

1986

## Chinese and Western Treaty Practice: An Application to the Joint Declaration Between the People's Republic of China and Great Britain Concerning the Question of Hong Kong

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### Recommended Citation

Goldstein, Jay R. "Chinese and Western Treaty Practice: An Application to the Joint Declaration Between the People's Republic of China and Great Britain Concerning the Question of Hong Kong." American University International Law Review 1, no. 1 (1986): 167-194.

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# NOTES AND COMMENTS

## CHINESE AND WESTERN TREATY PRACTICE: AN APPLICATION TO THE JOINT DECLARATION BETWEEN THE PEOPLE'S REPUBLIC OF CHINA AND GREAT BRITAIN CONCERNING THE QUESTION OF HONG KONG

### INTRODUCTION

In September of 1984,<sup>1</sup> Great Britain and the People's Republic of China (PRC)<sup>2</sup> concluded a Joint Declaration on the question of Hong Kong.<sup>3</sup> Under the Joint Declaration, Great Britain agreed to relinquish

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1. See D. BONAVIDA, HONG KONG 1997: THE FINAL SETTLEMENT 7 (1985) [hereinafter cited as D. BONAVIDA] (noting that the initialling of the Joint Declaration occurred on September 26, 1984 and the ratifying occurred on June 30, 1985).

2. The People's Republic of China exercises sovereignty over the Chinese mainland. The Communist government gained control of China in 1949. Prior to 1949, the Communists' rivals, the Nationalists, controlled China's government. With the Communist takeover, however, the Nationalists retreated to the island province of Taiwan (including the Pescadores, Quemoy and Matsu), which today is the only area of China controlled by the Republic of China. See Cohen, *Recognizing China*, 50 FOREIGN AFF. 30 (1971) (chronicling official United States position vis-a-vis Chinese Communists and Nationalists); J. FAIRBANK, THE UNITED STATES AND CHINA 1 (1981) (introducing issues of importance for Chinese foreign relations); J. FAIRBANK & K.C. LIU, 11 CAMBRIDGE HISTORY OF CHINA, LATE CHING 1800-1911, PART 2, 1 (1980) (outlining China's foreign policy historically); HU, A HISTORY OF THE MODERN CHINESE REVOLUTION 1 (1977) (describing Communist Chinese historical perspective).

3. Joint Declaration of the Government of the People's Republic of China and the Government of the United Kingdom of Great Britain and Northern Ireland on the Question of Hong Kong, September 26, 1984, 40 BEIJ. REV. 1, 6 (1984) [hereinafter cited as Joint Declaration]. An examination of the history of the founding of Hong Kong provides necessary insight as to the rationale for the Joint Declaration. See D. BONAVIDA, *supra* note 1, at 19-32 (detailing Western intervention, Chinese responses, and growing trade in Hong Kong's history). The first significant event in Hong Kong's founding occurred at the close of the Opium War in 1842. To end the war, the Ching Emperor ceded in fee the island of Hong Kong to Great Britain. Treaty of Nanking, August 29, 1842, China-Great Britain, 30 BRITISH AND FOREIGN STATE PAPERS 389, 390, reprinted in 123 Parry's T.S. 465, 467 (1979). In 1860 China ceded in fee both the Stonecutters Island and the southern part of the Kowloon Peninsula (known as "Kowloon") to Great Britain. Convention of Peking, October 24, 1860, China-Great Britain, 50 BRITISH AND FOREIGN STATE PAPERS 10, 11, reprinted in 123 Parry's T.S. 71, 73 (1979). The newly acquired lands provided a valuable source of trade revenue to the British. D. BONAVIDA, *supra* note 1, at 25. Britain, however, found these territories difficult to protect. *Id.* Consequently, in 1898, after further hostilities, China leased 350

sovereignty over Hong Kong to the PRC by July 1, 1997.<sup>4</sup> In return, the PRC consented to limit its control over Hong Kong, its new administrative region.<sup>5</sup> Specifically, the PRC agreed to leave Hong Kong's present social and economic system basically intact.<sup>6</sup> The Joint Declaration, despite the PRC's assurances that Hong Kong will remain socially and economically unchanged, may significantly redefine Hong Kong's status as an international center of commerce.<sup>7</sup>

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miles of land north of Kowloon, known as the New Territories, to Great Britain, for a term of ninety-nine years. This lease terminates on June 30, 1997. Convention of 1898, June 9, 1898, China-Great Britain, 90 BRITISH AND FOREIGN STATE PAPERS 17, reprinted in 186 Parry's T.S. 310 (1979). Thus the generic term "Hong Kong" represents Hong Kong Island, Stonecutter Island, Kowloon, and the New Territories.

4. Joint Declaration, *supra* note 3, at i. Great Britain's lease of the New Territories terminates in 1997. *Id.* Hong Kong, however, depends on the New Territories for much of its water supply, electric generating source, present and future manufacturing plants, and housing for approximately one-half of its inhabitants. N. MINERS, 15 THE GOVERNMENT AND POLITICS OF HONG KONG 313 (1981) [hereinafter cited as N. MINERS]. Therefore, without the land buffer or the resources from the New Territories, Hong Kong, under an isolated and vulnerable British controller, exposes itself to economic pressure or military attack from the PRC. *Id.*

5. See South China Morning Post, July 17, 1982, at 1, col. 2 (noting that Hong Kong will be a "special administrative region"). The PRC created the concept of "special administrative region" under article 31 of its 1982 Constitution. See P.R.C. CONST. art. 31 (1982) (noting concept was originated to reunite Taiwan with the mainland, allowing Taiwan to retain a capitalist economic system in exchange for accepting the overall political sovereignty of the People's Republic); see also P.R.C. CONST. preamble (1982) (mentioning only Taiwan in a passage explaining the reunification of the motherland).

6. Joint Declaration, *supra* note 3, at annex 1, art. 6. The Joint Declaration permits Hong Kong to maintain its capitalist economic and trade system. *Id.* Specifically, Hong Kong may maintain its free ports and continue its policy of free trade. *Id.* at annex 1, art. 13. In addition, the Joint Declaration allows Hong Kong to:

maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong, including freedom of the person, of speech, of the press, of assembly, of association, of correspondence, of travel, of movement, of strike, to form or to join trade unions, of demonstration, of choice, of occupation, of academic research, of belief.

*Id.* at annex I, art. 13.

7. Hong Kong maintains an international reputation as a leading manufacturing and commercial center. See N. MINERS, *supra* note 4 (describing Hong Kong's reputation in 1975); Chiu, 1984 *Sino-British Agreement on Hong Kong and its Implications on China's Unification*, 21 ISSUES AND STUDIES 13 (1985) (noting that Hong Kong is the world's third largest financial center); A. YOUNGSON, HONG KONG: ECONOMIC GROWTH AND POLICY 92-114 (1978) (discussing Hong Kong's role as an international trading center); see also N. MINERS, *supra* note 4, at 53 (discussing how consistent policies of free enterprise and trade motivate foreign businesses to use the port as a center for the transshipment of goods to the PRC and the rest of Asia); W. BEAZER, THE COMMERCIAL FUTURE OF HONG KONG 61 (1978) (noting that in addition to its status as a trading middleman, Hong Kong's manufacturing capabilities make it one of the world's twenty leading exporters). Hong Kong also derives a significant amount of its income from investment capital. N. MINERS, *supra* note 4, at 53. This investment capital makes Hong Kong one of Asia's largest financial centers, supplying banking, insurance, and investment services to international trading companies operating

The Joint Declaration creates a new concept of "one country, two systems."<sup>8</sup> This concept, while novel in its approach, fosters skepticism among experts as to the PRC's future behavior toward Hong Kong.<sup>9</sup> The marriage between the world's freest economic marketplace and the world's largest socialist economy paints an ironic picture.

The success of this marriage depends on a number of legal and political factors. The Joint Declaration's potential for success requires an analysis of the PRC's past treaty performance along with its current political climate in relation to traditional Western treaty practice. Section I of this Comment describes Western treaty practice, outlining key provisions within the 1969 Vienna Convention on the Law of Treaties.<sup>10</sup> Section II evaluates the historical foundations of the PRC's treaty performance. It traces the evolution of this performance by reviewing the PRC's behavior in prior treaty obligations and compares and contrasts this performance with the principles embodied in the Vienna Convention. Section III discusses the significant political events leading to the enactment of the Joint Declaration and explains the scope of the Joint Declaration.<sup>11</sup> Section IV then examines the

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throughout the Pacific basin. *Id.*

8. See generally Weisskopf, *Peking Eyes Taiwan as Accord is Initialled*, Washington Post, Sept. 27, 1984, at A21, col. 2 (noting that Premier Deng Xiaoping coined this phrase during negotiations over the Joint Declaration to pacify Britain and Hong Kong, and to entice the Taiwanese to negotiate to reunite with the Chinese people).

9. See Chiu, *1984 Sino-British Agreement on Hong Kong and its Implications on China's Unification*, 21 ISSUES & STUDIES 13 (1985) (discussing the extent of Hong Kong's autonomy under the Joint Declaration); Clarke, *Hong Kong Under the Chinese Constitution*, 14 HONG KONG L.J. 71 (1984) (discussing the constitutionality of an autonomous Hong Kong under the PRC Constitution).

10. Vienna Convention of the Law of Treaties, May 23, 1969, A/CONF. 39/11/Add.2 [hereinafter cited as Vienna Convention]; see *infra* notes 12-41 and accompanying text (describing provisions of the Vienna Convention).

11. Joint Declaration, *supra* note 3, at art. 3(5). The Joint Declaration and its three annexes discuss the framework for Hong Kong's governance after 1997. *Id.* The Joint Declaration summarizes the subsequent annexes, and provides a general synthesis of the PRC's basic policies toward Hong Kong. *Id.*

Annex I elaborates upon these basic policies. The material includes a construction of Hong Kong's executive, legislative, and judicial branches of government, the PRC's role in this construction, the continuance of Hong Kong as a financial center, the maintenance of Hong Kong's educational system, and the citizenship status of individuals currently living in the British territory. *Id.* at annex I. Annex II details the establishment of a Sino-British Joint Liaison Group whose formation proposes to ensure a smooth transfer of Government in 1997. *Id.* at annex II. Annex III clarifies the confusion as to the possessory right of individuals leasing land prior to 1997, for a term expiring after 1997. *Id.* at annex III.

See generally Comment, *Legal Aspect of the Sino-British Draft Agreement on the Future of Hong Kong*, 20 TEX. INT'L L. REV. 167 (1985) (providing an analysis of the Joint Declaration's provisions); Comment, *International Agreements: Joint Declaration of the Government of the People's Republic of China on the Question of Hong Kong*, 26 HARV. INT'L L.J. 249 (1985) (elaborating on provisions of the Joint Declaration).

probability for a successful implementation of the Joint Declaration based on both the PRC's past performance in its treaty obligations and its current political climate.

### I. Western Treaty Practice as Codified Under the Vienna Convention

The Vienna Convention on the Law of Treaties entered into force on January 27, 1980.<sup>12</sup> It culminated a thirty year effort to incorporate customary principles of treaty interpretation into a general convention on international treaty law.<sup>13</sup> The Vienna Convention addresses topics traditionally considered within the framework of the law of treaties. These topics include: conclusion and entry into force of treaties,<sup>14</sup> observance, application, and interpretation of treaties,<sup>15</sup> amendment and modification of treaties,<sup>16</sup> and invalidity, termination, and suspension of operation of treaties.<sup>17</sup> The Vienna Convention also articulates procedural rules concerning treaty depositories, notifications, corrections, and registration.<sup>18</sup>

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12. See J. SINCLAIR, *VIENNA CONVENTION ON THE LAW OF TREATIES* 1 (2d ed. 1984) (providing an analysis of the Vienna Convention). Article 84 of the Vienna Convention provides that the Vienna Convention enters into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession. Vienna Convention, *supra* note 10, at art. 84. The Convention entered into force on January 27, 1980, following the deposit by Togo on December 28, 1979 of the thirty-fifth instrument of ratification or accession. J. SINCLAIR, *supra*, at 1. Great Britain acceded to the Vienna Convention on June 25, 1971. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS OF 31 DECEMBER 1984, 695 (1985) [hereinafter cited as MULTILATERAL TREATIES].

13. See J. SINCLAIR, *supra* note 12, at 3. The effort to codify treaty law into a convention began with the work program of the International Law Commission in 1949. *Id.*

14. Vienna Convention, *supra* note 10, at part II. This part of the Convention is divided into three sections, the first relating to the conclusion of treaties (articles 6-18), the second to reservations (articles 19-23), and the third to entry into force and provisional application (articles 24 and 25). *Id.*

15. Vienna Convention, *supra* note 10, at part III. Part III is divided into four sections regarding observance of treaties, application of treaties, interpretation of treaties, and treaties with third states. *Id.*

16. Vienna Convention, *supra* note 10, at part IV. Part IV consists of three articles (articles 39-41) concerning amendment and modification of treaties. *Id.*

17. Vienna Convention, *supra* note 10, at part V. Part V, consisting of articles 42-72, articulates the circumstances in which a treaty ceases to apply, in whole or in part, because of an acknowledged ground of invalidity, termination, or suspension. *Id.*

18. Vienna Convention, *supra* note 10, at part VII. See generally S. MALAWER, *IMPOSED TREATIES AND INTERNATIONAL LAW* (1977) (asserting that similar to other multilateral treaties, the eight parts of the Vienna Convention attempt to envelop many conflicting interests and viewpoints, sacrificing the clarity of specific definitions for the neutrality of simplistic abstractions).

The Vienna Convention's applicability is limited to treaties concluded between states. J. SINCLAIR, *supra* note 12, at 231. Therefore, treaties concluded between states and

This Comment only discusses parts three and five of the Vienna Convention as only these parts apply to bilateral treaties. Part three discusses treaty observance, application, and interpretation, and part five deals with treaty invalidity, termination, and suspension of operations.<sup>19</sup>

#### A. VIENNA CONVENTION PART V: ADHERENCE TO BILATERAL TREATIES

##### 1. *Termination of Bilateral Treaties*

Part five of the Vienna Convention sets forth conditions that justify invalidating bilateral treaties.<sup>20</sup> Two of the most ambiguous and controversial conditions that allow a state to invalidate a treaty include coercion and fundamental change of circumstance.<sup>21</sup> The sections that follow discuss both conditions.

##### a. *Terminating a Treaty under the Coercive Force Theory*

The Vienna Convention invalidates treaties that are procured by the use or threat of use of force when the threat or use violates the international legal norms embodied in the United Nations Charter.<sup>22</sup> Although the United Nations Charter never specifically defines force, the Vienna Convention's framers agreed that force encompasses armed or physical aggression.<sup>23</sup> Subsequent to the Vienna Convention's passage, the framers passed a declaration condemning states' use of economic or political

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international organizations, or concluded by international organizations with other international organizations, fall outside the scope of the Vienna Convention. Vienna Convention, *supra* note 10, at art. 1.

19. None of the other six parts of the Vienna Convention significantly affect a concluded and ratified bilateral treaty. Part I introduces the Vienna Convention. Vienna Convention, *supra* note 10, at part I. Part II defines the procedure for concluding a treaty. *Id.* at part II. Part IV discusses the modification of a multilateral treaty. *Id.* at part IV. Part VI elaborates upon the problems of state succession. *Id.* at part VI. Part VII outlines the format for treaty ratification. *Id.* at part VII. Part VIII designates the specific procedure that enters the Vienna Convention into force. *Id.* at part VIII.

20. Vienna Convention, *supra* note 10, at part V; see S. ROSENNE, *THE LAW OF TREATIES: A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION* 250-371 (1970) (discussing the specific provisions contained in part V); J. SINCLAIR, *supra* note 12, at 159-202.

21. Coercion and fundamental change in circumstance are controversial because no accepted definitions of either state coercion or fundamental change in circumstance exist. See *infra* notes 22-25 and accompanying text (discussing the international interpretation of state coercion); *infra* notes 26-27 (discussing the international interpretation of fundamental change in circumstance).

22. Vienna Convention, *supra* note 10, at art. 52; see U.N. CHARTER art. 2(4) (prohibiting threat or use of force in international relations).

23. See J. SINCLAIR, *supra* note 12, at 178 (citing framer's comments and discussing the term "force" and the general controversy surrounding its interpretation).

pressure to procure treaties.<sup>24</sup> The declaration, however, does not specifically compel inclusion of economic or political pressure in the Vienna Convention's definition of coercive force.<sup>25</sup> The ultimate decision to include economic or political pressure in the definition of coercion rests with interpreters of the Vienna Convention.

*b. Terminating a Treaty Under the Fundamental Change in Circumstance Theory*

The Vienna Convention also permits treaty abrogation if a fundamental change in circumstance occurs, and the change was unforeseeable at the time that the parties signed the treaty.<sup>26</sup> A fundamental change in circumstance is loosely defined as a changed circumstance that must constitute an essential basis of the consideration that originally bound the parties to a treaty and it must radically transform parties' remaining treaty obligations.<sup>27</sup>

B. VIENNA CONVENTION PART III: OBSERVATION AND INTERPRETATION OF BILATERAL TREATIES

*1. Observing Bilateral Treaties*

Part three of the Vienna Convention encompasses treaty observation and interpretation.<sup>28</sup> Article 27 prohibits a state from invoking domestic law to justify a failure to implement a treaty.<sup>29</sup> A treaty enters into

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24. See Declaration on the Prohibition of the Threat or Use of Economic or Political Coercion in Concluding a Treaty, U.N. CONFERENCE ON THE LAW OF TREATIES 285, U.N. Doc. A/CONF. 39/1/Add.2 (1971).

25. *Id.* at 64; see Malawer, *A New Concept of Consent and World Public Order: "Coerced Treaties" and the Convention on the Law of Treaties*, 4 VAND. J. TRANS-NAT'L L. 1 (1970) (criticizing article 52 in light of the existence of many small "new states").

26. Vienna Convention, *supra* note 10, at art. 62; see J. SINCLAIR, *supra* note 12, at 192 (discussing the historical development of "change of circumstance").

27. J. SINCLAIR, *supra* note 12, at 192. Although of ancient origin, this custom remains controversial. *Id.* The ease with which one party to an agreement may legitimately claim a change in circumstance endangers the sanctity of all treaties. *Id.* at 193. Treaty termination under this principle, however, is limited. Vienna Convention, *supra* note 10, at art. 62; see T. BUERGENTHAL & H. MAIER, PUBLIC INTERNATIONAL LAW 112 (1985) (discussing fundamental change in circumstance as a form of invalidity).

28. See Fisheries Jurisdiction (U.K. v. Ice.) 1973 I.C.J. 3, 18; (examining International Court of Justice's interpretation of fundamental change in circumstance); see also Vienna Convention, *supra* note 10, at arts. 26-38 (discussing fundamental change in circumstance).

29. See Vienna Convention, *supra* note 10, at art. 27; see also T. BUERGENTHAL & H. MAIER, *supra* note 27, at 104 (discussing the general necessity of observing treaties).

force binding the parties if each party satisfies its own procedure for treaty conclusion. This procedure exists notwithstanding the fact that a treaty's substance conflicts with a party's constitutional law.<sup>30</sup>

## 2. *Interpreting Bilateral Treaties*

Although article 27 technically binds parties to a treaty, different interpretations of an international agreement often threaten treaty adherence.<sup>31</sup> Disputes over the meaning of a specific word in the treaty's official text usually arise because of language difficulties,<sup>32</sup> and of the problems of determining the parties' true intent concerning deliberately vague clauses or phrases.<sup>33</sup> When the meaning of a clause or phrase creates an ambiguous or unreasonable obligation for a party, the Vienna Convention stresses that the parties shall interpret the treaty in accordance with the "ordinary meaning" of the clause or phrase<sup>34</sup> and in "light of its object and purpose."<sup>35</sup> After evaluating a treaty's text, a third party tribunal can attempt to decipher the parties' intent by studying supplementary information,<sup>36</sup> such as preparatory work for the treaty and the party's behavior subsequent to treaty enactment.<sup>37</sup>

The Vienna Convention emphasizes that a treaty authenticated in two or more languages possesses equal authority in each language.<sup>38</sup>

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30. Vienna Convention, *supra* note 10, at art. 27. For example, if the United States ratifies a treaty with Canada, and part of the treaty prohibits United States citizens from publicly demonstrating in the United States against Canadian policies, the United States may not claim in an international tribunal that the treaty violates the domestic law of the United States to justify failing to honor the treaty.

31. See T. BUERGENTHAL & H. MAIER, *supra* note 27, at 105 (discussing "ordinary meaning" and "special meaning").

32. See Vienna Convention, *supra* note 10, at art. 33 (noting that concluding parties generally authenticate as official the text of the agreement in respective languages); see also J. SINCLAIR, *supra* note 12, at 147 (discussing interpretation of plurilingual treaties); HUNGDAH CHIU, *THE PEOPLE'S REPUBLIC OF CHINA AND THE LAW OF TREATIES* 72 (1972) (discussing the Chinese Communist view of treaty interpretation).

33. J. COHEN & HUNGDAH CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW* 1144 (1974).

34. Vienna Convention, *supra* note 10, at art. 31(1); see J. SINCLAIR, *supra* note 12, at 121 (considering consequences that normally and reasonably flow from the text).

35. Vienna Convention, *supra* note 10, at art. 31; see J. SINCLAIR, *supra* note 12, at 119 (stating that parties must apply the same standard of good faith to interpret and observe a treaty).

36. Vienna Convention, *supra* note 10, at art. 32; see J. SINCLAIR, *supra* note 12, at 143 (defining supplementary means of interpretation as including documentation of negotiations prior to treaty conclusion). Negotiating documents are often misleading, however, because clarifying negotiations frequently occur off the record. *Id.* at 143.

37. Vienna Convention, *supra* note 10, at art. 32.

38. *Id.* at art. 33. Unity of a treaty and its terms in plurilingual agreements safeguards each party by combining the principle of equal authority of authentic texts with the presumption that the terms mean the same thing in each text. Report of the Inter-



When authentic texts possess a different meaning not clarified by supplementary means of interpretation, the most reasonable meaning applies.<sup>39</sup> When concluding parties fail to agree on a common interpretation, however, the Vienna Convention proposes that they present the discrepancy for resolution to either the International Court of Justice or a neutral arbitration panel.<sup>40</sup>

The Vienna Convention's treaty termination and interpretation provisions codify Western notions of customary international law.<sup>41</sup> Concepts such as coercive force, fundamental change in circumstance, and third party adjudication exemplify Western perception of international treaty law. Comparing Western views of treaty law with those of the PRC provides the necessary insight into how the PRC would treat a bilateral agreement such as the Joint Declaration.

## II. PRC Treaty Practice

### A. EVOLUTION OF PRC'S LEGAL SYSTEM

To compare the Western notion of treaty law with PRC notions, it is necessary to understand the PRC's legal system and the role that it plays in the PRC's interpretation of international law.

The PRC's legal system evolved from Confucian ideology<sup>42</sup> and post World War II Soviet practice.<sup>43</sup> The PRC's original legal system relied

national Law Commission to the General Assembly, 19 U.N. GAOR Supp. (No. 9) at ch. 4, U.N. Doc. A/6009 (1966), reprinted in 1966 2 Y.B. INT'L L. COMM'N 225, U.N. Doc. A/Cn.4/Ser./1966/Add.1.

39. Vienna Convention, *supra* note 10, at art. 33. See *Maurommatis Palestine Concessions*, 1924 P.C.I.J., Ser. A, No. 2, at 19 (defining "reasonable" as most harmonious to the object and purpose understood by parties to the treaty).

40. See Vienna Convention, *supra* note 10, at art. 66. Under the annex to the Vienna Convention, the procedures established for forming a conciliation board facilitate the disputing parties' search for an arbitration panel. *Id.*

41. See generally J. SINCLAIR, *supra* note 12 (discussing treaty termination and interpretation).

42. See G. SCOTT, CHINESE TREATIES 42 (1975) [hereinafter cited as G. SCOTT]; L. LEE, CHINA AND INTERNATIONAL AGREEMENTS 133-63 (1969) (noting that Confucian ideology defines the state's role through the dichotomy of the terms *li* and *fa*); Schwartz, *On Attitudes Toward Law in China*, in GOVERNMENT UNDER LAW AND THE INDIVIDUAL 27 (M. Katz ed. 1957). The term *fa*, having negative connotations, represents law. *Id.* Under Confucianism, the implementation of law is used to punish those committing the most serious crimes. *Id.* at 31. Instead of *fa*, the Confucianists rely upon *li*, which represents a code of conduct amongst individuals. *Id.* at 27. All relationships in Chinese society, such as father/son or employer/employee, are governed by a standard of propriety. *Id.* When one defies this standard, the person faces ridicule and admonishment from peers. Such fear of admonishment effectively maintains public order. *Id.* at 30.

43. See G. SCOTT, *supra* note 42, at 42-45 (discussing the ways in which Chinese law resembles Soviet law, particularly during the 1950's).

on the "rule of man," as opposed to the "rule of law," defining social order largely according to relationships between individuals.<sup>44</sup> As in the Soviet Union, the Communist Party took control of the PRC judicial system.<sup>45</sup> Consequently, in both the PRC and the Soviet Union, the ruling party disregarded constitutional rights at its discretion.<sup>46</sup>

Similar to its treatment of domestic law, the PRC used international law as a political instrument to realize Communist Party goals.<sup>47</sup> PRC commentators acknowledged the primacy of national self-interest in the PRC's philosophy of international law:

If [international law] is useful to our country, to socialist enterprise, or to the peace enterprise of the world, we will use it. However, if this instrument is disadvantageous to our country, to socialist enterprises or to peace enterprises of the people of the world, we will not use it.<sup>48</sup>

Thus, the PRC embraced the idea of the illimitable sovereignty,<sup>49</sup> advocating the use of international law to promote the country's political policies.<sup>50</sup> The doctrine of illimitable sovereignty, which the PRC adopted from early Soviet influences,<sup>51</sup> prohibits states from infringing on PRC sovereignty and also prohibits the PRC from infringing on other states' sovereignty.<sup>52</sup> This doctrine supports the PRC's belief that

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44. *Id.* at 42. "Rule of man" traditionally refers to social order maintained by the leadership's subjective directives created to solve particular problems. See DEBARRY, *SOURCES OF CHINESE TRADITION* 15-30, 86-121 (1960) (discussing Confucian government and tradition); see also G. SCOTT, *supra* note 42, at 41 (noting that the "rule of law" refers to the institutionalization of social order and codifies principles to express desired conduct for individuals interacting in society); DEBARRY, *supra* at 122-48 (discussing Han Fei Tzu, Li Ssu, and legalism generally).

45. G. SCOTT, *supra* note 42, at 45.

46. *Id.* at 44.

47. See HUNGDAH CHIU, *The Nature of International Law and the Problem of a Universal System*, in *LAW IN CHINESE FOREIGN POLICY: COMMUNIST CHINA AND SELECTED PROBLEMS OF INTERNATIONAL LAW* 2 (Shao-Chuan Leng & Hungdah Chiu eds. 1972) (stating that the PRC agrees with the Soviet view that international law, like municipal law, should be a state's foreign policy instrument).

48. See *LAW IN CHINESE FOREIGN POLICY*, *supra* note 47, at 3, citing *Refute the Absurd Theory Concerning International Law by Ch'en T'i-ch'iang*, *Jen-min jing pao* (People's Daily), Sept. 18, 1957 (describing the left wing's use of international law in the PRC during the 1950's).

49. See G. SCOTT, *supra* note 42, at 47-50 (stating that the PRC is unwilling to compromise its state sovereignty for Western considerations).

50. See G. SCOTT, *supra* note 42, at 97 (discussing that like the Chinese, most Western nations adopt a policy promoting self-interest); L. SCIENMAN & R. WILKINSON, *INTERNATIONAL LAW AND POLITICAL CRISIS* (1968) (giving specific examples of this type of behavior).

51. See G. SCOTT, *supra* note 42, at 47 (discussing the PRC adoption of Soviet practices).

52. See Vamvoukos, *Chinese and Soviet Attitudes toward International Law: A Cooperative Approach*, 5 *REV. SOCIALIST L.* 131, 136 (1979) [hereinafter cited as Vamvoukos] (stating the PRC perceives the West as using aggression and exploitation

it has an absolute right to make independent decisions concerning its internal and external affairs.<sup>53</sup>

Like the Soviets, who adapted their concept of sovereignty to accommodate the international community,<sup>54</sup> the PRC recently recognized various traditional sources of international law,<sup>55</sup> such as treaties and customs.<sup>56</sup> PRC writers now emphasize that treaties are important for governing relations between ideologically diverse nations.<sup>57</sup> As evidence of the PRC's recent acceptance of traditional international law,<sup>58</sup> the

to violate the sovereignty of other states). See also J. HSIUNG, *LAW AND POLICY IN CHINA'S FOREIGN RELATIONS* 73 (1972) [hereinafter cited as J. HSIUNG] (citing PRC's claim that the United States' actions in North Korea during the Korean War as an example of such Western aggression).

53. See G. SCOTT, *supra* note 42, at 47 (stating Marxist theory treats sovereignty as a ploy by capitalist jurists to conceal the class nature of state dictatorship); see also J. HSIUNG, *supra* note 52, at 73 (noting the PRC uses this hard line theory to shield itself from past ills). The PRC still fears submitting to the "imperialist" nature of the West. *Id.*

54. See INTERNATIONAL LAW 7 (F.I. Kozhevnikov ed. n.d.), reprinted in G. SCOTT, *supra* note 42, at 47.

55. Vamvoukos, *supra* note 52, at 138. Article 38(1) of the Statute of the International Court of Justice sets forth the following traditional sources of international law: "a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations." STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38(1).

56. Vamvoukos, *supra* note 52, at 139; see HUNGDAH CHIU, *supra* note 32, at 3 (stating that PRC textbooks offer little information pertaining to the PRC's perception of general legal principles as acceptable sources of international law). The PRC historically did not accept traditional sources of international law, such as treaties and customs because to do so implied that the PRC accepted Western political systems. *Id.* Western ideology contradicted the Marxist-Maoist ideology. *Id.* at 140. See Ying T'ao, *Recognize the True Face of Bourgeois International Law from a Few Basic Concepts*, 1 STUDIES IN INTERNATIONAL PROBLEMS 46, 47 (1960), cited in HUNGDAH CHIU, *supra* note 32, at 2. The Chinese scholar, Ying T'ao, explains this contradiction: "the substantive sources of bourgeois international law are the external policy of the bourgeoisie, which is also the will of the ruling class of those big capitalist powers." *Id.* T'ao concludes that the formal use of sources of international law acts as a smoke screen for Western nations' true intentions: the perpetuation of class character. *Id.* The PRC's perceptions of international law, however, do appear in a limited sense in the PRC's treaties and legal arguments. *Id.* at 3. For example, in defense of the PRC's right of sovereignty over Taiwan, PRC writers invoke the principle of *ex injurica jus non oritur* which prevents the acquisition of a right through an illegal act. Vamvoukos, *supra* note 52, at 140.

57. See WANG YAO-T'EN, *INTERNATIONAL TRADE TREATIES AND AGREEMENTS* 10 (1958), reprinted in G. SCOTT, *supra* note 42, at 60 (absent a treaty, the PRC could face situations in which Western countries invoke customs that conflict with the PRC's perception of international law); LAW IN CHINESE FOREIGN POLICY, *supra* note 47, at 11 (noting that the PRC avoids the conflicts that could arise in this situation by recognizing treaties as valid sources of international law).

58. G. SCOTT, *supra* note 42, at 61. Between 1949 and 1974 the PRC concluded over 2,000 treaties. *Id.* Between 1975 and 1980, the PRC concluded 580 bilateral and 25 multilateral agreements. See HUNGDAH CHIU, *AGREEMENTS OF THE PEOPLE'S RE-*

PRC significantly increased the number of formal agreements it concluded between 1970 and 1980, making it a leading treaty-maker.<sup>59</sup>

Prior to the PRC's acceptance into the United Nations in 1971,<sup>60</sup> the Republic of China was the sole representative of the Chinese people in the United Nations.<sup>61</sup> Upon instatement into the United Nations, the PRC proclaimed that it was not obligated to honor earlier treaties or conventions signed by the Republic of China.<sup>62</sup> Rather than becoming a party to Republic of China's treaties or conventions, the PRC independently adopted the substance of many of these treaties or conventions.<sup>63</sup> The PRC rationalized adopting such treaties or conventions, finding that these agreements merely crystallized preemptory norms.<sup>64</sup>

The PRC's reaction to the Vienna Convention demonstrates how the PRC selectively accedes to various treaty provisions without formally ratifying the treaty itself. The Republic of China negotiated and signed the Vienna Convention before the United Nations had accepted the PRC, thereby excluding the PRC from becoming a signatory to the treaty.<sup>65</sup> The PRC refused to ratify the Vienna Convention, even after it was accepted into the United Nations.<sup>66</sup> Instead, the PRC follows

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PUBLIC OF CHINA 118-221 (1981).

59. G. SCOTT, *supra* note 42, at 61.

60. On October 25, 1971 the General Assembly of the United Nations adopted Resolution 2758 restoring the PRC as the only lawful representative of the Chinese people in the United Nations. G.A. Res. 2758, 26 U.N. GAOR (1976th plen. mtg.) at 36, U.N. Doc. A/L. 632 (1971) [hereinafter cited as G.A. Res. 2758].

61. The Republic of China represented the Chinese people in the United Nations from September 28, 1945 to October 25, 1971. G.A. Res. 2758, *supra* note 60. This is significant because only United Nations member states may sign multilateral treaties concluded under United Nations guidance. See Vamvoukos, *supra* note 52, at 139 (noting that until its instatement in 1971, the PRC could not validly accede to a multilateral treaty concluded under United Nations guidance).

62. On September 29, 1972 the Secretary General of the United Nations received a communication from the PRC's Minister of Foreign Affairs stating:

with regard to the multilateral treaties signed ratified or acceded to by the defunct Chinese government before the establishment of the PRC, my government will examine their contents before making a decision in the light of the circumstances as to whether or not they should be recognized.

Materials, 1985 Chinese-American Summer Law Program, ch. 5, item 12-3 (unpublished, C. Grossman ed.) (available at the editorial offices of the American University Journal of International Law and Policy, Washington, D.C.).

63. Vamvoukos, *supra* note 52, at 139.

64. *Id.* The PRC believes that many principles found in multilateral treaties incorporate traditional international law customs. See *infra* notes 65-68 and accompanying text (discussing the PRC's treatment of the Vienna Convention).

65. The Vienna Convention opened for signature before the PRC's acceptance into the United Nations in 1971. See *supra* note 60 (discussing the PRC's acceptance into the United Nations); MULTILATERAL TREATIES, *supra* note 12, at 695, 702 (noting that at the Vienna Convention, the Republic of China acted as the representative for the Chinese people signing the document on April 27, 1970).

66. MULTILATERAL TREATIES, *supra* note 12, at 695.

those Vienna Convention provisions which it deems as existing principles of international custom.<sup>67</sup>

For example, the PRC follows the Vienna Convention's basic provisions on treaty interpretation and termination on the grounds that they represent international custom.<sup>68</sup> Because the PRC identified and adhered to the customary norms of treaty interpretation and termination, and because it did not ratify the Vienna Convention, the PRC is not bound by the remaining Vienna Convention guidelines. The PRC enjoys the prerogative of defining these provisions according to its national self-interest.

The following section identifies how the PRC defines treaty termination and interpretation and then compares those definitions to Western notions of those two concepts.

## B. THE PRC'S USE OF TREATY TERMINATION

### 1. *Terminating a Treaty Under the Theory of Unequal Treaty*

Like the West, the PRC adopts the notion of treaty termination. The PRC sanctions treaty termination under the coercive measure theory<sup>69</sup> and unequal treaty doctrine.<sup>70</sup> The unequal treaty doctrine defines inequality as a treaty creating nonreciprocal obligations<sup>71</sup> or a treaty concluded by coercive measures.<sup>72</sup> In contrast to the Vienna Convention's narrow and vague definition of coercive force, the PRC's interpretation

67. See *supra* note 64 and accompanying text (explaining the PRC's beliefs regarding the status of multilateral treaties).

68. See HUNGDAH CHIU, *supra* note 32, at 72-120 (discussing the PRC's treatment of treaty interpretation and termination).

69. See *supra* notes 22-25 and accompanying text (describing the coercive measure theory under the Vienna Convention).

70. HUNGDAH CHIU, *supra* note 32, at 60-71. The Nationalist Chinese employed the unequal treaty theory in the 1920's to attack earlier treaties concluded by China with Western powers who received most-favored-nation treatment, territorial cessions, and favorable tariff regulations. *Id.* In 1928, the Nationalists requested that all of these "unequal treaties" be renegotiated. J. HSIUNG, *supra* note 52, at 252; see also TYO-KAO, *THE TERMINATION TREATIES IN INTERNATIONAL LAW* (1933) (analyzing the Nationalist Chinese concept of unequal treaties); *infra* notes 71-75 and accompanying text (discussing the PRC's use of unequal treaties).

71. See Ying T'ao, *Recognize the True Face of Bourgeois International Law from a few Basic Concepts*, 1 *STUDIES IN INTERNATIONAL PROBLEMS* 46, 47 (1960), translated in HUNGDAH CHIU, *supra* note 32, at 5 (stating that "where treaties are concluded with capitalist countries in accordance with self serving needs of bourgeoisie, the substance of these treaties must be scrutinized"). The PRC maintains that when negotiating with a Western nation, questioning the reciprocity of a treaty's obligations is a method of checking the Western nation's motives. *Id.*

72. See G. SCOTT, *supra* note 42, at 90 (stating that the PRC included the idea of coercion in the concept of inequality of parties); see also *supra* notes 22-25 and accompanying text (discussing the Vienna Convention's definition of coercive force).

of coercive force prohibits states from imposing political and economic sanctions on another state to procure a treaty.<sup>73</sup> The PRC's theory sanctioning treaty termination also differs from the Vienna Convention on the issue of substantive textual inequality.<sup>74</sup> Although the Vienna Convention does not recognize substantive textual inequality as grounds for invalidating a treaty, the PRC does.<sup>75</sup> The PRC, therefore, looks beyond a treaty's language and considers the benefits that it confers on each of the concluding parties to determine whether the treaty is valid.<sup>76</sup> In addition to the PRC's acceptance of the unequal doctrine to terminate a treaty, the PRC also adopts the Western concept of fundamental change of circumstance.

## 2. *Terminating a Treaty Under the Theory of Fundamental Change in Circumstance*

The PRC's application of fundamental change of circumstance to invalidate a treaty, however, differs from the definition expounded in the Vienna Convention.<sup>77</sup> The PRC recognizes that a fundamental change

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73. G. SCOTT, *supra* note 42, at 91.

74. *See id.* at 92 (stating that under PRC notions of treaty law, treaties should be based on "equal" and "reciprocal" considerations that include relevant political and economic facts).

75. *See id.* (stating that treaties in the PRC should be based on "equal" and "reciprocal" considerations, including relevant political and economic facts).

76. HUNGDAH CHIU, *supra* note 32, at 64; 1946 Sino-American Treaty of Friendship, Commerce, and Navigation, November 4, 1946, Republic of China-United States, 63 Stat. 1299, T.I.A.S. No. 1871. The PRC considers the treaty unequal, even though on its face the treaty confers mutual benefit to each country (including encouraging both nations to establish factories and increase commerce with one another). *Id.* At the treaty's conclusion, however, China's economic strength hardly matched that of the post-war United States. HUNGDAH CHIU, *supra* note 32, at 63. Nationalist China lacked the capabilities to conduct even a fraction of the business in the United States compared to United States' business conducted in China. *Id.* The PRC also characterizes treaties to which it is not a party as unequal. *Id.* *See generally* Huang Yu, *Such Cooperation*, People's Daily, Dec. 31, 1956, at 1, col. 2 (citing the PRC's declaring unequal the 1956 United States-Switzerland Agreement on Cooperation Concerning Civil Uses of Atomic Energy, 8 U.S.T. 91, T.I.A.S. No. 3745, on the grounds that the United States supplies the Swiss with nuclear material, but reserves the right to supervise and procure inventions produced from the use of this material).

77. *See* Noonan, *Revolutions and Treaty Termination*, 2 DICK. J. INT'L L. 301, 313 (1984) (stating that the PRC views the 1949 Revolution as a fundamental change of circumstance). The Vienna Convention does not consider changes in internal law sufficient to justify abrogation of a treaty. *See supra* notes 20-21 and accompanying text (discussing the fundamental change in circumstance doctrine under the Vienna Convention); *see also* Vienna Convention, *supra* note 10, at arts. 60-62 (giving other reasons for invalidating treaties, which include material breach and impossibility of performance).

Despite the PRC's acceptance of the Vienna Convention's theory of material breach to unilaterally abrogate a treaty, the PRC occasionally decides not to terminate a

of circumstance is valid grounds for treaty termination,<sup>78</sup> but argues that Western nations use the theory as a "capitalist" pretext to unilaterally abrogate unfavorable agreements.<sup>79</sup>

PRC theorists suggest that rather than systematically terminating treaties, states should resolve disputes through diplomatic consultation, including revising or reconcluding treaties to incorporate changes.<sup>80</sup> PRC jurisprudence offers little guidance, however, for determining which changes in circumstance trigger negotiation rather than treaty abrogation.<sup>81</sup> It is therefore difficult to determine the magnitude of a change of circumstance justifying terminating a treaty.<sup>82</sup> The PRC's preference for negotiation, rather than termination, leads to problems in treaty interpretation.

### C. PRC PRACTICE OF TREATY INTERPRETATION

Most of the difficulties arising from concluding treaties with the PRC involve disputes regarding interpretation, rather than termination,

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treaty under such circumstances. In 1966, the PRC and the Soviet Union agreed not to require citizens of either country to produce vaccination certificates upon entering the other country. J. COHEN & HUNGDAH CHIU, *supra* note 33, at 515. The Soviets subsequently announced their decision to require all Chinese citizens entering the Soviet Union to have proof of smallpox vaccination. *Id.* The PRC claimed violation of this agreement but nevertheless, continued to honor the agreement. *Id.*

On the other hand, the PRC frequently employs the theory of impossibility of performance to terminate treaties. The PRC abrogated the Sino-Soviet Cultural Cooperation Agreement, under this theory. July 5, 1956, U.S.S.R.—PRC, V *Chung-hua jen-min Kung-ho-kuo t'iao-yueh-chi*, 1956, 152-54 (1958), 263 U.N.T.S. 129 (strengthening cooperation between the two countries in the spheres of science, technology, education, literature, art, public health, physical culture, journalism, publishing, broadcasting, television, and in other cultural spheres). The PRC claimed that during its 1966 Cultural Revolution, it closed its schools under a state of emergency. J. HSIUNG, *supra* note 52, at 248-49. Therefore, due to circumstances beyond its control, the PRC sent all Soviet students home. To the PRC, this suspension of studies constituted a legitimate supervening cause justifying terminating its treaty obligation. *Id.*

78. Chou Keng Sheng, *Looking at the West Berlin Question from the Angle of International Law*, 1 *STUDIES IN INTERNATIONAL PROBLEMS* 44 (1959), translated in HUNGDAH CHIU, *supra* note 32, at 103.

79. WANG YAO T'EN, *INTERNATIONAL TRADE TREATIES AND AGREEMENTS* 15 (1958), translated in HUNGDAH CHIU, *supra* note 32, at 103 [hereinafter cited as WANG]. The Standing Committee of the National People's Congress possesses the power to decide on the ratification or abrogation of important agreements concluded with foreign states. P.R.C. CONST. art. 67(14) (1982).

80. HUNGDAH CHIU, *supra* note 32, at 104; see L. OPPENHEIM, 1 *INTERNATIONAL LAW* 947 (8th ed. 1955) (claiming Western nations invoke this doctrine based on political motivations). Although the practical importance of fundamental change in circumstance may at times be exaggerated by the West, nations dissatisfied with the *status quo* frequently use this theory to escape burdensome treaties. Vienna Convention on the Law of Treaties, reprinted in 8 *I.L.M.* 707 (1969).

81. J. COHEN & HUNGDAH CHIU, *supra* note 33, at 104.

82. *Id.*

of various agreements.<sup>83</sup> The PRC adheres to the Vienna Convention's provisions recognizing preparatory work for treaty interpretation.<sup>84</sup> In disputes arising from the meaning of a word appearing in different texts, the PRC, like the signatories to the Vienna Convention, concedes that both texts possess equal authority,<sup>85</sup> but maintains that there is only one official meaning.<sup>86</sup> The PRC follows the principle of *in dubio mitius*<sup>87</sup> when preparatory work fails to resolve interpretational disputes. Under the *in dubio mitius* principle, the PRC interprets disputed terms in a way that is less onerous for the party assuming an obligation.<sup>88</sup>

The 1955 Agreed Announcement between the PRC and the United States<sup>89</sup> typifies the PRC's interpretational dispute procedure.<sup>90</sup> The 1955 Agreed Announcement provided for the release of each country's nationals from the other state.<sup>91</sup> A dispute arose as to the interpretation of Article 3 which provided that: "the PRC recognizes that Americans in the PRC who desire to return to the United States are entitled to do so. The PRC has adopted and will further adopt appropriate measures so that they can expeditiously exercise their right to return."<sup>92</sup> The United States claimed that Article 3 extended to all United States citizens in the PRC, including those detained in Chinese prisons.<sup>93</sup>

The PRC rejected the United States' position, and applied the agree-

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83. HUNGDAH CHIU, *supra* note 32, at 72. The Chinese writer, Lin Hsin, identifies this problem as "sleeping in the same bed but dreaming different dreams." *Id.*

84. J. COHEN & HUNGDAH CHIU, *supra* note 33, at 1214; *see* HUNGDAH CHIU, *supra* note 32, at 84 (stating that preparatory work is a generally accepted rule in treaty interpretation); Vienna Convention, *supra* note 10, at art. 32 (outlining the Convention's support of preparatory work in treaty interpretation).

85. WANG, *supra* note 79, at 11-14, translated in J. COHEN & HUNGDAH CHIU, *supra* note 33, at 1162-64.

86. *See* J. COHEN & HUNGDAH CHIU, *supra* note 33, at 1210 (discussing problems of language barriers in treaty interpretation).

87. HUNGDAH CHIU, *supra* note 32, at 85. Literally translated, this principle means in doubtful cases, the mild one applies. *Id.*

88. L. OPPENHEIM, *supra* note 80, at 953; *see* HUNGDAH CHIU, *supra* note 32, at 85 (stating that the Chinese prefer the principle of *in dubio mitius* because it adds justification to its desire to limit infringement upon its sovereign rights).

89. *Agreed Announcement of the Ambassadors of the United States of America and the People's Republic of China, Sept. 10, 1955*, 33 DEP'T ST. BULL. 844, 846 (Sept. 19, 1955) (providing for the release of each country's nationals from the other nation).

90. HUNGDAH CHIU, *supra* note 32, at 82.

91. *Agreed Announcement*, *supra* note 89.

92. *Id.* at art. 3(1).

93. *See Continued Detention of U.S. Civilians by Communist China*, 33 DEP'T ST. BULL. 1049-50 (Dec. 26, 1955). The United States asserted that "the declaration is simple, clear, and positive. It says that any United States citizen has the right to leave China . . . . No distinction is made as between those in prison and those out of prison."



ment only to imprisoned American PRC residents.<sup>94</sup> The Chinese followed the norms of international practice and consulted the 1955 Agreed Announcement's negotiating history to support its position.<sup>95</sup> The PRC contended that the United States raised, and the PRC rejected, the prisoner issue during negotiations.<sup>96</sup> The PRC prevailed and persuaded the United States to abandon its demand that all Americans living in the PRC be entitled to return to the United States.<sup>97</sup>

The PRC's and the United States' negotiation of the 1955 Agreed Announcements' interpretation also demonstrates the PRC's position concerning language disputes. During negotiations, the United States and the PRC disagreed over the timing of the release of American civilians.<sup>98</sup> The final English version of the 1955 Agreed Announcement required "expeditious" release, while the corresponding Chinese text enabled the PRC to act less promptly.<sup>99</sup> The PRC determined that the Agreement's preparatory work failed to support either side's interpretation and interpreted the Agreement accordingly to *in dubio mitius*, and argued that a less demanding standard than "expeditious" should apply.<sup>100</sup> The PRC withheld releasing some American civilians until fifteen years later.<sup>101</sup>

The PRC's behavior during the dispute over the 1955 Agreed An-

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94. See R. YOUNG, *NEGOTIATING WITH CHINESE COMMUNISTS: THE UNITED STATES EXPERIENCE, 1953-1967*, 81 (1968) (observing that the Chinese claimed a distinction between "ordinary American residents" and "those who offended against the law"); see also HUNGDAH CHIU, *supra* note 32, at 83 (noting that the PRC agreed that the future disposition of Chinese prisoners remained within its sovereignty and was not viewed as a matter susceptible to intervention by outside states).

95. HUNGDAH CHIU, *supra* note 32, at 83; see *supra* note 36 and accompanying text (discussing the application of negotiating history by the Vienna Convention on the Law of Treaties).

96. Ho Yang, *U.S. Stonewalling at Geneva*, 16 *PEOPLE'S CHINA* 13-14 (1956). During the Geneva talks the United States demanded the release of all American nationals, including spies and law breakers. *Id.* The PRC contended that a "country possesses the inviolable sovereign right to deal with law-breaking aliens according to its own law." *Id.* Accordingly, the American representative, Ambassador Johnson, finally agreed to this principle. *Id.*

97. HUNGDAH CHIU, *supra* note 32, at 84. As a result, the PRC held American prisoners in China from the time of the Agreed Announcement until the early 1970's. *Id.*

98. See G. SCOTT, *supra* note 42, at 38 (stating that the United States delegation wanted civilians released immediately, while the Chinese delegation wanted indefinite delay).

99. The Chinese term *jin-su* conveys the sense of utmost speed inherent in the word "expeditious", yet inappropriately translates the connotation of efficacy which distinguishes "expeditious" from the phrase "very quickly." J. COHEN & HUNGDAH CHIU, *supra* note 33, at 1144.

100. See *supra* note 87 and accompanying text (defining the term *in dubio mitius*).

101. See HUNGDAH CHIU, *supra* note 32, at 84 (stating that Americans were still being held when the book was published in 1972).

nouncement indicates that the PRC advocates negotiation as the most appropriate method of dispute resolution.<sup>102</sup> Nonetheless, the PRC refuses to accept the jurisdiction of the International Court of Justice or neutral arbitration tribunals<sup>103</sup> because it disfavors using third party adjudication to settle international disagreements in cases of public international law.<sup>104</sup> The PRC, however, did relinquish some control over dispute resolution in the 1953 Korean Armistice Agreement<sup>105</sup> by consenting to the creation of a commission to supervise the Armistice Agreement's performance.<sup>106</sup> The commission, comprised of representatives from two communist and two neutral Western countries, followed the rule of unanimity,<sup>107</sup> to ensure that the Armistice Agreement was interpreted thoroughly and fairly.<sup>108</sup>

#### D. SUMMARY OF THE DIFFERENCES BETWEEN PRC TREATY PRACTICE AND THE PRACTICE EMBODIED IN THE VIENNA CONVENTION

A comparison of the PRC's treatment of bilateral treaty law under international custom to Western treatment of treaty law under the Vienna Convention reveals that PRC theories differ from Western theories. The PRC and Western theories vary on three points regarding treaty termination. First, the PRC's definition of coercion includes economic or political aggression,<sup>109</sup> whereas Western countries have not

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102. G. SCOTT, *supra* note 42, at 132.

103. See HUNGDAH CHIU, *supra* note 32, at 83 (noting that the PRC disfavors any method of dispute resolution that might potentially limit its sovereignty); 1979-1980 I.C.J.Y.B. 87-88 (1980) (describing the structure and composition of the International Court of Justice). Therefore, even though the PRC, as a permanent member of the United Nations Security Council, appoints a member to the International Court of Justice, it refuses to accept that Court's jurisdiction. *Id.*

104. See Lockett, *Dispute Settlement in People's Republic of China: The Developing Role of Arbitration in Foreign Trade and Maritime Disputes*, 16 G.W. J. INT'L L. & ECON. 239-69 (1982) (discussing the PRC's treatment of arbitration in private law); see also Houzhi, *Arbitration a Method Used by China to Settle Foreign Trade and Economic Disputes*, 4 PACE L. REV. 519-36 (1984) (discussing arbitration in international context).

105. Korean Armistice Agreement, July 27, 1953, People's Republic of Korea-People's Republic of China, United Nations 4 U.S.T. 230, T.I.A.S. No. 2781, 472 U.N.T.S. 36 [hereinafter cited as Armistice Agreement].

106. See HUNGDAH CHIU, *supra* note 32, at 77 (discussing the Armistice Agreement).

107. See *id.* at 77 (listing the four countries involved: Czechoslovakia, Poland, Switzerland, and Sweden).

108. *Id.* at 78.

109. See *supra* note 72 and accompanying text (describing the PRC's definition of coercive force).

decided whether to accept this liberal concept.<sup>110</sup> Second, the PRC approves of treaty termination for substantive textual inequality, a practice that Western nations do not permit.<sup>111</sup> Third, the PRC prefers to consult before abrogating a treaty under the fundamental change in circumstance doctrine.<sup>112</sup> Western countries, in contrast, consider fundamental changes to be a basis for automatic termination.<sup>113</sup>

With the exception of dispute resolution, the PRC and the Western countries have similar theories of treaty interpretation. Unlike the West, the PRC almost always refuses to submit public law disputes to third party adjudicatory tribunals. The PRC, therefore, resolves its treaty disputes, through consultation.<sup>114</sup> This comparison of PRC and Western acceptance of third party adjudication in particular, and PRC and Western treaty practice in general, foreshadows the Joint Declaration's potential for success.

### III. The Signing of Joint Declaration

Proper evaluation of the Joint Declaration's binding effect also requires an understanding of the political circumstances leading up to and surrounding the document's signing as well as the document's basic provisions. Pertinent events preceding the Joint Declaration's signing include the Gang of Four's arrest in 1976 and Deng Xiaoping's emergence in 1978 as the Communist Party's leader.<sup>115</sup> The PRC entered an

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110. See generally G. SCOTT, *supra* note 42, at 90 (distinguishing both Chinese view and Declaration on Prohibition of Military, Political, or Economic Coercion in the Conclusion of Treaties from Vienna Convention viewpoint as expressed by article 52. Declaration on Prohibition of Military, Political or Economic Coercion in Conclusion of Treaties, U.N. Doc. A/CONF. 39/26 (1969)).

111. See *supra* notes 73-75 and accompanying text (outlining the PRC's use of substantive textual inequality).

112. See HUNGDAH CHIU, *supra* note 32, at 104 (explaining the PRC's use of fundamental change in circumstance).

113. See J. SINCLAIR, *supra* note 12, at 192 (describing fundamental change in circumstance under the Vienna Convention).

114. See J. COHEN & HUNGDAH CHIU, *supra* note 33, at 1206-07 (explaining the PRC's philosophy concerning third party adjudication).

115. Prior to Deng Xiaoping's acquisition of control of the Communist Party, Mao-tse-tung and his inner council, known as the Gang of Four, comprised the PRC's leadership. See generally T. White, *China: Burnout of a Revolution*, 13 TIME 30 (Sept. 26, 1983) (outlining China's political history from 1945 to present). With Mao's death and the Gang of Four's subsequent arrest in 1976, a two year power struggle ensued. *Id.* By 1978, Deng Xiaoping emerged as the country's leader. *Id.*; see J. FAIRBANK, *THE UNITED STATES AND CHINA*, *supra* note 2 at 417 (discussing political developments of Mao and the Gang of Four from 1962-76); J. WANG, *CONTEMPORARY CHINESE POLITICS* (1980) (framing Chinese political milieu); A. CHAN, *ON SOCIALIST DEMOCRACY AND THE CHINESE LEGAL SYSTEM* (1985) (documenting origins and events surrounding *Liyizhe* debates).

age of reform, upon Deng's rise to power.

Deng emphasized modernizing the Chinese economy by encouraging Western investment<sup>116</sup> and deemphasizing central control. This policy gives industry greater self-determination regarding pricing, wages, production and development.<sup>117</sup>

Deng advocates improving Chinese domestic productivity through increasing the supply of Western capital and technology.<sup>118</sup> For many years, the PRC has used Hong Kong to facilitate Western contact with the PRC.<sup>119</sup> Using this commercial center as a free port to send exports to other countries<sup>120</sup> and allowing forty-five percent of its total imports to enter Hong Kong, the PRC derives one-third of its gross convertible foreign exchange earnings from Hong Kong.<sup>121</sup>

In light of the financial importance of Hong Kong to the PRC, Western investors and Hong Kong business persons feared that the PRC would fully and unilaterally annex Hong Kong in 1997.<sup>122</sup> The potential for Communist control caused the value of the Hong Kong dollar to fall dramatically on the world market.<sup>123</sup> As a consequence, Hong Kong suffered serious economic problems and faced political uncertainty.<sup>124</sup> To reduce this uncertainty, the PRC and Great Britain nego-

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116. Bonavia, *Socialist Balancing Act*, 130 FAR EAST. ECO. REV. 36 (1985) [hereinafter cited as Bonavia, *Socialist Balancing Act*]. In addition to Deng's efforts to increase support from the international community, he recently moved to ensure the success of his program by enlisting further cooperation from his own government. Washington Post, Sept. 17, 1985 at A1, col. 2. Deng and Party General Secretary Hu Yaobang asked for and received the resignation of sixty-four senior members of the central committee and ten members of the Politburo. *Id.* The leaders replaced them with younger and more educated bureaucrats sympathetic to economic reform. *Id.*

117. Bonavia, *Socialist Balancing Act*, *supra* note 115, at 36. Industry's self-determination remains limited. Lewis & Ottley, *China's Developing Labor Law* 59 WASH. U.L.Q. 1165, 1168 (1982). Although the central government no longer directly appoints plant managers, the government maintains control, retaining the right to approve appointments of plant managers. *Id.* at 1183.

118. See N. MINERS, *supra* note 4, at 23 (emphasizing economic benefit of western technology to the PRC).

119. *Id.*

120. *Id.* at 27. The PRC uses Hong Kong as a means of trading with countries such as Indonesia with whom it maintains hostile relations. See 64 FAR EAST ECON. REV. 62 (1980) (describing PRC-Indonesia trade through Hong Kong). Direct trade between Indonesia and the PRC ceased after the military coup in Indonesia in 1965. *Id.*

121. N. MINERS, *supra* note 4, at 21-22.

122. D. BONAVIA, *supra* note 1, at 59.

123. *Id.* at 78. The rate of exchange of the Hong Kong dollar fell in relation to the United States dollar from 6:1 in 1982 to 7.8:1 in 1983. *Id.* On October 15, 1983 the Hong Kong Government protected the currency by pegging it to the United States dollar at an exchange of \$7.8 Hong Kong dollars to \$1.00 U.S. *Id.*

124. *Id.* at 79. Among the more significant effects created by the uncertainty of a PRC annexation were the abandonment of a project to build a new airport, construc-

tiated the Joint Declaration as an orderly settlement to the problem.<sup>125</sup>

The Joint Declaration transfers sovereignty over Hong Kong from Britain to the Chinese on July 1, 1997.<sup>126</sup> The Joint Declaration, however, limits the PRC's control over Hong Kong. The Joint Declaration requires the PRC to give Hong Kong's residents influence in choosing their own government, either by direct election or through consultation.<sup>127</sup> In addition, the PRC may not change the region's social and economic system for forty-nine years after the treaty takes effect.<sup>128</sup> Further, the PRC may not levy taxes,<sup>129</sup> maintain public order,<sup>130</sup> or inhibit the free flow of capital in Hong Kong.<sup>131</sup> Finally, the Joint Declaration provides for continued private possession of land<sup>132</sup> and a peaceful and orderly transfer of government in 1997 through the establishment of the Sino-British Joint Liaison Group.<sup>133</sup>

The Joint Liaison Group represents the core benefit of the signing of the Joint Declaration. The PRC and Great Britain both agreed that it is in their best interest to ensure an orderly transfer of government in 1997. The PRC realized that its modernization plans were dependent on Hong Kong<sup>134</sup> and Great Britain realized that it needed to protect

tion projects for business offices and housing, and a fear that banks would close as businesses withdrew funds. *Id.*

125. Joint Declaration, *supra* note 3. See generally D. BONAVIA, *supra* note 1 (discussing the political events leading up to the signing of the Joint Declaration).

126. The PRC considers the Joint Declaration a formal international agreement. HUNGDAH CHIU, *supra* note 32, at 14. The PRC entitles its most important documents, such as agreements regulating political or economic relations between contracting states, "treaties". *Id.* A "declaration," is normally a document that only provides for general principles of international relations. *Id.* The Joint Declaration's title, however, is more a result of semantics than an indication of the information it contains. *A Question of Semantics*, 116 FAR EAST. ECON. REV. 16 (1984). The PRC consistently argues that the three treaties transferring Hong Kong's control to Great Britain are illegitimate. See *supra* note 3 (discussing the conclusion of these treaties). The PRC loses face by labelling the Joint Declaration a treaty instead of a declaration. Therefore, the PRC believes it currently possesses a lawful right to control Hong Kong. By concluding a treaty stipulating the manner in which Great Britain will permit the PRC to control Hong Kong in 1997, the PRC formally admits to the world that the PRC relinquished its right to Britain in the 1800's to control Hong Kong. Comment, *Legal Aspects of the Sino-British Draft Agreement on the Future of Hong Kong*, 22 TEX. INT'L L. REV. 167 (1985).

127. Joint Declaration, *supra* note 3, at art. 4.

128. *Id.* at art. 5. The forty-nine year period begins July 1, 1997 and ends June 30, 2046. *Id.*

129. *Id.* at art. 8.

130. *Id.* at art. 11.

131. *Id.* at art. 7.

132. See *id.* at annex 3 (stating that leases and all rights related to such leases will continue to be recognized and protected).

133. *Id.* at annex 2.

134. See N. MINERS, *supra* note 4, at 23 (discussing PRC's economic dependence on Hong Kong); see also Kamm, *Importing Some of Hong Kong - Exporting Some of*

its own business interests<sup>135</sup> and retain a good rapport with the Hong Kong people and the international community. The parties thus signed the Joint Declaration to give the PRC sovereignty over Hong Kong while placing limitations upon the PRC's ability to control.<sup>136</sup> The prospects for a successful transfer of sovereignty, conditioned upon an economically independent Hong Kong, is discussed in the following section.

#### IV. The Joint Declaration's Potential for Success in Light of PRC Treaty Practice and Political Influence

This Comment compared PRC interpretations of treaty law with Western views as codified in the Vienna Convention. It also outlined the political events that compelled the PRC and Britain to sign the Joint Declaration. Using these two sections as a framework, this Comment now analyzes the various problems which may arise in the future because of differences in treaty interpretation in light of a changing political climate.

##### A. THE TERMINATION OF THE JOINT DECLARATION

###### 1. *Using the Theory of Unequal Treaty to Terminate the Joint Declaration*

The PRC traditionally uses the unequal treaty doctrine to abrogate its treaty obligations.<sup>137</sup> If the PRC applies the unequal treaty doctrine to the Joint Declaration, it may use the reciprocity principle to abrogate the Agreement. Specifically, the PRC considers the nineteenth century treaties between China and Great Britain that cede or lease parts of Hong Kong to Britain unequal.<sup>138</sup> Under a PRC interpretation of the unequal treaty doctrine, Britain's occupation of Hong Kong is

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*China*, 7 CHINA BUS. REV. 28 (1980) (discussing how Special Economic Zones plan to function).

135. W. BEAZER, *THE COMMERCIAL FUTURE OF HONG KONG* 74, 75 (1978). British entrepreneurs use Hong Kong as a haven for investment because Hong Kong's corporate tax rates are far below comparable rates in England. *Id.* In addition to the tax advantages, Britain's trade surplus with Hong Kong reached the level of 1.5 billion Hong Kong dollars in 1976. *See also* N. MINERS, *supra* note 4, at 8-17 (detailing British interests in Hong Kong).

136. *See generally*, Joint Declaration, *supra* note 3, at arts. 4, 5, 7, 8, 11, annex 3 (discussing the limitations on PRC control contained in the Joint Declaration).

137. *See* G. SCOTT, *supra* note 42, at 90 (discussing the PRC definition of the unequal treaty doctrine).

138. *See* Johnson, *The Mousetrapping of Hong Kong*, 24 ASIAN SURV. 887, 898 (1984) (noting that on August 15, 1983, Communist Party General Secretary Hu Yaobang stated that he considered the so-called three Hong Kong treaties unequal).

still invalid.<sup>139</sup> The terms of the Joint Declaration permit Britain to exchange Hong Kong, an illegally occupied territory, for the PRC's promise to limit its control over Hong Kong's government.<sup>140</sup> Thus, although Britain's obligation in the Joint Declaration is equal on its face, it fails to satisfy the PRC's requirement of treaty equality.<sup>141</sup> The PRC views Britain as transferring its sovereignty over a region of the PRC over which Britain has no sovereignty.<sup>142</sup> Accordingly, under the PRC's theory of international treaty law, the PRC may legitimately invalidate the Joint Declaration. Since 1949, however, the PRC has not declared unequal any bilateral treaties that its Communist Government concluded.<sup>143</sup> The PRC fears that using the unequal treaty doctrine to abrogate a treaty would allow other nations to employ the same doctrine to abrogate a treaty concluded with the PRC.<sup>144</sup> It, therefore, is unlikely that the PRC would invoke the unequal treaty doctrine to abrogate the Joint Declaration.

## 2. *Terminating the Joint Declaration Under the Theory of Fundamental Change in Circumstance*

The PRC may use another tool, such as a fundamental change in circumstance, to invalidate or terminate the Joint Declaration.<sup>145</sup> Previously, not every fundamental change constituted grounds for automatic treaty abrogation.<sup>146</sup> Instead, the PRC tried to rectify, through consul-

139. The PRC's reciprocity argument, as applied to the Joint Declaration, hinges on accepting the premise that Great Britain illegally possesses Hong Kong.

140. Joint Declaration, *supra* note 3, at arts. 1-3.

141. See HUNGDAH CHIU, *supra* note 32, at 60-71 (describing the irrelevancy of equality on its face).

142. See *supra* note 75 and accompanying text (stipulating that the unequal treaty doctrine falls within the PRC's, not the West's, concept of international law).

143. See HUNGDAH CHIU, *supra* note 32, at 64. To date, the PRC only declared unequal those treaties concluded by prior Chinese governments or by different nations. *Id.* at 65-71.

144. Treaty of Friendship and Mutual Non-Aggression Between the People's Republic of China and the Union of Burma, 3 *People's Republic* 13 (Feb. 2, 1960). Burma charges that the Sino-Burmese Treaty of Friendship and Mutual Non-Aggression contains only verbal reciprocity. *Id.* Article 3 of the Treaty provides that "each contracting party undertakes . . . not to take part in any military alliance directed against the other contracting party." *Id.* But the PRC, with over three million people in its armed forces, needs no ally to protect itself against 100,000 Burmese troops. HUNGDAH CHIU, *supra* note 32, at 64. By forbidding Burma to form an alliance with a country like the Soviet Union or the United States the Treaty, though equal in wording, leaves the Burmese unprotected against Chinese expansion. *Id.*

145. See WANG, *supra* note 79, at 15 (explaining the PRC's interpretation of fundamental change in circumstance).

146. See *supra* note 77 (describing how a Soviet change did not prompt a PRC breach).

tation, the imbalance caused by a fundamental change in circumstance.<sup>147</sup> If left wing extremists take control of the PRC's Communist Party, however, and decide that a capitalist Hong Kong impairs the advancement of Party ideology,<sup>148</sup> the new PRC government may use the fundamental change in circumstance theory to abrogate the Joint Declaration.

For example, if the extremists come to power, they could abolish article 31 of the PRC's 1982 Constitution and then classify the abolition as a fundamental change in circumstance.<sup>149</sup> Article 31 creates the internal procedure by which the PRC allows "special administrative regions" to exist under laws differing from the laws of the PRC.<sup>150</sup> The Joint Declaration permits Hong Kong to maintain its current economic and political system pursuant to this article.<sup>151</sup>

Without the safeguard provided by article 31 of the Constitution, Hong Kong has no guarantee of retaining its political independence,<sup>152</sup> because other provisions of the Chinese Constitution would control when the administrative or local rules of Hong Kong contravene it.<sup>153</sup> For example, the Constitution stresses that the PRC's economic system is based on socialist public ownership of the means of production.<sup>154</sup> A

147. *Id.*

148. See *infra* notes 174-76 and accompanying text (describing left wing ideology and the probability of an extremist swing in PRC politics).

149. P.R.C. CONST. art. 31 (1982). Contrary to the American notion that a Constitution is a stable and lasting document, the PRC frequently and significantly changes its Constitution. P.R.C. CONST., adopted on Sept. 30, 1954, March 5, 1978, December 4, 1982, Foreign Press, Peking (Translation). It, therefore, is not inconceivable for the PRC to change its Constitution again, particularly if a new, ideological government comes to power.

150. P.R.C. CONST. art. 31 (1982) (stating "the state may establish special administrative regions when necessary). The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of specific conditions". *Id.* The PRC invented special administration regions with Taiwan specifically in mind, but to date the PRC only applies the concept to Hong Kong. See Weng, *Some Key Aspects of the 1982 Draft Constitution of the Peoples Republic of China*, 492 CHINA Q. 505, 505 (1983); see also P.R.C. CONST. preamble (1982) (mentioning Taiwan in regard to reunification of the motherland).

151. Joint Declaration, *supra* note 3, at art. 3.

152. Questions arise as to whether article 31, even as it exists in the 1982 Constitution, protects Hong Kong from imposition of communist structure. See Clarke, *supra* note 9, at 74-81 (discussing socialism and the 1982 Constitution).

153. P.R.C. CONST. art. 5 (1982) (stating "no law or administrative or local rules or regulations shall contravene the Constitution").

154. P.R.C. CONST. art. 6 (1982). The PRC bases its political system upon the principle of democratic centralism. Even if China abolishes its current Constitution subsequent documents will almost surely incorporate this principle. 1954, 1975, and 1978 Constitutions, translated in FOREIGN LANGUAGE PRESS, PEKING. See also SCHRAM, POLITICAL THOUGHT OF MAO TSE TUNG 313 (1977) (defining the Party's system of democratic centralism "in which the minority is subordinate to the majority,



capitalist Hong Kong, therefore, contravenes Chinese constitutional law and the PRC could not tolerate its existence.<sup>155</sup> Accordingly, the PRC may abrogate the Joint Declaration under the doctrine of fundamental change in circumstance to establish a socialist Hong Kong.<sup>156</sup>

Article 27 of the Vienna Convention, however, expressly forbids a country to use a law of internal governance to abrogate a treaty.<sup>157</sup> Considering the fact that the PRC is striving to gain respect in the international arena, it is unlikely that the PRC would use the fundamental change in circumstance theory to terminate the Joint Declaration.<sup>158</sup> Instead, the PRC will probably try to implement the changes that it wants in the Joint Declaration through consultation with Great Britain.<sup>159</sup> The success of such consultation depends on the Joint Declaration's ability to resolve disputes.

## B. THE INTERPRETATION OF THE JOINT DECLARATION

The Joint Liaison Group provides an already established structure for consultation between the PRC and Great Britain.<sup>160</sup> If the Group is unable to resolve a dispute, it refers the issue to the British and Chinese Governments for further consultation.<sup>161</sup> The Joint Declaration

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the lower level to the higher level, the part to the whole, and the entire membership to the Central Committee. . ."); R. FAIRBANK, *THE UNITED STATES AND CHINA*, *supra* note 2, at 367 (noting democratic centralism is mass organizations); WANG, *CONTEMPORARY CHINESE POLITICS* 48 (1980) (attributing this "organizational principle" to Lenin).

155. P.R.C. CONST. art. 6 (1982).

156. Under the Vienna Convention a signatory cannot invoke the provisions of its internal law to justify its failure to perform or abrogate a treaty. Vienna Convention, *supra* note 10, at art. 27. Although there is no existing information on whether the PRC accepts this principle, the PRC's notion of state sovereignty and hence national security directly conflicts with a provision limiting internal behavior. *See* notes 27-29 and accompanying text (discussing article 27).

157. Vienna Convention, *supra* note 10, at art. 27.

158. New York Times, Sept. 27, 1985, at A12, col. 1.

159. Joint Declaration *supra* note 3, at art. 3(4). The Joint Declaration will ultimately contain problems of interpretation. For instance, the Declaration calls for the PRC's appointment of Hong Kong's chief executive on the basis of elections or local consultations. *Id.* "Local Consultations" implies anything from citizen discussions in local town halls to a meeting of PRC officials in a Hong Kong hotel room. *See infra* note 160 (discussing the selection of Hong Kong officials).

160. *See generally*, Joint Declaration, *supra* note 3, at annex 2 (discussing Sino-British Joint Liaison Group). In the Joint Liaison Group one senior official of ambassadorial rank and four additional members represent each side. Joint Declaration, *supra* note 3, at annex 2, art. 7. These representatives will hold consultations to ensure the smooth implementation of the Joint Declaration. Joint Declaration, *supra* note 3, at annex 2, art. 2.

161. Joint Declaration, *supra* note 3, at annex 2, art. 3.

provides for disbanding this Group by the year 2000.<sup>162</sup> Considering the Joint Liaison Group's short lifespan and its policy of referring problems to the two Governments, it cannot effectively resolve or enforce complex or long term interpretive problems.<sup>163</sup>

The Joint Declaration's article 2 of annex 2 empowers the Joint Liaison Group to establish special subgroups "to deal with particular subjects requiring expert assistance."<sup>164</sup> Forming such a subgroup for resolving disputes would help the Joint Declaration's parties solve interpretive problems arising from the Agreement.<sup>165</sup>

The PRC, however, currently has little incentive to create such a subgroup.<sup>166</sup> Without substantial outside pressure, it is unlikely that the PRC will limit its sovereignty and submit a Joint Declaration dispute to third party adjudication. The PRC currently enjoys a reputation for

162. *Id.* at annex 2, art. 8.

163. Any dispute-resolving body that possesses no enforcement power, like the Joint Liaison Group, and any dispute-resolving body whose decisions revert to another source after its decisions receive a negative reception, like the Joint Liaison Group, potentially holds negligible authority.

164. Joint Declaration, *supra* note 3, at annex 2, art. II.

165. Since the PRC rejects the jurisdiction of the International Court of Justice and no enforcement mechanism exists to enforce the Joint Declaration, the Joint Declaration's interpretation hinges on negotiations between the PRC and Britain. *See supra* note 100 (discussing the PRC's rejection of the jurisdiction of the International Court of Justice). Precedent exists, however, for the formation of a dispute-resolving subgroup. *See supra* notes 102-05 and accompanying text (describing the configuration of the dispute-resolving body in the Korean Armistice Agreement). The PRC willingly agreed to bring before an arbitration panel problems in interpreting the Korean Armistice. *Id.*

166. A possible way for Britain to provide the incentive to form a subgroup to resolve interpretational disputes rests with Britain's willingness to permit reforms in Hong Kong's legislative structure. *See* White Paper: The Further Development of Representative Government in Hong Kong, November 1984, *reprinted in* D. BONAVIA, *supra* note 1, at 210-24 (discussing Hong Kong's current legislative structure).

The Joint Declaration gives Hong Kong in 1997 the autonomy to choose its executive, legislative, and judicial branches of government. Joint Declaration, *supra* note 3, at annex 1, art. 1. If Britain grants this autonomy to Hong Kong now, allowing Hong Kong to directly elect its own legislative body, by 1997 a government entrenched in the democratic system will exist for ten years. A common principle suggests that, people more adamantly resist giving up something they already possess, than being prohibited from acquiring something they never possessed. Accordingly, the people of Hong Kong will offer more resistance to PRC control, if the PRC tries to restrict the Hong Kong people's right to directly elect its own legislature, than if the Hong Kong people never acquire this right from the PRC.

Recently in Hong Kong, British officials permitted electoral colleges, chosen by Hong Kong residents, to select members to Hong Kong's legislative Council. D. BONAVIA, *supra* note 1, at 212. By the next elections in 1988, some British officials recommend a system of "one man, one direct vote." La, *The Buck Stops Here*, 130 FAR EAST. ECON. REV. 28 (1985). The PRC contends that it will not permit such a system. *Id.* at 43. Rather than face reprisals from the PRC, Britain may use this recommendation of a direct vote in Hong Kong as a bargaining incentive to entice the PRC to accept a dispute resolving subgroup with enforcement powers.

being a reasonable and responsible member of the international community; a reputation primarily enhanced by the signing of the Joint Declaration.<sup>167</sup> The potential dividends which would accrue to the PRC if it agreed to form a neutral body to resolve and enforce disputes, would insignificantly foster its public image, but would severely limit its perceived right of sovereignty.<sup>168</sup>

Differences between Western and PRC treaty practice such as the unequal treaty or fundamental change in circumstance doctrine will probably not affect the PRC's adherence to the Joint Declaration. The PRC's refusal to submit disputes to third party adjudicatory bodies, therefore, underlines one important difference that could realistically effect the PRC's adherence to the Joint Declaration.

### C. OUTSIDE INFLUENCES AFFECTING THE SUCCESS OF THE JOINT DECLARATION

Without a neutral body enforcing the Joint Declaration, the PRC will rely on economic or political influences to interpret the Agreement. These influences emanate from the economic fate of Deng's modernization program.<sup>169</sup>

#### 1. *The Success of the Joint Declaration Under Deng's Leadership*

If Deng significantly tampers with the Joint Declaration, he could trigger a mass exodus of Western business from Hong Kong.<sup>170</sup> This exodus would threaten the PRC's modernization drive, and would weaken Deng's Party control and national power.

Both the PRC's economic success, achieved in part through Hong Kong's continued prosperity, and its adherence to the Joint Declaration interrelate with the PRC's desire to reunify with Taiwan. Deng believes that the PRC's rapid economic growth, coupled with the lateral freedom given to Hong Kong residents, gives Taiwan incentive to unify the Chinese people under an agreement similar to the Joint Declaration.<sup>171</sup>

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167. New York Times, Sept. 27, 1985, at A12, col. 1.

168. See G. SCOTT, *supra* note 42, at 132 (explaining how "intervention" by any third party infringes on the PRC's sovereignty).

169. See Joint Declaration, *supra* note 3, at annex 2 (providing that the Joint Liason Group possesses no enforcement power).

170. N. MINERS, *supra* note 4, at 22.

171. Interview with Gu Xiancheng, Advisor, China International Trust and Investment Corporation, Beijing (July 24, 1985); Peoples Daily, Sept. 27, 1984, at 1, col. 2. The Republic of China rejects this proposition claiming such a solution causes it to lose its sovereignty. *Foreign Minister Rejects Hong Kong Solution*, Foreign Broadcast Information Service, Oct. 5, 1984, at 6, col. 3. Without sovereignty Taiwan retains no legal means to protect itself against the PRC taking away rights the PRC promised to

Accordingly, any PRC deviation from the Joint Declaration weakens the pro-unification message that the PRC wants to convey to Taiwan.<sup>172</sup>

## 2. *The Success of the Joint Declaration After Deng*

At eighty-one years old, Deng's death or retirement is imminent. Consequently, assuming that the PRC's modernization continues to succeed, Deng will leave Party control to his followers rather than to a more extremist group.<sup>173</sup> Reformists who incorporate Deng's ideology likely will continue to adhere to the Joint Declaration and interpret the treaty to favor significant autonomy for Hong Kong. Many leftists, however, wait for the PRC's economy to falter to redefine the PRC's government.<sup>174</sup> Chinese leftists still adhere to traditional Maoist ideas, denouncing the corrosive influence of Deng's policies on Party and social conduct.<sup>175</sup> Top leftist officials advocate opening up China to the West, but only in conjunction with "sharp vigilance and education of communist ideology as its core."<sup>176</sup> Middle level cadres, who joined the PRC Communist Party during the Cultural Revolution and who will hold the highest positions of power by 1997, support factionalism or constant revolution to establish a true communist society.<sup>177</sup>

The PRC's turbulent political past suggests that the chances for radical changes in the future are likely. Harsh extremist movements<sup>178</sup> mark the PRC's history and are reminiscent of the Chinese propensity for undergoing periodic ideological purges. An unsuccessful modernization program could provide the leftists with the power to gain controlling positions in the Communist Party.<sup>179</sup> These leftists will place tighter controls at all levels of government.<sup>180</sup> The PRC's economic

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Taiwan at the time of the unification. Chiu, *1984 Sino-British Agreement on Hong Kong and its Implications on China's Unification*, 21 *Issues & Studies*, 13, 19 (1985). Hungdah Chiu, *Prospects for the Unification of China: An Analysis of the Views of the Republic of China on Taiwan*, 23 *ASIAN SURVEY* 1081-94 (1983).

172. Interview with Gu Xiancheng, Advisor, China International Trust and Investment Corporation, Beijing (July 24, 1985).

173. Washington Post, Sept. 17, 1985, at A18, col. 1.

174. Bonavia, *Socialist Balancing Act*, *supra* note 116, at 37.

175. Washington Post, Sept. 17, 1985, at A1, col. 1.

176. Bonavia, *Socialist Balancing Act*, *supra* note 116, at 36.

177. *Id.*

178. *See id.* at 36 (listing these extremist movements as the Great Leap Forward 1958-1961 and the Great Proletarian Cultural Revolution 1966-1976).

179. Washington Post, Sept. 17, 1985, at A18, col. 1.

180. Bonavia, *Socialist Balancing Act*, *supra* note 116, at 36. As an example of this dogma, veteran economic planner and chief party disciplinarian Chen Yub stresses the negative influence of "decadent capitalist ideology" entering through China's increasingly open door. *Id.*

needs and its desire to unite with Taiwan will most likely be the strongest limitations on the PRC's assertion of absolute control over Hong Kong.

Constant tension between reformists and leftists adds to Hong Kong's insecurity over its political and economic future. After Deng leaves power, Deng's followers' continuation of Party control would assure Hong Kong that the PRC will continue to adhere to the Joint Declaration and to interpret the treaty to promote Hong Kong's autonomy. In contrast, if the leftist faction of the Communist Party gains control after Deng's departure, it is doubtful that the PRC will adhere to the intent of the Joint Declaration and it is unlikely that the PRC will interpret the treaty to afford Hong Kong significant autonomy.

### CONCLUSION

Despite the differences between PRC and Western countries regarding treaty law, the PRC's effort to move closer to a society governed by the rule of law, rather than the rule of man,<sup>181</sup> assures Hong Kong, Great Britain, and the international business community that the Joint Declaration will be binding. The PRC's past treatment of treaties as an important source of international law suggests that it will honor the Joint Declaration. Without a neutral adjudicatory body to resolve interpretational disputes, the PRC's interpretation of the document, however, depends on the success of Deng Xiaoping's reformist drive for economic modernization and the PRC's desire to reunite with Taiwan.

For Hong Kong to avoid dependence on the PRC's economic and political future, the burden rests with Great Britain to ensure the protection of Hong Kong's residents' rights. To accomplish this, Great Britain should force the expansion of the Joint Liaison Group's authority<sup>182</sup> to include an arbitration panel comprised similarly to the body formed by the Korean Armistice Agreement.<sup>183</sup>

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181. See DEBARRY, SOURCES OF CHINESE TRADITION, *supra* note 44, at 86-148 (contrasting Confucian and Legalist thought).

182. See *supra* notes 163-64 (explaining method available to Great Britain to force expansion of the Joint Liaison Group).

183. See *supra* notes 104-07 and accompanying text (outlining the formation of the Korean Armistice Commission).