WANG Wei

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

© Higher Education Press and Springer-Verlag 2009

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

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


Received September 24, 2008 and accepted November 24, 2008

WANG Wei
School of Law, Fudan University, Shanghai 200438, China
E-mail: wangwei99@fudan.edu.cn
The legal status of the CEPA between the Mainland and Hong Kong of China

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, 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), 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”, 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”, the agreement was entitled “arrangement”. 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.
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.