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中国服务贸易协会  
China Association of Trade in Services

# 2022

## 中国国际服务贸易 年度观察

ANNUAL  
REVIEW ON

INTERNATIONAL  
TRADE IN  
SERVICES IN CHINA

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# 中国国际服务贸易 年度观察

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# 中国国际服务贸易年度观察 (2022)

石静霞 \*

## 一、引言

根据世界贸易组织 (World Trade Organization, WTO) 的统计, 近年来全球服务贸易平均增速为货物贸易增速的两倍, 在国际贸易中的占比和地位稳步提升。<sup>1</sup> 尽管服务贸易在许多发达经济体中占据其国际贸易的主体地位, 在发展中经济体国际贸易中的占比亦在迅速上升, 但总体上服务贸易在国际贸易中的重要性经常被忽略。部分原因在于服务的无形性以及服务贸易相关问题的复杂性。<sup>2</sup>

2021 年适逢我国加入 WTO 20 年。这 20 年既是我国经济快速发展的 20 年, 也是我国服务贸易发展的加速器。目前我国服务业产值占 GDP 的比重从 2001 年的 33% 左右稳步上升到 55% 左右, 出口量占我国出口总额的 10% 左右, 缩小了我国与世界产业结构的差距。<sup>3</sup> 至 2021 年底, 我国已连续 7 年保持服务贸易世界第二大国地位, 服务贸易进出口额占全球总额的比例持续提升, “中国服务”已成为“全球服务”发展的巨大引擎。<sup>4</sup> 在新冠疫情肆虐世界、全球经济陷入衰退、单边主义日益抬头时, 我国同东盟和日韩澳新共十五国于 2020 年 11 月 15 日签署《区域全面经济伙伴关系协定》(Regional Comprehensive Economic Partnership, RCEP)。RCEP 中包含了很多服务业开放内容, 致力于营造更为公平的服务贸易竞争环境, 对国际服务贸易的规则构建及发展产生积极影响。<sup>5</sup> 在“一带一路”建设中, 随着信息技术的发展, 以互联网、大数据、跨境电商为代表的新型服务贸易正成为

\* 石静霞, 中国人民大学法学院教授、博士生导师, 北京仲裁委员会 / 北京国际仲裁中心仲裁员。

1 See World Trade Organization, World Trade Report 2019: The Future of Services Trade. 该年度报告统计数据截至 2017 年底。

2 Roberto Azevêdo, Forward by the WTO Director-General, World Trade Report 2019: The Future of Services Trade.

3 尹伟华: 《“十四五”时期我国产业结构变动特征及趋势展望》, 载《中国物价》2021 年第 9 期。

4 中国与世界共享“服贸”发展机遇, 新华国际时评, 2021 年 9 月 7 日, [http://www.bj.xinhuanet.com/hyzt/2021zgfmh/gundong/2021-09/07/c\\_1127838100.htm](http://www.bj.xinhuanet.com/hyzt/2021zgfmh/gundong/2021-09/07/c_1127838100.htm) (2022 年 1 月 16 日访问)。

5 RCEP 在服务贸易领域内达成的协议将推动服务贸易显著增长, 国新网, 2021 年 3 月 25 日, <http://www.scio.gov.cn/32344/32345/44688/45119/zy45123/Document/1700953/1700953.htm> (2022 年 5 月 26 日访问)。

新的经济增长点。<sup>6</sup>

习近平总书记指出, 服务贸易是国际贸易的重要组成部分和国际经贸合作的重要领域, 在构建新发展格局中具有重要作用。中国坚持开放合作、互利共赢, 共享服务贸易发展机遇, 共促世界经济复苏和增长。<sup>7</sup> 2021 年是“十四五”开局之年, 中国持续推进服务业开放, 加快推进服务业供给侧结构性改革, 服务贸易体制机制不断完善, 服务贸易发展水平不断提升。从连续 4 年缩减外资 (含服务业外资) 准入负面清单, 到出台海南自由贸易港跨境服务贸易负面清单, 以及探索建设国家服务贸易创新发展示范区等, 我国在 2021 年释放多重坚持推进经济全球化、深化国际经贸合作的信号。<sup>8</sup> 当前全球疫情仍未结束, 加之俄乌战争叠加效应, 世界经济面临多重挑战, 服务业开放合作是推动经济复苏的重要力量。

在此背景下, 本报告重点梳理中国 2021 年对外参加或签署的重要多边、区域和双边经贸协定中的服务贸易规则及承诺, 观察和讨论 2021 年我国服务业发展和北京市服务业的重点法律法规及文件, 并展望未来市场开放和规则构建。

6 数字经济提振信心, 营商环境加速完善——从服务贸易看“一带一路”建设新看点, 新华社, [http://www.gov.cn/xinwen/2020-09/09/content\\_5541990.htm](http://www.gov.cn/xinwen/2020-09/09/content_5541990.htm) (2022 年 5 月 26 日访问)。

7 “习近平在 2021 年中国国际服务贸易交易会全球服务贸易峰会上发表视频致辞”, 新华社, 2021 年 9 月 2 日。致辞全文见: [http://www.gov.cn/xinwen/2021-09/02/content\\_5635041.htm](http://www.gov.cn/xinwen/2021-09/02/content_5635041.htm) (2022 年 5 月 26 日访问)。

8 “共享服务贸易发展机遇, 共促世界经济复苏和增长”, 求是网, 2021 年 9 月 4 日, [http://www.qstheory.cn/wp/2021-09/04/c\\_1127827826.htm](http://www.qstheory.cn/wp/2021-09/04/c_1127827826.htm) (2022 年 5 月 26 日访问)。



## 二、多边层面：WTO《服务贸易国内规制参考文件》达成

2021年12月2日，包括我国在内的WTO 67个成员共同发表《关于完成服务贸易国内规制谈判的宣言》，确认服务贸易国内规制联合声明倡议（Joint Statement Initiative of Services Domestic Regulation, SDR）谈判顺利结束并达成《服务贸易国内规制参考文件》，决定参加方在一年内完成各自正式核准工作。<sup>9</sup> WTO 首轮多边贸易谈判“多哈发展回合”自2001年启动以来一直成果寥寥，<sup>10</sup>“服务贸易国内规制”谈判的成功结束对WTO 多边贸易而言是非常重要的进展。

### （一）《SDR 参考文件》的主要内容

服务贸易国内规制谈判于2017年12月在WTO第11届部长级会议(MC11)上正式发起，谈判成果文件体现为《服务贸易国内规制联合声明—服务贸易国内规制参考文件》（下称《SDR 参考文件》）。在总则部分，规则体现了发展导向，规定给予发展中成员最长达7年的实施过渡期；规则还强调参加方的监管权利，明确各方有权对其境内服务提供进行管理和制定新法规等。在具体规则要求部分，提出了服务贸易相关措施应符合客观和透明的标准、程序公正与合理要求，且不对服务提供者进行性别歧视等。在金融服务规则方面，考虑到金融服务的特殊性，为金融相关的许可、资质的申请与审批提供了适度的灵活监管空间。<sup>11</sup>

在具体内容上，《SDR 参考文件》聚焦于与服务贸易相关的许可要求和程序、资质要求和程序及相关技术标准，旨在促进服务贸易国内规制措施的透明度、可预见性和便利性。在透明度方面，《SDR 参考文件》要求WTO 成员公布所有的服务业许可要求及授权程序，建立服务提供方可进行咨询的适当机制，在公布相关服务业的法律法规时征询相关利益方意见并对意见予以考虑等。在可预见性方面，《SDR 参考文件》要求就申请处理建立指示性的时间表，提供有关许可申请审理的进展，允许申请方改正申请材料中的微小错误或提供进一步

9 WTO, Declaration on the Conclusion of Negotiations on Services Domestic Regulation, WT/L/1129, December 2, 2021.

10 多哈回合试图解决之前《关税与贸易总协定》（General Agreement on Tariff and Trade, GATT）历次谈判中忽视发展中成员利益而积累的发展赤字。为此，一些发展中成员始终坚持应首先完成多哈回合授权，并多次利用WTO 的共识（consensus）决策机制拒绝启动新议题谈判。See e.g., Genevieve Dufour & David Pavot, WTO Negotiations: The Unfinished Doha Development Agenda and the Emergence of New Topics, Global Trade and Customs Journal, Vol. 15, No. 5, pp. 244-251 (2020).

11 WTO, Joint Initiative on Services Domestic Regulation – Reference Paper on Services Domestic Regulation, INF/SDR/2, Nov. 26, 2021.

信息等。在便利性方面，《SDR 参考文件》要求申请只需经过一个主管机关，允许申请方随时提交申请，接受电子方式申请以及复件材料，申请费用应合理和透明，以公开透明方式制定相关技术标准，确保相关程序公正公平，且不在提供者之间进行性别歧视等。<sup>12</sup>

### （二）《SDR 参考文件》的特点及意义

#### 1. 《SDR 参考文件》达到成为“关键多数协定”的标准

如果开放式诸边协定的参加方达到行业覆盖的关键多数，则在经济学意义上而言，免费搭车对参加方造成的利益外溢可忽略不计。参加方允许非参加方虽不承担协定义义务但可享受协定利益，此类协定被称为“关键多数协定”（critical mass agreements, CMAs）或“临界数量协定”，通常可基于最惠国待遇原则将协定利益扩及所有WTO 成员。<sup>13</sup> SDR 谈判启动时有59个WTO 成员参加，至协议签署时已有67个成员，包括中国、美国和欧盟成员国在内的服务贸易进出口排名的前9位成员，只有出口排名第8、进口排名第10的印度未参加谈判。参加成员的服务贸易量涵盖全球服务贸易90%，达到成为“关键多数协定”的标准。因此，《SDR 参考文件》可在最惠国待遇基础上将协定利益扩及所有WTO 成员。WTO 总干事奥孔乔-伊维拉女士在WTO 有关《SDR 参考文件》发布会上呼吁该协议参与方继续与其他WTO 成员接触，并鼓励其切实落实其中的技术援助，以吸引更多成员尤其是发展中成员加入。<sup>14</sup>

#### 2. 为诸边谈判引入创新模式，助力重振WTO 谈判功能

服务贸易国内规制是世贸组织在近20年以来首次实现以诸边谈判方式取得重大突破的议题。相关谈判达成协议，表明世贸组织谈判可以向积极方向前进。这有助于重振世贸组织谈判功能，为世贸组织未来其他议题谈判路径提供重要借鉴。<sup>15</sup> 服务贸易国内规制谈判利用

12 Ibid, pp. 4-8.

13 See Manfred Elsig, WTO Decision-Making: Can We Get a Little Help from the Secretariat and the Critical Mass, in Redesigning the World Trade Organization for the Twenty-First Century, pp.86-90 (2010); Peter Gallagher & Andrew Stoler, Critical Mass as an Alternative Framework for Multilateral Trade Negotiations, Global Governance Vol. 15, p. 375 (2009); Gary Winslett, Critical Mass Agreements: The Proven Template for Trade Liberalization in the WTO, World Trade Review, Vol. 17, No. 3, pp. 405-426 (2018).

14 WTO, Negotiations on Services Domestic Regulation Concluded Successfully in Geneva, Dec. 2, 2021; [https://www.wto.org/english/news\\_e/news21\\_e/jssdr\\_02dec21\\_e.htm](https://www.wto.org/english/news_e/news21_e/jssdr_02dec21_e.htm) (last visited May 18, 2021).

15 参见龚柏华：《论WTO 规则改革现代化中的诸边模式》，载《上海对外经贸大学学报》2019年第2期；谢理：

《服务贸易总协定》（General Agreement on Trade in Services, GATS）减让表修改方式载入各成员承诺，并根据 GATS 关于修改承诺表的程序予以实施，不影响未参加成员的贸易利益，无须所有成员的共识决策。在 67 个参与成员中，截至 2021 年底已有 41 个成员完成了减让表修改。<sup>16</sup>

### 3. 《SDR 参考文件》将有效削减服务贸易成本

近年来由于数字技术等因素的驱动，全球服务贸易迅速发展，按增值统计方式，服务贸易目前已基本占全球贸易的一半左右。《SDR 参考文件》的相关规则旨在优化成员服务业领域许可审批流程，降低企业经营成本，改善全球服务贸易营商环境。根据世贸组织和经合组织的联合研究报告，参考文件的生效将为全球企业参与国际服务贸易每年节省约 1500 亿美元成本，尤其惠及中小微企业，金融、商业、通信和运输服务业收益尤为显著。<sup>17</sup>

### 4. 在 WTO 诸多协定中首次引入社会条款

《SDR 参考文件》在第 2 节第 22 条“措施制定”（d）款专门规定，成员在制定与授权服务提供等相关措施时，必须确保“这些措施不在服务提供者之间形成性别歧视”。这是 WTO 协议中首次出现社会条款（social clauses）。WTO 目前正在进行谈判或正在酝酿的此类谈判包括“贸易和妇女经济赋权”、“贸易和可持续发展”等。参考文件中首次纳入性别平等条款，要求各参加方在法律法规中确保男女享有平等参与服务贸易的权利，成为 WTO 支持妇女经济赋权（women economic empowerment）的重要途径。<sup>18</sup>

## （三）中国与《SDR 参考文件》的谈判

一直以来，我国持续开展包括服务业在内的改革开放，颁布了《外商投资法》及其配套法规，确立了包括服务业在内的外商投资准入前国民待遇加负面清单管理制度。我国从 2017 年“服务国内规制”诸边谈判启动时即积极参与，不仅联合各方发起谈判，并主动提

供方案建议，以实际开放行动履行责任担当。在谈判过程中，我国会同各方积极研提谈判具体问题解决方案，在必要情况下显示灵活性以寻求共识。在最后阶段，我国及时提交了两份关于具体承诺减让表的草案文件，为顺利完成谈判作出积极贡献。<sup>19</sup>

我国作为全球服务贸易第二大市场，《SDR 参考文件》对我国服务市场的整体营商环境改善和进一步吸引服务业外资有重要作用，有助于中国企业更加便利地在境外设立商业实体、取得经营许可和相关资质，并通过跨境方式提供服务。此外，还有助于降低我国企业进入国际市场的成本，为我国服务贸易高质量发展提供规则保障。目前我国已完成 GATS 减让表修改，将与各方共同推动该谈判成果早日落地生效。

《诸边贸易协定和 WTO 谈判路径的选择》，载《国际经济法学刊》2019 年第 2 期。

<sup>16</sup> WTO, Joint Initiative on Services Domestic Regulation – Schedules of Specific Commitments – Revision, INF/SDR/3/Rev.1, Dec. 2, 2021.

<sup>17</sup> WTO & OECD, Services Domestic Regulation in the WTO: Cutting Red Tape, Slashing Trade Costs, and Facilitating Services Trade, Trade Policy Brief, Nov. 19, 2021.

<sup>18</sup> WTO, Services Domestic Regulation – Rationale and Content, Potential Economic Interests, and Increasing Prevalence in Trade Agreement, November 2021, pp. 2-3.

<sup>19</sup> 新华社：商务部解读 WTO 服务贸易国内规制联合声明倡议谈判成果，2021 年 12 月 8 日，[http://www.gov.cn/xinwen/2021-12/08/content\\_5659345.htm](http://www.gov.cn/xinwen/2021-12/08/content_5659345.htm)（2022 年 5 月 28 日访问）。

### 三、《区域全面经济伙伴关系协定》中的服务贸易

《区域全面经济伙伴关系协定》（RCEP）于 2022 年 1 月 1 日正式生效，标志着全球人口最多、经贸规模最大、最具发展潜力的自由贸易区正式落地，体现了中国和缔约方维护多边主义和自由贸易、促进区域经济一体化的关键举措，为亚太区域乃至全球贸易投资增长以及疫后经济复苏作出贡献。<sup>20</sup> 服务贸易自由化及相关承诺是 RCEP 的重点内容之一。RCEP 在沿袭 WTO 服务贸易规则框架的基础上有较大超越，选择性吸收了其他高水平自由贸易协定（FTAs）有关服务贸易的新兴纪律和制表模式，并通过制表模式的双轨制、制表模式转化的过渡制、明确缔约方对规则解释与适用的自由裁量权等方式，兼顾不同缔约方的发展水平异质性。本报告重点分析 RCEP 第 8 章“服务贸易”与该章的《金融服务附件》《电信服务附件》，提炼出我国应重点关注的纪律和义务。

#### （一）关于服务贸易的一般规则（第 8 章）

RCEP 第 8 章规定了服务贸易的一般规则，是协定关于服务贸易的最重要章节。除一般纪律外，该章针对金融服务、电信服务与专业服务制定了三个附件。

#### 1. 第 8 章主要内容及特点

##### （1）本章核心义务

第 8 章包括正文 25 条和 8-A（金融服务），8-B（电信服务），8-C（专业服务）三个附件。本章核心义务包括：国民待遇<sup>21</sup>、市场准入<sup>22</sup>、最惠国待遇<sup>23</sup>、具体承诺表与不符措施承诺表的自选双轨制<sup>24</sup>、配套具体承诺表的过渡机制<sup>25</sup>，以及禁止当地存在要求（local presence）<sup>26</sup>。其中，具体承诺表与不符措施承诺表的自选双轨制，以及与之配套的透明度

20 商务部：国际司负责人谈 RCEP 即将生效有关情况，2021 年 11 月 6 日，[http://fta.mofcom.gov.cn/article/rcep/rcepnews/202111/46078\\_1.html](http://fta.mofcom.gov.cn/article/rcep/rcepnews/202111/46078_1.html)（2022 年 1 月 18 日访问）。RCEP 协定文本参见中国自由贸易区网，[http://fta.mofcom.gov.cn/rcep/rcep\\_new.shtml](http://fta.mofcom.gov.cn/rcep/rcep_new.shtml)。

21 RCEP，第 8.4 条。

22 RCEP，第 8.5 条。

23 RCEP，第 8.6 条。

24 RCEP，第 8.3 条、第 8.7 条、第 8.8 条。

25 RCEP，第 8.12 条。

26 RCEP，第 8.11 条。

清单与过渡安排，体现出 RCEP 在兼顾缔约方不同发展水平、追求渐进自由化的高度灵活性。

#### （2）制表模式的自选双轨制：灵活的自由化步调

RCEP 缔约方关于服务贸易市场准入与国民待遇的约束性承诺，可从两种制表模式中自主选择：一种是采用正面清单列表模式的“具体承诺表”（Schedules of Specific Commitments），另一种是采用负面清单列表模式的“不符措施承诺表”（Schedules of Non-Conforming Measures）。RCEP 缔约方的服务贸易发展水平和国内监管能力差异较大，若采用 GATS 或 CPTPP 的单一制表模式则难以调和缔约方之间的利益分歧。因此，RCEP 创造性地采用了灵活包容的双轨制设计，允许各缔约方自主选择符合其开放需求的制表模式，以差异化步调促进区域内服务贸易的整体自由化。<sup>27</sup> 我国等 8 个成员采用正面清单方式的“具体承诺表”。

#### （3）现状锁定与棘轮条款：锚定的自由化方向

为自动锁定缔约方在服务贸易方面的自由化进展，包括锁定现有的开放水平以及锁定缔约方未来的自由化成果，确保开放水平不同步的缔约方一齐朝着服务贸易自由化的目标同向而行，RCEP 对具体承诺表和不符措施承诺表均规定了现状锁定条款（standstill clause）与棘轮条款（ratchet clause），但要求的强度有所差异。<sup>28</sup> 一方面，缔约方如采用具体承诺表（如中国），应在承诺表中以“FL”（Future Liberalization，即“未来自由化”）对进一步自由化的部门或分部门加以确定。在这些部门和分部门中，任何承诺表中列入的适用条款、限制、条件、资质，应当限定于该缔约方的现行措施，即现状锁定要求。<sup>29</sup> 如一缔约方今后对该措施的修正减少或消除了其与市场准入义务或国民待遇义务的不符性，则该缔约方不得随后以增加该措施与前述义务不符性的方式对该措施进行修正，即棘轮要求。<sup>30</sup> 另一方面，缔约方如采用不符措施承诺表，则其制表模式本身已内置了锁定现状要求与棘轮要求。此类缔约方在制定“现有不符措施保留承诺表”时，应承诺该类措施在未来不再加严的义务，并锁定未来的任何自由化措施。<sup>31</sup>

根据上述要求，缔约方不论是采用具体承诺表还是不符措施承诺表，均应遵守同等程度

27 关于 RCEP 的混合列表模式解释，see Ministry of Trade and Industry – Singapore, Understanding the RCEP Services, Investment and E-Commerce Chapters, pp. 10-16.

28 关于这两类条款的具体含义，see European Union, Services and Investment in EU Trade Deals – Using Positive and Negative Lists, April 2016, p.4.

29 RCEP，第 8.7.3 条。

30 RCEP，第 8.7.4 条。

31 RCEP，第 8.8 条。



的棘轮要求。但就现状锁定要求而言，采用具体承诺表的缔约方，通常也是服务贸易国际竞争力和国内监管能力相对较低的发展中国家，可以通过标注“FL”字样，自主选定遵循现状锁定要求的服务部门。此类差异化安排，显示了 RCEP 在服务贸易开放承诺上的灵活务实以及对发展中国家特殊与差别待遇的包容。<sup>32</sup>

#### (4) 与具体承诺表配套的过渡机制

为促进各缔约方的服务贸易自由化，RCEP 针对采用具体承诺表的缔约方设置了专门的过渡机制，规定此类缔约方应在 6 年内将其正面清单转化为负面清单。RCEP 针对具体承诺表设置的过渡机制，规定了明确的操作程序、时限要求及自由化水平基准，较之以往 GATS 和部分 FTAs 中的内置议程更有实操性和约束力。中国应充分利用 6 年过渡期，推进服务贸易对外开放与国内改革，理顺正面清单与负面清单的转化方式。

#### (5) 服务贸易的国内规制 (domestic regulation)

RCEP 服务贸易章节不仅要求扩大服务业的市场准入机会，也要确保公平透明的服务贸易环境，使各缔约方的服务及服务提供者获得非歧视待遇。RCEP 国内规制条款试图使其其他缔约方服务提供者申请授权的程序更为透明和简化，要求缔约方在可行范围内对此类申请程序建立指示性的框架，通知申请人其申请状态，如果拒绝申请则应提供原因或理由。<sup>33</sup> RCEP 透明度规则义务在整体上较为节制，着力于强化事后环节的信息公布与咨询回应，未对事前和事中环节施加要求。<sup>34</sup> 此外，RCEP 要求缔约方应通过互联网方式发布影响服务贸易的国内法规与国际协定，并在其法律框架所规定的范围，以英文方式提供前述信息。<sup>35</sup>

#### (6) 禁止要求当地存在

RCEP 对依据不符措施承诺表作出承诺的缔约方施加了“禁止要求当地存在”的义务。<sup>36</sup> “禁止要求当地存在”（下称“禁存义务”）也称“不设立权”，指一国不得将外国服务提供者在当地设立或维持商业存在或成为居民作为允许其通过跨境方式提供服务的前提条件。

32 Pasha L. Hsieh, The RCEP: New Asian Regionalism and the Global South, Institute for International Law and Justice Working Paper, 2017/4, New York, pp. 46-48; Jane Kelsey, Regional Comprehensive Economic Partnership (RCEP) Services Chapter: Risks for Developing Countries' and LDCS' Policy Space and Regulatory Sovereignty (2016), at 2-7.

33 RCEP, 第 8.15 条。

34 RCEP, 第 8.14 条。

35 RCEP, 第 8.14 条。

36 RCEP, 第 8.11 条。

“禁存义务”适用于跨境服务贸易的三种模式，即跨境提供、境外消费和自然人移动。在网络信息技术迅速发展的背景下，该规则降低了服务提供者（特别是中小微企业）通过网络等跨境方式提供服务的固定成本，对于电子商务 / 数字贸易的发展、跨境服务贸易的自由化具有重要的促进意义。<sup>37</sup> 除了要求设立当地存在，“禁止要求成为居民”是“禁存义务”的另一体现。应注意的是，对公司董事会、高管人员等的特定国籍要求不属于“要求成为居民”类的当地存在要求，在负面清单中涉及不同义务，应予以分别列明。

## 2. 我国法律法规与 RCEP 服务贸易一般性规则的衔接

RCEP 服务贸易规则的特点和要求，对我国完善服务贸易国内规制、促进制度型开放提出了更高要求和标准。我国需在详细梳理国内涉及服务贸易的众多法律法规基础上，进一步提高我国服务市场的开放水平，同时着眼于高水平制度型开放，做好相关国内法的因应和调整。

### (1) 从法律上和技术上重视不符措施列表，真实反映我国的开放水平及意图

RCEP 在服务贸易承诺制表模式的自选双轨制，为我国探索高水平服务贸易开放提供了必要缓冲；而 RCEP 设置的向不符措施承诺表过渡的 6 年时限，以及相配套的现状锁定条款与棘轮条款，对我国负面清单制表能力提出了更为现实而紧迫的要求。鉴于 RCEP 规定采用具体承诺表作出承诺的缔约方应在协定生效后 3 年内启动提交不符措施建议承诺表，我国应在提交该不符措施建议承诺表之前梳理好我国各部门、各行业涉及服务贸易的法律法规，特别是厘清“跨境提供”、“境外消费”和“自然人移动”三类跨境服务贸易的开放现状与监管要求，理顺服务贸易的“商业存在”开放与相关服务业的投资开放之间的内在关系，为全面采用负面清单列表方式做好准备。

### (2) 考虑当地存在要求的存废，加强监管能力与合作

RCEP 对采用不符措施承诺表作出承诺的缔约方施加了“禁存义务”。在信息通讯技术和电子商务 / 数字贸易环境下，禁存义务对于确保跨境服务贸易自由化起着重要作用。相较 GATS 而言，“禁存义务”是一项值得重视的新义务。我国目前在电信、空运服务的销售和营销等服务中规定了当地存在要求。例如，在 GATS 承诺表中，我国对基础电信、增值电信业务、移动话音和数据服务、国内服务的模式一（即跨境提供）所做的承诺为“见模式三”。对模式一的承诺见模式三，实际上即要求服务提供者如果通过跨境提供模式向我国消费者提

37 参见石静霞、鄢雨虹：《论跨境服务提供中的禁止要求当地存在规则——兼论对我国服务市场开放的启示》，载《上海对外经贸大学学报》2020 年第 3 期。

供电服务，须以在我国设立商业存在为前提。这是较为典型的当地存在要求。按照 RCEP 过渡机制的要求，我国在期满后应转为“不符措施承诺表”的承诺模式，这意味着我国将在 RCEP 项下受到“禁存义务”的约束。“禁存义务”对我国服务业的监管能力提出了新挑战，应加强我国对服务贸易监管能力建设，并寻求关于国际监管的合作，为跨境服务贸易的有序提供和监管奠定良好的法治基础。

## (二) 金融服务附件<sup>38</sup>

### 1. RCEP《金融服务附件》的主要内容

《金融服务附件》以缔约方条约义务为中介，要求缔约方的自律组织履行金融服务开放的国民待遇义务，以间接扩张义务主体的方式，确保国民待遇义务的落实。附件第 10 条规定，如一缔约方要求另一缔约方的金融机构成为一自律组织成员，方可在其领土内提供金融服务，缔约方应确保其自律组织遵守该缔约方在服务贸易章节项下的国民待遇义务。<sup>39</sup> 为顺应数字经济背景下金融服务创新与贸易发展的需要，附件纳入了有关新金融服务的国民待遇要求，<sup>40</sup> 并为金融信息的跨境转移与处理提供了基本保障。<sup>41</sup> 每一东道国应当致力于允许在其领土内设立的另一缔约方的金融机构在该东道国领土内提供东道国无需通过新法律或者修改现行法律即允许其本国金融机构在类似情况下提供的新金融服务。缔约方既不得阻止其领土内的金融服务提供者进行日常营运所需的信息转移，包括通过电子方式或其它方式进行数据转移；也不得妨碍其领土内金融服务提供者进行日常营运所需的信息处理。<sup>42</sup>

金融服务业的高风险性决定了其“重监管”的特征，而不透明的监管程序与监管要求将极大地减损金融服务开放承诺的实效。附件设置了覆盖“事先 - 事中 - 事后”全环节的金融监管透明度规则，其规则的广度、深度与力度，远超第 8 章正文针对一般服务贸易所设置的透明度纪律水平。缔约方应当确保适用于本附件的所有普遍适用的措施以合理、客观和公正的方式实施，且此类普遍适用的措施应立即公布或以其它方式使公众周知。<sup>43</sup> 为防止缔约方

<sup>38</sup> RCEP，第 8 章附件 A。

<sup>39</sup> RCEP，第 8 章《金融服务附件》第 10 条。自律组织是指任何非政府机构，包括任何证券或期货交易所或市场、清算或支付结算机构或其它下列组织或者协会，具有被认可的自律组织资质并依据立法授权行使监管权。《金融服务附件》第 1 条 f 款。

<sup>40</sup> 《金融服务附件》第 3 条。

<sup>41</sup> 《金融服务附件》第 9 条。

<sup>42</sup> 《金融服务附件》第 11 条。

<sup>43</sup> 《金融服务附件》第 7 条。

滥用例外条款，该条强调，此类措施不得以构成任意或不当歧视的方式适用，也不能对金融机构投资或金融服务贸易构成变相限制。缔约方根据附件规则在新金融服务以及信息跨境转移处理方面履行自由化义务的同时，也享有充分的监管裁量权。就新金融服务而言，缔约方有权根据其国内法律法规，以符合国民待遇的方式对新金融服务的提供施加许可、机构或法律形式及其他要求。<sup>44</sup>

### 2. 我国法律法规与 RCEP《金融服务附件》的衔接

RCEP《金融服务附件》代表了我金融领域的最高承诺水平。首次引入了新金融服务、自律组织、金融信息转移和处理等规则，就金融监管透明度作出了高水平承诺，在预留监管空间维护金融体系稳定、防范金融风险的前提下，为各方金融服务提供者创造了更加公平、开放、稳定和透明的竞争环境。这些规则将不仅有助于我国金融企业更好地拓展海外市场，还将吸引更多境外金融机构来华经营，为国内金融市场注入活力。RCEP 关于新金融服务、信息转移和处理等条款既为中资金融机构创新业务模式和海外数据传输带来了新的便利，同时也对中国金融开放水平、风险防控和数据安全管理提出了更高要求。<sup>45</sup>

#### (1) 我国金融领域数据安全立法与关键基础设施立法

RCEP 第 9 条要求缔约方不得阻止其领土内的金融服务提供者进行日常营运所需的信息转移，包括通过电子方式或其它方式进行数据转移，也不得阻止其领土内金融服务提供者进行日常营运所需的信息处理。但同时该条第 1 款也规定，“缔约方认识到，每一缔约方可就信息转移和信息处理设置其管理要求”，即尊重并鼓励各国建立自己的信息跨境流动规则。我国在金融服务方面采取了进一步开放的姿态，《金融服务附件》中也首次引入了新金融服务、自律组织、金融信息转移和处理等规则，就金融监管透明度作出了高水平承诺。<sup>46</sup>

金融行业因其行业特性，对于数据资源的利用率及时效性有较高要求。近年来金融业与科技相结合的趋势也加剧了对金融数据流动效率与区域间数据保护壁垒间的矛盾。因此 RCEP 框架鼓励加强多边金融数据流动规则建立，促进金融数据在区域间的有序高效流动。我国应进一步建立和完善数据安全和个人信息保护的法律制度体系，在突出金融行业监管的监管作用，强化金融业机构等日常数据合规建设的前提下，加强金融数据跨境流动规则的自

<sup>44</sup> 《金融服务附件》第 3 条第 2 款。

<sup>45</sup> 廖媛媛、马兰：《RCEP 对中国金融业的影响》，载《中国金融》2021 年第 7 期。

<sup>46</sup> RCEP，《附件二：服务具体承诺表 - 中国》。



由度与多元化。<sup>47</sup> 应综合把握 RCEP《金融服务附件》设置的审慎措施规则、金融服务例外规则、新金融服务监管裁量权、信息转移与处理监管裁量权，结合 RCEP 第 17 章有关“关键公共基础设施”的安全例外条款，强化我国金融安全治理体系与治理能力。

## (2) “禁存义务”的排除适用与金融机构的当地存在要求

第 8 章针对一般服务贸易设置的“禁存义务”不适用于本附件所涵盖的服务，这意味着 RCEP 下一缔约方有权要求另一缔约方的金融服务提供者在当地设立或维持商业存在，或要求其符合当地居民身份，以此作为允许其通过跨境方式提供服务的前提条件。RCEP《金融服务附件》对“禁存义务”的排除适用，降低了 RCEP 对我国现有金融准入与监管机制的冲击，为我国渐进有序地推进金融开放提供了规则支撑。

## (三) 电信服务<sup>48</sup>

### 1. RCEP《电信服务附件》的主要内容

RCEP 第 8 章《电信服务附件》包括 23 个条款，主要确立缔约方政府在电信服务监管方面的保证义务，特别是确保本国存在公平竞争有序的电信服务市场以及其他缔约方电信企业进入本国电信服务市场提供服务等。在电信监管模式上，鉴于各国对电信服务的监管模式不同，RCEP 允许缔约方对电信服务采取不同的监管方式，包括直接监管、依靠市场力量运行或其他监管模式，但无论采取何种监管方式，均不得歧视提供者、注重保护消费者利益及维护公共利益。<sup>49</sup> 附件要求缔约方确保其电信监管机构的独立性和公正性，监管机构应独立于任何公共电信服务提供者，并且不对其负责。监管机构作出的监管决定和使用的程序，对所有市场参与者公平对待。<sup>50</sup>

在电信服务领域，外国提供者对东道国公共电信服务的接入和使用是提供服务的关键。对此，针对公共电信服务提供者的义务，RCEP《电信服务附件》明确了缔约方公共电信服务提供者在互联互通、号码携带和获得号码等方面的义务，并就主要运营商给予公共电信服

务的待遇进行了规定。<sup>51</sup> 附件要求在此类接入和使用上应按照合理、透明和非歧视的条件进行，但对这些义务允许一些例外，包括缔约方基于信息安全与机密、用户个人数据隐私等。例外措施不得歧视或构成变相的贸易限制措施等。在与主要运营商的互联互通方面，附件规定了一般条款、与主要运营商互联互通的选择以及互联互通报价和协议的公开提供等。<sup>52</sup> 为保障电信服务领域的充分竞争，附件对反竞争行为的竞争保障、转售、主要运营商网络因素的分类计价进行了规定。<sup>53</sup> 此外，技术中立对于电信服务而言是关键问题之一。对此协定明确了服务提供者在技术选择方面的灵活性，要求缔约方保证技术中立，即缔约方不得阻止公共电信提供者选择其为提供服务而愿意使用的技术等。<sup>54</sup> 最后，在电信争端解决方面，附件规定，针对本协定项下的争端缔约方应保证另一缔约方的公共电信服务提供者可以及时诉诸电信监管机构或争端解决机构；当电信监管机构最终裁决或决定不公正对待公共电信服务提供者时，后者能够根据其法律法规获得对此类裁决或决定的复议。<sup>55</sup>

### 2. 我国法律法规与 RCEP 电信服务规则的衔接

总体上，RCEP 电信服务章节相较于 GATS 规定了更高的标准和更具体的义务，旨在确保包括有关获得和使用电信服务、竞争性保障、电信网络互连、电信监管机构独立、透明度等方面的关键义务，在深度和广度上均对我国的电信服务规则提出了新要求。我国电信服务贸易规则自入世以来，虽在不断完善和开放，但目前在监管独立性、电信立法及电信服务转售限制等方面与 RCEP 对电信服务自由化的要求还有一定距离，应继续优化监管独立性、透明度、市场准入等方面的国内法律法规及实施机制。

47 叶鹏、郭富城：《RCEP 语境下，金融数据跨境规制的探讨与展望》，[http://www.east-concord.com/zygd/Article/202012/ArticleContent\\_1977.html](http://www.east-concord.com/zygd/Article/202012/ArticleContent_1977.html)（2022 年 5 月 29 日访问）。

48 RCEP，第 8 章附件 B，电信服务。

49 RCEP，第 8 章附件 B，电信服务，第 3 条。

50 RCEP，第 8 章附件 B，电信服务，第 12 条。

51 RCEP，第 8 章附件 B，电信服务，第 5 条、第 9 条、第 15 条。

52 RCEP，第 8 章附件 B，电信服务，第 4 条。

53 RCEP，第 8 章附件 B，电信服务，第 6 条、第 8 条、第 19 条。

54 RCEP，第 8 章附件 B，电信服务，第 21 条。

55 RCEP，第 8 章附件 B，电信服务，第 23 条。

## 四、双边层面：投资协定中的服务业开放

### (一) 《中欧全面投资协定》

《中欧全面投资协定》(China-EU Comprehensive Agreement on Investment, 以下简称 CAI 或协定) 谈判自 2013 年正式启动, 历经 35 轮谈判后于 2020 年 12 月 30 日完成。这是 2009 年《里斯本条约》将外国直接投资纳入欧盟“共同商业政策”专属权能后,<sup>56</sup> 欧盟对外缔结的第一个投资协定, 也是继 1985 年《中欧贸易与经济合作协定》以来中欧经贸关系中最重要双边法律文件。尽管目前 CAI 的批准生效因受中欧关系影响而面临不确定因素, 但在规则层面上, CAI 与我国 2020 年 11 月 15 日签署的 RCEP 共同构成我国近年来构建国际经贸条约版图的两个里程碑。与我国之前已签订的 100 多份双边投资协定 (Bilateral Investment Treaties, 以下简称 BIT) 和 17 份自由贸易协定 (Free Trade Agreement, 以下简称 FTA) 中的投资章节相比, CAI 规则具有明显的全面性和先进性, 代表了我国现阶段商签经贸条约的新范式。虽名为投资协定, 但 CAI 不仅涵盖投资自由化内容, 而且包括大量的服务贸易自由化内容。<sup>57</sup>

#### 1. 侧重于服务业的投资自由化

与早期国际投资协定侧重于投资促进和保护相比, 晚近投资协定发展的一个主要特点在于促进投资自由化和便利化, 即投资市场准入和相适应的监管框架。这种趋势与各国对投资协定促进外国直接投资流向的作用相关。<sup>58</sup> 我国传统上签署的 BIT 重在投资保护, 但随着我国自贸区 / 港的建设和《外商投资法》的颁布实施, 准入前国民待遇加负面清单模式的开放模式实质性地扩大了外资在我国的市场准入水平, 为我国商签经贸条约中的投资自由化奠定了基础。在欧盟层面, 随着《里斯本条约》的生效, 外国投资在欧盟对外关系中的作用日益

得到重视。与成员国之前对外签署的 BITs 不同, 欧盟近年来在 FTAs 投资章节中将投资自由化作为主要目标之一。<sup>59</sup> 顺应上述趋势, 在规定了序言、目标和基本定义后, CAI 第二部分集中于投资自由化, 包括 7 个条款, 涉及以负面清单 (或不符措施) 方式承诺的市场准入、履行要求、对外资的非歧视待遇以及为从事商业目的的自然人临时停留等内容。<sup>60</sup> 结合中欧双方的具体承诺附件看, CAI 在投资自由化领域一方面固化了我国近年来在国内法和自贸区 / 港进行的外资准入变革和承诺, 另一方面也有不少创新性规则。

CAI 全面性的一个重要体现在于其虽为投资协定, 但所适用的行业包含了许多关键的服务贸易投资, 并确立了服务市场进一步开放的纪律规制。这既是由欧盟对我国直接投资状况所决定的谈判重点,<sup>61</sup> 也反映了欧盟近年来所签协定中将贸易和投资规则加以融合的特点。<sup>62</sup> 借助投资与服务贸易之间的密切联系, CAI 是我国迄今为止签订的投资协定中涵盖服务自由化承诺和纪律最多的经贸条约。鉴于我国目前与世界上主要发达经济体所签的 FTAs 数量较为有限, CAI 所包含的服务贸易自由化是我国对外商签投资条约新范式的体现。

CAI 的全面性还体现于其所适用的行业承诺方式, 即不符措施列表形式, 或称“负面清单”。作为列表方式而言, 采用正面清单和负面清单并不直接或当然体现开放水平的高低, 甚至可以达到事实上相同的开放效果。<sup>63</sup> 近年来我国在属于自主自由化开放措施的国内自贸区 / 港建设中对负面清单方式的作用已高度重视, 但国内清单在内容、形式、公众参与等方面与经贸协定中的不符措施列表有不少区别。<sup>64</sup> 此外, 负面清单对谈判方的列表能力有很高要求, 对现存不符措施和未来不符措施的列表要求谈判者对各行各业发展现状和未来趋势及本

59 See Angelos Dimopoulos, “Shifting the Emphasis from Investment Protection to Liberalization and Development: The EU as a New Global Factor in the Field of Foreign Investment”, (2010) 11 (1) Journal of World Investment and Trade, pp. 5-27.

60 CAI, Section II (Investment Liberalization).

61 参见商务部:《中国外资统计公报 (2021)》, <http://images.mofcom.gov.cn/wzs/202111/20211125164038921.pdf>, 第 11 页, 2021 年 11 月 15 日 (2022 年 5 月 30 日访问)。

62 See, e.g., Amokura Kawharu, “Punctuated Equilibrium: The Potential Role of FTA Trade Commissions in the Evolution of International Investment Law”, (2017) 20 (3) Journal of International Economic Law, p.87.

63 See Rudolf Adlung & Hamid Mamdouh, “How to Design Trade Agreements in Services: Top Down or Bottom Up?”, (2014) 48 (2) Journal of World Trade, pp.191-218.

64 See Jie (Jeanne) Huang, “Nationwide Regulatory Reform Starting from China’s Free Trade Zones: The Case of the Negative List of Non-Conforming Measures”, in Julien Chaise (ed.), China’s International Investment Strategy-Bilateral, Regional, and Global Law and Policy (Oxford University Press, 2018), pp.93-98.

56 Treaty of Lisbon – Amending the Treaty on European Union and the Treaty Establishing the European Community, 2007/C306/01, effective as of December 1, 2009, Article 188 A, Article 188 C. 欧盟共同商业政策 (common commercial policy) 建立在关税同盟与商业关系上, 是欧盟以超国家的专属权能代表成员国统一对外谈判和制订国际经贸规则的依据。

57 本报告依据的 CAI 文本及附件基于欧盟根据透明度要求在其网站上公布的版本, 详见 <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237> (last visited May 20, 2022)。根据说明, 该文本在双方完成国内批准程序和协定生效前, 仍需经文字用语、条文编号或顺序调整等技术层面的修改。

58 See Inose Takamichi, “The Evolution of Investment Liberalization under the Recent Investment Treaties”, (2020) 16 (5) Public Policy Review 1, pp.3-12.



国利益的动态发展有熟练掌握或预测。<sup>65</sup> 这也是我国在经贸条约中通过负面清单方式进行承诺所面临的挑战。

从目前欧盟公布的 CAI 文本看，中欧双方附件各包括四方面内容，在形式上虽不完全一致，但无实质性区别。其中附件一和附件二分别为现存不符措施和未来不符措施，所涉义务包括国民待遇、最惠国待遇、履行要求和高管人员及董事会四方面。附件三是关于市场准入的特定承诺及限制，即与投资自由化义务不一致的措施。该附件包含了产业分类信息，主要涉及服务业。<sup>66</sup> 附件四则是有关公司内部人员调动和商务访客的入境及临时居留方面的保留或限制措施。<sup>67</sup> 我国在附件一中列入 36 个条目 (entries)，绝大部分条目中的义务仅涉及国民待遇。附件二列入 17 个条目，所涉义务除国民待遇外也包括其他类别。我国在 CAI 附件中所做的全面具体的开放承诺回应了欧盟企业进入我国市场的大部分关切，包括欧盟投资较为集中的服务领域的大幅开放，如金融、电信、医疗、环境服务等。与 GATS 承诺表相比，我国在这些领域大幅放宽了准入限制，包括云计算等新型服务业。CAI 是目前我国对外签订的所有经贸条约中唯一对服务业投资采取负面清单方式的协定，<sup>68</sup> 将为我国未来更多采取这种列表方式积累经验。欧盟列表中包含欧盟层面措施和各成员国措施，在附件一列入 15 项保留 (reservations)，附件二列入 22 项保留。这些保留绝大部分涉及服务业，多数保留所涉义务不止一项。<sup>69</sup>

CAI 投资自由化的排除范围对服务业也有特别关注。除了 GATS 对政府服务、航空运输及附属服务等事项的排除外，CAI 首先排除的是视听服务业。<sup>70</sup> 视听服务是数字化时代服务业的重要组成部分。基于传统上对文化多样性的保护，欧盟在其签订的经贸协定中一贯排除

视听服务方面的义务。<sup>71</sup> 对我国而言，视听服务在现阶段涉及到网络文化产业发展、文化产品内容审查等诸多敏感问题。CAI 对视听服务的排除应该说契合了双方在该领域行使规制权的需要。

## 2. 金融服务的监管框架

CAI 在“监管框架”第三节专门规定了“金融服务”，涉及范围及定义、审慎例外、高效和透明监管、信息转移和处理、新金融服务、特定例外、自律组织及清算和支付系统等条款。作为投资协定，CAI 对金融服务监管框架的规定既是协定在体例和内容上的创新，也凸显缔约方对金融市场开放的特别关注，其内容反映了中欧在金融服务监管方面的新趋势。

第一，市场开放和东道国监管权的并重。在市场开放方面，CAI 涵盖的金融部门包括保险、与保险相关的服务以及银行和其他金融服务。相较 GATS，我国在 CAI 中的金融开放承诺部门增加，例如在银行和其他金融服务项下包括了担保和承诺、货币经纪、资产管理、金融资产的结算和清算服务等。<sup>72</sup> CAI 在开放金融市场的同时注重东道国的规制权，通过审慎例外、金融服务例外及有效和透明监管等条款，对保证本国金融系统的安全和稳定留下监管空间。

第二，市场开放和公平竞争的统一。鉴于中欧近年来已不断取消各类金融服务壁垒，CAI 对金融服务监管框架的重点转向双方的监管规则协调，在金融服务提供的许可、资质要求、交易机会和资格授予以及对新金融服务的监管等方面，均要求给予同等待遇。

第三，兼顾金融创新与风险防范。CAI 对金融创新的关注体现于新金融服务和对金融科技监管沙盒 (regulatory sandbox) 的约束。<sup>73</sup> 为促进对新金融服务的包容和审慎监管，CAI 要求缔约方对金融服务提供者尽力努力给予同等待遇，包括自贸试验区和自贸港先试先行时应符合非歧视要求，但继续保留审慎监管例外。这表明 CAI 试图回应中欧双方实施金

65 See Rodrigo Monardes V, “Challenges for Countries in Trade in Services’ Negotiations with the NAFTA Approach, The Experience of Chile in the Free Trade Agreement with the United States”, (2016) 5 (1) British Journal of American Legal Studies, pp.390-392.

66 这些措施来源目前为商务部发布的《外商投资准入特别管理措施（负面清单）》（2019 年版）。谈判者特别注明在 CAI 正式签署前，我国将更新并援引最新版清单。China - EU Investment Agreement Negotiation - Schedules of China, Negotiator’s Note, p.5. 附件三的列举依据为 CAI 第二部分第 2 条（市场准入）。

67 CAI - Schedules of China.

68 在 RCEP 项下，我国目前对投资领域的承诺采用负面清单模式，但排除了服务业投资，因此服务业具体承诺表仍采取正面清单模式。RCEP, Annex II, Schedule of Specific Commitments for Services - China.

69 CAI - Schedules of European Union.

70 CAI, Section II, Article 1 (Scope of Application).

71 See Antonios Vlassis, “European Commission, Trade Agreements and Diversity of Cultural Expressions: Between Autonomy and Influence”, (2016) 31 (4) European Journal of Communication, pp.446-461; Lucia Bellucci, “The Notion of ‘Cultural Diversity’ in the EU Trade Agreements and Negotiations: New Challenges and Perspectives”, (2016) 2 (2) Italian Law Journal, pp.433-444.

72 这些国际公认标准包括但不限于 G20、金融稳定委员会、巴塞尔银行监管委员会、国际保险监管者协会、国际证监会组织、反洗钱金融特别行动工作组以及税收透明度和信息交换全球论坛等组织采纳的标准。

73 2016 年英国启动金融科技监管沙盒计划，旨在金融科技创新和有效管控风险中找到平衡。See Guilio Cornelli et. al., Inside the Regulatory Sandbox: Effects on Fintech Funding, BIS Working Paper, No. 901, November 9, 2020. 参见陈佩、孙祁祥：《多元共治：创新与监管的平衡—基于“监管沙盒”理论依据与国际实践的思考》，载《保险研究》，2019 年第 3 期，第 27-35 页。目前包括我国在内的约 40 多个国家和地区实施了金融创新监管沙盒。中国人民银行于 2019 年 2 月启动金融科技监管的创新试点工作，已覆盖北京、上海等地区。



融科技监管沙盒的现状，并对此类监管施加了非歧视要求。

第四，关于金融信息的转移和处理。这是 CAI 关于金融服务的另一突破性规定，涉及到数据跨境流动问题。金融业是最体现数据密集型特点的现代服务业之一，涉及大量的客户敏感数据及隐私。在数据跨境流动中对金融信息是否需要给予特殊待遇存在争议。<sup>74</sup> CAI 明确要求缔约方在不违反东道国基于审慎原因的监管要求前提下，原则上不得阻止其领土内的金融服务提供者就日常营运所需要的信息进行处理和转移。

在逆全球化抬头甚至盛行之际，CAI 所包含的服务业开放规则及承诺向全球展现了我国的制度型开放承诺和创新社会治理的良好形象。中欧间并不存在明显的地缘政治冲突，因政治层面的影响而冷却 CAI 这一重要谈判成果并不符合双方利益。CAI 的达成殊为不易，中欧应在既有成果基础上对未来双边关系进行客观评估和理性判断，在求同存异基础上积极预防更大的负外部性发生，使来之不易的谈判成果发挥条约作用，方能裨益于双方长足的经贸发展和共同利益。

## (二) 《中毛自由贸易协定》中的服务贸易

毛里求斯被称为“非洲的离岸天堂”（offshore haven）。<sup>75</sup> 2017 年 12 月，中毛双方启动自由贸易协定谈判。经过四轮谈判，2019 年 10 月 17 日，中毛双方签署《中华人民共和国政府和毛里求斯共和国政府自由贸易协定》（以下简称《中毛 FTA》）。《中毛 FTA》于 2021 年 1 月 1 日生效实施。<sup>76</sup>

《中毛 FTA》包括序言、17 个章节和 3 个附件，总体上实现了全面、高水平 and 互惠。在服务贸易方面，《中毛 FTA》第 7 章规定了“服务贸易”。本章包括 24 条内容，在规则层面上与 GATS 并无显著区别。本章包括三个附件，附件一为金融服务、附件二为自然人流动、附件三为中医药合作。在服务贸易的具体承诺方面，《中毛 FTA》采取正面清单列表，在 100 多个服务分部门作出了总体水平相当、利益平衡的开放承诺，并同意在农业、金融、

<sup>74</sup> See Nigel Cory & Robert D. Atkinson, Financial Data does not Need or Deserve Special Treatment in Trade Agreements, Information Technology and Innovation Foundation (ITIF), April 2016. 该报告认为，CPTPP 中对金融服务数据跨境处理的特殊规定传递了危险信号，即为监管需要可以对金融服务数据施加当地存储要求，这将引发越来越多的数字保护主义政策。

<sup>75</sup> John Njiraini, Mauritius: Africa's Offshore Haven, Global Finance, Dec. 9, 2019, <https://www.gfmag.com/magazine/december-2019/mauritius-africas-offshore-haven> (last visited Jan. 28, 2022).

<sup>76</sup> 《中毛 FTA》的中英文文本见中国自由贸易区网，[http://fta.mofcom.gov.cn/mauritius/mauritius\\_special.shtml](http://fta.mofcom.gov.cn/mauritius/mauritius_special.shtml)（最后访问 2022 年 5 月 28 日）。

医疗、旅游等多个领域开展经济技术合作。《中毛 FTA》是毛方迄今在其服务领域开放水平最高的自贸协定。毛方在金融、教育、建筑、旅游、健康等 11 个服务领域作出承诺，分部门超过 130 个。中方则在商业服务、金融、交通等领域大幅放宽对毛市场准入限制，总体开放水平远超我 GATS 承诺。

从附件内容看，首先，金融服务是中毛双方的重点合作领域之一。在规则方面，《中毛 FTA》就金融服务制定了单独附件，双方同意将在国内规制、监管透明度、承认等领域加强合作。在市场准入方面，毛里求斯在保险、银行、证券等服务部门对中方作出高水平开放承诺，允许中国企业在毛设立商业存在，并给予国民待遇。中方则在加入世贸组织承诺基础上，纳入金融领域最新开放政策。《中毛 FTA》将为中毛金融机构进入双方市场创造良好营商环境和发展机遇，也将为推动两国金融部门更紧密和更深入的合作提供契机。<sup>77</sup> 其次，毛里求斯对服务的开放亮点之一是在自然人流动方面。中国公民可以去毛里求斯开放的服务部门开展业务，我国赴毛人员主要包括商务访问者、合同服务提供者、毕业实习生、公司内部调动人员等。<sup>78</sup> 第三，毛方对我国首次完全开放中医服务市场，同意全面加强中医药交流合作，有利于我国中医药走出去。<sup>79</sup>

电子商务也是双方共同关注的议题。根据《中毛 FTA》第 11 章（“电子商务”），双方同意开展法律法规、政策和实践经验的信息交流与分享，共同加强研究和培训，促进数字证书和电子签名的互认，提升贸易管理文件电子版本的接受度，共同营造良好发展环境，为企业提高效率、开拓市场提供更大便利。

<sup>77</sup> 《中毛 FTA》第 7 章附件一“金融服务”。

<sup>78</sup> 《中毛 FTA》第 7 章附件二“自然人流动”。

<sup>79</sup> 《中毛 FTA》第 7 章附件三“中医药合作”。

## 五、2021 年中国国际服务贸易发展及相关重要立法和文件

### (一) 中国 2021 年的服务贸易发展概要

从统计数据看，尽管有新冠疫情影响，2021 年中国服务贸易仍保持了较快速增长。全年服务进出口总额达 52982.7 亿元人民币，同比增长 16.1%。<sup>80</sup> 2021 年国际服务贸易发展主要呈现出几个特点：第一，知识密集型服务贸易稳定增长。知识密集型服务涵盖的部门一般是金融、教育、知识产权使用费、电信计算机和信息服务等。2021 年，知识密集型服务进出口 23258.9 亿元，同比增长 14.4%。<sup>81</sup> 金融服务、电信计算机和信息服务进出口增速很快，分别为 31.1% 和 19.3%。第二，运输服务进出口大幅增长。自新冠疫情发生以来，海外对防疫物资等商品的需求大量激增，但因疫情防控措施导致海运以及空运运力的严重不足和海运价格的急剧上升。运输服务伴随货物贸易的增长大幅增长，成为服务贸易十二大领域中增长最快的领域。<sup>82</sup> 第三，旅行服务进出口继续下降。新冠疫情对旅行服务进出口的影响很大且仍在持续。如剔除旅行服务，中国 2021 年服务进出口则呈明显上扬之势。<sup>83</sup>

2021 年度服务贸易统计数据表明：一是全球服务贸易受到冲击，由于各经济体服务贸易结构存在差异，因此对各经济体的服务贸易影响各有不同。以知识密集型为主要结构的国家或经济体受到的冲击相对较小，而以旅行为主要结构的国家或经济体受到的冲击则相对较大；二是在疫情冲击下，我国服务贸易结构发生改变，以旅行服务为主要进口的服务贸易受到较大影响，引起我国服务贸易结构改变；三是我国持续深化改革开放，推动自由贸易试验区建设，营商环境不断优化，服务业基础不断夯实，成为我国指数相对稳定的主要内因。<sup>84</sup>

### (二) 与服务贸易相关的重要法律法规及文件

数字贸易是国际服务贸易的重要部分，近年来已成为全球经贸规则重构的新兴领域。

80 参见商务部：商务部服贸司负责人介绍 2021 年全年服务贸易发展情况，2022 年 1 月 30 日，<http://www.mofcom.gov.cn/article/xwfb/xwsjfr/202201/20220103277846.shtml>（2022 年 5 月 25 日访问）。

81 其中，知识密集型服务出口 12623.9 亿元，增长 18%，知识密集型服务进口 10635 亿元，增长 10.4%。同上注。

82 2020 年，运输服务进出口 16821.5 亿元，增长 61.2%。其中运输服务出口 8205.5 亿元，增长 110.2%，运输服务进口 8616 亿元，增长 31.9%。同上注 81。

83 2020 年，我国旅行服务进出口 7897.6 亿元，下降 22.5%。剔除旅行服务，2020 年我国服务进出口增长 27.2%，与 2019 年同期相比增长 30.9%。同上注 81。

84 国际贸易经济合作研究院：《全球服务贸易发展指数报告（2021）》。

特别是新冠疫情促使全球加速进入数字时代，围绕数字服务贸易领域的市场准入、跨境数据流动、数据本地化等标准与规则竞争日趋激烈。<sup>85</sup> 我国已正式提出申请加入全面渐进的跨太平洋伙伴关系协定（Comprehensive and Progressive Trans-Pacific Partnership, CPTPP）和《数字经济伙伴关系协定》（Digital Economic Partnership Agreement, DEPA），<sup>86</sup> 彰显了持续扩大数字经济领域高水平开放的基本态度。在国内法层面上，2021 年中国在推动数字贸易和数据跨境流动等方面有持续进展。除 2017 年实施的《网络安全法》外，《个人信息保护法》和《数据安全法》在 2021 年通过并实施。这三部法律共同构建起中国的一般数据尤其是个人信息和重要数据本地化存储、数据出境需遵守安全评估和安全审查相结合的总体框架。此外，《网络安全审查办法》于 2021 年 11 月 16 日通过，《数据出境安全评估办法（征求意见稿）》于 2021 年 11 月 2 日发布<sup>87</sup>，2021 年 11 月 1 日，《网络安全数据安全管理条例（征求意见稿）》相继发布。

#### 1. 《数据安全法》

《数据安全法》于 2021 年 9 月 1 日起施行。该法进一步规范数据跨境流动规则，为我国跨境数据的依法有序自由流动提供有力保护。根据《数据安全法》和《网络安全法》相关规定，一般数据在遵循平等互惠等原则基础上基本可实现自由流动，但可能受到三方面限制：一是对于自愿参与关键信息基础设施保护体系的一般数据，依据关键信息基础设施收集和产生数据的跨境流动规则进行审查。二是一般数据的处理活动如果影响或可能影响国家安全也应进行国家安全审查。三是依据平等原则对一般数据的跨境流动进行限制。重要数据的跨境流动则应遵循法律法规确立的出境安全审查规则。依据数据处理主体的不同，重要数据分为关键信息基础设施运营者收集和产生的重要数据以及其他数据处理者收集和产生的重要数据。对于关键信息基础设施运营者收集和产生的重要数据的跨境流动，《数据安全法》要求依据《网络安全法》相关规定进行安全审查。国家核心数据的跨境流动则遵循更严格的审查规则。

《数据安全法》确立的数据跨境流动规则契合当前我国数据跨境流动的发展趋势，有利

85 World Economic Forum, Digital Trade in Services and Taxation, White Paper, October 2021, pp. 5-9.

86 2021 年 9 月 16 日，中国向 CPTPP 保存方新西兰提交了中国正式申请加入 CPTPP 的书面信函。商务部：中方正式提出申请加入《全面与进步跨太平洋伙伴关系协定》（CPTPP）[http://www.gov.cn/xinwen/2021-09/16/content\\_5637879.htm](http://www.gov.cn/xinwen/2021-09/16/content_5637879.htm)（2022 年 5 月 22 日访问）。2021 年 11 月 1 日，中国向 CPTPP 保存方新西兰提交了中国加入 DEPA 的正式申请。商务部：中方正式提出申请加入《数字经济伙伴关系协定》（DEPA），<http://www.mofcom.gov.cn/article/syxwfb/202111/20211103213288.shtml>（2022 年 5 月 22 日访问）。

87 《数据出境安全评估办法》于 2022 年 7 月 7 日发布。



于我国应对网络安全风险。根据相关国际经贸协定的发展趋势，在适用数据跨境流动规则时，应注意两个问题：第一，平衡好安全与发展的关系，推动跨境数据的安全自由流动。应注意的是，对于不同等级、不同类别的国家安全风险应确立不同的处理方式。对那些可能产生特定国家安全风险的数据跨境流动，应进行严格限定；对一般数据则应持更开放包容的态度，通过数据安全促进数据的跨境自由流动和数据产业的发展。第二，合理构建数据分级分类管理制度。在《数据安全法》实施过程中应进一步明确“重要数据”的具体内涵和判断标准，并统筹“重要数据”的认定授权和认定程序，确保数据分级分类管理制度的有效实现。

## 2. 《个人信息保护法》

2021年8月20日，《中华人民共和国个人信息保护法》（下称《个信法》）通过，并于2021年11月1日起生效实施。《个信法》与《网络安全法》、《数据安全法》一起构建我国网络空间治理和数据保护的法律法规体系。《个信法》进一步完善了关于个人信息出境的管理规定，在《网络安全法》基础之上，增加了专业机构的个人信息保护认证、国家网信部门的标准合同等方式，增加了个人信息出境的合法路径，包括安全评估<sup>88</sup>、保护认证、标准合同等。<sup>89</sup>《个信法》中还规定了个人信息可以跨境提供的特殊方式，如法律、行政法规或者国家网信部门规定了其他的条件的，以及我国缔结或者参加的国际条约、协定的对向境外提供个人信息条件等有规定的，可以适用其他规定。

针对个人信息出境，除了第38条规定的一般性条件外，《个信法》还明确了两项特殊性要求。一是单独同意。根据《个信法》第39条，个人信息处理者向中华人民共和国境外提供个人信息的，应当向个人告知境外接收方的名称或者姓名、联系方式、处理目的、处理方式、个人信息的种类以及个人向境外接收方行使本法规定权利的方式和程序等事项，并取得个人的单独同意。二是“同等保护水平”和“问责制”。向境外提供个人信息的，个人信息处理者应当采取必要措施，保障境外接收方处理个人信息的活动达到本法规定的个人信息保护标准。<sup>90</sup>这一要求体现了主要国家和地区立法中通用的“同等保护水平”的思路。

上述立法进程表明，我国在2021年致力于积极融入全球高标准数字贸易治理体系。通

88 《个信法》第40条规定，关键信息基础设施运营者和处理个人信息达到国家网信部门规定数量的个人信息处理者，应当将在中华人民共和国境内收集和产生的个人信息存储在境内。确需向境外提供的，应当通过国家网信部门组织的安全评估；法律、行政法规和国家网信部门规定可以不进行安全评估的，从其规定。

89 标准合同文本是个人信息出境合同的一部分，个人信息处理者可根据自身需求与境外接收者就权利义务关系签订更具体的合同，但不得修改标准合同文本的条款，不得减损标准合同中的保护水平，且增加条款亦不得与标准合同文本相抵触。

90 《个信法》第38条第3款。

过对标高标准的数字贸易规则，一方面为中国数字贸易发展提供新的发展空间，另一方面也为中国参与数字贸易国际规则的制定，并在规则制定中把握主动权和话语权奠定基础。我国应在后续加入CPTPP和DEPA的谈判过程中，继续统筹国内法治与涉外法治，积极参与国际法治，完善数字贸易标准体系与政策法律体系，为完善数字服务贸易监管提供有效的法律保障。<sup>91</sup>

## 3. 《“十四五”服务贸易发展规划》

习近平总书记高度重视国际服务贸易的发展。《中共中央国务院关于推进贸易高质量发展的指导意见》要求“深化服务贸易领域改革和开放，持续推进服务贸易创新发展试点，完善促进服务贸易发展的管理体制和政策体系”。<sup>92</sup>2021年3月，《第十四个五年规划和2035年远景目标纲要》对服务贸易高质量发展提出明确要求。根据上述精神，商务部等24部门于2021年10月出台《“十四五”服务贸易发展规划》（下称《规划》），对深化服务贸易改革开放、加快服务贸易数字化进程、深化服务贸易对外合作等方面进行了前瞻性部署，彰显我国在新发展理念下对于国际服务贸易发展的高度重视。《规划》坚持改革先行、开放先行，将“深化服务贸易改革开放”作为首个重点任务专章，从放宽服务领域市场准入、提高跨境服务贸易开放水平、打造高水平改革开放平台等三个方面进行了重点阐述。以建立健全跨境服务贸易负面清单为标志，主动推动“十四五”时期要素流动型开放和制度型开放相结合、“边境上”准入与“边境后”监管相衔接，彰显出我国坚定不移扩大对外开放的决心和信心。

2020年8月12日，商务部印发《全面深化服务贸易创新发展试点总体方案》，明确要全面探索扩大服务业对外开放。坚持要素型开放与制度型开放相结合、开放与监管相协调、准入前与准入后相衔接，从制度层面和重点领域持续发力，提升开放水平。有序拓展服务业开放领域。对标国际高标准，分别以全面取消、大幅放宽、有序放开为原则，推动取消或放宽对服务贸易的限制措施。探索放宽特定服务领域自然人移动模式下的服务贸易限制措施，按照对等原则推动职业资格互认。同时，要全面探索服务贸易创新发展模式。大力发展数字贸易，完善数字贸易政策，优化数字贸易包容审慎监管。促进制造业服务业深度融合，推动生产性服务业通过服务外包等方式融入全球价值链，发展新兴服务贸易。《方案》特别强调，全面探索提升便利水平。加快推进人民币在服务贸易领域的跨境使用。在京津冀等具备条件的试点地区开展数字人民币试点。

91 杨燕青、吴光豪：《加快数据跨境流动规则落地》，光明日报理论频道，2021年11月26日。

92 《中共中央、国务院关于推进贸易高质量发展的指导意见》，2019年11月19日，第四部分第11条（“大力发展服务贸易”）。



### （三）海南自贸港跨境服务贸易负面清单

2021年6月10日,《海南自由贸易港法》颁布实施,提供了《海南自由贸易港跨境服务贸易特别管理措施(负面清单)(2021年版)》(下称《海南负面清单》)的法律基础。2021年7月23日,《海南负面清单》发布,明确列出针对境外服务提供者的11个门类70项特别管理措施。这是我国在国家层面推出的跨境服务贸易领域首张负面清单,自2021年8月26日起实施。<sup>93</sup>总体上看,《海南负面清单》对接高标准国际经贸规则,推动高水平制度型开放,体现出以下特点:

**第一,新模式。**负面清单模式是当前国际高标准自贸协定在投资和跨境服务贸易领域作出开放安排的主要模式。《海南负面清单》列出了境外服务提供者通过跨境交付模式、境外消费模式、自然人移动模式三种模式向海南自由贸易港提供服务的特别管理措施,在这个清单之外的领域,在海南自由贸易港内,对境内外的服务及服务提供者都是一视同仁。

**第二,新规则。**《海南负面清单》统一列出国民待遇、市场准入、当地存在、金融服务跨境贸易等方面对于境外服务提供者以跨境方式提供服务的特别管理措施。国民待遇和市场准入是我们在加入世贸组织和签署的自贸协定中已经纳入的服务领域国际规则。当地存在、金融服务跨境贸易则是高标准国际经贸协定中新的规则。

**第三,新领域。**《海南负面清单》在我国现有开放水平基础上,在专业服务、交通运输、金融、教育等跨境服务贸易领域提出针对性开放举措。在人才政策方面,取消境外个人参加注册计量师、勘察设计注册工程师、注册消防工程师等10多项职业资格考试方面的限制,为境外人才参与海南自贸港建设提供便利。

**第四,新水平。**《海南负面清单》的开放度在120多个服务分部门超过了我国入世承诺水平,也高于我国目前生效的绝大多数自贸协定相应领域的开放水平。

《海南负面清单》体现的制度型开放安排有助于推动服务贸易自由化,提升海南自由贸易港整体开放水平。与其他已出台的自贸港政策可形成叠加效应,推动海南自贸港形成服务贸易发展的新优势。<sup>94</sup>同时,鉴于数字贸易的重要性,海南应探索设立跨境数据有序流动的监管体系。在“一线”建立分类、分级、分流向的数据跨境传输安全管理制度,放松互联网访问限制,实现跨境数据便利流动,实行入境信息内容分类审查制度,建立数据出境等级安

<sup>93</sup> 商务部令2021年第3号:《海南自由贸易港跨境服务贸易特别管理措施(负面清单)(2021年版)》,2021年7月23日。

<sup>94</sup> 参见匡贤明:《尽快释放海南服贸负面清单效应》,载《经济参考报》2021年8月10日。

全管理制度。在“二线”重点强化对自贸港流向内地的信息数据监管,积极推动数据跨境流动规则国际互认。

### （四）北京市的服务业发展及相关规划

#### 1. 《北京市“十四五”时期现代服务业发展规划》<sup>95</sup>

“十三五”以来,北京市高度重视加快推动现代服务业高质量发展。数据显示,现代服务业已经成为拉动北京经济增长的主引擎和提升北京国际影响力的主窗口。金融、科技、信息、商务、文化等领域引领作用愈发凸显;国家服务业扩大开放综合示范区和中国(北京)自由贸易试验区“两区”建设稳步推进。2021年11月18日,北京市印发《北京市“十四五”时期现代服务业发展规划》(下称《北京规划》),明确北京立足首都城市战略定位,以首都发展为统领,以推动高质量发展为主题,坚持数字化、专业化、品质化、国际化发展导向,加快构建与首都“四个中心”功能相适应的高质量现代服务业体系,持续强化北京在全球产业链、价值链、创新链中的核心地位,打造国际一流的高能级服务枢纽。到2025年,北京现代服务业产业增加值占地区生产总值比重将达到70%左右,服务贸易规模超过1.3万亿元。

根据《北京规划》,在“十四五”时期,北京将围绕“两区”建设,推动现代服务业高质量发展。主动融入国家开放战略,对接国际新理念、新规则,建立与国际接轨的开放制度体系,推动更高水平的开放改革,提升国内国际服务辐射力。“十四五”时期,北京还将构建现代服务业发展指数体系等关键举措,强化市场在资源配置中的主体地位,培育国际一流的现代服务业发展生态。《北京规划》提出了100多项具体措施,包括加快推动现代服务业和先进制造业深度融合等。尤其是在专业服务业发展方面特别提出,支持境外知名仲裁机构和国际商事调解组织在京设立业务机构,打造国际商事仲裁中心等重要举措。

#### 2. 《北京市关于改革优化法律服务业发展环境若干措施》<sup>96</sup>

法律服务业发展是北京市两区建设的重要领域。2021年7月发布的《北京市关于改革优化法律服务业发展环境若干措施》(下称《北京措施》)旨在“对标高标准国际经贸规则,

<sup>95</sup> 北京市发展和改革委员会关于印发北京市“十四五”时期现代服务业发展规划的通知,京发改〔2021〕1606号,2021年11月10日。

<sup>96</sup> 北京市发展改革委员会、北京市司法局:关于印发改革优化法律服务业发展环境若干措施的通知,京发改规〔2021〕2号,发布日期2021年7月5日。

积极推动制度创新，以更大力度谋划和推进自由贸易试验区高质量发展”的要求，进一步加强法律服务领域体制机制创新，促进法律服务业专业化高端化国际化发展。《北京措施》坚持对标一流，与国际规则、国际实践对接，探索推进新制度、新机制。<sup>97</sup>

《北京措施》主要包括：提供更加便利的工作居留和出入境服务、促进法律业务跨境收支便利化、优化司法行政审批服务、打造国际商事仲裁中心、支持涉外法律服务机构开拓市场以及加大涉外法律服务人才培养力度等。特别是在打造国际商事仲裁中心方面，《北京措施》提出，为发挥好北京商事服务优势、吸引国际优秀仲裁资源，支持知名仲裁机构和国际商事调解组织在北京自贸区设立业务机构，开展民商事争议领域涉外仲裁和涉外调解业务，依法支持中外当事人在仲裁前和仲裁中的财产保全、证据保全、行为保全等临时措施的申请和执行。支持各类企业在签署涉外合同时选择北京仲裁机构进行商事仲裁，并约定北京作为仲裁地。针对开展国际仲裁业务需大量访问国际网站的需求，提出在中国（北京）自由贸易试验区探索构建安全便利的国际互联网数据专用通道，做好中国（北京）自由贸易试验区范围内仲裁机构等法律服务机构访问国际学术前沿网站的安全保障服务。

### 3. 《北京市全面深化服务贸易创新发展试点实施方案》

为贯彻落实《国务院关于同意全面深化服务贸易创新发展试点总体方案的批复》（国函〔2020〕111号），深入推进服务贸易领域供给侧结构性改革，建立和完善首都新时期服务贸易创新发展的体制机制，为全国发展服务贸易提供可复制可推广经验，北京市于2020年11月26日印发《北京市全面深化服务贸易创新发展试点实施方案》（下称《北京方案》）。

《北京方案》提出，北京依托中国国际服务贸易交易会、国际一流双枢纽机场等重大开放平台，发挥北京数字资源优势，聚焦数字贸易发展，推进与国际规则对接，加快提升金融、互联网信息、专业服务等重点领域服务贸易能级，提高资金、人才、技术、数据等要素跨境流动的自由化便利化水平，构建高效安全的服务贸易治理体系，增强服务贸易主体的国际市场竞争能力，引领“中国服务”提升全球价值链地位，助推首都高质量发展。北京将致力于打造“三位一体”数字贸易试验区，探索跨境数据安全有序流动，释放数字贸易创新发展活力。围绕重点领域，塑造首都服务业双向开放新格局，包括拓展金融服务业开放市场，扩大互联网信息服务开放规模等。在深化专业服务领域开放改革方面，《北京方案》特别提出，要允许境外知名仲裁机构及争议解决机构经登记并备案后，在自贸试验区设立业务机构，就国际商事、投资等领域发生的争议提供仲裁服务。

97 打造国际商事仲裁中心，外籍法律高端人才来京更便利 - 北京“两区”建设法律服务支持措施发布，北京日报，2021年8月1日。

北京法律服务业的对外开放为北京服务贸易发展的重点内容，国家层面为积极推进北京国际仲裁中心的建设亦提供了多项保障措施。例如，最高人民法院专门印发《关于人民法院为北京市国家服务业扩大开放综合示范区、中国（北京）自由贸易试验区建设提供司法服务和保障的意见》、<sup>98</sup> 设立北京金融法院、支持金融服务领域改革创新，并在北京市第四中级人民法院揭牌成立“北京国际商事纠纷一站式多元解纷中心”等。最后，以北京仲裁委员会 / 北京国际仲裁中心为代表的国际仲裁机构有效提升了国际仲裁服务水平，对建设北京国际仲裁中心，进一步提高法律服务业开放水平具有重要意义。

98 最高人民法院：《关于人民法院为北京市国家服务业扩大开放综合示范区、中国（北京）自由贸易试验区建设提供司法服务和保障的意见》〔法发（2021）11号〕，2021年3月22日。

## 六、结语与展望

2021 年，中国在国际服务贸易方面，对外积极参与国际经贸协定中的服务贸易规则构建，对内高度重视服务业发展及市场开放，在新冠疫情的重大影响中仍取得了瞩目成绩。但与发达国家相比，我国服务贸易发展的产业基础还相对较弱，服务业在 GDP 的占比低于服务业在全球 GDP 的占比，服务贸易在国际贸易中的占比亦低于全球服务贸易在国际贸易中的占比。中国服务业的制度型开放也相对不足，服务贸易出口竞争力提升较为缓慢。在后疫情时代，服务贸易发展很可能面临更大的保护主义挑战，其中国家安全、技术标准、知识产权保护、优先购买本地服务、限制技术服务出口等限制服务贸易发展的措施数量进一步增加。

由于新冠疫情和俄乌战争等多重因素影响，2022 年我国服务贸易发展仍面临较大挑战，特别是旅行服务进出口大概率仍将处在下行区间。受数字产业快速发展带动，数字贸易特别是数字服务出口有可能成为发展亮点。从国际上看，发达国家仍将是我国重要的服务贸易合作伙伴，但受疫情等多重因素影响，服务贸易往来仍存在较大不确定性。应继续删减和降低外商投资准入负面清单中涉及服务业的特别管理措施，在跨境交付、境外消费、自然人流动三种模式的服务贸易在更大范围进一步加速发展的同时，助力商业存在模式的服务贸易进行高质量提升。

“数字开启未来，服务促进发展”。尽管面临国内外多重挑战，但服务业持续扩大开放是我国新一轮高水平制度型改革开放的重中之重。习近平总书记在 2021 年北京服贸会开幕致辞中强调，中国将提高开放水平，在全国推进实施跨境服务贸易负面清单，探索建设国家服务贸易创新发展示范区，扩大合作空间，加大对共建“一带一路”国家服务业发展的支持；加强服务领域规则建设，支持北京等地开展国际高水平自由贸易协定规则对接先行先试，打造数字贸易示范区；设立北京证券交易所，打造服务创新型中小企业主阵地。这为中国继续大力发展服务业、促进国际服务贸易、参加服务贸易国际规则制订指明了清晰的前进方向。

## 发布机构简介

### 北京仲裁委员会 / 北京国际仲裁中心

北京仲裁委员会 / 北京国际仲裁中心（简称北仲）是依据《中华人民共和国仲裁法》于 1995 年 9 月 28 日设立的常设仲裁机构。成立二十余年来，北仲已逐渐成为国内领先并在国际上具有一定影响力的多元争议解决中心。自 2013 年起，北仲组织行业专家编写的中英版《中国商事争议解决年度观察》，已成为中外业界交流的重要平台。2017 年北仲受邀成为联合国国际贸易法委员会争议解决第二工作组观察员。2018 年北仲被最高人民法院首批纳入“一站式”国际商事纠纷多元化解决机制。2019 年北仲正式施行《国际投资仲裁规则》，为国际社会讨论国际投资仲裁改革提供一份“中国方案”。北仲还提供商事调解、工程评审等多元争议解决服务。

### 中国服务贸易协会

中国服务贸易协会（简称中服贸），是 2007 年经国务院批准、商务部筹建的服务贸易行业组织。协会主要成员包括中远集团、中金公司、中国邮政集团、中国信保、IBM、马士基、亚马逊、京东、阿里等数千家会员企业。国务院参事室支持发起的中国跨境电商 50 人论坛秘书处设在协会。协会主要业务：与联合国贸发会议、南南办、WTO、WCO 等国际组织合作，积极推动中国机构参与、主导的国际交流与合作；关注新技术、研究新模式、培育新业态与推动适应新业态的人才培养；承办服贸会、进博会等国家级会议会展与培育服务贸易、跨境电商、数字贸易等自主会议会展品牌；与地方政府开展重点项目合作与产业招商，推动区域经济高质量发展等四个方面。



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# Annual Review on International Trade in Services in China (2022)

Shi Jingxia\*

## I. Introduction

According to the statistics of the World Trade Organization (WTO), in recent years, global trade in services has enjoyed an average growth rate twice as much as that of trade in goods, and its share and status in international trade has steadily increased.<sup>1</sup> Trade in services occupies a dominant position in the international trade of many developed economies, and its proportion in the international trade of developing economies is also rising rapidly, but generally, the importance of trade in services in international trade is often ignored. This is partly because of the invisibility of services and the complexity of the issues associated with trade in services.<sup>2</sup>

The year 2021 marked the 20<sup>th</sup> anniversary of China's accession to the WTO. These 20 years not only witnessed the rapid development of China's economy, but also served as an accelerator of China's services trade development. At present, the proportion of the output value of the service sector in China's GDP has risen steadily from about 33% in 2001 to about 55%, and the export volume accounts for about 10% of China's total export volume, narrowing the gap between China and the world's industrial structures.<sup>3</sup> By the end of 2021, China had remained the world's second largest country in services trade for seven consecutive years, and the proportion of imports and exports in services trade in the global total had continually increased. "Chinese services" has become a huge engine for the development of "global services".<sup>4</sup> At a time when COVID-19 was ravaging the world, the global economy was in recession and unilateralism was on the rise, the *Regional Comprehensive Economic Partnership* (RCEP) was signed on November 15, 2020 by totally 15 countries, including China, ASEAN countries, Japan, South Korea, Australia and New Zealand. The RCEP includes many aspects of opening up the service sector, aims to create a fairer playing field for ser-

\* Shi Jingxia, Professor and Doctoral Tutor of Renmin University of China Law School, Arbitrator of Beijing Arbitration Commission / Beijing International Arbitration Center.

1 See World Trade Organization, World Trade Report 2019: The Future of Services Trade. The statistical data in this annual report were up to the end of Year 2017.

2 Roberto Azevêdo, Forward by the WTO Director-General, World Trade Report 2019: The Future of Services Trade.

3 Yin Weihua. Outlook on the Characteristics and Trends of Changes in China's Industrial Structure during the "14<sup>th</sup> Five-Year Plan" Period. *China's Prices*, 2021, Issue 9.

4 xinhuanet.com International News Commentary: China Shares "Trade in Services" Development Opportunities with the World, September 7, 2021, [http://www.bj.xinhuanet.com/hyzt/2021zgfmh/gundong/2021-09/07/c\\_1127838100.htm](http://www.bj.xinhuanet.com/hyzt/2021zgfmh/gundong/2021-09/07/c_1127838100.htm) (visited on January 16, 2022).

vices trade competition, and has a positive impact on the establishment and development of rules for international services trade.<sup>5</sup> During the "Belt and Road" construction, along with the development of information technology, new types of services trade represented by the Internet, big data and cross-border e-commerce are becoming a new economic growth point.<sup>6</sup>

General Secretary Xi Jinping has pointed out that trade in services is an important part of international trade and an important field of international economic and trade cooperation, and plays an important role in building a new development pattern. China is committed to opening up and cooperation for mutual benefit and win-win, sharing services trade development opportunities and jointly promoting world economic recovery and growth.<sup>7</sup> The year 2021 is the first year of the "14<sup>th</sup> Five-Year Plan". China will continue to open up its service sector, accelerate supply-side structural reform in the service sector, continually improve the system and mechanism of trade in services, and continually raise the level of development of trade in services. From reducing the foreign investment (including foreign investment in the service sector) access negative list for the fourth consecutive year, to issuing the negative list for cross-border services trade in Hainan Free Trade Port, and then to exploring the development of a national demonstration zone for innovative development of services trade, China sent multiple signals of advancing economic globalization and deepening international economic and trade cooperation in 2021.<sup>8</sup> At present, the world economy is facing multiple challenges due to the ongoing global pandemic and the overlapping effects of the Russia-Ukraine war. Opening-up and cooperation in the service sector is an important force driving economic recovery.

In this context, this report focuses on sorting out the services trade rules and commitments under important multilateral, regional and bilateral economic and trade agreements that China participated in or signed in 2021, observing and discussing the development of China's service sector as well as the key laws, regulations and documents in Beijing's service sector in 2021, and looking into the future market opening and rules development.

5 Website of the State Council Information Office, RCEP Agreements Reached within the Sector of Trade in Services will Drive Significant Growth of Trade in Services, March 25, 2021, <http://www.scio.gov.cn/32344/32345/44688/45119/zy45123/Document/1700953/1700953.htm> (visited on May 26, 2022).

6 Xinhua News Agency: Digital Economy Boosts Confidence, Business Environment is Improved at a Faster Speed - New Focus of "Belt and Road" Construction from the Perspective of Services Trade, [http://www.gov.cn/xinwen/2020-09/09/content\\_5541990.htm](http://www.gov.cn/xinwen/2020-09/09/content_5541990.htm) (visited on May 26, 2022).

7 Xinhua News Agency: "Xi Jinping Delivered a Video Speech at 2021 China International Fair for Trade in Services and Global Trade in Services Summit", September 2, 2021. For the whole speech, see: [http://www.gov.cn/xinwen/2021-09/02/content\\_5635041.htm](http://www.gov.cn/xinwen/2021-09/02/content_5635041.htm) (visited on May 26, 2022).

8 QSTHEORY.CN: "Sharing Services Trade Development Opportunities and Jointly Promoting World Economic Recovery and Growth", September 4, 2021, [http://www.qstheory.cn/wp/2021-09/04/c\\_1127827826.htm](http://www.qstheory.cn/wp/2021-09/04/c_1127827826.htm) (visited on May 26, 2022).

## II. The Multilateral Level: WTO Reference Paper of Services Domestic Regulation Signed

On December 2, 2021, totally 67 WTO Members including China jointly made the *Declaration on the Conclusion of Negotiations on Services Domestic Regulation*, confirming the successful conclusion of negotiations on the Joint Statement Initiative of Services Domestic Regulation and the signing of the *Reference Paper of Services Domestic Regulation* (SDR Reference Paper), deciding that participants complete their respective official approval procedures within one year.<sup>9</sup> The WTO's first round of multilateral trade negotiations "Doha Development Round" have been unproductive since they were launched in 2001,<sup>10</sup> so the successful conclusion of negotiations on "Services Domestic Regulation" represents a significant progress to the WTO multilateral trade.

### (I) Main Contents of the SDR Reference Paper

Negotiations on "Services Domestic Regulation" were officially launched in December 2017 at the WTO's 11<sup>th</sup> Ministerial Conference (MC11), and the negotiation achievement document is embodied by the Joint Statement of Services Domestic Regulation-the *Reference Paper of Services Domestic Regulation* (hereinafter referred to as the SDR Reference Paper). In the General Provisions, the rules embody the development orientation and provide developing Members with a transition period of up to 7 years. The rules also emphasize the regulatory rights of participating parties, specifying the right of each party to regulate the provision of services within its territory and to enact new regulations. In the part of specific rules requirements, it is proposed that measures related to trade in services should conform to objectivity and transparency standards, as well as procedural justice and reasonableness requirements, and not discriminate against service providers on the basis of gender. In terms of financial service rules, considering the particularity of financial services, it provides appropriate flexible regulatory space for finance-related licensing and qualification application and approval.<sup>11</sup>

In terms of specific contents, the *SDR Reference Paper* focuses on licensing requirements and procedures, qualification requirements and procedures, and relevant technical standards related to trade

9 WTO, *Declaration on the Conclusion of Negotiations on Services Domestic Regulation*, WT/L/1129, December 2, 2021.

10 The Doha Round attempted to address the development deficit accumulated during previous negotiations under the *General Agreement on Tariff and Trade* (GATT) due to the negligence of developing Members' interests. Hence, some developing Members insisted that the Doha Round authorization should be first fulfilled and repeatedly refused to launch negotiations on new issues making use of the WTO's consensus decision-making mechanism. See e.g., Genevieve Dufour & David Pavot, *WTO Negotiations: The Unfinished Doha Development Agenda and the Emergence of New Topics*, *Global Trade and Customs Journal*, Vol. 15, No. 5, pp. 244-251 (2020).

11 WTO, *Joint Initiative on Services Domestic Regulation – Reference Paper on Services Domestic Regulation*, INF/SDR/2, Nov. 26, 2021.

in services, aiming at promoting transparency, predictability and convenience of services domestic regulatory measures. In terms of transparency, the *SDR Reference Paper* requires WTO Members to publish all licensing requirements and authorization procedures for service industries, establish an appropriate mechanism for service providers to refer to, and consult and consider the opinions of relevant stakeholders when publishing relevant laws and regulations on service industries. In terms of predictability, the SDR Reference Paper requires that an indicative timetable should be established for the processing of applications, information should be provided on the progress of the licensing application, and the applicant should be allowed to correct minor errors in the application materials or provide further information. In terms of convenience, the *SDR Reference Paper* requires that approval by a singular competent authority should suffice, applicants should be allowed to submit an application at any time, and electronic and duplicated application materials should be accepted. It provides that the application fee should be reasonable and transparent, relevant technical standards should be established in open and transparent ways, relevant procedural justice and fairness should be ensured, and there should be no gender discrimination among service providers.<sup>12</sup>

### (II) Characteristics and Significance of the SDR Reference Paper

#### 1. The SDR Reference Paper Meeting the Criteria of Being a "Critical Mass Agreement"

If the number of participants of an open plurilateral agreement reaches a critical majority of industrial coverage, in an economic sense, the interest spillover from free riding is negligible for the participants. Agreements under which participating parties allow non-participating parties to enjoy the benefits without assuming the obligations are known as "critical mass agreements" (CMAs). The benefits of such agreements can usually be extended to all WTO Members on the basis of most-favoured-nation treatment.<sup>13</sup> 59 WTO Members participated when the SDR negotiations were launched, but by the time the Agreement was signed, there had been 67 members. Of the Top 9 members on the list of service trade imports and exports, including China, the United States and EU member states, only India, the 8<sup>th</sup> exporter and the 10<sup>th</sup> importer, did not participate in the negotiations. Participating Members' trade in services covers 90% of global trade in services, meeting the criteria of being a "critical mass agreement". Therefore, the *SDR Reference Paper* can extend the benefits of the agreement to all WTO members on the basis of most-favoured-nation treatment. At the WTO News Conference regarding the *SDR Reference Paper*, Ms. Okonjo-Iweala, Director-General of the WTO, called on the agreement participants to continue to contact with other WTO Members and encouraged them to actually implement the technical assistance thereunder in order to

12 Ibid, pp. 4-8.

13 See Manfred Elsig, *WTO Decision-Making: Can We Get a Little Help from the Secretariat and the Critical Mass*, in *Redesigning the World Trade Organization for the Twenty-First Century*, pp.86-90 (2010); Peter Gallagher & Andrew Stoler, *Critical Mass as an Alternative Framework for Multilateral Trade Negotiations*, *Global Governance* Vol. 15, p. 375 (2009); Gary Winslett, *Critical Mass Agreements: The Proven Template for Trade Liberalization in the WTO*, *World Trade Review*, Vol. 17, No. 3, pp. 405-426 (2018).



attract more Members, especially developing members, to join.<sup>14</sup>

## 2. Introducing an Innovative Mode of Plurilateral Negotiations, Helping to Revitalize the WTO's Negotiating Function

The services domestic regulation marks the first issue on which the WTO has achieved a major breakthrough by means of plurilateral negotiation in nearly 20 years. Relevant negotiations reaching an agreement shows that the WTO negotiations can move forward in a positive direction. This will help revitalize the WTO's negotiating function and provide an important reference for future WTO negotiations on other issues.<sup>15</sup> Negotiations on services domestic regulation include the commitments of each Member in the form of modifying the Schedule of Concessions of the *General Agreement on Trade in Services* (GATS), and the implementation will be in accordance with the procedures of modifying the Schedule of Commitments under GATS. It does not affect the trade interests of non-participating Members, so a consensus decision by all Members is not required. Of the 67 participating Members, 41 had revised the Schedule of Concessions by the end of 2021.<sup>16</sup>

## 3. The SDR Reference Paper will Effectively Reduce Service Trade Costs

Driven by digital technology and other factors, global trade in services has developed rapidly in recent years. According to value-added statistics, trade in services now basically accounts for about half of global trade. The relevant rules in the *SDR Reference Paper* aim at optimizing the licensing and approval process in the service sector of member countries, reducing operating costs of enterprises and improving the business environment for global services trade. According to a joint study by the WTO and the OECD, after the Reference Paper takes effect, global enterprises participating in international trade in services will save about US \$150 billion in annual costs. Micro, small and medium-sized enterprises as well as the financial, commercial, communications and transportation service industries will be particularly benefited.<sup>17</sup>

## 4. Introducing a Social Clause in a WTO Plurilateral Agreement for the First Time

The *SDR Reference Paper* specifically stipulates in Section 2, Article 22, "Measures Formulation"

<sup>14</sup> WTO, *Negotiations on Services Domestic Regulation Concluded Successfully in Geneva*, Dec. 2, 2021; [https://www.wto.org/english/news\\_e/news21\\_e/jssdr\\_02dec21\\_e.htm](https://www.wto.org/english/news_e/news21_e/jssdr_02dec21_e.htm) (last visited May 18, 2021).

<sup>15</sup> See Gong Baihua. On the Plurilateral Mode During WTO Rules Reform Modernization, *Journal of Shanghai University of International Business and Economics*, 2019, Issue 2. Xie Cheng. Plurilateral Trade Agreements and Selection of WTO Negotiation Paths, *Journal of International Economic Law*, 2019, Issue 2.

<sup>16</sup> WTO, *Joint Initiative on Services Domestic Regulation – Schedules of Specific Commitments – Revision*, INF/SDR/3/Rev.1, Dec. 2, 2021.

<sup>17</sup> WTO & OECD, *Services Domestic Regulation in the WTO: Cutting Red Tape, Slashing Trade Costs, and Facilitating Services Trade*, Trade Policy Brief, Nov. 19, 2021.

(d) that Members must ensure that "such measures do not discriminate between service providers on the basis of gender" when formulating and authorizing measures related to service provision. It is the first time that a social clause has appeared in a WTO agreement. Such negotiations currently under way or under consideration in the WTO include "trade and women economic empowerment", "trade and sustainable development", etc. For the first time, a gender equality clause is included in the Reference Paper, requiring all participating parties to ensure equal rights of men and women to participate in trade in services in their laws and regulations, which has become an important way for the WTO to support women economic empowerment.<sup>18</sup>

## (III) China and the SDR Reference Paper Negotiations

China has always been carrying out reform and opening up, including in the service sector. It has promulgated the *Foreign Investment Law* and its supporting regulations, and established the management system of pre-establishment national treatment plus negative list for foreign investment, including in the service sector. China had taken an active part in the plurilateral negotiations on "services domestic regulation" since they were launched in 2017. China not only initiated the negotiations jointly with other parties, but also offered schemes and proposals, fulfilling its responsibilities with practical opening actions. During the negotiations, China worked with other parties to actively explore solutions to specific issues arising in the negotiations and showed flexibility when necessary so as to seek a consensus. At the final stage, China submitted two draft documents on schedules of specific commitments in a timely manner, making a positive contribution to the successful conclusion of the negotiations.<sup>19</sup>

China is the world's second largest market regarding trade in services, and the *SDR Reference Paper* plays an important role in improving the overall business environment of China's services market and further attracting foreign investment in the service sector. It will help Chinese enterprises to, more conveniently, set up commercial entities overseas, obtain business licenses and relevant qualifications, and provide services by cross-border means. In addition, it will also help reduce the costs for Chinese enterprises to enter the international market and provide rules guarantee for the high-quality development of China's services trade. China has completed the revision of the GATS Schedule of Concessions, and will work with all parties to push for the early implementation and effectiveness of the negotiation achievements.

<sup>18</sup> WTO, *Services Domestic Regulation – Rationale and Content, Potential Economic Interests, and Increasing Prevalence in Trade Agreement*, November 2021, pp. 2-3.

<sup>19</sup> Xinhua News Agency: the Ministry of Commerce Interpreting the Negotiation Achievements of the WTO *Joint Statement Initiative of the Services Domestic Regulation*, December 8, 2021, [http://www.gov.cn/xinwen/2021-12/08/content\\_5659345.htm](http://www.gov.cn/xinwen/2021-12/08/content_5659345.htm) (visited on May 28, 2022).

### III. Trade in Services under the Regional Comprehensive Economic Partnership (RCEP)

The Regional Comprehensive Economic Partnership (RCEP) entered into force on January 1, 2022, marking the official establishment of the world's most populous free trade area with the largest economic and trade scale and the greatest development potential. It represents a key measure taken by China and the other contracting parties to uphold multilateralism and free trade and promote regional economic integration. It will contribute to the growth of trade and investment in the Asia-Pacific region and even the whole world as well as to the post-pandemic economic recovery.<sup>20</sup> Liberalization of trade in services and related commitments are one of the highlights of RCEP. RCEP has carried on and surpassed the WTO services trade rules framework. It selectively assimilates new disciplines and tabulating modes regarding trade in services under other high-level FTAs, and takes into account the heterogeneity of development levels of different Contracting Parties by means of the dual-track system of tabulating modes, the transition system of the tabulating mode conversion, and the specified discretionary power of Contracting Parties in rules interpretation and application. This report focuses on the analysis of RCEP Chapter 8 "Trade in Services" and its *Financial Services Annex* and *Telecommunications Services Annex*, thereby extracting the disciplines and obligations that China should pay close attention to.

#### (I) General Rules on Trade in Services (Chapter 8)

Chapter 8 of RCEP provides for general rules on trade in services and constitutes the most important chapter related to trade in services thereunder. Besides general disciplines, this Chapter has three annexes, respectively targeting Financial Services, Telecommunications Services and Professional Services.

##### 1. Main Contents and Characteristics of Chapter 8

###### (1) Core Obligations in this Chapter

Chapter 8 includes 25 articles in the main body and three annexes, i.e. Annex 8A Financial Services, Annex 8B Telecommunications Services and Annex 8C Professional Services. Core obligations in this Chapter include National Treatment<sup>21</sup>, Market Access<sup>22</sup>, Most-Favoured-Nation Treatment<sup>23</sup>, the optional dual-track system of the Schedules of Specific Commitments and the Schedules of

<sup>20</sup> Ministry of Commerce: The Principal of the International Department Talking about the Pending Effectiveness of the RCEP, November 6, 2021, [http://fta.mofcom.gov.cn/article/rcep/rcepnews/202111/46078\\_1.html](http://fta.mofcom.gov.cn/article/rcep/rcepnews/202111/46078_1.html) (visited on January 18, 2022). For the RCEP text, see China's Free Trade Area Website: [http://fta.mofcom.gov.cn/rcep/rcep\\_new.shtml](http://fta.mofcom.gov.cn/rcep/rcep_new.shtml).

<sup>21</sup> RCEP, Article 8.4.

<sup>22</sup> RCEP, Article 8.5.

<sup>23</sup> RCEP, Article 8.6.

Non-Conforming Measures<sup>24</sup>, the transition mechanism supporting the Schedules of Specific Commitments<sup>25</sup>, and the prohibited requirement on local presence.<sup>26</sup> Specifically, the optional dual-track system of the Schedules of Specific Commitments and the Schedules of Non-Conforming Measures, as well as the supporting Transparency List and transition arrangement, embody RCEP's high flexibility in terms of taking into account contracting parties' different development levels and pursuing progressive liberalization.

###### (2) Optional Dual-Track System of Scheduling Modes: Flexible Liberalization Pace

RCEP contracting parties can independently choose from two tabulating modes when it comes to their binding commitments on market access and national treatment regarding trade in services: one is the Schedules of Specific Commitments under the positive list tabulating mode, and the other is the Schedules of Non-Conforming Measures under the negative list tabulating mode. RCEP contracting parties' services trade development levels and domestic regulatory abilities vary a lot, and it will be difficult to reconcile interest divergence between contracting parties if a singular tabulating mode under GATS or CPTPP is adopted. Hence, RCEP has creatively adopted the flexible and inclusive dual-track system design, allowing all contracting parties to independently select a tabulating mode aligned with their opening-up needs, thus promoting the overall liberalization of trade in services within the region by means of differentiated paces.<sup>27</sup> 8 Members including China have adopted the "Schedules of Specific Commitments" under the positive list mode.

###### (3) Standstill and Ratchet Clauses: Anchored Liberalization Direction

In order to automatically lock Contracting Parties' progress in liberalization of trade in services, including locking existing opening-up levels and Contracting Parties' future liberalization achievements, and to ensure that Contracting Parties with uneven opening-up levels work together towards the goal of liberalization of trade in services, RCEP employs the standstill clause and the ratchet clause for both the Schedules of Specific Commitments and the Schedules of Non-Conforming Measures, with different requirement intensity though.<sup>28</sup> On the one hand, if a Contracting Party adopts the "Schedules of Specific Commitments" (e.g. China), it shall identify in its Schedule sectors or sub-sectors for future liberalization with "FL" (i.e. Future Liberalization). In these sectors and sub-sectors, any applicable terms, limitations, conditions, and qualifications listed in any Sched-

<sup>24</sup> RCEP, Articles 8.3, 8.7 and 8.8.

<sup>25</sup> RCEP, Article 8.12.

<sup>26</sup> RCEP, Article 8.11.

<sup>27</sup> For an interpretation of the mixed tabulating modes under RCEP, see Ministry of Trade and Industry – Singapore, *Understanding the RCEP Services*, Investment and E-Commerce Chapters, pp. 10-16.

<sup>28</sup> For specific meanings of these two types of clauses, see European Union, Services and Investment in EU Trade Deals – Using Positive and Negative Lists, April 2016, p.4.

ule shall be limited to the existing measures of that Party, i.e. the standstill requirement.<sup>29</sup> If a Party henceforward amends the said measures in a manner that reduces or eliminates the inconsistency of those measures with Market Access or National Treatment obligation, as it existed immediately before the amendment, that Party shall not subsequently amend those measures in a manner that increases the measures' inconsistency with the foregoing obligation, i.e. the ratchet requirement.<sup>30</sup> On the other hand, if a Contracting Party adopts the Schedules of Non-Conforming Measures, its tabulating mode has built-in standstill and ratchet requirements. When formulating "the Schedules of Retaining Current Non-Conforming Measures", such Contracting Parties should commit not to make such measures stricter in the future and lock any future liberalization measures.<sup>31</sup>

In accordance with the above requirements, Contracting Parties are subject to the same degree of ratchet requirements whether they adopt the Schedules of Specific Commitments or the Schedules of Non-Conforming Measures. However, as far as the standstill requirement is concerned, Contracting Parties adopting the Schedules of Specific Commitments, which are usually developing countries with relatively low international competitiveness and domestic regulatory capacity in services trade, can independently choose service sectors to comply with the standstill requirement by marking "FL". Such differentiated arrangements demonstrate RCEP's flexibility and pragmatism regarding the commitments on opening trade in services as well as its tolerance for special and differential treatment of developing countries.<sup>32</sup>

#### (4) The Transition Mechanism Supporting the Schedules of Specific Commitments

In order to promote the liberalization of trade in services among Contracting Parties, RCEP has set up a special transition mechanism for Parties that adopt the Schedules of Specific Commitments, requiring such Parties to convert their positive lists into negative lists within six years. The RCEP transitional mechanism targeting the Schedules of Specific Commitments provides clear operating procedures, time-bound requirements and liberalization level benchmarks, and is more practical and binding than the built-in agenda in the previous GATS and some FTAs. China should make full use of the six-year transition period to promote opening-up and domestic reform of trade in services, and straighten out the conversion mode from the positive list to the negative list.

#### (5) Domestic Regulation of Trade in Services

The RCEP Trade in Services Chapter requires expanding market access opportunities for service industries, as well as ensuring a fair and transparent environment for trade in services so that ser-

vices and service providers of Contracting Parties receive non-discriminatory treatment. The RCEP domestic regulation provision seeks to make the procedures more transparent and simplified for service providers of other Parties to apply for authorization, requiring Contracting Parties to, to the extent practicable, establish an indicative time frame for such application procedures, provide the applicant with information concerning the application status, and provide reasons or causes if an application is denied.<sup>33</sup> The obligations under the RCEP transparency rules are relatively moderate on the whole, focusing on strengthening the information disclosure and consultation response at the post-event links, without imposing requirements on the pre-event and in-event links.<sup>34</sup> In addition, RCEP requires Contracting Parties to make the domestic regulations and international agreements which affect trade in services publicly available on the Internet and, to the extent provided under its legal framework, in the English language.<sup>35</sup>

#### (6) "Prohibited local presence requirement"

RCEP imposes the obligation of "prohibited local presence requirement" on Contracting Parties making commitments in accordance with the Schedules of Non-Conforming Measures.<sup>36</sup> "Prohibited local presence requirement" (hereinafter referred to as the "presence prohibition obligation", also known as the "non-establishment right") means that a Party shall not require a service supplier of another Party to establish or maintain a commercial presence, or to be resident, in its territory as a precondition for the supply of cross-border services. The "presence prohibition obligation" applies to three modes of cross-border services trade, namely cross-border supply, overseas consumption and movement of natural persons. In the context of rapidly developing network information technology, this rule reduces the fixed costs of service providers (especially micro, small and medium-sized enterprises) to provide services through the Internet and other cross-border means, which is of great significance for promoting the development of e-commerce/digital trade and the liberalization of cross-border services trade.<sup>37</sup> Besides the local presence requirement, the "prohibited requirement on becoming a resident" is another reflection of the "presence prohibition obligation". It should be noted that specific nationality requirements for the board of directors, senior management, etc., are not local existence requirements under the category of "requirement on becoming a resident", which involve different obligations in the negative list and should be listed separately.

<sup>29</sup> RCEP, Article 8.7.3.

<sup>30</sup> RCEP, Article 8.7.4.

<sup>31</sup> RCEP, Article 8.8.

<sup>32</sup> Pasha L. Hsieh, *The RCEP: New Asian Regionalism and the Global South*, Institute for International Law and Justice Working Paper, 2017/4, New York, pp. 46-48; Jane Kelsey, *Regional Comprehensive Economic Partnership (RCEP) Services Chapter: Risks for Developing Countries' and LDCS' Policy Space and Regulatory Sovereignty* (2016), at 2-7.

<sup>33</sup> RCEP, Article 8.15.

<sup>34</sup> RCEP, Article 8.14.

<sup>35</sup> RCEP, Article 8.14.

<sup>36</sup> RCEP, Article 8.11.

<sup>37</sup> See Shi Jingxia, Yan Yuhong. On the Rule of Prohibited Local Presence Requirement during Cross-border Service Provision - Enlightenment on China's Opening up the Service Market, *Journal of Shanghai University of International Business and Economics*, 2020, Issue 3.



## 2. Connection between China's Laws and Regulations and RCEP General Rules on Trade in Services

The characteristics and requirements of the RCEP rules on trade in services set higher requirements and standards for China to improve domestic regulations on trade in services and promote institutional opening-up. On the basis of sorting out many domestic laws and regulations related to services trade, China needs to further improve the opening-up level of its services market, while focusing on high-level institutional opening-up and appropriately responding to and adjusting the relevant domestic laws.

### (1) China should attach importance to the Schedules of Non-Conforming Measures legally and technically to truly reflect China's opening-up level and intention.

RCEP's optional dual-track system regarding the services trade commitment tabulating mode provides a necessary buffer for China's exploration of high-level services trade opening-up. However, the 6-year time limit set by RCEP for the transition to the Schedules of Non-Conforming Measures, as well as the supporting standstill clause and ratchet clause, impose more realistic and urgent requirements on China's negative list tabulating capability. In view of the RCEP provision that Contracting Parties that have made commitments using the Schedules of Specific Commitments should start submitting the Schedules of Non-Conforming Measures within 3 years after the entry into force of the Agreement, China should sort out its laws and regulations related to trade in services in various sectors and industries before submitting such Schedules of Non-Conforming Measures. In particular, it should clarify the opening-up status quo and regulatory requirements of "cross-border supply", "overseas consumption" and "movement of natural persons" (the three types of cross-border services trade), and straighten out the internal relationship between the opening-up of "commercial presence" of services trade and the opening-up of investment in relevant service industries, so as to make preparations for the full adoption of the negative list tabulating form.

### (2) China should Consider the Removal of Local Presence Requirements and Strengthen Regulatory Capacity and Cooperation

RCEP imposes the "prohibition of local presence" on Contracting Parties that make commitments using the Schedules of Non-Conforming Measures. In the context of information communication technology and e-commerce/digital trade, the "presence prohibition obligation" plays an important role in ensuring the liberalization of cross-border trade in services. Compared with GATS, the "presence prohibition obligation" is a new obligation worthy of attention. China currently stipulates local presence requirements in the sales and marketing of telecommunications and air transport services. For example, in the GATS Schedules of Commitments, China's commitment to Mode I (i.e. cross-border supply) of basic telecommunications, value-added telecommunications, mobile voice and data services and domestic services is "see Mode 3". The commitment to Mode 1 is shown in Mode 3, which in fact requires service providers to establish a commercial presence in China, as a precondition, if they want to provide telecommunications services to Chinese consumers through the cross-border provision mode. This is a typical local presence requirement. According to the require-

ments of the RCEP transition mechanism, China should convert to the commitment mode of "Schedules of Non-Conforming Measures" after a due period, which means that China will be bound by the "prohibition of local presence" under RCEP. The "prohibition of local presence" imposes new challenges on the regulatory capacity of China's service sector. China should strengthen the regulatory capacity construction regarding trade in services and seek cooperation on international regulation, so as to lay a good legal foundation for the orderly provision and regulation of cross-border services trade.

## (II) Financial Services Annex<sup>38</sup>

### 1. Main Contents of RCEP *Financial Services Annex*

Taking Contracting Parties' treaty obligations as an intermediary, the *Financial Services Annex* requires Contracting Parties' self-regulatory organizations to fulfill national treatment obligations towards financial services opening-up, so as to ensure the implementation of national treatment obligations by means of indirectly expanding obligation subjects. Pursuant to Article 10 of the Annex, if a Party requires a financial institution of another Party to be a member of a self-regulatory organization to provide a financial service in its territory, that Party shall ensure that its self-regulatory organization observes that Party's National Treatment obligations under the Trade in Services Chapter.<sup>39</sup> In order to adapt to the financial services innovation and trade development needs in the context of digital economy, the Annex incorporates National Treatment requirements regarding new financial services,<sup>40</sup> thus providing basic guarantee for the cross-border transfer and processing of financial information.<sup>41</sup> Each host Party shall endeavour to permit financial institutions of another Party established in the territory of the host Party to supply a new financial service in the territory of the host Party that the host Party would permit its own financial institutions, in like circumstances, to supply without adopting a law or modifying an existing law. A Party shall not take measures that prevent transfers of information, including transfers of data by electronic or other means, necessary for the conduct of the ordinary business of a financial service supplier in its territory; or processing of information necessary for the conduct of the ordinary business of a financial service supplier in its territory.<sup>42</sup>

38 RCEP, Chapter 8 Annex A.

39 RCEP, Chapter 8 *Financial Services Annex* Article 10. Self-regulatory organization means any nongovernmental body, including any securities or futures exchange or market, clearing or payment settlement agency, or other organization or association that is recognized as a self-regulatory organization and exercises regulatory or supervisory authority by legislation or delegation, *Financial Services Annex* Article 1, Paragraph f.

40 *Financial Services Annex* Article 3.

41 *Financial Services Annex* Article 9.

42 *Financial Services Annex* Article 9.

The high risk of the financial service sector determines its characteristics of “heavy regulation”, and the opaque regulatory procedures and requirements will greatly reduce the effectiveness of the commitment to financial service opening-up. The Annex sets the financial regulatory transparency rules covering the whole link of “pre-event, in-event and post-event”, whose breadth, depth and strength far exceeds the transparency discipline level set in Chapter 8 targeting general trade in services. Each Party shall ensure that all measures of general application to which this Annex applies are administered in a reasonable, objective, and impartial manner, and that such measures of general application are promptly published, or otherwise made publicly available.<sup>43</sup> In order to prevent Contracting Parties from abusing the exception clause, this Article emphasizes that such measures may not be applied in a manner that constitutes arbitrary or improper discrimination, nor shall they constitute disguised restrictions on financial institutions investment or financial services and trade. Contracting Parties have full regulatory discretion while complying with liberalization obligations under the annex rules regarding new financial services and the cross-border transfer and processing of information. In the case of new financial services, Contracting Parties are entitled to impose relevant licensing, institutional or juridical forms or other requirements on the supply of the new financial services in a manner consistent with national treatment in accordance with their domestic laws and regulations.<sup>44</sup>

## 2. Connection between China’s Laws and Regulations and RCEP *Financial Services Annex*

RCEP *Financial Services Annex* represents the highest commitment level in China’s financial sector. It has introduced for the first time such rules as new financial services, self-regulatory organizations, and transfer and processing of financial information, making high-level commitments on financial regulatory transparency. On the premise of reserving a regulatory space to maintain the stability of the financial system and prevent financial risks, it has created a fairer, more open, more stable and more transparent competitive environment for financial services providers of all Parties.

These rules will not only help China’s financial enterprises better expand overseas markets, but also attract more overseas financial institutions to operate in China and inject vitality into the domestic financial market. RCEP provisions on new financial services as well as transfer and processing of information bring new convenience for Chinese financial institutions to innovate business models and transfer overseas data, while raising higher requirements on China’s financial opening-up level, risk prevention and control, and data security management.<sup>45</sup>

### (1) Data Security Legislation and Critical Infrastructure Legislation in China’s Financial Sector

Article 9 of the RCEP *Financial Services Annex* requires that a Party shall not take measures that

<sup>43</sup> *Financial Services Annex* Article 7.

<sup>44</sup> *Financial Services Annex* Article 3, Paragraph 2.

<sup>45</sup> Liao Yuanyuan, Ma Lan. RCEP’s Influence on China’s Financial Industry, *China Finance*, 2021, Issue 7.

prevent transfers of information, including transfers of data by electronic or other means, necessary for the conduct of the ordinary business of a financial service supplier in its territory; or processing of information necessary for the conduct of the ordinary business of a financial service supplier in its territory. But in the meantime, Paragraph 1 of this Article also provides that “the Parties recognize that each Party may have its own regulatory requirements concerning the transfer of information and the processing of information”; namely, all countries are respected and encouraged to establish their own rules on cross-border information flow. China has taken the stance of furthering the opening-up of financial services. The *Financial Services Annex* has also introduced rules on new financial services, self-regulatory organizations, and transfer and processing of financial information for the first time, thus making a high-level commitment regarding financial regulatory transparency.<sup>46</sup>

Due to its industrial characteristics, the financial industry has relatively high requirements on the utilization and timeliness of data resources. In recent years, the combination of the financial industry and technology has intensified the contradiction between financial data flow efficiency and inter-regional data protection barriers. Therefore, the RCEP framework encourages the establishment of multilateral rules on the flow of financial data to facilitate the orderly and efficient inter-regional flow of financial data. China should further establish and improve the legal institutional system of data security and personal information protection, and on the premise of highlighting the regulatory role of financial industrial regulation and strengthening the daily data compliance construction of financial institutions, strengthen the freedom and diversification of financial data cross-border flow rules.<sup>47</sup> China’s financial security governance system and governance capacity should be reinforced combining the security exception clause related to “critical public infrastructure” in Chapter 17 of RCEP and synthesizing prudent measures rules, financial services exception rules, new financial services regulatory discretion, and regulatory discretion on information transfer and processing under RCEP *Financial Services Annex*.

### (2) Excluded Application of the “Presence Prohibition Obligation” and Local Presence Requirements on Financial Institutions

The “presence prohibition obligation” targeting general trade in services under Chapter 8 does not apply to services covered in this Annex, which means that a Party to RCEP is entitled to require a financial service supplier of another Party to establish or maintain a commercial presence, or to be resident, in its territory as a precondition for the supply of cross-border services. The excluded application of the “presence prohibition obligation” under the *Financial Services Annex* has reduced RCEP’s impact on China’s current financial access and regulation mechanism, providing rules support for China to progressively advance financial opening-up.

<sup>46</sup> RCEP, *Annex II: Schedule of Specific Commitments for Services - China*.

<sup>47</sup> Ye Peng, Guo Fucheng. Discussion and Outlook on Financial Data Cross-border Regulation in the Context of RCEP, [http://www.east-concord.com/zygd/Article/202012/ArticleContent\\_1977.html](http://www.east-concord.com/zygd/Article/202012/ArticleContent_1977.html) (visited on May 29, 2022).

### (III) Telecommunications Services<sup>48</sup>

#### 1. Main Contents of RCEP *Telecommunications Services Annex*

Comprising 23 clauses, RCEP Chapter 8 *Telecommunications Services Annex* mainly establishes the guarantee obligations of the governments of Contracting Parties regarding telecommunications services regulation, particularly ensuring a fairly competitive and orderly domestic telecommunications services market and service provision by telecommunications enterprises of another Party in the domestic telecommunications services market. Respecting telecommunications regulation modes, in view of various countries' different telecommunications services regulation modes, RCEP allows Contracting Parties to adopt different regulation modes towards telecommunications services, including direct regulation, operation relying on the role of market forces or other regulation modes, provided that suppliers are not discriminated against, and attention is paid to protecting consumer welfare and maintaining public interests despite the regulation mode.<sup>49</sup> The Annex requires that each Party shall ensure that its telecommunications regulatory body is separate from, and not accountable to, any supplier of public telecommunications services, and that the regulatory decisions of, and the procedures used by, its telecommunications regulatory body are impartial with respect to all market participants.<sup>50</sup>

In the field of telecommunications services, foreign suppliers' access to and use of the public telecommunications services in the host countries is the key to service delivery. In this regard, regarding the obligations of public telecommunications services suppliers, the *Telecommunications Services Annex* to RCEP specifies the obligations of public telecommunications services suppliers of Contracting Parties in terms of interconnection, number portability and access to numbers.<sup>51</sup> The Annex requires that such access and use should be conducted on terms and conditions that are reasonable, transparent and non-discriminatory, but allows some exceptions to such obligations, including that a Party may take measures that are necessary to ensure the security and confidentiality of messages and to protect the personal information of end users, provided that such measures are not applied in a manner which would constitute a means of discrimination or a disguised trade restriction. In terms of interconnection with major operators, the Annex stipulates general terms, choices of interconnection with major operators, interconnection offering and public provision of protocols.<sup>52</sup> For the purpose of safeguarding adequate competition in the telecommunications services sector, the Annex provides for competitive safeguards against anti-competitive practices, resale, and unbundling of major operators' network elements.<sup>53</sup> Moreover, technological neutrality is one of the critical issues relating to telecommunications services. In this regard, the Agreement specifies the flexibility in the

choice of technology for service suppliers, requiring Contracting Parties to guarantee technological neutrality. That is, a Party shall not prevent public telecommunications suppliers from choosing the technologies that they use to supply their services.<sup>54</sup> Finally, regarding resolution of telecommunications disputes, the Annex stipulates that each Party shall ensure that a supplier of public telecommunications services of another Party may have timely recourse to its telecommunications regulatory body or dispute resolution body to resolve disputes arising under this Annex, and that any supplier of public telecommunications services aggrieved by a final determination or decision of its relevant telecommunications regulatory body may obtain a review of such determination or decision in accordance with its laws and regulations.<sup>55</sup>

#### 2. Connection between China's Laws and Regulations and RCEP *Telecommunications Services Rules*

Overall, the RCEP Telecommunications Services Chapter features higher standards and more specific obligations compared with GATS rules. It is designed to ensure critical obligations including the acquisition and use of telecommunications services, competitive safeguard, telecommunications network interconnection, telecommunications regulatory body independence, transparency, etc., putting forward new requirements on China's telecommunications service rules in terms of depth and breadth. China has continually improved and opened up telecommunications services trade rules since the WTO accession, but at present, it still needs to cover a certain distance before meeting RCEP requirements on telecommunications services liberalization regarding regulatory independence, telecommunications legislation and telecommunications services resale restrictions, and should continue to optimize regulatory independence, transparency, market access and other aspects of the domestic laws and regulations and enforcement mechanisms.

48 RCEP, Chapter 8 Annex B, Telecommunications Services.

49 RCEP, Chapter 8 Annex B, Telecommunications Services, Article 3.

50 RCEP, Chapter 8 Annex B, Telecommunications Services, Article 12.

51 RCEP, Chapter 8 Annex B, Telecommunications Services, Articles 5, 9 and 15.

52 RCEP, Chapter 8 Annex B, Telecommunications Services, Article 4.

53 RCEP, Chapter 8 Annex B, Telecommunications Services, Articles 6, 8 and 19.

54 RCEP, Chapter 8 Annex B, Telecommunications Services, Article 21.

55 RCEP, Chapter 8 Annex B, Telecommunications Services, Article 23.



## IV. Bilateral Level: Service Sector Opening-up under Investment Agreements

### (I) China-EU Comprehensive Agreement on Investment

The *China-EU Comprehensive Agreement on Investment* (hereinafter referred to as CAI or the Agreement) was officially launched into negotiations in 2013, and concluded on December 30, 2020 upon 35 rounds of negotiations. It marks the first investment agreement signed by the EU externally after foreign direct investment was included into EU “common commercial policy” exclusive power and function under the 2009 Treaty of Lisbon,<sup>56</sup> as well as the most important bilateral legal document in the China-EU economic and trade relationship since the 1985 *China-EU Trade and Economic Cooperation Agreement*. Despite uncertain factors confronting the approval and entry-into-force of CAI affected by China-EU relationships, at the rules level, CAI and RCEP which was signed by China on November 15, 2020 jointly constitute two milestones of China’s development of the international economic and trade treaty map in recent years. Compared with the investment chapters under the over 100 Bilateral Investment Treaties (BITs) and 17 Free Trade Agreements (FTAs) China previously signed, CAI rules are notably comprehensive and advanced and represent a new paradigm of China’s commercially signed economic and trade treaties at the current stage. In spite of the name of investment agreement, CAI not only covers investment liberalization contents but also includes massive services trade liberalization contents.<sup>57</sup>

#### 1. Investment Liberalization with a Focus on the Service Sector

Compared with earlier international investment agreements, which focused on investment promotion and protection, one of the main features of the recent development of investment agreements is the promotion of investment liberalization and facilitation, i.e. investment market access and an appropriate regulatory framework. This trend is related to the role of investment treaties in promoting foreign direct investment flows in various countries.<sup>58</sup> BITs traditionally signed by China focus

<sup>56</sup> Treaty of Lisbon – Amending the Treaty on European Union and the Treaty Establishing the European Community, 2007/C306/01, effective as of December 1, 2009, Article 188 A, Article 188 C. The common commercial policy of the EU is based on the customs union and commercial relations. It is the basis for the EU to represent its member states in unified foreign negotiations and formulation of international economic and trade rules with supranational exclusive powers and functions.

<sup>57</sup> CAI text and annexes on which this report is based are based on the version disclosed by the EU on its website in accordance with transparency requirements, see <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237> (last visited May 20, 2022). According to the notes, this text is still subject to technical revisions such as wording, articles number or order adjustment before both sides complete the domestic approval procedures and the agreement takes effect.

<sup>58</sup> See Inose Takamichi, “The Evolution of Investment Liberalization under the Recent Investment Treaties”, (2020) 16 (5) *Public Policy Review* 1, pp.3-12.

on investment protection, but along with the construction of Chinese Free Trade Areas/Ports and the promulgation and enforcement of the *Foreign Investment Law*, the opening-up mode of pre-establishment national treatment plus negative list has substantially expanded the market access level of foreign investment in China, laying a foundation for investment liberalization under China’s commercially signed economic and trade treaties. At the EU level, as the *Treaty of Lisbon* entered into force, the role of foreign investment in the EU’s external relationships has increasingly attracted attention. Unlike BITs previously signed externally by member states, the EU has in recent years targeted investment liberalization as one of the main objectives in the investment chapters of FTAs.<sup>59</sup> Conforming with the said trend, after the preamble, objectives and definitions, CAI Party 2 focuses on investment liberalization, including 7 clauses covering market access committing in the form of negative list (or non-conforming measures), performance requirements, non-discriminatory treatment towards foreign investment, and natural persons’ temporary stay for commercial purposes.<sup>60</sup> Combining the annexes of both parties’ specific commitments, in the sector of investment liberalization, CAI has, on the one hand, solidified China’s foreign investment access reform and commitment regarding domestic law and Free Trade Areas/Ports, and on the other, innovated many rules.

An important reflection of CAI’s comprehensiveness lies in the fact that although it is an investment agreement, it applies to plenty of critical service sector investments and establishes the disciplinary regulation for further opening of the service market. This is not only a negotiation focus determined by the EU’s direct investment in China,<sup>61</sup> but also reflects the convergence of trade and investment rules that is characteristic of agreements the EU has signed in recent years.<sup>62</sup> By virtue of the close relationship between investment and services trade, CAI is an economic and trade treaty covering the most commitment to and discipline of services liberalization among the investment agreements China has signed so far. In view of the limited number of FTAs signed by China with major developed economies in the world, the liberalization of services trade included in CAI is an embodiment of the new paradigm of China’s negotiation and conclusion of investment treaties with foreign countries.

The comprehensiveness of CAI is also reflected in its application of industrial commitment mode, namely the non-conforming measures listing form, or “negative list”. As a tabulating method, the adoption of positive list and negative list does not directly or certainly reflect the level of openness, and can even achieve factually the same effect of openness.<sup>63</sup> In recent years, China has attached

<sup>59</sup> See Angelos Dimopoulos, “Shifting the Emphasis from Investment Protection to Liberalization and Development: The EU as a New Global Factor in the Field of Foreign Investment”, (2010) 11 (1) *Journal of World Investment and Trade*, pp. 5-27.

<sup>60</sup> CAI, Section II (Investment Liberalization).

<sup>61</sup> See the Ministry of Commerce: China Foreign Investment Statistical Bulletin (2021), <http://images.mofcom.gov.cn/wzs/202111/20211125164038921.pdf>, p. 11, November 15, 2021 (visited on May 30, 2022).

<sup>62</sup> See, e.g., Amokura Kawharu, “Punctuated Equilibrium: The Potential Role of FTA Trade Commissions in the Evolution of International Investment Law”, (2017) 20 (3) *Journal of International Economic Law*, p.87.

<sup>63</sup> See Rudolf Adlung & Hamid Mamdouh, “How to Design Trade Agreements in Services: Top Down or Bottom Up?”, (2014) 48 (2) *Journal of World Trade*, pp.191-218.

great importance to the role of negative list during the construction of domestic free trade areas/ports, which constitutes an independent and liberalized opening-up measure. However, there are many differences between the Chinese list and the list of non-conforming measures under economic and trade agreements in terms of content, form and public participation.<sup>64</sup> In addition, the negative list has a high requirement on the tabulating ability of negotiators, and the list of existing and future non-conforming measures requires negotiators to master or predict the development status quos and future trends of various industries as well as the dynamic development of national interests.<sup>65</sup> This is also a challenge confronting China when committing by means of negative list under an economic and trade treaty.

According to the CAI text currently published by the EU, the annexes of China and Europe each contain four aspects, which are not completely consistent in form, but have no substantial difference. Specifically, Annex I and Annex II are existing non-conforming measures and future non-conforming measures respectively, and the obligations involved include national treatment, most-favored-nation treatment, performance requirements and senior management and the board of directors. Annex III contains specific commitments and restrictions on market access, i.e. measures inconsistent with investment liberalization obligations. This Annex contains information on industrial classification, mainly related to the service sector.<sup>66</sup> Annex IV contains reserved or restrictive measures relating to intra-company personnel transfers and entry and temporary stay of business visitors.<sup>67</sup> China has included 36 entries in Annex I, the vast majority of which only relate to the obligation of national treatment. Annex II contains 17 entries covering other categories of obligations in addition to national treatment. China's comprehensive and specific opening-up commitments made in the CAI annexes have responded to most of the concerns of EU enterprises which are to enter the Chinese market, including the substantial opening-up of the service sectors where EU investments are concentrated, such as finance, telecommunications, health care and environmental services. Compared with the GATS Schedules of Commitments, China has significantly eased access restrictions in these areas, including new-type service industries such as cloud computing. CAI represents the only agreement adopting the negative list form for service sector investment among all the economic and trade treaties signed by China,<sup>68</sup> and will accumulate experience for China to adopt this tabulating form more often in the future. The EU list contains measures at the EU level and measures taken by member states. 15 reservations are listed in Annex I and 22 are listed in Annex II. The vast majority of these reservations relate to service industries and most of them involve more than one obligation.<sup>69</sup>

The exclusion scope of CAI investment liberalization also pays special attention to the service sector. Besides the exclusion of governmental services, air transport and auxiliary services under GATS, CAI firstly excludes audio-visual services.<sup>70</sup> Audio-visual services constitute an important part of the service sector in the digital age. Based on the traditional protection of cultural diversity, the EU has consistently excluded obligations regarding audio-visual services in economic and trade agreements it signs.<sup>71</sup> For China, audio-visual services currently involve numerous sensitive issues such as the development of network cultural industry and the censorship of cultural products. We can say that CAI's exclusion of audio-visual services meets the needs of both parties in exercising regulatory rights in this field.

## 2. Regulatory Framework of Financial Services

CAI specially provides for "financial services" in Section III of "Regulatory Framework", involving scope and definitions, prudential exceptions, efficient and transparent regulation, information transfer and processing, new financial services, specific exception, self-regulatory organizations, and clearing and payment systems. As an investment agreement, CAI's regulation of the financial services regulatory framework is not only an innovation in the style and content of the Agreement, but also highlights the Parties' special attention to the opening-up of the financial market. Its contents reflect the new trend of financial services regulation in China and Europe.

First, equal attention is paid to market opening-up and the host country's regulatory power. In terms of market opening-up, the financial sector covered by the CAI includes insurance, insurance-related services, and banking and other financial services. Compared with GATS, more Chinese departments have committed to the financial opening-up in CAI, such as guarantee and commitment, money brokerage, asset management, and settlement and clearing services of financial assets under

64 See Jie (Jeanne) Huang, "Nationwide Regulatory Reform Starting from China's Free Trade Zones: The Case of the Negative List of Non-Conforming Measures", in Julien Chaise (ed.), *China's International Investment Strategy-Bilateral, Regional, and Global Law and Policy* (Oxford University Press, 2018), pp.93-98.

65 See Rodrigo Monardes V, "Challenges for Countries in Trade in Services' Negotiations with the NAFTA Approach, The Experience of Chile in the Free Trade Agreement with the United States", (2016) 5 (1) *British Journal of American Legal Studies*, pp.390-392.

66 The source of these measures is currently the *Special Administrative Measures (Negative List) for the Access of Foreign Investment* (2019) promulgated by the Ministry of Commerce. Negotiators have specially noted that before CAI is officially signed, China will update and quote the newest version of list. China – EU Investment Agreement Negotiation – Schedules of China, Negotiator's Note, p.5. The listing basis of Annex III is CAI Part 2 Article 2 (Market Access).

67 CAI – Schedules of China.

68 Under RCEP, China currently adopts the negative list mode to commit to the investment sector, except for investment in the service sector. Hence, the Schedules of Specific Commitments for Services still adopts the positive list mode. RCEP, Annex II, Schedule of Specific Commitments for Services – China.

69 CAI – Schedules of European Union.

70 CAI, Section II, Article 1 (Scope of Application).

71 See Antonios Vlassis, "European Commission, Trade Agreements and Diversity of Cultural Expressions: Between Autonomy and Influence", (2016) 31 (4) *European Journal of Communication*, pp.446-461; Lucia Bellucci, "The Notion of 'Cultural Diversity' in the EU Trade Agreements and Negotiations: New Challenges and Perspectives", (2016) 2 (2) *Italian Law Journal*, pp.433-444.

banking and other financial services.<sup>72</sup> CAI pays attention to the regulation rights of the host country while opening up the financial market, and reserves a regulatory space to ensure the security and stability of the domestic financial system through prudential exception, financial services exception and efficient and transparent supervision.

Second, market opening-up and fair competition are unified. In view of the fact that China and Europe have continually removed various financial services barriers in recent years, CAI's focus on the regulatory framework of financial services has shifted to the coordination of regulatory rules between both Parties, requiring equal treatment in the licensing, qualification requirements, trading opportunities and qualification granting of financial services supply, as well as the regulation of new financial services.

Third, both financial innovation and risk prevention are valued. CAI's attention to financial innovation is reflected in new financial services and constraints on the fintech regulatory sandbox.<sup>73</sup> To promote inclusive and prudent regulation of new financial services, CAI requires Contracting Parties to make every effort to give equal treatment to financial services providers, including non-discrimination requirements on pilot free trade zones and free trade ports during early and pilot Implementation, with the exception of maintained prudential regulation. This shows that CAI attempts to respond to the status quo of fintech regulatory sandboxes being implemented in both China and Europe, and has imposed non-discriminatory requirements on such regulation.

Fourth, the transfer and processing of financial information is involved. This is another CAI breakthrough regulation on financial services, involving the cross-border flow of data. Financial industry is one of the most data-intensive modern services, involving a large amount of sensitive customer data and privacy. There is controversy over whether financial information needs special treatment in

<sup>72</sup> These internationally recognized standards include but are not limited to those adopted by G20, Financial Stability Board, Basel Committee on Banking Supervision, International Association of Insurance Supervisors, International Organization of Securities Commissions, Financial Action Task Force on Money Laundering, and Global Forum on Transparency and Exchange of Information for Tax Purposes.

<sup>73</sup> In 2016, the UK launched the Fintech Regulatory Sandbox program, which aims to strike a balance between fintech innovation and effective risk management. See Guilio Cornelli *et al.*, *Inside the Regulatory Sandbox: Effects on Fintech Funding*, BIS Working Paper, No. 901, November 9, 2020. See Chen Pei, Sun Qixiang, *Diversified Co-governance: the Balance between Innovation and Regulation -- Reflections based on the "Regulatory Sandbox" Theoretical Basis and International Practices*, *Insurance Studies*, 2019, Issue 3, pp. 27-35. At present, roughly more than 40 countries and regions, including China, have implemented financial innovation supervision sandboxes. In February 2019, the People's Bank of China launched a pilot innovation program for fintech regulation, which has covered Beijing, Shanghai and other regions.

the cross-border flow of data.<sup>74</sup> The CAI explicitly requires parties not to, in principle, prevent financial services providers in their territory from processing and transferring information needed for the conduct of the ordinary business, on the precondition of not violating the host country's regulatory requirements for prudential reasons.

In the context of rising and even prevailing anti-globalization, the opening-up rules and commitments of the service sector contained in CAI show a good image of China's institution-based opening-up commitments and innovative social governance to the world. There is no obvious geopolitical conflict between China and Europe, and it is not in the interest of either side to cool down CAI, an important negotiation result, due to political influence. It was not easy to achieve CAI. China and the EU should objectively evaluate and rationally judge the future bilateral relations on the basis of the existing achievements, actively prevent the occurrence of greater negative externalities on the basis of seeking common ground while reserving differences, and make the hard-won negotiation results play the treaty role, so as to benefit both sides in terms of the considerable economic and trade development and common interests.

## (II) Trade in Services in the China-Mauritius Free Trade Agreement

Mauritius is referred to as the "offshore haven of Africa".<sup>75</sup> In December 2017, China and Mauritius launched negotiations over a free trade agreement. Upon four rounds of negotiations, on October 17, 2019, both parties signed the *Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Mauritius* (hereinafter referred to as the *China-Mauritius FTA*). It became effective on January 1, 2021.<sup>76</sup>

Including the Preamble, 17 Chapters and 3 Annexes, the *China-Mauritius FTA* has generally achieved comprehensiveness, high level and reciprocity. In terms of trade in services, Chapter 7 thereunder provides for Trade in Services. Comprising 24 articles, this Chapter is not apparently different from GATS at the rules level. It has three Annexes, i.e. Annex A Financial Services, Annex B Movement of Natural Persons, and Annex C TCM Cooperation. Regarding specific commitments to trade in services, under the *China-Mauritius FTA*, the positive list is adopted, generally equivalent commitments with balanced interests are made on opening-up in more than 100 service sub-sectors,

<sup>74</sup> See Nigel Cory & Robert D. Atkinson, *Financial Data does not Need or Deserve Special Treatment in Trade Agreements*, Information Technology and Innovation Foundation (ITIF), April 2016. The report argues that special provisions under the CPTPP for cross-border processing of financial services data have sent a dangerous signal that local storage requirements can be imposed on financial services data for regulatory purposes, which will lead to increasing digital protection policies.

<sup>75</sup> John Njiraini, *Mauritius: Africa's Offshore Haven*, *Global Finance*, Dec. 9, 2019, <https://www.gfmag.com/magazine/december-2019/mauritius-africas-offshore-haven> (last visited Jan. 28, 2022).

<sup>76</sup> For the Chinese and English texts of the *China-Mauritius FTA*, see the website of China's Free Trade Areas: [http://fta.mofcom.gov.cn/mauritius/mauritius\\_special.shtml](http://fta.mofcom.gov.cn/mauritius/mauritius_special.shtml) (last visited on May 28, 2022).



and it is agreed to carry out economic and technological cooperation in agriculture, finance, health care, tourism and other areas. The *China-Mauritius FTA* marks the most open free trade agreement in the service sector of Mauritius up to now. The Mauritian side has made commitments in 11 service sectors, including finance, education, construction, tourism and health, covering more than 130 sub-sectors. China, on the other hand, has significantly eased restrictions against Mauritius on market access in the areas of commercial services, finance and transportation, with an overall level of openness far exceeding that of China's commitments under GATS.

According to the annexes, first of all, financial services are one of the key areas of cooperation between China and Mauritius. In terms of rules, the *China-Mauritius FTA* sets a separate annex on financial services, under which the two sides agree to strengthen cooperation in domestic regulation, regulatory transparency, recognition and other areas. In terms of market access, Mauritius has made a high-level commitment on opening up to China in the insurance, banking, securities and other service sectors, allowing Chinese enterprises to establish commercial presence in Mauritius and granting national treatment thereto. On the basis of its WTO commitments, China has incorporated the latest opening-up policy in the financial sector. The *China-Mauritius FTA* will create good business environments and development opportunities for Chinese and Mauritian financial institutions to enter the other party's market, and also provide opportunities for closer and deeper cooperation between the financial sectors of the two countries.<sup>77</sup> Second, one of the highlights of Mauritius's services opening-up is the movement of natural persons. Chinese citizens can go to Mauritius to carry out business in the services sectors open to the public. Chinese people who go to Mauritius mainly include business visitors, contractual services providers, graduate interns, and personnel transferred within the company.<sup>78</sup> Third, Mauritius has for the first time fully opened its TCM services market to China and agreed to strengthen exchanges and cooperation on TCM in an all-round way, which will help Chinese TCM to go global.<sup>79</sup>

Electronic commerce is also a common concern of both sides. In accordance with Chapter 11 of the *China-Mauritius FTA* ("Electronic Commerce"), both sides agree to carry out information exchange and sharing of laws and regulations, policies and practical experience, jointly strengthen research and training, promote mutual recognition of digital certificates and electronic signatures, enhance the acceptance of electronic versions of trade management documents, and jointly create a favorable environment for development, thus providing greater convenience for enterprises to improve efficiency and expand markets.

77 *China-Mauritius Free Trade Agreement* Chapter 7 Annex A "Financial Services".

78 *China-Mauritius Free Trade Agreement* Chapter 7 Annex B "Movement of Natural Persons".

79 *China-Mauritius Free Trade Agreement* Chapter 7 Annex C "TCM Cooperation".

## V. Development of International Trade in Services and the Relevant Legislation and Regulations in China in 2021

### (I) The Development of Trade in Services in China in 2021

Statistics show that China's trade in services maintained relatively fast growth in 2021 despite the impact of COVID-19. The yearly total imports and exports of services reached RMB 5,298.27 billion Yuan, growing by 16.1% year on year.<sup>80</sup> The development of international trade in services in 2021 mainly showed several features. First, trade in knowledge-intensive services grew steadily. The sectors covered by knowledge-intensive services are generally finance, education, intellectual property royalties, and telecommunications computers and information services. In 2021, imports and exports of knowledge-intensive services reached RMB 2,325.89 billion Yuan, growing by 14.4% year on year.<sup>81</sup> Exports and imports of the financial services as well as the telecommunications computers and information services grew rapidly by 31.1% and 19.3% respectively. Second, the import and export of transport services increased significantly. Since the outbreak of COVID-19, overseas demands for goods such as anti-pandemic supplies had surged, but due to the pandemic prevention and control measures, shipping capacity and air transportation capacity had been severely limited and shipping prices had skyrocketed. Transport services grew substantially along with the growth of trade in goods and became the fastest growing sector among the 12 sectors of trade in services.<sup>82</sup> Third, the import and export of travel services continued to decline. The impact of COVID-19 on the import and export of travel services was significant and continuing. Excluding travel services, China's imports and exports of services in 2021 would show a clear upward trend.<sup>83</sup>

The statistics of trade in services in 2021 showed as follows: First, global trade in services had been impacted. Due to the differences in the structures of trade in services among different economies, the impacts on trade in services varied from economy to economy. Countries or economies featuring a knowledge-intensive structure were less affected, while those featuring a travel structure were more

80 See the Ministry of Commerce: Principal of the Department of Services Trade of the Ministry of Commerce Introduces the Development of Services Trade in 2021, January 30, 2022, <http://www.mofcom.gov.cn/article/xwfb/xwsj/zr/202201/20220103277846.shtml> (visited on May 25, 2022).

81 Specifically, exports of knowledge-intensive services reached RMB 1,262.39 billion Yuan, growing by 18%, and imports of knowledge-intensive services reached RMB 1,063.5 billion Yuan, growing by 10.4%. Ibid.

82 In 2020, imports and exports of transport services reached RMB 1,682.15 billion Yuan, growing by 61.2%. Specifically, exports of transport services reached RMB 820.55 billion Yuan, growing by 110.2%, and imports of transport services reached RMB 861.6 billion Yuan, growing by 31.9%. Ibid.

83 In 2020, imports and exports of China's travel services reached RMB 789.76 Yuan, decreasing by 22.5%. Excluding travel services, China's imports and exports of services grew by 27.2% in 2020, increasing by 30.9% compared with 2019 year on year. Ibid 1.

affected. Second, under the impact of the pandemic, China's services trade structure had changed. The services trade characterized by the import of travel services had been greatly affected, leading to changes in China's services trade structure. Third, China had continually deepen reform and opening up, promoted the development of pilot free trade zones, optimized the business environment and consolidated the foundation of the service sector, which had become the main internal reasons for the relative stability of China's index.<sup>84</sup>

## (II) The Important Laws and Regulations related to Trade in Services

Digital trade is an important part of international trade in services and has become an emerging field of global economic and trade rules reconstruction in recent years. In particular, the COVID-19 pandemic has accelerated the global entry into the digital era, intensifying competition over standards and rules in digital services trade, including market access, cross-border data flow and data localization.<sup>85</sup> China has officially applied to join the *Comprehensive and Progressive Trans-Pacific Partnership* (CPTPP) and the *Digital Economic Partnership Agreement* (DEPA),<sup>86</sup> demonstrating the basic attitude towards continually expanding high-level opening-up in the digital economic sector. At the domestic law level, China made continuous progress in promoting digital trade and cross-border data flow in 2021. In addition to the *Cybersecurity Law* enacted in 2017, the *Personal Information Protection Law* and the *Data Security Law* were adopted and implemented in 2021. Together, the three laws establish an overall framework for China's general data, especially personal information and important data, to be stored locally, and data to be subject to security assessment and security review when leaving the country. In addition, the *Cybersecurity Review Measures* was adopted on November 16, 2021, the *Data Exit Security Assessment Measures* (Draft) was released on November 2, 2021, and the *Network Data Security Management Regulations* (Draft) was released on November 1, 2021.

### 1. Data Security Law

The *Data Security Law of the People's Republic of China* was enforced on September 1, 2021. This

<sup>84</sup> Institute of International Trade and Economic Cooperation: *Global Trade in Services Development Index Report (2021)*.

<sup>85</sup> World Economic Forum, *Digital Trade in Services and Taxation*, White Paper, October 2021, pp. 5-9.

<sup>86</sup> On September 16, 2021, China submitted a written letter to New Zealand, the depositary of the CPTPP, formally applying to join the CPTPP. Ministry of Commerce: China Officially Applied to Join the *Comprehensive and Progressive Trans-Pacific Partnership* (CPTPP) [http://www.gov.cn/xinwen/2021-09/16/content\\_5637879.htm](http://www.gov.cn/xinwen/2021-09/16/content_5637879.htm) (visited on May 22, 2022). On November 1, 2021, China submitted an official application to New Zealand, the depositary of the CPTPP, applying to join the DEPA. Ministry of Commerce: China Officially Applied to Join the *Digital Economic Partnership Agreement* (DEPA) <http://www.mofcom.gov.cn/article/syxwfb/202111/20211103213288.shtml> (visited on May 22, 2022).

law further standardizes cross-border data flow rules and provides a strong protection for the lawful, orderly and free cross-border flow of Chinese data. According to relevant regulations under the *Data Security Law* and the *Cybersecurity Law*, on the basis of following the principle of equality and mutual benefits, general data can basically realize free flow, but may be constrained in three aspects: First, general data voluntarily participating in the critical information infrastructure protection system will be reviewed according to cross-border flow rules targeting data collected and generated by critical information infrastructure. Second, general data processing activities should also be subject to national security review if they affect or may affect national security. Third, the cross-border flow of general data is restricted according to the principle of equality. The cross-border flow of important data should follow exit security review rules established by laws and regulations. According to different data processing subjects, important data can be divided into important data collected and generated by critical information infrastructure operators and important data collected and generated by other data processors. For the cross-border flow of critical data collected and generated by critical information infrastructure operators, the *Data Security Law* requires a security review in accordance with the relevant provisions of the *Cybersecurity Law*. Cross-border flows of core national data are subject to stricter review rules.

The cross-border data flow rules established under the *Data Security Law* conform to the current development trend of China's cross-border data flow, which is conducive to China's response to network security risks. According to the development trends of relevant international economic and trade agreements, two issues should be paid attention to when applying rules on cross-border data flow. First, efforts should be made to strike a balance between security and development and promote the safe and free flow of cross-border data. It should be noted that different treatment methods should be established for different grades and categories of national security risks. Strict limits should be placed on the cross-border flow of data that may pose specific national security risks; we should adopt a more open and inclusive attitude towards general data and promote the free cross-border flow of data and the development of data industry through data security. Second, a hierarchical and classified data management system should be reasonably developed. In the implementation process of the *Data Security Law*, the specific connotation and judgment criteria of "important data" should be further clarified, and the identification authorization and identification procedures of "important data" should be coordinated to ensure the effective realization of the hierarchical and classified data management system.

### 2. Personal Information Protection Law

The *Personal Information Protection Law of the People's Republic of China* (hereinafter referred to as *Personal Information Law*) was adopted on August 20, 2021 and entered into force on November 1, 2021. The *Personal Information Law*, the *Cybersecurity Law* and the *Data Security Law* jointly form a legal system for cyberspace governance and data protection in China. The *Personal Information Law* has further improved provisions on the personal information exit management. On the basis of the *Cybersecurity Law*, it has increased personal information protection certification of

professional institutions, the standard contracts of state cyberspace administration and other ways, and increased the legitimate paths of personal information exit, including security assessment,<sup>87</sup> protection certification and standard contracts.<sup>88</sup> The Personal Information Law also stipulates special ways for cross-border provision of personal information. If laws, administrative regulations or state cyberspace administration prescribe other conditions, or international treaties and agreements concluded or participated in by China prescribe conditions for overseas provision of personal information, other provisions may apply.

For the exit of personal information, in addition to the general conditions stipulated in Article 38, the Personal Information Law also specifies two special requirements. One is separate consent. According to Article 39 thereunder, a personal information processor providing personal information outside the territory of the People's Republic of China shall inform the individual the overseas recipient's designation or name, contact information, the processing purpose, the processing mode, the type of personal information, and the ways and procedures for the individual to exercise rights under this Law towards the overseas recipient, and obtain the individual's separate consent. Second, "equivalent level of protection" and "accountability". Where personal information is provided abroad, the personal information processor shall take necessary measures to ensure that the overseas recipient's processing activities of personal information meet the personal information protection standards stipulated in this Law.<sup>89</sup> This requirement embodies the idea of "equivalent level of protection" commonly used in the legislation of major countries and regions.

The above legislative process shows that China was committed to actively integrating into the global high-standard digital trade governance system in 2021. The bench-marking of high-standard digital trade rules, on the one hand, provides new development space for the development of China's digital trade, and on the other, lays a foundation for China to participate in the formulation of international digital trade rules and take the initiative and say in the formulation of rules. During the subsequent negotiations for joining CPTPP and DEPA, China should continue to coordinate the domestic and foreign rule of law, actively participate in the international rule of law, improve the digital trade standard system and the policy and legal system, and provide effective legal guarantee for improv-

<sup>87</sup> Article 40 of the *Personal Information Law* stipulates that operators of critical information infrastructure and personal information processors that handle personal information to the amount specified by the state cyberspace administration shall store the personal information collected and generated in the territory of the People's Republic of China within the territory. If it is really necessary to provide it abroad, it shall pass the security assessment organized by the national cyberspace administration; where laws, administrative regulations and the provisions of the state cyberspace administration do not require a security assessment, such provisions shall prevail.

<sup>88</sup> The text of a standard contract is a part of a personal information exit contract. A personal information processor can, based on his own needs, enter into a more specific contract with the overseas recipient regarding rights and obligations relationships without revising the terms of the standard contract text, reducing the level of protection under the standard contract or contradicting against the standard contract text.

<sup>89</sup> *Personal Information Law*, Article 38, Paragraph 3.

ing the regulation of digital services trade.<sup>90</sup>

### 3. 14<sup>th</sup> Five-year Plan for Development of Trade in Services

General Secretary Xi Jinping attaches great importance to the development of international trade in services. The *Guiding Opinions of the CPC Central Committee and the State Council on Promoting the High-quality Development of Trade* requires "deepening reform and opening up in the field of trade in services, continuously promoting the innovative development experiments of trade in services, and improving the management system and policy system to promote the development of trade in services".<sup>91</sup> In March 2021, the *Outline of the 14<sup>th</sup> Five-Year Plan and Vision 2035* set out clear requirements on the high-quality development of trade in services. In line with the above spirit, 24 departments including the Ministry of Commerce issued the *14<sup>th</sup> Five-year Plan for Development of Trade in Services* (hereinafter referred to as the *Plan*) in October 2021, making forward-looking plans for deepening the reform and opening up of trade in services, accelerating the digitalization process of trade in services, and deepening foreign cooperation in trade in services. It shows that China attaches great importance to the development of international trade in services under the new development concept. Adhering to the principle of giving priority to reform and opening up, the *Plan* takes "deepening reform and opening up of trade in services" as its first special chapter on key tasks and focuses on three aspects: easing market access in the service sector, improving the level of opening up in cross-border services trade, and building a high-level platform for reform and opening up. With the establishment and improvement of a negative list for cross-border trade in services as a hallmark, we have taken the initiative to integrate factor flow-based opening-up and institution-based opening-up, and to align access "at the border" with oversight "behind the border" during the "14<sup>th</sup> Five-Year Plan" period. This demonstrates China's resolve and confidence in unswervingly expanding the opening-up.

On August 12, 2020, the Ministry of Commerce issued the *Overall Plan for Comprehensively Deepening Pilot Innovation in Trade in Services*, making it clear that China shall comprehensively explore further opening-up of the service sector. Persistent efforts shall be made to combine factor-based opening-up and institution-based opening-up, coordinate opening up and regulation, and link pre-establishment with post-establishment. Sustained efforts shall be made to improve opening up levels both at the institutional level and in key areas. The service sector shall be opened up in an orderly manner. Benchmarking international high standards, removal or easement of restrictions on trade in services shall be pushed in the principle of complete removal, significant relaxation and orderly liberalization. Ways shall be explored to relax restrictions on trade in services under the mode of movement of natural persons in specific service sectors, and promote mutual recognition of vo-

<sup>90</sup> Yang Yanqing, Wu Guanghao. *Accelerating the Landing of Rules on Cross-border Data Flow*, theory.gmw.cn, November 26, 2021.

<sup>91</sup> *Guiding Opinions of the CPC Central Committee and the State Council on Promoting the High-quality Development of Trade*, 2019 No. 35 document, November 19, 2019, Part IV, Article 11 ("Vigorous Development of Trade in Services").



cational qualifications in accordance with the principle of reciprocity. At the same time, innovative development models for trade in services shall be explored. China shall vigorously develop digital trade, improve digital trade policies, and optimize inclusive and prudent regulation of digital trade. It shall promote deeper integration of manufacturing services, encourage producer services to integrate into global value chains through services outsourcing and other means, and develop emerging trade in services. The *Plan* lays special emphasis on comprehensively exploring ways to improve convenience. The cross-border use of the RMB shall be accelerated in services trade. Trials of the digital RMB shall be launched in the Beijing-Tianjin-Hebei region and other pilot areas where conditions permit.

### (III) Negative List for Cross-border Trade in Services in Hainan Free Trade Port

On June 10, 2021, the *Hainan Free Trade Port Law* was promulgated and implemented, providing a legal basis for the *Special Administrative Measures on Cross-border Trade in Services at Hainan Free Trade Port (Negative List) (2021 Edition)* (hereinafter referred to as Hainan Negative List). On July 26, 2021, *Hainan Negative List* was released, which clearly lists 70 special administrative measures in 11 categories targeting overseas service providers. This is China's first negative list for cross-border services trade at the national level, which was effective on August 26, 2021.<sup>92</sup> Generally speaking, the *Hainan Negative List* benchmarks high-standard international economic and trade rules, promotes high-level institutional opening-up, and reflects the following characteristics.

First, a new mode. The negative list mode is the main mode for making opening-up arrangements in the investment and cross-border services trade sector under current high-standard international free trade agreements. The *Hainan Negative List* lists special administrative measures for overseas service providers to provide services to Hainan Free Trade Port through three modes: cross-border delivery, consumption abroad, and movement of natural persons. In sectors beyond this List, within Hainan Free Trade Port, domestic and overseas services and service providers are treated equally.

Second, new rules. The *Hainan Negative List* lists, in a unified manner, special administrative measures for cross-border services provision by overseas service providers in terms of national treatment, market access, local presence and cross-border financial services trade. National treatment and market access are international rules in the service sector that have been included in the WTO and the free trade agreements we have signed. Local presence and cross-border trade in financial services are new rules under high-standard international economic and trade agreements.

Third, new frontiers. Based on China's current level of opening-up, the *Hainan Negative List* proposes pertinent opening-up measures targeting the sector of cross-border trade in services such as professional services, transportation, finance and education. In terms of talent policy, restrictions on overseas individuals taking more than 10 professional qualification examinations such as registered

92 Ministry of Commerce Order 2021 No. 3: Special Administrative Measures on Cross-border Trade in Services at Hainan Free Trade Port (Negative List) (2021 Edition), July 23, 2021.

metrologist, registered engineer of survey and design, and registered fire engineer have been lifted to facilitate the participation of overseas talents in the construction of Hainan Free Trade Port.

Fourth, new level. The openness of *Hainan Negative List* exceeds China's WTO accession commitment level in more than 120 service sub-sectors, and is also higher than the openness of corresponding areas under the vast majority of China's currently effective free trade agreements.

The institutional opening arrangement embodied in the *Hainan Negative List* will help to promote the liberalization of services trade and improve the overall openness of Hainan Free Trade Port. It can form a superposition effect with other existing free trade port policies and help Hainan Free Trade Port to form new advantages in the development of services trade.<sup>93</sup> Meanwhile, given the importance of digital trade, Hainan should explore the establishment of a regulatory system for the orderly flow of cross-border data. At the "first tier", efforts shall be made to establish a security management system for classified, graded and diverged cross-border data transmission, relax Internet access restrictions, realize the convenient flow of cross-border data, implement a classified review system for inbound information contents, and establish a hierarchical security management system for outbound data. At the "second tier", focus shall be placed on strengthening supervision over the flow of information and data from the Free Trade Port to the mainland, and actively promoting international mutual recognition of rules governing cross-border data flows.

### (IV) The Development of Beijing's Service Industry

#### 1. Beijing Development Plan of Modern Service Sector in the "14<sup>th</sup> Five-year Plan" Period<sup>94</sup>

Since the "13<sup>th</sup> Five-Year Plan", Beijing has attached great importance to accelerating the high-quality development of modern service sector. Data show that modern service sector has become the main engine driving Beijing's economic growth and the main window to enhance Beijing's international influence. Finance, science and technology, information, commerce, culture and other fields are playing an increasingly prominent leading role. Steady progress has been made in developing the National Comprehensive Demonstration Zone for Expanding Opening-up of the Service Sector and the China (Beijing) Pilot Free Trade Zone. On November 18, 2021, Beijing City issued the *Beijing Development Plan of Modern Service Sector in the "14<sup>th</sup> Five-year Plan" Period* (hereinafter referred to as *Beijing Plan*), which specifies that based on the strategic positioning of capital city, leading with the Capital development, at the theme of promoting high-quality development, and adhering to the digital, professional, quality-oriented and international development direction, Beijing shall accelerate the development of a high-quality modern service sector system that is compatible

93 See Kuang Xianming. Release the Effect of Hainan's Services Trade Negative List as Soon as Possible, *Economic Information Daily*, August 10, 2021.

94 The Notice of Beijing Municipal Commission of Development and Reform on Printing and Issuing *Beijing Development Plan of Modern Service Sector in the "14<sup>th</sup> Five-year Plan" Period*, Jing Fa Gai No. [2012] 1606, November 10, 2021.

with the Capital's functions as "four centers", continue to strengthen Beijing's core position in the global industrial chain, value chain and innovation chain, and build Beijing into an international first-class high-level service hub. By 2025, the added value of Beijing's modern service sector will account for about 70% of the gross regional domestic product, and the scale of trade in services will exceed RMB 1.3 trillion Yuan.

According to the *Beijing Plan*, during the "14<sup>th</sup> Five-Year Plan" period, Beijing will focus on the construction of "two districts" to promote high-quality development of modern service sector. It will actively integrate itself into China's opening-up strategy, align itself with new international ideas and rules, establish open institutions and systems in line with international standards, promote opening-up and reform at a higher level, and enhance the influence of domestic and international services. During the "14<sup>th</sup> Five-Year Plan" period, Beijing will also establish a modern service sector development index system and other key measures to strengthen the dominant role of the market in resource allocation and foster a world-class modern service sector development ecology. The *Beijing Plan* outlines more than 100 specific measures, including accelerating the deep integration of modern services and advanced manufacturing. In particular, important measures have been proposed to develop professional services, such as supporting well-known overseas arbitration institutions and international commercial mediation organizations to set up offices in Beijing so as to build an international commercial arbitration center.

## 2. Several Measures of Beijing City on Reforming and Optimizing the Development Environment of Legal Service Sector<sup>95</sup>

The development of legal service sector is an important field in the construction of the two districts in Beijing. The *Several Measures of Beijing City on Reforming and Optimizing the Development Environment of Legal Service Sector* (hereinafter referred to as *Beijing Measures*) released in July 2021 is intended to, following the requirements of "benchmarking high-standard international economic and trade rules, actively promoting institutional innovation, and with greater intensity, plotting and promoting the high-quality development of pilot free trade areas", further strengthen the system and mechanism innovation in the legal service area, and promote the professional, high-end and international development of the legal service sector. The *Beijing Measures* strives to match first-rate standards, align with international rules and practices, and explore to advance new systems and mechanisms.<sup>96</sup>

The *Beijing Measures* mainly include providing more convenient work, residence and entry and exit services, facilitating cross-border legal business revenue and expenditure, optimizing judicial

<sup>95</sup> Notice of Beijing Municipal Development and Reform Commission and Beijing Municipal Bureau of Justice on Printing and Issuing *Several Measures on Reforming and Optimizing the Development Environment of Legal Service Sector*, Jing Fa Gai Gui No. [2012] 2, issued on July 21, 2021.

<sup>96</sup> Beijing Daily: Build an International Commercial Arbitration Center, Facilitate Foreign Legal High-end Talents to Come to Beijing - Beijing "Two Zones" Construction Legal Service Support Measures Released, August 1, 2021.

administrative approval services, building an international commercial arbitration center, supporting foreign-related legal service institutions to explore the market, and strengthening the cultivation of foreign-related legal service talents. Especially in the aspect of building an international commercial arbitration center, *Beijing Measures* proposes that, to give full rein to Beijing's commercial service advantages and attract international outstanding arbitration resources, efforts shall be made to support well-known arbitration agencies and international commercial mediation organizations to set up business offices in Beijing Free Trade Zone, carry out foreign-related arbitration and mediation business in the field of civil and commercial disputes, and lawfully support Chinese and foreign parties in applying for and executing temporary measures such as property preservation, evidence preservation and behavior preservation before and during arbitration. All kinds of enterprises are supported to choose Beijing arbitration institutions for commercial arbitration and agree on Beijing as the place of arbitration when signing foreign-related contracts. Considering that conducting international arbitration business requires massive access to the international websites, it is proposed to explore building a safe and convenient international Internet data dedicated channel in China (Beijing) Pilot Free Trade Zone, and to appropriately provide security guarantee services to arbitration institutions and other legal service institutions within China (Beijing) Pilot Free Trade Zone for visiting international academic cutting-edge websites.

## 3. Implementation Plan of Beijing City for Comprehensively Deepening the Pilot Program for Innovative Development of Trade in Services

To implement the *Reply of the State Council on Agreeing to the Overall Plan for Comprehensively Deepening the Pilot Program for Innovative Development of Trade in Services* (Guo Han No. [2020] 111), further advance supply side structural reform in the field of trade in services, establish and perfect the system and mechanism of innovative development of Capital services trade in the new period, and provide duplicable and promotable experience for nationwide services trade development, Beijing printed and issued the *Implementation Plan of Beijing City for Comprehensively Deepening the Pilot Program for Innovative Development of Trade in Services* (hereinafter referred to as the *Beijing Plan*) on November 26, 2020.

*Beijing Plan* proposes that, relying on China International Fair for Trade in Services, the international first-class dual-hub airport and other major open platforms, and giving rein to Beijing's advantages in digital resources, Beijing shall focus on the digital trade development, promote docking with international rules, speed up services trade upgrading in key areas such as finance, Internet information and professional services, improve the liberalization and facilitation of cross-border flows of such factors as capital, talents, technology and data, establish an efficient and secure governance system for trade in services, enhance the competitiveness of services trade entities in the international market, lead "Chinese services" to a higher position in the global value chain, and boost high-quality development of the Capital. Beijing will be committed to building a "trinity" pilot digital trade zone to explore the secure and orderly flow of cross-border data and unleash the vitality of digital trade innovative development. Focusing on key areas, it will shape a new pattern of two-way opening-up of the Capital's service sector, including expanding the opening-up market of financial

services and expanding the opening-up scale of Internet information services. In terms of deepening the opening-up and reform of professional services, the *Beijing Plan* specifically states that well-known overseas arbitration institutions and dispute settlement institutions, after being registered and put on record, should be allowed to set up offices in the pilot free trade zone to provide arbitration services for disputes arising in international commercial and investment fields.

The opening-up of Beijing's legal service sector to the outside world is a key content of Beijing's services trade development, and a number of safeguard measures have also been provided at the national level for actively promoting the construction of Beijing International Arbitration Center. For example, the Supreme People's Court specially issued the *Opinions on the People's Court's Provision of Judicial Services and Safeguards for the Construction of Beijing National Comprehensive Demonstration Zone for Expanding Opening-up of the Service Sector and China (Beijing) Pilot Free Trade Zone*,<sup>97</sup> the Beijing Financial Court has been set up to support reform and innovation in the financial services sector, and the "Beijing One-stop Diversified Dispute Resolution Center for International Commercial Disputes" has been unveiled and established in the Beijing No. 4 Intermediate People's Court. Finally, international arbitration institutions represented by Beijing Arbitration Commission/Beijing International Arbitration Center have effectively improved the level of international arbitration services, which is of great significance to the construction of Beijing International Arbitration Center and the further improvement of the openness of the legal service sector.

97 The Supreme People's Court: *Opinions on the People's Court's Provision of Judicial Services and Safeguards for the Construction of Beijing National Comprehensive Demonstration Zone for Expanding Opening-up of the Service Sector and China (Beijing) Pilot Free Trade Zone* [Fa Fa No. (2021) 11], March 26, 2021.

## VI. Conclusion and Outlook

In 2021, In terms of international trade in services, China actively participated in the establishment of rules for trade in services in international economic and trade agreements externally, and attached great importance to the services industry development and market opening-up domestically, making remarkable achievements despite the significant impact of COVID-19. However, compared with developed countries, the industrial foundation of China's services trade development is still relatively weak, the proportion of services in GDP is lower than that of services in global GDP, and the proportion of services trade in international trade is also lower than that of global services trade in international trade. The institutional opening-up of China's service sector is also relatively insufficient, and the improvement of export competitiveness of services trade is relatively slow. In the post-COVID-19 era, the development of trade in services is likely to face greater protectionist challenges, with an increasing number of measures restricting the development of trade in services, such as national security, technical standards, intellectual property protection, preferential purchase of local services, and restrictions on the export of technical services.

Due to the influence of multiple factors such as COVID-19 and the Russia-Ukraine war, the development of China's trade in services will still face great challenges in 2022, and in particular, the import and export of travel services will probably remain in a downward range. Driven by the rapid development of the digital industry, digital trade, especially the export of digital services, is likely to become a bright spot of development. Internationally, developed countries will remain China's important partners in trade in services, but there are still great uncertainties in trade in services due to the pandemic and other factors. China should continue to cut or lower the special administrative measures related to the service sector from the negative list for foreign investment access, and contribute to the high-quality improvement of services trade based on the commercial presence mode while further accelerating the development of trade in services under the three modes of cross-border delivery, overseas consumption and movement of natural persons in a wider scope.

"Digit opens the future, and service promotes development". Despite the multiple challenges at home and abroad, the continuous and expanded opening-up of the service sector is the top priority of China's new round of high-level institutional reform and opening-up. In his opening speech at the 2021 China (Beijing) International Fair for Trade in Services, the General Secretary Xi Jinping stressed that China would enhance the opening-up level, promote the implementation of a negative list of cross-border services trade across the country, explore the construction of a national services trade innovative development demonstration zone, expand the space for cooperation, and increase support for the development of the service sectors in "Belt and Road" countries. China would strengthen the development of rules in the service sector, support Beijing and other places in carrying out pilot projects of docking rules under high-level international free trade agreements and build a digital trade demonstration zone. The Beijing Stock Exchange would be set up to build a battlefield for service-innovative small and medium-sized business owners. This has pointed out a clear direction for China to continue to vigorously develop the service sector, promote international trade in services and participate in the formulation of international rules on trade in services.



## Introduction to Issuing Institutions

### Beijing Arbitration Commission

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The Beijing Arbitration Commission, also known as the Beijing International Arbitration Center (the BAC/BIAC), was established on 28 September 1995. Over the past two decades, the BAC/BIAC has become a leading arbitration institution in China with an international reputation for its independence, impartiality, professionalism and efficiency. Since 2013, the Commercial Dispute Resolution in China: An Annual Review and Preview has become a major source of information concerning the dispute resolution practice in China for practitioners at home and abroad, and has been highly recognized by experts in the industry. The BAC/BIAC has been invited as an observer for the UNCITRAL Working Group II since 2017. The BAC/BIAC was recommended as one of the arbitration institutions within the “one-stop” diversified international commercial dispute resolution platform established by the China International Commercial Court in 2018. The BAC/BIAC released Investment Arbitration Rules in 2019, which endeavors to provide a Chinese approach in response to investor-state dispute settlement reform. The BAC/BIAC also provides other alternative dispute resolution services such as commercial mediation and construction dispute board.

### China Association of Trade in Services

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China Association of Trade in Services (CATIS) is a national trade organization approved by the State Council. There are several thousand membership enterprises under CATIS. And the secretariat of China Cross-border E-commerce 50-person forum, which is launched by the Counselor Office of State Council, is set under CATIS structure. The mission of CATIS covers the following aspects: to promote international cooperation and communication under the support of international organizations such as UNCTAD, UNOSSC, WTO and WCO; to cultivate talents-training program on new technology, new business model, emerging industry etc; to organize national-level conference and activities such as CIFTIS and CHIE, and to cultivate and promote national conference brand; to achieve program cooperation and promotion with local government authorities; to serve for the high-quality development of regional economy.



北京仲裁委员会  
Beijing Arbitration Commission  
北京国际仲裁中心  
Beijing International Arbitration Center



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