

# COMMENTS

## RETHINKING HONG KONG: A BLUEPRINT FOR THE FUTURE

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### INTRODUCTION

The Falklands War has awakened Britain to the dangers of ignoring potentially troublesome situations in her overseas territories. Although the lease under which Britain administers ninety percent of Hong Kong's territory does not expire until 1997,<sup>1</sup> Prime Minister Thatcher has decided to settle the question of Hong Kong's future now rather than later.

Negotiations between British and Chinese representatives began in Beijing, September 1982, and continue to this day. Although the parties have been negotiating for over six months, the public has received only limited information concerning the substance of the discussions. Understandably, speculation about possible agreements abound. This Comment goes beyond speculation by assessing possible outcomes and recommending an agreement that would meet the interests and desires of the three main parties—China, Britain, and the people of Hong Kong. It is divided into three sections: a discussion of the positions of China and Britain, a presentation of several alternatives the parties may

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1. I. J. COHEN & H. CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY* 373 (1974) [hereinafter cited as COHEN & CHIU]. Cohen and Chiu present the historical background: "Great Britain . . . annexed the island of Hong Kong under the Treaty of Nanking, which terminated the Opium War in 1842. Further hostilities culminating in the 1860 Treaty of Peking . . . forced China to cede Britain the Kowloon Peninsula facing the island, and in 1898 the badly weakened Ch'ing dynasty had been required to 'lease' Britain, for a period of ninety-nine years, a much larger area including the remainder of Kowloon and the so-called 'New Territories.' *Id.*

reach, as well as the potential effects of these alternatives, and a proposal for a future administration for Hong Kong.

## I. THE PROBABLE CHINESE POSITION

Two questions need to be answered to determine China's intentions toward Hong Kong. First, does China intend to reassert sovereignty over Hong Kong? Second, will China alter the Colony's current economic, social, and political systems?

The answer to the question of whether China intends to assert sovereignty seems clear. Chinese officials visiting Hong Kong's leftist leaders reportedly declared that a basic thorn in the China-Britain negotiations from China's viewpoint would be a demand for formal British recognition of China's sovereignty over Hong Kong. Two months into the Beijing talks, a senior Chinese official told Western European journalists that sovereignty itself is "not negotiable." This position is no surprise. The People's Republic has consistently and emphatically maintained that Britain forced China to sign the treaties which ceded Hong Kong and the Kowloon Peninsula and leased the New Territories. The People's Republic argues that treaties gained in such a manner are "unequal treaties," and therefore null and void.<sup>2</sup> Thus, China asserts that it never lost sovereignty over Hong Kong.<sup>3</sup>

Regardless of whether China did or did not lose sovereignty over Hong Kong, a second question arises if Britain is to formally recognize any Chinese sovereignty over Hong Kong. That question concerns what changes, if any, China would propose to make in Hong Kong's economic, social and political structures.<sup>4</sup>

Not surprisingly, predictions concerning control over Hong Kong cover a wide spectrum of views ranging from the optimistic belief that if Britain formally recognizes the People's Republic's sovereignty, China will allow the *status quo* to continue, to the opposite extreme that if China regains control, China will establish a communist administration. Perhaps even the Chinese do not know precisely what is planned for Hong Kong.

Nevertheless, statements from Chinese officials indicate that the present capitalist system would not change. Chinese Premier Zhao Ziyang recently told a delegation of Hong Kong developers that Hong Kong's capitalist system would remain, and that

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2. *Foreign Ministry Spokesman on Xianggang Issue*, 41 BEIJING REV. 11 (1982).

3. For example, in 1972, in a letter to the Chairman of the United Nations General Assembly Special Committee on Colonialism, the Chinese ambassador to the United Nations reiterated Beijing's claim to continuous sovereignty over Hong Kong, and promised that the issue of sovereignty would be ". . . settled in an appropriate way when conditions are ripe." 1 COHEN & CHIU, *supra* note 1, at 383-84.

4. For a closer look at China's choices *see infra* text accompanying notes 46-64.

"China regarded this [the capitalist system] as Hong Kong's mainstay after 1997."<sup>5</sup> Zhao suggested that China would administer Hong Kong as a special economic zone unaffected by China's national policy and economic system.<sup>6</sup>

Specifically, Premier Zhao told the delegation: "Your investments in China are guaranteed [will not be nationalized]; the investment you have in Hong Kong also have no problems."<sup>7</sup> The Premier also dealt with the crucial question of who would administer Hong Kong. He remarked that, when China regains sovereignty over Hong Kong, China will intend that the Hong Kong people, rather than the British, administer Hong Kong.<sup>8</sup>

Zhao earlier stated that after 1997 China will still allow Hong Kong to enter into commercial contracts with foreign parties "independently."<sup>9</sup> Elaborating on this principle, Zhao declared that Hong Kong could "set up its own congress, elect a government, and administer itself."<sup>10</sup> Premier Zhao's statements suggest that China would allow Hong Kong residents a high degree of autonomy. These statements are particularly informative and authoritative, albeit imprecise, indications of China's negotiating position.<sup>11</sup> Expanding upon Premier Zhao's promise to continue Hong Kong's capitalist system, one might speculate that Hong Kong capitalists would administer Hong Kong through a "committee of local notables approved by Peking."<sup>12</sup>

Premier Zhao is not the only Chinese official to comment on the future of the capitalist system in Hong Kong. Significantly, in November of 1982 Chinese Politburo member, Liao Chengzhi, made a number of statements to a delegation from the Hong Kong Factory Owners Association. Mr. Liao told the delegation that Hong Kong can keep its capitalist system "for a few centuries." Hong Kong will become a special administrative zone<sup>13</sup> administered by the Hong Kong people as a special economic zone.<sup>14</sup> Liao further stated that after China regains sovereignty "only the governor and the flag would change . . . ."<sup>15</sup> Hong Kong residents will be free to travel overseas. Freedoms of speech and pub-

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5. Zhao Says Hong Kong to Retain Capitalist System, FBIS W1 (Dec. 22, 1982).

6. See *infra* text accompanying notes 46-54.

7. See *supra* note 5 at W2.

8. *Id.*

9. *Id.*

10. *Id.*

11. Mr. Zhao's remarks do not hint at the characteristics the new administration.

12. Keatley, *Hong Kong Wary of Chinese Overtures*, Asian Wall St. J. Weekly, Dec. 20, 1982, at 10, col. 1.

13. See *infra* text accompanying notes 55-58.

14. See *infra* text accompanying notes 46-54.

15. See *infra* note 10 at W1.

lication will continue. The Hong Kong police will maintain law and order without "a single soldier or staff member from the People's Republic." Additionally, Hong Kong residents will choose the system of property ownership. Hong Kong's monetary reserves will be retrieved from Britain and used for local needs. Also, the legal system will remain unchanged, except for the elimination of appeals to the Privy Council. The Civil Service will remain unchanged and expatriates may stay. Finally, the Hong Kong dollar will continue to be an international currency.<sup>16</sup> In short, based on the statements of Zhao and Liao, it appears that the Chinese will demand the re-establishment of Chinese sovereignty over Hong Kong, while allowing the present capitalist system to continue.

Given the valuable role of Hong Kong's foreign exchange in China's modernization program and the importance which Beijing places on economic development,<sup>17</sup> it seems likely that keeping Hong Kong in its present prosperous and capitalist state best serves China's interests. However, should China's outlook shift from an emphasis on the expansion of foreign trade and economic modernization and development to an emphasis on ideological purity, it is conceivable that Hong Kong's socialist-exempt status could disappear overnight.

## II. THE PROBABLE BRITISH POSITION

Little is known of Britain's actual negotiating position and goals, because Britain and China agreed that the Hong Kong negotiations would be confidential. Nonetheless it is possible to ascertain, at least partially, Britain's stance at the Beijing talks.

While the Chinese base their claim to sovereignty over Hong Kong on the position that the Hong Kong treaties are "unequal treaties" and therefore invalid, the British claim, at least superficially, centers on Prime Minister Thatcher's bold assertion that the treaties are valid under international law and may only be altered with the consent of both Britain and China.<sup>18</sup> As explained later, international law is equivocal on the question of whether Mrs. Thatcher is correct.<sup>19</sup>

Even if the treaties are valid, Britain will lose sovereignty over the New Territories in 1997. Britain has permanent title to

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16. Cheung, *PRC Claims UK Turns Down Self-Rule for Hong Kong*, FBIS W1-W2 (Dec. 2, 1982).

17. Ching, *Chinese Leaders Emphasize Economic Growth, Open Door at Party Congress*, *Asian Wall St. J. Weekly*, Sept. 6, 1982, at 2, col. 1.

18. Bowring, Lee & Bonavia, *Still on Borrowed Time*, *FAR E. ECON. REV.*, Oct. 1, 1982, at 10.

19. See *infra* text accompanying notes 29a-35.

only ten percent of the present day Hong Kong territory—Hong Kong Island and Kowloon Peninsula. Thus, unless China renews the New Territories lease, an unlikely proposition,<sup>20</sup> Hong Kong as we know it will cease to exist.<sup>21</sup>

Certainly, the British are aware of the lease's termination date and can predict that Britain will eventually have to acknowledge Chinese sovereignty over Hong Kong and then convince the Chinese that an agreement which preserves Hong Kong's current form of economic prosperity is mutually advantageous. Naturally, Britain will argue that the Colony's success depends upon a free-wheeling capitalist economy and the presence of, at the very least, a British-style administration. While arguing this point, Britain can count on the fact that Hong Kong's economic value is of greater import to China than to Britain.

Hong Kong's actual value to Britain is not known. However, a common estimate is that Britain earns one hundred million pounds annually from Hong Kong.<sup>22</sup> This pound figure includes such factors as two-way trade, air landing rights, and Hong Kong's sterling reserves held in London.<sup>23</sup> To this figure, some British politicians<sup>24</sup> contend, one should add, as an indicator of Hong Kong's value to Britain, a quantified British continued willingness and ability to "exert world influence."<sup>25</sup> One politician points to Hong Kong's value as a gateway for the West's relations with China.<sup>26</sup> Yet, the consensus is that while Hong Kong may be useful to Britain, it is by no means indispensable.

Hong Kong's value to China, at least in economic terms, far outweighs its value to Britain. China has considerable investments in Hong Kong, including department stores, restaurants, banks, insurance companies, and financial syndicates.<sup>27</sup> China "benefits substantially from Hong Kong's financial services, its international contacts and its skills in designing, styling, [and] promotion and marketing of Chinese goods."<sup>28</sup> Estimates of Hong Kong's value to China as a source of foreign exchange run as high

20. Ching, *China Hints of Hong Kong Takeover But Wants Colony to Remain Free Port*, Asian Wall St. J. Weekly, July 26, 1982, at 6, col. 1.

21. *Britain and China to Begin 'Intense' Hong Kong Talks*, Asian Wall St. J. Weekly, Sept. 27, 1982, at 1, col. 4.

22. Nelson, *Political Consensus over a Golden Goose Green*, FAR E. ECON. REV. Sept. 17, 1982, at 28, 30 [hereinafter cited as Nelson].

23. W. BEAZER, *THE COMMERCIAL FUTURE OF HONG KONG* 74-6 (1978).

24. Including David Owen, a former Labor Foreign Secretary.

25. Nelson, *supra* note 22, at 30.

26. *Id.*

27. R. HUGHES, *BORROWED PLACE BORROWED TIME, HONG KONG AND ITS MANY FACES* 41 (1976).

28. Ching, *China Hints of Hong Kong Takeover but Wants Colony to Remain Free Port*, Asian Wall St. J. Weekly, July 26, 1982, at 6, col. 1.

as forty percent of China's annual foreign exchange earnings.<sup>29</sup> Furthermore, Hong Kong Chinese have invested sizeable sums in the People's Republic. For example, ninety percent of the one billion dollars which will be invested in the Shenzhen Special Economic Zone bordering Hong Kong comes from Hong Kong Chinese.<sup>30</sup> China will not wish to estrange these investors.

Alone, Hong Kong's financial importance to China is not necessarily enough to ensure Hong Kong's lasting position as a capitalist enclave adjoining socialist China. Regardless of Hong Kong, China is now in the enviable position of being a third-world country with plenty of foreign exchange.<sup>31</sup> If China's rumored oil wealth materializes,<sup>32</sup> Hong Kong's foreign exchange will be less vital to China's modernization program.

A more important factor may convince China to grant Britain's request that Hong Kong continue its peculiar economic, political, and social systems. China is well aware that Taiwan's willingness to consider voluntary reunification with the mainland depends upon maintenance of a capitalist economy in Taiwan.<sup>33</sup> Thus, China's treatment of Hong Kong will show Taiwan whether Beijing is serious when it says that Hong Kong and possibly later Taiwan will be allowed to maintain a capitalist system, lifestyle, and customs.

Whatever China's relative negotiating strength vis-a-vis Britain's strength, one must remember that, although Mrs. Thatcher has insisted that the Hong Kong treaties are valid under international law, in almost the same breath, Mrs. Thatcher mentioned that such treaties can be altered with the consent of both parties.<sup>34</sup> Implicitly, this remark suggests Thatcher's awareness of the need to negotiate and her willingness to negotiate. Britain realizes that it will gain nothing by rigidly insisting on the legitimacy of the treaties. Consequently, Britain will likely concede on the sovereignty issue while pressing the Chinese for an agreement which will maintain as much of the Hong Kong *status quo* as possible.

Finally, Britain has declared that it is acting out a sense of

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29. Bowring & Lee, *Tread Softly, Iron Lady*, FAR E. ECON. REV., Sept. 17, 1982 at 27. See also, Wong & Lachica, *Hong Kong's Value to China Appears to Be Anybody's Guess*, Asian Wall St. J. Weekly, Dec. 27, 1982 at 3, col. 1, for the proposition that nobody seems to know where the forty percent figure came from.

30. Fung, *Zhuhai Economic Zone Failing to Attract Foreign Investment*, Asian Wall St. J. Weekly, August 23, 1982, col. 1.

31. Lachica, *China Quietly Becomes a Major Lender as Its Coffers Swell with Untapped Cash*, Asian Wall St. J. Weekly, Nov. 29, 1982, at 4, col. 1.

32. Bowring & Lee, *supra* note 29.

33. *Id.*

34. Nelson, *Maggie Sinks in the West*, FAR E. ECON. REV. Oct. 8, 1982, at 9.

moral obligation toward the people of Hong Kong<sup>35</sup> rather than for commercial, colonial, or strategic reasons.<sup>36</sup> It is not exactly clear what this moral commitment means in terms of what Britain can do or will do for Hong Kong. John Walden, the Colony's former director for home affairs, has asked how this avowed moral responsibility relates to the British Nationality Act of 1981 which effectively prevents most Hong Kong residents from emigrating to Britain.<sup>37</sup> Perhaps it just means that Britain will use all its efforts to strike the best deal it possibly can for the people of Hong Kong.

### III. UNEQUAL TREATIES

The most pressing legal question surrounding the Hong Kong controversy involves the debate over the validity of the treaties that are the basis for the British presence in Hong Kong. If either country can show that it has the weight of international law on its side, it will have materially strengthened its bargaining position.

Although the Chinese firmly assert that under the doctrine of "unequal treaties" any treaty forced upon a defeated party in war is invalid under international law and may be abrogated at any time; this view "does not seem to have any support in the writings of Western international law scholars."<sup>38</sup> In the West, treaties forced upon a defeated party have long been held valid under international law.<sup>39</sup> However, the 1969 Vienna Conference on the Law of Treaties<sup>40</sup> lends some support to the Chinese view of "unequal treaties". Participants in this Conference took a formal position "deploring the fact that in the past States have sometimes been forced to conclude treaties under pressure exerted in various forms by other States" and "desiring to ensure that in the future no such pressure will be exerted in any form by any State in connection with the conclusion of a treaty."<sup>41</sup>

The wording of this declaration suggests that it applies to fu-

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35. *Prime Minister Thatcher Holds Press Conference*, FBIS W1, W6 (Sept. 28, 1982).

36. *Lee, Honour at Stake*, FAR E. ECON. REV., Dec. 3, 1982, at 12.

37. *Fund, Hong Kong's People Urged to Voice Views on Colony's Future*, Asian Wall St. J. Weekly, Dec. 27, 1982, at 4, col. 4.

38. Chiu, *Comparison of the Nationalist and Communist Chinese Views of Unequal Treaties*, in CHINA'S PRACTICE OF INTERNATIONAL LAW: SOME CASE STUDIES 241, 267 (J. Cohen, ed. 1972) [hereinafter cited as *Unequal Treaties*].

39. Leng, *The Sino-Soviet Dispute*, in LAW IN CHINESE FOREIGN POLICY: COMMUNIST CHINA & SELECTED PROBLEMS OF INTERNATIONAL LAW 263, 279 (S. Leng & H. Chiu, eds. 1972) [hereinafter cited as *Sha-Chuan Leng*].

40. Britain, unlike China, is a party to the Vienna Convention. M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 121 (1982).

41. *Unequal Treaties*, *supra* note 38, at 242.

ture treaties not to previous ones.<sup>42</sup> The Conference's pronouncements might be merely *lex ferenda*,<sup>43</sup> "the law which it is desirable to establish, rather than rules of customary international law." The People's Republic, on the other hand, maintains that the "unequal treaties" doctrine is a longstanding rule of international law that applies to treaties pre-dating the Vienna Conference,<sup>44</sup> such as the treaties relating to Hong Kong.

Although the West does not accept the Chinese view of the invalidity of "unequal treaties," China can challenge the legitimacy of the Hong Kong treaties under two other theories. First the doctrine of *rebus sic stantibus* or changed circumstances, is commonly thought to be an acceptable ground for altering or abrogating a treaty.<sup>45</sup> As one might expect, the Chinese believe that when a treaty is "unequal" one party can modify or abrogate the treaty under *rebus sic stantibus*.<sup>46</sup> However, some commentators believe that such action should not take place unilaterally, but rather should be negotiated.<sup>47</sup> On several occasions China has negotiated in cases of changed circumstances.<sup>48</sup> Thus, China might still employ the doctrine in its negotiations with the British.

Interestingly, Article 62 of the 1969 Vienna Convention on the Law of Treaties declares that *rebus sic stantibus* does not apply to treaties that establish boundaries. The United Nations International Law Commission has interpreted the phrase "treaties which establish boundaries" to include treaties of cession.<sup>49</sup> That interpretation would include the Hong Kong treaties that ceded Hong Kong Island and Kowloon Peninsula to Britain. In any case, the Vienna Convention did not necessarily establish customary rules of international law, and China did not participate in the Convention.

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42. *Id.* at 267.

43. H. CHIU, THE PEOPLE'S REPUBLIC OF CHINA AND THE LAW OF TREATIES 104 (1972) [hereinafter cited as H. CHIU].

44. *Id.* at 62-63.

45. *Id.* at 101-02.

46. *Id.* at 103.

47. Leng, *supra* note 39, at 279. See also, H. CHIU, *supra* note 43, at 103, for Art. 65 of the 1969 Convention on the Law of Treaties which calls for negotiations whenever *rebus sic stantibus* is invoked. If China did make use of *rebus sic stantibus*, it would probably argue that such great changes have taken place in Asia, especially with regard to China's role as a world power, that the Hong Kong treaties are an achronism. Undoubtedly, Britain would point to the prosperity of Hong Kong and its inhabitants.

48. H. CHIU, *supra* note 43, at 104-10.

49. *Id.* at 103. Britain could argue that the 1898 lease treaty was actually a "disguised cession" on the grounds that the treaty was designed to protect and to be an extension of Hong Kong, that Britain gained sole jurisdiction over the New Territories, and that there were no lease payments provided for in the agreement. Scheffer, *Hong Kong's Case in International Law*, *Asian Wall St. J.*, Oct. 29, 1982, at 4, col. 1.

The second theory under which China might invalidate the Hong Kong treaties is the doctrine of succession. In short, China would argue that when the Communists seized power in 1949, in effect, they created a new state and are therefore not bound by any pre-1949 treaties.<sup>50</sup> Article 16 of the Vienna Convention of 1978 on the Succession of States in Respect of Treaties would support this argument. Article 16 provides: "A newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates."<sup>51</sup> In addition, Article 24 of the same Convention states that a successor state is bound by a bilateral treaty "only if (1) the state expressly agreed, or (2) through its conduct is considered to have agreed to the treaty."<sup>52</sup> Thus, if China could demonstrate that it is a successor state and did not by its conduct agree to the treaty, it would have a strong argument supporting the invalidity of the Hong Kong treaties.

Naturally, Britain would maintain that successor states must accede to the prior state's obligations. Otherwise, "lawlessness in the international legal order would result."<sup>53</sup> Another possible British argument is that the succession doctrine applies only to a change of state, not to a change of government. Thus, the British would attempt to demonstrate that the Chinese revolutions of 1911 and 1949 resulted in a changed government. Finally, Britain could respond with the doctrine of *pacta sunt servanda* which is "based on the premise that international treaties are legally binding 'because there exists a customary rule of international law that treaties are binding.'"<sup>54</sup> Consequently, although the West does not accept the Chinese position on the illegality of "unequal treaties," the doctrine of *rebus sic stantibus* and an argument based on the negativist view of succession, i.e., a new state decides what treaties it will honor, provide China with a moderately firm basis to dispute the Hong Kong treaties.

Obviously, international law does not conclusively support either side's position. This fact simply highlights the need for

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50. The notion of creating a new state through revolution has been accepted by some commentators. D. O'CONNELL, *STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW* 88 (1967). The issue of whether or not China qualifies as a new state is resolved in China's favor in Tso, *The Legal Implications of the Sino-British Treaties Regarding Hong Kong*, 4 *LOY. L.A. INT'L & COMP. L.J.* 11, 122-23 (1981) [hereinafter cited as *Sino-British Treaties*].

51. Maloney, *Succession of States in Respect of Treaties: The Vienna Convention of 1978*, 19 *FA. J. INT'L L.* 885, 907 (1979).

52. *Sino-British Treaties*, *supra* note 50, at 125.

53. *Id.* at 124.

54. *Id.* at 123.

Britain and the People's Republic to accept practical realities and to compromise.

#### IV. A CLOSER LOOK: HOW CHINA MIGHT TREAT HONG KONG

China faces a difficult task in deciding what changes to make, or not to make, in Hong Kong. This section examines several frequently mentioned possibilities: the creation of a special economic zone or a special administrative zone and the creation of an administration such as the administration of Macao.

##### A. Special Economic Zone

Some commentators suggest that China could simply reclassify Hong Kong as a Special Economic Zone [SEZ].<sup>55</sup> China gained some experience with Special Economic Zones several years ago when it set up four zones in the Guangdong and Fujian provinces. These zones use tax concessions not available elsewhere in China, simplified bureaucratic procedures, and lower labor and property costs to attract foreign investment and technology.<sup>56</sup> Provincial bodies have a significant amount of autonomy in operating the SEZs.<sup>57</sup>

Because of its proximity to Hong Kong, the Shenzhen Special Economic Zone has been the most successful of the zones in attracting outside investment. Approximately 1300 mostly small scale projects, valued at approximately one billion dollars have been approved for the Shenzhen Special Economic Zone.<sup>58</sup> Yet, foreigners doing business in Shenzhen have frequently complained about bureaucratic<sup>59</sup> and labor inefficiency.<sup>60</sup>

In the Guangdong Zone, the Guangdong People's Congress has promulgated regulations to increase the Special Economic Zone's attractiveness to foreign investors. Specifically, the regulations provide advantages for investors unavailable in the rest of China. For instance, the Zone's income tax rate on enterprises is fifteen percent<sup>61</sup> compared to approximately thirty-five percent

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55. This reclassification would entail government intervention but only to a limited extent.

56. *Lucky Shenzhen is Next to Hong Kong: Other SEZs Will Find Life More Difficult*, FAR E. ECON. REV., Oct. 1, 1982, at 61-2 [hereinafter cited as *Lucky Shenzhen*].

57. Stepanek, *China's SEZs*, CHINA BUS. REV. 38 (March/April 1982).

58. *Lucky Shenzhen*, *supra* note 56, at 62.

59. Fung, *Zhuhai Economic Zone Failing to Attract Foreign Investment*, Asian Wall St. J. Weekly, August 23, 1982, at 9, col. 1.

60. Fung & Leung, *Shenzhen's Economic Zone is 'Model', But Not the Kind China Intended*, Asian Wall St. J. Weekly, July 20, 1981, at 1, col. 2.

61. The Regulations on Special Economic Zones in Guangdong Province, art. 14, in *New Regulations for Guangdong's SEZs*, CHINA BUS. REV. 54 (Sept./Oct. 1980).

elsewhere in China. Also, recent additions to the Special Economic Zone Code have modified the labor and wage systems so that employers have greater control over the hiring and discharge of workers and a certain amount of leeway in the payment of wages and the method of payment.<sup>62</sup> Other regulations have simplified the process of obtaining a land use permit<sup>63</sup> and have eased procedures for entering and exiting the SEZs.<sup>64</sup>

Certainly, the SEZs seem like daring experiments in economic liberalism and decentralization. However, a major problem with the zones is that they are dependent upon a stultified, lethargic, and often confusing bureaucracy. If China attempted to impose an SEZ arrangement on Hong Kong, this imposition would likely have a stifling effect on the economy. Investors would begin to question Hong Kong's future as a prosperous capitalist enclave and decrease their investments.

Of course China could reclassify Hong Kong as an SEZ and then simply issue regulations allowing business to continue as usual. Two commentators have warned that "there is all the difference in the world between a SEZ Special Economic Zone which is essentially an industrial entity and . . . Hong Kong which owes its prosperity to an entirely different legal, administrative and economic system."<sup>65</sup>

### B. Special Administrative Zone

In light of China's often expressed intention to allow Hong Kong's current social and economic systems to remain unchanged, a likely scenario is that China will not attempt to force Hong Kong into SEZ status but will instead declare the Colony to be a Special Administrative Zone. Such a declaration would, in effect, maintain the *status quo*.

Support for the establishment of a Special Administrative Zone is found in Article 31 of the New People's Republic Constitution. That article states: "The state may establish special administrative regions when necessary. The system to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of the specific

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62. Guangdong Provisional Labor and Wage Regulations in Special Economic Zones, arts. 1-20, in Moser, *Guangdon's SEZs*, CHINA BUS. REV. 42-43 (March/April 1982) [hereinafter cited as Moser].

63. Guangdong Provisional Land Regulations and Shenzhen Land Regulations for Shenzhen Special Economic Zone, arts. 1-14, in Moser, *supra* note 51, at 44-45.

64. Guangdong Provisional Entry/Exit Regulations in Special Economic Zones and Guangdong Provisional Land Regulations for Shenzhen Special Economic Zone, arts. 1-23, in Moser, *supra* note 51, at 41-42.

65. Bowring & Lee, *supra* note 22, at 21, col. 2.

conditions.”<sup>66</sup> Many commentators believe that this Article was promulgated for Taiwan, Macao, and Hong Kong. A pro-Beijing Hong Kong newspaper, *Ta Kung Pao*, interpreted this section of the Constitution as allowing the National People’s Congress to “enact or give lasting legal authority to whatever final settlements are reached on maintaining the present systems . . .” in Hong Kong.<sup>67</sup> This interpretation is consistent with Liao Chengzhi’s assertions that Hong Kong’s law will remain basically unchanged.<sup>68</sup>

An article supportive of Hong Kong becoming a special administrative district appeared in the Hong Kong newspaper, *Kuang Chiao Ching*, shortly after negotiations began.<sup>69</sup> The author interviewed economists and lawyers in the Chinese Academy of Social Science. Each of the five interviewees insisted that China would not treat Hong Kong as a Special Economic Zone but rather as a Special Administrative Zone. These experts listed six features that distinguish Hong Kong from a Special Economic Zone. A summary of these characteristics follows because it demonstrates the difficulty of converting Hong Kong into a Special Economic Zone. These characteristics also provide further insights into China’s plans for Hong Kong.

1. *Differences in the Social Systems.* Special Economic Zones are special in the sense that they have different economic policies from the rest of China. Otherwise, the politics and culture remain socialist. Hong Kong’s socio-political and economic systems and lifestyle are completely different from those of China. This situation cannot be changed overnight. The economists and lawyers stated that, to preserve Hong Kong’s world economic position and to “guarantee the economic interests of Chinese and foreign consortiums in Hong Kong,” a “Hong Kong special administrative zone of China will be set up after the recovery of sovereignty so as to differentiate Hong Kong from China’s socialist system and keep her nature as a capitalist society unchanged.”

2. *Differences in Economic Structure.* The experts described Special Economic Zones as “a variety of economic components reflected by different forms of ownership systems coexisting under the dominance of socialist and state-capitalist economies.” On the other hand, Hong Kong’s economic makeup has always been thoroughly capitalist. Hong Kong, as a Special Administrative Zone, by definition would retain its capitalist economy.

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66. Art. 31, THE CONSTITUTION OF THE PRC (1982).

67. *Ta Kung Pao on PRC Constitution, Hong Kong*, FBIS W1 (Dec. 9, 1982).

68. See *supra* text accompanying notes 8-10.

69. *‘Hong Kong Special Administrative Zone’ Detailed*, FBIS W4 (Nov. 23, 1982).

3. *Difference in Political Organization.* Political power in Special Economic Zones has the same "character and organizational setup as other cities and provinces in China." As a Special Administrative Zone, Hong Kong will "enjoy a high degree of autonomy." Although a local council will be created which will elect principal government administrators subject to Beijing's approval, Hong Kong's current government structure and its civil servants, police, and governmental personnel will remain.

4. *Differences in Laws and Decrees.* The Special Economic Zones and Hong Kong operate under two distinct legal systems. Article 30 of the People's Republic of China's Constitution provides that "[t]he system implemented in a special administrative zone shall be stipulated by law according to the specific conditions." Thus the laws and legal system of mainland China need not be imposed upon Hong Kong. Rather, the Colony's current legal system could remain intact, except for the right of appeal to the Privy Council.

5. *Differences in Power over Foreign Affairs.* Special Economic Zones' have no foreign relations power. Hong Kong, on the other hand, will be able to independently enter into economic and cultural agreements with other countries and to participate in international economic organizations under a Special Administrative Zone status. Hong Kong will be able to act as an "independent tariff region."

6. *Differences in the Degree of Democracy and Freedom.* Unlike the residents of a Special Economic Zone, residents of a Hong Kong Special Administrative Zone will continue to enjoy their current standard of freedom of speech, press, assembly, association, religion, and movement. In addition, the Hong Kong resident's lifestyle—lotteries, mahjong, horse racing—will continue.

In short, rather than convert to a Special Economic Zone, it is suggested that Hong Kong acquire considerable autonomy and legislative power, an independent judiciary, a useful amount of control over foreign economic relations, and, importantly, retain the existing economic and social systems. According to the Chinese, this is merely "showing respect for history and reality." Since the predictions in the Kuang Chiao Ching article are consistent with the statements of Premier Zhao and Liao Chengzhi, it is likely that this is the alternative which Beijing has chosen for Hong Kong.<sup>70</sup>

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70. However, there is no publicly stated explanation noting why this solution would be chosen, one possible explanation is that the Chinese are more aware of

### C. The Macao Solution

Another alternative for Hong Kong is the proposition that Britain and China agree to administer Hong Kong in a manner similar to Portugal's current administration over Macao. Superficially, such administration might seem like a plausible solution. Portugal solved the legal dilemma that Britain is now facing by including in the 1976 Portuguese Constitution a provision that Macao is merely "a territory under Portuguese administration." In fact, Portugal had tried to return Macao to China two years before but received no response from the Chinese.<sup>71</sup>

Meanwhile, Macao carries on under a Portuguese administration and an essentially Portuguese legal system. However, "[r]eal power [in Macao] is in the hands of Peking's official and unofficial representatives in the Chinese-dominated capitalist economy . . . . These people are always consulted by the governor when major policy decisions have to be made."<sup>72</sup> While the Portuguese apparently can tolerate a subordinate role to the Chinese in running Macao, it is unlikely that the British psyche can withstand a similar arrangement regarding Hong Kong.<sup>73</sup>

The major reason why the Macao alternative will not work is that the people of Hong Kong want concrete assurance from Beijing of what their future will be. They will not get this assurance because China has reserved the right to adjust control over Hong Kong "when the time is ripe."<sup>74</sup>

### D. Other Alternatives

Certainly, there are other alternatives that Beijing might apply to Hong Kong. For instance, China might decide that maintaining Hong Kong's economic benefits is more important than eliminating the last major remaining vestige of Western imperial-

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popular opinion in Hong Kong, which generally favors the *status quo*, than many commentators speculate. See *Most in Hong Kong Oppose Prospect of Rule by China*, Asian Wall St. J. Weekly, Aug. 15, 1982 at 1, col. 4. See also, Lee, *The Point of No Return*, FAR E. ECON. REV. 14 (Aug. 10, 1982). Certainly, numerous delegations of entrepreneurs and industrialists have visited Beijing in the past year and have made their fears known to high officials in the Chinese government. Presumably, the People's Republic has decided that Hong Kong, for the moment, is valuable in its present form.

71. *The Macau Solution*, FAR E. ECON. REV. at 12, col. 1 (July 30, 1982).

72. Lee, *The Portuguese Gamble*, FAR E. ECON. REV. 51 (Aug. 27, 1982).

73. One reader of the Far Easter Economic Review wrote: "At present, the Macau Government acts like a Chinese amah, taking care of the house and the children for an absent master, to whom she is answerable. Hong Kong has, on the other hand, hitherto been more like a tenant, with British sponsored administrative autonomy in its own quarters, within reasonable limits." *Landlord and Tenant*, FAR E. ECON. REV. 3 (Oct. 22, 1982).

74. Bowring & Lee, *The Macau Solution*, FAR E. ECON. REV. 12 (July 30, 1982). See also Huang in *Lisbon on Macao, 1977 Question*, FBIS W1 (June 30, 1982).

ism in China. In exchange for British recognition of China's sovereignty over Hong Kong, China might allow business to carry on as usual.<sup>75</sup>

Regardless of its stated intentions, China may set up a Communist dominated administration. Many of the older industrialists and officials in Hong Kong remember the Communist promises in Shanghai in 1949 that their enterprises would not be nationalized. In 1952 nationalization took place. As a Hong Kong resident recently wrote: "It may be recalled that Shanghai was the financial capital of Asia and to a certain degree played the same role as that which Hong Kong does at the present time. Shanghai virtually disappeared from the international scene for twenty five years and there is no reason why Hong Kong could not do the same." Fearing the loss of Hong Kong's economic well-being, one industrialist stated that "[I]f the British leave, so will we—and anyone else who has any chance of being accepted elsewhere."<sup>76</sup> A group of young, politically active Hong Kong professionals commissioned a recent survey that found that "[m]ost people, if assured [that] life remains under a free atmosphere, would be happy to stay in Hong Kong."<sup>77</sup> However, if the Colony is returned to China and freedoms [are] lost, few would willingly stay.<sup>78</sup>

To the casual observer, it may appear that Hong Kong's success depends on its British administration and legal system and that any change in the *status quo* would have disastrous consequences for Hong Kong. Perhaps Hong Kong's success is attributable not to British administration but rather to the presence of an administration that safeguards the residents' personal freedoms. Although increasing numbers of middle class, Hong Kong-born Chinese desire the end of colonial rule, they do not wish to live under a Communist system.<sup>79</sup>

Nonetheless, a number of American entrepreneurs and investors believe that a Chinese takeover would not harm Hong Kong's future prosperity. Rather, they suggest that a takeover would make it easier to do business with China. Meanwhile, other entrepreneurs are either waiting to see how events develop or reducing their investments in Hong Kong enterprises. In short, entrepreneurs generally view China's intentions with varying degrees of

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75. However, the recent statements of Premier Zhao and Mr. Liao Chengzhi indicate that such an agreement is unlikely. See *supra* text accompanying notes 5-27.

76. Lee, *Honour at Stake*, FAR E. ECON. REV., Dec. 3, 1982, at 12, 13.

77. *Most in Hong Kong Oppose Prospect of Rule by China*, Asian Wall St. J. Weekly, Aug. 15, 1982, at 1, col. 4.

78. *Id.*

79. Davies & Lee, *The People Without a Voice of Their Own*, FAR E. ECON. REV., Oct. 22, 1982, at 44.

unease.<sup>80</sup>

Not surprisingly, other Asian countries are adjusting their investment, immigration, and property laws in hopes of capitalizing on the possible outflow of Hong Kong funds that result from the uncertainty over Hong Kong's future.<sup>81</sup> As yet, only a small amount of money has left the Colony for countries such as Thailand, Singapore, and the Philippines.<sup>82</sup>

One hopes that the Chinese are aware of the potential for a massive withdrawal of financial, industrial, and managerial resources from Hong Kong if the solution to the Hong Kong question does not adequately conform to the desires of Hong Kong's residents. The majority of the people of Hong Kong have made clear their preference for a continuation of Hong Kong's capitalist system and present lifestyle.

## V. PROPOSED SOLUTION FOR HONG KONG

The following recommendations are an attempt to account for the interests of China, Britain, and the people of Hong Kong, and to demonstrate that a solution acceptable and beneficial to all parties is possible. Initially, both Britain and China must accept the practical realities. Specifically, Britain must recognize the importance of sovereignty over all the Hong Kong territories to the intensely nationalistic People's Republic of China. Dogmatic refusal on Britain's part to admit Chinese sovereignty on the grounds that a treaty is a treaty, and that Britain does not break treaties, is likely to thwart the negotiations. Additionally, were Britain not to relent on the sovereignty issue, China would simply have to wait until 1997 to recover the New Territories. Without the New Territories, the rest of Hong Kong is essentially worthless to the British. Thus, Britain's best hope for maintaining a useful and profitable role in Hong Kong is to relent on the question of sovereignty. Britain can then negotiate for a future presence in Hong Kong, and for the rights of Britain's present Hong Kong subjects.

On the other hand, China must understand that the vast majority of people in Hong Kong want the *status quo* to continue. Any attempt to significantly alter Hong Kong's social, economic, political, and legal systems is likely to result in a rapid flight from

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80. See Lachica, *Colony Takeover Might Promote China Trade*, Asian Wall St. J. Weekly, Nov. 15, 1982, at 4, col. 2.

81. Even Guam hopes to cash in on the possible exodus of Hong Kong capital. Lachica, *Guam Hopes to Become Asian Entrepot by Luring Business from Hong Kong*, Asian Wall St. J. Weekly, May 10, 1982, at 9, col. 1.

82. *Southeast Asia Beckons "Flight Capital" from Hong Kong, but Little Arrives Yet*, Asian Wall St. J. Weekly, Nov. 22, 1982, at 21, col. 2. See also Sricharatchanya, *Gearing Up for Flight*, FAR E. ECON. REV., Nov. 12, 1982, at 71 (Thailand).

Hong Kong of local and foreign capital, business, and industry, as well as the flight of professionals and managers who run the system. Unless China is prepared to forego as much as forty percent of its estimated annual dollars in foreign exchange earnings, and is prepared to care for Hong Kong's five million people, the Chinese would do well to consider carefully the wishes of the residents of Hong Kong.

Not only must China and Britain accept certain realities, they must also realize that any agreement must reassure the Hong Kong citizenry that the present system will continue. To provide such reassurance, any agreement must contain the following guarantees:

- 1) The Hong Kong people will retain their individual freedoms such as freedom of the press, speech, religion, association, and travel.
- 2) The capitalist economy will remain.
- 3) The day-to-day activities of the Hong Kong people will not be restrained.
- 4) The local police will stay. The Chinese will not bring any troops into Hong Kong because residents may consider Chinese troops to be an implicit check on Hong Kong's autonomy.
- 5) The legal system will remain unchanged except for the removal of the right of appeal to the Privy Council because such a right is inconsistent with the notion of Chinese sovereignty over Hong Kong. The legal system will function independent of China's legal system.
- 6) The efficient civil service will remain. The Chinese will allow expatriates at all civil service levels to remain because they can provide a sense of continuity. Gradually more Chinese will rise to the top posts of the Civil Service. Eventually, the Civil Service will be composed of Hong Kong Chinese. This composition is consistent with the notion of Chinese sovereignty over Hong Kong.
- 7) The Hong Kong currency will remain in use as the principal currency and will move freely between foreign markets.
- 8) The changeover from British to local administration will occur gradually. A transition period of twenty-five to fifty years is necessary because any agreement must convince the people of Hong Kong that the familiar and comfortable systems and institutions will not be subject to sudden or drastic changes. As a condition for this transition period, Britain will immediately recognize China's sovereignty over Hong Kong.
- 9) A British governor will officiate for the next fourteen years in order to ease the transition. A Hong Kong Chinese governor, acceptable to China, Hong Kong, and, until the end of the transition period, to Britain, will replace the British governor.

- 10) If the people of Hong Kong desire, they will have an expanded role in Hong Kong politics.
- 11) Hong Kong will continue to independently conclude economic agreements.

Any final agreement on Hong Kong's future status must be embodied in a binding document. A treaty between China and Britain would be one choice. Another choice is the inclusion of an outline of Hong Kong's special status in the People's Republic of China's Constitution.

In sum, there is nothing revolutionary about this proposal although it is the only one that delivers maximum benefits to all parties involved. China will regain undisputed sovereignty over all of Hong Kong while continuing to receive the benefits of Hong Kong's economic prosperity. Meanwhile, Britain will have a crucial administrative role in Hong Kong for more than a decade with continuing influence for a number of years after that. Britain will fulfill its self-avowed moral duty to the people of Hong Kong by leaving Hong Kong with its economic, social, and legal systems intact and secure. Finally, Hong Kong will be assured of its continued existence under a familiar system.

### CONCLUSION

As this Comment demonstrates, China and Britain can reach a solution that will provide considerable benefits for China, Britain, and the people of Hong Kong while allowing the parties to meet their policy objectives. Flexibility and a willingness to compromise must exist on both sides of the conference table.

Lord MacLehose, Hong Kong's former governor, has aptly described the framework within which a successful solution to the Hong Kong question should be sought:

All our minds are on the future, not on the past and whatever may have been the basis of British administration in Hong Kong and whatever may be the legal definition of it, what we are concerned about is good arrangements for the future. And if good and satisfactory arrangements can be made which will ensure the prosperity and stability of Hong Kong, I cannot believe anything will be allowed to stand in the way of the implementation of such arrangements.<sup>83</sup>

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83. Lord MacLehose Speech on Future of Hong Kong, FBIS W1, 8 (Dec. 8, 1982).