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RESEARCH ARTICLE

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The legal status of the CEPA between the Mainland and Hong Kong of China

Abstract The nature of the Closer Economic Partnership Arrangement (CEPA) is a free trade agreement under the framework of the WTO. For the purpose of clarifying the legal status of the CEPA and the future agreements between the Mainland and other separate customs territories of China, four options are brought forward: (1) To revise the PRC Foreign Trade Law, (2) to make amendment to the Basic Law of Hong Kong Special Administrative Region of China, (3) to have a special law on the conclusion of the interregional agreements, or (4) to amend the PRC Constitution.

Keywords CEPA, HKSAR, WTO, lawfulness

摘要 中国大陆和香港更紧密经贸关系安排的性质属于自由贸易协定，签订 CEPA 需要遵守 WTO 框架规则。为使 CEPA 和中国大陆与中国其他独立关税区之间的未来协议合法化，四种方式可供选择：即修改《中华人民共和国对外贸易法》，修改《香港特别行政区基本法》，对签订区域间协议制定特别法，或修改《中华人民共和国宪法》。

关键词 更紧密经贸关系的安排，香港特别行政区，世界贸易组织, 合法性

The Mainland and Hong Kong Special Administrative Region Closer Economic Partnership Arrangement (CEPA),[1] signed on 29 June 2003, is the first Free

[1] For the official text (in Chinese) of the CEPA, see http://www.tid.gov.hk/sc_chi/cepa/fulltext.html; for the official English translation of the CEPA, see http://www.tid.gov.hk/english/cepa/fulltext.html, or the WTO official document, WT/REG162/1.

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Trade Agreement (FTA) between the Mainland of China and one of its separate customs territories, the Hong Kong Special Administrative Region (HKSAR), and also the first regional trade agreement between two customs territories of one country under the framework of the World Trade Organization (WTO). In October 2004, the Mainland and Macao also signed a CEPA, which is a copy of the first CEPA. Both CEPAs entered into force on 1 January 2004 and were notified to the WTO on 12 January 2004. In this article, the CEPA refers to the first one, i.e., the Mainland-Hong Kong CEPA. The conclusion of the CEPA raises new issues for both international law and Chinese domestic law. This article focuses on the legal status of the CEPA, i.e. whether the CEPA is a lawful agreement from international law and domestic law perspectives. It must be noted that the issues raised by the Mainland-Hong Kong CEPA can also be regarded as the issues raised by the Mainland-Macao CEPA.

Unlike other closer economic partnership agreements,[2] the CEPA does not directly use the word of "agreement" or "treaty", but "arrangement". Although the designation given to an agreement is "legally irrelevant" per se (Klabbers, 1996),[3] and the term "arrangement" may also be used as the term of "treaty" (McNair, 1961) (Glahn, 1986) (Shearer, 1994), it may be meaningful under certain circumstance. More significantly, another free trade agreement which is under negotiations between Hong Kong and New Zealand is entitled "Closer Economic Partnership Agreement", [4] not "Closer Economic Partnership Arrangement". Is there any reason for the special wording of the CEPA? Is the difference of the wording intentional?

From the negotiating history of the CEPA, the term "arrangement" was the result of an understanding of the Mainland and HKSAR negotiators that most FTAs in the world are preferential agreements among states, while the negotiated trade agreement between the Mainland and the HKSAR was under "one country", i.e. China. Therefore, based on the principle of the "one country, two systems",[5] the agreement was entitled "arrangement".[6] So the term "arrangement", instead of "agreement", is intentional, which leads to another question: Does it imply a different legal status of the CEPA? From an international law standpoint, "states

[2] For instance, the Agreement between New Zealand and Singapore on a Closer Economic Partnership, 2000-11-14.

[3] *See* Article II: 1(a),the 1969 Vienna Convention on the Law of Treaties. *See also* 1 Oppenheim's International Law, Peace, Part 2 to 4, § 586, at 1208 (Robert Jennings & Arthur Watts eds., Longman 9th ed. 1992) (1905).

[4] See the WTO Trade Policy Review, Hong Kong, China, Report by the Government, WT/TPR/G/109, ¶ 44.

[5] The "One Country, Two Systems" policy is in the preamble of the HKSAR Basic Law and it is incorporated into the CEPA as a leading principle of the arrangement. See CEPA, art. 2.1.

[6] See the news report entitled the Origin of the CEPA, available at http://www.sznews.com/n/ca407281.htm.

cannot avoid an instrument being a treaty merely by giving it a title suggesting otherwise",[7] so it is a little hasty to make a conclusion that the CEPA is not an international agreement just because of its special title. In order to know the legal status of the CEPA, it is necessary to look at two sides. One side is the place of the CEPA under international law. The other side is the place of the CEPA under PRC domestic law and HKSAR domestic law, especially those laws authorizing the conclusion of treaties, which are called "constitutional requirements" for the validity of treaties. (Sen, 1988) (McNair, 1961) Nevertheless, the precondition to identify the legal status of the CEPA is to clarify its nature.

1 Nature of the CEPA

There is not such a term as free trade agreement or free trade area in the main body of the CEPA and its six annexes, which may raise the question of whether the CEPA is a FTA. In some Chinese scholars' view, the CEPA is not a FTA, but a new type of regional trade agreement under the WTO framework, a so-called "creation". (Weng, Wang, 2004) (Zeng, 2004) In my view, although there is no wording of FTA, the nature of the CEPA is still a free trade agreement.

Firstly, from perspective of content, the CEPA provides that the Mainland and Hong Kong will apply zero tariff to imported goods from each other,[8] which complies with the main characteristic of FTA. Secondly, from perspective of form, the CEPA was notified to the WTO in the name of FTA. On 27 December 2003, China and Hong Kong notified the CEPA to the WTO (Committee on Regional Trade Agreements and the Council for Trade in Services) based on Article XXIV: 7(a) of the GATT 1994 and Article V: 7(a) of the General Agreement on Trade in Services (GATS), and requested that it should be circulated to the WTO Members.[9] The notification clearly states that the purpose of the CEPA is to establish "a free trade area" within the meaning of GATT Article XXIV and GATS Article V.[10] On the same day, China and Macao gave a similar notice to the WTO about the CEPA between China and Macao, also including the wording of "a free trade area".[11] Thirdly, in an official document made by the General Office of the PRC State Council, the CEPA is deemed as an agreement to establish a free trade area.[12] Fourthly, in the WTO practice, the CEPA has also been regarded as FTA. For example, in a meeting of the Council

[7] Oppenheim, supra note 3, at 1209.
[8] CEPA, art. 5.
[9] WT/REG162/N/1, S/C/N/264.
[10] Ibid.
[11] WT/REG163/N/1, S/C/N/265.
[12] *Guobanfa* [2003] No.95, para.1(1).

for Trade in Goods of the WTO held in January 2004, the two CEPAs (one with Hong Kong, the other with Macao) were deemed to be regional trade agreements and treated together with two other FTAs.[13] Both the Mainland and Hong Kong have not indicated any intention to create a new type of regional trade agreement. In fact, the CEPA neither breaks through the scope of GATT Article XXIV, nor creates a new type of regional trade agreement, which is inconsistent with the WTO.[14] On all accounts, the CEPA is a FTA in nature.

2 Position of the CEPA under international law

According to the 1969 Vienna Convention on the Law of Treaties (hereinafter "the Vienna Convention"), a treaty is "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[15] Although the Vienna Convention does not preclude non-state subjects from concluding a treaty,[16] it is generally acknowledged that the subjects of concluding treaties are states and international organizations. (Fitzmaurice, 2002) So far, there has been no international rule allowing two regions under one state to conclude treaties.

It seems that the CEPA, under the Vienna Convention accepted by both the PRC and the HKSAR,[17] is not a treaty because it is not concluded between States or between a state and an international organization. The Mainland is the main body of the PRC;[18] the HKSAR is a special administrative region of the PRC, with

[13] See Minutes of the Meeting of the Council for Trade in Goods, ¶ 4, G/C/M/72 (Jan. 26, 2004) (The other two free trade agreements are the FTA between the US and Singapore, the FTA between the US and Chile).

[14] According to GATT Article XXIV: 5, there are three types of regional trade agreements, i.e., free trade agreement, customs union agreement and interim agreement for the formation of a free trade area or a custom union.

[15] The Vienna Convention, art. 2: 1(a).

[16] Article 3 of the Vienna Convention states: "The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect: (a) the legal force of such agreements . . . . "

[17] The PRC submitted a document acceding to the Vienna Convention on 9 May 1997, which took effect to China on 3 October 1997. The Vienna Convention is also applicable to the HKSAR, see List of Treaties in Force Applicable to the Hong Kong Special Administrative Region, as 26 February 2004, compiled by the Department of Justice of the HKSAR, http://www.justice.gov.hk/interlaw_e.htm.

[18] In the CEPA, the Mainland refers to the entire customs territory of the PRC. In the Notice of the General Office of the State Council, the CEPA is described as an arrangement between the "main body" of a state and its separate custom territory. See *Guobanfa* [2003] No. 95, para. 1(1).

a high degree of autonomy.[19] Historically, the PRC resumed its sovereignty over Hong Kong on 1 July 1997 according to the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong ("Sino-British Joint Declaration") concluded on 19 December 1984,[20] which is a treaty between the PRC and the United Kingdom. (Mushkat, 1997) The legal status of Hong Kong was announced in the Sino-British Joint Declaration as being "directly under the authority of the Central People's Government of the People's Republic of China",[21] and this status is further confirmed in the constitutional document of Hong Kong, i.e. the HKSAR Basic Law.[22]

The economic foundation of establishing a FTA between the Mainland and the HKSAR is that each has a different customs system. Hong Kong's status of a separate customs territory has long been affirmed by the GATT/WTO. Unlike the United Nations whose members should be states,[23] WTO is composed of both states and separate customs territories.[24] Jackson pointed out, "full state 'sovereignty' is not a condition of GATT/WTO membership". (Jackson, 1998) Hong Kong, as a separate customs territory, became a contracting party of the GATT on 23 April 1986 after the United Kingdom declared Hong Kong to possess full autonomy respecting to external commercial relations and to be a contracting party of the GATT according to GATT Article XXVI:5(c).[25] Macao became a contracting party of the GATT, as a separate customs territory also, on 11 January 1991 after a similar

[19] The HKSAR Basic Law, arts.1–2.
[20] The Sino-British Joint Declaration, paras. 1–2.
[21] The Sino-British Joint Declaration, para. 3(2).
[22] Article 1 of the HKSAR Basic Law states: "The Hong Kong Special Administrative Region is an inalienable part of the People's Republic of China." Article 2 states: "The National People's Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law."
[23] U.N. CHARTER arts. 3–4(1).
[24] Article XII:1 of the Agreement Establishing the World Trade Organization states: "Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement."
[25] L/5986, BISD 34S/27 (1986–1987). GATT 1994 Article XXVI: 5(c) states: "If any of the customs territories, in respect of which a contracting party has accepted this Agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, such territory shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party." There are more than 50 nations which got GATT membership according to GATT Article XXIV: 5(c). See John H. Jackson, 48.

declaration to GATT by the government of Portugal.[26] Since 1 January 1995, Hong Kong and Macao has been WTO Members in the name of "Hong Kong, China" and "Macao, China".[27] After their handover to China,[28] Hong Kong and Macao remain the status of separate customs territories under China's sovereignty and the membership in the WTO.[29]

Under the WTO, a free trade area can be established between "two or more customs territories".[30] According to Article XXIV of the GATT 1994, a customs territory means "any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories".[31] The Mainland and the HKSAR have two different customs systems, so they are two customs territories under the WTO. Accordingly, the two contracting parties of the CEPA, as two different customs territories in one sovereign state, could establish a free trade area.

However, the possibility of concluding a FTA between two customs territories under the WTO does not mean the FTA is definitely an international agreement under international law. Because the two parties (also two customs territories) of the CEPA are under one state, the CEPA is different from a typical international agreement. Indeed, it is highly difficult to find international law basis of giving the CEPA the status of a treaty. Nevertheless, is it possible to find any domestic law basis of giving the CEPA the status of a treaty, or an international agreement?

3 Position of the CEPA under PRC domestic law

According to the PRC Constitution,[32] the Standing Committee of the National People's Congress (NPC) shall ratify "treaties" and "important agreements"

[26] GATT Activities 1991, GATT, at 101(Geneva 1992). See also L6806, BISD40S/35 (1992–1993).
[27] See http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.
[28] China resumed sovereignty over Hong Kong on July 1, 1997, and Macao on December 20, 1999.
[29] As to the status of a separate customs territory of Hong Kong, see para. 3(6) of the Sino-British Joint Declaration, and the HKSAR Basic Law, art. 116. As to the status of a separate customs territory of Macao, see the Joint Declaration of the Government of the People's Republic of China and the Government of the Portugal Republic on Question of Macao, para. 2(8); and see the Basic Law of the Macao SAR, art. 112.
[30] GATT art. XXIV: 8(b).
[31] GATT art. XXIV: 2.
[32] The existing PRC Constitution was enacted in 1982 by the 5th NPC, and amended in 1988, 1993, 1999 and 2004. According to Article 57 of the PRC Constitution, The NPC is the highest national institution, with the Standing Committee as its permanent organ.

concluded with foreign states.[33] "Treaties" and "important agreements" refer to: (1) Treaties of friendship and cooperation, treaties of peace and similar treaties of a political nature; (2) treaties and agreements relating to territory and delimitation of boundary lines; (3) treaties and agreements relating to judicial assistance and extradition; (4) treaties and agreements which contain stipulations inconsistent with the laws of the PRC; (5) treaties and agreements which are subject to ratification as agreed by contracting parties; and (6) other treaties and agreements subject to ratification.[34]

It is evident that the CEPA, if it is a treaty or important agreement, does not belong to category (1) to (5). The CEPA, as a free trade agreement, is also different from the first free trade agreement that China signed with the ASEAN countries, i.e., the ACFTA Framework Agreement. The latter requires the internal ratification procedures for its entry into force.[35] From the wording of CEPA Article 23, it is unnecessary to get ratification from the NPC or its Standing Committee, because the CEPA took effect on the day of the signature. More significantly, the CEPA did not get prior or post authorization from the NPC or its Standing Committee, and after the conclusion of the CEPA, the NPC or its Standing Committee did not raise an objection to it, or ask to review it. This acquiescence implies that the CEPA does not belong to category (6) of the "treaties" and "important agreements" that are subject to ratification.[36] Therefore, the CEPA is not a "treaty" or an "important agreement" under China's legal system.

In China, the law regulating conclusion of treaties is the Law of the PRC on the Procedure of the Conclusion of Treaties.[37] Article 2 of the Law provides: "This Law shall be applicable to bilateral or multilateral treaties and agreements and other instruments of the nature of a treaty or agreement concluded between

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[33] The PRC Constitution, art. 67(14). See also the Law of the People's Republic of China on the Procedure of the Conclusion of Treaties, art. 3(2).

[34] The Law of the People's Republic of China on the Procedure of the Conclusion of Treaties, art.7.

[35] The ACFTA Framework Agreement, art. 16(2). However, it must be pointed out that it is unclear whether the ACFTA is an "important agreement" which should be ratified by the NPC Standing Committee, or merely an ordinary international agreement which should be approved by the State Council.

[36] According to prevailing academic view, what "other treaties and agreements subject to ratification" of category (6) include are subject to the decision of the Standing Committee of the National People's Congress. See "A Few Questions on International Law and International Treaties", the 14th Law Lecture Held by the Standing Committee of the NPC, http://www.people.com.cn/GB/14576/15097/2369578.html, 2004-3-2. The NPC Standing Committee did not make a decision to require the review or ratification of the CEPA after its signature.

[37] The Law of the People's Republic of China on the Procedure of the Conclusion of Treaties was passed by 17th meeting of the Standing Committee of the 7th NPC on December 28, 1990, effective on the same date.

the People's Republic of China and foreign states." Beyond all doubts, Hong Kong, as a Special Administrative Region, is part of China, not a foreign state, which excludes the application of the Law of the PRC on the Procedure of the Conclusion of Treaties.

The only Chinese law directly related to the conclusion of free trade agreements or other regional trade agreements is the Foreign Trade Law (amended 2004).[38] Article 5 of the Foreign Trade Law provides: "The People's Republic of China shall, based on the principle of equality and mutual benefit, promote and develop trading relations with other states and regions, conclude or join customs union agreements, free trade agreements or other regional economic and trade agreements, join regional trade organization." It seems that the PRC may conclude FTAs not only with states, but also with regions. Do the "regions" include Special Administrative Regions like Hong Kong and Macao? The Foreign Trade Law does not define the concept of "regions", however, Article 69 of the Foreign Trade Law expressly provides that the law does not apply to Hong Kong or Macao.[39] Therefore, the Foreign Trade Law cannot be the legal foundation for the conclusion of the CEPA though it is the only direct legal source for China to conclude regional trade agreements.

On the face, the CEPA is an agency-to-agency agreement between two levels within one state, i.e., central and local. The HKSAR government agency responsible for signing the CEPA is the Department of Finance of the HKSAR. The corresponding PRC government agency is the Ministry of Commerce (hereinafter "MOFCOM"), which had obtained the authorization from the State Council.[40] Meanwhile, the MOFCOM has the function of CEPA negotiations and implementation.[41] This function also comes from the authorization of the State Council.[42] Therefore, the CEPA could be regarded as an agreement between the PRC central government and the HKSAR government. According to

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[38] The Foreign Trade Law of the PRC was promulgated on May 12, 1994 by the 7th meeting of the Standing Committee of the 8th NPC and came into force on July 1, 1994, amended by the 8th meeting of the Standing Committee of the 10th NPC on April 6, 2004.

[39] Article 69 of the Foreign Trade Law of the PRC (2004 amended) states: "The Law shall not apply to separate customs territories of the People's Republic of China."

[40] *Guobanfa* [2003] No.95, pmbl.

[41] The internal institution of the MOFCOM responsible for Hong Kong affairs is the Department of Taiwan, Hong Kong and Macao. One of the main functions of the Department of Taiwan, Hong Kong and Macao is to "play a leading role in organizing negotiations, implementation and review of the CEPAs with Hong Kong and Macao, and other economic communications and cooperations." See Notification on Publication of the Main Functions and Internal Institutions of Departments, Offices and Bureaus in the MOFCOM, *Shangwubu Banfa* [2003] No.7, 2003-6-26.

[42] See Notification on the Rules of Main Functions, Internal Institutions and Personnel Arrangement of the MOFCOM, made by the General Office of the State Council, *Guobanfa* [2003] No.29, para. 2(12), 2003-4-25.

Article 3 of Organization Law of the State Council of the PRC, the State Council shall perform functions and powers authorized by the PRC Constitution. However, the PRC Constitution does not empower the State Council to conclude treaties or agreements with a Special Administrative Region.[43]

4 Position of the CEPA under HKSAR domestic law

The HKSAR has the capacity to conclude certain treaties and international agreements in the name of "Hong Kong, China". This capacity is first guaranteed by paragraph 3(10) of the Sino-British Joint Declaration, which states: "The HKSAR may on its own, using the name 'Hong Kong, China', maintain and develop economic and cultural relations, and conclude relevant agreements with states, regions and relevant international organizations… " The Annex 1 of the Sino-British Joint Declaration further explains China's basic policy for Hong Kong, which once again acknowledges Hong Kong's power to conclude agreements relating to "economic, trading, financial, shipping, communication, tourism, cultural, sporting or other areas" with "states, regions and relevant international organizations".[44] Besides, Hong Kong's capacity to conclude agreements was further confirmed in Hong Kong domestic law. Article 151 of the HKSAR Basic Law[45] reads as follows: "The Hong Kong Special Administrative Region may on its own, using the name "Hong Kong, China", maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields."

All above legal documents allow the HKSAR to conclude certain kinds of agreements with "states" and "regions", but the problem is that none have defined the domain of "states" or "regions". HK has full capacity to conclude trade agreements with the European Community. However, is the HKSAR able to conclude trade agreements with the Mainland? [46] If so, is the Mainland

[43] Article 89(9) of the PRC Constitution only provides that the State Council has the right to conclude treaties and agreements with "foreign states".
[44] See Annex 1 of the Sino-British Joint Declaration, para. 11.
[45] The HKSAR Basic Law was enacted by the 3rd session of the 7th NPC on 4 April 1990 and took effect on 1 July 1990. Although the HKSAR Basic Law was not enacted by the HKSAR legislature, it is the foundation of the HKSAR domestic law. See Lord Irvine's comment for the draft of the HKSAR Basic Law, Lee M C M (1988), 309, 324.
[46] Article 136 of the Basic Law of the Macao SAR is similar to Article 151 of the Basic Law of the HKSAR, providing the Macao SAR to conclude agreements with "states, regions and international organizations" in respect of relevant fields. However, it is also unclear whether the Macao SAR is able to conclude agreements with the Mainland of China.

regarded as a "state" or a "region" in the agreement? What is the legal status of such agreement under the HKSAR legal framework? There is not a clear answer from current Hong Kong laws. In accordance with Article 18 of the HKSAR Basic Law, the laws applicable to Hong Kong include three parts, i.e., the HKSAR Basic Law, the laws previously in force in Hong Kong before the enactment of the HKSAR Basic Law,[47] and the laws enacted by the legislature of the HKSAR, all of which fail to provide any legal basis upon which an agreement between the Mainland and the HKSAR can be established. Moreover, it is noteworthy that both the Sino-British Joint Declaration and the HKSAR Basic Law provide that HKSAR may use the name of "Hong Kong, China" to conclude agreements with states, regions and international organizations. However, in the CEPA, the HKSAR uses the name "HKSAR" as a contracting party, instead of "Hong Kong, China". This subtle difference in languages further increases the distance between the CEPA and the HKSAR Basic Law.

5 Suggestions for a lawful CEPA

It seems that the issue of concluding agreements between the HKSAR and the Mainland was beyond the considerations of Chinese and British negotiators when they negotiated conditions for the handover of Hong Kong from the United Kingdom to China, and it was also outside the thoughts of the draftsmen of the HKSAR Basic Law. The HKSAR Basic Law does not provide domestic law origin to satisfy the constitutional requirements of the validity of agreements between the Mainland and the HKSAR. Moreover, although the HKSAR Basic Law is only applicable to the territory of Hong Kong, it is also well known in the Mainland because it is the Mainland that enacted it. Therefore, the lack of interregional agreement-making capacity for both the Mainland and the HKSAR seems "manifest" to each other.[48] In such case, because the conclusion of the CEPA is, internationally and domestically, unlawful, the CEPA has to be deemed to be an unlawful interregional FTA, except under the framework of the WTO which allows two separate customs

[47] Article 8 of the HKSAR Basic Law states: "The Laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this [Basic] Law, and subject to any amendment by the legislature of the HKSAR."

[48] Article 46 of the Vienna Convention provides that a State may not claim its consent of concluding a treaty invalid due to violation of its internal law, unless the violation was manifest and concerned a rule of its internal law of fundamental importance.

territories to establish a FTA provided the FTA is consistent with GATT Article XXIV and GATS Article V.

If the conclusion of the CEPA is unlawful due to contractual incapacity of the two sides of the agreement, then another question arises: What is the legal basis of applying the CEPA in the Mainland and the HKSAR under the principle of the "one country, two systems"? On the one hand, since the CEPA is not an international agreement, it is not China's international law duty to implement it. On the other hand, because the CEPA cannot be conferred legal status under existing domestic law of the PRC and the HKSAR, it is not the "legal" duty of the PRC or the HKSAR to implement the arrangement.

For the purpose of legalizing the CEPA and future agreements between the Mainland and the HKSAR, this article brings forward the following options.

The first option is to revise the PRC Foreign Trade Law. The Foreign Trade Law of 2004 introduces the term of FTA in the Chinese legal system for the first time, thereby providing a legal basis for negotiating and signing FTAs with foreign states and regions. However, the Foreign Trade Law does not apply to the separate customs territories of the PRC, which limits the effect of the Foreign Trade Law in respect of regional integration, cuts the link between the CEPA and the Foreign Trade Law, loses a good opportunity to offset the negative effect caused by the Constitutional lacuna of no legal basis for concluding agreements between the Mainland and the HKSAR. In my view, the application of the Foreign Trade Law to the relations with the HKSAR is feasible. The PRC has been placing the trade relations with the HKSAR under the framework of "foreign trade" for many years. For example, the MOFTEC, the government agency dealing with PRC's foreign economic and trade affairs, as provided by the Foreign Trade Law, was originally responsible for negotiations of the CEPA with the HKSAR. From March 2003, after the adjustment of functions of the MOFTEC, its name was changed to the MOFCOM,[49] but its functions relating to foreign trade, including organizing the CEPA negotiations and implementation, remain.[50] Furthermore, the negotiation and signature process of the CEPA is consistent with Article 48 of the Foreign Trade Law, which provides that "the department in charge of foreign trade", i.e. the MOFCOM, shall carry out multilateral and bilateral foreign trade consultations, negotiations and dispute settlement. In addition, because the main aim of the revisions of the 1994 Foreign Trade Law was to implement China's WTO commitments and to

[49] See Decision on Institutional Reform Plan of the State Council made by the first session of the 10th NPC, 10 March 2003. See also Notification on the Establishment of Institutions made by the State Council, *Guofa* [2003] No.8, March 21, 2003.
[50] *Guobanfa* [2003] No.29.

transfer WTO rules into Chinese domestic law,[51] if the Foreign Trade Law does not apply to the HKSAR, how can the PRC implement its WTO commitments and WTO obligations when dealing with Hong Kong and Macao, both of which are also WTO members? The non-applicability of the Foreign Trade Law to the HKSAR will inevitably result in discrimination in applying the PRC Foreign Trade Law to WTO members, no matter who will be accorded more-favored-treatment, Hong Kong, or other WTO members, which is apparently inconsistent with the most-favored-nation treatment. Lastly, in my view, if the PRC tries to apply the Foreign Trade Law to its relations with the HKSAR, it should be borne in mind that the Foreign Trade Law does not apply to the HKSAR territory, but to the trade relations between the PRC and the HKSAR which occur within the Mainland of China. Such consideration comes from the due respect to the HKSAR Basic Law and the "high degree of autonomy" of the HKSAR.

The second option is to make amendment to the HKSAR Basic Law. The existing Article 151 of the HKSAR Basic Law merely provides that the HKSAR may conclude some agreements with states, regions and relevant international organizations in the name of "Hong Kong, China". My suggestion is to add one paragraph to Article 151: "The HKSAR may also conclude relevant interregional agreements with other Special Administrative Regions or the Mainland, in the name of 'HKSAR', and the conclusion and implementation affairs of the interregional agreements shall be regulated in a special law enacted by the National People's Congress (or the NPC Standing Committee)." With respect to the HKSAR Basic Law, another possible way to smooth conclusion of agreements between the two sides is to interpret Article 151 of the HKSAR Basic Law so that the Mainland may be included in the concept of "regions".[52]

The third option is to have a special law providing negotiation, conclusion, ratification, implementation, termination and interpretation of interregional agreements between the Mainland and Special Administrative Regions, or between one Special Administrative Regions and another. This special law is not exclusive, but may be coexisted with other options.

The fourth option is to amend the PRC Constitution. As discussed in the previous section, the NPC Standing Committee merely ratifies "treaties" and "important agreements" with "foreign states". The CEPA, as a FTA in nature,

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[51] Yu Guangzhou, one of the Vice Ministers of the MOFCOM, Address at a news interview, http://www.mofcom.gov.cn/article/200404/20040400206411_1.xml, 2004-4-7. See also the new report entitled the Main Contents and Significance of the Revisions of the Foreign Trade Law, News Office of the MOFCOM, http://www.mofcom.gov.cn/article/2004-4/ 2004040020 5975_1.xml.

[52] The power of interpretation of the HKSAR Basic Law is vested in the NPC Standing Committee. See the HKSAR Basic Law, art. 158.

concerns China's fundamental foreign trade policy, and the commitments in the CEPA are deeper and broader than China's commitments in the WTO. Accordingly, the CEPA will have a great impact on China's existing laws. In the notice issued by the General Office of the State Council, entitled "the Notice on Relevant Works for Implementing the CEPA",[53] the State Council requires that the existing policy and rules should be "adjusted and revised" according to the CEPA,[54] which clearly indicates the importance of the CEPA. Therefore, the PRC Constitution may include free trade agreements in "important agreements", and broaden the subjects so as to contain Special Administrative Regions. One potential issue of this option is that it may weaken the authority of the NPC, which now only reviews and ratifies treaties or important agreements with foreign states. A stand-by option is that free trade agreements are regarded as "ordinary agreements", which are subject to the approval of the State Council. This stand-by option also needs the amendment to the PRC Constitution in order to include agreements with Special Administrative Regions.[55]

In sum, the CEPA has no legal basis in the existing PRC and HKSAR domestic law. It is necessary, under the framework of the "One Country, Two Systems", to clarify the legal status of agreements between the Mainland and the HKSAR, by conferring the CEPA or other interregional agreements legal validity, providing their implementation legal effect (rather than administrative effect from administrative notifications). More significantly, through legalization of the CEPA, one of the oldest principles of international law, i.e. pacta sunt servanda, could be borrowed as a legal obligation binding on two separate customs territories under "One Country".

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[53] *Guobanfa* [2003] No. 95.
[54] Id, para.2(2).
[55] Article 89(9) of the PRC Constitution provides that the State Council is responsible for concluding "treaties" and "agreements" with "foreign states".

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