Autonomy of the Hong Kong Special Administrative Region

Keywords: autonomy; China; Hong Kong; unequal treaties; United Kingdom.

1. BACKGROUND OF THE AUTONOMY OF HKSAR

On 1 July 1997 the People's Republic of China recovered Hong Kong in accordance with the Sino-British Joint Declaration of 19 December 1984.[1] On the same day, China announced the Hong Kong Special Administrative Region (HKSAR) formally established and functioning as of 1 July 1997.

Hong Kong is an area composed of three regions, i.e. Hong Kong Island, Kowloon, and the New Territories. These three regions of the Chinese territory fell to British rule in the 19th Century through three separate treaties. Hong Kong Island was "ceded" "in perpetuity" to the British by the Peace Treaty of Nanking of 24 August 1842, which formally ended the notorious Opium War waged by Britain against China in 1840.[2] Kowloon, lying opposite Hong Kong Island and separated from the Island by what the British called the Victoria Harbour, was "ceded" to the British by the Convention of Peking of 24 October 1860 as a result of what was called the Second Opium War in Chinese history.[3] Finally, the New Territories, which geographically is the Kowloon Peninsula aside from the Southern tip which is Kowloon, was "leased" to the British for ninety-nine years by the so-called Convention Respecting an Extension of Hong Kong Territory between China and the United Kingdom of 9 June 1898.[4]

Since the Chinese Republican Revolution of 1911, the successive gov-

1. *See* 23 ILM 1366-1387 (1984).
2. *See* G. Hertslet, Hertslet's China Treaties 7-12, 3rd ed. (1908).
3. *Id.*, at 48-52.
4. *Id.*, at 120-122.

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ernments in China regarded these three treaties as unequal treaties. In fact, between 1942 and 1943, as well as at the end of World War II, the then Nationalist Government of China asked for the return to China of Hong Kong by the United Kingdom, but the demand was categorically turned down by the latter in the talks.

Since the establishment of the People's Republic of China in October 1949, the policy of the Chinese Government towards treaties in force during the old regime is that the Chinese Government "shall examine those treaties and agreements and shall recognize, abrogate, revise or renegotiate them according to their respective contents".[5]

To the Chinese Government, as the three treaties were unequal in nature, they were simply invalid; Hong Kong was not a British colony, but under British occupation as a result of British aggression. Thus, after the restoration of China's representation in the United Nations in 1971, and at the instance of the Chinese Government, the United Nations Special Committee on Decolonization adopted on 15 June 1972 a resolution recommending the deletion of Hong Kong and Macao from its list of colonies, which was approved by the 27th General Assembly.[6]

Notwithstanding this formal stand, before the 1980s, the Chinese Government was not in a hurry to recover Hong Kong and in a sense took a practical attitude toward the British administration of Hong Kong. This was dictated by the strategic considerations of China's over-all foreign policy in the context of realities of the then international power relationships. Economically, Hong Kong served in the wake of the Korean War and after, and still serves as an important foreign trade entrepôt and investment outlet for China.

Meanwhile, in the view of the British Government, the three treaties, which were validly concluded in the context of the international law then prevailing, formed the legal basis of the British presence in Hong Kong. But the ninety-nine year term of the lease of the New Territories under the 1898 Convention would expire by the year 1997. And Hong Kong Island, Kowloon, and the New Territories are fully integrated economically and socially and inseparably interdependent of each other. It can be easily un-

5. This policy was first set out in the Common Program of the Chinese People's Political Consultative Conference, adopted at the first meeting of the Conference in September 1949. *See* The Important Documents of the First Plenary Session of the Chinese People Political Consultative Conference (1949).

6. UN Doc. GA/RES/2908 (1972).

derstood why the British Government had to take the initiative to approach the Chinese Government in the late 1970s for an over-all settlement of the question of Hong Kong.

China's basic position for the negotiations on this question was that in view of the invalidity of the three treaties, China's sovereignty over Hong Kong could never be in question and was not negotiable; Hong Kong must be recovered to China and the instrument that should result from the diplomatic talks must not be in the character of replacing those three treaties. On the other hand, the Chinese Government took account of the history and present reality of Hong Kong and upon resuming the exercise of its sovereignty would implement the policy of 'one state, two systems', an essential feature of which would be the establishment of HKSAR with a high degree of autonomy. In the interest of the prosperity and stability of Hong Kong, as well as for the sake of the confidence of the people in Hong Kong, the Chinese Government would like to see that the basic policies and their elaboration be incorporated into the instrument.

The Joint Declaration, concluded by the two Governments at the end of diplomatic talks, and signed on 19 December 1984, avoids any reference to those treaties. It is only in its Preamble which, in setting out the object and purpose of the Declaration, states that the question of Hong Kong "is left over from the past". This vague allusion to past history could in no sense be interpreted to include the validity of those treaties. The sentence reads:

> the two Governments agreed that a proper negotiated settlement of the question of Hong Kong, which is left over from the past, is conducive to the maintenance of the prosperity and stability of Hong Kong and to the further strengthening and development of the relations between the two countries on a new basis.[7]

However, the irreconcilable views of the two Governments on this matter can be discerned by the fact that the crucial paragraphs of the main text of the Joint Declaration are in the form of unilateral declarations of the two

7. Joint Declaration, *supra* note 1, at 1371.

Governments. Thus, paragraph 1 states that China

> declares that to recover the Hong Kong area [...] is the common aspiration of the entire Chinese people, and that it has decided to resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997.[8]

The wording of this Paragraph speaks for itself with regard to the Chinese position on the question. Paragraph 2 states that the Government of the United Kingdom "declares that it will restore Hong Kong to the People's Republic of China with effect from 1 July 1997".[9] Neither does this Paragraph 2 make any reference to the three treaties. On the other hand, the word "restore" used in this unilateral declaration of the United Kingdom is significant, since it at least connotes the meaning that the word carries, i.e. Hong Kong is to be given back as a territory which was taken away from China.

2. AUTONOMY OF HKSAR

The Chinese Government's basic policies towards Hong Kong on resumption of the exercise of its sovereignty have been written into Paragraph 3 of the Joint Declaration in the form of a unilateral declaration consisting of 12 points and China's elaborations of these basic policies appear as Annex I of the Joint Declaration.[10]

'One state, two systems' is the fundamental policy of the Chinese Government for the realization of reunification of the Country. The motivations that underlie this fundamental policy are, on the one hand, the genuine desire and will of the Government to reunify the Country by peaceful means, and on the other hand, the determination of the Government to uphold national unity and territorial integrity, at the same time taking account of the history and realities of the regions concerned. The legal basis of this policy lies in Article 31 of the 1982 Constitution of

8. *Id.*
9. *Id.*
10. *Id.*, at 1373.

China, which provides that

> the state may establish special administrative regions when necessary. The systems to be instituted in the special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions.[11]

So far as Hong Kong is concerned, the main point of the policy of 'one state, two systems' is to establish a special administrative region immediately on China's resumption of exercise of sovereignty. Except for defence and foreign affairs which are to be administered by the Central Government, HKSAR will exercise a high degree of autonomy vested with executive, legislative, and judicial powers; no socialist system or policies will be practised in the Region - the original capitalist society, economic system, and way of life will remain unchanged, and the laws previously in force in Hong Kong will remain basically the same; fundamental rights and freedoms will be ensured by law in the Region; Hong Hong's status as an international financial centre as well as a free port and separate customs territory will be retained; etc. The Chinese Government also proclaimed that China's basic policies regarding Hong Kong will remain unchanged for 50 years, which was to be provided in the Basic Law of HKSAR to be enacted by China's National People's Congress.

The Basic Law was formally enacted by the National People's Congress on 4 April 1990 and promulgated by the President of the Republic on the same day to take effect from 1 July 1997.[12]

2.1. Legal status of HKSAR and relationship between the Central Authorities and HKSAR

The relationship between the Central Authorities and HKSAR is a very important issue dealt with in the Basic Law, for the definition of the relationship is determinative of the legal status of HKSAR and the scope and limits of power of its autonomy.

HKSAR, as an inalienable part of China, is a local administrative

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11. A.P. Blaustein & G.H. Flanz (Eds.), 4 Constitutions of the Countries of the World 35 (1991).
12. *See* Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, published by the Office of Hong Kong and Macao Affairs of the State Council of the People's Republic of China, reproduced *in* 29 ILM 1511-1551 (1990).

region directly under the Central People's Government[13] and at the same time a special administrative region exercising a high degree of autonomy which is authorized by the National People's Congress and practising the capitalist systems and the way of life prevailing before 1 July 1997.[14]

Consistent with the general concept of autonomy, HKSAR is vested with executive, legislative, and judicial powers by the National People's Congress.[15]

The domain of power reserved to the Central Authorities is of the nature that is indispensable to the maintenance of sovereignty and territorial integrity of the state. In this respect, the most important reserved powers are, as is the normal case with other autonomies in modern history, the responsibility of the Central Government in Beijing for the foreign affairs relating to HKSAR and for the defence of the Region; the Ministry of Foreign Affairs of China is to establish an office in Hong Kong.[16]

Because of limits of space, the rest of this note will exclusively deal with the power of HKSAR to conduct external affairs as provided by the Basic Law.

2.2. *The delegation of power in external affairs*

It is mostly in the area of external affairs that the autonomy of HKSAR is distinct from other autonomies in modern history. HKSAR is authorized to conduct external affairs in broad specialized areas other than political and military relations,[17] whereas very few, if any, autonomies in modern history were vested with any power to conduct external affairs or at most with very restricted power in very restricted areas. This distinctive feature of the autonomy of HKSAR is necessitated by the meaningful implementation of the policy of 'one state, two systems' and is conducive to the maintenance and further development of the Region's viable economy and flourishing trade.

Thus, HKSAR is authorized to establish official or semi-official economic and trade missions in foreign countries, whenever there is such a

13. *Id.*, Arts. 1 and 12.
14. *Id.*, Arts. 2, 5, and 12.
15. *Id.*, Arts. 2, 16, 17, and 19.
16. *Id.*, Arts. 13 and 14.
17. *Id.*, Arts. 150-152, 154, and 156.

need.[18] And this need is obvious for the promotion of foreign trade and investment. Indeed, today HKSAR maintains such missions in the United States, Canada, Brussels, etc. It is also authorized to maintain and develop and to conclude and implement agreements with foreign states and regions and relevant international organizations in economic, trade, financial and monetary, shipping, communications, and certain other appropriate fields.[19] Autonomy in the conduct of its external trade relations, including treaty-making power in trade matters, though in the nature of delegation of power by the National People's Congress, is of particular importance to HKSAR as a separate customs territory of China, as free trade is the lifeblood of the economy of the Region. Indeed, it would be inconvenient for the Chinese Government and may be contrary to the best economic and trade interests of HKSAR should the Chinese Government take the responsibility to negotiate and conclude trade agreements with other states for or on behalf of HKSAR as should be done in principle.

Also, representatives of the Government of HKSAR may, as members of delegations of China, participate in international organizations or conferences in appropriate fields limited to states and affecting the Region, or may attend in such other capacity as may be permitted by the Central Government and the international organization or conference concerned, and may express their views, using the name 'Hong Kong, China'. Arrangements have been made for its representatives, as members of Chinese delegations, to participate in a number of specialized agencies of the United Nations, such as the Universal Postal Union (as HKSAR maintains its own Postal Administration), the World Health Organization, the International Labour Organization, etc. On the other hand, as the tonnage of the Hong Kong merchant fleet is one of the world's largest and the importance of shipping to its trade, as well as its shipping management, different from that of the Central Government, the Governments of China and the United Kingdom, following the consultations between the representatives of both sides of the Sino-British Joint Liaison Group set up by the two Governments in 1985 in accordance with Paragraph 5 of the Joint Declaration and Annex II,[20] made arrangements with the International Maritime Organization as required by its constitution for Hong Kong to be a 'quasi-

18. *Id.*, Art. 156.
19. *Id.*, Art. 151.
20. Joint Declaration, *supra* note 1, at 1379.

member' of the Organization, a status which would be maintained for HKSAR as from 1 July 1997.[21]

In addition, HKSAR is authorized to participate, using the name 'Hong Kong, China', in international organizations and conferences not limited to states.[22] The most prominent example is Hong Kong's membership in the General Agreement on Tariffs and Trade (GATT) (now World Trade Organization (WTO)). Membership in GATT and WTO is not limited to states. A separate customs territory of a state may be a party.[23] In the history of GATT, a number of developing countries, before attaining independence, were "deemed to be" contracting parties to the GATT under Article 26(5.c) upon the sponsorship of the responsible contracting party. As the issue of China's status of contracting party of GATT is a complicated one (which is not within the scope of the present note), both China and the United Kingdom after in-depth consultations, agreed that Hong Kong should be "deemed to be a contracting party" to GATT under Article 26(5.c), through a declaration by the United Kingdom to GATT distributed to all contracting parties, and that China would send a Note to GATT confirming that Hong Kong would continue to be so deemed upon China's recovery of Hong Kong. Actions to that effect were taken by both Governments in 1986.[24] Today, HKSAR is a member of the WTO.

In short, notwithstanding these powers in the conduct of external affairs, these powers find their source in the authorizations from the Central Authorities, and are limited to certain selected specialized fields. HKSAR remains a local administrative Region directly under the Central Government. Therefore, HKSAR cannot have an identity distinct from China under international law.

Here, a few words should be inserted with regard to the extent that HKSAR will be bound by China's present treaty obligations.

It has to be pointed out at the beginning that, starting from its position of invalidity of the above said three treaties, the Chinese Government did not treat the question of Hong Kong as one of succession, and that customary rules and state practice on succession with respect to treaties in the case of transfer of a part of a territory to another state, do not apply to the case

21. 39 United Nations Yearbook 1357 (1985).
22. Art. 152 Basic Law, *supra* note 12.
23. A. Porges (Ed.) (with contributions by F. Weiss and P.C. Mavroidis), Guide to GATT Law and Practice 939, 6th ed. (1994).
24. GATT, BISD 34/S, at 27 (1986-1987).

of Hong Kong. To the Chinese Government, with respect to the application of China's treaty obligations to HKSAR, account has to be taken of their compatibility with the implementation of the policy of 'one state, two systems'. The Chinese Government was also aware that there are also certain treaties, presumably of a multilateral nature, in appropriate fields, such as customs procedure, tourism, labour standards, etc., to which the United Kingdom is a party and which had been applied to Hong Kong, and to which China is not a party, but which remain of importance to the economy and way of life in HKSAR. The matter of treaty obligations is provided for in the Basic Law of HKSAR, taking full account of these considerations. Thus, according to Article 153 of the Basic Law, the application to HKSAR of China's treaties, multilateral or bilateral, shall be decided by the Central Government in accordance with the circumstances and needs of the Region, and after seeking the views of the Government of the Region.[25] Of course, there are treaties which are either obviously of the character that they are to be applied to the state party as a whole, or expressly provide for the application throughout all parts of a state party. In these circumstances, there can be no choice, and indeed these treaties are of such a character that they can present no problem of their application to HKSAR. Other categories of treaties, particularly bilateral, concluded by China are hardly compatible with the circumstances and needs of HKSAR. An example is China's investment protection agreements with other states. Certainly, these agreements will not be applied to HKSAR. In fact, in order to assure that foreign investments in Hong Kong would be fully protected by HKSAR, with the specific authorization on a case-by-case basis by the Chinese Government and subject to examination and approval of the Chinese Government with respect to contents and text, the British Hong Kong Government had, for the past few years, concluded investment protection agreements, which will be retained by HKSAR, with some states having large investment stakes in Hong Kong.

According to the same Article 153, multilateral agreements to which China is not a party, but which were implemented in Hong Kong, may continue to be implemented in HKSAR. Of course, should there be any representations by contracting parties with regard to implementation of such treaties, they have to be made through the Chinese Government.

As to the new multilateral treaties which should appear after the estab-

25. Art. 153 Basic Law, *supra* note 12.

lishment of HKSAR and to which China happens not to be a party, and which circumstances and needs require application to HKSAR, the Central Government will either authorize or assist, as necessary, the Government of HKSAR to make appropriate arrangements for their application to the Region.

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