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# The Changing Face of Hong Kong's International Air Transport Relations

Gary N. Heilbronn\*

## I. INTRODUCTION

**S**ituated on the southwestern tip of the world's second largest, but most populous nation, Hong Kong has a significant role as both a tourist stopover and destination, as well as a major air transport gateway to the southern provinces of the People's Republic of China ("P.R.C."), which, despite the legal and political issues raised by the approaching transfer of the territory to P.R.C. sovereign control, is only likely to increase in importance in the foreseeable future.<sup>1</sup>

### A. Commercial and Trading Implications

A very substantial volume of air passengers and air cargo pass through Hong Kong each year. During 1985-86, thirty scheduled airlines operated 55,094 passenger flights and 3,424 cargo flights to and from Hong Kong's international airport, maintaining direct links to 105 cities, fifty-two of them being non-stop services.<sup>2</sup> Over a dozen non-scheduled (charter) air carriers operated 218 passenger and 496 cargo flights, with another 1,430 non-revenue flights being made.<sup>3</sup>

"An increase of 8.5 per cent in aircraft movements was recorded, bringing the annual total to 64,770. More than 80 per cent of the aircraft calling at Hong Kong were wide-bodied. . . . The scheduled air services network covered Europe, the Middle East, South Africa, North America, Australasia and Asia."<sup>4</sup>

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<sup>1</sup> ICAO, *Special Report: Air Passenger and Freight Transport The Asia/Pacific Region*, ICAO CIRCULAR 201-AT/79 (1986), at 110-16, 132-34 [hereinafter ICAO, *Special Report*].

<sup>2</sup> CIVIL AVIATION DEPT., REPORT ON CIVIL AVIATION: HONG KONG 1985-1986, at 9 (1987) (Gov't Printer H.K.) [hereinafter REPORT ON CIVIL AVIATION].

<sup>3</sup> *Id.*

<sup>4</sup> HONG KONG 1987, at 199 (1987) (Gov't Printer H.K.).

## 1. Significance of Air Transport to Hong Kong

Hong Kong's sophisticated international air transport system enhances the territory's political sway with the P.R.C. and the Asia-Pacific region generally. It also provides a valuable means of maintaining close links with Chinese and other peoples elsewhere in the world and brings significant economic benefits to the territory. Hong Kong earned an estimated \$17,300 million from tourism during the year, an increase of 20% over the 1985 amount.<sup>5</sup>

A total of 10.6 million passengers passed through the airport in 1986, compared with 9.8 million the previous year. . . . General cargo including manufactured goods imported, exported and re-exported by air totalled 536,000 tons compared with 430,000 tons in 1985. The value of airborne goods totalled \$122,927 million. Viewed against Hong Kong's total trade . . . imports by air made up about 21 per cent, exports by air 28 per cent and re-exports by air about 19 per cent in value terms respectively.<sup>6</sup>

In broader trade terms, the value of all "trade in services" to Hong Kong in 1985 amounted to about \$80 billion (17% of total trade in goods) with shipping, aviation and travel services, banking, financial and insurance services together accounting for 90% of the total export of services.<sup>7</sup>

## 2. Competitive Airport Development

While business interests and government in Hong Kong debate the possibility of building newer and bigger facilities to ease the burden on Kai Tak International Airport,<sup>8</sup> moves are afoot to build new international airports at nearby Macau and neighboring Shenzhen province, both some fifty kilometers from downtown Hong Kong.<sup>9</sup> The "traffic diversion" possibilities (intentions) of these proposals are relatively obvious, but such plans are a long way from fruition<sup>10</sup> and, in view of the

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<sup>5</sup> *Id.* at 225. Unfortunately, precise figures relating solely to air transport are not available.

<sup>6</sup> *Id.* at 198.

<sup>7</sup> *Id.* at 13.

<sup>8</sup> *E.g.*, *Talks on Airport Imminent*, S. China Morning Post, Feb. 17, 1987, at 3 [hereinafter S.C.M.P.]; *New Airport Back on the Agenda*, S.C.M.P., June 6, 1987, at 1; *Second Airport Top Priority for Government*, S.C.M.P., June 14, 1987, at 1. Services at Kai Tak are also limited by a noise-related curfew.

<sup>9</sup> *E.g.*, Westlake, *Surrounded by Runways*, FAR E. ECON. REV., July 2, 1987, at 68; *Reach for the Skies*, Sunday Morning Post, June 14, 1987, (Sunday Spectrum, Sun. ed. of S.C.M.P.), at 1; *China's Grand Airport Plans*, Sunday Morning Post, June 21, 1987; *China Gives Macau Approval for Airport*, S.C.M.P., Aug. 7, 1987.

<sup>10</sup> The implications of the "airport competition" issue seem to be that the P.R.C. either condones this kind of competitive enterprise amongst present and future regions; or alternatively, it would not be against seeing a diminution of Hong Kong's present dominance as the international air

international air transport infrastructure and tourism attractions of Hong Kong, they are unlikely to substantially detract from Hong Kong's position as one of the major regional air transport hubs.<sup>11</sup>

### B. *Context of International Air Transport Relations*

Hong Kong is a British colony and since international air transport relations took on their modern, post-World War II form, the territory has been carried along "under the wing" of the United Kingdom, whose government has been completely responsible for all of Hong Kong's international relations.<sup>12</sup> Though this situation will only continue until the passing of sovereignty over Hong Kong to the P.R.C. on July 1, 1997,<sup>13</sup> there have already been substantial policy shifts. Indeed, some significant legal issues are being dealt with in the field of civil aviation in the early phases of the "transitional period" between the signing of the Joint Declaration on the Question of Hong Kong ("Joint Declaration")<sup>14</sup> and the transfer of sovereignty.

The loss of Hong Kong's dependence upon the United Kingdom, and the P.R.C.'s seemingly generous delegation of authority with respect to international air transport relations<sup>15</sup> to the post-1997 Hong Kong government has meant that what could be called a "repatriation" of Hong Kong's international air transport laws is also occurring.<sup>16</sup> It is the nature, scope and legal context of Hong Kong's changing role in international air transport, with its important implications both for Hong

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"gateway" to the southern part of the continent, although to adopt the latter may be reading too many political undertones into the situation.

<sup>11</sup> ICAO, *Special Report*, *supra* note 1.

<sup>12</sup> See *infra* part II.

<sup>13</sup> It has been argued that the United Kingdom "forced the hand" of the P.R.C. in the early 1980s, precipitating the need for a formal settlement of the future of Hong Kong by 1997, when the British leasehold over the New Territories expires, when in fact, the status quo could have been maintained by inaction for several decades to come. See Wesley-Smith, *Settlement of the Question of Hong Kong*, 17 CALIF. W. INT'L L.J. 116, 127 (1987); Mushkat, *The Transition From British to Chinese Rule in Hong Kong: A Discussion of Salient International Legal Issues*, 14 DEN. J. INT'L LAW & POL'Y 171 (1986).

<sup>14</sup> Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, 1984 Gr. Brit. T.S. No. 20, Cmnd. 9352, Annex I, *reprinted in* 23 I.L.M. 1371 (reproduced in a White Paper published by Her Majesty's Government in London on September 26, 1984). The three-page joint declaration of policies, is elaborated upon in Annex I which contains a substantial section (IX) dealing solely with civil aviation.

<sup>15</sup> The precise nature and scope of authority granted to Hong Kong in civil aviation matters is discussed below. See *infra* part III.

<sup>16</sup> See *id.* In view of the fact that there is no domestic air carriage within Hong Kong, only international air transport laws are relevant here. Naturally, Hong Kong's "rejoining" the P.R.C., does raise the issue of laws governing future domestic air travel between what is now Hong Kong and anywhere else in P.R.C. territory. However, this issue will be much more subject to P.R.C. policy at that time and is outside the scope of the present Article.

Kong's legal system and the traditional principles of international air transport law and relations, which is the subject of the following discussion.

## II. UNDER BRITISH RULE

For almost all intents and purposes, the international air law of Hong Kong is that of the United Kingdom since relevant U.K. law (modified as necessary) has been applied to Hong Kong, either expressly or by implication.<sup>17</sup> Certain local aspects of Hong Kong's international air transport operations are governed by local enactments,<sup>18</sup> and the Hong Kong government's own Civil Aviation Department and the Air Transport Licensing Authority ("ATLA") administers all relevant laws and regulations.<sup>19</sup> On the other hand, Hong Kong's international aviation relations have been handled solely by the United Kingdom, as colonies have no independent status in international law.<sup>20</sup> Naturally, any international civil aviation conventions to which the United Kingdom is not a party, such as the Convention on the International Recognition of Rights in Aircraft<sup>21</sup> involving aircraft registration obligations,<sup>22</sup> have no

<sup>17</sup> The application of English Law to Hong Kong was clarified by The Application of English Law Ordinance Cap. 88 L.H.K. 1971 ed. (1966). This gave the force of law in Hong Kong, to *inter alia* any UK acts "which applied to Hong Kong by virtue of — (i) any Order in Council; (ii) any express provision in the enactment, or by necessary implication; or (iii) any Ordinance."

<sup>18</sup> *E.g.*, the Civil Aviation (Births, Deaths & Missing Persons) Ordinance and Regulations, Cap. 173 L.H.K. 1984 ed. (1984), which provides for the keeping and preservation of records of births, deaths, and persons missing and believed dead as a consequence of an accident occurring anywhere in the world or during a journey in an aircraft registered in Hong Kong; the Air Passenger Departure Tax Ordinance, Cap. 140 L.H.K. 1985 ed. (1985), providing for the imposition and payment of an air passenger tax for passengers intending to depart from Hong Kong; the Civil Aviation (Aircraft Noise) Ordinance, S.I. 1986, No. 33 (1986), providing for the Director of Civil Aviation (D.C.A.) to restrict the operation in Hong Kong of certain aircraft with excessive noise emission. There are a number of other Hong Kong ordinances and subsidiary legislation relating to airports, air transport licensing and transportation of dangerous goods.

<sup>19</sup> For discussion of ATLA, see *infra* note 48 and accompanying text.

<sup>20</sup> See D.W. GREIG, INTERNATIONAL LAW 100-02 (1976).

<sup>21</sup> The Convention on the International Recognition of Rights in Aircraft, June 19, 1948, ICAO Doc. 1195, 310 U.N.T.S. 151 [hereinafter 1948 Geneva Convention], requires its contracting states to recognize four categories of private rights in aircraft registered in other contracting states: (i) rights of property in aircraft; (ii) rights to acquire by purchase and have the possession of aircraft; (iii) rights to possess aircraft under leases of six months or more; (iv) mortgages and similar rights in aircraft, created contractually as security for payment of an indebtedness (art. 1). The convention came into force on Sept. 17, 1953 and has at present forty-seven parties. ICAO ANNUAL REPORT OF THE COUNCIL—1983, at 162 [hereinafter ICAO ANNUAL REPORT]. See generally Wilberforce, *The International Recognition of Rights in Aircraft*, 2 INT'L L.Q. 421 (1949).

<sup>22</sup> This may be an important issue for Hong Kong as under the 1984 Joint Declaration it is entitled to "keep its own aircraft register in accordance with provisions laid down by the Central People's Government concerning nationality marks and registration marks of aircraft." Convention on International Civil Aviation, signed Dec. 7, 1944 ICAO Doc. 2187, T.I.A.S. 1591, 61 Stat 1180 (vol. 2) at Annex I, § IX [hereinafter 1944 Chicago Convention] (Hong Kong's obligations are found

place in the present law of Hong Kong, though nearly fifty states, including the U.S., have ratified this convention. Nor will this convention be likely to apply formally in the foreseeable future, as the P.R.C. is not a party.

### A. *Public International Air Law*

All of Hong Kong's public international air law obligations derive from those accepted by the United Kingdom, which has played a significant role in international aviation relations since their inception.<sup>23</sup> Basically, laws governing the broad legal and regulatory framework of commercial international air transport and relevant international criminal law already apply in Hong Kong. The difficulty is that their mode of application will have to change radically before 1997.

#### 1. Relevant International Conventions

Hong Kong is not a party to any international conventions relating to air transport, nor a member<sup>24</sup> of the International Civil Aviation Organization ("ICAO"),<sup>25</sup> and its air carriers have little involvement with the International Air Transport Association ("IATA").<sup>26</sup> However, the

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in Annex VII). At present, Hong Kong has no aircraft register and it would appear more desirable for Hong Kong voluntarily to accept the additional obligations imposed under the convention (*see supra* note 21) prior to 1997, after which time, even proposals to develop the existing system in this manner may become unlikely and more subject to political events and forces. *See infra* part III.

<sup>23</sup> *See generally* SHAWCROSS & BEAUMONT, *AIR LAW* (1983).

<sup>24</sup> Hong Kong government representatives at present participate as part of the U.K. delegation to the International Civil Aviation Organization (ICAO), but only in the consideration of regional matters. They also participate when the United Kingdom negotiates bilateral air services agreements affecting Hong Kong and may be called on to speak on technical matters. *See* Hong Kong's Status and Participation in International Organizations, Att'y Gen. Chambers (Rev. Nov. 1984) (Hong Kong), *cited in* Kan, *Some Notes on Hong Kong's Foreign Relations* 7 (May 1985) (unpublished paper).

<sup>25</sup> *See* 1944 Chicago Convention, *supra* note 22. ICAO officially came into existence on April 4, 1947 pursuant to Part II of the Convention on International Civil Aviation, which has some 155 signatories, giving it virtually universal application. For details of how that organization functions, *see generally* BIN CHENG, *LAW OF INTERNATIONAL AIR TRANSPORT* (1962).

<sup>26</sup> IATA is the international airline industry's trade association, though its powers are considerably wider. Principles for the resolution of commercial aviation issues, which were controversial and could not be agreed upon in the 1944 Chicago Convention, concern the number of flights that should be allowed on each route (capacity) and price structures to be used. Negotiations concerning capacity were left to governments in bilateral air services agreements [hereinafter BASA], and price structure negotiation was delegated to interested airlines (usually in IATA) in most BASAs. A significant secondary function is IATA's Agency Administration: a worldwide program regulating the commercial and legal relations between international airlines, and their accredited passenger and cargo sales agents. *See* J.W.S. BRANCKER, *IATA AND WHAT IT DOES* (1977); B. GIDWITZ, *THE POLITICS OF INTERNATIONAL AIR TRANSPORT* (1980); L. Cooper, *The IATA Airline-Agency Relationship*, in *ESSAYS IN AIR LAW* 27 (A. Kean ed. 1982). Hong Kong's major international air carrier, Cathay Pacific Airways Ltd., has never been a member of IATA, though a new, small com-

1944 Chicago Convention,<sup>27</sup> and the International Air Services Transit Agreement<sup>28</sup> do expressly extend to Hong Kong.<sup>29</sup> The 1944 Chicago Convention has institutionalized the fundamental principle of sovereign state control over all international air services and machinery for stan-

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petitor, Hong Kong Dragon Airlines [hereinafter Dragonair], joined IATA on May 25, 1987. *Dragonair to Join Airline Cartel*, Sunday Morning Post, May 24, 1987. IATA accredited agents make up only a small proportion of all Hong Kong's travel and freight forwarding agents. There are eighty-seven IATA accredited agent locations in Hong Kong amongst over 1000 licensed travel agents. Interview with IATA's Agency Administration Representatives, Hong Kong.

<sup>27</sup> See 1944 Chicago Convention, *supra* note 22. Aside from creating ICAO (and replacing the 1926 International Technical Committee of Aerial Legal Experts (CITEJA) with ICAO's Legal Committee) as well as replacing certain pre-World War II treaties and institutions [art. 80] notably 1) the International Convention on Air Navigation, also known as the 1919 Paris Convention, which had set up the International Commission for Air Navigation (CINA) and 2) the 1928 Pan-American Convention on Commercial Aviation, Feb. 20, 1928, 129 L.N.T.S. 223, (also known as the 1928 Havana Convention), the 1944 Chicago Convention formally re-affirmed national control over air services in arts. 1, 2, 5 and 6. With respect to *scheduled* services, the provisions are:

Article 1: The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

Article 2: For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.

Article 6: No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with such permission or authorization.

Fundamental to the modern system of international commercial air transportation, is sovereign state control over both "scheduled" and "non-scheduled" (charter) air services. Rights to operate charter air services are rarely exchanged in bilateral air services agreements, but are approved or rejected independently by all governments concerned. See ICAO, DEFINITION OF A SCHEDULED INTERNATIONAL AIR SERVICE, ICAO Doc. 7272/2 (1985). See *infra* notes 53 and 148. See P.P.C. Haanappel, *Bilateral Air Transport Agreements 1913-1980*, 5 INT'L TRADE LAW J. 245 (1980) [hereinafter Haanappel, *Bilateral Agreements*]; P.P.C. Haanappel, *The International Air Transport Association (IATA) and the International Charter Airlines*, 4 ANNALS OF AIR & SPACE LAW 143 (1979) [hereinafter Haanappel, *IATA*]; A. Lowenfeld & F. Mendelsohn, *Economics, Politics and Law: Recent Developments in the World of International Air Charters*, 44 J. AIR L. & COM. 679 (1970).

<sup>28</sup> The International Air Services Transit Agreement, signed Dec. 7, 1944, entered in force Jan. 30, 1945, ICAO Doc. 834, 84 U.N.T.S. 389 [hereinafter Transit Agreement] also appended to the 1944 Chicago Convention, has some ninety-eight signatories with notable exceptions being the P.R.C., U.S.S.R. and F.R.G. (For up-to-date membership, see the most recent issue of ICAO ANNUAL REPORT OF THE COUNCIL.) It applied only to scheduled international air transport and exchanged "technical rights" ("first and second freedoms of the air") i.e., the rights to fly over all other signatories territory ("overflight") for non-commercial ("technical") reasons. However, the exercise of such rights are nonetheless subject to article 6 of the 1944 Chicago Convention which requires state permission for the operation of scheduled services, leading to the suggestion that any privileges granted under the Transit Agreement are illusory. See Denaro, *State Jurisdiction in Air-space Under International Law*, 36 J. AIR L. & COM. 668, 697 (1970).

<sup>29</sup> The Civil Aviation Act 1949 (Overseas Territories) Order 1969, S.I. 1969, No. 592, App. III L.H.K. 1972 ed. (1969), applies part of the Civil Aviation Act, 1949, 12 & 13 Geo. 6, ch. 67, to give effect to the 1944 Chicago Convention's obligations and the Transit Agreement in Hong Kong. See 1944 Chicago Convention, *supra* note 22; Transit Agreement *supra* note 28.

standardizing rules<sup>30</sup> and procedures for technical and operational safety in the air (though certain legal implications of these matters still give rise to controversy).<sup>31</sup> The Technical Annexes to the Convention also extend to Hong Kong<sup>32</sup> the bulk of flight operational and airport safety provisions and treaties dealing with offenses on board aircraft,<sup>33</sup> hijacking,<sup>34</sup> and the protection of aircraft and civil aviation.<sup>35</sup>

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<sup>30</sup> See *supra* note 27 and accompanying text; *infra* note 32 and accompanying text. Though fundamental, the 1944 Chicago Convention was, however, almost completely silent on commercial issues. There is merely reference to the prevention of "economic waste caused by unreasonable competition" [art. 44(e)] and the need to ensure that the rights of all contracting states are respected and that they have a "fair opportunity to operate international airlines" [art. 44(f)]. Implicit in these two notions is the approval of "regulated competition" as the means of ensuring balanced exploitation of world resources while maintaining scope for the development and operation of air services by all nations.

<sup>31</sup> For example, it is often argued that an "open skies" philosophy should be adopted internationally. That is, commercial air services should operate freely between states—without needing permissions, or being subject to control over capacity and pricing—similar to maritime services; making bilateral air services agreements of much less significance and potentially redundant. Incidental issues traditionally dealt with in the administrative clauses, could then be included in the multilateral trade negotiation of the General Agreement on Trade and Tariffs (GATT), Oct. 10, 1949, T.I.A.S. 2100, 64 Stat B141 (vol. 3). There is already some support for the view that air transport should be brought within the GATT in the context of "trade-in-services."

<sup>32</sup> Mainly through the Civil Aviation Act of 1949 (Overseas Territories) Order 1969, *supra* note 29, and the Air Navigation (Overseas Territories) Order 1977, S.I. 1977, No. 422, App. III NI L.H.K. 1980 ed. (1977), as well as various subsidiary legislation.

<sup>33</sup> The Tokyo Convention Act 1967 (Overseas Territories) Order 1968, S.I. 1968, No. 1864, App. III CS1 L.H.K. 1969 ed. (1968), extends to Hong Kong much of the effect given by the United Kingdom to the Convention on Offenses and Certain Other Acts Committed On Board Aircraft, Dec. 4, 1969, ICAO Doc. 8364, 704 U.N.T.S. 709 [hereinafter 1963 Tokyo Convention] and at present has 117 parties (ICAO ANNUAL REPORT, *supra* note 21, at 163). It deals with the powers of aircraft commanders as well as sabotage and acts of violence against aircraft, crew and passengers. The Extradition (Tokyo Convention) Order 1971, S.I. No. 2103, App. III DB1 L.H.K. 1982 ed., deems crimes committed on board aircraft in flight to be within the jurisdiction of any countries to which the 1963 Tokyo Convention and the Extradition Act, 1870, 33 & 34 Vict., ch. 52 apply, that is, when the aircraft is registered in a state, party to the convention or a country with whom the United Kingdom has an extradition treaty.

<sup>34</sup> The Hijacking Act 1971 (Overseas Territories) Order 1971, S.I. 1971, No. 1739, App. III, CZ1 L.H.K. 1974 ed., extends to Hong Kong, much of the Convention For the Suppression of Unlawful Seizure of Aircraft, effective Oct. 14, 1971, ICAO Doc. 8920, 860 U.N.T.S. 105 [hereinafter 1970 Hague Convention] and has 121 parties to it. ICAO ANNUAL REPORT, *supra* note 21, at 164. It creates the crime of hijacking and provides legal measures to deter it. The Extradition (Hijacking) Order 1971, S.I. 1971, No. 2102, App. III, DA1 L.H.K. 1982 ed., extends the Extradition Act, 1870, § 16, so that any new offenses under the legislation become extradition crimes within the jurisdiction of state parties to the convention regardless of whether the United Kingdom has extradition treaties in force.

<sup>35</sup> The Protection of Aircraft Act 1973 (Overseas Territories) Order 1973, S.I. 1973, No. 1757, App. III, DF1 L.H.K. 1974 ed. (1973), extends to Hong Kong much of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, effective Jan. 26, 1973, ICAO Doc. 8966, 974 U.N.T.S. 177 [hereinafter 1971 Montreal Convention], and has 119 parties to the convention (ICAO ANNUAL REPORT, *supra* note 21, at 165). It provides new offenses and severe



## 2. Traffic Rights—Bilateral Air Services Agreements

Since the International Air Transport Agreement,<sup>36</sup> which amounted to an almost total exchange of "commercial rights" for the airlines of the (now eleven) state signatories,<sup>37</sup> gained only minimal support amongst nations, international air services agreements have been entered into by virtually all states of the world to exchange commercial traffic rights on a bilateral or multilateral basis.<sup>38</sup> Hong Kong has always been treated as a point of origin or destination within the United Kingdom, and the rights relating to all international air services passing through the colony, have been negotiated by the United Kingdom and incorporated in various U.K. bilateral air services agreements.<sup>39</sup>

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penalties for crimes against aircraft and civil aviation (though the scope of application of the treaty to offenses against aircraft "in service" is somewhat wider than that of the English provisions applying in Hong Kong). The Extradition (Protection of Aircraft) Order 1973, S.I. 1973, No. 1756, App. III DE1 L.H.K. 1982 ed. (1973), extends the Extradition Act of 1870 (U.K.) to Hong Kong so that all new offenses are extradition crimes within the jurisdiction of states party to the convention whether the United Kingdom has extradition treaties in force or not. *Supra* note 33.

<sup>36</sup> International Air Transport Agreement, signed Dec. 7, 1944, effective Feb. 8, 1945, ICAO Reg. No. 1003, 171 U.N.T.S. 387. It set out and purported to exchange the so-called "Five Freedoms of the Air" (see below), now recognized to include 6th and 7th freedom traffic despite some controversy as to precisely what 5th, 6th and 7th freedom traffic are (see BIN CHENG, *supra* note 25, at 8-17):

### The Freedoms of the Air

#### *Technical Rights*

First Freedom: the right of an airline of state A to fly over state B without landing [right of "overflight"]

Second Freedom: the right of an airline of state A to land in the territory of state B for "non-commercial" reasons ["non-traffic" landing rights].

#### *Traffic Rights*

Third Freedom: the right of an airline of state A, to set down in state B, traffic [passengers, cargo, mail] picked up in state A.

Fourth Freedom: the right of an airline of state A, to pick up or set down in state B, traffic destined for state A.

Fifth Freedom: the right of an airline of state A to pick up or set down in state B, traffic coming from or destined for state C.

Sixth Freedom: (a) the "type of fifth freedom traffic" which passes from state A to state B with the airline of state C and via a "stopover" in the territory of state C — arguably no more than a combination of 3rd and 4th Freedom traffic; or

(b) "cabotage": the right of an airline of state A to carry traffic originating in state B, between two points within the territory of state B — normally considered to be purely "domestic" traffic of state B.

See 1944 Chicago Convention, *supra* note 22, art. 7.

<sup>37</sup> ICAO ANNUAL REPORT, *supra* note 21, at 153-56.

<sup>38</sup> See Haanappel, *Bilateral Agreements*, *supra* note 27, at 245.

<sup>39</sup> Aside from provisional arrangements with certain states, for example, the P.R.C., Taiwan and Nepal, which for political or other reasons have not been formalized, there are some two dozen bilateral air service agreements of the United Kingdom which at present, authorize scheduled international air services into Hong Kong (note that Hong Kong is now itself party to the Netherlands and Switzerland agreements: see *infra* note 109). They are with the following states (though some

Prior to 1986, no special procedure was followed in Hong Kong when the United Kingdom negotiated, entered into, applied or gave legal effect to any of the U.K.'s bilateral air services agreements affecting Hong Kong. Naturally, some consultation with local international air carriers occurred prior to and during negotiations, and Hong Kong government representatives were usually invited to attend negotiations when an agreement involved air traffic rights to, from, or through Hong Kong.<sup>40</sup> After being given legal effect in conformity with U.K. law, the U.K. agreements were simply published in the relevant treaty series. Although upon such publication the agreements acquired evidentiary value in Hong Kong courts under section 98(2) of the Interpretation and General Clauses Ordinance,<sup>41</sup> they did not become part of Hong Kong's municipal law (nor for that matter the municipal law of the United Kingdom),<sup>42</sup> as they are not given such force by local legislation.<sup>43</sup> On the international level, bilateral and multilateral air service agreements are "treaties"<sup>44</sup> and thus have force in public international law, but merely as

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may have been amended by Exchanges of Notes): Australia [Cmnd. No. 410, Feb. 7, 1958] entry into force for Hong Kong (hereinafter "eif HK") Feb. 7, 1958;; Burma [Cmnd. No. 8764, Oct. 25, 1952] eif HK Oct. 25, 1952; Canada [Cmnd. No. 7857, Aug. 19, 1949] eif HK Aug. 19, 1949 (soon to be replaced by a HK negotiated agreement); Ceylon [Cmnd. No. 7859; Aug. 5, 1949] eif HK May 15, 1969 by Cmnd. No. 4111; France [Cmnd. No. 6787, Feb. 28, 1946] eif HK Feb. 28, 1946; Germany (FRG) [Cmnd. No. 137, Jul. 22, 1955] eif HK Mar. 7, 1957; India [Cmnd. No. 8451, Dec. 1, 1951] eif HK Apr. 1, 1951; Indonesia [Cmnd. No. 5433, Jun. 28, 1973] eif HK Jun. 28, 1973; Italy [Cmnd. No. 8413, Nov. 22, 1976] eif HK Feb. 17, 1979; Japan [Cmnd. No. 8937, Dec. 29, 1952] eif HK Jul. 31, 1953; Kenya [Cmnd. No. 7710; Jul. 5, 1979] eif HK Jul. 5, 1979; Korea [Cmnd. No. 9263, Mar. 5, 1984] eif HK Mar. 5, 1984; Kuwait [Cmnd. No. 1168, May 24, 1960] eif HK Jan. 24, 1977 [by Cmnd. No. 7224]; Lebanon [Cmnd. No. 8739, Aug. 15, 1951] eif HK Jul. 11, 1974 [by Cmnd. No. 5902]; Malaysia [Cmnd. No. 5373, May 24, 1973] eif HK May 24, 1973; New Zealand [Cmnd. No. 8784, Oct. 4, 1982] eif HK Oct. 4, 1982; Philippines [Cmnd. No. 9596 Jan. 31, 1955] eif HK Jan. 31, 1955; Portugal [Cmnd. No. 6927, Dec. 6, 1945] eif HK Apr. 3, 1952 [by Cmnd. No. 8597]; Singapore [Cmnd. No. 4619, Jan. 12, 1971] eif HK Jan. 12, 1971; South Africa [Cmnd. No. 7858, Oct. 26, 1945] eif HK Dec. 1, 1972 by Cmnd. No. 5222; Switzerland [Cmnd. No. 8284, Apr. 5, 1950] eif HK May 1, 1957 by Cmnd. No. 217 (now replaced by a Hong Kong-Switzerland agreement, *see* note 109); Thailand [Cmnd. No. 8265, Nov. 10, 1950 (corrected Cmnd. No. 8738)] eif HK Nov. 10, 1950 and USA [Cmnd. No. 7016, Jul. 23, 1977] eif HK Jul. 23, 1977] eif HK Jul. 23, 1944: Details supplied in correspondence dated Jul. 4, 1987 from the Director for Civil Aviation (HK).

<sup>40</sup> *See* Kan, *supra* note 24. Since new powers have accrued to Hong Kong following the signing of the 1984 Joint Declaration, new procedures exist and are discussed *infra* part III.

<sup>41</sup> Cap. 1 L.H.K. 1986 ed.

<sup>42</sup> The same principle applies in Hong Kong as in the United Kingdom and most other commonwealth countries. *See* Pan-American World Airways Inc. v. Dept. of Trade, [1976] 1 Lloyd's Rep. 257, 260.

<sup>43</sup> In the U.S., these intergovernmental agreements are negotiated and signed as an exercise of the executive power of the President without need for "advice and consent" of the Senate. *See* U.S. CONST. art. II, § 2.

<sup>44</sup> Article 2(1) of the 1969 Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679 (from UN Doc. A/CONF. 39/27), defines "treaty" as: "an international agreement concluded between the States in written form and governed by international law whether embodied in a single

intergovernmental agreements so that only the actual state parties are bound by them and may enforce them.<sup>45</sup>

### 3. Licensing of International Air Services

Commercial licensing of local (non-foreign) airlines operating international air services out of Hong Kong is a totally local affair, although the authority for it derives from the Civil Aviation Act 1949 (Overseas Territories) Order 1969 (U.K.).<sup>46</sup> Licensing of scheduled international services by local and British colonial carriers<sup>47</sup> is carried out by the ATLA<sup>48</sup> and a permit for foreign scheduled air carriers (those not prescribed in regulation 3) is also necessary under regulation 20A.<sup>49</sup> As far as such scheduled services operated by foreign airlines are concerned, the nature and extent of their rights derive from bilateral air services agreements<sup>50</sup> and the usual requirement therein that upon each party's receipt

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instrument or in two or more related instruments and whatever its particular designation." See also LORD MCNAIR, *LAW OF TREATIES* 4 (1961); Statute of the International Court of Justice, art. 38(1), 59 Stat. 1055 (1945), T.S. No. 993.

<sup>45</sup> As intergovernmental agreements, they are similar to private contracts, they merely create rights and legally binding obligations for the state parties. Violation of an accord by party A may justify: (i) party B refusing to abide by its obligation to permit party A's airline operate commercial services in party B's territory; (ii) a diplomatic protest; (iii) arbitration proceedings; or (iv) legal action in the International Court of Justice. Almost inevitably, a negotiated political solution is opted for. See LORD MCNAIR, *supra* note 44, at 13-22; D.W. GREIG, *supra* note 20, at 7-9.

<sup>46</sup> Civil Aviation Act 1949 (Overseas Territories) Order 1969, *supra* note 29. Schedule 2, paragraph 5, of the Civil Aviation Act authorizes the Governor to make regulations for the purpose of commercial licensing. These regulations were promulgated on Nov. 4, 1949 in the Air Transport (Licensing of Services) Regulations, App. I, G1 L.H.K. 1985 ed., and have been amended on several occasions.

<sup>47</sup> See Air Transport (Licensing of Services) Regulations, *supra* note 46, reg. 3. These regulations also set out in detail the criteria which are applied by the authority in exercising its discretion to grant licenses. *Id.* at reg. 11. The existence of other air services and their duration as well as their efficiency and regularity; the demand; the extent to which the applicant will be able to provide a safe, regular, frequent, punctual, efficient and satisfactory service at reasonable charges; the aircraft to be used; the financial resources of the applicant and general conditions of employment for crew etc., are to be taken account of by the ATLA. See *infra* note 48 and accompanying text.

<sup>48</sup> Established by regulation 4 of the Air Transport (Licensing of Services) Regulations, *supra* note 46. ATLA is authorized to license aircraft used for the

carriage in the Colony of passengers, mail or cargo for hire or reward upon any scheduled journey between two places, one of which is the Colony . . . [and] . . . registered in . . . (ii) any of the Channel Islands or the Isle of Man; (iii) any colony for the government of which Her Majesty's Government in the United Kingdom is responsible; or (iv) any country or place; outside Her Majesty's dominions, in which for the time being She has jurisdiction in right of Her Majesty's Government in the United Kingdom.

*Id.* at reg. 3(1). Note that U.K. carriers are treated as foreign carriers, since 1985 Amendments to the regulations.

<sup>49</sup> Air Transport (Licensing of Air Services) Regulations, *supra* note 46, reg. 20A.

<sup>50</sup> See 1944 Chicago Convention, *supra* note 22, art. 6. Special permission or other authorization of the relevant contracting state to the convention is required for the operation of scheduled international air services over or into the territory of that state. Under article 5, when permission is

of the other's designation of an airline to operate the routes described in the agreement, it shall grant without delay to the airlines so designated the appropriate operating authorization.<sup>51</sup> Of the some thirty-four scheduled international passenger and cargo carriers licensed to operate in Hong Kong,<sup>52</sup> only two (Cathay Pacific Airways and Hong Kong Dragonair) at present seek to obtain licenses from ATLA.

Permits for the operation of non-scheduled international air services in the Colony must be obtained from the Director of Civil Aviation<sup>53</sup> who also grants Air Operators' certificates (to carriers meeting the usual technical, operational and safety standards).<sup>54</sup> Some eighteen non-scheduled international passenger and cargo carriers now hold permits to operate in Hong Kong.<sup>55</sup>

### B. *Private International Air Law*

Hong Kong's private international air law derives from the U.K.'s participation in various international conventions, as enacted into local law, and English case law found in:

[t]he common law and rules of equity . . . so far as they may be applicable to the circumstances of Hong Kong or its inhabitants and subject to such modifications thereto as such circumstances may require, save

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required for non-scheduled (charter) operations (always, for commercial operations), then it is also obtained from the contracting state.

<sup>51</sup> Usually in article 3—Designation and Authorization. See Air Services Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, July 23, 1977, ICAO Reg. No. 2703, 28 U.S.T. 5367, T.I.A.S. 8641 [hereinafter Bermuda II] (though subject to proof of "substantial ownership and control" of the airline by the nationals of the designating party and certain other technical requirements).

<sup>52</sup> See REPORT ON CIVIL AVIATION, *supra* note 2, apps. VI-VIII, Civil Aviation Department for the most up-to-date figures.

<sup>53</sup> Though in accordance with article 5 of the 1944 Chicago Convention, permits are only required for a non-scheduled service of an aircraft which "takes on or discharges passengers, cargo, or mail in the Colony". See Air Transport (Licensing of Services) Regulations, *supra* note 46, reg. 22(3). The procedures, criteria, etc. involved in the grant of charter licenses are set out in A.I.P. Hong Kong FAL 1-3 TO FAL 1-8 (Aug. 27, 1987). The main criteria are that the applicant "has reasonably demonstrated that corresponding scheduled services cannot satisfy a genuine demand by providing the service or capacity required at the price offered and, in the case of applications made by airlines based outside Hong Kong, that the government of the country in which the airline is based would afford no less favorable treatment to a Hong Kong based airline making a similar application." *Id.* at cl. 5.1. Also, it is a condition of all such permits that the "holder does not advertise such services for sale direct to the general public." *Id.* at cl. 5.4

<sup>54</sup> See The Air Navigation (Overseas Territories) Order 1977, *supra* note 32, reg. 22; *id.* art. 6 (requiring that the operator be "competent, having regard in particular to his previous conduct and experience, his equipment, organization, staffing, maintenance and other arrangements, to secure the safe operation of aircraft of the types specified in the certificate on flights of the description and for the purposes so specified").

<sup>55</sup> See REPORT ON CIVIL AVIATION, *supra* note 2.

to the extent that such common law or any such rule of equity may from time to time be modified or excluded by:

- (a) any Order in Council which applies to Hong Kong;
- (b) any act which applies to Hong Kong, whether by express provision or by necessary implication; or
- (c) any Ordinance.<sup>56</sup>

During the period to 1984, amendments to the private international law aspects of air transport in Hong Kong were made by the U.K. government through U.K. subsidiary legislation<sup>57</sup> and by the Order of the Governor of Hong Kong,<sup>58</sup> though both were made pursuant to U.K. legislation.<sup>59</sup>

### 1. Liability with Respect to Carriage by Air<sup>60</sup>

Of most importance with respect to liability is the application in Hong Kong of the 1929 Warsaw Convention<sup>61</sup> as amended by the 1955

<sup>56</sup> See The Application of English Law Ordinance, *supra* note 17, § 3. The term "Act" is defined as an "enactment of the Parliament of England, the Parliament of Great Britain, or the Parliament of the United Kingdom". *Id.* § 2. An "Order in Council" is defined as "an order made by Her Majesty in Her Privy Council", and "Ordinance" as "(a) any Ordinance enacted by the Governor by and with the advice and consent of the Legislative Council; (b) any proclamation made by the British Military Administration on or between 1 September 1945 and 1 May 1946; and (c) any subsidiary legislation made under such Ordinance or proclamation." See Interpretation and General Clauses Ordinance, *supra* note 41, § 3.

<sup>57</sup> For example, to substitute the Special Drawing Rights of the International Monetary Fund, for the Poincaré gold franc, as the unit of account for non-international air carriage. Carriage by Air Acts (Application of Provisions) (Overseas Territories) (Amendment) Order 1984, S.I. 1984, No. 701, L.N. 179/84 (1984) (Hong Kong Government Gazette).

<sup>58</sup> For example, Carriage by Air (Application of Provisions) (Overseas Territories) (Hong Kong Dollar Equivalents) Order, App. I AC1 L.H.K. 1984 ed., to specify the value of the Poincaré gold franc in Hong Kong dollars.

<sup>59</sup> The Carriage By Air Act, 1961, 9 & 10 Eliz. 2, ch. 27; Carriage By Air Acts (Application of Provisions) (Overseas Territories) Order 1967, S.I. 1967, No. 810.

<sup>60</sup> Neither the United Kingdom nor the P.R.C. are parties to the Convention for the Unification of Certain Rules Relating to Damages Caused by Aircraft to Third Parties on the Surface, May 29, 1933, Cmnd. No. 5056, 192 L.N.T.S. 289 [hereinafter 1933 Rome Convention] having five adherents, or the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed Oct. 7, 1952, Cmnd. No. 8886, 310 U.N.T.S. 181 [hereinafter 1952 Rome Convention] having thirty-five adherents. SHAWCROSS & BEAUMONT, *supra* note 23, ch. 10. However, the Civil Aviation Act 1949 which makes damages recoverable without proof of negligence or intention in respect of loss or injury being occasioned to persons or property on the surface as a result of objects falling from aircraft in flight, applies in Hong Kong. See Civil Aviation Act, 1949, *supra* note 29, § 40.

<sup>61</sup> Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed Oct. 12, 1929, effective Feb. 13, 1933, ICAO Reg. No. 601, 137 L.N.T.S. 11 [hereinafter 1929 Warsaw Convention] having 115 adherents, essentially established a set of uniform rules governing the rights and responsibilities of international air carriers, as well as air passengers, consignors and consignees of goods in the event of loss or injury to them in the course of carriage between the territories of two parties to the convention, or even between two points within the territory of one contracting party when there is an agreed stopping place within the territory of another state. Pri-

Hague Protocol<sup>62</sup> and 1962 Guadalajara Convention.<sup>63</sup> For cases outside the scope of the "Warsaw regime," parts of the U.K. Carriage by Air Acts govern virtually all aspects of international air carrier liability in the law of Hong Kong.<sup>64</sup> Neither the new international air carriage liability regime proposed by the 1971 Guatemala Protocol to the 1929 Warsaw Convention nor the 1975 Montreal Protocols Nos. 1-4 which would *inter alia* replace the existing monetary unit used to assess maximum carrier liability (the Poincaré gold *franc*) with the International Monetary Fund's "Special Drawing Right"—a value established through a basket of currencies, but approximating the U.S. dollar—are part of the law in Hong Kong.<sup>65</sup> They have yet to come into force, and may never do so.

## 2. Commercial Aspects of International Air Transport

The international commercial functions of international air carriers in Hong Kong are carried on in much the same manner as any other business.<sup>66</sup> However, certain activities such as charter parties or leasing, capacity sharing through "pooling" and operational "joint ventures," or for that matter other commercial arrangements, such as pricing and agency commission fixing agreements, are more characteristic of international air transport.

Such activities in Hong Kong have traditionally been subject to minimal regulatory or governmental interference. For example, there are no

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marily, the convention provided for a presumption of carrier negligence in return for maximum carrier liability limitations.

<sup>62</sup> This Protocol to Amend the 1929 Warsaw Convention, signed Sept. 28, 1955, effective Aug. 1, 1963, ICAO Doc. 7632, 478 U.N.T.S. 371 [hereinafter 1955 Hague Protocol] now has 103 adherents. ICAO ANNUAL REPORT, *supra* note 21, at 164-65. It simplified requirements as to passenger tickets, baggage checks and air weighbills and doubled the maximum liability limit recoverable for passenger death or personal injury to 250,000 Poincaré *francs* (now HK \$135,000). See Carriage by Air (Application of Provisions) (Overseas Territories) (Hong Kong Dollar Equivalents) Order, *supra* note 58.

<sup>63</sup> Convention Supplementary to the 1929 Warsaw Convention, signed Sept. 18, 1961, effective May 1, 1964, ICAO Reg. No. 1757, 500 U.N.T.S. 31 [hereinafter the 1961 Guadalajara Convention] now having sixty-four adherents, of which the P.R.C. is not one. ICAO ANNUAL REPORT, *supra* note 21, at 162-63. The convention clarified the meaning of "carrier" under the Warsaw regime to include the contracting carrier and actual carrier.

<sup>64</sup> See The Carriage By Air (Overseas Territories) Order 1967, S.I. 1967, No. 809, App. III CG1 L.H.K. 1967 ed., which provides for the extension of the Carriage by Air Act 1961, as modified, to various British colonies etc., including Hong Kong, and the 1929 Warsaw Convention as amended by the 1955 Hague Protocol as well as the 1961 Guadalajara Convention.

<sup>65</sup> In interpreting the various provisions of the U.K. legislation giving effect to law relating to international air carrier liabilities, resort is obviously made to the decisions of U.K. courts, though only the decisions of the English Privy Council are binding upon Hong Kong courts. *de Lasala v. de Lasala*, [1980] A.C. 546 (P.C.1979) (Hong Kong).

<sup>66</sup> For example, a reasonable amount of aircraft financing is carried on in Hong Kong.

“antitrust” or “restrictive trade practices” enactments in Hong Kong and no such U.K. enactments apply.

### III. THE TRANSITION: 1984 TO 1997 AND BEYOND

Despite the evident political uncertainty in Hong Kong as to the manner in which post-1997 commercial enterprises will, in fact, be allowed to function, all indications are that the international air transport industry and civil aviation administration can look forward to considerable independence—at least in the short to medium term. This is not only because the Joint Declaration outlines a level of autonomy over international air transport relations beyond that practiced under British rule,<sup>67</sup> but also because of the express P.R.C. promise that the “basic policies of the People’s Republic of China regarding Hong Kong” and their elaboration in Annex I to the Joint Declaration and the Basic Law (Constitution)<sup>68</sup> of the Hong Kong Special Administrative Region (“S.A.R.”) “will remain unchanged for 50 years.”<sup>69</sup>

#### A. *Relevant Aspects of the Joint Declaration*

The fundamental principle with respect to international air transport relations is that pursuant to Annex I, section XI of the Joint Declaration, the Central People’s government will be responsible for the foreign affairs of the Hong Kong S.A.R.<sup>70</sup> However, in this regard, Hong Kong appears to be no worse off than it was as a colony of the United Kingdom,<sup>71</sup> and potentially even better off with respect to the management of its international aviation relations.<sup>72</sup>

That part of the Joint Declaration which is of primary relevance to international air transport relations is section IX of Annex I, which is

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<sup>67</sup> While the status quo in respect of civil aviation administration is maintained, Hong Kong should soon have its own aircraft register and may possibly play a more substantial role with international aviation organizations. More importantly, it is acquiring the authority to negotiate, agree and enter into bilateral air services agreements and arrangements in its own right. Joint Declaration, *supra* note 14, Annex I, § IX.

<sup>68</sup> The National People’s Congress of the People’s Republic of China shall enact and promulgate a Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China [hereinafter referred to as the Basic Law] in accordance with the Constitution of the People’s Republic of China, stipulating that after the establishment of the Hong Kong Special Administrative Region the socialist system and socialist policies shall not be practised in the Hong Kong Special Administrative Region and that Hong Kong’s previous capitalist system and life-style shall remain unchanged for 50 years.

Joint Declaration, *supra* note 14, Annex I, § I. The Basic Law is expected to be drafted by early 1988 and as yet only unofficial drafts are available.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* Annex I, § XI.

<sup>71</sup> See *supra* part II.

<sup>72</sup> See *infra* part III.A.2.a (discussion of Hong Kong’s potential role in ICAO and in bilateral air services agreement negotiations).

devoted exclusively to civil aviation.<sup>73</sup> However, in addition, there are other sections which recognize Hong Kong's relative autonomy with respect to several air transport related matters, notably sections XIII dealing *inter alia* with the maintenance of rights and freedoms in the Hong Kong S.A.R., including freedoms of movement and travel,<sup>74</sup> and section XIV concerning *inter alia* the application of immigration controls on persons from foreign states and regions and the issue of certain travel documents.<sup>75</sup> Moreover, section II provides for the maintenance after 1997 of Hong Kong's pre-existing laws which would include the framework of a sophisticated legal system for international air transport.<sup>76</sup>

### 1. Continued Application of Existing Law

The earlier discussion of the state of Hong Kong laws governing international air transport prior to, and in 1984, evidenced a total reliance upon U.K. enactments and orders in council. This is crucial as section II of Annex I of the Joint Declaration specifically provides that:

After the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong (i.e. the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained, save for any that contravene the Basic Law and subject to any amendment by the Hong Kong Special Administrative Region legislature.<sup>77</sup>

Thus, U.K. legislation will not continue to apply, but Hong Kong legislation will. While issues may, in theory, be raised as to the political pressure which may in the future be exerted upon the legislature to amend Hong Kong laws that may or may not contravene the Basic Law,<sup>78</sup> but are nonetheless not favored by the P.R.C., it is self-evident that any re-enactment by the pre-1997 Hong Kong legislature of existing U.K. laws applying air transport law to Hong Kong will, in principle, continue in force after 1997. This situation is underscored by a provision at the end of section II: "The laws of the Hong Kong Special Administrative Region shall be the Basic Law, and the laws previously in force in Hong Kong and laws enacted by the Hong Kong Special Administrative Region legislature . . . ."<sup>79</sup> As all the U.K. air transport law "application" enactments will clearly cease to apply on July 1, 1997, the Hong

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<sup>73</sup> Joint Declaration, *supra* note 14, at Annex I, § IX.

<sup>74</sup> *Id.* Annex I, § XIII.

<sup>75</sup> *Id.* Annex I, § XIV.

<sup>76</sup> *Id.* Annex I, § II.

<sup>77</sup> *Id.*

<sup>78</sup> From unofficial recent drafts, it appears that the wording used with respect to Hong Kong's civil aviation powers and responsibilities is almost identical to that of the Joint Declaration. *Id.* Annex I, § IX.

<sup>79</sup> *Id.* Annex I, § II.



Kong government intends that before then, all such laws will be replaced by Hong Kong legislation. The Hong Kong (Legislative Powers) Order 1986,<sup>80</sup> makes provision for this in section 2. Although some policy changes have already occurred,<sup>81</sup> this "repatriation" process has not yet commenced, and before it does, several questions arising particularly in relation to the continued application of international conventions and other treaties to which the United Kingdom is a party need to be considered.

#### a. Continuance of International Obligations

Even when enacted in Hong Kong, such ordinances will purport to give effect to what is U.K. municipal law as well as laws enacted pursuant to the U.K. obligations under international conventions and other international instruments—which in many cases, entitle the U.K. government to expect reciprocal rights from other state parties. Hong Kong is at present also entitled to have such expectations and benefit in the same way as the United Kingdom, though naturally, it is now the United Kingdom which would make the effort to enforce such reciprocal obligations on behalf of Hong Kong. Subsequently, it will have to be the P.R.C. which does this, provided the P.R.C. is also party to the relevant international instrument.<sup>82</sup>

Under ordinary principles, article 15 of the Vienna Convention on the Succession of States in Respect of Treaties ("1978 Vienna Convention")<sup>83</sup> provides that:

When part of the territory of a State, or when any territory for the international relations of which a State is responsible, not being part of the territory of that State, becomes part of the territory of another state:

(a) treaties of the predecessor State cease to be in force in respect

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<sup>80</sup> S.I. 1986, No. 1298, LN 219/86, in force on Aug. 26, 1986.

<sup>81</sup> Notably, Hong Kong's new role as contracting party to bilateral air services agreements. See *infra* part III.B.2.

<sup>82</sup> Colonies and territories do not have governments of their own or are subject to the control of another state and thus, are not recognized as having international personality. D.W. GREIG, *supra* note 20, at 80. This would still be the case of Hong Kong after 1997, as its laws will be subject to a constitution imposed by another country and thus, control by the P.R.C.'s Central People's government. Additionally, its foreign relations are expressly the responsibility of the P.R.C. Joint Declaration, *supra* note 14, Annex I, § XI.

<sup>83</sup> Vienna Convention on the Succession of States in Respect of Treaties, Aug. 22, 1978, 17 I.L.M. 1488 at 1496 (from U.N. Doc. A/Conf. 80/31 of Aug. 22, 1978 as corrected by A/Conf. 80/31/Corr. 2 of Oct. 27, 1978). Although it has attracted few signatories and is unlikely to come into force, the convention appears to be declaratory of pre-existing customary international law on this and other points. See J.L. Magdelenat & J. Huang, *Les Accords de Transport Aérien Dans les Successions D'états: le Cas Particulier de Hong Kong*, 10 ANNALS OF AIR & SPACE LAW 103 (1985).

of the territory to which the succession of States relates from the date of the succession of States; and

(b) treaties of the successor State are in force in respect of the territory to which the succession of States relates from the date of the succession of States, unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

There remains a problem regarding the application of treaties to which the United Kingdom is a party. It is crucial that since the Joint Declaration does not provide for the continued force of U.K. enactments and subsidiary legislation applying to Hong Kong,<sup>84</sup> all international conventions concerning international air transport, as well as all of the bilateral air services agreements entered into by the United Kingdom in connection with Hong Kong's international air services, may thereby cease to apply. It is conceivable, however, that some of these conventions and agreements might apply in Hong Kong under the theory that such treaties extend to the whole of the territory of a contracting party, even its colonies.<sup>85</sup> Thus, they may continue to apply independently.<sup>86</sup>

With respect to those treaties, except air services agreements, to which the P.R.C. is already a party (which includes virtually all the international conventions relating to international air transport to which the United Kingdom is a party), the operation of the second leg of article 15 of the 1978 Vienna Convention<sup>87</sup> is less likely. Annex I, section XI, of the Joint Declaration makes it clear that the P.R.C. may decide which of the international agreements to which it is, or will be a party, will apply to Hong Kong, and doubtless in what circumstances.<sup>88</sup> Application of such agreements is not automatic upon succession.

#### The application to the Hong Kong Special Administrative Region

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<sup>84</sup> See *supra* note 78 and accompanying text.

<sup>85</sup> See Vienna Convention on the Law of Treaties, *supra* note 44, art. 29 (which provides that "unless a different intention exists in the treaty, or is otherwise established, a treaty binds each of the parties in respect of the whole of its territory").

<sup>86</sup> On the other hand, it is expressly stated in Annex I, section XI of the Joint Declaration that: "International agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong remain implemented in the Hong Kong Special Administrative Region." Joint Declaration, *supra* note 14, Annex I, § XI. If reliance was to be placed on art. 29 of the Vienna Convention on the Law of Treaties as the authority for the implementation of such agreements in Hong Kong (since U.K. enactments no longer have any force) pursuant to this sentence in the Joint Declaration, too many uncertainties would persist. Certainly, the more neat and practical solution is to re-enact the implementing legislation as Hong Kong ordinances so that they continue to apply, subject to inconsistency with the Basic Law.

<sup>87</sup> See Vienna Convention on the Succession of States in Respect of Treaties, *supra* note 83, art. 15.

<sup>88</sup> See Joint Declaration, *supra* note 14, Annex I, § XI.

of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Hong Kong Special Administrative Region, and after seeking the views of the Hong Kong Special Administrative Region Government.<sup>89</sup>

Once the Central People's government has made the decision to extend any such treaties, then there appears to be a clear P.R.C. obligation to provide necessary executive authorizations to the Hong Kong S.A.R. government, so that it may enact the treaties concerned into local law, or apply them as required.<sup>90</sup> Naturally in these circumstances the P.R.C. is taking responsibility for any treaty violations which occur in the Hong Kong S.A.R., and is representing to the community of nations that it can and will act to ensure compliance by the S.A.R. with all its treaty obligations.

Thus while Hong Kong may, prior to 1997, voluntarily legislate to take on international responsibilities and obligations—for example, with respect to the treatment of hijackers and persons committing crimes against or on board aircraft<sup>91</sup> or to fulfill obligations as to the certification of commercial aircraft and crew, imposed pursuant to the 1944 Chicago Convention—which would be normally owed by the United Kingdom, it would find difficulty in seeking reciprocal action from any other state, absent the goodwill of the United Kingdom prior to 1997, and that of the P.R.C. thereafter.

## 2. Civil Aviation Provisions

The specific powers and authority which the P.R.C. is delegating to the Hong Kong S.A.R. with respect to civil aviation are quite broad, with the bare minimum of control retained by the Central People's government, as is consistent with the P.R.C.'s responsibility for the S.A.R.'s foreign affairs. The primary repository of such powers (Annex I, section IX)<sup>92</sup> involves four aspects of international air transport relations.

(1) **Civil aviation administration:** the aircraft register, technical management of flight operations, airports, air traffic services (traffic control, communications, navigational aids etc.) and discharge of responsibilities under the regional air navigation procedures of the ICAO,<sup>93</sup> are

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<sup>89</sup> *Id.*

<sup>90</sup> The Central People's government is required to authorize or assist the Hong Kong Special Administrative Region government to make appropriate arrangements for the application to the Hong Kong Special Administrative Region of other relevant international agreements. See Joint Declaration, *supra* note 14, Annex I, § IX.

<sup>91</sup> See *supra* notes 33-35.

<sup>92</sup> See Joint Declaration, *supra* note 14, Annex I, § IX.

<sup>93</sup> In addition to the eighteen annexes to the 1944 Chicago Convention, detailed operational Procedures for Air Navigation Services (PANS), Regional Navigation Air Plans and Regional Sup-

totally under S.A.R. control.

(2) **Commercial air service licensing:**<sup>94</sup> negotiation and conclusion of "all arrangements concerning the implementation" of any air service agreements and provisional arrangements;<sup>95</sup> designation of airlines thereunder by the Hong Kong S.A.R. government;<sup>96</sup> issue of "licenses to airlines incorporated [in] and having their principal place of business" in the S.A.R.;<sup>97</sup> and issue of "permits to foreign airlines for services other than those to, from or through the mainland of China,"<sup>98</sup> is to be under the control of the Hong Kong S.A.R. government (for both scheduled and non-scheduled services),<sup>99</sup> though the Central People's government "shall give . . . authority" (emphasis added) for all such action.<sup>100</sup>

(3) **Air service rights affecting the P.R.C.:** air service arrangements between the Hong Kong S.A.R. and other parts of the P.R.C. for airlines incorporated and having their principal place of business in Hong Kong<sup>101</sup> and other airlines of the P.R.C. are to be made by the Central People's government *in consultation with* the government of the Hong Kong S.A.R.<sup>102</sup> On the other hand, the Central People's government

plementary Procedures (SUPPS) specify requirements of adequate air navigation facilities etc., in the world's nine "air navigation regions". See SHAWCROSS & BEAUMONT, *supra* note 23, at 131.

<sup>94</sup> See *supra* notes 46-55 and accompanying text.

<sup>95</sup> Joint Declaration, *supra* note 14, Annex I, § IX.

<sup>96</sup> Designation, unlike licensing, is not expressed to be limited to airlines incorporated in and having their principal place of business in the Hong Kong S.A.R. See *generally infra* note 100.

<sup>97</sup> Joint Declaration, *supra* note 14, Annex I, § IX.

<sup>98</sup> *Id.* In this context, it would appear that the jurisdiction of the ATLA will be slightly more limited than it is before 1997, as it has been issuing licenses for scheduled air services between Hong Kong and the P.R.C. Similarly restricted will be the D.C.A., who is theoretically responsible for the issue of permits to foreign *scheduled* carriers, including those with the right to operate "beyond point rights" in the P.R.C., if any such rights had been, or are subsequently agreed.

<sup>99</sup> The D.C.A. is also responsible for issuing charter service licenses under the Air Transport (Licensing of Air Services) Regulations. *Supra* notes 46, 50 & 51 and accompanying text. It would appear that power to issue such "licenses" to foreign charter carriers, even for non-scheduled air services, the subject of a duly authorized agreement between the Hong Kong S.A.R. and the relevant foreign state, would cease in 1997, *unless* the relevant test of regulation 20A was changed to refer to "licenses" for local charter airlines and "permits" for foreign charter operators or further clarification is given in the final draft of the Basic Law. *Id.*

<sup>100</sup> It is envisaged by the present Hong Kong government, that the P.R.C. will provide a "general authority" for the purposes of "implementing" authorized agreements, much in the same way as the present Governor of Hong Kong has been provided with a "general entrustment" by the U.K. government for similar purposes relating to the 1986 Hong Kong-Netherlands and 1988 Hong Kong-Switzerland bilateral air services agreements. See *also infra* note 138.

<sup>101</sup> This type of link with Hong Kong replaces the traditional requirement as to the substantial ownership and control of the airline being in the hands of nationals of the relevant contracting party to the 1944 Chicago Convention—something which will be, in practice, more difficult for Cathay Pacific Airways to comply with than Dragonair.

<sup>102</sup> After 1997, what was previously cabotage (domestic) traffic between the United Kingdom, and in no sense improperly reserved to British carriers in accordance with article 7 of the 1944 Chicago Convention, shall become international traffic and likewise, services to the P.R.C. and possi-

shall have the authority to conclude all air services agreements:

(a) involving stopovers in the Hong Kong S.A.R. by all airlines operating between other regions of the P.R.C. and other states and regions; and

(b) involving stopovers within the P.R.C. for airlines operating between the Hong Kong S.A.R. and other states.<sup>103</sup>

The P.R.C.'s right to offer or deny foreign states stopovers in Hong Kong obviously means an accrual of negotiating power. However this power is qualified; it is also provided that in concluding these agreements the "special conditions and economic interests"<sup>104</sup> of the Hong Kong S.A.R. shall be taken into account and the S.A.R. government be consulted as well as be entitled to send representatives to participate as members of the P.R.C. government delegation in such consultations with foreign governments.

(4) **Air services rights affecting only the S.A.R.:** the Hong Kong S.A.R. government shall itself negotiate and enter into bilateral air services agreements<sup>105</sup> providing routes for airlines incorporated in and having their principal place of business in the Hong Kong S.A.R.,<sup>106</sup> and conclude provisional arrangements with no other restriction than that no air service agreement be in force. It will also be able to renew and amend pre-existing agreements with the aim of maintaining the rights thereby established as far as is possible.<sup>107</sup>

In summary, the authority granted to the Hong Kong S.A.R. pursu-

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bly also Taiwan (given that the P.R.C. regards it as part of its own territory) would become cabotage traffic and very likely reserved to P.R.C. and Hong Kong carriers. See Magdelenat & Huang, *supra* note 83. See also *supra* notes 78-86 and accompanying text.

<sup>103</sup> Joint Declaration, *supra* note 14, Annex I, § IX.

<sup>104</sup> *Id.*

<sup>105</sup> While the Joint Declaration requires that all *scheduled* air services to, from or through the Hong Kong S.A.R., aside from those operating to, from or through "the mainland of China" (for clarity, it would have been preferable to say "any other part of the P.R.C."), be regulated either by formal air service agreements or provisional arrangements (which concept is not defined), and no other informal arrangements are permissible. Joint Declaration, *supra* note 14, Annex I, § IX. There is no specific provision for *non-scheduled* services in the text, but they could be encompassed by the ordinary licensing process. See Air Transport (Licensing of Air Services) Regulations, *supra* note 46.

<sup>106</sup> This meant, in effect, that only the needs of locally-based airlines are to be taken into consideration when route exchanges are negotiated. Foreign incorporated airlines, such as British Airways and the P.R.C.'s CAAC, or even Cathay Pacific Airways, if it decided to shift its principal place of business (a concept undefined in the Joint Declaration, but well-known in English law) out of Hong Kong, would not qualify for designation.

<sup>107</sup> Pre-existing arrangements whereby airlines not incorporated and having their principal place of business in the S.A.R. have established rights, will be maintained. For example, British Airways could be, in theory, a designated carrier of the Hong Kong S.A.R. on any particular route, provided this occurred prior to 1997, though only until its license needed renewing under the post-1997 rules.

ant to Annex I, section IX means that its post-1997 powers will very much resemble the powers it exercised prior to 1984. Actually it will have extra responsibilities relating first to the creation and maintenance of an aircraft register, and secondly to the negotiation of air services agreements and arrangements. This latter matter, however, has already been the subject of a change in policy by the U.K. government, as evidenced by the negotiation of new bilateral air services agreements with the Netherlands, Switzerland<sup>108</sup> and Canada, and the entry into force of the 1986 Hong Kong-Netherlands agreement.<sup>109</sup>

#### a. Other Air Transport-Related Provisions

Before continuing to consider the two main areas where changes are occurring in Hong Kong's international air transport relations,<sup>110</sup> brief mention needs to be made of other provisions of the Joint Declaration which directly affect international air transport relations. Pre-existing law establishing *inter alia* freedom of travel and movement,<sup>111</sup> as well as the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights,<sup>112</sup> shall remain in force by virtue of Annex I, section XIII.<sup>113</sup>

Aside from provisions already discussed,<sup>114</sup> the 1944 Chicago Convention further underscores the importance of state sovereignty in the legal order relating to aviation by requiring, for example, that each contracting state undertakes to enforce its own "rules of the air" both in its

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<sup>108</sup> Hong Kong and Switzerland Accord, signed Jan. 26, 1988, Special Supp. No. 5 to the Hong Kong Gov't Gazette, Feb. 12, 1988 [hereinafter HK-Switzerland Accord].

<sup>109</sup> Agreement Between the Government of Hong Kong and the Government of the Kingdom of the Netherlands Concerning Air Services, signed Sept. 17, 1986, entry in force June 26, 1987 Cmnd. No. 4856 [hereinafter HK-Netherlands Accord]. The Hong Kong Government is also, at present, a party to a similar agreement with Switzerland, and contemplating commencing bilateral air service negotiation with several other foreign governments. See *infra* notes 131-138 and accompanying text.

<sup>110</sup> Namely, 1) issues related to the 1944 Chicago Convention: Hong Kong's participation in ICAO, its aircraft register and the changing status of the International Air Services Transit Agreement; and 2) the authority to negotiate and enter into air services agreements.

<sup>111</sup> While legislation (e.g. Immigration Ordinance Cap. 115 L.H.K. 1984 ed.) usually operates to restrict such rights, judicial decisions at least recognize the application of, Magna Carta, ch. 42 ("it shall be lawful (except for a short period in time of war, for the common benefit of the realm) for anyone to leave and return to Our Kingdom . . ."). See, e.g., *Columbia Export Packers (H.K.) Ltd. v. McCulloch*, 1976 H.K.D.C.L.R. 108. Some support to a common law right to freedom of movement was given in *Supreme Finance Ltd. v. Wan Hang Trading Ltd.*, 1983 H.K.L.R. 314, 323.

<sup>112</sup> International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, 21 GAOR Supp. (No. 16) at 49 (1966).

<sup>113</sup> Joint Declaration *supra* note 14, Annex I. Though paragraph 15 of the Basic Law provides that the rights and freedoms contained in that chapter are subject to limitations prescribed by law. A. Chen, *Editorial*, 17 HONG KONG L.J. 133, 135 (1987).

<sup>114</sup> See *supra* notes 25 and 27.

own territory and above the "high seas"<sup>115</sup> as well as its national laws with respect to passports, immigration, customs and health or quarantine control—including the right to search aircraft.<sup>116</sup> Though the Joint Declaration provides partial guarantees that after 1997 the Hong Kong S.A.R. will be able to establish, maintain and apply its own laws with respect to these matters (Annex I, sections II and VI cover maintenance of existing customs and quarantine laws; section XIII concerns freedom of movement *inter alia*; and section XIV provides for issuance of passports, travel documents and the imposition of immigration controls on foreigners), these powers are of relatively limited scope and subject to the P.R.C.'s overall control of Hong Kong's international affairs as set out in Annex I, section XI.<sup>117</sup>

### B. ICAO Membership and Other Convention Obligations

As regards ICAO membership after 1997, Hong Kong will, in theory, be in much the same position as it is under British rule. Annex I, section XI, to the Joint Declaration provides:

Subject to the principle that foreign affairs are the responsibility of the Central People's Government, representatives of the Hong Kong Special Administrative Region Government may participate, as members of delegations of the Government of the People's Republic of China, in negotiations at the diplomatic level directly affecting the Hong Kong Special Administrative Region conducted by the Central People's Government.<sup>118</sup>

Though the role of the Hong Kong S.A.R.'s representatives will doubtless remain subordinate to their P.R.C. counterparts, it would appear that the Hong Kong S.A.R. government should be able to attend, participate and assist the P.R.C. delegation in ICAO meetings. This is especially true for meetings having either worldwide or regional effects, such as the General Assembly and various meetings at the committee level, at least on an ad hoc basis. However, unless Hong Kong, China can maintain a representative attached to the P.R.C.'s small permanent delegation in Montreal,<sup>119</sup> there would appear to be little scope for it to

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<sup>115</sup> See 1944 Chicago Convention, *supra* note 22, art. 12. This would appear to be encompassed by the authority granted to the Hong Kong S.A.R. in respect of management of air traffic operations under the Joint Declaration Section IX. See *supra* part III.B.

<sup>116</sup> See 1944 Chicago Convention, *supra* note 22, arts. 13, 14, 16.

<sup>117</sup> See *supra* part I.

<sup>118</sup> See Joint Declaration, *supra* note 14. This principle has been confirmed but received no further clarification or elaboration in the most recent unofficial draft of the Basic Law, ch. 7, art. 1.

<sup>119</sup> This is not an unreasonable suggestion in view of the facts that the Hong Kong S.A.R. has been delegated a considerable degree of independence in international air transport relations and will account for a substantial part of the P.R.C.'s total involvement in international civil aviation.

have any *formative* influence on international or regional air transport policy.

### 1. Hong Kong's Aircraft Register

The Hong Kong government is at present giving consideration to the establishment of an aircraft register as mandated by the Joint Declaration requirement that the Hong Kong S.A.R. shall "keep its own aircraft register in accordance with provisions laid down by the Central People's Government concerning nationality marks and registration marks of aircraft."<sup>120</sup>

Aircraft are deemed to have the nationality of the state in which they are registered and dual nationality is excluded under articles 17-18 of the 1944 Chicago Convention.<sup>121</sup> At this stage the mode of implementing this aspect of the Hong Kong S.A.R.'s international air transport powers is far from having been decided. However, it would appear that the Hong Kong S.A.R. aircraft register would necessarily have to be a part of the overall P.R.C. register, and the aircraft of both places would have the same nationality. Also since the P.R.C. is a party to the 1944 Chicago Convention, it must comply with Annex 7. This concerns the position, size and type of character used for registration marks, or notification to the ICAO of any divergences from the norm.<sup>122</sup>

### 2. Dealing With the "Transit" Agreement

The "International Air Service Transit Agreement," ("Transit Agreement"), whereby ninety-eight contracting parties to the 1944 Chicago Convention, have exchanged "technical rights" (the 1st and 2nd freedoms of the air), that is, the rights to: (a) fly over any other signatories' territory ("overflight"), and (b) land in any other signatory's territory for non-traffic ("technical") reasons,<sup>123</sup> was not signed by several major states including the P.R.C., the U.S.S.R. and F.R.G.

Although these transit rights are now given the force of law in Hong Kong,<sup>124</sup> it is unlikely that this agreement could continue to apply after 1997 since the P.R.C. is not a signatory. Even the Joint Declaration's

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<sup>120</sup> See Joint Declaration, *supra* note 14, Annex I, § IX. However, no mention of keeping of an aircraft register occurs in the latest unofficial draft of the Basic Law.

<sup>121</sup> Exceptions do exist in respect of aircraft operated by international operating agencies. See ICAO, *Resolution Adopted by the Council on Nationality and Registration of Aircraft Operated by International Operating Agencies*, ICAO Doc. 8722-C/976, Feb. 20, 1968.

<sup>122</sup> Mention has already been made of the fact that neither the United Kingdom nor the P.R.C. are parties to the 1948 Geneva Convention and the desirability of including matters required under that Convention, in the register. See *generally supra* note 22.

<sup>123</sup> See *generally supra* note 28.

<sup>124</sup> Through the Civil Aviation Act 1949 and the Civil Aviation Act 1949 (Overseas Territories) Order. See *supra* note 29 and accompanying text.



inclusion, as part of its delegation of authority relating to the entering into of air services agreements, of the power for the Hong Kong S.A.R. to: "negotiate and conclude Air Service Agreements providing . . . rights for overflights and technical stops,"<sup>125</sup> would not authorize the continued application of the Transit Agreement.<sup>126</sup>

Moreover, the Transit Agreement itself, specifically restricts its signatories to states who are members of ICAO, which Hong Kong could never be.<sup>127</sup> Even if Hong Kong voluntarily legislated to give these rights to all parties to the Transit Agreement, it could not require reciprocity<sup>128</sup> unless the P.R.C. were to sign the Transit Agreement on behalf of Hong Kong. The only real option is to exchange these technical freedoms in the context of bilateral air services agreements with other states and seek ad hoc approvals for overflight, etc. as required when no bilateral air services agreement is in existence.

In practice, these rights are often exchanged in bilateral air service agreements, as is seen in article 3(1) of the HK-Netherlands agreement.<sup>129</sup> Sometimes the need to negotiate a grant of technical rights in this way means that the other parties usually otherwise disadvantaged non-parties to the Transit Agreement such as Burma and Indonesia, will seek corresponding advantages during relevant air services negotiations.<sup>130</sup>

### C. Hong Kong's Bilateral Air Services Agreements

Some 2,000 bilateral and multilateral<sup>131</sup> air service agreements have been negotiated<sup>132</sup> and many are still in force.<sup>133</sup> They authorize the op-

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<sup>125</sup> See Joint Declaration, *supra* note 14, Annex I, § IX. This wording is reproduced in the latest unofficial draft of the Basic Law, but it is still unclear if it would justify entry of the Hong Kong S.A.R.'s into a multilateral agreement such as the Transit Agreement.

<sup>126</sup> Transit Agreement, *supra* note 28.

<sup>127</sup> See *id.* preamble, art. VI.

<sup>128</sup> That is, it could not require in the course of bilateral air service negotiations or even in the course of ordinary airline operations, the right for Hong Kong scheduled airlines to overfly or make technical stops in relevant territories.

<sup>129</sup> See generally *supra* note 109.

<sup>130</sup> Even at the end of World War II, the fact that nations might "trade" international air service rights—even to obtain political and other concessions—was clearly recognized. "Politically and economically, the result of the adoption of the principle of territorial sovereignty was that transit and landing facilities became commodities to be bargained for and sold to the highest bidder, the price exacted often having little or nothing to do with civil aviation." Jennings, *International Civil Aviation and the Law*, 22 BRIT. Y.B. INT'L L. 191, 192 (1945).

<sup>131</sup> Although of little direct application to Hong Kong, multilateral agreements relating to air services have been made by some states e.g., the International Agreement on the Procedure for the Establishment of Tariffs for Scheduled Air Services (ECAC), signed July 10, 1967, effective May 30, 1968, ICAO Doc. 8681, 696 U.N.T.S. 31, which apparently, was intended to apply to Hong Kong's air service relations with the Netherlands between 1971 and 1987. See generally *supra* note 153.

<sup>132</sup> The procedure for establishing an air service agreement between countries normally in-

eration of foreign states' scheduled international air services to the various countries concerned. However, for commercial or political reasons, air links may be non-existent or effected by the carrier of only one of the two countries party to any given agreement.<sup>134</sup>

As mentioned earlier, Hong Kong's international air services have been traditionally negotiated as part of U.K. bilateral air services agreements.<sup>135</sup> However, on June 26, 1987 an "Agreement Between the Government of Hong Kong and the Government of the Kingdom of the Netherlands Concerning Air Services"<sup>136</sup> came into force. It is doubly significant since it is the first air services agreement entered into by Hong Kong in its own right, and it also appears to be the first example in the relatively short history of international aviation, of such an international agreement being made by a political entity possessing anything other than full sovereignty.<sup>137</sup> This agreement sets a precedent that will, in principle, be followed over the years and even after Hong Kong becomes part of the territory of the P.R.C. on July 1, 1997.<sup>138</sup>

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volves: (a) prior negotiations between the airlines of countries concerned; (b) discussions between airlines and government departments; (c) formal negotiations between both government aviation and foreign affairs officials assisted by airline advisors; (d) the signing of an Air Services Agreement, Protocols or Memoranda of Understanding relating to an existing one; (e) the exchange of notes, informal "side-letters" of other semi-secret memoranda which may interpret or may even virtually amend the agreement; and (f) "tabling" of the agreement in Parliament, registration with ICAO and the agreement's subsequent appearance in the relevant publication of treaties, for example, the United Nations Treaty Series.

<sup>133</sup> Hong Kong has bilateral air services agreements with two dozen countries as at the end of 1986 and more informal arrangements with several other countries, for example Austria, Nepal, and Taiwan. See generally *supra* note 39. Some forty scheduled and non-scheduled carriers serve Hong Kong. See REPORT ON CIVIL AVIATION, *supra* note 2. For a detailed list of all such agreements, see ICAO, *Aeronautical Agreements And Arrangements*, ICAO Doc. 9460 LGB 382 (Supp.) (1986).

<sup>134</sup> See REPORT ON CIVIL AVIATION, *supra* note 2 (airlines actually serving Hong Kong are set out in an appendix dealing with traffic movement).

<sup>135</sup> See generally *supra* note 39. There are some twenty-four of them still in force in early 1988.

<sup>136</sup> See HK-Netherlands Accord, *supra* note 107; Special Supp. No. 5 to the Hong Kong Government Gazette, June 26, 1987. (Replacing the Agreement Between the Government of the United Kingdom and the Government of the Netherlands, Aug. 13, 1946, Cmnd. No. 6893, 4 U.N.T.S. 367, [hereinafter UK-Netherlands Agreement] which entered into force Nov. 3, 1971 (Cmnd. No. 4856).)

<sup>137</sup> For a detailed examination of this new agreement, see G.N. Heilbronn, *Hong Kong's First Bilateral Air Services Agreement: A Milestone in Air Law and an Exercise in Limited Sovereignty*, 18 HONG KONG L.J. 64 (1988).

<sup>138</sup> The draft agreement was actually negotiated by the Government of the United Kingdom "for the purpose of providing the framework for air services between Hong Kong and the Netherlands," and was doubtless intended to be the basis for future air services agreements. See Letter from Geoffrey Howe to Sir Edward Youde, Sept. 12, 1986, annexed to the HK-Netherlands Agreement; letter from Geoffrey Howe to Sir David Wilson, Jan. 7, 1988, annexed to the HK-Switzerland Agreement [hereinafter Letters]. Hong Kong representatives participated in these negotiations and more recent ones for a new HK-Switzerland Agreement and separate Hong Kong-Canada Accord.

## 1. Legal Authority and Effect Prior to 1997<sup>139</sup>

The governments of countries following the British legal tradition negotiate such agreements as an exercise of their executive powers, but usually after consultation with their designated international carriers (in Hong Kong's case, Cathay Pacific Airways Ltd.). For Hong Kong, the authority to enter this and subsequent agreements, derives from an "entrustment" provided to the Governor by the U.K. Secretary of State for Foreign Affairs. The terms of the entrustment<sup>140</sup> concerning the HK-Netherlands and HK-Switzerland accords were that the Governor was authorized: "to conclude the said agreement . . . agree and confirm amendments . . . carry into effect and exercise the other powers conferred upon a contracting party," though prior agreement of the United Kingdom is required for termination rights to be exercised.<sup>141</sup> The agreement is then brought to public attention by publication in the Hong Kong Government Gazette.<sup>142</sup>

## 2. Unusual Aspects of the HK-Netherlands Accord<sup>143</sup>

This air services agreement follows standard form although there are a few peculiarities, some arising from the particular political circumstances of Hong Kong and others from the fact that virtually no "liberal" provisions are included in this otherwise rather "traditional" Bermuda I style accord.

### a. Limited Routing and Modified Designation

First, in respect of route description and airline designation (article

<sup>139</sup> The general legal effect of bilateral air services agreements and their particular place in Hong Kong law prior to 1984, was discussed *supra* part II.

<sup>140</sup> This was a "special" entrustment insofar as it specifically authorized Hong Kong to conclude the agreement and a "general" entrustment insofar as broader "implementation" powers were also included. In this way, it parallels the specific and general authorizations which the P.R.C. is to provide for the Hong Kong Special Administrative Region Government with respect to air services agreements after 1997. See generally *supra* note 100. Should the Hong Kong Government desire to institute negotiations in respect of any *new* agreement, another "specific" entrustment would be required, as was seen in the case of Switzerland.

<sup>141</sup> See Letters, *supra* note 138. This form of procedure has apparently been adopted as it will fit in with the requirement for "special authorization" etc., set out in the Joint Declaration, *supra* note 14, Annex I, § IX. It is envisaged that the P.R.C. will follow the same procedure after 1997.

<sup>142</sup> Naturally, it is also registered with ICAO and will be subsequently published in the relevant Treaty Series. See UK-Netherlands Agreement, *supra* note 136.

<sup>143</sup> Most of the following comments also apply to the 1988 HK-Switzerland Agreement. See *supra* note 109. The usual contents of traditional bilateral air service agreements are: 1) technical and administrative provisions; 2) clauses granting operating rights; 3) route descriptions; 4) capacity (seating and cargo space) provisions; and 5) tariff clauses. The first three are ordinarily in a standard form (with only details varying from country to country), but changes in "capacity provisions" and "tariff clauses" are more significant.

3), only the routes and the points of origin and destination (Amsterdam and Hong Kong) are specified. Though it is agreed that the parties' airline(s) may operate *through* unspecified points,<sup>144</sup> the only significant reference to designation is that "one or more airlines" may be designated by *each* contracting party to serve the routes specified (article 4(1)). Thus in principle, both Cathay Pacific and Dragonair (or any other British carrier) could be designated by the Government and licensed, in the case of local or British colonial carrier to operate scheduled services on this route by Hong Kong's Air Transport Licensing Authority.<sup>145</sup> Secondly, the standard clause requiring "substantial ownership and control" of a designated airline by nationals of the contracting party concerned, applies to the Netherlands, but in view of Hong Kong's future specific authority to maintain aviation relations independent from the P.R.C., the accord merely requires that Hong Kong's designated "airline is incorporated and has its principal place of business in Hong Kong." (This standardized provision has been repeated in the HK-Switzerland accord.)<sup>146</sup>

#### b. Traditional Capacity and Tariff Clauses

The capacity and tariff clauses in the HK-Netherlands agreement are quite traditional and in line with those relied upon in its 1946 predecessor. This is a little surprising in view of the *laissez faire* economic traditions of both the Netherlands and Hong Kong (though quite expected in respect of Switzerland). The "capacity" control principles resemble the relatively inflexible Bermuda I model, rather than the more "liberalized" format.<sup>147</sup> The broad principle is to provide capacity for

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<sup>144</sup> In view of these countries' small sizes and their airlines' reliance upon carriage of traffic actually from and to third countries, liberal "fifth freedom" rights are allowed from unspecified intermediate points. See BIN CHENG, *supra* note 36 and accompanying text. However in these circumstances, it is surprising that liberal access to "beyond point" traffic, say to London or Tokyo (though not into the P.R.C.) has not also been granted or referred to in the agreement, even though the carriers may not, at present, be in need of them. It should be noted that Hong Kong and Switzerland granted each other "beyond points" (excluding to the P.R.C.) in the 1988 HK-Switzerland Accord. See *supra* note 109.

<sup>145</sup> See *supra* note 46. Designation and licensing of a carrier by one party is ordinarily adequate and under the air services agreement, the other party must grant appropriate operating permits without delay. HK-Netherlands Agreement, *supra* note 109, art. 4(2)-(3).

<sup>146</sup> HK-Netherlands Agreement and HK-Switzerland Agreement, *supra* note 109, art. 4(4)(b) (in accordance with the terminology used in Joint Declaration, *supra* note 14, Annex I, § IX). See *supra* part III.B.

<sup>147</sup> There now also exist, some "liberal bilateral" air service agreements in which, especially the "capacity" and "tariff" provisions, impose fewer (or more flexible) regulatory controls over airline activities. Within limits, they allow airlines more freedom to decide how many flights are run at any time on any route as governments exercise less control over "capacity". Airlines may set any fare levels, as IATA mechanisms are de-emphasized, though governments do take a greater role by setting broad pricing limits. In the past the situation was the reverse. A number of "liberal" agreements have been made, mainly by the United States, the Netherlands, the United Kingdom,

each country's own 3rd and 4th freedom traffic as the "primary objective" of the service,<sup>148</sup> (but this is more clearly worded than in the Bermuda I, the 1946 UK-Netherlands Agreement, and Bermuda II, which emphasized 3rd freedom rights and referred to traffic "between" rather than "to" and "from" the contracting states). Express provision is also made for review of the practical application of these principles by the aeronautical authorities of both contracting states. Such Bermuda II style *ex post facto* review procedures, however, have had limited effect in the past.<sup>149</sup> Also, the parties have opted for the traditional tariff clause, rather than a more liberal formula,<sup>150</sup> and require "double approval"<sup>151</sup> as well as provide for consultations between the designated and other

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Australia, New Zealand and some smaller states, but more liberal elements are now being found in many agreements. See Heilbronn, *supra* note 137.

<sup>148</sup> "[A]nd [they] shall have as their primary objective the provision at a reasonable load factor of capacity adequate to meet the current and reasonably anticipated requirements for the carriage of passengers and cargo, including mail, to and from the area of the Contracting Party which has designated the airline." See HK-Netherlands Agreement, *supra* note 109, art. 6(3); HK-Switzerland Accord, *supra* note 108, art. 6(3).

<sup>149</sup> Charter operations in and out of any country, which are approved on an *ad hoc* basis by the states concerned have a marked effect upon the "capacity" requirements on any particular route, thus making airline projections as to traffic requirements quite unreliable. See generally *supra* note 53 and accompanying text; Haanappel, *IATA*, *supra* note 27, at 143; A. Lowenfeld & F. Mendelsohn, *supra* note 27.

<sup>150</sup> It is also surprising because Cathay Pacific Airways Ltd. is not an IATA member and KLM has supported freer pricing in the past; Hong Kong and Netherlands are both "free market" economies and the latter has pioneered liberalized tariff provisions in bilateral air service agreements. See, e.g., H. Wassenbergh, *Innovation in International Air Transportation Regulation (the U.S.-Netherlands Agreement of 10 March 1978)*, 3 AIR LAW 138 (1978). On the other hand, Swissair and the Swiss government have consistently supported IATA and resisted liberalization of international aviation.

<sup>151</sup> Approval by both governments, rather than "liberal" variations such as where: (i) governments themselves, agree and specify the tariffs or "tariff zones" within which any prices may be set; or (ii) governments allow their own airline to decide its own tariffs (with or without consultation with other interested airlines or in IATA) which means the lowest tariffs prevail, and also minimize government approval requirements in one way or another. Then, in such cases either (a) government approval is automatic, possibly subject to "minimum tariff levels" (not yet in any bilateral agreement); (b) any tariffs are allowed *unless* both states disapprove ("double disapproval"); (c) any tariffs are allowed, if an airline's "home state" approves (also very liberal, but with little support internationally); or (d) any tariffs are allowed if the state where traffic originates approves ("country-of-origin"). Two other innovative concepts further liberalize these clauses: "matching" (which authorizes 3rd, 4th and 5th freedom carriers to meet any lower or more competitive price proposed by another carrier) (but for the 5th freedom carriers to benefit, it would have to be provided for in their own bilateral air service agreements with the other two relevant states); and "price leadership" (which is rarely agreed to, but would enable 3rd, 4th, and 5th freedom carriers to "undercut" each other's tariffs). These provisions are only marginally less free than unregulated or uncontrolled pricing, as a stimulus to competitive pricing. See U.S. Model Pricing Clauses, ICAO Doc. At. Conf/2-WP/11, apps A-B.

regional airlines.<sup>152</sup> However, inter-airline tariff accords are not a prerequisite to filing a tariff for government approval. Thus, the HK-Netherlands agreement (like the HK-Switzerland accord) stops short of specifically authorizing airline negotiations in IATA traffic conferences. This was the case under the United Kingdom's previous arrangements with the Netherlands,<sup>153</sup> in which tariff accords were highly recommended.<sup>154</sup>

### c. Future Bilateral Air Services Agreements

Given the delicate political relations between Hong Kong and the P.R.C., it is understandable that the first and second Hong Kong bilateral air services agreement should be rather unremarkable and echo the traditional Bermuda I provisions found in the P.R.C.'s own recent bilateral air transport agreements.<sup>155</sup> Probably of more significance is the precedent which these agreements have set, not only to formalize as much as possible before 1997 the procedures to be followed *vis à vis* the P.R.C., but also to smooth the way for negotiations by Hong Kong with states more likely to hesitate before entering into international aviation agreements with political entities having less than full sovereign power, no matter how autonomous they appear.

## IV. CONCLUSION

In line with general developments in Hong Kong's politico-legal system, the law governing the international air transport relations of the Colony is in a state of rapid transition with many noticeable changes occurring. This is partly because the local laws governing international air transport relations rely almost completely upon U.K. enactments and executive action which will soon lose their force in Hong Kong. More importantly the changes are due to the P.R.C.'s delegation of authority to the Hong Kong S.A.R. government, which significantly enhances the S.A.R.'s autonomy in these matters after 1997, despite the P.R.C.'s un-

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<sup>152</sup> See HK-Netherlands Agreement, *supra* note 136, art. 9(3); HK-Switzerland Accord, *supra* note 108.

<sup>153</sup> See Annex A to the Exchange of Notes constituting and Agreement Further Modifying the Agreement Between the Government of the United Kingdom and the Government of the Netherlands Regarding Certain Air Services, Nov. 3, 1973, Cmnd. No. 4856, 823 U.N.T.S. 369, cl. 6. Note that there is a mistake in clause 6 which refers to the ECAC multilateral pricing agreement (*see* International Agreement, *supra* note 130) as having being opened for signature on July 10, 1956 instead of 1967.

<sup>154</sup> See generally *supra* note 26 and accompanying text concerning IATA and Hong Kong airline's involvement in its activities.

<sup>155</sup> For example, the Agreement Between the Government of Australia and the Government of the People's Republic of China Relating to Civil Air Transport, signed at Beijing on Sept. 7, 1984.

doubted overall responsibility for the Hong Kong S.A.R.'s international relations generally.

Some uncertainties remain since they have been unavoidably built into the kind of political solution to the "Hong Kong problem" which was supplied by the Joint Declaration. For example, the extent to which pre-1997 laws and executive procedures may have to be changed due to political influence from the P.R.C. is uncertain as are the unknown details of the Basic Law (to be drafted by the Central People's government in 1988). Also unclear are the final terms whereby the present U.K. legislation applying the international air transport legal and regulatory regime to Hong Kong will be re-enacted into Hong Kong law, in the several years left for that task to be achieved. However, given the goodwill of all parties concerned, the future of Hong Kong's international air transport relations looks bright.