



Hong Kong as a separate customs territory: Past, present and prospect

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ABSTRACT

This article reviews the journey of Hong Kong attaining and retaining the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) membership as a separate customs territory, and examines the present challenges for the Hong Kong Special Administrative Region (HKSAR) to maintain its status within the multilateral trade system. By exploring the related facts and laws, the article concludes that Hong Kong has been a separate customs territory member of the GATT and WTO by virtue of the multilateral trade rules, and other countries are not entitled to revoke the HKSAR's separate customs territory status through unilateral measures. Given the past journey and present challenges with the separate customs territory status of Hong Kong, the following prospects can be drawn. The HKSAR remains qualified to possess full autonomy when conducting external commercial relations. A malfunctioning Appellate Body of the Dispute Settlement Body (DSB) may be incapable to safeguard the interests of HKSAR as a separate customs territory.

1. Introduction

In 2021, the Hong Kong Special Administrative Region (HKSAR) of the People's Republic of China (PRC)¹ was ranked sixth among the world's leading merchandise traders and accounted for 3.1% of global trade [1]. With only 7.4 million population and 1113.76 square km area [2] to produce limited domestic goods, the HKSAR's trade growth in recent years (Fig. 1) has mainly relied on the growth of re-export.² Its special status as a free port and separate customs territory under the World Trade Organization (WTO) is a major reason that the HKSAR continues to be one of centres for international trade and finance.

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¹ In this article, the PRC represents China, a Member State of the United Nations with full capacity for rights in international law. The Central People's Government (CPG) is the highest state administrative organ of the PRC (see the Constitution of the PRC, Art. 57). Hong Kong, which holds a derived and partial legal personality as a subject of international law and can conclude international trade treaties with other countries, may refer to the British Hong Kong occupied by the UK from 1841 to 1997 or HKSAR of the PRC since 1997 according to the different contexts. Mainland China is the geographical regions of China excluding the territories of the three WTO members: Taiwan, Penghu, Kinmen and Matsu; Hong Kong; and Macao. See (Fig. 2).

² Hong Kong's domestic exports are much less than its re-export (the exports of foreign goods which already imported to HKSAR), hence, most of the Hong Kong exported goods are not produced within Hong Kong.

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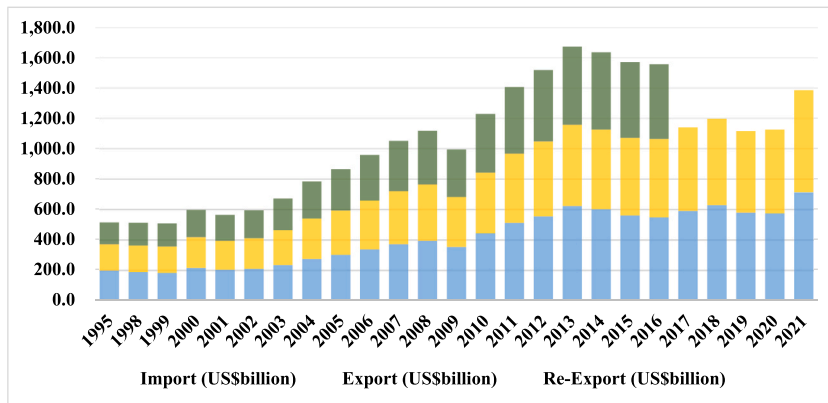


Fig. 1. Hong Kong's trade of goods with the world.

Source: The UN Comtrade Database (<https://comtrade.un.org/>)

On May 29, 2020, former President Trump announced that the US government ‘will take action to revoke Hong Kong’s preferential treatment as a separate customs and travel territory from the rest of China’ [3]. In response to this remark, the HKSAR made a statement on May 30, 2020 that the ‘sanctions or trade restrictions against Hong Kong are not justified’ [4]. Furthermore, the Ministry of Commerce of the PRC declared on June 2, 2020 that the separate customs territory status of the HKSAR has a legal basis in WTO agreements [5]. Having been unable to get the US to modify its position, the HKSAR government on October 30, 2020 initiated a consultation [6] in the WTO with the US (*DS597*), pursuant to the WTO rules³ and related agreements.⁴ After the Trump Administration, President Joe Biden on February 10, 2021 expressed concern about the crackdown in Hong Kong [7]. The WTO Panel concluded in its report that the US actions are ‘inconsistent with obligations under the GATT 1994’ [8]. The HKSAR welcomes the ruling made by the Panel and ‘strongly condemns such a measure’ of the revised origin marking requirement [9]. Based upon this series of events, the continuation of the HKSAR’s status as a separate customs territory has been brought into the spotlight of international law and relations [10].

⁵Hong Kong, the former overseas territories occupied by the UK⁶ and a current special administrative region of the PRC, has been a member of the General Agreement on Tariffs and Trade (GATT) since 1986 and its successor WTO since 1995 [11]. Literature review shows that there is a research gap under international law and relations, regarding the separate customs territory status of Hong Kong⁷ [12,13,14]. In particular, two literatures have comprehensively introduced the US actions against the HKSAR: the Liu, J., and Cai, C. (2020) [15] focus on the US Congressional legislation, while the AJLL (2021) [10] provides details on the US government’s actions to terminate Hong Kong’s special status. Meanwhile, the Office of the US Trade Representative has published a report to present US views on the functioning of the DSB [16]. The implementation of the *DS597* panel report is still unclear as the US continues to block appointments to the WTO Appellate Body, which responsible for reviewing appeals [17,18]. More in-depth analysis is thus needed to answer the following questions: 1) What is the legal basis of Hong Kong attaining and retaining its separate customs territory status? 2) Would the US be eligible to revoke the current status of Hong Kong? 3) Could WTO law safeguard the HKSAR’s separate customs territory status?

To clarify the above questions and to propose recommendations for the HKSAR and PRC on how to fulfil obligations and safeguard rights in the multilateral trade system, this article will examine the past, present, and prospect of Hong Kong’s status as a separate customs territory under international law. Section 2 traces back Hong Kong’s journey in retaining its status as a separate customs territory by examining the evolution of the multilateral trading system and numerous historical documents, e.g., the GATT-WTO

³ General Agreement on Tariffs and Trade (GATT) 1994, Art I: 1, Art IX: 1 and Art X: 3(a).

⁴ Agreement on Rules of Origin, Art 2(c), (d), (e); Agreement on Technical Barriers to Trade, Art 2.1.

⁵ Data accessed from the UN Comtrade Database (<https://comtrade.un.org/>) and Fig. 1 is a visualized by the authors. Hong Kong’s re-export data of 2017–2021 cannot be accessed from the UN Comtrade Database.

⁶ The questions of Hong Kong and Macau before their return to China do not at all fall under the ordinary category of ‘colonial territories’, and Hong Kong and Macau were not included in the list of colonial territories covered by the Declaration on the Granting of Independence to Colonial Countries and Peoples, by virtue of the UN General Assembly Resolution (A/RES/2908(XXVII)), which approves the recommendation that ‘the Special Committee should recommend to the General Assembly that Hong Kong and Macau and dependencies be excluded from the list of Territories to which the Declaration is applicable’ in the Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (A/8723/Rev.1/Vol I, p. 27), with reference to the Letter Dated 8 March 1972 from the Permanent Representative of China to the United Nations Addressed to the Chairman of the Special Committee (A/8723/Rev.1/Vol I, ANNEX I, p. 70).

⁷ The following issues have been noticed: 1) Taiwan’s separate customs territory status and its relationship with the Mainland China; 2) the ‘one country, two systems’ and HKSAR’s international legal personality; and 3) the Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA) and its legal nature under the WTO law.

collections. Section 3 explores the current challenges to the HKSAR's separate customs territory status, using a narrative method of geo-economics and international relations.⁸ Section 4 then applies the doctrinal legal research methodology of international law⁹ to present perspectives and prospects for the HKSAR's WTO membership as a separate customs territory.

2. The journey of Hong Kong retaining its separate customs territory status

Hong Kong was occupied by the UK in 1842 after the Opium War and was used as an outpost to promote trade and investment in China [19,20]. In 1898, a large block of land, called New Territory, was leased to the UK from China for a period of 99 years [21].¹⁰ In the 1980s, the UK and China conducted 22 rounds of negotiations and, afterwards, signed the Joint Declaration of the Government of the PRC and the Government of the UK on the Question of Hong Kong (1984 Joint Declaration).¹¹ As a result, Hong Kong was returned to China in 1997.¹² During the transitional period, Hong Kong became a GATT member on April 23, 1986 and has been a WTO member since January 1, 1995. This section will review the journey of how Hong Kong retained the status of a separate customs territory in the GATT and WTO and identify the role of the UK and China in the journey.

2.1. British Hong Kong (before 1985)

Hong Kong has been a free port since 1841 [22]. In the following about one hundred years, Hong Kong was ruled by the UK and had no autonomy in conducting its external commercial relationships. Hong Kong gradually explored the separate customs territory status from the UK in 1950s. The United Nations imposed an embargo on trade with the PRC because of the Korean War [23], and British Hong Kong's trade with Mainland China during and, after the Korean War, breached the UK's obligation to implement the embargo [19]. In order to avoid compliance risk and safeguard British trade interests, the UK had to delegate its liability of trading with the PRC to Hong Kong by granting Hong Kong a separate customs territory status. Since then, Hong Kong has become a most important transshipment trade port and undertaken formal and informal trade with Mainland China [23].

During the early process for advancing multilateral trade system,¹³ British Hong Kong, as a free port represented by the UK, had no reciprocal concessions but rode along in most negotiations. It means that Hong Kong had no bargaining power or voice during multilateral trade negotiations [24]. This situation changed during the Multifibre Arrangement (MFA) negotiations. In the 1960s, exports of textiles and garments from emerging economies grew rapidly, and therefore the US and the then European Community (EC) tried to restrict imports from developing countries in an effort to protect domestic textile industries [25]. As a developing member¹⁴ of the textile exporters, Hong Kong's interests in the MFA negotiations were fundamentally inconsistent with the proposition of the UK and other developed economies to set import quota restrictions on textiles [26]. As a result, the British Hong Kong authority sent its own delegation to participate in the MFA negotiations, with the aim of safeguarding its interests. In 1961, Hong Kong, together with the UK, spoke in the GATT for the first time, regarding the international trade of cotton textiles [27]. In the next year, Norway requested the UK to forward its wish of negotiation to Hong Kong on the exports of certain cotton textiles to Norway [28]. Norway and Hong Kong concluded a long-term arrangement on cotton textiles trade in 1963, which marked the first moment when Hong Kong acquired autonomy in the conduct of its external commercial relations [29]. From then on, British Hong Kong began to conclude various international trade agreements with different countries and gradually became a separate party distinguished from the UK in the multilateral trade system.

Facing these practices, the UK intended to keep Hong Kong's status as a separate customs territory after the PRC resumed sovereignty over Hong Kong. The 1984 Joint Declaration explicitly declared that the HKSAR 'will retain the status of a free port and a separate customs territory.'¹⁵ Hong Kong in 1984 was not a formal member of any multilateral trade agreement, and, until January 1986, Hong Kong's voice could only be heard in the GATT through the UK, in the form of 'the United Kingdom on behalf of Hong Kong' [30]. In addition, the 1984 Joint Declaration's annex provided that the HKSAR 'may participate in relevant international organizations and international trade agreements (including preferential trade arrangements), such as the GATT and arrangements regarding international trade in textiles.'¹⁶

⁸ Narrative is one of the qualitative methods that can be used in this paper to describe, conduct and understand issues of geo-economics and international relations between the US and China, with a focus on the HKSAR's separate customs territory status.

⁹ There is no generally accepted methodology of international law. This paper will apply the methods used to determine the existence of norms or rules of international law and the means of synthesising facts, ideas, and legal principles.

¹⁰ The Convention between Great Britain and China Respecting an Extension of Hong Kong Territory, signed at Peking, 9 June 1898.

¹¹ The Joint Declaration of the Government of the PRC and the Government of the UK on the Question of Hong Kong (1984 Joint Declaration), signed on 19 December 1984.

¹² 1984 Joint Declaration, Arts. 1 and 2.

¹³ The multilateral trade system advocating free trade emerged, out of the desire for peace and prosperity in reaction to the Second World War.

¹⁴ Hong Kong was regarded as a developing member of the former Imperial Preference and the multilateral trade system, enjoying the preferential treatments given to all developing countries. The Imperial Preference was designed to encourage trade within the British Empire by lowering tariff rates among members.

¹⁵ 1984 Joint Declaration, Art. 3(6).

¹⁶ 1984 Joint Declaration, Annex I, Art. VI.

2.2. Transition years (1985–1997)

In 1985, the UK started to presume Hong Kong to be a separate customs territory in the GATT, given that the 1984 Joint Declaration had stated in its annex that both the UK and PRC shall take actions to ‘enable the HKSAR to maintain its economic relations as a separate customs territory, and in particular to ensure the maintenance of Hong Kong’s participation in the GATT, the MFA and other international arrangements’.¹⁷ The PRC launched an investigation on this issue. Shi Jiuyong,¹⁸ then legal counsel of the Chinese Chief Representative Office to the Sino-British Joint Liaison Group, reported to the Central People’s Government (CPG) with a recommendation that ‘Hong Kong shall retain the advantages as a free port’ and ‘Central People’s Government shall recognize Hong Kong to be a contracting party in the GATT as a separate customs territory’, considering the complexity of the PRC’s ‘restoration to the GATT’. Shi Jiuyong’s opinions were finally adopted by the Central People’s Government [31].

The GATT provided that the UK, as the then responsible contracting party, can declare Hong Kong to be a separate contracting party to the GATT.¹⁹ The UK government made a declaration on April 23, 1986 under Article XXVI: 5(c) of the GATT that ‘Hong Kong will, with effect from the date of this communication, be deemed to be a contracting party to the Agreement’ [32]. Since then, Hong Kong has become a contracting party to the GATT by virtue of the declaration made by the UK Government [33]. At the same time, the PRC made a communication, stating that, after the return of Hong Kong in 1997, the HKSAR would ‘retain the status of a free port and a separate customs territory’, ‘using the name of “Hong Kong, China” to maintain and develop relations and conclude and implement agreements with states, regions, and relevant international organizations in the economic, trade and other fields’ [34].²⁰ In the 1990 Basic Law of the HKSAR of the PRC (1990 Basic Law),²¹ the PRC reaffirmed its position to retain the HKSAR’s status as a separate customs territory after Hong Kong’s return to the PRC in 1997.²²

As a contracting party of the GATT, Hong Kong was a full participant in the Uruguay Round and assumed all the rights and obligations through formally accepting the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Final Act). The Final Act required the negotiating participants to ratify the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement). By virtue of Article XI of the WTO Agreement,²³ Hong Kong accepted the WTO rules and became an original member of the WTO since January 1, 1995 [35].

2.3. HKSAR years (1997 - present)

On May 30, 1997, the Hong Kong Economic and Trade Office made a communication to the WTO and stated that, ‘using the name of “Hong Kong, China”, Hong Kong will continue to be a WTO Member on and after July 1, 1997’ [36]. As promised in the 1986 Communication from China to the GATT [34] and acknowledged by the 1990 Basic Law, the HKSAR retained its membership in the WTO as a separate customs territory after the successful handover of Hong Kong to China in 1997.

The PRC made an official Communication to the GATT in 1986, in order to seek the resumption of its status as a contracting party to the GATT [37]. On March 4, 1987 the GATT Council established a working party on the PRC’s status as a contracting party [38] of which Hong Kong was a member [39]. After 15 years of negotiation, the PRC finally acceded to the WTO in 2001 [40]. The then Secretary of Commerce and Industry of the HKSAR made a remark at the WTO Ministerial Conference, stating that ‘China’s entry into the WTO will have no effect in Hong Kong’s participation in the WTO’ [41].²⁴ From then on, both ‘China’ (Mainland China) and ‘Hong

¹⁷ Ibid., Annex II, Art. 4(a).

¹⁸ Shi Jiuyong was Judge (1994–2010), Vice-President (2000–2003), President (2003–2006) of the International Court of Justice, and member (1987–1993), Chairman (1990) of the International Law Commission.

¹⁹ GATT, Art. XXVI: 5(c). It stipulates that ‘If any of the customs territories, in respect of which a contracting party has accepted this Agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, such territory shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party’.

²⁰ Some research has misunderstandings towards China’s attitudes on Hong Kong’s GATT membership, for instance, China was forced to treat Hong Kong as essentially an independent economy because the 1984 Joint Declaration allowed Hong Kong to retain membership in the WTO. See Ref. [66].

²¹ The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (1990 Basic Law) was adopted at the Third Session of the Seventh National People’s Congress (the NPC) of the PRC on 4 April 1990 and was put into effect as of 1 July 1997. See Ref. [67].

²² 1990 Basic Law, Art. 116. It stipulates that ‘The Hong Kong Special Administrative Region shall be a separate customs territory. The Hong Kong Special Administrative Region may, using the name ‘Hong Kong, China’, participate in relevant international organizations and international trade agreements (including preferential trade 36 arrangements), such as the General Agreement on Tariffs and Trade and arrangements regarding international trade in textiles. Export quotas, tariff preferences and other similar arrangements, which are obtained or made by the Hong Kong Special Administrative Region or which were obtained or made and remain valid, shall be enjoyed exclusively by the Region’.

²³ It stipulates in Article XI concerning the ‘Original Memberships’ of the WTO Agreement that ‘The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO’.

²⁴ The remark reads, ‘The accession of China will significantly enhance the universal nature of the WTO. China’s entry into the WTO will have no effect on Hong Kong’s participation in the WTO. Hong Kong will continue to be a separate Member of the WTO using the name ‘Hong Kong, China’. Under the ‘one country, two systems’ principle, we will continue to be a separate economic entity and a separate customs territory. Our trade and economic policies will continue to be made entirely in the HKSAR and they will continue to be separate from those of the Mainland China.’

Kong, China' are WTO members, and their trading relationships shall be regulated under the framework of WTO law, although the sovereignty of the HKSAR belongs to the PRC (Fig. 2).

In 2003, Mainland China and the HKSAR concluded an agreement concerning their economic relationship, namely the Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA) [42]. The CEPA is a Regional Trade Agreement (RTA) of two WTO members, and it is primarily regulated by Article XXIV of the GATT and Article V of the General Agreement on Trade in Services (GATS). The CEPA explicitly states that the conclusion, implementation and amendment of the CEPA shall be consistent with the rules of the WTO.²⁵ Several articles of CEPA additionally mention the application of certain WTO rules: 1) Articles 15 and 16 of the 'Protocol on the Accession of the PRC to the WTO' and paragraph 242 of the 'Report of the Working Party on the Accession of China' will not be applicable²⁶; 2) the two sides undertake not to apply countervailing measures to goods imported and originated from each other, after reiterating their observance of the WTO 'Agreement on Subsidies and Countervailing Measures' and Article XVI of 'the GATT 1994'²⁷; 3) service suppliers of other WTO members that are juridical persons established under the laws of one side will be entitled to preferential treatments granted by the other side under the CEPA²⁸; and 4) the CEPA and provisions in its Annexes shall not affect the ability of Mainland China or Hong Kong to maintain or adopt exception measures consistent with the rules of the WTO.²⁹ The HKSAR's economic relationship with the Mainland China shall be consistent with WTO rules, given that both 'China' and 'Hong Kong, China' are full members of the WTO (Fig. 3). The CEPA shows that the PRC regards the HKSAR as a separate customs territory with full and independent autonomy in the conduct of its external commercial relations.

To sum up, Hong Kong, as a separate customs territory, has become a contracting party to the GATT in accordance with Article XXVI: 5(c) of the GATT since 1986 and attained the original WTO membership by virtue of the Article XI of the WTO Agreement since 1995. In addition, Article 116 of the 1990 Basic Law acknowledges the HKSAR's particular status after Hong Kong's successful handover in 1997. The legal basis for Hong Kong acquiring the status of a separate customs territory comes from both the multilateral treaties and Chinese domestic law [43].

3. Present challenges to HKSAR's separate customs territory status

Since 2013, the growth of HKSAR trade of goods has slowed down and been in a state of flux (Fig. 1), which demonstrates the challenges the HKSAR is encountering to further expand its international trade. The outbreaks of street riots in 2019 and COVID-19 in 2020, together with other forms of distractions, led to social unrest [44]. Apart from dragging the city into social and economic depression, such social unrest has attracted wide international concerns. Several western countries expressed their concerns, and in particular former US President Trump announced to revoke Hong Kong's status as a separate customs territory from the rest of China [3].

3.1. The US is Acting to revoke the HKSAR's preferential treatment

The US has a strong interest in Hong Kong's status regarding trade and economy [15]. Over a period of 20 years from 1995, external merchandise trade between the US and Hong Kong had been steadily increasing (Fig. 4). In 2019, the US exported goods to the HKSAR were valued at HK\$212.9 billion and imported goods HK\$3.67 billion, and hence the US enjoyed a trading surplus of HK\$209 billion [45]. For re-exports in 2019, the US exported goods valued at HK\$1.39 billion through the HKSAR to other trade partners, and it was an 11.2% increase over the preceding year [45]. It was a consistent policy of the US to treat Hong Kong as a bridge connecting to Mainland China, although different voices have arisen within the US in recent years. The decline in Hong Kong-US trade since 2013 (Fig. 4) illustrates the negative impact of such dissenting voices.

In 1992, the US adopted the US-Hong Kong Policy Act of 1992 (US-HK Act 1992)³⁰ 1) the US should recognize that the PRC 'resumed the exercise of sovereignty over Hong Kong with effect on July 1, 1997'³¹; 2) the US should support a high degree of autonomy of Hong Kong³²; 3) the US should respect Hong Kong's status as a separate customs territory and as a contracting party to the GATT, whether or not the PRC participates in the latter organization³³; 4) the US should continue to treat Hong Kong as a separate territory in economic and trade matters, such as import quotas and certificates of origin after the 1997 handover³⁴; 5) the US should continue to grant the products of Hong Kong non-discriminatory trade treatment by virtue of Hong Kong's membership in the GATT³⁵; etc. Unfortunately, this recognition is subject to certain conditions. For example, Hong Kong should continue to enjoy a high degree of

²⁵ Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA) 2003, Art. 2.2.

²⁶ *Ibid.*, Art. 4.

²⁷ *Ibid.*, Art. 8.

²⁸ *Ibid.*, Art. 12.2.

²⁹ *Ibid.*, Art. 18.

³⁰ US-HK Act 1992, 22 U.S.C. 5701 et seq.

³¹ *Ibid.*, sec 2(1)(A).

³² *Ibid.*, sec 2(1)(B).

³³ *Ibid.*, sec 102 (3).

³⁴ *Ibid.*, sec 103 (1).

³⁵ *Ibid.*, sec 103 (4).

Sovereignty State	Regions	WTO Membership	GATT/WTO Accession Year
China	Mainland China	China	11 December 2001
	Taiwan, Penghu, Kinmen, and Matsu	Chinese Taipei	1 January 2002
	Hong Kong	Hong Kong, China	GATT - 23 April 1986 WTO - 1 January 1995
	Macao	Macao, China	GATT - 11 January 1991 WTO - 1 January 1995

Fig. 2. WTO members of one sovereignty State of China.
Source: WTO official website (<https://www.wto.org/>).

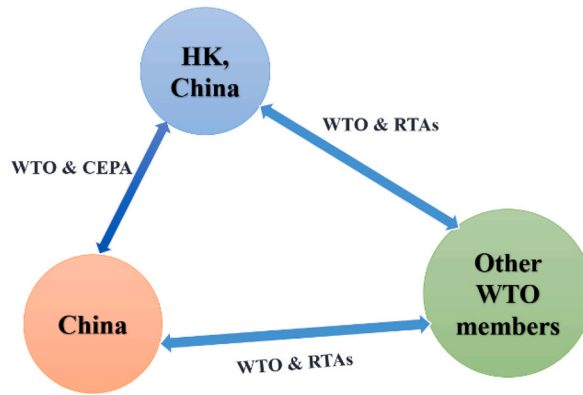


Fig. 3. The HKSAR's international trade relations under WTO law.
Source: Visualized by the authors.

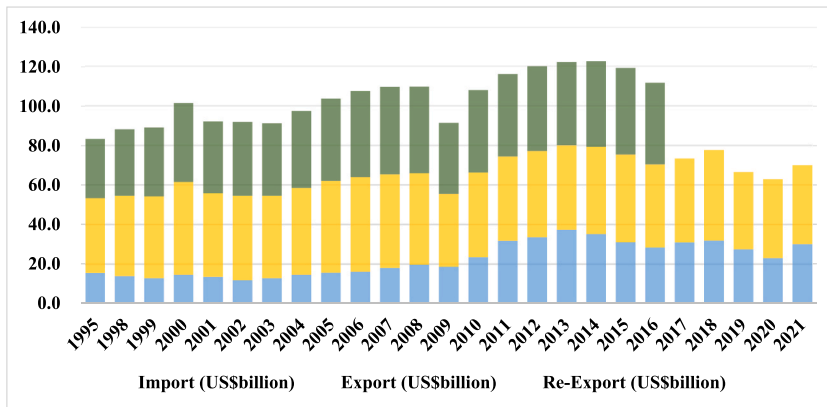


Fig. 4. Hong Kong's trade of goods with the US.
Source: The UN Comtrade Database (<https://comtrade.un.org/>).

autonomy in all matters other than defence and foreign affairs,³⁶ and Hong Kong should be fully autonomous from the PRC with respect to economic and trade matters.³⁷ The US-HK Act 1992 authorizes that on or after July 1, 1997 the US President may determine whether Hong Kong is sufficiently autonomous to justify treatment under a particular US law.³⁸ And if not, US President may issue an Executive Order to suspend the application of US laws with respect to Hong Kong, which includes the US-HK Act 1992 itself,³⁹ which means US President may threaten to revoke the HKSAR's preferential treatment as a separate customs territory by changing the manner of how to apply the laws enacted by the US Congress.

The US Congress adopted the Hong Kong Human Rights and Democracy Act 2019 (HKHRDA2019)⁴⁰ to amend the US-HK Act 1992 [15]. In the HKHRDA2019, the US added 'an assessment of the efforts by the government of the PRC to use the status of Hong Kong as a separate customs territory to import items into the PRC from Hong Kong in violation of the export control laws of the US' to compile an 'annual report on violations of US export control laws and United Nations sanctions occurring in Hong Kong'.⁴¹ Furthermore, in the Hong Kong Autonomy Act 2020 (HKAA2020),⁴² the US Congress supports, authorizes, and eventually requires, the President to impose sanctions on foreign persons and entities that 'materially contribute to China's failure to preserve Hong Kong's autonomy' [46]. These Acts together have brought challenges to the HKSAR's separate customs territory status.

US President has the authority to suspend the application of US law in accordance with Section 201(a) and 202(a) of the US-HK Act 1992, even though the US law recognizes the HKSAR's separate customs territory status and never explicitly authorizes US president to revoke the HKSAR's special economic status. Former President Trump on July 14, 2020 signed the President's Executive Order on Hong Kong Normalization (President's Executive Order) to 'suspend or eliminate different and preferential treatment for Hong Kong' [47]. The next day, former Secretary of State Pompeo made an announcement to officially declare that Hong Kong is no longer autonomous from the PRC [48].

The President's Executive Order suspended the application of US statutes, including the origin marking requirements set forth in Section 304 of the Tariff Act of 1930.⁴³ In light of the President's Executive Order, the US Customs and Border Protection (USCBP) followed to issue a notice on August 11, 2020, requiring that goods produced in Hong Kong must be marked to indicate that their origin is 'China' after September 25, 2020. The US prior treatment of goods of HKSAR origin was consistent with the fact that the US generally permits goods originating within the territory of other WTO members to be marked with the English name of said territory. However, according to the USCBP notice, goods produced in Hong Kong must be marked to indicate 'China' instead of 'Hong Kong' as their origin. The foregoing measure of US denies Hong Kong's separate customs territory status and means that the HKSAR will no longer be entitled to the benefits as a separate WTO member in the trade with the US. In response to the USCBP notice, the HKSAR government released a statement on August 11, 2020 and strongly objected to such origin marking requirement from the US government [49].

3.2. The HKSAR's qualification as a separate customs territory is being challenged

The alleged basis for the US to revoke HKSAR's separate customs territory status is that 'Hong Kong is no longer sufficiently autonomous' [47]. It is worth re-examining the qualification for HKSAR to maintain its separate customs territory status under the GATT and WTO. The GATT and WTO allow for membership of entities with less than full sovereignty and full statehood, as long as these entities can possess 'full autonomy' in the conduct of their 'external commercial relations' and 'of the other matters' provided in the WTO Agreement⁴⁴ and GATT.⁴⁵

The term 'full autonomy' textually indicates the exclusive and undivided competence of a member. However, the degree of 'full autonomy' has been applied flexibly in GATT and WTO practices.⁴⁶ In 1947, when the UN Conference on Trade and Employment was considering the acceptance of Burma, Ceylon, and Southern Rhodesia into the GATT, the UK assured the following abilities of these territories: 1) to approve and modify tariffs without requiring the consent of the UK; 2) to apply the GATT 1947 without reference to the UK; and 3) to enter into contractual relations on commercial matters with foreign governments [50]. The degree of autonomy derived and granted by the UK to these territories was already sufficient for them to join the GATT. In the era of the WTO, the then EC⁴⁷ obtaining its membership of the WTO as a separate customs territory also shows that 'full autonomy' could be applied flexibly. Neither the EC nor its member States individually had full control over the whole EC territory on the issues regulated by the WTO, when the EC became an original member of the WTO together with some of its member States. Moreover, the EC had no independent and full

³⁶ Ibid., sec 2(1)(B).

³⁷ Ibid., sec 103 (3).

³⁸ Ibid., sec 202(a).

³⁹ Ibid., sec 201(a) and sec 202(a).

⁴⁰ HKHRDA2019, Public Law 116-76, 22 U S C. 5701 note, H.R. 3289.

⁴¹ HKHRDA2019, sec 5(4).

⁴² HKAA2020, Public Law 116-149, 22 USC 5701 note, H.R.7440.

⁴³ Tariff Act of 1930, 19 U S C. 1304, sec 304.

⁴⁴ Agreement Establishing the World Trade Organization (WTO Agreement) 1994, Art. XII.

⁴⁵ GATT, Art. XXXIII.

⁴⁶ Burma (Myanmar), Ceylon (Sri Lanka), Southern Rhodesia (Zimbabwe), Liechtenstein, Macao, Hong Kong, Chinese Taipei, and European Community (European Union).

⁴⁷ On 29 November 2009, the WTO received a Verbal Note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the Treaty of Lisbon, as of 1 December 2009, the European Union replaces and succeeds the European Community.

competence to regulate the services and intellectual property⁴⁸ regulated by GATS and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs), which were the important ancillary agreements of the WTO. Therefore, if the EC can be viewed as a case to provide a standard for being a WTO member, the ‘full autonomy’ will require neither a separate customs territory nor its responsible State having full autonomy on its own, as long as they could impose a degree of full autonomy in certain matters. Accordingly, since the EC could be accepted as an original member of the WTO, similar standards could be imposed on the ‘full autonomy’ requirements for other members.

For the ‘external commercial relations’ and ‘of the other matters’, the matters were limited to trade of goods in the GATT and are expanded to include goods, services, intellectual property, and other external commercial relations in the WTO. The objects of autonomy under the WTO Agreement include both the competence to negotiate, implement, and enforce tariff schedules, and other rights and obligations provided in the WTO package agreements. For example, a separate customs territory must have the competence to extend diplomatic privileges and immunities to WTO officials and members⁴⁹ and have the ability to participate in dispute settlement process.⁵⁰ The WTO Agreement requires that a separate customs territory must be able to amend and implement legislation and institute administrative regulations to ‘ensure the conformity of its laws, regulations, and administrative procedures with its obligations’.⁵¹ It is worth noting that the 1990 Basic Law provides the HKSAR the competence on the matters of export quotas, tariff preferences, and other similar arrangements.⁵² Moreover, the National People’s Congress authorizes the HKSAR to be entitled with independent executive, legislative, and judicial power.⁵³ Given the expansion of WTO law beyond trade in goods, it is increasingly difficult to distinguish irrelevant matters from the affairs that require ‘full autonomy’. However, matters indirectly affected by WTO rules are still deemed as not within the scope of the WTO itself, such as education, health care, rights over resources, internal security, and public order.

The Central People’s Government, on June 10, 2014, issued a White Paper on the Practice of the ‘One Country, Two Systems’ policy in the HKSAR (2014 White Paper on HKSAR). It clearly stated that ‘ensuring the high degree of autonomy of the HKSAR’ will be upheld, consistent with understanding and implementing the policy of ‘one country, two systems’.⁵⁴ Though some of the decisions issued by the National People’s Congress [51] may be understood as infringements of the rule of law in the HKSAR, none has any direct relation to or amounts to any apparent interference with the HKSAR’s ‘full autonomy’ [52,53,54]. Therefore, it can be asserted that the HKSAR has full autonomy in the conduct of its external commercial relations [55]. As a result of exercising such autonomy, the HKSAR has so far signed eight FTAs, including the CEPA [56].⁵⁵ The US President’s Executive Order alleged that a series of the PRC’s actions⁵⁶ have ‘increasingly denied autonomy and freedoms that China promised to the people of Hong Kong’ [47] and further claimed to revoke the HKSAR’s status of separate customs territory. Is the US or another state eligible to revoke the HKSAR’s status as a separate customs territory? Under both the GATT and WTO, there are no such rules that a member party can revoke the membership of another party. Hence, it is questionable for the US to disqualify the membership of HKSAR in the WTO unilaterally.

4. Prospects for HKSAR’s WTO membership as a separate customs territory

We are now in a world of constant changes, and uncertainties exist in the US-China relationship and multilateral trade system. In view of the separate customs territory status of the Hong Kong and the multilevel legal provisions, this article attempts to discuss the following issues in relation to the HKSAR’s WTO membership as a separate customs territory.

4.1. Can WTO law safeguard the HKSAR’s separate customs territory status?

The GATT had evolved over time since 1947 and morphed into the WTO in 1995, which has established the Dispute Settlement Body (DSB) to resolve disputes between members.⁵⁷ Considering the trade conflict and increasing tension between the US and the PRC, the US would continue to pressure the PRC with HKSAR issues [15]. The US revoking the preferential treatment of Hong Kong as a separate customs territory will certainly affect Hong Kong’s trade interests, concerning their close trade relation (Fig. 4). Hong Kong, a member of the WTO, is entitled to seek remedy from the US through the DSB of the WTO.

The Panel report of the *US-Origin Marking Requirement* [6] has concluded that the actions taken by the US have violated WTO rules,

⁴⁸ The Uruguay Round agreements cover the WTO Agreement and the agreements on goods, services and intellectual property, dispute settlement, trade policy review mechanism and the plurilateral agreements. See Treaty Establishing the European Community as Amended by Subsequent Treaties (The Treaty of Amsterdam) 1997, Art. 113.

⁴⁹ WTO Agreement, Arts. VIII: 2 and VIII: 3.

⁵⁰ Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Annex 2.

⁵¹ WTO Agreement, Art. XVI:4.

⁵² Basic Law of the HKSAR of the PRC (Basic Law) 1990, Art. 116.

⁵³ *Ibid.*, Arts. 2, 16, 17 and 19.

⁵⁴ White Paper on the Practice of the ‘One Country, Two Systems’ Policy in the HKSAR (White Paper on HKSAR) 2014, Sec. V.

⁵⁵ HKSAR has signed eight FTAs respectively with the Mainland of China (2003), New Zealand (2010), the Member States of the European Free Trade Association (EFTA) (2011), Chile (2012), Macao (2017), the Association of Southeast Asian Nations (ASEAN) (2017), Georgia (2018) and Australia (2019).

⁵⁶ Including the Law of the PRC on Safeguarding National Security in the HKSAR (2020 HKSAR National Security Law).

⁵⁷ WTO Agreement, Art. III: 3.

including the principle of non-discrimination⁵⁸ and *pacta sunt servanda*.⁵⁹ The non-discrimination principle is an important cornerstone of the multilateral trading system, which can be applied in the requirement of origin marking.⁶⁰ The US shall accord to the products of the HKSAR no less favourable treatment regarding duties, rules, and other related aspects than that which the US accords to similar products of other countries.⁶¹ Thus, it is not appropriate for the US to apply discriminatory treatment to the HKSAR. The measure of the US on origin marking requirement may have also violated the principle of *pacta sunt servanda*.⁶² The US became a member of the GATT on January 1, 1948, and Hong Kong joined the GATT in 1986, when the US entered tariff negotiations with Hong Kong.⁶³ It showed the US's consent to apply the GATT to its trade relationship with Hong Kong. In 1995, both the US and Hong Kong became the original members of WTO, which means the WTO rules shall be applicable between them.⁶⁴ Thus, as equal parties, it is not appropriate for the US to revoke the HKSAR's WTO membership as a separate customs territory. In a word, to preserve the basic principles of the multilateral trading system, each WTO member, including the US and Hong Kong, has the obligation to eliminate the discriminatory treatment in international trade relations and the right to protect its legitimate benefits from being impaired. In addition, the Panel report clearly ruled that the US' measure is inconsistent with the most-favoured-nation treatment requirement in respect of origin marking under the GATT and completely refuted the US' invocation of security exceptions [8].

In the future, the US is likely to treat the HKSAR and Mainland China the same, instead of treating the HKSAR as a separate customs territory. For example, the US may apply Section 232 of the Trade Expansion Act of 1962⁶⁵ - the one that has already been applied to Mainland China - to the HKSAR [57,58]. If this happens, the HKSAR may initiate a second case on 'Tariff Measures on Certain Goods' against the US to the DSB [59]. Since the US applying Section 232 to Mainland China has already been ruled to violate the GATT, similar judgement would likely apply to the HKSAR case.

It is not yet known whether the HKSAR can eventually safeguard its legal rights as a separate customs territory through the DSB. The dispute settlement of the WTO is structured in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) which provides clearly-defined rules with timetables for completing a case. A dispute settlement procedure in the DSU approximately includes the following stages: 1) consultations, mediation, and etc.⁶⁶; 2) establishment of Panels and adoption of Panel reports⁶⁷; and 3) appellate review and adoption of Appellate Body Reports (if applicable).⁶⁸ Since the US has blocked all new appointments [60], the Appellate Body of DSB is not functioning as it intends to: late in the Obama Administration, the US government began blocking reappointments, and in the subsequent years the US blocked all new appointments to the WTO Appellate Body [61]. The persons of the Appellate Body were reduced to only one on December 10, 2019; and the term of the last person expired on November 30, 2020. This means that the Appellate Body no longer has the minimum of three persons needed to hear new appeals, and that it was eventually shut down [62]. The US government seems to insist on bringing a fundamental reform to the current multilateral trading system and refused to solve the pressing problem of the Appellate Body [63,64].

Trading rules have little value if they cannot be enforced; hence, the effectiveness of the DSB is critical to the WTO's success. However, new appeal cases cannot be heard by the Appellate Body at current stage. It is not easy for the HKSAR to enforce the implementation of this satisfactory Panel report and urge the US to respect the ruling and immediately withdraw the requirement. It is now unrealistic to expect the US to comply with a Panel report that is not in its favour. All in all, with a malfunctioning DSB, WTO rules are not in a strong position to safeguard the HKSAR's trade interests as a separate customs territory against US interference.

4.2. Will the HKSAR maintain its WTO membership as a separate customs territory?

In principle, the HKSAR may lose its WTO membership in only one way: withdrawal.⁶⁹ It remains questionable whether other members can question the HKSAR's disqualification, since it is an original member of WTO.

To withdraw, 'Hong Kong, China' as a member only needs to send a written notice to the Director-General of the WTO.⁷⁰ In the GATT era, 'Hong Kong, China' should withdraw by sending a written notice to the Secretary-General of the United Nations.⁷¹ Withdrawal from the WTO seems easier, but re-accession will be extremely difficult, which requires the approval by 'a two-thirds majority of the members of the WTO'.⁷² At the same time, the costs of withdrawal are enormous and incalculable. If the HKSAR were to withdraw from the WTO successfully, it would have to negotiate bilateral agreements with individual countries or participate in regional trade agreements to guarantee its economic interests. However, the actual effect may be up for question. Therefore, the

⁵⁸ GATT, Art. IX: 1.

⁵⁹ Vienna Convention on the Law of Treaties (VCLT) 1969, Art. 26.

⁶⁰ GATT, Art. IX: 1.

⁶¹ *Ibid.*, Art. I: 1.

⁶² Latin for 'agreements must be kept in good faith', is a fundamental principle of international law. See Ref. [68].

⁶³ GATT, Art. XXXV: 1.

⁶⁴ WTO Agreement, Art. XIII: 2.

⁶⁵ Trade Expansion Act of 1962, 19 U S C. 1801.

⁶⁶ DSU, Arts. 4 and 5.

⁶⁷ *Ibid.*, Arts. 6 to 16.

⁶⁸ *Ibid.*, Art. 17.

⁶⁹ WTO Agreement, Art. XV.

⁷⁰ *Ibid.*, Art. XV: 1.

⁷¹ GATT, Art. XXXI.

⁷² WTO Agreement, Art. XII: 2.

HKSAR is not expected to voluntarily withdraw from the WTO. May the PRC, as the HKSAR's 'responsible contracting party'⁷³ under the GATT, withdraw on its behalf from the WTO?⁷⁴ Still unlikely. As an important *trans*-shipment port for Mainland China, the HKSAR in 2019 re-exported goods valued at HK\$2154.7 billion originating from Mainland China, and re-exported goods valued at HK\$2190.19 billion to Mainland China [45]. The PRC has no reason to diminish its trade interests or close its 'outside window' by breaching its legal obligation under the 1990 Basic Law.⁷⁵ Therefore, it is unlikely for either the PRC or HKSAR to voluntarily withdraw the HKSAR's membership from the WTO (Fig. 5).

Since both GATT and WTO rules have set up a criterion for becoming a member as a separate customs territory, it might be possible for one territory to be disqualified by violating such criterion. Currently, the conditions for acceding to the GATT⁷⁶ or WTO⁷⁷ as a separate customs territory shall not constitute the prerequisites for maintaining membership. Once a territory has already been a WTO member, there is no provision for disqualification in WTO law, and no member is authorized to judge the qualification of other members. Since the WTO is a multilateral trade organization with a dispute settlement mechanism available for members to resolve their differences [65], the US may refer to a dispute settlement process and/or the Ministerial Conference, to interpret or amend the provisions of the WTO Agreement. For bringing disputes against the HKSAR, the US would need to prove that any benefit accruing to it under the WTO agreements has been directly or indirectly impaired by the HKSAR.⁷⁸ However, DSB recommendations and rulings cannot add to or diminish the rights and obligations provided in the applied agreements.⁷⁹ A DSB ruling to deny the HKSAR its membership or change its existing status as a separate customs will clearly alter its existing rights and obligations under the WTO Agreement, which will be not appropriate and legitimate. It is proved in the Panel report that Hong Kong is a separate customs territory and complies with relevant WTO rules. Only the Ministerial Conference and the General Council have the exclusive authority to interpret the WTO Agreement and related agreements, and the decision to adopt an interpretation shall be taken by a three-fourths majority of the WTO members. To amend the WTO Agreement, the US may presume an amendment to the provisions on members' rights and obligations. Such amendments will take effect when accepted by two thirds of the members and will only be binding for the members who accept it.⁸⁰ All in all, depriving a member its status of a separate customs territory in the multilateral trading system is a matter that needs to be handled carefully and cannot be decided by any individual member's unilateral action.

In addition, the future of the HKSAR as a separate customs territory will be affected by the policies of the PRC. It is both a legal obligation⁸¹ and policy guideline⁸² for the Central People's Government to 'maintain the prosperity and stability of Hong Kong'. As a result, the Central People's Government has proposed several remarkable policies to promote economic prosperity in Hong Kong and to strengthen the Mainland-HK integration, including: 1) Individual Travelers Scheme⁸³; 2) CEPA⁸⁴; 3) a better infrastructure framework to link Hong Kong with the mainland⁸⁵; 4) Integration in the Guangdong-Hong Kong-Macao Greater Bay Area and so on. Considering the new round of reform and opening-up policy since 2013, the PRC has established 21 free trade zones and Hainan free trade port and has made a lot of efforts in building the Guangdong-Hong Kong-Macao Greater Bay Area (Fig. 6). The economic relation and trade between Mainland China and the HKSAR will continue to develop so as to form a customs union in the Greater Bay Area. Nonetheless, the HKSAR is still unique as a mature and widely recognized international free port and trade centre, whose status and interests will be maintained by both the HKSAR and the PRC.

5. Conclusion

Hong Kong has been a WTO original member since January 1, 1995 and a contracting member of GATT since April 23, 1986 as a separate customs territory. British Hong Kong's membership of the GATT was promoted and declared by the UK in accordance with Article XXVI: 5(c) of the GATT, and recognized by the PRC. Hong Kong's membership of the WTO is empowered by Article XI of the WTO Agreement, authorized by the PRC and the 1990 Basic Law, and recognized by other WTO members when the WTO was established.

Currently, the challenges facing the HKSAR regarding its separate customs territory status are mainly from the US. Though US domestic laws and sanctions from the US government will keep challenging the HKSAR's separate customs territory interests, both GATT and WTO rules provide no legal basis for the unilateral measures of the US. Satisfying the conditions and qualifications as a separate customs territory, the HKSAR is still qualified to possess full autonomy in the conduct of its external commercial relations and of other matters provided in the WTO Agreement.

⁷³ GATT, Art. XXVI: 5(c).

⁷⁴ *Ibid.*, Art. XXXI.

⁷⁵ 1990 Basic Law, Art. 116.

⁷⁶ GATT, Art. XXVI: 5(c).

⁷⁷ WTO Agreement, Art. XII.

⁷⁸ GATT Art. XXIII, and DSU Art. 3.3.

⁷⁹ DSU, Art. 3.2.

⁸⁰ WTO Agreement, Art. X: 3.

⁸¹ 1990 Basic Law, Preamble; 2020 HKSAR National Security Law, Chapter I, Art. 1.

⁸² 2014 White Paper on HKSAR, Foreword and Section IV.

⁸³ The Individual Travelers Scheme allows mainland Chinese to apply for a single-use travel permit to visit Macau or Hong Kong as independent travellers. See Ref. [66].

⁸⁴ Section 2. (c) para. 3 CEPA 2003.

⁸⁵ For example, the Guangzhou-Shenzhen-Hong Kong Express Rail Link, and the Hong Kong-Zhuhai-Macao Bridge.

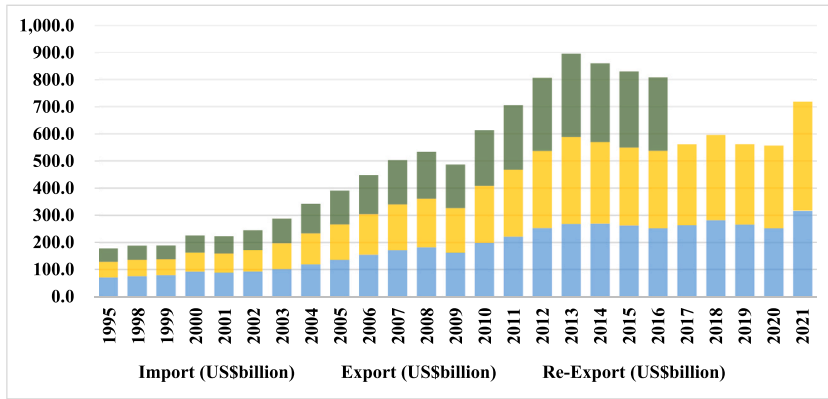


Fig. 5. Hong Kong's trade of goods with Mainland China. Source: The UN Comtrade Database (<https://comtrade.un.org/>).

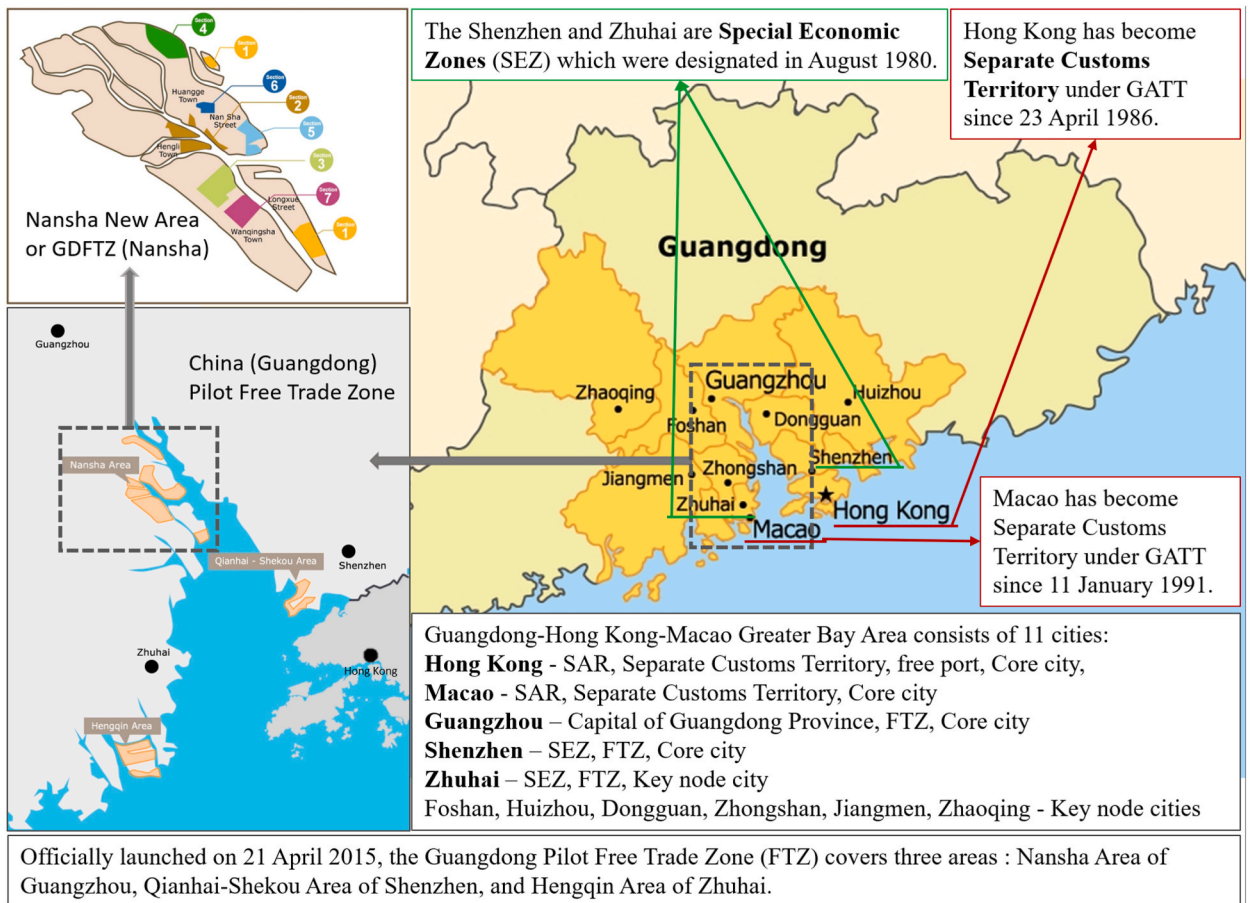


Fig. 6. Overview of the cities of the Greater Bay Area of China. Source: The Hong Kong Trade Development Council (<https://research.hktdc.com/>) and revisualized by the authors.

In the future, the US may treat the HKSAR and Mainland China the same, unilaterally and explicitly revoking the HKSAR's separate customs territory status. Bringing the US to the DSB might be a plausible option for the HKSAR; however, a malfunctioning Appellate Body of the DSB may be incapable of safeguarding the HKSAR's special economic status. The HKSAR will largely retain its separate customs territory status and WTO membership, unless the PRC and/or HKSAR voluntarily withdraws 'Hong Kong, China' from the WTO, which is, however, unlikely to happen. Although this paper attempts to feature a relevant and timely topic and to present our

perspectives and prospects on the HKSAR's status as a separate customs territory, we cannot predict the future with any certainty as the US-China relationship and the multilateral trading system, as well as the world, are in a state of constant change. The DS597 panel report has concluded that the US actions against the HKSAR have violated WTO rules, it would be better to further analyse and discuss the actual WTO panel report on the case. We will be glad to continue/update or read the discussion on this tropical case in our future research if there are any developments.

Author contribution statement

Wangwang Xing: Conceived and designed the experiments; Performed the experiments; Contributed reagents, materials, analysis tools or data; Wrote the paper. </p>

Li Yao: Analyzed and interpreted the data; Contributed reagents, materials, analysis tools or data.

Data availability statement

Data associated with this study has been deposited at Source: The UN Comtrade Database (<https://comtrade.un.org/>).

Additional information

No additional information is available for this paper.

Declaration of competing interest

The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

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