

# THE U.S. ROLE DURING AND AFTER HONG KONG'S TRANSITION

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## 1. INTRODUCTION

In the months approaching China's resumption of sovereignty over Hong Kong on July 1, 1997, U.S. policy analysts are painstakingly reviewing how the territory will change under Chinese rule. The answer is important to U.S. interests for several reasons: first, because of the enormous U.S. economic presence in Hong Kong; second, because any adverse developments in Hong Kong are likely to affect U.S.-China relations; and third, because China's promise to give Hong Kong a high degree of autonomy under the "one country, two systems" policy has political implications for Taiwan.

A confident assessment of Hong Kong's future remains elusive. On one hand, Hong Kong's economy, increasingly tied to the expanding economy of mainland China, continues to grow. Annual growth in the past few years has been five to six percent. Over the last decade, Hong Kong has climbed from the fifteenth to the eighth largest trader in the world, and its per capita gross domestic product ("GDP") has risen from \$6,000 to \$23,800. With a population of only six million, Hong Kong's economy now equals one-fifth the GDP of mainland China and its 1.2 billion people. Along with its extraordinary economic track

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record, Hong Kong plays an increasingly vital role as a conduit and financial center for U.S., Chinese, and international economic and business interests. Under these circumstances, some in the United States believe that the change from British to Chinese sovereignty will make little difference and that Hong Kong will continue to demonstrate strong economic growth, to foster a friendly and supportive business environment, and to provide an overall atmosphere that allows significant scope for individual freedom.

Despite positive signs, Hong Kong's political future and the individual rights of its citizens remain tenuous. In the past, Britain and China have argued acrimoniously over political reforms, new governmental institutions, and other arrangements surrounding the colony's transition to Chinese rule. China repeatedly has accused Britain of using its last years as Hong Kong's sovereign to establish new democratic institutions where none existed before and has said that these will hamper China's own ability to rule Hong Kong. As a result, China has threatened to undo many of the political reforms enacted during the past few years under Hong Kong's last British Governor, Christopher Patten. Additionally, during the course of Sino-British transition negotiations, political concerns occasionally caused Chinese leaders to hold up business contracts, stall in approving major construction projects, and hamper other economic arrangements in Hong Kong. Such behavior has convinced some that China is likely to continue politicizing economic and other decisions in Hong Kong after 1997. These critics believe that Chinese leaders are willing to tolerate economic losses in Hong Kong when issues of sovereignty and Chinese governance are involved.

Throughout much of the decade since the ratification of the Sino-British Joint Declaration ("Joint Declaration") in 1985,<sup>1</sup> the United States has assumed a low profile on matters involving

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<sup>1</sup> See Joint Declaration on the Question of Hong Kong, Dec. 19, 1984, U.K.-P.R.C., 1985 Gr. Brit. T.S. No. 26 (Cmnd. 9543), para. 1 [hereinafter Joint Declaration]. The Joint Declaration was the final result of several years of negotiations between China and Britain over Hong Kong's future. The agreement lays out China's basic policies and guarantees regarding Hong Kong, including policies on rights of Hong Kong citizens and foreign nationals, Hong Kong's legislative, judicial, and other governmental institutions, and financial and monetary arrangements. See *id.* para. 3. The agreement was initialed on September 26, 1984; signed on December 19, 1984; and ratified on May 27, 1985. See *id.*

Hong Kong. The U.S. policy is due, in part, to the fact that no country questions China's sovereign rights over Hong Kong beginning July 1, 1997. The low U.S. profile with respect to Hong Kong may also be accounted for by the closeness of U.S.-British relations and the reluctance of U.S. policymakers to second-guess British governance decisions.<sup>2</sup> As the July 1, 1997 transition date approaches and the British presence in the colony wanes, interested parties in both Hong Kong and China have increased pressure on U.S. policymakers to adopt favored policies. In this growing lobbying effort, the options that some in Hong Kong support directly conflict with options supported by Beijing. Moreover, there is divided opinion within Hong Kong itself.

Chinese leaders have objected to what one official called the "gradual insistence" by some U.S. policymakers on "inserting the United States" into the affairs of Hong Kong,<sup>3</sup> and signs indicate that they will continue to object. Liberal-minded activists in Hong Kong, however, wish for a broader and more visible U.S. presence, particularly in the form of support for democratic principles and institutions. The U.S. and international business communities in Hong Kong, while receptive to a more visible U.S. presence, nevertheless argue for involvement that respects Beijing's concerns and targets specific matters, often economic issues. All groups interested in U.S. involvement in Hong Kong are likely to become more vocal in making their cases to U.S. officials as the transition date approaches. The U.S. Congress has been receptive in the past to those groups that argue for more assertive U.S. involvement in Hong Kong's political life. Given U.S. interests in the territory, Congress is likely to remain active in 1997 and beyond.

## 2. U.S. INTERESTS IN HONG KONG

Hong Kong has long been a focal point of U.S. economic, political, and other interests in Asia. Each set of interests brings forth its own advocates, both domestic and international. These interests contribute to the U.S. policymaking process, particularly in the U.S. Congress. During the months preceding and follow-

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<sup>2</sup> Henry Kissinger once referred to the close U.S.-British relations as the "special relationship." HENRY KISSINGER, *WHITE HOUSE YEARS* 86 (1979).

<sup>3</sup> Interview with a Chinese official who cannot be named in this Article, in Beijing, China (1985).

ing Hong Kong's transition of sovereignty to Chinese rule, all parties are likely to increase pressure on U.S. policymakers to adopt favored policies. Complicating the U.S. policymaking process, U.S. interests in Hong Kong often compete with, rather than complement, one another.

### 2.1. *U.S. Economic Interests in Hong Kong*

Hong Kong is the largest base of U.S. economic operations in Asia. Today, about 31,000 Americans live and work in Hong Kong, and approximately 1,000 U.S. firms have corporate offices there.<sup>4</sup> By 1995, U.S. investments in Hong Kong totaled \$10.5 billion. According to the U.S. Consul General in Hong Kong, U.S. exports to the territory in 1994 amounted to \$11 billion, while U.S. imports were about \$9 billion.<sup>5</sup> Hong Kong is the major transshipment point for Chinese products exported to the United States, which were valued at more than \$30 billion in 1993. Because of the sizable U.S. economic interests in Hong Kong, the U.S. business community tends to press the U.S. government for a more calibrated and targeted approach toward matters involving Hong Kong and to downplay politically sensitive issues.

### 2.2. *The U.S. Perspective on Human Rights and Democracy in Hong Kong*

Since the 1989 military crackdown in Tiananmen Square, and mindful of massive demonstrations in Hong Kong that followed Tiananmen, U.S. officials have paid close attention to the prospects for human rights and political freedom in Hong Kong. Americans have been generally supportive of Governor Patten's modest measures to increase the level of democracy in Hong Kong prior to its reversion to China. Many U.S. officials have been critical of China's pressure tactics and opposition to Patten's political initiatives. U.S. officials and Members of Congress have been particularly outspoken against Chinese statements that

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<sup>4</sup> Most of the corporate offices in Hong Kong function as financial and marketing bases for manufacturing facilities in mainland China and as headquarters for business activities throughout Asia.

<sup>5</sup> See Consul General Richard W. Mueller, *America's Long-Term Interest in Hong Kong*, Address to the Foreign Correspondents' Club, Hong Kong (May 22, 1995), available in LEXIS, Genfed Library, Dstate File.

Beijing will dissolve Hong Kong's Legislative Council in 1997.

### 2.3. *Hong Kong as a Model for Chinese Reunification with Taiwan*

U.S. leaders sometimes view Beijing's handling of the Hong Kong transition as a method of forecasting the way Beijing could be expected to handle reunification with Taiwan. Chinese authorities have reinforced this view by frequent statements that the "one country, two systems" policy approach is what China will follow for both territories. A smooth transition in Hong Kong would buttress the arguments of those who assert that U.S. interests in Taiwan would not suffer from reunification. A rocky transition would support the arguments of those who press for strong U.S. support for Taiwan's status as separate from the mainland.

### 2.4. *Most Favored Nation Treatment of Chinese Exports*

Hong Kong has been an important element in the U.S. debate over China policy since the Tiananmen crackdown, especially in the annual debate over whether the United States should approve Most Favored Nation ("MFN") tariff treatment for Chinese exports to the United States.<sup>6</sup> Critics of China have argued in the past that MFN status should be withheld from China unless Beijing meets certain conditions, including a more accommodating Chinese stance on democracy and human rights in Hong Kong. An important counter-argument has held that cutting off MFN treatment would have a disastrous economic and perhaps negative political impact on Hong Kong, especially because the bulk of Chinese exports to the United States passes through the colony.

### 2.5. *Export Controls*

Non-proliferation of weapons is a top policy priority for the

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<sup>6</sup> MFN is the tariff treatment that the United States extends to almost all of its trading partners. China's eligibility for MFN status is subject to an annual renewal, which the President must request by June 3 each year and which automatically goes into effect if Congress does not enact a joint resolution of disapproval within 60 days. See 19 U.S.C. §§ 2431-32 (1994). Renewal of China's MFN status became controversial the year following the Tiananmen Square crackdown of 1989, and has been the subject of sometimes rigorous debate in subsequent years. The collateral effect on Hong Kong of withdrawing China's MFN status has been one of the issues debated.

United States, which considers China to be a significant proliferation risk. Under British rule, Hong Kong has adhered to non-proliferation principles. The colony has maintained export controls on high technology and strategic goods effective enough to qualify for U.S. export control exemptions under section 5(k) of the U.S. Export Administration Act.<sup>7</sup> Although the United States will continue to treat Hong Kong separately from China for export control purposes after the 1997 transition, many U.S. and Hong Kong officials are concerned that Chinese companies may take advantage of Hong Kong's more liberal export controls either to ship prohibited arms and materials clandestinely to rogue states or to import prohibited weapons for use by China's own military.

### 3. BACKGROUND TO DEVELOPMENTS IN HONG KONG

Much of the current U.S. interest and increasing involvement in Hong Kong results from two issues: developments surrounding Sino-British negotiations and disagreements over Hong Kong's future, and lingering U.S. revulsion after China's brutal 1989 display in Tiananmen Square. Before examining the current U.S. policy toward Hong Kong and its prospects for the future, a brief review of the relevant aspects of the history of Hong Kong is useful.

Hong Kong's current situation stems from the terms under which the British originally acquired the territory, a combination of wartime concessions and a 99-year lease, the latter negotiated and signed with China in 1898. In 1982, as the end of the lease approached, the British government began a series of difficult bilateral negotiations with China about Hong Kong's future. These negotiations led to the Joint Declaration, which provided for the return of all of Hong Kong to China on July 1, 1997.<sup>8</sup>

Lacking power and basis for opposition, and faced with the strong Chinese insistence on regaining sovereignty over Hong Kong, Britain felt compelled to give ground repeatedly during the course of negotiations leading up to the Joint Declaration. China made compromises as well, most notably its pledge to leave Hong Kong's socioeconomic system virtually unchanged for fifty years

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<sup>7</sup> See 50 U.S.C. app. § 2404(k) (1994).

<sup>8</sup> See Joint Declaration, *supra* note 1, para. 1. The U.S. government maintained a low profile throughout these negotiations.

after 1997 and its promise to approach rule of Hong Kong under the general guidelines of "one country, two systems."<sup>9</sup> In its final form, the Joint Declaration set out the basic criteria for Hong Kong's future, as agreed upon by the British and Chinese governments.<sup>10</sup> Subsequently, British officials reportedly considered initiating political reforms that would grant the people of Hong Kong greater autonomy in the period leading to 1997. The British government moved cautiously, however, in part because of the Chinese government's staunch objections to granting the Hong Kong government a political status separate from the People's Republic of China ("P.R.C.") after 1997.

Between 1984 and 1989, the British and Chinese settled into a pattern of frank but generally cooperative interaction and negotiation over Hong Kong.<sup>11</sup> Britain, responsible for administering Hong Kong through June 1997, pushed for as much autonomy as possible for the territory. Among other proposals, the British negotiators suggested the institution of direct elections for Hong Kong's legislature, the Legislative Council ("Legco"). China opposed these efforts as attempts to interfere with its own ability to administer Hong Kong after 1997. These tensions prolonged the negotiations over plans for the Basic Law.

The Basic Law was finally adopted on April 4, 1990, but many of its provisions were vague, leaving room for controversy.<sup>12</sup> For example, the Basic Law prescribed few details for the election of Legco. The Basic Law provided only that the Hong Kong Legislative Council "shall be constituted by election" implemented "with gradual and orderly progress" and with "the ultimate aim the election of all the members of the Legislative Council by universal suffrage."<sup>13</sup>

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<sup>9</sup> *See id.*

<sup>10</sup> *See id.* Further details of Hong Kong's future governance were provided in a second document enacted by the Chinese government, The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, that will serve as Hong Kong's de facto constitution after 1997. *See* The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (April 4, 1990), *translated in* 29 I.L.M. 1520 [hereinafter Basic Law].

<sup>11</sup> The United States remained uninvolved during the course of the negotiations between the British and the Chinese.

<sup>12</sup> *See* Basic Law, *supra* note 10.

<sup>13</sup> *Id.* art. 68.

Basic Law negotiations coincided with China's June 1989 crackdown in Tiananmen Square. In the weeks after Tiananmen, over one million Hong Kong citizens demonstrated against the Chinese government's action. People in Hong Kong also were influential in supporting dissidents in China. They smuggled out political critics as well as information that proved damaging to the Beijing regime, both at home and abroad. Tiananmen and its aftermath stimulated the first genuine U.S. attempts to become more involved in Hong Kong's political future. Tiananmen also changed British and Chinese attitudes toward Hong Kong in several ways.

For the British — and, by extension, the Americans — the Chinese people in Hong Kong, long considered politically apathetic, suddenly were showing keen interest in politics. Many in Hong Kong pressed for more support from London to establish better safeguards against possibly capricious Chinese government action toward Hong Kong after the 1997 transition. A number of Hong Kong's increasingly important middle class of professionals and business people advocated strengthening and expanding the colony's institutions of representative government. Additionally, these groups began to approach U.S. policymakers for assistance in helping to assure Hong Kong's future.

For China, Hong Kong's reaction to Tiananmen raised a major security concern. It heightened China's sensitivity to any action by the British, the Americans, or any other country that might encourage political conditions in Hong Kong that were inconsistent with Beijing's concepts of stability. Consequently, when China's National People's Congress promulgated the Basic Law in April of 1990, it strengthened wording concerning subversion.

British authorities, while trying to avoid unduly antagonizing the P.R.C., took several steps to reassure those living in Hong Kong. The British government passed a Bill of Rights for Hong Kong citizens in 1991, granted an additional 50,000 Hong Kong heads of families with close ties to Great Britain the option to emigrate there, and encouraged the United States, France, and other countries to grant more generous immigration options to Hong Kong employees of foreign-owned businesses and institutions.

The British also reaffirmed their support for Hong Kong in two other ways. First, they proceeded with plans to build a large, complicated, and expensive airport project. Second, they pushed



Chinese leaders to agree that Hong Kong legislators elected before 1997 would be allowed to complete their terms after China took over in July 1997 — a concept known as the “through train.” Almost from the outset, both the airport plan and the “through train” concept for certain Legco members met with serious Chinese objections.<sup>14</sup> Leaders of the P.R.C. effectively froze international financial support for the airport by asserting that they had not been adequately consulted on the project and that its financing might be subject to review after 1997.

In an effort to solve the problems surrounding the airport and the “through train,” and to rejuvenate those programs, in September 1991 Prime Minister John Major became the first Western head of government since Tiananmen to travel to Beijing and meet with Chinese leaders. Although the Prime Minister signed a memorandum of understanding (“MOU”) with Beijing over the airport, Chinese officials continued to voice reservations that ultimately made it difficult for the project to proceed.

Under the circumstances, Britain decided to shift the style, if not the substance, of its policy toward Hong Kong. The more cautious policy of the recent past — solicitous of P.R.C. concerns and fearful of antagonizing China — was put aside in favor of a more direct approach. This approach was implemented under the leadership of a new Hong Kong Governor, Christopher Patten, who was also a close friend of Prime Minister Major. Shortly after assuming office in the Fall of 1992, Governor Patten precipitated a protracted political confrontation with Beijing when he proposed broadening the political representation of legislative institutions in Hong Kong. By Western standards, Patten’s proposals seemed mild. The Governor did not propose increasing the number of directly elected seats in Legco, a figure upon which China and Britain had already agreed, but instead opted for a series of steps to institutionalize procedures on which he found the Joint Declaration and the Basic Law to be silent.<sup>15</sup>

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<sup>14</sup> Beijing especially objected to the “through train” concept for certain Legco members who were vocal critics of the P.R.C., members such as Martin Lee and Szeto Wah.

<sup>15</sup> In his reform proposal, Governor Patten expanded the number of functional constituency seats in Legco from 21 to 30, and broadened their franchises to include a wider range of workers within each profession. He expanded the District Board jurisdiction and abolished the tradition of appointing some Legco members to serve concurrently on the Executive

Beijing was suspicious of the new trends in British policy. Chinese leaders especially objected to the decision to go ahead with Hong Kong's New Airport and Port Construction Project. The huge project came with a price tag in excess of \$20 billion, and involved numerous multinational contracts to construct terminals, runways, highways, railroad lines, bridges, and a tunnel crossing Hong Kong Harbor. The project's size and expense raised Chinese suspicions that Britain would attempt to drain Hong Kong's substantial treasury surplus prior to 1997. Furthermore, Beijing felt that Britain's handling of the airport proposal ignored China's insistence that it be sufficiently consulted by Britain on all major issues affecting Hong Kong after 1997, since China would ultimately inherit the consequences of those decisions.

China's greatest objections to British actions were raised against Patten's political reforms. Beijing swiftly and vigorously denounced both the Governor and his reform platform, claiming that the reforms contravened the Joint Declaration and the Basic Law and were nothing short of an attempt to create new democratic institutions in Hong Kong where none had existed before. Chinese leaders maintained that Patten's changes would complicate Chinese reassertion of sovereignty in 1997 and, in the meantime, divide political opinion and reduce business confidence in the territory. In response to Patten's initiatives, Beijing announced in February 1994 that it would end the "through train" to which it had previously agreed, dismantle the current legislative structure of Hong Kong, and establish a provisional legislative body not provided for in the Basic Law.<sup>16</sup>

#### 4. CURRENT U.S. HONG KONG POLICY

China's crackdown in Tiananmen Square on June 4, 1989, ended the consensus within the U.S. government that had characterized much of U.S. policy toward China for the previous decade. In the months following Tiananmen, the Bush Adminis-

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Council, the Governor's advisory board. Additionally, Governor Patten lowered the voting age from 21 to 18.

<sup>16</sup> China first announced that it would establish a separate legislative body in Hong Kong in November 1992, shortly after Governor Patten announced his political reform platform. Beijing repeated and confirmed these assertions periodically in the intervening years, until finally naming a provisional legislature on December 21, 1996.

tration reached a series of decisions to limit sanctions on China and protect U.S.-China relations. These decisions lacked popular support and increasingly antagonized Members of Congress. As a result, Congress began to hold hearings and to debate a wide range of measures related to every conceivable aspect of U.S. policy involving China. To some extent, this internal U.S. policy conflict continues today.

Hong Kong's return to Chinese sovereignty in 1997 has been one of the issues addressed in U.S. legislative efforts. Since 1992, Congress has enacted numerous measures designed to protect U.S. relations with Hong Kong, to pressure the White House to monitor closely developments there, and to persuade Chinese leaders to pursue more enlightened policies. In addition, the United States has negotiated and continues to negotiate a number of bilateral agreements with Hong Kong that will apply after the territory's reversion to Chinese rule. These agreements include: a civil aviation agreement; an extradition treaty; a mutual legal assistance agreement; a prison transfer agreement; a bilateral investment treaty; and agreements on future consular arrangements.

#### 4.1. *The United States-Hong Kong Policy Act of 1992*<sup>17</sup>

Most of the current U.S. policy toward Hong Kong is encapsulated in a single law, the United States-Hong Kong Policy Act of 1992.<sup>18</sup> Senator Mitch McConnell introduced the bill that eventually became law because he perceived a lack of coherent U.S. policy for dealing with the impending Chinese rule over Hong Kong. The law prescribes how the United States should conduct bilateral relations with Hong Kong when the territory becomes a non-sovereign entity.<sup>19</sup>

The United States-Hong Kong Policy Act is comprised of four main sections.<sup>20</sup> The first two sections constitute a series of findings and policy statements that are non-binding expressions of U.S. policy goals and objectives.<sup>21</sup> The Act states that support for democratization is a fundamental principle of the United

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<sup>17</sup> 22 U.S.C. §§ 5701-32 (1994).

<sup>18</sup> *See id.*

<sup>19</sup> *See id.*

<sup>20</sup> *See id.*

<sup>21</sup> *See id.* §§ 5701-15.

States that should apply to U.S. policy toward Hong Kong after 1997,<sup>22</sup> and that the United States should play an active role in maintaining Hong Kong's stability and prosperity.<sup>23</sup>

The substantive core of the United States-Hong Kong Policy Act states that the United States will continue to apply U.S. laws to an autonomous Hong Kong after the transition to Chinese rule in the same manner that they were applied before the transition.<sup>24</sup> It also extends congressional approval for all treaties and international agreements between the United States and Hong Kong so that the treaties and agreements continue in force after July 1, 1997, and it requires the President to report to Congress if he determines that Hong Kong is not competent to carry out its obligations or that it is not "appropriate" for Hong Kong to have rights or obligations under any such treaty or international agreement.<sup>25</sup>

The United States-Hong Kong Policy Act also gives the President authority to issue Executive Orders to suspend U.S. laws regarding Hong Kong, or portions thereof, if he determines that Hong Kong is not sufficiently autonomous.<sup>26</sup> In making such a decision, the President should consider the terms, obligations, and expectations contained in the Joint Declaration.<sup>27</sup> The Act provides that the President may terminate any such Executive Order if he determines that Hong Kong has regained sufficient autonomy.<sup>28</sup>

Additionally, the United States-Hong Kong Policy Act requires that the Secretary of State report to Congress by March 31 in each of six years — 1993, 1995, 1997, 1998, 1999, and 2000 — on eight specific factors regarding Hong Kong.<sup>29</sup> These factors include: (1) significant developments in U.S. relations with Hong Kong and in agreements that the United States has entered into

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<sup>22</sup> See *id.* § 5701(5).

<sup>23</sup> See *id.* § 5701(4).

<sup>24</sup> See *id.* § 5721(a).

<sup>25</sup> *Id.* § 5721(b).

<sup>26</sup> See *id.* § 5722(a). Any Executive Order issued under this provision must be published in the Federal Register. See *id.* § 5722(c).

<sup>27</sup> See *id.* § 5722(b).

<sup>28</sup> See *id.* § 5722(d).

<sup>29</sup> See *id.* § 5731.

with Hong Kong;<sup>30</sup> (2) developments surrounding the transition to Chinese sovereignty;<sup>31</sup> (3) the nature and extent of official and unofficial U.S.-Hong Kong exchanges;<sup>32</sup> (4) any U.S. laws suspended or reinstated under sections 201 and 202 of the Act;<sup>33</sup> (5) treaties and international agreements that the President has determined Hong Kong is incompetent to carry out under section 201(b) of the Act;<sup>34</sup> (6) significant problems in U.S.-Hong Kong cooperation on export controls;<sup>35</sup> (7) “the development of democratic institutions in Hong Kong;”<sup>36</sup> and (8) “the nature and extent of Hong Kong’s participation in multilateral forums.”<sup>37</sup>

The Act also requires, where applicable, a separate subreport on “China: Hong Kong” in U.S. reports that are compiled on a country-by-country basis.<sup>38</sup> This provision expressly affects: (1) reports compiled under sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961;<sup>39</sup> (2) trade barrier reports required by section 181 of the Trade Act of 1974;<sup>40</sup> and (3) economic policy and trade practices reports required by section 2202 of the Export Enhancement Act of 1988.<sup>41</sup>

#### 4.2. *Congressional Amendment of the United States-Hong Kong Policy Act*

The 104th Congress battled over foreign policy issues in 1995 and 1996, both internally and with the White House. Debate was especially rancorous within Congress over attempts to reorganize

<sup>30</sup> See *id.* § 5731(1).

<sup>31</sup> See *id.* § 5731(2).

<sup>32</sup> See *id.* § 5731(3).

<sup>33</sup> See *id.* § 5731(4). Sections 201 and 202 of the United States-Hong Kong Policy Act are codified at 22 U.S.C. §§ 5721-22 (1994).

<sup>34</sup> See *id.* § 5731(5). Section 201(b) of the United States-Hong Kong Policy Act is codified at 22 U.S.C. § 5721(b) (1994).

<sup>35</sup> See *id.* § 5731(6).

<sup>36</sup> *Id.* § 5731(7).

<sup>37</sup> *Id.* § 5731(8).

<sup>38</sup> See *id.* § 5732.

<sup>39</sup> See *id.* § 5732(1). Sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961 are codified at 22 U.S.C. §§ 2151n(d), 2304(b) (1994).

<sup>40</sup> See *id.* § 5732(2). Section 181 of the Trade Act of 1974 is codified at 19 U.S.C. § 2241 (1994).

<sup>41</sup> See *id.* § 5732(3). Section 2202 of the Export Enhancement Act of 1988 is codified at 15 U.S.C. § 4711 (1994).

U.S. foreign policy programs and departments, levels of U.S. foreign assistance funding, and international population assistance programs. U.S. policy toward China figured prominently in some of these debates, particularly in the period of time surrounding China's military exercises and missile test firings in the Taiwan Straits.<sup>42</sup>

Some Members of Congress disagreed with the Clinton Administration's policy of "engagement" with China<sup>43</sup> and believed that a tougher approach would better influence Chinese behavior. As a result, the 104th Congress sought to strengthen the United States-Hong Kong Policy Act by adding a requirement for a 1996 report, expanding the information required to be included in the report, and making the reporting requirement a permanent one. Using three different legislative vehicles, the 104th Congress successfully amended the United States-Hong Kong Policy Act of 1992 in the first two of these ways, but was not able to make the Hong Kong report a permanent annual requirement.

#### 4.2.1. *The Foreign Relations Authorization Act, Fiscal Years 1996 and 1997*<sup>44</sup>

The Conference Report to Senate Bill 908/House Bill 1561, the Foreign Relations Authorization Act, began as the 104th Congress' major vehicle for considering legislative provisions relating to China and Hong Kong.<sup>45</sup> Although the bill provoked heated debates between the Clinton Administration and Congress over a wide range of foreign policy, restructuring, and reorganization issues, it did not become law. On April 12, 1996, the bill

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<sup>42</sup> On March 8, 1996, amidst international tensions during Taiwan's first direct presidential elections, China began conducting ballistic missile exercises in the Taiwan Straits off two key Taiwanese ports. On March 10, 1996, the United States responded by sending two carrier battle groups into the Straits.

<sup>43</sup> At a news conference in the White House briefing room on May 26, 1994, President Clinton defined the "engagement policy" as engaging China "in a growing web of political and economic cooperation and contacts." President William J. Clinton, Remarks at Press Conference on China Trade Status (May 26, 1994), in U.S. Newswire, available in Westlaw, File No. 3823616. The President further stated his view that "the best path for advancing freedom in China is for the United States to intensify and broaden its engagement with that nation." *Id.*

<sup>44</sup> H.R. 1561, 104th Cong. (1995); S. 908, 104th Cong. (1995).

<sup>45</sup> See S. 908, 104th Cong. (1995); H.R. 1561, 104th Cong. (1995).

was vetoed by President Clinton for several reasons, none of which was related to the Hong Kong provisions.<sup>46</sup>

In the legislation, Congress attempted to amend section 301 of the United States-Hong Kong Policy Act of 1992, which relates to reporting requirements.<sup>47</sup> Congress proposed three changes: (1) requiring that an additional report be submitted by March 31, 1996, a year which had been skipped in the original public law;<sup>48</sup> (2) adding a permanent annual reporting requirement to extend beyond the year 2000;<sup>49</sup> and (3) requiring that the annual March reports include more detailed information on Hong Kong's situation.<sup>50</sup> In listing the last amendment to the United States-Hong Kong Policy Act, S. 908 specifically linked the amendment to past "deficiencies in reports submitted to the Congress" by the Clinton Administration under 22 U.S.C. § 5731.<sup>51</sup> The President's veto of the Foreign Relations Authorization Act ended this particular attempt to strengthen the Hong Kong provisions in U.S. law.

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<sup>46</sup> The Foreign Relations Authorization Act would have authorized appropriations for the Departments of State, Justice, and Commerce for fiscal year 1996. The House Committee on International Relations reported on H.R. 1561 on May 19, 1995. See H.R. REP. NO. 104-128, pt. 1 (1995). The bill was passed by the House on June 8, 1995, by a vote of 222-192. On December 14, 1995, the Senate passed an amended version of the bill by a vote of 82-16, necessitating a conference. The final Conference Report was passed by the House on March 12, 1996, by a vote of 226-172, and by the Senate on March 28, 1996, by a vote of 52-44. See H.R. CONF. REP. NO. 104-478 (1996). President Clinton vetoed the bill on April 12, 1996. A veto override attempt in the House on April 30, 1996, failed to achieve the necessary two-thirds margin to pass, and the Foreign Relations Authorization Act died.

<sup>47</sup> See S. 908.

<sup>48</sup> The language contained in S. 908 would have amended 22 U.S.C. § 5731 "by inserting 'March 31, 1996,' after 'March 31, 1995.'" *Id.* § 605(a)(2).

<sup>49</sup> S. 908 would have amended 22 U.S.C. § 5731 "by striking 'and March 31, 2000,' and inserting 'March 31, 2000, and every year thereafter.'" *Id.* § 605(a)(2).

<sup>50</sup> S. 908 added six more requirements to the eight reporting requirements in 22 U.S.C. § 5731. These additional requirements included detailed information on: (1) the Basic Law and its consistency with the Joint Declaration; (2) the openness and fairness of elections to Hong Kong's legislature; (3) the openness and fairness of the election of Hong Kong's new chief executive, and the executive's accountability to the legislature; (4) the treatment of political parties in Hong Kong; (5) the independence of Hong Kong's judiciary and its power to exercise final judgment over Hong Kong law; and (6) Hong Kong's Bill of Rights. See *id.* § 605(b).

<sup>51</sup> *Id.*

4.2.2. *Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996*<sup>52</sup>

With the Foreign Relations Authorization Act obviously in deep trouble, Members of Congress interested in amending the United States-Hong Kong Policy Act turned to the 1996 Foreign Operations Appropriations measure.<sup>53</sup> The annual foreign operations bill is the primary legislative vehicle for reviewing and funding the U.S. foreign assistance program and for influencing executive branch foreign policymaking. The Foreign Operations Appropriations bill was extraordinarily controversial, becoming at one point stalemated for three months because of international population assistance and family planning programs.<sup>54</sup> Ultimately, however, the bill passed, and the 104th Congress succeeded in enacting some of the provisions that it had attempted to enact in the doomed Foreign Relations Authorization Act.

Section 576 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act amended section 301 of the Hong Kong Policy Act of 1992 by requiring that an additional report be submitted by March 31, 1996<sup>55</sup> and requiring that specific information be included in the 1996 report.<sup>56</sup> The information required in the 1996 report included information on:

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<sup>52</sup> Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996, Pub. L. No. 104-107, 110 Stat. 704 (1996).

<sup>53</sup> See H.R. 1868, 104th Cong. (1995). The 1996 Foreign Operations Appropriations bill was reported by the House Appropriations Committee on June 15, 1995. It passed the House on July 11, 1995, and passed the Senate, amended, on September 21, 1995 by a vote of 91-9. A Conference Report was filed on October 26, 1995. The House agreed to the Conference Report on October 31, 1995, by a vote of 351-71, but with one amendment in disagreement on international family planning assistance. The Senate agreed to the Conference Report on November 1, 1995, by a vote of 90-6, with an amendment to the House amendment. After a three month stalemate, the bill was enacted by reference when conferees attached compromise language and H.R. 1868 to the Continuing Resolution on Appropriations, H.R. 3019, which the President then signed on January 26, 1996. H.R. 1868 was later enacted in its own right as Pub. L. No. 104-107 on February 12, 1996. See Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996, Pub. L. No. 104-107, 110 Stat. 704 (1996).

<sup>54</sup> See *supra* note 53.

<sup>55</sup> See Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996, Pub. L. No. 104-107, § 576(a), 110 Stat. 704, 750 (1996).

<sup>56</sup> See *id.* § 576(b).



- (1) the Basic Law and its consistency with the Joint Declaration;
- (2) the openness and fairness of elections to [Hong Kong's] legislature;
- (3) the openness and fairness of the election of [Hong Kong's] chief executive and the executive's accountability to the legislature;
- (4) the treatment of political parties [in Hong Kong];
- (5) the independence of [Hong Kong's] judiciary and its ability to exercise the power of final judgment over Hong Kong law; and
- (6) [Hong Kong's] Bill of Rights.<sup>57</sup>

Although the Foreign Operations Appropriations bill was not passed until February 12, 1996, Clinton Administration officials had anticipated the new requirements imposed by the law. The Administration submitted the additional Hong Kong report by the March 31, 1996 deadline, complete with the additional information required by the new law.

#### 4.2.3. *Omnibus Appropriations Act for Fiscal Year 1997*<sup>58</sup>

The 104th Congress turned to the Hong Kong issue for a third time in the Omnibus Appropriations Act for Fiscal Year 1997.<sup>59</sup> Once again, Congress included a provision directing that additional information be included in the annual Hong Kong report.<sup>60</sup> Like the Foreign Operations Appropriations measure, the added requirements were imposed for one report only, in this case the

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<sup>57</sup> *Id.* Although Congress could have used this bill to amend the United States-Hong Kong Policy Act to permanently require the additional information in future reports, appropriators generally like to accommodate any necessary changes in the appropriation bill for that year without amending permanent law. Thus, the Foreign Operations Appropriations bill dealt only with the requirements of the March 1996 Hong Kong report and not with the requirements of future reports.

<sup>58</sup> Omnibus Appropriations Act for Fiscal Year 1997, Pub. L. No. 104-208, § 571 (1996).

<sup>59</sup> *See id.*

<sup>60</sup> *See id.*

report due by March 31, 1997.<sup>61</sup> The additional requirements imposed by the Omnibus Appropriations Act were almost identical to those required under the Foreign Operations Appropriations Act and those in the vetoed Foreign Relations Authorization Act.<sup>62</sup>

#### 4.2.4. *Other Congressional Actions*

The 104th Congress considered legislation to extend diplomatic privileges, exemptions, and immunities to Hong Kong's Economic and Trade Offices in the United States. Currently, representatives of Hong Kong stationed in the United States receive their diplomatic privileges because of their affiliation with the British government. In recognition of the impending transition to Chinese rule and mindful of U.S. promises to treat Hong Kong as an autonomous entity separate from the P.R.C., Senate Bill 2130 sought to give Hong Kong diplomatic privileges under the provisions of the International Organizations Immunities Act,<sup>63</sup> which applies to public international organizations.<sup>64</sup> The Senate considered the bill on September 28, 1996, and passed it by

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<sup>61</sup> See *id.* The 1997 report was required by section 301 of the original United States-Hong Kong Policy Act of 1992. See 22 U.S.C. § 5731 (1994).

<sup>62</sup> Compare Omnibus Appropriations Act for Fiscal Year 1997, § 571 with Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996, Pub. L. No. 104-107, § 576, 110 Stat. 704, 750 (1996) and H.R. 1561, 104th Cong. (1995) and S. 908, 104th Cong. (1995). In the Omnibus Appropriations Act for Fiscal Year 1997, Congress reflected China's decisions on Hong Kong's legislature, changing the reporting requirement from one on the "fairness of elections for the legislature" to the new requirement of a report on China's plans to dissolve Hong Kong's elected legislature and replace it with a provisional appointed body. See Omnibus Appropriations Act for Fiscal Year 1997, § 571. The other five additional requirements are the same as those listed for the Foreign Operations Appropriations Act, and include reports on: the Basic Law and its consistency with the Joint Declaration; the openness and fairness of the election of Hong Kong's chief executive and the executive's accountability to the legislature; the treatment of political parties in Hong Kong; the independence of the judiciary and its ability to exercise the power of final judgment over Hong Kong law; and Hong Kong's Bill of Rights. See *id.*; Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996, § 576.

<sup>63</sup> See S. 2130, 104th Cong. (1996). Senate Bill 2130 was an original measure reported to the Senate by Senator Helms on September 25, 1996, without written report. See 142 CONG. REC. S11,291 (daily ed. Sept. 25, 1996).

<sup>64</sup> See 22 U.S.C. § 288 (1994).

unanimous consent without amendment.<sup>65</sup> Because the House did not act on the measure before adjournment, the issue has not been resolved.

In the past, concern for the future of Hong Kong residents has led Members of Congress to address issues outside the framework of the United States-Hong Kong Policy Act. Congress has acted several times, for example, on issues relating to visas for Hong Kong residents. The 101st Congress enacted the Immigration Act of 1990,<sup>66</sup> which establishes a separate immigrant visa quota for Hong Kong and offers a deferred visa to Hong Kong residents, thereby providing a possible future refuge without provoking an immediate exodus.<sup>67</sup> In the 103rd Congress, Senator Connie Mack and Representative John Porter were especially concerned about possible Chinese reprisals against Hong Kong journalists because of their reporting.<sup>68</sup> Each of the two Congressmen introduced legislation that would have provided a certain number of deferred visas to Hong Kong journalists and their families.<sup>69</sup>

## 5. CURRENT AND PENDING BILATERAL AND MULTILATERAL AGREEMENTS

Section 201(b) of the United States-Hong Kong Policy Act sets the broad policy parameters under which the U.S. President can continue, suspend, or judge to be inappropriate existing U.S. agreements with Hong Kong.<sup>70</sup> Hong Kong's impending change in sovereignty raises a number of unprecedented and complicated questions for the United States involving the continued validity of U.S. bilateral and multilateral agreements with Hong Kong that were negotiated, signed, and implemented while Great Britain was the sovereign. Because of the United States-Hong Kong Policy

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<sup>65</sup> See 142 CONG. REC. S11,658-59 (daily ed. Sept. 28, 1996).

<sup>66</sup> See Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

<sup>67</sup> U.S. visas generally must be used within the fiscal year that they are issued. The Immigration Act of 1990 permitted extension of the period of validity until January 1, 2002, for immigrant visas issued to certain aliens before September 1, 2001. See Immigration Act of 1990, § 154(a)(1)-(2). Hong Kong residents are the only aliens to whom this extension applies. See *id.* § 154(b).

<sup>68</sup> See 139 CONG. REC. S3867-68 (daily ed. Mar. 26, 1993) (statement of Sen. Mack); 139 CONG. REC. E587-88 (daily ed. Mar. 10, 1993) (statement of Rep. Porter).

<sup>69</sup> See S. 665, 103rd Cong. (1993); H.R. 1265, 103rd Cong. (1993).

<sup>70</sup> See 22 U.S.C. § 5721 (1994).

Act, continuation of these agreements after the transition date depends partly on the President's future decisions. The continuing viability of U.S. agreements with Hong Kong is also contingent upon Hong Kong's future capacity either to continue or to enter into international agreements in its own right, without interference from Beijing.<sup>71</sup> In some cases, application of agreements to Hong Kong may also depend on the acquiescence of China, as the new sovereign.

The United States currently maintains approximately nineteen bilateral agreements with Hong Kong, many of which actually are legal agreements with Great Britain that were "extended" to Hong Kong. The fact that bilateral U.S.-British agreements have been extended to Hong Kong in the past raises both policy and procedural questions. As of this writing, whether and how many of the approximately forty U.S. bilateral agreements with the P.R.C. may be extended to Hong Kong in the future remains unclear.<sup>72</sup>

Apart from bilateral agreements with both Hong Kong and China, the United States currently is also a party to approximately forty multilateral agreements with Hong Kong, and to approximately fifty-one multilateral agreements with the P.R.C., raising similar questions about whether and how to extend these agreements to the non-signatory party.

Twenty multilateral agreements bind all three parties. Problems should be minimal in continuing to apply these to Hong Kong after reversion to Chinese sovereignty. Their continued application, nevertheless, raises practical difficulties for the future. These difficulties include decisions on who the "central authority" is for the purposes of a particular agreement, what are the proper

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<sup>71</sup> Paragraph 3(2) of the Joint Declaration promises Hong Kong a "high degree of autonomy, except in foreign and defense affairs, which are the responsibilities of" China. Joint Declaration, *supra* note 1, para. 3(2). Paragraph 3(10) of the Joint Declaration, however, provides that Hong Kong will have the authority on its own to "maintain and develop economic and cultural relations and conclude relevant agreements with states, regions, and relevant international organizations." *Id.* para. 3(10).

<sup>72</sup> According to U.S. Treaties in Force, the United States and China have approximately 40 bilateral treaties and agreements. See U.S.T. 51-52 (1996). There may be other treaties or agreements in force, however, that deal with more specialized areas. Although additional treaties may not be accounted for in U.S. Treaties in Force, any agreement made by a branch of the U.S. government would have the effect of law.

channels of communication, and which party should be accountable for agreement breaches.

Given the status of the Sino-British Joint Declaration, an agreement between two sovereign nations, and the authority that the agreement gives to the Sino-British Joint Liaison Group ("JLG"),<sup>73</sup> the United States has had little influence over the course of legal affairs in Hong Kong during the transition process. Transition arrangements in Hong Kong were seen by the United States as delicate political matters to be handled by the British. British officials, in fact, encouraged this view. Additionally, the JLG alone had been given responsibility for reviewing and making determinations about each of Hong Kong's agreements with other countries. In each case, until that process was completed, countries with agreements with Hong Kong were unsure of what action might be needed.

By early 1996, Clinton Administration officials determined that U.S. interests would be better served if the United States became more involved in the transition process. U.S. policy-makers began to hold discussions with Chinese and Hong Kong government officials about the continued application of U.S. agreements and treaties with Hong Kong after the transition. As of the writing of this article, these discussions are ongoing.

Ultimately, the United States and China will have to reach decisions on the following issues:

- (1) Current U.S.-Hong Kong bilateral agreements that will remain in force in Hong Kong after 1997, but that will not be extended to the P.R.C.;
- (2) Current U.S.-P.R.C. bilateral agreements that will be extended to Hong Kong after 1997;
- (3) Current multilateral agreements in force for Hong

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<sup>73</sup> The "JLG" was created under Annex II of the Joint Declaration. See Joint Declaration, *supra* note 1, Annex II, § 2. Sections 4 and 5 of Annex II specify matters for consideration by the JLG to include any actions the two governments need to take "to ensure the continued application of international rights and obligations affecting Hong Kong," and actions to help the Hong Kong government "conclude agreements [on economic and cultural matters] with states, regions, and relevant international organizations." *Id.* Annex II, §§ 4(b), 5(b). The JLG is currently in the process of reviewing all bilateral and multilateral agreements to determine which should lapse, which should remain in force, and which should be replaced with other agreements.

Kong, but not for the P.R.C., that the P.R.C. will agree to continue in force in Hong Kong after 1997;

(4) Current multilateral agreements in force for the P.R.C. and the United States, but not for Hong Kong, which the P.R.C. will agree to extend to Hong Kong after 1997; and

(5) Mechanisms for administering the various agreements after 1997.

As of early 1997, U.S. Administration officials had formed preliminary positions on a number of issues. For example, they had decided which bilateral agreements concerning Hong Kong should not survive the transition. These included the mutual defense assistance agreement and the consular convention.<sup>74</sup> U.S. officials had also reached preliminary agreement about which bilateral agreements with the P.R.C. should not be extended to Hong Kong. These included agreements on matters that were either presumed or known to be within Hong Kong's sphere of autonomy after 1997, such as agreements on postal matters and intellectual property rights.<sup>75</sup> Other agreements unlikely to be extended after the transition are those that do not appear relevant to Hong Kong.<sup>76</sup> In addition, U.S. policymakers concluded that some agreements warranted further discussion as to their applica-

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<sup>74</sup> See Consular Convention, June 6, 1951, U.S.-U.K., 3 U.S.T. 3426; Mutual Defense Assistance Agreement, Jan. 27, 1950, U.S.-U.K., 1 U.S.T. 126. The consular convention and the mutual defense assistance agreement cover foreign affairs and defense, respectively. Those matters in Hong Kong will be under the authority of the P.R.C. Thus, the existing agreements, negotiated with Great Britain, will not apply after the transition.

<sup>75</sup> Although postal matters are not specifically mentioned in the Joint Declaration, U.S. officials have judged them to be within Hong Kong's control after 1997. Therefore, the parcel post agreement with the P.R.C. would not apply to Hong Kong. See Parcel Post Agreement Between the Postal Service of the United States of America and the Ministry of Posts and Telecommunications of the People's Republic of China, Oct. 9, 1980, U.S.-P.R.C., 32 U.S.T. 2920. The U.S.-China Memorandum of Understanding on the protection of intellectual property, which entered into force on January 17, 1992, will not apply to Hong Kong after the transition because the Basic Law gives control over intellectual property rights specifically to the Hong Kong government after the transition. See Basic Law, *supra* note 10, art. 105; U.S.-China Memorandum of Understanding on Protection of Intellectual Property, Jan. 17, 1992, U.S.-P.R.C., T.I.A.S. No. 12036.

<sup>76</sup> For example, agreements the United States now has with the People's Republic of China concerning embassy sites and satellite launches do not appear to affect Hong Kong.

bility to Hong Kong.<sup>77</sup>

A number of new U.S. agreements are being discussed — either with Hong Kong, when the matter concerns areas where Hong Kong has been promised autonomy, or with the P.R.C. These discussions are in various stages of progress, but expectations are that they will be completed before the July 1 transition date.<sup>78</sup> According to U.S. State Department officials, the U.S. position in these discussions is not to create new situations for the United States in Hong Kong that did not exist before. Instead, the talks are to determine how best to continue the status quo arrangements that have existed in U.S.-Hong Kong relations and that Beijing in the Joint Declaration promised can continue after the reversion of sovereignty.<sup>79</sup> Three areas of discussion have particular implications for future U.S. policy: extradition, consular, and defense.

### 5.1. *Extradition Agreement*

The recently negotiated U.S.-Hong Kong extradition agreement is among the most important pending U.S. agreements with Hong Kong. In an example of what the future may hold, controversy has already arisen over the new agreement.

On January 7, 1997, a Massachusetts Federal District Court refused to approve the Hong Kong government's extradition request for Lui Kin-Hong on one charge of bribery conspiracy

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<sup>77</sup> Agreements of this type include agreements on atomic energy, fisheries, and property. See Agreement Concerning Fisheries Off the Coasts of the United States, July 23, 1985, U.S.-P.R.C., T.I.A.S. No. 12002; Protocol Between the Nuclear Regulatory Commission of the United States of America and the State Scientific and Technological Commission of the People's Republic of China on Cooperation in Nuclear Safety Matters, Oct. 7, 1981, U.S.-P.R.C., 33 UST 4111; Convention Relating to the Tenure and Disposition of Real and Personal Property, Mar. 2, 1899, U.S.-U.K., T.S. No. 146.

<sup>78</sup> These agreements include: a new extradition treaty, which has been approved by the JLG; a bilateral investment agreement; a new consular convention; a mutual legal assistance agreement; an air services agreement; and a prisoner exchange agreement, which is currently awaiting JLG approval. In addition, the U.S. Department of Defense is currently involved in discussions about continued U.S.-Hong Kong cooperation, including discussions on an agreement to allow U.S. Navy ships to continue to make Hong Kong a port-of-call after the transition date.

<sup>79</sup> Interview with a U.S. State Department Official (Jan. 1997).

and nine substantive bribery charges.<sup>80</sup> In denying the extradition request, Chief Judge Joseph L. Tauro reasoned that it was impossible for the Crown Colony of Hong Kong, as the requesting sovereign, to prosecute and punish Lui prior to Hong Kong's reversion to the sovereignty of the P.R.C., which currently has no extradition agreement with the United States.<sup>81</sup> The court's order held that the terms of the existing U.S.-Hong Kong Extradition Treaty establish "that Lui cannot be extradited to a sovereign that is not able to try and to punish him, any more than he could be extradited to a non-signatory nation."<sup>82</sup>

The District Court's memorandum also made two other statements about pending arrangements that could complicate future U.S. policy. First, the court referred to China's harsh, non-democratic judicial system as the judicial system that would likely exist in the Hong Kong Special Autonomous Region ("S.A.R.") after July 1, 1997.<sup>83</sup> The court's view on this matter runs directly counter to China's promises of autonomy enshrined in the Basic Law, an international agreement signed by both China and the United Kingdom.<sup>84</sup> The view also contradicts the stated policy of the United States to treat Hong Kong after July 1, 1997, as an entity separate and distinct from the P.R.C.<sup>85</sup> Second, the Court's memorandum inferred that the U.S. Congress, in enacting the United States-Hong Kong Policy Act, did not intend that the existing extradition treaty would extend beyond Hong Kong's reversion "absent any further action on [Congress'] part."<sup>86</sup> Congress, however, in section 201(b) of title II of the Act, specifically approved the continuation of all treaties and international agreements already in force with Hong Kong after the 1997 transition date.<sup>87</sup> Congress' intent was to bolster

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<sup>80</sup> See *Lui Kin-Hong v. United States*, No. CIV. A. No. 96-104849-JLT, 1997 WL 37477, at \*12 (D. Mass. Jan. 7, 1997) (memorandum and order denying extradition request).

<sup>81</sup> See *id.* at \*3.

<sup>82</sup> *Id.* at \*5.

<sup>83</sup> See *id.* at \*12.

<sup>84</sup> Article 82 of the Basic Law gives power of final adjudication to Hong Kong's Court of Final Appeal, to be presided over by Hong Kong judges. See Basic Law, *supra* note 10, art. 82.

<sup>85</sup> See 22 U.S.C. §§ 5711-15 (1994).

<sup>86</sup> See *Lui Kin-Hong*, 1997 WL 37477, at \*9.

<sup>87</sup> See 22 U.S.C. § 5721(b) (1994).



public and international confidence by expressing what U.S. policy towards Hong Kong would be after the transition.

Moreover, section 201(b) of the United States-Hong Kong Policy Act gives specific congressional approval for treaties and agreements that are in force between the United States and Hong Kong directly or, as in the case of the extradition treaty under which *Lui Kin-Hong v. United States* was brought, for those treaties and agreements that are actually between the United States and Great Britain, but that have been extended to Hong Kong.<sup>88</sup> Section 202 of the Act reserves to the President alone the power to determine, by Executive Order, which of these continuing treaties or agreements should be abrogated.<sup>89</sup>

### 5.2. *Consular Discussions*

Because the operative U.S. consular agreement in Hong Kong was negotiated and signed with the United Kingdom, U.S. Administration officials for months held discussions with Chinese officials on a matter that is within the P.R.C.'s sole jurisdiction — U.S. consular arrangements in Hong Kong. A new consular agreement was finally concluded and signed during the week of March 24, 1997. According to State Department officials, the U.S. goal was to reach an agreement that will permit the status quo in Hong Kong to continue. For instance, U.S. Administration officials wanted an agreement that allows the United States to continue to share information with Hong Kong authorities on law enforcement, intellectual property rights, and export control issues. All these are currently important functions of the U.S. consulate in Hong Kong, and they reportedly have been accommodated in the new consular agreement.

Sino-U.S. consular discussions were particularly sensitive in the areas of law enforcement and security. The U.S. position in these discussions was to emphasize China's Joint Declaration promises that the status quo can continue. China's position was to offer all consulates in Hong Kong the status and treatment conveyed by the Vienna Convention. Current U.S. consular arrangements in Hong Kong are both more specific and more beneficial than the Vienna Convention, as are the consular arrangements the United

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<sup>88</sup> *See id.*

<sup>89</sup> *See id.* § 5722.

States now has with China itself.

Some observers have suggested that the United States should simply have sought to extend to Hong Kong the current U.S. consular agreement with China. U.S. officials opposed this position, preferring to emphasize Hong Kong's separate status with a separate consular agreement. U.S. officials have faced some delicate political problems in their request for "special" treatment in Hong Kong, despite the assertion of State Department officials that the U.S. goal in these consular discussions was not to create new situations for the United States in Hong Kong that did not exist before, but instead to determine how best to continue the arrangements that have already existed.

For example, U.S. officials wanted to continue to work directly with Hong Kong government authorities to share sensitive information on export control violations, alien smuggling, drug trafficking, money laundering, and other enforcement issues. One concern is that Chinese officials may try to insert themselves into day-to-day law enforcement interactions between the United States and Hong Kong after July 1997. Another example involves questions about whether U.S. law enforcement efforts in Hong Kong can remain insulated from future bilateral tensions. This is particularly relevant since in the past China has sought to impose economic and other costs on U.S. business and government activities because of political problems in Sino-U.S. relations. Although some of these questions will not be answered until the new agreement has been in force, U.S. officials nevertheless appear quite pleased with the consular agreement as signed.

### *5.3. Defense Issues*

On defense and security issues, another area outside of Hong Kong's promised autonomy, the U.S. Department of Defense continues to hold discussions with the P.R.C. to determine the extent to which current U.S.-Hong Kong defense cooperation can be continued. Currently, about seventy U.S. Navy ships a year make port visits to Hong Kong for rest and relaxation. Notification for such visits has been routinely handled through the British government in Hong Kong, and U.S. Administration officials would like these visits to continue after the transition. Although Chinese officials have reportedly agreed in principle to continue such port visits, details have yet to be finalized.

## 6. NEAR-TERM PROSPECTS FOR U.S. POLICY

Unless the U.S. government decides to confront the P.R.C. more directly concerning the Hong Kong issue, the ability of the United States to directly affect the course of events in Hong Kong during the 1997 transition and afterward seems marginal. The course of U.S.-China relations over 1995-1996 suggests that Clinton Administration officials might be hesitant to take a more confrontational approach. After several extraordinarily tense years in U.S.-China relations, Chinese and U.S. officials now appear cautiously optimistic about prospects for the near future.

U.S. and Chinese officials quietly have increased the number of talks and contacts at both the working and senior levels over the past year. U.S. policymakers seem encouraged by China's softer rhetoric and Chinese attempts to accommodate some U.S. concerns about weapons proliferation, human rights, and trade. Also encouraging are China's efforts to improve its knowledge of and relations with Congress, including the formation of a high-level working group on the U.S. Congress headed by a senior Chinese foreign policy official, Liu Huaqiu, and an increase in the size of the congressional liaison office at the Chinese Embassy in Washington.

Chinese officials appear equally encouraged at more muted rhetoric from the U.S. Congress and at the unprecedented number of Members of Congress interested in visiting China and talking with Chinese officials. Beijing may also be pleased at recent indications that some parts of the U.S. government are discussing the possibility of extending permanent MFN status to China.

### 6.1. *The Role of Congress*

Against the backdrop of current U.S.-China relations, Clinton Administration officials likely will spend at least the first half of 1997 concentrating on the pending agreements relating to the U.S. position in Hong Kong after the transition. U.S. officials appear confident that no major problems will arise in ongoing discussions, and that the parties will reach an equitable agreement on most, if not all, outstanding matters. Once an accord is reached, congressional approval likely will be required on at least some agreements.

The form of any new U.S.-Hong Kong agreement will determine the resulting congressional role. Because the United

States has a declared policy to treat an autonomous Hong Kong S.A.R. differently from the way that China is treated in U.S. policy, the transition poses unusual challenges for Clinton Administration officials in bringing matters before Congress. Agreements considered to be treaties will be referred to the Senate Foreign Relations Committee and ratified by the Senate only. Agreements not considered treaties may be reviewed by the whole Congress, or, conversely, may not need any congressional consideration. Furthermore, measures formulated as treaties will be subject to Senate "advice and consent" only; their terms cannot be altered while the Senate considers ratification. Measures formulated as legislation, on the other hand, are subject to the amendment process which allows Congress the opportunity to make legislative changes.

Given the unique circumstances that will exist for Hong Kong after the 1997 transition, there appears to be little precedent to guide how the United States should configure agreements with Hong Kong. Lacking such guidance, Clinton Administration officials appear to have greater flexibility to decide whether a pending agreement with Hong Kong should be considered a treaty or some other form of agreement.

Regardless of its ultimate role in considering pending agreements with Hong Kong, Congress will maintain an ongoing interest in the specifics of future U.S.-Hong Kong agreements, as well as in general U.S.-Hong Kong relations. The House International Relations Committee and Senate Foreign Affairs Committee, in particular, are likely to hold hearings early in 1997 on various aspects of the transition process and on the U.S. policy position with respect to Hong Kong. Given Congress' efforts to amend the United States-Hong Kong Policy Act in 1995 and 1996, Congress is likely to revisit the issue in 1997. In particular, Members of Congress may try again to extend the annual March reporting requirement mandated by the Hong Kong Policy Act beyond its current cutoff date in the year 2000.<sup>90</sup> Alternatively, Congress may seek to make permanent the additional reporting requirements mandated for the 1996 and 1997 reports in the appropriations bills for those fiscal years. In addition, Members of Congress may consider adding new reporting requirements to reflect new issues that might arise in the coming months, such as

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<sup>90</sup> See 22 U.S.C. § 5731 (1994).

reports on extradition matters and the Hong Kong government's treatment of U.S. consular officials and U.S. businesses operating within the territory.

## 7. LONGER-TERM PROSPECTS FOR U.S. POLICY

The United States has based the separate treatment it is prepared to give to Hong Kong on the promise of Chinese leaders that they can pursue a "one country, two systems" policy toward Hong Kong, and that Hong Kong will have significant autonomy over its own affairs. This is the reason for the United States-Hong Kong Policy Act — to provide the statutory basis for the U.S. government to treat one part of a sovereign nation differently from another part. Thus, despite ongoing negotiations with China, and despite U.S. talks with the Hong Kong government, the overall direction of U.S. policy ultimately depends on American satisfaction with the implementation of the "one country, two systems" concept in Hong Kong.

Despite the apparent improvements in U.S.-China relations, a number of variables and other key indicators during the coming months could affect the course of U.S. policy toward Hong Kong. The U.S. Congress is particularly susceptible to the pressure of a wide range of interest groups about developments in Hong Kong. Democracy advocates, journalists, religious groups, businesses, and others in Hong Kong may seek to pursue their differences with China by appealing for intervention by Congress and other U.S. policymakers. Any number of groups — both within China and Hong Kong and within the United States — will be anxious to present their own policy alternatives to U.S. policymakers.

Some in Hong Kong and the United States are likely to argue for a U.S. policy that is more assertive and that focuses on preserving and expanding political rights in Hong Kong. They may urge the United States to use liberally the provisions in the United States-Hong Kong Policy Act that allow the United States to suspend legal and other benefits for Hong Kong after 1997 if the P.R.C. does not allow sufficient autonomy there.<sup>91</sup> These benefits range from textile quotas to immigration quotas and technology transfer restrictions. Their loss to Hong Kong would have a strong negative impact on China and presumably could be

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<sup>91</sup> See 22 U.S.C. § 5722 (1994).

used to dissuade P.R.C. authorities from infringing too much on Hong Kong autonomy. Those supporting a more assertive U.S. policy argue that the benefits of such an approach, followed vigorously, outweigh its potential disruptions to U.S.-China relations.

Others, also generally positive about U.S. involvement in Hong Kong, argue for a more modulated and calibrated U.S. policy approach. Many, in Hong Kong in particular, say that U.S. congressional interest in the territory is beneficial for Hong Kong because it keeps Hong Kong's profile high. Many of these observers want the United States and others to show Beijing that the international community is keenly interested in the outcome in Hong Kong, and that other countries would take a negative view of any heavy-handed Chinese pressure in the territory. This group has pressed for U.S. congressional hearings on Hong Kong and increased activism by Members of Congress.

Other observers warn against greater U.S. involvement in Hong Kong. They aver that the P.R.C. is highly sensitive on the Hong Kong question and that U.S. "meddling" could cause unpredictable consequences. They have offered little critical comment on U.S. statements and policy up to this point, but they indicate that stronger statements of support or an outpouring of U.S. sympathy for democracy advocates could harden Chinese policy and seriously erode Hong Kong's autonomy.

Over the longer term, other factors may surface that could affect congressional attitudes and U.S. policy toward Hong Kong. A number of key indicators — developments to watch over the coming months in gauging trends in Hong Kong — can assist observers in analyzing prospects for the future and making decisions about the likely course of U.S. policy.

### *7.1. The Chief Executive, C.H. Tung*

Certainly one crucial factor involves the leadership of Hong Kong's new Chief Executive, wealthy shipping magnate C.H. Tung, whose role after July 1, 1997, will be similar to that played by past British Governors. In accordance with the Basic Law, the new Chief Executive was chosen by the Beijing-appointed 400-member Selection Committee, which announced its selection on December 11, 1996. Some have expressed concerns about Mr. Tung's fitness for the job — wondering, for instance, whether the lucrative Chinese government shipping contracts that saved his

company from bankruptcy years ago may make him too beholden to Beijing. But Tung has moved carefully and swiftly in his early tenure in office. His decision to retain in office senior-level civil servants — particularly Anson Chan, the highly-respected Chief Secretary and second-highest ranking official in Hong Kong — bolstered optimism that no drastic governmental changes would occur after July 1, 1997.

### 7.2. *The Civil Service*

Continuity in Hong Kong's civil service and China's approach to civil service issues are commonly viewed in Hong Kong to be crucial elements in Hong Kong's future. Although the Joint Declaration guarantees that Hong Kong's civil servants will be able to continue at their jobs with full pay and benefits — and Tung's decision to retain senior officials appears to reinforce this guarantee — concern remains about the attrition rate in the civil service. Concern is particularly high about civil service professionals, some of which continue to leave their jobs prematurely by either moving to the private sector or taking early retirement.

Currently, the vacancy rate within the civil service is reported to be below four percent, and any gaps have been filled by hiring consultants or contractors. However, of the estimated 1,400 civil servants who are considered "key" in running Hong Kong efficiently, approximately twenty percent are eligible for early retirement prior to China's takeover. If those eligible decide to elect for early retirement, government services could suffer, resulting in a sharp erosion of public confidence that, in turn, could have collateral effects. Of particular concern is the retention rate within Hong Kong's police force and judiciary — institutions essential for maintaining stability and international confidence in Hong Kong.

### 7.3. *Provisional Legislature*

Beijing's decision to dissolve the elected Legislative Council on July 1, 1997, and to replace it with an appointed temporary body, the so-called "provisional legislature," is likely to be an acid test for U.S. confidence regarding the "one country, two systems" concept. A provisional legislative body is not provided for in either the Joint Declaration or the Basic Law, and Beijing's decision to appoint such a group is viewed by many U.S. policymakers as the beginning of heavy-handed Chinese interfer-

ence in Hong Kong's promised decision-making autonomy. The behavior of the provisional legislature, legislative actions taken by the provisional legislature during its tenure, the length of time before elections are held for the first Hong Kong S.A.R. Legislative Council (and whether Beijing honors its commitments about the first legislature),<sup>92</sup> and the reaction of democracy advocates in Hong Kong to the provisional body constitute factors that are likely to have continuing repercussions for U.S. policy.

#### 7.4. *Freedom of the Press*

The extent to which China allows freedom of expression — including freedom of the press and freedom of assembly — is another key variable that can indicate likely U.S. policy towards Hong Kong. Under the Basic Law, China has accepted a number of provisions with regard to Hong Kong's political and economic future. Among these legal guarantees is one contained in Article 27 of the Basic Law, which declares:

Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike.<sup>93</sup>

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<sup>92</sup> On April 4, 1990, China's Seventh National People's Congress adopted a document entitled the Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administration Region. Paragraph 6 of this document states:

The first Legislative Council of the Hong Kong S.A.R. shall be composed of 60 members, with 20 members returned by geographical constituencies through direct elections, 10 members returned by an election committee, and 30 members returned by functional constituencies. If the composition of the last Hong Kong Legislative Council before the establishment of the Hong Kong S.A.R. is in conformity with the relevant provisions of this Decision and the Basic Law of the Hong Kong S.A.R., those of its members who uphold the Basic Law of the Hong Kong S.A.R. of the People's Republic of China and pledge allegiance to the Hong Kong S.A.R. of the P.R.C., and who meet the requirements set forth in the Basic Law of the Region may, upon confirmation by the Preparatory Committee, become members of the first Legislative Council of the Region.

<sup>93</sup> Basic Law, *supra* note 10, art. 27.



Despite the apparent clarity of such language, Chinese officials routinely make statements suggesting that either a more restrictive approach to or total disregard of these provisions will prevail after the transition to Chinese rule. China's Foreign Minister, Qian Qichen, who is also chairman of the Preparatory Committee, has been quoted as saying that journalists would be able to publish criticism, "but not rumors or lies" or personal attacks on Chinese leaders.<sup>94</sup> Apart from the dissolution of Legco, Beijing's approach to issues of personal freedom in Hong Kong could be the most volatile issues surrounding the transition.

## 8. CONCLUSIONS

A widespread view in the international community is that better relations between the United States and China — the two largest economic players in Hong Kong — will be a key component in Hong Kong's future. Some fear that Hong Kong could easily become a collateral casualty of poor U.S.-China relations. Therefore, many observers with policy suggestions to offer the United States include among them that the United States should hold regular high-level dialogues with Chinese officials, have more economic exchanges with China, and seek to minimize actions that seem to challenge China's sovereignty or authority over Hong Kong. By the same token, better U.S.-China relations could facilitate a more visible U.S. presence in Hong Kong, even in the face of objections from Beijing. Such an enhanced presence could include expanded direct U.S. contacts with Hong Kong and a continued U.S. insistence that China honor the terms of the Sino-British Joint Declaration.

Ultimately, over the next few years, the Clinton Administration and Members of Congress are likely to be in the difficult position of having to balance a number of often competing U.S. policy goals. They will have to make difficult choices between U.S. economic, political, and security goals in China on the one hand, and U.S. economic and political imperatives in Hong Kong on the other. Additionally, bearing in mind the United States-Hong Kong Policy Act, they will certainly be monitoring China's

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<sup>94</sup> Erik Guyot, *Free-Press Fears Spread to Financial News*, ASIAN WALL ST. J., Oct. 18, 1996, at 3, available in 1996 WL-WSJA 12476138.

adherence to its commitments concerning Hong Kong's future.