CHINA'S LIBERALISATION OF LEGAL SERVICES UNDER THE CHAFTA: MARKET ACCESS OR LACK OF MARKET ACCESS FOR AUSTRALIAN LEGAL PRACTICES

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China's Liberalisation of Legal Services under the ChAFTA: Market Access or Lack of Market Access for Australian Legal Practices

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This article explores China's commitments to liberalising legal services under the recently concluded China – Australia Free Trade Agreement (ChAFTA). While China's ChAFTA commitments extend beyond its commitments on legal services under the World Trade Organisation and under most of China's other FTAs, we argue that the degree of liberalisation under the ChAFTA has been over-stated. The ChAFTA does not create additional market access for Australian legal practices as it merely recognises the existing practice in the Chinese market and the same market access granted to Australia has been extended to all other foreign legal practices by initiatives launched in the Shanghai Free Trade Zone. Further, the ChAFTA fails to lift the major regulatory barriers to foreign legal practices in China. Consequently, Australian law firms will continue to compete with other foreign law firms in the same regulatory environment. China is likely to continue to unilaterally liberalise its legal services market via the free trade zones; but such liberalisation is likely to be applied to all foreign legal practices. Towards this end, the benefits that the ChAFTA would bring to Australian legal practices are likely to be two-fold: (1) increased business opportunities in cross-border transactions, and (2) strengthened confidence in doing business in China.

1 INTRODUCTION

The landmark China – Australia Free Trade Agreement ("ChAFTA"), concluded in November 2014 and signed in June 2015, entered into force on 20 December 2015.[1] Australia has high expectations on the opportunities that the ChAFTA is to create for its businesses in its largest export market.[2] Overall, Australia's expectations are not untenable given the widespread and in many areas unprecedented commitments that China has made to

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[1] See Australian Government, Department of Foreign Affairs and Trade, China-Australia Free Trade Agreement, available at: http://dfat.gov.au/trade/agreements/chafta/Pages/australia-china-fta.aspx

[2] See, for example, Australian Government, Department of Foreign Affairs and Trade, Media Release – Historic China-Australia FTA enters into force, available at: http://trademinister.gov.au/releases/Pages/2015/ar_mr_151220a.aspx

significantly enhance market access for Australia's goods and services exports.[3] With respect to specific sectors, however, the exact degree of liberalisation is not easy to discern without a detailed analysis of the relevant commitments. This article examines China's commitments to liberalising the legal services sector under the ChAFTA with an aim to explore the market access that Australian legal services providers may actually gain and the challenges that they are likely to face.

Global expansion of law firms for market opportunities, profits and clients is one of the most remarkable and continuing trends in the process of globalisation.[4] Given the potential of the Chinese market, international law firms have strived to expand businesses into China in the past decades.[5] According to China's Ministry of Justice ("MOJ"), by 2014 a total of 170 foreign law firms, including 39 of the world's top 50 law firms, have established 225 foreign representative offices ("FROs") in China.[6] The expansion of foreign law firms in China paralleled the development and reforms of China's legal services sector and confronted considerable regulatory barriers. While western countries managed to open the Chinese market in the admission of China to the World Trade Organisation ("WTO"), China's WTO commitments on legal services have been proven insufficient to allow foreign law firms to expand presence and legal practice in China, hence the ongoing call for further liberalisation of the market.[7] Since its WTO membership, China has been active in regional cooperation and integration. China now has 13 free trade agreements ("FTAs") and is negotiating eight FTAs and conducting feasibility studies for five further FTAs.[8] Among the existing FTAs including the ChAFTA, China has made specific commitments on legal services in all but one FTA, that is, the China – ASEAN FTA. However, other than the arrangements between China and the Hong Kong and Macau Special Administrative Regions ("SAR"), China's FTA commitments have yet to lead to any fundamental change of its domestic regulatory regime on legal services. China's approaches to opening the market for HK and Macau legal practices, therefore, provide a model for its future liberalisation of legal services to all foreign legal service suppliers. As part of its economic reforms, China also made efforts to unilaterally liberalise the legal services market; however, the progress has been very slow due

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3 For a summary of the major commitments, see Australian Government, Department of Foreign Affairs and Trade, China-Australia Free Trade Agreement, Key Outcomes, available at: http://www.dfat.gov.au/trade/agreements/chafta/fact-sheets/Pages/key-outcomes.aspx http://trademinister.gov.au/releases/Pages/2015/ar_mr_151220a.aspx

4 See Jomati Consultants LLP, "The Next Wave: Globalisation after the Crisis", March 2010, available at: http://www.altmanweil.com/dir_docs/resource/b1834c69-8653-4fc8-961e-fee62e308ab8_document.pdf

5 Generally see Rachel E. Stern & Su Li, "The Outpost Office: How International Law Firms Approach the China Market", Summer 2015, *Law & Social Inquiry* 1-28.

6 See Ministry of Justice, Announcement No. 147 issued on 13 August 2014; also see INTELLIGEAST, Representative Offices of Foreign Law Firms in China, 2 August 2015, available at: http://zhihedongfang.com/article-12342/ (in Chinese)

7 See, for example, Mark A. Cohen, "International Law Firms in China: Market Access and Ethical Risks" (2012)8(6) *Fordham Law Review* 2569-2575; Liyue Huang, "The Legal Service Market in China: Implementation of China's GATS Commitments and Foreign Legal services in China" (2012)5(1) *Tsinghua China Law Review* 29-48.

8 China FTA Network, available at: http://fta.mofcom.gov.cn/english/index.shtml

to the cautious approach China took to avoid undue impacts of foreign competition on its own legal profession.[9] More recently, the launch of the Shanghai Free Trade Zone ("SHFTZ") in 2013[10] was significant as it creates enhanced market access for foreign law firms and provides a testing ground for further liberalisation across the nation.

All of the aspects above are relevant to our assessment of the implications for Australia's legal services suppliers under the ChAFTA. That is, to understand the opportunities and challenges that the ChAFTA would bring to Australian legal practices, it is crucial to examine China's WTO and FTA commitments on legal services so as to understand whether the ChAFTA has secured additional market access for Australian legal practices. Further, it is necessary to analyse China's domestic regulation of the provision of legal services by foreign suppliers so as to discover whether the ChAFTA has removed the regulatory hurdles confronting foreign legal services suppliers in China, and if so, to what extent. The analysis of China's regulatory framework necessarily involves an analysis of the relevant rules developed within the SHFTZ.

The article proceeds as follows. Section 2 provides an overview of China's economic environment for foreign services providers and in particular China's legal profession market and the position of foreign legal practices in the market. Section 3 conducts a comparison between China's ChAFTA commitments on legal services and those under the WTO and the other FTAs. It argues that while China's ChAFTA commitments extend beyond those under the WTO and most of China's other FTAs, they have failed to touch upon the major regulatory barriers to foreign legal practices in the Chinese legal market. Section 4 explores China's regulatory regime on legal services with a focus on the major regulatory constraints on the provision of legal services by foreign suppliers. As part of the analysis, the section examines the liberalisation of legal services within the SHFTZ. Section 5 offers observations on China's approach to liberalising legal services and the implications of its ChAFTA commitments on legal services for Australia's legal services suppliers. Section 6 concludes.

2 CHINA'S ECONOMIC REFORMS, LEGAL SERVICES MARKET AND AUSTRALIAN LEGAL PRACTICES

2.1 New Model of Development and New Opportunities

China's decades of rapid growth and its recent growth slowdown are both well-documented.[11] It is recognised that China's past development model based on government

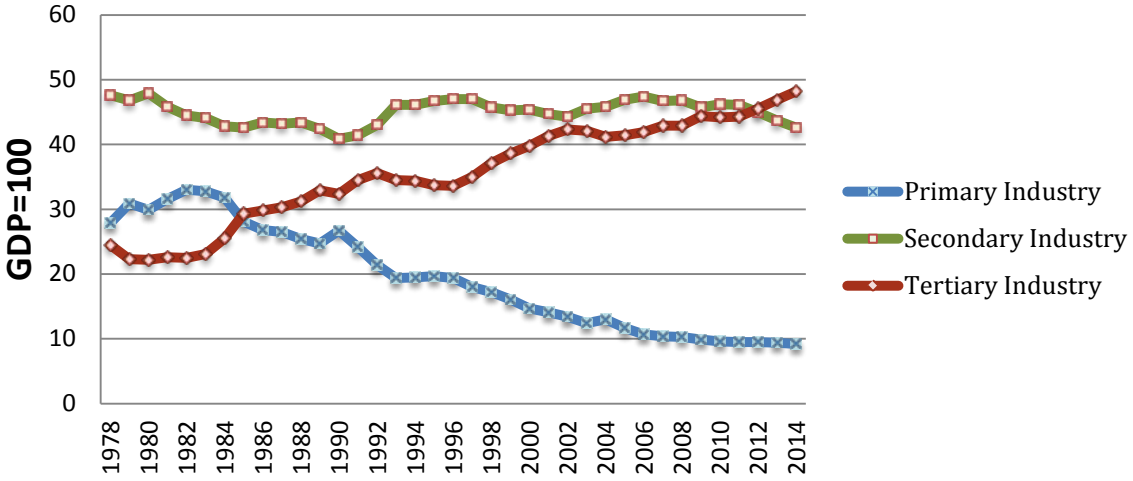
[9] Jane Heller, "China's New Foreign Law Firm Regulations: A Step in the Wrong Direction" (2003)12(3) *Pacific Rim Law & Policy Journal* 751-780 at 753-760.

[10] The homepage of the SHFTZ can be found at: http://en.china-shftz.gov.cn/

[11] See, for example, a recent study by the Asian Development Bank on the potential impacts of China's economic slowdown on Asian countries, Fan Zhai and Peter Morgan, "Impact of the People's Republic of China's Growth Slowdown on Emerging Asia: A General Equilibrium Analysis", ADBI Working Paper Series (No. 560), March 2016.

investment and exports has largely run its course and is not sustainable in the long term. The Chinese government, therefore, has launched a series of economic reforms to optimise its economic structure for sustainable development. The ongoing reforms, as affirmed in China's 13th Five Year Plan (2016-2020) and amongst other policy directives, aim to encourage investment in the services sector and as shown in Figure 2-1, have led to steady growth of the tertiary industry.

Figure 2-1 China's Industry Structure Distribution, Share of GDP (1978-2014)[12]



Consistent with the policy directive, the launch of the free trade zones in Shanghai, Guangdong, Fujian and Tianjin serves to create a regulatory and operating environment for testing new initiatives and market reforms, particularly in the services sector.[13] As a result, China's services imports have continued to grow in recent years and in 2015, accounted for 20.2% of China's total imports.[14]

China's new model of development, in furtherance of the development of a strong service and innovation-based economy, unleashes massive growth potential for foreign services providers in the Chinese market. Australia's economic growth relies predominantly on services. For example, in 2014-15, Australia's services sector represented approximately

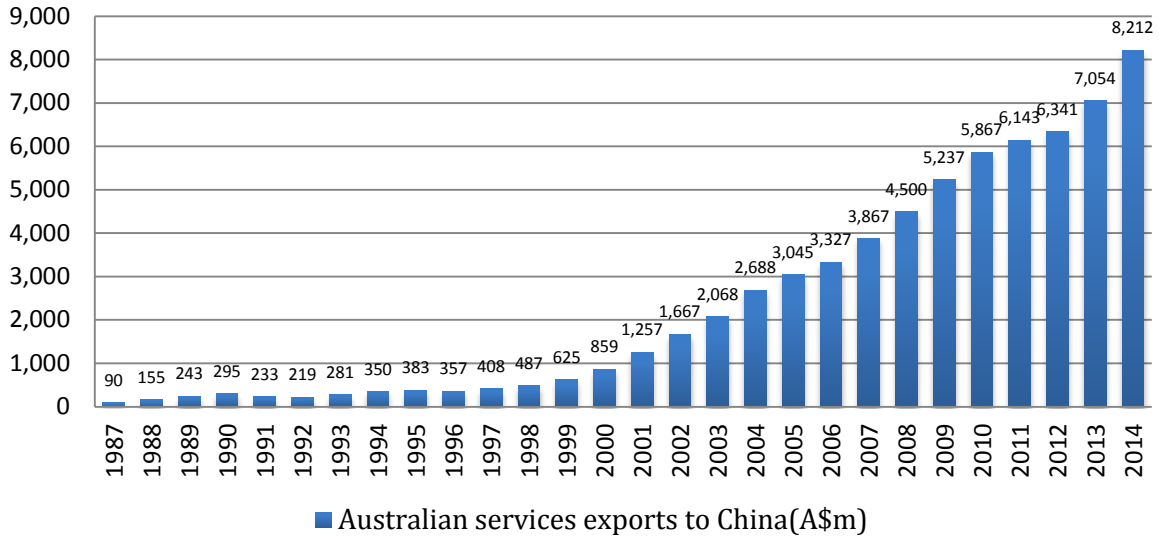
[12] The data is collected from National Bureau of Statistics of China, China Statistical Yearbook 2015, Table 3-7: Share of Contributions of the Three Strata of Industry and Main Sectors to the Increase of the GDP, available at: http://www.stats.gov.cn/tjsj/ndsj/2015/indexeh.htm

[13] See Helen Wong, "China's Free Trade Zones Will Accelerate Reform", The Australian Business Review, 3 April 2015, available at: http://www.theaustralian.com.au/business/business-spectator/chinas-free-trade-zones-will-accelerate-reform/news-story/ef5e52067b99bd3ec10dc2098425f59b. Also see, Jamil Anderlini, "New China Free Trade Zones to Lift Growth", Financial Times, 14 December 2014, available at: https://next.ft.com/content/dfac8e5e-834f-11e4-9a9a-00144feabdc0

[14] Ministry of Commerce of the People's Republic of China, Comprehensive Department, "Current Status of China's Services Trade", 10 May 2016, available at: http://zhs.mofcom.gov.cn/article/Nocategory/201605/20160501314855.shtml

60% of its GDP, worth around $970 billion.[15] In the same period, Australia's direct service exports amounted to $62 billion, accounting for approximately 20% of Australia's total value of exports.[16] China is the largest importer of services from Australia, with an average annual growth of 12% (by value) over the ten years up to 2014: see Figure 2-2.[17] Accordingly, the ChAFTA would contribute to both China's continuous economic reforms by attracting Australian services investors and the needs of Australian services providers to enter and grow in the Chinese market.

Figure 2-2 Australia's Services Exports to China (1987-2014)[18]



2.2 China's Legal Profession Market and Australian Legal Practices

The legal profession in China has developed rapidly over decades. By the end of 2015, the number of Chinese law firms had soared to almost 24,000 from approximately 70 in 1979, and the number of lawyers to 297,000 from approximately 200.[19] To enter the Chinese market, foreign law firms must take the form of FROs which was not permitted until 1992. Between 1992 and 2013, an average of twelve new international law firms per year have set up FROs in China's major cities (see Figure 2-3), particularly in Beijing, Shanghai and

[15] Australian Government, Department of Industry, Innovation and Science, Office of Chief Economist, "Australian Industry Report 2015", at 3, available at: http://www.industry.gov.au/Office-of-the-Chief-Economist/Publications/Documents/AIR2015.pdf

[16] Australian Government, Productivity Commission, "Barriers to Growth in Service Exports", Research Report (November 2015) at 2, available at: http://www.pc.gov.au/inquiries/completed/service-exports/report/service-exports.pdf

[17] Ibid., at 9.

[18] Australian Government, Department of Foreign Affairs and Trade, Trade Statistics: Australia's direction of goods & services trade – financial year (from 1986-87 to present), available at: http://dfat.gov.au/trade/resources/trade-statistics/Pages/trade-time-series-data.aspx

[19] Sina.com.cn, News reports on 9th National Lawyer Representatives Conference held on 30 March, 2016, available at: http://news.sina.com.cn/c/2016-03-30/doc-ifxqxcnp8227504.shtml (in Chinese)

Guangdong. In 2014, the number of FROs dropped slightly, partially due to the global mergers between law firms and the collapse of certain international law firms. For example, Australian firms Allens and Mallesons Stephen Jaques both closed their China offices as a result of, respectively, an alliance with Linklaters and a merger with Chinese firm King & Wood.

Figure 2-3 Number of International Law Firms in China (1992-2014)[20]

Despite the growing presence of foreign law firms in China, they face considerable challenges in the market. Besides stringent Chinese regulations of FROs (which will be discussed in section 4), foreign legal practices must compete not only with themselves but also with the huge number of Chinese law firms which generally enjoy a price advantage as they operate at significantly lower costs. Consequently, 70% of foreign law firms in China are reportedly not covering operating costs.[21] However, foreign law firms treat China as a marginal facet of their global businesses and a market too strategically important to abandon. Given the constrained Chinese market, foreign law firms have focused on pursuing high-end, non-litigation services related to foreign capital, such as cross-border mergers and acquisitions, overseas IPOs, technology transfer and IP protection, etc. Thanks to the surge in China's outbound foreign direct investment in the past decade with an average growth of 35% annually, foreign law firms have managed to grow their businesses in advising Chinese companies in cross-border transactions. China's continuous opening-up via both domestic initiatives and FTAs will continue to create increasingly more business opportunities for foreign legal practices. As China's first comprehensive FTA with a developed economy and its latest efforts at trade liberalisation, the ChAFTA has a great potential to create opportunities for Australian services suppliers in the Chinese market. Australia's law firms, while smaller in both numbers and scale than US and UK law firms in China, are among the

[20] The data is compiled by the authors from the annual list published by the MOJ between 1992 and 2014.

[21] Robert Lewis, "Ranking the Top Domestic and Foreign Firms in China-A Snapshot of the Present as a Basis for a Projection of Future Market Trends", July-August 2013, at 17, available at: http://www.zhonglun.com/UpFile/File/201309261413278376.pdf

most innovative and experienced providers of legal and business services in the world. With the gradual liberalisation of other types of services (such as architecture and engineering services) and the regulatory barriers to foreign investment between China and Australia[22], Australian legal practices are well-positioned to succeed in the Chinese market. Yet, the degree of success Australian legal practices would achieve largely depends on whether the ChAFTA has provided them with a competitive advantage over other foreign legal practices and has lifted the major regulatory hurdles in China.

3 CHINA'S LIBERALISATION OF LEGAL SERVICES

3.1 China's WTO Commitments on Legal Services

The WTO General Agreement on Trade in Services ("GATS") requires each WTO member to have a "Schedule of Specific Commitments" ("GATS Schedule") which sets out the service sectors that "the Member guarantees market access and national treatment and any limitations that may be attached."[23] An GATS Schedule typically contains "horizontal commitments" which apply to all sectors listed in the Schedule and "sectoral commitments" which set out specific commitments and limitations on market access and national treatment regarding each of the listed sectors or subsectors. All commitments and limitations are scheduled with regard to each of the four different modes of service supply, namely, (1) Cross-Border Supply (i.e. services provided remotely by suppliers in one Member via electronic means, the post, etc. to clients in another Member); (2) Consumption Abroad (i.e. customers from one Member enter the territory of another Member to obtain services); (3) Commercial Presence (i.e. services suppliers of one Member establish a presence in the territory of another Member to provide services); and (4) Presence of Natural Persons (i.e. persons of one Member enter the territory of another Member to supply services).

Upon its accession to the WTO, China made specific commitments to opening its legal services sector. Under its GATS schedule,[24] China committed to not imposing restrictions on the provision of legal services by foreign suppliers by way of Cross-Border Supply or

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[22] According to the International Legal Services Advisory Council, investment flows are an important driver of demand for exports of legal services. See Australian Government, International Legal Services Advisory Council, "Submission on Legal Services to the Department of Foreign Affairs and Trade in respect of the Indonesia-Australia Comprehensive Economic Partnership Agreement", March 2011, at 4, available at: http://dfat.gov.au/trade/agreements/iacepa/Documents/International-Legal-Services-Advisory-Council-submission-on-legal-services-4-Mar-11.pdf

[23] See Article XX of the GATS. The text of the GATS is available at: https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm. For an official introduction of the GATS, see WTO, Trade in Services Division, "The General Agreement on Trade in Services: An Introduction", 31 January 2013, available at: https://www.wto.org/english/tratop_e/serv_e/gsintr_e.pdf

[24] WTO, Report of the Working Party on the Accession of China, Addendum – Schedule CLII – The People's Republic of China, Part II – Schedule of Specific Commitments on Services & List of Article II MFN Exemptions, WT/ACC/CHN/49/Add.2 (1 October 2001). (GATS Schedule)

Consumption Abroad. However, various types of restrictions are maintained in relation to services supplied via Commercial Presence.

First, as mentioned above, foreign law firms must use representative offices to supply legal services in China. In the first year of accession, China imposed geographic and quantitative limitations on FROs, which were removed after 11 December 2002.

Second, the scope of legal services that FROs are allowed to provide is confined to the following:

> (a) to provide clients with consultancy on the legislation of the country/region where the lawyers of the law firm are permitted to engage in lawyer's professional work, and on international conventions and practices;
> (b) to handle, when entrusted by clients or Chinese law firms, legal affairs of the country/region where the lawyers of the law firm are permitted to engage in lawyer's professional work;
> (c) to entrust, on behalf of foreign clients, Chinese law firms to deal with the Chinese legal affairs;
> (d) to enter into contracts to maintain long-term entrustment relations with Chinese law firms for legal affairs;
> (e) to provide information on the impact of the Chinese legal environment.
> Entrustment allows the foreign representative office to directly instruct lawyers in the entrusted Chinese law firm, as agreed between both parties.

Essentially, FROs cannot provide legal services in relation to Chinese law but are only allowed to advise on laws of foreign jurisdictions where they are qualified and on international laws. To avoid any ambiguities, China explicitly excludes "Chinese law practice" from its specific commitments on legal services. This restriction on scope of services is further confirmed by clauses (c) and (d) above which require FROs to engage Chinese law firms for services relating to Chinese law via matter-based or long-term "Entrustment". Under an Entrustment arrangement, FROs are permitted to "directly instruct lawyers in the entrusted Chinese law firm". The only practice that FROs are allowed to undertake in relation to Chinese law is set out in clause (e), that is, to "provide information on the impact of the Chinese legal environment" ("Legal Environment Services"). Accordingly, it is generally understood that China's WTO commitments on legal services are intended to draw a clear line between legal services on matters relating to Chinese law and those on foreign and international laws and to restrict the practice of FROs to the latter.[25] A deviation from this general understanding arises from the controversies over the exact scope of the Legal Environment Services. While it was the expectation of some western countries that China's commitment on Legal Environment Services would allow foreign law firms to provide

[25] See, for example, above n 7, Huang, "The Legal Service Market in China", at 37; above n 5, Stern & Li, "The Outpost Office: How International Law Firms Approach the China Market", at 6-7; Julian Yang, "Legal Services Reform in China: Limitations, Policy, Perspectives, and Strategies for the Future" (2013)1(6) *Journal of Political Risk*, available at: http://www.jpolrisk.com/legal-services-reform-in-china-limitations-policy-perspectives-and-strategies-for-the-future/#more-9.

services on Chinese law[26], the expectation conflicts with the intention of the Chinese government which was not prepared to open the market. To clarify its position, Chinese regulators offered some guidance on what Legal Environment Services do not cover in domestic regulations issued to implement the WTO commitments, which will be discussed in section 4. As a matter of practice, it is strongly believed that China's domestic regulations have the effect of significantly limiting the legal services that FROs may provide in the Chinese market even though Chinese authorities have tended to give some leeway to FROs when enforcing the regulations. The entrenched position of the Chinese government is therefore to isolate domestic legal profession from foreign competition in relation to "Chinese law practice".

Third, FROs cannot employ Chinese national registered lawyers. As section 4 will show, this restriction is elaborated on and strengthened in the relevant Chinese regulations to reinforce the efforts to prevent FROs from engaging in "Chinese law practice".

Fourth, apart from some limited horizontal commitments applicable to all of the services sectors listed in China's GATS Schedule, China has made no specific commitments and hence can impose restrictions on the supply of legal services by temporary presence of foreign lawyers. The horizontal commitments allow senior employees of foreign law firms (i.e. managers, executives and specialists), as intra-corporate transferees ("ICTs"), to enter and temporarily stay up to three years in China. Further, service salespersons are allowed to enter and temporarily stay in China up to 90 days subject to conditions that such persons must not receive "remuneration from a source located within China" and must not be "engaged in supplying the service". These commitments, however, do not affect China's ability to use other measures such as visa policies to restrict the entry and stay of foreign lawyers. Finally, all representatives of a FRO must be residents in China six months per year ("Residency Requirement").

The restrictions contemplated in China's GATS Schedule do not exhaust the regulatory barriers foreign law firms may face in providing legal services in China. Other restrictions such as qualification requirements also limit the market access and business opportunities of foreign legal services providers.[27] However, the restrictions China maintains on foreign legal services providers are not uncommon. As noted by the WTO Secretariat, similar types of regulatory barriers also exist in many other jurisdictions, particularly restrictions on the type of legal entity, partnership with local professionals, the hiring of local professionals, and the movement of professional, managerial and technical personnel, as well as

[26] Andrew Godwin, "The Professional 'Tug of War': The Regulation of Foreign Lawyers in China, Business Scope Issues and Some Suggestions for Reform" (2009)33(1) *Melbourne University Law Review* 132-162 at 136-137.

[27] As a matter of practice, qualification requirements or such kind of domestic regulatory measures do not need to be scheduled under Articles XVI (Market Access) and XVII (National Treatment) of the GATS but are subject to Article VI of the GATS (Domestic Regulation).

qualification/licensing requirements, and residency and nationality requirements.[28] Therefore, China's committed level of liberalisation of legal services does not seem to fall short of the standard among WTO members.

3.2 China's Commitments on Legal Services under FTAs

As of 31 December 2015, China has made commitments on legal services in 12 of its FTAs. Like its WTO commitments, China agreed not to impose any restrictions on the supply of legal services by foreign providers via Cross-Border Supply or Consumption Abroad under the FTAs. Therefore, our discussions below focus on China's commitments in relation to the other two modes of services, in particular Commercial Presence.

(a). *FTAs Reproducing GATS Specific Commitments*

Eight FTAs essentially reproduce China's GATS specific commitments on the supply of legal services via Commercial Presence. These include the China – New Zealand FTA (2008)[29], the China – Singapore FTA (2009)[30], the China – Pakistan FTA (2009)[31], the China – Peru FTA (2010)[32], the China – Chile FTA (2010)[33], the China – Costa Rica FTA (2011)[34], the China – Iceland FTA (2014)[35], and the China – Switzerland FTA (2014)[36]. The commitments and restrictions on legal services under these FTAs, therefore, remain the same as those under the WTO.

(b). *FTAs with Minor Differences in Horizontal Commitments*

Four FTAs extend the period of temporary stay for services salespersons (which are also referred to as a type of "Business Visitors") from 90 days to six months and remove the restriction that such persons must not receive "remuneration from a source located within China". Business Visitors also include an investor or an authorised representative of the

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[28] WTO, Council for Trade in Services, Legal Services: Background Note by the Secretariat, S/C/W/43 (6 July 1998) at 8-11. (WTO Secretariat Note 1998); WTO, Council for Trade in Services, Legal Services: Background Note by the Secretariat, S/C/W/318 (14 July 2010) at 16-18.

[29] China – New Zealand FTA, China Schedule of Specific Commitments on Services, effective on 1 October 2008, available at: http://images.mofcom.gov.cn/gjs/accessory/200804/1208159672262.pdf.

[30] China – Singapore FTA, China's Schedule of Specific Commitments on Services, effective on 1 January 2009, available at: http://fta.mofcom.gov.cn/topic/ensingapore.shtml.

[31] China – Pakistan FTA, China's Schedule of Specific Commitments, effective on 10 October 2009, available at: http://fta.mofcom.gov.cn/pakistan/xieyi/chinachengruo_en.pdf

[32] China – Peru FTA, China's Schedule of Specific Commitments on Services, effective on 1 March 2010, available at: http://fta.mofcom.gov.cn/bilu/annex/bilu_fujian6_01_en.pdf.

[33] China – Chile FTA, Schedule of Specific Commitments - Schedule of China, effective on 1 August 2010, available at: http://fta.mofcom.gov.cn/chile/xieyi/zhongfangchengruo2.pdf

[34] China – Costa Rica FTA, Schedule of Specific Commitments – Schedule of China, effective on 1 August 2011, available at: http://fta.mofcom.gov.cn/topic/encosta.shtml

[35] China – Iceland FTA, China – Schedule of Specific Commitments – Schedule of China, effective on 1 July 2014, available at: http://fta.mofcom.gov.cn/iceland/xieyi/xieyifj07-zfcrb_en.pdf

[36] China – Switzerland FTA, China – Schedule of Specific Commitments, effective on 1 July 2014, available at: http://fta.mofcom.gov.cn/topic/enswiss.shtml (see Annex 6 on General Provision & Definitions and Annex 7 on Specific Commitments)

investor seeking to "establish, expand, monitor, or dispose of an investment of that investor" in China. Such investors or representatives are also entitled to a temporary stay up to six months. These FTAs include the China – New Zealand FTA[37], the China – Singapore FTA[38], the China – Peru FTA[39], and the China – Switzerland FTA[40].

In addition, China's FTAs with Pakistan, Chile, New Zealand, Peru, Costa Rica, and Switzerland do not include the following language which appears in China's horizontal commitments under the GATS:

> The conditions of ownership, operation and scope of activities, as set out in the respective contractual or shareholder agreement or in a licence establishing or authorizing the operation or supply of services by an existing foreign service supplier, will not be made more restrictive than they exist as of the date of China's accession to the WTO.

The impact of the absence of the language in the above-mentioned FTAs would be negligible. To the extent that the language applies to legal services, it requires China to at least maintain certain conditions of market access for FROs already established in China before its WTO accession. However, the language does not alter the various restrictions set out in China's specific commitments on legal services. In other words, restrictions on the form of legal entity, scope of activities, etc. remain applicable to the supply of legal services by foreigners in China regardless of the language. Further, all of these FTA parties (i.e. Pakistan, Chile, New Zealand, Peru, Costa Rica, and Switzerland) were already members of the WTO before the FTAs took effect. Therefore, it appeared unnecessary to include the language in the FTAs as China had assumed the obligations embedded in the language as part of its GATS commitments under the WTO.

Where the language is explicitly included in the China – Singapore FTA, the China – Iceland FTA, and the China – South Korea FTA[41], the following qualification is added:

> Any new sector and sub-sector scheduled after China's accession to the WTO shall not be subject to the preceding sentence.

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37 China – New Zealand FTA, China's Commitments on Temporary Entry by Natural Persons, available at: http://images.mofcom.gov.cn/gjs/accessory/200804/1208159917496.pdf

38 China – Singapore FTA, China's Commitments on Temporary Entry of Natural Persons, available at: http://www.fta.gov.sg/csfta/annex6_commitmentsontemporaryentryofnaturalpersons.pdf. For definitions of Business Visitors and ICTs, see: http://www.fta.gov.sg/csfta/chapter9_movementofnaturalpersons.pdf

39 China – Peru FTA, China's Commitments on Temporary Entry of Natural Persons, available at: http://fta.mofcom.gov.cn/bilu/annex/bilu_fujian7_en.pdf. For definitions of Business Visitors and ICTs, see: http://fta.mofcom.gov.cn/bilu/annex/bilu_xdwb_09_en.pdf

40 See above n 36.

41 China – South Korea FTA, China – Schedule of Specific Commitments, signed on 1 June 2015, available at: http://fta.mofcom.gov.cn/korea/annex/fujian8_A-2_zfcrb_en.pdf. China's horizontal commitments on the entry and temporary stay of ICTs and business visitors/salespersons are essentially the same as its WTO commitments with the allowed period of stay up to three years for ICTs and 90 days for business visitors/salespersons. See China – South Korea FTA, Annex 11-A-Section A: China's Specific Commitments on Movement of Natural Persons, available at: http://fta.mofcom.gov.cn/korea/annex/xdzw_en.pdf (pp. 107-108)

As discussed above, the inclusion of the language does not seem to alter China's specific commitments on legal services. Nor does the qualification seem to be applicable to the legal services sector which was scheduled at the time of China's entry into the WTO and hence was not a new sector.

(c). *China – South Korea FTA*

Under the China – South Korea FTA signed on 1 June 2015, China made additional / WTO-plus specific commitments on legal services, which are set out below:

> Korean law firms which has [sic] representative offices in China can provide legal services with Chinese law firms in the form of joint operation in Shanghai Pilot Free Trade Zone. During the period of joint operation, both parties' legal status, names and financial status are independent, each of the said parties bears its own civil liabilities. The clients of the joint operation are not limited to Shanghai. Korean lawyers in the joint operation are not allowed to deal with the Chinese legal affairs.
>
> Korean law firms which has [sic] representative offices in Shanghai Pilot Free Trade Zone and Chinese law firms can send lawyers to each other as legal consultants.

Accordingly, the additional commitments go beyond China's specific commitments under the GATS and all of the other FTAs discussed above by allowing Korean law firms to: (1) form joint operation, and (2) exchange lawyers as legal consultants with Chinese law firms in the SHFTZ. These commitments are worth further elaboration.

Under the first commitment, "joint operation", which may also be translated as "economic association", "commercial association" or "association", is a defined term under Chinese law. Under the *General Principles of Civil Law 1986*, a "joint operation" may be undertaken by forming an incorporated or unincorporated entity. [42] Evidently, the commitment only allows unincorporated entities given the condition that the cooperating parties must remain independent with regard to legal status, names, financial status and civil liabilities. Subject to the condition, the rights and obligations of the cooperating parties are negotiated and specified in their "joint operation" agreement. Further, there are no restrictions on the duration of "joint operation"; hence, both long-term and ad hoc / matter-based cooperation are permissible. Finally, "joint operation" can only be formed by Korean law firms that have already established an FRO in the SHFTZ[43] and must be undertaken within the SHFTZ. However, the clients that a "joint operation" can serve are not subject to any geographical restrictions. In addition, the restriction on scope of activity still applies so that Korean lawyers in a "joint operation" must not provide legal services in relation to Chinese law.

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[42] *General Principles of Civil Law of the People's Republic of China*, adopted at the 4th Session of the 6th NPC on April 12, 1986, effective on 1 January 1987; amended at the 10th session of the Standing Committee of the 11th NPC on 27 August 2009, effective on the same date, Articles 51-53.

[43] It is unclear from the English version of the commitment whether "joint operation" can only be formed by FROs of Korean law firms established in the SHFTZ. This is clarified to be the case in the Chinese version of the commitment, see http://fta.mofcom.gov.cn/korea/annex/fujian8_A-2_zfcrb_cn.pdf

The second commitment permits FROs of Korean law firms established in the SHFTZ to enter into contracts with Chinese law firms for the exchange of lawyers to act as legal consultants. Such consultancy arrangements should not be considered as an employment of Chinese lawyers by FROs of Korean law firms. Rather, it seems to be merely intended to allow secondment of Chinese qualified lawyers to FROs of Korean law firms to provide advice on matters relating to Chinese law. Further, such secondment arrangements can be undertaken within the SHFTZ only.

(d). *China – Australia FTA (ChAFTA)*

China's specific commitments on legal services under the ChAFTA[44] are essentially the same as those under the China – South Korea FTA, hence extending beyond China's commitments under the WTO and the other FTAs discussed above. These commitments are set out below:

> (1) In accordance with Chinese laws, regulations and rules, Australian law firms which have established their representative offices in the China (Shanghai) Pilot Free Trade Zone ("FTZ") may enter into contracts with Chinese law firms in the FTZ. Based on such contracts, these Australian and Chinese law firms may dispatch their lawyers to each other to act as legal counsels.
>
> This means Chinese law firms may dispatch their lawyers to the Australian law firms to act as legal counsels on Chinese law and international law, and Australian law firms may dispatch their lawyers to the Chinese law firms to act as legal counsels on foreign law and international law. The two sides shall cooperate within their respective business scope.
>
> (2) In accordance with Chinese laws, regulations and rules, Australian law firms which have established their representative offices in the China (Shanghai) Pilot Free Trade Zone ("FTZ") are permitted to form a commercial association with Chinese law firms in the Shanghai FTZ. Within validity of this commercial association, the two law firms of each side respectively have independent legal status, name, financial operation, and bear civil liabilities independently. Clients of the commercial association are not limited within the Shanghai FTZ. Australian lawyers in this type of commercial association are not permitted to practise Chinese law.

While different wording is used (e.g. "legal counsels" as opposed to "legal consultants"), the first commitment seems essentially the same as the commitment to allow the exchange of lawyers by way of consultancy arrangement under the China – South Korea FTA. The ChAFTA further clarifies that this commitment is intended to facilitate cooperation between Chinese and Australian law firms subject to the restriction that the lawyers dispatched under consultancy arrangements (i.e. secondees) can only provide legal services they are qualified to provide. This is to prevent Australian lawyers from engaging in Chinese legal practice.

The second commitment uses the term "commercial association" instead of "joint operation" which is used under the China – South Korea FTA. However, as the Chinese

[44] China – Australia FTA, China – Schedule of Specific Commitments, signed on 17 June 2015, available at: http://fta.mofcom.gov.cn/Australia/annex/xdwb_fj3-B_en.pdf

versions of the two FTAs use the same wording[45], the two English terms must be understood as referring to the same type of cooperation between Australian / Korean law firms and Chinese law firms. Thus, the commitment allows the forming of an unincorporated entity between Australian law firms having already established an FRO in SHFTZ and Chinese law firms within the SHFTZ. The commitment is subject to the same conditions applicable under the China – South Korea FTA.

As with China's horizontal commitments under some of the other FTAs discussed above, the ChAFTA allows a period of stay of up to three years for ICTs (i.e. senior employees) and six months for Business Visitors. However, the ChAFTA provides a slightly higher level of liberalisation by granting spouses and dependents of ICTs the same period of stay in China subject to the condition that the ICTs stay in China for more than 12 months.

(e). *The Closer Economic and Partnership Arrangement*

China signed a Closer Economic and Partnership Arrangement ("CEPA") with Hong Kong[46] and Macau[47] respectively in 2003. Given the unique position of the SARs in China's political structure, they are often used as "a testing ground for foreign policy by the Mainland Chinese authority." [48] Consequently, the overall level of liberalisation under the CEPAs extends beyond that which is under the WTO and the other FTAs.[49] Since the conclusion of the CEPAs in 2003, ten supplementary agreements have been entered into between the Mainland and each of the SARs between 2004 and 2013.[50] The level of liberalisation on legal services under the CEPAs is mainly reflected in the following commitments which permit (using HK as an example):

- HK law firms which have established representative offices in the Mainland to form "joint operation" or "commercial association" with Mainland law firms without

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45 China – Australia FTA, China – Schedule of Specific Commitments (in Chinese), signed on 17 June 2015, available at: http://fta.mofcom.gov.cn/Australia/annex/xdwb_fj3-B_cn.pdf

46 Mainland and Hong Kong Closer Economic and Partnership Arrangement, Mainland – Schedule of Specific Commitments, signed on 29 September 2003, available at: http://fta.mofcom.gov.cn/cepa/annex/1166497019777.pdf (in Chinese)

47 Mainland and Macau Closer Economic and Partnership Arrangement, Mainland – Schedule of Specific Commitments, signed on 17 October 2003, available at: http://fta.mofcom.gov.cn/cepa/annex/mo_4.PDF (in Chinese)

48 See above n 7, Huang, "The Legal Service Market in China", at 46-47.

49 For a summary of the Mainland – Hong Kong CEPA, see Henry S. Gao, "The Closer Economic Partnership Arrangement (CEPA) between Mainland China and Hong Kong – Legal and Economic Analyses" in Paul J. Davidson (eds.) Trading Arrangements in the Pacific Rim: ASEAN and APEC (New York: Oceana, 2004), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=752785. For an analysis of the economic impact of the CEPAs on the parties, see Chun Kwok Lei & Shujie Yao, "The Closer Economic Partnership Agreement between Mainland China, Hong Kong and Macau" ch 7 in Chun Kwok Lei & Shujie Yao, *Economic Convergence in Greater China: Mainland China, Hong Kong, Macau and Taiwan* (Routledge, 2009) 184-198.

50 Mainland and Hong Kong CEPA, see https://www.tid.gov.hk/english/cepa/tradeservices/leg_liberalization.html; Mainland and Macau CEPA, see http://www.cepa.gov.mo/cepaweb/front/eng/itemI_2.htm

geographic restrictions.[51] However, a number of other types of restrictions apply. First, "joint operation" is limited to at most three Mainland's law firms. Second, "joint operation" must not take the form of partnership. Third, HK lawyers in a "joint operation" must not practice Mainland law.

- Mainland law firms to employ HK qualified lawyers. However, the employed HK lawyers must not practice Chinese law;
- HK legal practitioners to practice as lawyers in the Mainland provided that they have had at least 5 years' experience in legal practice and have passed the National Judicial Examination ("NJE") as well as training and assessment offered by lawyers associations in the Mainland. Further, such HK legal practitioners are allowed to work at only one Mainland's law firm and must not at the same time be employed by FROs of any foreign law firms in the Mainland; and
- HK law firms to enter into contractual arrangement with Mainland law firms in Guangdong province, whereby Guangdong law firms may second Mainland lawyers to work as consultants on Mainland law in FROs of HK law firms in Guangdong.

On 27 and 28 November 2015, the Mainland entered into a "CEPA Trade in Services Agreement" with Hong Kong and Macau respectively, which took effect on 1 June 2016.[52] The agreements provide a negative list of restrictions on national treatment, meaning that the Mainland is not to maintain any restrictions on national treatment on HK or Macau services providers except for those listed. On legal services, the national treatment restrictions to be maintained include (using HK as an example):

- wholly HK-invested representative offices of HK law firms must not practice Mainland law or employ Mainland practising lawyers;
- cooperation between Mainland law firms and FROs of HK law firms is limited to the following ways: (1) secondment of lawyers as legal consultants to advise on the laws of their respective jurisdictions; (2) "joint operation" or "commercial association" based on contractual arrangements and their own authorised scope of practice; and (3) partnership in Guangzhou, Shenzhen and Zhuhai in accordance with the specific rules approved by the judicial administrative authority.

Accordingly, HK / Macau legal services providers are treated more favourably than those from other countries in many aspects. Essentially, HK / Macau law firms are subject to less geographical restrictions in cooperating with Mainland law firms and are entitled to form partnerships with Mainland firms in the designated cities. HK / Macau legal practitioners are

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[51] As discussed above, "joint operation" and "commercial association" are used interchangeably in China's commitments on legal services under the FTAs. In relation to an interpretation of the commitment under the CEPAs, see above n 26, Godwin, "The Regulation of Foreign Lawyers in China, Business Scope Issues and Some Suggestions for Reform", at 155.

[52] Mainland and Hong Kong CEPA Trade in Services Agreement, see http://www.tid.gov.hk/english/cepa/legaltext/cepa13.html; Mainland and Macau CEPA, see http://fta.mofcom.gov.cn/article/zhengwugk/201511/29558_1.html (in Chinese)

allowed to work for Mainland law firms as employees and to attend the required tests and trainings to become qualified to practice in the Mainland. The CEPAs and subsequent arrangements between the Mainland and the SARs represent the direction of China's future liberalisation of legal services. However, the fact that it took over a decade for the Mainland to commit to the above market-opening to HK / Macau suggests that China has been very cautious and is likely to continue to move slowly in liberalising its legal services market.

3.3 An Appraisal of China's ChAFTA Commitments on Legal Services

China's commitments on legal services under the ChAFTA reflect its most recent efforts and approaches to the liberalisation of legal services. As the major areas of liberalisation, the commitments relating to "commercial associations" and exchange of lawyers extend beyond China's commitments under the WTO and the other FTAs (with the exception of the CEPAs). However, as will be elaborated in section 4, the practical effects of the commitments may be very limited as they do not create additional market access for Australian legal practices compared to other foreign legal services providers. Rather, the ChAFTA commitments merely represent China's incremental recognition of certain existing practice in the market and have already been extended to all foreign legal practices through its domestic regulations within the SHFTZ.

Compared with the limited commitments discussed above, there are a number of market access commitments that Australia has failed to obtain in the ChAFTA negotiations. As correctly identified by the Law Council of Australia, these mainly include:[53]

- the right to enter into different forms of commercial associations (including partnership or incorporated legal practice) with Chinese law firms without geographical restrictions;
- the right for Australian law firms in China to undertake Chinese law practice or employ Chinese legal practitioners to do so;
- the removal of the Residency Requirement for ICTs;
- the removal of the citizenship restrictions for Australian citizens to gain admission in China; and
- mutual recognition of legal qualifications between Australia and China.

While some of the commitments above have been made available to HK or Macau legal practices only, others have not been offered by China in any existing FTAs. It is, therefore, not a surprise that Australia was unable to obtain these commitments. In this connection, the ChAFTA mandates that the parties continue to work together with a view to develop measures to enhance mobility for Australian and Chinese lawyers and promote closer cooperation between Australian and Chinese commercial law firms.[54] This provides a

[53] Law Council of Australia, "Discussion Paper – The Proposed China-Australia Free Trade Agreement: Key Issues Regarding Legal Practice in China for Australian lawyers" (Discussion Paper), 16 October 2013, at 21-30.

[54] China – Australia FTA, Side Letter on Legal Services, available at:

framework for negotiations of further liberalisation of legal services as legal services play an increasingly significant role in the growing economic activities between China and Australia. However, the mandate seems to be limited to the areas of liberalisation to which China has committed under the ChAFTA, that is, cooperation between Chinese and Australian law firms and their lawyers, and movement of legal professionals. This suggests that China has not been prepared to allow foreigners including Australian citizens to gain admission in China or to recognise Australian legal qualifications. On the latter point, the ChAFTA merely mandates the parties "to explore possibilities for mutual recognition of respective professional and vocational qualifications".[55] Last but not least, the ban of foreign law firms from providing services on Chinese legal matters including through the employment of Chinese lawyers to do so will not be lifted. In any event, China's further liberalisation of legal services to Australian law practices is unlikely to extend beyond China's commitments to HK and Macau but may follow the model of arrangements between the Mainland and the SARs. This suggests that further negotiations under the ChAFTA framework are likely to progress slowly such that significant market access for Australian legal practices may not be achievable in near future.

4 CHINA'S REGULATION OF FOREIGN LEGAL PRACTICES

As one of the focal approaches to promoting the growth of services sectors, Australia has been devoted to international trade negotiations with an aim to seek reduction or removal of barriers to its service exports especially those behind the border.[56] However, as indicated above, Australia has failed to do so in the negotiations of the ChAFTA in its goal to remove the major regulatory hurdles to its legal services suppliers in the Chinese market. This section examines these regulatory barriers and their implications for foreign legal practices.

4.1 Regulation of Foreign Investment in Legal Services Sector

The *Provisions Guiding Foreign Investment Direction 2002*[57] classifies foreign direct investment into four categories: "encouraged", "restricted", "prohibited" and "permitted" and mandates the relevant authorities to formulate a detailed catalogue for the first three categories with those not included in the catalogue deemed to be "permitted" (Article 4). The first such catalogue was issued in 1995 and subsequently amended many times.[58] Foreign

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http://dfat.gov.au/trade/agreements/chafta/official-documents/Documents/chafta-side-letter-on-legal-services.pdf

55 Article 8.15 of ChAFTA.

56 See above n 16, "Barriers to Growth in Service Exports", at 251-269.

57 Issued by State Council Decree No. 346 on 11 February 2002, effective on 1 April 2002.

58 *Catalogue of Industries for Guiding Foreign Investment*, promulgated by the State Planning Commission (SPC), State Economic and Trade Commission (SETC) and the MOFTEC, effective on June 20, 1995; amended in 1997 (by Order No. 9 of the SPC, the SETC and the MOFTEC), in 2002 (by Order No. 21 of the SPC, the SETC and the MOFTEC), in 2004 (by Order No. 24 of the NDRC and the MOFCOM), in 2007 (by

investment in legal consultation services has consistently been treated as a "restricted" category. In the current 2015 Catalogue, such investment is included in the "prohibited" list, meaning that foreign legal practices in China are prohibited from the provision of legal services on Chinese legal matters except for "the provision of information on the environmental impact of Chinese laws" (i.e. Legal Environment Services). This is consistent with China's commitments under the WTO and the FTAs.

As a general list, the catalogue provides little guidance for foreign investment in China's legal services sector in relation to the form of investment, the exact scope of business, the possibility of engaging Chinese lawyers and cooperation with Chinese law firms, etc. These are regulated by a number of specific legislations. As a general matter, the *Law on Lawyers*[59] allows foreign law firms to conduct business in China and empowers the State Council to develop relevant regulations (Article 58). The implementing regulations were originally in the form of provisional rules jointly formulated by several departments of the State Council[60], which were subsequently replaced by the State Council's *Regulations on Representative Offices of Foreign Law Firms in China 2001*[61] ("FRO Regulation").

(a). *Form of investment*

Under Article 6 of the FRO Regulation, foreign law firms are required to establish a representative office to conduct business in China and are prohibited from the practice of using offices of consulting firms for legal service activities.[62] The creation of FROs must be approved by the MOJ in accordance with the criteria contemplated in Article 7 of the regulation. The criteria encompass qualification requirements on FROs and their representatives and the requirement of an "actual need" for a foreign law firm to establish a FRO in China. This "actual need" requirement is elaborated in the implementation rules of the regulation to involve consideration of (1) the social and economic conditions and the needs for development of legal services in the area where the FRO is proposed to be established; (2) the size, date of establishment, principal areas of practice, business prospects and development plans of applicants; and (3) restrictions on the legal service activities by

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Order No. 57 of the NDRC and the MOFCOM), in 2011 (by Order No. 12 of the NDRC and the MOFCOM), and in 2015 (by Order No. 12 of the NDRC and the MOFCOM, effective on 10 April 2015).

59 Adopted at the 19th Session of the Standing Committee of the 8th NPC on 15 May 1996; amended on 29 December 2001, 28 October 2007, and 26 October 2012, effective on 1 January 2013.

60 *Provisional Rules on the Establishment of Offices by Foreign Law Firms in China*, issued by the Ministry of Justice and the State Administration for Industry and Commerce Order No. 004 on 26 May 1992, effective on the same date. FROs of HK or Macau law firms are regulated under separate rules. See *Rules on the Administration of Representative Offices of Law Firms from the Hong Kong Special Administrative Region and the Macao Special Administrative Region*, issued by the Ministry of Justice Order No. 70 on 13 March 2002, and amended by Order No. 84 on 30 November 2003, Order No. 104 on 22 December 2006, and Order No. 131 on 27 April 2015, effective on 1 June 2015.

61 Issued by State Council Decree No. 338 on 22 December 2001, effective on 1 January 2002. [FRO Regulation]

62 See also above n 26, Godwin, "The Regulation of Foreign Lawyers in China, Business Scope Issues and Some Suggestions for Reform", at 134.

foreign law firms under Chinese laws.[63] Further, the establishment of an additional FRO is not allowed until the most recently established FRO has operated for three consecutive years.[64] These conditions for the establishment of FROs are not inscribed in China's GATS Schedule or the ChAFTA. Therefore, China appears to have breached its obligations under these agreements by applying an economic needs test to applications of foreign law firms to establish FROs.[65] The broad drafting of the test is essentially intended to allow Chinese authorities to determine the number and location of FROs by discretion. In practice, the conditions may be abused by Chinese authorities to impose both geographic and quantitative restrictions on FROs and to delay the establishment of multiple offices by foreign law firms.[66]

(b). *Scope of activities*

Consistent with China's commitments under the GATS and the FTAs, the scope of activities of FROs is confined to legal services on laws of foreign jurisdictions in which their lawyers are qualified and on international laws and practice.[67] For all services on Chinese legal matters, FROs must engage a Chinese law firm to provide via Entrustment and are not allowed to make profits out of the Entrustment. As clarified in the implementing rules, Chinese legal matters may include the following activities: (1) participating in litigation in the capacity of lawyers; (2) providing opinions or certification on issues in written documents such as contracts, constitutions etc. to which Chinese law applies, or on acts or matters to which Chinese law applies; (3) representing clients in arbitration and advising on the application of Chinese law; and (4) representing clients in dealings with the Chinese government or authorised agents with administrative functions including in handling all sorts of formalities such as registration, alteration, applications, filing, etc.[68] Further, while FROs are permitted to provide "Legal Environment Services", they must not provide any specific opinions or judgments on the application of Chinese law and must not make profit from such services.[69]

Accordingly, as flagged in Section 3.1, the FRO Regulation and its implementation rules have offered clarifications on the permitted scope of business of foreign legal practices in China. It seems to be intended that foreign legal practices shall be banned from engaging in any forms of Chinese legal practice which shall exclusively fall within the business scope of Chinese law firms. In this connection, some observers with local experience take the view

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63 *Rules on the Implementation of the Regulations on Representative Offices of Foreign Law Firms in China*, issued by the Ministry of Justice Order No. 92 on 2 September 2004, effective on the same date, Article 4. [Implementation Rules]

64 Ibid., Article 10(1).

65 See Article XVI:2 of the GATS and Article 8.6 of ChAFTA. For an analysis of the potential WTO violations, see above n 53, Law Council of Australia, Discussion Paper, at 14-16.

66 See above n 9, Heller, "China's New Foreign Law Firm Regulations", at 771-772.

67 See above n 61, FRO Regulation, Article 15.

68 See above n 63, Implementation Rules, Article 32.

69 See above n 63, Implementation Rules, Articles 32 & 33.

that "Legal Environment Services" are limited to "preparing client newsletters and reporting generally on the impact of the Chinese legal environment for marketing purposes" and should in no case be considered to include services on any matter that is subject to, or governed by, Chinese law.[70] In practice, foreign law firms have been accused of undertaking extensive practice prohibited under the legislations, taking advantage of the regulatory ambiguity and more importantly the lax enforcement of the rules by Chinese authorities.[71] While the ambit of "Legal Environment Services" remains debatable, it is subject to the interpretation of the MOJ. This means the permitted scope of activities of foreign law practices may well be restricted as the MOJ considers necessary to strictly interpret and enforce the laws. Finally, the prohibition of foreign law firms from making profit out of Entrustment and "Legal Environment Services" confirms the intent of Chinese regulators to exclude FROs from Chinese legal practice and to preserve the market share and profits from such practice for the Chinese legal profession.[72] Collectively, the Chinese laws at least have the potential to constitute a complete denial of access of foreign law firms to the Chinese legal service market. Such restrictions are likely to considerably restrain the profitability of foreign law firms in China.[73]

In addition, both foreign law firms and their FROs are prohibited from undertaking the following activities: (1) direct or indirect investment in Chinese law firms; (2) alliance with Chinese law firms to share profits and risks; (3) establishment of a joint office with or secondment of foreign lawyers to Chinese law firms to provide legal services; (4) managing, operating, controlling or obtaining equity interest in Chinese law firms.[74] While the restrictions under item (3) have been relaxed under the ChAFTA and within the SHFTZ, the other restrictions remain firmly in place. The effect of these restrictions is to ensure the operations of Chinese law firms remain "independent from the influence of foreign law firms".[75]

(c). *Restrictions on employment of Chinese lawyers*

Article 16 of the FRO Regulation prohibits a FRO from employing Chinese lawyers. Specifically, the following activities are prohibited: (1) entry into employment agreement or *de facto* employment relationship with Chinese lawyers; (2) entry into agreement with Chinese lawyers to share profits and risks or allow involvement in management; (3) payment of remuneration, expenses or shared profits to Chinese lawyers; (4) engaging Chinese lawyers to provide services in the name of the foreign law firm or its FRO in China.[76] While

[70] See above n 26, Godwin, "The Regulation of Foreign Lawyers in China, Business Scope Issues and Some Suggestions for Reform", at 140-141; above n 7, Huang, "The Legal Service Market in China", at 40-41.
[71] See above n 26, Godwin, "The Regulation of Foreign Lawyers in China, Business Scope Issues and Some Suggestions for Reform", at 141-143; above n 7, Huang, "The Legal Service Market in China", at 45-46.
[72] See above n 7, Huang, "The Legal Service Market in China", at 41-42.
[73] See above n 5, Stern & Li, "How International Law Firms Approach the China Market", at 12-13.
[74] See above n 63, Implementation Rules, Article 39.
[75] See above n 7, Huang, "The Legal Service Market in China", at 44.
[76] See above n 63, Implementation Rules, Article 40.

Chinese citizens including Chinese lawyers may be employed by FROs as non-legal supporting staff, they must suspend their practising certificate and must not provide legal services to clients during the employment. This prohibition not only creates a disincentive for Chinese qualified lawyers to become employees of FROs but also eliminates the capacity of Chinese qualified lawyers to advise on Chinese law if they choose to work at foreign law firms. Accordingly, the prohibition reinforces the ban of foreign law firms from engaging in Chinese legal practice.

(d). *Qualification restrictions*

Foreign lawyers are unable to satisfy the requirements for admission[77] in China mainly because they are not allowed to attend the NJE which is available for Chinese citizens (including HK, Macau and Taiwan residents) only[78]. This citizenship requirement makes it impossible for foreign lawyers to become Chinese legal practitioners and hence for them to undertake Chinese law practice. While Australia takes the position that qualification requirements should be based on knowledge, ability and professional fitness and not on nationality[79], China is unlikely to remove the nationality requirement in the foreseeable future.

4.2 Shanghai Free Trade Zone

On 29 September 2013, China launched its first free trade zone – the SHFTZ. As a testing ground for institutional reforms and market liberalisation, the SHFTZ reduces regulatory barriers for businesses. Amongst others, it adopts a "negative list" approach to further the opening up of services sectors and level the playing field for foreign services suppliers as opposed to domestic ones.[80] On legal services, it is mandated that the possible mode of cooperation between Chinese and foreign law firms need to be explored.[81] To implement this mandate, the Shanghai Municipal Bureau of Justice published two pilot programs or measures on 18 November 2014 which allow (1) exchange / secondment of lawyers between Chinese law firms and FROs of foreign law firms[82], and (2) establishment of "joint operation"

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77 See above n 59, *Law on Lawyers*, Article 5.

78 *Measures for the Implementation of National Judicial Examination*, issued by Ministry of Justice Order No. 11 on 14 August 2008, effective on the same date, Articles 15 & 24. *Provisions on the Participation of Residents of the Hong Kong Special Administrative Region and the Macao Special Administrative Region in the National Judicial Examination*, issued by Ministry of Justice Order No. 94 on 24 May 2005, effective on the same date.

79 See above n 53, Law Council of Australia, Discussion Paper, at 29.

80 *Regulations of China (Shanghai) Pilot Free Trade Zone*, adopted at the 14th Session of the Standing Committee of the 14th Shanghai Municipal People's Congress of Shanghai on 25 July 2014, available at: http://en.china-shftz.gov.cn/Government-affairs/Laws/General/319.shtml

81 *Notice on Printing and Distributing the Overall Plan for the China (Shanghai) Pilot Free Trade Zone*, issued by the State Council Notice No. 38 on 18 September 2013, effective on the same date.

82 *Implementing Measures of the China (Shanghai) Pilot Free Trade Zone for the Secondment of Lawyers as Legal Consultants by Chinese and Foreign Law Firms*, issued by the General Office of the Shanghai Municipal People's Government on 18 November 2014, effective on the same date.

or "commercial associations" between Chinese and foreign law firms[83]. While these two areas of liberalisation are exactly the same as those China committed under the ChAFTA, the two measures have provided significant clarity on the scope of the liberalisation.

Under the first measure, a Chinese law firm is allowed to send its lawyers to a representative office of a foreign law firm to provide consultancy on Chinese law; and a foreign law firm is allowed to send its lawyers to a Chinese law firm as foreign law consultants. The Chinese law consultants are allowed to provide legal services on Chinese legal matters in the capacity of a Chinese legal practitioner, including advising on Chinese law and representing clients in civil and commercial litigation and non-litigation matters. The Chinese and foreign law consultants can only provide legal services that they are qualified to provide. There are various requirements on the Chinese and foreign law firms wishing to enter into such an arrangement and their lawyers, including:

- the Chinese law firm must have been established for at least three years in the form of partnership with more than 20 lawyers and its head office or a branch in Shanghai (including the SHFTZ);
- the FRO must have been established for at least three years in Shanghai or other cities. In the latter case, an additional FRO must have already been established in Shanghai (including the SHFTZ);
- at least one party, the Chinese law firm (including branch) or the FRO, must have been established in the SHFTZ; and
- the secondees must have five or more years full-time practicing experience in their respective jurisdictions and cannot be managing partners of the law firms or the chief representative of the FRO.

Other major restrictions include:

- one foreign law firm is only allowed to enter into such a secondment arrangement with one Chinese law firm;
- the Chinese and foreign law firm already in such an arrangement must not create an association with other law firms; and
- the number of secondees is limited to three.

A secondment arrangement must be based on contract which must set out matters such as fee arrangements, distribution of incomes and debts arising from the cooperation, and the term which shall in principle not be shorter than two years.

The second measure allows Chinese and foreign law firms to create a "commercial association" within the SHFTZ and to provide legal services in the name of the association. The parties may charge clients as an association or separately. In the former case, the parties

[83] *Implementing Measures of the China (Shanghai) Pilot Free Trade Zone for the Establishment of Association between Chinese and Foreign Law Firms*, issued by the General Office of the Shanghai Municipal People's Government on 18 November 2014, effective on the same date.

will distribute incomes based on their association agreement. Most of the requirements and restrictions applicable to the secondment arrangement also apply to the association arrangement, such as the requirements on Chinese and foreign law firms, the restrictions that one Chinese law firm can only enter into an association with one foreign law firm and that the term of an association must generally not be less than two years. Major additional requirements include:

- the applicants for the creation of an association must be the head office of a Chinese law firm (i.e. not its branches) and a foreign law firm (i.e. not its representative offices); and
- during the term of the association, the parties must remain independent in relation to legal status, name, financial status and liabilities. However, the parties *must* share office space and equipment and may also share non-legal supporting staff. The office space must be chosen between the Chinese law firm (including branch) or the FRO established in the SHFTZ.

The pilot programs are aimed at promoting cooperation between Chinese and foreign law firms. In a press interview on the programs, Ma Yi, an official in charge of lawyer administration at the Shanghai Bureau of Justice clarified that the promotion of the cooperation seeks to address the increasing demand for cross-jurisdiction legal services such that Chinese and foreign law firms work together to provide one-stop shop services to clients in cross-border transactions.[84] However, the existence of various restrictions and limitations suggests that the programs are not intended to bring radical changes to the market but merely gradual and experimental ones. As Ma stressed, the programs do not alter the fundamental rules on foreign legal practices such as the prohibition of foreign legal practices from advising on Chinese legal matters or employing Chinese legal practitioners to do so. On the latter point, Chinese lawyers dispatched to foreign law firms are not employees of the foreign firms and must provide services on Chinese law under the name of their Chinese employers.

5 OBSERVATIONS AND IMPLICATIONS

5.1 China's approach to liberalisation of legal services

Legal profession has a unique position in China's economy. Due to historical and cultural reasons, China's legal profession received little recognition and respect from the government and society until the launch of the "Reform and Open Door" policy in 1978.[85] With fast growing economic interactions between China and the rest of the world, the reforms created

[84] Shumin Hu & Simin Ji, "Official of Shanghai Bureau of Justice on the Liberalisation of Legal Services in the SHFTZ", FTZ Post, 17 March 2014, available at: http://www.ftzsino.com/cn/interpretation/20140317/MTM5NTAZMJY2OTC.html

[85] See above n 9, Heller, "China's New Foreign Law Firm Regulations", at 753-754; above n 7, Huang, "The Legal Service Market in China", at 31-32.

great demand for the development of a robust legal system and of a legal profession with international expertise and competitiveness. While the reforms rehabilitated the legal profession, its development progressed slowly in the first two decades due to China's "highly cautious approach to liberalisation of the legal services sector".[86] Consequently, the legal profession remained as a weak line in the economy before China's accession to the WTO. The cautious approach was a result of weighing and balancing the benefits and costs of opening up the legal services sector. On the one hand, the liberalisation of the sector would attract foreign capital, expertise and know-how necessary for the development of the local legal profession; while on the other hand, the Chinese government was concerned about the impact of liberalisation on national security and on the business of domestic law firms which were unlikely to be able to compete with their foreign counterparts.[87] These conflicting values have continued to influence the policy directive of the Chinese government on the liberalisation of the sector post China's WTO accession; hence, liberalisation has been taking place incrementally with considerable caution.[88]

The balanced approach to the liberalisation of the legal services sector was envisaged in China's Five-Year Plans the highest policy documents outlining the economic and societal development goals for every five years. The liberalisation of legal services under the ChAFTA and within the SHFTZ falls within the policy directive contemplated in the 12th Five-Year Plan (2011-2015).[89] Under this Plan, the development goals for the legal services sector include to: (1) improve the quality and international expertise of the legal profession; (2) increase the scale and international competitiveness of local law firms; and (3) expand legal services of domestic firms in global transactions. The main approaches to achieving these goals include to: (1) further open up the legal services sector; (2) strengthen cooperation with international lawyers' associations and foreign professional bodies; and (3) improve the business structure of cross-border legal services and encourage local law firms to act for domestic companies in outbound investment transactions. Apparently, the policy directive was carefully drafted with an emphasis on the goals to promote the internationalisation and competitiveness of domestic law firms and to enhance their expertise and experience in cross-border transactions. While promotion of cooperation between Chinese and foreign law firms contributes to the pursuit of the goals, it must be undertaken in a cautious manner so as to avoid the negative impacts on the development of the domestic legal profession. Thus, concerns such as the loss of market share, profit and talented professionals to foreign law

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86 See above n 7, Huang, "The Legal Service Market in China", at 38-39; above n 9, Heller, "China's New Foreign Law Firm Regulations", at 754-760.

87 See above n 7, Huang, "The Legal Service Market in China", at 33-35.

88 See above n 26, Godwin, "The Regulation of Foreign Lawyers in China, Business Scope Issues and Some Suggestions for Reform", at 149-150.

89 Outline of the 12th Five-Year Plan for the Development of Trade in Services, promulgated by Ministry of Commerce *et al.*, Shang Fu Mao Fa [2011] No.340 on 27 September 2011, effective on 27 September 2011.

firms, national security, etc. have caused the reluctance of the Chinese government to open the market for foreign legal services suppliers too quickly.[90]

5.2 How much market access will Australian legal practices have under ChAFTA?

China's cautious approach to the liberalisation of legal services determines that the market access granted to Australian legal services suppliers under the ChAFTA would not be as significant as expected. Essentially, China's commitments are designed to promote cooperation between Chinese and Australian law firms to the benefit of China's own legal profession. For Australian legal practices, these commitments remain within the boundaries of China's regulatory framework on legal services and are limited in terms of the form of cooperation, the area of operation, and the scope of business. We focus on the two major commitments relating to "joint operation" and the exchange of lawyers below.

The commitment that cooperation via "joint operation" or "commercial association" must take the form of an unincorporated entity whereby parties maintain independent legal status, name, financial operation, and civil liabilities suggests that merger or partnership between Australian and Chinese law firms or any other forms of investment by Australian law firms in Chinese law firms would be impossible. What is permitted is merely a "commercial association" based on contractual arrangements. Practically speaking, the commitment would allow Australian and Chinese law firms to share profits, clients, workplace, supporting staff, etc. and their lawyers to work together in an established office so as to provide one-stop shop services to clients. The commitment meets the needs of clients in cross-border transactions and the needs of Chinese lawyers to acquire expertise and experience from working side by side with their foreign colleagues. The question is whether "commercial associations" provide additional market access for Australian legal services suppliers compared with the forms of cooperation already undertaken by foreign and Chinese law firms in practice. It is the authors' understanding that many foreign and Chinese law firms have entered into certain Strategic or Friendship Arrangements under which they undertake cross-referrals of matters and clients, marketing activities, secondment of lawyers, etc. and work together (although often remotely) for clients in cross-border transactions. Such arrangements or alliances may not achieve the level of cooperation allowed under "commercial associations" to the extent that they are often non-exclusive and do not create a separate entity which allows foreign and Chinese lawyers to physically work together and more importantly, provide legal services in its own name. A more sophisticated form of cooperation between Chinese and foreign law firms has been the so-called Swiss Verein structure used, for example, in the merger between China's King & Wood and Australia's Mallesons Stephen Jaques to form King & Wood Mallesons in March 2012[91] and lately in the

[90] See above n 7, Huang, "The Legal Service Market in China", at 33-34; above n 26, Godwin, "The Regulation of Foreign Lawyers in China, Business Scope Issues and Some Suggestions for Reform", at 149-150.

[91] King & Wood Mallesons, Our History, available at: http://www.kwm.com/en/au/about-us/history

merger between Chinese firm Dacheng and international firm Dentons in January 2015[92]. The structure presents similar features as a "commercial association". Under both of the structures, foreign and Chinese law firms may share branding, clients, strategy and other functions as agreed and act for clients as a single entity, while they remain independent in terms of financial operation and civil liabilities.[93] Further, it is common that under Swiss Vereins Chinese and foreign lawyers work together in one workplace with shared administrative and supporting staff[94], as the case would be under "commercial associations". Towards this end, there is only one element of a "commercial association" that may be considered to enable a closer form of cooperation. That is, while member firms do not share profits under Swiss Vereins, profit-sharing is possible under a "commercial association" which arguably opens the door for Australian legal practices in China to make profits from the provision of legal services relating to Chinese law by the association. This is possible as profit sharing arrangement appears to be left for the parties in an association to craft themselves. In this connection, neither the ChAFTA nor the SHFTZ measures have clarified whether such profit sharing would be allowed as an exception to the FRO Regulation, which prohibits FROs from making profit out of Chinese law practice undertaken by Chinese law firms. Even though this is still legally prohibited under an association, it would be practically difficult for Chinese authorities to investigate and determine whether a profit sharing arrangement has actually enabled FROs to make profit from the Chinese law practice of the association. Given the regulatory ambiguity and the practical difficulties, Chinese authorities may take a "hands-off" approach so as to leave space for such cooperation to develop and Chinese legal practices to benefit from the cooperation. If this turns out to be the case, then "commercial associations" would create the possibility for Australian law firms to increase profitability in the Chinese market. However, the possibility for Australian law firms to make profits from the Chinese law practice of an association does not mean their lawyers in the association would be permitted to engage in such practice. The restrictions on foreign lawyers' scope of practice remain untouched under the ChAFTA and the SHFTZ measures. Finally, regardless of whether China's ChAFTA commitment relating to "commercial associations" would actually benefit Australian legal practices, one must note that China allowed such cooperation generally within the SHFTZ on 18 November 2014, only one day after the conclusion of the ChAFTA negotiations. As the ChAFTA limits the area of operation of an association within the SHFTZ, it does not appear to grant any additional market access to Australian law firms as compared to other foreign law firms.

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92 Patti Waldmeir & Josh Noble, "Dentons-Dacheng Merger to Create World's Largest Law Firm", 22 January 2015, available at: http://www.ft.com/intl/cms/s/0/a70f0cb2-a225-11e4-aba2-00144feab7de.html#axzz3wdAJxZcS

93 For an introduction of the Swiss Verein structure, see Nick Jarrett-Kerr & Ed Wesemann, "Enter the Swiss Verein: 21st century global platform or just the latest fad?", Edge International Review, 2014, available at: http://www.edge.ai/wp-content/uploads/2014/05/enterswissverein_2012.pdf

94 Also see Liu Zhen, "Unite in the Shanghai FTZ", Asian Legal Business (1 May 2014), available at: http://www.legalbusinessonline.com/features/unite-shanghai-ftz/65694

As with the previous commitment, the commitment on the exchange of lawyers as legal consultants between Australian and Chinese law firms within the SHFTZ does not seem to create additional market access for Australian legal services providers. For Australian law firms, the most significant benefit from the commitment would be the capacity to use Chinese secondee lawyers to provide legal services to clients and to make profit from such services via secondment arrangements. However, in practice, such an exchange of lawyers has frequently taken place under Friendship or Swiss Verein cooperation whereby fee arrangements between foreign and Chinese law firms have also been common.[95] Moreover, to build China practice and human resources, most foreign law firms in China have employed Chinese citizens who are qualified to practice Chinese law as professional staff.[96] As required by Chinese law, these employees must suspend their practising certificate and must not provide legal services during their employment with the FROs. However, FROs have often used the local professional staff as 'Chinese legal consultants' to provide legal services to clients; and due to various considerations and difficulties in enforcement, the Chinese authorities have given some flexibility to such practice.[97] Finally, to avoid hiring Chinese lawyers as employees, an alternative practice has been for foreign law firms to engage a Chinese law firm to provide services on Chinese law via matter-based or long-term Entrustment.[98] Given the existing practice above, the ChAFTA commitment on the exchange of lawyers does not seem to create any new market opportunities for Australian legal services suppliers. Rather, it is better seen as gradual recognition of the existing practice. More significantly, this form of cooperation was also introduced in the SHFTZ right after the ChAFTA negotiations were concluded. Therefore, the market access the ChAFTA granted to Australian legal practices does not extend beyond what other foreign law firms would also enjoy within the SHFTZ.

In short, China's major commitments on legal services under the ChAFTA may well turn out to be of little practical importance as they do not create additional market access for Australian legal practices even though they extend beyond China's commitments under the WTO and most of the other FTAs. What Australian law firms are allowed to do under the commitments are largely similar to the existing practice in the market except for the possible profitability enhancement for Australian legal practices under "commercial associations" with Chinese law firms. However, this benefit has been negated by China's extension of the ChAFTA commitments to the SHFTZ immediately after the ChAFTA was concluded. Australia's trade negotiators must have been aware of China's plan to launch the pilot programs within the SHFTZ as these were widely reported during the ChAFTA negotiations. It would therefore be interesting to understand why Australia agreed to accept the level of

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95 Ibid.

96 See above n 26, Godwin, "The Regulation of Foreign Lawyers in China, Business Scope Issues and Some Suggestions for Reform", at 143.

97 Ibid., at 143-147.

98 Ibid., at 143-144; also see above n 5, Stern & Li, "How International Law Firms Approach the China Market", at 17-18.

liberalisation (offered by China) which would be available to it anyway. Having failed to secure any meaningful market access for its legal practices in the ChAFTA negotiations, Australia will find it more difficult to do so in future negotiations with China without granting reciprocal market access to China in this or other areas of trade. Towards this end, Australian legal practices will continue to compete with other foreign legal practices under the same market conditions. The regulatory barriers erected by the Chinese laws will continue to constrain the ability of Australian law firms to expand market share and practice and to increase profitability.

6 CONCLUSION

The ChAFTA is undoubtedly a landmark achievement in the development of the China – Australia economic relationship. While it is still too early to assess the actual degrees of liberalisation and benefits to businesses in specific areas of trade, in general the ChAFTA is expected to have the effect of promoting trade and investment and opening up new prospects of economic cooperation between the two countries. As far as legal services are concerned, the level of liberalisation under China's ChAFTA commitments is apparently over-stated. The ChAFTA does not provide Australian legal practices any competitive advantage over other foreign legal practices. Australian law firms will continue to compete with other foreign law firms in the same regulatory environment in which major restrictions on all foreign legal practices will continue to apply. However, as the ChAFTA liberalises many other areas of trade and investment, it has the potential to create unprecedented opportunities for Australian legal practices to grow their businesses in cross-border transactions between the two countries. Further, as with all the other FTAs, the ChAFTA creates intangible benefits for businesses in both countries including Australian legal practices by bolstering both incentives and confidence in doing business in the markets of the trading partners.[99] Finally, while China has been cautious in its approach to the liberalisation of legal services, it has taken steps to unilaterally open up this sector via the free trade zones. This unilateral liberalisation demonstrates China's willingness to allow more market access to foreign legal practices and is in alignment with China's policy goals to strengthen the competitiveness and global outlook of domestic law firms. Nevertheless, it must be noted that any further liberalisation of this kind is unlikely to lead to significant market-opening in a short period of time and is likely to be made available to foreign legal practices across the board.

[99] This observation was made by the Hon Andrew Robb AO MP, the former Australian Minister for Trade and Investment and one of the key architects of ChAFTA, at his keynote speech at the conference titled "China-Australian Economic Law Relations in the Post-ChAFTA World" at UNSW Law on 17 June 2016.