

2000

The Hong Kong Special Administrative Region as a Model of Regional External Autonomy

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Xiaobing Xu and George D. Wilson, *The Hong Kong Special Administrative Region as a Model of Regional External Autonomy*, 32 Case W. Res. J. Int'l L. 1 (2000)

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ARTICLE

THE HONG KONG SPECIAL ADMINISTRATIVE REGION AS A MODEL OF REGIONAL EXTERNAL AUTONOMY

Xiaobing Xu & George D. Wilson***

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INTRODUCTION

The potential for Hong Kong, now formally known as the Hong Kong Special Administrative Region (HKSAR) of the People's Republic of China (PRC), to serve as a model for helping solve problems in other parts of the world was first suggested by the Beijing leadership while talks between Great Britain and the PRC about Hong Kong's post-1997 future were still taking place. As early as June 22-23, 1984, PRC paramount leader Deng Xiaoping remarked to a Hong Kong industrial and commercial delegation

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that the “successful settlement of Hong Kong’s status might provide useful elements for the solution of international questions.”¹ On July 31, 1984, he told British Foreign Secretary Geoffrey Howe that:

[T]he ‘one country, two systems’ formula will work. This will produce a favorable reaction internationally and will serve as an example for other nations in settling disputes history has bequeathed to them. When we developed the concept of ‘one country, two systems’, we also considered what methods could be used to resolve international disputes. There are so many issues all over the globe that are tangled in knots and very difficult to solve. It is possible, I think, that some of them might be disentangled by this method.²

After the negotiations between the PRC and Britain led to the conclusion of the Sino-British Joint Declaration in December 1984,³ there were considerable international echoes of the Chinese advocacy. For example, on April 9-12, 1986, the American Society of International Law held a panel session discussing “the Hong Kong Accord as a Model for Dealing with Other Disputed Territories.”⁴ As one of the panelists, Hurst Hannum, pointed out during the discussion and subsequently, Hong Kong’s “extremely broad” external relations powers are “where one sees the extent of the autonomy that has been granted” to it,⁵ and such autonomy is “the most distinctive feature” of the Joint Declaration.⁶

This Article discusses the HKSARs external autonomy and, as indicated by the title, treats it as a model of regional external autonomy. As the HKSAR has celebrated its second anniversary, it is now possible to consider not only what is stated in the Joint Declaration, and in Hong Kong’s

¹ DENG XIAOPING, ON THE QUESTION OF HONG KONG 9 (Bureau for the Compilation and Translation of Works of Marx, Engels, Lenin, and Stalin Under the Central Committee of the Communist Party of China (trans., Foreign Language Press 1993).

² *Id.* at 14.

³ See 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, Dec. 19, 1984, P.R.C.-U.K., *reprinted in* 23 I.L.M. 1366 (1984) (an international agreement, between Great Britain and the PRC, consisting of three annexes and two brief memoranda, which was the result of two years and 23 formal sessions of arduous negotiations and which entered into force on May 27, 1985), *also available at* <<http://www.info.gov.hk/trans/jd/jd2.htm>> (visited Feb. 25, 2000) [hereinafter Joint Declaration].

⁴ Kevin M. Harris (reporter), *The Hong Kong Accord as a Model for Dealing with Other Disputed Territories*, 80 AM. SOC’Y OF INT’L L. 348 (1986).

⁵ *Id.* at 365-66 (Remarks of Hurst Hannum).

⁶ HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 140 (1990).

Basic Law,⁷ but also what has actually happened in the first two years of the HKSAR's existence. This Article is, however, not an attempt to discuss any immediate applicability of the HKSAR model to other parts of the world, but rather to consider major characteristics of Hong Kong's external autonomy and the respective roles of the HKSAR, China, and the international community in shaping such external autonomy into the next century. It will serve, hopefully, as a useful step on the road to the HKSAR's being considered seriously as a workable model of external autonomy that might be applied elsewhere in the future.

Part I of the Article examines the HKSAR's unprecedented external autonomy and Hong Kong's own role in forming and sustaining its external relations. Part II then discusses the Chinese aspect of the HKSAR's external relations and the PRC's role in determining Hong Kong's external autonomy. Finally, Part III considers the role of the international community in recognizing and supporting Hong Kong's external autonomy and its international legal status.

I. HONG KONG AND ITS EXTERNAL AUTONOMY

The first qualification for the HKSAR's external autonomy to be characterized as a model of regional external autonomy is the extensiveness of the external relations powers enjoyed by the HKSAR. The HKSAR arguably enjoys *in real terms* more far-reaching external autonomy than any other autonomous region in the world. Hong Kong's outstanding external autonomy gradually evolved from, and is firmly based on, its British-influenced international character. The future of the HKSAR's external autonomy will depend not only on continued support from China and the international community but also on Hong Kong's own performance in maintaining its international character,⁸ especially its position in the world economy.

A. *Unprecedented Regional External Relations Powers*

According to Article 62 of the Basic Law, the HKSAR government shall exercise the power to "conduct external affairs as authorized by the

⁷ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (1990), reprinted in 29 LL.M. 1511 (1990), also available at <http://www.info.gov.hk/basic_law/english/f02.htm> (visited Jan. 23, 2000) (a national law of the PRC, widely recognized as Hong Kong's "mini-constitution," which entered into force on Apr. 4, 1990) [hereinafter Basic Law].

⁸ For example, HKSAR Chief Executive Tung Chee Hwa recognizes that "Hong Kong must retain the special features of a cosmopolitan city in order to attract foreign investment as well as tourists," while maintaining and improving the English-language abilities of Hong Kong's people is "one of the prerequisites for Hong Kong to become the leading cosmopolitan city of Asia." *CE Meets Legislators* (visited Oct. 26, 1999) <<http://www.info.gov.hk/gia/general/199901/04/0104180.html>>.

Central People's Government under this Law."⁹ The detailed grant of external affairs powers to the HKSAR is provided in Chapter VII of the Basic Law, entitled "External Relations."¹⁰ In general, the HKSAR's external autonomy is concerned mostly with economic and cultural matters. For example, the HKSAR may on its own develop external relations and conclude international treaties with foreign states and regions and relevant international organizations "in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields."¹¹ The HKSAR may also participate in its own right in international organizations and conferences that are not limited to states.¹² In non-economic or cultural fields, the HKSAR is granted a number of powers; it is, for example, authorized to issue HKSAR passports and manage its own immigration control.¹³ The courts of the HKSAR – in handing down rulings under Hong Kong's British-common-law-influenced judicial system – may refer to precedents of other common law jurisdictions,¹⁴ judges and other members of the judiciary of the HKSAR may be recruited from other common law jurisdictions,¹⁵ and judges from other common law jurisdictions may be invited to sit on the HKSAR Court of Final Appeal (CFA).¹⁶

In sum, from treaty power¹⁷ to separate membership in international organizations;¹⁸ from management of transborder movement of goods and services¹⁹ to control of international shipping and air transportation;²⁰ from

⁹ Basic Law, *supra* note 7, at art. 62.

¹⁰ *Id.* arts. 150-57.

¹¹ *Id.* art. 151.

¹² *See id.* art. 152.

¹³ *See id.* art. 154.

¹⁴ *See id.* art. 84.

¹⁵ *See id.* art. 92.

¹⁶ *See id.* art. 82.

¹⁷ By July 1999, the HKSAR had concluded some 70 bilateral agreements of its own with more than 40 countries throughout the world. The subject matter of the agreements included air services, investment promotion and protection, surrender of fugitive offenders, mutual legal assistance in criminal matters, and transfer of sentenced persons. For a list of these agreements, see *The Hong Kong Special Administrative Region and External Affairs* (visited Nov. 29, 1999) <<http://www.info.gov.hk/info/exaffa.htm>>.

¹⁸ Hong Kong is, for example, a full, independent member of the World Trade Organization (WTO) and of the Asian Development Bank (ADB).

¹⁹ The HKSAR shall "be a separate customs territory" and "pursue the policy of free trade and safeguard the free movement of goods, intangible assets and capital." Basic Law, *supra* note 7, at arts. 116 & 115.

²⁰ The HKSAR shall "maintain Hong Kong's previous systems of shipping management and shipping regulation ..." and "continue to maintain a shipping register ..." *Id.* arts. 124 & 125. It shall also "continue the previous system of civil aviation management in Hong

international financial cooperation²¹ to transnational legal assistance;²² from issuance of the HKSAR passport to immigration control; from use of English as an official language²³ to the reference of precedents of other common law jurisdictions in Hong Kong courts; from overseas judges sitting in the HKSAR's courts, including the CFA,²⁴ to government civil servants possessing foreign citizenship and/or the right of abode in foreign states;²⁵ and from its own overseas presence²⁶ to foreign representation in Hong

Kong and keep its own aircraft register ..."; and "may negotiate and conclude ... air service agreements ... with foreign states" in regard to all scheduled air services to, from, or through Hong Kong, which do not operate to, from, or through the mainland of China. *Id.* arts. 129 & 133.

²¹ The HKSAR "shall provide an appropriate economic and legal environment for the maintenance of the status of Hong Kong as an international financial center." *Id.* art. 109.

²² Article 96 of the Basic Law provides that the HKSAR "may make appropriate arrangements with foreign states for reciprocal juridical assistance." *Id.* art. 96. However, Hong Kong's competence to sign and enforce its extradition agreements with the United States has been challenged in both the United States and the HKSAR courts before and after the hand-over. For a summary of an earlier case, see James D. Wilets, *Lui v. United States*, 110 F.3d 103 (1st Cir. 1997), 91 AM. J. INT'L L. 539 (1997). For a report of two recent cases, see Angel Lau, *Fight Against Extradition Lost*, S. CHINA MORNING POST, Oct. 27, 1999, at 2.

²³ Article 9 of the Basic Law provides that "[i]n addition to the Chinese language, English may also be used as an official language" Basic Law, *supra* note 7, at art. 9.

²⁴ As of November 1999, there were six judges from other common law jurisdictions (two each from Australia, New Zealand, and the U.K.) appointed as non-permanent judges of the Hong Kong Court of Final Appeal: The Honourable Sir Anthony Mason; The Right Honourable Lord Cooke of Thorndon; The Right Honourable Sir Edward Somers; The Honourable Sir Daryl Dawson; The Honourable the Lord Nicholls of Birkenhead; and The Honourable the Lord Hoffmann. *See Judges of Court of Final Appeal* (visited Nov. 29, 1999) <<http://www.info.gov.hk/jud/guide2cs/html/cfa/judge1st.htm>>. When a three-judge panel of the Court of Appeal upheld, on July 29, 1997, the legality of the Provisional Legislative Council, the *New York Times* reported that "[i]ndeed, remarkably, only one of the three judges was Chinese, making this the first time that judges of foreign nationality have deliberated on Chinese laws; all Hong Kong's judges retained their appointments after China resumed sovereignty over Hong Kong on July 1." Edward A. Gargan, *Hong Kong Court Upholds China's Rule*, N. Y. TIMES July 30, 1997, at 10.

²⁵ However, only those foreign nationals previously serving in public service in Hong Kong may continue to be employed in the HKSAR. *See* Basic Law, *supra* note 7, at art. 101.

²⁶ *See SAR Beijing Office Formally Opens* (visited Oct. 17, 1999) <<http://www.info.gov.hk/gja/general/199903/04/0304offe.htm>>. Hong Kong maintains ten official economic and trade offices in eight countries. The HKSAR also established a mainland China office, the Office of the Government of the HKSAR in Beijing, on March 4, 1999. *See id.*

Kong;²⁷ the HKSAR can be seen to enjoy probably the most extensive external autonomy that has ever existed in an autonomous region in the world, historical or current.

Most commentators generally agree that the HKSAR enjoys a high degree of external autonomy that far outstrips the powers granted to other subnational entities in other states.²⁸ In a comparative study of the foreign affairs powers of autonomous regions in the world, Hannum, an acknowledged authority on autonomy, has generally “ranked” Hong Kong as third – behind two Soviet republics and the Free Territory of Trieste – in terms of the formal, autonomous, foreign affairs powers granted by international treaty or domestic law.²⁹ However, the *proposed* Free Territory of Trieste never became a reality. Meanwhile, as for the Ukrainian SSR and Byelorussian SSR, “[d]espite . . . formal membership . . . in the United Nations and their adherence to numerous international agreements,”³⁰ international law scholars have generally treated them as a pragmatic exception – an example of political expediency – rather than a valuable precedent.³¹ Although current international law practices do not support any

²⁷ There are almost 100 foreign consular and other official and semi-official missions in the HKSAR. An official list of foreign representation in the HKSAR is available at <<http://www.info.gov.hk/isd/hk99/ewww/app/app05/index.htm>>. Although the establishment of these missions in the HKSAR needs China's approval, see Basic Law, *supra* note 7, at art. 157, the HKSAR is responsible for the day-to-day management of foreign missions. For example, on November 9, 1999, a HKSAR court denied the diplomatic immunity claim of Solomon Dominic Musa, the principle immigration officer of Sierra Leone, who was accused of selling three diplomatic passports illegally to an undercover agent, “based on an order endorsed by the Chief Executive that Musa did not enjoy that right.” See Magdalen Chow, *Immunity Refused in Passport-Selling Case*, S. CHINA MORNING POST, Nov. 10, 1999, at 5.

²⁸ See, e.g., Remarks of Hurst Hannum, *supra* note 5, at 364 (commenting that Hong Kong approaches “the status of an independent state,” being very close to the end of the “continuum” - of autonomous arrangements in the world “that varies from entities which merely have power over personal status or perhaps culturally autonomous groups to autonomous arrangements that are extremely difficult to distinguish from fully independent states”).

²⁹ Hurst Hannum, *The Foreign Affairs Powers of Autonomous Regions*, 57 NORDIC J. INT'L L. 273-77 (1988).

³⁰ *Id.* at 274.

³¹ See, e.g., PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 81 & n.53 (7th rev. ed. 1997) (commenting that the “purpose and effect” of amending the Soviet Union's constitution to permit the Ukraine and Byelorussia to become U.N. members was simply “to give the U.S.S.R. three votes instead of one”). See also ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 16-17 (1963); HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY* 50 (3rd rev. ed 1995). Hannum himself has acknowledged that “it is difficult to speak of any meaningful autonomy in the conduct of their international relations.” HANNUM, *supra* note 29, at 274.

autonomous region with the kind of formal external relations powers similar to that held by the Ukrainian SSR and Byelorussian SSR, it has been argued that Hong Kong should be able to accede to multilateral treaties and participate in international organizations independently even though the parties and members of these treaties and organizations are limited to sovereign states. For example, in an article examining environmental issues in Hong Kong and their relationship to the Basic Law, Benjamin Liebman has argued that the HKSAR should have the same status in international environmental agreements and organizations as it has in the WTO.³²

Liebman's argument, although limited to environmental issues, would certainly give the HKSAR's external autonomy a qualitative leap forward if accepted and implemented. He believes that it is necessary for Hong Kong to have independent status in international environmental agreements and organizations because the Basic Law fails to: (a) acknowledge the need for third party consent in determining Hong Kong's status in such agreements and organizations; and (b) consider the ways that the PRC may influence Hong Kong's environmental and trade policies indirectly, thus, undermining HKSAR autonomy. Second, he suggests that Hong Kong may acquire such a status anyway, since the Basic Law also fails to: (c) account for Hong Kong's development status ("developed," as opposed to "developing") in international agreements; (d) contemplate the interrelation of trade issues with environmental issues and the possibility that, by granting autonomy to Hong Kong in the WTO, the Basic Law may also grant autonomy in environmental external policy; and (e) take account of the different status of international treaties in Hong Kong and China and the possibility that such differences may allow Hong Kong's Legislative Council (LegCo) *de facto* veto power over international agreements applied to Hong Kong by China.³³ We find Liebman's argument unpersuasive.

It is correct to point out that there is a dilemma in applying a PRC treaty to Hong Kong if the HKSAR is unwilling to accede to it while the treaty, by its terms, requires application to all of China, such as in the case of the Framework Convention on Climate Change (1992) and of the Convention on Biological Diversity (1992).³⁴ It is also true that the Basic

³² Benjamin L. Liebman, *Autonomy Through Separation?: Environmental Law and the Basic Law of Hong Kong*, 39 HARV. INT'L L. J. 231,272 (Winter 1998).

³³ See *id.* at 234-5.

³⁴ See United Nations Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849, 851 (1992). See Convention on Biological Diversity, June 5, 1992, art. 3, 31 I.L.M. 818, 824 (1992). China ratified both treaties on January 5, 1993. At Hong Kong's request, Britain did not apply the two conventions to Hong Kong when it ratified the two conventions in 1992. See Liebman, *supra* note 32, at 257-58 & n.130. In contrast, Portugal informed the U.N. Secretary-General that the two conventions would apply to Macau on June 28, 1999. On December 15, 1999, China informed the U.N. Secretary-General that the two conventions would continue to apply to Macau SAR with effect from December 20,

Law neither provides for nor forbids China to seek its treaty partners' consent in determining Hong Kong's status in such a situation.³⁵ However, Liebman fails to give any plausible reason why his suggested solution – that the HKSAR participate in international environmental treaties in its own right – should be established as an international law precedent. On the contrary, attempts by the PRC to work with its treaty partners to exclude Hong Kong from a treaty that causes such a dilemma should not be interpreted as undermining “the Basic Law’s statement that Hong Kong ‘is an inalienable part of the People’s Republic of China,’”³⁶ but rather as the PRC, in its discretion as the HKSAR’s sovereign, choosing to make exceptional rules for Hong Kong.

It is, moreover, at best superficial to argue that, as China can exert indirect influence on Hong Kong’s environmental policy, the HKSAR’s autonomy in environmental policy is ephemeral and an independent status for the HKSAR in international environmental treaties and organizations is necessary.³⁷ Liebman cites as an example of China’s indirect influence the fact that the PRC’s ban on the import of hazardous wastes in the summer of 1996, under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,³⁸ forced Hong Kong

1999, the date of Macau’s return to the PRC. See *United Nations Framework on Climate Change* (visited Feb. 5, 2000) <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXVII/treaty22.asp>>; *Convention on Biological Diversity* (visited Feb. 5, 2000) <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXVII/treaty24.asp>>.

³⁵ Article 153 of the Basic Law states only that:

The application to the Hong Kong Special Administrative Region 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 Region, and after seeking the views of the government of the Region.

International agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Special Administrative Region. The Central People's Government shall, as necessary, authorize or assist the government of the Region to make appropriate arrangements for the application to the Region of other relevant international agreements.

Basic Law, *supra* note 7, at art. 153.

³⁶ Liebman, *supra* note 32, at 260.

³⁷ See *id.* at 273.

³⁸ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 28 I.L.M. 657 (1989), also available at <http://www.tufts.edu/fletcher/multi/texts/BH937.txt>>. The U.K. applied the Basel Convention to Hong Kong in 1995. China signed the convention in 1991 and agreed that the convention would continue to apply to Hong Kong after 1997.

to implement – ahead of time – its own law³⁹ on shipments of both foreign waste through Hong Kong to China and Hong Kong's own waste to China. However, at the time both China and (British) Hong Kong had independent international obligations to take measures to control transboundary movements of hazardous waste under the Basel Convention and, in making such “transboundary” policies, could be expected to influence one another no matter what status Hong Kong had then or has now (or in the future). It requires a huge leap to conclude that, since China's implementing measures *appeared* to have influenced Hong Kong's implementing measures, the HKSAR's autonomy in environmental policy as it exists now is somehow ephemeral and, therefore, Hong Kong should have an independent status in international environmental treaties.

Regarding Hong Kong's arguably different development status from that of China in treaties, such a distinction in and of itself does not justify full and independent membership for the HKSAR in international environmental agreements. The assertion that, since the HKSAR participates in the WTO Committee on Trade and Environment independently and contributes its own international environmental policy in that context,⁴⁰ so should it also in international environmental agreements and organizations, reflects confusion in analysis of, rather than any incoherence in, the Basic Law. The Basic Law clearly contemplates and provides for the HKSAR's status as a *non-state* player in various international arenas. As such, the HKSAR can always make and implement its own autonomous environmental policy no matter whether it is represented as a separate member in the WTO due to its status as a separate customs territory or as part of the PRC delegations to international environmental organizations due to its status as an SAR of the PRC,⁴¹ or, whether it signs international environmental agreements autonomously in the WTO context or is bound by them through the consent of the PRC.

Finally, Liebman exaggerates the consequences of the different status of treaties in the HKSAR and PRC legal systems. He claims that Hong Kong's common law tradition, in which treaties have to be incorporated by legislation to be effective locally, may allow the HKSAR LegCo *de facto*

³⁹ See Hong Kong Ordinance No. 14 (Waste Disposal (Amendment) Ordinance) (1995), Ch. 354, §§20A-20L. Hong Kong enacted this ordinance in order to bring its laws into line with the Basel Convention. Originally, it had intended to implement the new regulation by the end of 1996, but implementation began earlier in that year, after the PRC's action. See Liebman, *supra* note 32, at 274-75.

⁴⁰ Liebman contends that “either Hong Kong must possess autonomy in international environmental policy, or else Hong Kong's autonomy in the WTO must be limited.” Liebman, *supra* note 32, at 272.

⁴¹ Even as a part of the PRC delegations to international organizations, the Hong Kong delegates speak for Hong Kong and make policy statements of the HKSAR autonomously in the name of “Hong Kong, China.”

veto power over international treaties applied to Hong Kong by China – especially international environmental treaties on which the HKSAR’s legislature is willing to disregard Beijing’s dictates⁴² – by refusing to enact local implementing legislation. However, his claim fails on two counts. First, China has never dictated in the past, or indicated that it intends to dictate in the future, that the HKSAR apply the PRC’s environmental protection treaties. As Liebman himself acknowledges, China did not force the HKSAR to abide by the Framework Convention on Climate Change and the Convention on Biological Diversity even though China had the best excuse to do so because both conventions require that the PRC apply their provisions to all of China.⁴³ Nor does Basic Law Article 153 in any sense imply, as he suggests, that China will somehow force the HKSAR to abide by PRC treaties. Second, even though it is conceivable that there might be occasions where the HKSAR LegCo were to take issue in the future with the HKSAR executive administration’s decision to abide by a PRC treaty – *after* consultation between the administration and the central government in accordance with Article 153 of the Basic Law – it is doubtful how meaningful this “veto” would be both internationally and locally. From an international law point of view, the “veto” could not excuse the HKSAR from its international treaty obligation at all. In fact, the common law tradition (not China) would dictate that the HKSAR abide by the treaty internationally, in spite of the LegCo’s “veto.”⁴⁴ Locally, Basic Law Article 50 provides that if the LegCo refuses to pass important legislation, the HKSAR Chief Executive may then choose to dissolve the LegCo.⁴⁵ Given the clear meaning of Basic Law Article 153 and China’s consistent practice, and given the fact that environmental protection is a legitimate and increasingly popular cause in the HKSAR,⁴⁶ neither a threat to veto the

⁴² See Liebman, *supra* note 32, at 278.

⁴³ As a more recent example, the Standing Committee of the National People’s Congress (NPCSC) decided on December 29, 1998 to ratify the Minimum Age Convention (1973) (ILO Convention No. 138). Significantly, the NPCSC declared that, until announced otherwise, the convention will *not* apply to the HKSAR. See *The NPCSC’s Decision to Ratify the Minimum Age Convention*, PEOPLE’S DAILY (Overseas Edition) [RENMIN RIBAO (HAIWAIBAN)], Dec. 30, 1998, at 4.

⁴⁴ According to common law, “[t]he negotiation and conclusion of international agreements is an exclusive prerogative function of the Queen and her Ministers: moreover, an international agreement so concluded will be binding on the Commonwealth country whether or not internal legislation is enacted to implement it.” See J. E. S. FAWCETT, *THE BRITISH COMMONWEALTH IN INTERNATIONAL LAW* 56 (1963).

⁴⁵ See Basic Law, *supra* note 7, at art. 50.

⁴⁶ It has been asserted that “Hong Kong people are now much more aware of environmental problems and are expecting something to be done about them.” Such increased public awareness seems to be reflected by pollution complaints received by the government in Hong Kong, which have been rising rapidly in number over the last five

HKSAR administration's international environmental commitments by the LegCo, nor a threat to dissolve the LegCo by the Chief Executive, would ever occur lightly.

B. Hong Kong's Strengths and Constraints in Shaping its External Autonomy

Hong Kong's strengths in shaping its external autonomy come directly from its international character. It is without a doubt one of the most important international cities in Asia and it does not hide its ambition to become "the premier international city in Asia in the 21st Century,"⁴⁷ "a world city" of its own.⁴⁸ Hong Kong's major international characteristics, which have formed the foundation of Hong Kong's external relations include the facts that: many Hong Kong Chinese speak English and possess foreign, particularly British, passports which facilitate their international contact;⁴⁹ Hong Kongers live in a modern metropolitan community that is also home to many foreign nationals and businesses;⁵⁰ and, most importantly, Hong Kong people work in an externally oriented economy, which transformed Hong Kong into a well known international financial, business, and trade center.

To accommodate Hong Kong's British-influenced international character, the HKSAR became the first autonomous region in China to be granted external autonomy. Hong Kong's international character not only makes the external autonomy of the HKSAR possible but it also underlies its prominence. In fact, as one of the most important non-state players in the modern world economy, Hong Kong's extensive autonomous external activities have arguably produced – and will likely continue to produce – more significant international impact than that of the external activities of other autonomous regions. Today, the HKSAR's influence accompanies its leaders and official delegations abroad nearly every day as they meet and interact with foreign leaders and delegations. It is more than symbolic when Hong Kong, the world's tenth largest trading economy (sixth largest, if

years. See *Hong Kong Becomes More Environmentally Conscious*, (visited Jan. 13, 2000) <<http://www.info.gov.hk/gia/general/199902/23/0223100.htm>>.

⁴⁷ For the HKSAR Chief Executive's speech at the World Economic Forum on February 1, 1999, see *Hong Kong to be Asia's Major International City, CE Tells WEF* (visited Oct. 25, 1999) <<http://www.info.gov.hk/gia/general/199901/30/0130019.htm>>.

⁴⁸ Chris Yeung, *Lawmakers Back Tung's 'Big Vision' Blueprint*, S. CHINA MORNING POST, Oct. 28, 1999, at 1.

⁴⁹ According to the Immigration Department of the HKSAR, as of the end of December 1997, around 3.5 million British National (Overseas) (BN(O)) passports were in circulation. The HKSAR Immigration Department report is available at *Travel Documents* (visited Oct. 25, 1999) <<http://www.info.gov.hk/info/traldoc.htm>>.

⁵⁰ The United States alone has some 35,000 citizens in the HKSAR. See *Mid-Year Population* (visited Jan. 31, 2000) <<http://www.info.gov.hk/hkbi/enghki/12/12-2a.htm>>.

European Union (EU) countries are regarded as one entity)⁵¹ – China is the ninth largest⁵² – speaks as a full member in the WTO, while China is still in the process of applying for WTO membership. It is also impossible to ignore the physical evidence of Hong Kong's international influence in its numerous, overseas, official or semi-official offices and in the ubiquity of its people and investments worldwide. Other existing autonomous regions in the world and few if any in the past, simply cannot compare.

Nevertheless, the HKSAR's external autonomy is also under legal, political, and economic constraints. The legal constraints result from the reality that the PRC is the sovereign power and that the HKSAR is a non-state player. Thus, even though the HKSAR's external powers and autonomy are unprecedented for a non-state player, it has limited international capacities and cannot do many things that the smallest and least important states can do, such as casting a vote in the U.N.. Moreover, although, as an international financial and services center with a GNP almost open sixth of China's, Hong Kong's place in the regional and world economy is more important than that of many sovereign states, overall it has a limited role in international relations in a world where sovereign states still hold sway, notwithstanding the widespread empowerment of non-state actors such as international organizations.

The political constraints on Hong Kong's external autonomy originated from its colonial history. Although it has been known as a political (as well as non-political) refugee haven, it has also been portrayed as an apolitical society. Internally, the British colonial government in Hong Kong simply did not permit Hong Kong residents any chance for political activism until the controversial, political reform plan of Britain's last governor there, Christopher Patten, was introduced and implemented in the final years of the U.K.'s rule.⁵³ Externally, Hong Kong's relations with China since 1949, although not without political conflicts, have often been described as being mutually beneficial economically. Hong Kong survived the Cold War by serving as a window between East and West, rather than as an outpost of anti-Communism. While Hong Kong was governed by the U.K., which maintained an embargo against the PRC from early in the Korean War on, Hong Kong continued to trade with China and became an important source of foreign currency and material goods for the latter. And internationally, Hong Kong – an influential economic but non-state player – was largely immune from world politics. It had essentially no power, and its people

⁵¹ For the WTO's website regarding this, see *Leading Exporters and Importers in World Merchandise Trade, 1998* (visited Jan. 18, 2000) <<http://www.wto.org/wto/intltrad/998appl.htm>>.

⁵² *See id.*

⁵³ Patten's reform plan drew the PRC's strong opposition. *See* JONATHAN DIMBLEBY, *THE LAST GOVERNOR: CHRIS PATTEN & THE HANDOVER OF HONG KONG* 114-38 (1997).

generally evinced little interest, in international politics.⁵⁴ All these factors effectively prevented Hong Kong from playing any meaningful international political role in spite of its great economic strength.

The notion of Hong Kong as an apolitical society has been challenged, however, certainly since the profound reaction there regarding the tragic Tiananmen Incident in the summer of 1989. The record high turnout of voters in the first HKSAR LegCo election in May 1998 showed that political interest and participation in Hong Kong has been on the rise.⁵⁵ But it seems that the change of political landscape within Hong Kong has not changed the constraints on its external politics. First, in China's view, the "one country, two systems" design is clearly meant to separate politics in Hong Kong and China. As the Chinese saying goes, "well water does not intrude into river water."⁵⁶ Second, since July 1, 1997, while the PRC has refrained from intervening in the HKSAR's affairs, such as the free election of the first LegCo of the HKSAR, it has also vigilantly guarded against any undue foreign political influence in Hong Kong. China continues to resist attacks on the Basic Law's gradual approach to the HKSAR's democratization and opposes any overt politicization of Hong Kong.⁵⁷ Third, even though Hong Kong may from time to time be involved or even dragged into world politics,⁵⁸ it continues to lack political power (the power being held in

⁵⁴ It has often been reported that Hong Kong residents are generally not interested in world politics. See, e.g., Ting Wai, *The External Relations and International Status of Hong Kong*, OCCASIONAL PAPERS/ REPRINTS SERIES IN CONTEMP. ASIAN STUD., No. 2-1997 (139), at 12.

⁵⁵ See Mark Landler, *Hong Kong Confronts Democracy: How Soon?*, N.Y. TIMES, May 27, 1998, at A6.

⁵⁶ For example, China has barred Hong Kong's anti-Beijing political figures from visiting China. See *Barred Activists Still Await Answers From Mainland*, HONG KONG STANDARD, Apr. 14, 1999, available in LEXIS, News Library.

⁵⁷ See Roda Mushkat, *The Future of Hong Kong's International Legal Personality: Does International Law Matter? A Post-Handover Snapshot*, 22 S. ILL. U. L. J. 275, 277, 285-87 (1998) (commenting on the PRC's "decidedly low profile" and "hands-off" posture toward Hong Kong since the handover from Great Britain). China protested the British Counselor General's meetings with some candidates from Hong Kong's democratic camp before the May 1998 LegCo election and criticized these activities as interventionist. Recently, the PRC also criticized the remarks as "inappropriate" of the new U.S. consul-general in Hong Kong, Michael Klosson, concerning the state of Hong Kong's democracy, the right of abode issue, and China's refusal to permit the Pope's visit to Hong Kong. See *China Reminds U.S. to Keep Out of Hong Kong's Internal Affairs*, Agence France Press, Oct. 28, 1999, available in LEXIS, News Library.

⁵⁸ Clearly, Hong Kong both benefits and suffers from the "weather" of Sino-U.S. relations. An American campaign-year distortion of Hong Kong's overseas influence was highlighted by a recent congressional hearing on "allegations made by the Republican Party's right wing that [Hong Kong's] Hutchison Whampoa" would "hand China control

Beijing), if not interest, and the link between Hong Kong and the rest of the world continues to be in fundamentally economic, rather than political, terms.

Indeed, as a tiny, natural-resource-challenged territory, Hong Kong's greatest international strengths have always been its strategic location and its unusually effective and powerful economic performance. Being politically impotent in its relations with the world, it almost goes without saying that Hong Kong's external autonomy would not be so prominent if it did not have such a robust, externally-oriented economy. However, as another Chinese saying goes, "water not only navigates, but also sinks," and weak economic performance could, obversely, impose constraints on Hong Kong's external autonomy. To put it another way, any persistent weakening of Hong Kong's economy will surely erode its international status and eventually hurt the significance of its external autonomy.

Unfortunately, during the two years of the HKSAR, a number of unhappy economic events caused some serious damage to Hong Kong and to its overseas image. The biggest blow to the HKSAR was the economic recession it suffered, soon after the handover from Britain, under the impact of the "Asian Financial Crisis."⁵⁹ Hong Kong is also certainly not without competitors. While Hong Kong's economy has been battered, there have been steadily occurring signs that Hong Kong's dynamic neighboring competitors – such as Shanghai, Singapore, and Taipei, as well as others – are all stepping up their challenges to the position of the HKSAR.⁶⁰

over the strategically important waterway [the Panama Canal]." Glenn Schloss, *SAR, Mainland 'Blurred'*, S. CHINA MORNING POST, Oct. 27, 1999, at 5.

⁵⁹ On July 2, 1997, one day after the handover, the Thai baht was devalued and sparked a severe financial crisis across Asia. A clear sense of the severe impact of the crisis on Hong Kong at that point and as time passed was conveyed by the acknowledgment of HKSAR Financial Secretary Donald Tsang, on a trip to Europe at the end of August 1998, of how much Hong Kong's stock market capitalization had fallen - a whopping U.S. \$304 billion to U.S. \$251 billion - from where it stood at the end of August 1997 (U.S. \$555 billion). Property prices also dropped by more than 50 percent. Rents fell by about the same percentage, back to levels at which they had been seven or eight years earlier. See Speech by Financial Secretary in the Hague (visited Jan. 3, 2000) <<http://www.info.gov.hk/gia/general/199810/01/1001006.htm>>.

⁶⁰ For example, the Singapore International Monetary Exchange (SIMEX) re-launched a Hong Kong equity futures contract on November 23, 1998. The expansion of SIMEX contracts is in line with the Singapore government's plans to expand Singapore's role as a regional financial center, at the expense of Hong Kong. See Barry Porter, *Singapore Raises Stakes in Exchange Battle*, S. CHINA MORNING POST, Nov. 6, 1998, at 6. In addition, as the Chief Secretary for Administration, Mrs. Anson Chan, recently told Australia's National Press Club: "I am aware that Australia has ambitions to become Asia's premier financial center outside of Japan, a position Hong Kong currently occupies. We acknowledge your claim. We are ready for the challenge." See *Chief Secretary for Administration Lays out HK Facts - and a Challenge*, (visited Jan. 17, 2000) <<http://www.info.gov.hk/gia/general/>

Some of the bad news coming from Hong Kong since the recession was interpreted as showing signs of poor administration by the new HKSAR government. For example, the crippling operational problems at Hong Kong's expensive new Chek Lap Kok International Airport in July 1998 led to paralysis of the air cargo terminal for more than a month.⁶¹ However, since the summer of 1998, the operation of the airport has improved significantly. A recent opinion survey commissioned by the HKSAR Airport Consultative Committee shows that the majority of people responding to the survey have given high scores for the level of services provided at the new airport. During the 1998 Christmas season, the airport handled one hundred thousand passengers a day, and the once troubled Super Terminal One cargo facility is handling an average of 5,000 tons of cargo a day.⁶² In early 1999, the magazine *Travel & Leisure* ranked the airport as "one of the world's premier airports" in its annual Critics' Choice award.⁶³

Improved government administration arguably contributed to such a turnaround. It is important for the HKSAR not only because of Deng Xiaoping's proud cultural statement that "it is not true that only foreigners can be good administrators. We Chinese are just as capable,"⁶⁴ but also because an effective external autonomy requires effective administration of transportation and communication services, among other things. In fact, as an international center for transport, trade, business, and tourism, Hong Kong is very much dependent, for instance, on the operation of its airport.

Hong Kong not only faces significant internal difficulties, but also is vulnerable to negative external influences. Perhaps the most serious test for the HKSAR's administration was its massive and risky intervention in the stock and futures markets in late 1998.⁶⁵ It is estimated that the Hong Kong

199911/24/1124284.htm>.

⁶¹ It was estimated that this would cost the HKSAR about one percent of its annual GNP. Another notorious example was the deadly outbreak of bird flu in December 1997, which necessitated the slaughter of some 1.6 million chickens. The good news is, however, that nineteen world flu experts issued a joint declaration at the end of 1998, praising the previous year's emergency measures taken by the HKSAR government and people as a "model for the world" and stating that they may well have prevented a disastrous spread of the deadly flu throughout the world. See *World Flu Experts Appreciate the Successful Control of the Bird Flu in Hong Kong*, PEOPLE'S DAILY (Overseas Edition) (Dec. 17, 1998), at 5.

⁶² See *ACC Survey Shows High Scores for Airport Services* (visited Oct. 25, 1999) <<http://www.info.gov.hk/gia/general/199812/18/1218095.htm>>.

⁶³ See Richard Meier et al., *The Critics' Choice Awards*, TRAVEL & LEISURE, Jan. 1999, at 94.

⁶⁴ DENG XIAOPING, *supra* note 1, at 10.

⁶⁵ See *One Country, Two Systems, Big Crisis*, FIN. TIMES (London), Sept. 1, 1998, at 20, available in LEXIS, News Library. The HKSAR government decided on December 15, 1998 to dispose, in an orderly fashion, of the stocks acquired in its massive anti-speculation

Monetary Authority (HKMA) spent more than HK\$100 billion (some U.S. \$14 billion) of the HKSAR's enormous reserves (U.S. \$88.6 billion as of November 1998)⁶⁶ to buy stocks and futures and keep share prices at levels that punished international speculators betting on a decline.

Initially, only China and the U.K. openly supported the HKSAR's intervention in the stock and futures markets in late August 1998.⁶⁷ International reactions were generally critical, and the HKSAR's measure was seen as a dangerous breach of free market principles. For example, Nobel laureate Milton Friedman, a most outspoken supporter of Hong Kong's free economy in the past, called the operation "insane" and suggested that it was part of a plan to "socialize" Hong Kong.⁶⁸ Less dramatic critics, such as U.S. Federal Reserve Chairman Alan Greenspan, feared that it "would erode some of the extraordinary credibility that the Hong Kong monetary authorities have achieved over the years," and hoped that it "was an isolated episode."⁶⁹ The Heritage Foundation, which has ranked Hong Kong as the world's freest economy for a number of years, maintained that ranking in 1998 but admonished the HKSAR government to change its course or surrender its top position.⁷⁰

However, later world opinion moved toward a better understanding of the HKSAR's motivations and, ultimately, a more favorable reaction to the intervention. The facts seem to have borne out the necessity of the action in the face of unprecedented, sophisticated, and coordinated transborder attempts at manipulating HKSAR's financial markets. As the *Times (of London)* pointed out approvingly, the HKSAR government's operation in the stock and futures markets was a "spectacular intervention," and the "turning point for China's financial centre. The hedge funds, which had been spreading an unchecked plague from Bangkok to Moscow, were taken on

campaign of August 1998. See *HKSAR Government Decides to Sell or Reduce Its Stocks*, PEOPLE'S DAILY (Overseas Edition) [RENMIN RIBAO (HAIWAIBAN)], Dec. 17, 1998, at 5.

⁶⁶ See *Hong Kong's Latest Foreign Currency Assets Figures Released* (visited Oct. 25, 1999) <<http://www.info.gov.hk/gia/general/199812/17/1217186.htm>>.

⁶⁷ See *Sino-British Joint Group Meets in HK*, CHINA DAILY, Sep. 18, 1998, available at <http://www.chinadaily.com/cn/cndydb/1998/09/d2-198.i18.html>.

⁶⁸ Erik Guyot, *Hong Kong's Stock Intervention Is 'Insane,' Milton Friedman Says*, WALL ST. J. (Sept. 3, 1998), at A19.

⁶⁹ Jacob M. Schlesinger, *Greenspan Says Global Rate Cut Isn't Planned: Fed Chief Provides No Clue About a U.S. Reduction Despite Slowing Growth*, WALL ST. J., Sept. 17, 1998, at A2.

⁷⁰ See BRYAN T. JOHNSON ET AL., HERITAGE FOUNDATION, 1999 INDEX OF ECONOMIC FREEDOM (5th ed., 1998) available at <<http://www.heritage.org/index/execsum.html>>. (visited Nov. 8, 1999). Hong Kong actually retained its number-one position in 1999, not only in the Heritage Foundation ranking, but also in the ranking of several other institutions. See *Financial Secretary Welcomes HK's Rating as World's Freest Economy* (visited Jan. 21, 2000) <<http://www.info.gov.hk/gia/general/200001/11/0111164.htm>>

and beaten,” and “the West . . . should be grateful to [the general directors of the Hong Kong operation] Sir Donald Tsang, Hong Kong’s Financial Secretary, and to Joseph Yam, head of the monetary authority” for taking “an enormous risk” that “paid off, making a big profit and sending the hedge funds slinking away,” having helped avoid the worst effects of the Asian Financial Crisis.⁷¹

While fighting for the recovery of Hong Kong’s first recession in 20 years, the HKSAR government also seized the “opportunity” of the downturn to assemble a series of strategic policies to restructure its economy. One of the HKSAR’s most ambitious current endeavors is to build a hi-tech future. It includes a HK\$13 billion Cyberport,⁷² a science park,⁷³ and the systematic efforts to commence the commercial application of Chinese medicine.⁷⁴ In addition to going hi-tech, the HKSAR government has also successfully negotiated and signed a deal with the Walt Disney Company to establish a Disneyland theme park in Hong Kong – the third one outside the United States, after Paris and Tokyo – to promote tourism.⁷⁵ After more than two years of painful economic recession, there have at last been strong signs of economic recovery in the HKSAR. Recent government figures show that Hong Kong’s economy had a surprisingly strong, trade-led rebound in the third quarter of 1999, with surging growth of 4.5 percent.⁷⁶ Moreover, shortly after the U.S. and the PRC concluded a deal on China’s accession to WTO membership, the Hang Seng index for the first time in 25 months climbed to the 15,000-point level.⁷⁷ The initial offer of Hong Kong’s “Tracker Fund,” used to dispose of some of the HKSAR government’s excess stock portfolio, was also three times more than the planned offering size of HK\$10 billion, coming in at HK\$33 billion.⁷⁸ All of this has restored

⁷¹ *Hong Kong Shows How to Speculate*, TIMES (London), Oct. 27, 1998, at 31.

⁷² For a story of the project, see *\$13 Billion Cyberport Project Announced* (visited Jan. 17, 2000) <<http://www.info.gov.hk/gia/general/199903/03/0303169.htm>>.

⁷³ See *Provisional HK Science Park Company Limited Established* (visited Jan. 18, 2000) <<http://www.info.gov.hk/gia/general/199807/07/0707107.htm>>.

⁷⁴ See *Hong Kong’s Hi-tech Future Outlined by Chief Executive in Silicon Valley*, (visited Jan. 18, 2000) <<http://www.info.gov.hk/gia/general/199907/23/0722157.htm>>. For measures taken to build a traditional Chinese medicine “port” in Hong Kong, see *LCQ3: Development of Chinese Medicine in Hong Kong* (visited Jan. 18, 2000) <<http://www.info.gov.hk/gia/general/199905/05/0505190.htm>>.

⁷⁵ See Angela Li & Stella Lee, *\$21b Disney Park Deal Sealed*, S. CHINA MORNING POST, Nov. 2, 1999, at 1.

⁷⁶ See David Evans, *U.S. Investment Bank Forecasts 2pc Expansion in First Quarter*, S. CHINA MORNING POST, Jan. 8, 2000, at 2.

⁷⁷ See Suzanne Harrison, *HSI Soars Past 15,000*, S. CHINA MORNING POST, Nov. 20, 1999, at 5.

⁷⁸ See David Saunders, *Tracker Fund to Stand at \$33b*, S. CHINA MORNING POST, Nov. 9, 1999, at 1.

much confidence to the HKSAR government, which claims that the "worst" is over. Indeed, it appears that Hong Kong is now not only well poised to enjoy and exploit its robust economy again, but is also much better prepared to meet the challenges of globalization and the explosion of high technology in the 21st century.

II. CHINA AND THE HKSAR'S EXTERNAL AUTONOMY

One of the distinctive characteristics of the HKSAR's external autonomy is its special Chinese dimension. On the one hand, as there is no ethnic difference between the people of Hong Kong and the majority of mainland Chinese, the HKSAR's external autonomy leads to additional Chinese representation in some international institutions and fora. On the other hand, even though Hong Kong is in a process of reintegration into, rather than separation from, the PRC, many aspects of the HKSAR's external autonomy – such as trade and immigration control – apply between China and Hong Kong almost as between two separate countries. Meanwhile, the "China" factor also looms large in the debate over the self-determination claim for the people of Hong Kong, as the issue relates to China's actions over the years to reaffirm its sovereign claims on Hong Kong, and the ultimate settlement of the Sino-British dispute over such claims when the UK relinquished Hong Kong and returned it to China completely in July 1997. Finally, although the HKSAR's external autonomy has so far received strong backing from the PRC, the *sovereign* status of China vis-à-vis the *autonomous, regional* status of the HKSAR ultimately defines and determines the future of the HKSAR's external autonomy.

A. *The Chinese Dimension to the HKSAR's External Autonomy*

The HKSAR represents a rare case where a local community, which is in fact ethnically part of the majority ethnic population in a sovereign state, has acquired the status of an autonomous region within that state while the rest of the majority ethnic population in the same state remains non-autonomous. The HKSAR is the first autonomous region in the PRC established for the predominant ethnic community in China, the Han.⁷⁹ All other autonomous regions in China have been established for various minority ethnic communities.⁸⁰ Obviously, then, Hong Kong became an SAR of the PRC *not* because its 98 percent Chinese population is different from the rest of the majority population on the mainland in terms of ethnicity, which is perhaps the most common reason to give a local minority

⁷⁹ Macau became the second autonomous region established for the Han community in China on December 20, 1999, when it returned to China after 400-plus years as a Portuguese colony.

⁸⁰ Hong Kong is called a special administrative region of the PRC, while other minority communities in China are autonomous regions. See P.R.C. CONST. (1982) art. 31 and ch. 3.

community autonomy. This helps explain why Hong Kong is called an SAR rather than an autonomous region in China's Constitution.

One direct outcome of granting external autonomy to the HKSAR is that China has to tolerate additional "Chinese" representation in certain international institutions and fora such as the WTO, the World Customs Organization and the ADB – all of which Hong Kong belongs to in its own right, using the name "Hong Kong, China". Multiple Chinese international representation in international institutions – "tripled" when Macau was added at the end of 1999, and "quadruples" if Taiwan is counted⁸¹ – is unusual, and certainly unique in that it has been arranged without any special considerations as to ethnicity.

While there is no ethnic difference between Hong Kongers and the Han community on the Chinese mainland, and while the HKSAR is reintegrating with China, many external autonomous arrangements designed for the relations between Hong Kong and foreign states have also been applied to the relations between Hong Kong and China. For instance, mainland Chinese continue to need "visas" to visit the HKSAR. The trade between Hong Kong and China is also treated as "foreign" trade. These arrangements enable Hong Kongers to continue to enjoy more liberal and favorable treatments in, for example, immigration and trade matters – as provided by the international community – than their compatriots on the mainland.

For this reason, the special Chinese dimension of the HKSAR's external autonomy is closely watched by other countries who bestow more liberal and favorable treatments on Hong Kong. A good example is the May 1999 Cox Report, which pointed out a number of cases unearthed by Hong Kong customs authorities relating to violations of strategic trade controls. The HKSAR government was quick to declare that for Hong Kong's own interests, the HKSAR will maintain close cooperation with its major trading partners in "combating the illegal diversion of strategic commodities."⁸²

B. The Sino-British Sovereignty Dispute and the Self-Determination Controversy over Hong Kong

The status of Hong Kong was long a matter of dispute between Britain and China. Hong Kong was a British colony for more than 150 years, after a

⁸¹ For example, Taiwan is also a member of the Asian Development Bank (ADB), using the name "Taipei, China." Soon, it may well be the case that Hong Kong, Macau, China, and Taiwan are all separate members of the WTO.

⁸² For the Cox Report, see Report of the Select Committee on U.S. National Security and Military Commercial Concerns With the People's Republic of China, H. R. REP. NO. 105-851 (1999) (visited Nov. 18, 1999) <<http://www.house.gov/coxreport/>>. For the HKSAR government's response to the Cox Report, see *Strategic Trade Controls*, (visited Nov. 18, 1999) <<http://www.info.gov.hk/general/199905/24/0524163.htm>>, and *Government Responds to Cox Report*, (visited Nov. 18, 1999) <<http://www.info.gov.hk/general/199905/26/0526165.htm>>.

royal charter in 1843 proclaimed it a Crown colony.⁸³ The official British policy regarding the status of Hong Kong was based on the three 19th century treaties with China. They are formally known as: (1) the Treaty of Nanking⁸⁴ (1842), concluded after Britain defeated China in the Opium War (1839-42); (2) the Treaty of Peking,⁸⁵ or "Convention of Friendship of 1860," by which Britain annexed Kowloon and Stonecutter's Island, facing the island of Hong Kong; and (3) the Convention of Peking⁸⁶ (1898), or "Convention Respecting an Extension of Hong Kong Territory," by which Britain, again taking advantage of China's physical and political weaknesses, obtained in a 99-year rent-free "lease," to expire in July 1997, a much larger area of land north of Kowloon, which later came to be known as the "New Territories."

Britain regarded these treaties as legally binding documents that legitimized British colonial rule there. Britain also insisted that, in particular, sovereignty over Hong Kong island and Kowloon (as opposed to the New Territories) was ceded to it by the Treaty of Nanking and the Treaty of Peking. However, China, from the latter Qing Dynasty onward, rejected the British occupation of Hong Kong as illegal and maintained that the three treaties were null and void because they were "unequal treaties" imposed on the Qing government by force and thus Hong Kong continued to be Chinese territory.⁸⁷

The arguments of both the UK and the PRC have had unsettling international law implications. Indeed, state practices and theorists were – and remain – deeply divided on the concept of the "unequal treaty."⁸⁸ The ambiguity on this issue actually helped both sides to insist on, rather than settle, their cases in the name of international law. Thus, in the beginning of the Sino-British negotiations on the post-1997 future of Hong Kong, Britain insisted that, consistent with customary international law, treaties such as the

⁸³ See Charter of the Colony of Hong Kong, Apr. 5, 1843, *reprinted in* 1 James William Norton-Kyshe, *HISTORY OF THE LAWS AND COURTS OF HONG KONG FROM THE EARLIEST PERIOD TO 1898* at 21-23 (1971).

⁸⁴ Treaty of Nanking, Aug. 29, 1842, Gr. Brit.-P.R.C., 93 Consol. T.S. 465.

⁸⁵ Convention of Friendship Between China and Great Britain (Treaty of Peking), Oct. 24, 1860, Gr. Brit.-P.R.C., 123 Consol. T.S. 71.

⁸⁶ Convention Between China and Great Britain Respecting an Extension of Hong Kong Territory (Convention of Peking), June 29, 1898, Gr. Brit.-P.R.C., 186 Consol. T.S. 310.

⁸⁷ Both the Republic of China (i.e., Taiwan) and PRC governments also laid consistent claim to sovereignty over Hong Kong. See KEVIN P. LANE, *SOVEREIGNTY AND THE STATUS QUO: THE HISTORICAL ROOTS OF CHINA'S HONG KONG POLICY* 4 (1990).

⁸⁸ Renowned international legal scholar Ian Brownlie has written that: "[w]hile 'Western' jurists oppose the doctrine on the ground that it is too vague, the principle is regarded as entirely just by newly independent states, and it is no longer confined to the thinking of jurists from Communist states." IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 616 (4th ed. 1990).

three 19th century Sino-British treaties on Hong Kong, were “made to be kept,” while China responded they were not. Later, as an alternative, the UK proposed to give Hong Kong’s sovereignty back to China in exchange for continued British governance of Hong Kong. Again, China did not agree. In the end, although Britain relinquished its “treaty rights,” the Joint Declaration seemingly saved face for both sides by juxtaposing China’s statement that it had decided to “resume the exercise of sovereignty over Hong Kong” with the British declaration that it would “restore Hong Kong to the People’s Republic of China.”⁸⁹

There can be no doubt that the final solution of the Sino-British sovereignty dispute in China’s favor should be attributed to a number of non-legal factors, such as British post-World War II decolonization policy, the rise of a reformed and “open” China from the late 1970s onward, a renewed perception of the importance of non-antagonistic Sino-British relations, and the reality that Hong Kong could not survive without the material support of the PRC. These factors, and others, and the manner in which the sovereignty issue was dealt with in the Joint Declaration, in a sense, left the legal issue of “unequal treaties” unresolved. Consequently, the actions taken by China and Britain over the years to affirm their positions have continued to engender controversy, as has the claim of self-determination for the people of Hong Kong.

The right to self-determination is a popular but controversial concept that has been argued on behalf of many “peoples” around the world, discussed in a rich body of literature, and defined in various international treaties, including the Covenant of the League of Nations, the U.N. Charter, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and several U.N. General Assembly resolutions.⁹⁰ The right to self-determination generally means that all peoples (especially in a colony or a non-self-governing territory) can freely determine their political status – or any other status – on the basis of their choice of independence from, integration into, or free association with a state and can freely pursue their

⁸⁹ Roda Mushkat, *The Transition from British to Chinese Rule in Hong Kong: A Discussion of Salient International Legal Issues*, 14 DENV. J. INT’L L. & POL’Y 171, 179 (1986). See also Joint Declaration, *supra* note 3, at 1,2.

⁹⁰ See, e.g., *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960); *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8082 (1970).

economic, social, and cultural development.⁹¹ In other words, it means freedom from foreign domination and attainment of full self-government.

Relying on this definition, a number of scholars have argued, both before and after Hong Kong's return to China, that Hong Kong was and still is entitled to the right to self-determination in spite of China's insistence on, and the Joint Declaration's recognition of, PRC sovereignty over Hong Kong because Hong Kong was: (1) a British Crown colony; (2) a non-self-governing territory under British administration; and (3) of distinct and unique cultural identity during a century and a half of colonial existence.⁹² Hence, the argument goes, the transfer of sovereignty over Hong Kong from the UK to the PRC without the freely-expressed consent of the Hong Kong people violated the right to self-determination of those inhabitants, and the Joint Declaration and the Basic Law lack legitimacy to foreclose that right.⁹³

The above argument, to be sustainable, has to be based on the premise that British colonial rule in Hong Kong, founded on the three 19th century Sino-British treaties, was legitimate and that the Chinese sovereign claim to Hong Kong was groundless. Such a premise is questionable, however. First, as mentioned above, international law provides neither clear support for, nor rejection of, the validity of the three treaties. As state practices and opinions of international law scholars in regard to the "unequal treaties" doctrine are divided along "East-West" and "North-South" lines, there is *at least* no generally accepted conclusion on it.⁹⁴ Thus, while Hong Kong was under British colonial rule from 1842 onward, China's determination to put "right the wrongs of the Opium Wars"⁹⁵ made it clear that the question of Hong Kong would remain an unresolved issue between the UK and China

⁹¹ See International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 1, 999 U.N.T.S. 171, 173; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 1, 993 U.N.T.S. 3, 5.

⁹² See Roda Mushkat, *Hong Kong As an International Legal Person*, 6 EMORY INT'L L. REV. 105,113 (1992); Nihal Jayawickrama, *The Right of Self-Determination - a Time for Reinvention and Renewal*, 57 SASKATCHEWAN L. REV. 1,15-16 (1993); John W. Head, *Selling Hong Kong to China: What Happened to the Right of Self-Determination?*, 46 KANS. L. REV. 283,301 (1998).

⁹³ Mushkat also argues that the right to self-determination could justify the kinds of international intervention used by the United States in Operation Just Cause in Panama and the Grenada Invasion (interventions for the stated purpose of preserving democracy), or by the U.N. in Haiti, Rwanda, and Somalia (humanitarian interventions) against any invasion from or military occupation by the PRC. See RODA MUSHKAT, *ONE COUNTRY, TWO INTERNATIONAL LEGAL PERSONALITIES: THE CASE OF HONG KONG* 11-15 (1997).

⁹⁴ See BROWNIE, *supra* note 88.

⁹⁵ BRUCE BUENO DE MESQUITA et al., *RED FLAG OVER HONG KONG* 3 (1996).

throughout the colonial period after Qing.⁹⁶ It was only resolved upon the signing of the Joint Declaration in 1984, accommodating both China's claim and the reality of Hong Kong after 150 years of British colonial existence.

While aiming at the promotion and protection of the right to self-determination, international legal documents concerning it, including two international human rights covenants and the Declaration on the Granting of Independence to Colonial Countries and Peoples, also emphasize that the right's exercise should be "in conformity with the provisions of the Charter of the United Nations"⁹⁷ and "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of [that Charter]."⁹⁸ Accordingly, before the issue of sovereignty over Hong Kong was resolved between China and the UK, any claim as to the right to self-determination of the Hong Kong people was at best premature and at worst might arguably have infringed upon China's national unity and territorial integrity. By the same token, after the sovereignty issue was settled by the Joint Declaration, the right was then preempted for all practical purposes.

The same rationale may have been behind the U.N.'s action to exclude Hong Kong and Macau from the list of colonial territories by the General Assembly's Special Committee on Colonialism. On March 10, 1972, shortly after China resumed its seat in the U.N. in 1971, the PRC government sent a letter to the Committee's Chairman stating that:

Hong Kong and Macao are part of Chinese territory occupied by the British and Portuguese authorities. The settlement of the questions of Hong Kong and Macao is entirely within China's sovereign rights and does not fall under the ordinary category of colonial territories.

Consequently, they should not be included in the list of colonial territories covered by the Declaration on the Granting of Independence to Colonial Countries and People.

With regard to the questions of Hong Kong and Macao, the Chinese government has consistently held that they should be settled in an

⁹⁶ All Chinese governments – no matter what their politics – after the fall of the Qing Dynasty consistently maintained China's sovereign claim over Hong Kong. See LANE, *supra* note 87, at 22, 55-58, 62-67.

⁹⁷ International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 1 § 3, 999 U.N.T.S. 171, 173; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 1 § 3, 993 U.N.T.S. 3, 5.

⁹⁸ *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 67, U.N. Doc A/4684 (1961).

appropriate way when conditions are ripe. The United Nations has no right to discuss these questions.⁹⁹

China's position was subsequently accepted by the U.N. General Assembly¹⁰⁰ and the General Assembly's Special Committee on Colonialism accordingly removed Hong Kong and Macau from the U.N. list.¹⁰¹

Some advocates of the right to self-determination for the people of Hong Kong have pointed to the 1975 decision of the International Court of Justice (ICJ) in the *Western Sahara Case*, citing the ICJ's advisory opinion to the effect that whatever legal ties may have existed at the time of colonization they may not now stand in the way of the application of the principle of self-determination, which has supposedly become a peremptory norm of international law.¹⁰² They assert that Hong Kong's legal ties with China at the time of British colonization similarly may not now block the application of the right to self-determination to the inhabitants of the territory.¹⁰³ Yet, this is a subjective interpretation of the *Western Sahara* opinion, which, in fact, stated at the end:

[T]he Court's conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as *might* affect the application of Resolution 1514 (XV) [(December 14, 1960) of the U.N. General Assembly, containing the Declaration on the Granting of Independence to Colonial Countries and Peoples] in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory.¹⁰⁴

The ICJ concluding statement indicates clearly that if the legal ties are of the nature of territorial sovereignty, then they "might" affect the application of the right to self-determination. Accordingly, the ICJ opinion is in essence no different from that of international human rights documents like the ICCPR and the ICESCR that uphold the principle of national unity and territorial integrity in the exercise of the right to self-determination. This

⁹⁹ *Hong Kong Is Chinese Territory*, PEOPLE'S DAILY, [RENMIN RIBAO] Aug. 20, 1967, at 2 (letter cited in commentary), reprinted in JEROME A. COHEN & HUNGDAH CHIU, PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY 384 (1974).

¹⁰⁰ See GA Res. 2978, U.N. GAOR, 27th Sess., Supp. No. 30, at 80, U.N. Doc. A/8730 (1972).

¹⁰¹ See Nihal Jayawickrama, *The Right of Self-Determination*, in HONG KONG'S BASIC LAW: PROBLEMS AND PROSPECTS 85, 88-89 (Peter Wesley-Smith ed., 1990).

¹⁰² See *id.*

¹⁰³ See *id.*

¹⁰⁴ *Western Sahara*, 1975 I.C.J. 12, at 68, reprinted in 14 I.L.M. 1355, at 1407 (emphasis added).

natural reading of the opinion distinguishes Hong Kong from the Western Sahara, as Hong Kong was not only under China's sovereignty at the time of colonization by the UK but was also consistently claimed by China right up to the end of Britain's period of colonial rule.

C. *China's Influence on Hong Kong's External Autonomy*

As the sovereign power, China defines the HKSAR's external autonomy and determines its future in many ways. The Basic Law draws a distinction between foreign and external affairs. As Yash Ghai has pointed out, the HKSAR's external powers:

. . . [a]re regarded in functional terms, not carrying connotations of sovereignty or diplomacy. A distinction is implied between *foreign affairs*, which are quintessentially matters of state and international diplomacy, and *external affairs*, which appear to be concerned with economic and cultural matters. The former expression is used when referring to the responsibilities of the [PRC Central People's Government] CPG (as in art. 13 [of the Basic Law]) and the latter when referring to the powers of the HKSAR (in art. 13 as well as the title of chapter VII).¹⁰⁵

He states further that "[w]hen the powers of the HKSAR transgress beyond the economic or cultural, some degree of specific authorization or permission from the CPG is necessary, so that the Central Authorities are able to control their exercise (as with the visa arrangements or the establishment of consular offices in the HKSAR (art. 157))."¹⁰⁶

China determines the interpretation of the Basic Law in case disputes arise in regard to the meaning of its provisions. Basic Law Article 158 states:

The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress [NPCSC].

The Standing Committee of the National People's Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.

The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such

¹⁰⁵ YASH GHAI, HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 433 (1997) (emphasis in original).

¹⁰⁶ *Id.*, at 433-34.

interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.

The Standing Committee of the National People's Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law.¹⁰⁷

Clearly, although the HKSAR courts may be authorized by the NPCSC to interpret the Basic Law, especially the provisions which are within the limits of the autonomy of the region, it is the NPCSC which has the final say, especially in regard to the interpretation of the provisions concerning the powers of the CPG and the relationship between the Central Authorities and the HKSAR. Thus, the distinction between "foreign" and "external" affairs and the definitions of "relevant external affairs" and "appropriate fields" fall under the responsibility of the NPCSC.¹⁰⁸

¹⁰⁷ Basic Law, *supra* note 7, at art. 158.

¹⁰⁸ In 1999, Article 158 of the Basic Law took the central stage of the HKSAR's first constitutional "crisis" since the reunification, concerning the so-called "right of abode" issue in Hong Kong. In its controversial judgment of January 29, 1999, *Ling v. Director of Immigration* (visited Jan. 15, 2000) <http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv_14_16_98.htm>, also found at 1 H.K.L. REP. & DIG., Feb. 15, 1999, at 315 (Ct. of Final App., Jan. 29, 1999), the CFA held that the restricted scheme for granting settlement in the HKSAR to eligible Mainland Chinese (permitting the entrance of 150 Mainland residents per day, or over 55,000 per year, for settlement in the HKSAR) violated their right of abode guaranteed by the Basic Law. The judgment soon engendered fears in Hong Kong that an officially estimated 1.6 million eligible Mainland Chinese might flood the region in the next few years. After initial hesitation on how to approach the situation - *see, e.g., Right of Abode Issue* (visited Jan. 15, 2000) <<http://www.info.gov.hk/gia/general/199905/14/0514218.htm>> - the HKSAR government finally decided on May 18, 1999 to request the NPCSC to interpret Articles 22(4) and 24(2) and (3) of the Basic Law "in accordance with the true legislative intent." *See Right of Abode: The Solution* (visited Oct. 17, 1999) <<http://www.info.gov.hk/gia/general/199905/18/0518132.htm>>. On June 26, 1999, the "Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China" was adopted at the Standing Committee's Tenth Session. *See Interpretation by the Standing Committee of the National People's Congress of Article 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (visited Jan. 17, 2000) - <http://www.info.gov.hk/basic_law/english/text0221.htm>. On December 3, 1999, the same five CFA Justices who decided the earlier case (four Permanent Justices plus Sir

The PRC also holds the key to possible grants of further external autonomy powers to the HKSAR in the future. During the drafting of the Basic Law, China refused to include in the Basic Law a proposed article to the effect that Hong Kong would be given authority over all powers not specifically vested in the Central Authorities (i.e., the National People's Congress (NPC), the NPCSC, and the CPG). It is, therefore, the PRC – not the HKSAR – which controls the so-called “residual” powers for determining authority not expressly granted in the Basic Law. Chinese legal experts argued that any vesting of residual powers in the HKSAR would be inconsistent with the HKSAR's status as a local “administrative region,” as well as with the unitary nature of the Chinese state.¹⁰⁹ Accordingly, Basic Law Article 20 states that: The Hong Kong Special Administrative Region may enjoy other powers *granted to it* by the National People's Congress, the Standing Committee of the National People's Congress or the Central People's Government.¹¹⁰ Thus, whenever an unspecified power is needed and has to be defined, the PRC's Central Authorities have the power to make decisions on the matter in their discretion. The exercise of the residual powers can either be granted to the HKSAR government or retained by the Central Authorities.

The HKSAR's external autonomy is not without Chinese foreign policy guidance. The issue of Hong Kong's relations with Taiwan is an instructive example. At China's behest, immediately after the handover from Britain, Hong Kong quit the Asian Productivity Organization because of Taiwan's membership in it.¹¹¹ While the HKSAR government has an extraordinary

Anthony Mason, a Non-permanent Justice from another common law jurisdiction) unanimously upheld the validity of the Standing Committee's interpretation in *Yung and 16 Others v. the Director of Immigration*. See *Judiciary: CFA Judgment: Lau Kong Yung* (visited Jan. 17, 2000) <http://www.info.gov.hk/jud/guide2cs/html/cfa/judmt/facv_10_11_99.htm>. Chief Justice Andrew Li-Kwok-nang stated: “It is clear that the Standing Committee has the power to make the interpretation. This power originates from Article 67(4) of the Chinese constitution and is contained in Article 158(1) of the Basic Law itself.” It was “a valid and binding interpretation...which the courts in the HKSAR are under a duty to follow.” See Cliff Buddle, *NPC Calls the Shots: Judges*, S. CHINA MORNING POST, Dec. 4, 1999, at 1. Despite all the controversy surrounding the right of abode issue, its final resolution decisively confirmed the NPCSC's power of interpretation of the Basic Law. See *Government Statement on Court of Final Appeal Judgment* (visited Jan. 17, 2000) <<http://www.info.gov.hk/gia/general/199912/03/1203114.htm>>; see also *Government Welcomes Court of Final Appeal Judgment* (visited Jan. 17, 2000) <<http://www.info.gov.hk/gia/general/199912/03/1203238.htm>>.

¹⁰⁹ See Wu Jianfan, *Several Issues Concerning the Relationship Between the Center of the People's Republic of China and the Hong Kong Special Administrative Region*, 2 J. CHINESE L. 65, 74 (1988).

¹¹⁰ Basic Law, *supra* note 7, at art. 20 (emphasis added).

¹¹¹ See Jonathan Braude, *Pass for Patten's Benchmark Test*, S. CHINA MORNING POST, June 30, 1998, at 23.

amount of freedom to make contact with foreign governments or with other Chinese provincial or regional governments, particularly in the economic arena, it has much less freedom to make official contact with the Taiwanese government because of the high degree of PRC sensitivity where Taiwan is concerned.¹¹² It also would be difficult for the HKSAR to take policy positions to promote Taiwan's entry into the WTO ahead of the PRC, even if Taiwan finishes its entry negotiations with WTO members before China, and even if it would be in Hong Kong's own best interests to put its trade relations with Taiwan under the WTO rules as early as possible.¹¹³ Many have worried that China's foreign policy guidance may excessively encroach upon the HKSAR's external autonomy.¹¹⁴ Given, however, the fact that the current goal of the PRC's foreign policy is to create and maintain a stable

¹¹² See *HK & Taiwan Authorities Only Operational Contacts (resent)* (visited Oct. 17, 1999) <<http://www.info.gov.hk/gia/general/199901/06/0106157.htm>>. The HKSAR government's handling of Taiwan related issues is based on the seven fundamental principles and policies declared by Chinese Vice Premier Qian Qichen in June 1995 and summarized in HKSAR Secretary for Constitutional Affairs Michael Suen's written reply to LegCo member Christine Loh Kung-wai's questions on January 6, 1999. See *id.*

¹¹³ So far, Taiwan and the HKSAR have not completed entry negotiations, and Taiwan appears concerned that Hong Kong may choose *not* to complete such negotiations, thus making it difficult for Taiwan to enter the WTO ahead of the PRC. According to HKSAR Secretary for Security Regina Ip: "the government of the HKSAR has long supported Chinese Taipei's application for World Trade Organization (WTO) membership. As an open economy, Hong Kong attaches tremendous importance to the multilateral trading system built on the basis of the WTO. It is also a fact that Chinese Taipei is our fourth-largest trading partner. Nonetheless, . . . the General Council of the General Agreement on Tariffs and Trade (GATT, the predecessor of the WTO) reached an understanding in 1992 that China's accession to GATT should precede that of Chinese Taipei. The government of the HKSAR has all along abided by this understanding." See Regina Ip's written reply to LegCo member Fred Li Wah-ming's question on "whether the Government has supported Taiwan's application for joining that Organisation . . .," which is available at *LCQ6: Relationship Between the HKSAR and Taiwan* (visited Jan. 17, 2000) <<http://www.info.gov.hk/gia/general/199809/16/0916069.htm>>. For a recent account of the issue, see Amanda Chang, *Deal With HK Not Crucial to Taiwan's WTO Bid*, Central News Agency, Nov. 16, 1999, available in LEXIS, News Library.

¹¹⁴ A case in point may be China's refusal to allow Pope John Paul to visit Hong Kong. A HKSAR government spokesman offered the following explanation on August 9, 1999: "[c]urrently, the Vatican is maintaining "diplomatic relations" with Taiwan. As such, the proposed visit to Hong Kong by the Pope involves foreign affairs. It would only be appropriate to discuss the proposed visit, after the Central People's Government and the Vatican have resolved the relevant issues." See *Statement on Visit by the Pope* (visited Jan. 17, 2000) <<http://www.info.gov.hk/gia/general/199908/09/0809224.htm>>. However, when the 1997 World Bank Group/International Monetary Fund Annual Meetings were held in Hong Kong, officials from 25 states maintaining "diplomatic relations" with Taiwan at that time were allowed to attend the meetings. See *LCQ6: CPG Responsible for Foreign Affairs Relating to the HKSAR* (visited Jan. 17, 2000) <<http://www.info.gov.hk/gia/general/199910/13/1013139.htm>>.

and peaceful international environment for China's own economic development and modernization,¹¹⁵ it seems likely that Chinese interference will be rare except on the issue of Taiwan and that, arguably, the HKSAR will still be able to take an independent line on other issues where the interests of Hong Kong and the PRC diverge, since one of the express aims of the Basic Law is to protect such differences between China and the HKSAR and since there are really few other areas as delicate as the question of Taiwan.¹¹⁶

In principle, the HKSAR also has to follow China's decisions on international sanctions. On July 18, 1997, the HKSAR Provisional LegCo adopted U.N. Sanctions Bill 1997,¹¹⁷ which provides that the Chief Executive shall "make regulations to give effect to" relevant instructions from the "instructing authority," the Ministry of Foreign Affairs of the People's Republic of China,

[w]here, under Chapter 7 of the Charter of the United Nations, the Security Council of the United Nations has decided on a measure to be employed to give effect to any of its decisions and has called on the People's Republic of China to apply the measure, then any instruction given by the instructing authority to the Chief Executive

(a) to implement the sanctions specified in the instruction against the place outside the People's Republic of China specified in the instruction for the purposes of the Hong Kong Special Administrative Region of the People's Republic of China applying that measure¹¹⁸

According to this legislation, the HKSAR government has published regulations to give effect to the CPG's instructions on implementation of the U.N. sanctions against, for example, Iraq, Libya, Angola, Somalia, Liberia, and Rwanda.¹¹⁹

¹¹⁵ In a speech addressing China's envoys at a national meeting on diplomatic work in Beijing on August 28, 1998, PRC President Jiang Zemin said that China will strive to create a better international environment favorable to the realization of its goals in the socialist modernization drive. He added that: China's reform, opening-up and modernization drive needs domestic political stability and unity, as well as a peaceful international environment. *Jiang on Chinese Diplomacy*, 41 BEIJING REV., Sept. 21-27, 1998, at 4.

¹¹⁶ The at times frosty relationship between the United States and the PRC is perhaps another such delicate area.

¹¹⁷ A list of bills passed by the Provisional Legislative Council is available at *Provisional Legislative Council Bills* (visited Jan. 17, 2000) <<http://www.legco.gov.hk/yr97-98/english/bills/byr9798.htm>>.

¹¹⁸ United Nations Sanctions Ordinance (July 18, 1997), available in <<http://www.legco.gov.hk/yr97-98/english/billsa125-e.htm>> (visited Feb. 12, 2000).

¹¹⁹ See *Six Regulations Implementing U.N. Sanctions Gazetted*, CHINA PRESS [QIAO BAO], Aug. 23, 1997, at A7.

At least in theory, the HKSAR should also join in China's own sanctions against another state in a "tit-for-tat," retaliatory trade war or other dispute. In the past, Hong Kong joined in the UK's unilateral sanctions against Argentina during the war over the Falkland Islands/Islas Malvinas. However, the UK allowed Hong Kong to decide for itself whether to join sanctions imposed by the British Commonwealth countries against South Africa for its apartheid regime. Arguably, at least to be consistent with the Falkland Islands/Islas Malvinas precedent and hard-line PRC policy and practice on the Taiwan issue, the HKSAR should join China's sanctions, especially on issues of sovereignty and territorial integrity.¹²⁰ However, this is a question upon which there can only be speculation now, for future determinations will have to be made under the control of the PRC Central Authorities and, in any event, likely occasions for actual use of such sanctions would appear to be exceedingly rare.

As the HKSAR's external powers, albeit highly autonomous and unprecedented, are *granted* powers, while the foreign affairs powers of the PRC come directly from its sovereignty, the former therefore has to bear the "brand" of the latter. For example, when the HKSAR participates in international organizations – governmental and non-governmental – in its own right, it must be represented as "Hong Kong, China."¹²¹ When representatives of the HKSAR participate in international organizations or conferences as members of the delegations of the PRC, they may express their own views but must use the name of "Hong Kong, China."¹²² The HKSAR's own shipping register also uses the term "Hong Kong, China" in its name.¹²³ To China, this is certainly not just a game of names; the seeming formality actually carries important political and legal significance, especially in light of the Taiwan issue.

Finally, there is also a physical time limit and an express condition to the current external autonomy of the HKSAR. Basic Law Article 5 states: "The socialist system and policies shall not be practiced in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years."¹²⁴ China's guarantee of the

¹²⁰ After NATO's bombing of the PRC embassy in Belgrade on May 7, 1999, Beijing banned a number of previously scheduled visits to Hong Kong by warships of the U.S. Pacific Fleet in May and June. Although the ban affected Hong Kong's economy – since, each year, up to 70 U.S. Navy ships visit Hong Kong, spending some U.S. \$50 million – the issue is distinguishable because permission to grant visits by foreign warships rests with the sole discretion of the PRC Central Authorities as a matter of defense. *See Beijing Bans Visits by U.S. Navy*, S. CHINA MORNING POST, May 21, 1999, at 4; Stella Lee, *Pentagon Regrets Ban on U.S. Navy*, S. CHINA MORNING POST, May 22, 1999.

¹²¹ Basic Law, *supra* note 7, at arts. 149 & 151.

¹²² *Id.* art. 152.

¹²³ *Id.* art. 125.

¹²⁴ *Id.* art. 5.

HKSAR's autonomy, including its external autonomy, is not open-ended and, in the final analysis, *only* for fifty years. What will happen after fifty years? Although Deng Xiaoping said that China's policy toward Hong Kong would not change for 100 years,¹²⁵ the question will be completely up to the future PRC leadership to answer. In addition, many powers now granted to the HKSAR are based on the differences between mainland China and Hong Kong. As Hong Kong is in a process of reintegration into China, what will happen when some of the differences between China and Hong Kong diminish as China continues to catch up or, as others have rather pessimistically warned,¹²⁶ the HKSAR continues to be integrated into and becomes more like the PRC? Again, it is China that holds the answer.

III. THE INTERNATIONAL COMMUNITY AND THE HKSAR'S EXTERNAL AUTONOMY

The HKSAR's external autonomy also depends on the recognition and support of the international community. Practically speaking, Hong Kong's autonomous external powers could become meaningless if few states and international organizations were interested in developing and maintaining separate relations with it. From the point of view of international law, unlike states and international organizations, which are regarded as the normal types of international legal persons and can acquire their international personalities by meeting fixed conditions,¹²⁷ Hong Kong's international legal status relies not only on China's authorization but also on the recognition and acceptance of other, existing international persons.

¹²⁵ On June 3, 1988, Deng Xiaoping told all the participants at the "International Conference on China and the World in the Nineties" that:

We have solemnly promised that our policy towards Hong Kong will remain unchanged for fifty years after 1997. Why 50 years? There is a reason for that. We need not only to reassure the people of Hong Kong but also to take into consideration the close relation between the prosperity and stability of Hong Kong and the strategy for the development of China. The time needed for development includes the last 12 years of this century and the first 50 years of the next. So, how can we change our policy during those 50 years? Now there is only one Hong Kong, but we plan to build several more Hong Kongs in the interior. In other words, to achieve the strategic objective of development, we need to open wider to the outside world. Such being the case, how can we change our policy towards Hong Kong? As a matter of fact, 50 years is only a vivid way of putting it. Even after 50 years our policy will not change either. That is, for the first 50 years it cannot be changed, and for the second there will be no need to change it. So this is not just idle talk.

DENG XIAOPING, *supra* note 1, at 61.

¹²⁶ See, e.g., DAVID NEWMAN & ALVIN RABUSHKA, HONG KONG UNDER CHINESE RULE: THE FIRST YEAR, Hoover Institution on War, Revolution and Peace: Essays in Public Policy, No. 90 (1998).

¹²⁷ See BROWNLIE, *supra* note 88, at 59.

A. *The International Community's Role in the HKSAR's External Autonomy*

The HKSAR's external autonomy must exist and operate in a dynamic relationship between Hong Kong and the outside world. It goes almost without saying that the expansive grant of treaty power to the HKSAR would become only so much verbiage if few states or international organizations had the need or desire to negotiate and sign bilateral agreements with the HKSAR. Similarly, while the PRC agreed that international treaties that were applied to Hong Kong by Britain would continue to be applied to Hong Kong after 1997, both Britain and China had to seek the consent of other parties to these treaties who could refuse to be bound by these treaties involving Hong Kong on the grounds that Hong Kong's return to China constituted a fundamental change in circumstances, or that Hong Kong could not carry out its international obligations independently.¹²⁸

In a broader sense, the HKSAR's external autonomy also exists and operates in China's comprehensive relations with the rest of the world, particularly with the HKSAR's main economic partners. Not only China's foreign policy but also the "China" policies of other nations will affect Hong Kong's external autonomy. For example, during the recent, continuing row between China and the United States over allegations of Chinese spying and illegal acquisition of American nuclear weapons technology, it has been reported that Hong Kong's privilege to import "dual use" American technology, which is denied to China, may be removed.¹²⁹

Clearly, the international community, via its power of recognition and support, can exercise some "constitutive" effect on Hong Kong's autonomous status as a non-sovereign international actor, or it can deny or cut down that recognition and support and thereby undermine Hong Kong's external autonomy. The use of such power is starkly evident, for instance, in the adoption by the U.S. of the United States-Hong Kong Policy Act of 1992.¹³⁰ Under the terms of the Act, the United States on the one hand

¹²⁸ See YASH GHAI, *supra* note 105, at 455, n. 14.

¹²⁹ See Simon Beck, *Spy Row Threatens SAR Imports of Technology*, S. CHINA MORNING POST, Mar. 27, 1999, at 1; Simon Beck, *Export Status is on the Line*, S. CHINA MORNING POST, Mar. 27, 1999, at 17.

¹³⁰ See United States-Hong Kong Policy Act of 1992, 22 USC §§ 5701-5732 (1992) (passed during the 102nd Congress and signed into law by President George Bush on Oct. 5, 1992). Since 1993, the U.S. State Department has released six Hong Kong Policy Act Reports and the last such report is due to come out around the same time this Article will be printed. In addition, since July 1, 1997, there have been six reports made by House Task Force on the Hong Kong Transition as to the status of Hong Kong following its return to

expressly recognizes and supports the autonomous status of the HKSAR within the PRC, but on the other hand such recognition and support is subject to the proviso that the HKSAR remains “sufficiently autonomous” under the terms of the Joint Declaration.¹³¹ On the basis of the terms, obligations, and expectations expressed in the Joint Declaration with respect to Hong Kong, the statute authorizes the President at any time on or after July 1, 1997 to issue a determination that Hong Kong is “not sufficiently autonomous” and by executive order to suspend the application of any U.S. laws that accord Hong Kong treatment different from that of the PRC. Furthermore, as a means of active oversight, the Act requires the Secretary of State to issue reports to Congress summarizing conditions in Hong Kong of interest to the United States from March 31, 1993 through March 31, 2000.¹³²

Although no other country in the world has adopted legislation similar to the U.S.-Hong Kong Policy Act, about which China has expressed resentment,¹³³ both Britain and the EU do issue their own periodical reports on Hong Kong.¹³⁴ These documents constitute valuable sources for researching and evaluating, among other things, the development of Hong Kong’s external relations with the countries and regions in question. They also reveal another unusual aspect of the HKSAR’s external autonomy: that is, behind such unprecedented autonomy lies unprecedented international recognition. It is rare for an autonomous region to attract such strong support and even “coercive” as arguably in the case of the U.S.-Hong Kong Policy Act pressure from the West. There is no question that the West has important stakes in both political and economic terms in continuing its support of the HKSAR’s autonomy, including providing for more liberal and favorable treatment to Hong Kong in such areas as trade, finance, immigration, and law enforcement. However, strong as the international recognition and support is, the HKSAR’s external autonomy could still become an easy target in the future if relations should sour among Hong Kong, the PRC, and their major Western trading partners.

the PRC. All these reports are available at <<http://www.usconsulate.org.hk/ushk/>> (visited Feb. 9, 2000).

¹³¹ See United States-Hong Kong Policy Act of 1992, 22 U.S.C. §5722(a) & (b) (1992).

¹³² *Id.* §5731.

¹³³ The U.S.-Hong Kong Policy Act “provoked Beijing’s wrath as ‘an unwelcome American interference in purely Chinese domestic affairs detrimental to health Sino-U.S. relations.’” Ming K. Chan, *Global Implications of Hong Kong’s Retrocession to Chinese Sovereignty*, in HONG KONG’S REUNION WITH CHINA: THE GLOBAL DIMENSIONS 29 & 40 n.20 (Gerard A. Postiglione & James T.H. Tang, eds., 1997).

¹³⁴ See, e.g., Report on the European Union and Hong Kong: Beyond 1997, COM(97) 171 final. For the series of six-month reports presented by the UK Foreign Secretary to Britain’s Parliament, see <<http://www.fco.gov.uk/news/keythemepage.asp?56>> (visited Dec. 2, 2000).

Foreseeing that the recognition and support of the international community would play an important role in determining the level of external autonomy to be enjoyed by the HKSAR, both the PRC and UK actively and successfully sought out such recognition and support on behalf of Hong Kong in regard to Hong Kong's international rights and obligations during the transition period after the signing of the Joint Declaration and leading up to July 1997.¹³⁵ In the future, China and the HKSAR will have to continue to seek international recognition and support for various aspects of the HKSAR's external autonomy. One of the most important tasks of the HKSAR's Immigration Department, for example, is to promote the HKSAR passport throughout the world, especially in the EU and in Latin American countries. Currently, only some sixty-seven countries/territories give visa-free access to HKSAR passport holders,¹³⁶ compared to the approximately eighty countries that admit holders of the UK's special Hong Kong British National (Overseas) (BN(O)) passport without visas.¹³⁷

B. *Hong Kong's International Legal Personality*

An international person can be briefly defined in international law as an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims.¹³⁸ According to this definition, not only states and international organizations have been generally regarded as the normal types of international legal persons, but also a variety of other historical and current entities have been recognized as international persons to varying extents. The test is that, as long as an entity's international capacity has been accepted and significant international legal relations between the entity and existing international legal persons

¹³⁵ For example, as of June 30, 1997, China and the UK had secured that 214 international treaties would continue to apply to Hong Kong. For a list of these treaties, see *The Position of the People's Republic of China and the United Kingdom on Multilateral Treaties Applying to the Hong Kong Special Administrative Region*, 36 I. L. M. 1675,1675-83 (1997). It was also determined that the HKSAR would continue to participate in 34 international organizations after July 1, 1997. See *China Notifies U.N. on Treaties Applying to HK*, CHINA DAILY, Jun. 23, 1997, at 1; *Ministry of Foreign Affairs' Spokesman on HKSAR's Continuing Participation in Activities of International Organizations*, PEOPLE'S DAILY (Overseas Edition) [Renmin Ribao (Haiwaiban)], (Jun. 25, 1997), at 4.

¹³⁶ See *Government Welcomes Visa-Free Arrangements* (visited Jan. 19, 2000) <<http://www.info.gov.hk/gia/general/199911/11/1111110.htm>>. One million HKSAR passports have been issued so far. See Lee King-wai, *Tampered Passports Leads to Rules Clamp*, HONG KONG STANDARD, Dec. 28, 1999, available in LEXIS, News Library.

¹³⁷ See Jane C.Y. Lee, *Nationality and Right of Abode*, in THE OTHER HONG KONG REPORT: 1997, at 253, 255 (Joseph Y.S. Cheng ed., 1997).

¹³⁸ See *Reparation for Injuries Suffered in the Service of the United Nations*, I.C.J. 174, 179.

maintained, such an entity may be recognized as a person under international law to the extent that its personality exists only in the relations between the entity and those international legal persons who recognize the entity's personality. In other words, the key element to establish a new international person is the existence of international legal relations, which are the result of a particular entity's international legal capacities, as recognized and accepted by existing international persons.

Such being the case, the HKSAR can be quite readily identified as an international legal person. Under British colonial rule, Hong Kong had developed considerable external autonomy in its economic relations with other parts of the world. In general, however, the existence of such external autonomy in its recent colonial history, especially before the transition period (May 27, 1985 through June 30, 1997), was arguably insufficient to support a separate international legal personality for Hong Kong, even though the substantial development of autonomous features in implementing the Joint Declaration during the transition period, such as the signing of several bilateral treaties with foreign states, might have been. Since the handover, the continuation of Hong Kong's pre-handover international rights and obligations, the practice of the HKSAR's expanded and unprecedented external autonomy in accordance with the Basic Law, and the solemn guarantee of such autonomy under the Joint Declaration (an international treaty), as well as general recognition and tremendous support throughout the world, all point to the establishment of a limited international legal personality for the HKSAR as a non-state entity. Today, among the HKSAR's key international legal relations are a number of separate memberships in international organizations which do not require statehood as the condition for membership and a net of bilateral treaties and agreements between Hong Kong on the one hand and foreign nations and international organizations on the other.¹³⁹

Nevertheless, while the HKSAR's international legal status may be strong with unprecedented external autonomy as an autonomous region, its international personality is necessarily limited. Despite the fact that states, international organizations, and entities like the HKSAR are all deemed international persons, the extent of their personality varies significantly. It is perhaps in this sense that Roda Mushkat feels that defining Hong Kong's international legal status poses "a daunting challenge to an international lawyer confronted with an entity which is not a 'state', yet possessing 'stately attributes'; not 'sovereign' yet 'highly autonomous'; not a

¹³⁹ An example of an HKSAR bilateral treaty with an international organization is the Customs Cooperation Agreement between the European Community and the HKSAR of May 13, 1999. See *HKSARG Signs Customs Co-operation Agreement with European Community* (visited Jan. 3, 2000) <<http://www.info.gov.hk/gja/general/199905/13/0513114.htm>>.

'conventional' member of the international community, yet a most respectable 'actor' on the international stage."¹⁴⁰

Compared with those of the principal international persons (states) Hong Kong's international legal relations are largely limited to non-political and non-military areas, as the Basic Law clearly provides that China is responsible for the HKSAR's foreign affairs and defense.¹⁴¹ Thus, only to the extent that the HKSAR is allowed to have autonomous legal relations with foreign states and international organizations are Hong Kong and China two separate legal persons. Beyond the HKSAR's external autonomy, there is only one legal person representing China namely, the PRC and the HKSAR on the international plane, and to still argue for some separate legal personality for the HKSAR, as Mushkat has, distorts the real picture of the HKSAR's international legal personality.

For example, although analytically attractive, it is legally specious to claim – as Mushkat does – that the HKSAR's international personality can be based on its "stately attributes," including its own population, territory, government, and ability to engage in international action autonomously.¹⁴² Such ambiguous maneuvering along the line between national sovereignty and regional autonomy marks an attempt to transgress the boundary between China's sovereignty and the HKSAR's autonomy. It therefore does not help to either justify or define the HKSAR's international personality. On the contrary, it only leads to more misleading analogies with respect to Hong Kong.

One such problematic analogy to Liechtenstein's membership in the Statute of the ICJ is that, since the HKSAR has the capacity to bear international responsibility, then it should be able to become a party to the ICJ statute and bring international claims before the ICJ.¹⁴³ Yet, by whatever international law standard, and in spite of any factual arguments about size of population, territorial area, etc., Liechtenstein is a sovereign state and the HKSAR is not. Until the ICJ statute is modified, only states may be parties to that statute, as well as "in cases before the Court."¹⁴⁴

¹⁴⁰ MUSHKAT, *supra* note 93, at 1.

¹⁴¹ See Basic Law, *supra* note 7, at art. 2; see also Joint Declaration, *supra* note 3, at 3(2).

¹⁴² MUSHKAT, *supra*, note 93 at 4-11.

¹⁴³ See *id.* at 38.

¹⁴⁴ Statute of the International Court of Justice, June 26, 1945, art. 34, 59 Stat. 1055, 1059. Article 34(1) of the ICJ Statute states that (1) Only states may be parties in cases before the Court. *Id.* Articles 35(1) and 35(2) state:

(1) The Court shall be open to the states parties to the present Statute. (2) The conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in position of inequality before the Court.

Another questionable analogy is that, since “neither the British Nationality (Overseas) [BN(O)] nor the Chinese nationality to be conferred on the inhabitants of the HKSAR could be regarded as providing real and effective nationality,” then, according to the criterion of the “genuine link,”¹⁴⁵ the HKSAR government should be able to provide diplomatic or equivalent protection to its people traveling overseas or in China.¹⁴⁶ However, leaving aside the questionable premise that neither the BN(O)¹⁴⁷ nor the Chinese nationality for HKSAR residents confer any real and effective nationality, and bearing in mind that it is a general rule of international law that nationality is a prerequisite for diplomatic protection,¹⁴⁸ it is clear that the criterion of the genuine link simply cannot be used to argue that an autonomous region (the HKSAR) is competent to challenge or bypass its sovereign (the PRC) and provide its own “diplomatic” protection to the Chinese nationals residing in Hong Kong – an inalienable part of the PRC as proclaimed in the Joint Declaration, consistent with the fact of the July 1997 handover, and pursuant to the Basic Law.

The boundary between the PRC’s sovereignty and the HKSAR’s autonomy also raises questions with respect to the assertion that Hong Kong

Id. art. 35.

¹⁴⁵ Nationality is usually acquired on the basis of *jus soli* (the law of the soil or land) or *jus sanguinis* (the law of blood or descent). However, according to the “genuine link” criterion, *jus soli* or *jus sanguinis* links between a state and an individual may not be genuine and the real legal bond between a person’s nationality and a state may instead be based on the social fact of attachment, such as one’s residence and main business location. The criterion of the genuine link is useful in cases of dual nationality; however, its application in *Nottebohm* (Liech. v. Guat.) 1955, I.C.J. 25-26 (Apr. 6), which Mushkat cites, is controversial. See MUSHKAT, *supra* note 93, at 40. The ICJ there denied Liechtenstein the right to protect Friedrich Nottebohm - a German national naturalized in Liechtenstein but living in Guatemala for a long time - against Guatemala, since the Court found any genuine link between Liechtenstein and Nottebohm to be lacking. See *Nottebohm* (Liech. v. Guat.) 1955, I.C.J. 25-26 (Apr. 6).

¹⁴⁶ See MUSHKAT, *supra* note 93, at 40.

¹⁴⁷ A passport status adopted by Britain in the British Nationality (Hong Kong) Act of 1990 to maintain a “formal” relationship with Britain and to include the privilege of continued reliance on British consular protection – although bestowing no right of abode in the UK. See British Nationality (Hong Kong) Act, 1990, ch. 34 (Eng.). Over three million Hong Kongers are registered as BN(O)s. See *Six-Monthly Report on the Implementation of the Joint Declaration on Hong Kong* (visited Jan. 17, 2000) <<http://www.fco.gov.uk/news/keythemepage.asp?56>> at Jan.-June 1997, para. 14.6.

¹⁴⁸ The only exception to this rule is that an international organization such as the U.N. may provide diplomatic protection to its agents. In its 1949 advisory opinion on the reparation for injuries suffered in service of the U.N., the ICJ unanimously held that the U.N. has the legal capacity to claim its own damages for injuries suffered by individuals as its agents. However, to date, there has never been a case in which the U.N. competed against the claim of its agent’s own home state.

should be given legal personality by the international community in a manner similar to the way international personality is accorded to “the Order of Malta (for its dedication to the assistance of the world’s sick and poor), the Holy See (for leading the Catholic Church),” and “national liberation movements (for their purported aim to combat colonialism).”¹⁴⁹ Such an assertion overlooks the basic fact that neither the Order of Malta nor the Holy See is subject to a modern, sovereign state. Hong Kong’s international personality is not only different from that of states, but also different from that of entities like the Holy See, the Order of Malta, or, for that matter, the Palestinian Liberation Organization. Although the international legal personalities of such entities all depend on the recognition and acceptance of the international community, in the final analysis only Hong Kong needed, and will again need after fifty years of guaranteed existence, a sovereign’s, i.e. China’s, authorization for its international capacities.

IV. CONCLUSION

Upon reflection, it seems clear that the HKSAR’s external autonomy is unique in its unprecedentedness, its special Chinese dimension, and the strong international recognition and support it has received. As a model, the HKSAR’s external autonomy is not, and cannot be, perfect, for it is an ongoing, transitional system that will continue to require time and experience to fill in the details, clarify the ambiguities, and improve upon its original design. However, it has arguably established a higher standard and expectation of autonomy in the world, overcoming tremendous obstacles, especially some deep-seated East-West political conflicts. Although it is only intended to exist for fifty years, the Hong Kong model could become a lasting example of foreign affairs power-sharing for the world community. As the theoretical and legal blueprints of the model have passed their initial tests and survived some difficult challenges, and as all major players (Hong Kong itself, the PRC, and the international community) involved have obvious interests in maintaining and supporting the HKSAR’s external autonomy, the continued success of that autonomy in practice can be expected and may eventually guarantee its utility as a model of some kind, some time, elsewhere in on the globe, from which disputed territories can take helpful guidance.

¹⁴⁹ MUSHKAT, *supra* note 93, at 10.