

HONG KONG'S DEMOCRACY, HUMAN RIGHTS, AND AMERICA'S TRADE SANCTIONS

*By: Raj Bhala**

ABSTRACT

There is no systematic link in America's international trade law to human rights. While the U.S. includes provisions in its free trade agreements on labor rights, it does not – in contrast to the European Union – include human rights clauses in them. Only episodically, and in an *ad hoc* fashion, does the U.S. respond through its trade laws to human rights issues. One such instance has been American measures taken after China, effective 1 July 2020, imposed its *National Security Law* on Hong Kong. In this instance, the U.S. has indelibly linked its liberal capitalist values to its import-export measures.

This article explores Hong Kong as a case study in the linkage by the U.S. of its trade policy to human rights. It argues that Hong Kong is a useful precedent on which the U.S. should build, indeed, lead. That is true even after the infamous events at the U.S. Capitol of 6 January 2021, a day on which America lost more of its innocence as a young, hopeful nation, and undermined its exceptionalism as a shining light. The rationale for the argument is self-evident. No systematic defense of democracy specifically, or human rights generally, is offered – or necessary. After all, plenty of such defenses have been made across the

* Brenneisen Distinguished Professor, The University of Kansas, School of Law, Senior Advisor, Dentons U.S. LLP (Kansas City), "On Point" Columnist, BloombergQuint (Mumbai), www.bloombergquint.com. J.D., Harvard (1989); M.Sc., Oxford (1986); M.Sc., London School of Economics (1985); A.B., Duke (1984). Marshall Scholar (1984-86). Member, Council on Foreign Relations, Royal Society for Asian Affairs, and Fellowship of Catholic Scholars. Author, *International Trade Law: A Comprehensive Textbook* (5th ed., 4 vols., 2019), *Modern GATT Law* (2nd ed., 2 vols., 2013), *TPP Objectively* (2nd ed., 2019), *Trade, Development, and Social Justice* (2003), and *Understanding Islamic Law (Shari'a)* (2nd ed., 2016); http://en.wikipedia.org/wiki/Raj_Bhala [<https://perma.cc/CAL9-PSGB>].

I am grateful to Jared R. Jevons, Editor in Chief, Reiley Pankratz, Symposium Editor, Connor M. Nybo, Articles Editor, and the entire *Journal* team for their outstanding work, not only on this article, but also on the entire Symposium. With over 200 participants (albeit virtually, amidst the COVID-19 pandemic) from at least 19 countries, it was the largest Symposium in the history of the University of Kansas Law School.

The views expressed herein do not necessarily represent those of the University of Kansas, Dentons, or Bloomberg, or their employees, affiliates, or clientele.

centuries. The tale of what happened in Hong Kong, both in fact and in law, provides all the rationale that should be necessary.

Part II examines China's *National Security Law* and the essential legal developments that led up to it. Part III reviews the U.S. response to that *Law*, plus key developments in Hong Kong and Chinese views and counter-measures targeting America. Part IV suggests the U.S. response was correct, and a useful precedent on which to broaden and deepen the trade-human rights linkage, in what arguably is an Open Society War.

I. A USEFUL PRECEDENT

Timothy Garton Ash observed in his December 2020 essay, *The Future of Liberalism*, that “[f]or the first time this century, among countries with more than one million people, there are now fewer democracies than there are non-democratic regimes.”¹ The reason is linked to economics, as Martin Wolf of the *Financial Times* rightly observed:

To understand what is happening, one must connect politics to economics. Branko Milanovic, an expert on inequality, did this in *Capitalism Alone*, published last year [2019]. Capitalism has triumphed, he argues. He is right: the market economy is indeed triumphant. But, he adds, capitalist economies go with two distinct political systems in leading economies: the “liberal” model of the U.S. and its allies, which is the concern of Messrs Garton Ash . . . , and China’s “political” model.

Mr. Milanovic argues correctly that liberal democracy is a good in itself and also allows peaceful self-correction. People do desire freedom and U.S. voters have disposed of Donald Trump. The Chinese cannot do the same with Premier Xi Jinping. The argument for “political capitalism” is instrumental: it works. The rise of China has indeed been extraordinary. . . .

Mr. Milanovic’s dichotomy is useful but simplistic. A third political version of capitalism exists: demagogic authoritarian capitalism. This can arise out of collapsed communism, as in today’s Russia, or out of enfeebled democracy, as in Brazil or Turkey. Demagogic authoritarian capitalism is a hybrid. As in the Chinese system of bureaucratic authoritarian capitalism, the ruler is above the law and democratically unaccountable – elections are a sham. But power is personal, not institutionalised. This is corrupt gangster politics. It rests on the personal loyalty of sycophants and cronies. Often the core consists of the family members, viewed as most trustworthy of all. This is the political system Mr. Trump wished to install in the U.S.

¹ Timothy Garton Ash, *The Future of Liberalism*, PROSPECT (Dec. 9, 2020), www.prospectmagazine.co.uk/magazine/the-future-of-liberalism-brexite-trump-philosophy [https://perma.cc/DJ3P-YKWT].

Such rulers are like wasp larvae that eat the spider from within. They manage to win an election and then erode the institutional and political bulwarks against indefinite personal rule. Mr Trump has all the relevant characteristics: the truth is what he says it is; a fair election is one he wins; and a good official is one who is loyal. He wants to be an autocrat. This is distinct from saying that he wants to govern. Nero was not very interested in governing either. But he definitely was tyrannical.

...

Liberal democracy does have one big advantage: its main opponent. . . . China's approval rating in Gallup polling is a median of 32 per cent among over 130 countries. It has hardly budged in 10 years. People respect China, but do not like it. China also confronts the challenge of sustaining economic dynamism without a credible rule of law.²

Among the principal supporters of such tyranny are "pluto-populists," that is, the privileged plutocratic class that benefits from "tax cuts and deregulation," and persuades "a large proportion of the population to vote against its economic interests by focusing on culture and identity."³

The defeat of Donald Trump does not spell an end to the power of pluto-populism. It is, however, an occasion for a reappraisal of the link between American trade policy and human rights. There is no systematic link. There are no "human rights" or "democracy" clauses in Americas' free trade agreements ("FTAs"), as there are in those of the European Union. Yet, as U.S. trade sanctions on China concerning Chinese Communist Party ("CCP") treatment of Uyghurs in Xinjiang Province, and the Department of State's declaration that such treatment constitutes both "crimes against humanity" and "genocide," there is a link.⁴

This article explores the link in the context of the Sino-American confrontation over Hong Kong. This article argues the link the U.S. has drawn between its liberal capitalist values, on the one hand, to its import-export measures, on the other hand, is a useful precedent on which the U.S. should build, indeed, lead. No systematic defense of democracy specifically, or human rights generally, is offered – or necessary. Plenty of such convincing defenses have been made across the centuries. Among the best ones are literary: Franz

² Martin Wolf, *The Fading Light of Liberal Democracy*, FIN. TIMES (Dec. 22, 2020), www.ft.com/content/47144c85-519a-4e25-9035-c5f8977cf6fd?shareType=nongift [<https://perma.cc/9URW-MCMQ>] [hereinafter *The Fading Light*].

³ *Id.*

⁴ See Raj Bhala, *China's Uyghurs, Human Rights, and America's Trade Sanctions*, National Human Rights Commission, India (NHRC), 19 NHRC ENGLISH JOURNAL 2020, 101–117 (Journal of the National Human Rights Commission, India, December 2020), https://nhrc.nic.in/publications/latest-released-publications_

Kafka wrote chillingly in *The Trial* (1925), as did George Orwell in *1984* (1949), of what happens when a place becomes like what Hong Kong is being turned into by the CCP. That said, the devolutionary tale (chronicled below) of what happened to one of the world's great cities, both in fact and in law, provides all the rationale that should be necessary.

To be sure, there is an irony in this argument: it was President Trump, the alleged demagogic authoritarian capitalist, who supported this linkage, and it will be his successor, President Joe Biden, arguably a liberal (or at least moderate) capitalist, who is charged with strengthening the link.

Part II of this article examines China's *National Security Law* and the essential legal developments that led to it. Part III reviews the U.S. response to that *Law*, plus key developments in Hong Kong and Chinese views and counter-measures targeting America. Part IV suggests the U.S. response was correct, and a useful precedent on which to broaden and deepen the trade-human rights linkage, in what arguably is an Open Society War.

II. HONG KONG AND "ONE COUNTRY, ONE SYSTEM"?

A. *Legal Background*

That the Sino-American Trade War was about more than cross-border commerce, that it was about two different systems with incompatible ideologies and values, seemed proven by events in May 2020 concerning China's treatment of Hong Kong. Britain handed back Hong Kong to China on 30 June 1997. Under 1992 legislation, *United States-Hong Kong Policy Act of 1992*, America treated Hong Kong separately from China for purposes of trade relations.⁵ The *1992 Act* allowed for "different" treatment for Hong Kong than the People's Republic of China ("PRC") with respect to trade and other economic issues, and political matters, but only if Hong Kong remains "sufficiently autonomous" from the Mainland.

Consequently, exports from the Hong Kong Special Administrative Region ("SAR") to the U.S. were granted MFN treatment, as per Article I:1 of the General Agreement on Tariffs and Trade ("GATT"), but not subject to trade remedies imposed on Chinese-origin merchandise, such as the Section 301 tariffs in the Sino-American Trade War, Section 232 steel and aluminum tariffs,⁶ or antidumping-countervailing duty ("AD-CVD") penalties.⁷ Likewise, for inbound foreign direct investment ("FDI"), the U.S. treated it differently for Committee on Foreign Investment Review of the United States ("CFIUS") review purposes depending on the Hong Kong versus Mainland character of the

⁵ See Pub. L. No. 102-383, 106 Stat. 1448 (Oct. 5, 1992), 22 U.S.C. §§ 5701-5732, <https://uscode.house.gov/view.xhtml?path=%2Fprelim%40title22%2Fchapter66&edition=prelim> [<https://perma.cc/5MBB-NB69>].

⁶ See 2 RAJ BHALA, INTERNATIONAL TRADE LAW: A COMPREHENSIVE TEXTBOOK, ch. 18 (5th ed. 2019) [hereinafter BHALA, VOLUME 2].

⁷ 3 RAJ BHALA, INTERNATIONAL TRADE LAW: A COMPREHENSIVE TEXTBOOK, chs. 1-27 (5th ed. 2019).

investor seeking to acquire an American company. Conversely, the U.S. treated exports to Hong Kong differently from those to the Mainland. Such exports were not subject to the same controls, particularly restrictions administered by the Department of Commerce (“DOC”) on exports and re-exports of dual-use items⁸ from those applicable to merchandise bound for China.

This “special status” for the Hong Kong SAR – essentially treating it as a *bona fide* customs territory distinct from the rest from China – contributed to its continued growth and development. Indeed, for World Trade Organization (“WTO”) purposes, the U.S. treated as a separate customs territory distinct from the PRC. This status was consistent with (as noted earlier) the December 1984 *Sino-British Joint Declaration*, and July 1997 *Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*. Under those documents, China promised Hong Kong – in exchange for Britain returning the territory to China – “would have a ‘high degree of autonomy’ in its legal and economic affairs for 50 years, under a ‘one country, two systems’” paradigm.⁹

However (as also noted above), in November 2019, President Trump signed legislation amending the 1992 *Act*, namely, the legislation the *Hong Kong Human Rights and Democracy Act*.¹⁰ He did so following massive protests in Hong Kong against alleged CCP encroachment of Hong Kong’s freedoms, and expressions of concern by the State Department about the “continual erosion” of its autonomy from China.¹¹ The 2019 *Act* mandated that the Secretary of State make an annual certification as to whether Hong Kong continues to deserve the aforementioned special treatment. The first instance of that certification, in spring 2020, was negative. Additionally, the President signed separate legislation (Senate Bill 2710¹²) forbidding exportation (for one year) from the U.S.

Around 21 May 2020, China announced enacted legislation applicable to Hong Kong concerning national security. The National People’s Congress passed it on 28 May by a vote of 2,878-1 (with six abstentions), with final approvals and formal implementation scheduled for later in summer 2020.¹³ The Standing Committee of the National People’s Congress (“NPC”) unanimously

⁸ BHALA, VOLUME 2, *supra* note 7, at Chapter 25.

⁹ See Iain Marlow & Daniel Flatley, *What Hong Kong Losing Its ‘Special Status’ Would Mean*, BLOOMBERG (Aug. 23, 2020), www.bloomberg.com/news/articles/2019-10-02/what-u-s-congress-is-and-isn-t-doing-about-hong-kong-quicktake [https://perma.cc/LCK5-KJSB].

¹⁰ See 22 U.S.C. §§ 5725–5726 (2019); *Hong Kong Protests: China Warns US Over Human Rights and Democracy Act*, BBC NEWS (Nov. 28, 2019), www.bbc.com/news/world-asia-china-50584928 [https://perma.cc/SL7J-D9NX]; Mario Parker, *Trump Signs Hong Kong Bill Backing Protesters, Angering China*, BLOOMBERG (Nov. 27, 2019), www.bloomberg.com/news/articles/2019-11-27/trump-signs-hong-kong-bill-that-will-strain-relations-with-china [https://perma.cc/4SKK-S8KJ].

¹¹ *Quoted in Why Hong Kong’s “Special Status.”*

¹² See Pub. L. No. 116-77, 133 Stat. 1173 (2019).

¹³ Iain Marlow, *China Approves Hong Kong Security Legislation, Defying Trump*, BLOOMBERG (May 28, 2020), www.bloomberg.com/news/articles/2020-05-28/china-approves-hong-kong-security-legislation-defying-trump?sref=7sww9Sx1 [https://perma.cc/F72X-8REP] [hereinafter *China Approves Hong Kong*].

approved the legislation on 29 June,¹⁴ and President Xi Jinping signed it on 30 June – all without publication of the full text.¹⁵ The legislation entered into force, again with no details available, at 23:00 Hong Kong time on 30 June 2020, to coincide with the 23rd anniversary of the handover by Britain to China of Hong Kong (which occurred on 1 July 1997), thus giving “the city’s 7.5 million people little time to digest what is expected to be highly complex legislation,” “[a]mid[st] fears the law will crush the global financial hub’s freedoms, and reports that the heaviest penalty under it would be life imprisonment.”¹⁶ Those reports proved correct.

The new legislation spanned six Chapters, 66 articles, and 18 pages, and finally was published (in Mandarin, late on 30 June 2020 Hong Kong time, 15 hours after it was passed, and just as it entered into force).¹⁷ An unofficial English translation quickly appeared.¹⁸ Formally entitled *Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region*, China inserted it into Hong Kong’s legal code. (The Orwellian nature of the title was unmistakable – it was about “safeguarding” Hong Kong’s security.) This *National Security Law* contained four key offenses, namely, it criminalized:¹⁹

¹⁴ See Chris Buckley, *What China’s New National Security Law Means for Hong Kong*, N.Y. TIMES (June 30, 2020), www.nytimes.com/2020/06/28/world/asia/china-hong-kong-national-security-law.html [https://perma.cc/2KP9-5D6M]; *National Security Law: Hong Kong Leader Carrie Lam Demands International Respect for the Legislation as it is Added to City’s Basic Law*, SOUTH CHINA MORNING POST (Hong Kong) (June 29, 2020), www.scmp.com/news/hong-kong/politics/article/3091119/hong-kong-national-security-law-passed-beijing-expected [https://perma.cc/94GU-VU9R].

¹⁵ See *Hong Kong Security Law: Anger as China’s Xi Signs Legislation*, BBC NEWS (June 30, 2020), www.bbc.com/news/world-asia-china-53234255 [https://perma.cc/L55W-BB6H] [hereinafter *Hong Kong Security Law*]; Clare Jim & Yew Lun Tian, *China Passes National Security Law in Turning Point for Hong Kong*, REUTERS (June 29, 2020), www.reuters.com/article/us-china-hongkong-security/china-passes-national-security-law-in-turning-point-for-hong-kong-idUSKBN241061 [https://perma.cc/6EBJ-UQ7B] [hereinafter *China Passes National Security Law*].

¹⁶ See James Kynge, *Hong Kong’s Pre-eminence Threatened by New Law*, FIN. TIMES (June 30, 2020), www.ft.com/content/a74d9bbd-83b1-47ac-86ee-3102d19e54ff?shareType=nongift [https://perma.cc/T4LY-JKM4]; *China Passes National Security Law*, *supra* note 15.

¹⁷ See *China Enacts Sweeping Powers to Silence Hong Kong’s Dissidents*, BLOOMBERG (June 29, 2020), www.bloomberg.com/news/articles/2020-06-29/china-set-to-approve-hong-kong-security-law-risking-u-s-anger?sref=7sxw9Sxl [https://perma.cc/N9E8-8SZY] (emphasis added) [hereinafter *China Enacts Sweeping Powers*]. Note, too, the irony that “Chief Executive Carrie Lam, who had defended the law even as she acknowledged she hadn’t seen a full draft, said the local police force and Department of Justice were ready to enforce it.” *Id.* See also *China Makes Life Max Term for Security Crimes: Hong Kong Update*, BLOOMBERG (June 29, 2020), www.bloomberg.com/news/articles/2020-06-30/joshua-wong-quits-party-ahead-of-china-law-hong-kong-update?sref=7sxw9Sxl [https://perma.cc/84DR-TGHH] (reporting “[t]he legislation . . . was published in full only as it took effect”).

¹⁸ See James Ockenden, *National Security Law English Translation*, TRANSIT JAM (June 30, 2020), <https://transitjam.com/2020/06/30/national-security-law-english-translation/> [https://perma.cc/SJ3P-MZXE].

¹⁹ See *Hong Kong: First Arrests Under “Anti-Protest” Law as Handover Marked*, BBC NEWS (July 1, 2020), www.bbc.com/news/world-asia-china-53244862 [https://perma.cc/ZL42-SF2H].

- (1) Secession (Article 20), *i.e.*, any effort to create independence for Hong Kong from the Mainland. Secessionist acts may be non-violent. Thus, for example, the authorities declared chants such as “Hong Kong independence,” “Liberate Hong Kong, the revolution of our times!,” “Hong Kongers build a nation,” waving a flag about Hong Kong’s independence, or likewise “waving of flags that advocate independence of Tibet, Taiwan, Shanghai and East Turkestan,” were offenses.²⁰
- (2) Sedition (Article 22), or subversion of state power, that is, of China’s central or regional government, *i.e.*, undermining CCP authority over Hong Kong, including hatred of either the central or SAR government, per Article 29. So, for instance, the aforementioned chants and banners were examples of altering the legal status of Hong Kong and subverting state power.²¹ Similarly, media commentary or picketing could be considered seditious acts.
- (3) Terrorism (Articles 24 and 26), such as perpetrating or inciting violence or acts of intimidation, including damaging public transportation facilities, and mass protests. Also included were support (*e.g.*, transport, labor, venue assistance) for such acts, yet unclear was whether an alleged “supporter” had to know whether a person receiving that support was a terrorist.
- (4) Foreign interference, namely, collusion with foreign forces (Article 29), *e.g.*, foreign governments or their agents, the media, non-governmental organizations (“NGOs”), or academics.²² This offense included direct or indirect acceptance of support from a foreign organization with a view to performing an act hostile to Hong Kong.

All four offences carried a maximum sentence of life in prison.²³

Until the text was published, Hong Kong, and the world, relied on a summary *Bloomberg* published – because, as *Bloomberg* reported, “China didn’t publish the full draft law before its passage or allow a public debate, which is required under the [Hong Kong] *Basic Law*, Hong Kong’s mini-constitution,”

[hereinafter *Hong Kong: First Arrests*].

²⁰ Iain Marlow & Natalie Lung, *Hong Kong Files First Charges Under New Law, Bans Rallying Cry*, BLOOMBERG (July 2, 2020), www.bloomberg.com/news/articles/2020-07-03/hong-kong-bans-protest-movement-s-rallying-cry-for-revolution?sref=7sxw9Sxl [https://perma.cc/NXJ7-C6XT] [hereinafter *Hong Kong Files First*]. Indeed, the first prosecution under the *National Security Law* was of “[a] man carrying a ‘Liberate Hong Kong’ sign as he drove a motorcycle into police [thus hitting and injuring some officers] at a protest against the territory’s Chinese rulers”; 23-year-old Tong Ying-kit was charged with both separatism and terrorism. Jessie Pang & Anne Marie Roantree, *Hong Kong Man Accused of Terrorism in First Use of New China Security Law*, REUTERS (July 2, 2020), www.reuters.com/article/us-hongkong-protests/hong-kong-man-accused-of-terrorism-in-first-use-of-new-china-security-law-idUSKBN2440A6 [https://perma.cc/3FAC-89S3].

²¹ *Hong Kong Files First*, *supra* note 20.

²² See *Hong Kong Security Law*, *supra* note 15; *Hong Kong Security Legislation Backed by China’s Parliament*, BBC NEWS (May 28, 2020), www.bbc.com/news/world-asia-china-52829176 [https://perma.cc/5WZW-2XGP] [hereinafter *Hong Kong Security*].

²³ See *Hong Kong Security Law*, *supra* note 15.

and “[t]he process also bypassed Hong Kong’s elected Legislative Council”):²⁴ The *Bloomberg* synopsis proved accurate:²⁵

- All four crimes carry maximum sentences of life.
- Applies to actions after the law’s implementation.
- Covers Hong Kong residents or companies and non-residents anywhere.
- Terrorism charges include “serious disruption” of transportation networks.
- Collusion provision includes advocates of foreign sanctions.
- Subversion includes overthrowing Hong Kong government organs and attacking its offices.
- Violators are barred from seeking or holding public office for an unspecified period.
- Gives Beijing power to prosecute “complex” cases relating to foreign influence or other “serious circumstances.”
- Allows closed trials in cases involving state secrets or other subjects “not fit for open trial.”
- Allows Justice Minister to opt out of jury trials in some cases.
- Grants immunity to Chinese agents performing duties in Hong Kong.
- Calls for stronger “management” of news agencies and foreign NGOs.²⁶

Chillingly (as intimated in the third bullet point), under Article 38, the new law “extend[ed] to actions committed by anyone, *whether or not they are Hong Kong residents, anywhere in the world* and appears to cover even non-violent tactics employed by protesters in a wave of unrest that gripped the former British colony last year.”²⁷ In other words, the *Law* “can also be broken from abroad by non-residents under Article 38, and this could mean that foreigners could be arrested on arrival in Hong Kong” or China.²⁸ So, for example, “foreign nationals who speak in favour of independence for the territory, or advocate sanctions against China, could be prosecuted upon entering Hong Kong or Mainland China.”²⁹ Likewise, they could be arrested while transiting through Hong Kong or the Mainland.³⁰ Indeed, presence on Cathay Pacific Airways, which is Hong Kong based, or any Mainland-based Airline, rendered a

²⁴ *China Enacts Sweeping Powers*, *supra* note 17.

²⁵ *China Says Hong Kong Law Hangs ‘Sword of Damocles’ Over Critics*, BLOOMBERG (June 29, 2020), www.bloomberg.com/news/articles/2020-06-29/china-set-to-approve-hong-kong-security-law-risking-u-s-anger [<https://perma.cc/LX3U-T6TB>] [hereinafter *China Says Hong Kong Law Hangs*].

²⁶ *Id.*

²⁷ *Id.* (emphasis added).

²⁸ *Hong Kong: First Arrests*, *supra* note 19.

²⁹ Nicolle Liu & Joe Leahy, *HK Begins Crackdown Despite Foreign Condemnation*, FIN. TIMES (July 1, 2020), www.ft.com/content/59f3f2b6-82d0-4b2c-92b2-cf9bc5a9c402?shareType=nongift [<https://perma.cc/2UYA-2S2K>] [hereinafter *HK Begins Crackdown*].

³⁰ See *Cardinal Zen Says He’s Prepared for Arrest under Hong Kong Security Law*, CATHOLIC NEWS SERVICE (July 1, 2020), <https://cnstopstories.com/2020/07/01/cardinal-zen-says-hes-prepared-for-arrest-under-hong-kong-security-law/#noredirect> [<https://perma.cc/SB82-UXEC>] [hereinafter *Cardinal Zen Says*].

passenger vulnerable.

Though the *National Security Law* was not to be applied in an *ex post facto* manner (*i.e.*, it “would not be applied to offences committed before it was passed”), “suspects arrested in Hong Kong on charges of violating the law may be tried on the Mainland.”³¹ Also chillingly, the legislation did not define precisely the vital terms in the aforementioned offenses it criminalized, creating the potential for loose interpretation and, therefore, wide suppression. The exercise of religion could be deemed subversive, as belief in an authority beyond the CCP might be deemed to undermine the authority of the government.³² Likewise, the candid evaluation of official economic statistics – for instance, arguing that CCP data on gross domestic product (“GDP”) growth are overstated, or on export declines amidst the Trade War are understated – could be considered subversive.

Who would do so – interpret vague and ambiguous terms in the *Law* – was a deeply troubling point. This legislation said Hong Kong’s “‘judicial organs’ along with its government and legislature ‘must effectively prevent, stop and punish acts endangering national security.’”³³ That spelled an encroachment on Hong Kong’s much-vaunted British-style judicial independence, and an end to the rule of law that attracts businesses and human capital to Hong Kong from America and around the world.³⁴ Not surprisingly, in response to what it called “‘uncertainty’ caused by the new rules, *The New York Times* said it would move

³¹ *Hong Kong: First Arrests*, *supra* note 19.

³² *See Cardinal Zen Says*, *supra* note 30.

³³ David Lague, *Xi Makes High-stakes Power Play in Move to Subdue Hong Kong*, REUTERS (May 23, 2020), www.reuters.com/article/us-hongkong-security-law-analysis/xi-makes-high-stakes-power-play-in-move-to-subdue-hong-kong-idUSKBN22Z0MU [https://perma.cc/45YH-DRDB].

³⁴ For its part, LegCo debated a new law criminalizing disrespect for the Chinese national anthem, which initially had been introduced to the body in 2019. *See* Karen Leigh, *What Are the New Laws China Is Pushing for Hong Kong?*, BLOOMBERG (May 26, 2020), www.bloomberg.com/news/articles/2020-05-26/what-are-the-new-laws-china-is-pushing-for-hong-kong-quicktake?sref=7sxn9Sxl [https://perma.cc/4F3M-NRH5] [hereinafter *What Are the New*]; *Protests Dwindle, Police Arrest More Than 300: Hong Kong Update*, BLOOMBERG (May 26, 2020), www.bloomberg.com/news/articles/2020-05-26/hong-kong-police-say-protesters-have-started-blocking-roads [https://perma.cc/7J6N-BC8H]. On 4 June 2020, LegCo passed the so-called “*Anthem Law*,” which “punish[es] anyone who shows disrespect for China’s national anthem – something that was already a crime in the Mainland.” *What Are the New*. Notably, the *Anthem Law*:

allows for a fine and jail sentence of as long as three years for people who “willfully” alter or insult the anthem or sing it in a “distorted or derogatory” manner, anywhere from online posts to sporting events. Called “March of the Volunteers,” the anthem was penned during China’s struggle against the Japanese and later adopted by the People’s Republic of China. Among Hong Kong’s democracy supporters, especially the young, the anthem has become a symbol of Communist Party interference and has often drawn boos during soccer matches. The protest camp last year created its own anthem, called “Glory to Hong Kong.”

Id.

its digital media operations out of Hong Kong, representing about a third of its employees based in the city, to Seoul.”³⁵

In particular (as intimated in the 10th bullet point above), the *National Security Law*, in Article 55, allowed for charges in “complex cases” to be brought to special adjudicators hand-picked by the Chief Executive of Hong Kong (who is essentially chosen by China).³⁶ The trials can be held in secret, with no jury, there is no limit on how long a suspect or defendant can be held, and the presumption that a suspect will be granted bail is reversed. Thus, China has the “power over how the law should be interpreted, and not any Hong Kong judicial or policy body,” and “[i]f the law conflicts with any Hong Kong law, the Beijing law takes priority.”³⁷ Overall then, as the British Broadcasting Corporation (“BBC”) put it, “Hong Kong’s sweeping new security law is a frighteningly open-ended tool to suppress political agitation,” and “[I]ike similar laws on the Chinese Mainland, it appears that it can be manipulated to meet the needs of the Communist Party as required to crush almost any action deemed threatening.”³⁸

Moreover, the new legislation allowed China’s “relevant national security organs” to set up “agencies” in Hong Kong “to fulfil relevant duties to safeguard national security.”³⁹ It was the first time they were authorized to operate openly in Hong Kong.⁴⁰ They reported directly to senior officials in Beijing, and put in charge of them as the security chief for Hong Kong was a hardliner, Zeng Yanxiong.⁴¹ He was:

best known as [Communist] Party boss in the Guangdong city of Shanwei when a protest by villagers in Wukan seeking compensation for land requisitioned by the government broke out in 2011.

³⁵ Demetri Sevastopulo, Don Weinland & Primrose Riordan, *Trump Signs Hong Kong Act Clearing Way for China Sanctions*, FIN. TIMES (July 14, 2020), www.ft.com/content/66ee7145-aaf5-40e6-842f-32977cacb9b2?shareType=nongift [<https://perma.cc/TBQ3-UZAW>] [hereinafter *Trump Signs Hong Kong*].

³⁶ See Scott Murdoch & Yann Chow, *Hong Kong Police Arrest More than 300 Protesting China’s Birthday Gift’ of Security Law*, REUTERS (June 30, 2020), www.reuters.com/article/us-hongkong-protests/hong-kong-police-arrest-more-than-300-protesting-chinas-birthday-gift-of-security-law-idUSKBN2423Y2 [<https://perma.cc/2TTP-GBR2>] [hereinafter *Hong Kong Police Arrest*].

³⁷ *Hong Kong: First Arrests*, *supra* note 19.

³⁸ *Hong Kong Security Law*, *supra* note 15.

³⁹ *Hong Kong Security*, *supra* note 22 (reporting the legislation states that “when needed, relevant national security organs of the Central People’s Government will set up agencies in Hong Kong to fulfil relevant duties to safeguard national security in accordance with the law,” meaning that “China could potentially have its own law enforcement agencies in Hong Kong, alongside the City’s own”); Nicole Liu & Joe Leahy, *China Looks to Set Up National Security Agencies in Hong Kong*, FIN. TIMES (May 22, 2020), www.ft.com/content/7eb97cd7-616e-4cdf-88a5-ba41fb1ea62c [<https://perma.cc/4MM3-2WJB>] (quoting Wang Chen, Chinese official, speech to National People’s Congress).

⁴⁰ See *HK Begins Crackdown*, *supra* note 29.

⁴¹ See *Zheng Yanxiong: China Appoints Hard-line Hong Kong Security Chief*, BBC NEWS (July 3, 2020), www.bbc.com/news/world-asia-china-53275405 [<https://perma.cc/54JY-NHEV>] [hereinafter *Zeng Yanxiong*].

He famously criticised the villagers for talking to “a few rotten foreign media organisations” instead of the government about their grievances.

“These media organisations will only be happy when our socialist county falls apart,” he said in remarks broadcast on local TV.

The unrest led to a rare concession by the authorities, with the direct election of a popular local leader. However, five years later he [the elected local leader] was jailed for corruption and the protests were quashed.⁴²

It was Mr. Zeng who orchestrated the Wukan crackdown, which bode ominously for Hong Kong:

In 2011, disaffected locals forcibly expelled government officials from the area, accusing the officials of grabbing their land in a series of corrupt deals with developers.

A blockade ensued and, as part of a negotiated settlement to defuse tensions, the locals were given the right to elect their own council. It became a grass roots democratic exemption in China.

Five years later, the residents – angry that no money had been paid for the stolen land – started marching in the streets again. The situation escalated after their elected leader was taken away by the authorities on what are thought to have been trumped up charges.

The empowered locals were in charge of their own affairs and they believed they could achieve justice. But when the Communist Party became fed up with this rebellion it was over to senior cadre Zheng Yanxiong and others to deal with it. Hundreds of riot police were ordered in to seize control, making mass arrests and crushing the “Wukan experiment.”

Since then this Cantonese-speaking enforcer has moved up through the ranks with a reputation for doing whatever is necessary. Now he’s in charge of a new security agency in Hong Kong which operates without any legal restraints whatsoever, and which no other agencies can touch.⁴³

Moreover, Mr. Zeng’s national security organs, along with Hong Kong’s government, were empowered to supervise education in Hong Kong’s schools on national security matters.⁴⁴ That was thanks to Article 9, which obliges Hong Kong’s government to “take necessary measures to strengthen public

⁴² *Id.*

⁴³ *Id.* (analysis by Stephen McDonnell).

⁴⁴ See *Hong Kong Security Law*, *supra* note 15.

communication, guidance, supervision and regulation” of schools, as well as the media, internet and social organizations.

The authorities wasted no time in enforcing the *National Security Law*. On 1 July 2020, they detained approximately 360 persons among the thousands who participated in an annual pro-democracy rally to mark the anniversary of the U.K. handover of Hong Kong to China.⁴⁵ (Authorities said the rally was an illegal assembly, as gatherings of over 50 people owing to the coronavirus-2019 (“COVID-19”) pandemic were banned.) They used pepper spray, tear gas, and water cannons on the protestors, and arrested 10 persons, including one for carrying a Hong Kong independence flag.⁴⁶ Police said seven officers were injured, including one stabbed in the arm by “rioters holding sharp objects.”⁴⁷ And, “[t]wo other women were arrested for possessing pro-independence stickers that said ‘Resist Beijing, Liberate Hong Kong,’ ‘One Nation, One Hong Kong.’”⁴⁸

On 8 July, Hong Kong’s Minister of Education, Kevin Yeung, declared all students were banned from “any political activity in schools including singing, posting slogans and boycotting classes.”⁴⁹ Schools had to put down this behavior. So, for example, it was illegal to sing, play, or broadcast *Glory to Hong Kong*, because it was “closely related to the social and political incidents, violence and illegal incidents that have lasted for months” (students had sung it in lieu of China’s national anthem).⁵⁰ Likewise, “students must not form human chains, chant slogans or express other political messages.”⁵¹ Such examples, coupled with the vague and ambiguous terms of the *Law*, suggested very few activities might not be subject to prosecution. Perhaps even writing software code, or working on a chemistry experiment, could be deemed unlawful if they were connected to a matter that Mainland officials deemed a threat.

On 28 July 2020, renowned Hong Kong University Law Professor Benny Tai was dismissed from his post “due to a criminal conviction over his role in the 2014 pro-democracy protests.”⁵² Official Chinese media called him a “hardcore troublemaker,” and the Hong Kong-Beijing Liaison Office (which represents China’s government in Hong Kong) intoned: “The University of Hong Kong’s decision to fire Benny Tai is a move that punishes evil and praises the virtuous.”⁵³ However, the Professor said HKU succumbed to pressure from the Mainland, called his removal “the end of academic freedom,” as “[a]cademic staff in education institutions in Hong Kong are no longer free to make

⁴⁵ *Hong Kong: First Arrests*, *supra* note 19; *Hong Kong Police Arrest*, *supra* note 36.

⁴⁶ *Hong Kong: First Arrests*, *supra* note 19; *Hong Kong Police Arrest*, *supra* note 36.

⁴⁷ *Hong Kong: First Arrests*, *supra* note 19.

⁴⁸ *Hong Kong Files First*, *supra* note 20.

⁴⁹ *Hong Kong Pupils Banned from Political Activity*, BBC NEWS (July 8, 2020), www.bbc.com/news/world-asia-china-53336191 [https://perma.cc/P9C3-SBL3].

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Benny Tai: Hong Kong University Fires Professor Who Led Protests*, BBC NEWS (July 28, 2020), www.bbc.com/news/world-asia-china-53567333 [https://perma.cc/4ZRF-3RHF] [hereinafter *Benny Tai*].

⁵³ *Id.*

controversial statements to the general public about politically or socially controversial matters.”⁵⁴ On 10 August, authorities arrested Jimmy Lai, one of the Hong Kong’s successful textile and apparel (“T&A”) entrepreneurs who pioneered the Giordano Brand, and owner of the SAR’s most widely read (as of 2019) print and online papers, *Apple Daily*, for alleged collusion with foreign forces.⁵⁵ (Having earlier jailed Mr. Lai, the authorities closed, on June 23, 2021, that last vestige of Hong Kong’s free press, *Apple Daily*.⁵⁶) Authorities also purged libraries of any suspicious material. On 6 October, a teacher at the Alliance Primary School was fired for allegedly “promoting Hong Kong independence” because she “showed students a TV documentary featuring pro-independence activist Andy Chan Ho-tin,” and then “[p]upils were . . . asked to answer four questions from a worksheet about freedom of speech and proposals for Hong Kong’s independence.”⁵⁷ Notably, this “misconduct” took place before the *Law* entered into force.⁵⁸

Simply put, all such actions manifest a different view about a liberal arts education than traditionally prevailed in Hong Kong:

Hong Kong’s government made liberal studies compulsory in 2009 with the slogan: “It benefits you for life.” But pro-Beijing figures quickly grew concerned that the subject, with modules such as Hong Kong Today and Modern China, covered areas the Communist party considered taboo.

Most schools openly discussed events such as the 1989 Tiananmen Square massacre, making Hong Kong students the only pupils in China permitted to examine the incident.

. . .

Apart from targeting teachers, the government has also urged publishers to voluntarily rewrite liberal studies textbooks. Publishers have dropped references to Hong Kong’s observance of “the separation of powers”, once considered a hallmark of the city’s common law legal system, and removed photos of its 2014 pro-democracy “Umbrella Movement.” The new textbooks also play down China’s pollution problem and issues with workers’ rights, according to local media and Education Breakthrough, an advocacy group. A line

⁵⁴ *Id.* (quoting Tai Yiu Ting (@BennyTaiHK), FACEBOOK (July 28, 2020, 7:10 AM), www.facebook.com/BennyTaiHK/posts/1455230568004033).

⁵⁵ See Jimmy Lai: Arrested Hong Kong Tycoon Tells Protesters To Be “Careful,” BBC NEWS (Aug. 12, 2020), www.bbc.com/news/world-asia-china-53748285 [<https://perma.cc/7YU5-V6J8>].

⁵⁶ See Yvette Tan, *Apple Daily: The Hong Kong Newspaper that Pushed the Boundary*, BBC NEWS (June 24, 2021), www.bbc.com/news/world-asia-china-53734887.

⁵⁷ *Teacher Disqualified for Promoting “Hong Kong Independence,”* BBC NEWS (Oct. 6, 2020), www.bbc.com/news/world-asia-54431729 [<https://perma.cc/BV89-ZY3A>] (observing it was also “the first time that the territory’s Education Bureau has removed a teacher’s licence due to classroom content”) [hereinafter *Teacher Disqualified*].

⁵⁸ *Id.*

critical of China's rubber-stamp parliament was removed from new versions of the textbooks, too.

The pro-democracy Hong Kong Professional Teachers' Union criticised the edits as "political censorship."

But Lawrence Tang, of the pro-establishment Hong Kong Federation of Education Workers, said liberal studies had focused too much on "critical thinking" and missed out on "national identity and patriotism."⁵⁹

And so, the expansive, dare it be said merciless, application of the *National Security Law* continued.

Without doubt, the *in terrorem* effect of the *National Security Law* caused self-censorship not only among Hong Kong's educational and research institutions, but also among banks and security firms that provide research to investor clients:

One economist at an international investment bank in Hong Kong said they were concerned about stepping "on a landmine" in the views they express on China after the new law comes in. Meanwhile, a bank analyst said the security legislation could make existing trends "exponentially worse" and cause financial research to become "irrelevant." Analysts already engaged in self-censorship to an extent in order to maintain relationships with mainland Chinese clients, the economist added, but the new law could "make it institutionalised."

...

Investment banks in Hong Kong last year [2019] avoided mentioning the city's political turmoil in their notes to avoid upsetting Beijing An economist at state-owned Bank of Communications claimed he was forced to resign in part over his comments about the impact of the Hong Kong protests. Swiss bank UBS was temporarily shut out of advising on bond deals in China and put a top economist on leave after his comments on a swine fever outbreak prompted a furore.

...

. . . [M]any [financial analysts] are wondering what kind of material – such as, for example, a piece questioning the veracity of China's official economic data – could fall under the scope of the law. Hong Kong . . . has long been the preferred location in Asia for banks and brokers to provide their clients with research on China's economy and its markets. But with the new law, some think the legal firewall that

⁵⁹ Nicolle Liu & Joe Leahy, *Beijing Wrests Control of Hong Kong's Classrooms*, FIN. TIMES (Oct. 6, 2020), www.ft.com/content/19a1a697-17d9-405c-ba42-28998cfb707a [<https://perma.cc/C72U-QVDR>].

separates Hong Kong from mainland China could in effect disappear.

...

Some investors believe further self-censorship of research could also encourage more fraudulent activity by companies listed in Hong Kong.⁶⁰

⁶⁰ Primrose Riordan, Hudson Lockett & Thomas Hale, *New China Security Law Could Stifle Research in HK, Say Analysts*, FIN. TIMES (June 30, 2020), www.ft.com/content/9e7d7279-4a23-4795-a6c5-89aef460af7 [<https://perma.cc/TR79-4ZRF>]; see also Victor Mallet, *Hong Kong Law Threatens Freedom of Information*, FIN. TIMES (July 2, 2020), www.ft.com/content/a9dcd620-b51e-4a68-bd95-dc387aeec3e7 [<https://perma.cc/AQ75-CQ66>] (arguing the *National Security Law* will impede freedom of information, particularly with respect to holding government accountable, and exposing abuses, and thus will undermine credible data on which markets rely and a free society rests). Self-censorship extended to small retail stores. See Yanni Chow & Carol Mang, *New Security Law Starts to Break Down Hong Kong's Pro-Democracy Economy*, REUTERS (July 6, 2020, 7:07 PM), www.reuters.com/article/us-hongkong-protests-economy/new-security-law-starts-to-break-down-hong-kongs-pro-democracy-economy-idUSKBN24800H [<https://perma.cc/V5UW-6N6S>] (reporting on the removal of “protest-themed paintings, posters and flags from the list of items for sale,” “protective gear worn by protesters, flags with the slogan ‘Liberate Hong Kong,’ and other items carrying popular chants,” and “so-called Lennon Walls, the mosaics of colored Post-it notes with protest messages left by customers, named after the John Lennon Wall in communist-controlled Prague that was covered with Beatles lyrics and messages of political grievance” by several among the “4,500 or so small businesses in Hong Kong’s ‘yellow economy,’ which supports pro-democracy protesters and vice versa”). And, of course, booksellers began self-censoring within days of the *National Security Law* taking effect:

The city used to revel in its reputation for its free press and as an outlet for open criticism of Beijing. But China’s imposition of a national security law aimed at quashing political protests in the territory has also sent a chill through Hong Kong’s once vibrant publishing and media industry.

...

The new regulations imposed this month were set to be tested at the popular annual book fair, until a surge in coronavirus infections forced organisers to delay the event. The fair drew more than 1m visitors over seven days last year, despite disruption from anti-government protests near the venue. A group that supports Junius Ho, a pro-Beijing lawmaker, had called on visitors to the fair to report any books on Hong Kong independence or products that endangered national security.

But the threats have not been just economic. In 2015, five men linked to Causeway Bay Books in the city disappeared. The shop specialised in sensationalist gossip about the Chinese leadership and was popular with mainland tourists.

Lee Bo, who worked at the shop, was snatched from Hong Kong, while publisher

Moreover, as for foreign financial institutions (“FFIs”):

Bankers at Credit Suisse Group AG . . . , HSBC [Hong Kong Shanghai Bank] Holdings Plc . . . , Julius Baer Gruppe AG . . . , and UBS Group AG . . . , among others, are broadening scrutiny under their programs that screen clients for political and government ties and subjecting them to additional diligence requirements. . . .

The designation, called politically exposed persons, can make it more difficult or altogether prevent people from accessing banking services, depending on what the bank finds about the person’s source of wealth or financial transactions.

The checks at some wealth managers have involved combing through comments made by clients and their associates in public and in media, and social media posts in the recent past

. . . [T]he broadened scrutiny of clients also applied to Hong Kong and Chinese officials who had implemented the law in anticipation of any U.S. sanctions against them.

One banker at a global wealth manager that holds more than \$200 billion in assets said the audit of its clients could go back as far as 2014

and author Gui Minhai vanished from Thailand. He later appeared in custody in Mainland China.

Jimmy Pang, director of publisher Subculture, said Hong Kong had lost its reputation as the world’s freest Chinese-language publishing community. “The boundary of the national security law is very unclear. The red line is a moving one,” he said.

He fears potential penalties under the law are too great for publishers to risk a mis-step.

Within days of the new law being imposed, public libraries pulled a handful of titles from the shelves for review, including two books written by Joshua Wong, the pro-democracy campaigner. Mr. Pang’s company had published some of the books under review.

“In just one month, the national security law has overturned Hong Kong. Hong Kong’s freedom has faded,” Mr. Pang said.

A lack of clarity on what might be deemed illegal means Mr. Pang has opted not to sell *6430*, a book about the 1989 Tiananmen Square massacre, at the fair when it does open. The book includes interviews with dissidents in exile.

Nicole Liu & Alice Woodhouse, *Hong Kong’s Publishers Self-Censor in Wake of National Security Law*, FIN. TIMES (July 18, 2020), www.ft.com/content/f1352a8a-3931-4160-99f2-af7bbe5b67db [https://perma.cc/FAU9-JJUY].

in some cases to gauge a client's political stance since Hong Kong's 2014 pro-democracy "umbrella" movement. Protesters at the time used umbrellas to shield themselves from tear gas and pepper spray deployed by police.

...

Some wealth managers in Hong Kong say they are worried about the regulatory and reputation risks to their banks if charges under the sweeping security law are brought against some of their politically linked clients. . . .

A top executive at a regional wealth manager said that his firm's risk and compliance team prepared a list of top 10 Hong Kong individuals identified in local media as pro-democracy sympathisers within a couple of days of the enactment of the law on July 1, the anniversary of the handover.⁶¹

Note that at least two motives drove FFI concerns: running afoul of *China's National Security Law*, and also reputational risk. Query, however, whether FFIs might exacerbate the risk by "playing along" with the *Law* by a purge of politically incorrect clients.

The status of Hong Kong as a merchandise trading center gradually had been diminished: in 1992, 45% of China's exports went through Hong Kong; by 2019, the figure had fallen to 12%,⁶² as the CCP bolstered other ports on the Mainland's east coast, such as Shanghai. With the new *National Security Law*, the status of Hong Kong as a global financial hub, as well as a prominent regional educational center, is in doubt. Indeed, note the confluence of events: "the end of Hong Kong's preferential treatment" by the U.S. in response to that *Law*, lessened the attractiveness of Hong Kong as "an important base for international banks and trading firms,"⁶³ especially with respect to trade finance activities; and the diminished importance of that financial base made Hong Kong less central as *entrepôt* (i.e., import-export distribution, repackaging, and distribution) trade.

Not surprisingly, public opinion surveys showed a majority of Hong Kong residents opposed the *National Security Law*.⁶⁴ So, too, did over 80% of the

⁶¹ Sumeet Chatterjee, James Pomfret & Greg Torode, *Exclusive: Global Banks Scrutinize their Hong Kong Clients for Pro-Democracy Ties*, REUTERS (July 19, 2020, 10:14), www.reuters.com/article/us-hongkong-security-wealth-exclusive/exclusive-global-banks-scrutinize-their-hong-kong-clients-for-pro-democracy-ties-sources-idUSKCN24L096 [https://perma.cc/W6SY-ADD2].

⁶² See Jenny Leonard, Iain Marlow & John Harney, *U.S. Halts Some Hong Kong Trade Benefits Over China Law*, BLOOMBERG (June 29, 2020, 5:04 PM), www.bloomberg.com/news/articles/2020-06-29/u-s-suspends-some-trade-benefits-to-hong-kong-ross-says?sref=7sxw9Sxl [https://perma.cc/4NZG-9TRL] [hereinafter *U.S. Halts Some*].

⁶³ *Id.*

⁶⁴ See *China Says Hong Kong Law Hangs*, *supra* note 25.

companies the American Chamber of Commerce surveyed.⁶⁵ Why do it then? Why did the CCP impose this law. *Bloomberg* also offered an answer: “Hong Kong’s freedoms have become increasingly tenuous as [China’s President] Xi [Jinping] grows more confident in China’s ability to withstand foreign pressure and Hong Kong protesters embrace more radical positions such as independence.”⁶⁶ Bluntly put, the answer is sheer confidence in power. So, unsurprisingly, “Hong Kong leader Carrie Lam, who defended the legislation, . . . welcomed the NPC’s approval,” predicting:

It will not affect the legitimate rights and freedoms enjoyed by Hong Kong residents,” she said. “‘One Country, Two Systems’ has been Hong Kong’s top advantage, and a stable and safe society will provide a favorable business and investment environment. This will help better Hong Kong’s development down the road.”⁶⁷

So, the pro-China argument was “the law is essential to tackle growing violence and ‘terrorism,’ and that the territory’s residents have nothing to fear from it.”⁶⁸ Only a small number of veritable miscreants would be prosecuted. But, equally unsurprisingly, “Hong Kong’s democracy camp” was unpersuaded:

Jimmy Lai, a Hong Kong media tycoon and prominent pro-democracy activist, said the laws could push business away and eventually turn anyone who participates in a demonstration into a criminal.

“It’s like a knife on top of our head,” Lai told Bloomberg Television. “Anytime it will come to our neck.”⁶⁹

And so, it did for Mr. Lai. In August 2020, he was arrested under the *National Security Law* for “collaborating with foreign forces,”⁷⁰ and formally charged in December with “conspiring with foreign forces to endanger national security.”⁷¹

In effect, CCP and pro-China Hong Kong officials saw Mr. Lai and his cohorts as a small number of “troublemakers” who destabilized Hong Kong with

⁶⁵ *See id.* (observing eighty percent of these companies were “concerned” or “very concerned” about the new legislation).

⁶⁶ *Id.* (reporting that “Beijing is determined to signal strength and resolve even when doing so might harm China’s economic and reputational interests in the U.S., Europe and now India,” said Rush Doshi, Director of the Brookings China Strategy Initiative”).

⁶⁷ *China Approves Hong Kong*, *supra* note 13.

⁶⁸ *Hong Kong Security*, *supra* note 15.

⁶⁹ *China Approves Hong Kong*, *supra* note 13.

⁷⁰ Primrose Riordan, *Hong Kong Activist Joshua Wong Sentenced to Prison Over Protests*, *FIN. TIMES* (Dec. 2, 2020), www.ft.com/content/743fafac-b9f6-490f-b06d-c142868f2865 [hereinafter *Hong Kong Activist Joshua*]. Mr. Lai was arrested again in December 2020, and detained, for alleged fraud, specifically, illegal use of his company’s premises. *See Hong Kong Pro-Democracy Tycoon Jimmy Lai Detained for Fraud*, *BBC NEWS* (Dec. 3 2020), www.bbc.com/news/world-asia-china-55168823 [<https://perma.cc/ZF8K-F85W>].

⁷¹ *Hong Kong Pro-Democracy Tycoon Jimmy Lai Charged Under Security Law*, *BBC NEWS* (Dec. 11, 2020), www.bbc.com/news/world-asia-china-55271020 [<https://perma.cc/5ECP-NSMA>].

violent, anti-China protests.⁷² They, not the broader Hong Kong public and its freedoms, were the target of the new *National Security Law*. Conversely, “Demosisto, an advocacy group led by prominent young Hong Kong democracy activist Joshua Wong, said the security law will be ‘the death of freedom in Hong Kong.’”⁷³ The 24-year-old Mr. Wong proved prescient. In December 2020, he was sentenced to 13.5 months in prison for “organising, participating in and inciting others to take part in an unauthorised assembly when protesters surrounded police headquarters” in June 2019.⁷⁴ That was “the toughest and most high-profile sentence for an opposition figure” handed down in 2020,⁷⁵ even though he was not convicted under the *National Security Law*, which post-dated his offence. The sentencing Magistrate, Wong Sze-lai, said it was “necessary to emphasize deterrence and punishment.”⁷⁶

That was not sufficient for the authorities, however. In May 2021, they jailed Mr. Wong for an additional 10 months for participating in a vigil to commemorate the 4 June 1989 Tiananmen Square massacre.⁷⁷ Such vigils, which had been held annually since 1990, became illegal in 2020 (purportedly for public health reasons amidst the COVID-19 pandemic). And, in March 2021, the 73-year-old Mr. Lai, along with seven other prominent, veteran pro-democracy leaders – included the venerable 82-year-old barrister, Martin Lee, revered as the “father of democracy” in Hong Kong, were founded guilty of unauthorized assembly.⁷⁸ Mr. Lai received a 14-month sentence, and Mr. Lee an 11-month suspended sentence.⁷⁹

⁷² James Pomfret & Stella Qiu, *China Media, Hong Kong Government Bristle at Trump’s Pledge of Curbs, Sanctions*, REUTERS (May 30, 2020, 9:33), www.reuters.com/article/us-hongkong-protests/china-media-hong-kong-government-bristle-at-trumps-pledge-of-curbs-sanctions-idUSKBN237022 [<https://perma.cc/7T4D-ZR7Q>] [hereinafter *China Media, Hong Kong*].

⁷³ *Id.*

⁷⁴ *Hong Kong Activist Joshua*, *supra* note 70.

⁷⁵ See Jessie Pang & Clare Jim, *Hong Kong Activist Joshua Wong Defiant as He Is Jailed Over 13 Months for Protest*, REUTERS (Dec. 2, 2020), www.reuters.com/article/us-hongkong-security/hong-kong-activist-joshua-wong-jailed-for-thirteen-and-a-half-months-for-anti-government-protest-idUSKBN28C0SP (also reporting “Wong had pleaded guilty to organising and inciting an unlawful assembly near the city’s police headquarters during the height of the sometimes violent demonstrations in June last year,” and that “[h]e faced a maximum of three years in jail”).

⁷⁶ *Hong Kong Activist Joshua*, *supra* note 70.

⁷⁷ *Hong Kong: Joshua Wong Jailed Over Banned Tiananmen Vigil*, BBC NEWS (May 6, 2021), www.bbc.com/news/world-asia-china-57005120 [<https://perma.cc/69YH-VHW3>].

⁷⁸ See Austin Ramzy, *Hong Kong Court Convicts Democracy Leaders Over Protest March*, N.Y. TIMES (Mar. 31, 2021), www.nytimes.com/2021/03/31/world/asia/hong-kong-democracy-protest.html?referringSource=articleShare [<https://perma.cc/TE76-NX3T>] (also reporting: “‘This trial was also about the long history, legacy and contributions of the elder statesmen and women of the movement,’ said Samuel Chu, the managing director of the Washington-based Hong Kong Democracy Council. ‘It is about discrediting their lifetime contributions to Hong Kong, to the movement, to workers, to grass-roots, to individuals and their professions.’”).

⁷⁹ See *Hong Kong: Jimmy Lai Sentenced to 14 Months for Pro-Democracy Protests*, BBC NEWS (Apr. 16, 2021), www.bbc.com/news/world-asia-56770567; *Hong Kong Media Tycoon Jimmy Lai Faces 12 Months in Prison for Unauthorized Assembly*, REUTERS (Apr. 16, 2021), www.reuters.com/world/asia-pacific/hong-kong-media-tycoon-jimmy-lai-faces-12-months-prison-unauthorised-assembly-2021-04-16/.

B. November 2020 LegCo Purge

In November 2020, the CCP and Carrie Lam made plain they also considered pro-democracy legislators in Hong Kong's Legislative Council ("LegCo") – the unicameral legislature for the Special Administrative Region ("SAR") to be a threat under the *National Security Law*, which (as discussed earlier) criminalized (with punishment of up to life imprisonment) acts of subversion, secessionism, terrorism, or collusion with foreign forces. On 11 November, China's NPC Standing Committee "adopted a resolution allowing the city's executive [*i.e.*, Hong Kong's Chief Executive, Ms. Lam] to expel lawmakers deemed to be advocating Hong Kong independence, colluding with foreign forces or threatening national security, without having to go through the courts."⁸⁰ In other words, said the Standing Committee's resolution, "lawmakers should be disqualified if they support Hong Kong independence, refuse to acknowledge China's sovereignty, ask foreign forces to interfere in the city's affairs or in other ways threaten national security," and that the Hong Kong government could act directly, without having to work through the judiciary.⁸¹ Any shred of separation of powers was gone. Indeed, "the Hong Kong government has said that the concept of the separation of powers has never actually applied in the city."⁸²

Ms. Lam's government acted immediately, "announc[ing] the disqualification of four assembly [*i.e.*, LegCo] members who had previously been barred from running for re-election as authorities deemed their pledge of allegiance to Hong Kong was not sincere."⁸³ That is, on 10 November, four prominent representatives, Kwok Ka-Ki, Alvin Yeung, Dennis Kwok of the Civic Party, and Kenneth Leung of the Professionals Guild, were dismissed.⁸⁴ Allegedly, these four officials advocated independence for Hong Kong, which

⁸⁰ Jessie Pang & Sharon Tam, *Hong Kong Pro-Democracy Lawmakers to Resign as Beijing Moves to Quash Opposition*, REUTERS (Nov. 10, 2020, 7:21 AM), www.reuters.com/article/us-hongkong-security/hong-kong-pro-democracy-lawmakers-to-resign-as-beijing-moves-to-quash-opposition-idUSKBN27R0CO [<https://perma.cc/KX52-XW77>] [hereinafter *Hong Kong Pro-Democracy Lawmakers*].

⁸¹ *Hong Kong Pro-Democracy Lawmakers Resign After China Ruling*, BBC NEWS (Nov. 11, 2020), www.bbc.com/news/world-asia-china-54899171 [<https://perma.cc/XNK7-EJND>] [hereinafter *Hong Kong Pro-Democracy Lawmakers Resign*]. As foreign judges, including from Britain, sit on the Hong Kong Court of Final Appeal, and as the *Basic Law* "guarantees that Hong Kong's courts will 'exercise judicial power independently, free from any interference,'" whereas the *National Security Law* breached the principles of separation of powers and judicial independence, because (*inter alia*) that Law "allows trials for some offenses to be conducted in Mainland China and for Carrie Lam, the Hong Kong Chief Executive, to directly appoint a pool of judges for national security-related cases in a stark break with the spirit of the Basic Law," the U.K. warned "that British judges sitting on Hong Kong's highest court should not lend 'a veneer of legitimacy' to the territory's legal system if it was compromised by the security law." Primrose Riordan & Nicolle Liu, *Hong Kong's Independent Judiciary Braced for Beijing Onslaught*, FIN. TIMES (Nov. 25, 2020), www.ft.com/content/d08b540f-f124-437b-976c-013c431f61cc [<https://perma.cc/TJ22-L7Z4>].

⁸² *Hong Kong Pro-Democracy Lawmakers Resign*, *supra* note 81.

⁸³ *Hong Kong Pro-Democracy Lawmakers*, *supra* note 80.

⁸⁴ *Hong Kong Pro-Democracy Lawmakers Resign*, *supra* note 81.

was illegal under Article 20 of the *National Security Law*. They flatly denied the charge, and their cause was taken up by their fellow like-minded legislators.

Fifteen of the remaining 17 opposition representatives (there had been 21 in total) in LegCo resigned in solidarity.⁸⁵ And, “[a]t a news conference in Hong Kong which started with all opposition lawmakers holding hands, Democratic Party Chairman Wu Chi-Wai said: ‘We can no longer tell the world that we still have ‘one country, two systems, this declares its official death.’”⁸⁶ China said the resignations were an “open challenge” to its authority, while an opposition lawmaker unfurled a banner in the LegCo Assembly building that read “She [Carrie Lam] will stink for 10,000 years.”⁸⁷

The CCP-Lam purge of LegCo was a watershed. The 19 departing opposition members (*i.e.*, the four who were tossed out plus the 15 who tendered their resignation letters) were “all part of the *moderate* old guard of democrats.”⁸⁸ LegCo was “crippled.”⁸⁹ All that was left in the 70-seat LegCo was one extreme – loyalists to the Mainland – with no possibility of reasonable dialogue, nor of holding pro-Beijing officials accountable to public opinion in Hong Kong. As the BBC tellingly reported, “[f]or the first time since Hong Kong was handed back to China in 1997 the body has almost no dissenting voices,” notwithstanding the fact Britain returned the city “under the ‘one country, *two* systems’ principle, which allowed it to retain more rights and freedoms than the mainland *until 2047*.”⁹⁰

Ms. Lam assertion – that she “welcomed diverse opinion . . . but the law had to be applied”⁹¹ – sounded oxymoronic, because “the law” was a tool to stifle “diverse opinion.” That was confirmed by the CCP itself:

Shortly after the disqualifications, China’s Representative Office in the city said Hong Kong had to be ruled by loyalists.

“The political rule that Hong Kong must be governed by patriots shall

⁸⁵ *Hong Kong: China Condemns Defiant Opposition Lawmakers*, BBC NEWS (Nov. 12, 2020), www.bbc.com/news/world-asia-china-54900174 [<https://perma.cc/FAC7-DM3R>] [hereinafter *Hong Kong: China Condemns*].

⁸⁶ *Hong Kong Pro-Democracy Lawmakers*, *supra* note 80. Arguably, the opposition had no choice but to resign *en masse*, for had they stayed in their LegCo seats, then they would have legitimized China’s and Ms. Lam’s actions. In any event, “[M]s Lam said the four council members who were disqualified had already failed to meet the requirements to stand in the now postponed elections next year [2021].” *Hong Kong Pro-Democracy Lawmakers Resign*, *supra* note 81.

⁸⁷ *Hong Kong: China Condemns*, *supra* note 85.

⁸⁸ *Hong Kong Pro-Democracy Lawmakers*, *supra* note 80 (emphasis added).

⁸⁹ *Hong Kong: China Condemns*, *supra* note 85 (quoting Hong Kong political commentator Johnny Lau).

⁹⁰ *Hong Kong Pro-Democracy Lawmakers Resign*, *supra* note 81 (emphasis added).

⁹¹ *Hong Kong Pro-Democracy Lawmakers*, *supra* note 80 (characterizing her remarks, and also reporting her words: “We could not allow members of a Legislative Council who have been judged in accordance with the law that they could not fulfil the requirement and the prerequisite for serving on the Legislative Council to continue to operate”); *Hong Kong Pro-Democracy Lawmakers Resign*, *supra* note 81 (quoting Ms. Lam that “although she ‘welcomes diverse opinions in the Legislative Council,’ these had to be expressed ‘in a responsible manner’”).

be firmly guarded,” the Liaison Office said.⁹²

Likewise:

Chinese Foreign Ministry spokesman Wang Wenbin said the disqualification of the four lawmakers was “rational, reasonable and in line with the constitution and laws.”

“This was a necessary requirement for adhering to and improving on ‘one country, two systems,’ implementing Hong Kong’s *Basic Law*, as well as Hong Kong’s *National Security Law*.”⁹³

Dennis Kwok replied: “If observing due process and fighting for democracy can lead to being disqualified, it [disqualification] will be my honour.”⁹⁴

The LegCo purge was a watershed in a second sense, namely, the direct targeting by the U.S. of senior officials in China’s legislature. On 7 December, America imposed a travel ban on 14 members of the National People’s Congress Standing Committee (“NPCSC”), specifically, its Vice Chairpersons, and their immediate family members, plus put financial sanctions on them: any assets those officials had within the U.S. were blocked (*i.e.*, frozen), and all U.S. persons (individuals and companies) were forbidden from dealing with them.⁹⁵ The U.S. said these 14 newly identified Specially Designated Nationals (“SDNs”) were directly involved in disqualifying democratically-elected opposition members from LegCo. With this move, the U.S. was clearly looking through Hong Kong to Beijing to hold CCP officials on the Mainland responsible for their repressive measures. Sanctions policy thus was aligned with other dimensions of trade policy: with the Mainland having compromised Hong Kong’s autonomy, the U.S. did not differentiate between Mainland officials and their proxies in Hong Kong, like Chief Executive Carrie Lam, just as it did not differentiate between merchandise made on the Mainland versus Hong Kong. From the American perspective, the U.S. was adjusting its measures to China’s erosion of the “One Country, Two Systems” formula that had guaranteed Hong Kong’s freedom since the 1 July 1997 British handover of the territory.

As had been its pattern throughout the Trade War, the CCP’s response was tit-for-tat. In December, it said it would sanction additional U.S. officials and restrict travel by U.S. diplomats in retaliation for the American measures against the NPCSC.⁹⁶

⁹² *Hong Kong Pro-Democracy Lawmakers*, *supra* note 80.

⁹³ *Hong Kong Pro-Democracy Lawmakers Resign*, *supra* note 81 (emphasis added).

⁹⁴ *Id.*

⁹⁵ See Humeyra Pamuk, *U.S. Slaps Sanctions on 14 Chinese Officials over Hong Kong Crackdown*, REUTERS (Dec. 7, 2020, 9:49 AM), www.reuters.com/article/usa-china-sanctions/u-s-slaps-sanctions-on-14-chinese-officials-over-hong-kong-crackdown-idUSKBN28H1ZT [<https://perma.cc/4P4M-TTLS>].

⁹⁶ *China to Sanction U.S. Officials, Curb Some Diplomat Travel*, BLOOMBERG (Dec. 10, 2020, 1:37 AM), www.bloomberg.com/news/articles/2020-12-10/china-to-sanction-u-s-lawmakers-curb-some-travel-for-diplomats?sref=7sxw9Sxl [<https://perma.cc/4SXE-QS7A>].

C. Failed 2003 Attempt to Implement Basic Law Article 23 and CCP Argument

Notably, the CCP's new legislation was akin to that considered by Hong Kong's Legislative Council in 2003, *i.e.*, *National Security (Legislative Provisions) 2003*. That 2003 LegCo effort, to implement Article 23 of Hong Kong's *Basic Law*, failed. LegCo was forced to shelve it after strong demonstrations against it by people in Hong Kong:

According to Article 23 of the *Basic Law*, Hong Kong's government and legislature were required to enact and pass national security legislation to replace colonial laws that expired when the former U.K. colony reverted to Chinese sovereignty in 1997.

Hong Kong's first chief executive, Tung Chee-hwa, attempted to pass national security legislation in 2003 but withdrew it after it triggered a mass protest. Mr Tung's Administration never recovered from the failure and he resigned two years later halfway through his second term. His three successors never attempted to reintroduce national security laws, despite ever more strident warnings from Chinese officials that Hong Kong was duty-bound to do so under the *Basic Law*.⁹⁷

Note the CCP interpretation of Article 23, namely, that Hong Kong was in violation of this provision by not replacing the British colonial era national security law with a new one. So, this time, having been patient since 2003, the CCP bypassed LegCo. The bill came straight from Beijing.

Was China correct in its view of Article 23? This Article states:

The Hong Kong Special Administrative Region shall enact laws *on its own* to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.⁹⁸

From China's perspective, LegCo failed to enact the laws called for by Article 23. Indeed, the U.K. failed to do so before the 1997 handover: it had attempted to define "subversion" and "secession" via the *Crimes (Amendment) (No.2) Bill 1996*, the CCP opposed that effort.⁹⁹ So, the CCP had to act. Mainland

⁹⁷ Tom Mitchell & Nicolle Liu, *China Risks New Hong Kong Protests by Imposing Security Law*, FIN. TIMES (May 21, 2020), www.ft.com/content/f2c2c055-cba9-45e1-81f8-94cc76672f14 [https://perma.cc/95H6-BEQH].

⁹⁸ *Chapter II Relationship Between the Central Authorities and the Hong Kong Special Administrative Region*, THE BASIC LAW (July 17, 2020), www.basiclaw.gov.hk/en/basiclawtext/chapter2.html [https://perma.cc/6VNC-UQHJ] (emphasis added).

⁹⁹ See YIU-CHUNG WONG, ONE COUNTRY, TWO SYSTEMS IN CRISIS: HONG KONG'S

authorities needed a legal tool to deal with widespread unrest, which they had witnessed in 2019 in the Hong Kong SAR in response to a controversial extradition bill (which LegCo also could not enact amidst violent protests).¹⁰⁰

D. Hong Kong Lawyers Counterargument

Did the way in which the CCP acted, however, contravene the *Basic Law*? Changes to the *Basic Law* require (under its own terms) public debate and passage by LegCo.¹⁰¹ The Party did not allow for such a debate, and bypassed LegCo.¹⁰² The *Basic Law* guaranteed “freedom of speech, the press, assembly, association, procession and demonstration.”¹⁰³ The *National Security Law* threatened those freedoms, and more, said leading Hong Kong legal scholars, and the Hong Kong Bar Association:

[The new *National Security Law*] would prohibit “splittism, subversion, terrorism, any behaviour that gravely threatens national security and foreign interference.”

These terms have not been defined but the proposed law would probably be similar to China’s national security legislation, said Johannes Chan, a former Law School Dean at the University of Hong Kong. “China’s national security law basically covers whatever [Beijing] wants it to cover. The last thing we want is for Mainland China’s criminal law to apply to Hong Kong.”

...

Beijing said it could not wait any longer for Hong Kong to introduce its own national security law [following the 2003 failed effort, discussed above] But Beijing did not have the authority to impose such a law, lawyers said. Beijing’s proposal violates the *Basic Law*, which [in Article 23, quoted above] states that Hong Kong shall enact anti-subversion laws “on its own,” according to the Hong Kong Bar Association, adding that there are “a number of worrying and problematic features” about the proposed law.

...

“This is the nuclear option: Beijing’s ultimate power to impose whatever it wants on Hong Kong, outside and above Hong Kong’s constitutional, political and legal structure,” said Antony Dapiran, a

TRANSFORMATION SINCE THE HANDOVER 69–70 (2008).

¹⁰⁰ See *Hong Kong ‘No Longer Autonomous from China’ – Pompeo*, BBC News (May 27, 2020), www.bbc.com/news/world-us-canada-52824839 [<https://perma.cc/4VES-7JMM>] (reporting “[t]he anti-mainland sentiment was fuelled last year by a proposed - and later scrapped - bill that would have allowed criminal suspects to be extradited to China”).

¹⁰¹ See *What Are the New*, *supra* note 34.

¹⁰² *Id.*

¹⁰³ *Hong Kong Files First*, *supra* note 20.

lawyer who has written two books on Hong Kong's protest culture. Hong Kong's rule of law, which includes an independent judiciary, is one of the crucial factors that distinguishes it from mainland China. But the draft law [which was finalized and implemented] instructs the territory's judiciary to "effectively prevent, stop and punish acts endangering national security." This suggests Hong Kong's judges will be instructed by the Chinese Communist Party to act in certain ways, undermining the city's rule of law.

While China's state security agencies have long operated undercover in Hong Kong, the proposed bill allows China's secret police to have a formal presence in the territory. Legal scholars say this also violates the *Basic Law*.

...

Much remains unknown about the law, including the definitions of "splittism, subversion, terrorism and foreign interference." The scope of China's national security law extends beyond ordinary criminal activities to cover finance, business and the internet.

It is also unclear if the law will apply retroactively, whether Hong Kong courts or mainland Chinese courts will administer the law and how China's secret police will operate in Hong Kong. "From Beijing's point of view, these uncertainties may be a feature rather than a bug: fuzzy legal boundaries will compel more people to engage in self-censorship," said Alvin Cheung, a legal scholar.¹⁰⁴

Dean Chan thus concluded any assurances from the CCP about the new law were "short-sighted":

"From the beginning, Beijing's understanding of 'one country, two systems' has been 'one country, two economic systems,' and they don't want anything else," he says. "But Hong Kong's economy doesn't work like that. *You can't have economic success without also political freedoms and all the basic values that flow from that.*"¹⁰⁵

His proposition was a fundamental one: not only did the CCP's law contravene the "One Country, Two Systems" principle, but also economic performance and political liberty are positively correlated.

Not surprisingly, on 1 July 2020, when the *National Security Law* was implemented, the Hong Kong Bar Association issued a five-page *Statement*

¹⁰⁴ Sue-Lin Wong & Nicolle Liu, *What is China's Proposed National Security Law for Hong Kong?*, FIN. TIMES (May 27, 2020), www.ft.com/content/27f4c7d0-ef5c-409c-b7b1-6c8108b8d128?shareType=nongift [https://perma.cc/U3D6-QSPD] [hereinafter *What is China's?*].

¹⁰⁵ Quoted in Tom Mitchell, Nicolle Liu & Xinling Liu, 'A Broken Piece of Jade': *The Turbulent Future of Hong Kong*, FIN. TIMES (May 29, 2020), www.ft.com/content/33ebddb5-4489-4774-bb61-7a7272f852e5?shareType=nongift [https://perma.cc/VHT4-29BH] (emphasis added).

saying “it was ‘gravely concerned’ about the *Law* and its broadly defined criminal offenses.¹⁰⁶ “[L]awyers, judges, police and Hong Kong residents were given no opportunity to familiarise themselves with the contents of the new *Law*, including the serious criminal offenses it creates, before it came into force.”¹⁰⁷ These offences were “widely drawn and absent a clear and comprehensive array of publicly accessible guidelines and basic safeguards as to legal certainty and fair treatment, are capable of being applied in a manner that is arbitrary, and that disproportionately interferes with fundamental rights.”¹⁰⁸

E. American Counterargument and Ending of Hong Kong’s Special Trade Status

Likewise, America rejected the Chinese perspective. When the CCP persisted within 24 hours of U.S. warnings,¹⁰⁹ Secretary of State Mike Pompeo determined that Hong Kong and the Mainland were all but one: “No reasonable person can assert today that Hong Kong maintains a high degree of autonomy from China, given facts on the ground.”¹¹⁰ The Secretary added:

“It is a different Chinese Communist Party today than it was 10 years ago,” Pompeo said. The Party is “intent upon the destruction of Western ideas, Western democracies, Western values.”

...

“If the Chinese are going to treat Hong Kong the same way they treat mainland China, there’s *no basis* for the United States to treat it

¹⁰⁶ *Hong Kong Files First*, *supra* note 20; *The Law of the People’s Republic of China (“PRC”) on Safeguarding National Security in the Hong Kong Special Administrative Region (“HKSAR”)*, HONG KONG BAR ASSOCIATION (July 1, 2020), www.hkba.org/sites/default/files/20200701%20HKBA%20statement%20on%20Safeguarding%20National%20Security%20in%20HKSAR.pdf [https://perma.cc/XD2S-R48C] [hereinafter Hong Kong Bar Association Statement].

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See Keith Bradsher & Steven Lee Myers, *Beijing Hardens Resolve to Defy U.S., Even While Calling for Cooperation*, N.Y. TIMES (May 28, 2020), www.nytimes.com/2020/05/28/world/asia/china-united-states.html [https://perma.cc/BS73-PV9A] (reporting “Secretary of State Mike Pompeo declared on Wednesday [27 May] that Washington would no longer consider Hong Kong to have significant autonomy, clearing the way for Mr. Trump to end the special trade and economic relations the territory now enjoys,” but that “[l]ess than 24 hours later, the National People’s Congress, China’s legislature, did precisely what Mr. Pompeo had railed against: authorizing new security laws in Hong Kong”).

¹¹⁰ *Quoted in Katrina Manson & Demetri Sevastopulo, U.S. Says Hong Kong Is No Longer Autonomous From China*, FIN. TIMES (May 27, 2020), www.ft.com/content/3ae02552-6948-47ae-8e53-233bcded6bf5 [https://perma.cc/C4UJ-FV77]. The Secretary’s full statement is U.S. Department of State, Press Statement, *P.R.C. National People’s Congress Proposal on Hong Kong National Security Legislation*, Michael R. Pompeo, Secretary of State (May 27, 2020), <https://china.usembassy-china.org.cn/prc-national-peoples-congress-proposal-on-hong-kong-national-security-legislation/> [https://perma.cc/7XJD-V9KJ].

differently as well,” Pompeo said.¹¹¹

He was correct, and his conclusion seemed to prove Soros’ characterization of the Sino-American relationship as a clash concerning the openness of societies. The implication of the Secretary declining to certify Hong Kong’s autonomy was that Hong Kong would lose its special trade status under U.S. law, as well as its visa waiver privilege (meaning travel from Hong Kong, like travel from the Mainland, to the U.S. would not be visa-free).¹¹²

And so the U.S. did. As of 29 June 2020, America commenced steps to end its treatment of Hong Kong as a separate customs or travel territory for purposes of U.S. law.¹¹³ The State Department said America was “end[ing] exports of U.S.-origin defense equipment and . . . tak[ing] steps toward imposing the same restrictions on U.S. defense and dual-use technologies to Hong Kong as it does for China.”¹¹⁴ Likewise, the DOC suspended preferential treatment that exempted U.S. companies from needing to apply for an export license for exports to Hong Kong – they would need to do so, as they did for shipments to the Mainland. The DOC said its “regulations affording preferential treatment to Hong Kong over China, including the availability of export license exceptions, are suspended.”¹¹⁵

¹¹¹ Quoted in Yueqi Yang & Jordan Robertson, *U.S. Has No Basis to Give Hong Kong Special Treatment, Pompeo Says*, BLOOMBERG, (May 31, 2020), www.bloomberg.com/news/articles/2020-05-31/pompeo-says-u-s-now-has-no-basis-to-treat-hong-kong-specially?sref=7sxx9Sxl [<https://perma.cc/7VBF-XYFX>] (emphasis added).

¹¹² See Demetri Sevastopulo, *Donald Trump to Revoke Hong Kong Trade Privileges in China Escalation*, FIN. TIMES (May 29, 2020), www.ft.com/content/4c620b9e-90b7-47bd-afe0-bec216bfa631?shareType=nongift [<https://perma.cc/G8KB-7U4Z>] [hereinafter *Donald Trump to Revoke*].

¹¹³ See *U.S. Halts Some, supra* note 62; Katrina Manson & Demetri Sevastopulo, *U.S. Bars Arms Exports to Hong Kong as it Revokes Special Status*, FIN. TIMES (June 29, 2020), www.ft.com/content/552f40bf-f44a-4e11-bd12-6564ae36865e?shareType=nongift [<https://perma.cc/G65B-DQFT>] (also observing the “move was largely symbolic given that the U.S. shipped only \$1.4m of defence goods to Hong Kong last year [2019], and “[t]he vast majority of that was firearms for police and prison officers,” but that “Kurt Tong, a retired diplomat who served as U.S. Consul-General in Hong Kong until last year [2019], said the move was ‘symbolically important’ since it was the first step taken by Washington and would likely not be the last) [hereinafter *U.S. Bars Arms*].

¹¹⁴ U.S. Department of State, *U.S. Government Ending Controlled Defense Exports to Hong Kong*, Press Statement (June 29, 2020), <https://hk.usconsulate.gov/n-2020062901/> [<https://perma.cc/65PT-H9V3>].

¹¹⁵ U.S. Department of Commerce, *Statement from U.S. Secretary of Commerce Wilbur Ross on Revocation of Hong Kong Special Status*, LEGISTORM (June 29, 2020), https://www.legistorm.com/stormfeed/view_rss/1856667/organization/33279.html [<https://perma.cc/7K G2-KN5C>]. For the DOC suspension order, issued by BIS, see *Suspension of License Exceptions for Hong Kong*, 2 July 2020, www.bis.doc.gov/index.php/documents/pdfs/2568-suspension-of-license-exceptions-for-exports-and-reexports-to-hong-kong/file. The order covered “exports to Hong Kong, reexports to Hong Kong, and transfers (in-country) within Hong Kong of items subject to the Export Administration Regulations (EAR), 15 C.F.R. Parts 730-774, that provide differential treatment than those available to the People’s Republic of China.” *Id.* The scope of the order was comprehensive: the elimination of the special status for Hong meant “no items subject to the EAR may be exported to

This change affected, for example, cameras, processors, microprocessors, surveillance equipment – and even carbon fiber, a dual use item that could be used in golf clubs and missile components.¹¹⁶ Indeed, all merchandise that previously enjoyed the benefits of differentiation from China thanks to a “Made in Hong Kong” rather than a “Made in China” country of origin label henceforth had to be labelled “Made in China.” The homogenization of origin labelling, equating merchandise from Hong Kong with that in the Mainland, caused consternation among Hong Kong producer-exporters.¹¹⁷ They had worked for decades at branding their goods and building a reputation for quality. They feared losing American, and possibly other developed country markets. Their goods would be commingled through labelling with those “Made in China,” and foreign consumers did not have the same degree of confidence in Mainland products as in theirs.

As discussed above, on 29 May 2020, President Trump declared via an *Executive Order* an end to that status (with actual effect occurring the following month).¹¹⁸ This *Order* called on relevant governmental departments and agencies to start eliminating policy exemptions under U.S. law that preferred Hong Kong relative to the Mainland. The President noted the 1984 *Declaration*, which took effect on 27 May 1985, was not set to terminate until 2047 (50 years from the 1997 handover). But, he reasoned, with the *National Security Law* China was imposing on Hong Kong, the CCP clearly breached the 1984 *Declaration* guarantee of “One Country, Two Systems”:

“My announcement today will 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,” Trump said. . . .

The State Department will revise its travel advisory for Hong Kong to

Hong Kong, reexported to Hong Kong, or transferred within Hong Kong based upon an authorization provided by a License Exception except for transactions that would otherwise be eligible for a license exception if exported to the People’s Republic of China,” hence “[a] license must instead be sought and obtained whenever a license requirement applies for an export to, a reexport to, or a transfer within, Hong Kong.”

Several License Exemptions were implicated, such as one for Additional Permissive Re-Exports in the EAR. *See* 15 C.F.R. § 740.16. The change meant Hong Kong would be reclassified as a D-1 country, losing its status as being treated like A-1 countries (which is accorded to *Wassenaar Arrangement* member countries), along with the PRC. Consequently, controlled items, which can be re-exported within A-1 countries, could not be re-exported to Hong Kong (because of its reclassification to D-1 status, with the Mainland). Another example was the License Exemption for “cooperating governments” in the EAR. *See* 15 C.F.R. § 740.11(c). Under it, exports of certain items to NATO members and other “cooperating governments” are allowed. Hong Kong’s loss of special trade status meant it no longer was considered a cooperating government, hence it could not receive exports under this Exemption.

¹¹⁶ *See U.S. Bars Arms*, *supra* note 113.

¹¹⁷ *See Stella Wong, Hong Kong’s Small Businesses Anxious Over ‘Made in China’ Policy*, NIKKEI ASIA (Nov. 10, 2020), <https://asia.nikkei.com/Business/Business-trends/Hong-Kong-s-small-businesses-anxious-over-Made-in-China-policy> [<https://perma.cc/3TSQ-LDCF>].

¹¹⁸ *Donald Trump to Revoke*, *supra* note 112.

warn U.S. citizens of increased surveillance by Chinese state security, he said, adding that the city will now face the same customs restrictions as the mainland.¹¹⁹

Perhaps encouraged by the Mainland, Hong Kong sued the U.S. in the WTO over the cancellation of its special trade status, the first time ever it had brought a case under the *DSU*.

On 3 November 2020, Hong Kong explained:¹²⁰

On 11 August 2020, the U.S. Customs and Border Protection (USCBP [*i.e.*, “CBP”]) published a notice that, after 25 September 2020, goods produced in Hong Kong must be marked to indicate that their origin is “China” for the purposes of the origin marking requirement set forth at Section 304 of the *Tariff Act of 1930*, 19 U.S.C. § 1304. By subsequent notice, . . . CBP extended the date for compliance with this requirement to 10 November 2020.

Section 304 . . . requires articles of non-U.S. origin imported into the United States to be marked “in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article.” Prior to the imposition of the revised origin marking requirement as announced in the notice published on 11 August 2020, the United States has required, and therefore permitted, goods produced in Hong Kong, China to be marked to indicate that their origin is “Hong Kong.” The United States’ prior treatment of goods of Hong Kong, China origin was consistent with the fact that the United States generally permits goods originating within the territory of other WTO Members, including separate customs territory Members, to be marked with the English name of that territory.

. . . CBP published the notice on 11 August 2020 pursuant to the “*Executive Order on Hong Kong Normalization*” signed by the President of the United States Donald J. Trump on 14 July 2020. The *Executive Order* suspends the application of Section 201(a) of the *United States-Hong Kong Policy Act of 1992*, 22 U.S.C. § 5721(a), to a variety of U.S. statutes, including Section 304 of the *Tariff Act of*

¹¹⁹ Alex Fang, *U.S. to Cut Hong Kong’s Special Status*, NIKKEI ASIA (May 29, 2020), https://asia.nikkei.com/Spotlight/Hong-Kong-protests/US-to-eliminate-special-treatment-of-Hong-Kong?utm_campaign=RN%20Subscriber%20newsletter&utm_medium=one%20time%20newsletter&utm_source=NAR%20Newsletter&utm_content=article%20link&del_type=3&pub_date=20200530040000&seq_num=2&si=%user_id% [https://perma.cc/3LBH-DPST].

¹²⁰ See *United States – Origin Marking Requirement: Request for Consultations by Hong Kong, China*, WTO Doc. WT/DS597/1 (Nov. 3, 2020), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/597-1.pdf&Open=True> [https://perma.cc/MV3Y-SGMW] [hereinafter *Hong Kong Origin Complaint*]; *Hong Kong, China Initiates Dispute Complaint Against U.S. Origin Marking Requirements*, WTO (Nov. 3, 2020), www.wto.org/english/news_e/news20_e/ds597rfc_03nov20_e.htm [https://perma.cc/U4W9-NXPP].

1930.

Under Section 201(a) of the *United States-Hong Kong Policy Act of 1992*, the laws of the United States apply to Hong Kong, China in the same manner as those laws applied to Hong Kong prior to the resumption of the exercise of sovereignty by the People's Republic of China on 1 July 1997, unless the President of the United States determines and issues an *Executive Order* that Hong Kong, China "is not sufficiently autonomous to justify treatment under a particular law of the United States . . . different from that accorded the People's Republic of China." The suspension of Section 201(a) . . . as it applies to Section 304 of the *Tariff Act of 1930* is the legal basis upon which . . . CBP ordered that goods produced in Hong Kong "may no longer be marked to indicate 'Hong Kong' as their origin, but must be marked to indicate 'China.'"¹²¹

Hong Kong alleged the U.S. origin rules violated several GATT-WTO obligations.

Hong Kong claimed they violated two pillars of GATT, non-discrimination and transparency. First, the basic GATT most favored nation ("MFN") obligation, along with the MFN rule for marking requirements:

- (1) Article I:1 of the GATT 1994, because in respect of the rules and formalities of importation pertaining to marks of origin, the United States does not extend to products of Hong Kong, China origin immediately and unconditionally the same advantages, favours, privileges, or immunities that the United States extends to like products originating in the territory of other countries;
- (2) Article IX:1 of the GATT 1994, because the United States does not accord to the products of Hong Kong, China treatment with regard to marking requirements no less favourable than the treatment that the United States accords to like products of other countries; . . .¹²²

Likewise, Hong Kong said, the rules violated the parallel obligation in Article 2(d) of the *WTO Agreement on Rules of Origin*, because those rules "discriminate[d] between Hong Kong, China and other Members in respect of the rules of origin that it applies to imports."¹²³ Relatedly, the rules violated Article 2(c) of this *Agreement*, "because in respect of products produced in Hong Kong, the United States requires the fulfilment of a certain condition not related to manufacturing or processing, as a prerequisite for the determination of the country of origin."¹²⁴ Further, the rules violated the MFN obligation in Article 2:1 of the *TBT Agreement*: "the origin marking requirements that the United States applies to imports are technical regulations and, in respect of those technical regulations, the United States does not accord to products imported

¹²¹ *Hong Kong Origin Complaint*, *supra* note 120, at 1.

¹²² *Id.* at 2.

¹²³ *Id.*

¹²⁴ *Id.*

from Hong Kong treatment no less favorable than the treatment that it accords to like products originating in other countries.”¹²⁵

Second, Hong Kong alleged the U.S. origin rules were non-transparent, specifically, they violated GATT Article X:3(a) “because the United States does not administer its origin marking requirements in a uniform, impartial, and reasonable manner.”¹²⁶ For the same reason, they violated the parallel provision in Article 2(3) of the *WTO Agreement on Rules of Origin* concerning the administration of rules of origin (“ROOs”) “in a consistent, uniform, impartial, and reasonable manner.”¹²⁷

How strong were Hong Kong’s core theories about MFN and transparency? Is it not the sovereign province of a WTO Member, here, the U.S., to decide whether to grant special trade status, just as it is to offer special and differential (“S&D”) treatment or enter into an FTA? Hong Kong’s MFN theory seemed to presume it was entitled to be treated differently from China. Even if it was, might the U.S. defend the case on GATT Article XXI national security grounds? As to transparency, this theory required evidence. Hong Kong needed proof CBP operated in a non-uniform, partial, and unreasonable manner.

Terminating Hong Kong’s special status was not the only measure the President declared in late May 2020. There were two others. First, the President said the U.S. would “impose sanctions on individuals seen as responsible for ‘smothering – absolutely smothering – Hong Kong’s freedom,’”¹²⁸ *i.e.*, the U.S. took “necessary steps to sanction PRC . . . and Hong Kong officials directly or indirectly involved in eroding Hong Kong’s autonomy.”¹²⁹ Such sanctions could include freezes of assets subject to U.S. reach, of such persons, and even restricting access of Chinese banks who do business with those persons to U.S. dollar payments and transactions with U.S. banks.¹³⁰ On 26 June 2020, the State

¹²⁵ *Id.*

¹²⁶ *Hong Kong Origin Complaint*, *supra* note 120, at 2.

¹²⁷ *Id.*

¹²⁸ Quoted in Steve Holland, David Brunstrom & Sarah Wu, *In Broadside Against China, Trump Moves Toward Ending Hong Kong Privileges*, REUTERS (May 28, 2020), www.reuters.com/article/us-hongkong-protests/hong-kong-warns-removing-u-s-special-status-is-a-double-edged-sword-idUSKBN235040 [https://perma.cc/2HQ5-S56X] [hereinafter *In Broadside*].

¹²⁹ Quoted in *Donald Trump to Revoke*, *supra* note 112.

¹³⁰ See Gina Chon, *Breaking Views – U.S. Senate Could Shift China Risk into Overdrive*, REUTERS (May 26, 2020), www.reuters.com/article/us-china-u-s-breakingviews/breakingviews-u-s-senate-could-shift-china-risk-into-overdrive-idUSKBN23309S [https://perma.cc/E3Y3-2L RG].

Restricting access by such banks to the U.S.-dollar clearing and settlement system raised the broader question of China attempting to engineer a decoupling of its financial system from the dollar. Given the prominence of the dollar as a reserve currency and its widespread use in international transactions, that would be a difficult, three-pronged task. First, China would need to de-emphasize its dollar-denominated trade, FDI, and portfolio transactions, shifting to the *yuan* and other currencies. Second, China would need to lessen its use of the SWIFT system for payments order messaging. Third, China would need to reduce its need for the New York Clearing House Interbank Payments System (“CHIPS”), which clears \$1.6 trillion worth of dollar transactions daily (95% of all such transactions). See Andy Mukherjee & Nisha Gopalan, *Can China Win the Financial Cold War?*, BLOOMBERG (Aug. 6, 2020), www.bloomberg.com/opinion/articles/2020-08-06/can-china-win-the-financial-cold-war-it-depends-on-u-s-allies?ref=7sxw9Sxl [https://perma.cc/N766-YEUR].

Department followed through, “impos[ing] visa bans on unspecified Chinese Communist Party officials accused of infringing the freedom of Hong Kong citizens. . . .”¹³¹ In specific, Secretary of State Mike Pompeo said the ban targeted CCP officials “responsible for, or complicit in, undermining Hong Kong’s high degree of autonomy.”¹³²

Second, Mr. Trump issued a *Proclamation* “to better safeguard vital university research by suspending the entry of foreign nationals from China identified as potential security risks,” meaning that the U.S. would deny visas to “3,000 to 5,000 Chinese graduate students.”¹³³ That is, “the U.S. would restrict Chinese nationals with ties to the People’s Liberation Army from obtaining student and work-exchange visas, in an effort to target China’s ‘military-civil fusion strategy.’”¹³⁴ Third, he announced the U.S. “would examine the practices of Chinese companies listed on U.S. exchanges, in order to protect American investors,”¹³⁵ because (as he put it) “[i]nvestment firms should not be subjecting their clients to the hidden and undue risks associated with financing Chinese companies that do not play by the same rules.”¹³⁶

The choice of law issue faced by Chinese and other Hong-Kong-operative banks, and their response in favor of complying with U.S. sanctions, is discussed below.

¹³¹ *China to Impose Visa Ban on Americans Interfering in Hong Kong*, BLOOMBERG (June 29, 2020), www.bloomberg.com/news/articles/2020-06-29/china-to-impose-visa-ban-on-americans-interfering-in-hong-kong?sref=7sxx9Sxl [https://perma.cc/CV8G-LUDZ] [hereinafter *China to Impose Visa*].

¹³² *Quoted in id.*

¹³³ *In Broadside*, *supra* note 128.

¹³⁴ *Quoted in Donald Trump to Revoke*, *supra* note 112.

¹³⁵ *Id.*

¹³⁶ *Id.* On 13 May, President Trump called on the U.S. federal pension fund (specifically, the Federal Retirement Thrift Investment Board) not to invest in Chinese equities, including index funds that invest in Chinese shares. *See* Tom Mitchell & Don Weinland, *Beijing Hits Back at Trump Call to Block U.S. Pension Fund Investment in China*, FIN. TIMES (May 13, 2020), www.ft.com/content/a0da73e0-33c2-4ac5-a635-fb5fd9160293 [https://perma.cc/X7NX-JCSH].

The Trump Administration took further steps against China that related to its disagreement with CCP policy in Hong Kong. For example, effective 16 June, it banned passenger flights from China (thus affecting Air China, China Eastern Airlines, China Southern Airlines and Hainan Airlines) – a measure that also was in protest of China’s blocking of U.S. flights amidst the COVID-19 pandemic. *See China Eases Foreign Travel Limit After US Threat*, BBC NEWS (June 4, 2020), www.bbc.com/news/business-52912517 [https://perma.cc/M8F7-R8FV]. In March, China said domestic and “foreign airlines could operate no more than one weekly flight to China” and any given country, “adding that carriers could not exceed the level of service they were offering on 12 March,” but China’s “March [*Executive*] Order . . . effectively banned US airlines, which had voluntarily suspended service between the two countries in February due to the pandemic and Mr Trump’s Order barring entry to the US for most Chinese travellers,” and the U.S. argued “refusal to grant requests [by U.S. airlines] to resume service this month [June] violated the agreement governing air travel between the two countries, which dates back to 1980.” *Id.* Fortunately, in mid-June the two sides worked out a basic reciprocity arrangement, catalyzed by China’s agreement to allow U.S. airlines to fly to the Mainland: Chinese carriers would be allowed the same number of flights as U.S. carriers. *See* David Shepardson, *U.S. to Revise Chinese Passenger Airline Ban After Beijing Move*, REUTERS (June 4, 2020, 12:51 PM), www.reuters.com/article/us-usa-china-airlines/u-s-to-revise-chinese-passenger-airline-ban-after-beijing-move-idUSKBN23B2WJ [https://perma.cc/NHR3-ENUM] (reporting the U.S. decided, effective 8 June, “Chinese carriers could operate ‘the same number of scheduled passenger flights as the Chinese government allows

III. AMERICA'S TRADE MEASURES IN RESPONSE

A. July 2020 Hong Kong Autonomy Act and Executive Order

The aforementioned two measures essentially paved the way for a third set of actions. On 2 July 2020, the U.S. House of Representatives and Senate each unanimously passed the *Hong Kong Autonomy Act*, which mandated new sanctions against China.¹³⁷ Though President Trump did not immediately sign

ours,” after China agreed “all airlines can increase the number of international flights involving China to two per week if none of their passengers test positive for COVID-19 . . . for three consecutive weeks,” “[i]f five or more passengers on one flight test positive upon arrival, the CAAC will bar the airline for a week,” and “[a]irlines would be suspended for four weeks if 10 passengers or more test positive”); David Shepardson, *U.S. Will Allow Chinese Passenger Carriers Two Flights Per Week*, REUTERS (June 5, 2020, 10:57 AM), www.reuters.com/article/us-usa-china-airlines/u-s-will-allow-chinese-passenger-carriers-two-flights-per-week-idUSKBN23C2AW [https://perma.cc/7WWQ-UJSN] (reporting “[t]he United States will permit Chinese passenger air carriers to operate two flights per week after Beijing said it would ease coronavirus-related restrictions to allow in more foreign carriers”).

U.S. allies also took measures in protest of China’s new *National Security Law*. On 28 May 2020, they – that is, Australia, Canada, and the U.K., along with the U.S. – issued a *Joint Statement on Hong Kong* “reiterate[ing] our deep concern regarding Beijing’s decision to impose a national security law in Hong Kong.” See U.S. EMBASSY & CONSULATES IN CHINA, *Joint Statement on Hong Kong*, <https://china.usembassy-china.org.cn/joint-statement-on-hong-kong/> [https://perma.cc/66FA-T2SJ]. Also, the U.K. warned it would grant a path to U.K. citizenship. See *U.K. to Change Immigration Rules for Hong Kong Citizens if China Passes Law*, BBC NEWS, (June 3, 2020), www.bbc.com/news/uk-52900700 [https://perma.cc/56ZJ-2CK6] (reporting that “people in Hong Kong who hold British National (Overseas) (BNO) passports [which the U.K. issued to all Hong Kong citizens before the 1997 handover to China] will be allowed to come to the U.K. for 12 months without a visa,” up from a limit of six months,” be given work permits, and potentially full British citizenship, and that while “[a]round 350,000 people in Hong Kong currently already have a BNO passport . . . 2.6 million others are also eligible,” meaning there could be a potential exodus of human capital from Hong Kong). China “hit back at the UK’s pledge to extend visa rights, arguing . . . the two countries had previously agreed a memorandum stating that the UK would not give Hong Kong BNO passport holders right of residency,” that this “agreement was reached alongside the 1984 *Joint Declaration*, which established the ‘one country, two systems’ arrangement that guarantees Hong Kong a level of autonomy,” and that [in the words of Zhao Lijian, Spokesman, Ministry of Foreign Affairs] “[a]ll of our Hong Kong Chinese compatriots are Chinese citizens,” so “‘if the ‘UK unilaterally changes its approach’ on the matter of British Nationals (Overseas), China would ‘resolutely oppose’ and ‘reserve the right to use appropriate countermeasures.’” Laura Hughes & Yuan Yang, *U.K. Widens Visa Rights Offer to Almost 3m Hong Kong Residents*, FIN. TIMES (May 29, 2020), www.ft.com/content/06e30290-1fcb-44cb-9ed6-5f4b0e7ff565 [https://perma.cc/2R4Z-FDE6]. See also Viren Vaghela, *The British Passport Stoking Controversy in Hong Kong*, BLOOMBERG (June 6, 2020, 3:55 AM), www.bloomberg.com/news/articles/2020-06-06/what-s-the-passport-stoking-controversy-in-hong-kong-quicktake?sref=7sxw9Sxl [https://perma.cc/WY6E-Z225] (reporting the reaction of China, namely: “The Chinese Embassy in London said on July 1 [2020] the U.K. had previously promised ‘it will not confer the right of abode to Chinese citizens in Hong Kong who hold BNO passports.’ All Chinese compatriots living in Hong Kong count as Chinese nationals, the Embassy said. ‘If the British side makes unilateral changes to the relevant practice, it will breach its own position and pledges as well as international law and basic norms guiding international relations.’”).

¹³⁷ See *Hong Kong Autonomy Act*, H.R. 7440, 116th Cong. (2020) (enacted), www.congress.gov/bills/116/housebills/7440/text?q=%7B%22search%22%3A%5B%22Hong+Kong%22%5D%7D&r=18&s=1 [https://perma.cc/434H-BK9Z]; *Hong Kong: U.S. Passes*

the bill, obviously the margin of approval was veto-proof. On 14 July he did sign it, and issued a second *Executive Order* (following the first on the topic on 29 May) concerning the provisions of the *Act*, in effect normalizing relations with Hong Kong – with those of the Mainland being the new normal.¹³⁸

The *Act* contained two key targets and forbidden activities. First, the *Act* covered any foreign entity or individual that assists China in eroding the autonomy of Hong Kong as guaranteed by the December 1984 *Sino-British Joint Declaration* and July 1997 *Basic Law*. This *Act* required “the State Department, in consultation with the Treasury [Department], to report on and establish penalties for foreign persons and entities who have ‘materially’ contributed to undermining Hong Kong’s ‘one country, two systems’ framework.”¹³⁹ The first “*State Hong Kong Report*” was due 90 days after enactment of the *Act* (*i.e.*, by 12 October 2020), and thereafter annually. Depending on the facts, banks could be held liable as such entities. These *Reports* must identify any non-U.S. person that contributed materially to the Mainland government’s failure to uphold Hong Kong’s autonomy.

Second, the *Hong Kong Autonomy Act* barred financial institutions and non-financial entities, both American and foreign, from “knowingly” doing business – conducting a “significant transaction” – with a sanctioned entity or individual. Within 30-60 days after the *State Hong Kong Report*, the Treasury Department must issue its own study – the “*Treasury Hong Kong Report*.” The Treasury Department must identify any “foreign financial institution,” or “FFI,” that “knowingly conducts a significant transaction with the foreign persons.” So, banks that dealt with Chinese officials involved in repressing pro-democracy protestors in Hong Kong could be liable in this respect.

Sanctions as Nations Condemn New Law, BBC NEWS (July 2, 2020), www.bbc.com/news/world-asia-china-53259656 [<https://perma.cc/5URD-RZR6>] [hereinafter *Hong Kong: U.S. Passes*]; Patricia Zengerle, *U.S. House Bill Targets Banks Amid Fears Over China Law for Hong Kong*, REUTERS (July 1, 2020, 5:48 PM), www.reuters.com/article/us-hongkong-protests-usa-sanctions/u-s-house-passes-bill-to-sanction-chinese-banks-over-hong-kong-idUSKBN2427GD [<https://perma.cc/KJP3-P7AN>].

¹³⁸ See Exec. Order No. 13936, 85 Fed. Reg. 43413 (July 14, 2020); *The President’s Executive Order on Hong Kong Normalization* (July 14, 2020), <https://trumpwhitehouse.archives.gov/presidential-actions/presidents-executive-order-hong-kong-normalization/> [<https://perma.cc/GSN2-VLEN>] [hereinafter July 2020 *Executive Order on Hong Kong*]; *Trump Ends Preferential Economic Treatment for Hong Kong*, BBC NEWS (July 15, 2020), www.bbc.com/news/world-us-canada-53412598 [<https://perma.cc/9X7B-LBD2>]; *Hong Kong: China Vows to Retaliate After Trump Ends Special Economic Status*, BBC NEWS (July 14, 2020), www.bbc.com/news/world-asia-china-53414539 [<https://perma.cc/PHB3-VAK5>] [hereinafter *Hong Kong: China Vows*]; *Trump Signs Hong Kong*; Jeff Mason & Steve Holland, *China Vows Retaliation After Trump Ends Preferential Status for Hong Kong*, REUTERS (July 14, 2020), www.reuters.com/article/us-hongkong-security-trump/trump-ends-hong-kong-preferential-status-in-response-to-oppressive-chinese-actions-against-city-idUSKCN24F2KQ [<https://perma.cc/639F-M5YR>].

¹³⁹ Cathy Chan, *How Hong Kong Sanctions Could Threaten Wall Street*, BLOOMBERG (July 7, 2020, 2:53 PM), www.bloomberg.com/news/articles/2020-07-07/how-hong-kong-sanctions-could-threaten-wall-street-quicktake?sref=7sxw9Sx1 [<https://perma.cc/LZ6F-QPU5>] [hereinafter *How Hong Kong Sanctions*].

Indeed, this prohibition had particularly acute implications for banks:

Big U.S. banks are at risk since their foreign subsidiaries may have Chinese officials, their relatives and associates as customers. Investment banks get a big chunk of their Chinese revenue from stock sales, financing for companies and big shareholders. Commercial and retail banks in the U.S. could be even more exposed because most global transactions are done in U.S. dollars and flow through the U.S. banking system.¹⁴⁰

The concerns were limited neither to U.S. banks nor to commercial or investment banks.

That is because of the definition of “FFI” in the *Act*, which references the broad definition of “financial institution” in the U.S. Code, and thus which includes non-U.S. insurance companies. (Other American sanctions legislation relies on a narrower definition of “financial institution,” namely, that used by the U.S. Financial Crimes Enforcement Network, or FINCEN.)

As for sanctions, the *Act* authorized the President to impose them on violators, including “a block on assets, restrictions on access to loans from U.S. institutions, bans on being a primary dealer in U.S. debt, conducting foreign exchange and banking transactions, as well penalties on executives among others [such as denying entry to the U.S.].”¹⁴¹ That is, for non-U.S. individuals or entities named in a *State Hong Kong Report*, the President may impose blocking sanctions on a non-U.S. person named in one *Report*, but “shall” do so if that person is named in any two such *Reports*.

For FFIs that knowingly conduct illegal transactions, the President must impose one or more measures from a 10-item menu laid out in the *Act*:

- (1) Prohibitions on loans from U.S. financial institutions.
- (2) Prohibition on designation as a primary dealer of U.S. government debt instruments (*e.g.*, participating in the initial offerings of U.S. Treasury bills, notes, and bonds).
- (3) Prohibition from serving as an agent of the U.S. government or from serving as a repository for government funds.
- (4) Prohibition on FX transactions subject to U.S. jurisdiction in which the FFI has an interest.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* The Administration also contemplated the possibility of attempting to undermine the currency peg of Hong Kong’s dollar to the U.S. dollar of HK \$7.80 = U.S. \$1.00. See Nick Wadhams, Jenny Leonard, Jennifer Jacobs & Saleha Mohsin, *Trump Aides Weigh Proposals to Undermine Hong Kong’s Dollar Peg*, BLOOMBERG (July 7, 2020, 6:21 PM), www.bloomberg.com/news/articles/2020-07-07/trump-aides-weigh-proposals-to-undermine-hong-kong-s-dollar-peg?sref=7sxn9Sxl [https://perma.cc/KH6N-TBS3]. The U.S. could limit the ability of Hong Kong banks to buy or borrow U.S. dollars to defend the peg, though such a measure would hurt Hong Kong’s banks, not the CCP (which could step in and provide the liquidity they needed to maintain the peg), and inject greater political risk into holding dollars, thereby increasing the attractiveness of *yuan vis-à-vis* dollars. *Id.*

- (5) Prohibition on U.S. correspondent banking services to the FFI.
- (6) Imposition of blocking sanctions or asset freezes on any property or interest in property within U.S. jurisdiction of the FFI.
- (7) Restrictions or prohibitions on exports to the FFI.
- (8) Bans on U.S. persons “investing or purchasing significant amounts in equity or debt instruments of the foreign financial institution.”
- (9) Denial of entry into the U.S. by corporate officers of the FFI.
- (10) Imposition of options (1)-(8) on principal executive officer (or persons with similar authority or function) of the FFI.

One year after an FFI is included in a *Treasury Hong Kong Report*, the President must impose five or more of the aforementioned 10 sanctions on that FFI (unless the Treasury Department removes the FFI from its Report). If an FFI stays in the *Report* for two years, then the President must hit it with all 10 sanctions.

Notice the “wiggle room” that the time gaps create. For instance, an FFI can work with the U.S. to change its behavior – namely, end “significant” transactions with a designated party – and thus warrant removal from the *Treasury Hong Kong Report* within the first year of its listing. Also, the *Act* empowers the President to waive or terminate sanctions. For example, the President can de-list an entity from the *State* or *Treasury Hong Kong Report*, if he decides that the actions of that entity (1) “do not have a significant and lasting negative effect that contravenes” China’s obligations under the *Basic Law*; (2) “are not likely to be repeated in the future”; and (3) “have been reversed or otherwise mitigated through positive countermeasures taken” by the FFI. But, the *Act* also allows Congress to negate a Presidential sanctions waiver or termination if it passes a joint resolution of disapproval in both houses by a veto-proof two-thirds majority.

Pursuant to the *Act*, on 14 July 2020, the President issued an *Executive Order* that covered a range of sanctions. With respect to export controls and cooperative arrangements, the *Order* stated:

Section 1. It shall be the policy of the United States to suspend or eliminate different and preferential treatment for Hong Kong to the extent permitted by law and in the national security, foreign policy, and economic interest of the United States.

...

Section 3. Within 15 days of the date of this *Order*, the heads of agencies shall commence all appropriate actions to further the purposes of this *Order*, consistent with applicable law, including, to:

- (a) amend any regulations . . . under *IEEPA* [*i.e.*, the 1977 *International Emergency Economic Powers Act*, 50 U.S.C. Sections 1701 *et seq.*], which provide different treatment for Hong Kong as compared to China;

(b) amend the regulation at 8 C.F.R. 212.4(i) to eliminate the preference for Hong Kong passport holders as compared to PRC passport holders;

(c) revoke license exceptions for exports to Hong Kong, re-exports to Hong Kong, and transfers (in-country) within Hong Kong of items subject to the *Export Administration Regulations*, 15 C.F.R. Parts 730-774, that provide differential treatment compared to those license exceptions applicable to exports to China, reexports to China, and transfers (in-country) within China;

(d) consistent with Section 902(b)(2) of the *Foreign Relations Authorization Act*, Fiscal Years 1990 and 1991 (Public Law 101-246), terminate the export licensing suspensions under Section 902(a)(3) of such *Act* insofar as such suspensions apply to exports of defense articles to Hong Kong persons who are physically located outside of Hong Kong and the PRC and who were authorized to receive defense articles prior to the date of this *Order*;

(e) give notice of intent to suspend the [1998] Agreement Between the Government of the United States of America and the Government of Hong Kong for the Surrender of Fugitive Offenders [which provides for extradition] . . . ;

(f) give notice of intent to terminate the Agreement Between the Government of the United States of America and the Government of Hong Kong for the Transfer of Sentenced Persons . . . ;

(g) take steps to end the provision of training to members of the Hong Kong Police Force or other Hong Kong security services at the Department of State's International Law Enforcement Academies;

(h) suspend continued cooperation undertaken consistent with the now-expired Protocol Between the U.S. Geological Survey of the Department of the Interior of the United States of America and Institute of Space and Earth Information Science of the Chinese University of Hong Kong Concerning Scientific and Technical Cooperation in Earth Sciences . . . ;

(i) take steps to terminate the Fulbright exchange program with regard to China and Hong Kong with respect to future exchanges for participants traveling both from and to China or Hong Kong;

. . .

(l) propose for my consideration any further actions deemed necessary and prudent to end special conditions and preferential

treatment for Hong Kong.¹⁴²

Note especially, per Section 3(a) and (c)-(d) above, that because the U.S. deemed Hong Kong indistinguishable from the Mainland, it imposed export restrictions on sales of sensitive technology and weapons to Hong Kong, just as it did to China. And, per Section 3(a), reference to the *IEEPA*¹⁴³ raised the prospect the U.S. might piggy-back on it, imposing sanctions it allows, which are wider and tougher those in the *Hong Kong Autonomy Act*.

As for blocking sanctions against individuals, the *Executive Order* declared the following measures:

Section 4. All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, of the following persons are *blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in*:

(a) Any foreign person determined by the Secretary of State, in consultation with the Secretary of the Treasury, or the Secretary of the Treasury, in consultation with the Secretary of State:

(i) to be or have been involved, directly or indirectly, in the coercing, arresting, detaining, or imprisoning of individuals under the authority of, or to be or have been responsible for or involved in developing, adopting, or implementing, the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Administrative Region [*i.e.*, the National Security Law];

(ii) to be responsible for or complicit in, or to have engaged in, directly or indirectly, any of the following:

(A) actions or policies that undermine democratic processes or institutions in Hong Kong;

(B) actions or policies that threaten the peace, security, stability, or autonomy of Hong Kong;

(C) censorship or other activities with respect to Hong Kong that prohibit, limit, or penalize the exercise of freedom of expression or assembly by citizens of Hong Kong, or that limit access to free and

¹⁴² July 2020 *Executive Order on Hong Kong*, *supra* note 138. On 19 August 2020, the U.S. formally ended its extradition treaty with Hong Kong concerning fugitives, its agreement on the transfer of sentenced persons, and its deal on reciprocal tax treatment on income derived from the international operation of ship. See Bill Faries, Nick Wadhams & Iain Marlow, *U.S. Ends Pacts With Hong Kong On Extradition, Shipping Tax*, BLOOMBERG (Aug. 19, 2020) www.bloomberg.com/news/articles/2020-08-19/u-s-ends-three-pacts-with-hong-kong-on-extradition-taxes-ke1losxs?sref=7sxw9Sxl [<https://perma.cc/QUY7-G5LX>].

¹⁴³ BHALA, VOLUME 2, *supra* note 7, at ch. 17.

independent print, online or broadcast media; or

(D) the extrajudicial rendition, arbitrary detention, or torture of any person in Hong Kong or other gross violations of internationally recognized human rights or serious human rights abuse in Hong Kong;

(iii) to be or have been a *leader or official* of:

(A) an entity, including any government entity, that has engaged in, or whose members have engaged in, any of the activities described in Sub-sections (a)(i), (a)(ii)(A),(a)(ii), (B), or (a)(ii)(C) of this Section; or

(B) an entity whose property and interests in property are blocked....

(iv) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, any person whose property and interests in property are blocked pursuant to this Section;

(v) to be *owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly*, any person whose property and interests in property are blocked pursuant to this section; or

(vi) to be a *member of the board of directors or a senior executive officer* of any person whose property and interests in property are blocked pursuant to this section.

...

Section 5. I hereby determine that the making of *donations* of the types of articles specified in Section 203(b)(2) of *IEEPA* (50 U.S.C. 1702(b)(2)) by, to, or for the benefit of any person whose property and interests in property are blocked . . . would seriously impair my ability to deal with the national emergency declared in this *Order*, and I hereby *prohibit* such donations. . . .

Section 6. The prohibitions in Section 4(a) . . . include:

(a) the making of any *contribution or provision of funds, goods, or services* by, to, or for the benefit of any person whose property and interests in property are blocked . . . ; and

(b) the receipt of any contribution or provision of funds, goods, or services from any such person.

...

Section 10. For the purposes of this *Order*:

- (a) the term “person” means an individual or entity;
- (b) the term “entity” means a government or instrumentality of such government, partnership, association, trust, joint venture, corporation, group, subgroup, or other organization, including an international organization;
- (c) the term “United States person” means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States; and
- (d) The term “immediate family member” means spouses and children of any age.¹⁴⁴

Manifestly, the scope of the measures under the *Act* and *Executive Order* was broad, and unprecedented in the recent issue of Sino-American relations. As the President himself said the *Act* had given his Administration “powerful new tools to hold responsible the individuals and the entities involved in extinguishing Hong Kong’s freedom.”¹⁴⁵

In particular, these measures were in addition to those provided for under the *Hong Kong Autonomy Act*, i.e., the *Order* created an additional, complementary sanctions program against non-U.S. persons implementing China’s *National Security Law*. Note the risk of indirect exposure. The measures in the *Order* target such persons – even if they are outside U.S. jurisdiction – who are not actively engaged in wrongful conduct, but who have customers, or work with counterparties, that do. These persons would have to terminate such relationships immediately to avoid being designated as providing material support to a sanctioned party, even if that meant cancelling existing contracts and ending lucrative business dealings.

On 6 August 2020, the U.S. announced its first major round of sanctions under the President’s *Executive Order*.¹⁴⁶ It targeted the highest official in Hong Kong, the Chief Executive, Carrie Lam, plus 10 of her colleagues in the SAR’s government (including Luo Huining, the top Mainland Chinese official in Hong Kong, Xia Baolong, Director of the Hong Kong and Macau Affairs Office, China State Council, Teresa Cheng, Hong Kong’s Justice Secretary, Lee Ka-chiu, Hong Kong’s Secretary of Security, and Chris Tang, Commissioner, Hong Kong Police Force).¹⁴⁷ Ms. Lam had no property or other assets subject to U.S.

¹⁴⁴ July 2020 *Executive Order on Hong Kong*, *supra* note 138 (emphasis added).

¹⁴⁵ Quoted in *Hong Kong: China Vows*, *supra* note 138.

¹⁴⁶ See Jennifer Jacombs, Nick Wadhams & Jenny Leonard, *U.S. Sanctions Hong Kong’s Carrie Lam Over China Crackdown*, BLOOMBERG (Aug. 7, 2020, 6:47 PM), www.bloomberg.com/news/articles/2020-08-07/u-s-poised-to-sanction-hong-kong-chief-carrie-lam-for-crackdown?ref=7sxnw9Sxl [https://perma.cc/8BCR-CCQP] [hereinafter *U.S. Sanctions Hong Kong’s Carrie*].

¹⁴⁷ See David Brunnstrom & Daphne Psaledakis, *U.S. Imposes Sanctions on Hong Kong’s Lam, Other Officials Over Crackdown*, REUTERS (Aug. 7, 2020, 9:53 AM), www.reuters.com/article/us-usa-china-hong-kong-sanctions/u-s-imposes-sanctions-on-hong-kongs-lam-other-officials-over-crackdown-idUSKCN253215 [https://perma.cc/S6SN-R6XM] [hereinafter *U.S. Imposes*].

jurisdiction (*i.e.*, nothing of hers could be frozen by U.S. authorities), had no plans to travel to America, and apparently had no plans to do business with U.S. banks or non-bank businesses. Hence, the move had little personal effect. Anticipating the move against her, she said on 31 July that she would “just laugh it off.”¹⁴⁸

She could not quite do so. Non-U.S. banks, fearful of doing business with targeted persons and thereby jeopardizing their relationships in the U.S. and with U.S. entities, their transactions denominated in the world’s pre-eminent currency, the U.S. dollar, and their access to the SWIFT payments, chose not to provide Ms. Lam with banking services.¹⁴⁹ With no accounts, she was forced to receive her salary (HK \$ 5.2 million, *i.e.*, U.S. \$672,000) as Hong Kong’s Chief Executive in cash, and admitted her home had “piles of cash.”¹⁵⁰ Further, on 9 November, the U.S. tacked on more sanctions, targeting “four more Chinese officials in Hong Kong’s governing and security establishment over their alleged role in crushing dissent,” namely: “Deng Zhonghua, Deputy Director of the Hong Kong and Macau Affairs Office; Edwina Lau, Deputy Commissioner of Police in Hong Kong, and Li Jiangzhou and Li Kwai-wah, two officials at the newly established National Security Office in Hong Kong.”¹⁵¹

Yet, imposing sanctions on Hong Kong’s highest-ranking official was hugely symbolic in positioning the U.S. against CCP-led curtailments of political freedom. It was, as the *Financial Times* observed, “unprecedented” and a “dramatic ramp[ing] up” of President Trump’s “campaign against Beijing.”¹⁵² Ms. Lam was targeted because, as the U.S. Treasury Department put it, she was “directly responsible for implementing Beijing’s policies of suppression of freedom and democratic processes.”¹⁵³ Apparently, the specific event that prompted the U.S. move was her decision to postpone for one year the elections for LegCo that had been scheduled for 6 September, which “deal[t] a blow to the pro-democracy opposition that had hoped to make huge gains.”¹⁵⁴

Sanctions].

¹⁴⁸ Quoted in *U.S. Sanctions Hong Kong’s Carrie*, *supra* note 146.

¹⁴⁹ See Primrose Riordan & Nicolle Liu, *Hong Kong’s Leader has “Piles of Cash” at Home After U.S. Sanctions*, FIN. TIMES (Nov. 29, 2020), www.ft.com/content/0f9f0e98-faac-4ecd-8896-8cda3746a920?shareType=nongift [<https://perma.cc/MN6V-4LGN>] [hereinafter *Hong Kong’s Leader*].

¹⁵⁰ *Id.*

¹⁵¹ *U.S. Sanctions 4 Chinese Officials Over Hong Kong Crackdown*, NIKKEI ASIA (Nov. 10, 2020, 9:41 AM), <https://asia.nikkei.com/Politics/International-relations/US-China-tensions/US-sanctions-4-Chinese-officials-over-Hong-Kong-crackdown> [<https://perma.cc/Q6HS-UQN5>].

¹⁵² Demetri Sevastopulo & Katrina Manson, *Trump Escalates Anti-China Campaign with Hong Kong Sanctions*, FIN. TIMES (Aug. 7, 2020), <https://www.ft.com/content/6822dfdf-8cb8-494d-9a89-c6ee29a345d4?shareType=nongift> [<https://perma.cc/A6JX-EUVR>] [hereinafter *Trump Escalates Anti-China*].

¹⁵³ Quoted in *U.S. Sanctions Hong Kong’s Carrie*, *supra* note 146.

¹⁵⁴ *U.S. Imposes Sanctions*, *supra* note 147; see also Keith Bradsher, Elaine Yu & Steven Lee Myers, *With Security Law as a Cudgel, Beijing Cracks Down On Hong Kong*, N.Y. TIMES (July 31, 2020), <https://www.nytimes.com/2020/07/31/world/asia/hong-kong-election-national-security-law.html?referringSource=articleShare> [<https://perma.cc/2DBW-3ZYR>] (reporting “the authorities postponed for a year the election itself,” and “[w]hile they cited the coronavirus

B. CCP Countermeasures

Not surprisingly, China did not sit idly in response to the *Hong Kong Autonomy Act* and Presidential *Executive Order*. China fought back. Given its long-standing position against foreign powers meddling in what the CCP deems its internal affairs, China blocked a May 2020 proposal by the U.S. to hold a United Nations (“U.N.”) Security Council meeting about the Hong Kong crisis.¹⁵⁵ Also not surprisingly, given the history of tit-for-tat behavior in the Sino-American Trade War, the Chinese Embassy to the U.S. “accused the U.S., Australia, Canada and the U.K. of ‘foreign meddling in Hong Kong affairs’ after the allies issued a *Joint Statement* condemning Beijing’s plan to implement the security law,” and “at a press conference in Beijing, Zhao Lijian, a spokesman for the Ministry of Foreign Affairs, lashed out at the statement, [saying] ‘Hong Kong is China’s Hong Kong.’” China vowed it would enact “countermeasures” against the U.S., which would adversely affect the U.S. trade surplus with Hong Kong, and harm American financial institutions operating there.¹⁵⁶ It put this vow in racial terms:

Zhang Xiaoming, Deputy Director of the Hong Kong and Macau Affairs Office, said China would retaliate if the U.S. imposed sanctions. “Of course we’re not intimidated. Gone are the days when Chinese people had to be at somebody’s disposal or rely on others for the air one breathes,” Mr Zhang said.¹⁵⁷

And, so China did.

The first such “countermeasure” came on 1 June 2020, when China cut purchases of U.S. agricultural products, contrary to its commitments under the *Phase One Agreement* (discussed earlier):

Chinese government officials told major state-run agricultural companies to pause purchases of some American farm goods including soybeans as Beijing evaluates the ongoing escalation of tensions with the U.S. over Hong Kong. . . .

State-owned traders Cofco and Sinograin were ordered to suspend purchases Chinese buyers have also canceled an unspecified

pandemic as justification for the move, it underscored Beijing’s fears that pro-democracy candidates could triumph”).

¹⁵⁵ See David Wainer, *China Blocks U.S. Call For UN Security Council Hong Kong Meeting*, BLOOMBERG (May 27, 2020, 8:32 PM), www.bloomberg.com/news/articles/2020-05-28/china-blocks-u-s-call-for-un-security-council-hong-kong-meeting?sref=7sxx9Sx1 [<https://perma.cc/862Q-XDZE>] (reporting the Chinese Mission to the U.N. “accused the U.S. of being ‘the trouble maker of the world,’” and argued “[l]egislation on national security for Hong Kong is purely China’s internal affairs,’ [and] . . . has nothing to do with the mandate of the Security Council.”).

¹⁵⁶ Yuan Yang, *China Threatens Countermeasures After U.S. Criticism of Hong Kong*, FIN. TIMES (May 29, 2020), www.ft.com/content/cd8de935-1a28-495b-bd64-23d2bfb5fa70?shareType=nongift [<https://perma.cc/EYW2-NXEZ>].

¹⁵⁷ *HK Begins Crackdown*, *supra* note 29.

number of U.S. pork orders. . . . Private companies haven't been told to halt imports. . . .

. . .

The measures to halt imports come after President Donald Trump on Friday [29 May 2020] lobbed a barrage of criticism at Beijing after it moved to impose controversial new national security legislation on Hong Kong. Critics say it will crack down on dissent and undermine the "one country, two systems" principle that has kept Hong Kong autonomous of the mainland since the 1997 handover from the British.

Cofco and Sinograin are China's key importers of farm goods. They had been making pricing inquiries for 20 to 30 cargoes of U.S. soybeans on Friday but held off on going through with purchases after Trump indicated he would punish Chinese officials. . . .¹⁵⁸

Brazil was among the likely beneficiaries of these countermeasures, as China could shift to importing Brazilian soy and other products.

China announced its next counter-measure on 29 June 2020: Americans who meddled in Hong Kong would be denied entry:

"As a response to the U.S.'s wrongful decision [on 26 June, noted above] to impose visa bans on Chinese officials, China decides to impose visa bans on Americans who behave badly in Hong Kong affairs," Foreign Ministry spokesman Zhao Lijian told reporters . . . in Beijing . . . , without naming any specific targets.

"Who will be the targets? Relevant people would know clearly themselves," Zhao added.¹⁵⁹

For the time being, the reciprocal travel bans each side imposed on selected individuals from the other was symbolic. The COVID-19 pandemic had shut

¹⁵⁸ *U.S. Halts Some*, *supra* note 62. On 1 June, Hong Kong authorities banned for the first time in 30 years the annual commemoration of the 4 June 1989 Tiananmen Square massacre. They did so because of COVID-19 social distancing requirements, though the move was seen as a possible countermeasure. See *Vigil Banned, Hong Kong Set to Commemorate Tiananmen with "Candles Everywhere"*, REUTERS (June 3, 2020), www.reuters.com/article/us-china-tiananmen-hongkong/vigil-banned-hong-kong-set-to-commemorate-tiananmen-with-candles-everywhere-idUSKBN23A3GU [<https://perma.cc/Q5Y4-7W3T>]; *Tiananmen: Police Ban Hong Kong Vigil for Victims of 1989 Crackdown*, BBC NEWS (June 1, 2020), www.bbc.com/news/world-asia-china-52877411 [<https://perma.cc/ZF5S-W5RT>] (also recalling that "[o]n the night of 3 June [1989] tanks moved in and troops opened fire, killing and injuring many unarmed people in and around Tiananmen Square," "[a]fterwards the authorities claimed no-one had been shot dead in the square itself," and "[e]stimates of those killed in the crackdown range from a few hundred to several thousand," but that "China has never given an official figure for how many people died"). Nevertheless, "tens of thousands" of Hong Kongers violate the ban and "stage[d] a mass vigil." *Hong Kong: Tens of Thousands Defy Ban to Attend Tiananmen Vigil*, BBC NEWS (June 4, 2019, 11:06 PM), www.bbc.com/news/world-asia-china-52920083 [<https://perma.cc/2GYB-LUBC>].

¹⁵⁹ *Quoted in China to Impose Visa*, *supra* note 131.

down most international travel.

On 23 July 2020, hardly 48 hours after the United States closed China's Houston Consulate (discussed above), China ordered the closure of America's Consulate in Chengdu.¹⁶⁰ On 10 August, China sanctioned 11 American officials (Senators, Congressmen, and NGO leaders, though no Trump Administration officials). That was in direct response to the imposition (on 6 August, also discussed above) by the U.S. of sanctions on Hong Kong's Chief Executive, Carrie Lam and 10 other Chinese officials.¹⁶¹ And, throughout, China upped non-transparent non-tariff barriers ("NTBs"), for example, hitting Burger King and other U.S. food chains operating in China with inspections, albeit citing COVID-19-related concerns.¹⁶²

C. January 2021 Hong Kong Mass Arrests and CCP Blocking Legislation

1. January 2021 Hong Kong Mass Arrests

Two developments in January 2021 further escalated what had become a battle about Hong Kong in the context of the Sino-American Trade War. First, on 6 January 2021 "dawn raids"¹⁶³ of "72 premises across the city,"¹⁶⁴ over 1,000 Hong Kong police officers imposed their "biggest crackdown" since China implemented its *National Security Law*, arresting 55 democracy activists, including some of the city's most prominent civil liberty advocates and politicians, including former law professor Benny Tai,¹⁶⁵ plus Hong Kong

¹⁶⁰ See *Beijing Slams Forced U.S. Entry to China's Houston Consulate*, BLOOMBERG (July 25, 2020, 9:50 AM), www.bloomberg.com/news/articles/2020-07-24/china-asks-u-s-to-close-consulate-in-chengdu-city?sref=7sww9Sxl [<https://perma.cc/8S9X-YUV3>]; Yew Lun Tian & Gary McWilliams, *China Orders U.S. Chengdu Consulate Shut; Protesters Jeer Houston Closure*, REUTERS (July 23, 2020), www.reuters.com/article/us-usa-china-consulate/china-orders-u-s-to-shut-chengdu-consulate-retaliating-for-houston-idUSKCN24P09U [<https://perma.cc/2S8T-NWGM>]; *China Vows Retaliation After U.S. Shuttles Houston Consulate*, BLOOMBERG (July 22, 2020, 11:13 AM), www.bloomberg.com/news/articles/2020-07-22/u-s-asked-china-to-close-houston-consulate-top-editor-hu-says?sref=7sww9Sxl [<https://perma.cc/62GB-J6LY>].

¹⁶¹ See *China Imposes Sanctions on U.S. Senators over Hong Kong*, BBC NEWS (Aug. 10, 2020), www.bbc.com/news/world-asia-china-53722811 [<https://perma.cc/AY8F-ZRP6>]; *China Hits U.S. Officials With Sanctions, Avoids Top Trump Aides*, BLOOMBERG (Aug. 10, 2020, 9:08 PM), www.bloomberg.com/news/articles/2020-08-10/china-to-sanction-u-s-officials-in-retaliation-over-hong-kong?sref=7sww9Sxl [<https://perma.cc/L42L-9BLT>].

¹⁶² See C.K. Tan & Kensaku Ihara, *China Expands Burger King Probe to Other U.S. Chains*, NIKKEI ASIAN REV. (Aug. 2, 2020, 13:31), <https://asia.nikkei.com/Business/Companies/China-expands-Burger-King-probe-to-other-US-chains> [<https://perma.cc/72D4-RTAH>].

¹⁶³ See Iain Marlow, Kari Soo Lindberg & Natalie Lung, *Beijing Sends Biden Stark Message with Hong Kong Crackdown*, BLOOMBERG (Jan. 6, 2021, 11:11 PM), www.bloomberg.com/news/articles/2021-01-06/beijing-sends-stark-message-to-biden-with-hong-kong-crackdown?sref=7sww9Sxl [<https://perma.cc/5SYC-YEA9>] [hereinafter *Beijing Sends Biden*].

¹⁶⁴ *National Security Law: Hong Kong Rounds Up 53 Pro-Democracy Activists*, BBC NEWS (Jan. 6, 2021), www.bbc.com/news/world-asia-china-55555299 [<https://perma.cc/9RXH-G9MG>] [hereinafter *National Security Law: Hong Kong Rounds*].

¹⁶⁵ *U.S., Canada, Britain, Australia Condemn Hong Kong Arrests of Activists*, REUTERS (Jan. 9, 2020, 8:48 PM), www.reuters.com/article/us-hongkong-security/u-s-canada-britain-australia-condemn-hong-kong-arrests-of-activists-idUSKBN29F025 [<https://perma.cc/D8VF-KNF6>] [hereinafter *U.S., Canada, Britain*].

District Councillors Lawrence Lau, Fergus Leung, and Calvin Ho, and former Democratic Party Chairman Wu Chi-wai.¹⁶⁶ For the first time, China arrested a foreign citizen under the *Law* – 79-year old John Clancey, an American lawyer (solicitor) with Ho, Tse, Wai & Partners,¹⁶⁷ Chair of the Asian Human Rights Commission, founding member of the Executive Committee of the China Human Rights Lawyers Concern Group, and former Catholic Priest.¹⁶⁸ The police arrested while he was asleep, and searched his law firm offices.¹⁶⁹

China faulted those arrested for their sponsorship of an unofficial 2020 primary to choose opposition candidates for LegCo, which China alleged “was part of a plan to ‘overthrow’ the government” – subversion under the *Law*.¹⁷⁰ Indeed, “Beijing defended . . . [the] arrests, with Foreign Ministry spokeswoman Hua Chunying saying they were needed to stop ‘external forces and individuals [colluding] to undermine China’s stability and security.’”¹⁷¹ But, “the crackdown appeared to confirm the fears of many who warned about the reach of the *Law*, with Amnesty International saying the arrests are ‘the starkest demonstration yet of how the national security law has been weaponised to punish anyone who dares to challenge the establishment.’”¹⁷²

Joshua Wong (already serving a 13 ½ month sentence for illegal assembly) won that unprecedented independently-organized, non-binding, and unofficial public primary, in which 610,000 Hong Kongers voted – over 13% of the city’s registered voters. In what is a “procedural exercise common in democracies

¹⁶⁶ See *Jailed Hong Kong Activist Joshua Wong Suspected of Violating City’s New Security Law*, REUTERS (Jan. 7, 2021, 3:53 AM), www.reuters.com/article/us-hongkong-security/jailed-hong-kong-activist-joshua-wong-suspected-of-violating-citys-new-security-law-idUSKBN29C0ZG [<https://perma.cc/48V8-DUTC>] [hereinafter *Jailed Hong Kong Activist*].

¹⁶⁷ See Yanni Chow & Yoyo Chow, *Hong Kong Arrests 53 for Plot to “Overthrow” Government in Latest Crackdown on Dissent*, REUTERS (Jan. 5, 2021, 7:22 PM), www.reuters.com/article/us-hongkong-security/hong-kong-arrests-53-for-plottooverthrow-government-in-latest-crackdown-on-dissent-idUSKBN29B01K [<https://perma.cc/PRP9-4E58>] [hereinafter *Hong Kong Arrests 53*].

¹⁶⁸ See Demetri Sevastopulo & Katrina Manson, *U.S. Imposes Sanctions on Chinese Officials Over Hong Kong Crackdown*, FIN. TIMES (Jan. 15, 2021), www.ft.com/content/62211afa-34d8-48aba1ac-15caab146fe8?shareType=nongift [hereinafter *U.S. Imposes Sanctions on Chinese Officials*]; *Beijing Sends Biden*, *supra* note 163; *Jailed Hong Kong Activist*, *supra* note 166; Iain Marlow, Natalie Lung & Alfred Liu, *Hong Kong Arrests U.S. Citizen, Dozens More Under Security Law*, BLOOMBERG (Jan. 6, 2021, 4:15 AM), www.bloomberg.com/news/articles/2021-01-05/ex-hong-kong-lawmakers-among-dozens-arrested-under-security-law?sref=7sxw9Sxl [<https://perma.cc/RU5R-Y465>] [hereinafter *Hong Kong Arrests U.S. Citizen*]; *National Security Law: Hong Kong Rounds*, *supra* note 164. See also Primrose Riordan, *Detained U.S. Lawyer Urges Hong Kong to Look to Ireland for Inspiration*, FIN. TIMES (Jan. 12, 2021), www.ft.com/content/7b017148-5d6e-477d-8259-33e0feac08dc?shareType=nongift (reporting: “The first expatriate to be arrested under Hong Kong’s new national security law has appealed to local democracy activists not to give up hope, comparing their movement with Ireland’s struggle for self-rule,” and quoting Mr. Clancey: “Look at Irish history . . . They were completely hopeless for so long, but eventually they got part of Ireland – they got a republic” . . . ‘In a difficult situation we shouldn’t just give up and have no hope for the future.’”) [hereinafter *Detained U.S. Lawyer Urges Hong Kong*].

¹⁶⁹ *Detained U.S. Lawyer Urges Hong Kong*, *supra* note 168.

¹⁷⁰ *U.S., Canada, Britain*, *supra* note 165.

¹⁷¹ Quoted in *National Security Law: Hong Kong Rounds*, *supra* note 164.

¹⁷² *Id.*

worldwide,”¹⁷³ in the Hong Kong primary, the goal of the opposition was:

to overcome Beijing’s lock on power and their internal differences by holding a public primary to select a unified slate of candidates. They then planned to secure enough seats on the legislature to access a provision of city law [specifically, its Charter] that would [have] forced Chief Executive Carrie Lam to step down after blocking her budget.¹⁷⁴

However, “Chinese authorities had at the time warned the plans might run afoul of the new security law, comparing the effort to trying to foment a ‘color revolution.’”¹⁷⁵ They disqualified several opposition candidates (including Joshua Wong), and then delayed the entire election for a year citing difficulties associated with the COVID-19 pandemic.¹⁷⁶ And, the authorities arrested “two academics behind the primaries strategy,” plus “13 candidates from the primaries.”¹⁷⁷

That is, “China’s top agencies for Hong Kong as an ‘unlawful - manipulation’ of the city’s election system and a violation of the national security law.”¹⁷⁸ After all:

Police said campaigning to win a majority in Hong Kong’s 70-seat Legislative Council with the purpose of blocking government proposals to increase pressure on democratic reforms could be seen as subversive.

The city’s leader is not directly elected and only half the legislative seats are open to democratic vote, with the other half stacked mostly with pro-Beijing figures.¹⁷⁹

Defending the *Law* and the arrests, and vowing not to be intimidated by foreign sanctions, the Hong Kong government said: “There is a clear line between political pluralism and attempts to seriously undermine the performance of government duties and functions. Such a vicious plot would not be tolerated in any country.”¹⁸⁰ The Mainland’s liaison office in Hong Kong “praised the arrests as a step to put Hong Kong back ‘on the right track.’”¹⁸¹

Australia, Canada, Britain, and the U.S. viewed the facts differently. Their

¹⁷³ *Hong Kong Arrests U.S. Citizen*, *supra* note 168.

¹⁷⁴ *Beijing Sends Biden*, *supra* note 163. Under Hong Kong’s Charter, if LegCo fails twice to pass an annual budget, then the Chief Executive must resign. So, the opposition goal was dubbed the “35+ plan.” See *Hong Kong Arrests 53*, *supra* note 167.

¹⁷⁵ *Beijing Sends Biden*, *supra* note 163.

¹⁷⁶ See *Hong Kong Arrests U.S. Citizen*, *supra* note 168; *National Security Law: Hong Kong Rounds*, *supra* note 164.

¹⁷⁷ *National Security Law: Hong Kong Rounds*, *supra* note 164.

¹⁷⁸ *Hong Kong Arrests U.S. Citizen*, *supra* note 168.

¹⁷⁹ *Hong Kong Arrests 53*, *supra* note 167.

¹⁸⁰ Quoted in *Jailed Hong Kong Activist*, *supra* note 166.

¹⁸¹ *Beijing Sends Biden*, *supra* note 163.

9 January *Joint Statement* intoned:

The *National Security Law* is a clear breach of the Sino-British *Joint Declaration* and undermines the “One Country, Two Systems” framework. It has curtailed the rights and freedoms of the people of Hong Kong. It is clear that the *National Security Law* is being used to eliminate dissent and opposing political views.

We call on the Hong Kong and Chinese central authorities to respect the legally guaranteed rights and freedoms of the people of Hong Kong without fear of arrest and detention. It is crucial that the postponed Legislative Council elections in September proceed in a fair way that includes candidates representing a range of political opinions.¹⁸²

The U.S. also imposed sanctions “target[ing] two Chinese Communist party officials involved in setting Hong Kong policy, in addition to a pro-Beijing legislator in the territory and three Hong Kong security officials in the police force.”¹⁸³ Consequently, Americans were forbidden from dealings with these individuals. Predictably, Hong Kong’s government “denounced the sanctions as ‘insane, shameless and despicable’ foreign interference.”¹⁸⁴

The *Joint Statement* could not, however, confront the reality that (as *Bloomberg* observed) that the mass arrests “showed how much Chinese President Xi Jinping has tipped the balance of power back to the government after a historic wave of democracy protests gripped Hong Kong for months in 2019,” as “Xi has marched ahead with efforts to quash the city’s opposition, despite international condemnation and the Trump administration’s efforts to sanction Chinese officials and roll back trade benefits for the Asian financial center.”¹⁸⁵

What, or even whether, the U.S. and its allies could alter Hong Kong’s trajectory was unclear. Incoming Secretary of State Anthony Blinken “condemn[ed] the ‘assault on those bravely advocating for universal rights,’” and promised the Biden Administration “‘will stand with the people of Hong Kong and against Beijing’s crackdown on democracy.’”¹⁸⁶ Hong Kong’s last British Governor, Chris Patten, exhorted “[l]iberal democracies around the world” to continue “to speak out against the brutal destruction of a free society.”¹⁸⁷ He added that: “We should not be seeking to contain China but to constrain the Chinese Communist Party.”¹⁸⁸ But, what was the difference, with the CCP in control of the Mainland, uncontained from, and thus unconstrained in, Hong Kong?

¹⁸² U.S. DEP’T OF STATE, *Joint Statement on Hong Kong*, (Jan. 9, 2021), <https://2017-2021.state.gov/joint-statement-on-hong-kong-3/index.html> [<https://perma.cc/RVX3-T387>].

¹⁸³ *U.S. Imposes Sanctions on Chinese Officials*, *supra* note 168.

¹⁸⁴ *Id.*

¹⁸⁵ *Beijing Sends Biden*, *supra* note 163.

¹⁸⁶ *Id.*

¹⁸⁷ *Hong Kong Arrests 53*, *supra* note 167.

¹⁸⁸ *Id.*

Ominously, “Taiwan’s government said Hong Kong had changed from the ‘pearl of the Orient’ to ‘purgatory of the Orient.’”¹⁸⁹ But, insofar as purgatory (in Catholic teaching) is an intermediary realm for souls *en route* to heaven, the analogy seemed optimistic. Predictably, Hua Chunying, a spokeswoman for the Chinese Foreign Ministry, repeated China’s refrain about what it regarded as an internal matter: “‘no other countries have the right to make wanton comments or interfere’ in China’s affairs.”¹⁹⁰ China kept up its pressure on Hong Kong’s democracy movement. In February, in its largest use of the *National Security Law* to date, Hong Kong authorities charged 47 activists – 39 men (including Benny Tai) and eight women, ranging in age from 23 to 64, with subversion.¹⁹¹ They were among the 55 activists who had been arrested in dawn raids the previous month.

2. January 2021 Blocking Legislation

The second watershed event of the New Year was a legal punch aimed at the U.S. China significantly increased the legal nature of its retaliation against the U.S. over their disagreements about Hong Kong, and indeed, over the wide array of issues in the Sino-American Trade War. China’s Ministry of Commerce (“MOFCOM”) announced (on 9 January, with immediate effect) a new law – rules on *Unjustified Extraterritorial Application of Foreign Legislation* – to shield its entities from any “unjustified sanctions.”¹⁹² No Chinese company or individual was permitted to comply with such sanctions. In effect, they were blocked by the CCP from following U.S. or any foreign governmental sanctions measures MOFCOM deemed illegal. So, for example, Chinese banks in Hong Kong were prohibited from not providing banking services to Carrie Lam and other officials the U.S. had blacklisted for suppressing democracy in the SAR.

Thus, Chinese entities – presumably whether in China or overseas – faced the possibility of a true conflict of law: either violate U.S. sanctions and comply with China’s new law, but face punishment from the U.S., or *vice versa*, comply with American sanctions but violate Chinese law, and face consequences in China. Those consequences included being sued in Chinese court for compensation, presumably damages associated with losses caused by adherence to U.S. sanctions. In turn, China’s new law exposed foreign investors in Chinese companies to sizeable liabilities. Simply put, having long complained about America’s assertion of “long-arm jurisdiction,”¹⁹³ China asserted its own version of extraterritorial reach.

¹⁸⁹ *Id.*

¹⁹⁰ Quoted in *Beijing Sends Biden, supra* note 163.

¹⁹¹ See *Hong Kong Charges 47 Activists in Largest Use Yet of New Security Law*, BBC NEWS (Feb. 28, 2021), www.bbc.com/news/world-asia-china-56228363 [<https://perma.cc/AW6P-ALPN>].

¹⁹² Quoted in Tom Mitchell, *China Launches Measures to Protect Companies from U.S. Sanctions*, FIN. TIMES, (Jan. 9, 2021), www.ft.com/content/33c307b7-7157-442d-90b4-f48308429d02?shareType=nongift [<https://perma.cc/39UU-4JML>] [hereinafter *China Launches Measures to Protect*].

¹⁹³ *Id.* The January 2021 law complemented rules China put in place concerning designation of “unreliable entities,” (*i.e.*, “foreign companies . . . that did anything that undermined China’s national interests, such as selling military equipment to the self-governed island of Taiwan”), which responded to the U.S. “Entity List” (discussed earlier). See *id.*

The new Chinese blocking law created an opaque “working mechanism” whereby targeted companies (*i.e.*, ones targeted by foreign governments), any other Chinese company, or even any individual Chinese citizens, could apply to MOFCOM for a determination as to the justifiability of the threatened foreign government sanction measure. If MOFCOM found the measure unjust, and the interests of the petitioner were injured, then it “may offer” the petitioning entity “support and also take unspecified counter-measures.”¹⁹⁴ That is:

a Chinese person or organization that is restricted by foreign legislation from “engaging in normal economic, trade and related activity with a third State or its citizens,” may report it to the commerce department within 30 days.

The Commerce Department [*i.e.*, MOFCOM] will then assess a case for its potential violation of international law, impact on China’s sovereignty and national security, and impact on Chinese citizens.

When a citizen or other organisation “suffers significant losses” from non-compliance with foreign legislation, “relevant government departments may provide necessary support”

The Chinese government might also enact “necessary counter-measures” in response.¹⁹⁵

Consequently, MNCs with substantial business interests in China could be at risk for complying with foreign sanctions,¹⁹⁶ because MOFCOM might decide their compliance with what it deemed an unjust measure had caused the loss. Notably, this new law coincided with a significant change in U.S. State Department policy: the Department lifted its long-standing self-imposed ban on U.S. officials meeting with their counterparts in Taiwan.¹⁹⁷

¹⁹⁴ *Id.*

¹⁹⁵ Josh Horwitz, *China to Counter ‘Unjustified’ Foreign Trade and Business Laws*, REUTERS (Jan. 9, 2021, 4:24 AM), www.reuters.com/article/us-china-law/china-to-counter-unjustified-foreign-trade-and-business-laws-idUSKBN29E07Y [<https://perma.cc/6C29-RUG6>].

¹⁹⁶ *China Pushes Back Against U.S. Sanctions With New Rules*, BLOOMBERG (Jan. 10, 2021, 6:25 PM), www.bloomberg.com/news/articles/2021-01-09/china-issues-rules-to-protect-firms-citizens-from-foreign-laws?sref=7sxw9Sx1 [<https://perma.cc/H8B4-YPA2>].

¹⁹⁷ *Pompeo: U.S. to Lift Restrictions on Contacts with Taiwan*, BBC NEWS (Jan. 10, 2021), www.bbc.com/news/world-us-canada-55606594 [<https://perma.cc/7AE8-5WZS>] (quoting Secretary of State Mike Pompeo that the restrictions had been implemented to “appease” China, and that “lifting all of these self-imposed restrictions . . . recognises that the US-Taiwan relationship need not, and should not, be shackled by self-imposed restrictions of our permanent bureaucracy,” and also that as a vibrant democracy and reliable American partner, the restrictions were outdated: “The closer partnership between Taiwan and the US is firmly based on our shared values, common interests and unshakeable belief in freedom and democracy”); Stephen Cunningham, *U.S. Eases Restrictions on Contact With Taiwan in Jab at China*, BLOOMBERG (Jan. 10, 2021, 3:25 AM), www.bloomberg.com/news/articles/2021-01-09/u-s-to-end-restrictions-for-diplomats-regarding-taiwan-pompeo?sref=7sxw9Sx1 [<https://perma.cc/82JY-BY3K>] (noting: “The announcement was the latest in a series of moves by the Trump Administration to reshape the U.S. relationship with

D. CCP Intellectual Arguments

Throughout the battle with the U.S. over Hong Kong, China's responses were more than retaliatory in form. They also were intellectual in nature. That is, there were prominent intellectuals who provided the justification for the CCP's approach to Hong Kong:

Mr. Tian [Feilong] has joined a tide of Chinese scholars who have turned against Western-inspired ideas that once flowed in China's universities, instead promoting the proudly authoritarian worldview ascendant under Xi Jinping, the Communist Party leader. This cadre of Chinese intellectuals serve as champions, even official advisers, defending and honing the Party's hardening policies, including the rollout of the [*National*] *Security Law* in Hong Kong.

"Back when I was weak, I had to totally play by your rules. Now I'm strong and have confidence, so why can't I lay down my own rules and values and ideas?" Mr. Tian, 37, said in an interview, explaining the prevailing outlook in China. Witnessing the tumult as a visiting scholar in Hong Kong in 2014, Mr. Tian said, he "rethought the

Taiwan. Donald Trump accepted a telephone call from Taiwan's President Tsai Ing-wen weeks before taking office in January 2017, has said his support for the 'One China' policy was contingent on getting better trade deals, announced arms sales, and sent senior officials to Taipei"); *China Launches Measures to Protect, supra* note 192; Katrina Manson, *U.S. Risks Enraging China by Easing Limits on Taiwan Relations*, FIN. TIMES (Jan. 9, 2021), www.ft.com/content/debd932f-48f7-4933-a596-a4663b442002 [https://perma.cc/E7YV-7CBQ] (reporting that from 1979, the year of the *Taiwan Relations Act*, until the change, "contacts between the two [were] governed by an unpublished set of codes that limit[ed] where officials can meet and even how correspondence [was] conducted"); Idrees Ali & David Brunnstrom, *Pompeo Lifts Restrictions on U.S.-Taiwan Relationship as Clock Runs Out on Trump Administration*, REUTERS (Jan. 9, 2021, 2:54 PM), www.reuters.com/article/us-usa-taiwan-diplomacy/pompeo-lifts-restrictions-on-u-s-taiwan-relationship-as-clock-runs-out-on-trump-administration-idUSKBN29E0Q6 [https://perma.cc/PT5G-LLAM] (observing that "[t]he move appeared to be another part of an effort by Pompeo and Trump's Republican administration to lock in a tough approach to China before Democratic President-elect Joe Biden takes office on Jan. 20") [hereinafter *Pompeo Lifts Restrictions on U.S.-Taiwan*]. The freedom for U.S. government officers to travel to Taiwan and meet with Taiwanese officials was, at least from Taiwan's perspective, a major positive shift:

"Decades of discrimination, removed. A huge day in our bilateral relationship. I will cherish every opportunity," Hsiao Bi-khim, Taiwan's *de facto* ambassador in Washington, tweeted.

A senior Taiwanese official familiar with the island's security planning told Reuters this was the largest adjustment by the United States in its policy toward the island in recent years, saying both main U.S. political parties have always strongly supported exchanges between the United States and Taiwan.

"It reflects the current situation of closer cooperation between the United States and Taiwan on regional and global issues," the official said . . . *Id.*

relationship between individual freedom and state authority.”

“Hong Kong is, after all, China’s Hong Kong,” he said. “It’s up to the Communist Party to clean up this mess.”

While China’s Communist Party has long nurtured legions of academics to defend its agenda, these authoritarian thinkers stand out for their unabashed, often flashily erudite advocacy of one-Party rule and assertive sovereignty, and their turn against the liberal ideas that many of them once embraced.

They portray themselves as fortifying China for an era of deepening ideological rivalry. They describe the United States as a dangerous, overreaching shambles, even more so in the wake of the coronavirus pandemic. They oppose constitutional fetters on Communist Party control, arguing that Western-inspired ideas of the rule of law are a dangerous mirage that could hobble the Party.

They argue that China must reclaim its status as a world power, even as a new kind of benign empire displacing the United States. They extol Mr. Xi as a historic leader, guiding China through a momentous transformation.

A number of these scholars, sometimes called “statists,” have worked on policy toward Hong Kong, the sole territory under Chinese rule that has been a stubborn enclave for pro-democracy defiance of Beijing. Their proposals have fed into China’s increasingly uncompromising line, including the security law, which has swiftly curbed protests and political debate.

...

As well as earnestly citing Mr. Xi’s speeches, these academics draw on ancient Chinese thinkers who counseled stern rulership, along with Western critics of liberal political traditions. Traditional Marxism is rarely cited; they are proponents of order, not revolution.

Many of them make respectful nods in their papers to Carl Schmitt, the German legal theorist who supplied rightist leaders in the 1930s and the emerging Nazi regime with arguments for extreme executive power in times of crisis

...

The [Chinese] education authorities generously fund pro-Party scholars for topics such as how to introduce security laws in Hong Kong. Chinese and foreign foundations that once supported less orthodox Chinese scholars have retrenched because of tightening official restrictions.

More than fear and career rewards have driven this resurgence of authoritarian ideas in China. The global financial crisis of 2007, and the United States' floundering response to the coronavirus pandemic, have reinforced Chinese views that liberal democracies are decaying, while China has prospered, defying predictions of the collapse of one-Party rule.

"China is actually also following a path that the United States took, seizing opportunities, developing outward, creating a new world," Mr. Tian said. "There is even a fervent hope that we'll overtake the West in another 30 years."

China's authoritarian academics have proposed policies to assimilate ethnic minorities thoroughly. They have defended Mr. Xi's abolition of a term limit on the presidency, opening the way for him to stay in power indefinitely. They have argued that Chinese-style "rule by law" is inseparable from rule by the Communist Party. And more recently they have served as intellectual warriors in Beijing's efforts to subdue protest in Hong Kong.

"For them, law becomes a weapon, but it's law that's subordinated to politics," said Sebastian Veg, a Professor at the School of Advanced Studies in Social Sciences in Paris who has studied the rise of China's statist thinkers. "We've seen that at work in China, and now it seems to me we're seeing it come to Hong Kong."

...

A Chinese government paper in 2014, which Professor Jiang [Shigong of Peking University] is widely credited with helping write, asserted that Beijing had "comprehensive jurisdiction" over Hong Kong, dismissing the idea that China should stay hands off. The framework that defined Hong Kong's status was written in the 1980s, when China was still weak and under the sway of foreign liberal ideas. . . .

"They treat Hong Kong as if it were part of the West, and they treat the West as if it were the entire world." Professor Jiang recently said of Hong Kong's protesters. . . .

...

"The survival of the state comes first, and constitutional law must serve this fundamental objective," Professor Chen [Duanhong of Peking University] . . . , citing Mr. Schmitt, the authoritarian German jurist, to make the case for a security law in Hong Kong.

"When the state is in dire peril," Professor Chen wrote, leaders could set aside the usual constitutional norms, "in particular provisions for civic rights, and take all necessary measures."

...

“We have to choose what side we’re on, including us scholars, right?” he said. “Sorry, the goal now is not Westernization; it’s the great rejuvenation of the Chinese nation.”¹⁹⁸

There was a delicious irony in the CCP finding nothing in the intellectual heritage of Karl Marx (1818-1883), Vladimir Lenin (1870-1924), or any other traditional Communist thinker, let alone Mao Zedong (1893-1976), on which to draw.

E. NATO, U.N., and Business Perspectives and Impacts

Of course, the ideas of Schmitt, and statism itself (discussed above), were anathema not only to the U.S. and its western allies, but also to many in Asia, for example, India, Japan, Korea, and the Philippines. Thus, arguably, there was something rather reductionist about statist intellectuals casting Sino-American differences as East-West clash. Indeed, Jens Stoltenberg, Secretary-General of the North Atlantic Treaty Organization (“NATO”), summarized the reaction of much of the world to China’s actions in Hong Kong: “It is clear that China does not share our values – democracy, freedom, and the rule of law.”¹⁹⁹ By no means was “our” limited to the west. The *National Security Law* indeed was “widely condemned across the world.”²⁰⁰

But, not all countries denounced that *Law*. At the 44th session of the U.N. Human Rights Council, 53 countries led by Cuba voiced support for China and the *National Security Law*.²⁰¹ They argued China acted within its rights under Public International Law:

Non-interference in internal affairs of sovereign states is an essential principle enshrined in the Charter of the United Nations and a basic norm of international relations. In any country, the legislative power on national security issues rests with State, which in essence is not a human rights issue and therefore not subject to discussion at the Human Rights Council.

We believe that every country has the right to safeguard its national security through legislation, and commend relevant steps taken for this purpose. In this context, we welcome the adoption of the *Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (HKSAR)*, as well as China’s reaffirmation of adherence to “one country, two systems”

¹⁹⁸ Chris Buckley, ‘Clean Up This Mess’: *The Chinese Thinkers Behind Xi’s Hardline*, N.Y. TIMES (Aug. 2, 2020), www.nytimes.com/2020/08/02/world/asia/china-hong-kong-national-security-law.html?referringSource=articleShare [https://perma.cc/YHH3-NMGR].

¹⁹⁹ Quoted in *Hong Kong Security Law*, *supra* note 15.

²⁰⁰ *Hong Kong: U.S. Passes*, *supra* note 137.

²⁰¹ See *id.*

guideline.²⁰²

Moreover, neither Chinese nor American business communities were monolithically opposed to the new *Law*:

The Chinese and Hong Kong governments have tried to reassure the local and international business community that the legislation “will create a more law-based, reliable and stable business environment for foreign investors.” The law may be particularly welcomed by some mainland Chinese investors and Chinese state-owned enterprises who hope that it will enable the authorities to end anti-government protests in the territory.

But the proposed law has stoked fears among some businesses in Hong Kong. The American Chamber of Commerce in Hong Kong said the law “may jeopardise future prospects for international business” if it undermines Hong Kong’s rule of law. Beyond the business community, the law might have implications for academics, non-government organisations and news organisations. . . .²⁰³

Additionally, two of the world’s most prominent banks, HSBC and Standard Chartered, voiced support for the *National Security Law*.²⁰⁴ Both are headquartered in London, but Asia is the source of most of their profits, and Hong Kong is the base of their operations. Yet, HSBC came in for ridicule for its stance:

Why did anyone expect anything else from The Hongkong and Shanghai Banking Corporation? “There was enough civil unrest that business couldn’t possibly flourish,” says one person close to the bank who supports Beijing’s new law.

Insiders talk of the bank as apolitical and a guest in every country. In other words, its nationality is ambiguous, a citizen of nowhere. That offers more freedom but confers less natural protection than any enjoyed by a national champion. It means HSBC can be pilloried by Washington for supporting Beijing and attacked by Beijing for providing information to the U.S. on Chinese telecoms equipment maker Huawei.

Never a typical British company, its unusual background is described in its history *The Lion Wakes*: a pseudo central bank in Hong Kong well after its founding in 1865, with ranks of “international officers”

²⁰² *Joint Statement Delivered by Permanent Mission of Cuba at the 44th Session of Human Rights Council* (June 30, 2020), www.china-un.ch/eng/hom/t1793804.htm [<https://perma.cc/2T2J-QAC3>].

²⁰³ *What is China’s?*, *supra* note 104.

²⁰⁴ *Mike Pompeo Criticizes HSBC for Backing Hong Kong Security Law*, BBC NEWS (June 10, 2020), www.bbc.com/news/business-52989121 [<https://perma.cc/Y5HT-QVZ8>] [hereinafter *Mike Pompeo Criticizes*].

that required “demilitarisation” as recently as 2000.

Despite British management, HSBC was for well over a century regarded in London as a foreign entity. . . .²⁰⁵

So, the U.S. said they – HSBC and Standard Chartered – were coerced into their position by the CCP’s bullying tactics, and that such “browbeating” “should serve as a cautionary tale.”²⁰⁶

There was truth in this claim. The CCP announced on 9 July that banks in Hong Kong that complied with American measures risked violating Article 29 of the *National Security Law*.²⁰⁷ That provision forbade participation in sanctions, blockages, or hostile activities against Hong Kong or China. Article 29 also covered state secrets, thus potentially prohibiting them from providing information to a foreign government on a high-level client if it were interpreted to apply to measures targeting the Mainland and SAR, but also individuals.²⁰⁸ Banks thus could be faced with a *bona fide* conflict of law problem: to comply with those of one country would *ipso facto* be to violate those of the other country. Implementing the U.S. measures and routing transactions through offshore entities in third countries did not seem to be an option for them, because China claimed extraterritorial reach under the *Law*.²⁰⁹

Early signs indicated banks in Hong Kong, including Chinese banks, regardless of whether they had voiced support for the National Security Law, were opting to choose in favor of complying with U.S. sanctions. That was

²⁰⁵ Tom Braithwaite, *HSBC is a Citizen of Nowhere*, FIN. TIMES (June 12, 2020), www.ft.com/content/6bfb8213-1b72-4bf0-8e5e-ad2218f3df37?shareType=nongift [https://perma.cc/4UBT-YSYY].

²⁰⁶ Mike Pompeo Criticizes, *supra* note 204 (quoting U.S. Secretary of State Mike Pompeo).

²⁰⁷ See Cathy Chan, *Global Banks Risk Breaching China Law by Complying With U.S.*, BLOOMBERG (July 9, 2020, 11:00 AM), www.bloomberg.com/news/articles/2020-07-09/global-banks-risk-breaching-china-law-by-complying-with-u-s?sref=7sxx9Sx1 [https://perma.cc/5CVR-LT9J] [hereinafter *Global Banks Risk*].

²⁰⁸ *Id.*

²⁰⁹ The conflict of law problem also faced non-bank entities, particularly those with servers holding information about individuals that the U.S. might regard as private, but to which China might demand access. For example, in response to the “twin pressure,” “Naver, South Korea’s biggest internet services company, has begun to back up user data in Singapore rather than Hong Kong [and] The New York Times newspaper decided to relocate part of its Hong Kong offices to Seoul.” See Takeshi Kihara, *A Month On, Hong Kong Banks Caught Between U.S. and China Sanctions*, NIKKEI ASIAN REV. (July 30, 2020), <https://asia.nikkei.com/Business/Finance/A-month-on-Hong-Kong-banks-caught-between-US-and-China-sanctions> [https://perma.cc/86KL-JD2U].

China’s extraterritorial application of the *National Security Law* has had profound implications for Mainland and Hong Kong students studying overseas, and for all students and faculty – regardless of nationality – in their classes and teaching those classes, respectively. Succinctly put, the *Law* has challenged faculty to preserve free thought and speech in the classrooms, while protecting students, and the families of Chinese students on the Mainland and in Hong Kong, from retaliation by CCP authorities for any statements made in class that run afoul of Party censors. For one among many accounts of the fear and pedagogical disruption caused by the *Law*, see, e.g., Michael Bristow, *Hong Kong Security Law: Why Students Abroad Fear It*, BBC NEWS (Nov. 9, 2020), www.bbc.com/news/world-asia-china-54718434 [https://perma.cc/2XPC-TR4H].

because they sought “to safeguard their access to crucial dollar funding and overseas networks”.²¹⁰

Major lenders with operations in the U.S. including Bank of China Ltd., China Construction Bank Corp., and China Merchants Bank Co. have turned cautious on opening new accounts for the 11 sanctioned officials, including Hong Kong Chief Executive Carrie Lam [discussed above]. . . . At least one bank has suspended such activity.

At some lenders transactions via the U.S. are banned, while compliance must now review and sign off on others that would previously have been immediately processed. . . .

Foreign lenders like Citigroup Inc. have taken steps to suspend accounts or are increasing scrutiny of Hong Kong clients.

Such measures underscore the ability of the U.S. to use the greenback’s dominance in international transactions as a pressure point in the intensifying standoff with China. China’s state-owned lenders need to preserve their access to global financial markets, particularly at a time when Beijing is leaning on them to prop up the economy from the fallout of the coronavirus.²¹¹

In other words, insofar as there was a financial Cold War brewing the U.S. and China, China was in no position to fight it.

As for American businesses in Hong Kong, the worries were not insignificant. Over 1,300 U.S. firms had offices in Hong Kong (and of them, about 800 made Hong Kong their regional headquarters or centers), and they employed over 100,000 workers.²¹² Roughly 85,000 Americans resided in Hong Kong.²¹³ Thus, the prospect of layoffs for Hong Kongers loomed (assuming they could not find positions with Chinese or third-country companies). Many of those offices had confidential information stored electronically. Thus, the prospect of securing that data, repatriating it, and shutting down their Hong

²¹⁰ *China Banks Act to Comply With Trump Sanctions on Hong Kong*, BLOOMBERG (Aug. 12, 2020, 1:59 AM), www.bloomberg.com/news/articles/2020-08-12/chinese-banks-move-to-comply-with-u-s-sanctions-on-hong-kong?sref=7sxw9Sxl [<https://perma.cc/A7XJ-EWTT>] [hereinafter *China Banks Act*].

²¹¹ *Id.* (emphasis added).

²¹² See Jessie Pang & Greg Torode, *Hong Kong Officials Say Trump “completely wrong” to End City’s Special Status*, REUTERS (May 29, 2020, 8:03 PM), www.reuters.com/article/us-hongkong-protests/hong-kong-leaders-say-trump-completely-wrong-for-curbing-ties-idUSKBN23601J [<https://perma.cc/L9NU-MNEK>].

²¹³ See David Lawder, *U.S. business to Trump: Go slowly on Hong Kong response*, REUTERS (May 27, 2020, 9:12 PM), www.reuters.com/article/us-hongkong-protests-usa-business-analysis/u-s-business-to-trump-go-slowly-on-hong-kong-response-idUSKBN23408W [<https://perma.cc/4DKK-24AF>] [hereinafter *U.S. Businesses to Trump*].

Kong-based servers loomed.²¹⁴ In the 10-year period 2009-2018, America's trade surplus with Hong Kong, totalled \$297 billion, its biggest among its trade partners. Thus, the prospect of rubbing out healthy trade numbers for America loomed, assuming China denied U.S. merchandise shipped to Hong Kong DFQF treatment). From a cold business perspective, what mattered was not the rule of law generally, but the rule of business law, that is, predictability in the fields of contracts, labor, and regulation.²¹⁵ Thus, the U.S. Chamber of Commerce "urge the Chinese government to find ways to peacefully de-escalate the situation in Hong Kong and preserve the 'one country, two systems' framework that has worked so well for Hong Kong, China and the international business community," and dubbed the prospect of "jeopardiz[ing] Hong Kong's special status" a "serious mistake on many levels."²¹⁶

Arguably, China held the upper hand. First, unlike the possible (and horrific) possibility that the U.S. would come to the defense of Taiwan in the event of the Mainland pursued coercive reunification, America was unable, unwilling, or both to use military might to rescue Hong Kong. Indeed, the U.S. had accepted the PRC's sovereignty over Hong Kong. Second:

While Hong Kong remains a major trading hub and a key gateway from China to the rest of the world, it matters far less to the country's fortunes than it once did. *In 2019, 12% of China's exports went to or through Hong Kong, down from 45% in 1992.* China is also far less reliant on inflows of foreign capital and expertise, and has made a much lower priority of making the *yuan* an international currency.²¹⁷

In other words, CCP officials had long planned to diminish its economic dependence on Hong Kong.

Nonetheless, destabilization of Hong Kong's financial markets benefitted no one:

The stakes are high: a panicked business community [in Hong Kong] could trigger cascading outflows that crash its [*i.e.*, Hong Kong's] markets and cause runs on its banks. A wave of emigration could create a brain drain that damps its appeal as a financial center.

The \$4.9 trillion stock market, the world's fourth largest, is now the most volatile since 2012, according to a measure of historical 100-day

²¹⁴ See *id.*

²¹⁵ See *id.*

²¹⁶ U.S. Chamber of Commerce, *U.S. Chamber of Commerce Urges Chinese Government to Preserve Hong Kong's "One Country, Two Systems" Framework*, Press Release (May 26, 2020, 8:00 AM), www.uschamber.com/press-release/us-chamber-of-commerce-urges-chinese-government-preserve-hong-kong-s-one-country-two [https://perma.cc/FAE9-NFU8].

²¹⁷ Nick Wadhams & Ben Bartenstein, *U.S. Says Hong Kong's Autonomy Is Gone, Sowing China Trade Doubt*, BLOOMBERG (May 27, 2020, 10:44 AM), www.bloomberg.com/news/articles/2020-05-27/pompeo-finds-hong-kong-is-no-longer-autonomous-from-china?sref=7sxw9Sxl [https://perma.cc/3X8M-Q7T4] (emphasis added).

swings on the Hang Seng Index.

...

Local companies are lining up to defend China's expanded powers. Hong Kong property developers issued a statement saying the national security law will guarantee stability and prosperity, even as their shares tumbled to multi-year lows. . . .

...

Such efforts to calm the business community aren't new. Back in the early 1980s, the then free-floating currency plunged as London and Beijing held talks over the return of Hong Kong to Chinese rule. The Colonial government arrested the slide by pegging the Hong Kong dollar to the greenback. [Impressively, the Hong Kong Monetary Authority maintained this peg, HK\$ 7.8 = U.S. \$1, was maintained from 1984 onwards.] Maintaining confidence became an important focus for the British rulers in the run up to the 1997 handover, especially as hundreds of thousands of Hong Kongers migrated to Canada in order to obtain overseas citizenship.²¹⁸

These mixed implications, with no serious damage to the Mainland (other than, perhaps, its bailout of the Hong Kong Stock Exchange and involvement, if any, in defending the peg), may have explained why President Trump's 29 May announcement was vague.²¹⁹ He did not on that occasion specify precisely when Hong Kong's special trade status would end, nor when it would lose its visa waiver privilege. He also did not identify exactly who among CCP and Hong Kong government officials he would target for sanctions.

IV. AN OPEN SOCIETY WAR?

A profound way to conceptualize the linkage of trade and human rights in the context of Hong Kong is that this linkage, both catalyzes and reflects an "Open Society War." If so, then query whether China's political system might well be the core of the problem. None other than the thoughtful investor, George Soros (1930-), and his intellectual mentor, the renowned philosopher, Karl Popper (1902-1994), suggest this characterization for the entire Sino-American Trade War. Popper wrote *The Open Society and Its Enemies* (1945) while at the University of Canterbury, New Zealand, and joined (in 1946) the London School

²¹⁸ Sofia Horta e Costa & Richard Frost, *Battle for Hong Kong Is Shifting to City's Financial Markets*, BLOOMBERG (May 29, 2020, 3:36 AM), www.bloomberg.com/news/articles/2020-05-29/battle-for-hong-kong-is-now-shifting-to-city-s-financial-markets?sref=7sxw9Sxl [<https://perma.cc/Z2Y4-PKPM>].

²¹⁹ See Jenny Leonard, Josh Wingrove & Justin Sink, *Trump's China Announcement Leaves Room to De-Escalate Tensions*, BLOOMBERG (May 29, 2020, 11:54 AM), www.bloomberg.com/news/articles/2020-05-29/trump-weighs-sanctions-on-china-finance-sector-over-hong-kong?sref=7sxw9Sxl [<https://perma.cc/6RVD-95JX>].

of Economics, where Soros was his student (from 1947-1954). At the January 2019 World Economic Forum in Davos, Switzerland, it was Soros who delivered the most important speech.²²⁰ Applying Popper's concept of an "open society," Soros castigated the closed nature of Chinese governance, singling out President Xi Jinping and the abuse of large, data-rich information technology to spin a "web of totalitarian control the likes of which not even George Orwell could have imagined."²²¹

Mr. Soros was not alone. Rather, his views respected expectations major world leaders had when China acceded to the WTO on 11 December 2001:

"The old Chinese system, which was by no means a democracy, still guaranteed enough debate, and play, and openness because there was a regular rotation of leadership," [former U.S. President Bill] Clinton [(1946, President, 1993-2001)] said. "Now that it appears that a person [Xi Jinping] is in charge of China who intends to stay there for life [given his abolition of term limits on the office of the Presidency of China], in essence, that changes things. But we shouldn't accept or assume that it's all going to be bad without working to make it better."

Clinton noted "clear disagreements" between Washington and Beijing over its crackdown on freedoms in Hong Kong and the internment of Uighur Muslims in western China, but added that there was a "desperate need to work together" on climate change and the Covid-19 pandemic.

...

[Former British Prime Minister Tony] Blair [(1953-, PM, 1997-2007)] said China's more recent foreign and domestic policies had undermined his belief that Chinese politics would gradually become more open as it joined the world economy. When he and Clinton were in office, *there was hope that China's political system would liberalize as its economy opened up*, Blair said.

"That was our hope, and possibly and certainly, it was my actual expectation. You've got to say in the last few years, *there's been more external aggression and more internal repression. That's just a fact.*

²²⁰ See George Soros, *Remarks Delivered at the World Economic Forum* (Jan. 24 2019), www.georgesoros.com/2019/01/24/remarks-delivered-at-the-world-economic-forum-2/ [https://perma.cc/6AK2-R96N].]

²²¹ *Id.* Mr. Soros is not alone in commenting that China has become less open under the leadership of President Xi than his predecessors, contrary to the expectations of the West throughout the 1990s and early 2000s. See NICHOLAS R. LARDY, *THE STATE STRIKES BACK: THE END OF ECONOMIC REFORM IN CHINA?* (2019); Arvind Subramanian & Josh Felman, *The Coming China Shock*, PROJECT SYNDICATE (Feb. 5, 2019), www.project-syndicate.org/commentary/coming-china-shock-end-of-exceptionalism-by-arvind-subramanian-and-josh-felman-2019-02 [https://perma.cc/9DQ3-83G6].

...²²²

Whether the two great powers, America and China, can come together to resurrect Hong Kong's democracy and de-escalate trade tensions remains uncertain.

In the end, the answer may depend on their ability to introspect. Can America, having lost its innocence with the 6 January 2021 insurrection (if not long before during the "Lost Generation" of some of its greatest writers), reimagine an authentic, humble exceptionalism? Can China, having suffered grievously through 19th and early 20th century colonialism (and monstrous Maoist mishaps thereafter), transcend those humiliations as it plans for renewed grandeur in a multi-polar 21st century world?

Honest introspection did not seem to be on the CCP's horizon as of March 2021. To the contrary, its changes to Hong Kong's electoral rules gave credence to the Soros characterization of an "Open Society" conflict. The above-discussed LegCo purge did not satisfy the Party, nor did its waves of mass arrests of democracy sympathizers. The CCP continued to fear Hong Kong citizens might elect representatives that took stances contrary to what it regarded as the best interests of China. After all, Hong Kong residents had "been free to contest polls on their own," and "[i]n the last Legislative Council election in 2016, 40 of 70 seats were filled through a public vote."²²³ Moreover, "[a]ccording to the *Basic Law*, . . . the 'ultimate aim' for Hong Kong was to achieve universal suffrage in a 'gradual and orderly manner' in accordance with democratic values and processes."²²⁴

So, in March 2021, the NPC approved (by a vote of 2,895-0, with 1 abstention) major changes to Hong Kong's electoral rules.²²⁵ Soon thereafter, China's top decision-making body, the Standing Committee of the NPC, approved it unanimously, too.²²⁶ First, and most notably, the CCP sought to

²²² Iain Marlow, *Bill Clinton Says China's Direction Under Xi Upended U.S. Ties*, BLOOMBERG (Nov. 16, 2020, 7:03 PM), www.bloomberg.com/news/articles/2020-11-17/bill-clinton-says-china-s-direction-under-xi-upended-u-s-ties?sref=7sxw9Sx1 [https://perma.cc/SD8M-TPTY] (emphasis added).

²²³ Michelle Chan, *China Approves Hong Kong Election Overhaul Bill*, NIKKEI ASIA (Mar. 11, 2021), <https://asia.nikkei.com/Politics/China-People-s-Congress/China-approves-Hong-Kong-election-overhaul-bill> [https://perma.cc/DRY4-RD6G] [hereinafter *China Approves Hong Kong Election*].

²²⁴ *Id.*

²²⁵ See Demetri Sevastpulo, Tom Mitchell & Primrose Riordan, *China Passes Hong Kong Election Law Despite US Warning*, FIN. TIMES (Mar. 11, 2021), www.ft.com/content/b96d1e82-e693-4d62-bcf6-089e6c1c8cf2?shareType=nongift [https://perma.cc/W8AN-2G49] (reporting: "the changes to Hong Kong's election system, which will empower a pro-Beijing "election committee" to vet and appoint lawmakers. Previously, half the seats in the territory's Legislative Council were directly elected after an open nomination process"); *China Approves Hong Kong Election Overhaul Bill* (noting: the CCP touted the changes "as an 'improved democratic electoral system with Hong Kong characteristics'").

²²⁶ *Hong Kong: China Limits Parliament to "Patriots"*, BBC NEWS (Mar. 30, 2021), www.bbc.com/news/world-asia-china-56560829 [https://perma.cc/M4NA-9XHD] [hereinafter *Hong Kong: China Limits Parliament*].

create “a government agency to vet every candidate running not only for chief executive but for the legislature and other levels of office, including neighborhood representatives.”²²⁷ Avowedly, the Party wanted only “patriots” in office:

NPC Vice-Chairman Wang Chen announced to the NPC that changes were needed as “the rioting and turbulence that occurred in Hong Kong society reveals that the existing electoral system has clear loopholes and deficiencies.” He said “risks in the system” needed to be removed to ensure “patriots” were in charge.

Premier Li [Keqiang] warned that China would “resolutely guard against and deter” interference by external forces in Hong Kong’s affairs.

. . .

Ian Chong, Politics Professor at the National University of Singapore, . . . [said]: “In 2019, the pan-democrats did extremely well [in local elections], which was alarming to the CCP . . . , because it showed that all their negative rhetoric didn’t seem to be working.”

“I think for the CCP, they really want to remove the voices that they don’t like to hear.”²²⁸

Under the new regime, the Hong Kong Election Committee, which was slanted “heavily” in favor of the Mainland, received two new powers over LegCo.²²⁹ The Committee could (and would) vet all LegCo candidates. And, the Committee itself could elect LegCo members (indeed, the number of LegCo seats increased from 70 to 90 for this purpose). Every candidate would have to undergo two rounds of vetting to ensure they hold allegiance to Hong Kong,

²²⁷ Keith Bradsher & Austin Ramzy, *Demanding Loyalty, China Moves to Overhaul Hong Kong Elections*, N.Y. TIMES (Mar. 5, 2021), www.nytimes.com/2021/03/04/world/asia/china-hong-kong-election-law.html?referringSource=articleShare [<https://perma.cc/FS9N-3AZF>].

²²⁸ *China NPC: Beijing to Overhaul Hong Kong Electoral System*, BBC NEWS (Mar. 5, 2021), www.bbc.com/news/world-asia-china-56264117 [<https://perma.cc/AX9Z-ZXCA>]. See also *China Approves Hong Kong Election* (reporting: “Chinese Vice Premier Han Zheng – also the top official responsible for Hong Kong affairs – said the election overhaul is necessary to ‘plug the loophole’ in the current ‘one country, two systems’ model and safeguard national security. ‘I strongly support and warmly welcome the passage’ of the electoral reform, [Hong Kong Chief Executive Carrie] Lam said in a statement after the resolution was approved, adding that the new election system will ensure Hong Kong’s long-term stability and prosperity. ‘It is natural and essential to require people vested with governing powers to be patriotic, which is also part and parcel of basic political ethics and a principle that applies everywhere in the world.’”).

²²⁹ *Hong Kong: What is China’s “Patriot” Plan for Electoral Reform?*, BBC NEWS (Mar. 30, 2021), www.bbc.com/news/world-asia-china-56534040 [<https://perma.cc/Q56M-V3MV>] [hereinafter *Hong Kong: What is China’s “Patriot” Plan*]. The Committee itself was “a powerful body” that until the changes “only elected the city’s most senior official, the Chief Executive,” and with the changes grew in number from 300 members to 1,200-1,500. *Id.*

support the *Basic Law*, and pass police and national security checks.²³⁰ Hong Kong's CEO, Carrie Lam, commented correctly that “there is not a ‘one-size-fits-all’ way of doing democracy,” but her assurance the Committee would not screen out candidates on the basis of their political views – only if they were “non-patriots” – rang hollow.²³¹

Second (as indicated), the number of seats in LegCo increased from 70 to 90. Third, the number of directly elected representatives was cut from 35 to 20. So, the direct voice of the people went from 50% of the seats (35 out of 70) to 22.2% (20 out of 90). These two changes, along with the first, diluted the voice of the public in terms of picking and electing for candidates who, in turn, could wield significant influence in LegCo. As to the other 70 seats, 40 were allocated to MPs the Election Committee chose, and 30 were elected by functional constituencies, in effect, “special interests such as business, banking and trade, which historically are also pro-Beijing.”²³² Thus, it would take an alignment of the 20 directly elected legislators, plus an additional 26 most likely from these special interests, to form a majority (46 out of 90) in LegCo – but the Committee could abort any such coalition in its candidate vetting process for “patriots.”

In essence, the CCP engineered electoral rules that, upon their entry into force on 31 March 2021, wiped out a credible opposition. Before the two changes, the people of Hong Kong elected, via “open nominations and direct elections,” 50% of their LegCo representatives.²³³ After the changes, that figure dropped to 20%-30% of the lawmakers.²³⁴ Predictably, the CCP's moves attracted “international condemnation from the U.S., the U.K. and the European Union.”²³⁵ After all, the much ballyhooed “One Country, Two Systems” seemed now to be in the rubbish bin – a reality not lost in Taiwan.

In response to the U.K. pronouncement that China was in a “state of ongoing non-compliance” with the 1984 *Sino-British Joint Declaration*, China accused Britain of “groundless slanders,” and said:

The U.K. has no sovereignty, jurisdiction or right of “supervision” over Hong Kong after the handover, and it has no so-called “obligations” to Hong Kong citizens . . . no foreign country or organization has the right to take the *Joint Declaration* as an excuse to interfere in Hong Kong affairs, which are China's internal affairs.²³⁶

²³⁰ See *Hong Kong: China Limits Parliament*, *supra* note 226.

²³¹ *Id.*

²³² *Hong Kong: What is China's “Patriot” Plan*, *supra* note 229.

²³³ See Tom Mitchell, Primrose Riordan & Nicole Liu, “*Hong Kong Will Sit on China's Lap*”: *Beijing Crushes City's Autonomy*, FIN. TIMES (Mar. 13, 2021), www.ft.com/content/a53362f4-22bf-4a50-b336-b78c37ba0a02?shareType=nongift [https://perma.cc/X3EN-66QD] [hereinafter “*Hong Kong Will Sit on China's Lap*”].

²³⁴ See *id.*

²³⁵ *China Approves Hong Kong Election*, *supra* note 223.

²³⁶ Andrew Davis, *China Slams U.K., Says It Has No Right to Supervise Hong Kong*, BLOOMBERG QUINT (Mumbai) (Mar. 13, 2021), www.bloombergquint.com/politics/u-k-says-china-not-complying-with-hong-kong-handover-treaty [https://perma.cc/P3NE-G6HF].

Perhaps. The CCP implemented the election law changes not by an outright amendment to the 1997 *Basic Law*, but rather via amending the Annexes to that *Law*.²³⁷ The angry, anti-Colonial Chinese response was parlous.

First, it did not address Britain's international legal point concerning the 1984 *Declaration*. Second, it skirted the reality that adding or modifying an Appendix is substantively equivalent to modifying the *Law*, in so far as both parts of the text had equal weight. Third, the Annexes undermined the spirit of both the *Declaration* and *Law* to see competitive elections in Hong Kong, with a view toward universal suffrage. Thus, not surprisingly, the Biden Administration maintained the stance of the Trump Administration, opposing the CCP's behavior in Hong Kong. The SAR would not receive separate trade treatment from the Mainland.²³⁸

With Hong Kong indistinguishable from the Mainland, there was one less Open Society in the world.

²³⁷ See *Hong Kong: China Limits Parliament*, *supra* note 226.

²³⁸ Demetri Sevastopulo, *Biden Administration Maintains Trump Policy on Hong Kong*, FIN. TIMES (Mar. 31, 2021), www.ft.com/content/0b53dd49-64cb-4ce2-a4e6-73002a56fd57?shareType=nongift [https://perma.cc/SF2R-BA3N] (reporting: “‘Over the past year . . . China has continued to dismantle Hong Kong’s high degree of autonomy, in violation of its obligations under the Sino-British *Joint Declaration* and Hong Kong’s *Basic Law*,’ [U.S. Secretary of State Antony] Blinken said in making the annual [2021] determination to Congress required by the *Hong Kong Policy Act*. Last year [2020], Donald Trump became the first U.S. President to declare that Hong Kong was no longer sufficiently autonomous from China to deserve special status, which includes trade privileges. This month, the U.K. said that China was violating the 1984 *Joint Declaration*”).