

ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE

# Power of discourse in free trade agreement negotiation

Yan Wang\*

Guangdong University of Foreign Studies, 2 Baiyun Avenue North, Guangzhou, Guangdong, P.R. China, 510420  
Email: [swallow\\_wang79@163.com](mailto:swallow_wang79@163.com)

## Abstract

This article illustrates the power of discourse in free trade agreement (FTA) negotiation, elucidating the concept from the perspective of a country's abilities of rule control, rule assimilation and rule contestation. To enhance rule control, the G2 (the US and EU) have chosen their FTA partners, designed the FTA rules, and offered offensive-defensive exchange strategically. They have approached weak or trade-dependent parties first in FTA negotiation, innovated new rules to accelerate FTA negotiation, skillfully constructed intentional ambiguity and exemptions to remove rule discrepancies and made offensive-defensive exchange with their negotiating parties. Some of these strategies have been copied by China although in a different way. Further, a template approach for negotiating an FTA and exporting domestic laws and normative values to others contributes to the G2's rule assimilation. A de facto FTA template has also been established by China recently, but its legal culture and political stance have led it to sign incomplete contracts and tolerate rule differences with its negotiating parties instead of transposition of domestic law. In facing the rival rules adopted by their competitors, the G2 have incorporated counteractive rules in their FTAs with their competitors' close trading nations. China has also contested rules treating China as a non-market economy in its FTAs, but its stance toward state-owned enterprises (SOE) disciplines and rules forbidding forced technology transfer is milder due to its lack of experience in dealing with unfavourable rules.

**Keywords:** FTA negotiation; power of discourse; rule assimilation; rule contestation; rule control

## 1. Introduction

In the last two decades, only a few meaningful agreements have been concluded in the World Trade Organization (WTO).<sup>1</sup> The battlefield for rule-making of trade and investment rules has shifted to the so-called mega-FTAs, such as the Trans-Pacific Partnership (TPP), Trans-Atlantic Trade and Investment Partnership (TTIP), and Comprehensive Economic Partnership Agreement (CETA). The US and the EU acted as the norm entrepreneurs<sup>2</sup> in rule-reshaping through these FTAs. Their G2 domination in terms of global rule-making raised China's concern

---

\*The article is funded by the National Social Science Fund of China (Grant no. 18FFX062) and Characteristic Innovative Project of Guangdong Provincial Department of Education (Grant no. 2017WTSCX030). Much gratitude is extended to the reviewers and editors of Leiden Journal of International Law.

<sup>1</sup>The Information Technology Agreement became one of the World Trade Organization's covered agreements in 1997, and the Agreement on Basic Telecommunications became the fourth protocol of the General Agreement on Trade Services in 1998. The Trade Facilitation Agreement entered into force on 22 February 2017.

<sup>2</sup>J. S. Fleury and J. M. Marcoux, 'The US Shaping of State-Owned Enterprise Disciplines in the Trans-Pacific Partnership', (2016) 19 *Journal of International Economic Law* 445.

on both trade diversions and geopolitical influence.<sup>3</sup> Thus, China announced its external strategy of ‘enhancing the power of discourse in global economic governance and accelerating FTA negotiation with its alliance’<sup>4</sup> in the Fifth Plenary Session of the 18<sup>th</sup> Chinese People’s Congress in 2015, manifesting its intention of pursuing more contributions to the rule-making of international rules and exerting more influence on FTA negotiations.

The purpose of this research is to clarify the meaning and the three capabilities of the power of discourse in FTA negotiation and to conduct a comparison of approaches of raising the power of discourse between G2 and China. To develop the study, the article is divided into six sections. After a general introduction of the research background and purpose in [Section 1](#), [Section 2](#) establishes an analytical framework for the research on the power of discourse in FTA negotiation. The following sections discuss the three capabilities that make up the power of discourse: the powers of rule control, rule assimilation, and rule contestation. Each of these is elaborated through [Sections 3–5](#) by an examination of G2’s experience and China’s performance. Finally, a conclusion summarizing the findings and implications of the study is drawn in [Section 6](#).

## 2. Analytical framework of the power of discourse in FTA negotiation

Based on Michel Foucault’s power of discourse theory, discourse is entwined with power, in that power intrinsically affects and controls the formation and reproduction of discourse, and leading discourse could provide someone with a platform to manifest his or her power.<sup>5</sup> The previous studies on the power of discourse focused on sociology, in a different context compared to international policies and laws, so it is necessary to rebuild the theoretical framework for the current research. This article refers to international relations theories, such as realism and liberal institutionalism, to explain the nature of the power of discourse in FTA negotiation,<sup>6</sup> states’ motives of acquiring such power, and the distribution of the power.

### 2.1 Application of realism and liberalism in the study

State interests, distribution of power, and anarchy are three keys that build realism.<sup>7</sup> Power plays a major role in a world in which states are major actors. States establish institutions based on their calculations of self-interest and relative gain, so institutions are not independent variables but are decided by the power structure<sup>8</sup> and are shaped by powerful states to increase their share of world power.<sup>9</sup> Openness or closure in foreign trade will be inexplicable without understanding configurations of state interests and power.<sup>10</sup> The power of discourse in FTA negotiation is ultimately

<sup>3</sup>G. Wang, ‘China’s FTAs: Legal Characteristics and Implications’, (2011) 105 *American Journal of International Law* 498, 508; Z. Xiaotong, Z. Ping and Y. Xiaoyan, ‘The EU’s New FTA Adventures and Their Implications for China’, (2014) 48 *Journal of World Trade* 525.

<sup>4</sup>See Working Report of the Fifth Plenary Session of the 18<sup>th</sup> Chinese People’s Congress, available at [www.zx.chengdu.gov.cn/Item/110020187.aspx](http://www.zx.chengdu.gov.cn/Item/110020187.aspx) (accessed 15 December 2018).

<sup>5</sup>Z. Wang, *On Foucault* [福柯] (1999), 182.

<sup>6</sup>The article does not differentiate realism and neo-realism strictly, as it is not relevant regarding whether the power comes from the state or structure.

<sup>7</sup>P. J. Katzenstein, R. O. Keohane and S. D. Krasner, ‘International Organization and the Study of World Politics’, (1998) 52 *International Organization* 645, at 655.

<sup>8</sup>S. D. Krasner, ‘Global Communications and National Power: Life on the Pareto Frontier’, (1991) 43 *World Politics* 336; S. Strange, ‘Cave! Hic Dragones: A Critique of Regime Analysis’, in S. D. Krasner (ed.), *International Regimes* (1983), 337, at 345.

<sup>9</sup>T. Evans and P. Wilson, ‘Regime Theory and the English School of International Relations: A Comparison’, (1992) 21 *Millennium Journal of International Studies* 329, at 330; J. J. Mearsheimer, ‘The False Promise of International Institutions’, (1994) 19 *International Security* 5, at 13.

<sup>10</sup>See R. Gilpin, *War and Change in World Politics* (1981).

decided by states' material capability,<sup>11</sup> and the major states set the terms of co-operation and institutions.<sup>12</sup>

Liberal institutionalists fault realism because it belittles international co-operation among states.<sup>13</sup> On economic issues, states establish institutions to acquire absolute gain, which could function independently to constrain cheating by the states and facilitate their interaction.<sup>14</sup> Thus, as an independent variable, FTAs not only work for the private purposes of the leading country, but also act as collective goods that further regional economic integration, provide rules for governance, and guarantee state expectations. In FTA negotiation, the soft and material powers of states shape international order.<sup>15</sup>

This article examines the power of discourse through an analytical eclecticism<sup>16</sup> of realism and liberal institutionalism by combining the findings of these two theories. The article presents the opinion that FTA negotiation is driven by both state interest and the interdependency of states. This has provided the power of discourse with the features of being both a private vehicle and a public good. A state's power to lead FTA discourse is primarily decided by its material power but is also influenced by its soft power.

## 2.2 Theoretical propositions

The references to realism and liberalism have led the study to proceed with four theoretical propositions.

### 2.2.1 Power of discourse in FTA negotiation serves a leading state's private purposes

In an anarchic world, institutional power serves to protect states' political and economic interests<sup>17</sup> and construct institutional hegemony.<sup>18</sup> The US has negotiated FTAs to push multilateral trade negotiations through competitive liberalization, enhancing geopolitical security, rebuilding international rules, and depressing the rise of the EU and China. For example, the dominance of the US in investor-state dispute settlement (ISDS) rules creates advantages in the provision of lawyers and arbitrators but bias against civil law experts who are not accustomed to the long pleading phases, dissenting opinions, and reliance on precedent and adversarial opponents.<sup>19</sup> The EU also gains from its rule-making of geographical indication (GI) provisions in its FTAs that maintain the competitiveness of its agricultural products.

### 2.2.2 Power of discourse in FTA negotiation provides collective goods

An FTA, even when reached between a hegemony and its spoke, acts as a regional public good as well. It maintains order, constrains government behaviour, removes tariff and non-tariff barriers, furthers regional market integration, provides a dispute settlement mechanism, and depresses domestic protectionism. In exercising its power of discourse, the hegemony shoulders the costs

<sup>11</sup>K. W. Abbott, *Theory of International Politics* (1979), 191; J. J. Mearsheimer, *The Tragedy of Great Power Politics* (2001), 56–7.

<sup>12</sup>K. W. Abbott, 'International Relation Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts', (1999) 93 *AJIL* 361, at 365.

<sup>13</sup>R. O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (1984), 6–7.

<sup>14</sup>See Abbott, *supra* note 12, at 366.

<sup>15</sup>See generally J. Nye, *Soft Power: The Means to Success in World Politics* (2004).

<sup>16</sup>See generally R. Sil and P. J. Katzenstein, *Beyond Paradigms: Analytic Eclecticism in the Study of World Politics* (2010).

<sup>17</sup>See Strange, *supra* note 8.

<sup>18</sup>B. Allison, *From Traditional to Institutionalized Hegemony, G8 Governance* (February 2001), available at [www.g8.toronto.ca/scholar/bailin/bailin2000.pdf](http://www.g8.toronto.ca/scholar/bailin/bailin2000.pdf) (accessed 20 February 2017).

<sup>19</sup>E. Gilman, 'Legal Transplant of Trade and Investment Agreements: Understanding of Exportation of U.S. Laws to Latin America', (2009) 41 *Georgetown Journal of International Law* 263, 271.

of negotiation and enforcement by providing collective goods to the smaller states which have little leverage in the negotiations on free ride.<sup>20</sup>

### *2.2.3 Distribution of the power of discourse in FTA negotiations is decided by the willingness and capabilities of states*

The leadership of FTA negotiation derives from the willingness of leaders to set specific rules for others<sup>21</sup> and their capability of rule-making in terms of hard power and soft power. The hard power is majorly reflected by a country's military and economic power.<sup>22</sup> With strong market power, the country can persuade others to accept its proposed rules by offering market benefits. The soft power is a country's ability to attract or persuade,<sup>23</sup> manifested by its well-established domestic rules and legal culture, comprehensive knowledge and information on the negotiated issues, and abundant treaty negotiation techniques and experience.

### *2.2.4 States' power of discourse in FTAs is fragmented*

FTAs are bilateral and regional in nature. By the end of November 2018 there were 308 FTAs in force notified to the WTO.<sup>24</sup> Hence, a state's power of discourse in FTA negotiations is fragmented. To enjoy a strong power of discourse it is insufficient for a state to have dominance in one or several FTAs, as its advantage could be offset by other states' dominance in other FTAs. A state needs to extend its rule influence over other countries, even its rivals. Thus, to evaluate a state's power of discourse in FTAs, it is also necessary to consider the FTAs that are negotiated by others.

## **2.3 Elements of power of discourse and contributing factors**

Due to the fragmenting nature of the FTAs, the evaluation of a state's power of discourse first needs to study its dominance in its own FTAs, then embark on its capability of influencing other FTAs and competing with rival terms set by its competitors. Thus, the power shall be assessed through three lenses, which are also three elements of such power, namely the power of rule control, power of rule assimilation, and power of rule contestation.

The core of the power of discourse is a country's power of rule control, reflected as a country's capability of taking the lead in launching an FTA negotiation, controlling the agenda, and proposing the rules finalized in the FTA. Three factors contribute to such capability. First, a careful selection of FTA partners, such as negotiating with weak parties or grouping with alliances, could increase a state's rule control. Second, drafting treaty terms technically could reduce the leading country's discrepancies with its negotiating parties. Third, an appropriate offensive-defensive exchange, that is, offering market benefits and development aid for other parties' compromise, also helps in rule control.

The power of rule assimilation is a state's rule influence over the FTAs that are concluded by others. There are three reasons for acquiring such power. First, a hegemon always has an inner need for ideology diffusion.<sup>25</sup> It can spread neoliberal economic policies and implement Washington consensus in developing states through the rule assimilation of FTAs.<sup>26</sup> Second, the fragmenting nature of the FTAs indicates the significance of rule assimilation. A state needs to affect other FTAs to increase its relative power of discourse over other states. Third, a strong

<sup>20</sup>T. Pedersen, 'Cooperative Hegemony: Power, Ideas and Institutions in Regional Integration', (2002) 28 *Review of International Studies* 677, 681.

<sup>21</sup>See Keohane, *supra* note 13, at 19.

<sup>22</sup>See Nye, *supra* note 15.

<sup>23</sup>*Ibid.*

<sup>24</sup>See the WTO database, available at [rtais.wto.org/UI/PublicAllRTAList.aspx](https://rtais.wto.org/UI/PublicAllRTAList.aspx) (accessed 30 November 2018).

<sup>25</sup>See Pedersen, *supra* note 20, at 686.

<sup>26</sup>See J. T. Gathii, 'The Neoliberal Turn in Regional Trade Agreements', (2011) 86 *Washington Law Review* 421, 422.

power of rule assimilation in FTA negotiation indicates a strong influence on multilateral rules, as the rules adopted most frequently in FTAs might eventually become multilateral rules.

Unlike rule control, rule assimilation is more influenced by one's soft power rather than material power. For example, some emerging economies have a relatively strong power of rule control, but their rule assimilation is marginal due to the lack of recognition of their legal culture. Two variables are discussed to assess a state's effects on rule assimilation. One is the template approach that enhances a state's rule consistency, and the other is the transposition of laws and norms that persuades others to follow its rules voluntarily.

The power of rule contestation refers to a country's capability of confronting rival rules proposed by its competitors, which derives from a country's pursuit of relative power.<sup>27</sup> Big powers engage in competition in FTAs for security, and political and economic dominance. To reinforce its comparative advantages,<sup>28</sup> a big power includes terms that depress its rivals' rise in FTAs. These unfavourable terms attract rule contestation from the targeted countries when the latter uphold their own power of discourse. There are also some benchmarks in evaluating a country's power of rule contestation by inquiring whether it can recognize the unfavourable rules and contest them in a timely manner and whether it can do so with appropriate alliances through effective techniques.

### 3. Power of rule control in FTA negotiation

The power of rule control stands in the centre of the power of discourse. The G2 countries have shown their remarkable ability of rule-making in FTA negotiation through the wise choice of FTA parties, well-designed rules, and offensive-defensive exchange. China, as a young learner, has also established its ability of rule control in selected areas.

#### 3.1 US and EU power of rule control in FTA negotiation

##### 3.1.1 US and EU selection of FTA partners

First, in the circumstance that a new rule is proposed, to reduce the costs of negotiation, a leading country usually selects weak countries or countries with minor rule discrepancies to negotiate first. After the new rule is accepted by a critical mass,<sup>29</sup> it will be easier for the rule leader to treaty with the rule breakers.<sup>30</sup> In proposing a chapter on e-commerce, once the EU disputed with the US on the GATS 2000 negotiation, the US concluded FTAs with Argentina and Singapore first, then persuaded Australia to accept the US-suggested rules even though Australia had once opposed them in WTO negotiations.<sup>31</sup> Finally, the US influenced the EU and a similar e-commerce chapter was found in the EU's FTAs with Korea in 2009.

In proposing the non-discrimination principle of SOE disciplines, the US also targeted small countries first and concluded an FTA with Chile in 2002 requiring non-discrimination treatment to be provided to the covered investments.<sup>32</sup> Then, it concluded an FTA with Singapore in 2004, requiring its government enterprises to provide non-discrimination treatment to the US's covered investment, goods, and service suppliers.<sup>33</sup> After more countries accepted the rule, the

<sup>27</sup>See K. N. Waltz, *Theory of International Politics* (1979); D. Baldwin (ed.), *Neorealism and Neoliberalism: The Contemporary Debate* (1993).

<sup>28</sup>R. Gilpin, *The Political Economy of International Relations* (1987), 215–21. See also Mearsheimer, *supra* note 9, at 20; Pedersen, *supra* note 20, at 679.

<sup>29</sup>M. Finnemore and K. Sikkink, 'International Norm Dynamics and Political Change', (1998) 52 *International Organization* 887, 901.

<sup>30</sup>C. R. Sunstein, 'Social Norms and Social Roles', (1996) 96 *Columbia Law Review* 903, 912.

<sup>31</sup>S. Wunsch-Vincent, *The WTO, the Internet and Trade in Digital Products: EC-US Perspectives* (2006), 207.

<sup>32</sup>US-Chile FTA, Art. 16.4.3.

<sup>33</sup>US-Singapore FTA, Art. 12.3.

non-discrimination principle of SOE disciplines was adopted by all the developing states of the TPP.<sup>34</sup>

Second, a country can enter into an FTA with countries with a similar position first to form a discourse alliance, then establish the alliance as a 'hub' to dominate FTA negotiation with other spokes.<sup>35</sup> That is the case in which the weakened great powers, such as the European countries, deepen their integration to acquire advantages of scale.<sup>36</sup> Among the hundreds of FTAs filed with the WTO, over one fifth have been ratified by the EU or European Free Trade Association (EFTA),<sup>37</sup> making the EU and EFTA the hubs benefiting the most from being discourse alliances.

### 3.1.2 US and EU design of FTA rules

To acquire more rule control, the G2 countries have utilized their rich treaty techniques to develop more acceptable rules. First, in order to update trade rules to their preference, the G2 countries have engaged in rule innovation. In the chapter on trans-boundary service, the US shifted to a negative list from the traditional positive list, that is, starting from unfettered liberalization across all sectors and modes, then agreeing on exclusions and reservations, rather than adopting an empty slate and specifying the sectors or modes to be accessible.<sup>38</sup> The further innovative use of a standstill clause to existing non-conforming measures and a ratchet to lock in their future liberalization<sup>39</sup> ensured that the US would conclude an 'A level' standard service chapter with its partners. In the US-Mexico-Canada Agreement (USMCA), exchange rate manipulation that used to be out of the FTA domain was reined in by the US, requiring that each party shall maintain a market-determined exchange rate regime, refrain from competitive devaluation, and disclose information as required.<sup>40</sup>

The EU also innovated rules to reach a more balanced investment chapter in the Japan-EU EPA (JEEPA). The traditional most-favoured nation (MFN) clause has allowed the investors to cherry-pick the most-favoured procedural and substantive provisions concluded by the host state and triggered a number of controversial disputes, such as *Siemens v. Argentine*<sup>41</sup> and *Bayindir v. Pakistan*.<sup>42</sup> Hence, 'treatment' is redefined by the EU to carve out both the ISDS and substantive provisions in other international agreements. Only in the circumstance that a party breaches the JEEPA provision can such breach amount to a violation of the MFN treatment.<sup>43</sup>

Second, 'constructive ambiguity'<sup>44</sup> can reduce the discrepancies among the FTA parties when the negotiating issue is sensitive. The EU and US once held completely different opinions on the nature of digitally delivered content.<sup>45</sup> To maintain the cultural diversity of the EU countries,<sup>46</sup> and to protect their audio-visual industries from competition, the EU insisted that such content be

<sup>34</sup>TPP, Art. 17.4.

<sup>35</sup>S. Lester and B. Mercurio, *Bilateral and Regional Trade Agreements* (2009), 54.

<sup>36</sup>Pedersen, *supra* note 20, at 682.

<sup>37</sup>See Lester and Mercurio, *supra* note 35, at 54.

<sup>38</sup>R. Adlung and H. Mamdouh, 'How to Design Trade in Service Agreement: Top Down or Bottom Up?', (2014) 48 *Journal of World Trade* 191, 197.

<sup>39</sup>J. Kelsay, *Serving Whose Interest: The Political Economy of Service Trade* (2008), 56.

<sup>40</sup>USMCA, Arts. 33.4, 33.5.

<sup>41</sup>*Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 August 2004).

<sup>42</sup>*Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009).

<sup>43</sup>JEEPA, Art. 8.9; also see CETA, Art. 8.7.

<sup>44</sup>The technique of 'constructive ambiguity' was first used by US Secretary of State Henry Kissinger in dealing with the Taiwan issue in China-US Joint Communiqué in 1972. W. Isaacson, *Kissinger: A Biography* (1992), 481–2.

<sup>45</sup>P. A. Messerlin, S.E. Siwek and E. Cocq, *The Audiovisual Sector in the GATS 2000 Negotiations* (2004), 5, 11, available at [core.ac.uk/download/pdf/6240250.pdf](http://core.ac.uk/download/pdf/6240250.pdf) (accessed 5 July 2017).

<sup>46</sup>Consolidated version of the Treaty on European Union and of the Treaty establishing the European Community, Art.151, para. 4.

treated as a service and carved it out of both the EU's common commercial policy and its Doha negotiation mandate.<sup>47</sup> The US, instead, endeavoured to lobby its trading partners to treat the electronically-delivered content the same as that transacted in physical form to enlarge its overseas service market.

To shield its disagreement with the EU, the US established a separate chapter on e-commerce in its FTAs.<sup>48</sup> This was a significant move, as the US and EU no longer needed to argue regarding whether the content was goods or services or whether they should be liberalized through the scheme of GATT or GATS. The new chapter allowed the parties to pick up the MFN treatment, national treatment, and subsidy disciplines given by the WTO-covered agreements. Such ambiguity liberalized e-commerce while leaving the EU adequate space to protect its audio-visual services. Hence, the EU-Korea FTA imitated the US FTAs and established a similar chapter, confirming the applicability of the WTO agreements to measures affecting electronic commerce and subscribing to a permanent duty-free moratorium on electronic transmissions.<sup>49</sup>

The constructive ambiguity was also shown by the US definition of non-commercial assistance, that is, the subsidy, in the SOE chapter. The subsidy is defined as a financial contribution provided by governments or public institutions in the Agreement on Subsidies and Countervailing Measures.<sup>50</sup> In *US subsidy and countervailing duties*, the US failed to prove that Chinese state-owned banks were public institutions; thus, the favourable commercial loans provided by them were not subsidies.<sup>51</sup> To relieve the burden of proof, the US defined the non-commercial assistance in TPP as 'an assistance to a state-owned enterprise by virtue of that state-owned enterprise's government ownership or control', whether it was provided by a public institution or not.<sup>52</sup>

Third, in negotiating the market access of sensitive products or highly disputed rules or rules with uncertainty,<sup>53</sup> the G2 have resorted to various exit or escape mechanisms, such as non-conforming measures, opt-in, phase-out, re-negotiation, and sunset, to relieve their disputes with the negotiating parties. The surrogate country methodology in anti-dumping investigations was once rejected by China as a condition of entry into the WTO. China finally accepted it after an exemption and a sunset clause were given.<sup>54</sup> In TPP, the exemptions to SOE disciplines were like a maze,<sup>55</sup> exempting government procurement measures,<sup>56</sup> financial support to imports and exports that meet specific requirements,<sup>57</sup> scheduled non-conforming measures, small SOEs with assets lower than SDR200 million,<sup>58</sup> sub-federal level SOEs,<sup>59</sup> and sovereign funds<sup>60</sup> to acquire each party's approval.

<sup>47</sup>See Wunsch-Vincent, *supra* note 31, at 146–7.

<sup>48</sup>US-Singapore FTA, Art. 14.3, para. 1; US-Chile FTA, Art. 15.3.

<sup>49</sup>M. Burri, 'New Legal Design for Digital Commerce in Free Trade Agreements', (2017) 107(3) *DigiWorld Economic Journal* 1, 10.

<sup>50</sup>Agreement on Subsidies and Countervailing Measures, Art. 1.1; see R. Ding, '“Public Body” or Not: Chinese State-owned Enterprise', (2014) 48 *Journal of World Trade* 167, at 167.

<sup>51</sup>AB Report, *US – Anti-dumping and Countervailing Duties (China)*, DS379/WT/AB/R, para. 317.

<sup>52</sup>TPP, Art. 17.1: definitions.

<sup>53</sup>B. Koremenos, 'Contracting around International Uncertainty', (2005) 99 *American Political Science Review* 549.

<sup>54</sup>China's protocol to enter into the WTO, Sec. 15(d). If Chinese governments or enterprises can prove that market economy prevails in that industry in China, then the sales prices in China would be used. Nevertheless, Sec. 15(a) shall expire upon 15 years of China's entry into the WTO.

<sup>55</sup>See Fleury and Marcoux, *supra* note 2, at 445.

<sup>56</sup>TPP, Art. 17.2.

<sup>57</sup>TPP, Art. 17.13.

<sup>58</sup>See *ibid.*

<sup>59</sup>See TPP, Ann. 17 D.

<sup>60</sup>TPP, Art. 17.2.

### 3.1.3 Offensive-defensive exchange

An offensive-defensive exchange provides impetus to the rule-taker for their agreement.<sup>61</sup> The more trade that is dependent on the dominant country's market results in a higher possibility of rule acceptance by the small country when economic incentives are given. This explains the US strategy of selecting countries that are heavily dependent on US imports as FTA partners.<sup>62</sup> By offering tariff-free treatment on primary and manufactured products that had not been fairly liberalized by GATT, such as textiles, apparel, and sugar, the US has successfully persuaded small developing countries to accept US rules in their defensive areas. The development aid given to countries through the EU generalized scheme of preferences system also secures its leading role in the realm of human rights and environmental protection.<sup>63</sup>

## 3.2 China's rule control in FTA negotiation

By December 2017, China had concluded 15 FTAs with 13 countries and its two special administration regions.<sup>64</sup> China's early FTA negotiation strategy was to avoid trade diversions generated by high-standard FTAs,<sup>65</sup> raising its geopolitical influence and obtaining full market economy recognition from other countries.<sup>66</sup> Rule control was not treated as a priority. Upon its rise, China expressed its intention of raising its power of discourse and accelerating its FTA negotiation to cope with the WTO stalemate. China is now negotiating or updating 14 FTAs,<sup>67</sup> and is about to launch more negotiations upon the conclusion of joint feasibility studies.<sup>68</sup> The following sections discuss China's rule control from the perspectives of its choice of treaty parties, design of FTA rules, and offensive-defensive exchanges in FTA negotiations.

### 3.2.1 China's choice of FTA parties and its discourse alliance

It appears that China has intentionally chosen weak parties to negotiate with first but also treated with select developed countries. China's new FTA partners, except Japan, Korea, Norway, and Canada, are developing countries that have weaker hard and soft power. Negotiating with weak parties allows China to enjoy a dominant role in the negotiation, while treaties with certain developed countries helps China update its rules. However, it appears that China has negotiated too many FTAs at one time, which compromised the quality of its discourse. Even though a feasibility study is conducted before the formal negotiation, such a feasibility study is intended to narrow the negotiating issues instead of finding an appropriate negotiating party, as China has concluded FTAs with all countries with which China has conducted feasibility studies.

To increase its rule control, China tried to align with the Association of Southeast Asian Nations (ASEAN) to enhance the group's overall power of discourse. After the conclusion of the ASEAN+1 FTA, China established a close relationship with ASEAN by offering significant market

<sup>61</sup>See Lester and Mercurio, *supra* note 35, at 36.

<sup>62</sup>Morning Edition: *US Trade Representative Robert Zoellick Comments on CAFTA* (National Public Radio broadcast 28 May 2004).

<sup>63</sup>Conditions of the GSP plus system can be seen on the European Commission's website, [ec.europa.eu/trade/import-and-export-rules/import-into-eu/gsp-rules/gsp/](http://ec.europa.eu/trade/import-and-export-rules/import-into-eu/gsp-rules/gsp/) (accessed 20 December 2018).

<sup>64</sup>By December 2017, the 15 FTAs China concluded are with Hong Kong SAR and Macau SAR, Chile, Pakistan, New Zealand and Singapore, ASEAN, Peru, Costa Rica, Iceland, Switzerland, Australia, Korea, Georgia, and Maldives, available at [fta.mofcom.gov.cn](http://fta.mofcom.gov.cn) (accessed 20 December 2018).

<sup>65</sup>See Xiaotong, Ping and Xiaoyan, *supra* note 3, at 521.

<sup>66</sup>See Wang, *supra* note 3.

<sup>67</sup>China is now negotiating an RCEP, a China-Japan-Korea FTA, and also FTAs with the Gulf Cooperation Council, Norway, Sri Lanka, Mauritius, Moldova, Papua New Guinea, Israel, and Pakistan. China is updating its FTAs with Singapore, Korea, New Zealand, and Pakistan.

<sup>68</sup>China's FTA feasibility studies are with Colombia, Fiji, Nepal, Canada, Bengal, Mongolia and Switzerland for FTA negotiation or update.



benefits to ASEAN unilaterally and establishing a vertical integration of the production network with it. The negotiation of the Regional Comprehensive Economic Partnership (RCEP) reflected China's intention of decreasing the US and Japanese influences on the area, establishing an institutional framework for a Free Trade Area of Asia-Pacific. The ongoing RCEP negotiation has been contentious since its commencement, as each of its negotiating parties expressed the intention of rule control in the negotiation, and rule discrepancies between the developed parties and emerging economies have been significant. Moreover, the underlying structural differences in each of these economies implied the difficulty of observing coherence across the coverage and provisions of the agreement due to their different sectoral advantages, trade dependencies, and state dominations in the economy.<sup>69</sup>

### 3.2.2 China's rule design in FTAs

China negotiated its first FTA in 2003. Sophisticated negotiation techniques, such as constructive ambiguity or exit mechanisms, have not been thoroughly used by China. However, China did innovate some rules and adopt flexible mechanisms in FTA negotiation. In some cases, China even proposed offensive rules to its parties, contributing to the reshaping of norms in its socialization with the global community.<sup>70</sup>

First, regarding rule innovation, China has established its own techniques to reduce rule discrepancies with its treaty parties to accelerate negotiation. The 'early harvest program', composed by tariff-free or low-tariff schedules, has accelerated negotiation and worked as a confidence-building measure for FTA negotiation.<sup>71</sup> In the chapter on 'economic co-operation' in the China-Korea FTA, China has also made some innovations by establishing the objective of reaching production capacity co-operation plans with Korea to relieve the pressure of its over-capacity factories. It was agreed that China and Korea would reinforce their co-operation in the manufacturing industries to raise both countries' production capacity of steel and textiles.<sup>72</sup> The two parties should facilitate the transfer of high technologies<sup>73</sup> to strengthen their respective advantages and competitiveness in information and telecommunication technologies.

Furthermore, in its FTAs with developed countries, China has developed a hybrid approach to tolerate the rule discrepancies with its FTA parties, which can also be regarded as rule innovation. In the China-Australia FTA negotiation, China's trial use of negative listing in its pilot provinces and cities<sup>74</sup> did not equip it with sufficient experience in foreign investment regulation. Thus, a hybrid approach was adopted in which Australia opened its market through a negative list, while China offered Australia a positive list and would replace it with a negative list later.<sup>75</sup> On the issue of transparency of ISDS, a similar approach was adopted in both the China-Australia FTA and China-Canada Investment Promotion and Protection Agreement, i.e., that the arbitration notice and arbitral award should be publicly disclosed, but the disclosure of parties' submissions was

<sup>69</sup>*Ibid.*, at 259–60. See also Y. Huang and T. Khanna, 'Can India Overtake China?', *ForeignPolicy*, 1 July 2003, at 8; T. N. Srinivasan and S. D. Tendulkar, *Reintegrating India with the World Economy* (2003).

<sup>70</sup>See G. Chin, 'Two-Way Socialization: China, the World Bank and Hegemonic Weakening', (2012) 19 *Brown Journal of World Affairs* 211, 223. See also M. D. Harpaz, 'China's Coherence in International Economic Governance', (2016) 21 *Journal of Chinese Political Science* 123, 139.

<sup>71</sup>J. Wang, 'China, India, and Regional Economic Integration in Asia: The Policy and Legal Dimensions', (2006) 10 *SYBIL* 269, 288.

<sup>72</sup>See China-Korea FTA, Arts. 17.8, 17.11.

<sup>73</sup>See TPP, Art. 17.10.

<sup>74</sup>China has adopted negative lists on foreign investment regulation in Shanghai, Guangdong, Fujian province, and Tianjin since 2015.

<sup>75</sup>See China-Australia FTA, Art. 9.

subject to the host state's discretion.<sup>76</sup> Thus, China could keep its submissions secret in its investment disputes.

Second, to drop rules that China and its FTA parties have disputes on, China has adopted the re-negotiation<sup>77</sup> or phased negotiation<sup>78</sup> technique in its FTAs instead of constructive ambiguity and various exit mechanisms. When the re-negotiation clause and 'early harvest program' were both included, the parties could work on the disputed issues and upgrade the FTA after it brought 'early harvest' to them. Although such a technique made Chinese FTAs incomplete contracts, it was effective in reducing rule discrepancies among the parties, ensuring the rule consistency of China's FTAs, and enhancing the dynamics and competitiveness of the FTAs.

Third, on the issue of free movement of natural persons, China has proposed highly liberalized and offensive rules to its parties. The rules of free movement of natural persons in high standard FTAs, such as the TPP, primarily refer to business persons and technical workers that are in shortage in the host states.<sup>79</sup> To strengthen China's advantage in infrastructure construction and to facilitate overseas acquisition and local establishment, China has persuaded its parties to allow other groups to enter into their territories for a longer time.

In the China-Australia FTA, apart from business visitors and corporate transferees, independent senior executives were allowed to reside in Australia for a maximum period of four years. Further, a maximum of 1,800 visas could be given annually to Chinese contractors for a maximum stay of four years. Their spouses and family members could also work, reside, and travel in Australia during their stay.<sup>80</sup> Then, to facilitate Chinese equipment export and cross-border infrastructure construction services, equipment installers and maintenance workers could be given entry permission for up to three months. These commitments given by Australia were beyond its commitments in the TPP, as the latter only allowed independent executives and contractual service providers to enter Australia for up to two years.<sup>81</sup>

### 3.2.3 China's offensive-defensive exchange in FTA negotiation

The technique of offensive-defensive exchange has been used by China frequently. In its early FTAs as concluded with Hong Kong SAR, Macau SAR, ASEAN, Pakistan, and Chile, the 'early harvest programs' were considered a charm offensive with Chinese wisdom.<sup>82</sup> In negotiating the ASEAN+1 FTA, eight categories of agricultural products and dozens of manufactured goods were liberalized ahead of the planned establishment of the free trade area, and China offered unilateral concessions to ASEAN members who felt they would not benefit as much from the program.<sup>83</sup>

China's recent FTAs with Australia, Korea, and Georgia demonstrated a similar use of Chinese offensive charm like the US or EU. For example, full liberalization covering 96.8 per cent of Chinese merchandized goods persuaded Australia to recognize China's full market economy

<sup>76</sup>See China-Australia FTA, Art. 16; *China-Canada Investment Promotion and Protection Agreement*, Art. 28. China's BITs are available at [tfs.mofcom.gov.cn/article//201111/20111107819474.shtml](http://tfs.mofcom.gov.cn/article//201111/20111107819474.shtml) (accessed 15 December 2018).

<sup>77</sup>For example, in the China-Australia FTA, Australia offered China a negative list on investment liberalization, while China offered Australia a positive list but promised to re-negotiate the list based on a negative listing approach in the following years.

<sup>78</sup>For example, China-Pakistan FTA negotiation has undergone six stages. It was developed from a preferential trade arrangement reached in 2003. Then, the early harvest program was adopted in 2005. In 2006, the China-Pakistan FTA was concluded. In 2008 and 2009, two additional agreements on investment and trade in service were reached. See Wang, *supra* note 3, at 498.

<sup>79</sup>See generally the TPP, Ch. 12.

<sup>80</sup>See China-New Zealand FTA, Ch. 10, Ann. 1.

<sup>81</sup>See TPP, Ann. 12-A-Australia, Ann. 12-A-Canada.

<sup>82</sup>See J. Kurlantzick, *Charm Offensive: How China's Soft Power Is Transforming the World* (2007).

<sup>83</sup>See Wang, *supra* note 71, at 286. This is because all ASEAN products in Chs. 1-8 of the Harmonized System have been covered by preferential tariff rates, while not all Chinese products have been covered. The ASEAN countries are allowed to list items that they would not grant tariff concessions on to China.

status,<sup>84</sup> and China's huge market and potential investment flow to Georgia also led Georgia to promise never to adopt the surrogate country methodology in its anti-dumping investigations.

#### 4. Power of rule assimilation in FTA negotiation

The trade rules maintained by each country have their boundaries, but they could cross those boundaries and become other countries' domestic law, either unconsciously or intentionally. The power of rule assimilation is a country's capability to spread its FTA effects to others, which contributes to a country's power of discourse in FTA negotiation.

##### 4.1 US and EU power of rule assimilation

The power of rule assimilation is based on the power of rule control, as the different abilities of countries in achieving consistent treaty networks are decided by their underlying asymmetries in treaty negotiations. Yet, there are other factors that allow countries to behave better in co-ordinating their treaty networks. Negotiating FTAs based on one's model can enhance that country's FTA consistency and spread its rules faster. Exporting its domestic laws and normative values to others not only harnesses FTA negotiation but also makes its rules readily acceptable to non-FTA parties.

##### 4.1.1 Significance of FTA models

A template approach can reduce the non-conformity and arbitrariness of the rules adopted by a country's FTAs and decrease variation of treaty language,<sup>85</sup> thus improving its rule assimilation. The US has developed its FTA templates since the 1990s based on NAFTA to embrace and reinforce GATT/WTO commitments, including other subjects, notably transparency or anti-corruption, e-commerce, and trade capacity building.<sup>86</sup> The template, after revision, also rebalances the investment protection and state's regulatory power and goes beyond the Agreement on Trade-related Aspects of Intellectual Property approach on minimum standard intellectual property protection.<sup>87</sup>

In FTA negotiation, the US would rather abandon negotiations than accept significant deviation from its template.<sup>88</sup> Due to its strong stance in making uniform investment rules in its FTAs and bilateral investment treaties (BITs), the investment chapter of NAFTA was acknowledged as the de facto global standard for investment protection,<sup>89</sup> producing strong effects on rule assimilation. Its FTA parties further extended US rules to other countries in their FTAs and persuaded European countries to abandon the Dutch golden standard and adopt more precise and complete treaty terms like those in NAFTA.<sup>90</sup> The indirect expropriation in CETA is no longer vague like the old Dutch style, but is clearly defined as 'measures having effect that substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure', and it is clarified that:

<sup>84</sup>The background of the China-Australia FTA can be found on China's MOFCOM website, available at [fta.mofcom.gov.cn/Australia/australia\\_special.shtml](http://fta.mofcom.gov.cn/Australia/australia_special.shtml) (accessed 8 August 2017).

<sup>85</sup>W. Alschner and D. Skougarevskiy, 'Mapping the Universe of International Investment Agreement', (2016) 19 *Journal of International Economic Law* 561, 563.

<sup>86</sup>C. O. Taylor, 'Of Free Trade Agreements and Models', (2009) 19 *Indiana International and Comparative Law Review* 569, 586–90.

<sup>87</sup>*Ibid.*, at 590.

<sup>88</sup>K. J. Vandevelde, *U.S. International Investment Agreements* (2009), 109.

<sup>89</sup>N. Lavranos, *The New EU Investment Treaties: Convergence Towards the NAFTA Model as the New Plurilateral Model BIT Text?*, at 3, available at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2241455](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2241455) (accessed 20 June 2018).

<sup>90</sup>*Ibid.*

except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures designed and applied to protect legitimate public welfare objectives will not be treated as indirect expropriation.<sup>91</sup>

#### 4.1.2 Export of domestic laws and normative value

The FTA has been an effective vehicle for the US to export its laws and legal norms to the rest of the world.<sup>92</sup> The US has exported its federal rules on appropriation, unfair trade remedies, and civil proceeding rules, such as affidavits and cross-examination of evidence, to its FTA parties.<sup>93</sup> It has also required its parties to extend copyright term,<sup>94</sup> making plant patents derived from genetically modified organisms registrable<sup>95</sup> and exempting an Internet service provider from liability if it removes access to material in good faith according to the US standard.<sup>96</sup> The EU has taken the same path over the past decade in proposing its intellectual property laws with ‘TRIPS plus’ provisions in its FTAs.<sup>97</sup>

With continuous and concerted efforts, by the end of 2014 the pre-established national treatment first proposed by the US in NAFTA had been accepted by over 228 international investment agreements as signed by the US, EU, Canada, Finland, Japan, Korea, Costa Rica, and Peru among others.<sup>98</sup> The rule has been further accepted by Asian countries such as Malaysia and Vietnam, through the TPP negotiation and has influenced China as well.

Apart from the rules, the global spread of American legal theories and normative values also facilitates the voluntary transplant of its rules by developing countries. The debate over free trade and fair trade, and the proposal of comparative advantage theory in the legal context, whether it is American unilateralism or not,<sup>99</sup> educates the developing countries to recognize the environmental effects of trade and provides strong moral and legal arguments for the transposition of US standards and rules. It is claimed that when investing in the US, foreigners gain access to a legal system that is fair, transparent, and rule-based, while the US investors do not enjoy the same protection in developing countries.<sup>100</sup> Hence, a country’s legal environment that has not been internalized must be treated as an integral part of its comparative advantage.<sup>101</sup>

Thus, the rules of negative listing, pre-established national treatment, intellectual property protection, competition neutrality, sustainable development, fair labour standards, transparency, and full participation of stakeholders have been regarded as proxies of good normative values that respect that ‘those that are not forbidden by law should be allowed’, ‘private property is sacred and inviolable’, ‘free and fair competition enhance efficiency’, ‘human rights protection’, and ‘procedure justice and due process’. Once they are accepted by the academic scholars and citizens of the host countries, the governments will be pushed to reform. That is why China’s recent

<sup>91</sup>CETA, Ann. 8-B.

<sup>92</sup>M. Baker, ‘No Country Left Behind: The Exporting of US Legal Norms under the Guise of Economic Integration’, (2005) 19 *Emory International Law Review* 1321, 1324. See Gilman, *supra* note 19, at 267.

<sup>93</sup>See C. G. Garcia, ‘All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration’, (2004) 16 *Florida Journal of International Law* 301, 483. See also Gilman, *supra* note 19, at 267.

<sup>94</sup>See TPP, Art. 18.63.

<sup>95</sup>TPP, Art. 18.37.

<sup>96</sup>TPP, Art. 18.82.

<sup>97</sup>See I. Krizic and O. Serrano, ‘Exporting Intellectual Property Rights to Emerging Countries: EU and US Approaches’, (2017) 22 *European Foreign Affairs Review* 57, 58.

<sup>98</sup>See UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (2015), 110.

<sup>99</sup>R. Higgott, ‘American Unilateralism, Foreign Economic Policy, and the ‘Securitisation’ of Globalisation’, 2003 Center for the Study of Globalisation and Regionalisation Working Paper No. 124/03, at 12, available at [wrap.warwick.ac.uk/1997/1/WRAP\\_Higgott\\_wp12403.pdf](http://wrap.warwick.ac.uk/1997/1/WRAP_Higgott_wp12403.pdf) (accessed 29 September 2017).

<sup>100</sup>See Baker, *supra* note 92, at 1363.

<sup>101</sup>*Ibid.*, at 1364.

investment policy has been Americanized to recalibrate the investment protection and regulatory policy space.<sup>102</sup> The China-Australia FTA transplants the general exceptions of GATT to protect the lives and health of humans, animals, plants, exhaustible natural resources, and artistic, historical, and archeological treasures.<sup>103</sup> It is also deemed inappropriate to encourage investment by relaxing the environmental measures through the China-Korea FTA.<sup>104</sup>

## 4.2 China's power of rule assimilation in FTA negotiation

After years of negotiation, China has developed a de facto FTA template, but transposition of laws has been intentionally left out in China's FTA negotiation.

### 4.2.1 China's de facto FTA template

Early scholarship opined that China did not develop its FTA template,<sup>105</sup> as China followed a minimalist approach in terms of both depth and width in FTA drafting, with no intention of harmonizing regional laws.<sup>106</sup> However, in the author's view, China has developed a de facto FTA template since 2008, and its rule consistency of recent FTAs has improved significantly.

The ten FTAs<sup>107</sup> concluded after 2008 have been similarly structured, with almost identical titles in each chapter. They all cover trade in goods, trade in services, and intellectual property in the whole package, indicating those areas have been negotiated together, which is an essential feature of the US or EU modern FTAs and is different from the ASEAN+1 FTA or China-Pakistan FTA.<sup>108</sup>

The rules, sequence, and even the wording, are not much different from each other, especially on the subjects of trade in goods, trade remedies, and trans-boundary service. The content of the recent Chinese FTAs can be divided into six parts, namely preamble and definitions, trade in goods, trade in service, other substantive issues, procedural issues, and final chapters. There are usually four to six chapters on trade in goods, covering market access, treatments, customs and trade facilitation, trade remedies, technical barriers, and sanitary and phytosanitary measures. Then, there are two to four chapters on cross-border service, including general rules and specific rules on financial services, telecommunication, and temporary entry of natural persons. Other substantive issues, such as intellectual property, government procurement, competition, economic co-operation, and environmental protection, have been common in China's FTAs since 2008, although the chapter on investment has varied among them.<sup>109</sup> The procedural issues usually include chapters on transparency, dispute settlement, and institutional framework, and the final two chapters are the exceptions and final words. It appears that China has developed its preferred FTA setting and insisted on its use with different parties.

Furthermore, all these FTAs share common features such as importing NAFTA rules with necessary modifications, incorporating WTO rules, and constructing collaborative treaty terms rather

<sup>102</sup>A. Berger, 'Investment Rules in Chinese PTIAs – A Partial "NAFTAization"', in R. Hofmann, S. W. Schill and C. J. Tams (eds.), *Preferential Trade and Investment Agreements: From Recalibration to Reintegration* (2013), 297–333.

<sup>103</sup>China-Australia FTA, Chapter of Investment, Art. 8.

<sup>104</sup>China-Korea FTA, Art. 12.16.

<sup>105</sup>See P. Yu, 'Sinic trade agreements', (2011) 44 *University of California, Davis Law Review* 953, 1011–18; Harpaz, *supra* note 70.

<sup>106</sup>See Harpaz, *ibid.*, at 130.

<sup>107</sup>They are FTAs between China and New Zealand, Switzerland, Singapore, Peru, Iceland, Costa Rica, Korea, Australia, George, and Maldives.

<sup>108</sup>Apart from a framework agreement, the ASEAN+1 FTA consists of three separate agreements relating to trade in goods, trade in service, and dispute settlement. The original China-Pakistan FTA only covered trade in goods, but its second-stage negotiation covered trade in service.

<sup>109</sup>The Investment Chapter also appeared in China-Sweden FTA after 2008, but there were almost no substantive rules in these two FTAs. The China-Georgia FTA did not contain the Investment Chapter.

than contractual terms. China's FTA setting follows the general structure of high-standard FTAs and accepts certain US rules with revisions. However, due to its lack of treaty drafting experience, distrust of the imported rule, and consideration of enforcement flexibility, the rules in WTO-covered agreements are reiterated, and general and collaborative treaty terms are adopted.

Hence, in the author's view, China's de facto FTA model resembles the FTAs of the G2 in the chapter-setting but is simpler and includes more general terms. The de facto template improves the rule consistency of China's FTAs. However, the general terms in Chinese FTAs can hardly change others' behaviour, indicating that China's template will not spread its rules as effectively as the US template.

#### *4.2.2 China's lack of intention of legal transposition*

For quite a long time China has had no intention of exporting its domestic laws to others in its FTA negotiations. First, as a developing country, it is difficult for its legal culture to produce power to lead other countries. Moreover, norm exports or legal transplants are inconsistent with Chinese foreign policy. In the Asian-African conference held in 1955, the Chinese leader expressed China's non-interference policy on other countries' domestic affairs by proposing 'seeking commonality while reserving difference in global cooperation',<sup>110</sup> which China has abided by ever since. After its open-up policy in 1978, China reaffirmed its 'no argument' attitude when it entered the World Bank and International Monetary Fund and positioned itself as a non-challenger to the existing international rules.

Therefore, even though it is shown that transposition of domestic laws to their FTA partners helps to spread their legal values and rules worldwide,<sup>111</sup> China would rather adopt compromise terms to tolerate rule discrepancies in FTA negotiation. Rule spread and legal transposition via FTA has not been considered necessary for China due to its lack of both ability and willingness.

### **5. Power of rule contestation in FTA negotiation**

To enhance export advantage and for security purposes, a big power may adopt rules intentionally targeting its competitors in its FTAs. If the targeted state fails to deter the spread of these rival rules, it has to accept them after they are socialized in the global community. Thus, the power of rule contestation is significant.

#### **5.1 US and EU power of rule contestation**

To frustrate the objectives of rival rules and their spread, the G2 usually establish counteractive rules and adopt the encircling strategy.

##### *5.1.1 Establishing conflicting rules to frustrate the rival rules*

To weaken the EU global GI protection and its trade advantage in wine and agricultural products, the US adopted rules in the US-Korea FTA and TPP to depress the registration and protection of GI. The TPP deprives the registration of a GI if it is a term customary in language as the common name of the product or is likely to cause confusion with a pre-existing trademark.<sup>112</sup> The EU fought back in CETA, requiring that the member shall not allow the registration of a trademark

<sup>110</sup>The principle 'seeking commonality while reserving difference' was first proposed by China's Prime Minister Zhou Enlai in the Asian-African conference. 'Non-interference' was one of the five principles raised in that conference. See [dangshi.people.com.cn/n/2015/0415/c85037-26846224.html](http://dangshi.people.com.cn/n/2015/0415/c85037-26846224.html) (accessed 17 October 2018).

<sup>111</sup>P. Yu, *supra* note 105; Harpaz, *supra* note 70, at 139.

<sup>112</sup>TPP, Art. 18.32.

that consists of a GI.<sup>113</sup> The EU-Vietnam FTA also requires the parties to establish and maintain a registration and protection system for GIs, which shall contain at least a GI registry, a GI verifying process, procedures for GI objection, rectification, and termination, and the legal remedies for unauthorized uses of GIs.<sup>114</sup> In case a term is protected both as a trademark and as a GI, only when ‘the identical or similar trademark has been acquired in good faith [that] the eligibility for or the validity of the trademark, or the right to use the trademark [will not] be prejudiced by the GI protection’.<sup>115</sup>

Another example of US and EU rule contestation is their rivalry on technical standards. The EU technical standards on product safety and environmental effects are made in accordance with the ‘precautionary principle’ adopted by the EU treaties.<sup>116</sup> The precedents of the US federal court instead require that any government regulation on public health, safety, and environmental protection be made based on scientific proof and cost-benefit analysis.<sup>117</sup> Their discrepancies have triggered several disputes under the WTO.<sup>118</sup> To remove the entry barriers for its genetically modified agricultural products and to curtail the EU’s role in shaping global technical standards, the US suggests that its partners provide sufficient scientific proof of product risks and conduct cost-benefit analyses in making technical standards.<sup>119</sup>

The EU has chosen to decrease the rule disparity with Canada in CETA by establishing a voluntary regulatory co-operation forum and strengthening mutual co-operation.<sup>120</sup> Meanwhile, CETA does not prevent the parties from adopting different regulatory measures or pursuing different initiatives<sup>121</sup> and acknowledges the EU’s right to take measures to prevent environmental degradation when lacking full scientific certainty regarding whether there are threats of serious or irreversible damage.<sup>122</sup>

Rule contestation produces meaningful results if the contesting states hold almost equivalent power. For emerging countries, such as China and India, it is not possible to divert strong nations’ rules domination, but they could defer the spread of unfavourable rules if they contest those rules actively. India accepted the ISDS in most of its BITs or FTAs over the last century. However, after its industrial policies were challenged by foreign investors through ISDS early this century, it terminated all its BITs and re-negotiated the BITs after its new BIT model was established.<sup>123</sup> China’s rule contestation on special anti-dumping measures against non-economic countries in its FTAs discussed herein also shows its rule contestation against unfavourable rules.

### 5.1.2 Encircling strategy to defer the spread of rival rules

To raise their power of rule contestation, both the US and EU adopted the ‘encircling strategy’, reaching FTAs with their competitors’ close trading nations and drafting the rules to their own preference in those FTAs. To promote the TPP rules, US President Barak Obama once claimed

<sup>113</sup>See CETA, Art. 20.19.

<sup>114</sup>See EU-Vietnam Free Trade Agreement, Ch. 12, Arts. 12.24, 12.25, 12.27, available at [trade.ec.europa.eu/doclib/press/index.cfm?id=1437](https://trade.ec.europa.eu/doclib/press/index.cfm?id=1437) (accessed 12 May 2019).

<sup>115</sup>EU-Vietnam Free Trade Agreement, Ch. 12, Art. 6.7.

<sup>116</sup>EU Operation Treaty, Art. 174.2.

<sup>117</sup>F. Anderson et al., ‘Regulatory Improvement Legislation: Risk Assessment, Cost-Benefit Analysis and Judicial Review’, (2000) 11 *Duke Environmental Law & Policy Forum* 89.

<sup>118</sup>See Appellate Report *European Communities – Measures Concerning Meat and Meat Products*, adopted 13 February 1998, WT/DS26/AB/R; Panel Report *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, adopted on 21 November 2006, WT/DS291/R.

<sup>119</sup>See TPP, Art. 25.5.

<sup>120</sup>See CETA, Arts. 21.6, 21.4.

<sup>121</sup>*Ibid.*, Art. 21.5.

<sup>122</sup>See CETA, Ch. 24, Trade and Environment, Art 24.8.

<sup>123</sup>L. Cotula, ‘Do Investment Treaties Unduly Constrain Regulatory Space’, (2014) 9 *Questions of International Law* 19, 25.

that if the US could reach a consensus on intellectual property protection with all Asian countries, it would benefit its negotiation with China later.<sup>124</sup> The US promotion of SOE disciplines in the TPP reflected its encircling strategy. After the rules were accepted by Singapore and Korea in the US-Singapore FTA and US-Korea FTA, the US further influenced Malaysia and Vietnam through the TPP. The SOE disciplines impose restrictions on the provision of non-commercial assistance, requiring the SOEs to make transactions based on commercial consideration and treat their suppliers, wholesalers, and retailers non-discriminatorily on both commercial and public function activities.<sup>125</sup> The cross-subsidy and evidence discovery rule further responds to the advantage enjoyed by Chinese SOEs. The former forbids the state-owned bank to provide preferential facilities to SOEs, and the latter requires the parties to provide information on state shareholding and intervention, preferential policies, and assistance to the claimant, thereby improving the enforceability of SOE disciplines.<sup>126</sup> China has a close trade relation with Southeast Asian countries. The chapter will generate influence on China if China negotiates or updates its FTAs with these countries later.

The encircling strategy also works for the EU in its rule contestation with America. In the CETA negotiation, the EU not only persuaded Canada to adopt GI rules but also collaborated with Canada to compete with the US in reforming the ISDS by establishing a permanent international investment court. The idea was first proposed by the EU in 2015 in its concept paper<sup>127</sup> and later was incorporated into its FTAs with Canada and Vietnam. This new scheme significantly revises the NAFTA-type ISDS. It has a fixed roster of panelists, and the panelists are appointed by the court randomly without intervention by the disputing parties.<sup>128</sup> An appellate mechanism is established to review the manifest errors in the appreciation of the facts and errors in the application or interpretation of applicable law.<sup>129</sup>

As Canada used to be a rule follower of the US and has a close relationship with it, the EU's 'encircling strategy' in ISDS reform not only cures the defects of the ISDS but also avoids the contamination of NAFTA-type ISDS rules and decreases the dominance of the ICSID.<sup>130</sup> Among the 541 recorded investor-state disputes from 1972 to 2010, over 60 per cent were brought to the ICSID.<sup>131</sup> The chairman of the ICSID is also the chairman of the World Bank, influenced by the US, who has the authority to appoint the chief or sole arbitrator if the disputing parties cannot agree on the issue. Thus, the EU reform will decrease the ICSID and US influence on investor-state disputes. The strategy works, as Canada has retrieved its commitment on NAFTA-style ISDS in USMCA.<sup>132</sup>

## 5.2 China's rule contestation against unfavourable rules

As the biggest developing country in the world, China holds significant shares in global trade and investment to defend itself against certain rival rules. However, its power of rule contestation is

<sup>124</sup>President Barack Obama, Press Conference by the President, *White House*, available at [www.whitehouse.gov/the-press-office/2013/10/08/press-conference-president](http://www.whitehouse.gov/the-press-office/2013/10/08/press-conference-president) (accessed 20 June 2018).

<sup>125</sup>See Ch. 17 of the TPP; Ch. 18 of the CETA.

<sup>126</sup>See TPP, Ann. 17B, Art. 28.3.

<sup>127</sup>See C. Malmström, *Investment in TTIP and Beyond - The Path for Reform: Enhancing the Right to Regulate and Moving from Current ad hoc Arbitration Towards an Investment Court*, Concept Paper (2015), available at [trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.PDF](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF) (accessed 20 December 2018).

<sup>128</sup>CETA, Art. 8.27.

<sup>129</sup>*Ibid.*, Art. 8.28.

<sup>130</sup>Y. Wang, 'The Rule Contesting of Investor-State Dispute Settlement Mechanism by US and EU' [国际投资仲裁机制改革的美欧制度之争], 2 *Global Law Review* [环球法律评论] 118 (2017).

<sup>131</sup>T. Schultz and C. Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study', (2015) 25 *European Journal of International Law* 1147.

<sup>132</sup>USMCA, Chs. 14, 14-C, 14-D, and 14-E. Any new investor-state dispute between America and Canada shall not be brought to the ISDS.



constrained by its soft power of recognizing the rival rules and approaching appropriate partners to defer them.

When China entered into the WTO, China's Protocol of Accession allowed the WTO members to sidestep several China-related questions by special anti-dumping and safeguard provisions,<sup>133</sup> which were either WTO-minus or WTO-plus in nature and lowered China's rights under the WTO or burdened China with more duties.<sup>134</sup> When these rules failed to address China's problems as anticipated, additional 'China-specific' rules were adopted in G2 FTAs or domestic law, including special trade remedy rules against a non-market economy or SOE disciplines targeting state capitalism.

For example, when the US or EU launches an anti-dumping investigation against China's exporters, the normal value of the product is decided by the 'surrogate country' methodology,<sup>135</sup> which is the sales price in a third country rather than the transaction price in China. This special methodology was accepted by China's Accession Protocol as a cost of entry into the WTO.<sup>136</sup> It caused a huge loss to Chinese enterprises and treated China as a second-class citizen in the global community,<sup>137</sup> so China fought back firmly in its FTAs and BITs.

In October of 2003, China was about to launch an FTA negotiation with Australia. The proposed FTA would greatly benefit Australia's wine, agricultural products, raw material enterprises, and service industry. To start the formal negotiation of the China-Australia FTA, China laid a precondition that Australia should treat China as a full market economy and abandon discriminatory rules. Upon the conclusion of a feasibility study on the China-Australia FTA, China and Australia reached the 'Memorandum of Recognizing China's Status of Full Market Economy and Launching China-Australia FTA Negotiation' on 18 April 2005. Australia promised not to seek recourse to Sections 15 and 16 of China's Accession Protocol to the WTO and paragraph 242 of the Working Party Report on the Accession of China.<sup>138</sup> Similarly, both the China-Korea FTA and China-Georgia FTA included a clause forbidding the use of a surrogate country methodology in anti-dumping investigations.<sup>139</sup>

Further, China's rule contestation was also manifested by its opposition to the special safeguard rules in the China-Korea FTA negotiation, which were required by Korea but opposed by China. The rule was dropped in its fifth joint feasibility study by the FTA in 2008.<sup>140</sup>

As the SOE disciplines do not routinely appear in China's FTA negotiations and China has no political willingness to respond to state capitalism directly, China's rule contestation to SOE disciplines is milder. In the China-Canada Investment Facilitation and Investment Protection Treaty, it is required that the treatment provided to Canadian investors on expansion, management, and operation of the covered investment and the sales and other disposal of assets shall not be lower than the treatment that is given to China's domestic investors. Moreover, it is forbidden for the

<sup>133</sup>M. Wu, 'The "China, Inc." Challenge to Global Trade Governance', (2016) 57 *Harvard International Law Journal* 261, 268.

<sup>134</sup>See J. Y. Qin, 'Trade, Investment and Beyond: The Impact of WTO Accession on China's Legal System', (2007) 191 *The China Quarterly* 720, 723.

<sup>135</sup>Trade Preference Promotion Act, 19 USC 2101, Sec. 504. Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016, Art. 2.7. A. Polouektov, 'Non-market Economy Issues in the WTO Anti-dumping Law and Accession Negotiation: Revival of Two-tier Membership?', (2002) 36 *Journal of World Trade* 1, 10.

<sup>136</sup>See Qin, *supra* note 134, at 724.

<sup>137</sup>See Polouektov, *supra* note 135, at 4.

<sup>138</sup>Memorandum of Understanding Between the Department of Foreign Affairs and Trade of Australia and the Ministry of Commerce of the People's Republic of China on the Recognition of China's Full Market Economy Status and the Commencement of Negotiation of a Free Trade Agreement Between Australia and the People's Republic of China, para. 2 (18 April 2005), available at [www.dfat.gov.au/geo/china/fta/mou\\_aust-china\\_fta.pdf](http://www.dfat.gov.au/geo/china/fta/mou_aust-china_fta.pdf) (accessed 5 July 2018).

<sup>139</sup>China-Korea FTA, Art. 7.1; China-Georgia FTA, Art. 3.

<sup>140</sup>The dropping of the special safeguard clause was recorded in the negotiation process of the China-Korea FTA, available at [fta.mofcom.gov.cn/korea/korea\\_special.shtml#1F](http://fta.mofcom.gov.cn/korea/korea_special.shtml#1F) (accessed 5 July 2018).

senior officers of a covered investment to be required to be a Chinese citizen.<sup>141</sup> These two provisions run counter to China's current policy that the transfer of shareholding of SOEs shall be approved by the Chinese State-owned Assets Supervision and Administration Commission (SOASAC) and that the directors and supervisors of SOEs should be appointed by the SOASAC in an enterprise jointly held by a Canadian investor and Chinese SOE.<sup>142</sup> China requires an exemption of most-favoured treatment, national treatment, and nationality restriction of senior executives and directors of SOEs and reserves the right to adopt further non-conforming measures.<sup>143</sup> Apparently, such rule contestation is inadequate. In USMCA, the US designed more China-specific rules on SOEs. Three types of non-commercial assistance are banned, including the loan or loan guarantee provided to an uncreditworthy SOE, non-commercial assistance offered to the SOEs that are insolvent or on the brink of insolvency in the absence of a credible restructuring plan, and equity that is converted from outstanding debt if it is inconsistent with the usual practice of a private investor.<sup>144</sup> None of these rules was contested by China.

There are also some other rules that China failed to contest. For example, the G2 countries forbade their FTA partners to require a transfer of technology as a condition of market access of foreign direct investment.<sup>145</sup> For China's industry upgrade, its enterprises need to acquire high technologies through investments. However, in China's investment treaty with Japan and Korea, instead of rule contestation, China committed to not requiring technology transfer in its investment laws.<sup>146</sup>

## 6. Conclusion

The competition for power of discourse is fierce among big nations. To pursue such power, both the US and EU have developed techniques to enhance their abilities of rule control, rule assimilation, and rule contestation. These techniques not only allow them to establish a coherent treaty network for themselves that suits their overseas political and economic objectives but also establish a common cognition of the supremacy of their rules globally and create a gravity that attracts others to follow.

The G2's success in drafting FTAs reflects the significance of exploring the power of discourse in the context of FTA negotiation. The strategies of rule control, rule assimilation, and rule contestation adopted by them cannot be copied directly but can offer some suggestions to China to improve its FTA network and raise its power of discourse.

China has launched its regional FTA strategy and has concluded FTAs with its strategic alliances all around the world. As new FTA partners are mostly small developing countries, it is highly possible that China will have a dominant role in the negotiations. The text of the current 15 FTAs shows that China's treaty negotiation techniques have improved, its treaty consistency has increased, and China has been more engaged in rule-making. However, China's current FTA network has not developed a pattern that could generate a cohesive lead in future FTA negotiation. They are still immature in terms of rule control, rule assimilation, and rule contestation. Based on

<sup>141</sup>See China-Canada FIPA, Arts. 6, 7.

<sup>142</sup>The asset transfer of an SOE needs to be approved by the State-Owned Assets Supervision and Administration Commission (SOASAC) in China. If the enterprise loses its SOE identity after the transaction, the transaction needs to be approved by the government. The directors and supervisors of SOEs should be appointed by the SOASAC. See State-Owned Assets Administration Act, Arts. 22, 53, available at [www.xuexila.com/fanwen/banfa/2766538.html](http://www.xuexila.com/fanwen/banfa/2766538.html) (accessed 10 July 2017).

<sup>143</sup>See China-Canada Investment Facilitation and Protection Agreement, Art. 8, available at [tfs.mofcom.gov.cn/article/Nocategory/201111/20111107819474.shtml](http://tfs.mofcom.gov.cn/article/Nocategory/201111/20111107819474.shtml) (accessed 10 July 2017).

<sup>144</sup>USMCA, Art. 22.6.

<sup>145</sup>2012 U.S. Model BIT, Art. 8, P 1(f), (h). CETA, Art. 8.5.

<sup>146</sup>Sino-Japan-Korea Investment Promotion, Facilitation and Protection Agreement, Art. 7.2.

this study, China's rule control has been constrained by its soft power, due to the lack of FTA negotiation and drafting skills. The imprecise terms adopted in its de facto template and its lack of willingness and ability regarding legal export has resulted in China's deficiency in rule assimilation. China's contestation of the SOE disciplines and technology transfer rules is either absent or weak. All these restrict its power of discourse in FTA negotiation, and continuous learning from the experience of the G2 will benefit its capacity building in future FTA negotiation.