

Financing the Chek Lap Kok New Airport: A Case Study in Amending the Sino-British Joint Declaration on the Question of Hong Kong

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I. INTRODUCTION

Since the signing in 1984 of the Sino-British Joint Declaration on the Question of Hong Kong (the "Joint Declaration"),¹ a number of issues involving the administration of Hong Kong have caused friction between Great Britain ("Britain") and the People's Republic of China ("China"). One of the most contentious of such issues concerns the financing of a new airport in the territory. Construction of the airport, which is to be called Chek Lap Kok New Airport, has already begun on outlying Lantau Island. The total cost for completing the airport, and a number of bridges, tunnels and railway lines needed to link the airport to Hong Kong Island, is estimated to be in excess of US\$20 billion,² making it one of the largest infrastructure projects currently under way in the world.³

The airport project has become a focus of controversy between Britain and China because it is not scheduled to be completed until 1997, the year that sovereignty over Hong Kong reverts to China. Because most of the financing for the airport will extend past the date on which Hong Kong is returned to Chinese rule, banks will not lend to the project

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1. Joint Declaration on the Question of Hong Kong, Sept. 26, 1984, Gr. Brit.-P.R.C., 23 I.L.M. 1366 [hereinafter Joint Declaration]. The Joint Declaration was ratified by the parties and came into force on May 27, 1985.

2. In this article, Hong Kong dollar (HK\$) amounts have been translated into United States dollar (US\$) amounts at a rate of US\$1 = HK\$7.8.

3. Louise do Rosario, Cleared for Takeoff, *Far E. Econ. Rev.*, Nov. 17, 1994, at 14. See also China and Britain Agree on Hong Kong Airport, *N.Y. Times*, Nov. 5, 1994, at 8; Britain, China Sign Pact on Financing of New Airport, *Asian Wall St. J. Wkly.*, Nov. 7, 1994, at 8. For a discussion of the airport project in light of other major Asian infrastructure projects, see William Holstein, Building the New Asia, *Bus. Wk.*, Nov. 28, 1994, at 62.

unless they are assured that China will honor such debts.⁴ Because of China's leverage over the colony's access to private financing for the project, Britain has been forced to seek out China's formal approval of any financing plan for the airport project.

On November 4, 1994, Britain and China reached a six-point accord on the airport project that established certain broad outlines for the financing of the two largest components of the project, the airport itself and the airport railway (the "November Fourth Accord").⁵ One of the most significant elements of the accord was that the two sides agreed that the total aggregate debt incurred by the Hong Kong government in connection with the project would be kept below HK\$23 billion (US\$3 billion).⁶ This agreement represented a significant victory for China, which was concerned that Britain was going to saddle the colony with excessive debt before returning it to Chinese sovereignty.⁷ The British side had argued that the current low interest rate environment made it sensible to finance the airport with a much greater degree of debt.⁸ However, they ultimately conceded to Chinese demands to cap the debt at a relatively low percentage of the total cost of the airport.

The November Fourth Accord is only the most recent of a number of agreements concerning the airport that Britain and China have reached since the project was first proposed in 1989. Britain ostensibly began this massive infrastructure project in an effort to demonstrate to the world that Britain had confidence in, and influence over, the future of Hong Kong despite China's repression of the student democracy protests in Tiananmen Square.⁹ However, ever since the project was proposed, it has been China, and not Britain, that has successfully used the project to demonstrate its power over Hong Kong's future.¹⁰

Within months of the initial announcement of the project, China began to express its reservations concerning costs, demanding that the

4. *Id.* at 15; see also Steven Mufson, *Accord Boosts Hong Kong Airport: Chinese-British Settlement Puts Massive Project on Line for 1997*, Wash. Post, Nov. 5, 1994, at A19.

5. The full text of the November Fourth Accord appears in *The Agreed Minute*, S. China Morning Post, November 5, 1994 (Supp.), at 4 [hereinafter "November Fourth Accord"].

6. *Id.* at para. 1.

7. See *Outcome of Tough Negotiations*, Xinhua News Agency, Nov. 4, 1994, available in LEXIS, News Library, Asia-pc File; Sandra Worthington, *Hong Kong Airport Deadlock Broken*, Lloyds List, Nov. 5, 1994, available in LEXIS, News Library, Asia-pc File.

8. *do Rosario*, *supra* note 3, at 15.

9. *Hong Kong's Airport Tie-Up: More Confirmation that 1997 has Arrived*, Far E. Econ. Rev., Nov. 17, 1994, at 5.

10. *Id.*

project be scaled down.¹¹ Following more than a year of negotiations, Britain and China came to an agreement on the airport that acknowledged China's right to have input in the planning and financing of the project. This agreement, called the Memorandum of Understanding Concerning the Construction of the New Airport in Hong Kong and Related Questions (the "Memorandum of Understanding"),¹² called for the completion of as many of the principal components of the airport project as possible prior to the date of Hong Kong's return to China¹³ and for the creation of a joint Sino-British committee to oversee the major financing and construction aspects of the project.¹⁴

The continuing negotiations and agreements between Britain and China concerning the airport project illustrate the degree to which control over major aspects of Hong Kong policymaking has already passed from British to Chinese hands. This article briefly reviews the Hong Kong airport dispute and places it in a legal context. In particular, this article aims to evaluate the agreements reached by Britain and China over the financing of the airport project in light of the principles for the transition from British to Chinese rule set forth in the Joint Declaration.

Section II of the article describes the Chek Lap Kok New Airport project and some of the organizations most actively involved in seeing through the project. Section III argues that the degree of Chinese control over the financing of the airport project demonstrates that China has obtained greater influence in Hong Kong's pre-1997 affairs than was envisioned by the Joint Declaration. Finally, Section IV of the article looks ahead to the future of the negotiations over the airport project and speculates that, as 1997 draws nearer, Chinese control over the project will further deviate from the principles of the Joint Declaration.

11. See Sino-British Understanding Over Hong Kong Airport, *Fin. Times*, July 5, 1994, at 4, which describes the history of negotiations over the airport up to 1991.

12. For the full text of the Memorandum of Understanding Concerning the Construction of the New Airport in Hong Kong and Related Questions, see Sino-British Understanding Over Hong Kong Airport, *supra* note 11 [hereinafter *Memorandum of Understanding*]. The signing of the Memorandum of Understanding required British Prime Minister John Major to travel to Beijing, making him the first head of state to visit China following the Tiananmen Square uprising. See Runway Clear, *Economist*, July 6, 1991, at 34.

13. Memorandum of Understanding, *supra* note 12, para. A.

14. *Id.* at para. C.

II. THE CHEK LAP KOK NEW AIRPORT PROJECT

Chek Lap Kok New Airport is to be built on a headland and additional reclaimed land on the northwest side of Lantau Island, a sparsely populated island approximately 35 kilometers east of Hong Kong Island.¹⁵ In addition to a runway, terminal and associated facilities, the core components of the airport project include:¹⁶ an airport railway line connecting the airport to the Central Airport on Hong Kong Island; a system of expressways, bridges and underwater tunnels linking Lantau to Kowloon and Hong Kong Island, including a 2.2 kilometer bridge known as Lantau Fixed Crossing¹⁷ and a new tunnel under Hong Kong Harbor; a number of land reclamation projects, related to the new transportation links, to be undertaken in Kowloon and in the Central and Wanchai areas of Hong Kong Island;¹⁸ and the development of a new town at Tung Chung, on Lantau Island, which will house approximately 20,000 people and which is expected to become the residence of many of the new airport's workers.¹⁹

When it is completed, Chek Lap Kok New Airport will replace the overcrowded Kai Tak Airport²⁰ in Kowloon as the principal international airport serving Hong Kong. Kai Tak is currently operating at its maximum capacity of 26 million passengers per year, and the congestion of the airport is believed to be endangering Hong Kong's status as the major regional transportation hub in Southeast Asia.²¹ The new airport is being designed to accommodate 35 million passengers a

15. do Rosario, *supra* note 3, at 14. For a description of the airport site, see also Jesse Wong & Steve Glain, *Economists Say Impact of Costly Airport Project on Hong Kong is Unlikely to be Overwhelming*, *Asian Wall St. J. Wkly.*, Aug. 19, 1991, at 4.

16. The principal components of the airport project are listed in *China and UK Agree on Hong Kong Airport*, *E. Asian Exec. Rep.*, July 1991, at 4.

17. If completed, the Lantau Fixed Crossing will be one of the world's longest suspension bridges, accommodating both road and rail traffic. *Id.*

18. As a result of these and other earlier land reclamation projects, it is estimated that the British will return to China roughly 25 more square miles in Hong Kong than they acquired in 1841. See Nick Hasell, *Hong Kong: The Colony Tenses for a Future Perfect*, *Mgmt. Today*, May 1, 1992, available in LEXIS, News Library, Asia-pc File.

19. See Andrew Laxton & Simon Pritchard, *Chek Lap Kok to be Debt-Free by 2001: Airport Finances Itself in Four Years*, *S. China Morning Post*, Nov. 6, 1994, at 1.

20. Kai Tak Airport was built in 1956 on reclaimed land in the crowded, heavily commercial area of Kowloon. *Id.*

21. Mufson, *supra* note 4; Laxton & Pritchard, *supra* note 19.

year,²² a capacity which is believed to be sufficient to meet Hong Kong's needs for the next 20 to 30 years.²³

The organizations primarily responsible for planning and managing the airport project are the Provisional Airport Authority (the "PAA"), which will construct and operate the airport, and the Mass Transit Railway Corporation (the "MTRA"), which will have similar responsibilities with respect to the new airport railway.²⁴ Both of these organizations are corporations that are wholly owned by the Hong Kong government.²⁵ Under the terms of the November Fourth Accord, the PAA and the MTRA are expected to raise HK\$11.6 billion (US\$1.48 billion) and HK\$11.4 billion (US\$1.46 billion), respectively, in private sector debt.²⁶ The Hong Kong government will provide the remaining HK\$60.3 billion (US\$7.7 billion) required by the PAA and the MTRA to fund the core components of the project.²⁷

Significant construction work on the airport project has already begun. Since the first contract connected to the airport project was awarded in May 1992, contracts worth more than HK\$51 billion (US\$6.5 billion) have been signed.²⁸ Of these contracts, roughly 20 percent have gone to British companies,²⁹ further intensifying the friction between Britain and China over the project. China has accused the Hong Kong government of showing favoritism towards British firms, particularly since several contracts have been awarded to firms that were not the

22. Laxton & Pritchard, *supra* note 19.

23. *do* Rosario, *supra* note 3, at 14.

24. *Id.* at 15.

25. Garry Evans, *Hong Kong: Project Finance — Airport Financiers Face Chinese Puzzle*, *Euromoney*, June 11, 1992.

26. Sean Kennedy, *Lenders Look Forward to Supplying PAA Finance*, *S. China Morning Post*, Nov. 5, 1994, at 2. If the private sector debt financing for the airport project is structured in the form of a syndicated loan, it will be the largest single borrowing ever in the Hong Kong market. *Id.* Alternatively, the PAA and the MTRA could obtain a portion of the debt financing by accessing the bond markets.

27. This HK\$60.3 billion will be divided HK\$36.6 billion (US\$4.7 billion) to the PAA and HK\$23.7 billion (US\$3 billion) for the MTRA. *Id.* See also Lum S. Neo, *Hong Kong Government Seeks Approval for HK\$23.7 billion Airport Funds*, *Bus. Times (Singapore)*, Nov. 9, 1994, at 4.

28. John McGarrett, *Hong Kong: Hope is Flying Sky-High for HK's Airport*, *Construction News*, Nov. 3, 1994, at 11; Keith Wallis, *Core Work Well Under Way and on Target*, *S. China Morning Post*, Nov. 5, 1994 (Supp.), at 4.

29. The only country whose firms have received a larger share of the work on the airport project thus far is Japan, whose companies have won approximately 27% of the contracts. See Kennedy, *supra* note 26; McGarrett, *supra* note 28. See also *Hong Kong: British Get Share of \$963M Airport Jobs*, *Construction News*, Feb. 2, 1995, available in LEXIS, *News Library*, *Asia-pc* File.

lowest bidders for the work.³⁰ Chinese leaders have expressed concern that Britain is attempting to repatriate part of Hong Kong's wealth prior to the island's reversion to Chinese rule by awarding lucrative contracts to British contractors.³¹

III. CHINESE INFLUENCE OVER THE AIRPORT PROJECT IN LIGHT OF THE JOINT DECLARATION

China's increasing influence over the financing of the airport project demonstrates the extent to which Britain and China have moved away from the principles set forth in the Joint Declaration. The two countries agreed in the Joint Declaration that China would resume sovereignty over Hong Kong at midnight on June 30, 1997³² and agreed to permit Hong Kong's capitalist system to continue for 50 years after the change-over.³³ The Joint Declaration also contains a number of agreements covering the transitional period between the date of the Joint Declaration's ratification and June 30, 1997.³⁴

The Joint Declaration is an international agreement between Britain and China. It contemplates China's adoption of an internal law known as the Basic Law of the Hong Kong Special Administrative Region (the "Basic Law") that is intended to serve a function in Hong Kong similar to that of a constitution after June 30, 1997.³⁵ The Basic Law, promulgated by China's National People's Congress in April 1990, implements the principles that are set forth in the Joint Declaration regarding the first 50 years following the resumption of Chinese sovereignty over Hong Kong.

The Joint Declaration does not give the Chinese any explicit authority over the administrative or financial affairs of Hong Kong prior to the change-over date. With respect to the period up to June 30, 1997,

30. Hasell, *supra* note 18; Wallis, *supra* note 28.

31. Hasell, *supra* note 18.

32. Joint Declaration, *supra* note 1, paras. 1, 2.

33. Paragraph 3(5) of the Joint Declaration provides that "[t]he current economic and social systems in Hong Kong will remain unchanged, and so will the lifestyle." Joint Declaration, *supra* note 1, para. 3(5). Annex 1 to the Joint Declaration further provides that "[a]fter the establishment of the Hong Kong SAR [Special Administrative Region], the socialist system and the socialist policies shall not be practiced in the Hong Kong SAR and that Hong Kong's previous capitalist system and lifestyle shall remain unchanged for fifty years" *Id.* Annex 1.

34. For a legal analysis of the Joint Declaration, see Liu Y. Chu, *Interpretation and Review of the Basic Law of the Hong Kong Special Administrative Region*, 2 J. Chinese L. 49 (1988).

35. Joint Declaration, *supra* note 1, para. 3(12).

Paragraph 4 of the Joint Declaration provides that "the Government of the United Kingdom will be responsible for the administration of Hong Kong with the object of maintaining and preserving its economic prosperity and social stability, and that the Government of the People's Republic of China will give its cooperation in this connection."³⁶ This general principle is not contradicted or significantly limited anywhere in the Joint Declaration.

The one provision in the Joint Declaration which provides for Chinese involvement in pre-1997 Hong Kong affairs is Paragraph 5, as supplemented by Annex 2. Paragraph 5 calls for the establishment of a Sino-British Joint Liaison Group "to ensure a smooth transfer of government in 1997"³⁷ The functions of the Joint Liaison Group are enumerated in Annex 2 to the Joint Declaration.³⁸ Although the two sides did not attempt to list all of the matters which are appropriately within the scope of the Joint Liaison Group's deliberations, the Joint Liaison Group was not intended by either side to have a role in the administration of Hong Kong.³⁹ Rather, the Joint Liaison Group was set up as a purely consultative body, which had as its focus the transfer of power in 1997, not matters relating to the administration of Hong Kong prior to that transfer of power.

The Joint Declaration was intended as the blueprint for the transition from British to Chinese sovereignty over Hong Kong.⁴⁰ The power that China has wielded over the financing of the airport project, however, is largely disproportionate to the very limited influence over pre-1997 Hong Kong that was granted to China by the terms of the Joint Declaration.

36. Id. para. 4.

37. Id. para. 5.

38. Annex 2 states that the specific functions of the Joint Liaison Group shall be: (1) to conduct consultations on the implementation of the Joint Declaration; (2) to discuss matters relating to the smooth transfer of government in 1997; and (3) to exchange information and conduct consultations on such subjects as may be agreed by the two sides. Id. Annex 2.

39. China's official news service, the Xinhua News Agency, stated the following at the time of the establishment of the Joint Liaison Group: "Not being an organ of power, the group will play no part in the administration of Hong Kong or the future special administrative region. Nor will it have any supervisory role over that administration." Sino-British Joint Liaison Group to be Set Up, Xinhua Gen. Overseas News Service, Sept. 26, 1984, available in LEXIS, News Library, Asia-pc File; see also Denis Chang, The Basic Law of the Hong Kong Special Administrative Region: Economics and Norms of Credibility, 2 J. Chinese L. 21, 30 (1988).

40. See, e.g., David Dodwell, Only Time Will Tell . . ., Fin. Times, Sept. 7, 1984, at 22.

The airport project was unveiled by Hong Kong Governor David Wilson in October 1989.⁴¹ The announcement of the project was intended to bolster confidence in Hong Kong's future at a time when such confidence was waning in the wake of the Tiananmen Square incident.⁴² The British interest in maintaining confidence in Hong Kong's future was far from altruistic. As the largest source of private foreign investment in Hong Kong, Britain was acting in part to protect the massive investment of British companies in the territory.

In addition, Britain did not want fears over the transition to Chinese rule after Tiananmen Square to generate further pressure within Hong Kong for Britain to offer the right of British abode to greater numbers of Hong Kong residents. At the time of the signing of the Joint Declaration, Britain had decided not to change its nationality policies, which provided that the more than two million Hong Kong residents who were born in the colony and who were classified as British Dependent Territory Citizens did not have the right of abode in Britain.⁴³ Following Tiananmen Square, Britain faced increasing pressure to reverse its decision.⁴⁴ The confidence-building measures, such as the airport project, were seen as one way to defuse some of that pressure.

At the time of the announcement of the airport project, the British vowed to go ahead with their plans for the airport regardless of whether they were able to procure China's endorsement for the project.⁴⁵ Almost immediately after the announcement, however, the British began

41. For a history of the Hong Kong airport project, see, e.g., Linda Choy, *Lengthy Countdown to Signing of Historic Agreement*, S. China Morning Post, Nov. 5, 1994, at 2. An earlier plan for a new airport in Hong Kong had been announced by the government in 1974, but that plan was subsequently abandoned for cost reasons. See *Sino-British Understanding Over Hong Kong Airport*, supra note 11.

42. See *Hong Kong's Airport Tie-up: More Confirmation that 1997 has Arrived*, supra note 9.

43. Britain's 1981 Nationality Act does not extend the privilege of the right of abode in Britain to British Dependent Territory Citizens. See *British Nationality Act, 1981*, ch. 61; see also *Resentment Lingers Over Definition of Nationality*, Austl. Fin. Rev., Feb. 14, 1985, available in LEXIS, News Library, Asia-pc File.

44. See, e.g., Victoria McGlothen, *Peking Bloodshed Puts New Urgency on Hong Kong Emigration*, Reuter Lib. Rep., June 4, 1989, available in LEXIS, News Library, Asia-pc File; Robert Mauthner, *Howe to Visit Hong Kong in Bid to Defuse Entry Row*, Fin. Times, June 10, 1989, at 2; John Elliot, *Crisis in China: Governor to Back HK Passports Demand*, Fin. Times, June 7, 1989, at 4.

45. See Jesse Wong, *Bureaucrats Botch Colony's Transition to Chinese Rule*, Asian Wall St. J. Wkly., Sept. 9, 1991, at 1, 18.

strenuous negotiations with their Chinese counterparts to get such an endorsement.⁴⁶

The British were motivated to gain Chinese approval by practical and commercial, rather than legal, concerns. As the analysis of the Joint Declaration above suggests, the British side had no obligation stemming from the Joint Declaration to obtain China's approval for the airport project, either through the Joint Liaison Group or otherwise. Instead, it was the reality that the Hong Kong government would not be able to attract private sector funding for the project without China's approval that necessitated Britain's approaching the Chinese side.⁴⁷

The negotiations to secure Chinese support for the project ultimately led to the signing of the Memorandum of Understanding in September 1991.⁴⁸ The Memorandum of Understanding can be interpreted as an implicit amendment of certain terms of the Joint Declaration. For example, pursuant to paragraph 3 of the Memorandum of Understanding, an airport committee was established with membership drawn equally from the British and Chinese sides.⁴⁹ Although the airport committee is formally under the auspices of the Joint Liaison Group, the authority granted to the committee with respect to the airport project significantly exceeds the powers given to the Joint Liaison Group under the Joint Declaration.

Specifically, the Hong Kong government is obligated, under the Memorandum of Understanding, to consult with the Chinese representatives on the airport committee before it grants major airport-related franchises or contracts straddling June 30, 1997 or guarantees airport-related debt straddling that date.⁵⁰ The Hong Kong government is also obligated to consult with the Chinese before it proceeds with any airport-related project other than the "core program projects" listed in the

46. *Id.*

47. See *do Rosario*, *supra* note 3.

48. The negotiation process included: (1) a four-day mission to China in July 1990 by Francis Maude, the then British Minister with special responsibility for Hong Kong; (2) a visit to Beijing by Foreign Minister Douglas Hurd in April 1991; and (3) six separate rounds of talks in Hong Kong, from October 1990 to May 1991, between British and Chinese negotiators. *Choy*, *supra* note 41.

49. Memorandum of Understanding, *supra* note 12, para. C. The airport committee held its first meeting in July 1992. Since that initial meeting, there have been prolonged periods when the airport committee did not meet due to friction between the British and Chinese sides, including a seven month period from December 1992 to June 1993 and a nine month period from September 1993 to May 1994. See *Choy*, *supra* note 41.

50. Memorandum of Understanding, *supra* note 12, para. C(i).

annex to the Memorandum of Understanding.⁵¹ Although these obligations are phrased to require “consultation”⁵² only, they mark a substantial concession by the British; they cede a supervisory role over Hong Kong administrative matters to a committee of the Joint Liaison Group,⁵³ precisely the type of role that both sides acknowledged the Joint Liaison Group would not play at the time of the signing of the Joint Declaration.

The Memorandum of Understanding also contains several other significant British concessions. Britain agreed, for example, that the Hong Kong government would not incur debt that must be repaid after June 30, 1997 in excess of HK\$5 billion (US\$640 million) without the consent of China⁵⁴ and that the Hong Kong government would set HK\$25 billion (US\$3.2 billion) as its minimum fixed target for financial reserves to be retained on June 30, 1997.⁵⁵ The British side also agreed to appoint an official of the Bank of China in Hong Kong as a member of the airport authority⁵⁶ and to consult with China regarding the appointment of the other members of that authority.⁵⁷

51. *Id.*, para. C(ii). The “core program projects” set forth in the annex are: (1) the airport (first runway and associated facilities), (2) North Lantau Expressway, (3) West Kowloon Reclamation, (4) West Kowloon Expressway, (5) Western Harbor Crossing, (6) Route 3 (part), (7) airport railway, (8) that part of the Central and Wanchai Reclamation that relates to the airport railway, (9) Lantau Fixed Crossing and (10) Tung Chung Development Phase One.

52. The exact meaning of the term “consult” has been the source of some tension between the British and Chinese sides. The British view of the meaning of “consult” has been that the two sides should discuss matters. In the Chinese version of the Joint Declaration, however, “consult” is translated as “*shen-yi*”, which carries the wider meaning of “consult with the intention of reaching consensus.” Michael Byrnes, *Hong Kong Balances Illusion and Reality*, *Austl. Fin. Rev.*, Jan. 19, 1993, available in LEXIS, News Library, Asia-pc File.

53. For a discussion of the concessions made by the British side in the Memorandum of Understanding, see, e.g., Jeffrey Parker, *Britain Cedes China a Pre-1997 Voice in Hong Kong*, *U.P. Intl.*, July 4, 1991, available in LEXIS, News Library, Asia-pc File. During the negotiation of the Joint Declaration in July of 1984, China’s proposal for a Joint Liaison Group set off a brief financial crisis in Hong Kong due to fears that China was looking for a power-sharing arrangement prior to the change-over. Chang, *supra* note 39, at 30. The financial crisis subsided when China reassured the Hong Kong and international financial communities that it did not intend for the Joint Liaison Group to be an organ of power. *Id.* On the Chinese view of the airport committee, see *Airport Committee Holds Inaugural Meeting*, *Xinhua Gen. Overseas News Service*, Nov. 12, 1991, available in LEXIS, News Library, Asia-pc File.

54. Memorandum of Understanding, *supra* note 12, para. D.

55. *Id.* at para. E.

56. *Id.* at para. F(ii). On the selection of the Bank of China official, paragraph F(ii) goes on to provide, “[t]he Chinese side will no doubt give the Hong Kong government some suggestions as to who this member should be.” *Id.*

57. *Id.* at para. F(iv).

The cumulative effect of these British concessions in the Memorandum of Understanding is to significantly weaken the agreement set forth in paragraph 4 of the Joint Declaration that Britain would be solely responsible for the administration of Hong Kong prior to the change-over. The Joint Declaration enshrined June 30, 1997 as the clear dividing line between British and Chinese rule over Hong Kong. The Memorandum of Understanding, however, acknowledges the creation of a new category of issues, those that straddle the change-over date, and establishes a form of power-sharing arrangement with respect to those issues.

Moreover, the effect of the Memorandum of Understanding's weakening of the principles of the Joint Declaration is not limited solely to the airport project. With respect to other projects that straddle the change-over date, the British government in Hong Kong has acknowledged, through its actions, that it will not move ahead without China's endorsement.⁵⁸ For example, China has withheld its support for a new container port in Hong Kong, known as the Container Terminal 9 Project, because of China's displeasure that certain contracts for the project were awarded to members of the Jardine Matheson conglomerate.⁵⁹ Chinese officials have accused the Hong Kong government of awarding the work to Jardine Matheson on the basis of its support for Hong Kong Governor Patten's electoral reform proposals, to which China has strongly objected.⁶⁰ China's failure to give its consent to the container port has caused construction of this project to be

58. See, e.g., Steve Glain, *Sewage Project Gets Low-Priority Treatment as Hong Kong Officials Focus on New Airport*, *Asian Wall St. J. Wkly.*, Aug. 5, 1991, at 16, discussing how the Hong Kong government's plans for a new sewage treatment system were delayed pending China's approval.

59. See do Rosario, *supra* note 3, at 15.

60. *Id.* China's displeasure that contracts for the container port were awarded to Jardine Matheson is just one element of the problematic relationship that exists between the Chinese government and the conglomerate, Hong Kong's oldest *hong*. The problems between the two can be traced back to Jardine's involvement in the opium wars in the 19th century and are reinforced by the fact that many Chinese leaders view Jardines as a symbol of the colonial era. See, e.g., Gideon Rachman, *The Battle for Asia*, *Economist*, Nov. 12, 1994 (Supp.), at 19, 24. Recently, the conglomerate's decision to delist its companies from the Hong Stock stockmarket by the end of 1994 also was a source of friction with China, which is concerned that the delisting will reduce confidence in Hong Kong's future. See Jonathan Karp, *Parting Shots: Jardine Holds Last Annual Meeting in Hong Kong*, *Far E. Econ. Rev.*, June 16, 1994, at 69; Louise Lucas, *Hongs Prepare for Climate Change*, *Fin. Times*, April 7, 1994, at 26. On Jardine's attempts to mend its relationship with China, see Erik Guyot, *Jardine Seeks Rapprochement with Beijing*, *Asian Wall St. J.*, Jan. 11, 1995, at 1. On Governor Patten's electoral reforms, see, e.g., Louise do Rosario, *Hong Kong: Derailed*, *Far E. Econ. Rev.*, Sept. 22, 1994, at 36.

indefinitely delayed.⁶¹ The Memorandum of Understanding, therefore, not only permitted significant Chinese involvement in, and control over, the airport project but also increased China's pre-1997 influence in Hong Kong's affairs.

Three years after the execution of the Memorandum of Understanding, China won additional concessions from Britain on the airport project with the signing of the November Fourth Accord. Prior to November 4, 1994, Britain had proposed that the Hong Kong government fund the airport project by borrowing approximately HK\$69 billion (US\$8.8 billion) from the private sector.⁶² China, however, would not give its consent to such a high level of debt financing, expressing concerns that repayment would put excessive burdens on the Hong Kong government after 1997.⁶³ As a result, the first paragraph of the November Fourth Accord limits the amount of borrowings for the airport and the airport railway to HK\$23 billion (US\$3 billion), which reflects China's demands for a relatively low cap on the project's debt.⁶⁴

Consistent with the precedent set by the Memorandum of Understanding, the November Fourth Accord also enhances the authority of the airport committee of the Joint Liaison Group. In paragraph 3 of the November Fourth Accord, the British and Chinese agree to strengthen the role of the airport committee as a cost monitoring and control agency.⁶⁵ In particular, the Hong Kong government is obligated to report to the airport committee on a quarterly basis concerning the progress, financing and changes in cost of the airport project.⁶⁶ This expansion in the role of the airport committee formalizes the involvement of the committee in the on-going management of the airport project and makes China, through its representation on the committee, an active participant in the pre-1997 governing of Hong Kong.

The November Fourth Accord has significantly increased China's pre-1997 political clout in Hong Kong by demonstrating China's power to dictate the financing terms for the airport project and by enhancing the

61. do Rosario, *supra* note 3, at 15.

62. *Id.* at 14.

63. See *Outcome of Tough Negotiations*, *supra* note 7.

64. November 4th Accord, *supra* note 5, para. 1.

65. *Id.* at para. 3.

66. *Id.*

authority of the airport committee.⁶⁷ The November Fourth Accord has also steered China's relationship with Hong Kong further away from the principles set forth in the Joint Declaration. As discussed above, the Joint Declaration did not envision China having any supervisory role over projects carried out by the Hong Kong government prior to 1997. Even more significantly, however, China committed itself in the Joint Declaration to maintaining Hong Kong's unique capitalist system and lifestyle unchanged for fifty years.⁶⁸ This pledge to maintain, in the language of the Chinese government, "one country, two systems" is the fundamental underpinning of the Joint Declaration.⁶⁹

China's policies toward the financing of the airport project call into serious question whether China will honor that commitment. Respect for the rule of law and faith in private sector solutions to problems are the two factors which have been crucial to making Hong Kong the principal financial center in Southeast Asia and are integral to its capitalist system and lifestyle.⁷⁰ China's use of its influence over the financing of the airport project, in disregard of the letter and the spirit of the Joint Declaration, and its insistence on limiting private sector involvement in the project suggest that China is not committed to ensuring the continuance of either of these factors in Hong Kong.⁷¹ Without such a commitment, China's "one country, two systems" promise will be illusory.⁷²

67. For a discussion of China's political gains with the November 4th Accord, see Fanny Wong, *Britain Bows to Beijing Pressure*, S. China Morning Post, Nov. 5, 1994, at 1.

68. See discussion *supra* note 33.

69. The Chinese government has used the expression "one country, two systems" to describe its policies for re-establishing its rule over Hong Kong. The expression is intended to mean that although Hong Kong will be under the direct administration of the Chinese government (one country), for at least fifty years it will be permitted to retain its capitalist system rather than to conform to the rest of China's socialist system (two systems). See, e.g., Zhang Youyu, *The Reasons for and Basic Principles in Formulating the Hong Kong Special Administrative Region Basic Law and Its Essential Contents and Mode of Expression*, 2 J. Chinese L. 5 (Spring 1988). On the inherent contradictions of the "one country, two systems" pledge, see Nigel Holloway, *Paradise Lost*, Far E. Econ. Rev., Feb. 23, 1995, at 55; Mariko Tanigaki, *Toward 1997: The Future of Hong Kong*, 8 Japan Rev. Intl. Aff. 234 (1994).

70. On Hong Kong's status as Southeast Asia's primary financial center, see John Peet, *The Booming Orient*, Economist, June 27, 1992 (Supp.), at 12.

71. This argument is made in *Hong Kong's Airport Tie-Up*, *supra* note 9. See also Fasten Your Seat Belts, Economist, Nov. 12, 1994 at 30.

72. On the status of the "one country, two systems" pledge, see generally *It's Already 1997* in Hong Kong, Economist, Dec. 18, 1993, at 36.

IV CONCLUSION

Throughout the negotiations regarding the airport project, China has consistently acknowledged the need for a new airport in Hong Kong.⁷³ It recognizes that the congestion and lack of additional capacity at the almost forty year-old Kai Tak Airport threaten Hong Kong's long-term health as an international financial center and as a regional transportation hub.⁷⁴ China also understands that the completion of the airport project will produce a number of collateral benefits. For example, the airport should increase commercial and residential development on underpopulated Lantau Island and other western areas of Hong Kong, thereby relieving some of the pressure in the over-crowded eastern half of the territory.⁷⁵ Additionally, the closing of Kai Tak Airport will allow the Hong Kong government to rescind the long-standing 12-story height restriction in Kowloon, necessary so that planes could land at Kai Tak. The elimination of the height restriction is expected to open up Kowloon to substantial new vertical development.⁷⁶

Because of such benefits, the airport project will make Hong Kong an even more valuable asset when it is returned to China on June 30, 1997. Moreover, it has never been in China's interest to significantly delay the construction of the airport project because any delay increases the likelihood that liability for completing the project will fall on the post-1997 Hong Kong government. Nevertheless, China has risked the benefits that it would receive from an early completion of the airport project to use the project as a means of increasing its political influence in Hong Kong prior to the change-over date. Understanding that its blessing is required for any airport financing plan to succeed, China has used that leverage to demand concessions from the British side that are wholly inconsistent with the terms of the Joint Declaration.

73. See, e.g., Backgrounder on Memorandum of Understanding Concerning Construction of New Airport in Hong Kong, Xinhua Gen. Overseas News Service, Sept. 2, 1991, available in LEXIS, News Library, Asia-pc File. The preamble of the Memorandum of Understanding states that both China and Britain are "bearing in mind the urgent need for a new airport in Hong Kong in order to ensure and develop its prosperity and stability." The Memorandum of Understanding, *supra* note 12.

74. See Mufson, *supra* note 4. In 1993, congestion at Kai Tak Airport caused the airport to turn away 6,700 flights, representing approximately 1.4 million passengers. See Macau Set for New Airport Opening, Bangkok Post, Nov. 8, 1994, at 25.

75. *Id.* Rosario, *supra* note 3, at 14.

76. Hasell, *supra* note 18. The closing of Kai Tak airport will also free the airport site itself for development, which may become one of the most expensive pieces of Kowloon real estate.

The Sino-British negotiations concerning the airport project have already resulted in two documents, the Memorandum of Understanding and the November Fourth Accord, that represent significant victories for the Chinese. In addition, a number of issues concerning the project remain to be settled, and the British may yet be forced to make additional concessions that will further undermine the commitments made in the Joint Declaration.

For example, paragraph 6 of the November Fourth Accord provides that the two sides will agree on the terms of the financial support agreements to be entered into between the Hong Kong government and the PAA and MTRA.⁷⁷ These agreements will set out the extent to which the Hong Kong government will be liable for the respective obligations of the PAA and MTRA and will therefore greatly affect the ability of the PAA and MTRA to obtain debt financing.⁷⁸ Other major issues that remain outstanding include the sale of land along the airport railway and the awarding of many valuable airport-related franchises.⁷⁹

Judging from the precedents set by the Memorandum of Understanding and the November Fourth Accord and by the fact that China's negotiating position continues to strengthen as the change-over date draws closer, it is likely that the outcome of the above issues will result in a further weakening of the principles set forth in the Joint Declaration. China, for example, has already expressed concerns that it is not receiving sufficient information about the operations of the MTRA and has asked for tighter monitoring of that company.⁸⁰

Undoubtedly, China will continue to press for its oversight role to be strengthened in other areas of the project as well. Although it is unlikely that China's demands for pre-1997 power-sharing in Hong Kong will ever lead it to formally repudiate the Joint Declaration, the history of the Sino-British negotiations over the financing of the Chek Lap Kok

77. November 4th Accord, *supra* note 5, para. 6. Paragraph 6 provides that these agreements will be announced "after a common view has been reached by the two sides through consultation." *Id.*

78. See Chris Yeung et al., \$23b Sought from Legco, *S. China Morning Post*, Nov. 5, 1994, at 1.

79. *Id.* See also Wong, *supra* note 67. It is estimated that 62 hectares of land along the airport railway line will be available for sale by the Hong Kong government. *Id.* The land disposal issue is being handled by the Sino-British Land Commission. *Id.*

80. See Quinton Chan & Danny Gittings, Chinese Fears over Expat Control of MTR Threaten to Derail Chek Lap Kok Link, *S. China Morning Post*, Nov. 6, 1994, at 1. In particular, China has questioned the expatriate management of the MTRA and has accused it of running the MTRA as an "independent kingdom." *Id.*

New Airport illustrate the extent to which the Joint Declaration has already essentially become a dead letter.