

Björn Ahl, Die Anwendung völkerrechtlicher Verträge in China

Summary: The Application of International Treaties in China

China was confronted with the Western concept of international treaties under unfavourable historical conditions. In the 19th century, treaties were used as an instrument of the colonial powers to open China by force to engage in trade with other countries. For the Chinese, international treaties represented restrictions on state sovereignty and national humiliation. When international law textbooks were translated into Chinese and arguments based on international law were used by the Chinese Government in its international relations, international law was not understood as an end in itself, but rather, like military science and other useful technical skills, as an instrument for the purpose to 'control foreigners'. Hence, the value of international law for the modernization of China was regarded as marginal.

Apart from the continuing influence of the traditional Chinese worldview and foreign policy, the actions of the European powers and Japan have also contributed to the Chinese disregard of international law during the second half of the 19th century as the colonial powers did not act on the basis of international law when they had the rules of international law against them. Only after the People's Republic of China (PRC) regained economic power in the course of the reform and opening policy, international treaties commenced to play a more positive role. This has become particularly evident towards the end of the 1990s with the introduction of domestic reforms to prepare for the accession to the World Trade Organization (WTO).

Cultural tradition has contributed its part to the rejection of the idea to enter into treaty-relationships on the basis of an equal legal status of states. The image of a 'Middle Kingdom' that claims a central position within the international order is of significance for Chinese foreign policy to date, and the success of the economic modernization of the country reinforces this viewpoint. Thus, the PRC constitutes a non-saturated power that only reluctantly accepts the international power structure. This worldview implies for the municipal application of international treaties that those implementation mechanisms will be preferred that give the party-state leadership the greatest possible flexibility and leave the door open to avoid an alignment of domestic rules and institutions with international standards (Introduction).

I. International Law and Municipal Law

The Chinese concept of sovereignty is rather a political programme with the aim of gaining 'national strength' than a notion of a legal doctrine. It consists of the elements of official patriotism, communist ideology as well as anti-Western tendencies. On the one hand, scholars, under the influence of globalization, seem to detach themselves gradually from the rigid dogma of sovereignty. On the other hand, the rhetoric of 'national strength' seems to prevail. As regards the practice of the internal application of international treaties, such a concept of sovereignty implies that international obligations will only be accepted reluctantly, and their domestic implementation is subject to the condition that the relevant international obligations promote national interests.

Chinese scholars reject both the monistic and dualistic views that are typically used to describe the relationship between international law and municipal law. The monist theory with primacy of international law is criticized as denying state sovereignty and as reflecting an imperialist policy to control the world through world law. The dualist theory is regarded as overemphasizing the formal antagonistic aspect of international law and municipal law. Instead, commentators favour a 'dialectical model' that is borrowed largely from soviet legal doctrine. According to this dialectical view, international law and municipal law are separate systems that infiltrate and supplement each other rather than conflicting with each other. Commentators state that when states enact municipal law, they take into account the requirements of international law. Similarly, when states participate in enacting international law, they consider it from the standpoint of domestic law. As long as states seriously perform their international obligations, international law and domestic law can always be reconciled. As the dialectical model is based on the assumption of separate systems of law, it can be interpreted in the sense of a differentiating dualism. This approach is comparable with various views of Western scholars insofar as it leaves the normative question open how existing conflicts between municipal law and international law should be resolved. The main consequence of this theoretical position for the practice of domestic treaty implementation lies within the flexibility that is granted to state organs in the application of treaty provisions (Chapter 1).

II. Treaty-making

The conditions of domestic treaty application relate not only to existing treaty obligations but also to the participation of different state organs in the treaty-making process. As regards the external representation of the PRC on the international plane, the existing ambiguity is associated with the fact that the current Constitution, unlike the Constitution of 1954, does not explicitly assign the exclusive competence of external representation to the State President. However, taking into account that the Constitution is dominated by the principle of concentration rather than separation of powers, there may be no need for a clear delineation of the competence of external representation. In practice, the State President represents the PRC to conclude more important treaties; the President ratifies treaties in accordance with Art. 81 of the Constitution. Less important treaties or agreements are concluded by a Minister of the State Council. The discussion about the scope of the external representation power of the State President reveals how much Chinese constitutional law is still influenced by the concept of collective state leadership in the area of external representation. The reason for scholars to question the State President's external powers may be connected with the inconsistency between the constitutional status of the President as the highest representative of the state in external matters on the one hand, and the constitutional status of the National People's Congress (NPC) and the NPC Standing Committee respectively as the highest state organs on the other. Hence, some scholars view the State President as exercising only a 'symbolic role' when ratifying treaties and suggest that the NPC Standing Committee should be responsible for the treaty ratification on the international plane. However, the scholarly proposals disregard the requirements of intergovernmental intercourse as well as the text of the Chinese Constitution. Moreover, these suggestions ignore that the office of the President is regularly held by the Secretary General of the Communist Party.

Although the power of the NPC Standing Committee to participate in the treaty-making process has been gradually expanded, the circumstances of the accession of China to the WTO revealed the relatively weak position of the NPC Standing Committee in relation to the executive. When the NPC Standing Committee approves a treaty, internal decision-making includes not only the delegates of the Standing Committee but involves in the process of informal decision-making other relevant actors of the Party-State. Therefore, the NPC Standing Com-

mittee's power to approve treaties is, in practice, not a genuine power of parliamentary participation and control.

The Special Administrative Region of Hong Kong is vested with a separate power to conclude international treaties. The treaty-making competence is provided for in the Basic Law of Hong Kong and the underlying international treaty, the Joint Declaration. The Central Government retains the competence to conclude treaties in the field of defence and foreign affairs. Chinese scholars have made various attempts to interpret Hong Kong's treaty-making power restrictively. In practice, the Special Administrative Region exercises its treaty-making power independently and is not subject to the proposed limitations (Chapter 2).

III. Legal Doctrine of Treaty Application

Chinese legal doctrine distinguishes three types of implementation mechanisms: adoption, transformation and a hybrid form.

1. Adoption

The term of 'adoption' is understood as a process by which international treaties are *en bloc* incorporated into the domestic legal system without being transformed into domestic law. Sometimes 'adoption' is equated with 'automatic application' or 'direct application'. Adoption is conducted either by an implied or an explicit domestic act.

The traditional interpretation of the Chinese practice of treaty implementation practice is based on the mechanism of adoption. This view holds that treaties become part of domestic law and are directly applicable by courts and the administration when they bind the PRC on the international plane. The arguments in favour of this kind of automatic standing incorporation of international rules are mainly based on the existence of statutory norms of reference which provide for the application of a treaty provision in case national legislation conflicts with an international treaty.

In the second half of the 1990s, this traditional interpretation was largely abandoned when Chinese scholars started to explore the question of treaty implementation more closely in preparation for the accession to the WTO, and they came to the conclusion that the WTO Agreement and its annexes should not be directly applicable. Although

the traditional view of automatic or general adoption of treaties is still advocated by some authors, others try to limit the domestic effects of treaty norms on different stages of the implementation process. One group of commentators limits the domestic effects of treaties on the level of application by arguing that making treaties part of the domestic legal system does not mean that treaties can be directly applied by courts. The recently developed view of 'selective adoption' advocates that only those treaty norms which are explicitly referred to in a statutory reference norm become part of the domestic legal system. A last group of authors regards the mode of automatic adoption only as a 'legislative tendency' without normative effect.

The main reason for the deviation from the traditional internationalist approach may have been that until the second half of the 1990s there was practically no provable practice of direct treaty application. Thus, the internationalist position remained merely theoretical. At the time when the internationalist position was developed, treaty obligations were mainly aimed at the state as such and the possibility of individuals invoking treaty provisions before municipal courts was not regarded as relevant. Therefore, the restriction of the principle of general adoption is a realistic adaptation to the implementation practice of other states and follows to a certain extent the requirements of the constitutional structure of the PRC. It would contradict the People's Congress system of the Chinese constitution, if the courts directly applied all treaty provisions which are binding upon China and, as a result, the courts would be conferred a stronger position in relation to the People's Congresses.

2. Transformation

Compared to the notion of 'adoption', the term of transformation lacks clarity. There is agreement insofar as international law is translated into domestic law by way of transformation. Some regard it as an act of transformation, if the legislator takes into consideration treaty obligations in the process of drafting a national statute. Transformation, unlike adoption, refers in most scholarly writings not to the international treaty as a whole but is conducted selectively as individual treaty provisions are transformed into national law through an *ad hoc* legislative act and others are omitted from transformation. The minority of scholars which interprets implementation practice in the sense of transformation bases its view predominantly upon the rejection of the interpretation of reference provisions as embodying a general rule of auto-

matic treaty incorporation. For the WTO Agreement and international human rights treaties, a transformation of treaty obligations into Chinese law is regarded as necessary.

3. Hybrid Form

The hybrid form is described as a synthesis of adoption and transformation. The underlying assumption is that directly applicable treaty provisions become binding within the Chinese legal system without an additional domestic act, whereas treaty provisions that are not directly applicable require a transformation into domestic law. Further, the hybrid form may be understood as a process that, in a first stage, adopts the treaty as a whole into the domestic sphere and, in a second stage, provides for implementing legislation of non-directly applicable treaty provisions. This view is a form of interpretation of the current practice that seeks for a solution with 'Chinese characteristics'. It borrows arguments from the description of the interrelationship between international law and municipal law that was described in terms of legal spheres which are separate as well as interconnected. This leads to the 'dialectical unity' of two opposing implementation mechanisms: international treaties are incorporated into national law through the modality of adoption as well as through the mechanism of transformation. However, legal scholars have not yet reached a consensus regarding the applicable criteria to determine whether a treaty norm can be directly applied or not (Chapter 3).

IV. Legislative Practice of Treaty Application

From the analysis of legislative practice follows that four different modalities of state actions have to be distinguished that become relevant for the application of international treaties in China: (1) The publication of the treaty text, (2) the adoption of statutory reference norms by the legislature and (3) the issuing of judicial interpretations by the Supreme People's Court as well as (4) the harmonization of domestic legislation with international obligations. The interaction of these four elements constitutes a mechanism for the application of treaties within the People's Republic of China (PRC).

1. Publication of Treaties

It follows from practice that the first precondition for the legal relevance of an international treaty within the domestic legal system is that the text of the treaty has been published in the official Gazette of the National People's Congress (NPC) Standing Committee. In practice, the text of the treaty is always published together with the NPC Standing Committee's decision on the ratification in the sense of Art. 67 (14) of the PRC Constitution. This implies that the authorization by the NPC Standing Committee to conclude or to accede to a treaty must precede the publication of the treaty text. At the moment of publication of the treaty text, the treaty becomes legally binding within the domestic legal system. In case the publication in the Gazette precedes the entry into force of the treaty upon the international plane, the internal legal force of the treaty is subject to the condition of its binding effect among states. Treaties the conclusion of which has been authorized by the NPC Standing Committee have the same rank in the Chinese hierarchy of norms as laws enacted by the NPC Standing Committee. It must be noted that Chinese scholars deny any legal effect of the publication of treaty texts. However, practice implies that the publication of both the treaty text and the ratification decision intend legal effects. If the practice of publication of treaty texts is examined without taking into account the other state actions in relation to international treaties, it may be interpreted as an act transforming the content of the treaty into domestic law. If this interpretation is correct, the domestic courts and the administration would apply the published treaty like a national law. If the treaty publication in the Gazette is viewed separately from other acts of the state in relation to treaties, it may as well be interpreted as commanding the direct application by domestic state organs in the sense of the 'implementation doctrine' (*Vollzugslehre*), but without incorporating the treaty into the municipal legal order. However, the practice of applying statutory reference norms and issuing judicial interpretations indicates that the treaty publication does not have the function of allowing the administration and the courts to apply the relevant treaty provisions directly. In order to achieve this result, another state action is required in addition to the publication of the international treaty in the Gazette. This practice excludes an interpretation of the publication in terms of the transformation doctrine or the enforcement doctrine. Thus, publication of a treaty text does not imply that it can be applied like a national statute. Moreover, treaty application may not be regarded as a direct and unconditional command for national authorities to enforce the relevant treaty provisions.

Instead, the publication of a treaty in the Gazette of the NPC Standing Committee constitutes the first and necessary step in the process a treaty provision must pass through in order to become directly applicable within the domestic sphere. Therefore, the publication of a treaty text may be interpreted in terms of the adoption doctrine, i.e. the publication, in general, brings about the integration of the treaty into the domestic legal system. Particularly, the practice with regard to human rights treaties emphasizes that a treaty forming part of the domestic legal system does not imply its direct applicability. In order to directly apply a treaty norm, an additional step is necessary in either the form of a statutory reference norm or a judicial interpretation that refers to the relevant international treaty.

This interpretation of the publication practice negates the traditional view of Chinese scholars that international treaties become part of the domestic legal system upon their entry into force on the international level and are directly applicable without further conditions. However, the traditional view could not convincingly reflect the implementation practice of the 1980s and 1990s, and it was negated by the modern literature that evolved in the run-up to China's accession to the WTO.

2. Statutory Reference Norms

Reference norms are statutory provisions that command, under certain conditions, the application of norms of international law within a particular area of municipal law. Under Chinese law, reference norms provide for a mechanism that allows courts and the administration to apply directly those treaty provisions published in the Gazette which the statutory reference norm refers to. Consequently, state organs are not permitted to apply treaties directly if the treaty has been published but no statutory reference norm explicitly refers to the relevant treaty.

The publication of the treaty text must be regarded as a necessary precondition for the application of a treaty provision on the basis of a statutory reference norm. A reference norm that refers to a treaty that has not been published in the Gazette cannot serve as the basis for a direct application of the treaty provision. Therefore, reference provisions that potentially refer to WTO law cannot enable the direct application of the WTO Agreement because the Agreement has not been published in the Gazette of the NPC Standing Committee. This result is further reinforced by the fact that the Supreme People's Court issued a judicial

interpretation which excluded the direct application of WTO law within the domestic legal system.

3. Judicial Interpretations

The judicial interpretation of statutes by the Supreme People's Court is a particular feature of the Chinese legal system that may be explained by the configuration of the court system that resembles the structure of the administration, and by the attempt to monopolize the interpretation of law. In general, the judicial interpretations reiterate the contents of reference norms which supplement or adjust the content of reference norms. The practice of issuing judicial interpretations that relate to international treaties implies that a reference norm must not necessarily be supplemented by a judicial interpretation in order to enable direct applicability of a treaty provision.

Due to the practice of the Supreme People's Court to issue judicial interpretations that fulfil a legislative rather than an adjudicative function, and which sometimes interfere with the law-making competence of the NPC Standing Committee, it is assumed that a judicial interpretation may mandate direct application of a treaty norm without a relevant statutory reference norm. Thus it appears that a judicial interpretation may substitute a statutory reference norm. On the other hand, it is assumed that, on the basis of the same reasoning, the Supreme People's Court may exclude the direct applicability of an international treaty, although a reference norm refers to that treaty.

4. Harmonization of Domestic Laws

The harmonization of the domestic legal system with international treaties by amending existing laws and regulations or by adopting new legislation constitutes another modality of state action in relation to international treaties. The adaptation of laws and regulations is independent from the abovementioned state actions because the reception of the contents of an international treaty by way of passing or changing laws is not based on the publication of the treaty. Further, no separate reference norm is required which commands direct applicability because the harmonized laws are of the same quality as other laws that have been adopted without any reference to international law, and are therefore

directly applicable. Often, the relationship between a harmonized law and an international treaty is not stated explicitly.

It is assumed that the harmonization of laws may be considered even if the treaty has been published and a reference norm or a judicial interpretation has already effected the direct applicability of the treaty. Doctrine and practice indicate the possibility that both the incorporated treaty and the legislation that has been adjusted to that treaty become valid within the domestic legal order. If in such a case the treaty provision conflicts with the parallel domestic legislation, such a conflict might be resolved by applying statutory reference norms which provide for the priority of the treaty norm. This presupposes that the scope of the relevant reference norm covers the ambit that is regulated by the parallel domestic legislation and that it orders the prior application of the treaty norm which conflicts with the provision of domestic law. If the imponderabilities of the application of reference norms by courts are taken into account, it is unlikely that a provision of an international treaty prevails over conflicting parallel domestic legislation (Chapters 4 and 5).

V. Rank of Treaties within the Domestic Legal System

Apart from the different views on how treaties become binding on domestic state organs, the inconsistencies of the hierarchy of norms in the PRC are responsible for the ambiguities of the ranking of treaties in relation to municipal law. In general, the rank of treaties is the same as the rank of the law which is adopted by the state organ that participates in the process of treaty-making, i.e. international treaties which are subject to the approval of the NPC Standing Committee have the rank of national statutes. The view that ranks such treaties above statutes is based on an incorrect interpretation of statutory reference norms which provide for the prior application of treaty provisions. Such statutory reference norms do not provide for a primacy of international law in terms of validity but provide only for a prior application of the treaty provisions they refer to (Chapter 6).

VI. Adjudicative Practice of Treaty Application

Courts in the PRC are dependent on the People's Congresses and the administration of the respective level, further, they are subject to the control by higher courts and the Party. It follows from the structure of the judiciary that local courts are unlikely to prefer the application of a treaty provision in case the international obligation conflicts with local regulations or local government rules. It is, however, quite possible that local courts prefer the application of a treaty norm to the application of a national statute, as long as the application of the international treaty promotes local economic interest. The analysis of cases in different areas of law where courts applied international treaties revealed that courts apply international law not only to cases that involve a foreign element but also to mere national cases. Moreover, courts, in general, applied treaty provisions on the basis of statutory reference provisions or judicial interpretations, and not without the basis of a domestic act that specifically commands the application of international law (Chapter 7).

VII. Statements before Human Rights Treaty Bodies

According to statements of the Chinese Government before human rights treaty bodies, treaty provisions become automatically effective in the domestic legal system upon being binding on the PRC, if the NPC Standing Committee has decided positively about the ratification of the relevant treaty. Moreover, some official statements claim the direct applicability of human rights treaty provisions. However, the statements make clear that, in general, courts and administrative bodies exclusively apply national laws. The statements suggest that national legislation has already exactly reproduced the contents of international human rights conventions and therefore makes any direct application of treaty norms superfluous. This suggestion is incorrect, particularly regarding the fundamental rights of the Chinese Constitution which were not implemented by acts of the legislature. Fundamental rights are not directly applicable by courts or the administration; they can only be indirectly applied through implementing legislation (Chapter 8).

VIII. Conclusion

Originally, Chinese scholars held the view that international treaties were *eo ipso* incorporated into the domestic legal system without requiring a domestic act to trigger the municipal effects of the treaty. Moreover, the traditional opinion advocated that treaties were in all parts directly applicable. The traditional view is rejected by a modern concept that draws on many arguments that were developed to oppose the direct application of WTO rules. Although accession to the WTO had caused many Chinese scholars to explore in detail the question of the effects of treaties in municipal law, these studies developed various arguments which attempted not only to limit the effectiveness of international trade law but of international treaties altogether. This attitude of Chinese scholars reflects the political belief of the state-party leadership that China must regain its status as a world power and that effective domestic implementation of treaty obligations obstructs rather than promotes this development.

The complex mechanism that controls the domestic application of treaties in China enables State organs to limit the effectiveness of treaty implementation within the domestic legal system. As the accession of the PRC to the WTO has revealed, the NPC Standing Committee may choose not to publish the text of the treaty in the official Gazette and, as a result, the treaty does not become legally valid within municipal law. Once the treaty has been published, the courts and the administration may be excluded from applying the treaty if no statutory reference provisions are adopted that refer to the treaty and enable direct application of it. Even if a statutory reference provision refers to the treaty, the Supreme People's Court is in the position to interpret the reference norm or the treaty by means of a binding judicial interpretation that inhibits the direct application of the treaty. Even without such an interpretation, the effect of the application of a reference norm is questionable due to the fact that reference provisions grant courts wide discretionary power. Courts have wide discretionary authority if the reference norm makes the prior application of a treaty subject to the condition of a conflict of norms or a loophole in the law. In such cases, the courts may prefer the domestic provision which is inconsistent with an international obligation, although reference norms that provide for the prior application of treaties imply an internationalist approach. Such an implementation mechanism enables the PRC Government to prove in relation to other States the domestic implementation of treaty obligations by way of the publication of the treaty and by reference norms

that provide for the prior application of international law. Notwithstanding, domestic practice may continue to ignore international obligations. This is evident in the area of human rights treaties, and is well possible in other areas.

The future development of the domestic application of international treaties in China depends certainly on the evolution of the political system as a whole. Even without political liberalization, the economic necessity of increasing efficiency may well lead to a gradual expansion and differentiation of the practice of treaty application. Such a development will depend on the consolidation of international co-operation as well as the strengthening of courts by way of a professionalization of judges and lawyers. The future organization of the relationship between the Central Government and the provinces will be decisive for developing the willingness of courts on the local level to apply the provisions of international treaties. Courts on the local level will only be willing and able to apply treaty provisions that are inconsistent with local economic interests, if courts are separated from the interests and influence of the local administration (Chapter 9).