PRESERVING THE RULE OF LAW IN HONG KONG AFTER JULY 1, 1997: A REPORT OF A MISSION OF INQUIRY

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK: THE COMMITTEE ON INTERNATIONAL HUMAN RIGHTS*

1. INTRODUCTION

On July 1, 1997, governmental authority over Hong Kong will pass from the United Kingdom to the People’s Republic of China (“China” or “the P.R.C.”). The advent of Chinese rule has raised concern beyond Hong Kong’s borders about future rights of people in Hong Kong to be free of governmental arbitrariness. That concern, in turn, focuses sharply on preservation and modification of Hong Kong’s system of justice, the rule of law, and independence of its judges and lawyers.

To address these questions, to determine whether and to what extent the doubts and apprehensions concerning Hong Kong’s future are well founded, and to ascertain whether the Association of the Bar of the City of New York (“the Association”) could and should play a meaningful role as events unfold, a mission of inquiry was organized under the auspices of the Association’s Committee on International Human Rights, chaired by Jay Topkis.

* The principle authors of this report are the Honorable Leonard B. Sand, Chair, United States District Judge (Senior Judge) of the Southern District of New York; R. Scott Greathead, a member of Owen & Davis; Monica P. McCabe, a member of Reid & Priest; and Maurice N. Nessen, a member of Kramer, Levin, Naftalis & Frankel. We are grateful to the John Merck Fund and the Nate B. and Frances Spungold Foundation for underwriting the cost of the mission.

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1.1. The Mission’s Methodology

Prior to leaving for Hong Kong, the members of the mission received helpful advice from many knowledgeable Hong Kong watchers in New York. The mission devoted its time in Hong Kong to meeting with members of the Hong Kong government, judges, legislators, leaders of the Hong Kong bar (both barristers and solicitors), law professors, journalists, human rights advocates, consular officials, and business leaders. Regrettably, the mission could not obtain a meeting with Christopher Patten, the Governor of Hong Kong, who was in Europe for most of our visit; however, the mission did meet with the Governor’s Director of Administration, Richard Hoare.

Everyone with whom the mission met extended a warm welcome, encouraged the mission’s efforts, and urged the Association to maintain a continuing involvement with Hong Kong and its legal community. The mission’s recommendation that the Association play an ongoing role as liaison with the Hong Kong Bar Association and Law Society largely responds to these encouragements.

1.2. The Mood In Hong Kong

During the week the mission spent in Hong Kong, October 24-31, 1995, there was intense interest and discussion of matters relating to the 1997 transition, not only on the part of those with whom the mission met, but also in the daily press and public forums. The mission purposefully selected late October for the visit to allow some dust to settle following the September 17, 1995 election for the Hong Kong Legislative Council (“Legco”). This election resulted in a resounding victory for Martin Lee, Chairman of the Democratic Party, and those generally aligned with his pro-democracy political views, such as Emily Lau, Christine Loh, and Margaret Ng. At the same time, Tsang Yok Sing, the leader

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1 We particularly wish to express our appreciation to George Black of the Lawyers Committee for Human Rights and to Professor Johannes Chan of the University of Hong Kong Law School. Daniel F. Feldman, Esq., a Henry Luce Scholar assigned to the Hong Kong office of Paul Weiss Rifkind Wharton & Garrison, coordinated our appointments and acted as an invaluable guide and advisor.

2 A complete list of those with whom the mission members met is set forth in the Appendix.
of the Democratic Alliance for the Betterment of Hong Kong Party ("DAB party") and a prominent pro-China advocate, was defeated. The debate of various substantive issues discussed in this report took place in the aftermath of these election results.

Hong Kong’s leaders worry about the quality and accuracy of criticisms and expressions of concern by persons outside of Hong Kong. Some fear that further "lecturing" from the outside will invoke a traditional distaste for foreign intervention and be counterproductive. This sensitivity to foreign criticism is especially reflected in the views of Hong Kong business leaders who fear that doubts and misapprehensions about the future, particularly among journalists, will discourage investors from continuing the flow of capital into the Hong Kong Special Administrative Region ("S.A.R."), as it will be known after July 1, 1997. For example, the foreign press frequently mentions a flight of capital and residents from Hong Kong, but neglects to mention the influx of funds and residents, despite the fact that the net balance favors Hong Kong.

At the meetings the mission attended and in many interviews, two particular writings disparaging Hong Kong seem to have touched sore nerves. On June 26, 1995, Fortune Magazine, which had earlier published an article describing Hong Kong in positive terms, published an article by Louis Kraar, entitled The Death of Hong Kong, predicting Hong Kong’s demise as a leading financial center.³

The second reference is to an opinion written by a United States district court judge in Massachusetts finding that the court had jurisdiction over a wrongful death action brought on behalf of the estate of a Massachusetts resident who drowned in a hotel swimming pool in Hong Kong.⁴ In explaining why it had jurisdiction over the action pursuant to the Massachusetts long arm statute and why, on the special facts of the case, there was a sufficient nexus with Massachusetts to defeat the defendant’s motion to dismiss for lack of jurisdiction, the court wrote:

Furthermore, the uncertain future of the Hong Kong legal system, given the island’s reversion to Chinese sovereignty

³ Louis Kraar, The Death of Hong Kong, FORTUNE, June 26, 1995, at 118.
in less than two years, counsels heavily in favor of jurisdiction to ensure that the Nowaks have the opportunity to obtain redress, if any be appropriate, for the grievous loss they have suffered.\textsuperscript{5}

That this one-line statement, written by a district judge in a wrongful death case where the issue was in no sense dispositive, should create such resentment highlights the apprehension with which many Hong Kong leaders view any foreign expressions of concerns. The wishes expressed that the mission view Hong Kong’s future positively also reflects the sensitivity over representation. Although the degree of emphasis or minimization of those issues of conflict discussed herein varied depending upon the political orientation of the speaker, the mission heard no voices of utter despair or great pessimism. No one admitted any intent to leave Hong Kong, although many are said to hold foreign passports.

There is no way, short of visiting Hong Kong, to adequately capture the atmosphere and dynamics of the place and the attitudes of its people. Recognizing this, there is a caveat to the mission Report: despite efforts to keep abreast of subsequent developments in Hong Kong, including, for example, monitoring local press stories and meeting with Hong Kong’s Solicitor General in February, 1996,\textsuperscript{6} the mission’s first-hand insights into Hong Kong focus on late October 1995. However, recent local press stories and the comments of Hong Kong’s Solicitor General in February 1996 indicate that there have been no significant developments which materially alter the issues discussed or the recommendations contained in this Report.

Section 2 briefly discusses the historical background of Hong Kong. Section 3 describes the basic documents which will govern Hong Kong’s transition from a British Crown Colony to a Chinese S.A.R., and reports on the four principal issues being debated with respect to that transition: the Bill of Rights Ordinance (“BORO”), the composition of the Court of Final Appeals

\textsuperscript{5} \textit{Id.} at 34.

\textsuperscript{6} On February 2, 1996, Solicitor General Daniel Fung addressed a luncheon meeting attended by members of various Association committees. His visit was preceded in October 1995 by that of Roderick Woo, a prominent solicitor and the President of the Law Society of Hong Kong.
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("CFA"), the continuation or replacement of the recently elected Legco, and the issues relating to the Acts of State Doctrine. Section 4 discusses the impact, apart from Hong Kong-China relations, which the transition will have on the legal system in Hong Kong. Finally, Section 5 summarizes the mission’s reactions and recommends continuing contact with Hong Kong’s legal community by the Association.

2. HISTORICAL BACKGROUND

Hong Kong, once a barren rock home to two thousand fishermen, is now an international center for finance and trade with a population of over 6.3 million people. The island colony has fueled the economic development of Southern China and other parts of Southeast Asia. Although Hong Kong has undergone this vast metamorphosis, it retains many attributes of British colonialism, having been a colony of England since 1841. This is particularly apparent in the Hong Kong legal system, which replicates the English system. For example, the Hong Kong legal profession is divided between barristers and solicitors, and conducts virtually all of its proceedings in English, despite the fact that only thirty-eight percent of Hong Kong’s residents speak English and only a small fraction speak it as their first language. In considering the consequences of the end of British colonialism and the advent of Chinese rule, it is important to examine Hong Kong’s historical evolution.

2.1. Britain and Hong Kong

The history of modern Hong Kong traces its beginning to the first Anglo-Chinese War, better known as the Opium War, which began in 1840. The conflict received its name from several

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7 Fraser L. Hunter, Jr., a member of the Committee on International Human Rights and a former resident of Hong Kong, made major contributions to this section of the Report.
10 See Alex Lo, Mr. and Ms. Average Moving Up in Single File, S. CHINA MORNING POST, Nov. 6, 1996, at 1.
decades of cultural conflict between China and the western trading nations over the sale of Indian-grown opium in China by British merchants, which Chinese imperial authorities tried to stop.  

The first Opium War was a relatively small-scale conflict. Shortly after hostilities began, Chinese authorities in Canton entered into negotiations to end the conflict. Acting without specific authority from London, Captain Charles Elliot of the Royal Navy, Britain’s Chief Superintendent of Trade, reached an agreement with China at Ch’uen-pi to end the hostilities in exchange for British possession of Hong Kong. The Convention of Ch’uen-pi was repudiated almost immediately by both sides, and Elliot was dismissed from his post. In the letter of dismissal, Lord Palmerston, then Britain’s Foreign Minister, sharply denigrated Elliot’s diplomatic achievement:

You have obtained the Cession of Hong Kong, a barren island with hardly a house on it . . . . Now it seems obvious that Hong Kong will not be a Mart of Trade . . . our Commercial Transactions will be carried on as heretofore at Canton; but [the British residents] will be able to go and build Houses to retire to, in the desert island of Hong Kong.

Following a short resumption of hostilities and period of further negotiations, in 1842 the British enlarged upon the gains of the Convention in the Treaty of Nanking. In addition to enlarging British trading rights at five Chinese “Treaty ports” and providing compensation for the destruction of opium stocks, the Treaty formally ceded “to Her Majesty the Queen of Great Britain . . . the Island of Hong-Kong, to be possessed in perpetuity by Her Britannic Majesty, her heirs and successors . . . .”

On June 26, 1843, Hong Kong formally became a British

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13 See WELSH, supra note 11, at 104.
14 See Convention of Ch’uen-pi, Jan. 20, 1841; see also WELSH, supra note 11, at 104-06.
15 WELSH, supra note 11, at 108.
17 Id. at 467.
For the first time in history, China had surrendered territory to a foreign power. The British further enlarged their holdings following the Second Anglo-Chinese War, securing the southern tip of the Kowloon peninsula and nearby Stonecutters Island in the Convention of Peking. Yet even after the second, and final, Anglo-Chinese conflict, Great Britain still possessed only thirty-two square miles of mostly barren, mountainous territory containing a population of just over ninety thousand.

At the close of the nineteenth century, the Great Powers, with the exception of the United States, maneuvered to obtain advantageous portions of Chinese territory. While Russia, France, Germany, and Japan took territory from China by force or threat, Great Britain completed its territorial acquisition of Hong Kong by leasing from China the remainder of the Kowloon peninsula, its immediate hinterland, and the islands in the archipelago surrounding Hong Kong. This ninety-nine-year lease of what became known as the "New Territories" increased the total land under British control to approximately 390 square miles. As history would reveal, the lease also set a time limit on Great Britain's presence in Hong Kong.

Although Hong Kong had reached its present-day territorial limits by the turn of the twentieth century, it was not until the 1950s that Hong Kong became the focal point for trade with China that it is today. Indeed, throughout the first half of the twentieth century, Shanghai was generally considered the chief port of entry to the China market. The success of the Communist Revolution in 1949 led Hong Kong and Shanghai to change their relative positions. With the overthrow and flight of the Nationalist government, Hong Kong saw an influx of refugee industrialists from China and a redirection of capital away from mainland China to Hong Kong. These events formed the

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18 See MORRIS, supra note 12, at 18.
19 Convention of Peking (1860).
20 See MORRIS, supra note 12, at 19.
21 See id.
22 See id. at 19-20.
23 See id. at 20.
24 See id.
25 See id. at 21.
impetus for Hong Kong’s postwar growth surge. Between 1945
and 1950, Hong Kong’s population quintupled to two million, and
by 1995 had reached 6.1 million. Economic growth also
increased sharply in postwar Hong Kong and by the end of 1993,
Hong Kong’s Gross Domestic Product exceeded Great Britain’s on
a per capita basis.

Following the Communist Revolution in 1949, several events
occurred in China and elsewhere which figured in the historical
forces that resulted in the agreement reached in 1984 between
Britain and China providing for Hong Kong’s reversion to
Chinese rule. First, the unrest in China generated by the Great
Leap Forward and the Cultural Revolution caused smaller but
significant upheavals in Hong Kong. In May 1962, seventy
thousand Chinese refugees came to Hong Kong to escape the
famine and shortages resulting from the catastrophic failure of the
Great Leap Forward. Five years later, during the Cultural
Revolution, the Red Guards nearly sacked the British Embassy in
Beijing. Although Hong Kong escaped outright invasion by the
Red Guards, it suffered through a summer of violent riots and
terrorist acts. These events, which were likely monitored, if
not actually directed, by the Chinese government, highlighted
Hong Kong’s rather obvious vulnerability to China.

For the Hong Kong Chinese, another particularly significant
event was Great Britain’s enactment of the Immigration Act of
1971. The Immigration Act

conferred the right of abode in the United Kingdom only on ‘citizens of the United Kingdom and Colonies who
[were] connected with Britain by birth, adoption, natural-
ization or registration or [were] children or grandchildren
of such persons . . . or who [had] been resident in Britain

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26 See id. at 351.
27 See generally, WELSH, supra note 11, at 465-70.
28 See MORRIS, supra note 12, at 306.
29 See WILLIAM H. OVERHOLT, THE RISE OF CHINA: HOW ECONOMIC
REFORM IS CREATING A NEW SUPERPOWER 205 (1993). In 1967, when Red
Guards approached the Hong Kong border, Premier Zhou Enlai reportedly
issued orders to the local army commander to stop them. See id.
30 See WELSH, supra note 11, at 466-68.
31 See Immigration Act 1971, ch. 77 (Eng.).
for a continuous period of five years . . . ."  

The Act defined persons who managed to meet this criteria as "patrials." Very few Hong Kong Chinese qualified. Despite 130 years of British sovereignty, Parliament denied the vast majority of Hong Kong's Chinese the right to live in Great Britain.

If the Immigration Act of 1971 and the expiration of the lease on the New Territories in 1997 provide the canvas on which Hong Kong's subsequent history is written, two other events in the early 1970s provide a prelude to that history. President Nixon's secret trip to China in late February 1972, and the resulting "Shanghai Communique," acknowledged the extent of the West's interest in re-establishing relations with mainland China. Part of the price of this renewed relationship included recognition of China's territorial claim to Taiwan. As the Communique stated, "[t]he United States acknowledges that all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of China. The United States does not challenge that position." If Great Britain's closest ally, the United States, was willing to compromise on Taiwan to gain relations with China, Hong Kong's future as a British territory was certainly in some question.

Less than five days after the Shanghai Communique, China requested that the United Nations Committee on Decolonization drop Hong Kong from the list of colonial territories. As the Chinese representative explained:

The question of Hong Kong and Macao belong to the category of questions resulting from the series of unequal treaties which the imperialists imposed on China. Hong Kong and Macao are part of Chinese territory occupied by the British and Portuguese authorities. The settlement of

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32 WELSH, supra note 11, at 473 (citing Immigration Act 1971).
33 Immigration Act 1971, pt. 1, ch. 2(6).
34 See WELSH, supra note 11, at 473.
35 See id. at 470-71.
36 Id. at 471.
37 See id.
the questions of Hong Kong and Macao is entirely within China’s sovereign right[.] 38

Although Great Britain could have objected to China’s request on the grounds that Hong Kong (apart from the New Territories) had been ceded to the United Kingdom in perpetuity, Great Britain did not object. 39 Instead, one week later, Britain and China issued a joint communique calling for embassies in London and Beijing and affirming “principles of mutual respect for sovereignty and territorial integrity.” 40 The die for Hong Kong’s future had been cast.

2.2. Hong Kong and the People’s Republic of China

The P.R.C.’s posture toward Hong Kong is driven by two divergent views that must be reconciled. On the one hand, the P.R.C. has always considered Hong Kong’s existence as a foreign territory on its border an abhorrent reminder of the Opium Wars and of China’s humiliation at the hands of Great Britain during the nineteenth century, which can only be overcome by restoring Hong Kong as part of China. This view sees restoration of Hong Kong to China as a matter of pride and of righting historical wrongs. On the other hand, China’s Communist rulers have made it a policy not to jeopardize Hong Kong’s prosperity and its role as Southeast Asia’s principal financial center. In light of this view, it makes no economic sense to restore Hong Kong to its nineteenth century status.

China has long had the means and a colorable pretext for regaining Hong Kong by force, as India did with the Portuguese colony of Goa in 1961, and Indonesia did in 1975 with East Timor, also a former Portuguese colony. 41 The P.R.C. never recognized the legal validity of the nineteenth century treaties ceding Hong Kong to Britain. 42 Hong Kong has always been

38 Id.
39 See id. at 471-72.
40 Id. at 472.
41 See OVERHOLT, supra note 29, at 206.
vulnerable to recovery by force — since World War II, it has been lightly defended by a relatively small British garrison, and according to many long-time residents the mission encountered, the Chinese might have had to do little more than turn off the water supply and cut off food supplies from the mainland. But rather than pursue its nationalist impulses to recover Hong Kong forcibly, the P.R.C. maintained the status quo.

The wisdom of China’s hands-off policy toward Hong Kong is vividly illustrated by the British territory’s contribution to China’s extraordinary economic growth since the beginning of Chinese economic reform in 1979. The transformation began in China’s Guangdong Province, which borders Hong Kong. Once a relatively poor, agricultural district, Guangdong had a large and cheap labor force — wages were only ten percent of those in Hong Kong — and, unlike crowded Hong Kong, plenty of land for new factory sites. With the benefit of capital, technology, and management skills supplied by capitalist entrepreneurs from Hong Kong, between 1978 and 1992 Guangdong’s economy achieved an annual real growth rate of over twelve percent. Since 1979, two-thirds of all foreign investment in China has come from Hong Kong.

In the late 1970s, China’s Communist leaders reportedly saw three options available to them: leaving Hong Kong in the hands of the British indefinitely, recovering Hong Kong by force, or resuming sovereignty over Hong Kong while retaining the benefits of the existing capitalist system. China chose the third option and, in 1981, commenced negotiations with the British government leading toward the restoration of Chinese sovereignty over Hong Kong under terms that would preserve its capitalist economy and lifestyle by creating, in the often-quoted words of Deng Xiaoping, “one country, two systems.”

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43 See OVERHOLT, supra note 29, at 183.
44 See id. at 186.
45 See id. at 183, 186.
46 See id. at 195.
47 See id. at 206.
48 See id. at 206-07.
3. THE TRANSFER OF SOVEREIGNTY: THE GOVERNING DOCUMENTS AND PRINCIPAL ISSUES

The basic terms under which China would resume governmental authority over Hong Kong are set out in the Sino-British Joint Declaration on the Question of Hong Kong, which was signed by the British and Chinese governments on December 19, 1984.\(^4\) The Joint Declaration sets forth general principles agreed to by the two governments to guarantee under Chinese rule a high degree of autonomy and basic rights for Hong Kong and its citizens. To the extent that agreements on paper offer a guide, the Joint Declaration is the primary documentary source for drawing any conclusions about the future of Hong Kong’s legal system under Chinese rule.

Further details of the transition are supplied in two subsequently adopted documents agreed to by both governments: the Basic Law of the Hong Kong Special Administrative Region of the Republic of China, adopted by the P.R.C.’s National People’s Congress (“NPC”) on April 4, 1990;\(^5\) and the Agreement between the British and Chinese Sides on the Question of the Court of Final Appeal in Hong Kong, signed on June 9, 1995,\(^6\) the terms of which were enacted by Legco as the Hong Kong Court of Final Appeal Ordinance on July 1, 1995.

A third document, the Bill of Rights Ordinance,\(^7\) was adopted without China’s approval by Hong Kong’s Legco on June 8, 1991. While the BORO provides an additional basis for confidence in Hong Kong’s future, the Chinese government’s objections to it have caused some political leaders in Hong Kong to question China’s intention to carry out the commitments it has made to preserve Hong Kong’s freedoms.

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\(^5\) The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Apr. 4, 1990), translated in 29 I.L.M. 1520 [hereinafter Basic Law].

\(^6\) Agreement Between the British and Chinese Sides on the Question of the Court of Final Appeal in Hong Kong, June 9, 1995, P.R.C.-U.K. [hereinafter Court of Final Appeal Agreement].

\(^7\) Hong Kong Bill of Rights Ordinance, Ordinance No. 59 (1991) [hereinafter Bill of Rights].
3.1. The Sino-British Joint Declaration

The Joint Declaration on the Question of Hong Kong commits Britain to restoring Hong Kong to the P.R.C. on July 1, 1997, and obligates China to establish the Hong Kong S.A.R. on that date. The Joint Declaration is most remarkable for the extraordinary degree of autonomy China agrees to cede to the new government of the Hong Kong S.A.R., which is perhaps unprecedented for a government recovering sovereignty over former colonial territory.

In its preamble and first section, the Joint Declaration articulates the two goals of the Chinese government: first, "to recover the Hong Kong area," which the P.R.C. declares "is the common aspiration of the entire Chinese people," and second, to accomplish this by a negotiated settlement that "is conducive to the maintenance of the prosperity and stability of Hong Kong." The agreement does not expressly address the degree to which restoring capitalist Hong Kong as an integral part of Communist China, while preserving Hong Kong's prosperity and stability, may be perceived to be potentially competing objectives. The remainder of the Joint Declaration seeks to reconcile these goals in a series of "declarations" agreed to by the two governments. The most significant points include:

(1) The Hong Kong S.A.R. will be "directly under the authority of the Central People's Government" of the P.R.C., but "will enjoy a high degree of autonomy, except

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53 China amended its Constitution in 1982 to add Article 31, which permits the creation of special administrative regions within the state where socialism will not be practiced and the existing social and economic systems will remain unchanged. China adopted the amendment to accommodate the reacquisition of sovereignty over Taiwan as well as Hong Kong. See CHRISTINE LOH, HONG KONG "A HIGH DEGREE OF AUTONOMY" AND THE BASIC LAW 18-21 (1995).

54 See Joint Declaration, supra note 49, para. 3(2). The Joint Declaration was registered as a treaty with the United Nations, pursuant to Article 102 of the U.N. Charter, and as such, its provisions are enforceable under international law.

55 Id. para. 1.

56 Id. pmbl.
in foreign and defence affairs . . . .”

(2) The Hong Kong S.A.R. will be “vested with executive, legislative and independent judicial power, including that of final adjudication,” and “[t]he laws currently in force in Hong Kong will remain basically unchanged.”

(3) The Hong Kong S.A.R.’s government “will be composed of local inhabitants” and will be headed by a chief executive appointed by the Chinese government “on the basis of the results of elections or consultations to be held locally.” Current employees of the Hong Kong government, both Chinese and foreign nationals, may remain in their jobs, and British and other foreign nationals may serve as advisers or hold “certain public posts.”

(4) “The current social and economic systems in Hong Kong will remain unchanged, and so will the life-style. Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law . . . . Private property, ownership of enterprises, legitimate right of inheritance and foreign investment will be protected by law.”

In addition, the Chinese government agreed to enact the “basic policies” laid out in the Joint Declaration in a “Basic Law” to be adopted by the NPC, and confirmed that these policies “will remain unchanged for 50 years.”

In Annex I to the Joint Declaration, the Chinese government “elaborated” on the basic policies it agreed to in the main document. Some of these “elaborations” reinforce the concept of the Hong Kong S.A.R.’s autonomy. Others presage issues that have come to bedevil the transition process.

Annex I provides that all laws in force in Hong Kong prior to July 1, 1997 shall remain in force “save for any that contravene
the Basic Law" or that are amended by the legislature of the Hong Kong S.A.R. These include "the common law, rules of equity, ordinances, subordinate legislation and customary law." Annex I affirms the basic "rights and freedoms" provided in existing law that will be maintained and protected by the S.A.R. government, including some that are not explicitly listed in the main body of the Joint Declaration. It also explicitly provides that the provisions of the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force.

The inclusion of the two international human rights covenants is significant, as China has not signed either instrument. However, the Chinese government has objected to the 1991 enactment by Hong Kong's Legco of a Bill of Rights Ordinance modeled on the ICCPR because it results in the repeal of certain British laws restricting press and other freedoms that were in effect at the time of the Joint Declaration and which the P.R.C. wants to maintain.

Controversy has also risen over two "elaborations" in Annex I of the Joint Declaration dealing with the S.A.R.'s legislature and its CFA. Annex I specifies that the legislature of the Hong Kong S.A.R. "shall be constituted by elections." This provision is significant since when the Joint Declaration was signed in 1984, Hong Kong's Legco, a vestige of colonial rule, had no elected members. When Britain proposed that the first direct Legco elections take place in 1991 for eighteen of Legco's sixty members, the Chinese objected, preferring a smaller number. This disagree-

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62 Id. annex 1, § II.
63 Id.
64 Id. annex I, § XIII. The list of rights and freedoms contained in Section XIII of Annex I includes the following rights not included in the list set forth in the main body of the Joint Declaration: the rights "to form and join trade unions," "of demonstration," of "inviolability of the home," and "the freedom to marry and the right to raise a family freely." Id.
67 Joint Declaration, supra note 49, annex I, § XIII.
68 Id. annex I, § I.
ment led to an impasse\(^69\) that continues to this day regarding the composition and manner of selection of the S.A.R.’s first legislature following the transfer of authority in 1997.\(^70\)

Annex I also provides for the creation of a court of final appeal which shall exercise “the power of final judgment” of the S.A.R., replacing the Judicial Committee of the Privy Council in London, which presently serves as the highest level of appeal for Hong Kong’s judicial system.\(^71\) It further specifies that the S.A.R.’s chief executive will appoint the members of the CFA with the endorsement of the legislature, and that the CFA may include “judges from other common law jurisdictions.”\(^72\) The composition of the CFA, particularly the number of foreign judges who would be permitted to sit on it, has led to controversy.\(^73\)

Finally, in Annex II to the Joint Declaration, the two governments establish a Joint Liaison Group composed of representatives from both sides who will meet regularly to consult on the implementation of the Joint Declaration and discuss other matters relating to the “smooth transfer” of authority in 1997.\(^74\)

3.2. The Basic Law

On April 4, 1990, the NPC adopted the Basic Law, which on July 1, 1997 becomes the Hong Kong S.A.R.’s “constitution,”\(^75\) replacing the Letters Patent, the document issued under the Queen’s hand that establishes the basic framework of the colonial government.\(^76\) Article 2 repeats the Joint Declaration in granting the Hong Kong S.A.R. “a high degree of autonomy and . . . executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this

\(^{69}\) See infra section 3.2.3.


\(^{71}\) See Joint Declaration, supra note 49, annex I, § III.

\(^{72}\) Id.

\(^{73}\) See discussion infra section 3.3.

\(^{74}\) See Joint Declaration, supra note 49, annex II.

\(^{75}\) Basic Law, supra note 50.

\(^{76}\) The Hong Kong Letters Patent 1991 (No. 1) [hereinafter Letters Patent].
Law.” Although Article 159 provides that the NPC can amend the Basic Law, any amendment presumably must conform with the Joint Declaration.

The Basic Law is structured to follow the “basic policies” of the Joint Declaration. The Basic Law provides that all of Hong Kong’s existing laws shall be maintained except for any that contravene the Basic Law or are amended by the S.A.R.’s legislature. It reiterates the basic rights of the S.A.R.’s residents that are set out in the Joint Declaration and expressly adds the right to freedom from “arbitrary or unlawful arrest, detention or imprisonment” and the prohibition of “torture” and “arbitrary or unlawful deprivation of . . . life.” The Basic Law also provides that the two international human rights covenants “shall remain in force,” adding that they “shall be implemented through the laws” of the S.A.R.

3.2.1. The Acts of State Issue and Other Limits on Autonomy

Certain provisions of the Basic Law seem to undercut the Joint Declaration’s promise of a “high degree of autonomy” and its guarantees of basic rights. The most troubling are Article 19, which deprives the S.A.R.’s courts of jurisdiction “over acts of state such as defence [sic] and foreign affairs,” and Article 158, which vests the ultimate “power of interpretation” of the Basic Law in the Standing Committee of the NPC rather than the courts.

Article 158 reflects what is perhaps the most significant difference between the Chinese and British systems of law.
Unlike the British and U.S. systems, where the courts operate independently as the final interpreters of the law, the P.R.C.'s courts "are subject to tight political control" and are subordinate to the NPC, whose Standing Committee has the power to interpret the Constitution.\(^\text{87}\)

The effect of Article 158 is mitigated by a clause requiring the NPC to authorize the S.A.R.'s courts to interpret the Basic Law on their own in cases that are "within the limits of the [S.A.R.'s] autonomy."\(^\text{88}\) Still, the courts must abide by the interpretation of the NPC's Standing Committee in cases "concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region."\(^\text{89}\)

When read with Article 19, Article 158 gives the Standing Committee the unreviewable authority to determine what cases fall within the definition of "acts of state" and thus fall outside the jurisdiction of the S.A.R.'s courts. These provisions have raised concern among many Hong Kong lawyers and legislators that the Standing Committee will expansively interpret "acts of state" for political or doctrinal reasons in ways that will seriously undercut the S.A.R.'s autonomy and the independence of its courts.\(^\text{90}\)

Another troubling provision is Article 23, which requires the S.A.R.'s legislature to enact laws prohibiting a variety of crimes that include "subversion against the Central People's Government" and "theft of state secrets."\(^\text{91}\) This provision has raised fears that these laws will be used against critics of Beijing and to restrict free expression.\(^\text{92}\) Under Chinese criminal law, "subversion"

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\(^{87}\) COHEN & LANGE, supra note 9, at 5, 24.

\(^{88}\) Basic Law, supra note 50, art. 158.

\(^{89}\) Id. In interpreting the Basic Law, the Standing Committee is required to consult with its Committee for the Basic Law of the Hong Kong S.A.R., a twelve member committee appointed by the Standing Committee, six of whom must be Hong Kong residents. See id. art 158, app.

\(^{90}\) These concerns are compounded by Article 17 of the Basic Law, which empowers the NPC's Standing Committee to invalidate laws that it finds are "not in conformity" with the Basic Law "regarding affairs within the responsibility of the Central Authorities" or the relationship between the Central Authorities and the S.A.R. Id. art. 17.

\(^{91}\) Id. art. 23.

criminalizes counter-revolutionary acts with the intent of overthrowing the political power of the dictatorship of the proletariat and the socialist system. In a recent criminal case in the P.R.C., a Beijing-based journalist for Hong Kong's *Ming Pao* newspaper was convicted of "theft of state secrets" and was sentenced to imprisonment for twelve years after he acquired information concerning undisclosed interest rate changes and international gold transactions planned by the People's Bank of China.

### 3.2.2. The S.A.R.'s Chief Executive and Legislative Council

Other important provisions of the Basic Law deal with the selection of the S.A.R.'s Chief Executive and legislature, and the composition of its CFA. Articles 45 and 68, respectively, provide that the "ultimate aim" is to elect the S.A.R.'s Chief Executive and its legislature by "universal suffrage," but that the method of selection will be determined "in light of the actual situation" in the S.A.R. and "in accordance with the principle of gradual and orderly progress." The qualifying language reflects the Chinese government's post-Tiananmen concern that the democratic process in the S.A.R. not run free. The details of the selection process are spelled out in two annexes to the Basic Law, and in the text of the Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region. The Central People's Government will appoint the first Chief Executive based on a recommendation by a "broadly representative" Selection Committee composed of four hundred permanent

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93 See LOH, *supra* note 53, at 30 n.6 (citing Articles 90-104 of the Criminal Law of the P.R.C.).


95 Basic Law, *supra* note 50, arts. 45 & 68.

96 See *id.* annexes I & II.

97 Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region, adopted Apr. 4, 1990 (P.R.C.) [hereinafter Decision of the National People's Congress].
Hong Kong residents. Subsequent Chief Executives will be elected by a "broadly representative" Election Committee composed of eight hundred Hong Kong residents, who will vote for candidates "nominated jointly" by at least one hundred members of the Election Committee. After the year 2007, the selection process can be changed by a two-thirds vote of the S.A.R.'s Legislative Council, subject to the consent of the Chief Executive and the approval of the Standing Committee of the NPC.

The S.A.R.'s first Legislative Council will serve a two-year term and will consist of sixty members, of whom twenty will be directly elected by geographic constituencies, thirty will be elected by functional constituencies, and ten will be elected by the Election Committee. For the second and third Legislative Councils, which will serve four-year terms, the number of directly-elected members will increase to twenty-four and thirty, respectively. After 2007, the manner of selection can be changed in the same manner as for the Chief Executive.

3.2.3. The Legco Through-Train Issue

A heated and increasingly contentious issue is whether the members of Legco elected in 1995, who will have two years remaining in their terms, can retain their seats and become members of the first S.A.R. Legislative Council. This so-called "through-train" issue is the subject of an ongoing dispute, arising out of the Chinese government's discontent with the British government's expansion of the franchise for the 1995 Legco elections without the NPC's approval. In addition, the substantial majority of those elected won their seats in part by the votes of pro-democracy critics of Beijing. The P.R.C.'s "Decision" on the formation of the S.A.R.'s first legislature would permit sitting Legco members to retain their seats, but only if certain

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98 See id.
99 See Basic Law, supra note 50, annex I.
100 See id.
101 See Decision of the National People's Congress, supra note 97.
102 See Basic Law, supra note 50, annex II.
103 See id.
conditions were met, including the requirement that the rules for the 1995 Legco elections conform to the Basic Law. The Chinese government asserts that these conditions were not met and that it will install a new legislature in 1997.105

The Hong Kong officials who met with mission members recognized the importance of a smooth transition by permitting the Legco elected in 1995 to continue as the S.A.R.'s first Legislative Council. According to Tsang Yok Sing, the chairman of the pro-Beijing DAB Party, the "through train' had been taken for granted when the Basic Law was drafted."106 The Chinese government first signaled its unwillingness to allow the through-train in 1993, when negotiations between the British and Chinese governments regarding the terms of the 1995 election broke down.107 The results of these elections only hardened the P.R.C.'s position, despite the commitment to "universal suffrage" it made in the Basic Law.108

The biggest winner in the 1995 Legco elections was the Democratic Party, founded by Martin Lee and other critics of Beijing after the 1989 Tiananmen Square massacre, which won twelve of twenty directly-elected seats, and seven indirectly-elected seats.109 Immediately after the results were in, a Chinese government spokesman announced, "[t]he last legislature of the British administration in Hong Kong will end on June 30, 1997.... The attitude of the Chinese Government on this issue is consistent and will not change and will not be influenced by the result of the election."110

The P.R.C. further signaled its obvious discomfort with the outcome of the 1995 elections on December 28, 1995, when it named the 150 members of the Preparatory Committee, which will prescribe the method of forming the S.A.R.'s first government and Legislative Council.111 The Preparatory Committee

106 Sing, supra note 104, at 24.
107 See id.
108 See Basic Law, supra note 50, arts. 45 & 68.
110 Id.
replaces the Preliminary Working Committee ("PWC"), a body appointed by the P.R.C. in mid-1993 to serve as an advisory "shadow government" in Hong Kong. Of the ninety-four members of the Preparatory Committee from Hong Kong, more than fifty are leading representatives of the colony's business community, who have been relatively uncritical of the P.R.C.'s positions on the new government. Twenty-nine seats went to political party representatives who mostly follow Beijing's wishes. The Democratic Party won no seats.\(^1\)

One new member of the Preparatory Committee, Allen Lee Peng-fei, the Chairman of the pro-business Liberal Party, justified the make-up of the group by stressing that "[b]usinessmen's confidence ... [and] presence on the committee is of vital importance .... After all, Hong Kong means business."\(^1\)

To date, the Preparatory Committee has done little to encourage those who hoped the S.A.R.'s first Legislative Council would be as independent and democratic as the present Legco. At its first plenary session in Beijing on January 26, 1996, one of the Preparatory Committee's first items of business was to adopt rules mandating the "confidentiality" of its proceedings and "collective responsibility" for final decisions "to avoid confusion in the final phase of transition."\(^1\) According to press accounts, under these rules members may not leak confidential information, quote statements by other members, disclose the agenda of discussions before its public announcement, or publicly oppose a decision that has been finalized by the Preparatory Committee.\(^1\) Even Mr. Allen Lee Peng-fei recognized the problem this presents for public involvement in the important decisions that the body will be making over the next few months, reportedly asking, "[h]ow can we consult the public if Hong Kong people don't know what's on the committee agenda?"\(^1\)

Then, as anticipated, on March 24, 1996, the Preparatory Committee voted to replace Legco with an appointed council as

\(^{112}\) See id.

\(^{113}\) Id.


\(^{115}\) See id.

\(^{116}\) Id.
of July 1, 1997, an action which Governor Patten referred to as "a black day for democracy in Hong Kong."\textsuperscript{117} Hong Kong media reported that only one person on the 150 member Preparatory Committee, Frederick Fung, voted to keep Legco for its full term.\textsuperscript{118} It is further reported that Fung, a local lawmaker, will be excluded from sitting on the provisional body that will replace Legco.\textsuperscript{119} Although this action of the Preparatory Committee was not a surprise, it was a disappointment and has raised the level of anxiety of those who are apprehensive that China will not tolerate political independence in Hong Kong.\textsuperscript{120}

3.2.4. The S.A.R.'s Judiciary and Court of Final Appeal

Chapter IV, Section 4, of the Basic Law implements the commitment in the Joint Declaration to maintain "[t]he judicial system previously practiced in Hong Kong"\textsuperscript{121} with courts that "shall exercise judicial power independently, free from any interference."\textsuperscript{122} That system is to include a CFA. It also reiterates the language of the Joint Declaration providing that the CFA may include "judges from other common law jurisdictions."\textsuperscript{123}

Since the Basic Law does not come into effect until July 1, 1997, it cannot provide for an earlier establishment of a CFA to replace the Privy Council. All political factions in Hong Kong in 1991 viewed a quicker formation of the CFA as necessary to effect a "smooth transition" in the appellate process. This has resulted in four years of contentious negotiations between the British and Chinese governments that finally produced the CFA Agreement, signed on June 9, 1995, and a controversy over the CFA's composition and jurisdiction.

\textsuperscript{117} Elected Legislature in Hong Kong to End, N.Y. TIMES, Mar. 25, 1996, at A9.
\textsuperscript{118} See id.
\textsuperscript{119} See id.
\textsuperscript{120} See Edward A. Gargan, In Its Takeover Overture, China Calls the Tune, N.Y. TIMES, Apr. 15, 1996, at A4.
\textsuperscript{121} Basic Law, supra note 50, art. 81.
\textsuperscript{122} Id. art. 85.
\textsuperscript{123} Id. art. 82.
3.3. The Court of Final Appeal Agreement

Hong Kong has a distinctly British-style court system comprised of several levels.124 The lowest level consists of the Magistrate's Courts, which have jurisdiction over relatively minor criminal offenses and which are staffed by sixty-eight magistrates. The next level is the District Court, which has limited civil and criminal jurisdiction, and consists of thirty judges. Above that is the Supreme Court, which is comprised of the High Court and the Court of Appeal. The High Court is Hong Kong's court of general jurisdiction in civil and criminal cases and is staffed by twenty-three judges. The Court of Appeal hears appeals from the High Court and the District Court. The Chief Justice and nine Justices of Appeal sit on the Court of Appeal, where they typically hear approximately nine hundred civil and criminal appeals each year.125

Appeals from the Court of Appeal can be made to the Judicial Committee of the Privy Council in London. According to officials, because of the time and expense involved, generally less than ten cases are appealed to the Privy Council per year. This is the only element of the Hong Kong judicial system that requires replacement upon the transfer of sovereignty. Many hoped to replace the Privy Council with a CFA that would be in place prior to July 1, 1997, and that would duplicate as nearly as possible the high quality of the Law Lords in London. To them, the CFA Agreement is a major disappointment.

The CFA Agreement was originally intended to provide for the operation of the CFA prior to the 1997 transfer of authority.126 The consensus was that early functioning was needed to maintain confidence in Hong Kong's judicial system and to avoid delays or prejudice to appeals to the Privy Council that could not be decided by July 1, 1997.127 An agreement was also necessary to address the details of the CFA's composition that were not specified in the Joint Declaration or the Basic Law.

In 1991, the British and Chinese governments, through the

124 See COHEN & LANGE, supra note 9, at 23.
125 See Hong Kong Government Information Services, HONG KONG 1995, 49-58, Appendix 46.
126 See COHEN & LANGE, supra note 9, at 24.
127 See id.
Joint Liaison Group, agreed in principle on the early establishment of the CFA. The agreement provided also that the CFA would be comprised of five judges: a Chief Justice, who must be a Chinese national; three permanent Hong Kong judges, who could be local or expatriate; and a fifth non-permanent judge, who would come from a list of non-permanent Hong Kong judges or from another common-law jurisdiction.

The Joint Liaison Group reached this agreement without consulting with Hong Kong's legal community or Legco, and it was vigorously opposed. The Bar Association and a number of Legco members, led by Martin Lee, argued that the CFA must be permitted to invite more overseas judges to sit, in order to ensure that it would maintain the high caliber and independence that they were accustomed to with the Privy Council. Fearing defeat of the proposed CFA legislation in Legco, the Hong Kong government deferred the issue while negotiations within the Joint Liaison Group continued.

When the final CFA Agreement was reached in June, 1995, it contained three principal features. First, it deferred establishment of the CFA until July 1, 1997. Second, it reaffirmed the 1991 agreement providing for a five-member CFA, with no more than one foreign judge selected and permitted to sit on a case. Third, the Agreement provided that legislation creating the CFA would exclude from its jurisdiction "acts of state," as provided in Article 19 of the Basic Law.

On June 14, the Hong Kong government submitted a bill to Legco implementing the CFA Agreement, where it was vigorously debated. The legislation was opposed by the Bar Association and Martin Lee, the leader of the Democratic Party, who said that the CFA Agreement meant that "the rule of law is finished in Hong Kong."

Although the bill passed Legco (which then included three colonial Government officers and eighteen members appointed by

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128 See id.
129 See id. at 25.
130 See LOH, supra note 53, at 82-84.
132 See id.
133 Id.
the Governor), the repercussions of the debate were undoubtedly felt in last September's elections, in which Mr. Lee's Democratic party scored a landslide victory. Although some Hong Kong leaders regard the CFA issue as having been fully resolved, at one time Mr. Lee threatened to submit to Legco a bill amending the CFA Ordinance to allow more foreign judges, to narrow the definition of "acts of state," and to put the Court into place before 1997.

The issue of how the CFA will be established remains one of deep concern to many in Hong Kong. An independent and highly qualified judiciary, especially at the highest level, is crucial to maintaining the rule of law, as well as the confidence of overseas investors who rely on the independence and quality of Hong Kong's courts and the availability of appeal to the Privy Council. To many, the quality and independence of the S.A.R.'s Court of Final Appeal symbolizes the stature of the entire judicial system.

The advocates of creating a CFA with two or more overseas judges argue that such foreign involvement is necessary (1) because the pool of judicial talent in Hong Kong is too small to ensure the selection of a high quality court; (2) to ensure that the CFA has the world class reputation required to maintain the confidence of the world financial community; (3) to enable Hong Kong's legal system to maintain contacts with other common law jurisdictions; and (4) to allow the CFA to maintain its independence from governmental influence.

While these are compelling objectives, some of them could be accomplished with the presence of the single overseas judge permitted under the present CFA Agreement. Moreover, based on the caliber and experience of the members of the Hong Kong bar and bench, the "talent pool" in Hong Kong is sufficient to create a highly qualified CFA.

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135 See Martin Lee, Courting Disaster, S. CHINA MORNING POST, June 14, 1995.

136 Two proposals to broaden the field of judicial candidates being discussed by members of the Hong Kong legal community would appear to warrant further consideration. One proposal would permit retired judges, at some time after leaving the bench, to return to practice before the courts on which they had served, with appropriate restrictions to avoid conflicts. The present
To those who doubt the good faith of the P.R.C. in carrying out its commitment to maintain Hong Kong’s institutions and autonomy, the most compelling argument in favor of appointing more overseas judges is the need to ensure the continued independence of the judiciary after 1997. The continuation of an independent judiciary is essential to the rule of law in Hong Kong. A key element is the judicial selection process itself.

It appears that under the process, the S.A.R.’s Chief Executive will appoint members of the Judicial Officers Recommendation Commission (“JORC”) from among the Hong Kong judiciary, members of the legal profession, and other eminent individuals. Upon the recommendation of the JORC, and with the approval of the Legislative Council, the Chief Executive will appoint the Chief Justice and the judges of the CFA.

Legco members Martin Lee and Christine Loh, among others, have warned that the selection of the Chief Justice and CFA judges will be controlled by China’s “hand-picked team” and have criticized the lack of institutional guarantees of the independence of the JORC. These are legitimate concerns, and the entire process is one that must be monitored carefully by all who are concerned about maintaining the rule of law and the high quality of Hong Kong’s judicial system.

3.4. The Bill of Rights Ordinance

When the United Kingdom ratified the ICCPR on May 20, 1976, it expressly extended its application to Hong Kong, with certain reservations. Although China has not signed the ICCPR, it agreed in the Joint Declaration that the Covenant procedures which prohibit judges from returning to private practice are a significant deterrent to many who might otherwise seek judicial office. Elevation to the bench of solicitors, as well as barristers, which is only recently occurring, would also broaden the pool of aspirants to judicial office.

137 See Basic Law, supra note 50, art. 88; Hong Kong Court of Final Appeal Ordinance, pt. 1, 6-7; Joint Liaison Group, Submission on the Joint Liaison Group Agreement and the Hong Kong Court of Final Appeal Bill (July 3, 1995).

138 LOH, supra note 53, at 83; Lee, Courting Disaster, supra note 135.

139 These included a reservation of the right not to apply Article 25(b) of the ICCPR to the extent that it may require the establishment of an elected Executive or Legislative Council in Hong Kong. See THE HONG KONG BILL OF RIGHTS: A COMPARATIVE APPROACH 665-66 (Johannes Chan & Yash Ghai eds., 1993) [hereinafter A COMPARATIVE APPROACH].

140 See discussion supra section 3.1.
“as applied to Hong Kong shall remain in force.”

Like Britain, Hong Kong never had a formal, written bill of rights, and there appears to have been no serious movement to adopt one until the Tiananmen Square massacre in June 1989 aroused popular concerns in Hong Kong over the future of civil and political liberties under Chinese rule. A number of well-placed observers contend that the British government’s decision to enact a Bill of Rights in Hong Kong — announced by Hong Kong’s Governor, Lord Wilson, in October 1989 — was intended to quiet those fears and to keep the transfer of sovereignty on track.

The adoption of a Bill of Rights presented two dilemmas. The first was how to make it superior to other laws — a doctrine the British call “entrenchment” — in view of British law that appeared to limit the authority of Hong Kong’s Legco to enact entrenched legislation. The second dilemma was how to meet Chinese government objections that a Bill of Rights would violate the Joint Declaration by effecting a fundamental change in the nature of the Hong Kong legal system.

The first legal problem was met by a 1991 amendment of the Letters Patent — Hong Kong’s constitutional instrument — which authorized the enactment of laws implementing the ICCPR in Hong Kong and barred the future enactment of laws inconsistent with the Covenant:

The provisions of the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 16 December 1966, as applied to Hong Kong, shall be implemented through the laws of Hong

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141 Joint Declaration, supra note 49, annex I, § XIII.
142 See A COMPARATIVE APPROACH, supra note 139, at 2, 4.
143 For a discussion of the origins of the BORO, see Yash Ghai, The Bill of Rights and the Basic Law: Inconsistent or Complementary? (June 18, 1994) (unpublished manuscript presented at a seminar organized by the University of Hong Kong Faculty of Law, on file with the Association of the Bar of the City of New York, Committee of International Human Rights).
144 See id. at 3-4. The obstacle was the Colonial Laws Validity Act of 1865, “which cast doubts about the ability of the Hong Kong Legco, as an unrepresentative legislature, to pass entrenched legislation.” Id. at 4.
145 See id. at 4-5.
146 See id. at 5-6.
Kong. No law of Hong Kong shall be made after the coming into operation of the Hong Kong Letters Patent 1991 (No. 2) that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with that Covenant as applied to Hong Kong.\(^{147}\)

Many commentators take the position that the Letters Patent, as amended, entrench the ICCPR rather than the BORO.\(^{148}\) In any event, there is general agreement that the amendment at least "indirectly" entrenches the BORO until the transfer of sovereignty on July 1, 1997, at which time it will continue to enjoy "quasi-superior status" based on Article 39 of the Basic Law, which provides that the ICCPR "shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region."\(^{149}\)

In order to counter the Chinese government's objection that adoption of a Bill of Rights would violate the Joint Declaration, the language of the BORO mirrors *in haec verba* the wording of the ICCPR. The British government has used this to argue that the BORO simply codifies the ICCPR and is consistent with the Joint Declaration and Article 39 of the Basic Law, which provide for its continuing application to Hong Kong.

That argument has not laid the Chinese government's objections to rest. The principal focus of controversy arises out of Article 3(2) of the BORO, which provides that "[a]ll pre-existing legislation that does not admit a construction consistent with this Ordinance is, to the extent of the inconsistency

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\(^{147}\) The Hong Kong Letters Patent 1991 (No. 2).

\(^{148}\) See Ghai, *supra* note 143, at 5-6. This is the official position of the British Government, as articulated by the Secretary of Home Affairs:

The Bill of Rights has a status that is the same as other Hong Kong ordinances. It is the covenant, not the bill, that is entrenched in the Letters Patent, Hong Kong's constitutional document.

The Letters Patent provides that no legislation shall be enacted which is inconsistent with the covenant as applied to Hong Kong. The Letters Patent will, of course, cease to apply in Hong Kong after June 30, 1997. After that, the Basic Law will in effect entrench the covenant as applied to Hong Kong.


\(^{149}\) Basic Law, *supra* note 50, art. 39 (emphasis added).
repealed.150 Pursuant to this provision, the Hong Kong government, acting through the Solicitor General, has undertaken a review of all existing legislation to identify pre-existing laws that are inconsistent with the BORO and has sought their repeal or amendment by Legco. According to Solicitor General Daniel Fung, Q.C., this task is about eighty percent complete.151

The BORO has afforded a degree of protection for civil and political liberties not previously enjoyed by the citizens of Hong Kong, or the United Kingdom, for that matter. Since its enactment in 1991, dozens of court cases, particularly at the level of the Magistrate's Courts and the District Court, have applied the BORO to enforce individual liberties.152 Although the Court of Appeals' treatment of the BORO has been criticized by some commentators as too conservative,153 there have been some significant appellate decisions upholding rights guaranteed in the BORO and the ICCPR. In R. v Sin Yau-ming,154 a leading decision, the Court of Appeal repealed mandatory presumptions based on possession of certain quantities of narcotics that shifted the burden of proof to the defendant in prosecutions under the Dangerous Drugs Ordinance. The court reasoned that such mandatory suppositions violated the presumption of innocence guaranteed by Article 11(1) of the BORO.155

The BORO has also resulted in ordinances repealing or modifying a number of pre-existing laws deemed inconsistent with it. These ordinances have effectively nullified laws requiring the

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150 Bill of Rights, supra note 52, art. 3(2).


152 See Andrew Byrnes, Director of the Centre for Public and Comparative Law of the University of Hong Kong, Killing it Softly? The Hong Kong Courts and the Slow Demise of the Hong Kong Bill of Rights 2 (Sept. 30, 1995) (unpublished manuscript presented at a seminar on Hong Kong and the International Covenant on Civil and Political Rights, on file with the Association of the Bar of the City of New York, Committee of International Human Rights).

153 See id.


155 See id. at 144-45, 148-49.
registration of private associations (the Societies Ordinance), empowering the government to suspend a television broadcaster’s license (Television Ordinance), restricting public demonstrations (Public Order Ordinance), and authorizing the government to impose martial law, control transport and suppress publications during times of civil unrest (Emergency Regulations Ordinance).

Citing these amendments, on October 17, 1995, the Chinese government and its PWC issued a press release accusing the British and Hong Kong governments of violating “the principle under the Joint Declaration and the Basic Law that the laws previously in force in Hong Kong shall remain basically unchanged.” Asserting that the amendments to the various public order and media laws “are not conducive to the maintenance of stability of Hong Kong,” the press release announced PWC’s conclusion that the BORO’s provision repealing prior inconsistent laws should be scrapped, and that the repealed laws restricting association, media, and similar rights must be restored.

The attack by the Chinese government and the PWC on the BORO unleashed a furious reaction in Hong Kong. Democratic Party Chairman Martin Lee called the proposal to reinstate the repealed laws “pernicious because these laws would stifle public debate and free expression at a time in our history when freedom of expression is most critical.” A host of prominent legal scholars harshly criticized the proposal in the press; one called it “constitutional terror,” another “unquestionably retrograde.” Even many China supporters in Hong Kong were critical. For example, Tsang Yok Sing, Chairman of the pro-Beijing DAB, disagreed with the PWC’s criticism of the BORO and doubted whether it conflicted with the Basic Law.

Practically the only defenders of the attack on the BORO were a few members of the PWC itself. Former Court of Appeal Justice and PWC member Simon F.S. Li informed mission

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157 Id.
160 Interview with Tsang Yok Sing, Chairman of DAB, in Hong Kong (Oct. 28, 1995).
members that he did not believe Hong Kong needed a Bill of Rights. According to Li, it is "gilding the lily, like drawing legs on a snake."

As with the Legco-"through-train" issue, the Chinese government's opposition to the BORO raises serious questions as to its intentions concerning the rule of law in Hong Kong.

4. THE IMPACT OF THE TRANSITION ON THE HONG KONG LEGAL SYSTEM

As previously noted, the Hong Kong bar functions in a manner which largely reflects Hong Kong's status as a British colony. A large segment of the bar has been educated in Great Britain, and virtually all of the proceedings are conducted in English. The legal profession is divided between solicitors and barristers, and many other aspects of the English practice are followed. Hong Kong has a common law system, and the courts of Hong Kong cite decisions of all common law jurisdictions for their precedential value.

Much of this will change as of July 1, 1997. The Hong Kong legal system will become a bilingual system. Translating English words of art into Chinese is no small task. Law professors note that Chinese equivalents simply do not exist for some common law terms. Indeed, several barristers and solicitors, including Hong Kong-born Chinese, confided that they would not feel comfortable arguing or otherwise dealing with a legal matter in any language other than English without additional training. Clearly the magnitude of the change that will take place is great, considering that for over one hundred years all Hong Kong juries have been English-speaking, despite the fact that Cantonese is overwhelmingly the predominant language of the citizenry.

Although the adoption of bilingualism is the most obvious change that will occur, other consequences will flow from the interchange between the mainland Chinese and Hong Kong legal

161 Interview with Simon F.S. Li, Former Court of Appeal Justice and PWC member, in Hong Kong (Oct. 27, 1995).
162 See discussion supra section 3.3.
163 See discussion supra section 3.3.
164 News accounts report that the first High Court trial to be conducted entirely in Chinese was scheduled to take place on Dec. 4, 1995. See Cliff Buddy, First Case to be Heard in Chinese, S. CHINA MORNING POST, Dec. 2, 1995.
systems. These interchanges, already well underway, are likely to accelerate substantially. Of particular interest is the extent to which common law concepts will be operative in the future in both Hong Kong and mainland China.

Solicitor General Fung notes recent developments which suggest that mainland China has been looking to modernize its legal system as a means of fostering economic growth. As part of this exploration, Fung states, China has been studying common law practices. Since 1987, three law schools in China have been studying Hong Kong law and translating this law into Chinese. Fung argues that the interest in Hong Kong law arises "because its a subset of the common law which carries with it, relatively speaking, the least foreign cultural baggage. It is the more accessible and it is perhaps, more politically acceptable because we will soon be part of one country . . . ."

In response to the adoption of a bilingual system, the Hong Kong Attorney General’s office translated all of the statute books into Chinese. All future legislation will be drafted bilingually. As Fung explains:

In other words, we don’t just draft in English and translate [into] Chinese, we have two teams working in tandem, in English and Chinese, to produce the final results. So we are able by this process of drafting common law statutes in the Chinese language to influence the mainland legislative system in quite a significant way. We supply our materials to the National People’s Congress Legislative Affairs Commission and they then draft with input from our laws. So we have given them our bankruptcy law, we have given them our companies legislation, we have given them various bits of our commercial legislation and China has been undergoing a fever-pitch legislative cycle [in] the last 18 months.

Hong Kong has also been actively training mainland private sector lawyers, sending selected lawyers to work in England in a

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165 See Remarks, supra note 134.
166 Id.
167 Id.
barrister’s chambers for ten months, then to work in Hong Kong for two months before returning to China.

Within China, judges have begun training in common law concepts. In addition, the creation of an independent Chinese bar is under study. China has also introduced a system of law reporting, and has published law reports of the Supreme People’s Court since 1992. In Hong Kong, an English edition of the China Law Reports has been initiated and will be published annually by Butterworth, a leading law publisher.

Clearly, both the Hong Kong and Chinese legal systems are in flux. This situation creates both challenges and opportunities for law schools, bar associations, and all others engaged in legal affairs. The impact of the interchange between Chinese law and Hong Kong law will have serious consequences on the development and preservation of the rule of law for both China and Hong Kong. It is a process which should be studied closely and to which the United States should offer whatever assistance it can provide.

5. CONCLUSIONS AND RECOMMENDATIONS

As disclosed by an analysis of the salient issues relating to the transition, there are two major schools of thought which roughly parallel the political division between the adherents to the pro-Beijing political parties, such as the DAB and those aligned with Hong Kong’s Democratic Party. Although these parties are often referred to as the Pro-China and Pro-Democracy factions, these labels are not helpful. These two groups are better characterized as those who believe Hong Kong’s interests are best served by adopting a conciliatory, cooperative, and trustful attitude toward China (the “Trust China” advocates), and those who believe that Hong Kong’s interests are better served by aggressively confronting China whenever and wherever tension exists (the “Confront China” advocates).

The “Trust China” advocates focus on the P.R.C.’s motivation to maintain and encourage the enormous contribution Hong Kong makes to the mainland economy. The P.R.C. has already

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168 Solicitor General Fung summarizes the economic relationship between Hong Kong and China as follows:

Hong Kong is the world’s fourth biggest trading power, after the European Union, the U.S. and Japan. It is the fourth largest financial center in the world after New York, Tokyo and London. Hong Kong
manifested its intent in the Joint Declaration and Basic Law to preserve Hong Kong's democratic institutions and free market economy. The Hong Kong community should give China no reason to doubt Hong Kong's good faith and desire to cooperate. It is counter-productive to approach China in a confrontational or antagonistic fashion. Writing on July 17, 1995, William H. Overholt, Managing Director of Bankers Trust Hong Kong, and an officer of Vision 2047, an umbrella organization of Hong Kong business leaders, stated this view quite bluntly:

Hong Kong has several confrontational anti-Chinese politicians, for instance [sic], Martin Lee, Emily Lau and Christine Loh. They thrive only in an atmosphere of confrontation. They will see their careers ended if the transition goes well, because China will not accept them and their view of China as satanic would lose credibility with their constituents if things went well.169

The "Trust China" advocates maintain that expressions of concern over the transition will have adverse economic consequences, and hostility toward China only increases the danger that some of the dire predictions of the "Confront China" group will become self-fulfilling prophesies. Rather, they believe China's own economic and political interests — including those related to

has the world's largest container port. It accounts for some 40% of China's hard currency earnings and is China's biggest trading partner. Hong Kong is the biggest gold capital investor in China, having capital investments of U.S.$66 billion in China, which dwarfs anything invested by Japan, the United States, or Taiwan. Conversely, China is the biggest single investor in Hong Kong.

Remarks, supra note 134. He also emphasizes the cultural ties between the two entities:

They [Chinese leaders] send their children to school [in Hong Kong], they buy our stocks, they speculate on our stock markets, they race in our race track, they buy our properties, they drive our cars, they wear clothes just like the rest of us.

Id.

169 William H. Overholt, China After Deng Xiaoping, BANKERS TRUST RESEARCH (July 17, 1995), at 24. The mission disagrees with the views expressed by Mr. Overholt, but includes this quotation to highlight the heated nature of the dispute between the "Trust China" and the "Confront China" advocates.
Macau and Taiwan — coincide with those of Hong Kong and provide an adequate assurance that the rule of law will continue to flourish in Hong Kong.

The "Confront China" proponents, not surprisingly, focus on the events in Tiananmen Square on June 4, 1989, and seek to maximize the ability of Hong Kong to remain free from authoritarian control by China. Although they recognize that the Joint Declaration and Basic Law do provide certain assurances to Hong Kong, they emphasize the fact that, at one time, China seemed prepared to go even farther in offering protection to Hong Kong than its present stance reflects. They fault the British government for having too readily compromised the interests of Hong Kong in exchange for other considerations such as agreement with respect to the construction of the new Hong Kong airport.

An event which took place in Hong Kong in late October 1995 provides an apt illustration of why reliance on China's perception of its best interests concerning Hong Kong may not be enough. When the PWC sub-group's proposals to overturn certain provisions of the BORO were made public, considerable negative publicity resulted. In an apparent effort to counter this adverse publicity, three "mainland legal experts," Shao Tianren, Xiao Weiyen, and Wu Jianfan, came to Hong Kong and held a meeting at the offices of Xinhua, the New China News Agency, which serves as the principal representative of the P.R.C. in Hong Kong. The meeting was closed to all but the 150 District Affairs Advisors who had been designated by China and who may fairly be characterized as pro-China advocates. Although the meeting was closed to the public, press reports indicate that at the end of two hours of lectures, the speakers announced that the briefing session was over. Despite the fact that the assembled audience intended to be favorable to China, the speakers gave no

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170 For example, Martin Lee states that in 1987, when he was a member of the P.R.C.-appointed Basic Law Drafting Committee and the principal negotiator with China concerning the Court of Final Appeal, he proposed, and Chinese government representatives agreed, that a majority of that Court would be comprised of visiting judges who were not Chinese nationals, a position which China now rejects. See discussion supra section 3.3.

171 See discussion supra section 3.4.

172 China Confronters perceived the meeting to be illustrative of the Communist Party technique of talking to one's supporters to assure a united front against adversaries.
opportunity to any attendees to ask questions or express their views. Press reports also noted that the lecturers spoke in Mandarin, even though Cantonese is the overwhelmingly predominant dialect spoken in Hong Kong.

Second-hand oral reports suggest that no attempt was made to explain the legal arguments which have been advanced by those urging repeal of certain provisions of the BORO. Rather, the thrust of the remarks made by the spokesmen for China was that the questioned Bill of Rights provisions were manifestations of an anti-Chinese conspiracy on the part of Britain and other enemies of China. Reference was made to the Opium Wars which resulted in China's original loss of Hong Kong and the humiliation it now seeks to redress.

"Confront China" proponents who discussed this meeting were hopeful that it might shake the confidence of those attending the meeting in their belief that one can safely rely on China's own self-interest in Hong Kong. According to one legislator, this may have been the first occasion on which certain pro-China Hong Kong residents were exposed to the delivery of a mandate from the mainland for which their views or comments were not solicited or welcomed.

Recognizing that reports of the mainland legal experts' visit to Hong Kong come primarily from China confronters, the mission nevertheless concludes that, at least as of October 31, China's attempt to deal with the negative publicity concerning its opposition to certain Bill of Rights provisions was a public relations disaster. This raises the question of whether such conduct is symptomatic of the larger problem: whether the differences in political traditions and attitudes between the P.R.C. and the leaders of Hong Kong are so vast that China and Hong Kong may each act contrary to its own best interests, not by design, but inadvertently out of lack of familiarity with or sensitivity to the needs of the other.

The mission concludes that the process of education in which the leaders of both China and Hong Kong must participate will be aided, not hindered, by full and free debate in Hong Kong and

174 See id.
175 See discussion supra section 3.4.
elsewhere of the critical issues surrounding the transition. Hong Kong is a vibrant and thriving world center, richly endowed with able, energetic, and devoted civic and legal leaders. Hong Kong will not be “killed” if public focus is directed to those areas in the Hong Kong/Chinese relationship which are potential trouble spots.

It is unrealistic to suppose that legislation can be enacted that will fully protect Hong Kong from every conceivable exercise of sovereignty on the part of China which might have an adverse impact on Hong Kong. But there is a benefit in debating over these provisions. When the views of the China confronters prevail in whole or in part, a potential trouble spot is removed or minimized. When the China confronters do not succeed, they have nevertheless served the worthwhile purpose of alerting China and the world to the significance of the issue.

The concern is not that the current debates will suggest to the P.R.C. how, if it wished, it might impair Hong Kong’s present status. Nor does the mission believe that the vigorous assertion by the China confronters of their concerns will cause China to view Hong Kong with greater suspicion or lack of confidence.

In short, the mission rejects the notion that one should gloss over potential areas of conflict and act as if reliance on China’s self-interest is all that is needed to preserve the rule of law in Hong Kong. For that reason, this report does not refrain from discussing the various contentions with respect to transitional issues. The line between law and politics is not always clearly defined and this report has attempted to avoid expressing purely political views. The mission does believe, however, that an exposition of the various issues and how their resolution may affect the rule of law in Hong Kong is a worthwhile endeavor.

5.1. The Rule of Law in Hong Kong Will Require Careful Worldwide Monitoring

The threat to the preservation of the rule of law in Hong Kong is not so much that China will deliberately act contrary to its own best interests which coincide with the best interests of Hong Kong. Rather, it is that China will act contrary to its best interests concerning Hong Kong out of a lack of understanding or sympathy towards the vastly different traditions and beliefs of that community. Continuing close scrutiny and discussion concerning
the Hong Kong-China transition on an international level is beneficial and should be encouraged.

China, and indeed some residents of Hong Kong, have expressed the view that foreign observers, especially human rights monitors, have been inappropriately hostile towards China. They have, therefore, been regarded as unwanted meddlers in China's internal affairs. This attitude on the part of China, however, should not deter the monitoring of events in mainland China or Hong Kong which impact the preservation of the rule of law.

In any event, the Hong Kong-China transition is in no sense purely an internal Chinese matter. The transition of a capitalist society with a common law-based legal system from a crown colony to a region of China is by its very nature an event of international concern. The political, economic, and other interests the free world has in Hong Kong are of vast proportions. The Hong Kong experience will be watched with interest with respect to the Portuguese colony of Macau, which passes to Chinese sovereignty in 1999. The Transition will also inevitably affect the outcome of the conflict over the future status of Taiwan. The ability of Hong Kong to maintain its role as a major world financial center depends in large measure on international perception as to whether Hong Kong will continue to be a stable environment, politically and economically, with faithful adherence to the rule of law.

All of these reasons mandate that those concerned with the worldwide maintenance of the rule of law continue to carefully monitor events occurring in Hong Kong. It is also imperative that this monitoring continue well beyond July 1, 1997. Many have expressed the view that the risks to Hong Kong's preservation of the rule of law and of its economy will not be as great in the early years of the transition as they will be in the later years, when world attention on Hong Kong will have abated and the temptation for exploitation may have increased.

United States-China relations are extremely delicate and are likely to remain so in the foreseeable future. In particular, issues relating to trade, Taiwan, alleged sales by China of nuclear materials, and alleged human rights violations within mainland China will have a significant effect on the dialogue between the two countries. It is imperative that questions relating to the preservation of the rule of law in Hong Kong not be overlooked or compromised because attention is focused elsewhere.
5.2. **Proposal for an On-Going Relationship Between the Association of the Bar of the City of New York and the Hong Kong Legal Community**

The ties between the New York bar and the Hong Kong legal community are numerous. Because of the concern of many of Hong Kong's leaders that the transition to Chinese rule be viewed positively, several of them have come to New York and will come in the future to address members of the New York bar. The mission recommends that the Association be prepared to deal, in an ongoing manner, with matters of mutual interest to the New York and Hong Kong legal establishments. A key aspect of this involvement is forming and maintaining a relationship with the Hong Kong legal establishment, including the Hong Kong Bar Association and the Law Society of Hong Kong.

The details of this proposal should be worked through in the next few months, with the goal of providing the Hong Kong legal establishment and other interested parties assurance that our interest in Hong Kong is not ephemeral and that the New York City Bar Association is prepared to speak up whenever it may be useful to preserve the rule of law in Hong Kong. The leaders of both the Hong Kong Bar Association and the Law Society of Hong Kong expressed great enthusiasm when this proposal was tentatively advanced.

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176 See supra note 6.
6. APPENDIX

Members of the Mission to Hong Kong met with the following persons:

MEMBERS OF THE JUDICIARY

HON. HENRY LITTON, Vice President, Supreme Court, Court of Appeal; HON. ANTHONY G. ROGERS, Judge of the High Court; HON. SIR TI LIANG YANG, Chief Justice, The Supreme Court of Hong Kong.

MEMBERS OF LEGCO AND THE HONG KONG GOVERNMENT

HON. DANIEL R. FUNG, Solicitor General; R.J.F. HOARE, OBE, JP, Director of Administration, Government Secretariat; HON. MARTIN C.M. LEE, Q.C., Legislative Councillor; HON. CHRISTINE LOH, Legislative Councillor; CECILIA TSUNG, Executive Officer (Visits), Government Information Services.

MEMBERS OF THE LEGAL PROFESSION

PROF. JOHANNES M.M. CHAN, Dept. of Law, University of Hong Kong; GEORGE EDWARDS, ESQ., Centre for Comparative and Public Law, University of Hong Kong; T.C. FOO, ESQ., T.C. Foo & Co. Solicitors & Notaries; PAUL HARRIS, ESQ., Human Rights Monitor; SIMON S.O. IP, ESQ., Law Society; GLADYS LI, Q.C., CHAIR, H.K. Bar Association; HON. SIMON F.S. LI, Q.C., Director, The Bank of East Asia Ltd.; VINCENT LIANG, ESQ., Lo & Lo, Law Society; PROF. DEREK ROEBUCK, Professor of Comparative Law; PETER K.P. SIT, Council Member, The Law Society of Hong Kong; PROF. RAYMOND WACKS, Faculty of Law, University of Hong Kong; RODERICK BUN WOO, ESQ., President, The Law Society of Hong Kong.

OTHERS

JENNIFER E. BLAND, Vice Consul, U.S. Consul General; ANDREW CHOIA, Senior Advisor, Russell Reynolds Associates, Inc.; DAVID R. HALPERIN, Coudert Brothers; ALAN R.J. HO,
ESQ.; SIR JOSEPH HOTUNG; MR. JOHN KAMM; KEVIN LAU CHUN TO, Ming Pao Newspapers, HK Journalists Assoc.; CHRISTINE MAR, Executive Director, Vision 2047 Foundation; MARK MICHELSON, Warren Williams International Ltd.; MICHAEL MORGAN, ESQ., American Chamber of Commerce; WILLIAM H. OVERHOLT, Managing Director, Bankers Trust Company; STEPHEN A. SCHLAIKjer, Deputy Principal Officer, U.S. Consul General; GARY SILVERMAN, Correspondent, Far Eastern Economic Review; DOUGLAS G. SPELMAN, Ph.D., Chief Economic/Political Section, U.S. Consul General; HON. TSANG YOK-SING, Democratic Alliance for the Betterment of Hong Kong.