

**AUTONOMOUS NON-CENTRAL GOVERNMENTS IN  
THE INTERNATIONAL SYSTEM  
- THE CASE OF HONG KONG**

A Thesis submitted for the Degree of Doctor of Philosophy (PhD)

By

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## ABSTRACT

The thesis analyses the evolution of Hong Kong as an autonomous international actor and how that has been sustained under Chinese sovereignty, in the context of the wider debate on paradiplomacy and the increasing international participation of Non-Central Governments (NCG). The opening chapter offers a review of the literature on non-state actors (NSA) and emphasises the limitations of the new literature on NCGs that emerged in the 1990s which fails to deal with the heterogeneity of NCGs, the specific characteristics that differentiate them from other NSA and their impact on the international system. The next two chapters examine the factors behind the process of HK's emergence as an international player in the early 1960s: textile trade interests and reaction to protectionism; HK elite bureaucracy legitimisation strategy; flexibility of the international system for what accounted the Dominions' historical precedent and the pragmatic interests of influential states. HK's emergence as an international financial centre, the development of a system of external representation in the 1970s and the creation of the new framework for external relations inserted in the 1984 Joint Declaration, further contributed to consolidate and expand HK's autonomy into new areas, including political ones, at the same time they introduced a note of ambiguity in HK's international status. Fresh insights into the negotiation of the JD international affairs chapter are offered. Chapter Four examines HK's post-1997 implementation of the new external relations' framework and how far external autonomy was preserved demonstrating that the level of external autonomy HK enjoys is determined not merely by the relation with the Central Government but by the interplay between this, HK's own strategy and actions and the attitude of external players. The logic of "autonomy cum isolation" that prevails in HK-Beijing relations, deviant practices concerning "specific authorisations" and excessive governmentalisation of external affairs are identified as the main risks for future autonomy in a context where the SAR has been able to preserve the core of its external autonomy in relation to China. Chapter Five deals with HK's legitimacy basis and sources of influence as an international player looking at its participation in WTO. To assert its influence HK uses not one but a combination of sources of influence, namely technical expertise, economic power, and above all the performance of a systemic broker role associated with its dual identity. The final chapter discusses the research results and concludes that, unlike other NCG, HK has been able to have a direct impact on the international system, namely through the participation in the process of international rules-making in trade and financial matters. This capacity is determined by the triangle "external autonomy-legitimacy-influence" which conditions the ability of NCG to take advantage of the opportunities created by the globalisation-localisation process to enhance their international role and contribute to a better global governance.

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## INTRODUCTION

The Hong Kong (HK) handover on 1 July 1997, a high profile event which commanded wide international interest, constituted the apex of the internationalisation of the HK question and at the same time a puzzling situation for the entire international community insofar as it was about to witness an act which apparently runned counter the logic of the post-Cold War era. In fact, not only the end of a colony was delinked from the creation of a new state and the exercise of the right of self-determination, but also a prosperous and strategic international capitalist centre was being handed over peacefully and voluntarily to a socialist state. Moreover, the new HK Special Administrative Region was going to operate according to the “one country, two systems” model in which the capitalist and socialist systems coexist inside the same state, an innovation without precedent in the international system.

The presence of a very large number of states and the high international visibility of the event was to a great extent justified by HK’s role as a major international trade and financial centre strongly founded on its capacity to act on its own internationally, with whom the states present are used to deal directly with. Understandably, the far reaching transference of sovereignty from Britain to China raised doubts about the ability of HK to preserve its international status and external autonomy, particularly in a context marked by a growing economic integration with China, and how far China would respect its commitments enshrined in the Joint Declaration and allow HK freedom on the international stage. Similarly, questions could be raised about the potential influence of HK on the PRC system and how far it could induce changes on specific aspects of China’s foreign policy.

As an autonomous international actor, HK, being a non-sovereign entity, is apparently an anomalous case in an international system still strongly influenced by a state-centric perspective that sees states as the dominant and only relevant international actors. However, the emergence of HK as an international player associated with a complex process of decolonisation and the interplay between the complex forces of globalisation, seems to be the expression of an inherent flexibility and adaptability of the international

system, often overlooked. In this context the HK international experience is useful to understand better under what conditions and through which processes the international system has accommodated this unorthodox phenomenon as well as the limits of this flexibility.

Interestingly, HK's "anomaly" has been attenuated as a consequence of the increasing international participation of other Non-Central Governments (NCG), particularly in the course of the 1990s, which has been called "paradiplomacy" and equated with a process of localisation of foreign policy<sup>1</sup>. This phenomenon is considered by the body of theory on "paradiplomacy" to be the result of the acceleration of globalisation<sup>2</sup>, which created favourable conditions for a greater presence of NCGs and other Non-state actors (NSA) on the international stage, associated with important qualitative changes, namely the diversification of the issue-areas where they participate, direct contributions to shape emerging international regimes and the development of new sources of influence<sup>3</sup>. Evidence suggests, however, that it was not globalisation alone but a more complex process involving the interaction between globalisation-localisation that explains the phenomenon, although this trend of localisation has been largely neglected by the literature<sup>4</sup>. Interestingly, localisation has in some ways paved the way to advances in economic globalisation, namely in terms of the localisation of comparative advantages of firms, as demonstrated by the clustering approach<sup>5</sup>, insofar as in order to compete

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<sup>1</sup> Hocking, Brian, Localizing Foreign Policy – Non-Central Governments and Multilayered Diplomacy, St.Martin's Press, London, 1993. Duchacek used the concept of paradiplomacy, "Perforated sovereignties", in Michelmann, Hans and Soldatos, P. (eds.), Federalism and International Relations – The role of subnational units, Clarendon Press, Oxford, 1990, pp. 15-27.

<sup>2</sup> There is not a uniform but different views on the essence of the concept of globalisation. On the different understandings see Higott and Underhill who identify four different meanings Richard Higott and G. Underhill (eds) Non-State actors and authority in the global system, Routledge, London, 2000, pp. 2-6. For a taxonomy of the literature on globalisation see Richard Higott and Reich, 1998, "Globalisation and sites of conflict: towards definition and taxonomy" CSGR Working Paper no. 1/98.

<sup>3</sup> For an analysis of the different sources of influence of non-state actors see Josselin and Wallace (eds.) Non-state actors in World Politics, Palgrave, London, 2001, p. 253.

<sup>4</sup> There are some exceptions like Rosenau who although not mentioning explicitly localisation argues that the globalising world is both integrating and fragmenting, what he calls "fragmegration" – see James Rosenau "Governance in a New Global Order" in David Held and McGrew (eds.) Governing Globalization – power, authority and global governance, Polity Press, Cambridge, 2002, pp. 70-86.

<sup>5</sup> OECD, Enhancing SME Competitiveness – the OECD Bologna Ministerial Conference, Paris, 2001. Background paper for workshop 2, Michael Enright and others, pp. 115; OECD, Innovative clusters, drivers of national innovation systems, OECD, Paris, 2001; OECD, Boosting innovation – the cluster approach, OECD, Paris 1999.

globally firms require a local base where they consolidate innovation processes, skills and knowledge.

This greater international participation of NSA and NCGs in particular, added to the complexity of the international system characterised in the globalisation era by its multilevel governance, where there is the coexistence and interplay between supranational, regional, national and sub-national levels, not the monopoly of the global level<sup>6</sup>. Furthermore, besides greater complexity this generates also greater ambiguity in the international system, namely about the exact location of authority, its fragmentation and the management of overlapping jurisdictions and rules, thus having an impact on HK insofar it changed the context in which it was used to operate.

The links between HK and the phenomenon of paradiplomacy include two inter-related aspects that deserve to be researched, the more so as, surprisingly, HK has been neglected by the “paradiplomacy” literature. On the one hand, how far the activities of NCGs affected HK international action and created new opportunities and challenges to which HK has to respond. On the other, how far the HK case has a potential impact on other NCGs and is relevant to understand better the nature of NCGs as international actors in this more complex global system, particularly key aspects which have not been sufficiently explored: the specific characteristics of NCG that differentiate them from other types of NSA; the basis of autonomy and legitimacy to act internationally; NCGs’ sources of influence and their impact on the international system. The relevance of the HK case for this research can be justified on different grounds. Firstly, HK is a pioneer among NCGs in terms of “paradiplomacy” activities and therefore it enables us to understand the causes and how relevant has been the precedent set by HK. Secondly, it is claimed that HK has a high profile international status and is one of the most active and powerful non-sovereign actors in the international stage<sup>7</sup>. If this is the case, the HK case is relevant not only because of the potential demonstration effect on other NCGs

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<sup>6</sup> This is recognised by David Held and Anthony McGrew (eds.), op. cit., p. 9 and by Josselin and Wallace, op. cit., p. 259.

but also to understand the sources of influence open to this category of actors. Thirdly, HK has been a strategic player in the process of globalisation and performed extremely relevant roles for the regional and global economies<sup>7</sup>. In this context it is a particularly interesting case to shed light on the globalisation-localisation paradox and the challenges it poses to NCGs.

The main concern of this thesis is to analyse the factors behind and the dynamics of the evolution of HK as an autonomous international actor and see how autonomy has worked, and how sustainable it has proved to be, under Chinese sovereignty. The interest of this perspective is clearly demonstrated by the circumstance that never before a relation between a NCG and its Central Government has been subject to such an intense international scrutiny, reflecting not only the importance of HK to the international system but also the significance of this relationship to the international community as a test to assess China's international posture and credibility as an emerging global power.

It should be noted that, although the HK-Beijing relationship is an important dimension, the analysis of the HK experience is approached from a broader perspective exploring the theoretical ties with NSA and NCGs in particular, and not through the prism of the Chinese concept of "one country, two systems" as this would involve a more restrictive Chinese-centred perspective and limited comparisons with Macao and Taiwan, thus presenting limitations in terms of capturing the richness of HK's status as an international actor and the possible impact of its action on the international system.

The thesis is organised in six chapters. Chapter I considers the views of the International Law theory and International Relations theory on the nature and position of NSAs in the international system and carries out a review of the IR literature on non-state actors, with

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<sup>7</sup> James Tang, "Hong Kong's international status" in The Pacific Review, vol.6. no.3, 1993, pp.205-215 and Roda Mushkat One country, Two International Legal Personalities – the case of Hong Kong. HK University Press, HK, 1997

<sup>8</sup> Michael Enright, Edith Scott (eds.) The Hong Kong Advantage, Oxford University Press, New York, 1997.

particular emphasis on the analysis of NCGs and paradiplomacy, proposing a new framework to analyse NCGs' capabilities as international players.

Chapter II analyses the origins and process of emergence of HK as an autonomous player in the international system and explains the factors that pressed HK to act internationally on its own on the one hand, and facilitated the international community's acceptance of this unorthodox phenomenon, on the other.

Chapter III examines the impact of the transition from British to Chinese sovereignty on HK's international status and autonomy, with particular emphasis on the development of the new formal framework that regulates HK's external relations and establishes the boundaries of its external autonomy in its relation with the sovereign power.

Chapter IV principal task is to analyse, in the context of the post-1997 reality, the foundations and scope of HK's external autonomy and the constraining factors that condition in practice its evolution, including the relationship with the Central Government, by looking at the practical implementation of the new external relations framework and the HKSAR's interaction with external players.

Chapter V looks at HK's participation in WTO, a priority international organisation for the HKSAR, namely at the pattern of interaction with other members, and offers an analysis of HK's sources of influence, explaining why and how HK acquired a high profile and has been able to play an active role in the process of rules-making in the international trading system. On the other hand, the chapter enquires how far HK's lack of sovereignty poses any limitations to its participation in WTO.

Chapter VI discusses the research results taking into account comparative references of other NCGs cases, particularly Catalonia, Quebec and Greenland, highlighting both the differences and similarities with the HK case, and reflects prospectively on the potentialities of NCGs as international actors and the roles they can perform in the international system.

## CHAPTER ONE

### **NON-STATE ACTORS AND NON-CENTRAL GOVERNMENTS AS INTERNATIONAL PLAYERS – A REVIEW OF THE LITERATURE**

The participation and influence of non-state actors in the international system has been growing since World War I. This phenomenon has challenged the validity of the state-centric approach and gradually showed that it was no longer possible to understand the evolution of the international system nor the behaviour of States without taking into account the role of non-state actors.

The main objectives of this chapter are, on the one hand to analyse the evolution of the debate in the International Relations literature on non-state actors, in particular during the 1990s, and how far it has contributed to consolidate a new paradigm alternative to the state-centric one. On the other, it intends to contribute to better define the distinctive features of HK as an international player in the context of the analysis of the features of non-state actors. Section one is concerned with the International Law perspective on non-state actors, in particular the debate on the nature of their international personality. Section two addresses the evolution of the IR literature since the 1970s and carries out a comparative analysis of the most influential positions, with particular attention to the heterogeneity of non-state actors. Section three is devoted to the analysis of Non-Central Governments, as a specific type of non-state actor, and the development of their paradiplomacy as international players. Finally, section four proposes a new framework for the analysis and differentiation of NCGs as international players combining the domestic and external dimensions.

## 1.1. INTERNATIONAL LAW AND NON-STATE ACTORS

International Law theory has been dominated by the traditional state-centric school<sup>9</sup> , which considers States are the exclusive and only legitimate subjects of International Law thus denying international personality to non-state actors. However, the analysis of the International Law theory reveals the existence of alternative and more flexible approaches that challenge the view of the traditional school and criticise its rigidity admitting, under special circumstances, non-state actors can possess international personality.

### **The traditional school**

This theory is based on two fundamental assumptions. On the one hand it assumed that international personality derives from sovereignty and therefore sovereign states are the sole international persons. On the other, it considered non-state entities' participation in the international system as absolutely exceptional with no significant impact on the nature of the system.

International personality is identified with the set of rights and obligations enjoyed by sovereign states. Sovereignty, including both its internal dimension, associated with supremacy in relation to any other power within the borders of a territory, and external dimension, associated with independence from other entities, is at the core centre of the definition of international personality. In addition, gaining sovereignty is a necessary and sufficient condition to become an international person. Under this state-centred approach, and as a consequence of the predominance of the principle of formal equality between states, international personality tends to be an absolute, uniform and static concept. There is only one kind of personality shared by all actors and unlikely to change over time.

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<sup>9</sup> For one of the most influential works see Oppenheim, Lassa Lawrence, International Law – A treatise, 7<sup>th</sup> ed. (H. Lauterpacht), Longmans, London, 1948.

Moreover, it assumes that all states have equal influence over both the processes of rules-making and rules-enforcing. This highly formal approach tends to overlook the actual differences in power and capabilities between states namely how they differ in terms of the intensity of international participation and the capacity to influence the regulation of the international system.

The second basic assumption is that non-state actors participation in the international system is not only exceptional but when it occurs has no structural consequences in terms of changing the basic features and rules of the system. Consequently, there is no need for International Law to regulate non-state actors when acting in the international system, both their behaviour and status, as they were considered to be governed exclusively by the national law of the country of “residence” which follows them when acting internationally.

### **The “dual personality” theory**

A second school of thought has emerged more recently in International Law, the “dual personality theory”, which puts forward the thesis that non-state entities can have indeed international personality but of a different kind from the one possessed by states. This approach adopts a more flexible view of international personality and regards it more as a relative rather than an absolute phenomenon.

In spite of these differences the “dual personality theory” insofar as it accepts the idea that the international personality of the state is the model and there is a primacy of states as subjects of international law, is still relatively close to the traditional school and cannot be considered a radical breakaway from it.

Developed by influential authors such as Brownlie<sup>10</sup>, Shaw<sup>11</sup> and Starke<sup>12</sup>, this second school establishes a fundamental distinction between two types of international personality, “objective” and “qualified” personality to use Shaw’s terminology<sup>13</sup>.

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<sup>10</sup> Brownlie, Jan, Principles of Public International Law, 4<sup>th</sup> edition , Oxford, Clarendon Press 1990, pp.58-70

<sup>11</sup> Shaw, Malcolm., International Law, (4<sup>th</sup> edition). Cambridge University Press, Cambridge, 1997.

In what concerns the concept of international personality, the definition proposed by Brownlie as the “capacity to possess international rights and duties and to maintain its rights by bringing international claims”<sup>14</sup>, although conventional and circular, contributes to clarify the distinction between the concept of international personality as such and the *indicia* of international personality.

The absence of a clear distinction has been rightly pointed out by Starke when he drew attention to the fact that in the literature four different meanings of “subject of international law” tend to be interchangeably used: (i) incumbent of rights and duties under international law (ii) holder of a procedural privilege of prosecuting a claim before an international court (iii) possessor of interests for which provision is made by international law (iv) capacity to conclude treaties with states and international organisations. This generates an obvious confusion and lack of accuracy.

The definition adopted by Brownlie links international personality with the two first meanings that correspond to the core contents and rejects the other two, which are deemed to be mere *indicia*. For Brownlie there are four fundamental *indicia* of legal personality: (i) treaty making powers (ii) capacity to present international claims (iii) liability for the consequences of breaches of international law (iv) enjoyment of privileges and immunities in relation to the national jurisdictions of states<sup>15</sup>.

This concept of international personality introduces an element of flexibility and points to the idea that the extent of rights and obligations is not static and fixed but on the contrary can be variable. The elasticity of the concept is an important characteristic that leaves open the question if to be recognised international personality it is sufficient to

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<sup>12</sup> Strake, J. G. Introduction to International Law, 11<sup>th</sup> ed (revised by I.A. Shearer), Butterworths, London, 1994, pp.51-62

<sup>13</sup> Shaw, op.cit. p.181-182.

<sup>14</sup> Brownlie, op.cit., p. 58.

<sup>15</sup> Academie du Droit International, International Law at the 50<sup>th</sup> anniversary of the UN, collected courses 1995.

possess one right or obligation disregard of its relevance, or if a minimum core of rights and obligation is necessary to be considered an international person.

The distinction between objective (or automatic), and qualified (or restricted), international personality is an important contribution of this school. Objective personality is associated with the possession of a wide range of international rights and obligations which entitles the entity to be accepted automatically, on the basis of Customary Law, as an international legal person and is opposable *erga omnes*. States and International Organisations are considered to enjoy this more complete and stable type of personality.

Qualified personality is considered to be not only more restricted but also dependent on the recognition by entities possessing objective personality. It can only operate *in personam*, that is to say can be opposable not to all international persons but only to those who accepted voluntarily to recognise this type of personality.

It should be noted that the difference between objective and qualified personality is not merely quantitative, in the sense that qualified personality involves necessarily a more limited range of rights and duties, but essentially qualitative in three important respects. First, objective personality is opposable *erga omnes* since it is founded in International Customary Law, while qualified personality, founded on the voluntary recognition by objective international persons, is only valid for those recognising it. Second, objective international persons have the capacity to affect the process of creation of new international persons, and thus the expansion or contraction of the international system, which qualified persons lack. Third, objective persons can influence and play a direct role in the rules-setting process at the international level, something which is theoretically not possible for qualified persons who generally can only exert indirect influence.

For the debate on the status of non-state entities the important innovation introduced by this new approach is the consideration that they can possess a qualified international personality which will be valid for those recognising it<sup>16</sup>.

It should be noted that this is still regarded as an exceptional phenomenon which has to be analysed on a case by case basis and therefore there are no general rules or criteria regarding the kind of entities which are in principle able to be considered as qualified international persons. It is possible that non-state entities, for example two international NGOs, belonging to the same category of actors and with similar degrees of international involvement possess different international personality status.

The decisive criterion is finally the existence of a link, however marginal, with the international legal system by which a non-state actor acquires rights and obligations under International Law. There are no minimum standards so that even if the entity acquires one single right or obligation it is deemed sufficient to substantiate the acquisition of international personality. Although the vast majority of authors consider that, in principle, individuals do not have international personality, this logic admits that a specific individual who committed crimes against humanity can be judged by an international penal court thus acquiring international personality as a consequence of becoming directly subjected to international duties. Similarly, if an agreement between a state and a Transnational Corporation (TNC) is subject to rules of International Law, the TNC will acquire international personality because it will enjoy international rights. Qualified personality is considered not as a stable and permanent characteristic but as a fluid phenomenon in the sense that it is elastic and reversible.

In spite of the flexibility introduced by the qualified personality approach it presents some limitations and can be subject to three major criticisms. First, there is a confusion between two concepts which are clearly distinct: personality i.e. the potential capability

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<sup>16</sup> A good example of the way this system operates is the 1991 "European Convention on the recognition of the legal personality of International NGO's" of the Council of Europe article 2 (1).

to bear rights and duties, and capacity, which is the concrete measure, the actual range of rights and duties a specific actor possesses.

Personality and the determination of the substantive criteria that justifies its possession are, logically, previous to the exact determination of what specific rights and obligations are integrated. However, in the analysis of qualified international personality the logic is reversed as personality is identified with, and determined by the concrete capacity. As a consequence this approach does not explain the substantive factors which justify granting international personality to non-state entities and why it should be granted to some and not to others.

Secondly, there is a tendency to deal with non-state entities as if they were a homogeneous group. It seems inaccurate to consider that the same kind of international personality applies to non-state actors with a permanent participation and a stable, diversified and significant range of rights and duties, recognised by the majority of objective international persons, and actors which have sporadic contacts and possess a very small number of rights and obligations, sometimes merely on a transitory basis, recognised only by one or a few states.

Consequently, it is necessary to acknowledge the heterogeneity of non-state entities and to introduce a greater differentiation in terms of the categories of international personality. The introduction of a third category could contribute to make clear the distinction between a more structured, stable and rich personality of non-state entities and sporadic manifestations of international personality. I would argue that three categories of international personality should be adopted: objective personality (states and I.O., based on customary law), qualified personality (more restricted but still rich and permanent) and precarious personality (applied to transitory and rather weak manifestations of personality).

Thirdly, the “dualistic school” fails to address the fundamental question of the international regulation of the behaviour and status of non-sovereign entities. Although

it is widely recognised that under International Law there are no rules governing the establishment, behaviour, immunities or responsibilities of non-state actors such as international NGOs or TNCs, this school does not take a position *de jure constituendo*, on the need to develop an international legal framework to regulate their status and activities.

It should be noted that this issue constitutes the other side of the coin of the fragility of non-sovereign actors' personality. In fact, the more there is a deficit of regulation of an area which should be regulated, the more fragile and less consistent tends to be the international personality of the non-state entities to the extent that the definition of international codes of conduct for NGOs or TNCs would directly impose on them rights and duties and increase their accountability when acting at the international level.

The third school, which can be named the "Transnational Law school", while relatively marginal, has nevertheless contributed an interesting perspective that is closely related to the problem of regulation. Based on Jessup's seminal work<sup>17</sup> it argues that a new body of legal rules resulting from the blend of public and private International Law should be developed resulting in what is called "transnational law" aimed at regulating actions or events which go beyond national frontiers.

This would imply a far-reaching structural change in the international system. Transnational Law would replace International Law and as a consequence non-state actors acting across borders would become subjects of transnational law rules and thus acquire transnational personality. This body of rules is to be determined objectively rather than subjectively, in the sense that it applies to acts and events and not to actors, to what they do and not to what they are. As a result the legal status of states and non-states actors would tend towards equalisation, as they would be submitted to the same body of rules.

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<sup>17</sup> Jessup, Philip, Transnational Law, Yale University Press, New Haven, 1956.

In sum, International Law has clear difficulties in dealing with the phenomenon of non-state actors and in addressing the challenges posed by their increasing participation in the international system. If it is true that the legal system is in general slow to adapt to changes in social reality, it is also true that the dominance of the traditional school exacerbates the problem. The dual personality school represents a step forward in bringing international law closer to the reality of the international system. However, even if it admits that non-state actors can possess international qualified personality this is still regarded as exceptional, depending on the formal recognition by states rather than on objective criteria. The concept of qualified personality, although not completely satisfactory, is a useful instrument for the analysis of the international status of non-state actors.

## **1.2. NON-STATE ACTORS IN INTERNATIONAL RELATIONS LITERATURE**

The issue of non-state actors and their role in the international system has been traditionally a marginal theme in the International Relations (IR) literature and research agenda as a result of the predominance of a state-centric view of world affairs. Consequently, there is neither a consistent line of research within IR on the experience of, nor a theory of non-state actors which are simply defined negatively as those lacking the attributes of sovereignty.

Looking at the evolution of IR literature in more recent times it is possible to distinguish three different periods. The 1970s witnessed the emergence of a fresh interest in the phenomenon of non-state actors leading to the first body of IR literature developed around the new theories of transnational relations and interdependence.

In the 1980s there was a clear decline in the attention devoted to this topic with the exception of a few studies conducted on federated states and external relations of federal systems. This is apparently contradictory with the predominance of neo-liberal thinking during this period. Interestingly, while challenging the position and advocating the role

back of the state at the domestic level, neo-liberals have not challenged to the same extent the dominance of states at the international level.

A third period was initiated in the early 1990s when the study of non-state actors gradually regained interest and became again a relevant topic in IR literature. This section will analyse in more detail the first and third periods trying to identify the main differences between them.

### **The 1970s debate**

The earlier debate on transnational actors in the 1970s is a consequence of the interplay between a structural crisis in the world economy marked by the end of the golden years of economic growth, the internationalisation of US multinational corporations and a rapid increase of FDI and the emergence of the first wave of international NGOs.

In this context a new body of IR literature emerged in the 1970s centred on transnational relations and interdependence. The most relevant contributions were made by Keohane and Nye<sup>18</sup>, Mansbach and Lampert<sup>19</sup> and Rosenau<sup>20</sup>. There are some areas of convergence but also important differences between them.

On the convergence side there are three common points. First, a critical assessment of the dominant “state-centric view” of world politics stressing its limitations and the invalidity of its two basic assumptions – that states are the sole relevant players in the international system and they operate as unitary and monolithic actors – and the fact it considers as irrelevant the behaviour of non-state actors. This does not mean the state-centric approach does not acknowledge the increasing participation and influence of non-state actors, but rather that it sees their participation as subordinated to the

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<sup>18</sup> Keohane, R. and Nye, J.(eds), Transnational Relations and World Politics (5<sup>th</sup> Edition), Harvard University Press, Cambridge, 1981 and Power and Interdependence: world politics in transition, Little, Brown, Boston, 1977.

<sup>19</sup> Mansbach, Richard and Lampert, D. and Ferguson, Y. (eds) The web of world politics – non-state actors in the global system, Prentice-Hall, New Jersey, 1976.

<sup>20</sup> Rosenau, J. The study of Global Interdependence, Frances Pinter Publis., London 1980.

requirements of states and with no capacity to alter the basic structure of the system, namely the monopoly of instruments of coercion and violence.

Secondly, there is a consensus that states remain the dominant actors in the international system and their position has not been, and is unlikely to be, seriously challenged, although it is admitted their behaviour is influenced and constrained by non-state actors. To use Rosenau's words "...international relations conducted by governments have been supplemented [not supplanted] by relations among private individuals, groups and societies that can and do have important consequences for the course of events"<sup>21</sup>.

Thirdly, they all treat non-state actors as a homogeneous group failing to understand the diversity of strategies, patterns of behaviour and strength of different types of actors. Even when there is an attempt to distinguish between different categories of actors, as in the case of Mansbach, this does not lead to any operational consequences<sup>22</sup>.

There are also interesting differences between these three contributions, which should be analysed in more detail, as they were seminal in launching different lines of research taken up and developed in the 1990s.

### **Keohane and Nye**

The contribution of Keohane and Nye is clearly the one which goes further in terms of trying to analyse the interaction between states and non-states actors in a unified system. The main goal of their research is to understand "the contamination of inter-state relations by transnational relations" which contributes to overcome the dichotomy between state-centric vs. society-centric as alternative approaches.

However, if we look at the two fundamental research questions which drive their enquiry - assess the impact of transnational relations on the power of states, namely if they have weakened it, and see to what extent transnational relations contribute to

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<sup>21</sup> Rosenau, op.cit., p.1

<sup>22</sup> Mansbach, op.cit., pp.39-41.

aggravate the inequalities between states - we conclude that this is not a balanced exercise. Although the behaviour of non-state actors is taken on board, the entire analysis takes the state system as the point of departure and reference which means that non-state actors become relevant only insofar their behaviour has concrete impact on state power or disturbs the equilibrium of the state system. Consequently, the interest in non-state actors is “instrumental” leaving aside the analysis of areas where there is no interaction with states.

In any case a new analytic framework is proposed to replace the state-centric approach paradigm of world politics, which combines traditional international politics with bureaucratic politics and transnational relations. An interesting innovation has been the incorporation of Allison’s bureaucratic politics approach<sup>23</sup> in the analysis, which challenges the idea of states as unitary actors.

Keohane and Nye take bureaucratic politics a bit further in two interesting ways. First, by calling attention to the functioning of bureaucratic politics at the international level thus expanding the original analysis centred on the domestic process of foreign policy decision-making. They introduced a new category of interactions named “transgovernmental”, defined as interactions between governmental sub-units across state boundaries, basically bureaucracies which have international links with other bureaucracies not controlled by political decision-makers. Secondly, by considering that bureaucratic politics apply also to non-governmental actors which should not be seen either as unitary actors. This contributed to launch a new line of research which, unfortunately, has not been very much explored. As a result this new framework covers and combines three types of relations and their interactions: transnational relations (between non-governmental actors), interstate relations (between states) and transgovernmental relations (between bureaucracies across the borders)<sup>24</sup>.

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<sup>23</sup> Graham Allison, Essence of Decision: explaining the Cuban Missile Crisis Little Brown, Boston, 1971.

<sup>24</sup> Keohane and Nye, Transnational Relations op. cit. pp. 382-383

Another interesting feature of Keohane and Nye's work is the fact it is focused on the consequences of non-state actors' behaviour on states and the international system, and devotes little attention to the causes and nature of their increasing influence. This contrasts with Rosenau's approach which, as we will see, focus more on the causes and dynamics of the transnationalisation of world affairs.

Keohane and Nye consider the issue of "loss of control" of states is misleading, taking into account the existence of other causal factors besides transnational relations and the fact the loss is not uniform, varying with the sector of state activity, more intense in economic than in security matters. They argue that this loss of control is not fundamentally explained by non-state actors' action and reject a causal link between increasing influence of non-state actors and a weakened nation-state.

The most innovative contribution that makes their work still relevant, is the conclusion that transnational relations and actors contribute to aggravate inequalities between states. Their main argument is that the intensity of activities and capability of non-state actors is unequally distributed, probably more skewed than the formal power of states, in the sense that stronger non-state actors are based on the stronger and more developed states while weaker states tend to be associated with less structured and capable transnational actors. Thus transnational relations tend to widen the existing gap between strong and weak states.

This has two crucial implications. First, for Keohane and Nye transnational relations and actors should be seen as one of the basis of state power. In this sense they not only question the view that non-state actors' growing influence necessarily weakens the state but also argue that, in some circumstances, non-state actors contribute to strengthen state power as "transnational organisations are particularly serviceable as instruments of governmental policy whether through control or willing alliance"<sup>25</sup>.

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<sup>25</sup> Keohane and Nye, *Transnational Relations* op.cit. Introduction pp. xxi.

Secondly, there is an explicit recognition of the more complex nature of relations between state and non-state actors by stressing that besides relations of conflict and confrontation there are also relations of cooperation, alliances and coalitions. This shift in perspective sets the stage for a more complex analysis of state vs. non-state actors relations rejecting the view that those could be reduced to a zero-sum game.

### **Rosenau**

Rosenau's analysis while sharing the same critique to the "state-centric framework" differs in some respects from Keohane and Nye's approach. The first aspect is the fact his analysis takes the phenomenon of interdependence as the point of departure and consequently the relations between states and non-state actors are regarded as one of the dimensions of a wider process that none of them control but which determines their options. Anticipating some aspects of the current analysis of globalisation, Rosenau sees interdependence as an all powerful and pervasive process, driven by technological innovation and sustained by advances in communications and transportation.

The second aspect is that besides conflict and co-operation, which presupposes interaction, a third hypothesis is considered, the existence of a sphere of independent and autonomous behaviour of non-state actors in specific areas where there is no interaction with states. This is an important contribution towards recognising the need to study non-state actors independently and not only as a function of state behaviour.

Thirdly, Rosenau's conclusion that the position of the state and its authority has been weakened as a whole is more negative and assertive than the one reached by Keohane. The decline in state power is regarded as a result of the dynamics of interdependence, through two different channels, the nature of interdependence issues and the development of new sources of loyalty, and not as a consequence of a purposeful action on the part of non-state actors. In this respect Rosenau becomes closer to Keohane when he recognises that the influence of non-state actors was not the predominant factor behind the "loss of control" of states.

Fourthly, Rosenau's analysis focuses more on the causes than on the consequences of the emergence of non-state actors. He argues that to understand this upward trend it is necessary to look more at the issues that became predominant in the international agenda than at players. Insofar as the nature of the issues brought to the forefront of the agenda become more technical, they offered new opportunities for non-state actors to assert their influence in specific areas due to their superior management experience, technical knowledge and expertise in those areas when compared to central governments.

As a result a mixed picture tends to prevail in which an objective division of areas of influence becomes apparent with states remaining predominant in specific issue-areas and non-state actors gaining influence in others. As a consequence the increasing power and influence of non-state actors is not global and uniform but partial varying with the issue-area.

The decline in state power is also explained by institutional and social changes. One of the interesting contributions made by Rosenau is the consideration that the emergence of new sources of loyalty (distinct from authority) associated with non-state actors, which compete with the traditional loyalty basis used by States, nationality, is one of the fundamental structural changes which can deeply undermine the legitimacy and authority of states and simultaneously contribute to consolidate non-state actors as real authority structures.

### **Mansbach and Lampert**

Mansbach and Lampert's research has clear differences with the other two approaches. Although they start by acknowledging the limitations of the "state-centric model", their final conclusion is somewhat contradictory. Contrary to Rosenau and Keohane/Nye, they conclude that this model is still partially valid and therefore do not advocate it should be abandoned altogether. To justify this position it is argued that the relevance of the state-centric approach varies with the type of behaviour being particularly relevant to explain co-operative behaviour in the international system.

Secondly, the main concern of Mansbach's study was to assess the level of involvement and interaction of state and non-state actors with particular emphasis on the processes of violence and conflict in the international system. The most striking conclusion is that "non-state actors are more prone to conflict and violence than nation states"<sup>26</sup> and their responsibility for violence in the system is greater than states, taking into account their role in civil wars. From there, Mansbach concludes that "the more conflictual the behaviour the less the state-centric model can explain, the more co-operative the behaviour the more the state-centric model can explain"<sup>27</sup>.

Thirdly, Mansbach and Lampert made an important contribution to the recognition of the heterogeneity of non-state actors, identifying four different categories out of the total six main types of global actors (interstate non-governmental actor, governmental non-central actor; interstate non-governmental actor; individuals), contrasting with Keohane and Rosenau's uniform approach. Nevertheless, this was still a limited effort because besides identifying the categories it did not produce any relevant result regarding an in depth analysis of the specific characteristics, strategies, patterns of behaviour and impact of each type of actor.

### **The 1990s and non-state actors**

A renewed interest in non-state actors and their participation in the international system marked the 1990s. This was the result of the perception that non-state actors gained increasing influence in the new post-Cold War context and played an active role in the two dominant phenomena which marked the new era: the acceleration of economic globalisation and the expansion of democratic values and political transitions.

The 1990s IR literature on non-state actors is still influenced by the 1970s debate on transnational relations presenting a strong element of continuity rather than the introduction of a major shift in paradigm. Yet, it is characterised by some distinct features, namely a greater concern with empirical studies, the rejection of a simplistic

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<sup>26</sup> Mansbach, *op.cit.* pp.285

<sup>27</sup> *Ibidem.* p.278.

dichotomy between state-centric vs. society-centric visions of the international system, and a move towards a more differentiated analysis of various types of non-state actors.

This led to more attention being devoted to identify the specific characteristics of each category of non-state actors, what particular channels they use to participate in the international arena and the impact of their actions. One case in point has been the recognition of Non-Central Governments (NCGs) as an autonomous category.

In spite of the recognition of non-state actors' diversity, there is an important element of continuity since the analysis is still heavily concentrated on relations between states and non-state actors neglecting the interactions between different non-state actors.

Particular attention should be devoted to two of the most influential works presenting contrasting perspectives: Susan Strange's analysis<sup>28</sup> which argues an increasing influence of a particular kind of non-state actor, TNCs, and a significant shift in power in their benefit leading to the weakening of the state; and Risse-Kappen analysis<sup>29</sup> which does not support the idea of states loosing power and stresses the cooperative interactions between states and non-state actors.

### **Risse-Kappen: the complementarily approach between States and Non-state actors**

Risse-Kappen's main concern is to examine how states interact with transnational non-state actors and under which domestic and international conditions can the former influence and change state policies. His main argument is that the capacity of non-state actors to influence policies is basically determined by two variables, the differences in domestic structures and the level of international regulation and institutionalisation of specific issue-areas. On the basis of the evidence collected it is argued these factors operate according to the following rules: the stronger the state and its control over domestic structure the more difficult for non-state actors to exert influence; the more

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<sup>28</sup> Susan Strange, The Retreat of the State – the diffusion of Power in the World Economy, Cambridge University Press, Cambridge, 1996.

<sup>29</sup> Risse-Kappen, Thomas (ed.) Bringing Transnational relations back in – Non-State actors, Domestic Structures and International Institutions . Cambridge University Press. Cambridge, 1995.

internationally regulated the issue-area, the greater the access of transnational actors to national politics, the more legitimate their actions and the greater their influence<sup>30</sup>.

One of the consequences of this approach is that it makes less relevant the consideration of the subjective characteristics of different types of non-state actors to assess their influence in the international system since the determinant factors are objective and external. In this sense it reinforces the tendency to see non-state actors as a homogeneous whole, assuming they act internationally in similar ways which is not helpful to deepen our understanding of non-state actors.

A fundamental assumption behind Risse-Kappen's argument is that the main purpose of non-state actors is to influence state policies since the fundamental channel for them to influence the international system is by acting domestically, through states. This reflects the conviction that the state system is still dominant and the power of states is basically unaffected by non-state actors' international activities. This view can be criticised on the grounds that it ignores the autonomous interventions of non-state actors that surpass the state and are exactly aimed at escaping state control. Non-state actors have certainly other objectives than to influence national state policies and can act directly in the international system, opposing or supporting international regulation, mobilising public opinion or making deals with other non-state actors to ensure control over economic resources or to challenge state decisions.

Finally, Risse-Kappen criticises the analysis prevailing in the 1970s arguing there was an excessive concentration on confrontation between states and non-states actors and points out the need to take into account also co-operation and "coalition building" relations, but falls ironically in the same trap in the opposite direction when it ignores the confrontational dimension and concentrates exclusively on relations of co-operation.

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<sup>30</sup> Risse-Kappen, op.cit. pp.25-32

### **Strange and the redistribution of structural power in favour of Non-State actors**

A contrasting view is presented by Strange who puts more emphasis on the interaction and confrontation between states and what she considers the most relevant non-state actors, TNC's, and the outcomes of this process namely in terms of redistribution of "structural power"<sup>31</sup>.

Her main conclusion is that the power of states is declining, while paradoxically state intervention is growing, as a result of the integration of world economic structures<sup>32</sup>. For Strange structural changes led to shifts in power in three different ways: "upwards", from weak states to stronger states; "sideways" from states to non-state authorities, mostly TNCs; some of the power lost by states has simply "evaporated", nobody is exercising it. Because of their role in the process of technological change, TNCs were the main recipients of the power lost by states and as a result reinforced their influence in the international system.

However, it should be noted that this conclusion does not mean that Strange supports the thesis of the collapse of the state. Instead, she recognises that TNCs have not taken over from states, the former still possess a strong position in the system despite the diffusion of authority. The new context is marked by the fact TNCs exercise a parallel authority alongside governments in questions of economic management which is particularly intense in four strategic domains: location of industry and investment; direction of technological innovation; management of labour relations and taxation<sup>33</sup>.

On this point Strange follows Rosenau's analysis which considered interdependence, the name given to globalisation in the 1970s, to be the main factor behind the state "loss of control". The only difference is that Strange identifies clearly a recipient of the power lost by States and attributes greater relevance to the economic dimension of

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<sup>31</sup> Structural power is defined in opposition to relational power based on Nye's distinction between "hard" and "soft" power. Structural power is defined as "power over" structures (in opposition to "power from") which can be exercised only by "being there", a sort of indirect and unconscious power which is not associated with an apparent use of means of coercion but is based on the dominance of basic structures. Strange, *op.cit.* pp 25-27.

<sup>32</sup> *Ibidem.* p.14.

globalisation, whereas Rosenau did not identify a recipient and tended to emphasise more the political and institutional dimension of interdependence, namely the emergence of new sources of loyalty.

Secondly, for Strange the specific features of different types of non-state actors matter and determine their capacity to act and influence outcomes. TNCs are considered to be the strongest actors with a significant impact on the international system because of the ways in which they operate, their size and the economic basis of their power. While it is true that Strange restricts her analysis to TNCs and does not consider other types of actors, with the exception of the Mafias, her position implicitly recognises heterogeneity of non-state actors and the relevance of a differentiated analysis of the characteristics and capabilities of each category. Furthermore, it is explicitly recognised the need for more in-depth and innovative work on non-state authority<sup>34</sup>.

Thirdly, Strange has a very different position regarding the relationship between non-state actors and international regulatory systems. Whereas Risse-Kappen implicitly argues that more dense international regulation is welcomed by non-state actors as it reinforces their influence over national systems, Strange shows that more regulation is likely to weaken and countervail excessive power of TNCs, not reinforce it, and therefore tends to be resisted, particularly with respect to financial markets. This is a clear example of the limitations of Risse-Kappen's approach resulting from its neglect of the differences between categories of non-state actors. It seems clear that while INGO's see international regulation positively as a means of strengthening their position, TNCs tend to see it as a problem.

On the other hand, Risse-Kappen does not explain why some issue-areas are more submitted to international regulation than others and avoids any normative consideration on the sufficiency or desirability of such regulation. This contrasts with the more normative position adopted by Strange who points out the current deficit of global

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<sup>33</sup> *Ibidem*, p.46.

<sup>34</sup> Strange, *op.cit*, p.xvi (preface).

governance “we have now a ramshackle assembly of conflicting sources of authority”, and the danger for the international system of the absence of an “opposition” or “countervailing powers” which makes the more urgent the development of sources of “negarchy”<sup>35</sup>.

Finally, Strange’s contribution while stressing the dominance of economic factors does provide a more integrated and articulated analysis between economic and political factors. Two interesting political elements are pointed out as structural seeds for increasing power of TNCs and weakening legitimacy of the state: the proliferation of new and alternative sources of loyalty and identity which challenge the monopoly of identity based on citizenship and nationalism, an argument which was developed by Rosenau in the 1970s; the lack of democratic legitimacy of TNCs and the fact they are not accountable to anyone, in particular democratic governments, potentially imposes a severe limit to democracy.

Although there are clear divergences between these two perspectives there are also some common points which are worth underlining. First, both Strange and Risse-Kappen restrict their analysis to the relations between states and non-state actors, which is an important, though not exclusive, dimension of their international participation. The state is the main reference and non-state actors’ activities tend to be seen as relevant only if and when they have a direct impact on states. In short, relations between non-state actors are still to a large extent neglected.

There are short references to potential conflicts between INGOs and TNCs, visible in areas such as the environment, in Risse-Kappen, recognising that sometimes INGOs challenge and press TNCs and side with Governments to impose international regulations, but this avenue is not explored. Similarly Strange when talking about the damage of the absence of countervailing power to balance arbitrary authority of TNCs, suggests that transnational movements of NGOs might constitute an emerging source of

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<sup>35</sup> Strange borrows the concept created by Daniel Deudney which means the power to negate, limit or constrain arbitrary authority. Strange, op.cit. p.198

opposition<sup>36</sup> thus highlighting the importance of relations between different categories of non-state actors. The challenge for the research on non-state actors is to correct this imbalance through a more in-depth analysis of the differences and similarities between diverse categories of non-state actors and their different roles in the international system.

### **1.3. NON-CENTRAL GOVERNMENTS AS INTERNATIONAL PLAYERS**

One of the most important contributions of the 1990s IR literature to the study of non-state actors has been the increasing attention devoted to, and the research produced on Non-Central Governments (NCGs) as a specific category of non-state actors. Among the most important contributions the works of Brian Hocking<sup>37</sup> and Hans Michelmann and Panayotis Soldatos<sup>38</sup>, based on the analysis of the experience of Federal States, are particularly interesting and influential because of the richness of the empirical material and the relevance of the research questions formulated.

Both Hocking and Michelmann consider the increasing international activities of sub-national political entities as a new and relevant phenomenon in the international system that constitutes a response to the challenges of globalisation. Moreover, both see it as a result of the interaction between two opposite but mutually reinforcing processes: “from within out”, reflecting the fact local governments go out to promote local interests and reduce the risks of international threats; “from without in”, by which NCGs become the focus of attention and suffer the pressures of both foreign governments and non-state actors.

However, Hocking and Michelmann present also differences in relation to four dominant themes addressed by this body of literature: the definition of the nature of NCGs as

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<sup>36</sup> Strange, *op. cit.*, p.198.

<sup>37</sup> Hocking, Brian, Localizing Foreign Policy – Non-Central Governments and Multilayered Diplomacy, St.Martin's Press, London, 1993 and Hocking (ed) Foreign Relations and Federal States, Leicester University Press, London, 1990.

<sup>38</sup> Michelmann, Hans and Soldatos, P., Federalism and International Relations – The role of subnational units, Clarendon Press, Oxford, 1990.

international players; the causes of their increasing international participation; its consequences, particularly for national foreign policies; and the nature and pattern of relations between NCGs and Central Governments in the sphere of international affairs.

### **The causes of NCGs increasing international participation**

As far as the causes of the increasing international involvement of NCGs are concerned, different authors emphasised different factors grouped under three basic criteria: internal vs. external causes; economic vs. political causes; and global vs. specific causes.

Hocking considers there are two determinant causes of the “localisation of foreign policy”. First, the increasing economic interdependence led NCGs to become more active internationally in order to overcome central government ineffectiveness and respond to an expanding foreign policy agenda. Concurrently, Central Governments faced with increasing complex tasks that overstretch institutional capacity decided to decentralise by encouraging sub-national governments to get internationally involved in certain areas.

The second major factor is of a socio-political nature, “social activism” reflecting the fact that civil society groups increasingly active in local politics cultivate international links and solidarity to overcome a sense of frustration and deficit of participation associated with representative democracies. In other words, they search for more international participation to compensate for an unsatisfactory level of domestic participation.

As to Michelmann’s analysis there is not a clear conclusion on what are the determinant causes of the “paradiplomacy” of federated states. Although Michelmann considers the role of economic causes, related to NCGs greater proximity with local economic agents and problems, in particular with small and medium-sized enterprises, in the end he attaches more importance to political factors related to political leaders’ search for visibility and the motivations of opposition parties to enhance their domestic profile and counterbalance foreign policy priorities of the ruling party. Reference is also made to a

more radical political motivation, subnational units seeking political independence, but that is considered to be exceptional.

In contrast, Soldatos distinguishes between internal and external causes and argues that the external ones became the “stronger stimulus” for paradiplomacy since the mid - 1970s, in particular a growing global interdependence, while before that internal causes played a more important role. With respect to internal causes he suggests a distinction between causes related to federal states structures, namely constitutional uncertainties and grey areas associated with the division of competencies between Central Governments and NCGs, and causes specific to federated units.

In sum, different perspectives coexist. Hocking attaches more relevance to global, external and a combination of economic and political causes whereas Michelmann is more inclined to emphasise internal, specific and political factors. Soldatos adopts a middle ground position and suggests a greater balance of internal vs. external factors, political vs. economic factors and general vs. specific factors.

### **The nature of NCGs as international players**

The second central issue discussed in the literature is the nature and characteristics of NCGs as international players. Two fundamental positions can be identified: the first, supported by Michelmann and Soldatos, sees NCGs simply as non-states actors sharing all their fundamental features; the second, supported by Hocking, sees NCGs as a new and autonomous category of actors different both from states and non-state actors.

Hocking makes a stimulating and original contribution to the debate by stressing the hybrid nature of NCGs as international actors, combining features of states and non-state actors<sup>39</sup>. They are regarded as a *tertium genus*, between states and non-state actors, which possess four main specific characteristics: (i) promotion of regional interests (ii) concentration on economic agenda (iii) high fluctuation in the intensity of their

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<sup>39</sup> Hocking, Localizing Foreign Policy, pp. 44-47.

international participation (iv) close links with regionally based non-state actors<sup>40</sup>. This is potentially an important step forward in the attempt to grasp the essence of sub-national units which, unlike other non-state actors, are also polities, some even possessing a democratic legitimacy.

It is still open to question whether this political dimension is sufficient to substantiate the creation of a third category of players or if it only justifies the consideration of NCGs as an autonomous sub-category of non-state actors. Much depends on whether in spite of the hybrid nature it is believed that non-state features are still dominant. Clearly the most important limitation of Hocking's analysis is the fact it fails to discuss and explain the implications of this hybrid nature. Besides the reference to the fact NCG have an ambivalence as they can act both as "primary international actors", through direct international action, and as "mediating actors", through their influence over national governments, there is no other consideration of the practical implications of hybridism, namely in terms of international personality, the channels of participation or the pattern of relations with other players.

Furthermore, while there is a reference to the fact NCGs are not homogeneous actors and present clear differences not only between Federal systems but also within the same system, there is no attempt to try to identify different models of NCGs. Hocking's final conclusion that generalisations about NCG are not possible is somehow questionable and clearly contradictory with his attempt to identify specific characteristics of NCGs.

However, independently of the validity of the *tertium genus* thesis, Hocking's contribution is very important insofar as it highlights the political nature of this type of actors and forces us to look at the question of the deficit of accountability generally associated with non-state actors, as mentioned by Strange, with different eyes: instead of undermining democracy the participation of NCGs might, on the contrary, strengthen it.

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<sup>40</sup> Ibidem., p.47.

### **Relations between NCGs and Central Governments in managing external affairs**

The third main issue in the debate on NCGs is the relationship between sub-national units and central governments, the articulation between the international participation and national foreign policy and the autonomy enjoyed by these entities as international actors. A comparative analysis of the two approaches indicates that one position considers cooperation as the dominant pattern of relations while the other sees the predominance of conflict.

As far as relations with Central Government are concerned, Hocking tends to support an idea of harmony and the prevalence of co-operation between the two levels and criticises the “perforated sovereignty approach” of Duchacek<sup>41</sup>. As a consequence he argues that the level of autonomy is much lower than believed and that NCGs are not separate diplomatic players, instead they should be “brought into the mainstream of contemporary multilayered diplomacy” and to traditional foreign policy processes.

The predominance of co-operative relations is justified on two different grounds. Firstly, the fact central Governments have an interest in profiting from local bureaucratic expertise in specific areas and using NCGs as channels to get access to local interests. Secondly, he claims NCGs have also a self-interest in developing co-operation with the centre in order to strengthen their bargaining power abroad and to prevent potential adverse reactions on the part of foreign states towards emancipated sub-national units.

In this context the key issue becomes co-ordination and the efficiency of the “linkage mechanisms” involving consultation prior to negotiation and participation in actual negotiations which Hocking assumes not only to be the dominant form of interaction but also efficient to ensure coherence. According to this view, the significance of NCGs’ international participation is not so much related to their capacity to act directly and autonomously in the international arena but rather their capacity to influence domestic foreign policy processes which is believed to vary with the type of issue and the stage of the policy-making process. In sum, their ability to act through states is the key question

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<sup>41</sup> Hocking, op.cit., p.46.

and therefore the conditioning factors of their external involvement are considered to be mainly internal: constitutional rules, in general restrictive; NCGs local influence and capacity to articulate local interests; level of economic development of each sub-national unit.

A different view was developed by Michelmann and Soldatos who stress a greater autonomy of NCGs in the international arena and the challenges posed to national foreign policy. However, Hocking's argument that this approach is too conflict-prone is somehow inaccurate as it ignores some modulations and differentiation between various degrees of international activity. Even in Duchacek's analysis there is a distinction between three forms of "paradiplomacy": transborder regional paradiplomacy (transborder relations between contiguous NCG); transregional paradiplomacy (between non-contiguous NCG belonging to geographically close states) and global paradiplomacy (contact with distant states and centres)<sup>42</sup>. Interestingly, the first two types involve exclusively relations between NCGs on "low politics" issues while the third one involves relations between NCGs and central governments of foreign states and might cover also "high politics" areas. The level of conflict with central governments is significant only at the level of global paradiplomacy but almost non-existent in transborder regional paradiplomacy or very low in transregional paradiplomacy. Duchacek even argues that the dominant scenario is one marked by a mixture of co-operation in some areas and competition with central governments in other areas. Hocking is thus referring to only one level of international involvement and even there takes the most radical example, termed "proto-diplomacy", to refer to global paradiplomacy actions conducted by NCGs motivated by a project of separatism and self-determination.

Furthermore, Soldatos sees paradiplomacy not necessarily as a source of conflict and considers co-operation as a more important and relevant dimension in centre-region relations, arguing that segmentation should be seen as a "rationalisation process", a positive development as "...decentralisation could enhance unity and efficiency in

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<sup>42</sup> Duchacek, "Perforated sovereignties", in Michelmann (ed.), op. cit., pp. 15-27.

external relations and become a remedy for the crisis of the nation-state in foreign policy”<sup>43</sup> the more so as actor segmentation does not necessarily imply policy segmentation. On this matter the proximity with Hocking’s position is greater than anticipated.

There are, however, some formal differences. To start with, Soldatos develops a more detailed and complex analysis of the domestic relations between NCG and central governments, which constitutes an important contribution and a useful framework to better understand this crucial dimension. He presents a more complex set of relations between NCG and Central Governments identifying two main types of relations. Firstly, co-operative action (supportive) which can be developed either in co-ordination with central governments or as joint actions between central and local governments which imply a greater degree of integration and coherence. Secondly, parallel action (or substitutive), a more autonomous dimension which can be either developed in harmony or in disharmony (leading to fragmentation). It is only in this last case that conflict with central government becomes a dominant feature.

By proposing this framework Soldatos, unlike Hocking who restricts relationship to cooperative action conducted on the basis of active co-ordination, enlarges the range of possibilities of interaction between NCGs and the centre. Differing from Hocking’s view that if there is not cooperation the actors are bound to conflict, Soldatos suggests that there are other types of non-conflictual relations that are consistent with a more independent pattern of international interventions of NCGs.

Furthermore, while Hocking seems to assume that co-ordinated actions are sufficient to overcome the problem of foreign policy coherence, Soldatos believes that, in spite of the dominance of co-operation relations, problems of coherence still persist and have to be addressed through different channels. This last position is probably more in tune with

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<sup>43</sup> Soldatos, “An explanatory framework for the Study of Federated States as Foreign-policy actors”, in Michelmann (ed), op.cit., p.42.

reality in particular if we bear in mind that co-ordination between bureaucracies is a very costly and difficult process.

### **The consequences of NCGs international participation**

The fourth dominant theme in the literature on NCGs is the consequences of their international participation for national foreign policy. On this question two contradictory positions emerge. A negative view, the “chaos scenario” which considers the paradiplomacy of sub-national units as a dangerous derogation of state power and a clear threat to the coherence and unity of foreign policy. NCGs are regarded as trespassers and their behaviour as deviant.

A more positive view sees the international involvement of NCG as an important development that contributes to advance democratisation of foreign policy and promote greater participation of citizens in areas which have an increasingly important impact on their daily lives. This change reflects the expansion of foreign policy to include what was termed “private foreign policy” developed by non-state actors.

Both Hocking and Michelmann reject the view that NCGs’ international participation undermines national foreign policy. Rather, they emphasise the changes in the nature of foreign policy and the increasing complexity that characterises it as both the state and NCGs are no longer regarded as unitary actors. It is also argued that NCGs activities are still mainly concentrated in “low politics areas”, although their incursion in “high politics” is acknowledged<sup>44</sup>, and for that reason there was not a significant threat to the core “high politics” areas of foreign policy.

However, Hocking does not explicitly subscribe the alternative view that NCGs activities promote democratisation of foreign policy. Michelmann is more enthusiastic about the positive political impact of paradiplomacy in strengthening democracy and

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<sup>44</sup> This point is particularly illustrated by Hocking with examples taken from Australia, namely the opposition of the New South Wales Government to the visit of nuclear ships and from the US, namely the adoption of economic sanctions against the apartheid regime in South Africa because of human rights

subscribes the conclusions of Kincaid who turns the argument upside down arguing that paradiplomacy not only strengthens democracy and pluralism in federal states but its suppression might undermine the vitality and stability of the state<sup>45</sup>.

Although the evidence presented by Hocking and Michelmann does provide a solid basis to reject the “threat-theory”, one should not rule out the hypothesis that central governments, and more so central bureaucracies, still perceive NCGs’ actions as a potential threat to the unity of foreign policy, fuelled by the fear NCGs’ autonomous voice might be used by foreign states to cause domestic instability and weaken the state’s bargaining position.

In conclusion, based on the experience of Federal States, the research on NCGs as international players was consolidated in the 1990s. The analysis of the most relevant contributions yields a number of interesting conclusions. Firstly, NCGs increasing international activities are considered to be a lasting and structural phenomenon in the international system which results from the interplay between economic, namely a growing economic interdependence, political and institutional factors. Secondly, to act internationally they can use two different channels either indirect action, through influence exerted on the Central Government, or direct access to the international arena. When they choose the second format their participation can be characterised as being mainly concentrated in low politics areas (though not exclusively) driven by economics, subject to fluctuations and associated with the use of informal instruments.

Thirdly, various analysis suggest that paradiplomacy is a phenomenon closely associated with democratic systems and developed countries. The extent to which democracy and wealth (as resources are needed to finance external activities) are necessary pre-conditions for sub-national units’ external participation is still to be tested.

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violations by various American States, starting with Michigan (1984), before federal sanctions were adopted – Hocking, Localizing Foreign policy, op.cit., pp. 18; 65-68.

<sup>45</sup> Kincaid, “Constituent Diplomacy in Federal Polities and the Nation-state: conflict and Co-operation” in Michelmann and Soldatos (eds.), op. cit., p.56.

Finally, in terms of the consequences of the phenomenon and impact on foreign policy, although there is still some concern that paradiplomacy might reduce coherence and efficiency of national foreign policy, the dominant position in the literature is that positive effects tend to prevail and NCGs' participation can indeed contribute to greater democracy and citizen participation and a more flexible, agile and robust foreign policy, helping central government to deal more effectively with an increasing complex external environment.

Although the literature on NCGs provides important insights to understand the nature of this kind of international player it is not immune to criticisms as it presents some vulnerabilities and limitations. Reference can be made here to four main aspects.

Firstly, the analysis has been mostly restricted to Federal systems and to the experiences of federated states and failed to take into consideration other experiences in unitary states in order to grasp the similarities as well as the differences. In this context the case of HK is ignored although it is probably the best example of NCGs' international participation and the entity with the strongest international status.

Even within Federal States, there is an exclusive concentration on federated states thus neglecting the cases of lower levels of government (local government) which are also becoming internationally more active. This clearly shows that the scope of analysis must be broadened in order to be able to test if the conclusions are specific to federal systems or can also be applied elsewhere.

Secondly, the analyses neglect the relations between NCGs and other non-state actors, with the exception of relations with other NCGs in the context of transborder relations, as most of the attention is concentrated on the relations between NCG and their own central governments. The relations of NCGs with other non-state actors as TNCs or INGOs is extremely important *per se* and also to understand the pattern of relations with

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central governments. It is in the analysis of this direct interaction that the differences and similarities between non-state actors can be grasped.

Thirdly, there is a tendency to attach more attention to processes and institutional aspects of NCGs' international participation and less to outcomes and assessment of the effectiveness of NCG international activities. Similarly, whereas there is some discussion of the domestic impact of NCG international activities on Federal systems, there is no discussion of the impact of NCGs' participation in the international system, namely the extent to which they have contributed to introduce new practices, or changed the relations between states. This is an important issue which deserves more attention.

Fourthly, there is a tendency to see NCGs both as a homogeneous group and unitary actors. Indeed, the various contributions, although mentioning here and there some differences between sub-national units, fail to engage in a more systematic and rigorous analysis of those differences and to identify and characterise different types of NCGs. Hocking's attempt to point out the distinctive characteristics of NCGs, although important to sustain the view that NCG are an autonomous category of international players, overlooks the differences within the category itself.

On the other hand, these analyses criticise the view of sovereign states as unitary actors but fall in the same trap in relation to NCGs. Just like central governments, NCG are characterised by complex decision-making processes where the roles of bureaucracies, pressure groups and civil society institutions have to be taken into account. The "bureaucratic politics" approach has to be applied also to NCGs, as suggested by Rosenau.

## **1.4. TOWARDS A NEW FRAMEWORK OF ANALYSIS FOR NCGs AS INTERNATIONAL PLAYERS**

The research on NCGs as international players is still in its early days. Despite recent progress, the current level of understanding of this phenomenon, as demonstrated in the previous section, is not completely satisfactory. Much attention has been devoted to formal aspects and to prove and illustrate that NCG act autonomously at the international level. What is now required in order to move forward is a more thorough analysis and assessment of the real dimension, intensity and quality of that international participation. It is also important to highlight the heterogeneity of NCGs and to distinguish between different categories on the basis of their real capacity for international action. This requires the selection of relevant criteria which are obviously non-coincident with criteria that might be used to assess other aspects of NCGs' status.

From a methodological point of view, a comparative analysis of NCGs' behaviour cannot be restricted to a mere "ad hoc" listing, based on empirical observation, of "factual differences", which might or might not have any significance. Any comparative analysis can only lead to a meaningful result if there is a previous definition of relevant criteria that set the parameters of what we are comparing and for what purpose.

One possible criterion has been suggested by Roda Mushkat, the domestic or international nature of the genetic act of creation of the NCG<sup>46</sup>. According to this view it is possible to distinguish between NCGs which are a result of a process of domestic devolution of powers (decentralisation) and NCGs which are created by international treaty as a result of the will of the international community. This last category is associated with the example of "internationalised territories" created either for security reasons or as a result of the relevant international functions performed.

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<sup>46</sup> See Mushkat, Roda, "Hong Kong as an International legal person" in Emory International Law Review, vol.6, 1992, pp. 104-170 ( 109-110).

A second criteria has been suggested by the 1980 Report of the Institute for Procedural Aspects of International Law (PAIL) on models of autonomy prepared for the US Department of State, the model of State in which the NCG is integrated leading to the identification of different categories: (i) Federated States integrated in federal system (ii) regions or provinces from unitary states (iii) associated states (micro-states which have delegated competencies in foreign affairs and defence to a primary state)<sup>47</sup>.

Both criteria are highly formal and not really helpful to capture the essence of the real involvement of NCGs at the international level and to differentiate them. They leave out the informal dimensions of NCGs' international action, particularly important for this category of actors, and tend to concentrate on the relations between NCGs and Central Governments, assuming this is the determinant factor of their international status.

The identification of relevant criteria to assess NCG as international players is still an issue that needs to be addressed. With a view to contribute to the debate this study proposes the adoption of a composed criteria, which combines in an interactive manner, two fundamental parameters: the level of autonomy and the density of international personality. In so doing we will be combining the domestic (autonomy) and international (international personality) levels and exploring the intersection between the two. This analysis incorporates simultaneously the perspectives and inputs from International Law and International Relations as it looks both at norms, institutional environment and practices.

### **Autonomy in international relations**

The concept of autonomy in international affairs is the object of some debate and is clearly difficult to define. However, the contributions from an International Law perspective tend to converge in identifying autonomy as self-government and independence in political decision-making and action at the domestic level<sup>48</sup> stressing

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<sup>47</sup> Hannum, Hurst and Lillich, R. "The concept of autonomy in International Law" in Yoram Dinstein (ed) *Models of autonomy*, Transaction books, London, 1981, pp.215-254.

<sup>48</sup> Hannum and Lillich, *op.cit.* pp.248.

the idea of separateness<sup>49</sup> and exclusive control over internal affairs. It is regarded basically as a political reality underpinned by legal norms and limited to the internal order.

A second attribute has been stressed by Tamanaha<sup>50</sup> who considers that autonomy also means non-interference by the “principal entity”(Central Government) in the sphere of self-government. This could be regarded as “negative autonomy” adapting to the realm of autonomy the distinction between “positive sovereignty” and “negative sovereignty” suggested by Jackson<sup>51</sup>. This rightly points out that autonomy does not only affect the autonomous entity but also affects and constrains the Central Government’s behaviour imposing a self-restraining mechanism. This is a very important component because generally speaking it is the subtle interference of Central Governments that mostly undermines autonomy.

I would argue that there is a third attribute which has been neglected. In fact autonomy must also involve the right to participate in wider political decision processes controlled by the Central Government which might affect the interests of the autonomous entity. This implies co-operation and negotiation concerning the management of matters of mutual interest. So, whereas the two first components emphasise separation, boundaries, demarcation and potential conflict, the third one involves interaction and co-operation.

In sum, autonomy involves interaction between three different dimensions: (i) self-government, exclusive control on internal affairs (ii) non-interference from Central Government (iii) participation in global decisions and co-management of matters of mutual interest. Furthermore it is noteworthy that autonomy is not necessarily restricted to internal affairs and sometimes also covers external relations.

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<sup>49</sup> Crawford, J. “The criteria for Statehood in International Law” in British Yearbook of International Law, 48 (1976-77), pp.93-182.

<sup>50</sup> Tamanaha, “Post-1997 Hong Kong: a comparative study of the meaning of high degree of autonomy” in, California Western International Law Journal vol 20, 1989, p.44.

<sup>51</sup> Jackson, Robert, Quasi-States – Sovereignty International Relations and the Third World Cambridge, Cambridge University Press, 1993.

However, as mentioned earlier, the fact autonomy in many NCG is limited to internal affairs does not mean that in practice the external affairs sphere is excluded and there are no interaction between the two levels. In fact, as foreign policy agenda expands into “low politics” areas and the boundaries between domestic and international affairs become loose, the issue of the “external extension of internal competencies” of NCGs<sup>52</sup>, generates increasing tension and pressure for autonomous external action. In short, the separation between these two levels of autonomy is artificial and the total absence of autonomy in external relations can potentially undermine and weaken domestic autonomy<sup>53</sup>. In any case, even when powers for autonomous external relations are granted, autonomy is predominantly seen as a domestic process and evolving primarily according to internal circumstances and political power struggle.

The assessment of the real degree of autonomy enjoyed by a specific NCG is a difficult task. It cannot be based solely on the formal rules regulating autonomy but has also to take into account the way the autonomy system operates in practice looking at the three dimensions of autonomy analysed above.

Hannum, in his comparative study of autonomous entities, defines the minimum conditions for an entity to be considered a “fully autonomous territory” which include 5 main aspects: (i) a locally-elected legislature with some independent legislative power in the areas of autonomous competencies; (ii) a locally-chosen chief executive; (iii) an independent judicial power; (iv) exclusion of discretionary powers regarding limitations to local power which have to be explicit and specific in areas of special concern to the principal government; (v) power-sharing arrangements between the central and

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<sup>52</sup> Jean Salmon mentions that one of the pressing dilemmas Federal States have to face is “comment concilier le fait que l'on octroie des competences exclusives a une unite federee dans les domaines particuliers sans lui conferer en meme temps leur prolongement externe, ou a l'inverse comment concilier que l'on octroie a l'autorite centrale le pouvoir de traiter avec les autres puissances sur des matieres relevant des entites federee sans lui donner les pouvoirs necessaires pour en assurer les prolongements internes” - Institut de Sociologie, Les Etats Federaux dans les relations internationales, Actes du colloque de Bruxelles, Editions Bruylant, Université de Bruxelles, 1982, p. 506.

<sup>53</sup> This point is also made by Michael Dardzinsky in the Hong Kong transition section, American Society of International Law, Proceedings of the 91<sup>st</sup> Annual Meeting (9-12 April 1997) pp.193.

autonomous governments in specific areas (police powers, exploitation of natural resources, implementation of national / central legislation )<sup>54</sup>.

Although these criteria are useful to assess the extent to which an entity passed or not the threshold of autonomy, they do not enable us to assess the exact level of autonomy enjoyed. For this, attention must also be paid to more informal aspects related to the way the autonomy system operates in practice, in particular the nature and action of autonomous entity's political parties (if they are simply extensions of national parties or locally-based parties); the budgetary independence and size of autonomous sources of revenue crucial to finance and underpin the implementation of autonomous policies and the extent to which the entity is dependent on financial transfers from the central government; the "de facto" ability to act internationally, even when no powers to conduct external relations are formally granted.

### **International personality**

Regarding international personality, it constitutes the fundamental expression of the international community's recognition of NCGs' international action and more than that the legitimacy of their external involvement in pursuance of specific interests.

International personality is regarded in this context not as a potential capacity to possess international rights and duties, as the dominant approach tends to see it but rather as the "actual attribution" of international rights and duties, in line with Shaw's view<sup>55</sup>. Thus, the assessment of the density of NCG's international personality is based on concrete rights and duties effectively acquired and exercised. Secondly, given the wide range of rights and duties involved, it must be selective and has to be based on the most relevant parameters.

I would argue there are four decisive questions should be considered to assess the density of NCG's international personality: (i) treaty making powers translated in

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<sup>54</sup> Hannum and Lillich, op.cit. pp.250-251.

<sup>55</sup> Shaw, op.cit., p.186.

effective negotiation and signature of international bilateral treaties or agreements; (ii) autonomous participation in international multilateral organisations, both governmental and non-governmental, which reflects an important collective recognition of the capacity to be an international actor; (iii) external representations, *jus legationis*, in foreign countries and accreditation of representatives and offices of foreign states in NCGs; (iv) capacity to bring claims regarding the violation of obligations by other parties and to be held responsible at the international level for violating its own international obligations.

This framework is based on the assumption that NCGs' qualified international personality is a variable and elastic concept based on concrete facts. It aims at defining a more balanced basis to assess NCGs international personality in three areas. Firstly, balance informal and formal aspects of NCGs external actions through the inclusion of relations with other NCGs and non-state actors, instead of limiting analysis to state actors. Secondly, to balance the entitlement to rights and obligations with the actual exercise of those rights and obligations, thus involving the operational side of international personality. It should be noted that the fact rights are exercised and duties performed consolidate and deepen international personality while the simple possession without implementation tends to weaken it. Thirdly, to balance collective/multilateral with bilateral recognition from states and other international actors.

In addition, a dense international personality implies not only the coverage of these four areas but also a reasonable degree of diversification within each one of them. In fact a mere quantitative assessment of the number of treaties /agreements signed or the number of representation offices abroad opened by a specific NCG is not appropriate and can be misleading. A more qualitative approach is required, involving diversification and continuous manifestation.

In fact, it is not possible to say that a certain NCG possesses a highly dense international personality if, in spite of being a party to many international agreements or to International Organisations, they are all concentrated in one single sector or if, in spite of possessing a reasonable number of representation offices abroad they are concentrated

in a very limited number of countries and do not develop any substantial work. A diversified international participation in a wide range of issue-areas or sectors is an essential requirement of a highly-dense international personality.

Similarly, the assessment of the density of international personality is also subject to a “clause of actualisation”, meaning that a dense international personality cannot rest on activities exercised sometime in the past, particularly if since then the NCG has been internationally inactive and did not exercise the majority of its rights and obligations. International activity must be developed and treaty-making powers exercised in the present. Unlike the international personality of States, which is irreversible even if the state’s international involvement is minimal, the qualified personality of NCG’s is reversible and has to be permanently justified and exercised.

### **Categories of NCGs**

The framework proposed in this chapter makes an original contribution to the analysis of NCGs as international players which derives from the fact it combines two criteria – international personality and autonomy - which are usually either analysed as entirely separate questions or, on the contrary, unified as being one and the same thing. For instance, Mushkat focuses on international personality and regards autonomy as one of its foundations, whereas Hannum focuses on autonomy and sees international personality as a part (and projection) of the autonomy status<sup>56</sup>, suggesting international personality is basically determined by domestic factors and the degree reached in this sphere is one of the elements to characterise the level of autonomy. Both these views are inappropriate.

The argument put forward is that autonomy and international personality are independent factors and therefore each of them has no capacity to determine the other. However, this does not mean that they are not inter-related. A variety of interlinkages do

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<sup>56</sup> Hannum and Lillich, *op.cit.*, pp. 232-235

exist and these are important factors to explain the evolution of NCGs international status.

The possession of international personality by a NCG may contribute to strengthen its domestic autonomy status and reinforce its bargaining power vis-à-vis the Central Government, but it is also true that many other factors account for the actual level of domestic autonomy, namely those pertaining to internal political processes, NCG leadership or economic strength. By the same token, a high level of domestic autonomy may have a positive impact in strengthening the degree of international personality, by giving the NCG the means and creating a more positive attitude on the part of other international actors to engage in autonomous relations with the NCG. However, the degree of international personality depends mainly on the attitude and recognition of the international community and is mostly influenced by other fundamental external factors.

Consequently, there is no necessary correspondence between the degree of external autonomy and the degree of international personality enjoyed. It is perfectly possible that a NCG possesses a high degree of autonomy but only a low-density international personality. On the other hand, a NCG possessing a limited degree of domestic autonomy may be able, by using informal channels, to obtain a reasonable degree of international personality, which in turn might be used to press for an expansion of its autonomy status.

On the other hand, a high degree of domestic autonomy does not lead necessarily to a highly dense international personality and vice-versa. In theory we can only accept the hypothesis that both these factors tend to be more relevant as “negative limits”, in the sense that a relatively weak domestic autonomy can be a potential impediment for external action and a weak international personality might as well in the long term undermine the sustainability of a high degree of autonomy.

The framework proposed in this chapter is a valid instrument to analyse NCGs as international actors and to build a meaningful differentiation among them. The use of the actual degree of autonomy and the density of international personality, as defined in this section, originates the following matrix of possible combinations:

<b>PERSONALITY DENSITY</b>	<b>LEVEL</b>	<b>AUTONOMY</b>	
	<b>HIGH</b>	<b>MEDIUM</b>	<b>LOW</b>
<b>HIGH</b>	Robust	Robust	Trespassers
<b>MEDIUM</b>	Robust	Trespassers	Trespassers
<b>LOW</b>	Restrained	Restrained	Non-Robust

On the basis of the intersection of both parameters it is possible to propose a classification of NCGs which includes four main categories:

a) Robust .

Robust NCGs are a category of international players that possess a mutually reinforcing combination of a high or medium degree of autonomy and a highly dense international personality (diversified, actual exercise). Their international participation tends to be consolidated, stable and diversified and oriented towards the pursuance of NCGs' own specific interests. Their action extends beyond low politics and is likely to cover also "high politics" areas. Relations with the central Government are relatively formalised and the level of conflict over external relations is relatively low. Although this category of NCGs tend to concentrate on parallel actions, they also cultivate co-operative relations with the Central Government in external affairs as they are more relaxed about the risks of central interference which could curtail their autonomy and thus more willing to capture potential benefits deriving from Central Government's support at the international level. Probably the closest example to a robust actor is HK. The research carried out in the next chapters on HK' external relations will provide the evidence to confirm or not this view.

b) Trespassers

This category is characterised by the coexistence of a medium dense international personality and a low/medium level of autonomy. The emergence of a strong international personality resulted either from international factors (performance of international useful functions) or the capacity to take advantage of a domestic crisis or the weakness of the Central Government and its inability to conduct an effective foreign policy. In general it depended upon the exploration of informal channels in order to overcome restrictive formal rules. The level of conflict with the Central Government tends to be high. Parallel actions predominate and there is little room for co-operation with the centre. Trespassers seek to use their international recognition to press internally for greater autonomy but, in the long term, a limited domestic autonomy and a high level of conflict might undermine the sustainability of a dense personality. International

participation risks to be affected by instability and even some negative reactions on the part of some members of the international community. To a certain extent, this is a transitory category in the sense that the structural tension is sooner or later resolved either in the direction of greater autonomy, moving up to become a robust NCG, or in the direction of an eroded international personality to become a non-robust player.

The Quebec is an example of this category of actor taking into account that it has a medium to low level of autonomy if we consider the external autonomy dimension, but a medium dense international personality and a high level of conflict with the Canadian central government. Another example, although characterised by a lower level of conflict with the Central Government, would be Catalonia that has a medium level of autonomy as it has no autonomous powers in external affairs but a medium dense international personality.

c) Restrained

Restrained NCGs are marked by a high/medium level of autonomy and a low dense international personality. To some extent they are the opposite of trespassers and correspond to relatively weak international players. The extensive autonomy, which does not necessarily include powers to conduct external relations, is not used to build a strong international status. This is a consequence of either the lack of recognition and interest on the part of the international community, or the incapacity (political, institutional or even economic) to act internationally. Sometimes the NCG has the required conditions but lacks the motivation to become an autonomous international player in particular when it has already a strong influence over the Central Government and its foreign policy and is therefore able to pursue its specific interests through the centre. The level of conflict with the Central Government is low and co-operative relations predominate. This type of NCG is less driven by the pursuance of its own objectives and more willing to respond positively to the Central Government's requests for the NCG to be instrumental and act internationally to complement its efforts and contribute to the implementation of national foreign policy objectives. This weak international personality is likely to undermine the domestic autonomy status.

As examples of this category could be cited some of the Canadian Provinces like the New Brunswick or some of the Spanish autonomous regions like the Basque region, which despite medium level of domestic autonomy have a low dense international personality. Another example would be Greenland, which assumed an international identity as the best example of protection of the rights of indigenous peoples, possessing however, in spite of the fact it was the only part of a member state to have ever left the EU<sup>57</sup>, not a very dense international personality as its rights and obligations are restricted to the fisheries area. However, although the level of conflict with the central government has traditionally been limited and co-operation prevailed, in recent years it has increased significantly and so Greenland status is changing and becoming closer to a trespasser.

d) Non-Robust

Non-Robust NCG combine a low level of autonomy with a low dense international personality. Conflict with the Central Government over external relations is low but there is also little room for interaction and cooperation in this field. NCGs have little capacity to influence foreign policy and tend to act internationally simply as Central Governments' agents for specific purposes. Their international participation covers only a limited range of low politics areas and is often geographically restricted (transborder or sub-regional) and concentrated on relations with other NCGs. This type of actors face a considerable risk to find themselves involved in a declining spiral which can further weaken their fragile position. Their qualified international personality can easily degenerate in a precarious personality which, in turn, contributes to compress their *de facto* autonomy. Examples can be found in some of the French regions as the Midi Pyrenees, mainly involved in transborder relations with other NCGs.

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<sup>57</sup> Greenland has joined the EU in 1973 with Denmark but after a referendum abandoned the EU in 1985 after signing a treaty of withdrawal, because of the concern of losing control over the fisheries and of the contradiction between an integration policy vis-à-vis Brussels and a devolution policy vis-à-vis Copenhagen.

The role of HK as an international player has been the object of interest since the signature of the 1984 Sino-British Joint Declaration. The international personality of HK has been the subject of some debate among lawyers<sup>58</sup> and International Law specialists, in particular by Mushkat<sup>59</sup>, who considers there is a solid foundation for international personality based on five fundamental factors: the possession of “factual stately attributes” and the consequent proximity to sovereign states, with the exception of constitutional independence; the international recognition granted to HK through the accreditation of HK representative offices and HK’s admission to multilateral organisations; the “international legal entitlements”, i.e. HK’s “right to self-determination”, regarded as a fundamental basis for its international personality; the “membership in the international civil society”, its participation in international organisations and multilateral treaties, and the strong links it maintains with other non-state actors; the special international functions performed as a prominent economic and financial centre both for the global and regional economies.

I would argue that Mushkat’s analysis of HK’s international personality is opened to a major criticism. It reveals a tendency to see the similarity with States as the main foundation of HK’s personality. This logic was pushed even further by others who qualify HK as a “quasi-state”<sup>60</sup>, or more precisely a reversed form of the Jacksonian concept<sup>61</sup>. Mushkat and Tang neglect a more promising avenue, the exploration of the essence of HK as a non-state actor, whose personality has a different nature from that possessed by sovereign states, as noted above.

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<sup>58</sup> For example International Commission of Jurists, Countdown to 1997. Report to a mission to Hong Kong (Geneva, ICIJ, 1992)

<sup>59</sup> Mushkat, Roda, “Hong Kong as an International Legal Person” in Emory International Law Review, vol 6, Spring 1992, n1 pp.105-170 and One country, Two International Legal Personalities – the case of Hong Kong, HK, HK University Press, 1997, (chapter 1)

<sup>60</sup> James Tang “Hong Kong’s international status” in Pacific Review, vol 6 (3) 1993, pp. 205-215

<sup>61</sup> Jackson’s analysis takes as the point of departure the distinction between “negative sovereignty” (freedom from outside interference, non-intervention) which is a formal legal entitlement, and “positive sovereignty” (capabilities to control resources and deliver economic development securing the satisfaction of the population’s needs), a substantive dimension which determines how far governments can be their own masters and take advantage of independence. Jackson’s argument is that “quasi-states” possess the latter but not the former. In this light Hong Kong has positive sovereignty but lacks negative sovereignty which is the opposite of a “quasi state” status.

As far as HK's autonomy is concerned there are few analysis available. One of the most comprehensive exercises was carried out by Tamanaha<sup>62</sup>, using Hannum's criteria and comparative elements of other NCGs, who argues that the HKSAR does not possess a high degree of autonomy for its legislative and executive independence are relatively restricted. HK presents a mixed picture characterised by considerable autonomy in some areas, namely in economic, monetary, fiscal and judiciary matters and even, although more moderate, in the legislative area, but restrictions in others areas, namely the executive powers and the designation of the Chief Executive. In light of these considerations, HK should be best characterised as having an expanding "medium degree of autonomy" which can evolve to a high degree of autonomy.

The application of this new framework to the HK case is particularly interesting as it enables us to understand the strengths and limits of the international status of one of the most active and high profile NCGs and how far HK is a robust international actor.

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<sup>62</sup> Tamanaha, op.cit., pp.57-58

## CHAPTER TWO

### THE EMERGENCE OF HONG KONG AS AN INTERNATIONAL PLAYER: CAUSES AND PROCESSES

#### 2.1. SELF-GOVERNMENT AND DOMESTIC AUTONOMY IN POST- 1945 HONG KONG

As a British colony Hong Kong (HK) has always been regarded as *sui generis*, not only because the British sovereignty seemed somehow transitory and particularly constrained by the special relationship with China, considering that the majority of the territory belonged to another state and was controlled under a system of 99-year contractual lease, but also because the majority of the population was of Chinese origin with a strong cultural identity.

One of the most striking aspects of post-1945 HK's history has been its apparent immunity to the decline and disintegration of the British Empire which accelerated during the 1950s, and to the winds of change of decolonisation<sup>63</sup>. It remained stable and prosperous in contrast with the political turmoil that characterised many parts of the Empire. HK is also a rather unique case because it was untouched by the wave of political reforms aimed at promoting the development of colonies towards self-government, the main orientation of British colonial policy after WW II formulated by the Labour government (1945-51)<sup>64</sup>.

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<sup>63</sup> On decolonisation see John Darwin, Britain and Decolonization – the retreat from Empire in the Post-War World, London, Macmillan Press, 1988.

<sup>64</sup> Ronald Hyam (ed.) British documents on the End of the Empire – the Labour Government and the end of the Empire 1945-51, Part I, London, HMSO, 1992, - doc.71, Cmd 7433, 1948.

However, HK was not completely immune to changes elsewhere contrary to what is suggested by conventional analysis. The process of decolonisation and disintegration of the Empire also had an important impact in HK but its manifestation was very different from other colonies. Its impact was not to be found in formal constitutional changes to the political system, but rather in the informal changes leading to an increased *de facto* autonomy both in internal matters, notably financial matters, and later in external affairs, with the transfer of power from the sovereign being made not to local elected politicians but rather to bureaucrats and local business groups.

### **HK and self-government**

In HK there was not a development towards self-government but rather to self-administration. The origins of the self-government model date back to the Dominions' experience<sup>65</sup> - the self-governing settler colonies named as such in 1907, including Canada, Australia, New Zealand, South Africa and the Irish Free State - between 1900 and the early 1930's when they acquired independent sovereignty<sup>66</sup>.

In the context of the Dominions, the self-government concept implied initially a full autonomy in domestic affairs while foreign affairs and defence remained strictly reserved to London as Britain tried to secure a unified Imperial foreign and security policies. Under this system the Dominions acquired already in 1900 considerable powers translated in the capacity to amend their constitutions, to make laws with little interference from Westminster, to control immigration or establish their own tariffs and define their trade policy.

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<sup>65</sup> On the increasing autonomy of the Dominions to engage in foreign relations, in particular with border countries see Frederick Madden and John Darwin, Selected documents on the Constitutional history of the British Empire and Commonwealth vol VI, The Imperial Association : the emergence of the Commonwealth and the evolution of Dominion Status 1900-1965, Greenwood Press Publications, 1993

<sup>66</sup> On the Dominions evolution see Judd Denis, Empire – the British Imperial experience from 1765 to the present, Fontana Press, Harper Collins, 1997, pp. 287-296 and Carter Gwendolen, The British Commonwealth and the International Security: the role of the dominions 1919-1939, Greenwood Press, Publishers Westport, 1947, pp. xv-xx.

After World War I, following the increasing international recognition of their autonomy status demonstrated by their participation in the 1918 Peace Conference and admission to the League of Nations, the Dominions expanded their autonomy status into the sphere of foreign affairs, acquiring limited powers mainly related to the ability to negotiate commercial treaties but still with no interference in the conduct of foreign policy and diplomatic representation<sup>67</sup>. This process is particularly interesting not only because it shows the flexibility of Britain and of the international system vis-à-vis non-sovereign entities, but above all because it set a precedent relevant for the emergence of HK's autonomy in external affairs, as will be argued later.

In the late 1940s a dualistic perception of HK started to emerge in London. First, a vision of HK as a strategic spot, the "Berlin of the East"<sup>68</sup>, mainly adopted by the Foreign Office and to a lesser extent the Ministry of Defence, more pessimist, tended to stress the risks and vulnerability of HK and was prepared to let it go if costs became too high<sup>69</sup>. Second, an economic perspective adopted by the Colonial Office (CO), saw HK as the crucial entrepot for trade with China and a regional base for British businessmen in the East<sup>70</sup>, more optimistic, stressed the strength and potential of HK and regarded political change and self-government as an effective mechanism to consolidate British presence. These two conflicting views led to two different strategies on how to preserve British presence and interests: one supporting the preservation of the status quo; another advocating the promotion of self-government and political development in HK.

HK was never formally granted any degree of self-government. However, although full self-government leading to independence was never an option envisaged for HK<sup>71</sup>, there

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<sup>67</sup> Judd Denis, op.cit. p.290. The first precedent of autonomous negotiation of an international agreement by a Dominion was set in 1923 when Britain allowed the Canadian Government to negotiate the Halibut Fisheries Treaty on its own.

<sup>68</sup> See CAB 131/17 DC1(57)3, 31.1.1957

<sup>69</sup> This perception became less pessimistic only when Britain was able to engage the US in HK defence in 1956 through a secret agreement between Macmillan and Eisenhower according to which Britain accepted not to press for the PRC admission in the UN and in return the US regarded HK as a joint defence problem - see Alastair Horne, Macmillan 1957-86, London, Macmillan Press, 1989, p. 56.

<sup>70</sup> PRO CO 1030/859. This point was explicitly made in a Report prepared by the Colonial Office and the Board of Trade to the Prime Minister in 1957 on the costs and value of HK to Britain.

<sup>71</sup> Ronald Hyam (ed), op. cit., vol II, doc 192 CAB 129/71 C(54) 307, 11.50.54 (Report by the Official Committee on Commonwealth membership- appendix). In this document HK was included in a list of 20

was some openness on the part of Britain to grant a limited degree of self-government and constitutional advancement to HK between 1945-52<sup>72</sup> following London's endorsement of the 1946 Young Plan for political reform as an antidote to a scenario of losing HK seriously considered by London, namely in the Kitson Report<sup>73</sup>, since China's Kuomintang Government request for the return of the New Territories in the context of the 1942 Anglo-Chinese negotiations for the abolition of extraterritorial rights in China<sup>74</sup>. Contrary to what is generally believed, HK was not completely excluded from the new British colonial policy. Interestingly, one can argue that the consideration of the HK constitutional reform preceded the debate on the new colonial policy.

This trend would be aborted and the Young Plan, which included some democratic elements, would never be implemented. Not only the Plan was abandoned in 1949 but the whole idea of constitutional advancement was dropped altogether in 1952 because of the changes in geo-strategic conditions as conventionally explained<sup>75</sup>, but above all as a result of domestic resistance, associated with Governor Grantham's action, who opposed the Plan, and the opposition of the old "hongs" (HSBC, Swire, Jardine Matheson), which considered democratic reforms could create considerable political risks to their own economic interests<sup>76</sup>. I would argue that one factor which has not been sufficiently emphasised was the opposition of the HK elite bureaucracy as it feared democratisation would weaken its own power. This is a relevant element to understand better Grantham's position, himself a cadet in the beginning of his career. The elite bureaucracy was probably the real driving force behind the opposition to reform. It was not a coincidence that the 1952 Urban Council reform finally adopted was nothing else than a new version of the 1946 Hazlerigg proposal.

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colonies for whom independence was impossible, alongside Malta, Cyprus, Gibraltar, Falkland Islands, Fiji and Mauritius. This was mainly explained for security and strategic reasons.

<sup>72</sup> Steve Tsang, Democracy Shelved: Great Britain, China and attempts at constitutional reform in Hong Kong 1945-52, Oxford University Press, New York, 1988.

<sup>73</sup> PRO FO 371/53635. The Kitson memorandum of July 1946 proposed opening negotiations and puts forward different options, including the possibility of retrocession and recognition of Chinese sovereignty in exchange for a new lease and the continuation of British administration

<sup>74</sup> See FO 371/31662, FO 371/31665, CO 129/58823-4.

<sup>75</sup> Endacott, Government and people in Hong Kong: 1841-1962, a Constitutional history, Hong Kong University Press, 1964.

<sup>76</sup> Steve Tsang, op.cit., p. 211.

Although formal self-government powers were not granted, an unorthodox and informal process of devolution of powers to HK did take place. The main difference with the general self-government policy is that these powers were transferred to the hands of the HK elite bureaucracy and the business community and not to LegCo and elected politicians.

### **Financial devolution**

The commitment of the HK bureaucracy and Governor Grantham to gain greater autonomy to HK was clearly illustrated by the process of financial devolution in 1955-56. Some official documents<sup>77</sup> provide the details of an interesting debate that developed between HK and London, inside the Colonial Office (CO) and between it and other departments. It should be recalled that historically HK after having gained some financial autonomy in the course of the XIX century, was submitted to direct financial control of the Treasury after WWII until 1948, when responsibility for supervision was returned to the CO which laid down the new rules for financial control over HK in the 1948 despatch no. 302 of the Secretary of State for the Colonies, Creech Jones.

In 1955 Governor Grantham raised with the CO the question of the degree of financial autonomy, protesting against the limited level enjoyed by HK and pressing for greater autonomy. His main argument was the discrimination HK was being subject to, when compared with African colonies. In his view there was no justification for HK, an important trade centre, to enjoy far less financial autonomy than underdeveloped African colonies with fragile economies.

This claim caused an internal debate within the CO on whether HK should be granted financial devolution similar to the African Colonies and the 1948 despatch changed. Three different positions emerged inside the CO: a position against devolution and for the enforcement of the 1948 despatch<sup>78</sup>; a middle-way position that supported the

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<sup>77</sup> See PRO CO 1030/392.

<sup>78</sup> PRO CO 1030/392, pp.3-4 This position was supported by Mr. Wheatly

solution of revising the despatch in order to adapt it to the new circumstance and to legitimise some of the current practices, but not going as far as to grant full financial devolution<sup>79</sup>; finally a position which supported granting full financial devolution to HK as the existing *de facto* autonomy had not caused any problems and HK managed its finances responsibly<sup>80</sup>. It is interesting to note that all officials involved in the decision-making process recognised that HK enjoyed already a substantial *de facto* financial autonomy.

This last position was finally endorsed by the Secretary of State and the 1948 despatch was revoked according to the terms agreed with Governor Grantham. The new despatch introduced important changes. Firstly, it puts all the emphasis on the mechanism of consultation and not in control and gives priority to semi-official, informal exchanges of information between the HK Government and the Colonial Office. Secondly, the requirement of budget estimates and supplementary expenses' approval by the Secretary of State was abolished. Thirdly, the need for approval was limited to loans with more than one-year maturity, and thus abolished for short-term loans<sup>81</sup>. In compensation the HK Government should formally inform the Secretary of State on financial legislation and proposals on banking.

In sum, under pressure from HK, London formally granted financial devolution to the colony. This set in motion a *sui generis* process, without parallel in the British Empire, by which HK progress towards self-administration, not self-government, was informal and flexible. As a consequence of the lack of clear rules, this process enabled HK to gain in practise higher levels of autonomy than colonies where a self-government policy was applied.

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<sup>79</sup> PRO CO 1030/392, p.7

<sup>80</sup> PRO CO 1030/392, pp.19. This position was supported by Mr. Johnston.

<sup>81</sup> Lyttelton despatch CO 1030/392.

## **2.2.THE EMERGENCE OF HONG KONG'S INTERNATIONAL AUTONOMY : THE INTERNATIONAL TRADE DIMENSION**

The expansion of domestic autonomy preceded and paved the way to the emergence of external autonomy although it was not the determinant factor. This section will address the role of other factors responsible for the emergence of HK as an international actor. The hypothesis that will be tested is whether this was determined by HK's trade identity and the exercise of treaty making powers, by the development of an external representation system or by its role as a financial centre based on monetary autonomy.

### **The Lancashire Agreement and the divergence of economic interests**

One of the key turning points to understand the emergence of HK's autonomy in external affairs, was the signature of the Lancashire Agreement between the HK Textile Negotiating Committee (of textile industries) and the UK Cotton Board, on 31 December 1958 and entered into force on 1 February 1959, by which the HK Association of Textile Industries accepted "voluntary export restrictions" on cotton textiles.

Although signed between two private organisations, the agreement was in reality negotiated between the UK and HK governments and represented a settlement of divergent interests. The textile industry was the leading sector of the labour-intensive, export-led industrialisation strategy adopted by HK. Textile exports increased rapidly, namely to the UK market, benefiting from the colonial preference system and in 1958 HK was already the second major source of imports to the UK of grey cotton cloth<sup>82</sup>. The new competition from HK entailed a strong reaction from the British industry.

The signature of the Lancashire Agreement was the result of a long process between 1955-58 during which the conflict of interests between the UK and HK became

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<sup>82</sup> See Hong Kong General Chamber of Commerce, The First Half – a review of the HK textile Undertaking, Brown and Sons Ltd., Hull, 1960.p. 11.

increasingly apparent and the pressure of London grew while HK tried to resist protectionist measures against its exports.

The origins date back to 1955 when the first signs of a campaign against imports of cotton yarn, grey cloth and shirts from HK became visible in Britain led by Lancashire business interests. The protests were based on the argument of unfair competition because of the low wages in Asia, and specifically HK, already pointing to the idea of “social dumping”. The Lancashire interests pressed for the imposition of trade barriers to HK and India exports in order to protect domestic industries. The British government resisted this pressure and ruled out this possibility. As a consequence the strategy changed and instead of import restrictions it was considered that the solution was to press HK (and India) to accept voluntary limitations of exports. In order to convince HK to accept this, a delegation from the UK Cotton Board, led by Sir Clegg, travelled to HK in early 1957, to try and obtain an agreement. HK businessmen, supported by the HK Government, rejected the Clegg proposal and in May the HK Cotton Spinners Association declared publicly that it could not accept any limitation of exports<sup>83</sup>.

HK's initial resistance did not demobilise Britain and the pressure intensified in the subsequent years. The 1957 visit to HK of F. J. Erroll, MP Parliamentary Secretary to the UK Board of Trade, marked the beginning of a new phase of political pressure and the direct intervention of the British government in this process which until then had been basically informal and conducted by the private sector. The pressure intensified in 1958 because the HK case became more closely interlinked with the Indian case. In fact in 1958 Clegg successfully reached an agreement with India on voluntary restriction but its validity was dependent on Britain reaching similar agreements with HK and Pakistan.

Later on political pressure gained momentum when, under pressure of Lancashire industries, the House of Commons debated in May 1958<sup>84</sup> the problem of HK labour

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<sup>83</sup> Hong Kong Annual Report 1956, HK Government.

<sup>84</sup> Parliamentary session of 23.5.1958 mentioned in Frank Welsh, A History of Hong Kong Harper Colins, London, 1993, pp. 457-458. The attack was made by the Labour MP Ernest Thornton from Farnsworth, Lancashire.

standards which were strongly criticised and considered as “disgraceful”. The subtle message that was being sent to HK businessmen was that if they kept on refusing any limitation, Britain as the sovereign power could impose through legal means higher labour standards in HK with a structural impact on labour costs, likely to damage HK’s competitiveness.

A few months later HK finally accepted to start negotiations with a view to limit exports. In September 1958 a delegation of the UK Cotton Board, led by its Chairman Lord Rochdale, arrived in HK to start negotiations that were conducted between the UK Cotton Board and an HK “ad hoc” Textiles Negotiating Committee headed by J.D. Clague, Deputy Chairman of the Federation of HK Industries in representation of the HK industry<sup>85</sup>, expressly set up for that purpose with the help of the HK Government. An Agreement was signed on 31 December 1958 and entered into force on 1 February 1959. Formally it was an Undertaking given by the HK Textile Negotiating Committee to the UK Cotton Board according to which HK industries agreed to limit cotton textile goods to the UK to a maximum of 118 million square yards per year. The agreement, valid for 3 years was regarded by HK industry as an exceptional and transitory arrangement to give Lancashire industry a breathing space for restructuring. Contrary to HK expectations, the Lancashire Agreement was not going to be terminated in 1962. The pressure for extension of the agreement was very strong in the following years and the Agreement was extended several times.

The Lancashire Agreement marked an extremely important shift, preparing the stage for HK gaining autonomy in running external affairs in trade matters. Besides giving the first signal of the new wave of trade protectionism that was going to come, it had three fundamental implications.

Firstly, it brought into the open the profound conflict of interests between Britain and HK in trade matters. It made clear that although London was responsible for the welfare of HK it was prepared to sacrifice its interests to defend the UK ones. This difference of

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<sup>85</sup> Hong Kong Report 1959, HK Government.

interests led London and HK to adopt two diametrically opposite trade policies: Britain, a protectionist trade policy, clearly in tension with GATT rules; HK a free trade policy, which would become a key characteristics of its emerging international personality.

Secondly, although an intra-Empire question, the Agreement had an important international impact insofar as it created a precedent that was used by third countries to impose similar restrictions to HK exports. This effect was clearly identified by the HK General Chamber of Commerce<sup>86</sup> which anticipated the problem and went as far as to argue already in 1960 that American private interests made much reference to Lancashire and used it as an important argument when lobbying the US Government to press HK to limit its exports to the US market. This link between the Lancashire Agreement and the US-HK negotiation process in the early 1960s is the more relevant as the latter, as will be argued below, was decisive in the emergence of HK's autonomy in external affairs.

Thirdly, the Lancashire Agreement left the UK in an unsustainable position to defend internationally the interests of HK against the various countries trying to impose restrictions to HK exports. Britain had no conditions, no credibility or moral standing to oppose third countries doing exactly the same thing it had done to its colony. The inhibition of the UK to act internationally on HK's behalf in this matter created space for HK to defend its interests on its own and to act autonomously in the international stage.

The next section will analyse the characteristics and dynamics of this crucial process for the emergence of HK's international personality and identity. This process had two very distinct but complementary phases, a bilateral phase and a multilateral phase.

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<sup>86</sup> HK General Chamber of Commerce, *op. cit.* p 13. The connection between the Lancashire Agreement and the US pressure and position was also mentioned by the Governor of HK in a telegram to the Secretary of State for the Colonies. 9.5.1961 – HKRS 270.5.32, CR 12/5905/56.

## **Bilateral Agreements on voluntary limitations on exports of cotton textiles**

During the bilateral phase HK acted internationally under pressure and engaged directly in negotiations with a series of sovereign states to regulate bilateral trade of cotton textiles. Adopting a trade policy radically different from that of Britain, this process contributed for HK to acquire an increasing *de facto* autonomy in managing international affairs in trade. It is particularly important to understand how this came about, what factors favoured HK's autonomy and why did Britain accept losing control and tolerated autonomy.

The negotiation process between HK and the US initiated in 1959 constituted the major turning point and was decisive in the genesis of this new autonomy in external affairs, not only because it contributed to change London's attitude in relation to the management of external affairs but also because it set a precedent to other countries. This clearly justifies looking in more detail at the US negotiation process.

### **HK-US Negotiations**

The American pressure on HK to limit cotton textile exports to the US market started in 1959 immediately after the signature of the Lancashire Agreement. As early as February 1959, when the Agreement entered into force, the Assistant Secretary for International Affairs of the US Department of Commerce, Mr Kearns, visited HK to obtain a limitation of HK textile exports. Its timing and purpose is a clear illustration of the powerful international demonstration effect of the Lancashire Agreement. The pressure further increased in November when Mr Kearns made his second visit to formally request a voluntary restriction of exports of cotton garments from HK.

The impact of this visit was analysed in an exchange of telegrams between the Governor of HK and the Colonial Secretary<sup>87</sup> where the Governor recognised that pressure was strong and that HK was having difficulty in resisting it since the visit caused a split

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<sup>87</sup> HK PRO HKRS 270.5/31, CR 12/5905/56 II, pp. 100, Savingram from the HK Governor to the Secretary of State for the Colonies, no. 1941, 27.11.1959

inside the HK industry. Negotiations began aimed not at reaching a government to government agreement but, inspired by the Lancashire model, an agreement between HK and US industries. HK industries accepted to restrict exports and offered a 3 years voluntary undertaking<sup>88</sup>, but this was not accepted by the American industry. The US did not take any unilateral action and so the whole question died away.

The second US attempt to press HK was in 1961 following the election of President Kennedy. The main factor behind this was the fact that Kennedy, responding to the pressure of American textile industry, had assumed during the campaign strong political commitments to protect the US textile industry from foreign competition.

The attitude of the Kennedy Administration was also explained by two other factors. Firstly, pressure from Congress intensified as it threatened to take unilateral action and impose import restrictions, an outcome the Administration wanted to prevent. Secondly, pressure from Japan, the most dynamic exporter to the US market, which, in the context of US-Japan Textile Restriction Agreement, refused to cut exports if HK was not also pressed to limit its exports to the US market.

The approach adopted by the US to start talks was rather different from the 1959 process in two important respects: the initiative was co-ordinated this time by the State Department and not by the Commerce Department; the US contacted London and did not approach HK directly. This had a clear meaning: the US Government wanted to treat it as an international issue and at the governmental level and no longer as a mere industry to industry private negotiation. The first meeting to discuss the problem of the HK textiles was held in Washington in the State Department in April 1961<sup>89</sup> involving only the UK and US Governments with no participation of HK representatives.

Although this was still an exploratory meeting it had two important implications for subsequent negotiations. First, Britain, possibly as a strategy to alleviate pressure,

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<sup>88</sup> HK PRO HKRS n 270/5/31, CR 12 5905/56, pp. 155, Memorandum of the Association of 22.12.59. The document was published in the HK Govt Daily Information Bulletin of 28.12.1959.

<sup>89</sup> See HKPRO HKRS 270 5/33, CR 12 5905 56 III, doc.4, Minutes of the Meeting.

argued that HK had a significant autonomy and was not “governed from London” and so, given the fact it would be impossible to impose any measure against its will, HK had to participate directly in the negotiations. Secondly, the US clearly established a link between wider US-UK trade negotiations and the HK question in the sense that if Britain did not press HK to solve the textile problem it would not get results in trade issues which were exclusively of the UK interest<sup>90</sup>. In other words, the UK own trade interests could be damaged if London did not press HK to limit its exports.

After this meeting and with a view to prepare the participation of HK in the next stage of talks, the HK Government promoted a co-ordination meeting between the Financial Secretary, John Cowperthwaite, and representatives of HK industries held in May 1961 in the Commerce and Industry Department<sup>91</sup>. In the meeting two decisions were taken. First, the Financial Secretary and the Director of Commerce and Industry should attend the meeting in London in representation of HK. Second, that they should not enter into final negotiations but should say to the Americans that an agreement with HK industry was not out of the question.

A similar meeting was held two weeks later where the Financial Secretary informed the industry about the results of the London talks. This close consultation and co-ordination between the HK Government and the private sector was from the beginning a fundamental trait of HK’s international participation and indeed one of the ingredients of the success of its external action as a NCG. This contributed not only to create a legitimacy basis for the HK Government to act externally representing HK interests, but also to make its action more effective.

### **The London negotiations**

The negotiations held in London on 15-16 May 1961 on HK textiles were of utmost significance in the process of HK gaining autonomy in external trade matters. Although

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<sup>90</sup> The Deputy Director of the Office of International Resources, Mr Nichols told the UK delegation that “... but if on wider trade policy grounds the UK wished for some progress to be made, perhaps a little pressure could be brought to bear on HK.” Record of the meeting HKRS 270 5 33, doc.4.

<sup>91</sup> Minutes of the meeting in HKRS 270 5 33 – CR 12 5905/56 III, doc. 8, pp.1-6.

a UK delegation was formally present at the meetings, the negotiations with the US were conducted directly by the HK representatives which adopted an autonomous strategy aimed at resisting the American pressure and postponing any agreement on export restriction.

The three sessions of the talks -15 May (morning), 15 May (afternoon) and 16 May (morning) - were different in nature and contents. The minutes of the meetings<sup>92</sup> are an extremely interesting document to illustrate and explain a fundamental change in the relationship between London and HK in the management of HK's external affairs and the beginning of HK's autonomy in international matters.

The 15 May meetings were attended by the UK, the US, Canada and HK delegations, being HK represented by the Financial Secretary, Sir John Cowperthwaite and the Director of Commerce and Industry, Mr Angus. The morning meeting was dominated by the introductory remarks made by the UK delegation, Mr Melville from the CO, who emphasised two crucial points that set the tone for the negotiations. On the one hand he stressed HK's autonomy and pointed out that although HK had formally an "old fashioned Constitution" and many powers concentrated in the hands of the Governor, in practice he could not impose HK's industry to accept an agreement. This was a recognition of HK's *de facto* autonomy and Britain's limitations to solve directly the problem.

On the other hand, Melville used the Cold War argument stressing the common British and American concern about HK vulnerability as the "Berlin of the East". This required, he argued, a careful consideration of the negative impact of measures that could weaken HK and undermine its stability. In short, the British intervention was confined to political aspects and sent a clear message that the US had to deal directly with HK.

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<sup>92</sup> HKPRO 11KRS 270.5/33, CR 12/5905/56 III, docs.38 and 39.

The two most important sessions were the 15 May afternoon session and the 16 May, which were dominated by direct exchanges between HK and the US. On 15 May afternoon the exchanges between the HK representative, Cowperthwaite and the American chief negotiator, Schaetzel, focused on the justification for the restriction of HK textile exports<sup>93</sup>.

The HK position in this meeting was structured around three points. Firstly, to deconstruct the idea that the Lancashire Agreement was a precedent which could legitimise the US request for export restriction. Because Lancashire was indeed, as argued above, a factor which weakened HK's bargaining position, Cowperthwaite decided to take the initiative and from the start raise directly the question as a pre-emptive strike to undermine a potential American line of argument. He argued that Lancashire could not be seen as a precedent because there was a special situation in the relation between HK and Britain which did not apply to third countries, the fact that all HK exports entered the British market duty free because of the Commonwealth preference, already an important UK concession. Therefore the starting point was quite different and the situation was not comparable.

Secondly, Cowperthwaite tried to question the justification for the American request on the grounds that there were no clear signs of disruption of the American industry, as production had not decline, and that the US had rejected the 1959 voluntary undertaking offered by HK industry. This meant that restrictions were not after all really necessary. Furthermore, a limitation of exports to US and Canada could have very negative repercussions for HK, because it would create a precedent leading other countries to request similar limitations, but for the US as well.

Thirdly, refrain the American impetus to reach an immediate agreement and strengthen HK bargaining position by arguing the HK Government had no mandate to negotiate as the Government could not impose its will on HK businessmen and therefore any decision had to obtain the consent of the industry.

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<sup>93</sup> HKPRO HKRS 270 5/33, CR 12-5905/56, III doc. 38, (minutes)

In response Schaetzl made clear that there was this time, unlike in 1959, a clear political determination to act, in particular because President Kennedy had a political commitment to solve the problems of the US textile industry. Cowperthwaite reacted to this by challenging the veracity of the assumption that HK exports caused damage to US production and pressed the American negotiator to make the “demonstration of the damage”, clearly showing HK was not intimidated and was determined to resist any violation of free trade principles.

Schaetzl also pointed out that the US was prepared to offer compensation for the damage caused to HK industry by a restriction of exports. This was also rejected by Cowperwaite, who argued that not only direct compensation was out of the question but any form of indirect compensation was not viable since it was politically very sensitive to establish a link between limits on exports and reception of US aid.

In relation to the question of compensation for HK’s effort, the UK raised the question of assistance being provided to HK through a reduction of the US tariffs in items other than textiles. Interestingly, Cowperthwaite rejected the UK proposal, clearly showing disagreement and distancing himself from the UK strategy to try and bridge positions. Clearly, the HK negotiation strategy was different, and was aimed at resisting export restrictions and delay as much as possible any negotiations or agreement. This was another important signal of HK’s autonomy.

The meeting on the 16 May was even more interesting in terms of showing HK’s autonomy and relative “room for manoeuvre” to negotiate with the US. In this meeting, held in the Colonial Office with the participation of the UK, US and HK delegations and chaired by Mr Melville, for the first time substantive aspects of a possible agreement were negotiated<sup>94</sup>.

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<sup>94</sup> HKPRO HKRS 270 5 33, CR 12 5905 56, doc. 39, Minutes.

On the assumption that something should be done to regulate HK's exports in the short term, the US representative, Mr Jacques, presented the broad lines of its proposal which included two aspects: (i) a global quota for HK textile exports to the US of 180 million square yards, based on average exports during the period 1958-60, which implied a 40% cut back compared to the 1960 exports; (ii) sub-quotas for 7 critical items of garments based on average 1956-60 exports.

The HK delegation reacted negatively to this proposal. Mr Angus pointed out that its contents was far worse than the 1959 Kearns' proposal<sup>95</sup> and Cowperthwaite was even more radical arguing that with this proposal HK would not be more damaged if the US took unilateral action an imposed import restrictions, thus signalling that HK was not desperately seeking an agreement to avoid unilateral action and could simply withdraw from the process leaving the US in the politically difficult position to impose unilateral restrictions.

Although stressing that they had no mandate to negotiate, Cowperthwaite and Angus presented after all an informal counter-proposal which was deemed to be nothing else than what they thought could be acceptable to the HK industry. This included 3 points: (i) quota based on 1960 figures with a 5 % annual growth rate; (ii) restrictions should be limited only to really critical items (rejecting a global quota and pointing to a reduction in the number of critical items); (iii) other items should be considered on their merits and objective criteria had to be defined to qualify an item as critical.

In spite of the fact the negotiation was not conclusive, the important fact was that on 16 May a substantive negotiation occurred directly between the US and HK on trade matters with a view to a bilateral agreement on voluntary exports restrictions. HK was able to pursue its own interests and speak with its own voice. Moreover, there were also three important innovations of great significance.

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<sup>95</sup> HKRS 270.5.33, CR 12 5905 56, doc 39, pp. 6.

Firstly, the UK was present at the negotiations but did not speak on behalf of HK neither took the lead of the negotiation process, adopting instead a passive role and allowing HK representatives to defend its own interests. Secondly, further stressing HK's autonomy, the UK played the role of a mediator between the US and HK delegations trying to bridge divergent positions with a view to facilitate an agreement. Formally, the UK took an independent stand but if it was closer to any position it was to the American one. Thirdly, not only HK spoke on its own but expressed in relation to specific aspects disagreement with the UK and showed clearly it had its own negotiation strategy different from Britain's underlying strategy in the sense it was committed to resist as much as possible an agreement, while Britain, under the US pressure, was trying to help reaching an agreement.

The motivations of HK to actively engage in this process and to take a firm position were obvious: save its largest industry whose prosperity was highly dependent on exports to the US, already then HK's first export market.

The interesting question is what were the motivations of Britain to allow things to develop as they did, why did London allow HK to conduct autonomously the negotiations with the US in violation of constitutional rules. The answer is complex and involves the consideration of the interplay between three different factors.

Firstly, because of the Lancashire Agreement, London was faced with a serious problem of lack of credibility and morale to oppose the requests of third countries and defend HK's interests that would be in clear contradiction with the protectionist measure it had taken against HK. Moreover, Britain felt somehow responsible for the problem HK was facing considering that the Lancashire Agreement set a precedent contributing to the pressure the US and other countries were putting on HK.

Secondly, Britain was not willing to damage its crucial relation with Washington because of HK and therefore tried not to get too much involved and maintain a low profile, fearing the risk of paying costs in terms of its own trade relations with the US if

it failed to deliver what the US wanted. So, instead of taking the lead and assuming the responsibility to get HK's agreement, London opted to stress HK's autonomy and let HK take the stage. This was a risk-aversion strategy. By taking a broker role Britain was being constructive and could not be accused by the Americans of not co-operating but at the same time could not be held responsible for an eventual failure of the negotiations.

Thirdly, as argued earlier, there was a precedent in British Colonial policy related to the Dominions' external autonomy in commercial matters and so this autonomy was not a completely new thing for Britain. In addition, it had a limited scope and did not imply relinquishing powers in other areas of international affairs. This circumstance contributed to weaken the opposition of the British bureaucracy and the Foreign Office to this solution.

### **The GATT Cotton Textiles Agreements**

Two months after the London meetings, HK was taking part in multilateral negotiations held in Geneva, under the auspices of GATT (17–21 July 1961) to negotiate a short term cotton textile arrangement. HK formally participated as part of the UK delegation, although the HK industry had tried to convince the HK government that a different format was required. Interestingly, the Chairman of the Federation of HK Industries, Sir Sik-nin Chau, in a letter sent to the Director of the Commerce and Industry, made clear that

“...having regard to the divergent interests of the United Kingdom and HK on the textile question, HK must be directly represented at the Conference, and any attempts for representation to be through the UK authorities must be strongly resisted...”<sup>96</sup>.

The HK Government did not adopt this position, but caught between the pressure of the industry for HK to defend autonomously its interests and London's monopoly in foreign affairs, did propose something else rather unusual which caused some surprise in London: the participation in the multilateral negotiations of a representative of the HK

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<sup>96</sup> HK PRO, HKRS 163.1 2718 (Letter of 8.5.1961).

industry to accompany the HK delegate as an adviser<sup>97</sup>. London turned down this proposal<sup>98</sup>.

Although apparently the HK participation in the multilateral negotiations followed the traditional format of integration in the UK delegation, in reality the negotiations marked a departure from conventional practice. The HK Financial Secretary Cowperthwaite, as recognised in his report<sup>99</sup>, was able to intervene directly and separately from the UK delegate and given freedom to present HK's specific positions and make its own voice heard. Furthermore, the HK representative presented, unlike the UK, specific reservations to the proposed text of the Short-Term agreement related on the one hand to the presentation of clear evidence of disruption in importing countries and the need to limit arbitrary requests for restrictions and, on the other, to the risk of free riding by third countries which were not restraining their exports. This marked a clear differentiation from the UK and asserted HK's firmness in negotiations.

Finally, HK delayed for some months<sup>100</sup> the final acceptance of the agreement by the UK thus conditioning its entry into force. Even more importantly, when the Foreign Office sent the document of acceptance both for Britain and for HK to the GATT Secretariat only in December 1961, there was a crucial distinction made. In relation to the UK the acceptance was not subject to any limitation while in relation to HK acceptance was subject to specific understandings on the operation of the agreement involving three aspects all related to obligations of importing countries<sup>101</sup>. This was an unprecedented public recognition by London, formally communicated to an international organisation, of HK's specificity making clear the agreement's application to HK was different from its application to Britain.

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<sup>97</sup> HK PRO HKRS 163/1/2718 Telegram from the Governor of HK to the Secretary of State for the Colonies 5.7.61.

<sup>98</sup> HKPRO, HKRS 163/1/2718 Telegram from the Secretary of State to the Governor on 7.7.1961.

<sup>99</sup> HK PRO File HKRS 163/1/2718: Report on GATT Cotton Textiles Meeting in Geneva 17-21 July.

<sup>100</sup> See HKRS 161/1/2718: GATT Draft Record of meetings 17-21 July, Spec (61) 247, pp. 8.

<sup>101</sup> HKPRO, HKRS 163/1/2718: Telegram sent by the Foreign Office to the UK mission in Geneva telg no. 489, 5.12.1961.

This negotiation process was also important in terms of the impact it had on HK's perception of the challenges it would have to face to defend its interests internationally and how it had to strengthen its capacity to act externally. The reflections of Cowperthwaite in the Report he wrote on his return to HK are particularly interesting and illustrate how far he was conscious of the great difficulties HK was bound to face and of the need to strengthen and organise HK's bureaucracy to be prepared for international negotiations

This was an extraordinary Conference which I found very exhausting, mentally and physically because of my isolated position. It had an unrealistic air because we were talking politics in the guise of economics ... I am afraid however that if our international trade develops its complexity we will require a considerable strengthening of our economic staff<sup>102</sup>.

In 1962 HK's international participation was still a one-man show. Cowperthwaite was really acting alone but the transition towards an institutionalised approach and the creation of a critical mass to manage international matters was going to be very quick.

The Short Term Arrangement entered into force in January 1962 was going to last until 1 October 1962 when it was replaced by the Long Term Cotton Textile Arrangement. Its significance is not limited to the international visibility HK gained during the negotiations. It is also important for another reason. Bilateral agreements were negotiated in the framework of the multilateral instrument and were seen as a mere development of it, not as innovative instruments. This contributed to soften London's potential opposition creating room for HK to negotiate and sign these bilateral agreements on its own, since the UK had signed the multilateral umbrella agreement on behalf of HK.

### **The network of bilateral trade agreements**

After the entry into force of the Short Term Cotton Textile Arrangement, HK was naturally confronted with requests from various countries to restrict textile exports. This

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<sup>102</sup> HK PRO, HKRS 163.1/2718.

forced the HK Government to engage actively in detailed and difficult negotiations with a group of importing countries leading to the signature of various bilateral agreements with nine different countries: the US (1962), Canada (1964), West Germany (1966), the Benelux countries (1967), Norway (1963), Sweden and Australia (1968) and later with the EEC (1970). All these agreements were renegotiated several times<sup>103</sup>.

Different patterns started to emerge. For example in the West Germany case, Bonn contacted first the HK Government directly but, as HK showed resistance, turned to Britain and requested the UK Embassy in West Germany a restriction of HK exports. Norway illustrates a different case where the whole process was conducted directly with HK leading to one of the first cases of exercise of “treaty making powers” by HK, as the agreement was directly signed by the Director of the Commerce and Industry Department on behalf of HK.

This impressive network of bilateral agreements developed during the 1960s was a crucial factor behind HK’s growing international visibility and action.

### **Treaty making powers**

All negotiations were conducted autonomously by HK with little interference from London, even when there was a formal intervention of the British diplomatic representation like in the Italian case<sup>104</sup>. However, there was some degree of ambiguity and a mixed and contradictory practice in terms of the exercise of treaty making powers by HK.

The conventional practice consolidated in the 1950s was that although HK could participate actively in the negotiations, international agreements were always signed by

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<sup>103</sup> See Hong Kong Reports, from 1961 to 1970, HK Government.

<sup>104</sup> HK PRO, HKRS 270/5/48. The 1965 negotiations with Italy provide an interesting example of the autonomy HK enjoyed. Italy approached the UK and presented an aide-memoire to the British Embassy in Rome and talks were held in Rome attended by 3 HK officials who conducted the negotiations. Although the UK Embassy was involved in the follow up it was clearly stated in a telegram from the UK Ambassador in Rome to the Governor of HK on 10.3.1965 that Britain had no interference in the substance of the negotiations. “... I saw Parboni this morning. I emphasised that the purpose of my visit was not to continue negotiations on behalf of HK but to receive Italian replies to your proposals.”.

Britain on behalf of HK. An example were the trade agreements between HK and Indonesia signed in 1956 and 1960 for HK to carry out the spinning of American raw cotton supplied to Indonesia under US public law 480 programme, a mechanism of US aid.

The 1956 Agreement was signed by the UK Charge d’Affaires in Jakarta and the 1960 agreement by the UK Ambassador in Jakarta, who was authorised by the Foreign Office to sign the trade agreement on behalf of HK<sup>105</sup>. It should be stressed that London was eager to tightly control the exercise of treaty making powers and preserve its monopoly. An interesting illustration of this concern is provided by the letter of the Foreign Office sent to the British Embassy in Jakarta related to the extension of the 1956 agreement<sup>106</sup> where the question of the capacity for HK to enter into an international agreement on its own was explicitly addressed. It stressed the idea HK had no such capacity and therefore extreme care should be put in preventing HK from exercising treaty making powers and avoid any reference in the text that could suggest otherwise<sup>107</sup>.

The Foreign Office was particularly concerned about the international implications and the difficulty to justify how HK was able to sign an international agreement

“...as the Notes will be registered with the United Nations some explanation will have to be given to them to forestall any possible question by UN of the capacity of the Government of HK to conclude an international agreement within the meaning of article 102 of the Charter”.

The solution to solve the problem was either to consider that the agreement was signed by the UK, acting on behalf of HK, or, in alternative, the HK Government acting with

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<sup>105</sup> HKPRO HKRS 163/1/1814, Telegram from the Foreign Office to the Ambassador in Jakarta of 24.12.1959.

<sup>106</sup> HK PRO file HKRS 163/1/1814 Doc 167 Letter from the Foreign Office to UK Embassy in Jakarta, 12.2.1957.

<sup>107</sup> The letter mentions “ The main cause of our concern is to be found in the wording of paragraph 3 of the notes of July 2, 1956, referring to the HK deal which gives the erroneous impression that the government of HK is competent to enter into such an agreement with a foreign government on its own account. Notes exchanged last year therefore raised the question of the capacity of the Government of HK to enter into an international agreement with a foreign government.” HKPRO, HKRS 163/1/1814.

the consent of the UK. These instructions were followed by the Jakarta Embassy and the first formula was the one used in the exchange of notes of 5 April 1957<sup>108</sup>.

This orientation was still followed in the 1960s. The 1965 Italian case is a good example of this continuity. Italy approached Britain and presented an aide-memoire to the UK Embassy in Rome requesting a limitation of HK exports. The HK Government prepared a draft text of the memorandum and it was sent to the Secretary of State in London for consideration and possible amendments and was then presented by the British Embassy in Rome to the Italian authorities. This Agreement, between the Italian and HK Governments, would have been signed by Britain on behalf of HK if at the last moment the Italian Government had not decided to call off the process<sup>109</sup>. The approach taken by Rome to contact the UK in the first place opened the door to London's interference.

However, at the same time a completely different practice emerged which constituted a fundamental innovation in the 1960s. HK was able to sign bilateral agreements on export limitations on its own, so a *de facto* autonomy in the exercise of treaty making powers had developed. The case of Norway, mentioned earlier, provides a clear example of this new phenomenon of great significance for HK's international personality as the agreement was signed directly by HK in Oslo in March 1963<sup>110</sup>, without any previous formal authorisation from London.

During the first half of the 1960s it was possible to find a mixed picture, hardly surprising in a context of change where the old rules were no longer applicable but the new rules were not yet consolidated. In some cases HK would exercise treaty-making powers on its own. In others, Britain exercised greater control and signed agreements on behalf of HK limiting autonomy. One of the variables which tended to influence the practice was the initial channel chosen by the foreign country, i.e. whether it would approach Britain as the sovereign power formally responsible for HK's external affairs (West Germany, Italy) or instead contact directly the HK Government (Norway,

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<sup>108</sup> Treaty Series n. 1 (1957) London, Her Majesty's Stationery Office.

<sup>109</sup> HK PRO file HKRS no. 270 5 48

<sup>110</sup> Hong Kong Annual Report 1964, HK Government.

Netherlands) or in some cases both at the same time. When Britain was involved from the beginning, foreign countries feared direct contact with HK could generate misunderstandings, London would naturally exercise its formal powers of international representation of HK. When foreign countries contacted directly HK, as they increasingly realised that trade policy was really decided in HK, Britain interfered little and HK tended to sign the agreement on its own.

Confronted with an unorthodox phenomenon of a sovereign power with little capacity to impose its will on the colony, foreign countries responded in an unorthodox way violating international rules and practice to pursue their interests. As they realised decisions on trade were taken in HK, not in London, started to contact and deal directly with HK surpassing Britain. This had an important implication for the deepening of HK's international status because these binding international bilateral agreements marked the origin of the emergence of HK's international personality as they created a set of rights and obligations for which HK was directly responsible.

The intensification of this new phenomenon of HK's *de facto* exercise of limited *jus tractum* powers was a clear violation of the constitutional rules governing HK. Britain's response was to change the rules in order to legitimise the illegal practice, thus putting an end to a situation that could affect its prestige. So, in 1969 Britain informally granted devolution of powers to HK to sign international bilateral trade agreements<sup>111</sup> recognising HK's autonomy in this sphere. That was the case of the 1970 bilateral agreement with the US on cotton textiles which was formally concluded by an exchange of notes between the US Consul General in HK and the Director of Commerce and Industry in December 1970<sup>112</sup>.

The consolidation of HK's new international status involved not only the process of negotiation and formalisation of bilateral agreements, but also the process of

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<sup>111</sup> This was not formalized in writing but constituted an informal understanding for which evidence is scarce. However there is a credible source to this informal devolution process the Report of the Advisory Committee on Diversification, 1979, Government Printer, Hong Kong. pp. 301-302.

<sup>112</sup> Annual Departmental Report CID 1970-71, HK Government.

implementation of those agreements, which contributed to the formation of HK's international image.

The strategy adopted by HK was to control exports rather than have import restrictions imposed by importing countries which would mean losing any capacity to influence events. HK developed and implemented an effective and sophisticated system of export control and gained relevant expertise in managing it. This implied a high level of co-ordination between the government and the business sector for efficient quota allocation to firms with two objectives: ensure that quota was not exceeded which would have negative effects; secure that quota was fulfilled in order to avoid its reduction on the grounds of non-utilisation<sup>113</sup>. Undoubtedly HK gained international credit for the efficient management of the export control system and built an image of credibility and capacity to comply with obligations and to respect commitments. HK attained consistently a high performance rate in terms of quota utilisation<sup>114</sup>, thus being regarded as a trustworthy partner.

The export quota system had another important effect though less visible and generally ignored: the change in HK's industry attitude which became more supportive to protectionism leading to a growing divergence and tension with HK Government free trade policy<sup>115</sup>. In fact, as a consequence of a system of quota distribution, an oligopoly structure emerged and industries that were granted quotas developed a vested interest in maintaining them as they worked as barriers to entry to new competitors. This reduced internal and external competition pressure and allowed the development of a profitable secondary market of quota sub-allocation, generating considerable rents for firms that got the quota initially but were unable to fulfil it. This contradiction risked undermining HK's international bargaining position. Ironically, the conflict which existed earlier between the UK and HK on trade policy was a reality within HK by the late 1960s.

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<sup>113</sup> Interview with William Dorward, 21.1. 2001.

<sup>114</sup> Annual Departmental Reports CID 1967 –70. For West Germany the level of quota utilisation amounted to 90% in 67 and 97% in 69; for the US the quota utilisation on the cotton textiles agreement was extremely high ranging from 94.4% in 1967 to 99.5% in 1968 and 99.9 % in 1969.

The management of this complex network of agreements made HK the forerunner of bilateral textile negotiations at the world level. As a consequence, HK gained relevant expertise in dealing with very technical and complex trade matters and showed capacity to manage effectively export control systems and comply with its obligations, thus asserting its international credibility.

The evolution since the late 1950s was remarkable and HK had moved a long way since the first negotiations with the UK on the Lancashire Agreement. The changes were striking: from an approach based on industry to industry private agreements which had no international dimension to government-to-government agreements implying a set of international obligations and rights; from a strategy to resist restrictions on exports to a full adherence to the voluntary export restraints model; from a process based on the will and capacity of a single man, John Cowperthwaite, to the creation of an institutional and professional structure to act internationally and the set up of a system of external representation; from no autonomy in external relations to an increasing degree of autonomy first in controlling and conducting the substance of negotiations and then by exercising a *de facto* autonomy in *jus tractum*, later legitimised by the 1969 devolution of powers act.

By the late 1960s HK had definitely gained autonomy in external affairs but only in a specific area – trade – an evolution which has a clear parallel with the experience of the old Dominions except the fact HK was not granted constitutional self-government. At the same time other areas like shipping and civil aviation were, in contrast, still under the tight control of London, and civil aviation international agreements continued to be negotiated and signed by Britain.

### **The multilateral phase: HK in GATT in the 1970s**

The participation of HK in multilateral organisations in particular GATT in the 1970s gave an important boost to HK's international image and status. This marked the

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<sup>115</sup> Interview with William Dorward, 21.1. 2001.

beginning of a second phase where the level of autonomy in managing external commercial affairs increased.

By 1969, HK was participating in different capacities in eight main multilateral organisations of universal and regional nature: GATT, ESCAP, UNCTAD, OECD, UNDP, the APO (full member), ADB (full member). Among these multilateral organisations the GATT was by far the most important and strategic one for HK, constituting one of the pillars of HK's international participation.

The status of HK in GATT was particularly interesting and *sui generis*. Since 1947 and until 1986 HK was not a contracting party of GATT on its own. The UK was the contracting party that had applied the GATT rules to HK and acceded to GATT on behalf of HK. It must be stressed that the fact HK was not a contracting party to GATT did not mean it was not protected by the GATT system. By virtue of the UK membership and extension to HK, the Colony could legally react to the violation of GATT rules by third countries likely to affect its rights. This gave HK some bargaining power and explains why importing countries were so interested in obtaining HK's agreement to restrain exports, because otherwise they had, in order not to violate GATT rules, to resort to anti-dumping or safeguard mechanisms under GATT.

The GATT negotiation process of the 1974 Multi-Fibre Arrangement (MFA) marked a turning point in HK's international participation and identity and made a decisive contribution to consolidate HK's autonomy in external commercial affairs.

Negotiations started in 1972. HK was extremely interested in these negotiations because of its potential impact on the entire textile industry which accounted then for more than 50% of HK's exports. In these negotiations HK was represented by William Dorward, a HK official recently appointed head of the Geneva Trade Office. This constituted an important innovation as he was the first ever HK official to be allowed to hold that position. Dorward was a member of the "administrative officers" elite bureaucracy with a vast experience in trade matters and international bilateral negotiations. His

designation clearly showed that the HK Government felt the need to have its own people in charge and has strongly pressed for his appointment to conduct the negotiations and defend HK interests on the spot.

HK played a high profile and very relevant role in the MFA negotiations<sup>116</sup>. It made an important contribution to structure and strengthen the developing countries exporters' position in the negotiations, through leadership in technical matters, by providing advice to the developing countries group on the contents and implications of the draft agreement and warning against the most important threats to exporters' interests.

Moreover, it has also actively contributed to the negotiations by playing a broker role at two levels. First within the developing countries group by bridging positions between different interests, namely between "old" and "new" exporters, a role that was accepted because HK was seen as more neutral than other countries, like India. This has certainly contributed to a greater co-ordination and a more unified stand of exporting countries. Second, to a lesser extent, HK has also helped bridging the differences between developed and developing countries, importers and exporters, taking advantage of its credibility and good relations with the developed group. For instance, HK gave an important contribution to the debate leading to the creation of a textile surveillance body as a control mechanism.

The high profile of HK during the early stages of the negotiations culminated in its direct participation in the very restricted group that conducted behind closed doors the final stage of negotiations and struck the final agreement. This group included six actors: the US, EEC, Japan, India, Brazil and HK<sup>117</sup>. The participation in the inner circle, where HK was the only non-sovereign entity, constituted not only a recognition of HK's economic power and strong position in world textiles trade, but also an international recognition of its autonomy in conducting external trade relations, the more

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<sup>116</sup> Interview with William Doward, 21.1.2001.

<sup>117</sup> Interview with William Dorward, 21.1.2001

so as the UK did not attend these final meetings, because as a EEC member its interests were represented by the European Commission.

HK's international visibility reached a high level without precedent in HK's history of international participation, in particular in a multilateral forum. It is important to understand how this qualitative change came about. I would argue that three key factors accounted for this unprecedented role of a NCG in an international organisation.

Firstly, HK possessed a high level of expertise and technical competence in textiles trade which enabled HK to play a leadership role among the exporter's group and to be seen as a credible interlocutor by developed countries. This was mainly the result of the relevant experience acquired during 10 years of intense bilateral negotiations on cotton textiles. Indeed, the bilateral phase was a crucial condition for the affirmation of HK's influence in multilateral *fora*.

Secondly, the success of the efforts developed by HK, namely by Dorward, to cultivate ties and become accepted in the developing countries circle. In the beginning of negotiations HK was regarded with suspicion by developing countries, as it was seen as controlled by Britain and closer to the developed countries group. Dorward felt HK faced a problem of credibility because it was difficult to convince developing countries that HK's interests were coincident with theirs.

The decisive factor for HK to gain the confidence and get accepted in the circle was the close relationship with Brazil. Being a large and very influential country within the developing group, more moderate than other leading countries like India or Indonesia, Brazil was chosen as a strategic "entry point" and Dorward started cultivating ties with the Brazilian Ambassador and chief negotiator in Geneva, Marcelo Raffaelli. Brazil became HK's most important ally and the main sponsor of its acceptance in the developing countries circle. The perception of the G-77 on HK changed. If this confidence had not existed HK would have never been able to influence developing countries' positions and through this the outcome of negotiations.

Thirdly, the UK entry into the EEC in January 1973, during the negotiations, had a very important effect in terms of facilitating HK's greater *de facto* autonomy in conducting multilateral commercial negotiations in GATT. In fact, the UK became diluted in the EEC and lost its direct voice in GATT because of the Commission's exclusive competence in trade matters. The HK representative, now a HK official, sat in the EEC delegation besides the Commission. Not only was he allowed to express his views in parallel with the Commission, but also his positions were frequently different and often in contradiction with the European common position.

This contrast contributed to strengthen HK's separate identity. HK emerged therefore as a *sui generis* and unprecedented case, a non-sovereign entity which adopted positions different from the delegation in which it was formally integrated. The important point was that the international community accepted and responded with flexibility to this unknown situation, granting HK a new and unparalleled status of a "quasi-contracting party".

The involvement of HK in the MFA negotiations had important implications for HK's autonomy. On the one hand, HK's autonomy and separate voice were strengthened and more than that legitimised and recognised by the international community at large. This implied a qualitative change because during the bilateral phase recognition of HK's international personality was made on a case-by-case basis and by a limited number of countries, the signatories of bilateral agreements. Now this was a much broader recognition of HK's capacity to act internationally.

On the other, the MFA process had a far-reaching implication for HK's international identity. It added a new element to it, the developing country status, as HK became an active member of the developing group. Before the negotiations HK was more associated with the OECD Group, participated in Group B meetings in UNCTAD and had closer links mainly with developed countries because of the bilateral negotiation process.

The MFA negotiation process represented the resolution of this ambiguity and the clear option for a new strategy to join the developing countries camp and side with its interests in order to strengthen its bargaining position. In so doing HK was adapting to the new challenges of a more difficult and politicised international context marked by the New International Economic Order debate. HK realised that in order to defend its interests it could no longer rely on the letter of agreements and the skills of its negotiators alone against the protectionism of OECD countries. It had to make alliances and join in with developing countries that shared similar interests, in order to reduce its vulnerability and enhance its bargaining position, namely by influencing the developing countries' positions.

The exercise of this *de facto* autonomy in conducting external commercial relations, was a catalyst for the emergence of an international identity which was axed on four main distinctive traits: (i) Free trade champion against the tide of protectionism; (ii) a responsible and trustworthy player which respected the letter and spirit of agreements and complied to its obligations; (iii) a facilitator of agreements helping to bridge divergent positions between importers and exporters, developed and developing countries; (iv) a developing country identity.

### **2.3. THE EMERGENCE OF HONG KONG AS AN INTERNATIONAL FINANCIAL CENTRE AND AUTONOMY IN MONETARY AFFAIRS**

The main purpose of this section is to understand the factors that accounted for HK's development as an international financial centre and what role did this play in the emergence of HK as an autonomous player in the international system. The hypothesis that will be tested is that the financial dimension might have been a more important basis than trade for the affirmation of HK's external autonomy and identity.

After WWII HK's financial sector experienced a considerable expansion that resulted from the interplay between three different factors<sup>118</sup>. Firstly, the postwar second wave industrialisation started in the early 1950s<sup>119</sup>, has not only been supported by the banking sector in terms of credit but has in turn generated an increasing demand for banking services. Secondly, the 1949 communist victory in the Chinese civil war and the growing Cold War tension and instability in the region, caused unrest in many areas, namely in Southeast Asia, leading to large inflows of capital from China and Southeast Asia into HK seeking security. HK was regarded as a neutral and safe place and so capital, just like people, took refuge there. Thirdly, the Chinese Overseas factor and the fact HK developed a new role as a “financial entrepot” as the HK banks became the main players in channelling overseas remittances to residents in China leading HK to become the world capital of the Overseas Chinese businesses<sup>120</sup>.

### **The banking sector and banking crises**

In the postwar period the financial sector was still characterised by a low degree of complexity and sophistication as it was limited to banks. Other financial institutions were underdeveloped, in particular the stock exchange. As a consequence the financial expansion was mainly the expansion of the banking sector which accelerated from 1954 onwards based on the growth in size and strength of a core group of institutions rather than on the expansion in the number of banks. In fact, the number of licensed banks decreased from 143 in 1948 to 94 in 1954 and 74 in 1972 but in contrast the number of branches increased from 3 in 1954 to 404 in 1972<sup>121</sup>.

During this phase the sector was also characterised by the dominant position in the market of the British banks, in particular, the Hong Kong and Shanghai Banking Corporation (HSBC), by far the largest commercial bank in HK. However, although

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<sup>118</sup> See Y.C. Jao, Banking and Currency in Hong Kong – a study of postwar financial development, Macmillan Press, London 1974, pp. 18, 43.

<sup>119</sup> The beginning of HK industrialisation dates back to the early 1930s when a number of industries were established to take advantage of the Imperial Preference System created by the 1932 Ottawa Agreements – see Jao, “Financing Hong Kong's postwar industrialisation – the role of the Hong Kong and Shanghai Banking Corporation” in Frank King (ed.) Eastern Banking – essays in the history of the Hong Kong and Shanghai Banking Corporation, Athlone, London, 1983, pp. 545-596.

<sup>120</sup> Enright et al (eds.), The Hong Kong Advantage, Oxford University Press, 1997, pp. 65-70.

controlled by British capital, the Bank had its headquarters located in HK and not in London. This implied that the HSBC was not subject to supervision of British monetary authorities and this constituted an interesting early sign of the autonomy of HK's financial sector vis-à-vis Britain.

Another important feature of the banking system was the absence of a Central Bank and the unparalleled situation of having private banks performing some of its duties. Although public institutions retained some functions, the majority was performed by private banks, in particular the HSBC which had a "quasi-central bank" status, illustrating the considerable power private banks possessed in HK's financial system.

In the area of monetary policy their power was further enhanced because in the absence of the majority of traditional instruments, the banks controlled the only instrument left, interest rates. In fact, under the Interest Rate Agreement established in July 1964 by the Exchange Banks Association, licensed banks started to co-ordinate their positions on exchange rates and to set the maximum rates of interest for deposits in HK dollars in order to curb harmful competition, in function of their short term commercial interests and not of HK's economy long term interests. The Government did not possess any effective means to influence interest rates<sup>122</sup> which were not in reality an instrument of discretionary macroeconomic policy.

However, autonomy in banking had limitations and tended to be restricted from time to time. In periods of banking crises the level of influence of Britain increased and autonomy was restrained while during expansionary periods the role of London tended to decline. A key area where London's intervention was felt from time to time with some intensity was in banking laws. After the 1965 banking crisis, visits of experts from London took place to supervise the revisions of the 1964 Ordinance and, again, in 1984, in the middle of the 1982-86 crisis.

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<sup>121</sup> On the banking structure see Jao, op.cit.pp. 32-46.

<sup>122</sup> Interview with Lord Sandberg, former Chairman of HKHSBC, 24.4.2001.

From this perspective HK possessed a considerable level of autonomy in managing its financial system in relation to Britain. Interestingly, this autonomy was a consequence of the extensive powers gained by private banks in the management of the system and not of HK Government gaining autonomous powers. In fact, it was exactly the circumstance the HK Government had little control over the system that made possible the reinforcement of the role of the private sector, which in turn led to autonomy. Paradoxically, this also generated the seeds for restrictions to autonomy. In fact, successive crises caused by lack of proper supervision and the fact banks could not control themselves, paved the way for temporary reassertion of control by Britain. London was mainly concerned with the potential negative impact of HK financial problems on the Sterling Area and with the risk it could, as the sovereign power, be held internationally responsible for HK's liabilities in case of collapse of the banking system.

However, this domestic autonomy was not translated into external autonomy in financial matters. One can even argue that this restriction of internal autonomy was a condition for the successful internationalisation of HK's financial system as it tended to create pressure for HK to adapt to international standards and restore confidence in HK's banking sector.

### **The stock exchange and capital market**

The development of HK's capital market was an important factor in the process leading to the emergence of HK as an international financial centre. It remained small until the late 1960s, with a low level of transactions, limited to domestic operators lacking an international dimension, justifying its qualification as "parochial"<sup>123</sup>.

1968 was a benchmark year insofar it marked the beginning of a boom period (1968-72) directly associated with structural changes in the market. These changes were not only quantitative but also qualitative and included four main aspects<sup>124</sup>. First, the remarkable growth of the nominal turnover started in 1968 and further expanded in the following

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<sup>123</sup> Jao, op.cit., pp. 81

<sup>124</sup> Jao, op. cit., p.83-87

years so that in 1972 the nominal turnover was 46 times that of 1968. Secondly, the sharp rise in stock prices measured by the Hang Seng Index, which rose from 107.55 at the end of 1968 to 843.40 at the end of 1972. Thirdly, the number of stocks listed more than tripled rising from 59 in 1968 to 190 in 1972, implying greater number of operators and greater diversification of companies. Fourthly, the internationalisation of the stock exchange as for the first time foreign stocks began to be quoted and overseas brokers were admitted, led by British and Japanese stocks looking for new opportunities.

This boom was induced by the international climate of euphoria surrounding stock markets as a result of high growth rates, but there were also causes specific to HK which played a decisive role: China's foreign policy reorientation and alignment with the US in the context of the Cold War; the stability of the HK dollar; a favourable tax system; and, above all, the absence of any regulation on stock market activities allowing operators to act freely in the market.

The unregulated nature of HK's stock market and its low maturity was probably one of the key factors to explain international interest in it as doubtful players were given the possibility to conclude operations and commit irregularities that could not be committed in more developed capital markets subject to tighter supervision. So, HK became competitive and attracted capital because it adopted in the early stages lower standards than those prevailing at the international level, implying lower transaction costs.

### **Currency and exchange rate policy**

The currency and exchange rate policy was probably the segment of the financial sector where traditionally HK had less autonomy and London's influence was stronger. That is why the process by which HK gained considerable autonomy in managing the HK dollar and its external reserves had greater visibility and constituted a more radical departure from past practices.

In fact until 1967, the benchmark year for the affirmation of HK's autonomy, HK had little room to follow its own exchange rate policy. London's influence was very strong

as the HK dollar had a fixed peg with the pound since 1935 and, as a member of the Sterling Area since 1941, was forced to hold its reserves exclusively in sterling<sup>125</sup>, which implied a very high exchange risk. In addition, HK had no autonomy in exchange rate policy and was bound to automatically follow the changes in the UK policy.

That was the case with the significant devaluation of the pound in 1949 by 30,5% which determined a devaluation of the HK dollar of the same magnitude. In November 1967 the pound was again devalued by 14,3% and HK's first reaction was to follow *pari passu* this devaluation. In both cases the devaluation of the HK dollar was a mere mechanical consequence of London's decision geared by adjustments required by the British economy, not by the HK economy. This artificial decision had high costs for HK.

However, the 1967 devaluation was immediately followed by an unprecedented decision with profound consequences for the assertion of HK's monetary autonomy. The sequence of events is revealing: on 18 November 1967 Britain decided to devalue the pound by 14,3% and gave 4 hours prior notice to the HK Government ; on 20 November the HK dollar was devalued by the same rate; three days later the HK Government decided on 23 November to revise its prior decision and re-valued the HK dollar by 10 % leaving a residual devaluation of only 5,7 %<sup>126</sup>. The first reaction on 20 November was still a "conditioned act" determined by past experience but mainly by the concern to protect HK banks' interests and to prevent heavy losses to Banks and the Exchange Fund given the fact their reserves were held in sterling.

Following the negative reactions in HK, the Government decided to take a step back and appreciated the HK dollar against the pound because of the potential negative impact on prices. This was the first manifestation of HK's autonomy in monetary affairs without parallel in British colonial history. It showed that HK had divergent interests and therefore the link with the pound was no longer appropriate for HK's economic

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<sup>125</sup> HK Annual Report 1969, HK Government Press 1970. In 1967 99% of HK's external reserves were held in sterling.

<sup>126</sup> See Jao, *op.cit.*, pp. 143 - 144

conditions. Furthermore, it had also a symbolic impact proving that colonial currency could be stronger and more stable than the currency of the colonial master.

The upwards revaluation resulted in heavy losses for local banks and the Exchange Fund leading HK to another manifestation of autonomy by exercising its bargaining power vis-à-vis Britain, forcing London to enter into negotiations to find some form of protection against the risks of future sterling devaluation. Not only was an agreement reached in June 1968, whereby Britain offered a mechanism to reduce the risk, but HK's initiative was pivotal in relation to other members of the Sterling Area which, based on HK's precedent, started pressing London for similar protection leading finally to the Basle Agreement of July 1968, a last attempt to save the Sterling Area<sup>127</sup>.

The second benchmark occurred in 1972 when, after Britain decided in June to float the pound, HK took the decision to break the link with sterling and peg the HK dollar to the US dollar. This was not a mere manifestation of autonomy but a major advancement towards a real monetary independence leading to an irreversible separation from Britain's exchange rate policy and to greater capacity to take decisions more adapted to HK's economic reality. This marked also the end of the Sterling Area and therefore the end of membership obligations contributing also to greater autonomy.

As a result of this evolution, a process of structural change in HK's monetary affairs took place in less than a decade. By the mid-1970s HK possessed its own currency, independent from the UK currency, internationally credible and convertible. Moreover, it was internationally recognised as a strong and stable currency, contrary to other important currencies during this period, and would remain so until 1977, backed by considerable reserves. Also important, HK proved to have the capacity and will to manage an autonomous exchange rate policy gradually consolidated from 1967 onwards. The fact HK did not resort to competitive devaluations to face growing international

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<sup>127</sup> Under the Basle Agreement Britain guaranteed to all Sterling Area members, the US dollar value of all officially held sterling in excess of 10 % of each country's official external reserves. In exchange Sterling Area members committed themselves to maintain a minimum of their reserves in sterling - Jao, op.cit. pp 144 - 145.

competition, partly possible because of an extremely effective external trade policy, gained HK credibility and reinforced the image, like in trade, of a fair player.

This assertion of monetary independence, a typical area of sovereignty, by a non-sovereign entity was unknown and without precedent in the international system. HK's case was absolutely unique and had no parallel among NCGs thus contributing to shape HK's international identity. This autonomy would be strengthened throughout the 1970s but in the early 1980s there was an interesting reversal, a temporary decline in autonomy as a consequence of London's active intervention in the solution of the 1983 HK dollar crisis, culminating in the panic reactions of the Black Saturday of 24 September. This was clearly the worst ever crisis of the HK currency and a severe blow to its credibility.

This crisis was certainly triggered by the crisis of confidence associated with the deadlock in the Sino-British negotiations on the future of HK and the failure of the 4<sup>th</sup> round. It was no coincidence that the 4<sup>th</sup> round communiqué was issued on 23 September, exactly on the eve the HK dollar collapse, proving that political tension can have damaging effects on markets.

The eminence of a serious financial crisis and the political repercussions on the negotiation process, with China accusing Britain of sabotage and deliberately provoking instability just to prove how indispensable British administration was for the stability of HK, set the stage for Britain's strong intervention.

Pressed by circumstances and the need to find a solution, the Government asked an economist from the private sector, John Greenwood<sup>128</sup> to present and explain his proposal of a fixed peg put forward in August 1983<sup>129</sup> for the reintroduction of the system of issue-banks paying foreign currency for the issue of new HK dollars.

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<sup>128</sup> Interview with John Greenwood on 23.1.2001. Based in HK, he was the editor of a bi-monthly economic journal *The Asian Monetary Monitor*.

<sup>129</sup> Greenwood, "How to Rescue the Hong Kong Dollar" in Asian Monetary Monitor, Nov-Dec 1983, pp.9-37.

There was clear hesitation and resistance on the part of the HK Government to Greenwood's proposal. Given the political context in which the crisis was taking place with high tension between Britain and China over the negotiations deadlock, the decision had important implications and so London became actively involved in the decision making process in two different ways. Firstly, a high level meeting was held on 29 September in the British Embassy in Washington involving the Prime Minister and the Chancellor of the Exchequer, senior officials of the Bank of England and Alan Walters, where the HK dollar crisis was discussed as well as Greenwood solution. One of the main concerns was that with a fixed exchange rate if an attack on the HK dollar would follow, the pressure on HK reserves would be severe and Britain would be politically obliged to cover the deficit and put her own reserves at risk.

Secondly, two British officials, Charles Goodhart a Bank of England official, and David Peretz, Treasury official, were sent to HK to assess locally the situation and to what extent the Greenwood plan could work. After making several contacts with different players they endorsed the Greenwood plan. Their position was crucial to break the HK Government resistance and was the basis for London's approval<sup>130</sup>. Their intervention was decisive for the adoption of the new system of the HK dollar fixed peg to the US dollar. Although there was a concern to show that such an important decision on the HK dollar was taken in HK for political reasons. However, and unlike the decisions on monetary affairs in 1972 and 1974, this time London exerted a strong influence behind the scenes. This change, explained both by the gravity of the financial situation and the political sensitivity associated with the Sino-British negotiations, represented a reversal, though a temporary one, in HK's autonomy in monetary affairs.

### **HK's emergence as an international financial centre**

The rise of HK as an international financial centre started in the early 1970s and involved a gradual process which was going to last almost a decade. The resolution of the 1983 crisis marked in a sense the consolidation of this process. This would lead HK to become an important financial centre, translated not only in the large number of

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<sup>130</sup> Interview with Charles Goodhart, 15.3.2000.

international banks and other financial institutions present in HK, but also in the specific functions HK plays involving 5 major aspects<sup>131</sup>: a capital exporting centre; a loan syndication centre; a centre of securitisation; a foreign exchange trading centre and an international gold trading centre.

The year of 1972 represented an important benchmark in this process because of the coincidence of three events: the HK dollar de-link from sterling and the consolidation of HK's monetary independence; the consolidation of the internationalisation of the stock exchange which reached in that year a historical peak in terms of volume of transactions and number of stock quoted; and China realignment with the US in the Cold War context. Besides the autonomy of the HK dollar and the fact it was then a strong and stable currency, other factors have also played a role in the rise of HK as an international centre.

On the domestic front, three aspects seem to have been particularly relevant: (i) the advancement of financial liberalisation when the moratorium on the issue of new banking licences imposed in 1966 was lifted in March 1978 allowing the entry of large financial institutions as fully licensed banks; (ii) the national treatment clause meaning that foreign banks are treated on equal footing as domestic banks; (iii) low transaction costs as a result of low taxes on profits, the absence of requirement to maintain statutory non-interests bearing reserves deposit insurance scheme, when compared to other financial centres<sup>132</sup>.

On the external front, there were four fundamental causes. Firstly, the location economics factor, associated with the specific advantage HK possessed because it is located in a favourable time-zone it filled the gap derived from large time differences between the US Pacific Coast and Europe enabling the existence of a world-wide 24

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<sup>131</sup> For a detailed analysis of these functions see Jao (ed.) Hong Kong banking system in transition: problems, prospects and policies, Chinese Banks Association Ltd, Asian Research Service, HK, 1988, pp 2-16.

<sup>132</sup> Transaction costs for foreign banks are in general higher in other Asian financial markets namely Singapore, Australia, Japan and South Korea – for a 1986 comparison see Jao (ed.) op. cit., table 1.9 page 22.

hour market in banking. Secondly, structural changes in the banking system as multinational banks since the early 1970s started to establish branches in all major financial centres as an attempt to escape the high regulation at home. HK as an offshore banking centre attracted the great majority of the world top banks reaching a total number of 116 foreign banks in 1986<sup>133</sup>. So HK benefited from the reorganisation of multinational banks and the beginning of globalisation in this sector closely associated with the functioning of offshore banking.

Thirdly, the growing importance of the China factor, started in 1972 with China's realignment with the West, further intensified with the 1978 "open door policy" as the gradual resumption of a trade entrepot role in the China trade and the consolidation of a "financial entrepot" role raised international interest in HK and led many financial institutions and firms to be located in HK as a platform to enter the China market.

Finally, I would argue that there is another important factor which tends to be ignored, the increase in outward investment and the internationalisation of HK banks and big firms' activities which contributed also to strengthen HK's status as an international financial centre and gave a major boost to its international visibility.

This phenomenon started in the late 1970s under the leadership of the HSBC which initiated an internationalisation process and diversification of activities leading to its transformation from a regional bank into a real multinational bank. This process was implemented by Michael Sandberg, who became the Chairman of the bank in 1978, on the basis of a "three-legged" strategy pointing to a strong presence in three regions, Asia, the US and Western Europe, through the acquisition of large and prestigious banks in those markets.

The benchmark in this process was the acquisition in 1980 of the Marine Midland Bank from New York, then the 12<sup>th</sup> largest American bank. This was an extremely important

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<sup>133</sup> The number of foreign banks grew very rapidly from 40 in 1974 to 79 in 1980 and 116 in 1986. This was mainly explained by the considerable increase of American and Japanese banks which accounted for 40% of the total- Jao and Association of Chinese Banks (ed.), op.cit., pp 31, table 1.15.

and mediatic process given that it was then the largest bank acquisition in the US history. As a consequence, the process leading to the acquisition had a great impact and provoked initially a strong protectionist reaction first on the part of New York State authorities and then by Federal Authorities, namely the Federal Reserve, which, fearing the foreign control of a large American bank and the precedent it would set for other pending cases, tried to block the acquisition by HSBC. The decision-making process has even involved the Congress making this a highly visible political issue<sup>134</sup>.

This process contributed to HK's high international visibility and also to the recognition by the world's largest financial market of the power and credibility of the largest HK bank, at the same time it represented the birth of the first HK multinational group. This operation had a tremendous impact in HKSBC's international profile: it jumped from the 71<sup>st</sup> position in the world bank ranking in 1979 to become the 27<sup>th</sup> largest bank in 1983<sup>135</sup> and became the largest foreign bank in the US. The internationalisation of the HSBC, the symbol of HK financial sector and the "HK Bank", was a projection of HK's economic power and an important catalyst for the internationalisation of other economic groups.

### **Implications for HK's international status**

The rise of HK as an international financial centre contributed to boost HK's international visibility and added a new dimension to HK's international identity. In some aspects this new dimension was complementary and consistent with the identity developed in trade insofar as it projected the image of an economically powerful and responsible player, with autonomy in decision-making, but in others it was different and even at odds with the trade dimension. In fact the development of the financial dimension of HK's international identity occurred at the same time HK was trying to

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<sup>134</sup> For an interesting and detailed account of the process of negotiations and the difficulties in obtaining the US authorities approval for the acquisition see Frank King, The History of the Hong Kong and Shanghai Banking Corporation Vol IV "The Hong Kong Bank and the period of development and nationalism 1941-1984: from regional bank to multinational group", Cambridge University Press, Cambridge, 1991, pp 807 -849

assert a developing country status in trade in the mid 1970s. Clearly, the status of an international financial centre brought HK closer to the developed countries group introducing a contradiction with HK's international identity in trade and creating a clear ambiguity in HK's international image.

In addition, while in trade HK was a completely free economy with no barriers to trade flows, in finance the image was somehow different and less liberal because HK possessed barriers to entry into the banking sector, a result of the 1966 *moratorium* on bank licences. Finally, while in trade HK's external relations were more driven by conflict and the need to counteract raising protectionism from developed countries giving rise to a more aggressive position on the part of HK, in finance relations were more complementary and less tense both with other developed financial markets and with developing countries.

The impact of the financial dimension on HK's international status and external autonomy was also different from trade in three different ways. Firstly, its impact was mainly to cultivate the informal side of HK's external relations. In fact the process involved mainly private non-state actors, private business from HK and multinational foreign firms, rather than ties between HK and foreign states and governments like in trade. The international recognition of HK status as a financial centre was fundamentally a process led by private financial institutions, not by governments.

Secondly, the financial dimension unlike trade did not contribute to the consolidation of HK's international personality, as it did not originate international rights and obligations for HK or the exercise of "treaty making powers". The process that took place was merely the transposition to the domestic legal system of international norms and standards to regulate the emerging financial sector.

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<sup>135</sup> World Banking Annual Survey – various issues 1973-1985 Investors Chronicle (63<sup>rd</sup>, 68<sup>th</sup>, and 72<sup>nd</sup> Annual Surveys) The Economist .

Thirdly, it had little impact in terms of the development of the multilateral dimension as HK did not acquire membership of international financial organisations, given the restriction to sovereign States, nor developed any form of autonomous participation. Despite the status as an international financial centre, the international system in this field was unable to accommodate HK's *sui generis* nature. However, this did not constitute a significant obstacle for the consolidation of HK's financial power, partly because it occurred in, and benefited from, a context of international financial deregulation and globalisation, exactly when the power of intergovernmental financial institutions and governments over financial markets started to decline.

## **2.4. HONG KONG EXTERNAL REPRESENTATION**

The exercise of the *jus legationis* and the development of a system of external representation constituted an important manifestation of HK's capacity to act internationally on its own. This contributed to strengthen HK's external autonomy in particular because this implied a clear recognition of its international personality on the part of sovereign States where representative offices were located.

HK was the first NCG to create representative offices in foreign countries and so had a pioneering role in the use of this important instrument of paradiplomacy. This started in the late 1950s and constituted a long process that took some time to consolidate. This section will analyse the process leading to the creation of autonomous representative offices and the pattern of relations between HK and London on this matter.

### **Origins and evolution of HK's Economic and Trade Offices**

The creation of government trade offices was a gradual process that went through four different phases.

The first phase (1952-63) started in the mid 1950s involving the creation of the HK Office in London in 1955, the transformation of the HK Government Agency in Japan into the HK section of the British Embassy in Tokyo in 1952, and the creation of the Sydney Office in 1959. The rationale behind the last two offices was not the affirmation of HK's autonomy but simply trade promotion. On the contrary, their creation reflected then the affirmation of the UK monopoly and control over HK external affairs. The HK autonomous commercial representation office in Tokyo was absorbed in the British Embassy and the creation of the Sydney Office was negotiated and approved by the British and the Australian Governments in June 1959 with no participation of HK<sup>136</sup>.

This first phase involved mainly *ad hoc* initiatives, exclusively directed to trade promotion, disintegrated from any global strategy for external relations, and therefore had no impact on the development of HK's external autonomy.

The second phase (1964-1972) started in mid 1960s and involved the creation of three trade offices, first in Brussels in 1965, followed by Washington in 1966 and Geneva in 1967. This marked the launching for the first time of the basic framework of a system of external representation and, unlike the previous phase, corresponded to the purposeful implementation of a HK planned strategy to respond to new international challenges.

The creation of the Offices was an initiative of the HK Government, which made a formal proposal to London. In the case of Brussels the Governor proposed the creation of a trade office in 1963 in a formal communication<sup>137</sup> and with respect to Washington the proposal was presented to the British Government in 1964<sup>138</sup>. In both cases the proposal was inspired by the earlier creation of private representation offices in Brussels and New York at the joint initiative of the Federation of HK Industries and the HK General Chamber of Commerce.

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<sup>136</sup> Hong Kong Reports, 1955 to 1960 issues, HK Government.

<sup>137</sup> PRO File CO 1030-1631

<sup>138</sup> PRO file CO 1030-1633 HK Trade Office. Savingram sent by the Governor to the Colonial Secretary on 6.6.1964.

However, these offices faced important limitations in their autonomy, imposed by London. The process of creation of the Washington Office is particularly interesting in this respect. In fact the Governor in his 1964 proposal<sup>139</sup> wanted the Office to have some autonomy and a wide range of competencies, including the possibility to conduct direct official negotiations with the US Government in trade matters. For that he proposed the Office should have separate premises from the Embassy and the Head of the Office, although attached to the UK representation, should not be made a part of it and should enjoy full diplomatic status and privileges. In addition, he proposed to appoint a HK Official, Mr Barlow from the Commerce and Industry Department, to head the Office.

Although the London comments were in general positive, there was a strong reaction against two main aspects of the proposal. On the one hand, the Head of the Office should be fully integrated in the British Ambassador staff, a solution justified by the concern to avoid any divergence between UK and HK positions. On the other, the Officer should not be able to contact directly the US Government Departments, in particular the State Department, and could only do that through the Embassy. Clearly the Foreign Office wanted to preserve the UK competencies in managing HK's external affairs. Britain's control would be further affirmed as London rejected the designation of a HK official and imposed an UK official, Mr A. Hermann, a diplomatic service officer. The same position was adopted in the case of the Brussels Office, as London rejected once again the Governor's proposal to appoint a HK Official and imposed a UK Official, Mr J. H. Martin, a Colonial Office official<sup>140</sup>.

So, in the second phase although the creation of trade offices in the major export markets (US and Europe) and in Geneva to manage the participation in GATT, represented a step forward in enabling HK to pursue its specific interests, the trade offices had still important limitations in their autonomy and capacity to project a

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<sup>139</sup> PRO, file CO 1030/1633 Savingram sent to the Colonial Secretary on 6.6.1964.

<sup>140</sup> See PRO file CO 1030 / 1631

separate identity. This was due to two fundamental mechanisms used by London to preserve its control. First, the formal integration of the HK offices in the British Embassies meant not only that the Directors were responsible to the Ambassador more than to the HK Government but also there was no autonomous accreditation of HK representatives as such.

Secondly, the imposition of UK officials to head the HK trade offices. This constituted an obstacle to a more effective defence of HK's interests, as these officials had limited knowledge and contacts with HK, did not identify with its objectives and followed the London directives.

The third phase (1973-85) started in the mid 1970s and was marked by a fundamental qualitative change that reinforced not only the effectiveness but also the autonomy of the ETOs: the designation of HK high officials to head the offices. This trend started with the designation of William Dorward to head the Geneva Office in 1973. The fact that the directors were from now on HK officials with large experience in trade and economic negotiations, with a better understanding of, and more motivation to pursue HK interests, contributed to increase the effectiveness of the offices' action.

Moreover, although still formally integrated in the British embassies and responsible to the Ambassador, the Office heads started to report directly to the Trade and Industry Department in HK and to take HK directives as the basis for their action. As a consequence they started to operate separately from the embassy and in general moved to separate premises.

Finally, this phase was also marked by the beginning of the "rotation system" a specific and innovative feature of HK's system of external representation according to which the elite bureaucracy moves from domestic posts in very different sectoral areas to external posts and back to domestic posts, which became a key factor behind HK's success in international affairs as will be argued below.

The fourth phase (1985-97), triggered by the signature of the Joint Declaration on the future of HK, was characterised by two aspects. First, the expansion of the system with the creation of six new offices: in 1986 San Francisco, to cover the West Coast of the US and promote ties with the 19 Western States, and New York to cover the East Coast; in 1988 Tokyo given the size of the Japanese economic interests in HK and the status of Japan as the largest Asian economy; in 1991 Toronto to deal with the Canadian Government but also the provinces, taking into account economic interests but also the growing HK immigration community; in 1995 Sydney, covering relations both with Australia and New Zealand, and Singapore with a more regional vocation dealing with relations with ASEAN and also with the APEC Secretariat in Singapore. It should be noted that in this phase HK adopted a more decentralised approach illustrated by the San Francisco and New York offices and the orientation adopted by the Toronto office, investing more in ties with other NCGs.

Second, trade offices gained greater autonomy in relation to British diplomatic structure and ceased to be integrated in the UK Embassies, being recognised as autonomous representations. In some cases the offices were officially accredited and granted a quasi-official status, in particular in Canada where it was accredited under the Foreign Missions and International Organisations Act<sup>141</sup> and granted diplomatic privileges and immunities but also, although less explicitly, in Geneva with WTO as HK became a contracting party in 1986, and in Brussels with the European Union.

### **External representation: factors of success**

The creation of economic and trade offices (ETOs) in the mid-1960s was basically a response to growing trade protectionism. The primary initial objective was to complement and provide support to the process of bilateral negotiations already in motion by obtaining accurate information on the strategy of HK partners, anticipating changes likely to affect HK and trying to soften the protectionist impetus by maintaining regular contacts with Governments. In these contacts the ETOs tried not only to explain

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<sup>141</sup> James Tang, "Hong Kong's international status" in The Pacific Review, vol.6, no.3, 1993, p.208.

HK position and assess the evolution of HK trade partners' trade policy, including monitoring changes in trade legislation or administrative practices likely to affect HK interests, but also to try and influence the decision-making process and to counteract the more radical protectionist positions. This was particularly important in the US where a complex activity of lobbying was organised mainly concentrated in the US Congress, rather than in the Administration, absorbing a great deal of the office's time and efforts<sup>142</sup>.

The evolution of trade policies of major players, including the US and EEC, and the discussion of possible strategies to approach negotiations with third countries were somehow the object of exchanges with London through the London Office, showing that the growing autonomy of HK in managing external commercial relations did not mean complete separation from London, or absence of contacts or co-ordination with the British Government. On the contrary, HK continued to ask for the support and direct intervention of London in more complex matters and to benefit from the inputs and information the British diplomatic machinery could provide.

The second objective was to make sure HK specific interests were not marginalised and sacrificed by the British diplomacy to promote British global interests by trying to make the UK diplomacy more open and aware of HK's specific economic interests. The factors of success of HK's external representation system are closely associated with the specific features it assumed since the mid-1970s, in particular three crucial aspects which correspond to important innovations in relation to sovereign states external representation: the "rotation system"; close co-ordination between the government and the private sector for external action; informality and flexibility.

### **Rotation system**

The most important aspect relates to a "rotation system" in which the members of the HK elite bureaucracy (administrative officers) placed as heads of the trade offices since the early 1970's would move from domestic posts in very diversified departments to

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<sup>142</sup> Interview with William Dorward, who headed the Washington Office from 1982-88, 21.1.2001.

external posts and back again to domestic posts. That was the case with William Dorward who after holding a direction position in the commerce and industry department was posted as head of the Geneva office, returning to HK in 1978 to become the Secretary for Trade and Industry and was again posted in Washington as head of the office between 1982-88. Other examples of this system are key members of the HKSAR Government in early 2002 like Chau Tak-kay, Secretary for Commerce and Industry<sup>143</sup>, Sandra Lee Suk-yee, Secretary for the Civil Service<sup>144</sup>, John Tsang Chun-wha, Secretary for Planning and Lands<sup>145</sup> as well as many other cases, including the current heads of HK trade offices<sup>146</sup>.

The functioning of the rotation system implied that HK, unlike sovereign states and other NCGs, did not possess a specialised body of diplomats but instead used its highly qualified generalist top bureaucrats to represent HK externally. This had several important and positive implications. First, HK representatives had an unusual high level of technical expertise enabling them to exert influence when discussing or negotiating with counterparts from other countries, generally traditional diplomats. In addition, given their previous domestic experience they knew precisely what HK's specific interests were and so could defend them more effectively abroad. It should also be stressed that this system also implied less fragmentation and greater unity within the bureaucracy thus avoiding the dysfunctional effects of the usual conflict between diplomats and sectoral departments officials.

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<sup>143</sup> Chau Tak-hay was the Head of the Geneva Office and gained experience in the GATT system in the early 80s. After that he returned to HK to become the Director-General of Trade in 1990 and the Secretary for Trade and Industry in 1991.

<sup>144</sup> Sandra Lee was first in the Washington office, as Deputy Director, between 1985-94, then returned to HK to become the Deputy Director of the Home Affairs Department in 1995, Deputy Secretary for the Civil Service in 1996. She was posted abroad again as Director of the London Trade Office in 1999.

<sup>145</sup> John Tsang after having been the Private Secretary to Governor Patten, was posted in the London Trade Office as Director-General in 1997 and remained there for two years before returning in 1999 to HK to become the Commissioner of Customs and Excise.

<sup>146</sup> Examples are Carlson Chan who after having been posted in the London Office in 1993, returned to HK to become the Principal Secretary for Home Affairs in 1996 and was posted abroad again in 1997 as the Director of the Tokyo ETO. Clement Mak, currently Deputy Secretary in the Constitutional Affairs Bureau was posted in the Washington Office between 1994-96 returning to HK in 1996 to take his current post. Raymond Fan is another interesting example as he was Director of the New York Trade Office in 1991, returned to HK to become the Principal Assistant Secretary for Education and Manpower, moved to the Security Bureau and was posted a second time in the New York ETO in 1998. See Staff Biographies. The Government of the HKSAR. 1998.

Secondly, this system induced HK elite bureaucracy to acquire a multi-skill training and international experience and became aware of the key importance of trade and external economic relations for HK's prosperity. This had important implications in terms of the way in which bureaucrats performed domestic posts upon their return to HK. In other words, the rotation system leads to establish an effective articulation between domestic and international affairs, overcoming artificial boundaries and giving HK a more robust capacity to act internationally.

Finally, there was another important objective for HK related to the continuous renovation of HK's public administration<sup>147</sup>. In fact it is expected that upon their return to HK the officials posted abroad can contribute, on the basis of their overseas experiences and contacts with foreign bureaucracies, to introduce new ideas and solutions to improve the quality of HK's Public Administration. External representation functions were also regarded as posts of observation of other countries' experiences, and bureaucrats as vehicles of innovation and modernisation of HK bureaucracy by importing and adapting the best practices to HK's needs.

### **Articulation between the private and public sectors**

The second feature and strength of the HK representation system is the very close articulation and co-ordination between Government and the private sector, in particular business associations, in the management of external relations and the co-existence of two parallel structures the ETO and Trade and Development Council (TDC) offices. This co-ordination was institutionalised in the TDC regarding the definition of the global strategy, but manifested itself also at the level of implementation, in the articulation between ETOs and the semi-official TDC offices on the ground. This was clearly a factor of success for HK's international activities insofar as by combining the relative advantages of public and private actors HK was able not only to explore simultaneously

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<sup>147</sup> This objective was pointed out to me by Ken Leung, executive officer in charge of ETOS in the CIB, interview 11.10. 2000.

formal and informal channels, but also to ensure that external action is consistent and relevant to the needs of the business sector.

Furthermore, this co-ordination was also important to keep under control the divergences between the HK Government and the business sector on trade policy, i.e. the Government's advocacy of free trade policy and an adherence to protectionism of many sectors of HK business, thus reducing the risk of weakening HK's bargaining position.

### **Implications for HK's international personality and autonomy**

The creation and operation of HK ETOs contributed to project HK's international identity and to consolidate its autonomy in external affairs. The impact was very limited during the initial years as a consequence of the formal integration of the offices in the British embassies and the substantive control exerted by London on their activity. The situation changed when the offices gained autonomy in the mid-1970s becoming more effective instruments of external action. The contribution of the external representation system was particularly relevant at four levels.

First, it gave HK external action a more permanent and stable nature in contrast with the transitory nature of trade negotiations and the exercise of treaty making powers, showing the international community that HK international participation was not an episodic process but a long lasting phenomenon.

Secondly, it enabled HK to develop simultaneously and in an articulated manner, formal official relations with foreign states and informal relations with sub-national units and other non-state actors, increasing the level of effectiveness of HK's external action as it explored the inter-linkages and complementarities between both channels in the domestic decision making process.

Thirdly, the experience provided by trade offices together with the effect of the rotation system led to an almost dilution of the boundaries and greater co-ordination between domestic and external domains, in the sense that HK started to “think internationally” even when taking decisions on apparently domestic issues.

Fourthly, in terms of international identity the external representation system was crucial not only to assert HK’s image as a responsible international player but also to contribute to manage the tensions and the ambiguity of HK’s double and contradictory identity as a developing entity (in trade matters) and a developed entity (in financial matters). Finally, in a few cases where HK offices were granted formal diplomatic recognition, like in Canada, this contributed to enrich HK’s international personality by conferring a limited set of rights reserved to sovereign states.

## **2.5. HONG KONG BUREAUCRACY AND EXTERNAL AUTONOMY**

In order to understand the gradual expansion of HK’s autonomy in external affairs and its emergence as an international player it is fundamental to consider a horizontal institutional factor, i.e. the action and interests of HK bureaucracy. The importance of this factor has not been fully recognised both by the literature on HK external affairs, which tends to see HK as a single and coherent player, and by the literature on HK’s administrative system, as it tends to look exclusively at the domestic process failing to analyse the external dimension.

The argument put forward here contains two different but complementary ideas. First, HK’s autonomy in external affairs would not have been possible if the HK bureaucracy was not such a powerful group, the dominant player in HK, possessing a large degree of autonomy vis-à-vis Britain. In addition, the HK civil service underwent a series of structural changes and reforms from the late 1960s onwards, which have contributed to its modernisation and prepared the stage for a more intense and purposeful international action.

Secondly, the development of HK's international participation and status was possible because the elite bureaucracy had an objective interest in promoting that process. Its corporate interests coincided with, and were best served by, an internationally active HK as will be demonstrated.

The HK colonial system of governance was characterised by the existence of a very strong and autonomous bureaucracy, which constituted the centre of power, the more so as local politics were virtually non-existent and elected politicians an unknown reality until 1985. Although formally the power was heavily concentrated in the hands of the Governor, appointed by and accountable to London, in reality it was to a great extent controlled by career bureaucrats in HK. It should not be forgotten that the Governors themselves were career bureaucrats from the British Civil Service and this fact has certainly facilitated their relations with the HK bureaucracy. Some authors have considered that the dominant role of the bureaucracy in HK reached such an unprecedented level that this could be regarded as a distinctive feature of HK. Harris qualified HK as one of the best examples of an "administrative state"<sup>148</sup> and Lau as a "bureaucratic polity"<sup>149</sup>.

However, this power was not detained by the civil service as a whole but concentrated in the hands of a very limited group, the "administrative officers" which constituted the elite of HK bureaucracy, representing a very tiny minority, 127 officials in 1973, rising to 306 in 1981 and 467 in 1997 which accounts on average for less than 0.3% of the total civil service<sup>150</sup>. This elite was characterised by three fundamental features. First, the dominance of expatriates which started to decline only from the late 70s onwards. Until the mid-1980s administrative officers were one of the fundamental exceptions to the policy of localisation adopted since 1948. However, this did not mean expatriates had a strong loyalty to London and managed HK according to British interests. On the

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<sup>148</sup> Harris.P., Hong Kong: a study in Bureaucratic Politics, Heinemann, Hong Kong, 1988, pp. 70

<sup>149</sup> Lau S.K., Society and Politics in Hong Kong, the Chinese University Press, HK, 1982, pp.26-29

<sup>150</sup> Ahmed Shafiqi et all(eds), The civil service in Hong Kong: continuity and change, HK University Press, HK, 1998, pp. 23-24.

contrary, as a consequence of long service periods, on average between 20-30 years as demonstrated by Cheng and Lee<sup>151</sup>, they identified themselves with local interests and became committed to enhance HK's autonomy vis-à-vis London.

Secondly, administrative officers were generalists, not specialists, who rotated between different departments acquiring a varied experience in different areas of Public Administration, which enabled them not only to obtain a holistic view of Administration but also to promote better co-ordination between different departments, thus avoiding fragmentation<sup>152</sup>.

Thirdly, the dual function, a bureaucratic and a political one. They were top administrators and key players in policy implementation but also quasi-ministers since some administrative officers were also members of the Executive Council (others members of LegCo) taking part in policy decision-making. Unlike the British system where bureaucrats and politicians have separate roles and powers and the latter control the former, in HK administrative officers cumulated the two functions which contributed to strengthen their power the more so as they were not subject to control by elected politicians. Scott<sup>153</sup> went as far as to argue that, contrary to conventional wisdom, the power in HK did not reside with the traditional Hong Kong but rather with the elite bureaucracy. This position has the merit to call attention to the real magnitude of power of bureaucrats in HK but can be considered as too radical as it is more accurate to consider there was a real share of power between the business and the bureaucratic elites. The alliance between the two is more fundamental to understand the HK system of governance than eventual competition.

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<sup>151</sup> Joseph Cheng and Jane Lee, "The changing attitudes of the senior bureaucrats in HK's transition" in The China Quarterly 147, September 1996, pp.912-937. They showed that at the level of Directorate grade staff, 24.2% had a length of service between 16-20 years; 21.2% between 21-25 years; and 19.9% between 26-30 years (table 2 pp.920). In other words 2/3 of the top civil servants had a length of service between 16-30 years and more than 50% had more than 21 years of service.

<sup>152</sup> This question has been emphasised by Norman Miners Government and Politics in HK, 5<sup>th</sup> edition Hong Kong University Press, Hong Kong, 1991 and Ian Scott and John Burns (eds) The Hong Kong Civil Service – personnel policies and practices, Oxford University Press, London, 1984, and Ian Scott, Political change and the crisis of legitimacy in Hong Kong, Hurst and Company, London, 1989.

<sup>153</sup> Ian Scott, op.cit., 1989, pp. 65, 79

Another key dimension to understand the relevance of the bureaucratic factor for the expansion of HK's international participation, is the far reaching process of reform which started to be implemented as a response to the 1967 riots and political turmoil. This severely challenged the legitimacy basis of the HK Government and its bureaucracy and therefore the main objective was to restore the legitimacy on a more robust basis and create the conditions for political stability. This response involved structural changes at three levels: (i) the adoption of greater social concerns and the active intervention of the Government in fostering social policies; (ii) improvement of labour conditions and revision of labour legislation, as poor working conditions were clearly one of the ingredients of the 1967 unrest; (iii) the reform of the Civil Service and the introduction of administrative innovations based on the 1973 Mackinsey Report recommendations<sup>154</sup>. Two fundamental aspects of the reform were "localisation", in particular in directorate posts where the share of expatriates declined, and the promotion of good governance as a result of a determined policy to combat corruption based on the creation in 1973 of the Independent Commission Against Corruption (ICAC).

These structural changes, started in 1968 but more consistently implemented during the MacLehose governorship, were successful in bringing about an increase in HK's Government legitimacy. An important implication of this, as rightly pointed out by Scott, was an expanded autonomy of the bureaucratic elite from both the HK business class and from Britain as well as China<sup>155</sup>. In fact, once the crisis was over and economic prosperity and political stability returned to HK, both London and Beijing devoted less attention and showed less interest in HK facilitating a further expansion of its autonomy. In addition, administrative reforms contributed to increase the efficiency of Public Administration and to consolidate the "esprit de corps" thus increasing the bureaucracy technical capacity to act both domestically and internationally.

The key argument put forward is that it was exactly the HK elite bureaucracy the driving force behind HK's increasing international activities and expansion of external

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<sup>154</sup> For a detailed analysis of the impact of the Mackinsey Report see Scott, op. cit., 1988, pp.133-140 and Miners, op.cit., pp.94-100.

<sup>155</sup> Ian Scott, op. cit., 1988, pp.165.

autonomy, and its members the agents who carried out the plan. John Cowperthwaite, the key person who first understood in the early 1960s that in order to maintain its prosperity HK had to be active internationally and defend its interests on its own, was an administrative officer just like David Jordan, William Dorward or Chau Tak-hay, who made important contributions to build HK's autonomy in external affairs. Furthermore, the heads of the ETOs were all administrative officers. This commitment of the HK elite bureaucracy to internationalisation can be explained essentially by self-interest insofar as the emergence of HK as an international player served the elite's corporate interests in three different ways.

Firstly, it enhanced its prestige and allowed the creation of ties with other bureaucracies whose support could be mobilised and from whom HK could secure the transfer of institutional "soft technology" to improve HK Administration.

Secondly, given the nature of HK economy, HK's international participation and capacity to defend its interests against protectionism became a crucial condition to maintain good economic performance which, in turn, constituted the new legitimacy basis of bureaucratic power generating a new source of pressure for the elite bureaucracy to act internationally.

Thirdly, the development of HK's international identity was regarded by the elite bureaucracy as a leverage to increase its "room for manoeuvre" in relation to London and a mechanism to ensure that the growing contradiction between UK and HK's economic interests did not damage HK's specific interests. Although initially the bureaucracy acted pressed by the HK business elite motivated by short term interests, later on towards the end of the 1960s external action became the expression of the elite bureaucracy's own autonomous strategy.

In short, the role of HK elite bureaucracy was decisive to the genesis and success of HK's participation in the international system. In contrast with the experience of other NCGs where the development of paradiplomacy was mainly driven by local elected

politicians against the opposition of central bureaucracies<sup>156</sup>, in HK the bureaucracy took the lead and pushed forward the process demonstrating a rare capacity to innovate and explore new channels. This is to some extent at odds with some aspects of the “bureaucratic politics” model analysis<sup>157</sup>. Interestingly, although in some aspects the HK experience is consistent and supports the validity of “bureaucratic politics” showing the strong influence of bureaucracy over London’s policy, in other respects the HK case deviates from and challenges assumptions of the model as it shows that, under certain circumstances, bureaucracy can be a catalyst for change.

### **The driving force behind HK’s emergence as an international player**

After careful consideration of the three hypothesis formulated concerning the origins of the process of HK’s emergence as an international player and the development of autonomy in external affairs, evidence suggests that trade and HK’s involvement in bilateral trade negotiations was the critical key factor. The financial/monetary autonomy and external representation factors were less important to explain the genetics of HK’s direct participation in the international system. The creation of ETOs not only started later in the mid 1960s, essentially as an instrumental mechanism to complement trade negotiations, but remained under London’s control until the early 1970s when HK was able to appoint its own officials to run the offices.

Similarly, the autonomy in monetary affairs emerged also later towards the end of the 1960s starting with the 1967 decision to adopt an exchange rate policy different from Britain and culminating in the 1972 historic decision to break the HK dollar link with the pound. A strong, stable, autonomous and convertible currency was certainly one of the ingredients behind the gradual emergence of HK as an international financial centre in the course of the 1970s.

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<sup>156</sup> Michelmann and Soldatos (eds) Federalism and International Relations – the role of subnational units, 1990, Clarendon Press, Oxford, pp. 301-303.

<sup>157</sup> Allison, Essence of decision : explaining the Cuban missile crisis, Little Brown, Boston, 1971. Allison disputes the idea that foreign policy is the result of a purposeful decision of a united government and that rationality prevails. The power of bureaucracy is considerable, constraining politicians’ decisions, as it controls information and the implementation process. In general bureaucracy tends to be conservative and to favour existing precedents opposing change or innovations. Moreover, the process of foreign policy

However, the fact the monetary and the external representation dimensions did not play an important role in the genetics, does not mean they were not relevant for the development and consolidation of HK's external autonomy and international identity. On the contrary, both made in different ways an important contribution to the consolidation and deepening of HK's international status and autonomy in external affairs.

The dynamics of the process of acquisition of autonomy in running external affairs in trade matters has been marked by gradualism and informality and evolved in two different phases a bilateral phase centred on bilateral trade negotiations on textiles exports restrictions, where autonomy evolved from autonomy in conducting negotiations to autonomy to sign international bilateral agreements on its own, and a multilateral phase, centred around HK's active participation in GATT and the MFA negotiations. HK's international participation and autonomy in relation to Britain were recognised by the entire international community in GATT, granting increased legitimacy to HK's external action, and allowed the emergence of a new identity of HK as a developing country, showing how far HK had distanced itself from Britain to the point of joining the opposite camp.

The emergence as an international financial centre in the 1970s contributed also to strengthen HK's international status but through different channels and with different effects. In fact it did not have an impact at the level of HK's international personality nor did it induce the exercise of treaty making powers or formal relations with foreign states. Its impact was concentrated on the most informal dimensions of HK's external relations and involved the recognition of HK's economic power and international participation by non-state actors, in particular TNCs. In the financial area HK became closer to developed countries' interests in clear tension and contradiction with HK's identity in the trade field.

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decision-making involves constant bargaining between different domestic groups and search for compromise.

The system of external representation has greatly contributed to manage this contradiction and to grant some coherence to HK's external relations. Furthermore it contributed to consolidate HK's international participation, by giving it a more permanent character and introducing HK to the circles of diplomacy.

The interaction between these different dimensions led to the consolidation of HK's international identity anchored in four aspects: the image of a free trade champion; a reliable partner and fair player which complies to its international obligations and international norms; a developing country which in some areas played a leading role; a neutral player in Asia in the context of the Cold War, where people and capital seek refuge playing even a mediating role in specific conflicts<sup>158</sup>.

This identity became increasingly complex and dense but also increasingly ambiguous which is illustrated by the coexistence and tension between a developing country identity, assumed in trade, and a developed country identity in financial matters or by the contrast between a free trade philosophy in trade and a protectionist approach in monetary and financial matters. This ambiguity became an important characteristic of HK's international identity.

Finally, the evidence also leads us to conclude that HK's autonomy in external affairs was not a generalised across the board phenomenon, on the contrary it was restricted to specific areas and its intensity was variable reaching the highest level in trade. There was a mixed picture because areas with clear and intense autonomy co-existed with areas with no autonomy, where London retained full control until the mid-1980s, such as civil aviation in relation to which Britain controlled the entire process of negotiations of air services agreements and managed it to the benefit of British Airways<sup>159</sup>.

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<sup>158</sup> See Dick Wilson, Hong Kong, Hong Kong!, Unwin Hyman, 1990, pp. 111-125.

<sup>159</sup> This was one source of conflict between the HK Government and London as pointed out by Lord Wilson, interview on 21.5.2001. Also interview with Anthony Baker, Director of the International Aviation negotiations, UK Government, 18.3.2002. Before 1984, air services agreements were negotiated by the UK and HK landing rights were integrated in the overall bilateral agreement concluded by Britain with a specific country. After 1984 autonomous ASA on HK started to be negotiated by HK, with the UK

In sum, although London's monopoly in managing HK's external relations was broken and challenged as HK consolidated a robust autonomy in trade matters, this did not mean Britain lost all its powers and prerogatives. On the contrary, London remained in control of many areas and trade became an exception to the rule. However, it set in motion a process that London could no longer stop. In the late 1970s autonomy would expand to political areas, a process further consolidated with the beginning of the transition process to Chinese sovereignty. The dynamics of this process and its impact on HK's international status will be the subject of next chapter.

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involvement, but were formally signed by the UK. Interestingly, in the 1994-96 negotiation process with the PRC on HK landing rights, Beijing did not accept to negotiate directly with HK, only with Britain.

## CHAPTER THREE

### THE SINO-BRITISH NEGOTIATIONS AND THE TRANSITION PERIOD – IMPACT ON HK'S EXTERNAL AUTONOMY AND INTERNATIONAL STATUS

The rise of HK as an international player and the gradual assertion of its autonomy in external affairs analysed in the previous chapter, led HK to become by the late 1970s an unprecedented and unique case, the most powerful NCG possessing the highest degree of external autonomy and the most robust international status.

However, HK became also a case of high international significance for a completely different reason, the unprecedented process of transfer of sovereignty from a sovereign State to another sovereign State, unique in three different respects. For the first time since 1945 a colony was not going to become independent and its people denied the chance to exercise the right to self-determination under the UN Charter but, instead, was going to be integrated in a sovereign State and transformed in an autonomous local government. Second, in the context of the Cold War, for the first time a successful capitalist economy and an important regional centre for capitalist firms was going to be transferred peacefully to a communist State. Thirdly, the transfer and the future of HK was going to be submitted to an innovative formula, “one country, two systems” by which two contradictory economic systems, capitalist and socialist, coexist inside the same country, a solution without precedent in the international system.

This chapter is concerned with the impact of the process of transfer of sovereignty, involving both the Sino-British negotiations and the transition period, on HK's external autonomy and international status. Section one provides a brief analysis of the context

and objectives of the Sino-British negotiations on the future of HK, the dynamics of the negotiation process and its international impact. Section two addresses the process of negotiation of the specific provisions on international affairs contained in the JD, looking at the negotiation positions of both China and Britain and their relative inputs. Section three deals with the new framework for HK external relations and international participation defined by the Basic Law, its structure and the opportunities and constraints it poses to HK's international activities. Section four reflects on the interaction between this formal framework and the practice developed during the transition period, and the impact this had on HK's international status.

### **3.1. SINO-BRITISH NEGOTIATIONS AND THE FUTURE OF HONG KONG**

#### **Retrocession and the international status of HK**

The question of the sovereignty over HK and the retrocession to China was settled by the 1984 Sino-British Joint Declaration (JD), an international treaty which introduced a fundamental change in HK's formal international status, marking the beginning of a new phase where HK would cease to be a colony and be integrated in another sovereign state, the People's Republic of China (PRC).

Since WWII, HK international legal status went through three different phases. The post-JD period corresponds to the third stage in this evolution.

During the first stage, despite the Chinese challenge to Britain's legitimacy following the 1942 Kuomintang (KMT) Government request for the return of the New Territories in the context of the Chongqing extraterritoriality negotiations<sup>160</sup>, HK from a legal point of view was recognised internationally as a colony whose destiny was to evolve towards self-determination. Since 1947 HK was included in the list of colonial territories of the UN Special Committee on Decolonisation. Similarly, Britain was internationally

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<sup>160</sup> See Steve Tsang, Hong Kong: an appointment with China, I.B. Tauris, London, 1997, pp. 30-33. These negotiations were intended to end the British concessions in China but the Chinese side considered the situation of the leased territories to be similar to the foreign concessions. Given the British opposition

recognised as the sovereign power and in that capacity had to report to the committee on a regular basis on HK's constitutional advancement towards self-government. This constituted a source of embarrassment for London because it could neither report any progress nor justify why political development could not take place. The British strategy was to be as discrete as possible, talk as little as possible and avoid international discussions about HK.

In this period there was no divergence between sovereignty and administration, internationally they were both concentrated in Britain<sup>161</sup>. In practice the PRC decided to accept the British Administration and the *status quo*, provided Britain did not allow HK to move towards self-government or to be used as a basis of destabilisation by the KMT as established in the 1955 understanding<sup>162</sup>.

There was a fundamental change in this situation in 1972 marking the beginning of the second stage. Following China's realignment with the West in the context of the Cold War and its readmission in the UN in 1971, Beijing requested the UN Special Committee on Decolonisation, in a letter signed by foreign minister Huang Hua, to remove both HK and Macao from the list of colonial territories to be granted independence according to the 1960 UN Resolution<sup>163</sup>. The letter was clearly a reaffirmation of the Chinese sovereignty over HK.

There was no serious British opposition to this proposal, the maximum London did to safeguard its position was to send a note to the UN Secretary General where it was

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to this view, both sides agreed to solve the concessions issue and defer the New Territories issue to a later stage. London agreed to raise and discuss the lease problem after the defeat of Japan.

<sup>161</sup> Interestingly the Foreign Office had admitted as early as 1946 in the Kitson memorandum (PRO FO 371/53635 The future of HK, 18.7.1946) the separation of administration and sovereignty as a possible scenario. The document proposed 4 different options: (i) return the New Territories in exchange for Anglo-Chinese joint control over important infrastructures; (ii) turn the entire HK into an Anglo-Chinese condominium; (iii) place HK under international control, with a strong role of UK and China in its administration; (iv) retrocede the entire HK in exchange for a new 30 year lease on the entire territory.

<sup>162</sup> This understanding was established between Governor Grantham and Premier Zhou Enlai during an unofficial visit of the former to Beijing in 1955 - Flowerdew, The Final Years of British Hong Kong – the discourse of colonial withdrawal, Macmillan Press, 1998, pp.28-29 (footnote 35)

<sup>163</sup> Cottrell, The End of Hong Kong, John Murray, London, 1993 pp. 32

stated that the Chinese letter “in no way affected the legal status of Hong Kong”<sup>164</sup>. In the absence of British opposition the Committee approved the recommendation, later on ratified and approved by the 27th General Assembly on November 1972<sup>165</sup>. In so doing it did not only approve the intended result (removal from the list of colonial territories) but, I would argue, also accepted the validity of the arguments China used to justify its request. It is difficult not to consider that there was an implicit international recognition of China’s sovereignty over HK.

This had three important implications for HK’s international legal status. Firstly, it ceased to be recognised as a colony falling into a *sui generis* category. Secondly, the international community ceased to recognise the right of HK people to self-determination. A key objective of China’s initiative was clearly to ensure that independence was definitely excluded as a scenario for HK. Thirdly, the recognition that HK was Chinese territory under British Administration and so the existence of limits to what the UK could do. The separation between sovereignty and administration emerged as a new feature, which had been already visible in Macao since 1967, later on formalised in the 1979 Sino-Portuguese secret agreement<sup>166</sup>.

The 1972 developments had profound implications for the evolution of the future process leading to the Joint Declaration. Before the international community China defined a set of political principles that would guide its future strategy (i) HK future was not an international question; (ii) the retrocession of the entire HK was unavoidable; (iii) the problem would be settled peacefully through negotiations; (iv) China would define the timing, thus holding the initiative.

On the British side, once the inevitability of negotiations had been accepted, the question was how to deal with uncertainty and to try to settle the matter as soon as possible. The

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<sup>164</sup> See Cottrell, *op.cit.*, pp. 33

<sup>165</sup> UN Doc GA /RES/ 2908 (1972)

<sup>166</sup> The secret agreement signed on 8.2.1979 was made public by an official note of the Portuguese Council of Ministers on 9.1.1987 – see *Diário de Notícias* 9.1.1987.

question would finally be raised bilaterally by Britain in the context of Governor MacLehose 1979 official visit to Beijing<sup>167</sup>.

MacLehose inaugurated a new era in the Government of HK. He had two important and complementary objectives on his agenda. On the one hand, to restore the legitimacy of British rule severely weakened after the 1967 events. On the other, being the first Governor to come from the Foreign Office, a diplomatic objective to promote the reconciliation of HK with China and the CCP and to improve co-operation following the 1972 UK – China rapprochement.

Britain was anxious to raise and settle the question of the 1997 lease of the New Territories and decided, secretly, to raise the question through an official channel and use the opportunity of the MacLehose visit to prepare the stage for the visit by Foreign Secretary, David Owen, due to take place later in April. The British motivations to raise the question of HK future at that time were mainly three.

First, to take advantage of China's new climate of greater openness to the outside world and engagement in economic reforms under a more moderate leadership. It was also considered that the future of Deng was still uncertain, its leadership was not yet consolidated.

Second, the political concern to secure an honourable decolonisation, and avoid a precipitate withdrawal was not only for reasons of prestige but also to minimise the risks of a mass migration to the UK that could threaten domestic stability. The silence the Chinese maintained since 1972 on the future of HK was fuelling anxiety in Britain. The scenario London most feared was one in which there would be no clarification and simply on the eve of 1997 China would tell Britain to go.

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<sup>167</sup> The invitation was transmitted to Governor MacLehose by the Foreign Trade Minister Li Qiang during an informal visit to HK in December 1978 to ask HK help to speed up China's modernization programme.

Thirdly, an economic motivation related to the fact, pointed out by Cottrell, that London was starting to write a series of loans guarantees for the construction of infra-structural projects whose repayment periods were extending beyond 1997<sup>168</sup>, assuming financial commitments for equipment that could be under Chinese control in 1997.

There is a conventional view that the erosion of private investors' confidence caused by uncertainty related to land leases and the security of their assets played an important role and pressed Britain to take the initiative. Indeed, this was how MacLehose presented the question to Deng Xiaoping for the sake of argument. However, both Cottrell and Tsang<sup>169</sup> question this view and argue that this was not the real reason as there was no 1997 related problem in the property market. Following the "open door" policy, investors were excited about business prospects in China and so there was an optimistic climate and not a real concern about a long-term problem. The issue of erosion of economic confidence was mainly a problem affecting Britain, not HK private investors. In this light MacLehose initiative has to be seen as a "pre-emptive strike to prevent a crisis" as Tsang puts it<sup>170</sup>, rather than a desperate response to a confidence crisis in HK which did not exist.

Finally, the British motivation to go ahead had to do with the evolution of the Macao process and the information that in the context of the 1979 restoration of diplomatic relations the Macao question had been discussed and settled. Although the Foreign Office did not know then the exact contents of the 1979 Sino-Portuguese secret agreement, it was considered that if China did talk about Macau it would be ready to talk about HK<sup>171</sup>.

With this in mind, the Foreign Office decided that MacLehose should go ahead and formally raise the question with an important qualification. He should not raise the

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<sup>168</sup> The best example was the project of a complex of power stations at Castle Peak in the New Territories whose repayment schedules ran from 1991 to 2002. See Cottrell, op.cit., pp 43.

<sup>169</sup> See Cottrell, op.cit., pp 41-42 and Steve Tsang, Hong Kong – an appointment with China, I.B. Tauris, London, 1997, pp. 83-90

<sup>170</sup> Tsang, Hong Kong: an appointment with China, op.cit., pp 86.

<sup>171</sup> See David Owen Memoirs Time to Declare, Michael Joseph I td, London, p. 405.

question of the main lease but of the sub-leases given to private investors by Britain<sup>172</sup> on the grounds that uncertainty was having a negative impact on investors' confidence. In other words the question should be raised as a commercial problem and not as a political one.

The political question of the global lease would to be raised by David Owen, during his visit to Beijing due to take place in April. Because of the fall of the Labour Government Owen's visit did not take place. Interestingly, some evidence points to the hypothesis he was intending to concede British sovereignty on the whole of HK in exchange for the continuation of British administration on a renewable basis<sup>173</sup>. This negotiation strategy was nothing else than the line traditionally favoured by the Foreign Office since the 1946 Kitson Memorandum.

The MacLehose initiative was not successful. China was not ready to talk about HK, as it was still focused on the reunification with Taiwan and in the early stages of the construction of the "one country, two systems" concept<sup>174</sup>. The uncertainty about the main lease remained and the British solution for the land leases was rejected. Moreover, Deng reaffirmed China's sovereignty, restating the 1972 declaration.

In spite of British pressure, uncertainty would remain for the next 3 years, as China did not accept to talk about the future of HK until January 1982 when Zhao Ziyang told Humphrey Atkins, a junior British Foreign Minister, that China was prepared to talk. China would make its position clear four months later when in April Deng Xiaoping in a meeting with Edward Heath sent a message to London that China wanted to recover

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<sup>172</sup> It has been mentioned by Cottrell, and confirmed during the interview with Lord Wilson, 21.5.2001, that this difference generated a problem of translation by the Chinese translator during the MacLehose – Deng meeting who translated the global lease question between UK-China and not the sub-leases. David Wilson intervened to correct the translation emphasising the difference, but this means that the British well thought subtlety was spoiled by a translator's inaccuracy.

<sup>173</sup> David Owen, *op. cit.*, p.407.

<sup>174</sup> The work had already started following the secret creation in 1978 of the new HK and Macau Affairs Office under the State Council. It was headed by Liao Chengzi, a Central Committee member, who had been the head of the CCP structure in HK before the war and a specialist of Overseas Chinese Affairs. Behind the scenes he was the real architect of the "one country two systems" concept – Cottrell, *op.cit.* pp.59-60.

both sovereignty and administration and that the “Nine Points” proposal for Taiwan would be the basis for negotiations.

### **The context of negotiations**

The official opening of the Sino-British negotiations on HK was announced on 24 September 1982 at the end of Margaret Thatcher’s visit to China. Britain had attained one of its short-term objectives as defined in the Downing Street preparatory meeting in late July<sup>175</sup>.

At the outset the negotiation positions of each party were constrained by different factors which contribute to explain their negotiation strategies.

On the Chinese side there were diverse factors at play. First, domestic political considerations involving the conflicts between the reformist camp led by Deng Xiaoping and the conservative camp led by Chen Yun. Contrary to conventional analysis, economic reforms and the open door policy were not the sole element of Deng’s strategy to strengthen his position inside the CCP. There was a second and complementary element, reunification. In the words of Cottrell<sup>176</sup> reunification and economic reforms were “twin elements” of Deng’s strategy in the sense that a commitment to reunification was a political tool to compensate and get some support from the conservatives thus moderating their opposition to economic reforms. Progress on reunification was therefore a necessary requirement for Deng to secure political control inside the party.

Secondly, the efforts devoted to have the reunification with Taiwan moving failed. The ‘Nine Points’ proposal did not receive any reply from Taipei and the new Reagan Administration was more supportive of Taiwan and so its position more secure, in particular after the 1979 US-Taiwan Relations Act. It became clear that a rapid reunification with Taiwan was not viable leading to a change in the priorities of the

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<sup>175</sup> This meeting took place on 28 July 1982 and involved the Prime-Minister, Edward Youde, Sir Percy Cradock and Alan Donald - Cottrell, op.cit.,pp.69-70.

<sup>176</sup> See Cottrell, op.cit., pp. 58-59.

reunification policy that shifted to HK. This shift was explained by the fact Deng needed, for internal political reasons, to deliver a triumph on reunification quickly. HK was a less complex and difficult case at the same time it could work as a “show case” for Taiwan, thus contributing to convince Taipei of the merits of the proposed formula.

Thirdly, on the external front China was starting to readjust its foreign policy<sup>177</sup>, trying to adopt a more independent position in relation to the US and a more neutral position in the context of the Cold War, which motivated Beijing to look for a closer relationship with the EEC, regarded as an alternative third major player. Sorting out the HK question with the UK and improving bilateral relations would serve this purpose.

In addition, Beijing was eager to make sure that its gradual integration in the international community had to be accompanied by a reparation of the humiliations China suffered at the hands of Western powers in the XIX century of which HK was the most vivid and dramatic example. The retrocession of HK would serve this purpose by contributing to the rehabilitation of China’s pride and prestige.

The combination of these factors led China to adopt a hard line position and to control the initiative in order to get a quick result and prevent the risk of another humiliation. The circumstance the New Territories lease expired in 1997 and the fact that the rest of HK was not viable without this part of the Territory, strengthened China’s bargaining position and severely weakened the British one. China challenged the validity of the three treaties on the cession of HK island, Kowloon and the New Territories<sup>178</sup> but, even if that was disputed, Beijing had still a highly powerful argument. According to International Law it was unquestionable that the lease was due to expire and so if China decided not to renew it, 93 % of HK’s territory would return automatically to China’s sovereignty.

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<sup>177</sup> James Tang and Frank Ching “Balancing the Beijing-London -HK “three legged stool” 1971-1986” in Ming Chan (ed), The HK reader – a passage to Chinese sovereignty, M.E. Sharp, New York, 1996, p. 51

<sup>178</sup> Duncanson argues there was also an international factor to explain China’s insistence in the thesis of unequal treaties related to the USSR and the existence of unequal treaties in Central Asia, regarding the definition of China’s borders and territorial disputes with the USSR. Beijing did not want to set a

On the British side different factors constrained its negotiation position. First, the change of Government and the new conservative government led by Margaret Thatcher. This implied the hardening of the British position and a determination to resist decolonisation, which represented a step back in relation to what was the state of the British thinking in early 1979.

Second, the links of the HK case with other colonies and the Falklands war, an act of preservation of British imperial remainings, contributed to fuel a harder position which insisted in the validity of the treaties. The similarities between HK, the Falklands and Gibraltar led London to resist the formal recognition of China's sovereignty over HK. The perception was that if Britain accepted that the treaties were invalid in the case of HK this would set a precedent and have immediate repercussions in the cases of Gibraltar and the Falklands<sup>179</sup>, opening new fronts and providing legal arguments for Spain and Argentina to challenge internationally British sovereignty, making the Falkland war effort meaningless.

Third, the HK factor and the special responsibilities of Britain. London was concerned to make sure it could not be accused of betraying HK. Moreover, it had to ensure that a final settlement would be acceptable to HK in order to avoid a major political crisis. This required that HK had to be somehow consulted and involved in the process. In the early stages of the negotiations Britain tried to support the idea of HK involvement when it presented the "three legged stool"<sup>180</sup> concept but then abandoned this strategy given China's strong opposition and accepted the marginalisation of HK people from the process.

Finally, an economic factor related to the fact Britain was increasingly interested in strengthening its economic interests in Asia and China, to take advantage of the

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precedent by softening its position - Duncanson, "Anglo-Chinese negotiations" in Jurgen Domes and Yu-Ming Shaw (eds) Hong Kong: a Chinese and international concern, Westview Press, 1988, pp 26-41

<sup>179</sup> Dennis Duncanson, op.cit., pp 26 -41

opportunities generated by the “open door policy”. This meant that London was concerned to ensure that the solution of the HK question would not cause any irreversible damage to UK–China long-term bilateral relations which tended to contribute to soften Britain’s position. There was a tension with the defence of HK interests and the potential risk of Britain being accused of selling out HK to obtain economic advantages for herself<sup>181</sup>, putting London in a delicate position.

As a result Britain had a weak bargaining position, derived not only from the fact HK was not viable without the New Territories and could not be defended if attacked, but also from the circumstance London had to reconcile contradictory interests being caught between its specific self-interests in the future UK-China relations, and the obligation to promote HK interests and reach an agreement acceptable to HK. The adoption of an inflexible position on the question of sovereignty in the early stages of the negotiations, for the reasons mentioned above, proved to be a “highly expensive” strategy that had to be finally abandoned.

### **The dynamics of negotiations**

The Sino-British negotiations were a very complex and highly visible piece of international negotiations. The purpose of this section is not to analyse in detail the negotiation process, already analysed elsewhere<sup>182</sup> but simply to identify the crucial

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<sup>180</sup> This was presented by the British Minister responsible for HK, Lord Belstead, during a visit to HK in 1982 – Tang and Ching, op.cit., pp. 42-43.

<sup>181</sup> This concern explains why Britain did not accept Beijing’s invitation for Margaret Thatcher to bring along a business delegation to conclude contracts during her trip to Beijing to sign the Joint Declaration in 1984, for fear it could raise suspicions in HK. It should be noted that the British delegation went 3 months later ... - interview with Hugh Davies, 23.5.2001

<sup>182</sup> The best account of the negotiation process is provided by Robert Cottrell, The end of HK – the secret diplomacy of Imperial retreat, 1993, John Murray, London, pp. 98–174. There are also other relevant accounts namely Steve Tsang, Hong Kong an appointment with China, I.B. Tauris, London 1997, pp.81-110 ; John Flowerdew, The Final years of British Hong Kong-the discourse of colonial withdrawal, Macmillan Press, London, 1998, pp.32-52; Gerald Segal, The Hong Kong fate, Simon and Schuster, London, 1993, pp. 31-51; Joseph Cheng (ed.) Hong Kong in Transition, Oxford University Press, London, 1986, pp.1-14; Ming Chan, Postiglioni (eds.) The Hong Kong reader – passage to Chinese sovereignty, M.E. Sharpe, New York, 1996, pp. 41-64; Percy Cradock, Experiences of China, John Murray, London, 1994, pp.159-247.

turning points to better understand the specific negotiation of the international affairs section of the JD.

The negotiations developed in four different phases with different characteristics. Phase one was dominated by the deadlock over the question of sovereignty. There were no real negotiations going on and no progress between 1982 and March 1983. It has been described as a phase of “talks about talks”. Britain insisted on the validity of the treaties and reaffirmed its sovereignty over HK island and Kowloon, for reasons mentioned above but also to try and consolidate a bargaining position to exchange concession on sovereignty for a Chinese concession on the continuation of British administration. The problem was that China did not accept to start negotiations and demanded that the British concession on sovereignty had to be made before negotiations could proceed. In the meantime China kept on working on a unilateral solution and Liao Chengzi continued with its drafting of a blueprint for HK which would lead to the “Twelve Point” plan. Once approved by the CCP Central Committee it would be very difficult to change China’s position and negotiations would be irrelevant.

The deadlock was overcomed through a British initiative know as the “first finesse”: Prime Minister Thatcher, advised by Sir Percy Cradock<sup>183</sup>, sent a letter to Zhao Zhiyang suggesting that Britain could consider the possibility of accepting a transfer of sovereignty stating that “if the negotiations yield arrangements acceptable to the people of HK the Prime Minister “would be prepared to recommend to Parliament the transfer of sovereignty”<sup>184</sup>.

Phase two started in May 1983, when a negotiation agenda was agreed. It was marked by a deadlock over the question of administration. The positions of the two parties were irreconcilable: Britain insisted that the British Administration should continue as it was an indispensable condition for the future stability and prosperity of HK; China opposed

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<sup>183</sup> The strategy was worked out by Cradock together with Tony Galsworthy – Cradock, op.cit. p. 186

<sup>184</sup> Cottrell, op.cit., pp.102-103.

this view and insisted it would resume also administration arguing that sovereignty and administration were indivisible. As a consequence British withdrawal was unavoidable.

In order to prove its point Britain presented a series of papers prepared by the General Duties Branch of the HK Government complemented with some inputs from the Foreign Office and the British Embassy in Beijing. These papers covered many sectoral areas (such as education, health, trade, civil service, legal system etc) were aimed at proving the complexity of HK's reality and show that British expertise and knowledge of the HK system was indispensable for its subsistence. Many negotiation rounds were dedicated to the extensive presentation of the papers with China taking a passive attitude. Like in the first phase there were no real negotiations but simply the reaffirmation of two irreconcilable positions.

This phase was also marked by an intensification of parallel initiatives outside the negotiation table aimed at increasing pressure and empty the formal negotiation process. There were two fundamental initiatives taken by China: the public presentation of the "Twelve Point" plan; the intensification of direct contacts with HK aimed at cultivating local Chinese support for China's position, a strategy carried out by the new Xinhua Director in HK, Xu Jiatun<sup>185</sup>.

The "Twelve Point" plan, a blueprint for the future of HK, was presented in July 1983 to a group of HK secondary school students visiting Beijing<sup>186</sup>. This was the core nucleus for the future Joint Declaration and constituted a crucial input to the negotiations on international affairs matters since it was the first document where HK international dimension was mentioned. In fact, as much as 3 out of the 12 points had to do with external affairs.

As a result Britain's "room for manoeuvre" was severely diminished and tension escalated with extremely negative effects on HK. For the first time the lack of progress

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<sup>185</sup> Cottrell.op.cit., pp.112-114.

<sup>186</sup> Ibidem, p. 112.

in negotiations and the climate of confrontation had an impact on HK as it eroded confidence and triggered the September 1983 HK dollar severe crisis. Under great pressure London decided to give in through an initiative known as the “second finesse”<sup>187</sup>. The British position would be finally clarified in the 6<sup>th</sup> round when Cradock gave a formal reassurance that Britain would seek no “links of authority” with HK after 1997. In the words, Britain would accept to withdraw if a good agreement was reached. The negotiation entered a new and more positive phase.

The third phase was marked by the start of real negotiations on specific issues. At this stage the major point of tension was the nature and contents of the final agreement. China put the “Twelve Point” plan on the table of negotiations and wanted a vague document containing general principles and formed by two parallel declarations. In addition it wanted to establish a Sino-British Joint Commission with real powers to oversee and interfere in HK’s administration until 1997.

In contrast, Britain wanted a more detailed and legally binding agreement, which could offer more guarantees to HK, and rejected the idea of a Commission with powers to interfere with HK Administration. With that in mind, and since the British side had to take the initiative and provide the contents for the detailed text, Britain started to prepare a second set of papers, once again prepared by the General Duties Branch the HK Government, but this time with a very different orientation. They were no longer aimed at proving that British administration was indispensable but rather to emphasise the current autonomy of HK, the capacity to manage its own future. This would be the basis for the work of the future Wilson-Ke Working Group.

This indicates there were two different perspectives on the negotiations: Britain assumed a more legalistic approach while China adopted a more political approach with little awareness of the relevance of legal questions. This difference of perspectives has contributed to make the negotiations more difficult and complex.

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<sup>187</sup> Ibidem. pp 130

Furthermore, the British position also illustrates the fact that negotiations were marked by a lack of trust between the two sides. Britain did not trust China to run HK and preserve the system and therefore insisted in having a detailed agreement and everything written down. China was also suspicious about the British intentions and thought that London would do everything to drain all the money out of HK and to undermine the future Chinese rule and therefore insisted in the Joint Commission. This mutual distrust remained an underlying factor that made negotiations more difficult.

In an attempt to put further pressure on the British side, China announced a unilateral deadline to conclude the negotiations for September 1984. In case an agreement could not be reached until then, Beijing would take unilateral action and settle the HK question without Britain. London understood then that if it wanted to obtain any concessions from Beijing it had to work within the Chinese timetable<sup>188</sup>.

The difficulties and differences were bridged through high level political intervention in two stages. The first one corresponded to the visit of Foreign Secretary Howe to Beijing on 15 –18 April 1984. In the context of a meeting with Deng, the Chinese side agreed to the principle that the agreement would be more detailed, provided that the “Twelve Point Plan” remained the centre piece, and accepted a more flexible interpretation of the September deadline which would be for the initialling, not the ratification, of the agreement.

Although HK had been systematically marginalised from the process and not allowed to participate in the formal negotiations, the third phase was also marked by a more active HK as some sectors made co-ordinated attempts to influence the contents of the final agreement. A group of unofficials from Exco and Legco presented publicly a document containing their concerns and the minimum conditions of acceptability for HK, in May

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<sup>188</sup> Cradock, *op.cit.* p. 197. Cradock points out that from the beginning it was felt that the deadline and its pressure could also work to the benefit of Britain, and considers that the moment when Britain decided to meet the deadline constituted the third key turning point in the negotiations.

1984<sup>189</sup>. The main concerns related to three fundamental topics: the nationality issue and how Britain was going to honour its obligations; the method of consultation of the HK people and confirmation of the acceptance of the agreement; the contents of the agreement, namely the guarantee of a legally binding nature, the incorporation of its provisions into the future Basic Law and the characterisation of HK's future legal, economic and social systems. This initiative would prove to be more effective than initially expected as many of these points were actually taken into consideration by Britain and incorporated into the Agreement.

The fourth and final phase of negotiations started with the formation of the Wilson-Ke working group, approved during the April Howe-Deng meeting, responsible to negotiate the detailed text of the JD. This phase was marked by an intense and substantive work of detailed negotiations, clearly the most productive phase of the entire negotiation process.

This was also probably the phase where Britain scored more points and was able to see its proposals through. After having lost in various fronts the British strategy was one of damage limitation. In that Britain has ironically benefited from the deadline set by China, which has also put pressure and constrained the Chinese negotiation position. As the deadline approached, China was also forced to make concessions and accept compromises in order to be able to deliver the agreement on time.

The best illustration of this phenomenon was the outcome of Foreign Secretary Howe's second visit to Beijing on 27-31 July aimed at solving the last blocking problems. At that moment China made the largest concessions ever during the entire negotiation process and accepted the British proposals on three fundamental issues: the JLG was going to be an organ of liaison not power and so would not interfere in the administration of HK; the JD would be a legally binding agreement for both sides, a true international treaty; the future Basic Law would necessarily incorporate the policies contained in the JD.

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<sup>189</sup> The initiative was aimed at lobbying the House of Commons, more specifically the 16 May debate on Hong Kong. For that purpose a delegation went to London, led by Sir S.Y. Chung but was unsuccessful in its mission – Cottrell, *op. cit.* pp. 152-153.

However, a small group of the most intractable issues would still remain open and real stumbling blocks until the very end of the negotiations. The list included the issues of nationality (China refused to recognise BDTC citizenship and passports and to accept dual nationality), land leases (in particular the partition of revenues from new leases granted between 1984-1997), civil aviation (China wanted to take over the landing rights of HK, while Britain wanted to allocate them to HK), the presence of PLA troops in HK (China wanted troops to be stationed as they were an important symbol of sovereignty) and the political evolution of HK towards representative government.

After a long and exhausting process of negotiations the JD was finally initialled in Beijing on September 1984 and subsequently approved for signature by the Standing Committee of the National People's Congress in November and the House of Lords in December 1984<sup>190</sup>. On 19 December Thatcher and Deng formally signed the agreement in Beijing. Although China wanted to avoid the internationalisation of the HK question, this was indeed one of the main outcomes of the Sino-British negotiations as the negotiation process had a high international visibility and the question was finally settled through an international treaty subject to International Law.

The negotiations revealed also a major paradox. Despite all the economic power and robust international status, HK was prevented from participating and having a say in an international negotiation process where its own future was being decided. This reflected not only the absence of democratic representative institutions in HK but also the limitations of non-sovereign actors to act in a system still dominated by sovereign states.

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<sup>190</sup> The House of Lords approved the text of the Joint Declaration for signature in the 10<sup>th</sup> December 1984 session on the future of HK – see Parliamentary Debates (Hansard), Fifth series, vol. CDL VIII (2<sup>nd</sup> vol. 1984-85 sessions), pp. 27-87.

### **3.2. THE NEGOTIATIONS ON THE INTERNATIONAL AFFAIRS CHAPTER OF THE JOINT DECLARATION**

The existing accounts in the literature of the Sino-British negotiations tend to be confined to the analysis of the overall negotiations and the evolution of the negotiation positions of both parties. What is generally lacking is a more detailed analysis of the negotiation dynamics of specific core parts of the JD, what were the inputs of the two parties, the points of disagreement and how the final solution came about, as well as the inter-linkages and cross bargaining between different parts. There is no analysis available of the specifics of the negotiations of the parts of the JD dealing with HK international affairs. The purpose of this section is to make a first contribution to fill this gap and present an interpretation, based on interviews with some of the participants in the negotiation process, of the inputs made by Britain and China to this part of the JD and their different motivations.

Before analysing the inputs of China and Britain and their respective negotiation positions, it is important to place the negotiation of the external affairs question in the context of the global negotiation process. The part on external affairs was fundamentally negotiated in the fourth phase of negotiations although some initial inputs were made in the third phase. The details of the JD provisions on external affairs were discussed and agreed by the Wilson-KE working group, the negotiation body charged with the responsibility of drafting Annex I, in the final stages of the negotiation process.

The working group was created in June 1984 and started operating by the end of July. The British team was headed by David Wilson<sup>191</sup>, former political adviser to MacLehose and Under-Secretary of State, responsible for Asia and the Pacific, and included also Robin McLaren (political adviser to Governor Youde) Gerald Nazareth (HK Government law draftsman), Fred Burrows (Foreign Office Legal Adviser) and William

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<sup>191</sup> Although Geoffrey Howe wanted an eminent legal expert to lead the British side, Cradock opposed this and proposed David Wilson arguing that the essential thing was to have someone who understood the way the Chinese negotiate and political constraints and there was no time to train a legal expert on that - Cradock, op. cit. p. 199.

Ehrman (First Secretary of the British Embassy). The Chinese team was headed by Ke Zaizhou (deputy director of the department of international organisations treaties and laws at the Chinese MFA). It included Wu Jianfan, Zhang Yu, Jiang Weiping, Zhang Xianghin and Shi Jiuyong (MFA jurist and eminent International Law professor).

The negotiations of the external affairs provisions were fundamentally co-ordinated by two negotiators who played a very influential role, Fred Burrows on the British side, and Shi Jiuyong on the Chinese side, the two most experienced and prominent experts of International Law from each delegation<sup>192</sup>. This also signals that the negotiation had more a technical tone than a political one, reflecting the fact this was not a controversial issue in the context of negotiations. In short, the negotiation was highly concentrated, developed over a period of two months, and carried out during the most positive period of the Sino-British negotiations although submitted to great pressure created by the September deadline.

However, if it is true that the actual negotiation was carried out in the fourth phase in the context of the Wilson-Ke working group, there were some antecedents and specific inputs, which were presented at earlier stages of the negotiation. The first one, and probably the most important, was the “Twelve Points Plan” mentioned above. This document, which would constitute the centre piece of the JD, included three points which had to do with foreign affairs: (i) the principle that HK would run its own affairs with no interference of the Central Government with the exception of defence and foreign affairs; (ii) the provision that HK would have considerable freedom to take part in international activities; (iii) the guarantee HK would remain a free port and a financial centre. Here it was already clear that foreign affairs would be an exception to the high degree of autonomy and would be the Central Government reserved dominion. In addition, an important dimension of HK international status, its role as an international financial centre, would be preserved.

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<sup>192</sup> Interviews with David Little, head of the HK Government International Law Division, 3.11.99 and Shi Jiuyong, Vice- President of the International Court of Justice, 6.6.2001.

So far this was according to expectations. What was new and rather surprising was China's intention to let HK have "considerable freedom", autonomy to act internationally, in apparent contradiction with the first principle. Britain was certainly positively surprised as China's initial position included not only a reference to external relations but went beyond expectations. One of the main tasks of the negotiations was going to be a more detailed definition of this sphere of HK's external autonomy.

The second input was a British one. It was the preparation and presentation of the second set of papers during the third phase of negotiations at the start of the 8<sup>th</sup> round. This second set, unlike the first one, was aimed at emphasising HK's existing domestic autonomy in specific areas and capacity to handle its own future. This extensive collection of papers was the fundamental basis for the work of the Wilson-Ke group<sup>193</sup>.

The precise content of those papers is still open to question, probably until the moment when the documents will be disclosed to the public. What is possible to conclude on the basis of the interviews conducted, is that there was no specific paper on external relations but only some short and dispersed references, namely in the paper on trade policy.

It is more difficult to assert who played a more active role in the negotiation process and who pushed forward the idea of HK's external autonomy. As one could expect the British and Chinese accounts differ. The most likely hypothesis is that although Britain gave the first input and supported the idea to grant HK autonomy in specific areas of external relations, China exerted more influence in terms of the expansion of the autonomy's scope adopting a more liberal and open approach than the initial proposal put forward by Britain. The interpretation proposed for the relative negotiation positions, inputs and motivations of China and Britain to behave as they did, takes into account both arguments based on the previous practice and on the specific context of the overall negotiation. Let us analyse in turn the negotiation position of each party.

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<sup>193</sup> Interview with Lord Wilson, 21.5.2001.

Britain's negotiation position was very careful and prudent. The British concern was initially restricted to trade and its initial proposal to the Chinese side was not very ambitious<sup>194</sup>. The question of autonomy in managing external commercial matters was raised in the sectoral paper on trade included in the second collection, with the intention to ensure HK's continued participation in GATT. This minimalist approach can be explained by two good reasons. Firstly, London had low expectations on the foreign affairs area as this was closely linked to sovereignty and so likely to be carefully controlled by China. Knowing of China's determination to prevent any limitation to its sovereignty and the sensitiveness of the question, Britain did not want to create more conflicts and tensions that could derail an already fragile negotiation process.

Secondly, trade was clearly the most developed and consolidated area of HK's external autonomy but this had no parallel in other areas where London was less liberal and kept HK's external relations under stricter control fully exercising its sovereign rights. Such was the case, for instance, of civil aviation and the negotiation of air services agreements which were directly negotiated by London and primarily subordinated to its interests without any participation of HK. So, Britain's own policy on HK external affairs was in some areas inconsistent with the defence of a broad autonomy.

This minimalist initial approach seems to have expanded in a second stage to include two other areas, shipping and civil aviation, in relation to which Britain put forward also proposals to allow HK to enjoy autonomy.

The Chinese negotiation position was more flexible in this area than in other areas of negotiation. Going beyond expectations China somehow took the lead in proposing a far-reaching and clearly innovative system of autonomy in external relations. The proposal to adopt a wider list of sectors where HK could act on its own internationally came from China, which added more appropriate fields to the areas proposed by London. Moreover, the granting of treaty making powers to HK was a Chinese input. In short, the Chinese contribution to the text of this part of the JD was greater than

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<sup>194</sup> Interview with Judge Shi Jiuyong, 6.6.2001.

generally believed and more significant than the British one, exceeding initial expectations.

The Chinese decision was not taken at the negotiation table but much earlier. In fact, China had already stated in the “Twelve Points Plan” its intention to allow HK freedom to act internationally even before the negotiations started. Chinese officials, in particular Shi Jiuyong, had looked at examples of other autonomous entities in terms of degrees of external autonomy trying to find a source of inspiration but rapidly reached the conclusion that the normal formal autonomy pattern was rather limited and decided to advance with an innovative solution<sup>195</sup>. How can China flexibility be explained? Different factors seem to have been at play.

China was primarily concerned in securing HK's economic prosperity which was largely dependent on its ability to remain an international financial, communications and trade centre. This in turn was a crucial condition for HK to be able to play a supportive role to economic reforms and constitute China's main gate to the world economy. For that HK required a certain degree of autonomy in external affairs which would contribute to boost international confidence in its continuity as an international centre.

I would argue that in addition to this explanation advanced by Chinese sources, there were two other factors at play. One was that China adopted a more liberal posture because Beijing saw the powers to conduct autonomous economic relations as being delegated powers from the sovereign, thus derived not original powers, and so this was a guarantee that China sovereignty would not be diminished<sup>196</sup>.

In addition, China was motivated by the fact that the granting of considerable autonomy in external affairs could serve as a strong political signal to the international community that China was determined to preserve HK's place in the international system by sending

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<sup>195</sup> Interview with Shi Jiuyong on 6.6.2001.

<sup>196</sup> See Shi Jiuyong, Autonomy of the Hong Kong Special Administrative Region, in Leiden Journal of International Law, 11, 1998, pp. 63-70.

the message that members of the international community could continue dealing directly with HK.

The interaction between these different factors together with the circumstances that conditioned the British negotiation position, provides a sound basis to the argument that China's input to the negotiation of the international affairs chapter of Annex I was more determinant than the British input and China exerted a greater influence on the final output showing a more audacious attitude. In this sense external affairs constituted an interesting exception to the dominant tendency in other chapters where Britain took the lead.

Although China adopted in general a relatively open attitude, there was an important exception to this, civil aviation where the two parties changed positions: Britain a more flexible and devolutionist approach and China a more centralist one. It is interesting to note that both sides regard the external affairs file as one of the least controversial parts of the JD where agreement was easier to reach. The most remarkable exception was civil aviation and air services agreements which was one of the most difficult questions in the entire negotiation process and one of the last to be settled.

In fact Britain pressed for some degree of autonomy for HK in this field. Ironically, London's position was contradictory insofar it pushed for something which Britain as a colonial power did not practice. As demonstrated above, Britain kept HK landing rights tightly under control, trading them for the benefit of the UK in support for its economic interests, namely British Airways. As a consequence air services agreements were directly negotiated and signed by London with no intervention of the HK government<sup>197</sup>. In the negotiations Britain opposed China's position to keep for itself and have full control over HK landing rights, which was what Britain was exactly doing as the colonial master.

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<sup>197</sup> This was a motif for tensions between London and HK leading to recurrent complaints on the part of the HK Government as recognised by Lord David Wilson, interview on 21.5.2001. Also interview with Anthony Baker, Director of the International Aviation Negotiations, UK Government, 18.3.2002.

China's initial position was rather radical and refused any autonomy to HK in this matter insisting in getting full control over landing rights. This inflexibility was explained by two different reasons. First, the fact landing rights and control over air space was regarded as an important dimension of sovereignty and therefore should be controlled by the Central Government. Second, there were important commercial interests which led CAAC, the Chinese aviation company, to press strongly for an asset which could enable it to trade HK landing rights with third parties. It is important to bear in mind that in 1984 CAAC was still dominated by the People's Liberation Army, and so it was in fact the military, determined to obtain some tangible prize from the negotiations and with their strong political leverage, who were behind the Chinese hard position.

It is believed that this issue originated internal tensions and disagreements inside the Chinese side between the Foreign Ministry advocating a more moderate position and CAAC with a more hard-line position that was overturned at the end. The question was finally settled and Britain could claim victory. In any case the negotiation on civil aviation confirmed two interesting aspects. First, it was the first sign of a British strategy which would be developed during the transition period, to push to the limits for greater autonomy in areas previously controlled by London (air services agreements but also investment protection agreements, fugitive offenders). Second, it showed that the "one country, two systems" and the negotiations were not as consensual as generally believed inside China's leadership as there was, like on the issue of economic reforms, an opposition of the conservative camp to some aspects of the concept and its implementation.

As a result of the Sino-British negotiations, civil aviation emerged as an important example of an area where there was a significant advancement of HK's autonomy when compared with the pre-negotiations situation. After 1985, HK started to have a say in the negotiations of the air services agreements and to sign them on its own.

The main argument put forward is that the external affairs part is to some extent unique in the context of the overall negotiations as it runs counter the dominant trends in two

different ways. Firstly, contrary to the majority of other issues dealt with in Annex I of the JD in relation to which the main concern of the two sides was to maintain the “status quo” and “freeze” HK’s current reality to ensure the preservation of the system, in the field of external affairs the two sides went much further, well beyond current reality, introducing several innovations.

Secondly, while China is commonly seen as the side which offered more resistance to change that could affect its future sovereignty and Britain as the “demandeur”, pressing for concessions to strengthen HK’s autonomy, in the external affairs chapter evidence suggests it has been the other way around, China was more forthcoming and hold the initiative in terms of establishing an autonomy sphere for HK in external affairs.

### **Provisions of the Joint Declaration**

The JD contains a wide range of provisions on external affairs both in the main text and in Annex I. The main text includes basic general principles: (i) that foreign affairs are the responsibility of the Central Government and an exception to the high degree of autonomy the HK SAR enjoys (para 3.2); (ii) the SAR retains the status of a free port and a separate customs territory (para.6) (iii) the SAR retains the status of an international financial centre (para.7) (iv) the SAR can develop autonomous relations in economic and cultural areas and conclude agreements on its own with foreign states, regions and international organisations (para.10) (v) the SAR ability to issue its own travel documents (para.10).

Annex I develops in more detail these basic principles. Chapter XI contains the general framework of HK’s autonomy in external affairs, including bilateral and multilateral spheres. This is complemented with provisions on specific areas particularly relevant for HK: trade and external commercial relations (chapter VI); finance and the role as an international financial centre (chapter VIII); shipping and HK’s role as a shipping register (chapter VIII); civil aviation and the role of HK as a centre of international and regional aviation (chapter IX); travel documents and control over international immigration (chapter XIV).

An integrated analysis of all these provisions leads us to conclude that there is a mixture of continuity, involving the formalisation and preservation of the *status quo* illustrated by the first three principles of the main text, and innovation, implying different conditions from the pre-negotiations situation, illustrated by the last two principles contained in paras 9 and 10 of the main text. The main argument is that innovation and change are more important in the external affairs section than in any other parts of the JD, and are visible at four different levels.

Firstly, the JD formally recognises a sphere of autonomy in external affairs, which was until then informal and fluid, with no defined boundaries and limits. All the manifestations of autonomy were formally in contradiction with constitutional rules since there was not any formal devolution of powers in external affairs from Britain to HK.

There is an apparent paradox inside the JD insofar as on the one hand it is established that foreign affairs is a competence of the sovereign and an exception to the high degree of autonomy of the SAR, and, on the other, HK is granted autonomy to act internationally in a wide range of areas. The paradox is partly resolved by a crucial distinction introduced by the JD between foreign affairs and external affairs whose rationale will be analysed below, and partly by the consideration that all powers HK enjoys in this field are derived powers delegated by the Central Government and therefore ultimately susceptible of being subject to its control<sup>198</sup>. This view held by China is controversial and can be challenged by the argument that the autonomous competencies enjoyed by HK derive from an international treaty and not from an act of delegation of powers.

Secondly, the JD expands the scope of HK's autonomy into new areas both through the inclusion of areas previously subject to London's tight control and areas never activated before. Before the Sino-British negotiations the areas where HK enjoyed *a de facto*

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<sup>198</sup> See Shi Jiuyong, *op. cit.*, pp. 69.

autonomy were basically trade, the most developed one, and to a lesser extent, financial and immigration issues. The JD not only provides a list which includes areas where HK did not enjoy autonomy such as communications or shipping, but more importantly this is considered, as argued below, an “open list” which might further expand to include other areas.

Thirdly, the JD formally grants HK explicit “treaty making powers” including in areas where it did not possess such powers. Basically, the only area where HK exercised treaty-making powers was trade, on the basis of the 1969 informal devolution, and this is expanded to include all areas belonging to HK’s sphere of autonomy. In addition, these powers were also granted in relation to areas with a more political contents, in particular civil aviation, immigration and visa abolition and legal and justice areas, even though under a more restricted system of specific prior authorisations.

Fourthly, the JD implies an international recognition of HK’s external autonomy by two strong and influential sovereign states through an international treaty, strengthening the basis of legitimacy for HK’s international participation and inviting other countries to interact directly with HK. It also provides an important guarantee that this autonomy will last and cannot be arbitrarily restricted by the sovereign power.

### **3.3. THE BASIC LAW AND HONG KONG’S FRAMEWORK OF EXTERNAL AFFAIRS**

The Basic Law (BL) was approved by the National People’s Congress (NPC) in 1990 culminating a 5 year process which involved the production of a Draft text by the BL Drafting Committee, a special body appointed by the PRC and operating under the supervision of the Standing Committee of the NPC. The BL has a dual character insofar it is the mini-constitution of HK, the SAR fundamental law occupying the apex of the hierarchy of laws which can not be contravened by any laws enacted by the SAR<sup>199</sup>, and

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<sup>199</sup> BL art. 11.

at the same time an ordinary Law of the PRC without constitutional dignity, enacted according to article 31 of the Chinese Constitution and susceptible to be amended by the NPC.

Unlike other NCGs, HK's high degree of autonomy has no constitutional status and is neither enshrined nor guaranteed in the Chinese Constitution, which might be seen as a source of fragility and as providing insufficient juridical protection. However, this does not mean that in the PRC context the BL is a common ordinary law. On the contrary, it has a very special nature and is best characterised as a "reinforced law" in the sense that the freedom to amend it is limited by an international treaty. In fact, until 2047 the NPC can not introduce arbitrary changes in violation of the principles and specific provisions of the JD. Thus, the BL has a unique nature in China's legal system as its basic content is directly guaranteed by an international treaty binding on the Chinese State<sup>200</sup>.

The BL contains a developed and detailed framework for HK's external affairs, including a clear definition of the competence of both the SAR and the Central Government and the contents and limits of the SAR's external autonomy. The existence of explicit and detailed provisions on external affairs is rather unique when compared with other NCGs. Although there is a special chapter on external affairs, chapter VII, articles 150 to 157 of the BL, which reproduce the exact contents of section XI of Annex I of the JD, not all relevant provisions are concentrated in this chapter but dispersed by various articles throughout the BL<sup>201</sup>, namely article 13, of fundamental structural importance asserting the Central Government exclusive competence on foreign affairs and including a general authorisation for the SAR Government to conduct external

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<sup>200</sup> This limit to the amendment of the BL is indirectly recognised in art 159 which states " No amendment of this Law shall contravene the established policies of the People's Republic of China regarding Hong Kong". Although there is no direct reference to the JD it is known that these basic policies are spelled out there.

<sup>201</sup> The full list of dispositions include besides articles 150-157, the following: article 13, article 18 (application to HK of PRC laws related to foreign affairs); article 19 (SAR courts no jurisdiction over acts of state such as defence and foreign affairs); article 23 (prohibition of the HK SAR political organisations to establish ties with foreign political organisations); article 48 (9); article 62 (3); article 96 (agreements with foreign states on reciprocal juridical assistance); article 116; article 126 (authorisation for access of foreign warships to HK harbour); art. 129 (access of foreign states aircrafts); article 133 (air services agreements) and arts. 134 –135 (civil aviation); article 141 (freedom of religious organisations); article 149 (NGO's external relations).

affairs on its own, and articles 48 and 62, which grant the Chief Executive and the SAR Government explicit competence to conduct external affairs.

### **Foreign affairs vs. External affairs**

The Basic Law system on HK external autonomy is based on a fundamental distinction between foreign affairs and external affairs, clearly made in article 13 (1),(3) BL as well as in the use of “External Affairs” as the title of Chapter VII.

This represents continuity in relation to the JD where such a distinction already existed (para. 2, section I of Annex I). The relevance of this conceptual distinction is related to the fact it is the basis for the division of competencies between the Central Government and the SAR Government insofar as “foreign affairs” is the exclusive competence and responsibility of the Central Government while “external affairs” is a competence of the SARG and constitutes an area where HK is formally allowed to enjoy autonomy. The boundaries between the two concepts set the boundaries of HK’s autonomy to act externally. There is yet a third category of “transnational relations”, which is also introduced by the BL and differentiated both from foreign and external affairs.

Even though the BL uses the two concepts it does not provide neither a clear definition of each concept nor spells out substantive criteria to distinguish them. However, an integrated and systematic interpretation of the various dispositions of the BL suggests two alternative hypotheses.

The first hypothesis is that the BL adopts an objective criteria related to the nature of the issues. The distinction between foreign affairs and external affairs would correspond, *grosso modo* to the academic distinction between “high politics” and “low politics” with foreign affairs equated with high politics areas and external affairs with low politics.

The second hypothesis is that the distinction is centred around a subjective criteria associated with the type and characteristics of players, so that foreign affairs would involve exclusively official relations between sovereign states, both at bilateral and

multilateral levels, while external affairs involves the participation of non-sovereign entities.

A systematic interpretation of the different dispositions of the BL leads us to conclude that it adopts a mixed position basing the distinction not on a single criterion but rather on a combination of criteria. In fact, there is an implicit articulation between three criteria, an objective criterion related to the nature of the issue-areas, a subjective criterion related to the nature of actors and a teleological criterion related to the purpose of the action and the interests pursued.

Firstly, foreign affairs are closer to high politics while external affairs are predominantly associated with low politics areas. This clearly results from the fact the issue-areas listed under article 151 BL that define the scope of external affairs, all pertain, probably with the single exception of some aspects of monetary affairs, to the domain of low politics. There is not a list of issue-areas falling under foreign affairs which is defined by exclusion. However, there is not a perfect coincidence between external affairs and low politics. On the one hand, there is an element of uncertainty because there are some low politics areas which have not been expressly listed under article 151 (namely social sectors like education, health, environment, technology) and it might be the case that some are under foreign affairs.

On the other, one should note that not only in article 151 monetary affairs, without restriction, have been included under external affairs although some of its aspects could be considered as high politics, but also outside article 151 there are areas closer to high politics like civil aviation and the use of air space and immigration where HK can exert powers and enjoy some autonomy though more limited (articles 133 and 154-155 BL).

Secondly, taking into account the nature of actors involved, foreign affairs involves exclusively relations between sovereign states and with International Organisations restricted to states, being HK interests represented by the PRC. In contrast, external affairs involves always the participation of non-state actors, at least one of the parties is

a non-sovereign entity, as stated in article 151 “foreign states, regions and relevant international organisations”. It is possible to identify two different types of relations: (i) an asymmetric one between the SAR, a non-state actor, and sovereign states; (ii) a symmetric one between the SAR and other non-state actors, namely non-sovereign states like federated states, regions, which means regional governments thus covering NCGs similar to HK, and international organisations which has to be understood to mean international organisations not limited to states.

One interesting question is to know if external affairs cover relations between the SAR and all types of non-state actors, including private and social sectors, or only with public non-state actors. The interpretation of the relevant dispositions seems to suggest that only relations with public non-state actors, involving always relations between governments, are considered external affairs the implication being that relations between the SAR and TNCs or international NGOs fall outside the scope of this category.

Thirdly, there is a difference in terms of the purpose and scope of external action. In foreign affairs the purpose of external action is wider and includes not only the pursuance of specific interests of the State in question but also the defence of interests and positions of third states, for instance an ally, and even the promotion of more global and abstract interests of the international community as a whole (restore international order and peace) or contribute to the improvement of the international system through the definition of global rules. In the context of external affairs the scope of action is more limited and restricted to the promotion of specific interests of the SAR, which becomes both the legitimacy basis and the limit of HK’s external autonomous action. In other words, external action under external affairs is only justified when there is a specific and direct self-interest of HK and cannot be driven by the pursuance of the interests of a third party or abstract interests of the international community.

This teleological limit is implicit in the logic of external autonomy and can be indirectly derived from the dispositions of articles 150 and 152, which consider that the participation of HK in foreign affairs actions is only justified if the SAR is directly

affected by the matter and so has a direct interest, as well as in article 13, where the SAR is authorised to conduct on its own *relevant* external affairs, which has to be interpreted as relevant to the SAR's specific interests.

The consideration of the nature of interests pursued introduces an additional distinction insofar as in foreign affairs related to HK, China global national interests and foreign policy objectives prevail over any SAR interests, while external affairs is the realm of HK specific interests and motivations. In this sense foreign affairs belongs to "one country" equation and external affairs becomes a dimension of the "second system".

Although the distinction between "high politics" and "low politics" is the central criteria for the distinction between foreign and external affairs, the co-existence and interaction with the other two criteria generates a more complex picture and more fluid boundaries between the two categories. For instance, the participation HK in an international organisation limited to states but dealing with low politics issues (labour, health, intellectual property rights) which would be seen as external affairs according to the nature of the issue-area, actually falls under foreign affairs because of the nature of the actor involved.

When the nature of matters is articulated with the purpose of action one can conclude that a low politics issue might not necessarily be regarded as external affairs namely if there is not a direct interest of HK in the matter. To some extent the BL adds to the confusion when under chapter VII on external affairs includes issues that clearly belong to foreign affairs such as those mentioned in articles 150,152(1) and 157 (consular missions).

Finally, it should be mentioned that the BL includes a third category that can be named "trasnational relations". This category emerges from article 149 of the BL, which regulates the external relations of HK NGOs, and constitutes an innovation in relation to the JD. Unlike foreign and external affairs, which involve relations at the governmental level, here we deal exclusively with relations at the non-governmental level, more

informal, between HK NGO's and their counterparts in foreign countries, involving exclusively private non-state actors.

### **The SAR sphere of autonomy**

The second structural element of the BL system which can condition the future ability of the SAR to engage in international relations, is the exact configuration of the SAR sphere of autonomy in conducting external relations on its own. The fundamental conclusion in this respect is that the system created by the BL does not encapsulate a simple and clear cut dichotomy between defined areas of autonomy and no autonomy, but implies a more complex four-tier structure with some grey areas.

The first tier corresponds to a more general level related to policy formulation involving the definition of global and long-term objectives, priorities as well as strategies for HK external relations. Although this is not explicitly regulated by the BL, the principles of “one country” imply that the broad lines of HK’s external affairs can not be in contradiction or open conflict with China’s global foreign policy guidelines. This requires a certain measure of co-ordination between the Central Government and the SAR Government in order to ensure a minimum level of consistency between HK’s autonomous strategy and national interests.

Given this requirement of consistency, the level of autonomy HK enjoys to define its broad external affairs policy options is not of a high degree but of a medium degree. Another important feature of this tier is the coexistence between separated options (parallel actions) and co-operation with the Central Government.

The second tier is related to external affairs policy implementation structured around the list of areas defined in art. 151 BL (economic, trade, financial, monetary, shipping, communications, tourism, culture, sports) where HK can act on its own on the basis of a “general authorisation” conferred by the Central Government. This authorisation contained in art. 13 (3) BL, has a permanent, no time limit, and unconditional nature. Given its latitude and wide scope, covering the management of relations, treaty making

powers and “jus legationis”, this is not a mere authorisation but a real devolution of powers implying that the sovereign power can no longer exercise the competencies which have been the object of devolution.

In this tier HK enjoys greater autonomy than in the first tier, closer to the high degree of autonomy it enjoys in domestic affairs though slightly more reduced because in external affairs the Central Government still has a formal power of ultimate supervision. Moreover, in this level HK can act exclusively on the basis of its specific self-interests not constrained by national interests.

It is interesting to note that in this tier there is a strong link between external autonomy and domestic autonomy. The ability to act externally is to some extent a projection of autonomy in domestic matters, a necessary mechanism to materialise and develop internal autonomy of an international city where boundaries between the domestic and external levels are much more blurred. This raises an interesting question about the limits of autonomy in external affairs and to what extent it has elasticity and can expand to cover all areas where HK enjoys domestic autonomy, i.e. whether external autonomy can match domestic autonomy.

This is particularly relevant when we consider the nature of the list contained in article 151 BL, whether it is an open or a closed list. In other words, if autonomy only covers the areas expressly listed or if HK can act also in areas not expressly foreseen in this article. For example, it is particularly striking that social sectors such as education, health, labour or technical sectors such as science and technology or environment have not been listed. Can HK develop autonomous relations with foreign countries in these “low politics” areas?

The interpretation of the article points to the conclusion that it is an open list taking into account the use of the expression “including” which signifies that the list is not exhaustive and other fields can be added to it, a view also shared by specialists in China

and HK<sup>202</sup>. As a result, the autonomy in external affairs is elastic and flexible but also marked by some uncertainty. The acceptance of the open nature of the list does not solve the question to know what are the limits of its expansion. Can it expand to cover only other fields with an analogous nature or can it also include completely different areas? In other words, there is still an unresolved question, to know whether the BL allows for a more liberal view according to which HK can act externally under article 151 potentially in all areas where it enjoys domestic autonomy, or a more restrictive position in terms of the fields that can be added. In this respect it is of fundamental importance to look at the practice developed after the handover, an issue addressed in the next chapter.

The third tier corresponds to a level of more restricted autonomy where HK can act only on the basis of “specific authorisations” given by the CPG. Unlike in the second tier these are authorisations given on a case by case basis implying greater control over the contents and purpose of the SAR action.

The BL expressly identifies 3 areas where such specific authorisations apply: air services agreements (article 133 and 134 BL); reciprocal juridical assistance (article 96 BL); immigration and visa abolition agreements (article 155 BL). In all three cases what is at stake is exclusively the exercise of treaty making powers and not any other acts.

These are areas which have a special connection with sovereignty and so the level of autonomy allowed by the BL is more limited than in the second tier, probably similar to the first tier although the actual level of autonomy depends on the exact level of control exercised in the act of authorisation. I would argue that what is unique about these three areas is that they are neither external affairs nor foreign affairs but correspond indeed to a middle ground between the two.

The fourth tier, corresponds to a “negative sphere” of no autonomy which is associated with the areas falling under foreign affairs where the CPG has exclusive competence.

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<sup>202</sup> This interpretation is shared by Shi Jiuyong, interview on 6 June 2001, as well as by the specialists in the International Law Division of the SARG.

HK enjoys no autonomy in these matters and has no right to act. However, even in this sphere, participation of the SAR should not be completely excluded. In fact, HK might be able to act marginally if the Central Government decides, for reasons of operational convenience, to delegate specific functions to the SAR in the foreign affairs areas. In such a case an important limitation still applies: the SAR will not have decision-making powers, will simply execute decisions taken by others, and national interests predominate and prevail over specific interests in case of conflict.

### **3.4. THE TRANSITION PERIOD AND ITS IMPACT ON HK's EXTERNAL AUTONOMY AND INTERNATIONAL STATUS**

Contrary to the general orientation of the JD, which points to the maintenance of the *status quo* by freezing the existing system, external affairs constituted an exception incorporating innovations and allowing room for change. One of the most remarkable aspects was that in the field of external affairs, unlike in others, the BL provisions started to be *de facto* implemented in advance, well before this Law entered into force on 1 July 1997. Britain and China anticipated in several years the implementation of the system so that reality would be in tune with the BL at the handover, bridging the gap between the pre-negotiations situation and the situation encapsulated in the BL. Interestingly, in spite of the fact the BL did not possess a juridical effectiveness<sup>203</sup> during the transition, it had a political effectiveness and produced concrete effects in the field of external affairs.

The twelve-year transition period brought about a densification of HK international status and personality, with the expansion and increasing complexity of HK's international rights and obligations, as well as the deepening of HK's autonomy in managing external relations. This process involves both quantitative and qualitative phenomena at different levels of HK's international participation.

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<sup>203</sup> The BL had a curious nature in legal terms. It was enacted as a PRC Law in 1990 and so existed since then in China's legal system, not in the HK one, but was deemed to produce effects and be applied only in 1997. It is probably a unique and unprecedented case where a law had a 7 years "vacatio legis" period.

First, there was a considerable increase in the number and importance of international multilateral organisations in which HK participates. During the transition HK joined many international organisations, notably what can be considered the two most relevant multilateral fora: GATT, later WTO, and APEC.

On the eve of the handover HK participated in a group of 31 international organisations including both organisations in which HK already participated before the Sino-British negotiations and organisations HK joined after 1985, in relation to which HK continued participation after the handover had to be approved by the JLG<sup>204</sup>. This list includes organisations in which HK participates in 3 different capacities: as a full member (6)<sup>205</sup>; as an associate member (7) and integrated in the sovereign power delegation (18).

In addition HK participated in many other international organisations, probably more than 300, as estimated by the US State Department<sup>206</sup>, where relevant organisations such as APEC, OECD (trade Committee, Financial Market Committee as an observer), UN Environmental Programme or the International Bank of Settlements are included.

As far as multilateral agreements are concerned, at the end of the transition period a large number of multilateral international agreements were applicable to HK. A total of 195 international treaties and conventions, distributed by 20 different fields, covering not only economic and social areas but also political issues such as human rights, disarmament and security, applied to HK and the JLG agreed on its continued application after the handover. This impressive number of treaties implies for HK a wide range of international rights and obligations thus contributing to the densification of its international personality.

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<sup>204</sup> The vast majority, 26 out of 31, was approved between 1985 –1989 before Tiananmen. The last 5 cases were international organisations. See Document Constitutional Affairs Bureau, December 1996, [www.info.gov.hk/cab/joint.html](http://www.info.gov.hk/cab/joint.html) 30.10.2000.

<sup>205</sup> The organisations in which HK has full membership are: Asian Development Bank; WTO; World Customs Organisation; International Textiles and Clothing Bureau; Network of Aquaculture Centre in Asia and Pacific; World Meteorological Organisation.

<sup>206</sup> US-Hong Kong Policy Act Report 2000, April 1, US Department State [www.usconsulate.org.hk/ushk/pi/20000401.htm](http://www.usconsulate.org.hk/ushk/pi/20000401.htm) page 28

Secondly, on the bilateral front, the transition period had also a very significant impact as the number of bilateral agreements negotiated and signed by HK increased significantly with the signature of 50 new agreements. This was even more significant because these agreements went beyond the traditional trade agreements that existed before 1984. In fact the transition brought about an expansion of the areas in which HK exercises treaty making powers, in particular in three new areas: civil aviation; investment; legal and juridical co-operation. In civil aviation HK signed 21 air service agreements with foreign states between 1986-97, starting with the Netherlands based on the JD provisions. This represented a clear departure from the previous practice, where the UK had full control over HK's landing rights and negotiated them in the context of UK agreements with third countries.

As far as investment is concerned HK signed 14 investment promotion and protection agreements between 1992-97. Unlike air service agreements, investment protection agreements were not specifically foreseen neither in the JD nor in the BL, and their signature seems to have resulted from the pressure of foreign investors associated with the decline in confidence after Tiananmen. The negotiation and signature of these agreements by HK was submitted to the prior approval of the JLG implying an agreement between the British and Chinese sides. This is an interesting example of the extent to which the practice developed during the transition conditioned the post handover reality. In fact, although the BL did not foresee the need for a prior authorisation for this kind of agreements, the practice of the sovereign power authorisation was introduced setting a precedent for the future.

In legal and juridical matters, HK signed 8 Agreements<sup>207</sup> on Surrender of Fugitive Offenders between 1992-96, 4 Agreements on Mutual Legal Assistance in Criminal Matters between 1996-97 and one Agreement on Transfer of Sentenced Persons with the US in 1997. This represented the anticipation of the implementation of art. 98 of the BL dealing with agreements on "reciprocal juridical assistance" with foreign states. The

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<sup>207</sup> IKSAR Government, CAB internet page [www.info.gov.hk/cab/joint.html](http://www.info.gov.hk/cab/joint.html) page 4.

main reason behind this seems to have been the need for HK to respond to the challenges of international organised crime and drug trafficking. HK wanted to show the international community not only it was not an asylum for criminals but also that it was prepared to co-operate and fight actively the problem.

Thirdly, the expansion of HK's external autonomy and international status during the transition period is also illustrated by the consolidation of HK's external representation through the expansion of the Economic and Trade Offices system which more than doubled, increasing from 4 to 10 offices, as mentioned in chapter two, in some of the most important economic centres in the world.

Besides these manifestations of HK increasing participation in the international system the transition period was also marked by two fundamental qualitative changes with far reaching consequences for HK's international status: the "personalisation" of external affairs; the "politicisation" of external affairs as HK's external action expanded into political areas and HK gained autonomy in managing some specific matters.

### **Personalisation of external affairs**

The personalisation of external affairs is associated with the fact the HK Governor became internationally active representing HK and providing a face to it in the international arena. This assumption of a new diplomatic role led the Governor to be engaged in a series of regular official visits to foreign countries during which he met world leaders to discuss matters of mutual concern, promote HK's interests and stimulate confidence in HK's future. These visits gave HK a new high international visibility and added a new instrument to the existing external representation system.

This phenomenon started as a consistent and systematic process with David Wilson in particular from 1989 onwards. In 1989 the Governor paid one visit to the US to meet the new Administration in October and this would further expand in 1990, when from a total

of 10 visits<sup>208</sup>, 6 were made by the Governor covering the USA, Canada, Japan and Europe. In 1991 the trend continued and David Wilson was engaged in 5 visits<sup>209</sup> to Europe, Australia and Southeast Asia.

The main factor to explain the genesis of this new phenomenon was the negative impact of Tiananmen and the need HK felt to act internationally to counteract the pessimism about HK's future, reassure investors and reverse the decline in confidence. In addition it can be argued that this represented also the adaptation of HK's external representation to the trend of mediatisation of international politics.

The personalisation trend reached its climax with Governor Patten who used this instrument to its full potential. Being a politician, Patten used his mediatic and international image to raise HK's international profile. Just after taking office in 1992 he visited Canada and Japan in November. The intensity of official visits abroad increased in the following years. The number of visits of the three top figures of the HK Government (Governor, Chief Secretary and Financial Secretary) increased from 10 in 1993<sup>210</sup> 9 in 1994<sup>211</sup> to 15 in 1995<sup>212</sup> and 21 in 1996<sup>213</sup> (declining to 6 in 1997 for obvious reasons).

An important aspect of Patten's strategy was to balance the protagonism of the Governor with the promotion of the international exposure of key members of the Government, in particular those considered to be the pillars of continuity after 1997, so that they could gain international experience, become known to the international community and world

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<sup>208</sup> In 1990 Governor Wilson paid visits to the US, Canada, Italy, France, Brussels – EU and Japan - Hong Kong Report, HK Government, 1990 and 1991.

<sup>209</sup> Hong Kong Report, HK Government, 1992.

<sup>210</sup> In 1993 Governor Patten visited Japan, the EU (Brussels), the US where he met President Clinton. Hong Kong Report 1993, HK Government.

<sup>211</sup> In 1994 Patten visited Australia, the US, Japan and South Korea. Hong Kong Report 1994, HK Government.

<sup>212</sup> In 1995 Chris Patten made only one visit to the Philippines. The majority of foreign visits were made by Anson Chan (10). Hong Kong Report 1995, HK Government.

<sup>213</sup> In 1996 Patten was much more active on the world scene and made 6 high-profile visits to the US, where he met President Clinton, Canada, the EU- Brussels, Germany, France and Japan. The majority of the visits abroad were made by the Financial Secretary Donald Tsang (9). Hong Kong Report 1996, HK Government.

leaders and cultivate their own personal ties<sup>214</sup>. This involved a deliberate move to promote Anson Chan and Donald Tsang's international exposure in sequence: 1994 and above all 1995 were the years of the Chief Secretary's high international visibility and 1996 the year of the Financial Secretary intense international exposure.

It should be noted that the majority of these visits were high level and high profile visits where the Governor, the Chief Secretary or the Financial Secretary met on a regular basis the top leaders of the states they visited. This clearly contributed to strengthen HK's international visibility and status and reflected the recognition of HK as an international player.

Furthermore, these high level visits were exclusively the Governor's initiative and a manifestation of HK's autonomy in external affairs. Both Wilson and Patten decided on the countries, timing and objectives of these visits on their own with no interference from Britain. In general the Foreign Office adopted a passive position, it did neither encourage nor discourage these initiatives<sup>215</sup>. So, not only when making the decision Patten did not seek the approval from London but also in the course of the visits the British Embassies were not involved in the meetings.

Finally, these visits were not merely concerned with the promotion of HK economic interests but had also a clear political agenda behind it. Besides explaining to key countries the evolution of the transition process, Patten was definitely trying to mobilise international support for democratic reforms in HK, strongly opposed by China, and to secure the engagement and continued presence of key players in HK after the handover, so that it would remain an international centre. In short, it was a strategy for the internationalisation of the HK question in order to raise international awareness and to ensure that influential countries would be vigilant and willing to press China if necessary.

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<sup>214</sup> This is clearly demonstrated by data regarding the weight of the Governor's visits in the total number of high level visits abroad: in 1993 the Governor accounted only 30 % of visits; 45% in 1994; 7% in 1995 and 30% in 1996.

## **Politicisation of external affairs**

The politicisation of HK external affairs was another crucial trend and corresponded to a fundamental qualitative change brought about by the transition. It was not only the result of this internationalisation strategy, but also of the fact that, for quite different reasons, HK started to develop an international action and manifest autonomy in three new fronts with a political nature: refugees, the Vietnamese boat people; human rights; US-China trade war and MFN status renewal.

## **Refugees and immigration**

The expansion of HK external affairs into political areas started with the issue of international migrations and refugees, related to the Vietnamese refugees (Vietnamese boat people) who from 1976 onwards fled Vietnam. Their first port of call and foremost destination was HK where they arrived in their hundreds and later in their thousands reaching the impressive record figure in a single year of 34.000 people in 1989<sup>215</sup>.

Given the great relevance of Vietnam in the context of the Cold War, a very contentious issue between the US and the Soviet Union and since 1979 also between the Soviet Union and China, this was a politically sensitive question. In addition, the large numbers of refugees involved and the humanitarian dramas further contributed to turn it into a highly visible international problem. HK found itself right at the centre of it.

The first reaction of the HK Government was one of moderation, great caution and concern with the humanitarian question. HK accepted to play the role of the port of first asylum and the number of refugees coming into HK waters increased rapidly. This was mainly explained by the fact the HK Government was concerned that if stronger measures were adopted preventing refugees from coming into HK waters or denying them assistance, the Territory would be seen as responsible for the aggravation of the

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<sup>215</sup> This was confirmed both by Lord Wilson, interview on 21.5.2001 and Edward Llewellyn, interview 17.10.2001.

<sup>216</sup> Hong Kong Report 1990, HK Government. See John Torgrimson, "Vietnamese boat people" in Sung Yun-Wing (ed.), The other Hong Kong Report, 1991, Chinese University Press, HK, pp. 103-115.

humanitarian plight and this could severely damage the positive international image of HK with potential high costs in other areas, namely trade and investment<sup>217</sup>. In other words, the high dependence of HK's prosperity on its positive international image imposed a clear restraint on HK authorities' attitude. HK was facing a difficult dilemma between the need to continue playing the role of port of first asylum and the high costs for a small and already crowded territory to receive large inflows of refugees and have to spend large sums of public money to provide them with food and shelter.

The necessity to respond to the problem and find a way out, when a unilateral action involving forced repatriation was not an option, led HK to become internationally active and to devise a strategy to legitimise a policy in accordance with its interests by building a solution with different members of the international community that could be internationally accepted. The initiative came from HK, as Britain was still hesitant about the policy to be followed. Probably one of the main reasons for that was the fact there was an intractable disagreement between HK and the US on this subject not only because HK felt that the American economic embargo against Vietnam was a major indirect cause for the growing flow of refugees, but also because the international opposition to HK idea of forced repatriation was led by the US which used the human rights card and was intransigent in rejecting involuntary repatriation<sup>218</sup>. This was then a very sensitive issue and the UK was not prepared to get involved in an expensive conflict with the US on this matter.

The policy proposed by HK on the refugees question included two aspects<sup>219</sup>: (i) the people who could be considered refugees as they met the criteria had to be resettled overseas in other countries as HK had no physical conditions to keep them; (ii) the people who did not meet the criteria and are only economic immigrants must be repatriated and return to Vietnam. This implied an operation of scrutiny to determine who met the criteria and who did not as well as the organisation of an operation of repatriation.

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<sup>217</sup> This concern was clearly expressed by the Government in the Hong Kong Report 1990, pp. 6-8.

<sup>218</sup> Anthony Seldon, Major-a political life, Phoenix, London, 1997, p. 91

<sup>219</sup> See Hong Kong Report 1990, HK Government, pp.6-8.

Once the policy designed, HK tried to sell it to the international community and secure both its approval and engagement in the solution of the problem, namely in terms of sharing the financial burden. This was done at the bilateral level, in the context of contacts with foreign countries namely the US where the question was put to the Congress, and to European countries, and at the multilateral level involving contacts with the UN High Commissioner for Refugees (UNHRC) which in the beginning strongly resisted any idea of repatriation.

A benchmark moment was the organisation in June 1989 of the Geneva Conference on Vietnamese Refugees, attended by Governor Wilson who, in a manifestation of considerable autonomy, addressed the Conference on behalf of HK and presented the HK policy to respond to the refugee problem emphasising that there was not a real solution without forced repatriation.

The Conference endorsed the fundamental aspects of HK policy, namely the screening principle and the principle of repatriation of non-refugees, and agreed on a Comprehensive Plan of Action. However, it did not go as far as to agree on the principle of forced repatriation supported by HK, mainly because of the US opposition, leaving only open the option of voluntary repatriation. In this process HK showed a clear autonomy in relation to London (initially Britain manifested reservations and did not openly support the HK position) and took the lead at the international level. Furthermore, HK position besides its influence at the multilateral level has also influenced the policies of individual countries, namely Southeast Asia countries and Japan.

The new international consensus carefully built under HK initiative created the necessary conditions to start solving effectively the Vietnamese refugees' problem. In order to create an operational framework, HK set in motion a new international initiative involving negotiations with Vietnam, a process that was also participated by Britain, to reach an agreement on a scheme for repatriation. As a result, the three parties reached an

agreement on September 1990 on a scheme of voluntary repatriation managed by the UNHCR covering people that volunteer and those who did not oppose repatriation, a “second category”<sup>220</sup>. In October 1991 a formal agreement was signed between the UK Government and the Vietnamese Government approving an Orderly Return Programme to promote the voluntary repatriation of Vietnamese illegal immigrants. Although HK exerted great influence in the negotiations it was not allowed to exercise autonomous treaty making powers in this matter.

This process not only introduced a new political area but also generated institutional changes in HK’s external relations. In fact, traditionally the Political Adviser, although a diplomat, was mainly concerned with relations with the PRC and had little involvement in HK’s external affairs. One of the interesting institutional developments was the expansion of the competencies of the Political Adviser Office which started to intervene in and co-ordinate all the matters related to refugees unlike the majority of the other economic external affairs areas co-ordinated by the Trade and Industry Department<sup>221</sup>.

## **Human rights**

The second political area where HK became active internationally during the transition was on the human rights front. This was a clear input of Governor Patten and a result of his new active role in HK’s external affairs. There were two different channels at work. The first was a more formal channel related to HK’s involvement in the UN system and the application to HK of the two fundamental Conventions on human rights, the International Covenant on Economic Social and Cultural rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), whose continued application beyond 1997 was guaranteed under the JD<sup>222</sup> and the BL<sup>223</sup>. The UK had extended the application of these Covenants to HK although with some restrictions,

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<sup>220</sup> The creation of this “second category” or “grey area” repatriation was proposed in a joint statement issued by the UNHCR, HK and Vietnam in September 1990. See John Torgrimson, *op. cit.*, pp.108.

<sup>221</sup> Interview with Lord Wilson, 21.5.2001.

<sup>222</sup> Joint Declaration, Annex I, art.XIII, para 4.

<sup>223</sup> BL, article 39 (1).

namely Britain did not extend mechanisms that allow individual complaints related to personal violation of human rights<sup>224</sup>.

These Conventions imply a mandatory mechanism of periodic reporting on the implementation of the rights in a public hearing in the international monitoring bodies, foreseen in art. 40 of the ICCPR and art. 16 of the ICESCR. In compliance with this obligation and following the British strategy to consolidate the human rights system in HK with the approval of the 1991 Bill of Rights Ordinance, a response to the Tiananmen events, the UK started to report on the human rights situation in HK from 1992 onwards.

Although HK was not allowed to formally present on its own the document, the Report was actually prepared in HK and reflected the Territory's views. Moreover, the HK representatives attended the public session and had the opportunity to directly answer questions and interact with the representatives of other countries. This gave HK a considerable international exposure and provided an opportunity, by being subject to international scrutiny, to show its good record in terms of human rights protection and assert its credibility as an actor that met international standards in this field, just like in many others, thus adding a new trait to its international image.

The second channel was more informal and is related with the active participation of the HK Governor in the regional debate on human rights in Asia, in particular his controversy with Lee Kuan Yew from Singapore, one of the architects of the "Asian values" theory. The debate was between a universalist approach that consider human rights are universal and are best protected in democratic systems, supported by Patten, and a cultural relativism approach, which considered the existence of different regional and cultural understandings and supported the model of authoritarian regimes legitimated by economic performance, advocated by Singapore's Senior Minister. There were many exchanges some in private, some in public. Patten mentions two specific

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<sup>224</sup> The UK has not ratified the First Optional Protocol to the International Covenant on Civil and Political Rights - Roda Mushkat, One country, two international legal personalities, HKU Press, HK, 1997, pp.126-128.

incidents, one during a famous public lecture at the HK University<sup>225</sup>, which clearly illustrated the disagreement and confrontation between the two leaders. This debate had a high visibility in China and in Asia due to the high profile of the two participants and the fact it occurred at a time when the “Asian values” approach was at its highest.

The HK Governor has openly criticised the Asian values philosophy in public meetings<sup>226</sup>, conferences and official visits all over the world, playing a pioneer role in terms of opposition to a philosophy strongly anchored in the “Asian miracle” analysis. In so doing HK distanced itself from some Asian countries building an image of an advocate of the universality of human rights and signalling its difference with China, hoping this would constitute another safeguard to guarantee HK freedoms after the handover and preserve international standards.

### **US-China trade conflict**

The third issue which contributed to the politicisation of HK’s external affairs was the intervention of HK in the US-China trade conflict, where HK played a facilitator role in the question of renewal of the Most Favoured Nation (MFN) status to China. Although apparently a mere economic issue this was in reality a matter with a high political contents given the centrality of the US-China relationship in the post Cold War international system, the underlying growing strategic competition between the superpower and the new emerging global power and the fact the MFN mechanism was used by the US as a political tool to contain China.

But this was also a political role because of the specific political objectives the HK Government was pursuing. In fact there was a concerted strategy to lobby in Washington in favour of the renewal of the MFN status to China when there was a growing pressure in Congress, namely on the part of the Republicans, to withdraw it on the basis of China’s poor human rights record and military strengthening. The strategy was executed

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<sup>225</sup> See Chris Patten, East and West, Macmillan 1998, Pan Books edition, 1999, pp. 147-148.

<sup>226</sup> For example in the speech to the Foreign Correspondents Club in November 1993 where he severely criticised the Asian values perspective and argued that human rights “are indivisible and interdependent”. See Dimbleby, J., The Last Governor, Little, Brown and Company, London, p. 251.

by the HK Washington ETO, mainly concentrated in lobbying the US Congress, and by Patten himself, in the context of his official visits to the US where he met President Clinton, in 1993, 1994 and 1996, the Congress and business circles<sup>227</sup>.

This was motivated by two different reasons. Firstly, HK's self-interest and protection of economic interests. HK was clearly interested in convincing the US not to withdraw the MFN status to China insofar that would mean placing higher tariffs on Chinese exports leading to their contraction which, in turn, would damage HK's economy as the China trade became since the late 1970s one of the engines of its prosperity<sup>228</sup>.

However, there was a second objective to this external affairs initiative, a political one: to show Beijing that HK was not anti-China and could play a useful role to support China's interests. This was then intended to be a conciliatory gesture that could contribute to ease the high political tension with Beijing over democratic reforms<sup>229</sup>.

Interestingly, Dimbleby suggests that the strategy was somewhat more complex than that, arguing that Patten was also trying indirectly to exert pressure on Beijing to be more forthcoming on the issue of political reforms by "...discreetly persuading the Americans to hint obliquely that there was a link, however slight, between the renewal of MFN and the enhancement of democracy in Hong Kong."<sup>230</sup> In other words, although pressing for the renewal, Patten hoped that the US could use the MFN tool to press China to adopt a more flexible position on HK's political reforms.

The HK intervention proved to be effective even though it was not the decisive factor to explain the American decision to renew the MFN status. It has played a certain role because Patten's arguments and position were seen in Washington as more credible and convincing than China's own arguments. At the same time his insistence on the

<sup>227</sup> Patten had good access to the White House and to other key players in the American system, namely the Treasury, the State Department and leading Senators. See Patten quoted in Dimbleby, *op. cit.*, p. 193.

<sup>228</sup> According to estimates by Enright, China trade entrepot role would account in the 1990s something close to 30 % of HK's GDP. HK firms handle 50% of Mainland China's exports. See Enright et all (ed) *The Hong Kong Advantage*, Oxford University Press, 1997, p. 71

<sup>229</sup> Interview with Edward Llewellyn, adviser to the Governor, 17.10.2001.

devastating effects for the HK economy reminded the Americans that HK was the most important centre of US economic interests in Asia, playing a relevant role in the global economy and so it was in the US best interests not to damage it.

Besides proving that HK possessed the skills to act internationally, this episode also demonstrated how close the HK relationship with the US was. Clearly, one of the key strategic changes in HK's international insertion and alliances during the transition period, in particular in the 1990s, was the fact the US became HK's main partner in the international system, clearly replacing the UK in terms of advocacy of HK's case and speaking up for HK on the international stage. This fundamental development further contributed to the expansion of HK's autonomy in relation to the sovereign power but has also raised reservations in London and suspicious in Beijing.

From the above account it is clear that the transition period has contributed to consolidate and expand HK's autonomy to act internationally and strengthen its international status. However, it is less clear what was the key factor behind this. Four different hypotheses can be considered.

First, this was the result of positive co-operation between Britain and China in the context of the JLG to promote HK's international status. The two powers had clearly different motivations. Britain deliberately pushed to expand HK's external autonomy as a security mechanism for the future, hoping that increased international exposure and the creation of precedents internationally<sup>231</sup> would help protecting the domestic autonomy of the future SAR. China was mainly concerned with the preservation of HK's role as an international economic and financial centre, a key asset for China's economy and to prove the international community its intention to respect its commitments. In spite of the different motives, there was an objective convergence of interests that made such co-

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<sup>230</sup> Dimbleby, J., *op.cit.*, p.192

<sup>231</sup> This was a deliberate British strategy as pointed out by Alan Paul, interview on 19.12.2001. During the last phase of the transition London sent directives to the British Embassies for British delegations to international organisations and conferences to facilitate the visibility of the HK delegate and allow him to speak and present HK's specific views in order to set a precedent.

operation possible in a context where neither party wanted to be accused of blocking the process.

The second hypothesis is that the key factor was HK's proactive initiative and strategy taking advantage of a situation where the control of the outgoing sovereign was weakening and the control of the incoming sovereign was not yet established. As the control of the sovereign power loosened, HK gained more room for manoeuvre and made its way.

The third possibility is that the "China factor" was the key explanation. During the 1990s the Chinese economy boomed and became one of the fastest growing economies at the same time it accelerated its integration in the world economy, becoming the number one priority for world FDI. Since HK was a crucial door to the China market, HK's international position was enhanced contributing to expand its links with foreign countries.

The fourth hypothesis highlights the relevance of external factors related to the strong acceleration of the globalisation process in the 1990s and the strategic roles HK performed in the global economy as a financial centre and co-ordinator of fragmented production processes<sup>232</sup>. The circumstance HK was a key player in the globalisation of the world economy led many countries to be willing to interact with HK and to accept and legitimise its engagement in international activities.

It is difficult to identify what was the crucial factor but, on the basis of the evidence available, one can argue that rather than the influence of a single factor it was a combination between these four factors that accounted for the expansion of HK's external autonomy and international status. The transition period generated a completely new framework for HK external relations but we have to look at the practical implementation of the system after 1997 and the SAR experience in managing external

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<sup>232</sup> Enright, *op.cit.*, pp. 53-83

affairs to assess its impact on HK's autonomy in external affairs, a key issue which will be the subject of the next chapter.

## CHAPTER FOUR

### THE HONG KONG SPECIAL ADMINISTRATIVE REGION'S EXTERNAL AUTONOMY AND INTERNATIONAL PARTICIPATION IN THE POST-HANDOVER PERIOD

During the 1984-1997 transition period HK's institutional system for external action went through significant qualitative changes when compared with the bureaucratic-led decentralised model that prevailed in the 1960s and 1970s. Firstly, the institutional system became more complex with a greater number of actors (the Governor, the Political Adviser and the TID) representing the end to the bureaucracy's monopoly in external affairs. Secondly, there was a politicisation of HK's external affairs, as HK became active internationally in matters of refugees, asylum and human rights.

Thirdly, the system gained greater autonomy in relation to the sovereign power. There was, however, an apparent paradox because while HK's autonomy increased in certain areas, Britain's involvement also increased indirectly through the Political Adviser<sup>233</sup>, in many instances to help strengthening HK's external autonomy. This reflects the fact that greater autonomy does not necessarily mean separation from the sovereign power. In the case of HK during the transition, autonomy was combined with co-operation with Britain in external affairs proving that the two can co-exist.

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<sup>233</sup> The Political Adviser was a senior diplomat from the Foreign Office posted in HK to advise the Governor. He was exclusively in charge of relations with China and did not get involved in HK external relations. Basically he was the liaison officer with Beijing and the Xinhua office in HK. Besides his links with the FCO, he played another fundamental function in the "intelligence" area, maintaining close contacts with the British intelligence services and other foreign services present in HK, namely the US.

This chapter addresses the question of HK's international participation and external autonomy after the retrocession to China's sovereignty, focussing on the influence of the three main conditioning factors – HK's own action and institutional capacity; the nature of the HK-Beijing relationship; the policies and attitudes of external actors – and their combined impact on autonomy and the level of HK's international participation. Section one, looks at changes in the SAR's institutional framework for the management of external relations, its nature and conditions to produce a coherent external action. Section two deals with the new HK-China relationship in the field of international affairs in an attempt to understand how rules were implemented, how HK and the PRC's areas of competence have been articulated and the extent to which the SAR's sphere of autonomy was respected. Section three is concerned with the experience and priorities of HK's international participation and how far it had an impact on, or induced changes in the international system. Finally, section four analyses the perceptions and interaction of major external actors with HK and how far they have upheld or weakened the SAR's external autonomy and capacity to act internationally on its own.

#### **4.1. HONG KONG'S INSTITUTIONAL FRAMEWORK FOR THE MANAGEMENT OF EXTERNAL RELATIONS**

In the post handover period there were both elements of continuity and change in the institutional system that manages HK's external relations.

As far as continuity is concerned, the bureaucratic component remained unchanged. The Trade and Industry Department (TID) kept intact its powers and autonomy in managing economic external relations. The system of external representation constituted by the ETOs, whose network was maintained and increased in 2001 with the creation of a new office in Guangzhou, remained in place with no changes in personnel and the preservation of the dominant position of administrative officers. There is also an element of continuity in the formal preservation of the role of the Chief Executive in external affairs despite some substantive changes highlighted below.

We can find also continuity in the excessive governmentalisation of external affairs and the fact civil society and NGOs remain excluded and have no meaningful participation in the institutional system. In this respect the system is unbalanced and lacks fundamental institutions, such as a “think-tank” capable of thinking strategically on HK’s external affairs and long term position in the international system. This constitutes an handicap for HK and is a key factor behind a major paradox that marks the SAR’s international status: although HK is an active international player it has a domestic deficit of attention for international matters and a civil society which is not fully aware of the relevance and complexity of HK’s international status.

The evolution of the institutional system was also marked by important changes in the post-handover period. Firstly, the Chief Executive was formally granted powers to conduct external affairs by the BL art. 48 (9) reflecting a certain tendency for centralisation of such functions in his hands. This power was never granted to the HK British Governor who developed an active role in external affairs informally, based on substantive elements namely, his personality, political skills and international image.

Secondly, although equipped with this formal legitimacy, in substance the Chief Executive’s role has lost in relevance and international visibility when compared with the pre-handover period. Tung Che-hwa tried to keep up the mechanism of high level visits abroad<sup>234</sup> but after the initial set of visits it lost momentum and declined in intensity, in spite of the attempt to increase the exposure of the Chief Executive in high multilateral meetings, in particular through his participation in the APEC 1997 Vancouver leaders’ summit, never attended by any HK Governor due to Beijing’s opposition.

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<sup>234</sup> Just after the 1997 handover the Chief Executive made 5 visits to Singapore, Malaysia, US, Brussels (EU) and the UK. In 1998 there was a decline with only two visits to Germany and France a tendency that was maintained in 1999 when the Chief Executive made only two official visits to S Francisco (US) and the Republic of Korea. In 2000 there was a slight increase to 3 (US, Canada, UK). Hong Kong Reports. 1997-2001, HKSAR Government.

Although there was an attempt to strengthen the formal status of the Chief Executive in external relations and to promote some centralisation in his hands, seen by Beijing as a risk-reduction strategy, paradoxically the substantive role of the Chief Executive has declined. This is fundamentally explained by personal factors since, unlike his predecessor, he was not a well-known international personality, lacked charisma and political weight.

However, I would argue that the reduction of international exposure was also a deliberate risk-aversion strategy adopted by the Chief Executive. His visits abroad implied that he had to speak, make statements and answer questions which created a dilemma. The choice was between saying the same things as Beijing and risk to be seen as lacking autonomy and too compliant with the sovereign's directives, or saying different things and risk raising doubts in Beijing about his loyalty and how far he can be trusted. He would be in trouble either way and therefore choose to reduce his international exposure in order to contain the risks of finding himself in dilemmatic and embarrassing situations. This option had a clear cost for the HKSAR insofar it lost its international face.

The third important change has been the elimination of the Political Adviser Office, which represented a strong link between the sovereign power and the HK Government in the previous institutional structure. As a consequence, in the SARG there is no longer the presence of an official from the sovereign power's Foreign Service inside the structure of Government. The interests of the PRC Ministry of Foreign Affairs (MFA) are now represented in HK by a completely separate structure, the Office of the MFA Commissioner (MFAO).

This had an important implication for HK. With the departure of the Political Adviser, HK lost the capacity to deal with intelligence matters and maintain its links with foreign intelligence services. HK does not have its own intelligence services to replace the political adviser. Moreover, it lacks the knowledge and skills to organise and run this type of services. This vacuum that emerged after the handover, is a clear limitation for

the SARG in dealing with foreign partners, with Taiwan and even Beijing, insofar HK lacks classified information about people and processes. This puts HK at a disadvantage, weakening its capacity to act internationally.

Fourthly, there was the emergence of a new player in the HK Government structure, the Constitutional Affairs Bureau (CAB), entrusted with a double function: on the domestic front to co-ordinate across departments matters related to external affairs; on the external front to manage relations between the HKSARG and the CPG, ensuring compliance with the BL provisions on foreign affairs and the necessary articulation between foreign affairs and external affairs<sup>235</sup>.

As far as internal co-ordination is concerned, the CAB maintains permanent contacts with the different policy departments and bureaux advising them on the application to HK of international agreements as well as on negotiations of new agreements. The co-ordination exercised by CAB covers four main areas<sup>236</sup>. Firstly, the establishment of standard procedures regarding different acts in the external affairs domain in order to ensure uniformity. Secondly, the study, analysis and approval of innovative solutions proposed by specific departments so as to ensure its compliance with the BL, crucial to allow for some flexibility, i.e. introduction of new wording or new clauses in standard agreements.

Thirdly, although policy sectoral departments are allowed considerable freedom to define their own specific long term goals and to manage external relations, CAB has tried to ensure some co-ordination between departments in order to attain consistent and coherent action with a foreign partner so that HK's bargaining position is strengthened. The objective is to adopt an integrated view of the relationship with a specific foreign partner in order to avoid, for instance, that in the context of a conflict with a foreign partner HK does not adopt contradictory positions across sectors.

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<sup>235</sup> CAB, SARG "Confidence in the Constitutional Arrangements" policy objective for the Constitutional Affairs Bureau 2001, Policy Address, 2001, pp. 4-11;22-24.

<sup>236</sup> Interview with CAB officials on 18.12.2001.

A fourth area of CAB co-ordination is between HK's external affairs and specific interests on the one hand, and China's foreign policy and national interests, on the other. To this end, CAB disseminates information and advises departments about the foreign policy guidelines defined by the CPG and organises meetings among heads of department to discuss such guidelines, in order to improve consistency and prevent potential conflicts.

Although we find both elements of operational and policy co-ordination in CAB's action, the first type is clearly dominant, driven by the objective to ensure the SAR fully respects the boundaries of its autonomy in external affairs so that it cannot be accused of being a trespasser. The component of policy co-ordination is weak and can only be slightly detected in the third and fourth areas. By and large the CAB does not prepare any policy document dealing with the global strategy and options in the area of external affairs and does not even coordinate the long-term policy options defined by the different sector departments. In fact, what still predominates is the co-existence of a multiplicity of policy guidelines in specific sectors, with diverse levels of sophistication lacking global coherence. In other words, there is not an articulated external affairs' policy that sets out both the objectives and strategies for HK's international participation.

Looking at the institutional system and its components one can conclude that although the BL points to a greater centralisation of the system in the hands of the Chief Executive, in practice the system did not experience a radical change and is best characterised as a semi-decentralised one in the post-handover period.

Unlike other NCG's, such as Catalonia and Quebec which adopted in the 1990s a more centralised model with the creation of a central body responsible for the management of external relations, in the HKSAR sectoral departments are still the dominant players and enjoy considerable autonomy in conducting external affairs both in terms of policy

making and policy implementation<sup>237</sup>. However, it should be classified as semi-decentralised because a new element of central co-ordination has been recently introduced associated with CAB's role.

In any case the coordination developed by CAB is weak and rather limited for two reasons. On the one hand, it does not really cover co-ordination of policy aspects related to external affairs, the definition of global objectives and strategies, but deals mostly with legal aspects. Its dominant purpose is the management of relations between the SAR and the CPG to ensure that the SARG departments act within the limits of HK's external autonomy and follow standard procedures in order to prevent potential conflicts with Beijing. In this light co-ordination is more inward than outward looking. On the other, what prevails is a "negative co-ordination" mode, aimed at reducing contradictions and limiting damage, rather than "positive co-ordination", which implies building on common objectives and actions.

## **4.2. THE RELATIONSHIP BETWEEN THE HKSAR AND THE CENTRAL GOVERNMENT IN INTERNATIONAL AFFAIRS**

The HKSAR-CPG relationship in managing foreign and external affairs is a completely new experience for both sides. The last five years were clearly a learning process where the two sides tried to implement the system designed in the BL by interpreting the rules, designing procedures, establishing channels of communication and finding new solutions for cases not regulated. In so doing they have tested the boundaries of their respective spheres of competence and established modalities of accommodating their specific interests. Although the operational aspects of the new relation are not yet completely consolidated, from the experience accumulated between 1997-2001 it is possible to identify already some trends.

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<sup>237</sup> This idea of the post 1997 HK system remaining decentralised was confirmed by Anson Chan, interview on 17.12.2001. She also mentioned that one of the changes was that the Chief Executive has less

## **Institutional channels**

There are different institutional channels through which the HKSARG and the CPG exchange information and articulate positions on external affairs. Three main channels coexist.

Firstly, the channel between the MFA Office and the CAB is the most important one. The MFAO, set up in accordance with art.13 BL, is a representative structure of the CPG in the SAR in the field of foreign affairs. According to the MFAO's own definition<sup>238</sup>, it performs three main functions: (i) handle HK related foreign affairs which are the responsibility of the CPG; (ii) assist the HKSAR in handling on its own the relevant external affairs in accordance with the BL or under authorisation of the CPG; (iii) carry out other assignments entrusted by the CPG.

The CAB has permanent direct contacts with the MFAO but also mediates between SARG departments and the Office in a wide range of issues. The analysis of this interaction reveals that there are four main contact areas: (i) the granting of CPG authorisations for the SAR to negotiate and conclude international agreements; (ii) the implementation of the CPG's international rights and obligations related to HK, namely those involving submission of Reports, the enforcement of UN sanctions and provision of privileges and immunities; (iii) the SAR's participation in international organisations limited to states; (iv) the establishment of consular missions in HK. The two first areas are clearly the day-to-day dominant areas of contact<sup>239</sup>.

Secondly, in trade matters and WTO-related issues there is a different channel. Contacts with the CPG are managed mostly by the HK Trade Office in Beijing<sup>240</sup> directly with MOFTEC, the dominant player in this field.

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intervention in external affairs after 1997 than before.

<sup>238</sup> Interview with the MFAO officials in HK on 18.12.2001, Li Chunyan and Song Ruan.

<sup>239</sup> Interview with CAB officials on 18.12.2001.

<sup>240</sup> Interview with the Director of the HK ETO in Beijing, Bowen Leung, 4.12.2001, established in March 1999.

Thirdly, the top regular contacts between the Chief Executive and the State Council, in particular the Vice-Premier responsible for HK and reunification. There is a regular annual meeting where foreign affairs are addressed, and various *ad hoc* contacts. This level does not deal with operational and detailed management of foreign affairs but predominantly with global policy options, and the provision of classified information to the Chief Executive on the PRC's foreign policy objectives.

### **Post-1997 practice**

The experience accumulated and the post-1997 practice is still evolving and its analysis constrained by the lack of available official data and reports. Therefore this section is based on a series of interviews conducted with key players in Beijing and HK between 1999 and 2002.

The section looks at the practice that has emerged at three different levels: management of foreign affairs; management of external affairs; the system of specific authorisation covering grey areas that fall between foreign and external affairs. Each level has its own logic and rules but there are important linkages between them demonstrating the complexity and density of the system of external relations.

### **Foreign Affairs**

As far as foreign affairs are concerned, the practice has contributed to clarify what matters fall under this general category and what are the boundaries with external affairs. The MFAO has consistently managed different foreign affairs matters related to HK, which are of the exclusive competence of the CPG.

The first area, probably the closest one to the heart of sovereignty, includes matters related to defence and national security. A central issue has been the approval by the CPG of applications of foreign state aircraft and foreign warships to visit the HKSAR. The most relevant aspect, because of its high visibility, has been the authorisation for US warships from the Pacific Fleet and aircraft to call at HK. In the post-handover period

this became a highly politicised issue insofar as Beijing has denied authorisation in several occasions and suspended the visits for long periods as a retaliation mechanism in periods of high tension with Washington. This was the case after the bombing of the Chinese Embassy in Belgrade in May 1999, when visits were suspended for 5 months<sup>241</sup>. Again in 2001 after the EP-3 incident with the US aircraft over the South China Sea near Hainan, in April, the visits were also suspended until July<sup>242</sup>. This illustrates clearly that the PRC's national interests are paramount in matters of foreign affairs and prevail in case of conflict with HK's specific interests.

A second area includes the application to the HKSAR of international multilateral treaties limited to states. The CPG decides whether to apply or not a specific treaty in the SAR's territory one of its sovereign power's prerogatives. Since 1997 and until 2001, the CPG has decided to apply to HK a total of 24 new multilateral agreements, the majority related to political, diplomatic and defence matters<sup>243</sup>. There were also cases of discontinuity, 4 agreements which were applied to HK before 1997 but ceased to be after<sup>244</sup>.

Nevertheless this provides an important manifestation of HK's autonomy insofar a considerable number of multilateral international agreements applicable to the SAR are not applicable to Mainland China. In fact a percentage as high as 40% of the total number of multilateral agreements (81 out of a total of 217 in 2001) apply exclusively to HK but not to the rest of China. Interesting enough the majority of these agreements are in labour (ILO conventions), human rights (9), customs (9) and merchant shipping (11)

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<sup>241</sup> Herald Tribune 4.11.1999. After this, the frequency of port calls and aircraft visits returned to normal levels, 50-70 ships and 100 planes per year – US Department of State, HK Policy Act Report 2000, [www.consulate.org.hk/ushk/pi](http://www.consulate.org.hk/ushk/pi) , pp.9.

<sup>242</sup> The CPG denied authorisation for the visit of a US military aircraft in April and to a US warship port call in May. Only in July the suspension was lifted. Since then and until March 2002, nearly 20 ships including 2 aircraft carrier battle groups of the Seventh Fleet Flagship visited HK - US Department of State, US-HK Policy Act Reports 2001 and 2002 internet version ([www.State.gov/p/eap/rls/rpt/4465.htm](http://www.State.gov/p/eap/rls/rpt/4465.htm))

<sup>243</sup> The most relevant political and diplomatic multilateral treaties were: UN Convention on the Law of the Sea; Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction; Vienna Convention on the Law of the Treaties; Convention on the prohibition or restrictions on the use of certain conventional weapons.

areas<sup>245</sup>, reflecting the specific and differentiated identity of the SAR in relation to the PRC at two levels: in economic terms, HK's unique status as a major international shipping centre and its condition as a separate customs territory and a full member of WTO; in political terms, the human rights standards, including labour rights, in HK are quite different from those prevailing in the Mainland and more in line with international standards.

The handover process has contributed to widen the gap between the sovereign power and HK in the post-handover period when compared with the period prior to 1997. There has been an evolution from a situation marked by convergence where all the multilateral agreements applicable to HK were also applied to Britain, to a situation marked by a divergence where nearly half of the agreements applicable to the SAR are not applicable to China, simply because the former sovereign power had an higher level of integration in the international system and incorporation of international rules than the new sovereign power. As a result, the differentiation became more evident contributing to reinforce HK's formal external autonomy.

A third area concerns HK's participation in international organisations limited to States, where sovereignty is a pre-condition for membership. In these organisations HK does not have a separate membership and can only participate as part of the Chinese delegation. The practice since 1997 shows that HK has enjoyed some "room for manoeuvre"<sup>246</sup>. HK delegates are not submitted to the CPG's prior approval, there is a simple communication of the SARG informing on the identity of the delegates designated to attend the meeting in representation of HK. Furthermore, the SAR delegates have the opportunity to participate in the internal co-ordination meetings of the PRC delegation, present their proposals and at times influence the delegation's final position.

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<sup>244</sup> The agreements were the Montreal Convention on the making of plastic explosives for the purpose of detection; Wellington Convention on regulation of Antarctic Mineral resource activities; ILO Convention n. 45 on underground work (women); ILO Convention no. 141 on rural workers organisations.

<sup>245</sup> HKSAR Information Department, "The HKSAR and external affairs" October 2002, [www.info.gov.hk/info/exaffa.htm](http://www.info.gov.hk/info/exaffa.htm).

<sup>246</sup> Interview with CAB officials on 18.12.2001.

There has been an interesting development in situations of disagreement between the SAR and Mainland delegates inside the PRC delegation. The tendency has been for the PRC delegation not to express a position and to remain silent, thus showing a consensus not to act, until the differences have been settled internally. This has been the experience with technical treaties, namely the Hague Convention on Private International Law and the Hague Convention on indirectly held securities. In this sense, and in relation to a limited number of cases involving matters with no political sensitivity for China, the SAR has been able to use a “veto” as far as China’s position is concerned, considering that China has not imposed its views<sup>247</sup>. However, one can suspect that this will not be the case in areas where the PRC has strong interests or carry more political weight.

The process of HK participation in the PRC delegation brought about two important effects for China. On the one hand, it has contributed to improve China’s image in international *fora*. In the meetings HK delegates are often very active as they have great technical expertise and master the English language at the same time their presence give an image of openness and flexibility. The participation of expatriates as HK delegates, such as David Little or Stuart Harbinson, adds to this positive effect since their presence gives confidence to third countries and is the best visible sign of HK’s autonomy<sup>248</sup>. This experience has expanded because since 1997 the SAR started to participate on a regular basis in three new international organisations limited to states: the World Tourism Organisation (1999); the World Health Organisation (2000) and the Group of Twenty (1999)<sup>249</sup>.

On the other hand, it brought about the expansion of China’s international participation. The specific interest of HK in certain organisations led China to get involved in more

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<sup>247</sup> Interview with high HK Government officials on 17.12.2001.

<sup>248</sup> It is interesting to note the parallel and contrast with the situation in the early 1970s. By then the presence of expatriates as HK representatives was seen as suspicious and regarded by third countries as a sign of HK’s lack of autonomy in relation to London. Today the situation is exactly the opposite as the presence of the very same expatriates is a sign of autonomy and a positive element that reinforces trust.

<sup>249</sup> At the end of 2002 the HKSAR participated on a regular and permanent basis in a total of 24 International Organisations limited to states, under art. 152(1) of the BL, integrated in the PRC delegation

*fora*, namely organisations in which the PRC has not a direct interest, simply because HK could not participate on its own and so China had to be instrumentally involved to make HK's involvement legally viable. One of the best examples of this phenomenon is the Hague Conference on Private International Law.

The fourth major area relates to consular relations and diplomatic representation, which is a competence of the sovereign power. This is an interesting area because the CPG voluntarily decided not to exert all the powers and associate the SAR in operational terms. China allowed HK to play a more active role in consular affairs according to the following division of labour: the CPG has the direct responsibility for issues of establishment and abolition of consular representation, approval of new consulates, consular appointments and control of credentials and for granting privileges and immunities; the HKSARG is responsible for the day to day management of the consular corps, namely questions of issuing consular identity cards, the actual provision of privileges and immunities and the security of consular premises<sup>250</sup>.

This constitutes an interesting innovation, not foreseen in the BL, of an authorisation given by the CPG to the SAR to exercise delegated competencies in foreign affairs matters. This does not strengthen the sphere of formal autonomy of HK since the granting and termination of the delegation of powers is arbitrary, fully dependent on the CPG's will and convenience. However, it can nevertheless contribute to strengthen HK's *de facto* external autonomy insofar it allows the system of direct contacts between the foreign consulates and the HK Government to continue. On the other hand, this is a sign of flexibility on the part of China showing that HK's sphere of competencies can be expanded through this mechanism by which the CPG decides to associate the SAR to the exercise of specific functions in foreign affairs.

Although the dominant picture has been one of continuity, it is also true that the handover brought about some relevant changes in the area of consular relations which

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and in a few cases more autonomously as an associate member. See CAB, HKSARG, [www.info.gov.hk/cab/topical/iorg\\_lts.html](http://www.info.gov.hk/cab/topical/iorg_lts.html) 8.1.2003.

<sup>250</sup> See Hong Kong Report 1998, HKSAR Government, pp. 10-11.

reflect the foreign policy orientations of the new sovereign power and the primacy of China's objectives over HK interests. One relevant example has been the creation of the North Korean Consulate in HK in 2000<sup>251</sup>, traditionally rejected by HK in the past because of concerns about Pyongyang intelligence and other dubious activities. This was a PRC decision. Beijing decided that one of its closest allies should have a presence in the SAR, although there was an opposition of HK authorities, namely the Police, to the idea of opening a Consulate in HK because of the fear HK could be turned into the new centre of North Korea criminal activities (counterfeiting, drug trafficking and arms trade) given the experience of Macao, affecting HK's internal security and international image<sup>252</sup>.

Another example was the announced closure of South Africa's Consulate and its transformation in a semi-official representation because South Africa had no diplomatic relations with the PRC and maintained relations with Taiwan. This possibility was contrary to HK interests, given the historical links with South Africa and its strong economic ties, but was dictated by China's reunification policy priorities. This turned out to be a very interesting case in the relationship between the SAR and Beijing. South Africa changed its position and established diplomatic relations with the PRC, thus preventing the closure of the Consulate, in a process where HK played a bridge role and contributed positively to China's foreign policy<sup>253</sup>.

The fifth main area of foreign affairs involves political issues. After 1997, the two main issues were human rights and refugees issues/ asylum policy. On the latter the HKSAR

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<sup>251</sup> The Consulate was opened on 16 February 2000. In the beginning HK was chosen to play a role as a neutral ground for "diplomatic contacts" between the two Koreas. Seoul and Pyongyang agreed to held in HK the first meeting between the North and South defence ministers since the Korean War in late September 2000 but at the last minute the meeting place was changed to a South Korea island- see BBC News, 20.9.2000 (<http://news.bbc.co.uk/2/hi/asia-pacific/933902.stm>)

<sup>252</sup> On the opposition of the HK police see Aidan Foster-Carter, "North Korea: making up lost ground, Pyongyang reacts" in *Comparative Connections Journal*, January 2000, vol 1, n. 3, 4<sup>th</sup> Quarter 1999, Pacific Forum CSIS (<http://www.csis.org/pacfor/cc/994Qnkorea.html>) and Glenn Schloss "Beijing's interference hurts SAR's image" *South China Morning Post*, 10.6.1999. See also *Far Eastern Economic Review*, 25.10.2001, regarding the criminal activities of North Korea in Macau organised around the Zokwang Trading Co.

<sup>253</sup> Interview with MFAO officials in HK, 18.12.2001.

decided to end HK's "port of first asylum" policy for Vietnamese in January 1998<sup>254</sup>, implying in practice that any Vietnamese coming to HK is no longer entitled to a special treatment and will be treated as any illegal immigrant involving immediate repatriation. The influence of China in this decision was probably significant showing that although the SAR has autonomy to define and implement its immigration policy, in matters of international immigration and refugees with political implications, China has a say and the issue becomes a foreign affairs matter<sup>255</sup>.

Human Rights is a highly sensitive and politicised issue for China and so Beijing was very careful in handling HK related international obligations in this field. In fact, China allowed some autonomy for HK to prepare the Reports on the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) presented to the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, respectively, in 1999. The Reports were formally presented by a Chinese delegation including various HK officials. Furthermore, complaints subsequently presented by the Committee about violations by the HKSAR of provisions of the Covenant have been addressed to the PRC Government, not to the SAR, thus recognising the sovereign power competence<sup>256</sup>. So, although China allowed HK to prepare its own Report and discuss it in Geneva, this has to be seen as another example of delegation of powers in foreign affairs matters and not as an expansion of HK's sphere of autonomy.

More recently after September 11, the issue of terrorism and international co-operation to fight terrorism became increasingly seen as pertaining to the realm of foreign affairs.

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<sup>254</sup> See Hong Kong Report 2000, HKSAR Government, pp. 422-423. Since 1975 HK received more than 200.000 vietnamese refugees and at the end of 2000 only 97 refugees and 116 vietnamese migrants remained in HK. Over 25 years HK has managed to resettle 143.000 refugees in third countries and to repatriate 67.000 back to Vietnam.

<sup>255</sup> The idea that human rights and international immigration/refugees matters belong to foreign affairs was expressed by the Hong Kong and Macao Affairs Office official, Commissioner Zhang Xiao-Ming, interview on 30.11.2001.

<sup>256</sup> A good example has been the complaint presented by the UN Committee on Economic, Social and Cultural Rights, through a letter sent by its Chairwoman, Mrs. Virginia Dandan, in May 2002 to the PRC. The letter complaining about the removal of 10.000 abode seekers from the SAR in violation of the UN recommendations, was addressed to Ambassador Sha Zukang, China's Permanent Representative in Geneva - South China Morning Post 15.9.2002 also cited in an interview with the UNHRC on 21.11.2002.

Although it involves both domestic security (in relation to which HK is competent) and external security (for which China is responsible) making it a grey area, the fact is that the high level of internationalisation made terrorism an issue under Beijing control despite the fact the SAR security forces are involved in operational aspects. This same logic can easily be extended to other soft security areas strongly interlinked with terrorism such as drug trafficking, money laundering, and organised crime. The emerging orientation is that while day-to-day co-operation between the HKSAR police forces and other foreign police forces can be conducted by the SAR, formal agreements have to be controlled by the CPG.

### **Specific authorisations**

As mentioned in chapter three, the Basic Law expressly foresees the need for China's specific prior authorisation for HK to conclude international agreements in three different areas: juridical reciprocal assistance (art. 96 BL); civil aviation and air services agreements (art.133 BL); and visa abolition agreements (art. 155 BL). In spite of the existence of some formal differences between the three cases, namely the fact the law mentions "specific authorisations" in relation to air services agreements and only authorisations in the other two cases, it is generally recognised they are basically similar and follow the same regime. The way this system of specific authorisations has been implemented in practice since 1997, reveal an overall picture of absence of major conflicts and formal compliance with the rules. Yet, there have been also some unexpected developments and deviant practices that tend to marginally restrict HK's autonomy.

The first observation is that there was a quite intense activity in terms of the conclusion of international agreements subject to PRC authorisation, demonstrating that the more intense and tight control of the sovereign power did not create obstacles or slowdown the level of HK's international interaction and creation of new rights and duties. Between 1997-2001 more than 60 bilateral agreements subject to the PRC authorisation were signed by HK with foreign countries, including 26 new Air services agreements, 4

overflight agreements, 20 reciprocal juridical assistance agreements, 8 visa abolition agreements and one IPPA. It should be noted that these are new agreements and not renewals of existing agreements.

The number of these new agreements signed by HK is actually higher after the handover than under British rule. More importantly, the agreements subject to authorisation are the dominant category of bilateral agreements signed by HK with over 50 countries, accounting for 2/3 of the total 100 binding bilateral agreements concluded since 1997<sup>257</sup>.

The second observation is that China has adopted a more restrictive understanding and practice on the system of authorisation than Britain. In fact, in the pre-handover period London used to give only one authorisation to negotiate and sign and, as a rule, it was a general authorisation to negotiate with a group of countries and not on a case by case basis. After 1997 the system became more rigorous for the rule started to be a case by case authorisation. In addition, the mechanism after 1997 has involved in reality not one authorisation as before but two subsequent authorisations: an initial authorisation to negotiate the agreement with a specific country; a second authorisation to sign the agreement once the negotiation is concluded. So, there are two moments of control by the sovereign power which are relatively independent.

The process starts with the presentation of a written request by the HKSAR Government to the MFAO whose main element is the identification of the country with whom HK wants to negotiate and the type of agreement. In general this is the only element provided, as there is not the practice of providing a detailed information about the HK reasons to present the request. In this first stage the MFAO controls if there is any obstacle, namely political, to enter into negotiations with a specific country. In extreme cases, where China has a diplomatic conflict or a serious problem with the country in question, one can expect authorisation to be denied.

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<sup>257</sup> HKSAR Information Department, "The HKSAR and external affairs" October 2002, internet version [www.info.gov.hk/info/exaffa.htm](http://www.info.gov.hk/info/exaffa.htm). Annex I includes the list of bilateral agreements signed as of 19.9.2002.

It should be noted that the level of control exerted by the CPG is greater than it appears at first sight because of the existence of an in-built mechanism. The HKSAR is authorised to negotiate an agreement but its autonomy is constrained because the agreement is a standard one, whose model has been previously approved by the CPG. As a consequence its contents are somehow prefixed and clauses are not supposed to be changed.

As soon as the first authorisation is granted the negotiations start<sup>258</sup>. During the negotiation process there are no contacts with the MFAO except in cases where a new clause different from the standard text of the agreement is proposed and the parties want to introduce it. Then, the CAB consults the MFAO before the completion of negotiations in order to ensure there is no objection to the innovative clause.

After the negotiation is concluded the process enters into the phase of the second and final authorisation. Then, the SARG submits the draft agreement to the MFAO for approval and concession of authorisation to sign. The CPG's control is more intense at this stage as the detailed text is submitted to scrutiny.

There were not many cases of denial of authorisation which remains an exception. Difficulties tend to be worked out by the two parties and divergences are not publicly discussed. However, there are references to some cases of denial of authorisation, in particular cases involving agreements with the US<sup>259</sup>. The case was not related to the signature of a bilateral agreement but rather with the implementation of existing agreements. This involved a request by the US Government, in the context of the bilateral juridical assistance agreements, for the SAR co-operation regarding evidence

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<sup>258</sup> The authorisation to negotiate is granted through a letter signed by the PRC Minister of Foreign Affairs addressed to the SAR Chief Executive. For example, the Air Services Agreement with Sweden signed on 14.3.2000 was authorised through the letter dated 10.12.1997 signed by Qian Qichen, then Minister of Foreign Affairs, where it is said "*I hereby inform you that the Central People's Government authorises the Government of the HKSAR to conclude the Agreement between the Government of the HKSAR of the People's Republic of China and the Government of the Kingdom of Sweden concerning Scheduled Air Services*".

<sup>259</sup> This was admitted by the PRC both by the MFA Office officials, interview on 18.12.2001, and by the Ministry of Foreign Affairs in Beijing, interview with Zhang Xinsen on 4.12.2001.

and testimony of HK residents in connection with the 1996 Clinton-Gore re-election campaign financing scandal in which Chinese funds were implicated<sup>260</sup>.

In spite of these exceptional cases, there were not major open conflicts over the functioning of the authorisation mechanism. The most difficult question is clearly the fact Beijing is sensitive about the possibility of HK concluding bilateral agreements with countries that have no diplomatic relations with the PRC.

However, a careful and more detailed analysis reveals that the system of authorisation has been in practice informally extended to other areas. I would argue there was a tendency for the gradual emergence of a deviant practice, though still limited, which is not fully consistent with the rules and boundaries defined in the BL and tends to strengthen the CPG's control and restrict the SAR's autonomy. This resulted from two different mechanisms.

Firstly, the application of the authorisation system to acts related to international affairs other than international agreements, i.e. public statements, organisation of international meetings, joint activities or initiatives with foreign states or official visits. The SAR initiative to organise an international meeting in HK might have to be submitted to the CPG's approval, in particular if this is a meeting of an international organisation limited to states. For example, in the case of the September 1997 Annual Meeting of the World Bank/IMF held in HK, authorisation was granted by Beijing and the international organisations signed parallel agreements with China and the SAR<sup>261</sup>. The intervention of Beijing seems to have been justified on the grounds that there was a need to confer diplomatic privileges and immunities to delegates.

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<sup>260</sup> The "Chinagate" involved illegal contributions in the amount of US\$ 300.000 allegedly made by China, the head of the PLA Military Intelligence Gen. Ji Shengden, to finance the re-election campaign through the Democratic Party fund raiser Johnny Chung. According to the investigation conducted by the Congress the money originated in the PLA and was routed through HK firstly to the China Resources Holding Company Ltd and then through the China Bank - *Los Angeles Times* (4.4.1999), *Washington Times* (4.9.1999), *Washington Post* (21.9.1998 and 5.11.1999)

<sup>261</sup> Interview with CAB officials on 18.12.2001. The MFAO expressed the same view even more broadly stating that in relation to all international meetings, disregard of its nature even if they are not restricted to states, when the SARG wants to organise them in HK has to obtain authorisation from the CPG- interview on 18.12.2001.

Similarly, official visits, in particular of heads of state or government, to HK have to be approved. In relation to official visits made by the Chief Executive or other public officials abroad, the rule is different as the SAR is free to choose the countries and the time of the visit and there is little interference on the part of the CPG.

The most notable case where authorisation was denied was the visit of the Pope to HK in 1999, vetoed by Beijing because of the Vatican diplomatic relations with Taiwan<sup>262</sup>. This was a very controversial case because of the considerable support in HK for the visit and the fact that China's veto was seen as potentially contributing to undermine international confidence in HK and to erode its autonomy<sup>263</sup>. The SAR Government found itself in a very difficult position, because of internal divisions between Donald Tsang, who expressed support for the visit, and Tung Che-hwa, who accepted the Beijing logic, and finally decided to consider the visit a foreign affairs matter, because of the "Taiwan factor", thus accepting the CPG's interference<sup>264</sup>.

Some sectors of HK society challenged this position and considered it to be a religious question and a problem of restriction of religious freedom<sup>265</sup>. This is clearly an example of the restrictive impact of the "Taiwan factor" on HK's external autonomy insofar as it transforms any matter in a foreign affairs issue. On the other hand, it shows how the PRC uses HK as a bargaining tool for its foreign policy objectives, using the prospect of the visit to HK to press the Vatican to cut ties with Taiwan and then blocking the visit as a retaliation in the absence of progress.

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<sup>262</sup> The Guardian, 10.8.1999

<sup>263</sup> Concerns were expressed by different sectors of the political spectrum, pro-democracy politicians like Christine Loh and Emily Lau, but also by pro-Beijing politicians such as the Chairman of the Democratic Alliance for the Betterment of HK, Tsang Yukshing and Alan Lee a former leader of the Liberal Party – The Guardian, 10.8.1999.

<sup>264</sup> HKSAR Government statement, 9.8.1999, Press Release, HK Government

<http://www.info.gov.hk/gia/general/199908/09/0809224.htm> and Chief Executive answers in the media session on 11.8.1999, Press release, HK Government <http://www.info.gov.hk/gia/general/199908/11/0811258.htm>.

<sup>265</sup> This was expressed among others by the HK Human Rights Monitor in the 9.8.1999 statement <http://www.hkhrm.org.hk/english/reports/press/pr090899.html>.

Secondly, the authorisation system has been expanded and applied to the negotiation and signature of international agreements in areas outside the three areas explicitly foreseen in the BL and belonging to external affairs where HK can act on its own. The first example is the Agreements on Investment Protection and Promotion (IPPA). Although they are clearly an economic matter and belong to the sphere of autonomy, the IPPAs have been subject to the authorisation of the CPG<sup>266</sup>. It is true that, as noted in chapter three, a precedent developed during the transition period when these agreements started to be submitted to the joint approval of the UK and China in the JLG. However the question is why was this practice maintained when it is not consistent with the BL?

The answer seems to be that China considers that some aspects involved in IPPA touch sovereignty, namely issues related to expropriation in particular the clause related to compensation in case of nationalisation, which is seen as creating a potential obligation for the PRC<sup>267</sup>. As a result this constitutes the most obvious case of deviant practice implying a stronger control by the CPG and leading to a significant practical outcome: since the handover only one IPPA has been signed, precisely with the former sovereign. All the other existing 13 agreements were signed before the handover. In this case it seems clear that not only the authorisation system was applied but it was used to block the signature of new IPPAs, thus restricting HK's autonomy of decision. One case in point has been the agreement with the US whose negotiations started in 1995 but so far was not signed suggesting that it has been put on hold because of Beijing's influence.

Another development has been the emergence of a general criterion that if an agreement implies an obligation for the CPG or duties the SAR can not discharge on its own, then it has to be submitted to authorisation. This is a general clause which tends to be applied

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<sup>266</sup> HKSAR officials recognise this is a sensitive area where the CPG exerts considerable control. The Agreement signed with Britain on 30.7.1998 mentions explicitly the existence of a CPG's authorisation.

<sup>267</sup> The PRC MFA went as far as to consider investment protection as an area belonging to foreign affairs – interview with Zhang Xinsen on 4.12.2001. The sensitive questions relate first to the provision on compensation for losses (HKSAR-Britain Agreement, art.4) resulting from “... war or other armed conflicts, revolution, a state of national emergency, revolt insurrection or riot...” with explicit reference to the obligation to compensate for losses caused by the forces which means in relation to HK the PLA forces. Second, the obligation to compensate in case of expropriation (art.5) and the guarantee of “unrestricted transfer of investments and returns abroad” (art.6).

across the board even in areas included in art.151 list<sup>268</sup>. In this case it is not only the specific clause dealing with an obligation for the CPG, even if indirect and however marginal to the structure of the agreement, that is subject to authorisation but the overall agreement.

A similar practice is followed whenever there is a question with a connection to Taiwan. HK's autonomy tends to be somehow limited because any question, even of low politics, that might have a link with Taiwan justifies the intervention of the CPG and the use of the authorisation mechanism. In other words the Taiwan factor tends to transform external affairs matters into "quasi foreign affairs" thus restricting in practice HK's formal autonomy as in the Asian Productivity Organisation case mentioned below.

Moreover, the scope of authorisation is larger than believed because it is not limited to the initial phase of negotiation and conclusion of the agreement, but covers also its implementation. For instance, in the context of juridical assistance agreements the CPG has to be notified of foreign requests for assistance as well of requests made by the SAR and, in practice, the CPG can interfere and block the process when it considers that sovereign interests and politically sensitive matters are at stake. This implies that in reality a system of authorisation does exist in the process of implementation of juridical assistance agreements<sup>269</sup>.

In sum, the scope of the system of authorisation has been enlarged beyond the formal limits set in the BL. I would argue that the application of the authorisation system on the basis of criteria not foreseen in the BL introduces a restriction to the SAR's autonomy. The gradual and subtle expansion of the authorisation system has the potential to subvert the balance between external affairs and foreign affairs and should be seen as one of the most serious risks for HK's external autonomy the more so as it can maintain an appearance of autonomy, because on the surface it is the SAR that acts.

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<sup>268</sup> The existence of this practice was confirmed both by interviews with HKSAR officials on 18.12.2001, and MFAO official, Li Chunyan, on 18.12.2001.

<sup>269</sup> Interview with HKSAR officials, 26.3.2003.

## External Affairs

External affairs correspond to the sphere of autonomy of the HKSAR in international affairs defined *rationae materiae* on the basis of the list of areas included in article 151 BL, where the SAR can act on its own on the basis of a general authorisation granted by the CPG. One of the uncertainties raised by the BL was the extent to which this was an open or a closed list, i.e. whether HK could act autonomously only in the areas explicitly mentioned there or also in other areas. The post-handover experience has demonstrated that although there is a general consensus on both sides that art. 151 list is an open one and a flexible interpretation should prevail, there are nevertheless some slight differences and nuances on the limits of such flexibility when we take a more in depth analysis of the views expressed by different actors. Two nuances came out more vividly.

The first nuance detected is that there is not a complete coincidence of views within the CPG itself. There are different positions between the Ministry of Foreign Affairs, which has a more liberal and flexible approach admitting clearly that art 151 is an open list and HK can act on its own in other areas not explicitly mentioned, and the HKMAO, the guardian of the BL, which has a more conservative position and sees it nearly as a closed list<sup>270</sup>.

The second nuance relates to the difference of emphasis between the MFAO and the SARG, namely CAB. Although both share the same view that art. 151 contains an open list, there is a difference on how to proceed and how far to go in terms of the limits of “implicit areas”. The SARG understands it has the legitimacy to make its own judgement on what falls in the logic and spirit of art.151 and does not have to consult beforehand the MFAO. In the absence of an explicit legal limitation the SAR acts as a rule because it considers there is room for informal expansion of the list and the SAR benefits from a general permanent authorisation. In addition, the SAR considers that, in

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<sup>270</sup> Interviews with the PRC MFA officials, 4.12.2001 and with the HKMAO officials, Zhang Xiao-Ming, 30.11.2001.

principle, all areas included in its domestic autonomy are areas where HK can act externally on its own. In other words, domestic autonomy is a criterion for external autonomy, in the limit external affairs tend to match domestic autonomy<sup>271</sup>, thus implying a large scope for the expansion of the list.

In contrast, the MFAO seems to hold the view that new areas should be the object of previous consultation between CAB and the MFAO, the principle of freedom to act should not apply automatically, on the one hand, and has some reservations to the idea of external autonomy matching domestic autonomy, on the other<sup>272</sup>. In spite of these differences, the MFAO adopts a flexible approach and clearly recognises that HK can act autonomously in areas not explicitly included in art.151, namely social areas, such as education, labour, health, environment and science and technology. One of the practical examples of HK's autonomy in these "implicit areas" are the bilateral agreements concluded on Cooperation in Information Technology with Israel, Australia, Canada, Finland, India and the UK, which were freely negotiated and concluded by the SAR without previous authorisation of the CPG.

During these first years of implementation of the new system, there have been differences of views between the SARG and the MFAO in terms of knowing whether specific matters fall or not under art.151. Often the difficulty lies with subjects that involve simultaneously matters that are within the SAR's autonomy as well as other matters that fall under the CPG's competence<sup>273</sup>. One case in point is economic subjects that fall under art.151 but involve a few provisions which might require juridical assistance. Two examples are customs cooperation and tax matters, in principle clearly within the SAR's sphere of autonomy but in practice object of some CPG's interference whenever they include any provisions, however marginal, which imply authorisation. In these mixed cases a "marginalist" principle seems to apply in the sense that these marginal components of the agreement determine the regime applied to the entire agreement.

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<sup>271</sup> Interviews with HKSAR officials on 3.11.1999 and 18.12.2001.

<sup>272</sup> Interview with MFAO officials on 18.12.2001.

<sup>273</sup> Interview with HK Government officials on 18.12.2001 and 26.3.2003.

As mentioned earlier September 11 and the war on terrorism has contributed to change the way soft security questions are seen shifting them more towards foreign affairs. The traditional and intense cooperation between HK police and the US Law Enforcement authorities<sup>274</sup> is today more subject to Beijing scrutiny and informal reporting. In relation to terrorism some aspects pertain to the foreign affairs domain, namely the application to the SAR of the UN Security Council Resolutions on Terrorism<sup>275</sup> while others fall under external affairs, namely its participation in the Financial Task Force on Money Laundering, a transgovernmental network where the SAR has played a remarkable leadership role serving as President of the Group in the last few years in the attempt to co-ordinate international efforts against money laundering and suspicious financial transactions. The same applies to HK's autonomous participation in the World Customs Organisation and its counter-terrorist activities.

In the external affairs sphere HK has been able to exercise its autonomy in other important domains. First, the participation in International Intergovernmental Organisations where the SAR had a separate and autonomous membership in 1997 remained active and autonomy was not restricted. The number of organisations where HK participates under art.152 (2) BL has gone up as HK joined 6 new organisations<sup>276</sup>.

In addition the SAR has also expanded its participation in non-intergovernmental international organisations where it has a separate membership having joined 34 new

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<sup>274</sup> Law enforcement cooperation is clearly, as recognised in the US-HK Policy Act Report of 2000 and 2002 (internet version [www.usconsulate.org.hk/ushk/pi/20000401.htm](http://www.usconsulate.org.hk/ushk/pi/20000401.htm)) "a central pillar of US-HK relations" involving cooperation in the combat to terrorism, human smuggling, trafficking in persons, narcotic traffic, commercial fraud, money laundering, organised crime and even illegal high-technology transfer.

<sup>275</sup> The CPG decided on the implementation in HK of the UN Security Council Resolutions 1267, calling for the freezing of funds and other financial assets owned or controlled by the Taliban, and 1373 which freezes the financial assets of Osama Bin Laden, Al-Qaeda and associates.

<sup>276</sup> These organisations are the Asia Pacific Group on Money Laundering (1997), the International Association of Film Commissioners (1999), The Financial Stability Forum (1999), the Manila Framework Group (1997), the Governmental Advisory Committee of the Internet Corporation (1999), and the Study Group on Asia Tax Administration and Research (2000). At the end of 2002, the HKSAR had a separate membership in a total of 26 intergovernmental organisations not limited to States -- see HK Government, CAB at [www.info.gov.hk/cab/topical/iorg\\_lts.html](http://www.info.gov.hk/cab/topical/iorg_lts.html).

organisations since 1997<sup>277</sup>. There was only one case that goes in the opposite direction: the Asian Productivity Organisation (APO). In fact since July 1997 there was a suspension of HK's participation in APO, although not a formal withdrawal as mentioned in the US-Hong Kong Policy Act Report of 1999<sup>278</sup>, which has given rise to some speculation about the reasons why the HKSAR decided to take that step. The APO case is particularly interesting because it illustrates the impact of the Taiwan factor on HK and how far it tends to restrict HK's international autonomy. In fact the explanation to the SAR's suspension is related not to the loss of interest as officially claimed, but to the PRC pressure concerned with Taiwan's participation in APO using the name of "Republic of China"<sup>279</sup>. Beijing has used the SAR participation to demonstrate its displeasure to APO for allowing the status of Taiwan to continue.

Second, the structure of external representation formed by the network of ETOs remained in place pursuing HK's specific interests with clear autonomy. The network was recently expanded with the creation in 2001 of a new ETO in Guangdong signalling HK's interest in the Pearl River Delta and its efforts to manage the sub-regional integration process. Besides the ETOs the SAR has also a network of 47 Trade and Development Council Offices and 20 HK Tourist Association Offices operating in all continents with a private or a mixed public-private nature<sup>280</sup>.

Thirdly, the HKSAR has been able to continue to decide and organise autonomously official visits of the SARG members to foreign countries. Although there was by and large continuity in this chapter, some changes could also be detected. The number of

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<sup>277</sup> At the end of 2002, the HKSAR participated in a total of 126 non-intergovernmental international organisations in a wide range of fields. The new organisations HK joined after 1997 are concentrated in two main fields: culture/education ; judicial/securiy – see HK Government, CAB at [www.info.gov.hk/cab/topical/iorg\\_lts.html](http://www.info.gov.hk/cab/topical/iorg_lts.html).

<sup>278</sup> US-Hong Kong Policy Act Report of 1.4.1999, Department of State, chp.VIII internet version [www.state.gov/www/regions/eap/990401/us-hk\\_pol\\_act\\_rpt.html](http://www.state.gov/www/regions/eap/990401/us-hk_pol_act_rpt.html). Interview with Yugi Yamada, Adviser to APO Secretary General, 7.11.2002 who confirmed the innaccuracy of the US information stating that "HKSAR has not officially informed APO of any withdrawal from membership so HK is still considered as a member". He added that "HK has neither been actively involved in APO activities since July 1997 nor officially intimated the withdrawal from APO membership".

<sup>279</sup> United Kingdom, FCO, Six-Monthly Report to Parliament, July-December 1997, p.24.

<sup>280</sup> See Hong Kong Report 2000, pp.462-468, HKSAR Government.

visits of the Chief Executive abroad declined since 1997 and remained at low levels while the visits by other members of the Government registered an increase<sup>281</sup>.

It is also possible to detect a tendency towards greater diversification of visits. After 1997, for the first time ever, HK officials visits to Latin America (Brazil, Chile and Argentina), South Africa, Eastern Europe and Nordic Countries took place<sup>282</sup>. The SAR has enjoyed freedom in decision-making regarding the countries and time of these visits, which have been subject to mere notification of the CPG but not to any authorisation. Moreover, although the Chinese Embassies provided protocol assistance to HK representatives, Chinese diplomats have not attended the high level meetings and discussions between the SARG members and foreign host governments nor interfered in the contents of this paradiplomacy activity.

In sum, I would argue that globally the level of the SAR autonomy in external affairs has not diminished during the 1997-2001 period. The main tendency has been one of stabilisation. However, a number of subtle and invisible mechanisms and procedures have generated some marginal restrictions and can become, if uncontrolled, potential factors of erosion of the SAR's autonomy in external affairs in the future. First the existence of standard texts of agreements previously approved by the CPG, even in areas falling under art.151, tends to reduce the SAR's "room for manoeuvre" in negotiations of international agreements, namely because changes in clauses or innovative clauses have to be submitted in principle to the MFAO approval.

Secondly, the expansion of the authorisation mechanism covering informally areas under external affairs as mentioned earlier, constitutes a limitation to HK's external autonomy. The IPPAs, the "Taiwan clause" and "CPG obligations clause" are examples of this informal trend.

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<sup>281</sup> The total number of visits made by other SARG members went up from 3 in 1997, to 10 in 1998, 12 in 1999 and 17 in 2000 – see HK Reports 1997-2001, HKSAR Government.

<sup>282</sup> The Financial Secretary Donald Tsang visited Brazil, Argentina and Chile in May 1998 and South Africa in July 1999. Again, Chief Secretary Anson Chan visited Brazil in May 2000. The Financial Secretary paid an official visit to Hungary, Poland and the Czech Republic in September 2000 and to Norway, Denmark, Sweden and Finland on May 1999.

### **Features of the HKSAR-PRC relationship: separation vs. cooperation**

The relationship between the HKSAR and the new sovereign power in international affairs has been a new experience for both China and HK, requiring a continuous learning process. Three underlying factors have conditioned the development of the relationship.

First, the difference in the starting positions of the two players. In fact, while the SAR had a practical experience and memory of the previous relation with the former sovereign power, the PRC had no previous experience of this kind with any autonomous region, no precedent to follow. This gave HK a certain advantage since it could adopt a more relaxed and flexible approach than China.

However, it should be noted that there were also negative aspects of the colonial legacy, which created a disadvantage for HK. In fact, because under British rule London monopolised relations with China, there was a deficit of direct interaction between HK and China, which led key players in HK, including the bureaucracy, to have little experience of, and not knowing China in depth. This constituted a handicap for HK that was not really prepared to handle directly the relationship with Beijing.

Second, the limitations of the BL. The new relationship was supposed to be a rules-based one, built on written rules enshrined in the BL. The problem is that in practice this is partly an illusion because this, as any other law, can not provide an exhaustive regulation of all situations. The BL should be seen more as creating but a framework within which understandings and courses of action are consolidated and legitimised. As a consequence, the SAR and the PRC did not only follow the existing rules but had to forge solutions for new situations not foreseen in the BL.

Third, international surveillance and monitoring of HK's international participation carried out by interested members of the international community. The levels of HK's

international participation and external autonomy are certainly a good test to China's respect for the SAR's autonomy status and can be easily assessed by external players. Both China and HK know this is an area where they are under permanent scrutiny and so are particularly careful to respect the rules and avoid any accusation of deviant behaviour.

After the first years of the SAR existence, the relationship with the sovereign power in international affairs is not yet consolidated, as practices and procedures are still evolving. However, it is possible to identify already some basic features that, so far, have characterised the relationship.

Firstly, it has been a highly formal relationship based on detailed rules, close observation of the BL and respect for the boundaries. This contrasts with the previous HK-Britain relationship which tended to be more informal as there were no written rules on HK's autonomy sphere nor on the relative competencies of the two parties<sup>283</sup>. In the pre-handover period the logic was, as much as possible, to test the limits and see how far HK's autonomy could go, but since 1997 the main logic has been the preservation of the established limits<sup>284</sup>.

Secondly, the relationship has been asymmetric in a double sense. On the one hand while the CPG's foreign policy had an impact on HK's external affairs and influenced the SAR options, the opposite was not true. The SAR was not allowed to give inputs to the national process and had little impact on China's foreign policy. On the other hand, it was asymmetric because the relationship was much more concentrated on HK's bilateral relations than on multilateral participation.

Thirdly, the relationship has been marked more by a logic of separation with little co-operation. This is somehow paradoxical because in international affairs one would expect to see more co-operation developing than in areas where HK has greater

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<sup>283</sup> Interview with HKSAR officials, 18.12.2001.

<sup>284</sup> Interview with Alan Paul, 19.12.2001.

autonomy. In this the reduced level of conflicts and tension experienced so far is more explained by a low level of interaction than by a successful conciliation of divergent interests.

This separation has been seen by many as the legacy of the transition process and the prevailing logic that, in order to preserve the second system and its identity, HK had to insulate itself as much as possible from entanglement with the Mainland to avoid contamination and risks of interference. The way in which the “one country, two systems” was conceived and incorporated in the JD and the BL has created a “tight corset of non-conjugal relations”<sup>285</sup>, an artificial separation which hamper normal contacts.

In addition, the high international visibility of this area and the great concern of China not to be seen as interfering or limiting HK’s autonomy, leads Beijing to be overcautious, reducing interaction to the minimum, sometimes ignoring issues and not doing what one would expect a sovereign power would do. For different reasons the SAR is also overcautious not to be seen as giving in. The outcome of the convergence of the radical risk-reduction strategies of both HK and the PRC is an artificial reduction of bilateral interaction.

There are interesting examples of this separation. One was the low level of interaction during the crucial phase of China’s WTO accession negotiations in spite of the fact HK is one of the most experienced members. Another example is the fact HK gets little strategic inputs from China. The Ministry of Foreign Affairs does not provide HK with general diplomatic restricted information regarding global issues as London used to do, but transfers only, from time to time, specific information that directly concerns the SAR<sup>286</sup>.

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<sup>285</sup> US House of Representatives, Report on “Hong Kong’s ongoing transition: implications of chinese sovereignty”, 23.3. 2001, Kerry Dumbaugh, pp.9-10 (mimeo).

<sup>286</sup> Interviews with HKMAO officials, 30.11.2001, and Alan Paul, 19.12.2001.

This unexpected silence and passivity of Beijing in matters of international affairs, the fact the CPG does not make its views known, creates a disturbing situation for the SAR. In fact, as HK does not know what Beijing thinks and wants, the SAR's external affairs options tend to be formulated in a “vacuum”, generating anxiety and uncertainty, sometimes restraining the SAR from acting fearing tensions with Beijing. Paradoxically, the silence of the sovereign power, when it should exercise guidance, can be as problematic as excessive interference<sup>287</sup>.

The other side of the coin of this separation is the fact there is little reporting from the SAR to the CPG. This can be interpreted in two different ways. A positive one which sees this as a sign of increased autonomy, particularly when compared with the pre-handover situation when there was an intense reporting and considerable number of telegrams were sent, and phone calls made to London everyday<sup>288</sup>. There is also an opposite interpretation, more negative, which argues that less reporting does not mean necessarily more autonomy but can mean rather more solitude and a sense of being cut-off<sup>289</sup>.

There is clearly a danger for HK's future autonomy associated with this more negative view. The argument put forward is that the way in which the relationship has evolved suggests that the autonomy of HK in external affairs is equated with isolation, to use the words of Thynne<sup>290</sup>, who, looking at the SAR global autonomy, contrasted this hypothesis with the scenario of autonomy as “dynamic self-governance”. This scenario of “autonomy with isolation” is seen as the most negative one where the formal autonomy to decide freely could have the cost of cutting off the SAR from crucial sources of information and to exclude it from the networks and processes necessary to maintain its voice and influence. In this context, autonomy would not have any utility

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<sup>287</sup> This relevant but invisible phenomenon and this hypothesis were discussed with Alan Paul, interview on 19.12.2001, and Bowen Leung, Director of the SARG Office in Beijing, interview on 4.12.2001.

<sup>288</sup> The intense reporting to London was confirmed by Bowen Leung, interview on 4.12.2001, who before 1997 worked in Governor Patten's Cabinet.

<sup>289</sup> Interview with Alan Paul, 19.12.2001.

<sup>290</sup> Ian Thynne “One country” or Two systems? – Integration and autonomy in perspective” in Ian Scott (ed.) Institutional change and the political transition in Hong Kong, Macmillan Press in association with the Asia Research Centre, Murdoch University, 1998. pp.235-247

and would operate only as the seed of the SAR's waning. Autonomy is not a homogeneous reality, there can be different modalities of autonomy, some working to the advantage of the autonomous entity but others to its disadvantage.

In the post-handover experience there are some signs of the realisation of this scenario. However, it is too soon to know whether this phenomenon of separation is only a transitory feature that emerged in this initial phase or a long lasting feature of the relationship. One of the consequences of this separation has been the HKSAR's impossibility to participate and give inputs to the process of formulation of the PRC's foreign policy. However, despite the absence of a formal participation, there remains an interesting question to be researched, to what extent did the HKSAR's action in external affairs had in practice any impact on, or added value to China's foreign policy, even if indirectly. Existing evidence, although scarce, suggests that despite the SAR's little influence on China's foreign policy orientations, in specific areas there was some impact which should not be overlooked<sup>291</sup>.

Firstly, China started to have to think about and be concerned with HK interests when negotiating an international agreement in order to know if it is relevant to HK and whether it should be applied to the SAR or, on the contrary, a reservation should be made for HK.

Secondly, China had to assume new responsibilities in terms of the consular protection of HK residents implying sometimes considerable additional work such as in the case of HK citizens in South Africa because of the high number of road accidents<sup>292</sup>. In the beginning this gave rise to some misunderstandings. One can cite the incident of the HK workers trapped in a factory in Jakarta during the May 1998 riots and violence against the Chinese community in Indonesia, basically explained by the fact Chinese authorities were not yet fully aware of their new responsibilities<sup>293</sup>. Equally interesting due to its

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<sup>291</sup> Interviews with HK Government officials, 18.12.2001, and MFAO in HK, 18.12.2001.

<sup>292</sup> Interview with the PRC Ministry of Foreign Affairs on 4.12.2001.

<sup>293</sup> SCMP, 15.5.1998. It was reported that the 80 HK workers trapped in a factory in Jakarta contacted the Chinese Embassy in Jakarta for assistance but were told that the Embassy could not help. As a

unique and unprecedented nature is the special and unique regime China accepted to the protection of Chinese nationals resident in HK when they are in the Mainland<sup>294</sup>.

Thirdly, China's image and activity in certain international organisations changed as a result of HK's participation in the Chinese delegation. Sometimes the delegation became more active because of HK's input. In general the presence of HK delegates, some of them expatriates, gave a new image of openness and flexibility, as they have been able to speak freely to defend HK's interests. This has contributed to boost China's image. In some organisations where HK participates on its own, the perception that China had two voices and sometimes HK expressed different positions from China, added to the credibility of the PRC<sup>295</sup>.

In addition, because of HK, Beijing expanded its international participation and was exposed to areas where it did not use to be involved. In fact, because of the SAR interest in specific organisations where it can not participate on its own, China had to become involved and to assure an instrumental participation. Two relevant examples have been the International Maritime Organisation (international conventions on oil pollution and oil pollution damage) and the Hague Conventions on Private International Law<sup>296</sup>.

Finally, there was an impact on China's bilateral relations with third countries. In fact, HK played a facilitator role between China and other countries, helping bridging

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consequence they phoned the RTHK reporting about their situation. The Chinese Embassy in Jakarta at first seemed not to be aware of its responsibilities in relation to HK residents. The SARG had to contact the MFAO which intervened to overcome the problem and reverse the Embassy initial approach. This was not openly discussed but several HK officials statements issued between 15-20 May have strongly emphasised the liaison and coordination between the SARG, the MFAO and the Embassy in Jakarta. The SARG was obviously concerned with the situation and this explains why it decided to send two Immigration officers on 16 May, to the Embassy in Jakarta in order to make sure protection and assistance to HK residents was effectively delivered – Daily Information Bulletin, HK Information Service, 15-20 May 1998, [www.info.gov.hk/gia/general/199805/15-20/0515268.htm](http://www.info.gov.hk/gia/general/199805/15-20/0515268.htm).

<sup>294</sup> Interview with Bowen Leung, 4.12.2001. The protection of HK residents in the Mainland although not foreseen became a function of the SAR office in Beijing as a result of the pressure of HK population.

<sup>295</sup> The "one country, two systems" and the HKSAR status were new for members of international organisations who raised doubts about HK's personality and the continued application of international rights and obligations. Some organisations have asked for clarification like IMO, in the context of the International Oil Pollution Compensation Fund, and the OECD, in relation to the Paris Convention on Nuclear Third Party Liability. Their questions were answered by the JLG - FCO, UK Six-monthly Report to Parliament, July-December 1997, pp.24

differences and overcoming tensions. Besides the US-China relations and HK's role in the approval of the PNTR status to China by the US Congress, the most clear example was the South Africa case, which can be seen as the first example of a contribution made by the SAR to China's foreign policy, insofar as it helped establishing diplomatic relations between China and South Africa. It is believed that the HK factor and the relevance of South Africa economic relations with the SAR led South Africa to revise its policy, cut ties with Taiwan and establish diplomatic relations with the PRC in January 1998<sup>297</sup>. This capacity of the SAR to add value to China's foreign policy is recognised by the Central Government<sup>298</sup>. Yet the South Africa case should not be overstated and we have still to wait and see whether this was only an isolated case or the manifestation of a long-term trend.

Although there are not yet many examples of this, I would argue that building ties with other NCGs of foreign states can be another potential strategic area where HK can add value to China's foreign policy considering the political sensitiveness and limitations the PRC faces in dealing directly with sub-national governments of foreign states. The ties HK can easily establish with its fellow NCGs can be useful for China and for the diversification and decentralisation of its external relations.

#### **4.3. HK's INTERNATIONAL PARTICIPATION AND IMPACT ON THE INTERNATIONAL SYSTEM**

The international participation of the HKSAR occurred both at the multilateral and bilateral levels. One striking feature of this participation is the priority attached to, and intensity of participation in multilateral organisations. This is a major difference with the great majority of other NCGs, which have minimal multilateral involvement and centre

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<sup>296</sup> Interview with HK Government officials on 3.11.1999 and 18.12.2001.

<sup>297</sup> The Joint Communiqué on the establishment of diplomatic relations was signed by the Chinese Foreign Minister Qian Qichen and the South African Foreign Minister Alfredo Nzo in December 1997 - PRC Foreign Ministry ([www.fmprc.gov.cn/eng/30772.html](http://www.fmprc.gov.cn/eng/30772.html))

<sup>298</sup> The relevance of the South Africa case was recognised by the MFAO which mentioned that HK's network of international contacts could be useful to China. - interview with Li Chunyan, 18.12.2001.

their external relations on the bilateral domain. Multilateralism is clearly the strongest dimension of HK external affairs and an important characteristic of HK's international identity, further accentuated after the handover.

### **Trade and investment**

At the multilateral level the SAR's priorities were clearly trade and investment areas and the participation in the World Trade Organisation (WTO) at the global level, and APEC at the regional level<sup>299</sup>.

WTO is by far the number one priority, not only because HK is basically a global trader which finds its interests best protected by multilateral trade rules, but also because in WTO the SAR has a separate membership and can therefore exercise fully its autonomy. In fact HK, together with Macao, are the only NCGs that are members of WTO which can be seen already as a manifestation of the "one country, two systems" at the international level.

The contribution of HK to the development of WTO and commitment to multilateral rules contributed over the years to build HK's prestige and high visibility as will be demonstrated in the next chapter. This status has been further enhanced in the post-handover period as a result of HK's contribution to the launching of the Doha Round in 2001.

As far as APEC is concerned, HK has mixed feelings towards it. On the one hand, it has an interest to be involved and participate in regional economic co-operation with its major trade partners and have a separate membership, as APEC is not limited to states. On the other, HK has a clear commitment to multilateral trade rules and regards regional arrangements as problematic and a potential factor that can weaken WTO. So, as long as APEC is an instrument to push forward further liberalisation of trade and investment at

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<sup>299</sup> The SAR has been active also in a third organisation the World Customs Organisation (WCO) aimed at improving the effectiveness and efficiency of Customs administrations and facilitating trade through harmonisation of procedures. HK has been since July 2000 Vice-Chairman of WCO. The priority status of the three organisations results clearly from HK statements - see Hong Kong Report 2000 pp. 118-119.

the regional level HK sees it as a positive factor, but if APEC would evolve to a preferential regional system HK would change its view.

The SAR has been actively involved in the three areas of APEC's activity – trade and investment liberalisation; trade and investment facilitation; economic and technical cooperation – and gained visibility through its forward looking proposals to speed up liberalisation and the assumption of high level functions. HK has been the Vice-chair of the Committee on Trade and Investment since 1996 and was the Chair of the Government Procurement Experts Group from 1995-1999. More recently in 2000 the HKSAR was the Convenor of the *ad hoc* Task Force for the Development of Trade Facilitation Principles where it played a decisive role in the formulation and approval of the “Nine Principles”.

### **Financial area**

HK has been also internationally active in the financial area. In this field the most relevant aspect has been HK's participation in the Financial Action Task Force (FATF) where it has asserted its credibility in terms of its commitment to fight money laundering. This is an important soft security issue that gained high visibility after September 11 given its linkages with terrorist groups financing. HK's reputation and practical actions were the main factors behind the SAR's election as President of FAFT in 2001-2002 exactly one of the most challenging periods in the organisation's life. The SAR leadership in such a key area in the fight against terrorism gained HK widespread international recognition.

In the financial area the HKSAR has been active also in the area of co-operation among central banks in Asia, in particular in matters concerned with banking supervision. The SAR has played a leadership role by chairing the working group on banking supervision of the Executives Meeting of East Asia-Pacific Central Banks (EMEAP) since 1996. Furthermore, HK has participated actively in international *fora* of banking supervision namely the Core Principles Liaison Group set up by the Basel Committee on Banking Supervision, the Offshore Group of Banking Supervisors and the South East Asia New

Zealand and Australia Forum of Banking Supervisors<sup>300</sup>. This prominent role in the area of banking supervision contributed to maintain HK status as an international financial centre.

Moreover, HK's participation in these bodies is particularly relevant because it confirms HK's involvement in a new and fundamental trend in the international system. Both the FAFT and the Basel Committee are not traditional multilateral organisations but transgovernmental networks, which involve bureaucrats, international organisations, private and NGO sectors<sup>301</sup>. These networks, partly a response to the overload and politicisation of multilateral organisations, have gained increasing influence in policy agendas and rules setting and constitute a new channel which enhanced the opportunities for HK, as well as other NCGs, to expand their international participation.

### **Human Rights**

The third area of great visibility in terms of HK's international participation has been Human Rights and HK's involvement in the ICCPR and ICESCR processes. Its relevance, unlike the other two, does not derive from the fact it is an area of external autonomy, but from the fact it has a high international visibility given the concern of the international community that human rights standards in the SAR might decline.

One of the main implications of the application of the two covenants to HK is the submission of HK to an international monitoring system operated on the basis of a Report on the human rights situation which is assessed and discussed by the other members<sup>302</sup>. At the handover there was a problem regarding the functioning of this monitoring mechanism, i.e. who was going to prepare and present the Report. One of the possibilities was for the HKSAR itself to present it in Geneva. Since HK was not a sovereign entity and membership of the Human Rights Committee is limited to states, this was not legally possible. The other possibility was to allow China, which at the time

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<sup>300</sup> Hong Kong Report 2000 pp.78-79, HKSAR Government.

<sup>301</sup> David Held and McGrew, Governing Globalization – power, authority and global governance, Polity Press, Cambridge, 2002, p. 11.

<sup>302</sup> This monitoring mechanism is foreseen in art. 40 of the ICCPR and arts. 16 and 17 of the ICESCR.

was not a signatory of neither of the covenants, to present the reports on behalf of HK. This would be also a strange solution because China had no link with the system, was not a party and non-members could not legally participate in the process.

The second solution was the one finally adopted. The decision was to allow China, although a non-member, to present the Report on HK as the sovereign power and on behalf of the SAR on the basis of the succession principles<sup>303</sup>. This was in itself a completely new and unprecedented situation for the Organisation<sup>304</sup>.

So, for the first time since the handover China submitted the Report on HK to the Human Rights Committee on January 1999 thus securing the continuity of the practice initiated by Britain before 1997<sup>305</sup>. The Report was prepared in HK by the SARG allegedly without any interference or formal approval by the CPG, which has been interpreted internationally as a sign of autonomy<sup>306</sup>. However, taking into account the sensitivity of this matter, one can suspect that despite the absence of any formal approval, the contents of the Report has been the object of consultations and even submitted informally to Beijing's clearance.

Another interesting innovation came later during the discussion of the Report in November 1999. Although the delegation was chaired by the PRC's Permanent Representative in Geneva, Zonghuai Qiao, he has only formally presented the HK delegates and left the room leaving to the HK officials, led by the Secretary of Home Affairs, David Lam, the responsibility to discuss directly the Report and answer questions<sup>307</sup>. The discussion took place without the presence of the sovereign power

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<sup>303</sup> China as a successor state to the UK and considering the existence of the previous UK and China communications to the UNHCR. In the introduction to the Report, the UN states that "although China is not a state party to the ICCPR, the Government notified the Secretary-General of the UN of the continuing application of the covenant to the HKSAR by a letter dated 4.12.97".

<sup>304</sup> Interview with Markus Schmidt, Secretary of the Human Rights Committee on 21.11.2002.

<sup>305</sup> Human Rights Committee, Report on HK, China, CCPR/HKSAR/99/1 of 16.6.1999. The previous Report on HK had been submitted by Britain in July 1995.

<sup>306</sup> See US State Department, Hong Kong Policy Act Report, 1.4.1999 which states that the Report was transmitted to the UN through Beijing but "unedited by the Central Government" p.25, internet version at [www.state.gov/www/regions/eap/990401\\_us\\_hk\\_pol\\_act\\_rpt.html](http://www.state.gov/www/regions/eap/990401_us_hk_pol_act_rpt.html).

<sup>307</sup> UN, Minutes of the Meetings, Press releases Doc. HR/CT/99/47 of 1.11.1999, HR/CT/99/48, HR/CT/99/4.

representative, responsible for submitting the Report and the final receiver of recommendations, which constitutes another unprecedented practice, used by Beijing to show that HK was free to discuss openly the Report and express its views.

The Human Rights Committee chaired by Medina Qiroga, expressed some concerns on the human rights situation in HK and put forward recommendations<sup>308</sup>. The main concerns were related to the failure to implement previous recommendations, in particular the creation of an independent body to investigate and monitor human rights violations in HK as well as the problems of independence of the judiciary related to the reinterpretation of art.24(2) BL, rules of deportation, limits to the freedom of association. One of the key recommendations was the creation of a Human Rights Commission in HK, an independent body to monitor human rights status, promote and protect human rights<sup>309</sup>, a proposal taken up again by Mary Robinson in her 2000 visit to the HKSAR which encountered resistance from the SARG<sup>310</sup>, and still has not been implemented to date.

The Report on the ICESCR under arts.16 and 17 of the Covenant, was also presented by China in 1999 and discussed in April 2001 in the Committee on Economic, Social and Cultural Rights<sup>311</sup>. The PRC Ambassador followed the same procedure as in the ICCPR case.

There is an interesting aspect related to the uncertainty on whether these procedures will continue in the future not only because of some curious statements made during the discussion of the ICCPR that “China might not be under the obligation to continue the reporting procedure”<sup>312</sup>, but above all because China became a party to the two Covenants and will start reporting on its own. The practice of an autonomous Report and

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<sup>308</sup> UN, doc. CCPR/C/79/Add. 117 of 12.11.1999.

<sup>309</sup> This idea was initially put forward by Brian Burdekin, Special Adviser on National Institutions to the High Commissioner for Human Rights, and later included in the Committee recommendations. What was envisaged was a model based in the Paris Principles defined by the Commission on Human Rights, resolution 1992/54 of 3.3.92, the UNGA Resolution 48/134 of 20.12.1993.

<sup>310</sup> Interview with Stephanie Kleine-Ahlbrandt, China Desk Officer, Office of the HCHR, 21.11.2002.

<sup>311</sup> Report, UN doc E/1990/5/Add.43 of 20.9.1999 and Summary Press release documents of the CESCR 25<sup>th</sup> session 27-30 April 2001 (conclusions).

separated presentation and discussion of the HK Report might change and HK might become a mere section in the PRC's national report. If HK becomes absorbed in the national Report, this will significantly reduce the visibility of the discussion on HK's human rights as well as HK's limited autonomy in this field.

### **HK Non-Governmental Organisations**

Another important dimension of HK's international participation is external relations at the non-governmental level, developed by HK NGOs. This is a more informal channel, which is particularly useful for a non-sovereign entity like HK. The HK situation in this area is characterised by a paradox.

HK has a large and very active NGO sector and is the regional headquarters for many International NGOs. Yet, the level of international action and links of many HK NGOs is still modest, as they tend to concentrate their activities more in the domestic arena. Being a very heterogeneous sector, there are certainly exceptions, NGOs that adopt a mixed orientation, both internal and external, although their main concern is concentrated in international issues that have a direct domestic relevance for HK, namely human rights issues<sup>313</sup>. The explanation seems to lie more in the attitude and deficit of co-ordination among NGOs, as there is no NGO platform in HK, a crucial condition for an effective international action. The *ad hoc* and uncoordinated initiatives of HK Human Rights NGOs in the Committee on Human Rights in Geneva regarding the debate on the HK Reports under ICCPR and ICESCR, provides a good example of the limitations affecting their international action<sup>314</sup>.

In HK there is not a single example of an NGO that concentrates its attention and activities on international affairs. In fact, there is not a private "think-tank" that reflects

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<sup>312</sup> UN doc HR/CT/99/49 of 2.11.1999, pp.2.

<sup>313</sup> A good example of a NGO with a mixed orientation is Civic Exchange, headed by Christine Loh, a former LegCo Member and vocal supporter of democratic reforms, which is active in international projects, mainly with US NGOs. Interview with Christine Loh, 10.4.2002.

<sup>314</sup> In 1999 several HK NGOs submitted reports on HK's human rights situation criticising the SARG Report. The problem was that these parallel reports contained conflicting information and positions between them, undermining their credibility and the effectiveness and impact of their initiatives - interview with Markus Schmidt, 21.11.2001.

strategically on HK's external affairs policy, how should HK respond to the challenges arising from the evolution and changes of the international system and what might be the SAR's long term position in it. For an entity that is an important international city and an active player in the international system, this is a striking paradox with two main implications.

First, the absence of long term strategic thinking which, in turn, reduces the capacity of HK to act proactively. The Chief Executive tried to overcome the problem through the creation of the Council of International Advisers<sup>315</sup> but so far this has failed to have a major impact.

Second, the governmentalisation of the SAR's external affairs, dominated by the Government's action and perspective with little space for NGOs' participation in decision-making and external activities, as civil society lacks a credible interlocutor to the SAR Government. As a consequence the HKSAR lacks an alternative perspective to the governmental one and a meaningful debate on external affairs options. In addition, it is more dependent on formal channels and can not explore "track two" channels.

A certain awareness of this problem is gradually emerging in the NGO sector. An interesting example is the innovative project set up by Civic Exchange in 2001 to run an "International Affairs Salon"<sup>316</sup>. The project is aimed primarily at promoting a public debate on international affairs in HK and to facilitate interaction between government officials and NGOs on these matters. To some extent this can become the seed of the creation of a real "think-tank", a credible civil society interlocutor on international affairs, which is still lacking.

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<sup>315</sup> This advisory body includes mainly corporate leaders of major international TNCs and has a dominant business approach – HK Government, Press releases, "CECIA provides advice on global economy", 8.12.2001 ([www.info.gov.hk/gia/general/htm](http://www.info.gov.hk/gia/general/htm))

<sup>316</sup> Interviews with Yan Yan, Project Coordinator of Civic Exchange, 19.11.2001 and Christine Loh, 10.4.2002. For Christine Loh one of the objectives of the project is to create the conditions for the Salon to evolve into a "think-tank".

## **Impact on the international system**

Besides the specific impact of the HKSAR international action in specific *fora*, there has been a more general and structural impact of the HKSAR on the international system with very interesting long-term effects, particularly for NCGs and other non-sovereign players. This impact has manifested itself at two different levels. The first is an innovation introduced by the HKSAR model in international treaties. It has a legal nature and is related to the insertion in several international treaties of the so called “HK Clause”. The second has a more political nature and is related with the “demonstration effect” exerted by the HKSAR and its considerable external autonomy on sovereign states and other NCGs in the international system.

### **The “HK Clause”**

The “HK Clause” is a completely new clause without precedent in the international system that provides for the possibility of differentiated application of an international treaty to different parts of the same state. It has an interesting title “States with more than one system of law” and the following contents

“If a state has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more and may modify this declaration by submitting another declaration at any time.”<sup>317</sup>

The application of this clause is based on a fundamental condition, i.e. the existence within a state of two or more legal systems. In the international system this is an exceptional situation since the unity of the legal system, even allowing for legislative autonomy, is the rule in sovereign states. China is today an unprecedented case because it has three different legal systems coexisting within its territory, the Mainland, HK and Macao systems. In the case of the HKSAR and the PRC, the legal systems are not only

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<sup>317</sup> Article 56 of the Convention for the Unification of certain rules for International Carriage by Air, Montreal, May 1999 in the context of ICAO. The clause has a similar contents in other international treaties, for example article 13 of the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage in the context of IMO.

separated but they belong to completely different families, HK possessing a common law system and Mainland China a Continental system.

This clause confers China a high degree of flexibility in the sense that it can choose between three options: apply the treaty to the entire territory, both to the Mainland and the HKSAR (and MSAR); apply the treaty to Mainland China but not to the HKSAR; apply only to the HKSAR and not to the rest of China's territory. This is a powerful instrument to preserve HK's autonomy and safeguard its interests in the sense that it allows to break a potential deadlock in areas where, because of international rules, HK is not able to conclude agreements on its own and has therefore to rely on China's intermediation. Because the traditional rule is a uniform application of a treaty to the entire territory of a state, China would be unwilling to play the intermediation role if the price to pay for applying it to HK would be the automatic application of a treaty to the Mainland when Beijing did not want the application of that specific treaty. This would block the whole process and damage HK interests.

By the same token, the clause allows HK to reject the application of a treaty in which it is not interested but China is. It is interesting to note that this clause can also protect HK from an invisible effect that other NCGs, namely Quebec, have protested against which can indirectly restrict *de facto* domestic autonomy. The argument was that the interference in areas of domestic autonomy protected by the Constitution which could not be done directly by the Central Government was finally achieved through the back door when Central Governments sign international agreements in areas belonging to the NCGs' sphere of autonomy, generating obligations mandatory for NCGs which they have to implement even against their will. This restricts NCGs' own autonomous policies in those fields, thus restricting domestic autonomy through an international process<sup>318</sup>.

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<sup>318</sup> Institut de Sociologie Belgique, Les Etats Federaux dans les relations internationales, Actes d'colloque de Bruxelles, Editions Bruylant, Université de Bruxelles, 1982, pp. 505-510.

The “HK clause” represents a clear repercussion of the “one country, two systems” model in the international system, demonstrating that the model means more and more “one country, two legal systems” than anything else and that this dimension is the key one for the international system. Moreover, the clause demonstrates unequivocally not only the international recognition for the specificity of the “one country, two systems” model, but also the capacity of the international community to deal with and adapt flexibly to a new situation.

It should be stressed that the clause has a general nature and therefore is potentially applicable to other states, namely the UK and Canada. The HKSAR and China created an innovation that can have a wider application with potential impact in the future relationship between Central Governments and NCGs in other states. Although before 1997 there were states possessing more than one legal system, they never pressed for a similar solution because they were not really interested in it, as there was resistance to allow greater external autonomy for NCGs. The HK specific situation created the conditions for the innovation to be accepted.

It is particularly important to stress that the introduction of the clause was a consequence of HK’s action and represents a concrete contribution of the SAR to the international system through an innovation that introduces flexibility and potentially strengthens the interests and positions of NCGs. Although the proposal was formally presented at the negotiation table by the PRC, in fact the clause was conceived by the HKSAR, which took the initiative and persuaded the CPG<sup>319</sup>.

The “HK clause” was introduced in an international treaty for the first time in 1999, with the International Convention on Arrest of Ships in the context of IMO/UNCTAD but expanded rapidly to other treaties, namely to ICAO Conventions, IMO Conventions and all the Hague Conventions in the context of the Hague Conference on Private

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<sup>319</sup> Interview with HK Government officials on 3.11.1999 and 17.12.2001.

International Law<sup>320</sup>. In the future it is likely that this clause will further expand to other areas of the international system.

### **Demonstration effect**

The second major impact of the HKSAR at the international level is the “demonstration effect” it exerts over other NCGs and the relationship between Central Governments and autonomous entities in third states.

Third countries tend to fear that the HK example might contaminate their own NCGs and stimulate them to demand more autonomy in external affairs and similar powers to those enjoyed by the SAR. This concern is greater in the post-handover context than before 1997 because under British sovereignty rules were informal and implicit, there were no legal guarantees of HK’s autonomy. After 1997 the new system became permanent, more formal and with explicit rules. In addition, its international visibility increased significantly as the HKSAR experience has so far proved that a system where a NCG enjoys a considerable level of external autonomy has worked smoothly, did not generate many conflicts between the autonomous entity and the Central Government and, more importantly, did not undermine or weaken the sovereign power’s foreign policy, on the contrary had a positive impact on it. The HKSAR experience seems to support Soldatos’ argument mentioned in chapter one that paradiplomacy strengthens, not weakens, national foreign policy, thus questioning the validity of the traditional argument that NCGs’ external autonomy jeopardises the unity and coherence of national foreign policy, widely used by states to resist granting more space for NCGs.

As a consequence third countries face a dilemma in relation to HK. On the one hand they see it as a special case and have a clear advantage in dealing autonomously with HK. In this context they are prepared to accept to create conditions for HK to participate

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<sup>320</sup> In the context of ICAO the examples are the 1999 International Convention for the Unification of certain rules for International Carriage (ICAO) and the 2001 Convention on International Interests in Mobile Equipment. In the context of IMO the 2000 Protocol on Preparedness, Response and Cooperation to Pollution Incidents, the 2001 International Convention on Civil Liability for Bunker Oil Pollution damage and the 2001 International Convention on the Control of Harmful anti-fouling Systems on Ships - International Law Division, Department of Justice of the HKSAR Government, interview on 17.12.2001.

on its own in organisations until now restricted to states. On the other, some states resist this because they fear it could set a precedent for their own NCGs to seek greater autonomy in those organisations. There have been already some practical examples of reactions of third states in the context of international negotiations which demonstrate their recognition of the powerful “demonstration effect” exerted by HK<sup>321</sup>.

The first example in the multilateral context was provided by the 1999-2001 negotiations of the Draft Hague Convention on Jurisdiction and effects of Foreign Judgements where the US manifested concern about the HK Clause and tried to restrict the possibility of application of the clause to a certain group of countries – China, Canada and the UK – in order to avoid its application to the US itself. This position was explained by the fact one of the US Federated States, Louisiana, was interested in pressing for the use of the clause in order to be able not to apply the Convention in its territory, an outcome the Federal State wanted to prevent.

A second example relates to the Convention on Children Adoption, also in the context of the Conventions on Private International Law, where the UK demonstrated interest in using the clause in order to apply the Convention first to Scotland but not to the rest of the UK territory. This suggests Scotland might be using the HK autonomy model to press London for greater autonomy in specific areas of external affairs.

The third example is particularly powerful to illustrate the impact of HK's demonstration effect. It involves the relations between Spain and the HKSAR regarding the possibility of signing an Air Services Agreement. HK was interested in signing such an agreement with Spain because Cathay Pacific wanted to establish some presence in the Spanish market. It was also known that Catalonia was also interested in developing the airline business with HK.

The Madrid Government had a negative reaction and refused to negotiate and conclude the Agreement directly with HK on its own, in spite of the fact HK has signed more than

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<sup>321</sup> Interviews with HKSAR officials, 17.12.2001 and 18.12.2001.

50 of such agreements with various sovereign states. The arguments invoked by the Spanish Ministry of Foreign Affairs were constitutional constraints arising from chapter III of the 1978 Constitution which foresees that only the Central Government, but not any of the Spanish Autonomous Regions, can conclude binding international agreements, and from art.2 (1) of Decree 801/72 which defines the meaning of international agreements under Spanish Law, according to which they can only be concluded with states or international organisations. In other words, Madrid did not recognise the legitimacy and powers of HK to negotiate on its own and conclude binding international agreements.

As an alternative Spain proposed two ways of dealing with the question: the first option was for the PRC, on behalf of HK, to negotiate directly with Spain; the second was for the agreement to be negotiated by the HKSAR but representing the PRC. Both these alternatives are in contradiction with the BL, violate HK's sphere of autonomy and seem therefore unacceptable to HK.

This is an extremely relevant case insofar as more than constitutional rules, what seems really to worry Madrid is the potential demonstration effect on Catalonia, the most powerful NCG in Spain which has been increasingly active externally. If Madrid would conclude an air services agreement directly with the HKSAR, recognising the legitimacy of a foreign NCG to exercise treaty making powers, in clear contradiction with its policy in relation to Catalonia, it would be extremely difficult to resist Barcelona's pressure to be given the right to conclude international agreements on its own.

This is a vivid example of the concerns the HKSAR participation in the international system raises for states eager to protect their monopoly in external relations which leads an active and well known member of the international community to go as far as to ignore and negate HK's well established international autonomy. Objectively, Madrid contributed to strengthen the Central Government's position and to weaken HK's autonomy, paradoxically in contradiction with the EU policy.

If Spain's position would be adopted by other states, this would severely undermine HK's autonomy. This reminds us that HK's effective level of autonomy does not depend only on written rules, HK-Beijing relations or the CPG's behaviour, but also upon a critical external factor, i.e. the recognition by other members of the international community, their policies towards, and interaction with HK.

#### **4.4. EXTERNAL ACTORS PERCEPTIONS AND POLICIES TOWARDS THE HKSAR**

The actual level of autonomy in external affairs enjoyed in practice by the HSAR does not depend exclusively on the SAR's own dynamism and activity or on the evolution of HK-Beijing relationship and intensity of the sovereign power control. The behaviour and attitude of external actors in relation to HK is a third key factor that conditions external autonomy in two different ways. First, the recognition by foreign states and International Organisations of HK's capacity to act internationally constitutes one of the pillars of the external legitimacy basis of HK's autonomy that complements the domestic sources of legitimacy i.e. the Basic Law. Second, the willingness of external actors to interact with HK not only provide the opportunity for the formal autonomy powers to be exercised and materialised but also the intensity of that interaction determines the direction in which external autonomy will evolve, whether it will decline, expand or stabilise.

One of the first signs of foreign states' recognition of HK's international status is the fact that a very large number of countries, over 90, have an official or semi-official presence in HK either a diplomatic representation, consulates, or honorary consuls. Actually, the number of foreign consulates has increased after the handover with the creation of 7 new consulates<sup>322</sup>.

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<sup>322</sup> The new consulates created in the HKSAR after 1.7.1997 are North Korea, Hungary, Kuwait (Consul-General) Tanzania, Guinea, Estonia, Niger (Honorary Consul).

The recognition is not only from states but as well from international organisations. This phenomenon has been translated for many years in HK's participation in International Organisations but after the handover a new manifestation has emerged: a significant increase in the number of international organisations that opened representation offices in the HKSAR, chosen as the regional headquarters for their operations. One relevant example was the Bank of International Settlements which opened in HK the representative office for Asia and the Pacific, the first office ever to be opened outside Europe, due to HK's status as one of the leading international centres for banking<sup>323</sup>. There are another 4 major international organisations that have set up offices in HK after the handover: the IMF represented by a resident representative; the International Finance Corporation and the World Bank Private Sector Development Office set up a joint regional office for East Asia and the Pacific; the UN High Commissioner for Refugees established a sub-office.

The HKSAR has remained an important centre for international conferences becoming one of the top international meeting cities ahead of cities like Madrid, Lisbon, Tokyo or S. Francisco<sup>324</sup>. Since the handover the HKSAR has hosted various large scale international Conferences, including intergovernmental ones such as the 1997 IMF/World Bank Annual Meeting, the 2001 World Fortune Forum and the 2001 PECC meeting.

These are certainly visible signs of the recognition of HK's international status by the international community but tell us little about external actors' perception of the scope and degree of HK's external autonomy and their willingness and motivations to interact with, and engage the HKSAR, essential to assess the sustainability of the SAR's role as an international player. For that it is necessary to go more in depth in the analysis of perceptions and motivations of the three major external players, the US, Japan and the EU and its Member States.

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<sup>323</sup> At the end of 2000 there were 138 foreign owned banks in the HKSAR, including 79 of the world top 100 banks – HK Report 2000, HKSAR Government.

## Japan

As far as Japan is concerned HK is perceived as an important regional economic centre for Japanese interests in terms of trade but mainly as a destiny of foreign investment. There are a total of 18.000 Japanese citizens living in HK and over 2000 companies, which manage more than 3000 factories in the Pearl River Delta Region<sup>325</sup>. Although HK share in total Japanese FDI has declined since 1997 from an average of 3% of total outflows to 1,9%, the Japanese FDI in HK is still relevant being concentrated in three main sectors: retail trade, finance and real estate<sup>326</sup>. However, although economics has been traditionally the dominant dimension of HK-Japan bilateral relations, political issues became increasingly visible since the mid-1990s with the proximity of the handover<sup>327</sup>, involving the territorial disputes between Japan and China on the Diaoyutai/Senkaku islands in late 1996, when protest against Japan in HK gained momentum<sup>328</sup>.

This new tension scenario continued and was even reinforced after the handover though with a different format. It ceased to manifest itself through street demonstrations and became more institutionalised through the Legislative Council resolutions. In an unprecedented move LegCo approved a motion in January 2000 demanding a written apology from Japan, compensation for wartime atrocities and recognition of China's sovereignty over Diaoyutai/Senkaku islands<sup>329</sup>. In December 2000 a second motion demanding compensation for the Nanjing massacre was also endorsed by LegCo<sup>330</sup>.

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<sup>324</sup> In 2001 HK occupied the 16<sup>th</sup> position with more than 80 meetings organised in a list headed by Paris, London and Brussels, and close to the position of Rome, Washington and Barcelona - Statistics of the Union of International Associations 2002 ([www.statistics@uia.be](mailto:www.statistics@uia.be)).

<sup>325</sup> Umezawa Itaru, Consul-General "Japan and Hong Kong: a dynamic partnership for the future" speech to the Japan Society, HK on 27.9.2000 and Ministry of Foreign Affairs of Japan "The visit to Japan of Chief Executive of the HKSAR, 27.3.2001 ([www.mofa.go.jp/region/asia-paci/china/sary.html](http://www.mofa.go.jp/region/asia-paci/china/sary.html)).

<sup>326</sup> Brian Bridges "Japan and Hong Kong: commerce, culture and conflict" 2003, in The China Quarterly (forthcoming)

<sup>327</sup> Bridges, op.cit.p.1

<sup>328</sup> South China Morning Post, 27.9 and 8.10.1996

<sup>329</sup> LegCo Proceedings, 12 January 2000

<sup>330</sup> South China Morning Post, 14.12. 2000

To some observers this reflects a new role HK started to play in Sino-Japanese relations as a “safety valve allowing some of the political tensions between Tokyo and Beijing to be expressed through HK people and institutions”<sup>331</sup>, thus sparing China-Japan direct relations from suffering further damage.

Partly as a result of this tension, Japan has adopted a low-key approach in assessing and monitoring the SAR’s evolution. Tokyo adopted a very careful approach due to its concern to prevent HK becoming another source of tension. In official statements Japan has expressed a positive assessment through the mantra that “one country, two systems principle can in general be said to be functioning smoothly”, repeated in every edition of Japan’s Diplomatic Bluebook, and went as far as to consider that, given the positive experience, the HK model was appropriate to Taiwan<sup>332</sup>. Besides this general and vague assessment, there were no specific comments made on the HKSAR’s international status or external autonomy.

The main interest of Japan in the SAR’s external affairs is HK’s participation and policy in WTO. This is explained by the fact Japan has a strong convergence of interests with HK as a strong supporter of the primacy of WTO and multilateral rules in the world trading system and a critic of the proliferation of regional agreements. During the Chief Executive’s visit to Japan in March 2001 the only international issue discussed with the Foreign Minister Yohei Kono was WTO and the exchange of information about the exploratory negotiations for the possible creation of FTAs in which both Japan (with Singapore) and HK (with New Zealand) are engaged<sup>333</sup>.

Japan’s main concern is that HK can operate as an “international economic centre”, as expressed by Foreign Minister Ikeda to his Chinese counterpart Qian Qichen during the

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<sup>331</sup> Brian Bridges, *op.cit.p.12.*

<sup>332</sup> MFA of Japan, Diplomatic Bluebook 1998-2002 editions

([www.mofa.go.jp/policy/other/bluebook/1999/III-a.html](http://www.mofa.go.jp/policy/other/bluebook/1999/III-a.html).) There was an interesting statement made by Foreign Minister Makiko Tanaka in December 2001, so far the most positive assessment made by a Japanese official who commended the HK model to Taiwan as a future blueprint for reunification with Mainland China – Agence France Press, 25.12 2001, cited in Bridges, *op.cit.*

<sup>333</sup> Japanese MFA document, “ The visit of Chief Executive of the HKSAR”, 27.3.2001 ([www.mofa.go.jp/region/asia-paci/china/sarv\\_0103.html](http://www.mofa.go.jp/region/asia-paci/china/sarv_0103.html)).

handover ceremony<sup>334</sup>. Paradoxically, although the Japanese approach to HK is strongly determined by economic interests, Tokyo has been increasingly dragged into political rows, related to hot issues in Sino-Japanese relations and nationalist manifestations. This has two main implications as far as HK's autonomy is concerned. Firstly, it contributed to neutralise Japan and weaken its potential role as an active supporter of HK's external autonomy leading to a decline in Japan's interaction with the SAR at the international level, translated, for instance, in the reduced number of bilateral agreements Japan has with HK<sup>335</sup> and the fact there was not one single agreement signed with the HKSAR.

Secondly, it indirectly reveals a *de facto* limitation to the SAR's autonomy. The SAR institutions (LegCo) have clearly interfered with matters pertaining to the realm of China's foreign policy and its bilateral relations with Japan. Under normal circumstances this would have induced a strong reaction from Beijing and an accusation that the SAR was trespassing its competencies. Surprisingly, because this was an expression of nationalism that served the interests of the sovereign power, there was no reaction. Beijing has implicitly given its approval to acts that are seen as useful to national interests. The LegCo 2000 motions are not a manifestation of HK's autonomy and ability to influence China's foreign policy but, on the contrary, a sign of limitation of its autonomy.

### **European Union's perception and attitude**

Besides the human links associated with the fact over 41.400 EU citizens are currently living in HK, the European Union (EU) has relevant economic interests in HK both in terms of trade and investment flows. Total EU trade with the SAR amounted to Euro 31.3 billion in 2001 making the EU the third trading partner of HK accounting for 12% of its total trade, after China (42%) and the US (14%).

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<sup>334</sup> South China Morning Post, 7.7.1997.

<sup>335</sup> Japan has only two bilateral agreements with HK in economic matters (air services agreement and IPPA), both signed before the handover – HK Information Note, Information Services Department, HKSAR Government “The HKSAR and external affairs” April 2001.

Although for the EU the importance of HK as a trade partner is much more limited (15<sup>th</sup> largest partner), the SAR is still the third most important market for the EU in Asia absorbing 2.2% of total EU exports after Japan (4.8%) and China (2.7%)<sup>336</sup>. EU exports to HK are highly concentrated in 3 countries, Germany, UK and France.

As far as FDI is concerned, HK is an important destination for EU investment in Asia, although the region as a whole is a low priority in EU global investment. During the second half of the 1990s HK absorbed on average 1.3% of the EU total FDI outflows, ranking second in Asia after Japan and well ahead of Mainland China (0.8%). In 2000 the EU was the third largest source of investment, accounting for 9% of total external investment in HK. The number of EU firms in HK has increased sharply and in 2001 a record level of 299 EU companies used HK as their regional headquarters and another 598 had regional offices in the SAR<sup>337</sup>.

Just before the handover the EU has explicitly defined its main interests in HK in the 1997 Commission paper<sup>338</sup>: economic interests, human links, common values, political interests. As far as political interests are concerned, HK was regarded as possessing a strategic position in the region due to its “democracy and freedom of expression” implicitly assuming it could have an important demonstration effect not only on China but also on the region. Although the document highlighted a diversified and apparently balanced set of interests, the analysis of subsequent documents and practice reveals that in reality economic interests are by far dominant and the EU engagement in other areas has declined overtime.

With respect to the SAR’s external relations, the EU adopted in the 1997 document two significant decisions. Firstly, to carry out a monitoring process of the SAR evolution and respect for the “one country, two systems” through the publication of an annual report.

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<sup>336</sup> European Commission, Communication on “Europe and Asia : a strategic framework for enhanced partnership” 4.9.2001 COM (2001) 469 final (annexes) and EU Commission, External Relations Directorate, “The EU’s relations with HKSAR” internet version at [http://europa.eu.int/comun/external\\_relations/hong\\_kong/intro/index.htm](http://europa.eu.int/comun/external_relations/hong_kong/intro/index.htm) 7.2.2002.

<sup>337</sup> European Commission, Fourth Annual Report on Hong Kong, COM (2002) 450 final, 5.8.2002, pp.9.

Secondly, to adopt proactive consistent actions in order to uphold HK's external autonomy and contribute to maintain the SAR's international status through dealing directly with the SAR in autonomy areas, maintaining the intensity of high level visits to HK and concluding bilateral agreements.

This strategy was strongly supported by other EU institutions, namely by the European Parliament Committee on Foreign Affairs, Security and Defence Policy<sup>339</sup>.

The EU has exercised a regular international monitoring role. Unlike the US, the EU has performed this not through one but two different Reports: the EU Commission Annual Reports, started in 1998<sup>340</sup>; the UK Six-monthly Reports on Hong Kong prepared by the Foreign Office and submitted to the British Parliament<sup>341</sup>. Although the Reports have different timings and contents they have also some common ground. Over the years there has been a certain convergence between them. By and large both the EU and the UK make a positive assessment of the implementation of the "one country, two systems" model stressing that the SAR's autonomy has been respected<sup>342</sup> even though there are clearly differences of tone between the two Reports<sup>343</sup>. On the external front there is also a positive assessment of HK's international participation and the recognition of its autonomy in external affairs<sup>344</sup>.

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<sup>338</sup> European Commission Communication to the Council on "The European Union and HK: beyond 1997", COM (97) 171, 23.4.1997, endorsed by the EU Council conclusions of 3.6.1997.

<sup>339</sup> Report on the Communication from the Commission to the Council on "The European Union and HK : beyond 1997" Rapporteur John Cushnahan PE 226.790/fin, 7.9.1998, p. 15.

<sup>340</sup> Up to now 4 Reports have been published the First Annual Report on the SAR of Hong Kong COM (98) 796 final, 1998 ; Second Annual Report COM (2000) 294 final on 18.5.2000; Third Annual report COM (2001) 431 final of 25.7.2001; Fourth Annual Report COM (2002) 450 final of 5.8.2002.

<sup>341</sup> Since the handover the Foreign Office has published 11 Reports presented to the Parliament by the Secretary of State for Foreign and Commonwealth Affairs, from July-December 1997 to July-December 2002.

<sup>342</sup> In the Six-monthly Report of July-December 2001, the UK states that "... our overall assessment remains that the "one country, two systems" is working well in practice... the SAR Government has by and large exercised the high degree of autonomy promised under the JD and the BL..." pp. 11. The EU Commission, in the 2000 Report considers that the "one country, two systems" principle remains intact and is generally working well.".

<sup>343</sup> The UK Reports have a more critical tone and are more assertive, making clear what the British position is on a specific question and in which direction Britain would like to see things evolve, while the Commission's reports tend to be more descriptive.

<sup>344</sup> For example in the July-December 2001 Report, the UK recognises that " HK continues to play an active role in the international stage" pp. 8.

The EU perspective on HK as an international player is very much dominated by trade. HK's independent participation and active role in WTO is strongly underlined in the EU Reports, while other dimensions of HK's international status deserve less attention. To some extent this is explained not only by the fact EU-HK relations are driven by economics, but also because of the projection of the EU's own international identity. Like the HKSAR, the EU identity is closely associated with trade, where traditionally it speaks with a single voice.

The UK perspective is somehow different and more complex as the perception of HK as an international player also includes political and strategic aspects, emphasising for instance the role of HK in the control of trade of strategic goods and proliferation of sensitive technology, in the fight against terrorism, namely through its involvement in the FATF, and its model role in terms of human rights standards and practice in Asia.

Beyond the overall positive assessment, both the EU and the UK expressed concerns regarding the SAR evolution in two main areas: (i) legal questions and potential restrictions to HK's legal autonomy raised above all by the Right of Abode issue initiated in January 1999 with the two judgements by the Court of Final Appeal against HK Immigration Ordinances 2 and 3<sup>345</sup>, but also by the 1999 "Desecration of Flags" case<sup>346</sup> and the Rendition of Offenders issue<sup>347</sup>; (ii) limitations to the freedom of expression, press freedom and freedom of religion, raised by events like the statements

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<sup>345</sup> The 29.1.1999 Court of Final Appeal judgements initiated the case which granted the right of abode to all children born in Mainland China to at least one parent with the right of abode in HK even if the parent had become a HK permanent resident after the children was born. Concerned with the risks of massive immigration, the SAR Government requested the Standing Committee of the National People's Congress to interpret articles 23 and 24 of the BL. In June the Standing Committee endorsed the interpretation sought by the SARG making more restrictive the right of abode that one of the parents had to be already a permanent resident at the time of birth. This undermined the authority of HK's judiciary and confidence in the rule of law, since the SARG could seek to overcome judicial decisions it considered unfavourable by asking interpretations of the sovereign power, thus weakening autonomy.

<sup>346</sup> The Court of Appeal considered in March 1999 that parts of the National and Regional Flags Ordinance that created the offence of desecration of flags were unconstitutional because they violated the ICCPR, namely the right of freedom of expression. The CFA has overturned this ruling following the SARG appeal.

of the PRC Liaison Office officials regarding Taiwan-HK relations<sup>348</sup> , the Robert Chung case<sup>349</sup>, the Catholic Church case<sup>350</sup> and Falun Gong<sup>351</sup>. In this there has been a coincidence of views with the US, which has expressed similar concerns.

The UK has even established an important link between the domestic autonomy and the external autonomy of the SAR, noting that “ HK’s success as a city with an international status and personality depends directly on the SAR’s continued autonomy and on preservation of HK’s freedoms”<sup>352</sup>. This idea, also expressed by the US, constitutes a key component of external actors’ perception of HK’s status. It means that for external actors the domestic and external spheres are closely interlinked. Their willingness and interest in interacting with HK does not depend exclusively on HK’s formal autonomy and capacity to act externally but also on the existence of a real domestic autonomy. The autonomy of the legal system, the maintenance of the rule of law and respect for fundamental rights and freedoms are not only elements of HK’s international image but condition directly HK’s credibility as an international actor, insofar as they are crucial for HK to comply with its international obligations (turning these into domestic legislation for example), and to protect external actors’ interests and foreign property in the SAR.

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<sup>347</sup> This was raised by two main cases in 2000 when people, including HK residents, were tried and executed in China for crimes committed in HK. What concerned some observers was that the HKSAR did not call for jurisdiction when it had a clear competence to judge these cases.

<sup>348</sup> In April 2000 Wang Fengchao, Deputy Director of the PRC Liaison Office, said publicly that the HK media should not disseminate views advocating the independence of Taiwan. In May 2000, He Zhiming, another official of the Liaison Office, said HK businessmen trading with Taiwan firms that supported Taiwan’s independence, should observe the PRC policy of absolute prohibition of trade with such firms and not take a risk - EU Third Annual Report, *op. cit.*, p.3.

<sup>349</sup> This occurred in July 2000 and involved a HK University academic Prof. Robert Chung who received a message, through the Vice-Chancellor, from the Chief Executive to stop carrying out opinion polls on his popularity. This case raised concerns about academic freedom in HK.

<sup>350</sup> This case occurred in September 2000, involved the pressure exerted by PRC officials in HK on the Catholic Church Head, Bishop Joseph Zen to keep low key the celebrations of the October 1 Vatican canonisation of 120 foreign missionaries and chinese catholics martyred in China.

<sup>351</sup> Since 1999 the Falun Gong organisation was banned and prosecuted in the Mainland but authorised to continue to operate in HK as long as they do not break local laws, on the basis of freedom of religion. This is seen as a manifestation of HK’s autonomy and difference as well as the existence of a rule of law system. However, the CPG has strongly pressed the SARG to restrict and control Falun Gong activities but pressure was resisted.

<sup>352</sup> UK. FCO. Six-monthly Report, July-December 1999, p.7.

In the efforts to fulfil the initial objective to uphold HK's external autonomy, the EU and its Member States have used two other mechanisms besides the monitoring one. Firstly, the mechanism of high level visits to HK by European leaders. Since the handover there has been a reasonable flow of European visitors to HK, including UK Government Ministers and the delegations of the British Parliament on a regular basis<sup>353</sup>, the EU Commissioners for External Relations, Leon Brittan (1998) and Chris Patten (2000), delegations of the EU Parliament in 1998 and 2000, and Government members of other EU states, namely the Prime Ministers of Spain and Denmark in 2000, the German Interior Minister and the Portuguese Foreign Minister in 2001.

Secondly, the negotiation and signature of bilateral agreements, by far the most important mechanism used by the EU. In fact, the EU, partly as a consequence of its legalistic tradition, has been the most important external player having signed the largest number of new international agreements with the HKSAR, thus contributing to exercise and consolidate its treaty making powers. Overall the EU, and its Member States, is the most important HK partner in terms of bilateral agreements accounting for more than 36% of the total 126 agreements signed by HK before and after the handover<sup>354</sup>. If we consider only the bilateral agreements signed by the HKSAR since July 1997 until the end of 2002, the EU position is even stronger accounting for 41% of total agreements<sup>355</sup>.

However, not all the EU states are equally actively engaged with HK. There is a leading core group formed by 5 countries the UK, the Netherlands, Italy and surprisingly Portugal and Finland, which were responsible for nearly 2/3 of the new agreements signed by the EU Member States with the SAR. This clearly reflects the great diversity of positions and levels of engagement that exist inside the EU in relation to HK. The EU approach is therefore very heterogeneous and sometimes contradictory. It is possible to

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<sup>353</sup> The Deputy Prime Minister John Prescott, the Foreign Secretary and the Minister of Agriculture visited HK in 1998, FCO Ministers in 2000 and 2001. British Parliament delegations, namely the All Party China Group and the Foreign Affairs Committee visited HK several times in 1998, 2000 and the House of Commons Committees on Transport and on Trade and Industry in 2002.

<sup>354</sup> Hong Kong SAR Information Department, "The HKSAR and external affairs" October 2002, [www.info.gov.hk/info/exaffa.htm](http://www.info.gov.hk/info/exaffa.htm) 8.1.2003. With the exception of Air Services Agreements (12 out of 55), the EU states have a dominant position in all other areas.

distinguish between four different groups. The first group includes the most active players, clearly the EU Commission and the UK, which registered the highest level of interaction and engagement with HK at the international level.

The second group includes countries that have been moderately active namely in the sphere of the exercise of treaty making powers such as Italy, the Netherlands, Portugal and some Nordic countries. The third group, France and Germany, has strong economic interests in HK but has adopted so far a rather passive attitude which contrasts with the size of their interests and seems to show a deliberate decision to adopt a low key position justified by a risk-aversion strategy aimed at preventing any collateral damage to their central bilateral relations with China. It is particularly significant that Germany has not signed one single agreement with HK after the handover, and more than that has avoided any reference to the HKSAR in its policy documents. A good illustration of this benign neglect is the May 2002 German Strategy Paper on East Asia, where there is not a single reference to the HKSAR despite the fact that one of the key focal points of the strategy is democracy, the rule of law and human rights and there is abundant reference to the political dialogue with the PRC<sup>356</sup>.

The fourth group includes Spain which has adopted in practice a negative position in relation to the SAR's external autonomy when, as mentioned above, it refused to sign an Air Services Agreement with HK, proposing instead it should be signed with Beijing, a solution that not only would be inconsistent with the BL but would also weaken HK's external autonomy.

In sum, the dominant EU perception of HK as an international player, with the exception of the UK, is that of a separate customs territory possessing a separate trade policy and voice in WTO. This reflects not only the core of EU interests in relation to HK but also the new leadership role of the Commission assumed since 1997 inside the EU in terms

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<sup>355</sup> If we exclude Air Services Agreements, the EU states were responsible for 20 out of 37 agreements, i.e. 54% of the total, signed by the SAR since 1997.

of bilateral relations with HK. The European perception and attitude, despite its heterogeneity, made a positive contribution to uphold HK's international status and external autonomy, although below the expectations created by the 1997 statements, particularly by stimulating the exercise of treaty making powers.

### **The US approach**

The US is clearly the external actor that has the more complex, dense and multidimensional relationship with HK. Unlike other players, American interests are not restricted to the economic and commercial areas. Economic interests are obviously of great significance for the US. In 2001 the SAR was the US thirteenth export market absorbing US\$1 billion of American exports and over 1,100 resident US firms operate in the SAR where American FDI through 2000 amounted to over US\$ 23 billion<sup>357</sup>. However, the US combines economic dimensions with political and even security interests in its approach to the SAR.

A crucial area in the US-HK bilateral relation touching soft security issues is law enforcement co-operation and the fight against organised crime. HK's role is so relevant for the US that HK has been explicitly recognised as the US leading law enforcement partner in the Asia-Pacific region<sup>358</sup>, namely in the international fight against drug trafficking through extradition of drug-trafficking fugitives and share of evidence, money laundering and income tax evasion and more recently on terrorism. The American interest is clearly illustrated by the presence of the seven major US law enforcement agencies in HK and their intense interaction with the HK police and security forces.

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<sup>356</sup> Strategy Paper "Tasks of German Foreign Policy East Asia – Japan, South and North Korea, Mongolia, China including Hong Kong, Macau and Taiwan – at the beginning of the 21<sup>st</sup> Century", Federal Foreign Office, Berlin, May 2002, pp. 6.

<sup>357</sup> US Hong Kong Policy Act Report 2002 of 31.3.2002, pp. 8, Department of State, ([www.state.gov/p/eap/rls/rpt/9319.htm](http://www.state.gov/p/eap/rls/rpt/9319.htm))

<sup>358</sup> US Consul General in HK, Speech "A tale of two cities: the image and reality of HK today" Asia Society, Houston, Texas, 15.2.2001, p. 6.

The US has supported and acknowledged HK's international role and participation in multilateral *fora* namely the active contribution to enlist the Financial Action Task Force on Money Laundering in the international anti-terrorism efforts, and to set good international examples of effective domestic mechanisms to control suspicious transactions, namely the underground "hawala" banks, widely used by terrorist networks, in relation to which HK was one of the first to regulate their activities.

A second area relates to defence and strategic affairs. Firstly, the US has an interest in maintaining routine port calls of US navy ships and aircraft in the HKSAR not only for re-supply but essentially to maintain a sign of continuity and affirmation of the US strategic dominance in Asia. Washington has been concerned that the reversion of HK to the military control of the PRC could disturb the overall balance of forces in East Asia considering that Chinese military forces gained unprecedented control over one of the major ports in the Pacific Rim<sup>359</sup>.

It is interesting to note that, although HK has ceased to be a relevant strategic and military centre in the late 1950s, 1997 was seen as having a potential strategic impact. Continuity of port visits was maintained but this question gained greater visibility after 1997 when the PRC, using authorisation of ship visits as an instrument to show its positive or negative assessment of the state of US-PRC relations, has suspended temporarily visits in 1999 and 2001 as mentioned above<sup>360</sup>. Another case of strategic concern for the US involving HK and the PRC was the control gained by the HK firm Hutchison Wampoa, through Panama Ports Company, over the navigation in the Canal of Panama, by controlling the Cristobal and Balboa ports in the two sides of the Canal,

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<sup>359</sup> This concern has not been expressed openly very often but there is a reference in some Congress documents namely in the Report prepared for the House of Representatives International Relations Committee, Asia Pacific SubCommittee, by Kerry Dumbaugh "Hong Kong's Reversion to China: problems and remedies for the United States", 3.3.1997, pp.19-20.

<sup>360</sup> US Congress, Speaker's task force on the HK Transition, 9<sup>th</sup> Report, 30.1.2001. The US considered that the denial of authorisation for visits of US navy ships and aircrafts to HK has "negatively affected HK's reputation as an open, cosmopolitan and internationally connected city" US HK Policy Act Report 2001, 31.7.2001, p.2 ([www.state.gov/p/eap/rls/rpt/4465.htm](http://www.state.gov/p/eap/rls/rpt/4465.htm)).

awarded by the Panama Government in 1999 on the basis of a 25 to 50-year lease contract. This implied the end of the US control<sup>361</sup>.

In this field the US attaches great relevance to HK as one of the largest ports in the world, in its role of export control of trade in strategic goods, namely exports to countries of special proliferation risk. Although HK is not a member of the various international control regimes, it has adopted the substantive rules of these regimes and is committed to maintain its standards, namely the Nuclear Non-Proliferation Treaty, the Missile Technology Control regime, the Nuclear Suppliers Group and the Wassenaar Arrangement<sup>362</sup>. The US Government and Congress have expressed concerns over the possibility of decline of the HK strong and credible export control system because of the PRC and the difficulty to control PLA vehicles, but so far consider that the HKSAR maintains a credible system<sup>363</sup>. This is an interesting case where a NCG although not being able to be a party to international control regimes reserved to sovereign states, can play a relevant international role in the control of arms proliferation by voluntarily adopting in practice international rules, through their incorporation in domestic legislation.

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<sup>361</sup> This question gained great visibility at the political and military levels. Two Resolutions of the US House of Representatives , no. 186 (17.9.1999) , and of the Senate, no. 61 (19.9.1999), expressed concern that the close ties between Hutchison Wampoa and Beijing could mean a strong presence of China and ability to monitor shipping in the area and therefore pose a long-term threat to US security interests (<http://www.usconsulate.org.hk/ushk/bills/1999/0917.htm>). The military perspective was expressed by the US Southern Commander in Chief, Gen. Charles Wilhelm in his statement on the issue before the US Senate Armed Services Committee on 22.10.1999, who argued that "...the impact of chinese commercial interests in Panama is less a local threat to the Canal and more a regional threat posed by expanding Chinese influence throughout Latin America." ([www.usconsulate.org.hk/ushk/others/1999/1022a.htm](http://www.usconsulate.org.hk/ushk/others/1999/1022a.htm))

<sup>362</sup> The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, is a multilateral accord which has replaced CoCom, the Cold War organisation for controlling sensitive exports to the Soviet bloc with some differences: broader membership and a smaller list of controlled goods. Under CoCom HK had the status of a "cooperating country". Although HK participated in Wassenaar after 1994 because the UK was a participating state, the SAR ceased to participate in any capacity after the handover because China is not a member – Dumbaugh, *op.cit.*, 1997.

<sup>363</sup> This concern was expressed in 1999 by the US Congress Fox Commission that raised the question of the risk of transhipment of sensitive technology via HK because of the failure of HK Customs to control PLA vehicles that cross the border. Confidence was reestablished when HK authorities proved in practice to carry out the control namely in March 2000 when they held 5 armoured vehicles assembled in Ukraine and loaded in Naples destined to the port of Tianjin in Northern China – Dumbaugh, *op.cit.* 2001.

A third area is related to human rights, individual liberties and the consolidation of rule of law and democracy. The US interest is justified not only by the concern to protect US economic interests in HK, which depend on the existence of a rule of law system and an independent judiciary, but also of the potential demonstration effect that the SAR's high human rights standards and rule of law can have on the PRC, thus contributing to bring about changes in the Mainland system through contagion<sup>364</sup>. In this field it is important to note that besides the action of US Government Agencies, the US NGOs, clearly the most active foreign agencies in HK, play a very active role through their interaction with HK NGOs.

The US is the external player that has the most complete and integrated perception of HK as an international actor, capturing the complexity and density of HK's international status. It goes beyond HK's trade identity and covers HK's role in international security and political dimensions, namely political change in China, and HK's contribution as a broker between the US and China, illustrated more recently by its contribution to the approval by the US Congress of the Permanent Normal Trade Relations (PNTR) status that paved the way to the US final approval of China's WTO accession<sup>365</sup>.

The US, like the EU, has made a positive assessment of the evolution of HK's external autonomy, stressing the absence of signs of CPG's efforts to limit HK's autonomy and the fact HK and Beijing at times pursued different agendas in multilateral economic *fora*<sup>366</sup>. However, this has to be qualified as the US, more than any other external player,

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<sup>364</sup> US Consul General in HK, Michael Klosson, Speech "A tale of two cities: the image and reality of HK today" Asia Society, Houston Texas, 15.2.2001. On the political demonstration effect see Michael Yahuda "A catalyst for change? The HK Special Administrative Region and Chinese Politics" in Leung, P. and Cheng Hong Kong SAR: in pursuit of Domestic and International Order, The Chinese University Press, HK, pp.25-35

<sup>365</sup> US Consul General Michel Klosson Speech "The US and HK: turning challenges into opportunities" Chinese manufacturers Association in HK (28.9.2000), where he acknowledges the relevant role HK played in the US debate stressing that the fact that both Tung Che hwa and Martin Lee, coming from very different positions, have both supported the granting of the PNTR status during their visits to the US "helped to reach persons across our political spectrum" thus contributing to the positive outcome of the May 24 vote in the House of Representatives.

<sup>366</sup> US-HK Policy Act Report 2000, Department of State. Also in the 2002 Report it is stated "HK's autonomy as an international economic actor remained intact as it actively and independently participated as a full and active member of numerous international economic organisations such as WTO, APEC, and FATF..." p.2.

expressed concerns over specific developments regarded as potentially undermining autonomy in the future. Three main issues were raised. Firstly, the consideration that complex legal requirements for “sovereign assent” by the CPG have in some cases “hindered timely cooperation”<sup>367</sup>. This is a reference to the operation of the system of authorisation and sovereign power control, which raises some concerns that this might, if excessively bureaucratic and slow, limit in practice HK’s international participation.

Secondly, a more structural question related to the trend of HK closer economic integration with Mainland China. This has been perceived by the US as presenting risks in terms of affecting HK’s autonomy as a separate customs territory and erode HK status. There was a clear reference to the FTA process between HK and China, the “Closer Cooperation Partnership Arrangement”, and to the proposal of co-location of customs and immigration officials on the PRC side of the border for simplification of procedures, both seen as initiatives that can call into question HK’s autonomy. By becoming more interlinked with China, HK might weaken its international ties and become less relevant to the international community, if the SAR does not manage the process carefully and strikes “a proper balance between deeper economic interdependence with China on the one hand and HK’s autonomy and international connections, on the other”<sup>368</sup>.

Thirdly, the US has also identified a weak link that in the long term can weaken HK’s international role, i.e. the deficit of domestic attention in HK for international matters and the fact that both HK’s international personality and active participation are somehow overlooked in HK itself by major civil society actors<sup>369</sup>. As argued earlier, this is the paradox of HK being an active and robust international player but with a low domestic awareness of the relevance and complexity of its international role.

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<sup>367</sup> US-HK Policy Act Report 2000, p.9.

<sup>368</sup> US Consul General in HK , Speech “One country, two systems: Five years – US perspectives on HK” American Chamber of Commerce, 6.6.2002.

<sup>369</sup> Ibidem.

Since the handover the US has actively upheld HK's external autonomy in different ways. In this respect the US has an unique position among major external players for it has formally recognised HK's autonomy through a legal instrument that makes the support for HK's external autonomy a binding obligation for the US Government and not a mere option or declaration of foreign policy. In fact, the 1992 US HK Policy Act<sup>370</sup> not only presupposes HK's autonomy but allows the US to treat HK differently from the way it treats China in US law as a perfectly separate territory in economic and trade matters (sec.103), in cultural matters (sec.105) or in legal matters, namely bilateral binding agreements.

However, this special treatment accorded to HK is reversible and can be halted if the US Government considers that the substantial autonomy that justified it in the first place is eroded as a consequence of PRC's illegitimate interference in HK's affairs. In fact under sec. 202 (a) of the Act, the President can suspend the application of a specific law if it considers HK is not "sufficiently autonomous". So far this provision has not been used which shows that until now the US did not consider that a major crisis has occurred, but constitutes the most powerful potential red card that can be used in case of violation of the "one country, two systems" model.

In the last five years and according to the spirit of the HK Act, the US has upheld the SAR's external autonomy using different mechanisms. There are two main features that are unique to the US and differentiate it from the EU approach. Firstly, unlike the EU, which has been very active in the exercise of treaty making powers, the US has not signed any bilateral agreement with the HKSAR<sup>371</sup> and adopted a more pragmatic approach putting the emphasis on the development of concrete bilateral co-operation actions, namely in law enforcement<sup>372</sup> (including the provision of training for HK

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<sup>370</sup> Public Law no. 102 – 383, 5.10.1992

<sup>371</sup> The six US –HK bilateral agreements have been all signed before the handover in 1996 and the first half of 1997 - HKSAR Information Department, "The HKSAR and external affairs" October 2002, ([www.info.gov.hk/info/exaffa.htm](http://www.info.gov.hk/info/exaffa.htm). Annex I)

<sup>372</sup> For example the US – HK extradition treaty is certainly the most operational one and co-operation has been robust. Since the handover HK has processed 36 US requests for provisional arrest and extradition and the US has processed 10 HK requests - US Consul General Speech, 6.6.2002, op. cit.

police), financial, trade export control (including international control regimes briefing HK on the Missile Technology Control Regime), academic and cultural areas.

The second aspect was that the US interaction with HK has been intense at the non-governmental level, using more informal channels and not only at the governmental level. Besides the American NGO's initiatives, the US Government supports the development of close ties between American NGO's and its counterparts namely between universities<sup>373</sup> as a way of strengthening the civil society in HK.

There has been no fundamental contradiction between the US Administration and Congress positions in relation to HK but a large convergence of views if we compare the Reports from the State Department and the Speaker's Task Force on HK. However, this recognition and support to HK's external autonomy has not been fully shared by all US institutions, namely by the judiciary. This was an interesting exception pointed out by some authors who argued that US courts have adopted in specific cases, for instance the Matimak Trading Co. vs. Albert Khalily and Jerry Lui cases, a negative position denying HK the capacity to act internationally and considering the SAR as a "stateless entity", thus undermining in practice its autonomy<sup>374</sup>.

However, I would argue that Hsiung overstated the case and neglected other important facts that point in the opposite direction. Even in relation to the cases mentioned, the Courts made wrong decisions from a legal point of view by violating the letter and spirit of the 1992 HK Policy Act. More importantly, the US Government responsible for foreign policy disagreed and attacked the ruling of the extradition case. It presented an appeal arguing that the US-HK extradition agreement was a legally valid and binding

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<sup>373</sup> Instruments like the Fulbright Programme on the Department of State International Visitor Programme. It is estimated that around 8 000 students are studying in the US at any given time and approximately 60.000 graduates of US institutions live in HK – US-HK Policy Act Report 2000 p. 16 [www.usconsulate.org.hk/ushk/pi/20000401/htm](http://www.usconsulate.org.hk/ushk/pi/20000401/htm).

<sup>374</sup> James Hsiung (ed) Hong Kong the super paradox: life after return to China, St. Martin's Press, New York, 2000, pp.171-199. In the Matimak case (1997) involving a breach of contract by the US firm, the District Court decided in 1996 to dismiss the complaint arguing that HK was not a foreign state and so Matimak was not a subject of a foreign state. The ruling was appealed to the US Court of Appeals, second circuit which decided that Matimak could not sue because the 1992 US HK Act did not regard HK as an independent sovereign state.

agreement and the Court had illegitimately interfered in the conduct of foreign affairs<sup>375</sup>. These cases seem to be exceptional and not the expression of a dominant trend, although they show that we are far from an unanimous view on HK's external autonomy and legitimacy not only between states but also within specific states.

In spite of the overall positive contribution to uphold HK's autonomy, the US attention for HK has declined in the course of the last few years because of the absence of major problems in HK but also because the US policy towards China has changed under the Bush Administration, becoming more pragmatic and constructive, particularly after September 11. As a result there is a lower pressure for political change in China and this, in turn, tends to weaken the US concern for political development in HK<sup>376</sup>. Nevertheless, the US remained the most vigilant and vocal external player as well as the most active HK partner.

The most important external actors for HK, the US, EU and Japan, made a positive assessment of the evolution of HK's external autonomy since 1997, considering that it was not diminished by the sovereign power and recognised the SAR capacity to act internationally on its own. However, their level of attention and engagement with HK has been gradually declining since the handover because of the evolution of their bilateral relations with China and of the absence of major problems in HK. This decline so far has not been sufficient to affect structurally the international recognition of HK as an autonomous international player insofar it has not reduced the level of interaction below a minimum critical level.

This chapter addressed the question of the evolution of HK's external autonomy and international participation in the post-handover period and provided evidence that validate the hypothesis that autonomy was a function of the interplay between three major factors: HK's own strategy and dynamism in international affairs; the new HK-

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<sup>375</sup> US- HK Policy Act Report 2000, p.9 ([www.usconsulate.org.hk/ushk/pi/20000401.htm](http://www.usconsulate.org.hk/ushk/pi/20000401.htm).)

<sup>376</sup> See Dumbaugh, 2001, "Hong Kong ongoing Transition", op. cit. The author considers that "issues involving HK largely have ceased to command much attention in the United States" pp. CRS-15. Robert Sutter, China specialist at Georgetown University, in an interview on 10.7.2002 expressed a similar view.

Beijing relationship and the level of control exercised by the sovereign power; the attitude and interaction of major external actors. Three main conclusions should be underlined.

Firstly, HK's external autonomy in the post handover period has experienced neither an expansion nor a decline but rather a tendency for stabilisation, also helped by the new set of written rules contained in the BL. To this outcome contributed the fact that the BL rules on external affairs were respected by Beijing and there was not any major crisis or conflict in the relationship.

However, it is argued that two less visible risk factors have emerged which might affect negatively external autonomy in the long term. One is the informal expansion of the mechanism of specific authorisation covering acts and certain types of agreements that under the BL were not subject to that control, which have been used to justify a stronger control by Beijing and a transformation of external affairs into foreign affairs matters. In contrast with the pre-handover experience, informality tends to work to the disadvantage of the SAR since written rules are an important guarantee of its autonomy.

The other risk factor is related to the paradox of HK as an active international player to have a rather passive civil society in international affairs and no "think-tank" to deal with the long-term position of HK in the international system.

Secondly, the HK-CPG relationship in foreign affairs has so far been marked not only by compliance with the BL rules but also by separation and a scenario of "autonomy cum isolation", with little co-ordination and co-operation between the sovereign power and the SAR, which in the long run can prove as damaging to HK's external autonomy as abusive interference.

Thirdly, the evidence analysed suggests that the external actors' attitude towards the SAR has overall contributed to upheld HK's autonomy, despite the considerable diversity of positions and degrees of involvement among members of the international

community. There has been a tendency for decline in the level of attention and engagement with the SAR on the part of many external actors, partly explained by the centrality of their relationship with China. Yet, this has not been dramatic enough as to bring about a major change and so the level of interaction remained above a minimum critical level.

Nevertheless some signs emerged that perceptions of external actors might be changing and a new dilemma is facing them. On the one hand, they kept on showing the willingness to accept HK's international participation thus showing that the international system is more flexible and able to accommodate unorthodox phenomena than generally believed. On the other, some states show concern over the potential demonstration effect that HK's robust international status and external autonomy might have on their own NCGs encouraging them to press for more autonomy, leading external actors to become less supportive.

However, the positions of external players and the evidence discussed in this chapter do not provide a clear answer regarding the identification of the HK's legitimacy basis to act internationally and the sources of influence the SAR uses to pursue its interests. The analysis of these two important dimensions of HK as an international player will be carried out in the following chapter based on HK's experience in WTO.

## CHAPTER FIVE

### THE HKSAR IN WTO: AUTONOMY BASIS AND INFLUENCE

The HKSAR's international participation and patterns of interaction with major international players is better understood in the context of the experience and practical interaction in a specific organisation. The case study allows us to capture not only the complexity of HK's behaviour but also the essence of the underpinnings of its external autonomy and international status as well as the challenges for its future sustainability.

The WTO is the obvious choice for different reasons. On the one hand it is the first priority forum for HK given the relevance of trade for HK's economy. WTO is exactly at the core of HK's interests, where HK can enjoy a high degree of autonomy, have a separate identity and its own voice. On the other, given the fact China joined WTO in December 2001 and became one of its high profile members, the WTO is also relevant to assess the sustainability of the SAR autonomy.

This chapter is organised in four sections. Section one analyses the status of HK in WTO and its main characteristics as a member. Section two looks at the SAR's participation, key interests and priorities in WTO and enquiries into the existence of any limitations arising out of HK's non-sovereign nature. Section three considers the pattern of interaction between HK and major players, the areas of convergence and divergence of interests, and HK's sources of influence in the Organisation. Finally, section four deals with the impact of both the handover and China's accession on HK's autonomy in WTO.

#### 5.1.HK's STATUS IN WTO: THE DUAL PERSONALITY SYNDROME

The historical evolution of HK's participation and status in GATT and later in WTO, is an impressive story of gradual affirmation and consolidation of HK's autonomy and

separate identity in the multilateral trade system, leading up to full membership, a completely unique and unparalleled situation among NCGs.

Historically HK's status in GATT / WTO has gone through three different stages as seen in chapter two: "dependent colony" HK's participation integrated in the UK delegation with no formal status in GATT; "quasi contracting party" stage after 1972 as a result of Britain's accession to the EEC; "full member" stage following HK's accession in 1986<sup>377</sup>. The accession was a direct consequence of the retrocession process to Chinese sovereignty and of the joint political impulse of Britain and China translated in the parallel declarations issued to GATT<sup>378</sup> supporting HK's membership and guaranteeing that substantive conditions and autonomy would be preserved. The second pillar of accession was a technical one, the fulfilment of three substantive conditions for membership i.e., an independent trade policy, different tariffs and trade regulations from the sovereign power, a separate customs administration (art. XXIV of GATT) and autonomy in the conduct of external commercial relations.

This stage was marked by this change in the formal legal status but also by another crucial change in HK's substantive status and identity in GATT. HK's accession coincided with the beginning of the Uruguay Round where for the first time services were introduced in the agenda and subject to GATT rules. This caused a major split in HK's identity introducing the conditions for the emergence of a dual identity. Whereas in trade in goods HK's interests converge with developing countries, in trade in services HK is closer to developed countries' interests and positions and more distant from

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<sup>377</sup> This was achieved under article XXVI: 5 (c) of GATT on the basis of the Declaration of Britain as the sovereign power complemented by a PRC declaration. This was an automatic procedure which did not involve any negotiation with, or approval by GATT members. Some members expressed doubts about the procedure and the lack of consultation, namely because of the risk of creating a strange situation if the PRC would not be a member in 1997. This did really happen and created an unprecedented situation in GATT/WTO, because GATT was only applicable to two small parts of the Chinese territory, HK and Macau - see <http://www.sunsonline.org/trade/process/during/86/04260086.htm>.

<sup>378</sup> The United Kingdom declaration of 23.4.1986 notified the GATT Director General that HK had full autonomy over its external commercial relations and should be considered a contracting party to GATT. This was complemented by China's communication to the DG on the same date by which Beijing informed the GATT that under the JD Hong Kong would become a SAR on 1.7.1997, returning to Chinese sovereignty, and would retain its autonomy in commercial matters - [www.sunsonline.org/trade process/during/86/04260086.htm](http://www.sunsonline.org/trade process/during/86/04260086.htm).

developing countries. As a consequence HK gained, in contrast with the previous stage, a dual identity, simultaneously as a developing country and a developed country. This has created a serious challenge for HK in terms of its ability to manage the inherent contradictions and tension encapsulated in the new situation.

I would argue that this duality and ambiguity is the main characteristic of the HKSAR as a member of WTO. The crucial question to the present research is what are the implications of this duality both for HK, whether this is an asset or a liability, and for WTO, if it has any impact on the functioning of the Organisation.

For that we have to consider the wider context and look first at other characteristics of HK as a WTO member. I would argue there are four main characteristics.

Firstly, HK is a big trading power with a significant weight in world trade, which constitutes an important substantive basis for its participation, and influence in WTO. In 2001 HK accounted for 3,1% of total world trade and was the 10<sup>th</sup> largest exporter in the world with a total export value of US\$ 91 billion. If intra-EU trade is excluded the position of HK is even stronger accounting for 4 % of world trade and becoming the 6<sup>th</sup> largest exporter and the 6<sup>th</sup> largest importer in the world merchandise trade<sup>379</sup>. HK's position is strong not only in terms of trade in goods but also in trade in services, being the 10<sup>th</sup> largest exporter of commercial services and accounting for 2,9 % of total world exports of services in 2001<sup>380</sup>.

One of the consequences of this big trader status is the fact HK is currently the 9<sup>th</sup> largest contributor to the WTO budget and the Appellate Body budget, accounting for 3.3% of its total value in 2002 ahead of countries like Spain, Singapore, Mexico or China<sup>381</sup>. Moreover, HK is one of the major contributors to extra-budgetary funds for

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<sup>379</sup> WTO, International Trade Statistics 2002, Geneva Table I.5 leading exporters and importers in world merchandise trade in 2001 and Table I.6 excluding intra-EU trade.

<sup>380</sup> WTO, International Trade Statistics 2002, Geneva Table I.7.

<sup>381</sup> WTO Annual Report 2002 Table V.5.

technical co-operation together with the Netherlands, Switzerland, UK, US, Sweden, and Germany<sup>382</sup>.

Secondly, HK is a pro-system member meaning it is strongly committed to strengthen the multilateral trade system and the WTO organisation. As a small and vulnerable non-sovereign entity, lacking political bargaining and instruments of retaliation, HK has long decided that the only protection it can have in a system dominated by sovereign states is a rule-based system and multilateral norms. In this context, HK is committed to contribute to the success of negotiations and avoid major failures that can reduce WTO credibility and undermine its role. This was the main motivation for HK to join and play a leading role in the “De La Paix Group”, in the context of the Uruguay Round, whose intervention was of critical importance. The Group was responsible for the breakthrough text for Punta del Este, and for the successful conclusion of the final stage of negotiations<sup>383</sup>. Similarly, in the launching of the Doha Round in 2001 HK played an important role in creating common ground. HK’s motivation was, in the face of the sense of danger and great fragility after the Seattle disaster<sup>384</sup>, to do something to strengthen the system and recover its credibility, as WTO would not survive a second disaster<sup>385</sup>.

Thirdly, HK is a “living example”, a “model to be emulated ” in terms of compliance with WTO rules. The key point is that HK has a coherent position not only because it supports liberalisation in all sectors, both in goods and services, contrary to the great majority of WTO members who advocate liberalisation in some areas but protectionism in others, but also because its deeds are consistent with its words insofar as HK is a real free trade practitioner. This contributes to HK’s credibility and prestige and to uphold its

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<sup>382</sup> WTO Annual Report 2002 Table V.6 pp 168

<sup>383</sup> Besides HK the group included Australia, New Zealand, Canada, Korea, Switzerland, Hungary, the Nordic Countries and Columbia - John Croome, Reshaping the World Trading System – a history of the Uruguay Round, Kluwer Law International, WTO, 199, pp 37 and 298-300.

<sup>384</sup> The failure of Seattle has been very much explained in the media as the result of the strong protest of anti-globalisation groups and riots in Seattle. However, the key explanation is internal and less visible and is related to the existence of considerable divisions and the lack of common ground between the WTO members, partly because the meeting was not carefully prepared based on a “Christmas Tree” methodology which proved unmanageable.

<sup>385</sup> Interview with Stuart Harbinson, 20.11.2002.

role model as a reference to be emulated as explicitly recognised by the other WTO members in the conclusions of the Trade Policy Reviews of 1998 and 2002<sup>386</sup>.

Fourthly, HK is a non-sovereign member of WTO which integrates a very small group of four exceptional cases: HK; Macao; the Customs territory of Taiwan, Penghu, Kinmen and Matsu; and the European Communities (EC). Although theoretically sovereignty is not a pre-requisite for WTO membership, in practice it is paradoxically nearly restricted to sovereign states.

At present HK, together with Macao, which is really a by-product of HK's status given the linkages in the context of China's reunification process, are the only NCGs in the world that are members of WTO. Furthermore, given the very special nature of the EU whose Member States are sovereign members of WTO, and the controversy over Taiwan's sovereignty, one can argue that HK and Macao are the only genuine non-sovereign members of WTO.

In theory the non-sovereign nature of HK does not have any implications as the SAR enjoys formally the same rights as any sovereign member of WTO. However, a more in depth analysis reveals that in practice HK faces some subtle and less visible limitations which derive from the lack of sovereignty, as will be demonstrated below.

### **Dual identity**

Formally, HK is a developing country within WTO. It should be noted that in WTO the status of developed or developing country is not imposed on the members on the basis of any objective criteria, on the contrary a self-election system applies as each member is free to choose what status it considers more adequate to its specific condition. HK has elected itself a developing country which has a major consequence, the fact it is entitled to enjoy special and differential treatment according to WTO rules.

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<sup>386</sup> WTO, Trade Policy Review – HK China 1998, Bernan Associates pp. ix-xi. In the concluding remarks by the Chairperson in the Third policy review on 7-8 December 1998, it was stated that HK demonstrated its “continuing commitment to the primacy of WTO...” and that “...members looked forward to seeing

This formal status has not been in general questioned by other members, but since the early 1990s some criticisms started to be expressed, namely by the EU, which tried to get support for its view that HK, Korea and Singapore should be graduated and considered as developed countries<sup>387</sup>. More recently in the 1998 TPR of HKC, the issue of the developing country status was again raised by the second discussant who confronted HK with the contradiction and double standards between HK's position and status in APEC, where it considered itself a developed country accepting the 2010 deadline, and in WTO where it continued to consider itself a developing country<sup>388</sup>.

In any case HK's formal status is not yet openly challenged in WTO although criticisms are expressed in private by both developed and developing countries<sup>389</sup>. This is partly explained because in practice HK has not used the privileges of differential treatment or taken illegitimate advantage of its status. In recent years the only exception has been the adoption of the TRIPS regime for which HK requested the transition period and more time for implementation<sup>390</sup>. However, the pressure for graduation of HK and other high income countries is mounting and is likely to increase further in the near future because of OECD countries' demands in the context of the DDA negotiations<sup>391</sup>.

In spite of the formal status as a developing country, in reality HK identity is less clear cut and much more ambiguous. I would argue it has a dual identity both as a developed

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HK China continuing to contribute by its example and leadership at the WTO, to the further strengthening of the multilateral trading system.”.

<sup>387</sup> John Croome *op.cit.* p. 326.

<sup>388</sup> WTO, Trade Policy Review, HK China 1998, Bernan Associates WT/TPR/M/52 pp 161-162.

<sup>389</sup> For example India, interview with Deputy Permanent Representative, Haran, 20.11.2002, Brazil interview with Brazilian mission officials, 18.11.2002, and Japan, interview with Permanent Mission Official responsible for WTO, Shingo Yamagami, 20.11.2002

<sup>390</sup> HK had the chance to postpone implementation of the TRIPS agreement taking longer to review and adapt domestic legislation completed in 2000. In addition HK benefited from technical assistance from other WTO members, Australia, UK and the EU Patent Office - Council for Trade Related Aspects of Intellectual Property Rights meeting of 6.3.2001 Minutes IP/C/M/29, p.8.

<sup>391</sup> There is an intention in the Doha agenda to tighten up the special and differential treatment system by making it mandatory, more precise and robust. Many developing countries are pressing for greater concessions but for OECD countries this would only be possible if the group of developing countries is narrowed down which means applying more restrictive criteria. This will create further pressure for HK to graduate and cease to have a developing country status - interviews with Stuart Harbinson, 20.11.2002, and WTO Director General, Dr Supachai, 26.11.2002.

and a developing country, which emerged since the conclusion of the Uruguay Round when services were included in the WTO regime. In trade in goods HK shares many of the concerns of developing countries, particularly in textiles supporting the idea of termination of the MFA regime and the full integration of textiles in WTO rules. HK is an active member of the International Textiles and Clothing Bureau (ITCB), an international organisation composed exclusively by 20 developing countries exporters of textiles, and played a leading role in its creation together with Brazil and India in the mid 1980s.

The ITCB has played a crucial role in terms of the co-ordination of positions among the three different groups of developing countries that co-exist inside the organisation<sup>392</sup> which enhanced the bargaining capacity of the exporters in the Uruguay Round negotiations where ITCB participated directly in the negotiations and was able to introduce the idea of gradual phase-out of the MFA leading to the effective approval of the phase-out plan until 2005, when textiles will be fully integrated in the WTO system<sup>393</sup>.

HK position is also closer to developing countries positions in other areas, namely in “rules”, particularly the strong opposition to anti-dumping arbitrary regimes, and in competition, where it is closer to more radical developing countries’ views like India, opposing a structured competition policy.

In contrast, HK is closer to developed countries and shares their views in specific areas, namely in services, supporting liberalisation with the exception of professional services, in TRIMS, trade facilitation and in many issues related to the institutional system. Moreover, HK participates as an observer in OECD Groups (the Committee on Financial Markets, Trade Committee, Committee on International Investment and Multinational

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<sup>392</sup> John Groome *op.cit.* 90 –91.

<sup>393</sup> The 1995 Agreement on Textiles and Clothing aims at the full integration of the textiles and clothing sector into normal GATT rules by 2005, involving a gradual process to bring products under GATT in 4 phases: 1995-97, 16% of products; from 1998-2001 a further 17%; from 2002-04 a further 18%; on 1.1.2005 quotas have to be eliminated in relation to the remaining 49% of products, only tariffs can apply and importing countries will no longer be able to discriminate between exporters.

Enterprises) where the SAR has the opportunity to know better the developed countries positions and concerns, in particular the differences among EU Member States, which are not visible in Geneva where they act with a single voice. This gives HK a foot in the developed countries camp.

Finally, there is a third situation where HK takes a middle ground position, equidistant from developed and developing countries, in areas such as TRIPS and even more clearly in agriculture where HK has a perfectly neutral position having no interests whatsoever in this sector.

Although the dual identity that has emerged since the mid-1980s is still strong, changes might occur pushing HK closer to the developed camp. One is graduation and the reform of the preferential treatment system under discussion in the Doha Round. Another crucial factor will be the full integration of textiles in the WTO system and the termination of the MFA in 2005, which can weaken HK's strongest link with developing countries and the crucial basis of its developing country identity in GATT since the 1960s.

One of the main concerns of this research is to understand the implications of this dual identity for HK and the WTO and to what extent this is an asset or a liability for the HKSAR.

This could indeed be a liability for HK if its split identity was perceived as an expression of incoherence and a mere opportunistic mechanism to maximise gains. In a system where clear cut categories and black and white logic prevails, there was a potential risk for HK to be considered an abnormal case consequently marginalised by both camps and lost in the middle. This would severely undermine HK's credibility turning it into a minor and isolated player, with no influence in WTO.

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However, this is not the case, HK's dual identity is respected, understood and even seen as positive by other members. Firstly, they realise this position is brought about by the incoherence of other members (developed countries support liberalisation in services but try to impose protectionist measures in goods and vice-versa for developing countries) than by HK which maintains a coherent position supporting a global liberalisation in all areas. Secondly, HK's positions derive from the substantive nature of its economy and concrete interests and are not determined by artificially fabricated strategies or games to gain advantages or by political motivations. Thirdly, HK does not discriminate against any member, treats equally all trade partners thus inducing an idea of impartiality.

### **HK as a bridge builder**

In this context my argument is that HK's dual identity is on the whole an asset for HK and one of the most robust basis for its affirmation in WTO, insofar as it paves the way for HK to be able to perform a bridge builder role between developed and developing countries inside WTO.

In fact, exactly because HK has a foot in each camp the SAR has good conditions to bridge positions thus contributing to the advance of negotiations. The good access HK has to the inner circle of each camp, together with the technical expertise of its negotiators, enables HK to better understand the contents and grounds of different positions, to assess their respective degree of flexibility and eventual fall back positions, and their systemic impact, all essential tools for any broker.

This bridge builder role does not cover all areas, certainly not areas where HK takes more radical and firm positions like textiles, anti-dumping or RTA's, but has consistently manifested itself in a considerable number of fields and in different occasions. There are plenty of examples. In the context of the Uruguay Round the role of HK inside the "De La Paix Group", already mentioned, helped in creating a common ground for the success of the final stage of negotiations through their initiative to send a letter to major players (US, EU and Japan), crucial to overcome problems derived from the change in the US Administration and the French opposition to the Blair House

Agreement<sup>394</sup>. Another case in point was HK's role in the negotiation group on TRIMS<sup>395</sup>.

More recently, in the context of the Doha process, HK's role as a bridge builder gained considerable visibility. Firstly, HK's role as Chairman of the General Council in 2001 and the key contribution Stuart Harbinson made to secure the success in Doha and enable the Round to be effectively launched, by bridging positions between the radicals that resisted the idea of a new round like India and the African Group, and the supporters of a new round, including OECD and some developing countries.

Secondly, the selection of Stuart Harbinson in 2002 as Chairman of the Committee on Agriculture in charge of managing one of the most difficult and hot negotiations between the EU on the one side, and the US and the Cairns Group, on the other. HK was deliberately chosen because of its guarantee of impartiality, since it has no interests in the agriculture sector, and its established credentials as a bridge builder.

There are also manifestations of this broker role at the level of sectoral negotiations. A good example is provided by the negotiation on TRIPS, the question of TRIPS and public health. This was discussed for the first time in the TRIPS Council of June 2001 and concerns the problem that patents on medicines have created obstacles to the access to medicines for the treatment of HIV/AIDS and other pandemics, preventing the most affected developing countries from solving public health problems. HK has clearly held a position to balance and reconcile interests, namely intellectual property protection essential for the development of new medicines on the one hand, and the need to support the combat to pandemic diseases, on the other<sup>396</sup>.

From HK's point of view the TRIPS should be part of the solution for major pandemics and not a problem for public health and therefore the TRIPS Agreement should be

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<sup>394</sup> John Croome, op. cit., pp 299-300

<sup>395</sup> Ibidem, p. 223

<sup>396</sup> Statement by Secretary of Commerce and Industry, Chau Tak Hay, at the Ministerial Conference 10.11.2001 WT/MIN(01)/ST/18

interpreted in a flexible way. This is a middle ground position between a group of countries with strong interests in the pharmaceutical industry, led by the US and including Switzerland, Japan, Canada, which take a more conservative position, and another group of developing countries, led by Brazil involving many Latin American and African countries, which push for greater flexibility which risk to subvert rules<sup>397</sup>.

Another example has been in the context of the Council of Trade in Services where HK, although advocating liberalisation alongside developed countries, considered that it would be important to involve developing countries, otherwise negotiations would be meaningless. For that and in order to bridge positions and respond to developing countries' concerns, HK proposed an "emergency safeguard" for developing countries so that they could feel more comfortable and confident to open their services markets<sup>398</sup>.

Still another illustration of HK's effort to play a bridge role concerns the area of TRIMS, namely in terms of the definition of the scope and possible contents of a multilateral investment agreement which OECD countries want but many developing countries, namely India, Indonesia resist and have strong reservations against. HK has proposed the adoption of a narrow approach to the definition of investment limiting it to FDI and excluding other forms because it could "command greater support among the wider membership"<sup>399</sup>. Moreover, although supporting transparency as the basic principle for a favourable environment for investment<sup>400</sup>, HK also acknowledged the constraints developing countries face in fulfilling its obligations and so proposed that an eventual multilateral framework should promote a balance between pursuing more transparency and avoiding the imposition of burdensome obligations on developing countries.

An interesting question arising from this is to know whether HK is a "systemic broker" or rather a mere "single issue" broker performing that role on a non-permanent basis. The evidence available seems to support the idea that there was an evolution from a

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<sup>397</sup> WTO, Minutes of the Council on TRIPS meetings IP/C/M/33, 2.1.2001, pp. 62-63

<sup>398</sup> Interview with Stuart Harbinson on 21.11.2002

<sup>399</sup> WT/WGTR/M/12, pp. 21-22 of 31.10.2000.

status of a single issue broker to a condition closer to a systemic broker in more recent times, insofar as HK has been called upon to intervene in global processes such as the Doha Round, its role is unanimously recognised by other WTO members and HK assumed this as one of its strategic objectives in WTO<sup>401</sup>.

This condition of a bridge builder has several consequences. Firstly, HK is regarded as a more neutral and impartial member, despite the fact it takes strong positions on specific issues. As a result it gets often chosen to act as panellist in the Dispute Settlement panels, in particular in very sensitive cases like the Banana Panel involving a dispute between the US and the EU which was chaired by Stuart Harbinson<sup>402</sup>. HK is not the only member recognised as a bridge builder, other examples such as Norway, New Zealand, Singapore get often cited. What is different and specific about HK is the fact it is the only systemic broker and the only that derives its influence from the dual identity.

What is unique and paradoxical about HK is how the SAR, despite being a big trader is still regarded by the majority as impartial and neutral. It is difficult to fully explain this paradox but I would argue it is explained primarily by the dual identity but also by two other factors. One is the fact HK is not aligned with any of the major players, the EU, US, Japan, Canada or big developing countries, but shows an independent stand. It can side with the US on liberalisation of financial services but simultaneously take a firm and critical position against the same US on anti-dumping. This autonomy in pursuing its specific interests helps maintaining an image of impartiality showing that for HK's high profile in WTO autonomy in relation to the sovereign power is not the only one that matters, autonomy in relation to major players is also relevant.

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<sup>400</sup> Minutes of the meeting of the working group on the Relationship between trade and investment WT/WGTI/M/17, 31.5.2002, p.19.

<sup>401</sup> Interview with Stuart Harbinson on 21.11.2002.

<sup>402</sup> The panel was established in June 1996, chaired by Stuart Harbinson based on a complaint presented by Ecuador, Guatemala, Honduras, Mexico and the US against the EC - WTO, DSR 1997, vol III. Stuart Harbinson was also selected to chair other panels such as the India - Patent protection for pharmaceuticals and Agricultural chemical products established on 16.10.1997 on the basis of a complaint presented by the EC - see WTO, DSR 1998, Vol. VI, pp. 2199 -2752.

The other factor is HK's non-sovereign nature and its low political weight which fuels the perception that HK's positions are not determined by complex political and strategic interests, but driven by economic interests. Although this is not necessarily the case, the international community tends to perceive HK as an apolitical actor which conditions HK's behaviour. HK has rejected any change that could lead to the "politicisation" of WTO using this argument to oppose the idea of greater participation of NGOs in WTO<sup>403</sup>, thus upholding the myth that WTO is a mere economic and technical forum and that politics stay outside. This clearly shows that HK is conscious of the risks that if it is seen as actively involved in more politicised issues its status might be severely weakened. The lack of sovereignty works in this respect as an advantage to HK insofar it contributes for HK to be seen as neutral thus enabling it to play the bridge builder role<sup>404</sup>. However, the lack of sovereignty presents also limitations in other respects which will be analysed below.

Secondly, HK has to devote a lot of effort and resources to play this bridge role, as this is not a process of spontaneous generation. This is a deliberate investment made by HK to uphold its prestige and position in WTO which does not generate immediate but only long term benefits, although it has short term costs. In this context HK has been facing a trade-off between playing this systemic role and pursuing its own commercial interests, as both compete for limited resources. The trade-off was more visible when Stuart Harbinson became Chairman of the General Council in 2001. Then the HK Government had to decide to reduce the workload from HK so that Harbinson would have more time and space to perform his high functions. This meant that for a while HK specific interests were less intensively pursued and attached a lower priority<sup>405</sup>. So, in the limit, the performance of a bridge role might be at the expense of HK's own interests.

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<sup>403</sup> This was expressed by HK in a specific communication to the 2000 General Council debate on external transparency WT/GC/W/418, p.2, 31.10.2000, WTO.

<sup>404</sup> The relevance of the a-political stand of HK came out implicitly in the interviews carried out with some of the most influential WTO members, namely the EU - interview with Carlo Trojan, EC Representative to WTO, 19.11.2002

<sup>405</sup> Interview with Stuart Harbinson, 21.11.2002.

Thirdly, this bridge builder role contributes to strengthen HK's influence in the organisation because this is what makes HK relevant both to developed and developing countries. For the latter HK's 'capacity to turn the real developing countries in the right direction and moderate the positions of the most radical ones, is an asset. For the former, HK provides relevant technical expertise and finances technical assistance at the same time as, because of its links with OECD countries, confers more credibility to developing countries' views thus contributing to moderate developed countries' positions. So, both camps see HK's role as constructive and useful<sup>406</sup>.

HK's dual identity and the performance of a broker role are the primary factors that account for HK's influence in WTO. I would argue that in its absence HK would probably be a tiny player. Furthermore, the level of HK influence in the future is tied up to the effective capacity to preserve this feature and perform the role<sup>407</sup>. There are of course other factors that account for HK's influence. In general it is mentioned that the quality and expertise of HK personnel and negotiators, the fact HK sets a good example in terms of fulfilling WTO obligations and its active support to WTO development, are among the most important ingredients but they should be seen as second level factors.

The influence of HK is primarily materialised in its active participation in the core decision-making group that dominate the Organisation (between 25-30 members), the so-called "green room" group<sup>408</sup>. These are informal and off-the-record meetings involving a restrict group, whose composition vary partially with the matter, which addresses the most difficult issues, negotiates behind close doors and takes the final decisions on the core issues, subsequently submitted for formal approval to the plenary. HK has been involved regularly in the "green room system". Just to cite two examples, HK was involved in two crucial "green room" meetings. One was the final negotiations for the conclusion of the Uruguay Round in December 1993 which settle the last

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<sup>406</sup> This view was confirmed by the WTO Secretariat, interview with Keith Rockwell, WTO Director of Information, 18.11.2002.

<sup>407</sup> Interview with Andrew Stoler, former Deputy Director-General of WTO, and former member of the US representation, 18.2.2003.

<sup>408</sup> The "green room" meetings became an essential element in the Uruguay Round promoted by DG Dunkel - John Croome, op.cit., p.138.

sensitive issues, where HK was seating with another 11 countries, Brazil, Canada, Colombia, the EC, Egypt, El Salvador, India, Japan, Malaysia, Pakistan and the US<sup>409</sup>. More recently in the final Ministerial Green Room in Doha where HK was represented by the Secretary for Commerce and Industry, Chau Tak Hay, seating with another 20 Ministers including the “Quad” countries, Indonesia, Malaysia, Kenya, South Africa, Chile, Egypt, Singapore, Switzerland and Tanzania<sup>410</sup>.

## **5.2. HK PRIORITIES AND PARTICIPATION IN WTO**

HK has a diversified and active participation nearly in all areas of WTO work. However, HK has specific priorities that we have to take into account in order to better understand the pattern of participation.

### **Sectoral priorities**

Besides the general systemic objectives of HK, the SAR has specific priorities in relation to the issues included in the WTO agenda. In this respect it is useful to take the Doha Development Agenda (DDA) as a reference and see how HK positions itself in relation to the issues that are at the centre of the new round of negotiations. In global terms HK considers the DDA to be “balanced and manageable”<sup>411</sup>, basically because it combines further trade liberalisation and new rule-making at the same time it allows some flexibility to deal with the specific conditions of developing countries.

I would argue that HK has four major priorities: trade in services; industrial tariffs; trade rules, in particular anti-dumping, RTAs and dispute-settlement; and trade facilitation, transparency and government procurement<sup>412</sup>.

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<sup>409</sup> Marcelo Raffaelli and Tripti Jenkins, The Drafting of the Agreement on Textiles and Clothing, ITCB, Geneva, 1995, p. 85.

<sup>410</sup> Interviews with Chau Tak Hay on 19.12.2001, and HK ETO official in Geneva on 19.11.2002.

<sup>411</sup> Trade Policy Review, HK China, Report by the Government WT/TPR/G/109 18.11.2002, pp. 20-21

<sup>412</sup> Interview with officials of the HK ETO in Geneva on 19.11.2002.

Trade in Services is becoming a key priority area because HK's economy is overwhelmingly dominated by services and HK is a strong exporter of service trade. HK supports the idea of progressive liberalisation in a wide range of service sectors, particularly in financial services, telecommunications, audio-visual services and maritime transport. The only major exception is professional services (legal, medical services) where, because of pressures by HK major professional groups, the SAR is more protectionist.

As far as industrial tariffs are concerned HK pushes for substantial reduction and elimination of tariffs. HK's ultimate goal is tariff zero, which HK actually practices in relation to all imports entering the SAR, although in terms of legal obligations the situation is different because as of 2001 only 42 % of all HK's tariff lines were bound at 0 %<sup>413</sup>. In this respect HK supports a comprehensive coverage and a formula approach to tariff cuts and is keen to deal with issues like high tariffs, tariff peaks, tariff escalation and nuisance tariffs in the current negotiations.

In what concerns strengthening trade rules, HK holds the view that they should be clarified and reviewed. The first key area for HK is anti-dumping rules which HK considers have been used in such a protectionist way that it has subverted WTO rules. This requires urgent review in order to ensure that progress in trade liberalisation is not eroded through the back door by an abusive use of anti-dumping actions.

The second area concerns RTAs, which HK sees as a potential risk to WTO and multilateral rules given the present proliferation of agreements, with some countries participating in several uncoordinated processes simultaneously. HK is also particularly concerned that rules of origin might create barriers to trade thus subverting the rules, since RTAs serve to facilitate trade between members but can not raise barriers to trade

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<sup>413</sup> This is the difference between legal obligation and actual practice meaning that HK is being more liberal than it was legally obliged to. In fact, HK is committed to bind tariffs only to a certain percentage of goods which means that it can legally resort to tariffs, in other categories of goods, for example, as a retaliatory measure. This is maintained as a bargaining tool for HK - WTO Secretariat HK Trade Policy Review 2002 Report by the Secretariat WT/TPR/S/109, pp. 19-24 table III.2.

with third parties. In this HK considers that the present rules can not ensure the consistency of RTAs with WTO rules and therefore have to be made clearer and stricter.

Thirdly, HK attaches relevance to the review of the Dispute Settlement Understanding (DSU) in order to improve it, namely by enhancing the rights of third parties, although HK practice has been contradictory. This derives from the fact HK's use of the dispute settlement mechanism is very rare as will be demonstrated below.

In a second level of priority we find the issues of trade facilitation and transparency. Here HK is at the forefront of the debate, given the credentials and innovative work it has developed in APEC in the late 1990s regarding the "Nine principles" on transparency. HK supports the principle of transparency in government procurement policies, laws, regulations, procedures, crucial to create a fair and predictable market environment and foster competition as well as the conclusion of a multilateral agreement on transparency in government procurement. In addition, HK supports a simplification and reduction of trade procedures, which can enhance efficiency in trade and reduce costs not only for business but also for consumers and governments

In contrast, there are areas that attract little attention on the part of HK. Among the most important issues in the DDA, HK has little enthusiasm for two issues, trade and environment and competition issues. On competition HK disagrees with the idea that a horizontal competition policy and a global competition law are needed, contrary to the EU position, arguing that competition policy is sector specific and that the existence of an open economy exposed to external competition is sufficient to ensure it<sup>414</sup>.

Finally, as mentioned earlier, HK has absolutely no interest in agriculture which is somehow a non-issue for HK. The fact HK has no agricultural sector clearly enhances HK's impartial image and facilitates its ability to play a bridge role, exactly what the SAR is currently performing between the US, the Cairns Group and the EC.

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<sup>414</sup> See discussion in the 1998 Trade Policy Review session WT/TPR/M/52, pp. 160 - 166

### **HK's participation: formal and informal levels**

This set of priorities explains the pattern of participation of the HKSAR in WTO institutional bodies. Actually, HK's participation occurs at two different levels: the formal institutional structures; the informal negotiation groups, the so-called "groups of friends" which are specific to the culture of GATT/WTO, introducing an important element of flexibility inside the organisation that goes beyond traditional UN groupings.

On the formal level, HK participates actively in several sectoral committees and working groups in accordance with the set of interests mentioned above. HK's participation covers all the three main areas of WTO activities: goods, services and intellectual property.

In the area of trade in goods HK participates in the Council for Trade in Goods and has particular interests in some of the bodies operating under the Council namely the Committees on market access, anti-dumping practices, subsidies and countervailing measures, *rules of origin* and TRIMS and obviously in the Textiles Monitoring Body which supervises the implementation of the 1995 Agreement on Textiles and Clothing.

In services HK participates actively in the Council for Trade in Services and has a particular interest in some of the bodies under it, namely the Committee on Trade in Financial Services and the working party on GATS rules.

As far as intellectual property is concerned, HK participates in the Council on TRIPS. This is the area where HK progress was slower towards meeting WTO standards and has used developing countries' preferential treatment to benefit from a transition period.

## **The Dispute Settlement Mechanism**

Besides the participation in bodies concerned with sectoral negotiations HK participates in a horizontal area, the Dispute Settlement Mechanism (DSM)<sup>415</sup>. This new system is a structural and fundamental mechanism to secure the enforcement of WTO rules and to ban unilateral action thus limiting arbitrary exercise of power by the powerful and protecting the weakest members.

Despite the relevance of this mechanism to strengthen WTO, paradoxically HK's participation in the DSM has been minimal. In fact, since 1995 there is not any complaint filed against HK and more significantly HK has not requested the creation of any panel against other members, with one single exception, a complaint against Turkey in 1996.

This is a very relevant case to understand HK's policy regarding dispute settlement. The complaint was about the quantitative restrictions imposed by Turkey on textile and clothing products as a consequence of the conclusion of a customs union agreement with the EC. HK claimed this constituted a violation of GATT articles XI and XIII and requested consultations, the first stage of the mechanism, which were effectively held<sup>416</sup>. HK's motivation was not only to react to unilateral action that directly damaged its interests, but also to pursue a systemic concern related to the consequences for third parties of RTAs, and the need to clarify art. XXIV implications.

The consultations did not settle the dispute but HK decided not to pursue the case and did not request a panel. The situation is even more bizarre as HK decided to participate as a third participant in a panel established in March 1998 to settle the dispute between India and Turkey following a complaint presented by India on exactly the same question<sup>417</sup>.

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<sup>415</sup> This mechanism to settle disputes was set up by the Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes in all areas of the Uruguay Round package.

<sup>416</sup> WTO/DS29 case Turkey-restrictions on imports of textile and clothing products WT/DS/OV/5 p.47.

Subsequently India has explicitly criticised HK on this matter complaining there was no information about the outcome of the HK-Turkey consultations and considered this "... served to undermine the efficacy of the DSU and the multilateral trading system...urge HK, China to appropriately rectify the situation"<sup>418</sup>. It is interesting to look into the reasons why HK decided not to confront directly Turkey in a panel but instead indirectly, through another WTO member panel where the same issue was being discussed.

I would argue that although the uncertainty on whether the panel would rule in favour of HK might have played a role, the real and decisive explanation is more complex and less visible. What is at stake is HK's fear of a potential hostile bilateral response or a "retaliation measure" on the part of the EC which was strongly involved in this dispute<sup>419</sup>. This case clearly illustrates the reluctance of HK to be directly involved in open disputes with other WTO members. The fact HK did not requested the creation of panels does not result from the absence of violation of rules that affect HK interests but rather from a deliberate policy not to use the mechanism, although not assumed by HK which justifies its conduct with the absence of complains by firms back in HK<sup>420</sup>.

The key point is that HK, as a non-sovereign entity fears the potential damaging effects of open confrontation with sovereign states for two basic reasons. Firstly, because of the power gap and greater vulnerability of HK as it lacks the means of retaliation, including political ones, which states possess and can use against the SAR outside the context of WTO. Secondly, the systemic concern that HK's involvement in many disputes could damage the image of impartiality and thus undermine the SAR's ability to perform the bridge builder role, one of the pillars of its status in WTO.

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<sup>417</sup> The panel was established on 13.3.1998 and decided in May 1999 in favour of India. HK participated as a third party – WTO, DSR 1999, vol VI, pp. 2095-2556, HK statement p. 2351.

<sup>418</sup> WTO, Trade Policy Review, HK China 1998, WT/TPR/M/52, p.158.

<sup>419</sup> Interview with HK ETO officials in Geneva, 18.11.2002.

<sup>420</sup> Interview with Stuart Harbinson, 20.11.2002.

In this context HK's option is for a low profile. The maximum it has done was to be involved as a third party in some panels but even so in only four cases<sup>421</sup>. Interestingly, HK's justification has been the "systemic relevance" of the cases and not its own interests, thus suggesting that the sole motivation is to uphold the system, namely the consistency between RTAs and WTO in the Turkey-textiles case or the DSM in the US-301 Section case. The DSM clearly creates a dilemma for the HKSAR, between using the system whenever necessary to enforce rules and uphold WTO on the one hand, and the performance of a bridge builder role, on the other. This tension has been so far resolved in favour of the second objective.

The HKSAR not only participates actively in these bodies but plays also a leading role being regularly elected Chairman of some of them. Since 1997 the HKSAR has been the Chairman of 6 main bodies, including the Committee on Technical Barriers to Trade (1997), the Council for Trade in Services (1999), the Dispute Settlement Body (2000), the General Council (2001), the Committee on Agriculture Special Session (2002) and the Committee on Budget, Finance and Administration (2003). In this period HKC was among the top ten WTO members, being the second most elected member to perform high level functions after France (7), with 6 elections, a similar record as Costa Rica, and ahead of high profile members like Canada (5), Japan (5), New Zealand (5), Brazil (4) or Korea (4)<sup>422</sup>. This is clearly another manifestation of HK's high profile in WTO and the inherent recognition by the other WTO members.

### **Informal dimensions**

In parallel with the participation in institutional bodies, there is another important dimension of HK's participation, more informal, related to its involvement in various "groups of friends". These are informal groups organised around a specific issue and composed of members that share similar interests and positions and try to co-ordinate their action in order to enhance their bargaining power in the formal negotiation process.

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<sup>421</sup> HK has participated as a third party in the following panels, the majority against the US: (i) the US-Shrimp WT/DS58, DSR 1998 vol VII pp. 2753-3324; (ii) Turkey-textiles and clothing WT/DS 34, DSR 1999 vol VI pp.2095-2556 ; (iii) US-Section 301-310, DSR 2000, vol II pp.573-1185, HK's arguments pp. 1068-1077 (iv) US-Byrd Amendment.

These groups, which are specific to GATT/WTO culture, introduce an important element of flexibility insofar as their composition is variable and cuts across the traditional rigid groupings in the UN system, bringing often together developed and developing countries. This flexibility presents an important advantage for a non-sovereign actor like HK and helps the SAR managing the tensions arising out of its dual identity.

There are many informal groups, probably one of the best known is the Cairns Group, an heterogeneous alliance of 17 countries, involving OECD, middle-income, and even Least Developed Countries, from 4 continents, with a common goal: press for agricultural trade liberalisation.

Naturally HK is not involved in this group given the absence of interests in the agricultural sector, but participates actively in as many as 14 “groups of friends” in five different areas<sup>423</sup>, including: the Anti-Dumping friends group<sup>424</sup>; the group on Trade Facilitation, the so called Colorado Group<sup>425</sup>; the group on Non-Agricultural Market Access, integrating the pro-liberalisation core group<sup>426</sup>; the group on Transparency in Government Procurement<sup>427</sup>; and various groups on Services, such as financial services or maritime transport<sup>428</sup>. In the Services area HK has played a particular leadership role by taking the initiative to organise the groups on audiovisual, MFN exemptions and GATS-art VI.

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<sup>422</sup> WTO, Press Releases WTO Chairpersons 1997-2003 [www.wto.org/english/news\\_epr97.03e.html](http://www.wto.org/english/news_epr97.03e.html).

<sup>423</sup> HK ETO in Geneva, interview on 18.11.2002.

<sup>424</sup> This group involves influential members of WTO such as Brazil, Chile, Israel, Korea, Mexico, New Zealand, Norway, Singapore, Thailand, Turkey and Chinese Taipei and basically takes a position against the US policy on anti-dumping.

<sup>425</sup> This group includes the Quad members, Australia, Chile, Costa Rica, Hungary, Korea, Morocco, New Zealand, Norway, Singapore and Switzerland.

<sup>426</sup> This core group includes besides HK Australia, New Zealand and Singapore.

<sup>427</sup> This group involves the EC, Canada, Japan, the US, Australia, Hungary, Czech Republic, Korea, New Zealand, Norway, Poland, Singapore and Switzerland.

<sup>428</sup> The HKSAR is a member of a total of 10 groups of friends on Services, including financial services, telecommunications, maritime transport, aviation, logistics, audiovisual, computer and related services.

## **Perceptions on HK's participation and contribution to WTO**

HK's high profile and contribution to WTO has been acknowledged by the other WTO members. This recognition is implicit in HK's involvement in the core centre of decision-making or on its election to chair major bodies of the Organisation. Moreover, there has been an explicit recognition of HK's role on the occasion of the periodic evaluations of HK's trade policy carried out under the trade policy review mechanism<sup>429</sup> in which a large number of WTO members are involved. Both positive aspects and criticisms are expressed in the reviews, thus providing a comprehensive and balanced view of WTO Members' perceptions on HK.

So far HK has been subject to four reviews, two before the handover, in 1990 and 1994, and two after the handover, in 1998 and 2002. The two most recent reviews deserve particular attention. Overall both projected a highly positive assessment of HK's trade policy and of its role in WTO. An in-depth analysis of the minutes of discussion and the statements of members and discussants allow us to capture a more accurate overview of the dominant aspects of WTO members' perception on HK's membership.

Firstly, HK is seen as a key supporter of the multilateral trade system highly committed to the primacy of WTO as expressed in the concluding remarks of the Chairperson of the 1998 Review<sup>430</sup>, and in the statements of various members with very heterogeneous profiles such as India, the EC and Canada<sup>431</sup>. Besides stressing the exemplary implementation of WTO commitments in various areas, members also noted the efforts made by HK to improve its record in less strong areas such as protection of intellectual property rights, by taking steps to implement the TRIPS Agreement, or by acceding to the WTO Agreement on Government Procurement.

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<sup>429</sup> The Trade Policy Review Mechanism is a product of the Uruguay Round, approved on a provisional basis and later made permanent as an annex to the WTO Agreement (annex 3).

<sup>430</sup> WTO, Trade Policy Review, HK, China, 1998 WT/TPR/52, p. ix.

<sup>431</sup> WTO, WT/TPR/52, pp. 156-159.

Secondly, HK is seen to set the example and exercise leadership in WTO by being a “free trade champion”<sup>432</sup> and one of the most open and liberal economies in the world<sup>433</sup>. However, there are also some points of criticism, weak aspects in relation to which HK is seen as not fully meeting WTO standards. This was the case with the import regime of two products, fish and rice, which have some import controls and therefore constitute an exception to openness<sup>434</sup>, and the consideration that the current level of “bound tariffs” is low and therefore it was felt that HK should make further progress in terms of binding more its industrial tariffs<sup>435</sup>, although it was recognised that HK does not apply tariffs in practice.

Thirdly, there is a sense that HK is a model member to be emulated by other WTO members not only because it is a free trade practitioner, but also because of its non-confrontational attitude towards other members. Interestingly, HK was seen as a model, a “perfect WTO member” because it has no conflicts with other members and “its recourse to the dispute settlement mechanism was rare” as expressed by the first discussant during the 1998 Review<sup>436</sup>. In the same session India expressed an opposite view, considering that HK’s non-use of the DSM is a negative sign likely to undermine WTO.

However, there are a few exceptions to this model role, three areas in relation to which WTO members have expressed concerns. This is the case of trade and competition, where some members, particularly developed members<sup>437</sup> consider that HK’s resistance to adopt a general competition law, cartel law or any mechanism to sanction restrictive business practices, do not guarantee a full competitive environment. Another less robust area is intellectual property rights, where issues of enforcement are still seen as problematic, despite the progress made by HK, in particular the issue of copyright

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<sup>432</sup> The expression was used in the context of the 1998 Review by Hungary which stated that HK was “one of the most committed champions of free trade” WT/TPR/M/52, p.157.

<sup>433</sup> WTO, TPR, HK, China, 2002, concluding remarks by the Chairperson [www.wto.org/english/tratop\\_e/tpr\\_e/tp208\\_crc\\_e.htm](http://www.wto.org/english/tratop_e/tpr_e/tp208_crc_e.htm).

<sup>434</sup> WTO, Trade Policy Review 1998, WT/TPR/M/52, p.151 (comments by Mr. Yoichi Suzuki).

<sup>435</sup> See TPR 1998, WT/TPR/M/52 p.163 and TPR 2002, the concluding remarks of the Chairperson.

<sup>436</sup> Teije Johannessen statement in the discussion WTO, WT/TPR/M/52, p.149.

piracy<sup>438</sup>. The third area of concern is the environment where HK is not perceived as a very committed member to uphold sustainable development as a major goal of the trade system<sup>439</sup>.

In the context of the 1998 and 2002 reviews, the role of HK as a bridge builder in WTO was not explicitly mentioned. However, several influential countries tend to recognise HK's role as a broker, a member that takes in many occasions a middle ground position and helps moving things forward in a pragmatic way, fundamentally because it does not stick to rigid positions and does not have neither an ideological bias nor strongly politically motivated positions<sup>440</sup>. The "political-neutral HK" emerges clearly as a powerful image in WTO Members' perception of HK.

This consensual positive perception of HK's role is an important factor to uphold HK's autonomy and the maintenance of a high profile. WTO members recognise HK's separate identity and its condition as a full member of WTO, with exactly the same rights and obligations as any other member. The non-sovereign nature is not seen as posing any obstacle or constraint to HK's participation.

However, I would argue that, contrary to WTO members' perception and formal WTO rules, which grant formal equal status to sovereign and non-sovereign members, there are some substantive differences. HK's lack of sovereignty generates indeed some limitations to its participation in WTO.

Firstly, the non-use of the DSM, as noted earlier, is to a certain extent explained by the concern to avoid direct confrontations with sovereign members. This is partly a consequence of the lack of sovereignty and the fact HK does not possess the political

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<sup>437</sup> The criticisms were expressed by Japan, the EU and the two discussants in the context of the 1998 Review WT/TPR/M/52 , pp.150-166.

<sup>438</sup> WTO Secretariat 2002 TPR, WT/TPR/S/109, p.47. This concern was also voiced by the US and Japan in the 1998 TPR, WT/TPR/M/52, pp. 154-156.

<sup>439</sup> See the First discussant comments 1998 Review, Mr. Terje Johannessen, WT/TPR/M/52, p.149.

<sup>440</sup> This was explicitly recognised by India, interview with V.P.Haran, 20.11.2002, by Japan, interview with Shingo Yamagami, 20.11.2002, and by Brazil, interview with Vera Thorstensen, 18.11.2002. The

bargaining and means to respond to the risks of retaliation or hostile action by states with which HK has a trade conflict.

Secondly, HK faces limitations in terms of its involvement in more political aspects of WTO's institutional life. One example is the admission of new members, an area that tends to be highly politicised because some powerful members have blocked in the past, and will continue to block in the future, the accession of some candidate members for political reasons, as a way to gain political leverage in a complex bargaining that goes beyond WTO. China's accession provides a good example when we consider the attitude of the US in the accession process. In this context HK restrains itself from being involved. It is highly unlikely that we see HK either giving strong support or opposing the admission of a specific candidate<sup>441</sup>. Another example is the fact it is almost impossible for HK to aspire to a candidature to the post of Director-General given the heavy requirements of political backing and alliances involved, even though it is a big trader and an influential member. So, HK faces a practical obstacle to exercise its right to present its own candidate to Director-General.

Thirdly, HK's participation in sectoral negotiations involving political issues is also constrained by its non-sovereign condition. This would be the case with issues such as the control of trade of strategic goods, issues related to labour standards and fundamental rights or aspects of the foreign investment regime with sovereignty implications.

The analysis of WTO members' perception suggests there is an informal code of political-neutrality for HK which is positively valued by WTO but which imposes a structural constraint on HK. The SAR is aware that the violation of this code would bring about harmful consequences for its status and weaken its influence in the organisation. China's accession is likely to have a significant impact and further

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same view was expressed by the former deputy Director-General of WTO, Andrew Stoler, interview on 18.2.2003.

<sup>441</sup> This hypothesis was tested with Stuart Harbinson who recognised the existence of limitations because of HK's lack of sovereignty – interview on 20.11.2002.

contribute to strengthen this code and reduce HK's "room for manoeuvre", as will be analysed below.

### **5.3. HK's INTERACTION WITH MAJOR PLAYERS**

The contribution of major external actors to the sustainability and consolidation of HK's external autonomy has been stressed in the previous chapter. The WTO experience provides an opportunity to look at the practical interaction of HK with the US, Japan and the EC and see whether there is a strategy of alignment with external players.

#### **The US**

The dominant aspect of US-HK relationship in WTO is the active advocacy of trade liberalisation and free trade at the global level. This shared goal together with the fact HK is an active advocate and practitioner of free trade principles, accounts for the American interest in interacting with HK both in WTO and other *fora* like APEC and the recurrent declaration that the SAR is a natural and the most reliable US partner in pursuing that goal.

Despite the convergence of positions in relation to global liberalisation and the philosophy of the international trading system, the US-HK relationship is also marked by contradictions. In fact we can find both areas of convergence and divergence between the two.

As far as convergence is concerned, services are a crucial area where HK and the US hold similar positions supporting further liberalisation. But even here, there is disagreement on some specific issues, namely the US insistence to maintain some MFN exemptions in services while HK wants its full elimination, and divergences over maritime transport in relation to which the US has a more conservative position. Similarly, HK's resistance to open up professional services markets is also a cause of criticism by the US.

The areas of divergence are numerous and of considerable significance. The area of greater divergence, where the US and HK held completely antagonistic positions is anti-dumping. HK considers that the US has an unacceptable position and is, in practice, undermining the advances in trade liberalisation and WTO rules taking with one hand what it had given with the other.

Secondly, although both agree with the free trade principle, they have different views on the method to achieve it. Whereas HK supports the idea of primacy of the multilateral system as key to achieve free trade and sees many risks in RTAs, the US attaches more relevance to regional liberalisation. In fact, Washington has promoted since the end of the Cold War a complex network of FTA Agreements seen as crucial to achieve the economic goal of free trade but also a political goal, the creation of security and stability, somehow substitutes for the old bilateral defence treaties.

Divergence also includes tariffs, textiles, competition and some institutional matters. On this last area, it is relevant to refer to the DSM and the divergence over opening the system to the participation of external civil society actors, namely NGOs, in the panels through the submission of the “amicus curiae briefs”. The US supported this change and played a pivotal role in specific cases such as the “Shrimp-Turtle” and “Carbon Steel” panels and in the General Council debates<sup>442</sup>, while HK took a conservative position and opposed this change and other ideas of direct participation of civil society in WTO<sup>443</sup>.

## **Japan**

As far as HK-Japan interaction is concerned the dominant aspect is the fact both share a strong commitment to the primacy of WTO as the priority organisation for their

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<sup>442</sup> WTO, “United States – imposition of countervailing duties on certain hot-rolled lead and Bismuth Carbon Steel products originating in the UK” Report of the Appellate Body WT/DS138/AB/R of 10.5.2000, para. 38. Also US support for greater transparency in WTO dispute settlement WT/GC/W/413 of 11.10.2002 and Rev.1 of 13.10.2000.

<sup>443</sup> “External Transparency, General Principles” communication from Hong Kong, China WT/GC/W/418 of 31.10.2000.

international participation. Japan's limited international political voice led Tokyo to elect WTO as the most important forum to build its international influence. The similarity with HK strategy shows how far sovereign and non-sovereign members may share in practice similar constraints in terms of their participation in the international system.

As a consequence of this concern with WTO primacy, both HK and Japan converge in terms of adopting a critical approach to RTAs as a potential threat to WTO. Recently HK adopted a more flexible position but the basic concern remains valid and therefore the SAR advocates with Japan and others the need to clarify and tighten up the rules of article XXIV of GATT. There is also convergence in relation to services, as both support liberalisation and oppose MFN exemptions<sup>444</sup>.

On the divergence side we find some areas. One is competition in relation to which Japan supports the idea of creating multilateral rules of competition and adopts an active stand, although more moderate than the EC, while HK opposes any specific measure. Divergences exist also in the areas of investment and TRIMS, namely with respect to the question of national treatment where HK has a more liberal attitude, and on environment where Japan supports the clarification of the relationship between trade and environmental rules with a view to ensure the consistency between the two.

### **The EC**

The relationship between HK and the EC in WTO is particularly interesting given the similarities as they share two important features. Firstly, both are non-sovereign members and so, as noted earlier, exceptional cases in the multilateral trading system. This condition creates expectations of closer co-operation not necessarily in sectoral negotiations where positions are dictated by specific interests, but in horizontal matters related to the philosophy of the Organisation, its institutional setting and opening up to

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<sup>444</sup> Council of Trade in Services, Minutes of Meetings, S/C/M/39 of 15.10.1999, pp. 5-11, S/C/M/45 of 18.8.2000, and S/C/M/54 of 27.8.2001, pp.1-2.

the participation of other non-sovereign actors to prevent an excessive governamentalisation and resolve the “legitimacy gap”<sup>445</sup>.

Secondly, the EC like HK is a non-typical and unique international actor profoundly characterised by its dualism in external relations: in economic and commercial matters, “low politics” areas, the EU acts with a single voice in a coherent and cohesive manner under the co-ordination of the Commission; in political, security and defence matters, “high politics” areas, the EU lacks co-ordination and coherence and is hostage of divergent interests of Member States. As a result the EU has a dual and contradictory identity as an external actor, being in low politics a robust and credible actor, a characteristic HK shares, but a weak and non-robust actor in “high politics” areas.

In this context WTO is a priority forum for the EU, just like for HK, insofar as it is a space where the EU can affirm and consolidate its international identity and project its soft power. Moreover, given its overall external relations framework, the EU tends to adopt a political neutral approach and resist any trend of politicisation of WTO, considering that it is, and should remain, a strict economic forum<sup>446</sup>.

This common ground is a structural aspect that influences the EC-HK relationship. However it is not the only one. The unique historical ties between HK and the EC, with no parallel with any other major player, is a second structural factor. In fact since 1971 and until 1986 HK has participated in the GATT integrated in the EC delegation and consolidated its own identity in the multilateral trading system by marking the difference with the EC. As a consequence, historically relations between HK and the EC were tense and problematic, almost as a “family row”, and this contributed to keep the two members apart for long periods. The relationship improved in recent years<sup>447</sup>, partly

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<sup>445</sup> Rubens Ricupero, “Rebuilding confidence in the multilateral trading system: closing the “legitimacy gap”” in Gary Sampson (ed), The role of the World Trade Organisation in Global Governance, United Nations University Press, New York, 2001, pp. 37-58.

<sup>446</sup> Interview with Carlo Trojan, EC Representative to WTO, Head of the Commission’s Office in Geneva, on 19.11.2002.

<sup>447</sup> This was recognised both by Stuart Harbinson, former HK Permanent Representative, and by Carlo Trojan, EC Permanent Representative, in the interviews held on 20.11.2002 and 19.11.2002 respectively.

as a result of HK's sound and moderate positions and partly as a consequence of the handover.

There is a convergence between HK and the EC on a number of areas, particularly in services (both support liberalisation although with some divergences in relation to the audio-visual sector in relation to which the EC is more protectionist and MFN exemptions) in trade facilitation (supporting simplification and transparency of trade regimes and administrative procedures) and in government procurement and transparency. There is also convergence on some aspect of institutional matters, particularly on the election of the Director General and the role and preparation of Ministerial Conferences.

In contrast, there are important areas of divergence. The most significant one is competition policy in relation to which HK rejects the foundations of such a policy, a position strongly criticised by the EC. Furthermore, the traditional areas of divergence remain, such as textiles, tariffs and RTAs while new areas emerged, namely on investment, environment and some aspects of the institutional format, mainly in relation to the external transparency issue supported by the EC but opposed by HK.

The question of external transparency is particularly relevant in the analysis of the EU-HK relationship. The central question is whether WTO should open up to the participation of NGOs and other actors, or should be kept closed. Being two non-sovereign members, one would expect they could develop a special relationship in systemic matters and converge in opposing a state-centred perspective, as their interests would lay in greater participation of other non-sovereign actors likely to dilute the sovereignty element and enhance their positions.

Contrary to expectations, HK and the EC adopted divergent positions. Surprisingly, HK held a rather conservative position and objectively supported a statist perspective, which

rejects the idea of opening up the WTO to NGOs' participation<sup>448</sup>. There was an important debate on external transparency E-Transparency, in the General Council in November 2000, where HK opposed the direct participation of NGOs and civil society organisations in WTO because of the "risk of politicising the operations of the Organisation"<sup>449</sup>. HK draw a clear distinction between enhancing transparency to civil society and making provisions for their direct participation, and considered that the adequate level for dialogue with the civil society is the domestic context of each Member.

The EC took a different position, closer to the idea of increasing E-Transparency, although less affirmative than other OECD countries, like Canada, which proposed opening WTO trade policy reviews to external observers<sup>450</sup>, or the US. However, the EC recognised that the monopoly of government in setting the international trade agenda no longer existed, thus implicitly suggesting this should have implications for the WTO operation<sup>451</sup>.

A related question was the debate on the possibility of submission of *amicus curiae* briefs by NGOs in the DSM and their participation in the judicial body of WTO. Following the decision of the Appellate Body to admit *amicus curiae* briefs in the case of "EU-Asbestos" (WT/DS 135) and to establish a procedure to consider briefs by private individuals or groups, a special meeting of the General Council discussed the matter in November 2000<sup>452</sup>. HK took a position against both the procedure and the admission of the briefs, arguing that the admission was a substantive issue and therefore the Appellate Body had no competence to decide on this, only members could do so. In addition, it rejected the possibility of NGOs involvement in the dispute settlement on the basis that this would give non-members more rights than members that are not parties or

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<sup>448</sup> Steve Charnovitz, *Trade Law and Global Governance*, Cameron May, London, 2002, pp. 516-529. The author contrasts this statist view with the individualist perspective as the two sides of the debate.

<sup>449</sup> WTO: External Transparency – General principles, communication from HK China Doc. WT/GC/W/418 of 31.10.2000, p.2.

<sup>450</sup> WTO External Transparency, Informal paper by Canada, doc. WT/GC/W/415 of 17.10.2000, pp.1-2.

<sup>451</sup> Pascal Lamy, Speech on "WTO Challenges confronting the world trade system today", in *European Foreign Affairs Review* -, Nov 8, 2000.

<sup>452</sup> WTO General Council, Minutes of Meetings, WT/GC/M/60 of 23.1.2001.

third parties to the dispute at the same time this would “create an impossible burden on developing countries members” who could not respond to large number of briefs submitted because of time and resources constraints, putting them at a disadvantage<sup>453</sup>. On this question HK expressed a similar position to developing countries, namely Brazil, India and Egypt.

In contrast, the EU although conceding that the decision had to be made by Members, clearly stated that a re-negotiation of the DSU agreement was needed to change the rules given that “...a civil society had a clear interest in some issues relating to the work of WTO and in particular to that of the Dispute Settlement Body...”<sup>454</sup>. The EU favoured the admission of briefs together with Canada, the US, the most active supporter of this change since 1999. This constitutes a change in the EC position. In fact, in 1999 the EC coincided with HK’s position and opposed the admission of briefs by the Appellate Body in the US-Carbon Steel case, considering NGOs intervention as “inadmissible” and contrary to WTO rules<sup>455</sup>. The Asbestos case marked the turning point as the EC, against whom the complaint was made, changed its mind and submitted two briefs attached to its submission to the Panel.

HK’s current conservative position and objective support to the “statist perspective” is in striking contrast with HK’s earlier positions. Long passed are the days when HK dared to propose London that a member of HK industry should attend GATT negotiations together with a HK official. As time went by and HK consolidated its position as a full member of GATT/WTO, it seems to have lost the will to push for changes and be at the forefront of institutional innovation. Somehow, we can argue that HK has been infected by the “sovereignty logic”, accepting to be an exception and unique actor in an organisation dominated by states, rather than attempting to subvert that logic and promote the extension of its own status to other non-sovereign players, including NCGs and NGOs.

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<sup>453</sup> WTO General Council, Minutes of Meetings, WT/GC/M/60 of 23.1.2001, pp. 5-7.

<sup>454</sup> Ibidem, pp. 24-26

<sup>455</sup> WTO, Report of the Appellate Body, WT/DS/138/AB/R para.36

On NCGs there is an interesting discussion in WTO on trade rules implementation in the context of Federal States. On this the EC and HK share the same position: that WTO rules bind not only Central Federal Governments but also sub-national governments, federated states, otherwise WTO rules could be easily circumvented. The question of subsidies is one of the concerns because subsidies granted by a NCG to firms, although less visible, violate exactly in the same way WTO rules as subsidies granted by the Central Government. Recently in the debate on transparency and government procurement, HK, together with the EC, Norway, Malaysia and Switzerland, argued that rules of transparency should apply not only to Central levels of Government but also to sub-national levels otherwise a considerable part of government procurement would escape the rules. An opposite view was expressed by Brazil, Indonesia, Mexico, India and Egypt that considered the scope of the agreement should be limited to federal governments thus allowing for more flexibility<sup>456</sup>.

One can understand that sovereign states, particularly developing countries, have resisted NGO participation because they fear this can weaken their position, not only because national NGOs can challenge the coherence and unitary nature of the state position, but above all, as putted by Brazil, because the change would further strengthen the position of strong states whose NGOs are better funded and more able to exert influence, thus widening the gap between weak states with weak NGOs and strong states with strong NGOs<sup>457</sup>.

However, the factors that account for the paradox associated with HK's support to the statist view are certainly different and less obvious. I would argue that there are three different reasons behind HK's option. Firstly, resistance to change. If HK has done well in the current system of a closed WTO, there is no pressure to change which necessarily involves uncertainty and risks. Secondly, HK fears that opening WTO will negatively affect and diminish its role as a bridge builder as the negotiation process would become

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<sup>456</sup> Working Group on Transparency and Government Procurement, Minutes of Meetings, WT/WGTGP/M/10 of 1.8.2002 pp. 4-5.

more complex and above all more politicised, thus creating constraints to HK's participation.

Thirdly, and probably the most important reason, there is a reaction of the elite bureaucracy that has controlled HK's external participation since the 1960s, which fears that the participation of HK NGOs, even business associations or professional groups, would challenge its monopoly and weaken its power basis.

Being two major players in WTO the EC and HK maintain relevant and intense relations. However, contrary to expectations and despite historical links, HK has not a special relationship with the EC<sup>458</sup>, even in areas where their common non-sovereign nature would suggest a greater articulation of positions would be possible. In other words, HK relates to the EC in the same way it relates to other major players such as Japan or the US.

In sum, the analysis of the pattern of relations between HK and major players leads us to reach two important conclusions. Firstly, bilateral relations reveal a common pattern: HK has both points of convergence and divergence with each one of the three actors, in different matters.

Secondly, because of this pattern HK is not aligned with any of the major players in WTO, on the contrary follows a "variable geometry" approach which contributes to consolidate its image as an independent player. This explains why HK is sometimes called upon to play a broker role between some of these major players, such as recently between the US and the EC in the context of the negotiations on Agriculture.

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<sup>457</sup> WTO, General Council, Minutes of Meetings, WT/GC/M/60, pp.11-12. Interesting enough Brazil's view seems to confirm Keohane and Nye argument on the co-operative relations between states and non-state actors mentioned in chapter one.

<sup>458</sup> Interviews with Carlo Trojan, 19.11.2002, and the Geneva HK ETO officials on 18.11.2002.

The argument put forward is that this substantive autonomy in relation to the three major players is as important as the autonomy in relation to the sovereign power for the affirmation and sustainability of HK's identity, credibility and influence in WTO.

#### **5.4. HK'S AUTONOMY AND CHINA'S ACCESSION**

The main challenge for HK's autonomy and its sustainability in WTO has not been the handover as expected but is, and will be, China's accession to the Organisation.

##### **The handover impact**

The impact of 1997 on HK's status and participation has been minimal. Besides a few formal changes such as the name, changed to HK,China, there was by and large continuity in terms of policy and even personnel. The best symbol was the fact that an expatriate, Stuart Harbinson, remained until 2002 the HKSAR representative, a strong sign of continuity that reinforced the confidence of, and reassured other WTO members.

It is true that in the first months after July 1997 there was some scepticism about HK's capacity to remain autonomous and freely determine its trade policy. WTO members kept HK under close scrutiny, looking for signs of China's interference, i.e. co-ordination with the PRC mission in Geneva or a change in HK's positions in WTO. As time went by, and in the absence of hard evidence, the suspicions started to dissipate and gradually WTO members began to believe that "one country, two systems" was really working.

This probation period lasted for some time. The key moment that marked the end of this transition was the Third Trade Policy Review, in December 1998, when WTO members collectively recognised that there were no changes in HK trade policy and that HK was

effectively autonomous in its definition, as clearly stated in the statements of the “Quad” members and several developing countries<sup>459</sup>.

This overall picture of continuity does not mean there were no changes at all. Changes did occur in HK’s attitude and strategy although they were less visible. As a result of the handover and because of the initial scepticism of other WTO members, HK felt, more than ever, a greater pressure to constantly demonstrate that its autonomy remained untouched and it was in control of decisions and could pursue its own interests. This produced two side effects.

Firstly, the intensification of HK’s participation in WTO recognised as the anchor of its autonomy and international identity, namely through a greater investment in its bridge builder role also facilitated by the launching of a new round of trade negotiations.

Secondly, and paradoxically, the reduction of its participation in other UN bodies, in particular UNCTAD and the World Health Organisation. This is an interesting process by which the affirmation and preservation of HK’s autonomy in WTO in the post-1997 circumstances was made at the expense of its participation in other international organisations.

In fact, after 1997 HK has avoided as much as possible participating in meetings of UN bodies where it participates integrated in the Chinese delegation<sup>460</sup>. This is explained because of the concern that the sharp contrast between WTO, where it has a separate identity and enjoys ample autonomy, and other organisations, might undermine its autonomy in WTO insofar as this dualist status is not only embarrassing but can also confuse other WTO members and fuel misperceptions. The risk is even greater in

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<sup>459</sup> WTO, HKC TPR 1998, WT/TPR/S/52. The Chairperson summarised WTO members’ assessment “...there is no indication that HK’s traditional openness to trade and foreign investment has been affected by reunification and as such the present economic regime may be broadly characterised as business as usual” (p.xix). The US statement went as far as to recognise that “the concerns prior to the handover that the system of openness, predictability and transparency might be compromised had proved to be groundless” (p.153). In the same line, the EU, Japan and Canada praised HK for the continuity of its trade policy and several developing countries, like India and Turkey expressed similar views (pp.155-159).

<sup>460</sup> This phenomenon was pointed to me by Geneva HK ETO officials, interview on 18.11.2002.

Geneva because in general the same diplomats cover simultaneously WTO and other UN economic organisations. In other words, HK has been concerned to avoid that its lack of autonomy in intergovernmental organisations restricted to states could “infect” its status in WTO and undermine its autonomy and credibility.

The decline of HK’s participation in UNCTAD, an organisation with close links with WTO where HK used to be active, is probably the best example and represents a clear cost HK had to pay in order to preserve its autonomy and image in WTO. This clearly demonstrates that HK has been faced with trade-offs between quantitative and qualitative participation and tended to resolve them in favour of quality and at the expense of quantity.

### **China’s accession to WTO**

More than the handover it is China’s accession to WTO in December 2001, after 15 years of hard negotiations, that creates the most important challenges for the SAR’s autonomy in WTO. We will see then what challenges the interaction with China might generate for HK’s substantive autonomy in WTO.

Since December 2001 there is a completely new and unprecedented situation for HK. In fact for the first time ever HK has to interact with the sovereign power in WTO as a full member and equal partner. It should be recalled that as a consequence of Britain’s accession to the EEC in 1972, the UK did not have a separate voice and an autonomous participation in GATT, which meant that HK never had to deal directly with the conflict of interests and divergences with the sovereign power. Moreover, the dilution of the UK in the EC delegation was one of the crucial factors behind the affirmation of HK’s own identity and autonomy in GATT as argued earlier. After 1997, because the PRC was not yet a member of WTO there was no change in the situation. The absence of the sovereign power for more than 30 years has been an exceptional circumstance which has undoubtedly made life easier for HK and facilitated the consolidation of its autonomy.

This has now changed and the context in which the HKSAR has to operate is substantially different and more complex. The complexity is further aggravated if we add another factor, the importation into WTO of the political confrontation concerning China's reunification as a consequence of Taiwan's accession in January 2002. Taiwan adopted a strategy of open confrontation with the PRC to affirm its political separation and tried to use WTO as an entry point to other UN organisations, namely WHO, and expand its international status.

The HK-China interaction in WTO will be a crucial test to the robustness of HK's autonomy and demonstrates that challenges to autonomy do not arise solely from deliberate actions and violation of rules in the context of the HK-PRC relationship, but might result from factors related to the mere HK-China interaction in the international system, beyond their control, which can affect autonomy even though autonomy rules are respected.

HK has been very careful to show independence whenever possible and to exercise its autonomy by adopting positions different from China. This concern has existed since the handover and during the last phase of China's accession negotiations. It partly explains the fact that, contrary to expectations, HK did not play a direct and active role in China's accession, either providing advice to the PRC or supporting actively China's bid inside WTO<sup>461</sup>, clearly showing it did not want to be seen as an instrument of China's policy. The other key reason was the fact China did not request support, despite HK's solid know-how and experience of WTO, given the tensions and suspicions in relation to HK and Governor Patten in the last phase of the pre-handover period<sup>462</sup>.

However, I would argue that despite this apparent no role, HK did play an indirect role in China's accession although it was not the result of any deliberate action. The fact China has respected HK's autonomy status and the JD has certainly created confidence

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<sup>461</sup> This was confirmed by the former HK Secretary for Trade and Industry, Chau Tak hay, interview on 18.12.2001 and by Stuart Harbinson, interview on 20.11.2002.

in WTO members and proved China could be a responsible member of the international community. So, the post-handover SAR experience has been a good test of China's ability to comply to its international obligations and contributed to China's credibility indirectly facilitating the approval of the PRC's accession<sup>463</sup>.

The experience of interaction between the SAR and China in WTO is very recent and so it is too early to reach conclusions about its impact on HK's autonomy. Nevertheless, so far there were no signs of major constraints to the SAR autonomy. The coexistence and interaction between HK and the sovereign power has been useful to demonstrate in practice that they have both differences and common positions in different areas and, above all, that their trade and economic interests are not coincident.

In fact, as far as the positions of HK and China on the key issues are concerned, there are three different situations. Firstly, areas of convergence, particularly textiles and anti-dumping issues. Secondly, grey areas of indefinition where China is still in the process of decision and has not yet taken a definitive position, like investment or competition, and therefore it is impossible to know whether HK and the PRC positions diverge or converge. Thirdly, areas of divergence particularly on industrial tariffs and services, where China is less liberal, and interestingly in some institutional issues. One case in point has been the procedures for appointment of future WTO Director-Generals, discussed in late 2002 in the General Council. The first point of disagreement was that while China wanted a system of rotation between developed and developing countries to the post, HK considers rotation is not the best system because it introduces rigidity and can prevent WTO from picking the most able person to run the Organisation. The second point of disagreement was on the preferred voting method as a last resort solution in case no consensus is reached. China supported a simple majority method while HK preferred a system of qualified majority  $\frac{3}{4}$  or double majority, on the basis

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<sup>462</sup> Recently there were signs of change in attitude as China has taken advantage of HK's expertise by privately hiring retired HK high officials with great expertise of WTO like the case of Chau Tak Hay hired by MOFTEC as a consultant in mid-2002.

<sup>463</sup> The negotiations on China's accession were concluded on 17.9.2001 when the 18<sup>th</sup> Meeting of the WTO Working Party on China approved all remaining issues. Later the Doha Ministerial Conference

that the Director General requires the widest possible support to perform its role and the fact the prospect of a simple majority could discourage WTO members from seeking consensus in the first place<sup>464</sup>.

These areas of divergence are of strategic importance for the HKSAR insofar as they are a clear demonstration of HK's own specific identity and substantive autonomy in relation to the sovereign power. Moreover, this is the last frontier to HK's autonomy in the sense that the ultimate test to its robustness is exactly whether HK will be able to maintain a divergent position dictated by its own substantive interests and oppose Beijing's position, when an issue of fundamental importance for China is at stake.

The short experience of HK-China interaction in WTO also reveals that there have been no formal co-ordination meetings or initiatives between the two aimed at building common positions, contrary to what some observers could expect<sup>465</sup>. The dominant aspect has been "separation" rather than "co-operation". HK held only, from time to time, informal talks with the PRC, namely on services and anti-dumping, to exchange ideas just like with any other WTO member. For HK the priority has been the preservation of its separate identity.

The expression of views similar to China on specific issues is not in itself a factor likely to weaken autonomy. HK's position and policy are well known in WTO and asserted well before China's accession. In this context the convergence is likely to be seen as a coincidence and not interpreted as an expression of HK's getting closer to China, if anything it will be the opposite, China seen as converging with HK's long established positions. Only in extreme cases where HK would adopt a position similar to the PRC but in contradiction with HK's policy in WTO, could other WTO members perceive the change as being induced by China and reflecting an erosion of HK's autonomy.

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ratified on 10 November China's accession to WTO and China signed the Protocol the next day becoming officially a member on December 11, 2001 after 14 years of negotiations.

<sup>464</sup> Interview with Geneva HK ETO officials on 19.11.2002 and 7.3.2003.

<sup>465</sup> Interview with Geneva HK ETO officials on 19.11.2002.

From the above account it is possible to conclude that so far HK's autonomy has not been limited by China's accession. Probably the only exception has been HK's low profile and silence in the monitoring process of China's compliance with accession obligations, which suggests that HK felt practical limitations in criticising directly the sovereign power performance<sup>466</sup>. Even so this had a minor impact because WTO members did not expect HK would play a key role and so its silence has been seen as understandable<sup>467</sup>.

In this context it is possible to argue that in some respects China's accession and interaction with HK can have a positive impact on autonomy insofar as it provides an excellent opportunity for other WTO members to become more aware and get a more vivid picture of the differences between HK and China positions, experiencing first hand the practical manifestations of HK's autonomy.

However, China's accession and HK-China interaction present also potential risks for HK's autonomy in the long run. There are three main potential constraints.

Firstly, the impact of the Taiwan factor and the limitations HK is likely to face in terms of its relations with Taiwan or any issue involving Taiwan in WTO. There are several areas of convergence with Taiwan, but HK knows it will have to be very careful given the sensitiveness of PRC-Taiwan relations and the politicisation strategy adopted by Taiwan inside WTO. In other words, HK will be constrained in its relations with a specific WTO member and is not free to have the same kind of relationship it has with any other member. Up to now HK has interacted with Taiwan and there have been no signs of concern or tension on the part of China. However, a considerable convergence of positions with Taiwan in the future would certainly raise Beijing's eyebrows.

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<sup>466</sup> There is a limit to silence. If HK keeps permanently silent on China's implementation of obligations and does not react if things go wrong, this might affect HK's credibility. There is a potential dilemma for HK: be passive in order to prevent tensions with China and loose credibility and seen as lacking autonomy; or be more vocal and risk conflicts with the sovereign power.

<sup>467</sup> Interview with the EC Representative, Carlo Trojan, on 19.11.2002.

Secondly, China's announced strategy to WTO might compete with and reduce HK's "room for manoeuvre". China defined that the core of its strategy to gain influence in WTO is the performance of a broker role between developed and developing countries in WTO<sup>468</sup>. This means China has appropriated part of HK's agenda and is planning to perform exactly the same function HK has been performing for the last two decades in WTO. This option, clearly inspired in the SAR experience, implies China is going to be a competitor for HK's space, which might weaken one of the fundamental bases of the SAR's influence, indirectly eroding autonomy. Of course it is still uncertain whether China will be able to attain that goal. Initial conditions are not very favourable because China is still too engaged and identified with developing countries and therefore lacks at present the required impartiality to perform effectively that role. For the moment, HK has a strong comparative advantage and is better positioned to play this broker role, but conditions might change in the future.

Thirdly, the impact of China's accession might have also negative indirect implications for HK in terms of potentially contributing to limit HK's participation in the core decision-making centre, translated in a decline in HK's involvement in the "green room" mechanism. Because of China's big trader status, weight and trade engine potential, it is already considered to be one of the key players in WTO and is rapidly being integrated in the "green room" group as a permanent participant.

The risk for HK is that, because the "green room" is restricted and there is a concern to avoid over expansion and representation and keep it within manageable limits, the SAR might get less often invited to the "green room" as other members might feel that as China is already there HK's interests are being taken care of<sup>469</sup>. The possibility that other WTO members might play down HK autonomous voice and think it is enough to have China in the inner circle, can clearly reduce HK's role and influence in WTO in the long

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<sup>468</sup> This goal was mentioned by the PRC Ministry of Foreign Affairs official, interview on 4.12.2001. Some statements of PRC Foreign Trade Minister, Shi Guangsheng, pointed out implicitly in that direction, for example the speech of 10 November 2001

[http://english.mostec.gov.cn/article/200211/20021100050101\\_1.xml](http://english.mostec.gov.cn/article/200211/20021100050101_1.xml).

<sup>469</sup> This potential effect was discussed with Stuart Harbinson, interview on 20.11.2002, who admitted this was a possible scenario which somehow could concern the HKSAR.

run, which in turn will contribute to erode HK's autonomy and influence at a more global level given the significance of WTO for HK's international status.

Yet, there is a variable that can influence or even reverse this scenario: China's own attitude. If China decides to uphold HK's autonomy, even for the sake of its international image and credibility, and press for HK to continue to be involved in the inner circle, then it might sustain the process and prevent other WTO members from eroding HK's autonomy.

This is probably the most important and structural challenge to HK's autonomy. Contrary to expectations it does not derive from any direct deliberate intention or deviant behaviour on the part of the PRC to restrict HK's autonomy, but rather from the mere presence and the sheer size and influence of China in the international trade system. Interestingly, there would be a potential decline in substantive autonomy although formal autonomy remained intact, caused by third countries actions and not by the sovereign power.

Finally, there is a potential risk factor outside WTO, which can have a significant impact on HK's autonomy in WTO, related to the process of economic integration between HK and the PRC. This process received a major impulse with the presentation of a proposal in late 2001 for the creation of a Free Trade Area between HK and the Mainland, known as the "Mainland-Kong Kong Closer Economic Partnership Arrangement" (CEPA).

This was an initiative of HK's business sector, which was then formally presented by the HKSAR Government to the CPG in Beijing. Consultations started in early 2002 and it is already clear that the FTA arrangement will be comprehensive covering trade in goods, trade in services and trade and investment facilitation<sup>470</sup>. It should be noted that the engagement of HK in FTA negotiations with China and also with New Zealand,

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<sup>470</sup> IKSAR Report to the 2002 TPR, WTO, WT/TPR/G109pp. 11-12.

represents the most important change in HK's trade policy since the handover, translated in a more flexible and open-minded attitude in relation to RTAs<sup>471</sup>.

The negotiation and eventual signature of an agreement with China can be seen as strengthening the exercise of formal autonomy powers. However, an opposite effect can also be produced. In fact, the risk for HK is that this closer economic integration raises doubts in WTO members' minds about the effective degree of autonomy enjoyed by HK in defining its trade policy. The problem is twofold. Firstly, this might be seen as potentially calling into question HK's status as a separate customs territory, the substantive basis for its separate membership of WTO. Secondly, if the FTA induces an even greater dependence of HK on China's market and reduces the level of diversification of HK's economic relations leading potentially to a decline of international ties<sup>472</sup>, there will be a perception that HK's substantive autonomy is inevitably affected. So, the way HK manages the CEPA process and balances ties with China with international ties, is critical to see whether HK's autonomy status in WTO will be eroded or not.

In sum, this chapter addressed HK's participation in WTO where HK enjoys a very special status being the only NCG, together with the MSAR, that is a member of the Organisation. Four fundamental conclusions emerge from this analysis.

Firstly, HK's lack of sovereignty, despite the formal equality with sovereign WTO members, implies some vulnerabilities and practical limitations to HK's participation, namely its de-politicisation. HK responded with two different but complementary strategies: developed a dual identity which enable HK to become a systemic bridge builder between states helping to create common ground and moderate conflicts;

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<sup>471</sup> WTO, 2002 TPR, HK, China, WT/TPR/G/109 p.11, para 41. The first FTA process in which HK got involved was with New Zealand whose negotiations started in May 2001.

<sup>472</sup> Some observers have criticised HK's strategy of closer integration considering that HK is not becoming a "world city" as the Chief Executive announced but risking of becoming another Chinese city. Gordon Chang argued that closer integration is a "loser's game for HK" Far Eastern Economic Review, 30.1.2001. The US has also expressed concerns through the statements of the former US Consul General, Michael Klossen, speech at the American Chamber of Commerce of 6.6.2002 ([www.usconsulate.org.hk/cg/2002/060601.htm](http://www.usconsulate.org.hk/cg/2002/060601.htm)).

unconditional pro-system stand, being the most active supporter of the primacy of WTO and multilateral rules, which generated widespread recognition and prestige.

The performance of these two roles was not automatic or cost free, HK had to mobilise resources and people to do that, which generated trade-offs between the performance of public interest functions and the pursuance of its own interests. Furthermore, the performance of these public interest functions is an important element of HK's legitimacy basis as an international player.

Secondly, HK is an influential member of WTO. For that it has used its economic power and big trader status but also a sophisticated combination of other sources of influence which include technical expertise, the access to the informal "green room" core decision-making circle, rigorous compliance and enforcement of multilateral rules and most importantly, the performance of a systemic bridge builder role between developed and developing members.

Thirdly, the existence of a "variable geometry" matrix of positions and the non-alignment with major players is a crucial ingredient to uphold HK's autonomy and preserve its image of neutrality. In this context it seems that the preservation of substantive autonomy requires not only autonomy in relation to the sovereign power, but also autonomy in relation to dominant actors in the international system.

Fourthly, the major challenge to HK's autonomy in WTO is China's accession and not the 1997 handover, which did not bring about any significant change. Historically, the consolidation of HK's autonomy and robust status in GATT and WTO were greatly facilitated by the absence of the sovereign power as an autonomous player. China's accession changed the context and created an unprecedented situation where the SAR has to interact directly with the sovereign power and carefully address their mutual differences. The most significant potential risk for HK's autonomy in WTO is associated with the possibility of HK's gradual and invisible exclusion from the inner circle of

decision-making, an outcome which does not result from China's purposeful action but rather from China's sheer size and influence and the own dynamics of the WTO process.

## CHAPTER SIX

### THE HONG KONG CASE AND NCGs IN THE INTERNATIONAL SYSTEM: COMPARATIVE ANALYSIS AND DISCUSSION OF RESEARCH RESULTS

This chapter is concerned with the discussion of the research results and evidence provided by the case of HK trying to contrast them with the experience of other NCGs analysed in the literature. This comparative perspective allow us to better capture the significance of the HK case to understand the role of NCGs in the international system, namely whether it is an exceptional case marked by unique circumstances which can not be replicated or, on the contrary, provides elements to understand the dynamics and implications of a wider phenomenon.

The analysis focus on five main aspects: (i) the genesis of the process of emergence as international autonomous players and the factors that facilitated it (ii) the institutionalisation of external relations; (iii) the pattern of relations with the Central Government (iv) the attitude of the international community and the legitimacy basis of NCGs international activities; (v) the impact of their action on the international system and implications for their future role as international players in the context of globalisation.

#### 6.1. ORIGINS AND FACILITATING FACTORS OF NCGs' EMERGENCE AS INTERNATIONAL PLAYERS

As far as the origins of the process of NCGs participation in the international system are concerned, the HK case is clearly a relevant one insofar it is a pioneer among NCGs. HK's external activities started in the early 1960s being the critical benchmark the May

1961 London negotiations with the US on textile exports restrictions. This was followed by a series of bilateral negotiations with various OECD countries regarding voluntary restrictions of cotton textiles exports and the signature of bilateral agreements under the Long Term Textile Arrangement, as analysed in chapter two.

However, HK was not the only pioneer, there is an interesting parallel with another NCG, Quebec, which started also to be active internationally around the early 1960s, following the famous 1960 meeting with De Gaulle, marking the start of a special relationship with France and the subsequent creation of representative offices in Paris (1961) and London (1962). Yet, these were exceptions because the majority of NCGs started to be internationally active in the late 1970s and 1980s with the acceleration of the phenomenon of economic interdependence and globalisation. In the cases of Catalonia and Greenland there was also an important political change in the late 1970s critical to explain the beginning of their international activities, the granting of domestic autonomy status: the 1979 “Estatut de Autonomia” of Catalonia<sup>473</sup>, a consequence of the Spanish transition to democracy; the 1979 Home Rule Act by which Denmark granted autonomy to Greenland and changed the status of the colony.

As far as the origins of the emergence of NCGs as international players are concerned, the HK case is consistent with the analysis carried out on the causes of paradiplomacy, associated with the process of globalisation and the interplay between two processes “from within out” and “from without in”, combining external and internal factors.

In the case of HK the critical factor was a major conflict of interests with Britain on trade combined with the emergence at the international level of protectionism against textiles on the part of major OECD importers. In this context Britain had no conditions to defend HK interests against arbitrary measures adopted by third countries. This combination of internal and external factors led HK to go international, in order to defend its textile industry and ensure the survival of its economy.

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<sup>473</sup> The statute of autonomy was approved by Lei Orgânica 4/1979 of 18 December.

Yet, because HK was motivated exclusively by economic objectives, it distances itself from other NCGs, such as Catalonia or Quebec, for whom political factors and the affirmation of specific cultural identities were the main driving force.

On the economic front, HK confirms the importance of globalisation as a causal factor of paradiplomacy but introduces a new perspective. While in general the literature sees paradiplomacy as a defensive response of NCGs to minimise potential negative effects of globalisation, the HK case shows there is another side where paradiplomacy results from a more proactive strategy in the context of which NCGs take advantage of opportunities.

This is associated with the process of regional clustering and the creation of SMEs clusters. Globalisation of economic activity has coexisted with an apparently competing tendency, the localisation of industries and comparative advantages<sup>474</sup>. HK has supported the emergence of sectoral clusters<sup>475</sup> (like other NCGs such as Baden-Wurttemberg, Catalonia or Emilia Romagna), which are a major basis of HK's economic power and competitiveness in the global economy. In this context paradiplomacy becomes a complementary instrument of the development of clusters and affirmation of their competitiveness in the global economy. It is no coincidence that the most active NCGs correspond to the most prosperous regional clusters, showing that NCGs are placed at the intersection between globalisation and localisation.

Furthermore, the HK case reveals the importance of an historical factor that has been neglected in the literature but is important to understand the emergence of paradiplomacy, in particular why it was tolerated by some Central Governments. This factor is the historical precedent of the British Dominions which after WWI, and until independence in 1931, gained limited autonomy in the sphere of foreign affairs, as

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<sup>474</sup> OECD, Enhancing SME Competitiveness – the OECD Bologna Ministerial Conference, 2001.

Background paper for workshop 2, Michael Enright and others, pp. 115-150. One of the fundamental explanations of the importance of localisation is that, unlike information, knowledge and innovation requires face-to-face interaction and geographical proximity. Globalisation made information diffusion at long distances easier and cheaper, but did not change the nature of the diffusion of knowledge which is the basis of innovation, in turn the key factor of competitiveness.

mentioned in chapter two. These were the first cases of non-sovereign public entities that were allowed to act in the international system. This precedent is extremely important to understand why London tolerated and did not react strongly against HK's *de facto* international participation in the early 1960s and why Britain granted informally powers for HK to negotiate and sign commercial agreements on its own in 1969.

I would go further and argue that the Dominions precedent was also important to explain the paradiplomacy of other NCGs, in particular the cases of the Australian States and the Canadian provinces, since Australia and Canada were exactly former Dominions. This effect was certainly important in the emergence of Quebec in the international system insofar as Ottawa demonstrated some flexibility and tolerated the creation of autonomous representative offices from 1961 onwards and a closer relationship with France, including the signature of the 1965 Franco-Quebec cooperation agreement on education<sup>476</sup>. This would not have been possible in the absence of such a precedent.

There is an interesting commonality between HK and the Quebec, the two pioneers, in the sense that for both the beginning of their direct participation in the international system was clearly facilitated by the Dominions precedent. In other words, I would argue that the British de-colonisation policy is a crucial factor in the emergence of the phenomenon of paradiplomacy and paved the way for NCGs international participation by introducing an element of flexibility in the international system. Britain helped to set these new rules that allowed non-sovereign governments to act internationally. Furthermore, because Britain was then a big power and a dominant player the rules were not disputed and got accepted by the international community.

However, the analysis of the emergence of HK as an international player reveals also interesting differences with the majority of NCGs in three different respects.

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<sup>475</sup> Enright et all., The Hong Kong Advantage, Oxford University Press, New York, 1997, pp. 95-107.

<sup>476</sup> The importance of the Dominions precedent in relation to Quebec is recognised by Jean Cloutier, "Le Québec à l'étranger" in L'Action Nationale vol 85 – n 8, Oct 1995, pp. 204-205.

Firstly, the genesis and consolidation of the process of HK's participation in the international system was led and implemented by the HK elite bureaucracy starting with the seminal contribution of John Cowperthwaite. As argued in chapter two, in the beginning the bureaucracy responded to the pressure of the business community but later it took external affairs in its own hands as an autonomous project and an instrument to consolidate and legitimise its power.

This critical role played by the bureaucracy has no parallel among NCGs. In the vast majority of cases paradiplomacy was launched and led by politicians and the political elite of specific regions, either the Prime Ministers of Quebec, the President of the Generalitat of Catalonia, Jordi Pujol or the former Premier of Greenland Home Rule Government, Johnathan Motzfeld. The absence of elected politicians and a political elite in HK until the late 1980s accounts to some extent to the specificity of HK's experience. In any case the hypothesis that paradiplomacy is strongly associated with democratic states and presupposes the existence of elected local politicians is only partially challenged by the HK case. In fact, although HK's emergence as an international player was not led by democratically elected politicians there was still a democratic element insofar the sovereign power, Britain, was itself a democracy.

In this context, the HK case suggests that the bureaucracy can be more innovative and less conservative than generally believed, thus questioning some of the assumptions of the "bureaucratic politics" model. Moreover it proves that bureaucracy is not an unitary actor, relations between different levels of bureaucracy within the state, namely the divergence of interests between central and local bureaucracies, have to be looked at in order to understand the process of foreign policy and its articulation with paradiplomacy.

In addition, although the experience of other NCGs highlights the importance of the "personalisation" of external affairs and the leading role of politicians that give a face to it internationally, the HK case shows that in order to be a robust and effective international player, the role of local politicians might not be sufficient. The existence of a dynamic and competent bureaucracy is also a key condition for success, not only

because of the direct support it provides to politicians, but also because of the strategic ties it creates with central bureaucracies of foreign states. In other words, the HK case points to the need to have a right mix between “personalisation” and “institutionalisation” of external affairs. Although during the transition period HK achieved a good balance between the two, the irony is that in the post-handover period the balance was broken as the “personalisation” dimension has declined and HK started experiencing the negative effects of not having a strong face to represent and speak for it internationally. The challenge for HK now is to try and re-establish that balance.

Secondly, from the outset HK’s paradiplomacy has been almost exclusively concentrated in relations with foreign states in distant continents. As a consequence HK practised “global paradiplomacy” and relations with other NCGs have been, and still are, marginal. This contrasts with the great majority of NCGs which started by developing “transborder regional paradiplomacy” involving relations with other NCGs from neighbour countries and later evolved into “transregional paradiplomacy”, with NCGs from distant countries. By and large this is still the dominant dimension of their external relations, even though in some cases elements of “global paradiplomacy” and relations with states have also emerged.

For example, Catalonia started by cultivating relations across the border with the French regions of Languedoc-Roussillon and Midi-Pyrenees, which has resulted in the creation of the Euroregion Catalonia/Languedoc-Roussillon/Midi-Pyrenees and later expanded its relations to other NCGs in Latin America, US, Eastern Europe and Asia. Of the total bilateral agreements signed by Catalonia with public foreign entities between 1983-1999, 82% were signed with other NCGs and only 18% with states<sup>477</sup>. Greenland has also strong links with a limited number of NCGs, concentrated in Nordic countries and Canada (Quebec, and Northwest Territories) and a few bilateral agreements with 3 states, Canada, Russia, and Norway restricted to the fishing sector. Quebec is a slightly

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<sup>477</sup> Interview with the Director General for Relacions Exteriors of the Government of Catalonia, Joaquim Limona, on 22.11.1999. Between 1983-99 there were 44 agreements signed with other NCGs such as Quebec, Baden-Wurttemberg, Province of Buenos Aires, states of California, Massachussets, Florida and

different case as it has a greater balance between transregional and global paradiplomacy. Quebec's paradiplomacy was built on the relationship with a single state, France, which is still today the first pillar of its international strategy, and later with the Francophone states. In parallel the Quebec has developed an extensive network of relations with other NCGs which until the mid-1990s accounted for around 50% of Quebec's bilateral agreements<sup>478</sup>.

In contrast, HK has not explored so far, with the exception of some US states, the horizontal paradiplomacy, i.e. relations with other NCGs. This is undoubtedly a deficit area and constitutes an interesting opportunity for the HKSAR to further develop its external relations for two reasons. On the one hand, it provides an opportunity for HK to strengthen its position in the globalisation process given the fact that many of these NCGs are powerful economic actors and represent the interests of some of the most dynamic clusters in the global economy. On the other, this is an opportunity for HK to add value to China's foreign policy and be more relevant to national objectives.

Thirdly, the dominant and critical instrument in the genetics of HK's international participation has been the exercise of "treaty making powers" which has simultaneously contributed to build HK's international personality. The experience of other NCGs is in general different. The *jus tractatum* has been the least accessible and more problematic instrument. The Quebec started to affirm its external autonomy by creating external representations in the early 1960s. The exercise of treaty making powers was seriously restricted. Even the most important international agreement signed by Quebec, the 1965 Franco-Quebec education agreement, was an exception for many years and led Ottawa to dilute its significance by signing an "umbrella agreement" with France to cover Quebec-France relations<sup>479</sup>. Similarly, the creation and action of representative offices, economic and trade offices, was also the critical instrument for the emergence and

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Illinois and various French regions, and only 9 agreements with 7 states, Israel, Japan, Mexico, Tchec Republic, Tunisia, Marroco and Argentina.

<sup>478</sup> Ministry of International Relations of Quebec, "Le Quebec dans un ensemble international en mutation- plan strategique 2001-2004"

<sup>479</sup> Belanger, T. " La politique étrangère québécoise" in Alain Gagnon (ed) Quebec - Etat et Societe, Editions Quebec, Quebec, 1994. pp. 255-281.

consolidation of Catalonia's international participation, with its COPCA offices<sup>480</sup> on the basis of a strong partnership between the Government and the business sector, as well as for Greenland with the offices in Ottawa and Brussels.

HK's experience of a relatively intense and continuous exercise of treaty making powers, initially in external commercial matters and later in areas such as legal and juridical matters, has a major implication insofar as it contributed to build a dense international personality involving a large and diversified set of international rights and obligations, a crucial pillar of a robust international status. In contrast, many NCGs still have a precarious and fragile international personality<sup>481</sup>.

## **6.2. INSTITUTIONALISATION OF EXTERNAL RELATIONS**

For the large majority of NCGs the early stages of international participation is a non-structured, open-ended process where there is neither a specific institutional structure to deal with, nor a strategy for external relations. HK was not an exception and so its international participation was initially based on "ad hoc" initiatives that lacked coherence. In a second phase there was an effort to promote the institutionalisation of external relations by defining some rules and procedures and creating permanent instruments like external representations. The dominant feature of this fragile institutional system to deal with external relations is its decentralised nature, reflecting the circumstance that various government departments in different areas develop external actions according to their specific needs, and the absence of any co-ordination body.

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<sup>480</sup> In 2000 Catalonia had a total of 33 offices of the Consorci de Promoció Comercial de Catalunya (COPCA) in all continents, the majority in Europe (14) and Asia (9), including one in HK and another in Beijing. The COPCA is a partnership between the Generalitat of Catalonia, the Chambers of Commerce, Industria y Navigacion de Catalunya and sectoral industrial and exporters associations – interview with Joaquim Limona on 22.11.1999.

<sup>481</sup> The precarious nature of Quebec's international personality was openly recognised by the former Minister of International Affairs, Bernard Laundry, one of the main architects of Quebec's external relations, in his speech of 12.10.1995 "La personnalité internationale du Québec: bilan et perspectives" Ministry of International Relations, Quebec (no reference).

In HK the system has been largely decentralised involving an active intervention of three main bodies: the Chief Secretary, the Financial Secretary and the Secretary for Trade and Industry. From the late 1980s onwards the Governor also became increasingly active in external affairs. This was also the dominant model for other NCGs like Quebec and Catalonia which had decentralised systems. However, they introduced earlier than HK, changes in the system in the direction of a more centralised model, which could ensure greater coordination of external activities. The Quebec created in 1985 the Ministry of International Relations in an attempt to improve coordination and structure a policy, but in spite of these efforts, coordination is considered to be poor<sup>482</sup>. Catalonia has also created in 1997 a Directorate General for External Relations under the Presidency of the Government with exactly the same objectives of attaining greater co-ordination and coherence in external action.

This trend has manifested itself in HK more recently with the new CAB competencies, but as argued earlier, coordination is rather limited, with the focus put on “negative” co-ordination and with a predominantly internal orientation. This leads to the conclusion that the system remains in essence decentralised with some attempts to introduce elements of central co-ordination.

This demonstrates how far NCGs are concerned with the costs of the lack of co-ordination and coherence of their external action. Consequently, they are trying to respond to the pressures for greater coherence, brought about by the increasing complexity of the international system in the globalisation era. It is true that sovereign states are also struggling with similar difficulties. However, I would argue that because of its non-sovereign nature, the lack of coherence in external action is more costly and problematic for NCGs than for states because the former have no formal legal basis to legitimise their international participation and therefore have to conquest that legitimacy by proving their capacity and effectiveness.

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<sup>482</sup> Luc Bernier De Paris a Washington – la politique internationale du Quebec, Presses de l’Universite du Quebec, 1996, p. 28

The analysis of the HK case reveals also an important difference in the institutional system. In general NCGs have created a specialised bureaucracy to deal with external affairs, a diplomatic corps, thus importing the conventional state model. In contrast, HK does not have a specialised body of diplomats as the management of external relations is carried out by the generalist bureaucratic elite, according to a rotation between performance of external representation posts followed by domestic posts and vice-versa. This enabled HK to enjoy several benefits: (i) ensure greater coherence between the external and domestic plans because those who lead government departments have international experience and those posted abroad know the technical dossiers and domestic priorities (ii) have a group of international negotiators and representatives with a greater technical expertise than traditional diplomats which has been instrumental for HK to assert its influence, (iii) reduce the level of conflicts between sectoral departments that act externally which tend to undermine the effectiveness of external action as a result of a more integrated and holistic view of HK's interests.

Because the elite bureaucracy rotates between domestic and external posts as well as between different domestic departments, they have a more holistic view of the Administration, which makes co-ordination easier to achieve. In this context, because of the "rotation system" the absence of a formal mechanism of co-ordination of external affairs in HK has been less problematic than for other NCGs. To some extent the rotation system constitutes an in-built informal mechanism which helped attaining reasonable coherence in external action. The HK experience seems relevant to other NCGs the more so as efforts to create a specialised bureaucracy have proven not very successful in terms of improving co-ordination and coherence.

Finally, the HK experience reveals, in line with other NCGs, the excessive governmentalisation of external affairs and the deficit of civil society involvement in the debate and decision-making on paradiplomacy. As mentioned in chapter four, the absence of a think-tank on international affairs in the HK institutional system is worth noting. This is clearly a handicap for NCGs and places them at a disadvantage in relation

to states for two basic reasons. Firstly, because it limits the possibility of NCGs to participate in “track-two” initiatives which are increasingly useful to address conflicts and tensions internationally. Secondly, because it means HK has no instrument to reflect on a long-term perspective on the evolution of the international system and its own future position in it.

Interestingly, the role “think-tanks” can play in strengthening NCGs capacity to act internationally and introducing innovation in paradiplomacy, starts slowly to be recognised by some NCGs, namely by HK’s civil society, Quebec<sup>483</sup>, and Greenland. Catalonia went as far as to create recently in 2001 a group of specific “think-tanks” to deal with various regions, the Mediterranean and Asia<sup>484</sup>. In spite of this progress it is clear that although NCGs are non-sovereign players they experience barriers and problems of dialogue and articulation with civil society on international affairs similar to those experienced by Central Governments.

### **6.3. RELATIONSHIP BETWEEN NCGs AND CENTRAL GOVERNMENTS**

The pattern of relations between NCGs and Central Governments in international affairs is a key factor that influences the level of NCGs’ autonomy in external affairs. In general the literature on paradiplomacy considers that conflict is the dominant feature of these relations but recognises there is also a pattern of co-operation, as discussed in chapter one. For the great majority of NCGs these are not really alternatives as in practice conflict and co-operation tend to coexist although in different proportions in different NCGs. Even in the context of the most conflitual relationship, Quebec-Ottawa, there are manifestations of co-operation, either moments of greater flexibility, such as in the mid 1980s which produced the 1985 agreement for Quebec’s participation in the

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<sup>483</sup> Ministry of International Relations of Quebec, “Le Quebec dans un ensemble international en mutation- plan strategique 2001-2004” pp.54 -57

<sup>484</sup> The “Casa de Asia” and the “Institut Europeu de la Mediterrània” were created in 2001 as a consortium between the Government of Catalonia, the Barcelona City Council and the Spanish Ministry of Foreign Affairs and combines both catalan specific interests and spanish global interests with respect to Asia and the Mediterranean regions (<http://www.casaasia.org/index2.html> ; [www.iemed.org/cmenuis.htm](http://www.iemed.org/cmenuis.htm))

Conference of Heads of State and Governments of the Francophonie, or areas where a more co-operative behaviour exists such as immigration.

The HK case is not completely consistent with this analysis for various reasons and introduces new elements into the debate.

Firstly, the relation of HK with the sovereign power has been shaped by a very special circumstance which can not be replicated in the cases of other NCGs, the transfer of sovereignty from one sovereign power, Britain, to another sovereign, China. In this respect HK experience is rather unique. This process produced two fundamental effects, which have been highly beneficial to the affirmation of HK's external autonomy. On the one hand, the competition and mutual control between the outgoing and the incoming sovereign powers produced a loosening of central control allowing more room for HK to expand its external activities. Moreover, the retrocession led the outgoing sovereign power to proactively support the expansion of HK's international status and autonomy as a "security" mechanism in relation to the risks of violation of HK's domestic autonomy by China in the future. This is absolutely unprecedented in the relations between Central Governments and NCGs.

On the other hand, the specific nature of the transference of sovereignty led to an internationalisation of HK's transition and a considerable international interest for, and monitoring of HK's external autonomy to check whether the PRC respected the rules. No other NCG has ever seen its own relation with the Central Government being subject to such an intense international scrutiny by key players in the international system. This has clearly helped HK protecting its sphere of external autonomy.

Secondly, the existence of a formal and relatively detailed regulatory framework for the relations between HK and the Central Government on international affairs is an innovation that differentiates HK experience from that of other NCGs.

HK's initial experience in the 1960s and 1970s was similar to the standard experience of NCGs: it developed a *de facto* autonomy in limited areas but in violation of constitutional rules that conferred Britain the full control and monopoly over foreign affairs. HK was clearly a trespasser that started to develop some "illegal" international activities, tolerated by London.

However, since 1984 with the JD, later developed by the BL, the relations between HK and the Central Government in international affairs started to be regulated by a set of written rules which recognise HK's autonomy and ability to act internationally on its own in specific areas (art.151 BL). As a result, HK was granted the stronger and most developed *de jure* external autonomy status among NCGs, which contributed to close the gap and reduce the contradictions between the practice and outdated formal rules.

It is interesting to note that, for many NCGs, the persistence of rigid formal constitutional rules lacking realism, flexibility and denying them autonomy to act externally at odds with practice, is a fundamental cause of conflict with Central Governments.

In the case of Catalonia, the Spanish constitution considers all international relations as being of the exclusive competence of the Central Government (art. 149 no.1(3)). The wide scope of this definition creates considerable constraints to the external activities of the "Comunidades Autonomas" and led the Constitutional Court to consider it excessive and to introduce some flexibility by adopting a more restrictive concept of international relations, closer to the idea of foreign affairs<sup>485</sup>. Interestingly, the Court has recognised the legitimacy of external action of the Comunidades Autonomas in certain circumstances and tried to set the limits of such action. In addition, the Statute of

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<sup>485</sup> The fundamental decision was the Constitutional Court ruling regarding the establishment of an external representation office of the Basque Region in Brussels which Madrid considered a violation of art. 149.1 (3) of the Constitution. The Court ruled against the Central Government and admitted that in order to fulfill their functions the Comunidades Autonomas "might have to carry out activities outside the Spanish territory". The Court has also set the limits of the Comunidades' external action: it cannot imply the exercise of treaty making powers; origin obligations towards foreign states or affect the foreign policy of the State; create responsibilities for the State in relation to other states; the exercise of *jus legationis*". See STC 165/1994, 26.5.1994 (Pleno) in BCJ 158 (1994).

Autonomy does not recognise any autonomy to Catalonia to act externally and deals only marginally with international affairs foreseeing that Catalonia can ask Madrid for central authorities to negotiate international agreements on cultural relations with foreign states where Catalan communities reside<sup>486</sup>. This framework has generated recurrent tensions between Catalonia and Madrid, with other organs of the state attempting to moderate conflicts.

Similarly, in the case of Greenland foreign affairs are reserved to the sovereign power, Denmark. The Home Rule Act<sup>487</sup> did not recognise Greenland any capacity to act on its own internationally. The most it did was to create some co-operative procedures to accommodate Greenland interests in Danish foreign policy: Greenland has to be consulted before treaties likely to affect its interests directly are concluded by Denmark (section 13); the possibility to integrate Greenland officials in Denmark embassies (section 16.1); the possibility of Greenland to participate in Danish delegations to international negotiations (section 16.2); the possibility of Greenland to be given a specific authorisation by the Central Government to negotiate directly international agreements (section 16.3). This last aspect, involving the possibility of delegation of powers to exercise treaty making powers, although exceptional and granted on a case by case basis, is clearly the most important power attributed to Greenland with similarities with the HK experience.

There have been tensions between Greenland and Denmark on foreign affairs, namely in security and environmental affairs (whaling), leading Greenland political parties to request a change in the Home Rule Act in order to grant greater autonomy in foreign affairs and security matters. A particularly controversial issue has been the contradictions regarding the use of the Thule Base in Greenland by the US and its integration in the American National Missile Defence plan. Greenland opposes this project and has prevented Denmark from giving the green light to Washington, thus

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<sup>486</sup> Article 27 of the Statute of Autonomy of Catalonia.

<sup>487</sup> Greenlandic Home Rule Act, Act no. 577 of 29.11.1978 approved by the Danish Parliament.

showing its autonomy and capacity to influence Denmark foreign policy decisions in relation to a highly visible “high politics” international question<sup>488</sup>.

The case of Quebec is slightly different and more complex because the 1867 Canadian Constitution is silent and does not regulate the question of external affairs and the division of competencies between the Federal Government and the Provinces, as it was then still under British sovereignty. There has been a high level of conflict between the Quebec and Ottawa on this issue. The main basis Quebec has used to legitimise its external action has been the “Gérin-Lajoie doctrine”<sup>489</sup>, according to which all international action is justified by the logic of external extension of domestic competencies. This is a legal construction that has arisen out of the necessity to tackle the problem of the absence of any formal rules and constitutes certainly the most ambitious formulation of the scope of external autonomy<sup>490</sup>. There is an interesting parallel with the debate in HK as the position supported by some sectors that external autonomy could in principle match internal autonomy is nothing less than the application of the Gérin-Lajoie doctrine.

This construction is rejected by the Canadian Central Government. A clear demonstration of the high level of conflict reached, is the fact that the Central Government has actively obstructed Quebec’s initiatives and done what it could to undermine Quebec’s strategy, for instance by blocking the opening of representative offices, by prohibiting the creation of a general delegation in Washington, by pressuring foreign governments not to interact with Quebec or by trying to dilute its status in international *fora* supporting other Canadian Provinces to participate in the same *fora*<sup>491</sup>.

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<sup>488</sup> The US has formally requested Denmark to allow the Thule Base to be used in the NMD project in December 2002. Greenland has demanded to be involved in the negotiations and in December 2002 Vice-Premier Josef Motzfeldt participated in the meeting between the US State Secretary Colin Powell and the Danish Foreign Minister in Washington – see BBC News 19.12.2002.

<sup>489</sup> The doctrine was formulated by the Quebec Minister Paul Gérin-Lajoie in 1965 in a speech on the international personality of Quebec.

<sup>490</sup> This doctrine is still the main basis of Quebec’s international action as recognised in the Plan stratégique 2001-2004, *op.cit.*, p. 66.

<sup>491</sup> The best example was Ottawa’s support to the participation of the Nouveau-Brunswick Province in the Ministerial Conference of the Francophonie after Quebec’s accession in 1986 – see Jean Philippe Therien and Louis Belanger “La politique étrangère québécoise” in Alain Gagnon (ed.) *Etat et Société*, Editions Québec/Amerique, 1994, pp. 255-281.

The HK experience suggests that the definition of a formal framework to regulate NCG-CG relations in external affairs has certainly contributed to keep conflict with the new sovereign, China, at low levels. The regulation of these relations, involving the definition of areas of autonomy and its limits not only moderate conflicts but can provide a positive basis for better co-operation insofar it offers guarantees for both sides. The insistence on a rigid and outdated set of rules, constantly violated, tends to stimulate, not contain, deviant behaviour and lead NCGs to constantly test the limits. The majority of NCGs and their respective Central Governments have not yet made the transition to meet the challenge. The adoption of a better, more balanced and realistic regulatory framework is probably the way forward and the HK experience provides useful insights.

Thirdly, the HK case, particularly the post-handover experience, contributes to deepen the analysis of the pattern of relations between NCGs and CGs by introducing a third scenario. In fact the HK case shows that these relations do not revolve exclusively around the dichotomy conflict/co-operation but can involve a third hypothesis, separation. As argued in chapter four, the relations with Beijing have been marked essentially neither by conflict nor co-operation but by separation.

For many NCGs the scenario of “autonomy as separation” might be regarded as the ideal situation that could allow them to insulate themselves from the interference of Central Governments and strengthen autonomy. However, this also presents risks and disadvantages. Separation can turn autonomy in an illusion in the long term as it generates the seeds likely to undermine the autonomy and cause the decline of the NCG. The cost of this separation is that the NCG has no chance to participate in the national foreign policy decision-making process and influence the Central Government’s options, although it has to suffer the consequences of those options. For HK the major challenge remains to break the dangerous logic of isolation and separation and promote greater co-operation with Beijing. As argued in chapter one, meaningful autonomy does not involve only a dimension of separation – non-interference and complete control over

domestic options – but has also to include the dimension of “inclusion”, participation in the national project and in foreign policy making. In the light of this more comprehensive concept of autonomy, HK presents a structural limitation to its external autonomy.

#### **6.4. NCGs LEGITIMACY AS INTERNATIONAL ACTORS AND THE ATTITUDE OF THE INTERNATIONAL COMMUNITY**

The legitimacy of NCGs’ international participation is a critical question insofar as it is a determinant factor of the sustainability of their external action and of the robustness of their international status. In the literature on paradiplomacy the question of legitimacy tends to be seen essentially as a domestic question, whether the NCGs have been granted or not the powers to act internationally on their own by the state and if the effects of that action are recognised as valid. If such powers have been granted, on the basis of devolution, it is assumed that legitimacy exists. This is a rather legalistic and simplistic position that fails to grasp the essence of the legitimacy basis of NCGs as international players.

The HK case clearly challenges this perspective insofar it demonstrates the key importance of the external basis of legitimacy, related to the attitude and recognition of members of the international community, particularly states. So, the legitimacy of NCGs as international actors has to be analysed in the interplay between the domestic and the external foundations. Furthermore, the early stages of HK as an international player suggest that external foundations are the most relevant component, namely when the NCG acts in violation of domestic constitutional rules but its external autonomy is nevertheless recognised by members of the international community.

In the case of HK its legitimacy derives primarily from the fact sovereign states recognise HK’s autonomy to act on its own. This recognition is firstly granted by the Joint Declaration. In fact, unlike all other NCGs, since 1984 HK’s international

participation is legitimised by an international treaty. This constitutes also an important limit to the sovereign power, which can not unilaterally decide to reduce or eliminate HK's degree of autonomy. Secondly, recognition also derives from the fact foreign states deal directly and sign binding bilateral agreements with HK. Indeed the exercise of treaty making powers is probably the most important formal recognition of HK's legitimacy. In this respect HK is in a particularly strong position because all its bilateral agreements are signed with more than 70 different states, whose validity and binding nature as international instruments, unlike the agreements signed between NCGs, are not questioned.

Thirdly, HK benefits from an unprecedented circumstance which no other NCG has experienced, the formal recognition of its external autonomy and legitimacy by the superpower, the US, through a binding law, the 1992 US-HK Policy Act, which creates a legal obligation for the US Government to interact with and uphold HK's external autonomy.

However, the research reveals, as discussed in chapter five, that HK's legitimacy as an international player is based not only on formal elements, but also on informal and substantive factors. A key aspect is HK's performance of a useful role in the international system namely as an international financial centre and a model of a "free trade champion". Probably the most relevant aspect was the fact HK played a bridge role between sovereign states in various areas, in particular in the area of international trade as shown in the WTO experience.

This was clearly a strategic dimension of HK's affirmation as an international player. HK's legitimacy is strongly associated with the fact that besides pursuing its own interests HK has also accepted to pursue the "public interest" of the international community and push forward systemic collective interests. This second dimension tends to be absent in the international participation of other NCGs which see the international system in a narrower perspective, exclusively in function of their specific interests. The HK case raises the question of the need for NCGs to adopt a different and forward

looking perspective and change the traditional logic of “what can the international system do for me” for “what can I do for the international system”, if they wish to strengthen their legitimacy.

Another element that plays an important role as a legitimising factor is HK’s de-politicised nature, the political-neutral. The international community seems to value positively the non-involvement of NCGs in political issues. In addition, HK adopted a non-confrontational approach, which tends to be valued positively by the international community while conflictual players are de-valued.

A third fundamental substantive element that constitutes an important foundation of HK’s legitimacy is its strict adherence and full respect for, and compliance with international rules, namely in trade, financial systems and more recently human rights fields. The respect for International Law norms that are binding for HK, and even the voluntary adoption of international rules which are not binding by incorporating them in domestic legislation, is a crucial basis of HK’s prestige and legitimacy as an international actor.

The widespread understanding of NCGs that international rules can be somehow circumvented at the sub-national level, as demonstrated in the WTO context by the debate on enforcement of trade rules, runs exactly in the opposite direction of the evidence provided by the HK experience and is likely to undermine, not strengthen, NCGs’ capacity to act internationally. Sometimes NCGs tend to think they are exempted to comply with international rules that are fundamentally seen as binding for Central Governments. However, the question of compliance at the sub-national level is becoming increasingly important and so NCGs can consolidate more effectively their credibility as international players by choosing to comply and enforce international rules, sometimes moving faster than CGs, instead of hiding behind CGs that fail to enforce.

Finally, HK legitimacy seems to be based, as argued in chapters four and five, on a non-exclusive approach to its bilateral relations and the absence of a strong alliance and dependence in relation to a single sovereign state. The maintenance of a diversified set of relations and autonomy vis-à-vis major external players is a key element. This contrasts with the experience of other NCGs which followed a strategy of strong alliance and association with one state, or groups of states, to affirm their international identity and compensate for the pressure and hostility of their own Central Governments. This was the case of Quebec which built its external relations on a key alliance with one state, France, which has been crucial to recognise and legitimise Quebec's international participation. Similarly, Greenland has concentrated its relations with Nordic countries and Canada, countries that have "Inhuit" minorities. This "exclusive" approach necessarily excludes some members of the international community and therefore fragilises the legitimacy basis.

## **6.5. IMPACT OF NCGs ON THE INTERNATIONAL SYSTEM AND CONTRIBUTION TO CHANGE**

As far as the impact and implications of paradiplomacy are concerned the literature adopted a domestic perspective and restricted the analysis to the impact of NCGs' external relations on national foreign policy as seen in chapter one. The basic concern has been to assess whether paradiplomacy constitutes a derogation of state power and contributes to undermine the coherence of foreign policy, or, on the contrary, has a positive impact and contributes to rationalise and strengthen foreign policy.

What has been missing is the consideration of the impact of paradiplomacy on the international system, to what extent NCGs made any contribution to change the system or introduce new practices. The problem is that it was assumed that, because of their fragile position and weak international status, NCGs lack the capacity to have any impact on an international system still dominated by sovereign states. Even when they are seen as capable of some influence it is seen as being exerted indirectly by inducing

changes in their Central Government's foreign policy. A good example would be Greenland's influence in Denmark's international position and policy on indigenous peoples' rights, leading the central government to take relevant initiatives in UN *fora*<sup>492</sup>, or Quebec's influence on Canada's policy towards the Francophonie and UNESCO with respect to cultural diversity.

The HK case challenges this view and assumptions. What is new about HK and contrasts with all other NCGs, is the fact it had a direct impact on, and contributed to innovations and change in the international system. This impact is particularly relevant at three different levels.

Firstly, HK has actively contributed to international multilateral rules-making in two relevant fields, international trade and the financial sector, something which is in general seen as restricted to states. As demonstrated in chapter five, HK's action in WTO, its participation in the core decision making group, provide strong evidence of HK's effective contribution and influence over the process of production of multilateral trade rules. Similarly, HK's leadership action in the FATF group and in various organisations dealing with financial matters, show the active contribution of HK in the establishment of a new regulatory framework for international financial operations.

The interesting point about HK is that besides participating actively in globalisation its external action has contributed to the regulation of globalisation itself. This suggests that NCGs' commitment to a better regulation of globalisation and capacity to influence the process of rules-making might be a better strategy to preserve their own interests and sphere of autonomy than to take advantage of the failures of an unregulated globalisation process.

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<sup>492</sup> Greenland convinced Denmark, a member of the UN Human Rights Commission, to launch the project of a universal declaration of the rights of indigenous peoples in 1982 and to introduce in the Human Rights Commission agenda the issues of the Universal Declaration of the rights of the indigenous people and the UN decade for indigenous peoples in 1996.

Secondly, HK introduced an important innovation in the international system, the differentiated application of international treaties to different parts of the territory of a state. The manifestations of this innovation include both the WTO case, as in 1997 GATT and the other multilateral agreements were only applicable to a part of China, the HKSAR, but also the insertion of the “HK Clause” in various international multilateral treaties, as a result of HK’s purposeful action.

This constitutes a far-reaching innovation in the international system and a change in the principle that international treaties apply, once signed by states, to their entire territory. Furthermore this has introduced greater flexibility in the international system that might have relevant and positive implications for NCGs should the “HK clause” further expand into new areas.

Thirdly, HK’s international participation and specific circumstances associated with the handover induced also changes in the attitudes and policies of states towards NCGs, translated both in more tolerance and willingness to accept direct interaction. HK exercised for many years treaty making powers and signed an unprecedented number of bilateral agreements with sovereign states. The change in states’ attitudes is clearly demonstrated by innovations such as the 1992 US-HK Policy Act, a benchmark in terms of the recognition of the legitimacy of a NCG as an international actor by a state, or the unprecedented process of international monitoring of the sovereign power’s respect for HK’s autonomy, carried out by the US and the EU through periodic official reports. A key aspect of this change is that influential states in the international system are no longer simply tolerating HK’s paradiplomacy, they are proactively supporting and upholding HK’s external autonomy and direct participation in the international system.

While it is clear that HK had an effective impact on the international system, the question that remains to be addressed is what factors account for that. The analysis of the HK experience leads us to conclude that the crucial factor is multilateralism, associated with the use of a sophisticated combination of different sources of influence that go well beyond economic power. In fact, HK’s capacity to influence the process of

international rules-making and to change the scope of international treaties are both strongly associated with HK's participation in multilateral organisations as well as in the informal new transgovernmental networks. It should be noted that the multilateral system is HK's first priority in external relations and the core element of its external strategy.

In contrast, other NCGs tend to attach priority to bilateral relations and build their paradiplomacy around links with specific states, hoping to gain some kind of protection or sponsorship. Their participation in multilateral organisations and transgovernmental networks is minimal partly because of obstacles imposed by the international system, and partly as a result of NCGs' own options. For instance, Quebec has a very limited participation in multilateral organisations being nearly restricted to Francophonic organisations, particularly the Agence Cooperation Culturelle et Technique. Similarly, Greenland multilateral participation is also minimal and is restricted to sub-regional organisations, the Nordic Council, where it has a separate membership, and the Arctic Council, founded in 1996 by the eight Arctic countries. Catalonia has a similar experience<sup>493</sup>.

The strong commitment of HK to multilateralism and its active participation in various universal multilateral organisations, particularly WTO, is unique among NCGs. This indicates not only that multilateral rules are the best protection for NCGs rights and interests, compensating for their vulnerability, but also that multilateralism is the best channel for NCGs to have an impact on structural aspects of the international system. For many NCGs the only option open to them is the participation in the national delegation, not necessarily an autonomous participation in multilateral organisations. Even so, a greater priority to multilateralism should be seriously seen as an opportunity to enhance their influence over the design of the new international regimes for the regulation of globalisation. HK validates the argument that one of the fundamental basis for the affirmation of non-state actors' influence in the international system is their

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<sup>493</sup> Interview with Joaquim Molina on 22.11.1999.

capacity to exploit the space between multilateral organisations that are providing regimes of global governance and their member states<sup>494</sup>.

The strategic importance of multilateral organisations derives from the fact they are precisely the key actors in the process of regulation of globalisation and are at the centre of the production of new regimes of global governance, which necessarily affect NCGs both domestically and as international actors.

Interestingly, in turn NCGs are very important for the success of this process of regulation of globalisation, an aspect that has been largely neglected. The effective implementation and enforcement of multilateral rules require a greater involvement of NCGs so that rules are also enforced at sub-national levels and deviant practices do not prevail. One should not forget that in many areas, namely in economic and social areas, international rules have ultimately to be implemented by NCGs because of their domestic competencies as these issues fall within the sphere of their autonomy.

Central Governments alone can not ensure the effective implementation and enforcement of many international norms, be it WTO rules or environmental norms, at the domestic level. In this context, the fact NCGs have little say in the process of rules making induces alienation and little commitment to international rules, thus being a factor of fragilisation of the multilateral system. Opening WTO and other multilateral organisations to NGOs and other non-state actors, including NCGs, is of great relevance for the future credibility of the multilateral system. HK has adopted a conservative position on this matter but this might change. HK is undoubtedly the best placed NCG to take the initiative and lead an innovative process of greater participation of NCGs in the multilateral system.

Globalisation has reinforced the trend towards universal rules. However, these rules have still to be implemented locally and coexist with local rules and a diversity of regional identities that press for flexibility in order to adapt universal rules to specific

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<sup>494</sup> Josselin and Wallace (eds.) Non State Actors in World Politics, Palgrave, London, 2001, p. 3.

regional and local circumstances. To overcome potential tensions and reconcile interests, the new international rules have to possess in-built flexible mechanisms and overcome the traditional rigid model of legal norms. The model of the EU directive, where the objectives and principles are clearly defined but some freedom is allowed for states to choose the path and the concrete measures to reach those objectives, is probably a useful model for the International Law in the globalisation era. If this is not achieved, then the risk of violation and non-compliance with international rules is very high, making them of limited relevance.

Besides the potential contributions of NCGs to the globalisation process and their crucial role in harmonising globalisation and localisation, one should also consider a complementary aspect, the impact of globalisation on NCGs' ability to act as international actors. Once again HK provides a useful example. The effects of globalisation on HK play out in a complicated and contradictory way, involving both opportunities and constraints.

As far as opportunities are concerned, globalisation brought about higher priority and concerns for "low politics" and "soft" security issues. This enhanced HK's relevance for the international system because those are areas where HK can act on its own and has a strategic position.

Secondly, globalisation contributed to increase the relevance of the multilateral system and multilateral rules, crucial to regulate the process and ensure its sustainability. For a long time HK has been active in multilateral *fora* and so this change has contributed to create new opportunities for HK to influence the process of rules-making. Moreover, the coexistence between universal rules-making and local rules-enforcement has contributed to enhance HK's position and of other NCGs.

Thirdly, globalisation created a new opportunity for HK to expand its external relations into other areas, namely in security areas, which before were closed to HK's intervention.

However, globalisation has also created challenges for HK. The first effect was that it made states more eager to reassert control given the sense of loss of power associated with the growing influence of non-state actors, which tends to induce limitations to HK and other NCGs external autonomy. State power has not been necessarily weakened across the board as a consequence of globalisation. We have to differentiate between the impact on strong and weak states. When it is said that globalisation has weakened the state power, this is probably true for weak states which further lost influence, but not for strong states which have probably strengthened their positions. The capacity of strong states to further add to their power is explained not only by their structural position in the international system but also by the fact they have strong non-state actors, NGOs, NCGs and firms, with whom they co-operate, articulate positions and forge alliances to pursue common interests.

Secondly, the management of external relations became much more complex and demanding for HK. This created pressure for better institutional organisation, for personalisation of external affairs and for greater financial resources, as external participation became increasingly costly. One good example was that HK has been forced to balance activities aimed at pursuing its own specific interests with systemic activities of public interest.

Moreover, this complexity has created pressure for greater co-operation with the sovereign power, namely with China. In a globalised system an autonomous HK has more difficulty than in the past, in standing alone and isolated, which generates the necessity to develop more co-operative relations with China. This poses an important challenge to HK because it requires a skilful balance between autonomy and co-operation with Beijing, so that co-operative relations do not undermine autonomy. One of the problems HK faces in striking the right balance is the fact the JD and the BL are a rigid framework with no flexibility to respond to the new challenges. This framework was approved in the Cold War period but is being implemented in the post-Cold War era, in a completely different context. As a consequence, the existing framework,

namely when it tends to emphasise insulation and boundaries, is not adapted to the new realities and might pose obstacles to HK's international participation in the future.

Thirdly, globalisation created new sources of potential tension between HK and Beijing insofar as high politics and low politics issues become much more entangled and interlinked. Boundaries became less clear, such as between soft and hard security issues, generating more grey areas. In this context, the risks of politicisation of "low politics" issues increase, which tends to pave the way for Central Governments to interfere in NCGs' sphere of autonomy.

In conclusion, the impact of NCGs on the international system has been limited and manifested itself mostly in an indirect way, through their impact on national foreign policies. However, the HK case demonstrates that they can have also a direct impact. Furthermore, the acceleration of globalisation contributes to increase, not reduce, the chances that the role of NCGs in the international system might be further enhanced in the future. The main argument is that this results from the complex interplay between globalisation and localisation of comparative advantages and the fact NCGs are likely to be strategic facilitators between the global and the local levels in the process of globalisation, balancing different interests, organising local actors to participate in the global system, providing some legitimacy to the process and ensuring the implementation and enforcement of global rules.

The capacity and will of NCGs to promote changes and have a greater say in rules-making is still to be seen. So far, it is interesting to note that one of the fundamental findings about the nature of HK as an international actor is that it does neither contest the rules and logic of the international system nor proposes radical changes. On the contrary, it tends to accept the logic and tries to strengthen its position within the system, not working against the system. This seems to be a common feature with other NCGs which suggests that NCGs are more pro-system and tend to be more moderate

than other non-state actors, such as NGOs and TNCs, which seek more actively to change the structure of the international system.

## CONCLUSIONS

The research of the HK case developed in this thesis provides useful insights to better understand the nature of NCGs as international actors despite the existence of some unique conditions that are not replicable to other NCGs. The evidence discussed in the different chapters regarding the research questions identified in the introduction points to five main conclusions.

Firstly, HK's emergence as an autonomous international player in the early 1960s, making HK a pioneer among NCGs, was driven by trade and led by the elite bureaucracy. It shows that the international system in spite of the state-centric features is more flexible than generally believed insofar it was able to accommodate such an unorthodox phenomenon. This flexibility and acceptance by influential states of the international community was explained by two key factors: the existence of precedents associated with the British Dominions' autonomy in external economic matters set in the early XX century by the then dominant power; more importantly, the pragmatic interests of specific members of the international community who saw the possibility of dealing directly with HK as useful to pursue their own economic and political interests. In this light the consideration of the factors that eased the international community potential opposition and led it to accept NCGs activities are as important to understand the genesis of paradiplomacy than the factors that pushed NCGs to go out on their own.

Secondly, NCGs have specific characteristics that differentiate them from other categories of NSAs as international players. The analysis of HK's international status leads to the conclusion that HK is a robust actor based on its dense international personality and medium level of autonomy, and suggests that NCGs, namely those that can be regarded as robust actors, present three specific distinctive features: they enjoy international personality of a special kind, qualified personality, with a permanent and more or less diversified nature strongly associated with their capacity to exercise treaty making powers; their international activities are more constrained by domestic legal rules and international norms than other actors, and have frequently to face and manage

the contradictions arising out of overlapping jurisdictions considering they control local rules; enjoy a stronger legitimacy basis, many of them electoral, to act and are subject to accountability and therefore are less affected by the problem of lack of accountability and representation associated with other NSAs, namely NGOs and TNCs. However, these differences are not sufficient to qualify NCGs as a *tertium genus* as suggested by Hocking. NCGs should be seen as a special category of non-state actors, since sovereignty is still the determinant differentiation factor.

Thirdly, the external autonomy of NCGs, crucial for their credibility as international actors, has an important foundation in domestic autonomy. However, as the HK case demonstrates, domestic autonomy is a necessary but not a sufficient condition and the degree and dynamics of substantive external autonomy is fundamentally determined by the complex interplay between three different factors: NCGs own institutional capacity and strategy to act internationally; the pattern of relations with the Central Government and the mechanisms and level of control exerted by the former; the attitude and recognition of external players and willingness to interact on the international stage. In the HK case the role of external players and international monitoring has been particularly relevant not only in upholding directly HK's autonomy but also indirectly by moderating Beijing's temptation to cross the boundaries of autonomy.

Fourthly, the HK case demonstrates that NCGs can have, using different sources of influence, a direct impact on the international system and even introduce innovations, contradicting conventional analysis which considered they could only have an indirect impact by influencing Central Governments' policies. In fact HK has a direct participation in the process of international rules-making in trade (WTO) and financial areas (FAFT and Basle Committee), exerts a "demonstration effect" on other NCGs and relations with their respective CGs and has even introduced innovations, particularly the "HK clause" which tends to reinforce the flexibility of the international system which allowed HK to become an international actor in the first place.

In this process HK has used not one but a combination of different sources of influence, namely professional expertise, financial and economic strength, access to international organisations and networks of foreign bureaucracies and more importantly its role as a bridge builder between states, as demonstrated by the research on WTO, exploring its ambiguity of both a developed and developing country. This ambiguity emerges as a strong and distinctive trait of HK as an international actor contributing to strengthen its influence in the international system.

Fifthly, although globalisation poses challenges to NCGs' paradiplomacy it presents also opportunities and on the whole creates a favourable environment for NCGs to expand their international activities and strengthen their influence in the international system in the future as a consequence of two different processes. On the one hand, the localisation trend associated with the clustering-innovation complex, which coexists and is in several respects complementary to globalisation, enhances the position of NCGs in the international system. On the other, the process of global governance, the other side of globalisation, opens new opportunities for NCGs international participation insofar it implies the coexistence of different levels in a multilayered system, overlapping jurisdictions and rules at the global, regional, national and sub-national levels. As shown in the HK case, NCGs can play a relevant potential role both in international rules-making - not only through their participation in multilateral bodies (WTO) but also through the new transgovernmental networks (i.e. FAFT) which have a growing role in policy formulation and rules and are more accessible to NCGs – and in international rules implementation and enforcement. Because of domestic devolution, the effective implementation and enforcement of global rules depend ultimately in some areas more on NCGs than on Central Governments.

In short, a central argument of the thesis is that HK is a robust international player and the sustainability and effectiveness of its paradiplomacy and international participation is determined by the triangle “external autonomy-legitimacy-influence” which are inter-related but different variables. External autonomy is a complex variable with a triple dimension: separation from the Central Government (negative autonomy), participation

in national policy-making (positive autonomy) and autonomy in relation to external players. Legitimacy is associated not only with a democratic basis of the NCG but also formal recognition by external players linked with a dense international personality and the performance of substantive and useful functions to the international system. Influence depends mainly on the way NCGs mobilise support and use different sources of influence to pursue their goals. In the HK case the three sides of the triangle are relatively strong and balanced although some weaknesses exist, namely in the external autonomy side, as far as positive autonomy is concerned, and the legitimacy side, as far as democracy is concerned. This allowed HK not only to have a direct impact on the international system by inducing innovations, participating in the making of international rules and exerting a demonstration effect on NCGs and foreign states, but also to preserve, so far, the core of its external autonomy under Chinese sovereignty although there are risks to its future sustainability.

In this context the research results confirm only partially the initial hypothesis insofar they show that although external autonomy is a central question, the sustainability of HK's position and status as an international actor depends also on other determinant variables, legitimacy and influence, whose basis and contents are not coincident with autonomy.

The progress of globalisation and more importantly the coexistence between globalisation and localisation creates favourable opportunities for HK and other NCGs to consolidate their positions as international players in the future. The asymmetries, overlapping of jurisdictions and multilayered governance that characterises the current international system, imply contradictions and the need to define what rules prevail in which circumstances. NCGs can play a strategic role in contributing to manage and smooth these contradictions and bringing about greater coherence between the different levels, namely by flexibly adapting global rules to local circumstances. However, it remains to be seen whether NCGs will translate this potential into reality, thus contributing to better global governance or, on the contrary, if they become hostages of parochial interests and obstacles to that process.

## ANNEX I

### **The methodology of interviews**

The thesis research included a series of interviews which constituted one of the most important primary sources. These 45 interviews were conducted between August 1999 and April 2003 in Britain, Hong Kong, Beijing, Geneva, Brussels and The Hague with a diversified range of people.

The interviews were carried out with three main purposes. Firstly, to obtain original information, data and insights in relation to specific research issues that had not been researched before and in relation to which no secondary sources or official documents were available. Secondly, they were intended to confirm information and data obtained from secondary sources as well as to clarify or complement information or test hypothesis formulated on the basis of the analysis of documents and other primary sources. Some interviews were specifically aimed at cross checking and validating the information and views obtained in the context of other interviews.

Thirdly, they seek to identify further questions not foreseen at the outset which are inevitably brought about by the contact with people who are involved in the practical implementation of policies and the daily operation of institutions.

A diversified group of people ranging from government officials and retired officials, representatives of NGOs, to scholars and politicians was interviewed. The selection of interviewees was made on the basis of different criteria. In some cases the direct involvement, specific responsibilities and contribution to particular historical processes, such as the Sino-British negotiations or the initial stages of HK's international participation was the key factor. Others were interviewed because of their present institutional functions, i.e. HK and PRC officials or WTO officials. What was selected was the institution and this led logically to interview the individuals who presently hold

the posts. Finally, other interviewees were selected because of their particular knowledge and qualifications as observers and commentators of HK's affairs.

The methodology of preparation of the interviews was similar in all cases. The people selected to be interviewed were approached in the same way. There was a preliminary formal contact to request the interview by fax, in a few cases by letter, where the main aspects and objectives of the research were explained as well as the specific issues which would be addressed in the interview. A letter signed by the supervisor was attached to the fax to confirm the academic interest of the interview and ensure the credibility of the process. In case of acceptance this contact was then followed by one or more contacts by telephone or e-mail to arrange the date and time of the interview.

The great majority of interviews were oral interviews involving personal contact and interaction. Consequently, this implied the organisation of several field work trips, involving four trips to Hong Kong (June 1998, November 1999, October 2000 and November-December 2001), two trips to Beijing (January 1999 and November 2001), one trip to Geneva (November 2002), one trip to Brussels (October 2001) and one trip to the Hague (June 2001) as well as several trips inside the UK, to make the interviews and carry out other research activities. There were, however, a few exceptional cases of written interviews where the questions were sent in writing by e-mail or fax and written answers were provided, namely the cases of the interviews with the Directors of International Relations departments of the Governments of Catalonia, Quebec and Greenland, with Christine Loh, Andrew Stoler, Nick Starling and Kerry Dumbaugh.

As far as the nature of the interviews is concerned, the majority were directive interviews conducted on the basis of a list of previously defined and precise questions with a logic sequence. There were, however, some cases of semi-directive interviews, more open, where due to the profile and experience of the interviewee more space was granted to an open-ended discussion of the general theme.

In the case of oral interviews a specific set of questions was prepared beforehand for each interview. The list included both general questions common to other interviews as well as specific questions tailored to the interviewee. In a few cases, when the interview was aimed at merely clarifying a specific issue only the second type of questions was formulated. Common questions were instrumental in capturing and comparing the perceptions of different players on the same issue, i.e. the views of the HKSAR and the PRC on the evolution of the SAR-CPG relationship or on HK's external autonomy.

The interviews were not recorded given the initial resistance of various interviewees and the potential constraints recording would create for a more free expression of ideas. Only a few notes were taken in a notepad in order to disturb as little as possible the normal flow of the conversation. A detailed account of the interview was elaborated immediately after the interview to ensure an accurate registration of details and nuances, later analysed in more depth individually and on a comparative basis with other interviews' accounts. In some cases, particularly in relation to HK officials, there was a follow-up to the interview involving further contacts in writing by e-mail intended to clarify specific points or to obtain further details and evidence to substantiate the arguments and key ideas expressed during the interview.

In global terms there was a positive reaction of the people interviewed. In all but 3 cases the request for an interview was accepted. Moreover, all interviewees were happy to talk, provide information and materials and share their views. Some have even showed a special interest in the global theme of the research and in getting access to the final results. In general the interviewees agreed to be quoted but in a few cases objections were presented and specific requests not to be quoted made. These requests were fully respected, in accordance with the code of conduct on social science research ethics, and consequently some restrictions were introduced in terms of quotation and detailed identification of the source.

The interviews carried out provided in general valuable and relevant inputs to the thesis research at the same time they constituted a rewarding personal experience. The

interviews had some points in common: they had a qualitative rather than quantitative nature; and provided a direct contact with practical aspects of HK's external relations and the complex network of interactions between different players.

However, there were also important differences. Firstly, while a group of interviews focused more on the past and the historical process of HK's emergence as an international player and interviewees tended to emphasise achievements and opportunities, another group looked mostly oriented into the future and tended to emphasise more the challenges HK faces in the international system. Secondly, in some interviews only official information was transmitted and sensitive or difficult issues were avoided. In contrast, in others interviewees talked more openly, expressed views different from the official line and addressed sensitive issues. Finally, there were "restrictive interviews" driven by a single issue with a more technical nature (air services agreements or WTO participation) and "global interviews", where the overall position of HK as an international actor was addressed in its different dimensions, with a more political nature.

These differences resulted in an interesting and complementary mix that stimulated and enriched the research process, facilitating a better understanding of the complex nature and diversity of views on HK's status as an international actor.

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