

External Affairs and HKSAR's Status as an International City

Introduction

The HKSAR is undoubtedly an international city. It is well known as a global financial and commercial centre, as well as a hub for logistical and other activities. Under the "One Country, Two Systems" policy as constitutionally guaranteed under the Basic Law, the HKSAR enjoys a high degree of autonomy with a social and legal system different and distinct from those of the Mainland.

The "One Country, Two Systems" policy was designed to address the situations of China (including the HKSAR). As noted in the Preamble to the Basic Law, the aims of establishing the HKSAR include upholding national unity and territorial integrity as well as maintaining the prosperity and stability of the HKSAR. It is crystal clear that the Basic Law has given due regard to

the needs of maintaining the status of the HKSAR as an international commercial, financial and shipping centre.

A World City as We Know It

In accordance with the provisions of the Basic Law, the HKSAR maintains, and makes full use of, its attribute as an international city.

For a start, BL 9 allows the use of English, in addition to the Chinese language, as an official language by the executive authorities, legislature and judiciary of the HKSAR. Since English is one of the main languages commonly used by the international community (especially the international commercial community), its continued status as an official language under BL 9 is essential in maintaining the HKSAR as a friendly





place to live in, to visit and to otherwise establish contact with.

Using the words “shall provide ... for”, BL 109, in fact, requires the HKSARG to provide an appropriate economic and legal environment for the maintenance of the status of the HKSAR as an international financial centre. Similarly, BL 128 requires the HKSARG to provide conditions and take measures for the maintenance of the HKSAR’s status as a centre of international and regional aviation.

BL 114 to 116, in turn, provide for the policy of free trade and for the HKSAR as a separate customs territory. Just as important are the other

provisions of the Basic Law which authorize the HKSAR to handle a wide range of external affairs.

External Affairs under the Basic Law

Under BL 2, the NPC has authorized the HKSAR “to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of [the Basic] Law”. The high degree of autonomy conferred on the HKSAR is also underlined by BL 12. Under this provision, the HKSAR is “a local administrative region of the People’s Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People’s Government”.



Taking advantage of the “One Country, Two Systems” policy, the HKSAR has developed an effective and close relationship with the international community in the past 20 years. Currently, there are over 240 bilateral agreements between the HKSAR and foreign states and regions, covering a wide range of fields including civil aviation, trade, investment, criminal justice cooperation, avoidance of double taxation and tax information exchange. These are in addition to over 250 multilateral conventions that have been applied to the HKSAR, some of which do not apply to the rest of China. How is this possible under the framework of the Basic Law? The answer is, “by design”.

The Basic Law, through BL 13(1) and BL 14(1), does reserve generally to the CPG its responsibility over the foreign affairs relating to, and the defence of, the HKSAR. In line with the principle of high degree of

autonomy, it is expressly provided, however, that the CPG “authorizes the HKSAR to conduct relevant external affairs on its own in accordance with [the Basic] Law” (BL 13(3)). There are a number of provisions in the Basic Law that empower the HKSAR to conduct external affairs on its own as authorized under the Basic Law or with the specific authorizations from the CPG.

Chapter VII of the Basic Law deals with external affairs. BL 151 is one of the eight provisions in that chapter. Under this article, the HKSAR is specifically authorized to 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 other provisions in Chapter VII deal with various aspects of the conduct of the HKSAR’s external affairs. The prior authorization of the CPG will be required for those aspects which are not already authorized or are otherwise reserved. For instance, prior authorization is expressly required for the establishment of foreign consular and other official or semi-official missions in the HKSAR (BL 157(1)). On the other hand, the issue of HKSAR passports and suitable travel documents (BL 154(1)) and the establishment (subject to a duty to report to the CPG) by the HKSAR of official or semi-official economic and trade missions in foreign countries (BL 156) are examples where authorization on a case by case basis is not required.

There are other Basic Law provisions outside its Chapter VII which require prior CPG approval before certain acts can be carried out by the HKSAR in its external relationship with other states or territories. These provisions are predicated upon Chinese sovereignty over the HKSAR but recognize its status as a Special Administrative Region, governing arrangements on reciprocal juridical assistance (BL 96), air services agreements (BL 133), access of foreign warships to the ports of the HKSAR (BL 126), and access of foreign state aircraft to the HKSAR (BL 129(2)). Using the name “Hong Kong, China”, the HKSAR has been granted prior authorization under the Basic Law to participate in “relevant international organizations and international trade agreements (including preferential trade arrangements) such as the General Agreement on Tariffs and Trade and arrangement regarding international trade in textiles” (BL 116(2)).



The above Basic Law provisions highlight the interface between the resumption of Chinese sovereignty over Hong Kong and the implementation of the “One Country, Two Systems” policy thereafter. In this connection, although the high degree of autonomy conferred on the HKSAR, in the form of its delegated executive, legislative and judicial powers, does not include foreign affairs and defence, for which the CPG is solely responsible, the Basic Law permits the HKSAR to conduct external affairs on its own as authorized under its provisions or with specific authorizations from the CPG.

Stay Connected

These unique arrangements under the Basic Law which allow the HKSAR to remain as a global player on the world stage are truly unique and are hardly enjoyed by other sub-national economies.

The wisdom of adopting the formulation of “Hong Kong, China” permits the participation of the HKSAR in international organizations and conferences not limited to states (BL 151 and 152(2)). It is in this capacity that the HKSAR participates as a full member in organizations of this kind, such as the World Trade Organization, the World Customs Organization, the Asia-Pacific Economic Cooperation (“APEC”) and the Asia Infrastructure Investment Bank (“AIIB”) which the HKSAR joined recently.

For those international organizations and conferences limited to states, representatives from the HKSARG may participate in them as members of the Chinese delegation (BL 152(1)). In that capacity, the HKSAR participate in, for instance, the World Intellectual Property Organization, the International Civil Aviation Organization, the Hague Conference on Private International Law (“HCCH”), and the World Health Organization

(“WHO”). In the last case, it was with the support of the CPG that Dr. Margaret Chan, a former Director of Health of the HKSAR, was elected in 2006 as the Director-General of WHO and recently completed her term as such. In addition, Mr Shun Chi-ming, Director Hong Kong Observatory, was re-elected in 2014 as the President of the World Meteorological Organisation’s Commission for Aeronautical Meteorology to serve a second four-year term.

The HKSAR’s collaboration with various renowned international organizations also merits attention. Apart from the offices set up in the HKSAR by the International Monetary Fund, the Bank for International Settlements and HCCH, the HKSAR also concluded, with the support of the CPG, an administrative arrangement with the Permanent Court of Arbitration (“PCA”) in 2015 concerning the conduct of dispute settlement proceedings, including investor-state dispute resolution, in the HKSAR (see more discussion below).

The Department of Justice from time to time sends representatives to participate in, as well as support, events organized by international organizations. Examples include events organized by the Asia Pacific Regional Office of HCCH in Hong Kong and other parts of the Asia Pacific region. In addition, the HKSAR have collaborated with the United Nations Commission on International Trade Law in its technical assistance and capacity building activities, including those organized through the platform of APEC.



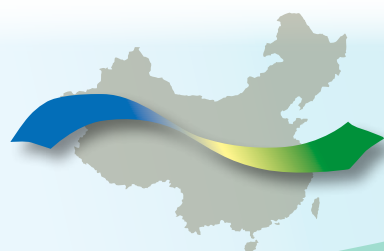
The Belt and Road Initiative

The authorization under the Basic Law for the HKSAR to conduct external affairs has placed the HKSAR in a very unique position to participate in the Belt and Road Initiative which seeks to facilitate connectivity, including trade and financial integration.

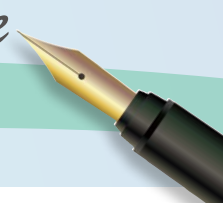
In 2013, the CPG announced the Belt and Road Initiative which is a strategic and visionary initiative to foster closer cooperation between places far and near lying on two ancient economic corridors, namely "Silk Road Economic Belt" and

"21st Century Maritime Silk Road".

In March 2015, the National Development and Reform Commission and the Ministries of Foreign Affairs and the Commerce jointly published the "Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road" (推動共建絲綢之路經濟帶和21世紀海上絲綢之路的願景與行動) ("Vision and Actions"), which explains that the Belt and Road Initiative "aims to promote the connectivity of Asian, European and African continents and their adjacent seas" and "establish and strengthen partnerships among the countries along the



The Belt & Road Initiative





Belt and Road". The five major goals set out in the Vision and Actions include promoting inter-governmental cooperation, improving infrastructure, enhancing investment and trade facilitation, strengthening financial cooperation and promoting cultural exchanges.

The Vision and Actions further states that the HKSAR may leverage its unique role and actively participate in and contribute to the Belt and Road Initiative. The 13th Five-Year Plan was released in March 2016 and in it contained the CPG's support in building the HKSAR as an international legal and dispute resolution services centre in the Asia Pacific Region as well as the active participation of the HKSAR under the Belt and Road Initiative.

The Belt and Road Initiative will definitely open up immense business opportunities. The areas covered involve more than 60 countries and engage about 4.4 billion people, accounting for around 63% of global population, and

an aggregate GDP of over USD 20 trillion, representing around 29% of global GDP¹.

The countries and regions covered by the Belt and Road route adopt very different social, economic and legal systems. There is an obvious need to promote greater awareness and understanding of the relevant international rules on trade, investment, finance and maritime transport with a view to facilitating robust trade and economic cooperation.

Hong Kong as a Legal Hub

Mainland enterprises require extensive legal support in their "going global" in pursuit of opportunities arising from the Belt and Road Initiative, ranging from legal advice on local laws, procedural rules and business practices of the destination to mitigating risks and resolving disputes. In short, there are issues of legal risk management to be addressed.

The HKSAR is the only common law jurisdiction within China. Under the "One Country, Two

¹ Speech by Gao Hucheng: Deepen Economic, Trade Cooperation, Co-create New Brilliancy (4 July 2014), Ministry of Commerce of the PRC, <http://gaohucheng2.mofcom.gov.cn/article/speech/201408/20140800683425.shtml>.



Systems” policy, the HKSAR maintains its common law system with which the international community is familiar. The HKSAR courts, including its own CFA, are well known for their judicial independence. The HKSAR will have a pivotal role to play in providing the requisite international legal and dispute resolution services when the Mainland enterprises “go global” and pursue the Belt and Road Initiative, and assist in developing a sound legal risk management regime for overseas businesses.

The HKSAR’s legal and dispute resolution professionals are highly regarded in the Asia-Pacific region. They consist of both local talents and experts from other jurisdictions who have rich experience in areas including financial and international trade, and can provide high quality legal and dispute resolution services (including arbitration and mediation) in various specialised areas.

The HKSAR has always been and will continue to be a neutral venue for dispute resolution in the Asia Pacific Region, providing efficient and high quality dispute resolution services (including arbitration and mediation) for commercial and investment disputes involving Mainland parties and other economies along the Belt and Road.

Apart from international trade, infrastructural integration will also bring about enormous opportunities for development in the Belt and Road region, but as a result international investors may need to handle the country risk and political risk with care. In this regard, it is pertinent to note the development of investor-state arbitration services that can be offered by the HKSAR.

The HKSAR’s administrative arrangement with PCA made in 2015 mentioned above will facilitate the conduct of PCA-administered arbitration in the HKSAR, including state-investor and other forms of international investment arbitration. This



arrangement, together with the other relevant measures we have implemented, place the HKSAR in an even better position to provide high-end specialist dispute resolution services to the international business community.

Incidentally, the operation of AIIB, a multilateral investment bank now having 56 members from across Asia (including the HKSAR), Europe, Africa, Oceania and the Americas, would also bring in new opportunities for the HKSAR's legal sector if any of the financing and fund-raising activities for infrastructure projects, whether along Belt and Road countries or otherwise, are to be launched in or via the HKSAR.

Conclusion

Over the past 20 years since the establishment of the HKSAR, the city, holding fast to its core values, including the rule of law, judicial independence and protection of human rights, remains a vibrant and thriving economy. This success is achieved at the same time when the uniqueness of the HKSAR under the auspices of the unprecedented "One Country, Two Systems" policy, implemented through the Basic Law, has been instrumental in unleashing its potential as a responsible participant when handling external affairs.

