

Submission of Hanson Y Huang

In respect of the

Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Bill

("the Bill")

And

The Adverse Impact thereof on the International Reputation of Hong Kong SAR

1. Under Article 13 of the Basic Law ("BL"), the Central People's Government authorizes the Hong Kong Special Administrative Region ("HKSAR") to conduct relevant external affairs on its own in accordance with the BL. However, the Bill will preclude the HKSAR from fully discharging its legal obligations under international treaties, hence undermining the heretofore impeccable reputation that underpins its international commercial standing and success.
2. The Bill, regardless of its constitutional standing or legislative intent, is an internal law made pursuant to the Co-operation Arrangement between the Mainland and the HKSAR on the Establishment of the Port at the West Kowloon Station of the Guangzhou-Shenzhen-Hong Kong Express Rail Link for Implementing Co-Location Arrangement ("Jurisdictional Colocation Arrangement").
3. The Bill seeks to establish a Mainland Port Area ("MPA") in the West Kowloon station wherein: "Except for reserved matters, the MPA is to be regarded as an area lying outside Hong Kong but lying within the Mainland for the purposes of:
 - (a) the application of the laws of the Mainland, and of the laws of Hong Kong; and

(b) the delineation of jurisdiction (including jurisdiction of the courts) over the MPA.

In short, the Bill seeks to displace and de-establish the duties of the HKSAR under international law to scrupulously implement treaty obligations within its entire territory.

4. Articles 151 of the BL provides that the HKSAR may maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in certain appropriate fields.

Article 153 of the BL further stipulates that International agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the HKSAR.

5. The HKSAR is party to over 250 multilateral treaties and over 200 bilateral agreements in force. While not all such treaties and agreements have direct application to the MPA, some of the more prominent treaties are pertinent, and any breach thereof will attract international attention and criticism.

6. Every treaty and international agreement in force is binding upon the parties to it and must be performed by them in good faith ("*pacta sunt servanda*").

The rules on observance and application of treaties and international agreements are laid out in the Vienna Convention on the Law of Treaties ("VCLT"). Both China and the HKSAR are party to the VCLT and are bound by its terms: China acceded to the convention on 3 September 1997, and extended its application to the HKSAR through BL Article 13.

7. The Bill, by ousting HKSAR jurisdiction over the MPA, contravenes two out of five provisions on observance and application of treaties under the VCLT.

8. Article 29 of the VCLT on "Territorial scope of treaties" provides that:

"Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."

Hence, the treaty obligations of the HKSAR extend to its entire territory, including the MPA; the Bill will be a derogation thereof. Clause 2 of Article 6 of the Bill specifically

stipulates that the boundary of the HKSAR is not affected. Establishment of the MPA is in breach of HKSAR's international obligation.

9. Article 27 of the VCLT on "Internal law and observance of treaties" stipulates that:
"A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.... "

Thus, the treaty obligations of the HKSAR may not in any way be de-established or diminished by any internal law. The Jurisdictional Colocation Arrangement is clearly an internal law between the HKSAR and the Guangdong government; the Bill will result in the HKSAR breaching its international obligations.

10. Two other notions may be invoked but must also be dispelled, namely: "non-interference in the domestic affairs of States" and "succession and transfer of jurisdiction".
11. "Non-interference in the domestic affairs of States", though a recognized international doctrine, is inapplicable in the case under consideration.

Comparing Jurisdictional Co-location Arrangement at the MPA with co-location arrangement at Shenzhen Bay is at best disingenuous. The latter is more akin to a domestic affair, as Shenzhen has neither the constitutional nor the international standing of the HKSAR. The former must be held to a higher standard of scrutiny. Both China and the HKSAR agreed to be bound by the relevant international treaties, especially since China acceded to the VCLT only after the reversion of Hong Kong. State practice by the Central Government also confirm that the HKSAR's implementation of and compliance with international treaties is not a domestic affair: prior to the reversion, the Secretary General of the United Nations was informed through several diplomatic notes on each and every international treaty that will continue to be implemented in the HKSAR after the reversion.

The wisdom of implementing the Jurisdictional Co-location Arrangement aside, there may be a possibility of curing the shortcoming of the Bill by again informing the Secretary General of the UN through diplomatic notes on the variation of the treaty obligations of the HKSAR, provided such variation can pass VCLT muster.

12. "Succession and transfer of jurisdiction" under certain circumstances is permissible under VCLT. This legal device can be invoked on the basis that under the Bill, the mainland, in assuming jurisdiction over the MPA, will also assume the treaty obligations pertaining thereto, and there will be no legal vacuum.

Under the present circumstances, this approach is specious. The different parties and standards of compliance with international agreement aside, a legal lacuna still remains. Amongst the over 250 international agreements to which the HKSAR is a party, over 70 are agreements to which the People's Republic of China is not a party, and the HKSAR will stand in breach.

13. In conclusion, the Bill is inherently flawed in failing to address the issue of compliance with international treaties and will adversely impact the international reputation of the HKSAR. We urge Legco not to pass the Bill until effective remedies are in place.

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