HONG KONG-CHINA LEGAL SYNERGY IN THE RUN-UP TO AND BEYOND 1997

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I am delighted and honoured to be here this evening, and if that famous Flemish mystic philosopher Maurice Maeterlinck was correct in characterizing dinnertime as constituting the climax to the day, I am a little tempted, perversely, to render my speech an anti-climax. I am inclined to that approach because, in essence, a subject such as the law ought to be boring. The law ought to be boring because we rely on the law for its inherent stability, for its implicit promise of continuity, and we rely on it as a cornerstone supporting our society's civic development and material prosperity. Hong Kong does not appear to subscribe to this theory in light of the fact that, fortunately or otherwise, we have had more than our fair share of excitement, particularly over the last decade and a half. In short, we seemed determined to live out the so-called ancient Chinese curse of living in interesting times.

So what makes Hong Kong tick? Just before I took the flight over here, I picked up a copy of the *Asian Wall Street Journal* which publishes, periodically, an update on confidence determinants in Hong Kong. What they do is assess concrete evidence such as investment levels, capital inflows and outflows, and immigration and emigration figures, as opposed to merely taking the proverbial pulses of the people of Hong Kong or, for that matter, taking the pulses of editorial opinion writers in New York.

And this is what they had to say: that in every sector they have examined, starting with the stock market, the property market and currency deposits in Hong Kong dollars as opposed to U.S. dollars, moving onto figures for retail sales, net immigration into Hong Kong, the number of foreign firms located in or
establishing regional headquarters in Hong Kong, every sector (save only for the stock market which has posted a minor correction over the month of March) has actually hit record highs, indeed, record highs for all time. For example, as regards the property market, we have now reached the stage whereby a typically modest medium-sized apartment of 1,500 square feet in Hong Kong now commands a breathtaking average price of US$2 million, representing an increase of sixty percent over the price of the same property in January 1996.

So far as concerns currency deposits, we have seen a record high of currency deposits being held in Hong Kong dollars with a corresponding decline of those held in foreign currencies. In terms of foreign firms establishing a presence in Hong Kong, February 1997 shows an absolute record of nearly 4650 major overseas firms establishing regional headquarters in Hong Kong. Regarding immigration inflow and emigration outflow from Hong Kong, we have seen a dramatic drop in emigration levels whereby emigration figures for 1996 are lower than in any year since the Tiananmen Square incident in 1989. So far as the stock market is concerned, Hong Kong peaked in January of this year. We have come down slightly in March to around 13,600 on the Hang Seng Index, which is higher than at any time in 1996. And the only reason for the slight revision in stock prices is the perception that interest rates in the United States may go up. In other words, our stock market appears to rise or fall according to the decisions of Alan Greenspan: now his views are clearly not coloured by considerations of 1997. And I suppose that observation underscores a piece of folk wisdom which has gained currency in Hong Kong, namely, that Hong Kong does not really have a monetary policy since, by reason of the Hong Kong dollar being pegged to the U.S. dollar, Hong Kong’s monetary policy is actually set by the Federal Reserve in the United States!

I mention all of the above by way of relevant background, and some of you who may have heard me speak in Washington D.C. in December last year may be forgiven a sense of déjà vu because at the end of 1996, I looked at the same confidence determinants laid down by the Asian Wall Street Journal and they show more or less the same picture, the current trend starting with an upswing as from January of 1996. So what explains this phenomenon? What explains, more importantly, the apparent sharp difference between actual economic commitments and investment
levels in Hong Kong and some of the more popular throwaway sentiments you might read about in, for example, the New York Times or Fortune Magazine which predicted, I think somewhat prematurely, the death of Hong Kong in August 1995.

What explains, in short, the divergence between media views and those of the people who put their money where their mouths are. As the Asian Wall Street Journal reminds us, even taking into account such factors as short term greed and a bit of carpetbagging, perhaps, in the run-up to 1997, the level of foreign investment in Hong Kong reveals a striking picture. Given human nature and our present knowledge of the behavioural sciences, people do not go around committing so much money — and it is mostly overseas money — to a particular market if there is something fundamentally wrong with it. So what is Hong Kong’s secret? I think that question is worth examining in some detail and the way I propose to do this is to go back to basics (apologies to John Major), to look at what has guaranteed and reinforced our continuous growth and prosperity throughout the transition and thereafter to peek over the time horizon to see whether those factors will survive beyond June 30, 1997.

Hong Kong has had the benefit of arguably the longest orderly transfer of sovereignty in human history. We started our journey in 1982 and we will finish this pilgrimage in about 100 days from today. One of the great advantages of a long transition is that we have been able to use the last fifteen years as a kind of decompression chamber. By that notion, I mean that as we ascend gradually, like deep sea divers, to the surface to embrace the actual transfer of sovereignty, we have been able to pause periodically, to monitor our progress, to prognosticate as to what lies ahead and, in the course of undertaking these series of stock-taking exercises, we can usefully identify five milestones which have marked our passage and which act also as harbingers of things to come.

These five milestones are worth remembering. They can be represented in terms of time by the years 1982, 1984, 1990, 1991, and 1995. 1982 marks the beginning of our journey. In that year, the P.R.C. Constitution underwent its fourth metamorphosis. 1982 was also four years after Deng Xiaoping’s accession to power, six years after the official termination of the Cultural Revolution. By 1982, domestic pressures in China mandated the revision of its Constitution to meet social and economic develop-
ments resulting from the introduction of 'market socialism' as state policy. One article appeared in the 1982 P.R.C. Constitution never previously seen, namely, Article 31. This provides that "[t]he 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 the specific conditions."

Now that, as all of you recognize, is the constitutional reduction of Deng Xiaoping's famous dictum, "one country, two systems." I mentioned that as marking the beginning of our journey because it is often forgotten that "one country, two systems" is not the result of Sino-British negotiations but constitutes rather the blueprint — a home-grown blueprint — for the future governance of Hong Kong after the resumption of Chinese sovereignty over the territory laid down before Sino-British negotiations actually began. It must always be born in mind that although the P.R.C. Constitution was actually amended or underwent its fourth metamorphosis in December of 1982, debate over "one country, two systems" long preceded 1982.

Assuming the recollection of one of our former Governors, Lord MacLehose, as recounted in a recent interview he gave to one of Hong Kong's leading dailies to be accurate, Deng Xiaoping broached with him the "one country, two systems" concept as early as 1979. This confirms our general understanding that the formula "one country, two systems" underwent its gestation in the late 1970s and became crystallized as state policy in the early 1980s. I am sure you recall that the "one country, two systems" doctrine was originally cast as the silver bullet for disposing of the seemingly monstrous obstacles to the lofty goal of peaceful reunification with Taiwan. Now Taiwan came first on the agenda of national unification in the 1979/80 period. By 1981, however, priorities had changed whereby Hong Kong became the focus for the implementation of the formula. Hong Kong then took precedence over Taiwan as a case for experimentation. By 1982, the doctrine was ripe for cutting the Gordian knot in Sino-British negotiations over Hong Kong's future.

Why do I go into all this background? I do so because the very fact that "one country, two systems" is a Chinese formula — specifically, Deng's Formula — goes some way towards answering a persistent and important question nagging Hong Kong residents and investors, alongside overseas statesmen, business leaders, media
writers, as well as people like you and me over the last decade and a half, namely, what is to stop China from tearing up those two pieces of paper, the Joint Declaration\(^1\) and the Basic Law,\(^2\) come July 1, 1997? What is to stop them from saying: “Actually, we were just kidding these last thirteen years, let’s forget all of this”?

Now whilst many factors must be weighed in the balance in answering this crucial question, one of the most important is, I suggest, the inescapable fact that “one country, two systems” is a Chinese formula. It was not something rammed down China’s throat by a foreign power. It was not even, strictly speaking, something hammered out as a result of negotiations between two sovereign states. On the contrary, it is home-grown. It is something original that China came up with, a fundamental concept of which China is very proud.

In September 1982, Margaret Thatcher visited Beijing to inaugurate two years of negotiations over Hong Kong’s future. The catalyst for her visit was the pressing commercial need to resolve a seemingly intractable problem arising from the reality that, in the early 1980s, much of Hong Kong’s wealth was tied up in property and the acquisition of property in Hong Kong that was, in those days, financed by fifteen-year mortgages. By 1982, a bare fifteen years remained of the ninety-nine-year lease granted to Victorian Britain by Manchu China under the 1898 Convention of Peking which covered ninety-eight percent of Hong Kong’s territory including, critically, the international airport and the manufacturing districts. Time was running out and commercial patience was sorely tested wherefor the two sides had to put their heads together so as to lance the boil of uncertainty blemishing the face of Hong Kong’s political and economic future.

As many of you will know from the accounts written of that period, the initial British position was to make an opening gambit for an extension of British sovereignty over Hong Kong. That failed. By 1983, the British fallback was to cede sovereignty to China but retain a right to British administration over Hong

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Kong for the next one-hundred years. That bid was likewise unsuccessful and in September 1984 the two sovereign states ended up full circle at the original Chinese position — by initialing a treaty known as the Sino-British Joint Declaration which detailed the formula for the governance of Hong Kong after June 30, 1997, which was nothing less than “one country, two systems” writ large.

Those among you who subscribe to the notion, which I actually regard to be simplistic and false, that the two-year period of negotiations witnessed repeated British capitulations to Chinese-held positions, might wish to cite the foregoing history as evidence to support that particular theory. However, just as we are often reminded that God is in the details, in reality, the merits of the Joint Declaration lie in the detailed provisions — supplied by Britain — which flesh out the “one country, two systems” formula.

More significantly, “one country, two systems” is a much broader principle for the governance of China itself. China is the most populous nation on earth, indeed, in the history of humanity. With a population five times that of the United States but with only one-third of her arable land, China is, almost by definition, a country which is well-nigh impossible to govern as a unitary state. Hence, the search for a magic formula for governing China which found expression in relation to a prodigal territory — Hong Kong — is soon to be reincorporated back into the Chinese polity.

The 1984 Sino-British Joint Declaration is an agreement which, in terms of its content and implications, is little short of miraculous. I shall demonstrate why. The Joint Declaration has the nature of an international treaty. It compels the existing sovereign power, Britain, to return sovereignty over Hong Kong to China, but subject to conditions. Those conditions are spelled out in the Joint Declaration. And that document is registered with the United Nations. It has the force of international law. It binds the incoming sovereign to the outgoing sovereign to respect the conditions of handover. I do not propose to recite the terms of the Joint Declaration. I am sure you know them very well and it is terribly boring for me to read from the little blue book. But a few provisions are worthy of highlighting.

First and foremost is the provision which says that Hong
Kong post-1997 will retain its own currency which is the Hong Kong dollar, a hard currency and a tool of international trade pegged to the United States dollar, currently backed-up by US$63 billion of reserves making Hong Kong the second richest per capita territory anywhere in the world. In absolute terms, in terms of amount of foreign reserves held, we are ranked number seven in the world. And this provision means that the renminbi will not be circulated in Hong Kong. The renminbi will be treated as foreign currency.

This is backed-up by a related provision which says that Hong Kong will remain a separate customs territory in international legal terms. As a separate tax area, Hong Kong will enjoy fiscal autonomy, which means that Hong Kong can collect its own taxes and remit no taxes whatsoever to the center. By the same token, we cannot call upon the center to bail us out if we are ever in trouble. For every year over the last ten consecutive years, we have had a budget deficit only in one year and that was shortly after Tiananmen Square in 1989. Post-1997, deficit budgets will be rendered unconstitutional.

Other provisions in the Joint Declaration provide that we will retain our own separate shipping register and our own separate aircraft register. Hong Kong will also enjoy separate international persona, so that, for example, Hong Kong is a founding member of the World Trade Organization (“WTO”). As you all know, China is not a member. China is encountering great difficulty in acceding to the WTO. But whether or not the P.R.C. succeeds in joining the WTO in 1997 makes no difference whatsoever to Hong Kong’s position. Hong Kong retains its seat in the WTO. Take another example. Hong Kong is a founding member of the Asia Pacific Economic Cooperation forum. We sit alongside China in APEC. Come 1997, we will continue sitting alongside China in APEC. The only change would be a change of nomenclature: Hong Kong will be known as “Hong Kong, China.”

3 See Joint Declaration, supra note 1, para. 3(7) & annex I § VII.
4 See id. para. 3(6) & annex I § VI.
5 See id. para. 3(8) & annex I § V.
6 See id. annex I § VIII.
7 See id. annex I § IX.
8 See id. annex I § XI.
Most significantly of all to my mind is the provision in the Joint Declaration which says that Hong Kong is to retain its own separate legal system, which is the common law system. This means that Hong Kong is and will remain locked into the international grid. The common law forms Britain's proudest legacy to Hong Kong, bestowed as a result of a century and a half of colonial rule. The common law has as its most famous hallmark reliance on a case law system — more significantly, one which is not purely domestic in nature.

Today, our courts in Hong Kong refer on a regular basis to decisions not just of our own jurisdiction, but also to those of the House of Lords in England, the Privy Council, the High Court of Australia, the Court of Appeal in New Zealand, the Indian Supreme Court, the South African Supreme Court, the South African Constitutional Court, the Canadian Supreme Court, the U.S. Supreme Court, and the U.S. Federal District Courts, to quote but a few examples. These overseas decisions are cited not, of course, by way of binding authority but by way of persuasive precedent on relevant issues arising in the course of litigation. This will remain the case beyond 1997. Conceivably, in the year 2000, for example, Hong Kong courts may refer to a case decided by the U.S. Supreme Court in the year 1999 on a relevant issue for guidance. In this, we will behave no differently from the other fifty-six common law countries the world over — each of them independent, sovereign nations which refer, where necessary, to the learning and jurisprudence of other common law jurisdictions by way of persuasive, though not binding, authority. It is important to note that, in adopting such conduct, no compromise to the sovereignty is implied.

Back ing up the provision for retention of the common law is a related provision stipulating that Hong Kong will have its own separate judicial system with power of final adjudication. What does this mean? Today, Hong Kong arguably does not yet enjoy full power of final adjudication because, currently, our court of last resort remains the Privy Council in London. Now, of all the issues that divided Britain and China during the 1982 to 1984 period, the question of what to do about the Privy Council after 1997 proved to be one of the most intractable. However, after

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9 See id. para. 3(3) & annex I § II.
10 See id. para. 3(3) & annex I § III.
two years of hard negotiations and a bit of ingenuity thrown in, the architects of the Joint Declaration, namely Britain and China, must be congratulated for arriving at a solution that was peculiarly imaginative, pragmatic, and unique for Hong Kong.

The solution was to replace the Privy Council, not by a body in Beijing, even though that was what the doctrine of mirror-imaging virtually mandated, but to replace the Privy Council by a Court of Final Appeal ("CFA") located in Hong Kong and established as a common law court. Further, this Court of Final Appeal would be a court in which judges from overseas common law jurisdictions may be invited to sit and participate in deliberations and from which P.R.C. judges will necessarily be excluded since P.R.C. judges are, *ex hypothesi*, not common lawyers.

Now, if we should pause here to examine the structure of the Joint Declaration, we would see something very interesting. We see the beginnings of an experiment of historic proportions — an experiment by the People’s Republic of China with a form of government that will go way beyond any federal model in terms of tolerating separateness and autonomy. Should one care to look the world over, I think one would be hard-pushed — I myself would certainly feel hard-pushed — to identify any federal state which would tolerate an integral part of its sovereign territory circulating its own exclusive, hard currency and from which the national currency is excluded from circulating, remitting no taxes whatsoever to the center, having a legal system which is jurisprudentially and philosophically different from the national system, having its own judiciary fully quarantined from the judiciary of the larger nation-state, and, finally, having a Court of Final Appeal with no overarching supreme court imposed on top to supervise the work of the CFA. Thus, whilst Hong Kong will, after June 30, 1997, have its own Court of Final Appeal with no overarching supreme court imposed on top to supervise the work of the CFA. Thus, whilst Hong Kong will, after June 30, 1997, have its own Court of Final Appeal, the rest of China will have its own Supreme People’s Court. None of the world’s great federal nations — neither the United States nor India nor Germany nor Canada nor Australia — have ever experimented with a system of this nature.

The Joint Declaration is remarkable in two other respects worthy of note. First, it contains an annex known as Annex I. This is a document whereby China commits itself in writing to spelling out its detailed policies towards the Hong Kong Special Administrative Region. This document is longer than the Joint Declaration itself and is also registered with the United Nations.
It also operates under international law binding China to Britain and vice-versa. Annex I repeats the salient features of Joint Declaration but goes into greater detail. For example, in Part XIII to Annex I, China commits itself to having the provisions of the two most comprehensive, multilateral human rights treaties ever sponsored by the United Nations, namely, the International Covenant on Civil and Political Rights ("ICCPR"), and the International Covenant on Economic, Social and Cultural Rights ("ICESCR") continue to apply to Hong Kong post-1997. This is despite the fact that China herself is not yet a signatory to either covenant.

We stand presently at the crossroads of Chinese history and I express myself as reasonably optimistic of seeing China’s accession to the ICCPR and to the ICESCR at some stage after June 30, 1997, but before the year 2000. Two years ago, I stuck my neck out to predict that we are likely to see Chinese accession to those two international covenants neither before Hong Kong’s reversion to China nor until after all the ramifications of Deng’s succession have been worked out, which now looks likely to take place sometime later this year — possibly after the Fifteenth Chinese Communist Party ("CCP") Congress scheduled for the autumn. China wants, understandably, to resolve first her more pressing problems, but the question of accession seems now to be only a matter of time.

I make the foregoing prognosis because we know that the question of accession to the two treaties has been debated in internal CCP think-tanks since 1987. That debate was suspended after 1989 but revived in the early 1990s and now has been given added impetus by belated United States accession to the ICCPR in 1992 and reporting thereunder to the United Nations Human Rights Committee ("UNHRC") in 1995. These moves have left China isolated as the only member of "P5" (Permanent Member of the Security Council) not yet a signatory to the ICCPR. China still has an alibi with respect to the ICESCR because the U.S. has still not acceded the ICESCR, but I suspect we will see U.S. accession at some stage also in the near future.

When that happens and China accedes herself to the covenants, the question of reporting to the United Nations on implementing treaty obligations in relation to Hong Kong would be resolved once and for all. At the moment, the UNHRC takes the view that there should be continuing reporting, either by
China on behalf of Hong Kong or by Hong Kong reporting with China's consent, under the terms of the ICCPR as well as the ICESCR post-1997 on the basis that human rights supposedly devolve with people and territory and would not be affected by a change in sovereignty.

Now the Joint Declaration is remarkable in a second respect. This document actually obliges China to translate the terms of the Joint Declaration into an enforceable, domestic form. In other words, it obliges China to draft a mini-constitution for Hong Kong. This process began very shortly after the Joint Declaration was made. The Joint Declaration was initialled in September 1984. It was signed by the two heads of government at a state ceremony in Beijing in December of the same year and ratified by Parliament in the United Kingdom the following May. In the following month, June 1985, China established the first of two bodies to work on the drafting process. Known as the Basic Law Drafting Committee comprising mainland as well as Hong Kong experts, it worked in tandem with another body known as the Basic Law Consultative Committee established in December 1985, thereby commencing five years of an unprecedented process of constitutional drafting.

This was unprecedented in three senses. First of all, China has never previously drafted a mini-constitution for any part of its sovereign territory. Secondly, Hong Kong has never previously had a comprehensive, modern, written constitution. Even today, the closest equivalent we have to a written constitution is a document known as the Letters Patent which form a badge of office given by Her Majesty the Queen to the Governor as her representative or plenipotentiary in Hong Kong. This is a document one can reproduce on two sides of a foolscap. Our edition was drafted by British Foreign Office mandarins in 1917 but with a pedigree dating back to the Nineteenth Century when, in the heyday of Empire, the Letters Patent formed a standard, generalized instrument for the governance of Imperial possessions. This document empowers the Governor "to make laws for the peace, order and good government" of the territory. It is not an instrument particularly suited to governing a post-modern, post-industrial society. It is certainly not an instrument with which we would feel comfortable for governing Hong Kong after its reversion to Chinese sovereignty. Hence, the need to undergo this constitutional drafting process so as to translate the terms of
the Joint Declaration into living domestic law.

The process of constitutional drafting was unprecedented in a third sense in that Hong Kong people have never previously participated in any such process before 1985. The five years from 1985 to 1990 formed a watershed. The Drafting Committee comprised two-thirds Mainland and one-third Hong Kong members. The Consultative Committee consisted 100% of Hong Kong people whose task it was to formulate ideas and gauge public opinion, expert as well as non-expert, and to convey the same to the Drafting Committee for the purpose of putting pen to paper.

In April 1990, the end-product of that seminal process being a 160-article instrument known as the Basic Law was promulgated by the National People's Congress of China to come into operation as Hong Kong's mini-constitution on July 1, 1997. This document reflects all the material provisions of the Joint Declaration. Since Sino-British relations were actually very good for the most part of the 1985-90 period, there was (and this is not a well-publicized fact) considerable and very valuable British input to the Basic Law through the Sino-British Joint Liaison Group, being the designated official diplomatic channel through which Britain and China communicated for the purpose of implementing the Joint Declaration. This input ensured consistency between the Basic Law and the Joint Declaration.

I do not propose to bore you with a recitation of the Basic Law, but one point warrants emphasis, namely, that within the Basic Law itself is incorporated a bill of rights known as Chapter II of the Basic Law. This comprises nineteen Articles, eighteen of which spell out protection for discrete, individual forms of human rights and civil liberties such as free expression, freedom of association, freedom of movement, etc. The nineteenth article, Article 39, is, arguably, the most important, the one which is most pregnant with information.

Article 39 comprises two paragraphs. The first paragraph provides that "[t]he provisions of the ICCPR [and] the ICESCR as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special

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11 See id. annex II (describing in detail the functions of the Joint Liaison Group).
Administrative Region." The second paragraph says that "[t]he rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

What does all that mean? It means that the bottom-line for human rights protection in Hong Kong post-1997 are provisions of the ICCPR and the ICESCR. They form a floor of minimum standards below which human rights protection by law cannot constitutionally fall. In other words, what we have by virtue of Article 39 of the Basic Law is incorporation into Hong Kong’s future mini-constitution of the international standards of the two UN treaties which confer upon Hong Kong human rights protection encumbered by neither cultural baggage nor any Asian bias, but is instead universalist in nature.

In 1991, Hong Kong enacted its own Bill of Rights to dovetail with Article 39 of the Basic Law. This was a government initiative taking four years in the gestation which started in 1987. We looked at different bills of rights the world over, particularly those in common law jurisdictions. We took expert advice, particularly from Canadian judges. What we ended up doing in 1991 was to replicate almost verbatim the language of the ICCPR as applied to Hong Kong and to make that enforceable in the domestic context.

Of the 138 sovereign states which have now acceded to the ICCPR, Hong Kong is unique in being the only territory that has actually rendered the terms of the ICCPR enforceable in domestic terms. The UN confirms that Hong Kong is unique in this process. As we all know, countries tend to find it relatively easy to sign up to international covenants but much more difficult to enforce them, and they tend to get unusually sensitive when criticized for non-compliance. Hong Kong is the only jurisdiction that has domestically incorporated the ICCPR and, because we have done so in a common law context, the Covenant has become a living law for Hong Kong people, one which is interpreted by our courts on a regular basis.

Over the course of the last six years since 1991, Hong Kong has built up an interesting corpus of jurisprudence - interesting because this body of case law is cultivated not just on homegrown precedents developed in Hong Kong. On the contrary, it is infused with case materials from all the other common law
jurisdictions I have earlier mentioned. Additionally, we have gone beyond the common law world in looking for persuasive authority. We cite in our courts on regular basis decisions of the European Court of Human Rights at Strasbourg. We cite also UN Human Rights Committee decisions on individual reference under the Optional Protocol. What Hong Kong has ended up with is a unique synthesis of homegrown and international jurisprudence which, we are assured, is referred to with great interest by the UN as well as by many other common law jurisdictions around the world.

In 1995, Hong Kong enacted, with full P.R.C. support, its Court of Final Appeal statute which repatriates to Hong Kong the power of final adjudication, the same to come into operation on July 1, 1997. The CFA is a highly imaginative concept. It has five seats, headed by a Chief Justice, and consists of three other permanent judges, together with a fifth seat to be filled on an ambulatory basis by invitees coming from one of two panels, a Hong Kong Panel of jurists and an Overseas Panel of jurists.

On the Overseas Panel, we expect to find the most eminent common law jurists from around the world. We are currently assured of at least one U.S. Supreme Court Justice who has expressed an interest in sitting on the Overseas Panel. When I spoke last year to the Lord Chancellor of England and members of the House of Lords Appellate Committee, every single judge expressed an interest in sitting on the Overseas Panel. In addition, we expect to invite also judges from Australia, New Zealand, India, South Africa, Zimbabwe, Canada - in short, all the major common law jurisdictions around the world. This would make for a highly competent and cosmopolitan court which would reflect, accurately, Hong Kong’s international character. Thus, if, for example, a maritime dispute were to reach our Court of Final Appeal, the Chief Justice might wish to invite an Admiralty expert from London to participate in its deliberations so as to leaven the debate.

So far as the permanent appointees to the CFA are concerned, there is no nationality requirement, save only for the Chief Justice who must be a Hong Kong Chinese person with no foreign passport or right of a abode. The other three permanent appointees can be of any nationality, provided they are common law lawyers. Now, if one were to survey all the major jurisdictions the world over, one would be hard-pushed to identify any
jurisdiction anywhere in the world where non-resident aliens are
given an input into the judicial process at the very highest level.
But that is the fleshing out of the vision laid down in the “one
country, two systems” doctrine.

Those are the five structures which I have thought important
to identify as foundation stones supporting the survival of the rule
of law in Hong Kong after June 30, 1997. The next question is:
where do we go from here? How does one prognosticate as to
what lies over the horizon? I believe the key to Hong Kong’s
future is encapsulated in an exhortation made famous by your
thirty-fifth president, but which I shall paraphrase: Ask not what
China can do for Hong Kong; ask what Hong Kong can do for
China.

I am told, incidentally, that Kennedy’s saying was not even
original: he was inspired by his old prep school Choate (whose
alumni are guaranteed entry to Harvard but not, unfortunately,
to U. Penn!) where there is an archway on which that exhortation
is emblazoned. I mention that because the real key to Hong
Kong’s future lies in the fact that Hong Kong forms the interface
between China and the West — the effective bridge and communi-
cator between China and the wider world.

One is reminded of the famous debate between Mao Zedong
and Zhou Enlai in 1949 at the end of the Civil War, which saw
the Red Army triumphant throughout the Mainland. What was
interesting was that, riding on the crest of rampant nationalism,
the Red Army nevertheless stopped at Hong Kong’s borders,
which is something the Nationalists would not have done. In the
Cairo Conference in 1943, a deal was struck between Roosevelt
and Chiang Kai-Shek over the objections of Churchill whereby,
come the eventual defeat of Japan, the Nationalists and not the
British would receive the surrender from Japanese forces occup-
ying Hong Kong. That deal, though struck, was never implement-
ed. In 1949, the Red Army stopped paradoxically at Hong
Kong’s borders because Mao was adamant that China needed
Hong Kong to act as its window to the outside world.

That position has not changed today. If anything, the same
has been reinforced — reinforced not just because Hong Kong still
accounts for forty percent of China’s hard currency earnings, not
just because Hong Kong bankrolls China’s economic moderniza-
tion, not just because Hong Kong’s entrepreneurs own 4,000
factories in Guangdong’s Pearl River Delta alone employing eight
times Hong Kong’s natural workforce, but, more importantly, because Hong Kong acts as an intellectual stimulus to China. We are not mere Medicis to China’s process of modernization. Hong Kong constitutes the living laboratory for China, holding up the mirror to reflect what the future might hold in store for China herself. China takes from Hong Kong what she likes or finds useful and adapts it for her own use. Hong Kong also reminds China of what the outside world expects of China by way of standards of behaviour, etc. China traders know full well that dealing with China through a Hong Kong intermediary is a much less painful and usually more profitable option than dealing with China directly.

In the legal sphere, this translates into a number of interesting developments which I shall very briefly outline. Since 1987, China has evinced a fascination with the common law as an instrument for dispute resolution par excellence, because the common law, with its doctrine of case precedent, is able to inject a degree of precision and predictability to dispute resolution which is absent from a Continental system—certainly absent from China’s own. Since 1987, at least three different law schools in China have been studying Hong Kong law as a specialty and translating our laws into Chinese. The Hong Kong Government has overtaken them in this game because we have virtually completed the translation of our pre-existing statute law into Chinese and we draft all present and future legislation bilingually. This means that we do not merely draft in English and translate into Chinese, but we have two teams working in tandem undertaking synchronized drafting. The end result is often supplied to our mainland counterparts, not by compulsion but by way of voluntary exchange to provide intellectual stimuli to our northern neighbors. One of the principal recipients under this exchange program is the National People’s Congress Legislative Affairs Commission. It is scarcely surprising that should you look at China’s Bankruptcy Law or companies legislation as well as bits and pieces of China’s commercial law, you will find Hong Kong’s fingerprints all over the place.

At the regional level, the role of mentor which Hong Kong plays is even more striking. Shenzhen, which lies immediately across from our land border, was the first of the Special Economic Zones (“SEZ”) so designated by Deng Xiaoping in 1979. In 1992, Shenzhen was the first of the SEZs to be given legislative

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autonomy. What that meant was that since 1992, Shenzhen was empowered through its own Shenzhen People’s Congress to pass laws different and separately from the rest of the country. Since 1992, Shenzhen has enacted over 250 pieces of primary and subsidiary legislation of which two-thirds come from Hong Kong sources with our blessing and our cooperation, and with no charge for copyright royalties! The Shenzhen authorities like this system — in fact, they appreciate it so much that a dialogue is underway between the Shenzhen Government and the Hong Kong Government for the training of lawyers of the Shenzhen People’s Congress in legislative drafting techniques by the Attorney General’s Chambers In Hong Kong. This is a program which I anticipate will become a reality after June 30, 1997.

Let me take another example from a different source. In Easter 1996, we were invited to inaugurate the opening of the Guangdong People’s Procuracy Training Center. Now procurators in China are akin to district attorneys in the United States. They investigate as well as prosecute crimes. After the training center was opened, we were invited to deliver a series of lectures on Hong Kong’s criminal justice system. We did so, focusing on such stock common law concepts as the presumption of innocence, the burden of proof, the rules of evidence, the rules of procedure and so on, at the end of which the Training Center was so impressed that they asked us to incorporate our materials into their standard training curriculum and also to receive their trainees in Hong Kong to observe our legal system in action. And because we now have trials conducted at every level of our courts in either English or Chinese, Hong Kong is able to demonstrate to Guangdong the common law in operation in a language which minimizes the barriers to communication. Since the inauguration of this program in the late spring of 1996, we have played host to eight delegations from Guangdong Province alone.

You may query, rightly, why China should be so interested in Hong Kong’s criminal justice system? Is not theirs so very different? The answer is interesting because in March 1996, the National People’s Congress promulgated a new Criminal Procedure Law to come into operation on January 1, 1997. This law introduced for the first time not merely in the history of the P.R.C. but in 4000 years of Chinese history, the notion of presumption of innocence for the accused in criminal proceedings,
puts the burden of proof in criminal cases on the state, restricts the right of administrative detention to fourteen days in general cases and thirty-seven days in serious cases, which gives China the idea of habeas corpus as a notion. Further, the ten-month hiatus between promulgation and implementation of the law afforded an opportunity both for learning by lawyers and procurators in China and for the Attorney General’s Chambers in Hong Kong to play a role in the provision of necessary training.

Yet, perhaps a more interesting question is why China changed its Criminal Procedure Law at all? Part of the answer or part of the credit goes to three Englishmen who spent August 1995 in Beijing, namely, an English High Court Judge who is a criminal trial specialist, Mr. Justice Anthony Hooper, a former Chairman of the English Bar who is a Queen’s Counsel specializing in criminal trial advocacy, Mr. Robert Seabrook, Q.C., and one of the editors of Archbold’s Criminal Pleading, Evidence and Practice, the leading criminal practitioners’ Bible in England and also in Hong Kong. In the summer of 1995, these three were flown out from London to Beijing where they spent two weeks advising the NPC Legislative Affairs Commission on how to revamp China’s criminal procedure law.

As we behold the fruits of their labors, we see explode an oft-held myth that China is only interested in modernizing her economic law but not her public or criminal law. I believe the reality to be vastly different since any country that has undergone double digit real growth for ten consecutive years is a nation transformed. And the law of unintended consequences dictates that, like it or not, changes have to be brought about to meet the demands and expectations of a population which now lives in a stakeholders’ economy. These include demands for enhanced protection of property as well as personal rights, resulting in the same approximating with rising domestic expectations and international standards.

Allow me to give you a final example. Two weeks ago I was in Kunming, the capital of Yunnan Province in Southwest China, which is fast establishing itself as the focal point of Sino-Thai-Burmese three-way trade. I enjoyed a dialogue with the Chief Justice of the Kunming Intermediate People’s Court, Mr. Sun Shaohong, whom I sought to interest in a project which has now sold like hotcakes throughout all the cities of China, which I visited this spring from Guangzhou to our immediate north,
through to Shanghai and Beijing and beyond the Great Wall to Dalian in former Manchuria, which is the entrepot for Sino-Japanese-Korean threeway trade.

The experimental project which I proposed is to set up a model court in each of these centers of commerce so as to demonstrate the modalities of common law litigation, using Putonghua as a medium of instruction, using real-life Hong Kong as well as real-life P.R.C. case materials, using judges, prosecutors and defense counsel from Hong Kong as legal players and, most importantly of all, inviting P.R.C. judges, procurators, private sector lawyers and law professors to sit as members of a jury. The exercise would involve working through the case material, allowing the jury to deliberate and return a verdict, whereafter a post-mortem or workshop would be held to assess the results and move up the learning curve.

The Kunming judiciary reacted with enthusiasm. They informed me that they had not played host to a visiting legal delegation since 1986. It transpired that in 1986 a group of Californian judges visited Kunming and set up a model court to demonstrate the merits of the Californian jury system, in English of course, using California case materials. And that exchange in 1986 — which was just one exchange in eleven years — had the effect of changing the Kunming judicial system by persuading the adjudicative committee to adopt the principle of unanimous verdicts in finding guilt in criminal cases as opposed to their former practice which allowed for majority verdicts.

I cite the foregoing piece of anecdotal evidence by way of illustration of what engagement as a policy might achieve. I do so because, at the end of the day, the crucial issue in current American foreign relations — one which will remain central for years to come — is whether containment or engagement constitutes the right policy to modulate U.S.-China relations. Indeed, U.S.-China relations are likely to remain the most pressing and important foreign policy topic for the first decade of the Twenty-First Century and possibly beyond. As members of a distinguished and intelligent audience, I leave it to you, ladies and gentlemen, to supply the critical answer to that question.

But I conjured up the foregoing example to illuminate the crucial role Hong Kong must play in China’s historic process of late Twentieth Century modernization so as to demonstrate that, at the end of the day, 1997 generates two-way traffic — from
China to Hong Kong and back. The commonplace media treatment of the drama of 1997, often portrayed as that of a communist monolith swallowing whole the free market enclave of Hong Kong is hopelessly simplistic. The truth is vastly more complex and may be more accurately analogized as a two-way street, in other words, as a matter of managing the transition both from the incoming sovereign’s point of view as well as from that of Hong Kong bidding to maintain its autonomy. In this unprecedented experiment, Hong Kong will act in partnership with China, albeit as junior partners in an historic joint venture. Hong Kong, in today’s reality as well as in Mao’s vision back in 1949, remains the natural interface between China and the outside world. This simple fact emerges, at the end of the day, as the final guarantor of Hong Kong’s survival and prosperity beyond 1997.

Thank you very much.