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## Closer Integration, Controversial Rules: Issues Arising from the CEPA between Mainland China, Hong Kong, and Macao

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# CLOSER INTEGRATION, CONTROVERSIAL RULES: ISSUES ARISING FROM THE CEPA BETWEEN MAINLAND CHINA, HONG KONG, AND MACAO

Jiaxiang Hu<sup>†</sup>

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## I. INTRODUCTION

On June 29, 2003, the central government of the People's Republic of China and the government of Hong Kong Special Administrative Region signed the Closer Economic Partnership Arrangement (CEPA).<sup>1</sup> Then, on October 17, 2003, with the same title and almost the same contents, the Chinese central

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<sup>1</sup> Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA), P.R.C.-H.K., June 29, 2003 *translated at* <http://www.tid.gov.hk/english/cepa/legaltext/fulltext.html> [hereinafter Hong Kong CEPA]; Mainland and Macao Closer Economic Partnership Arrangement (CEPA), P.R.C.-Mac., Oct. 17, 2003 *translated at* [http://www.economia.gov.mo/page/english/cepa\\_e.htm](http://www.economia.gov.mo/page/english/cepa_e.htm) [hereinafter Macao CEPA]. Please note that there are no official English versions of these documents. See <http://www.zhuhai-trade.gov.cn/cepa/> (Chinese version). The titles are translated into English by the author.

government signed a similar agreement, Closer Economic Partnership Arrangement (CEPA),<sup>2</sup> with the government of Macao Special Administrative Region.<sup>3</sup> Both arrangements have been in effect since January 1, 2004. These two documents indicate a substantial step to further integrate the economies of mainland China, Hong Kong, and Macao. After China entered the World Trade Organization (WTO) on December 11, 2001,<sup>4</sup> the two CEPA agreements have aroused much attention from both the academic and business circles, particularly regarding their effects on economic development in these three areas. Furthermore, the issue of whether the rules in the CEPA agreements are in conformity with the provisions of the WTO agreements also merits attention. In the following sections, the author examines the CEPA agreements, particularly Articles 7 and 8, as they apply to the 1994 General Agreement on Tariffs and Trade (GATT),<sup>5</sup> the Anti-dumping Agreement,<sup>6</sup> and the Agreement on Subsidies and Countervailing Measures.<sup>7</sup>

## II. A RETROSPECTIVE VIEW OF THE TRADE RELATIONS BETWEEN MAINLAND CHINA, HONG KONG, AND MACAO

Since mainland China, Hong Kong, and Macao have all obtained full membership in the WTO, the current trade relations among them are regulated not only by bilateral agreements like CEPA, but also by the WTO agreements. The WTO has both

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<sup>2</sup> Macao CEPA, *supra* note 1.

<sup>3</sup> *Id.*

<sup>4</sup> See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1995, 33 I.L.M. 1125, 1144, *reprinted in* THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 11 (Cambridge Univ. Press 1999) (hereinafter WTO Agreement). Hong Kong and Macao acceded to the WTO as original Members in 1994 under Article XI of the WTO Agreement. *See id.*

<sup>5</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194 [hereinafter GATT].

<sup>6</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, in Annex 1A of Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1995, *reprinted in* THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 147 (Cambridge Univ. Press 1999) (hereinafter Anti-Dumping Agreement).

<sup>7</sup> See Agreement on Subsidies and Countervailing Measures, in Annex 1A of Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1995, *reprinted in* THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 231 (Cambridge Univ. Press 1999) (hereinafter Agreement on Subsidies and Countervailing Measures).

sovereign States and separate customs territories as its Members, a fact which can be traced back to the GATT history. When the original General Agreement on Tariffs and Trade (GATT) was signed in 1947, there were only twenty-three signatories.<sup>8</sup> Many countries, before they gained full independence, were the colonies of western powers. They became GATT contracting parties with the sponsorship of their suzerain States under Article XXXIII of GATT 1947, which states:

A government not party to this Agreement, or a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, may accede to this Agreement, on its own behalf or on behalf of that territory, on terms to be agreed between such government and the CONTRACTING PARTIES. Decisions of the CONTRACTING PARTIES under this paragraph shall be taken by a two-thirds majority.<sup>9</sup>

Among this group of GATT "contracting parties" are Hong Kong and Macao.<sup>10</sup>

According to the Sino-British Joint Declaration,<sup>11</sup> signed December 19, 1984, after the Chinese government resumed the exercise of sovereignty over Hong Kong on July 1, 1997, "[t]he Hong Kong Special Administrative Region will retain the status of a free port and a separate customs territory."<sup>12</sup> The Declaration further states that "[u]sing the name of 'Hong Kong, China', the Hong Kong Special Administrative Region may on its own maintain and develop economic and cultural relations and conclude relevant agreements with States, regions and relevant international organizations."<sup>13</sup> These principles are reaf-

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<sup>8</sup> See GATT, *supra* note 5. In his book, *THE CREATION OF STATES IN INTERNATIONAL LAW*, James Crawford made an estimate that shortly before World War II, there were only about seventy-five States on the earth. See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 1 (Oxford Univ. Press 1979).

<sup>9</sup> See GATT, *supra* note 5, at art. XXXIII.

<sup>10</sup> Hong Kong and Macao became GATT separate territories under the sponsorship of United Kingdom and Portugal, their former suzerain States.

<sup>11</sup> The Joint Declaration of the Government of the People's Republic of China and the Government of the United Kingdom of Great Britain and Northern Ireland on the Question of Hong Kong, Dec. 19, 1984, *translated at* <http://www.info.gov.hk/trans/jd/jd2.htm> [hereinafter the *Sino-British Joint Declaration*].

<sup>12</sup> *Id.* at Point 3(6).

<sup>13</sup> *Id.* at Point 3(10).

firmed in similar words in Article 116 of the Basic Law of the Hong Kong.<sup>14</sup>

On April 13, 1987, the Chinese government and the Portuguese government signed the Sino-Portuguese Joint Declaration.<sup>15</sup> Point 2(8) of the Declaration stipulates that after the Chinese government resumes the exercise of sovereignty over Macao on December 20, 1999, "[t]he Macao Special Administrative Region will remain a free port and a separate customs territory in order to develop its economic activities."<sup>16</sup> The Declaration further states that "[u]sing the name 'Macao, China', the Macao Special Administrative Region may, on its own, maintain and develop economic and cultural relations and in this context conclude agreements with States, regions and relevant international organizations."<sup>17</sup> Similar wording can also be found in Article 112 of the Basic Law of the Macao.<sup>18</sup>

Before China became a full member of the WTO, trade regulations between mainland China, Hong Kong, and Macao were different from trade relations between China and other countries. In other words, Hong Kong and Macao received more preferential treatment than other countries under the Chinese domestic law. As China was "poised to finalize its WTO accession process, some small and medium enterprises (SMEs) in Hong Kong feared that they would lose their competitive edge over foreign companies once China's market fully opened up."<sup>19</sup> Therefore, the SME's pressed the Chinese central government and the governments of Hong Kong and Macao to maintain this special preferential treatment even after China entered the

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<sup>14</sup> The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, April 4, 1990, available at [http://www.info.gov.hk/basic\\_law/fulltext/content0205.htm](http://www.info.gov.hk/basic_law/fulltext/content0205.htm) [hereinafter *The Basic Law of Hong Kong*].

<sup>15</sup> The Joint Declaration of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macao, Apr. 13, 1987, translated at <http://www.imprensa.macao.gov.mo/bo/i/88/23/dc/en> [hereinafter *The Sino-Portuguese Declaration*].

<sup>16</sup> *Id.* at Point 2(8).

<sup>17</sup> *Id.* at Point 2(7).

<sup>18</sup> The Basic Law of the Macao Special Administrative Region of the People's Republic of China, Mar. 31, 1993, translated at [http://www.imprensa.macao.gov.mo/bo/i/1999/leibasica/index\\_uk.asp](http://www.imprensa.macao.gov.mo/bo/i/1999/leibasica/index_uk.asp) [hereinafter *The Basic Law of Macao*].

<sup>19</sup> Henry S. Gao, *Legal Issues under WTO Rules on the Closer Economic Partnership Arrangement (CEPA) Between Mainland China and Hong Kong*, 2 CHINESE J. INT'L L. 629 (2003).

WTO.<sup>20</sup> After a series of high-level meetings over one and a half years, the final results are the two CEPA agreements between mainland China and Hong Kong and Macao.

### III. LEGAL STATUS OF THE CEPA AGREEMENTS

As a general rule, the WTO requires that "each Member shall ensure the conformity of its law, regulations and administrative procedures with its obligations as provided in the annexed Agreements."<sup>21</sup> The WTO uses GATT's Article I (General Most-Favored-Nation Treatment)<sup>22</sup> and Article III (National Treatment on Internal Taxation and Regulation)<sup>23</sup> as the cornerstones of the current world trade regime.<sup>24</sup> However, the WTO rules are not a monolithic bloc, impermeable to change. GATT Article XXIV provides exceptions for WTO Members to form customs unions and free trade areas in which the constituent members may derogate from the WTO rules by offering more preferential treatment to each other.<sup>25</sup>

<sup>20</sup> *Id.*

<sup>21</sup> WTO Agreement, *supra* note 4, at art. XVI(4).

<sup>22</sup> GATT, *supra* note 5, at art. I. As a general rule, the first paragraph of Article I provides that:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

*Id.*

<sup>23</sup> *Id.* at art. III. The core provision of this article is the first paragraph, which provides that:

The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

*Id.*

<sup>24</sup> Jeremy R. Regal, *Russia in the WTO: How Russia's Institutional Idiosyncrasies May Impede Its Ability to Abide by the WTO's Governing Cornerstones*, 9 UCLA J. INT'L L. & FOREIGN AFF. 97, 108 (2004).

<sup>25</sup> *Id.* at art. XXIV.

According to GATT Article XXIV, a customs union:

... shall be understood to mean the substitution of a single customs territory for two or more customs territories so that:

(i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and

(ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union.<sup>26</sup>

A free trade area "shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories."<sup>27</sup> These provisions are the legal source for various economic co-operations, both bilateral and regional.

The CEPA agreements each contain a main text, six annexes, and one schedule. Each covers not only those traditional issues of trade in goods, but also relatively new issues such as service and investment. The most substantial part of each of the two documents is that which states that Hong Kong and Macao agree to bind their existing zero import tariff regimes with respect to all goods from mainland China.<sup>28</sup> In return, mainland China agrees to apply a zero import tariff for imports from Hong Kong and Macao beginning January 1, 2004.<sup>29</sup> This treatment applies to specific items, which are specified in Annex 1 of each agreement.<sup>30</sup> Mainland China also agreed to apply a zero import tariff to those imports from Hong Kong and Macao that are not included in the Annex by January 1, 2006.<sup>31</sup>

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<sup>26</sup> *Id.* at art. XXIV(8).

<sup>27</sup> *Id.*

<sup>28</sup> Hong Kong CEPA and Macao CEPA, *supra* note 1, at art. 5(1).

<sup>29</sup> *Id.* at art. 5(2).

<sup>30</sup> *Id.* at art. 5(2), Annex 1, tbl. 1 (including *inter alia*, antibiotics, perfumes, make-up, clothing, watches and clocks, and ice cream).

<sup>31</sup> *Id.* at art. 5(3).

According to Article 11 and Annex 4 of each agreement, mainland China has promised to gradually ease and ultimately eliminate restrictions on the services provided by Hong Kong and Macao businessmen.<sup>32</sup> Mainland China, Hong Kong, and Macao have agreed to further promote their investment facilitation.<sup>33</sup> Therefore, the two CEPA agreements are in nature free trade agreements rather than customs union agreements, for they do not mandate mainland China, Hong Kong, and Macao to apply uniform duties and other restrictive regulations to territories that do not join the WTO.

Through the formation of the CEPA agreements, the Chinese government hoped to assure businessmen and entrepreneurs in Hong Kong and Macao that they would not lose the preferential treatment from mainland China even after China entered the WTO. Nevertheless, whether fulfilling the expectations of Hong Kong and Macao interferes with China's obligations under the WTO remains debatable.

#### IV. CONTROVERSIAL RULES IN THE CEPA AGREEMENTS

Examined superficially, the CEPA agreements contain no rules that conflict with the WTO rules. GATT Article XXIV permits, with the exception of those measures under Articles XI, XII, XIII, XIV, XV and XX, that a WTO Member may eliminate any restrictive measures to its constituent members in a customs union or free trade area.<sup>34</sup> Therefore, Articles 6 and 7 of the CEPA agreements seem blameless in mandating that mainland China, Hong Kong, and Macao will not take anti-dumping and countervailing measures against the imports from each other.<sup>35</sup> But the issue is not so simple. If we read GATT Article XXIV carefully, we find that the constituent members in a free trade area are precluded from levying higher duties or exercising more restrictive measures than those existing prior to the formation of the free trade area against those WTO Members not included therein.<sup>36</sup> As WTO Members have recognized, the purpose of a free trade area "should be to facilitate trade be-

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<sup>32</sup> *Id.* at art. 11, Annex 4.

<sup>33</sup> *Id.* at arts. 16, 17.

<sup>34</sup> GATT, *supra* note 5, at art. XXIV:4.

<sup>35</sup> Hong Kong CEPA and Macao CEPA, *supra* note 1, at arts. 6, 7.

<sup>36</sup> GATT, *supra* note 5, at art. XXIV.



tween the constituent territories and *not raise barriers to the trade of other contracting parties with such territories.*"<sup>37</sup>

Theoretically, two situations might arise after the formation of a free trade area. First, the general tariffs might be increased and more restrictive measures exercised against the non-constituent members. We regard *the tariffs in this situation as absolutely higher and the measures as absolutely more restrictive* compared with those existing before the formation of the free trade area. This situation, however, has already been forbidden by the WTO rules.<sup>38</sup>

A second situation might be one where the existing level of tariffs and the restrictive measures to the non-constituent members do not change, but the tariffs applied within the constituent members have been lowered significantly and the restrictive measures greatly eased. Consequently, *the tariffs to those non-constituent members have been raised comparatively and the measures comparatively more restrictive.* In the context of the CEPA agreements, to eliminate the anti-dumping and countervailing measures would mean that the exporters in the respective constituent members will not meet any restrictions, including anti-dumping and countervailing measures, despite whether these measures are necessary in some unusual circumstances. This is unfair to many enterprises both inside and outside the constituent members, as they have been deprived of the opportunity to sue these exporters for their unfair trade either as the complainant or third party.

Anti-dumping and countervailing measures are popular practices by which an importing country tries to protect its domestic industry from the dumping of foreign low-price products.<sup>39</sup> In order to avoid the abuse of these measures, GATT Article VI:6(a) mandates that:

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<sup>37</sup> *Id.* (emphasis added).

<sup>38</sup> GATT, *supra* note 5, at art. XXIV:5(a).

<sup>39</sup> In the context of the WTO, the terms "country" or "countries" as used in the WTO Agreement and the Multilateral Trade Agreements are to be understood to include any separate customs territory Member. In the case of a separate customs territory Members of the WTO, where an expression in the WTO Agreement and the Multilateral Trade Agreements is qualified by the term "national," such expression shall be read as pertaining to that customs territory, unless otherwise specified. See WTO Agreement, *supra* note 4, at art. VXI.

[n]o contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party *unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry*.<sup>40</sup>

Therefore, WTO Members are permitted to use anti-dumping and countervailing measures only in some special circumstances.

CEPA Articles 6 and 7, however, have touched the other side of this issue: whether the total elimination of anti-dumping and countervailing measures in free trade agreements is commendable. The abuse of anti-dumping and countervailing measures overlooks the comparative advantages existing in different countries and jeopardizes normal international trade relations. The same result applies to the practice of eliminating the anti-dumping and countervailing measures. This is because dumping/subsidy practices in nature aim at dominating the market of the importing country and gaining the predatory profits. This is the legal base for the use of anti-dumping and countervailing measures.

In order to give an objective appraisal in a WTO anti-dumping or countervailing litigation, a panel or Appellate Body is required to consider the statements of both the disputing parties and any relevant third party.<sup>41</sup> Article 6(1) of the Anti-Dumping Agreement states: "[a]ll interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question."<sup>42</sup> Article 6(2) further states: "[t]hroughout the anti-dumping investigation *all interested parties* shall have a full opportunity for the defense of their interests. To this end, the authorities shall, on request, provide opportunities for *all interested parties* to meet those parties with adverse interests, so that opposing views may be presented

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<sup>40</sup> GATT, *supra* note 5, at art. VI (emphasis added).

<sup>41</sup> Anti-Dumping Agreement, *supra* note 6, at art. 6(1).

<sup>42</sup> *Id.*

and rebuttal arguments offered.”<sup>43</sup> Similar provisions can also be found in Article 12 of the Agreement on Subsidies and Countervailing Measures.<sup>44</sup> Neither the wording of the above provisions nor the practice of the WTO Dispute Settlement Body (DSB) indicates that the “interested parties” should be limited to the disputing parties. In other words, all relevant parties upon which the settlement of a dispute might have some effect can be regarded as the “interested parties,” with the right to participate in a dispute settlement process and to defend their own interests. To eliminate the possibility of settling disputes through litigation is, *de facto*, to take away their right to defend their own interests.

The same reasoning can also be found in the Dispute Settlement Understanding.<sup>45</sup> Article 10(1) states that “[t]he interests of the parties to a dispute and *those of other Members* under covered agreements at issue in the dispute shall be fully taken into account during the panel process.”<sup>46</sup> Article 10(2) further states:

*[a]ny Member having a substantial interest in a matter before a panel and having notified its interest to the DSB [Dispute Settlement Body] (referred to in this Understanding as a ‘third party’) shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.*<sup>47</sup>

Two points may be drawn from the above provisions. First, any WTO Member, if it deems necessary, has the right to participate in an on-going panel process.<sup>48</sup> Second, in such a circumstance, the panel has the obligation to take the request of third parties into the panel examination.<sup>49</sup> In some circumstances, a

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<sup>43</sup> *Id.* at art. 6(2) (emphasis added).

<sup>44</sup> Subsidies and Countervailing Measures, *supra* note 7, at art. 12.

<sup>45</sup> Dispute Settlement Understanding, in Annex 2 of Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1995, *reprinted in* THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS (Cambridge Univ. Press 1999) [hereinafter Dispute Settlement Understanding].

<sup>46</sup> *Id.* at art. 10(1).

<sup>47</sup> *Id.* at art. 10(2).

<sup>48</sup> *See id.*

<sup>49</sup> *See id.*

third country can request the authorities of the importing country to take anti-dumping action on its behalf, although the decision whether or not to proceed with a case rests with the importing country.<sup>50</sup> All these provisions indicate that the right and interest of a third party in a dispute settlement should not be ignored.

Additionally, private parties are not qualified to bring their complaints to the WTO Dispute Settlement Body (DSB).<sup>51</sup> In general, if a domestic industry determines that its benefits have been impaired or impeded by imports, which are either at a lower-than-normal price or with some subsidization, the domestic industry can only refer the matter to the relevant authorities.<sup>52</sup> If the situation is serious enough, the relevant authorities shall, on behalf of the injured industry, bring the complaint to the DSB.<sup>53</sup> The fact that Articles 6 and 7 of the CEPA agreements prohibit the initiation of anti-dumping and countervailing litigation between mainland China and Hong Kong or Macao is essentially the equivalent of any industry in these three areas losing the opportunity to refer complaints to the relevant authorities. This is true even when the industry has been seriously injured by the dumped imports or imports with some subsidization from the exporting authorities.

Obviously, the CEPA agreements have some loopholes. The Chinese government and the governments of Hong Kong and Macao may focus so much attention on the continuation of their closer relations after China's accession to the WTO that they inadvertently deprive the interests of other WTO Members. At the moment, there are two practicable ways to close these loopholes. One is to amend Articles 6 and 7 of the CEPA agreements, making the anti-dumping and countervailing litigation available among mainland China, Hong Kong, and Macao. The three governments may agree on more restrictive rules on the initiation of anti-dumping and countervailing measures. The second solution is to establish a uniform institution to deal with the complaints involving dumping and subsidy issues from both

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<sup>50</sup> See Anti-Dumping Agreement, *supra* note 6, at art. 14.

<sup>51</sup> See generally Dispute Settlement Understanding, *supra* note 46; see also Anti-Dumping Agreement, *supra* note 6.

<sup>52</sup> See Anti-Dumping Agreement, *supra* note 6.

<sup>53</sup> *Id.*

the constituent members of the CEPA agreements and other WTO Members.

Because the CEPA agreements' provisions are in conflict with the WTO practices, the following question has been raised: should the current WTO rules, *inter alia* GATT Article VI and the Anti-dumping Agreement, be amended so that the elimination of anti-dumping and countervailing measures will become a mandatory prohibition? The answer to this question should be in the affirmative. Nevertheless, in view of the complexity of the amendment process,<sup>54</sup> the most practicable way is to establish this proposition through the WTO dispute settlement practices. Only under this consideration can the "proper balance between the rights and obligations of Members" be maintained.<sup>55</sup>

The provisions of CEPA have also reminded us of the over-debated issue of how to deal with the challenge of globalization versus regionalization in the context of WTO, which will be explained below.

#### V. THE ECONOMIC ANALYSIS OF A REGIONAL TRADE ARRANGEMENT

Early in the 1950s, shortly after the GATT was signed, some economists adopted a rather skeptical attitude towards the benefits of regional trading. In 1950, Jacob Viner drew the distinction between *trade creation* (additional trade created through establishing a customs union) and *trade diversion* (trade being diverted from an efficient producer outside the union to a less efficient producer in a Member country).<sup>56</sup> This theory about customs unions found that the overall welfare benefit to Member countries depended on the degree of trade creation, as opposed to trade diversion.<sup>57</sup> As regional integration increased the efficiency of an external tariff, the competitive position of a customs union would improve at the expense of the rest of the world.<sup>58</sup> Therefore, the overall impact of regional in-

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<sup>54</sup> See WTO Agreement, *supra* note 4, at art. X.

<sup>55</sup> Dispute Settlement Understanding, *supra* note 45, at art. 3(3).

<sup>56</sup> JACOB VINER, THE CUSTOMS UNION ISSUE (Carnegie Endowment for International Peace 1950).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

tegration is at best ambivalent.<sup>59</sup> With the proliferation of free trade areas since the 1960s, Viner's skepticism about the likely welfare benefits of customs unions gradually gave way to a popular opinion among economists that regional trade blocs generally creates, rather than diverts, trade.

Among the proponents of regional trading arrangements are prominent figures, including Gary Sampson, the former Development Division Director of the WTO. In his article *Regional Trading Arrangements and the Multilateral Trading System*,<sup>60</sup> Sampson states:

With a successful conclusion of the [Uruguay] Round, it is fair to speculate that the growth in regionalism—operating in accordance with GATT obligations—has at least the potential to strengthen the rules-based multilateral trading system. The surge of regionalism parallels and complements a rapid expansion in GATT's membership as evidenced by the fact that 28 countries are now in the process of accession to GATT. . . In short, provided that regionalism remains open—and the rules and procedures of the GATT offer the only generally available means of ensuring that it does—there is no reason why regional trade agreements and multilateral system should not continue to be mutually supportive.<sup>61</sup>

What Sampson cherishes sounds plausible in theory, but unattainable in practice. When Article XXIV of GATT 1947 was drafted as the exemptions to the general principle of non-discrimination among GATT contracting parties, it was deemed that there should be some strict rules adhered to it.<sup>62</sup> For example, Article XXIV(7)(a) requires:

[a]ny contracting party deciding to enter into a customs union or free trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable

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<sup>59</sup> *Id.*

<sup>60</sup> Gary Sampson, *Regional Trading Arrangements and the Multilateral Trading System*, in REGIONAL TRADE BLOCS, MULTILATERALISM AND THE GATT: COMPLEMENTARY PATHS TO FREE TRADE? 17-18 (Till Geiger & Dennis Kennedy eds., 1996).

<sup>61</sup> *Id.*

<sup>62</sup> See GATT 1947, *supra* note 5, at art. XXIV(7)(a).

them to make such reports and recommendations to contracting parties as they may deem appropriate.<sup>63</sup>

However, this provision is neither clear nor operable based on both procedural and substantive issues.

Procedurally, different views may arise with respect to when notification of a regional trade agreement should occur, whether: (i) at the conclusion of negotiations, (ii) when the agreement is signed, (iii) when it is ratified, or (iv) when it enters into force. In most cases, an international agreement may enter into force only after it is signed by the governments of its participants, ratified by their legislative bodies, or even approved by a referendum. If the notification process occurs prior to entry into force, then the examination body of the WTO will review the agreements which might be rejected eventually by one or more of the participants involved. Alternatively, if agreements are examined only after a protracted and perhaps difficult process of domestic legislative approval, the prospect of amending an agreement to reflect the concerns of the WTO Members will present its own difficulties.

Apart from the apparent procedural problems like the one mentioned above, there are also more substantial issues which merit our concern. Regional trading arrangements are often regarded by scholars as the faster way to liberalize international trade, as trade tariffs are lowered further among the participants of these arrangements.<sup>64</sup> But, these scholars overlook the fact that tariff barriers in these regional blocs have been raised comparably for non-participants. According to Jacob Viner, two opposite forces would result from the creation of a customs union: (1) a trade-creating force generated by the elimination of protection of domestic producers against their counterparts in other countries in the union and (2) a trade-diverting force resulting from the preferential access granted to partner countries in the union *vis-à-vis* more efficient third country producers.<sup>65</sup> Therefore, regional trading arrangements in a customs union look like a double-edged sword: they embody both

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<sup>63</sup> *Id.*

<sup>64</sup> See Stephen Woolcock, *Regional Integration and the Multilateral Trading System*, in REGIONAL TRADE BLOCS, MULTILATERALISM AND THE GATT: COMPLEMENTARY PATHS TO FREE TRADE? 115 (Till Geiger & Dennis Kennedy eds., 1996).

<sup>65</sup> VINER, *supra* note 56.

free trade and protection since they are inherently preferential and discriminatory.

The situation for the free trade area is no better than that of the customs unions, particularly in the context of those free trade areas with preconditions for their membership. For example, taking the North American Free Trade Agreement (NAFTA), Professor Jagdish Bhagwati, in his article, *The Agenda of the WTO*, states that the passage of NAFTA was subject to Mexico's acceptance of the supplemental agreements on environmental and labor standards.<sup>66</sup> As Professor Bhagwati asserts, this is just the "wrong way to go."<sup>67</sup> As free trade requires no preconditions, why should the regional trading agreements require preconditions as in the case of NAFTA? If it is proper to impose such prior conditions for some participants to join a free trade area, then we would have to revise all our textbooks of international economics which tell us that, regardless of what other countries' policies are, we shall generally profit from freeing of trade in a non-discriminatory fashion. Therefore, the demands imposed on Mexico could have been successfully resisted, as they were in the GATT and now as they are in the WTO.<sup>68</sup> However, in view of the overall interests, the Mexican administration had to accept these prior conditions, as this situation resulted from a superpower bargaining one-on-one with a vastly inferior power. In turn, this has strengthened the environmental and labor lobbies' argument that because NAFTA required these preconditions, so must the WTO. In short, NAFTA has made negotiations in the WTO more complex, not less.

In her article *The Triumph of Regionalism over Globalism: Patterns of Trade in the Interwar Period*, Patricia Clavin gives us another perspective on the potential threat of regional trade blocs to the world economy.<sup>69</sup> During the Great Depression, the

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<sup>66</sup> Jagdish Bhagwati, *The Agenda of the WTO*, in CHALLENGES TO THE NEW WORLD TRADE ORGANISATION (Pitou van Dijck & Gerrit Faber eds., 1996).

<sup>67</sup> *Id.*

<sup>68</sup> Whether the result will really benefit developing countries remains debatable, the recently finished WTO Ministerial Conferences have shown that developing countries have begun to use their combined force in the WTO to argue on some significant issues with the developed countries.

<sup>69</sup> Patricia Clavin, *The Triumph of Regionalism over Globalism: Patterns of Trade in the Interwar Period*, in REGIONAL TRADE BLOCS, MULTILATERALISM AND THE



world's leading capitalist countries - United States, Britain and France - failed to cooperate in efforts to combat the Depression because their different analyses of the causes of the Depression, coupled with the priority of national politics, left them little common ground.<sup>70</sup> Although viable internationalist-oriented initiatives to save the world economy were proposed, there was a lack of political will to make them work. Instead, countries like National Socialist Germany and Fascist Italy, governed by regimes who argued that conflicts in the political economy could be eliminated, came to pose the gravest threat to capitalist liberal democracy.<sup>71</sup> In the build-up to the Second World War, the lack of cooperation among the sterling and franc regions, and the troubled history of trade negotiations, left the capitalist economies more vulnerable than the axis opponents, in preparations on the road to war.<sup>72</sup>

In Clavin's view, the Peace Treaties of Versailles, concluded in 1919, helped to underline the divisions between European powers, by encouraging States to protect national interests through the adoption and promotion of regional ties.<sup>73</sup> Despite the fact that the nineteenth-century "age of imperialism" appeared to have passed, the peace settlement worked to extend the territorial boundaries of the British and French empires; while the White Dominions (Canada, New Zealand and Australia) secured self-government, the popularity of notions of imperial economic interdependence among right-wing political groups continued.<sup>74</sup> Although the diminution of Germany's status as a great power, coupled with the "cuts in its national flesh," served to limit German influence and custom in Eastern Europe during the early 1920s,<sup>75</sup> by the 1930s, German economic penetration of Eastern Europe had returned in an aggressive form.<sup>76</sup> In fact, particular members of German society were not alone in looking on with envious eyes at the continued

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GATT: COMPLEMENTARY PATHS TO FREE TRADE? 33 (Till Geiger & Dennis Kennedy eds., 1996).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *See id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

imperial ties enjoyed by Britain and France.<sup>77</sup> The apparent economic and strategic benefits enjoyed by the “have” imperial powers encouraged the drive for similar advantages by the “have not” powers, which were as diverse as Japan, the promoter of co-prosperity across Southeast Asia and Italy, where there was a drive to conquer the Mediterranean.<sup>78</sup> Even the United States, aloof to these imperial pretensions and disdainful of others’ resort to Empire in the 1930s, nevertheless was motivated to strengthen its ties within its own American economic backdoor, both to the North and to the South.<sup>79</sup>

Although the present fragmentation of regional trade blocs are not as threatening to the world economic structure as they were in the 1930s, no one can assure us that similar tragedies will not reoccur. Thus, in preparing the Uruguay Round of multilateral trade negotiations, many prominent scholars and others advocated to make GATT obligations, relating to regional trading agreements, stricter and more precise. According to the work of an eminent study group, many existing regional integration arrangements:

fall far short of the (GATT) requirements. The exceptions and ambiguities which have thus been permitted have seriously weakened the trade rules, and made it very difficult to resolve disputes (to which GATT obligations are relevant). They have set a dangerous precedent for further special deals, fragmentation of the trading system, and damage to the trade interests of non-participants . . . GATT rules on customs unions and free trade areas should be examined, redefined so as to avoid ambiguity, and more strictly applied.<sup>80</sup>

Despite long-standing recognition of the lack of GATT obligations and due procedures relating to regional trading arrangements, the effort of the Uruguay Round negotiators in improving matters in this area was modest at best. Therefore, a fundamental revision of WTO rules and procedures concerning regional trade arrangements should be well appreciated.

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 39-40.

<sup>80</sup> Fritz Leutwiler *et al.*, *Trade Policies for a Better Future*, Report to the Director-General (Geneva: GATT Secretariat, 1985).

## VI. CONCLUSION

There has already been a significant amount of published literature dealing with the regulation of anti-dumping and countervailing measures.<sup>81</sup> The CEPA has brought a new perspective on the issues. Article 3(2) of the Dispute Settlement Understanding provides that "one of the functions of the WTO dispute settlement mechanism is to clarify the existing provisions of those multilateral agreements."<sup>82</sup> Following this vein, the WTO panels and the Appellate Body "are obliged to adjudicate disputes arising from WTO Members, even when involving the interpretation of the most obscure provisions of the WTO agreements, and to do so in an objective manner."<sup>83</sup> Among these "obscure provisions" are those WTO rules on anti-dumping and countervailing measures. Hopefully, the views expressed in this Comment will be taken into account when a dispute involving the elimination of anti-dumping and countervailing measures arises.

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<sup>81</sup> See, e.g., Joost Pauwelyn, *Evidence, Proof and Persuasion in WTO Dispute Settlement: Who Bears the Burden?*, 1 J. INT'L ECON. L. 227 (1998); A. W. Shoyer, *The First Three Years of WTO Dispute Settlement: Observations and Suggestions*, 1 J. INT'L ECON. L. 277 (1998); Aluisio de Lima-Campos, *Nineteen Proposals to Curb Abuse in Anti-dumping and Countervailing Duty Proceedings*, 39 J. WORLD TRADE 239 (2005).

<sup>82</sup> Dispute Settlement Understanding, *supra* note 45, at art. 3(2).

<sup>83</sup> Jiaxiang Hu, *The Role of International Law in the Development of WTO Law*, 1 J. INT'L ECON. L. 143 (2004).