One Country-Two Foreign Policies: United States Relations with Hong Kong after July 1, 1997

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Comment

ONE COUNTRY-TWO FOREIGN POLICIES: UNITED STATES RELATIONS WITH HONG KONG AFTER JULY 1, 1997

"The people of Hong Kong, their institutions and their spirit, will soon test the Communist Chinese leadership's tolerance for freedom of thought in a way that protests in Tienanmen Square and Lhasa never have." 1

I. INTRODUCTION

For the past 150 years, Hong Kong has been the West's gateway to China. The tiny British colony2 has acted as a haven where Western rules and standards apply in an Eastern marketplace;3 Under British rule, Hong Kong has been transformed from an uninhabited, rocky island4 into the world's third-largest financial center and one of the most dynamic industrial hubs in modern history.5

3. In a May 5, 1993 speech before the U.S. House of Representatives, Hong Kong Governor Christopher Patten cited the combination of Chinese entrepreneurs and the Western-style rule of law as a fundamental reason for Hong Kong's commercial success under colonial rule. 139 CONG. REC. E1157, E1158 (daily ed. May 5, 1993) [hereinafter Patten Speech].
4. Until the mid-nineteenth century, Hong Kong played little role in China's history. Christian C. Day, The Recovery of Hong Kong by the People's Republic of China—A Fifty Year Experiment in Capitalism and Freedom, 11 SYRACUSE J. INT'L L. & COM. 625, 629 (1984). Prior to this time, the area had few permanent settlers and served mainly as a port for pirates. Id.
5. William H. Overholt, Hong Kong and China After 1997: The Real Issues, in THE CHINA CHALLENGE: AMERICAN POLICIES IN EAST ASIA 30, 38 (Frank J. Macchiara & Robert B. Oxnam eds., 1991) (stating Hong Kong is world's third largest financial center if measured by number of banks present and fourth largest if measured by number of offshore loans originated); Patten Speech, supra note 3, at E1158 (stating Hong Kong is tenth largest trading community in world).

A unique culture emerged in Hong Kong under British rule. With the high-
The United States has benefitted tremendously from Hong Kong's unique status, particularly in the past fifty years. The colony served the United States as an intelligence outpost to spy on Maoist China in the 1950s, as a diplomatic bargaining chip to establish better relations with China in the 1970s, and as an important trading partner in the 1980s and 1990s. Currently, with over seventeen billion dollars in bilateral trade between the United States and Hong Kong annually, the colony is the United States' fourteenth largest trading partner. It is also a common station for U.S. business operations in the Far East and the principal entrepôt for U.S. trade with China.

The U.S. relationship with Hong Kong will inevitably change drastically after July 1, 1997, when Britain will permanently transfer sovereignty of the colony to the People's Republic of China (PRC or China) pursuant to the 1984 Joint Declaration on the Future of Hong Kong (Joint Declaration). Under that agreement, Hong Kong will be governed by a Chinese population of over five million who have learned to live and prosper "in a milieu of capitalism amidst minimum government intervention and the Rule of Law." Neoh, supra note 2, at 310. Neoh described the singular character of the Hong Kong Chinese as follows:

"[S]omething unique has been emerging from Hong Kong's cities: it is Hong Kong Man. He is go-getting and highly competitive, tough for survival, quick-thinking and flexible. He wears western clothes, speaks English or expects his children to do so, drinks western alcohol, has sophisticated tastes in cars and household gadgets, and expects life to provide a constant stream of excitement and new openings. But he is not British or western (merely westernized). At the same time he is not Chinese in the same way that citizens of the People's Republic of China are Chinese. Almost alone in the Chinese world Hong Kong has not adopted Putonghua (Mandarin) as the lingua franca: instead Cantonese holds sway."

Id. at 311 (quoting Hugh Baker, Life in the Cities: The Emergence of the Hong Kong Man, 95 China Q. 469, 478-79 (1983)).

6. See Hungdah Chiu, The Hong Kong Agreement and American Foreign Policy, 3 OCCASIONAL PAPERS/REPRINT SERIES IN CONTEMP. ASIAN STUD. 1, 3-4 (1986).


8. Id.; Richard H. Solomon, China and MFN: Engagement, Not Isolation, Is Catalyst for Change, Statement before the Subcommittee on East Asian and Pacific Affairs of the Senate Foreign Relations Committee (June 6, 1990) (transcript available in Villanova University School of Law Library) [hereinafter China and MFN]. "Of the $25 billion in Chinese exports to Hong Kong in 1989, $24 billion were re-exported to other countries. This represents 48% of all Chinese exports. The United States is by far the largest market for Hong Kong's re-export of Chinese products, taking $8.5 billion in 1989." China and MFN, supra.

Comment  

827  

erned as a semi-autonomous Special Administrative Region of China for fifty years.10 As a Special Administrative Region, Hong Kong will retain its current capitalist economic system and enjoy a "high degree of autonomy" in its governance in all areas except defense and foreign affairs.11

The United States initially relied on the Joint Declaration to protect its extensive interests in Hong Kong beyond 1997.12 In recent years, however, U.S. and world confidence in the guarantees of the Joint Declaration have been shaken by the PRC’s open hostility toward democracy within its borders.13 Chinese aggressions, such as the Tiananmen Square Massacre14 and the relentless squelching of Hong Kong’s pro-democracy movement,15 have dimmed the world’s hope that Hong Kong’s capitalist economy can flourish under Chinese rule.16

(1984) [hereinafter Joint Declaration]. The agreement stipulates that China will assume irrevocable sovereignty over Hong Kong on July 1, 1997. Id. at 1371. Although the Joint Declaration is not called a treaty, both China and Britain have publicly stressed that it is legally binding. Susan L. Karamanian, Legal Aspects of the Sino-British Draft Agreement on the Future of Hong Kong, 20 Tex. Int’l L.J. 167, 182-83 (1985); see also Neoh, supra note 2, at 327 n.78 (stating two countries were "meticulous in attending to formalities, accreditation of persons who conducted the negotiations and initialling of the text, ratification and entry into force...") and supra at 1371 ("The Hong Kong Special Administrative Region will enjoy a high degree of autonomy, except in foreign and defense affairs.").

10. Joint Declaration, supra note 9, at 1371 ("The Hong Kong Special Administrative Region will enjoy a high degree of autonomy, except in foreign and defense affairs . . . .")

11. Id. at 1372 ("Current social and economic systems in Hong Kong will remain unchanged, and so will the life-style.").

12. See Statement by Secretary of State George Schultz, U.K. & China Reach Agreement on Hong Kong (Sept. 26, 1984), Dep’t St. Bull., Nov. 1984, at 56. When the Joint Declaration was signed, the United States applauded the agreement as a "good reason for sustained confidence in the future of Hong Kong as an attractive and thriving commercial center." Id.


15. Hong Kong: Hard Politics, ECONOMIST, Jan. 9, 1993, at 33. On January 3, 1993, China’s senior leader in charge of Hong Kong affairs threatened that “[i]f Hong Kong is to confront China, Hong Kong people may have to face a lot of hardship.” Id.

16. See generally Nicholas D. Kristof, British-Chinese Rift Stirs Anxiety in Hong
In an effort to ensure Hong Kong's prosperity and stability beyond 1997, the United States has enacted the United States-Hong Policy Act of 1992 (Act).\textsuperscript{17} The Act separates U.S.-Hong Kong and U.S.-China policy in the areas in which the Joint Declaration grants Hong Kong autonomy, such as trade, immigration and cultural exchange.\textsuperscript{18} Furthermore, the Act grants the President of the United States the authority to evaluate annually Hong Kong's social, economic and political progress to determine whether the territory should receive preferential treatment in future years.\textsuperscript{19} Because the United States is Hong Kong's largest export market,\textsuperscript{20} the Act provides the United States with substantial control over the territory's post-1997 prosperity.

This Comment critically analyzes the Act as an instrument for effectuating U.S.-Hong Kong policy. Part II discusses Hong Kong's history and rise to international prominence as a conduit for East-West trade. Part III focuses on the resurgence of Chinese rule in Hong Kong as a result of the Joint Declaration and the economic integration of China's southern provinces with the territory. Part IV provides the history of U.S.-Hong Kong relations and outlines the provisions and purposes of the Act. Finally, Part V analyzes the legality of the Act under international law and its likely impact.

This Comment concludes that, although the Act may improve U.S.-Hong Kong relations in isolated areas and may provide needed assurance of Western support to the Hong Kong people, its basic premise of separating Hong Kong and China under U.S. foreign policy is flawed. Hong Kong's prosperity and value to the world community have come as a result of its ties to China for the past 150 years. Moreover, in the past decade, the economies of Hong Kong and China have become virtually inseparable. Given this reality, the most effective U.S. policy is one that merges U.S. objectives in Hong Kong and U.S. objectives in China into one comprehensive foreign policy.

II. Hong Kong's "Borrowed"\textsuperscript{21} History and Rise to International Prominence

A. Great Britain Captures a Piece of Asia: Hong Kong's Development Under British Rule

Britain gained sovereignty over Hong Kong through three nine-
teenth-century treaties with China's Manchu Dynasty. Britain first developed its interest in Hong Kong as a commercial entrepôt in the early nineteenth century when Britain traded gold and silver for Chinese silk and tea. During the 1820s, Britain developed a trade deficit with China and began exchanging opium for Chinese goods in an attempt to curb its deficit. This trade practice eventually led to the Opium War between Great Britain and China. Britain defeated China in the war and, under the Treaty of Nanking, gained a twenty-one million dollar indemnity and annexed the island of Hong Kong in perpetuity.

Prior to British colonization in 1842, Hong Kong was described as "a barren island with hardly a house on it." Hong Kong's inhospitable exterior, however, suited the British. They were looking for a mercan-

22. Chiu, supra note 6, at 1. For a detailed discussion of the three treaties by which Great Britain acquired Hong Kong, see Kerrin Tso, The Legal Implications of the Sino-British Treaties Regarding Hong Kong, 4 Loy. L.A. Int'l & Comp. L. 111, 117-26 (1981).


24. Palumbo, Comment, supra note 2, at 669; see also Chen, supra note 14, at 294 (stating that Britain attained its first trade surplus in 1836 because of opium trade).

25. Tso, supra note 22, at 111-12. Local Chinese leaders strongly opposed Britain's opium distribution because of the devastating effect the drug was having on the Chinese population. Day, supra note 4, at 629-30 n.30. Notwithstanding Chinese opposition, Britain continued to encourage Chinese consumption of the drug and, by 1836, Britain achieved a trade surplus largely due to its opium trade. Tso, supra note 22, at 111. As Chinese opposition to the drug trade grew in the 1890s, so, too, did the British military presence protecting the opium trade routes in China. Id. In 1839, China and Britain launched into a three-year war after Chinese forces seized British opium supplies and trading factories in Canton and other outposts. Day, supra note 4, at 630 n.30.

26. Palumbo, Comment, supra note 2, at 670 n.14 (citing Treaty of Nanking, August 29, 1842, P.R.C.-Gr. Brit., 50 British and Foreign State Papers 389, reprinted in 93 Consol. T.S. 465 (1979)). Opium, the main subject of dispute in the war was not addressed in the treaty. Tso, supra note 22, at 112. Britain, nonetheless, continued to force opium upon the Chinese and pressured the Chinese government into legalizing the drug by 1858. Id.

27. Tso, supra note 22, at 112. The concessions forced upon China included the payment of six million dollars for opium seized and destroyed by the Chinese during the war. Id.

28. Johnson C. Ng, Note, 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) (citations omitted). Hong Kong was mostly rock and had no natural resources other than a natural deep-water harbor. Id.; see also Encyclopaedia of Asian History 74 (Ainslie T. Embree ed., 1988). Hong Kong's native population in 1841 was approximately five thousand. Encyclopaedia of Asian History, supra, at 74. However, after the British takeover, Chinese laborers migrated to the colony seeking new opportunities, and by 1844, the colony's population reached nineteen thousand. Id.

29. See Day, supra note 4, at 629. Britain needed "settled conditions, suppression of robbery and piracy, the guarantee of contracts and impartial justice" to trade successfully in the Far East. Id. Hong Kong provided each of these conditions on an easily managed plot of land that was outside of China's control. Id.
tile station where they could trade in a stable environment under British law, not a colony for British immigrants and settlers.\textsuperscript{30}

After Britain and France defeated China in the Second Opium War of 1858-1860,\textsuperscript{31} China signed the Convention of Peking.\textsuperscript{32} ceding the southern part of the Kowloon Peninsula and the Stonecutters Island to Britain in perpetuity.\textsuperscript{33} The 4.1-square-mile peninsular territory ‘‘afforded the British better protection of their position on Hong Kong Island and gave them a foothold on the Chinese mainland.’’\textsuperscript{34}

Britain leased the final piece of its Hong Kong colony, the 350-square-mile New Territories, from China in 1898 under the Second Convention of Peking.\textsuperscript{35} The lease was set for ninety-nine years and will expire at midnight on June 30, 1997.\textsuperscript{36} Britain’s initial reason for leasing the New Territories was to defend Hong Kong.\textsuperscript{37} In time, however, the New Territories became assimilated into the commercial life of the colony.\textsuperscript{38} Currently, the three Hong Kong territories are completely integrated, with much of the colony’s population, industry and water supply located in the New Territories.\textsuperscript{39}

B. Hong Kong’s Economic Growth

During the early years of colonization, Hong Kong served Britain primarily as an entrepôt for opium trade with China and India.\textsuperscript{40} How-

\begin{itemize}
  \item \textsuperscript{30} Id.
  \item \textsuperscript{31} See Ng, Note, supra note 28, at 70. The Second Opium War began in 1859 when a British envoy en route to Beijing was fired upon by Chinese forces. Id. The Chinese were defeated in 1860, and the war was brought to a close with the signing of the Convention of Peking. Id.
  \item \textsuperscript{33} Id.
  \item \textsuperscript{34} Kevin P. Lane, Sovereignty and Status Quo: The Historical Roots of China’s Hong Kong Policy 3 (1990).
  \item \textsuperscript{35} Convention of 1898, June 9, 1898, P.R.C.-Gr. Brit., 90 British and Foreign State Papers 17, reprinted in 186 Consol. T.S. 310 (1979); see also Ng, Note, supra note 28, at 70 (describing history of Hong Kong). The territory was ceded to Britain by the weakened Manchu Dynasty government after their defeat in the Sino-Japanese War of 1894-1895. Lane, supra note 34, at 3-4. During this time period, Germany, Russia and France also succeeded in pressuring the Manchu regime into providing them with port territories on the Chinese mainland. Id.
  \item \textsuperscript{36} Convention of 1898, June 9, 1898, P.R.C.-Gr. Brit., 90 British and Foreign State Papers 17, reprinted in 186 Consol. T.S. 310 (1979).
  \item \textsuperscript{37} Id. The Convention of 1898 states in part: ‘‘Whereas it has for many years past been recognized that an extension of Hong Kong territory is necessary for the proper defence [sic] and protection of the Colony, it has now been agreed between the Governments of Great Britain and China that the limits of British territory shall be enlarged under lease.’’ Id.
  \item \textsuperscript{38} Day, supra note 4, at 631 n. 37.
  \item \textsuperscript{39} Id.
  \item \textsuperscript{40} Encyclopedia of Asian History, supra note 28, at 75.
\end{itemize}
ever, in the second half of the nineteenth century, Hong Kong’s economic value vastly expanded for a number of reasons.41 First, the opening of Eastern markets such as Japan, Korea and China, and the concomitant improvement of trade routes from Europe and through the Pacific Ocean brought more trade through the colony.42 Hong Kong also offered the unique advantage in Asia of having a stable and secure colonial administration governed by British free trade and laissez-faire policy.43 Finally, various political disturbances on the Chinese mainland provided needed labor by forcing a constant flow of immigrants to seek refuge on the colony.44

As Hong Kong’s trading market expanded throughout Southeast Asia and the Western Pacific, opium was replaced by goods such as rice, sugar and textiles.45 By 1880, thirty percent of China’s external trade was directed through the colony.46 With the influx of trade, related commercial enterprises such as shipping, banking and insurance also prospered.47

Hong Kong’s economy also proved to be resilient. The colony’s commercial life rebounded from devastating setbacks in both World War II48 and the Korean War.49 The United Nations embargo of China during the Korean War crippled Hong Kong’s trade with China, the col-

41. Id.
42. Id.
43. Id.
44. Id. at 74-75. The population of the colony rose from 19,000 to 119,300 (116,335 of whom were Chinese) between 1844 and 1861 largely as a result of the disruptive conditions created by the Taiping Rebellion (1851-1864). Id. Mainland residents again fled in mass to Hong Kong as a result of political disturbances at the turn of the century and the 1911 Revolution, forcing Hong Kong’s population to rise to 456,939 in 1911 and 878,947 in 1931. Id. at 75. By 1941, Hong Kong’s population reached 1.6 million as a result of Japan’s invasion of China in 1937. Id. at 76.
45. Id. at 76. By 1880, Hong Kong’s place as a commercial entrepôt was firmly established. Id.
46. Id.
47. Id.
48. Ng, Note, supra note 28, at 70. The Japanese invaded the colony in December 1941 and remained there for nearly four years. Id. During Japanese occupation, the colony’s trade came to a virtual standstill and forced deportation contracted the population from 1.6 million to 600,000. ENCYCLOPEDIA OF ASIAN HISTORY, supra note 28, at 76; see also Day, supra note 4, at 631 (describing decline and subsequent swell of Hong Kong’s population from 1930s to 1950s). Hong Kong’s downward spiral, however, was quickly reversed in 1945 when the British regained control of the colony. Ng, Note, supra note 28, at 70. The population sustained unprecedented growth as Hong Kong natives returned and over 700,000 mainland Chinese immigrated to the colony seeking refuge from Mao Tse-tung’s Communist government. Id. at 70-71; Day, supra note 4, at 631. Between 1945 and 1950, Hong Kong’s population grew from 600,000 to 2.2 million, and its economy rebounded with the influx of labor and capital from its immigrants. Ng, Note, supra note 28, at 70-71.
49. Ng, Note, supra note 28, at 71.
mony's primary source of commerce.\textsuperscript{50} However, Hong Kong responded by transforming itself from an entrepôt into an industrialized city-state.\textsuperscript{51} This transformation was successful largely because Hong Kong had a solid communication, industrial and labor infrastructure that developed through decades of international trade.\textsuperscript{52}

It is as an industrial and financial power that Hong Kong has made its mark on modern commercial history.\textsuperscript{53} Hong Kong's gross domestic product (GDP) increased a staggering twenty-three times from 1947 to 1981,\textsuperscript{54} with an average annual growth rate of 8.7%.\textsuperscript{55} This growth rate increased to 11.9% from 1976 to 1981, which was one of the highest in the world.\textsuperscript{56}

Hong Kong's economic success during the late 1970s and early 1980s was primarily due to the opening of China's markets in 1979 by its leader, Deng Xiaoqing.\textsuperscript{57} Hong Kong exports to China have increased at an average of eighty-five percent per year since 1979.\textsuperscript{58} Chinese exports to Hong Kong have also increased at an average rate of thirty-one percent per year.\textsuperscript{59} In 1985, China became Hong Kong's largest trading partner, accounting for an estimated twenty-six percent of the colony's total imports and exports.\textsuperscript{60} According to Chinese customs statistics, bilateral trade between China and Hong Kong reached forty billion U.S.

\begin{itemize}
\item \textsuperscript{50} Id.
\item \textsuperscript{51} Day, supra note 4, at 631.
\item \textsuperscript{52} Id. Hong Kong's thriving entrepôt economy facilitated its transformation into an industrial city-state. Id. The colony had capital and skilled industrial labor from mercantile businesses such as shipbuilding, and a legal and financial community with worldwide contacts. Id. In addition, because the colony had an international reputation for stability, investors readily supplied the capital needed for Hong Kong's industrial growth. Id.
\item \textsuperscript{53} See Y.L. Wu & Y.C. Jao, The Economic Consequences of 1997, 20 CASE W. RES. J. INT'L L. 17, 18 (1988) (stating that Hong Kong has been leading financial center in Asia-Pacific region since late 1960s).
\item \textsuperscript{54} Id. at 18-19. In 1947, the GDP was approximately $243; in 1981 it was estimated at $5,594. Id. at 19. Furthermore, Hong Kong's population tripled during this period, reaching 5.15 million in 1981. Id. From 1950 to 1976, Hong Kong's GDP grew faster than any other Asian economy. Day, supra note 4, at 631-32.
\item \textsuperscript{55} Wu & Jao, supra note 53, at 19.
\item \textsuperscript{56} Id.
\item \textsuperscript{57} For a discussion of Hong Kong's economic ties to China during the past two decades, see infra notes 57-68 and accompanying text.
\item \textsuperscript{58} Neoh, supra note 2, at 320. Re-exports from Hong Kong to China have also increased 84% per year since 1979. Id.
\item \textsuperscript{59} Id.
\item \textsuperscript{60} Id.; Ng, Note, supra note 28, at 72. By the late 1980s, Hong Kong actually had a trade deficit with China because imports from China represented 35% of the value of all imports into Hong Kong, but exports to China represented only 20% of the value of all exports from Hong Kong. Neoh, supra note 2, at 320.
\end{itemize}
dollars in 1990.61 This figure is more than twice the amount of bilateral trade that Hong Kong has with its next largest trading partner, the United States.62

Hong Kong has also re-established its position as China’s trade link to the rest of the world. China is Hong Kong’s largest supplier and market for re-exports.63 Hong Kong trade figures show that “re-exports accounted for $14.219 billion out of Hong Kong’s $20.305 billion in total exports to China in 1990.”64 Furthermore, out of the $30.274 billion in total Chinese exports that Hong Kong received in 1990, it re-exported products valued at $30.822 billion.65

China has poured a substantial amount of direct investment into Hong Kong’s infrastructure and economy in recent years and has opened up selected areas of the Guangdong Province, adjacent to the New Territories, to Hong Kong investment.66 Currently, more than 20,000 Hong Kong manufacturers have relocated their factories to the Chinese mainland, where they employ approximately three million PRC workers.67 This movement, plus the growing trade links, has resulted in an irreversible integration of the economies of Hong Kong and China.68


62. U.S. Policy Toward Hong Kong, supra note 7, at 279. In 1991, Hong Kong imports from the United States amounted to $8.1 billion and Hong Kong exports to the United States were worth $9.3 billion. Id. Although China is Hong Kong’s largest overall trading partner, the United States is Hong Kong’s largest export market. Id. For a further discussion of United States’ economic and political ties to Hong Kong, see infra notes 157-203 and accompanying text.

63. Re-exports are products that are imported into a country and then exported without undergoing substantial manufacturing changes to their shape, nature, form or utility. Business International, supra note 61.

64. Id.

65. Id.

66. U.S. Policy Toward Hong Kong, supra note 7, at 278 (“The PRC is the largest foreign investor in Hong Kong, and Hong Kong is the largest source of foreign investment in China . . . .”).

67. Id. China has likewise taken advantage of business opportunities in Hong Kong. Neoh, supra note 2, at 320. For example, “China Resources, China’s largest trading firm in Hong Kong[,] has over 7,000 employees.” Id. In addition, China has bought large stakes in Hong Kong companies such as HK Telecom and Cathay Pacific Airways. Id. at 320-21.

68. Neoh, supra note 2, at 320-21. The following passage by Neoh, a resident of Hong Kong, underscores the interdependence of Hong Kong and Southern China:

The economic mutual dependence is further underlined by the fact that in 1989, Hong Kong received nearly three times as much water from the Guangdong Province than Hong Kong had in its reservoirs. The major electricity supplier of Hong Kong is China Light and Power, a Hong Kong company, which is connected to the Guangdong grid and supplies three million kilowatts of electricity daily to Guangdong Province, representing 7% of the electricity generated in Hong Kong. This trend is increasing rapidly as supply agreements with the Special Economic Zone of Shekou are further implemented. The Guangdong Nu-
III. HONG KONG AND CHINA: INSEPARABLE FUTURES

A. China's Claim of Sovereignty Over Hong Kong

China's extensive investment in Hong Kong since the late-1970s is not accidental. It is merely one step in China's eighty-year commitment to reclaim its lost territories. After reclaiming Hong Kong from Great Britain in 1997, China will reclaim Macao from Portugal in 1999 under a treaty similar to the Joint Declaration. China's ultimate goal is to regain control of the Republic of China (Taiwan), the refuge of the Nationalist Government that was ousted by the Communists in 1949. Some authorities speculate that China will be benevolent in its treatment of Hong Kong in order to induce Taiwan to come back into the fold.

Since the Nationalist Government rose to power in China during the early twentieth century, the Chinese have claimed that the three treaties by which Britain gained sovereignty over Hong Kong are "une-
qual treaties” and therefore invalid.73 This opposition to Britain’s claim to Hong Kong is one of the few Nationalist policies that the Communist Government pursued after its rise to power in 1949.74 The Chinese, although never providing a clear definition of “unequal treaties,”75 have argued that the treaties are “unequal” because European expansionists forced the agreements upon China after it had been weakened by war and corruption.76 China has further claimed that it never knowingly relinquished sovereignty over Hong Kong to Britain because nineteenth-century Chinese language had no term equivalent to “cessation.”77 Under this claim, China asserts that it was a logical impossibility for the Manchu government to have understood that it was permanently relinquishing its claim to Hong Kong when it signed the three treaties with Britain.78

In 1943, while Great Britain and China were negotiating the termination of British extraterritorial rights and other special rights in China, the Nationalist Government under Chiang Kai-Shek demanded that the New Territories lease also be terminated.79 When Britain refused, the

73. For a discussion of Britain’s acquisition of Hong Kong, see supra notes 22-39 and accompanying text.
74. Palumbo, Comment, supra note 2, at 671. One of the mandates of the Nationalist Government was to recover Chinese territories lost to foreign nations. Id. Likewise, the Communist Government “has maintained its interest through the years to reassert its authority over Hong Kong ‘when the time was ripe.’” Id.
75. Bowie, supra note 14, at 249. For a treaty to be valid, according to Chinese interpretation, “there must be genuine equality between the parties; equality depends upon ‘state character, economic strength, and the substance of correlation of the contracting states.’” Id. (quoting Hungdah Chiu, The People’s Republic of China and the Law of Treaties 97 (1972)).
76. LANE, supra note 34, at 4. In support of China’s “unequal treaties” argument, Lane commented:

Since the 1920s, both the Kuomintang ( . . . Nationalist Party) and the Chinese Communist Party . . . have included Hong Kong’s treaties in a group of agreements signed by the Qing’s Manchu government that are considered “unequal.” Their argument, that treaties imposed on the Qing government under threat of military force cannot be considered valid, is persuasive. The treaties of 1842 and 1860 were classic examples of British “gunboat diplomacy,” and the 1898 Convention of Beijing was signed with a weak, divided China that had been badly defeated in a war with Japan.

Id.
77. Id. (stating that a Western text on international law was not translated into Chinese until 1864).
78. Id.
79. Hungdah Chiu, Introduction, 20 Case W. Res. J. Int’l L. 1, 2 (1988) [hereinafter Chiu, Introduction]. In the 1842 Treaty of Nanking, Britain gained control of Hong Kong and established its lucrative extraterritoriality system within China. Neoh, supra note 2, at 316. The treaty mandated “the opening of Chinese ports to foreign trade; the extension of a privileged position to foreign residents in China under the protection of extraterritorial rights exercised by consular authorities; and the conduct of foreign relations as equals.” Id. These extraterritoriality privileges were ostensibly set up because of the vast differ-
Nationalists, wishing to avoid delay of the termination of British extraterritorial rights; temporarily acquiesced but reserved the right to reopen negotiations in the future.\textsuperscript{80} Future negotiations between Britain and the Nationalists never materialized. The Nationalists were driven from the Chinese mainland to Taiwan by Mao Tse-tung’s Communist forces in late 1949.\textsuperscript{81} The reunification cause, however, was adopted by the Communist-led PRC.

From its inception in 1949, China’s Communist Government has viewed Hong Kong as “Chinese territory to be recovered.”\textsuperscript{82} Nevertheless, the Communist government took no direct action to recover the territory until the 1980s.\textsuperscript{83} Before that time, China was willing to maintain

\textbf{References}\n
\textsuperscript{80} Chiu, \textit{Introduction}, supra note 79, at 2. In 1943, China’s international position was weak and the Nationalist Government desperately needed capital to fight encroaching communist forces. Neoh, \textit{supra} note 2, at 315-18. It is not surprising, therefore, that the Nationalists sacrificed sovereignty over Hong Kong to free the mainland from the economically draining extraterritoriality system. \textit{Id.}

\textsuperscript{81} Chiu, \textit{Introduction}, supra note 79, at 2. In 1950, Britain withdrew its recognition of the Nationalist Government, thereby placing the new Communist Government in no position to negotiate the “Hong Kong question” with Great Britain. \textit{Id.}

\textsuperscript{82} \textit{Id.} at 2-3. On March 8, 1963, the state-run \textit{People’s Daily} (\textit{Renmin Ribao}) described the Chinese policy toward Hong Kong as follows:

At the time the People’s Republic of China was inaugurated, our government declared that it would examine the treaties concluded by previous Chinese governments with foreign governments, treaties that had been left over by history, and would recognize, abrogate, revise, or renegotiate them according to their respective contents.

As a matter of fact, many of these treaties concluded in the past either have lost their validity, or have been abrogated or have been replaced by new ones. With regard to the outstanding issues, which are a legacy from the past, we have always held that, when conditions are ripe, they should be settled peacefully through negotiations and that, \textit{pending a settlement, the status quo should be maintained}. Within this category are the questions of Hong Kong, Kowloon, and Macao and the questions of all those boundaries which have not been formally delimited by the parties concerned in each case.

\textit{Id.} at 3 (emphasis added) (quoting \textit{A Comment on the Statement of the Communist Party of the U.S.A., People’s Daily} (\textit{Renmin Ribao}), March 8, 1963, at 1 (editorial)).

\textsuperscript{83} Lane, \textit{supra} note 34, at 89-91.
tain the status quo in Hong Kong for a number of reasons.\textsuperscript{84} China had a high stake in maintaining the colony's economic prosperity because substantial foreign exchange came from trade with Hong Kong.\textsuperscript{85} Hong Kong also served as an outlet for Chinese political dissidents, and provided China indirect mail and trade contact with Taiwan.\textsuperscript{86}

Although China permitted British governance of Hong Kong until the 1980s, it has adamantly opposed any attempts by the world community to make Hong Kong an independent state.\textsuperscript{87} For example, when the United Nations listed Hong Kong and Macao as colonies in 1972, thereby subjecting them to the United Nations Declaration on the Granting of Independence to Colonial Countries and People, China successfully lobbied to have the two removed from the list.\textsuperscript{88} In its letter to the Chairman of the General Assembly's Special Committee on Colonialism, China argued:

Hong Kong and Macao are part of Chinese territory occupied by the British and Portuguese authorities. The settlement of the questions of Hong Kong and Macao is entirely within China's sovereign right and does not at all fall under the ordinary category of colonial territories. . . . The United Nations has no right to discuss these questions.\textsuperscript{89}

As the 1980s approached, foreign investors, Hong Kong business people and government officials became uneasy about the colony's future.\textsuperscript{90} Hong Kong investors were aware that the New Territories'
ninety-nine year lease expired on July 1, 1997,\textsuperscript{91} and they knew that the rest of the colony could not viably function without the New Territories.\textsuperscript{92} Economic growth in the colony ebbed as investors waited for assurance of stability beyond 1997.\textsuperscript{93} They were particularly concerned with the security of property rights after 1997 because land in Hong Kong was leased from the colonial government instead of bought.\textsuperscript{94} By the 1980s, it was clear that the New Territories property leases would extend beyond 1997.\textsuperscript{95} This left the Hong Kong government in a "legal quandary, because it was unable to lease land for periods after which its own rights would cease."\textsuperscript{96}

In September 1982, Britain's Prime Minister, Margaret Thatcher, travelled to China to initiate discourse on an official resolution to the Hong Kong question.\textsuperscript{97} Upon the commencement of negotiations, China declared that it would not extend the New Territories' lease and that it considered the treaties by which Britain gained control of the entire colony to be "unequal" and, therefore, invalid.\textsuperscript{98} While claiming

\begin{itemize}
\item 91. For a discussion of the New Territories lease, see supra note 35-39 and accompanying text.
\item 92. For a discussion of the interdependence of the three areas that comprise Hong Kong, see supra notes 38-39 and accompanying text.
\item 93. LANE, supra note 34, at 89-91. Investor concerns led Hong Kong's Governor, Sir Murray MacLehose, to discuss the 1997 New Territories lease expiration with Chinese leader Deng Xiaoping in 1979. Id. at 89. Deng reportedly told MacLehose that Hong Kong investors should "set their hearts at ease." Id. Notwithstanding Deng's apparent lack of concern, Britain and China began to focus in detail on Hong Kong's future. Id.
\item 94. Id. at 89.
\item 95. Id.
\item 96. Id.
\item 97. Chiu, Introduction, supra note 79, at 4. The tangible result of Thatcher's trip was that China and Britain issued a joint communiqué stating that both countries "agreed to enter talks through diplomatic channels following the visit, with the common aim of maintaining the stability and prosperity of Hong Kong." Id.
\item 98. Neoh, supra note 2, at 323. Prime Minister Thatcher underestimated China's commitment to reclaiming Hong Kong and "the rancor with which Chinese leaders regarded the unequal treaties." LANE, supra note 34, at 91. During her initial visit to Beijing, Thatcher claimed British sovereignty over Hong Kong and insisted the treaties were legally valid. Id. Directly thereafter, she publicly announced this stance in Hong Kong and added that any government that failed to honor these treaties could not be trusted to uphold others. Id. China's reply was terse and effective. Id. at 92. It released a statement that sent Hong Kong's economy into a temporary tailspin and persuaded Thatcher to reconsider her position. Id. The statement read:
\begin{quote}
These treaties, which were forced upon the Chinese people, provide an ironclad proof of British imperialism's plunder of Chinese territory. The Chinese people have always held that these treaties are illegal and therefore null and void. Even when they were still in a powerless status, the Chinese people waged a protracted, unremitting and heroic struggle against imperialist humiliation and oppression and against the series of unequal treaties forced upon them by imperialism. It was not until the founding of the People's Republic of China in 1949 that the
\end{quote}

sovereignty over all of Hong Kong, China attempted to ease the concerns of the Hong Kong people and outside investors by publicly assuring that Britain and China would engage in bilateral negotiations with the aim of "preserving the stability and prosperity of Hong Kong."99

In the late months of 1982, the two-year negotiations on the future of Hong Kong began, and so too did the colony's flight of capital and talent.100 During these two years, real estate prices fell fifty to ninety percent and the Hong Kong dollar reached a new low.101 The colony also sustained a talent drain as residents who could afford to do so either emigrated or made plans to emigrate.102

Chinese people finally won independence and emancipation. Now that the Chinese people have stood up, it is only natural that they find these treaties . . . unacceptable.

Id. 99. LANE, supra note 34, at 92 (citations omitted).

100. Chen, supra note 14, at 303-08.

101. Id. at 303.

102. Id. at 305-08. Hong Kong has not experienced an overall population drain because of the constant influx of immigrants from China. Id. at 304-05. Demographic indicators, nevertheless, show large numbers of residents from the middle to top echelons of the business community have left the country or are making arrangements to leave the country. Id. at 305. For example, one U.S. bank has reported losing 20% of its officer-level staff. Id.; see also Shirley Yam, Hong Kong China Seeks Halt to Exodus, S. CHINA MORNING POST, Sept. 18, 1990, at 6 (discussing proposal that would extend U.S. visas to key employees in Hong Kong).

In 1989, the U.S. Consulate General in Hong Kong acknowledged in an official report that the colony was losing valuable talent and that the likely outcome of this emigration would be "higher costs and possibly reduced operating efficiency." WILLIAM MCGURN, PERFIDIOUS ALBION: THE ABANDONMENT OF HONG KONG 135 (1991) (citing REPORT BY THE U.S. CONSULATE GENERAL IN HONG KONG, IMPACT OF THE BRAIN DRAIN ON HONG KONG'S ECONOMY (1989)). Citing a 1988 study commissioned by Peat Marwick management consultants in Hong Kong, the Consulate General listed the following likely consequences of Hong Kong's emigration:

Loss of highly skilled and experienced middle managers/professional (reduced efficiency, use of less qualified in key positions).

Higher labor turnover at all levels (from less than 1 percent in 1982 to over 5 percent in 1987; increase in "job hopping").

Higher compensation packages (contributing to inflationary spiral).

Growth of service sector/lower investment by multinationals (service-sector investment by multinationals discouraged; some operations transferred elsewhere in the region).

Loss of accountability (decline in employee loyalty, difficult to assign responsibility for decisions).

Social consequences (loss of community leaders).

Capital outflow (family and asset "portfolio diversification" leads to lower level of investment and domestic business activity).

Id. at 138.

Prominent Hong Kong businesses have also fled the colony or have diversified their interests to minimize risk. See Chen, supra note 14, at 305-06. For example, Jardine Matheson, Hong Kong's oldest trading company, moved its
B. *The Joint Declaration and the Future of Hong Kong*

On September 26, 1984, Britain and China initialed the Joint Declaration on the Question of Hong Kong. The Joint Declaration contains twelve basic points, which are summarized as follows:

1. That Hong Kong ("HK") shall be established as a Special Administrative Region ("SAR") of the People's Republic [of China] under Article 31 of the Constitution.
2. That the HKSAR will enjoy a high degree of autonomy except in foreign and defense affairs which are the responsibilities of the Central Government.
3. That the HKSAR will be vested with executive, legislative and independent judicial power, including that of final adjudication and that laws currently in force will remain basically unchanged.
4. That the HKSAR Government will be composed of local inhabitants. The Chief Executive will be appointed by the Central Government on the basis of elections or consultations to be held locally. Principal officers nominated by the Chief Executive will be appointed by the Central Government.
5. That the current social and economic systems in Hong Kong will remain unchanged and so will the lifestyle. Rights and freedoms will be protected by law as will private property.
6. That the HKSAR will retain the status of a free port and a separate customs territory.
7. That the HKSAR will retain the status of an international financial center with its foreign exchange, gold and securities markets, a free flow of capital and a freely convertible Hong Kong dollar.

domicile to Bermuda in 1984. *Id.* at 306. Hong Kong's largest bank, the Hong Kong and Shanghai Banking Corporation, instead of fleeing the colony, has invested extensively in non-Hong Kong businesses. *Id.* The unfortunate result of either approach has been a vast depletion of capital in the colony. *Id.* Moreover, "[r]ecent signs indicate that the outflow of capital will not subside and will continue to increase as 1997 approaches." *Id.*


104. China enacted Article 31 in its 1982 constitution in anticipation of assuming sovereignty over Hong Kong and Macao (and later Taiwan). LANE, *supra* note 34, at 90. Article 31 stipulates: "The State may establish Special Administrative Regions where necessary. The systems to be instituted in Special Administrative Regions shall be prescribed by law and enacted by the National People's Congress in the light of the specific conditions." *Id.*
8. That the HKSAR will have independent finances which will not be taxed by the Central Government.

9. That the HKSAR may establish mutually beneficial economic relations with the United Kingdom and other countries.

10. That the HKSAR may, using the name “Hong Kong, China,” maintain on its own, economic [relations,] . . . develop cultural relations and conclude relevant agreements with states, regions and relevant international organizations.

11. That the HKSAR will be responsible for maintenance of public order within the SAR.

12. That the above principles and their elaboration in Annex I shall be enacted in a Basic Law and that they will remain unchanged for fifty years.105

The agreement, although not formally called a treaty, has the binding effect of a treaty.106 Despite the glaring ambiguity of several of the Joint Declaration’s terms, most notably the phrase “high degree of autonomy,”107 the agreement effectively quieted the fears of many Hong

105. Joint Declaration, supra note 9, at 1371-72, construed in Neoh, supra note 2, at 326 n.77.

106. Karamanian, supra note 9, at 183. Consistent with its policy of asserting that it never legally lost sovereignty over Hong Kong, China refused to call the document by which it regained control of the colony a “treaty.” Id. Under customary international law as codified in the Vienna Convention on Law of Treaties, “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation” is a treaty. Vienna Convention on the Law of Treaties, May 23, 1969, art. (2)(1)(a), 1155 U.N.T.S. 331, reprinted in SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES 1945-1986 449 (1989) (emphasis added); see also Nancy C. Jackson, The Legal Regime of Hong Kong After 1997: An Examination of the Joint Declaration of the United Kingdom and the People’s Republic of China, 5 INT’L TAX & BUS. LAW. 377, 403 (1987) (discussing application of Vienna Convention on Law of Treaties to Joint Declaration). Furthermore, Chinese law explicitly accepts the term “declaration” as creating the binding obligations of a treaty. Karamanian, supra note 9, at 183; see also Samuel S. Kim, The Development of International Law in Post-Mao China: Change and Continuity, 1 J. CHINESE L. 117, 133 (1987) (stating Joint Declaration is “case in which China accepted the international legal validity of a joint declaration as a binding international treaty”).

Moreover, both China and Britain have publicly stressed that the Joint Declaration is to be legally binding. Karamanian, supra note 9, at 183. In ratifying the agreement, both parties were meticulous in attending to treaty formalities such as “accreditation of persons who conducted the negotiations and initialing of the text, ratification and entry into force, and . . . registration with the U.N. in accordance with Article 102 of the U.N. Charter.” Neoh, supra note 2, at 327 n.78.

Kong residents\textsuperscript{108} and the international community about the future of the territory.\textsuperscript{109} This confidence boost was best illustrated by the rebound of Hong Kong’s economy after its slowdown between 1982 and 1984.\textsuperscript{110}

C. Hong Kong’s Relationship with China Sours: Developments After the Joint Declaration

1. The Massacre at Tiananmen Square

Events in the late 1980s have caused the people of Hong Kong to question China’s commitment to “one country, two systems.” Most notably, China’s massacre of pro-democracy demonstrators on June 4, 1989, in Tiananmen Square devastated Hong Kong’s confidence and economic growth.\textsuperscript{111} China largely blamed the demonstrations on the infiltration of Western democratic ideas which had occurred during the past decade of economic reform.\textsuperscript{112} One government solution, therefore, was to

Kong’s autonomy under Joint Declaration with autonomy enjoyed by other non-sovereign regions and suggesting modifications where appropriate to achieve level of autonomy commensurate with comparable situations).

108. Palumbo, Comment, supra note 2, at 685 & n.129. Concurrent with the initialization of the Joint Declaration, Britain distributed The White Paper to the people of Hong Kong to explain the agreement and test its popularity in the colony before the document was formally ratified by the British Parliament. \textit{Id.} at 684-85 & nn.126-28 (citing \textit{White Paper: A Draft Agreement Between the Government of the United Kingdom and Northern Ireland and the Government of the People’s Republic of China on the Future of Hong Kong} (Sept. 26, 1984)). The White Paper, which contained the text of the Joint Declaration, a history of negotiations and a memorandum on the status of British Dependent Territories citizens, was designed to reassure Hong Kong residents that the colony would function autonomously after 1997. \textit{Id.} at 684 n.126. Based on polls taken after the distribution of The White Paper, the majority of people in Hong Kong and the government councils approved of the agreement. \textit{Id.} at 685 & n.129.

109. See Ng, Note, supra note 28, at 83-86 (discussing increased Japanese and U.S. investment in Hong Kong since signing of Joint Declaration, including stationing of corporate headquarters in colony).

110. Wu & Jao, supra note 53, at 21-26. Hong Kong’s economic rebound was also partially due to government currency regulation. \textit{Id.} at 20-21. Although any regulation in Hong Kong is rare and resisted, the government’s two-step regulation system proved successful. \textit{Id.} First, the government required that the Hong Kong banknote be 100% backed by U.S. dollars at a fixed rate. \textit{Id.} at 20. Second, the government abolished “the 10% withholding tax on interest income from Hong Kong dollar denominated deposits with financial institutions.” \textit{Id.} at 21.

111. \textit{Hong Kong—Foreign Economic Trends}, (June 11, 1991), available in LEXIS, 1991 National Trade Data Bank, Market Reports [hereinafter \textit{Foreign Economic Trends}]. Overall, growth in Hong Kong slowed from its 10.5% average in 1987 and 1988 to only three percent. \textit{Id.}

112. See Chen, supra note 14, at 301 (noting that PRC Premier Li Peng is not favorable toward China’s experiment in capitalism).
sharply curb economic reforms\textsuperscript{113} and reassert a commitment to socialist rule.\textsuperscript{114} This socialist retrenchment impacted Hong Kong's important trade with China's southern provinces and cast doubt on Hong Kong's prospects of maintaining its capitalist system beyond 1997.\textsuperscript{115}

The impact of China's crackdown went beyond economics. China's hardline reaction to the pro-democracy movement stirred an anger among the Hong Kong people that created unprecedented political expression in the colony.\textsuperscript{116} When the Chinese government declared martial law two weeks prior to the massacre, over one million protestors marched in the largest demonstration in Hong Kong's history to show their support for China's student movement.\textsuperscript{117} Furthermore, only hours after the massacre, hundreds of thousands of Hong Kong residents again swarmed the streets in protest.\textsuperscript{118}

The Chinese government, in response, declared that it "[would] not allow people to use Hong Kong as a base for subverting the central people's government" and that Hong Kong would lose its right to maintain its capitalist system if it engaged "in activities to overthrow" the Chinese government.\textsuperscript{119}

The massacre also gave Hong Kong residents a disheartening lesson on the pliant nature of the Chinese constitution. Several provisions of the constitution can be construed to justify the government's actions in Tiananmen Square.\textsuperscript{120} First, the constitution grants the State the power to suppress "treasonable and other counterrevolutionary activities."\textsuperscript{121} Furthermore, although the constitution gives Chinese citizens freedom of speech and demonstration, these freedoms may only be ex-

\textsuperscript{113} Id. at 302. China also curbed its economic reforms to combat a high inflation rate that reached 35\% in 1988. Id.

\textsuperscript{114} Id. In response to threats posed by the growing pro-democracy movement, Premier Li Peng announced to the National People's Congress on March 20, 1989, that China will never "adopt private ownership, negating the socialist system." Id. (quoting Daniel Southern, Chinese are Told to Prepare for New Austerity Measures, WASH. POST, Mar. 21, 1989, at A1).

\textsuperscript{115} Id. at 309-10.

\textsuperscript{116} Bowie, supra note 14, at 247. After witnessing the Mainland's pro-democracy movement, Hong Kong residents, traditionally complacent about politics, began to challenge the Chinese government "in a desperate hope that they could somehow convince China not to violate Hong Kong's autonomy in 1997." Chen, supra note 14, at 309.

\textsuperscript{117} Chen, supra note 14, at 309. More than one-sixth of Hong Kong's total population joined the demonstration. Id.

\textsuperscript{118} Id.

\textsuperscript{119} China Warns Hong Kong Residents, WASH. POST, July 22, 1989, at A18.

\textsuperscript{120} Bowie, supra note 14, at 250.

\textsuperscript{121} Id. (quoting XIANFA [Constitution] (1982) ch. 1, art. 28). The Chinese constitution mandates that "[t]he state maintains public order and suppresses treasonable and other counterrevolutionary activities; it penalizes actions that endanger public security and disrupt the socialist economy and other criminal activities, and punishes and reforms criminals." Id. at n.67 (quoting XIANFA [Constitution] (1982) ch. 1, art. 28).
erced if they do not "infringe upon the interests of the State, of society, . . . or upon the lawful freedoms and rights of other citizens." 122

Moreover, citizens of China have a duty to "safeguard the unity of the country," to "abide by the constitution and the law, keep state secrets, and protect public property," and a duty to not "commit acts detrimental to the security [of China]." 123

The constitutional provisions outlined above are difficult to reconcile with the Joint Declaration. For example, although peaceful demonstrations are allowed under the terms of the Joint Declaration, 124 they could be construed as a threat to national security under the PRC Constitution, justifying Tiananmen Square-style military action. 125 Such legal reasoning is, to say the least, disquieting to a population steeped in British stare decisis tradition. 126

2. The Drafting of the Basic Law of Hong Kong

Since the massacre at Tiananmen Square, fears that China would

122. Id. at 250-51 n.70 (quoting XIANFA [Constitution] (1982) ch. 2, art. 51). Article 51 states that "[t]he exercise by citizens of the People's Republic of China of their freedoms and rights may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens." Id. (quoting XIANFA [Constitution] (1982) ch. 2, art. 51).

123. Id. at 251 nn. 75-77 (quoting XIANFA [Constitution] (1982) ch. 2, arts. 52-54). Article 52 states that "[i]t is the duty of citizens of the People's Republic of China to safeguard the unity of the country and the unity of all its nationalities." Id. at 251 n. 75 (quoting XIANFA [Constitution] (1982) ch. 2, art. 52). Article 53 specifies that "[c]itizens of the People's Republic of China must abide by the constitution and the law, keep state secrets, protect public property and observe labour discipline and public order and respect ethics." Id. at 251 n. 76 (quoting XIANFA [Constitution] (1982) ch. 2, art. 53). Article 54 states that "[i]t is the duty of citizens of the People's Republic of China to safeguard the security, honour, and interests of the motherland, they must not commit acts detrimental to the security, honour and interests of the motherland." Id. at 251 n. 77 (quoting XIANFA [Constitution] (1982) ch. 2, art. 54).

124. Joint Declaration, supra note 9 (preserving "[t]he exercise by citizens of the People's Republic of China of their freedoms and rights may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens." Id. at 250-51 n.70 (quoting XIANFA [Constitution] (1982) ch. 2, art. 51). Article 51 states that "[t]he exercise by citizens of the People's Republic of China of their freedoms and rights may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens." Id. at 250-51 n.70 (quoting XIANFA [Constitution] (1982) ch. 2, art. 51). Article 52 states that "[i]t is the duty of citizens of the People's Republic of China to safeguard the unity of the country and the unity of all its nationalities." Id. at 251 n. 75 (quoting XIANFA [Constitution] (1982) ch. 2, art. 52). Article 53 specifies that "[c]itizens of the People's Republic of China must abide by the constitution and the law, keep state secrets, protect public property and observe labour discipline and public order and respect ethics." Id. at 251 n. 76 (quoting XIANFA [Constitution] (1982) ch. 2, art. 53). Article 54 states that "[i]t is the duty of citizens of the People's Republic of China to safeguard the security, honour, and interests of the motherland, they must not commit acts detrimental to the security, honour and interests of the motherland." Id. at 251 n. 77 (quoting XIANFA [Constitution] (1982) ch. 2, art. 54).

125. Under the terms of the Joint Declaration, "[t]he Hong Kong Special Administrative Region will enjoy a high degree of autonomy, except in foreign and defense affairs which are the responsibility of the Central People's Government." Joint Declaration, supra note 9 (emphasis added).

126. See Neoh, supra note 2, at 338-43. Hong Kong's legal system is derived entirely from Great Britain. Id. at 339. The legal tradition in Hong Kong, called the Rule of Law, is based upon three basic precepts: the absolute rule of law over arbitrary exercise of power, that no person is above the law, and that constitutional principles of the rights of private individuals are developed by judicial decisions. Id. at 340. The bulk of Hong Kong's Rule of Law has been developed by common law judges. Id. Although judicial proceedings in Hong Kong are conducted in English and much of the law is imported from England, one study showed that 75.4% of Hong Kong Chinese regard the colony's legal system as just and 47.6% did not even regard the legal system as being foreign. Id. at 338 (citing SIU-KAI LAU & HSIN-CHI KUAN, THE ETHOS OF THE HONG KONG CHINESE 124, 127 (1988)).
not grant the HKSAR the autonomy envisioned when the Joint Declaration was signed have largely materialized. Under the Joint Declaration, Hong Kong's supreme post-1997 law will be the Basic Law.127 The Joint Declaration stipulated that the Chinese government was to draft the Basic Law, but that the document must be drafted consistent with the terms and policies of the Joint Declaration.128 Although the Basic Law, which was completed in 1990, loosely conforms to the Joint Declaration, it fails to provide the level of autonomy anticipated by many Hong Kong citizens and international observers.129

The system of government provided for in the Basic Law is much less democratic than Hong Kong residents had anticipated.130 The main seat of power in post-1997 Hong Kong will be the executive branch.131 The Chief Executive, effectively appointed by the PRC,132 is directed by the Basic Law "to implement the directives issued by the Central People's Government in respect to the relevant matters provided for in [the Basic Law]."133 In carrying out the PRC's policies, the Chief Executive has the authority "to dissolve the entire Legislative Council once during his term in office."134

Conversely, Hong Kong's legislative and judicial branches are weak organs of government under the Basic Law. In the legislature, the Hong Kong people will only elect twenty out of the sixty Legislative Council representatives.135 In addition, the Standing Committee of the National People's Congress will retain veto power over the laws passed by the Legislative Council.136 The power of the judiciary will also be limited

128. See Joint Declaration, supra note 9. The Joint Declaration provides: [T]he basic policies of the People's Republic of China regarding Hong Kong and the elaboration of them in Annex I to this Joint Declaration will be stipulated, in a Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, by the National People's Congress of the People's Republic of China, and they will remain unchanged for 50 years.

Id.
129. Palumbo, Comment, supra note 2, at 707-10.
131. See Palumbo, Comment, supra note 2, at 703.
132. According to Article 45 of the Basic Law, the Chief Executive shall be "selected by election or through consultations held locally and be appointed by the Central People's Government." Id. at n.258 (quoting Basic Law, supra note 127, art. 45).
133. Id. at 703 (quoting Basic Law, supra note 127, art. 48(8)).
134. Id.
135. Id.
136. Id. Another more insidious restriction that the Basic Law imposes upon the Hong Kong Legislature is that it excludes from service those who have
because it will not be empowered to interpret the Basic Law. 137 This power will rest with the National People’s Congress Standing Committee. 138 Consequently, Hong Kong courts will only have the right to “final adjudication” stipulated by the Joint Declaration in cases that do not involve interpretation of the Basic Law or broad national or international issues. 139

3. China’s Stifling of Hong Kong’s Pro-Democracy Movement

Hong Kong never established democratic institutions under British rule. 140 Since the signing of the Joint Declaration, however, a growing number of Hong Kong residents have sought to establish democratic roots in the colony before its transition to Chinese rule in 1997. 141 In 1991, this movement gained considerable momentum when, for the first time in Hong Kong’s history, there were direct elections for eighteen seats in the Legislative Council. 142

The pro-democracy movement achieved another victory in 1992

the “right to abode in a foreign country.” Id. at 704. This exclusion from government is likely to further add to the “mass exodus of the young and talented from the colony.” Id. at 705.

137. Id. at 704.
138. Id. Article 158 of the Basic Law gives the Standing Committee of the National People’s Congress the power to interpret the Basic Law. Id.
139. Neoh, supra note 2, at 345. Hong Kong does not have an independent judiciary under current British rule. Id. at 346. Britain has reserved the right to legislate for Hong Kong and the right to overrule the decisions of the colony’s highest court by the Privy Council. Id. However, Hong Kong enjoys “de facto autonomy” because Britain rarely exercises its right to legislate or overrule. Id.
140. Id. at 348. Colonial Hong Kong’s government prior to 1984 was not representative, but it was responsive. Id. The British-appointed colonial governor and his civil servant had the exclusive power to formulate and implement public policies. Id. Hong Kong did have a legislature that appropriated funds to the governor and passed his laws, but the body was not democratically elected. Id. Notwithstanding the structure of the colonial government, the public was able to play an active role in shaping public policy through an outspoken press, legislative debate and special interest groups. Id.
141. Marcus W. Brauchli, Red Flag: A Push for Democracy Divides Hong Kong and Angers China, WALL ST. J., Nov. 18, 1992, at A1, A8. The leader and primary spokesperson of Hong Kong’s pro-democracy movement is Martin Lee of the United Democrats Party. Id.
142. Id. Hong Kong has received accolades from the United States for completing its first elections. Richard H. Solomon, Assistant Secretary for East Asian and Pacific Affairs, called the elections “an important step in advancing the democratic process.” U.S. Policy Toward Hong Kong, supra note 7, at 277. Senator McConnell further underscored the importance of the elections by stating:

One way to encourage China to live up to its commitment is to put in place a genuine, working democracy in Hong Kong before 1997. The more the people of Hong Kong participate in the political process now, the harder it will be for China to reverse that system after assuming sovereignty.

when it enlisted the support of the British government. In 1992, British Prime Minister John Major reversed Britain’s policy of “squelch[ing] the colony’s democratic impulses” by appointing a new governor to speed up democratic reforms in the colony.\(^{143}\) The new governor, Christopher Patten, directly challenged the Chinese in a speech on October 7, 1992, in which he “laid out a bold plan for expanding democracy in the colony, calling for a majority of seats in the Legislative Council to be chosen by the people or their elected representatives in 1995.”\(^{144}\)

China has openly opposed Hong Kong’s pro-democracy movement, particularly since Patten’s October 7th proposal.\(^{145}\) In response to the Patten proposal, China warned that “if Mr. Patten went ahead with his pro-democracy movement, Beijing would be obliged to undo the changes in 1997.”\(^{146}\) According to China, such an action is justified because the Joint Declaration requires Britain to keep the colony’s present political system intact until the transition of power in 1997.\(^{147}\)

China has also accused Governor Patten of trying to “internationalize” Hong Kong’s plight as it moves closer to Chinese control.\(^{148}\) China maintains that Patten has encouraged other nations, particularly the United States, to interfere in Hong Kong’s affairs because Britain is not strong enough to confront China on its own.\(^{149}\) China views such overtures as a direct assault on its national reunification mission and its right to exercise sovereignty over Hong Kong.\(^{150}\) Making specific reference to the United States-Hong Kong Policy Act of 1992\(^ {151}\) as an example of British-inspired interference, China has flatly stated that it “never makes


\(^{145}\) *Hong Kong: Hard Politics*, *supra* note 15, at 33. On January 3, 1993, China’s senior leader in charge of Hong Kong affairs threatened that “[i]f Hong Kong is to confront China, Hong Kong people may have to face a lot of hardship.” *Id.*

\(^{146}\) *Id.* The Ta Kung Pao, a Chinese-controlled newspaper in Hong Kong asserted: “If the British side wants to give China a ‘stab in the back’ during the remaining hours before sunset, the Chinese side will be forced to respond with a ‘fatal weapon.’” *Id*. Kristof, *supra* note 16, at A3 (quoting Ta Kung Pao).

\(^{147}\) Brauchli, *supra* note 141, at A8. Britain has denied that the Joint Declaration implied any such agreement. *Id.*


any concession on sovereignty or national interests."152

Although Patten and the pro-democracy movement enjoy steady popular support,153 a substantial number of Hong Kong residents favor following China's lead.154 Hong Kong's business community, particularly its capitalist leaders, fear that the movement is a wasted effort that will only serve to damage the colony's economy.155 Some business leaders have told the new governor to "'forget about democracy' and stick to the colony's 'fundamental law': economic gain."156

IV. THE UNITED STATES-HONG KONG POLICY ACT

A. The History of U.S.-Hong Kong Relations

Since World War II, the Unites States has used Hong Kong as a vehicle to effectuate its China policy.157 For example, when the United States was allied with Chiang Kai-Shek's Nationalist Government during World War II, it decided that a strong, Western-allied China would stabilize East Asia after Japan's defeat.158 To this end, the United States supported and played an active role in China's attempts to regain control of Hong Kong from Great Britain.159

When the Communists took over China in 1949, the United States adopted an official "hands off" policy concerning the Hong Kong sovereignty issue.160 Notwithstanding this policy, U.S.-Hong Kong commercial and diplomatic interaction increased dramatically over the next decade. Hong Kong became a spying outpost for the United States to keep watch on Maoist China.161 One outcome of this espionage activity was that the U.S. Consulate General's office in Hong Kong grew from fewer than twelve before the Communist Revolution to several hundred immediately thereafter.162

152. No Concessions, supra note 150, at 61.

153. Hong Kong's Clash of Wills, ECONOMIST, Dec. 12, 1992, at 16 (stating that 37% of Hong Kong residents backed Patten's proposals, and that 24% opposed them; however, majority of population is in favor of further talks).


155. Id.; see also, Kristof, supra note 16, at A3 (noting that Chinese business people are skeptical of system that will be dismantled over next few years).

156. Brauchli, supra note 141, at A8.

157. Prior to World War II, the U.S. did not have substantial contacts with Hong Kong. See generally Chiu, supra note 6, at 1-3 (discussing history of U.S.-Hong Kong relations).

158. Id. at 2.

159. Id. In 1943, while China and Britain disputed British extraterritorial rights in China and sovereignty over Hong Kong, President Roosevelt proposed, on China's behalf, that Britain voluntarily return Hong Kong to the Chinese. Id. No response was made to this proposal because Britain had no intention of relinquishing its control of Hong Kong at that time. Id. at 3.

160. Id. at 3.

161. Id.

162. Id. The majority of the new staff was devoted to "'gathering, analyzing, and translating Chinese Communist materials:' Id.
By the 1970s, when President Nixon began the process of establishing diplomatic relations with the PRC, Hong Kong’s Cold War strategic value had diminished. Nonetheless, in the wake of Hong Kong’s unparalleled economic growth in the 1970s, the U.S. diplomatic presence continued to grow, playing an integral role in establishing trade relations between the United States and Hong Kong. U.S.-Hong Kong relations further solidified in the 1980s. Deng Xiaoping’s economic reforms facilitated a seven-fold increase in U.S.-China trade between 1979 and 1989. Much of this bilateral trade passed through Hong Kong for further manufacturing or re-exportation. In addition to serving as a link for U.S.-China trade, Hong Kong was also crucial to China in its efforts to smuggle goods through the U.S.-enforced embargo during the Korean War. In May 1951, the United States persuaded the United Nations to adopt a resolution that called for an embargo against China of war materials and military strategic goods. Paul Carlson, *U.S. Trade Policy and the Hong Kong Agreement*, 15 J. LEGIS. 59, 64 (1988). The international community’s application of the embargo effectively ended with the Korean War. However, the United States clung to the policy until then-President Richard Nixon normalized relations with China in the early 1970s.

163. Informal relations were established between the United States and the PRC by the Shanghai Communique in 1972. See Joint Communique, Issued at Shanghai, Feb. 27, 1972, 66 DEP’T ST. BULL. 435 (1972).


165. *Id.* at 5. The U.S. Consulate-General is one of the largest among the 61 consular offices in Hong Kong. *Id.* In addition, Hong Kong has an office in Washington at the British Embassy as well as multiple industrial development and tourist promotion offices in major cities throughout the United States. *Id.*

The diplomatic relations between Hong Kong and the United States have been well utilized. Hong Kong (through Great Britain) and the United States are contracting parties to more than 85 multi-national agreements in areas such as “arbitration, aviation, copyright, customs, trade, health . . . publications, satellite communications, telecommunications, and other matters.” *Id.* at 5.


167. Hong Kong participated in much of the U.S.-China trade as a result of its economic integration with China’s southern provinces. *Hong Kong Country Marketing Plan ’90*, June 11, 1991, available in LEXIS, 1991 National Trade Data Bank Market Reports [hereinafter Market Reports]. About 40 percent of re-exports consist either of goods made in China and shipped abroad via Hong Kong or goods imported into China from abroad via Hong Kong. Manufacturers seeking lower wages have shifted much production to southern China. An estimated 40 percent of Hong Kong-owned manufacturing capacity is now located in the neighboring province of Guangdong.

168. See *Foreign Economic Trends*, *supra* note 111 (China and United States are primary destinations for re-exports from Hong Kong).
Kong was an important U.S. economic interest in its own right by the time the Joint Declaration was signed in 1984. Hong Kong had become a major market for U.S. integrated circuits, electronic components, agriculture and aircrafts, and a major import source for textile products. Furthermore, Hong Kong provided a base for U.S. businesses to promote their interests in Southeast Asia and mainland China.

Notwithstanding its extensive economic interest in Hong Kong, the United States refused to take an overt stance on the Hong Kong sovereignty issue until the passage of the Act in 1992. This "hands off" policy was demonstrated in 1972 when "the Special Committee on Colonialism of the United Nations General Assembly placed Hong Kong and Macao on its list of colonial territories entitled to self-determination." China requested that both territories be removed from the list, and the United States, traditionally a proponent of decolonization, raised no objection.

B. U.S. Policy Toward the Joint Declaration on the Future of Hong Kong

Given its extensive and interwoven ties to China and Hong Kong, the United States closely monitored the negotiations between Britain and the PRC that led to the Joint Declaration. Consistent with its past policy, however, the United States remained uninvolved. In one public address, the U.S. Consul-General stated that the United States

169. Chiu, supra note 6, at 4-5.

170. Id. In 1984, Hong Kong imported $3.1 billion worth of goods from the United States, and exported $7.9 billion worth of goods to the United States.

171. Id. at 5.

172. Carlson, supra note 162, at 70. Until the passage of the Act, the United States asserted that the issue of Hong Kong's sovereignty should be resolved between China and Great Britain without outside interference. Id. This view was and still is held by China.

173. Id. Inclusion of Hong Kong and Macao on the United Nation's list may have brought eventual independence to both territories. Id. This result was incompatible with China's territorial claim to the two regions. Chiu, Introduction, supra note 79, at 3-4.

174. Carlson, supra note 162, at 70.

175. Chiu, supra note 6, at 7-10.

176. Id. On June 7, 1984, Burton Levin, U.S. Consul-General in Hong Kong, stated:

The United States does not see a role for itself in the present negotiations. We have made clear our interest in a settlement that preserves Hong Kong's prosperity and stability and our pleasure that both the U.K. and the PRC share and are working toward this objective. We will be supportive in any appropriate way we can.

Id. at 9 (quoting mimeographic text of U.S. Consul-General Burton Levin's speech given on June 7, 1984).
had no role in the negotiations between Britain and the PRC.\textsuperscript{177} In the same address, however, he reminded the PRC that the United States has extensive interests in Hong Kong and that the success of the Hong Kong negotiations would impact the U.S. position on any future attempts by the PRC to reunite with Taiwan.\textsuperscript{178} He also stated that the United States would support Hong Kong's continued participation "in such arrangements as international postal and telecommunications organizations, the GATT [General Agreement on Tariff and Trade], and the multifiber [textile] arrangements following restoration of Chinese sovereignty."\textsuperscript{179} Therefore, prior to the signing of the Joint Declaration, the United States had established that, although it would not directly intervene in negotiations concerning Hong Kong's future, it had a strong interest in the outcome of those negotiations.\textsuperscript{180}

On the day that the Joint Declaration was initialed by representatives of Britain and the PRC, George Schultz, then-Secretary of State, expressed enthusiastic support for the agreement.\textsuperscript{181} In his short statement, Schultz emphasized the U.S. interest "in the continued stability and prosperity of Hong Kong" and said "the agreement [would] pro-

\textsuperscript{177} Id. at 8-9 (quoting mimeographed text of U.S. Consul-General Burton Levin's speech given on June 7, 1984).

\textsuperscript{178} Id. As a result of the Taiwan Relations Act of 1979, 22 U.S.C. §§ 3301-3316, 1988 (effective Jan. 1, 1979), the United States had a strong "political, moral and legal interest" in Taiwan. Chiu, supra note 6, at 8. In furtherance of this interest, the U.S. Consul-General said that China's reunification with Hong Kong should serve as a model that is "as attractive as possible to the people of Taiwan." Id. at 10.

\textsuperscript{179} Chiu, supra note 6, at 10 (quoting U.S. Consul-General Burton Levin's speech given on June 7, 1984).

\textsuperscript{180} Id. at 7-10.

\textsuperscript{181} Secretary of State George Schultz, U.K. & China Reach Agreement on Hong Kong, Sept. 26, 1984, DEP'T. ST. BULL., Nov. 1984, at 56. Schultz stated:

The U.S. Government welcomes the successful conclusion of two years of negotiations between the United Kingdom and the People's Republic of China over the future of Hong Kong.

The United States has had a strong interest in the continued stability and prosperity of Hong Kong and believes the agreement will provide a solid foundation for Hong Kong's enduring future progress.

In this regard, we have noted statements by both sides indicating that Hong Kong's way of life will be guaranteed for 50 years from 1997 and that systems existing in Hong Kong will continue in the special administrative region.

We expect the American business communities, both in the United States and Hong Kong, will see in this agreement good reason for sustained confidence in the future of Hong Kong as an attractive and thriving commercial center.

The United States will provide any assistance it can, in close cooperation with the United Kingdom and the People's Republic of China, to maintain Hong Kong's appropriate participation in international bodies.

Id.
vide a solid foundation for Hong Kong's enduring future progress."182 Schultz also stated that the United States interpreted the document to mean that "Hong Kong's way of life [would] be guaranteed for 50 years from 1997 and that systems existing in Hong Kong [would] continue in the special administrative region."183 In accordance with this interpretation, he encouraged U.S. businesses to continue investing in Hong Kong.184 Finally, Schultz pledged to support Britain's and the PRC's efforts to "maintain Hong Kong's appropriate participation in international bodies."185

Notwithstanding the optimistic official response to the Joint Declaration, a prescient U.S. newspaper article cautioned that Hong Kong's stable future was dependent on future political developments in China.186 The Wall Street Journal professed that "the essence of the declaration is that five million largely free people will soon have their futures determined by a totalitarian government not known for its tolerance or stability."187

C. The United States Abandons Its "Hands Off" Policy Toward Hong Kong

During the seven years since the 1984 signing of the Joint Declaration, the U.S. economic stake in Hong Kong has increased dramatically.188 By 1991, Hong Kong was the United States' fourteenth largest trading partner.189 Furthermore, the U.S. trade balance with Hong Kong has become much more favorable as U.S. exports to Hong Kong have more than doubled, while Hong Kong imports have grown only moderately.190 In 1991, "each resident of Hong Kong averaged over $1,300 in purchases of U.S. goods, which, on a per capita basis, is three

182. Id.
183. Id.
184. Id.
185. Id.
186. Chiu, supra note 6, at 12.
189. U.S. Policy Toward Hong Kong, supra note 7, at 279.
190. Compare Chiu, supra note 6, at 4-5 (stating that in 1984, bilateral trade between Hong Kong and United States was $11 billion, U.S. firms invested $4.5 billion in Hong Kong, approximately 14,000 Americans lived in Hong Kong and over 800 U.S. businesses had offices in Hong Kong) with U.S. Policy Toward Hong Kong, supra note 7, at 279 (stating that in 1991, bilateral trade between Hong Kong and the U.S. was $17.4 billion, U.S. firms invested $7 billion in Hong Kong, approximately 21,000 Americans lived in Hong Kong and over 900 U.S. businesses had offices in Hong Kong).
times more than what the Japanese purchased from [the United States in that same year]."\textsuperscript{191}

In conjunction with its economic ties to Hong Kong, the United States has developed a strong public policy interest in preserving Hong Kong's way of life.\textsuperscript{192} One U.S. congressman called Hong Kong "a shining example of the power of industriousness and enterprise when allowed to flourish in a free environment."\textsuperscript{193} Likewise, the U.S. Senate commended Hong Kong's strides toward democracy upon the successful completion of its first direct legislative election on September 15, 1991.\textsuperscript{194}

Until the late-1980s, U.S. policymakers relied on the Joint Declaration to guarantee Hong Kong's stable and prosperous future.\textsuperscript{195} However, as U.S. economic and public policy interests in Hong Kong mounted and its distrust of China's hardline regime grew, the United States cautiously set aside its "hands off" policy.\textsuperscript{196}


\textsuperscript{192} For a discussion of the way of life in Hong Kong, see supra note 5.


\textsuperscript{194} S. Res. 182, 102nd Cong., 1st Sess. (1991). In commending Hong Kong for successfully holding the first direct elections to its legislative council, the Senate resolved:

\ldots the Senate hereby—

(1) commends the people of Hong Kong for successfully holding their first direct elections to their Legislative Council;

(2) congratulates the eighteen newly elected members of the Legislative Council on being the first directly elected members of that body;

(3) urges the Hong Kong government to give all due respect to the views of the democratically elected representatives of the people of Hong Kong; and

(4) urges the further development of democratic institutions in Hong Kong at an accelerated pace in advance of the 1995 elections and the subsequent transfer of Hong Kong to the People's Republic of China in 1997.

\textit{Id.}

\textsuperscript{195} Congress did not begin to question Britain's willingness and ability to enforce the terms of the Joint Declaration until 1988. See, \textit{e.g.}, 134 CONG. REC. E3655 (daily ed. Oct. 21, 1988) (expressing "the sense of Congress concerning the disturbing events in Hong Kong, and the apparent unwillingness of the London government to protect the democratic rights of Hong Kong citizens and the Western style economy that those people have so successfully established").

\textsuperscript{196} U.S. politicians first spoke of taking a more active role in Hong Kong's future in 1988 when Britain bowed to PRC pressure and accepted the PRC's drafting of the Basic Law without British Parliamentary debate. 134 CONG. REC. H1160 (daily ed. Mar. 24, 1988). Representative Porter commented: "Chinese leaders have objected to any British Parliamentary debate on Hong Kong's post-1997 constitution, 'the Basic Law.' Based on reports of its contents, China has much to fear from such a debate." \textit{Id.} Porter also called on other members of the House of Representatives to sign onto his letter urging British Prime Minister Margaret Thatcher to escalate Hong Kong's movement toward a democratic government before 1997. \textit{Id.}

Congressional discussion of Hong Kong's future increased and intensified
The first tangible outcome of Congress’ deliberations on Hong Kong’s future was an immigration bill designed to curb the flight of capital and talent from the territory. 197 In the Immigration Act of 1990, 198 the United States increased Hong Kong’s visa quota from five thousand to ten thousand per year and created a special quota for Hong Kong employees of United States firms. 199 Most importantly, the act provided that all of these visas could be exercised at the holder’s discretion at any time until the year 2002. 200 By allowing visa extensions beyond 1997, the United States hoped to eliminate Hong Kong residents’ fear of staying in Hong Kong after the Chinese takeover. 201

Two years after the passage of the Immigration Act of 1990, in the wake of further Chinese threats to breach the Joint Declaration, 202 the United States abandoned its “hands off” policy toward Hong Kong with considerably after the Tiananmen Square massacre on June 4, 1989. See, e.g., 136 Cong. Rec. H3373 (daily ed. June 7, 1990); 135 Cong. Rec. E2096 (daily ed. June 13, 1989). In one congressional debate, Representative Solomon of New York expressed the changing attitude of U.S. lawmakers regarding Hong Kong’s prospects after the Tiananmen Square massacre:

> It should have been apparent since the savage June 4 massacre in Beijing that beneath the superficial liberalization of China lurked the entire repressive apparatus of totalitarian communism, ready to spring forth at any serious challenge to its power.

> Now that we have had our eyes opened, we should turn our gaze at the future of over 5 million people in Hong Kong, who must have seen in the fate of the Chinese students a foretaste of their own treatment once their free, prosperous island is turned over to the murderous regime.


197. For a discussion of Hong Kong’s capital flight and “brain drain,” see supra notes 100-02 and accompanying text.


200. Id. The former deadline for Hong Kong residents to exercise their visas was four months. Id.

201. Although over a thousand of Hong Kong’s “best and brightest” people leave the territory each week, some Hong Kong residents have been lured back home by business opportunities and the security of knowing that they can leave the territory after 1997. See Joyce Barnathan, Coming Home—And Cashing In, Bus. Wk., Oct. 5, 1992, at 57 (reporting that outflow of people from Hong Kong has “leveled off,” and “[a]n estimated 30,000 young professionals have returned in the past 12 months”).

202. See, e.g., 137 Cong. Rec. E505 (daily ed. Feb. 7, 1991). Representative Campbell noted that “[o]ne] month after the Tiananmen Square Massacre, the Beijing Government explicitly threatened to abrogate its treaty commitment” because it “depleted the support that the Chinese prodemocracy movement had received from the people of Hong Kong.” Id. In response to Hong Kong Governor Christopher Patten’s democratic reforms, Vice Premier Zhu Rongji cryptically stated: “People ask whether we have to stick to the Joint Declaration, or whether it should go with the wind.” Unsettling Remarks: Beijing’s Anti-Democracy Attacks Finally Shake the Hong Kong Markets, Time, Nov. 30, 1992, at 21.
the passage of the United States-Hong Kong Policy Act of 1992.\textsuperscript{203}

D. The United States-Hong Kong Policy Act of 1992

The United States-Hong Kong Policy Act allows the United States to treat Hong Kong, where appropriate, as a separate entity from the PRC for purposes of U.S. domestic law.\textsuperscript{204} Under the Act, the areas in which separate treatment is appropriate are determined by the terms of the Joint Declaration.\textsuperscript{205} The Joint Declaration grants Hong Kong a “high degree of autonomy” in nine areas: economic policy, trade, finance, monetary policy, shipping, communications, tourism, culture and sport.\textsuperscript{206} The Act establishes a direct U.S. policy toward Hong Kong in each of these areas.\textsuperscript{207} For example, in the area of commerce, the Act provides that the United States “should continue to treat Hong Kong as


\textsuperscript{204} Id.; see also U.S. Policy Toward Hong Kong, supra note 7, at 280 (interpreting Act).

\textsuperscript{205} U.S.-Hong Kong Policy Act § 2. In the “Findings and Declarations” section, the Act states the United States’ dedication to following the terms of the Joint Declaration:

(1) The Congress recognizes that under the 1984 Sino-British Joint Declaration:

(A) The People’s Republic of China and the United Kingdom of Great Britain and Northern Ireland have agreed that the People’s Republic of China will resume the exercise of sovereignty over Hong Kong on July 1, 1997. Until that time, the United Kingdom will be responsible for the administration of Hong Kong.

(B) The Hong Kong Special Administrative Region of the People’s Republic of China, beginning on July 1, 1997, will continue to enjoy a high degree of autonomy on all matters other than defense and foreign affairs.

(C) There is provision for implementation of a “one country, two systems” policy, under which Hong Kong will retain its current lifestyle and legal, social, and economic systems until at least 2047.

(D) The legislature of the Hong Kong Special Administrative Region will be constituted by elections . . . .

(E) Provision is made for the continuation in force of agreements implemented as of June 30, 1997, and for the ability of the Hong Kong Special Administrative Region to conclude new agreements either on its own or with the assistance of the Government of the People’s Republic of China.

(2) The Congress declares its wish to see full implementation of the provisions of the Joint Declaration.


\textsuperscript{207} U.S.-Hong Kong Policy Act § 101(2). The “Title I—Policy” portion of the Act states that “[t]he United States should actively seek to establish and expand direct bilateral ties and agreements with Hong Kong in economic, trade, financial, monetary, aviation, shipping, communications, tourism, cultural, sport, and other appropriate areas.” Id.
a separate territory in economic and trade matters, such as import quotas and certificates of origin."

The Act does not establish a U.S. policy toward Hong Kong in the two areas reserved to PRC control by the Joint Declaration—defense and foreign affairs. The Act, however, states that the United States should maintain its consulate-general and other "official and semi-official organizations" in Hong Kong. Likewise, the Act invites Hong Kong to maintain its "official and semi-official missions" in the United States.

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208. Id. § 103(1). Under this provision, Hong Kong will not be directly harmed by the U.S. import laws that restrict U.S.-PRC trade. For a discussion of these laws, see infra note 215. The Act also states that "[t]he United States should continue to grant the products of Hong Kong nondiscriminatory trade treatment (commonly referred to as 'most-favored-nation status') by virtue of Hong Kong's membership in the General Agreement on Tariffs and Trade." U.S.-Hong Kong Policy Act § 103(4).

When a nation grants another nation most-favored-nation status (MFN), it undertakes "to give [that] state the benefit of any [trade] concession it has given, or may later give, to any third state." Restatement (Third) of the Foreign Relations Law of the United States § 801 cmt. a (1987) [hereinafter Restatement]. Where there is an MFN clause in a multilateral agreement, such as the General Agreement on Tariffs and Trade (GATT), the clause requires nondiscrimination among all parties. Id. For background on GATT, see Michael A. Beznezy, GATT Membership for China: Implications for United States Trade and Foreign Policy, 11 U. Pa. J. Int'l Bus. L. 193, 196 (1989). GATT is a post-World War II treaty designed to limit both tariff and non-tariff trade barriers such as import quotas, licensing requirements and regulatory actions designed to limit imports. Id.

Because both Hong Kong and the United States are signatories to GATT, Hong Kong receives MFN status from the United States through that agreement. U.S.-Hong Kong Policy Act § 103(4). The PRC is also currently granted MFN status by the United States; however, the PRC's status is based upon more tenuous legal grounds. The PRC does not derive its MFN status through GATT membership because it is not a GATT signatory. Beznezy, supra, at 196. Instead, the PRC derives its MFN status through the United States-PRC Accord, a bilateral treaty. Id. at 206 (citing Agreement on Trade Relations Between United States of America and People's Republic of China, July 7, 1979, U.S.-P.R.C., 31 U.S.T. 4651). The PRC's MFN status is reviewed yearly because it is a communist country. Id. at 207. Hence, China is under constant threat of losing its favorable trade treatment with the United States. Cf. Lena H. Sun, China Works to Improve U.S. Relations: Rhetoric Toned Down as Trade Status Viewed At Risk Under Clinton, WASH. POST, Jan. 2, 1993, at A1 (stating United States is recipient of 25% of China's $83 billion export industry).


210. Id. § 101(3). Section 101(3) states: "The United States should seek to maintain, after June 30, 1997, the United States consulate-general in Hong Kong, together with other official and semi-official organizations, such as the United States Information Agency American Library." Id.

211. Id. § 101(4). Section 101(4) states in part:

The United States should invite Hong Kong to maintain, after June 30, 1997, its official and semi-official missions in the United States, such as the Hong Kong Economic & Trade Office, the Office of the Hong Kong Trade Development Council, and the Hong Kong Tourist Association.

The United States should invite Hong Kong to open and maintain
Under the Act, any U.S.-Hong Kong policy codified before July 1, 1997, will remain in effect after the PRC assumes sovereignty over Hong Kong. The Act however grants the President authority, in consultation with Congress, to suspend any such law by executive order if he or she determines that "Hong Kong is not sufficiently autonomous to justify treatment ... different from that accorded the [PRC]." The Act stipulates that "the President should consider the terms, obligations, and expectations expressed in the Joint Declaration with respect to Hong Kong" in making this determination. Hence, not only is the Joint Declaration the legal framework upon which the United States based the Act, but it is the framework upon which the United States will interpret the validity of laws created under the Act.

By separating U.S. treatment of Hong Kong from its treatment of the PRC under U.S. law, the Act spares Hong Kong from the "domestic legal constraints that limit [U.S.] commercial, cultural, and other relations with the PRC." The Act prevents the tariff and trade restric-

other official or semi-official missions to represent Hong Kong in those areas in which Hong Kong is entitled to maintain relations on its own, including economic, trade, financial, monetary, aviation, shipping, communications, tourism, cultural, and sport areas.

Id.

212. Id. § 201(a) ("Continued Application of United States Law"). Id. Section 201(a) states that "the laws of the United States shall continue to apply with respect to Hong Kong, on and after July 1, 1997, in the same manner as the laws of the United States were applied with respect to Hong Kong before such date . . . ." Id.

213. Id. § 202(a).

214. Id. § 202(b). Under § 202(d) of the Act, the President may terminate the executive order suspending Hong Kong's separate treatment "whenever the President determines that Hong Kong has regained sufficient autonomy to justify different treatment under the law or provision of law in question." Id. § 202(d).

215. U.S. Policy Toward Hong Kong, supra note 7, at 280. A State Department spokesperson explained:

Statutes now in force set forth mandatory rules that apply to China by name, or to "states," "countries," [sic] or similar terms. These statutes, which include the Jackson-Vanik provisions and current China sanctions legislation, could require the imposition on Hong Kong of restrictions and disabilities that would be inconsistent with our desire to respect Hong Kong's promised autonomy from the PRC.

Id.

Since the Communist takeover in 1949, the United States has subjected China to numerous trade restrictions. As a communist or non-market economy (NME) country, China is subject to three import restrictions under U.S. law. Bezner, supra note 208, at 204-06. First, the anti-dumping provision of the Trade Agreement Act of 1979 provides that if the International Trade Commission (ITC) or the U.S. Department of Commerce determines that a NME "export is priced below its fair market value, and if a domestic industry has been materially injured, an anti-dumping duty will be imposed in an amount that eliminates the favorable margin." Id. at 205 (citing Trade Agreement Act of 1979, 19 U.S.C. §§ 1673-1677 (1979)). Second, § 406 of the Trade Act of 1974 provides that exports from a communist country may be restricted at the Presi-
tions that the United States applies to the PRC as a communist nation from being applied to Hong Kong. The supercomputer market provides a concrete example of the value of this separation. Without the Act, Hong Kong, one of the world’s largest banking centers, could not access “the state of the art American-made supercomputers they need to con-
tinue to serve business in Hong Kong . . . because under [U.S.] law these computers are not made available to China.”216 The Act, conversely, grants Hong Kong continued access to U.S. supercomputers.217

Aside from simply separating Hong Kong from the PRC under U.S. law, Congress drafted the Act to encourage greater direct ties between the United States and Hong Kong prior to July 1, 1997.218 According to Senator McConnell, the Act’s sponsor, “[t]he more extensive and estab-
lished United States-Hong Kong ties are before 1997, the more likely that they will be maintained after 1997.”219 McConnell asserted that the Act creates a “transparent legal framework” to assure both Hong Kong and the United States that “ties will not be affected by the change of sovereignty.”220 By fostering these ties, U.S. lawmakers also hoped that the overall confidence level in Hong Kong would rise, thus stem-
ing Hong Kong’s emigration and boosting its economic growth.221

dent’s discretion if the ITC finds that the export has caused a “disruption in the market of a domestically produced good.” Id. at 206 (citing Trade Act of 1974, 19 U.S.C. § 2436 (1976)). Finally, § 201 of the Trade Act of 1974 provides that the President may take corrective actions to aid a domestic industry if the ITC finds that exports from a communist country are increased to such quantities “as to seriously injure a domestic industry.” Id. (citing Trade Act of 1974, 19 U.S.C. §§ 2251-2252 (Supp. V 1975)).

Under U.S. law, certain exports to China are also restricted. For example, under the auspices of an informal and largely defunct coalition formed between the United States and its European allies in 1949 called the Coordinating Committee for Multilateral Export Controls (COCOM), the United States restricts its exports of certain sensitive technologies to China. See Carlson, supra note 162, at 66; Hungdai Chiu, Recent Legal Issues Between the U.S. and the People’s Republic of China, 12 MD. J. INT’L L. & TRADE 1, 21 (1987).


217. See U.S.-Hong Kong Policy Act § 103(8). The Act stipulates:

The United States should continue to support access by Hong Kong to sensitive technologies controlled under the agreement of the Coordin-
ating Committee for Multilateral Export Controls (commonly referred to as “COCOM”) for so long as the United States is satisfied that such technologies are protected from improper use or export.

Id.


219. Id.

220. Id.

221. Id.
V. CRITICAL ANALYSIS

A. The Validity of the U.S.-Hong Kong Policy Act Under International Law

Whether or not its motives were confrontational, the United States, through the Act, has rejected China's sovereign control over Hong Kong.222 This rejection is implicit in the Act's creation of a separate Hong Kong policy223 and has been stated explicitly by U.S. officials. For example, prior to the passage of the Act, a top State Department spokesperson under President Bush stated that the executive branch "would welcome a bill that establishes clearly the authority of the U.S. government to treat Hong Kong, where appropriate, as a non-sovereign entity."224

China has castigated the United States for the Act and has called the legislation an illegal meddling in Chinese affairs.225 According to China, the Act will turn Hong Kong "into an appendage of the United States and an independent state in disguised form, which will be at the United States' beck and call."226 China argues that Hong Kong in order to keep its preferential status,227 will be forced to align itself with the United States in its interactions with China and the rest of the interna-

222. For a discussion of the United States' rejection of China's sovereignty over Hong Kong, see infra notes 229-231 and accompanying text.
223. For a discussion of the Hong Kong policy created by the Act, see supra notes 204-21 and accompanying text.
224. U.S. Policy Toward Hong Kong, supra note 7, at 280. Presenting a more direct attack on China's sovereignty over Hong Kong, Senator Mitch McConnell, the Act's initial sponsor, stated that one purpose of the Act was to counter the economic and security threat a single "Greater China" posed to the United States. Senator Mitch McConnell, Hong Kong and the Future of China Three Years After the Tiananmen Square Massacre, Address before the Heritage Foundation (June 4, 1992), available in LEXIS, Executive Library, ALLEXE file, at *3 [hereinafter McConnell]. McConnell argued that economic necessity is drawing the PRC, Hong Kong and Taiwan together. Id. He warned that the United States must broaden and deepen its economic relations with all three territories before the integration proceeds further, or risk U.S. economic interests being "locked out" as they were in Europe when the European Economic Community was created. Id.
226. U.S. Efforts to 'Meddle', supra note 225, at 73.
227. See U.S.-Hong Kong Policy Act § 202 (providing that U.S. President may terminate Hong Kong's preferential treatment upon determination that territory is not sufficiently autonomous to merit that treatment).
tional community.228

The legal basis for China's objection to the Act is that it interferes with China's sovereignty over Hong Kong. China claims that no rule of international law "allows a country to unilaterally create any type of legal act governing Hong Kong."229 In particular, China has declared that the Joint Declaration is a bilateral agreement between China and Britain which "can never be used as grounds for a third country to formulate any legal act concerning China's sovereignty."230

China's sharp reproach of the Act on the basis of sovereignty raises a recurrent Sino-U.S. dispute over what territories and actions fall within the internal affairs of the PRC. Both nations agree with the general proposition that a state may not unilaterally interfere with the domestic affairs of another state.291 Their dispute, however, arises in

228. U.S. Efforts to 'Meddle', supra note 225, at 73. A Chinese government publication stated:

The United States will use this act to sow discord between the Hong Kong SAR and the central government and to undermine relations between the Hong Kong SAR and the Chinese mainland. . . . This act will also effect Hong Kong's economic and cultural ties with other countries and areas because, if there is a conflict of interest between the United States and other countries or areas, the United States will use this act to bend Hong Kong to its will and to force Hong Kong to take its side—or the United States will threaten to take any action against Hong Kong that it sees fit. Should this situation arise, Hong Kong, as a free port and an international city, will lose its freedom to a certain extent, and this act will subject it to certain constraints which will be unfavorable to Hong Kong's economic development.

Id.

229. Id. at 72-73. Simply stated, the Chinese stance on Hong Kong governance is that "[b]efore 1997, Hong Kong's affairs are affairs between China and Great Britain and after July 1, 1997, when Hong Kong is returned to China, Hong Kong's affairs will belong purely to China's domestic affairs." Act Termed 'Detrimental', supra note 225, at 5.

230. U.S. Efforts to 'Meddle', supra note 225, at 73. China's reaction to what it perceives as the Act's violation of its national sovereignty is consistent with its reaction to similar incursions in the past. For example, as discussed earlier, China proclaimed before a Special United Nations Committee on Colonialism in 1972, that "Hong Kong . . . is entirely within China's sovereign right" and that the United Nations had no authority to address the territory's future. Tso, supra note 22, at 115-16.

Likewise, the Sino-British agreement on Hong Kong was drafted as a joint declaration rather than a treaty because of the issue of sovereignty. Hurst HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 136 (1990). China took the position during the Joint Declaration negotiations that Hong Kong was an internal matter, and therefore a treaty was an inappropriate way to address the territory's status. Id. In their unique formulation of the agreement, both Britain and China were able to express their legal opinions as to the status of Hong Kong. Roda Mushkat, The International Legal Status of Hong Kong Under Post-Transitional Rule, 10 Hous. J. Int'l L. 1, 9 (1987). Britain declared that Hong Kong would be restored to the PRC. Id. Conversely, China announced that the exercise of sovereignty over Hong Kong would be resumed. Id.

231. Compare Restatement, supra note 208, § 206 (expressing U.S. view
defining the boundaries of China’s domestic affairs.

The Sino-U.S. conflict over Taiwan is illustrative of this dispute and provides a framework for analyzing the legality of the U.S.-Hong Kong Policy Act. When Mao’s Communist forces defeated Chiang Kai-shek’s Nationalist forces in 1949, Chiang fled to Taiwan and established the Republic of China (ROC) government. Since the inception of the ROC, Taiwan has had to defend itself against numerous military attacks by the People’s Republic of China. In spite of the hostility that has raged between Communist China and Taiwan since 1949, both territories claim that they are part of the same Chinese sovereign. Furthermore, both parties claim that their government is the legitimate

that sovereignty “implies a state’s lawful control over its territory generally to the exclusion of other states”) with Article on U.S. “Lies” About F-16’s to Taiwan, F.B.I.S., Sept. 18, 1992, at 4 (quoting Xin Li, How Could the Application of U.S. Laws in China Be Tolerated—Refuting the So-Called Argument Asserting That It Is Legal to Sell Weapons to Taiwan, FAZHI RIBAO, Sept. 13, 1992, at 4) [hereinafter U.S. “Lies”] (stating that “[a] country’s domestic laws can only be enforced on its own territory and, without exception, the U.S. domestic laws can only be enforced on U.S. territory “and that “China is a sovereign country and has supreme jurisdiction over its entire domestic affairs”).


233. For a discussion of China’s civil war and the defeat of the Nationalist Government, see supra note 80-82 and accompanying text.

234. See JOHN F. COPPER, CHINA DIPLOMACY: THE WASHINGTON-TAIPEI-BEIJING TRIANGLE 2-3 (1992). In 1950, Mao planned an attack on the Nationalists in Taiwan, but his plans were thwarted by the intervention of U.S. forces. Id. at 2. With the onset of the Korean War in 1950, the United States sought to control the spread of communism in Asia, and Taiwan’s security became a military priority. Id. at 1-2. In 1954, PRC forces opened fire on Quemoy and Matsu, two islands adjacent to Taiwan that were under Nationalist control. Id. at 2. U.S. intervention on behalf of Taiwan again discouraged the PRC from launching a full-scale attack. Id. After this Communist attack, the United States and Taiwan signed the U.S.-Republic of China Defense Treaty in which the United States pledged to come to Taiwan’s aid if it were attacked or threatened militarily. Id. The treaty, “follow[ing] similar agreements with the Philippines, South Korea and Japan,” gave the United States the right to deploy such land, sea and air forces in the vicinity of Taiwan as may be required for its defense. MARTIN L. LASATER, POLICY IN EVOLUTION: THE U.S. ROLE IN CHINA’S REUNIFICATION 15 (1989). In 1958, Communist forces again tried to take Quemoy, and the United States upheld its treaty obligation to Taiwan by resupplying Nationalist forces and stationing howitzers with nuclear capability on Quemoy. Id. at 16. In 1962, when China attempted its final seizure of Quemoy, the United States reasserted its commitment to protect Taiwan and its outlying islands. Id.

235. Michael C. Davis, The Concept of Statehood and the Status of Taiwan, 4 J. CHINESE L. 135, 139 (1990). Both the ROC and the PRC claim to be the legitimate government of all China and both have traditionally rejected dual recognition and dual participation in international organizations. Id. More recently, however, the ROC has taken a softer view of the sovereignty issue and no longer greets foreign governments that are attempting to establish relations with inquiries into their motives and their relations with the PRC. Id. Currently, “Taiwan both accepts an array of unofficial relationships with foreign governments and a variety of statuses in international organizations.” Id. at 140.
government of all of China. Consequently, no nation can establish official relations with both Taiwan and China. Moreover, any nation establishing official relations with either the PRC or Taiwan inevitably meddles in the internal affairs of what the other territory considers its sovereign domain.

From the 1950s through most of the 1970s, the United States maintained official relations with Taiwan and played an integral role in defending the island against PRC military advances. By the late 1960s, however, strategic reasons dictated that the United States must establish official relations with China. Therefore, after extensive negotiations, the United States and the PRC signed the Shanghai Communique in 1972, which opened communications between the two countries, and the Joint Communique in 1978, which finally established official U.S.-PRC relations.

While the United States maintained official relations with the Tai-

236. Id. at 139.
237. Id. Both the PRC and the ROC object to dual recognition. Id. As of 1990, 28 countries maintained official relations with the ROC and not with the PRC, while over 140 countries maintained official relations with the PRC and engaged in unofficial relations with Taiwan. Id. at 140.
238. See, e.g., U.S. "Lies", supra note 225, at 4 (Chinese publication chiding United States about its relations with Taiwan).
239. See COPPER, supra note 234, at 1-16. For a discussion of U.S. military intervention on Taiwan's behalf, see supra note 234.
240. A full discussion of the strategic reasons for the U.S. decision to pursue diplomatic relations with the PRC is beyond the scope of this Comment. The reasons, however, are thoroughly developed in LASATER, supra note 234, at 16-31. Lasater cites the mutual desire of the United States and the PRC in preventing escalation of the Vietnam War into a Sino-U.S. conflict as one reason why the countries improved their relations. Id. at 17. Lasater also indicated that by the mid-1960s the U.S. admitted that its policy to bring about a collapse of China's communist regime by containment had failed, and the U.S. desire to mend relations with China was hastened. Id. Furthermore, he cited the Sino-Soviet split in the 1960s and 1970s as an incentive for China to pursue closer relations with the United States to protect itself from the Soviet Union. Id. at 21-22.

At least one author has noted another significant reason for the U.S. overtures to China in the late-1960s. COPPER, supra note 234, at 14. Copper stated that U.S. officials believed that Taiwan had lost much of its strategic military importance to the United States after the Vietnam War. Id. Critics of this view, however, asserted that Taiwan was still strategically important for protecting U.S. trade growth in the region and for guarding Japan and South Korea's oil lifeline. Id.

243. LASATER, supra note 235, at 22-31 (discussing Shanghai and Joint Communiques and normalization of Sino-U.S. relations in 1970s).
wan, the island prospered economically and developed democratic institutions. With the establishment of official relations with the PRC, however, the United States ended its official recognition of Taiwan, removed U.S. forces that had been stationed in the Taiwan Strait and terminated the 1954 U.S.-ROC Defense Treaty. Moreover, in the Joint Communique, the United States expressly "acknowledged" the PRC's claim to sovereignty over Taiwan. This apparent abandonment of Taiwan by the United States led to a congressional and popular outcry. The legislative manifestation of this outcry was the 1979 Taiwan Relations Act (TRA), in which the United States established the equivalent of official relations with Taiwan unilaterally through U.S. domestic law.

The TRA parallels the U.S.-Hong Kong Policy Act in several important ways. Both acts were ostensibly drafted to ensure that the domestic

244. See generally COPPER, supra note 235, at 15-16 (describing U.S. relations with Taiwan and development of Taiwan during Carter administration).

245. LASATER, supra note 235, at 30. In an official U.S. statement accompanying the Joint Communique, the United States stated that it recognized the PRC "as the sole legal government of China." U.S. Statement, DEP'T ST. BULL., Jan. 1979, at 26 (discussing Joint Communique). In the same statement, the United States notified Taiwan that the United States was "terminating diplomatic relations and that the Mutual Defense Treaty Between the United States and the Republic of China [was] being terminated." Id. Finally, the United States stated that it would withdraw military personnel from Taiwan within four months. Id.

246. Joint Communique, supra note 242 (stating that United States "acknowledges the Chinese position that there is but one China and Taiwan is part of China").

247. COPPER, supra note 235, at 10-16. The Congress, already suspicious of then-President Jimmy Carter's foreign policy acumen, voiced several criticisms of the Joint Communique. Id. First, the negotiations of the instrument were undertaken secretly while Congress was in recess. Id. at 10-11. In fact, when Carter agreed to the Joint Communique, he announced his decision to Congress only three hours before he broadcast his agreement on national television. Id. at 11-12. Criticism of the actual agreement focused on the fact that Carter had abandoned Taiwan by breaking diplomatic relations, terminating the defense treaty and removing U.S. forces while obtaining only an oral agreement from China that it would settle its differences with Taiwan peacefully. Id. at 9-11. Finally, Congress objected to the agreement's lack of a policy regarding Taiwan. Id. at 15. The Joint Communique made Taiwan's relationship to the United States vague and unworkable. Id.

Public opinion polls also indicated the public's dissatisfaction with the Joint Communique. Id. at 16. Although the American public favored relations with China, it strongly opposed abandoning Taiwan. Id. The polls showed that Americans "viewed Taiwan as a loyal friend, a showcase of American assistance, a nation that was providing for its population, and a nation that was admired." Id.


statutory limitations that apply to communist countries do not apply to Taiwan and Hong Kong. Both acts also were drafted to ensure that the United States maintain separate commercial and cultural ties with the territories. Finally, both acts met with the same vehement protest from the PRC's Government, which claimed that the acts constituted U.S. meddling in Chinese internal affairs.

The two acts also have significant dissimilarities. First, the scope of the TRA is far broader than that of the U.S.-Hong Kong Policy Act. Most significantly, the TRA ties Taiwan's security to U.S. security interests in the Far East. To this end, the TRA includes provisions to "provide Taiwan with arms of a defensive character" and "to maintain the capacity of the United States to resist any resort to force or other forms of coercion that would jeopardize the security . . . of the people.

250. Compare Damrosch, supra note 249, at 181 (stating that "[b]ecause of the U.S. acknowledgment of the Chinese position that 'Taiwan is part of China,' something had to be done to clarify that statutes applicable to the PRC as a communist, non-market economy country would not apply to Taiwan") with U.S. Policy Toward Hong Kong, supra note 7, at 280 (stating that without U.S.-Hong Kong Policy Act, U.S. statutes that apply to communist countries "could require the imposition on Hong Kong of restrictions and disabilities that would be inconsistent with [the U.S.] desire to respect Hong Kong's promised autonomy from the PRC"). For a discussion of the trade restrictions that the United States applies to communist countries, see supra note 215.

251. See Damrosch, supra note 249, at 159-60 (discussing TRA's goal of fostering development of commercial relations between United States and Taiwan); McConnell, supra note 224, at *4 (discussing need to establish direct relations between United States and Hong Kong in light of vast commercial interest at stake). In language remarkably similar to that used by the proponents of the Act, Damrosch described the commercial purposes of the TRA as follows:

'It was a major objective of the TRA to ensure that commercial relations between the U.S. and Taiwan could develop normally, without adverse effects from the derecognition of Taiwan. At the time, the U.S. was Taiwan's largest trading partner and Taiwan was the eighth largest trading partner of the U.S.; thus both sides had a tremendous economic stake in nourishing profitable commercial relations. Just as important was the security dimension of continued economic and commercial activity. A stable, prosperous Taiwan was thought to be critical to the maintenance of peace and security in the Western Pacific . . . .

252. See U.S. Law Review, Vol. 38, Iss. 3 [1993], Art. 6

Damrosch, supra note 249, at 159-60.

253. See U.S. 'Lies', supra note 231 (criticizing United States for placing its laws (TRA) above those of Chinese government); U.S. Efforts to 'Meddle', supra note 225, at 72 (criticizing United States for passing Act in disregard of China's national sovereignty).

254. See TRA § 3301(b)(4) (stating United States would consider "any effort to determine the future of Taiwan by other than peaceful means . . . a threat to the peace and security of the Western Pacific area and of grave concern to the United States").
The U.S.-Hong Kong Policy Act, in contrast, offers no military protection to Hong Kong.

Another way in which the TRA differs from the U.S.-Hong Kong Policy Act is in the creation of de facto official relations. The TRA, despite acknowledging Taiwan's unofficial status under U.S. law, creates the virtual equivalent of official relations. For example, the TRA mandates that "[w]henever the laws of the United States refer or relate to foreign countries . . . , such terms shall include and such laws shall apply with respect to Taiwan." The U.S.-Hong Kong Policy Act conversely limits U.S. relations with Hong Kong to those areas in which China has agreed to grant Hong Kong a high degree of autonomy under the Joint Declaration.

Under international law, the PRC's argument that the TRA violates Chinese sovereignty is stronger than its argument that the U.S.-Hong Kong Policy Act violates Chinese sovereignty. One of the fundamental precepts of international law is that every sovereign state has the right to independence and supreme authority over its territory and its people. The corollary of this rule is that no state may violate the independence of a state or that state's right to exercise supreme authority over its people and territory. Not all interferences with another state's internal

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255. Id. § 3301(b)(5) & (6).
256. U.S.-Hong Kong Policy Act § 2(b) (acknowledging that Hong Kong will not enjoy "high degree of autonomy" in defense and foreign affairs).
257. TRA § 3303. The TRA expressly states that in the absence of diplomatic relations with Taiwan, "the law of the United States shall apply with respect to Taiwan in the manner that the laws of the United States applied with respect to Taiwan" prior to the signing of the Joint Communique. Id. § 3303(a).
258. Id. § 3303(b)(1).
259. Each section of the Act establishing U.S. policy toward Hong Kong is based on the provisions of the Joint Declaration. See U.S.-Hong Kong Policy Act §§ 101-105. For a further discussion of the Act's reliance on the terms of the Joint Declaration, see supra notes 205-08 and accompanying text.
260. OPPENHEIM'S INTERNATIONAL LAW: PEACE § 117 (Sir Robert Jennings & Sir Arthur Watts, 9th ed. 1992). One authority has described the elements of sovereignty:

Inasmuch as [sovereignty] excludes subjection to any other authority, and in particular the authority of another state, sovereignty is independence. It is external independence with regard to the liberty of action outside its borders. It is internal independence with regard to liberty of action of a state inside its borders. As comprising the power of a state to exercise supreme authority over all persons and things within its territory, sovereignty involves territorial authority . . . . As comprising the power of a state to exercise supreme authority over its citizens at home and abroad, it involves personal authority . . . .

Id. § 119. OPPENHEIM'S INTERNATIONAL LAW states:

The duty of every state to abstain, and to prevent it agents . . . from committing any violation of another state's independence or territorial integrity or personal authority is correlative to the corresponding right possessed by other states. In the Lotus case the Permanent Court of International Justice stated that "the first and foremost restriction im-
affairs violate state sovereignty. Acts such as the TRA that "intervene in the management of the internal or international affairs of other states" and call for the use of military force without the state's permission however do violate sovereignty.\textsuperscript{262} Therefore, China has a credible argument that United States has violated international law by supporting Taiwan's military and carrying on de facto official relations with Taiwan.\textsuperscript{263}

In contrast, the PRC's assertion that the U.S.-Hong Kong Policy Act constitutes a violation of international law is much weaker. International law dictates that for a state to intervene in another state's domestic affairs, the state's action must be "forcible or dictatorial, or otherwise coercive, in effect depriving the state intervened against control over the matter in question."\textsuperscript{264} Under this formulation, acts such as severing diplomatic relations, limiting exports and organizing boycotts are not considered dictatorial and, therefore, are legal.\textsuperscript{265} Because the most severe sanction available under the U.S.-Hong Kong Policy Act is the withdrawal of Hong Kong's preferential status under U.S. law,\textsuperscript{266} it too is non-dictatorial and, therefore, legal.

The validity of the U.S.-Hong Kong Policy Act is further supported by the terms of the Joint Declaration, in which the PRC expressly agreed to allow Hong Kong to carry on certain international relations.\textsuperscript{267} Under international law, a country may cede aspects of its sovereign

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\textsuperscript{262} Id. (footnotes omitted) (1949 I.C.J. 35 (April 9)).

\textsuperscript{263} The primary shortcoming of the Chinese argument is that it overlooks the reality that Taiwan considers itself a part of China but not a part of the PRC. Taiwan's ROC government is in fact recognized as the government of all of China by 28 countries. Davis, supra note 235, at 140. Moreover, Taiwan and the PRC have operated as separate entities since the Communist Revolution prevailed on mainland China in 1949. Therefore, China's claim that Taiwan falls within its internal affairs is based more upon its theory of a Greater China than reality.

\textsuperscript{264} Oppenheim's International Law, supra note 260, § 129.

\textsuperscript{265} Id. These sanctions are often undertaken by a state to express its displeasure with another state's actions. Id. Although such sanctions may be intended to force another state to change its course of conduct, "they fall short of being dictatorial." Id.

\textsuperscript{266} For a discussion of the Act's termination provisions, see supra notes 213-14 and accompanying text.

\textsuperscript{267} Joint Declaration, supra note 9, at 1372 (stating "the Hong Kong Special Administrative Region may on its own maintain and develop economic and cultural relations and conclude relevant agreements with states, regions and relevant international organizations").
control expressly or by implication as a result of a treaty.\textsuperscript{268} Traditionally, this basis of interference only arose when the interfering state was a party, a guarantor or third party beneficiary of the treaty.\textsuperscript{269} Under an emerging norm of international law, however, the United States may base its right to formulate a Hong Kong policy on the Joint Declaration even though it was in no way privy to that agreement.\textsuperscript{270}

The International Court of Justice (ICJ) established in the \textit{Nuclear Tests} cases\textsuperscript{271} that unilateral declarations made by a state's public officials may legally bind that state with respect to third parties that rely on those declarations.\textsuperscript{272} In the \textit{Nuclear Tests} cases, the ICJ found that the petitioning nations could bind France to unilateral declarations made by

\textsuperscript{268} Oppenheim's \textit{International Law}, supra note 260, § 131(5) ("A right of intervention may arise as a result of a treaty by which one state, expressly or by implication, consents to intervention for certain purposes by another state.")


\textsuperscript{270} The PRC has frequently raised the argument that despite U.S. claims to the contrary, the U.S.-Hong Kong Policy Act does not follow the terms of the Joint Declaration, but instead expands Hong Kong's legal relationship with the United States beyond the bounds of the Joint Declaration. \textit{See}, e.g., \textit{Commentary on U.S. "Interference" in Hong Kong}, F.B.I.S., Apr. 8, 1992, at 4, 5 (quoting Jui Chih, \textit{The Camouflage Has Finally Been Removed—Commenting on Reactions of Some U.S. Government Officials to McConnell Bill}, \textit{Wen Wei Po}, Apr. 7, 1992, at 11). The PRC commentators, however, have focused on the language that U.S. officials have used to describe Hong Kong's status rather than on the language of the Act itself. \textit{See id.} (quoting U.S. officials describing Hong Kong as "an entity separate from China," an "independent region" or a "nonsovereign entity").


\textsuperscript{272} Alfred P. Rubin, \textit{The International Legal Effects of Unilateral Declarations}, 71 Am. J. INT'L L. 1 (1977). In the \textit{Nuclear Tests} cases, the ICJ stated that "[w]hen it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration." Rubin, supra, at 1-2 (quoting Nuclear Tests Case (Australia v. France), 1974 I.C.J. 253 (Dec. 20) and Nuclear Tests Case (New Zealand v. France), 1974 I.C.J. 457 (June 22)). The ICJ gave the following basis for holding unilateral declarations binding:

One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of \textit{pacta sunt servanda} in the law of treaties is based on good faith, so also is the binding character of international obligations assumed by unilateral declaration. Thus States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.

\textit{Id.} at 2 (quoting Nuclear Tests Case (Australia v. France), 1974 I.C.J. 253 (Dec. 20) and Nuclear Tests Case (New Zealand v. France), 1974 I.C.J. 457 (June 22)).
French officials stating that France would stop nuclear atmospheric testing in the South Pacific.  

The PRC, by signing the Joint Declaration with Great Britain and registering the agreement with the United Nations, publicly expressed its intent to the international community to be bound by the agreement. Furthermore, since signing the Joint Declaration, the PRC has reaffirmed its intent to be bound by the agreement in subsequent government publications. Under the Nuclear Tests cases' principles, the international community may rely on China's guarantees in the Joint Declaration. Therefore, even though the United States is not a party to the Joint Declaration, it can legitimately rely on the terms of that agreement in codifying its own relations with Hong Kong.

B. The Impact of the U.S.-Hong Kong Policy Act

As this Comment has shown, the United States has a strong economic and human rights interest in ensuring that Hong Kong retains a "high degree of autonomy" from the PRC. In this regard, the Act's purpose "to make clear to Beijing that America intends to fully support the autonomy promised to Hong Kong under the Joint Declaration" is laudable. Moreover, the angry response that the Act has provoked from the Chinese government indicates that the Act at least partially has achieved this objective.

Practically, however, the Act will have little direct impact on U.S.-Hong Kong relations beyond July 1, 1997. The contours of that relationship, as in the past, will be determined by the actions of the PRC. Throughout its 150 year history, Hong Kong's economic success has stemmed from its ties to China. Never have these ties been more cultivated than in the past decade. In conjunction with growing bilateral trade and investment between Hong Kong and the PRC over the past decade, Hong Kong's vast industrial sector has been extensively inte-

274. For a discussion of the formalities undertaken by the PRC and Britain in ratifying the agreement, see supra note 106.
275. See, e.g., Article Terms Act 'Absurd', F.B.I.S., Apr. 23, 1992, at 42-43 (quoting Kuan Chao, U.S.-Hong Kong Policy Act is Absurd, Ta Kung Pao, Apr. 23, 1992, at 5) ("The Chinese Government has promised the whole world that it will take [the Joint Declaration and the Basic Law] as the only criterion for guiding and handling all affairs in Hong Kong.").
276. See Joint Hearing, supra note 188, at 54-55. Hong Kong scholar, Stephen Ng, expressed a similar justification for the Act in a House of Representatives hearing in April of 1992. Id. He argued that the PRC, by signing the Joint Declaration and depositing it at the United Nations, invited the world community to be the guarantor of the agreement. Id.
278. For a discussion of the PRC's reaction to the Act, see supra notes 225-30 and accompanying text.
279. For a discussion of Hong Kong's ties to the PRC, see supra notes 57-68 and accompanying text.
grated with the Special Economic Zones adjacent to Hong Kong on the Chinese mainland.\textsuperscript{280} The symbiotic relationship between Hong Kong and the PRC is even more pronounced where U.S. trade relations are involved. Seventy percent of the PRC’s exports to the United States travel through Hong Kong.\textsuperscript{281} In light of this relationship, it is unrealistic to believe that the Act can ensure Hong Kong’s post-1997 prosperity and autonomy by separating U.S.-Hong Kong policy from U.S.-PRC policy.

A more effective way for the United States to ensure successful future relations with Hong Kong would be to develop a comprehensive policy toward China that includes post-1997 Hong Kong. Such a policy would require American politicians to solve more than a decade of disputes over how the United States should respond to China’s various human rights infractions.\textsuperscript{282} Such a fusion of policy, however, would

\textsuperscript{280} U.S. Policy Toward Hong Kong, \textit{supra} note 7, at 278.


\textsuperscript{282} See W. Gary Vause, \textit{Tibet to Tienanmen [sic] Square: Chinese Human Rights and the United States Foreign Policy}, 42 VAND. L. REV. 1575 (1989) (discussing conflicting congressional and administrative policies toward China). The debate over the United States’ policy toward China has been particularly vociferous in the years since the massacre at Tiananmen Square. In direct response to the Chinese human rights violations surrounding the massacre, the U.S. Congress drafted the United States-China Relations Act of 1991. H.R. 2212, 102d Cong., 1st Sess. (1991). The Bill stipulated that the President could not renew China’s most-favored-nation (MFN) trade status “unless a specified report is submitted to the Congress stating that China has accounted for and released prisoners who dissented in Tiananmen Square on June 3, 1989.” \textit{Id.} The Bill also conditioned renewed MFN status on China’s “overall significant progress” in several other areas, including “adhering to the Joint Declaration on Hong Kong.” \textit{Id.} The Bill was vetoed by then President Bush, and his veto was overridden by the House of Representatives and nearly overridden by the Senate. 138 CONG. REC. H1144 (daily ed. Mar. 11, 1992); 138 CONG. REC. S3816 (daily ed. Mar. 18, 1992) (reporting Senate vote as 60 in favor of overriding the President’s veto and 38 opposed). In vetoing the Bill, Bush argued that denying China MFN trade benefits would isolate China from the West, thereby fostering rather than discouraging human rights violations. China and MFN, \textit{supra} note 8. Conversely, the majority in the Congress argued that denial of MFN status would send China a needed message that the world, particularly the United States, will not tolerate human rights violations. 136 CONG. REC. S6943 (daily ed. May 24, 1990) (statement of Sen. Humphrey). Senator Humphrey stated that President Bush’s renewal of MFN status for China is “sending the message [to the Chinese] that crime against humanity pays.” \textit{Id.}

Not surprisingly, Hong Kong has played a pivotal role in both sides of the debate over China’s MFN status. The Bush Administration argued that denial of China’s MFN status would directly result in the loss of 20,000 Hong Kong jobs. China and MFN, \textit{supra} note 8. Hong Kong’s industrial integration with Southern China and its entrepôt role support this assertion:

Hong Kong companies have invested in more than 2,500 southern China enterprises. An additional 10,000-15,000 southern China enterprises do processing and assembly work for Hong Kong companies. The employment of two million workers in southern China’s Guangdong Province is related directly or indirectly to Hong Kong
match the reality of the economic and political ties between Hong Kong and the PRC.

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trade and investment. The Hong Kong government estimates that about 20,000 Hong Kong manufacturing jobs would be lost if MFN were denied.

Id.

In response, the Congress has argued that the long-term consequences of allowing China's human rights violations to go unchecked are much more threatening to Hong Kong's future than the temporary economic slowdown that denial of China's MFN status would cause. See 136 Cong. Rec. S6943, S6944 (daily ed. May 24, 1992) (statement of Sen. Humphrey). For example, Senator Humphrey has stated:

The President claims that 20,000 Hong Kong jobs will be lost if MFN for China is not renewed. Every 20 weeks, Hong Kong hemorrhages 20,000 of its citizens who flee to other nations fearing the very hardline leadership in Peking whom the President proposes to reward. The long-term consequences for Hong Kong of keeping the hardline regime in power are far more devastating than the short-term ones caused by not renewing MFN.

Id.