The Delineation of Treaty-making Powers between the Central Government of the People’s Republic of China and the Special Administrative Region of Hong Kong

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I. Introduction

This article investigates treaty making by the People’s Republic of China (‘China’) and its Special Administrative Region of Hong Kong (‘HKSAR’) with a focus on the delineation of treaty-making powers between the Central Government and the Region. Though China is a unitary state, the Region of Hong Kong enjoys far-reaching autonomy that allows it to maintain its capitalist system and own institutions, independent judicial authority and a legal system that is separate from Mainland China. The autonomy of the HKSAR includes the power to conclude certain international agreements on its own. This study of treaty-making powers takes a doctrinal approach. It analyses Chinese and HKSAR legislation including scholarly views and the relevant treaty-making practice. Competences and procedures of treaty making are a crucial factor of a state’s treaty practice. The modalities of participation of state organs in the treaty-making procedure determine the domestic effects of international treaties. Legislative approval of a treaty can be regarded as a precondition of the validity or applicability of treaty norms under municipal law. It often depends on the state organ, which approves the conclusion of a treaty, if or where the treaty is published and how a treaty is ranked within the domestic hierarchy of norms. In Mainland China, treaties which are approved by the Standing Committee of the National People’s Congress (‘NPC’) are attached to the approval decision and published in the NPC Standing Committee’s Official Gazette. Such treaties have the rank of national statutes.

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2 Part of this article is based on chapter two and the English summary of the author’s book, BJÖRN AHL, DIE ANWENDUNG VÖLKERRECHTLICHER VERTRÄGE IN CHINA [THE APPLICATION OF INTERNATIONAL TREATIES IN CHINA] 67-122, 357-358 (2009).
3 Given that the Central Government does not exercise jurisdiction over the territory of Taiwan, China is also a divided state. Björn Ahl, Taiwan, in 2 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 746 (Rüdiger Wolfrum ed., 2012).
5 Zhonghua Renmin Gongheguo Renmin Daibiao Dahui Changwu Weiyuanhui Gongbao (中华人民共和
II. Treaty-making Powers of the Central State

According to Art. 89 cl. 9 of the Chinese Constitution, the power to conclude treaties and agreements with foreign states is vested in the State Council.⁷ Procedure and competences of treaty-making are provided for in detail in the Law of the People’s Republic of China on the Procedure of Concluding International Treaties (hereinafter ‘Treaty-making Law’) of 1990.⁸ This law was modelled on a similar Soviet law of 1978.⁹ Whereas other states make use of internal regulations, China has followed the

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⁹ O Poryadke Zaklyucheniya, Ispolneniya I Denonsatsii Mezdunarodnykh Dogоворov SSSR [Law on the Procedure for the Conclusion, Performance, and Denunciation of International Treaties of the
practice of some socialist states to adopt a law to regulate details of how the Government conducts its external relations. The Ministry of Foreign Affairs (‘MFA’) concludes treaties and agreements under the direction of the State Council. The Treaty-making Law stipulates competences and authorization procedures for each step that precedes the conclusion of a treaty. Those steps include the proposal to conclude a treaty, preparation of the treaty draft by the relevant department of the State Council in charge, as well as negotiation and determination of the final treaty text.

International treaties are concluded either in the name of China, in the name of the Central People’s Government (‘CPG’), the State Council, or in the name of a department of the State Council such as a ministry, commission or another department directly under the State Council. The competences to authorize treaty drafts and to sign full powers of representatives depend on this categorization. However, the Treaty-making Law does not specify the conditions under which an international treaty is concluded in the name of the State, the Government or a ministry. Commentators suggest that only important political treaties and treaties that relate to the territory of China are concluded in the name of the State. If matters fall exclusively within the competence of a State Council department, the agreement can be concluded in the name of the department; in all other cases treaties should be signed in the name of China or the CPG.

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10 Treaty-making Law art. 3, cl. 4.
11 For a detailed analysis compare QIN XIACHEONG (秦晓程), ZHONGHUA RENMIN GONGHEGUO DIJE TIAOYUE DE XINGSHI YANJIU (中华人民共和国缔结条约的形式研究) [STUDY ON THE FORMS OF TREATIES CONCLUDED BY THE PEOPLE’S REPUBLIC OF CHINA] (2003).
12 Treaty-making Law art. 4.
13 Treaty-making Law art. 5 and 6. See also WANG TIEYA (王铁崖), GUOJIFA (国际法) [INTERNATIONAL LAW] 301 (2010) [hereinafter WANG TIEYA (王铁崖), GUOJIFA].
concluded in the name of the Central Government.\textsuperscript{14} In practice treaties that require approval by the Standing Committee of the National People’s Congress (‘NPC’) are generally concluded in the name of China.\textsuperscript{15}

If treaties are negotiated and signed in the name of China, the State Council authorizes the treaty drafts that are prepared and submitted by the MFA and/or the relevant State Council department.\textsuperscript{16} Treaties signed in the name of the Central Government are prepared by the MFA or another State Council department in charge. The State Council authorizes the draft.\textsuperscript{17} Agreements that are negotiated and signed in the name of a government department concerning matters within the functional competence of the department concerned are authorized by that department or in consultation with the MFA.\textsuperscript{18}

\textbf{A. Ratification of Treaties and External Representation of China}

As regards the external representation of China on the international plane, the current

\begin{footnotesize}
\textsuperscript{14} Zhang Yiqin (张亦勤), \textit{Jianshu Woguo Dijie Tiaoyue de Shenpi Chengxu (简述我国缔结条约的审批程序)} [\textit{Description of the Approval Procedure of Chinese Treaty-making}], in \textit{GUOJI TIAOYUE YU GUONEIFA DE GUANXI}, supra note 5, at 237, 243.


\textsuperscript{16} Treaty-making Law art. 5, cl. 1, sentence 1.

\textsuperscript{17} Treaty-making Law art. 5, cl. 1, sentence 2.

\textsuperscript{18} Treaty-making Law art. 5, cl. 1, sentence 3.
\end{footnotesize}
Constitution, unlike the Constitution of 1954,\(^1^9\) does not explicitly assign the exclusive competence of external representation to the State President. Commentators often simply state that the power to make treaties is jointly exercised by the NPC Standing Committee, the State President and the State Council.\(^2^0\) In practice, the State President represents China to conclude more important treaties; the President ratifies treaties in accordance with Art. 81 of the Chinese Constitution.\(^2^1\) Ministers of the State Council conclude less important treaties or agreements.\(^2^2\) Some scholars view the State President as exercising only a ‘symbolic role’ when ratifying treaties and suggest that the NPC Standing Committee should be responsible for the treaty ratification on the international level.\(^2^3\) However, those scholarly views disregard the requirements of intergovernmental intercourse as well as the text of the Chinese Constitution and ignore that the Secretary General of the Communist Party normally holds the office of State President. The reason for questioning the State President’s external powers may be related to the inconsistency between the constitutional status of the President as the highest representative of the state in external matters on the one hand, and the constitutional status of the NPC and the NPC Standing Committee respectively as the highest state organs on the other. According to the wording of the Constitution and the current treaty practice, it is the State President who represents China on the international plane and ratifies treaties. Power of representation may be delegated to ministers of the State Council.

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\(^{19}\) See XIANFA [CONSTITUTION] art. 41 (1954).

\(^{20}\) LI JINRONG (李金荣), GUOJIFA (国际法) [INTERNATIONAL LAW] 291 (2002); WU JIE (吴杰), XIANFA JIAOCHENG (宪法教程) [TEXTBOOK ON CONSTITUTIONAL LAW] 228 (1996) and WANG TIEYA (王铁崖), GUOJIFA, supra note 12, at 299.

\(^{21}\) XIANFA [CONSTITUTION] art. 81 (1982): “The President of the People’s Republic of China receives foreign diplomatic representatives on behalf of the People’s Republic of China and, in pursuance of decisions of the Standing Committee of the National People’s Congress, appoints and recalls plenipotentiary representatives abroad, and ratifies and abrogates treaties and important agreements concluded with foreign states.”


\(^{23}\) Xie Xinsheng (谢新胜), supra note 7, at 48-49; Chen Hanfeng et al. (陈寒枫), Guoji Tiaoyue yu Guoneifa de Guanxi he zai Zhongguo de Shijian (国际条约与国内法的关系和在中国的实践) [The Relationship between International Treaties and Municipal Law and the Practice in China], in GUOJI TIAOYUE YU GUONEIFA DE GUANXI, supra note 5 at 86, 95; Xu Lisha (徐里莎), Lun Guoji Tiaoyue zai Guonei Zhixing de Lifa Shijian (论国际条约在国内执行的立法实践) [On the Legislative Practice of the Domestic Execution of International Treaties], Hicourt.gov.cn (Mar. 3, 2003), http://www.hicourt.gov.cn/theory/artilce_list.asp?id=903&l_class=2.
B. Legislative Approval

The Constitution provides that the Standing Committee of the NPC decides on the ratification and abrogation of international treaties and important agreements concluded with foreign states. \(^{24}\) Chinese legal doctrine defines the term of international treaties\(^ {25}\) and international agreements\(^ {26}\) both in a broad and a narrow sense. Whereas analysis and definition of the exact scope of these terms differ to some extent,\(^ {27}\) there is consensus that international treaties and agreements in their broadest sense denote any agreement under international law between states or other subjects of international law irrespective of the designation of the agreement. It is not required that the agreement is contained in one single document or that it is laid down in written form.\(^ {28}\) The narrow meaning of international treaties includes important agreements concerning political or economic matters that are concluded in written form and are subject to formal procedures including legislative approval such as treaties of alliance, border or neutrality treaties.\(^ {29}\) The Constitution applies the term of ‘treaty’ in a narrow meaning in order to distinguish it from less important ‘agreements’, which do not require the approval of the NPC Standing Committee. Agreements in a narrow sense denote less formal agreements on specific administrative or technical matters that require approval by the State Council or are

\(^{24}\) XIANFA [CONSTITUTION] art. 67, cl. 14 (1982). The Constitution calls legislative approval of treaties by the NPC Standing Committee ‘decision on ratification’ (Chinese: Jueding tong Waiguo Dijie de Tiaoyue de Pizhun (决定同外国缔结的条约的批准)).

\(^{25}\) Chinese: tiaoyue (条约).

\(^{26}\) Chinese: xieding (协定).

\(^{27}\) Xie Xinseng (谢新胜), supra note 7, at 47; WANG TIEYA (王铁崖), GUOJIFA, supra note 12, at 295; Chen Yifeng, The Treaty-making Power in China: Constitutionization, Progress and Problems, 15 ASIAN Y.B. INT’L L. 43, 46, 49-50, 52 (2009); Jerry Z. Li & Guo Sanzhuhan, China, INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS, supra note 4 at 163.

\(^{28}\) WANG TIEYA (王铁崖), ZHONGHUA FAXUE DACIDIAN, GUOJIFA JUAN (中华法学大词典 国际法卷) [COMPREHENSIVE LEGAL SCIENCE DICTIONARY OF CHINA, VOLUME ON INTERNATIONAL LAW] 547 (1996); WANG TIEYA (王铁崖), GUOJIFA, supra note 12, at 294; for different forms of treaties accepted in Chinese practice see CHIU HUNGDAH, THE PEOPLE’S REPUBLIC OF CHINA AND THE LAW OF TREATIES 14 (1972); with regard to non-written agreements, see Qin Xiaocheng, Oral International Agreements and China’s Relevant Practice, 4 CHINESE J. INT’L L. 465 (2005).

\(^{29}\) LI HAOPEN (李浩培), TIAOYUEFA GAILUN (条约法概论) [INTRODUCTION TO TREATY LAW] 24 (1987); WANG TIEYA (王铁崖), GUOJIFA, supra note 12 at 294, 296, 302.
concluded by a Department of the State Council without such approval requirement.\textsuperscript{30}

According to the Treaty-making Law, treaties and important agreements are subject to legislative approval. Once the text of such an instrument has been signed, it is submitted to the State Council for examination and verification and the State Council refers it to the NPC Standing Committee to take the decision on the approval of the treaty. Consequently, the State Council has the power to decide whether the relevant treaty falls within the category of ‘treaties and important agreements’. Since the State Council is in a more powerful position in practice, the NPC Standing Committee’s competence under the current constitution to overrule a decision of the State Council is only a theoretical option.\textsuperscript{31} The Treaty-making Law provides that in particular the following treaties and agreements fall within this category: treaties of friendship and cooperation, treaties of peace and other treaties of a political nature as well as treaties and agreements which contain stipulations inconsistent with the laws of China.\textsuperscript{32} The purpose of the last section of this provision is to avoid inconsistencies between the contents of international treaties and the Chinese domestic legal system. The NPC Standing Committee can act in different ways to ensure conformity of treaties and municipal law: It can withhold approval, can combine approval with the declaration of a reservation or can adopt changes of domestic law.\textsuperscript{33} It is also argued that approval by the NPC Standing Committee of a treaty that deviates from domestic law constitutes an implied amendment of the relevant national legislation due to the legislative character of the approval.\textsuperscript{34} Given the informal consensus finding procedures prior to submission for approval of an international treaty to the NPC Standing Committee, it is unlikely that the Standing Committee will withhold its

\textsuperscript{30} YU XIANYU (余先予), GUOJI FALU DACIDIAN (国际法律大词典) [COMPREHENSIVE INTERNATIONAL LAW DICTIONARY] 159 (1995).

\textsuperscript{31} Chen Yifeng, supra note 26, at 43-69, 51; Zhu Pengfei, supra note 5, at 61-62.

\textsuperscript{32} Further, the following treaties require treaties and agreements concerning territory and delimitation of boundary lines; treaties and agreements relating to judicial assistance and extradition; Treaty-making Law art. 7.

\textsuperscript{33} Wu Hui, supra note 5, at 129; WANG TIEYA (王铁崖), INTERNATIONAL LAW, supra note 12, at 302.

\textsuperscript{34} YANG ZEWEI (杨泽伟), GUOJIFA JIAOCHENG (国际法教程) [INTERNATIONAL LAW TEXTBOOK] 28 (1999); Luo Ao (罗傲), Lun Guoji Tiaoyue zai Zhongguo de Shiyong (论国际条约在中国的适用) [About the Application of International Treaties in China], FAZHI YU SHEHUI (法制与社会) [LEGAL SYSTEM AND SOCIETY] 13, 13 (2009).
approval. In case there is no consensus among the state and party organs involved, the treaty will just not be submitted to the NPC Standing Committee for approval. An example of such a situation of a treaty pending legislative approval after it has been signed is the International Covenant on Civil and Political Rights (‘ICCPR’), which was initially signed by the Chinese government in 1998. However, it has not been submitted to the NPC Standing Committee for approval. Consequently, the accession of China to the ICCPR is still pending.\(^{35}\) Although the power of the NPC Standing Committee to participate in the treaty-making procedure has been gradually expanded,\(^{36}\) the circumstances of the accession of China to the WTO revealed the relatively weak position of the NPC Standing Committee in relation to the executive. Art. 67 cl. 14 of the Constitution stipulates that the President shall not ratify a treaty unless the Standing Committee of the NPC, after reviewing the treaty at one of its sessions, renders a decision to that effect. However, when acceding to the WTO, the Chinese government deposited the instrument of ratification only two days after signature, without the consent of the Standing Committee. Although the Standing Committee published a decision on the accession to the WTO, the decision referred only to the progress of the accession negotiations in general and was taken 15 months before the date of signature.\(^{37}\) The intention was that the Standing Committee had, in this case, either taken an anticipated decision on the accession or waived its power of decision regarding the ratification.\(^{38}\) However, it is very doubtful whether the Chinese Constitution allows

\(^{35}\) It was said in an official statement of the State Council of 2005 that “[t]he Chinese government also signed the International Covenant on Civil and Political Rights in October 1998. At present, the Chinese government departments concerned are pressing on with their research and preparations, and when conditions are ripe, the State Council will submit a request to the Standing Committee of the NPC for examination and approval”, see ST. COUNCIL INFORMATION OFFICE, BUILDING OF POLITICAL DEMOCRACY IN CHINA, http://www.china.org.cn/english/2005/Oct/145718.htm (2005).

\(^{36}\) Chen Yifeng, supra note 26, at 51-52, counts 361 treaties that were subject to legislative approval before 2009. Compare also Chen Zihua, supra note 7, at 71.


\(^{38}\) Yu Minyou, Compliance with China’s WTO Accession Agreement: A Chinese Lawyer’s Perspective,
State organs to waive their powers or to delegate competences, as was the case for accession to the WTO. Some commentators therefore regard the accession of China to the WTO as a violation of the Chinese Constitution.\(^{39}\)

When the NPC Standing Committee approves a treaty, the internal decision-making includes not only the delegates of the Standing Committee but involves in the process of informal decision-making other relevant actors of the Party-State.\(^{40}\) Hence, the NPC Standing Committee’s power to approve treaties is, in practice, not a genuine power of parliamentary participation and control.

III. Treaty-making Competence of Hong Kong

Although Hong Kong is an autonomous sub-entity of a unitary state, it arguably enjoys more extensive external autonomy than any other autonomous region.\(^{41}\)The aspects that, apart from its treaty-making power, constitute Hong Kong’s special international status include separate membership in international organizations, control of international shipping and air transportation, status as a separate customs territory with its own currency and system of taxation, issuing of Hong Kong Special Administrative Region (‘HKSAR’) passports and immigration control.\(^{42}\) As was agreed upon in the Sino-British Joint Declaration the Basic Law of Hong Kong vests the HKSAR with powers to conduct external affairs including the power to make treaties with foreign states.\(^{43}\) The HKSAR is not a state but a sub-entity of China; it

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\(^{39}\)ZHANG NAIGEN (张乃根), GUOJIFA YUANLI (国际法原理) [THEORY OF INTERNATIONAL LAW] 25 (2002).


\(^{42}\)Xu Xiaobing & George D. Wilson, The Hong Kong Special Administration Region as a Model of Regional External Autonomy, 32 CASE W. RES. J. INT’L L. 1, 3-6 (2000).

has been often described as an entity *sui generis*. Although Hong Kong is an organised political community under a government, it is not an entity that is in its external relations only bound by public international law and can avail itself of autonomous powers internally. The Basic Law provides that the Region is subordinated to the CPG and powers to exercise foreign affairs are vested in the CPG. The Region has no powers to give itself a constitution; the Central Authorities are responsible of amending the Basic Law.

Although the HKSAR does not fulfil the prerequisites of statehood, the Region possesses relative legal personality in relation to specific rights and obligations under international law and its actions are insofar regulated directly by international rules. However, Mainland Chinese commentators do, in general, not recognise the international legal personality of Hong Kong, although they accept a treaty-making competence of the Region. It is argued that Hong Kong is neither a state nor has it any other international legal personality. Based on the provision that the HKSAR is a local administrative region directly under the CPG, some commentators conclude that the Region is not even a partial subject of international law.

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45 Xianggang jiben fa [Basic Law] art. 12, 13, 159.

46 The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life...” Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 178 (Apr. 11), http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=41&case=4&code=isu&np3=4; Xu Xiaobing & George D. Wilson, *supra* note 41, at 35-37.

47 Yuan Gujie & Qiu Zhiqiao (袁古洁 丘志乔), Xianggang, Aomen huigui hou de bufen diyuequan ji tiaoyue shiyong (香港, 澳门回归后的部分缔约权及条约适用) [Partial Treaty-making Competence and the Application of International Treaties in Hong Kong and Macau after the Handover], Hu Nan Shi fan Da Xue Xue Bao, She Hui Ke Xue Bao (华南师范大学政法学院) [Journal of Hu Nan Normal University (Social Sciences Edition)] 17, 18 (2001).


the fear of harming the sovereignty of the nation.⁵⁰

A. Delineation of the HKSAR’s Treaty-making Power

A general rule on the delineation between the external powers of Hong Kong and the CPG is provided for in the chapter on the relationship between the Central Authorities and the HKSAR in Art. 13, which introduces the distinction between ‘foreign affairs’ powers of the CPG and ‘external affairs’ to be exercised by the HKSAR.⁵¹ Even though both terms seem to be not significantly different, the corresponding terms in Chinese⁵² indicate that the former relates to ‘quintessentially matters of state and international diplomacy’, whereas the latter appears to be concerned with ‘economic and cultural matters’.⁵³

A more specific provision on treaty making is laid down in the chapter on external affairs in Art. 151 of the Basic Law.⁵⁴ According to the wording of Art. 151, the HKSAR is vested with treaty-making powers in ‘appropriate fields’. The list of matters mentioned in this article is not exhaustive but has only exemplary character. The Basic Law must be interpreted in order to determine the fields in which Hong Kong can conclude treaties, apart from those already explicitly listed in Art. 151. An indication of how to interpret the notion of ‘appropriate fields’ is the wording of Art. 151 that terms treaties to be concluded by the HKSAR ‘agreements’. The Chinese


⁵¹ XIANGGANG JIBEN FA [BASIC LAW] art. 13 reads: “The Central People’s Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region. The Ministry of Foreign Affairs of the People’s Republic of China shall establish an office in Hong Kong to deal with foreign affairs. The Central People’s Government authorizes the Hong Kong Special Administrative Region to conduct relevant external affairs on its own in accordance with this Law.”

⁵² Chinese: Waijiao Shiwu and Duiwai Shiwu (外交事务 对外事务).

⁵³ YASH GHAI, HONG KONG’S NEW CONSTITUTIONAL ORDER 461 (1999). See as well Sino-British Joint Declaration, supra note 42, art. 3, cl. 10, which refers to Hong Kong’s power to conclude treaties regarding economic and cultural matters.

⁵⁴ XIANGGANG JIBEN FA [BASIC LAW] art. 151 reads: “The Hong Kong Special Administrative Region may on its own, using the name ‘Hong Kong, China’, maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields.”

The same wording can be found in the Sino-British Joint Declaration, supra note 42, Annex I Elaboration of the Government of the People’s Republic of China of Its Basic Policies Regarding Hong Kong, XI Foreign Affairs.
language version of the Basic Law, which prevails in case of a contradiction between
the English and the Chinese versions of the Basic Law, uses the term xieyi.\footnote{Pursuant to a decision of the National People’s Congress Standing Committee, the Basic Law, the Chinese text shall prevail in case of discrepancy between the Chinese text and its English translation, see Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui guanyu Zhonghua Renmin Gongheguo Xianggang tebie Xingzhengqu Jibenfa Yingwenben de Jueding (全国人民代表大会常务委员会关于中华人民共和国香港特别行政区基本法英文本的决定) [Decision of the National People’s Congress Standing Committee on the English Text of the Basic Law of the Hong Kong Special Administrative Region] (promulgated by the Standing Comm. Nat’l People’s Cong., Jun. 28, 1990), 1990 Standing Comm. Nat’l People’s Cong. Gaz, 250.} This wording seems to relate to the general distinction between ‘treaties’\footnote{Chinese: tiaoyue (条约).} and ‘agreements’.\footnote{Qiu Zhiqiao (丘志乔), Lun Xianggang, Aomen tebie xingzheng qu de tiaoyue dijie ji shiyong (论香港，澳门特别行政区的条约缔结及适用) [On the Conclusion and Application of International Treaties in the Special Administrative Regions of Hong Kong and Macau], FUJIAN ZHENGFA GUANLI GANBU XUEYUAN XUEBAO (福建政法管理干部学院学报) [JOURNAL OF THE UNIVERSITY OF POLITICS AND LAW OF ADMINISTRATIVE CADRES IN FUJIAN] 37, 37, 38 (2000); Yuan Gujie & Qiu Zhiqiao (袁古洁 丘志乔), supra note 46, at 17, 18.} If this distinction is regarded as crucial for the determination of the contents of agreements in the sense of Art. 151, the HKSAR is prohibited from entering into politically important treaties.

The same result is achieved by taking into consideration the distinction in Art. 13 of the Basic Law between ‘foreign affairs’ and ‘external affairs’. The competence of the Central Government in defence matters under Art. 14 of the Basic Law implies that the HKSAR also has no treaty-making powers in the area of defence. Mainland Chinese commentators also conclude that Hong Kong’s treaty-making competence only covers matters of a ‘non-political’ nature.\footnote{Huang Deming & You Wenjun (黄德明 左文君), Guoji fazhi shiye xia de diyuquan (国际法治视野下的缔约权) [On Treaty Making Capacity from Perspective of International Rule of Law], GONGMIN YU FA (国民与法) [Citizen and Law] 4, 6 (2011).} In practice, prior approval of the CPG will always be sought in all unspecified fields, and when in doubt, as the ‘mandate to negotiate’ will be raised by the other party of the proposed agreement.

It has been proposed to apply the Mainland Chinese Treaty-making Law to Hong Kong in order to impose an approval procedure that subjects the conclusion of treaties by the HKSAR to prior scrutiny by the CPG.\footnote{Huang Deming & You Wenjun (黄德明 左文君), Guoji fazhi shiye xia de diyuquan (国际法治视野下的缔约权) [On Treaty Making Capacity from Perspective of International Rule of Law], GONGMIN YU FA (国民与法) [Citizen and Law] 4, 6 (2011).} However, this would formally require that the Treaty-making Law is included via a decision of the NPC Standing Committee in Annex III of the Basic Law, which sets out the national laws to be applied in the HKSAR. Further, Art. 18 cl. 3 Basic Law provides that Laws listed in Annex III to the Basic Law shall be confined to those relating to defense and foreign affairs as well as other matters outside the limits of the autonomy of the Region as
specified by the Basic Law.\textsuperscript{60} Like other provisions of the Basic Law, Art. 18 cl. 3 uses the concept of ‘foreign affairs’ to refer to external relations powers outside the autonomy of the HKSAR. Hence, a national Treaty-making Law could only be made applicable in Hong Kong for matters of ‘foreign affairs’. As foreign affairs lie within the exclusive competence of the CPG, there is no need to make the national Treaty-making Law applicable to Hong Kong.

After the handover in 1997, the HKSAR has on its own concluded bilateral investment promotion and protection agreements (BITs) and double taxation avoidance agreements under Art. 151.\textsuperscript{61} The HKSAR also concluded treaties in the areas of customs co-operation, maritime transportation and social security.\textsuperscript{62} In 2011 and 2012, Hong Kong concluded free trade agreements with the European Union and New Zealand as well as environmental and labour cooperation agreements.\textsuperscript{63} Most of

\textsuperscript{60} See YASH GHAI, supra note 52, at 392-394.


the agreements fall under the categories of Art. 151 that are expressly listed such as the economic, trade and financial areas. However, the agreements on social security, labour and environmental cooperation relate to the general category of ‘appropriate fields’.

Whereas a comprehensive review of the agreements currently in force in general shows a restrictive approach of the Hong Kong Government in the exercise of treaty-making powers, it can be observed that Hong Kong has slightly expanded its treaty-making activity during the past few years by concluding treaties that go beyond the express matters of Art. 151. However, international agreements on social insurance, labour and environment fall definitely within the ‘appropriate fields’ of the external affairs of Hong Kong as they have a close connection to the development of an international and sustainable local economy and do not touch on matters of relevance for the sovereignty of the Central State. The HKSAR has also gradually expanded the scope of agreements concluded with foreign states within the express matters of Art. 151. While in the past most agreements were concluded in the areas of civil aviation, investment protection and juridical assistance in criminal matters, the focus has shifted to agreements on the avoidance of double taxation and to free trade agreements.64

The practice after 1997 indicates that agreements on the establishment of representations of international organisations in Hong Kong were concluded between the Central Government and the relevant international organisation pursuant to Art. 152 cl. 1 of the Basic Law. 65 The CPG’s competence may be based on the fact that the

http://www.doj.gov.hk/eng/laws/treaties.html#bf (last visited Mar. 8, 2014). The environment cooperation agreement with New Zealand was signed by the Hong Kong Government Environmental Protection Department in the name of Hong Kong, China and by the Ministry for the Environment of New Zealand in the name of New Zealand.


agreements confer on the representations and their personnel in Hong Kong certain privileges and immunities falling within ‘foreign affairs’. Although under Art. 152 cl.2 the HKSAR may, using the name Hong Kong, China, participate in international organisations not limited to states. It appears that the discretion lies with the Central Government depending on the subject matters of the agreements and whether participation in the agreements is limited to states. For example, Hong Kong is a member of the WTO in its capacity as a separate customs territory and by virtue of Art. 116 Basic Law and it became a ‘non-state member’ of the International Civil Aviation Organization in 2010. According to current practice, the host country agreement with the international organization is concluded by the CPG and a memorandum of administrative agreement is signed by the Hong Kong Government and the international organization.

**B. Treaty-making Power Subject to Authorization**

Different from Art. 151, the provisions of Art. 96, 133 and 155 of the Basic Law provide a treaty-making power of the Region which can only be exercised upon approval by the Central Government. The conclusion of treaties by the Region is conditional upon ‘the assistance or authorisation of the Central People’s Government’. It is concluded from the context that ‘to assist’ and ‘to authorise’ are not alternative options but that an authorisation is required in all circumstances. Hong Kong may rely on the assistance of the Central Government in order to enter into treaty negotiations with a foreign government. In practice, the HKSAR is required to obtain authorisation in order to enter into negotiations with a foreign government and needs also to obtain further authorisation of the finalized text of the agreement before the agreement may become binding on Hong Kong.

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66 "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 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."


68 Lung Wan Pun, supra note 63, at 611.

69 XIANGGANG JIBEN FA [BASIC LAW] art. 96 and art. 155.
Pursuant to Art. 96, the HKSAR may enter, with the assistance or authorisation of the CPG, into agreements with foreign states on reciprocal juridical assistance such as agreements for the mutual enforcement of judgements and arbitral awards, taking of evidence overseas and extradition arrangements. \(^{70}\) Hong Kong has concluded numerous agreements on mutual legal assistance, surrender of fugitive offenders and transfer of sentenced persons pursuant to Art. 96. \(^{71}\)

As of 2014 Hong Kong had signed over 60 air service agreements with foreign states. \(^{72}\) Air service agreements under Art. 133 of the Basic Law concern air services between Hong Kong and foreign states. Such agreements are the responsibility of the HKSAR Government but require ‘specific authorizations’ of the CPG. Authorization is effected by the MFA on a case-by-case basis approving the conclusion of a specific air service agreement by the HKSAR Government with a certain foreign government. \(^{73}\)

Different from the establishment of official and semi-official economic and trade missions, which only have to be reported to the CPG, the establishment of foreign consular and other official or semi-official missions in Hong Kong requires the approval of the Central Government. \(^{74}\) It is questionable whether the Region or the Central Government has the power to conclude a bilateral consular agreement. Although the conclusion of a consular agreement does not fall into the external affairs ambit of Art. 151 Basic Law due to the political significance of such agreements, it could be argued that the approval of establishing a consular mission in Hong Kong pays enough respect to the sovereignty of the state and includes the authorisation to enter into the relevant consular agreement. However, consular agreements are in practice concluded by the Central Government and their application is extended to the HKSAR. \(^{75}\)

\(^{70}\) YASH GHAH, *supra* note 52, at 464.


\(^{74}\) Xianggang Jiben Fa [Basic Law] art. 157, cl. 1.

C. Restrictions of the Treaty-making Power of the Central Government in Relation to Hong Kong

There are generally two ways in which an international treaty or agreement becomes binding on the HKSAR. Treaty obligations of the HKSAR either arise as a result of the exercise of Hong Kong’s own power to conclude agreements under Art. 151 of the Basic Law or as a result of the decision of the CPG to apply an international treaty to Hong Kong to which China is or becomes a party. Normally, international treaties become binding upon each party in respect of its entire territory. However, China’s practice in regard to Hong Kong is different given that treaties to which China is a party are not necessarily applicable to the HKSAR but require a specific decision of the CPG in order to become binding in relation to the territory of the Region. According to Art. 153, cl. 1 of the Basic Law, the CPG decides on the application of treaties to which China is or becomes a party in accordance with the ‘circumstances and needs of the Region, and after seeking the views of the government of the Region.’ Hence, the Basic Law provides for a specific consultation procedure between the CPG and the Hong Kong government as a precondition for the applicability of international treaties concluded by the CPG to the territory of the HKSAR. This procedural requirement implies a restriction of the CPG’s treaty-making power in relation to the HKSAR.

The Basic Law also provides for a power of the Region to participate in the treaty making of the Central Government. Pursuant to Art. 150 of the Basic Law, representatives of the HKSAR may participate in negotiations at the diplomatic level as members of the delegation of the Central Government, if the negotiations directly affect the Region. Chinese commentators have described this power as a ‘restricted power of diplomatic negotiations’ of the HKSAR. The power to participate is


Lung Wan Pun, supra note 63, at 591.

Compare the similar wording of the Sino-British Joint Declaration, supra note 42, at Annex I Part XI. It has been regarded as a mistake to incorporate a provision about the participation of the HKSAR in diplomatic affairs in the chapter on the external affairs of the HKSAR. See Roda Mushkat, Foreign, External and Defence Affairs, in The Basic Law and Hong Kong’s Future 248, 252 (Peter Wesley-Smith & Albert Chen eds., 1988).

Yun Guanping & Zhong Yekun, supra note 48, at 311; Chinese: youxian de waijiao tanpan quan
viewed to be restricted in various aspects: it is only the Central Government that may take the initiative to conduct negotiations with foreign governments and the CPG has discretion whether to allow participation of the Region or not, even if the negotiations affect the Region. Moreover, representatives of the HKSAR may not, as members of a delegation of the CPG, hold the views of the Region.\textsuperscript{80} In practice, different views of representatives of the CPG and the Region will be solved in informal meetings before the start of the negotiations and both sides will agree on a concerted action. It then depends on various factors such as the expertise of the individual delegation members whether a member from Beijing or from Hong Kong will lead parts or all of the negotiations. Hence, the participation of the HKSAR in treaty negotiations of the CPG operates in a practical way that makes best use of expertise and resources of both the Region and the Central Government. Here, practice appears to be in sharp contrast with the abovementioned restrictive scholarly views that attempt to reduce any impact that the Government of the HKSAR may have on foreign affairs of China. The conclusion of air service agreements providing air services between other parts of China and other states and regions with stops at the HKSAR and air services between the HKSAR and other states and regions with stops at other parts of China falls within the competence of the CPG.\textsuperscript{81} In concluding such agreements, the CPG is required to take into account the special conditions and economic interests of the HKSAR. Moreover, Hong Kong Government representatives may participate in air service agreement negotiations as members of the Central Government delegation.\textsuperscript{82} This procedural requirement for the conclusion of air service agreements by the CPG also implies a restriction of the CPG’s treaty-making power in relation to the HKSAR.

\textbf{IV. Conclusion}

The conditions of domestic treaty application relate not only to existing treaty obligations but also to the participation of different state organs in the treaty-making process. As regards the external representation of China on the international plane, the existing ambiguity is associated with the fact that the current Constitution, unlike the

\textsuperscript{80} Ibid.
\textsuperscript{81} X\textsc{i}angg\textsc{a}ng J\textsc{i}ben F\textsc{a} [\textsc{b}asic \textsc{law}] art. 132, cl. 1.
\textsuperscript{82} X\textsc{i}angg\textsc{a}ng J\textsc{i}ben F\textsc{a} [\textsc{b}asic \textsc{law}] art. 132, cl. 2 and 3.
Constitution of 1954, does not explicitly assign the exclusive competence of external representation to the State President. However, taking into account that the Constitution is dominated by the principle of concentration rather than separation of powers, there may be no need for a clear delineation of the competence of external representation. In practice, the State President represents China to conclude more important treaties; the President ratifies treaties in accordance with Art. 81 of the Constitution. Ministers of the State Council conclude less important treaties or agreements. The discussion about the scope of the external representation power of the State President reveals how much Chinese constitutional law is still influenced by the concept of collective state leadership in the area of external representation. The reason for scholars to question the State President’s external powers may be connected with the inconsistency between the constitutional status of the President as the highest representative of the state in external matters on the one hand, and the constitutional status of the NPC and the NPC Standing Committee respectively as the highest state organs on the other. Hence, some scholars view the State President as exercising only a ‘symbolic role’ when ratifying treaties and suggest that the NPC Standing Committee should be responsible for the treaty ratification on the international plane. However, the scholarly proposals disregard the requirements of intergovernmental intercourse as well as the text of the Chinese Constitution. Moreover, these suggestions ignore that the Secretary General of the Communist Party regularly holds the office of State President.

Although the power of the NPC Standing Committee to participate in the treaty-making process has been gradually expanded, the circumstances of the accession of China to the WTO revealed the relatively weak position of the NPC Standing Committee in relation to the executive. When the NPC Standing Committee approves a treaty, internal decision-making includes not only the delegates of the Standing Committee but involves in the process of informal decision-making other relevant actors of the Party-State. Therefore, the NPC Standing Committee’s power to approve treaties is, in practice, not a genuine power of parliamentary participation and control. The HKSAR is vested with a separate power to conclude international treaties. The
treaty-making competence is provided for in the Basic Law of Hong Kong and the underlying international treaty, the Joint Declaration. The Central Government retains the competence to conclude treaties in the field of defence and foreign affairs. Chinese scholars have made various attempts to interpret Hong Kong’s treaty-making power restrictively. In practice, the Region exercises its treaty-making power independently and is not subject to the proposed limitations by the CPG. Particular the practice of the past years indicates that the HKSAR has gradually expanded the scope of agreements concluded under Art. 151 of the Basic Law. Some agreements such as those on the avoidance of double taxation and on free trade fall within the express matters of Art. 151, while agreements on social insurance, labor and environment cannot be subsumed under the express fields in which the HKSAR has the power to conclude agreements. However, such agreements belong to the ‘appropriate fields’ of the external affairs of Hong Kong as they have a close connection to the development of an international and sustainable local economy.

Apart from Hong Kong’s power to conclude agreements on its own, it can also participate in treaty negotiations of the CPG. Practice in this regard indicates that scholarly suggestions to restrict this kind of participation do not play any significant role. Further, it is found that the provisions of the Basic Law that require the CPG to take into account the needs of Hong Kong and to consult its views when it decides on the application of an international treaty to the HKSAR do in fact restrict the treaty-making power of the CPG with relation to Hong Kong.