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Autonomy through Separation?: Environmental Law and the Basic Law of Hong Kong

Benjamin L. Liebman*

One hundred days after taking office as Chief Executive of the Hong Kong Special Administrative Region (Hong Kong SAR) of the People's Republic of China, Tung Chee-hwa pledged both to take steps to improve Hong Kong's environment,¹ and to increase coordination of environmental policy with officials in neighboring Guangdong Province.² Tung's comments marked a rhetorical shift from environmental policy in British Hong Kong: eight years earlier, the Hong Kong government's first White Paper on environmental policy, *Pollution in Hong Kong—A Time to Act*, made only passing mention of China.³ Yet the White Paper was not alone in its view that Hong Kong could think of its problems independently from those across the border. Promulgated ten months after the White Paper, Hong Kong's mini-constitution under Chinese rule, the Basic Law for the Hong Kong Special Administrative Region of the People's Republic of China,⁴

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1. See *Hong Kong's Chief Executive Tung Chee-hwa Gives First Policy Address* [hereinafter *Tung Address*], Section D, BBC Summary of World Broadcasts, Oct. 10, 1997, available in LEXIS, News Library, Curnws File.

Environmentalists criticized Tung for failing to introduce any new initiatives in the speech. See *Green Groups Blast Chief Executive for Saying Little on Environment in Speech*, 20 INT'L ENV'T REP. CURR. REP. (BNA) 21, at 974 (Oct. 15, 1997).

2. See *Tung Address*, *supra* note 1.

3. See generally HONG KONG GOVERNMENT, *POLLUTION IN HONG KONG—A TIME TO ACT* (1989).

4. The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted by the National People's Congress on April 4, 1990, 29 I.L.M. 1511 (1990), 1990 FAGUI HUIBIAN at 5 [hereinafter Basic Law]. For an overview of the Basic Law, see generally YASH GHAI, *HONG KONG'S NEW CONSTITUTIONAL ORDER* (1997); *THE BASIC LAW AND HONG*

emphasizes separating Hong Kong from the rest of China at the same time as it provides for China's resumption of sovereignty over Hong Kong.

This Article uses an analysis of the status of environmental law in Hong Kong to argue that the Basic Law's vision of autonomy for Hong Kong is limited and unworkable. Three weaknesses undermine the effectiveness of the Basic Law. First, the Basic Law fails to provide a comprehensive or realistic mechanism for determining Hong Kong's status in international law, and as a result fails to secure Hong Kong's status both internationally and in China. Second, the Basic Law's conception of a sphere of autonomy for Hong Kong that separates Hong Kong from the rest of China is at odds with the reality of Hong Kong's integration with China, and thus may impede efforts at much needed regional problem solving. Third, the Basic Law mirrors weaknesses in Chinese law more generally by failing to delineate sufficiently Hong Kong's autonomy, and by neglecting to provide any mechanism for guaranteeing that Hong Kong's autonomy will be maintained.⁵

Much analysis leading up to Hong Kong's return to China focused on whether the Basic Law would adequately protect Hong Kong from China, and whether Hong Kong's status in international organizations

KONG'S FUTURE (Peter Wesley-Smith & Albert Chen eds., 1988) (discussing the 1988 draft of the Basic Law). The National People's Congress (NPC) enacted the Basic Law pursuant to article 31 of the Chinese constitution, which states that "[t]he state may establish special administrative regions when necessary." XIANFA [CONSTITUTION], 1982 FAGUI HUIBIAN at 1, art. 31. The constitution also states that "[t]he systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions." *Id.* Although the Basic Law is subordinate to the Chinese constitution, the precise status of the constitution in the Hong Kong SAR is unclear. See GHAI, *supra*, at 57, 61-62.

The statement that the Basic Law will serve as a mini-constitution is controversial: some argue that the law is simply an ordinary statute granting limited authority to Hong Kong. See GHAI, *supra*, at 137; see also Ann D. Jordan, *Lost in the Translation: Two Legal Cultures, the Common Law Judiciary and the Basic Law of the Hong Kong Special Administrative Region*, 30 CORNELL INT'L L.J. 335, 351 (1997) (arguing that "[i]n the Chinese legal hierarchy the Basic Law is merely another . . . national-level law" and thus "is not a mini constitution"); *infra* text accompanying note 291 (discussing the NPC's power to repeal the Basic Law). *But see Tung Address, supra* note 1, ("The Basic Law is the constitutional law of the Hong Kong Special Administrative Region.")

China began drafting the Basic Law in 1985, 18 months after China and the United Kingdom signed the Joint Declaration, which provides for China to "resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997." 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, para. 1, Dec. 19, 1984 [hereinafter Joint Declaration]. For an overview of the negotiations leading up to the Joint Declaration and a discussion of the declaration, see GHAI, *supra*, at 36-38, 43-56. Britain was not involved in the Basic Law's drafting, though it did at times attempt to influence the drafting of the document. See *id.* at 59-60.

5. The emphasis on separation is understandable: the Basic Law's emphasis on walling Hong Kong off from the rest of China reflected an attempt to assuage fears of Hong Kong's residents regarding Hong Kong's return to China. See *infra* note 18 (discussing the failure of the Basic Law to increase public confidence in Hong Kong's reversion).

would be preserved.⁶ Inquiry into the status of international environmental law in Hong Kong suggests different questions. Does the Basic Law adequately provide for Hong Kong's integration with the rest of China? Does the Basic Law account for the new international obligations Hong Kong may assume as part of China? Does the Basic Law account for the different statuses the Hong Kong and Chinese legal systems accord international law?

The problems this Article examines are neither limited to international or cross-border environmental law, nor to Hong Kong. Inconsistencies and attempts at separation in the Basic Law in some cases parallel inconsistencies and rigid categorizations in international treaties. Moreover, the conceptual and practical problems that impede environmental solutions in Hong Kong and Guangdong also plague attempts to address trans-jurisdictional environmental problems elsewhere in China. Environmental law in Hong Kong poses broad challenges to China's rigid notions of state sovereignty, which are at the heart of China's policy toward Hong Kong, China's participation in international lawmaking, and China's domestic legal system.

Clear definition of Hong Kong's placement in specific international agreements was beyond the scope of the task the Basic Law's drafters faced in the late 1980s. It would have been unrealistic, for example, to have expected the Basic Law to stipulate Hong Kong's development status in specific international agreements post-1997. But one of the Basic Law's specific goals was to define a sphere of autonomy for Hong Kong, both within China and internationally. The Basic Law fails to meet this goal conceptually and practically: this Article demonstrates that the separation-based conceptual framework the Basic Law creates is in tension with the reality of Hong Kong's integration into China. This Article also shows that the practical mechanism the Basic Law creates does little to clarify Hong Kong's status or to provide Hong Kong with autonomy in a range of organizations and relationships.

The problems that undermine the Basic Law are not surprising. Some of the problems that weaken the effectiveness of the Basic Law plague other Chinese laws. Scholars have criticized Chinese laws and the Chinese constitution for being vague or aspirational, and have noted the numerous competing sources of legal authority in China.⁷ The Basic Law differs from other Chinese laws, however, in that it is being implemented in a highly developed legal system. Hong Kong's executive branch, courts, and legislature are much more likely to base

6. See, e.g., sources cited *infra* note 79.

7. See, e.g., Anthony R. Dicks, *Compartmentalized Law and Judicial Restraint: An Inductive View of Some Jurisdictional Barriers to Reform*, 141 CHINA Q. (1995) *passim*; Perry Keller, *Sources of Order in Chinese Law*, 41 AM. J. COMP. L. 711, *passim* (1994).

their actions and decisions on the Basic Law than are their mainland counterparts to base decisions on Chinese national laws or the Chinese constitution. The challenge facing Hong Kong is to develop its relationship with China despite the Basic Law's lack of clarity, in much the same way as mainland government agencies and local authorities structure their decisions and lawmaking within the confines of vague statutory language and unclear lines of legal authority. The risk is that Hong Kong's relationship with China may suffer from the arbitrariness that undermines the effectiveness of law in China.

This Article suggests Hong Kong's relationship with China will develop as a result of a range of factors—international agreements, regional problems, local interests—that the Basic Law does not fully contemplate. The reality of this relationship will necessarily diverge from the framework the Basic Law creates. In many cases, China, Hong Kong, and the international community are likely to overlook the imperfections described herein as they focus on Hong Kong's continued economic prosperity and Hong Kong's political status. Solutions to environmental problems will not depend on the details of formalist interpretations of the Basic Law, but Hong Kong's environmental relationship with the rest of China will reflect, and challenge, the governance model the Basic Law creates. To the degree China is able to acknowledge and address these challenges, it will be better prepared to secure Hong Kong's place in China, and to address questions of law and governance in China as a whole.

This Article is divided into four parts. Part I briefly introduces the Basic Law's provisions regarding autonomy and the environment, summarizes Hong Kong's and China's environmental problems and efforts to date to address such problems, and describes the status of international environmental law in Hong Kong and China prior to Hong Kong's reversion to China.

Part II examines the status of international environmental law under the Basic Law. After examining the framework the Basic Law creates for determining Hong Kong's international status and contrasting this framework with international norms of state succession, Part II discusses five problems that undermine the Basic Law's attempt to define Hong Kong's place in China and the international community, demonstrating that the Hong Kong-China relationship cannot work in the manner the Basic Law envisions. First, the Basic Law fails to take account of the need for third party consent in determining the SAR's status, and fails to contemplate that Hong Kong may accede to new international obligations as part of China. Second, the Basic Law fails to account for whether Hong Kong has developed or developing nation status in international agreements. Third, the Basic Law fails to contemplate the interrelation of economic and trade issues with environ-

mental issues and the possibility that, by granting autonomy to Hong Kong in international trade organizations, the Basic Law may also grant autonomy in environmental foreign policy. Fourth, the Basic Law fails to consider the ways in which China may influence Hong Kong's environmental and trade policies indirectly, and thus undermine the autonomy the law grants to Hong Kong. Fifth, the Basic Law fails to take account of the different status of international treaties in Hong Kong and China, and the possibility that such differences may allow Hong Kong de facto veto power over international agreements signed by China.

Part III examines the Basic Law's implications for cross-border environmental problems in the Pearl River Delta. Part III argues that the Basic Law's emphasis on separating and distinguishing Hong Kong from the rest of China may impede solutions to regional environmental problems.

Part IV explores the impact of the Basic Law's weaknesses on efforts to address trans-jurisdictional environmental problems elsewhere in China and on efforts to rethink Hong Kong's status in China. Part IV argues that such rethinking is contingent on China's acceptance of less rigid conceptions of sovereignty, both in its relations with its subnational units and its relations with the international community.

I. BACKGROUND

A. *The Basic Law and Hong Kong's Autonomy*

The Basic Law both asserts China's sovereignty over Hong Kong and separates Hong Kong from the rest of China. The law declares that "[t]he Hong Kong Special Administrative Region is an inalienable part of the People's Republic of China,"⁸ and that the SAR shall "exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power."⁹ In enumerating specific powers of the SAR government, the Basic Law focuses on trade and economic issues:¹⁰ Hong Kong has "independent finances"¹¹ and its own freely-convertible currency,¹² formulates its own "monetary and financial policies,"¹³ and remains a "separate customs territory."¹⁴ The Basic Law provides for

8. Basic Law, art. 1.

9. Basic Law, art. 2. The Basic Law states that "under the principle of 'one country, two systems,' the socialist system and policies will not be practised in Hong Kong." *Id.*, preamble.

10. See GHAI, *supra* note 4, at 140 (stating that "[t]he autonomy of the HKSAR has to be found principally within the interstices of the economic system established for it"). Professor Ghai notes that the autonomy the Basic Law grants Hong Kong differs from that seen in other areas of the world because the purpose of autonomy in the Hong Kong SAR is to preserve Hong Kong's economic system; "[a]utonomy is secondary, and is contingent on the other, larger aim." *Id.* at 181.

11. Basic Law, art. 106.

12. Basic Law, art. 111.

13. Basic Law, art. 110.

14. Basic Law, art. 116; see generally BASIC LAW arts. 105-35 (providing for Hong Kong's

the SAR to pursue free trade policies,¹⁵ and for Hong Kong to continue "as a centre of international and regional aviation."¹⁶ The Basic Law's emphasis on economic autonomy was to be expected. The law reflects China's belief that it can allow Hong Kong economic independence without sacrificing Chinese sovereignty.¹⁷ The law also may reflect China's view that if it convinces Hong Kong's citizens that the territory's economy will not suffer, they will more readily accept life under Chinese rule.¹⁸

Non-economic provisions of the Basic Law underscore the separation of Hong Kong from the rest of China.¹⁹ The law grants Hong Kong powers not vested in any of China's other subnational units. Hong Kong possesses the right to issue its own passports²⁰ and to maintain its own immigration policy for non-Chinese citizens.²¹ Hong Kong maintains its own judicial system.²² National laws are not to be applied in the SAR, subject to certain exceptions,²³ and "[n]o department of the Central People's Government . . . may interfere in the affairs which

economic autonomy from China). More than a fifth of the Basic Law's 160 articles come under the chapter titled "Economy." *See id.*

15. *See* Basic Law, art. 115.

16. *See* Basic Law, art. 128.

17. *See* Wu Jianfan, *Several Issues Concerning the Relationship Between the Central Government of the People's Republic of China and the Hong Kong Special Administrative Region*, 2 J. CHINESE L. 65, 66-68 (1988); Xiao Weiyun, *What's the Legal Status of Hong Kong?*, CHINA L., June 15, 1996, at 90; *cf. Tung Urges HK People to be Confident About Future*, Xinhua News Agency, Dec. 17, 1996 available in LEXIS, News Library, Xinhua File ("[W]e must be mindful and sensitive to our sovereign's aspirations in the international arena and be particularly sensitive to the feeling of the Chinese people in areas of sovereignty and territorial integrity." (quoting SAR Chief Executive-designate Tung Chee-hwa) (internal quotation marks omitted)).

18. There is little evidence that the promulgation of the Basic Law reassured Hong Kong's citizens about their future: "the final draft of the Basic Law depressed public confidence in Hong Kong to a level even lower than that immediately after the June 4 Incident." Ming K. Chan, *Democracy Derailed: Realpolitik and the Making of the Hong Kong Basic Law, 1985-90*, in *THE HONG KONG BASIC LAW: BLUEPRINT FOR 'STABILITY AND PROSPERITY' UNDER CHINESE SOVEREIGNTY?* 3, 26 (Ming K. Chan & David J. Clark eds., 1991). Yet given the close proximity of the Basic Law's promulgation to the Tiananmen crackdown, it may not be fair to judge public reaction to the Basic Law independently from the crackdown itself. Professor Ghai argues that the signing of the Joint Declaration did, to a degree, reassure Hong Kong residents, but that confidence slipped with the publication of the 1988 and 1990 drafts of the Basic Law. *See* GHAI, *supra* note 4, at 57-61.

19. The Basic Law itself does not provide a clear list of the SAR's powers; for such a list, see GHAI, *supra* note 4, at 146.

20. *See* Basic Law, art. 154.

21. *See id.* The status of immigration from other parts of China is less clear: article 22 states that the central government shall determine immigration levels from China to Hong Kong, after consultation with the SAR. *See* Basic Law, art. 22; GHAI, *supra* note 4, at 172-73 (discussing the ambiguity of articles 22 and 154).

22. "The judicial system previously practiced in Hong Kong shall be maintained, except for those changes consequent upon the establishment of the Court of Final Appeal of the Hong Kong Special Administrative Region." Basic Law, art. 81.

23. *See* Basic Law, art. 18; *see also infra* note 221 (discussing article 18).

the Hong Kong Special Administrative Region administers on its own in accordance with" the Basic Law.²⁴

Commentators have echoed the Basic Law's emphasis on Hong Kong's separation from China. Most observers have focused on the degree of autonomy the Basic Law grants to Hong Kong, or the degree to which this autonomy will be honored post-1997.²⁵ Criticism of the Basic Law has often targeted provisions in the Basic Law that restrict Hong Kong's moves towards democracy,²⁶ or the possibility that Chinese interpretations of the Joint Declaration's statement that "[t]he laws currently in force in Hong Kong will remain basically unchanged" will undermine Hong Kong's autonomy by locking Hong Kong into the undemocratic system in place at the time of the Joint Declaration's signing.²⁷ Few observers have questioned whether separation is the appropriate model for Hong Kong's return to China.

In contrast to the Basic Law's detailed provisions regarding Hong Kong's economic affairs, the law makes only passing reference to Hong Kong's environment.²⁸ The Basic Law mentions Hong Kong's natural environment three times: article 7 states that "[t]he land and natural resources within the Hong Kong Special Administrative Region shall be State property;"²⁹ article 97 specifies that the SAR's district organizations may be responsible for "environmental sanitation;"³⁰ and article 119 instructs the SAR government to "formulate appropriate policies to . . . pay regard to the protection of the environment."³¹ None of these provisions signify substantial concern for the environment. Arti-

24. Basic Law, art. 22.

25. See, e.g., GHAI, *supra* note 4, at 139 (arguing that in prescribing "details of the capitalist system that Hong Kong must preserve," the Basic Law "erodes into the autonomy that [Hong Kong] might otherwise have enjoyed"); Chan, *supra* note 18, at 28 ("[T]he Basic Law ensures that all of the crucial levers of power are left in China's hands."); WANG ENBAO, HONG KONG 1997: THE POLITICS OF TRANSITION 110 (1995) ("[A]s long as the Basic Law is implemented the autonomy of Hong Kong will be protected.")

26. See, e.g., Michael C. Davis, *Human Rights and the Founding of the Hong Kong Special Administrative Region: A Framework for Analysis*, 34 COLUM. J. TRANSNAT'L L. 301, 313 (1996) (stating that the Basic Law's system for elections "seriously strains the notion of democratic elections"); GHAI, *supra* note 4, at 226-41, 259-63; cf. WILLIAM GOODHART, Y.M. RAJA AZIZ ADDRUSE, JOHN DOWD, & HANS-HEINER KUEHNE, COUNTDOWN TO 1997, at 67-75 (Int'l Commission of Jurists, 1992) (criticizing British reluctance to introduce democracy in Hong Kong).

27. Joint Declaration, *supra* note 4, art. 3, para. 3. For a discussion of the Chinese view of the meaning of article 3 in the context of Hong Kong's Bill of Rights Ordinance, see Wu Jianfan, *The Bill of Rights: China Responds to Criticism of the PWC's Legal Proposals*, WINDOW, Nov. 10, 1995, at 10.

28. Environmental affairs, with passing references, fare better than some other policy areas that the Basic Law does not mention at all. For a discussion of such omissions, see GHAI, *supra* note 4, at 146.

29. Basic Law, art. 7.

30. Basic Law, art. 97.

31. Basic Law, art. 119.

cle 7 is intended to make clear that title in Hong Kong's land shifted from the British Crown to the Chinese government,³² article 97 serves merely as an example of areas that may be delegated to district board control, and article 119's mention of the environment follows a list of nine "trades" that Hong Kong is to promote.³³ Nevertheless, article 119's instruction that Hong Kong's government should "pay regard to the protection of the environment" does establish that the Basic Law intends for *local* environmental lawmaking to be within the SAR's sphere of autonomy.

B. Environmental Protection in Hong Kong and China

One explanation for the Basic Law's lack of emphasis on the environment may be that Hong Kong and China were just beginning to develop environmental law when China drafted the Basic Law in the late 1980s.³⁴ Hong Kong did not establish its Environmental Protection Department (EPD) until 1986.³⁵ Since then, the territory has

32. Some ambiguity exists on this point. In general, the phrase "State property" has been taken to mean property of the Chinese government. Under such a construction, the land comes under the control of the SAR government when the Chinese government vests title in the land with the SAR government. This would allow leases in the SAR to be signed by the SAR government. See GHAI, *supra* note 4; cf. WANG, *supra* note 25, at 107 (stating that Article 7 shifts title to the SAR government).

33. See Basic Law, art. 119. Article 119 states that "[t]he Government of the Hong Kong Special Administrative Region shall formulate appropriate policies to promote and co-ordinate the development of various trades such as manufacturing, commerce, tourism, real estate, transport, public utilities, services, agriculture and fisheries, and pay regard to the protection of the environment." Basic Law, art. 119. The article can be read to require *policies* for the various economic areas listed, but that the SAR government merely "pay regard to" the environment. One observer has argued that the placement of the reference to the environment demonstrates the Basic Law's relative lack of concern with the environment. See Roda Mushkat, *Environmental Problems and Policy Response in Hong Kong: An Evaluation From an International Legal Perspective*, 2 ASIAN Y.B. INT'L L. 113, 118-19 (1992).

34. China created the Basic Law Drafting Committee in 1985; the first draft of the law was made public in 1988. See Chan, *supra* note 18, at 4; GHAI, *supra* note 4, at 57-58.

The extremely low level of environmental protection in Hong Kong in the 1980s suggests a possible silver lining to the Basic Law's lack of detail regarding environmental policy. As Professor Ghai argues, the Basic Law's detailed description of economic issues may actually undermine Hong Kong's autonomy by restricting the SAR's future policy choices. See GHAI, *supra* note 4, at 139-40. China objected to Hong Kong's pre-1997 political reforms, *see id.* at 272-74, and certain pre-1997 infrastructure projects, *see infra* note 243, by arguing that the Joint Declaration and the Basic Law preserve the political and financial systems in place in 1984. Absent detailed provisions in either document regarding environmental policy, Hong Kong's environmental policy may be free to develop beyond its state at the time of the signing of the Joint Declaration or the enactment of the Basic Law. Such development, however, is unlikely under the pro-business individuals China has chosen to lead the first SAR government. See *infra* text accompanying notes 222-228.

35. Prior to the establishment of the EPD in 1986, Hong Kong established an Environmental Protection Unit (EPU), in 1977, and an Environmental Protection Agency (EPA), in 1981. See Environmental Protection Department, ENVIRONMENT HONG KONG 1996, at 3 (1996). Although the EPA was "more weighty" than the EPU, the EPA's "role was largely advisory." See *id.*

enacted "a staggering number of new environmental laws."³⁶ Despite this increased environmental lawmaking and increasing awareness of environmental problems,³⁷ Hong Kong is plagued by air,³⁸ water,³⁹ and noise pollution⁴⁰ that makes Hong Kong "[a] first world economy with a third world environment."⁴¹ Hong Kong is the most densely populated urban area in the world.⁴² The celebrated Victoria Harbour has "become a vast sewage and industrial waste pit" that is "now under threat of virtually disappearing altogether as a result of" the Hong Kong government's land reclamation program.⁴³ Public concern re-

In contrast, the EPD is "responsible for all pollution prevention and control measures, including the planning of the territory's sewage and wastes management programmes, but excluding responsibility for conservation and the natural environment[,] which remains with the Agriculture & Fisheries Department." *Id.* at 5. For a description of the EPD's responsibilities, see *id.*

China established its National Environmental Protection Agency (NEPA) in 1984, under the Ministry of Urban and Rural Construction; NEPA became independent of the ministry and thus an agency directly under the State Council in 1988. See *The National Environmental Protection Agency (NEPA)*, in CHINA ENVIRONMENT YEARBOOK 1994, at 217, 218 (Zhang Lijun ed., 1995).

36. Mei Ng & Lisa Hopkinson, *A Little Green Dragon?*, 5 ASIAN J. ENVTL. MGMT. 75, 75 (1997). For an overview of Hong Kong's environmental legislation, see ENVIRONMENT HONG KONG 1996, *supra* note 35, at 8-17, 116-29.

37. See Wong Koon-kwai, *The Environment: Heading Towards Sustainability?*, in THE OTHER HONG KONG REPORT 1996, at 367, 374-76 (Nyaw Mee-Kau & Li Si-ming eds., 1996). Increased awareness does not appear to translate into increased support for environmental programs. See *infra* text accompanying note 44.

38. See ENVIRONMENT HONG KONG 1996, *supra* note 35, at 9-11; Elisabeth Tacey, *Ozone Attack Pushes Air Pollution to Record Levels*, S. CHINA MORNING POST, July 27, 1996, at 1 (reporting record air pollution levels in Hong Kong); Ng Kang-Chung & Angela Li, *Pollution Record Leaves HK Choking*, S. CHINA MORNING POST, Jan. 4, 1996, at 1 (same). Hong Kong "has one of the highest per capita electricity consumption levels in the world" and emits "twice the world average of carbon dioxide per person." See Mei Ng, Letter to the Editor, *Energy Efficiency Should be First Choice*, S. CHINA MORNING POST, Oct. 25, 1996, at 30.

39. See ENVIRONMENT HONG KONG 1996, *supra* note 35, at 16-18; Fiona Holland, *Saturday Focus, Little Hope for an Empty Ocean*, S. CHINA MORNING POST, Oct. 26, 1996, at 21 (reporting that "Hong Kong has plundered and polluted its seas with hardly a backward glance").

40. See ENVIRONMENT HONG KONG 1996, *supra* note 35, at 11-12.

41. Ng & Hopkinson, *supra* note 37; see also Editorial, *Putting the Environment on the Agenda*, S. CHINA MORNING POST, Oct. 27, 1996, at 10 (arguing that many of the government measures that have been put in place are "cosmetic" or only scratch "the surface of the problem").

42. See ENVIRONMENT HONG KONG 1996, *supra* note 35, at 2.

43. *Reclamation of the Harbour—Fate or Folly?*, URB. PLAN. & ENVTL. Q. (Fred Kan & Co.), Dec. 1995, at 1; see also *Cleanup Plan for Victoria Harbor Stalls, But Serious Pollution Problems Continue*, 18 Int'l Env't Rep. Curr. Rep. (BNA) 387 (May 17, 1995) (detailing pollution in Victoria Harbour). Commentators have blamed Hong Kong's polluted waters and inadequate enforcement of Hong Kong's environmental laws for outbreaks of cholera in the colony. See Terri Mottershead, *Endangerment of Public Health—The Real Cost of Water Pollution in Hong Kong*, H.K. ENVTL. L. ASS'N NEWSL. (Hong Kong Environmental Law Ass'n), Sept. 1994, at 1-2.

For a more positive view of steps Hong Kong has taken to address environmental problems, see Bowen Leung Po-wing, *Foreword*, ENVIRONMENT HONG KONG 1996, *supra* note 35 (describing progress in implementing Hong Kong's anti-pollution strategy); Katharine Morton, *Hong Kong: Moving Mountains*, ENV'T RISK, Sept. 1993, yearbook ed. at 33-35 (arguing that "Hong Kong has one of the most sophisticated environmental regulatory and management systems in Asia" and quoting EPD acting director John Boxall as stating "[r]ell me somewhere else in the world that has gone from virtually no controls to reasonable controls in 10 years on an economy growing

garding the environment remains low: a Hong Kong environmental group reported that a 1996 study ranked Hong Kong last of 39 countries and territories in public support for environmental protection.⁴⁴

Inadequate enforcement has undermined increased environmental lawmaking. Commentators have criticized the Hong Kong court system's "generally sympathetic approach . . . to environmental offenders"⁴⁵ and have noted that the courts are "reluctant to treat environmental offenses seriously."⁴⁶ Although Hong Kong's environmental laws constitute "a comparatively sophisticated framework," most of these laws rely on Hong Kong's Environmental Protection Department for enforcement of penalties.⁴⁷ Yet the courts may simply reflect the views of Hong Kong society more generally: many environmentalists blame Hong Kong's obsession with economic growth for a general lack of environmental concern.⁴⁸

at an average of 8% per annum"); *The Environment*, HONG KONG 1995, 409, 409 (Renu Daryanani ed., 1995) (reporting that "government expenditure on the environment" was approximately "three percent of public spending" and that "the Hong Kong Government has been moving rapidly and investing large sums of money to correct past environmental mistakes").

44. FRIENDS OF THE EARTH, OVERALL STATE OF HONG KONG'S ENVIRONMENT (Jan. 1997) (on file with author). The same report showed that a majority of Hong Kong residents were not willing to pay increased taxes to fund environmental measures. *See id.*

45. URB. PLAN. & ENVTL. L. Q. (Fred Kan & Co.), Dec. 1995, at 1. The report noted as an example that an offender "convicted of its 2nd, 3rd and 4th offences . . . was fined the same amount . . . on each conviction," HK\$10,000, which is a fraction of the maximum fine of HK\$400,000 "plus [HK\$] 10,000 for each day the offence . . . continued." *Id.*

46. URB. PLAN. & ENVTL. L. Q. (Fred Kan & Co.), Sept. 1995, at 1; *see also Attorney Says Uninformed Judiciary Failing to Enforce Environmental Laws*, 17 Int'l Env't Rep. Curr. Rep. (BNA) 955 (November 16, 1994) (reporting criticism of the Hong Kong judiciary's enforcement of environmental laws).

Hong Kong's judiciary appears to be playing an increasingly active role in environmental enforcement. In one month in 1996, courts issued 63 convictions for breaches of anti-pollution legislation. *See HK Courts Make Convictions Against Pollution Makers*, Xinhua News Agency, Feb. 14, 1996, available in LEXIS, News Library, Xinhua File.

47. *Are Hong Kong's Anti-Pollution Laws Effectively Enforced?*, URB. PLAN. & ENVTL. L. Q. (Fred Kan & Co.), June 1996, at 1. Hong Kong's laws do not provide "for ordinary citizens to bring proceedings against a polluter, or against the EPD for failing in its job to enforce the law." *Id.* Although Hong Kong law includes the "common law rights of action against polluters," including "private and public nuisance, trespass and negligence," no such action "has ever been brought by citizens or the Attorney General against polluters." *Id.* at 2 (emphasis omitted). The report notes that pollution levels have "dramatically increased" since the enactment of Hong Kong's anti-pollution laws, and blames this increase in part on the EPD's reliance on "consultation, advising and warning" rather than prosecution of environmental offenders. *Id.*

For an overview of the EPD's enforcement activities and environmental convictions, see ENVIRONMENT HONG KONG 1996, *supra* note 35, at 130-41.

48. "[T]he environmental agenda [in Hong Kong] has often . . . been delimited to match the archetypal image of Hong Kong as a place where its people are efficient, profit-maximizing, ruthlessly individualistic in the market but only to serve the goal of fulfilling familial duties at the end of the day." Man Si-wai, *The Environment*, in FROM COLONY TO SAR: HONG KONG'S CHALLENGES AHEAD 319, 320 (Joseph Y.S. Cheng & Sonny S.H. Lo eds., 1995). Hong Kong politicians often oppose strict environmental controls on the grounds that the economic costs of

Discussion of Hong Kong's environment must take place in the context of an understanding of the current state of environmental protection in China. China's environmental standards influence Hong Kong in at least three ways. First, Hong Kong suffers the direct effects of air and water pollution from across the border in Guangdong Province.⁴⁹ Second, weaker enforcement of pollution controls elsewhere in China may induce Hong Kong companies to move polluting activities across the border to Guangdong.⁵⁰ Third, concern with the uncertainties of life under Chinese rule may accentuate Hong Kong's obsession with economic development: "[t]he combination of Hong Kong's manic materialism and profound political anxiety is now proving as lethal a cocktail for the local environment as the uncontrolled poisons her factories pour into the once-fragrant harbour."⁵¹

Although numerous reports have commented on the dismal state of China's environment,⁵² there are also reasons to be optimistic regarding China's commitment to environmental protection. China's moves to tighten environmental protection are increasingly driven by recognition of the large costs environmental destruction will have on economic development. Like Hong Kong, China has begun to implement a wide array of new environmental legislation,⁵³ and China's environmental

such legislation will be too great. See Bryan Bachner, *Regulating Pollution in the People's Republic of China: An Analysis of the Enforcement of Environmental Law*, 7 *COLO. J. INT'L ENVTL L. & POL'Y* 373, 400, 406 (1996).

49. See *infra* text accompanying notes 233-239.

50. See Tom Korski, *Lax Laws Allow Foreign Pollution to Relocate*, *S. CHINA MORNING POST*, Mar. 4, 1997, at 12.

The movement of many Hong Kong factories across the border may have negative environmental effects on Hong Kong: many of the factories and farms along Guangdong's Dongjiang River, Hong Kong's primary water source, are Hong Kong-owned. See Vincent R.J. Chen, *River of No Return?*, *ONE EARTH*, Spring 1997, at 15, 17. But see Pamposh Dhar, *Hong Kong—Environment: Rapid Growth Leaves Legacy of Pollution*, Inter Press Serv., Oct. 3, 1995, at 1 ("The problem of industrial pollution [in Hong Kong] has abated somewhat with the movement of industries across the border into China's Guangdong province. . . .").

51. Linda Siddall, *The Environment*, in *THE OTHER HONG KONG REPORT 1991*, 402, 405 (Sung Yun-wing & Lee Ming-kwan eds., 1991). Man Si-wai identifies three arguments used against stricter environmental concerns in the run-up to Hong Kong's return to China: Hong Kong cannot survive without continued rapid economic growth, which will not be possible with stricter environmental controls; Hong Kong should not obsess with preserving its own environment, as the significance of Hong Kong's environment is reduced when viewed as only a small part of China; and Hong Kong's political liberties can only be preserved if Hong Kong remains useful to China economically—environmentalism stands in the way of this necessary continued development. See Man, *supra* note 48, at 320-21.

52. See, e.g., VACLAV SMIL, *CHINA'S ENVIRONMENTAL CRISIS* (1993); Homer Sun, Note, *Controlling the Environmental Consequences of Power Development in the People's Republic of China*, 17 *MICH. J. INT'L L.* 1015, 1018-21 (1996); Sheila Tefft, *Fueling Pollution*, *S. CHINA MORNING POST*, Sept. 22, 1995, at 23; Tim Zimmermann, Susan V. Lawrence, Brian Palmer & Philippe B. Moulter, *China Takes a Deep Breath*, *U.S. NEWS & WORLD REP.*, Sept. 9, 1996, at 36.

53. See, e.g., Zhonghua Renmin Gongheguo Huanjing Zaosheng Wuran Fangzhi Fa [Environmental Noise Pollution Prevention and Control Law of the People's Republic of China], *reprinted*

regulatory bodies have become increasingly aggressive. In July, 1996, for example, China ordered the closing of 999 factories along the Huaihe River, one of the world's most polluted rivers.⁵⁴ Guangdong has also taken steps to improve environmental protection, including banning new coal- and oil-fired plants from the Pearl River Delta, closing polluting plants, and moving polluting factories out of urban areas.⁵⁵ These may be small steps in relation to the size of China's environmental problems, but they suggest caution in regard to assumptions that Beijing will directly undermine Hong Kong's environmental protection mechanisms.

The conventional wisdom has been that Hong Kong's return to China entails significant risks to the Hong Kong environment.⁵⁶ Al-

in ZHONGGUO HUANJING BAO [CHINA ENVTL. NEWS] Nov. 2, 1996, at 3; Zhonghua Renmin Gongheguo Shui Wuran Fangzhi Fa [Water Pollution Prevention and Control Law of the People's Republic of China], May 15, 1996, reprinted in ZHONGGUO HUANJING BAO [CHINA ENVTL. NEWS], May 21, 1996, at 2; Zhonghua Renmin Gongheguo Gutu Feiwu Wuran Huanjing Fangzhi Fa [Solid Waste Pollution Prevention and Control Law of the People's Republic of China], Oct. 30, 1995, 1995 FAGUI HUIBIAN at 55; Zhonghua Renmin Gongheguo Daqi Wuran Fangzhi Fa [Air Pollution Prevention and Control Law of the People's Republic of China], Aug. 29, 1995, 1995 FAGUI HUIBIAN at 5. For an overview of China's environmental laws, see generally Julia Epley Klee & Felicity C. Thomas, *An Evolving Environmental Framework: China's Environmental Policies*, CHINA BUS. REV., Jan. 11, 1997, at 24; CHINA ENVIRONMENT YEARBOOK 1994, *supra* note 35, at 34-79; CHINA ENVIRONMENT YEARBOOK 1995, at 9-28 (Zhang Lijun ed., 1996). For a discussion of problems confronting China's recent attempts to strengthen environmental laws, see generally William P. Alford & Yuanyuan Shen, *Limits of the Law in Addressing China's Environmental Dilemma*, 16 STAN. ENVTL. L.J. 125 (1997).

54. See Tom Korski, *Factories Closed as Environmental Agency Targets Polluters*, S. CHINA MORNING POST, Oct. 1, 1996, at 8; Liu Yinglang, *River Quality Improves after Forced Shut-Down*, CHINA DAILY, Aug. 8, 1996, at 15. The director of China's National Environmental Protection Agency (NEPA) stated in 1996 that NEPA had shut 30,000 polluting factories in the previous three years. See Mei Ng, *Environment Chief Looks Ahead*, ONE EARTH, Spring 1996, at 22.

Many observers are skeptical of the effectiveness of such actions, noting that many closed factories reopened shortly after being shut, or combined with other factories in order to avoid the new regulations. Author's interviews with academics and environmental officials in Beijing, July 1996. Cf. Liu Yinglang, *Henan Wins War Against Polluting Factories*, CHINA DAILY, Nov. 29, 1996, at 31 (reporting that "some manufacturers are waiting to reopen their plants instead of switching to cleaner industries").

55. See *Guangdong to Control Industrial Pollution*, Xinhua News Agency, May 12, 1995 available in LEXIS, News Library, Xinhua File; *South China Delta Bans Petrochemical Power Plants*, REUTERS EUROPEAN BUS. REP. May 31, 1995; see also Daniel Kwan, *\$13.4b Earmarked for Anti-Pollution Drive; Tax Breaks and Low-Interest Loans to Entice Investors to Join Crusade*, S. CHINA MORNING POST, Aug. 6, 1996, at 3 (detailing Guangdong's plans to increase investment in environmental protection, especially in Shenzhen); *China's Guangdong Province Spending \$206 million to Reduce Coal Plant SO₂*, UTIL. ENV'T REP., Oct. 27, 1995, at 15; see also *Environmental Market Trends in Four East Asian Areas*, E. ASIAN EXECUTIVE REP., Oct. 15, 1995 at 8 (describing Guangzhou as "one of the leading cities in China in environmental protection"); *Guangdong's Environment Protection Fruitful*, Xinhua News Agency, June 11, 1996 available in LEXIS, News Library, Xinhua File (reporting that Guangdong "leads the country in tree planting" and that the provincial government has "mapped out over 120 environmental protection-related rules and regulations" in the past five years); *Guangdong Shuts Down 295 Polluting Factories*, WASH. TIMES, Oct. 18, 1996, at A19 (reporting that Guangdong closed 295 polluting factories in September 1996).

For a discussion of environmental law in Guangdong, see Bachner, *supra* note 48, at 385-91.

56. See, e.g., Bryan Bachner, *Conserving a Legal Heritage in Hong Kong: Environmental Regulation After 1997*, 19 LOY. L.A. INT'L & COMP. L.J. 363, 363 (1997) ("[T]he restoration of mainland

though there is little question that China faces colossal environmental challenges, or that Hong Kong is far ahead of China in most areas of local environmental protection,⁵⁷ this Article argues that future threats to Hong Kong's environment are more likely to come from Hong Kong's continued concern with economic growth and business interests' domination of the SAR government,⁵⁸ than from interference from Beijing or Guangdong. Similarly, this paper argues that impediments to addressing Hong Kong's environmental problems are likely to stem not from return to Chinese rule, but rather from the Basic Law's emphasis on separation, a conception of autonomy that fails to appreciate the interconnectedness of China's and Hong Kong's environmental problems, and that ignores the implications of environmental policy for economic affairs and conceptions of sovereignty.

C. *International Environmental Law in Hong Kong and China*

China has not lagged behind Hong Kong in international environmental law. China was a relative latecomer to international environmental treaties,⁵⁹ but in the past decade China has begun to play an active role in international environmental lawmaking, and has become a signatory to the major international environmental treaties.⁶⁰ China

authority over Hong Kong in 1997 raises serious questions for the territory's future environmental policy."); Julie Bloch, *Conservation in a Concrete Jungle: Political, Legal and Societal Obstacles to Environmental Protection in Hong Kong*, 6 GEO. INT'L ENVTL. L. REV. 593, 594 (1994) ("[A]ctions taken before 1997 to incorporate conservation goals into current laws and policies may prevent serious environmental harm in the future.").

57. See, e.g., *Get Tough with China, Say Greens*, S. CHINA MORNING POST, Dec. 4, 1995, at 6 (reporting that Hong Kong "has stricter pollution controls on power stations" than China); Mei Ng, *Environmental Chief Looks Ahead*, ONE EARTH, Spring 1996, at 22 (reporting NEPA director Xie Zhenhua as stating that Hong Kong's environmental controls are more advanced than those in China). But see *Bachner*, *supra* note 48, at 401 (noting that Hong Kong's environmental policy is "unprogressive . . . vis a vis many . . . countries, including the People's Republic of China"); Ng Cho Nam, Letter to the Editor, *Polluters Will Come Back to Haunt Us*, S. CHINA MORNING POST, July 20, 1995, at 20 (noting that "[e]nvironmental regulations in China are equally, if not more, comprehensive and stringent than those in Hong Kong"); Foo Choy Peng, *Clean City Policy Could Bring HK Greater Returns*, S. CHINA MORNING POST, Oct. 10, 1997, at 3 (reporting that "Shanghai's commitment to environmental protection . . . puts Hong Kong to shame").

The mainland Chinese press has at times cited Hong Kong's environmental policies and environmental organizations as positive examples. See, e.g., Miao Kun, *Weile luse de Xianggang [For a Green Hong Kong]*, ZHONGGUO HUANJING BAO [CHINA ENVTL. NEWS], June 29, 1997, at 1 (discussing activities of Friends of the Earth—Hong Kong).

58. See *infra* text accompanying notes 224–228.

59. China recognized only one international environmental protocol prior to 1970, which "dealt with gas and germ warfare." Cai Shouqiu & Mark Voigts, *The Development of China's Environmental Diplomacy*, 3 PAC. RIM L. & POL'Y J. S-17, S-19 (1993). China participated in the 1972 United Nations Conference on Human Environment in Stockholm, but China was not a signatory to the conference's final agreement. See *id.* at S-22; see also Roda Mushkat, *The Daya Bay Nuclear Plant Project in the Light of International Environmental Law*, 7 UCLA PACIFIC BASIN L.J. 87, 103 (1990) (discussing China's participation in the Stockholm conference).

60. See RICHARD E. BENEDICK, *OZONE DIPLOMACY* 185–97 (1991); Abram Chayes & Charlotte Kim, *China and the UN Framework Convention on Climate Change*, in *ENERGIZING CHINA:*

is a signatory to most international environmental agreements that have come into force in the past two decades, including the Vienna Convention for the Protection of the Ozone Layer,⁶¹ the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol),⁶² and the London Amendments to the Montreal Protocol,⁶³ the Convention on International Trade in Endangered Species (CITES),⁶⁴ the Convention on Biological Diversity (Biodiversity Convention),⁶⁵ the Framework Convention on Climate Change (Climate Change Convention),⁶⁶ the Convention on Wetlands of International Importance (Ramsar Convention),⁶⁷ and the Basel Convention on Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention).⁶⁸ Although Britain applied⁶⁹ the four ozone agree-

RECONCILING ENVIRONMENTAL PROTECTION AND ECONOMIC GROWTH (Michael B. McElroy, Chris P. Nielsen, & Peter Lydon, eds., forthcoming 1998).

61. *Vienna Convention for the Protection of the Ozone Layer*, Mar. 22, 1985, U.N. Doc. UNEP/IG.53/Rev. 1, S. Treaty Doc. No. 99-9, 99th Cong., 1st Sess. (1985), T.I.A.S. 11,097 (entered into force Sept. 22, 1988). China acceded to the treaty on September 11, 1989. See UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 1995, at 917 (1996) [hereinafter MULTILATERAL TREATIES].

62. Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550 (entered into force Jan. 1, 1989) [hereinafter Montreal Protocol]. China acceded to the treaty on June 14, 1991. See MULTILATERAL TREATIES, *supra* note 61, at 917.

63. Adjustments and Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer, Adopted at London, June 29, 1990, 30 I.L.M. 537 [hereinafter London Revisions]. China acceded to the revisions on June 14, 1991. See MULTILATERAL TREATIES, *supra* note 61, at 917. China has not signed the Copenhagen Amendments to the Montreal Protocol. See Adjustments and Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer Adopted at Copenhagen, Nov. 25, 1992, 32 I.L.M. 874 (1993) (entered into force June 14, 1994) [hereinafter Copenhagen Revisions].

64. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES]. See UNITED STATES DEPARTMENT OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1996, at 330 (reporting China a party to the Convention) [hereinafter TREATIES IN FORCE].

65. Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 [hereinafter Biodiversity Convention]. China ratified the treaty on January 5, 1993. See MULTILATERAL TREATIES, *supra* note 61, at 908.

66. Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849 [hereinafter Climate Change Convention]. China ratified the treaty on December 22, 1994. See MULTILATERAL TREATIES, *supra* note 61, at 904.

67. Convention on Wetlands of International Importance Especially as Waterfowl Habitat, opened for signature Feb. 2, 1971, T.I.A.S. No. 11084, 996 U.N.T.S. 245 [hereinafter Ramsar Convention]. See TREATIES IN FORCE, *supra* note 64, at 331 (reporting Chinese membership in the Convention).

68. *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, Mar. 22, 1989, U.N. Doc. UNEP/IG 80/3 (1989), S. TREATY DOC. No. 5, 102d Cong., 1st Sess. (1991), 28 I.L.M. 657 [hereinafter Basel Convention]. China acceded to the treaty on December 17, 1991. See MULTILATERAL TREATIES, *supra* note 61, at 917.

69. Prior to July 1, 1997, Hong Kong's participation in international agreements was formally decided by the United Kingdom, but in practice "[w]hen Britain agree[d] to an international convention the Hong Kong government [was] normally asked whether it wishe[d] to be bound by it." NORMAN MINERS, *THE GOVERNMENT AND POLITICS OF HONG KONG* 221 (5th ed.

ments,⁷⁰ CITES,⁷¹ the Ramsar Convention,⁷² and the Basel Convention⁷³ to Hong Kong,⁷⁴ and the Sino-British Joint Liaison Group reached agreement regarding the continued application of a number of environmental agreements to the Hong Kong SAR,⁷⁵ Britain did not

1991). In both the United Kingdom and Hong Kong, international agreements require domestic legislation to become part of domestic law. See PETER WESLEY-SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW IN HONG KONG 39 (1994); see also *infra* text accompanying notes 210–222 (discussing the status of international agreements in domestic Hong Kong law). Prior to local enactment, international agreements “merely create obligations between governments and do not affect the legal position of individuals in domestic law.” WESLEY-SMITH, *supra*, at 40–41.

70. Hong Kong is a signatory to the Copenhagen Revisions, which China has not signed. See MULTILATERAL TREATIES, *supra* note 61, at 885 n.7, 889 n.9, 891 n.4, 892 n.3.

71. See TREATIES IN FORCE, *supra* note 64, at 331 n.9. It is questionable how far either China or Hong Kong has gone to meet its obligations under CITES. One scholar notes that “a substantial endangered species trade still exists” in Hong Kong. Bloch, *supra* note 56, at 597. Hong Kong has not always been a full participant in CITES even in formal terms: Hong Kong delayed implementation of the international ban on ivory by six months, thanks to a British reservation for Hong Kong. See *id.* at 610. Hong Kong’s and China’s experience with CITES and the Ramsar Convention, see *infra* note 72, emphasizes the importance of local enforcement, rather than mere international obligation. Absent a high degree of administrative commitment to enforcing environmental regulations, local effects of international commitments are likely to be minimal.

72. See TREATIES IN FORCE, *supra* note 64, at 332 n.5. At present one Hong Kong location, the Mai Po Marshes, is a Ramsar site. See PLANNING, ENVIRONMENT & LANDS BRANCH, HEADING TOWARDS SUSTAINABILITY: THE THIRD REVIEW OF PROGRESS ON THE 1989 WHITE PAPER POLLUTION IN HONG KONG—A TIME TO ACT 31 (1986) [hereinafter WHITE PAPER THIRD REVIEW]. Mai Po became a Ramsar site in 1995. See *Hong Kong to Protect Wetland*, Xinhua News Agency, Apr. 24, 1996 available in LEXIS, News Library, Xinhua File; see also John Flint, *Patten Reveals Boost to Mai Po*, S. CHINA MORNING POST, Dec. 22, 1995, at 5 (noting that Mai Po’s Ramsar listing “places a moral, not legal, responsibility, on [Hong Kong’s government] to protect the site”). Hong Kong moved extremely slowly to designate the Mai Po Marshes as a Ramsar site, perhaps because China was not initially a party to the treaty. See Mushkat, *supra* note 33, at 123. Six Chinese wetland reserves were identified for protection when China joined the Ramsar Convention in 1992. See *Rare Birds Under Well Protection in Northeast China*, Xinhua News Agency, May 6, 1994 available in LEXIS, News Library, Xinhua File.

73. See MULTILATERAL TREATIES, *supra* note 61, at 898 n.8. For a discussion of the Basel Convention’s status in Hong Kong, see *infra* text accompanying notes 195–208.

74. Other environmental agreements Britain applied to Hong Kong include the International Convention for the Prevention of Pollution from Ships and the International Convention on the Establishment of an International Fund for Compensation for Oil Damage. See TREATIES IN FORCE, *supra* note 64, at 386–89; Jill Cottrell, *Environmental Protection*, in TRADE AND INVESTMENT LAW IN HONG KONG 211, 214–15 (Philip Smart & Andrew Halkyard eds., 1993); David McKellar, *International Maritime Pollution Conventions in Hong Kong (Part 1)*, H. K. ENVTL. L. ASS’N NEWSL. (Hong Kong Envtl. Law Ass’n), Dec. 1994, at 8–9; see also Alison Wiseman, *Steps to Halt Oil Pollution*, S. CHINA MORNING POST, Dec. 1, 1994, at 2 (discussing regulations to bring Hong Kong into compliance with amendments to the International Convention for the Prevention of Pollution from Ships). China is a party to most marine pollution treaties. See TREATIES IN FORCE, *supra* note 64, at 386–89. Britain also applied the Convention for the Regulation of Whaling, 49 Stat. 3079, 155 L.N.T.S. 349, entered into force Jan. 16, 1935, to Hong Kong. See TREATIES IN FORCE, *supra* note 64, at 453. Although not listed as a party to the original 1931 Convention, China is a party to the 1956 protocol to the Convention. See *id.* at 453–54. Hong Kong has enacted domestic legislation banning the capture of certain species of whales.

75. Britain and China established the Joint Liaison Group pursuant to the Joint Declaration. See Joint Declaration, *supra* note 4, art. 5 (“The Government of the United Kingdom and the

apply either the Climate Change Convention or the Biodiversity Convention to the territory.⁷⁶ Environmental agreements did not rank high on the colonial government's list of priorities: Hong Kong's pre-transition participation in international agreements was largely concerned with trade relations.⁷⁷

Hong Kong's and China's statuses with regard to the Climate Change and Biodiversity Conventions contrast with international agreements that received the most attention in the run-up to Hong Kong's reversion to China. Commentators generally discussed Hong Kong's post-1997 treaty obligations with reference to treaties extended to Hong Kong that China had not joined,⁷⁸ particularly the International Covenant on Civil and Political Rights (ICCPR)⁷⁹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁸⁰ Similarly,

Government of the People's Republic of China declare that, in order to ensure a smooth transfer of government in 1997, and with a view to the effective implementation of this Joint Declaration, a Sino-British Joint Liaison Group will be set up"); *id.* at Annex II (providing for the establishment and operation of the Joint Liaison Group). As of October 1996, the Joint Liaison Group had agreed on the application of nine multilateral "conservation" treaties and five "marine pollution" treaties to the Hong Kong SAR. See *List of Agreed Multilateral Treaties to Apply to SAR*, Oct. 10, 1996, at 1-2, 8-9 (on file with author). Included in the list are the Ramsar Convention, CITES, the Vienna Convention, Montreal Protocol, London and Copenhagen Amendments to the Montreal Protocol, and the Basel Convention. See *id.* For a discussion of the operation of the Joint Liaison Group, see *Hired Gun*, NEW GAZETTE, Aug. 1994, at 16, 16-21.

76. See MULTILATERAL TREATIES, *supra* note 61, at 907 n.2, 911 n.1. Hong Kong is also not a party to the International Tropical Timber Agreement, 33 I.L.M. 1014 (1994), opened for signature Apr. 1, 1994, despite Hong Kong being the world's tenth largest importer of tropical timber. See *Ban on Imported Hardwood Timber to Hong Kong Unlikely, Seminar Agrees*, 17 Int'l Env't Rep. Curr. Rep. (BNA) 5, at 233 (Mar. 9, 1994). China has signed the agreement. See *Tropical Timber*, 19 Int'l Env't Rep. Curr. Rep. (BNA) 19, at 807 (Sept. 18, 1996). At a 1994 seminar on tropical hardwoods in Hong Kong, environmentalists, industry representatives and Hong Kong government officials agreed that "a ban on the import of hardwood timber into Hong Kong is unlikely." See *Ban on Imported Hardwood Timber to Hong Kong Unlikely, Seminar Agrees, supra*. Hong Kong has banned the use of tropical hardwoods in government construction projects. See RODA MUSHKAT, ONE COUNTRY, TWO INTERNATIONAL LEGAL PERSONALITIES: THE CASE OF HONG KONG 100 & n.100 (1997); Kathy Griffin, *HK Poser on Paper Recycling*, S. CHINA MORNING POST, Jan. 10, 1994, at 6.

77. See MINERS, *supra* note 69, at 220.

78. See, e.g., Roda Mushkat, *Hong Kong as an International Legal Person*, 6 EMORY INT'L L. REV. 105, 148 (1992) ("The territory's predicament lies in the fact that the continuation of external ties and international agreements is essential in order to maintain the territory's prosperity and its status as a major international commercial center. This predicament is compounded because the PRC is not a party to many of the international agreements presently extending to the territory."). In February 1996, China approved the continued application of "more than 200 multilateral treaties covering aviation, finance and shipping" to the Hong Kong SAR. Simon Holberton, *Chinese Approve HK's Treaties*, FIN. TIMES, Feb. 10, 1996, at 3.

79. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

80. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, [hereinafter ICESCR]. For articles discussing the status of the treaties in Hong Kong, see, e.g., Mushkat, *supra* note 78, at 150; Donna Deese Skeen, *Can Capitalism Survive Under Communist Rule? The Effect of Hong Kong's Reversion to the People's Republic of China in 1997*, 29 INT'L L. 175, 196-203 (1995); Davis, *supra* note 26, at 311-21 (1996); George E. Edwards &

scholars noted the possible difficulties in continued enforcement of extradition treaties between Hong Kong and foreign states.⁸¹ Yet whereas human rights treaties and extradition treaties are cases in which Hong Kong's return to China poses a possible threat to continued application of international agreements,⁸² and suggest areas of international law in which Hong Kong has been a more active participant than has China, examination of the post-reversion applicability of environmental agreements reveals an area of international law in which China's participation has exceeded that of Hong Kong, and thus raises the question whether Hong Kong, in becoming part of China, has assumed new international obligations.

II. INTERNATIONAL ENVIRONMENTAL LAW UNDER THE BASIC LAW

A. *The Basic Law and Norms of State Succession*

The Basic Law provides for Hong Kong's status in a wide range of international agreements to remain unchanged. Yet the framework the law establishes for assessing Hong Kong's status in international agreements is ill-suited to environmental agreements for two principal reasons. First, the Basic Law is primarily concerned with maintaining Hong Kong's status with regard to economic and trade and human rights agreements. Thus, although the Basic Law does include provi-

Mark Zuckerman, *Rights Monitoring Under Threat? Hong Kong at the United Nations*, CHINA RTS. F., Winter 1996, at 28, 29-31; Johannes Chan, *State Succession to Human Rights Treaties: Hong Kong and the International Covenant on Civil and Political Rights*, 45 INT'L & COMP. L. Q. 928, 934 (1996). The Basic Law provides for the continued application of both treaties in Hong Kong, stating that, "[t]he provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force." Basic Law, art. 39. For a discussion of the possible interpretations of article 39, see GHAI, *supra* note 4, at 386-87, 419-20; see also Shin-ichi Ago, *Application of ILO Conventions to Hong Kong After 1997*, 17 DALHOUSIE L.J. 612, 619 (1994) (questioning continued application of International Labor Organization conventions applicable to Hong Kong but not ratified by China). China signed the ICESCR on October 27, 1997. See *Chinese Envoy Signs International Rights Treaty*, BBC Summary of World Broadcasts, Nov. 3, 1997, available in LEXIS, World Library, Curnws File.

81. See, e.g., Janice M. Brabyn, *Extradition and the Hong Kong Special Administrative Region*, 20 CASE W. RES. J. INT'L L. 169, 173-174 (1988) (noting that Hong Kong's pre-1997 "extradition powers and relations [were] a direct consequence of, and [were] dependent upon, its colonial status," and thus that "both powers and relations [regarding extradition would] end when that colonial status ends" if nothing were done to provide for the continued application of such agreements).

82. For discussion of the status of human rights norms in the SAR, see Richard Swede, *One Territory—Three Systems? The Hong Kong Bill of Rights*, 44 INT'L & COMP. L. Q. 358, 359 (1995) ("[T]here are grounds for supposing that the International Covenant on Civil and Political Rights . . . will continue to be applied in the territory."); GHAI, *supra* note 4, at 371-427 (noting that the Basic Law itself recognises and entrenches the ICCPR). For a discussion of the continued application of the U.S.-Hong Kong extradition agreement, see *infra* note 104.

sions regarding agreements to which China, but not Hong Kong, is a party, the language of the Basic Law makes clear that the chief concern is with maintaining Hong Kong's status in organizations or agreements to which China is not a party. Environmental agreements challenge this framework, as China is a signatory to important agreements that Britain did not apply to Hong Kong. Environmental agreements may thus provide one of the first tests of the degree to which China treats Hong Kong as an integrated part of the People's Republic. Second, the Basic Law's categorization of international agreements fails to clarify whether concern for maintaining Hong Kong's economic and cultural independence from China permits Hong Kong to maintain independent status with regard to agreements only partially linked to trade or culture. This section will first examine the Basic Law's provisions regarding the applicability of international agreements in the SAR in an attempt to assess the status of environmental agreements, and then will briefly contrast such provisions with norms of state succession.

1. The Basic Law

The Basic Law provides that the central government will be responsible for Hong Kong's foreign affairs⁸³ and defense.⁸⁴ Yet the Basic Law also allows Hong Kong to maintain independent status in certain international agreements and organizations, and to conduct a range of "external affairs"⁸⁵ under the designation "Hong Kong, China."⁸⁶ The Basic Law suggests two mechanisms for analyzing the status of international environmental agreements in the SAR. First, the Basic Law includes provisions that determine the applicability of treaties to the SAR with reference to whether such treaties were applicable in Hong Kong or China prior to Hong Kong's reversion to China. Second, the Basic Law provides for Hong Kong's continued participation in certain types of agreements. Neither mechanism clarifies the status of environmental agreements.

The Basic Law separates treaties into two categories: treaties to which China is a party, and treaties to which China is not a party. First, Article 153 of the Basic Law states that "[t]he application to the Hong Kong Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's government."⁸⁷ Such decisions, however, will be made "in accordance with the circumstances and needs of

83. Basic Law, art. 13.

84. Basic Law, art. 14.

85. Basic Law, ch. VII.

86. Basic Law, art. 151.

87. Basic Law, art. 153.

the Region, and after seeking the views of the government of the Region.”⁸⁸ The Basic Law’s discussion of treaties to which China is a party does not include any mention of the status of such agreements in British Hong Kong. Although previous application may play a role, via consideration of Hong Kong’s circumstances and consultation with the SAR government, Article 153 suggests that application of such agreements may be considered independent from pre-transition application. The Basic Law’s failure to guarantee the continued application in the SAR of agreements previously applied both in Hong Kong and China may be an affirmation of Chinese sovereignty over Hong Kong; China wanted to signal that Hong Kong’s participation in international agreements will be as a part of China.⁸⁹ Yet the Basic Law also leaves open the possibility that China may terminate the application of some treaties in Hong Kong, despite China’s own participation in such treaties, or alter Hong Kong’s status with regard to international agreements. As discussed below,⁹⁰ such possibilities are particularly relevant in the environmental sphere, where Hong Kong’s and China’s different development statuses may imply different international obligations.

Second, the Basic Law expressly provides for the possible continued application of agreements applied in Hong Kong, but not China. Article 153 states that “[i]nternational agreements to which the People’s Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Special Administrative Region.”⁹¹ The article also provides for the future application of agreements to which China is not a party, stating that “[t]he Central People’s Government shall, as necessary, authorize or assist the government of the Region to make appropriate arrangements for the application to the Region of other relevant international agreements.”⁹² The Basic Law neither specifies what types of treaties

88. *Id.*

89. *Cf.* Basic Law, art. 152 (“Representatives of the Government of the Hong Kong Special Administrative Region may, as members of delegations of the People’s Republic of China, participate in international organizations or conferences in appropriate fields limited to states and affecting the Region . . . using the name ‘Hong Kong, China.’”).

90. *See infra* text accompanying notes 148–180.

91. Basic Law, art. 153.

92. *Id.* The Basic Law’s provisions regarding continued application of treaties largely echo the provisions of the Sino-U.K. Joint Declaration. The Joint Declaration states that “[I]nternational agreements to which the People’s Republic of China is not a party but which are implemented in Hong Kong may remain implemented in the Hong Kong Special Administrative Region.” Joint Declaration, *supra* note 4, annex I, § XI. The Joint Declaration also provides that “agreements to which the People’s Republic of China is or becomes a party shall be decided by the Central People’s Government . . . after seeking the views” of the SAR government. *Id.* The Joint Declaration suggests that the PRC and the SAR may be parties to some agreements or organizations on different terms: the declaration states that Hong Kong “shall continue to retain its

may continue in force, nor specifies what body shall make such determination, but the text suggests a presumption in favor of continued application of agreements that China has not signed.

Environmental agreements appear to fall into the first category of agreements: China is a signatory to most environmental agreements Britain applied to Hong Kong,⁹³ and is party to the Climate Change and Biodiversity Conventions, which Britain did not apply to Hong Kong.⁹⁴ Thus, under Article 153, the application of international environmental agreements post-reversion "shall be decided by the Central People's government."⁹⁵ When or how such decisions will be made is unresolved; a literal reading of the Basic Law suggests that Hong Kong will not have international obligations under any agreements to which China is a party until China expressly applies such treaties to Hong Kong. Whether or when the central government will do so for all environmental agreements is unclear.⁹⁶ Yet even if environmental agreements fall into the first category of treaties, the second category is also relevant for environmental treaties. Provisions for an international identity for Hong Kong separate from that of China could establish a precedent for Hong Kong to have independent status within international agreements that are or become applicable to both Hong Kong and China.⁹⁷

status in an appropriate capacity" in organizations in which both the PRC and Hong Kong participated prior to July 1, 1997. *Id.*

93. The one major exception is the Copenhagen Revisions to the Montreal Protocol, which Britain applied to Hong Kong but which China has not signed. *See supra* note 63.

94. *See supra* note 76.

95. *But see infra* text accompanying notes 128–147 (arguing that the Basic Law overlooks the need for third party consent to Hong Kong's omission from environmental agreements to which China is a signatory).

96. Chinese observers and officials have said they expect the central government to handle the status of environmental agreements on a case by case basis. Author's interviews with academics and environmental officials in Boston, Nov. 1996. China has taken action regarding the four ozone agreements: in June 1997, China informed the United Nations that the Vienna Convention, Montreal Protocol, and London and Copenhagen Revisions to the Montreal Protocol would continue to be applied in Hong Kong after July 1, 1997. *See* Xinhua English Newswire, June 6, 1997, available in 1997 WL 11180894; *Int'l Agreements Implemented in HK May Continue*, Xinhua English Newswire, June 6, 1997, available in 1997 WL 11180957. In a possible sign that Hong Kong will not have independent status in environmental agreements applied in both Hong Kong and China, China announced in August 1997 that the Mai Po Nature Reserve had become China's seventh Ramsar site, or wetland of international importance. *See* Fiona Holland, *Mainland Urged to Boost Status of Key Wetland Site*, S. CHINA MORNING POST, Aug. 23, 1997, at 6. China's official report of the announcement made no mention of the fact that Mai Po had already been designated a Ramsar site by Britain. *See* *China's Seventh Wetland Under Ramsar Convention*, Xinhua News Agency, Aug. 22, 1997, available in LEXIS, World Library, Curnws File.

97. This Article does not examine the possibility that, independent of the Basic Law, Hong Kong may have acquired an independent "international legal personality." MUSHKAT, *supra* note 76, at 1–41. Professor Mushkat argues that "Hong Kong possesses a degree of latitude to engage in international action autonomously . . . matched by no other non-sovereign government in the contemporary system." *Id.* at 4. Professor Mushkat further states that China and Britain "have conferred on the HKSAR express functions and powers that imply possession of international personality, including the maintenance and development of relations with states, regions, and

Article 153 of the Basic Law does not distinguish the various international agreements Britain applied to Hong Kong, or that China signed, but other provisions of the Basic Law suggest the types of agreements in which Hong Kong has autonomy.⁹⁸ Article 151 states that Hong Kong may “maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields.”⁹⁹ Other provisions of the Basic Law reveal similar concern with maintaining Hong Kong’s economic and trade relations. Thus, the Basic Law provides for Hong Kong to remain a “separate customs territory” and to continue to participate in “relevant international organizations and international trade agreements . . . such as the General Agreement on Tariffs and Trade and arrangements regarding international trade in textiles.”¹⁰⁰ The Basic Law also includes specific articles allowing for Hong Kong to continue as a separate entity in international shipping¹⁰¹ and aviation.¹⁰² Furthermore, the Basic Law permits Hong Kong autonomy in some non-trade international agreements. The Basic Law explicitly provides for the continued application of the ICCPR and the ICESCR,¹⁰³ and allows Hong Kong to “make appropriate arrangements with foreign states for

international organizations as well as the conclusion and implementation of international and regional agreements.” *Id.* at 11.

98. The Basic Law also distinguishes “foreign affairs,” Basic Law, art. 13, from “external affairs,” Basic Law, ch. VII, suggesting that China will control all of Hong Kong’s foreign affairs, but that Hong Kong has autonomy in external affairs. Such a distinction may be circular, and thus unsustainable: Hong Kong’s external affairs are those affairs in which it has autonomy, while its foreign affairs are those over which Beijing has control. *See* GHAI, *supra* note 4, at 433–34.

99. Basic Law, art. 13.

100. Basic Law, art. 116. For a list of “international organizations in which Hong Kong’s continued participation has been agreed in the JLG,” see MUSHKAT, *supra* note 76, at 191–92; *see also Sino-British Joint Declaration (Summary)* (last modified Oct. 31, 1995) <<http://info.gov.hk/info/jd-sum.htm#rights>> (noting that prior to Hong Kong’s return to China, the Joint Liaison Group “reached agreement on Hong Kong’s continued participation in 26 international organizations”).

101. *See* Basic Law, arts. 124–27.

102. *See* Basic Law, arts. 128–35. Article 133 permits Hong Kong, “[a]cting under specific authorizations from the Central People’s Government,” to “renew or amend” air service agreements previously in force and to “negotiate and conclude” new air agreements. *Id.*, art. 133.

103. Basic Law, art. 39. The precise language of the article, however, leaves some doubt as to the extent of application of the ICCPR and ICESCR. The Basic Law specifies that the Conventions “as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.” *Id.* Hong Kong did not enact its Bill of Rights Ordinance until 1991, a year after the NPC adopted the Basic Law. *See generally* THE HONG KONG BILL OF RIGHTS: A COMPARATIVE APPROACH (Johannes Chan & Yash Ghai eds., 1993). Despite the fact that China is not a signatory to the ICCPR, the Chinese government has indicated that it, and not the SAR government, will be responsible for meeting the reporting requirements of the treaty. *See* Maureen Pao, *Reports on Rights to be filed in UN*, H.K. STANDARD, Nov. 6, 1997 available in LEXIS, World Library, Curnws File.

reciprocal juridical assistance," subject to the authorization of the central government.¹⁰⁴

Such specific provisions fail to establish whether Hong Kong will be permitted to act autonomously in international environmental agreements. The Basic Law's omission of specific mention of the environment from the areas in which Hong Kong will have autonomy may suggest that environmental agreements are not within Hong Kong's sphere of autonomy. However, environmental agreements may also be analogous to the types of agreements in relation to which Hong Kong will have autonomy: environmental norms are directly linked to trade and economic relations.¹⁰⁵ Moreover, environmental agreements, like economic and trade agreements, may require significant adjustments in domestic law.¹⁰⁶

There are also strong arguments against such analogies. One reason Hong Kong is able to continue its membership in the World Trade Organization is that WTO membership is open to "[a]ny State or separate *customs territory* possessing full autonomy in the conduct of its external commercial relations," not only to nations.¹⁰⁷ One commentator observes that Hong Kong's continued participation in the WTO and the Asian-Pacific Economic Forum (APEC) is possible *because* such

For a discussion of Hong Kong's Bill of Rights Ordinance, see THE HONG KONG BILL OF RIGHTS: A COMPARATIVE APPROACH, *supra*, *passim*; Davis, *supra* note 27, at 319–21; GHAI, *supra* note 4, at 389–411. On January 20, 1997 Hong Kong's provisional legislature recommended the repeal of articles in the Bill of Rights Ordinance requiring all other Hong Kong legislation be in line with the ordinance. See *How the Laws are Affected*, S. CHINA MORNING POST, Jan. 21, 1997, at 6. The NPC Standing Committee subsequently announced that the relevant articles of the ordinance would not have effect after July 1, 1997. See Decision of the Standing Committee of the National People's Congress on Treatment of the Laws Previously in Force in Hong Kong in Accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Annex 2, art. 7, Feb. 23, 1997. For an explanation of the Chinese view that Hong Kong's Bill of Rights Ordinance violated the Sino-U.K. Joint Declaration and the Basic Law, see Wu, *supra* note 28; see also GHAI, *supra* note 4, at 351–52, 418–23 (detailing Chinese objections to the ordinance).

104. Basic Law, art. 96. For a discussion of extradition in pre- and post-transition Hong Kong, see Brabyn, *supra* note 81, at 169. The status of Hong Kong's extradition agreements post-reversion is unclear. One American court refused to extradite an individual to Hong Kong in the run-up to the reversion, stating that Hong Kong would "cease to have any existence beyond that as a part of China," and thus that Hong Kong would not be "able to fulfill its obligations as a requesting sovereign under" the U.S.-Hong Kong extradition treaty. *Lui v. United States*, 957 F. Supp. 1280, 1286 (D. Mass. 1997). The court stated that "Hong Kong reverts to China on July 1, 1997," but argued that "[t]he terms of the [Extradition] Treaty do not." *Id.* at 1288. The decision was subsequently reversed. See *United States v. Lui*, 110 F.3d 103 (1st Cir. 1997). The U.S., China, and Hong Kong have agreed on the terms of an extradition treaty between the U.S. and the SAR; as of August 1997, ratification of the treaty was pending in the United States Senate. See Simon Beck, *Senators Add Protection to Extradition Treaty*, S. CHINA MORNING POST, Aug. 2, 1997, at 4.

105. See *infra* text accompanying notes 180–193.

106. See *infra* note 115.

107. Agreement Establishing the World Trade Organization, art. XII, Apr. 15, 1994, 33 I.L.M. 1144, 1150 (emphasis added).

organizations are not limited to states.¹⁰⁸ Environmental agreements, in contrast, are agreements among states;¹⁰⁹ to the degree that Hong Kong's continued participation in the WTO depends on the nature of the WTO—an organization of customs territories—Hong Kong's autonomous participation in international environmental agreements and organizations seems implausible. Yet there are also counter arguments to this analysis: the ICCPR and ICESCR are limited to states,¹¹⁰ and require that the treaty be applied in all of a signatory state's territory.¹¹¹ Despite this language, the Basic Law provides for the continued application of both treaties. Moreover, Article 151 of the Basic Law expressly permits Hong Kong to enter into agreements with foreign states,¹¹² despite Hong Kong's own non-state status.

The Basic Law thus yields little insight into the status of environmental agreements in the SAR. The omission of environmental agreements from the Basic Law suggests both that the Basic Law's drafters did not foresee the rapid development in environmental agreements that was beginning at the time of drafting,¹¹³ and that the drafters were not concerned with environmental protection, whether via domestic or international policymaking.¹¹⁴ Environmental agreements are

108. See W. K. Chan, *Thinking Globally—Hong Kong's Participation in International Environmental Forums*, 5 *ASIAN J. ENVTL. MGMT.* 85, 87 (1997). Professor Chan argues that “[t]he clear principle . . . is that the future Hong Kong government is free to participate in international forums, even to the extent of signing international treaties, as long as there are no sovereignty implications and Hong Kong participates as an ‘economy’ or a ‘territory’; otherwise, Hong Kong can only participate through its sovereign state.” *Id.*

109. See *infra* text accompanying notes 135–139.

110. See ICCPR, *supra* note 79, art. 48, para. 1, (“The Present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.”); ICESCR, *supra* note 80 art. 26, para. 1 (same). Although the phrase “member of any of its specialized agencies” could be construed to include Hong Kong, which is a member of some such agencies, “[t]he phrase was not intended to allow ratification or accession by a non-State entity.” Chan, *supra* note 80, at 941–42.

111. See ICCPR, *supra* note 79, art. 50, (“The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.”); ICESCR, *supra* note 80, art. 28 (same); *cf.* Chan, *supra* note 80, at 940 (arguing that “[a]rticle 50 should not be applicable in the case of transfer of territory from one sovereign State to another sovereign State which is not already a party to the ICCPR”).

112. See Basic Law, art. 151.

113. The Basic Law's failure explicitly to consider international environmental agreements was not surprising; both Hong Kong and China were just beginning to take steps toward tightening their environmental laws in the late 1980s, and the Montreal Protocol, one of the first international environmental agreements requiring significant commitments by Hong Kong, did not enter into force until 1989.

114. The Basic Law Drafting Committee included 36 members from China and 23 members from Hong Kong, and “[t]he Hong Kong members . . . were overwhelmingly drawn from professional and business sectors of the economy.” Chan, *supra* note 18; see also MARK ROBERTI, *THE FALL OF HONG KONG: CHINA'S TRIUMPH AND BRITAIN'S BETRAYAL* xiii (1984) (noting that Hong Kong's representatives on the committee were “conservative businesspeople”).

also distinct from the agreements and fields the Basic Law lists in that environmental agreements require greater sacrifice of state sovereignty.¹¹⁵ China's willingness to allow Hong Kong autonomy in trade, culture, and even human rights may have stemmed from the belief that Beijing could delegate responsibility for Hong Kong's external affairs in these areas without encroaching on Chinese sovereignty; this is less true in the environmental field, where Hong Kong's compliance with international norms may not be separable from China's own compliance.

2. State Succession

Although the Basic Law and the Sino-British Joint Declaration provide for Hong Kong's continued status as an international actor, the Joint Declaration is binding only between the United Kingdom and China, and the Basic Law only within China. Commentators have suggested viewing Hong Kong's reversion to China in the context of international norms of state succession,¹¹⁶ particularly in the context of the Vienna Convention on Succession of States.¹¹⁷ Such an exercise illuminates additional problems with the Basic Law's failure to provide guidance as to the status of international environmental agreements.

115. Although trade and human rights agreements may require adjustments in domestic law, and thus may be seen as significant infringements on state sovereignty, environmental agreements require more complex administrative mechanisms. See Chayes & Kim, *supra* note 60, at 3. The degree of domestic adjustment required may not be of particular concern to China in the case of Hong Kong, since the Basic Law grants Hong Kong autonomy in local environmental policy and national environmental laws will not apply in the SAR, but to the degree China sees environmental agreements as sovereignty-related, China may be unwilling to allow Hong Kong autonomy in environmental diplomacy.

116. See, e.g., Roda Mushkat, *The Transition from British to Chinese Rule in Hong Kong: A Discussion of Salient International Legal Issues*, 14 DEN. J. INT'L L. & POL'Y 171, 194 (1986).

117. See Vienna Convention on Succession of States in Respect of Treaties, Aug. 22, 1978, 1978 U.N.J.Y.B. 106, 17 I.L.M. 1488 [hereinafter Vienna Convention on Succession of States]. Neither Britain nor China is a signatory to the Convention. See MULTILATERAL TREATIES, *supra* note 61, at 848. Nevertheless norms of state succession are likely to be used by third-party states to evaluate the status of treaties in the SAR, and provide a useful guidepost for evaluating the Basic Law's provisions. Moreover, the difficulties facing application of state succession norms to environmental agreements in the Hong Kong SAR demonstrate that difficulties ascertaining the status of international environmental agreements under the Basic Law are not unique to that document.

The Vienna Convention's norms have been challenged in the context of human rights agreements. Speaking with reference to Hong Kong, the chairman of the ICCPR Human Rights Committee stated that "[o]nce the people living in a territory find themselves under the protection of the International Covenant on Civil and Political Rights, such protection cannot be denied to them by virtue of the mere dismemberment of that territory or its coming within the jurisdiction of another State or of more than one State." *Statement by the Chairperson on Behalf of the Human Rights Committee Relating to the Consideration of the Part of the Fourth Periodic Report of the United Kingdom Relating to Hong Kong*, CCPR/C/79/Add.57 (3 Nov. 1995), reproduced in 3(2) I.H.R.R. 410 (1995), quoted in Chan, *supra* note 80, at 934. Professor Chan notes that, in contrast to the Human Rights Committee, "the practice of other human rights treaties bodies is ambivalent and inconclusive." *Id.* at 937.

The convention provides that

[w]hen part of the territory of a State, or when any territory for the international relations of which a State is responsible . . . becomes part of the territory of another state: (a) treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates from the date of the succession of States and (b) treaties of the successor state are in force in respect of the territory to which the succession of States relates from the date of the succession of states, unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.¹¹⁸

Three general problems confront attempts to apply the convention to Hong Kong. First, the convention suggests that Hong Kong's international legal obligations should become one with those of China, a view that directly clashes with the clear intent of the Joint Declaration and the Basic Law that Hong Kong maintain its independent status with regard to certain treaties and international organizations to which China is not a signatory or member.¹¹⁹ This conflict highlights a deficiency in the Joint Declaration and the Basic Law. Hong Kong and Britain cannot determine whether Hong Kong maintains independent status with regard to international agreements; Hong Kong's continued participation is contingent on the consent of third party participants in international agreements and organizations.¹²⁰

Second, China is likely to object to any classification of Hong Kong's reversion as state succession. China believes that it has merely resumed control over Hong Kong;¹²¹ China refers to Hong Kong's return to

118. Vienna Convention on Succession of States, *supra* note 117, Annex I, pt. 2, art. 15, at 1496; *see also* Mushkat, *supra* note 78, at 146-47 (discussing application of the Convention to Hong Kong); Note, *Taking Reichs Seriously: German Unification and the Law of State Succession*, 104 HARV. L. REV. 588, 591-92 (1990) (discussing the "moving boundaries rule" of state succession (internal quotation marks omitted)).

119. *Cf.* Shawn B. Jensen, *International Agreements Between the United States and Hong Kong Under the United States—Hong Kong Policy Act*, 7 TEMP. INT'L & COMP. L.J. 167, 179 (1993) (arguing that "the Joint Declaration modifies a recognized rule of public international law on state succession to treaties").

120. *See* MUSHKAT, *supra* note 76, at 28-29; Jensen, *supra* note 119, at 183; Mushkat, *supra* note 78, at 149. The Joint Liaison Group's activities suggest recognition of the need to obtain third party consent. One of the principal tasks of the Joint Liaison Group has been to obtain third party consent to the continued application of agreements to Hong Kong in cases in which China is not a party to such agreements. *See Hired Gun*, *supra* note 75, at 18; *see also infra* text accompanying notes 127-146 (discussing need for third party consent).

121. *See* Mushkat, *supra* note 78, at 149; *cf.* Liu Hanpeng, *Lingtu Zbuquan Biangeng Huo Huiifu Xingshi Hou Tiaoyue Jibeng Wenti [Questions Regarding Succession to Treaties after the Change or Restoration of Territorial Sovereignty]*, in ZHONGGUO GUOJIFA NIANKAN 1987 [CHINESE Y.B. INT'L

China as "the resumption of the exercise of sovereignty over Hong Kong."¹²² Yet despite this objection, China's actions in signing the Joint Declaration and in setting forth provisions in the Basic Law regarding treaty succession suggest implicit recognition that Hong Kong's transition is a case of state succession. Moreover, the Vienna Convention on Succession of States defines a "succession of states" as "the replacement of one State by another in the responsibility for the international relations of the territory."¹²³ Regardless of whether Britain transferred sovereignty over Hong Kong to China or whether China merely resumed the exercise of sovereignty it had always possessed, responsibility for Hong Kong's international relations has shifted from the United Kingdom to China, and thus the transition qualifies as state succession for the purposes of the Convention.¹²⁴

Third, China may object to the application of the Convention on State Succession on the grounds that neither China nor Britain is a signatory to the convention. Although the convention itself embodies norms established by numerous cases of state succession in the past half century, China has repeatedly made clear that it will not be bound by international norms to which it has not consented. Moreover, given the shared concern of China and many foreign countries of maintaining Hong Kong's autonomy in economic and trade relations, it is unlikely that foreign states will object to preservation of Hong Kong's independent status in international agreements, even if such status violates state succession norms. International norms regarding state succession could be used, however, by states arguing that Hong Kong should be bound by all international agreements to which China is a party.¹²⁵

Even if norms of state succession are applied, they are likely to prove problematic. International environmental agreements provide the area in which international treaty succession norms might be most important to Hong Kong, as they represent an area in which Hong Kong may assume new obligations as part of China. But, as with the case of the Basic Law, simply deciding which treaties will be applied in Hong Kong is insufficient: application of environmental agreements to Hong Kong may also require determination of Hong Kong's status in such

L. 1987] 54, 56 (Zhongguo Guojifa Xuehui [Chinese Ass'n of Int'l Law] ed., 1987) (arguing that there is a distinction between restoration of sovereignty over a territory, where sovereignty has never been lost but exercise of sovereignty has been interrupted, and recovery of sovereignty, where sovereignty is lost and then regained).

122. Joint Declaration, *supra* note 4, annex I, § 1; Basic Law, preamble.

123. Vienna Convention on Succession of States, *supra* note 117, art. 2(b), 17 I.L.M. at 1490.

124. See Mushkat, *supra* note 78, at 146-47.

125. Cf. *infra* text accompanying notes 127-146 (discussing the possibility that Hong Kong acceded to new international obligations on July 1, 1997).

agreements, and significant revision of Hong Kong's domestic legislation.

*B. The Climate Change and Biodiversity Conventions:
New Obligations and the Need for Third-Party Consent*

The Basic Law fails not only to provide a framework for determining the status of international agreements in Hong Kong, but also to acknowledge that certain agreements may be applicable to Hong Kong regardless of the provisions of the Basic Law. The law's statement that "[t]he application to the Hong Kong Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's government"¹²⁶ may face an initial challenge in the application to Hong Kong of the Climate Change and Biodiversity Conventions. Examination of the status of the treaties in the SAR reveals the Basic Law's failure to acknowledge the need for third-party consent in determining Hong Kong's status in international organizations and agreements.¹²⁷ Although Britain and China in practice acknowledged the need for the Sino-British Joint Liaison Group to obtain third-party consent to ensure Hong Kong's continued participation in international organizations and agreements post-reversion, examination of the Climate Change and Biodiversity Conventions suggests that in the absence of third-party consent to Hong Kong's *continued non-participation* the treaties became applicable to Hong Kong on July 1, 1997. Inquiry into the status of the Climate Change and Biodiversity Conventions in the Hong Kong SAR also reveals the Basic Law's disregard of the possibility that Hong Kong would assume new international obligations when it became part of the PRC.

Following the 1992 Rio Earth Summit, which resulted in China and the United Kingdom ratifying the Climate Change and Biodiversity Conventions,¹²⁸ the Hong Kong government decided not to participate in either convention. At the time, Hong Kong claimed that its "unique position after 1997" prevented application of the treaties in the territory.¹²⁹ The Hong Kong government cited concerns over Hong Kong's potential financial obligations and uncertainty over Hong Kong's status as equivalent to a developed or developing country under the trea-

126. Basic Law, art. 153.

127. The statement in the Basic Law that China alone will determine the status of international agreements in the SAR parallels China's view of the Basic Law itself. One commentator has noted that despite the Sino-British Joint Declaration, "Beijing . . . insisted that the drafting of the Basic Law was entirely a domestic Chinese matter with input from Hong Kong residents." Chan, *supra* note 18, at 22.

128. See MULTILATERAL TREATIES, *supra* note 61, at 904-05, 908-09.

129. *Doubts Over Green Pacts*, S. CHINA MORNING POST, Dec. 3, 1992, at 6.

ties.¹³⁰ Despite its refusal to request that the United Kingdom apply the treaties to Hong Kong, the territory's government pledged support for the conventions' principles,¹³¹ and since 1992 the Hong Kong government has taken some steps toward compliance with the conventions.¹³² Nevertheless, Hong Kong remained outside the treaties and

130. In discussions concerning a Hong Kong Legislative Council motion that Hong Kong formally adopt the Climate Change and Biodiversity Conventions, Hong Kong's Secretary for Planning, Environment, and Lands stated that although it might be possible for the United Kingdom "to ratify the Conventions on behalf of Hong Kong, as in the case of the Montreal [Protocol] . . . such an arrangement for Hong Kong . . . would need to take into account the status under which Hong Kong might be designated." Hong Kong Legislative Council, Dec. 2, 1992. The statement suggests the Hong Kong government was aware of the potential costs that it might be obliged to bear if joining as a territory of the United Kingdom resulted in developed country status. *See also* WHITE PAPER THIRD REVIEW, *supra* note 72, at 31 (stating that "[s]ome legal and practical problems prevent Hong Kong from formally adopting the Convention on Biological Diversity, but we are committed to meeting the environmental objectives of the Convention").

Hong Kong's claim that its "unique position after 1997" made joining the conventions difficult is undermined by Hong Kong's compliance with developed country requirements in the Montreal Protocol and the London and Copenhagen Amendments to the protocol. As with the Climate Change Convention, under the Montreal Protocol, China, as a developing country, is not required to take concrete steps to reduce emissions in the short-term. *See infra* text accompanying notes 148–177 (discussing differing status for developed and developing countries under the Climate Change Convention and the ozone agreements). Hong Kong's decision to stay out of the Climate Change and Biodiversity Conventions was due in part to a changed political atmosphere: concerns over offending China were not nearly as strong in the late 1980s, when the United Kingdom signed the Vienna Convention and Montreal Protocol, as they were in 1992. Author's interviews with academics in Hong Kong, March 1997. By 1992, Hong Kong was careful to avoid taking steps that suggested it had state status. *Id.* Additionally, Hong Kong was able to request that Britain apply the Copenhagen and London Amendments to the Montreal Protocol—which also came into force in the early 1990s—because the target dates for phasing out CFC imports were prior to Hong Kong's return to China. *Id.* Although the fact that the United Kingdom's adoption of the Climate Change and Biodiversity Conventions came three years after the United Kingdom signed the Montreal Protocol—and therefore Hong Kong was three years closer to returning to China—may have factored into Hong Kong's reluctance to join the treaties, Hong Kong's decision, particularly regarding the Climate Change Convention, was also likely due to the potential cost of compliance. *Cf.* MUSHKAT, *supra* note 76, at 101 (stating that "none of the arguments [against Hong Kong's joining the Rio treaties] seems convincing, however, in light of the territory's role as an international legal entity capable of extensive and autonomous participation in international agreements").

131. *Doubts Over Green Pacts*, *supra* note 129. Although the Hong Kong government stated that it intended to take steps to reduce greenhouse gases emissions and protect the environment, the government did not state whether it intended to meet developing or developed country targets. *See id.*

132. In 1993, Hong Kong conducted an inventory and drafted projections of greenhouse gases, as mandated by the Climate Change Convention. *See* Kathy Griffin, *Concern at Greenhouse Gas Control*, S. CHINA MORNING POST, Jan. 9, 1993, at 4. The EPD reported Hong Kong's 1990 production of greenhouse gases to be 34.9 million tons, and predicted that by 2000 the figure would drop to approximately 32.5 million tons. *See id.* However, "no legally enforceable measures have been introduced designed to reduce the emissions of carbon dioxide and other greenhouse gases," and the Hong Kong government's actions regarding both the Climate Change Convention and the Biodiversity Convention "fall[] considerably short of effective implementation of the Rio treaties." MUSHKAT, *supra* note 76, at 101.

Regardless of whether Hong Kong participates in the Climate Change Convention, global warming may present a significant threat to Hong Kong: a 1993 report found that 35% of the Pearl River Delta could be under water within fifty years. *See* Kathy Griffin, *Threat to HK Over Rising Seas*, S. CHINA MORNING POST, July 2, 1993, at 6.

thus, prior to July 1, 1997, had no formal obligation to comply with the agreements.¹³³

The Basic Law conflicts with statements in the Climate Change and Biodiversity Conventions that suggest the treaties should apply to entire nations. As both conventions are treaties "to which the People's Republic of China is . . . a party," under the Basic Law's formulation the Chinese government possesses the power to determine application of the agreements to Hong Kong.¹³⁴ The treaties, in contrast, suggest that China does not have such a choice.¹³⁵ The two agreements expressly provide for compliance by nations, and include no language that suggests that a portion of a nation may be excluded from a signatory nation's obligations under the agreements. The Climate Change Convention's provisions regarding developed country emissions require "national policies . . . on the mitigation of climate change."¹³⁶ Such language suggests that had Hong Kong become part of a nation currently obligated to reduce greenhouse gas emissions, such a requirement would apply to Hong Kong.¹³⁷ Similar language regarding the commitments of all parties to the treaty suggests that, in the absence of an explicit waiver from other parties to the Climate Change Convention, Hong Kong must be included in reporting requirements applicable to China.¹³⁸ The Biodiversity Convention likewise suggests

133. Hong Kong—like most countries—appears reluctant to take steps to reduce greenhouse gas emissions. For example, the Hong Kong Environmental Department's 1996 annual report, while discussing in depth Hong Kong's efforts to reduce ozone-depleting chemicals, makes no mention of the Climate Change Convention. See Environmental Protection Department, ENVIRONMENT HONG KONG 1996, *supra* note 35, *passim* (1996). For discussion of Hong Kong's compliance with the Montreal Protocol, see *infra* text accompanying notes 156–159. One commentator has stated that Hong Kong was content to be a free-rider in the climate change negotiations. See Bloch, *supra* note 56, at 612–13. Ironically, Hong Kong may actually meet developed country targets under the Climate Change Convention. See *infra* note 171.

134. See *supra* text accompanying notes 86–89.

135. Norms of treaty succession dictate a similar conclusion. See *supra* text accompanying notes 116–124.

136. Climate Change Convention, *supra* note 66, art. 4, 2(a).

137. Annex I to the Climate Change Convention lists countries required to take steps to reduce greenhouse gas emissions; they are primarily the developed countries of Western Europe, North America, and Oceania, as well as Turkey, Japan and the transitional economies of Eastern Europe. See Climate Change Convention, *supra* note 66, Annex I. At present, developing countries and newly-industrialized countries are not obligated to reduce emissions. Hong Kong's paradox may have been that were the Climate Change Convention to be applied to the territory as part of Britain, Hong Kong might have been considered an Annex I country; as an individual participant or as part of China, Hong Kong is not obligated to reduce greenhouse gas emissions.

Hong Kong environmentalists point out that Hong Kong's CO₂ emissions are already at twice the world average, and per capital electricity consumption exceeds that of some countries, including Poland and Spain, that are obligated to reduce greenhouse gas emissions. See Friends of the Earth, *Power without Policy: Friends of the Earth's Position on Energy Policy*, Oct. 1996, at 11, 14 (on file with author).

138. The Climate Change Convention requires all parties to develop "national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol," Climate Change Convention, *supra* note 66, art. 4, 1(a), and to "[f]ormulate, implement, publish and regularly update national and, where appropriate, regional

that, absent agreement of parties to the convention, China is bound to apply the convention in Hong Kong. The convention stipulates that "the provisions of this Convention apply, in relation to each Contracting Party . . . in areas within the limits of its national jurisdiction."¹³⁹

Attempts by China or Hong Kong to argue that Hong Kong should be excluded from the conventions will undermine the Basic Law's statement that Hong Kong "is an inalienable part of the People's Republic of China."¹⁴⁰ China may object to requiring application of the treaties to Hong Kong by noting that Britain was not required to apply all of its treaty obligations to Hong Kong. Yet the United Kingdom never claimed that Hong Kong was actually a part of the United Kingdom; China, in contrast, maintains that Hong Kong has always been a part of China.¹⁴¹ In practice, however, a dispute over application of the Climate Change or Biodiversity Conventions is unlikely to arise: given that the conventions require few concrete actions by developing countries, there is little reason to expect that third parties will take steps to require Hong Kong to be included in the Climate Change Convention, or that China will object to including Hong Kong.¹⁴² Nevertheless, Hong Kong's status in the agreements has important precedential value. Autonomous status under the conventions for Hong Kong would manifest a level of autonomy for Hong Kong above anything the Basic Law contemplates: unlike membership in the WTO and other multilateral agreements, in which Hong Kong can participate as a customs area,¹⁴³ the Climate Change and Biodiversity Conventions are agreements among states, and no other non-state has autonomous status under the conventions.¹⁴⁴

The conclusion that China lacks the power unilaterally to decide whether environmental treaties will apply differently to Hong Kong compared to the rest of China suggests the Basic Law's ambiguity regarding international environmental agreements will be resolved against

programmes containing measures to mitigate climate change," Climate Change Convention, *supra* note 66, art 4, 1(b). As discussed below, *see infra* text accompanying notes 230–232, an obligation on China to reduce emissions would not necessarily require Hong Kong to reduce emissions.

139. Biodiversity Convention, *supra* note 65, art. 4. This provision applies with regard to "components of biological diversity." *Id.* For "processes and activities," the convention's provisions apply whenever they are "carried out under" a party's "jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction." *Id.* The convention also requires the development of "national strategies," *id.* art. 6(b), which should, in China's case, include Hong Kong.

140. Basic Law, art. 1.

141. *See, e.g.*, Basic Law, preamble; MINERS, *supra* note 69, at 3–6.

142. Additionally, other signatories to the Conventions are unlikely to demand that China treat Hong Kong as an integrated part of China, as such a demand could be seen as undermining Hong Kong's autonomy.

143. *See supra* text accompanying note 107.

144. *See* MULTILATERAL TREATIES, *supra* note 61, at 904–05, 908–09.

Hong Kong maintaining autonomy in international environmental agreements and organizations.¹⁴⁵ This conclusion is troubling, however, for compliance with environmental treaties will often require substantial revision of domestic legislation. If the Basic Law grants Beijing the power to commit Hong Kong to meeting specific environmental targets, it may also grant the central government the power to rewrite Hong Kong's environmental laws,¹⁴⁶ and in so doing to involve itself importantly in economic affairs in Hong Kong. Moreover, the fact that Hong Kong's reversion to China will bring with it at least some new obligations under international environmental law suggests that it is misguided to see Hong Kong's reversion to China only as a threat to Hong Kong's environment, and lends support to the view that the Basic Law overemphasizes Hong Kong's separation from China.

C. Hong Kong's Development Status under International Agreements

The Biodiversity and Climate Change Conventions are not the only environmental treaties whose status is unclear in the SAR. The Montreal Protocol, Basel Convention, and other agreements China has signed and that Britain applied to Hong Kong similarly challenge the Basic Law's treaty application provisions. Although the Basic Law provides for the continued application of such treaties in Hong Kong, the Basic Law does not—and perhaps cannot—specify whether Hong Kong should participate as a developed or developing country.¹⁴⁷ Difficulties in determining Hong Kong's status stem not only from the Basic Law's failure to consider Hong Kong's status in treaties that continue in force post-reversion, but also the international agreements' inconsistent definitions of development. Hong Kong's development status in environmental agreements is important not just in ascertaining Hong Kong's obligations under international agreements, but also in determining whether Hong Kong is treated separately from China in such agreements.

Environmental agreements are inconsistent in their definitions of development status. Although environmental treaties are consistent in their requirement that developed countries take the lead in addressing

145. Unless China and other signatory states expressly provide for Hong Kong to have such autonomous status.

146. The Basic Law's failure to consider the need for executing legislation is discussed at length below. *See infra* text accompanying notes 209–231. Application of national environmental laws would not necessarily weaken environmental standards in Hong Kong. *See infra* note 240.

147. The Basic Law cannot specify whether Hong Kong counts as a developed or developing country because such determination is made either by the treaties themselves or by agreement of the parties to the treaties. But had the Basic Law expressly provided for Hong Kong to have independent status in environmental agreements, it is conceivable that Hong Kong would then have had a status different from China's in such agreements.

environmental issues,¹⁴⁸ the various treaties use different standards to define developed and developing countries. The Montreal Protocol provides a specific measurement for determining development status: the protocol stipulates that any country whose per capita consumption of substances the protocol controls is less than 0.3 kilograms is allowed a ten-year grace period in phasing-out ozone-depleting substances, and is entitled to technical and financial assistance from countries whose consumption exceeds 0.3 kilograms.¹⁴⁹ In contrast, the Climate Change Convention provides a specific list of countries required to meet developed country targets for reducing greenhouse gas emissions,¹⁵⁰ and a separate, smaller list of countries required to provide financial assistance to other nations.¹⁵¹ The Climate Change Convention does not, however, provide a definition of "developing" nations entitled to receive such funds. Similar vagueness characterizes the Biodiversity Convention which, while requiring developed countries to "provide new and additional financial resources to enable developing country Parties to meet the agreed full incremental costs to them of implementing measures which fulfill the obligations of this Convention,"¹⁵² does not define "developed" or "developing." The Basel Convention takes yet another approach. Although the Basel Convention itself does not distinguish between developed and developing parties, the third meeting of the Conference of Parties to the Basel Convention decided to ban shipments of waste for disposal from OECD countries to non-OECD members.¹⁵³

148. See, e.g., Climate Change Convention, *supra* note 66, preamble ("Recognizing . . . the need for developed countries to take immediate action . . . as a first step towards comprehensive response strategies . . . with due consideration of their relative contributions to the enhancement of the greenhouse effect."); Basel Convention, *supra* note 68, preamble ("Taking into account . . . the limited capabilities of the developing countries to manage hazardous wastes and other wastes . . ."); Montreal Protocol, *supra* note 62, preamble ("Acknowledging that special provision is required to meet the needs of developing countries for [substances that deplete the ozone layer] . . .").

149. "Any Party that is a developing country and whose annual calculated level of consumption of the controlled substances is less than 0.3 kilograms per capita on the date of the entry into force of the Protocol for it, or any time thereafter within ten years of the date of entry into force of the Protocol shall, in order to meet its basic domestic needs, be entitled to delay its compliance with the control measures . . . by ten years . . ." Montreal Protocol, *supra* note 62, art. 5, para. 1.

150. See Climate Change Convention, *supra* note 66, Annex I; see also *supra* note 137 (listing Annex I countries). Article 4 of the Convention states that Annex I countries shall "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting [their] anthropogenic emissions of greenhouse gases and protecting and enhancing [their] greenhouse gas sinks and reservoirs." Climate Change Convention, *supra* note 66, art. 4, para. 2(a).

151. See Climate Change Convention, *supra* note 66, Annex II. Annex II countries include Western European nations, the U.S., Japan, Australia, New Zealand, and Turkey. See *id.*

152. Biodiversity Convention, *supra* note 65, art. 20, para. 2.

153. See Decision III/1, Third Meeting of the Conference of Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Waste. The decision serves as an

The different definitions of developing country result in inconsistent classifications for Hong Kong and potential conflicts between Hong Kong's and China's statuses in international environmental agreements. Hong Kong has attempted to meet developed country requirements for the phase-out of ozone-depleting substances under the Montreal Protocol and subsequent ozone agreements.¹⁵⁴ Hong Kong banned local production of ozone-depleting substances in 1989, banned importation of "halons for local consumption" from January 1, 1994, and banned importation of chlorofluorocarbons (CFCs) and certain other ozone-depleting substances from January 1, 1996.¹⁵⁵ The Hong Kong Government has stated that "[a]ll measures under the Montreal Protocol have been fully met;"¹⁵⁶ imports of CFC for local consumption were down by eighty-five percent by 1996.¹⁵⁷ Hong Kong has also implemented a quota and licensing system for hydrochlorofluorocarbons (HCFCs),¹⁵⁸ which will be phased out by 2030 in accordance with the Montreal Protocol and its amendments.¹⁵⁹ Hong Kong's decision to comply with developed country standards for the elimination of ozone producing chemicals may have been due to Hong Kong's emissions being well in excess of the 0.3 kilogram per capita cut-off. With per capita emissions above 0.3 kilograms, Hong Kong could not claim a status different from that of Britain: Hong Kong's obligations were the same whether it was considered a part of Britain or an independent entity. Hong Kong also could not claim that its reversion to China created potential conflicts in its status, as China, like other developing countries, is not exempt from reducing emissions, but rather enjoys a ten-year deferral in the target date for phasing-out CFCs. Moreover,

amendment to the Convention, and becomes effective upon ratification by 75% of the parties to the Convention. See Douglas F. Brennan, *Trade and Environment Goals at a Crossroads: Challenges for Global Treaties and National Environmental Regulation*, 20 Int'l Env't Rep. Curr. Rep. (BNA) 3, at 133 (Feb. 5, 1997). As an amendment to the convention, the decision of the Conference of Parties will not be binding on states that do not ratify the amendment.

154. See ENVIRONMENT HONG KONG 1996, *supra* note 35, at 10-11, 59 (describing Hong Kong's legislation and program for phasing out the use of ozone-depleting substances).

155. Hong Kong Environmental Protection Department, *Control of Ozone Depleting Substances in Hong Kong—An Update*, ACE Paper 47/96 (Sept. 1996) (on file with author).

156. WHITE PAPER THIRD REVIEW, *supra* note 72, at 65. But see Billy Wong Wai-yuk, *Government in Row over Lunch Boxes*, S. CHINA MORNING POST, Aug. 29, 1995, at 5 (reporting environmentalists' claims that Hong Kong was "failing in its international obligations" under the Montreal Protocol by not enacting restrictions on styrofoam).

157. See Hong Kong Environmental Protection Department, *supra* note 155, at 2.

158. *Authorities Taking Applications for Allocations of HCFCs in 1996*, 18 Int'l Env't Rep. Curr. Rep. (BNA) 22, at 843 (Nov. 1, 1995).

159. See EPD Extends List of Controlled Substances in Line with Montreal Protocol Amendments, 18 Int'l Env't Rep. Curr. Rep. (BNA) 1, at 31 (January 11, 1995). Hong Kong has also taken steps to enforce the CFC ban in court; in 1995, the Environmental Protection department brought 17 prosecutions for violations of Hong Kong's Ozone Layer Protection Ordinance. See ENVIRONMENT HONG KONG 1996, *supra* note 35, at 132.

Hong Kong may also have realized that the economic costs to Hong Kong of phasing-out CFCs were not likely to be extensive.¹⁶⁰

In contrast to Hong Kong, China is a developing country under the Montreal Protocol, with annual consumption of ozone-depleting substances well below the 0.3 kilogram cutoff.¹⁶¹ As Hong Kong has already phased-out CFCs, it is unlikely that China will take any active steps to alter Hong Kong's status with regard to the agreements. Yet failure to do so may raise difficult questions for China. If China officially alters Hong Kong's status with regard to the Montreal Protocol and claims that Hong Kong is no longer bound to developed country standards,¹⁶² China is likely to draw international concern that it is undermining the Montreal Protocol. If China allows the treaty to remain applied to Hong Kong separately from its application in China, however, China may set a precedent for treating Hong Kong as an autonomous entity for the purposes of international environmental agreements, and thus undermine its own claim that Hong Kong is an inalienable part of China.¹⁶³

Prior to Hong Kong's return to China, Britain and China agreed that the Montreal Protocol and London and Copenhagen Amendments to the protocol would continue in force in the SAR.¹⁶⁴ Such an agree-

160. Hong Kong did not have any plants manufacturing CFCs or other ozone-depleting substances; the primary uses of CFCs in Hong Kong were in consumer products and as solvents in industry. Author's interviews with academics in Hong Kong, March 1997. CFC substitutes were already available for both consumer products and industrial solvents by the time Hong Kong agreed to phase-out CFC usage. *Id.*

161. China's CFC emissions have grown rapidly in the past decade, see Paul J. Smith, *Free Trade and the Environment: Will Free Trade Save China's Environment?*, 1 BUFF. J. INT'L L. 27, 33-34 (1994), but China is beginning to switch to production of CFC-free products, see, e.g., Renee Lai, *Green Move to Double Refrigerator Capacity*, S. CHINA MORNING POST, Feb. 3, 1997, at 3.

162. Hong Kong's emissions are unlikely to raise China above the 0.3 kilogram cutoff.

163. China might avoid this dilemma by agreeing with the Montreal Protocol Conference of Parties to treat Hong Kong as a special case or by delegating autonomy to Hong Kong for the purposes of the ozone agreements, but such action might set a precedent for other, more controversial, areas of environmental diplomacy.

The fact that Hong Kong has reported that it has already phased-out CFCs suggests that nothing will be done either to alter or clarify Hong Kong's status in the ozone agreements after July 1, 1997—most likely, the issue will be ignored by all parties. China itself has taken steps to eliminate CFC usage ahead of the Montreal Protocol's deadline for developing countries. See Jessica Poppele, *The CFC Challenge: Chlorofluorocarbons*, CHINA BUS. REV., July 1994, at 34. But see *Fear Over China's Use of CFCs*, S. CHINA MORNING POST, July 31, 1993, at 2 (reporting that China's CFC consumption is expected to increase by twenty percent annually). Moreover, Hong Kong's participation in the ozone agreements as a part of China would not actually affect the status of ozone-depleting chemicals in Hong Kong, as Hong Kong's domestic legislation regarding the control of such substances will remain in effect. Yet it may become more difficult to control the already burgeoning black market in CFC imports from China to Hong Kong. See Elisabeth Tacey, *Black Market Blooms in CFCs*, S. CHINA MORNING POST, Oct. 2, 1995, at 2 (reporting slow process of conversion of CFC-using air conditioners, and noting reports of "extensive smuggling" of CFCs from China to Hong Kong).

164. See *supra* note 75.

ment suggests that Hong Kong continues to have an independent status in these agreements.¹⁶⁵ Yet independent status for Hong Kong runs contrary to language in the Montreal Protocol that membership in the protocol be limited to states,¹⁶⁶ and suggests the possibility that Hong Kong may have independent status in other environmental agreements, most importantly the Climate Change Convention. If the fact that environmental treaties are among sovereign states does not prevent Hong Kong from maintaining independent status in the ozone agreements, Hong Kong's non-state status should not prevent it from conducting autonomous environmental policy-making in other areas—or from maintaining a development status different from that of China in agreements applied in Hong Kong and China.¹⁶⁷

Hong Kong's concern over conflicts in development status was one of the reasons it decided not to join the Climate Change Convention.¹⁶⁸ If Hong Kong had joined as part of the United Kingdom, Hong Kong might either have been treated as a part of the United Kingdom, and thus subject to the provisions regarding Annex I and Annex II countries, or as an independent entity. Under the Climate Change Convention, newly industrialized countries are considered to be developing nations,¹⁶⁹ and thus an independently-classified Hong Kong would probably not have faced significant obligations under the Climate Change Convention.¹⁷⁰ If Hong Kong had been classified in line with the United Kingdom, however, the territory would have faced significant requirements that it reduce its emissions; Hong Kong's desire to avoid the risk of such commitments may explain why it remained

165. In notifying the United Nations that all four agreements would continue to apply in the SAR, China drew a distinction between the Vienna Convention, Montreal Protocol, and London Revisions, all of which China has signed, and the Copenhagen Revisions, which China has not signed. Compare Xinhua English Newswire, June 6, 1997, 1997 WL 11180894 (listing treaties signed by China that will continue to apply to Hong Kong) with *Int'l Agreements Implemented in HK May Continue*, Xinhua English Newswire, June 6, 1997, 1997 WL 11180957 (listing agreements not signed by China that will continue to apply to Hong Kong). Despite this distinction, the announcements did not suggest any change in Hong Kong's status in the agreements.

166. See Montreal Protocol, *supra* note 62, art. 15. Allowing separate status for one portion of a country would also conflict with the Montreal Protocol's statement that "[n]o reservations may be made to this Protocol." *Id.*, art. 18.

167. Assigning Hong Kong developed country status could also be used to support arguments that other economically developed regions of developing countries should have statuses different from that of the nation as a whole. However, the uniqueness of Hong Kong's position, both in international law and as a part of China, would undermine the force of such arguments.

168. See *supra* note 130.

169. See Chayes & Kim, *supra* note 60, at 7. This was due in large part to China's objection to newly industrialized countries being classified as developed countries: "China strongly opposed any differentiation among developing countries on the basis of comparative stages of development or economic growth." *Id.* at 20. China was concerned about being singled out due to its rapidly developing economy and increasing greenhouse emissions. See *id.*

170. Hong Kong thus would have had equal status with China.

outside the Climate Change Convention.¹⁷¹ In the absence of further agreements that impose emissions-reduction commitments on newly industrialized countries, Hong Kong's post-reversion status is unlikely to change: if Hong Kong remains outside the convention, it will have no commitments, and if China applies the convention to Hong Kong, the SAR will, as a non-Annex I or II party, have few commitments.¹⁷²

The benefits that may accrue to Hong Kong as part of China and thus as a developing country may explain Hong Kong's reluctance to participate in any capacity in negotiations leading up to the Climate Change and Biodiversity Conventions. Hong Kong's chair was empty at the 1992 Rio Conference on Environment and Development.¹⁷³ Yet

171. Some observers believe that Hong Kong may actually meet the Rio targets of reducing greenhouse gas emissions to 1990 levels by 2000, due largely to increased use of natural gas—instead of coal—in Hong Kong's power plants. Author's interviews with academics in Hong Kong, March 1997. More than half of Hong Kong's CO₂ emissions are from the power sector, and power sector growth is low. *Id.* Others dispute the claim that Hong Kong will meet the Rio targets: Friends of the Earth—Hong Kong estimates that CO₂ emissions alone will increase by 31% between 1996 and 2000. See Friends of the Earth, Submission to the Advisory Council on the Environment: Energy Policy, Climate Change and the Environment, July 1996, at 2 (on file with author); see also Elizabeth Tacey, *The Efficient Way to Save the Planet*, S. CHINA MORNING POST, Oct. 31, 1997, at 19 (noting that Hong Kong will come closer than many countries and territories to meeting the goal of reducing greenhouse emissions to 1990 levels by 2000, but also reporting forecasts that Hong Kong's emissions will reach 170% of 1990 levels by 2010).

172. Montreal Protocol precedent could be relevant if any future agreements impose emissions restrictions on newly industrialized countries. If Hong Kong were to remain a party to the Montreal Protocol on different terms from China, a future climate change agreement that imposed requirements on newly industrialized countries might similarly be applied to Hong Kong.

173. See Chan, *supra* note 108. Hong Kong's lack of national status may have accounted for Hong Kong's absence from the Rio Summit. See 'Friends' Aim to Regenerate Spirit of Rio, S. CHINA MORNING POST, Nov. 8, 1994, at 28. Other non-states, however, did send representatives to the conference. One observer attributes Hong Kong's failure to participate to "the anticipated opposition from the Chinese government." Hung Wing-tat, *The Environment, in THE OTHER HONG KONG REPORT 1994*, at 253, 255 (Donald H. McMillen & Man Si-wai eds., 1994). Hong Kong's failure to send a representative to Rio followed China's successful blockage of Hong Kong's participation in the Second World Climate Conference in 1990, on the grounds that Hong Kong was not a sovereign state. See Siddall, *supra* note 51, at 415.

Britain represented Hong Kong at Rio, but while the United Kingdom signed both the Climate Change Convention and the Biodiversity Convention, Britain left the decision on whether Hong Kong would join the Conventions to the Hong Kong government. See Ng Cho-nam & Ng Ting-leung, *The Environment, in THE OTHER HONG KONG REPORT 1992* 364, 379 (Joseph Y.S. Cheng & Paul C.K. Kwong eds., 1992). In a report issued in 1993, the Hong Kong government outlined its official response to the Earth Summit, stating that "the government is determined to adopt the standards set out at the 'Earth Summit' and to meet fully the obligations of the international agreements on the environment applied to Hong Kong." Planning, Environment and Lands Branch, Government Secretariat, *THE HONG KONG ENVIRONMENT: A GREEN CHALLENGE FOR THE COMMUNITY* 103-04 (1993). The report noted that Hong Kong had already begun to contribute "to the achievement of the [Climate Change Convention's] objectives" by increasing the use of natural gas in power plants. *Id.* at 104. In explaining Hong Kong's status in the Climate Change and Biodiversity Conventions, the report stated that "Hong Kong cannot itself become a party to the two Conventions though they could be extended to us by the UK before 1997. Our view is that the immediate need is to assess and improve Hong Kong's performance in line with the principles of the Convention." *Id.* at 106.

Hong Kong's decision not to participate in the Climate Change Convention may also reflect deference to China. China has been an active participant in climate change negotiations, especially as an advocate for developing countries.¹⁷⁴ China has argued that developed countries are primarily responsible for global warming, and thus that developing country implementation of commitments under the Climate Change Convention should be contingent on developed countries providing financial and technical assistance to developing countries. The success of the Chinese view¹⁷⁵ may have been one reason contributing to Hong Kong's decision to stay outside the Convention, at least while it remained a British territory.

Hong Kong's reluctance to participate in the Climate Change and Biodiversity Conventions may reveal an additional way in which environmental agreements challenge the Basic Law's conception of post-reversion Hong Kong. In providing for a degree of autonomy in trade and other areas, the Basic Law appears to assume that Hong Kong would want to assert its autonomy to whatever degree possible. Yet Hong Kong's lack of participation in the Rio Conference suggests that Hong Kong may be happy to defer to China when it comes to environmental agreements—and thus to reap the benefits of developing country status.

Hong Kong's inclusion in the ozone agreements but omission from the Climate Change Convention suggests that Hong Kong's status in environmental agreements is more likely to reflect the degree of autonomy China grants Hong Kong than it is to impact Hong Kong's local environmental legislation. There are strong arguments in favor of applying environmental agreements to Hong Kong as a part of China, rather than as an independent entity.¹⁷⁶ To do so, however, particularly with regard to agreements already applied to Hong Kong, would undermine confidence both in Hong Kong's autonomy and in the SAR's commitment to addressing environmental concerns. By choosing, or being told by Beijing, to align itself with China's development status, Hong Kong may actually be foreclosing the opportunity to conduct its own environmental diplomacy. Conversely, if Hong Kong and China do not apply the Biodiversity and Climate Change Conven-

174. See generally Chayes & Kim, *supra* note 60 (discussing China's role in the Climate Change negotiations).

175. Climate Change Convention article 4(7) states that developing country implementation "will depend on the effective implementation by developed country parties" of commitments "related to financial resources and transfer of technology." Climate Change Convention, *supra* note 66, article 4(7); see also Chayes & Kim, *supra* note 60, at 9 (discussing the Chinese view, and noting disagreements between developed and developing countries as to the meaning of article 4(7)).

176. See *supra* text accompanying notes 136–139.

tions to the Hong Kong SAR, they will, in effect, be allowing Hong Kong to assume an autonomous status in international environmental law which may require Hong Kong to meet developed country targets under environmental treaties. The precedent-setting nature of these decisions suggests another failing of the Basic Law. Not only does the Basic Law underestimate the degree to which Hong Kong's status in international agreements may be dependent on third-party consent; the Basic Law also mistakenly assumes that Hong Kong's status in international agreements can be determined on a case by case basis.

The tension China and Hong Kong face in determining Hong Kong's development status in the Climate Change Convention and ozone agreements also reflects inconsistencies among environmental agreements. Having met developed country requirements under the Montreal Protocol, Hong Kong may have feared being required to meet developed country targets under the Climate Change Convention. Yet there were legitimate arguments in favor of Hong Kong having independent status from Britain—Hong Kong was never a part of the United Kingdom. Independent status would have led to different development classifications for Hong Kong in different environmental treaty regimes, as is the case with other newly industrialized economies. Whereas independent status under the Montreal Protocol would have required Hong Kong to meet developed country targets, under the Climate Change Convention Hong Kong would not have been an Annex I or II party. Treated independently from Britain, Hong Kong would similarly not have been a developing country under the Basel Convention, which imposes stricter requirements on OECD members than on other parties.¹⁷⁷

The inconsistency among environmental agreements parallels inconsistent determinations of development status in international trade regimes: Hong Kong is treated on the same terms as developed countries for the purposes of the WTO, but as a developing country for the purposes of the Multifibre Arrangement.¹⁷⁸ The inconsistencies that inhere among various multilateral agreements reveal that classifications

177. Hong Kong is not—and cannot become—a member of the OECD because OECD membership is limited to sovereign nations. See Chan, *supra* note 108. Thus while a proposed amendment to the Basel Convention will ban OECD members such as South Korea and Mexico from shipping hazardous waste to developing countries, see *supra* text accompanying note 154, Hong Kong will not be subject to the same prohibition.

178. Cf. Henry R. Zheng, *The Fourth Multifibre Arrangement and the New Legal Regime for International Trade in Textiles*, 25 COLUM. J. TRANSNAT'L L. 301, 308 (1987) ("[W]hile developing countries are generally subject to MFA quotas, all developed countries except for Japan are exempt."); *Arrangement Regarding International Trade in Textiles (Multifibre Arrangement)*, Dec. 20, 1973, art. 6(1), 25 U.S.T. 1001, 930 U.N.T.S. 166; *Protocol Extending the Arrangement Regarding International Trade in Textiles*, July 31, 1986, conclusions, paras. 13(a) & (b), GATT B.I.S.D. (33d Supp.) at 7 (1987).

reflect political decisions made in the international agreements. Thus China's efforts to protect the developing status of newly industrialized countries in the Climate Change Convention negotiations reflected a new twist to an old game: China attempted to shield itself from future obligations, just as the U.S. and other western countries sought to shield themselves from textile imports by treating Hong Kong as a developing country.

The variation in definitions of development suggests difficulties in analogizing from how Hong Kong is treated in one agreement to how Hong Kong should be treated in any other agreement. Yet whether environmental agreements determine Hong Kong's development status independently from that of China may have relevance for Hong Kong's status in economic agreements: as trade and environmental issues become increasingly intertwined, it may become difficult to grant Hong Kong independent status in trade agreements and not in environmental agreements—or to treat Hong Kong as part of China for the purposes of environmental agreements and not for trade agreements.¹⁷⁹ Although determination of Hong Kong's status in individual environmental agreements is beyond the scope of the Basic Law, Hong Kong's confused status in environmental agreements demonstrates the Basic Law's failure to recognize that Hong Kong's international status, as well as Hong Kong's status in China, will result from a range of factors and be reflected in a variety of contexts, some of which are beyond the central government's exclusive control.

D. The Interrelated Nature of International Commitments: Trade and the Environment

The Basic Law fails to consider the interrelated nature of trade and environmental agreements. The Basic Law grants Hong Kong autonomy in its trade relations without considering that such autonomy may include significant autonomy in environmental issues. The Basic Law may thus create a framework whereby Hong Kong is not permitted to engage directly in environmental treaty-making but is permitted to use its voice in trade organizations to conduct environmental diplomacy.

A number of environmental agreements include express restrictions on trade, and CITES and the Basel Convention are primarily concerned with regulating trade. CITES restricts trade in certain endangered species,¹⁸⁰ and the Basel Convention restricts trade in hazardous mate-

179. The unsustainability of inconsistencies between Hong Kong's status in trade and environmental agreements is discussed below. See *infra* text accompanying notes 180–193.

180. See CITES, *supra* note 64, arts. III–V.

rials and other wastes.¹⁸¹ Although not primarily concerned with trade, the Montreal Protocol bans trade in ozone-depleting substances and products made with or containing such substances among parties to the protocol and states that are not parties to the protocol.¹⁸² Trade restrictions in environmental agreements may clash with certain WTO provisions. For example, GATT article XI restricts the use of quotas and import bans,¹⁸³ thus creating a potential conflict with the Basel Convention's pending ban on shipments of hazardous waste from OECD to non-OECD nations.¹⁸⁴ Although no environmental treaties have been directly challenged in the WTO,¹⁸⁵ commentators have increasingly noted the potential for clashes between environmental and trade agreements. Developed countries have expressed concern that the WTO will be used to undermine the force of environmental agreements; developing countries have expressed fears that developed countries will use environmental concerns as pretexts for imposing trade restrictions on developing countries.¹⁸⁶

181. See Basel Convention, *supra* note 68, art. 6. The Basel Convention is moving toward an outright ban on the shipment of hazardous waste from OECD countries to non-OECD countries. See *supra* text accompanying note 153.

Hong Kong has enacted at least two pieces of environment-related trade legislation. The Ozone Layer Protection (Products Containing Scheduled Substances) (Import Banning) Regulation "prohibits the import of controlled products from a country or place not a party to the Montreal Protocol unless . . . it complies with the requirements of the Protocol." ENVIRONMENT HONG KONG 1996, *supra* note 35, at 117. The Waste Disposal (Amendment) Ordinance 1995 establishes a permit system to control "import and export of hazardous and other wastes in accordance with the requirements [of] the Basel Convention." ENVIRONMENT HONG KONG 1996, *supra* note 35, at 125.

182. See Montreal Protocol, *supra* note 62, art. 4; see also London Revisions, *supra* note 63, section O (amending article 4 to ban exports as well as imports of controlled substances). If Hong Kong is considered separately from China for the purposes of the ozone agreements, Hong Kong may be in violation of the agreements if it fails to curtail imports of controlled substances from China.

Although the Climate Change Convention does not explicitly restrict trade, future provisions under the convention may restrict trade. See Brennan, *supra* note 153, at 136 ("Future trade-related environmental measures under [the] Framework Convention on Climate Change are likely to include CO₂ and energy taxes, trade restrictions on timber, and restrictions on trade in products and technologies that cause excessive greenhouse gas emissions such as inefficient motors or appliances.").

On the relationship between international trade and environmental issues, see generally DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE (1994).

183. See General Agreements on Tariffs and Trade, Oct. 30, 1947, art. XI, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

184. See Brennan, *supra* note 153 (discussing the possible impact of GATT provision on environmental agreements); see also *supra* note 153 (discussing status of Basel Convention ban on shipments from OECD to non-OECD nations).

185. See Brennan, *supra* note 153, at 136-37.

186. In general, developed countries, most notably the U.S. and the European Community, have backed the use of environment-related trade measures; developing countries have had "uniformly hostile reactions to the linkage of trade and environment issues across international borders." Daniel P. Blank, Note, *Target-Based Environmental Trade Measures: A Proposal for the New WTO Committee on Trade and Environment*, 15 STAN. ENVTL. L.J. 61, 87 (1996); see also ESTY, *supra*

In contrast to Hong Kong's non-participation in the Rio Earth Summit, Hong Kong's government describes itself as "an active participant" in the WTO's Committee on Trade and Environment.¹⁸⁷ Environmental activists have viewed Hong Kong's participation negatively, claiming that Hong Kong has played a leading role in shifting "the sentiment" in the committee toward "curtailing the scope of" the Montreal Protocol, the Basel Convention, and CITES.¹⁸⁸ Environmentalists were particularly concerned with proposals that would give the WTO "the final say in determining on a case-by-case basis whether environmental treaties violate global fair trade rules."¹⁸⁹ Hong Kong's views in the WTO suggest concern with environmental considerations being used to control trade. China has also been critical of developed countries' uses of environmental rules and regulations as trade barriers, and China's reaction to recent WTO decisions on trade and environmental issues suggests that it may back WTO efforts to limit environmental treaties.¹⁹⁰ Indeed, China advocated language in the Climate

note 182, at 187 (noting developing country fears that developed countries will use "trade restrictions to force acquiescence to northern environmental priorities over which legitimate disagreement remains regarding the resulting benefits").

187. See WHITE PAPER THIRD REVIEW, *supra* note 72, at 35; see also Chan, *supra* note 108 (arguing that the "Hong Kong government is uninhibited in being involved in the WTO's Committee on Trade and Environment").

At the December 1996 meeting of the WTO, members adopted a report of the Committee on Trade and Environment calling on conflicts between the WTO and environmental agreements to be resolved through the WTO. See *Ministers Adopt Trade/Environment Report, Renew Committee Created to Look at Issues*, 20 Int'l Env't Rep. Curr. Rep. (BNA) 1, at 3 (January 8, 1997); cf. Chan, *supra* note 108 (stating that the "Hong Kong government has not been as proactive [in global environmental forums] as in trade because the 'autonomy-versus-sovereignty' issue has not been clearly resolved").

188. Paul Weinberg, *Environment: WTO Threatens Environmental Treaties, Groups Warn*, INTER PRESS SERVICE, Aug. 21, 1996, available in LEXIS, News Library, Curnws File. The report discussed a joint statement the World Wide Fund for Nature, Greenpeace, and Friends of the Earth issued in advance of the December 1996 WTO meeting in Singapore. See *id.*; see also *WTO Committee Faces U.S. Questions on Role in Environmental Policy-Making*, 18 Int'l Env't Rep. Curr. Rep. (BNA) 4, at 158 (Feb. 22, 1995) (describing United States' statement that the WTO "is not the proper forum for environmental policy-making" and noting that Hong Kong was among the parties stating that the issue required further examination).

189. Weinberg, *supra* note 188. No WTO member has yet challenged a multilateral environmental treaty as violating the GATT, but WTO panels have found some national environmental laws to violate GATT provisions. See *GATT Dispute Settlement Panel Report: United States—Restrictions on Imports of Tuna*, Aug. 16, 1991, GATT B.I.S.D. (39th Supp.) at 155 (1993); *GATT Dispute Settlement Panel Report: Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) at 200 (1991); *GATT Dispute Settlement Panel Report: United States—Taxes on Automobiles*, Sept. 30, 1994, available in LEXIS, Intlaw Library, Gttwto File under 1994 GATTDP Lexis 8; Chris Wold, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, 26 ENVTL. L. 841, 843 (1996).

190. Chinese state-run media gave favorable coverage to a 1996 WTO ruling that U.S. environmental standards on gasoline discriminated against imported gasoline, and thus violated principles of free trade. Xinhua paraphrased a trade official of another WTO member state as saying that the WTO was "showing its teeth," by ruling that "the U.S. just cannot always charge others with trade protectionism but cite[] sovereignty when that country itself was found guilty

Change Convention against the use of trade restrictions or discriminatory measures as a means of reaching environmental goals.¹⁹¹

Hong Kong's participation in the WTO Committee on Trade and Environment demonstrates that Hong Kong's participation in trade organizations may include environmental policymaking.¹⁹² An interpretation of the Basic Law that prohibits Hong Kong from engaging in independent environmental diplomacy in environmental agreements but that permits Hong Kong full autonomy in the WTO is thus incoherent: either Hong Kong must possess autonomy in international environmental policy, or else Hong Kong's autonomy in the WTO must be limited.

At present, Hong Kong and China appear to share similar views regarding the relationship of environmental and trade issues. Both are skeptical of western countries, in particular the United States, using environmental arguments as a cloak for trade restrictions. Were a difference of opinion or interests to develop between China and Hong Kong regarding the interrelation of trade and the environment,¹⁹³

on the same charges." *WTO First Ruling: U.S. Discriminates against Gas Imports*, Xinhua News Agency, Jan. 23, 1996, available in LEXIS, News Library, Curnws File; see also Xinhua on "Uprisings" Against US Trade Policy, BBC Summary of World Broadcasts, July 30, 1996 available in LEXIS, News Library, Curnws File (quoting Xinhua commentary stating that the WTO ruling was "a severe warning to US double standards in trade," and stating that the U.S. "practices double standards in . . . environmental protection"). China's views regarding the WTO disputes may, however, reflect China's views about the United States more than China's views regarding the substantive issues at stake in the disputes.

191. See Chayes & Kim, *supra* note 60, at 6. The particular language can be found in the Climate Change Convention, *supra* note 66, art. 3(1).

192. The degree to which China permits Hong Kong to assert an independent international environmental policy may also be an issue in organizations to which both China and Hong Kong are parties. China and Hong Kong are both members of APEC, the Asia-Pacific Economic Cooperation forum. Hong Kong has maintained its independent status in APEC since July 1, 1997. At least one commentator has suggested that environmental protection and "trade-environment linkages" may be "promising issues for APEC-wide agreements." Jane Khanna, *Asia-Pacific Economic Cooperation and Challenges for Political Leadership*, WASH. Q., Winter 1996, at 257; see also Wan-Soon Kim, *A Past UR Agenda for Economic Cooperation in the Asia Pacific Region: The Korean View*, KOREAN OBSERVER, Summer 1995, at 115; *Ministers Adopt Urban-Oriented Action Plan*, ECO-LOG WEEK, July 19, 1996, available in 1996 WL 8729528 (reporting that "ministers responsible for the environment" from the 18 APEC members "made a collective commitment to improving the urban environment"). But see *Environmental Issues Low Priority at Asia-Pacific Economic Cooperation Forum*, 17 Int'l Env't Rep. Curr. Rep. (BNA) 24, at 987 (November 30, 1994) (stating that "[t]he environment was a decidedly low-priority issue during a series of [APEC] forum meetings" and that leaders attending the annual APEC summit "paid scant attention to . . . recommendations concerning the environment"). Hong Kong officials have reported raising environmental issues, in particular the need for cooperation to address cyanide fishing, in APEC working groups. See LegCo Panel On Environmental Affairs, Minutes of Meeting Held on Thursday, 13 June 1996, LegCo Paper No. CB(1)102/96-97 (last updated Dec. 24, 1996) <<http://legco.gov.hk/yr95-96/english/panels/ea/minutes/ea130696.htm>>.

193. Such a conflict is not out of the question, despite Hong Kong's increased tendency to identify China's economic interests as its own. For example, Hong Kong appears to have acted reluctantly to restrict the international trade in hazardous waste, see *infra* text accompanying notes 195-209, due to the important role Hong Kong played as a transshipment point for waste, while

however, China would face a quandary. Any effort to assert control over Hong Kong's trade policy may undermine not only the Basic Law, but the economic independence and thus stability of Hong Kong; any effort to allow Hong Kong an independent environmental policy might have precedent-setting value for allowing Hong Kong autonomy with regard to international environmental agreements, and thus perhaps other agreements among sovereign states.

E. Indirect Influences

The degree of independence Hong Kong maintains in the WTO remains to be seen, regardless of whether or not China joins the WTO.¹⁹⁴ Despite the Basic Law's assurances of autonomy, Beijing's control of the appointment of the SAR's Chief Executive and the SAR's provisional legislature raises questions about the degree to which Hong Kong's government will be willing to take positions that conflict with those taken by the central government.¹⁹⁵

Beijing is likely to influence strongly Hong Kong's environmental policy regardless of whether China permits Hong Kong autonomy in environmental agreements. Hong Kong's experience in implementing the Basel Convention shows that, in certain areas, China's compliance with an international agreement may force Hong Kong to follow suit. China's ability to exert such indirect influence reveals that even if the Basic Law expressly provided for Hong Kong to have an autonomous environmental policy, such a provision would be ephemeral.

Both China and the United Kingdom are parties to the Basel Convention. Although Britain did not initially apply the convention to Hong Kong, it did so in 1995.¹⁹⁶ China signed the convention in 1991,¹⁹⁷

China took an aggressive role in calling for the ban of waste shipments from the west to developing countries.

194. Cf. David E. Sanger, *China Faces Test of Resolve to Join Global Economy*, N.Y. TIMES, Mar. 2, 1997, at 1, 14 (stating that Hong Kong's autonomous status in the WTO after July 1, 1997 "is largely a fiction" and that "China will undoubtedly be able to use Hong Kong's status to its trading advantage"). If China remains outside the WTO, Hong Kong could potentially serve as China's voice within the body, whether by direct Chinese influence over the SAR's representatives in the WTO, or indirectly, by Hong Kong's representatives' recognition of shared interests with China. In contrast, Hong Kong repeatedly clashed with the United Kingdom in negotiations leading up to the establishment of the WTO. Author's interviews with academics in Hong Kong, March 1997.

195. Cf. ROBERTI, *supra* note 114, at xi ("Beijing . . . will control every facet of Hong Kong's affairs through a hand-picked governor"); Editorial, *Bad for Hong Kong*, INT'L HERALD TRIB., Dec. 30, 1996 ("The rigged selection this month by China of the future chief executive and legislature of Hong Kong makes clear that political freedoms will be severely curtailed if not entirely eliminated once China assumes control on July 1, 1997."); GHAI, *supra* note 4, at 231-33, 272-80 (discussing selection procedures for the Chief Executive and the provisional legislature).

196. See MULTILATERAL TREATIES, *supra* note 61, at 898.

197. *Id.* at 893. For a brief description of China's early compliance with the Basel Convention,

and played a key role in advocating a ban on the export of hazardous wastes from OECD to non-OECD countries, which the Third Conference of Parties to the Basel Convention passed in 1994.¹⁹⁸ Hong Kong took steps to implement the treaty via domestic law, enacting legislation in 1995 "to allow controls under the Convention to be introduced."¹⁹⁹ Yet the initial Hong Kong law fell short of international standards,²⁰⁰ and Hong Kong remained a major transfer point for illegal waste shipments.²⁰¹

China followed up its advocacy of a ban on the export of hazardous wastes from OECD to non-OECD countries by tightening domestic legislation.²⁰² In the summer of 1996, China launched a campaign to implement and publicize²⁰³ the new restrictions. The new controls shifted responsibility for the granting of licenses for waste imports from local governments to the central government, and in the summer of 1996 the central government was reported to have announced that it would not grant any new licenses.²⁰⁴ China's tightening of its solid waste law led Hong Kong to strengthen its own laws on waste shipments,²⁰⁵ as Hong Kong suddenly faced the possibility that it would

see Bryan Bachner & David McKellar, *Regulating the International Trade of Waste in Hong Kong*, H.K. ENVTL. L. ASS'N NEWSL. (Hong Kong Envtl. Law Ass'n), Mar. 1995, at 3, 5-6.

198. See *Basel Plenary Approves Protocol Work*, ENVTL. LIABILITY REP., Apr. 25, 1994, at 6, available in 1994 WL 10096886; see *supra* note 153 (discussing current status of the ban).

199. WHITE PAPER THIRD REVIEW, *supra* note 72, at 65.

200. See MUSHKAT, *supra* note 76, at 100 n.57 (stating that Hong Kong continued to permit "the import, export and trans-shipment of radioactive and other toxic substances if a license [was] obtained").

201. See *id.* ("[T]he territory is a major transshipment point for waste which is not necessarily destined for an internationally recognized specialist plant with adequate disposal facilities."); *International: Greenpeace Points to China as Emerging Dumping Spot*, 8 MED. WASTE NEWS 14, July 9, 1996, available in 1996 WL 8299946 (reporting increased dumping of foreign medical waste in China); Elisabeth Tacey, *A Dirty Trade, Dumped on Asia*, S. CHINA MORNING POST, July 12, 1992, at 17 (stating that "Hong Kong is thought to be one of the world's biggest transshipment ports for waste"). Some of Hong Kong's own exports go to "legitimate recycling facilities" in China, Tacey, *supra* (quoting Hong Kong principal environmental protection officer Dr. Ellen Chan Ying-lung) (internal quotation marks omitted), but in some cases "facilities are not sufficient or [are] non-existent." *Id.* Much of the waste shipped through Hong Kong to China is in plastics, which the Basel Convention does not control. See *id.*

202. See Solid Waste Pollution Prevention and Control Law of the People's Republic of China, *supra* note 53.

203. In the summer of 1996, Chinese media carried repeated stories detailing illegal shipments of waste from developed countries, especially the United States, to China. See, e.g., *Environmental Group Calls on US to Stop Dumping Waste*, Agence France Presse, June 25, 1996, available in LEXIS, News Library, Curnws File (discussing Chinese media reports of U.S. trash shipments to China). Hong Kong environmental NGOs echoed the Chinese government's attacks on the United States for shipping toxic waste to China. See *id.*

204. See Tacey, *supra* note 201; Yojana Sharma, *Hong Kong—Environment: Free Port Becomes Dumping Ground for Waste*, Inter Press Service, July 23, 1996, available in LEXIS, News Library, Curnws File; see also *Waste Import Ban and Water Bill*, ENVTL. LIABILITY REP., Nov. 1, 1995, available in 1995 WL 9767646 (discussing NPC Standing Committee approval of ban on imports of non-reusable waste, and limits on imports of recyclable waste).

205. See *Hong Kong Waste Regulations Spurred by Chinese Law, Conform with Basel Treaty*, 19 Int'l Env't Rep. Curr. Rep. (BNA) 19, at 830 (Sept. 18, 1996). Hong Kong was to have implemented

be stuck with both waste being shipped through Hong Kong to China and with increased amounts of the colony's own waste, which formerly had been shipped to China.²⁰⁶

Hong Kong's recent moves to comply with the Basel Convention illuminate three qualifications to the Basic Law's grant of autonomy to Hong Kong. First, Hong Kong's moves to comply with the convention show that Chinese laws that do not officially apply to Hong Kong may have a significant impact on Hong Kong's own laws.²⁰⁷ Second, these moves show that even in an area in which the Basic Law provides for the Hong Kong SAR's autonomy—international trade—Hong Kong's actions are likely to be curtailed if its policies run counter to those in China. Third, they emphasize the inseparability of trade issues from environmental issues.²⁰⁸

the new regulations by the end of 1996, but advanced the date of implementation after being "caught off guard by China's strict new law banning the import or transshipment of hazardous waste into or through the country." *Id.* The revised regulations require an application from importers for a permit to import waste; if waste is being transshipped through Hong Kong, the importers must also show approval from the shipment's intended destination, and post a bond to pay for transportation in the event that the waste is rejected by the destination country. *See id.* Environmentalists said that the law did not go far enough, noting that the regulations did not "cover the import or export of non-hazardous waste unless the cargo is intended for disposal purposes" in Hong Kong, and that the revised regulations did not include sufficient provisions for increased enforcement. *Id.*; *see also* Waste Disposal (Amendment) Ordinance No. 14 of 1995 (1996) (Hong Kong); P. T. Bangsberg, *Hong Kong Cracks Down on US Hazardous Cargo*, J. COM., Aug. 21, 1996, at A4 (discussing new Hong Kong regulations controlling waste).

Hong Kong enacted the 1995 ordinance in order to bring the territory's laws into line with the Basel Convention. For discussion of the enactment of the 1995 ordinance, *see EPD to Propose Amending Waste Control Law to Bring Measure in Line with Basel Treaty*, 17 Int'l Env't Rep. Curr. Rep. (BNA) 21, at 866 (Oct. 19, 1994); *Bill to Bring Territory in Line with Basel Treaty Moves Closer to Passage*, 17 Int'l Env't Rep. Curr. Rep. (BNA) 25, at 1050 (Dec. 14, 1994).

206. One Hong Kong official stated that "[t]he reason we are having this problem now [in Hong Kong] is that China suddenly decided it does not want to import waste," and added that "[l]ast year China was one of the main importers of waste, but now they have found that it is not very cost effective and it is not very good for the environment." Sharma, *supra* note 204 (quoting Hong Kong Environmental Protection Department Advisory Council Chairman Peter Wong) (internal quotation marks omitted) (second alteration in original); *cf.* Rachel Clarke, *Green Groups Praise Move but Tighter Laws Urged*, S. CHINA MORNING POST, Jan. 24, 1997, at 4 ("In China trade in toxic waste is seen as bad. In Hong Kong the philosophy is trade in toxic waste is a business which we want to monitor and control." (quoting Greenpeace International's Anne Dingwall) (internal quotation marks omitted)).

One press account noted that a factor motivating Hong Kong's decision to tighten its regulations on solid waste was the fear that "[w]ith China closing its doors, Hong Kong will be at the receiving end of a lot of rejected waste unless we step up our own legal controls." *United States Intervenes in Hong Kong Waste Dumping Row*, AGENCE FRANCE PRESSE, July 26, 1996, available in LEXIS, News Library, Curnws File (quoting Friends of the Earth—Hong Kong chairwoman Mei Ng) (internal quotation marks omitted); *see also* Sharma, *supra* note 204 ("Hong Kong at present has no effective laws to prohibit the entry of recyclable waste.").

207. This situation is not unique to Hong Kong: China may also be able to exert similar influence over other neighbors, including Taiwan.

208. One explanation given for Hong Kong's relatively weak enforcement of restrictions on waste shipments compared to other countries was that "we are a free port, so we don't have very strict regulations of what comes in and what goes out." Sharma, *supra* note 204 (quoting Hong

*F. The Status of International Law in Hong Kong:
A Possible Hong Kong Veto?*

Even if the Basic Law's statement that China will have the final say over the international status of the Hong Kong SAR is correct,²⁰⁹ the status of international law in Hong Kong itself is unclear. This section will discuss the status of international environmental law in Hong Kong, in particular the possibility that in preserving Hong Kong's pre-reversion legal system the Basic Law may also have authorized the SAR's government to exercise significant autonomy in international commitments. After a brief discussion of the status of international law in the Hong Kong and Chinese legal systems, this section will address the possibility that the non-self executing status of international agreements in Hong Kong will allow the SAR legislature to block, modify, or delay the application of international agreements to Hong Kong. This possibility is not unique to the environmental realm, but environmental agreements are particularly significant because both the SAR chief executive and legislature may be more willing to exercise autonomy in environmental law than in other areas.

Two major differences separate the Hong Kong legal system's treatment of international law from the treatment of international law in the Chinese legal system. First, treaties are not self-executing in Hong Kong. International agreements thus must be incorporated into local law.²¹⁰ Hong Kong therefore has enacted, for example, legislation to implement its commitments under the Montreal Protocol and the Basel Convention.²¹¹ In contrast, although China's constitution does not include any provisions governing the status of treaties or international law in Chinese law,²¹² China "tends to adopt" a system in which "treaties are directly applied internally."²¹³ China's General Principles

Kong Environmental Protection Department Advisory Council Chairman Peter Wong (internal quotation marks omitted).

209. See Basic Law, arts. 150–157.

210. See MUSHKAT, *supra* note 76, at 164, 171–79; Roda Mushkat, *Foreign, External, and Defense Affairs, in THE BASIC LAW AND HONG KONG'S FUTURE*, *supra* note 4, at 249, 258 n.26. For a discussion of the historical development of local application of treaties in Hong Kong, see Geoffrey Marston, *Unincorporated Treaties and Colonial Law—Hong Kong's "Parliament Belge"*, 20 H.K. L.J. 178, 194 (1990) ("[D]omestic courts will not enforce obligations and rights under international treaties, unless they are embodied in the domestic law." (citing Tai Ping-hoi v. Attorney General, 1987 HKLR 324, 328 (Nazareth, J.)) (internal quotation marks omitted)).

211. See *supra* notes 181 & 205; see also MUSHKAT, *supra* note 76, at 100 & n.56 (stating that "[f]or the most part, appropriate steps have been taken by the authorities to implement the respective duties, by incorporating the relevant conventions into domestic law" and listing relevant domestic laws).

212. See XIANFA [CONSTITUTION] (1982); see also Wang Tiewa, *The Status of Treaties in the Chinese Legal System*, 1 J. CHINESE & COMP. L. 1, 2 (stating that China's constitutions have failed "to clarify the status of treaties in the Chinese legal system").

213. Wang, *supra* note 212, at 4.

of Civil Law stipulate that where treaties to which China is a party conflict with domestic civil laws, the provisions of the international treaty govern, except where China has issued reservations to the treaty measures in question.²¹⁴

Second, customary international law applies in Hong Kong as part of English common law.²¹⁵ In contrast, China has taken a skeptical view of the application of customary international law. Although the General Principles of Civil Law state that "where the law of the PRC or international treaties which the PRC has concluded or participated in do not contain a relevant provision, international custom may be applied,"²¹⁶ China has in practice rejected applying customary international law, due to its view that it is not bound to norms that it did not play a part in forming. Although the comparatively non-sensitive nature of environmental law compared to human rights norms may mean that Hong Kong's courts will be more willing to use customary environmental norms²¹⁷ than human rights norms, the general reluctance of the Hong Kong courts to employ customary international law in any form²¹⁸ and the undeveloped nature of customary international environmental law makes such a scenario unlikely.

214. See General Principles of Civil Law, art. 142, para. 2 (1986); see also Wang, *supra* note 212, at 9–10 (discussing the General Principles of Civil Law and noting that the primacy of international treaties also applies for "matters relating to criminal jurisdiction").

Whether treaties are ever in practice self-executing in China is questionable. Despite the language of the General Principles of Civil Law, there are few examples of China enforcing the provisions of an international treaty absent domestic legislation. Nevertheless, the distinction with Hong Kong law remains important. As discussed below, the fact that treaties are never self-executing in Hong Kong allows for a potential clash between local Hong Kong law and international obligations agreed to by China.

215. See MUSHKAT, *supra* note 76, at 163–64, 167–71; Mushkat, *supra* note 79.

216. General Principles of Civil Law, article 142(1) quoted in MUSHKAT, *supra* note 76, at 186 (internal quotation marks omitted) (emphasis omitted).

217. For discussion of customary international environmental law, see, e.g., PATRICIA W. BIRNIE & ALAN E. BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 11, 84–85 (1992); Oscar Schacter, *The Emergence of International Environmental Law*, 44 J. INT'L AFF. 457, 470 (1991); Mushkat, *supra* note 33, at 116. Customary international environmental law may include principles such as a prohibition against states conducting or permitting activities in their territories without regard to the effects on the rights of other states, sustainable development, the precautionary principle, and the polluter pays principle. See Roda Mushkat, *Applicability of International Environmental Law to Hong Kong*, in *ENVIRONMENTAL LAW IN HONG KONG* 87, 92–95 (Gary N. Heilbronn ed., 1993); MUSHKAT, *supra* note 76, at 101–02; Lothar Gundling, *Our Responsibility to Future Generations*, 84 AM. J. INT'L L. 207, 212 (1990). Certain "soft law" instruments, such as the Rio Declaration and Agenda 21, may also have some effect on environmental policy in Hong Kong. See Mushkat, *Applicability of International Environmental Law to Hong Kong*, *supra*, at 100 (arguing that the Rio Declaration and Agenda 21 are "highly authoritative" and thus should be implemented by Hong Kong).

218. The degree to which customary international law is permitted to develop in Hong Kong will depend on the degree to which the common law itself is permitted to develop. The Basic Law stipulates that "[t]he laws previously in force in Hong Kong" including "the common law . . . shall be maintained." Basic Law, art. 8. Whether the Basic Law permits the common law to continue to develop, however, is unclear. See GHAI, *supra* note 4, at 351–54. If the common law

The Basic Law's broad language regarding the preservation of the Hong Kong legal system leaves unclear the degree to which the Hong Kong legislature must enact laws to comply with international obligations Beijing has undertaken. Examination of the need for legislation implementing Hong Kong's international obligations demonstrates that it may be impossible to allow the Hong Kong legislature to maintain autonomy with regard to local legislation if Hong Kong lacks autonomy in international environmental law. Similarly, if Hong Kong maintains autonomy in local environmental laws, Hong Kong may actually possess *de facto* veto power over international commitments the central government applies to it. Moreover, environmental law may be an area in which the SAR's legislature is willing to disregard Beijing's dictates.

Future environmental commitments the central government makes for the entire nation will require legislation by the Hong Kong SAR to become effective in Hong Kong. Yet such legislation—whether on controls of emissions of carbon dioxide, on waste transport, or on some other area—also appears to fit within the sphere of local authority the Basic Law cedes to Hong Kong.²¹⁹ The Basic Law grants the SAR legislature autonomy in local environmental policy, and prohibits the national government from enacting laws for the SAR except for the limited application of certain national laws.²²⁰ The potential conse-

is permitted to continue to develop, customary international law is also likely to continue to develop.

219. *Cf.* Ago, *supra* note 80, at 620 (suggesting that International Labor Organization conventions that China has ratified but that are not applied in Hong Kong pre-July 1, 1997, as well as ILO conventions that China ratifies after the formation of the Hong Kong SAR, may not be applicable in the SAR).

220. National laws applicable to the SAR are listed in Annex III to the Basic Law; the NPC Standing Committee "may add to or delete from the list of laws in Annex III," but such laws "shall be confined to those relating to defense and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law." Basic Law, art. 18; *see also* Basic Law, Annex III (listing national laws applied in Hong Kong from July 1, 1997). The Basic Law recognizes that even national laws cannot be directly applied to Hong Kong: national laws become applicable "by way of promulgation or legislation by the Region." Basic Law, art. 18; *see also* GHAI, *supra* note 4, at 182 ("[T]he national authorities have no power to make laws directly for Hong Kong, and in the limited scope for national laws, the modality of their application is regional enactment or promulgation."). In 1997, the NPC Standing Committee reaffirmed the primary role of national laws in Hong Kong, particularly in reference to Hong Kong's foreign affairs, deciding that "where any law making provision for foreign affairs in respect of the Hong Kong Special Administrative Region is inconsistent with national law applicable in the Hong Kong [SAR], the national law shall prevail so that it accords with the international rights enjoyed and international obligations borne by the Central People's Government." Decision of the Standing Committee of the National People's Congress on Treatment of the Laws Previously in Force in Hong Kong in Accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, *supra* note 103.

The Central Government may also be able to force Hong Kong to comply with national laws via Basic Law article 48, which provides that the Chief Executive of the SAR shall "implement the directives issued by the Central People's Government in respect of the relevant matters

quences of a conflict between Beijing's international obligations and the Basic Law's grant of autonomy to Hong Kong are unclear; although Hong Kong's legislature is unlikely openly to defy a treaty to which Beijing has committed the entire nation, such procedures may allow Hong Kong to delay adhering to or enforcing the treaty, as it has done in the past.²²¹

Commentators have suggested that the SAR's appointed legislature is likely to follow Beijing's dictates.²²² Yet there are three reasons this may not always be the case, particularly in environmental affairs. First, China's regional governments have been notoriously slow to obey central commands to improve environmental protection.²²³ There is little reason to suggest that the SAR's legislature will be less protective of local economic interests than are other regional governments.²²⁴ Second, the SAR's legislature and executive branch disproportionately represent Hong Kong's business interests, which have historically led opposition to further environmental regulation.²²⁵ In 1996, SAR Chief Executive Tung Chee-hwa expressed doubts about the polluter pays principle and, referring to calls for tighter environmental protection, stated that "[i]ndustries cannot survive if we impose a lot of charges on them."²²⁶ In turn, Hong Kong environmentalists have repeatedly

provided for in this Law." Basic Law, art. 48, para. 8. This provision is dependent on interpretation of the Basic Law's provisions regarding foreign affairs: the more expansive a definition of foreign affairs, the greater the number of national laws or policies that the central government may be able to direct the Chief Executive to implement in Hong Kong.

221. See *supra* note 71 (discussing Hong Kong's compliance with CITES).

222. See *supra* note 195 (discussing Beijing's influence over the SAR's political leaders).

223. However, in most cases local disregard for national environmental policymaking comes in the form of refusal to enforce environmental norms. Author's interviews with academics and environmental officials in Beijing, summer 1996. Local authorities only rarely have obligations to enact legislation. Cf. *Zhongguo Renmin Gongheguo Shuizuran Fangzhibifa* [Water Pollution Prevention Law of the People's Republic of China], May 11, 1994, revised May 15, 1996, art. 7 (permitting local and provincial authorities to enact provisions stricter than those in the national law).

224. However, the SAR's initial legislature may be more directly linked to the central government, and thus more likely to listen to Beijing's dictates, than are representatives in the provincial people's congresses. Representatives in the initial SAR legislature were appointed directly by Beijing, whereas members of provincial people's congresses are largely appointed by provincial and local Communist Party branches.

225. Prior to Hong Kong's reversion, the pro-China Democratic Alliance for the Betterment of Hong Kong moved to eliminate Hong Kong's "sewage charges on domestic households" and "surcharges on the business sector." Ip Kwok-him, *Charges Are Unfair*, ONE EARTH, Spring 1996, at 30. The motion failed. See *id.* According to an opponent of the motion, those in favor of scrapping the charges argued that such charges damaged Hong Kong's economy. See Christine Loh, *Polluters Should Pay*, ONE EARTH, Spring 1990, at 31. Hong Kong's pre-transition legislature was also criticized for being anti-environment. For example, in 1995 LEGCO voted down a government plan that would have mandated that taxis and minibuses switch from diesel to petrol. See *Hong Kong Pollution Scare Recedes as Breeze Blows Through Colony*, Agence France Presse, Jan. 4, 1996, available in LEXIS, Allnews File. For criticism of corporate Hong Kong's concern for the environment, see Ruth Mathewson, *Top Companies Fail Basic Green Test*, S. CHINA MORNING POST, Nov. 6, 1994, at 4.

226. Genevieve Ku, *Tung Seeks Sewage Plan Review*, S. CHINA MORNING POST, Nov. 23, 1996

questioned Mr. Tung's commitment to protecting the environment.²²⁷ The members of the pre-reversion Legislative Council who were the leading voices in favor of tightening environmental protection also tended to be advocates of greater democracy. China excluded such individuals from the provisional SAR legislature. Third, obsession with maintaining economic development is likely to dominate politics in the SAR. In such a context, arguments traditionally made against tightening environmental regulation—that further regulation will undermine economic growth—are likely to carry particular force. China's concern with maintaining Hong Kong's role as an economic center may similarly lead it to turn a blind eye to attempts by the SAR's legislature to weaken environmental laws or ignore international environmental obligations.²²⁸

Yet the ability of the SAR legislature to refuse to translate international environmental norms into local law will also be a test of the territory's autonomy in other spheres. In the short term, it is unlikely, if not inconceivable, that the SAR legislature will challenge Beijing on human rights issues. But any actions by the SAR government to assert autonomy in international obligations the Basic Law does not explicitly delegate to the SAR may, over time, lead to a legislature that is more willing to exert its autonomy in other fields.

The foregoing discussion is not meant to suggest that it is likely that the Hong Kong SAR's legislature will directly challenge Beijing's

at 6 (internal quotation marks omitted). Provisional legislators have similarly objected to the polluter pays principle, stating that it would harm economic growth. See Reggie Rathour, *No Backing for Polluter-Pays Scheme*, H.K. STANDARD, Sept. 23, 1997, available in LEXIS, World Library, Curnws File (reporting criticism of provisional legislators for failing to support the polluter pays principle).

227. See Angela Li, *Tung Accused of Bias Against Green Views*, S. CHINA MORNING POST, Dec. 7, 1996, at 6 (reporting claims that Tung "just listens to the business sector" (quoting Conservancy Association chairman Ng Cho-nam) (internal quotation marks omitted)); Alison Smith, *Tung Success Worries Greens*, S. CHINA MORNING POST, Dec. 31, 1996, at 7 (reporting that one environmental organization ranked Tung's election as Chief-Executive as "the biggest environmental concern of the year"); FRIENDS OF THE EARTH, *supra* note 44 (stating that Tung's "background is pro-business and there are few green voices in the new provisional legislature" but noting that Friends of the Earth hopes "that better communication with the PRC will mean increased action on cross-boundary pollution and development issues"). But see *Grassroots Bodies Want Clear Policy on Welfare, Homes*, H.K. STANDARD, Dec. 11, 1996, available in LEXIS, World Library, Curnws File (reporting environmentalists' belief that Tung's "links with China will help in tackling cross-border pollution problems" (quoting Friends of the Earth—Hong Kong spokesperson Lisa Hopkinson) (internal quotation marks omitted)). Environmentalists were also critical of Mr. Tung's predecessor, Hong Kong Governor Chris Patten. See, e.g., Patricia Young, *Pledges Stall at Planning Stage*, S. CHINA MORNING POST, Sept. 25, 1995, at 6 (detailing criticisms of Patten's environmental record); Patricia Young, *Lack of Vision Hampers War Against Pollution, Say Groups*, S. CHINA MORNING POST, Oct. 12, 1995, at 4 (same).

228. But cf. MUSHKAT, *supra* note 76, at 36 (arguing that Hong Kong "may be internationally responsible for violating its obligations under treaties to which [it] is a party," including "its obligations pertaining to . . . protection of the environment").

dictates in any area. A more likely scenario is that Beijing will turn a blind eye to the SAR's environmental policy, even if such policy involves disregard of international obligations. Nevertheless, even if the Hong Kong legislature does not directly challenge Beijing, any failure to enact legislation implementing international environmental obligations may be a *de facto* assertion of autonomy in environmental policy, local and international.

The preceding discussion is subject to two caveats. First, environmental agreements are not self-executing even in countries where international obligations are ordinarily self-executing. Although environmental treaties are "cast in the language of state obligation," such treaties are "designed ultimately to change the behavior of private actors," and thus "states must enact domestic legislation and establish administrative machinery."²²⁹ Thus even China must enact legislation to give effect to its international environmental commitments. Second, even if Hong Kong is considered part of China for the purposes of international environmental law, China will not be obliged to give effect to all treaty obligations in Hong Kong. Treaties may require China to take certain steps—such as prohibiting the import of controlled species under CITES, or cataloguing greenhouse gas emissions under the Climate Change Convention, in all areas under its jurisdiction, but China may choose to comply with other provisions—such as reducing emissions of controlled substances—in some areas and not in others.²³⁰ China might thus choose not to require compliance by Hong Kong. Neither caveat undermines the importance of the different status of international agreements in Hong Kong and China. Environmental laws China enacts pursuant to international obligations will not be applicable in Hong Kong, and absent incorporation of such international agreements into Hong Kong law the SAR will not be obligated to enact such legislation, although Beijing could apply national laws to Hong Kong or force Hong Kong to comply with national laws.²³¹ Moreover, in the case of international agreements that require equal application in all areas of a country's territory, giving local effect to international obligations will require the approval of the SAR legislature.

229. Chayes & Kim, *supra* note 60, at 3.

230. Environmental agreements that track national emissions do not require equal measures in all areas of a country.

231. *Cf. supra* note 220 (discussing application of national laws in Hong Kong).

G. Inconsistency of International Agreements and the Erosion of State-only Participation

The problems the previous sections describe are not the Basic Law's creation alone. The inconsistencies that will exist if Hong Kong, a non-sovereign entity, is permitted membership in the WTO but not autonomy in environmental agreements are due to more general inconsistencies between the international trade and environment fields. Trade agreements permit membership by subnational units; environmental agreements do not. Such a distinction becomes questionable as the two areas become increasingly intertwined. Similarly, inconsistencies in development status may not have raised significant problems to date because the treaties themselves are able to operate largely independent of each other. As trade agreements develop to encompass provisions regarding the environment—just as environmental agreements include provisions regarding trade—it may be increasingly difficult to sustain radically different measurements of development status. The potential incoherence of the differing definitions of trade and the environment is perhaps best demonstrated by the Basel Convention. As an OECD member, Mexico may soon be banned under the Basel Convention from exporting hazardous waste to “developing” nations; Hong Kong, with a per capita income more than twice that of Mexico, will not face such restrictions.

Additionally, Hong Kong's status in international environmental agreements challenges the conventional belief that participation in environmental agreements should be by states, not sub-national units. The rationale behind the conventional wisdom has been that requiring national participation may raise environmental standards in an entire nation. In Europe, participation in international treaty-making is increasingly by a supra-national unit, the European Union. Yet Hong Kong's position in the ozone agreements demonstrates that, in some cases, requirements of national compliance may reduce environmental obligations in certain parts of a country.²³² Allowance of membership by sub-national units in the GATT and the Multi-Fiber Arrangement appears an anomaly when compared to the general trend toward supra-national organizations. In a world with weakening sovereignty and increasing interconnectedness, however, Hong Kong's experience suggests that it may be desirable to allow sub-national units to participate in areas traditionally restricted to states.

232. This observation is not unique to Hong Kong. A similar argument can be made regarding the European Union's move to a common environmental policy.

III. THE BASIC LAW AND THE RESOLUTION OF TRANSBOUNDARY ENVIRONMENTAL PROBLEMS IN THE PEARL RIVER DELTA

This Article has thus far explored the ways in which the Basic Law fails to consider the complexities and contradictions inherent in attempts to define Hong Kong's status in international environmental law. Many of these problems trace back to the Basic Law's attempts to grant Hong Kong significant, but carefully delineated, autonomy without China ceding its sovereignty over Hong Kong; this Article has shown how the structure the Basic Law creates is inapplicable to international environmental law. The actual effect these problems have on efforts to restore and protect Hong Kong's environment are unclear: the status of international environmental law instructs more about the Basic Law than it does about Hong Kong's environmental policies. Yet the Basic Law's emphasis on separation may also impede efforts to address Hong Kong's environmental woes. This section examines the scope of cross-border pollution in the Pearl River Delta and pre-reversion efforts at regional environmental planning. Such examination yields two observations. First, Hong Kong's problems are integrated with Guangdong's, and thus Hong Kong can only address its environmental problems in cooperation with authorities across the border. Second, the Basic Law's emphasis on separation without providing for a clearly defined or functional sphere of autonomy may frustrate efforts at regional problem solving.

A. The Scope of Cross-Border Environmental Problems

The effect of pollution from Guangdong on Hong Kong is potentially immense.²³³ Hong Kong receives more than two-thirds of its water from Guangdong, and environmentalists have repeatedly expressed concern that continued development in Guangdong threatens Hong Kong's water supply.²³⁴ In 1995, Hong Kong's director of envi-

233. See Patricia Young, *Bordering on a Crisis*, S. CHINA MORNING POST, Jan. 14, 1995, at 16; see also Liu Jianhua, Peter Hills & Bill Barron, *Cross-Border Water Pollution and Sustainability in Hong Kong: The Need for an Integrated Approach with China 1* (1996) (unpublished paper on file with author) (arguing that "Hong Kong's environment is now under threat . . . from rapid urbanization and industrialization in Guangdong" and that "[i]t is unlikely that Hong Kong can make significant progress in the pursuit of sustainability if it fails to take account of developments in adjacent cross-border regions").

234. See, e.g., Elisabeth Tacey, *Save Water, Shower with a Friend*, S. CHINA MORNING POST, Jan. 25, 1995, at 5. According to Friends of the Earth, 76% of Hong Kong's water comes from Guangdong. See Friends of the Earth, *Agenda 2047 (Phase I): Friends of the Earth's Initial Response to the Territorial Development Strategy Review*, Dec. 1996 (on file with author). Hong Kong's agreement with China to provide water for Hong Kong runs until 2010; Hong Kong environmentalists point out that as water shortages worsen in China, Hong Kong may also face shortages.

ronmental protection commented that pollution from a power station under consideration in Guangdong had the potential to offset twenty years of improvements in Hong Kong's air quality.²³⁵ Hong Kong environmentalists have noted that Hong Kong's attempts to reduce air pollution face challenges not just due to local opposition, but also due to factories across the border in Shenzhen being the source of much of Hong Kong's air pollution.²³⁶ The Shenzhen River, which divides Hong Kong from Shenzhen, "is marked by choking, ecosystem-threatening pollution."²³⁷ Construction in Shenzhen threatens the ecology of Deep Bay, once a prime area for Hong Kong fishermen, and Hong Kong's first and only Ramsar site, the Mai Po Nature Reserve.²³⁸ Even cross-border noise pollution has become a significant environmental issue: a 1995 report stated that more than 200,000 Hong Kong residents were "being driven mad day and night by ear-splitting construction work just meters away in Shenzhen."²³⁹

Yet pollution moves in two directions: Chinese officials have blamed Hong Kong for focusing on the effects of pollution from Guangdong on Hong Kong, not the reverse. Speaking in Hong Kong, Xie Zhenhua, director of China's National Environmental Protection Agency, commented that "People here worry about whether the pollution [in Guangdong] will affect their water quality. We understand that but on the other hand, the pollution in Hong Kong might affect the water quality in Guangzhou."²⁴⁰ Similarly, Hong Kong environmental re-

See Editorial, *Water Crisis Brewing*, ONE EARTH, Spring 1997, at 2; see also *Fresh Water: The Coming Crisis?*, ONE EARTH, Spring 1997, at 6, 11 (reporting that "cross-border communication is rare" on issues related to water quality, and that as pollution increases in Hong Kong's water sources in Guangdong, "there's little Hong Kong can do besides watch, and wait").

235. See *Get Tough with China, Say Greens*, *supra* note 57; *Hong Kong Pollution Scare Recedes as Breeze Blows Through Colony*, *supra* note 225.

236. See *Hong Kong Pollution Scare Recedes as Breeze Blows Through Colony*, *supra* note 225; see also *Get Tough With China, Say Greens*, *supra* note 57 (reporting concerns that "mainland pollution could lead to a deterioration in air quality in Hong Kong").

237. Kevin Kwong, *The Frontier of Filth*, S. CHINA MORNING POST, July 27, 1996, at 1. Pollution in the river comes both from agricultural waste from Hong Kong and from industrial and household pollution from Shenzhen. See *id.* However, Hong Kong officials have noted that determining what proportion of waste comes from which side of the border is difficult, and that Shenzhen officials have authority over measuring water quality in the river. See *id.* Shenzhen environmental officials have stated that they have been unable to keep up with the city's rapid growth. See Ng Kang-chung, *Territory's Efforts Undermined by Lack of Treatment Plants and Lax Controls in Shenzhen*, S. CHINA MORNING POST, July 8, 1996, at 6.

238. See Patricia Young, *Project May Scar Deep Bay*, S. CHINA MORNING POST, Aug. 31, 1995, at 3 (reporting that reclamation project in Shenzhen directly across Deep Bay from the Mai Po Reserve threatened the reserve).

239. Billy Wong Wai-yuk, *Bordering on Madness*, S. CHINA MORNING POST, Mar. 5, 1995, at 4. The report noted that Hong Kong authorities were "helpless to act because the source was outside their jurisdiction." *Id.* Environmentalists claimed that noise from China also threatened birds in the nearby Mai Po Reserve, but a Hong Kong environmental official commented that "we are not bound to take any action due to the different jurisdictions." *Id.* (quoting Environmental Protection department spokesman Lillian Chan) (internal quotation marks omitted).

240. Kathy Griffin, *1997 Assurance*, ONE EARTH, Spring 1996, at 30 (internal quotation marks

searchers note that "Hong Kong has long exported much of its water and part of its air pollution to neighbouring regions of China."²⁴¹ Chinese officials have observed that pollution from Hong Kong comes not only in the form of pollution moving across the border, but also via Hong Kong-owned polluting industries that have relocated from Hong Kong to China over the past decade.²⁴²

Although China and Hong Kong have taken some steps toward cross-border environmental policymaking, China's views of pre-1997 attempts by Hong Kong to clean up the Hong Kong environment at times mirrored China's distrust of the departing colonial government in other areas. The Chinese government argued that Britain engaged in excessive spending, depleting the territory's coffers before Hong Kong reverted to China,²⁴³ and that Britain attempted to clean up Hong Kong's environment at the expense of China's environment. In January 1995 China demanded Hong Kong halt a multi-billion-dollar project to install new sewers and build a new sewage treatment facility in the colony. China claimed Britain should have consulted China regarding the project,²⁴⁴ and complained that the plan consisted of

omitted). Mr. Xie also stated that Hong Kong's environmental standards would not be lowered after 1997. *See id.*; *see also* Ng, *supra* note 57, at 22 (reporting Mr. Xie as stating that "Hong Kong already has a well-maintained and developed social, economic and political system" and that "[i]t would be unreasonable to force Hong Kong to follow the environmental management practices of China as they are considerably behind those of Hong Kong"). Although such a statement may have reassured Hong Kong environmentalists, the Basic Law leaves little room for NEPA to set environmental standards for Hong Kong. Unless environmental standards in Hong Kong can be said to affect China's foreign relations or state security, such standards will be wholly in the purview of the SAR legislature. China might be able to increase environmental standards in Hong Kong by signing on to new international agreements, *but see supra* text accompanying notes 209–221 (discussing need for legislation in Hong Kong to implement treaty commitments), but China cannot directly lower existing standards, except, perhaps, by the appointment of legislators not sympathetic to the environment. This is particularly the case given the central government's relation to provincial environmental legislation: national laws set minimum standards for environmental protection, and provinces are permitted to enact more stringent laws.

241. Liu, Hills & Barron, *supra* note 233, at 4.

242. *See Environment; Hong Kong, Macao, Guangdong Urged to Improve "Deteriorating Environment,"* BBC Summary of World Broadcasts, July 7, 1996, available in LEXIS, News Library, Curnws file. Guangdong's provincial government claimed that 20% of labor-intensive Hong Kong and Macao enterprises in the Pearl River Delta "fell into the category of polluting enterprises." *Id.*

243. One of the chief areas of contention was Hong Kong's construction of a new airport: China originally opposed construction of the airport out of fear that the departing British government was incurring excessive debt. For an analysis of the controversy over construction of the airport, see generally Michael S. Bennett, *Financing the Chek Lap Kok New Airport: A Case Study in Amending the Sino-British Joint Declaration on the Question of Hong Kong*, 9 J. CHINESE L. 77 (1995). A parallel exists between the sewerage plan and the airport not just in China's objections to major spending by the outgoing colonial government, but also in the colonial government waiting until virtually the last minute to engage in long-needed infrastructure projects.

244. *See* Simon Holberton, *China Opposes Plans to Clean Up HK's Fragrant Harbour: Beijing Wants HK Dollars 22bn Project Delayed while Alternatives are Considered*, FIN. TIMES, January 12, 1995, at 4 ("[O]nly in Hong Kong could a plan to clean up [the harbor] . . . become the subject of diplomatic controversy."). China's opposition appeared to be based on the desire to have a say in

"flushing Hong Kong's toilets on China's doorstep."²⁴⁵ The Hong Kong government, in turn, complained of an "unholy alliance" of environmentalists, private interests, and legislators blocking the plan.²⁴⁶

The fight over the sewage plan mirrored clashes with China over democratization:²⁴⁷ by waiting until shortly before Hong Kong's return to China to take action, the colonial government invited Chinese objections.²⁴⁸ The debate moved from disagreement over the most cost-effective route to reducing pollution in Victoria Harbour to a debate over sovereignty.²⁴⁹ The British argued that those aspects of the project that were to be completed by 1997 were not China's concern.²⁵⁰ Yet the British view, perhaps justified in discussions regarding some construction projects, was less well-founded in the context of a plan that would dump sewage into either present or future Chinese waters: regardless of Hong Kong's reversion, international norms required Britain to consult China about the plan's possible impact.²⁵¹

the project, as well as on environmental concerns. The project would have resulted in all of Hong Kong's waste being treated in a single facility, with waste then being dumped "into a deep water channel off the coast of China." *Id.* China claimed the project would damage Chinese fishing fields. *See id.* Hong Kong environmentalists also opposed the plan, largely because of objections to the dumping of semi-treated waste into Chinese waters. *See* Patricia Young, *Sewage Plan Demand*, S. CHINA MORNING POST, June 23, 1995, at 6. One Chinese academic claimed that the sewage plan would breach international environmental law regarding protection of the oceanic environment, and stated that neighboring "Zhuhai could definitely sue Hong Kong" in the International Court of Justice. Queenie Wang, *Mainland Told to Sue Over Waste Proposal*, S. CHINA MORNING POST, Dec. 4, 1994, at 2.

245. *Government Defends Sewage Disposal Plan, Cites 'Unholy Alliance' Opposing Proposal*, 17 Int'l Env't Rep. Curr. Rep. (BNA) 22, at 906 (November 2, 1994) (internal quotation marks omitted); *see also* Patricia Young, *Beijing to Reject Sewage Scheme*, S. CHINA MORNING POST, Nov. 15, 1994, at 6 (detailing China's objections to the plan).

246. *See Government Defends Sewage Disposal Plan, Cites 'Unholy Alliance' Opposing Proposal*, *supra* note 245 (internal quotation marks omitted).

247. For a description of British attempts to increase democracy in Hong Kong, *see* GHAI, *supra* note 4, at 75-78; GOODHART, ADDRUSE, DOWD & KUEHNE, *supra* note 26, at 68-72.

248. *See* Holberton, *supra* note 244 (noting that "the politicisation of the issue is a consequence of the past inaction, for which the Hong Kong government is responsible," and quoting Hong Kong Environment and Lands Department deputy secretary Tony Cooper as stating that "[w]e under-invested in the past and are trying to make up in the 1990s for what we did not do in the 1970s and 1980s" (internal quotation marks omitted)); *see also* *China Escalates Opposition to Plans Being Made by Hong Kong for Sewage Works*, 17 Int'l Env't Rep. Curr. Rep. (BNA) 24, at 998 (Nov. 30, 1994) (describing Chinese skepticism about the sewage plan, and Hong Kong attempts to prevent "formal" talks given difficulties faced in discussions on political reforms and the financing of Hong Kong's new airport).

249. *See China Escalates Opposition to Plans Being Made by Hong Kong for Sewage Works*, *supra* note 249 (quoting Hong Kong's chief environmental officer, David Hall, on the project as stating that "[i]t's an issue of sovereignty" (internal quotation marks omitted)).

250. *See Sewerage Master Plan Study Commissioned for Tseung Kwan O Area*, 10 Int'l Env't Rep. Curr. Rep. (BNA) 15, at 646 (July 27, 1994).

251. The plan ran into further trouble after an independent expert panel retained by the Hong Kong government failed to support the plan. The panel noted that dumping waste into Chinese waters "might violate regional water quality standards unless higher treatment was given to the waste." *Government Does About-Face on Ambitious Sewage Disposal Plan*, 18 Int'l Env't Rep. Curr.

Yet environmental reforms in Hong Kong differ from political reforms: regardless of Hong Kong's reversion to China, efforts to clean up the Hong Kong environment will only succeed via cooperation with Guangdong.²⁵² To a limited degree, Hong Kong and Guangdong have recognized the need for coordinated action, establishing the "Hong Kong-Guangdong Environmental Protection Liaison Group" in 1990 "to improve co-operation between the Hong Kong and Guangdong governments on environmental issues of mutual concern."²⁵³ The group, which meets once a year, has largely been concerned with issues of water pollution and exchanges of information. Despite these annual meetings,²⁵⁴ environmental planning in the region has continued to suffer from a lack of coordination. One example²⁵⁵ came in August 1995, when the Hong Kong government stated that it had been unaware of a major reclamation project in Shenzhen until a Hong Kong

Rep. (BNA) 2, at 63 (Jan. 25, 1995); see also Hong Kong Government Environmental Protection Department, *Review of Strategic Sewage Disposal Scheme Stage II Options, Executive Summary and International Review Panel Report* 28-31 (1995) (summarizing findings of review panel) (on file with author); Emily Thornton, *Affluence and Effluents*, FAR E. ECON. REV., Nov. 14, 1996, at 57 (reporting that Hong Kong was rushing to finish the first stage of the sewage treatment facility before July 1, 1997, and that a joint Chinese-Hong Kong task force was investigating the project's second stage).

252. See Hung, *supra* note 173, at 263 (arguing that Hong Kong and Guangdong need "[a] commonly agreed set of rules for the discharge of pollutants into common waters as well as a joint enforcement team").

253. WHITE PAPER THIRD REVIEW, *supra* note 72, at 35. Despite the existence of the group, one Hong Kong environmentalist noted that Hong Kong environmental officials were, until recently, reluctant to talk with their Guangdong or NEPA counterparts; part of this reluctance stemmed from Hong Kong government limits on official contacts with PRC officials. Author's interviews in Hong Kong, March 1997. Hong Kong environmentalists report that, in general, Hong Kong's non-government environmental organizations have had far more extensive contacts with provincial and national environmental officials in China than have Hong Kong environmental officials. *Id.*

254. Issues the body discussed at its January 1996 meeting included pollution in Mirs Bay and Deep Bay, "exchanges of information on major infrastructure projects," "a seminar . . . on pollution control in power stations," the next liaison meeting, a study of endangered white dolphins, and "a programme of visits." WHITE PAPER THIRD REVIEW, *supra* note 72, at 36. For reports of earlier meetings of the body see *HK-Guangdong Environmental Group Meets*, Xinhua News Agency, December 22, 1994 available in LEXIS, News Library, Xinhua File; see also R.J.S. Law, *Close Ties with China*, in ENVIRONMENT HONG KONG 1995, at 98, 98-99 (Hong Kong Envtl. Protection Bureau ed., 1995) (noting numerous "informal technical expert meetings during 1994," as well as plans to study pollution in Deep Bay and an agreement to exchange environmental information on development projects in Hong Kong and Shenzhen). Environmental groups have criticized Hong Kong officials for failing to take a harder line in discussions with Guangdong environmental authorities. See *Get Tough with China, say Greens*, *supra* note 57 (citing Hong Kong environmentalists' arguments that Hong Kong should press Guangdong authorities to adopt Hong Kong's air pollution standards).

255. An additional example is wetland conservation. The manager of Hong Kong's Mai Po Nature Reserve, which borders Shenzhen, stated that "There is an uncoordinated approach to development from both the Hong Kong and Shenzhen sides," and called on the Hong Kong-Guangdong Joint Environmental Protection Liaison Group to address development at the border. Anne Stewart, *Nature Reserve Action Plea*, S. CHINA MORNING POST, Oct. 10, 1996, at 7 (internal quotation marks omitted).

environmental group informed the government of the threat the project posed to Hong Kong's environment.²⁵⁶ One Chinese academic notes that while both Hong Kong and Guangdong officials conduct daily tests of water from the Dongjiang River, Hong Kong's primary water source, they do so separately and non-comprehensively.²⁵⁷ Moreover, despite increasing cross-border environmental problems, the Hong Kong government's 1996 "Third Review on the 1989 White Paper" makes only passing references to China.²⁵⁸ Coordination appears at its weakest in the most sensitive areas, most prominently the Chinese nuclear power plant at Daya Bay. Hong Kong environmentalists have repeatedly raised concerns about contamination from the plant,²⁵⁹ and about lack of coordination between Hong Kong and Chinese officials.²⁶⁰

256. See Young, *supra* note 238. Although Hong Kong and Guangdong were at the time engaged in a project to control pollution in the Shenzhen River, the reclamation project was "not a joint project and [was] not related to Hong Kong itself," and thus the Shenzhen government did not consult Hong Kong officials. See *id.* (quoting Raymond Cheung Tat-king of the Hong Kong Drainage Services Department). Hong Kong environmentalists pointed to Hong Kong's experience with reclamation to warn of the threat the Shenzhen project posed to the Hong Kong environment. See *id.* Yet given Hong Kong's history of environmentally destructive reclamation projects, the Shenzhen authorities are unlikely to be persuaded that they should be responsible for protecting Hong Kong's wetlands.

Coordination relating to pollution in Deep Bay itself appears to have been more successful. See Clarence Tsui, *Cross-Border Team to Study Bay Pollution*, S. CHINA MORNING POST, July 22, 1995, at 5 (reporting commissioning of report on pollution in Deep Bay "so as to develop a regional control strategy for the bay"). As of 1995, one third of Shenzhen's waste went directly into Deep Bay, though construction was under way on pipes that would direct sewage to other waters. See *id.* Hong Kong and Guangdong officials also agreed to develop plans to protect Mirs Bay "rather than wait for it to reach the stage Deep Bay is in." Keith Wallis, *Cleanup Plan Under Threat*, S. CHINA MORNING POST, Jan. 10, 1996, at 4 (quoting Hong Kong Environmental Protection Department assistant director Malcolm Broom) (internal quotation marks omitted).

257. See Chen, *supra* note 50, at 17. Professor Chen argues that it would be preferable for Hong Kong's environmental and water authorities "to join forces with their counterparts in southern China to test the water and work out problems *before* it's piped into the territory." *Id.*

258. The review notes the ongoing efforts of the Hong Kong-Guangdong Environmental Protection Liaison Group, mentions the need to coordinate with China on ocean pollution, and notes the likelihood of continued growth in the Pearl River Delta. See WHITE PAPER THIRD REVIEW, *supra* note 72, at 35-36, 41. Yet such references are often vague, like the mention of possible pollution to China's waters from Hong Kong's planned new sewage facility: "Discussions with the PRC on EIA for the oceanic outfall will continue." WHITE PAPER THIRD REVIEW, *supra* note 72, at 59.

259. See, e.g., Elizabeth Tacey, *Daya Bay Contamination to Increase During Refueling*, S. CHINA MORNING POST, Dec. 10, 1994 (reporting a potential tenfold increase in radiation during refueling at the plant); Editorial, *Open Communication Lines on Daya Bay*, S. CHINA MORNING POST, January 25, 1996, at 12 (stating that "Daya Bay's record in its first year of operation has not been an encouraging one" and blaming the plant for greeting requests for information about the plant with "stone-walling and evasion"); Patty Koo, *Nuclear Exposure*, ONE EARTH, Summer 1996, at 28 (describing continued concerns over the operation of Daya Bay).

260. For a discussion of public reaction to China's plans to build the Daya Bay nuclear plant, see IAN SCOTT, POLITICAL CHANGE AND THE CRISIS OF LEGITIMACY IN HONG KONG 309-12 (1989). Scott notes that China's plans to build Daya Bay placed the Hong Kong government "in a situation where it had to endorse a decision opposed by a majority of the territory's inhabitants" and that while "the government argued that it had no jurisdiction over a plant which was being

B. *The Basic Law: An Impediment to Solution*

Hong Kong's return to China should, in theory, make regional solutions more attainable: policymaking can be conducted absent the political tensions that undermined attempts at regional solutions pre-reversion. Yet although official contacts between Hong Kong and Guangdong will increase, any improvements in environmental policy coordination will occur despite, and not due to, the Basic Law. There are two reasons the Basic Law itself may be an impediment to effective resolution of environmental problems in the Pearl River Delta. First, although the Basic Law does not impose any actual bars to increased coordination between Hong Kong and China, the Basic Law's emphasis on keeping Hong Kong separate from the rest of China reflects a view that may discourage attempts at cross-border problem solving.²⁶¹ Second, the Basic Law's delegation of local environmental policymaking to the SAR government suggests that Hong Kong's environmental policy can be conducted without regard for environmental policy on the opposite side of the Shenzhen River; in reality, Hong Kong's environmental problems can only be fully addressed in coordination with both Guangdong's environment and the environmental problems facing China as a whole.

By emphasizing Hong Kong's separation from the rest of China, the Basic Law encourages Hong Kong to think of its environmental problems as distinct from those in China. Three articles of the Basic Law are directly relevant to how Hong Kong views cross-border environmental problems. First, Article 119 states that "[t]he Government of the Hong Kong Special Administrative Region shall formulate appropriate policies to . . . pay regard to the protection of the environ-

built in China, the project was not viable unless there was a market in Hong Kong for the electricity generated at Daya Bay." *Id.* at 312.

Coordination may be improving in other areas: when China shut the door on imports of hazardous waste, thus potentially leaving Hong Kong to deal with waste transhipped through the territory on its way to China, Hong Kong environmental officials met with mainland officials to discuss appropriate steps for dealing with the problem. See Sharma, *supra* note 204.

261. See Alex Lo, *Pollution Policies 'Hindered by Split'*, S. CHINA MORNING POST, Oct. 1, 1997, at 6 (reporting comments from Hong Kong environmentalists that the one country, two systems policy hampers cross-border coordination of environmental policy because Chinese authorities "do not want to see provincial governments try to influence Hong Kong" (quoting Friends of the Earth-Hong Kong Assistant Director Plato Yip Kwong-to)). *But cf.* C. K. Lau, *Tung's Bridge to the Mainland*, S. CHINA MORNING POST, Oct. 9, 1997, at 19 (arguing that Hong Kong's return to China means that consultations between Hong Kong and Guangdong "should take on a fraternal tone and help drive co-operation"); Lucia Palpal-latoc, *China Vows to Step Up Efforts for a Cleaner Environment*, H.K. STANDARD, Sept. 23, 1997, available in LEXIS, World Library, Curnws File (quoting NEPA director Xie Zhenhua as stating that "after the handover, it is now easier for China to discuss environmental problems with Hong Kong"). Hong Kong's Chief Executive has indicated that environmental planning will be included in a list of issues on which Hong Kong and Guangdong authorities will work together, but no specific actions have been taken. See *Tung Address*, *supra* note 1.

ment."²⁶² By expressly granting Hong Kong the right to design its own environmental policies, the Basic Law suggests Hong Kong can continue to formulate environmental policies in isolation from regional concerns. Second, Article 106 explicitly protects the SAR's financial independence, providing that the SAR "shall use its financial revenues exclusively for its own purposes, and they shall not be handed over to the Central People's Government."²⁶³ Article 106 may not technically bar Hong Kong from spending money on environmental measures in Guangdong that benefit Hong Kong, but it may make such expenditures difficult. Article 106 reflects fears in Hong Kong that China will misuse Hong Kong's wealth; even if Article 106 does not formally bar the Hong Kong government from spending money across the border, political concerns may make such expenditures impossible.²⁶⁴

Third, Article 22 states that "no province, autonomous region, or municipality directly under the Central Government may interfere in the affairs which the Hong Kong Special Administrative Region administers on its own"²⁶⁵ The meaning of Article 22, like the meaning of Article 160, is ambiguous. Combined with Article 119's suggestion that local environmental policy is within the sphere of the SAR's autonomy, Article 160 may make the SAR government reluctant to engage in substantive discussions related to environmental policy with either NEPA or provincial environmental authorities. Moreover, al-

262. Basic Law, art. 119.

263. Basic Law, art. 106.

264. The Basic Law may be indirectly responsible for such concerns: by failing to create a system that assures Hong Kong of its autonomy, the Basic Law may make it difficult for future Hong Kong governments to take steps that the Hong Kong public sees as undermining Hong Kong's economic welfare.

Environmentalists and the business community are likely to object to efforts to spend Hong Kong's finances on environmental measures in Guangdong, even where such measures are in Hong Kong's own interest. One Hong Kong academic commented that allowing Hong Kong to spend money on the mainland would suggest that Hong Kong's pollution is due primarily to pollution from China, and thus might both discourage Hong Kong from taking steps to address local environment problems and obscure the fact that Hong Kong is also exporting pollution to Guangdong. Author's interviews in Hong Kong, March 1997. Another Hong Kong observer said that fears of "Hong Kong's [financial] reserves being sucked dry" by China will prevent Hong Kong from spending money on the mainland, regardless of whether the Basic Law permits such spending. *Id.*

Environmentalists argue that concerns about spending money in China have already undermined the Hong Kong environment: for example, they argue that the best location for the construction of a fuel supply for Hong Kong's new airport would have been on an island in China, but the location was not politically feasible due to opposition in Hong Kong. *Id.*

265. Basic Law, art. 22. Despite this, many Chinese provinces are already operating in Hong Kong through province-owned commercial entities. Author's interviews in Hong Kong, March 1997. The provision restricting provincial interference in Hong Kong may have been particularly aimed at Guangdong: Beijing has long feared the creation of a Cantonese speaking block: in southern China, and has rarely, if ever, sent a Cantonese speaking official to manage its affairs in Hong Kong. *Id.* Despite such fears, however, Hong Kong's pre-1997 representatives in the NPC served as members of the Guangdong delegation. *Id.*

though both Hong Kong and Guangdong are subnational units,²⁶⁶ Hong Kong's special status means that Hong Kong and Beijing may be sensitive to interactions that suggest Hong Kong is no different from other subnational units. Combined with Article 160, such concerns imply regional environmental planning may involve coordination by Beijing.²⁶⁷ Yet intervention by Beijing may violate Article 119's grant of autonomy in environmental policy.

Even if Hong Kong and Guangdong are able to increase coordination of their environmental policies, coordination alone is unlikely to make a significant dent in the region's environmental woes. Although one Chinese environmental official has called for the establishment of a regional agency to address environmental problems,²⁶⁸ arguing that "without a unified discharge standard and a limit for the total volume of discharged waste, the environment in the area cannot be improved in the near future,"²⁶⁹ Hong Kong's and Guangdong's environmental regulatory frameworks differ significantly. Standardization will thus be extremely difficult. A recent comparison of the environmental regulatory processes in Hong Kong and Guangzhou found that business and commercial interests play a much greater role in formulation of pollution standards in Hong Kong than in Guangzhou, that Guangzhou officials play a more active role in carrying out environmental impact assessments than do their Hong Kong counterparts, and that Guangzhou environmental officials have greater discretionary power over environmental impact assessments than do Hong Kong officials.²⁷⁰ Additionally, Guangzhou's approach to the control of water pollution is based on the polluter pays principle, while Hong Kong relies on command and control policies.²⁷¹ Unlike its Guangzhou counterpart, the Hong Kong EPD lacks the ability to fine polluters directly—the EPD must rely on Hong Kong's courts to punish polluters.²⁷² More-

266. Cf. Wu, *supra* note 17, at 68–69 (stating that the Basic Law "makes clear that the Hong Kong SAR is on the same administrative level as a province, an autonomous region, or a municipality directly under the control of the Central Government"); Xiao, *supra* note 17, at 91 (stating that the Hong Kong SAR's autonomy "is still local autonomy").

267. *But cf.* Xiao, *supra* note 17, at 91 (stating that "no department [or] commission" of the central government "will be allowed to issue orders" to the Hong Kong SAR).

268. See *Environment; Hong Kong, Macao, Guangdong Urged to Improve "Deteriorating Environment," supra* note 242. The report stated that Chinese Environmental Protection Bureau engineer Ma Xiaoling said that regional environmental problems required cooperation among Guangdong, Hong Kong, and Macao. See *id.*

269. *Id.* (quoting China Environmental Protection Bureau engineer Ma Xiaoling) (internal quotation marks omitted). Ma noted that future infrastructure projects are likely to result in increased pollution. See *id.*

270. Shui-Yan Tang & Carlos Wing-Hung Lo, *Institutions and Environmental Regulatory Processes: Comparing Hong Kong and Guangzhou, China* (unpublished manuscript on file with author).

271. See *id.* at 11.

272. See *id.* at 13. Professors Tang and Lo also note that Guangzhou's water pollution controls

over, given the Basic Law's delegation of local environmental issues to the SAR government, any regional environmental body would lack lawmaking power, and would probably be viewed with suspicion in a Hong Kong concerned with maintaining autonomy and economic growth.

Furthermore, standardizing environmental regulation in Hong Kong and Guangdong is likely to be both ineffective and inefficient. Actual controls will depend as much on enforcement as on actual standards.²⁷³ And to the degree to which reducing pollution levels is cheaper in Guangdong than in Hong Kong,²⁷⁴ Hong Kong should pay to reduce pollution levels across the border in Guangdong, rather than reduce pollution in Hong Kong.²⁷⁵

Competitive pressures are likely to undermine attempts by Hong Kong and Guangdong to agree on tighter environmental controls. Experience elsewhere in China shows the difficulty China has faced in addressing cross-border environmental problems among provinces. Although Hong Kong is no longer a major manufacturing center, Guangdong remains in competition with other provinces and regions of China for investment, and thus may be unwilling to increase environmental standards absent application and enforcement of such standards in other provinces. Without national standards—which would not actually apply to Hong Kong—attempts by Guangdong and Hong Kong to address environmental concerns may, over the long term, fall victim to a “race to the bottom” within China.²⁷⁶

include uniform standards, while Hong Kong's standards differ for different licensees, that Guangzhou environmental authorities have “financial interests in enforcement,” while Hong Kong officials do not, and that Hong Kong's EPD “works as a partner with clients,” while its Guangzhou counterpart “dominates agency-client relationships.” *Id.* at 33. For a discussion of problems that undermine the effectiveness of environmental impact assessments in Guangzhou, see Shui-Yan Tang, Carlos Wing-Hung Lo, Kai-Chee Cheung, & Jack Man-Keung Lo, Institutional Constraints on Environmental Management in Urban China: Environmental Impact Assessment in Guangzhou and Shanghai (Jan. 7, 1997) (unpublished paper on file with author).

273. A regional agency would lack enforcement power. Standardizing environmental standards, or laws, in Hong Kong and Guangdong would not necessarily result in standardized enforcement. *Cf.* Jin Huang & Andrew Xuefeng Qian, “One Country, Two Systems,” *Three Law Families, and Four Legal Regions: The Emerging Inter-Regional Conflicts of Law in China*, 5 DUKE J. COMP. & INT'L L. 289, 308 (1995) (arguing that given “different legal, social, and economic systems,” “[h]aving the national legislature enact uniform substantive laws applicable only to certain legal regions might create more problems than it would solve”).

274. *See* Liu, Hills & Barron, *supra* note 233, at 6.

275. For example, Hong Kong's environment would be significantly improved if Hong Kong's neighbors were burning cleaner fuel than they do at present. Author's interviews with academics in Hong Kong, March 1997.

276. *Cf.* Richard B. Stewart, *Pyramids of Sacrifice?: Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1201–02, 1215 (1977) (arguing that “[s]tate officials have few strong incentives to assume the administrative and political burdens of carrying out environmental policies dictated by federal agencies” and that “decentralized environmental decisionmaking [is] flawed because spillover impacts of decisions in one jurisdic-

Hong Kong and Guangdong thus may find it difficult to tighten environmental standards absent increased standards elsewhere in China.²⁷⁷ Although comparisons between China, a non-federal nation,²⁷⁸ and western federal countries are difficult, arguments by western academics for a mixture of centralized environmental policy and local autonomy²⁷⁹

tion on well-being in other jurisdictions generate conflicts and welfare losses not easily remedied under a decentralized regime"). The "race to the bottom" phenomenon has been blamed for problems in enforcing environmental standards in China. See KENNETH LIEBERTHAL, *GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM* 288 (1995). Professor Lieberthal writes that in China, "it is in the specific interest of each county for all other counties to sacrifice in order to achieve [the] collective interest [of environmental protection]." *Id.*

However, enforcement of environmental laws and regulations may not yet be strong enough anywhere in China to lead companies to relocate to areas where standards, or enforcement measures, are less strict. NEPA has stated that "foreign money that comes to China is basically lured by cheap labour, cheap land prices, huge market potential and lower environmental standards." Korski, *supra* note 50 (internal quotation marks omitted). It is not clear whether decisions as to where in China to invest are influenced by local environmental standards. Cf. Tang, Lo, Cheung, & Lo, *supra* note 272, ("[U]nless a high level of environmental consciousness is developed among local residents and they have an efficient means of pressuring government officials to act on their concerns, local government officials will continue to emphasize economic growth at the expense of environmental protection because of the competitive pressure they face from other local jurisdictions.").

277. The race to the bottom phenomenon in environmental law may contrast with other areas in which increased contacts between Hong Kong and China have led to higher standards in China. For example, the listing of Chinese companies on the Hong Kong stock exchange has led to improved accounting standards in some large enterprises in China. However, increased contacts may, in some cases, have weakened Hong Kong's standards: the Hong Kong stock exchange has made concessions in its usual requirements to some Chinese companies listing on the exchange.

278. See XIANFA preamble (1982) (declaring that China is a "unitary state"); cf. WANG, *supra* note 25, at 95 ("China under the Basic Law is not a federation but a unitary state, and the Hong Kong SAR will be an autonomous region."); Xiao, *supra* note 17, at 90 (stating that Hong Kong "cannot be independent from China[,] neither can it be a member of [a] federal system"); cf. GHAI, *supra* note 4, at 182 (stating that the SAR "will have more powers than any autonomous region or federal unit, but their exercise will be subject to closer scrutiny and supervision than elsewhere").

Although China is, at least in name, a unitary state, it has established five provincial-level autonomous regions where ethnic minorities form a significant portion of the population (Tibet, Inner Mongolia, Xinjiang, Guangxi, and Ningxia), as well as numerous autonomous prefectures, counties, and townships. See GHAI, *supra* note 4, at 115 n.14. The actual autonomy of such regions is, however, limited, as "the broad framework within which the system operates denies autonomy of choice of policy" and "[t]here is no mechanism to resist encroachments on their powers by the centre." *Id.* at 116-17. Professor Ghai similarly argues that China's Special Economic Zones lack autonomy, as "they are merely instruments to carry out policy decided by the normal institutions of the state." *Id.* at 118. One irony of reform-era China is that although China's "autonomous regions" lack autonomy, many local areas in China enjoy autonomy in a wide range of local issues.

Federalism remains somewhat of a taboo topic within China, in part due to fears that federalism may lead to the collapse of central government control, and in part due to the advocacy of federalism by Chinese dissidents.

279. For a recent argument in favor of such a mixture in environmental regulation in the United States, see Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996). Professor Esty argues that "[i]n the realm of practice rather than theory, environmental policymakers remain justified in fearing the dynamic of a regulatory race to the bottom." *Id.* at 638. Professor Esty recognizes, however, that centralized environmental policy making "will not prove to be optimal in all cases" and thus advocates "a multitier regulatory structure capable of mixing and matching decision levels depending on the issue at hand." *Id.* at 652.

resonate in China. Tightening of national standards in China has often followed regional experiments in environmental lawmaking.²⁸⁰ Yet excessive autonomy for provincial and local authorities has also led to under- or non-enforcement of environmental laws.

Hong Kong's paradox is that it may have both too much and too little autonomy in environmental lawmaking. To the degree that the central government is more proactive than future SAR governments in addressing environmental issues, Hong Kong's environment will suffer from the non-application of national environmental standards. Yet to the degree to which Hong Kong's environmental controls exceed those across the border, Hong Kong's standards may be ineffective when faced with increasing pollution from Guangdong. Agreements with Guangdong may be ineffective given competitive pressures, a lack of interest in tightening environmental laws at the provincial or local level, and Guangdong's own lack of autonomy in environmental policy.²⁸¹ And NEPA's lack of jurisdiction over Hong Kong, and Hong Kong's own fears of interference by Beijing, may mean Hong Kong is not consulted in the formation of new national standards, standards which will affect the SAR without being applied there.²⁸²

IV. RETHINKING AUTONOMY IN HONG KONG, CHINA

Hong Kong's environmental law paradox mirrors Hong Kong's status in China more generally: the Basic Law both over-emphasizes Hong Kong's separation from China and fails to grant Hong Kong sufficient autonomy. As a result, the Basic Law's fundamental weakness is its failure to secure Hong Kong's place in China.

The integration of Hong Kong's and Guangdong's economies mirrors the interdependence of their environments, and underscores the impossibility of separation. Despite the Basic Law's emphasis on Hong Kong's economic autonomy, Hong Kong's economic integration with Guangdong was well underway when China promulgated the Basic

280. Author's interviews with academic and environmental officials in Beijing, Wuhan, and Nanjing, June–August 1996. Western commentators have often focused on environmental problems in China's fastest growing regions, particularly Guangdong, *see, e.g.*, Paul J. Smith, *Free Trade and the Environment: Will Free Trade Save China's Environment?*, 1 *BUFF. J. INT'L L.* 27, 28 (1994), but Chinese officials and academics argue that China's fastest developing areas, particularly Beijing, Shanghai, Guangdong, and Jiangsu, are taking the lead in introducing stricter environmental standards. Author's interviews with academic and environmental officials in Beijing, Nanjing, and Wuhan, summer 1996. *But cf.* Alford & Shen, *supra* note 53, at 133 (stating that China's environmental "laws presuppose a common national commitment to the goal of environmental protection and a higher degree of administrative cohesion than currently exists").

281. Chinese provinces may not have environmental standards lower than those national laws impose, but may have higher standards. *See* Alford & Shen, *supra* note 53, at 140.

282. Hong Kong may, at least in theory, be consulted in the formation of national laws via its representatives in the NPC.

Law in 1990.²⁸³ By 1992, 20,000 Hong Kong factories had moved north of the border,²⁸⁴ and more than twenty percent of Hong Kong's currency was in circulation in China.²⁸⁵ The economic integration of Hong Kong and Guangdong suggests that, like environmental policy, economic policy in the Pearl River Delta may be best served by regional planning.²⁸⁶ For example, over time it may make little sense for Hong Kong and Guangdong to continue to use separate currencies. As formal and informal trade barriers between Hong Kong and Guangdong fall, it may be questionable for Hong Kong to have autonomous status in the WTO but for Guangdong to be considered simply a part of China in the WTO.²⁸⁷

Hong Kong's and Guangdong's economic and environmental integration also demonstrates the emptiness of the Basic Law's grant of autonomy to Hong Kong, both internationally and within China. As this paper has shown, Hong Kong's autonomy as an international actor is likely to be unsustainable due to both the interrelation of economic and environmental issues, and to Hong Kong's economic and environmental integration with the rest of China. By creating a framework that may result in conflicts in Hong Kong's and China's positions in international agreements and organizations, the Basic Law invites Chinese interference in Hong Kong's autonomous spheres. Negotiations in the WTO will increasingly include discussions not only of environmental issues, but of labor standards and domestic competition policy. An autonomous trade policy for Hong Kong will necessarily entail autonomy in these areas as well; to the degree to which Hong Kong defers to China's strong views in such areas, Hong Kong's autonomy

283. See generally *THE HONG KONG-GUANGDONG LINK: PARTNERSHIP IN FLUX* (Reginald Yin-Wang Kwok & Alvin Y. So eds., 1995) (discussing Hong Kong's interaction and integration with Guangdong). On the economic interdependence of Hong Kong and southern China, see Sung Yun-wing, *Patterns of Economic Interdependence in the Natural Economic Territory*, in *SOUTHERN CHINA, HONG KONG, AND TAIWAN: EVOLUTION OF A SUBREGIONAL ECONOMY* 14, 14-27 (Jane Khanna ed., 1995). But cf. Chen Dezhaio, *Effect of the National Economic Territory on China's Economic and Political Strategies*, in *SOUTHERN CHINA, HONG KONG, AND TAIWAN*, *supra*, at 71, 74-75 (arguing that such integration will not lead to a "transformation into an independent economic area" because "ultimate authority rests with the central government").

284. See Ming K. Chan, *All in the Family: The Hong Kong-Guangdong Link in Historical Perspective*, in *THE HONG KONG-GUANGDONG LINK*, *supra* note 283, at 31, 50.

285. *Id.*; see also Xueqiang Xu, Reginald Yin-Wang Kwok, Lixun Li & Xiaopei Yan, *Production Change in Guangdong*, in *THE HONG KONG-GUANGDONG LINK*, *supra* note 283, at 135, 148 (noting that the stability of the Hong Kong dollar has resulted in Guangdong having lower inflation rates than other regions of China).

286. Prior to 1997, Hong Kong and Guangdong worked together in the development of certain infrastructure projects, despite political tensions. Cf. *Shenzhen to Enhance Economic Ties with Hong Kong*, Xinhua News Agency, Jan. 15, 1996, available in LEXIS, News Library, Curnvns File (describing areas of cooperation between Hong Kong and Shenzhen, but omitting environmental protection).

287. Assuming China is permitted to join.

will be weakened. Yet any reduction of Hong Kong's autonomy in such areas will likely reflect back on Hong Kong's status in international organizations. Will Hong Kong be permitted independent status in a WTO that includes China if Hong Kong is no longer viewed as an autonomous customs territory?²⁸⁸ Moreover, by ignoring the fact of interdependence, the Basic Law may allow for greater indirect influence over Hong Kong: just as China's tightening of controls on shipments of hazardous wastes led Hong Kong to comply with the Basel Convention, China is already able to exert significant influence over the Hong Kong economy.²⁸⁹

The Basic Law fails to provide any guarantees of Hong Kong's autonomy. The Basic Law itself is, like delegations of power to China's provinces, a conditional grant of autonomy: the central government may issue directives to the Chief Executive, the NPC may expand the list of national laws applicable in Hong Kong, the NPC may revise or repeal the Basic Law,²⁹⁰ and the NPC may invalidate Hong Kong laws that it views as violating the Basic Law.²⁹¹ The NPC also reserves to itself the sole power to interpret the Basic Law. The Basic Law provides no mechanism for resolving conflicts over Hong Kong's autonomy; moreover, Beijing's control over the selection of Hong Kong's political leaders suggests that Hong Kong's leaders are unlikely to challenge incursions into Hong Kong's autonomy.

The consequence of the Basic Law's conditional grant of autonomy is not merely a greater risk of China interfering in Hong Kong. Rather, the Basic Law impedes Hong Kong from serving a constructive role in China. Although the international dimensions of Hong Kong's return to China are *sui generis*, Hong Kong's return to China presents China with an opportunity to rethink regional-center relations. Yet rather than taking the opportunity to rethink such relations, the Basic

288. Cf. United States-Hong Kong Policy Act of 1992, 22 U.S.C. §§ 5701-5732 (Supp. V 1994) (stating that "[t]he Congress declares its wish to see full implementation of the provisions of the Joint Declaration" and requiring that the Secretary of State report to Congress on "developments related to the change in the exercise of sovereignty over Hong Kong").

289. For example, events in China already have direct influence on the Hong Kong stock market.

290. Although Britain would likely argue that efforts to revoke Hong Kong's autonomy violate the provisions of the Sino-U.K. Joint Declaration. Cf. GHAI, *supra* note 4, at 124 ("China has not developed any sophisticated mechanism to deal with assertions of autonomy that it finds distasteful, and thus denies the very premise of autonomy. There are no institutions for dialogue, mechanisms for defining issues between parties, or procedures for negotiations or adjudication.").

In July 1997, the Hong Kong Court of Appeals upheld the legality of the SAR's provisional legislature despite the fact that the formation of the legislature was not in accordance with the Basic Law. The Court's ruling relied in part on the NPC Standing Committee's endorsement of the formation of the legislature. For a critical account of the case, see Nihal Jayawickrama, *A Dangerous Bow to Beijing*, *ASIAN WALL ST. J.*, Aug. 5, 1997, at 6.

291. See Basic Law, art. 17.

Law defines Hong Kong's relationship to the central government in much the same way regional-center relations are defined elsewhere in China: Hong Kong has autonomy in certain ill-defined areas—unless Beijing decides otherwise. Such a structure is increasingly incapable of resolving the complexities of contemporary China.

The transboundary pollution problems in Hong Kong and Guangdong mirror those in other regions of China. Environmental law demonstrates the problems resulting from China's decentralization, and the importance of providing incentives for local enforcement of national laws. Lack of enforcement of environmental laws plagues all regions of China, and transboundary pollution issues among China's provinces, and even among different counties and municipalities within provinces, have emerged as major difficulties.²⁹²

China has attempted to resolve cross-border environmental problems via informal coordination.²⁹³ China's attempts at such coordination have been ineffective.²⁹⁴ China's Environmental Protection Law instructs regions to work together to solve trans-jurisdictional environmental problems,²⁹⁵ but many cases go unresolved.²⁹⁶ In the *Gansu*

292. See LIEBERTHAL, *supra* note 276, at 285–86. Professor Lieberthal notes that “very few environmental insults occur strictly within the administrative boundaries of one local political authority,” and that the current system of environmental charges levied on polluting firms “does not allow payments across administrative boundaries,” providing incentives for local authorities to locate “their most polluting enterprises near the downstream boundaries of their jurisdictions.” *Id.*

For a discussion of transboundary environmental problems, see Zhou Zifeng, *Guanche Zhixing “Huanjing Baohu Fa” Jiejue Kua Xingzhengqu Huanjing Wenti [Carrying Out Implementation of the “Environmental Protection Law” to Resolve Trans-Administrative District Environmental Problems]*, ZHONGGUO HUANJING ZONGLAN [A GENERAL SURVEY OF CHINESE ENVIRONMENT], Jan., 1996, at 18; cf. Alford & Shen, *supra* note 53, at 145 (noting the need for “regional regulatory approaches that cut across existing sub-national political boundaries”).

293. Author's interviews in Beijing, June–August, 1996; cf. LIEBERTHAL, *supra* note 276, at 317 (“At each level there is much attention to garnering resources and striking deals that will benefit the locality governed by that level of state administration. . . . In the absence of formal institutional mechanisms and a legitimate constitutional framework to give the system regularity and predictability, much is sorted out in practice through consensus building and bargaining.”); Paul E. Schroeder, *Territorial Actors as Competitors for Power: The Case of Hubei and Wuhan, in BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA* 283 (Kenneth G. Lieberthal & David M. Lampton eds., 1992) (“In the absence of political, constitutional, or legal formulas that might guide the policy process, Chinese units engage in lengthy bargaining over the specifics of any general policy that is to be implemented.”).

294. See ZHONGGUO HUANJING DIANXING ANJIAN YU ZHIFA TIYAO [TYPICAL CASES AND ENFORCEMENT SUMMARIES OF CHINESE ENVIRONMENTAL LAW] 259 (Xie Zhenhua ed., 1994) [hereinafter TYPICAL CASES] (stating that resolution of trans-jurisdictional environmental disputes has long been a problem in China); see also Jane Khanna, *The Calculus of Interests in the Subregional Economy of Southern China, Hong Kong, and Taiwan, in SOUTHERN CHINA, HONG KONG, AND TAIWAN: EVOLUTION OF A SUBREGIONAL ECONOMY* *supra* note 283, at 1, 4 (noting that “Beijing is proving to be weak in mediating interprovincial conflicts, which have dramatically increased”).

295. See *Zhonghua Renmin Gongheguo Huanjing Baohu Fu [Environmental Protection Law of the People's Republic of China]*, Dec. 26, 1989, 1989 FAGUI HUIBIAN at 419, art. 15.

296. See TYPICAL CASES, *supra* note 294, at 259.

Liancheng Aluminum Plant Air Pollution Compensation Case, for example, ten years of negotiations between authorities in Gansu and Qinghai provinces failed to resolve a dispute over air pollution from an aluminum plant; even central government intervention in negotiations failed to resolve the case.²⁹⁷ Finally, the affected counties sued the polluting plant, and won substantial compensation.²⁹⁸ Yet the suit was successful in part due to pressure from the central government.²⁹⁹ Moreover, while the plant paid the judgment in full,³⁰⁰ it also continued to pollute.³⁰¹

Liancheng Aluminum Plant demonstrates a crucial problem undermining China's current environmental laws. China's formally unitary system³⁰² has resulted in de facto federalism, in which regions exert autonomy by enacting their own laws, implementing their own policies, and by refusing to enforce national laws.³⁰³ In *Liancheng Aluminum*, local authorities did nothing to stop the plant from polluting, presumably because it was not in their economic interests to do so.

De facto federalism results partly from local governments exploiting the lack of order and lack of clarity that plague Chinese law more generally. Chinese law is both vague and of "questionable legislative authority,"³⁰⁴ with national, provincial, and local legislatures and bureaucracies issuing sometimes contradictory laws and regulations. In environmental law, unclear lines of authority mean that local environmental officials must often answer to the competing demands of NEPA directives and provincial or local economic policies. The strength of China's regions means that the central government is often unable to compel local authorities to follow national laws. Yet improving law

297. *See id.* at 258–60.

298. *See id.* at 259. The High People's Court of Gansu Province ordered the plant to pay Qinghai's Ledu county RMB 940,000. *See id.*

299. *See id.* at 260 (noting that resolution of the case was closely related to the fact that central authorities had taken an interest in the case).

300. *See id.* at 259.

301. *See id.* at 260.

302. China's system is unitary insofar as power emanates from the central government. Within the central government, however, responsibility for environmental policy is shared by numerous government ministries and bodies: Professors Alford and Shen note that eight central government ministries and commissions are engaged in China's efforts to comply with the Montreal Protocol. *See Alford & Shen, supra* note 53, at 139. Moreover, the wide range of local and provincial lawmaking in China makes classifying China's legal system as unitary somewhat questionable. For a discussion of local lawmaking, see Keller, *supra* note 7, at 736–37.

303. *See Alford & Shen, supra* note 53, at 134. As Professors Alford and Shen point out, the "general and aspirational" character of China's major environmental laws partially accounts for this problem by granting excessive discretion to local officials responsible for implementing environmental laws. *Id.* at 143.

304. Keller, *supra* note 7, at 711. Professor Keller notes that "[t]he disparate mass of laws and regulations which makes up the formal written sources of Chinese law does not possess sufficient unity to be regarded as a coherent body of law." *Id.*

implementation and enforcement in China is not merely a question of forcing local officials to enforce laws; it requires both ordering the many layers of Chinese law, and the creation of formal mechanisms or procedures for resolving conflicts among rival sources of law.

The strength of China's regions, the lack of an institution capable of imposing order on the legal system, and fears that formal devolution of power may undermine the legitimacy of the national government prevent China from confronting questions of legal ordering, both between the center and provinces as well as among various arms of the central government itself. Yet resolving questions of legal ordering is not merely a matter of formally devolving power. Environmental law demonstrates that devolution alone is not the solution: diversity of environmental standards may also lead to a "race to the bottom." The inability of the central government to force compliance with national laws suggests China's need for a more supple structure of governance, a structure in which regions are given more incentive to enforce national laws because their spheres of autonomy vis-à-vis the central government are better defined, and are protected.

Faults in the Basic Law parallel those in the Chinese legal system. Indeed, Hong Kong's autonomy may be both ill-defined and not guaranteed precisely because the Basic Law was constructed within the confines of the Chinese legal system. The Basic Law is a quasi-constitutional document enacted in a system in which constitutions are both easily changed and non-justiciable, in which law is often highly aspirational, in which central government control is exerted via policy as often as by law, and in which regions enjoy economic autonomy within moving boundaries established by Beijing. The Basic Law reflects the central government's concern with asserting its sovereignty over Hong Kong while allowing Hong Kong's economy to continue to flourish. A similar dilemma has faced China's reform era leaders domestically: how can provinces be given the economic autonomy necessary to encourage economic development without undermining central authority? The parallel between the *de facto* autonomy many of China's regions currently enjoy in economic policy and the autonomy the Basic Law grants to Hong Kong is striking. China has been content to permit provinces and local governments to conduct their own economic policies, with the consequence being regional disregard for national laws that are at odds with local economic policies. Hong Kong's autonomy is now similar. To the degree Hong Kong's assertions of autonomy are limited to the economic sphere, the central government may be willing to allow Hong Kong to conduct its own affairs without significant interference.

Yet a system based on discretionary economic autonomy, whether such autonomy is granted formally, in the Basic Law, or informally, as

is often the case in the rest of China, is particularly problematic when it comes to environmental law. In the case of Hong Kong, environmental law suggests separation of Hong Kong from the rest of China cannot work. In the case of China's provinces, environmental law demonstrates not only the negative side effects of economic autonomy, but also the difficulty of enforcing national law when regions do not see such enforcement as in their own interests.

As long as questions of governance are viewed as a zero-sum game, China will find it difficult to achieve a balance of national laws and regional autonomy, in Hong Kong or in China's provinces. Hong Kong's return to China presented China with an opportunity to begin to rethink how China relates to its regions; yet rather than considering how Hong Kong might serve as a positive model for other regions in China, the Basic Law focuses on how to separate Hong Kong from China. China's focus is not surprising, given the desire to use Hong Kong's return to China as a model for eventual reunification with Taiwan;³⁰⁵ over time, however, a system in which China's regions are able to interact in a variety of ways with each other and with the national authorities in both law creation and law enforcement, and in which China's regions maintain certain defensible spheres of autonomy against the central government, is more likely to lead to reunification than is ill-defined autonomy.

The Basic Law's failure to define Hong Kong's status in China mirrors the law's failure to define Hong Kong's status as an international actor. Continuing concerns over sovereignty result in an unworkable international status for Hong Kong. China's reform-era participation in international lawmaking has largely been founded on a rigid conception of sovereignty.³⁰⁶ Although China has been an active participant in numerous environmental agreements that challenge traditional norms of state sovereignty,³⁰⁷ China's participation in negotiations leading up to such agreements has reflected traditional state-centered views of sovereignty.³⁰⁸ Indeed, China has been slow to recognize that

305. See Xiao Weiyun, *A Study of the Political System of the Hong Kong Special Administrative Region Under the Basic Law*, 2 J. CHINESE L. 95, 97 (1988).

306. See SAMUEL S. KIM, CHINA IN AND OUT OF THE CHANGING WORLD ORDER 13-19 (Princeton Center of International Studies World Order Studies Program Occasional Paper No. 21, 1991). This was particularly the case post-1989, when "the old conception of state sovereignty . . . returned with a vengeance to Chinese foreign policy." *Id.* at 18. China similarly views "the outside world as an essentially sovereignty-centered state system." *Id.* at 8.

307. *Cf. id.* at 78. ("Almost everywhere today . . . state sovereignty is either in voluntary retreat or in a permeated situation. Economically, virtually every state today has a shared or compromised sovereignty.")

308. Professor Kim argues that while it is "tempting to see China's sudden activism in global environmental politics as evidence of . . . functionalist leaning[s]," in fact "China has managed to exploit environmental diplomacy to maximize foreign aid and technology transfer and to

participation in an increased web of interconnected international agreements may not be congruent with such rigid notions of sovereignty.³⁰⁹

China's domestic legal structure parallels China's sovereignty-centered view of world politics: China has been wary that excessive devolution of power to its regions will undermine stability and, ultimately, the legitimacy of the central government. Just as environmental law challenges rigid conceptions of sovereignty in the international sphere, domestic environmental law suggests the need to move toward a system in which both central and local authorities have stakes in law enforcement. Centralized environmental planning alone has led to non-enforcement; excessive devolution may likewise lead to ineffective environmental policies. Similarly, Hong Kong's status both internationally and domestically requires a more nuanced framework, in which not all assertions of autonomy are viewed as challenges to China's sovereignty, and in which not all incursions into local policymaking by China are viewed as undermining Hong Kong's autonomy.

The Basic Law does not preclude evolution; indeed, to the degree the Basic Law fails to provide a coherent framework, it may invite the development of a more subtle relationship between Hong Kong and the rest of China and may permit Hong Kong to maintain a degree of international personality. Yet the text of the Basic Law is not irrelevant: China's repeated statements that the law will answer questions of governance that arise in the SAR suggest that the law will play an important role as Hong Kong and China continue to work out the details of their new relationship. Environmental law is unlikely to be an early concern of the SAR government, or to be a key aspect of China's policy toward the SAR. Yet the ability of Hong Kong and China to address their common environmental problems will reflect the degree to which they are able to define Hong Kong's place in China.

minimize the international normative and material costs of the Tiananmen crackdown." *Id.* at 40.

China's strong view of state sovereignty leads it to the view that "[t]he manner of exploitation, utilization, and protection of a nation's natural resources is entirely an internal matter." Cai & Voigts, *supra* note 59, at S-33. China is extremely wary of environmental concerns being used "as an excuse to interfere with China's internal affairs." *Id.* at S-35.

309. Cf. KIM, *supra* note 306, at 80 ("Against . . . global megatrends Chinese state sovereignty is a paper tiger."); ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS passim* (1995).