THE CEPA AND THE GUANGDONG FTZ: A CRITICAL OUTLOOK*

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Abstract: Free trade relationships are commonly concluded by two or more countries or regions via a Free Trade Agreement (FTA). In the light of the "One Country Two System" policy, Macau is treated as an inter-regional partner in the mutual beneficial trade relationship with the Mainland of China. *The Mainland and Macau Closer Economic Partnership Arrangement (CEPA)* was concluded in 2003 and plays the role of the legal basis to promote and liberalize the trade between the two parties. After more than ten years' implementation, the CEPA has been modified so many times that the framework has become too broken and inefficient for realistic trade demands. Meanwhile, the Central Government of the People Republic of China (PRC) never ceases to accelerate further to open the domestic economy through successive innovations. Hence, China continues to conclude international free trade agreements (FTAs) with a variety of countries and regions, while on the other hand, it cultivates more open domestic economic conditions through the establishments of free trade zones (FTZs). However, the establishment of the Guangdong Free Trade Zone (GDFTZ) will reframe the trade relationship between Macau and the Mainland of China. Macau's advantage of remaining an open economy is now being threatened by the formidable competitor. Currently, there is a necessity to improve the CEPA to a more coherent, more comprehensive, more effective agreement in order to realize the mutual development as we move into a new era.

Keywords: CEPA; free trade; mutual development.

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I. Introduction

Macau has been officially recognized as a special administrative region of the People Republic of China (PRC) since 1999.[1] As an inalienable part, the PRC gains the sovereignty of Macau, but it was granted a high degree of autonomy under the "One Country, Two System" policy. The innovative value of this policy means that for the Mainland, Hong Kong and the Macau, each has their respective legislative, administrative and jurisdictive authority, as well as different legal statuses in international relationships. Macau has benefited as free port by remaining an open economy with a flourish trade among different countries and regions for many years. The crucial core of "One Country, Two Systems" policy endows both sides with considerable freedom to develop mutually beneficial achievements. In order to achieve this, *the Mainland and Macau Closer Economic Partnership Arrangement (CEPA)* was concluded in 2003 as the legal basis to promote trade liberalization. As the first inter-regional agreement, the CEPA works as a trial FTA for the ones to follow in the future, which are signed with different countries and regions.

The innovative value of the CEPA is that a sovereign country concludes an international agreement with its own subdivision. The CEPA is deemed to tie the Mainland and Macau into an alliance for the joint economic benefit. In the beginning, the CEPA exempted the goods with Macau origin from tariffs to enter into the Mainland and permitted Macau service suppliers to provide certain services on the Mainland. This crucial beginning has ploughed a stable trading way in goods and services. On the other hand, the PRC also transformed the economy into a market-driven diversification model with the help of Macau. However, the mutual benefits do not access so easily and well as predicted.

China has dramatically accelerated its economic development domestically and internationally through further steps of its "Open-Up" policy. Recently, the Mainland initiated the establishment of strategically placed domestic FTZs in Shanghai, Tianjin, Fujian and Guangdong, in order to enlarge the free trade environments in the Mainland. Because of the close geographical location, Macau carries the risk of losing the privileged advantages if the GDFTZ implements zero tariffs and open economy. Even worse, the CEPA stumbles in the space where Macau and the Mainland do not corporate as well as predicted. It is therefore time to ameliorate the trade relationship agreement between Macau and the Mainland for their jointly development. This article debates the legal improvements to the current free trade relationship between Macau and the Mainland through an analysis of the necessity of the FTA in the first place. The description of

1 The Constitution of the People`s Republic of China, Article 31, (effective on December 4, 1982).

the challenges to the CEPA releases the legal deficiencies for further mutual development in the third part. Approaches to enhancing the CEPA are suggested in the fourth part. Finally, the conclusion presents to the Government with options for making further decisions.

II. The special characteristics of the relationship between Macau and the Mainland

In the light of "One country, Two system", the PRC concluded a FTA with its own administrative province where Macau and the Mainland legally stand as two equal parties in the free trade relationship. Macau is treated as an interregional partner rather than a province. In the meantime, the Central Government of the PRC has declined to involve Hong Kong and Macau as parts of the proposed plan for the GDFTZ. Although Macau is excluded from the GDFTZ, Macau is significantly affected as the interdependence with the GDFTZ.

The reasons why Macau is treated as an economic partner should be analyzed. First, with the regard to international law, Macau and the Mainland of China are separate members in many international legal frameworks. They are both members of the WTO. According to the Article XXIV of the GATT[2] and Article V of the GATS[3], regional liberalization of trade is legally authorized. These therefore provide the legal bases for Macau and the Mainland to conclude FTAs. Meanwhile, from the internal law perspective, "One Country, Two Systems" endows Macau with the exercise of abundant rights, mainly of the executive, the legislature and independent judicial power, including the power of final adjudication.[4] Macau's legal and economic systems are totally different from the Mainland's. Moreover, the "One Country, Two Systems" policy also enables Macau to conduct foreign affairs under the name of "Macau, China"[5] without violating the Basic Law[6]. Therefore, both international and domestic laws establish the legal bases for Macau to conclude international agreements with the Mainland.

For these reasons, Macau and the Mainland are two individual entities in the trade relationship. Macau's exclusion from the plan for the GDFTZ also results from other factors besides these. From the view point of social stability, it

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2 GATT is the abbreviation of the General Agreement on Tariffs and Trade, (1994).

3 GATS is the abbreviation of the General Agreement on Trade in Services, (1995).

4 The Basic Law of the Macau Special Administrative Region of the People's Republic of China, Art. 2, (1993).

5 The Basic Law of the Macau Special Administrative Region of the People's Republic of China, Chapter VII, (1993).

6 The Basic Law is constitutional law of the Macau SAR.

would raise political risks if the GDFTZ contained Hong Kong and Macau at the first stage of the initiation of an open economy in China, since the "One country, Two systems" principle allows Macau to keep the capitalist system and the way of life as established before the handover of sovereignty for fifty years[7]. This means that China's socialist system and policies shall not be practiced in Macau before 2049. It is impossible to conceive how two different social systems could be implemented in the same FTZ. Moreover, the "Umbrella Movement" in Hong Kong exposes the Hong Kong residents` dissatisfaction with current policies. Such an unstable political condition in Hong Kong warns the Central Government of PRC that it is not a good time to include the SARs into the GDFTZ.

Legally speaking, the different legal systems of Guangdong province and the two SARs increase the difficulties of early practice in the FTZ. Existing laws cannot coherently settle all differences. A new legal framework would be required which should settle all the potential conflicts. It is a tough task to coordinate three different and independent legal systems into one legal framework in order to achieve free trade together, especially at the first attempt at FTZ strategy. Further, the question arises as how to balance the different international legal statuses of the Mainland, Hong Kong and Macau in the legislative system.

In this case, it is better to regard the establishment of the GDFTZ as a domestic strategy in the Mainland. PRC prudently excluded Macau from its plan at very beginning of initiating an open economy whereas it does not prohibit Macau to cooperate with the GDFTZ in joint developments. The rearrangement of the current FTA not only will achieve this goal but also will create more hopeful trade environment than if Macau and the Mainland work separately. However, the current FTA between Macau and the Mainland is the CEPA that is a fragmentary framework although it is most reliable in practice for decades. The CEPA lags behind the demands of trade prosperity.

III. The challenges to the CEPA

The Mainland of China was short of the experience for carrying free trade relationships forward when it developed its ambitions to liberalized trade. The CEPA was conceived as a pioneer agreement aimed to integrate the SARs and the Mainland together to the implement the "One County, Two Country" policy as well as to became a model for other future FTAs. Now, after years of practical implementation, the CEPA is facing abundant challenges that are the primary reasons for the disconnections between trade reality and demands.

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7 The Basic Law of the Macau Special Administrative Region of the People's Republic of China, Art. 5, (1993).

An overview of the CEPA shows it is more of a complex framework than comprehensive content, in the sense that it was a first legal framework with experimental features. The CEPA consists of one original agreement (Arrangement), ten additional supplements, as well as two further agreements named *The Agreement between the Mainland and Macao on Achieving Basic Liberalization of Trade in Services in Guangdong under the framework of CEPA (The Guangdong Agreement)* and *The CEPA Agreement on Trade in Services*. The Arrangement itself is so simple that need to enclose the six Annexes. First three of these together regulate the liberalization of trade in goods between Macau and the Mainland. Annexes 4 and 5 make provision for the liberalization of trade in services. Annex 6 governs Trade and Investment Facilitation. However, this is still insufficient and every year the Joint Steering Committee will generate one supplement that encloses more than one Annex in order to enrich or modify the Arrangement or its Annexes. There are currently 10 supplements with a further 15 Annexes comprising the CEPA.

The CEPA has developed a rough and tumble ad hoc structure. It is hard to use such a complex document for real business. What is worse, the CEPA still works as a framework structure rather than specific pragmatic provisions after more than ten years of practice. The endless supplements still restrain practical work instead of achieving the predicted plan. For the same reason, application of the CEPA is mainly confined to enterprises in Guangdong Province. Most trade transactions under it are concluded in the Pearl River Delta Area. However, the utilization is still low and that the lack of practical operability impedes the process of closer relationship between Macau and the Mainland. The process of fertilizing the liberalization of trade with the wider Mainland is torpid and unpredictable.

Moreover, another fatal weakness is the absence of a dispute resolution mechanism to settle practical legal conflicts which may involve not only private entities but also involve the administrative institutions from both sides. There have been disputes from first of implementation of the CEPA to the present. No one can deny the importance of the dispute resolution mechanism in any FTA. Needless to say, the CEPA derives from the WTO framework. The absence of dispute resolution mechanism implies that the Governments are trying to avoid facing these situations. They dangle the hope of "negotiation"[8] as an ineffective solution to any disagreement between the members of the CEPA. However, only the Joint Steering Committee, rather than any other entities, has right to take part in the "negotiations". Indeed, the Joint Steering Committee is supposed to take

8 Mainland and Macau Closer Economic Partnership Arrangement (CEPA), Art. 9, (2003). The CEPA Agreement on Trade in Service, Article 7, Section 2, (2015).

the responsibility of settling disputes.[9] However, the Joint Steering Committee plays a political role rather than a juridical one, because there are neither dispute settlement procedure rules nor a judicial or quasi-judicial institution for solving disputes in the CEPA. Taking a step back and following the "negotiations" route to settle alleged disputes is ironic as it is hard to imagine how Macau will be treated as equal as the Mainland in negotiations since it is merely an administrative division of China. Some scholars have also argued for the application of the WTO's dispute settlement mechanism in the CEPA, based on the fact that both of them are members of the WTO. This however is in theory only, China is never willing to sit and wait for one of its administrative subdivisions, although with the high the degree of autonomy, to file a suit against its Mother land in an international organization. Conversely, any country would naturally prefer to take action before the issue becomes international. Therefore, the absence of the dispute resolution mechanism obstructs the application of the CEPA.

The third challenge is the imperfect organization arrangement. The CEPA has an uncertain administrative institution. All the primary authority powers belong to the Joint Steering Committee that are including: "supervising the implementation of the 'CEPA'; interpreting the provisions of the 'CEPA'; resolving disputes that may arise during the implementation of the 'CEPA'; drafting additions and amendments to the content of the 'CEPA'; steering the working groups; dealing with any other affair relating to the implementation of the 'CEPA' ".[10] Gathering administrative, supervision, implementation and interpretation duties in one committee endangers the practical work. All the duties and functional responsibilities of FTAs should be discretely concentrated in different departments with explicit rights and obligations as well as procedures in the rules of the FTAs. Moreover, the members of the Joint Steering Committee are common senior representatives or officials who are designated by the two parties, instead of legal professionals or economic professionals who are better at dealing with the complex trade conditions and legislation. Furthermore, not all of the senior representatives or officials are able work full time for the CEPA. The majority of decisions are made in the time-limited annual meeting which cannot fulfill all the Joint Steering Committee's responsibilities. It is obvious that a decentralized administrative management is better than having the Joint Steering Committee to administer everything. Although there are increasing demands to establish Working Groups, so far no working group has been set up under the CEPA to deal with practical work. Another type of functional organization is the Liaison Offices

9 Mainland and Macau Closer Economic Partnership Arrangement (CEPA), Art. 19, Section3, (2003).

10 Mainland and Macau Closer Economic Partnership Arrangement (CEPA), Art. 19, (2003).

which have in essence no authority. This administrative management definitely cannot operate effectively and dutifully.

So far, these challenges cannot neutralize the achievement and ambitious goal of the CEPA. The CEPA has been successful in the construction of a trade liberalization platform for Macau and the Mainland. With the time flies and diverse changes, challenges are not avoided in the beginning of processing CEPA. However, after decades of practice, the challenges display the needs of the free trade agreement and the necessity of rearrangement the current CEPA structurally and substantially in order to achieve further liberalization of trade between the two sides. And it also further provides a solid legal framework for underpin the successes of the GDFTZ and the innovations in Macau.

IV. Amelioration to the CEPA

4.1 Rearrangement the CEPA

As mentioned above, the structure of the CEPA is rough and tumble. The CEPA should be facilitated, systematized and substantiated. Rearrangement of the CEPA should retain the main structure of the Arrangement but enrich the content. The Chapter I will retain the General rules of the CEPA with the purposes, principles and institutional structure. The Chapter II is about the liberalization of Trade in Goods. I suggest merging the original part and the Annexes 1,2,3 to the Arrangement, as well as all the Trade in Goods stipulations in the Supplements I to X. The clauses must be reviewed and integrated instead of being piled up. After all, there are supposed to have one solid and coherent Trade in Goods Agreement without frequent modification. For the same reason, all the lists of Macao Original Products and all schedules on Rules of Origin for Macao Goods could be renewed and amended every year, so it is perhaps better to separate these lists and schedules and to place them in an Annex. The process and principles for the enrichment and renewal of the lists should be indicated in the body of Chapter Two of the CEPA.

Chapter III concerns the liberalization of trade in services and this will be replaced by *The CEPA Agreement on Trade in Services* (signed on 28 November 2015). In this case, *The CEPA Agreement on Trade in Services* made remarkable progress integrating regulations throughout the Arrangement and related Annex 4 as well as through the long-winded references in the ten supplements. It comprehensively established a framework for the mutual development of the trade in services. First, it revoked the Articles 11 and 12 of the Chapter 4 of the Arrangement. The status of this agreement is higher than all the provisions in the CEPA trade in the service sector. If there are any conflicts between this agreement and the Arrangement, all the supplements and the Guangdong Agreement, *the CEPA Agreement on Trade in Service* prevails.

The scope and definition of the "Macau and the Mainland Trade in Services" are firstly indicated in the main agreement.[11] The newly specified definition and related requirements of the "Service Supplier" are set out in the Annex 3 to this agreement. It is however better to be regulated by the main body of *the CEPA Agreement on Trade in Services*. A further achievement is that this Agreement stipulates the obligations for both sides.[12] As well as the structure of this Agreement improving its accessibility, there are substantial improvements in the content. The structure of this agreement is more specific, detailed and comprehensive and it has become the most applicable agreement covering the trade in services between two sides.[13] Therefore, the provisions in *the CEPA Agreement on Trade in Services* should remain in Chapter III because that is specific and comprehensive and that in turn greatly reduces the probability of amendment. Additionally, Chapter III needs two Annexes. The two Annexes lay out the commitments of both sides, which can be extended and improved.[14] The Annex 1 retains the Mainland's commitments allowing Macau enterprises to provide services in the Mainland in the *CEPA Agreement on Trade in Services*. The Mainland's commitment includes one negative list and three positive lists guaranteeing Macau service suppliers are treated at least equal with the National Treatment when carrying out business. However, Macau's commitments does not illustrate in the Annex 2. Macao's reserved restrictive measures and further liberalization measures will be listed in this Annex after consultation between the two sides.[15] Macau's enterprises will not threaten the huge economy of the Mainland if they provide services there. On the contrary, the Macau Government cannot make decisions so easily. The Government determines circumspectly to what extent liberalization should be undertaken on the Mainland. The caution is due to the huge risk to Macau`s tiny economy of easily or rapidly being wrecked from the sensitive process of "One Country, Two Systems". Therefore, the Annex needs enrichment sooner or later.

Chapter IV regulates the Trade and Investment Facilitation. The CEPA provides for cooperation in seven areas namely: trade and investment promotion; customs clearance facilitation; commodity inspection, inspection and quarantine of animals and plants, food safety, sanitary quarantine, certification, accreditation and standardization management; electronic business; transparency in laws and

11 The CEPA Agreement on Trade in Service, Article 2, (2015).

12 The CEPA Agreement on Trade in Service, Article 3, (2015).

13 The CEPA Agreement on Trade in Service, Article 2, (2015).

14 The CEPA Agreement on Trade in Service, Article 3, Section 4, (2015).

15 The CEPA Agreement on Trade in Service, Annex 2, Macao's Specific Commitments on Liberalization of Trade in Services for the Mainland.

regulations; cooperation of small and medium sized enterprises, and industrial cooperation. However, all the provisions are general and lack utility. Although some cooperation in trade and investment promotion and cooperation of small and medium sized enterprises are under the light of *the CEPA Agreement between the Mainland and Macao on Achieving Basic Liberalization of Trade in Services in Guangdon*g, there still are no specific common standards covering the other areas for both sides.

Chapter V should provide the dispute resolution mechanism which will be discussed below in part 4.3.

4.2. Necessity of a specific organization structure to the CEPA

The CEPA was signed by the Ministry of Commerce of the PRC and by the Secretary Office of Economy and Finance of Macau. Neither of them established an organization structure to implement the CEPA. The Joint Steering Committee centralizes all the authority of CEPA. Although the CEPA sets up the Liaison Offices and the Work Groups, all the present agreements and supplements only provide the rough outline of an organization structure.

To function efficiently, the CEPA is supposed to establish a detailed organization structure with a clear division and assignment of responsibilities. The Joint Steering Committee is the highest institution with the responsibility for supervising the implementation of the CEPA and the subordinate institutions. The Committee has the authority make decisions, concluding new agreements, modifying the CEPA, calling meetings and taking emerging measures. Furthermore, the members of the Joint Steering Committee should be not only the present members but also experts in the economy and law who should make up one of third of the Committee. The Joint Steering Committee is suggested to need permanent body rather than merely an annual meeting. The permanent body, as a subordinate institution, should handle the daily work of the Joint Steering Committee and call for meetings when it is necessary. Another subordinate institution is supposed to have an administrative institution that is supposed to have the Secretariat office, the Trade in Goods Office, the Trade in Services Office and the Investment Office. The four offices implement their duty and rights according to the CEPA. Finally, Working Groups also can be set up when necessary. For instance, when a dispute happens, a Working Group can investigate the facts and make a professional report to the Join Steering Committee. Working Groups are also needed to investigate the standards within the CEPA like origin of the goods and the service suppliers.

It is only through organized institutions that the CEPA will achieve the predicted mutual beneficial economic and trade environment.

4.3 The necessity of the dispute resolution mechanism to the CEPA

The requirement of a disputes settlement mechanism would provide practical safeguards for the implement of the CEPA. Therefore, a dispute settlement mechanism should be established as soon as possible. This is especially true since the GDFTZ finished its elementary construction, and would proactively avoid problems not only for the GDFTZ but also for the adjacent Mainland and Macau. As a legal rule, any dispute resolution mechanism should include a wide range of content such as the applicable laws, the jurisdiction and other, legal remedies, etc.

4.3.1 The jurisdiction

The parties in dispute should follow the domestic civil produce law where the CEPA does not stipulate the centralized jurisdiction of any court. Generally, in the Mainland, the cases involving foreign factors should be undertaken by the Intermediate People's Court when there are no specific provisions.[16] There is no specific regulation about foreign jurisdiction in Macau, so there cases should follow the Macau Civil Produce Code. However, the jurisdiction chosen by the parties in dispute also has a priority.

In the GDFTZ, FTZ courts are set up to deal with free trade disputes related to the FTZs. Only cases that concern the free movement of goods, services and free investment into or out the FTZs can apply the relative special laws of the FTZs rather than territorial or personal doctrine. Otherwise, the outside courts have jurisdiction. Theoretically speaking, the FTZ court exercises direct jurisdiction in first instance cases. However, numerous international companies operate businesses in FTZs. According to the PRC Civil Procedure law and the Law of the Application of Law of Foreign-related Civil Relations, the FTZ court generally enable to deal the cases that involve: a) where the defendant's domicile, habitual residence, or the company's registration are located in the FTZ; b) where the subject matters involved in the case are located in the FTZ; c) where the legal factors causing the generation, change and elimination of the civil legal relationship occurs in FTZ.

Furthermore, the hypothesis challenges if there is legal arguments in international trade administrative cases. The Intermediate People`s Court, or a higher court, has the first-instance jurisdiction over international trade administrative suits.[17] International trade administrative cases include those

16 Supreme People's Court on the trial of administrative cases in a number of issues of international trade rules (最高人民法院关于审理国际贸易刑侦赶建若干问题的规定), Art. 3, Art. 4 and Art. 5, (2002)

17 Supreme People's Court on the trial of administrative cases in a number of issues of international trade rules (最高人民法院关于审理国际贸易刑侦赶建若干问题的规定), Art. 3, Art. 4 and Art. 5, (2002).

dealing with international trade in goods or in services, international trade related to intellectual property rights and other international trade administrative cases.[18] In another word, the international trade administrative cases are outside the FTZ court`s authority and legal competence. This implies therefore that the FTZ courts are deprived of the jurisdiction over international trade administrative cases. But obviously the FTZ court is most suitable for those cases. A moderate centralized jurisdiction is believed to help the stability of justiciable trials, the convenience of any dispute resolution and the enforceability of the judicial decision. The cases involving investment, trade, finance and intellectual property rights in the FTZ should be regarded as cases for the FTZ court. A centralized jurisdiction not only improves the meticulous and high quality of a trial but also is conductive to uniform standards of applying the law as well as intensively examining problems and finding solutions.

The main purpose of the jurisdiction of the FTZ court is handling all the free trade related cases. Therefore, the law must provide for the FTZ court to have the centralized jurisdiction for all relevant cases. On the other hand, the FTZ court also deserves the administrative jurisdiction over international trade, not least because the FTZ is designed to be a platform for the encouragement of international free trade and must therefore be as open as possible and as fair as possible. As an innovation of government management mechanisms, the FTZ court must ensure the special treatment of cases in the FTZ. It must also complement and improve judicial safeguards.

4.3.2 The applicable Law

At first, the FTA should clarify what law should be applied in the free trade cases that are the concerned with the free movement of trade in goods, services and related investment. The general principle in choosing the applicable law is that the international treaties and agreements have priority. However, the stipulations of the FTA between Macau and the Mainland must not be violated. Any other domestic trade laws cannot contradict them. Secondly, *Lex voluntatis* should be respect in trade transactions. If the business parties reach the agreement on the applicable law in certain cases, the appointed law should be use in that case. But the chosen law cannot violate public interests, health and security. *Lex voluntatis* is the core of commercial law. Respect for *Lex voluntatis* helps China to move towards an open economy. Especially when the FTZs open the door to more liberal trade with the world, the law cannot remain unchanged or refuse

18 Supreme People's Court on the trial of administrative cases in a number of issues of international trade rules (最高人民法院关于审理国际贸易刑侦赶建若干问题的规定), Art. 1, promulgated and shall go into effect October 1, 2002.

to make progress to accept that other laws may be chosen by entities to settle their disputes. Finally, if there are no special stipulations, then domestic law is applicable but it should follow international private law processes when the cases are engaged in international factors. Different legal provisions may be applicable to different legal cases. Which law should be applied hinges on how to determine whether the case is related to free trade or not. It is easy to understand that special legislation is needed to adapt the establishment of the FTZs with the settlement of the conflicts between free trade policy and existing law and fill the legislative vacuum. In this case, special laws may be more applicable than domestic law.

Other cases would fall under the authority of an existing legal regime just the same as would apply outside the FTZs. For instance, a traffic accident occurring in the GDFTZ has no legal characteristics involving free trade. A geographical factor alone is insufficient to entitle the FTZ court to apply the special FTZ laws.

However, not only special laws are approved for use in a FTZ. First, not all dispute points are about the trade in goods, services and related investments. The regulations covering inspections or testing of equipment, or standards for packaging, etc., are stipulated clearly in other laws. For example, the first litigant case in the SPFTZ Court: Henan Yixin Industry Co. Ltd versus Mettler Toledo International Inc., which was registered in SPFTZ, concerned a dispute over production quality in accordance with the contract. No specific law concerning the FTZ was applied throughout the whole hearing. So the applicable laws in the FTZ cases include existing laws. Most disputation occurs between equal parties. Apart from special law provisions, other disputes may be resolved in accordance with the Contract Law of the People`s Republic of China, the Civil Procedure Law and the Law of the Application of Law of Foreign-related Civil Relations of the People`s Republic of China, etc.

Furthermore, the law chosen by the parties in dispute should be supported as applicable law in certain cases. *Lex voluntatis* is the general principle of the international law.

4.3.3 The role of alternative dispute resolution

There is no denying that litigation is a time-consuming and often unprofitable measure to resolve disputes. For across regions like Macau, litigation may also be linked to other legal issues, conflicts as well as political sensitiveness. Where these are involved, international arbitration is often the ideal method of resolving the disputes.

Lex voluntatis is the cornerstone of arbitration as well as of free trade. International commercial arbitration is divided into *institutional arbitration* and *ad hoc arbitration.* The second of these is the earlier form of arbitration system, from which evolved *institutional arbitration*. *Institutional arbitration*

is compatible with stability and regularity under the legal requirements of an arbitration agreement.[19] Under an international arbitration agreement the parties in dispute endow the institution with the procedural and adjudicative right over disputes. Arbitration is close to the *Lex voluntatis* because it permits the choice of applicable laws, which could be native (home state) laws, another state's laws, international laws or international treaties, etc.

Ad hoc arbitration is to be encouraged in resolving disputes. Actually, *ad hoc arbitration hearings* frequently solve disputes such as those dealing with maritime affairs, futures and metal trading cases. For instance, the London Maritime Arbitrators Association has six outstanding arbitrators who arbitrate about six to seven hundred cases every year. This number may be much more than the amount of work for some arbitration institutions in a single year. The demands of *ad hoc arbitration* explain the necessity for the arbitrators' existence. However, the Chinese legal system[20] does not include the *ad hoc arbitration* as an appropriate legal status. The law stipulates the arbitration agreement must determine the arbitration committee that the parties have chosen.[21] This provision violates the *Lex voluntatis* that obviously expresses the legal attitude to the *ad hoc arbitration* in Mainland China.

Ad hoc arbitration is admitted in Macau under the law No. 29/96/M in accordance with the provisions of Macau Civil Procedural Law. It is a definite advantage that Macau can provide legal services to settle disputes in processing cross-broader business. Perhaps considerations of justice impede the development of *ad hoc arbitration.* Whereas, though arbitration does not have the level of legal effect of litigation, *ad hoc arbitration* also should be enforced. That parties are also entitled to make a choice and control all the steps of arbitration provides an assurance over procedural justice. Substantial justice could be ensured through the law because the findings of arbitration always come from law. Last but not least, litigation will always be available as a relief should arbitration fail,

Moreover, investment arbitration is a new method for both side. Investment disputes are composed of two types: one is a dispute between the investor and a host country and the second is a private investment dispute, in so far as disputes among private investors can be resolved by these ways. But the investment

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19 Chu Yongchang (儲永昌), *Research of Ad Hoc Arbitration and Discussion of the Development of Arbitration Service in China (*臨時仲裁制度探析-兼論中國仲裁服務市場的開放*),* 100 Arbitration and Law(仲裁與法律), (2005).

20 The Arbitration Law of the People's Republic of China, Art. 31, (adopt by the 8th National People`s Congress on August 31, 1994 and effective in 1995).

21 The Arbitration Law of the People's Republic of China, Art. 31, (adopt by the 8th National People`s Congress on August 31, 1994 and effective in 1995).

arbitration provides an effective way to settle disputes with a host country. The Bilateral Investment Treaty[22] (BIT) is the most reliable resource for solving disputes. Sovereign rights are neither exclusive to BITs nor to BIPAs[23], instead private parties are given rights and direct access to the international investment dispute resolution process.[24] In fact, BITs and BIPAs are structured to encourage investment dispute resolution on a bilateral, yet depoliticized private (third party arbitral) basis.[25] The Convention on the Settlement of Investment Disputes between States and Nationals of Other States[26] established the most important arbitration institution: the International Centre for Settlement of Investment Disputes (ICSID), which resolves disputes between investors and host countries.[27] BIT provisions granting foreign investors direct access to a dispute resolution system that allows them to challenge sovereign action directly within the ICSID forum is one of the BIT program's most significant innovations.[28] Until now, China has signed over 140 BITs but the provisions about mechanisms through ICSID are different from each other and use different exception terms such as: apply host country law; priority of domestic remedy; exception for major security reasons and approval and consent case by case. However, the GDFTZ will cover abandoned foreign investments, which mostly deal with government, so that the arbitration against government is one of the fundamental functions of dispute resolution mechanism in FTZ. A deep understanding of so many BITs reduces the risks of disputes and resolves relevant arguments in accordance with the relevant articles

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22 Traditional BITs were signed between two sovereign states mainly concerning the scope of investment protection, investment treatment, levy and compensation, currency exchange rules, performance requirements, high-level managers' nationality, transparency policy of tariff and tax law and regulations as well as investment dispute settlement procedural provisions.

23 *BIPA is the abbreviation of Bilateral Investment Promotion and* Protection Agreement.

24 Todd S. Shenkin, *Trade-Related Investment Measures in Bilateral Investment Treaties and the Gatt: Moving Toward a Multilateral Investment Treat*, 55 University of Pittsburgh Law Review, 583 (1993-1994).

25 Todd S. Shenkin, *Trade-Related Investment Measures in Bilateral Investment Treaties and the Gatt: Moving Toward a Multilateral Investment Treat*, 55 University of Pittsburgh Law Review, 583 (1993-1994).

26 Convention on the Settlement of Investment Disputes between States and Nationals of Other States was concluded in Washington on March 18, 1965, take effect on October 14, 1966. PRC signed in July 1990.

27 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Art. 1, (1965).

28 Todd S. Shenkin, *Trade-Related Investment Measures in Bilateral Investment Treaties and the Gatt: Moving Toward a Multilateral Investment Treat*, 55 University of Pittsburgh Law Review, 583 (1993-1994).

in the BITS. With a general lack of practical experience of dispute settlements between private investors and host countries, Macau and the GDFTZ should first take responsibility to explore investment arbitration in practice in order to adapt to increasing number of international disputes.

Last but not least. Amiable Composition[29] and *ex aequo et bono* will be carried out in favor of pursuing virtual markets in dealing disputes in the future. Today an amiable composition has the power to depart from the strict application of rules of law and decide the dispute according to equitable justice and fairness.[30] Until now Chinese law has not yet permitted Amiable Composition to exist. The arbitration tribunal in international commercial disputes must still strictly apply, directed by the conflict rules of the applicable law in our country.[31] However, with the dynamic views, the disputes will become more novel, more complicated and more unique in the future. If the existing law cannot solve the disputes, Amiable Composition should be implemented for free trade transaction success in the FTZs.

V. Conclusion

The relationship between Macau and Mainland is described as "Indivisible". Joint development always stands on the top of goals to both sides. Particularly in these days, China is devoted to the trade liberalization in the Mainland. That the CEPA ties closely Macau and the Mainland in a trade is becoming more and more important. Through it, Macau expects to get a seat on the China's fast developing train to prosperity whilst the Mainland also wants access to broader international market via Macau that has more experience of operating an open economy and more thorough infrastructure. We cannot stand aside as the Mainland initiates an open economy though the accelerating steps towards opening-up that have established the GDFTZ as it may be a threat to the open economy of Macau, but we can fix it by appropriate approaches. The CEPA is as a reliable FTA only if it is ameliorated.

The CEPA should evolve into the practical, comprehensive and applicable agreement following decades of exploration and accumulated experience.

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29 The Amiable Composition tribunal should satisfy the conditions: (a) be within the legal jurisdiction in which the arbitration happens; (b) be authorized by the parties to the dispute; (c) avoid violation of the relevant national mandatory rules and public policy; (d) apply the contract; (e) consider international practices.

30 Jana Herboczková, *Amiable composition in the International Commercial Arbitration*, (Masaryk University, Law Working Paper No.3), 1-11(2008), available at *https://www.law.muni.cz/sborniky/cofola2008/files/mezinaro.html* , (last visit: September 29, 2015).

31 The Arbitration Law of the People's Republic of China, Art. 16, (adopt by the 8th National People`s Congress on August 31, 1994 and effective in 1995).

Regarding the structure of the CEPA, the general framework of the CEPA should be rearranged into six parts. First, the general regulation of the whole CEPA including: the goals, the principles, the rights and obligations of both parties and other provisions which are implemented through every section of the CEPA. The second part should establish the substantive framework for the Trade in Goods to replace the current instructional rules which are complicated and impractical to follow up. The third part should focus on the Trade in Services and can use *the CEPA Agreement on Trade in Services* as a replacement for the current part but the Macau Commitments on Liberalization of Trade in Services for the Mainland should be issued as soon as possible. The forth part should substantially regulate the Trade and Investment Facilitation. The fifth part, the Dispute Resolutions Mechanism, would be a new division of the CEPA. The last part would be the Annexes including all the lists of Macao Origin Products for Implementation of Zero Import Tariff by the Mainland, the Mainland's Specific Commitments on Liberalization of Trade in Services for Macao, and the Macao's Specific Commitments on Liberalization of Trade in Services for the Mainland. Separating them as the Annexes from the main body of each part would enable the contents of them to be frequently modified. The main body of the CEPA should be stable and avoid modification as much as possible in order to maximize the predictable practical effect. Changing the annual supplements into renewals or amendments of the Annexes would help the application of the CEPA.

Beside rearrangement of the structure of the CEPA, the institutional structure also needs to be established. On the one hand, the Joint Steering Committee should delegate the administrative, investigative and implementing authority to the appropriate subordinate department. On the other hand, the Joint Steering Committee is still the senior authority for the CEPA and needs to be responsible for the supervision, decision-making and regulations. Such a hierarchical organization with separate functions would increase the efficiency, operability and transparency.

Last but not least, it is important and necessary to establish a dispute resolutions mechanism in the trade relationship between Macau and the Mainland. Disputes are inevitable in practical trade transactions. Providing legal remedies is a necessary part of any FTA. Considering the special relationship between Macau and the Mainland, arbitration is probably the most dependable and efficient way to settle specific real disputes rather than general negotiation in an annual meeting. In these circumstances, the CEPA should establish rules for the application of arbitration. In case arbitration cannot resolve the dispute, a law suit may be unavoidable and appropriate regulations for this also need to be set up.

All in all, the above suggestions are made not only to cover current urgent requirements but also for the long-term benefit of the joint development of Macau and the Mainland of China.

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