

*The China Review*, Vol. 6, No. 2 (Fall 2006), 97-120

## *CEPA and China's Banking Law: Conflicts and Adjustments*

Wei Wang

### *Abstract*

Mainland China has made a number of banking commitments to Hong Kong, under the Closer Economic Partnership Arrangement (CEPA), which are more favourable than China's banking commitments under the WTO. There are conflicts between the CEPA and the existing banking law of mainland China. Mainland China should adjust its banking law to implement its banking commitments under the CEPA. Now the work is only carried out by the China Banking Regulatory Commission through issuing notices or revising banking rules, which are at the bottom level of China's banking law, or in conflict with higher levels of China's banking law, such as banking regulations issued by the State Council. I suggest mainland China should adopt a top-down mechanism to deal with the issue, that is to say, the National People's Congress and the State Council should positively participate in the implementation of the CEPA, as well as other regional trade agreements.

### **Introduction**

Current Chinese foreign trade policy is a mixture of multilateralism and regionalism. After entry to the World Trade Organization (WTO) in 2001,

---

**Wei WANG**, LL.B. (ECUPL), LL.M. (Fudan), LL.M. (SMU, Sohmen Scholar), Ph.D. (in international financial law, University of London, John and Joan Jackson Scholar). He is an associate professor in international financial law at Fudan Law School, and research fellow at HKU Law Faculty. He is the author of a number of journal articles on financial law, WTO law, and commercial law. He has qualified as a lawyer in the People's Republic of China.

China began to pay close attention to regional trade integration so as to take advantage of regional trade agreements to maximize trade benefits.<sup>1</sup> The Central Committee of the Chinese Communist Party and the State Council of the People's Republic of China (PRC) made a significant strategic decision to conclude regional trade agreements.<sup>2</sup> This policy change was compatible with the belief of Hong Kong, also a Member of the WTO,<sup>3</sup> that free trade agreements (FTAs) are helpful in expanding trade and investment.<sup>4</sup> This consensus led to the conclusion of the Closer Economic Partnership Arrangement (CEPA) in June 2003.<sup>5</sup> Three months afterwards, six Annexes to the CEPA were signed as an integral part of the CEPA.<sup>6</sup> One of the six Annexes to the CEPA is the Specific Commitments on Liberalization of Trade in Services (CEPA Schedule).<sup>7</sup> On 27 October 2004, the two sides reached an agreement to provide further liberalization measures on trade in goods and services for the second stage of the CEPA, i.e., the Supplement to the Mainland and Hong Kong Closer Economic Partnership Agreement (CEPA II).<sup>8</sup> One of the Annexes to the CEPA II is the Supplements and Amendments to the Mainland's Specific Commitments on Liberalization of Trade in Services for Hong Kong (CEPA II Schedule).<sup>9</sup> On 18 October 2005, the Mainland and Hong Kong signed Supplement II to the Mainland and Hong Kong Closer Economic Partnership Agreement (CEPA III),<sup>10</sup> annexed by the Supplements and Amendments II to the Mainland's Specific Commitments on Liberalization of Trade in Services for Hong Kong (CEPA III Schedule).<sup>11</sup> On 27 June 2006, the two sides signed the Supplement III to the Mainland and Hong Kong Closer Economic Partnership Agreement (CEPA IV),<sup>12</sup> annexed by the Supplements and Amendments III to the Mainland's Specific Commitments on Liberalization of Trade in Services for Hong Kong (CEPA IV Schedule).<sup>13</sup>

A characteristic of the CEPA is that the FTA is between two separate customs territories under one country,<sup>14</sup> which results in not only international law issues, but also domestic law issues. This article concerns the latter, that is, the relationship between the CEPA and China's domestic law, especially the relationship between the CEPA and China's banking law. Structurally, after this introduction, I describe China's specific commitments relating to banking services under the CEPA, then address the issue of implementation of China's banking commitments under the CEPA. After exploring the conflicts between China's banking law and China's banking commitments under the CEPA, I focus on how to adjust China's banking law in the context of the CEPA. The article ends with concluding remarks.

## China's Specific Commitments in Banking Services under the CEPA

Service trade is covered by the CEPA.<sup>15</sup> The core of CEPA service trade is China's CEPA Schedule, as part of Annex 4 to the CEPA, in which the financial services sector is listed. In order to analyse China's banking commitments in the CEPA, it is necessary to look to two important concepts: banking services and banking service suppliers.

### Banking Services

China's CEPA Schedule includes the following banking services:

- a. Acceptance of deposits and other repayable funds from the public;
- b. Lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transactions;
- c. Financial leasing;
- d. All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts (including import and export settlements);
- e. Guarantees and commitments;
- f. Trading for own account or for account of customers: foreign exchange.

By comparison with the WTO banking service commitments in China's WTO Schedule,<sup>16</sup> the scope of banking services in China's CEPA Schedule is almost equal to that in China's WTO Schedule. The fact that China's CEPA Schedule does not include more categories of banking services indirectly indicates that the scope of banking services in China's WTO Schedule is broad enough.<sup>17</sup>

### Banking Service Suppliers

According to Article XXVIII (g) of the General Agreement on Trade in Services (GATS),<sup>18</sup> "service supplier" means any person that supplies a service. "Person" means either a natural person or a juridical person.<sup>19</sup> Because the concept of "natural person" is meaningless in supplying banking services, "juridical person" is the focus of analysis regarding banking services. GATS Article XXVIII (m)(i) stipulates that a "juridical person" of another Member means a juridical person which is constituted or otherwise organized under the law of that other Member, and is engaged

in substantive business operations in the territory of that Member or any other Member.<sup>20</sup> Under the WTO, no minimum operation time is required for being a “service supplier.” However, according to CEPA Annex 5 “Definition of ‘Service Supplier’ and Related Rules,” the standards of a Hong Kong service supplier (HKSS) providing service by way of a juridical person include the following:

- (1) establishment or registration based on HKSAR Corporation Regulations or other regulations, with a valid business registration certificate or licence;
- (2) being engaged in substantive business operations in Hong Kong for at least three years. Thus, the tests to determine engagement in substantive business operation in Hong Kong include, *inter alia*, a minimum of three years of registration and operation in Hong Kong.<sup>21</sup>

The conditions for becoming a Hong Kong banking service supplier are stricter than those for becoming an ordinary HKSS. To be a Hong Kong banking service supplier, a Hong Kong bank or a Hong Kong finance company should have engaged in substantive business operations for five years or more after it has been granted a licence by the Hong Kong Monetary Authority (HKMA) pursuant to the Hong Kong Banking Ordinance.<sup>22</sup> An applicant for the status of a Hong Kong banking service supplier should submit its applications for a Certificate of HKSS to the Trade and Industry Department (TID) of the HKSAR through the Banking Supervision Department of the HKMA.<sup>23</sup> After obtaining a Certificate of HKSS from the TID, the Hong Kong banking service supplier should apply to the China Banking Regulatory Commission (CBRC) to obtain the CEPA treatment.<sup>24</sup>

It is noteworthy that foreign banks and finance companies can receive the benefits of the CEPA by way of investment in Hong Kong banks or finance companies. In accordance with Annex 5 of the CEPA, if more than 50 per cent of the equity of a Hong Kong service supplier has been owned for at least one year after a merger or acquisition by a foreign service supplier, the service supplier which has been merged or acquired will be regarded as a Hong Kong service supplier.<sup>25</sup> Thus, foreign banks and finance companies may indirectly obtain the status of “Hong Kong banking service suppliers” so as to obtain more favourable treatment from China. To some extent, the CEPA will stimulate foreign direct investment (FDI) to Hong Kong, and this is a good example of China’s support for Hong

Kong's economy. Meanwhile, the drafters of the CEPA noted the possibility of foreign "shell companies" being set up in order to benefit from CEPA's favourable treatment by only registering a company in Hong Kong, so they designed the five-year substantive business operation standard, more than 50 per cent equity requirement and one year requirement after merger or acquirement, all of which aim to prevent foreign "shell companies" from taking advantage of the CEPA benefits.

A number of foreign bank branches in Hong Kong have already changed their status to Hong Kong banks for the purpose of gaining the benefits of the CEPA. For example, the Citibank Hong Kong Branch became the Citibank (Hong Kong) Ltd. in 2004,<sup>26</sup> and the Standard Chartered Hong Kong Branch became a Hong Kong bank, i.e., the Standard Chartered (Hong Kong) Ltd., wholly-owned by the Standard Chartered Bank.<sup>27</sup>

### Market Access Commitments in Banking Services

As to specific market access commitments, China provides more favourable than treatment to banking service suppliers of other countries under the WTO.<sup>28</sup> Firstly, the minimum total assets requirement for a Hong Kong bank to establish a branch or juridical person in China is reduced to US\$6 billion. This requirement lowers the threshold of market access by allowing medium-size Hong Kong banks to enter the Chinese market.<sup>29</sup> For example, a medium-size local Hong Kong bank, Wing Lung Bank, set up a branch in Shenzhen on 29 March 2004,<sup>30</sup> which became the first beneficiary of CEPA's reduction of the minimum total assets requirement. In June 2004, two other medium-size banks from Hong Kong, DahSing Bank and Shanghai Commercial Bank opened branches in Shenzhen.<sup>31</sup> Secondly, there is no precondition for a Hong Kong bank to set up a representative office before establishing an equity joint venture bank or equity joint venture finance company. Thirdly, the conditions for a branch of a Hong Kong bank located in China to apply for *renminbi* (RMB) business include: (1) two years business operation in China; (2) comprehensive consideration of the operation of all branches in order to determine whether it satisfies the qualification of profitability, unlike individual consideration of a single branch operation applicable to non-HK foreign bank branches. Fourthly, according to the CEPA II Schedule, China will allow Chinese branches of Hong Kong banks to conduct insurance agency business.<sup>32</sup> Fifthly, according to the CEPA III Schedule,

“the level of operating funds required of Mainland branches of Hong Kong banks for offering *renminbi* and foreign currency businesses to local customers will be assessed on the basis of all Mainland branches of the bank concerned rather than each branch individually, and on the condition that the average level of operating funds of all Mainland branches of the bank concerned is over RMB 500 million, the requirement on the level of operating funds of an individual branch should not be less than RMB 300 million.”<sup>33</sup>

In comparison, China’s WTO commitments in banking services are stricter. For example, the minimum total assets requirement to establish a foreign bank subsidiary is US\$10 billion at the end of the year prior to filing the application, while the minimum total assets requirement to establish a foreign bank branch is US\$20 billion at the end of the year prior to filing the application, and the minimum total assets requirement to establish an equity joint venture bank is US\$10 billion, while for Hong Kong banks, the total assets requirement is reduced to US\$6 billion. Moreover, under the WTO, the conditions for foreign-funded banks to engage in local currency business are three years business operation in China and being profitable for two consecutive years prior to the application, rather than the CEPA’s requirement of two years operation.

### **National Treatment Commitments in Banking Services**

In China’s CEPA Schedule, it seems that the specific commitments are related merely to market access. There is not a special column on national treatment. Does that mean China’s CEPA Schedule is irrelevant to national treatment? Or does that mean that China has not made national treatment commitments under the CEPA? This is a very confusing issue. Paragraph 3 of Annex 4 of the CEPA states: “In respect of the service sectors, sub-sectors or relevant measures not covered by this Annex, the Mainland (China) will apply Annex 9 of the ‘Schedule of Specific Commitments on Services List of Article II MFN Exemptions’ of the ‘Protocol on the Accession of the People’s Republic of China.’” This paragraph may connect China’s CEPA Schedule with China’s WTO Schedule in such a way as to complicate the seemingly simple commitments under the CEPA. Because national treatment limitation measures are covered in China’s WTO Schedule,<sup>34</sup> are they, as “relevant measures,” also covered in China’s CEPA Schedule according to paragraph 3 of Annex 4 of the CEPA? If so, China’s specific commitments concerning national treatment (as well as market access commitments and additional commitments) in the WTO

Schedule are to be “incorporated” into the CEPA as part of China’s commitments to Hong Kong under the CEPA framework.

It is very possible that this is the intention of the drafters of the CEPA, otherwise why is China’s WTO Schedule mentioned in the CEPA? It is China’s WTO obligation to abide by its WTO specific commitments. It is unnecessary for the CEPA to confirm China’s WTO obligations. According to the principle of effectiveness, *ut res magis valeat quam pereat*, which has been used in WTO cases on many occasions,<sup>35</sup> paragraph 3 of Annex 4 of the CEPA must be interpreted so as to make this paragraph meaningful and effective. In the first WTO Appellate Body Report, the Appellate Body held that an interpretation could not result in reducing whole clauses or paragraphs of a treaty to “redundancy or inutility.”<sup>36</sup> According to the principle of interpretation of effectiveness, it is highly probable<sup>37</sup> that paragraph 3 of Annex 4 of the CEPA has incorporated China’s WTO Schedule into the CEPA to supplement China’s CEPA Schedule. If this interpretation is right, the two service schedules under two different trade regimes are closely related, especially with respect to national treatment commitments.

If China’s specific national treatment commitments in China’s WTO Schedule are incorporated into the CEPA based on paragraph 3 of Annex 4 of the CEPA, China’s national treatment commitments in banking services under the framework of the WTO can also be regarded as China’s banking commitments under the framework of the CEPA. Therefore, the following banking commitments under the WTO are applicable to Hong Kong banking services and service suppliers under the CEPA:

- (1) For mode one (cross-border supply), China makes full national treatment commitments;
- (2) For mode two (consumption abroad), China makes full national treatment commitments;
- (3) For mode three (commercial presence), China makes partial national treatment commitments;<sup>38</sup>
- (4) For mode four (presence of natural persons), China does not make national treatment commitment except as indicated in the horizontal commitments.<sup>39</sup>

### Financial Cooperation Commitments

In order to strengthen banking cooperation and embody the support from China to Hong Kong, the drafters of the CEPA devised a special article,

i.e. Article 13, providing for financial cooperation between the two sides. According to CEPA Article 13, China shall adopt four supportive measures. Firstly, China supports wholly state-owned commercial banks (*guoyou shangye yinhang*)<sup>40</sup> and certain joint-stock commercial banks (*gufenzhi shangye yinhang*)<sup>41</sup> in relocating their international treasury and foreign exchange trading centres to Hong Kong.<sup>42</sup> Secondly, China supports its banks in developing network and business activities in Hong Kong through acquisition.<sup>43</sup> Thirdly, China supports the full utilization of financial intermediaries in Hong Kong during the process of reform, restructuring and development of the financial sector in China.<sup>44</sup> Fourthly, China supports eligible companies, including private enterprises in listing in Hong Kong.<sup>45</sup> Besides the four supportive measures, the financial regulators of China and Hong Kong shall strengthen regulatory cooperation and information sharing.<sup>46</sup> The above supportive measures aim to strengthen Hong Kong's position as an international financial centre in Asia.<sup>47</sup>

### **Implementation of China's Banking Commitments under the CEPA**

According to Paragraph 2 of Annex 4 to the CEPA, China would apply to services and service suppliers of Hong Kong the specific commitments in China's CEPA Schedule. China did implement its specific commitments under the CEPA, including, *inter alia*, banking service commitments. From 1 January 2004 to 30 December 2004, in accordance with China's banking commitments under the CEPA, the CBRC approved the establishment of branches in China by five Hong Kong banks. These were the Wing Lung Bank Shenzhen Branch, Shanghai Commercial Bank Shenzhen Branch, DahSing Bank Shenzhen Branch, Wing Hang Bank Shanghai Branch, and CITIC Ka Wah Bank Shanghai Branch.<sup>48</sup> By the end of 2004, 90 per cent of Hong Kong banks whose total assets met the CEPA requirement were approved to enter China.<sup>49</sup> Meanwhile, the CBRC approved, based on the preferential standards of the CEPA, applications for opening RMB business from 26 Mainland branches of Hong Kong banks.<sup>50</sup> As of the end of 2004, Hong Kong banks had set up 45 branches, 10 sub-branches, 1 finance company, 2 equity joint venture banks, and 24 representative offices in China.<sup>51</sup>

How to implement the CEPA in China is a very interesting issue. Because the CEPA is not a treaty or international agreement,<sup>52</sup> there is not



a problem of “direct effect” or “indirect effect,” or a problem of “domestic application of international agreements.”<sup>53</sup> Because the PRC Constitution neither provides how to implement international agreements in China, nor stipulates how to implement internal agreements between the Mainland and its Special Administrative Regions in China, there is no authoritative legal model for the CEPA's implementation in China. Undoubtedly, it is inevitable that the CEPA will be implemented in China, otherwise it would be no more than a piece of paper. However, its implementation is likely to lead to many questions. For example, if there is a conflict between the CEPA and China's existing law, which will prevail? Is it China's obligation to revise or amend its existing law so as to be consistent with the CEPA?

### The State Council Notice

In fact, the CEPA is being implemented by relevant Chinese government departments as an agreement with *de facto* legal effect, and more surprisingly, the legal basis of the implementation is not from laws made by the National People's Congress (NPC) or its Standing Committee, but from a low-level notice issued by the General Office of the State Council (*Guowuyuan Bangongting*), that is, the Notice on Relevant Works for Implementing the CEPA (*Guanyu Zhuohao Shishi Neidi yu Xianggang Aomen Gengjinmi Jingmao Guanxi Anpai Youguan Gongzuo de Tongzhi*) (State Council Notice).<sup>54</sup> The first sentence of the State Council Notice shows that the State Council has authorized the Ministry of Commerce (MOFCOM) to sign the CEPA and the leaders of the State Council have approved the implementation items listed in the State Council Notice. The main content of the State Council Notice is that all central government agencies and local governments should make corresponding revisions or formulate relevant policies and rules based on the CEPA.<sup>55</sup> But the problem is the nature of the State Council Notice. In other words, does the State Council Notice have binding force on its receivers?

According to the PRC Legislation Law (2000),<sup>56</sup> the State Council has power to formulate administrative regulations (*xingzheng fagui*) based on China's Constitution and laws made by the NPC and its Standing Committee.<sup>57</sup> However, the State Council Notice, which was not issued by the State Council, but by the General Office of the State Council, is not an administrative regulation in a strict sense. There is no place for such a

“notice” in the PRC legislative framework. Strictly speaking, the State Council Notice is neither a law nor a regulation, but an administrative “measure” with *de facto* legal force. Although the measure is not a law made by the NPC or a regulation promulgated by the State Council, it could still be regarded as a rule in the broadest sense, and could be subject to the review of the WTO if it is taken by a government or an authority and affects trade in services.<sup>58</sup> So far, a number of Chinese government departments have made changes to relevant administrative rules based on the State Council Notice. For example, in order to be consistent with the CEPA, based on the State Council Notice, the Ministry of Justice (*Sifabu*) has revised a rule relating to Hong Kong law firms.<sup>59</sup> Some other governmental departments have also issued special rules to implement the CEPA.<sup>60</sup> If the State Council Notice has binding force on other departments, it is also binding on China’s banking regulator, i.e., the CBRC. Therefore, it seems that the CBRC should also revise those banking regulatory rules which are inconsistent with the CEPA.

### The CBRC Notice

The CBRC has been implementing the CEPA and devoting much attention to the task.<sup>61</sup> On 28 August 2003, the CBRC sent out the Notice on Implementation of the CEPA (*Guanyu Luoshi Neidi yu Xianggang Guanyu Jianli Gengjinmi Jingmao Guanxi de Anpai de Tongzhi*) (CBRC Notice).<sup>62</sup> Unlike other implementation notices issued by the administrative departments and institutions directly under the State Council, which usually quote the State Council Notice as legal foundation, the CBRC Notice mentions neither the State Council Notice nor other legal sources. The CBRC Notice directly makes the following arrangements for implementing the CEPA:

- 1) Introducing China’s supportive measures in the CEPA to the Hong Kong banking industry;<sup>63</sup>
- 2) Instructing local banking regulatory bureaus to study the CEPA and implement the measures it contains;<sup>64</sup>
- 3) Instructing local banking regulatory bureaus to accept applications from Hong Kong banks for setting up branches and operating RMB business.<sup>65</sup>

Undoubtedly, the CBRC Notice reflects the determination of the CBRC to implement the CEPA in China’s banking and has binding force

on local banking supervisory bureaus. However, the CBRC Notice lacks a legal base to make itself legally valid due to the fact that, in China's legislative framework, departmental notices are not included as departmental rules.

According to the CBRC Notice, it would appear that the CEPA should apply directly to China's banking service sector. But in my view, the CEPA should be transformed into China's domestic law prior to implementation, like the WTO agreements.<sup>66</sup> This would then correspond to the requirement for the CEPA to be consistent with the WTO.<sup>67</sup> It is noteworthy that one of China's administrative departments, the MOFCOM, which is in charge of both China's WTO negotiations and CEPA negotiations, is of the view that the implementation of the CEPA is parallel with the implementation of the WTO.<sup>68</sup> Therefore, at the level of the CBRC, China's banking commitments under the CEPA should be implemented by way of revising relevant CBRC rules or formulating a rule relating to the CEPA.

## **Conflicts between China's Banking Law and the CEPA**

Hong Kong banks are accorded more favourable treatment in establishing branches and subsidiaries in China based on the CEPA than ordinary foreign banks based on the WTO. However, some provisions in China's current banking laws, regulations and rules are in conflict with China's banking commitments under the CEPA.

### **Minimum Total Assets Requirement**

As discussed above, the CEPA reduces the minimum total assets requirement for a Hong Kong bank to establish a branch or a juridical person in China from US\$10 billion to US\$6 billion. But the Regulation of the People's Republic of China on Administration of Foreign-funded Financial Institutions (*Zhonghua Renmin Gongheguo Waizi Jinrong Jigou Guanli Tiaoli*), issued by the State Council in December 2001 (FFFI Regulation 2001),<sup>69</sup> which is also applicable to Hong Kong banks doing business in China,<sup>70</sup> still provides that the minimum total assets requirement for setting up a juridical person is US\$10 billion,<sup>71</sup> and the minimum total assets requirement for setting up a branch is US\$20 billion.<sup>72</sup> The State Council has not shown any intention of revising the minimum total assets requirements to comply with the CEPA.

### **Three Years Operation Requirement for RMB Business**

Under the existing FFFI Regulation 2001, one of the conditions for foreign-funded banks to engage in local currency business is three years business operation in China and being profitable for two consecutive years prior to the application,<sup>73</sup> rather than the CEPA's requirement of two years operation. This banking regulation has not been revised or adjusted to comply with the relaxed CEPA requirement.

### **Requirement of a Representative Office**

According to the FFFI Regulation 2001, the requirement for establishing an equity joint venture bank is to have a representative office in China.<sup>74</sup> As mentioned above, under the CEPA, the precondition of having a representative office before establishing an equity joint venture bank disappears, which makes it easy for Hong Kong banks to set up equity joint venture banks in China. However, the FFFI Regulation 2001 has not been revised by the State Council in accordance with the CEPA commitments. This is a typical example of the conflict between China's banking law and the CEPA.

### **Requirement of Branch-Based Profitability Assessment**

According to the Detailed Rules for Implementing the Regulation of the People's Republic of China on Administration of Foreign-funded Financial Institutions (*Waizi Jinrong Jigou Guanli Tiaoli Shishi Xize*) issued by the People's Bank of China in 2002 (hereinafter the DRI 2002),<sup>75</sup> which was applicable to Hong Kong banks as well as foreign-funded banks, the requirement of profitability assessment for two consecutive years in order to deal with RMB business in China would be on the basis of an individual branch,<sup>76</sup> while under the CEPA, it is on the basis of an overall consideration of operations of all branches, greatly easing conditions for Hong Kong banks to operate RMB business in China.<sup>77</sup> Although the DRI 2002 as a whole was replaced by the Detailed Rules for Implementing the Regulation of the People's Republic of China on Administration of Foreign-funded Financial Institutions issued by the CBRC in 2004 (DRI 2004),<sup>78</sup> the branch-based profitability assessment for foreign banks to open RMB business in the DRI 2002 remains in the DRI 2004.<sup>79</sup>

From 1 December 2004, foreign bank branches located in west and north-east China began to enjoy a relaxed profitability requirement when

applying to conduct RMB business, that is, the CBRC, when reviewing such an application, should assess the profitability of all the Chinese branches of the foreign bank on a consolidated basis.<sup>80</sup> This new policy does not completely equalize Hong Kong banks and foreign banks in the process of applying to engage in RMB business in China because the consolidated basis is only applicable to some of the foreign bank branches in China, i.e. those located in western and north-eastern areas, while it is applicable to Hong Kong bank branches all over China. Given the fact that most foreign bank branches are located in eastern and south-eastern areas of China, such as Shanghai, Guangzhou and Shenzhen, the new policy to encourage foreign investment in western and north-eastern areas will have little impact on the branch-based profitability assessment for most foreign bank branches. Thus, the conflict between the CBRC and the DRI 2004 still exists.

### Insurance Agency Business

Under China's current banking laws and regulations, the scope of business of foreign banks does not cover insurance agency business. According to the FFFI Regulation 2001, the business scope of foreign banks includes the following items: public deposits, loans, draft acceptances and discounts, government bonds, financial bonds, foreign currency securities other than stocks, letters of credit and guarantee, settlements, foreign exchange and brokerage, foreign currency trading, inter-bank loans, bank cards, safe box services, credit investigation and counselling services, and other business approved by the banking regulator.<sup>81</sup> So far, there is no legal basis to allow Hong Kong bank branches to do insurance agency business in China unless the current banking regulations are amended. The CBRC has tried to resolve this problem by issuing a public notice,<sup>82</sup> requiring Hong Kong bank branches in China to file with local CBRC offices a record (*bei an*) of insurance agency business based on relevant rules in the FFFI Regulation 2001 and the DRI 2004. Moreover, the CBRC has also broadened the business scope of foreign banks in China so as to cover insurance agency business by issuing another public notice. According to the Public Notice of the CBRC on Further Opening up China's Banking Industry, from 1 January 2005, a foreign bank may engage in insurance agency business.<sup>83</sup> It seems that foreign banks do not need to apply for approval when engaging in insurance agency business. They only need to file a prior report with relevant CBRC local offices, but they should do the business "within permissible range of clients and business scope."<sup>84</sup>

The two public notices have no legal basis. For example, the public notice's authorization to Hong Kong bank branches in China to apply for insurance agency business is beyond the business scope of foreign-funded banks provided by the FFFI Regulation 2001. Since the FFFI Regulation 2001 was formulated by the State Council, the CBRC under the State Council has no power either to broaden or to narrow down the provision of the FFFI Regulation 2001. According to the PRC Legislation Law, the legal effect of administrative regulations is greater than that of rules made by administrative departments.<sup>85</sup> Furthermore, according to the Notice on Implementation of the PRC Legislation Law issued by the State Council,<sup>86</sup> administrative regulations should not be in conflict with the Constitution and laws, and rules should not be in conflict with the Constitution, laws and regulations.<sup>87</sup> Therefore, the CBRC public notice is *ultra vires*, and the CBRC's attempts to implement the CEPA is inconsistent with China's existing foreign banking regulations, which demand a new, and more importantly, lawful method of implementing the CEPA in the field of China's banking services.

### Adjustments of China's Banking Law under the CEPA

The PRC Commercial Banking Law (2003 amended)<sup>88</sup> and the Law on Banking Regulation and Supervision (*Yinhangye Jiandu Guanlifa*), (hereinafter Banking Supervision Law 2003)<sup>89</sup> are both silent on whether they are applicable to Hong Kong banks. However, under the framework of the "One Country, Two Systems,"<sup>90</sup> most Chinese laws, including the two banking laws, do not apply to Hong Kong.<sup>91</sup> Theoretically, Hong Kong banks are not "foreign banks," but "Chinese banks" in the broadest sense of the words. Accordingly, Hong Kong-funded banks in mainland China are not "foreign-funded financial institutions," but "Chinese financial institutions." Their Chinese nature comes from the concept of "One Country." But in practice, Hong Kong-funded banks in China enjoy the same treatment as foreign banks, which indicates the impact of another concept, "Two Systems."

Article 50 of the FFFI Regulation 2001 provides that the regulation applies *mutatis mutandis* to Hong Kong, Macao and Taiwan banks established and doing business in China. Therefore, the FFFI Regulation 2001 is the main target of adjustment under the influence of the CEPA. As discussed in the previous section, under the CEPA, there is no precondition for a Hong Kong bank to set up a representative office before establishing

an equity joint venture bank or equity joint venture finance company, so relevant provisions in the FFFI Regulation 2001 should be divided into two parts. In the first part, the existing two-year requirement for a representative office, which applies to non-CEPA states, should remain. In the second part, there would be no two-year requirement for Hong Kong/Macao banks.

The DRI 2004 should also be revised in accordance with the CEPA. Unfortunately, in the DRI 2004, there is no special arrangement for Hong Kong-funded banks. Obviously, the CBRC Notice, which only concerns the business scope of Hong Kong-funded banks as a normative document, rather than a banking rule, is not suitable for this task. In my opinion, the adjustments of China's banking law to the CEPA should go from the top down, rather than from the bottom up. In other words, the starting point would be from banking laws (NPC), or at least from banking regulations (State Council), not from banking rules (CBRC).

For the purpose of adjusting China's banking law under the CEPA, two different approaches could be considered. The first approach would be to create parallel legislation to regulate Hong Kong-funded banks in China in particular. This idea originates from the *de facto* dual legal systems of China's foreign investment law. In addition to the Corporation Law, China has a series of foreign-funded enterprises laws which are at the same level as the Corporation Law. This parallel mode of legislation could also be introduced in the area of foreign banking law. Although China, *de jure*, has the Commercial Banking Law 2003 and the Banking Supervision Law 2003 which are applicable to both domestic-funded banks and foreign-funded banks, foreign-funded banks are *de facto* regulated by one regulation (FFFI Regulation 2001), one rule (DRI 2004), and numerous relevant measures which are only for regulating foreign-funded banks. According to this legislation philosophy, the easiest way to regulate Hong Kong-funded banks is to enact special laws, regulations, rules, or measures only applicable to Hong Kong-funded banks, that is, a parallel set of legislation. However, this approach is time-consuming, and would be difficult to carry out. The CEPA is only an agreement between two different regions under one country, not a treaty or international agreement.<sup>92</sup> Under such circumstances, it is impossible for the NPC to include any CEPA-related topic in its legislation plan. In this respect, the CEPA differs from the WTO. China concluded a treaty with the WTO in order to gain accession,<sup>93</sup> so it is China's duty in international law to implement the WTO agreements. However, implementing the CEPA lacks

the basis of international law. It is doubtful whether the CEPA, as a free trade agreement under one country, has an international element.<sup>94</sup> Therefore, without NPC's legislative support, or its authorization, the State Council cannot issue a special regulation on the CEPA, let alone a special regulation to implement the CEPA's financial services liberalization requirements.

The second approach would be to add some special articles, rather than a separate regulation applicable only to Hong Kong, to the current foreign banking regulations, rules and measures. In this way, the current foreign banking legal framework need not be separated into several parts by regional trade agreements. It seems the CBRC is tending to adopt this piecemeal approach. For example, in the Measures of the CBRC for Implementing Administrative Licensing Matters of Foreign-funded Financial Institutions (*Zhongguo Yinhangye Jiandu Guanli Weiyuanhui Waizi Jinrong Jigou Xingzheng Xuke Shixiang Shishi Banfa*),<sup>95</sup> the minimum total assets requirement (US\$60 billion) for Hong Kong and Macao banks to establish branches, subsidiaries, and joint venture banks in China is added to the articles designed for general foreign-funded banks,<sup>96</sup> and so are the two years operation requirement for RMB business, and the overall consideration of profitability assessment.<sup>97</sup> However, although the CBRC has implemented some of China's CEPA banking commitments by incorporating them into a foreign banking rule, those CEPA-related articles in the foreign banking rule are ineffective because they conflict with the higher banking regulation issued by the State Council, i.e. the FFFI Regulation 2001. The CBRC has no power to revise any banking regulation issued by the State Council unless authorized to do so by the State Council.<sup>98</sup>

## Concluding Remarks

From the perspective of practice, it seems that the conflicts between China's banking law and the CEPA have little impact on Hong Kong banks in China as long as China *de facto* implements its CEPA commitments relating to banking services. As a matter of fact, China's implementation of the CEPA in the banking service sector is illegal, because the legal effect and status of the State Council Notice and the CBRC Notice are lower than the FFFI Regulation 2001 and the DRI 2004 respectively. In the long term, China may make more and more CEPA banking commitments. If there is not a mechanism to resolve existing and potential legal conflicts between China's banking law and China's CEPA commitments, legal conflicts are



bound to increase in number. In other words, if the FFFI Regulation 2001 and the DRI 2004 do not respond to the continuing development of the CEPA, there will be more and more "notices" to effect *de facto* changes in China's banking law. With the prevailing status of inferior "notices" over superior laws, regulations and rules, the authority of China's banking law will be greatly weakened. In addition, with more and more flexible notices, people's confidence in China's newly established rule of law will be easily shaken. Therefore, it is necessary to have a *de jure* way of implementing China's CEPA commitments and adjusting China's banking law.

Moreover, a resolution of the conflicts between the CEPA and China's banking law may also provide a model for potential conflicts between other FTAs and China's banking law, and for potential conflicts between the CEPA and China's law in other areas. It is predictable that China will conclude more and more regional trade agreements, mainly FTAs, with some countries, and in each FTA, there will be some special commitments that grant more favourable treatment to the other party involved in the agreement. Those special commitments may directly impact on China's existing law. China's banking law must respond to the development of banking services in the upcoming FTAs.

Looking at the implementation of the CEPA in China in practice, one finds that China's banking regulator, the CBRC, has taken a piecemeal approach. This piecemeal approach, although it can deal with the CEPA issue, cannot cope with the complex situations caused by a huge influx of regional trade agreements. However, the blame should not be put only on the CBRC. It is impossible to completely resolve the issue without the participation of the State Council and the NPC. Historically, the NPC has not taken measures necessary to address the issue of implementation of the WTO agreement in China. With the arrival of regional trade agreements in China, it remains to be seen whether the NPC will lose its second chance or mend its fences by bringing in necessary legislation to implement regional trade agreements. Unfortunately, so far the NPC has done nothing with respect to the CEPA. Without a legal basis and support from the highest level, the CBRC will find that, in dealing with the issue of the conflicts between the CEPA and China's banking law, its spirit is willing, but its flesh is weak.

## Notes

1. In this article, for the sake of convenience, "China" refers to mainland China

- (the main body of the People's Republic of China), while Hong Kong refers to the Hong Kong Special Administrative Region (HKSAR) under the People's Republic of China.
2. See General Office of the State Council, The Notice on Relevant Works for Implementing the CEPA, *Guobanfa*, No. 95 (2003), para. 1(1).
  3. Hong Kong became a WTO Member in January 1995, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm).
  4. See Trade Policy Review Body, Trade Policy Review, Hong Kong, China Report by the Government, WT/TPR/G/109, ¶¶41, 42 (18 November 2002).
  5. CEPA, Main Text, [http://www.tid.gov.hk/sc\\_chi/cepa/legaltext/files/main\\_sc.doc](http://www.tid.gov.hk/sc_chi/cepa/legaltext/files/main_sc.doc) (last updated 16 January 2006).
  6. *Ibid.*, Art. 21.
  7. CEPA, Annex 4, [http://www.tid.gov.hk/sc\\_chi/cepa/files/annex4\\_sc.doc](http://www.tid.gov.hk/sc_chi/cepa/files/annex4_sc.doc) (last updated 16 January 2006).
  8. CEPA II, Main Text, [http://www.tid.gov.hk/sc\\_chi/cepa/files/sa\\_main\\_sc.doc](http://www.tid.gov.hk/sc_chi/cepa/files/sa_main_sc.doc) (last updated 16 January 2006).
  9. CEPA II, Annex 3, [http://www.tid.gov.hk/english/cepa/files/sa\\_annex3\\_e.doc](http://www.tid.gov.hk/english/cepa/files/sa_annex3_e.doc) (last updated 16 January 2006).
  10. CEPA III, Main Text, [http://www.tid.gov.hk/english/cepa/legaltext/files/sa2\\_main\\_e.doc](http://www.tid.gov.hk/english/cepa/legaltext/files/sa2_main_e.doc) (last updated 16 January 2006).
  11. CEPA III, Annex 2, [http://www.tid.gov.hk/english/cepa/legaltext/files/sa2\\_annex2\\_e.doc](http://www.tid.gov.hk/english/cepa/legaltext/files/sa2_annex2_e.doc) (last updated 16 January 2006).
  12. CEPA IV, Main Text, [http://www.tid.gov.hk/tc\\_chi/cepa/legaltext/files/sa3\\_main\\_c.doc](http://www.tid.gov.hk/tc_chi/cepa/legaltext/files/sa3_main_c.doc) (last updated 29 June 2006).
  13. CEPA IV, Annex, [http://www.tid.gov.hk/english/cepa/legaltext/files/sa3\\_annex\\_e.doc](http://www.tid.gov.hk/english/cepa/legaltext/files/sa3_annex_e.doc) (last updated 29 June 2006). It must be noted that the CEPA IV Schedule does not contain any further financial service commitments.
  14. Wei Wang, "CEPA: A Lawful Free Trade Agreement under 'One Country, Two Customs Territories'?", *Law and Business Review of the Americas*, Vol. 10, No. 3 (2004), pp. 647–66.
  15. See CEPA (Note 5), ch. 4.
  16. The Schedule of Specific Commitments on Services of the People's Republic of China, WT/ACC/CHN/49/Add.2 (1 October 2001), available in *Compilation of the Legal Instruments on China's Accession to the World Trade Organization* (Beijing: Law Press China, 2002), pp. 700–46.
  17. It must be noted that in the CEPA II, the scope of banking services is broadened to include insurance agency business, although this is not listed in China's WTO Schedule.
  18. GATS, available in *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge: Cambridge University Press, 1999), pp. 284–307.
  19. See GATS, Art. XXVIII(j).

20. In the case of the supply of a service through commercial presence, owned or controlled by (1) natural persons of that Member; or (2) juridical persons of that other Member. See GATS, Art. XXVIII (m)(ii) .
21. See CEPA, Annex 5, "Definition of 'Service Supplier' and Related Rules," ¶¶3.1.1, 3.1.2(2), [http://www.tid.gov.hk/sc\\_chi/cepa/files/annex5\\_sc.doc](http://www.tid.gov.hk/sc_chi/cepa/files/annex5_sc.doc) (last updated 16 January 2006). In addition to the operation year requirement, there are other requirements for being a HKSS, e.g. profit tax, business premises, employment of staff. See *ibid.*, ¶¶3.1.2(3) (4) (5).
22. *Ibid.*, ¶3.1.2(2).
23. Notice to Service Suppliers No. 2/2003: Application Procedures for Certificate of Hong Kong Service Supplier, issued by the TID of the HKSAR Government, WT 324/9/5/7, ¶9 (14 November 2003).
24. See CEPA, Annex 5 (Note 21), Art. 7, and the Notice to Service Suppliers No. 2/2003: Application Procedures for Certificate of Hong Kong Service Supplier, issued by the TID of the HKSAR Government, WT 324/9/5/7, ¶14 (14 November 2003).
25. CEPA, Annex 4 (Note 7), footnote 2.
26. <http://www.info.gov.hk/hkma/chi/press/2004/20041029c4.htm> (29 October 2004).
27. [http://www.standardchartered.com.hk/chi/news/2004/c\\_press\\_20040511.pdf](http://www.standardchartered.com.hk/chi/news/2004/c_press_20040511.pdf) (11 May 2004).
28. See Specific Commitments on Opening Service Trade Area, Table 1 of Annex 4 of the CEPA, [http://www.tid.gov.hk/sc\\_chi/cepa/files/annex4\\_sc.doc](http://www.tid.gov.hk/sc_chi/cepa/files/annex4_sc.doc) (last updated 16 January 2006). The existing schedule of specific commitments under current CEPA is unilateral. There are only service commitments made by mainland China to the HKSAR. According to the arrangement, mainland China and the HKSAR will negotiate service commitments to be made by the HKSAR to mainland China, which will be contained in Table 2 of Annex 4 of the CEPA.
29. Prior to the CEPA, there were only four large banks in Hong Kong which had set up branches in China, i.e. the HSBC, Hang Seng Bank, Bank of East Asia and Bank of China Hong Kong Limited. See <http://www.southcn.com/news/hktwma/jingji/200307040705.htm> (4 June 2003).
30. <http://www.china.org.cn/chinese/zhuanti/qkjc/688897.htm> (26 October 2004).
31. <http://finance.sina.com.cn/b/20040604/1658797123.shtml> (4 June 2004); [http://www.gd.xinhuanet.com/newscenter/2004-06/22/content\\_2358044.htm](http://www.gd.xinhuanet.com/newscenter/2004-06/22/content_2358044.htm) (22 June 2004).
32. CEPA II, Annex 3 (Note 9).
33. CEPA III, Annex 2 (Note 11).
34. See WT/ACC/CHN/49/Add.2.
35. Panel Report on *Canada — Term of Patent Protection*, WT/DS170/R, ¶6.49,

footnote 30 (stating that “the principle of effective interpretation ... reflects the general rule of interpretation which requires that a treaty be interpreted to give meaning and effect to all the terms of the treaty.”); Appellate Body Report, in *Japan — Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, section D (stating that “the principle of effectiveness” is a fundamental interpretation principle); Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 21 November 2001, ¶131 and footnote 116 (interpreting the concept of “exhaustible natural resources” in line with the principle of effectiveness); Appellate Body Report, *United States — Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R, adopted on 25 February 1997, section IV:1, DSR 1997:1, at 24 (invoking the principle of effectiveness in treaty interpretation); Panel Report, *Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, adopted 12 January 2000, ¶4.609, 7.37 (stating that all terms must be given full meaning and must be interpreted to avoid inconsistencies and inutility); Appellate Body Report, *Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, ¶81 (stating that it is the duty of any treaty interpreter to give meaning to all provisions of a treaty); Appellate Body Report, *Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R, adopted 27 October 1999, ¶133 (applying “the fundamental principle of *effet utile*” and stating that the treaty interpreter should give effect to a “legal operative meaning for the terms of the treaty”); Appellate Body Report, *Argentina — Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, ¶88 (holding that “the Panel failed to give meaning and legal effect to *all* the relevant terms of the *WTO Agreement*”); Appellate Body Report, *United States — Section 211 Omnibus Appropriations Act*, WT/DS176/AB/R, adopted 1 February 2002, ¶161, 338; Panel Report on *EC — Trade Description on Sardines*, WT/DS231/R, adopted 23 October 2002, §7.76 (stating the principle of effectiveness is “a corollary of the general rule of interpretation in the Vienna Convention”); Appellate Body Report, *United States — Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, ¶271 (stating that the interpretative principle of effectiveness should guide the interpretation of the *WTO Agreement*).

36. Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted on 20 May 1996, section IV.
37. Although the principle of effectiveness is a fundamental principle of interpretation, it should be treated with some caution. See Michael Lennard, “Navigating by the Stars: Interpreting the *WTO Agreements*,” *Journal of International Economic Law*, Vol. 5, No. 1 (2002), pp. 59–60.

38. China's WTO banking commitment relating to mode three is: "Except for geographic restrictions and client limitations on local currency business (listed in the market access column), foreign financial institutions may do business, without restrictions or need for case-by-case approval, with foreign invested enterprises, non-Chinese natural persons, Chinese natural persons and Chinese enterprises. Otherwise, none."
39. The horizontal commitment with respect to mode four states: "Unbound except for the measures concerning the entry and temporary stay of natural persons who fall into the categories referred to in the market access column." WT/ACC/CHN/49/Add.2.
40. There are four wholly state-owned commercial banks in China: (1) Industrial and Commercial Bank of China (*Zhongguo Gongshang Yinhang*); (2) Agricultural Bank of China (*Zhongguo Nongye Yinhang*); (3) Bank of China (*Zhongguo Yinhang*); (4) China Construction Bank (*Zhongguo Jianshe Yinhang*).
41. By the end of October 2005, there were thirteen joint-stock commercial banks, including Bank of Communications (*Jiaotong Yinhang*), CITIC Industrial Bank (*Zhongxin Shiye Yinhang*), China Everbright Bank (*Zhongguo Guangda Yinhang*), Huaxia Bank (*Huaxia Yinhang*), Guangdong Development Bank (*Guangdong Fazhan Yinhang*), Shenzhen Development Bank (*Shenzhen Fazhan Yinhang*), China Merchants Bank (*Zhaoshang Yinhang*), Shanghai Pudong Development Bank (*Shanghai Pudong Fazhan Yinhang*), Industrial Bank Co. Ltd. (*Xingye Yinhang*), China Minsheng Banking Corp. Ltd. (*Zhongguo Minsheng Yinhang*), Evergrowing Bank (*Hengfeng Yinhang*), China Zheshang Bank (*Zheshang Yinhang*), and Bohai Bank (*Bohai Yinhang*).
42. CEPA, Art. 13(1).
43. CEPA, Art. 13(2).
44. CEPA, Art. 13(3).
45. CEPA, Art. 13(5).
46. CEPA, Art. 13(4).
47. The HKSAR Basic Law provides that the Government of the HKSAR should provide an appropriate environment for the maintenance of the status of Hong Kong as an international financial centre. See the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 4 April 1990 (entered into force 1 July 1997), Art. 109, available at [http://www.info.gov.hk/basic\\_law/fulltext/](http://www.info.gov.hk/basic_law/fulltext/).
48. See CBRC news release on 30 December 2004, <http://www.cbrc.gov.cn/chinese/module/infomore.jsp>.
49. Ibid.
50. Ibid.
51. Ibid.
52. Wang (Note 14).

53. As to the question of domestic application of international agreements, see John H. Jackson, "United States," in *The Effect of Treaties in Domestic Law*, edited by Francis G. Jacobs and Shelley Roberts (Sweet & Maxwell, 1987), pp. 141-69.
54. The State Council Notice, *Guobanfa*, No. 95 (2 December 2003).
55. *Ibid.*, ¶2(2).
56. The PRC Legislation Law, passed by the Third Session of the Ninth NPC on 15 March 2000, effective as from 1 July 2000, available in *Falü huibian 2000* (Law Compendium 2000) (Beijing: Renmin chubanshe, 2001), pp. 2-23.
57. *Ibid.*, Art. 56.
58. See GATS, Art. 1, ¶1 and ¶3(a).
59. See the Decision on Revising the Administrative Rules on Representative Offices Established in the Mainland by Law Firms from the HKSAR and Macao SAR, issued by the Ministry of Justice of the PRC on 30 November 2003 and which came into force on 1 January 2004, *Sifabu Order* No. 84.
60. For example, the Ministry of Information Industry issued the Proclamation on Relevant Issues of Implementation of the CEPA (30 September 2003); The Customs General Administration issued the Rules on Implementation of the Rules of Origin for Trade in Goods under the CEPA with Hong Kong (30 December 2003), *Haiguanzongshu Order* No. 106 (2003), <http://www.customs.gov.cn/FLFG/FLFG.asp>; The State Administration for Industry and Commerce issued the Relevant Opinions on Implementation of the CEPA with Hong Kong and the CEPA with Macao and to Facilitate Mutual Economic Development between the Mainland, Hong Kong and Macao, *Gongshangwaiqizi*, No. 149 (30 December 2003).
61. The CBRC news release on 30 December 2004, <http://www.cbrc.gov.cn/chinese/module/infomore.jsp>.
62. *Yinjiantong* (2003) No. 22.
63. *Ibid.*, para. 1.
64. *Ibid.*, para. 2.
65. *Ibid.*, para. 3.
66. Paragraph 67 of the Working Party Report states: "The WTO Agreements would be implemented by China in an effective and uniform manner through revising its existing domestic laws and enacting new ones fully in compliance with the WTO Agreement."
67. One of the principles of the CEPA is to be consistent with the WTO rules. See CEPA, Art. 2.
68. See MOFCOM Notice on Law-Based Administration to Do Foreign-funded Enterprise Examination Work (*Shangwubu Guanyu Yifa Xingzheng Zhuohao Waishang Touzi Qiye Shenpi Gongzuo de Tongzhi*), paragraph 6, issued by the MOFCOM on 21 January 2005, *Shangzihan* (2005) No. 3, available at <http://>

- search.mofcom.gov.cn/china/getDetail.jsp?site\_id=www&articleid=20050300022107&p\_keyword=CEPA&old\_key=CEPA.
69. FFFI Regulation 2001, State Council Decree 340, promulgated on 20 December 2001, effective 1 February 2002, available in *Guowuyuan gongbao* (Gazette of the State Council), No. 3 (2002), pp. 18–22.
  70. *Ibid.*, Art. 50.
  71. *Ibid.*, Arts. 6(3), 8(3).
  72. *Ibid.*, Art. 7(2).
  73. *Ibid.*, Art. 20(1)(2).
  74. *Ibid.*, Art. 8(2).
  75. DRI 2002, issued by China's former banking regulator, the People's Bank of China (PBC) on 29 January 2002, effective 1 February 2002, void on 1 September 2004, PBC Decree, No. 1 (2002), available in *Guowuyuan gongbao*, No. 35 (2002), pp. 37–45.
  76. *Ibid.*, Art. 38.
  77. See Specific Commitments on Opening Service Trade Area, Table 1 of Annex 4 of the CEPA (Note 28).
  78. DRI 2004, issued by the China Banking Regulatory Commission on 26 July 2004, effective 1 September 2004, CBRC Decree, No. 4 (2004), Arts. 6, 7, available in *Guowuyuan gongbao*, No. 7 (Bound Vols. 7–12, 2004), pp. 1–20.
  79. *Ibid.*, Art. 40.
  80. Public Notice of the CBRC on Further Opening up China's Banking Industry, ¶2 (24 November 2004), <http://www.banksupervision.net/list.asp?unid=5766>.
  81. The FFFI Regulation 2001 (Note 69), Art. 17.
  82. The Public Notice of the CBRC on Permitting Mainland Branches of Hong Kong and Macao Banks to Engage in Insurance Agency Business (1 November 2004), [http://www.cbrc.gov.cn/English/con\\_main/main1.jsp#](http://www.cbrc.gov.cn/English/con_main/main1.jsp#).
  83. See Public Notice of the CBRC on Further Opening up China's Banking Industry (Note 80), ¶5.
  84. *Ibid.*
  85. PRC Legislation Law (Note 56), Art. 79.
  86. State Council Notice on Implementation of the PRC Legislation Law, 8 June 2000, *Guofa* (2000), No. 11, <http://www.chinaiprlaw.com/flfg/flfg58.htm>.
  87. *Ibid.*, Section 2.
  88. Decision on the Amendment of the Law on Commercial Banks, passed at the Sixth Meeting of the Standing Committee of the Tenth NPC on 27 December 2003. See *Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui gongbao* (Gazette of the Standing Committee of the NPC), No. 1 (2004), pp. 32–35. For the whole body of Commercial Banking Law 2003, see Gazette of the Standing Committee of the NPC, No. 1 (2004), pp. 36–44.
  89. Banking Supervision Law 2003 was passed at the Sixth Meeting of the Standing Committee of the Tenth NPC on 27 December 2003 and took effect

- from 1 February 2004. See *Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui gongbao*, No. 1 (2004), pp. 4–9.
90. HKSAR Basic Law (Note 47), preamble.
91. According to paragraph 2 of Article 18 of the HKSAR Basic Law, China's national laws (*quanguoxing falü*) shall not be applied to the HKSAR except for those listed in Annex III of the HKSAR Basic Law. There are six laws listed in Annex III of the HKSAR Basic Law, including the Resolution on the Capital, Calendar, National Anthem and National Flag, Resolution on the National Day of the PRC, Nationality Law of the PRC and so on.
92. The CEPA took effect immediately after signature without ratification or review by the NPC, see CEPA (Note 5), Art. 23.
93. The Protocol on Accession of the People's Republic of China, WT/L/432 (23 November 2001), available in *Compilation of the Legal Instruments on China's Accession to the World Trade Organization* (Beijing: Law Press China, 2002), pp. 1–14.
94. See Wang (Note 14).
95. Measures of the CBRC for Implementing Administrative Licensing Matters of Foreign-funded Financial Institutions issued on 12 January 2006, effective from 1 February 2006, CBRC Decree (2006) No. 4, available in *Zhongguo yinhangye jianguan guizhang huibian* (Compendium of China Banking Regulations) (Beijing: Falü chubanshe, 2006), pp. 309–50.
96. *Ibid.*, Arts. 8(4), 28(2).
97. *Ibid.*, Art. 85(2).
98. See PRC Legislation Law (Note 56), Art. 79.