HONG KONG'S PARTICIPATION IN INTERNATIONAL DISPUTE SETTLEMENT: DEVIATIONS FROM CONVENTIONAL SOVEREIGNTY

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ABSTRACT

In the background of deteriorating economic, diplomatic, and geopolitical relations between China and the United States of America (hereinafter "US"), the Hong Kong Special Administrative Region (hereinafter "HKSAR") has emerged as a significant battleground. In light of the rapid changes in the legal regime that has secured HKSAR's unique status for decades and the apparent spill-over effects of the US-China trade war, HKSAR's legal standing before international courts and tribunals has gained new practical and theoretical meanings which this article assesses. This article analyses Hong Kong's participation in international trade, investment and taxation dispute settlement and delves into how Hong Kong may more actively utilize the World Trade Organization (WTO) dispute settlement regime, Investor-State Dispute Settlement (ISDS) in

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臺灣大學學術期刊資料庫

investment areas and dispute resolution mechanisms under double tax treaties to protect its legitimate interests in the future. Among the many facets of shared sovereignty, this article explores Hong Kong's participation in international dispute settlement to assess the extent to which shared sovereignty has allowed/allows Hong Kong to "expand" its international existence parallel to China's sovereignty. More fundamentally, this article reflects on and addresses the specific question as to whether HKSAR is ready to accept adjudicative methods of dispute settlement (rather than diplomatic means) when considering that the merits of doing so would exceed the economic and political costs. This article provides a comprehensive overview of HKSAR's involvement in international trade, investment, and taxation-related dispute resolution since its handover to mainland China in 1997.

KEYWORDS: *HKSAR, WTO, ISDS, MAP*

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I. INTRODUCTION

For many years, the Hong Kong Special Administrative Region (hereinafter "HKSAR") had approached international dispute settlement on a case-by-case basis and had no cogent strategy. Fundamentally, this is because Hong Kong is not independent and has been a relatively long-lasting example of shared sovereignty, which involves "the engagement of external actors in some of the domestic authority structures of the target state for an indefinite period of time."[1] Due to "one country, two systems" regime, the social and legal mechanisms between the mainland China and HKSAR are different.[2] The "one country, two systems" regime is a significant legal regime in Hong Kong Basic Law.[3] In order not to undermine Hong Kong's economic status, China has allowed Hong Kong to enjoy some international legal sovereignty, including concluding investment and tax treaties and keeping its position in some international organizations, like the World Trade Organization (hereinafter "WTO").

In the background of deteriorating economic, diplomatic, and geopolitical relations between China and the United States of America (hereinafter "US"), the HKSAR has emerged as a significant battleground. In May 2020, the National People's Congress of China authorized its Standing Committee to enact laws prohibiting activities in HKSAR that undermine China's national security.[4] Citing this consequential erosion of HKSAR's autonomy, the US Secretary of State issued a report, which stated that the altered status of HKSAR no longer warranted that special treatment is provided to the region under US law.[5] For its part, the HKSAR

[1] Albert HY Chen, *The Basic Law and the Development of the Political System in Hong Kong*, 15(1) ASIA PAC. L. REV. 19, 33 (2007); Stephen D. Krasner, *The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law*, 25(4) MICH. J. INT'L L. 1075, 1091 (2004). *See also* Guobin Zhu, *The Composite State of China Under 'One Country, Multiple Systems': Theoretical Construction and Methodological Considerations*, 10(1) INT'L J. CONST. L. 272, 272 (2012).

[2] Shuai Guo, *Cross-Border Insolvency Between Chinese Mainland and Hong Kong: The Past, the Present, and the Future*, 30(1) ASIA PAC. L. REV. 70, 71 (2022).

[3] Jaakko Husa, *Constitutional Biography of Hong Kong and Ambiguities of One Country, Two Systems Policy*, 9(2) CHINESE J. COMPAR. L. 268, 270 (2021).

[4] Chris Buckley et al., *New Security Law Gives China Sweeping Powers over Hong Kong*, N.Y. TIMES (June 29, 2020), https://www.nytimes.com/2020/06/29/world/asia/china-hong-kong-security-law-rules.html.

[5] Bureau of E. Asian & Pac. Affs., *2020 Hong Kong Policy Act Report*, U.S. DEP'T OF STATE (May 28, 2020), https://www.state.gov/2020-hong-kong-policy-act-report/ (this development was later formalized through an Executive Order dated July 14, 2020 [hereinafter Order]). Exec. Order No. 13936, 85 C.F.R. 138 (July 14, 2020) (Apart from the several modifications in the export control regime applicable to the Hong Kong Special Administrative Region [hereinafter HKSAR], the Order also imposes sanctions on persons engaged in *inter alia* "human rights abuse" and policies which may impair Hong Kong's security or autonomy. It also extends these sanctions to "all property and interests in property [of such persons] that are in the United States, that hereafter come within the United States [hereinafter US], or that are or hereafter come within the possession or control of any United States person."). *See also* Mao-Wei Lo & Chien-Huei Wu, *From USHKPA to HKHRDA and*

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government immediately indicated its willingness to seek remedy against the United States' actions under the dispute resolution regime of the WTO[6] and requested for the establishment of a WTO Panel in October 2020.[7] In light of the rapid changes in the legal regime that has secured HKSAR's unique status for decades and the apparent spill-over effects of the US-China trade war, HKSAR's legal standing before international courts and tribunals has gained new practical and theoretical meanings which this article assesses.

Hong Kong only participates in "economic" international dispute settlement and its international dispute resolution practice is limited to trade, tax or investment areas.[8] Thus, even though Hong Kong is a signatory to other international dispute settlement treaties, this article does not discuss Hong Kong's participation in other equally important international dispute settlement (hereinafter "IDS") mechanisms like the international court of justice (hereinafter "ICJ") and International Tribunal for the Law of the Sea.[9]

Among the many facets of shared sovereignty, this article explores Hong Kong's participation in international dispute settlement to assess the extent to which shared sovereignty has allowed/allows Hong Kong to "expand" its international existence parallel to China's sovereignty. More fundamentally, this article reflects on and addresses the specific question as to whether HKSAR is ready to accept adjudicative methods of dispute settlement (rather than diplomatic means) when considering that the merits of doing so would exceed the economic and political costs. This article provides a comprehensive overview of HKSAR's involvement in international trade, investment, and taxation-related dispute resolution since its handover to mainland China in 1997. This article argues that despite all available opportunities, so far, Hong Kong has not fully used its autonomy to participate in international dispute settlement.

HKAA: The Turnings of U.S.–China Policy and the End of Hong Kong's Full Autonomy, 25(2) UCLA J. INT'L L. & FOREIGN AFFS. 93, 93 (2021).

[6] Finbarr Bermingham, *Hong Kong Warned WTO Challenge to Potential US Trade Sanctions Could Be 'Counterproductive'*, S. CHINA MORNING POST (May 29, 2020), https://www.scmp.com/economy/china-economy/article/3086713/hong-kong-warned-wto-challenge-potential-us-trade-sanctions.

[7] Hong Kong has formally requested consultations with the US about its "made in China" marking requirement. *Hong Kong Files WTO Case Against U.S. "Made in China" Marking Requirement*, HKTDC RSCH. (Nov. 3, 2020), https://research.hktdc.com/en/article/NTgwODY0OTUz [hereinafter *Hong Kong Files WTO Case Against U.S.*].

[8] The Department of Justice [DoJ] aims to "commit to the development and promotion of Hong Kong as a leading international legal and dispute resolution services centre in the Asia-Pacific region, which objective complements Hong Kong's position as an international business and financial centre." *See LCQ14: Hong Kong as an International Arbitration Hub*, THE GOV'T OF THE HKSAR (Dec. 18, 2019, 4:05 PM), https://www.info.gov.hk/gia/general/201912/18/P2019121800402.htm.

[9] Kathleen Claussen, *Sovereignty's Accommodations: Quasi-States as International Lawmakers*, *in* CHANGING ACTORS IN INTERNATIONAL LAW 27, 45 (Karen N. Scott et al. eds., 2020). Other than international economic law, there are fewer examples of international dispute settlement raised by and against quasi-states.

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This article proceeds as follows. First, the participation of HKSAR in the WTO dispute resolution process is discussed. Then HKSAR's investment dispute resolution mechanisms and the state immunity HKSAR enjoys are considered. Afterward, the resolution of tax-related disputes, especially HKSAR's shift from diplomatic means to adjudicative methods is analyzed. The last part is the conclusion.

II. HKSAR LITIGATION EXPERIENCE IN THE WORLD TRADE ORGANIZATION: BETWEEN PASSIVE PARTICIPATION AND ACTIVE OBSERVATION

As a founding member of the WTO,[10] the HKSAR assumed all corresponding rights and obligations of the Uruguay Round negotiations including the 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter "DSU"). This part of the paper reviews HKSAR's participation in WTO DSU and provides an analysis of the impact this participation has on the economic sovereignty of the HKSAR. The proper subjects of WTO rights and obligations are its members (164 at the time of writing).[11] These comprise not only sovereign States but also customs territories (such as the EU, HKSAR or Macau SAR). In comparison to other international organizations, like the United Nations, the WTO has a peculiarity pursuant to Article XII of the WTO Agreement, that permits separate custom territories which have an autonomous trade policy to be WTO Members.[12] As a full member of the WTO, HKSAR has accepted the single undertaking of all the WTO agreements concluded during the Uruguay Round.[13]

The WTO agreements provide extensive rights and impose numerous obligations on members and their conduct of international trade. A key issue within the WTO system is the manner in which its members assess compliance with and enforce underlying rights and duties. A critical part of any enforcement mechanism is an effective dispute resolution system that aids in resolving disputes concerning underlying rules. Such a system is essential to promote and secure compliance with the rules. The basic institutional and jurisdictional scope of WTO dispute resolution is clearly set

[10] *International Trade Organizations: World Trade Organization*, TRADE & INDUS. DEP'T, THE GOV'T OF THE HKSAR, https://www.tid.gov.hk/english/ito/wto/wto_overview.html (last visited Mar. 31, 2022) [hereinafter *International Trade Organizations: WTO*]; *Hong Kong, China and the WTO*, WORLD TRADE ORG. [hereinafter WTO], https://www.wto.org/english/thewto_e/countries_e/hong_kong_china_e.htm (last visited June 29, 2022) [hereinafter *Hong Kong, China and the WTO*].

[11] *Members and Observers*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited June 29, 2022).

[12] *Accession: Explanation, How to Become a Member of the WTO*, WTO, https://www.wto.org/english/thewto_e/acc_e/acces_e.htm (last visited June 29, 2022).

[13] *International Trade Organizations: WTO*, *supra* note 10. Hong Kong acts as a full and separate member of the WTO with the name "Hong Kong, China."

臺灣大學學術期刊資料庫

out in Article XXIII of the General Agreement on Tariffs and Trade (hereinafter "GATT") 1994 and the DSU.[14] The latter has established a unified and compulsory dispute settlement mechanism for disputes arising from all covered agreements adopted under the umbrella of the WTO. The DSU comprehensively codifies the relevant procedural rules and guidelines. The same core principles apply to any dispute across all agreements and subject matters (with limited exceptions such as special or additional rules contained in a particular covered agreement applicable as *lex specialis*[15] to disputes arising under that agreement). This rule-based system of the DSU ensures that stakeholders can enjoy security and predictability in the multilateral trading system.[16]

In 2020, the WTO Appellate Body became in-operational but 19 countries, including Australia, Brazil, Canada and China, along with the EU have proposed a Multi-Party Interim Agreement (hereinafter "MPIA") to arbitrate trade disputes temporarily.[17] Article 25 of the DSU allows the arbitration of WTO disputes as an alternative to the Panel and Appellate Body procedure, thereby providing the legal basis for establishing a replica arbitration regime to counter the Appellate Body crisis.[18] The main challenge confronting this regime is whether it can produce legally binding decisions. HKSAR is also a participating member of the MPIA system.[19]

It is possible that in the future, the HKSAR may face greater challenges and sanctions from the US, resulting in more trade disputes.[20] In line with the view expressed following China's enactment of the national security law,[21] the US Department of Commerce revoked HKSAR's special status on

[14] *See generally* Rüdiger Wolfrum & Peter-Tobias Stoll, *General Agreement on Tariffs and Trade 1994*, *in* 2 MAX PLANCK COMMENTARIES ON WORLD TRADE LAW: WTO - INSTITUTIONS AND DISPUTE SETTLEMENT 193 (Rüdiger Wolfrum et al. eds., 2006); U.N. Conference on Trade & Dev. [UNCTAD], *Dispute Settlement: World Trade Organization*, at 41, U.N. Doc. UNCTAD/EDM/Misc.232/Add.11 (2003), https://unctad.org/system/files/official-document/edmmisc232add11_en.pdf.

[15] It is mentioned in WTO, WTO ANALYTICAL INDEX GATT 1994 – GENERAL (JURISPRUDENCE) 6, https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_general_jur.pdf [hereinafter WTO ANALYTICAL INDEX GATT 1994].

[16] *See generally* William J. Davey, *The WTO and Rules-Based Dispute Settlement: Historical Evolution, Operational Success, and Future Challenges*, 17 J. INT'L ECON. L. 679 (2014).

[17] Alessandra Mignolli, *The European Union Faces the Crisis of the WTO Dispute Settlement System: Tensions Between Multilateralism and Unilateralism in International Trade Law*, 3 ORDINE INTERNAZIONALE E DIRITTI UMANI [INT'L LEGAL ORDER & HUM. RTS.] 485, 495 (2020).

[18] WTO, *Multi-party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU*, at pmbl., WTO Doc. JOB/DSB/1/Add.12 (Apr. 30, 2020), https://www.hketogeneva.gov.hk/doc/1A12.pdf [hereinafter *MPIA*]; *id.* at 490.

[19] Australia; Brazil; Canada; China; Chile; Colombia; Costa Rica; the European Union; Guatemala; Hong Kong, China; Iceland; Mexico; New Zealand; Norway; Pakistan; Singapore; Switzerland; Ukraine and Uruguay are participating members, see *MPIA*, *supra* note 18.

[20] Ernst-Ulrich Petersmann, *Neo-liberal, State-Capitalist and Ordo-Liberal Conceptions of World Trade: The Rise and Fall of the WTO Dispute Settlement System* 3 (Eur. Univ. Inst. [EUI], Working Paper LAW 2020/16, 2020).

[21] Bermingham, *supra* note 6.

臺灣大學學術期刊資料庫

29 June 2020.[22] However, since the special status of HKSAR is determined by the WTO membership collectively, the revocation measures taken by the US violated its obligations under the WTO agreements and HKSAR decided in October 2020 to mount a challenge against some of the US measures.

A. As a Complainant

The WTO does not grant direct access to its work or meetings to any actor other than its members. This holds equally true for dispute settlement proceedings, to which only members can formally become parties.[23] Private actors and individuals such as industries, consumers and Non-Governmental Organizations (NGOs) are prohibited from initiating formal dispute resolution proceedings and do not have any standing before WTO panels or the Appellate Body.[24] The decision to file a complaint before the WTO dispute settlement system is made by governments independently. This mechanism reflects recognized principles of public international law by which persons, both natural and legal, derive their rights only from the rights of nation States themselves.[25] Traditionally, the exercise of diplomatic protection has been a matter of political expediency.

HKSAR has initiated two cases as complainant and twenty-two cases as the third-party under the DSU to date.[26] The first complaint was filed on 12 February 1996, by which HKSAR requested consultations with Turkey because Turkey imposed quantitative restrictions on the importation of HKSAR's textile and clothing products from 1 January 1996. HKSAR claimed that these measures breached Turkey's obligations under Articles XI and XIII of GATT 1994 and were unjustified under Article XXIV of GATT 1994.

The second complaint filed by HKSAR is the case DS597: *United States — Origin Marking Requirement* which centers around the special trade status that the US has given the HKSAR until 2020.[27] HKSAR decided in October 2020 to mount a challenge against some of the revocation measures imposed

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[22] *Statement from U.S. Secretary of Commerce Wilbur Ross on Revocation of Hong Kong Special Status*, U.S. DEP'T OF COM. (June 29, 2020), https://2017-2021.commerce.gov/news/press-releases/2020/06/statement-us-secretary-commerce-wilbur-ross-revocation-hong-kong.html.

[23] *Dispute Settlement System Training Module: Chapter 1 Introduction to the WTO Dispute Settlement System*, WTO, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s4p1_e.htm (last visited June 29, 2022).

[24] *Id*.

[25] Zubeida Mustafa, *The Principle of Self-Determination in International Law*, 5(3) INT'L LAW. 479, 479 (1971).

[26] *See, e.g.*, Request for Consultations by Hong Kong, *Turkey: Restrictions on Imports of Textile and Clothing Products*, WTO Doc. WT/DS29/1, G/L/64 (Feb. 15, 1996).

[27] *DS597: United States — Origin Marking Requirement*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds597_e.htm [hereinafter *U.S. — Origin Marking Requirement*].

臺灣大學學術期刊資料庫

by the US.[28] In this pending dispute, the consultations requested by Hong Kong on 30 October 2020 only target the question of "Made in China" labeling.[29]

The background to this dispute is the United States–Hong Kong Policy Act of 1992 which allowed the US to treat HKSAR differently from mainland China in trade and commercial relations, based on HKSAR's status as a highly autonomous part of China with its own legal and economic system.[30] This Act was enacted in recognition of the Sino-British Joint Declaration on the Question of Hong Kong (Joint Declaration), through which the control of HKSAR reverted to mainland China in 1997 while retaining certain rights for HKSAR. The Act permits (1) application of existing US laws to HKSAR in the manner that they applied before 1 July 1997 and (2) continued application of the international agreements to which the US and HKSAR were parties. In furtherance of this Act, the US Department of Commerce and the US Customs and Border Protection also framed regulations that would facilitate the treatment of HKSAR as a separate customs territory, mirroring the treatment that the region enjoyed while it was under British control.

Notably, the US–Hong Kong Policy Act of 1992 allows the US President to suspend Hong Kong's differential treatment via executive action if he determines that "Hong Kong is not sufficiently autonomous to justify" such different treatment.[31] This is precisely the measure that the former US President has taken against HKSAR, in light of China's enactment of the national security law.[32] The current US president also treats HKSAR as not autonomous from the People's Republic of China (hereinafter "PRC").[33] The withdrawal of HKSAR's special treatment will result in the application of such trade rules, tariffs and controls to HKSAR as applicable to trade between the US and China. These shall definitely be more onerous than the terms of trade that the HKSAR has enjoyed so far, especially in view of the ongoing trade war between the US and China and the several sanctioning measures in place in the US against both imports from and exports to China.[34]

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[28] *Hong Kong, China Initiates Dispute Complaint Against US Origin Marking Requirements*, WTO (Nov. 3, 2020), https://www.wto.org/english/news_e/news20_e/ds597rfc_03nov20_e.htm.
[29] *Hong Kong Files WTO Case Against U.S.*, *supra* note 7.
[30] 22 U.S.C ch. 66, § 5713.
[31] *Id.* § 5722.
[32] *Trump Targets China over Hong Kong Security Law*, BBC NEWS (May 30, 2020), https://www.bbc.com/news/world-us-canada-52856876.
[33] Terence P. Stewart, *Hong Kong, China Dispute with U.S. on Origin Marking Requirement*, CURRENT THOUGHTS ON TRADE (Apr. 1, 2021), https://currentthoughtsontrade.com/category/hong-kong-china-dispute-with-u-s-on-origin-marking-requirement/.
[34] Dorcas Wong & Alexander Chipman Koty, *The US-China Trade War: A Timeline*, CHINA BRIEFING (Aug. 25, 2020), https://www.china-briefing.com/news/the-us-china-trade-war-a-timeline/.

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There are two major consequences of the withdrawal of the HKSAR's special treatment: (1) It means goods made in Hong Kong and shipped to the US in the future will need to be marked as "Made in China,"[35] and (2) there is a threat and possibility that the additional customs duties already imposed on Chinese exports may also be imposed on Hong Kong exports on account of the trade war.

When we examine revocation measures taken by the US in line with its obligations to the HKSAR under the WTO, it is possible that a case could be made that the Act and possible measures taken by the US potentially breached GATT under Article III. The WTO Members can enjoy national treatment under GATT Article III. According to Article III:2, WTO Members are forbidden to levy higher internal taxes on imported goods compared with the "like" domestic goods.[36] As mentioned above, the US' revocation measures may negatively affect Hong Kong exports and Hong Kong exports may have to pay more taxes or duties compared with the "like" US domestic goods. Consequently, the revocation measures are likely to violate GATT Article III. What's more, some other GATT Articles may also be violated. Firstly, generally, export prohibitions and restrictions are forbidden under the GATT. In Article XI:1 GATT, the general elimination of quantitative restrictions is not only applied to the importation of products, but also to measures that restrict the exportation of goods.[37] Secondly, with respect to labeling ("Made in China"), Article IX:4 GATT provides that the domestic laws and regulations must permit compliance without "seriously damaging the products, materially reducing their value, or unreasonably increasing their cost."[38] Thirdly, if the additional customs duties already imposed on Chinese exports are imposed on Hong Kong exports, the US is bound to modify its WTO Schedules in accordance with the procedures of Articles XXVIII read with XXIV:6 GATT.

B. The HKSAR's Position in the case DS597

The consultations requested by Hong Kong on 30 October 2020 only targeted the question of labeling.[39] On 3 November 2020, the WTO

[35] Eric Lam, *U.S. to Label Hong Kong's Goods as "Made in China" in Blow to City*, BLOOMBERG (Aug. 11, 2020), https://www.bloomberg.com/news/articles/2020-08-11/u-s-to-label-hong-kong-s-goods-as-made-in-china-in-blow-to-city.

[36] Ministry of Econ., Trade and Indus., *National Treatment Principle*, *in* 2008 REPORT ON COMPLIANCE BY MAJOR TRADING PARTNERS WITH TRADE AGREEMENTS – WTO, FTA/EPA, BIT – 265, 266 (2008), https://www.meti.go.jp/english/report/downloadfiles/2008WTO/2-2NationalTreatment.pdf.

[37] Stephen A. Broome, *Conflicting Obligations for Oil Exporting Nations?: Satisfying Membership Requirements of Both OPEC and the WTO*, 38(2) GEO. WASH. INT'L L. REV. 409, 415 (2006).

[38] WTO ANALYTICAL INDEX GATT 1994, *supra* note 15, at 4, https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art9_jur.pdf (Art. IX (Jurisprudence)).

[39] *U.S. — Origin Marking Requirement*, *supra* note 27.

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Members received the request and Hong Kong has limited its claim to "labeling", probably because it wants to minimize the risk of the US invoking national security successfully. The legal basis of the pending complaint are Articles I:1, IX:1, X:3(a) of the GATT 1994, Article 2(c)(d)(e) of the Agreement on Rules of Origin and Article 2.1 of the Agreement on Technical Barriers to Trade (hereinafter "TBT Agreement").[40] Referring to Article 2.1 of the TBT Agreement, Most-Favored Nation (hereinafter "MFN") standard is provided. When the complainant wants to prove the disputed measures violate Article 2.1 of the TBT Agreement, three elements have to be met. Firstly, the disputing measure is a technical regulation within the meaning of Annex 1.1 of the TBT Agreement; secondly, the determination of likeness that the imported product is like with the domestic products and the products of other origin; lastly, the related imported goods is treated less favorably than the "like" goods from other countries.[41] In this case, the US' labeling making requirements are technical regulations within the scope of TBT Agreement. However, the goods imported from Hong Kong are treated less favorably than the "like" goods from other countries and consequently, Article 2.1 of the Agreement is violated.[42]

In defending its measures, the US will likely invoke the national security exception (Art. XXI GATT).[43] From the perspective of the US, within the TBT Agreement, the essential security actions should not be reviewable.[44] However, the panel in the Russia case has analyzed this exception in detail. The 2019 panel report in DS512: *Russia — Measures Concerning Traffic in Transit* provides some clarity on the extent to which the US can rely on this exception.[45] In its report, the panel found that Russia's actions were consistent with the national security exception.[46] Two important clarifications made by the Russia–Ukraine decision on the national security exception regime are directly relevant to the pending dispute between Hong

[40] Request for Consultations by Hong Kong, China, *United States — Origin Marking Requirement*, at 2, WTO Doc. WT/DS597/1, G/L/1365, G/RO/D/8, G/TBT/D/53 (Nov. 3, 2020) [hereinafter Request for Consultation by Hong Kong, China].

[41] First Written Submission of the United States of America, *United States — Origin Marking Requirements*, ¶ 304, WT/DS597 (July 2, 2021), https://ustr.gov/sites/default/files/enforcement/DS/DS597/US.Sub1.fin.pdf [hereinafter First Written Submission of the United States of America].

[42] Request for Consultation by Hong Kong, China, *supra* note 40; Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 202, WTO Doc. WT/DS381/AB/R (adopted June 13, 2012).

[43] *See generally* Brandon J. Murrill, *The "National Security Exception" and the World Trade Organization*, CONG. RSCH. SERV. (Nov. 28, 2018), https://fas.org/sgp/crs/row/LSB10223.pdf; Communication from the United States, *United States — Origin Marking Requirement*, WTO Doc. WT/DS597/2 (Nov. 13, 2020).

[44] First Written Submission of the United States of America, *supra* note 41, at 98.

[45] Panel Report, *Russia — Measures Concerning Traffic in Transit*, at 106, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019) [hereinafter *Russia — Measures Concerning Traffic in Transit*].

[46] Chao Wang, *Invocation of National Security Exceptions Under GATT Article XXI: Jurisdiction to Review and Standard of Review*, 18(3) CHINESE J. INT'L L. 695, 707 (2019).

臺灣大學學術期刊資料庫

Kong and the US. First, according to the panel, measures taken under Article XXI(b) are reviewable.[47] Thus, the WTO Panel could review the US decision to increase tariffs, restrict the export and "Made in China" labeling. Second, the panel report also found that the conditions under which the national security exception is invoked by a member can be objectively observed. Therefore, the Panel in DS597: *US — Origin Marking Requirement*, could review and assess the circumstances in which the US invokes national security exceptions *vis-à-vis* Hong Kong. Basically, the Panel could examine if the measures are necessary, if they have a plausible connection to national security, and if the measures are justified under the national security exception.

Another possible remedy available to HKSAR against the US measure in question is to challenge the measure under WTO covered agreements, specifically Article I of the GATT 1994. In this regard, it is important to recall HKSAR's distinct and original membership of the WTO which is separate from China's membership. In fact, HKSAR became a WTO Member in 1995, before China joined in 2001.[48] Hence, the non-recognition of HKSAR's autonomy cannot affect its status as a WTO Member. Hong Kong's legal personality is also recognized by the Hong Kong Basic Law, which remains in force to date.[49] As a result, HKSAR's membership in the WTO entitles it to enjoy the same trade benefits available to all other WTO Members under Article I of the GATT 1994. Thus, any US tariffs, export controls or other sanctions that are more onerous than those applied to imports and exports from other WTO Members would run afoul of the fundamental principle of WTO law, known as the MFN principle.

Until recently, HKSAR had not participated actively in the WTO dispute resolution regime, especially as a complainant. However, due to the tension between China and the US, HKSAR may utilize the WTO dispute resolution regime more in order to resolve possible disputes in the future. More robust use of this system could secure HKSAR's position in the ongoing trade war between US and China in the future.

C. As a Third Party

In addition to direct consultation requests, WTO Members can participate in proceedings initiated by other Members as third parties. According to Article 10 of the DSU, the interested member State must demonstrate "substantial interest" in the matter before a panel in order to secure a right to participate in proceedings. The third parties must notify the

[47] *Russia — Measures Concerning Traffic in Transit*, *supra* note 45, ¶ 7.104.
[48] *International Trade Organizations: WTO*, *supra* note 10; *Hong Kong, China and the WTO*, *supra* note 10.
[49] XIANGGANG JIBEN FA art. 151 (H.K.).

臺灣大學學術期刊資料庫

Dispute Settlement Body (DSB) of their interests. This includes the right to be heard once by the panel, the right to submit written submissions and the right to receive the submissions made by disputing parties to the first panel meeting.[50] Apart from ordinary third-party rights, "enhanced third-party" rights may also be claimed by third parties participating in disputes.[51] Compared with ordinary third-party rights, third parties can enjoy an additional opportunity through enhanced third-party rights in order to better protect their interests. In the *EC — Bananas III* case, the WTO panel gave sixteen out of twenty-one third-party participants enhanced third-party rights.[52] In this case, third parties could "observe the second substantive meeting of the panel with the parties and make a brief statement at a suitable moment during that meeting."[53] WTO jurisprudence shows that the existence of a member's interest in a particular dispute is not ordinarily questioned.[54] However, due to systemic interests and the precedential effects of reports issued and adopted by the Panel and Appellate Body, large delegations with sufficient resources often participate as third parties.[55]

As of March 2022, Hong Kong has been involved in twenty-two cases as a third-party:

Hong Kong, China as a third-party	WTO Agreement involved (as cited in panel request)
DS21: Australia — Measures Affecting the Importation of Salmonids	Art. XI GATT 1994
DS34: Turkey — Restrictions on Imports of Textile and Clothing Products	Art. XI, XIII GATT 1994
DS58: United States — Import Prohibition of Certain Shrimp and Shrimp Products	Art. I, XI, XIII, XX GATT 1994
DS152: United States — Sections 301–310 of the Trade Act 1974	Art. I, II, III, VIII, XI GATT 1994

[50] Understanding on Rules and Procedures Governing the Settlement of Disputes art. 10, app. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

[51] Takemasa Sekine, *Enhanced Third Party Rights Under the WTO Dispute Settlement System*, 15 MANCHESTER J. INT'L ECON. L. 354, 357 (2018).

[52] Panel Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, ¶¶ 7.4, 7.8, WTO Doc. WT/DS27/R/USA (adopted Sept. 25, 1997) (the term "enhanced third-party" was not used in this case).

[53] Sekine, *supra* note 51, at 358.

[54] Panel Report, *Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products,* ¶ 7.13, WTO Doc. WT/DS98/R (adopted Jan. 12, 2000).

[55] Krzysztof J. Pelc, *Twenty Years of Third-Party Participation at the WTO: What Have We Learned?*, *in* ASSESSING THE WORLD TRADE ORGANIZATION: FIT FOR PURPOSE? 203, 209 (Manfred Elsig et al. eds., 2017).

臺灣大學學術期刊資料庫

DS217: United States — Continued Dumping and Subsidy Offset Act of 2000	Art. X:3, VI:3, VI:2 GATT 1994
DS234: United States — Continued Dumping and Subsidy Offset Act of 2000	Art. VI, X GATT 1994
DS294: United States — Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)	Art. VI GATT 1994
DS315: European Communities — Selected Customs Matters	Art. X:3, X:1 GATT 1994
DS322: United States — Measures Relating to Zeroing and Sunset Reviews	Art. VI GATT 1994
DS337: European Communities — Anti-Dumping Measure on Farmed Salmon from Norway	Art. VI:1, VI GATT 1994
DS375: European Communities and its Member States — Tariff Treatment of Certain Information Technology Products	Art. II:1, X:1, X:2, XXIII GATT 1994
DS376: European Communities and its Member States — Tariff Treatment of Certain Information Technology Products	Art. II:1, X:1, X:2, XXIII GATT 1994
DS377: European Communities and its Member States — Tariff Treatment of Certain Information Technology Products	Art. II:1, X:1, X:2, XXIII GATT 1994
DS544: United States — Certain Measures on Steel and Aluminum Products	Art. II:1(a), II:1(b), I:1, X:3(a), XIX:1, XIX:2 GATT 1994
DS547: United States — Certain Measures on Steel and Aluminum Products	Art. I:1, II:1(a), II:1(b), X:3, XI:1, XIX, XIX:1, XIX:2 GATT 1994
DS548: United States — Certain Measures on Steel and Aluminum Products	Art. I:1, II:1(a), II:1(b), X:3(a), XI:1, XIX:1, XIX:2 GATT 1994

臺灣大學學術期刊資料庫

DS550: United States — Certain Measures on Steel and Aluminum Products	Art. I:1, II:1, II:1(a), II:1(b), X:3(a), XI:1, XIX:1, XIX:2 GATT 1994 (as cited in request for consultations)
DS551: United States — Certain Measures on Steel and Aluminum Products	Art. I:1, II:1(a), II:1(b), XI:1, XIX:1, XIX:2 GATT 1994
DS552: United States — Certain Measures on Steel and Aluminum Products	Art. I:1, II:1(a), II:1(b), X:3(a), XI:1, XIX:1, XIX:2 GATT 1994
DS554: United States — Certain Measures on Steel and Aluminum Products	Art. I:1, II:1(a), II:1(b), X:3(a), XI:1, XIX:1, XIX:2 GATT 1994
DS556: United States — Certain Measures on Steel and Aluminum Products	Art. I:1, II:1(a), II:1(b), X:3(a), XI:1, XIX GATT 1994
DS564: United States — Certain Measures on Steel and Aluminum Products	Art. I:1, II:1(a), X:3(a), XI:1, XIII:1, XIX:1, XIX:2 GATT 1994

SOURCE: Compiled by the authors from WTO, Disputes by member, available at: https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

All the twenty-two cases in the above table have involved interpretation of the GATT. Thus, Hong Kong's participation in cases as a third-party has been limited to trade to goods. At first sight, it may be surprising that Hong Kong's third-party participation is limited in goods disputes while its economy is driven by services. However, services (such as shipping, finance, and insurance) are directly involved in the trade of goods. Even more importantly, the economic power of HKSAR largely depends on maintaining the territory as a hub for Chinese exports to the rest of the world. In this respect, one can interpret HKSAR's involvement as a third party in WTO disputes as an indication of the crucial need to maintain a free market for goods which is one of the conditions for the territory's economic autonomy.

臺灣大學學術期刊資料庫

III. HKSAR'S APPROACH TO INVESTMENT DISPUTE SETTLEMENT: CAN A SYSTEMIC STAKEHOLDER BE SMALL?

Investor-state dispute settlement (hereinafter "ISDS") is one of the most successful forms of international dispute settlement. ISDS may gain considerable importance in Hong Kong's international dispute resolution strategy as a direct consequence of the trade war between the US and China and China's enactment of the national security law. Pursuant to the several executive actions that have followed, HKSAR has lost its special status under US law and consequently will no longer enjoy preferential treatment in trading with the US. A part of this preferential treatment in the past included access to certain export license exceptions which protected the HKSAR from becoming embroiled in the US-China trade war. Being treated at par with China in its trade relations with the US may curtail the economic activity in HKSAR significantly—thereby affecting both domestic entities and foreign investors in its territory.

International investment agreements (hereinafter "IIAs"), including bilateral investment treaties (hereinafter "BITs"), preferential trade agreements with chapters on foreign investment,[56] and sector-specific plurilateral agreements, like the Energy Charter Treaty,[57] contain substantive and well-defined foreign investment obligations. More than 3,000 IIAs constitute a proliferated network of investment protection with most of these IIAs normally containing the same or similar clauses which share the same purpose.[58] Foreign investors, including multinational corporations, can sue the State hosting their investment directly under an ISDS mechanism for failure to perform their obligations under IIAs.[59] This mechanism also vests the disputing parties with the power to appoint their arbitrators.[60]

Sovereign acts can be reviewed by arbitral tribunals so constituted and public interests can be challenged consequently.[61] The HKSAR may strategically choose to use its BITs to challenge the erosion of the value of its investments in relation to the US through ISDS provisions in its BITs in

[56] *See, e.g.*, North American Free Trade Agreement [NAFTA], Dec. 17, 1992, 32 I.L.M. 289; Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area [ASEAN–Australia–New Zealand FTA], Feb. 27, 2009, [2010] A.T.S. 1.
[57] The Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S. 95.
[58] Andrew D. Mitchell & James Munro, *Someone Else's Deal: Interpreting International Investment Agreements in the Light of Third-Party Agreements*, 28(3) EUR. J. INT'L L. 669, 673 (2017).
[59] Marco Bronckers, *Is Investor-State Dispute Settlements (ISDS) Superior to Litigation Before Domestic Courts? An EU View on Bilateral Trade Agreements*, 18 J. INT'L ECON. L. 655, 655 (2015).
[60] Chi-Chung Kao, *The Inclusion of Investment Court System into the EU-China BIT: Innovations, Prospects and Problems*, *in* CHINA-EUROPEAN UNION INVESTMENT RELATIONSHIPS: TOWARDS A NEW LEADERSHIP IN GLOBAL INVESTMENT GOVERNANCE? 247, 251-52 (Julien Chaisse ed., 2018).
[61] *See* Luca Pantaleo, *Lights and Shadows of the TTIP Investment Court System*, *in* TIPTOEING TO TTIP: WHAT KIND OF AGREEMENT FOR WHAT KIND OF PARTNERSHIP? 77, 91 (Luca Pantaleo et al. eds., 2016).

臺灣大學學術期刊資料庫

the future. Hong Kong could have more BITs so as to diversify its foreign investments. For instance, getting BITs with Korea, Switzerland or Brazil would permit to orient more foreign direct investment (FDI) towards these jurisdictions and make Hong Kong less dependent on the US. In the following sections, Section A introduces substantive ISDS provisions in Hong Kong's BITs, Section B focuses on Hong Kong's accession to international conventions and Hong Kong's role, Section C concentrates on State immunity Hong Kong enjoys and Section D examines Hong Kong's participation in the United Nations Commission on International Trade Law (hereinafter "UNCITRAL") Working Group III.

A. Bilateral Investment Treaty Approach

To date, Hong Kong has signed twenty-two Investment Promotion and Protection Agreements (IPPAs) to protect investors and some typical protection standards, like compensation for expropriation, are provided. In HK's BITs, the term "area" instead of "territory" is firstly applied, as the term "territory" is usually used to describe the "scope of sovereign States."[62] In 2019, Hong Kong signed a free trade agreement with an associated investment agreement with Australia.[63] Compared with the 1993 Hong Kong–Australia BIT, the fair and equitable treatment (FET) standard in the 2019 agreement is much narrower which is beneficial to protect the domestic legislation. The application of Chinese treaties, like IIAs, to Hong Kong, is unsettled and the China–Russia BIT has expressly carved out Hong Kong from its scope of application.[64] Like most BITs, the ISDS provisions of these BITs require that when an investment dispute between an investor of one Contracting Party and the other Contracting Party to such a treaty arises, the parties should first endeavor to settle the same amicably.[65] However, these BITs permit the submission of a claim to procedures agreed by both the parties if the dispute cannot be amicably resolved after a period of time—

[62] Zeng Huaqun, *Initiative and Implications of Hong Kong's Bilateral Investment Treaties*, 11(5) J. WORLD INV. & TRADE 669, 677 (2010); Agreement on the Encouragement and Protection of Investments Between the Government of Hong Kong and the Government of the Kingdom of the Netherlands, H.K.-Neth., art. 1.1, Nov. 19, 1992, [1993] HKTBA 3 [HK–Netherlands BIT].

[63] Brenda Horrigan et al., *Australia and Hong Kong Sign New Trade Agreement Containing Investor-State Dispute Resolution Provisions*, HERBERT SMITH FREEHILLS (Mar. 28, 2019), https://hsfnotes.com/arbitration/2019/03/28/australia-and-hong-kong-sign-new-trade-agreement-containing-investor-state-dispute-resolution-provisions/.

[64] Odysseas G. Repousis, *On Territoriality and International Investment Law: Applying China's Investment Treaties to Hong Kong and Macao*, 37(1) MICH. J. INT'L L. 113, 127 (2015).

[65] The Hong Kong Special Administrative Region bilateral investment treaties [hereinafter HKSAR BITs] share this clause.

臺灣大學學術期刊資料庫

three months,[66] six months[67] or sixty days[68] from written notification of the claim. When the disputing parties cannot reach an agreement following such procedures within a stipulated period, usually three months[69] or six months,[70] they can resort to international arbitration to resolve the dispute. Notably, foreign investors can initiate arbitration proceedings on behalf of a company that is involved in the dispute and owned or controlled by them.[71] Even though arbitration of disputes remains the preferred dispute settlement mechanism, in the last few years, Hong Kong has embraced mediation of Investor-State disputes.[72]

The larger majority of Hong Kong's BITs provide for arbitration under the Arbitration Rules of the UNCITRAL and parties can choose to modify the non-mandatory provisions of these existing rules. Alternatively, disputes can also be submitted to the International Court of Arbitration of the International Chamber of Commerce (ICC) or the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) for settlement by an arbitral tribunal.[73] The UNCITRAL rules applicable to the disputing parties should

[66] Agreement Between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments, H.K.-U.K., art. 8, July 30, 1998, [1999] HKTBA 4 [hereinafter HK–UK BIT(1998)]; Agreement Between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments, Austl.-H.K., art. 10, Sept. 15, 1993, [1993] HKTBA 5 [hereinafter HK–Australia BIT (1993)]; Agreement Between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the Republic of Finland for the Promotion and Protection of Investments, Fin.-H.K., art. 8(1), July 2, 2009, [2014] HKTBA 2 [hereinafter HK–Finland BIT (2009)].

[67] Except HK–UK BIT (1998), HK–Australia BIT (1993), HK–Finland BIT (2009) and Agreement Between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of Canada for the Promotion and Protection of Investments, Can.-H.K., art. 21 ¶ 1, Feb. 10, 2016, [2016] HKTBA 8 [hereinafter HK–Canada BIT (2016)], the other HKSAR BITs share this clause.

[68] HK–Canada BIT (2016), *supra* note 67.

[69] HK–UK BIT (1998), *supra* note 66; HK–Australia BIT (1993), *supra* note 66; HK–Finland BIT (2009), *supra* note 66.

[70] Except HK–UK BIT (1998), HK–Australia BIT (1993), HK–Finland BIT (2009) and HK–Canada BIT (2016), the other HKSAR BITs share this clause.

[71] Agreement Between the Government of Hong Kong and the Government of Japan for the Promotion and Protection of Investment, H.K.-Japan, art. 9 ¶ 4, May 15, 1997, [1997] HKTBA 8 [hereinafter HK–Japan BIT (1997)]; HK–Canada BIT (2016), *supra* note 67, art. 20 ¶ 2; Investment Agreement Between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the Republic of Chile, Chile-H.K., art. 21 ¶ 1(b), Nov. 18, 2016, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5413/download [hereinafter HK–Chile BIT (2016)].

[72] Kun Fan, *Mediation of Investor-State Disputes: A Treaty Survey*, 2020(2) J. DISP. RESOL. 327, 334 (2020); Yvonne Guo, *From Conventions to Protocols: Conceptualizing Changes to the International Dispute Resolution Landscape*, 11(2) J. INT'L DISP. SETTLEMENT 217, 229 (2020).

[73] Agreement Between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the United Arab Emirates for the Promotion and Reciprocal Protection of Investments, H.K.-U.A.E., art. 8(5), June 16, 2019, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5865/download [hereinafter Hong Kong–Arab Emirates BIT (2019)].

臺灣大學學術期刊資料庫

be the latest iteration of these rules.[74] The arbitral tribunal can determine interest.[75] Arbitral awards are binding on the disputing parties and should be enforced according to the related domestic law.[76] Alternatively, investors can also choose administrative or judicial settlement mechanisms[77] / reference to competent courts[78] of the other disputing party. Similarly, investors from a court of the disputing party can seek an interim measure of protection.[79] However, the same dispute cannot be submitted to an arbitral tribunal.[80] HKSAR's rights under the BIT regime are dependent on the individual treaties and their texts.[81]

B. ICSID Convention and New York Convention 1958

Until the handover in 1997, the United Kingdom (hereinafter "UK") acceded and extended conventions to and treaties to HKSAR as a Crown territory of the United Kingdom.[82] The 1965 International Convention for the Settlement of Investment Disputes (hereinafter "ICSID Convention") between States and Nationals of other States was signed by the UK in 1965.[83] The UK also ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (hereinafter "NYC") in

[74] Agreement Between the Government of Hong Kong and the Government of the Republic of Austria for the Promotion and Protection of Investments, Austria-H.K., art. 9, Oct. 11, 1996, [1997] HKTBA 22 [hereinafter HK–Austria BIT (1993)].
[75] HK–Australia BIT (1993), *supra* note 66.
[76] Agreement Between the Government of Hong Kong and the Government of the Federal Republic of Germany for the Encouragement and Reciprocal Protection of Investments, Ger.-H.K., art. 10, Jan. 31, 1996, [1998] HKTBA 5 [HK–Germany BIT (1996)]; Agreement Between the Government of Hong Kong and the Government of the Republic of France for the Reciprocal Promotion and Protection of Investments, Fr.-H.K., art. 9, Nov. 30, 1995, [1997] HKTBA 3 [HK–France BIT (1995)]; HK–Finland BIT (2009), *supra* note 66, art. 8(3); Agreement Between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the State of Kuwait for the Promotion and Protection of Investments, H.K.–Kuwait, art. 8 ¶ 3, May 13, 2010, [2013] HKTBA 9 [hereinafter HK–Kuwait BIT (2010)]; Agreement Between the Government of Hong Kong and the Government of the Republic of Korea for the Promotion and Protection of Investments, H.K.-S. Kor., art. 9(4), June 30, 1996, [1997] HKTBA 21 [HK–Korea BIT (1997)]; Hong Kong–Arab Emirates BIT (2019), *supra* note 73, art. 8(7); HK–Chile BIT (2016), *supra* note 71, art. 32.
[77] HK–Japan BIT (1997), *supra* note 71, art. 9 ¶ 3.
[78] HK–Finland BIT (2009), *supra* note 66, art. 8(2); Hong Kong–Arab Emirates BIT (2019), *supra* note 73, art. 8(4).
[79] HK–Kuwait BIT (2010), *supra* note 76, art. 8(2).
[80] HK–Japan BIT (1997), *supra* note 71, art. 9(3); HK–Finland BIT (2009), *supra* note 66, art. 8(2); Hong Kong–Arab Emirates BIT (2019), *supra* note 73, art. 8(6).
[81] *See generally* Ana Ubilava & Luke Nottage, *Novel and Noteworthy Aspects of Australia's Recent Investment Agreements and ISDS Policy: The CPTPP, Hong Kong, Indonesia and Mauritius Transparency Treaties*, *in* NEW FRONTIERS IN ASIA-PACIFIC INTERNATIONAL ARBITRATION AND DISPUTE RESOLUTION (Luke Nottage et al. eds., 2020).
[82] Stephen D. Mau, *Hong Kong's Experience with the New York Convention: An Introduction*, 9(2) TRANSNAT'L LAW. 393, 405 (1996).
[83] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 (1966) [hereinafter ICSID Convention].

臺灣大學學術期刊資料庫

1975 and made a "reciprocity reservation"[84] under Article I.3 thereof, in April 1977, the applicability and coverage of the 1958 NYC and ICSID Convention were extended to Hong Kong.[85] If Hong Kong becomes involved in more investment disputes, the ICSID Convention and NYC are important and will play very significant roles in the recognition and enforcement of investment arbitration awards.

1. ICSID Convention — In 1962, the World Bank facilitated the signature of the ICSID Convention to facilitate global investment.[86] The ICSID Convention establishes a mechanism for apolitical settlement of investment disputes.[87] As of date, there are 164 State parties to the ICSID Convention.[88] By establishing an autonomous system for conciliation and arbitration, ICSID provides an effective ISDS mechanism for foreign private investors and host States.[89] Through this mechanism, foreign investors can have access to what is considered a more depoliticized dispute resolution regime and host States can safeguard their national interest better by avoiding participation in other (or even multiple) fora of international litigation.[90] Foreign investors can bring claims directly against host States, instead of depending on their home States to secure remedies on their behalf.[91] However, they retain the right and can choose to file a suit in a domestic court of the host State if they so desire.[92] The structural flexibility provided by the ICSID Convention is often seen to be valued by foreign investors.[93]

A typical arbitral tribunal established under the ICSID Convention is composed of three arbitrators: each disputing party appoints one, and the two party-appointed arbitrators appoint the third arbitrator.[94] Generally,

[84] *See* ALBERT JAN VAN DEN BERG, THE NEW YORK CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 416 (1981).
[85] Mau, *supra* note 82.
[86] Bruno Zeller & Richard Lightfoot, *Good Faith: An ICSID Convention Requirement*, 8 VICTORIA UNIV. L. & JUST. J. 17, 17 (2018).
[87] Wenhua Shan, *EU Enlargement and the Legal Framework of EU-China Investment Relations*, 6(2) J. WORLD INV. & TRADE 237, 245 (2005).
[88] *List of Contracting States and Other Signatories of the Convention (as of September 3, 2021)*, ICSID (2021), https://icsid.worldbank.org/sites/default/files/documents/2021_Sep.ICSID.ENG.pdf.
[89] Zeller & Lightfoot, *supra* note 86, at 17.
[90] Sir Elihu Lauterpacht, *Foreword* to CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY, at xi (1st ed. 2001).
[91] Ibironke T. Odumosu, *The Antinomies of the (Continued) Relevance of ICSID to the Third World*, 8(2) SAN DIEGO INT'L L.J. 345, 358 (2007).
[92] Kate M. Supnik, *Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law*, 59 DUKE L.J. 343, 351 (2009).
[93] Eric Gottwald, *Leveling the Playing Field: Is It Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?*, 22(2) AM. UNIV. INT'L L. REV. 237, 248-49 (2007).
[94] *Number of Arbitrators and Method of Appointment - ICSID Convention*, ICSID, https://icsid.worldbank.org/services/arbitration/convention/process/appointment (last visited July 16, 2022).

臺灣大學學術期刊資料庫

arbitrators are familiar with the areas related to the dispute.[95] ICSID tribunals apply governing rules which are previously agreed upon between the disputing parties.[96] Arbitral proceedings are available publicly in part and arbitral awards can be enforced widely.[97] Even though Hong Kong has not been actively involved as a respondent in investment arbitration disputes, it is interesting to note that most disputes involving Hong Kong nationals have been instituted under the ICSID Convention. This may be because of Hong Kong's position as a financial hub which attracts companies from other jurisdictions.

2. New York Convention — The NYC[98] has established a uniform structure related to the enforcement stage of international commercial arbitration.[99] The Convention was adopted in 1958 and is still open for accession to the members of the United Nations (UN).[100] With Sierra Leone's 2020 ratification, a total of 166 States and territories have ratified the Convention.[101] The primary objective of the NYC is recognition and/or enforcement of the arbitral tribunal's awards. Both international and domestic arbitration awards must be treated equally by the Contracting States. The Convention shall apply to any "agreement in writing".[102] During the arbitral procedure, the parties' agreement is paramount. According to Article I, arbitral awards include the ones issued by permanent arbitral institutions and ad hoc arbitral tribunals.[103] The law of the forum country can be applied if there is no parties' agreement. When an award is rendered by the arbitral tribunal, it can be enforced more easily than foreign court judgement in ratifying countries.

China has made two reservations which include the reciprocity reservation and commercial reservation to the NYC.[104] On 1 July 1997, NYC

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[95] David R. Sedlak, *ICSID's Resurgence in International Investment Arbitration: Can the Momentum Hold?*, 23 PENN STATE INT'L L. REV. 147, 152 (2004).
[96] ICSID Convention, *supra* note 83, art. 42(1).
[97] *See id.* pmbl.; CHRISTOPHER F. DUGAN ET AL., INVESTOR-STATE ARBITRATION 182 (2008); CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 83 (Loukas Mistelis ed., 2007).
[98] *See generally* Arbitration Ordinance, (2011) Cap. 341 (H.K.).
[99] *See generally* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 [hereinafter 1958 New York Convention].
[100] *See* K.W. Patchett & Commonwealth Secretariat, *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Explanatory Documentation Prepared for Commonwealth Jurisdictions*, UNCITRAL 3 (1981), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-commonwealth.pdf.
[101] *See Contracting States*, N.Y. ARB. CONVENTION, https://www.newyorkconvention.org/countries (last visited July 16, 2022).
[102] 1958 New York Convention, *supra* note 99, arts. II, IV.
[103] *Id.* art. I.
[104] *China*, 1958 N.Y. CONVENTION GUIDE., https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=11&menu=568&opac_view=-1 (last visited July 16, 2022); Taroh Inoue, *Introduction to International Commercial Arbitration in China*, 36 H.K. L.J. 171, 188 (2006).

臺灣大學學術期刊資料庫

was extended by China to be applied to Hong Kong.[105] Hong Kong has a prominent role in setting up arbitral institutions in the Greater Bay Area (Guangdong-Hong Kong-Macao) and Hong Kong's arbitration system can resolve different types of disputes, including investment-related disputes.

C. Hong Kong Court of Final Appeal Approach Towards Sovereign Immunity

Sovereign immunity is important in international law and international relations[106] and "has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty, the jurisdiction of the State over events and persons within that territory."[107] In practice, sovereign immunity is a limited right of States. According to Article 5 of the UN Convention on Jurisdictional Immunities of States and Their Property (hereinafter "UNCSI"), "[a] State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention."[108] However, there is a difference between immunity from a suit and immunity from execution. The International Court of Justice (ICJ) held that the jurisdictional immunity does not indicate immunity from enforcement.[109]

1. Recognition of an Investment Award is Separate from Recognition of Execution — In *FG Hemisphere Associates LLC v. D.R. Congo*, the Hong Kong Court of Final Appeal held that the recognition of an investment award is a separate stage from the recognition of its execution.[110] Through its pleadings for immunity, the Democratic Republic of Congo tried to resist the recognition of an arbitration award in HKSAR. The court by majority held that well-established common law principles recognized that a waiver of immunity for the enforcement of arbitral awards must be evinced in respect of both jurisdictional immunity and immunity of property from execution, which are distinct immunities enjoyed by a State.[111]

2. Immunity from a Suit at the Recognition Stage —

(a) If Immunity Is Involved — Referring to the decision in *FG Hemisphere*, the Hong Kong Court of Appeal has held that when enforcing

[105] *Hong Kong*, 1958 N.Y. CONVENTION GUIDE, https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=11&menu=579&opac_view=-1 (last visited July 16, 2022).
[106] According to the reasoning of the International Court of Justice (ICJ) in Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 99, ¶ 57 (Feb. 3) [hereinafter *Jurisdictional Immunities of the State*].
[107] *Id.* ¶ 57.
[108] G.A. Res. 59/38, art. 5 (Dec. 2, 2004).
[109] *Jurisdictional Immunities of the State*, *supra* note 106, ¶ 113.
[110] Congo v. FG Hemisphere Assoc. LLC, [2011] 14 H.K.C.F.A.R. 95, ¶ 383.
[111] *Id.* ¶¶ 379, 382-83.

臺灣大學學術期刊資料庫

an award under the NYC, the relevant court exercises an adjudicative function for which the party seeking enforcement continues to bear the burden to address possible defenses and the party resisting enforcement continues to enjoy the right to resist enforcement based on aforesaid defenses.[112] Based on this reasoning, when recognizing an NYC award, the forum State can invoke its adjudicative power to decline recognition if certain conditions are met.

(b) Waiver — According to Article 7(1)(b) of UNCSI, immunity from a suit can be contractually waived in advance.[113] However, the Court of Final Appeal in the *FG Hemisphere* case held that the contract, which is the arbitration agreement to waive the State immunity, in this case, is insufficient.[114] In this regard, it held that the threshold of waiver of immunity is high and requires explicit words or conduct of an impleaded State indicating such waiver.[115]

The debtor State needs to exempt the forum State from offering immunity to another State.[116] In this regard, the majority of the Hong Kong Court of Appeal in the *FG Hemisphere* case held that international agreements cannot occasion a waiver of immunity by a non-party State according to the *pacta tertiis* rule.[117]

3. Immunity from Execution at the Execution Stage — As has been discussed above, immunity from execution is a distinct stage from immunity from a suit. The German Federal Constitutional Court in the *Philippine Embassy Bank Account Case* has stated that immunity from execution is not curtailed in international law, unlike immunity from jurisdiction, since forced execution entails more severe consequences for the foreign State.[118] As a general rule, the exception of waiver is available in cases of immunity from execution. However, in *FG Hemisphere* (Hong Kong Court of Final Appeal, hereinafter "HKCFA"), the court stated that the arbitral agreement itself cannot be regarded as a waiver of immunity from execution.[119] Overall, the HKCFA case is very significant because it is a dispute which highlights the complexities of Hong Kong's unique sovereignty as a participant in international dispute settlement. By recognizing the position of the People's

[112] FG Hemisphere Assoc. LLC v. Congo, [2010] 2 H.K.L.R.D. 66, ¶ 174.
[113] Int'l L. Comm'n, Rep. on the Work of Its Forty-Third Session, U.N. Doc. A/46/10, at 27 (1991).
[114] Congo v. FG Hemisphere Assoc. LLC, [2011] 14 H.K.C.F.A.R. 95, ¶ 390.
[115] *Id.* ¶ 392.
[116] See also the observation of the Supreme Court of the Netherlands in HR 14 oktober 2016, NJ 2017/192 mn.t Th.m. that it is the forum State's responsibility to afford immunity to the debtor State.
[117] Adrian Lai, *State Immunity in the Context of Enforcement of Investment Arbitration Awards*, *in* HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 17 (Julien Chaisse et al. eds., 2020). See also the judgment of the Hong Kong Court of First Instance on this issue by Reyes J., FG Hemisphere Assoc. LLC v. Congo, [2009] 1 H.K.L.R.D. 410, ¶ 116.
[118] August Reinisch, *European Court Practice Concerning State Immunity from Enforcement Measures*, 17(4) EUR. J. INT'L L. 803, 807 (2006).
[119] Congo v. FG Hemisphere Assoc. LLC, [2011] 14 H.K.C.F.A.R. 95, ¶¶ 378-79.

臺灣大學學術期刊資料庫

Republic of China that an international convention signed by the PRC did not recognize restrictive State immunity and that the PRC only recognized the doctrine of absolute State immunity, Hong Kong's constitutional courts gave full interpretation to Hong Kong's precarious international standing.

In resolving investor-State disputes, Hong Kong has dynamic approaches. Firstly, Hong Kong has signed a limited number of BITs but has in recent years started setting new model BIT standards which are very different from the BIT model adopted by China. Secondly, as an applicable territory under China's membership of the ICSID Convention and NYC, Hong Kong has provided alternative avenues for its residents to utilize other multilateral two conventions to promote the enforcement of arbitral awards. Lastly, by analyzing and limiting the immunity exercised in Hong Kong, the role of Hong Kong as a place to enforce awards can be protected.

D. UNCITRAL Working Group III

Due to many problems existing in the current ISDS mechanism, like the absence of an appeal mechanism and inconsistent arbitral awards, the UNCITRAL Working Group III was established to discuss possible reform of investment treaty arbitration.[120] UNCITRAL does not merely act as a venue for international law-making, but as an actor that has navigated a complex series of relationships in hopes of forging a salient role for the organization in the reforms process and "around one hundred states and observer entities have been involved in working group meetings so far, along with ten international governmental organizations and several dozen nongovernmental ones."[121] In Working Group III, all stakeholders have contributed their expertise to the deliberations.[122] The Working Group started out with a vote.[123] Participants including "representatives of 50 of the 60 member states of UNCITRAL . . . and 36 non-member states with observer status, as well as international and non-governmental organizations" attended the meeting.[124]

The three-step agenda of Working Group III was to

[120] U.N. Comm'n on Int'l Trade L. [hereinafter UNCITRAL] Working Grp. III, *Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of China*, at 2, U.N. Doc. A/CN.9/WG.III/WP.177 (July 19, 2019) [hereinafter UNCITRAL Working Grp. III, *Submission from China*].

[121] Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112(3) AM. SOC'Y INT'L L. 410, 429 (2018).

[122] UNCITRAL Working Grp. III, *Possible Reform of Investor-State Dispute Settlement (ISDS)*, at 2, U.N.Doc. A/CN.9/WG.III/WP.142 (Sept. 18, 2019).

[123] Anthea Roberts, *UNCITRAL and ISDS Reform: Not Business as Usual*, EJIL:TALK! (Dec. 11, 2017), https://www.ejiltalk.org/uncitral-and-isds-reform-not-business-as-usual/.

[124] *UNCITRAL Working Group III Continues Debate on ISDS Concerns and Multilateral Reform*, IISD (July 30, 2018), https://www.iisd.org/itn/2018/07/30/uncitral-working-group-iii-continues-debate-on-isds-concerns-and-multilateral-reform/.

臺灣大學學術期刊資料庫

> (a) first, *identify* and consider concerns regarding investor-State dispute settlement; (b) second, consider whether reform was *desirable* in the light of any identified concerns; and (c) third, if the Working Group were to conclude that reform was desirable, *develop* any relevant solutions to be recommended to the Commission (emphasis added).[125]

During the ISDS reform process, the interests and obligations of countries and investors should be carefully dealt with.

The latest session, which is the 42nd Working Group III session, was held in New York from 14 to 18 February 2022.[126] Participating territories including HKSAR and organizations have agreed that reforming the current investment treaty arbitration regime is desirable by focusing on four main themes. The first part is building an "*ad hoc* or standing multilateral mechanism". [127] China has proposed the establishment of a permanent appellate mechanism.[128] The second focus of reform is on the appointment and ethics of arbitrators. China points out that the selection of arbitrators is the basic right of parties and arbitrators should obey the code of conduct.[129] And referring to dispute prevention and mitigation, China recommends developing an alternative dispute resolution mechanism and adding a consultation process before the arbitration procedure. Consistent with its BIT practice in the last few years, Hong Kong is promoting mediation for dispute resolution. [130] Meanwhile, China also emphasizes the importance of transparency of third-party funding. Even though the UNCITRAL reform process is still ongoing, the different positions adopted by China (proposing a permanent appellate mechanism) and Hong Kong (supporting the mediation) show that Hong Kong still maintains some degree of autonomy in international economic dispute settlement even though its political sovereignty appears to be diminishing.

The aim of part II is not to only talk about HKSAR as a respondent or Hong Kong investors as claimants. Instead, it aims to demonstrate what actions HKSAR has taken in the ISDS forum as a systemic stakeholder. In other words, this part is talking about the special status of HKSAR in the ISDS forum. After the analysis of the four sections above, it can be seen that

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[125] Int'l Trade L. Comm'n, Rep. on the Work of Its Fiftieth Session, ¶ 264, U.N. Doc. A/72/17 (2017).
[126] *Working Group III: Investor-State Dispute Settlement Reform*, UNCITRAL, https://uncitral.un.org/en/working_groups/3/investor-state (last visited June 13, 2022).
[127] UNCITRAL Working Grp. III, *Possible Reform of Investor-State Dispute Settlement (ISDS) Addendum*, U.N. Doc. A/CN.9/WG.III/WP.166/Add.1 (July 30, 2019).
[128] UNCITRAL Working Grp. III, *Submission from China*, *supra* note 120, at 4.
[129] *Id*. at 5.
[130] Dini Sejko, UNCITRAL Working Group III on ISDS Reform Virtual Pre-Intersessional Meeting on the Use of Mediation in ISDS Background Paper for Session 3—Hybrid Models of Arbitration and Mediation 7 (2020) (unpublished manuscript) (on file with author).

臺灣大學學術期刊資料庫

HKSAR is actively participating in the ISDS forum. If there are investment disputes involving HKSAR or its investors as a party, HKSAR has provided a comprehensive system to resolve the related disputes and enforce the awards. In this way, HKSAR can improve its attractiveness and competitiveness and more foreign investors may invest in Hong Kong. Besides, Hong Kong investors can also enjoy better protection provided by HKSAR.

IV. HKSAR'S INVOLVEMENT IN INTERNATIONAL TAXATION DISPUTE RESOLUTION: FROM DIPLOMATIC MEANS TO ADJUDICATIVE METHODS

HKSAR has made a shift from utilizing diplomatic means to adjudicative methods when it comes to resolving tax-related disputes under double taxation agreements. In the following sub-sections, we will briefly look at the dispute resolution mechanisms under Hong Kong's double taxation agreements, consider the practice of mutual agreement procedure (hereinafter "MAP") in HKSAR and analyze the trends and benefits of the adjudicative methods in solving tax-related disputes.

A. How Tax Agreements Deal with Dispute Resolution

Three main procedures, namely unilateral actions, MAP, and mandatory binding arbitration are the main mechanisms in double taxation agreements for dealing with taxation-related disputes. The first procedure is that of unilateral action. According to Article 24 of the HKSAR double taxation agreements (MAP):

> Where a person considers that the actions of one or both of the Contracting Parties result or will result for him in taxation not in accordance with the provisions of this Agreement, he may, irrespective of the remedies provided by the domestic laws of those Parties, present his case to the competent authority of the Contracting Party of which he is a resident.[131]

The limitation period for such action, which runs "from the first notification of the action resulting in taxation not in accordance with the provisions of this Agreement," varies across the spectrum of HKSAR double taxation agreements.[132] Subsequently the MAP becomes relevant when a

[131] The HKSAR double tax agreements share this clause in the respective section, Article 24(1).
[132] Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Italian Republic) Order, (2013) Cap. 112CI, § 24(1) (H.K.) [hereinafter HK–Italy

臺灣大學學術期刊資料庫

competent authority is unable to resolve the problem unilaterally, and then reaches out to the other concerned competent authority in the other contracting jurisdiction to resolve the dispute through a mutual agreement procedure.[133] MAP requires the competent authorities to simply "endeavor" to resolve the dispute.[134] If the competent authorities cannot resolve the dispute:

> [W]ithin [two/three] years from the presentation of the case to the competent authority of the other Contracting Party, any unresolved issues arising from the case shall be submitted for arbitration upon request by the person and subject to both competent authorities and the person agreeing in writing to be bound by the decision of the arbitration board.[135]

The decision reached by such an arbitration board is binding for/on both parties.[136]

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double tax agreement (2013)]. Art. 24(1) stipulates two years, the left tax agreements require three years.

[133] The HKSAR double tax agreements share this clause in the respective section, Article 24(2).

[134] *Id.*

[135] Inland Revenue (Double Taxation Relief with respect to Taxes on Income) (Switzerland) Order, (2012) Cap. 112CA, § 24(5)(b) (H.K.) [hereinafter HK–Switzerland double tax agreement (2012)], stipulates three years; HK–Italy double tax agreement (2013), § 24(5); Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Jersey) Order, (2013) Cap. 112CG, § 23(5) (H.K.) [hereinafter HK–Jersey double tax agreement (2013)]; Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income and Capital) (Principality of Liechtenstein) Order, (2011) Cap. 112BU § 24(5) (H.K.) [hereinafter HK–Liechtenstein double tax agreement (2011)]; Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Kingdom of the Netherlands) Order, (2010) Cap. 112BL § 24(5) (H.K.) [hereinafter HK–Netherlands double tax agreement (2010)]; Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Guernsey) Order, (2013) Cap. 112CH § 23(5) (H.K.) [hereinafter HK–Guernsey double tax agreement (2013)]; Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Japan) Order, (2015) Cap. 112BS § 24(5) (H.K.) [hereinafter HK–Japan double tax agreement (2015)]; Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Islamic Republic of Pakistan) Order, (2017) Cap. 112CZ § 25(5) (H.K.) [hereinafter HK–Pakistan double tax agreement (2017)].

[136] HK–Italy double tax agreement (2013), *supra* note 135, § 24(5); HK–Jersey double tax agreement (2013), *supra* note 135, § 23(5); HK–Liechtenstein double tax agreement (2011), *supra* note 135, § 24(5); Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (Canada) Order, (2013) Cap. 112CF § 23(6) (H.K.) [hereinafter HK–Canada double tax agreement (2013)]; HK–Netherlands double tax agreement (2010), *supra* note 135, § 24(5); HK–Guernsey double tax agreement (2013), *supra* note 135, § 23(5); HK–Switzerland double tax agreement (2012), *supra* note 135, § 24(5); HK–Japan double tax agreement (2015), *supra* note 135, § 24(5); HK–Pakistan double tax agreement (2017), *supra* note 135, § 25(5).

臺灣大學學術期刊資料庫

B. HKSAR Mutually Agreed Procedure Practice

Based on the MAP peer review report of HKSAR, the MAP inventory and the number of new cases is small.[137] In this regard, taking the period from 2016-18 as an example, several observations can be made. For one, referring to the opening inventory on 1 January 2016, there were only six cases, where only one case was related to attribution/allocation.[138] During that period, thirteen attribution/allocation cases were submitted with only four "other" cases. For another, until 31 December 2018, four attribution/allocation cases have been resolved and the number of resolved "other" cases is three. Hence, ten attribution/allocation cases and six "other" cases are pending respectively. In addition, the average time to close cases is around fourteen months.[139]

In relation to the MAP outcomes of the closed cases (only for those commenced from 1 January 2016), two categories should be considered of transfer pricing, and other cases. With respect to transfer pricing cases, 67% (two cases) have been resolved by unilateral relief grant while the remaining 33% (one case) were denied by the MAP process.[140] With respect to the other cases, all of them (only one case) were resolved by unilateral relief grant.

C. Future of BEPS and HKSAR

Under Article 25 of the Organisation for Economic Co-operation and Development (OECD) Model Convention, MAP has been identified as the first choice when faced with taxation-related disputes. Only when the MAP process is unsuccessful in resolving such disputes should mandatorily binding arbitration be considered.[141] However, not all HKSAR double taxation agreements have incorporated mandatory binding arbitration as a tax-related dispute resolution mechanism.[142] For instance, the HK–Pakistan

[137] ORG. FOR ECON. CO-OPERATION & DEV. [hereinafter OECD], MAKING DISPUTE RESOLUTION MORE EFFECTIVE—MAP PEER REVIEW REPORT, HONG KONG, CHINA (STAGE 1): INCLUSIVE FRAMEWORK ON BEPS: ACTION 14, at 9 (2019), https://www.oecd-ilibrary.org/docserver/46034be3-en.pdf?expires=1662887986&id=id&accname=ocid53016431a&checksum=815D805014478E28D97B1AFE702059A5.

[138] *Id.* at 10.

[139] *Id.*

[140] *MAP Statistics 2018 Hong Kong, China*, OECD 3 (2018), https://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics-2018.htm.

[141] OECD, MODEL TAX CONVENTION ON INCOME AND ON CAPITAL: CONDENSED VERSION 41 (2017), https://www.oecd-ilibrary.org/docserver/mtc_cond-2017-en.pdf?expires=1662886202&id=id&accname=ocid53016431a&checksum=F7041E489439F6F570E632E54D03DAA5.

[142] Only HK–Italy double tax agreement (2013), § 24(5); HK–Jersey double tax agreement (2013), § 23(5); HK–Liechtenstein double tax agreement (2011), § 24(5); HK–Canada double tax agreement (2013), § 23(6); HK–Netherlands double tax agreement (2010), § 24(5); HK–Guernsey double tax agreement (2013), § 23(5); HK–Switzerland double tax agreement (2012), § 24(5); HK–Japan double tax agreement (2015), § 24(5); HK–Pakistan double tax agreement (2017), § 25(5) include mandatory binding arbitration. State sovereignty is the main reason why some countries tend not to

臺灣大學學術期刊資料庫

Double Tax Agreement, and the Hong Kong–Canada Double Tax Agreement, include mandatory binding arbitration clauses. This in spite of the stark difference is in the status of the contracting parties. While Pakistan is a developing country, Canada is a developed one. Yet the same provision regarding dispute resolution has been adopted within the double tax agreement by HKSAR.[143] Although MAP holds a dominant position in resolving tax-related disputes, mandatory arbitration has its own merits, like a more convenient initiating way and less biased awards.[144]

HKSAR should adopt mandatory arbitration in resolving taxation-related disputes for two reasons. First, more foreign investors will invest in HKSAR under the promise of greater rights secured through mandatory arbitration as compared to the MAP process. Under the OECD Model Convention, as long as MAP does not resolve all outstanding disputes, arbitration can be initiated directly only by foreign investors.[145] Conversely, competent authorities control the decision to initiate the MAP process.[146] It is possible that some States may impose additional barriers preventing access to the MAP process.[147] For example, if the disputes have already been submitted to the domestic judicial procedure, like litigation, the MAP process cannot be accessed.[148] Furthermore, the MAP process can only be initiated when taxpayers provide full information to both competent authorities.[149] This may lead to extended timelines as sometimes taxpayers have to resubmit more related information if either competent authority deems that the information is incomplete.[150]

However, on the contrary, in a mandatory and binding arbitral procedure, the concerned taxpayers can make an oral statement.[151] The Model Convention states that "[u]nless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall

include mandatory arbitration in their double tax treaties. *See* Xueliang Ji, *The Changing Paradigm of International Tax Dispute Settlement: What Are the Promises and Challenges of Mandatory Arbitration for China?*, 21 OR. REV. INT'L L. 117, 135 (2020).

[143] HK–Pakistan double tax agreement (2017), *supra* note 135, § 25(5); HK–Canada double tax agreement (2013), *supra* note 136, § 23(6).

[144] *See generally* INTERNATIONAL ARBITRATION IN TAX MATTERS (Michael Lang & Jeffrey Owens eds., 2015).

[145] OECD, *supra* note 141, at 453.

[146] *Id.* at 429.

[147] Julien Chaisse, *Making Tax Dispute Resolution Mechanisms More Effective—The Base Erosion and Profit Shifting Project and Beyond*, 10(1) CONTEMP. ASIA ARB. J. 1, 6 (2017).

[148] OECD, *supra* note 141, at 45.

[149] OECD, COMMENTARY ON ARTICLE 25: CONCERNING THE MUTUAL AGREEMENT PROCEDURE ¶ 75 (2017), https://www.oecd-ilibrary.org/docserver/g2g972ee-en.pdf?expires=1662886518&id=id&accname=ocid53016431a&checksum=2BB391CECE619E19C6BB426DACE1A9B9.

[150] *See generally* Lang & Owens (eds.), *supra* note 144.

[151] U.N., MODEL DOUBLE TAXATION CONVENTION BETWEEN DEVELOPED AND DEVELOPING COUNTRIES 433 (2011), https://www.un.org/esa/ffd/wp-content/uploads/2014/09/UN_Model_2011_Update.pdf.

臺灣大學學術期刊資料庫

be implemented notwithstanding any time limits in the domestic laws of these States."[152]

It illustrates that taxpayers can veto the award when they find the award does not protect their interests.[153]

Second, mandatory arbitration can offset MAP's defects.[154] Because in the MAP process, the competent authorities are only required to "endeavor" to resolve disputes, a definite result is not guaranteed.[155] The competent authorities will not be accountable for their failure to resolve a dispute. Although according to the minimum requirement of the Base Erosion and Profit Shifting (BEPS) Action 14, the treaty obligations should be implemented in good faith, these measures are not functional to achieve this goal as oftentimes competent authorities can be seen as coming to the table with their aggressive or unreasonable positions.[156] As a consequence, because of the benefits of mandatory arbitration, the competent authorities would be compelled to conduct the MAP process more efficiently and effectively.

Significantly, under the MAP process, even when the result is reached, there are no provisions that institute follow-up measures which will ensure the implementation of the said result. Additionally, no punitive action is possible against the losing party if it does not obey the award reached during the MAP process. In addition, arbitration cannot be commenced by investors before the MAP process ends. The MAP process may have a negative effect on the management of investments since it is highly time-consuming.[157] Under the OECD Model Convention, the MAP procedure should not exceed two years, while the period is three years under the UN Model Convention.[158]

Furthermore, often, the MAP process will not be initiated by competent authorities for a single case. The MAP process is initiated by the competent authorities with respect to an accumulated group of cases to resolve them simultaneously. By conducting the MAP process in the said way, the profits of one specific taxpayer may be sacrificed for the sake of protecting the

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[152] OECD, *supra* note 141, at 38.
[153] *Id.*
[154] *See generally* Jasmin Kollmann & Laura Turcan, *Overview of the Existing Mechanisms to Resolve Disputes and Their Challenges*, *in* INTERNATIONAL ARBITRATION IN TAX MATTERS 15 (Michael Lang & Jeffrey Owens eds., 2015).
[155] OECD, *supra* note 141, at 429.
[156] OECD, MAKING DISPUTE MECHANISMS MORE EFFECTIVE—ACTION 14: 2015 FINAL REPORT 9 (2015), https://www.oecd-ilibrary.org/docserver/9789264241633-en.pdf?expires=1662887210&id=id&accname=ocid53016431a&checksum=72760756B0365E721054F8929DFDB7B7; Chaisse, *supra* note 147.
[157] Luciana Nobrega & Silva Loureiro, *Mutual Agreement Procedure: Preventing the Compulsory Jurisdiction of the International Court of Justice?*, 37(10) INTERTAX 529, 539 (2009).
[158] OECD, MODEL TAX CONVENTION ON INCOME AND ON CAPITAL: FULL VERSION art. 25(b) (2014), https://www.oecd-ilibrary.org/docserver/g2g972ee-en.pdf?expires=1662887535&id=id&accname=ocid53016431a&checksum=27FD463683A1B81D00F16D15A2EA507E; U.N., *supra* note 151, art. 25(b).

臺灣大學學術期刊資料庫

profits of the State. Finally, the competent authorities may have differing interpretations of the same clause of the tax convention.[159]

The aforementioned dilemmas can be resolved by prescribing mandatory arbitration in double taxation treaties. Such arbitration will protect the rights and interests of all concerned stakeholders.[160] Such a provision can secure a stable investing environment as opposed to prejudicing the investors' interests under the MAP process. There are several advantages of adopting binding arbitration over MAP. First, compared to the MAP, arbitration is more neutral. Since the competent authorities control the MAP process, they may ignore the profits of taxpayers in order to maintain the interests of the Contracting States. Compared to the MAP, the arbitral tribunal is also more independent. The OECD Model Sample has recognized that arbitrators appointed in double taxation-related disputes must be impartial and independent from the time of their appointment until the tribunal's award is delivered. Second, the efficiency of MAP may be increased when a double taxation treaty provides for mandatory arbitration since the Contracting States tend to reach an agreement during the MAP process to protect their national sovereignty. For example, the MAP process is not likely to be completed within two years.[161] For one thing, if a suspension is requested by the aggrieved taxpayers and the competent authorities agree to it, the two-year period can be suspended. For another, if the competent authorities are awaiting an award from a court or administrative organization, the two-year period can also be suspended. Most importantly, if the competent authorities deem the two-year period too short, they can suspend the MAP process directly. In these circumstances, the taxpayers have little say in the suspension of the two-year period and the competent authorities simply need to inform the taxpayers of their decision. Because of the pressure from mandatory arbitration, the disputes can be resolved more efficiently during the MAP process, given their likely aversion to ceding their regulatory authority in an arbitral process.[162] Finally, after the arbitral tribunal has issued its award, taxpayers can enjoy greater profits for, (i) the taxpayers can veto the arbitration award if they are not satisfied with it and avail of local remedies.[163] They do not need to veto the award explicitly.[164] Instead, if the resolved issues are not withdrawn from local fora, like local court or administrative tribunals, this can be seen as a rejection of the arbitral award, (ii) the disputing competent authorities are bound by the arbitral award if the taxpayers accept it. A mutual agreement

[159] *See* OECD, COMMENTARIES ON THE ARTICLES OF THE MODEL TAX CONVENTION 369 (2010), http://www.oecd.org/berlin/publikationen/43324465.pdf.
[160] INTERNATIONAL ARBITRATION IN TAX MATTERS, *supra* note 144, at 36, 114.
[161] *See* OECD, *supra* note 141, at 456-57.
[162] *See generally* INTERNATIONAL ARBITRATION IN TAX MATTERS, *supra* note 144.
[163] *See* OECD, *supra* note 158, at M-60-61 art. 25.
[164] *See* OECD, *supra* note 141, at 459.

臺灣大學學術期刊資料庫

has to be reached by the competent authorities to implement the arbitral award, and (iii) the award can be implemented with no time limit. By utilizing arbitration, litigation costs can be avoided. Based on Section 25(5) of the OECD Model Convention, if litigation has already resolved the disputes, whether, in a domestic or international court, arbitration cannot be initiated.[165] This will prevent speedy dispute resolution since litigation is time and money-consuming. Furthermore, a domestic court may not be as efficient as an arbitral tribunal due to a lack of qualified staff and resources at the domestic level. As a result, taxpayers can still reach mandatory arbitration as an alternative dispute resolution method even though an award has been made in the lower court.

The competent authorities also like to utilize mandatory arbitration in tax matters in certain situations. Although MAP preserves the relationship between the competent authorities and the taxpayers, when faced up with controversial or sensitive issues, mandatory binding tax-related arbitration is preferable to the MAP process.[166]

The current US-China relations would also affect Hong Kong's use of taxation dispute resolution mechanisms. As what has been mentioned above, the relationship between China and US is intense and it can be revealed by the trade disputes between the two parties. According to the China–US double tax treaty, it taxation disputes occur, the MAP will be applied.[167] In order to resolve the taxation disputes more efficiently during the MAP process, the disputing parties should cooperate and communicate with each other. However, because of the intense relationship between both parties, the communication may be less efficient and consequently, MAP may be less effective in resolving the related taxation disputes. As there is no mandatory arbitration clause in the China–US double tax treaty,[168] the related taxation disputes may be unresolved. In this condition, it can be found that only MAP is not enough to resolve the increasing taxation disputes and without the mandatory arbitration, the effectiveness of MAP cannot be secured. In order to avoid this problem, Hong Kong should adopt mandatory arbitration in its double tax agreements. Mandatory arbitration can protect foreign taxpayers better, make tax-related dispute resolution mechanisms more efficient, and in the long term, facilitate the sustainable development of the economy.

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[165] *See* OECD, *supra* note 158, art. 25(5).
[166] Brian J. Arnold, *The Scope of Arbitration Under Tax Treaties*, *in* INTERNATIONAL ARBITRATION IN TAX MATTERS 111, 114 (Michael Lang & Jeffrey Owens eds., 2015).
[167] Agreement Between the Government of the People's Republic of China and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, China-U.S., art. 24, Apr. 30, 1984, http://www.chinatax.gov.cn/chinatax/n810341/n810770/c1153055/5026996/files/0adf969c3e134005b4b5d6da4f92e48e.pdf
[168] *Id.*

臺灣大學學術期刊資料庫

Mandatory arbitration is also useful to create a more favourable environment to attract foreign investment.

V. CONCLUSION

Hong Kong is a small territory in China and is a prime example of how shared sovereignty operates in small territories which remain embedded within the sovereignty of larger and more powerful States. Based on China's unique "one country, two systems" policy, Hong Kong currently enjoys some international legal sovereignty. This shared sovereignty has allowed and continues to allow Hong Kong to "expand" its international status as a financial and economic hub. However, this article has clearly shown that, Hong Kong has not actively used its IDS powers and rights. In this respect, the reality of shared sovereignty remains largely untapped. However, as this article has shown, recent US actions against HKSAR, including the withdrawal of HKSAR's special treatment, will result in breaches of WTO rules, like GATT and at the same time, may give rise to instability in Hong Kong and result in its economic decline. For this reason, in the next few years, there may be a rise in ISDS claims filed against HKSAR. Therefore, sooner or later, Hong Kong may be required to utilize its IDS rights under international law, including the WTO dispute settlement regime, ISDS in investment area and dispute resolution mechanisms under double tax agreements, to protect its legitimate interests.

Even though HKSAR has been involved in a relatively low number of cases, HKSAR appears increasingly prepared to adopt adjudicative methods of dispute settlement. This view is supported by the HKSAR's increased involvement in trade-related international dispute resolution procedures as a third party. In relation to investment disputes, HKSAR is not only concentrating on the recognition stage but also on the execution stage of arbitral awards. Finally, faced with international tax disputes, the HKSAR has begun to accept mandatory binding arbitration as an acceptable dispute resolution mechanism. When HKSAR realizes the benefits, it is more likely to adopt the adjudicative dispute resolution regime. Moreover, HKSAR can consider including adjudicative dispute resolution mechanisms in its international treaties subject to reservations. The reservations will allow Hong Kong to adopt these mechanisms smoothly and allow time for transition.

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