
CHINA LAW UPDATE

A NEW STAGE OF LEGISLATIVE EXPERIMENTATION OF CHINA IN HAINAN

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I. INTRODUCTION

On June 10, 2021, the National People's Congress Standing Committee (NPCSC) passed the Hainan Free Trade Port Law (hereinafter "Hainan FTP Law").¹ The Hainan FTP Law elevates the policy of building the Hainan Free Trade Port (FTP) to a statute made by the national legislature. It is the first free trade port law in China, as well as the first law National People's Congress (NPC) or NPCSC has passed for a provincial area, if not including Hong Kong Special Administrative Region (SAR) or Macau SAR, though in the name of a free trade port. It marks a novel stage for "legislative experimentation" in China and China's reform and opening-up policy.

This note will address the experimental characters of the Hainan FTP Law. Part II introduces the idea of legislative experimentation. Part III discusses the experimental characters of the Hainan FTP Law, focusing on liberalization of trade and investment, devolution of powers, and the use of the "positive and negative list" approach. Part IV concludes the note.

II. CONCEPT OF THE LEGISLATIVE EXPERIMENTATION

Hainan FTP is a further experimentation, designated by the Communist Party of China (CPC) and the State Council in 2018, at the thirtieth anniversary of becoming a separate province and the fifth special economic zone (SEZ). Its mission is to explore a path of building FTPs suitable for China.² The Hainan

¹ See Hainan Ziyu Maoyigang Fa (海南自由贸易港法) [Hainan Free Trade Port Law] (promulgated by Standing Comm. Nat'l People's Cong., June 10, 2021, effective June 10, 2021), CLI.1.5015177 (Chinalawinfo).

² See Zhonggong Zhongyang Guowuyuan Guanyu Zhichi Hainan Quanmian Shenhua Gaige Kaifang de Zhidao Yijian (中共中央、国务院关于支持海南全面深化改革开放的指导意见) [Guiding Opinions of the CPC Central Committee and the State Council on Supporting Hainan in Comprehensively Deepening Reform and Opening-up] (promulgated by the Central Comm. CPC and St. Council, Apr. 11, 2018, effective Apr. 11, 2018), CLI.16.313224 (Chinalawinfo); Xi Jinping (习近平), Zai Qingzhu Hainan Jiansheng Ban Jingji Tequ 30 Zhounian Dahuishang de Jianghua (在庆祝海南建省办经济特区30周年大会上的讲话) [Speech at the Gathering Celebrating the 30th Anniversary of the Founding of Hainan Province and the Hainan Special Economic Zone], Apr. 13, 2018, RENMIN RIBAO (人民日报) [PEOPLE'S DAILY], Apr. 14, 2018, at 2, <http://jhsjk.people.cn/article/29925838>; Guowuyuan Guanyu Tongyi Sheli Zhongguo (Hainan) Ziyu Maoyi Shiyangu de Pifu (国务院关于同意设立中国(海南)自由贸易试验区的批复) [Reply of the State Council on Approving the Establishment of China (Hainan) Pilot Free Trade Zone] (promulgated by St. Council, Sept. 24, 2018, effective Sept. 24, 2018), CLI.2.323597 (Chinalawinfo); Guowuyuan Guanyu Yinfa Zhongguo (Hainan) Ziyu Maoyi Shiyangu Zongti Fang'an de Tongzhi (国务院关于印发中国(海南)自由贸易试验区总体方案的通知) [Notice by the State Council of Issuing the Framework Plan for China (Hainan) Pilot Free Trade Zone] (promulgated by St. Council, Sept. 24, 2018, effective Sept. 24, 2018), CLI.2.323598 (Chinalawinfo). The main island of Hainan became the 12th pilot Free Trade Zone (FTZ), another form of experimentation starting from Shanghai in 2013, and the first FTP at the same time, similar to the situation in

FTP Law is the legalization of the experiment, which can be viewed as a new attempt of “legislative experimentation.”³ Prior to Hainan FTP Law, there has never been a particular statute passed by NPC/NPCSC for an experimental economic policy, whether for the special economic zone policy or the pilot free trade zone policy.

By definition, “legislative experimentation” (in China) refers to the multi-stage legislative action in a particular area or even in the whole country. It may fill the gaps in the existing law where there is a lacuna, or deviate from it, to test some public policy hypothesis. If the test is determined to be successful, it will permanently apply to this area and probably spread to other places, or even be elevated as a national law.⁴ Legislative experimentation is a particular form of policy experimentation. The concept of “legislative experimentation” puts the legislative action in the eyes of the chronic practice of legislation, and is broader compared to that of “experimental legislation” used by other academics. The latter emphasizes the experimental character of these laws or rules as the temporariness, whose expiration date is determined in advance and will terminate automatically.⁵ While, in this note, I place more weight on the

1988 when Hainan was elevated as a province and the main island of Hainan was selected as the SEZ simultaneously.

³ Some scholars use “experimental legislation” to signify the temporary statute or regulation enacted for experimentation. See e.g., Luzius Mader, *Evaluating the Effects: A Contribution to the Quality of Legislation*, 22 STATUTE L. REV. 119, 125 (2001); Sofia Ranchordás, *The Whys and Woes of Experimental Legislation*, 1 THEORY & PRAC. LEGIS. 415, 419 (2013); SOFIA RANCHORDÁS, CONSTITUTIONAL SUNSETS AND EXPERIMENTAL LEGISLATION: A COMPARATIVE PERSPECTIVE 7 (2014); MADELEINE MARTINEK, EXPERIMENTAL LEGISLATION IN CHINA BETWEEN EFFICIENCY AND LEGALITY 2 (2018); and Zachary J. Gubler, *Experimental Rules*, 55 B.C. L. REV. 129, 129 (2014). As a matter of fact, “experimental legislation” sometimes can be equivalent to “legislative experimentation” because of the polysemy of legislation, as the action and as the result, i.e. the text of legislation. In Chinese literature, “experimental legislation” (试验立法 or 试验性立法) are mainly used to refer to the action of legislation. See the Chinese documents cited *infra* note 4-6. Therefore, it is a choice of terminology. To avoid confusion with the terminology used in other English literature, I use “legislative experimentation” instead to refer to the action of legislation in this note.

⁴ Similar definitions, see LUO CHUANXIAN (罗传贤), LIFA CHENGXU YU JISHU (立法程序与技术) [LEGISLATIVE PROCESS AND TECHNIQUES] 340 (5th ed. 2008); Li Danyang (李丹阳), Shiyaxing Lifa de Zhongguo Shijian (试验性立法的中国实践) [*China's Practice of Experimental Legislation*], 2 XUEXI YU TANSUO (学习与探索) [STUDY AND EXPLORATION] 72, 72-73 (2016); Li Juan (黎娟), Shiyaxing Lifa de Lilun Jiangou yu Shizheng Fenxi — Yi Woguo Lifa Fa Wei Zhongxin (“试验性立法”的理论建构与实证分析——以我国《立法法》第13条为中心) [*The Theoretical Construction and Positive Analysis of “Experimental Legislation”: Focusing on Article 13 of China's Legislation Law*], 7 ZHENGZHI YU FALÜ (政治与法律) [POLITICS AND LAW] 84, 87 (2017). Cf. Sofia Ranchordás, *The Whys and Woes of Experimental Legislation*, *supra* note 3, at 419; SOFIA RANCHORDÁS, CONSTITUTIONAL SUNSETS AND EXPERIMENTAL LEGISLATION: A COMPARATIVE PERSPECTIVE, *supra* note 3, at 7; and Zachary J. Gubler, *supra* note 3, 129 (2014).

⁵ Some Chinese articles also attribute the temporary character to “experimental legislation” in a broad sense. However, the “temporariness” in Chinese legal context, doesn't emphasize the existence of expiration date, rather, the exploring character of those legislations in a long-term perspective, the same as legislative experimentation. See Wu Shichun (吴仕春), Shiyaxing Lifa: Fazhi Fazhan Wenbu Qianxing (试验性立法：法治发展稳步前行) [Experimental Legislation: A Steady Progress of Legal Development], RENMIN FAYUAN BAO (人民法院报) [PEOPLE'S COURT DAILY], June 26, 2014, at 2; Liu Wujun (刘武俊), Shiyaxing Lifa Zhide Qidai (“试验性立法”值得期待) [Experimental Legislation Worthy Looking Forward to], RENMIN ZHENGXIE BAO (人民政协报) [PEOPLE'S POLITICAL CONSULTATIVE CONFERENCE DAILY], July 1, 2014, at

unprecedented character of those laws or rules, which are designed to explore new public policies for a particular place, and ultimately for the whole nation.⁶ In my opinion, this notion of legislative experimentation is more suitable to illustrate and justify China's practice, because hardly any Chinese law has an expiration date, even those named after "interim" (暂行) or "for trial implement" (试行).⁷

In recent several years, scholars have developed a deep understanding of legislative experimentation, especially in a broader sense, policy experimentation. Indeed, as is concerned, legislative experimentation has certain disadvantages. First of all, the idea of legislative experimentation may intrude on the traditional ideal of the rule of law. In the eyes of traditional wisdom, the law should be certain, stable, and predictable. Experimentation indicates constant changes of societal rules, right in contradiction with the certainty, stability, and predictability of the law. In that case, people would not know what to do and how to plan their life. Therefore, the law cannot be experimented with; otherwise, it would undermine the focal principle of the rule of law. Nonetheless, legislative experimentation does not necessarily go against the idea of legal certainty and predictability. With regard to legal certainty and predictability, "[t]o what extent experimental legislation increases uncertainty heavily depends on how experiment clauses . . . are designed."⁸ Suppose the legislative experimentation is beforehand announced in a sufficient time, fully opened to public participation, and designed in lucid language. In that case, it provides enough certainty to the general public and those who will be affected by the experimentation.

Second, legislative experimentation will possibly violate the principle of equal treatment before the law, considering that different people in different places will be treated differently in the context of the experiment, as some legislative experiments take place in a circumscribed area and deviate from the

12; Zhang Baoshan (张宝山), *Shiyanxing Lifa Qude Xin Chengguo* (试验性立法取得新成果) [Experimental Legislation Has New Achievement], *ZHONGGUO RENDA* (中国人大) [JOURNAL OF PEOPLE'S CONGRESS OF CHINA], July 5, 2017, at 46.

⁶ See An Chenxi (安晨曦), Zai Jingyan Yu Guifan Zhijian: Shiyan Lifa Jiqi Leixinghua (在经验与规范之间：试验立法及其类型化) [Experimental Legislation and Its Categorization between Experience and Norms: A Proposal from Legislative Perspective], 3 *BEIFANG FAXUE* (北方法学) [NORTHERN LEGAL SCIENCE] 112, 113 (2015); Chen Guang (陈光), Lun Woguo Rengong Zhineng Shiyanxing Lifa (论我国人工智能试验性立法) [On the Experimental Legislation of Artificial Intelligence in China], 4 *ANHUI SHIFAN DAXUE XUEBAO* (RENWEN SHEHUI KEXUE BAN) (安徽师范大学学报(人文社会科学版)) [JOURNAL OF ANHUI NORMAL UNIVERSITY (HUM. & SOC. SCI.)] 77, 78 (2020).

⁷ See e.g., Aomen Tebie Xingzhengqu Quqi Quhui Shiyong Zanzing Banfa (澳门特别行政区旗、区徽使用暂行办法) [Interim Arrangement of the Regional Flag and Emblem of the Macau Special Administration Region] (promulgated by Preparatory Comm. for Macau SAR Nat'l People's Cong., Jan. 16, 1999, effective Jan. 16, 1999), *CLL1.21647* (Chinalawinfo); and Qiye Pochan Fa (Shixing) (企业破产法(试行)) [Enterprise Bankruptcy Law (For Trial Implementation)] (promulgated by Standing Comm. Nat'l People's Cong., Dec. 2, 1986, effective Nov. 1, 1988), *CLL1.3066* (Chinalawinfo) (This law was replaced by the Enterprise Bankruptcy Law *infra* note 46 on June 1, 2007.)

⁸ Rob van Gestel and Gijs van Dijk, *Better Regulation through Experimental Legislation*, 17 *EUR. PUB. L.* 539, 551 (2011).

general rules. Eventually, it is believed that, the authority of law will be diminished.⁹ Despite that different treatment of the test group and the control group is the essential methodology of experimentation, which guarantees credibility and integrity of the experiment, not every different treatment constitutes discrimination. Discrimination or not shall be determined in the light of subject matter and purpose on a case-by-case basis. Reasons like voluntary participation, harmonization of law, and sound objective fact can justify legislative experimentation, provided that it is appropriate and proportionate.¹⁰

Third, the overall social cost of legislative experimentation, *prima facie*, can be higher than legislation in one go because it involves multi-phases of legislative actions to make a policy permanent. Even the cost of interest groups, who want to influence the lawmaking to be more beneficial to them, will rise in such conditions in public choice theory.¹¹ However, it can be less costly compared to legislation in one go under certain circumstances.¹² For instance, legislative experimentation can more smoothly solve the impasse if the subject matter needed to deal with is complicated, risky, or novel and the transaction cost is too high for the legislature to get a national law passed. Hence, these concerns about legislative experimentation are not inevitably true and can be addressed appropriately.

Besides the possible lower cost, there are quite a lot of other advantages as to legislative experimentation. First, legislative experimentation will help to gather more information and tackle uncertainty during multi-stage rulemaking.¹³ In reality, people have bounded rationality. We almost always encounter cognitive bias, information asymmetries, and path dependency in our real life, making the information needed for legislation insufficient.¹⁴ While, legislative experimentation will provide more time for the hidden or absent information to emerge. Second, the multi-stage decision-making process of legislative experimentation can provide a second chance for prudent reconsideration with effect evaluation, which will improve the quality of legislation in another way.¹⁵ Thereby, the legislative process becomes a learning path for rule-makers. They can correct their errors before the legislation causes a dramatic negative impact. These two benefits aforementioned, which can be viewed as “internal virtues” of legislative

⁹ See Sofia Ranchordás, *The Whys and Woes of Experimental Legislation*, *supra* note 3, at 435-36.

¹⁰ See Rob van Gestel and Gijs van Dijck, *supra* note 8, at 548-50.

¹¹ See Zachary J. Gubler, *supra* note 3, 133 (2014).

¹² See Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 262-66 (2007).

¹³ See Sofia Ranchordás, *The Whys and Woes of Experimental Legislation*, *supra* note 3, at 425. A more detailed explanation, see SOFIA RANCHORDÁS, CONSTITUTIONAL SUNSETS AND EXPERIMENTAL LEGISLATION: A COMPARATIVE PERSPECTIVE, *supra* note 3, at 49-53.

¹⁴ A thorough discussion, see Jacob E. Gersen, *supra* note 12, at 266-72; Tom Ginsburg, Jonathan S. Masur & Richard H. McAdams, *Libertarian Paternalism, Path Dependence, and Temporary Law*, 81 U. CHI. L. REV. 291 (2014).

¹⁵ See Luzius Mader, *supra* note 3.

experimentation, make legislative experimentation ideal for rapidly changing and groundbreaking fields.

Third, suppose it is difficult for legislators to reach a consensus caused by different partisan interests or divided public opinion, leading to the congress deadlock. In that case, the legislative experimentation allows an opportunity to set aside the differences and attain a compromise.¹⁶ As we know, a lot of legislative debates are typically based on abstract ideas, and nobody, no matter for or against the legislative agenda, ascertains how it goes if the law is passed. Then give it a try and the truth will speak for itself. In that way, the opposing party will be more likely to support the legislation because of the possible revision or even repeal in the future. Fourth, legislative experimentation can increase the diversity of public policy and advance the decentralization of political power, which is considered a better way of improving social well-being when it involves the participation of executive branches or local authorities.¹⁷ The latter two benefits can be accordingly classified as “external virtues” of legislative experimentation.

Based on these advantages, we can make good use of legislative experimentation in numerous circumstances. Thus, in European Union, “the laws of the Member States allow and even enshrine the use of legislative experimentation.”¹⁸ Legislative experimentation is also a beneficial theoretical framework to help to understand China’s lawmaking, both for westerners and the Chinese. In the past, some western politicians, observers, and scholars are often ideologically biased and regard China’s lawmaking as arbitrary, while Chinese scholars lack a helpful theoretical method to better understand and justify it.

China had encountered the legality problem since the launch of reform and opening-up policy in 1978 because the reform constantly went beyond the law. There were many attempts to solve the problem. The most famous one is the theory of “Benign Unconstitutionality” developed by Professor Hao Tiechuan in the 1990s, which aimed to vindicate the longtime practice of legislative reform derogating from the Constitution every now and then.¹⁹ This theory aroused an intense debate in the academia.²⁰ In the perspective of the “Benign

¹⁶ See SOFIA RANCHORDÁS, CONSTITUTIONAL SUNSETS AND EXPERIMENTAL LEGISLATION: A COMPARATIVE PERSPECTIVE, *supra* note 3, at 66-68; Tom Ginsburg, Jonathan S. Masur & Richard H. McAdams, *supra* note 14, at 337-38.

¹⁷ See Sofia Ranchordás, *The Whys and Woes of Experimental Legislation*, *supra* note 3, at 431-32.

¹⁸ Case C-127/07, *Société Arcelor Atlantique et Lorraine et al. v. Premier Ministre et al.*, 2008 ECR I-9895 (opinion of Advocate General Poiares Maduro, ¶ 45, delivered on May 21, 2008).

¹⁹ See Hao Tiechuan (郝铁川), Lun Liangxing Weixian (论良性违宪) [On Benign Unconstitutionality], 4 FAXUEYANJIU (法学研究) [CHINESE JOURNAL OF LAW] 89 (1996).

²⁰ The core literature, see Tong Zhiwei (童之伟), Liangxing Weixian Buyi Kending — Dui Hao Tiechuan Tongzhi Youguan Zhuzhang de Butong Kanfa (“良性违宪”不宜肯定——对郝铁川同志有关主张的不同看法) [Benign Unconstitutionality Shall not Be Endorsed: A Different Opinion on Mr. Hao Tiechuan’s View], 6 FAXUEYANJIU (法学研究) [CHINESE JOURNAL OF LAW] 19 (1996); Hao Tiechuan (郝铁川), Shehui Biange Yu Chengwen Fa de Juxianxing — Zai Tan Liangxing Weixian Jian Da Tong Zhiwei Tongzhi (社会变革与成文法的局限性——再谈良性违宪兼答童之伟同志) [Social Change and the Limits of Written Law: A

Unconstitutionality” theory, it is legitimate as long as the law and policy are in the interests of the people and the nation and/or facilitates the progress of social productivity in the Marxist sense, even if they contravene the Constitution in a formal sense.²¹ The theory of “Benign Unconstitutionality” pointed out the critical tension between the reform and legality in China, though it seems bizarre in legal theory and thus invited blunt criticisms.²² The underlying notion of the debate extended right to the 2010s and invoked a huge amount of scholarships on the relationship of the reform and the Constitution.²³

Admittedly, “Benign Unconstitutionality” is an oxymoron, but the central problem of this theory is its substantive basis merely on necessity²⁴ rather than on any more fundamental and universal ground. As a result, the extent and power of explanation and justification are fairly limited. Not every experimentation involves and jeopardizes the Constitution. Even if it does, once the question of constitutionality is solved, that theory is no longer of use. In such cases, the theory of legislative experimentation based upon behavioral economics can help to justify the extensive legislative practice in China and to clarify the puzzle of the relationship between the legitimacy and the success of China in the past forty years since 1978, or even the past seventy years since 1949.²⁵

Further Discussion of Benign Unconstitutionality and Response to Mr. Tong Zhiwei], 6 FAXUEYANJIU (法学研究) [CHINESE JOURNAL OF LAW] 23 (1996) [hereinafter *Social Change and the Limits of Written Law*]; Hao Tiechuan (郝铁川), Wenrou de Dikang — Guanyu Liangxing Weixian de Jidian Shuoming (温柔的抵抗——关于“良性违宪”的几点说明) [Moderate Resistance: A Few Explanations Concerning “Benign Unconstitutionality”], 5 FAXUE (法学) [LEGAL SCIENCE] 18 (1997) [hereinafter *Moderate Resistance*]; Han Dayuan (韩大元), Shehui Bian'ge Yu Xianfa de Shehui Shiyixing — Ping Hao Tong Liang Xiansheng Guanyu Liangxing Weixian de Zhenglun (社会变革与宪法的社会适应性——评郝、童两先生关于“良性违宪”的争论) [Social Change and the Adaptability of the Constitution: A Comment on the Debate concerning “Benign Unconstitutionality” between Mr. Hao and Mr. Tong], 5 FAXUE (法学) [LEGAL SCIENCE] 19 (1997).

²¹ See Hao Tiechuan, *On Benign Unconstitutionality*, *supra* note 19.

²² See Tong Zhiwei, *supra* note 20.

²³ See e.g., Zhang Qianfan (张千帆), Xianfa Biantong Yu Difang Shiyi (宪法变通与地方试验) [Constitutional Derogation and Local Experimentation], 1 FAXUEYANJIU (法学研究) [CHINESE JOURNAL OF LAW], 63 (2007); Jiang Guohua (江国华), Shizhi Hexian Lun: Zhongguo Xianfa Sanshi Nian Yanhua Lujing de Jianshi (实质合宪论：中国宪法三十年演化路径的检视) [On Substantive Constitutionality: An Examination of the 30 Years' Evolution Path of the Chinese Constitution], 4 ZHONGGUO FAXUE (中国法学) [CHINA LEGAL SCIENCE] 180 (2013); Miao Lianying (苗连营) & Chen Jian (陈建), Xianfa Yu Gaige Guanxi de Zhongguo Luoji (宪法与改革关系的中国逻辑) [Chinese Rationale in the Relationship between Constitution and Reform], 1 JIANGHAI XUEKAN (江海学刊) [JIANGHAI ACADEMIC JOURNAL] 142 (2019).

²⁴ See Hao Tiechuan, *On Benign Unconstitutionality*, *supra* note 19, at 91; Hao Tiechuan, *Social Change and the Limits of Written Law*, *supra* note 20; Hao Tiechuan, *Moderate Resistance*, *supra* note 20.

²⁵ Actually, the legislative experimentation has begun since the founding of the PRC, as there were lots of “temporary laws” before the reform and opening up in 1978. A research about the legislative experimentation on Shenzhen Special Economic Zone, see Madeleine Martinek, *supra* note 3. And Sebastian Heilmann explored how China's policy experimentation contributed China's success, see SEBASTIAN HEILMANN, RED SWAN: HOW UNORTHODOX POLICY MAKING FACILITATED CHINA'S RISE (2018).

III. HAINAN FTP LAW IN EXPERIMENTAL PERSPECTIVE

As a consequence of successive amendments of the Constitution and the Legislation Law, as well as the standardization and legalization of the experimentation, the newly adopted Hainan FTP Law has much little to do with the question of constitutionality. Even so, it is still a product and a new phase of legislative experimentation. The Hainan FTP Law encompasses various experimentations and deviations in Chinese law, making Hainan FTP quite distinctive from other areas in mainland China. It intends to breakthrough rules of trade, investment, taxation, intellectual support, and environmental protection. That's why both the Master Plan for the Construction of Hainan Free Trade Port (hereinafter "Master Plan for Hainan FTP")²⁶ released in 2020 and the Hainan FTP Law emphasize the importance of establishing policies and legal systems in Hainan step by step.²⁷ This part illustrates the experimental character of Hainan FTP Law in three dimensions: liberalization, devolution, and "list approach" (positive and negative). These three dimensions can be categorized as primary and secondary dimensions in the Hartian sense,²⁸ which respectively touches on the substantive content and the legal authority, as well as the legislative technique dimension.

A. Liberalization

One of the main pillars of China's reform and opening-up policy is to gradually liberalize the potential of all kinds of economic elements, from the legitimization of private sectors in the 1980s to the reform of land property rights in recent years. Liberalization is mainly embodied in trade and investment freedom which Hainan FTP Law prioritizes to promote further.²⁹

According to the Hainan FTP Law, China will establish a special customs management system and simplify its customs procedures in the whole island of Hainan to promote trade freedom.³⁰ As per the Customs Law slightly amended two months earlier than the pass of Hainan FTP Law, consignees or consignors of cargos are obliged to bear with import or export license.³¹ While, Hainan FTP Law derogates from the Customs Law,³² stipulating that cargos and goods between the extra-jurisdictional areas and Hainan FTP can come and go freely,

²⁶ See Hainan Ziyou Maoyigang Jianshe Zongti Fang'an (海南自由贸易港建设总体方案) [Master Plan for the Construction of Hainan Free Trade Port] (promulgated by Central Comm. CPC and St. Council, June 1, 2020, effective June 1, 2020), CLI.16.342696 (Chinalawinfo).

²⁷ See Master Plan for Hainan FTP, *supra* note 26; and Hainan FTP Law, *supra* note 1, art. 2.

²⁸ See H.L.A. Hart, *THE CONCEPT OF LAW* (3rd ed., 2012).

²⁹ Another equally important priority for Hainan FTP, if not more crucial, is environmental protection. See Hainan FTP Law, *supra* note 1, ch. 5.

³⁰ See *id.*, art. 11.

³¹ See Haiguan Fa (海关法) [Customs Law] (promulgated by Standing Comm. Nat'l People's Cong., Jan. 22, 1987, effective July 1, 1987, rev'd Apr. 29, 2021), art. 24, § 1, CLI.1.5012731 (Chinalawinfo).

³² To be precise, the Customs Law allows a different treatment in a special customs zone approved by the State Council pursuant to its Article 34. Hainan FTP is approved by the State Council in 2018, invoking the Article 34 of the Customs Law to apply on.

as long as they are not forbidden or restricted in a negative list.³³ Also, different from the requirement of the Customs Law,³⁴ market players can store their cargos in Hainan FTP at any favorable place with no limit of time, as long as complying with environmental protection and work safety requirements.³⁵ Meanwhile, cross-border trade in services will be governed in a negative list approach, with a complementary financial payment and transfer system. Those services not on the list will receive national treatment.³⁶ To advance trade freedom, Hainan FTP will implement convenient customs clearance policies and simplify its formalities and procedures. Cargos entering Hainan will be directly cleared by the customs except those who need inspection, quarantine, or certificate.³⁷

However, there will be a distinction between “domestic border” and “inter-jurisdictional border.” The inter-jurisdictional border between Hainan FTP and other jurisdictions will be wide open, but the domestic border between Hainan FTP and the mainland China will be under control (“一线”放开, “二线”管住).³⁸ Consequently, cargos, goods, and vehicles entering Hainan from mainland China, will be treated as domestic flow. While cargos transported into other areas of the mainland from Hainan will be counted as importation with tariffs and import duties; And goods in the same direction will be overseen according to relevant regulations, although import procedures for vehicles will be simplified.³⁹

As to investment, Hainan FTP will comprehensively apply minimal vetting for investment and open up its investment access, except for those fields related to national security, social stability, ecological protection redlines, and major public interest.⁴⁰ Foreign investment can enjoy pre-establishment national treatment and will be regulated in a negative list approach.⁴¹ Still, foreign investment is subject to security review.⁴² These requirements are consistent with provisions in the Foreign Investment Law,⁴³ with the addition of the demand for ecological protection, given the marvelous environment in Hainan. Market access will also be relaxed and there will be a special list for market access. The government will focus on process regulation, and gradually

³³ See Hainan FTP Law, *supra* note 1, art. 13, § 1.

³⁴ See Customs Law, *supra* note 31, art. 38, § 2.

³⁵ See Hainan FTP Law, *supra* note 1, art. 15.

³⁶ See *id.*, art. 17.

³⁷ See *id.*, art. 16.

³⁸ See Master Plan for Hainan FTP, *supra* note 26.

³⁹ See Hainan FTP Law, *supra* note 1, art. 14.

⁴⁰ See *id.*, art. 18.

⁴¹ See *id.*, art. 19.

⁴² See *id.*, art. 55, § 2.

⁴³ See Waishang Touzi Fa (外商投资法) [Foreign Investment Law] (promulgated by Nat'l People's Cong., Mar. 15, 2019, effective Jan. 1, 2020), art. 4, art. 6, and art. 35, CLI.1.330426 (Chinalawinfo). The national security review is originally required by the National Security Law, see Guojia Anquan Fa (国家安全法) [National Security Law] (promulgated by Standing Comm. Nat'l People's Cong., July 1, 2015, effective July 1, 2015), art. 59, CLI.1.250527 (Chinalawinfo).

implement market access commitments.⁴⁴ To provide a better public service, Hainan FTP will stray from the Company Law (amended in 2018)⁴⁵ and the Enterprise Bankruptcy Law (2006)⁴⁶ and create a convenient system for establishing, operating, and de-registering companies, and optimize the insolvency proceedings.⁴⁷ Hainan intends to strengthen the basic position of market competition and to enhance the enforcement of anti-trust and anti-unfair competition laws. All sorts of market players will be treated equally in regard to market access, operation, access to productive factors, standard-setting, preferential policies, etc. They have to compete equally under the anti-trust law and anti-unfair competition law.⁴⁸

To satisfy the need for trade and investment in Hainan, the taxation system, the financial system, and even the administrative and judicial system in Hainan will be changed correspondingly. First, along with preferential policies of income tax for eligible corporations and individuals,⁴⁹ the taxation system will be simplified and optimized in Hainan FTP on the principle of balancing the tax burden and the financial revenue. As a result, people's tax burden will be significantly lower, and the attribution of revenue will be clearer.⁵⁰ Specifically, the tax reform is divided into two phases: When Hainan converts its customs to independent operation, taxes and fees such as VAT, exercise tax, vehicle purchase tax, city maintenance and construction tax, and education surcharge will be simplified and consolidated, while sales tax will be imposed on the retailing of cargos and services. After Hainan has become a separate customs zone, taxes will be further streamlined.⁵¹

Second, the financial restrictions will be eased. There will be a different system for cross-border monetary flow. Restriction on capital projects will be lessened in multi-stages, and external debts of non-financial corporations restricted will ultimately become fully convertible,⁵² superseding the restriction by the Regulation on Foreign Exchange Administration.⁵³ Financial institutions approved can carry on offshore financial business, through designated accounts or in particular areas.⁵⁴

⁴⁴ See Hainan FTP Law, *supra* note 1, art. 20.

⁴⁵ Cf. *Gongsi Fa* (公司法) [Company Law] (promulgated by Standing Comm. Nat'l People's Cong., Dec. 29, 1993, effective July 1, 1994, rev'd Oct. 26, 2018), CLI.1.324551 (Chinalawinfo).

⁴⁶ Cf. *Qiyepochan Fa* (企业破产法) [Enterprise Bankruptcy Law] (promulgated by Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective June 1, 2007), CLI.1.78895 (Chinalawinfo).

⁴⁷ See Hainan FTP Law, *supra* note 1, art. 21.

⁴⁸ See *id.*, art. 24.

⁴⁹ See *id.*, art. 30.

⁵⁰ See *id.*, art. 27, § 1.

⁵¹ See *id.*, art. 27, § 2. More tax measures that will be adopted, see *id.*, ch. 4, and the Master Plan for Hainan FTP, *supra* note 26.

⁵² See Hainan FTP Law, *supra* note 1, art. 51.

⁵³ See *Waihui Guanli Tiaoli* (外汇管理条例) [Regulation on Foreign Exchange Administration] (promulgated by St. Council, Jan. 8, 1996, effective Apr. 1, 1996, rev'd Aug. 1, 2008), art. 18, CLI.2.107240 (Chinalawinfo).

⁵⁴ See Hainan FTP Law, *supra* note 1, art. 52.

Third, the administrative and judicial system will be reformed as needed. The administrative division will be restructured.⁵⁵ And viable commercial dispute resolution mechanisms, including alternative dispute resolutions (ADRs) like arbitration and mediation, will form in Hainan.⁵⁶ Hence, Hainan will become a “one-stop” international center for commercial dispute settlement, where world-known international commercial arbitration institutions and mediation organizations will open branches and the International Commercial Court of the Supreme Court will set up a subdivision.⁵⁷ Besides, to provide better protection to intellectual property, the NPCSC has approved to set up a separate Hainan FTP Intellectual Property Court at the end of the year 2020,⁵⁸ which is the fourth independent intellectual property court and the only one apart from those in Beijing, Shanghai, and Guangzhou.⁵⁹

As shown in the discussion above, these multiple measures of liberalization are not a radical revolution, but an incremental change. Hainan FTP Law derives some rules from previous laws or regulations that proved practicable, and makes numerous new arrangements to be experimented with as well. With these measures of liberalization, Hainan will be the next gold rush destination, to be sure.

B. Devolution

Federalism has been viewed as a favorable institutional condition for social and economic innovation, as Justice Brandeis argued that the state can “serve as a laboratory” and “try novel social and economic experiments without risk to the rest of the country.”⁶⁰ China is not a federalist country, indeed, but there is still devolution of political and legal power in China, which scholars called

⁵⁵ See *id.*, art. 8, § 2.

⁵⁶ See *id.*, art. 54.

⁵⁷ See Zuigao Renmin Fayuan Guanyu Renmin Fayuan Wei Hainan Ziyou Maoyigang Jianshe Tigong Sifa Fuwu He Baozhang de Yijian (最高人民法院关于人民法院为海南自由贸易港建设提供司法服务和保障的意见) [Opinions of the Supreme People's Court on Judicial Services and Guarantees of the People's Courts for the Construction of Hainan FTP] (promulgated by Sup. People's Ct., Jan. 8, 2021, effective Jan. 8, 2021), CLL3.351456 (Chinalawinfo).

⁵⁸ See Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Sheli Hainan Ziyou Maoyigang Zhishi Chanquan Fayuan de Jueding (全国人民代表大会常务委员会关于设立海南自由贸易港知识产权法院的决定) [Decision of NPCSC on Establishing the Intellectual Property Court of the Hainan FTP] (promulgated by Standing Comm. Nat'l People's Cong., Dec. 26, 2020, effective Jan. 1, 2021), CLL1.349390 (Chinalawinfo).

⁵⁹ See Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Zai Beijing Shanghai Guangzhou Sheli Zhishi Chanquan Fayuan de Jueding (全国人民代表大会常务委员会关于在北京、上海、广州设立知识产权法院的决定) [Decision of the NPCSC on Establishing Intellectual Property Right Courts in Beijing, Shanghai and Guangzhou] (promulgated by Standing Comm. Nat'l People's Cong., Aug. 31, 2014, effective Aug. 31, 2014), CLL1.232867 (Chinalawinfo).

⁶⁰ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (J. Brandeis dissenting).

“market-preserving federalism,”⁶¹ “economic federalism,”⁶² or “*de facto* federalism.”⁶³ There is centralization as well as decentralization in China, as Prof. Yang Guangbin correctly pointed out that a dual combination of the unitary political system and economic federalism is the underlying structure in the transition of China.⁶⁴ It is broadly accepted that the decentralization of powers contributes a lot to China’s success.⁶⁵

There is devolution in Hainan FTP Law as well. According to the *Law*, the national government will authorize or delegate Hainan more autonomy in reform and administration.⁶⁶ The autonomy is embodied in the finance, land use, and legislative power. First, Hainan is encouraged to issue bonds within limits approved by the State Council for the development projects and set up a developmental investment fund operating on the rationale of the market and with the guidance of the government.⁶⁷ Meanwhile, Hainan FTP can autonomously reduce, exempt, and suspend governmental funds except those relevant to eco-compensation, if needed.⁶⁸

Second, The Hainan FTP Law grants Hainan provincial government the power to approve land use that originally belongs to the State Council,⁶⁹ required by the Land Administration Law.⁷⁰ And to strike against land

⁶¹ See Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J. L. ECON. & ORG. 1 (1995); Gabriella Montinola, Yingyi Qian and Barry R. Weingast, *Federalism, Chinese Style: The Political Basis for Economic Success in China*, 48 WORLD POL. 50 (1995); Yingyi Qian and Barry R. Weingast, *Federalism as a Commitment to Preserving Market Incentives*, 11 J. ECON. PERSP. 83, 85-88 (1997).

⁶² See Robert P. Inman & Daniel L. Rubinfeld, *Rethinking Federalism*, 11 J. ECON. PERSP. 43, 45-48 (1997). Yang Guangbin (杨光斌), *Zhongguo Jingji Zhuanxing Shiqi de Zhongyang — Difang Guanxi Xin Lun: Lilun Xianshi Yu Zhengce* (中国经济转型时期的中央—地方关系新论：理论、现实与政策) [A New Perspective on the Central-Local Relations During the Economic Transition of China: Theory, Reality, and Policy], 1 XUE HAI (学海) [ACADEMIA BIMESTRIE] 67 (2007).

⁶³ See ZHENG YONGNIAN, *DE FACTO FEDERALISM IN CHINA: REFORMS AND DYNAMICS OF CENTRAL-LOCAL RELATIONS* (2007).

⁶⁴ See Yang Guangbin, *supra* note 62.

⁶⁵ See Gabriella Montinola, Yingyi Qian and Barry R. Weingast, *supra* note 61; Zheng Yongnian, *supra* note 63; and Sebastian Heilmann, *supra* note 25.

⁶⁶ See Hainan FTP Law, *supra* note 1, art. 7.

⁶⁷ See *id.*, art. 25.

⁶⁸ See *id.*, art. 26. Eco-compensation is a Chinese version, with governmental intervention, of Payment for Ecosystem Services (PES), a market-oriented approach for environmental protection. For an overview of China’s eco-compensation policies and practices, see Lin Zhen and Huiyuan Zhang, *Payment for Ecosystem Services in China: An Overview*, 5 LIVING REV. LANDSCAPE RES., no. 2, 2011; Jichuan Sheng, Wenge Qiu, Xiao Han, *China’s PES-like horizontal eco-compensation program: Combining market-oriented mechanisms and government interventions*, 45 ECOSYSTEM SERVICES, 2020, article no. 101164; ASIAN DEVELOPMENT BANK, *TOWARD A NATIONAL ECO-COMPENSATION REGULATION IN THE PEOPLE’S REPUBLIC OF CHINA* (Nov. 2016).

⁶⁹ See Hainan FTP Law, *supra* note 1, art. 48, § 1.

⁷⁰ The Land Administration Law divides the power of land use approval among different levels of administrative branches. To prevent commercial “land grabbing” (圈地) in the name of “economic development zone” (经济开发区) and optimize land use, the critical approval power that will have a huge influence is reserved in the hand of State Council. See Tudi Guanli Fa (土地管理法) [Land Administration Law] (promulgated by Standing Comm. Nat’l People’s Cong., June 25, 1986, effective Jan. 1, 1987, rev’d in

hoarding that leads to a waste of land resources, a certain percentage of the idle land fee will be charged if the developmental land is attained in the way of concession and the construction has been overdue for one year than contracted. The specific measures are left to be formulated by Hainan.⁷¹

Third, the most important one, the People's Congress and its Standing Committee of Hainan can make local laws related to trade, investment (*e.g.*, arrangements concerning insolvency⁷² and equal treatment of market players⁷³), and other relevant administrative affairs, which can digress from national laws and administrative regulations made respectively by NPC/NPCSC and by the State Council, or involve affairs that are initially in the legislative authorities of NPC/NPCSC or the State Council, if approved by the respective authorities.⁷⁴ This is a significant step. Before the promulgation of the Hainan FTP Law, the privilege to deviate from higher laws was only enjoyed by the ethnic autonomous regions and special economic zones.⁷⁵ This indicates that the positioning of Hainan FTP is comparable to Shenzhen SEZ, which not only has achieved huge economic success, but also has led China's cause of reform and opening-up.

However, the devolution in Hainan FTP Law is pretty different in some aspects from the past. In the past forty years from 1978 to 2018, the basic trend of the central-local relations is that the power of the central government shrinks and that of the local government expands,⁷⁶ except for some particular affairs. The trend began to change, marked by the merger of national and local tax administrations in 2018, a slight reversal from the tax-sharing reform in 1994, which signifies recentralization, but it doesn't mean China will terminate the reform and opening-up policy. Rather, China will strive to keep a balance between centralization and decentralization. As a consequence, the devolution in Hainan FTP Law is literally more about power-sharing, which, in economists' words, can be best described as "cooperative federalism."⁷⁷

There are a lot of issues to be determined in detail since the Hainan FTP Law is just a broad legal framework for the creation of Hainan FTP.⁷⁸ Pursuant to national laws, most of these issues related to trade, investment, and land use approval should have fallen under the jurisdiction of the NPC/NPCSC or the

Aug. 26, 2019, effective Jan. 1, 2020), CLI.1.335313 (Chinalawinfo); and Yang Guangbin, *supra* note 62, at 71.

⁷¹ See Hainan FTP Law, *supra* note 1, art. 49.

⁷² See *id.*, art. 21.

⁷³ See *id.*, art. 24, § 24.

⁷⁴ See *id.*, art. 10.

⁷⁵ See Lifa Fa (立法法) [Legislation Law] (promulgated by Nat'l People's Congress, Mar. 15, 2000, effective July 1, 2000, rev'd Mar. 15, 2015), art. 75 and art. 90, CLI.1.245693 (Chinalawinfo).

⁷⁶ See Yang Guangbin, *supra* note 62.

⁷⁷ See Robert P. Inman & Daniel L. Rubinfeld, *supra* note 62, at 48-50.

⁷⁸ See Shen Chunyao (沈春耀), Guanyu Zhonghua Renmin Gongheguo Hainan Ziyou Maoyigang Fa (Cao'an) de Shuoming (关于中华人民共和国海南自由贸易港法案的说明) [Report on the Hainan FTP Law (Draft) of PRC], Dec. 22, 2020, <http://www.npc.gov.cn/npc/c30834/202106/589f495e276f4adb9092d6b6d951af58.shtml>.

State Council. Nevertheless, as per the Hainan FTP Law, a lot of decisionmaking powers will be largely shared by the central government and its Hainan provincial counterpart. Specifically, a couple of regulations will be compiled jointly by departments of State Council in charge and Hainan province: regulations of cargos, goods, and vehicles circulating between Hainan and the mainland;⁷⁹ regulations of market access;⁸⁰ scheme of tax simplification;⁸¹ plus regulations of taxing cargos and goods cross the “domestic border.”⁸² Besides, most of the lists discussed in Section C shall be determined under the cooperation of departments of the State Council and Hainan province.

As demonstrated in this section, Hainan FTP Law is not just delegating more power of the central government to the local government as usual. It is also exploring a new central-local power-sharing cooperation mechanism. If it is handled appropriately, this cooperation mechanism may have a great impact in the future.

C. List Approach

Another distinctive feature of Hainan FTP Law is the wide use of the list approach, particularly the negative list approach, which needs to have our attention. List approach can be divided into two models: “positive list” approach and “negative list” approach. In general, positive list approach means that only matters in the list or qualifications required in the list met are permitted or can enjoy other favorable treatments, such as affirmative action or financial relief. On the contrary, negative list approach indicates that people have the liberty to do anything and will not encounter interference, unless it is excepted in the list.

Obviously, in comparison, negative list approach is often more inclusive and provides more freedom than positive list approach. Negative list approach even includes those items having not yet come into existence. Positive list approach has its own benefits though. In trade and investment, “[e]xperience with the GATS showed that a positive-list approach was preferable when a new area was for the first time the subject of liberalization at a multilateral level.” It can be used as a response to issues with unforeseeable implications or complex regulations, to minimize risks and errors. And positive list approach can maintain flexibility as well if regularly updated.⁸³ These benefits of positive list approach do not just apply to trade and investment. So do to other fields. Therefore, these two approaches can be used for different purposes in different

⁷⁹ See Hainan FTP Law, *supra* note 1, art. 14, § 3.

⁸⁰ See *id.*, art. 20.

⁸¹ See *id.*, art. 27, § 3.

⁸² See *id.*, art. 29.

⁸³ See WTO Working Group on the Relationship between Trade and Investment, *Modalities of Pre-establishment Commitments Based on A GATS-type, Positive List Approach*, ¶ 7, WTO Doc. WT/WGTI/W/120 (June 19, 2002).

situations, though negative list approach is more prevailing in China nowadays out of the need for reform and opening-up.

Among other legislations, Hainan FTP Law makes the most use of the list approach. The word “list” (清单) appears 11 times in Hainan FTP Law, parallel with the frequency in Foreign Investment Law, and the word “catalogue” (目录) 3 times. Despite the high word frequency, there is only one kind of list in Foreign Investment Law: foreign trade market access negative list.⁸⁴ While there are various sorts of lists, both positive and negative, in Hainan FTP Law: the list of forbidden and restricted cargos and goods for import or export;⁸⁵ the negative list of cross-border trade in services;⁸⁶ the negative list of foreign investment market access;⁸⁷ the special list for relaxation of market access;⁸⁸ the catalogue of commodities to be taxed;⁸⁹ the list of environment access;⁹⁰ the negative list of work permits for foreigners;⁹¹ and the list of unilateral accreditation of extraterritorial vocational qualifications.⁹² Amongst these eight types of lists, there are five types of negative lists, simply three types positive, which will provide much more convenience to relevant market players. All of them are further experimentation on the basis of FTZ policies.

As a matter of fact, the technique of list approach *per se* is also a result of long-time experimentation. The technique originates in the international investment agreements (IIAs) and is extensively used in this area as well. In consequence, once upon a time, list approach was taken as merely an international law concept, rather than a domestic one.⁹³ China brought the technique from its previous practice of bilateral investment treaties (BITs) and free trade agreements (FTAs) into the domestic legislation.⁹⁴ As early as in 1995, China had formulated an Interim Regulation on Guiding Foreign Investment and a Guiding Catalogue of Industries for Foreign Investment with updates every several years.⁹⁵ Both of them consist of a hybrid of positive and

⁸⁴ See Foreign Investment Law, *supra* note 43.

⁸⁵ See Hainan FTP Law, *supra* note 1, art. 13, § 2.

⁸⁶ See *id.*, art. 17, § 2.

⁸⁷ See *id.*, art. 19.

⁸⁸ See *id.*, art. 20, § 1.

⁸⁹ See *id.*, art. 28, § 1.

⁹⁰ See *id.*, art. 32.

⁹¹ See *id.*, art. 46.

⁹² See *id.*, art. 47.

⁹³ See Ren Qing (任清), Fumian Qingdan Guoji Touzi Guize Xin Qushi (负面清单, 国际投资规则新趋势) [Negative List, A New Trend of the International Investment Rules], RENMIN RIBAO (人民日报) [PEOPLE'S DAILY], Nov. 6, 2013, at 22. The author was then a partner of Zhong Lun (中伦) Law Firm, now works in Global (环球) Law Office.

⁹⁴ See Lian Ruihua, note, *Further Opening-Up to Foreign Investment: The New Negative Lists*, 12 TSINGHUA CHINA L. REV. 143, 144-46 (2019).

⁹⁵ See Zhidao Waishang Touzi Fangxiang Zanxing Guiding (指导外商投资方向暂行规定) [Interim Regulation on Guiding Foreign Investment] (promulgated by State Plan. Comm'n., State Econ. & Trade Comm'n., and Ministry of Foreign Trade & Econ. Coop., June 20, 1995, effective June 20, 1995), CLI2.12656 (Chinalawinfo) (This regulation was replaced by the Regulation on Guiding Foreign Investment (指导外商投资方向规定) on Apr. 1, 2002); Waishang Touzi Chanye Zhidao Mulu (外商投资产业指导目录) [Guiding

negative lists with encouraged as well as restricted and forbidden industries, notwithstanding the absence of the any terminology of positive list or negative list.⁹⁶

The list approach began to expand its territory to a wider range as a regulative method in China along with the inception of pilot free trade zone policy. The Master Plan for Shanghai Pilot FTZ for the first time officially propose to explore the “negative list” regulative model,⁹⁷ which is trending up in China. And the first directory in the name of “negative list” to regulate foreign investment in China was issued in Shanghai in 2013.⁹⁸ It was perceived as “a fundamental shift of China’s FDI regulatory system”.⁹⁹ Since then, the list approach has become a prevalent regulatory technique in diverse areas at

Catalogue of Industries for Foreign Investment] (promulgated by State Plan. Comm’n., State Econ. & Trade Comm’n., and Ministry of Foreign Trade & Econ. Coop., June 20, 1995, June 20, 1995, rev’d Dec. 31, 1997), CLI4.12657 (Chinalawinfo) (This catalogue was repealed by a new Guiding Catalogue of Industries for Foreign Investment on Apr. 1, 2002, which was last revised on June 28, 2017).

⁹⁶ Those excluded in the Guiding Catalogue are all permitted. After 2017, the Guiding Catalogue of Industries for Foreign Investment broke into two separate lists: a negative one and a positive one. *See* Waishang Touzi Zhunru Tebie Guanli Cuoshi Fumian Qingdan 2018 Nian Ban (外商投资准入特别管理措施(负面清单)(2018年版)) [Special Administrative Measures (Negative List) for the Access of Foreign Investment (2018 Version)] (promulgated by Nat’l Dev. & Reform Comm’n., and Ministry of Com., June 28, 2018, effective July 28, 2018), CLI4.316374 (Chinalawinfo) [This negative list was repealed by a 2019 version one on July 30, 2019]; and Guli Waishang Touzi Chanye Mulu (鼓励外商投资产业目录(2019年版)) [Catalogue of Encouraged Industries for Foreign Investment (2019 Version)] (promulgated by Nat’l Dev. & Reform Comm’n., and Ministry of Com., June 30, 2019, effective July 30, 2019, repealed Dec. 27, 2020), CLI4.333605 (Chinalawinfo) [This catalogue was repealed by a 2020 version one on Jan. 27, 2021].

⁹⁷ *See* Guowuyuan Guanyu Yinfu Zhongguo Shanghai Ziyou Maoyi Shiyangu Zongti Fang’an de Tongzhi (国务院关于印发中国(上海)自由贸易试验区总体方案的通知) [Notice of the State Council on Issuing the Master Plan for China (Shanghai) Pilot Free Trade Zone] (promulgated by Central Comm. CPC and St. Council, Sept. 18, 2013, effective Sept. 18, 2013), CLI2.210726 (Chinalawinfo).

⁹⁸ *See* Zhongguo (Shanghai) Ziyou Maoyi Shiyangu Waishang Touzi Zhunru Tebie Guanli Cuoshi Fumian Qingdan 2013 Nian (中国(上海)自由贸易试验区外商投资准入特别管理措施(负面清单)(2013年)) [Special Administrative Measures (Negative List) for Access of Foreign Investment to China (Shanghai) Pilot Free Trade Zone (2013)] (promulgated by Shanghai Mun. Gov’t, Sept. 29, 2013, effective Sept. 29, 2013, rev’d June 30, 2014), https://www.shanghai.gov.cn/nw30984/20200820/0001-30984_37036.html (The 2013 version is cited here on purpose); and Xie Weiqun (谢卫群), Sun Xiaojing (孙小静), Ouyang Jie (欧阳杰), Shanghai Zimaoqu Kaichu Shoufen Fumian Qingdan (上海自贸区开出首份负面清单) [Shanghai Pilot Free Trade Zone Issued the First Negative List], RENMIN RIBAO (人民日报) PEOPLE’S DAILY, Oct. 1, 2013, at 2. This piece of news report asserted that “this is the first time for China to use a negative list to regulate foreign investment” (这是中国第一次用负面清单管理外商对华投资). The truth is that, as indicated above, it was just the first time for China to mention the term “negative list” in a regulative measure’s title.

⁹⁹ Zhongmei Wang, *Negative List in the SHPFTZ and Its Implications for China’s Future FDI Legal System*, 50 J. WORLD TRADE 117, 118 (2016).

different levels of authorities, like corporate bonds,¹⁰⁰ life insurance¹⁰¹, education,¹⁰² and executive power clarification,¹⁰³ etc.

Moreover, the list approach expands from regulations to national laws made by the NPC/NPCSC. The approach as a tool of regulation found its place in the national statute for the first time when the Small and Medium-Sized Enterprises Promotion Law was amended in 2017.¹⁰⁴ Thenceforth, it has become popular in the national legislation. There have been eight crucial national laws, including the Hainan FTP Law, that have adopted the technique to deal with international and domestic affairs until now.¹⁰⁵ Without any doubt, the technique will be further utilized in future legislation.

Hence, the list approach adopted in Hainan FTP Law is not a sudden whim of someone out of nowhere, but a result of iterative experimentation and

¹⁰⁰ See e.g., Zhongguo Zhengquanye Xiehui Guanyu Fabu Feigongkai Faxing Gongs Zhaiquan Bei'an Guanli Zili Guize de Tongzhi (中国证券业协会关于发布非公开发行公司债券备案管理自律规则的通知) [Notice of the Securities Association of China on Issuing Self-Disciplinary Rules on Administration over the Filing of Non-public Offering of Corporate Bonds] (promulgated by Sec. Ass'n of China, Apr. 23, 2015, effective Apr. 23, 2015, rev'd Dec. 20, 2019), CLI.6.247382 (Chinalawinfo). Attached in the notice is a Negative List Guidance regarding Undertaking of Non-public Offering Corporate Bonds Projects (非公开发行公司债券项目承接负面清单指引).

¹⁰¹ See e.g., Zhongguo Yinbaopianhui Renshenxian Bu Guanyu Yinfa Renshen Baoxian Chanpin Fumian Qingdan 2021 Ban de Tongzhi (中国银保监会人身险部关于印发人身保险产品“负面清单”(2021版)的通知) [Notice by the Life Insurance Supervision Department of the China Banking and Insurance Regulatory Commission of Issuing the “Negative List” of Life Insurance Products (2021)] (promulgated by Life Ins. Supervision Dep't of China Banking & Ins. Regul. Comm'n, Jan. 19, 2021, effective Jan. 19, 2021), CLI.4.351623 (Chinalawinfo).

¹⁰² See Jiaoyubu Bangongting Guanyu Yinfa Yiwu Jiaoyu Liu Ke Chaobiao Chaoqian Peixun Fumian Qingdan Shixing de Tongzhi (教育部办公厅关于印发义务教育六科超标超前培训负面清单(试行)的通知) (Notice of Ministry of Education General Office on Issuing the Negative List of over Training for the Six Subjects in Compulsory Education (For Trial Implementation)) (promulgated by Gen. Off. Of Ministry of Educ., May 6, 2020, effective May 6, 2020), CLI.4.342096 (Chinalawinfo).

¹⁰³ See e.g. Zhonggong Zhongyang Bangongting Guowuyuan Bangongting Yinfa Guanyu Tuixing Difang Geji Zhengfu Gongzuo Bumen Quanli Qingdan Zhidu de Zhidao Yijian (中共中央办公厅、国务院办公厅印发关于推行地方各级政府工作部门权力清单制度的指导意见) [The Guiding Opinions on Promoting the System of Listing the Authority of Local Governmental Departments at all Levels Issued by CPC Central Committee's General Office and the State Council's General Office] (promulgated by Gen. Off. of CPC Central Comm., and Gen. Off. of St Council, Mar. 24, 2015, effective Mar. 24, 2015), CLI.5.245988 (Chinalawinfo); Guowuyuan Bangongting Guanyu Yinfa Guowuyuan Bumen Quanli He Zeren Qingdan Bianzhi Shidian Fang'an de Tongzhi (国务院办公厅关于印发国务院部门权力和责任清单编制试点方案的通知) [Notice of the General Office of the State Council on Issuing the Pilot Program for Formulating the Power and Responsibility List of the Departments of the State Council] (promulgated by Gen. Off. of St. Council, Dec. 28, 2015, effective Dec. 28, 2015), CLI.2.262078 (Chinalawinfo). An integrated portal of power lists (权力清单) and responsibility lists (责任清单) of provincial governments, can be found on the official website of the State Council, available at <http://www.gov.cn/fuwu/quanzeqingdan/index.html> (last visited July 31, 2021).

¹⁰⁴ See Zhongxiao Qiye Cujin Fa (中小企业促进法) [Small and Medium-Sized Enterprises Promotion Law] (promulgated by Standing Comm. Nat'l People's Congress, June 29, 2002, effective Jan. 1, 2003, rev'd Sept. 1, 2017), art. 55, CLI.1.301231 (Chinalawinfo).

¹⁰⁵ The other seven national laws are, namely, Foreign Investment Law (2019) (外商投资法), Drug Administration Law (2019) (药品管理法), Cryptography Law (2019) (密码法), Export Control Law (2020) (出口管制法), Biosecurity Law (2020) (生物安全法), Yangtze River Protection Law (2020) (长江保护法) and Anti-foreign Sanctions Law (2021) (反外国制裁法).

practice. The adoption of list approach is major progress for China to avoid executive arbitrariness. It will provide transparency and predictability to the stakeholders, no matter it is positive list or negative list. Therefrom they will know what to do and how to plan their social and economic business, and make decisions accordingly.

IV. CONCLUSION

Despite there are several concerns about legislative experimentation, with proper schemes, these concerns can be dismissed, and its potential will be realized under certain circumstances. Hainan FTP Law is a brand new stage of legislative experimentation in China, after the special economic zone policy and the pilot free trade zone policy. The liberalization, devolution, and list approach embedded in the Hainan FTP Law exemplify the experimental characters of China's lawmaking. They are products of China's legislative experimentation and intend to explore some new arrangements, too. These experiments will accumulate useful experiences for the cause of reform and opening-up, such as in substantial policies, power allocation, and legislative techniques.