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The Legal Implications of the Sino-British Treaties Regarding Hong Kong

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I. INTRODUCTION

Chung-kuo, the Middle Kingdom,—this is China. Throughout its long history as the Middle Kingdom, China has developed a civilization based upon its own concept of law. In Imperial China (1550 B.C. - 1912 A.D.), Confucian philosophy served as a basis for law. According to Confucius:

If the people be led by laws and uniformity is sought to be given them by punishments, they will try to avoid punishments but have no sense of shame. If they be led by virtue and uniformity sought to be given them by li, they will have a sense of shame and, moreover, will become good.¹

Consequently, during the Imperialist period, the Chinese believed that by focusing on man’s virtue within society, political and social harmony would result. The leader of the country would be a moral and virtuous man who would seek to avoid hostilities by negotiation and compromise. It was with this philosophy that China encountered the nineteenth century imperialist policies of the western world.

During the eighteenth century, the western nations, particularly Britain, recognized the value of Chinese tea and silk to its trade. However, the British had no export commodity for which there was a demand in China. Therefore, the British paid in gold and silver. From 1781 to 1790, British traders brought 16.4 million taels of silver into China; from 1800 to 1810, the British paid 26 million taels.² Trade between China and Britain remained favorable to the Chinese until the 1820’s, when British merchants and the East India Company expanded the importation of opium into China. With opium as its chief export, Britain eliminated its trade deficit; in 1836, for the first time, China suffered a one million dollar trade deficit. As Tan Chung observed, “Britain’s China trade was no ordinary international trade. It was colonial exploitation, remittance and

². I. Hsu, The Rise of Modern China 220 (2d ed. 1975) [hereinafter cited as Hsu].
smuggling. With their trade blossoming, the British sought to protect the opium traffic against the opposition of local leaders. The Opium War and its consequences were inevitable.

China was wholly unprepared for war with any industrialized nation, especially Britain. The Opium War lasted three years, ending in 1842 with the signing of the Treaty of Nanking. The treaty's thirteen articles opened five Chinese ports to British trade; forced a twenty-one million dollar indemnity to Britain (including six million dollars for destroyed opium); and imposed a fixed tariff on China. Most importantly for purposes of this article, under Article III, China ceded the Island of Hong Kong to Britain "to be possessed in perpetuity by her Britannick Majesty, her Heirs and Successors. . . ." Opium, the primary subject of the war, was not dealt with in the treaty; however, as both Chinese and western scholars have noted, the continuance of the opium trade was forced upon the Chinese at gunpoint. Following the Opium War, efforts to stop the influx of opium were futile. By 1858, under British pressure, China legalized the opium trade.

From the end of the Opium War until 1949, China was a weak country of colonial stature, humiliated by western demands to which it was forced to accede. In international affairs and economic development involving China's territory, resources and labor, Chinese opinion and consent were ignored. There was neither a central authority nor a powerful military force to defend China's rights and territories. This was, for the Chinese, a century of degradation.

Since the Opium War, many changes have taken place in the western world and in China. Following World War II, the Chinese Communists came to power, establishing the People's Republic of China (PRC) in 1949. The Communists focused upon the problems of the Chinese peasantry, while in Hong Kong, a capitalist economy and industry flourished. The rapid post-war growth of the Hong Kong economy is attributable to the demand for Chinese manufactured products. In recent years, Hong Kong's exports have exceeded those of India. Hong Kong has developed from a simple harbor to "refit British subjects' ships" to one of the world's greatest free ports. It has become a major industrial and economic power in Asia.

Today, Hong Kong consists not only of the island, but includes

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Sino-British Treaties

Kowloon Peninsula, Stonecutters Island and the New Territories. Hong Kong Island, with an area of twenty-nine square miles, was ceded to the British in 1842, under the provisions of the Treaty of Nanking. Following this treaty, conflicts continued between the British and Chinese. In 1860, the British, at the Convention of Peking, took control of both Kowloon Peninsula and Stonecutters Island. China's vulnerability was apparent once again when it was defeated by Japan in 1895. The British "recognized that an extension of Hong Kong territory [was] necessary for the proper defense and protection of the Colony." Consequently, under the terms of the 1898 Convention of Peking, Britain was able to obtain a ninety-nine year lease for the New Territories, located on the mainland north of Kowloon. As Norman Miners noted, "These New Territories increased the area of the colony from 43 to 400 square miles." This article considers the legal implications of the Chinese-British treaties concerning Hong Kong. Because the basic views of the PRC on international law are quite antithetical to those of Britain, and in turn, those of the western world, the focus will be on the Chinese and British interpretations of the law of treaties; the Chinese view of the law of peaceful coexistence; and Hong Kong's racial issue.

II. BACKGROUND

A. Chinese Policies After 1949

Mao Tse-tung changed China's domestic and foreign perspectives and focused his ideals upon the Chinese peasantry. In order to create a self-sufficient egalitarian China, Mao looked to the Chinese masses. The Chinese Communist leaders directed their energies and policies to improving the lives of the masses. Mao's social aim was to serve the collective good—thus, the well-known slogan, "Serve the people." Mao's philosophy centered upon the Chinese peasants, and the Revolution itself depended for its success upon organizing them.

Under the PRC, an ideological conflict exists between "red" and "expert." The ideal Chinese socialist is one who is both a committed revolutionary and a political expert, i.e., one who has both a "proletarian state of mind," and the expertise to ensure good work.

Franz Schurmann has explained that "ideological goals" are basically "human," as compared with "technical goals" which basically belong only to professional experts. The ideological human goals seek to resocialize the Chinese from individual orientation into community orientation—to believe in community fulfillment rather than self-fulfillment. Technical goals are specialized goals, which require experts and enhance the position of experts, i.e., the professors, intellectuals and industrial planners in society. The technical goal, therefore, increases expert individualism. Although Mao stressed the need for unity between "red" and "expert," a conflict exists between the two.

Mao envisioned a society where political ideology was a characteristic that belonged not only to the peasantry but also to the leaders and experts. Mao authoritatively expounded upon this unification in 1958:

Red and expert, politics and business—the relationship between them is the unification of contradictions. We must criticize the apolitical attitude... Those who pay no attention to ideology and politics and are busy with their work all day long, will become economists or technicians who have lost their sense of direction and this is very dangerous. Ideological work and political work are the guarantee that economic and technical work will be carried through, they serve the economic base. Ideology and politics are the supreme commander; they are the soul...

For Mao, expertise should not be achieved at the expense of political philosophy.

Mao further speculated that it would be necessary to continually resolve society's contradictions:

The transition from socialism to communism is a struggle, a revolution. Even when we have reached the era of communism, there will definitely still be many, many stages of development and the relationship between one stage and another will necessarily be a relation leading from quantitative change to qualitative change. Every mutation or leap is a revolution.

Accordingly, the Chinese peasants were taught that struggles

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9. Id.
11. Id. at 65.
could not be avoided because these struggles were necessary to China's socialist development.

Mao felt that a better socialist society would develop through continuous struggle. The continuous revolution focused upon institutions. The social and cultural institutions with feudal and bourgeois remnants were to be destroyed and then rebuilt to conform to Mao's philosophy. The institutions were to instill Maoist values in the Chinese society. Through the social and cultural institutions, individuals would acquire the value of selflessness, which stressed the virtues of serving the people. The continuous struggle was to help transform society's individuals into "new socialist men and women" who were both red and expert.

In contrast to the Maoist concept which stresses the unification of "red" and "expert," the leaders of Hong Kong place primary importance upon the expert alone. Maoist political ideology does not play an important role in Hong Kong. Western economists have pointed out that Hong Kong's economic policy is based upon classical liberalism. "[T]he free flow of information, making the dissemination of international know how possible as well as the attraction of foreign investors. . ." exemplifies government policy in Hong Kong. By adopting laissez-faire policies, the government believes that private industry will direct resources in the optimum manner. Economic policies fostering free competition have established Hong Kong as a leading economic power in Asia.

Throughout modern Chinese history, both the Nationalists and the Communists have denounced British imperialism in Hong Kong. Since 1949, the PRC has made statements that "Hong Kong is Chinese territory." As a member of the United Nations, China addressed the Hong Kong issue after a Special United Nations Committee on Colonialism considered the matter in 1972, and it listed Hong Kong and Macao as its "colonial territories." Huang Han, the Chinese ambassador at that time, asserted the Chinese position: "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 sov-

ereign right and does not at all fall under the category of colonial territories.” 15 Huang Han added that, because the Hong Kong and Macao issues were domestic Chinese matters, the United Nations had no authority to address those questions.16

B. Chinese and British Economic Interests in Hong Kong

Despite the PRC's rhetoric regarding a Chinese solution for Hong Kong, it remains a free port economic center. The Chinese are well aware that change in government and ideology could substantially disturb Hong Kong's economy. In its search for a solution, the PRC must consider the enormous economic benefit derived from present-day Hong Kong. Richard Hughes noted in his book, Borrowed Place Borrowed Time, Hong Kong, "Communist trading and financial operations are interwoven with Hong Kong governmental and capitalist practice." 17 In Hong Kong, "commercialized Communism" has thrived. By using Hong Kong, China "has learned all the capitalistic gimmicks in sales promotion, advertising, hire practices, exhibitions and so on. It has mastered the art of watching the market trends and adjusting prices on the basis of supply and demand." 18 As in the pre-opium era, the Chinese desire the economic benefits of international trade. About one million pounds sterling flow from Hong Kong to mainland China each day.19 About fifty percent of Hong Kong's food, thirty-three percent of its petroleum, and thirty-three percent of its water are imported from the PRC.20 Not only does the PRC value trade with Hong Kong, but the PRC also owns over "fifty department stores, eight smaller banks, two insurance companies, three financial syndicates . . . shoe stores, publishing houses and restaurants" in Hong Kong.21 Thus, the mainland Chinese have profited from Hong Kong's strong economy.

Britain also has a substantial stake in the success of the Hong Kong economy. Michael Parks observed in a recent article about Hong Kong that the British "approach is not that of give and take,

15. Id. at 384.
16. Id.
17. R. Hughes, Borrowed Place Borrowed Time, Hong Kong and Its Many Faces 40 (1976) [hereinafter cited as Hughes].
18. Id.
19. Id. at 41.
21. Hughes, supra note 17, at 41.
as they claim, but just take-take. Since the end of World War II, British firms have made a fortune in Hong Kong and hundreds of billions of dollars have been sent to the mother country.”

Britain receives substantial economic and trading advantages. Most important are the large sterling balances kept invested in British government and local authority bonds, as well as short term loans and cash. This Hong Kong surplus derives from “the accumulated budget surpluses of the Hong Kong government; sterling assets held by the government’s Exchange Fund; and the reserves owned by Hong Kong banks.” In contrast to “other members of the sterling area,” Hong Kong has been unable to utilize its surplus for diversification because of British control.

In addition to the other economic advantages of “owning” Hong Kong, British firms have long enjoyed trading advantages there. For example, Hong Kong’s favorable geographical position facilitates trade with Southeast Asia. And the recent increase in trade with China has enhanced Hong Kong’s importance as a center for Western business. It is an ideal junction for American-European-Chinese business transactions. Additional British advantages derive from the “many Hong Kong laws, construction codes, utility regulations and development plans” that contain “buy-British” requirements, despite the fact that “Japanese or American products might be cheaper or more suitable.”

Britain has used Hong Kong both as a means to conduct business and as a captive export market. The only major cost to the British is a fraction of the garrison costs for 8000 occupation troops; in 1980, Hong Kong paid seventy-five percent of the $332 million price tag. Consequently, considering the problems of the British economy, Hong Kong remains a very valuable British asset, and Britain naturally will strive to retain this asset.

III. THE LAW OF TREATIES AND HONG KONG

Article 38 of the statute of the International Court of Justice enumerates the primary sources of law applicable to international
disputes: (1) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (2) customary law; (3) general principles of law; and (4) judicial expertise.\textsuperscript{28} International conventions include treaties and other written agreements between states.

To explain the role of treaties, Professor Lauterpacht wrote:

The rights and duties of States are determined in the first instance, by their agreement as expressed in treaties. . . . When a controversy arises between two or more States with regard to a matter regulated by a treaty, it is natural that the parties should invoke and that the adjudicating agency should apply, in the first instance, the provisions of the treaty in question.\textsuperscript{29}

Both Britain and China accept the western premise that treaties are a primary source of international law. In past dealings with its former colonies, Britain has used treaties as the primary source for interpreting each nation's legal rights and obligations. Although some Chinese writers have charged that the use of treaties as a source of international law is a bourgeois notion, other Chinese writers state a more traditional view that treaties are "an important source of international law and an important form of expressing international law."\textsuperscript{30} As members of the United Nations, both Britain and the PRC adhere to Article 38, which provides that treaties will be of first importance in resolving any differences between states. Consequently, despite differing views on international law, resolution of any dispute in this case would involve an initial analysis of all applicable treaties.

The Chinese view is that the Hong Kong treaties are "unequal," imposed by duress, and hence unenforceable. Before the 1949 Revolution, the western nations, Russia, and Japan had carved China into "spheres of influence." They took advantage of China's impotence and imposed onerous, one-sided treaty obligations on the Chinese. The Chinese claim that the Treaty of Nanking "opened the gate of China to foreign intrusion," and as a result transformed China into a "semi-sovereign country."\textsuperscript{31} This claim cannot be discredited easily:

\textsuperscript{28} Statute of the International Court of Justice, 59 Stat. 1055, 1060, art. 38, para. 1 (a)-(d).
\textsuperscript{29} L. \textsc{Henkins}, \textsc{International Law} 579 (1980) [hereinafter cited as \textsc{Henkins}].
\textsuperscript{30} \textsc{Cohen} & \textsc{Chiu}, \textit{supra} note 14, at 74.
\textsuperscript{31} \textsc{Liu}, \textsc{Britain's China Policy}, \textsc{China Report} 40 (Mar./Apr. 1980).
Whereas the West saw the first treaties as steps in extending Euro-
pean religion, culture and law to China, as well as economic 
expansion into China for western commerce, the Chinese saw the 
treaties within the context of their traditional concept of the 
world order, and not in terms of a nation state being deprived of 
its rights under international law.32

It was not until Chinese translations of Western international 
law were published that the Chinese realized the significance of 
their loss of sovereignty, inducing a long struggle to end its “une-
qual” position in the world order. The aim of both the Nationalist 
and Communist Chinese was to establish China’s equality among 
states. Since the establishment of the People’s Republic of China in 
1949, and the adoption of Marxism, China has continually empha-
sized “mutual respect for sovereignty” as a basic legal principle.

With reference to its “unequal” treaty claim against Britain, 
China could assert the principle of *rebus sic stantibus*. *Rebus sic 
stantibus* applies to treaties when circumstances have changed. 
China has used this doctrine to support its position in the past. The 
principle of *rebus sic stantibus* applies “when that state of things 
which was essential to, and the moving cause of, the promise or en-
gagement has undergone a material change, or has ceased, [and 
then] the foundation of the promise or engagement is gone and their 
obligation has ceased.”33 Both China and Britain accept this defini-
tion of *rebus sic stantibus*.

Generally, a successor state will argue *rebus sic stantibus* in con-
junction with a duress claim. Thus, China should not seek abroga-
tion of its predecessor state’s treaty commitments solely on the basis 
of *rebus sic stantibus*. China also claims that “unequal treaties” or 
“treaties of a ‘slave nature’ can be unilaterally abolished regardless 
of whether there has been a vital change of circumstances.”34 The 
Chinese argue that because the Sino-British treaties were promul-
gated when China was a semi-sovereign state, they are a product of 
duress, and therefore unenforceable.

The Chinese claim that the Opium War is evidence of China’s 
weakness, and events that followed established China’s semi-sover-

32. Ogden, Sovereignty and International Law: The Perspective of the People’s Republic 
of China, 7 INT’L L. & POL. 1,4 (1974) [hereinafter cited as Ogden].
33. D. O’CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL 
LAW 88 (1967) [hereinafter cited as O’CONNELL].
34. H. CHIU, THE PEOPLE’S REPUBLIC OF CHINA AND THE LAW OF TREATIES 103 
(1972).
eighty, which existed until 1949. Under the terms of the Treaty of Nanking, the British were granted extensive trade privileges. The Chinese were forced to open five ports in China to foreign trade; the number of these ports expanded throughout the nineteenth century. Recognizing the opportunities given to Britain, America and France sought equal treatment. As Victore Hsu explained:

Needless to say, after their defeat in the Opium War the Chinese were anxious to avoid new conflicts. They reasoned that denial of these requests would drive the American and French to seek trade under British auspices, in which case the Chinese would have difficulty distinguishing them, since they all looked alike and spoke equally unintelligible languages.35

Consequently, the Chinese signed the Treaty of Wangsia with the Americans on July 3, 1844, and the Treaty of Whampoa with the French on October 24, 1844.36 The extraterritorial provisions and the most-favored-nation clauses contained in these respective treaties were detrimental to China’s interests. The Chinese agreed to the terms “partly out of expediency and partly out of ignorance of international law and the concept of national sovereignty.”37

A general rule of international law provides that except for those granted diplomatic immunity, aliens who enter a State are subject to that State’s jurisdiction and are “responsible to it for all acts [committed] on its territory.”38 Extraterritorial rights granted by treaty to the British, Americans, French, and later the Spanish, Dutch, and Russians violated this general rule. These extraterritorial rights struck a strong blow to China’s sovereignty. The foreign powers rationalized that Chinese law did not conform to Western modes of thinking and doing business, especially with reference to “legal incorporation and proceedings for enforcement of contract.”39 As a result, foreigners in China were not subject to Chinese jurisdiction but rather to their respective countries’ consular courts. The Chinese could file suit against foreign nationals only in these courts.40

35. Hsu, supra note 2, at 244.
36. Id.
37. Id. at 244, 245.
38. L. Tung, China and Some Phases of International Law 70 (1940) [hereinafter cited as Tung].
40. Id.
The most-favored-nation clause also worked to China's disadvantage. The clause was used as a means to develop freer trade among nations. However, China grew weaker and lost almost all control in setting necessary trade restrictions on foreign items. The Chinese could not protect their own industries and merchants because of the fixed tariff established by the treaties. The trading rights and privileges given to one group of foreign nationals were extended to other groups because of the most-favored-nation clause. This further impaired China's sovereignty.\textsuperscript{41}

Foreign settlements thrived, and foreigners restricted Chinese rights within these areas. Although the Chinese soon recognized the inequities of the situation, it suffered further losses following its defeat in the Sino-Japanese War. Again, there was a scramble for concessions and control. "[T]he competing Powers seized strategic bases in China, partly as a means to defend their own positions and possessions in the Far East and partly as a point d'appui for the exploitation of China."\textsuperscript{42} Germany, Russia, France, Japan, Great Britain, and the United States sought to protect their respective economic and political interests. Leases to Chinese territories were granted to Germany, Russia, and France in 1898. At that time, Great Britain also obtained the ninety-nine year lease of the New Territories.

This historical background is intended to give the reader a better understanding of China's bitterness towards western imperialism and exploitation. It further illustrates the lack of respect for China's sovereignty. China could argue that no nation has experienced such blatant disregard for its interests as did China after the Opium War. The leased territories hindered China's own national defense. In addition, the Chinese delegation to the 1919 Paris Peace Conference noted, "This assertion of exclusive authority and power . . . made each concession virtually 'un petit état dans l'état', to the impairment of China's right as a territorial sovereign."\textsuperscript{43} Both Nationalist and Communist Chinese have struggled to end China's semi-sovereign position among nations. Hong Kong's status as a British "colony" is an unpleasant reminder of China's weakness before 1949.

Rebus sic stantibus could either strengthen or weaken China's argument. To augment its rebus sic stantibus position as to Hong

\begin{footnotes}
\footnote{41}{\textit{Id.} at 582.}
\footnote{42}{M.C. Bau, \textit{The Open Door Doctrine in Relation to China} 8 (1923).}
\footnote{43}{Tung, \textit{supra} note 38, at 26.}
\end{footnotes}
Kong, China could rely both on its duress claim and on the negativist approach to state succession. The latter theory negates all treaties upon a new state's succession. Discussing the concept of negativism, Lord McNair explains, "[T]he general principle is that newly established States which . . . cannot fairly be said to involve political continuity with any predecessor, start with a clean slate in the matter of treaty obligations." 44

Using the clean slate negativists' approach, China could assert that its socialist revolution culminated in a new state which did not "involve political continuity with any predecessor." As a result, China would no longer be obligated by the treaties "old" China made with Britain; the decision would rest with the PRC as to which treaties were to remain enforceable. The Vienna Convention of 1978 on the Succession of States in Respect of Treaties gives support to this view. Article 16 states:

A newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates. 45

This lends support to the Chinese claim that the Hong Kong issue is to be determined by China without reference to the old treaty provisions.

If China asserts that it is a successor state, will the international community accept this claim? With the 1949 Revolution, did China become a new entity? Chinese official pronouncements state that this revolution produced a fundamental change in the country's political, economic, and social system. As Professor O'Connell explained, "[A] new State may be formed . . . by revolutionary means, and thus with a break in legal continuity . . . . The cases of the United States, the Spanish American colonies, Greece, Belgium, Panama and Finland may be regarded as instances of revolutionary succession . . . ." 46

The Chinese would claim that in establishing the PRC, they created a new state just as former colonies do when they declare independence. A state is defined as having the following characteristics: (a) a permanent population; (b) a defined territory; (c) a gov-

44. Maloney, Succession of States in Respect of Treaties: The Vienna Convention of 1978, 19 VA. J. INT'L L. 885, 892 (1979) [hereinafter cited as Maloney].
45. Id. at 907.
46. O'CONNELL, supra note 33, at 88.
ernment; and (d) the capacity to enter into relations with other states. After the 1979 Revolution, the Chinese Communists controlled a permanent population living within a defined territory. The government is radically different from any preceding government, and only the PRC can enter into foreign relations involving China's territory and resources. Confucian teachings no longer dominate Chinese society; in its place, communism is taught and followed. The People's Liberation Army protects China's sovereignty. Government institutions and individual lifestyles were fundamentally changed with the establishment of the PRC. Since 1949, nations have "recognized" the PRC and "established" diplomatic relations with it. In 1971, the members of the United Nations voted to accept the credentials of representatives of the PRC. Thus, the four criteria of a state appear to be satisfied.

Article 62 of the Vienna Convention on the Law of Treaties sets forth as grounds for terminating a treaty that: (1) there has been a fundamental change of circumstances, which was not foreseen by the parties; (2) those circumstances constitute a basis for consent to be bound by the treaty; and (3) the change radically transforms the extent of the treaty obligations still to be performed. China could possibly enhance its position against Britain with respect to Hong Kong by using rebus sic stantibus and duress and state succession claims.

Inherent in any British response to Chinese claims of duress and state succession is the principle of pacta sunt servanda, i.e., that a treaty in force is binding upon the parties and must be performed in good faith. Pacta sunt servanda is based on the premise that international treaties are legally binding "because there exists a customary rule of International Law that treaties are binding." Professor Lauterpacht stated in his explanation of pacta sunt servanda that "[t]he binding effect of that rule rests in the last resort on the fundamental assumption, which is neither consensual nor necessarily legal, of the objectively binding force of International Law." Hence, the treaties would remain valid international obligations, at least until the burden of establishing their invalidity is borne.

With reference to state succession, the British would probably

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47. HENKINS, supra note 29, at 169.
49. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 881 (Lauterpacht 7th ed. 1948).
50. Id.
adopt the universal position: "when a State 'die[s], whether by consent, federation, cession, or disintegration, the successor State assume[s] ipso jure the bundle of rights and duties held by the predecessor State." If a change in sovereignty results in abrogation of international agreements, lawlessness in the international legal order would result. Stability in international law dictates that successor states be bound by prior treaty commitments. Thus, under the universalist view, despite the ninety-seven percent reversion of Hong Kong and the New Territories in 1997, the British would retain control of the island, as well as a small portion of Kowloon due to the Treaty of Nanking.

Britain could also challenge the facts upon which China relies to establish rebus sic stantibus. Changed circumstances, lending support to China's claim to treaty lapse, include the fundamental political, social, and economic changes which have occurred within both China and the Far East generally. No longer is China a pitiful giant, nor Britain an unchallengeable world power. Of course, those same changes have pulled China and Hong Kong even further apart. Britain could argue that Hong Kong's governmental and economic structures and views are consistent with its social and economic realities. The economy thrives under British administration, and the people have developed compatible attitudes and assumptions. These circumstances lend support to Britain's view that China should not obtain control of any part of Hong Kong.

China has argued rebus sic stantibus in support of its position in the Sino-Soviet border dispute. In 1964, China declared that all pre-1917 treaties with Russia were unequal, invalid, and unenforceable. The Soviet Union insisted on pact sunt servanda in response, emphasizing that "the historical practice of the inhabitants of the area" remained unchanged, and consequently that the treaties remained effective. A similar analysis of the "historical practices" of the Hong Kong "inhabitants" would support the British claim to continuance of the treaty regime.

The Vienna Convention of 1978 on the Succession of States in Respect of Treaties supports the Chinese position with reference to Hong Kong. It reflects the post-World War II concerns of Third

51. Id. at 886.
52. Id. at 891.
54. Id.
World states, decolonization, independence, and political change. Basic to the treaty are "principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all states, [and] of non-interference in the domestic affairs of States." Under Article 24, a bilateral treaty would remain binding on a successor state only if (1) the state expressly agreed, or (2) through its conduct is considered to have agreed to the treaty. If the PRC is a successor government, Article 24 would apply. China has expressly denounced the treaties with Britain. If that renunciation is effective, the termination date of the New Territories lease is irrelevant. It is within China's discretion either to continue the terms of the treaty even beyond 1997 or to terminate them before then.

China has the power to cut off Hong Kong island's water supply in the event of British refusal to relinquish its control. However, Britain could claim dispositive treaty protection. Dispositive treaties are those which: "(a) are in the nature of objective territorial regimes created in the interests of one nation or the community of nations; (b) are applied locally in virtue of territorial application clauses; [and] (c) touch or concern a particular area of land." The analogy to easements in domestic real estate law is apparent. In the case of Hong Kong, the focus would not be on the parties to the treaty, that is, the British government, and the predecessor government of the PRC, but rather on the water rights within the territory itself, i.e., its source in mainland areas.

Even if Britain were successful in protecting the right to a continued water supply, China could nonetheless isolate the island. A sovereign state can use its territory freely. Sovereignty "is fundamental to 'peaceful settlement of disputes, observance of treaties, special privileges and immunities in foreign relations....'" China would be exercising its sovereignty in a legitimate way if it chose to isolate the remaining British territory by denying foreign planes and ships access to its mainland facilities, harbors, and airports. Such action could effectively render Hong Kong valueless, and despite its

55. Maloney, supra note 44, at 885, 902.
57. Id. at art. 24, para. 1 (a)-(b).
58. Maloney, supra note 44, at 885, 895.
59. Ogden, supra note 32, at 29, 32.
60. Id. at 32.
dispositive treaty argument, Britain would be subject to great pressure to yield to Chinese demands.

IV. THE LAW OF PEACEFUL COEXISTENCE

In spite of substantial differences between the Chinese and the British views on international law and treaties, it is highly unlikely that China would use force to impose its interpretation. China has renounced the use of force in international disputes. PRC declarations on peaceful coexistence and the PRC's adherence to the United Nations Charter as a member state attest to this.

Article 2 of the United Nations Charter states: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." Even if Hong Kong were Chinese territory, the use of force would be "inconsistent with the Purposes of the United Nations." Furthermore, Article 33 provides that parties involved in any dispute endangering "the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration. . . or other peaceful means of their choice." If China employed force, Britain legitimately could take measures in self-defense. The use of force would also adversely affect China's position in the United Nations.

The law of peaceful coexistence is a self-imposed impediment to an invasion of Hong Kong. The 1954 Sino-Indian Trade Agreement in Tibet set forth five principles regulating relations between states: (1) mutual respect for each other's territorial integrity and sovereignty; (2) nonaggression; (3) noninterference in each other's internal affairs; (4) equality and mutual benefit; and (5) peaceful coexistence. As one Soviet writer noted, "The countries of the socialist camp are guided precisely by this principle in their relations with other countries."

Although both China and the Soviet Union accept the law of peaceful coexistence, since the deterioration in their relationship, beginning in 1956, the two countries have embarked on separate in-

62. Id. art. 33, para. 1.
64. THE SOVIET IMPACT ON INTERNATIONAL LAW 16 (H. Baade ed. 1965).
interpretations. Nikita Khrushchev, at the twentieth Congress, on February 14, 1956, drastically altered Soviet ideology with his enunciation of peaceful coexistence. In an atmosphere of peaceful coexistence, competition between capitalism and socialism would be economically oriented, and military force would be renounced. The philosophy of peaceful coexistence enabled the Soviets to avoid a nuclear war with America and made state-to-state relations possible with many western countries. This fostered international trade and economic strength. Khrushchev stated:

When we say that the socialist system will win in the competition between the two systems—the capitalist and the socialist system—this by no means signifies that its victory will be achieved through armed interference by the socialist countries in the internal affairs of the capitalist countries. Our certainty of the victory of communism is based on the fact that the socialist mode of production possesses decisive advantages over the capitalist mode of production. . . .

Mao disagreed with Khrushchev's theory on peaceful coexistence, emphasizing instead the need for continuous revolution and conflict within the socialist state and internationally, within third world countries, to root out imperialistic exploitation. Mao believed that capitalist imperialism was opposed to basic communist values; hence, destruction of capitalism was critical to the establishment of peace. Khrushchev's "peaceful coexistence" policy deviated from a basic communist tenet that the Chinese Communists adhered to, i.e., that war was inevitable for a communist society. Beijing branded Khrushchev's theory "revisionist." The Soviet Union viewed Chinese imperialism as an offense to communism.

With Mao's death and the ousting of the Gang of Four from power, much of the rhetoric in China stressing violence and revolutionary struggle abated. Ideology has been put aside and emphasis placed on industrialization; the Chinese have "opened their doors" to western capitalist countries such as the United States. This détente and establishment of diplomatic relations marks a radical shift from Chinese denouncements of the United States during the 1949-1969 period.

Today, the Chinese face economic concerns similar to those of the Soviets in 1956. Since 1975, Chinese authorities have empha-

sized China's drive toward "Four Modernizations": agriculture, industry, science-technology, and defense. One writer aptly noted, "Economic performance is considered by Chinese leaders to be the key to national security and international legitimacy." One very important example of China's policy shift is the Shanghai Communiqué, issued during President Nixon's visit in 1972. The Shanghai Communiqué states:

There are essential differences between China and the United States in their social systems and foreign policies. However, the two sides agreed that countries, regardless of their social systems, should conduct their relations on the principles of respect for the sovereignty and territorial integrity of all states, non-aggression against other states, non-interference in the internal affairs of other states, equality and mutual benefit, and peaceful co-existence. International disputes should be settled on this basis, without resorting to the use or threat of force.

The provisions of the Shanghai Communiqué clearly indicate that peaceful coexistence between China and the western powers has come into vogue.

In 1972, during an "off-the-record" interview between Chou En-lai and a foreign correspondent, the issue of Hong Kong arose. Expressing the Chinese position with reference to Hong Kong, Chou urged negotiations. Under international law, "[a] state must enter into negotiations when a treaty expire[s]." Even though the Soviet Union urged China to take Hong Kong back by force, the Chinese maintained that it "would not be provoked over Macao or Hong Kong" because China "would eventually call for negotiations." Current Chinese government policy is similar; it seems clear that the Hong Kong issue must be resolved peacefully through negotiation.

II. HONG KONG'S RACIAL ISSUE AND INTERNATIONAL LAW

The third and final legal issue to be discussed here concerns the status of the Chinese population in Hong Kong. To put this problem in numerical terms, there are 5,017,200 people in Hong Kong,
ninety-eight percent of whom are Chinese. Of these, only fifty-nine percent were born in Hong Kong. Undoubtedly, many who were not born in Hong Kong will “marry and raise their own families and eventually die there.” Although they share their parents’ pride in being Chinese, they do not identify with contemporary China’s frugal lifestyle. While their parents may have planned to stay in Hong Kong just temporarily, those born there of course consider it their home and plan to continue living there.

Fortunately, there have been no direct racial conflicts in Hong Kong. As one study noted, “The white minority lives on top of the society. But because of their small number, their existence is barely perceptible in the eyes of the Chinese majority in their daily encounters. Also, because of their number, they cannot afford to discriminate against local Chinese. . . .” Discrimination in Hong Kong is not based on race but rather upon wealth. This type of discrimination relates to and conforms with Hong Kong’s focus on economic achievement.

A good example of the absence of a racial problem between the Chinese and British is the 1967 riots. During the Cultural Revolution much of the political fervor in China spread to Hong Kong. In early 1967, the situation seemed stable; however, in May 1967, the local communists created industrial disturbances, producing “the most serious disorders in Hong Kong’s history.” Even though China supported the Hong Kong communists in their “struggle,” the Chinese leadership was disorganized and it did not attempt to take over Hong Kong.

The strikes and riots were not racially motivated: the demonstrators, “waving . . . little red books and chanting of the thoughts of Mao Tse-tung,” focused on political and economic issues. The changes sought would have affected not only the British system but also the lives of the many Chinese who benefit from British administration. Because most of the police were Chinese, their suppression of the disturbances did not involve a racial confrontation between

71. The Far East, supra note 6, at 390.
72. K. Hopkins, Hong Kong: The Industrial Colony 40 (1971).
British and Chinese; instead, the conflict was between the authorities and revolutionaries.

Although racial problems in Hong Kong are minimal, in future negotiations between China and Britain, the status of the people in Hong Kong will be a key issue. Since 1949, China has shown marked interest in the Hong Kong Chinese. The mainland authorities consider all Hong Kong Chinese to be citizens of China. Chinese law, which predicates nationality on the doctrine of *jus sanguinis*, offers diplomatic protection to those who leave China, seeking a better economic life abroad. The Constitution of the People's Republic of China, adopted in 1954, contains provisions pledging to protect the rights and interests of Chinese residing abroad.\(^7\)

During the nineteenth century, China was beset with many internal problems, some caused by the Tai'ping Rebellion (1850-64) and some by western imperialism. The disorders disrupted the lives of the peasants, and many migrated to Hong Kong. At first, the Manchu emperors in power strictly followed the tenets of Confucianism; they were very much against Chinese emigration. One author stated, "The emperors took the view that the loss of subjects was not a loss to be compensated for by any trade advantages."\(^8\) With western encroachment in China, the Manchu government suffered great humiliation. The importance of being a Confucian scholar continued; however, the wealthy self-made man became a symbol of prestige in southern China. A Chinese who had gone abroad and made his fortune was a highly respected man upon his return.

When the Communist Party came to power in 1949, the overseas Chinese did not return to China; they began to consider Hong Kong and other newly settled areas as their homes. However, some states to which large numbers of Chinese had immigrated felt threatened. Many Southeast Asians believed that overseas Chinese were fifth columns in China's effort to spread communism. Although the Great Proletarian Cultural Revolution's rhetoric may lend credence to this view, contemporary Chinese authorities adhere to the Bundung Conference Principles adopted in 1955. At that conference, Chou En-lai promised that China would live peacefully with the Southeast Asian nations despite their different political

76. Lawrie, *supra* note 74, at 280, 289.
77. COHEN & CHIU, *supra* note 14, at 752.
China has sought to resolve its differences with Southeast Asia diplomatically; a notable example is the "Sino-Indonesian Treaty on Dual Nationality," signed on April 22, 1955. That treaty provides:

[All persons who hold simultaneously the nationality of the People's Republic of China and the nationality of the Republic of Indonesia shall choose, in accordance with their own will, between the nationality of the People's Republic of China and the nationality of the Republic of Indonesia. . . . [In addition,] all children born in the Republic of Indonesia acquire upon their birth, the nationality of the People's Republic of China if both their parents or only their fathers hold the nationality of the People's Republic of China.]

These treaty provisions give one insight into China's position on nationality and bloodline. They constitute a departure from *jus sanguinis* permitting Indonesians of Chinese descent to choose which citizenship to adopt.

China has expressed its interest as a mother country in protecting overseas Chinese, particularly in Indonesia, Thailand, and more recently, Vietnam. In Southeast Asia generally, they have been very successful in business and finance, creating much resentment among the local populace. Such was the case in Indonesia, where severe persecution resulted in the late 1960's. The Chinese diplomatic note of protest asserted in part, "The racist persecution of the Chinese nationals by the Indonesian right wing reactionary forces . . . grossly violates principles of international relations."

China has an interest in protecting the rights of overseas Chinese. The treatment they receive abroad reflects upon China's sovereignty and status. China has stated that it will give those persecuted people its support and will seek actively to protect their lives and property. There are two competing interests: (1) respecting the sovereignty of another state, and (2) protecting the welfare of overseas Chinese. Generally, China will not interfere in a conflict between a foreign nation and an overseas Chinese resident of that nation. China respects the sovereign right of other nations to make

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their own laws and regulations, and overseas Chinese are expected to obey the rules. However, in instances where persecution against an overseas Chinese community is great, China will intervene diplomatically, as it did in Indonesia.

Determining the nationality of the Hong Kong people poses a unique problem. The Chinese government has declared that "Hong Kong is an inalienable part of Chinese territory, and our compatriots in Hong Kong are blood brothers and sisters of the Chinese people. The Chinese people cannot possibly turn a deaf ear to the British imperialists' fascist atrocities of barbarously suppressing our countrymen in Hong Kong." China's interest in the people of Hong Kong is even better grounded than its concern for those of Indonesia. Hong Kong was previously the territory of China, whereas no such claim applies to Indonesia.

British citizenship is founded upon both jus soli and jus sanguinis. On October 30, 1981, the British government enacted the Nationality Act of 1981,83 producing substantial changes in the acquisition of British citizenship. However, section 4 of the British Nationality Act of 1948 provides that "... every person born within the United Kingdom. ... shall be a citizen of the United Kingdom by birth."84

One of the major changes in the 1981 Act deals with Britain's designation: "citizenship by descent." Under provisions of the 1948 Act, British citizenship through descent could be passed on indefinitely upon the child's registration.85 The recent law abrogates this provision, limiting the acquisition of citizenship by descent, from father or mother, only to the first generation. The reason for this change was that second and third generations usually have extremely tenuous connections with the United Kingdom.86

The Nationality Act of 1981 requires "a real and close personal connection with the United Kingdom" to acquire British citizenship.87 This is at variance with the old English doctrine of perpetual allegiance, established in the fourteenth century.88 Until 1981, the

82. COHEN & CHIU, supra note 14, at 383.
83. The Nationality Act will become effective in 1982.
87. Id. at 996.
United Kingdom followed this doctrine, preserving the concept that "[n]o man may abjure his native country nor the allegiance which he owes to his sovereign."\footnote{89} The doctrine of perpetual allegiance is now obsolete.

Another factor in the change of policy is the increasing number of refugees and immigrants seeking entry to the United Kingdom. Revolutions and internal strife plague former colonies as well as others in the third world. Britain has enacted legislation which creates different categories of citizenship and limits the right of abode to those born and "belonging" to the United Kingdom.\footnote{90}

Three types of citizenship within the Commonwealth were created by the Nationality Act of 1981: British citizenship, British dependent territories' citizenship, and British overseas citizenship.\footnote{91} Under the provisions of this act, those born in Hong Kong possess British dependent territories citizenship. As one commentator explained: "They will not have citizenship of their particular colony. On independence, however, they will acquire citizenship of their new country and give up their former citizenship."\footnote{92} Although the Hong Kong people possess British citizenship, they are not granted a "right of abode" in the United Kingdom. In addition, when Hong Kong obtains "independence," the Chinese people in Hong Kong will lose their British citizenship.

The Nationality Act of 1981 tends to strengthen China's claims concerning the status of the Hong Kong people. However, China's interest in its "blood brothers and sisters in Hong Kong" is not reciprocated. A recent survey, conducted in 1981, showed that if Hong Kong were to revert to China, one-third of the population would prefer to leave, forty-one percent of them wishing to emigrate to the United States, twenty-five percent to Canada, and only two percent to Britain.\footnote{93} Apparently, the Hong Kong Chinese would not willingly subject themselves to incorporation into China, despite their feelings toward the current administration. As a foreign correspondent accurately observed, "The lingering preference of Hong Kong's Chinese for colonial conditions rather than the Communist way of life is strictly apolitical and strictly self-centered."\footnote{94}

\footnote{89. \textit{Id.}}
\footnote{90. Samuels, supra note 86, at 996.}
\footnote{91. \textit{Id.} at 997.}
\footnote{92. \textit{Id.}}
\footnote{93. L.A. Times, Apr. 2, 1981, at 7, col. 1.}
\footnote{94. Hughes, supra note 17, at 177.}
VI. CONCLUSION

The Chinese must appreciate that a solution to the Hong Kong dispute will affect not only British and Chinese interests but also the interests of other nations, such as the United States. Recognizing Hong Kong’s ideal location for trade with China and Southeast Asia, many multinational corporations have established themselves there. A majority of these corporations are American. The foreign firms have invested $2,114 million in Hong Kong as of February 1979. Nearly forty-five percent of this investment came from the United States. In addition, Hong Kong has exported more goods to the United States than to any other country, in 1977, HK$13,552 million; in 1978, HK$15,125; and in 1979, HK$18,797.

The issue of Hong Kong’s future is very difficult to resolve. Economically, Hong Kong is dependent upon the Chinese mainland for water and essentially all of its natural resources, except fish. In addition, Kai Tak Airport will belong to China in 1997. Maintaining Hong Kong’s status quo is of economic value to China. The mainland government wants the economic advantages Hong Kong offers, but at what political price? As one scholar noted, “[e]conomic benefits, foreign exchange earnings and an outlet for dissident citizens have, inter alia, to be balanced against national prestige, doctrinal purity and security of regime and state.”

There are three possibilities as to Hong Kong’s future. First, China could assert complete sovereignty over the island. Despite Britain’s desire to maintain the status quo, there are powerful international legal arguments in favor of China’s claim. The result might well be a destruction of capitalism as it now exists there.

A second alternative would be for China to administer Hong Kong under the present economic system, i.e., “to treat the whole area as a Free Trade Zone and permit the colony to operate in nearly the same fashion that it does today but with a Chinese rather than a British governor.” This would permit Hong Kong to continue as an important economic center in Asia. Although the laissez-faire economic policies of Hong Kong are inconsistent with communist philosophy, some manipulation of ideas and rhetoric could perhaps justify it.

95. THE FAR EAST, supra note 6, at 396.
96. Id. at 405.
97. Lawrie, supra note 74, at 280, 283.
The problem with either option would be the adverse effect of a "brain drain" from Hong Kong of managers, economic experts, and planners. As noted in the preceding section, Hong Kong is a very westernized society. Most of the five million Chinese in Hong Kong are apolitical; they are primarily economic people. This contrasts sharply with the basic ideological policies of contemporary China. Consequently, any complete revision of the political and economic structures there should involve an effort to retain those with management skill, and probably a reeducation campaign for those who voluntarily remain or who are prevented from leaving. Any partial assumption of control would raise the issue of permitting successful Chinese businessmen to control the economy. In discussing this possibility, a commentator observed, "[i]t would be an anomaly (under the present scheme of things, at least) to permit them to continue to operate the way that they do and to continue to accumulate wealth."99 Should China opt for a partial remedy, undoubtedly many of the successful Chinese would leave Hong Kong in order to protect their interests and assets.

The third possibility would be for Hong Kong to continue its status as a British colony. This would maintain Hong Kong's stability, and both China and Britain would continue to receive the economic benefits they now enjoy. This position would give China a lever to employ in negotiating greater concessions from Britain. Although this would be an attractive alternative economically, the philosophy of sovereignty, which China ardently embraces, would oppose such an election. Basic principles of Maoist ideology, with its focus on revolutionary commitment and self-reliance, are not consistent with Hong Kong's self-interested and dependent economic status.

It is important for those nations with economic interests in Hong Kong to remember that China's current policies favoring stable and moderate development are not a new phase in the Chinese quest for political, social and economic goals. Although the normalization of relations with Western nations is recent, the emphasis on experts, industrialists and economic planners is not new; conflicts have occurred between red revolutionary values and expert technological planning throughout the post-1949 period, and they may recur. In summation:

China is Communist to be sure, but it is also an aspiring great

99. *Id.* at 155.
power, a chauvinistic 'new nation' and the heir to a distinctive history and cultural style. Our task is to assess these complex strands as objectively and comprehensively as possible in order to facilitate what must inevitably be the slow and painful process by which China and the world adjust their demands upon each other. We should not caricature the Chinese demands. It will be difficult enough to deal with reality.\textsuperscript{100}

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