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# One Country, Two International Status? The Evolution of Hong Kong's International Positioning from Western Imperialism to Chinese Authoritarianism

MATTHIEU BURNAY AND FLORIAN COUVEINHES-MATSUMOTO\*

**ABSTRACT:** Today, Hong Kong has become a very symbolic place where one can witness a global clash between authoritarian and liberal-democratic ideologies and forces. In particular, the National Security Law enacted in August 2020 constitutes the symbol of the current trend of the confrontation. Hong Kong came to be a very symbolic tag because of its atypical history, and the resulting hybrid nature of its political and legal system, characterised by a permanent tension between the rule of law and the authoritarian rule of power. In this paper, we demonstrate that the rising influence of Beijing in Hong Kong, as best exemplified by the adoption of the 2020 National Security Law, signifies the end of the 'One Country-Two Systems' principle as it was traditionally understood. We also show that, as a direct consequence, the very special status of Hong Kong under international law as well as the ways in which foreign States interact with Hong Kong are deeply strained. The paper is divided into three parts. In a first part, the paper highlights how Hong Kong peculiarities find their roots in China's first encounters with international law as well as the Sino-British Joint Declaration. It is these two foundational events that explain the very special status of Hong Kong under international law. In a second part, the paper presents recent developments in the relationship between Beijing and HKSAR as well as their background both from the perspectives of international law and domestic law. In a third part, the paper analyses how Hong Kong's changing reality have sparked vivid reactions; questioned the ways in which private and public actors engage with Hong Kong in the legal sphere; as well as challenged the status of Hong Kong as a legal hub for international dispute resolution.

**KEYWORDS :** Hong Kong, International law, National Security Law, China, Legal Hub

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## I. Introduction

Today, Hong Kong has become a very symbolic place: it is the city where one can witness a global clash between authoritarian and liberal-democratic ideologies and forces. In particular, the National Security Law (NSL) enacted in August 2020 constitutes the symbol of the current trend of the confrontation. Still, in October 2019, the authorities of the Hong Kong Special Administrative Region (HKSAR) were obliged by massive demonstrations, international pressure, and the quasi-unanimous opposition of Hong Kongese legal professionals (led by the Hong Kong Bar Association and the more conservative Law Society) to withdraw the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill.<sup>1</sup> Such a law would have enabled the sending of prosecuted people – residents as well as foreigners – to States like mainland China, with which Hong Kong has no extradition agreement, and in which the guarantees for the respect of human rights are low or non-existent.<sup>2</sup> The fact that the law was dropped is thus noteworthy.<sup>3</sup> Equally significant was a Bill that the HKSAR considered in 2003 and that was aimed at implementing Article 23 of the Basic Law, relating to the constitutional obligation of the

<sup>1</sup> Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill, 29 March 2019, CB(3)510/18-19.

<sup>2</sup> The problem was that the chief executive much more than Hong Kong judges would have decided if the extradition request was admissible and well-founded. In particular, Hong Kong judges would not have been allowed to assess the plausibility of alleged offenses, or the respect for human rights and procedural guarantees by the State in which the prosecuted person will be judged: 'It's not a formal prosecution so you cannot examine the evidence presented by the other side. We all know that if they want to prosecute someone – a human rights defender or activist – actually in mainland China the charges are political in nature but they use other laws to prosecute them, like tax evasion, for example.' (Man-Kei Tam, director of Amnesty International Hong Kong). In addition, 'Hong Kong law [did] not require extradition arrangements to contain' human rights protection clauses, and '[e]nabling the Chief Executive to include the type of "safeguards" listed in Annex 2 to the 31 May 2019 Council Paper would likewise fail to meet the problem', notably because 'the proposal [was] merely that the Chief Executive "may" require such matters to be included in any ad hoc arrangement, not that she must do so', *Joint observations on the human rights implications of the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019*, available at <https://www.fairtrials.org/publication/joint-observations-human-rights-implications-hong-kongs-fugitive-offenders-and-mutual>, at para. 43 and 46.

<sup>3</sup> See esp. Cora Chan, 'Demise of "One Country, Two Systems"? Reflections on the Hong Kong Rendition Saga', 49(2) *Hong Kong Law Journal* (2019) 447, at 447.

HKSAR government to enact a prohibition on 'treason, secession, sedition, subversion against the Central People's Government [...] [and] prohibition of 'foreign political organizations or bodies from conducting political activities in the Region'.<sup>4</sup> In fact, this Bill was very similar to the 2020 NSL. However, the Bill was withdrawn from further consideration by the Legislative Council of Hong Kong, because of the demonstrators' pressure and the refusal of the James Tien's Liberal Party to back the Bill.<sup>5</sup>

This background shows the importance of the 2020 NSL: while international as well as local oppositions (a year of pro-democracy protests) were very strong, the Bill was nonetheless enacted. Furthermore, the NSL was directly adopted by the Standing Committee of the National People's Congress, that is to say by Mainland China, in order to avoid the possible reluctance of the Legislative Council of the HKSAR, and the repetition of the 2003 failure. This gross violation of (an *a contrario* interpretation of) Article 23 of the 1997 Hong Kong's Basic Law, according to which '[t]he Hong Kong Special Administrative Region shall enact [such] laws'<sup>6</sup>, is also a flagrant breach of the 1984 Sino-British Joint Declaration, which established the formal basis of the international status of Hong Kong. Such a move thus crystallises the end of the 'One Country-Two Systems' *fangzhzen* (general policy or guideline), or if one prefers, the way it was interpreted until recently.

The fact that the 2020 Law was immediately used to threaten Hong Kongese and foreign political opponents, and the explicit attempt to extend the application of the law beyond HKSR territory (Article 38 of the NSL) are definitive signs that the People's Republic of China (PRC) has won a major battle, although it has not yet won the war. This victory – which is not, if we use the official phrasing of the CPP, a 'win-win' consensus but resembles more a 'zero sum game' – should be seen in the wider context of a long-term Chinese strategy: for about ten years, the Party-

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<sup>4</sup> National Security (Legislative Provisions) Ordinance (2003) C007-e01.

<sup>5</sup> See further Fu Hualing, Carole Petersen, and Simon Young, *National Security and Fundamental Freedoms, Hong Kong's Article 23 Under Scrutiny* (2005); See also, Ngok Ma, 'Civil Society in Self-Defense: the Struggle against National Security Legislation in Hong Kong', 14(44) *Journal of Contemporary China* (2005) 465.

<sup>6</sup> Emphasis added.

State<sup>7</sup> has grown increasingly active in its endeavour to ‘shake’ the international legal order and the global governance system in which it is embedded. Specifically, the Party-State now attempts to modify or replace the liberal standards which emerged out of two moments of clear Western dominance: the post-World War II and the post-Cold War periods.<sup>8</sup> It is not an easy task to correctly analyse and assess this upheaval. Although we rarely accept to say or write it openly, we often tend to consider, as European academics and international lawyers, that the legal validity of these international standards does not simply originate in their embodiment in customary or conventional rules – as these can always be changed (although not under any conditions) – but also in their inherent truth or value. Rightly or wrongly, we tend to think that these ideals and hence these rules are objectively universal, and therefore that all States *should* recognise them as such. This twofold affirmation is precisely what the PRC foreign policy opposes in general and, in a very massive and striking way, translates into actual policies in Hong Kong.

In this paper, we will situate the legal and political realities of Hong Kong in their broader historical context. The hybrid nature of Hong Kong political system characterised by a permanent tension between the rule of law and the authoritarian rule of power does indeed find its root in the atypical history of the SAR. Against this background, the paper will highlight how the rising influence of Beijing in Hong Kong, as best exemplified

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<sup>7</sup> This terminology will be used as a way to describe the lack of separation between the Chinese Communist Party and the State.

<sup>8</sup> See for instance Jan Wouters *et al.*, *China, the European Union and global governance* (2012); Florian Couveinhes Matsumoto, ‘La Critique des Principales Orientations du Conseil de Sécurité par la République Populaire de Chine – Éléments pour une Evaluation des Effets de la Fin de l’hégémonie Occidentale sur le Droit de la Paix et de la Sécurité Internationales’, 117(2) *Revue Générale de Droit international Public* (2013) 232; Florian Couveinhes Matsumoto, ‘La Politique Juridique Extérieure de la République Populaire de Chine’, 17 *Annuaire français de relations internationales* (2016) 551; Matthieu Burnay, *Chinese Perspectives on the International Rule of Law: Law and Politics in the One-Party State* (2018); Congyan Cai, *The Rise of China and International Law: Taking Chinese Exceptionalism Seriously* (2019); Matthieu Burnay and Julien Chaisse, Special Issue on ‘China and the Global Commons’, 22(5) *International Community Law Review* (2020); Robert D. Williams, ‘International law with Chinese characteristics: Beijing and the “rules-based” global order’, *Global China – Assessing China’s Growing Role in the World*, October 2020; Tom Ginsburg, ‘Authoritarian International Law?’, 14(2) *American Journal of International Law (AJIL)* (2020) 221.

by the adoption of the 2020 NSL, signifies the end of the 'One Country-Two Systems' principle as it was traditionally understood. As a direct consequence, the very special status of Hong Kong under international law, as well as the ways in which foreign States interact with Hong Kong, are deeply strained. The paper will be divided into three parts. In a first part, the paper will highlight how Hong Kong's peculiarities find their roots in China's first encounters with international law as well as the Sino-British Joint Declaration. It is these two foundational events that explain the very special status of Hong Kong under international law. In a second part, the paper will present recent developments in the relationship between Beijing and HKSAR as well as their background, both from the perspectives of international law and domestic law. In a third part, the paper will analyse how Hong Kong's changing reality have sparked vivid reactions, questioned the ways in which private and public actors engage with Hong Kong in the legal sphere, as well as challenged the status of Hong Kong as a legal hub for international disputes resolution.

## II. Historical Roots

### A. The Origins of Hong Kong Peculiarities in Unequal Treaties

The current and future status of Hong Kong are to be read against the background of the political and legal history of China's engagement with international law. During more than a century, Hong Kong was part of a 'historical triangle' with China and Great Britain at its core.<sup>9</sup> As a British colony, it progressively emerged as a strategic place where the East was to meet the West while still preserving a quite unique political and societal environment. As such, the distinct identity of Hong Kong originates in China's first interactions with international law, when the confrontation between the Qing Dynasty and Western powers climaxed with the Opium War (1840-1842).<sup>10</sup> The Qing defeat in the Opium War marked the start

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<sup>9</sup> Ming K. Chan (ed.), *Precarious Balance: Hong Kong between China and Britain, 1842-1992* (1997), at 83.

<sup>10</sup> Phil W. Chan, 'China's Approaches to International Law since the Opium War', 27(4) *Leiden Journal of International Law* (2014) 859.

of what is still described in China as the ‘Century of Humiliations’ during which China was forced – following a succession of military defeats – to sign a number of ‘unequal treaties’.<sup>11</sup> These treaties signed with foreign powers ranging from Great Britain, France, the United States, and Japan were quite unique because of the level of inequality they entailed, but also because foreign nations very much acted in concert.<sup>12</sup> In addition to all the internal turmoil the Qing Dynasty had to face from the Taiping Revolution to the Boxer Revolution, the use of the law of nations to justify Western imperialism through these unequal treaties forced the Qing Dynasty to initiate significant political reforms in the late years of the 19th century. Those constitutional reforms rapidly proved to be insufficient as ‘a much more aggressive ideological revolution’ appeared to be necessary to ensure the survival of the Qing Dynasty.<sup>13</sup> The Chinese Revolution of 1911 put an end to centuries of imperial rule in China. At that point, Hong Kong was no longer a part of China though. The first of those above-mentioned unequal treaties was the Treaty of Nanjing (1842). It foresaw in its Article 3 the cession of the island of Hong Kong ‘in perpetuity’ to Great Britain. The Treaty of Nanjing was then complemented by the Treaty of The Bogue (1843) which further specified the terms of the (trade) relationship between China and the British Empire.<sup>14</sup>

It took decades until the issue came back as a discussion point on the agenda of Sino-British relations. It is under the prime ministership of Margaret Thatcher that negotiations were held and, at the time, there was a big uncertainty regarding the future of Hong Kong. The question did not only relate to the governance system to which Hong Kong would be submitted after the retrocession, the question also related to ‘the incongruity of combining a rich, capitalist city-state with an impoverished nation

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<sup>11</sup> The concept of unequal treaties has been the object of a significant amount of literature. For a historical overview of different categories of international treaties, see Inge van Hulle, ‘Grotius, Informal Empire and the Conclusion of Unequal Treaties’, 37(1) *Grotiana: A Journal under the Auspices of the Foundation Grotiana* (2016) 43.

<sup>12</sup> Matthew Craven, ‘What Happened to Unequal Treaties? The Continuities of Informal Empire’, 74 *Nordic Journal of International Law* (2005) 335, at 344.

<sup>13</sup> Cheng Jie, ‘Why Late Qing Constitutional Reform Failed: An Examination from the Comparative Institutional Perspective’, 10 *Tsinghua China Law Review* (2017) 107, at 147.

<sup>14</sup> Craven, *supra* note 12, at 344.

ruled by a Communist Party hierarchy'<sup>15</sup> One should not forget that back in 1980s, China was only at the early stages of the implementation of its opening up and reforms policy. It was thus still very far from being the second largest world economy that we know today. The singularity of the situation and the lack of precedent, from an international law perspective, added up to this uncertainty: It was indeed very uncommon for a colonial power to agree on the termination of colonial rule in an international treaty.<sup>16</sup> It is in 1984 that the negotiations were finally concluded with the adoption of the Sino-British Declaration, which established the details of the termination of more than 150 years of British colonial rule which was scheduled to take place in 1997. The year 1997 was not chosen by accident as the Convention between the United Kingdom and China Respecting an Extension of Hong Kong Territory (1898) foresaw a lease of 99 years, i.e. that was to be terminated in 1997.<sup>17</sup>

#### B. The Origins of Hong Kong Peculiarities in the Joint Declaration and the Hong Kong Basic Law

During the negotiations, it became rapidly clear that China and the UK would agree on the preservation of the special status of Hong Kong after the retrocession. This support for continuity rather than systemic changes can find different explanations, including the fact that Chinese elites themselves played a significant role in the maintenance of stability in the British colony.<sup>18</sup> It is the Chinese side which came up with the suggestion of the 'neither entirely occidental nor completely oriental'<sup>19</sup> model of 'One Country – Two Systems'. In the words of Deng Xiaoping, the 'One-Country-Two Systems' principle meant that 'within the People's Republic of China,

<sup>15</sup> David R. Meyer, *Hong Kong as a Global Metropolis* (2009), at 220.

<sup>16</sup> Lucian W. Pye, 'The International Position of Hong Kong', 95 *The China Quarterly* (1983) 456, at 456.

<sup>17</sup> Convention between the United Kingdom and China Respecting an Extension of Hong Kong Territory, signed at Peking, June 9, 1898; Ratifications exchanged at London, August 6, 1898, 4 *AJIL* (1910), at 295-296.

<sup>18</sup> John Carroll, *Edge of Empires: Chinese Elites and British Colonials in Hong Kong* (2007).

<sup>19</sup> Rao Geping and Wang Zhenmin, 'Hong Kong's "One Country, Two Systems" Experience under the Basic Law: two perspectives from Chinese legal scholars', 16(52) *Journal of Contemporary China* (2007) 341, at 341.



the mainland with its one billion people will maintain the socialist system, while Hong Kong and Taiwan continue under the capitalist system'.<sup>20</sup> This commitment to continuity was very much embraced in both the Joint Declaration and Hong Kong Basic Law – Hong Kong's 'mini-Constitution'. Article 2 Hong Kong Basic Law recognises the possibility for the Special Administrative Region (SAR) 'to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power'.<sup>21</sup> This high degree of autonomy is in a certain way justified in Article 3 of the Joint Declaration which emphasises the commitment of the PRC to take due account of 'the history of Hong Kong and its realities'. The Party-State attitude towards Hong Kong was very much that trade and investments should continue to thrive after the retrocession while any demands for further political reforms in Hong Kong shall be controlled.<sup>22</sup> What emerged out of the retrocession was a 'hybrid regime' that combined a strong commitment to the rule of law with a strong concentration of economic and political powers.<sup>23</sup> On the one side, the commitment to the rule of law that was to be secured by the living experience of the vibrant Hong Kong judiciary. On the other side, political participation and political decision making were to remain limited and strongly controlled by the Chinese Communist Party.

From an international law perspective, the Joint Declaration marked an important turning point in the history of China's engagement with international law. While the Nanjing Treaty was very much 'a symbol of their national humiliation', the Joint Declaration marked 'their recovery and

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<sup>20</sup> China Daily, *Deng Xiaoping on "one country, two systems"*, 19 February 2004, available at [http://www.chinadaily.com.cn/english/doc/2004-02/19/content\\_307590.htm](http://www.chinadaily.com.cn/english/doc/2004-02/19/content_307590.htm). It is to be noted that the narrative on the 'One Country – Two systems' has systematically been applied in the narrative on Hong Kong, Macau, but also Taiwan.

<sup>21</sup> The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 1 July 1997, available at <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/103944/126590/F-1433239456/CHN103944.pdf>.

<sup>22</sup> Jonathan D. Spence, *The Search for Modern China* (1999), at 717.

<sup>23</sup> Richard C. Bush, *Hong Kong in the Shadow of China: Living with the Leviathan* (2016), at 63; See also Roda Mushkat, 'Assessing Key Facet of the Rule of Law in Post-1997 Hong Kong', 10(1) *Journal of International and Comparative Law* (2014) 313, at 316.

triumph'.<sup>24</sup> For Hong Kong, the Joint Declaration secured the continued application of international treaties after the retrocession among other as a way to maintain the status of Hong Kong as an important global financial centre.<sup>25</sup> An important concern at the time of the negotiation of the Joint Declaration related to the question of whether the International Covenant on Civil and Political Rights (ICCPR) would still remain in force in Hong Kong after the retrocession. From the perspective of general international law on State succession, it became rapidly clear the PRC would be bound by ICCPR obligations as it had not positively renounced such obligations.<sup>26</sup> Not only was a reference to the ICCPR included in the Joint Declaration (Article 13 of Annex 1), the ICCPR very much emerged as a 'gold standard' of Hong Kong's constitutional order anchored in Article 39 of Hong Kong Basic Law, which has extensively been used by Hong Kong judges who have used the ICCPR as a justification for not enforcing some local pieces of legislation.<sup>27</sup>

### C. A Semi-Independent Foreign Policy

While the foreign affairs relating to HKSAR fall under the responsibility of the central government (Article 13 Basic Law), the Basic Law also recognises the possibility for Hong Kong, within certain limits, to issue its own passports and travel documents (Article 154), to set up official or semi-official economic and trade missions abroad (Article 156), and to

maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields (Article 151).

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<sup>24</sup> John D. Wong, 'From the Treaty of Nanking to the Joint Declaration: The Struggle for Equality through State Documents', 30 *Law & Literature* (2018) 309, at 325.

<sup>25</sup> Roda Mushkat, 'Hong Kong and Succession of Treaties', 46(1) *International and Comparative Law Quarterly (ICLQ)* (1997) 181, at 195.

<sup>26</sup> Johannes Chan, 'State Succession to Human Rights Treaties: Hong Kong and the International Covenant on Civil and Political Rights', 45(4) *ICLQ* (1996) 928, at 944.

<sup>27</sup> Carole J. Petersen, 'Prohibiting the Hong Kong National Party: Has Hong Kong Violated the International Covenant on Civil and Political Rights?', 48(3) *Hong Kong Law Journal* (2018) 789, at 789.

Hundreds of multilateral and bilateral treaties are thus applicable to Hong Kong, whether

- a. because a treaty which applied to Hong Kong before the handover is still in force (or is extended), although mainland China is not a party (Article 153 Basic Law),
- b. because mainland China is party to a treaty and has decided to apply it to Hong Kong,<sup>28</sup> or
- c. because Hong Kong has entered into a treaty on its own (in the fields listed in Article 151 Basic Law) or with Mainland China authorisation (pursuant to Articles 96, 133 and 155 of the Basic Law).<sup>29</sup>

The Basic Law also specifies that Hong Kong constitutes a ‘separate customs territory’ that can be a member of relevant international organisations and a party to trade agreements (Article 116).<sup>30</sup> Finally, Hong Kong has the power to participate in treaty negotiations undertaken by the PRC (Article 150).

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<sup>28</sup> ‘Normally, international treaties become binding upon each party in respect of its entire territory. However, China’s practice in regard to Hong Kong is different given that treaties to which China is a party are not necessarily applicable to the HKSAR but require a specific decision of the CPG in order to become binding in relation to the territory of the Region’ in Bjorn Ahl, ‘The Delineation of Treaty-Making Powers between the Central Government of the People’s Republic of China and the Special Administrative Region of Hong Kong’, 31 *Chinese (Taiwan) Yearbook of International Law and Affairs* (2013) 116, at 132-133; See along the same line Wan Pun Lung, ‘Application and Conclusion of Treaties in the HKSAR of the RPC: Sixteen Years of Practice’, 12(3) *Chinese Journal of International Law* (2013) 589, at 591, para. 5.

<sup>29</sup> See for instance Lung, *supra* note 28, at 602 para. 26 (‘As for agreements which involve issues of sovereignty such as foreign affairs and defence, the Government of the HKSAR must obtain specific authorization from the Central People’s Government for their negotiation and conclusion with foreign States and regions. Agreements on reciprocal juridical assistance as stipulated in Article 96 of the Basic Law in such an example. Such agreements concluded by the HKSAR mainly cover the areas of surrender of fugitive offenders, mutual legal assistance in criminal matters, and transfer of sentenced persons’); Ahl, *supra* note 28, at 127 (‘In practice, prior approval of the CPG will always be sought in all unspecified fields, and when in doubt, the “mandate to negotiate” will be raised by the other party of the proposed agreement’) and 131 (‘Different from Article 151, the provisions of Articles 96, 133 and 155 of the Basic Law provide a treaty-making power of the Region which can only be exercised upon approval by the Central Government. The conclusion of treaties by the Region is conditional upon “the assistance or authorization of the Central People’s Government”’).

<sup>30</sup> See generally Xiaobing Xu and George D. Wilson, ‘The Hong Kong Special Administrative Region as a Model of Regional External Autonomy’, 32(1) *Case Western Reserve Journal of International Law* (2000) 1, at 3-6.

The singular nature of Hong Kong has been intensely discussed among scholars<sup>31</sup> and widely recognised by important international stakeholders. In that sense, the United States established in the United States-Hong Kong Policy Act of 1992, that it would treat Hong Kong as a 'fully autonomous' territory from the PRC for matters relating to economics and trade.<sup>32</sup> International organisations also admit Hong Kong's participation depending on whether the organisation's basic instrument authorises non-States participation. For instance, Hong Kong became a 'non-State member' of the International Civil Aviation Organisation in 2010, and in 1995 a member of the WTO as a separate customs territory in accordance with Article XII of the Marrakesh agreement.<sup>33</sup> In this way, contrary to the PRC, Hong Kong is a founding member of the WTO.<sup>34</sup> Hong Kong has also been very active to conclude trade agreements at bilateral and multilateral levels. It is a party to eight regional trade agreements or preferential trade agreements recognised by the WTO (with New Zealand, Australia,

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<sup>31</sup> As a matter of fact, 'although the HKSAR does not fulfil the prerequisites of statehood, the Region possesses relative legal personality in relation to specific rights and obligations under international law and its actions are insofar regulated directly by international rules. However, Mainland Chinese commentators, in general, do not recognise the international legal personality of Hong Kong [...]', Ahl, *supra* note 28, at 125. Conversely, Huaqun Zeng argued in 2008 that '[t]he HKSAR enjoys probably the most extensive external autonomy that has ever existed in an autonomous region in the world, historical or current' in Huaqun Zeng, 'Unprecedented International Status: Theoretical and Practical Aspects of the HKSAR's External Autonomy', 9(3) *Journal of World Investment & Trade* (2008) 275, at 280. This formula is misleading: the constitutional guarantee of Hong Kong's autonomy does not result of an agreement between Mainland China and Hong Kong, but between Mainland China and the United Kingdom. As such, Hong Kong's autonomy in external affairs is distinct from the autonomy enjoyed by federate States in the United States of America, Switzerland or in other federal States. As the capacity of the UK to put pressure on China and to advocate for autonomy drastically reduced, Hong Kong's own capacity to do it proved to be insufficient. As we explain below, Hong Kong's autonomy in domestic and international matters might be great in the 'Law in Books', but is intrinsically dependent on Beijing's tolerance in the 'Law in action'.

<sup>32</sup> United States Hong Kong Policy Act of 1992: Public Law No. 102-383, 5. October 1992, 106 STAT. 1448.

<sup>33</sup> Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) 1994, 1867 UNTS 154.

<sup>34</sup> See generally Chien Hui Wu, *WTO and the Greater China: Economic Integration and Dispute Resolution*, (2012).

Chile, Georgia, European Free Trade Association, but also with Macao, the ASEAN, and the PRC).<sup>35</sup>

Hong Kong became a member of the Asian Development Bank,<sup>36</sup> and also joined the Asia-Pacific Cooperation Agreement (APEC).<sup>37</sup> Its authorities have voiced their 'keen interest' in joining the Regional Comprehensive Economic Partnership (RCEP),<sup>38</sup> and their 'open mind' regarding an accession of Hong Kong to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).<sup>39</sup> Since the handover, however, agreements on the establishment of representations of international organisations in Hong Kong has been concluded by the central government, pursuant to Article 152(1) of the Basic Law.

In the area of taxes, Hong Kong, which has long been an international financial centre, has been very active in entering into bilateral tax agreements. Hong Kong, whose finances and tax system are independent from the rest of the PRC (Article 8 of the Joint Declaration) constitutes a real 'springboard' for both inward and outward foreign investments.<sup>40</sup> While it provides the PRC with greater access to foreign capital, foreign

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<sup>35</sup> World Trade Organization (WTO), *Hong Kong, China and the WTO*, available at [https://www.wto.org/english/thewto\\_e/countries\\_e/hong\\_kong\\_china\\_e.htm#rtaPtaHead](https://www.wto.org/english/thewto_e/countries_e/hong_kong_china_e.htm#rtaPtaHead).

<sup>36</sup> Asian Development Bank, *Asian Development Bank and Hong Kong, China: Fact Sheet*, September 2021, available at <https://www.adb.org/publications/hong-kong-china-fact-sheet>.

<sup>37</sup> Hong Kong Special Administrative Region (HKSAR) Trade and Industry Department, *International Trade Organisations*, 16 August 2021, available at [https://www.tid.gov.hk/english/ito/apec/apec\\_hk.html](https://www.tid.gov.hk/english/ito/apec/apec_hk.html).

<sup>38</sup> Government of the HKSAR, *Hong Kong Keenly Interested in Joining RCEP*, 16 November 2020, available at <https://www.info.gov.hk/gia/general/202011/16/P2020111600779.htm>; The Chinese Ministry of Commerce has recently confirmed Beijing 'will actively support Hong Kong's early accession'. See Cissy Zhou, Frank Tang, and Orange Wang, *China Backs Hong Kong to Join RCEP Trade Deal in Potential Boost to City's Flagging Logistics Sector*, 25 June 2021, available at <https://www.scmp.com/economy/china-economy/article/3138789/china-backs-hong-kong-join-rcep-trade-deal-potential-boost>.

<sup>39</sup> Government of the HKSAR, *LCQ22: Hong Kong's participation in affairs of international organisations*, 27 February 2019, available at <https://www.info.gov.hk/gia/general/201902/27/P2019022700317.htm>.

<sup>40</sup> Alicia Garcia-Herrero and Gary Ng, *Hong Kong's Economy Is Still Important to the Mainland, at Least Financially*, 19 August 2019, available at <https://www.bruegel.org/2019/08/hong-kongs-economy-is-still-important-to-the-mainland-at-least-financially/>.

companies have long entrusted the institutional and regulatory framework of Hong Kong to serve as a gateway to do business with the PRC. The reality of Hong Kong as a financial centre is quite exceptional: 'We are presented with the unique phenomenon of a foreign, offshore financial centre operating a British-origin legal system within the Chinese state'.<sup>41</sup> Hong Kong has also long been considered by civil society organisations as a tax heaven. It has nevertheless escaped from being included in some of the main official lists of tax havens in recent years. In that sense, Hong Kong has now been removed first from the black and then the grey EU lists of tax havens.<sup>42</sup> The decision of the EU to remove Hong Kong from its lists of non-cooperative jurisdictions has been facilitated by Hong Kong's decision to apply its low taxation regime to both home and foreign companies.<sup>43</sup> The slow pace of reforms on tax matters (in comparison with, for instance, jurisdictions like Singapore) can be explained by a variety of factors including the fact that Hong Kong is somehow protected by China's power in global affairs as well as a need for Hong Kong not to isolate itself from the Chinese market.<sup>44</sup> A number of tax reforms have nevertheless been undertaken with the conclusion of a number of Information Exchange Agreements and Double Tax Agreements (DTA) in compliance with the Foreign Account Tax Compliance Act (FATCA):<sup>45</sup> Hong Kong has now adopted as many as 50 DTAs.<sup>46</sup> All these agreements have further limited the level of bank secrecy applied by Hong Kong banks.<sup>47</sup>

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<sup>41</sup> David C. Donald, *A Financial Centre for Two Empires* (2014), at 2.

<sup>42</sup> Christina Y.M. Ng, 'Is Hong Kong a Noncooperative Tax Jurisdiction? – An Issue of Concern Amidst International Economic Instability', 42(2) *International Tax Journal* (2016) 25, at 25.

<sup>43</sup> Oxfam International, *Notorious tax havens to be let off the hook in EU's blacklist review*, 6 March 2019, available at <https://www.oxfam.org/en/press-releases/notorious-tax-havens-be-let-hook-eus-blacklist-review>.

<sup>44</sup> Roland Vogt, 'Reputations and the Fight against Tax Evasion: EU Pressure and Asian Financial Centres', 95(2) *International Affairs* (2019) 365, at 375.

<sup>45</sup> Stefan Gannon, 'Hong Kong' in Sandra Booyesen and Dora Neo (eds.), *Can Banks Still Keep a Secret? Bank Secrecy in Financial Centres around the World* (2017) 224, at 246.

<sup>46</sup> HKSAR Department of Justice, *List of Double Taxation Avoidance Agreements (Legislative References)*, 1 July 2021, available at <https://www.doj.gov.hk/en/external/table6ti.html>.

<sup>47</sup> Gannon, *supra* note 45, at 249.

The power to conclude international agreements has also been exercised in some other areas where Beijing, because of the nature of its One-Party system, could hardly perform. This is particularly obvious in the area of extraditions, where Hong Kong has concluded as many as 19 surrender of fugitive offenders agreements in application of Article 96 of the Basic law which authorises the SAR to ‘make appropriate arrangements with foreign states for reciprocal juridical assistance’. Since 2013, the PRC has undertaken a major anti-corruption campaign whose scale and duration are very much unprecedented in China’s own history.<sup>48</sup> As part of this fight against corruption, China also launched a major ‘law enforcement drive’ whose idea is that there should be ‘no safe haven’, to use the words of Xi Jinping, for ‘corrupt’ officials to hide.<sup>49</sup> Though Hong Kong’s fight against corruption has been quite independent from institutional and political developments in the rest of China, the two issues have become increasingly connected (as highlighted below). Quite interestingly, the French *Cour de Cassation* ruled that the fact that Hong Kong – as a non-sovereign entity – had not exercised its right to negotiate an extradition agreement with France was legitimate ground to refuse an extradition to the SAR.<sup>50</sup>

### III. Contemporary Evolutions

The very specific status from the perspectives of domestic and international laws has been marked by major evolutions since the handover of 1997. In this section, we will highlight (1) how these changes have affected the ‘One Country-Two Systems’ policy as well as (2) the domestic and international reasons behind these contemporary evolutions.

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<sup>48</sup> Li Ling, ‘The “Organisational Weapon” of the Chinese Communist Party: China’s Disciplinary Regime from Mao to Xi Jinping’, in Rogier Creemers and Susan Trevasques (eds.), *Law and the Party in China: Ideology and Organisation* (2020), at 206.

<sup>49</sup> Xi Jinping via the 78th meeting of the Standing Committee of the Political Bureau of the 18th CPC Central Committee on 9 October 2014, see Chinadaily, *No ‘safe haven’ for corrupt officials*, 3 December 2015, available at [http://www.chinadaily.com.cn/china/2015twosession/2015-03/12/content\\_19796405.htm](http://www.chinadaily.com.cn/china/2015twosession/2015-03/12/content_19796405.htm).

<sup>50</sup> Cour de cassation, ch. crim., 14 février 2012, *Adalberto X*, n°11-87679.

A. Most Significant Evolution Since 1997:  
the Disappearance of Hong Kong as Separate 'System'?

According to the Sino-British Joint Declaration, the special status of Hong Kong within the PRC 'will remain unchanged for fifty years' (Article 3.12). However, this status called 'One Country Two Systems' that derives from the Joint Declaration and the Basic Law, is based on three ambivalent characteristics: First, '[t]he HKSAR is an inalienable part of the People's Republic of China' (Article 1 Basic Law) but it is authorised 'to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power [...]' (Article 2); Second, although the PRC (of which the HKSAR is a part) is led by a single authoritarian party, '[t]he HKSAR shall safeguard the rights and freedoms of the residents [...] and of other persons in the Region in accordance with law' (Article 4), and more importantly, but also according to a less clear-cut and less prescriptive expression, '[t]he *ultimate aim* is the election of all the members of the Legislative Council by universal suffrage' (Article 68, al. 2, emphasis added) and the '*ultimate aim* is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures' (Article 45, al. 2, emphasis added); Third, although the PRC largely follows a State model of capitalism,<sup>51</sup> '[t]he HKSAR shall protect the right of private ownership of property' (Article 6) and more broadly, '[t]he socialist system and policies shall not be practiced in the HKSAR, and the previous capitalist system and way of life shall remain unchanged for 50 years' (Article 5).

These three constitutional characteristics have been the most fundamental points of political tensions and judicial discussions since 1997. Recent developments testify to the fact that these tensions have now seen the victory of mainland China's grip over Hong Kong's autonomy, and of autocracy over democracy and political liberalism. Seen from Beijing, Hong Kong has *de facto* become primarily a national sovereignty issue the

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<sup>51</sup> Curtis J. Milhaupt and Wenton Zheng, 'Beyond Ownership: State Capitalism and the Chinese Firm', 103 *Georgetown Law Journal* (2015) 665.



emphasis has increasingly been put on the ‘one country’ dimension rather than the ‘two systems’.<sup>52</sup>

In fact, as soon as 1997, the Standing Committee of the National People’s Congress tried to bypass the Basic Law and to challenge Hong Kong’s autonomy.<sup>53</sup> But it is only with the adoption of the Hong Kong National Security Law in 2020 and the massive arrests and criminal sentences of political opponents, demonstrators, human rights activists, journalists and lawyers in 2019, 2020, and 2021, that the Basic Law’s interpretation in favour of autonomy, democracy, and human rights have definitely been defeated. Before this final blow, Hong Kong judges and especially the Court of Final Appeal had ‘repeatedly referred to the Basic Law as “our constitution”’,<sup>54</sup> and they sometimes tended to interpret China’s commitment to respect Hong Kong’s autonomy as a constitutional obligation that cannot be circumvented by simply invoking provisions of the Basic Law that point in another direction. Commentators write about a ‘clash of legal cultures’ between Hong Kong’s ‘liberal rule of law’ and Beijing’s ‘hardline Authoritarian Legality’.<sup>55</sup> For their part, Hong Kongese lawyers specialised in international law willingly outlined that the Basic Law implements

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<sup>52</sup> Cheng Jie, *The Story of a New Policy* (2009), available at [http://www.hkjournal.org/archive/2009\\_fall/1.htm](http://www.hkjournal.org/archive/2009_fall/1.htm). In 2007, President Hu Jintao asserted that ‘One country’ is in fact the prerequisite of ‘Two systems’. As Denis Chang put it, ‘[t]his [was] apt to be used by some to play up the “One Country” themes of sovereignty, unity and security to a point where what is a perfectly natural or even necessary characteristic of the HKSAR system will be wrongly deemed to be inconsistent with One Country. [...] In short, overemphasis on “One Country” can result in subverting the very concept of the OCTS model and turning the dialectic on itself.’ Denis Chang, ‘The Imperatives of One Country, Two Systems: One Country before Two Systems’, 37(2) *Hong Kong Law Journal* (2007) 351, at 359.

<sup>53</sup> Roda Mushkat, ‘Scrapping Hong Kong Legislature: An International Law Perspective’, 27(1) *Hong Kong Law Review* (1997), at 12-14.

<sup>54</sup> And more particularly Justice Bokhary. See Anton Cooray, *Constitutional Law in Hong Kong* (2nd ed., 2017), at 29, note 49; Cf. notably, Court of Final Appeal, *Ho Man Kong v. Superintendent of Lai Chi Kok Reception Centre*, (2014) 17 HKCFAR 179, at para. 27; *Ghulam Rbani v. Secretary for Justice* (2014) 17 HKCFAR 138, at para. 111; *W v. Registrar of Marriages* (2013) 16 HKCFAR 112, at para. 61, 209, 224, 225 (all by Justice Bokhary); *A v. Commissioner of Independent Commission Against Corruption* (2012) 15 HKCFAR 362, at para. 13 (Bokhary and Chan PJJ).

<sup>55</sup> Michael C. Davis, ‘The Clash of Legal Cultures Hong Kong Efforts to Maintain the Liberal Rule of Law vs. Beijing’s Hardline Authoritarian Legality’ in Weitseng Chen and Hualing Fu (eds.), *Authoritarian Legality in Asia: Formation, Development and Transition* (2020), at 169.

the Sino-British agreement<sup>56</sup> but that '[...] the Basic Law, which is a Chinese domestic law [...] has no status in international law and no international legal effect with respect to the interpretation of the Sino-British accord, and clearly may not be invoked as justification for failure to perform it'.<sup>57</sup> In particular, China has to fulfil the commitment it made in the Joint Declaration (Annex I, Article XIII, al. 4) that 'the provisions of the International Covenant on Civil and Political Rights', including Article 25 on the individual right to 'take part in the conduct of public affairs, directly or through freely chosen representatives' and 'to vote and to be elected at genuine periodic elections', 'shall remain in force'.

As mentioned in the introduction, the traditional political activism of the Hong Kong's civil society abruptly stopped in 2020, after reaching its height in 2014 with the Occupy Central with Love and Peace movement, inspired by the Occupy Wall Street Movement and commonly known as the Umbrella movement. Faced with this movement, the 2020 NSL was secretly prepared (the text was only known by a very few people until the last moment, and even the Hong Kong chief executive Carrie Lam allegedly did not see it)<sup>58</sup> and adopted in haste (Lam herself then vowed her 'full support' for the NSL)<sup>59</sup>. Although most of the offences mentioned in Article 23 (treason, sedition, theft of State secrets, creation of organisations aimed at challenging national security) were in fact already prohibited by various local rules, the purpose of the NSL was to institute four new

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<sup>56</sup> The One Country Two System has thus been interpreted in a variety of ways depending on whether it is considered as 'an international promise', 'a political commitment', or 'a constitutional obligation'. See Tu Yunxin, 'The Question of 2047: Constitutional Fate of "One Country, Two Systems" in Hong Kong', 21(8) *German Law Journal* (2020), 1481-1525.

<sup>57</sup> Mushkat, *supra* note 53, at 12.

<sup>58</sup> See for instance Tom Porter, *China imposed a sweeping and sinister national security law on Hong Kong, but what it actually says is still a secret*, 30 June 2020, available at <https://www.businessinsider.com/china-keeps-text-hong-kong-security-law-hidden-after-passing-2020-6>.

<sup>59</sup> Tony Cheung, Kimmy Chung, and Joyce Ng, *Two Sessions 2020: Hong Kong Leader Carrie Lam Vows 'Full Support' for National Security Law and Promises City's Freedoms Will Remain Unaffected*, 23 May 2020, available at <https://www.scmp.com/news/hong-kong/politics/article/3085741/two-sessions-2020-hong-kong-leader-carrie-lam-vows-full>.

offences including a crime of secession (Article 20), subversion (Article 22), terrorism (Article 24), and collusion (Article 29).

But the two most important points as regards the NSL are, first, that the Standing Committee of the National People's Congress unconstitutionally did substitute itself to the HKSAR authorities,<sup>60</sup> and second, that China and Hong Kong's authorities immediately threatened opponents of the new law and pro-democracy protesters, including those who simply bore white sheets of paper,<sup>61</sup> to apply the new law to them. In 2020-2021, the last public pro-democracy figures<sup>62</sup> were arrested or forced into silence, mostly for alleged violations of the NSL.<sup>63</sup> On 30 July 2021, a tribunal specialising in national security, whose members are all designated by Hong

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<sup>60</sup> The PRC justified it in reference to Article 62 (14) of the Chinese Constitution, which foresees that the National People Congress has the power to decide on the system to be instituted in special administrative regions. However, the Basic Law of Hong Kong provides that '[t]he Government of the HKSAR shall be *responsible for the maintenance of public order in the Region*' (Art. 14, emphasis added), that '[t]he Department of Justice of the HKSAR shall control criminal prosecutions, *free from any interference*' (Art. 63, emphasis added), and that '[i]n criminal (...) proceedings in the HKSAR, *the principles previously applied in Hong Kong and the rights previously enjoyed by parties to proceedings shall be maintained*' (Art. 86, emphasis added). See Johannes M.M. Chan, *Five Reasons to Question the Legality of a National Security Law for Hong Kong*, 1 June 2020, available at <https://verfassungsblog.de/five-reasons-to-question-the-legality-of-a-national-security-law-for-hong-kong/>.

<sup>61</sup> Tom Grundy, *Security Law: Hong Kong Police Arrest 8 at "Blank Placard" Silent Protest*, 6 July 2020, available at <https://hongkongfp.com/2020/07/06/security-law-hong-kong-police-arrest-8-at-blank-placard-silent-protest/>.

<sup>62</sup> The tightening of the repression began sooner, namely in 2019 and in the beginning of 2020. For instance, '[o]n 18 April 2020 Hong Kong police arrested fifteen prominent pro-democracy figures, including Martin Lee (barrister and founder of the Democratic Party), Margaret Ng (barrister and former legislator), and Lee Cheuk-yan (union leader and labour rights activist), for joining three 'unapproved' protests in 2019. The arrests follow an announcement from the Central Government's Hong Kong Liaison Office that it is not bound by Article 22 of the Basic Law (prohibiting interference in matters within the scope of Hong Kong's autonomy), as well as renewed calls by Chinese officials for Hong Kong to enact national security legislation.' See Alvin Y.H. Cheung, 'Political contestation in Hong Kong: From containment to Elimination', in Alessia Amighini (ed.), *Between Politics and Finance: Hong Kong's "Infinity War"?* (2020) 30, at 41-42.

<sup>63</sup> See the 'timeline of developments since China imposed national security legislation in Hong Kong [on 30 August 2020], making anything Beijing regards as subversion, secession, terrorism or colluding with foreign forces punishable by up to life in prison' proposed by Reuters, *The impact of the national security law on Hong Kong*, 4 June 2021, available at <https://www.reuters.com/world/asia-pacific/impact-national-security-law-hong-kong-2021-05-31/>.

Kong Chief Executive Carrie Lam pursuant to Article 44 of the NSL, released its first criminal sentence, outlawing the most popular slogan of recent demonstrations in Hong Kong: 'Liberate Hong Kong, revolution of our time'.<sup>64</sup> The decades-long commemoration of the Tiananmen massacre, which were taking place each 4 July since 1990, and during which tens of thousands (sometimes hundreds of thousands) of Hong Kongese stage a candlelit vigil, has been banned in 2020 and 2021. The official justification was health reasons but Chow Hang Tung, the new organiser of this candlelit vigil (her predecessors were already in jail) was arrested by the Hong Kong police on 4 June 2021. For its part, the Human Rights Front, a Hong Kong-based civil society organisation, broke up in August 2021.

Therefore, the new law both symbolises the breakdown of democracy and the loss of autonomy of Hong Kong. Through its text and implementation, it criminalises any contestation of this decline and prevents any return to a more liberal or more democratic regime, for instance through the organisation of open election primaries.<sup>65</sup> The NSL also enhances Beijing's pretention to extraterritorial reach. Currently, the NSL is mostly oriented towards the facilitation and legitimisation of the repression in Hong Kong. Nevertheless, it does so through the establishment of a crime of 'collusion' that aims at intimidating both Hong Kong citizens, foreigners, and international institutions.<sup>66</sup> For instance, the very official *China Daily Global* reported that the Civil Human Rights Front, which was finally disbanded in August 2021,

reportedly signed a joint declaration to the United Nations calling for an international investigation into alleged police brutality during the insurrection in 2019. If

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<sup>64</sup> See for instance Simon Leplâtre, 'Première Condamnation en Vertu de la Loi de Sécurité Nationale', *Le Monde International*, 2 August 2021; Rock Ronald Rozario, *Amnesty slams first sentence under Hong Kong security law*, 2 August 2021, available at <https://www.ucanews.com/news/amnesty-slams-first-sentence-under-hong-kong-security-law/93539#>.

<sup>65</sup> 'When asked on 19 August [2020, ten days before the establishment of the new crime of 'subversion' by the NSL] whether any democrat would be allowed to run for Chief Executive, Luo's predecessor Zhang Xiaoming retorted with th[is] statement: "the fact that you are allowed to stay alive, already shows the country's inclusiveness"', see Cheung, *supra* note 62, at 41.

<sup>66</sup> See in particular Carole J. Petersen, 'A Primer on Hong Kong's National Security Law', 1(4) *USALI Perspectives*, 19 November 2020.

true, this could constitute the offense of collusion with external elements to harm the city, contrary to the National Security Law for Hong Kong.<sup>67</sup>

The ‘international’ component of the NSL goes further than simply criminalising the will of Hong Kongers to gain support from outside. In this respect, Article 38 of the NSL specifies that the law also applies to offences committed ‘from outside the Region’ ‘by a person who is not a permanent resident of the Region’. In that sense, the NSL includes an important element of extraterritoriality and appears as both ‘a transnational, as well as a local mechanism for repression’.<sup>68</sup> For instance, the pro-democracy activist but also U.S. citizen Samuel Chu is subject to an arrest warrant based on alleged violations of the NSL (he is being prosecuted for ‘inciting secession’ and ‘colluding with foreign powers’).<sup>69</sup> As the law does apply to everyone, everywhere, it endeavours to lead governmental and non-governmental organs and organisations, States, media, and academics to global self-censorship when it comes to China. In that sense, the law follows a more general trend in which the Party-State attempts to extend its control beyond China’s own territory.<sup>70</sup> It has been used extensively in most of the laws adapted by the Party-State as part of its new national security legal architecture. For instance, the application of the 2017 National Intelligence Law allegedly extends to the foreign subsidiaries of a parent company whose headquarters are in China.<sup>71</sup> Interestingly though, the NSL goes one step further to what is, for instance, foreseen in the Criminal

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<sup>67</sup> Grenville Cross, *Civil Human Rights Front not Above the Law*, 17 August 2021, available at <https://www.china-daily.com.cn/a/202108/17/WS611b09f0a310efa1bd6692d9.html>.

<sup>68</sup> Eva Pils, *From the “Rule of Law” to “Rule by Fear”: Hong Kong’s National Security Law*, 3 August 2020, available at <https://rightnow.org.au/analysis/hong-kong-national-security-law/>.

<sup>69</sup> See AFP, *Exile is no protection from Hong Kong security law, says US dissident Samuel Chu – wanted for “secession”*, 1 August 2020, available at <https://hongkongfp.com/2020/08/01/exile-is-no-protection-from-hong-kong-security-law-says-us-dissident-samuel-chu-wanted-for-secession/>.

<sup>70</sup> See generally Zhengxin Huo and Man Yip, ‘Extraterritoriality of Chinese Law: Myths, Realities and the Future’, *Chinese Journal of Comparative Law (CJCL)* (2021) 328.

<sup>71</sup> Donald C. Clarke, *The Zhon Lun Declaration on the Obligations of Huawei and Other Chinese Companies under Chinese Law*, 17 March 2019, available at <https://ssrn.com/abstract=3354211>, at 4.

Law of the PRC (Article 7 and Article 8)<sup>72</sup> – that is, that Article 38 is not limited by the principle of dual criminality. The NSL therefore applies to offences even if the targeted act does not constitute an offence in the foreign jurisdiction.

In terms of substance, these changes can be explained by the PRC's growing confidence in its own authoritarian model of governance, and consequently by the CCP's more open rejection of 'Western values', some of them being endorsed in Hong Kong, with those now being presented as 'political perils' for the Party-State.<sup>73</sup> How, in more practical and procedural terms, has this evolution been possible? Overall, it was very predictable, as the true pivotal consideration in matters relating to Chinese constitutional law is not the balance of power but the capacity to actually provide an influential and authoritative interpretation of the division of powers.<sup>74</sup> As Humpty Dumpty famously said in *Alice in Wonderland*, the question is not, as Alice thought, 'whether you can make words mean so many different things', '[t]he question is which is to be master – that's all.'

#### B. Which is to Be the Master? Causes and Explanations of the Evolution

As regards the Hong Kong case, the question asked by Humpty Dumpty can be restated as: Who was and is the supreme interpreter of the constitutional 'high degree of autonomy' of Hong Kong? Of the political regime

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<sup>72</sup> Criminal Law of the People's Republic of China, adopted by the Second Session of the Fifth National People's Congress on 1 July 1979, last amended 26 December 2020, available at <https://www.fmprc.gov.cn/ce/cgvienna/eng/dbtyw/jdwt/crimelaw/t209043.htm>.

<sup>73</sup> Notice from the Central Committee of the Communist Party of China's General Office, *Communiqué on the Current State of the Ideological Sphere (Document 9)*, 22 April 2013; See the unofficial translation into English, ChinaFile, *Document 9: A ChinaFile Translation*, 8 November 2013, available at <https://www.chinafile.com/document-9-chinafile-translation>.

<sup>74</sup> On the theoretical argument that 'statutory law is inherently indeterminate and must fail to guide judicial decision-taking in particular cases', see for instance Michel Troper, 'Une théorie réaliste de l'interprétation', in Michel Troper, *La théorie du droit, le droit, l'État* (2001), at 69-84 and almost a century earlier: Carl Schmitt, 'Statute and Judgment – An Investigation into the problem of Legal Practice', in Lars Vinx and Samuel Garrett Zeitlin (eds.), *Carl Schmitt's Early Legal-Theoretical Writings* (2021) 39.

and the capitalist economic structure of Hong Kong? Of the content of human rights, the understanding of judicial independence and of the need to preserve the common law system? And finally, who is the supreme interpreter of the terms ‘Hong Kong’s external relations’ and ‘foreign affairs’ in the Basic Law?

According to Article 19(1) of this law, ‘[t]he HKSAR shall be vested with independent judicial power, including that of final adjudication’. However, the Basic Law also provides that ‘[t]he power of interpretation of this Law shall be vested in the Standing Committee of the National People’s Congress’ (Article 158(1)) and that the courts of the HKSAR are simply *authorised* by the Standing Committee ‘to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region’ (Article 158(2)). Thus, a ‘realist’ reading of the Basic Law makes clear that the Hong Kong court’s interpretation of the Basic Law is subordinate to that of mainland China’s Standing Committee. As we will illustrate below (See III.B. Impact on Hong-Kong as Legal Hub), this means that the determination of the content, the hierarchical value, or the implications of Hong Kong’s international commitments, ultimately lies in the hands of mainland China’s executive power and not Hong Kong’s tribunals.

As ‘[t]he HKSAR is an inalienable part of the People’s Republic of China’ (Article 1, Basic Law), Hong Kong’s courts are not entitled to interpret the text of the PRC Constitution (in particular, its Article 67(4) according to which ‘[t]he Standing Committee of the National People’s Congress exercises the following functions and powers: (1) to *interpret the Constitution and supervise its enforcement*; [...] (4) to *interpret laws*;’),<sup>75</sup> whereas the Standing Committee is legally and more prominently in practice, the supreme interpreter of the wording ‘final adjudication’ in the Basic Law. In fact, the Hong Kong Court of Final Appeal itself has recognised that ‘the NPCSC [National People’s Congress’ Standing Committee]’s power of interpretation is not limited to the excluded provisions’ but covers all the provisions of the Basic Law, and may be exercised outside any litigation.<sup>76</sup>

<sup>75</sup> Emphasis added.

<sup>76</sup> *Director of Immigration v. Chong Fung Yuen* (2001) 2 HKLRD 533.

This unbalanced relationship between these two kinds of interpreters is of great significance for the understanding of the current evolution of Hong Kong.

First, from a general or theoretical point of view, democratic regimes are characterised by the fact the supreme interpreter and decision-maker is the people; liberal regimes by the fact that it is the courts of law (as it tended to be the case in Hong Kong before the handover); and authoritarian regimes by the fact that it is the Executive. In view of this tripartite classification, the 1984 Sino-British Joint Declaration superficially looks like a compromise between the main features of liberal and authoritarian regimes. But in fact,

given the [...] plenary power of interpretation [of the Standing Committee of the National People's Congress], it is only through constitutional commitment and self-restraint, especially on the part of the Central Authorities, and constant dialogue with the HKSAR that the "basic policies" enshrined in the [19 December 1984 Sino-British Joint Declaration] and the Basic Law, including a 'High Degree of Autonomy' for the Region,<sup>77</sup> can be fully realised whilst not setting 'One Country' on a collision course with 'Two Systems'.<sup>78</sup>

Second, the fact that the power of interpretation of the Basic Law lies in the hand of the Standing Committee of the National People's Congress means, for instance, that 'the same body that enacted the national security law [NSL]' may impose its interpretation to Hong Kong judges if their interpretation is too liberal.<sup>79</sup> While the 'new' crimes do remain ill-defined in the NSL, their interpretation and enforcement are left to the newly established Office for Safeguarding National Security of the Central People's Government in the HKSAR that is responsible for the handling of 'serious' and 'complex' cases (Article 55).<sup>80</sup>

From a purely formal perspective, the NSL is identical to the Basic Law: it contains authoritarian provisions (admittedly, most of them are of this kind in the NSL) but also provisions regarding human rights (Article 4) and the rule of law (Articles 5 and 58). As with the Basic Law, however,

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<sup>77</sup> See Art. 2 Basic Law.

<sup>78</sup> Chang, *supra* note 52, abstract.

<sup>79</sup> See Petersen, *supra* note 66.

<sup>80</sup> Furthermore, for these cases it is Art. 57, Criminal Procedure Law of the PRC that shall apply.



the lack of independent or democratic institutions responsible for interpreting the law renders these liberal elements meaningless. In other words, the absence of any serious democratic institution, or application of the doctrine of the separation of powers, permits mainland China to unilaterally replace liberal standards by autocratic standards. For instance, it directly jeopardises the independence of the judiciary, irrespective of the ordinary meaning of the relevant Basic Law provisions. In fact, 'the NPCSC if challenged can at any time make another interpretation to deal with whether it has acted in excess of power under the Basic Law [...] and the HKSAR courts, like the rest of China, will be bound by the interpretation'.<sup>81</sup> This 'self-referential loop', as Denis Chang called it,<sup>82</sup> is the key point and 'Achilles' heel of Hong Kong's autonomy: the ultimate responsibility for the interpretation of the Basic Law lies with the NPCSC'<sup>83</sup> and 'unlike many federal or devolved regions, there is no institutional mechanism to ensure that [Hong Kong's executive and legislature] are exercised autonomously'.<sup>84</sup>

More generally, the National People's Congress and its Standing Committee do not recognise any legitimate domestic or decentralised actor that could determine, modify, or temper their decisions regarding Hong Kong, and as importantly, do not recognise any legitimate pre-defined domestic rule,<sup>85</sup> instrument, or consideration that could play the same roles.

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<sup>81</sup> Chang, *supra* note 52, at 361.

<sup>82</sup> *Ibid.*, at 365, note 35.

<sup>83</sup> Yash Ghai, 'The Imperatives of Autonomy: Contradictions of the Basic Law' in Johannes Chan and Lison Harris (eds.) *Hong Kong's Constitutional Debates, Hong Kong Law Journal* (2005), at 40; In the same vein, see for instance Matthew S. Erie, 'The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution', 60(2) *Virginia Journal of International Law* (2020) 225, at 253.

<sup>84</sup> Chan, *supra* note 3, at 447; See also Cora Chan, 'Thirty years from Tiananmen: China, Hong Kong, and the Ongoing Experiment to Preserve Liberal Values in an Authoritarian State', 17(2) *International Journal of Constitutional Law* (2019) 439, at 448-449.

<sup>85</sup> According to Article 159 of the Basic Law, '[t]he power of amendment of this Law shall be vested in the National People's Congress', and as outlined in the aforementioned 2014 White Paper, '[t]he NPCSC has the power of interpretation regarding the Basic Law of the HKSAR, the power of decision on revising the selection methods of the chief executive and the Legislative Council of the HKSAR, the power of supervision over the laws formulated by the legislative organs of the HKSAR, the power of decision on the HKSAR entering a state of emergency, and the power of making new authorization for the HKSAR. The HKSAR comes directly under the CPG, and its chief executive is accountable to the CPG'. Moreover, from an even more 'realistic' perspective, '[t]he Central Military

From an international perspective, the PRC does not accept the jurisdiction of any individual complaints mechanism (whether judicial or non-judicial) with regard to alleged human rights violations, and has never recognised the authority of an international court ruling outside the realm of international economic law. With regard to international instruments related to Hong Kong, the key document is of course the 1984 Sino-British Joint Declaration, that is the basis of the orientation of the Basic Law towards democracy, liberalism, and autonomy. But after remaining evasive for 20 years,<sup>86</sup> Chinese Foreign Ministry Spokesman Lu Kang clearly stated in 2017 that '[n]ow Hong Kong has returned to the motherland's embrace [...], the Sino-British Joint Declaration, as a historical document, no longer has any practical significance, and it is not at all binding for the central government's management over Hong Kong'.<sup>87</sup> Of course, one could give a long description of China's violations of its international obligations according to the Sino-British Declaration,<sup>88</sup> the ICCPR, and the Basic Law. However, as Eva Pils rightly noted, 'brute power practices' such as 'forced disappearance and torture' from mainland China's authorities towards citizens asking for autonomy, democracy, or liberalism, 'make the nuances of legal interpretation meaningless'.<sup>89</sup>

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Commission is the leading body of the Hong Kong garrison, and performs defense and other duties'.

<sup>86</sup> In November 2014, the chairman of the British Parliament's Foreign Affairs Committee, Sir Richard Ottaway, suggested that '[a]t the heart of [the] argument' used by China to refuse to allow visas to the members of this Committee, 'is that the joint declaration signed by China and the United Kingdom is now void and only covered the period from the signing in 1984 until the handover in 1997'. These words, credited to China's deputy ambassador to Britain, Ni Jian, were not officially confirmed. The Hong Kong's secretary for constitutional and mainland affairs Raymond Tam Chi-yuen declared one month later that 'the provisions of the joint declaration have been fully implemented and its purpose and objectives have also been fully fulfilled', a declaration that could be interpreted as implying that the treaty was still binding, or on the contrary that it is terminated because all the obligations it contends have been fulfilled.

<sup>87</sup> See Reuters, *China says Sino-British Joint Declaration on Hong Kong no longer has meaning*, 30 June 2017, available at <https://www.reuters.com/article/us-hongkong-anniversary-china-idUSKBN19L1J1>.

<sup>88</sup> For such an attempt see Alvin Y.H. Cheung, 'Road to nowhere: Hong Kong's Democratization and China's Obligations under Public International Law', 40(2) *Brooklyn Journal of International Law* (2015) 465.

<sup>89</sup> Pils, *supra* note 68. Eva Pils adds to torture and forced disappearance 'fear techniques' such as 'tracking and following; soft detention; "being traveled"; being asked in

This Orwellian approach of the exercise of political power is likely to expand to the whole society, through mechanisms that we already know thanks to previous totalitarian experiences, particularly the ‘Stalinist USSR’ and ‘Maoist China’. For instance, in 2011, a lawyer commenting on the pressure exercised on human rights activists during questioning and public self-criticism sessions, described them in these terms: ‘Not only did they want to make you say *that* black was white, you also had to explain *why* black was white.’ ‘The point, he thought, was to show who was master and show that no law – not even that of elementary logic – constrained the power he had tried to resist’.<sup>90</sup>

#### IV. Contemporary Evolutions’ Impact on Hong Kong’s ‘External Relations’ and ‘Foreign Affairs’

This disturbing evolution of Hong Kong and its relationship with mainland China has an impact on Hong Kong’s external relations and foreign affairs. Reactions to the evolving situation in Hong Kong by citizens and foreign States, international and transnational institutions, and also by foreign or transnational businesses affect the link between Hong Kong and the rest of the world (A), especially the status of ‘legal hub’ that Hong Kong has received over the years (B).

##### A. International Reactions to the Evolutions

The most vocal reactions against the adoption of the NSL came from the United Kingdom. In the words of Lord Patten, the former British governor of Hong Kong, the adoption of the NSL constitutes a ‘comprehensive assault on the city’s autonomy, rule of law, and fundamental freedoms. The integrity of one-country, two-systems hangs by a thread’.<sup>91</sup> It does also

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for “chats”; criminal, administrative, and judicial detention; violent attacks; [...] and – in one or two particularly disturbing instances—brief spells of medically unmotivated, forced psychiatric detention (被精神病).

<sup>90</sup> *Ibid.*; Eva Pils, *China’s Human Rights Lawyers: Advocacy and Resistance* (2015), at 215.

<sup>91</sup> Hong Kong Watch, *Unilateral Introduction of National Security Legislation Shows ‘Total Disregard’ for Hong Kong Autonomy and Fundamental Rights*, 21 May 2020,

constitute a 'flagrant breach of the Sino-British Joint Declaration' which 'cannot be tolerated'.<sup>92</sup> As denounced by the United Kingdom, but also by Australia for instance, the NSL cracks the 'firewall' that separates Hong Kong's and Beijing's judicial system, where human rights guarantees are much more limited.<sup>93</sup> It more specifically jeopardises the supreme nature of the Court of *Final Appeal*, which was established when Hong Kong returned to China and employs several non-permanent judges from Commonwealth nations.

This challenge to judicial independence has been particularly evident when Australian James Spigelman resigned as judge of the Hong Kong appeals court on 18 September 2020,<sup>94</sup> the day after Hong Kong Chief Executive Carrie Lam declared that 'the central government [China] grants administrative, legislative and judicial power to the HKSAR; ultimately, the three institutions are accountable to Beijing through an executive-led system of governance',<sup>95</sup> and thus disavowed several judges' declarations on the importance of the separation of power between the legislature,

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available at <https://www.hongkongwatch.org/all-posts/2020/5/21/unilateral-introduction-of-national-security-legislation-shows-total-disregard-for-hong-kong-autonomy-and-fundamental-rights>.

<sup>92</sup> Hong Kong Watch, *Patten-led group of 904 international Parliamentarians decry 'flagrant breach of the Sino-British Joint Declaration'*, 2 July 2020, available at <https://www.hongkongwatch.org/all-posts/2020/5/23/patten-led-group-of-198-parliamentarians-from-23-countries-decry-flagrant-breach-of-the-sino-british-joint-declaration>.

<sup>93</sup> NSL allows mainland China's authorities, in particular a 'Committee for Safeguarding National Security' (Art. 14) to openly operate in Hong Kong and, in some cases, to remove private persons from the Hong Kong legal system. This committee has a 'National Security Advisor' appointed by the Central Government (Art. 15) and is 'under the supervision of and accountable' to the Central Government. Information relating to the work of this Committee 'shall not be subject to disclosure' and its decisions 'shall not be amenable to judicial review' in Hong Kong.

<sup>94</sup> See Stephen Dziedzic, *Australian James Spigelman resigns as judge of Hong Kong appeals court over new national security law*, 18 September 2020, available at <https://www.abc.net.au/news/2020-09-18/judge-quits-over-hong-kong-national-security-law/12679318>.

<sup>95</sup> Jennifer Creery, *No separation of powers in Hong Kong says Chief Exec. Carrie Lam, despite previous comments from top judges*, 1 September 2020, available at <https://hongkongfp.com/2020/09/01/no-separation-of-powers-in-hong-kong-says-chief-exec-carrie-lam-despite-previous-comments-from-top-judges/>.

executive branch, and judiciary.<sup>96</sup> Carrie Lam’s statement may be understood as a logical follow-up of the 2015 declaration, made by the then-president of the Legislative Council Jasper Tsang, that the separation of powers was not a necessary condition for democracy, as shown by the sovereignty of the British Parliament.<sup>97</sup> It is also consistent with the Secretary for Education Kevin Yeung’s decision, approved by Carrie Lam, to delete ‘the “separation of powers” phrase from teaching materials after six publishers revised the content of Liberal Studies textbooks during a voluntary screening by the Education Bureau’.<sup>98</sup>

As a response to the enactment of the NSL, the European Parliament adopted a resolution calling China to fully respect the Basic Law and the Principle of ‘One Country, Two Systems’ (Paragraph 3); requesting the Council [of the European Union] and the member States to consider filing a case before the International Court of Justice for violation of the Joint Declaration and the International Covenant on Civil and Political Rights (Paragraph 9); recommending to impose targeted economic sanctions (Paragraph 12); and calling for the EU to make use of all the instruments at its disposal – including the ongoing negotiations of a Comprehensive Agreement on Investment – to put China under pressure (Paragraph 6).<sup>99</sup> A month later, the Council of the European Union adopted a ‘coordinated response package’ that included a recommendation to member States to

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<sup>96</sup> For instance, ‘[i]n 2001, then-chief justice Andrew Li said judicial independence was the most basic feature of Hong Kong’s common law system and “lies at the heart of the separation of powers”. In 2014, then-chief justice Geoffrey Ma said at the ceremonial opening of the legal year that the Basic Law, Hong Kong’s mini-constitution, “sets out clearly the principles of the separation of powers” between the three branches.’ See *Ibid.*; The doctrine of the separation of Powers is not mentioned in the index of several classical Hong Kong Constitution Law handbooks such as Kemal Bokhary, Joseph Fok, and Johannes Chan, *Halsbury’s Laws of Hong Kong: Constitutional and human rights law*, (2015) or Kemal Bokhary, Michael Ramsden, and Stuart Hargreaves (eds.), *Hong Kong Basic Law Handbook* (2015). However, it is developed in other reference works such as Johannes Chan and Chin Leng Lim, *The Law of the Hong Kong Constitution* (2nd ed., 2015) at para. 2026-2031 or Stefan H.C. Lo, K. Kwok-yin Cheng, and Wing Hong Chui, *The Hong Kong Legal System* (2nd ed., 2020) at 76-89, in a very ‘common law’ style.

<sup>97</sup> See Kris Cheng, ‘The separation of powers is not a necessary condition for democracy’ – LegCo president, 17 September 2015, available at <https://hongkongfp.com/2015/09/17/the-separation-of-powers-is-not-a-necessary-condition-for-democracy-legco-president/>.

<sup>98</sup> Creery, *supra* note 95.

<sup>99</sup> EP Resolution of 19 June 2020, OJ C 362/71.

review their extradition and other relevant agreements with Hong Kong in light of the adoption of the NSL.<sup>100</sup> In this line, France decided not to proceed with the ratification of the extradition agreement signed with Hong Kong in 2017<sup>101</sup> while Germany,<sup>102</sup> Ireland,<sup>103</sup> Finland,<sup>104</sup> and the Netherlands<sup>105</sup> have decided to suspend their extradition treaty with HKSAR.

At the UN level, more than 50 experts and special rapporteurs have urged the PRC to respect its international obligations, the ICCPR, and the Sino British Joint Declaration in particular, and called for China to withdraw the NSL.<sup>106</sup> In the UN Human Rights Council – of which China is an elected Member – the adoption of the NSL sparked an intense debate and opposition between China's supporters and other delegations. While a coalition led by Cuba negated the human rights implications of the NSL and claimed that the issue shall not be discussed by the Human Rights Council

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<sup>100</sup> Draft Council conclusions on Hong Kong, 24 July 2020, 9872/1/20 REV 1.

<sup>101</sup> Ministère de l'Europe et des Affaires Étrangères, *Hong Kong – Q&R – Extrait du point de presse (03.08.20)*, 3 August 2020, available at <https://www.diplomatie.gouv.fr/fr/dossiers-pays/chine/evenements/article/hong-kong-q-r-extrait-du-point-de-presse-03-08-20>.

<sup>102</sup> German Federal Foreign Office, *Foreign Minister Heiko Maas on the Postponement of the Elections in Hong Kong*, 31 July 2020, available at <https://www.auswaertiges-amt.de/en/newsroom/news/maas-postponement-elections-hong-kong/2372740>.

<sup>103</sup> Conor Gallagher, *Ireland Suspends Extradition Treaty with Hong Kong over Security Law*, 25 October 2020, available at <https://www.irishtimes.com/news/crime-and-law/ireland-suspends-extradition-treaty-with-hong-kong-over-security-law-1.4391000>.

<sup>104</sup> Finnish Prime Minister's Office (*Valtioneuvoston kanslia*), Closing Material of the Presentation of the President of the Republic 16.10.2020 (*Tasavallan presidentin esittelyn 16.10.2020 päätösaineisto*), 16 October 2020, available at <https://vnk.fi/-/tasavallan-presidentin-esittelyn-16.10.2020-paatosaaineisto>.

<sup>105</sup> Hong Kong Watch, *Hong Kong Watch welcomes Ireland and the Netherlands decision to suspend its extradition treaty with Hong Kong and calls for EU Members to now go further and suspend extradition with China*, 23 October 2020, available at <https://www.hongkongwatch.org/all-posts/2020/10/23/hong-kong-watch-welcomes-irelands-decision-to-suspend-its-extradition-treaty-with-hong-kong-and-calls-for-eu-members-to-now-go-further-and-suspend-extradition-with-china>.

<sup>106</sup> OHCHR, *UN experts call for decisive measures to protect fundamental freedoms in China*, 26 June 2020, available at <https://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26006>.

on that basis,<sup>107</sup> a coalition led by the UK emphasised, in contrast, the ‘clear implications for the human rights of people in Hong Kong’ the NSL entails.<sup>108</sup>

On the bilateral front, developments in Hong Kong, and the overall shifts in the relationship between Beijing and Hong Kong, have had numerous consequences. It has led a number of States to reconsider the special and separate status of the HKSAR. The United States has notably adopted the 2019 Hong Kong Human Rights and Democracy Act, which modifies in substance the U.S.-Hong Kong Policy Act of 1992.<sup>109</sup> According to this bill, the department of State has now to certify to Congress on an annual basis as to ‘whether Hong Kong warrants its unique treatment under various treaties, agreements, and U.S. law’.<sup>110</sup> It further specifies that the analysis

shall evaluate whether Hong Kong is upholding the rule of law and protecting rights enumerated in various documents, including (1) the agreement between the United Kingdom and China regarding Hong Kong’s return to China, and (2) the Universal Declaration of Human Rights.<sup>111</sup>

While Hong Kong’s Special Status has so far been preserved, former US Secretary of State Mike Pompeo notably stated that ‘no reasonable person can assert today that Hong Kong maintains a high degree of autonomy from China, given facts on the ground’.<sup>112</sup>

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<sup>107</sup> Permanent Mission of Cuba, *Joint Statement at the 44th Session of Human Rights Council*, 30 June 2020, available at <https://www.mfa.gov.cn/ce/cegv/eng/dbdt/t1793804.htm>.

<sup>108</sup> Julian Braithwaite, ‘UN Human Rights Council 44: Cross-regional statement on Hong Kong and Xinjiang’, presented at *United Nations*, Geneva, 30 June 2020, available at <https://www.gov.uk/government/speeches/un-human-rights-council-44-cross-regional-statement-on-hong-kong-and-xinjiang>.

<sup>109</sup> US Congress, H.R.3289 – Hong Kong Human Rights and Democracy Act of 2019 (2019), available at <https://www.congress.gov/bill/116th-congress/house-bill/3289>.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

<sup>112</sup> US Department of State, *P.R.C. National People’s Congress Proposal on Hong Kong National Security Legislation*, 27 May 2020, available at <https://2017-2021.state.gov/prc-national-peoples-congress-proposal-on-hong-kong-national-security-legislation/>.

## B. Impact on Hong Kong as Legal Hub

The impact of the handover over Hong Kong's relationship with international Law is no novelty. Changes in Hong Kong's policies relating to the conclusion of international agreements or to its participation to international organisations, but also in its policies regarding its understanding of customary international law, date back to 1997. For instance, as a common law country, Hong Kong applied before 1997 a restrictive doctrine of State immunity. After the handover, the Court of Final Appeal held that the question of State immunity is a matter that falls within the sphere of 'foreign affairs' (in contrast to Hong Kongese 'external affairs'), and thus that 'the HKSAR cannot, as a matter of legal and constitutional principle, adhere to a doctrine of state immunity which differs from that adopted by the PRC'.<sup>113</sup> Although the judges' minority strongly argued in favour of a strictly Hong Kongese and judicial appreciation of State immunities (without consulting the Executive of Hong Kong or Mainland China),<sup>114</sup> the National People's Congress Standing Committee issued in 2011 an 'Interpretation', stating that the Central People's Government alone defines the HKSAR's doctrine of State immunities and that Hong Kongese courts<sup>115</sup> are bound by this decision.<sup>116</sup> Today, the HKSAR applies a doctrine of absolute immunity and even the State's consent to arbitration is not considered as a waiver of immunity, although Justice Bokhary PJ suggested that it might be different if the State party to the dispute is also party to the 1958 New York Convention.<sup>117</sup>

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<sup>113</sup> *Democratic Republic of Congo v. FG Hemisphere Associates LLC (No. 1)* (2011) 14 HKCFAR 95, at para. 183 (Chan and Ribeiro PJJ, and Mason NJP).

<sup>114</sup> See the dissenting opinions of Bokhary PJ, at 123, and Mortimer NPJ, at 446.

<sup>115</sup> Although the Court of *final* appeal theoretically has the power of '*final* adjudication'. See, Arts. 2 and 19 Basic Law (emphasis added) and also, Art. 3.3 Joint Declaration and Annex I to the Joint Declaration, at para. I.2.

<sup>116</sup> See Instrument A114 – Interpretation of Art. 13, I and Art. 19, Basic Law of HKSAR of the People's Republic of China, adopted by the Standing Committee of the National People's Congress on 26 August 2011, available at <https://www.elegislation.gov.hk/hk/A114!en.assist.pdf>, esp. at 2. *In fine*: '[...] the HKSAR, including the courts of the HKSAR, is under a duty to apply or give effect to the rules or policies on state immunity that the Central People's Government has determined [...]']

<sup>117</sup> See on this issue *Democratic Republic of Congo v. FG Hemisphere Associates LLC (No 1)* (2012) HKCFAR, at para. 8 and 153-154 (Mr Justice Bokhary PJ).



This does not mean that the legal and judicial system of Hong Kong immediately and fully aligned on mainland China's system. On the contrary, in sharp contrast with the PRC, whose legal system is very much anchored in China's One Party System, far from the ideal of the rule of law, Hong Kong's legal system has been deeply shaped by the dynamics of legal globalisation, before but also after the handover. For instance, Hong Kong adopted *verbatim* provisions of the UNCITRAL Model Law and New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,<sup>118</sup> while States like Australia and even Singapore did not always go that far.<sup>119</sup> Hong Kong has thus a well-established framework for the enforcement of judgments and arbitral awards, and emerged as an international centre for disputes resolution. It not only has been described as 'one of the greatest trading economies in the world' by Prince Charles, but also as 'the oldest, most organic, and most mature New Legal Hub' – that is, a place where a well-established legal industry steers the demand for transactions.<sup>120</sup> According to a survey compiled by White & Case and Queen Mary University of London, Hong Kong is one of the five most preferred seats for arbitration together with London, Singapore, Paris, and

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<sup>118</sup> In particular, Art. 2A, UNCITRAL Model Law (according to which in the domestic law on arbitration's interpretation, consideration should be paid to its 'international origin', and according to which '[q]uestions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based') was adopted *verbatim* (See Shahla F. Ali, 'The Adoption of the UNCITRAL Model Law on International Commercial Arbitration in Hong Kong', in Gary Bell (ed.), *The UNCITRAL Model Law and Asian Arbitration Laws: Implementation and Comparisons* (2018), at 9) and still is Section 9 of Arbitration Ordinance Cap. 609.

<sup>119</sup> In his book *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration: Focusing on Australia, Hong Kong and Singapore* (2016), Dean Lewis compared the ways jurisdictions of Hong Kong, Australia and Singapore adopted the UNCITRAL Model Law and New York Convention. He notably studied the way Art. 2A is included in the Law. In 2016, he very significantly concluded that 'Hong Kong has the highest level of commitment with the inclusion of Art. 2A [...] resulting in a classification of nil or insignificant textual dissimilarity', see Dean Lewis, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration: Focusing on Australia, Hong Kong and Singapore* (2016), at 70 para. 3.2.4.

<sup>120</sup> Erie, *supra* note 83, at 253.

Geneva.<sup>121</sup> While it is popular with foreign companies and investors, the major basis of users is to be found in greater China.<sup>122</sup>

The future of Hong Kong as legal hub is now under stress. As the 2020 NSL, and more broadly, as Mainland China's policies towards Hong Kong relatively suddenly jeopardised its legal and judicial system and its liberal and peaceful atmosphere, neither legal security nor economic and physical security appear to be guaranteed. This shift considerably affects the state of mind of both the youth of Hong Kong and foreign investors and companies. In April 2021, a survey released by the Chinese University of Hong Kong's Institute of Asia-Pacific Studies stated that Hong Kongers were much more pessimistic about the city's future than they were three years ago: almost 60% of Hong Kongers between 15 and 30 years old would emigrate if they could.<sup>123</sup> Similarly, according to the *Financial Times* of 31 January 2021 and 1 February 2021,

[s]enior lawyers at 10 large law firms in Hong Kong, Tokyo and Singapore told [...] they had seen a surge in queries from clients, mostly headquartered in the US and Japan, about whether to write Hong Kong out of governing law and arbitration clauses when conducting business in the financial hub or entering into joint ventures with Chinese and other Asian counterparties.<sup>124</sup>

In the same vein,

[t]he managing partner of another US law firm in Hong Kong, who has worked in the territory for nearly a decade, said: 'We are now getting a lot of questions from companies about this; it has never occurred before in my time. We have large private equity clients who never used to care about arbitration clauses coming to us with the simple question of "is it safe to leave Hong Kong as the seat [of arbitration]?"' [...] He added that clients drawing up contracts "especially on a 10-20 years

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<sup>121</sup> White&Case, *2021 International Arbitration Survey: Adapting arbitration to a changing world*, 6 May 2021, available at <https://www.whitecase.com/publications/insight/2021-international-arbitration-survey>.

<sup>122</sup> 'Interview with Chiann Bao, the Secretary-General of the Hong Kong International Arbitration Centre', 2 *McGill Journal of Dispute Resolution* (2015-2016) 43, at 47.

<sup>123</sup> Cheryl Teh, *New poll shows 60% of Hong Kong youth aged 15 to 30 want to leave the city if they can*, 30 April 2021, available at <https://www.businessinsider.fr/us/poll-shows-60-percent-hong-kong-youth-want-to-leave-2021-4>.

<sup>124</sup> Tabby Kinder and Leo Lewis, *Companies Consider Writing Hong Kong Out of Legal Contracts*, 31 January 2021, available at <https://www.ft.com/content/1070440a-0993-4c19-9797-2c0e781fd7db>.

horizon” are increasingly thinking about alternative jurisdictions like Singapore for their arbitration.<sup>125</sup>

The lawyers quoted by the *Financial Times* linked the move of international corporations not to have Hong Kong as the governing law or the seat of arbitration, to the ‘announcement by Britain that it may pull its judges out of the territory’s highest court’, James Spigelman resignation from Hong Kong’s Court of Final Appeal, ‘as well as enhanced marketing by rival arbitration centres’.<sup>126</sup> Since then, the movement has accelerated significantly. In June 2021, the president of the British Supreme Court from 2017 to 2020, Brenda Hale, declared during an online conference that she would turn down an expected offer of a second term as a non-permanent judge on the Court of Final Appeal (her first stint expired a month later), because of ‘all sorts of question marks’ over Beijing’s new national security law.<sup>127</sup> Recently, Singapore has taken steps ‘to present itself as an alternative financial centre to Hong Kong. These include launching a corporate structure designed to lure funds from areas such as Hong Kong, the Cayman Islands and Luxembourg’<sup>128</sup>. One must add that the combination of the US-China rivalry and the growing mainland China’s grip over Hong Kong make foreign companies worry about the neutrality and impartiality of Hong Kong’s courts in disputes involving Chinese and/or American parties.

All the effects of this recent shift are not visible now. In a letter in response to the article of the *Financial Times* of January 2021, the secretary for justice of the HKSAR Teresa Cheng outlines that

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*; Tabby Kinder and Leo Lewis, *Businesses look at cutting Hong Kong from contracts over fears for rule of law*, 1 February 2021, available at <https://www.ft.com/content/1070440a-0993-4c19-9797-2c0e781fd7db>.

<sup>127</sup> See for instance Chris Lau, *National security law: former British top judge to quit Hong Kong’s highest court with the ‘jury still out’ on Beijing-imposed legislation*, 4 June 2021, available at <https://www.scmp.com/news/hong-kong/law-and-crime/article/3136014/national-security-law-britains-former-top-judge-quit>; The Straits Times, *Senior British judge to quit top Hong Kong court, citing security law question marks*, 4 June 2021, available at <https://www.straitstimes.com/asia/east-asia/senior-british-judge-to-quit-top-hong-kong-court-citing-security-law-question-marks>.

<sup>128</sup> Stefania Palma, Mercedes Ruehl, and Tabby Kinder, ‘Singapore reports record number of arbitration cases’, *Financial Times*, 1 April 2021.

the Hong Kong International Arbitration Centre (HKIAC) shows that the number of arbitration cases handled in Hong Kong last year actually increased, with 318 new cases, the highest number since 2009 [and that] [t]he total amount in dispute was close to \$9 billions – the highest since 2011. [Moreover, t]he vast majority of cases have the “seat” of arbitration in Hong Kong [...] [f]rom July to December 2020 – the six months following the introduction of the National Security Law – the HKIAC received 182 new cases, an increase of 39 per cent from the same period in 2019.<sup>129</sup>

However, this could be the result of a previous trend. For instance, ‘[i]n 2019, the Singapore International Arbitration Centre [also] received 479 new case filings, a record for the centre’.<sup>130</sup>

In fact, the most significant development is that ‘[t]he number of new cases handled by the Singapore International Arbitration Centre [SIAC] in 2020 *more than doubled* to 1,080 from the previous year’,<sup>131</sup> that this change is ‘driven in part by increasing numbers of Chinese companies looking to resolve international disputes’<sup>132</sup> (the parties from the US and China –and India – filed the most cases as foreign users), and that *SIAC surpassed its rival, the HKIAC for the very first time*.<sup>133</sup> Although Singapore has very ancient advantages over Hong Kong in specific areas, for instance in disputes relating to pharmaceutical products,<sup>134</sup> the impressive growth of cases handled by the SIAC is directly connected to mainland China’s

<sup>129</sup> Teresa Cheng, ‘Hong Kong’s role as a hub for arbitration is growing’, *Financial Times*, 10 February 2021.

<sup>130</sup> Kinder and Lewis, *supra* note 124.

<sup>131</sup> Palma, Ruehl, and Kinder, *supra* note 128 (emphasis added); Cf. SIAC, *Highlights – SIAC sets a new record in 2020*, 31 March 2021, available at <https://www.siac.org.sg/69-siac-news/699-siac-sets-a-new-record-in-2020>.

<sup>132</sup> Emma Connors, *Singapore’s lawyers take arbitration business from Hong Kong*, 15 April 2021, available at <https://www.afr.com/world/asia/singapore-s-lawyers-take-arbitration-business-from-hong-kong-20210414-p57j94>.

<sup>133</sup> Anna Zhang, *Singapore International Arbitration Centre Doubles New Case Load in 2020*, 5 May 2021, available at <https://www.law.com/international-edition/2021/05/05/singapore-international-arbitration-centre-doubles-new-case-load-in-2020/?slreturn=20210821073507> (emphasis added).

<sup>134</sup> Bryan Mercurio and Daria Kim argued that ‘the strategy of relying on Hong Kong’s geographic position in the region and broad-based attractiveness is not working’ in this domain, because ‘Hong Kong’s laissez-faire approach, which sees the government playing a minimum role, is not going to attract FDI in the sector. This is especially the case as Singapore and other countries in the region are actively pursuing pharmaceutical FDI through targeted planning and incentives (including subsidies and preferential tax treatment)’ in Bryan Mercurio and Daria Kim, ‘Foreign direct investment in the pharmaceutical industry: Why Singapore and not Hong Kong’, 10(2) *Asian Journal of Comparative Law* (2016) 235, at 255.

choice to enhance its influence on Hong Kong, and to the now well-entrenched tensions between China on the one hand and, on the other hand, the United States of America – but also Australia, the United Kingdom, Japan, or India. This link is notably shown by the fact that

[t]he biggest leap came from US parties, with the total number of cases filed jumping 738 per cent from 65 in 2019. [A] trend experts said [that this] was partly due to Singapore’s neutrality amid increasing tensions between Washington and Beijing. “Singapore walks a fine line between [the US and China],” said Jonathan Yuen, a lawyer for Rajah & Tann specialising in disputes. “By being friendly to both, it is seen as a relatively neutral ground for both sides. People may not want to go to New York or China, but both sides have no problem going to Singapore”.<sup>135</sup>

While business centres are driven by various factors (the concentration of economic activities but also pro-business governance including tax advantages, easy company incorporation procedures, infrastructures, good restaurants and so on), the expansion of a legal hub is primarily based on two major bases: legal certainty (i.e. guarantee given to economic actors that legal rules will apply notwithstanding geopolitics or political changes, something which is often referred to as ‘neutrality’ and ‘impartiality’ although the prevalence of legal certainty is a very political choice, and to a certain extent an authoritarian one) and the certainty that judicial and arbitral decisions will be fully executed. This is mostly according to these two criteria that the two biggest legal hubs of the region (the oldest, Hong Kong, and Singapore) are compared and, in fact, have been competing for a long time. As regards the first issue, legal certainty, it is linked with the neutralisation of a true democracy or a true representative regime (i.e. with the limitation of the effects of alternation of political parties in power) but above all with political stability and legal continuity. Until recently, although the HKSAR was a little bit below Singapore, it could compete with this ‘perfect dictatorship’.<sup>136</sup> But it is obviously not the case anymore. Who does still think that – to use classical criteria<sup>137</sup> – Hong Kong is one of the ‘most politically stable country in Asia’, a ‘nation with the

<sup>135</sup> Palma, Ruehl, and Kinder, *supra* note 128.

<sup>136</sup> To use the meaningful formula of Eugénie Mérieau, *La dictature, une antithèse de la démocratie ? – 20 idées reçues sur les régimes autoritaires* (2019).

<sup>137</sup> See for instance Guide Me Singapore, *Doing Business – Singapore vs Hong Kong*, available at <https://www.guidemesingapore.com/why-singapore/hong-kong/doing-business---singapore-vs-hong-kong>.

highest public trust of politicians' or 'transparency of government policy-making'? Moreover, all websites comparing Singapore and Hong Kong as business and arbitration centres are based on the assumption that the HKSAR legal system is a common law system that ensures equality before the law and is both transparent and independent, and close to the legal systems of London and New York. Even the conference 'Why Hong Kong is irreplaceable', held by its secretary for justice Teresa Cheng<sup>138</sup> upholds this argument, which is less and less persuasive in the wake of recent negative attention on its courts.

Hong Kong has launched an aggressive marketing campaign to protect the territory's reputation as a global legal and financial hub. While arguments on the political stability and common law system of Hong Kong are now less compelling, idiosyncratic arguments like the geographical proximity to China and the easiness to penetrate mainland China market are more convincing than ever.

From a legal point of view, one of the key assets of the HKSAR arbitration is that since the conclusion of the Arrangement concerning Mutual Enforcement of Arbitral Awards between Mainland China and the HKSAR on 21 June 1999 (an arrangement that took effect on 1 February 2000), PRC courts agree to enforce the awards made in HK pursuant the Arbitration Ordinance<sup>139</sup> which was amended on the basis of the Arrangement. Moreover, since 1 October 2019, the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the HKSAR provides that 'parties to Hong Kong-seated arbitrations administered by an eligible arbitration institution in Hong Kong have the right to apply for interim measures from Mainland Chinese courts'.<sup>140</sup> Hong Kong is the only jurisdiction which may

<sup>138</sup> See Asian Academy of International Law, *Why Hong Kong is irreplaceable*, 9 March 2021, available at [https://www.scmp.com/presented/news/hong-kong/topics/why-hong-kong-irreplaceable/article/3124071/why-hong-kong?module=perpetual\\_scroll&pgtype=article&campaign=3124071](https://www.scmp.com/presented/news/hong-kong/topics/why-hong-kong-irreplaceable/article/3124071/why-hong-kong?module=perpetual_scroll&pgtype=article&campaign=3124071).

<sup>139</sup> See Pt. 10 Div. 3 Arbitration Ordinance (Cap. 609).

<sup>140</sup> Herbert Smith Freehills, *China's Top Court publishes its first Annual Report on Judicial Review of Arbitration-related Cases*, ('Interim injunctions in support of arbitration'), 8 January 2021, available at <https://hsfnotes.com/arbitration/2021/01/08/chinas-top-court-publishes-its-first-annual-report-on-judicial-review-of-arbitration-related-cases/>. According to the Supreme People's Court of China, between 1 October 2019 and

provide such a useful service. The Arrangement concerning Mutual Enforcement of Arbitral Awards between Mainland China and the HKSAR has been amended on 27 November 2020 by a ‘Supplemental Arrangement’ concluded by the Chinese Supreme People’s Court and the Hong Kong Department of Justice. It stipulates that *all* arbitral awards made pursuant to the Arbitration Ordinance of Hong Kong are covered by the Arrangement (Supplemental Arrangement, A. 2), that recognition is not required prior to enforcing those arbitral awards before the courts of mainland China (Supplemental Arrangement, A. 1), that ‘parallel enforcement’ (in HKSAR and mainland China) is authorised (Supplemental Arrangement, A. 3<sup>141</sup>), and that the courts may order preservation measures before or after the enforcement of an arbitral award (Supplemental Arrangement, A. 4). Obviously, mainland China makes effort to reassure foreign investors and legal professionals. On the judiciary side, a 2006 Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the HKSAR also ‘permits enforceable judgments requiring payment of money made by the designated courts in Hong Kong and the Mainland pursuant to a written choice of court agreement by the parties, to be recognized and enforced in the other jurisdiction’.<sup>142</sup>

However, and quite surprisingly, Hong Kong has not (yet) found its place as a central venue for disputes emerging out of China’s flagship Belt and Road Initiative.<sup>143</sup> The legal dimension of the Belt and Road Initiative

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31 October 2020, 32 applications for interim measures have been granted by Mainland Chinese courts in relation to Hong Kong arbitration.

<sup>141</sup> To be compared with Arrangement, a. 2, al. 3: ‘If the place where the party against whom the application is filed is domiciled or the place where the property of the said party is situated is in the Mainland as well as in the HKSAR, the applicant shall not file applications with relevant courts of the two places at the same time. Only when the result of the enforcement of the award by the court of one place is insufficient to satisfy the liabilities may the applicant apply to the court of another place for enforcement of the outstanding liabilities. The total amount recovered from enforcing the award in the courts of the two places one after the other shall in no case exceed the amount awarded’. On this question before the entry into force the Arrangement and the Supplemental Arrangement, see Geoffrey Ma and Denis Brock (eds.), *Arbitration in Hong Kong: A Practical Guide* (4th ed., 2017), at para. 19.046.

<sup>142</sup> Lo, Cheng, and Chui, *supra* note 96, at 377.

<sup>143</sup> Lin Feng, ‘Hong Kong’s Role in the BRI Dispute Resolution: Limits of Law and Power of Politics’, 8(1) *CJCL* (2020) 224.

(BRI) – that is, the major framework in which China aims to enhance its connectivity with the rest of the world through investments and infrastructure projects – very much came as an after-thought. The BRI is characterised by an ‘infrastructure development first, institution [*i.e.* norms] next’ type of approach.<sup>144</sup> In the area of disputes resolution, the BRI could see the emergence of a variety of disputes that include investor to State disputes,<sup>145</sup> State to State disputes, and also purely commercial disputes. It is for commercial disputes that one is likely to see a number of sites – including Hong Kong – competing with each other. Against this background, China has created under the framework of the Supreme People’s Court, the China International Commercial Court (CICC) with the purpose of establishing it as a ‘one stop shop’ for disputes resolution under the BRI.<sup>146</sup> The potential for the CICC to become the main venue for litigation, arbitration, or mediation under the BRI still remains limited. According to Chaisse and Xu, ‘[T]he CICC’s stringent jurisdictional requirements and conservative institutional design show that the CICC cannot serve its stated objective of attracting new investment opportunities or foreign parties to the Chinese forum’.<sup>147</sup> As such, the CICC does not address what have long been described as the structural problems pertaining to the design and functioning of the Chinese legal and judicial systems.

## V. Conclusion

In the introduction, we have argued that Hong Kong has become the symbolic place of the clash between authoritarian and liberal/democratic ideologies and forces. We maintain this argument but also have to be careful not to succumb to a too simplistic understanding of the differences between Eastern and Western countries, or Eastern and Western values or

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<sup>144</sup> Jingyuan Zhou, ‘A New Multilateralism? A Case Study of the Belt and Road Initiative’, 8(2) *CJCL* (2020) 384.

<sup>145</sup> Muthucumaraswamy Sornarajah, ‘Chinese Investment Treaties in the Belt and Road Initiative Area’, 8(1) *CJCL* (2020) 55.

<sup>146</sup> Regulations of the Supreme People’s Court on several issues concerning the establishment of the International Commercial Courts, passed by the adjudication committee of the Supreme People’s Court, 25 June 2018, entry into force on 1 July 2018.

<sup>147</sup> Julien Chaisse and Xu Qian, ‘Conservative Innovation: The Ambiguities of the China International Commercial Court’, 115 *AJIL Unbound* (2021), at 17.



cultures. The Hong Kong case proves that, just like in the US, France, or other Western countries, the clash mostly opposes political (and often economic) leaders on the one hand, who try to impose 'their' rules irrespective of the will of the majority, or of attempted resistance of counter-powers or powerless minorities, and on the other hand, ordinary citizens who fight for their freedom or for democracy. This is not to say that there is no difference between mainland China – an authoritarian State – and western States, but rather that issues relating to the balance of power, and the ways in which any State addresses economic and political issues, are not to be taken for granted in particular when the rule of power trumps the rule of law. Recent developments in Hong Kong demonstrate that China's participation in the dynamics of globalisation and growing international presence have not made China a 'responsible stakeholder'. Furthermore, mainland China does not seem to 'socialise' and follow the path set by other great powers after the Second World War and the Cold War. Xi Jinping's 'New Era' finds one of its most blatant manifestations in Hong Kong, and demonstrates the Party-State commitment not to compromise when the political and ideological unity of China is concerned. The reality of Hong Kong and the progressive disappearance of the 'One Country-Two Systems' (traditionally understood) has significant implications for the international legal order and the future of international law. It shall support the development of an independent analysis of Chinese foreign policy's impact in Europe, and to 'study how [Chinese narratives] compare and interact with European interests and values, while acknowledging and reflecting Europe's diversity'.<sup>148</sup>

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<sup>148</sup> European Commission, 'Call: Upgrading Independent Knowledge on Contemporary China in Europe', Horizon Europe – Cluster 2 – Destination 3: Innovative Research on social and economic transformations', HE-CL2-TRANSFORMATIONS.