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FROM THE PRIVY COUNCIL TO THE COURT OF FINAL APPEAL:
WILL THE AREA OF NON-JUSTICIABILITY BE THE SAME IN HONG
KONG AFTER JULY 1, 1997?

I. INTRODUCTION

1997 marks great changes for Hong Kong. It is a year of concern for some and a time of anticipation for others. On July 1, 1997, when Hong Kong becomes a part of the People's Republic of China (PRC), the people will lower the flag of Great Britain and raise the Chinese flag in its place.¹ After being under British rule for 155 years, Hong Kong will commence its status as the Hong Kong Special Administrative Region (HKSAR)—the PRC's first Special Administrative Region (SAR).²

In preparation for the transfer, Great Britain and the PRC signed the 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 (Joint Declaration),³ which laid the foundation for the subsequent enactment of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Basic Law).⁴ Pursuant to the Joint Declaration and the Basic Law, the PRC will implement a "one country-two systems" plan (*yi guo liang zhi*) for Hong Kong. This plan allows for the continued application of the present common law system in Hong Kong after it

1. 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, U.K.-P.R.C., 23 I.L.M. 1371 [hereinafter Joint Declaration].

2. See XIANFA [Constitution], art. 31 (1982) (P.R.C.) ("The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of specific conditions.").

3. Joint Declaration, *supra* note 1.

4. See generally Joint Declaration, *supra* note 1; Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (1990), *reprinted in* 29 I.L.M. 1519 (1990) [hereinafter Basic Law.]

becomes an SAR in the PRC.⁵

Following the enactment of the Basic Law, Hong Kong's Legislative Council passed laws to fulfill the "one country-two systems" plan and to assure Hong Kong's smooth transition as an SAR. This Comment discusses the Court of Final Appeal Ordinance (CFA Ordinance), which creates the Court of Final Appeal (CFA) to replace the Judicial Committee of the Privy Council (Privy Council) as Hong Kong's highest court of appeal after 1997.⁶ Part II of this Comment introduces Hong Kong's present judiciary system and CFA Ordinance. Part III explains the "acts of State" exception in the CFA Ordinance and the limitation that the exception places upon the CFA's subject matter jurisdiction. Part IV discusses the procedure of determining which cases are non-justiciable under the exception. Part V analyzes the reality of the "one country-two systems" plan and its impact on the subject matter jurisdiction of the HKSAR courts. Part VI recommends a guideline to assist the National People's Congress (NPC) in determining which cases are non-justiciable under the "acts of State" exception. Part VII discusses the factors that restrain and prevent the possibility of the NPC's overbroad interpretation of the "acts of State" exception. Ultimately, this Comment concludes that jurisdiction between pre-1997 and post-1997 Hong Kong will likely be comparable. Although the "acts of State" exception can theoretically enlarge the area of non-justiciability, the PRC would be prudent in not reducing the HKSAR courts' adjudicative powers because the judiciary is a strong indicia of Hong Kong's success as an SAR. For the PRC, a successful HKSAR will undoubtedly help achieve one of its most significant long-term goals: the annexation of Taiwan.

II. THE PRESENT JUDICIARY SYSTEM IN HONG KONG

Hong Kong courts presently operate on a fused common law system.⁷ Under this system, when English law is inappropriate and no local legislation is available, the courts apply the Chinese cus-

5. See Joint Declaration, *supra* note 1, para. 3(5), at 1372.

6. Court of Final Appeal Ordinance, Ord. No. 79 (1995), reprinted in 35 I.L.M. 207 (1996).

7. See BERRY FONG-CHUNG HSU, THE COMMON LAW SYSTEM IN CHINESE CONTEXT: HONG KONG IN TRANSITION 10 (1992).

tomary laws that Hong Kong practiced prior to adopting English law.⁸ Just as Hong Kong's laws can be traced to the British common law system, Hong Kong's judicial hierarchy has its roots in the United Kingdom.

A. The Hierarchy of the Hong Kong Courts and the Types of Cases That Fall Under Their Jurisdiction

The Hong Kong judiciary includes the Court of Appeal, as well as the High, the District, the Magistrate's, the Coroner's and the Juvenile Courts.⁹ Tribunals with limited subject matter jurisdiction, such as the Lands, Labour, Administrative, Small Claims, and Obscene Articles Tribunals, also exist.¹⁰

Presently, the highest court in Hong Kong is the Supreme Court, which includes the Court of Appeal and the High Court.¹¹ The Court of Appeal hears appeals from the High Court, the District Court, and the Lands Tribunal.¹² The Court of Appeal also answers questions of law from the lower courts.¹³ Appeals from the Court of Appeal proceed to the Privy Council.¹⁴ Such appeals, however, are rare because of the exorbitant costs involved.¹⁵ Thus, for practical purposes, many consider the Court of Appeal to be the "final arbiter" of Hong Kong law.¹⁶

Below the Court of Appeal is the High Court of Hong Kong.¹⁷ Unlike the Court of Appeal, which has an "almost entirely appel-

8. See PETER WESLEY-SMITH, AN INTRODUCTION TO THE HONG KONG LEGAL SYSTEM 39 (1987). Chinese law and custom is applied most often in the areas of family and succession law. See HSU, *supra* note 7, at 15. During the early 1970s, a number of legislative reforms abolished a large part of Chinese law and local custom in the area of family law; however, Chinese law and custom not expressly abolished remains effective. See *id.* at 18.

9. See LEGAL DEP'T, HONG KONG GOV'T, LEGAL SYSTEM IN HONG KONG 1996, at 11 (1996) [hereinafter LEGAL SYSTEM].

10. See *id.*

11. See *id.* at 13. As of July 1, 1997, the Supreme Court will be renamed the High Court and will include the current Court of Appeal and the Court of First Instance, which is presently referred to as the High Court of Hong Kong. See *id.*

12. See *id.*

13. See *id.*

14. See WESLEY-SMITH, *supra* note 8, at 64.

15. See *id.*

16. *Id.*

17. See *id.* at 63.

late jurisdiction," the High Court has "mostly original jurisdiction."¹⁸ In particular, it has unlimited jurisdiction over civil and criminal cases.¹⁹

In the lower courts, the subject matter of a case and amount in controversy determine in which court the case may be initially filed. The District Court has jurisdiction over civil matters with claims not exceeding HK\$120,000 and land recovery cases with claims not exceeding HK\$100,000.²⁰ The District Court may also try criminal cases with relatively serious indictable charges.²¹ Magistrates' Courts try most minor criminal offenses.²² In addition, some Hong Kong courts and tribunals have independent jurisdiction, such as the Coroner's and Juvenile Courts, as well as the Lands, Labour, Administrative, and Small Claims Tribunals.²³ Cases from all courts and tribunals may eventually be appealed to the Privy Council.

B. The Privy Council: The Highest Court of Appeal in Hong Kong

Presently, a Hong Kong case reaches a final ruling upon appeal to the Privy Council.²⁴ Before a case reaches the Privy Council, a Hong Kong litigant must first exhaust all lower court appeals and then receive the Court of Appeal's approval to bring the case before the Privy Council.²⁵

The Privy Council provides final assurance that the law is properly applied.²⁶ Usually, five judges sit on the Privy Council; a minimum of three judges must deliberate and unanimously decide

18. *Id.*

19. See LEGAL SYSTEM, *supra* note 9, at 13.

20. See *id.* at 14. These amounts have been periodically raised in the past and will likely be raised to HK\$300,000 and HK\$500,000, respectively. See *id.*

21. See *id.* The District Court is precluded, however, from hearing serious offenses, such as murder, manslaughter, and rape. See *id.*

22. See *id.* at 14-15; see also PETER WESLEY-SMITH, 1 CONSTITUTIONAL & ADMINISTRATIVE LAW IN HONG KONG: TEXT AND MATERIALS 209 (1987).

23. See generally LEGAL SYSTEM, *supra* note 9, at 15-17; WESLEY-SMITH, *supra* note 22, at 209.

24. See LEGAL SYSTEM, *supra* note 9, at 11.

25. See WESLEY-SMITH, *supra* note 8, at 64. A party has the right to appeal only if the matter in dispute is at least HK\$500,000. See *id.* Alternatively, if the case involves an issue of "great general or public importance," the Court of Appeal, or in some circumstances the Judicial Committee, may grant leave to appeal. *Id.*

26. See *id.*

on a case; and if a full bench is present, at least four judges must agree before a decision is issued.²⁷

Normally, the Privy Council hears cases in London, but when it hears appeals from Hong Kong, it operates as a court of Hong Kong.²⁸ At present, the Privy Council handles an average of ten to fifteen cases a year.²⁹

What will happen to Hong Kong's judicial system after the return of Hong Kong to the PRC in 1997? The PRC has promised not to significantly change the judiciary after the transfer other than replacing the Privy Council with the CFA.³⁰ Pursuant to the Joint Declaration and the Basic Law, Hong Kong will continue to have a "high degree of autonomy," including an independent judicial power.³¹

Once Hong Kong assumes its status as an SAR, the Privy Council will no longer have the power to hear Hong Kong cases. Thus, in order to prevent a judicial vacuum, Hong Kong will need a new supreme appellate court.

C. The Transition from the Privy Council to the Court of Final Appeal as Hong Kong's Ultimate Arbiter of Law Starting in 1997

Many view the CFA's establishment as "a vital safeguard of [Hong Kong's] freedoms after the Chinese takeover."³² Pursuant to the Joint Declaration and the Basic Law, the CFA Ordinance was enacted on August 3, 1995.³³ It will take effect on July 1, 1997, and on that same day, the CFA will officially replace the Privy

27. See WESLEY-SMITH, *supra* note 22, at 204.

28. See *id.*

29. See Louise do Rosario, *No Appeal: Court Snagged Between Hong Kong and China*, FAR E. ECON. REV., May 18, 1995, at 22.

30. See LEGAL SYSTEM, *supra* note 9, at 24. The Joint Declaration states in relevant part: "After the establishment of the [HKSAR], the judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the vesting in the courts of the [HKSAR] of the power of final adjudication." Joint Declaration, *supra* note 1, annex I, sec. III, at 1373.

31. Joint Declaration, *supra* note 1, para. 3(3), at 1371; Basic Law, *supra* note 3, art. 2, reprinted in 29 I.L.M. 1519, 1521 (1990); see also *id.* art. 85, reprinted in 29 I.L.M. 1519, 1534 (1990).

32. John Leicester, *China, Britain Discuss Post-1997 Court for Hong Kong*, ASSOCIATED PRESS, Mar. 24, 1995, available in 1995 WL 4375364.

33. See Court of Final Appeal Ordinance (1995), reprinted in 35 I.L.M. 207 (1996).

Council.³⁴

III. THE NON-JUSTICIABILITY OF CASES CONCERNING "ACTS OF STATE"

Pursuant to the "one country-two systems" plan, the CFA will have broad jurisdiction. According to the CFA Ordinance, only cases involving "acts of State" will fall beyond judicial review.³⁵ This exception is an area of great controversy among Hong Kong legislators and commentators.

Because Hong Kong has yet to commence its SAR status and the CFA has yet to conduct its first hearing, it is impossible to accurately predict the outcome of cases involving the "acts of State" exception. This exception has never been interpreted in the context of an SAR under the "one country-two systems" plan. Therefore, prior cases relating to "acts of State" are not necessarily binding even under the doctrine of common law. Nevertheless, an attempt to understand the scope of this exception may be helpful in generating possible answers to questions about the adjudicative powers of the HKSAR courts.

A. Foreign Affairs as an "Acts of State" Exception

According to the Joint Declaration and the Basic Law, the PRC's Central People's Government retains responsibility over foreign affairs relating to the HKSAR.³⁶ Thus, the CFA Ordinance has exempted foreign affairs from judicial review.³⁷

On the other hand, the Joint Declaration and the Basic Law authorize Hong Kong to manage and control its external affairs.³⁸ For example, HKSAR representatives "may participate, as members of delegations of the Government of the [PRC], in negotiations at the diplomatic level directly affecting the HKSAR con-

34. See *id.* reprinted in 35 I.L.M. 207 (1996).

35. See *id.* pt. 1, § 4(2), reprinted in 35 I.L.M. 207, 211 (1996), which provides: "The Court shall have no jurisdiction over acts of state such as defence and foreign affairs."

36. See Joint Declaration, *supra* note 1, para. 3(2), at 1371; Basic Law, *supra* note 3, art.13, reprinted in 29 I.L.M. 1519, 1522 (1990).

37. See Court of Final Appeal Ordinance pt. 1, § 4(2), reprinted in 35 I.L.M. 207, 211 (1996).

38. See Joint Declaration, *supra* note 1, annex I, sec. XI, at 1376; Basic Law, *supra* note 3, art. 13, reprinted in 29 I.L.M. 1519, 1522 (1990).

ducted by the Central People's Government . . . [and] in international organizations or conferences in appropriate fields limited to states and affecting the [HKSAR]."³⁹ In addition, the HKSAR "may . . . us[e] the name 'Hong Kong, China', [to] maintain and develop relations and conclude and implement agreements with states, regions and relevant international organizations in the appropriate fields."⁴⁰ Furthermore, HKSAR delegates, as permitted by the Central Government, may take part in other capacities and express their views as "Hong Kong, China."⁴¹ Although the Central Government retains responsibility in deciding whether an international agreement involving the PRC applies to the HKSAR, the HKSAR may, in some instances, arrange to have other international agreements apply to it.⁴²

Commentators have stated that no true difference exists between external and foreign affairs.⁴³ If this view is correct, then any dispute relating to external affairs would be immune from judicial review. It is anomalous, however, that the PRC would have given Hong Kong the authority to handle its "external affairs," and yet, restricted the courts' powers in adjudicating matters concerning that subject. Surely, the drafters of the Joint Declaration and the Basic Law did not intend to create this contradiction.

A feasible way to clarify the non-justiciability of cases involving foreign affairs would be to dichotomize foreign matters into high policy and low policy issues. High policy foreign matters should be non-justiciable, and low policy foreign matters should remain within the jurisdictional purview of the HKSAR courts.

High policy foreign matters involve issues that only concern sovereign states.⁴⁴ Such matters include questions regarding agreements with foreign states, claims relating to territorial sovereignty, and disputes on Hong Kong's membership in organizations whose primary purpose is to maintain international peace and se-

39. Joint Declaration, *supra* note 1, annex I, sec. XI, at 1376-77.

40. *Id.* annex 1, sec. XI, at 1376.

41. *Id.* annex 1, sec. XI, at 1377.

42. *See id.*

43. *See* Roda Mushkat, *Foreign, External, and Defence Affairs*, in *THE BASIC LAW AND HONG KONG'S FUTURE* 249, 251-52 (Peter Wesley-Smith & Albert H.Y. Chen eds., 1988).

44. *See id.* at 252.

curity.⁴⁵ All other matters, in areas such as economic, financial and monetary, shipping, trade, communications, touristic, cultural, and sporting fields, should be categorized as low policy cases, even if they include international concerns.⁴⁶

Sovereign immunity cases also fall within the category of high policy foreign matters. These cases name foreign states as parties to a lawsuit. Generally, such cases are non-justiciable unless the states grant their consent.⁴⁷

There are two approaches to dealing with sovereign immunity cases: the traditional theory and the restrictive theory. Great Britain has adopted the latter approach,⁴⁸ under which a state is immune from lawsuits for public acts (*jure imperii*), but not for private acts (*jure gestionis*).⁴⁹

In contrast, the PRC follows the traditional theory,⁵⁰ which recognizes sovereign equality among all foreign states.⁵¹ Thus, the PRC does not subject foreign states to compulsory jurisdiction.⁵² Chinese courts apply sovereign immunity only to state organs and states *per se*, not to enterprises and corporations with separate legal entities.⁵³

Although distinctions may be drawn between the restrictive and traditional theories, English courts have recently applied international relations policies in deciding foreign affairs cases.⁵⁴ As a result, English courts have generally restrained their jurisdiction in cases involving sovereign states. Thus, although in theory English courts follow the restrictive approach, they have in practice applied the traditional approach to sovereign immunity cases.

45. See *id.* at 252-53.

46. See *id.* at 253.

47. See Wang Houli, *Sovereign Immunity: Chinese Views and Practices*, 1 J. CHINESE L. 23, 25 (1987).

48. See *id.* at 26.

49. See *id.* at 25 n.8.

50. See *id.* at 28.

51. See *id.* at 28-29.

52. See *id.* at 29.

53. See *id.* at 30.

54. See Hugh M. Kindred, *Acts of State and the Application of International Law in English Courts*, 19 CAN. Y.B. INT'L L. 271, 284-85 (1981).

B. Defense Cases Falling Under the "Acts of State" Exception

The Central Government retains responsibility not only over foreign affairs, but also over defense matters.⁵⁵ Thus, the CFA Ordinance similarly exempts defense cases from judicial review.⁵⁶

Defense cases concern the general maintenance of Hong Kong's integrity and security.⁵⁷ Pursuant to Hong Kong's promised autonomy, the HKSAR government will be responsible for maintaining public order within the region.⁵⁸ Although the Central Government will have military stations in Hong Kong, the Chinese military will not interfere with the HKSAR's internal affairs, except under prescribed circumstances.⁵⁹ In other words, the Chinese military will not act as a local constabulary force, but it will provide defense protection to the HKSAR. Based on this division of powers, the defense exception should be construed as pertaining only to high policy defense cases which involve the territory's integrity and national security. All other "defense" cases, involving issues such as local security, should be categorized as low policy defense cases, and thus, remain within the reviewing powers of the HKSAR courts.

Under the present British system, national security issues are not entirely immune from judicial review.⁶⁰ Although "defense" cases do not always fall outside the courts' adjudicative powers, the British judiciary normally confines its decisions to determining whether the decision-maker acted in good faith and within the scope of the law.⁶¹ Although the court may also consider evidence to determine whether a case involves a national security issue, this requirement is minimal.⁶² Once an action is claimed to have a na-

55. See Joint Declaration, *supra* note 1, para. 3(2), at 1371; Basic Law, *supra* note 3, art. 14, reprinted in 29 I.L.M. 1519, 1522 (1990).

56. See Court of Final Appeal Ordinance pt. 1, § 4(2) (1995), reprinted in 35 I.L.M. 207, 211 (1996).

57. See Mushkat, *supra* note 43, at 255.

58. See Joint Declaration, *supra* note 1, para. 3(11), at 1372; Basic Law, *supra* note 3, art. 14, reprinted in 29 I.L.M. 1519, 1522 (1990).

59. See Basic Law, *supra* note 3, art. 14, reprinted in 29 I.L.M. 1519, 1522 (1990).

60. See GRAHAME ALDOUS & JOHN ALDER, APPLICATIONS FOR JUDICIAL REVIEW: LAW AND PRACTICE OF THE CROWN OFFICE 35 (1993).

61. See *id.*

62. See *id.*

tional security purpose, a court may then excuse the case from judicial review.⁶³

An example of a non-justiciable defense case arises where the HKSAR faces foreign aggression that prompts the government to wage war.⁶⁴ These cases fall beyond judicial review because allowing judicial interference may have an adverse effect on military strategy, or alternatively, it may hinder or delay the government's effort to restore peace and order once it ends a war.⁶⁵ It is generally known that Hong Kong, as a colony of Great Britain, never had the power to wage or end wars. As an SAR of the PRC, it will not gain such new powers.⁶⁶

Defense cases may also involve internal security, which is an area under the HKSAR's control.⁶⁷ The focus will then fall on whether these cases are denied judicial review.

As previously noted, not all cases relating to defense are non-justiciable under the British system.⁶⁸ Consider the following hypothetical situation. A state of unrest befalls Hong Kong, and there is a civil disturbance among the Hong Kong people. The HKSAR government deems it necessary for local police to control and prevent civil violence. Under common law, "force may be met with reasonable force sufficient to combat it."⁶⁹ Absent a civil war, present Hong Kong courts may adjudicate this case and decide if reasonable force was used.⁷⁰ Once a civil war erupts, however, any

63. *See id.*

64. *See Mushkat, supra* note 43, at 259. The acts of waging and ending wars are normally discussed under the government's exercise of prerogative powers. *See* Peter Cane, *Prerogative Acts, Acts of State and Justiciability*, 29 INT'L & COMP. L.Q. 680, 694 (1980). These non-statutory powers are reserved to the government and may just as easily be considered under the defense powers. Cases involving the acts of waging and ending wars are non-justiciable, regardless if the actions are construed to fall under the exercise of prerogative powers or under the defense powers.

65. *See Cane, supra* note 64, at 694, 696. Presently, external defense matters in Hong Kong include infiltration by illegal immigrants and protection against invasion from the PRC itself. *See Mushkat, supra* note 43, at 255-56. After the transfer, these cases will no longer be relevant. *See id.*

66. *See Basic Law, supra* note 3, art. 18, *reprinted in* 29 I.L.M. 1519, 1523 (1990).

67. *See supra* note 58 and accompanying text.

68. *See supra* notes 60-63 and accompanying text.

69. Cane, *supra* note 64, at 695.

70. *See id.*

government action taken to control it will be non-justiciable.⁷¹ Nonetheless, the final word on deciding whether a state of civil war truly exists lies in the hands of the judiciary.⁷² From this situation, one may infer that if a case concerns high defense policy matters, such as those involving the entire region, it can justifiably be removed from the HKSAR courts' jurisdiction.

C. Other Types of Cases Speculated to Fall Under the "Acts of State" Exception

Are there any other types of cases that fall within the ambit of the "acts of State" exception? Many fear the unlimited possibility of cases that may fall under this exception. This fear stems from the language of the exception in the CFA Ordinance, which states: "the Court shall have no jurisdiction over acts of state *such as* defense and foreign affairs."⁷³ Many fear the overbroad interpretation of the phrase "*such as*" and the undefined limitations it could place upon the HKSAR courts' subject matter jurisdiction. Commentators find this phrase to be vague and all-encompassing, which leads to fears that once the transfer of sovereignty occurs, cases that are presently justiciable may fall under this exception and escape the courts' review.⁷⁴

Given the phraseology of the exception and its possible broad interpretation, all of the Central Government's and the HKSAR government's executive acts may also fall within the ambit of the

71. *See id.* The Basic Law states, in relevant part:

In the event that the Standing Committee of the [NPC] . . . by reason of turmoil within the [HKSAR] which endangers national unity or security and is beyond the control of the government of the Region, decides that the Region is in a state of emergency, the Central People's Government may issue an order applying the relevant national laws in the Region.

Basic Law, *supra* note 3, art. 18, reprinted in 29 I.L.M. 1519, 1523 (1990). Just as foreign affairs and defense matters fall within the responsibility of the Central Government, this provision implies that decision-making during a "state of emergency" also falls under the powers solely reserved to the NPC. This provision supports the strong likelihood that a civil war would be considered a "state of emergency," and thus, a decision made during a civil war would be non-justiciable.

72. *See Cane, supra* note 64, at 695.

73. Court of Final Appeal Ordinance pt. 1, § 4(2), *supra* note 6, reprinted in 35 I.L.M. 207, 211 (1996) (emphasis added).

74. *See* Frankie Fook-lun Leung, Introduction, Symposium, *July 1, 1997: Hong Kong and the Unprecedented Transfer of Sovereignty*, 19 LOY. L.A. INT'L & COMP. L.J. 257 (1997).

exception.⁷⁵ Presently, certain executive acts may be equivalent to "prerogative acts,"⁷⁶ which are mostly non-justiciable,⁷⁷ while other executive acts may be viewed as administrative acts, which are generally reviewable under the British system.⁷⁸

Given the vague implications of the phrase "*such as* defence and foreign affairs," it is unclear whether all administrative acts fall within this exception. The main reason for this concern is that this exception may leave the HKSAR courts with little or no adjudicative powers over government actions and those parties seeking redress for their grievances with no legal remedies.

In order to address this concern, this Comment turns to the root of the concern: who decides whether a case is justiciable under the "acts of State" exception after 1997? Under the present British system, this power lies with the courts.⁷⁹ Following the transfer of sovereignty from Britain to the PRC, however, the NPC will determine which cases fall beyond the courts' review.⁸⁰

IV. NPC: AN "ADJUDICATIVE" LEGISLATING BODY?

Suppose a case that raises issues speculated to fall under the "acts of State" exception comes before the CFA. Before deciding the merits of the case, the CFA must obtain a certificate from the Chief Executive on the questions of fact concerning "acts of State."⁸¹ The Central Government must grant its approval before the Chief Executive may issue this certificate.⁸² To decide whether

75. See Draft Hansard, Hong Kong Legislative Council Debate 193 (July 26, 1995). Article 18 of the first draft of the Basic Law excepted "cases relating to defence and foreign affairs . . . and cases relating to the executive acts of the Central People's Government." Raymond Wacks, *The Judicial Function, in THE FUTURE OF LAW IN HONG KONG* 127, 131 (Raymond Wacks ed., 1989). Although the final version of the Basic Law excludes the "executive acts" portion of the exception, many still fear that if the exception is construed broadly, executive acts may nevertheless be excepted from judicial review. See Basic Law, *supra* note 4, art. 19, reprinted in 29 I.L.M. 1519, 1524 (1990).

76. See Mushkat, *supra* note 43, at 256-57.

77. See ALDOUS & ALDER, *supra* note 60, at 34.

78. See SIR WILLIAM WADE & CHRISTOPHER FORSYTH, *ADMINISTRATIVE LAW* 43 (7th ed. 1994).

79. See Draft Hansard, Hong Kong Legislative Council Debate 192 (July 26, 1995).

80. See Basic Law, *supra* note 3, art. 19, reprinted in 29 I.L.M. 1519, 1524 (1990).

81. See Court of Final Appeal Ordinance pt. 1, § 4(3), reprinted in 35 I.L.M. 207, 211 (1990); Basic Law, *supra* note 3, art. 19, reprinted in 29 I.L.M. 1519, 1524 (1990).

82. See Basic Law, *supra* note 3, art. 19, reprinted in 29 I.L.M. 1519, 1524 (1990).

to grant approval, the Standing Committee of the NPC must consult with the Committee for the Basic Law of the HKSAR.⁸³

If the NPC decides that a case does not involve an "act of State," the CFA is free to adjudicate the case. If the NPC decides that the case does involve an "act of State," it decides any questions of fact concerning that particular matter and then issues a certifying document.⁸⁴ The Chief Executive uses this document to issue a certificate that is binding on the HKSAR courts.⁸⁵

To date, the NPC remains silent about its method for determining justiciability. It is uncertain whether it will define "acts of State" in the same manner as the British courts.

V. "ONE COUNTRY-TWO SYSTEMS" AND THE "ACTS OF STATE" EXCEPTION

Hong Kong's "one country-two systems" scheme is the first of its kind in the world. As an SAR, Hong Kong will receive a privileged status and enjoy a separate system unique to an SAR. Hong Kong will be unlike any other region or province in the PRC.⁸⁶ In this light, the PRC has allowed a fairly liberal approach to facilitate Hong Kong's reintegration.

In order to assure the success of the "one country-two systems" plan, the PRC should be given the benefit of the doubt that it will implement this plan in a conservative manner. Because the common law system is drastically different from the PRC's statutory system, there must be some compromises to make this plan work. The PRC has promised that Hong Kong's system will

83. See *id.*, art. 158, reprinted in 29 I.L.M. 1519, 1545 (1990). This Committee consists of twelve members; half are from Hong Kong and half are from the mainland PRC. See Proposal by the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region on the Establishment of the Committee for the Basic Law of the Hong Kong Special Administrative Region Under the Standing Committee of the National People's Congress, *id.* app., reprinted in 29 I.L.M. 1519, 1551 (1990).

84. See *id.* arts. 19, 158, reprinted in 29 I.L.M. 1519, 1524, 1545 (1990).

85. See *id.* art. 19, reprinted in 29 I.L.M. 1519, 1524 (1990).

86. SARs differ from both the national autonomous regions (NAR) established under the PRC Constitution and the Special Economic Zones (SEZ) established under the PRC government's open policy. The NARs and the SEZs all belong to a single constituent in mainland PRC. The policy behind SEZs is "to experiment with a market economy and to attract foreign investments in the SEZs." Mark B. Baker, *Forgotten Legal China*, 17 HOUS. J. INT'L L. 363, 389 (1995). In comparison, SARs enjoy a much higher degree of autonomy.

"remain unchanged."⁸⁷ "Remain unchanged" does not mean, however, that every detail will remain the same.⁸⁸ Rather, it means that Hong Kong will "remain fundamentally unchanged" in order to safeguard national sovereignty.⁸⁹

Given the novelty of the "one country-two systems" concept and the lack of specific guidelines for the NPC to decide justiciability, many are concerned about the possibility of arbitrary and overbroad interpretations of the "acts of State" exception. The "acts of State" principle is a muddled concept, even under the British system.⁹⁰ The novelty of the "one country-two systems" plan will only complicate this issue further. No existing models can guide the NPC. Although the PRC wants to preserve its defense and foreign affairs powers, it must release some control over these matters to the HKSAR in order for Hong Kong to enjoy its promised autonomy. This autonomy should also extend to the HKSAR's courts.

VI. RECOMMENDATION: HIGH POLICY MATTERS WILL BE NON-JUSTICIABLE, LOW POLICY MATTERS WILL REMAIN SUBJECT TO JUDICIAL REVIEW

To remain consistent with the rationale of excluding high policy defense and foreign affairs issues from judicial review, the NPC—in deciding whether a non-justiciable "act of state" issue exists—may want to implement a similar "high policy versus low policy" analysis. High policy cases affect the entire territory's integrity and national unity while low policy cases have localized impacts, affecting only a segment of the Hong Kong population. Thus, high policy cases should be removed from judicial review, and low policy cases should remain within the jurisdiction of the HKSAR courts.

87. Joint Declaration, *supra* note 1, para. 3(5), at 1372; Basic Law, *supra* note 3, art. 5, reprinted in 29 I.L.M. 1519, 1521 (1990).

88. See Zhang Youyu, *The Reasons for and Basic Principles in Formulating the Hong Kong Special Administrative Region Basic Law, and Its Essential Contents and Mode of Expression*, 2 J. CHINESE L. 5, 8 (1988).

89. *Id.*

90. See Cane, *supra* note 64, at 680. *But cf.* Draft Hansard, Hong Kong Legislative Council Debate 190 (July 26, 1995). "Acts of State are not known to too many lawyers . . . It is impossible to define it and yet when you see it you know what it is." (statement of Martin Lee). *Id.*

Admittedly, grey areas may still remain under this test. Therefore, this method of interpreting the "acts of State" exception should only be an initial guideline for the NPC and a vehicle to assist both Hong Kong and the PRC during their transition period. After the transition period, the NPC should allow Hong Kong's legislature to codify administrative rules to reinforce this test for non-justiciability. The rules should enumerate the government actions that would fall under the scope of the "acts of State" exception. The HKSAR should implement these rules, in order to determine the adjudicative powers of its courts.⁹¹ Gradually, the court will establish precedence, thereby binding the lower courts under the stare decisis principle. In this manner, the PRC may validate its promise of autonomy for Hong Kong, and at the same time, the Central Government may retain powers in areas affecting national concerns.

VII. REASSURANCES FOR HONG KONG

A. In Reality, "Acts of State" Cases Rarely Come Before the Courts

Hong Kong presently remains pessimistic regarding the scope of the "acts of State" exception. The bleak outlook seems overstated, however, because "acts of State" issues rarely come before the courts.⁹² The most recent "acts of State" case before a Hong Kong court was *Civil Air Transport, Inc. v. Central Air Transport Corp.*, decided in 1952.⁹³ This case involved a dispute concerning the ownership of certain aircrafts when the Communist party took over some territories within the PRC.⁹⁴ The case was classified under "acts of State" because it involved individuals acting on behalf of two governments.⁹⁵ Although this case involved a sovereign

91. During the transition period, the HKSAR courts, including the Administrative Tribunals, may handle cases that are arguably within the scope of the "acts of State" exception, but involve low policy issues, such as local economy and finance. After the transition period and the codification of rules concerning executive acts, the role of Administrative Tribunals and their subject matter jurisdiction may eventually become broader.

92. See Draft Hansard, Hong Kong Legislative Council Debate 190 (July 26, 1995).

93. See *id.*

94. See *Civil Air Transp., Inc. v. Central Air Transp. Corp.*, [1952] 2 Lloyd's List L. Rep. 259 (Eng. P.C.) (appeal taken from H.K.).

95. See *id.* Here, the court had to decide the validity of a transaction concerning aircrafts that was conducted when the Communist party ousted the Nationalist government

state, the court nevertheless exercised jurisdiction based on an ordinance enacted specifically to cover this type of dispute.⁹⁶ Without this ordinance, it is unclear whether the Privy Council would have decided to rule on this case.

The past is a guide for the future. It is unlikely that Hong Kong will be flooded with "acts of State" cases after the return of sovereignty to the PRC. Nevertheless, in the unlikely event that this exception becomes a frequent issue before the HKSAR courts, the NPC will likely take a conservative approach in deciding which cases will be immune from review.

B. Maintaining Confidence in the HKSAR's Judicial System Plays an Important Role in the PRC's Plans

Generally, there is a strong correlation between a stable judicial system and a prosperous economy. If a dispute arises, parties must be able to seek appropriate legal remedies in a fair and expeditious manner. Hong Kong is not an exception to this rule. A positive relationship exists between the public's high level of confidence in a dependable legal system and Hong Kong's economy.

1. The PRC Will Not Kill the "Goose that Lays Golden Eggs"

Hong Kong is one of Asia's largest financial markets.⁹⁷ Due to its stable and successful economy, the PRC has made considerable investments in Hong Kong during recent years.⁹⁸

Presumably, the PRC recognizes the judiciary's importance in Hong Kong. If the PRC widens the scope of the "acts of State" exception, investors may grow insecure about Hong Kong's judicial system. As a result, Hong Kong's economy may suffer.

In light of Hong Kong's presently robust economy, the PRC conceived the "one country-two systems" plan to assure that Hong Kong's economy continues to prosper. Thus, maintaining the confidence of investors and the general public is important to the PRC because Hong Kong's success may provide the gateway for in-

from power. *See id.* At the time of the transaction, the Nationalist government was recognized as the *de jure* government of the PRC. *See id.* Therefore, the court held that the transfer of the aircrafts was valid. *See id.*

96. *See id.*

97. *See* Anthony Neoh, *Hong Kong's Future: The View of a Hong Kong Lawyer*, 22 CAL. W. INT'L L. J. 309, 310 (1992).

98. *See id.* at 320-21.

vestment growth in mainland PRC.

2. A Conservative Approach May Further the PRC's Ultimate Plans for Reunification

In 1999, two years after Hong Kong's return to the PRC, Macao will become the PRC's second SAR as part of the PRC's continuing plan for reunification.⁹⁹ In preparation for Macao's return, the PRC has also incorporated the "one country-two systems" plan in its Joint Declaration with Portugal.¹⁰⁰ Similar to the HKSAR, a Joint Declaration and a Basic Law were formulated for the Macao Special Administrative Region (MSAR).¹⁰¹ If the PRC does not uphold its promise to maintain Hong Kong's present system, the PRC may stand to lose the public's confidence in the HKSAR, as well as in the MSAR.

The PRC also hopes to attract Taiwan as a third SAR.¹⁰² Thus, its adherence to the "one country-two systems" plan will be crucial both in securing the future of the MSAR, and in fulfilling the planned reunification. Placing the barest limitations on the SAR courts' jurisdiction may encourage Taiwan to join the PRC.

VIII. CONCLUSION

The PRC faces a great challenge in making the "one country-two systems" plan a reality for Hong Kong. The future of the PRC hinges upon Hong Kong's success as the PRC's first SAR. Hong Kong may serve as a model for the upcoming MSAR, as well as a catalyst to entice Taiwan to reunify with the PRC.

The PRC may successfully implement the "one country-two systems" plan in Hong Kong by maintaining a dependable judiciary for the HKSAR. As the CFA replaces the Privy Council, many will look to the CFA as an indication of the entire HKSAR judiciary's stability.

99. See Paul Fifoot, *One Country, Two Systems - Mark II: From Hong Kong to Macao*, 12 INT'L REL. 25 (1994).

100. See generally *id.*

101. See *id.* at 31, 33. The Basic Law of the Macao Special Administrative Region (MSAR) was promulgated in April 1993 and will take effect in Macao on December 20, 1999. See *id.* at 33.

102. See Agnes J. Bundy, *The Reunification of China with Hong Kong and Its Implications for Taiwan: An Analysis of the "One Country, Two Systems" Model*, 19 CAL. W. INT'L L.J. 271, 282 (1989).

Pursuant to the Joint Declaration, the Basic Law, and the CFA Ordinance, the CFA's broad jurisdiction will be similar to the Privy Council's jurisdiction, and subject only to the "acts of State" exception. By granting Hong Kong a high degree of autonomy, the PRC has provided a liberal approach to Hong Kong's reintegration. In light of Hong Kong's importance to the PRC, the NPC will likely place minimal limitations on the HKSAR courts' subject matter jurisdiction.

Due to the vague language of the "acts of State" exception, many are concerned about the broad scope of presently reviewable cases that may become immune from judicial review. This fear is especially true for cases falling beyond the "defence and foreign affairs" categories of the exception.

In order to create a balance between the NPC's reserved powers and to make the "one country-two systems" plan feasible for the judiciary, this Comment recommends a "high policy versus low policy" analysis. This test may assist the NPC in determining which cases should fall beyond the courts' reviewing powers and which cases should remain justiciable.

After Hong Kong's transition period, the NPC should allow the Hong Kong legislative body to codify this analysis and provide specific "acts of State" situations that will remain beyond review. After the enactment of this analysis, the cases falling within the "low policy" scope would be justiciable by the HKSAR courts, and any concerns regarding vagueness would be eliminated.

Pursuant to this recommendation, the NPC could retain sole responsibility over matters expressly reserved to it under the Basic Law and the Joint Declaration. Simultaneously, the autonomy that the PRC has promised Hong Kong may become a reality.

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* J.D. Candidate, Loyola Law School, 1997; B.A., University of California, San Diego, 1991. I dedicate this Comment to my mother who has given me more than I can ever thank her for. I thank my family and friends for their love and unyielding support. I also thank Professor Frankie Fook-lun Leung for his patience and guidance with this Comment. I also thank the Journal editors and staff who have provided me with their time and assistance. Most importantly, I thank God for all that He has given me and all that lies ahead.