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# CEPA: A LAWFUL FREE TRADE AGREEMENT UNDER “ONE COUNTRY, TWO CUSTOMS TERRITORIES?”

*Wei Wang\**

## I. INTRODUCTION

THE Mainland China and Hong Kong Special Administrative Region Closer Economic Partnership Arrangement (CEPA)<sup>1</sup> is the first Free Trade Agreement (FTA) between Mainland China and one of its separate customs territories, the Hong Kong Special Administrative Region (HKSAR). It is also the first regional trade agreement between two customs territories of one country to be created under the framework of the World Trade Organization (WTO). 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, that is whether the CEPA is a lawful agreement when looked at from international law and domestic law perspectives. First, the article introduces the background and negotiating history of the CEPA. Second, it gives an overview of the structure of the CEPA. Third, it discusses the nature and the legal status of the CEPA. And fourth, it provides some general suggestions for amending relevant People's Republic of China (PRC) laws in order to legalize the trade agreement under the one country, two customs territories arrangement.

## II. BACKGROUND AND NEGOTIATING HISTORY OF THE CEPA

### A. BACKGROUND

At the end of the 1970s, the PRC adopted a policy of reform and increasing openness. Since then, an economic and trade relationship has

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1. Closer Economic Partnership Arrangement between China and Hong Kong, China, Committee on Regional Trade Agreements, Jan. 20, 2004, WTO Doc. WT/REG162/1, available at [http://docsonline.wto.org/gen\\_home.asp?language=1&\\_=1](http://docsonline.wto.org/gen_home.asp?language=1&_=1) [hereinafter CEPA].

developed between Hong Kong and China,<sup>2</sup> laying the economic ground for establishing a free trade area.<sup>3</sup> After China's resumption of sovereignty over Hong Kong in July 1997, this economic relationship has been strengthened, especially with respect to the trade between Hong Kong and Guangdong Province. From 1997 to 2002, the direct trade volume between Hong Kong and Guangdong was more than USD \$200 billion.<sup>4</sup> The impact of the Asian financial crisis at the end of the 1990s, the terrorist attacks of 9/11, and the unexpected Severe Acute Respiratory Syndrome (SARS) outbreak in early 2003, however, dealt a heavy blow to Hong Kong's economy, leaving it in need of new stimulus. Meanwhile, facing challenges from other Asian areas, the cooperation between Hong Kong and Guangdong needs a second niche.<sup>5</sup> After resumption of sovereignty over Hong Kong, Chinese leaders have been unwilling to recognize the region's problems. While the impetus for this may be political, economic, or both, they nonetheless support any plan to drive Hong Kong's economy.<sup>6</sup> The CEPA embodies this type of support from the PRC Central Government to Hong Kong (and Macao).<sup>7</sup>

The second backdrop against which to consider the CEPA is China's entry into the WTO.<sup>8</sup> It is commonly recognized that China's WTO entry has precipitated a movement toward regional trade integration between

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2. See TRADE POLICY REVIEW BODY, TRADE POLICY REVIEW, HONG KONG, CHINA REPORT BY THE GOVERNMENT ¶¶ 25-26 (WTO, Report No. WT/TPR/G/109, 2002), available at [http://docsonline.wto.org/gen\\_home.asp?language=1&\\_1](http://docsonline.wto.org/gen_home.asp?language=1&_1) [hereinafter TRADE POLICY] (stating that China is Hong Kong's largest trading partner and has for decades been Hong Kong's principal supplier of imports, the largest re-export market and one of the largest domestic export markets, and that in 2001, China accounted for 40.3 percent of Hong Kong's total merchandise trade).
  3. Zhao Jinping, *Focusing on the "Two Sides Arrangement,"* LIAOWANG NEWS WKLY., June 30, 2003, at 14.
  4. People's Daily Online, *Trade between Guangdong, Hong Kong Brisk in First Quarter: Despite the Influence of Severe Acute Respiratory Syndrome (SARS), South China's Guangdong Province Still Boasts a Brisk Trade with Hong Kong*, at [http://english.people.com.cn/200304/14/eng20030414\\_115134.shtml](http://english.people.com.cn/200304/14/eng20030414_115134.shtml) (last updated Apr. 14, 2003); Chen Zuoer, Address at the Annual Conference of the 21st Century Forum (Dec. 18, 2003), available at <http://www.Szed.com/n1/ca684774.htm>.
  5. Press Release, Hong Kong Special Administrative Region, Speech by the Chief Executive (July 24, 2001), available at <http://www.info.gov.hk/gia/general/200107/24/0724346.htm>; Chen Zuoer, Address at a News Conference (June 28, 2003), available at <http://www.southcn.com/news/hktwma/shizheng/200306290164.htm> [hereinafter Zuoer Address].
  6. See Zuoer Address, *supra* note 5.
  7. General Office of the State Council, The Notice on Relevant Works for Implementing the CEPA, GUOBANFA [2003] No. 95, para. 1(2) (2003) [hereinafter Implementing the CEPA]; Wen: *CEPA is Special Arrangement under "One Country, Two Systems" Principle*, XINHUANET NEWS AGENCY, June 29, 2003, available at [http://news.xinhuanet.com/english/2003-06/29/content\\_943706.htm](http://news.xinhuanet.com/english/2003-06/29/content_943706.htm) (discussing address by Chinese Premier Wen Jiabao a meeting with the Hong Kong People after his presence at the signature ceremony of the CEPA).
  8. See Protocol on Accession of the People's Republic of China, Notification of Acceptance and Entry into Force, Nov. 20, 2001, WTO Doc. WLI/100, available at [http://docsonline.wto.org/gen\\_home.asp?language=1&\\_1](http://docsonline.wto.org/gen_home.asp?language=1&_1) (noting that on November 11, 2001, the People's Republic of China accepted the Protocol on Accession of the People's Republic of China).

China and its neighbors.<sup>9</sup> In tracing the history of China's foreign trade over the last two decades, one can see that the PRC has adopted a two-step foreign trade strategy which focuses on multilateralism before regionalism or bilateralism (that is first enter the WTO, then enter into FTAs).<sup>10</sup> Current Chinese foreign trade policy is a mixture of multilateralism and regionalism. For many years, the PRC's focus had been on its reentry into the General Agreement on Tariffs and Trade (GATT) (before 1995) and its accession into the WTO (after 1995).<sup>11</sup> Today, China pays close attention to regional trade integration so that it can maximize its trade benefits through a bifocal trade policy. The CEPA is a result of a significant strategic decision made by the Central Committee of the Communist Party and the State Council of the PRC government.<sup>12</sup> In fact, for China, the CEPA has become an experiment in further developing regional economic cooperation.<sup>13</sup> The establishment of two free trade areas with Hong Kong and Macao arouses expectations of a uniform Greater China Free Trade Area<sup>14</sup> that would include Mainland China, Hong Kong, Macao, and Taiwan. The probability of concluding a free trade agreement between Mainland China and Taiwan, however, is very low considering the fact that normal political relations have yet to be established between the two areas.<sup>15</sup>

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9. Wang Qin, *Progress and Prospect of China-ASEAN Free Trade Area*, 1 J. OF XIAMEN U. (ARTS & SOCIAL SCIENCE EDITION) 85, 86 (2004).
  10. See Quan Yi, *A New Wave of Bilateral FTA in Asia-Pacific Region and China's Strategic Choice*, 4 DONGNAN XUESHU 75, 76-77 (2003).
  11. From 1986 to 2001, China's foreign trade negotiations were mainly surrounding the accession to the GATT/WTO. For the history of China's WTO accession, see Yang Guohua & Cheng Jin, *The Process of China's Accession to the WTO*, 4 J. INT'L ECON. L. 297-328 (2001).
  12. Implementing the CEPA, *supra* note 7, at para. 1(1). The State Council is the highest administrative agency and responsible for the National People's Congress and its Standing Committee. See CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA arts. 85, 92 [hereinafter PRC CONSTITUTION].
  13. Implementing the CEPA, *supra* note 7, at para. 2(5).
  14. Liu Yi, *Economic Co-operation Between Guangdong and Hong Kong Under the CEPA*, 6 GUANGDONG SHEHUI KEXUE 110, 113 (2003); Gao Konglian, *The Key of Signing a FTA or CEPA between the Two Sides of Taiwan Strait is to Seek Practicability*, ECON. DAILY, Nov. 14, 2003, available at <http://news.kaoh.com.tw/show.php?d=58>; see Li Luoli, *What is More Important than the CEPA?* 7 KAIFANG DAOBAO 5, 6 (2003); see also *Merchants in Taiwan Hope that the Two Sides of the Taiwan Strait Sign an Agreement Similar to the CEPA*, available at <http://news.rednet.com.cn/Articles/2003/11/487666.htm> (last visited Aug. 31, 2004).
  15. Taiwan Affairs Office of the State Council, Taiwan Affairs Office of CPC Central Committee, *Taiwan Affairs Office of State Counsel are Authorized to Issue Statement on Cross-Straits Relations*, available at [http://www.gwytb.gov.cn:8088/detail.asp?table=Headlines&title=Headlines&offset=50&m\\_id=154](http://www.gwytb.gov.cn:8088/detail.asp?table=Headlines&title=Headlines&offset=50&m_id=154) (last visited Aug. 31, 2004) (Chinese officials expressed a strong willingness to establish a CEPA-like arrangement with Taiwan. On May 17, 2004, the Taiwan Affairs Office of the Central Committee of the Communist Party of China and the Taiwan Affairs Office of the State Council were authorized to issue a statement on Taiwan issues, in which Mainland China first officially proposed to establish a closer economic partnership arrangement based on reciprocity and mutual benefits with Taiwan. However, the Authorized Statement set up several conditions for the free trade arrangement with Taiwan, i.e. Taiwan leaders must recognize that Mainland China and Taiwan are the same country, and Taiwan leaders must give up their push for indepen-

The third background consideration is the Hong Kong government's adoption of a "more open-minded approach in pursuing high-standard FTAs."<sup>16</sup> For instance, Hong Kong began to negotiate a Closer Economic Partnership (CEP) Agreement with New Zealand in May 2001.<sup>17</sup> As a WTO Member, Hong Kong is convinced that free trade agreements consistent with WTO rules can bring about an expansion of trade and investment.<sup>18</sup> This belief was promoted by Hong Kong merchants, who, before and after China's WTO entry, both expected to benefit more from and worried about the possibility of losing the intermediate advantages Hong Kong had enjoyed. The Hong Kong General Chamber of Commerce suggested to the Chief Executive of the HKSAR,<sup>19</sup> Tung Chee Hwa, that Hong Kong and Mainland China should study the FTA model of the North American Free Trade Agreement (NAFTA).<sup>20</sup> Under appeals from merchants, scholars, and professionals,<sup>21</sup> the idea of establishing an FTA came to the mind of the HKSAR government.<sup>22</sup>

## B. NEGOTIATING HISTORY

On December 19, 2001, only one week after China became a WTO member, the chief executive of the HKSAR, during his visit to Beijing, proposed to establish an FTA between Mainland China and Hong Kong.<sup>23</sup> This suggestion received a positive response from China's central government. On January 25, 2002, the Department of Finance of the HKSAR and the Ministry of Foreign Trade and Economic Cooperation of the People's Republic of China (MOFTEC) held a first-round negotia-

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dence); see Zhang Mingqing, Address at a news conference held by the Taiwan Affairs Office of the State Council (May 24, 2004), available at [http://www.bjstb.gov.cn/IMAGES/GTBXWFBH/new\\_page\\_31.htm](http://www.bjstb.gov.cn/IMAGES/GTBXWFBH/new_page_31.htm) (In a statement by Zhang Mingqing, the spokesman of the Taiwan Affairs Office of the State Council, the conditions were simplified to one—realization of "direct, comprehensive and two-way 'three links' (Santong, i.e. mail link, transportation link and commerce link)").

16. TRADE POLICY, *supra* note 2, at ¶ 41.

17. At present (August 2004), the Hong Kong and New Zealand CEP Agreement is still in negotiations.

18. TRADE POLICY, *supra* note 2, at ¶ 42.

19. Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Apr. 4, 1990, art. 43 (entered into force July 1, 1997), available at [http://www.info.gov.hk/basic\\_law/fulltext/](http://www.info.gov.hk/basic_law/fulltext/) [hereinafter HKSAR Basic Law] (The Chief Executive is the administrative head of the HKSAR).

20. See CCGOV, *The Big Events of the CEPA*, available at <http://www.ccgov.org.cn/fgov/f0002/f2003070022.htm> (Apr. 29, 2004) [hereinafter *Big Events*].

21. Chi Fulin, *Zhongguo Ziyou Maoyiqu de Gouxiang* [Conceiving a Chinese Free Trade Area], Address at the Forum on the Change of Economic and Trade Relations between the Mainland China, Taiwan, Hong Kong, and Macao after the Mainland China and Taiwan's Entry to the WTO (Nov. 23, 2003), available at <http://www.homeoc.org.cn/wto/2shore4district/chinese%20free-trade%20area.htm>; see also Hu Angang, *A Design of Free Trade Agreements between Three Countries and Four Areas, China, HKSAR, Japan, and Korea*, 3-4 GUOJI JINGJI PINGLUN [Int'l Econ. Rev.] 17-20 (2001).

22. See SZ News, *The Origin of the CEPA*, available at <http://www.sznews.com/n/ca407281.htm> (June 30, 2003) [hereinafter *Origin of the CEPA*].

23. CEPA, *supra* note 1, fn. 1 (indicating that in the CEPA, Mainland China refers to the entire customs territory of the People's Republic of China).

tion to discuss the economic and trade arrangement, and formally name the FTA “closer economic partnership arrangement.”<sup>24</sup> The second-round negotiation was convened on March 27, 2002. On November 28, 2002, the fourth meeting was held between the Hong Kong Trade and Industry Department and the MOFTEC. On June 29, 2003, the main body of the CEPA was signed and went into effect. Six Annexes to the CEPA were signed and took effect on September 29, 2003. The initial negotiating history of the CEPA totaled less than two years, evidencing a new characteristic of current FTAs – speed.<sup>25</sup> It also reflects the Chinese central government’s support of the HKSAR. During early 2003, the SARS outbreak was so serious in Hong Kong and Mainland China that some worried the CEPA negotiation process would be delayed. However, Chinese leaders decided to speed up the progress of the negotiations.<sup>26</sup>

According to article 3.2 of the CEPA, the CEPA negotiations should be continuous to broaden its content. . On August 27, 2004, the two sides reached an agreement to provide further liberalization measures on trade in goods and services for the second stage of the CEPA (CEPA II). In addition to the Mainland China and Hong Kong CEPA, there is another CEPA between Mainland China and Macao, which was signed and took effect on October 17, 2003, and which is, in fact, a virtually identical copy of the CEPA between Mainland China and Hong Kong. In this article, the term CEPA refers to the CEPA between Mainland China and Hong Kong, unless otherwise stated.

The objectives of the CEPA are “to promote the joint economic prosperity and development of the Mainland and the Hong Kong Special Administrative Region . . . to facilitate the further development of economic links between the two sides and other countries and regions,”<sup>27</sup> and to strengthen trade and investment cooperation between the two sides.<sup>28</sup> In order to realize those purposes, three measures have been introduced: (1) progressively reducing or eliminating tariff and non-tariff barriers to trade in goods; (2) progressively achieving liberalization of trade in services through the reduction or elimination of discriminatory measures; and (3) promoting trade and investment facilitation.<sup>29</sup> According to the CEPA, starting January 1, 2004, Mainland China would apply zero tariff to *some* goods imported from Hong Kong.<sup>30</sup> No later than January 1, 2006, Mainland China will apply zero tariff to *all* goods imported from Hong Kong.<sup>31</sup>

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24. *Big Events*, *supra* note 20.

25. Bin Jiancheng, *Comparison and Reference of the New Generation FTAs*, 5 JINGJI SHEHUI TIZHI BIJIAO [Comparison of Economic and Social Systems] 85-90 (2003).

26. *Origin of the CEPA*, *supra* note 22.

27. CEPA, *supra* note 1, pmbl.

28. *Id.* art. 1.

29. *Id.*

30. *Id.* art. 5.2.

31. *Id.* art. 5.3.

The CEPA is not China's first try to establish a free trade area. During the 2000 Singapore summit meeting between the Association of South East Asian Nations (ASEAN) and China, then Chinese Premier Zhu Rongji proposed to establish an expert group to study the issue of regional integration between the ASEAN and China. In May 2002, the first meeting of the China-ASEAN negotiation Committee was held in Beijing. On November 4, 2002, China and ten ASEAN members signed the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the People's Republic of China (Framework Agreement), with the purpose of establishing the ASEAN-China Free Trade Area (ACFTA) within ten years. According to article 16 of the ACFTA Framework Agreement, the Framework Agreement shall enter into force on July 1, 2003. However, ASEAN countries and China did not complete the internal procedures for the agreement to take effect prior to July 1, 2003. To date, the ACFTA Framework Agreement has not yet come into force.<sup>32</sup>

### III. STRUCTURE OF THE CEPA

The CEPA is composed of two parts. The first part is the main body of the CEPA, which includes a Preamble and six Chapters (containing twenty-three articles). Chapter 1 mainly stipulates the five principles of the CEPA. The first principle is to abide by the "one country, two systems" ideology,<sup>33</sup> the political and legal foundation of Hong Kong's return to China. The second principle is to be consistent with the rules of the WTO.<sup>34</sup> The third principle is to satisfy the needs of both sides.<sup>35</sup> The fourth principle is to achieve reciprocity and mutual benefits, complementarities, and joint prosperity.<sup>36</sup> The fifth principle is to take progressive action, dealing with the easier subjects before the more difficult ones.<sup>37</sup> Chapter 2 of the CEPA is related to trade in goods, dealing with tariffs, tariff rate quota and non-tariff measures, anti-dumping measures, subsidies and countervailing measures, and safeguards. Chapter 3 provides rules of origin. Chapter 4 covers trade in services, including five articles on market access, service suppliers, financial cooperation, cooperation in tourism, and mutual recognition of professional qualifications. Chapter 5 is concerned with trade and investment facilitation. Chapter 6 contains other provisions, such as exceptions, institutional arrangements,

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32. The ACFTA Framework Agreement is available at <http://www.aseansec.org/13196.htm>. For the difficulties of the ACFTA Framework Agreement, see Wang Weiyi, *The Difficulties and Prospects of China-ASEAN Free Trade Area*, 10 DANGDAI YATAI [Contemporary Asia and Pacific] 26-29 (2003) (The barriers to establishing the ACFTA include, *inter alia*, a small market volume between the ASEAN and China, similar economic structures, political disputes (especially the dispute on the South China Sea), and the challenges from Korea and Japan).

33. CEPA, *supra* note 1, art. 2.1.

34. *Id.* art. 2.2.

35. *Id.* art. 2.3.

36. *Id.* art. 2.4.

37. *Id.* art. 2.5.

and amendments. One of the Vice Ministers of Commerce of the PRC, An Min, and the Financial Secretary of the HKSAR, Antony Leung, as representatives of Mainland China and the HKSAR, signed the main body of the CEPA.

The second part contains six annexes. Annex 1 is entitled Arrangements for Implementation of Zero Tariff for Trade in Goods. Annex 2 is entitled Rules of Origin for Trade in Goods. Annex 3 is entitled Procedures for the Issuing and Verification of Certificates of Origin. Annex 4 is entitled Specific Commitments on Liberalization of Trade in Services, including nine paragraphs and two tables. Table 1 (Mainland China's Specific Commitments on Liberalization of Trade in Services to Hong Kong) provides that, starting January 1, 2004, China shall open certain service sectors, including legal services, accounting, auditing and book-keeping services, architectural services, engineering services, integrated engineering services, urban planning and landscape architectural services, medical and dental services, real estate services, advertising services, management consulting services, convention services and exhibition services, telecommunication services, audiovisual services, construction and related engineering services, distribution services, financial services (insurance, banking and securities services), tourism and travel related services, and transport services. Table 2 (Hong Kong's Specific Commitments on Liberalization of Trade in Services to the Mainland China) has not been made yet.<sup>38</sup> Annex 5 is entitled Definition of 'Service Suppliers' and Related Requirements. Annex 6 is entitled Trade and Investment Facilitation. The six Annexes form an integral part of the CEPA.<sup>39</sup>

Moreover, the CEPA II reached in August 2004, as supplement to and part of the CEPA, contains the Record of Consultations on Further Liberalization under the Mainland and Hong Kong Closer Economic Partnership Arrangement, and two Annexes. Annex 1 is the Second Batch of Hong Kong Origin Products for Implementation of Zero Import Tariff; Annex 2 is Specific Contents on Further Liberalization of Trade in Services for Hong Kong. According to the CEPA II, Mainland China shall apply zero tariff to products under 713 Mainland 2004 Tariff Codes, and provide more preferential treatment to relevant services from Hong Kong.

It is noteworthy that the main body of the CEPA, its six Annexes, and the CEPA II are written in the Chinese language,<sup>40</sup> so the Chinese ver-

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38. According to paragraph 6 of Annex 4, the two sides will formulate and implement liberalization of Hong Kong's service sectors for the Mainland China and the relevant specific commitments will be listed in Table 2. The temporary unilateral benefit to Hong Kong embodies the support of the PRC Central Government to the HKSAR. *See id.* Annex 4.

39. *Id.* art. 21.

40. *Id.* art. 23, Annex 1 ¶ 7, Annex 2 ¶ 12, Annex 3 ¶ 13, Annex 4 ¶ 9, Annex 5 ¶ 9, Annex 6 ¶ 11. *See also* the Record of Consultations on Further Liberalization under the Mainland and Hong Kong Closer Economic Partnership Arrangement, ¶ 4, available at [www.tid.gov.hk/english/cepa/files/RoC\\_e.DOC](http://www.tid.gov.hk/english/cepa/files/RoC_e.DOC).



sion of the CEPA is the official version.

#### IV. LEGAL STATUS OF THE CEPA

Unlike other closer economic partnership agreements,<sup>41</sup> the CEPA does not directly use the word agreement or treaty, but instead uses the word arrangement. Although the designation given to an agreement is “legally irrelevant” *per se*,<sup>42</sup> and the term arrangement may also be used as the term of treaty,<sup>43</sup> it may be meaningful under certain circumstances. More significantly, another free trade agreement which is under negotiations between Hong Kong and New Zealand is entitled Closer Economic Partnership Agreement,<sup>44</sup> 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, it appears the use of the term “arrangement” was the result of an understanding between Mainland China and HKSAR negotiators that most FTAs in the world are preferential agreements among states, while the negotiated trade agreement between Mainland China and the HKSAR was under one country, China. Therefore, based on the principle of the “one country, two systems,”<sup>45</sup> the agreement was entitled arrangement.<sup>46</sup> So the use of 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 cannot avoid an instru-

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41. See, e.g., Agreement Between New Zealand and Singapore on a Closer Economic Partnership, November 14, 2000, N.Z.-Sing., available at <http://www.fta.gov.sg/fta/pdf/anzscep.pdf>.

42. JAN KLABBERS, *THE CONCEPT OF TREATY IN INTERNATIONAL LAW* 42 (Kluwer Law International, 1996); see Vienna Convention on the Law of Treaties, May 23, 1969, art. 2(1)(a), 1155 U.N.T.S. 331, available at <http://www.un.org/law/ilc/texts/treaties.htm> [hereinafter Vienna Convention]; see also LASSA OPPENHEIM, *OPPENHEIM'S INTERNATIONAL LAW, PEACE* in Part 2 to 4, § 586, at 1208 (Robert Jennings & Arthur Watts eds., Longman, 9th ed. 1992).

43. LORD MCNAIR, *THE LAW OF TREATIES* 24 (Oxford University Press 1961); GERHARD VON GLAHN, *LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 490 (Macmillan Publishing Co., 5th ed. 1986); J.G. STARKE & I.A. SHEARER, *STARKE'S INTERNATIONAL LAW* 401-02 (Butterworths, 11th ed. 1994) (discussing that an arrangement is an instrument less formal than a treaty and it is more usually employed for a transaction of a provisional or temporary nature).

44. *TRADE POLICY*, *supra* note 2, ¶ 44.

45. See CEPA, *supra* note 1, art. 2.1 (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).

46. *Origin of the CEPA*, *supra* note 22. See also Zeng Lingliang, *On the Legal Status and Development Trend of Regional Trade Arrangement under the WTO: Several Legal Issues Concerning Establishment of Free Trade Areas among Three Territories of China*, in *A TOPIC OF GENERAL INTEREST CONCERNING CHINA'S TRADE LAW: NEW LEGAL ISSUES BETWEEN THE TWO SIDES ACROSS THE TAIWAN STRAITS, HONG KONG AND MACAO* 204, 216 (Sun Wanzhong ed., China Renmin Gong'an University Press 2004) (stating that the reason of using the wording of closer economic partnership arrangement, rather than free trade agreement, is political).

ment being a treaty merely by giving it a title suggesting otherwise,"<sup>47</sup> 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.<sup>48</sup> Nevertheless, the precondition to identify the legal status of the CEPA is to clarify its nature.

#### A. NATURE OF THE CEPA

The terms free trade agreement or free trade area cannot be found in the main body of the CEPA and its six annexes, which may raise the question of whether the CEPA is an FTA. In some Chinese scholars' view, the CEPA is not an FTA, but rather a new type of regional trade agreement under the WTO framework, a so-called creation.<sup>49</sup> In my view, although the CEPA lacks explicit FTA wording, the nature of the CEPA indicates that it is nonetheless an FTA.

First, from the perspective of content, the CEPA provides that Mainland China and Hong Kong will apply zero tariffs to goods imported from each other,<sup>50</sup> which complies with the main characteristic of an FTA. Second, from the perspective of form, the CEPA was introduced to the WTO in the name of an FTA. On December 27, 2003, China and Hong Kong introduced 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 the two parties requested that the CEPA should be circulated to the WTO Members.<sup>51</sup> 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.<sup>52</sup> On the same day Mainland China and Hong Kong introduced their CEPA, China and Macao gave a similar notice to the WTO about the CEPA between China and Macao, also including the wording of "a free

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47. OPPENHEIM, *supra* note 42, at 1209.

48. See B. SEN, A DIPLOMAT'S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE 560 (Martinus Nijhoff Publishers, 3d ed. 1988); see also McNAIR, *supra* note 43, at 59-60.

49. Zeng Huaqun, *Some New Problems to be Researched in the Field of International Economic Law*, 26 FAXUE YANJIU [Chinese Journal of Law] 135 (2004); see also Weng Guomin & Wang Ling, *Some Legal Issues on the Mainland - Hong Kong Closer Economic Partnership Arrangement under WTO Rules*, 34 J. OF ZHEJIANG U. (HUMANITIES AND SOCIAL SCIENCES EDITION) 37, 39 (2004).

50. CEPA, *supra* note 1, art. 5.

51. Committee on Regional Trade Agreements, Council for Trade in Services, *Closer Economic Partnership Agreement between China and Hong Kong, China: Notification from the Parties*, WTO Doc. WT/REG162/N/1, S/C/N/264 (Jan. 12, 2004).

52. *Id.*

trade area.”<sup>53</sup> Third, in an official document made by the General Office of the PRC State Council, the CEPA is deemed an agreement to establish a free trade area.<sup>54</sup> Fourth, in WTO practice, the CEPA has been regarded as an FTA also. For example, in a meeting of the Council 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 were treated together with two other FTAs.<sup>55</sup> Both Mainland China 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.<sup>56</sup> On all accounts, the CEPA is an FTA in nature.

#### B. POSITION OF THE CEPA UNDER INTERNATIONAL LAW

According to the 1969 Vienna Convention on the Law of Treaties (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.”<sup>57</sup> Although the Vienna Convention does not preclude non-state subjects from concluding a treaty,<sup>58</sup> it is generally acknowledged that the subjects of concluding treaties are states and international organizations.<sup>59</sup> 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

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53. Council for Trade in Goods, Council for Trade in Services, *Closer Economic Partnership Agreement between China and Macao, China: Notification from the Parties*, WTO Doc. WT/REG163/N/1, S/C/N/265 (Jan. 12, 2004).

54. See Implementing the CEPA, *supra* note 7, at para.1(1).

55. See Council for Trade in Goods, *Minutes of the Meeting of the Council for Trade in Goods*, para. 4, WTO Doc. G/C/M/72 (Jan. 26, 2004) (the other two free trade agreements are the FTA between the United States and Singapore, and the FTA between the United States and Chile).

56. See General Agreement on Tariffs and Trade (GATT), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IA, 33 I.L.M. 1125, 1154, available at [http://www.wto.org/english/tratop\\_e/region\\_e/regatt\\_e.htm](http://www.wto.org/english/tratop_e/region_e/regatt_e.htm) [hereinafter GATT]. 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.

57. Vienna Convention, *supra* note 42, art. 2(1)(a) (emphasis added).

58. See *id.* art. 3 (stating: “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”).

59. See Malgosia Fitzmaurice, *The Identification and Character of Treaties and Treaty Obligations Between States in International Law*, 2002 BRIT Y.B. INT’L L. 141, 157; see also KLABBERS, *supra* note 42, at 48; GLAHN, *supra* note 43, at 507; PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES 27, para. 77 (Jose Mico et al. trans., Pinter Publishers 1989); STARK & SHEARER, *supra* note 43, at 404; 1986 Vienna Convention on the Law of the Treaties between States and International Organizations or between International Organizations (not yet effective).

both the PRC and the HKSAR,<sup>60</sup> is not a treaty because it is not concluded between States. One side, Mainland China is the main body of the PRC.<sup>61</sup> Another side, the HKSAR, is a Special Administrative Region of the PRC, with a high degree of autonomy.<sup>62</sup> Historically, the PRC resumed its sovereignty over Hong Kong on July 1, 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 December 19, 1984,<sup>63</sup> which is a treaty between the PRC and the United Kingdom.<sup>64</sup> 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,"<sup>65</sup> and this status is further confirmed in the constitutional document of Hong Kong, i.e. the HKSAR Basic Law.<sup>66</sup>

The economic foundation of establishing an FTA between Mainland China and the HKSAR is that each side has a different customs system. Hong Kong's status of a separate customs territory has long been affirmed by the GATT and the WTO. Unlike the United Nations, whose members should be states,<sup>67</sup> the WTO is composed of both states and separate customs territories.<sup>68</sup> John H. Jackson pointed out that "full nation-state 'sovereignty' is not a condition of [GATT and WTO] member-

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60. See Dep't of Justice of the HKSAR, *List of Treaties in Force and Applicable to the Hong Kong Special Administrative Region*, available at [http://www.justice.gov.hk/interlaw\\_e.htm](http://www.justice.gov.hk/interlaw_e.htm) (last updated Aug. 19, 2004) (note that the PRC submitted a document acceding to the Vienna Convention on May 9, 1997, which took effect to China on October 3, 1997, and further note that the Vienna Convention is also applicable to the HKSAR).

61. See CEPA, *supra* note 1, fn.1; see also Implementing the CEPA, *supra* note 7, at para. 1(1). In the CEPA, Mainland China 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.

62. HKSAR Basic Law, *supra* note 19, arts. 1-2.

63. Sino-British Joint Declaration, Dec. 19, 1984, U.K.-P.R.C., ¶ ¶ 1-2, available at <http://www.info.gov.hk/trans/jd/jd2.htm>.

64. STARKE & SHEARER, *supra* note 43, at 403 (discussing the Sino-British Joint Declaration as a "binding treaty arrangement"); RODA MUSHKAT, ONE COUNTRY, TWO INTERNATIONAL LEGAL PERSONALITIES: THE CASE OF HONG KONG 140 (Hong Kong University Press 1997).

65. Sino-British Joint Declaration, *supra* note 63, ¶ 3(2).

66. HKSAR Basic Law, *supra* note 19, arts. 1-2 (article 1 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").

67. U.N. CHARTER arts. 3-4(1), available at [www.un.org/aboutun/charter/chapter2.htm](http://www.un.org/aboutun/charter/chapter2.htm) (last visited Aug. 31, 2004).

68. Marrakesh Agreement Establishing World Trade Organization, Dec. 15, 1993, art. XII, 33 I.L.M. 13, 86-87, available at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto\\_e.htm](http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm) (stating "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").

ship.”<sup>69</sup> Hong Kong, as a separate customs territory, became a contracting party of the GATT on April 23, 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).<sup>70</sup> Macao became a contracting party of the GATT, also as a separate customs territory, on January 11, 1991, after a similar declaration to GATT by the government of Portugal.<sup>71</sup> Since January 1, 1995, Hong Kong and Macao have been WTO Members in the name of Hong Kong, China and Macao, China.<sup>72</sup> After their handover to China,<sup>73</sup> Hong Kong and Macao retained the status of separate customs territories under China’s sovereignty and the membership in the WTO.<sup>74</sup>

Under the WTO, a free trade area can be established between “two or more customs territories.”<sup>75</sup> 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.”<sup>76</sup> Because Mainland China and the HKSAR have two different customs systems, they constitute 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 an FTA. However, the possibility of concluding an FTA between two customs territories under

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69. JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* 48 (The Royal Institute of International Affairs 1998).

70. *Id.*; GATT, *supra* note 56, art. XXVI(5)(c) (stating:

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.

Note that more than fifty nations received GATT membership according to GATT Article XXIV(5)(c)).

71. See GENERAL AGREEMENT ON TARIFFS AND TRADE, GATT ACTIVITIES 1991: AN ANNUAL REVIEW OF THE WORK OF THE GATT 101 (Geneva 1991).

72. See WTO, *Understanding the WTO: The Organization, Members and Observers*, at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (Apr. 23, 2004).

73. *Midnight, July 1, 1997, Return of Hong Kong to Chinese Control*, available at <http://www.night.net/rosie/0697-hongkong.html> (last visited Aug. 31, 2004) (noting that China resumed sovereignty over Hong Kong on July 1, 1997, and Macao on December 20, 1999).

74. See Sino-British Joint Declaration, *supra* note 63, ¶ 3(6) (relating to the status of the separate customs territory of Hong Kong); see also HKSAR Basic Law, *supra* note 19, art. 116 (also relating to the status of the separate customs territory of Hong Kong); see Joint Declaration of the Government of the People’s Republic of China and the Government of the Republic of Portugal on the Question of Macao, Apr. 13, 1987, ¶ 2(8), available at <http://www.fmcoprc.gov.mo/eng/yglz/t53583.htm> (relating to the status of a separate customs territory of Macao); see also Basic Law of the Macao Special Administrative Region (SAR), Mar. 31, 1993, art. 112, available at [http://www.imprensa.macao.gov.mo/bo/i/1999/leibasia/index\\_uk.asp](http://www.imprensa.macao.gov.mo/bo/i/1999/leibasia/index_uk.asp) [hereinafter Basic Law of Macao SAR] (also relating to the status of a separate customs territory of Macao).

75. GATT, *supra* note 56, art. XXIV(8)(b).

76. *Id.* art. XXIV(2).

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, if not impossible, to find a basis in international law to give the CEPA the status of a treaty. The question remains, however, whether it is possible to find any domestic law basis for affording the CEPA the status of a treaty, or more generally the status of an international agreement?

### C. POSITION OF THE CEPA UNDER PRC DOMESTIC LAW

According to the PRC Constitution,<sup>77</sup> the Standing Committee of the National People's Congress (NPC) shall ratify treaties and important agreements concluded with foreign states.<sup>78</sup> Treaties and important agreements refer to:

- Treaties of friendship and cooperation, treaties of peace and other treaties of a political nature;
- Treaties and agreements concerning territory and delimitation of boundary lines;
- Treaties and agreements relating to judicial assistance and extradition;
- Treaties and agreements which contain stipulations inconsistent with the laws of the People's Republic of China;
- Treaties and agreements which are subject to ratification as agreed by the contracting parties; [and]
- Other treaties and agreements subject to ratification.<sup>79</sup>

It is evident that the CEPA, if it is a treaty or important agreement, does not belong to categories (1) through (5). Moreover, CEPA article 23 provides that the CEPA shall come into effect on the day of signature, which is different from China's WTO accession agreement authorized by the NPC Standing Committee before the conclusion of the accession protocol.<sup>80</sup> The CEPA, as a free trade agreement, is also different from the

77. See PRC CONSTITUTION art. 67 (note that the existing PRC Constitution was enacted in 1982 by the fifth NPC, and amended in 1988, 1993, 1999 and 2004) (also note that, per PRC Constitution article 57, the NPC is the highest national institution, with the Standing Committee as its permanent organ).

78. See *id.* art. 67(14); see also Law of the People's Republic of China on the Procedure of the Conclusion of Treaties, Dec. 28, 1990, art. 3(2), available at <http://www.fmprc.gov.cn/chn/wjb/zzjg/tyfls/tfscckzlk/xggnlf/t70826.htm> [hereinafter PRC Treaty Law] (passed by 17th meeting of the Standing Committee of the 7th NPC on Dec. 28, 1990, and entering into effect on the same day).

79. See PRC Treaty Law, *supra* note 78, art. 7.

80. See Zhang Naigen, *On the Constitution Amendment in Treaty Ratification Process*, 1 ZHENGZHI YU FALV 17, 18 (2004). On August 25, 2000, the NPC Standing Committee passed a special decision authorizing the State Council to negotiate and sign the WTO accession protocol, and the PRC President to ratify it. Although Part III(1) of the Protocol on Accession of the People's Republic of China (China Accession Protocol) provides that the protocol shall be open for acceptance by China until January 1, 2002, on November 11, 2001, one day after the signature of the China Accession Protocol, China's President at the time, Jiang Zemin, ratified the Protocol without seeking further approval from the NPC Standing Committee.

first free trade agreement that China signed with the ASEAN countries, the ACFTA Framework Agreement. The latter requires internal ratification procedures for its entry into force.<sup>81</sup> 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, neither the NPC nor its Standing Committee gave the CEPA prior or post authorization, and after the conclusion of the CEPA, neither the NPC nor its Standing Committee raised an objection to it or asked 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.<sup>82</sup> Therefore, the CEPA is not a treaty or an important agreement under China's legal system. Is the CEPA, however, an unimportant international agreement?

In China, the law regulating conclusion of treaties is the Law of the PRC on the Procedure of the Conclusion of Treaties, article 2 of which 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 the People's Republic of China and *foreign states*."<sup>83</sup> Beyond all doubts, Hong Kong, as a Special Administrative Region, is part of China and 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, which was amended in 2004.<sup>84</sup> 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

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Zhang Naigen argues, however, that the authorization of the NPC Standing Committee is in violation of the PRC Constitution because the PRC Constitution does not provide that the Standing Committee has the power of prior ratification or authorization of a treaty or important agreement.

81. See ACFTA Framework Agreement, *supra* note 32, art. 16(2). It must be pointed out, however, that it is unclear whether the ACFTA is an important agreement that should be ratified by the NPC Standing Committee, or merely an ordinary international agreement that should be approved by the State Council.
82. See Jiang Guoqing, *A Few Questions on International Law and International Treaties*, Fourteenth Law Lecture Held by the Standing Committee of the NPC, available at <http://www.people.com.cn/GB/14576/15097/2369578.html> (Apr. 29, 2000) (noting that, according to prevailing academic view, what "other treaties and agreements subject to ratification" of category (6) include are subject to the decision of the NPC Standing Committee, and also noting that the NPC Standing Committee did not make a decision to require the review or ratification of the CEPA after its signature).
83. PRC Treaty Law, *supra* note 78, art. 2 (emphasis added).
84. See Foreign Trade Law of the People's Republic of China, GAZETTE OF THE STANDING COMMITTEE OF THE NAT'L PEOPLE'S CONGRESS, Issue No. 4, at 247-53 (2004) (promulgated May 12, 1994, by the 7th meeting of the Standing Committee of the 8th NPC; entered into force July 1, 1994; amended Apr. 6, 2004, by the 8th meeting of the Standing Committee of the 10th NPC).

regional trade organization.”<sup>85</sup> 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? While the Foreign Trade Law does not define the concept of regions, article 69 of the Foreign Trade Law expressly provides that the law does not apply to Hong Kong or Macao.<sup>86</sup> Therefore, the Foreign Trade Law cannot be the legal foundation for the conclusion of the CEPA, even though it is the only direct legal source for China to conclude regional trade agreements.

On its face, the CEPA is an agency-to-agency agreement. 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 (MOFCOM), which had obtained the authorization from the State Council.<sup>87</sup> Meanwhile, the MOFCOM has the function of CEPA negotiations and implementation.<sup>88</sup> This function also comes from the authorization of the State Council.<sup>89</sup> Therefore, the CEPA could be regarded as an agreement between the PRC central government and the HKSAR government. According to article 3 of the 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.<sup>90</sup> Thus, the State Council has no power to authorize the MOFCOM to conclude agreements with the HKSAR.<sup>91</sup> Strictly speaking, the conclusion of the CEPA is an act of *ultra vires* made by the State Council. Indeed, there is no legal position of the CEPA under current Chinese domestic law. In other words, the CEPA exists in a legal vacuum without constitutional basis. Thus, it seems appropriate to say that the CEPA is *de jure* invalid, although it is *de facto* effective.

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85. *Id.*, art. 5 (emphasis added).

86. *Id.* art. 43 (stating “This Law shall not apply to the separate customs territories of the People’s Republic of China”).

87. *See* Implementing the CEPA, *supra* note 7, pmb.

88. *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) (noting that 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 which 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”).

89. *See* Circular of the General Office of the State Council on Printing and Issuing the Provisions on Main Functions, Internal Structure and Staffing of Members of the Ministry of Commerce, GUOBANFA [2003] No. 29, GAZETTE OF THE STATE COUNCIL OF THE P.R.C., Issue No. 17, at 24-28, para. 2(12) (2003) [hereinafter General Office Circular].

90. PRC CONSTITUTION art. 89(9) (providing that the State Council has the right to conclude treaties and agreements with foreign states).

91. *See* OPPENHIEM, *supra* note 42, at 1285 § 636 (under customary international law, the validity of a treaty is questionable if it is reached in violation of constitutional laws of one of the parties).



## D. 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, and further guaranteed by Annex 1 of the Sino-British Joint Declaration, which states:

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 states, regions and relevant international organisations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, touristic, cultural and sporting fields.<sup>92</sup>

Hong Kong's capacity to conclude agreements is further affirmed by Hong Kong domestic law. Article 151 of the HKSAR Basic Law<sup>93</sup> mirrors the excerpt above from Annex 1 of the Sino-British Joint Declaration.

All of the above referenced 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. There is no question that the HKSAR has the full capacity to conclude trade agreements with states such as France, Germany, or the United Kingdom, but is the HKSAR able to conclude trade agreements with Mainland China?<sup>94</sup> If so, is Mainland 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 to these questions in current Hong Kong law. In accordance with article 18 of the HKSAR Basic Law, the laws applicable to Hong Kong include three parts: (1) the HKSAR Basic Law; (2) the laws previously in force in Hong Kong before the enactment of the HKSAR Basic Law;<sup>95</sup> and (3) the laws enacted by the legislature of the HKSAR. All of these sources fail to provide any legal basis upon which an agreement between Mainland China and the

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92. See Sino-British Joint Declaration, *supra* note 63, Annex 1 ¶ 11.

93. See Lord Irvine's comment for the draft of the HKSAR Basic Law, in Martin C. M. Lee, *A Tale of Two Articles*, in *THE BASIC LAW AND HONG KONG'S FUTURE* 309, 324 (Peter Wesley-Smith & Albert H Y Chen eds., Butterworths, 1988) (The HKSAR Basic Law was enacted by the 3rd session of the 7th NPC on April 4, 1990, and took effect on July 1, 1990. Although the HKSAR Basic Law was not enacted by the HKSAR legislature, it is the foundation of the HKSAR domestic law).

94. Compare Basic Law of Macao SAR, *supra* note 74, art. 136, and HKSAR Basic Law, *supra* note 19, art. 151 (both providing the respective territory power to conclude agreements with "states and regions and relevant international organizations" in respect of relevant fields, but both also leaving in question whether the respective territory may conclude agreements with Mainland China).

95. See HKSAR Basic Law, *supra* note 19, art. 8 (stating, "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 Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region").

HKSAR can be established. Moreover, both the Sino-British Joint Declaration and the HKSAR Basic Law provide that the HKSAR may use the name of Hong Kong, China to conclude agreements with states, regions, and international organizations. In the CEPA, however, the HKSAR is identified as a contracting party under the name HKSAR rather than Hong Kong, China. This subtle difference in nominal designation further increases the distance between the CEPA and the HKSAR Basic Law.

## V. CONCLUDING REMARKS: SUGGESTIONS FOR A LAWFUL CEPA

The prevailing academic view is that “there cannot be bilateral treaties between China and the HKSAR.”<sup>96</sup> After excluding the possibility of an international agreement between Mainland China and Hong Kong, it is evident that the CEPA is merely an interregional agreement within one country. Even so, no legal basis exists for the conclusion of interregional agreements between Mainland China and its Special Administrative Regions. Although Chinese scholars generally take the view that the CEPA is not an international agreement,<sup>97</sup> few raise doubts about its legal validity. On the contrary, the CEPA is highly acclaimed as a creation in China,<sup>98</sup> but unfortunately, such a creation is not likely to create legal validity for itself.

It seems that the issue of concluding agreements between the HKSAR and Mainland China 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 Mainland China and the HKSAR. Moreover, although the HKSAR Basic Law is only applicable to the territory of Hong Kong, it is also well known in Mainland China because Mainland China enacted it. Therefore, the lack of interregional-agreement-making capacity for both Mainland China and the HKSAR is manifest to each other.<sup>99</sup> In such case, because the conclusion of the CEPA is unlawful, both internationally and domestically, the CEPA has to be deemed an unlawful interregional FTA, except under the framework of the WTO, which allows two separate customs territo-

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96. ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 328 (Cambridge University Press, 2000).

97. Huaqun, *supra* note 49, at 135; Mu Yaping & Lin Hao, *Defining Hong Kong Company: Problems and Criteria in the Definition of Hong Kong Company*, 11 *GUOJI MAOYI [INTERTRADE]* 43, 44 (2003).

98. Huaqun, *supra* note 49, at 135; Guomin & Ling, *supra* note 49, at 39.

99. Vienna Convention, *supra* note 42, art. 46 (providing 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).

ries to establish an 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 Mainland China and the HKSAR under the principle of "one country, two systems?" On the one hand, since the CEPA is not an international agreement, it is not China's 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 either. The realistic basis for implementing the CEPA in Mainland China and Hong Kong seems to be the wills of the political leaders, especially from the PRC central government's strong determination to support the economic stability and prosperity of the HKSAR. Nevertheless, an overemphasis on political purpose without regard to legal feasibility is a departure from China's newly established rule of law.<sup>100</sup>

For the purpose of legalizing the CEPA and future agreements between Mainland China and the HKSAR, this article brings forward the following options. The first 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 an FTA in nature, 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, although not as much as the WTO. In the notice issued by the General Office of the State Council, entitled the Notice on Relevant Works for Implementing the CEPA,<sup>101</sup> the State Council requires that the existing policy and rules should be "adjusted and revised" according to the CEPA,<sup>102</sup> which clearly indicates the importance of the CEPA. Therefore, the PRC Constitution may include free trade agreements in important agreements, and broaden the agreement-making subjects to include Special Administrative Regions, as well as foreign states. One potential issue of this option is that it may weaken the authority of the NPC or the principle of "one country, two systems" because it may bring the HKSAR and Mainland China on an equal footing. A standby option is to regard FTAs as ordinary agreements, which are subject to the approval of the State Council. This standby option also needs an amendment to the PRC Constitution in order to include agreements with Special Administrative Regions.<sup>103</sup>

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100. See PRC CONSTITUTION art. 5 (stating, "The People's Republic of China adopts the rule of law and establishes a socialist country with the rule of law"; this provision was added to the PRC Constitution through an amendment passed by the 2nd plenary session of the 9th NPC on March 15, 1999).

101. Implementing the CEPA, *supra* note 7.

102. *Id.* para. 2(2).

103. See PRC CONSTITUTION art. 89(9) (providing that the State Council is responsible for concluding treaties and agreements with foreign states).

The second option is to make amendments to the HKSAR Basic Law. The existing article 151 of the HKSAR Basic Law merely provides that the HKSAR may conclude agreements with states, regions, and relevant international organizations in the name of Hong Kong, China. My suggestion is to add the following paragraph to article 151:

The HKSAR may also conclude relevant interregional agreements with other Special Administrative Regions or the Mainland China, 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 Mainland China may be included in the concept of regions.<sup>104</sup>

The third option is to revise the PRC Foreign Trade Law. The newly revised Foreign Trade Law introduces the terminology 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 with respect to regional integration, cuts the link between the CEPA and the Foreign Trade Law, and forfeits a good opportunity to offset the negative effect caused by the Constitutional lacuna of there being no legal basis for concluding agreements between Mainland China 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 trade relations with the HKSAR under the framework of foreign trade for many years. For example, the MOFTEC, the government agency dealing with the 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. In March 2003, after the adjustment of functions of the MOFTEC, the agency's name was changed to the MOFCOM,<sup>105</sup> but its functions relating to foreign trade, including organizing the CEPA negotiations and implementation, remain.<sup>106</sup> Furthermore, the negotiation and signature process of the CEPA is consistent with article 48 of the Foreign Trade Law, which provides that the department responsible for foreign trade, that is the MOFCOM, shall carry out multilateral and bilateral foreign trade consultations, negotiations, and dispute settlement. In addition, be-

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104. See HKSAR Basic Law, *supra* note 19, art. 158 (vesting the power of interpretation of the HKSAR Basic Law in the NPC Standing Committee).

105. See Decision of the First Session of the Tenth National People's Congress on the Plan for the Institutional Reform of the State Council, GAZETTE OF THE STANDING COMMITTEE OF THE NAT'L PEOPLE'S CONGRESS, Issue No. 2, at 190-194 (2003); see also Notification on the Establishment of Institutions made by the State Council, GUOFA [2003] No. 8 (2003).

106. See General Office Circular, *supra* note 89, para. 2(12).

cause the main aim of the revisions of the 1994 Foreign Trade Law was to implement China's WTO commitments and to transfer WTO rules into Chinese domestic law,<sup>107</sup> 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 instead to trade relations between the PRC and the HKSAR which occur within Mainland China. Such consideration comes from the due respect to the HKSAR Basic Law and the high degree of autonomy of the HKSAR.

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

In sum, the CEPA has no legal basis in existing PRC and HKSAR domestic law. It is necessary, under the framework of "one country, two systems," to legalize agreements between Mainland China and the HKSAR, no matter what their names may be (i.e. quasi-international agreements or interregional agreements). Conferring legal validity on the CEPA or other interregional agreements would provide 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 with binding effect on two separate customs territories under one country. From this point of view, to the extent of one country, the interregional agreement is to be internationalized.

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107. Yu Guangzhou, Vice Minister of the MOFCOM, Address at a news interview, Apr. 7, 2004, available at [http://www.mofcom.gov.cn/article/200404/20040400206411\\_1.xml](http://www.mofcom.gov.cn/article/200404/20040400206411_1.xml); see also News Office of the MOFCOM, *The Main Contents and Significance of the Revisions of the Foreign Trade Law*, available at [http://www.mofcom.gov.cn/article/200404/20040400205975\\_1.xml](http://www.mofcom.gov.cn/article/200404/20040400205975_1.xml) (Apr. 7, 2004).

# **Perspective**

