From USHKPA to HKHRDA and HKAA:
The Turnings of U.S.–China Policy and the End of Hong Kong's Full Autonomy

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Abstract

This Article traces the evolution of U.S. law and policy toward Hong Kong—from the United States–Hong Kong Policy Act of 1992 (USHKPA) to the Hong Kong Human Rights and Democracy Act of 2019 (HKHRDA) and Hong Kong Autonomy Act of 2020 (HKAA). The USHKPA, enacted under the Clinton administration after the Tiananmen massacre but before the handover of Hong Kong, is a product of the United States' China policy, based on engagement. The USHKPA represented a compromise between Congress and the executive branch and reflected the nature of soft law, implementation of which is largely dependent on Executive discretion. After three decades of a policy of engagement and more than twenty years after China's resumption of control over Hong Kong, the United States' China policy has gradually changed, and it saw a significant turn under the Trump administration. In the midst of U.S.–China tension and with bipartisan support from Congress, the HKHRDA and the HKAA strengthen the review, reporting, and sanctions mechanisms for human rights, democracy, and autonomy in Hong Kong. Nonetheless, the Trump administration's decision to suspend Hong Kong's preferential treatment under U.S. law, due to the erosion of the high degree of autonomy guaranteed by the

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Sino-British Joint Declaration and the Hong Kong Basic Law, poses questions about its legality and legitimacy under public international law and World Trade Organization (WTO) law.

This Article argues that U.S. sanctions against individuals and entities who undermine Hong Kong's human rights, democracy, and autonomy can be justified based on international human rights law given the sanctions' limited scope, special designation, effectiveness, and proportionality. We also argue that the United States' trade-related measures can be justified under the general exception—public morals—and the national security exception in the General Agreement on Tariffs and Trade (GATT). We observe that the United States' termination of preferential treatment for Hong Kong based on its separate customs territory status covers four dimensions: rules of origin, tariffs, export control, and currency. We argue that even though there is little guidance from GATT and WTO law, historical and comparative approaches are helpful in evaluating whether Hong Kong still can sustain its WTO membership by virtue of its separate customs territory status.

Table of Contents

Introduction

On November 27, 2019, former U.S. President Donald Trump signed the Hong Kong Human Rights and Democracy Act of 2019 (HKHRDA) into law, which required the United States to impose sanctions against human rights abusers in Hong Kong and to consider revoking its separate customs territory status.[1] In response, on November 28, 2019, the Vice Minister of Foreign Affairs of the People's Republic of China (the PRC or China) Le Yucheng summoned then-U.S. Ambassador Terry Branstad and deemed the HKHRDA a nakedly hegemonic act.[2] At the same time, China's Ministry of Foreign Affairs issued a statement condemning the Act as "a severe interference in Hong Kong affairs, which are China's internal affairs."[3] The statement

1. Hong Kong Human Rights and Democracy Act of 2019, Pub. L. No. 116-76, 133 Stat. 1161 (codified as amended in scattered sections of 22 U.S.C.) [hereinafter HKHRDA].

2. *Angry China Summons U.S. Ambassador to Protest Trump's Signing of Hong Kong Bills*, L.A. Times (Nov. 28, 2019), https://www.latimes.com/world-nation/story/2019-11-27/trump-signs-bills-in-support-of-hong-kong-protesters [https://perma.cc/5L2P-34GN].

3. Statement of Ministry of Foreign Affairs of the People's Republic of China on Hong Kong Human Rights and Democracy Act (Nov. 28, 2019), https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1719774.shtml [https://perma.cc/HWD2-JSXB].

continued: "It is also in serious violation of international law and basic norms governing international relations. The Chinese government and the people firmly oppose such stark hegemonic acts."[4] Despite China's protests, former U.S. Secretary of State Michael Pompeo, in accordance with the HKHRDA and in response to Beijing's plan for a national security law for Hong Kong,[5] certified to Congress that, under U.S. law, Hong Kong no longer warranted special treatment as had been the case since July 1997, since "[n]o reasonable person can assert today that Hong Kong maintains a high degree of autonomy from China, given facts on the ground."[6] On May 29, 2020, Trump declared his intent to eliminate policy exemptions that provided Hong Kong with special treatment. This decision, in the words of Trump, "[would] affect the full range of agreements we have with Hong Kong, from our extradition treaty to our export controls on dual-use technologies and more, with few exceptions."[7] Led by the United States, the United Kingdom, and Japan, the G7 nations released a joint statement which expressed grave concern about the Hong Kong National Security Law (National Security Law). The statement condemned China's decision as "not in conformity

4. *Id.*

5. On May 28, 2020, the National People's Congress of the People's Republic of China (PRC) passed the "Decision to Establish and Improve a Legal Framework and Enforcement Mechanism for Safeguarding National Security in the Hong Kong Special Administrative Region" which authorizes the National People's Congress Standing Committee (NPCSC) to promulgate a National Security Law directly applying in Hong Kong. Then, on June 30, the NPCSC passed Hong Kong's National Security Law and it was officially promulgated on July 1. In brief, the law criminalizes acts of "succession," "subversion," "terrorism," and "collusion with external forces." In addition, the law requires Hong Kong special administrative region to establish a "national security commission" to safeguard national security with a Beijing-appointed adviser; respectively, a central government agency will also be set up to "monitor, supervise, coordinate and support Hong Kong's special administrative region government to implement the National Security Law." Notably, the Chief Executive of Hong Kong' special administrative region is empowered to appoint a set of judges to hear national security cases. The leaked provisions of the National Security Law triggered great concerns among Hong Kong society and international community, which criticize that the promulgation of the National Security Law will interfere Hong Kong's judicial independence and common law system, impose threats to human rights protection, and strangle Hong Kong's autonomous status guaranteed under the doctrine of "One Country, Two System" and the Hong Kong Basic Law. *Hong Kong Security Law: What is it and is it Worrying?*, BBC News (June 30, 2020), https://www.bbc.com/news/world-asia-china-52765838 [https://perma.cc/2TZX-WH7M].

6. U.S. Dep't of State Press Statement, Michael R. Pompeo, Secretary of State, P.R.C. National People's Congress Proposal on Hong Kong National Security Legislation (May 27, 2020), https://www.state.gov/prc-national-peoples-congress-proposal-on-hong-kong-national-security-legislation [https://perma.cc/3TRC-M6VY].

7. Remarks by President Trump on Actions Against China (May 29, 2020), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-actions-china [https://perma.cc/P2K2-NAPF].

with the Hong Kong Basic Law [HKBL] and its international commitments under the principles of the legally binding, UN-registered Sino-British Joint Declaration."[8] The G7 countries strongly urged the PRC government to reconsider its planned legislation. When the PRC approved and implemented the National Security Law on June 30, 2020, the U.S. Congress responded with the Hong Kong Autonomy Act (HKAA),[9] sanctioning individuals and entities purported to undermine Hong Kong's democracy and human rights. On the same day the HKAA was signed into law, Trump issued an Executive Order on Hong Kong Normalization (the Executive Order) suspending special treatment for Hong Kong under the U.S. legal system.[10] In response, Hong Kong's Chief Executive Carrie Lam said that her government would address the sanctions with the World Trade Organization (WTO).[11] On October 30, 2020, Hong Kong requested consultation with the United States under the WTO dispute settlement mechanism.[12]

Hong Kong's special treatment under U.S. law is closely linked to its status as a separate customs territory under the General Agreement on Tariffs and Trade (the General Agreement or the GATT) and subsequently the WTO. Such status reflects the historical legacy of the British colonial era. Originally sponsored by the United Kingdom in a communication dated April 24, 1986,[13] the United Kingdom declared that Hong Kong, as a separate customs territory, possessed full autonomy to conduct its external commercial relations and other matters listed in the General Agreement. The United Kingdom further stated that Hong Kong, in accordance with Article XXVI:5(c) of the General Agreement and in response to the wishes of Hong Kong, should be

8. G7 Foreign Ministers' Statement on Hong Kong, U.S. Department of State (June 17, 2020), https://www.state.gov/g7-foreign-ministers-statement-on-hong-kong [https://perma.cc/BME2-27DL].

9. Hong Kong Autonomy Act, Pub. L. No. 116-149, 134 Stat. 663 (2020) (codified as amended at 22 U.S.C. § 5701 [hereinafter HKAA].

10. The President's Executive Order on Hong Kong Normalization (July 14, 2020), https://www.whitehouse.gov/presidential-actions/presidents-executive-order-hong-kong-normalization [https://perma.cc/46Z2-6TGK].

11. *Govt to Raise US Sanctions with WTO*, NEWS.GOV.HK (Aug. 18, 2020), https://www.news.gov.hk/eng/2020/08/20200818/20200818_105825_935.html#:~:text=Chief%20Executive%20Carrie%20Lam%20said,with%20the%20World%20Trade%20Organization.&text=World%20Trade%20Organization.-,To%20be%20mistreated%20by%20another%20member%20of%20the%20World%20Trade,regulations%20of%20this%20international%20body [https://perma.cc/83VC-XE69].

12. Request for Consultations by Hong Kong, China, *United States—Origin Marking Requirement*, WTO Doc. WT/DS597/1 (Nov. 3, 2020).

13. GATT Secretariat, *Admission of Hong Kong as a Contracting Party—Certification by the Director-General*, GATT Doc. L/5986 (Apr. 24, 1986).

deemed a GATT Contracting Party. Since Hong Kong was a signatory and agreed to be bound by the WTO Agreement, Hong Kong became a founding Member of the WTO. After China regained sovereignty over Hong Kong in 1997, Hong Kong—as a special administrative region of China under the "One Country, Two Systems" regime—retained the power to maintain and to develop economic, trade, and other business relations under the name of "Hong Kong, China" on the basis of its status as a separate customs territory and member of the WTO.[14]

However, neither GATT nor WTO law specifies the criteria required to qualify as a separate customs territory. Even though Hong Kong participates in the WTO as a separate customs territory, it is unclear whether this WTO membership dictates that other WTO members must recognize and grant Hong Kong special treatment as a separate customs territory under their own domestic laws. Therefore, the question emerges: whether U.S. membership in the WTO obligates it to recognize Hong Kong as a separate customs territory. Moreover, with the United States' decision to suspend Hong Kong's special treatment under the USHKPA,[15] it is worth exploring whether the suspension would be incompatible with the United States' obligations under the WTO.

Such concerns are not baseless. Indeed, two decades after its return to China, the high degree of autonomy that Hong Kong was promised under the "One Country, Two Systems" regime has been significantly eroded as a consequence of frequent interpretations of the Hong Kong Basic Law (HKBL) by the Standing Committee of National People's Congress (NPCSC).[16] Notable examples include the proposed amendment of the extradition ordinance that spurred the anti-extradition ordinance movement and led to the enactment of the HKHRDA and the National People's Congress' Decision on Hong Kong's National Security Law that invited expressions of concern by Western countries and a joint-statement by the G7.[17]

14. *See* Hong Kong Economic and Trade Office, *Communication from Hong Kong*, WTO Doc WT/L/218 (June 3, 1997); Hong Kong, China's Participation in the WTO, Hong Kong Trade and Industry Department, https://www.tid.gov.hk/english/ito/wto/wto_overview.html [https://perma.cc/N3E4-DP6D].

15. United States–Hong Kong Policy Act, 22 U.S.C. §§ 5701–5732 (1992) [hereinafter USHKPA].

16. *See*, *e.g.*, Johannes Chan, *A Storm of Unprecedented Ferocity: The Shrinking Space of the Right to Political Participation, Peaceful Demonstration, and Judicial Independence in Hong Kong*, 16 Int'l J. Const. L. 373 (2018).

17. U.S. Dep't of State, *supra* note 6; *Canada Suspends Extradition Treaty with Hong Kong Over New Security Law*, CBC (July 3, 2020), https://www.cbc.ca/news/politics/canada-suspending-extradition-treaty-hong-kong-over-security-law-1.5636479 [https://perma.

In this context, this Article examines the legal and political implications of the HKHRDA, the HKAA, and the Executive Order issued by Trump and their potential impact on Hong Kong's status as a separate customs territory and investigates initial efforts of the Biden administration to safeguard Hong Kong's autonomy. Part I traces the history of Hong Kong's participation in the GATT, its status as a separate customs territory, and its subsequent membership in the WTO and situates this discussion within the "One Country, Two Systems" regime. Part II examines the evolution of U.S. policy toward Hong Kong—from the USHKPA to the HKHRDA and the HKAA. Parts III and IV assess the legality and policy impacts of the HKHRDA and the HKAA under public international law and WTO law.

I. Hong Kong as a Separate Customs Territory: From Colony to Special Administrative Region

During the late period of British colonial rule over Hong Kong, when the latter's return to China seemed inevitable, the United Kingdom pondered how to ensure the political and economic autonomy of Hong Kong and thus safeguard its rule of law and prosperity. In 1984, the United Kingdom and the PRC signed the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (Sino-British Joint Declaration).[18] It was agreed that China would regain sovereignty over Hong Kong in 1997 and, under the "One Country, Two Systems" regime, Hong Kong would continue to operate a capitalist economy featuring a "high degree of autonomy."[19] After the handover, the United Kingdom hoped to see this purpose effected through the ongoing implementation of the International Covenant on Political and Civil Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both of which the United Kingdom ratified in 1976 (and extended application thereof to Hong Kong). British Hong Kong thus adopted the Hong Kong Bill of Rights Ordinance in 1991,[20] which incorporated the rights

cc/X2GQ-SM6R]; *Hong Kong Suspends Extradition Agreements with France and Germany*, FRANCE 24 (Aug. 12, 2020), https://www.france24.com/en/20200812-hong-kong-suspends-extradition-agreements-with-france-and-germany [https://perma.cc/NNE3-LPE9].

18. Joint Declaration on the Question of Hong Kong, China-U.K. Gr. Brit. & N. Ir., Dec. 19, 1984, No. 23391, 1399 U.N.T.S. 33 [hereinafter The Sino-British Joint Declaration].

19. *Id.* art. 3(2).

20. *See generally* Constitutional and Mainland Affairs Bureau, An Introduction to Hong Kong Bill of Rights Ordinance, https://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/the_rights_of_the_individuals/human/BORO-InductoryChapterand-

embodied in these two Covenants. On the economic front, in 1986, the United Kingdom sponsored Hong Kong to become a Contracting Party to the GATT in accordance with Article XXVI(5). Subsequently, Hong Kong participated in GATT activities and was among the founding members of the WTO when the organization came into being on January 1, 1995.[21]

Hong Kong's accession to the GATT is attributed to a constitutional feature of the GATT and WTO, which allows separate customs territories—with limited autonomy but no absolute sovereignty—to join.[22] This constitutional design also reflects the functional needs of post–World War II international economic relations, where newly independent countries and colonies in the process of seeking independence needed to conduct their own economic diplomacy and develop their own trade relations. The relevant paragraphs of Article XXVI(5) of the General Agreement read as follows:

> (a) Each government accepting this Agreement does so in respect of its metropolitan territory and of the other territories for which it has international responsibility, except such separate customs territories as it shall notify to the Executive Secretary to the CONTRACTING PARTIES at the time of its own acceptance.
>
> (c) If any of the customs territories, in respect of which a contracting party has accepted this Agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, such territory shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party.[23]

Booklet-Eng.pdf (last visited Apr. 11, 2020); Johannes Chan, *State Succession to Human Rights Treaties: Hong Kong and the International Covenant on Civil and Political Rights*, 45 Int'l & Comp. L.Q. 928 (1996); Simon N. M. Young, *Restricting Basic Law Rights in Hong Kong*, 34 H.K. L.J. 109 (2004) (stating that the ordinance was enacted to incorporate the ICCPR into Hong Kong domestic law).

21. For an overview of the Hong Kong, China membership in the WTO and its status of GATT Contracting Party, *see Hong Kong, China and the WTO*, WTO, https://www.wto.org/english/thewto_e/countries_e/hong_kong_china_e.htm [https://perma.cc/9FSL-E3Z9] (last visited Nov. 6, 2020).

22. The GATT offers two venues for accessions: an ordinary route under Article XXIII of the General Agreement for countries or separate customs territories to join on the terms to be agreed between the acceding country or territory and the GATT Contracting Parties and a special route under the sponsorship of the parent country for separate customs territories. Regardless of the same status of separate customs territory in the WTO, Taiwan joined the WTO via the first route whereas Hong Kong joined the GATT and subsequently the WTO via the second route. *See* Chien-Huei Wu, WTO and the Greater China: Economic Integration and Dispute Resolution 1–27 (2012).

23. General Agreement on Tariffs and Trade, Oct. 30, 1941, 61 Stat. A-11, 55 U.N.T.S. 194, Article XXVI(5).

This sponsorship procedure offered a shortcut for newly independent countries in the early 1960s. Given that these newly independent countries had applied GATT rules through their former colonial rulers, it was generally assumed that, after these colonies claimed independence and became GATT Contracting Parties through the sponsorship of their former colonial rulers, the commitments contained in the schedules originally negotiated on behalf of these colonies would continue to be applicable.[24] Therefore, a prerequisite for application of this sponsorship procedure was that GATT rules had been applied to these former colonies through a GATT Contracting Party, which had international responsibility for them.

Paragraph 1 of the Protocol of Provisional Application,[25] which enabled the provisional application of the General Agreement prior to the emergence of the International Trade Organization,[26] envisioned its application as limited to the metropolitan territories of Belgium, France, the Netherlands, and the UK.[27] Paragraph 2 of the Protocol of Provisional Application nonetheless offered a possibility for these countries to extend the provisional application of the General Agreement to other territories following notice to the Secretary General of the United Nations.[28] Thus, before claiming independence, such territories were already subject to the rules of the General Agreement through their respective colonial powers.

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24. John H. Jackson et al., Legal Problems of International Economic Relation: Cases, Materials and Text on the National and International Regulation of Transnational Economic Regulations 232–233 (4th ed. 2002).

25. Protocol of Provisional Application of the General Agreement on Tariffs and Trade, Oct. 30, 1947, No. 814, 55 UNTS 308.

26. Due to opposition of the U.S. Congress, the International Trade Organization (ITO) has never come into being. Therefore, the GATT entered into force through provisional application without an organizational form until the WTO was established in 1995.

27. The GATT was essentially expected to be applied provisionally to the Contracting Parties with the main objective to relax the government-mandated trade protections. When the GATT was being negotiated, another wider project, the ITO, was also being formulated. The ITO was expected to serve as the institution responsible for administering the Havana Charter. Before concluding the ITO negotiation, the GATT participating governments decided to temporary apply the GATT by virtue of the Protocol of Provisional Application. The entry into force of the GATT on January 1, 1948 was thus meant to be provisional, pending the conclusion of negotiation and the entry into force of the Havana Charter. Article XXIV of the GATT regulated the relationship between the GATT and the Havana Charter. However, due to the U.S. Congress' unwillingness to ratify the Havana Charter on December 6, 1950, it failed to ever come into force. The provisional application of the GATT lasted until its transformation into the WTO. *See* Petros C. Mavroidis, The General Agreement on Tariffs and Trade: A Commentary 1–5 (2005).

28. World Trade Organization, Guide to GATT Law and Practice: Analytical Index 917 (6th ed. 1995).

As for Article XXVI(5) of the General Agreement, little was said about the procedure for sponsorship and the substance of establishing a separate customs territory. The defining element put forward in Article XXVI(5) of the General Agreement was "full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement." After 1963, four customs territories applied for accession under Article XXIV(5)(c) and were considered to have autonomy over their external commercial relations and other matters. Such autonomy was certified by the Executive Secretary (now the Director General).[29]

Prior to the United Kingdom's sponsorship in 1986, Hong Kong's participation in the GATT was governed by a UK declaration concerning the application of the General Agreement to Hong Kong, issued in 1948.[30] In 1986, two years after the adoption of the Sino-British Joint Declaration, the Permanent Representative of the UK to the GATT issued a communication to the GATT, which the Director General subsequently circulated to all Contracting Parties. In that communication, the Permanent Representative noted:

> I am instructed by Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs to refer to *the Declaration made by the United Kingdom on 28 June 1948 concerning the application of the General Agreement on Tariffs and Trade to Hong Kong*, and to declare that Hong Kong, being a separate customs territory, in respect of which the United Kingdom has accepted that Agreement, *possesses full autonomy in the conduct of its external commercial relations and of the other matters provided for in the Agreement*. In accordance with the provisions *of Article XXVI(5)(c)* of the said Agreement and with the wishes of Hong Kong, Hong Kong will, with effect from the date of this communication, be deemed to be a contracting party to the Agreement.[31]

The United Kingdom's communication foreshadowed the handover on July 1, 1997, as dictated by the Sino-British Joint Declaration. Until that date, the United Kingdom would continue to assume international responsibility for Hong Kong.[32] This was linked to a simultaneous

29. In addition to Hong Kong, the other three cases were Macau, Lesotho, and Liechtenstein. *See Status of Lesotho—De Facto Application of the GATT*, GATT Doc. L/2701 (Oct. 28, 1966); GATT Secretariat, A*dmission of Liechtenstein as a Contracting Party—Certification by the Director-General*, GATT Doc. L/7440 (Apr. 5, 1994) [hereinafter *Certification by the Director-General—Liechtenstein*].

30. Mavroidis, *supra* note 27, at 258.

31. GATT Secretariat, *supra* note 13 (emphasis added).

32. *Id.*

communication issued by China's Ministry of Foreign Affairs in 1986.[33] China's communication referred to the Sino-British Joint Declaration and noted that China would resume its sovereignty over Hong Kong on July 1, 1997. The communication further clarified Hong Kong's status as a special administrative region after the handover under the "One Country, Two Systems" regime and fulfilled the criteria of a separate customs territory. The communication noted:

> In accordance with paragraph 3 of the *Joint Declaration* and the relevant provisions of Annex I to that Declaration, the *Hong Kong Special Administrative Region will retain the status of a free port and a separate customs territory, will maintain the capitalist economic and trade systems previously practised in Hong Kong, will decide its economic trade policies on its own* and may on its own, using the name of "Hong Kong, China" maintain and develop relations and conclude and implement agreements with States, regions and relevant international organizations in the economic, trade and other fields. Section VI of Annex I to the Joint Declaration further provides in detail that the Hong Kong Special Administrative Region may participate in relevant international organizations and international trade agreements (including preferential trade arrangements), such as the General Agreement on Tariffs and Trade and arrangements regarding international trade in textiles. Accordingly, the Government of the People's Republic of China declares that*, with effect from 1 July 1997, the Hong Kong Special Administrative Region will meet the requirements for a customs territory to be deemed to be a contracting party as prescribed in GATT Article XXVI(5)(c)*, and therefore may, using the name of "Hong Kong, China," continue to be deemed to be a contracting party to the General Agreement on Tariffs and Trade.[34]

A closer look at the United Kingdom's communication shows that it did not contain criteria concerning why and how Hong Kong constituted a separate customs territory. It merely declared that Hong Kong "possesse[d] full autonomy in the conduct of its external commercial relations and of the other matters." By contrast, China's communication revealed more detail. China's communication first referred to Annex I of the Sino-British Joint Declaration and stated that Hong Kong upon handover would become a special administrative region and retain its free port status. The communication further identified the key features of this special administrative region status, including *internally*, the autonomy to determine trade policies on its own, and *externally*, the use of the name "Hong Kong, China" to participate in

33. GATT Secretariat, *Admission of Hong Kong as a Contracting Party—Communication from the People's Republic of China*, GATT Doc. L/5987 (Apr. 24, 1986).

34. *Id.* (emphasis added).

international trade agreements. Based on the United Kingdom's communication—and supported by China's communication clarifying Hong Kong's status as a special administrative region after the handover—the Director General certified that the procedure under Article XXIV(5)(c) had been satisfied, and Hong Kong became a Contracting Party to the GATT on April 23, 1986.[35] After being accepted as a Contracting Party to the GATT, Hong Kong participated in the Uruguay Round negotiations, accepted the resulting agreements, and became one of the founding Members of the WTO. On the eve of the handover, Hong Kong circulated a communication to the WTO Secretariat and subsequently to all the WTO Members, declaring that it would use "Hong Kong, China" from the date of handover.[36] Since then, the lingering influence of China over Hong Kong has persisted.

II. US Law and Policy Toward Hong Kong: From USHKPA to HKHRDA and HKAA

The United States' Hong Kong policy has tracked the evolution of U.S.–China policy and relations over the past thirty years. When the United States and China established diplomatic relations in 1979, U.S.–China policy was premised on the assumption that if the United States encouraged China's engagement in the international community, China would gradually reform its political system and become a responsible stakeholder. This policy of engagement has driven U.S. actions across multiple administrations but was most prominent during the Clinton administration, which delinked the most-favored-nation privilege from human rights and welcomed China's accession to the WTO.[37] The Clinton administration's ideological framework was consistently upheld by the subsequent Bush and Obama administrations when U.S.–China relations were considered a "constructive strategic partnership" due to the existence of common interests, such as cooperation on antiterrorism, the issue of North Korea's nuclear weapons, and coordination on climate change policy.[38] However, the situation changed after Trump won

35. GATT Secretariat, *Admission of Hong Kong as a Contracting Party—Certification by the Director-General*, GATT Doc. L/5986 (Apr. 24, 1986).

36. WTO Communication, *Communication from Hong Kong*, WTO Doc. WT/L/218 (June 3, 1997).

37. President's News Conference May 26, 1994, *in* Public Papers of the Presidents of the United States: William J. Clinton, Book II, 991, https://www.govinfo.gov/content/pkg/PPP-1994-book1/pdf/PPP-1994-book1-doc-pg991.pdf [https://perma.cc/Z562-FHAA].

38. *See generally* Yuka Koshino, *How Did Obama Embolden China?—Comparative Analysis of "Engagement" and "Containment" in Post-Cold War Sino-American Relations*, Foreign Pol'y Res. Inst. (2015) [https://perma.cc/A98J-K2LM].

the U.S. presidency in 2016 and adopted an unconventional China policy. The Trump administration accused China of trying to "transform the international order to align with [Chinese Communist Party (CCP)] interests and ideology" and claimed that its "use of economic, political, and military power to compel acquiescence from nation states harm[ed] vital American interests."[39] The engagement policy was abandoned, and a competitive approach was adopted by the Trump administration in response to the perceived challenges from China. Even after Joe Biden took office following the 2020 U.S. presidential election, President Biden has forecasted that there will be steep competition between the United States and China. The Chinese government's crackdown in Hong Kong is one of the most sensitive issues between the two powers.[40] Accordingly, the United States' attitude toward Hong Kong has adjusted and aligned with the escalation of U.S.–China tensions.

Due to its unique history and legal status, Hong Kong has long served as a gateway and steppingstone for businesses from the United States and other Western countries seeking to enter China. The United States has hoped that Hong Kong would serve as a positive example of Western governance models and set the direction for China's development. As a result, substantial economic and social ties exist between the United States and Hong Kong. The United States is one of the most critical sources of investment in Hong Kong: exports to Hong Kong totaled $30.78 billion in 2019[41] and U.S. direct investment in Hong Kong totaled approximately $81.9 billion at the end of 2019.[42] These close ties are grounded in Hong Kong's autonomous status, established by the Sino-British Joint Declaration and implemented through the "One Country, Two Systems" regime under the HKBL. Because the legal and political systems in Hong Kong differed from those in China, the United States has found it necessary to differentiate between

39. *United States Strategic Approach to the People's Republic of China*, The White House 1, (May 2020) https://www.whitehouse.gov/wp-content/uploads/2020/05/U.S.-Strategic-Approach-to-The-Peoples-Republic-of-China-Report-5.24v1.pdf [https://perma.cc/R8CB-XSHL].

40. *See* Robert Delaney, *Biden Pledges to Prevent China from Becoming the World's 'Leading' Country*, S. China Morning Post (Mar. 26, 2021), https://www.scmp.com/news/china/diplomacy/article/3127051/biden-pledges-prevent-china-becoming-worlds-leading-country [https://perma.cc/787U-7QP9].

41. *Trade in Goods with Hong Kong*, United States Census Bureau, https://www.census.gov/foreign-trade/balance/c5820.html (last visited July 17, 2020) [https://perma.cc/56Z5-HJYF].

42. *Hong Kong*, Office of the U.S. Trade Representative, https://ustr.gov/countries-regions/china-mongolia-taiwan/hong-kong#:~:text=U.S.%20foreign%20direct%20investment%20(FDI,%2C%20manufacturing%2C%20and%20information%20services (last visited July 17, 2020) [https://perma.cc/8RT2-FUG6].

Hong Kong and China under its domestic legal system. As a result, the United States passed the USHKPA in 1992, illustrating a comprehensive picture of U.S.–Hong Kong relations and solidifying the beneficial treatment accorded Hong Kong under the U.S. legal system.

Since 2014, however, the outbreak of a series of protests in support of democracy in Hong Kong prompted concern in the United States about the appropriateness of offering special treatment to Hong Kong. Eventually, the HKHRDA was passed in 2019 as an amendment to the USHKPA in the wake of anti-extradition protests and concerns about the extradition of U.S. citizens to the PRC from Hong Kong.[43] As authorized by the HKHRDA, the United States imposed several measures and sanctions against Hong Kong and the PRC government. On May 20, 2020, the National People's Congress of the PRC authorized the NPCSC to enact a national security law for Hong Kong. Immediately after, the U.S. Congress unanimously passed the HKAA. Trump signed the Act and simultaneously issued the Executive Order.[44] The HKAA imposes sanctions on foreign individuals and entities that participate in China's oppression of Hong Kong, while the Executive Order relinquished Hong Kong's special status in the United States. Below, we examine the background and legislative history of the USHKPA, the HKHRDA, the HKAA, and the Executive Order, with a focus on how the new legislation and Executive Order strengthen reporting and sanctions mechanisms pertaining to Hong Kong's democracy, autonomy, and human rights.

A. USHKPA: The Origin of Hong Kong's Special Status under the U.S. Legal System

1. The History of the USHKPA

Under the "One Country, Two Systems" policy,[45] Hong Kong was guaranteed retention of its capitalist economic system and its own currency, legal system, legislative system, and people's rights and freedoms for a period of fifty years. Considering that Hong Kong enjoyed

43. USHKPA § 6(a)(1).

44. Exec. Order No. 13936, 85 Fed. Reg. 43413 (July 14, 2020), https://www.whitehouse.gov/presidential-actions/presidents-executive-order-hong-kong-normalization/ [https://perma.cc/R3Q2-VCQC] [hereinafter "Executive Order on Hong Kong Normalization"]; *See also* Susan Lawrence & Michael Martin, Cong. Research Serv., R46473, *China's National Security Law for Hong Kong: Issues for Congress* 32 (2020) https://fas.org/sgp/crs/row/R46473.pdf [https://perma.cc/2BRD-843B].

45. Joint Declaration on the Question of Hong Kong, China-UK-North Ireland, Annex I, May 27, 1985 1399 U.N.T.S. 63. Regarding the definition of "One Country, Two System" Policy, *see* One Country, Two Systems, China.Org, http://www.china.org.cn/english/features/dengxiaoping/103372.htm (last visited Jan. 19, 2021) [https://perma.cc/WQ69-9PMN].

a high degree of autonomy on all matters, including trade and investment affairs, it became a thorny issue as to whether Hong Kong should be treated differently from China. Hong Kong was the most critical financial hub for the United States in the East Asia region and, therefore, the United States had a strong interest in maintaining the status quo by sustaining Hong Kong's vitality, prosperity, and stability. After the 1997 handover of Hong Kong, the United States hoped to continue to treat Hong Kong as a separate customs territory in order to maintain and expand economic and trade relations.[46] In other words, the United States hoped that the transition from being a dependent territory of the United Kingdom to a special administrative region of China would not change bilateral relations between the United States and Hong Kong.

However, the military repression of student protests in Tiananmen Square by the PRC in 1989 and the subsequent protests held by people in Hong Kong triggered great concern in the United States, bringing the issue of Hong Kong's status back to the table.[47] Beijing, Hong Kong, and Washington were the three primary forces engaged in formulating the future status of Hong Kong in the U.S. legal system both explicitly and implicitly. Beijing persistently objected to any sort of interference from foreign forces, which included some U.S. politicians' initiatives, "inserting the United States into the affairs of Hong Kong."[48]

Public opinion in Hong Kong was more diverse. The pro-Beijing camp upheld Beijing's position and protested against any potential interference by Western countries. Pro-democracy and liberal activists in Hong Kong, on the other hand, wished to see other countries—like the United States and the United Kingdom—actively support the status quo in Hong Kong and pressure China to implement its promises via domestic legislation.

As for U.S. policymakers, both political branches were shocked by the Tiananmen crackdown. Yet the reactions from the legislative branch seemed to be more acute than those of the White House and State Department because the latter were more attentive to economic interests and aimed to hold further trade negotiations with China. As a consequence, Congress was the main force pushing for more U.S. involvement in Hong Kong. In 1992, strong support from both the House and Senate eventually produced numerous measures meant to protect the stability of U.S.–Hong Kong relations, pressured the White

46. Kerry Dumbaugh, *The U.S. Role During and after Hong Kong's Transition*, 18 U. Pa. J. Int'l Econ. L. 333, 335–36 (1997).

47. *Id.* at 336.

48. *Id.* at 335.

House to closely monitor and evaluate developments in Hong Kong before the transition, and persuaded the Chinese government to live up to their commitments.[49] Senator Mitch McConnell introduced a bill regarding U.S.–Hong Kong relations after the handover and coordinated support from both Republicans and Democrats.[50] Eventually, the bill was passed as the USHKPA and signed into law by President Clinton as the first legislation to comprehensively lay out the United States' Hong Kong policy.

2. The Scope and Contents of the USHKPA

The USHKPA was comprised of four main sections. The first and second sections included the title, the factual findings regarding U.S.–Hong Kong relations, and the objectives of the Act. Clarifying the purpose and main theme, the USHKPA indicated that its foundation is the Sino-British Joint Declaration, wherein the Chinese government assured that Hong Kong would retain its current lifestyle and legal, social, and economic systems. The USHKPA further pointed out that human rights and the progress of the democratization of Hong Kong were "of great importance to the United States and are directly relevant to United States interests in Hong Kong."[51] Hence, the USHKPA explicitly declared that the human rights and democracy of Hong Kong would be of U.S. national interest after the handover in 1997.

The substance of the USHKPA can be categorized as containing three parts: general policy, the status of Hong Kong in the U.S. legal system, and reporting provisions of the Secretary of State. First, with regards to the general policy, the USHKPA stated that the United States would like to maintain current relations with Hong Kong even after China's resumption of sovereignty over the territory. Such relations included consulate, economic, trade, financial, monetary, aviation, shipping, communications, tourism, cultural, sport, and other appropriate regimes. Moreover, the USHKPA stipulated that the U.S. government should continue supporting Hong Kong's participation in international organizations where it would be eligible to act as a contracting party and should recognize Hong Kong as a separate customs territory capable of carrying on commercial, transportation, and educational affairs with the United States without China's involvement.

49. *Id.* at 343.

50. Susan Cornwell, *Hong Kong a Priority for U.S. Senate Democrats, Leader Says*, Reuters (Sept. 5, 2019), *https://www.reuters.com/article/us-hongkong-protests-senate/hong-kong-a-priority-for-u-s-senate-democrats-leader-says-idUSKCN1VQ29O* [https://perma.cc/5VN7-EMR7].

51. USHKPA § 2.

Second, the USHKPA affirmed that the legal status of Hong Kong under U.S. domestic law would remain unchanged—this included the continuity in force of existing international agreements between the United States and Hong Kong. Noticeably, Section 202 of the USHKPA authorized the President, after consulting Congress, to issue an Executive Order suspending the application of laws no longer appropriate if the President believed that Hong Kong was not sufficiently autonomous.[52] Third, in order to ensure that Hong Kong would enjoy a high degree of autonomy in line with the Sino-British Joint Declaration, Sections 301 and 302 of the USHKPA required the Secretary of State to transmit a report to Congress on conditions in Hong Kong of interest to the United States in 1993, 1995, 1997, 1998, 1999, and 2000. The scope of this report was to cover both economic and noneconomic developments in Hong Kong, including any change in the exercise of Chinese sovereignty over Hong Kong affecting U.S. interests and the status of democratic institutions in Hong Kong.

Some observations are worth noting about the USHKPA. First, the contents of the USHKPA were soft and left certain discretions for the executive branch. According to Article II of the U.S. Constitution and relevant case law,[53] the President enjoys certain "executive power" to conduct foreign policy.[54] Aside from the foreign affairs powers enumerated in Article I of the U.S. Constitution, Congress can still address matters of U.S. foreign relations that fall within the scope of the President's executive power, provided that such laws are exercised in harmony with the President and would not interfere with core presidential power under the U.S. Constitution.[55] As for the USHKPA, while the Act was promulgated with a view of authorizing the U.S. government to play an active role in maintaining Hong Kong's stability and prosperity, many of the provisions touched upon the diplomatic policy of the United States and, thus, fell within the scope of the President's executive power. As a result, in many circumstances, the USHKPA used such terms as "should," "make every effort," and "seek to," implying that such provisions were just the suggestions and recommendations of Congress, rather than legally binding clauses. Such features could also be attributed to a compromise between Congress and the Clinton

52. USHKPA § 202.

53. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

54. U.S. Const. art. 2, § 1, 2, cl. 1.

55. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). *See also* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale L.J. 231, 346–53 (2001).

administration, which endorsed an engagement policy and was thus hesitant to take a more confrontational approach. For example, the scope of the reporting provision in the USHKPA was significantly narrowed in comparison with its initial draft.[56] The implementation of the Act was accordingly highly dependent on the discretion of the executive branch.

Second, while the USHKPA clearly represented the United States' intention to protect its economic interests in Hong Kong, it also served as a political tool to maintain U.S. presence and extend its value of human rights in East Asia. In order to achieve this goal, the scope of the USHKPA not only covered trade and economic affairs, but also connected the implementation of the Sino-British Joint Declaration to U.S. interests. In other words, progressing democratization and expanding human rights were also constituents of the United States' Hong Kong policy and a significant factor in U.S.–China relations. For instance, in the section on general policy, the USHKPA specified that human rights served as a basis for Hong Kong's continued economic prosperity and were of great importance to the United States and directly relevant to U.S. interests in Hong Kong.[57] In addition, as mentioned above, the Secretary of State was to prepare a separate report to address the condition of human rights in Hong Kong as part of the annual report on the PRC, as required by Sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961.[58] However, the USHKPA did not explain what sanctions were to be imposed if human rights violations were found, which implied that the United States would resort to existing mechanisms to sanction human rights violations, such as the International Emergency Economic Powers Act.

Third, the reporting mechanism in the USHKPA only obligated the Secretary of State to transmit a report on Hong Kong in specific years. The reporting mechanism was originally designed to ensure that the transition of sovereignty over Hong Kong proceeded smoothly and to observe whether the PRC would faithfully abide by its assurances made in the Sino-British Joint Agreement. However, since 2003, the Secretary of State has not produced a separate report on human rights practice and a general annual policy report for Hong Kong, which may

56. *See* Shawn B. Jensen, International Agreements between the United States and Hong Kong under the United States–Hong Kong Policy Act, 7 Temp. Int'l & Comp. L.J. 167, 188–89 (1993).

57. USHKPA § 2(6).

58. *Id*. § 302(1); Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424. (P.L. 87-195).

fail to comprehensively reflect the circumstances motivating prominent civil rights movements in Hong Kong.[59]

B. HKHRDA: A Tiger With Teeth?

1. The History of the HKHRDA

Due to numerous deficiencies in the USHKPA, Congress has attempted to close these loopholes in order to reinforce the United States' presence in Hong Kong affairs. Due to the engagement policy embraced by the Clinton and Bush administrations, such attempts to reform the USHKPA were all vetoed by the White House. While relevant Acts have successfully included certain elements relating to Hong Kong, such as requiring the Secretary of State to incorporate additional information into the annual report,[60] U.S.–Hong Kong policy has been long affiliated with U.S.–China policy and not totally perceived as an independent topic in U.S. foreign policy.

The situation changed following the launch of prominent civil movements in Hong Kong, beginning with the umbrella movement in 2014 and accelerated by protests against the Anti-Extradition Law Amendment Bill in Hong Kong in 2019. This massive demonstration was triggered by the Hong Kong government's introduction of the Fugitive Offenders Amendment Bill, which subjected Hong Kong residents to a risk of exposure to the PRC's flawed judicial system through an extradition arrangement with PRC.[61] This was criticized for eroding Hong Kong's judicial independence, undermining its "high degree of autonomy," and infringing on popularly enjoyed civil and political rights.[62] The clashes between protesters and Hong Kong police wors-

59. The UN Refugee Agency, U.S. Department of State Annual Reports: Hong Kong (Special Administrative Region of China), https://www.refworld.org/publisher,USDOS,ANNUALREPORT,HKG,,,0.html#SRTop51 (last visited Nov. 12, 2020) [https://perma.cc/4DJD-9AX4]; U.S. Consulate General Hong Kong & Macau, Official Reports, https://hk.usconsulate.gov/our-relationship/official-reports (last visited Nov. 12, 2020) [https://perma.cc/9FMM-M4GY].

60. Omnibus Consolidated Appropriations Act of 1997 § 571, Pub. L. No. 104-208, 110 Stat. 3009 (1996), https://www.congress.gov/104/plaws/publ208/PLAW-104publ208.pdf.

61. Jeff Li, *Hong Kong-China Extradition Plans Explained*, BBC (Dec. 19, 2019), https://www.bbc.com/news/world-asia-china-47810723 [https://perma.cc/S8HY-CABM].

62. *See* Ethan Meick, *Hong Kong's Proposed Extradition Bill Could Extend Beijing's Coercive Reach: Risks for the United States*, U.S.–China Economic and Security Review Commission 2 (May 7, 2019), *https://www.uscc.gov/sites/default/files/Research/USCC%20Issue%20Brief_HK%20Extradition%20Bill.pdf* [https://perma.cc/XV45-T45W]; *see also* Greg Torode & James Pomfret, *Exclusive: Hong Kong Judges See Risks in Proposed Extradition Changes*, Reuters (May 28, 2019), *https://www.reuters.com/article/us-hongkong-politics-extradition-judges/exclusive-hong-kong-judges-see-risks-in-proposed-extradition-changes-idUSKCN1SZ09U* [https://perma.cc/WW5M-3JYP].

ened as the Hong Kong government persistently declined to respond to protesters' "five core demands,"[63] instead characterizing the movement as a riot and acquiescing to violent repression by the police. The disproportionate use of tear gas, rubber bullets, and numerous cases of so-called "unwilling suicide" all raised great concern in the international community about possible human rights violations in Hong Kong.[64]

The dramatic downturn of Hong Kong's democracy and freedom, together with the escalating conflicts between the United States and China, have contributed to the shift of the United States' Hong Kong policy since the Trump administration.[65] This attitude toward Hong Kong and China has also been adopted by the Biden administration, which has condemned China for assaulting democracy in Hong Kong.[66] Many U.S. policymakers now believe that the engagement policy was a mistake and predict that the U.S. and China will engage in "long-term strategic competition."[67] The HKHRDA, enacted with near-unanimous support in Congress, emerged against this background.

The legislative history of the HKHRDA begins in 2014. The bill was introduced by Republican Representative Chris Smith in the House and Democratic Senator Sherrod Brown in the Senate.[68] However, the bill did not come up for a vote until 2019. Following the gradually

63. Regarding the substance of the "Five Core Demands," *see* Tara John, *Why Hong Kong is Protesting: Their Five Demands Listed*, CNN (Aug. 30, 2019), https://www.cnn.com/2019/08/13/asia/hong-kong-airport-protest-explained-hnk-intl/index.html [https://perma.cc/R2TY-H4VP]; *see also* Wong Tsui-kai, *Hong Kong Protests: What are the 'Five Demands'? What do Protesters Want?*, S. China Morning Post (Aug. 19, 2019), https://www.scmp.com/yp/discover/news/hong-kong/article/3065950/hong-kong-protests-what-are-five-demands-what-do [https://perma.cc/6HG3-X56R].

64. *Press Briefing Note on Hong Kong, China*, United Nations Human Rights Office of the High Commissioner (Aug. 13, 2019), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24888&LangID=E [https://perma.cc/29KP-8FFD]; *Hong Kong: Arbitrary Arrests, Brutal Beatings and Torture in Police Detention Revealed*, Amnesty International (Sept. 19, 2019), https://www.amnesty.org/en/latest/news/2019/09/hong-kong-arbitrary-arrests-brutal-beatings-and-torture-in-police-detention-revealed [https://perma.cc/W32F-XKS3].

65. *See* Hal Brands, *Democracy vs Authoritarianism: How Ideology Shapes Great-Power Conflict*, 60(5) Survival 61, 66–67, 98 (2018) (discussing the competition between China and the United States).

66. Assault on Democracy in Hong Kong, U.S. Department of State (Mar. 11, 2021), https://www.state.gov/assault-on-democracy-in-hong-kong [https://perma.cc/4Y8T-YVXJ].

67. The White House, United States Strategic Approach to the People's Republic of China 7 (May 2020), https://www.whitehouse.gov/wp-content/uploads/2020/05/U.S.-Strategic-Approach-to-The-Peoples-Republic-of-China-Report-5.24v1.pdf; Prashanth Parameswaran, *The Future of US-China Strategic Competition: Minding the Clarity Gaps*, The Diplomat (Oct. 28, 2019), https://thediplomat.com/2019/10/the-future-of-us-china-strategic-competition-minding-the-clarity-gaps [https://perma.cc/G5YY-4B33].

68. 165 Cong. Rec. H9093 (daily ed. Nov. 20, 2019) (statement of Rep. Chris Smith).

intensifying confrontations between protesters and Hong Kong police, Democratic Representatives Jim McGovern and Chris Smith reintroduced and sponsored the bill in the House, and Republican Senator Marco Rubio sponsored the Senate bill. Eventually, the bill gained sufficient bipartisan support to pass in both the House and the Senate and was signed into law by Trump.[69]

2. The Scope and Contents of the HKHRDA

The HKHRDA reaffirms the principles and objectives of its 1992 predecessor, the USHKPA, and reinforces the provisions governing the reporting and sanctions mechanisms. The primary changes in the HKHRDA are as follows.

a. The International Nature of the Hong Kong Issue and its Implications for Human Rights and Democracy

Compared with the USHKPA, the HKHRDA dedicates sizable paragraphs in its policy statement to highlight U.S. concerns with increasing interference in Hong Kong's autonomy by the PRC government and increasingly frequent human rights violations in Hong Kong. The HKHRDA explicitly references international human rights treaties such as the Universal Declaration of Human Rights and the ICCPR.[70] Moreover, the HKHRDA furthers appeals to U.S. allies—including the United Kingdom, Australia, Canada, Japan, and South Korea—to jointly promote human rights in Hong Kong.[71] While these policy statements are not legally binding, the purpose of such provisions is to highlight the international nature of the Hong Kong issue and resist China's contention of non-interference to conceal potential human rights violations in Hong Kong. To be more precise, the international nature of the Hong Kong issue can be examined from two perspectives. First, Hong Kong's high degree of autonomy through the "One Country, Two Systems" regime was established in the Sino-British Joint Declaration, an international obligation the PRC is obliged to

69. *See Statement by the President*, The White House (Nov. 27, 2019), https://www.whitehouse.gov/briefings-statements/statement-by-the-president-30 [https://perma.cc/2P-DZ-Q5KQ]. While Trump signed the Act, he also made a statement simultaneously which specified that "certain provisions of the Act . . . would interfere with the exercise of the President's constitutional authority to state the foreign policy of the United States" and therefore he and the executive branch would "treat each of the provisions of the act consistently with the president's constitutional authorities with respect to foreign relations." *Id.*

70. Hong Kong Human Rights and Democracy Act of 2019, Pub. L. No. 116-76, § 3(1)(C); § 205(a)(1)(B)(xv); § 206(b)(2), 133 Stat. 1161, 1163 (codified as amended in scattered sections of 22 U.S.C.).

71. *Id.* § 3(11).

fulfill. Second, international human rights law, such as the ICCPR and ICESCR, are applicable in Hong Kong and the violation of these international human rights treaties by the PRC and Hong Kong government is of international concern. In view of the international nature of the Hong Kong issue, China's insistence on non-interference may not be a justifiable reason to shield it from the critiques or sanctions of Western countries like the United States.

b. Reinforcing the Reporting Provision and Introducing the Certification Mechanism

Unlike the USHKPA, which only obliged the Secretary of State to submit a report in a few specific years, the HKHRDA requires an annual report and broadens its scope of coverage. Under the HKHRDA, the annual report shall be submitted by the Department of Commerce and shall assess whether the PRC is using Hong Kong's special status to import items into its territory from Hong Kong in circumvention of U.S. export control laws and whether exports from the United States have been "used to develop . . . systems of mass surveillance and predictive policing."[72]

In addition, the HKHRDA requires the Secretary of State to certify annually whether Hong Kong deserves to retain its special economic status. The list of factors that shall be considered in order to reach such certification is much longer compared with the requirements of the USHKPA. For instance, the certification process must address essential factors such as freedoms of assembly, speech, expression, press, and judicial independence.[73] The certification process also requires an evaluation of whether Hong Kong's autonomy has eroded as a result of the PRC's actions and Hong Kong's capacity to fulfill its international obligations.[74] If Hong Kong is no longer considered to sufficiently exercise its own autonomy, the HKHRDA provides for the suspension or termination of its special and favorable status accorded by relevant U.S. laws and regulations.[75]

c. Visa Administration

The HKHRDA also facilitates a visa application procedure for protestors in Hong Kong. Specifically, the HKHRDA specifies that visa applicants, who resided in Hong Kong in 2014—the year that the umbrella movement was launched—and later, "may not be denied

72. *Id.* § 5, at 1166–67.
73. *Id.* § 205(a)(1)(B), at 1164.
74. *Id.* § 205(a)(1)(C), at 1164–65.
75. *Id.* § 205(a)(1)(A), at 1163–65.

primarily on the basis of the applicant's subjection to politically-motivated arrest, detention or other adverse government action."[76] The HKHRDA also requires the Secretary of State to see to it that consular officers receive training to ensure that the abovementioned provisions can be fully implemented.[77] That is to say, protesters in Hong Kong arrested or detained by Hong Kong authorities for antigovernment activities and political offences shall not be denied a U.S. visa solely due to the existence of a criminal record related to their political activities.

d. The Establishment of a Sanctions Mechanism

Unlike the silence of the USHKPA on the consequences for possible breaches of the Act, the HKHRDA is equipped with sanctions provisions to prevent human rights violations and deter Chinese officials seeking to undermine the autonomy of Hong Kong. According to Section 7 of the HKHRDA, the U.S. President is empowered to identify each foreign person responsible for "the extrajudicial rendition, arbitrary detention, or torture of any person in Hong Kong"[78] or "other gross violations of internationally recognized human rights in Hong Kong."[79] If such individuals are identified, the President *shall* impose sanctions on them. Such sanctions listed in the Act include: (1) *blocking assets*: freezing assets and restricting the ability of these individuals to conduct business with U.S. citizens in the United States in accordance with the International Emergency Economic Powers Act,[80] (2) *ineligibility for visas, admission, or parole*: denying or revoking visas for such individuals, and (3) *penalties*: civil and even criminal penalties shall be imposed on any person who commits an unlawful act described above.[81] Compared with the Global Magnitsky Human Rights Accountability Act, which specifies that the President *may* impose sanctions on human rights offenders in any country,[82] the HKHRDA imposes a positive obligation on the President to actively investigate individuals who are responsible for impeding freedoms and autonomy in Hong Kong and to implement sanctions if such individuals have been identified under the HKHRDA.[83]

76. *Id.* § 206(a), at 1165.
77. *Id.* § 206(b), at 1165–66.
78. *Id.* § 7(a)(1)(A), at 1168.
79. *Id.* § 7(a)(1)(B).
80. 50 U.S.C. §§ 1701–1706.
81. § 7(c), 133 Stat. at 1169.
82. Global Magnitsky Human Rights Accountability Act § 1263(a), 22 U.S.C. §§ 2656 note (Human Rights Sanctions).
83. After witnessing the Hong Kong police's horrifying suppression of protestors using munitions which cause severe harm, Congress and Trump signed into law that same

C. HKAA: Reinforcing Sanctions Mechanisms

1. The Background of the HKAA

While the enactment of the HKHRDA was viewed as a great triumph by the pro-democracy party of Hong Kong,[84] it unsurprisingly infuriated the PRC government. China fears having its governing authority over Hong Kong gradually eroded and the voice of "Reclaim Hong Kong, Revolution of Our Times" becoming the dominant expression of public opinion in Hong Kong.[85] Hence, in order to reinforce its control and exclude so-called foreign inference in Hong Kong, the NPCSC enacted the National Security Law for Hong Kong. Both Hong Kong's civil society and the international community have been surprised at the PRC's dramatic actions and the promulgation of Chinese-style national security crimes—including secession, subversion, terrorism, and collusion—which are notorious for their vague provisions and lack of due process and human rights protections.[86] Though criticized by the international community, the NPCSC nonetheless

day, together with the HKHRDA, an Act that prohibits the commercial export of covered munitions items to the Hong Kong police force. This Act specifies the covered munitions as items comprising of tear gas, pepper spray, rubber bullets, foam rounds, bean bag rounds, pepper balls, water cannons, handcuffs, shackles, stun guns, and tasers. Thirty days after this Act's enactment, the President shall prohibit the exportation of the covered items in order to prevent such ammunitions from aggravating the humanitarian crisis in Hong Kong. A sunset clause, expiring one year after the enactment of the Act, is also included. An Act to Prohibit the Commercial Export of Covered Munitions Items to the Hong Kong Police Force, Pub. L. No. 116-77, 133 Stat. 1173 (2019).

84. *See* Joshua Berlinger, *Protesters Celebrate a Victory After Trump Signs Hong Kong Human Rights Act*, CNN (Nov. 28, 2019, 7:02 AM) https://www.cnn.com/2019/11/28/asia/hong-kong-reaction-trump-legislation-intl-hnk/index.html [https://perma.cc/FGK6-WECQ].

85. *See* Michael C. Davis & Victoria Tin-bor Hui, *In Hong Kong, What Happens Now That Beijing has Called the Protests a 'Color Revolution'?*, Wash. Post (Aug. 10, 2019, 6:00 AM), https://www.washingtonpost.com/politics/2019/08/10/hong-kong-what-happens-now-that-beijing-has-called-protests-color-revolution [https://perma.cc/R42F-6NXK].

86. *See The Law of the People's Republic of China (PRC) on Safeguarding National Security in the Hong Kong Special Administrative Region (HKSAR): Statement of the Hong Kong Bar Association,* H. K. Bar Assoc., ¶¶ 7–8 (July 1, 2020), https://www.hkba.org/sites/default/files/20200701%20HKBA%20statement%20on%20Safeguarding%20National%20%20Security%20in%20HKSAR.pdf [https://perma.cc/F2GY-UXGM]; *Hong Kong's National Security Law: 10 Things You Need to Know*, Amnesty Int'l (July 17, 2020, 7:09 PM), https://www.amnesty.org/en/latest/news/2020/07/hong-kong-national-security-law-10-things-you-need-to-know [https://perma.cc/7XD5-FX6G]; Fionnuala Ní Aoláin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism) et al., *Comments on the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (National Security Law)*, U.N. Doc. OL CHN 17/2020 (Sept. 1, 2020), https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25487.

enacted and published the National Security Law on June 30, which took effect just before the anniversary of the handover on July 1.

In response to the National Security Law, the United States immediately adopted several countermeasures. As mentioned above, the Secretary of State, the Secretary of Commerce, and the President certified that Hong Kong no longer retained its autonomy and certain preferential treatments were revoked in accordance with the HKHRDA. In addition, Congress unanimously passed a new law—the HKAA—to deter the PRC from further eroding its own guarantee of "One Country, Two Systems" under the Sino-British Joint Declaration and the HKBL. The HKAA expressed the United States' dissatisfaction with the PRC over its failure to honor its obligation to maintain Hong Kong's democracy and freedom.[87]

2. The Scope and Contents of the HKAA

Building upon the USHKPA and the HKHRDA, the HKAA specifically focuses on the imposition of sanctions on foreign individuals and entities that are materially liable for the PRC's failure to maintain Hong Kong's autonomy. The HKAA first proclaims the understanding of Congress that the high degree of autonomy enjoyed by Hong Kong is established on the basis of the Sino-British Joint Declaration and the HKBL. Therefore, both the PRC and Hong Kong governments are obliged to carry out the provisions enumerated in these two legal instruments.[88] The HKAA then lays out multiple instances when actions undertaken by the PRC have contravened its obligation to refrain from eroding Hong Kong's autonomous status and have violated democratic principles and human rights enjoyed by the people of Hong Kong.

Section 5(a) of the HKAA obliges the Secretary of State, after consulting with the Secretary of the Treasury, to submit a report to the relevant congressional committees and determine which individuals have been, or are, materially contributing to "the failure of the Government of China to meet its obligations under the Joint Declaration or the Basic Law."[89] Between thirty and sixty days after the abovementioned report is submitted, Section 5(b) of the HKAA also requires that the Secretary of the Treasury identify any foreign financial institutions which knowingly conduct significant transactions with foreign individ-

87. *Bill Announcement*, The White House (July 14, 2020), https://www.whitehouse.gov/briefings-statements/bill-announcement-071420 [https://perma.cc/9H4W-LN7B].

88. *See* Hong Kong Autonomy Act, Pub. L. No. 116-149, § 4, 134 Stat. 663, 667–68 (2020) (to be codified at 22 U.S.C. § 5701).

89. *Id.* § 5(a), at 669.

uals identified in Section 5(a) of the report.[90] These reports are to be updated continually and shall be resubmitted with the annual report to the Congress under the USHKPA.[91]

Once the Secretary of the Treasury has identified foreign individuals or financial institutions in their submitted reports, and after one year from the date of the reports, the HKAA requires the President to adopt sanctions targeting those identified. For foreign persons, except where the HKAA provides otherwise, the President shall employ financial sanctions that treat the targeted individuals as a blocked person (namely, precluding transactions with U.S. persons and freezing his or her property in the United States).[92] In addition, the targeted person may also be excluded from the United States and have their visa revoked.[93] With regard to financial institutions, the HKAA specifies ten sanctions categories[94] and requires the President to impose no fewer than five of the ten listed sanctions. The imposition of the array of sanctions under the HKAA are tantamount to comprehensive exclusion from the U.S. financial market and the U.S. dollar system, and some experts argue that even preliminary identification in the report could have a significant impact on the targeted individuals and institutions.[95] Finally, the HKAA provides the President with the discretion to waive the application of the sanctions or remove foreign individuals and entities from the aforementioned reports subject to certain specified criteria listed in Section 8 of the HKAA.[96]

The HKAA not only impacts the identified foreign individuals and financial institutions but also impacts U.S. citizens and financial institutions engaged in transactions with the targeted foreign individuals and entities. While Trump indicated that certain provisions in the

90. *Id.* § 5(b).

91. *Id.* § 5(e).

92. *Id.* § 6(b)(1), at 671.

93. *Id.* § 6(b)(2).

94. The types of sanctions include: (1) loans from United States financial institutions, (2) prohibition on designation as a primary dealer, (3) prohibition on service as a repository of government funds, (4) foreign exchange, (5) banking transactions, (6) property transactions, (7) restriction on exports, (8) ban on investment in equity or debt, (9) exclusion of corporate officers, and (10) sanctions on principal executive officers. *Id.* § 7(b), at 672–73.

95. *Hong Kong Autonomy Act: U.S. Congress Passes Sanctions Bill in Response to Chinese National Security Law*, Sullivan and Cromwell, 4 (July 7, 2020), https://www.sullcrom.com/files/upload/sc-publication-hong-kong-autonomy-act-sanctions-bill.pdf [https://perma.cc/7Q5B-KLJH]; Duncan A. W. Abate & Tamer A. Soliman, *The Hong Kong Autonomy Act*, Mayer Brown (July 17, 2020), https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2020/07/200717_us_prc_hkg_globaltrade.pdf [https://perma.cc/LH5M-DM5Y].

96. § 8, 134 Stat. at 673–77.

HKAA could limit Presidential power granted under Article II of the U.S. Constitution,[97] he eventually approved this Act in order to express the United States' deep concern about Hong Kong's autonomy and democracy. By signing the HKAA, it is also manifestly apparent that the United States considers China to be its greatest threat and that Hong Kong is just another battlefield for these two powers. Not surprisingly, the HKAA has provoked strong opposition from the PRC, which has condemned the Act as the United States' "gross interference" in its internal affairs.[98] In March 2021, U.S. Secretary of State Antony J. Blinken updated Congress on 24 Chinese officials who have contributed to reducing Hong Kong's level of autonomy and imposed sanctions against these individuals in accordance with the HKAA. These sanctions designated 24 PRC and Hong Kong officials, including 14 vice chairs of the NPCSC and officials from Hong Kong's National Security Division.[99] While the efficacy of the sanctions requires further observation, the timing of the announcement is meaningful—it came on the eve of talks between the United States and China in Alaska, which not only showed the United States' firm commitment to supporting Hong Kong's high degree of autonomy but also expressed a strong message to Beijing that it should respect its obligations under the Sino-British Joint Declaration and stop imposing any kind of coercion in the Indo-Pacific region.

D. Trump's Executive Order on Hong Kong Normalization

On the same day that the HKAA was signed by Trump, the White House issued the Executive Order for Hong Kong Normalization (EO) which officially normalized the status of Hong Kong in the U.S. legal system. Authorized by the USHKPA and the HKHRDA, the Executive Order first reiterated the fact that the promulgation of the National Security Law has fundamentally undermined Hong Kong's autonomy. Notably, the Executive Order identified that "the situation with respect to Hong Kong, including recent actions taken by the PRC to fundamentally undermine Hong Kong's autonomy, constitutes an unusual and extraordinary threat, which has its source in substantial part outside the United States, to the national security, foreign policy, and economy

97. Statement on Signing the Hong Kong Autonomy Act, 2020 Daily Comp. Pres. Doc. 202000514 (July 14, 2020).

98. *Statement by the Ministry of Foreign Affairs*, Ministry of Foreign Affs. of China (July 15, 2020), https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/t1797857.shtml [https://perma.cc/G5RL-NR46].

99. *Hong Kong Autonomy Act Update*, U.S. Dep't of State (Mar. 17, 2021), https://www.state.gov/hong-kong-autonomy-act-update [https://perma.cc/C27A-L6P9].

of the United States."[100] Trump declared a national emergency with respect to that threat. The Executive Order was comprised of the following elements.

First, the Executive Order in Section 1 explicitly announced a United States' policy to suspend or terminate Hong Kong's special and preferential treatments under U.S. laws. Section 2 then identified five statutes to be suspended in accordance with Section 202 of the USHKPA, covering immigration, foreign investment, export control, and the marking of imported articles and containers. The Executive Order further instructed the heads of agencies, within 15 days of the date of the order, to commence relevant actions and measures to address issues such as preferences for Hong Kong passports, the license exception under the Export Administration Regulations, export of defense articles, bilateral agreements between the United States and Hong Kong on surrender of fugitive offenders, transfer of sentenced persons, training of members of Hong Kong police, taxation, and reallocating the ceiling for the admission of refugees from Hong Kong.[101] Notably, even academic exchanges under the Fulbright program were terminated. The normalization of Hong Kong's treatment under U.S. law to be seen as part of China, an enemy or a rival to the United States, is comprehensive.

Second, the Executive Order instructed the Secretary of State, in consultation with the Secretary of the Treasury, or vice versa, to designate a list of foreign persons who are denied entry into the United States and whose property and interests in the United States or within the possession or control of any U.S. person are to be blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt with. Such persons include those who are involved in the adoption and implementation of the National Security Law and those responsible for actions or policies undermining Hong Kong democracy, autonomy, human rights, or freedom of expression or assembly.[102] Importantly, the list extends to those who "have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of"[103] or are "a member of the board of directors or a senior executive officer"[104] of any person whose property and interests in property are blocked. Given that Hong Kong is one of the main financial

100. Executive Order on Hong Kong Normalization, 85 Fed. Reg. 43,413, 43,413–14 (July 14, 2020).

101. *Id.* § 3, at 43,414–15.

102. *Id.* §§ 4(a)(i)–(ii), at 43, 415.

103. *Id.* § 4(a)(iv).

104. *Id.* § 4(a)(vi), at 43, 416.

centers in East Asia, the sanctions on financial institutions and its board members may be particularly powerful.[105]

In practical terms, the Trump administration's decision to revoke Hong Kong's separate customs territory status covers four key areas under U.S. domestic law: rules of origin, tariffs, export control, and currency.

1. Rules of Origin

The Executive Order, referring to Section 201(a) of the USHKPA, explicitly suspends the application of Section 1304 of Title 19 of the United States Code, governing the marking of imported articles and containers.[106] In accordance with this Executive Order, U.S. Customs and Border Protection issued a notice requiring products originating in Hong Kong be marked as originating in China.[107] Prior to the Executive Order, products originating in Hong Kong were marked with Hong Kong as the country of origin even after the handover. With the suspension of the application of Section 1304, those products are now obliged to be marked with "Made in China," which eventually could undermine the value and attractiveness of Hong Kong products.

2. Tariffs

As a result of the Executive Order, goods originating both from Hong Kong and China are subject to most-favored-nation tariffs rates since neither Hong Kong nor China maintain a free trade agreement with the United States or benefit from any other preferential scheme under U.S. law. Therefore, the immediate effect of the revocation of Hong Kong's separate customs territory status due to tariffs is limited, since tariff rates for goods originating from Hong Kong and China are the same. Nonetheless, it might be a different case when it concerns anti-dumping duties, countervailing duties, and safeguard duties against China, which are limited to Chinese products and do not currently extend to products originating in Hong Kong. Chinese corporations often circumvent U.S. trade remedy measures through transshipment through Hong Kong. Namely, Chinese enterprises may transport their products to Hong Kong and package them with Hong

105. On August 7, 2020, the Department of Treasury imposed sanctions against 11 individuals, including the Hong Kong's Chief Executive Carrie Lam. *See Treasury Sanctions Individuals for Undermining Hong Kong's Autonomy*, U.S. Dep't of Treasury (Aug. 7, 2020), https://home.treasury.gov/news/press-releases/sm1088 [https://perma.cc/DJ9X-N2ZP].

106. Executive Order on Hong Kong Normalization, 85 Fed. Reg. § 2, at 43, 551.

107. Country of Origin Marking of Products of Hong Kong, 85 Fed. Reg. 48, 551 (Aug. 11, 2020).

Kong rule-of-origin certificates and thus avoid punitive duties. While the U.S. Customs and Border Protection has clarified that the decision to label products originating from Hong Kong as "Made in China" does not affect the imposition of contingent duties,[108] it is reasonable to expect that the revocation of Hong Kong's special customs territory status will eventually lead to the imposition of equal trade remedy measures on Hong Kong products.

3. Export Control

The USHKPA instructed that the U.S. government will continue to support Hong Kong's access to sensitive technologies controlled under the Coordinating Committee for Multilateral Export Controls (now called the Wassenaar Arrangement) insofar as the technologies are protected against improper use or export.[109] Under the current U.S. export control regime, Hong Kong enjoys favorable treatment from U.S. export licenses and regulations owing to its cooperating status with multilateral export control systems.[110] As it stands, under the Commerce Control List, Hong Kong is listed under Group B (less restricted), whereas China is listed under Group D (country of concern). In practice, licensing requirements apply both for Group B and Group D countries regarding products of national security concerns, but exports related to military, proliferation or biological uses or end-users, and missile technology items are prohibited only for Group D countries. Furthermore, Group B countries enjoy more favorable considerations than Group D countries when export licensing is applied. In 2018, of the $120.3 billion U.S. exports to China, three percent were subject to the Bureau of Industry and Security licensing requirement;[111] in contrast, among the $37.4 billion U.S. exports to Hong Kong in 2018, only 1.2 percent were subject to the licensing requirement.[112] In 2018, the Bureau of Industry and Security reviewed a total of 33,844 export/

108. Brett Fortnam, *CBP: 'Made in China' Rule Does Not Subject Hong Kong Goods to 301 Tariffs*, Inside U.S. Trade (Aug. 13, 2020, 5:19 PM), https://insidetrade.com/daily-news/cbp-%E2%80%98made-china%E2%80%99-rule-does-not-subject-hong-kong-goods-301-tariffs [https://perma.cc/3HS6-WB89].

109. USHKPA § 103(8).

110. U.S. Dep't of Com. Off. of Inspector Gen. et al., Report No. D-2007-050 Interagency Review of U.S. Export Controls for China: Vol I, at 3–4 (2007), https://media.defense.gov/2007/Jan/31/2001712101/-1/-1/1/07-050.pdf.

111. Bureau of Industry and Sec., U.S. Dep't of Com., 2018 Statistical Analysis of US Trade with China 5 (2018), https://www.bis.doc.gov/index.php/country-papers/2441-2018-statistical-analysis-of-us-trade-with-china-pdf/file.

112. Bureau of Industry and Sec., U.S. Dep't of Com., 2018 Statistical Analysis of U.S. Trade with Hong Kong 3 (2018), https://www.bis.doc.gov/index.php/country-papers/2480-2018-statistical-analysis-of-us-trade-with-hong-kong-pdf/file.

re-export applications worldwide valued at $81.3 billion with China accounting for 3,563 applications valued at $3.5 billion and Hong Kong accounting for 227 applications valued at $286.0 million.[113] The special treatment offered to Hong Kong opens a loophole for China to exploit the U.S. export control measures as strategic and sensitive items shipped to Hong Kong can be easily transshipped to China. Suspending preferential treatment to Hong Kong and placing it in the same group as China closes the regulatory gap.

4. Currency

The USHKPA also sets out the United States' support for free exchange between the U.S. dollar and Hong Kong dollar.[114] Currently, Hong Kong maintains a linked exchanged rate system which has been put into force since 1983 and ensures that the Hong Kong dollar exchange rates flows stably within a range between 7.75–7.85 Hong Kong dollars to one U.S. dollar. According to the Hong Kong Monetary Authority "[t]he stability of the Hong Kong dollar exchange rate is maintained through an automatic interest rate adjustment mechanism and the firm commitment by the Hong Kong Monetary Authority to honor the CUs [convertibility undertakings]."[115] In practice, in order to ensure the stability of Hong Kong's dollar, the monetary base is fully backed by foreign reserves, and all changes in the monetary based are reflected in the corresponding changes of foreign reserves at a fixed exchange rate. On top of this, the Hong Kong Monetary Authority provides convertibility undertakings, "under which the [Hong Kong Monetary Authority] commits to sell Hong Kong dollars upon request by banks at the strong-side CU of HK $7.75 per US dollar, and to buy Hong Kong dollars upon request by banks at the weak-side CU of HK $7.85 per US dollar."[116] In other words, backed with foreign reserves, the Hong Kong Monetary Authority sells Hong Kong dollars to banks for U.S. dollars in case of inflows into Hong Kong dollars, and vice versa, to safeguard the linked exchanged rate system and ensure the stability of the Hong Kong dollar.

Given Hong Kong's status as a major Asian financial center, the stability of the Hong Kong dollar and its free convertibility with the U.S. dollar are critical for Hong Kong's economic vitality and sustainability.

113. *Id.* at 8; Bureau of Industry and Sec., U.S. Dep't of Com., *supra* note 111 at 11.

114. USHKPA § 103(6).

115. *How does LERS Work?*, H. Ko Monetary Auth., https://www.hkma.gov.hk/eng/key-functions/money/linked-exchange-rate-system/how-does-the-lers-work (last updated August 10, 2020) [https://perma.cc/3X9P-GAS2].

116. *Id.*

Legally, unless the United States imposes sanctions against Hong Kong, just as it has against Iran,[117] and thus, blocks Hong Kong's access to the U.S. financial system and the transfer of U.S. dollars to Hong Kong banks, the free exchange between these two currencies will remain intact even if the Trump administration revokes the separate customs territory status of Hong Kong. Nonetheless, at the policy level, the revocation of the separate customs territory status may undermine confidence in the Hong Kong dollar. This would result in the outflow of capital, leading to significant depreciation of the Hong Kong dollar and thus breaking the linked exchanged rate system.[118]

E. From USHKPA to HKHRDA and HKAA, and the Executive Order: Strong Signals Delivered by the United States?

The enactment of the HKHRDA can be described as a significant triumph for the pro-democracy camp in Hong Kong and, not surprisingly, it faces strong opposition from both the Hong Kong and PRC central governments.[119] Similarly, the implementation of the HKAA is another strong signal by the United States of its irritation with the PRC's failure to meet its obligations under the Sino-British Joint Declaration and the HKBL. However, commentators contend that these two Acts actually change nothing about the current conflicts and dilemmas in Hong Kong, nor do they contribute to democracy and human rights.[120] Some

117. Transfers of Funds Involving Iran, 31 C.F.R. § 560.201 (2020); *see also* Kenneth Katzman, Cong. Research Serv., RS20871 Iran Sanctions 28–32 (2020), *https://fas.org/sgp/crs/mideast/RS20871.pdf*.

118. On the role of Hong Kong's currency peg in its economy growth and competitiveness, *see* Edmund R. Thompson, *The Future of Hong Kong's Currency Peg: The Basis of Business Confidence or Cause of Competitive Concern? Evidence from Manufacturing Firms*, 7 Am. J. of Chinese Stud. 37 (2000); Y. Y. Kueh & Raymond C. W. Ng, *The Interplay of the "China Factor" and US Dollar Peg in the Hong Kong Economy*, 170 China Q. 387 (2002).

119. Press Release, The Government of the Hong Kong Special Administrative Region, *HKSARG Strongly Objects to Acts on Hong Kong Becoming US Law* (Nov. 28, 2019, 10:21 AM), https://www.info.gov.hk/gia/general/201911/28/P2019112800260.htm; [https://perma.cc/3ZZT-Q8HV]; *Foreign Ministry Spokesperson Geng Shuang's Remarks on US Senate Passing Hong Kong Human Rights and Democracy Act*, Ministry of Foreign Affairs of People's Republic of China (Nov. 20, 2019), https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1716773.shtml [https://perma.cc/CPM8-3LV7].

120. Brian P. Klein, *Truth is, the Hong Kong Human Rights and Democracy Act Changes Nothing for Protesters and Their Hopes*, S. China Morning Post (Dec. 8, 2019, 10:00 PM), https://www.scmp.com/comment/opinion/article/3040840/truth-hong-kong-human-rights-and-democracy-act-changes-nothing [https://perma.cc/Y29P-RDVA]; Chi Wang, *US Sanctions and Hong Kong Autonomy Act are Empty Gestures that Show a Failure to Understand*, S. China Morning Post (July 4, 2020, 2:00 AM), https://www.scmp.com/comment/opinion/article/3091713/us-sanctions-and-hong-kong-autonomy-act-are-empty-gestures-show [https://perma.cc/UD2E-JT2L].

even devalue the effectiveness of the targeted sanctions and claim that "this type of sanctions legislation has a long history of failing to promote democratic political change."[121]

Notwithstanding these pessimistic views of the HKHRDA and the HKAA, this Article argues that the new laws are more forceful than the USHKPA from both political and legal perspectives. From the perspective of international politics, both new laws delivered strong, united messages to China from a profoundly divided U.S. Congress, during a time when Presidential impeachment proceedings were also ongoing. Regarding the legal aspects, the HKHRDA and the HKAA not only reiterate the U.S. President's authority but also connect the conditions of Hong Kong's human rights, democracy, and degree of autonomy with the decision over whether or not it will retain its special trade and economic status under the U.S. legal system. The Executive Order further revokes the special treatment Hong Kong receives and imposes sanctions on the PRC and Hong Kong's government officials considered responsible for derogating Hong Kong's autonomous status. These mechanisms pose stronger deterrents to the Hong Kong and the PRC central government in view of the negative economic consequences that would result if democracy and civil society were constrained. Such a scenario is not new—as the following Part will elucidate, the promotion of human rights and democracy has long been incorporated as a policy objective for the United States when negotiating on trade and economic affairs with its counterparties.[122] While the legitimacy of sanctions can be upheld under the U.S. domestic legal system, the legality of unilateral actions is worthy of examination and will be addressed in the following Part.

III. The Legality of U.S. Sanctions Against Hong Kong Human Rights Abusers

The United States has long adopted sanctions against countries to combat human rights abuses. Nevertheless, unilateral sanctions have been criticized as a means of extending American hegemony.[123] Even

121. Wang, *supra* note 120; Klein, *supra* note 120.

122. *See generally* Adam Smith, *A High Price to Pay: The Costs of the U.S. Economic Sanctions Policy and the Need for Process Oriented Reform*, 4 UCLA J. Int'l L. & Foreign Affs. 325, 329–31 (1999).

123. *See* Christopher Wall, *Human Rights and Economic Sanctions: The New Imperialism*, 22 Fordham Int'l L.J. 577, 601 (1998). The state-owned media in China also makes accusations that the unilateral sanctions imposed by the United States are the cause of chaos and disturbances around the world. *See The Record of Human Rights Violations in the United States in 2019*, China Daily (Mar. 14, 2020, 6:46 AM), https://www.chinadaily.com.

if the purpose of the sanctions is to pressure the targeted state to fulfill its obligations under international human rights law, traditionally, the imposition could not be justified according to the principle of non-interference under international law because human rights violations were happening within a sovereign state and were thus considered the internal affairs of that state.[124]

Nevertheless, contemporary international law seems to recognize the legitimacy of imposing sanctions in response to human rights violations even if such infringements happen within a country's jurisdiction. This transition has occurred because of the need to address the deficient enforcement mechanisms of human rights conventions.[125] While there have been considerable developments in the legal regime of international human rights protection, the enforcement mechanisms for addressing human rights violations are still underdeveloped.[126] Considering the fact that gross infringements of fundamental human rights are of significant concern to the international community, it is necessary to find alternative means to ensure that state signatories to human rights conventions fully follow their obligations and that the substance of those conventions is respected. From a policy perspective, the interpretation of human rights treaties should leave room for authorizing contracting parties to take reasonable and proportionate unilateral action to ensure other parties' compliance. Human rights sanctions can supplement the deficiencies of current enforcement mechanisms for addressing human rights violations in the international community and thereby maintain the authority of international human rights rulings. In turn, the gap between the law in books and the law in action in the regime of international human rights protection can be diminished.[127] As a result, in practice, sanctions are widely used and are among the most frequently adopted remedies targeting human rights violations.[128]

This Part will first examine sanctions against human rights violators that are collectively imposed by international organizations or unilaterally enacted by a state. Then, it will analyze the sanctions

cn/a/202003/14/WS5e6c0d5ea31012821727f0c5.html [https://perma.cc/LQE7-T85B].

124. *See* Mergen Doraev, *The"Memory Effect" of Economic Sanctions against Russia: Opposing Approaches to the Legality of Unilateral Sanctions Clash Again*, 37 U. PA. J. Int'l L. 355, 374 (2015).

125. *See* Peter G. Danchin, *US. Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative*, 41 Colum. J. Transnat'l L. 33, 84 (2002).

126. *See also* Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 Mich. J. Int'l L. 437, 461 (2006).

127. *See* Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 Yale J. Int'l L. 1, 3–5 (2001).

128. Danchin, *supra* note 125, at 73.

specified by the USHKPA, the HKHRDA, the HKAA, and the Executive Order with special focus on their legitimacy and legality under customary international law and under WTO law.

A. Unilateral and Multilateral Economic Sanctions

Economic sanctions can be defined as "coercive foreign policy action[s] . . . [that] intentionally suspend customary economic relations such as trade and/or financial exchanges in order to prompt the targeted state to change its policy or behavior."[129] The United Nations General Assembly passed a resolution entitled the Charter of Economic Rights and Duties of States, which emphasized the principle of non-intervention by economic coercion.[130] However, the gradual emergence of economic sanctions against human rights violators have opened the possibility that such humanitarian interference could be an exception to the principle of non-intervention. The concept of absolute state sovereignty should yield to the universal values of international human rights, and territorial integrity should allow for international intervention for humanitarian purposes.[131]

International organizations can impose economic sanctions by calling upon member states to act collectively or individually. The UN is a prime example of an organization calling upon its members to impose economic sanctions against countries that violate their international obligations, including human rights violations. According to Article 41 of the UN Charter, the UN Security Council may call upon member states to apply measures that "include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations"[132] if it "determine[s] the existence of any threat to the peace, breach of the peace, or act of aggression" under Article 39 of UN Charter.[133] To date, the UN Security Council has imposed numerous economic sanctions in response to human rights violations induced

129. *See* Sarah P. Schuette, *U.S. Economic Sanctions regarding the Proliferation of Nuclear Weapons: A Call for Reform of the Arms Export Control Act Sanctions*, 35 Cornell Int'l L.J. 231, 234 (2002).

130. Charter of Economic Rights and Duties of States, G.A. Res. 3281(XXIX), UN GAOR, 29th Sess., Supp. No. 31, 50 (1974).

131. *See generally* Allan Rosas, *State Sovereignty and Human Rights: towards a Global Constitutional Project*, 43 Pol. Stud. 61 (1995); *see also* Jack Donnelly, *State Sovereignty and International Human Rights*, 28 Ethics & Int'l Affs. 225 (2014).

132. U.N. Charter art. 41.

133. *Id.*, art. 39.

by states such as Southern Rhodesia,[134] Sierra Leone,[135] and Rwanda.[136] Some experts contend that the UN Security Council plays a limited role in exercising its authority to impose sanctions against countries that violate their human rights obligations because of political wrestling among great powers and manipulation of the veto power.[137] However, the UN Security Council has still provided a platform for member states to discuss their concerns about possible human rights violations in certain countries or regions and has successfully drawn the international community's attention to an exploration of better approaches to ensuring that human rights law are implemented.

Unlike multilateral sanctions authorized by the UN, there have been a growing number of unilateral sanctions imposed, especially by the United States, against individual states for human rights violations. Since 1950, the United States has imposed sanctions against numerous states and enacted several pieces of legislation, providing the legal bases for these sanctions, which include the Foreign Assistance Act of 1961,[138] Section 502 of the Trade Act of 1974,[139] Section 701 of the International Financial Institutions Act of 1977,[140] and the recently adopted Global Magnitsky Human Rights Accountability Act.[141] Though these laws involve different subject matters, ranging across trade, diplomacy, and foreign assistance, the United States has developed a comprehensive sanctions mechanism to pursue its policy of promoting human rights.

Multiple U.S. objectives are served by the threat or application of such sanctions. First, sanctions are a tool to induce countries to change

134. S.C. Res. 216 (Nov. 12, 1965); S.C. Res. 217 (Nov. 20, 1965); S.C. Res. 232 (Dec. 16, 1966); S.C. Res. 253 (May. 29, 1968); S.C. Res. 277 (Mar. 18, 1970); S.C. Res. 314 (Feb. 28, 1972); S.C. Res. 318 (July 28, 1972); S.C. Res. 320 (Sept. 29, 1972); S.C. Res. 326 (Feb. 2, 1973); S.C. Res. 328 (Mar. 10, 1973); S.C. Res. 333 (May. 22, 1973).

135. S.C. Res. 1171 (June 5, 1998); S.C. Res. 1306 (July 5, 2000); S.C. Res. 1446 (Dec. 4, 2002).

136. S.C. Res. 918 (May 17, 1994).

137. *See* Richard B. Lillich, *The Role of the UN Security Council in Protecting Human Rights in Crisis Situations: UN Humanitarian Intervention in the Post–Cold War World*, 3 Tul. J. Int'l & Comp. L. 1, 4–5 (1994); *see also* Buhm Suk Baek, *Economic Sanctions Against Human Rights Violations*, *in* Cornell Law School Inter-University Graduate Student Conference Papers Paper 11 at 42–43 (2008), https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1039&context=lps_clacp [https://perma.cc/MK6D-GGQF].

138. Foreign Assistance Act of 1961, Pub. L. No. 87-195 (codified in scattered sections of 22 U.S.C.).

139. Trade Act of 1974, Pub. L. 114, 125 (codified at 19 U.S.C. § 2462 (West 2020)).

140. International Financial Institutions Act, Pub. L. 95, 118 (codified at 22 U.S.C. § 262d (West 2020)).

141. Global Magnitsky Human Rights Accountability Act, Pub. L. 112, 208 (codified at 22 U.S.C § 2656 (West 2020)).

their national policies.[142] For instance, in order to halt the Taiwanese nuclear weapon program, the United States imposed export restrictions on nuclear-related fuel and materials to Taiwan throughout the 1970s.[143] Second, the United States makes use of sanctions to express dissatisfaction with the targeted states' poor human rights condition, especially in cases of autocratic governments that suppress democratic movements and engage in gross human rights violations.[144] For example, in the 1980s, the communist government of Poland enacted martial law to arrest the leaders of civil movements. In response, the United States, together with other Western allies, imposed economic sanctions against Poland to pressure the communist government to release those arrested, lift martial law, and eventually recognize the Polish people's rights to association and free speech.[145] In practice, the United States might list a set of criteria and stipulate that only when the targeted states fulfill such elements will the sanctions be lifted. For example, the United States imposed economic sanctions against Myanmar together with conditions for lifting those sanctions, such as the release of political prisoners, allowing freedom of speech, the press and association, and implementing democratic elections.[146]

B. Various Types of Sanctions Under HKHRDA, HKAA, and the Executive Order

The scope and content of sanctions against human rights violators vary, and their legality depends on the relevant international legal regimes. In general, sanctions targeting human rights violators can be categorized as nontrade-related sanctions or trade-related sanctions. The former includes the suspension of financial aid or asset freezes and travel bans on individuals accused of responsibility for human rights violations. The latter comprises of measures such as import

142. Dianne E. Rennack & Robert D. Shuey, Cong. Research Serv., 97-949 Economic Sanctions to Achieve US Foreign Policy Goals: Discussion and Guide to Current Law, at 4 (1999), https://crsreports.congress.gov/product/pdf/RL/97-949 [https://perma.cc/MK6D-GGQF].

143. *See* Nicholas L. Miller, *The Secret Success of Nonproliferation Sanctions*, 68 Int'l Org. 913, 931–33 (2014); Christopher W. Hughes, *North Korea's Nuclear Weapons: Implications for the Nuclear Ambitions of Japan, South Korea, and Taiwan*, 3 Asia Pol'y 75, 98–101 (2007).

144. *See* Kern Alexander, Economic Sanctions: Law and Public Policy 89–90 (2009).

145. Lee Lescaze, *Reagan Takes Economic Action Against Poland*, Wash. Post (Dec. 24, 1981), *https://www.washingtonpost.com/archive/politics/1981/12/24/reagan-takes-economic-action-against-poland/77d14879-cc44-4682-bc3f-5717c70bc845* [https://perma.cc/F989-BS7B].

146. Burmese Freedom and Democracy Act of 2003 § 9, Pub. L. No. 108-61, 117 Stat. 864 (2003) (codified at 50 U.S.C 1701 (West 2020)).

or export restrictions, punitive tariffs, and any form of action which would adversely affect the rights and interests of the sanctioned countries under the WTO. The legitimacy of the sanctions authorized by the HKHRDA, HKAA, and the Executive Order will be examined below.

1. Nontrade-Related Sanctions: The Interplay Between the Principle of Non-intervention and Sanctions as a Human Rights Intervention

According to the principle of non-intervention as stipulated in Article 2(4) of the UN Charter, states bear the duty not to intervene in matters within the domestic jurisdiction of other states.[147] However, some human rights have been recognized as universal values by the international community, so any gross violation of human rights—especially *jus cogens* norms and obligations *erga omnes*[148]—might raise great concerns among other countries in the region, and even among the whole international community.[149] Therefore, there seems to be room for other countries to intervene to deter such human rights abuses.

In fact, unilateral action should be permissible to some extent. This permission would promote the protection of human rights and allow countries to cope with gross human rights violations, even if these occur wholly within a sovereign state's territory, if such violations would threaten the peace and stability of neighboring states, the region, or the greater international community.[150] The issue then becomes: under what circumstance and to what extent can a state impose sanctions to address another state's violations of human rights obligations? For sanctions against those gross human rights violations, including genocide, slavery, racial discrimination, and torture, which are considered *jus cogens* norms, the legitimacy of sanctions against these human rights abuses is not disputed.[151] As for other human rights violations, such as the suppression of freedom of speech, the right to association, and other civil and political rights which are recognized by the ICCPR,

147. U.N. Charter art. 2, ¶ 4.

148. "*Jus Cogens*" is a Latin phrase which refers to a set of superior principles of international law (e.g., war crimes, crimes against humanity, genocide, and human trafficking) which cannot be derogated from and all states shall be bound. "*Erga Omnes*" is a legal term describing an obligation that its breach is owed to a group of states including that state or to the international community as a whole; therefore, any state other than the injured state is entitled to invoke the responsibility of the state.

149. *See* John Tasioulas, *Custom,* Jus Cogens*, and Human Rights*, *in* Custom's Future: International Law in a Changing World 95, 107–115 (Curtis A. Bradley ed., 2016).

150. *See* Sarah H. Cleveland, *Human Rights Sanctions and International Trade: A Theory of Compatibility*, 5 J. Int'l Econ. L. 133, 160 (2002).

151. *See* Donnelly (2014), *supra* note 131, at 231.

we believe that the legality of imposing sanctions against individuals, entities, or governments violating such human rights should also be upheld under international law. As the International Court of Justice reasoned in the *Barcelona Traction* case, the promotion and protection of human rights is of interest to all sovereign states.[152] Since the fundamental rights accorded in the ICCPR are internationally protected norms and have been well recognized as customary international law—and even bear *erga omnes* character[153] or at least the "obligation to the international community as a whole"[154]—the doctrine of non-intervention should therefore be read in a manner that allows space for such sanctions against human rights abuses which aim to strengthen norms around international human rights.[155]

Moreover, the legality and effectiveness of the kind of sanctions may depend upon their content and design. While sanctions are imposed to strengthen certain human rights conditions in targeted states, if those sanctions are not tailor-made but are instead comprehensively applied to the whole sanctioned state, they might conversely undermine the economic conditions and social welfare of the local inhabitants, which could accordingly constitute another kind of human rights violation.[156] What's worse, the sanctions might not be a sufficient deterrent to autocrats who are liable for the human rights crisis if the scope and content of the sanctions do not precisely target human rights abusers. As a result, states developing "tailor-made" sanctions should seek to diminish any negative impact on innocent civilians in sanctioned states.

As mentioned earlier, the HKHRDA authorizes the U.S. President to identify persons engaging in the extrajudicial delivery, arbitrary detention, or torture of any person in Hong Kong, and more broadly, impeding internationally recognized human rights. The sanctions that

152. Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. 3, ¶ 32 (Feb. 5).

153. *See* Peter G. Danchin, *U.S. Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative*, 41 Colum J. Transnat'l L. 33, 83 (2002); *see also* Chuang (2006), *supra* note 126, at 460.

154. *See* Annie Bird, *Third State Responsibility for Human Rights Violations*, 21(4), Euro. J. Int'l L. 883, 890–94 (2010); s*ee also* Int'l Law Comm'n Rep. on the Work of Its Fifty-Third Session, U.N Doc. A/56/10 at 26 (2001) (containing the draft articles on Responsibility of States for Internationally Wrongful Acts, Art. 48.1: "1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole . . . .").

155. *See* Amy Howlett, *Getting "Smart": Crafting Economic Sanctions That Respect All Human Rights*, 73 Fordham L. Rev. 1199, 1227 (2004).

156. *Id.* at 1228.

the President can adopt include blocking and prohibiting all transactions in property of a foreign person, denying the issuance of a visa for that person to enter the United States, and other measures provided under the International Emergency Economic Powers Act to carry out sanctions.[157] Likewise, the HKAA condemns how the PRC derogates from its commitments to maintain Hong Kong's autonomous status and oppresses the freedom of speech and assembly previously enjoyed by the people of Hong Kong; hence, the financial sanctions and visa restrictions would be imposed on foreign individuals who are materially contributing to China's coercion and undermining of Hong Kong's autonomy. Furthermore, the Executive Order also imposes sanctions against individuals and entities undermining democracy and human rights in Hong Kong.

While those sanctions will inevitably be accused of unduly intervening in China's internal affairs—especially when the targeted individuals are government officials or any institutions and their affiliates empowered by the authorities, we argue that the sanctions

157. The International Emergency Economic Powers Act authorizes the President in times of a declared emergency to:

> (A) investigate, regulate, or prohibit (i) any transactions in foreign exchange, (ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof, (iii) the importing or exporting of currency or securities, by any person, or with respect to any property, subject to the jurisdiction of the United States; (B) investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States; and (C) when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States; and all right, title, and interest in any property so confiscated shall vest, when, as, and upon the terms directed by the President, in such agency or person as the President may designate from time to time, and upon such terms and conditions as the President may prescribe, such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes.
>
> International Emergency Economic Powers Act, 50 U.S.C. § 1702(a)(1) (West 2020).

contained in the HKHRDA, the HKAA, and the Executive Order are not inconsistent with the principle of non-intervention because:

> (1) There has been great concern pertaining to the Hong Kong police's brutal suppression of protestors participating in civil movements.[158] Most importantly, Hong Kong's autonomous status has gradually been squeezed by the PRC government in contravention of commitments made in the Sino-British Joint Declaration with respect to realizing direct democratic elections in Hong Kong.[159] Commentators might argue that the Joint Declaration itself does not *accord* rights to third States, and as such the United States cannot justify sanctions by arguing that China fails to comply with its treaty obligations under the Joint Declaration.[160] However, in our view, the duty of respecting the Hong Kong people's civil and political rights under the ICCPR, which is reaffirmed and afforded additional support by the Joint Declaration and even the HKBL,[161] should be an *erga omnes* obligation or at least obligation owed to the international community as a whole. As a result, the abovementioned developments have created legitimate grounds for the United States and other countries to implement measures like sanctions with a view to protecting the civil and political rights of the people of Hong Kong.
>
> (2) Sanctions under the HKHRDA, the HKAA, and the Executive Order primarily target individuals or entities who engage in human rights abuses or undermine democracy. Such sanctions, which include the freezing of assets, limiting of financial transactions, and visa restrictions, will not negatively impact the people of Hong Kong. As a result, concerns over unilateral sanctions pertaining to human rights can be significantly mitigated and the legitimacy of the sanctions enhanced. In other words, the sanctions outlined in the HKHRDA, the HKAA, and the Executive Order should be considered as the least destructive means to contribute to the objective of protecting the fundamental freedoms of the people of Hong Kong.
>
> (3) The legality of the sanctions under the HKHRDA, the HKAA, and the Executive Order can also be maintained as the current situation in

158. *Hong Kong: Rights Under Attack on Anniversary*, Human Rights Watch (June 9, 2020, 8:00 AM), https://www.hrw.org/news/2020/06/09/hong-kong-rights-under-attack-anniversary [https://perma.cc/3G59-DMGC].

159. *See* Kenneth Roth, *China is Desperate to Stop Hong Kong's Pro-Democracy Movement*, Human Rights Watch (Aug. 19, 2020, 10:30 AM), https://www.hrw.org/news/2020/08/19/china-desperate-stop-hong-kongs-pro-democracy-movement [https://perma.cc/KQK9-C27Y].

160. *See* Lorenz Langer, *Out of Joint?—Hong Kong's International Status from the Sino-British Joint Declaration to the Present*, 46 Archiv des Völkerrechts, 309, 341 (2008).

161. *See* Chan (1996), *supra* note 20, at 938; *see also* Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, U.K.-China, annex 1, art 14, Dec 19, 1984, 1399 U.N.T.S. 23391.

> Hong Kong is no longer simply one of concern for the human rights of Hong Kong's citizens. The promulgation of the National Security Law has triggered even greater concern from the international community. For instance, the Office of the High Commissioner for Human Rights of United Nations warns that the "vague and overly broad" content of the law will be used to criminalize human rights activists for the exercise of their fundamental rights, which are protected by the ICCPR.[162] After the proclamation of the National Security Law, conflicts in Hong Kong have escalated and caused significant anxiety in the international community because even people who do not live in Hong Kong may be held liable for any offenses under the National Security Law committed outside Hong Kong. In our view, the existence of such long-arm jurisdiction poses a risk for nonresidents of Hong Kong, even U.S. citizens, who could find themselves subject to China's opaque and flawed criminal court system according to Article 55 of the National Security Law.[163] Therefore, it is fair to argue that U.S. sanctions outlined in the HKHRDA, the HKAA, and the Executive Order are legitimate countermeasures under international law for China's unlimited exercise of jurisdiction in the National Security Law.

2. Trade-Related Sanctions: A Struggle Between the Values of Human Rights Protection and Trade Liberalization

While the legality of relevant human rights sanctions can be established under customary international law, the legitimacy of those sanctions under WTO law should further be examined. In practice, human rights–related sanctions are usually imposed in the form of trade-restrictive measures by one WTO Member on another, such as enacting import or export restrictions on specific products to and

162. *UN Rights Office Expresses Alarm at Hong Kong Arrests under New Security Law*, UN News (July 3, 2020), https://news.un.org/en/story/2020/07/1067682 [https://perma.cc/7VQ9-PPQF].

163. Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Weihu Guojia Anquan Fa (中华人民共和国香港特别行政区维护国家安全法) [The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region] (promulgated by the Standing Comm. Nat'l People's Cong., effective June 30, 2020), art. 55 (China), https://china.usc.edu/national-people%E2%80%99s-congress-national-security-law-hong-kong-sar-june-30-2020 [https://perma.cc/YR9Y-TEPA] ("The Office for Safeguarding National Security of the Central People's Government in the Hong Kong Special Administrative Region shall, upon approval by the Central People's Government of a request made by the Government of the Hong Kong Special Administrative Region or by the Office itself, exercise jurisdiction over a case concerning offence endangering national security under this Law, if: (1) the case is complex due to the involvement of a foreign country or external elements, thus making it difficult for the Region to exercise jurisdiction over the case; (2) a serious situation occurs where the Government of the Region is unable to effectively enforce this Law; or (3) a major and imminent threat to national security has occurred.").

from countries or implementing discriminatory treatment on Members believed to be responsible for human rights violations.

For instance, in 2007, the European Union and the United States strengthened their sanctions against Myanmar authorities by banning the importation of goods from Myanmar.[164] However, the Myanmar government never filed a claim with the WTO because doing so would invite the international dispute settlement body to examine claims of human rights violations.[165] More recently, the United States imposed trade-restrictive measures against Venezuela that targeted the country's financial and gold sectors. Notably, unlike Myanmar, Venezuela initiated a WTO dispute with the United States, contending that the sanctions authorized by U.S. domestic laws violated several provisions under the WTO-covered agreements, including Article I:1 (Most-Favor-Nation Treatment), Article III:4 (National Treatment), Article XI:1 (Quantitative Restrictions) of the GATT 1994, and Article II:1 (Most-Favor-Nation Treatment) of the General Agreement on Trade in Services.[166]

The WTO's Appellate Body has indicated in the *United States–Shrimp/Turtle* case that legitimate public policies—such as public health and environmental protection—pursued by a Member can be justified under GATT Article XX (general exception), provided that the requirements set forth therein are met.[167] In addition, the security exception as set out in Article XXI of the GATT 1994—especially Article XXI(b)(iii) regarding international emergencies—can also have a role to play in examining the compatibility of human rights sanctions under WTO law. Article XXI of the GATT 1994 bestows considerable

164. Council Common Position (EC) No. 2007/750/CFSP of 19 November 2007 amending Common Position 2006/318/CFSP renewing restrictive measures against Burma/Myanmar, art. 2(b), 2007 O.J. (L 308) 1, 2. For a discussion of the legality of the EU's human rights sanctions under WTO, *see generally* Robert L. Howse & Jared M. Genser, *Are EU Trade Sanctions on Burma Compatible with WTO Law?*, 29 Mich. J. Int'l L. 165 (2008).

165. Howse & Genser, *supra* note 164, at 178.

166. Request for Consultations by Venezuela, *United States — Measures Relating to Trade in Goods and Services*, WTO Doc. WT/DS574/1 (Jan. 8, 2019). On March 26, 2021, the United States objected to including this case in the monthly regular meeting of the WTO Dispute Settlement Body and asserted that this panel request was illegitimate because "representatives of the Maduro regime do not speak on behalf of the Venezuelan people." *See Statement from USTR Spokesperson Adam Hodge on U.S. Action to Prevent Maduro Regime's Attempt to Undermine U.S. Sanctions*, Office of the United States Trade Representative (Mar. 26, 2021), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/march/statement-ustr-spokesperson-adam-hodge-us-action-prevent-maduro-regimes-attempt-undermine-us [https://perma.cc/8W2K-LEU4].

167. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *U.S.—Shrimp* Appellate Body Report].

discretion for sanctioning states to design and enact unilateral human rights sanctions. In fact, as mentioned earlier, in the Executive Order on Hong Kong Normalization, Trump found that the situation in Hong Kong constituted an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States and declared a national emergency with respect to that threat.

In the context of U.S. sanctions, from the outset, currency is largely outside the realm of the WTO with limited exceptions, such as Article XV(4) of the GATT 1994. If the United States prohibits the use of U.S. dollars by Hong Kong, such an attempt would be immune to WTO challenge as it falls outside the organization's jurisdiction. By contrast, categorizing Hong Kong in the same group as China and subjecting it to similar stringent export control rules, requiring products originating from Hong Kong to be marked as "Made in China," and subjecting Hong Kong products to the same contingent tariffs as Chinese products could infringe on Hong Kong's rights under the WTO Agreement on Rules of Origin and other relevant agreements, such as the Anti-Dumping Agreement.

In response to the sanctions imposed by the United States, the Hong Kong government has alleged that the United States' Hong Kong–related laws and relevant Executive Order are inconsistent with the rules and regulations of the WTO and has promised to "take up with the World Trade Organization against those sanctions."[168] In a communication on November 3, 2020, Hong Kong refers to the WTO dispute settlement mechanism and alleges that the U.S. acts are inconsistent with a number of WTO provisions, including Articles I:1, IX:1, X:3 of the GATT 1994 and Articles 2(a), 2(b) and 2(c) of the Agreement on Rules of Origin.[169]

However, in our view, the human rights sanctions authorized by the HKHRDA and especially the Executive Order issued by the President, which unilaterally imposes certain trade restrictions, can be justified through the Article XX(a) public morals exception and Article XXI(b)(iii) security exception under the GATT 1994.

168. *Govt to Raise US Sanctions with WTO*, news.gov.hk (Aug. 18, 2020), https://www.news.gov.hk/eng/categories/finance/index.html (choose "2020" from the "Timeline" dropdown; then choose "August"; navigate to "Page 4" and click the article's hyperlink) [https://perma.cc/69GH-GAU2].

169. Request for Consultations by Hong Kong, China, *United States—Origin Marking Requirement*, WTO Doc. WT/DS597/1 (Nov. 3, 2020).

a. GATT Article XX(a): The Public Morals Exception

The analytical framework for general exceptions under Article XX of the GATT 1994 is well established.[170] According to the Appellate Body Report in the *U.S.–Gasoline* case, a "two-tiered analysis" shall be conducted to examine whether a measure can be justified under general exceptions. The first tier is to examine whether the measure at issue falls within one of the sub-sections under Article XX and analyze whether the nexus requirements are met. The second requires that the measure comply with the requirements of the *chapeau*.[171]

First, among the categories prescribed in Article XX, the public morals category provides relatively promising ground for finding an exception that can be invoked to justify the human rights sanctions imposed by the Member. Starting from the definition of public morals, the WTO Panel and Appellate Body have shown great deference to the values pursued by the Member. In *EC—Seals Products*, the concept of public morals refers to the "standards of right and wrong conduct maintained by or on behalf of a community or nation,"[172] and a Member may define public morals in its territory according to its own systems and scales of values.[173]

Turning to the nexus requirement, one must assess whether a measure is necessary, as claimed, to protect public morals. In *China—Publications and Audiovisual Products*, the Appellate Body indicated that the following factors shall be considered: (i) the *contribution* of the measure to the realization of the ends it purports to pursue; (ii) the *importance of the common interests or values* protected by the measure; and (iii) the *restrictive effects* of the measure on international commerce.[174] In *Korea—Beef*, the Appellate Body also maintained that the necessity test involves the weighting and balancing process, and the factors that should be examined when exercising this test include: (i)

170. General Agreement on Tariffs and Trade, art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

171. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 22, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996).

172. Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 296, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005).

173. Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products EC—Seal Products*, ¶ 5.199, WTO Doc. WT/DS400/AB/R; WT/DS401/AB/R (adopted June 16, 2014) (quoting Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.461, WTO Doc. WT/DS285/R (adopted Apr. 20, 2005)).

174. Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 236, WTO Doc. WT/DS363/AB/R (adopted Jan. 19, 2010).

whether the interests or values protected by the measure are vital and important; (ii) whether potential alternatives are "reasonably available" for the respondent, namely to examine whether there are other actions that a Member can reasonably be expected to adopt to achieve the same contribution to the stated objective; and (iii) whether the alternatives are "less WTO inconsistent," namely whether those alternative measures are less trade restrictive than the challenged measure.[175]

In our view, whether sanctions in support of human rights deviate from the Member's obligations under the GATT 1994 should be assessed on a case-by-case basis and in line with the abovementioned factors. While it is evident that the protection of human rights is an important interest and hence satisfies part of the elements of the necessity test, whether the measure implemented contributes to the realization of those ends—like deterring human rights abuses—and whether there are other *less-trade restrictive alternative measures* reasonably available to the Member, still depends on the substance of the individual human rights sanction. It should also be noted that, as the Appellate Body in *EC—Asbestos* has stressed, "the more vital or important [the] common interests or values" pursued by a respondent, the more deference it should enjoy.[176]

We believe that the announced trade-related restrictions imposed by the United States so far are "tailored-sanctions" and can be justified under GATT Article XX(a) after a series of examinations according to the criteria above. First, when applying the foregoing WTO jurisprudence and the analysis, we suggest that there is ample room for incorporating human rights protections in the concept of "public morals" under Article XX(a). Preventing abuse and promoting human rights are widely embodied in Members' domestic laws and their foreign policies. In addition, as human rights abuses are banned by most Members of the WTO, human rights standards constitute "standards of right and wrong conduct maintained by or on behalf of a community or nation" as laid down by the Appellate Body in *EC—Seals Products*.[177] Notably, the importance of human rights protection is also honored by

175. Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶¶ 162–66, WTO Doc.WT/DS161,169/AB/R (adopted Jan. 10, 2001) [hereinafter *Korea—Beef*].

176. Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, 172, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001) (quoting *Korea—Beef*, *supra* note 174, ¶ 162).

177. *See* Howse & Genser (2008), *supra* note 164, at 186.

China's Constitution[178] and the HKBL,[179] which proves that it is not a Western concept exclusively. Accordingly, the concern of human rights violations in Hong Kong should fall within the scope of "public morals" under the Article XX(a) of the GATT 1994.[180]

Second, regarding the nexus requirement, we argue that the measures that have been adopted currently (for example, the change of the rules of origin by the Executive Order and any extensions to the foregoing measures, together with any implementing measures that are related to the treatment of goods of Hong Kong) can likely deter the PRC and Hong Kong from further eroding freedoms and human rights enjoyed by Hong Kong's residents and limit the range of options for the application of state violence. Second, the protection of freedom of speech and assembly for the people of Hong Kong and the protection of the population from the harms caused by crowd-control munitions[181] should be regarded as vital interests or values, which are guaranteed by the ICCPR. Hence, the United States' measures should enjoy greater degree of deference in accordance with the abovementioned jurisprudence. Finally, some might contend that there are other alternative measures which would be less inconsistent with the United States' WTO obligations. For example, the United States could impose more diplomatic pressure or take advantage of other political tools. However, we argue that such measures would not achieve the same level of effectiveness as the measures taken through the United States' recent Hong Kong legislation. Thus, the United States cannot implement alternative

178. Xianfa art. 33 (1982) (China) ("The State respects and preserves human rights.").

179. Xianggang Jiben Fa art. 39 (H.K.) ("The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.").

180. There is plenty of scholarship discussing the linkage between GATT Art. XX(a) and human rights protection. *See, e.g.*, Steve Charnovitz, *The Moral Exception in Trade Policy*, 38(4) Va. J. Int'l L. 689, 742–43 (1998); Misha Boutilier, *From Seal Welfare to Human Rights: Can Unilateral Sanctions in Response to Mass Atrocity Crimes Be Justified Under the Article XX(a) Public Morals Exception Clause?*, 75 Univ. Toronto Fac. L. Rev. 101, 113–121 (2017); *but see* Tatjana Eres, *The Limits of GATT Article XX: A Back Door for Human Rights*, 35 Geo. J. Int'l L. 597, 619–620 (2004).

181. *See* Verna Yu, *Dead Birds and Rashes: Hong Kong Residents Fear Teargas Poisoning*, The Guardian (Dec. 4, 2019), https://www.theguardian.com/world/2019/dec/04/nowhere-is-safe-hong-kong-residents-fearful-of-teargas-poisoning [https://perma.cc/BF6C-Z59T]; Tamara Mathias & Ruhi Soni, *Tear Gas Used for Crowd Control in Hong Kong Poses Health, Environmental Risks*, Reuters (Dec. 2, 2019), https://www.reuters.com/article/us-health-teargas-hongkong/tear-gas-used-for-crowd-control-in-hong-kong-poses-health-environmental-risks-idUSKBN1Y61L5 [https://perma.cc/RG8W-9BYV], for a discussion regarding public health concerns with crowd-control munitions.

measures which are less inconsistent with the WTO's obligations, and it should be fair to conclude that the measures implemented under the HKHRDA, the HKAA, and the Executive Order are necessary to protect public morals under Article XX.

Even if sanctions in support of human rights can be temporarily justified under Article XX(a), we next examine the question of whether the sanctions are consistent with the *chapeau* of Article XX. The purpose of the *chapeau* of Article XX is to ensure that measures provisionally justified by one of the exceptions listed in Article XX are not applied in an arbitrary and unjustifiable manner.[182] The *chapeau* is akin to the weighting and balancing approach, namely to evaluate the legitimacy of the Member's interests behind the measure and to compare it with the competing trade interests of other Members.[183] The effectiveness of the measure in advancing the legitimate interests is also taken into account. In light of the sanctions applied in support of human rights under the HKHRDA and the President's Executive Order, we argue that while those sanctions would constitute discrimination between Hong Kong and other Members, it would be neither unjustified, nor arbitrary, nor cause any hidden restrictions on international trade because there is ample evidence of the Hong Kong police abusing their authority to repress the citizens. Moreover, the enactment of the National Security Law further escalates crackdowns on Hong Kong people's freedom of speech, right to peaceful assembly, and other civil and political rights, and it even extends such a chilling effect through its extraterritorial jurisdiction over other regions such as Taiwan.[184] The above developments have triggered great concern over human rights violations[185] and distinguish the condition of Hong Kong from that of other Members. As a result, the measures adopted by the United States so far—"tailored-sanctions" directly addressing the spread of human rights abuses in Hong Kong—should be seen as meeting the requirements of the

182. *See* Peter Van den Bossche & Werner Zdouc, The Law and Policy of the World Trade Organization: Texts, Cases and Materials 572–73 (3rd ed. 2013).

183. *See U.S.—Shrimp* Appellate Body Report, *supra* note 167, ¶¶ 161–184.

184. *See* Daphne K. Lee, *Hong Kong's National Security Law May Endanger Foreign Nationals*, News Lens (July 1, 2020), https://international.thenewslens.com/feature/hkantielab/137137 [https://perma.cc/Z4NV-R9ZT].

185. *See, e.g.*, U.S. Consulate Gen. H.K., *2019 Country Reports on Human Rights Practices: China (Includes Hong Kong, Macau, and Tibet)—Hong Kong*, U.S. Department of State (Mar. 11, 2020), https://hk.usconsulate.gov/n-2020031101 [https://perma.cc/2QEC-L35D]; *Hong Kong: Arbitrary arrests, brutal beatings and torture in police detention revealed*, Amnesty Int'l (Sept 19, 2019), https://www.amnesty.org/en/latest/news/2019/09/hong-kong-arbitrary-arrests-brutal-beatings-and-torture-in-police-detention-revealed [https://perma.cc/XD8Z-6JZB].

chapeau because there are direct connections between the content of the trade restrictions and human rights violations.

b. GATT Article XXI:(b)(iii): The Security Exception

In addition to the general exception contained in GATT Article XX, its neighboring clause, the "security exception" in GATT Article XXI, provides another potential justification for sustaining the legality of the United States' human rights sanctions under the WTO. Article XXI of the GATT states that Members are empowered to implement trade-restrictive measures against other Members in pursuit of their own national security or to protect international security.[186] Traditionally, the role of the security exception was not highlighted in the practice of Panels and Appellate Bodies. However, this changed after the security exception was invoked by Russia and adjudicated by the Panel for the first time since the establishment of the WTO. In *Russia—Measures Concerning Traffic in Transit*, the panel indicated that it had jurisdiction over the invocation of the national security exception initiated by a Member. In other words, it was not a totally "self-judging" provision as asserted by Russia, and whether the measure was justified by Article XXI could still be examined by the Panel and Appellate Body.[187]

The next question is: what grounds are most relevant under GATT Article XXI to scrutinize the legality of the United States' human rights sanctions? Given that no resolution has been passed by the United Nations to date, the other possible ground that might support the United States' imposition of human rights sanctions under the HKHRDA and the Executive Order is GATT Article XXI:(b)(iii). This clause contains two key elements: the measure at issue adopted by the Member shall aim to protect its "essential security interests" and are "taken in time of emergency in international relations." Hence, the United States can argue that the human rights sanctions contained in the HKHRDA and the Executive Order are measures that the United States considers necessary for the protection of its essential security interests and that they are taken in a time of emergency.

In *Russia—Measures Concerning Traffic in Transit*, the Panel found that "essential security interests," a concept narrower than "security interests," shall be understood to refer to interests "relating to the quintessential functions of the state."[188] The Panel further pointed out

186. *See* GATT, 167 note 170, art. XXI.

187. Panel Report, *Russia—Measures Concerning Traffic in Transit*, ¶¶ 7.102–03, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019) [hereinafter *Russia—Measures Concerning Traffic in Transit* Panel Report].

188. *Id.* ¶ 7.130.

that the specific interests can vary between Members depending on the specific conditions and perceptions of those Members. For these reasons, the Panel held that, in general, the scope of the "essential security interest" is left to be decided by the Members who initiate the security exception.[189] Furthermore, the specific language—"which [the Member] considers," in the chapeau of Article XXI:(b)[190]—suggests that the Member is authorized to adopt any measure which it considers necessary to secure its essential security interests.[191] The general obligations for the Member invoking the security exception include designating its essential security interests in good faith and ensuring that the measure at issue adopted by the Member will plausibly protect their security interests.[192]

In comparison, the determination of whether the measure at issue is being "taken in time of an emergency in international relations" is relatively rigorous. The Panel pointed out that this refers to a situation of "armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state."[193] Moreover, the Panel further explained that "political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations for purposes of subparagraph (iii)."[194]

Applying these elements, this Article suggests that the sanctions set forth in the HKHRDA and the President's Executive Order meet the requirement of protecting the essential security interests of the United States and are necessary to achieve such objectives as the United States is entitled to decide the level of protection it desires. The promotion and protection of human rights have become an integral part of U.S. national security because the United States believes that improving the human rights situation around the world contributes to making the United States safer and more secure.[195] Accordingly, the HKHRDA is like

189. *Id.* ¶ 7.131.

190. *See* GATT, *supra* note 170, art. XXI ("Nothing in this Agreement shall be construed . . . (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests . . . .").

191. *See Russia—Measures Concerning Traffic in Transit* Panel Report, *supra* note 187, ¶¶ 7.146–47.

192. *Id.* ¶¶ 7.132–35, 7.138–39.

193. *Id.* ¶¶ 7.76, 7.111.

194. *Id.* ¶ 7.75.

195. *See* The White House, National Security Strategy of the United States of America 41–42 (Dec. 2017), https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905-2.pdf; *see also* William W. Burke-White, *Human Rights and National Security: The Strategic Correlation*, 17 Harv. Human Rights J. 249 (2004); Clair

many other general human rights sanctions under U.S. domestic law, which provide statutory authority for imposing such sanctions by the executive branch. This is because the HKHRDA reaffirms the power of the President under the International Emergency Economic Powers Act to impose a broad array of sanctions against Hong Kong if it is considered to be committing human rights abuses. Such power is reaffirmed in the Executive Order.

However, some might contend that such sanctions are not taken "in a time of international emergency" if they solely rely on the emerging human rights concerns and democracy crisis due to the enactment of National Security Law. Because the Panel seemed to adopt a more restrictive interpretation of the term "emergency," which refers to armed conflict or other tensions that are tantamount to war, the potential human rights violations happening in Hong Kong might not qualify as an element of "other emergency in international relations" under Article XXI:b(iii). Nevertheless, the gross human rights violations in Hong Kong are comprised of threats to the rights to peaceful assembly and freedom of expression as well as the use of disproportionate force by Hong Kong police—all documented by nongovernmental organizations and Special Rapporteurs of the UN Human Rights Council—and hence are of great concern to the international community.[196] Moreover, with the enactment of the National Security Law, the extraterritorial jurisdiction exerted by the law over U.S. citizens has further elevated the situation in Hong Kong into an international emergency. Numerous countries have condemned the PRC for neglecting its treaty obligations under the Sino-British Joint Declaration by deliberately mischaracterizing it as a historical document and asserting that it is no longer in effect.[197] Such "wolf-warrior" diplomacy enacted by the PRC government has generated fierce tensions between China and Western nations, leading some commentators to warn of a new international

Apodaca & Michael Stohl, *United States Human Rights Policy and Foreign Assistance*, 43 Int'l Stud. Q. 185, 185 (1999).

196. *China/Hong Kong SAR: UN Experts Urge China to Respect Protesters' Rights*, United Nations Human Rights Office of High Comm'r (Sept. 12, 2019), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24979&LangID=Eht [https://perma.cc/Y82D-9579]; *see also Protect the rights of people in Hong Kong*, Amnesty Int'l, https://www.amnesty.org/en/get-involved/take-action/stop-the-hong-kong-extradition-bill/[https://perma.cc/HRD8-M564] (last visited June 30, 2020).

197. Zhao Lijian, Foreign Ministry Spokesperson, Regular Press Conference for the Ministry of Foreign Affairs of China (June 3, 2020) (transcript available at https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1785528.shtml [https://perma.cc/5KGQ-GTV6]).

emergency.[198] From a legal perspective, considering that the terms "other emergency in international relations" and "war" are co-listed in Article XXI:b(iii), this Article suggests that the former should be interpreted to cover tensions or conflict among Members other than "war." Otherwise, the prerequisite "other emergency in international relations" would be redundant. In conclusion, we are of the view that while the Panel in *Russia—Measures Concerning Traffic in Transit* found that Article XXI is not completely self-judging and set certain thresholds for utilizing the security exception as grounds to justify WTO-inconsistent human rights sanctions imposed by the Member, the United States can still seek to frame the measures in the HKHRDA, the HKAA, the Executive Order, and relevant domestic law as in compliance with the requirement of being "taken in time of other emergency," especially considering the fact that democracy, freedom of speech and other human rights conditions in Hong Kong are being increasingly undermined and thereby threaten the peace and stability of the Western Pacific region.[199]

C. Summary: What Will Be the Next Steps for the United States?

While the PRC central government and Hong Kong government have strongly opposed the enactment of legislation responding to developments in Hong Kong and have denounced them as intrusions on China's sovereignty, we argue that the legality of the sanctions underlined in the HKHRDA, the HKAA, and the Executive Order should be upheld under both public international law and WTO law through the public moral exception in Article XX(a) and security exception in Article XXI:b(iii) of the GATT 1994 respectively. Some skeptics contend that the United States' actions are largely symbolic instead of a significant step forward because they do not significantly alter the current legal framework around sanctioning global human rights abuses under the 2015 Global Magnitsky Act.[200] Nevertheless, we argue that implementing these Acts and the Executive Order delivers strong political signals on China's oppression of Hong Kong and that there is a need to

198. Katsuji Nakazawa, *China's 'Wolf Warrior' Diplomats Roar at Hong Kong and the World*, Nikkei Asia (May 28, 2020, 4:00 AM), https://asia.nikkei.com/Editor-s-Picks/China-up-close/China-s-wolf-warrior-diplomats-roar-at-Hong-Kong-and-the-world [https://perma.cc/497Q-79DY].

199. *See generally* Brandon Alexander Millan & Joel S. Fetzer, *Support for Democracy and Willingness to Emigrate from Hong Kong*, 15 Taiwan J. Democracy 195 (2019).

200. Julian Ku, *The Hong Kong Human Rights and Democracy Act Is Redundant, but Still Worthwhile*, Lawfare (Nov. 25, 2019, 12:55 PM), https://www.lawfareblog.com/hong-kong-human-rights-and-democracy-act-redundant-still-worthwhile [https://perma.cc/Z4PG-QE2B].

combat the threat from China shared by both Congress and the executive branch.

With the promulgation of National Security Law and the abovementioned U.S. countermeasures, commentators argue that recent developments mark the end of the "One Country, Two Systems" regime and that they expect Hong Kong's status as a global financial hub to be severely impacted.[201] Notably, the United States has warned that it will be continuously evaluating further possible sanctions that can be adopted in response to future developments.[202] As a result, there is a possibility that the United States might eventually look to revoke Hong Kong's current legal status in international organizations, especially in the WTO, where Hong Kong is recognized as a separate customs territory and is entitled to full membership. The question then arises: can a state unilaterally deny the legal status and membership of another member under international law?

IV. The Legality of the United States' Unilateral Revocation of Hong Kong's Separate Customs Territory Status

It was not until the HKAA that the United States suspended the special status of Hong Kong. Both the USHKPA and HKHRDA retained the special status of Hong Kong under the U.S. domestic legal system. As legislators spelled out in the USHKPA, Sections 102 and 103 in particular, the United States was to treat Hong Kong as a territory autonomous from China after handover[203] and respect its status as a separate customs territory and a Contracting Party to the GATT (WTO Member).[204] However, such special treatment was not unconditional. Both provisions started with a *chapeau* referring to the Sino-British Joint Declaration. As the U.S.–China Economic and Security Review Commission noted in its 2019 annual report: "Hong Kong's special status provides for recognition of Hong Kong passports and diplomatic

201. *Factbox: What People Are Saying About Hong Kong's National Security Law*, Reuters (June 30, 2020, 8:37 PM), https://www.reuters.com/article/us-china-hongkong-security-analysts/factbox-what-people-are-saying-about-hong-kongs-national-security-law-idUSKBN24248V [https://perma.cc/Z7CL-9UK4]; *Beijing Passes Sweeping National Security Law for Hong Kong*, CBC (June 30, 2020, 12:25 AM), https://www.cbc.ca/news/world/china-security-law-hong-kong-1.5632377 [https://perma.cc/NS6Q-A95Q].

202. Press Release, Wilber Ross, Sec'y of Com., U.S. Dep't of Com., Statement from U.S. Secretary of Commerce Wilbur Ross on Revocation of Hong Kong Special Status (June 29, 2020), https://www.commerce.gov/news/press-releases/2020/06/statement-us-secretary-commerce-wilbur-ross-revocation-hong-kong?fbclid=IwAR0dNC0U450ULYx-WE9LYgz3pZYt_Mj_QiZbigmCxfRa_iuhwDUlzAgaR7Q [https://perma.cc/98J9-2PKL].

203. USHKPA § 102(3).

204. *Id.* § 103(3).

missions, as well as separate treatment in visa issuance, transportation, export controls, research, cultural, and educational exchange programs, and separate membership in international agreements and organizations."[205] More specifically, what justified the special treatment of Hong Kong under the U.S. legal system is the presumption of its unfettered autonomy even after the handover. It was based, at least in part, on the relevant provisions of the Joint Declaration. Therefore, a legitimate question is: what if this basis is no longer sustained? Can the United States legally revoke its special treatment of Hong Kong under U.S. law—in particular, its status as a special customs territory? Would such a move run counter to WTO law, in view of Hong Kong's membership in that organization? To answer the above questions satisfactorily, one has to first clarify the scope and coverage of such revocation.

At the positive law level, as mentioned in Part III of this Article, the USHKPA already envisioned the possibility of terminating special treatment for Hong Kong under U.S. law[206] and international agreements concluded between the United States and Hong Kong if the President found that Hong Kong was not legally competent to implement its obligations thereunder.[207] The HKHRDA further added a certification procedure by the Secretary of State to indicate "whether Hong Kong continues to warrant treatment under U.S. law in the same manner as U.S. laws were applied to Hong Kong before July 1, 1997."[208] In accordance with this provision, the former Secretary of State Mike Pompeo certified that Hong Kong is no longer autonomous and Trump issued an Executive Order aiming for Hong Kong normalization. At the international level, terminating Hong Kong's treatment as a territory autonomous from China could lead to denial of its "separate customs territory" status in the WTO. At the practical level, the suspension or termination of Hong Kong's special status in the U.S. domestic legal system would lead to bringing persons, capital, trade in goods and service back to the "normal" Chinese track.

In addressing the amendment to the extradition ordinance[209] and the subsequent anti-extradition ordinance movements that brought

205. U.S.–China Econ. & Sec. R. Comm'n, 2019 Report to Congress of the U.S.–China Economic and Security Review Commission, at 514 (2019), https://www.uscc.gov/sites/default/files/2019-11/2019%20Annual%20Report%20to%20Congress.pdf [https://perma.cc/3WH7-VZVZ].

206. USHKPA§ 202(a).

207. *Id.* § 201(b).

208. Hong Kong Human Rights and Democracy Act of 2019, Pub. L. No. 116-76, § 205(a)(1)(A), 133 Stat. 1161, 1163 (codified as amended in scattered sections of 22 U.S.C.).

209. Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation

the HKHRDA into being, the Congressional-Executive Commission on China in an Issue Brief pointed to the lack of progress on democratization, worsening of human rights protections and the erosion of Hong Kong's autonomy, and hinted at the possibility of suspending or terminating special treatment toward Hong Kong as well as relevant international agreements.[210] The United States finally hardened its position in the HKHRDA, the HKAA, and the Executive Order.

From a legal perspective, there is no compelling reason under U.S. domestic law to prevent the United States from suspending special treatment for Hong Kong via the HKAA and the subsequent Executive Order or terminating its international agreements with Hong Kong. Politically, the move to assess whether such special treatment is justified with the terms, obligations, and expectations expressed in the Sino-British Joint Declaration presents a credible threat to Hong Kong as other nations might follow suit and cancel any preferential treatment given to Hong Kong. Practically, as products originating from both China and Hong Kong are subject to most-favored-nation treatment, incorporating goods and services from Hong Kong under the blanket of Chinese goods and services seems to pose no legal controversy with the exception of those rights arising from Hong Kong's WTO membership by virtue of its separate customs territory status. In that regard, as a full member of the WTO, Hong Kong may argue that it is entitled to designate its own country of origin. The question is then what sustains Hong Kong's WTO membership.

Hong Kong's WTO membership, like the special treatment toward Hong Kong under U.S. laws, is based on the Sino-British Joint Declaration. Therefore, a logical question is: could Hong Kong's WTO membership be sustained if full autonomy no longer exists? The GATT/WTO has never dealt with this issue. In fact, it has neither spelled out what constitutes a "separate customs territory" nor specified the scope and nature of "full autonomy." However, the GATT/WTO has addressed the related issue of a loss of statehood.[211]

An illustrative case here is the Socialist Federal Republic of Yugoslavia which obtained observer status in 1950 and joined the GATT in 1966.[212] With the collapse of communism in Eastern Europe and disin-

(Amendment) Bill, (2019), Cap. CB(3)510/18–19, C491 (H.K.).

210. Meick, *supra* note 62, at 5.

211. On the accession and participation of the Socialist Federal Republic of Yugoslavia in the GATT, *see* K. Grzybowski, *Socialist Countries in GATT: East-West Trade-New Approaches*, 28 Am. J. Compar. L. 539, 547 (1980).

212. GATT Secretariat, *Minutes of Meeting Held in the Centre William Rappard, on 16–17 June 1993*, GATT Doc. C/M/264, at 3 (July 14, 1993).

tegration of the Socialist Federal Republic of Yugoslavia, the Socialist Federal Republic of Yugoslavia was transformed into the Federal Republic of Yugoslavia, consisting of Serbia and Montenegro (dissolved in 2006). As the UN General Assembly decided that the Federal Republic of Yugoslavia could not automatically inherit membership in the UN,[213] the General Council of the GATT also decided that Federal Republic of Yugoslavia should reapply for its status as a Contracting Party to the GATT.[214] In other words, as the Socialist Federal Republic of Yugoslavia disintegrated and lost its statehood, it could not assume rights and obligations under the General Agreement, and thus its membership under the GATT no longer existed. While the GATT/WTO does not establish rules addressing such situations, such decisions can be justified from the vantage point of public international law, as international legal personality—based on statehood[215] in this case—is the prerequisite for assuming rights and obligations under the GATT/WTO. The question is then: how to translate statehood to "full autonomy" by analogy in the context of a "separate customs territory."

GATT practices provide limited help in determining whether Hong Kong should continue to participate in the WTO by virtue of its status as a separate customs territory as GATT/WTO law. More broadly speaking, international law, has not developed mature theoretical and practical criteria for a territory to have "full autonomy to conduct its external commercial relations and other matters" without statehood. Therefore, to unfold the scope and nature of this "full autonomy," two approaches can be attempted: by investigating the details of the Sino-British Joint Declaration that enabled Hong Kong's accession to the GATT and subsequently sustains its WTO membership (*historical*

213. G.A. Res. 47/1, at 12 (Sept. 22, 1992).

214. As GATT Council decided, "The Council considers that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the contracting party status of the former Socialist Federal Republic of Yugoslavia in the GATT, and therefore decides that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for accession to the GATT and that it shall not participate in the work of the Council and its subsidiary bodies. The Council further invites other committees and subsidiary bodies of the GATT, including the Committees of the Tokyo Round Agreements and the Committee on Trade and Development, to take the necessary decisions in accordance with the above." GATT Secretariat, *supra* note 212.

215. On statehood and international legal personality, *see generally* James Crawford, The Creation of States in International Law 198–206 (2d ed. 2007). Whereas statehood is main source sustaining international legal personalities, it is argued that Hong Kong also possesses international legal personality. *See* Roda Mushkat, One Country Two International Legal Personalities: the Case of Hong Kong (H.K. Univ. Press ed., 1997); Zhichao Sun, *International Legal Personality of the Hong Kong Special Administrative Region*, 7 Chinese J. Int'l L. 339 (2008).

approach) and by comparing other separate customs territories (*comparative* approach).

As for the *historical* approach, China's communication in 1986 to the GATT is a good reference. In that communication, China referred to the Sino-British Joint Declaration, which in Section VI of Annex I elaborates China's policies toward Hong Kong as well as Hong Kong's trade and economic policies after the handover.[216] Section VI of Annex I mentions four points: the maintenance of the capitalist economic and trade systems previously practiced in Hong Kong, the retention of free port status and continuance of free trade policy, the status of separate customs territory and capacity to participate in relevant international organizations and international trade agreements, and, finally, the capacity to establish official and semi-official economic and trade missions in foreign countries.[217] On its face, Hong Kong, after the handover, was still able to retain autonomy in these four aspects. However, if one takes a broad view of full autonomy and looks to the legal and political context as envisaged in the Sino-British Joint Declaration and its Annexes, one may doubt whether a high degree of autonomy under the "One Country, Two Systems" regime has actually been implemented at the current moment and whether Hong Kong enjoys full autonomy to conduct its external commercial relations and other matters listed in the GATT/WTO covered agreements.

From the outset, the Sino-British Joint Declaration made it clear that "[t]he Hong Kong Special Administrative Region will be vested with executive, legislative, and independent judicial power, including that of final adjudication. The laws currently in force in Hong Kong will remain basically unchanged."[218] Annex I further prescribed that "[t]he legislature of the Hong Kong Special Administrative Region shall be constituted by elections"[219] to which the executive authorities shall be held accountable and that "the courts shall exercise judicial power independently and free from any interference. The power of final judgment of the Hong Kong Special Administrative Region shall be vested in the court of final appeal in the Hong Kong Special Administrative Region."[220]

216. GATT Secretariat, *Admission of Hong Kong as a Contracting Party—Communication from the People's Republic of China*, GATT Doc. L/5987 (Apr. 24, 1986).

217. Sino-British Joint Declaration on the Question of Hong Kong, China-U.K., Annex I, § IV, Sept. 26, 1984, 1399 U.N.T.S. 61.

218. *Id.* ¶ 3(3).

219. *Id.* Annex I, § I.

220. *Id.* Annex I, § III.

As it stands, while the Legislative Council on its face, is constituted through election, it is not based on universal suffrage but maintains functional constituencies that do not reflect geographical or population weight.[221] Furthermore, such functional constituencies are overwhelmingly dominated by pro-China camps, which in turn makes it difficult, if not impossible, to hold executive authorities accountable.[222] Moreover, the Legislative Council election, which was scheduled to be held on September 6, 2020, was postponed for one year, allegedly on the grounds of the COVID-19 pandemic.[223] The postponement of the Legislative Council election was followed by the NPC's decision to "improve" Hong Kong's electoral system on March 11, 2021,[224] which, according to Chris Patten, the final governor of Hong Kong, completely destroys the pledge of "One Country, Two Systems."[225] The Legislative Council is not the only institution suffering from a democratic deficit. Whereas Annex 1 of the HKBL regulates the direct election of the Chief Executive, the NPCSC, in its Decision concerning the 2016 Legislative Council Elections and 2017 Chief Executive Elections,[226] puts forward

221. Functional constituency is a system of "functional representation whereby different sectors of society will directly vote for a representative who will carry out a functional role that has both legislative and executive qualities." Such functional constituency is different from geographic suffrage and is sometimes challenged for its democratic legitimacy. *See* Simon N. M. Young, *Can Functional Constituencies Co-Exist with Universal Suffrage?* U. H.K. Ctr. for Compar. & Pub. L., Jan. 2005, at 1.

222. *See, e.g.*, Ian Scott & Joan Y.H. Leung, *Dysfunctional Elections and the Political System in Hong Kong*, 12 Asian J. Pol. Sci. 1 (2004); Ngok Ma, *Twenty Years of Functional Elections in Hong Kong: Exclusive Corporatism or Alternative Democratic Form?*, 45 J. Representative Democracy 421 (2009); Rowena Y. F. Kwok & Elaine Y. M. Chan, *Functional Representation in Hong Kong: Problems and Possibilities*, 24 Int'l J. Pub. Admin. 869 (2001).

223. Press Release, The Gov't of Hong Kong Special Admin. Region, LegCo General Election postponed for a year (July 31, 2020), https://www.info.gov.hk/gia/general/202007/31/P2020073100898.htm [https://perma.cc/MXT2-SHWJ].

224. Xinhua News, *China Adopts Decision to Improve Hong Kong Electoral System* (Mar. 11, 2021), *http://www.xinhuanet.com/english/2021-03/11/c_139802279.htm* [https://perma.cc/2BDH-8YWC].

225. Hong Kong Watch, *Patten: NPC Electoral Reforms in Hong Kong "Completely Destroys the Pledge of One-country, Two-systems,"* (Mar. 5, 2021), https://www.hongkongwatch.org/all-posts/2021/3/5/patten-npc-electoral-reforms-in-hong-kong-completely-destroys-the-pledge-of-one-country-two-systems. [https://perma.cc/85VV-B42N].

226. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Xianggang Tebie Xingzhengqu Xingzheng Zhangguan Puxuan Wenti He 2016 Nian Lifahui Chansheng Banfa De Jueding (**全国人民代表大会常**务委员会关于香港特别行政区行政长官普选问题和2016**年立法会**产生办法的决定) [Decision of the Standing Committee of the National People's Congress on Issues relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2014, effective 2017) 2014 Standing Comm. Nat'l People's Cong. Gaz. (China). Due to frustration from this decision, the umbrella movement subsequently took place.

additional procedural and substantive requirements that make direct election nearly impossible.

Above all, the judicial independence of Hong Kong—in particular, the authority of final adjudication of the Court of Final Appeal has been continuously undermined by the interpretations of the NPCSC. Recently, after the High Court of Hong Kong held the blank prohibition of wearing masks to be unconstitutional based on the emergence power, the spokesperson of the NPCSC said, "only the national legislature has the right to decide on issues of constitutionality."[227] Upon appeal, the Court of Final Appeal held the anti-mask law constitutional in cases of illegal demonstrations. While it is unclear whether the Court of Final Appeal's decision was influenced by the spokesperson's statement, the statement has undoubtedly produced a chilling effect and introduced a tremendous threat to judicial independence of Hong Kong.[228] It is thus argued that through the NPCSC's continuous interpretations of the HKBL, China has substantially altered the essence of the "One Country, Two Systems" regime.[229]

As for the *comparative* approach, currently, in the WTO, there are three members for whom membership is based on their status of separate customs territory: Hong Kong, Macau, and Taiwan. As Macau is also a special administrative region of China and was sponsored by Portugal under the same procedure as Hong Kong, it is of less help for our analysis because its autonomy is subject to and conditional upon China. If one aims to define "full autonomy" by comparing Hong Kong and Macau, it will offer China the opportunity to unilaterally define how much autonomy Hong Kong may have to qualify as a "separate customs territory" by equally squeezing the autonomy enjoyed by the two special administrative regions. Taiwan is also not a good benchmark—despite having limited diplomatic relations with other countries and

227. Tony Cheung et al., *No Other Authority Has Right to Make Judgments': China Slams Hong Kong Curt's Ruling on Anti-Mask Law as Unconstitutional*, S. China Morning Post (Nov. 19, 2019, 9:47 AM), https://www.scmp.com/news/hong-kong/politics/article/3038325/hong-kong-judges-slammed-chinas-top-legislative-body [https://perma.cc/A5Z8-DGTQ].

228. Cliff Buddle, *China's Top Legislative Body's Comments on the Power of Hong Kong Courts Strike at the Heart of "One Country, Two Systems*," S. China Morning Post (Nov. 21, 2019, 9:00 AM), https://www.scmp.com/comment/opinion/article/3038544/chinas-top-legislative-bodys-comments-power-hong-kong-courts-strike [https://perma.cc/GM2U-EDCP].

229. Todd Schneider, *David v. Goliath: The Hong Kong Courts and China's National People's Congress Standing Committee*, 20 Berkeley J. Int'l L. 575 (2002); Eric C. Ip, *Constitutional Competition Between the Hong Kong Court of Final Appeal and the Chinese National People's Congress Standing Committee: A Game Theory Perspective*, 39 Law & Soc. Inquiry 824 (2014); Chan (2018), *supra* note 16.

being unrecognized by the vast majority of countries,[230] it demonstrates more sovereign features or, put differently, possesses more comprehensive autonomy going beyond external commercial relations.

If we look further back into the history of the GATT, we find Lesotho and Liechtenstein joined the GATT with the same legal basis as Hong Kong did. Lesotho was sponsored by the United Kingdom to join the GATT in 1966 while Liechtenstein was sponsored by the Swiss Confederation in 1994. Lesotho (then with the name of Basutoland) was a British colony, which declared independence in 1966 and became a UN member then. The principality of Liechtenstein was and still is part of a customs union led by Swiss Confederation, which joined the Protocol of Provisional Application and accepted the obligations of the General Agreement on behalf of the customs union.[231] Before acceding to the GATT, Liechtenstein had already joined the UN in 1990.[232] Given that Lesotho declared its independence and acceded to the GATT at the same year and Liechtenstein joined the UN before acceding to the GATT, they are thus not appropriate benchmark to compare the full autonomy of a customs territory.

Currently, Curaçao, an overseas territory of the Netherlands, is seeking WTO accession as a separate customs territory and offers a good case study in understanding the essential characteristics of a separate customs territory. Unfortunately, the negotiations are still ongoing and few details on how Curaçao's autonomy is guaranteed and certified have been revealed.

Given the limited guidance on the criteria for a territory to have "full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement" in the GATT/WTO rules and the little help offered by past precedent, if the United States decides to raise the issue of revoking the separate customs territory status of Hong Kong before the WTO, a possible venue for discussion would be the General Council. The United States could request an item be listed on the agenda of the General Council discussing Hong Kong's WTO membership, alleging that the full autonomy promised by the Sino-British Joint Declaration and certified by China's communication in 1986 no

230. As of June 8, 2020, Taiwan, with its official name of the Republic of China, maintains diplomatic relations with 15 countries. On Taiwan's statehood, *see, e.g.*, Jonathan I. Charney & J. R. V. Prescott, *Resolving Cross-Strait Relations Between China and Taiwan*, 94 Am. J. Int'l L. 453, 453–58 (2000); Crawford, *supra* note 215; Lung-Chu Chen, The U.S.-Taiwan-China Relationship in International Law of Policy 3–47 (2016).

231. GATT Secretariat, *Certification by the Director-General—Liechtenstein*, GATT Doc. L/7440 (Apr. 5, 1994).

232. G.A. Res 45/1 (Sept. 18, 1990).

longer exists. Such an initiative would not necessarily lead to the expulsion of Hong Kong as a WTO Member, but it would call into question Hong Kong's autonomy, which currently sustains its membership.

As for the WTO dispute settlement mechanism, whether the Panel/Appellate Body has the jurisdiction to rule on the general question of the degree of autonomy that a Member enjoys and thus sustains its "separate customs territory" status is legally ambiguous and politically controversial. From a strategic perspective, it was wise for the United States to suspend its preferential treatment and adopt individual measures against Hong Kong. In doing so, it placed Hong Kong into a political dilemma to decide whether or not to pursue a case at the WTO, as it may open a window of opportunity for the WTO adjudicators to rule on the full autonomy. Also, it shifts the legal burden of proof from the United States to Hong Kong in making a *prima facie* case that the United States breached its WTO obligations.

Alternatively, if the United States chooses to take a more aggressive and provocative approach, it could pursue a case under the WTO dispute settlement mechanism. The critical issue here is whether Hong Kong has violated any provision of the covered agreements, as specified in Appendix 1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.[233] If the United States were to challenge the erosion of Hong Kong's autonomy, it appears that Hong Kong has not infringed any specific WTO obligations. Therefore, the only way is to launch a situation complaint, as set forth in Article XXIII(c) of GATT 1994. The provision speaks to "the existence of any other situation" nullifying or impairing any benefit accruing to a WTO Member directly or indirectly under the Agreement or impeding the attainment of any of its objectives. Two arguments may be advanced. First, the United States could argue that its benefits are nullified or impaired due the erosion of Hong Kong's autonomy, since the United States, in entering into the WTO Agreement, had envisioned Hong Kong as a free port maintaining liberal trade policies by virtue of its full autonomy. Second, the United States could argue that the erosion of Hong Kong's autonomy has prevented Hong Kong from implementing international legal obligations and assuming legal responsibilities under the GATT and, thus, impeded its objectives. Given the political complexities and legal ambiguities, one may not be too optimistic about the chance for the United States to convince the WTO adjudicators.

233. Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, app. 1, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

Conclusion

This Article traces the evolution of the U.S. laws and policies toward Hong Kong from the USHKPA to the HKHRDA and the HKAA. The USHKPA, enacted under the Clinton administration after the Tiananmen massacre, but before the handover of Hong Kong, is a product of the United States' policy toward China based on a policy of engagement. The USHKPA represents a compromise between Congress and the executive branch and reflects soft law, implementation of which is largely dependent on executive discretion. After three decades of a policy of engagement and more than twenty years of China's resumption of sovereignty over Hong Kong, the United States' China policy has gradually changed and saw a significant turn under the Trump administration. In the midst of U.S.–China tension and with bipartisan support from Congress, the HKHRDA and the HKAA strengthen the review, reporting, and sanctions mechanism on human rights, democracy, and autonomy in Hong Kong. In addition, the Trump administration also suspended the preferential treatment of Hong Kong under U.S. law, as the high degree of autonomy guaranteed by the Sino-British Joint Declaration and the HKBL has significantly eroded. With the inauguration of the Biden administration, sanctions against Chinese individuals suppressing Hong Kong's autonomy were imposed.

The suspension of preferential treatment under U.S. law and imposition of sanctions measures against individuals and institutions in Hong Kong implicate three subsets of legal issues: public international law, international trade law, and international institution law. The crucial issues here are whether the principle of non-intervention can be reconciled with the promotion and protection of human rights, whether trade measures can be justified by nontrade objectives or concerns, and whether the erosion of Hong Kong's autonomy could lead to the loss of Hong Kong's membership in the WTO. The first question concerns mainly nontrade related sanctions whereas the second relates to trade-related ones. The third question then points to the origins of Hong Kong's WTO membership: its full autonomy in conducting external commercial relations sustaining its "separate customs territory" status.

As far as nontrade-related measures are concerned, it is a choice and balance between the non-intervention principle and the promotion of human rights. Although non-intervention based on absolute sovereignty was a founding principle of international law, it has gradually lost its appeal and yielded to human rights protection and thus has opened a channel for third countries to intervene. Moreover, the U.S. measures

are justifiable in view of their limited scope and effect assessed against the principle of proportionality.

As for trade-related measures, where they are *prima facie* WTO-inconsistent, we argue that they can be justified by the public morals exception under the general exception in accordance with the criteria set forward by the WTO jurisprudence. These measures contribute to the realization of the objectives (the promotion of human rights and democracy in Hong Kong) and are necessary with no less restrictive measures available to achieve the same goals, and the interests pursued by the measures outweigh the trade loss suffered by Hong Kong. These measures may also be justified under the national security exception, as the situation in Hong Kong has been declared a U.S. national emergency.

With regard to the fundamental issue of Hong Kong's autonomy, we argue that GATT/WTO law and practice offers little guidance on whether Hong Kong risks losing its WTO membership by virtue of its separate customs territory status. We propose two approaches to address this question: a historical approach and a comparative approach. We argue that this issue is better addressed in the General Council than in the WTO dispute settlement mechanism. We further argue that if Hong Kong no longer possesses "full autonomy in the conduct of its external commercial relations and of the other matters provided for" in the WTO Agreement, the basis sustaining its separate customs territory status and WTO membership no longer holds. However, how to advance a WTO complaint relating to Hong Kong's full autonomy that sustains its "separate customs territory' status demands skilled litigation strategies. As it stands, Hong Kong has requested consultation under the WTO dispute settlement mechanism alleging that the U.S. requirements for marking Hong Kong products as "Made in China" violate the WTO rules. Whether this consultation request will turn into a panel request remains to be seen. If Hong Kong pursues this case, the burden of proof is incumbent on it to establish a *prima facie* case. The pursuit of this case may backfire as it offers an opportunity for WTO adjudicators or other WTO Members to rule or comment on the continued validity of its membership. The United States may wish to respond with a more provocative and aggressive move in launching a situation complaint.

In sum, the United States' Hong Kong policy is reflective of its China policy, shifting from engagement to containment. The high hopes to socialize China by bringing China into international relations

eventually have faded away and the efforts to sustain Hong Kong's autonomy as a GATT Contracting Party and through WTO membership are in peril. As China characterizes the Sino-British Joint Declaration as a historical document, Hong Kong's separate customs status may lose its ground.