Investment disputes between the Parties are to be settled by consultations through diplomatic channels if possible, otherwise by an ad hoc arbitral tribunal composed of three arbitrators, one appointed by each party and a third selected by the two arbitrators; the third must be a national of a country having diplomatic relations with both parties.<sup>346</sup> If the tribunal has not been constituted within four months of receipt of the request for arbitration, either party may invite the President of the International Court of Justice to make the necessary appointments.<sup>347</sup> The arbitral tribunal is to determine its own procedure, but it is to reach its award in accordance with the FTA provisions on investment and the principles of international law recognized by the parties.<sup>348, 349</sup> Disputes between an investor and a Party are if possible to be settled amicably through negotiations between the parties to the dispute, otherwise, at the option of the investor, either to the competent court of the Party that is a party to the dispute or to the International Centre for the Settlement of Investment Disputes (ICSID).<sup>350</sup>

---

<sup>337</sup> China-Chile FTA, Art. 95.

<sup>338</sup> China-Pakistan FTA, Ch. X, Arts 57-74.

<sup>339</sup> China-Pakistan FTA, Art. 60.

<sup>340</sup> China-Pakistan FTA, Art. 74 provides that 'Any question regarding conformity of a measure taken by either Party under this Agreement shall be submitted and proceeded with as provided under Chapter X of this Agreement'. Ch. X concerns dispute settlement, except for investment disputes.

<sup>341</sup> China-Pakistan FTA, Art. 53.

<sup>342</sup> China-Pakistan FTA, Art. 58. The investment provisions control: see Art. 53(8).

<sup>343</sup> See China-Pakistan FTA, Arts 53 and 54, respectively.

<sup>344</sup> China-Pakistan FTA, Art. 55.

<sup>345</sup> China-Pakistan FTA, Art. 56.

<sup>346</sup> China-Pakistan FTA, Art. 53(2), (3).

<sup>347</sup> China-Pakistan FTA, Art. 53(4).

<sup>348</sup> China-Pakistan FTA, Art. 53(5).

<sup>349</sup> China-Pakistan FTA, Art. 53.

<sup>350</sup> China-Pakistan FTA, Art. 54.

### 3.3.4. *Comparison of the DSMs in China's RTAs*

It can be hypothesized that the template for the DSMs in China's RTAs is the WTO DSM. A possible alternative template might be the general DSM under the North American Free Trade Agreement (NAFTA). Table 6 compares these DSMs. It indicates, first, that the ACFTA ADSM is based relatively closely on the WTO DSM. Second, the China-Chile FTA DSM and the China-Pakistan FTA DSM (with the exception of investment disputes) draw on the WTO DSM and also on the general NAFTA DSM. Third, the Mainland – Hong Kong CEPA DSM is relatively informal, is intergovernmental and diplomatic and does not draw directly on the WTO DSM; as already seen, however, this does not mean that it is incompatible with the WTO DSM. Fourth, under all of the China RTAs, the choice of the complainant party determines the forum; under the ACFTA the parties may agree to use more than one forum. Fifth, China's RTAs examined here, with two exceptions, provide that decisions can be taken by majority vote if it is not possible to reach a consensus. The exceptions are the Mainland – Hong Kong CEPA, under which disputes are to be settled by consensus, and investment disputes under the China-Pakistan FTA, which are to be settled by majority vote. Sixth, all DSMs in China's RTAs differ from the WTO DSM in that there is no appeal. Hence they are substantially less legalistic than the WTO DSM, whose Appellate Body has developed a substantial case law, refers to previous decisions and has many aspects of an international trade court.

## 4. CONCLUSION

The RTAs so far concluded by China fall into three broad categories: economic integration agreements, traditional regional trade agreements (RTAs) and bilateral free trade agreements (FTAs). This tripartite typology helps us to understand the range of China's RTAs already concluded, in negotiation or currently being contemplated. Only selected examples of each type could be given in this article. Once a broader range of RTAs can taken into account, however, this typology is likely to be useful in analysing China's RTAs in the future, and also in understanding their objectives, organization, operation, and relations to China's domestic structures, policy processes, legal and political culture and international and regional policies.

These RTAs are a manifestation of China's changing perceptions of external affairs and multilateral trade institutions.<sup>351</sup> They reflect a multiplicity of specific motives. Economic rationale in the sense of access to export markets and providing a legal framework for a dense web of international production networks, especially in Asia, plays a

---

<sup>351</sup> See for example, Cheng-Chwee Kuik, 'Multilateralism in China's ASEAN Policy', SAIS Working Paper Series, WP/05/03, Paul H. Nitze School of Advanced International Studies (SIAS), Johns Hopkins University, Washington, DC, Oct. 2003.

Table 6. Comparison of DSMs

Subject	WTO DSU	NAFTA, Section B – Dispute Settlement	ACFTA ADISM	China-Chile FTA (CCFTA)	China-Pakistan FTA (CPFTA)	Mainland – Hong Kong CEPA (MHKCEPA)
definitions	not applicable	not applicable	Article 1	Articles 5, 29	Article 5, 12, 28, 35, 46	
cooperation		Article 2003: Cooperation		Article 79 CCFTA = Article 2003 NAFTA	[investments], Article 57 CPFTA = Article 79 CCFTA	
coverage and application	Article 1	Article 2004: AD and CVD excluded	Article 2(1),(2), (3), (4)	Article 80 CCFTA approximately = Article 2004 NAFTA	Article 53 and 54 [investments], Article 58; Article 58 CPFTA = Article 80 CCFTA	
administration	Article 2		not applicable	Articles 97 CCFTA	Articles 75, 76, 77 CPFTA	Article 19(3) MHKCEPA
choice of forum		Article 2005 GATT Dispute Settlement: complainant party choice governs, but preference for NAFTA	Article 2(5)-(8): complainant party choice governs, unless parties expressly agree to use more than one forum	Article 81 CCFTA: complainant party choice governs	Article 53(1), (2), Article 54(1),(2) [investment disputes]; Article 60: complainant party choice governs; Article 60 (1), (2) CPFTA = Article 81 CCFTA	none
service of documents		Article 2005(5)	Article 3			
general provisions	Article 3 DSU	Article 2003: Cooperation				



consultations	Article 4 Article 2006: Article 2008(3) NAFTA similar to Article 4(11) DSU	Article 4: Article 4(1) chapeau ADMSM = Article 4(2) DSU; Article 4(2) ADMSM similar to Article 4(4) DSU; Article 4(3) ADMSM based on Article 4(3) DSU; Article 4(4) ADMSM virtually = Article 2006/4) NAFTA; Article 4(5) ADMSM = Article 4(6) DSU; Article 4(6) ADMSM follows Article 4(11) DSU; Article 4(6) ADSM = Article 4(8) DSU; Article 4(8) ADSM = Article 4(9) DSU	Article 82 FTA = Article 4(1)-(5) DSU	Article 56 [investments]; Article 59; Article 59 CPFTA = Article 82 CCFTA	Article 19(5), 1st sentence
good offices, conciliation and mediation	Article 5 Article 2007	Article 5: Article 5(1) ADMSM = Article 5(2), first two sentences DSU; Article 5(2) ADMSM = Article 5(5) DSU; Article 5(3) ADMSM = Article 5(2) DSU	Article 83(1) similar to Article 5(4) DSU	Article 61; Article 61 CPFTA = Article 5(1), (2) ACFTA	
establishment of panels	Article 6 Article 2008	Article 6: Article 6(1),(2) similar to Article 6(1),(2) DSU	Article 83(2)-(4) FTA = Article 2007(1)-(5) NAFTA (FTA Commission has no analogue in ADMSM); Article 84 FTA approximately = Article 2008(1)-(2) NAFTA	Articles 62, 63; Article 62 CPFTA = Article 84 CCFTA [except longer deadlines]; Committee meetings]	Article 19(4) [Steering Committee meetings]

Continued on next page

Table 6. Continued

Subject	WTO DSU	NAFTA, Section B – Dispute Settlement		China-Chile FTA (CCFTA)		China-Pakistan FTA (CPFTA)		Mainland – Hong Kong CEPA (MHKCEPA)	
		WTO DSU	ACFTA ADASM	China-Chile FTA (CCFTA)	China-Pakistan FTA (CPFTA)	Mainland – Hong Kong CEPA (MHKCEPA)			
terms of reference for panels	Article 7	Article 2012(3), (4), (5)	Article 8: Article 8(2) ADASM similar to Article 7(1) DSU	Article 87(4) CCFTA similar to Article 7(1) DSU	Article 64: Article 64(1) CPFTA = Article 86(1) CCFTA; Article 64(2) CPFTA = Article 87(4) CCFTA; Article 64(3), (4) CPFTA = Article 86(2), (3) CCFTA	Article 19(5), 2nd sentence			
composition of panels	Article 8	Article 2009, Article 2010	Article 7: Article 7(1) ADASM similar to Article 8(5) = DSU; Article 7(3) generally similar to Article 8(7) DSU	Article 85 CCFTA similar to Article 7 ADASM and correspondingly to DSU; Article 85(7) = Article 2009(2) NAFTA	Article 63: Article 63(1)–(6), (8) CPFTA = Article 85(1)–(7), (9)				
procedures for multiple commitments	Article 9		Article 6: Article 6(3), (4), (5) based on Article 9 DSU						
third parties	Article 10	Article 2008(3), (4), Article 2013	Article 10 ADASM = Article 10 DSU	Article 8: Article 8(1) similar to Article 11 DSU; Article 8(3)(a) ADASM = Article 11, last sentence DSU	Article 86(1) CCFTA similar to Article 11(DSU), Article 86(2) CCFTA = Article 11, 19(2) DSU	Article 64: Article 64(1) CPFTA = Article 86(1) CCFTA; Article 64(3), (4) CPFTA = Article 86(2), (3) CCFTA			
function of panels	Article 11								

panel procedures	Article 12, Appendix 3	Article 2012(1), (2)	Article 9(5), Annex 1; Article 9(2) = Article 12(4), (5) DSU; Article 9(4) f; Annex 1 ADSM similar to Annex 3 DSU; Article 11 ADSM analogous to Article 12(12) DSU but explicit emphasis on finding mutually satisfactory solution and settling dispute amicably	Article 87, Annex 7 CCFTA based on Article 12 DSU; express provision for decisions by consensus whenever possible (Article 87(3)); Article 88 CCFTA = Article 11(1),(2) ADSM	Article 65, Annex III: Article 65(1), (2) CPFTA = Article 87(1), (2); Article 65(3) CPFTA almost = Article 87(3) CCFTA
right to seek information	Article 13	Article 2014, Article 2015	Annex 1 (8)	Article 89 CC FTA analogous to Article 13 DSU and similar to Article 2015 NAFTA	Article 68: Article 68 CCPTA = Article 87 CCFTA
confidentiality	Article 14		Article 9(1), (4) first sentence ADSM similar to Article 14(1), (2) DSU		
interim review stage	Article 15	Article 2016	Article 9(7) similar to Article 15(2) DSU	Article 90 FTA = Article 2016 NAFTA and broadly similar to Article 15 DSU	Article 69: Article 69 CPFTA = Article 90 CCFTA
adoption of panel reports	Article 16	Article 2017	Article 8(4) and Article 9(8), (9) ADSM differ from DSU articles on panels, AB and DSB	Article 91FTA = Article 2017(1), (2) NAFTA	Article 70 CPFTA = Article 2017 NAFTA
appellate review	Article 17	no appeal	no appeal	no appeal	no appeal

Continued on next page

Table 6. Continued

Subject	WTO DSU	NAFTA, Section B – Dispute Settlement		ACFTA/ADSM	China-Chile FTA (CCFTA)	China-Pakistan FTA (CPFTA)	Mainland – Hong Kong CEPA (MHKCEPA)
		WTO DSU	Settlement				
communications with the panel or appellate body	Article 18	not applicable	Article 9(4) DSM broadly similar to Article 18 DSU	Article 9(4) DSM broadly similar to Article 18 DSU	Article 92(2) CCFTA = Article 91(1) DSU	Article 71 CPFTA almost = Article 92 CCFTA	
panel and appellate body recommendations	Article 19	Article 2018 [implementation of the final report]	Article 1, 2nd and 3rd sentences ADSM = Article 19 DSU	Article 1, 2nd and 3rd sentences ADSM = Article 19 DSU	Article 92(2) CCFTA = Article 91(1) DSU	Article 71 CPFTA almost = Article 92 CCFTA	
time-frame for DSB decisions	Article 20	not applicable; no appeal	not applicable; no appeal	not applicable; no appeal	not applicable; no appeal: Article 93(6), 2nd sentence CCFTA	not applicable; no appeal	not applicable; no appeal beyond Steering Committee
surveillance of implementation of recommendations and rulings	Article 21	not applicable	Article 12(1), (2) ADSM = much of Article 21(3) DSU; Article 12(3) ADSM = Article 21(5) DSU	Article 12(1), (2) ADSM = much of Article 21(3) DSU; Article 12(3) ADSM = Article 21(5) DSU	Article 92(1) CCFTA no analogue in DSU; Article 92(3),(4) similar to Article 21(3)(b),(c) DSU; Article 92(5),(6) similar to Article 21(5) DSU	Article 71 CPFTA = Article 92(1),(2) CCFTA	
compensation and suspension of concessions	Article 22	Article 2019	Article 13(1) ADSM = Article 22(1) DSU; Article 13(2) = Article 22(2), 1st sentence; Article 13(3) partly = Article 22(2), 2nd sentence, and partly analogous to Article 22(6) DSU; Article 13(4) no analogue in DSU; Article 13(5) = Article 22(3)(a),(b); Article 13(6) = Article 22(8), first sentence DSU	Article 13(1) ADSM = Article 22(1) DSU; Article 13(2) = Article 22(2), 1st sentence; Article 13(3) partly = Article 22(2), 2nd sentence, and partly analogous to Article 22(6) DSU; Article 13(4) no analogue in DSU; Article 13(5) = Article 22(3)(a),(b); Article 13(6) = Article 22(8), first sentence DSU	Article 93: Article 93(1), (2) CCFTA approximately = Article 22(2); Article 93(3), first two sentences FTA = Article 22(1) DSU; Article 93(3), 3rd sentence CCFTA = Article 22(8) 1st sentence DSU; Article 93 (4) CCFTA = Article 22(3)(a), (b) DSU; Article 94 FTA analogous to Article 21(5) DSU	Article 72 CPFTA approximately = Article 93(2) CCFTA; Article 72(2), (3), (4) CPFTA virtually = Article 93(4), (5), (6) CCFTA; Article 73 CPFTA virtually = Article 94 CCFTA	none

strengthening of the multilateral system	Article 23	not applicable	not applicable	not applicable	not applicable
special procedures involving LDCs	Article 24	not applicable	not applicable	not applicable	not applicable
arbitration	Article 25	not applicable, as ADMSM highest instance is arbitration	not applicable, as FTA highest instance is arbitration	not applicable, as CPFTA highest instance is arbitration	not applicable
non-violation complaints	Article 26	Article 4(1)(a) ADMSM	Article 80(a) CCFTA	but not expressed as such	
responsibilities of the secretariat	Article 27	not applicable	Article 97 [Free Trade Commission], Article 98 [administration of dispute settlement proceedings]	Articles 75, 76, 77 [Free Trade Commission]	
referrals of matters from judicial or administrative proceedings	not applicable	Article 2020	not applicable	not applicable	
private rights	not applicable	Article 2021	not applicable	Article 95 CCFTA = Article 2022 NAFTA	Article 74
alternative dispute resolution	Article 3(7)	Article 2022	see Articles 4, 5, 8(3) (a), weak provisions on implementation	see Articles 82, 83 CCFTA	see Articles 53(1), 54(1) [investment], 59, 61,
language			Article 14 ADMSM	Article 121 CCFTA	

significant role, but geopolitical reasons are more important.<sup>352</sup> The latter include building 'Greater China', enhancing political trust,<sup>353</sup> using regional integration to strengthen its position in the Asia-Pacific<sup>354</sup> and as a platform for broader political alliances and increased leverage in international institutions, achieving international recognition as a 'market economy' for anti-dumping purposes, the search for economic and military security, and access to energy and raw materials.<sup>355</sup> Even on the basis of the small sample of China's RTAs analysed here, one may hypothesize that, in addition to demonstrating a multiplicity of motives, distinct configurations of motives and different priorities are characteristic of different agreements. For example, CEPA combines economic integration, a 'gift to Hong Kong', or a possible model for Mainland-Taiwan relations. ACFTA joins regional trade, technology transfer, political influence and security. Access to raw materials is a central element in the China-Chile FTA, while investment, energy, raw materials and border security play an important role in the China-Pakistan FTA. Analysis of future RTAs should help to complete and if necessary modify these hypotheses. In other words, it is necessary to situate each RTA in its broader context and to analyse what is at stake in the RTA as a whole and in each specific legal provision.

Is there a single template for China's RTAs? Various authors have advanced different models. Focussing on a range of East Asian RTAs, Christopher Dent has proposed that China's RTAs follow the 'emerging developing country FTA model'. In his view, this model reflects the main characteristics of China's political economy. Its features are 'relatively simple FTA framework with a narrow policy and regulatory focus', 'simple, regime-wide only rules of origin normally based on a value content modality', trade liberalization concerned mainly with goods with some inclusion of services, sensitivity to national sovereignty in areas such as infrastructure, culture or strategic industry sectors, 'relatively simple liberalization phase-in schedules' including an Early Harvest Programme for goods and adherence to WTO rules on antidumping duties and countervailing duties.

<sup>352</sup> See also Wang, as n. 31 above., at p. 129-132. This echoes Sen's remarks about the 'new regionalism' in Asia: see Sen, as n. 2, at pp. 554-555, 566.

<sup>353</sup> See Wang, as n. 31 above, at pp. 140, who emphasizes the contribution of China's RTAs to 'peaceful existence and enhanced security' in the region.

<sup>354</sup> Note that, despite China's increasingly important economic and political role in the region, Garver concludes that 'India remains the overwhelmingly dominant power in the region' and that 'while China's capabilities in Central and South Asia are growing, that growth is taking place in the shadow of the far more vigorous growth of United States and Western influence': John W. Garver, 'China's Influence in Central and South Asia', in *Power Shift: China and Asia's New Dynamics*, ed. David Shambaugh (Berkeley: University of California Press, 2006), 204-225, at pp. 224, 225. Similarly, in terms of security, the United States 'remains predominant': Michael Yahuda, 'The Evolving Asian Order: The Accommodation of Rising Chinese Power', in *Power Shift: China and Asia's New Dynamics*, ed. David Shambaugh (Berkeley: University of California Press, 2006), 347-360, at p. 359.

<sup>355</sup> On energy as a rationale, see for example, David Zweig & Bi Jianhai, 'China's Global Hunt for Energy', *Foreign Affairs*, 25, (September-October 2005), 25-38; Richard N. Cooper, 'China's Coming Demand for Energy', in *China, Asia, and the New World Economy*, eds Barry Eichengren, Charles Wyplosz & Yung Chul Park (Oxford: Oxford University Press, 2008), 1-17. On energy security as part of China's energy policy, Development Research Center of the State Council, 'National Energy Strategies and Policies', in China Development Forum, 'China's National Energy Strategy and Reform: Background Reports', (15-17 Nov. 2003) [Development Research Center, State Council, 'China's National Energy Strategy and Policy, 2000-2020', Nov. 2003, draft national plan], pp. 3-46 <[www.efchina.org/FRreports.do?act=detail&id=112](http://www.efchina.org/FRreports.do?act=detail&id=112)>, visited 30 Apr. 2008; Jonathan Sinton, Rachel E. Stern, Nathaniel T. Aden & Mark T. Levine, 'Evaluation of China's Energy Strategy Options', Prepared for and with the support of the China Sustainable Energy Programme (Berkeley CA, China Energy Group, Lawrence Berkeley National Laboratory, 2005), available at <<http://china.lbl.gov/publications/nesp.pdf>>, visited 30 Mar. 2008.

In 2006 Penghong Cai suggested a 'China pattern', with the following characteristics: 'China does not have a clear strategy', 'domestic regulatory system is in transition', the 'rise of China is regarded as an indefinite factor', and 'unstable geopolitical environment is hard for China'.<sup>356</sup> However, these are general parameters for making policy about RTAs, potentially denying the existence of a single RTA template or logic.<sup>357</sup> A third, more pertinent perspective for present purposes is advanced by Antkiewicz and Whalley. They note that a striking feature of China's RTAs is the speed at which they are agreed and their variation in structure. In their view, '[T]he approach seems to be one of pragmatic management of a series of bilateral relationships in a customised manner, in which conventional economic and trade agreements, such as tariff-based free trade areas or [sic] customs unions, are merged into broader more encompassing relationship-building rather than precise narrower texts'.<sup>358</sup> Each of these perspectives focuses on different elements and operates at a different level of abstraction, ranging from content of legal texts to policy parameters to general strategy. They are not necessarily incompatible, thus calling again for careful analysis of each agreement. Their diversity, however, suggests that, at least at this stage, the distinction between economic integration agreements, RTAs and bilateral FTAs provides a useful typology for analysing China's RTAs.<sup>359</sup>

China's RTAs are negotiated and drafted in the shadow of WTO law. This is not to say that WTO law really provides a detailed template or model for China's RTAs. Depending on the type of RTA, it may do so for different provisions, but not for the RTA as a whole. Dispute settlement is a good example. The WTO DSU provides the basic template for the DSMs in China's RTAs, with NAFTA as a much more limited model drawn upon in bilateral FTAs. However, it appears more useful to focus separately on each of the three categories of China's RTAs. This is the case even though not all RTA DSMs provide expressly for relations between the RTA DSM and the WTO DSU.

Neither ASEAN nor enhanced ASEAN provides a template for DSMs in China's RTAs. Even when the WTO DSU is the model, however, the RTAs are much less detailed than the WTO analogue. More emphasis is given to amicable or mutually satisfactory solutions. Implementation relies more on diplomacy and informal pressures. For example, the ACFTA ADSM does not have any institution specifically entrusted with implementation, comparable to the WTO DSB.<sup>360</sup> This is consistent with much of Chinese legal culture, which until now has usually cut against the letter and spirit of Article 3(10) DSU, according to which 'requests for ... the use of the dispute settlement

<sup>356</sup> Peng-Hong Cai, as n. 157 above.

<sup>357</sup> Dent, as n. 21 above, pp. 237-238.

<sup>358</sup> Antkiewicz & Whalley, as n. 148 above, at p. 1554.

<sup>359</sup> In their useful review of agreements by the BRICSAM countries, including but not limited to China, Antkiewicz and Whalley suggest three types of agreements: those with large OECD countries, those with small entities in the same region and agreements with other BRICSAM countries: Agata Antkiewicz & John Whalley, 'BRICSAM and the non-WTO', *Review of International Organizations* 1 (2006), 237-261 at p. 239. This typology adopts the perspective of the BRICSAM country concluding an agreement and is based on the identity of the trading partner. It differs from the typology proposed here which aims to take account of the perspectives of all parties to the agreement and is based on the general objectives of the agreement.

<sup>360</sup> Compare ADSM Art. 12 and Art. 21(6) DSU.

procedures should not be intended or considered as contentious acts ...'.<sup>361</sup> In contrast, some lawyers have argued that ACFTA's long term success depends on ASEAN's adoption of a more legalized dispute settlement mechanism.<sup>362</sup> Whether this hypothesis is borne out by the facts, and whether such a form of dispute settlement is ever adopted in fact, depends very much on China. To date, there is little if any indication that China would prefer to settle ACFTA or other RTA disputes in a legalistic way.

The multiplicity and diversity of China's present (and doubtless future) RTAs pose the 'spaghetti bowl' or 'noodle bowl' problem, in which RTAs are overlapping and possibly contradictory.<sup>363</sup> Figure 1 shows the East Asian 'noodle bowl' as of January 2006.

The 'noodle bowl' phenomena is usually most acute with regard to ROOs; product-specific rather than content-based ROOs magnify the problem.<sup>364</sup> It also has an important impact on foreign investment, exports and regional economic and trade governance. On the basis of an economic model based on the increased exports which would result from a bilateral FTA, Baldwin recently concluded that currently Japan is the principal hub in East Asia, but that ten years from now East Asian regional integration would most likely be characterized by two hubs, China and Japan.<sup>365</sup> Currently, in his view, there is no real regionalism in Asia, if 'regionalism means preferential tariff liberalization', and East Asian regionalism is fragile, because 'there is no "top-level management"'.<sup>366</sup> Sen also concludes there is little convergence among RTAs in Asian 'new regionalism', due to differences in income levels and development strategies.<sup>367</sup> The great diversity of Asia, for example in contrast to the European Union, plays a very important part.<sup>368</sup> China's policies will be among the crucial determinants of any convergence among Asia-Pacific RTAs.

By virtue of China's size, population, history and culture, economic dynamism and importance in world trade, its policy toward regional trade agreements is certain to have a major impact on the international trading system, the future role of the WTO in managing RTAs and the continuing debate about relations between multilateralism and regionalism.<sup>369</sup> China's accession to the WTO has enhanced the possibilities of China's

<sup>361</sup> WTO DSU Art. 3(10).

<sup>362</sup> Greenwald, as n. 110 above, at p. 216. In 2001 Dobson argued that, given the diversity of Asia and its preference for consensus as a means of resolving problems, the success of ASEAN+3 would depend on strong political leadership and effective administration: see Wendy Dobson, 'Deeper Integration in East Asia: Regional Institutions and the International Economic System', *The World Economy* 24, no. 8 (2001), 995-1018, at p. 1014.

<sup>363</sup> In general, see Richard Baldwin, 'Managing the Noodle Bowl: The Fragility of East Asian Regionalism', Centre for Economic Policy Research, Discussion Paper Series, No. 5561, Mar. 2006, available at <www.cepr.org/pubs/DP5561.asp>, visited 12 Mar. 2008.

<sup>364</sup> To the extent that it may be less expensive for business to pay MFN tariffs instead of taking advantage of preferential ROOs, with the result that the RTA does not lead to trade creation among members: see Sen, as n. 2 above, at p. 579.

<sup>365</sup> Richard E. Baldwin, 'The Spoke Trap: Hub-and-Spoke Bilateralism in East Asia', in *China, Asia and the New World Economy*, eds Barry Eichengreen, Charles Wyplosz & Yung Chui Park (Oxford: Oxford University Press, 2008), 51-86 at p. 70.

<sup>366</sup> Baldwin, as n. 365 above; the quotations are from p. 4 and p. 2 respectively.

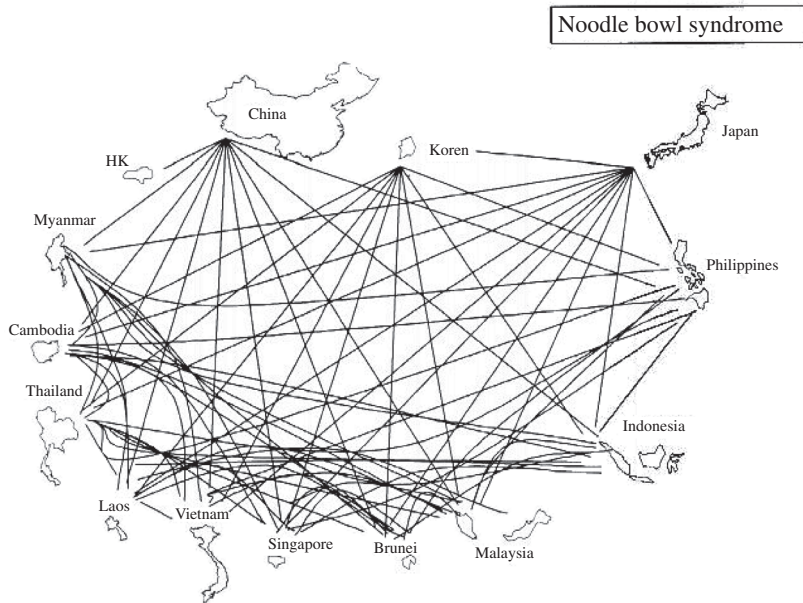
<sup>367</sup> Sen, as n. 1 above, at p. 581.

<sup>368</sup> See Pan Zhengqiang and other sources, as n. 312 above.

<sup>369</sup> See also Wang, as n. 31 above, at p. 121. Jong-Wha Lee & Innwon Park, 'Free Trade Areas in East Asia', *The World Economy* 28, no. 1 (2005), 21-49 argue that East Asian RTAs are more likely to be non-discriminatory than discriminatory vis-à-vis other countries because they are likely to lower tariff levels for outsiders to that applied to members, relying on trade facilitation and investment liberalization to benefit members.



Figure 1. The East Asia 'Noodle Bowl' Syndrome



Source: Richard Baldwin, 'Managing the Noodle Bowl: The Fragility of East Asian Regionalism', Centre for Economic Policy Research, Discussion Paper Series, No. 5561, March 2006, p. 3. The figure is based on Baldwin's calculations. East Asia means ASEAN, China, Japan and Korea.

regional and international cooperation. From a regional perspective, the main Asia-Pacific economies are now within the multilateral trading system. These elements provide a solid foundation for China's development in the context of Asia-Pacific regional integration and also farther afield.<sup>370</sup> From an international perspective, Chinese theory and practice of RTAs, including FTAs, are destined to play an important part in the debate about multilateralism and regionalism. Overall, China's RTAs are compatible with WTO law, though they diverge in some respects and go beyond WTO law in others. In any event, the only real WTO-law obligation is to notify RTAs, even in this respect WTO rules are not well-defined, and most RTAs are notified once they are already in force.<sup>371</sup> China now has the potential, challenge and opportunity to contribute to the development of a new role for the WTO in managing RTAs.

<sup>370</sup> See also Kong, as n. 214 above, at p. 848.

<sup>371</sup> Wang concludes that 'the real implication seems to be that almost no R.T.A. can ever be declared unlawful under the current WTO regime and that the process of CRTA [Committee on Regional Trade Agreements] examination can, in practice, be ignored': see Wang, as n. 31 above, at p. 138. On reasons for the weakness of the CRTA, see Jo-Ann Crawford and Roberto V. Fiorentino, as n. 1 above, p. 19. For suggestions to strengthen CRTA procedure, see Industrial Structure Council, METI, Japan, 2007 Report on Compliance by Major Trading Partners with Trade Agreements – WTO, FTA/EPA and BIT (Tokyo, Japan: Industrial Structure Council, METI, 2007), 507-509, also available at <[www.meti.go.jp/english/report/index.html](http://www.meti.go.jp/english/report/index.html)>.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.