Challenges and Solutions for the China–Us BIT Negotiations: Insights from the Recent Development of FTZs in China

Jie Huang*

ABSTRACT

Before conducting profound reforms of the trade and investment legal framework, China often implements the reforms on a small scale, generally in specified geographic zones, as testing grounds. From 2013 to 2015, China established four free trade zones (FTZs) as pilot projects to test how to update Chinese trade and investment law, boost China’s economy, and prepare China for high-standard BITs/FTAs negotiations. This article analyzes the interactions between China’s FTZs and the China–US BIT negotiations, and explores what insights gathered from China’s FTZs can provide a better approach to challenges in the China–US BIT negotiations. It concentrates on three issues of the BIT negotiations: non-conforming measures, pre-establishment national treatment, and transparency. For each issue, this article compares other BITs concluded by China and the USA and analyzes their differences, then it explores the reasons for the differences and how they can be reconciled by experiments in China’s FTZs, and finally it proposes solutions for the China–US BIT negotiations.

I. INTRODUCTION

Early in the 1980s, China and the USA explored the possibility of concluding a bilateral investment treaty (hereinafter ‘BIT”) but were unsuccessful.1 After more than two decades, on 18 June 2008, China and the USA agreed to re-launch negotiations for a BIT.2 This BIT has been suggested as ‘the most difficult one in history’ and may also be ‘the most worthwhile’ for the two countries.3 Many scholars have

* Jie Huang, Associate Professor of Law at Shanghai University of International Business and Economics, School of Law. This article was made possible through the China Ministry of Education Project (No. 13YJCGJW004), ‘Dawn Scholar’ Project, and Shanghai 085 Project. The author is very grateful for the anonymous reviewers’ comments and Shankuan Chen’s support and can be reached at humility_us@hotmail.com. All comments are highly appreciated.


explored the significance and necessity, challenges and solutions for the China–US BIT negotiations. This article adds another perspective to the current academic discussions, regarding what insights from the recent development of China’s Free trade zones (hereinafter ‘FTZ’) can provide input to the China–US BIT negotiations.

FTZs are a type of special economic zone broadly defined as ‘demarcated geographic areas contained within a country’s national boundaries where the rules of business are different from those that prevail in the national territory’. Different from FTZs, BITs or free trade agreements (hereinafter ‘FTA’) establish a region constituted by two or more sovereign states or separate custom territories that have agreed to liberalize trade or investment between them. Although FTZs and BITs/FTAs are fundamentally different, China’s FTZs are influential towards China’s negotiations of high-standard BITs/FTAs. This is because FTZs in China serve as pilot projects to test how to update the current Chinese trade and investment law, boost China’s economy, and prepare China for high-standard BITs/FTAs negotiations.

Non-conforming measures, pre-establishment national treatment, and transparency are thorny issues for China in its BIT negotiations with the USA, because China seldom made binding commitments in these areas in its previous BITs. However, in order to conclude a BIT with the USA, China has agreed to adopt a negative-list of non-conforming measures, provide pre-establishment national treatment, and enhance transparency in the proposed BIT. If the China–US BIT concludes, these unprecedented treatments will not only benefit investors/investment from the USA, but also other foreign investors/investment because of the most-favored-nation (hereinafter ‘MFN’) automatic adaptation function in other BITs concluded by China. To a certain extent, China’s confidence comes from its FTZs, because since 2013, the China (Shanghai) Pilot FTZ (hereinafter ‘Shanghai FTZ’) has implemented a negative list of non-conforming measures and provided pre-establishment national treatment to foreign investors/investment. The Shanghai FTZ...
has also taken effective measures to enhance transparency in administering investment. Because China’s FTZs are established by the National People’s Congress as testing grounds for high-standard international law, experience from the FTZs would possibly be extended to China’s BIT with the USA. Therefore, insights from China’s FTZs may help us to better approach challenges in the China–US BIT negotiations.

With this intention in mind, this article concentrates on three issues of the BIT negotiations: non-conforming measures, pre-establishment national treatment, and transparency. The reason is that, after the 18th round negotiations, in 2015, one main negotiation task for China and the USA is on non-conforming measures. Non-conforming measures are closely related to pre-establishment national treatment and transparency, and China’s FTZs have made valuable reforms in all these three aspects. Therefore, besides the Introduction section, Section II of this article explores the interactions between China’s FTZs and the China–US BIT negotiations. Sections III, IV, and V are devoted to non-conforming measures, pre-establishment national treatment, and transparency, respectively. These three sections compare other BITs concluded by China and the USA and analyze their differences, explore the reasons for the differences and how they can be reconciled by experiments in China’s FTZs, and propose solutions for the China–US BIT negotiations. Section VI concludes the article.

The USA will use the US Model BIT to negotiate with China. The US–Korea FTA is the first US FTA with a Northeast Asian partner and the US’s most commercially significant FTA in almost two decades. It serves as a model for trade agreements between the USA and the rest of the Northeast Asian countries including China. Therefore, when discussing US’s BIT practices, this article mainly considers the 2012 US Model BIT and the US–Korea FTA. For China’s BIT practices, this


10 Articles 36, 39, 40, 41, 44, 45 of the Regulations of the Shanghai FTZ.
article focuses on the China–Canada BIT\textsuperscript{15} and the China–Korea–Japan Investment Agreement.\textsuperscript{16} They have recently been concluded by China and can best represent China’s approach to BIT negotiations. Moreover, among China’s FTZs, the Shanghai FTZ was established first and has the most solid experience thus far. The other FTZs, although all have their own unique features, generally follow the Shanghai FTZ’s practice.\textsuperscript{17} Therefore, this article gives most attention to the Shanghai FTZ when discussing China’s FTZs.

II. THE INTERACTIONS BETWEEN CHINA’S FTZS AND THE CHINA–US BIT NEGOTIATIONS

China became the second largest economy in the world in 2010.\textsuperscript{18} In the past three decades, the success of China’s economy largely came from its export-oriented economy, mainly trade in goods.\textsuperscript{19} However, the driving force of the world economy has gradually shifted from trade in goods to investment and trade in services.\textsuperscript{20} Since 2010, the export-oriented economy increasingly fails to sustain China’s long-term development,\textsuperscript{21} and the growth of China’s GDP has tapered.\textsuperscript{22} Chinese foreign business and economic laws used to focus on trade in goods,\textsuperscript{23} thus a rapid and profound legal reform needs to be made to remove restrictions on trade in services and investment.\textsuperscript{24} In this context, the Standing Committee of National People’s Congress established the Shanghai FTZ, the China (Fujian) FTZ, the China (Guangdong) FTZ, and the China (Tianjin) FTZ in 2013 and 2014.\textsuperscript{25} These four

\textsuperscript{15} Agreement between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments (hereinafter ‘the China–Canada BIT’), concluded on 9 September 2012 and effective on 1 October 2014.


\textsuperscript{23} Razeen Sappideen and Ling Ling He, ‘Reflections on China’s WTO Accession Commitments and Their Observance’, 43 Journal of World Trade 847 (2009), at 847.


\textsuperscript{25} The Framework Plan of China (Shanghai) Pilot Free Trade Zone issued by the Standing Committee of the National People’s Congress in China on 3 July 2013; Decision of the 12th Session of the 12th Meeting of the Standing Committee of the National People’s Congress on 28 December 2014, http://news.china.com.cn/2014-12/29/content_34428633.htm (visited 29 December 2014). The Shanghai
FTZs shoulder the historic mission as testing grounds to restructure the trade and investment legal system in China.26 Almost at the same time period, China sped up its BIT negotiations with the USA. For China, the significance and necessity of the China–US BIT go beyond promoting bilateral investment. This high-standard BIT with the potential to become an FTA in the future is critical for China to push its internal reform of trade and investment legal framework.27 The BIT is also important for China’s participation in global lawmaker. With the impasse of the Doha Round, more and more states resort to FTAs and BITs to further liberalize trade.28 For example, in the Asia Pacific, the USA is negotiating the Trans-Pacific Partnership Agreement (TPP) with 11 other countries.29 In the Atlantic, the USA and the EU have also begun talks for the Transatlantic Trade and Investment Partnership (TTIP).30 Negotiation for the Trade in Services Agreement (TiSA) in the WTO is also underway.31 TPP, TTIP, and TiSA have gone beyond the WTO Agreement and contain WTO-plus and WTO-extra rules.32 Moreover, a global regime for investment is emerging.33 China has not been fully represented in any of the above global law-making process.34

FTZ is 120.72 km², the Fujian FTZ is 118.04 km², the Guangdong FTZ is 116.2 km², and the Tianjin FTZ is 119.9 km².26 Because China’s FTZs are newly established, little scholarship has been published in English, for contemporary scholarship see e.g. Wei Shen, ‘A Tale of Three Zones - Promises and Pitfalls of Three Financial Experimental Zones in China’, 131 Banking Law Journal 399 (2014); Introducing the Shanghai FTZ: What to Expect from the Chinese Government’s Latest Foreign Investment and Trade Strategy (notes), 32 International Financial Law Review 38 (2013).


34 China is not a member to the TPP negotiations, see Shiro Armstrong, China’s Participation in the Trans-Pacific Partnership, East Asia Forum, 11 December 2011 http://www.eastasiaforum.org/2011/12/11/china-participation-in-the-trans-pacific-partnership/ (visited 10 October 2014). China expressed its willing to participate in the TiSA negotiation on 24 September 2013; but the TiSA negotiating members have not accepted China up to 16 August 2014. See US Signals Greater Caution on China’s Bit to Join

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Therefore, China is deeply concerned that it may be marginalized in the process of making new international trade and investment law.\textsuperscript{35} Against this backdrop, China actively negotiates the Regional Economic Cooperation Partnership, the China–Korea (CJK)–Japan FTA, the China–Australia FTA, and the China–EU BIT.\textsuperscript{36} Among all these efforts, the most important one is the China–US BIT, not only because China and the USA are the two biggest economies in the world, but also because the USA is the initiator of making high-standard international law in TPP, TTIP, and TiSA.

The establishment of China’s FTZs in the past two years prepares China for negotiations of high-standard BITs/FTAs, especially the China–US BIT.\textsuperscript{37} Because the contemporary Chinese trade and investment law is enacted according to the WTO Agreement,\textsuperscript{38} China is not sure whether such high-standard liberalization would hurt its economy and social stability.\textsuperscript{39} In this context, China needs FTZs as a testing ground to experiment how to reform its trade and investment system and what offer it can make in negotiating high-standard BITs/FTAs.

Moreover, in terms of legal implications, the four FTZs are fundamentally different from foreign-trade zones in the US\textsuperscript{40} and free trade zones in Singapore.\textsuperscript{41} The latters are bonded areas that are isolated from the other part of the countries.\textsuperscript{42} China’s four FTZs have greater nationwide legal significance: they have been considered as a pilot for the third round of reform in Chinese foreign trade and investment regulatory regime after China adopting the opening-up policy in 1978 and

\begin{itemize}
\item \textsuperscript{36} China’s action has been described as ‘aggressive legalism’ in international economic law, see Saadia Pekkanen, ‘The Socialization of China, Japan, and Korea (CJK) in International Economic Law: Assessment and Implications’, 104 American Society of International Law Proceedings 529 (2010), at 529–31.
\item \textsuperscript{37} If a state signs a high standard-BIT/FTA without cautious and repeated tests in its domestic economy, public uproar may take place, see Kie Yoon Kim, ‘Alternative Future for Trade-Oriented Countries: Lessons from the Korea-U.S. FTA’, 11 Dartmouth Law Journal 55 (2013), at 61–67.
\item \textsuperscript{40} Foreign-Trade Zones Board, 74th Annual Report of the Foreign-Trade Zones Board to the Congress of the United States (2012), at 1.
\item \textsuperscript{41} Singapore Free Trade Zones Act, enacted in 1966 and most recently revised in 2011, http://statutes.agc.gov.sg/aol/search/display/view.w3p?query=DocId%3A61924426-e056-401a-9d5f-3823b420080f%20Depth%3A0%20ValidTime%3A02%20F01%20011%20TransactionTime%3A02%20F03%201987%20Status%3AInfonce;rec=0 (visited 14 August 2014).
\item \textsuperscript{42} Mary Jane Bolle and Brock R. Williams, ‘U.S. Foreign-Trade Zones: Background and Issues for Congress’, Congressional Research Service (7-5700, r42686), 7 (2012).
\end{itemize}
entering the WTO in 2001; they symbolize a national strategy and also function as a nationwide model.\textsuperscript{43} For example, in 2014, much of successful experience in the Shanghai FTZ has been accepted by the central government and been implemented nationwide.\textsuperscript{44}

III. NEGATIVE LIST OF NON-CONFORMING MEASURES
In a negative list, any industries that are not included should be fully open to foreign investors, who can automatically receive no less favorable treatment than domestic investors.\textsuperscript{45} Non-conforming measures are the ‘exceptions’ to such a liberalized approach.\textsuperscript{46} High-standard BITs generally contain a negative list of non-conforming measures.\textsuperscript{47}

A. Non-conforming measures in US BITs
Negative list is a typical approach adopted by US BITs or FTAs to regulate foreign investment.\textsuperscript{48} The provision of non-conforming measures in the US–Korea FTA and the US 2012 Model BIT are alike and has four features. First, non-conforming measures are exceptions to national treatment, MFN treatment, performance requirements, and senior management and boards of directors. Second, non-conforming measures include measures adopted by the central, regional, and local governments. Third, negative list contains three annexes of non-conforming measures. Annex I lists any existing non-conforming measures. Any amendments on the measures shall not decrease their conformity.\textsuperscript{49} Annex II provides that parties may maintain existing non-conforming measures or adopt new or more restrictive ones.\textsuperscript{50} Annex III contains non-conforming measures for financial service.\textsuperscript{51} Annex III also affects investment, because commercial presence of a service supplier is a mode of cross-border trade in services,\textsuperscript{52} and moreover, loans, debt instruments (e.g. bonds and debentures), and derivatives (e.g. futures and options) are considered as investment.\textsuperscript{53}

\textsuperscript{44} Notice to Extend the Replicable Reform Experience of Shanghai FTZ to Nationwide, Guo Fa [2014] No. 65, published on 31 December 2014.
\textsuperscript{47} ‘Measure’ includes any law, regulation, procedure, requirement, or practice. See e.g. Article 1.4. of the US–Korea BIT.
\textsuperscript{49} E.g. Article 11.12.1 (a) of the US–Korea FTA.
\textsuperscript{50} Article 1 of Annex II Explanatory Notes.
\textsuperscript{51} E.g., Article 1.b and c of Annex III Schedule of Korea with respect to Financial Services, Introductory Note for the Schedule of Korea.
\textsuperscript{52} Article 12.1 of the US–Korea FTA.
\textsuperscript{53} Article 1 of the US 2012 Model BIT.
Fourth, national treatment, MFN treatment, and senior management and boards of directors do not apply to government procurement or government subsidies or grants.

B. Non-conforming measures in China’s BITs

Significantly different from US BITs, non-conforming measures rarely appear in China’s BITs. Only four BITs concluded by China mention non-conforming measures but none of them lists existing non-conforming measures. The China–Slovak BIT is the first BIT concluded by China indicating that national treatment does not apply to any existing non-conforming measures, their continuation and amendment that does not increase the measures’ non-conformity.\textsuperscript{54} The China–Swiss BIT further requires that contracting parties will endeavor to remove the non-conforming measures progressively.\textsuperscript{55} The China–Korea–Japan Investment Agreement indicates that each contracting party shall take, when applicable, all appropriate steps to remove all the non-conforming measures progressively.\textsuperscript{56} Although ‘shall’ is used in the China–Korea–Japan Investment Agreement, it is qualified by ‘when applicable’, which imposes only a best-effort duty upon parties to remove existing non-conforming measures. Different from the US–Korea FTA, the non-conforming measures in the China–Slovak BIT, the China–Swiss BIT, and the China–Korea–Japan Investment Agreement only apply to national treatment. Moreover, they neither provide a list of existing non-conforming measures nor clarify whether the existing non-conforming measures include those of the central, regional, and local governments. The China–Korea–Japan Investment Agreement leaves these issues to a joint committee for future discussion.\textsuperscript{57} The other two BITs are silent on this matter.

Although the China–Canada BIT does not list existing non-conforming measures, it is different from the China–Korea–Japan Investment Agreement in two aspects. First, non-conforming measures apply not only to national treatment but also to MFN treatment and senior management, boards of directors, and entry of personnel.\textsuperscript{58} But unlike the US–Korea FTA, the China–Canada BIT does not provide performance requirements beyond the scope of TRIMs.\textsuperscript{59} Therefore, non-conforming measures do not apply to performance requirements in the China–Canada BIT. Second, the China–Canada BIT clarifies that national treatment, MFN treatment, and the provision for senior management, boards of directors, and entry of personnel do not apply to government procurement, government subsidies or grants, and


\textsuperscript{55} Ad Article 4, paras (2) and (3) of the Protocol to the Agreement between the Government of People’s Republic of China and the Swiss Federal Council on the Promotion and Reciprocal Protection of Investments (hereinafter ‘the China–Swiss BIT’), concluded on 27 January 2009 and effective on 13 April 2010.

\textsuperscript{56} Article 3.3. of the China–Korea–Japan Investment Agreement.

\textsuperscript{57} Ibid, Article 24.

\textsuperscript{58} Article 8.2 of the China–Canada BIT.

\textsuperscript{59} Article 9 of the China–Canada BIT. The China–Korea–Japan Investment Agreement does not provide performance requirements beyond the scope of TRIMs, either. See Article 7 of the China–Korea–Japan Investment Agreement.
disposition of a government’s equity interests in an existing state enterprise or an existing governmental entity.\(^{60}\) This is the same as the US–Korea FTA.

Therefore, in terms of non-conforming measures, the key differences between the US’s BITs and China’s BITs are two-fold. First, China’s BITs do not contain a negative list of non-conforming measures. Second, China’s BITs are ambiguous about whether non-conforming measures include those adopted by regional and local governments.

C. Reasons for the differences

The differences between US’s BITs and China’s BITs can be traced back to Chinese domestic law, especially the Foreign Investment Industry Guidance Catalogue (hereinafter ‘Catalogue for Foreign Investment’) jointly published by the Ministry of Commerce (hereinafter ‘MOFCOM’ and National Development and Reform Commission. Since 1997, China has used the Catalogue for Foreign Investment to regulate foreign investment.\(^{61}\) The Catalogue for Foreign Investment divides Chinese domestic industries into three categories: ‘encouraged’, ‘restricted’, and ‘prohibited’. The ‘encouraged’ category covers industries in which foreign investment is eligible for benefits, such as greater flexibility of foreign ownership, lower levels of governmental review, and tax and other investment incentives. The ‘restricted’ category covers industries in which foreign investment is subject to a higher level of government scrutiny and restrictions, such as ceilings on foreign ownership and limitations on the choice of corporate forms (e.g. foreign investment is more likely to be limited to joint ventures instead of wholly foreign-owned enterprises). Industries listed under the ‘prohibited’ category are barred from foreign investment. In terms of format, the Catalogue for Foreign Investment is only slightly different from a typical negative list, as it has the ‘encouraged’ category. In substance, the Catalogue for Foreign Investment is fundamentally different from a negative list, because industries not expressly listed in the Catalogue are not fully open to foreign investment. For example, the 2015 Catalogue for Foreign Investment clearly indicates that, besides the Catalogue, foreign investment is also restricted or prohibited in industries according to other national laws and regulations.\(^{62}\) Moreover, the encouraged category also includes restrictions on and prohibitions against foreign investment.\(^{63}\) For example, the accounting and auditing service are in the encouraged category but followed by a restriction: the chief partner shall have Chinese nationality.\(^{64}\)

\(^{60}\) Article 8.2 and 8.5 of the China–Canada BIT.


\(^{62}\) Article 14 of the restricted category and Article 12 of the prohibited category of the 2015 Catalogue for Foreign Investment.


\(^{64}\) Article 318 of the encouraged category of the 2015 Catalogue for Foreign Investment.
D. Breakthrough in China’s FTZs

China has agreed to adopt the negative-list approach in the China–US BIT.65 Because the negative-list approach significantly differs from the Catalogue for Foreign Investment, China needs a pilot to test whether its domestic governance can make a smooth transition. The pilot is the negative list of non-conforming measures published by the Shanghai FTZ in 2013,66 which was shortened in 2014.67

The negative list in the Shanghai FTZ is compiled in accordance with the Classification and Codes of National Economic Industry (2011) and includes 18 industries.68 The 2013 negative list has 190 special measures, covering 17.8% of all industries. Among them, 38 measures ban foreign investment and 74 restrict foreign investment. The list also deletes the ‘encouragement’ category in the Catalogue for Foreign Investment. The 2014 negative list decreases the number of special measures from 190 to 139, 26.8% less than the 2013 list. Among the 51 measures that have been eliminated, 14 special measures are revoked and open to foreign investment.69 Moreover, the 2014 list relaxes 19 special measures and clarifies some other measures in the 2013 list.70 Importantly, based upon the Shanghai 2014 negative list, on 20 April 2015, China released the national Special Administrative Measures (Negative List) on Foreign Investment Access to China Free Trade Zones (hereinafter ‘the 2015 FTZ Negative List’), reducing 17 non-conforming measures from the Shanghai 2014 negative list and also being more liberalized than the 2015 Catalogue for Foreign Investment.71 The 2015 FTZ Negative List is significantly different from the Catalogue for Foreign Investment, because it aims to regulate foreign and domestic investment equally and all industries not listed are automatically open except for reasons such as protecting national security, public order and culture, financial prudence, government procurement and subsidy, and taxation according to

66 The full name of the negative list is Special Administrative Measures (Negative List) on Foreign Investment Access to the China (Shanghai) Pilot Free Trade Zone, see http://en.shftz.gov.cn/Government-affairs/Laws/General/213.shtml, (visited 10 October 2014).
67 For a Chinese version, see http://www.china-shftz.gov.cn/PublicInformation.aspx?GID=8f7d8298-3462-4c6f-8ec8-8c42a315143c&CID=953a259a-1544-4d72-be6a-264677089690&MenuType=1 (visited 17 August 2014). No official English version is published yet.
68 ‘(S) Public management, social security and social organizations’ and ‘(T) International organizations’ are not subject to the negative list.
69 The other 37 eliminated measures are not meaningful, because 14 special measures are applied to both foreign and Chinese investments and thus do not have to repeat them on the list; and the rest 23 were consolidated with similar items and are not essentially ‘eliminated’ from the list.
its Article 3. This symbolizes that the Chinese government is making a landmark transition of the approaches to regulate foreign investment.

E. Insights for the China–US BIT

China has implemented its first negative list of non-conforming measures in the Shanghai FTZ. Although laudable, it is only a preliminary foundation for China to propose a negative list of non-conforming measures for the China–US BIT. Referring to the US–Korea FTA, the following issues are of importance when considering non-conforming measures for the China–US BIT negotiation.

1. Format

Unlike the three annexes of the US–Korea FTA, neither the 2014 Shanghai negative list nor the 2015 FTZ Negative List distinguishes which special measures may be continued or amended in the future and become less restrictive for foreign investment, or vice versa. For two reasons, the current format of the Shanghai negative list is inappropriate for the proposed negative list of non-conforming measures in the China–US BIT negotiations. First, it may send a misleading message to foreign investors: the negative list only contains non-conforming measures that may be removed sooner or later, and non-conforming measures could be continued or amended if the amendment would not decrease the conformity of the measure as it was immediately before the amendment. Consequently, this misleading message may create an improper expectation in the public that the list will only become shorter in the future, and all non-conforming measures may be eased in the long run. Second, there may be certain new industries that do not exist currently but may develop in the future. Under the current format, all industries that are not named in the list are presumed to be open to foreign investment. Therefore, new industries will be automatically open to foreign investment.

Drawing lessons from the 2014 Shanghai negative list and the 2015 FTZ Negative List the negative list in the China–US BIT may be divided into at least two groups. One group contains the non-conforming measures that can be continued or amended, and the amendments should not decrease the conformity of the measure as it existed immediately before the amendment. The other group specifies the non-conforming measures, which the government may maintain, or adopt new ones or more restrictive ones than the existing ones in the named industries.

2. Substance

In terms of substance, the 2014 Shanghai negative list and the 2015 FTZ Negative List may also provide useful insights for the proposed negative list from the Chinese side in the China–US BIT negotiation. However, three improvements should be made.

First, identify the laws or regulations for each existing non-conforming measure.

A very critical difference between the negative list of the US–Korea FTA and that of the China’s FTZs is that the former identifies the laws or regulations each existing non-conforming measure is based upon but the latter does not. For example, in the
construction services sector, South Korea maintains a non-conforming measure against the local presence requirement.\textsuperscript{72} Annex I Schedule of South Korea of the US–Korea FTA identifies seven laws and relevant provisions which the non-conforming measure is based upon. Articles 69-72 of the 2014 Shanghai negative list maintain four non-conforming measures against the local presence requirement in construction services. However, it does not specify which law or regulation the measures are based upon.

The proposed negative list from the Chinese side should identify the laws or regulations each existing non-conforming measure is based upon. The benefits of this approach are demonstrated by a dispute under the North American Free Trade Agreement (hereinafter ‘NAFTA’): the US Trucking Services case.\textsuperscript{73} Mexico contends that the USA has violated the national treatment provision by taking measures that refuse to allow Mexican firms to provide cross-border trucking services into the border states, because the USA has committed to phasing out reservations on cross-border trucking services under Annex I of the NAFTA.\textsuperscript{74} In fact, very few applications made by Mexican trucking firms were approved by the US from 1995 to 2001. The US argues that Mexican trucking firms are not in like circumstances with US trucking firms in regards to highway safety, considering the inadequacies of the Mexican regulatory system.\textsuperscript{75} However, the arbitral panel notes that the phase out commitment is unconditional and the inadequacies of the Mexican regulatory system did not provide a reason to make an exception to the phrase ‘like circumstances’ even though the parties are allowed to refuse applications from foreign investors if they fail to satisfy the market access requirements in a certain section ruled by the parties.\textsuperscript{76} The panel also determines that the US’s refusal to approve Mexican investors’ applications was and remains a breach of the national treatment provision.\textsuperscript{77} As this case shows, identifying the laws or regulations for which each existing non-conforming measure is based upon can bring at least two benefits. First, it provides clear guidance for foreign investors, as they can find detailed information about the non-conforming measures in the named laws and regulations. Second, it also provides a clear framework for the host state to keep the government from implementing non-conforming measures beyond the limit of the named laws and regulations.

Second, specify non-conforming measures at the central, regional, and local level of governments.

The negative list of the US–Korea FTA contains non-conforming measures at the central, regional, and local level of governments.\textsuperscript{78} When China entered the WTO, it promised to carry out a uniform administration of the trade regime.\textsuperscript{79} Provincial and local governments should not maintain provincial or local non-conforming

\textsuperscript{72} Annex I-Korea-1 of the US–Korea FTA.
\textsuperscript{74} Ibid, paras 102–52.
\textsuperscript{75} Ibid, paras 153–63.
\textsuperscript{76} Ibid.
\textsuperscript{77} Ibid, para 295.
\textsuperscript{78} E.g. Article 11.12 of the US–Korea BIT.
\textsuperscript{79} Article 2 of China WTO Accession Protocol, WT/L/432, 23 November 2001.
measures.\textsuperscript{80} China will probably follow this practice in its BIT negotiation with the USA.\textsuperscript{81} The proposed negative list from the Chinese side in the China–US BIT negotiation should include non-conforming measures at the central, regional, and local levels. In this process, two issues should be carefully addressed.

For one thing, before the 2015 FTZ Negative List was published, different FTZs published their own negative lists and some of their contents are conflicting. Besides the Shanghai FTZ, Pingtan Comprehensive Pilot Zone in the China (Fujian) FTZ also published a negative list in 2014.\textsuperscript{82} The list contains 99 non-conforming measures on the conduct of business in Pingtan, and any sectors not on the list are open to foreign investors. For example, in the construction sector, the Pingtan list does not indicate any non-conforming measures, but the Shanghai list has four non-conforming measures ranging from the equity joint venture requirement to majority shares held by Chinese parties.\textsuperscript{83} Because each zone is in a different stage of economic development, their regulations towards foreign investment vary. Consequently, negative lists published by different FTZs are not the same. However, in the China–US BIT negotiation, China needs to propose a negative list containing national, regional, and local non-conforming measures. The 2015 FTZ Negative List helps standardize the conflicting negative lists published in different zones in China so that a unified negative list can be formulated for the China–US BIT negotiation.\textsuperscript{84}

For the other, the ‘measures adopted or maintained by a Party’ in the US–Korea FTA not only include governmental measures but also ‘non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities’.\textsuperscript{85} Delineating the administrative powers exercised by government-authorized non-governmental bodies is a serious challenge for China. China should figure out how many non-governmental bodies are authorized by the governments to regulate foreign investment at the central, regional, or local levels, what non-conforming measures are implemented by these non-governmental bodies, and what measures should be included in the negative list for the China–US BIT negotiation.

\textbf{Third, clarify restrictions to foreign investment.}

Many entries in the Catalogue for Foreign Investment do not clearly indicate what the restrictions to foreign investment are. For example, Article 19 of the prohibited category of the 2015 Catalogue for Foreign Investment indicates that foreign investment in legal consultation concerning Chinese law is prohibited. The 2015 FTZ Negative List clarifies that foreign law firms can provide legal services only by setting up representative offices, cannot provide legal services involving Chinese law, and cannot hire Chinese lawyers.\textsuperscript{86} These provisions clearly communicate to foreign investors what the restriction is. If the contents of a non-conforming measure are

\begin{itemize}
\item \textsuperscript{80} Ibid.
\item \textsuperscript{81} Baihua Gong, ‘Legal Analysis on the “Negative Listings” of the National Treatment for FDI into China (Shanghai) Pilot Free Trade Zone’, 6 World Trade Organization Focus 23 (2013), at 27.
\item \textsuperscript{82} Sun Li, ‘Pingtan pilot zone releases negative list’, http://usa.chinadaily.com.cn/business/2014-06/04/content_17562588.htm (visited 20 December 2014).
\item \textsuperscript{83} Entries 69–72 of the 2014 Shanghai Negative List.
\item \textsuperscript{84} Article 1 of the 2015 FTZ Negative List, indicating that it applies to the Shanghai FTZ, the Guangdong FTZ, the Tianjin FTZ, and the Fujian FTZ.
\item \textsuperscript{85} Article 11.1.3. of the US–Korea BIT.
\item \textsuperscript{86} Articles 79, 80, and 81 of the 2015 FTZ Negative List.
\end{itemize}
unclear, the contour of the negative list is also ambiguous. Therefore, the goal of investment liberalization may be hard to achieve. The proposed negative list by the Chinese side in the China–US BIT should clearly indicate each restriction to foreign investment.

IV. PRE-ESTABLISHMENT NATIONAL TREATMENT

A. National treatment clause in US BITs

The description of pre-establishment national treatment in the 1982 US model BIT is vague. According to Article 2, ‘each party ... shall permit such investments to be established and acquired on terms and conditions that accord treatment no less favorable than the treatment it accords in like situations to investments of its own nationals or companies’.87 ‘Permit’ is different from ‘accord’, making the pre-establishment national treatment more of an option rather than an obligation imposed by international treaties. Its Paragraph 2 provides that ‘each party shall accord existing or new investment in its territory of nationals or companies of the other party, and associated activities, treatment no less favorable than that which it accords in like situations to investments and associated activities of its own nationals or companies’.88 ‘Associated activities’ includes ‘the establishment, control and maintenance of branches, agencies, offices, factories, or other facilities for the conduct of business’,89 but ‘establishment of investment’ is not the equivalent to the pre-establishment stage of investment. Apparently, the 1982 US Model BIT cannot cover all activities related to the pre-establishment stage of investment. Therefore, although the US–Egypt BIT is based upon the 1982 US Model BIT, it changes the wording of ‘associated activities include’ to ‘associated activities ... include but are not limited to’. The purpose is to ensure national treatment can cover all activities related to the pre-establishment stage of investment.90

Although the USA strives to promote investment liberalization, it cannot commit to pre-establishment national treatment in all industries. As exceptions to the national treatment, the 1982 US Model BIT provides that each party reserves the right to maintain exceptions to the sectors or matters listed in the Annex and agrees to notify the other party of any future exceptions falling within the above-mentioned Annex.91 However, no such article exists in the US–Egypt BIT.

The US–Egypt BIT illustrates that a gap exists between the 1982 US Model BIT and the actual BITs signed by the USA regarding the treatment accorded to foreign investor/investment. In this context, the 1984 US Model BIT was enacted.92 Unlike

88 Ibid, para 2.
89 Ibid.
90 Article 2, para 2 of the Treaty Between the USA and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments (hereinafter 'US–Egypt BIT'), signed at Washington, 29 September 1982.
91 The US 1982 Model BIT, Article 3, para 3, (a).
the 1982 US Model BIT, the definition of ‘associated activities’ in the 1984 US Model BIT no longer includes the establishment, control, and maintenance of branches, agencies, offices, factories, or other facilities for the conduct of business, and it only contains the organization, control, operation, maintenance, and disposition thereof.\textsuperscript{93} The national treatment provision uses ‘activities associated therewith’ rather than ‘associated activities’ when describing the coverage of national treatment.\textsuperscript{94} Therefore, it is unclear whether the definition of ‘associated activities’ can be applied to the national treatment provision. Moreover, according to Article 2, each party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies.\textsuperscript{95} In conclusion, there is no article in the 1984 US Model BIT that explicitly states that parties are committed to offering pre-establishment national treatment.

According to the US–Turkey BIT, negotiated on the basis of the 1984 US Model BIT, pre-establishment national treatment has been clearly excluded.\textsuperscript{96} Its Article 2 paragraph 2 provides that each party shall accord to foreign investments, \textit{once established}, and associated activities, treatment no less favorable than that accorded in like situations to investments of its own nationals and companies.\textsuperscript{97}

Compared to the 1982 US Model BIT, the changes of wording in the national treatment provision in the 1984 US Model BIT may demonstrate that USA has made some concessions on pre-establishment national treatment after gaining experiences from the BIT negotiations between 1982 and 1984.

According to the 1994 US Model BIT, ‘with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments, each party shall accord treatment no less favorable than that it accords, in like situations, to investments in its territory of its own nationals or companies’.\textsuperscript{98} It also keeps the exceptions to national treatment listed in the Annex consistent with the 1982 US Model BIT.\textsuperscript{99} Compared with the 1984 US Model BIT, the most remarkable change in the 1994 US Model BIT is using ‘establishment, acquisition, and expansion’ directly in the national treatment provision, which emphasizes that pre-establishment national treatment is an obligation under an international treaty. Even though pre-establishment national treatment was clearly established in the 1994 Model, the provision did not gain complete acceptance by the US’s BIT partners after 1994. For example, according to the US–Mozambique BIT, parties shall generally ensure the better of the national or MFN treatment in both the entry

\begin{itemize}
\item \textsuperscript{93} Ibid, Article 1, para 1, (e).
\item \textsuperscript{94} Ibid, Article 2.
\item \textsuperscript{95} Ibid.
\item \textsuperscript{96} The Treaty Between the United States of America and the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments, with Protocol (hereinafter ‘the US–Turkey BIT’), signed at Washington on 3 December 1985.
\item \textsuperscript{97} Article 2, para 2 of the US–Turkey BIT.
\item \textsuperscript{98} Article II of Treaty between the Between the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investments, April 1994.
\item \textsuperscript{99} Ibid, Article II para 2.
\end{itemize}
and post-entry phases of investment. The same contents appear in the US–Albania BIT, the US–Georgia BIT, the US–Azerbaijan BIT, the US–Honduras BIT, the US–Bahrain BIT and the US–Lithuania BIT. However, the US–Latvia BIT and the US–Ukraine BIT adopt the same article as the 1984 Model by explaining ‘associated activities’ as economic activities including organization of facilities for business (namely not including ‘establishment’). Only the US–Croatia BIT completely accepts the pre-establishment national treatment provision in the 1994 US Model BIT, which shows the low acceptability of the pre-establishment national treatment in the US BIT negotiations in the 1990s.

The 2004 US Model BIT has the same national treatment provision as Article 1102 of NAFTA. According to Article 2, ‘each party shall accord to investors of the other party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion . . . of investments in its territory.’ So far, this structure of the national treatment provision has been adopted in most BITs signed by the USA, such as the US–Uruguay BIT, the US–Rwanda BIT and the US–Korea FTA, and it remains the same in the 2012 US Model BIT. Today, national treatment clauses in the US BITs and FTAs


105 Ibid, Article 2.

always apply to both pre-establishment and post-establishment stages of investment.\textsuperscript{107} It is important to note that there is no definition of ‘investors’ in previous US Model BITs. However, in the 2004 Model and 2012 Model, to coordinate with pre-establishment national treatment, ‘investor of a party’ means a party or state enterprise thereof, or a national or an enterprise of a party, that attempts to make, is making, or has made an investment in the territory of the other party.\textsuperscript{108} Obviously, ‘attempts to make’ and ‘is making’ refer to the pre-establishment stage in the national treatment provision.

B. National treatment clause in China’s BITs

After China’s opening-up, the first BIT that China concluded was with Sweden.\textsuperscript{109} Since then, as of 2014, China has signed 145 BITs (103 in force) and 17 (15 in force) multilateral investment treaties or FTAs containing investment provisions.\textsuperscript{110} From 1982 to 2002, China concluded about 100 BITs, out of which only 19 contained national treatment clauses.\textsuperscript{111} A typical feature of these early national treatment clauses is that national treatment is conditioned by language such as ‘endeavor’ and ‘in accordance with its laws and regulations’.\textsuperscript{112} This means offering national treatment is a state’s best-effort duty rather than compulsory obligation.\textsuperscript{113} After 2002, except for the China–Tunis BIT, the China–Rumania BIT and the China–Cuba BIT, all BITs concluded by China contain a national treatment clause with

\textsuperscript{108} Article 1 of the 2004 US Model BIT and 2012 US Model BIT.
\textsuperscript{111} Wei Wang, ‘Historical Evolution of National Treatment in China’, 39 International Law 759 (2005), at 777.
\textsuperscript{113} See Wang, above n111.
This shows that China is obliged to offer national treatment to foreign investment/investors. From 2002 to 2015, China further enhances its national-treatment obligations by eliminating restrictions such as ‘in accordance with its laws and regulations’ and ‘without damaging its laws and regulations’. The typical examples are the China–ASEAN FTA, the China–India BIT, the China–Canada BIT, the China–Korea–Japan Investment Agreement, and all BITs concluded (re-concluded) between China and EU states with the exception of the China–France BIT and the China–Malta BIT. This means in its BIT negotiations after 2002, China considers national treatment as an obligation under international law rather than under its domestic law.

In sharp contrast to the US BITs, only five BITs that China concluded divide investment activities into stages in the national treatment clause. The China–Finland BIT is the first to divide investment activities into operation, management, maintenance, use, enjoyment, expansion, sale, or other disposals. It requires each contracting party to accord investments by the other party treatment no less favorable than the treatment it accords to investments by its own investors. The national treatment clause in the China–Swiss BIT applies to the management, maintenance, use, enjoyment, or disposal of their investments. Notably, ‘expansion’ is deleted from the national treatment clause. The China–Canada BIT applies national treatment to expansion, management, conduct, operation, and sale or other disposition of investments. However, ‘expansion’ may be subject to prescribed formalities and other


115 These BITs are The Agreement between the Government of the People’s Republic of China and the Germany Concerning the Promotion and Reciprocal Protection of Investments (hereinafter ‘the China–Germany BIT’), signed on 1 December 2003 and effective on 11 November 2005; The Agreement between the Government of the People’s Republic of China and Finland Concerning the Promotion and Reciprocal Protection of Investments (hereinafter ‘the China–Finland BIT’), signed on 15 November 2004 and effective on 15 November 2006; The Agreement between the Government of the People’s Republic of China and Belgium and Luxembourg Concerning the Promotion and Reciprocal Protection of Investments (hereinafter ‘the China–Belgium and Luxemburg BIT’), signed on 6 May 2005 and effective on 1 December 2009; The Agreement between the Government of the People’s Republic of China and Slovak Concerning the Promotion and Reciprocal Protection of Investments (hereinafter ‘the China–Slovak BIT’), signed on 7 December 2005 and effective on 25 May 2007; The Agreement between the Government of the People’s Republic of China and Spain Concerning the Promotion and Reciprocal Protection of Investments (hereinafter ‘the China–Spain BIT’), signed on 24 November 2005 and effective on 1 July 2008; Additional Protocol Between the Government of the People’s Republic of China and Bulgaria Concerning the Reciprocal Encouragement and Protection of Investments (hereinafter ‘the China–Bulgaria BIT’), signed on 26 June 2007 and effective on 10 November 2007; and The China–Swiss BIT.

116 Article 2.3 of the China–Finland BIT.
117 Ibid.
118 Article 4.2 of the China–Swiss BIT.
119 Article 6.1 of the China–Canada BIT.
information requirements, and applies only to sectors not subject to the prior approval process under the relevant guidelines and laws at the time of expansion.\textsuperscript{120} The national treatment clauses in the China–Uzbekistan BIT and the China–Tanzania BIT are the same: national treatment is applied to operation, management, maintenance, use, enjoyment, sale, and other disposals of investment, but is subject to the laws and regulations of the host state.\textsuperscript{121} Therefore, China’s BITs do not offer pre-establishment national treatment to foreign investors/investment.\textsuperscript{122}

To conclude, whether to extend national treatment to the pre-establishment stage is a critical difference between China’s BITs and US BITs.

C. Reasons for the differences

China does not offer pre-establishment national treatment to foreign investment/investors in its BITs, because its regulatory system for foreign investment is different from the one for domestic investment. Only after obtaining approval from Chinese government may foreign investors invest in any non-prohibited industries under the Catalogue for Foreign Investment. Generally, an inbound foreign investment should go through seven steps of governmental approvals: (1) Anti-Monopoly Review by MOFCOM, if applicable; (2) National Security Review by MOFCOM and a Ministerial Panel, if applicable; (3) Pre-Approving Name and Obtaining Local Site-related Opinion Letters by State Administration of Industry and Commerce, Land and Resources Department, Environmental Protection Department, etc.; (4) Project Approval by National or local Development and Reform Commission or State Council; (5) Enterprise Approval by MOFCOM or local Commerce Department; (6) Regulatory Approval by relevant industry regulator, if applicable; and (7) Enterprise Registration with Administration for Industry and Commerce.\textsuperscript{123}

Among the seven steps, step (2) national security review and step (5) enterprise approval are only applicable to foreign investment, and do not apply to domestic investment. A national security review will be conducted if a foreign investor would obtain actual control of a domestic enterprise in sectors that ‘relate to national security’ as a result of mergers and acquisitions.\textsuperscript{124} MOFCOM or local commerce departments can request a foreign investor to submit a national security report, or a foreign investor may voluntarily file with MOFCOM if it believes that a transaction is subject

\textsuperscript{120} Ibid, Article 6.3.
\textsuperscript{121} Article 3 of the Agreement between the Government of the People’s Republic of China and Uzbekistan Concerning the Promotion and Reciprocal Protection of Investments (hereinafter ‘the China–Uzbekistan BIT’), signed on 19 April 2011 and effective on 1 September 2011; and Article 3 of the Agreement between the Government of the People’s Republic of China and Tanzania Concerning the Promotion and Reciprocal Protection of Investments (hereinafter ‘the China–Tanzania BIT’), signed on 24 March 2013 and effective on 17 April 2014.
\textsuperscript{122} Justin Carter, ‘The Protracted Bargain: Negotiating the Canada-China Foreign Investment Promotion and Protection Agreement’, 47 Canadian Year Book of International Law 197 (2009), at 228.
\textsuperscript{124} Article 1.1 of Notice of Establishing the National Security Review System for Foreign Investors Merger and Acquisition of Domestic Enterprises, issued by State Department on 3 February 2011, Guo Fa Ban [2011] No. 6.
to national security review.\textsuperscript{125} Moreover, foreign investors need to be approved by MOFCOM and local commerce departments in order to establish foreign invested enterprises.\textsuperscript{126}

Compared with domestic investors, foreign investors have to go through stricter procedures in step (4) project approval and step (6) industry regulator approval. According to the Catalogue of Investment Projects Subject to Government Approvals\textsuperscript{127} and Regulation for Approving and Filing of Foreign Invested Projects,\textsuperscript{128} the Development and Reform Commission should verify projects with a total investment (including capital increase) of at least $1 billion US Dollars and belong to the encouraged category in the Catalogue for Foreign Investment, and projects with a total investment (including capital increase) of at least $100 million US Dollars and belong to the restrictive category (excluding real estate) in the Catalogue for Foreign Investment. For projects that require approval by the State Department, the National Development and Reform Commission shall, upon review, report to the State Department for approval.\textsuperscript{129} Moreover, relevant industry regulators can impose license/permit requirements to foreign investors in the restrictive industries according to the Catalogue for Foreign Investment. For example, foreign investment made in the media should obtain permits from the General Administration of Press and Publication. However, this approval procedure may not be applicable to domestic investment. Because the Catalogue for Foreign Investment does not regulate domestic investment, they are exempted from industry regulator approval applicable to foreign investment.\textsuperscript{130}

D. Breakthrough in China’s FTZs

In China, Shanghai FTZ is the pilot to offer pre-establishment national treatment to foreign investors/investment. This unilateral investment liberalization aims to help the government accumulate experience regarding how to handle challenges brought by pre-establishment national treatment. This valuable experience is helping prepare China for the China–US BIT negotiation.

\textsuperscript{125} Articles 2 and 3 of Regulation to Implement the National Security Review System for Foreign Investors Merger and Acquisition of Domestic Enterprises, issued by MOFCOM on 25 August 2011.
\textsuperscript{126} Notice of Delegating Foreign Investment Approval Authority to Local Commerce Departments, issued by MOFCOM on 10 June 2010, Shang Zi Fa [2010] No. 209.
\textsuperscript{128} Regulation for Approving and Filing of Foreign Invested Projects, Fa Zhan Gai Ge Wei Li [2014] No. 12, published on 17 May 2014.
\textsuperscript{129} Article 11 of Catalogue of Investment Projects Subject to Government Approvals (2014 Version) and Article 16 of Regulation for Approving and Filing of Foreign Invested Projects.
\textsuperscript{130} Notably, in the financial industry, compared with foreign investment, Chinese private investment may be subject to stricter requirements of Financial Supervision Authority. This brings another hotly debated issue: equality between Chinese state investment and private investment. National treatment is a comparative concept. Compared with Chinese state investment, foreign investment is subject to stricter approval requirement in the financial industry; but compared with Chinese private investment, foreign investment actually enjoy more privileges in the pre-establishment stage. Because of the length restriction, this article cannot discuss equality between Chinese state investment and private investment. However, this issue is very important for understanding national treatment in the Chinese context.
The Shanghai FTZ abolishes step (5) enterprise approval of the pre-establishment procedure. According to the Regulation for Archival Filing Management of Foreign Invested Enterprises in the Shanghai FTZ, enterprise approval by MOFCOM or local commerce departments do not apply to foreign invested enterprises in industries not involving the non-conforming measures.\(^{131}\) Instead, an archival filing system is established.\(^ {132}\) Investors can file relevant information online.\(^ {133}\) MOFCOM or local commerce departments do not examine the substance of the filed information at the establishment stage of a foreign enterprise.\(^ {134}\) Instead, they publish filed information for public credit supervision and may inspect enterprises randomly after its establishment.\(^ {135}\)

Moreover, the Shanghai FTZ relaxes steps (4) project approval and (6) industrial regulator approval. Both the establishment and expansion of foreign invested enterprises, and the merger and acquisition between foreign invested enterprises and Chinese domestic enterprises are not subject to project approval by National or local Development and Reform Commission, unless the negative list of non-conforming measures are applicable or the State Department has special regulations.\(^ {136}\) Investors can simply file relevant documents online.\(^ {137}\) Industrial regulator approval is also relaxed according to the negative list of non-conforming measures\(^ {138}\) and the State Department’s regulation.\(^ {139}\) For example, in the Shanghai FTZ, wholly foreign-owned enterprises can operate international maritime cargo handling, international maritime container freight station, and container yard services.\(^ {140}\) But outside of the Shanghai FTZ, foreign investment must establish joint ventures to conduct these businesses.\(^ {141}\)

Although China has made valuable trials in extending national treatment to the pre-establishment stage in the Shanghai FTZ, compared to the US–Korea FTA, China needs to make further breakthroughs in project approval and industrial regulator approval. Moreover, when reviewing foreign investment for anti-monopoly reasons, China needs to treat foreign and domestic investments equally.

**E. Insights for the China–US BIT**

The experiment in the Shanghai FTZ has enhanced China’s confidence, and China has agreed to extend national treatment to the pre-establishment stage in the China–US BIT. When drawing up the BIT, China needs to consider the following five important aspects.

\(^{131}\) Article 2 of Regulation for Archival Filing Management of Foreign Invested Enterprises in the Shanghai FTZ, effective on 1 October 2013.

\(^{132}\) Ibid, Article 3.

\(^{133}\) Ibid, Article 4.

\(^{134}\) Ibid, Articles 11–13.

\(^{135}\) Ibid.

\(^{136}\) Ibid, Article 2.

\(^{137}\) Ibid, Article 5.

\(^{138}\) See infra Section 2.4 about the negative list of non-conforming measures in the Shanghai FTZ.

\(^{139}\) Special Regulation for Enlarging Market Access and Temporarily Suspending Relevant Laws and Regulations in the Shanghai FTZ, Guo Fa [2014] No. 38, effective on 4 September 2014.

\(^{140}\) Ibid, Article 1.

\(^{141}\) Article 29.1 of Regulation of Maritime Transportation.
The first is the national treatment clause. Article 3 of the 2012 US Model BIT and Article 11.3 of the US–Korea FTA indicate, ‘Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investment in its territory.’ Establishment, acquisition, and expansion refer to the pre-establishment stage of foreign investment. Moreover, when the the Organization for Economic Co-operation and Development (hereinafter ‘OECD’) negotiated the proposed Multilateral Agreement on Investment, an example was used to illustrate the meaning of pre-establishment stage: ‘the pre-establishment phase, i.e. the making of the new investment, including the participation in existing enterprises, by foreign or non-resident investors’. In contrast, the BITs and FTAs that China has concluded do not include establishment, acquisition, and expansion in the definition of national treatment. Therefore, the China–US BIT may become the first BIT signed by China to incorporate establishment, acquisition, and expansion in its national treatment clause.

Second, the pre-establishment national treatment is also demonstrated by a negative list of non-conforming measures. If a party does not want to offer pre-establishment national treatment in certain industries, the party should clearly state so in the negative list. For industries that are not stated in the negative list, the admission of foreign investment projects and establishment and transformation of foreign-invested enterprises shall adopt the filing system in China according to the national treatment principle. For industries stated in the negative list, the admission of foreign investment projects and establishment and transformation of foreign invested enterprises need to be approved by relevant Chinese governmental agencies.

Third, the meaning of pre-establishment national treatment can also be illustrated by the definition of ‘investor’. If a BIT or FTA offers pre-establishment national treatment, it should define ‘investor’ broadly. In Article 11.28 of the US–Korea FTA, the definition of ‘investor’ is ‘a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party’. In contrast, the China–Korea–Japan Investment Agreement defines ‘investor’ as ‘a natural person or an enterprise of a Contracting Party that makes investments in the territory of another Contracting Party.

142 Article 3 of the 2012 US Model BIT and Article 11.3 of the US–Korea FTA.
145 Article 11.28 of the US–Korea FTA. A same definition is provided in Article 1 of the US 2012 Model BIT. The footnote 8 of the leaked investment chapter of the TPP further explains that ‘for greater certainty, the Parties understand that an investor “attempts to make” an investment when that investor has taken concrete action or actions to make an investment, such as channeling resources or capital in order to set up a business, or applying for permits or licenses’. Footnote 8 of the leaked investment chapter of the TPP, http://www.citizenstrade.org/etc/wp-content/uploads/2012/06/tppinvestment.pdf (visited 29 August 2014).
Party’. This definition implies a much narrower scope than the one in the US–Korea FTA. In the China–Canada BIT, the definition of ‘investor’ covers any natural persons and enterprises that ‘seek to make’, ‘is making’, or ‘has made’ a covered investment. But its footnote 1 clearly indicates that ‘seek to make’ and ‘is making’ are only applicable to the MFN treatment and not national treatment. Similar wordings can also be found in footnote 9 of the Investment Chapter of the China–New Zealand FTA. In the China–US BIT negotiation, China should consider broadening its definition of ‘investor’ from investors who ‘has made’ investment to include also investors who ‘seek to make’ or ‘is making’ investment.

Fourth, offering pre-establishment national treatment requires a broader definition of ‘investment’ in the China–US BIT. Like the 2012 US Model BIT, the China–Canada BIT and the China–Korea–Japan Investment Agreement do not restrict ‘investment’ to that which has been ‘invested’ in the territory of the other contracting party. This is a positive progress, because many of China’s BITs define ‘investment’ as assets ‘invested’, which implies that only established investment is protected.

Fifth, besides a negative list, the China–US BIT may contain exceptions in special situations that can exempt a party’s national treatment to foreign investment. This is important for China because exceptions can help alleviate the challenges brought by the pre-establishment national treatment.

The US–Korea FTA provides that national treatment does not apply to government procurement or subsidies or grants provided by a party, including government-supported loans, guarantees, and insurance. Article 14 of General Agreement on Trade in Services (hereinafter ‘GATS’) (general exceptions and national security exceptions), including its footnotes is incorporated into and made part of the US–Korea FTA. Additionally, parties may be exempted from their obligations under the FTA for reasons such as essential security and taxation. The essential security exception enables a party to apply ‘measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security or the protection of its own essential security interests’.

146 Article 1 of the China–Korea–Japan Investment Agreement.
147 Article 1 of the China–Canada BIT.
148 Ibid.
150 Article 1 of the China–Korea–Japan Investment Agreement, Article 1.1 of the China–Canada BIT, and Article 1 of the 2012 US Model BIT. See also Article 1 of the China–Switzerland BIT.
152 Carter, above n 122, at 228.
153 Ibid, Article 11.12.5.
154 Article 23.1.2 of the US–Korea FTA.
155 Ibid, Article 23.2.
156 Ibid, Article 23.3.
157 Article 23.2 of the US–Korea FTA.
Notably, Footnote 1 of Chapter 23 of the US–Korea FTA indicates that if a party invokes essential security in international investment arbitrations, the tribunal shall find that the exception applies.\(^{158}\) Moreover, the scope of the essential security exception in the US–Korea FTA may include economic crises in certain situations, as well as military and political threats.\(^{159}\) Therefore, ‘essential security’ in the US–Korea FTA leaves a party additional leeway other than ‘essential security’ under Article XIV \(^{\text{bis}}\) of the GATS to deviate from national treatment.

The China–Korea–Japan Investment Agreement neither stipulates the contents of existing non-conforming measures nor provides other exceptions to national treatment. This makes the meaning of national treatment rather incomplete and imprecise. Although the China–Canada BIT does not contain details of existing non-conforming measures, it delineates several exceptions to national treatment.\(^{160}\) The first is national treatment does not apply to existing or future prohibitions or limitations on the ownership or control of equity interests/assets or nationality requirements when disposing of a government’s equity interests in, or the assets of, an existing state enterprise or governmental entity.\(^{161}\) The second is government procurement, subsidies or grants including government-supported loans, guarantees, and insurance.\(^{162}\) The third are derogations based upon international intellectual property agreements.\(^{163}\) All these exceptions fill in a gap in China’s previous BITs. However, compared with the US–Korea FTA, the exceptions in the China–Canada BIT can be further elaborated. For example, exceptions in other international agreements, except those about intellectual properties, are not incorporated. It is also unclear whether China can be exempted from offering national treatment for security reasons other than national security exceptions in the GATS. Moreover, taxation is not included. BITs concluded by China do not contain taxation as an exception to national treatment, which is problematic. Before 2008, in China, foreign-invested enterprises paid enterprise income tax according to the Enterprise Income Tax Law for Foreign Invested Enterprises, and the law offered a wide range of preferential taxes, among which the lowest enterprise income tax could be 15% of taxable income.\(^{164}\) However, other enterprises had to pay 33% of taxable income as enterprise income tax.\(^{165}\) The preferential tax was abolished after the Chinese Enterprise Income Tax Law was enacted in 2008.\(^{166}\) The enterprise income tax rate is unified between foreign-invested enterprises and other enterprises at 25%.\(^{167}\) If a BIT contains clauses

\(^{158}\) Footnote 1 of Chapter 23 of the US–Korea FTA.
\(^{160}\) Article 8 of the China–Canada BIT.
\(^{161}\) Ibid, Article 8.2.a.
\(^{162}\) Ibid, Article 8.5.
\(^{163}\) Ibid, Article 8.4. The China–Canada BIT also contains a fourth exception for national treatment, but this is especially for Peru. See Annex B.8 of the China–Canada BIT.
\(^{164}\) Articles 7–11 of Enterprise Income Tax Law for Foreign Invested Enterprises. This law came into effect on 1 July 1991 and abolished on 1 January 2008.
\(^{165}\) Articles 1 and 3 of Chinese Enterprise Tax Law Temporary Regulation, effective on 1 January 1994 and abolished on 1 January 2008.
\(^{166}\) Article 60 of Chinese Enterprise Tax Law, effective on 1 January 2008.
\(^{167}\) Ibid, Article 4.
such as treatment granted to investment once admitted shall in no case be less favorable than that granted at the time when the original investment was made, Chinese government may be in breach of the BIT if taxation is not considered as an exception.

Therefore, enhancing contents of the exception clause is very important for China. The Shanghai FTZ has proved a valuable exploration. Besides a negative list, it provides two additional exceptions to national treatment. First, foreign investment can be restricted or forbidden according to treaties concluded by China. Second, foreign investors shall not invest in projects that may harm China’s national and social security as well as public interests. "National and social security" as well as "public interests" are most often used as exceptions to judgment recognition and enforcement in judicial assistance treaties concluded by China. "National and social security" and "public interests" are generally considered as the Chinese equivalents to the "public policy exception" in the US conflict of laws. Similar languages can be found in the China–Germany BIT, which provides "public security and order, public health or morality" as exceptions to national treatment. The China–France BIT considers protecting and facilitating the diversity policy of culture and language as exceptions to national treatment. All these concepts should be narrowly defined as fundamental interests and values of a country. If measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised investment restriction, a state may take such measures for the sake of public interests. Moreover, a state may take any action necessary and appropriate for the protection of its essential security interests in time of war or armed conflict, or economic or political emergency.

China may propose to adopt "national and social security" and "public interests" or "essential security" in the China–US BIT on the condition that these concepts are narrowly construed. A footnote like footnote 1 of Chapter 23 of the US–Korea FTA should also be suggested so as to make the security exception self-judging. Arguably, two NAFTA cases offer useful insights for China to interpret the meaning of "public interests". In UPS v Canada, UPS is a US corporation running postal services in Canada.

168 Shanghai 2014 negative list.
169 Ibid. Articles 1 and 2 of the State Council Measures for the National Security Review of Foreign Investment in Pilot Free Trade Zones, issued by the China State Department on 8 April 2015 and effective on 8 May 2015. Besides military equipment and areas, the scope of national security review also includes key culture, information technology products and services. The contents of the review can be extended to cultural security and public morality of the state.
172 Article 3 of the Protocol to the China–Germany BIT.
173 Article 4 of the China–France BIT.
service in Canada, which claims that Canada Post has breached the national treatment provision under NAFTA because Canada Post can get services similar to brokerage services from Canadian Customs and perform certain Customs function that are not available to UPS. Furthermore, UPS pays costs of transition and infrastructure systems that Canada Post gets free. The tribunal held that Canada, as all member countries of the World Customs Organization, distinguishes between courier and postal traffic on the basis that postal administrations and expert consignment operators have different objects and mandates, and transport and deliver goods in different ways and under different circumstances. Therefore, the customs procedure adopted in Canada is in compliance with the Universal Postal Convention and the Kyoto Convention, since customs administrations around the world accord different treatment to postal traffic than to express consignment operators for the simple reason that circumstances are not alike. Thus, corporations competing in certain business areas may be legally treated differently when public interest has been accepted as a defense.

Nevertheless, there is a risk that the public interest exception could be misused to harm foreign investors’ interest. In SD Myers, S.D. Myers, Inc. contends that Canada issued the Interim Order aimed at protecting and promoting the market share of Canadian producers, but not in consideration of health or environmental concerns. The tribunal concluded that if there is another alternative measure that does less harm to foreign investors than the Interim Order, the Interim Order shall be considered unnecessary to achieve the above-mentioned goals. Consequently, it is significant for a state to figure out the necessity and irreplaceability of non-conforming measures taken for public interests in practice.

In conclusion, besides the exceptions in the China–Canada BIT, China may consider proposing other exceptions in treaties already concluded: taxation, national and social security, as well as public interests, as exceptions to national treatment in the China–US BIT negotiation.

V. TRANSPARENCY

A. Transparency clause in US BITs

Compared with the 2004 Model BIT, the 2012 Model significantly modified the transparency clause. This clause is the highlight of 2012 Model BIT. The 2004 Model requires the parties to publish laws, administrative regulations, and judicial decisions of general application in advance. However, the US–Korea FTA and the 2012 BIT make a more detailed requirement than the 2004 Model BIT regarding the channel of publications and the procedure and time for seeking public comments in legislation. According to Article 11.3 of the 2012 Model BIT, each party shall

177 Ibid, para 97.
178 Ibid.
179 Ibid, para 117.
180 Ibid, para 118.
182 Ibid, para 241.
183 Ibid, para 221.
publish in advance the proposed regulations issued by its central government in a single official journal of national circulation and shall include in the publication an explanation of the purpose of and rationale for the proposed regulations. In most cases, each party shall publish the proposed regulations not less than 60 days before the date public comments are due; each party shall also at any time it adopts final regulations, address significant, substantive comments received during the comment period, and explain substantive revisions that it made to the proposed regulations in its official journal or in a prominent location on a government website. Although the US–Korea FTA requires the host state to seek public comments for proposed regulations, it only requires 40 days for the public comment period. Therefore, the 2012 Model BIT improves the transparency requirement.

More importantly, different from the 2004 Model BIT and the US–Korea FTA, the 2012 Model BIT adds a brand new standards-setting provision, requiring that each party shall allow persons of the other party to participate in the development of standards, technical regulations and conformity assessment procedures by its central government bodies, on terms no less favorable than those it accords to persons of its own. Regarding standards set by non-governmental standardizing bodies, the US 2012 Model BIT requires that each party shall recommend these bodies in its territory to allow persons of the other party to participate in the development of standards or conformity assessment procedures by those bodies. The standards-setting provision does not apply to sanitary and phytosanitary measures as defined in Annex A of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures; or purchasing specifications prepared by a governmental body for its production or consumption requirements. If a party violates the standards-setting provision, the State–State dispute resolution mechanism, rather than the investor–State dispute resolution mechanism, should be invoked.

The standards-setting provision only binds contracting parties’ central governments, so the local governments have no obligation to allow the other party’s investors to participate in the development of standards. This differs from the WTO Agreement on Technical Barriers to Trade, which requires that parties shall take all reasonable measures available to them to ensure that the technical regulations of local governments comply with the WTO Agreement. Moreover, although the standard and technical regulations are extensive, they are still confined to the field of trade in goods. This is because the standards and technical regulations are defined in reference to Annex 1 and 2 of the WTO Agreement on Technical Barriers to Trade. The 2012 US Model BIT also provides that ‘Consistent with Annex 1 of the WTO Agreement on Technical Barriers to Trade, three latter terms do not include standards, technical regulations or conformity assessment procedures for the supply of a service.’ Furthermore, footnote 14 of Article 11.8 stipulates: ‘a Party may satisfy

184 Article 11.3 of the 2012 US Model BIT.
185 Ibid, Article 11.8.a.
186 Ibid, Article 11.8.c.
187 Ibid, Articles 24.1 and 37.
188 Ibid, Articles 11.8.d.
189 Ibid.
this obligation by, for example, providing interested persons a reasonable opportunity to provide comments on the measure it proposes to develop and taking those comments account in the development of the measure’. This footnote is very ambiguous. For example, it does not specify what is ‘reasonable opportunity’, by what channel that investors can express their comments, and how seriously the government should take those comments into account so that the procedure of seeking comments will not be carried out superficially. Footnote 14 also does not specify whether the procedure for allowing persons of the other party to participate in setting standards should be consistent with Article 11.3 of the 2012 Model.\footnote{Ibid, Articles 11.3 (Articles 11.4) stipulates the procedure that each party shall follow for allowing persons of the other party to participate in enacting ‘regulations of general application’.} Footnote 14 plays a pivotal role in putting Article 11.8 into practice, and there are three possible ways to interpret it.

First, if the standards and technical regulations are published in the form of the ‘laws, regulations, procedures and administrative ruling of general application’ by the central government bodies of a contracting party,\footnote{Ibid, Article 10.1.} the standards and technical regulations may be considered as the ‘regulations of general application covered by this Treaty’ of Article 11.3. In this case, the procedure of public comments and comment period shall conform to Article 11.3.

Second, since ‘standards’ and ‘technical regulations’ are defined according to the WTO Agreement on Technical Barriers to Trade, the procedure of public comments and the comment period should also be consistent with the WTO Agreement. Notably, compared with the first interpretation (where Article 11.3 of the 2012 US Model BIT applies), the WTO Agreement on Technical Barriers to Trade is less stringent in ensuring persons of the other party participate in the development of regulations of general application. Contrary to the 2012 Model, the WTO Agreement on Technical Barriers to Trade does not require each party to ask the persons of the other party for opinions in the development of all standards and technical regulations, except those standards and technical regulations with significant effects.\footnote{Article 2.5 of the WTO Agreement on Technical Barriers to Trade.} For example, Article 2.5 of the WTO Agreement on Technical Barriers to Trade only stipulates ‘a member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation’.\footnote{Ibid.} In the WTO Agreement on Technical Barriers to Trade, the media requirement and the public comments period for publishing technical regulations are also less comprehensive than those in Article 11.3 of the 2012 BIT.\footnote{Article 2.9 of the WTO Agreement on Technical Barriers to Trade.}

Third, another possible interpretation of Footnote 14 is: the procedure to seek participation from investors of the other party should be no less favorable than what a party provides to its own nationals. Thus, the standards and technical regulation of general applications under Article 11.8 will be an exception to Article 11.3. This will give more flexibility to the host state.
Nevertheless, no matter how the 2012 Model BIT defines the procedure to seek participation of investors of the other party to design the standards and technical regulations, it complements and enhances the WTO Agreement on Technical Barriers to Trade. It also imposes a high requirement of transparency upon the central government of the host state.

**B. Transparency clause in China’s BITs**

Early in 1988, the China–Australia BIT required that each party make ‘public and readily accessible’ all laws and policies regarding investment, and if requested, provide copies of specified laws and policies to the other party or consult with them ‘with a view to explaining specified laws and policies’. The China–Korea–Japan Investment Treaty and the China–Canada BIT provide that, not only laws, regulations, and policies but also administrative procedures, administrative rulings, and judicial decisions of general application with respect to any matter covered by this agreement shall be promptly published. However, four significant differences exist between China’s BITs on one hand and the US–Korea FTA and the 2012 US Model BIT on the other. First, the China–Korea–Japan Investment Treaty and the China–Canada BIT do not specify through which channel the relevant measures should be published. Second, the China–Korea–Japan Investment Treaty does not require every proposed regulation affecting investment to be published for public comments, except regulations significantly affecting the implementation and operation of the relevant investment treaty. Different from the China–Korea–Japan Investment Treaty, the China–Canada BIT encourages, but does not impose an obligation upon, parties to publish in advance any measure that it proposes to adopt and provide a reasonable opportunity for public comments. Third, neither the China–Korea–Japan Investment Treaty nor the China–Canada BIT requires the host state to respond to public comments when publishing the final version of regulations. Fourth, no provision about public participation in standards setting exists in the China–Korea–Japan Investment Treaty and the China–Canada BIT. In the China–New Zealand FTA only, parties agree to establish a committee, body, or network for standards-related measures. Overall, these differences illustrate the gap between the US and China in their previous BIT practices, which may pose challenges to their BIT negotiations.

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195 Article 6 of the China–Australia BIT. Six subsequent BITs concluded by China also have similar provisions: Article 2.4. of the China–Turkey BIT, Article 10 of the China–Latvia BIT, Article 12.1 of the China–Finland BIT, and Article 19 of the China–ASEAN BIT.

196 Article 10.1 of the China–Korea–Japan Investment Treaty. Article 17.1 of the China–Canada BIT requires that laws and policies affecting a covered investment shall be made public and readily accessible.


199 Article 17.3 of the China–Canada BIT.

200 Article 99 of China–New Zealand FTA.
C. Reasons for the differences

Although the transparency clause in the BITs concluded by China has helped to promote the rule of law in China, Chinese law on public participation in legislation is still rather ambiguous and incomplete.

Chinese Legislation Law states that laws, regulations, procedures, and administrative rulings with general application shall be published in government gazettes and websites as well as newspapers of national circulation. Chinese Regulation for Publishing Government Information also requires that administrative agencies take the initiative to publish government information by channels such as government gazettes, government websites, news conferences, newspapers, broadcast, and television. An issue is that Chinese law does not require proposed laws to be published in a single official journal. Laws enacted by the National People’s Congress are published in government gazettes of the Standing Committees of the National People’s Congress. Other regulations, procedures, and administrative rulings are published in government gazettes of the state department or relevant ministries. Advisably, centralizing publication in a single journal of national circulation could help investors becoming acquainted with measures affecting investment.

Moreover, although Chinese Legislation Law requires legislators to seek interested parties’ comments for proposed measures, it neither specifies the scope of interested parties nor sets a minimum or maximum time period for comments. In practice, some proposed Chinese laws seek comments from the general public, but some are released only to a small number of interested parties.

Further, although Chinese Legislation Law provides various methods that may be adopted to gather public opinions, such as panel discussion, feasibility study meeting, and hearings, it does not require legislators to respond to public comments when publishing the final version of a measure. In practice, Chinese legislators rarely provide formal responses to public comments. An important improvement was made in the 2015 amendment of the Chinese Legislation Law. Its Article 37 provides that the Standing Committee of the National People’s Congress shall publish proposed laws for public comments except the Chairman of the Standing Committee decides otherwise, the public comment period shall be not less than 30 days, and the public should be informed about the results of comments. It waits to be seen whether the Standing Committee would respond to public comments in substance.

D. Breakthrough in China’s FTZs

The Shanghai FTZ has made a fruitful attempt at clarifying the channel of publication, seeking public comments, and responding to public comments.

203 Article 15 of Chinese Regulation for Publishing Government Information.
204 Articles 58 of the Chinese Legislation Law.
205 Ibid, Articles 71 and 86.
206 Ibid, Articles 36 and 67.
First, Article 54 of the Regulation for Shanghai FTZ provides that the Shanghai FTZ Board shall publish national and local laws, regulations, procedures and administrative rulings concerning FTZs on the official website of the Shanghai FTZ. This aims to centralize publishing in a single forum. Arguably, International Business Daily or the official website of Chinese Ministry of Commerce could be used as the single journal to publish measures affecting investment for the China–US BIT.

Second, compared with the Chinese Legislation Law, Article 52 of the Regulations of Shanghai FTZ specifies that the Shanghai Municipal Government shall disclose drafts of proposed regulations, administrative procedures, and rules affecting the FTZ to the general public and seek comments. When enacting the Regulations of Shanghai FTZ, the draft was published for public comments for 15 days (from 23 April to 8 May 2014) on the FTZ official website. The Regulations for Shanghai FTZ does not specify how much time that drafts of proposed laws and regulations shall be released for public comments. In practice, the period for public comments may range from 14 days to 30 days. Therefore, regarding the duration of the period for public comments, a gap exists between the US and China.

Third, Article 52 of the Regulations of Shanghai FTZ states that the Shanghai Municipal Government shall address public comments received during the commenting period when publishing the final version of a regulation, and shall maintain a reasonable time period between publication and implementation. Article 37 of the 2015 Amendment of the Chinese Legislation Law was drafted by reference to Article 52 of the Regulations of Shanghai FTZ. Both of them impose a strict requirement on legislators to seek public comments. The Regulations can be considered as a pioneer to prepare for the China–US BIT negotiations. However, compared with the US 2012 Model BIT, Article 52 of the Regulations of Shanghai FTZ does not specify how the government should respond to public comments and what comment should be responded to. Arguably, Article 11.3 of the US 2012 Model BIT provides a good example for improving Article 52 of the Regulations of Shanghai FTZ. Shanghai Municipal Government does not need to address all public comments, but it needs to respond to significant, substantive comments received during the comment period when finalizing regulations concerning the FTZ.

E. Insights for the China–US BIT

In order to facilitate China’s negotiation with the USA, the transparency clause may be divided into five aspects: clarifying channels for publication, seeking public
comments, responding to public comments, accepting public participation in standards setting, and others aspects.

Regarding the first two aspects, the Shanghai FTZ has made valuable efforts in publishing proposed regulations in a single official channel and seeking public comments, and China should be able to accept relevant requirements under the US 2012 Model BIT. It, however, remains an issue how long the public comment period should be. Considering the US–Korea FTA adopts 40 instead of 60 days as the minimum time for public comments, China may be able to negotiate with the USA to shorten the public comment period.

Responding to public comments will be more challenging for China, because Chinese legislators are not used to doing so. However, the relevant provisions in the Regulations of Shanghai FTZ and the 2015 Amendment of Chinese Legislation Law are close to that of the US 2012 Model BIT, which demonstrates the Chinese government’s determination. Chinese legislators should address significant and substantive comments received during the comment period and explain substantive revisions it made to the proposed measures when publishing its final version. Otherwise, the public does not know that the legislators have considered their comments. Arguably, China should accept this requirement in the China–US BIT, because it can improve the quality and democracy of China’s legislation.

Accepting public participation in standards setting will be very controversial in the China–US BIT negotiations. China should be conservative in accepting this requirement, because it is a new clause in the US Model BIT that has not been adopted by any US BIT, and the above discussion also shows that its meanings are not clear. Moreover, China has not empowered domestic private investors to participate in the development of standards by the central government. If China accepts the standards-setting provision in the China–US BIT and allows foreign investors to participate in setting standards, it essentially fails to create a level playing field for all investors.

Other issues concerning transparency include due process in the administrative proceedings and anti-corruption. Ensuring due process in the administrative proceedings will not be controversial between China and the USA. Anti-corruption in international trade and investment will be a tricky issue. The US–Korea FTA includes anti-corruption as part of the transparency requirement. However, BITs and FTAs concluded by China do not contain promises to eliminate bribery and corruption in international trade and investment. An anti-corruption provision may be accepted by China in the China–US BIT because of the nationwide anti-corruption efforts endorsed by Chinese President Xi Jinping. As a one-party state, China has a long way to go in the anti-corruption campaign. Anti-corruption should be included as part of transparency requirements in the China–US BIT, because this not only attracts foreign investment but also helps enhance China’s political transparency and sustainable development.

VI. CONCLUSION

Professor Chen An, a famous Chinese jurist specializing in international economic law, once indicated ‘[t]o China, the process of future BITs negotiation is somewhat
like crossing the river. Without knowing clearly the depth, velocity, flow and whirlpools of the river water, one must be cautious when crossing the “river,” and should not take anything for granted and drift along with the “stream”. This statement is especially true for the China–US BIT negotiations, as the USA is the strongest economy in the world and has the most sophisticated experience in making international investment law. When Deng Xiaoping implemented the opening-up policy, he emphasized that China should ‘cross the river by feeling the stones’. This means China needs to test each step cautiously before taking it. China’s FTZs function as the testing stones for the China–US BIT negotiations. Although China’s FTZs has been established for a little more than one year, they have created positive results in practice. The negative-list of non-conforming measures, pre-establishment national treatment, and transparency requirements are among best insights that China’s FTZs offer to the China–US BIT negotiations. In the long run, China’s FTZs will further contribute to China’s negotiations of high-standard BITs/FTAs.


214 E.g. in the first half of 2014, 1016 foreign-funded projects worth $5.4 billion US Dollars were launched in the FTZ. The number accounted for nearly half of all foreign-funded projects in Shanghai and nearly 20 percent of projects launched in the zone. See ‘Foreign Investment in FTZ Picks Up’, http://en.china-shftz.gov.cn/News-Information/News-update/237.shtml (visited 22 August 2014). 12,000 firms have been established in the Shanghai FTZ since its launch in 2013. This number is larger than the total number of firms established in this area in the last decade. See ‘China to lift restrictions on foreign investment in Shanghai FTZ’, http://en.shftz.gov.cn/News-Information/News-update/324.shtml (visited 12 October 2014).