

FACILITATING MARKET ACCESS FOR TAIWANESE LAWYERS IN CHINA

Shin-yi Peng*
Benjamin Y. Li**

INTRODUCTION

On December 11, 2001, the People's Republic of China (hereinafter "China" or the "PRC") became a member of the World Trade Organization (hereinafter the "WTO"). Only a year later, an assessment by the WTO Committee of Special Commitments found that the Chinese government had provided meaningful market access to various sectors of foreign services suppliers.¹ Notwithstanding China's efforts, however, the United States and other members of the WTO continue to pressure China to enhance market access for foreign lawyers. Faced with the recognition that increasing market access will likely lead to greater foreign investment, China is also concerned with the need to protect the domestic legal markets from being overwhelmed by foreign law firms.² China's cautious approach to its

* SHIN-YI PENG, Associate Professor of Law, National Tsing Hua University (Taiwan). S.J.D. 2000, University of Wisconsin-Madison. An earlier version of the article was presented at the International Conference on Industrial Organization, Law & Economics held by Athens Institute for Education and Research, Greece, June 9-11, 2005. I thank participants in the Conference for their comments.

** BENJAMIN Y. LI, LL.M., New York University School of Law. The co-author is currently an associate attorney at Sullivan & Cromwell LLP. A special acknowledgement is owed to my parents, K.T. and Jean Li, and my wife, Shiue Li-Shiuan, for their endless support and encouragement. The views expressed herein are personal and do not necessarily reflect those of any of my employers, past or present.

1. See Council for Trade in Services, *Communication from the People's Republic of China – Assessment of Trade in Services*, TN/S/W/9 (Dec. 19, 2002).

2. See Susan E. Vitale, *Doors Widen to the West: China's Entry in the World Trade Organization Will Ease Some Restrictions on Foreign Law Firms*, 7 WASH. U. J.L. & POL'Y 223, 248 (2001) ("China's primary concerns are protecting its domestic legal market and membership in the WTO in order to encourage foreign investment."). See also Michael J. Chapman & Paul J. Tauber, *Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services Under the General Agreement on Trade in Services*, 16 MICH. J. INT'L. L. 941, 953 (1995) ("Local

compliance with its WTO commitments on legal services has, to date, been considered unsatisfactory.³

The Republic of China (hereinafter “Taiwan” or the “ROC”), which China claims as part of its territory despite over five decades of separate rule, has enjoyed *de facto* sovereignty and developed prosperously as a result of its social, economic and democratic achievements.⁴ Regardless of the five-decade ban on direct flights and shipping across the strait, China has become Taiwan’s premier destination for exports and offshore investment. This phenomenon is largely attributable to the geographic advantage and the similarity in language and culture that exists between Taiwan and China.⁵ The increased investment and transactions between Taiwan and China create a demand for Taiwanese lawyers from Taiwan-based enterprises, which wish to rely on the professionals already familiar with their businesses and reputable for their high quality services. While foreign law firms may currently obtain authorized permission to establish representative offices under China’s regulatory regime, Taiwanese lawyers and law firms, due to the political tension between China and Taiwan, are hindered from legally providing legal services or establishing representative offices in China.⁶

The denial of access to its legal market by China of Taiwanese lawyers and law firms, following Taiwan’s accession into the WTO⁷, may not be entirely consistent with the WTO principles and obligations. Thus, China’s failure to accord “Most Favored Nation” (“MFN”) treatment to Taiwan is an emerging issue under the WTO’s legal framework. This essay addresses China’s liberalization of legal markets after Taiwan’s WTO accession and its discriminatory treatment of Taiwanese lawyers and law firms. Parts I and II introduces the rule-based approach

authorities sometimes express concern that foreign lawyers and firms will overwhelm the local firm, stifling the development of local bar.”).

3. See discussion *infra* Part II. C.

4. The administration of the Nationalist (or Kuomintang) moved to Taiwan following the revolution of the Chinese Communist Party in the Chinese Civil War of 1949. However, the ROC government, either led by the Nationalist or the Democracy Progressive Party (“DPP”), never officially renounced its claim to sovereignty over the Mainland China; the PRC government, by the same token, claims Taiwan as an integral part of China. See Parris Chang & Kok-ui Lim, *The International Status of Taiwan: Taiwan’s Case For United Nations Membership*, 1 UCLA J. INT’L L. & FOREIGN AFF. 393, 393-97 (1997).

5. See Shin-yi Peng, *Economic Relations between Taiwan and Southeast Asia: A Review of Taiwan’s “Go South” Policy*, 16 WIS. INT’L L.J. 639 (1998).

6. See discussion *infra* Part III.

7. On January 1, 2002, Taiwan followed China’s footsteps and joined WTO under the name of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu. See Press Release, *WTO Ministerial Conference Approves Accession of Chinese Taipei*, PRESS/253 (Nov. 11, 2001).

of the General Agreement on Trade in Services (“GATS”) and its implications on the liberalization of legal services. China’s previous restrictions to foreign law firms prior to its WTO accession, as well as its recent efforts with the fulfillment of the WTO commitments on legal services, will be discussed in Part III. Part IV examines the rationale behind China’s discriminatory treatment to preclude Taiwanese lawyers and law firms from entering into its legal market. Due to the political tension between entities on both sides of the straits, China has repeatedly recognized Mainland China and Taiwan as one country. However, China may have acted inconsistently with its obligations under GATS by maintaining the discriminatory measures against Taiwanese lawyers and law firms. Finally, Parts V and VI suggest that expediting market access for Taiwanese lawyers and law firms will not only implement China’s WTO commitments, but also facilitate the transactions between parties on both sides hence improving the quality of services through the exchange of skills between Chinese and Taiwanese lawyers. Finally, this essay argues that such liberalization of the legal market will likely lead to Taiwanese lawyers contributing more to the resolution of the long-existing political disputes between the two entities.

I. TRADE IN LEGAL SERVICES

In the early 1980s, many industrialized countries experienced the enormous growth of their service economies, whose potential had been unleashed by the communications revolution.⁸ Recognizing that the General Agreement on Tariffs and Trade (“GATT”)⁹, which is primarily a medium for coping with tariff-barrier issues, failed to effectively address the emerging challenges of complex and competitive trade in services, GATT Members sought a new resolution.¹⁰ Signed in Marrakech on April 15, 1994, the General Agreement on Trade in Services (“GATS”)¹¹ was the first and continues to be the only set of multilateral provisions governing international trade in services.¹²

8. See Robert F. Taylor & Philippe Metzger, *GATT and its Effect on the International Trade in Legal Services*, 10 N.Y. INT’L L. REV. 1, 3-4 (1997).

9. GATT, a multinational trade treaty which has been in force since January 1948, established the legal framework for negotiating and reducing trade barriers, particularly in the area of international trade in goods. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A11, 55 U.N.T.S. 194, available at http://www.wto.org/English/docs_e/legal_e/gatt47_e.pdf [hereinafter GATT].

10. See Taylor & Metzger, *supra* note 8, at 13.

11. General Agreement on Trade in Services, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1B, 33 I.L.M. 1125 (1994) [hereinafter GATS].

12. See Understanding the WTO – Services: Provisions for Growth and Investment, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm.

GATS applies to all internationally-traded services, excluding only air transport services, services directly related to the exercise of traffic rights, and services provided to the public in the exercise of governmental authority.¹³ In order to alleviate concerns that participating governments would be incapable of immediately complying with GATS' policy objectives, GATS was developed with flexibility in mind, thus subjecting the general principles of the Agreement to many exceptions and permitting individualized market-access commitments from signatory nations. Given the unique governmental interest in regulating legal services markets, this flexibility has precluded liberalization of legal services markets, in spite of the absence of any express exclusion of legal service markets from the purview of the Agreement.

A. GENERAL AGREEMENT ON TRADE IN SERVICES: GENERAL PRINCIPLES AND OBLIGATIONS

While GATS is comprehensive and broadly applicable to all service sectors, the general principles and obligations pronounced by GATS are subject to a series of exceptions. Article II of GATS provides that "with respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country."¹⁴ In principle, this obligation is required of all GATS members and applicable to all service sectors, regardless of specific commitments undertaken by individual members in a particular sector. In general, the MFN treatment requires GATS members to allow foreign competition in a service sector and provide equal opportunities in the sector to service suppliers of all other GATS members.¹⁵ While the MFN obligation applies to all services, the Agreement permits special temporary exemptions.¹⁶ For example, on the Final List of Article II (MFN) Exemptions of Indonesia, Nationals of Brunei Darussalam, Malaysia, the Philippines, Singapore and Thailand have been granted special treatment. Another example can be seen on the Final List of Article II (MFN) of Switzerland, where European countries have been

13. See GATS, *supra* note 11, art. II.1.

14. See GATS, *supra* note 11, art. II.

15. See JOHN H. JACKSON, *WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 308 (1997).

16. When GATS came into force, a number of countries already had preferential agreements in services that they had signed with trading partners, either bilaterally or in small group.

granted special treatment.¹⁷ The WTO Members deemed it necessary to maintain these preferences temporarily, normally no more than ten years, thus giving themselves the right to continue providing more favorable treatment to certain countries in particular services activities. These "Most-Favored-Nation exemptions," are listed alongside the WTO Members' first sets of commitments.¹⁸

Recognizing the impracticality of requiring every member country to immediately open every market sector to foreign competition, GATS also provides for liberalization to occur gradually over several years, with the commitments of individual countries to be modified periodically. Pursuant to the principle of progressive liberalization, GATS expressly strives toward "early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations."¹⁹ Article XIX of GATS prescribes periodic rounds of negotiations to begin no later than five years after the WTO agreement is entered into force.²⁰ It is envisioned that such negotiations will take place on a bilateral, plurilateral, or multilateral level.²¹ The architecture of GATS under this "positive listing approach" means that members are not obligated to open the market on the whole universe of services sectors. Rather, a member may refuse to make a commitment on the level of foreign competition in a given sector in order to pursue national policy objectives and exercise its regulatory powers.

B. TRADE IN LEGAL SERVICES UNDER GATS: MEMBERS' SPECIFIC COMMITMENTS

In spite of the fact that legal services were not expressly intended to be excluded from GATS at its inception, member countries have devised ways to create a *de facto* exception for many such services.

While a broad definition of legal services would include advisory and representation services as well as all the activities relating to the administration of justice, the latter activities have been effectively excluded from the scope of GATS. In most countries the administration of justice is considered a "service supplied in the exercise of governmental authority" according to

17. Informal Note By The Secretariat, Compilation of Article II (MFN) Exemption Lists, Job(04)/115, Council For Trade In Services, September 3, 2004.

18. *Id.*

19. See GATS *supra* note 11, art. XIX.4.

20. See *Id.*, art. XIX.1.

21. See *Id.*, art. XIX.4.

Article I(3)(c) of the Agreement.²² In the WTO's Services Sectoral Classification List, "legal services" is listed as a sub-sector of "business services" and "professional services."²³ This entry corresponds to the CPC number 861 in the United Nations Provisional Central Product Classification ("UNCPC")²⁴. In the UNCPC, the entry "legal services" is sub-divided into "legal advisory and representation services concerning criminal law" (86111), "legal advisory and representation services in judicial procedures concerning other fields of law" (86119), "legal advisory and representation services in statutory procedures of quasi-judicial tribunals, boards, etc." (86120), "legal documentation and certification services" (86130) and "other legal and advisory information" (86190).²⁵ The revision to the UNCPC approved by the United Nations (the "UN") Statistical Committee in February 1997 leaves the legal services classification substantially unchanged. As a result, GATS covers all advisory and representation services in the various fields of laws and in statutory procedures, to the exclusion of activities relating to the administration of justice.²⁶

As discussed *supra*, the general flexibility of GATS permits countries to refuse to open markets for certain services in order to retain the ability to pursue national policy objectives and exercise regulatory powers. Many countries have invoked such powers by placing restrictions on the types of legal entities that may

22. WTO SECRETARIAT, GUIDE TO THE GATS: AN OVERVIEW OF ISSUES FOR FURTHER LIBERALIZATION OF TRADE IN SERVICES 399-423 (2001).

23. *Note by the Secretariat: Services Sectoral Classification List*, MTN.GNS/W/120 (July 10, 1991).

24. For the purposes of the Uruguay Round negotiations, the WTO Secretariat developed a services sectoral classification-Documents W/120- in order to enhance the consistency of the commitments undertaken by each Member. Although optional, most Members followed the W/120 classification system. The 160 sub-sectors of which the W/120 is composed are defined as aggregates of the more detailed categories contained in the United Nations provisional Central Product Classification (Provisional CPC). Therefore, the CPC categories help clarify over the scope of the commitments actually undertaken under the GATS. In fact, most Members listed the corresponding CPC numbers when inscribing their GATS commitments.

25. *See Note by the Secretariat: Services Sectoral Classification List, supra* note 23. "Legal services" (861) is sub-divided as follows:

861 Legal services
 8611 Legal advisory and representation services in the different fields of law
 86111 Legal advisory and representation services concerning criminal law
 86119 Legal advisory and representation services in judicial procedures concerning other fields of law
 86120 Legal advisory and representation services in statutory procedures of quasi-judicial tribunals, boards, etc.
 86130 Legal documentation and certification services
 86190 Other Legal advisory and information services

26. Council for Trade in Services, *Legal Services: Background Note by the Secretariat*, S/C/W/43 (July 6, 1998).

be formed.²⁷ Most countries limit the choice of legal form to natural persons (i.e., sole proprietorship) or partnership, excluding limited companies.²⁸ On the other hand, restrictions on foreign equity specific to legal services are not very common. More often the restriction specified in the general investment legislation apply to legal services.

In addition, many member countries have exercised their general regulatory powers to impose licensing and qualification requirements.²⁹ In most countries legal qualification requirements include a university degree of three to five years and a period of practicing followed by a professional examination.³⁰ In some cases these requirements are so specific that regulators require foreign qualified lawyers to re-qualify in order to be able to practice domestically.³¹ Rigorous qualification requirements often make it impossible for a foreigner to practice host country law, representing an insurmountable barrier to trade in legal services.

Given the aim of GATS to facilitate liberalization of the presently heavily protected service markets, including the market for legal services, WTO members have an obligation to pursue progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations. Therefore, the existing limitations on market access in legal services ought to be subject to further liberalization in the ongoing rounds of services negotiations—the Doha Round.³² It remains to be seen if the negotiating momentum for reaching further consensus on legal services can be sufficiently generated in the Doha Round.³³

27. WTO SECRETARIAT, *supra* note 22, at 399.

28. *Id.*

29. Paper by the Organization for Economic, Co-Operation and Development (OECD), Managing Request-Offer Negotiations under the GATS: The Case of Legal Services, Committee on Specific Commitments Job(04)/77, June 2004.

30. *Id.* at 23.

31. *Id.* at 22.

32. The November 2001 Declaration of the Fourth Ministerial Conference in Doha, Qatar, provides the mandate for negotiations on a range of subjects and other work. The negotiations include those on services, which has begun in early 2000. The original mandate has now been refined by work at Cancún in 2003, Geneva in 2004, and Hong Kong in 2005.

33. Sydney M. Cone III, *Legal Services in the Doha Round*, Journal of World Trade 37(1) 29-47 (2003).

II. CHINA'S WTO ACCESSION AND ITS EFFECT ON LEGAL SERVICES MARKET

A. RESTRICTIONS ON FOREIGN LAW FIRMS PRIOR TO WTO ACCESSION

Despite the fact that several foreign law firms have had a presence in China since the 1970s,³⁴ it was not until 1993 that foreign law firms were granted official access. During that year, China officially opened its door to foreign law firms, pursuant to the "Tentative Regulations on the Establishment of Offices by Foreign Law Firms Within the Territory of China" ("Tentative Regulations").³⁵ While not all of the provisions are still in effect following China's accession to the WTO, knowledge of the regulations provides a basis for understanding the obstacles currently faced by foreign firms attempting to break into the Chinese market for legal services.

Enforced by the Ministry of Justice and the State Administration for Industry and Commerce, the Tentative Regulations, effective until December 31, 2001, imposed the following major restrictions on foreign law firms practicing in China:

1. *Approval and Registration Requirement*

The Tentative Regulations outlined the application and establishment, as well as the administration, of foreign law firms' representative offices. Under Article 2 of the Tentative Regulations, foreign law firms were required to obtain approval ("Pi-Zhun") from the Ministry of Justice and register ("Deng-Ji-Zhu-Ce") with the State Administration for Industry and Commerce before setting up a representative office in China.³⁶ Such "representative offices" were not recognized as legal entities with the result that their tax obligations and indebtedness shall be borne directly by the foreign law firms.³⁷ Moreover, they could not engage in legal services under the disguised form of "consulting firms" or "commercial firms" in an attempt to circumvent the approval and registration requirements.³⁸ The permit to establish a representative office would last for five years, though foreign law firms could file for an extension after its expiration.³⁹

34. For example, Coudert Brothers' Beijing office was opened in August 1979.

35. See Guanyu waiguo lüshi shiwusuo zai Zhongguo jingnei sheli banshichu de zanxing guiding [Tentative Regulations on the Establishment of Offices by Foreign Law Firms Within the Territory of China] (promulgated by the Ministry of Justice, May 26, 1992, effective May 26, 1992) 1992 FA GUI HUI BIAN 161, vol. 3 (P.R.C.) [hereinafter Tentative Regulations].

36. See *id.* art. 12.

37. See *id.* art. 14.

38. See *id.* art. 3.

39. See *id.* art. 11.

Notably, however, the Ministry of Justice provided no evaluative criteria for approval, prompting one commentator to suggest that the Tentative Regulations were merely "a source of authority for the government to expel foreign firm should they choose to."⁴⁰ Some foreign law firms have even hinted that developing relationships ("Guan-Xi") and networking with PRC government officials contributed favorably to their attempts to establish representative offices.⁴¹

2. *Geographical and Quantitative Limitation*

The approval and registration requirement was supplemented by a geographical limitation restricting foreign law firms to establish their representative office in only selected cities, including Beijing, Shanghai, Guangzhou and Shenzhen,⁴² and a quantitative limitation mandating that foreign law firms may only establish one office in China.⁴³ Foreign law firms typically prefer to set up their representative office in either Beijing or Shanghai, as Beijing has a reputation of the strategic stronghold for pursuing governmental approval required for investment projects, while Shanghai is widely considered the business and commercial center in the greater China region.⁴⁴

Known as the "One firm, One office" policy, the quantitative limitation created the most significant obstacle for foreign law firms. Many sought to circumvent the barrier by operating consulting firms in cities where they were prohibited from establishing an office. Baker & Mackenzie, for example, operated a consulting firm, B&M China Consultations Ltd. in Shanghai while simultaneously operating a legal practice in Hong Kong.⁴⁵ Although Baker & Mackenzie maintained that its Shanghai consulting firm did not employ lawyers, lawyers from its Hong Kong office occasionally utilized the Shanghai office in order to con-

40. Edward A. Adams, *Firm Join Legal 'Gold Rush' in China*, N.Y. L.J., July 1, 1996, at 1.

41. *Id.* The activities of several American firms include holding training sessions for the Ministry of Justice officials in their offices and hosting dignitaries visiting the United States.

42. The PRC opened five cities at the outset: Beijing, Shanghai, Guangzhou, Shenzhen and Haikou; in 1995, additional ten cities were added to the list: Dalian, Tianjin, Qingdao, Yantai, Suzhou, Hangzhou, Ningbo, Fuzhou, Xiamen and Zhuhai. See Hongming Xiao, *The Internationalization of China's Legal Services Market*, PERSPECTIVES, June 2000, available at http://www.oycf.org/perspectives/6_063000/internationalization_of_china.htm.

43. *Id.*

44. For example, a number of international law firms, such as Clifford Chance LLP and Linklaters, have set up representative offices in both Beijing and Shanghai.

45. See Yujie Gu, *Entering the Chinese Legal Market: A Guide for American Lawyers Interested in Practicing Law in China*, 48 DRAKE L. REV. 173, 200 (1999) (citing Ann Davis, *Shanghai Exit for Coudert*, NAT'L L.J., Jan. 30, 1995, at A6).

duct legal services.⁴⁶ The Ministry of Justice deemed the operation to be in violation of the quantitative ban and closed the firm's Shanghai consulting firm in 1995.⁴⁷

3. *Prohibition Against Representing Chinese Legal Affairs and Interpreting Chinese Law*

Another significant limitation imposed by the regulations was the prohibition against representing Chinese legal affairs and interpreting Chinese law. Article 15 of the Tentative Regulations enumerated several tasks that a foreign law firm was permitted to perform:⁴⁸

- (1) to provide clients with consultancy on the legislation of the country where the lawyers of the law firm are permitted to engage in lawyer's professional work, and on international conventions, international commercial laws, and international practices;
- (2) to handle, when entrusted by clients or Chinese law firms, legal affairs of the country where the lawyers of the law firm are permitted to engage in lawyer's professional work; and
- (3) to entrust, on behalf of foreign clients, Chinese law firms to handle legal affairs within the territory of China.

Nevertheless, the Tentative Regulations prohibited foreign law firms from representing Chinese "legal affairs" and interpreting Chinese law.⁴⁹ As a result, foreign firms were required to subcontract legal assignments to local Chinese law firms. Given that foreign firms establish law offices in China in part in order to advise their clients on Chinese law, these restrictions significantly undermined the ability of foreign law firms to satisfy their professional obligations.

4. *Prohibition Against Local Hiring*

The obstacles created by the restriction against representation were further compounded by Article 17 of the Tentative Regulations, which prohibited foreign law firms from hiring lawyers qualified to practice Chinese laws.⁵⁰ Any violation of this provision could lead to a serious reprisal, including the surrender by any Chinese lawyer employed by a foreign law firm of his or her license to practice.⁵¹

46. *Id.*

47. *Id.*

48. See Tentative Regulations, *supra* note 35, art. 15.

49. See *id.* art. 16 § 1 and § 2 ("Office of foreign law firms and their members may not engage in the following business activities: (1) to act as agent on Chinese legal affairs; (2) to interpret Chinese laws to their clients; or . . .").

50. See *id.* art. 17.

51. See Xiao, *supra* note 42.

5. *Prohibition on Taking the Lawyers Qualification Exam*

Because of political concerns, China has adopted a conservative exclusionary policy to exclude foreign citizens from taking the Lawyers Qualification Exam.⁵²

6. *Restrictions on the Chief Representative*

Several unwritten restrictions were imposed on the chief representatives of foreign law firms. The chief representative was required to have at least three years of practice experience in the firm's home country and a clean disciplinary record.⁵³ These restrictions raised the difficulty for a foreign law firm in engaging a qualified candidate to serve as the chief representative in its representative office.

B. CHINA'S WTO ACCESSION AND COMMITMENTS

China's Justice Minister Gao Changli pronounced that following China's accession to the WTO, "the legal service sector in China [would] be further opened . . . in accordance with WTO commitments."⁵⁴ On September 17, 2001, after almost fifteen years of negotiations, the terms of China's membership into the WTO were finally settled between China and the Working Party; on November 10, 2001, they were formally approved at the WTO Ministerial Conference in Doha, Qatar.⁵⁵ In accordance with Minister Gao's pronouncement, China was obligated to enter

52. *Id.*

53. *Id.* (Xiao suggests that such restriction, not officially promulgated but followed in practice, is to ensure the caliber of foreign lawyers, to limit the number of foreign lawyers, and in particular, to exclude foreign lawyers who receive just their licenses right). See also Gu, *supra* note 45, at 202 (citing Matt Forney, *Outside the Law: Reform Reversals Hit Foreign Law Firms in China*, FAR E. ECON. REV., Jan. 2, 1997, at 18).

54. See Vitale, *supra* note 2, at 243 (citing Foreign Law Firms Establish China Branches, XinHua, June 8, 2002, available at LEXIS, New Library, Xinhua File (citation omitted)).

55. The accession to WTO includes four phases: (1) Submission of a formal written request for accession and memorandum, covering all aspects of its trade and legal regime, by the applicant government. The request and memorandum will be examined by the Working Party, which will submit its findings for the General Council for approval. (2) Bilateral negotiation with interested Working Party members on concessions and commitments on market access for goods and services. (3) The result of bilateral negotiations are consolidated into the final accession package, which consists of a Report of the Working Party, a Protocol of Accession and Schedules of market access commitments in goods and services agreed between the acceding governments and WTO members. (4) The accession package is presented to the General Council or the Ministerial Conference for approval. If a two-third majority of WTO members vote in favor, the applicant is free to sign the protocol and to accede to WTO, subject to ratification in its national parliament or legislature. See How to Become a Member of the WTO, http://www.wto.org/english/thewto_e/acc_e/acces_e.htm.

into commitments to phase out the market access restrictions and national treatment limitations imposed by the old Tentative Regulations.⁵⁶

Among the commitments made, China promised that “geographic and quantitative limitations would be eliminated within one year after China’s accession to the WTO.”⁵⁷ With respect to the types of services representative office may provide, the Schedule of Specific Commitments provides an exclusive list of permitted activities, including the authority to:⁵⁸

- (1) provide clients with consultancy on the legislation of the country/region where the lawyers of the law firm are permitted to engage in lawyer’s professional work, and on international conventions and practices;
- (2) handle, when entrusted by clients or Chinese law firms, legal affairs of the country/region where the lawyers of the law firm are permitted to engage in lawyer’s professional work;
- (3) entrust, on behalf of foreign clients, Chinese law firms to deal with the Chinese legal affairs;
- (4) enter into contracts to maintain long-term entrustment relations with Chinese law firms for legal affairs; and
- (5) provide information on the impact of the Chinese legal environment.

While the Tentative Regulations prohibited foreign law firms from handling Chinese legal affairs and interpreting Chinese laws, Provision (5) seems to signify a gray area.⁵⁹

The expertise required of foreign lawyers has remained relatively unchanged. Like the Tentative Regulations, the Schedule mandates that the chief representative shall be a partner or equivalent (e.g., member of a law firm of a limited liability corporation) of a law firm of a WTO member and have practiced for no less than three years.⁶⁰ However, the Schedule specifies that “the representatives of a foreign law firm shall be practitioner lawyers who are members of the bar or law society in a WTO member and have practiced for no less than two years outside of China”.⁶¹ Some scholars believe that the two-year experience requirement imposed on the representatives was an apparent con-

56. See China – Schedule of Specific Commitments for Trade in Services, GATS/SC/135 (Feb. 14, 2002).

57. *Id.*

58. *Id.*

59. Jane J. Heller, *China’s New Foreign Law Firm Regulations: A Step in the Wrong Direction*, 12 PAC. RIM L. & POL’Y J. 751, 764 (2003).

60. See China – Schedule of Specific Commitments for Trade in Services, *supra* note 56.

61. *Id.*

cession by China, as the requirement had previously been three years.⁶²

Despite these concessions, however, most scholars admit that commitments under GATS do not have “direct applicability.”⁶³ In other words, in the absence of legislation, China’s commitments alone do not have the binding force upon its government or courts. The following section describes domestic legislative enactments and discusses whether they in fact embody the commitments made to the WTO.

C. CHINA’S CURRENT APPROACHES FOR COMPLIANCE

On January 1, 2002, the Regulations on the Administration of Foreign Law Firms’ Representative Office in China (“Regulations”) became effective, thereby replacing the Tentative Regulations.⁶⁴ Subsequently, on July 4, 2002, the Ministry of Justice issued Implementing Rules (“Rules”), which were designed to facilitate implementation of the Regulations and became effective on September 1, 2002.⁶⁵

While certain aspects of the Regulations and Rules appear to be more permissive than the Tentative Regulations,⁶⁶ the magnitude of discretion that the Regulations and Rules grant to the PRC authorities actually suggests a tightening, rather than a relaxation, of the regulations governing foreign law firms.⁶⁷ As

62. See Heller, *supra* note 59, at 765.

63. See Donald Clarke, *China’s Legal System and the WTO: Prospects for Compliance*, 2 WASH. U. GLOBAL STUD. L. REV. 97, 99 (2003) (suggesting that PRC’s WTO obligations will not bind its courts and government agencies until appropriate domestic legislations and regulations incorporating those obligations are enacted or promulgated). See also John H. Jackson, *Status of Treaties in Domestic Legal System: A Policy Analysis*, 86 AM. J. INT’L L. 310, 310-15 (1992) (suggesting that there must be a governmental action, e.g., the state incorporating the treaty norm into its domestic legislations, for the treaty rule to operate in the domestic legal system). *But cf.* Wang Tiewa, *The Status of Treaties in the Chinese Legal System*, 1 J. CHINESE & COMP. L. 1, 7 (1995) (suggesting that since treaties are directly applicable internally, thus it is not necessary to enact domestic laws for their implementation).

64. See Waiguo lüshi shiwusuo zhuhua daibiao jigou guanli tiaoli [Regulations on the Administration of Foreign Law Firms’ Representative Offices in China] (promulgated by the State Council, Dec. 22, 2001, effective Jan. 1, 2002) 2002 FA GUI HUI BIAN 132, vol. 1 (P.R.C.) [hereinafter Regulations].

65. See Sifabu guanyu zhixing waiguo lüshi shiwusuo zhuhua daibiao jigou guanli tiaoli de guiding [Implementing Rules of The Regulations on the Administration of Foreign Law Firms’ Representative Offices in China] (promulgated by the Ministry of Justice, July 4, 2002, effective Sept. 1, 2002) 2002 FA GUI HUI BIAN 174, vol. 8 (amended Sept. 2, 2004) (P.R.C.) [hereinafter Implementing Rules].

66. For example, lifting the one-firm-one-office restriction pursuant to the Implementing Rules. See discussion *infra* Part III. C.3.

67. See Misasha Suzuki, *The Protectionist Bar Against Foreign Lawyers in Japan, China, and Korea: Domestic Control in the Face of Internationalization*, 16 COLUM. J. ASIAN L. 385, 400 (2003).

such, it appears that the new legislation hinders, rather than advances, the liberalization of markets for legal services.

1. *The Scope of "Chinese Legal Affairs"*

Recall that Article 16 of the Tentative Regulations had forbidden foreign firms from offering advice on Chinese "legal affairs." While Article 32 of the Rules clarifies the meaning of the phrase "Chinese legal affairs," the new understanding serves in fact to constrain the types of services that foreign firms may provide by prohibiting the following activities:⁶⁸

- (1) any engagement in litigation activities in China as a lawyer;
- (2) to provide legal opinions on or certifying any specific issues with respect to application of Chinese laws in any contracts, agreements, articles of incorporation or other written documents;
- (3) to provide legal opinions on or certifying any action or events with respect to application of Chinese laws;
- (4) to provide opinions or comments in capacity of representative ("Dai-Li-Ren") in arbitration proceedings on application of Chinese laws and on facts related to Chinese laws; and
- (5) to handle, on behalf of its clients any registration, alteration, application, filing or other procedure with PRC government agencies or other organizations delegated under laws/regulations to implement administrative authorities.

Prior to the new legislation, foreign law firms customarily advised clients on issues pertaining to Chinese laws, liaised with central or local government agencies, and represented clients in arbitrations.⁶⁹ It is likely that the new definition of Chinese "legal affairs" prescribed by the Implementing Rules will largely undermine the ability of foreign law firms to serve their clients within those areas.

For example, despite the emergence of arbitration as a favored dispute resolution mechanism for foreign investors in China,⁷⁰ the prohibition on foreign law firms and their members from providing opinions or comments on the application of Chinese laws and on facts related to Chinese laws in arbitration proceedings may affect the enforceability of foreign or foreign-related arbitral awards in China. An arbitral tribunal for a dis-

68. See Regulations, *supra* note 64, art. 15; Implementing Rules, *supra* note 65, art. 32.

69. See RANDALL PEERENBOOM, *LAWYERS IN CHINA: OBSTACLES TO INDEPENDENCE AND THE DEFENSE OF RIGHTS*, 37-38 (1998).

70. See Sally A. Harpole, *How China Organizes Arbitral Tribunals: Arbitration in China*, 52 DISP. RESOL. J. 72, 72 (1997) (noting that in 1995 and 1996, CIETAC administered more international arbitration cases than any other arbitration institution in the world).

pute involving Chinese laws may be located outside the territory of China. If a Chinese representative office of a foreign law firm is retained as the representative and provides opinions or comments on application of Chinese laws or on facts related to Chinese laws throughout the proceedings, and a party eventually seeks to enforce the arbitral award in China, the courts may refuse to enforce it on the grounds that the enforcement would be contrary to public interest as a result of the violation of Article 15 of the Regulations.

The legislation also has the effect of prohibiting foreign lawyers from engaging in certain activities that non-lawyer foreigners are permitted to do. For example, the legislation prohibits foreign lawyers from representing clients in relatively ordinary procedures, such as the registration, or alteration of trademarks and patents, while non-lawyer foreigners are permitted to provide such services.⁷¹ Moreover, such prohibitions impair the ability of foreign law firms to collect sufficient materials required to conduct due diligence while local lawyers have unhindered access to officials and records.⁷²

While foreign firms may not advise on Chinese law or legal affairs, Article 15 does stipulate that representative offices and members may "provide information on the impact of the Chinese legal environment."⁷³ While it might seem that this provision permits firms to possibly interpret Chinese laws, Article 33 of the Rules limits the scope of this provision, noting that it does not permit representative offices and members to provide specific opinions on the application of the Chinese laws.⁷⁴ Although the Regulations and Implementing Rules were expected to implement China's efforts in complying with GATS commitments, a negative attitude towards liberalization of legal market is evident in the language.⁷⁵

2. *Entrustment Arrangement with Chinese Law Firms*

Foreign law firms commonly enter into agreements to subcontract legal assignments to local law firms in an arrangement known as "entrustment," under which representative offices may directly instruct lawyers in the entrusted law firm(s).⁷⁶ Even

71. See Suzuki, *supra* note 67, at 400.

72. *Id.*

73. See Regulations, *supra* note 64, art. 15 §5.

74. See Implementing Rules, *supra* note 65, art. 33.

75. See Suzuki, *supra* note 67, at 399 ("... if China's stated goal was to increase foreign interest in the country by allowing foreign lawyers to set up satellite offices, both the Regulations and the [Implementing] Rules have a contradictory impact by regulating foreign lawyers' actions within Chinese boundaries.").

76. See Regulations, *supra* note 64, art. 15.

though this practice is permitted, the structure of the arrangement is severely restricted by Article 39 of the Implementing Rules, which prohibits a representative office and its principle office from investing directly or indirectly in Chinese law firms, entering into joint profit-sharing ventures with Chinese law firms or lawyers, setting up an associated office or stationing staff in Chinese law firm to engage in legal services, or managing, operating, controlling or owning an interest in the form of shares in Chinese law firms.⁷⁷ As a result, foreign law firms must be careful so as to ensure that the entrustment arrangement will not be deemed a joint venture.⁷⁸

3. *Restrictions on Establishing Multiple Representative Offices*

As the Schedule of Commitments had pledged, the Regulations and Implementing Rules lift the geographic and quantitative limitations. In practice, however, additional requirements imposed on foreign law firms applying for additional representative offices in China may still discourage the firms' attempt to expand. The additional requirements are two-fold: the "practical need" ("Shih-Ji-Xu-Yao") requirement, and the waiting period.

To apply to establish a representative office in China, Article 7, Section 3 of the Regulation requires that the foreign law firm applicant have a "practical need" to set up a representative office to expand its legal service business.⁷⁹ According to the Implementing Rules, determining a "practical need" depends solely on the Ministry of Justice's interpretation of the following factors:⁸⁰

- (1) the state of social and economic development in the place where an intending representative office will be situated;
- (2) the requirement for the development of legal service business in the place where the intending representative office will be situated;
- (3) the scale and time of establishment, main business scope and specialties of the applicant and its analysis on the future prospects and future business development planning of the of the intending representative office; and
- (4) the restrictive provisions in the laws and regulations of China on engaging in designated legal service activities or business.

Given the ambiguity of the factors to be considered, the unpredictability of their interpretation, and the expansive amount of discretionary power granted to the Ministry of Justice in ap-

77. *Id.*

78. See Heller, *supra* note 59, at 766.

79. See Regulations, *supra* note 64, art. 7 § 3.

80. See Implementing Rules, *supra* note 65, art. 4.

plying the factors, one commentator has suggested that the new regulations frustrate foreign law firms in their attempt to expand representative offices.⁸¹ However, such a concern may be unwarranted. At the December 5, 2003 meeting held by the WTO Council for Trade in Services, the Chinese representative stated that more than fifty (50) representative offices of foreign law firms had been approved in Beijing and Shanghai after the promulgation of the Regulations, and none of them had been subject to the "practical need" test.⁸²

In addition, the Rules mandate a waiting period, so that effectively, foreign firms may not open more than one new office every three years.⁸³ This requirement creates an advantage for foreign law firms that maintained a presence in China.⁸⁴ Moreover, the three-year waiting period and the expensive application process, which may take up to nine months, substantially increase the operational costs of establishing a new office.

4. *Restrictions on the Representative and the Chief Representative*

Article 7 of the Regulations codifies the provision from the Schedule of Commitments, which prescribed that lawyers working in the representative offices must have at least two years of practice experience in extraterritorial jurisdictions and no criminal or discipline records.⁸⁵ With respect to the chief representatives, the period of practice experience is extended to at least three years, and the chief representatives are required to be partners of the foreign law firms or hold an equivalent position.⁸⁶ In addition, all representatives must reside in China at least six months out of the year.⁸⁷

81. Heller, *supra* note 59, at 766.

82. Council for Trade in Services, *Report of the Meeting Held on 5 December 2003*, ¶ 48, S/C/M/69 (Dec. 15, 2003).

83. Article 4 of Implementing Rules. The other additional requirement is that previously approved representative offices and their members shall have abided by the laws, regulations, rules of PRC and lawyers' professional ethics and practice guideline and have not been investigated for any or all of the liability under the Regulations.

84. See Heller, *supra* note 59, at 770.

85. See Regulations, *supra* note 64, art. 7 § 2.

86. *Id.*

87. *Id.* art. 19.

III. CHINA'S DENIAL OF ACCESS TO TAIWANESE LAW FIRMS AND LAWYERS

A. BARRIERS TO MARKET ACCESS

As of October 19, 2005, one hundred and forty-eight foreign law firms had obtained permission from the Ministry of Justice pursuant to the Regulations and Implementing Rules to establish a representative office in China.⁸⁸ However, no single permission has been granted to a Taiwan-based law firm.⁸⁹ There are several explanations for China's refusal to apply the Regulations and Implementing Rules to Taiwanese law firms.

The refusal is often attributed to the political tension between entities on both sides of the straits. China has repeatedly recognized that mainland China and Taiwan are one country. Hence recognizing Taiwanese law firms as "foreign" law firms is unacceptable insofar as it undermines the "One China" principle.

Somewhat ironically, however, given the "One China" principle, Taiwanese citizens are prohibited from taking the qualification examination required in order to obtain a license to practice Chinese law. On October 2, 1994, the Ministry of Justice for the first time permitted residents from Taiwan, Hong Kong and Macao to take the Lawyers Qualification Examination.⁹⁰ Among one hundred sixteen thousands (116,000) examinees, three hundred fifty nine (359) participants were from these three regions.⁹¹ However, the Lawyers Qualification Examination has never been open again to Taiwanese citizens after 1994.⁹²

Another explanation for China's refusal to apply the Regulations and Implementing Rules to Taiwanese law firms is found in Article 34 of the Regulation.⁹³ Article 34 envisions that Tai-

88. See Zhongguo de minzhu zhengzhi jianshe baipishu (2005), Zhonghua Renmin Gongheguo Guowuyuan Xinwen Bangongshi Fabu [China's White Paper on Democratic Politics Construction (2005), issued by Information Office Of China's State Council in October 2005] (October 2005), available at <http://gov.people.com.cn/GB/46733/46844/3783456.html>.

89. See generally Li Yong-ran & Luo Ming-wei, *Jiaru WTO hui dui woguo lishi zhizao zhi yingxiang* [Impact of WTO Accession on Taiwanese Lawyers], ZHONG LU HUI XUN [REPUBLIC OF CHINA BAR ASSOCIATION NEWSLETTER] (Republic of China Bar Association), Dec. 2001, at 12.

90. See Charles Chao Liu, *China's Lawyer System: Dawning Upon the World Through A Tortuous Process*, 23 WHITTIER L. REV. 1037, at 1071 (2002).

91. *Id.*

92. See Li Ping, *WTO yu woguo kaifang falü fuwu shichang xiangguan wenti yanjiu* [WTO and Liberalization of the PRC Legal Services Sector], Mar. 7, 2002, available at <http://www.acla.org.cn/pages/2002-3-7/s742.html>.

93. See Regulations, *supra* note 64, art. 34 ("[T]he administrative measure on the representative office established in the mainland by the law firm in the separate tariff zone of China shall be separately enacted by the administrative department in charge of justice under the State Council according to the principles of these Regulations.").

wan, like Hong Kong and Macao, will become a separate tariff zone of China and thus contemplates that the Ministry of Justice will adopt a separate set of regulations to govern the establishment of representative offices of Taiwanese law firms.⁹⁴ Although China has repeatedly proposed to Taiwan a model of “one country, two systems,” for the possible reunification of the Mainland and Taiwan, incumbent President, Chen Shui-bian, who is a supporter of formal independence,⁹⁵ appears to be reluctant to sacrifice Taiwan’s sovereignty during his term. It is unlikely, therefore, that China and Taiwan will be able to agree on a separate set of regulations to govern representative offices of Taiwanese law firms.⁹⁶

B. REVISITING THE MOST-FAVORED-NATION PRINCIPLE

China’s refusal to apply the Regulations and Implementing Rules to Taiwanese law firms may not be entirely consistent with the general WTO principle which forbids MFN treatment.⁹⁷ Under the WTO regulations, each WTO member shall accord unconditionally to service suppliers of any other member country treatment no less favorable than that which it accords to similar service suppliers of any other country. Taiwan became a member

94. See Richard Qiang Guo, *Piercing the Veil of China’s Legal Market: Will GATS Make China More Accessible for U.S. Law Firms?*, 13 *IND. INT’L & COMP. L. REV.* 147, 182 (2002) (“ . . . [Ministry of Justice] recently reported willingness to award firms from Hong Kong, Macao and Taiwan rights to practice mainland law, after substantial lobbying by Hong Kong Law Society for China to widen access.”) (citation omitted).

95. See Unmesh Kher & Matthew Forney, *A Tinderbox in Taiwan?*, *TIME*, Mar. 22, 2004, at 17.

96. A separate measure for the administration of Hong Kong and Macao law firms’ representative offices in China was promulgated February 2, 2002, and further amended November 30, 2003. Under this separate measure, restrictions imposed on Hong Kong and Macao law firms are similar to those on foreign law firms. Under the Regulations, Hong Kong and Macao law firms are not given substantial favorable treatment. See Xianggang, Aomen Tebie Xingzhengqu lüshi shiwusuo zhu neidi daibiao jigou guanli banfa [Administrative Regulations for Mainland Representative Offices of Law Firms from the Hong Kong and Macao Special Administrative Regions] (promulgated by the Ministry of Justice, Feb. 20, 2002, effective Apr. 1, 2002) 2002 FA GUI HUI BIAN 140, vol. 4, available at <http://www.cas.cn/html/Dir/2002/03/13/5985.htm>; Sifabu guanyu xiugai “Xianggang, Aomen Tebie Xingzhengqu lüshi shiwusuo zhu neidi daibiao jigou guanli banfa” de jue ding [Decision by the Ministry of Justice on Revising the Administrative Regulations for Mainland Representative Offices of Law Firms from the Hong Kong and Macao Special Administrative Regions] (promulgated by the Ministry of Justice, Nov. 30, 2003, effective Jan. 1, 2004) 2004 FA GUI HUI BIAN 195, vol. 1, available at http://www.chinacourt.org/flwk/show1.php?file_id=89834.

97. See generally Thomas Cottier and Petros C. Mavroidis et al., *REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW* (2000),

of the WTO in 2002.⁹⁸ China's denial of Taiwanese law firms' and lawyers' access to its legal market is therefore inconsistent with the MFN treatment's original purpose — ensuring equal opportunities to service suppliers from different countries.

As discussed *supra*, it was agreed in the Uruguay Round to permit limited exemptions to MFN under GATS.⁹⁹ Such exemptions, however, have to be taken at the time negotiations had been concluded, which, in the case of China, was prior to its accession to the WTO.¹⁰⁰ The Annex of GATS makes it clear that no “new” exemptions can be granted.¹⁰¹ Any future requests to give non – MFN treatment can only be met through the WTO waiver procedures.¹⁰² Because China did not declare its overtly discriminatory measures against Taiwanese lawyers and law firms in its MFN exemption list when joining the WTO, and as of date, China has not claimed any non-MFN treatment pursuant to the WTO waiver procedures, by maintaining the discriminatory measures against Taiwanese lawyers and law firms, China acts inconsistently with its obligations under GATS.

IV. FACILITATING MARKET ACCESS FOR TAIWANESE LAWYERS IN CHINA

A. HARMONIZING THE LEGAL PROFESSIONALS OF THE TWO SIDES

To comply with its WTO commitments, China should apply the Regulations and Implementing Rules to Taiwanese law firms. Expediting market access for Taiwanese lawyers in China would also facilitate the transactions between parties on both sides of the strait and improve the quality of legal services of both sides through the exchange of skills between Chinese and Taiwanese lawyers. While a myriad of issues can arise when constructing a transaction that complies with the laws of both China and Taiwan, liberalization of the legal market for Taiwanese lawyers will enable Taiwanese lawyers to more effectively solve the multi-jurisdictional legal problems and bridge the cultural gap.¹⁰³

98. See WTO Website, *Protocols of Accession for New Members since 1995, including commitments in Goods and Services*, http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm#tpkm.

99. WTO Secretariat, *A HANDBOOK ON THE GATS AGREEMENT* 10-11 (2005).

100. *Id.* at 13.

101. *Id.*

102. Marrakesh Agreement Establishing the World Trade Organization, art. IX:3, 33 I.L.M. 1125 (1994).

103. See Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443, 447-50 (1989).

Another potentially beneficial outcome of the liberalization of the legal market for Taiwanese lawyers is to encourage the exchange of skills between Chinese and Taiwanese lawyers. While Chinese lawyers would have an advantage with respect to the knowledge of the local business and regulatory environment, their Taiwanese counterparts would have more knowledge of a Taiwanese client's business and arguably more experience in dealing with complex legal issues. Accordingly, such exchange of skills will be mutually beneficial. For instance, in cross-border transactions involving both Chinese and Taiwanese clients, Chinese lawyers will serve more capably when representing a Taiwanese client, and Taiwanese lawyers will more competently access the investing environment in China.

It is conceivable that China's refusal to open its legal borders to Taiwanese lawyers and law firms is attributable to the political tension between the two entities, rather than the protection of the interests its legal professions. While the discriminatory treatment against Taiwanese lawyers and law firms clearly violates its WTO commitment, China also overlooks the fact that the driving force in the China-Taiwan relationship is primarily economic.¹⁰⁴ Taiwan's investment and trade has become a major part of China's economic growth, and China's market has been essential for Taiwan's exports, manufacturing, and resources.¹⁰⁵ Should China open its legal market to Taiwanese lawyers and law firms, Taiwanese businesses, with Taiwanese lawyers serving as a catalyst, will be more comfortable with the security of their investments, as well as the predictability of the local business environment. As the political dispute should be resolved on economic basis, liberalizing the legal market to Taiwanese lawyers and law firms as it has been granted to other WTO members, may be a potential positive step toward resolving the tension between China and Taiwan.

B. BUILDING UP A MUTUAL RECOGNITION AGREEMENT

In light of the previous section, it is of practical significance to explore the possibility for reaching a Mutual Recognition Agreement (MRA) on legal professionals between the two sides. GATS permits the development of MRAs in Article VII, which states:

For the purposes of the fulfillment, in whole or in part, of its standards or criteria for the authorization, licensing or certification of services suppliers, a Member may recognize the education or experience obtained, requirements met, or licenses

104. See James Lilley, *Strait Talk*, WALL ST. J., Apr. 19, 2004, at A20.

105. *Id.*

or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.¹⁰⁶

Mutual recognition can usually only be achieved by recognition of the “equivalence” of the content of the training and to the recognition of the home country’s authority to certify such training through the granting of diplomas or other evidence of qualification. Yet vast differences in the requirements for certification and/or licensure of lawyers exist among countries. These differences may serve as an impediment to trade in legal services, as they may require lawyers to duplicate licensing steps — such as obtaining additional education and experience — in order to gain recognition to practice in another country. The process of recognition requires the equally complex task of comparing frameworks established to meet different sets of cultural and social circumstances. The efficacy with which these processes can be undertaken will depend on how different are the legal traditions, legal cultures, legal education and legal systems of foreign countries. Empirical studies have shown that common legal traditions facilitate trade in legal services within legal families.¹⁰⁷ There are, of course, important similarities between Taiwanese and Chinese national laws, which are based on the same legal tradition and often share common principles of law. The development of a MRA between two sides under Article VII of GATS may be a mutually beneficial liberalization for both sides.

V. CONCLUDING REMARKS

GATS is aimed at facilitating the liberalization of the presently heavily protected legal services to foreign suppliers. China’s cautious approach to compliance with its WTO commitments on legal services has been unsatisfying. Particularly, with respect to Taiwan, increasing investments and transactions between parties on the two sides has created a demand for Taiwanese lawyers from Taiwan-based enterprises, which wish to rely on the professionals already familiar with their businesses and reputable for high quality services. While foreign law firms may currently obtain authorized permission to establish representative offices under China’s regulatory regime, Taiwanese lawyers and law firms, due to the political tension between China and Taiwan, are prevented from legally providing legal services or establishing representative offices in China.

106. See GATS *supra* note 11, art. VII.1.

107. WTO Document, S/WPDR/W/34, *Development of Disciplines on Domestic Regulation for the Legal and Engineering Sectors*, Communication from Australia, Sept. 6, 2005. The proposal was co-sponsored by New Zealand.

China's refusal to apply the Regulations and Implementing Rules to Taiwanese lawyers and law firms is not consistent with the MFN principle, one of the WTO general principles and obligations. Under the MFN treatment, each WTO Member must accord unconditionally to service suppliers of any other Member treatment no less than that is accorded to similar services suppliers of any other country. China's denial of Taiwanese law firms' and lawyer's access to its legal market is contradictory to the MFN treatment's original purpose – giving equal opportunities to service suppliers in a sector from all other WTO Member. Moreover, by maintaining the discriminatory measures against Taiwanese lawyers and law firms, China acts inconsistently with its obligations under GATS.

Expediting market access for Taiwanese lawyers in China will facilitate the transactions between parties on both sides of the strait and improve the quality of legal services of both sides through the exchange of skills between Chinese and Taiwanese lawyers. Further liberalization of legal market for Taiwanese lawyers will enable Taiwanese lawyers to more effectively solve the multi-jurisdictional legal problems and bridge the cultural gap. In addition, liberalizing the legal market for Taiwanese lawyers would encourage the exchange of skills between Chinese and Taiwanese lawyers. Indeed, there are important similarities between Taiwan and China national laws, which are based on the same legal tradition and often share common principles of law. The liberalization would likely be mutually beneficial if China recognizes the legal education, experience obtained, requirements met, or licenses or certifications granted in Taiwan.