

The Position of International Treaties in PRC and Mexican Law: Using the Chinese “Dialectical Model” to Implement and Enforce a Hypothetical Mexico-China FTA, as Related to Foreign Investment

ADRIÁN CISNEROS AGUILAR*

Abstract

Closer Sino-Mexican relations brought about a debate on the feasibility of concluding a FTA-and concerns about how it would be complied with in both jurisdictions. Regarding foreign investment, the concern is whether investors’ rights would be equally protected. Since the best indicator of eventual implementation and enforcement of FTA obligations is the position of international treaties vis-à-vis domestic laws, this article follows the Chinese “dialectical model” to go around potential issues in this regard, derived from interaction between a monist system (Mexico) and a dualist system (China), and of both with international law. Four solutions based on this model are proposed. Utilisation of at least some of them would ensure international law rules in the FTA are used to ensure implementation and enforcement whilst preserving the distinct characteristics of each legal system, bringing legal certainty to investors, necessary for more and better bilateral investment. The model has additional advantages beyond a FTA, leading to higher-standard treaties and circular interaction between the Mexican and Chinese legal systems and international law.

Introduction

Throughout their history, Sino-Mexican relations have been plagued with misunderstandings and claims of non-compliance, which span the repeated antidumping measures imposed by the Mexican

government on Chinese products¹, the ever-increasing trade deficit between Mexico and China,² the way in which the latter has outcompeted Mexico in its traditional market, the United States³ and, lately, the cancellation of two of the most important Chinese investment projects in Mexico: Dragon Mart Cancun and the Mexico City-Queretaro high speed railway.⁴ This, however, has not prevented either country from seeking a closer relationship, particularly since Presidents Xi Jinping and Enrique Peña Nieto took office, albeit with sub-optimal results.⁵

* S.J.D. Candidate, KoGuan Law School Shanghai Jiao Tong University; LL.M., Wuhan University, B.C.L., Panamericana University. Mexican Council for Science and Technology Scholar; Shanghai Ministry of Education International Scholarship Recipient; former China-OAS Graduate Scholarship Grantee (adrian.cisnerosaguilar@gmail.com). This paper was completed on June 2015. The websites cited were current as of this date unless otherwise noted.

¹ WTO, Anti-dumping measures: reporting member vs. exporting country (www.wto.org/english/tratop_e/adp_e/AD_MeasuresRepMemVsExpCty.pdf).

² As of December 2014, the latest numbers available, the trade deficit was of more than USD 60 billion, according to the Mexican Ministry of Economy (http://187.191.71.239/sic_php/pages/estadisticas/mexicojun2011/Z3bc_e.html).

³ Kevin P. Gallagher and Enrique Dussel Peters, China's Economic Effects on the U.S.-Mexico Trade Relationship. Towards a New Triangular Relationship?, in: Enrique Dussel Peters, Adrian H. Hearn, Harley Shaiken (ed.), *China and the New Triangular Relationships in the Americas: China and the Future of U.S.-Mexico Relations* (2013), 13-24 (“As a result of this trade analysis and the recent “triangular relationship”, we find that China is rapidly outcompeting Mexico in the U.S. market, as well as the United States in the Mexican market. Trade falling under the category of “direct threat” suggests that these trends will continue in the future.”).

⁴ Raymundo Riva Palacio, Peña Nieto y el Último Boy Scout [Peña Nieto and the Last Boy Scout], in: *El Financiero* (December 5th, 2014), (www.elfinanciero.com.mx/opinion/pena-nieto-y-el-ultimo-boy-scout.html);

⁵ Enrique Dussel Peters, México y China: ¿hacia una agenda? [Mexico and China: towards an agenda?], in: *Reforma* (November 10th, 2014), 6 (“Este interés estratégico bilateral –desde 2013 ambas naciones son “socios estratégicos integrales”–, sin embargo, ha sido desaprovechado hasta noviembre de 2014, particularmente porque las instituciones mexicanas (públicas, privadas y académicas) no han logrado coordinar una (nueva) agenda de trabajo e iniciado nuevas condiciones para cambiar la inercia anterior a 2013 [This strategic bilateral interest –since 2013 both nations are

As part of this new boost both countries are trying to give to their relationship, there have been voices in both sides of the Pacific that call for more constructive relations, while advocating for the serious consideration of a Mexico-China FTA.⁶ If that is eventually the case, it is

‘integral strategic partners’-, however, has not been taken advantage of as of December 2014, particularly because Mexican institutions (public, private and academic) have failed to coordinate a (new) working agenda and generate new conditions to change the inertia existing before 2013.”)].

- ⁶ Jorge Flores Kelly, *Un TLC entre México y China, ¿está en chino?* [A FTA between Mexico and China, unachievable?], in: *Forbes México* (June 4th, 2013), (www.forbes.com.mx/un-tlc-entre-mexico-y-china-esta-en-chino/); Statements given by GANG Zeng, former Chinese Ambassador to Mexico, prior to the official visit of President Xi Jinping to Mexico, as reported by *CNN Expansión* (June 3rd, 2013), (“Si podemos firmar un TLC con México, se va a reducir más el costo del comercio y se ampliará la cantidad de los productos, lo que beneficiará a ambos países...Ni exportando todo el tequila y la carne de cerdo mexicana a China se podría lograr un equilibrio comercial entre ambas naciones, pero un tratado de libre comercio favorecería a ello [If we can sign a FTA with Mexico, trade costs will be reduced even more and the amount of products exchanged will increase, which would benefit both countries...Not even exporting all the Mexican tequila and pork to China could we attain a trade balance between the two nations, but a free trade agreement would help it.]”), (www.cnnexpansion.com/economia/2013/06/03/china-preve-impulsar-un-tlc-con-mexico); YANG Shouguo, *Cuarenta años de las relaciones sino-mexicanas: evaluación, perspectiva y reflexión* [Forty Years of Sino-Mexican Relations: Evaluation, Perspective and Reflection], in: Enrique Dussel Peters, Yolanda Trápaga Delfín (ed.), *Cuarenta años de la relación entre México y China: acuerdos, desencuentros y futuro* [Forty Years of Relations Between Mexico and China: Agreements, Disagreements and Future] (2012), 238 (“Un consejero económico de la embajada china en México ha expresado abiertamente: China tiene mucho interés en suscribir un tratado de libre comercio con México, como los que ya tenemos con Chile, Perú y Costa Rica. Pero para poder negociar un acuerdo tenemos que tener un tratamiento igual y la condición previa es que exista un reconocimiento de economía de mercado, y México no quiere reconocer ese estatus a China, y como no hay esa condición previa no podemos negociar [A trade commissioner of the Chinese Embassy in Mexico has openly remarked: China is very interested in concluding a free trade agreement with Mexico, like the ones we have with Chile, Peru and Costa Rica. But in order to negotiate an agreement we must enjoy equal treatment and the precondition is that there is a recognition [of

clear that since the legal instrument signed by Mexico and China ought to reflect reciprocity in their concessions to each other and true access to their economies,⁷ neither country can be expected to sit down and negotiate concrete trade and investment commitments towards its conclusion without being reasonably assured that the obligations contained in it will be effectively carried out in both jurisdictions.

In this context, it is imperative for Mexico and China to get acquainted with each other's legal systems, especially with the way they interact with international law. Indeed, to analyse the Chinese and the Mexican legal systems as referred to the position occupied by international treaties, as well as their incorporation and implementation *ad intra* even before Mexico and China begin negotiations could enable decision-makers to make valid projections of each country's capacity to comply with specific FTA obligations, thus becoming an important implementation indicator of the whole agreement. Moreover, regarding a prospective investment chapter it could provide a reasonable forecast of the treatment investors of one party will receive in the other's territory. For these

China] as a market economy, and Mexico does not want to grant China such status, without that precondition we cannot negotiate].”).

⁷ Dialogues held between Enrique Dussel Peters and the author in the Centre of Chinese-Mexican Studies, National Autonomous University of Mexico (January-March 2015). See also Enrique Dussel Peters, Xi Jinping y EPN en noviembre de 2014 [Xi Jinping and Enrique Peña Nieto in November 2014], in: *Reforma* (June 25th, 2014), 4 (“La República Popular China comprende perfectamente que los desequilibrios comerciales, las brechas tecnológicas en el comercio, así como la falta de inversión en México por parte de las empresas chinas —y a diferencia de otros países latinoamericanos— no es sustentable y no refleja una alianza cooperativa y armoniosa, muchos menos “estratégica e integral”. México debiera insistir en una **relación recíproca** en todos los ámbitos del comercio e inversión y difundir masivamente los beneficios y retos que implican inversiones chinas en México como miembro del TLCAN [The People's Republic of China understands perfectly that the trade imbalances, the technological gaps in trade, as well as the lack of investment in Mexico by Chinese companies –contrary to what happens in other Latin American countries- is not sustainable and does not reflect a cooperative and harmonious partnership, much less does it reflect a “strategic and integral” one. Mexico should insist in a **reciprocal relationship** in all areas of trade and investment and massively disseminate the benefits and challenges that entail Chinese investments in Mexico, as a NAFTA member (emphasis in the original)].”).

purposes, and mindful that different histories have a bearing on the different approaches Mexico and China have taken face the incorporation and implementation of international law rules, we will begin by explaining the basic traits of each system as related to international treaties, especially the position of the latter vis-à-vis national laws and regulations. We will then discuss the issues that could derive from the interactions of both legal systems in case a FTA is concluded and propose the utilisation of the dialectical model, currently used by Chinese scholars to explain how international law informs and complements Chinese domestic law. Finally, we will propose some solutions to the said issues that reflect the use of this model, and which are ultimately aimed at ensuring the implementation and enforcement of a potential Mexico-China FTA provisions, thereby contributing to the legal certainty Mexican and Chinese investors would like to see in each other's jurisdictions in order to commit their capitals.

I. Position of Treaties in the Mexican Legal System

Historically, Mexico has always displayed an internationalist vocation, reflected in its active participation in international organs and the considerable extension of its FTA network.⁸ Nevertheless, due to its colonial past and subsequent clashes with foreign powers, the Constitution (*Constitución Política de los Estados Unidos Mexicanos*) continues being the pinnacle of the Mexican legal system, even before international law. This is proven by the fact that compliance with international obligations in general and with international treaties in particular is always measured against the Constitution, more specifically, the fundamental rights (*garantías individuales*) contained in it.

Indeed, although there is no express provision saying so, the Constitution has traditionally been interpreted as saying that international treaties occupy a position inferior to it, but still considered alongside

⁸ For a full list, see Mexican Ministry of Economy, Países con Tratados y Acuerdos Firmados con México [Countries with Treaties and Agreements in Force with Mexico], (www.economia.gob.mx/comunidad-negocios/comercio-exterior/tlc-acuerdos).

national laws as “supreme law of the Union.”⁹ Additionally, the Constitution either makes reference to the “international agreements to which Mexico is a party” or makes an express *renvoi* to international law in specific provisions.¹⁰ Furthermore, per a succession of Supreme Court mandatory judicial precedents, or *jurisprudencia*, while international treaties in general are placed just below the Constitution and prevail over every other norm in the Mexican legal system, those provisions within the said treaties -notwithstanding the subject of the latter- that protect or expand the scope of protection of fundamental rights are to be placed at a constitutional level, thus forming a *bloc constitutionnel*.¹¹ This is a major

⁹ Constitución Política de los Estados Unidos Mexicanos [Political Constitution of the United Mexican States], Art. 133, (www.diputados.gob.mx/LeyesBiblio/pdf/1_07jul14.pdf).

¹⁰ For the former case, see for example Arts. 1 (guarantee of enjoyment and protection of human rights in Mexico, as well as rules of interpretation of human rights norms), 15 (prohibition to conclude treaties that undermine human rights in any way), 73 (powers of the Mexican Congress), 89 (powers and obligations of the President) and 103 to 105 (jurisdiction of federal courts and of the Mexican Supreme Court); for the latter case, see Arts. 15 (possibility to recognise the jurisdiction of the International Criminal Court on a case-to-case basis) and 27 and 42 (ownership of territorial seas and the resources contained therein by the Mexican nation and composition of the Mexican territory) of the Mexican Constitution, above n. 9.

¹¹ LEYES FEDERALES Y TRATADOS INTERNACIONALES. TIENEN LA MISMA JERARQUÍA NORMATIVA [Federal Laws and International Treaties. They Have the Same Normative Rank] Eight Epoch, Registry no. 205596, Level: Full Court; Single Precedent; Source: Gaceta del Semanario Judicial de la Federación [Federal Judiciary Gazette]; Location: No. 60, December 1992; Area(s): Constitutional; Precedent: P. C/92, 27. TRATADOS INTERNACIONALES SE UBICAN JERÁRQUICAMENTE POR ENCIMA DE LAS LEYES FEDERALES Y EN UN SEGUNDO PLANO RESPECTO DE LA CONSTITUCIÓN FEDERAL [International Treaties. They Are Hierarchically Above Federal Laws and Below the Federal Constitution] Ninth Epoch; Registry no. 192867; Level: Full Court; Single Precedent; Source: Semanario Judicial de la Federación y su Gaceta [Federal Judiciary Weekly and its Gazette], Location: Volume X, November 1999; Area(s): Constitutional, Precedent: P. LXXVII/99, 46. TRATADOS INTERNACIONALES. SON PARTE INTEGRANTE DE LA LEY SUPREMA DE LA UNIÓN Y SE UBICAN JERÁRQUICAMENTE POR ENCIMA DE LAS LEYES GENERALES, FEDERALES Y LOCALES. INTERPRETACIÓN DEL ARTÍCULO 133 CONSTITUCIONAL” [International Treaties. They Form Integral Part of the Supreme Law of The

change in the Mexican hierarchy of norms that will necessarily have an effect on a potential Mexico-China FTA, should one of its provisions is deemed to pertain the protection of the fundamental rights of the persons covered by the agreement.

While the abovesaid means that international treaties are directly applicable internally and prevail over Mexican domestic law and all non-conforming domestic laws and regulations have to be either amended in accordance with the ratified treaty or else be declared unconstitutional (and hence repealed),¹² it also means that if international law is able to have this effect it is because the Constitution allows it. So much so, that a treaty even after its incorporation into Mexican law is subject to be declared unconstitutional, if it is proved that its provisions run against the Mexican Constitution.¹³

Union and Are Hierarchically Above General, Federal and Local Laws. Interpretation of Art. 133 of the Constitution] Ninth Epoch; Registry no. 172650; Level: Full Court; Single Precedent; Source: [Federal Judiciary Weekly and its Gazette], Location: Volume XXV, April 2007; Area(s): Constitutional, Precedent: P. IX/2007, 6. DERECHOS HUMANOS CONTENIDOS EN LA CONSTITUCIÓN Y EN LOS TRATADOS INTERNACIONALES. CONSTITUYEN EL PARÁMETRO DE CONTROL DE REGULARIDAD CONSTITUCIONAL, PERO CUANDO EN LA CONSTITUCIÓN HAYA UNA RESTRICCIÓN EXPRESA AL EJERCICIO DE AQUÉLLOS, SE DEBE ESTAR A LO QUE ESTABLECE EL TEXTO CONSTITUCIONAL [Human Rights Contained in the Constitution and in International Treaties. They Constitute the Parameter to Exercise Constitutional Regulation Control, But When There Is in the Constitution an Express Limitation to the Enjoyment of Human Rights, One Must Follow the Constitutional Text] Tenth Epoch; Registry no. 2006224; Level: Full Court; Mandatory Precedent; Source: Semanario Judicial de la Federación y su Gaceta [Federal Judiciary Weekly and its Gazette], Location: Book 5, April 2014, Volume I; Area(s): Constitutional, P./J.20/2014 (10a.), 202. It is important to mention that only the latter judicial precedent fulfilled the constitutional and legal requirements to become *mandatory*: the former precedents were only legally considered orientating criteria.

¹² See above n. 9.

¹³ Mexican Constitution, Art. 105, section II, n. 9 above. Also, Ley Reglamentaria de las Fracciones I y II del Artículo 105 de la Constitución Política de los Estados Unidos Mexicanos [Law Regulating Sections I and II of Article 105 of the Political Constitution of the United Mexican States], Art. 72, (www.diputados.gob.mx/LeyesBiblio/pdf/205_270115.pdf).

There have been some views that categorise the Mexican legal system as dualist, since only international treaties whose ratification has been previously approved by the Mexican Senate are to be considered “supreme law of the Union.”¹⁴ In our opinion, all this reflects in reality a monist system where international law takes precedence.¹⁵ Ratified treaties are directly applicable domestically and, provided they are approved by the Senate and do not contradict the Constitution, prevail over national laws. The fact that a legislative act (the Senate approval) is necessary to ratify and formally incorporate a treaty into Mexican law does not make the latter a dualist system, for its effect is that such treaty will be directly applied and its provisions susceptible to be invoked before national courts once this requisite is fulfilled, something that does not happen in a purely dualist legal system. Moreover, a legislative act does not necessarily result in the issuance of a statute. In a dualist system, a treaty still has to be “translated” into domestic law through the enactment of a statute containing it in its entirety or some of its provisions, all post-ratification.¹⁶

¹⁴ See above n. 9.

¹⁵ We are aware of the academic discussion that states that the distinction between monism and dualism has largely been overcome. For the purposes of our work, we will still use it because scholarly works on China still refer to it when describing its legal system; it also adds clarity for our analysis. See also in this respect Armin Von Bogdandy, *General Principles of International Public Authority: Sketching a Research Field*, in: 9 *German Law Journal* (2008), 11, 1930-1931, (“Different to European Union Law, the acts of international institutions do not have direct effect and supremacy within the domestic legal order...the lack of direct effect and supremacy can be seen as structural principles which distinguishes international institutions from supranational ones. The Court of First Instance misses this point in its decision in the Yussuf case [a case handled by the European Court of Justice]. Its decision is trapped in an antiquated monism irreconcilable with the autonomy of community law. This should not be interpreted as singing the praises of dualism; I rather advocate a conception of the interaction along the lines of a legal pluralism that acknowledges the many linkages between the different legal orders”).

¹⁶ Jordan J. Paust, *Basic Forms of International Law and Monist, Dualist and Realist Perspectives*, in: Marko Novakovic (ed.) *Basic Concepts of Public International Law-Monism & Dualism* (2013), 246, (“...dualism views all forms of international law as being entirely separate from domestic legal processes and that international law merely operates at an international level in a community of independent states or that, if it operates at all domestically,

Finally, under a dualist system it is less probable that an international treaty, being translated into a domestic law or regulation, will prevail over national laws, as we will see shortly when we discuss the Chinese legal system.

III. The position of international treaties in PRC law

Westerners still largely fail to be aware that, for historical and cultural reasons, China is a country that sacralises the principle of sovereignty, something that is reflected, among other instances, in its staunch support of the principles of territorial integrity and non-intervention, the sometimes unfounded claims that China does not abide to international standards¹⁷ and the occasional diplomatic clashes derived from foreign countries' attitudes or opinions on what China considers sensitive national affairs.¹⁸

it must be implemented or transformed by some formal conduct of a domestic political entity such as a state legislative body.”).

¹⁷ Unfounded because, for all it is worth, China is trying to raise its treaty standards while staying true to the guiding principles of its foreign policy. HUANG Jie, Associate Professor of Law at the Shanghai University of International Business and Economics has spoken of “making treaties [in China] more rule-based instead of policy-based,” something that, in her view, “was going to happen generally with all treaties, thanks to the trend started with the Transpacific Partnership Agreement (TPP) and the Transatlantic Trade and Investment Partnership (TTIP), but bilaterally China should not raise standards with all countries, countries with very different legal systems or degrees of development will not accept too stringent standards. So much so, that for example when it comes to BITs, China does not have a model BIT, as the United States does.” Remarks given at the conference “London v. Shanghai-Dialogue on Rule of Law Between International Financial Centres from East and West”, held at Shanghai Jiao Tong University on April 6th, 2015. See also XUE Hanqin, *Chinese Observations on International Law*, 6 *Chinese JIL* (2007), paras. 4 (“oftentimes China’s adherence to the principle of sovereignty is simply misinterpreted in the west as a disregard of the development of international law, or worse still, considered an excuse to evade its international responsibility”) and 8.

¹⁸ Eugenio Anguiano Roch, *Sin Sustento Político, Imposible Construir Relaciones Económicas Bilaterales Sólidas* [Without Political Sustentation, It Is Impossible To Build Solid Bilateral Economic Relations] in: Enrique Dussel Peters, Yolanda Trápaga Delfín (ed.), *Cuarenta años de la relación entre México y China: acuerdos, desencuentros y futuro* [Forty Years of

Concerning international treaties, the said sacralisation is reflected in the arguments developed by scholars directed at enhancing the effectiveness of domestic law at the expense of that of international treaties and the relative position of international treaties within the Chinese legal system.¹⁹ Indeed, under PRC law, treaty provisions do not necessarily prevail over domestic law, or at least not in the way Mexican legal tradition understands the concept of hierarchy of norms: a norm, (in our example, that contained in a domestic law or regulation) which constitutes an application of a superior norm (that contained in an international treaty), from which it deduces its validity. As a result, the inferior norm is subordinated to the superior norm and cannot contradict it.²⁰

To better understand this, we shall explain the nature of the Chinese legal system as a whole, regarding international law. China has a dualist system, in which international agreements whose ratification has

Relations Between Mexico and China: Agreements, Disagreements and Future] (2012), 47 (on the welcoming of the Dalai Lama by then-Mexican President Felipe Calderón Hinojosa, after having tacitly expressed to the PRC that he would not do so); Xinhua News, China Rejects Japanese Request To Shut Down Diaoyu Islands Website, (March 5th, 2015), (news.xinhuanet.com/english/2015-03/05/c_134041955.htm), (on the Japanese protest for China's launch of the English and Japanese versions of a website for the Diaoyu Islands to demonstrate sovereignty).

¹⁹ An area where this is evident is human rights and their protection in China, see XUE Hanqin and JIN Qian, *International Treaties in the Chinese Domestic Legal System*, 8 Chinese JIL (2009), paras. 31-32 (“In the human rights field...Each of the treaties is implemented through domestic legislation...but none of these domestic laws has any specific reference to the treaties. This means that when it becomes a party to a human rights treaty, China will first ensure that its national laws are in conformity with the terms of the treaty. Protection of individual human rights will thus be provided through the national laws. In judicial proceedings, courts will directly apply the relevant national laws to redress any infringement of individual rights.”). According to Björn Ahl, “[t]his attitude of Chinese scholars reflects the political belief of the state-party leadership that the PRC must regain its status as a world power and that effective domestic implementation of treaty obligations rather obstructs than promotes this development.”, Björn Ahl, *Chinese Law and International Treaties*, 39 HKLJ Part 3 (2009), 752.

²⁰ Eduardo García Máynez, *Introducción al Estudio del Derecho [Introduction to the Study of Mexican Law]* (2001), 83-88.

been approved by the Standing Committee of the National People's Congress and actually ratified by the President of the PRC are required to be incorporated through laws and regulations to be effective domestically.²¹ The enactment of domestic legislation containing provisions of a ratified treaty constitutes the legislative act by which international obligations are incorporated and implemented, rather than doing so by incorporating the treaty as such. Consequently, no international agreement becomes binding under the Chinese legal system unless there is a specific statute incorporating such agreement into domestic law, even though China -like any other nation- is responsible at the international level for compliance with the treaties it signs and treaties would in principle form part of the Chinese legal system, given their publication in the Bulletin of the Standing Committee of the National People's Congress (全国人民代表大会常务委员会公报).²²

²¹ Zhonghua Renmin Gongheguo Xian Fa [Constitution of the People's Republic of China], Arts. 67.14 and 81, (en.pkulaw.cn/display.aspx?id=3437&lib=law&SearchKeyword=constitution%20of%20the%20people%27s&SearchCKeyword=); Law of the PRC on the Procedure for the Conclusion of Treaties, Arts. 3, 7-9; Zhonghua Renmin Gongheguo Lifa Fa [Legislation Law of the People's Republic of China], Art. 8, (en.pkulaw.cn/display.aspx?id=386&lib=law&SearchKeyword=law%20on%20legislation&SearchCKeyword=). See also in this regard XUE Hanqin and JIN Qian, above n. 19, paras. 8 and 73 ("Under Article 8 of the Legislation Law, matters relating to certain important areas shall be governed exclusively by laws adopted by the NPC and the Standing Committee of the NPC...Accordingly, any treaty that affects the above-mentioned matters shall be subject to the domestic legal procedure of the Standing Committee of the NPC for ratification or accession...substantive treaty obligations have domestic legal effect and become applicable in domestic law only through specific provisions of national legislation." "Given the fact that treaties are usually the outcome of diplomatic negotiations and compromises between States parties, treaty terms tend to be vague and general in many cases. Therefore, substantive treaty obligations often need to be specified or transformed for the purpose of effective implementation at the national level.").

²² Zhonghua Renmin Gongheguo Dijie Tiaoyue Chengxu Fa [Law of the People's Republic of China on the Procedure for the Conclusion of Treaties], Art. 15, (en.pkulaw.cn/display.aspx?id=1213&lib=law&SearchKeyword=conclusion%20of%20treaties&SearchCKeyword=).

Further, given that every ministry at the national or local level is empowered to conclude treaties²³ and there is no express provision in the Chinese Constitution (中华人民共和国宪法) or in any other statute mandating that international treaties prevail over domestic law or even providing for their status in the hierarchy of norms, we have that the government can avail of laws of any rank to incorporate either an international treaty as a whole or certain provisions contained therein.²⁴ Indeed, the position of international treaties once incorporated into the Chinese legal system is completely relative, for it depends on the incorporating state organ, the hierarchy of the incorporating law itself and the extent of the incorporation (as we mentioned above, treaty provisions are included in implementing laws, and they are included rather selectively).²⁵

Now, although it is true that many laws and regulations in China contain a provision to the effect that if there is a contradiction between an international agreement ratified by China and a provision contained in the law or regulation in question, the international agreement shall prevail,²⁶

²³ Constitution of the PRC, Art. 89.9 above n. 21; Law of the PRC on the Procedure for the Conclusion of Treaties, Arts. 3, 5-6.

²⁴ See Björn Ahl above n. 19, 742-744.

²⁵ See above n. 21 and XUE Hanqin and JIN Qian above n. 19, para. 4.

²⁶ See for example Zhonghua Renmin Gongheguo Minshi Susong Fa [Civil Procedure Law of the People's Republic of China], Arts. 260, 267.1, 277, (en.pkulaw.cn/display.aspx?id=11161&lib=law&SearchKeyword=civil%20procedure&SearchCKeyword=); Zhonghua Renmin Gongheguo Xingzheng Susong Fa [Administrative Litigation Law of the People's Republic of China], Art. 72, (en.pkulaw.cn/display.aspx?id=18268&lib=law&SearchKeyword=administrative%20litigation&SearchCKeyword=); Zhonghua Renmin Gongheguo Shangbiao Fa [Trademark Law of the People's Republic of China], Arts. 17, 21 and 25 (en.pkulaw.cn/display.aspx?id=14839&lib=law&SearchKeyword=trademark%20law&SearchCKeyword=); Zhonghua Renmin Gongheguo Haiguan Fa [Customs Law of the People's Republic of China], Art. 56.6 (en.pkulaw.cn/display.aspx?id=18147&lib=law&SearchKeyword=customs%20law%20of%20the%20people%27s%20republic%20of%20china&SearchCKeyword=); Zhonghua Renmin Gongheguo Dui Wai Maoyi Fa [Foreign Trade Law of the People's Republic of China], Arts. 6, 16.11, 24 and 26.6 (<http://en.pkulaw.cn/display.aspx?id=3464&lib=law&SearchKeyword=foreign>

as well as that China regularly tries to make the necessary amendments to its domestic laws in order to prevent contradictions between international law and the legal system of the PRC²⁷, dualism can still pose a problem to those foreign countries entering into an international agreement with the PRC.²⁸ On the one hand, China has given signs before international dispute settlement mechanisms of intending to invoke domestic law to justify relative or lack of compliance with international obligations in the past.²⁹ On the other, given that an international treaty can be incorporated

n%20trade%20law%20of%20the%20people%27s%20republic%20of%20china&SearchCKeyword=#).

²⁷ See XUE Hanqin and JIN Qian above n. 19, para. 25.

²⁸ See Björn Ahl above n. 19, 752. It must be noted that, for some scholars like Björn Ahl, the Chinese method of implementation has political, rather than legal, goals. He states that “[s]uch an implementation mechanism enables the PRC Government to prove, in relation to other States, the domestic implementation of treaty obligations by way of the publication of the treaty and by reference norms that provide for the prior application of international law. On the other hand, domestic practice may continue to ignore international obligations. This is evident in the area of human rights treaties, and is well possible in other areas.” If this is the case, the issues we will discuss shortly in this paper become all the more relevant.

²⁹ In a famous WTO case, *Publications and Audiovisual Products*, that among other things, discussed China’s commitment under GATS on “sound recording distribution services”, China argued that the expression could not be extended to online distribution of music, as the negotiators of China’s GATS Schedule -and WTO members in general- had at the time no conception of this form of distribution, which would only be regulated with the WIPO Copyright Treaty in 2002. China argued as well that it lacked at the time a domestic legal framework for the distribution of music over the internet and such legal framework would only come into being with the 2001 amendment to its Copyright Law. Since the domestic and international regulation of online distribution of music had entered into force after China’s accession to the WTO, China could not be deemed to have violated its market access or national treatment commitments as contained in GATS. The Dispute Settlement Body (DSB) found, however, that China had acknowledged to have participated in the negotiation of the Copyright Treaty, which took place in 1996, as well as that China was aware that online distribution of music had become a technical and commercial reality since before China acceded to the WTO. So much so, that China was considering altering its domestic law as far back as 1998, even if the amendments were only passed in 2001. The DSB also observed that, given that online distribution of music was already a technical and commercial feasibility, “the lack of an international framework

and implemented by a national law of no specific level, it can be overridden either by a national law of superior hierarchy or by a newer law, under the principles *lex superior derogat inferiori*³⁰ and *lex posterior derogat priori*.

Furthermore, dualism causes that, as international law does not automatically become part of the Chinese legal system, a violation of treaty obligations cannot be directly invoked before a Chinese court.³¹

of intellectual property rights...*would not, in itself, be an impediment either to the legal supply of those services within a WTO Member, or that Member's ability to make full commitments on them in its Schedule* (emphasis ours).” Regarding China’s domestic regulation, it also observed that “[e]ven if the electronic distribution of sound recordings had been shown not to be specifically permitted within China at the relevant time...this would not in itself have prevented China from making a valid commitment on these services in its Schedule. *A Member's service commitments need not reflect its existing legal framework*. A number of Members, including China itself, have undertaken specific commitments whereby they have committed to guarantee a market access level *higher than their regulatory regimes at the time the commitments were made* (emphasis ours).” We can therefore see that for the DSB, in the same way that the lack of an international framework that regulates any given issue does not preclude a WTO member from making valid commitments regarding that issue or regulate it domestically, it is not possible to invoke the lack of domestic legislation to justify relative or non-compliance with Schedule commitments (whose validity is not related to the said legislation) or other WTO rules. This is something that seems to be equated by the DSB to the invocation of domestic legislation for the same purposes, which violates international law as expressed in Art. 27 of the VCLT. *China v. United States-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, Report of the Panel, WT7DS363/R (12 August 2009), paras. 7.1237-7.1247.

³⁰ See above para. 10. Interestingly, this principle is not as clear-cut in the law of treaties as it is in domestic law. In fact, according to Martti Koskenniemi, “each superior/inferior relationship can always be reversed to produce its contrary by the use of impeccable legal argument”. To him, the very circularity and fragmentation of law continues producing hierarchies and the means of reversing them. See Martti Koskenniemi, *Hierarchy in International Law: A Sketch*, in: 8 EJIL (1997), 567, 579.

³¹ Conversely, “the practice of applying statutory reference norms and issuing judicial interpretations indicates that the treaty publication does not have the capacity to allow the administration and the courts to apply the relevant treaty

Even in the case that a court ends up solving a dispute between a Chinese and a foreign party using a provision contained in an international agreement entered into by China, it will do so because the *substance* of that provision is contained in a Chinese law and regulation, and so in reality the judge is using domestic law to solve the dispute, even if exceptionally a treaty provision is applied directly.³²

IV. Monism vs. Dualism? Some issues posed by Mexico and China's differing approaches towards international law

We can see from the aforesaid that an international treaty would occupy a different position in each country's legal system: while in Mexico it would invariably be situated just below the Constitution and above all national laws and regulations (and even some of its provisions, if they pertain or expand fundamental rights contained in the Constitution, might be placed at the constitutional level), in China it will depend on

provisions directly." Björn Ahl, n. 19 above; XUE Hanqin and JIN Qian, above n. 19, para. 72 ("With respect to criminal law, China has prescribed almost all the international crimes as criminal offences under its national criminal law. In accordance with its international obligations, China has established criminal jurisdiction over such offences. Except for persons who enjoy jurisdictional immunities under international law, any person suspected of violating international criminal law and who is found in China will be brought to justice. Under Chinese law, a criminal suspect is entitled to all the legal rights and protections provided by law, *including those incorporated into Chinese law* from the human rights treaties to which China is a party." Emphasis ours).

³² See, for example, Waijiao Bu, Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan Deng Guanyu Chuli Shewai Anjian Ruogan Wenti de Guiding (1995) [Provisions on Certain Questions in Regard to Cases With Foreign Elements], (www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=17974&keyword=%E6%B6%89%E5%A4%96%E6%A1%88%E4%BB%B6%E8%A7%84%E5%AE%9A&EncodingName=&Search_Mode=like). Also see Björn Ahl, above n. 19, 751; XUE Hanqin and JIN Qian, above n. 19, paras. 52 ("The 1995 Provisions has at least two important implications. First...the courts should give effect to treaty obligations *as provided by relevant legislation*. Second...the courts should...construe domestic laws in a way that does not conflict with those obligations." Emphasis ours) and 55. ("With respect to treaty interpretation, courts normally interpret treaty terms as they do domestic laws..."). See also above n. 31.

which organ negotiates the treaty in question and the hierarchy of the laws enacted to implement it within the Chinese legal system, as well as how many treaty provisions are incorporated.

We believe that the aforesaid brings forth the following issues in case both countries conclude a FTA. First, it could lead not only to Chinese courts applying Chinese law instead of panels or arbitration tribunals applying FTA and international law rules to disputes arising from a potential Mexico-China FTA, but to Chinese investors enjoying better treatment in Mexico than Mexicans in China. Likewise, it could give way to either a lack of enforcement or a violation of investors' rights and obligations as contained in the FTA. Still, ensuring the prevalence of a FTA within a domestic legal system is a matter of concern not only in matters of equal treatment, but, for example, in matters pertaining protection of intellectual property or other economic rights of investors.

Of course, the hierarchy of norms within a domestic legal system is irrelevant vis-à-vis an international obligation. The latter will always prevail and therefore Mexico can always claim international responsibility from China should the latter breaches FTA provisions, pursuant to its obligation to comply with treaties in good faith and the prohibition to invoke domestic law to evade international obligations under the Vienna Convention on the Law of Treaties.³³ For many scholars this seems to actually be the best recourse in case of violations of FTAs or similar treaties.³⁴ Yet, that is not the real issue that will concern investors. Actually, the problem does not even lie on the dualist nature of the

³³ Vienna Convention on the Law of Treaties (VCLT), 1155 UNTS, 331, Arts. 26, 27 and 46.

³⁴ Andrew P. Tuck, United States-Chile FTA Chapter 10: Lessons from NAFTA Chapter 11 Jurisprudence, in: 15 *Law and Bus. Rev. Am.* (2009), 584; Filippo Fontanelli and Giuseppe Bianco, Converging Towards NAFTA: An Analysis of FTA Investment Chapters in the European Union and the United States, in: 50 *Stanford JIL* (2014), 224-225 (on the exclusion of an umbrella clause in U.S. FTA investment chapters); Prabhash Ranjan and Deepak Raju, Bilateral Investment Treaties and the Indian Judiciary, in: 46 *George Washington ILR* (2013-2014), 819-822 (on national law as a basis to determine the legality of international claims); Shelley M. Kierstead, An International Bind: Article XXIV: 12 of GATT and Canada, in: 25 *Ottawa Law Review* (1993), 315-340, (on the extent to which central governments are responsible for the fulfilment of GATT obligations to be effected by state or provincial governments).

Chinese legal system, which could lead to the application of their laws in FTA-related cases or the invocation of them to justify non-compliance, but on the fact that due to lack of transparency and professionalization of some members of the administration and the judiciary, as well as over-legislation, the Chinese legal system is inaccessible and opaque to outsiders.³⁵ Furthermore, it is pointless to declare that a party incurred in state responsibility, for example, by invoking domestic provisions to justify non-compliance with the FTA, if by then investors' rights have been violated and money or property has been lost. Above all, there would always be a risk that implementation and enforcement of the FTA are hindered, especially if the provisions are of a sophisticated nature.

It must be pointed out, though, that we do not regard this issue as fatal. After all, since international law is based upon consent, it is all about the political will showed by state-parties, and we have not found any disputes between China and its trading partners over this topic. Nevertheless, we consider it important that, following Ramírez, rules of international law contained in the FTA are used to ensure day-to-day implementation and swift and effective enforcement,³⁶ something in which the PRC (and Mexico, for that matter), for all the enhancements they have made in recent times to their legal systems, still have room for improvement.

V. The dialectical model as the means to find possible solutions to implementation and enforcement issues

³⁵ James Zimmerman, *I China Law Deskbook* [Zhongguo Falu Shouce] (2014), 35-36 (“The key challenges for U.S. companies investing in or exporting to China include labor costs and a shortage of qualified employees and management; unclear and ambiguous regulations; overlapping and contradictory rules; the lack of uniform nationwide application of rules; the lack of transparency; the need for an accessible and predictable rules-based system; inconsistent regulatory interpretation and implementation (given that regulatory challenges are systematic impediments to market access); bureaucracy; corruption; the lack of effective judicial remedies and the lack of an independent judicial system.”). Our experience has shown us that these concerns are shared by European and Latin American companies alike.

³⁶ Interview conducted by the author to Ricardo Ramírez Hernández, former chairman of the WTO Appellate Body, NAFTA panellist and lecturer at the Faculty of Law of the National Autonomous University of Mexico, March 2nd, 2015.

After having described the main risks posed in our opinion by the different treatment that Mexico and China would give to a prospective FTA, and with it to each other's investors, we should note that in recent times Chinese scholars have been favouring a "dialectical model", imported for the most part from soviet legal doctrine. Under this model, international law and municipal law are separate systems that are infiltrating and supplementing each other, rather than conflicting with each other.³⁷ If it is indeed true that the relationship between international and domestic laws can no longer be explained by pure dualism, but that in reality such relationship must be regarded as a monist system in which international law and domestic law operate in the same plane, then we must "monistically" regard the Chinese legal system as a system of competences and so bring it closer conceptually to the Mexican legal system. We believe that that would make it easier to orientate our solutions. Specifically regarding investment, what the said solutions ought to seek to avoid is, following Ramírez, that the state imposes whimsical or idiosyncratic measures to foreign investors: if the state creates a legitimate expectation to an investor and then imposes a whimsical or blatantly illegal measure it would constitute a violation of international law.³⁸

That said, Mexico could begin by requesting China during negotiations that at least a basic law (the highest category of norms enacted by the National People's Congress and which is positioned just below the PRC Constitution)³⁹ is the one used to incorporate the FTA to the Chinese legal system, thus avoiding, to the extent possible, to expose the FTA to be overruled by a subsequent law or one of higher hierarchy. Needless to say, this would require an amount of bargaining power on the

³⁷ WANG Tieya, *Guojifa Yinlun* [Introduction to International Law] (1998), 191; ZHOU Gengsheng, *Guoji Fa* [International Law] (1983), 20; see also XUE Hanqin and JIN Qian above n. 19, 305-306, fn. 12 ("Under Chinese law, there is no statute that explicitly regulates the forms or modalities for implementing treaty provisions at the domestic level or in national courts...However, it should be noted that the dichotomy between a monistic approach and a dualistic approach is more of a theoretical distinction, rather than a systemic choice. In State practice, monism and dualism are often mixed and blurred, depending on the subject matter or the nature of the treaty concerned. This is also true with respect to China.").

³⁸ See above n. 36.

³⁹ See Constitution of the PRC, Art. 62.3 above n. 21. Also Legislation Law of the People's Republic of China, Arts. 7, 78-79 above n. 21.

Mexican side, and therefore for some people like Ramírez it is not a realistic option, since no country accepts that its counterparty tells it what to do within its jurisdiction, which laws to enact, etc.⁴⁰ To be able to put this in the negotiating table. Mexico would have to persuade China by calling the attention of the Chinese negotiators on certain resources Mexico possesses, as well as areas worth investing in, prior study of the complementarities existing between the two economies.

Furthermore, there is a need to ensure that investors enjoy the same level of protection of their rights stated in the final FTA, in both jurisdictions. This, of course, is not meant to presuppose that investors' rights would not be protected, or that obligations contained in a potential FTA between Mexico and China would not be readily applied or complied with, merely that parties should be aware from the moment they start negotiating that their investors might not be protected in the terms expected: those negotiated by them as their common law governing investments in each other's territory. In other words, investors' rights would be protected in accordance with domestic law⁴¹ and not the provisions contained in the investment chapter of the FTA. This would be particularly true in the case of China and would bring up some questions. First, if treaty provisions cannot be directly invoked before a national court, an investor would only be covered by whichever provisions the Chinese legislator decided to incorporate into their legal system through relevant laws and regulations. In that case, what to do if the dispute settlement mechanism provided for in the potential FTA (the only one before which treaty provisions could be directly invoked) fails and the Mexican investor finds himself in need of resorting to domestic courts to have his rights protected, only to find out that the scope of protection granted by the FTA has varied? What is the point of entering into a FTA if investors of both parties risk not to be governed by the same set of rules? Second, assuming that at least the substance of the rights and obligations provided for investors in the FTA are contained in Chinese domestic laws, how to ensure that Mexican investors are duly covered by them? How to ensure that investors are aware of their rights and obligations under the relevant laws and regulations when conducting business, thus avoiding feeling handicapped to conduct even their day-to-day affairs without hiring local counsel? All this points to a need to ensure accessibility and

⁴⁰ See above n. 36.

⁴¹ See above n. 32.

publicity of laws and regulations in a way that goes around the existing language barrier problem between Mexico and China. This could be addressed by including a transparency clause in the FTA mandating that the parties have a duty to adopt all reasonable measures to publish all the laws, regulations and international agreements reached by each party that may affect the operation of the FTA, in a language that is sufficiently known to both parties, such as English.⁴²

A comprehensive transparency clause would have two benefits: a) although both Mexico and China have an obligation as WTO members to publish their legal economic norms regardless of whether they include a transparency clause in their FTA or not,⁴³ to include a more detailed transparency clause in the FTA would bring additional security to their WTO obligation, since it would mandate both parties to let each other know of any law (not only economic ones) that might affect the implementation and enforcement of the FTA, or the investors' rights, and b) a clause mandating English language would provide the parties with a common ground to minimise (as much as that can be reasonably expected) the risks of misunderstandings. In our experience, although it is more likely that in the near future more Chinese are fluent in Spanish than Mexicans are in Mandarin Chinese, the language barrier will continue representing an obstacle to equal access to each other's domestic laws and regulations.

Another recommendation would be to expressly state in the FTA that, notwithstanding the internal steps the Chinese government must follow to incorporate and implement the FTA in its domestic legal system, FTA terms shall prevail over both parties' national laws, and therefore no party may provide in its domestic legislation for an appeal from a panel decision to its domestic courts or for any way to render inapplicable *any* provision of this agreement, whether during a dispute under this agreement or otherwise. This wording should be coupled with another

⁴² This is in fact in line with Chinese legislation on the matter. See Law of the PRC on the Procedure for the Conclusion of Treaties, Art. 13, above n. 22.

⁴³ See GATT, Art. 10; GATS, Art. III; TRIPS, Art. 63, (https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf; https://www.wto.org/english/docs_e/legal_e/index_t_e.htm). The obligation would also be applicable because it is certain that, as all other FTAs signed by the two countries, a Mexico-China FTA would expressly state that it is concluded within the WTO framework.

provision that follows the wording of the China-Singapore FTA: “In fulfilling its obligations and commitments under this Agreement, each Party shall ensure their observance by regional and local governments and authorities in its territory as well as their observance by non-governmental bodies (in the exercise of powers delegated by central, state, regional or local governments or authorities) within its territory.⁴⁴”

The workability of this type of provisions has already been proved by NAFTA. When this treaty was being negotiated, the United States and Canada showed concern regarding the Mexican writ of *amparo*,⁴⁵ by

⁴⁴ China-Singapore FTA, Art. 109 (fta.mofcom.gov.cn/topic/ensingapore.shtml).

⁴⁵ Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos [*Amparo* Law, Regulating Articles 103 and 107 of the Political Constitution of the United Mexican States], (www.diputados.gob.mx/LeyesBiblio/pdf/LAmp_140714.pdf). *Amparo* is a purely Mexican constitutional remedy whose main purposes are: a) to preserve the rights and freedoms established in the Constitution and the treaties of which Mexico is a party against general norms, legislative and executive acts or omissions, governmental acts or omissions of authority (or in certain cases, individuals) and court decisions, and b) to preserve local and federal sovereignty and competences in interstate or federal-state disputes, provided rights and freedoms contained in the constitution or treaties had been violated. The effects of a writ of *amparo* are that the relief involves a restitution to the previous state of affairs or force the incumbent authority to respect the petitioner’s rights, that relief applies only to the petitioner (with the decision serves only in subsequent cases, though it lacks the force and effect of precedents under common law systems) and that if a general norm is declared unconstitutional through *amparo* or judicial precedents, it will cease to be applicable to the petitioner, but the if the said norm is deemed unconstitutional twice, congress will be requested to amend the law, the Mexican Supreme Court has the right to declare unconstitutionality of the norm ex-officio and render it inapplicable with general effects if the amendment is not effected in due time. There are two types of proceedings: indirect *amparo* action, which is an action heard in federal district court (or local courts when aiding federal courts in this regard) against: (i) federal, state or municipal laws, as well as international treaties concluded by Mexico, (ii) regulations issued by the executive branches of the state and federal governments, (iii) acts of authority of federal, state or municipal government agencies, and (iv) acts of courts within or outside trial proceedings, and direct *amparo* action, which is heard in a federal circuit court against final court decisions, awards, or final decisions that without deciding upon the main merits of the case conclude nonetheless the proceedings; this latter action

which the review of national antidumping or countervailing duty determinations by NAFTA binational panels could potentially be overturned, thus hindering the mandatory nature of their resolutions and with it, the effectiveness of the whole review mechanism⁴⁶. In the end the problem was solved by negotiating with Mexico that a panel decision was binding upon the parties involved,⁴⁷ that NAFTA would not affect the judicial review procedures of any party, nor any cases appealed under them,⁴⁸ and most importantly, that when one of the parties requested a binational panel review of an antidumping or countervailing duty

requires the previous exhaustion of other remedies. In both cases the government action being contested may be subject to a temporary injunction, which may be issued upon the filing of the petition, and a permanent injunction, which may be issued only after a hearing has been held allowing for the submission of evidence and legal arguments, but in both cases the order is directed to the government authority or court in question and not to the individuals or entities party to the proceedings. A motion for review may be filed with the Supreme Court against a judgment made under a writ of *amparo*, but only on the basis of constitutional issues.

⁴⁶ Sergio López Ayllón, *Los Paneles Binacionales del Capítulo XIX del Tratado de Libre Comercio No Son Autoridad Para Efectos del Amparo (Amparo en Revisión Número 280/98)* [North American Free Trade Agreement Binational Panels Are Not Considered Authority In Respect of *Amparo* Questions (amparo action on appeal no. 280/98)], in: *2 Cuestiones Constitucionales* (2000), online version, (“Resulta importante tener en cuenta que en México el capítulo XIX fue considerado principalmente desde una perspectiva exportadora y que poco se había reflexionado sobre las consecuencias que el procedimiento de revisión mediante paneles binacionales podría tener al entrar en contacto con el sistema jurídico mexicano. Por otra parte, la mayor preocupación de Canadá y Estados Unidos era que el funcionamiento del sistema jurídico mexicano, particularmente del juicio de amparo según lo percibían, impidiera el funcionamiento del mecanismo [It is important to bear in mind that in Mexico chapter XIX was seen mainly from an exporting perspective and little consideration had been given to the consequences that a review procedure through national panels could have when in contact with the Mexican legal system. On the other hand, the main concern of Canada and the United States was that, as they saw it, the inner workings of the Mexican legal system, particularly those of the writ of *amparo*, prevented the operation of the [review] mechanism],” (www.juridicas.unam.mx/publica/rev/cconst/cont/2/cj/cj9.htm#N12).

⁴⁷ North American Free Trade Agreement (NAFTA), Art. 1904.9 (www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement).

⁴⁸ See above n. 47, Arts. 1904.10-11.

determination, such determination should not be reviewed under any judicial review procedures of the importing Party, thereby forbidding all parties from providing in their domestic legislation for an appeal from a panel decision to their domestic courts.⁴⁹

FTAs signed by China, such as the Peru-China FTA, do not contain a similar provision, providing only for the obligation on both parties to ensure that in their territories there are administrative, arbitral and judicial review procedures with respect to administrative acts on customs matters⁵⁰ or affecting trade in services.⁵¹ Regarding investment, the closest thing to the issue at hand is Art.139.6, which provides, in a wording similar to that of NAFTA, for the finality and binding nature of an arbitration award rendered under the FTA and the commitment of both parties to the enforcement of the award.⁵² We believe this is not enough, because even if an award is enforced, if domestic law provides for remedies to appeal it, the interests of the foreign investor could still be damaged, most especially if the said domestic law grants a narrower scope of rights than the FTA and lesser means to defend them.

The aforesaid issue is connected with an aspect not to be disregarded even after a Mexico-China FTA enters into force: the way in

⁴⁹ See above n. 45, Art. 61, s. XXIII. It must be mentioned that this wording fits perfectly with the Mexican legal system, for the *Amparo* Law provides that a writ of *amparo* is inadmissible “in all other cases where inadmissibility derives from a provision of the Constitution or this Law”. Given that, as we mentioned before, the Constitution states that treaties are just below the constitution and prevail over national laws, NAFTA prevails over the *Amparo* Law, and so would the prohibition on Mexico to provide in its laws for an appeal to a panel decision. Accordingly, a petition to appeal through a writ of *amparo* either an antidumping or countervailing duty determination to which a binational panel review has been requested or a binational panel decision would be rendered inadmissible by a Mexican court. In this respect, see also Óscar Cruz Barney, *El Control Constitucional de las Resoluciones Antidumping y los Paneles del Artículo 1904 del Tratado de Libre Comercio de América del Norte* [Constitutional Control of Antidumping Determinations and the Panels of Article 1904 of NAFTA], in: IX Anuario Mexicano de Derecho Internacional [Mexican Yearbook of International Law] (2009), 190, (biblio.juridicas.unam.mx/estrev/derint/cont/9/art/art6.htm).

⁵⁰ Peru-China FTA, Art. 59 (fta.mofcom.gov.cn/topic/enperu.shtml).

⁵¹ See above n. 50, Art. 110.

⁵² See above n. 50, Art. 139.6.

which reciprocity is understood in Chinese law. Notwithstanding the principle of reciprocity in international law applies usually to diplomatic or consular law or ICJ proceedings and not to foreign investment, China exhibits a practice of conditioning certain provisions contained in its laws pertaining foreign elements to such principle. For instance, both the Civil Procedure Law and the Administrative Litigation Law state that if the courts of a foreign country impose restrictions on the procedural rights of the citizens and organizations of the PRC, the Chinese people's courts shall follow the principle of reciprocity regarding the procedural rights of the citizens and organizations of that foreign country.⁵³ Similarly, the Foreign Trade Law states that China has the right to adopt corresponding measures against any country that imposes discriminatory bans or restrictions on Chinese goods.⁵⁴ In this way, we believe that the Chinese understanding of the principle could be extended to foreign investment and include a clause in the FTA which provides that should a party violate the FTA by applying domestic law instead of treaty provisions during implementation or in the event of a dispute, the other party could, in application of the principle of reciprocity, not apply the FTA in all that which might benefit the first party's investors, thence applying its national laws to them.

It is worth noting, however, that such a wording is disfavoured by some scholars like Estrada, who argue that to use a solution based on the principle of reciprocity presupposes *ab initio* that China will not comply with the FTA or that it will try to subject it to its national laws. He then questions what the use would be of negotiating with the PRC at all.⁵⁵ Therefore, we cannot but leave to negotiators to decide upon the relevance and the applicability of such a clause.

VI. Conclusions

The need for more constructive relations makes it imperative for Mexico and China to get acquainted with each other's legal systems. Considering that sooner or later Mexico and the PRC will be seriously

⁵³ See Civil Procedure Law, Art. 5 and Administrative Litigation Law, above n. 26, Art. 71.

⁵⁴ See above n. 26, Arts. 7 and 31.

⁵⁵ Interview conducted by the author to Guillermo Enrique Estrada Adán, full-time professor of international law at the Faculty of Law of the National Autonomous University of Mexico, February 19th, 2015.

considering a Mexico-China FTA,⁵⁶ neither country can be expected to sit down and negotiate concrete trade and investment commitments towards its conclusion without being reasonably assured that the obligations contained in it will be effectively carried out in both jurisdictions.

This assurance will come from understanding how they comply with their bilateral obligations. To understand the position of treaties within the Mexican and Chinese legal systems is a good way to get a grip of such compliance and a good indicator of implementation and enforcement of an eventual Mexico-China FTA.⁵⁷ In this order of ideas,

⁵⁶ Jesús Seade, former Mexico's Chief Negotiator to the Uruguay Round and Ambassador to GATT; (founding) Deputy Director-General of the WTO, and Senior Adviser at the IMF and currently Chair Professor of Economics at Lingnan University in Hong Kong, has stated that "[Chinese] investments in natural resources will not increase substantially, whereas export-oriented investment will grow explosively, becoming 'China's second globalisation'. However, such growth will only target developed countries, while developing countries will continue receiving investments in natural resources". To him it was important for Mexico to become "China's great partner in North America", partnering with them for production, instead of regarding China as a competitor. Therefore his "ideal [situation] was a FTA with China, which would mean a hard law framework to regulate [Mexico and China's] economic relations". Special lecture given at El Colegio de México, February 4th, 2015.

For diverging opinions, see Angélica Hernández, TLC con China, inconveniente para México [FTA with China, inconvenient to Mexico], in: *Alto Nivel*, June 6th, 2013, (www.altonivel.com.mx/36274-tlc-con-china-inconveniente-para-mexico.html); Agendasia, Agenda Estratégica México-China, Dirigido al C. Presidente Electo Enrique Peña Nieto [Mexico-China Strategic Agenda, Addressed at President-elect Mr. Enrique Peña Nieto] (2012), 89 (on the proposal of bilateral agenda derived from the forum hosted by Agendasia and the Chinese Academy of Social Sciences, held in Beijing on May 21st, 2012); Enrique Dussel Peters, ¿TLC con China? [FTA with China?], in: *Reforma* (March 16th, 2005), 6A.

⁵⁷ This knowledge is also useful to understand how Mexico and China comply with multilateral obligations, which in turn is important to coordinate works and obtain bigger, shared benefits in those organs in which they both participate, which at the moment, for some scholars, would serve more to create a bilateral strategy (and therefore more useful to the Sino-Mexican relationship) than engaging in FTA negotiations. See Dialogues above n. 7 and Agendasia, above n. 56, 48-49 (proposals 12-17 on multilateral diplomacy with China in international and specialised fora).

throughout this paper we have tried to shed some light on how such FTA, being an international treaty, would be complied with in each jurisdiction, focusing our analysis on the treatment investors would receive as a result of that compliance. After analysing the Chinese and Mexican legal systems as to their relations with international law, the position international treaties enjoy in each jurisdiction and the issues potentially derived from both, we attempted to provide some solutions that sought to make use of the Chinese dialectical model aimed at not only going beyond the monistic or dualistic features of the Mexican and Chinese legal systems and that are reflected in their implementation and enforcement of international obligations, but at avoiding situations in which either country imposes whimsical or idiosyncratic measures to foreign investors.⁵⁸

30. Yet, the Chinese dialectical model presents advantages for both Mexico and China beyond a FTA. In our opinion, the way in which treaty implementation and enforcement is going to take place within domestic jurisdictions is a topic largely neglected in treaty negotiations. The analysis of the position of treaties in each jurisdiction could become the screening process to determine the most appropriate solution to the treaty they want to negotiate, whereas the use of one or some of the solutions proposed would ease concerns about the stage of development of a counterparty's legal system, and with it, of raising the legal standards on any particular treaty under negotiation. Indeed, as a result of this latter concern China has followed a "differentiated standards approach", for instance, when concluding Bilateral Investment Treaties (BITs), favouring lower standards when it believes that countries with very different legal systems or degrees of development will not accept too stringent standards.⁵⁹ Since the solutions based on the dialectical model are designed to go around the particularities of the legal systems and ensure equal levels of implementation and enforcement in both jurisdictions, China could raise the level of the legal obligations on the treaties it signs without concerning itself with non-compliance issues, thus making treaties more rule-based instead of policy-based.⁶⁰

Regarding investment, the dialectical model could greatly contribute to bring the much needed legal certainty to investors required

⁵⁸ See above para. 19.

⁵⁹ See HUANG Jie, above n. 17.

⁶⁰ See above n. 59.

for more and better bilateral investment, as well as to the attainment of reciprocity and true access to economies that should exist in this type of bilateral treaties. Indeed, only if Mexico and China are reasonably assured of the above can we talk of specific wording for key provisions in the investment or any other chapters in a Mexico-China FTA. And even if Mexico and China did not arrive at a successful conclusion of a FTA, the negotiations they undertake could still bring both countries closer and so the BIT they currently have in force, which so far has been utterly sub-utilised,⁶¹ might experience a revival with increased investment flows. If this is the case, implementation and enforcement of this BIT (which so far has not been a matter of concern for either country) will have to be ensured, and the solutions proposed in this paper might become all the more relevant to do this.

That being said, of the four solutions we propose in this paper, the inclusion of a comprehensive transparency clause and the drafting of a provision that ensures the prevalence of the FTA by prohibiting the existence in domestic law of appeal procedures from a panel decision or for any way to render inapplicable any provision of the agreement are the ones most likely to be accepted by China. Nevertheless, all four of them deserve to be put forward in the negotiation table, because all of them seek to, following the dialectical model, give way to a harmonious interaction between Mexico and China's domestic legal systems and international law by not regarding their respective means of incorporating the latter into their legal systems as an obstacle to due implementation and enforcement of a prospective FTA, or fair treatment to investors.

The solutions we propose are not intended either to put aside the right of both countries to claim international responsibility for non-compliance of the FTA per the VCLT, much less to question Mexico's or China's ability to carry out international obligations, but we do believe that the application of at least some of these solutions during drafting will eventually accustom national judges and administrative organs to apply – and abide to- the international standards contained in the FTA in a consistent manner. This would lead to a circular interaction between the

⁶¹ According to data from the Mexican Ministry of Economy, Chinese investments represent USD 363.61 million, less than 0.1% of the total investment flows received by the country in the period 1999-2014, (<http://www.economia.gob.mx/trade-and-investment/foreign-direct-investment/official-statistics-on-dfi-flows-into-mexico>).

domestic and international legal systems, whereby domestic law institutions shape international law and, in turn, international law comes back and permeates domestic law,⁶² influencing the socioeconomic objectives that end up becoming legally protected rights (*bienes jurídicos tutelados*) in the legal systems of Mexico and China and with them, their policies, future treaty strategies and behaviour in international organisations.⁶³

⁶² This circular interaction was first studied in European Community Law, under the name “boomerang effect”. It “implies a permanent relationship between the Community and national legal orders, in which the Community system would not limit themselves (sic) to exercising a passive role, but rather would play an active role in the configuration of the Community system of protection of human rights. The latter would then be destined to revert to national law in what we might call a boomerang effect, within the framework of a process of interaction not only of legal orders abstractly considered, but also of concrete values whose beneficiaries would be both the collective –European and national- and the individuals on which the collective is founded. This applies, even in sectors of the national legal orders which are not directly related to community law...” Ricardo Alonso García, General Course Community and National Legal Orders: Autonomy, Integration and Interaction, in: VII 1996 European Community Law, *Recueil des Cours de l’Académie de droit européen* (1999) I, 149.

⁶³ In fact, this phenomenon is not new in Mexico or the PRC. Domestic events have shaped their understanding of international law, but it has also enabled them to make contributions to the theory and praxis of the latter, such as the Estrada Doctrine in the case of Mexico and the notion of “two-men mindedness” in the case of China. The Estrada Doctrine, first embodied in a declaration sent by the Mexican Ministry of Foreign Affairs to their diplomats to acquaint them with new foreign policy, referred solely to governmental recognition of foreign governments, is founded in the principles of non-intervention and self-determination, and states that a government is not entitled to make critical passings on the legitimacy of foreign governments, limiting itself to maintain or recall its diplomatic representatives, and to continue accepting or not the representatives of the foreign government in question. See Philip C. Jessup, The Estrada Doctrine (Editorial Comment), in: 25 AJIL (1931), 4, 719-723. On the other hand, the “two-men mindedness” doctrine, first advanced by P.C. Chang during the drafting of the UDHR (and which unfortunately did not really find its way in the final text), follows Confucian doctrines and, parting from the Chinese word *ren* (仁), advocates that “whenever one takes any action, one should take account of the presence or existence of one’s fellow inhabitants in the community and act

accordingly”, seeking to “strike a proper balance between respecting other people’s sensibility and dignity on the one hand and enjoying one’s maximum freedom, on the other”. Sienho Yee, *The International Law of Co-progresiveness and the Co-progresiveness of civilizations* (Editorial Comments), in: 12, *Chinese JIL* (2013), paras. 14-15.