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COMMENT

DONNA DEESE SKEEN*

Can Capitalism Survive under Communist Rule? The Effect of Hong Kong's Reversion to the People's Republic of China in 1997

I. Historical Perspective

In 1997, after 155 years of British rule, Hong Kong will revert to Chinese rule.¹ This comment addresses the effects of this transfer of sovereignty in the period leading up to 1997 and attempts to envision what Hong Kong will look like after 1997.

Britain has officially occupied Hong Kong since 1841.² Throughout its long

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1. Anthony Neoh, *Hong Kong's Future: The View of a Hong Kong Lawyer*, 22 CAL. W. INT'L L.J. 309, 310 (1991-1992).

2. Britain hoisted its flag on the island, established a colony, and began development of a commercial seaport. Johnson C. Ng, *Hong Kong After 1997: An Experimental Government Practicing Capitalism Within a Socialist Sovereign*, 10 N.Y.L. SCH. J. INT'L & COMP. L. 67, 69 (1989). Hong Kong was ceded to the British Crown by China's Qing government in 1842, under the terms of the Treaty of Nanking, which concluded the First Opium War. Perry Keller, *Freedom of the Press in Hong Kong: Liberal Values and Sovereign Interests*, 27 TEX. INT'L L.J. 371, 373 n.3 (1992) (citing 1 PETER WESLEY-SMITH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW IN HONG KONG* 33-43 (1987)).

tenure, Britain has asserted its sovereignty over the colony on the basis of conquest and the subsequent treaties of cession and lease granted by the imperial government of China.³ When the People's Republic of China was formed, Chinese leaders took the position that the treaties were invalid because Britain obtained them through force.⁴ The People's Republic of China further asserted that the parties had been on unequal footing both economically and politically, and the result was a treaty containing inequitable terms.⁵ Subsequently, "one of the major goals of the Nationalist Revolution (in China) was to abrogate the 'unequal treaties' and to recover Chinese territories lost to foreign countries."⁶

Every leader of modern China has regarded it as his historical mission to end extraterritorial privileges in China and to abolish unequal treaties.⁷ This sense of historical mission is key to understanding Chinese behavior toward the question of Hong Kong.⁸ Extraterritoriality gained a foothold in China following the Opium War.⁹ Britain, in an effort to balance its trade deficit with China, had begun to import opium in exchange for Chinese goods.¹⁰ Lin Tse-Hsu, the Chinese Special Commissioner, was given the mission of eradicating the evils of opium from China. He addressed a letter to Queen Victoria that contained this proposition: "Suppose there were people from another country who carried opium for sale to England and seduced your people into buying and smoking it; certainly your

Under the terms of the First Convention of Peking, Kowloon and Stonecutters Island were also ceded to Britain in 1860. *Id.* The final territorial addition to the colony occurred in 1898 with the ratification of the Second Convention of Peking, in which Britain received a 99-year lease over the outlying area of Hong Kong known as the New Territories. *Id.* Hong Kong Island, the New Territories, Kowloon Peninsula, and Stonecutters Island comprise modern Hong Kong. Patricia Homan Palumbo, Comment, *Analysis of the Sino-British Joint Declaration and the Basic Law of Hong Kong: What Do They Guarantee the People of Hong Kong After 1997?*, 6 CONN. J. INT'L L. 667, 670 (1991). These areas have become so interdependent that separate treatment of them is not practically feasible. *Id.*

3. Keller, *supra* note 2, at 373.

4. *Id.* War was not considered to be an unlawful means of resolving international disputes until the nineteenth century when the General Treaty for the Renunciation of War was signed and later adopted by the United Nations Charter of 1945. Neoh, *supra* note 1, at 318-19. The Chinese view of Hong Kong's status was made clear in a letter to the chairman of the United Nations Special Committee concerning the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples in March 1972. The letter maintained that the settlement of the question of Hong Kong was a matter of China's sovereign right and that consequently Hong Kong should not be included in the list of colonial territories covered by the Declaration on the Granting of Independence to Colonial Countries and Peoples. People's Republic of China—United Kingdom: Agreement on the Future of Hong Kong, Sept. 26, 1984, in 23 I.L.M. 1366, 1367 (1984) (reproduced from the White Paper published by Her Majesty's Government in London on September 26, 1984, as reproduced by the Government Printer in Hong Kong) [hereinafter White Paper].

5. Neoh, *supra* note 1, at 318; *see also* Palumbo, *supra* note 2, at 671.

6. Palumbo, *supra* note 2, at 671.

7. Neoh, *supra* note 1, at 315.

8. *Id.*

9. *Id.*

10. Palumbo, *supra* note 2, at 669; Ng, *supra* note 2, at 69 (citing HONG KONG GOV'T INFO. SERVICES, HONG KONG 1987, at 1, 295 (1987)).

honorable ruler would deeply hate it and be bitterly aroused."¹¹ In response to China's prohibition on the import of opium, Britain sent an expeditionary force into China.¹² Subsequent actions sparked the Opium War that ended with the signing of the Treaty of Nanking.¹³ The Treaty of Nanking ceded Hong Kong Island to Great Britain.¹⁴

Yet, despite this deep sense of historical mission, China did not demand the return of Hong Kong, but chose to wait for Britain to make the first move.¹⁵ Although China continually asserted that Hong Kong was Chinese territory, it stated it would wait until conditions were ripe before making a move to reclaim Hong Kong.¹⁶ Many Westerners believe that China needed Hong Kong as an enclave to deal with foreigners and for the foreign exchange that Hong Kong brings to China.¹⁷ In 1979 Britain broached the subject of the territorial leases that were due to expire in 1997.¹⁸ Discussions between China and Britain continued on the subject until 1983, when "it became clear that the continuation of British administration after 1997 would not be acceptable to China in any form."¹⁹

II. The Hand-off

A. THE SINO-BRITISH JOINT DECLARATION

Once it became clear that China was ready to reassert its sovereignty over Hong Kong, negotiations began between Britain and China to reach some sort of agreement regarding Hong Kong's future.²⁰ Britain's goal was to ensure the stability and prosperity of Hong Kong.²¹ The Sino-British Joint Declaration on the Question of Hong Kong went into effect on May 27, 1985.²² The Joint Declaration articulates China's policy of "one country, two systems."²³ It provides that Hong Kong will become a Special Administrative Region of the People's Republic of

11. Neoh, *supra* note 1, at 315-16.

12. *Id.* at 316.

13. *Id.*

14. *Id.*; see also Palumbo, *supra* note 2, at 670.

15. Neoh, *supra* note 1, at 320.

16. White Paper, *supra* note 4, at 1367; Palumbo, *supra* note 2, at 671.

17. Neoh, *supra* note 1, at 320.

18. White Paper, *supra* note 4, at 1367.

19. *Id.* at 1368.

20. *Id.*

21. *Id.*

22. The Joint Declaration was ratified by the British Parliament in March 1985 and by the Third Session of the Sixth National People's Congress of the People's Republic of China on April 10, 1985. Palumbo, *supra* note 2, at 673. The Joint Declaration includes the declaration itself, three annexes, and an exchange of memoranda between Britain and China. *Id.* The three annexes are: Annex I, Elaboration by the Government of the People's Republic of China of Its Basic Policies Regarding Hong Kong; Annex II, Sino-British Joint Liaison Group; and Annex III, Land Leases. *Id.*

23. Keller, *supra* note 2, at 389.

China and that "[t]he current social and economic systems in Hong Kong will remain unchanged, and so will the lifestyle."²⁴

Britain's bargaining power was weakened in negotiations by China's insistence that if an agreement between them were not reached, China would unilaterally determine Hong Kong's fate.²⁵ Furthermore, a wide gulf separated the negotiators in their interpretation of key concepts.²⁶ Britain's attempts to clarify issues through further discussion have met with accusations from China that Britain is not abiding by its bargains.²⁷

The Joint Declaration is viewed as a treaty by the British government, the present Hong Kong government, and the United Nations.²⁸ The Declaration was registered with the United Nations by both the British and Chinese governments.²⁹ As a treaty, the Joint Declaration creates a legal duty under international law that obligates China to maintain a capitalistic system in Hong Kong for fifty years after the exchange in sovereignty in 1997.³⁰ The Chinese view the continued existence of a capitalist society in Hong Kong as an act of sovereign grace, expressed in an international agreement in the form of a declaration.³¹ But, because China has for so long viewed Hong Kong as primarily a domestic matter, observers

24. White Paper, *supra* note 4, at 1372. China's Constitution provides that: "The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in light of the specific conditions." P.R.C. CONST. art. 31, *reprinted in* IV CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 35, 43 (Albert P. Blaustein & Gisbert H. Flanz eds., 1992).

25. See Palumbo, *supra* note 2, at 673. As stated in the White Paper, *supra* note 4:

Her Majesty's Government have a duty to make clear beyond any possibility of misunderstanding the alternative to acceptance of the agreement set out in this White Paper. In their view, there is no possibility of an amended agreement. The alternative to acceptance of the present agreement is to have no agreement. In this case the Chinese Government has made it plain that negotiations could not be reopened and that it would publish its own plan for Hong Kong. There is no guarantee that such a unilateral plan would include all the elements included in the draft agreement, nor would it have the same status as a legally binding agreement between the two countries. Whether or not there is an agreement between Her Majesty's Government and the Chinese Government, the New Territories will revert to China on 1 July 1997 under the terms of the 1898 Convention. The remainder of Hong Kong (Hong Kong Island, Kowloon and Stonecutters Island) would not be viable alone. Hong Kong, including the New Territories, has since 1898 become an integral whole and Her Majesty's Government are satisfied that there is no possibility of dividing the New Territories which revert to China on 1 July 1997 from the remainder. The choice is therefore between reversion of Hong Kong to China under agreed, legally binding international arrangements or reversion to China without such arrangements. This is not a choice which her Majesty's Government have sought to impose on the people of Hong Kong. It is a choice imposed by the facts of Hong Kong's history.

White Paper, *supra* note 4, at 1370.

26. Neoh, *supra* note 1, at 329.

27. *Id.* at 329-30.

28. Palumbo, *supra* note 2, at 691.

29. *Id.* at 674.

30. *Id.* at 692.

31. Keller, *supra* note 2, at 387.

fear that after 1997 the Chinese will not view the Joint Declaration with the same regard normally given an international treaty.³² China's history of abiding by domestic agreements is considerably worse than its history of honoring international agreements.³³

One commentator has compared the Joint Declaration to China's agreement with Tibet and concluded that "China will probably break its promise of maintaining capitalism in Hong Kong."³⁴ In 1951 China entered into an agreement with Tibet for the "peaceful liberation of Tibet."³⁵ Under this agreement Tibet became a National Autonomous Region of the People's Republic of China as provided for in article 30(1) of the Chinese Constitution.³⁶ This agreement, like the Joint Declaration, promised the people of Tibet the right to regional autonomy. Yet, instead of enjoying the independence that they were promised, the Tibetans have suffered oppression, violence, and poverty under Chinese rule.³⁷

However, differences do exist between the Hong Kong and Tibet situations. Tibet is classified as a National Autonomous Region under article 30(1) of China's Constitution, while Hong Kong is classified as a Special Administrative Region under article 31 of the Constitution.³⁸ In addition, in Hong Kong's case a third party, Britain, is involved in the agreement. These distinctions, plus the fact that Hong Kong is a prosperous financial and business center, may give China more reason to uphold Hong Kong's autonomy.³⁹ "To maintain economic prosperity in the region, China will have to continue assuring the international community that Hong Kong is a safe place to live and invest, otherwise Hong Kong's well-known affluence will be lost, as will China's future share in it."⁴⁰

32. Palumbo, *supra* note 2, at 687.

33. *Id.* at 687-88. And China's history of honoring international agreements has not always been good. *Id.* China has not respected its agreements to import wheat from the United States and has broken other international agreements with American companies. *Id.* at 695. Nevertheless, one commentator notes that China's record for honoring its commitments is "unusually strong." William H. Overholt, *Hong Kong and China after 1997: The Real Issues*, in *THE CHINA CHALLENGE: AMERICAN POLICIES IN EAST ASIA*, 38 PROCEEDINGS OF THE ACADEMY OF POLITICAL SCIENCE No. 2, at 31, 32 (1991). This disparity of opinion is explained by the fact that China tends to write agreements that are subject to considerable variations of interpretation. *Id.*

34. Palumbo, *supra* note 2, at 696 (citing Chiu, *The 1984 Sino-British Agreement on Hong Kong and Its Implications on China's Unification*, 21 *ISSUES & STUDIES* 13 (1985)).

35. Palumbo, *supra* note 2, at 696.

36. *Id.*

37. *Id.* In September 1987 Tibetan Buddhist monks demonstrated in Lhasa, the Tibetan capital, protesting China's mistreatment of the religious and political population. Ng, *supra* note 2, at 80-81 (citing Edward A. Gargan, *Chinese Leader Faults U.S. Lawmakers on Tibet*, N.Y. TIMES, Oct. 17, 1987, at 32, cols. 1-3). After an angry crowd of Tibetans burned down a police station, the Chinese government responded by banning processions around one of Tibet's holiest Buddhist temples. *Id.* In addition, China refused to let any Western reporters cover the incident. *Id.* When the United States Congressional Human Rights Caucus requested permission to visit Tibet, Chinese authorities refused to grant permission. *Id.*

38. P.R.C. CONST., *supra* note 24, arts. 30, 31.

39. Palumbo, *supra* note 2, at 697.

40. *Id.*

The Joint Declaration is a remarkable document. According to the terms of the agreement, China will allow Hong Kong to maintain virtually all systems currently in place.⁴¹ In some respects Hong Kong is actually granted more authority than the colony had under British rule.⁴² The Joint Declaration provides that: (1) Hong Kong will become a Special Administrative Region of China, and through enactment of the Basic Law, China will stipulate that the socialist system and socialist policies shall not be practiced in the Hong Kong Special Administrative Region and that Hong Kong's previous capitalist system and life-style shall remain unchanged for fifty years;⁴³ (2) Hong Kong shall enjoy a high degree of autonomy;⁴⁴ (3) except for foreign and defense matters, Hong Kong will have executive, legislative, and independent judicial power, including that of final adjudication;⁴⁵ (4) the laws previously in force in Hong Kong shall be maintained;⁴⁶ (5) the courts of Hong Kong shall exercise judicial power independently and free from any interference;⁴⁷ (6) Hong Kong shall use its financial revenues exclusively for its own purposes and they shall not be handed over to China;⁴⁸ (7) Hong Kong shall maintain the capitalist economic and trade systems previously in place and shall decide economic and trade policies on its own;⁴⁹ (9) the monetary and financial systems previously practiced in Hong Kong, including the systems of regulation and supervision of deposit-taking institutions and financial markets, shall be maintained;⁵⁰ (10) Hong Kong may maintain and develop relations and conclude and implement agreements with states, regions, and relevant international organizations;⁵¹ (11) international agreements to which China is not a party but which are implemented in Hong Kong may remain in effect;⁵² (12) the maintenance of public order shall be the responsibility of the Hong Kong Special Administrative Region Government, and Chinese military forces stationed in Hong Kong will be for the purpose of defense and will not interfere in the internal affairs of Hong Kong;⁵³ (13) Hong Kong shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong, including freedom of speech, of the press, of assembly, and of association;⁵⁴ and (14) holders of valid travel documents shall be free to leave Hong Kong without special authorization.⁵⁵

41. See generally White Paper, *supra* note 4.

42. *Id.*

43. *Id.* annex I, art. I.

44. *Id.*

45. *Id.*

46. *Id.* art. II.

47. *Id.* art. III.

48. *Id.* art. V.

49. *Id.* art. VI.

50. *Id.*

51. *Id.* art. XI.

52. *Id.*

53. *Id.* art. XII.

54. *Id.* art. XIII.

55. *Id.* art. XIV.

Upon first reading, each of the above declarations gives concrete reassurance that nothing will really change in Hong Kong after the transfer to China in 1997. A second, closer reading lessens the feeling of reassurance. Some statements in the Joint Declaration are prefaced with qualification; many key concepts are nebulous. For example, the Joint Declaration states that China will allow Hong Kong to maintain "a high degree of autonomy."⁵⁶ Autonomy denotes the ability to make decisions independent of any external influence.⁵⁷ But this meaning was qualified with the words "high degree."⁵⁸ As one commentator noted, "there is no complete autonomy. The [Hong Kong Special Administrative Region] is a creation of the National People's Congress under Article 31 of the 1982 Constitution. It is especially true in the PRC, what is created by one law can be struck down by another."⁵⁹ The Joint Declaration also states that Hong Kong will keep the law previously in force: "the common law, rules of equity, ordinances, subordinate legislation and customary law."⁶⁰ Yet, this provision too is qualified by the statement "save for any that contravene the Basic Law."⁶¹

B. THE BASIC LAW

The Basic Law of the Hong Kong Special Administrative Region was adopted by the National People's Congress of the People's Republic of China in April 1990 and becomes effective on July 1, 1997.⁶² The Basic Law is intended to give legal effect to the provisions of the Joint Declaration.⁶³ To a large extent, the security of Hong Kong's future is dependent on China's willingness to follow the Basic Law.⁶⁴

56. *Id.* at 1371.

57. Neoh, *supra* note 1, at 332-33.

58. *Id.* at 333.

59. *Id.* (footnote omitted). The National People's Congress (NPC) is China's legislative body and as provided in the Chinese Constitution, "the highest organ of state power." Palumbo, *supra* note 2, at 679.

60. White Paper, *supra* note 4, at 1373.

61. *Id.*

62. The NPC appointed the Basic Law Drafting Committee (BLDC) in June 1985. In March 1990 the BLDC submitted the Final Draft of the Basic Law. Neoh, *supra* note 1, at 330. The BLDC consisted of fifty-eight members, with twenty-three drawn from a cross-section of the Hong Kong community. *Id.* However, after June 4, 1989, two of its members resigned, and two others did not attend the proceedings, reducing the Hong Kong contingent to nineteen. *Id.* The four members who left the BLDC, Bishop Kwong, Louis Cha, Martin Lee, and Szeto Wah, were among the liberal wing of the Hong Kong contingent; their departure left Hong Kong's representation heavily weighted in favor of the business community. *Id.*

The BLDC then established a consultative committee in Hong Kong comprising one hundred and fifty members, representing a cross-section of Hong Kong. *Id.* at 331. The chairman of the BLDC, Mr. Ji Peng Fei, a state councilor and the head of the Hong Kong and Macao Office in the State Council of China, appointed the committee's members. *Id.* "From the start the drafting and consultative processes were orchestrated by the Chinese government." *Id.*

63. See Palumbo, *supra* note 2, at 694.

64. *Id.*

Many of the policies concerning the transfer of sovereignty from Britain to China are not addressed in a specific manner in the Joint Declaration.⁶⁵ Instead, China asserted control over the interpretation and implementation of the Joint Declaration through article 3(12) of that agreement.⁶⁶ Under article 3 of the Joint Declaration the Chinese government agreed to stipulate its policies regarding the Hong Kong Special Administrative Region in legislation enacted by China's National People's Congress.⁶⁷ China fulfilled this initial obligation by enacting the Basic Law.⁶⁸

Since the Basic Law was enacted, many people have protested that it does not comply with the Joint Declaration.⁶⁹ For example, in the Joint Declaration, Hong Kong was vested with executive, legislative, and independent judicial power.⁷⁰ However, in article 17 of the Basic Law, the Standing Committee of China's National People's Congress has the power to invalidate laws that in their opinion do not comply with the Basic Law.⁷¹ Article 158 of the Basic Law also undermines the Joint Declaration's provision for an independent judiciary. Article 158 states that whenever a decision concerning a Basic Law provision that affects the central government is before the Hong Kong courts, they must consult with the Standing Committee.⁷² As the Basic Law is similar to a constitution governing Hong Kong after 1997, stripping the courts of the authority to interpret the Basic Law effectively removes the independent judiciary.⁷³

Currently, the Joint Liaison Group is reviewing all of Hong Kong's laws to make sure they are consistent with both the language and the substantive provisions of the Basic Law.⁷⁴ Hong Kong's Attorney General stated that there are about 600 ordinances in the statute book, and the majority will require change in varying degrees.⁷⁵ One half of the ordinances in question are based on U.K. enactments,

65. *Id.* at 695.

66. Keller, *supra* note 2, at 388.

67. *Id.*; White Paper, *supra* note 4, at 1372.

68. Keller, *supra* note 2, at 388; *see also* Neoh, *supra* note 1, at 327.

69. Neoh, *supra* note 1, at 329.

70. White Paper, *supra* note 4, at 1371.

71. *People's Republic of China: The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (pt. 3), 29 I.L.M. 1519, 1522 (1990) [hereinafter Basic Law].

72. *Id.* at 1544; *see also* Palumbo, *supra* note 2, at 708.

73. *See* Palumbo, *supra* note 2, at 708.

74. Christine Loh, *Why We Must Lay Down the Law to Avoid a "Black Hole,"* S. CHINA MORNING POST, Oct. 17, 1993, at 15 (Christine Loh is an appointed member of Hong Kong's Legislative Council). The establishment of the Sino-British Joint Liaison Group was provided for in Annex II of the Joint Declaration. Representatives from Britain and China are members of the group. The functions of the Joint Liaison Group are: to conduct consultations on the implementation of the Joint Declaration, to discuss matters relating to the smooth transfer of government in 1997, and to exchange information and conduct consultations on such subjects as may be agreed by the two sides. White Paper, *supra* note 4, annex II, arts. 1, 6. The Joint Liaison Group is an "organ for liaison and not an organ of power. It shall play no part in the administration of Hong Kong or the Hong Kong Special Administrative Region." *Id.* The group was formed when the Joint Declaration went into force and is supposed to continue working until January 1, 2000. *Id.*

75. Loh, *supra* note 74, at 15.

and in order to replace them a Hong Kong ordinance must be passed before July 1, 1997.⁷⁶ If China withholds cooperation, matters as basic as the validity of marriages and the basis on which land is leased will be left unresolved and open to political manipulation.⁷⁷

Of the 600 ordinances needing review, two hundred are international treaties, and many of the remainder are important bilateral agreements.⁷⁸ The multilateral treaties, applied to Hong Kong through extension by Britain, deal with such areas as merchant shipping, private international law, civil aviation, international arbitration, and customs cooperation.⁷⁹ Britain has also extended many bilateral agreements to Hong Kong, including agreements relating to air services, extradition, visa abolition, investment protection, and enforcement of judgments in civil and commercial suits.⁸⁰ As China does not agree in principle with many of these treaties, extensive negotiation is required.⁸¹

The unresolved state of Hong Kong law as 1997 approaches is bound to have an effect on people's conduct. For example, one unanswered question is whether publishers and software companies who depend on copyright protection for their commercial success will wait until June 30, 1997, before deciding to relocate to a jurisdiction where copyright protection is assured or make plans to relocate now.⁸² Hong Kong is a party to the Universal Copyright Convention and to the Berne Convention, both of which provide reciprocal protection of copyrights in works created by nationals of member countries.⁸³ Copyright law is primarily based on the United Kingdom Copyright Act of 1956.⁸⁴ Currently, designs and patents registered in the United Kingdom receive protection in Hong Kong.⁸⁵ Trademarks and service marks are registered in the Trade Mark Registry of Hong Kong.⁸⁶

The most optimistic attitude is to assume that if the localization and adaptation of Hong Kong law is not complete by June 30, 1997, China will extend the time to prepare amending legislation.⁸⁷ However, China does have the power to

76. Michael Sze Cho-cheung, Hong Kong's Secretary for Constitutional Affairs, reported in October 1993 that 110 of these U.K.-based ordinances have been dealt with by the Joint Liaison Group, but this report must be qualified by noting that eighty of those laws did not need to be localized as they will be allowed to lapse in 1997. Loh, *supra* note 74, at 15. Therefore, since the Basic Law was enacted in 1990, only thirty of the 300 laws have been resolved. *Id.*

77. Peter Goodespeed, *Tug-of-War over Hong Kong Enters End Game*, TORONTO STAR, Nov. 9, 1993, at A17.

78. Loh, *supra* note 74, at 15.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. Ferheen Mahomed, *A Foreign Investor's Guide to the Environmental Legal Regime of Hong Kong*, 28 SAN DIEGO L. REV. 787, 791 (1991).

84. *Id.*

85. *Id.*

86. *Id.*

87. Loh, *supra* note 74, at 15.

invalidate all laws not amended to conform with the Basic Law.⁸⁸ Article 8 of the Basic Law states that only Hong Kong laws that do not contravene the Basic Law will remain in effect after 1997.⁸⁹ Furthermore, article 17 states that the NPC Standing Committee may invalidate any post-1997 Hong Kong legislation that it determines is in violation of the Basic Law.⁹⁰

Additional contradictions exist between the Basic Law and the Chinese Constitution.⁹¹ Article 8 of the Basic Law states that laws currently in force in Hong Kong will remain basically unchanged.⁹² Yet under article 5 of the Chinese Constitution, "[n]o law or administrative or local rules and regulations shall contravene the constitution" and "[n]o organization or individual may enjoy the privilege of being above the constitution. . . ."⁹³ The Preamble to the Constitution of the People's Republic of China states that the Constitution is the fundamental law of the state and has supreme legal authority; the people of all nationalities, all state organs, the armed forces, all political parties, public organizations, and all enterprises in the country must take the Constitution as the basic norm of conduct; and they have the duty to uphold the dignity of the Constitution and ensure its implementation.⁹⁴ As the common law in Hong Kong serves the interests of capitalists, it seems impossible that the common law could not contradict the socialist principles enshrined in the Chinese Constitution.⁹⁵

Yet, even China's Constitution may change at the whim of the Communist Party.⁹⁶ In China, the Constitution does not represent a set of "immutable principles, but is a program of social reform to be interpreted according to the current policies of the Communist party."⁹⁷ The Chinese Constitution has undergone many revisions since 1954, illustrating the ease with which basic legal norms

88. *Id.*

89. Basic Law, *supra* note 71, at 1521. Article 8 in its entirety provides that "[t]he laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region." *Id.*

90. *Id.* at 1522.

91. One alternative to reduce the conflict that exists between the Basic Law, which is supposed to give legal effect to the Joint Declaration, and the Chinese Constitution is to append the Basic Law to the Constitution. Palumbo, *supra* note 2, at 700-01. The leaders of China have so far refused to append the Basic Law to the Chinese Constitution. Observers suggest that Chinese leaders want to "save face." *Id.* at 701. If China's government agrees that the Basic Law conflicts with the Chinese Constitution, then they would also have to concede that the Joint Declaration conflicts as well. *Id.* "The Chinese would be embarrassed to admit that they consciously entered into an agreement that conflicted with the Constitution." *Id.*

92. Basic Law, *supra* note 71, at 1521.

93. P.R.C. CONST., *supra* note 24, art. V.

94. *Id.* preamble; see also Palumbo, *supra* note 2, at 701.

95. Matthew H. Hurlock, *Social Harmony and Individual Rights in China*, 93 COLUM. L. REV. 1318, 1336 (1993) (reviewing BERRY FONG-CHUNG HSU, *THE COMMON LAW SYSTEM IN CHINESE CONTEXT: HONG KONG IN TRANSITION* (1992)).

96. See Neoh, *supra* note 1, at 333.

97. Keller, *supra* note 2, at 393.

can be changed in China.⁹⁸ Ultimately, political ideology controls China's legal system.⁹⁹

Chinese communist ideology adheres to four basic principles: keeping to the socialist road; upholding the dictatorship of the proletariat; insisting on Communist Party leadership; and adhering to Marxism-Leninism-Mao Zedong thought.¹⁰⁰ The leader of China's Communist Party, Deng Xiaoping, stated:

"One country, two systems" must be discussed on two levels. On one level is the fact that within a socialist country we will be permitting a specially privileged area to be capitalist not just for a short period of time, but for decades or a full century. On another level, we must affirm that the principal system throughout the country is socialist. . . . That we uphold the socialist system and the "four cardinal principles" was determined long ago, and is inscribed in our Constitution. The policies we formulate, including our policies toward Hong Kong, Macao and Taiwan, are also determined on the basis of upholding the four cardinal principles.¹⁰¹

When constitutional freedoms conflict with one of these principles, such freedoms may give way, as they did in the Tiananmen Square conflict in 1989.¹⁰²

The specter of Tiananmen Square is often in people's minds when considering the reversion of sovereignty to China. When Deng Xiaoping addressed the Basic Law Drafting Committee in April 1987, he made his position clear that if the "basic interests of his Central Government were to be threatened, then the Central Government would act to protect itself."¹⁰³ Article 18 of the Basic Law grants the Chinese government the power to issue an order applying the relevant national laws in the region in the event of a state of war or if, by reason of turmoil, a state of emergency exists.¹⁰⁴

98. The first Constitution of the People's Republic of China was enacted on September 20, 1954; the second on January 17, 1975; the third on March 17, 1978; the fourth on December 4, 1982; the fifth and most recent change was made in 1988. Neoh, *supra* note 1, at 333 n.111.

99. Palumbo, *supra* note 2, at 677-78.

100. Neoh, *supra* note 1, at 335.

101. *Id.* at 335-36.

102. Palumbo, *supra* note 2, at 678. Chinese students began to occupy Beijing's Tiananmen Square in April 1989, demonstrating against the treatment of former party leader Hu Yaobang and making speeches advocating democratic reform in China. Lawrence M. Friedman, "The United States-China Act of 1991" and Customary International Law, 13 B.C. THIRD WORLD L.J. 257 n.1 (1993) (citing Jeffrey A. McCredie, *Human Rights in the People's Republic of China: An Appraisal of Recent Events*, 3 TEMP. INT'L & COMP. L.J. 217, 217-18 (1989)). The Chinese government imposed martial law and soon after began arresting and beating the students. *Id.* Ultimately, over 300,000 troops with tanks were necessary for the government to regain control in Beijing. *Id.* Estimates of casualties ranged from 500 to 1,000, though the Chinese government maintains that no deaths occurred in Tiananmen Square. *Id.* The Tiananmen Square incident and the imposition of martial law has brought into question the actual validity and authority of the 1982 Chinese Constitution. Palumbo, *supra* note 2, at 678. The Chinese government's actions have been widely criticized as being in violation of China's Constitution. Article 29 provides that the military may only be used "in the event of the invasion by a foreign enemy, or a serious armed riot within the country." *Id.*

103. Neoh, *supra* note 1, at 336.

104. Basic Law, *supra* note 71, at 1523.

C. INTERPRETATION AND ENFORCEMENT OF THE AGREEMENTS BETWEEN CHINA AND BRITAIN

The Joint Declaration provides that disputes over interpretation and implementation are to be resolved at the level of the Joint Liaison Group, and failing that, by consultations between the British and Chinese governments.¹⁰⁵ No provisions concerning penalties for violations of the agreement were included in the Joint Declaration.¹⁰⁶ Britain will have little control over interpretation of the Joint Declaration after the transfer of sovereignty in 1997.¹⁰⁷ As the Joint Declaration provides no institutional mechanism for the resolution of disagreements over interpretation or implementation, the British government is restricted to the traditional rights of any sovereign party to an international treaty.¹⁰⁸ These traditional rights consist of the issuance of protests, demand for negotiations, and possible retaliatory measures in the event of breach.¹⁰⁹ The Joint Declaration contains no explicit statement that it takes priority over the Basic Law; therefore, the treaty cannot be invoked in any legal proceeding as binding authority for the interpretation of the Basic Law.¹¹⁰

As stated previously in the discussion of the Joint Declaration, China weakened Britain's bargaining power in negotiating the agreement for the transfer of sovereignty by insisting that if an agreement were not reached, China would unilaterally determine Hong Kong's fate.¹¹¹ Many issues are not well-defined and some areas are not specifically addressed. For instance, the agreements between China and Britain do not say anything specific about British instigated changes in Hong Kong before the 1997 transfer of sovereignty.¹¹² The Joint Declaration does state that "the Government of the United Kingdom will be responsible for the administration of Hong Kong with the object of maintaining and preserving its economic prosperity and social stability; and that the Government of the People's Republic of China will give its cooperation in this connection."¹¹³ However, when the current governor of Hong Kong, Chris Patten, put forth a proposal at the end of 1992 to broaden Hong Kong's electoral base and give residents more

105. Neoh, *supra* note 1, at 327.

106. Palumbo, *supra* note 1, at 695.

107. See Keller, *supra* note 2, at 388.

108. *Id.*

109. *Id.* If China violates the Joint Declaration, Britain could bring an action against China in the International Court of Justice; however, such action is unlikely as there is doubt that China would accept the Court's jurisdiction over the matter. Palumbo, *supra* note 2, at 695.

110. Keller, *supra* note 2, at 392.

111. Palumbo, *supra* note 2, at 673.

112. Lena H. Sun, *Governor of Hong Kong Takes on China's Leaders, Moves Toward Democracy in Enclave Irk Beijing*, WASH. POST, Nov. 13, 1992, at A16.

113. White Paper, *supra* note 4, at 1372.

of a say in choosing legislators, China reacted strongly.¹¹⁴ China issued statements threatening to scrap the Basic Law and announced that it would not honor any contracts after 1997.¹¹⁵

One Hong Kong government official commented, "[t]he language used was extraordinary," noting that the vitriol directed at Patten had not been used since the Cultural Revolution.¹¹⁶ The Chinese government accused Britain of breaking prior agreements and of undermining a smooth transfer of power.¹¹⁷ It warned that if Britain went back on its word, then so could China, and the whole future of "one country, two systems" could be in jeopardy.¹¹⁸

In June 1994 Hong Kong's legislature narrowly passed Governor Patten's democratic reform bill.¹¹⁹ For the first time in Hong Kong's history, its citizens will be able to choose the majority of their legislators in the 1995 elections.¹²⁰ China, however, fulfilled its threats by announcing in September 1994 that it would disband Hong Kong's legislature and other elected institutions when Hong Kong reverts to Chinese rule in 1997.¹²¹ China's Standing Committee of the National People's Congress voted to disband Hong Kong's legislature and district and city councils and to replace them with a new legislature based on the Basic Law and decisions by the National People's Congress.¹²²

Sources for legal analysis in Hong Kong after 1997 are not clear.¹²³ Currently, a Hong Kong judge with a question of interpretation looks to the Hong Kong constitutional devices and British case law.¹²⁴ The Joint Declaration is vague on

114. Patten proposed lowering the voting age from 21 to 18, allowing direct election for municipal councils, expanding the franchise for 30 out of 60 Legislative Council seats, and allowing voters to choose an electoral committee that would in turn vote for 10 legislators. Sun, *supra* note 111, at A16; see also David Holley & Christine Courtney, *Britain and China to Discuss Rules for Hong Kong Election*, L.A. TIMES, Apr. 14, 1993, at A4.

115. Matt Miller, *China Pours Cash into Hong Kong—Down Payment on Future of City It Takes Over in '97*, SAN DIEGO UNION-TRIBUNE, July 25, 1993, at A1.

116. *Id.*

117. *Id.*

118. H.D.S. Greenway, *Borrowed Time—Despite China's Promise to Leave Hong Kong's Capitalist System Alone for 50 Years, Unease and Doubt Plague This Prosperous British Colony as It Counts Down to 1997*, BOSTON GLOBE, June 20, 1993, Sunday Magazine, at 14.

119. Jesse Wong, *Hong Kong Approves Political Reform*, ASIAN WALL ST. J., June 30, 1994, at 1.

120. *China to Disband the Legislature in Hong Kong*, ASIAN WALL ST. J., Sept. 1, 1994, at 5.

121. *Id.*

122. *Id.*

123. Melissa K. Bauman, Note, *Defamation in Hong Kong and the People's Republic of China: Potential Perils of Two Standards of Free Speech*, 15 HASTINGS INT'L & COMP. L. REV. 671, 676 (1992).

124. *Id.* The laws of Hong Kong currently consist of: (1) statutes made by the Hong Kong Governor with the consent of the legislature, (2) the common law of Britain and rules of equity except where they are determined to be oppressive, (3) acts of the British Parliament specifically incorporated by reference in local legislation, (4) acts of Parliament that expressly or by necessary implication apply to Hong Kong, and (5) Orders-in-Council made by the Queen on the advice of her Privy Council. Neoh, *supra* note 1, at 339.

this issue.¹²⁵ As the Basic Law is the principal document governing Hong Kong's relationship with China, its interpretation will certainly play a key role in legal analysis. The Basic Law is not a common law statute; it is a purely Chinese statute and can be understood only in that context.¹²⁶

China's contemporary legal system remains heavily influenced by Soviet legal doctrines of the Stalin era.¹²⁷ According to these doctrines, law is the legislative expression of the will of the ruling class.¹²⁸ Chinese law also reflects the country's history of Confucian philosophy and centralized imperial government.¹²⁹ "Law has traditionally been the punitive face of authority—a disciplining force to be exerted against wrongdoers in order to restore social stability and public order when the power of custom and morality has failed."¹³⁰

An important part of Hong Kong's legal system derives from international treaties.¹³¹ Presently, treaties are made applicable to Hong Kong by their terms or by British legislation.¹³² With the transfer of sovereignty to China, the application of these treaties to Hong Kong will lapse.¹³³ The Basic Law provides that China will decide whether international agreements to which China is a party will apply to Hong Kong.¹³⁴

125. Bauman, *supra* note 130, at 676.

126. Keller, *supra* note 2, at 389.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* As part of China's economic reform there have been some changes in Chinese law. See generally Lucie Cheng & Arthur Rosett, *Contract with a Chinese Face: Socially Embedded Factors in the Transformation from Hierarchy to Market, 1978-1989*, 5 J. CHINESE L. 143 (1991). Most notably, China has recognized contract law. *Id.* "The emphasis on contractual responsibility was created by the Chinese leadership to enhance the opportunities and incentives for economic enterprise." *Id.* at 146. China realized the difficulties in attracting foreign partners to provide the currency and technology that they need without a contractual framework in place. *Id.* at 146-47. China also used contract domestically to increase productivity in some sectors. *Id.* at 146. Managers in some state-owned factories signed agreements to meet set production quotas. *Id.* In return, the managers received incentives for increased production and efficiency and the authority to sell production in excess of the quotas. *Id.* These uses of contract were accompanied by a growing legal infrastructure: the beginnings of a civil code that would recognize contractual obligations; new civil courts; and the recruitment and training of lawyers, legal advisors, and notaries. *Id.* at 147. Nonetheless, these institutions remain weak. *Id.* Chinese courts are subservient to the local government and the Communist Party; the civil codes are incomplete and confusing, and the proportion of trained legal personnel remains low. *Id.*

131. Neoh, *supra* note 1, at 350. Hong Kong is currently a party to the General Agreement on Tariffs and Trade (GATT), the Multi-Fiber Arrangement, the United Nations Conference on Trade and Development, extradition treaties, and multilateral conventions on judicial matters. *Walden Country Reports, Hong Kong*, Walden Publishing Ltd., 1993, available in LEXIS, World Library, ALLWLD file.

132. Neoh, *supra* note 1, at 350.

133. *Id.*

134. Basic Law, *supra* note 71, at 1544; see also Keller, *supra* note 2, at 392.

D. DOCTRINAL PURITY VERSUS ECONOMIC GAINS

Even if China is willing to honor the Joint Declaration, the question remains whether they will be able to honor its terms.¹³⁵ The Joint Declaration was negotiated when moderate political forces were in power.¹³⁶ The moderates were thought to be looking forward to enjoying some improvement in China's economy as the result of having Hong Kong as one of its Special Administrative Regions.¹³⁷ In the aftermath of Tiananmen Square, with the political conservatives in power, public order and security are of paramount concern.¹³⁸

Another unresolved issue is the conundrum of how China's socialist constitution can be the supreme law and yet permit the continued existence of capitalism.¹³⁹ In the mid-1980s some Chinese scholars suggested an amendment to the Chinese Constitution that would officially recognize the capitalist enclaves established as Special Administrative Regions.¹⁴⁰ In the alternative, China could have addressed the issue when enacting the Basic Law by stating that only article 31 of the Chinese Constitution (the article providing for Special Administrative Regions) would apply.¹⁴¹ However, according to recent legal texts and articles from China, the Chinese Constitution remains the supreme law of the country and the legal expression of national sovereignty, and therefore must apply in full to Hong Kong.¹⁴² The contradiction of Hong Kong's status as a Special Administrative Region allowed to maintain a capitalist system, yet governed by a communist constitution, leaves Hong Kong's legal relationship to the rest of China vague and confusing.

China experts warn that if a conflict arises between political control and economic progress, political control will win.¹⁴³ According to these commentators,

135. Palumbo, *supra* note 2, at 691.

136. *Id.* at 693.

137. *Id.*

138. Because the hard-line Communist Party leaders value public order so highly, some in Hong Kong fear that if these leaders remain a controlling force in China, public order in Hong Kong will be a higher priority than economic prosperity. Palumbo, *supra* note 2, at 694. On the other hand, there is some indication that Jiang Zemin, General Secretary of the Chinese Communist Party, who is considered a moderate, may gain control of China's government when Deng Xiaoping resigns or dies. *Id.* If Jiang Zemin or some other moderate gains control, then Hong Kong's future as a capitalist region will be more secure. *Id.*

139. Keller, *supra* note 2, at 391.

140. *Id.*

141. *Id.*

142. *Id.*

143. Greenway, *supra* note 118, at 14. "By all indications, the current leaders of China, while fearing political and economic chaos, still want economic reform, but in a more limited and controlled way." Cheng & Rosett, *supra* note 127, at 149. Chinese leaders want the economic benefits while avoiding the dispersion of power that reform implies; they seem to believe that economic reform can be achieved without any fundamental political change. *Id.* "As long as China's leaders are determined to adhere to Marxist ideology, build up 'socialism with distinct Chinese characteristics,' and maintain 'the planned economy combined with market forces,' any setback in economic perfor-

the policy of "one country, two systems" does not imply parity between capitalism and communism, but rather the unification of the country as a socialist state in which capitalist Special Administrative Regions will be permitted to exist for a transitional period.¹⁴⁴ In Hong Kong's case, that transitional period is defined as fifty years.¹⁴⁵ Chinese governmental authorities have rejected any suggestion that Hong Kong will not eventually be fully incorporated into China's unitary structure.¹⁴⁶

III. The Countdown

A. BUSINESS CLIMATE

Hong Kong is the second largest financial center in the Pacific region. Of its 165 banks, seventy-six are among the top 100 banks in the world.¹⁴⁷ The tiny British colony has amassed the greatest concentration of wealth in Asia.¹⁴⁸

The flow of capital from China to Hong Kong has increased dramatically in the last few years.¹⁴⁹ Through trading, finance, and the reexport of Chinese goods, Hong Kong has been China's golden goose.¹⁵⁰ China gets a substantial portion of its foreign exchange from Hong Kong.¹⁵¹ Property analysts estimate that Chinese companies have plowed over \$20 billion into Hong Kong real estate in the past two years alone.¹⁵² Hong Kong harbor is filled with Chinese vessels.¹⁵³ In 1992 trade with China totaled \$54 billion, 35 percent of Hong Kong's total trade.¹⁵⁴

Almost every Chinese province either openly or indirectly conducts business in Hong Kong.¹⁵⁵ Many Chinese governmental units have secret hard currency accounts in Hong Kong banks.¹⁵⁶ Many of China's key ruling families have sons and daughters working in lucrative jobs in Hong Kong.¹⁵⁷

mance could easily force China's leaders to reverse their reform movement." Jong H. Park, *Impact of China's Open-Door Policy on Pacific Rim Trade and Investment*, BUS. ECON., Oct. 1993, at 51, 54.

144. Keller, *supra* note 2, at 390.

145. *Id.*

146. *Id.*

147. David Stamp, *HK to Lose Financial Status under China*, REUTER ASIA-PAC. BUS. REP., June 24, 1993, available in LEXIS, World Library, REUAPB file.

148. Citibank estimates that \$1 trillion in investible capital is available in Hong Kong. This figure includes government and corporate reserves, investment property, savings, and consumers' stock holdings. Pete Engardio et al., *Asia's Wealth: It's Creating a Massive Shift in Global Economic Power (Special Report)*, BUS. WK., Nov. 29, 1993, at 104, col. 2.

149. Miller, *supra* note 115, at A1.

150. *Id.*

151. Sun, *supra* note 112, at A16.

152. Miller, *supra* note 115, at A1.

153. *Id.*

154. *Id.*; see also Neoh, *supra* note 1, at 320.

155. Sun, *supra* note 112, at A16.

156. *Id.*

157. *Id.*

The impact of China's increased stake in Hong Kong is under close scrutiny. Some Hong Kong residents and business people view Chinese investment as a positive sign.¹⁵⁸ They see it as further indication that the fortunes of China and Hong Kong are interwoven and that China wants Hong Kong to prosper after 1997.¹⁵⁹ Others view the situation as the downside of market reforms in mainland China.¹⁶⁰ Many Chinese investments appear designed for short-term profits, not long-term stability.¹⁶¹

China is already intervening in Hong Kong's economy by stalling major economic projects.¹⁶² Beijing is using these projects as pawns to express disapproval of Governor Patten's efforts to expand democracy before Britain hands over power to China.¹⁶³ Discussions between Britain and China regarding building a much-needed container shipping terminal for Hong Kong have reached a stalemate.¹⁶⁴ China also blocked financing for a new Hong Kong airport for years, saying it feared the project would leave Hong Kong with a mountain of debt after 1997.¹⁶⁵ On November 5, 1994, China and Britain finally signed an agreement to pay for the new \$20 billion airport.¹⁶⁶ However, officials say the agreement leaves major details still unresolved.¹⁶⁷

Business leaders must make decisions now on whether to invest billions of dollars that may earn returns only after the 1997 transition.¹⁶⁸ Hong Kong's stock market indicates that many business executives are making the decision to invest. Hong Kong's Hang Seng index rose 20 percent during October and November 1993.¹⁶⁹ The remarkable rise is partially attributable to a visit to China by a group of U.S. fund managers organized by the U.S. securities firm of Morgan Stanley.¹⁷⁰ The firm's chief equities strategist, Barton Biggs, predicts that investing in China will be "the world's most profitable investment opportunity for the next 10 years."¹⁷¹ He further stated that "[t]he best way into the China restructuring story is through Hong Kong."¹⁷²

Hong Kong's large, liquid market appeals to large U.S. investment institu-

158. Miller, *supra* note 115, at A1.

159. *Id.*

160. *Id.*

161. *Id.*

162. Stamp, *supra* note 147.

163. *Id.*

164. *Id.*

165. *Id.*; see also Goodespeed, *supra* note 77, at A17.

166. *China and Britain Agree on Hong Kong Airport*, N.Y. TIMES, Nov. 5, 1994, at 5.

167. *Id.*

168. Paul Blustein, *A Vote of Confidence in Hong Kong: Business Investing Heavily as 1997 Optimism Rises*, WASH. POST, May 25, 1992, at A1.

169. Simon Holberton & Patrick Harverson, *Foothold on Cliff of Opportunity: Foreign Investors Are Using Hong Kong's Stock Market as a Way into China*, FIN. TIMES, Nov. 9, 1993, at 17.

170. *Id.*

171. *Id.*

172. *Id.*

tions.¹⁷³ Currently, the Hong Kong government makes no distinction between local and foreign companies.¹⁷⁴ No restrictions are placed on capital movements or repatriation of profits.¹⁷⁵ "Hong Kong's wide-open financial markets are the extreme opposite of those in Singapore or Taiwan, and that has made it a thriving center of Chinese capitalism."¹⁷⁶ In 1990 Hong Kong authorities began discussions with China on plans to negotiate investor-protection agreements with major overseas partners, such as the United States, Japan, and several European countries.¹⁷⁷ The goal of these agreements is to provide guarantees for foreign-owned businesses after 1997.¹⁷⁸

Hong Kong also attracts foreign investors because its stock market has more listed companies involved in China than any other stock market in the world.¹⁷⁹ In the latest investment surge, investors have been targeting Hong Kong companies with a strong exposure to the Chinese economy.¹⁸⁰ Hong Kong-based investors have signed letters of intent for more than \$100 billion in mainland China projects in the past three years.¹⁸¹

The speed with which Hong Kong stock prices have risen has unsettled some investors and observers. They think that the Hong Kong market is overvalued and vulnerable to a political or economic setback.¹⁸² One international investment strategist says that U.S. investors may have mistaken Morgan Stanley's forecast of a positive economic outlook in China for a forecast of a positive, short-term outlook for the Hong Kong market.¹⁸³ "There is a good deal of indiscriminate buying taking place based on the long-term Chinese economic story . . . but there is a distinction between what is a good economic story and what is a good market story."¹⁸⁴

Hong Kong is undeniably the best gateway to China, but its stock market is vulnerable to internal Chinese politics.¹⁸⁵ Hong Kong's stock market has been a roller coaster, rising and falling in relationship to the progress of negotiations between Britain and China regarding the transfer of power in 1997.¹⁸⁶ At one point in November 1993 the Hang Seng index climbed to a record high of 9,612

173. *Id.*

174. *Walden Country Reports, Hong Kong, supra* note 131.

175. *Id.*

176. Engardio, *supra* note 148, at 104, col. 2.

177. *Walden Country Reports, Hong Kong, supra* note 131.

178. *Id.*

179. Holberton & Harverson, *supra* note 169, at 17.

180. U.S. investors are not the only ones investing in Hong Kong. Nomura Securities, the leading Japanese stockbroker, recently raised one billion dollars for investment in Asian equities. *Id.* If this trend continues, Japan may, for the first time, commit large sums to Hong Kong equities. *Id.*

181. Engardio, *supra* note 148, at 104, col. 3.

182. Holberton & Harverson, *supra* note 169, at 17.

183. *Id.*

184. *Id.*

185. *Id.*

186. Goodspeed, *supra* note 77, at A17.

points, but in the next three days plunged more than 646 points and lost 6.7 percent of its value.¹⁸⁷ Since 1984 the Hong Kong market has suffered what is known as a "political discount."¹⁸⁸ Political discount is shown by comparing the difference between Hong Kong's rating relative to other Asian markets.¹⁸⁹ Investors are currently prepared to pay prices of 19 to 24 times future corporate earnings in markets such as Singapore, Malaysia, and Thailand, but in Hong Kong they are prepared to pay only about 14 times future earnings.¹⁹⁰ Even though Hong Kong's prices are lower than other markets' in Asia, the current price is above Hong Kong's historical trend, "suggesting that either the market is in the process of being re-rated upwards to south-east Asian levels, or that a savage correction downwards could be in the offing."¹⁹¹

While China has given reassurances that Hong Kong will maintain its capitalistic system and that the Chinese government will not expropriate foreign property, it has also shown that if its sovereign authority is threatened, retaliation may be severe.¹⁹² In response to Governor Patten's proposals for democratic reform, China warned that it could abrogate any long-term contracts after Hong Kong reverts to China in 1997.¹⁹³ In a statement distributed by the New China News Agency, the Chinese government said, "[c]ontracts, leases and agreements signed and ratified by the Hong Kong British government which are not approved by the Chinese side will be invalid after June 30, 1997."¹⁹⁴

China itself has recently announced several economic reforms. China's banking system is undergoing an overhaul that will enable banks to lend based on commercial rather than political criteria.¹⁹⁵ Currently, China's banks, which are estimated to have \$2.3 trillion in deposits, have loan policies dictated by the government that force them to redirect savings into unprofitable state industries.¹⁹⁶ China has taken steps to unify its currency.¹⁹⁷ A U.S. Treasury official stated that China's move to a single, floating currency "constitutes a major step toward changing an exchange rate regime that has functioned as a big trade barrier."¹⁹⁸ Additionally, the Chinese stock exchange, where market capitalization has grown from

187. *Id.*

188. Holberton & Harverson, *supra* note 169, at 17.

189. *Id.*

190. *Id.*

191. *Id.*

192. See Sun, *supra* note 112, at A16 (in the 1960s Hong Kong critics of mainland China were the targets of fire-bombing; in 1989 the Tiananmen Square conflict also resulted in the death of pro-democracy demonstrators).

193. Reuters, *China Threatens to Cancel Contracts in Hong Kong After 1997 Turnover*, L.A. TIMES, Dec. 1, 1992, at A4.

194. *Id.*

195. Engardio, *supra* note 148, at 103, col. 3.

196. *Id.* col. 2.

197. *China: Bentsen Says China Needs More Progress on Human Rights Before MFN Is Renewed*, 11 INT'L TRADE REP. (BNA) 51 (Jan. 12, 1994).

198. *Id.*

zero to \$32 billion in two years, is taking steps toward a Western-style regulatory system and increasing its listings.¹⁹⁹ China is also introducing a secondary bond market and mutual funds.²⁰⁰ In the past, with few legal financial instruments to put cash into, local governments and state companies have put profits in real estate or siphoned it offshore into "shadowy Hong Kong companies."²⁰¹

In spite of China's economic reforms, there is still concern that government corruption and mismanagement may prevent China's wealth from being distributed to areas that need capital.²⁰² "Many Communist Party officials prefer to enrich themselves in secret by dealing with the overseas Chinese networks."²⁰³ Government reformers want the wealth to be in the hands of modern capital markets.²⁰⁴ Trillions of dollars are needed to build highways, telecommunications systems, and power plants.²⁰⁵ Huge amounts of money will need to be invested to build capital-intensive industries such as microelectronics, steel, and petrochemicals.²⁰⁶ These needs must be met if China is to advance from cheap-labor sweatshops to an advanced industrialized status.²⁰⁷ Yet, one business publication noted that "[w]hile 'red capitalists' in South China cruise in Lexuses and impress each other by smashing \$200 bottles of cognac at the banquet table, millions of peasants still live in poverty."²⁰⁸

Many residents of Hong Kong are establishing residence in other countries. This brain drain is bound to affect all of Hong Kong's business community.²⁰⁹ Some Hong Kong business leaders have tried to refute the brain drain by pointing out that many businessmen have really never left Hong Kong and that many who did are coming back looking for positions.²¹⁰ This practice is so prevalent that a term has been coined—astronauts.²¹¹ These "astronauts" are professional men who live in Hong Kong while their families live in other countries to establish residency.²¹² They want to guarantee that their children have better lifestyles and

199. Engardio, *supra* note 148, at 103, col. 2.

200. *Id.* col. 3.

201. *Id.* col. 2.

202. *Id.* col. 1.

203. *Id.* at 108, col. 1.

204. *Id.* col. 2.

205. *Id.* at 102, col. 2.

206. *Id.*

207. *Id.*

208. *Id.* at 103, col. 1.

209. Neoh, *supra* note 1, at 324; Palumbo, *supra* note 2, at 705 (immigration began after the signing of the Joint Declaration in 1984 and increased in 1989 following the Tiananmen Square conflict in Beijing; the primary destination has been Canada, but England, Australia, and the United States also receive many applications).

210. Daniela Deane, *Have Job, Will Travel*, L.A. TIMES, Mar. 31, 1993, at E8; see also Pete McMartin, *Going Home: Boom Economy of Hong Kong Lures Some Back*, VANCOUVER SUN, Nov. 5, 1993, at B1.

211. Deane, *supra* note 210, at B10.

212. *Id.*

educational opportunities than Hong Kong may be able to provide.²¹³ However, if these children are residents of another country, if they are raised and educated in another country, they probably will not return to Hong Kong. The effect of this loss will only be delayed.²¹⁴

B. TRADE

Although China is itself trying to regain membership in the General Agreement on Tariffs and Trade (GATT), it has allowed Hong Kong to become a member.²¹⁵ The People's Republic of China supplied the GATT with confirmation that Hong Kong will continue to possess full autonomy in its external commercial relations after 1997.²¹⁶ The confirmation of autonomy was an important commitment in view of the interests of the GATT contracting parties in ensuring that Hong Kong will not be subsumed into China's nonmarket system.²¹⁷

The declaration of Hong Kong's autonomy is characterized as going beyond a political pledge to constitute an undertaking of legal obligation.²¹⁸ Any interference with the autonomy of Hong Kong after 1997 would presumably be actionable within the framework of the GATT.²¹⁹ Both Britain and China will have to work in cooperation to ensure the continued application of existing international agreements applicable to Hong Kong and Hong Kong's continued participation in international organizations.²²⁰

213. *Id.*

214. *Id.* Although much has been written about Hong Kong's brain drain, recent reports have noted a new trend—reverse immigration. McMartin, *supra* note 210, at B1. Many of the residents who left Hong Kong may be returning. *Id.* These are not the so-called astronauts who shuttle back and forth between another country and Hong Kong, but immigrants who are leaving countries such as Canada, Australia, and the United States and resettling in Hong Kong. *Id.* According to the Hong Kong Trade Development Council, the Hong Kong census and statistics department recorded a net inflow of 65,000 returnees between mid-1992 and mid-1993. *Id.* Most of the people returning to Hong Kong had moved to Canada and established citizenship, but because of difficulties in finding a job with a salary comparable to Hong Kong's pay scale these people are moving back to Hong Kong. *Id.* As Hong Kong and Canada both recognize dual citizenship, the people returning have the best of both worlds: access to Hong Kong's dynamic economy and the insurance of Canadian citizenship if the political atmosphere in Hong Kong becomes unstable. *Id.*

215. *China: China Said to Scale Down Expectation of Early Accession to GATT, Sources Say*, 10 Int'l Trade Rep. (BNA) 1371 (Aug. 10, 1993). China was a founding member of the GATT in 1948, but left after the Communist takeover in 1949. *Id.* The People's Republic of China is now seeking to resume the seat vacated in 1949. *Id.* The contracting parties to the GATT did permit China to participate in the Uruguay Round negotiations. Lori Fisler Damrosch, *GATT Membership in a Changing World Order: Taiwan, China, and the Former Soviet Republics*, 1992 COLUM. BUS. L. REV. 19, 23 n.9 (1992).

216. Damrosch, *supra* note 215, at 25.

217. *Id.* at 35.

218. *Id.*

219. *Id.* Remedies would be comparable to those applied in the case of any breach of undertakings under the GATT, with the unusual twist that in the event China is still a nonmember at the time of the dispute, the issue would arise as to whether retaliatory measures would apply to Hong Kong only, or whether sanctions could be directed against China as a whole. *Id.*

220. Neoh, *supra* note 1, at 351.

Even if China becomes a contracting party to the GATT, uncertainties exist as to how China will accept Hong Kong's autonomous status. For instance, earlier this year, Hong Kong authorities broke up an international counterfeiting ring that conspired to export thousands of pirated video games to Latin America.²²¹ The games were made in China and sent to Hong Kong for shipment. Currently, many petitions are filed in the United States against China for intellectual property, transshipment, and trade quota violations.²²² The Office of the U.S. Trade Representative estimates that Chinese products shipped through third countries and relabeled to avoid quota restrictions accounted for \$2 billion of China's \$6 billion in textile exports to the United States.²²³ In response to this problem, on January 6, 1994, the U.S. Trade Representative announced that some of China's textile quotas may be cut by as much as one-third.²²⁴ China has responded that if these quota cuts take effect they will take corresponding retaliatory measures.²²⁵

As 1997 approaches, can GATT contracting parties still expect enforcement assistance from Hong Kong? Or will pressure from China cause Hong Kong customs authorities to close their eyes to violations of international agreements where China is the culprit?

C. HUMAN RIGHTS

Inextricably tied into the business climate is the human rights issue. Levi Strauss recently announced that it is closing its plants in China. This transnational corporation cited China's lack of regard for human rights as its reason for pulling out of China.²²⁶ A spokesperson for Levi Strauss told the Bureau of National Affairs that global sourcing guidelines require that the company consider human rights issues when making decisions regarding international purchasing and contracting.²²⁷ The American clothing manufacturer's decision came after conducting a six-month study of China's human rights situation.²²⁸ The company stated that "to continue manufacturing in China was unethical, given the scale of abuses."²²⁹ Levi Strauss is the second American company known to withdraw from China

221. *Also in the News—General Developments*, 10 Int'l Trade Rep. (BNA) 1344 (Aug. 11, 1993).

222. *See Textiles: USTR Raises Textile Transshipment in Talks with China, Hong Kong and Macau*, 10 Int'l Trade Rep. (BNA) 1495 (Sept. 15, 1993).

223. *China: Chinese Textile Quotas to Be Cut; China Says It Will Retaliate in Turn*, 11 Int'l Trade Rep. (BNA) 48 (Jan. 12, 1994).

224. *Id.*

225. *Id.*

226. *Company & Industry, China*, CROSSBORDER MONITOR (formerly BUS. INT'L), June 16, 1993, at 5; see also *USTR Kantor Welcomes Levi Strauss Decision to Leave China over Human Rights Concerns*, 10 Int'l Trade Rep. (BNA) 780 (May 12, 1993) [hereinafter *USTR Kantor*].

227. *USTR Kantor*, *supra* note 226.

228. *Company & Industry, China*, *supra* note 226, at 5.

229. *Id.*

on the basis of its human rights record.²³⁰ Timberland Company, an apparel and shoe manufacturer, decided to stop doing business with China in 1989 after the government's crackdown on the student democracy movement at Tiananmen Square.²³¹ Other companies, such as Roebuck International and Sears, Roebuck and Company, have adopted human rights policies that are binding on their Chinese contractors.²³²

In May 1994 the United States granted China most-favored-nation (MFN) status and severed the link between trade and human rights.²³³ When announcing the MFN decision, U.S. President Bill Clinton said the issue of human rights could be better advanced if the United States engaged China commercially.²³⁴ President Clinton vowed to develop a voluntary code of business principles for American companies operating within China's borders to promote human rights.²³⁵

In recent meetings with the Clinton administration U.S. business representatives have shown little interest in a rigorous code that could prod China to improve human rights.²³⁶ On the other hand, labor and human rights groups are pressing for standards that are tougher than American companies would ever accept.²³⁷ "As a result, the administration is increasingly unlikely to produce the kind of credible code that would be part of the 'new and vigorous' human-rights program Mr. Clinton promised when he renewed China's so-called most-favored-nation status."²³⁸

Indeed, human rights abuses appear to continue unabated in China.²³⁹ Human

230. Donna K. H. Walters, *Firms Unshaken by U.S. Terms for China; Trade: Country's Most Favored Nation Status Is Now Linked to Human Rights, but Companies Say Their Role Is Not That of Lobbyist*, L.A. TIMES, June 7, 1993, at D3.

231. *Id.*

232. Frank Gibney, Jr., *The Trouble with China*, NEWSWEEK, May 17, 1993, at 46.

233. Robert S. Greenberger, *Rights Rules: Clinton Seems Unlikely to Form Code for China*, ASIAN WALL ST. J., Aug. 22, 1994, at 1. Historically, trade has played the most significant role in U.S.-China relations. John Kruger & Charles Lewis, *Bill's Long March: When Big Money Talked, Clinton Retreated to George Bush's Policy*, WASH. POST, Nov. 7, 1993, at C3. Attempts by the United States to exert influence over Chinese policy have not resulted in great success. *Id.* In 1821 a sailor aboard an American trading ship was implicated in the drowning of a Chinese woman. *Id.* China threatened to revoke trade status with the United States unless the man was turned over to Chinese authorities. The United States was forced to give in, saying "[w]e are bound to submit to your laws while we are in your waters; be they ever so unjust, we will not resist them." *Id.* The sailor was hanged. *Id.* In the 1860s, an effort to engage China through trade led the United States trade emissary to promise that the United States "will not ask for, nor take concessions of, territory in the treaty ports, or in any way interfere with the jurisdiction of the Chinese government over its own people. . . ." *Id.*

234. Helene Cooper & Kathy Chen, *China to Renew Talks with U.S. on Rights Issue*, ASIAN WALL ST. J., Aug. 31, 1994, at 1.

235. Greenberger, *supra* note 233, at 1.

236. *Id.*

237. *Id.*

238. *Id.*

239. Kruger & Lewis, *supra* note 233, at C3.

Rights Watch/Asia (Asia Watch) said that shortly after the United States renewed China's MFN status, China criminalized many forms of civil protest.²⁴⁰ The new laws include a ban on cooperation with nongovernment organizations outside China and make illegal the receipt of assistance from any group that Beijing deems a "hostile organization."²⁴¹ According to Asia Watch, more than forty political leaders were imprisoned by the Chinese government in 1992 and 1993.²⁴² Asia Watch reports that one political prisoner was sent to a psychiatric institute last year after unfurling a banner to commemorate the third anniversary of Tiananmen Square. Since then the political leader has been forced to take psychotropic drugs as treatment for "paranoid psychosis."²⁴³

In connection with the 1993 renewal of China's MFN status, the United States and China signed a memorandum of understanding in August 1992.²⁴⁴ The agreement prohibits exports to the United States of goods made by prison labor.²⁴⁵ Problems have arisen because China has resisted efforts to stop the use of prison labor. Repeated requests for inspections of Chinese prison labor camps by the United States have been ignored or refused by China.²⁴⁶ The few requests that were granted allowed only limited access to U.S. inspectors.²⁴⁷

Unfortunately, even Chinese workers who are not in the prison camps often work under conditions that make them virtual prisoners. State-owned Capital Steel in Beijing works employees 365 days a year; if an employee misses a day due to illness, he or she is fined.²⁴⁸ "People are being worked way beyond reasonable limits and then docked if they don't," says an engineer at a U.S.-Chinese joint venture.²⁴⁹ With China's economy growing at such a rapid rate, and factories struggling under an avalanche of orders, conditions are likely to worsen.²⁵⁰

Many American companies and industries do not agree that China's trade status should be conditioned on the human rights issue. These companies say that "they promote democracy and human rights simply by being in China, trading with the country and showing the Chinese firsthand how a free and capitalistic marketplace works."²⁵¹ Even Roebuck International, which awards a prize for human rights

240. Greenberger, *supra* note 233, at 1.

241. *Id.*

242. Kruger & Lewis, *supra* note 233, at C3.

243. *Id.*

244. *China Fails to Implement Pact with U.S. on Prison Labor Exports, Officials Say*, 10 Int'l Trade Rep. (BNA) 1490 (Sept. 15, 1993).

245. *Id.*

246. As of October 1993 China had responded to only 16 of 31 requests for investigations under the pact and had granted one of five requests to inspect suspect facilities. *Id.*

247. *Id.*

248. Gibney, *supra* note 232, at 46.

249. *Id.*

250. *Id.*

251. Walters, *supra* note 230, at D3.

accomplishments, "believes its best hope for change in China is by example."²⁵² Luggage-maker Samsonite also shares the view that the best way to change China's policies on human rights is through example. Samsonite announced that it is considering plans to open plants in China to manufacture products for East Asia.²⁵³ The president of Samsonite's international division said, "[i]solating China will not help nor enhance human rights. . . . Opening its market is a more efficient way to try and bring about change."²⁵⁴

Other companies feel that they have little choice but to be in China.²⁵⁵ With more than 1.5 billion people, China has the potential to become the world's single largest buyer of consumer and industrial products. American Telephone and Telegraph Corporation (AT&T) recently signed a system support agreement, valued at \$500 million over five years, with governmental entities in China's Guangdong province.²⁵⁶ Since only two out of every ten people living in China have telephones, the country is a huge opportunity for AT&T.²⁵⁷ Boeing Company received orders totalling \$9 billion for jetliners, and China's thirty-five airlines are expected to be the aerospace industry's most frequent buyer in the next decade.²⁵⁸ As Christopher Padill, manager of government affairs for AT&T stated, "[t]here's not as much predictability and stability (in China) as businesses might like. . . . On the other hand, AT&T has to be there."²⁵⁹

Standing up for human rights also has immediate costs to the United States as a whole. Footwear import lobbyists say that inexpensive shoes from China save the American consumer \$16 billion annually.²⁶⁰ The U.S. Department of Commerce estimated in 1992 that 157,000 jobs depend on the Chinese export market.²⁶¹ The money made on aircraft sales to China certainly helped the ailing U.S. airline industry.²⁶² In a time of slow economic recovery, these statistics were probably a key factor in the decision to renew China's MFN status.²⁶³

Britain and Hong Kong have made efforts to ensure that China's lack of regard for human rights will not have a damaging effect on Hong Kong after the transfer of power to China in 1997.²⁶⁴ Annex I of the Joint Declaration states that the International Covenant on Civil and Political Rights (ICCPR) and the International

252. Kruger & Lewis, *supra* note 233, at C3.

253. Jenny Lam, *Samsonite May Set up China Plants to Serve Asian Markets*, BUS. TIMES, May 11, 1993, at 14.

254. *Id.*

255. Walters, *supra* note 230, at D3.

256. James T. Aredy, *AT&T Wins Guangdong Orders, Capping a Big Week for Brown*, ASIAN WALL ST. J., Sept. 2, 1994, at 4.

257. *AT&T, Ford Back China Trade Status*, USA TODAY, Apr. 5, 1994, at 1B.

258. Walters, *supra* note 230, at D3.

259. *Id.*

260. Kruger & Lewis, *supra* note 233, at C3.

261. *Id.*

262. *Id.*

263. *Id.*

264. See generally Keller, *supra* note 2, at 385-405.

Covenant on Economic, Social, and Cultural Rights (ICESCR) will remain in force in Hong Kong.²⁶⁵ In addition, Hong Kong recently enacted the Hong Kong Bill of Rights that incorporates the ICCPR into the colony's legal system.²⁶⁶ This enactment represents an unprecedented legal development for Hong Kong; if successful, primary responsibility for the protection of civil liberties will shift away from government administration and toward the judiciary.²⁶⁷

Still unresolved is the issue of how the Hong Kong Bill of Rights will coexist with China's Constitution.²⁶⁸ The Chinese Constitution is not subject to judicial or administrative interpretation, but is entrusted to the sole jurisdiction of the National People's Congress Standing Committee.²⁶⁹ The Standing Committee has not established any internal procedures to consider constitutional issues and has reportedly not decided a single constitutional case since the establishment of the People's Republic of China.²⁷⁰ Observers find it difficult to imagine that a Hong Kong judgment against Chinese government legislation or administrative action that violates the Bill of Rights will be well received in Beijing.²⁷¹

In any event, China can use provisions of the Basic Law to render the Bill of Rights ineffective. Article 8 states that only Hong Kong laws that do not contravene the Basic Law will remain in effect after 1997, and article 17 states that the National People's Congress Standing Committee may invalidate any post-1997 Hong Kong legislation that it determines violates the Basic Law.²⁷²

Another provision in the Basic Law that raises human rights concerns is article 18, which grants the Chinese government the power to "issue an order applying the relevant national laws in the Region" if the region is in a state of war or if, by reason of turmoil, a state of emergency exists.²⁷³ Much of the anxiety about article 18 revolves around speculation as to how the Chinese government may define the term turmoil. One concern is that Hong Kong depends almost exclusively on China for water, meat, vegetables, and food grains.²⁷⁴ To paralyze the region, China could simply shut off Hong Kong's water supply.²⁷⁵

A recent public announcement from government officials in Beijing placed a

265. *Id.* at 386.

266. *Id.* at 398.

267. *Id.* at 373.

268. *Id.* at 393. It is important to note the distinction between a right and a freedom under Chinese law. Palumbo, *supra* note 2, at 674. Freedom to engage in a certain activity means that a citizen may engage in that freedom only if it does not conflict with another citizen's freedom and if it does not conflict with a state interest. *Id.* A right takes precedence over a freedom. How this distinction is manifested is not always clear, but it is noteworthy that Chinese citizens are guaranteed many freedoms under China's Constitution. *Id.*

269. Keller, *supra* note 2, at 393.

270. *Id.*

271. *Id.* at 395.

272. Basic Law, *supra* note 71, at 1521-22.

273. *Id.* at 1523.

274. Palumbo, *supra* note 2, at 673.

275. *Id.*

national ban on satellite dishes.²⁷⁶ China's vice-minister of radio, film, and television stated: "Our control over foreign-originated television programs is a question of national sovereignty. . . . Such control is beneficial to the cultivation of patriotism among our citizens, safeguards the superior tradition of the Chinese race, promotes socialist civilization and maintains social stability."²⁷⁷ The announcement concerned Hong Kong residents, serving as a clear illustration of China's goal of social and political control.²⁷⁸ The ban brought into sharp focus the difference between Hong Kong's "freewheeling notions of press and public freedoms" and China's "callous caution."²⁷⁹ Fears are growing that China may already be stifling press freedom in Hong Kong through a "combination of heavyhanded police arrests, economic blackmail, outright bans and subtle intimidation."²⁸⁰

In 1993 an editor with China's official news agency, Xinhua, was sentenced to life imprisonment for selling an advance copy of a speech by Communist party Secretary Jiang Zemin to a Hong Kong reporter.²⁸¹ Chinese officials have since launched a major propaganda campaign promising equally severe punishment to anyone found guilty of "leaking state secrets."²⁸² A journalist for *Ming Pao*, a Hong Kong Chinese-language newspaper, was seized in September 1993 by Chinese security police and held incommunicado for eleven days before his arrest was announced.²⁸³ The journalist, Xi Yang, was charged with stealing state secrets and sentenced to twelve years in prison.²⁸⁴ Mr. Xi had filed a report with *Ming Pao* regarding the People's Bank of China selling part of its gold reserves to get foreign exchange.²⁸⁵ Mr. Xi's appeal was rejected by the Beijing High People's Court on April 14, 1994.²⁸⁶ The press community in Hong Kong believes that China is sending a clear message for them to behave themselves or face retribution.²⁸⁷

276. Peter Goodespeed, *Hong Kong's Notions of Media Freedom Already Colliding with China's Caution*, TORONTO STAR, Nov. 4, 1993, at A21.

277. *Id.*

278. *Id.*

279. *Id.* Hong Kong is known as one of the most open publishing and communications centers in Asia. *Id.* Hong Kong's population of six million people is served by 60 newspapers, two television stations, three radio networks, dozens of magazines, five-channel satellite television, a fledgling seven-channel cable system, and several international news organizations. *Id.*

280. *Id.*

281. *Id.* The Xinhua news agency is understood to be the headquarters of the Chinese Communist Party in Hong Kong. Ng, *supra* note 2, at 78 n.87. The director of Xinhua has always been both Beijing's representative and the head of the Chinese Communist Party in Hong Kong. *Id.*

282. Goodespeed, *supra* note 276, at A21.

283. *Id.*

284. *Protesters Denounce China's Imprisonment of Colony Reporter*, ASIAN WALL ST. J., Apr. 18, 1994, at 7 [hereinafter *Protesters*].

285. Goodespeed, *supra* note 276, at A21.

286. *Protesters*, *supra* note 284, at 7.

287. Goodespeed, *supra* note 276, at A21. In addition to instilling fear of criminal prosecution and punishment, China has used economic clout to control the Hong Kong media. *Id.* *Ming Pao* claims that Chinese officials are trying to control the placement of ads in the Hong Kong press. *Id.* The newspaper reported that publications regarded as unfriendly to China are being blacklisted. *Id.*

Fear of China's retribution is also a factor in Hong Kong politics. Martin Barrow, a member of Hong Kong's Legislative Council, and an executive of the British trading company Jardine Matheson Holdings Ltd., initially voiced strong support for the democratic reforms proposed by Governor Patten.²⁸⁸ "But after months of intense pressure from China, Mr. Barrow had indicated that he would vote against Mr. Patten."²⁸⁹ In the end, Mr. Barrow abstained from voting on the democratic reform bill.²⁹⁰ Many Hong Kong businessmen have huge investments in China and do not want to risk upsetting Beijing.²⁹¹ China can easily apply the same tactics against business executives that do not adhere to the Communist Party mandates as it does against journalists. Many of these same businessmen hope to become the new ruling elite in Hong Kong after 1997.²⁹²

D. U.S. POLICY REGARDING HONG KONG

The United States has lent support to Hong Kong's promised autonomy following 1997 through the U.S.-Hong Kong Policy Act of 1992.²⁹³ The United States maintains that the terms of the Joint Declaration should be strictly interpreted.²⁹⁴ To this end, the United States has pledged to "play an active role, before, on, and after July 1, 1997, in maintaining Hong Kong's confidence and prosperity, Hong Kong's role as an international financial center, and the mutually beneficial ties between the people of the United States and the people of Hong Kong."²⁹⁵ The Act states that the United States should continue to treat Hong Kong as a territory completely autonomous from China in all areas of trade and economics.²⁹⁶ The Act further provides that the laws of the United States will continue to apply to Hong Kong after 1997 in the same manner in which they currently apply and that all treaties and international agreements between Hong Kong and the United States will continue in force.²⁹⁷

As Congressman Porter noted when the Act was before the U.S. House of Representatives, the guarantees of autonomy for Hong Kong are meaningless

It also reproduced two memos from the Bank of China advising all companies owned or controlled by China that they are under strict orders not to advertise in eight blacklisted Hong Kong newspapers and 11 magazines. *Ming Pao* was one of the blacklisted newspapers. *Id.*

288. Wong, *supra* note 119, at 1.

289. *Id.*

290. *Id.*

291. Sun, *supra* note 112, at A16.

292. *Id.*

293. United States-Hong Kong Policy Act of 1992, Pub. L. No. 102-383, 106 Stat. 1448 (1992) (codified as 22 U.S.C. §§ 5701-5732).

294. "American pressure on the Chinese Government to adhere to the terms of the joint declaration signed with Britain in 1984 could play an important role in preserving Hong Kong's current legal, social, and political conditions." 138 CONG. REC. H8004 (daily ed. Aug. 11, 1992) (statement of Rep. Pelosi).

295. United States-Hong Kong Policy Act of 1992, *supra* note 293, § 101.

296. *Id.* § 103.

297. *Id.* § 201.

unless other nations step forward and amend their laws to allow for continued bilateral relations with Hong Kong after 1997.²⁹⁸ Had the United States not taken any action, Hong Kong would stand to receive the same treatment as China with regard to export controls and trade quotas. Applying the same treatment indiscriminately to Hong Kong and China would deny Hong Kong access to advanced American technology such as supercomputers that are used in banking and other industries.²⁹⁹ In addition, before the Act was passed, the issue of whether the United States could recognize different MFN status for Hong Kong and China was unclear, even though Hong Kong is a member of the GATT.³⁰⁰

While the U.S.-Hong Kong Policy Act goes to great lengths to state that Hong Kong will be treated as a separate autonomous entity by the United States, it includes references as to how Hong Kong's status may be threatened. The Act acknowledges that treaties and international agreements are valid "unless or until terminated in accordance with law."³⁰¹ The United States will continue to fulfill its obligations to Hong Kong under international agreements "so long as Hong Kong reciprocates."³⁰² The Act also provides that if the President of the United States determines that Hong Kong is not sufficiently autonomous to justify being treated differently from China, the President may issue an executive order suspending application of U.S. law.³⁰³ The Act states that when making such a determination, the President should consider the terms, obligations, and expectations expressed in the Joint Declaration.³⁰⁴

The Act also requires that the Secretary of State report to Congress every two years on conditions in Hong Kong. The report is to describe any significant development that affects U.S. interests, including the development of democratic institutions in Hong Kong.³⁰⁵

IV. The Forecast

A. KEEPING THE GOLDEN GOOSE LAYING EGGS

"It must not be forgotten that Hong Kong's very existence is due to the need for a neutral point of contact between East and West," says one Hong Kong resident.³⁰⁶ If China adheres to its policy of "one country, two systems," then Hong Kong will continue to prosper in the same role it has always played.³⁰⁷ Many optimists have surmised that China needs Hong Kong's economic prowess

298. 138 CONG. REC. H8003 (daily ed. Aug. 11, 1992) (statement of Rep. Porter).

299. *Id.*

300. *Id.*

301. United States-Hong Kong Policy Act of 1992, *supra* note 293, § 201.

302. *Id.* § 102.

303. *Id.* § 202.

304. *Id.*

305. *Id.* § 301.

306. Greenway, *supra* note 118, at 14.

307. *Id.*

so badly that they would not risk killing the golden goose by tampering with its current system. Some observers have gone so far as to state that Hong Kong is actually taking over China. In response to concern that China may expropriate businesses' property, one Hong Kong executive scoffed that "China is not going to take over Hong Kong. . . . Hong Kong is already taking over south China. A new [Asian] 'dragon' is being created, and this one is going to be the mother of all dragons."³⁰⁸ As William H. Overholt, executive director at the Hong Kong office of Bankers Trust Company pointed out: "If [China] intended to take that stuff for free in '97, or at greatly reduced prices, they wouldn't buy it now. . . . Also, they know that all they would have to do is expropriate one little piece of property, and the value of everything they had bought would plummet."³⁰⁹

Many business executives are willing to take a risk on doing business in Hong Kong because of the vast potential offered by the possibility of China's loosening of market controls. An important factor is the synergy between Hong Kong and South China.³¹⁰ "South China now has the fastest-growing economy among industrialized nations, and its special economic zones have become the manufacturing centre for the world. Hong Kong has aided and fed off that boom, to the point where the economic boundary between the two Chinas is non-existent."³¹¹

Guangdong province is one of China's special economic zones (SEZs) where Beijing allows the establishment of privately owned businesses.³¹² Guangdong's economy is expanding year after year at double-digit rates and is helping fuel the boom in Hong Kong.³¹³ Currently, 20 percent of Hong Kong's banknotes circulate in Guangdong.³¹⁴ Estimates show that Hong Kong companies employ 3 million workers in 25,000 factories on the mainland.³¹⁵ A typical Hong Kong shirt company, for example, will design, market, ship, bank, and insure in Hong Kong while sewing and finishing the shirts in Guangdong province.³¹⁶ Wages in

308. Blustein, *supra* note 164, at A22 (quoting Gary D. Gilbert, Chairman, Asia Terminals, Ltd.).

309. *Id.*

310. Neoh, *supra* note 1, at 321.

311. McMartin, *supra* note 210, at B1.

312. Blustein, *supra* note 168, at A22. When China moved toward an open-door policy, a law was passed that allowed the SEZs. Park, *supra* note 143, at 51. SEZs were established in Shenzhen, Zhuhai, and Shantou, all located in Guangdong province, as well as in Xiamen in Fujian province. Later, Hainan Island was designated as the fifth SEZ. *Id.* Special incentives are in place to encourage foreign investment and trade. *Id.* For example, local foreign trade corporations and private firms engaged in exporting are normally allowed to retain 25% of their foreign exchange earnings, but in the SEZs the foreign exchange retention rights are greater. *Id.* Perhaps encouraged by the success of the SEZs, China declared 14 cities along its Pacific coastline open for foreign direct investment and technology in 1984. *Id.* Then in 1985 China opened up three huge delta areas. *Id.* It appears that China is opening up the entire Pacific basin to attract the in-flow of foreign investment and technology. *Id.*

313. Blustein, *supra* note 168, at A22.

314. Paul S.P. Hsu, *Taiwan, Hong Kong, and China: The Chinese Productivity Triangle*, 27 INT'L LAW. 523, 528 (1993).

315. *Id.*

316. Blustein, *supra* note 168, at A22.

Guangdong are one-fifth to one-tenth the rate of Hong Kong wages.³¹⁷ The shift of low-cost labor into Guangdong is creating higher-paying jobs for Hong Kong, and this trend is expected to continue after 1997.³¹⁸

The integration of China's resources offers unrivaled potential.³¹⁹ Capitalists hope that eventually all of China, not just the provinces across Hong Kong's border, will become more open and market oriented. Businesses are positioning themselves to cash in on a potential explosion of industry and enterprise.³²⁰

In contrast to the view that China will continue to integrate resources and unify into one big open market, a private forecasting group has predicted that China will break up into about a dozen autonomous regions within five years. They advise U.S. companies to "remain nimble" and focus on selling services rather than installing new plants or equipment in the region.³²¹ The forecast suggested that the breakup will be triggered by the death of Deng Xiaoping, the leader of China's central government.³²²

B. PLUCKING THE GOLDEN GOOSE'S FEATHERS

China's response to the democratic reforms proposed by Governor Patten have caused many people to temper their optimism. The fact that China held up financing for Hong Kong's new airport for years, and continues to hold up a much needed container terminal, suggests that China has already plucked a few feathers from the golden goose.³²³

Doing business with Hong Kong in the period leading up to 1997 is a risk.³²⁴ However, many business leaders are willing to take the risk in order to position themselves to take advantage of the vast opportunities that China offers.³²⁵ As one commentator stated, the worst case scenario is one in which Hong Kong becomes just another Chinese city with no special status.³²⁶ If this happens "the risk in investing in Hong Kong is no greater than investing in China, and there are so many reasons for investing in China."³²⁷

317. *Id.*

318. *Id.*

319. See Park, *supra* note 143, at 51.

320. Blustein, *supra* note 168, at A1.

321. Also in the News—*General Developments*, 10 Int'l Trade Rep. (BNA) 1180 (July 14, 1993).

322. *Id.* Although Deng Xiaoping relinquished his last formal leadership position four years ago, he still wields great power in China. Daniel Southerland, *Frail Deng Makes Appearance on TV*, WASH. POST, Feb. 10, 1994, at A18. Deng is rarely seen in public and most observers think that he is in bad health. *Id.* China's economic reform and open-door policy have been led by Deng. See Park, *supra* note 140, at 51. Uncertainty exists as to whether the reformists will be able to retain their political power and continue the reforms in the absence of Deng. *Id.*

323. Greenway, *supra* note 118, at 14.

324. Holberton & Harverson, *supra* note 169, at 17.

325. *Id.*

326. Greenway, *supra* note 118, at 14.

327. *Id.* China's current economic boom began in about 1978 and has resulted in real annual growth averaging approximately 9% each year since. Nicholas D. Kristof, *The Rise of China*, FOREIGN AFFAIRS, Nov./Dec. 1993, at 59, 63. If China's economy continues to grow at its present rate,

Moody's Investors Service has said that Hong Kong is likely to lose its status as a world-class financial center after 1997.³²⁸ The agency fears that China will be unable to resist the temptation to meddle after the handover.³²⁹ Banks such as the venerable Hong Kong and Shanghai Bank have created escape hatches for their assets by setting up holding companies in other countries.³³⁰

Hong Kong is extremely useful to China as an entry point for technology, capital, management skills, and ideas.³³¹ Hong Kong is a major financial banking center, has fund management and capital raising capability, is a regional headquarters for multi-nationals, and is the tourist center for Asia.³³² But one cannot ignore the reality of the situation as well as lessons learned from the past. China has long felt a historical mission to regain sovereignty over Hong Kong.³³³ Although the Joint Declaration promises a high degree of autonomy, recent events have shown that China has no intent to give Hong Kong free reign over its own destiny. Indeed, China's whole system of governance is based on control and central planning. China is willing to loosen its control mechanisms to gain economic status. However, it would be foolhardy to think that it is willing to relinquish control altogether. As Governor Patten observed, "[h]istory is littered with the carcasses of decapitated geese."³³⁴

V. Conclusion

Siu-lun Wong, Professor of Sociology at Hong Kong University, addressing the issue of Hong Kong being transferred to China in 1997:

China may displace the United States in the first half of the 21st century as the largest economy in the world. *Id.* at 59. According to World Bank projections, China's net imports in the year 2002 will be \$639 billion, compared to \$521 billion for Japan. *Id.* at 61. Using these same projections, China will have a gross domestic product of \$9.8 trillion in the year 2002, compared to \$9.7 trillion for the United States. *Id.*

328. Stamp, *supra* note 147.

329. *Id.* Moody's Investors Service has recently announced that it might cut the rating of Hong Kong's biggest borrower, Mass Transit Railway Corporation (MTRC). David Stamp, *Agency May Cut Rating for HK's Biggest Borrower*, REUTER EUR. BUS. REP., Oct. 27, 1993, available in LEXIS, World Library, REUEUB File. Moody's reported that it would review MTRC's Aa2 rating for borrowings made in Hong Kong dollars for a possible downgrading. *Id.* Ratings from Moody's and rival company Standard and Poor's Corporation are important for big borrowers. *Id.* Low ratings usually mean that the borrower has to pay a higher interest rate, reflecting the greater risk for lenders. *Id.* The agency cited concern over the degree of financial autonomy Hong Kong will keep after the 1997 return to China. *Id.* Moody's acknowledged that as a Special Administrative Region Hong Kong is expected to maintain a significant degree of autonomy from China, but stated "the ultimate sovereign power over the territory's institutions—including the monetary and financial framework—will reside with China." *Id.* Bankers have noted that Moody's review will cover only local currency borrowing, but expressed concern that any downgrading might affect foreign investors psychologically by making them more cautious in lending to the MTRC. *Id.*

330. Blustein, *supra* note 168, at A22.

331. Neoh, *supra* note 1, at 321.

332. *Id.*

333. Neoh, *supra* note 1, at 315.

334. Greenway, *supra* note 118, at 14.

Will Hong Kong lose its developmental momentum as it approaches 1997? My analysis . . . would indicate that as long as the institutional principles essential to its past economic success are upheld, the relevant cultural factors can be expected to continue to fuel the engine of development. In the pursuit of modernity, is Hong Kong a model for the rest of China? The debate is open, but at least one thing is clear. Hong Kong stands as a concrete example of how modernization with distinctive Chinese characteristics can be attained.³³⁵

China probably will not make any immediate or drastic changes in Hong Kong's capitalist way of life. More likely is that China's government will begin to make slow, creeping changes to assimilate Hong Kong into the rest of China.³³⁶ Chinese authorities have already stated that they intend to make the Hong Kong Special Administrative Region part of a unified socialist China.³³⁷ Chinese leaders may have every intent of accomplishing this goal without damaging Hong Kong's tremendous financial and industrial assets, but it seems certain that Hong Kong will feel the effect. China may not purposely kill the golden goose, but it may unintentionally smother it.³³⁸

335. Neoh, *supra* note 1, at 312 (quoting and citing to Siu-lun Wong, *Modernisation and Chinese Culture in Hong Kong*, 1806 CHINA Q. 306, 324-25 (1986)).

336. Miller, *supra* note 115, at A1.

337. Keller, *supra* note 2, at 390.

338. The reference is to a remark by Christine Loh, a member of Hong Kong's Legislative Council, quoted in Miller, *supra* note 115, at A1.

