

THE POTENTIAL COSTS OF CAPITALISM: WHY CHINA'S MARKET ECONOMY IS AT THE ROOT OF ITS ANTI-SECESSION LAW

For the past 50 years, the People's Republic of China (P.R.C. or China) has claimed that there is only one China, and that Taiwan is a part of China.¹ Taiwan has, however, maintained that it is separate and distinct from mainland China.² When this dispute began, China was relatively passive in asserting its sovereignty.³ While China firmly asserted that Taiwan was part of China, reunification was considered a long term goal at best.⁴ More recently, however, China has become increasingly aggressive in its reunification efforts, attempting to begin reunification immediately.

On March 13, 2005, China passed a law forbidding "secession from China by secessionists in the name of 'Taiwan independence.'"⁵ This law authorizes China to use "non-peaceful means and other necessary measures to protect China's sovereignty and territorial integrity,"⁶ marking the first time that China passed a law asserting this right. This Note discusses how China's increasing market capitalism has strengthened its stance on reunification, culminating in the passing of the 2005 Anti-Secession Law by: (1) viewing the historical relationship between China and Taiwan; (2) analyzing the trends of increasing market capitalism and increasing aggression in China; and (3) discussing China's plan for reunification.

1. See *infra* note 125 and accompanying text.

2. Taiwan, CIA World Factbook, <https://www.cia.gov/cia/publications/factbook/geos/tw.html>.

3. See *infra* notes 50–59 and accompanying text.

4. See *infra* text accompanying notes 50–56.

5. Anti-Secession Law (Promulgated by the Standing Comm. Nat'l People's Cong., Mar. 13, 2005, effective Mar. 13, 2005), art. 1, available at <http://www.china.org.cn/> (search "anti-secession law article 1"; then follow "Third Session 10th National People's Congress and Chinese People's Political Consultative Conference" link), translated in China.org, Third Session 10th National People's Congress and Chinese People's Political Consultative Conference.

6. *Id.* art. 8.

I. HISTORICAL BACKGROUND

The modern battle⁷ over Taiwan's sovereignty was largely a product of the First Sino-Japanese War, several proclamations made during World War II, and the international treaties made thereafter.⁸ The First Sino-Japanese War,⁹ which only lasted from August 1894 to April 1895, resulted in a decisive loss for China.¹⁰ On April 17, 1895, China was compelled to sign the Treaty of Shimonoseki,¹¹ which provided, *inter alia*, that China would cede Taiwan to Japan in perpetuity.¹²

Following the promulgation of the treaty, Japan ruled Taiwan as a sovereign¹³ and without dispute from the international community.¹⁴ Despite this fact, the United States, Britain, and China sought to invalidate the treaty during World War II. These countries, calling themselves "The Three Great Allies," issued the Cairo Communiqué in 1943.¹⁵ The

7. The sovereignty of Taiwan (originally named "Formosa" by the Portuguese) has been disputed for hundreds of years. See Jonathan I. Charney & J. R. V. Prescott, *Resolving Cross-Strait Relations Between China and Taiwan*, 94 AM. J. INT'L L. 453, 454 (2000). China had ruled the territory in an administrative capacity as early as the late 1200s, but lost control on numerous occasions. Administration of Taiwan in Recent Centuries: The Ming Period, http://www.tpg.gov.tw/e-english/history/history-e-2_1.htm (last visited Feb. 13, 2007). Since the early 1600s, many nations, including China, Japan, Spain, and the Netherlands, have fought to control Taiwan. *Id.* In 1895, China lost Taiwan to Japan, leading almost directly to the modern battle over Taiwan's sovereignty. Charney & Prescott, *supra* at 456–57; see also *infra* notes 7–33 and accompanying text.

8. See *infra* notes 7–56 and accompanying text.

9. A dispute over the military presence of Japanese forces in Korea caused the First Sino-Japanese War. See The Columbia Encyclopedia 2616 (Paul Legassé ed., 6th ed. 2000).

10. Japan won relatively easily with modern army and superior naval skills. *Id.*; Reference.com, First Sino-Japanese War, http://www.reference.com/browse/wiki/First_Sino-Japanese_War (last visited Jan. 27, 2007).

11. Treaty of Peace, China-Japan, Apr. 17, 1895, 181 Consol. T. S. 217, available at <http://www.taiwandocuments.org/shimonoseki01.htm> (last visited Feb. 13, 2007).

12. *Id.* arts. 2(b) & (c). The text of the treaty reads, in relevant part:

China [will] cede[] to Japan in perpetuity and full sovereignty the following territories, together with all fortifications, arsenals, and public property thereon . . . The island of [Taiwan], together with all islands appertaining or belonging to the said island of [Taiwan]. . . [and] [t]he Pescadores Group, that is to say, all islands lying between the 119th and 120th degrees of longitude east of Greenwich and the 23rd and 24th degrees of north latitude.

Id.

13. Although the Taiwanese initially revolted against the Japanese, briefly changing the name territory from "Formosa" to "The Democratic Nation of Taiwan" and forming resistance forces, Japan still invested heavily in the infrastructure of the territory in order to exploit the territory's resources and to "cement the island within its growing empire." Christopher J. Carolan, *The "Republic of Taiwan": A Legal-Historical Justification for a Taiwanese Declaration of Independence*, 75 N.Y.U. L. REV. 429, 432–33 & n.15 (2000); see also Administration of Taiwan in Recent Times—The Ch'ing Period, http://www.tpg.gov.tw/e-english/history/history-e-2_3.htm (last visited Feb. 13, 2007).

14. Carolan, *supra* note 13, at 433.

15. Cairo Communiqué, Dec. 1, 1943, http://www.ndl.go.jp/constitution/e/shiry0/01/002_46/002_46tx.html.

communiqué was issued to “restrain and punish the aggression of Japan,”¹⁶ to demand the return of the land Japan had “stolen” from China and to call for Japan’s unconditional surrender.¹⁷ Two years later, the Three Great Allies and the Soviet Union again called for Japan’s unconditional surrender and the return of Taiwan to China in the Potsdam Proclamation of 1945.¹⁸ When Japan surrendered to the Allies in July of 1945, Japan agreed to abide by the terms of the Potsdam Proclamation of 1945.¹⁹

Although seemingly simple, Japan’s agreement to abide by the terms of the Potsdam Proclamation had legal effects that remain unclear. Between 1895, when the Treaty of Shimonoseki was signed, and 1945, when the Japanese surrendered in World War II, the Chinese national government had changed from that of the Ch’ing (or Qing) Dynasty to the Republic of China (ROC).²⁰ Taiwan, having belonged to the Ch’ing Dynasty, had

16. *Id.*

17. *Id.* The full passage reads in pertinent part:

The Three Great Allies are fighting this war to restrain and punish the aggression of Japan. They covet no gain for themselves and have no thought of territorial expansion. It is their purpose that Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and The Pescadores, shall be restored to the Republic of China. Japan will also be expelled from all other territories which she has taken by violence and greed. The aforesaid three great powers, mindful of the enslavement of the people of Korea, are determined that in due course Korea shall become free and independent.

With these objects in view the three Allies, in harmony with those of the United Nations at war with Japan, will continue to persevere in the serious and prolonged operations necessary to procure the unconditional surrender of Japan.

Id.

18. Proclamation Calling for the Surrender of Japan, Approved by the Heads of Governments of the U.S., China and the U.K., July 26, 1945, available at <http://www.niraikanai.wma.net/pages/archive/potsdam.html>. The Potsdam Declaration contained essentially the same terms as the Cairo Communiqué, and it incorporated the Cairo Communiqué by reference. See Cairo Communiqué, *supra* note 15. The only material difference between the Cairo Communiqué and the Potsdam Proclamation was that the Soviet Union was a party to the latter. See *id.*

19. Surrender by Japan. Terms Between the United States of America and the other Allied Powers and Japan, Sept. 2, 1945, 59 Stat. 1733.

We, acting by command of and in behalf of the Emperor of Japan, the Japanese Government and the Japanese Imperial General Headquarters, hereby accept the provisions set forth in the declaration issued by the heads of the Governments of the United States, China and Great Britain on 26 July 1945, at Potsdam . . .

Id.

20. During the end of the 1800s, China was experiencing increasing pressure from European imperialists to westernize. The Boxer Rebellion, <http://www.smpplanet.com/imperialism/fists.html> (last visited Feb. 13, 2007). Several European countries (including Britain, Germany, Russia, and France) and Japan demanded that China allow foreign missionaries into the country, implement foreign legislation in Beijing, and open more ports of trade with the West. *Id.* The citizens of China soon became disenchanted with these pressures and began to lash out against western culture. *Id.* The

never formally recognized the ROC.²¹ It was unclear, therefore, whether Taiwan could be *returned* to a government of which it had never been a part.²²

Additionally, the document conceding Japan's defeat was only a promise to abide by the Potsdam Proclamation.²³ Being as such, the document neither legally ceded Taiwan to China, nor formally relinquished Japan's control over the area.²⁴ By the time that the Multilateral Peace Treaty of 1951 came into effect,²⁵ officially signifying Japan's relinquishment of sovereignty over Taiwan, China had a new non-democratic government: the People's Republic of China.²⁶ China's change of government presented democratic nations with two problems. First, the Allies intended to return Taiwan to the democratic ROC government²⁷ and had attempted to aid the ROC in resisting the communist forces.²⁸ Second, despite the fact that the ROC had been ousted from mainland China and had fled to Taiwan, both the P.R.C. and the ROC claimed to be the legitimate government of Taiwan.²⁹ At this point, the international

rejection of western culture culminated in the "Boxer Rebellion." During the rebellion, there was wide-spread starvation, rape, murder, and general social unrest. *Id.* Prompted by rampant social unrest and the Boxer Rebellion, the revolutionary leader Sun Yat-Sen formed Tongmeng Hui (the "United League") in 1905. Emergence of Modern China: III, <http://www-chaos.umd.edu/history/modern3.html#republican> (last visited Oct. 4, 2007). After a number of unsuccessful uprisings, the Tongmeng Hui, based on democracy, nationalism, and socialism, took over China in 1911. *Id.*

21. When Japan surrendered Taiwan to China, the constitution adopted by the Republic of China (ROC) had never been applied to Taiwan because Taiwan was under Japan's control when the ROC took over. See Sean Cooney, *Why Taiwan is not Hong Kong: A Review of the PRC's "One Country Two Systems" Model for Reunification with Taiwan*, 6 PAC. RIM L. & POL'Y J. 497, 514 (1997).

22. *Id.*

23. Because agreeing to the Potsdam Proclamation was a condition of surrender, China was not immediately given legal control over Taiwan, but rather took control over the territory on behalf of the Allies pending the territory's ultimate disposition. Lung-Chu Chen, *Taiwan's Current International Legal Status*, 32 NEW ENG. L. REV. 675, 677 (1998).

24. *See id.*

25. Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169 (1952). The Treaty states that "Japan renounces all right, title and claim to [Taiwan] and the Pescadores." *Id.* art. 2. The Multilateral Peace Treaty, although signed in 1951, did not enter into effect until April 28, 1952. *Id.*

26. Communist sentiment existed in China as early as 1919. JUNE TEUFEL DREYER, CHINA'S POLITICAL SYSTEM: MODERNIZATION AND TRADITION 63 (5th ed., Pearson Education, Inc. 2006). By the early 1900s, the communists and the Kuomintang (the modern democratic socialist party or KMT) were openly fighting over the control of the country. *Id.* at 67-72. Eventually, the communists, led by Mao Zedong, overthrew the KMT forces. *Id.* at 77-79. Zedong proclaimed the founding of the People's Republic of China (P.R.C.) on October 1, 1949. *Id.* Meanwhile, the defeated ROC government fled to Taiwan. *Id.*

27. The ROC was the only official government of China while the Cairo Communiqué and the Potsdam Proclamation were in force. See Charney & Prescott, *supra* note 7, at 458.

28. The U.S. attempted to aid the ROC by sending its military to defend the ROC against the communists. See DREYER, *supra* note 26, at 78-79.

29. Although the ROC had been soundly defeated and retreated to Taiwan, the government refused to acknowledge defeat. Carolan, *supra* note 13, at 436. With no desire to formally recognize or

community was unclear as to which, if either, actually spoke for China.³⁰ Perhaps, due to these reasons, neither the ROC nor the P.R.C. were parties to the 1951 Multilateral Peace Treaty.³¹ The Multilateral Peace Treaty serves as the genesis of the dispute over Taiwan's sovereignty,³² as its only significance is Japan's formal renunciation of sovereignty over Taiwan.³³

A. *The International Response to the Taiwan Question*

Following the Multilateral Peace Treaty, the United States³⁴ responded to the prospect of the communist P.R.C. government's acquisition of Taiwan with the 1954³⁵ Mutual Defense Treaty (MDT).³⁶ The MDT called for both Taiwan and the U.S. to "resist communist subversive activities directed from without against their territorial integrity and political stability."³⁷ According to the MDT, Taiwan had the "inherent right to self defense."³⁸

legitimize another communist country, the non-communist international community allowed the ROC to represent China in the United Nations (U.N.) until 1971. *See id.*; *infra* notes 42–43 and accompanying text.

30. Carolan, *supra* note 13.

31. Treaty of Peace with Japan, *supra* note 25. There were 48 parties to the Multilateral Peace Treaty of 1951, but neither China nor Taiwan numbered among them. *Id.*

32. Charney & Prescott, *supra* note 7, at 458–59.

33. *See* Eric Ting-Lun Huang, *The Modern Concept of Sovereignty, Statehood and Recognition: A Case Study of Taiwan*, 16 N.Y. INT'L L. REV. 99, 142 (2003). The Multilateral Peace Treaty does not specify to which country Taiwan was to be ceded. *Id.* Additionally, "[t]hat question was not clarified by the Bilateral Peace Treaty of 1952 between Japan and the ROC, which simply recognized Japan's renunciation in the Multilateral Peace Treaty of 1951." Charney & Prescott, *supra* note 7, at 458–59.

34. All though this section focuses on the broader international response to the Taiwan question, Taiwan's international standing is heavily influenced by U.S. policy decisions. Huang, *supra* note 33, at 146 (noting the influence of U.S. policy on the international community's perception of Taiwan). Therefore, this section focuses heavily on U.S. response to the Taiwan question.

35. The U.S. waited for two years to enact the Mutual Defense Treaty (MDT) because, although there were indications that Mao Zedong and the communists intended to invade Taiwan, the P.R.C. chose to focus on more pressing concerns. *See* Carolan, *supra* note 13, at 437. It also took time for the U.S. to realize that, with the beginning of the Korean War and the ongoing Cold War, the democratic ROC would play an important part in the U.S.'s strategy in East Asia. *Id.* at 437 & n.48.

36. Mutual Defense Treaty Between the United States of America and the Republic of China, Dec. 2, 1954, U.S.-P.R.C. 6 U.S.T. 433.

37. *Id.* art. II. The entire passage reads:

In order more effectively to achieve the objective of this Treaty, the Parties separately and jointly by self-help and mutual aid will maintain and develop their individual and collective capacity to resist armed attack and communist subversive activities directed from without against their territorial integrity and political stability.

Id.

38. *Id.* art. X. According to the MDT, this was because the ROC had possession and control of all of the territories listed therein. *Id.*

It also granted the United States the right to use “land, air and sea forces in . . . Taiwan . . . as may be used for their defense.”³⁹ Following enactment of the MDT, the U.S. stationed “significant military sources in Taiwan and provided aid to the ROC when the P.R.C. attempted to seize several contested islands in the Strait of Taiwan.”⁴⁰

The MDT lasted for seventeen years, until Taiwan’s international status changed significantly. Up until that point, both the P.R.C. (in mainland China) and the ROC (in Taiwan) had claimed to be the legitimate government of China.⁴¹ Despite this fact, the ROC was the government that represented China before the United Nations (U.N.).⁴² In 1971, however, the U.N. changed its course⁴³ by formally recognizing the P.R.C. as the *sole* government of China.⁴⁴ This effectively expelled Taiwan from the U.N.⁴⁵ Following its expulsion, Taiwan was marginalized in the international community due to China’s political maneuvering⁴⁶ and the

39. *Id.* art. VII.

40. Jason X. Hamilton, *An Overview of the Legal and Security Questions Concerning Taiwanese Independence*, 1 LOY. U. CHI. INT’L L. REV. 91, 92 (2005); Colin P. A. Jones, *The United States Arms Exports to Taiwan Under the Taiwan Relations Act: The Failed Role of Law in United States Foreign Relations*, 9 CONN. J. INT’L L. 51, 52 (1993) (noting that the U.S. aided in defending the shore islands of Quemoy and Matsu against invasion from the P.R.C.).

41. GEORGE H. KERR, *FORMOSA BETRAYED* 434–50 (Houghton Mifflin 1965) (discussing the emergence of two Chinas in the international community); *see supra* text accompanying notes 26–31.

42. The role of the ROC as sole representative of China in the U.N. was curious considering that the ROC had long since been relegated to the small island territory of Taiwan. *See supra* text accompanying notes 27–31.

43. There is evidence that President Nixon led the international community toward the policy change to introduce “a new geopolitical counterweight to the Soviet power.” *See* Hamilton, *supra* note 40, at 93. The international policy shift came during the period when the Sino-Soviet split was reaching a boiling point. *See* Britannica.com, *The American Experience: Nixon’s China Game* www.pbs.org/wgbh/amex/china/peoplevents/pande06.html (last visited Mar. 9, 2006).

44.

The General Assembly . . . Recognizing that the representatives of the Government of the People’s Republic of China are the only lawful representatives of China to the United Nations. . . *Decides* to restore all its rights to the People’s Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of [the ROC] from the place which they unlawfully occupy at the United Nations and in all the organizations related to it.

Restoration of the Lawful Rights of the People’s Republic of China in the United Nations, G.A. Res. 2758, U.N. GAOR, 26th Sess., U.N. Doc. A/8429 (1971) (emphasis added), *available at* <http://www.un.org/documents/ga/res/26/ares26.htm> (follow “2758 (XXVI)” hyperlink). The phrase “and all the organizations related to it” in the resolution excluded Taiwan from organizations such as the World Health Organization (WHO), the International Monetary Fund (IMF), and a host of other environmental, human rights, and drug control organizations associated with the U.N. *See* Request for the inclusion of an item in the provisional agenda of the fifty-third session, <http://www.un.org/documents/ga/docs/53/plenary/a53-145.htm> (last visited Oct. 4, 2007).

45. *Id.*

46. After entering the U.N., China blocked Taiwan’s entrance into the U.N. and several other international organizations. Huang, *supra* note 33, at 146. China also mandated that the ROC “and all

international community's desire to increase diplomatic relations with China.⁴⁷ In 1979, the U.S. formally recognized the P.R.C. as the *sole* government of China⁴⁸ and subsequently terminated the MDT.⁴⁹

B. Chinese Aggression from the 1950s–1970s

In viewing the Sino-Taiwanese relationship from the early 1950s to the late 1970s, it is important to note that the P.R.C. was relatively passive in asserting its claim of sovereignty over Taiwan.⁵⁰ There are several reasons for China's behavior during this period. First, when the MDT was in effect (1954–1971), a full scale invasion of Taiwan was unrealistic.⁵¹ During that period, the U.S. military's presence in Taiwan was significant.⁵² The P.R.C. would have needed strong support, most likely from the Soviet Union, which it did not have.⁵³ Second, a military campaign, even with

organizations related to it" language appear in the resolution excluding Taiwan from the U.N. *See id.* at n.305.

47. For instance, following the P.R.C.'s entrance into the U.N., President Nixon, the first U.S. president to visit the P.R.C., issued the Shanghai Communiqué. Joint Communiqué Between the United States of America and the People's Republic of China, Feb. 28, 1972, <http://china.org.cn/english/china-us/26012.htm>. In the Shanghai Communiqué, the U.S. stated, *inter alia*, that it would "progressively reduce its forces and military installations on Taiwan," and that its ultimate goal is "withdrawal of all US forces and military installations from Taiwan." *Id.* art. 12. The countries also stated their intent to increase bilateral trade. *Id.* art. 13. The Shanghai Communiqué was the first attempt the U.S. made to "normalize" its relationship with the P.R.C. *See* Carolan, *supra* note 13, at 437.

48. *See* The Joint Communiqué on the Establishment of Diplomatic Relations Between the People's Republic of China and the United States of America, Jan. 1, 1979, <http://www.china.org.cn/english/china-us/26243.htm>. The communiqué states that "[t]he United States of America recognizes the Government of the People's Republic of China as the *sole legal Government* of China." *Id.* (emphasis added). However, "[i]t is important to underscore that the United States consistently has stopped short of *endorsing* the P.R.C.'s claim that Taiwan is part of China." Carolan, *supra* note 13, at 438 (emphasis added). The United States has only acknowledged China's claim of sovereignty. *See id.*

49. *See* Jones, *supra* note 40, at 53. Although the U.S. terminated the MDT, it enacted the Taiwan Relations Act in its place. *See* Taiwan Relations Act, Pub. L. No. 96–8, 93 Stat. 14 (1979) (codified as amended at 22 U.S.C. § 3301 (2004)). The Taiwan Relations Act retains the U.S.'s right to "provide Taiwan with arms of a defensive character; and to maintain the capacity of the United States to resist any resort to force or other forms of coercion that would jeopardize the security, or the social or economic system, of the people on Taiwan." *Id.*

50. *See infra* notes 51–59 and accompanying text. Although China attempted to overtake two islands (Quemoy and Matsu) in the Taiwan Strait, in 1954, 1958, and 1962, these islands were relatively small and very close to Mainland China. *See* Jones, *supra* note 40, at 52 & n.8; First Taiwan Strait Crisis Quemoy and Matsu Islands, http://www.globalsecurity.org/military/ops/quemoy_matsu.htm (last visited Mar. 23, 2006). In addition, China was responding to an impending attack from the deposed ROC government. First Taiwan Strait Crisis Quemoy and Matsu Islands, *supra*.

51. Zhengyuan Fu, *China's Perception of the Taiwan Issue*, 1 UCLA J. INT'L L. & FOREIGN AFF. 321, 325 (1996–1997).

52. *See id.*

53. *See id.*

Soviet aid, would have been very costly to the P.R.C. government.⁵⁴ Finally, although the P.R.C. firmly believed that there was “one China,” Mao Zedong expressed little urgency in reunification with Taiwan.⁵⁵ According to him, Taiwan would eventually be “liberated.”⁵⁶

The P.R.C.’s passiveness on reunification during this period is an important backdrop from which to gauge the effects of increasing capitalism on the P.R.C. perception of the Taiwan question. In the next part, this Note explores both China’s increasing market capitalism and its increasing aggression toward Taiwan.

II. INCREASING CAPITALISM AND INCREASING AGGRESSION

In the late 1970s, China underwent changes that drastically shifted its policy, both in regards to market capitalism and the Taiwan question. Before this period, China’s economy followed Marxist social doctrine under Mao Zedong’s leadership.⁵⁷ Following Mao’s death in September 1976, however, China’s economic ideology shifted.⁵⁸ This economic shift, although initially distinct from the Taiwan question, would later have a direct effect on China’s “One China” policy.⁵⁹

A. *The Shift to Capitalism: 1970s–Present*

In the late 1970s, China began reinterpreting and modernizing fundamental principles of its communist doctrine in order to gain more economic flexibility. In 1978, Mao Zedong’s successor, Deng Xiaoping,⁶⁰

54. *See id.*

55. Mao Zedong once said, “We do not want to take over Taiwan . . . all at once. [Taiwan can remain] in the hands of [the ROC], and it does not matter if this be ten years, twenty years, or thirty years.” *Id.* at 325–26. Also, according to Henry Kissinger, “[n]either then, nor in any subsequent meeting, did Mao indicate any impatience over Taiwan, set any time limits, make any threats, or treat it as the touchstone of [the Sino-U.S.] relationship.” *Id.* at 326.

56. *See Fu, supra* note 51, at 325–26.

57. During the time that Mao Zedong was the Chairman of the Central Committee of the Communist Party of China, he adhered strictly to the Marxist principles of state control of the means of production, socialist policy-driven economic decisions, a limited private sector, and egalitarianism. *See WEN-SHUN CHI, IDEOLOGICAL CONFLICTS IN MODERN CHINA: DEMOCRACY AND AUTHORITARIANISM* 254–58 (Transaction Publishers 1992) (1986); DREYER, *supra* note 26, at 145–46, 148. These policies isolated China, in many respects, from engaging in meaningful international trade relationships. *See DREYER, supra* note 26, at 148–49.

58. *See infra* notes 60–93 and accompanying text.

59. *See infra* notes 86–123 and accompanying text.

60. Deng Xiaoping was very critical of the way the economy had been run under Mao. DREYER, *supra* note 26, at 149.

introduced a plan called the “Four Modernizations.”⁶¹ This plan was introduced to “reform . . . the planning and management systems in industry and agriculture” in China.⁶² The first initiative was to increase personal responsibility in unproductive agricultural areas.⁶³ To accomplish this task, China reduced mandatory production quotas, reduced the amount of crops that had to be sold to the state, and encouraged open market crop sales.⁶⁴ Second, China reinterpreted its socialist land-use doctrine to allow flexibility in land transfers and to encourage business investment in urban areas.⁶⁵ Third, Xioping decentralized economic authority to state enterprises, thereby allowing the states to drastically increase efficiency.⁶⁶ In the last of the “Four Modernizations,” Xioping moved China’s state-set pricing system toward a system driven by market demand.⁶⁷ By the late 1980s, China had implemented each of these policies on a large scale,⁶⁸ and the economy was experiencing great progress.⁶⁹

61. *Id.*

62. *Id.*

63. During the Maoist era, farmers had little economic incentive to grow crops because they were required to sell the vast majority of them to the state at state-set prices. *See* DREYER, *supra* note 26, at 149. The state-set prices were often much lower than what the crops would have gotten on the open market. *See id.* at 149–52.

64. *Id.*

65. Under Mao, China closely adhered to Marxist doctrine that “land [was] not a commodity and that it [had] no exchange value because it exists naturally and is not the product of labor.” Pamela N. Phan, *Enriching the Land or the Political Elite? Lessons from China on Democratization of the Urban Renewal Process*, 14 PAC. RIM L. & POL’Y J. 607, 611 (2005). Following this doctrine, China kept strict controls over land and avoided leasing it to individuals or businesses. *Id.* However, by reinterpreting Marx’s writing in the 1980s, China determined that, although land itself could not be commoditized, its underlying value could. *Id.* This ideology shift allowed China to retain a Marxist philosophy, while increasing its flexibility in granting land rights for social and economic purposes. *See id.*

66. Before the policy shift towards market capitalism, states would subsidize unprofitable businesses. *See* DREYER, *supra* note 26, at 151–52. These businesses, hailed as the antithesis of capitalism, were largely unproductive because of the lack of incentives for workers. *Id.* at 147. Beginning in 1979, China instituted decentralization efforts. *Id.* at 152. The states, realizing that their successes or failures were in their own hands, lowered production quotas, instituted taxes instead of requiring business to turn over their profits, and dismantled unprofitable businesses. *Id.* at 152–53.

67. Under the Maoist regime of government set prices, market prices were unknown to the Chinese public. *See id.* at 155. Xioping initially introduced a two-tier pricing system, and eventually phased out state-set prices. *Id.* at 153–55.

68. First, in regard to agriculture, China loosened restrictions on production quotas, encouraged citizens to sell crops on the open market, increased the amount of credit that was available for agricultural investment, and increased the state procurement prices for crops that were sold under the quota system. DREYER, *supra* note 26, at 149–51. Second, private businesses were encouraged to enter into urban areas by attractive and previously unavailable land leasing options and by direct appeals to individuals to start their own businesses. *See* Phan, *supra* note 65, at 611–12. Third, the government began to delegate fiscal responsibility to individual states, and simplify administrative organizations. DREYER, *supra* note 26, at 152–53. States, in turn, lowered state-imposed mandatory quotas on factory production, stopped requiring business to turn over their profits to the state, and created bankruptcy

In 1988, China made two constitutional amendments to fully effectuate the new economic polices.⁷⁰ The first article of amendment was intended to legitimize the private sector of the economy.⁷¹ The amendment explicitly noted the importance of the private sector, and called it a “complement” to the socialist economy.⁷² The second article of amendment explicitly authorized the lawful transfer of land, a privilege neglected by the previous constitution.⁷³ No other amendments were made that year.⁷⁴

During the 1990s, China’s economy continued to experience great progress due to the continual reform of Chinese economic policy.⁷⁵ Although the country initially experienced a slight economic downturn, partially due to an international backlash against the 1989 Tiananmen Square incident,⁷⁶ the policies that China implemented in the 1980s proved effective.⁷⁷ In 1992, China “declared its intention to establish a ‘socialist

laws. *Id.* These changes heavily incentivized investment in capital for future production. *See id.* Last, China gradually reformed the centralized pricing system in favor of a system based on supply and demand. *Id.* at 153–55. This change brought the economy more in line with market forces.

69. *See* EconomyWatch.com, China Economy, http://www.economywatch.com/world_economy/china/index.html (last visited Mar. 23, 2007) (discussing the historical progress of China’s economy).

70. *See* XIAN FA arts. 11, 13 (1988) (P.R.C.), available at <http://english.people.com.cn/constitution/constitution.htm>; M. Ulric Killion, *China’s Amended Constitution: Quest for Liberty and Independent Judicial Review*, 4 WASH. U. GLOBAL STUD. L. REV. 43, 56 (2005).

71. *See* XIAN FA art. 11 (1988) (P.R.C.).

72. *Id.* The following paragraph was added to Article 11 of the 1982 Constitution:

The state permits the private sector of the economy to exist and develop within the limits prescribed by law. The private sector of the economy is a complement to the socialist public economy. The state protects the lawful rights and interests of the private sector of the economy, and exercises guidance, supervision and control over the private sector of the economy.

China’s Constitutional Framework, <http://www.cecc.gov/pages/virtualAcad/gov/stateconst.php> (last visited Mar. 23, 2007).

73. XIAN FA art. 10 (1988). The fourth paragraph of article 10, which previously read “no organization or individual may appropriate, buy, sell or lease land, or unlawfully transfer land in other ways,” was amended to read “[n]o organization or individual may appropriate, buy, sell or unlawfully transfer land in other ways. The right to the use of the land may be transferred in accordance with the law.” *See* China’s Constitutional Framework, *supra* note 72.

74. *See id.*

75. *See* DREYER, *supra* note 26, at 155–66.

76. The Tiananmen Square incident began when students, dissatisfied with the P.R.C. government, protested, demanding democracy, freedom, and economic reform. *See* Tiananmen Square, 1989: The Declassified History, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB16/documents/index.html#12-29>. On June 4, 1989, the P.R.C. brutally suppressed these protesters, killing between 180 and 500 students and injuring thousands more. *Id.* Because of these actions, the U.S. and many other countries imposed various sanctions on the P.R.C. *Id.*; DREYER, *supra* note 26, at 156.

77. China’s Gross Domestic Product (GDP) grew 5.2% in 1991 and 7% in 1992, each year having low levels of inflation. DREYER, *supra* note 26, at 156. China’s economic reforms were not, however, without drawbacks. From 1989 to 1991, China struggled with rising inflation, unequal distribution of income, and relatively low economic growth. *See id.*

market economic system.”⁷⁸ Commentators have interpreted this seemingly-contradictory statement to mean that China wanted to “use[] the advantages of capitalist market economies in order to develop socialized, large-scale production ‘while maintaining a balance of social and efficiency between the two.’”⁷⁹ In 1993, China amended articles 3 through 11 of the 1982 Constitution.⁸⁰ Like the 1988 amendments, these amendments dealt mostly with economic issues.⁸¹ In the most extreme amendment, China declared that its economy was “socialist *market economy*.”⁸² The P.R.C. amended the 1982 Constitution again in 1999,⁸³ declaring that China’s private and other non-public economies were “an important component” of the market economy rather than a “complement of the socialist economy.”⁸⁴ By the end of the 1990s, China’s gross domestic product (GDP) was equivalent to about one trillion U.S. dollars.⁸⁵

As a result of its progress toward free market capitalism, China now has the fourth largest economy in the world.⁸⁶ 2005 marked the third consecutive year that China’s economy grew at an annual rate of roughly ten percent.⁸⁷ China has also formed strategic economic relationships with many countries around the world.⁸⁸ In 2001, it became an official member of the World Trade Organization (WTO),⁸⁹ solidifying its desire to engage

78. DREYER, *supra* note 26, at 157.

79. *Id.* at 157–58.

80. XIAN FA (1993) (P.R.C.); Killion, *supra* note 70, at 56.

81. Killion, *supra* note 70, at 56; *see also* China’s Constitutional Framework, *supra* note 72 (discussing, section-by-section, the 1993 amendments to the 1982 Constitution).

82. XIAN FA art. 7 (1993) (P.R.C.) (emphasis added); *see also* China’s Constitution Framework, *supra* note 72.

83. XIAN FA (1999) (P.R.C.); Killion, *supra* note 70, at 56.

84. XIAN FA art. 7 (1999) (P.R.C.); Amendment Three, <http://www.china.org.cn/english/features/89052.htm> (last visited Mar. 23, 2007). *Compare* this with the previous constitution.

85. DREYER, *supra* note 26, at 169. Gross domestic product (GDP) is a measure of all of the goods and services produced in a given economy. It is generally considered to be a good indicator of economic well-being. *Id.*

86. At the end of 2005, China’s economy was outpaced only by the economies of the U.S., Japan, and Germany, respectively. *Economy in China is No. 4 in the World*, N.Y. TIMES, Jan. 25, 2006, at C10. In terms of purchase power parity (ppp), in 2006, China had the second largest economy in the world, behind that of the U.S. CIA.gov, CIA—World Factbook, <https://www.cia.gov/cia/publications/factbook/geos/ch.html> (last visited Mar. 9, 2006).

87. *See supra* note 86.

88. *See* Juan Vega, *China’s Economic and Political Clout Grows in Latin America at the Expense of U.S. Interests*, 14 MINN. J. GLOBAL TRADE 377, 385–414 (2005) (discussing China’s growing economic influence in countries such as Mexico, Brazil, Venezuela, Columbia, Bolivia, Peru, Nicaragua, Ecuador, Cuba, and a host of other countries in the southern hemisphere).

89. *See* John Waggoner, *WTO admits China, Taiwan as members*, U.S.A. TODAY, Nov. 12, 2001, at 01B.

in international free trade⁹⁰ and its status as a global economic leader.⁹¹ Some economists believe that, with further economic reforms,⁹² China could have the world's largest economy in the near future.⁹³

B. Increasing Aggression: 1970s–Present

During the same time that China was experiencing a drastic shift toward free market capitalism, China's policy on the Taiwan question changed as well. Although the U.S. terminated the MDT in 1979, it still maintained unofficial relations with Taiwan⁹⁴ and continued to sell Taiwan weapons "of a defensive character."⁹⁵ Although China had been tolerant of this relationship, in the early 1980s it began insisting that the U.S. halt these weapons sales.⁹⁶ During this period, the U.S. hoped to maintain Sino-U.S. diplomatic relations "in order to limit the Soviet Union's opportunities for exploiting its military power [in Asia]"⁹⁷ and this gave China leverage in its demand.⁹⁸ After China's initial demands, the U.S. momentarily considered selling arms to both China and Taiwan,⁹⁹ but

90. The WTO is an organization that is dedicated to facilitating international free market trade. See WORLD TRADE ORGANIZATION, 10 BENEFITS OF THE WTO TRADING SYSTEM 1–18 (2003), http://www.wto.org/english/res_e/doload_e/10b_e.pdf.

91. China's economy is intimately tied to the world economy. Nations around the world, especially the U.S., watch China closely. A downturn in China's economy means a downturn for the world economy. For instance, China has collected about 800 billion U.S. dollars. If China were to sell the U.S. dollar, this would drastically affect the U.S. economy, vastly eroding the value of the dollar. See, Central Banks Dump Dollar for Euro, http://www.atimes.com/atimes/Global_Economy/GA27Dj01.html (last visited Mar. 23, 2007).

92. See *infra* notes 185–96 and accompanying text.

93. See China to Become World's Largest Economic Entity by 2030, PEOPLE'S DAILY ONLINE, http://english.people.com.cn/200501/12/eng20050112_170361.html (last visited Mar. 23, 2007); Wayne M. Morrison, *China's Economic Condition*, FAS.ORG, Jan. 12, 2006, available at <http://www.fas.org/sgp/crs/row/IB98014.pdf> (noting that China might soon become the largest economy in the world).

94. See *supra* note 49.

95. *Id.*

96. John Holdridge, United States Assistant Secretary for East Asia and Pacific Affairs, testified in a Congressional hearing that "The Chinese [have] insisted. . . that we agree to the ultimate termination of arms sales [to Taiwan]." Y. Frank Chiang, *One-China Policy and Taiwan*, 28 FORDHAM INT'L L.J. 1, 56 (2004) (citing John H. Holdridge, U.S.-China Joint Communiqué, Statement Before the House Foreign Affairs Committee (Aug. 18, 1982), in DEP'T ST. BULL., Oct. 1982, at 19).

97. *Id.*

98. See *id.*

99. *Id.* at 55 (citing John H. Holdridge, U.S. Relations With China, Address before the House Foreign Affairs Committee (July 16, 1981), in DEP'T ST. BULL., Oct. 1981, at 38). "The U.S.-China relationship is a major component in our global and regional security policies . . . we concluded that we should revise the international traffic in arms to permit the licensing of commercial sales to China on a case-by-case basis." *Id.*

ultimately decided against that course of action.¹⁰⁰ The U.S. also decided against discounting arms sales to Taiwan¹⁰¹ but it did, however, issue a joint statement with China declaring that “territorial integrity and non-interference in each other’s internal affairs constitute the fundamental principles guiding U.S. China relations.”¹⁰²

During the 1990s, China became increasingly vocal and aggressive in its claim of sovereignty over Taiwan. In 1993, the same year that China amended its 1982 Constitution,¹⁰³ the P.R.C. issued a White Paper reiterating its plan for peaceful reunification with Taiwan.¹⁰⁴ The White Paper also claimed however, that China “[was] entitled to use any means it deem[ed] necessary, including military ones, to uphold its sovereignty and territorial integrity.”¹⁰⁵ In the mid-1990s, the Taiwanese people increasingly supported a declaration of independence from mainland China.¹⁰⁶ In 1995, China responded by closing “unofficial” reunification negotiations with the territory.¹⁰⁷ The following year, China conducted military exercises less than 50 miles from Taiwan’s coast, firing several missiles towards the territory.¹⁰⁸ These military exercises took place during Taiwan’s first direct democratic election¹⁰⁹ and were possibly intended to intimidate Taiwanese voters.¹¹⁰ Although the newly-elected

100. “We refused [to discontinue weapon sales to Taiwan] because the level of our arms sales must be determined by the needs of Taiwan, and we could not agree to a termination date, as the Chinese demanded, which might impair our ability to meet those needs.” *Id.* at 56.

101. Following the U.S.’s joint statement with China, China wanted the U.S. to discontinue arms sales to Taiwan. Conversely, Taiwan asked the U.S. to agree to “the six assurances.” See Six Assurances, <http://www.orechinacommittee.org/sixassurances.htm> (last visited Mar. 23, 2007).

102. Joint Communication of the United States of America and the People’s Republic of China, Aug. 17, 1982, available at http://www.usinfo.state.gov/eap/Archive_Index/Joint_communique_1982.html.

103. See *supra* notes 80–84 and accompanying text.

104. CCP White Paper on The Taiwan Question and Reunification of China, art. II [hereinafter CCP White Paper], <http://www.china.org.cn/e-white/taiwan/10-3.htm> (last visited Oct. 4, 2007); see also China’s Plan for Reunification, *infra* notes 122–49 and accompanying text.

105. CCP White Paper on the Taiwan Question and Reunification, art. III, available at <http://www.china.org.cn/e-white/taiwan/10-4.htm>.

106. See China-Taiwan History, <http://www.pbs.org/newshour/bb/asia/china/china-taiwan.html> (last visited Mar. 23, 2007).

107. See Lauren Eyton, *Taiwan-China Progress at a Glacial Pace*, ASIA TIMES, Jan. 21, 2005, available at <http://www.atimes.com/atimes/China/GA21Ad01.html> (last visited Mar. 23, 2007). China claimed it discontinued the negotiations because Taiwan had been attempting to expand its ties with the international community. *Id.*

108. Fu, *supra* note 51, at 321.

109. Taiwan Communiqué No. 71, June 1996, available at <http://www.taiwandc.org/twcom/71-no2.htm> (last visited Mar. 23, 2007).

110. Taiwan Angered by China’s ‘Threats,’ CNN Interactive World News, Feb. 6, 1996, available at http://cnn.tv/WORLD/9602/china_taiwan. During the elections, China issued statements lambasting Taiwan’s leading candidates and accusing them of attempting to divide China. *Id.* The leading

President Lee Ting-Hui made conciliatory gestures in order to avoid military engagement,¹¹¹ tension between China and Taiwan remained high throughout the 1990s.¹¹²

The relationship between China and Taiwan is still tense at the time of this writing. In 2000, China threatened military action if the Taiwanese people elected Chen Shui-bian, a supporter of Taiwan's independence, as their president.¹¹³ Chen *was* eventually elected, and, even though he moderated his position on reunification,¹¹⁴ China reiterated it would "never allow independence for Taiwan."¹¹⁵ China also warned foreign nations that reunification was a domestic issue in order to avoid international scrutiny.¹¹⁶ In December 2004, the Standing Committee of the National People's Congress announced its intention to include an anti-secession law in its legislative agenda.¹¹⁷ The law was introduced in reaction to "secessionist activities . . . [that] gravely threaten China's sovereignty and territorial integrity"¹¹⁸ and contemplated the use of force against Taiwan.¹¹⁹ Following the adoption of the anti-secession law in March of 2005, China threatened Taiwan with "disaster" if it ceased plans to resume reunification negotiations.¹²⁰ Currently, China has over 700 missiles pointed at various locations in Taiwan.¹²¹

candidate, Lee Ting-Hui, believed in Taiwan's independence from China, and later became Taiwan's president. Fu, *supra* note 51, at 321.

111. See Fu, *supra* note 51, at 321; see also Taiwan Angered by China's 'Threats,' *supra* note 110.

112. See *infra* notes 113–21 and accompanying text.

113. Milestone in China-Taiwan Ties, BBC News World Edition, Mar. 19, 2000, available at <http://news.bbc.co.uk/2/hi/world/asia-pacific/682686.stm>.

114. See *id.* "Mr. Chen gradually moderated his policies towards China and said explicitly he would not declare independence if elected and would be prepared to discuss any issue with Beijing." *Id.*

115. China: No Independence for Taiwan, CNN, <http://www.cnn.com/2005/WORLD/asjapcf/03/05/china.npc/index.html>.

116. See China's Hu Warns 'Bullying Nations,' BBC News World Edition, Apr. 24, 2002, <http://news.bbc.co.uk/1/hi/world/asia-pacific/1947977.stm>; China's Hu Warns US Over Taiwan, BBC News World Edition, May 2, 2002, <http://news.bbc.co.uk/1/hi/world/asia-pacific/1963389.stm>; China-Taiwan: Coercion or Deterrence, BBC News World Edition, July 13, 2002, <http://news.bbc.co.uk/2/hi/asia-pacific/2126226.stm>.

117. Ralph A. Sossa, *Much Ado About China's Anti-Secession Law*, ASIA TIMES, Mar. 5, 2005, available at <http://www.atimes.com/atimes/China/GC05Ad02.html>; China's Anti-Secession Law, <http://www.taiwandc.org/aslaw-main.htm> (last visited Mar. 23, 2007).

118. Draft Anti-Secession Law Explained, http://www.chinadaily.com.cn/english/doc/2005-03/08/content_422875.htm (translating vice-chairman of the Standing Committee, Wang Zhaoguo's, explanation of the draft Anti-Secession Law).

119. See *id.*

120. In 2006, Taiwan withdrew from reunification discussions with China due to China's military threat. See China Warns Taiwan of 'Disaster,' BBC News, Feb. 28, 2006, <http://news.bbc.co.uk/2/hi/asia-pacific/4757568.stm>. China threatened Taiwan with military action because of Taiwan's

III. CHINA'S PLAN FOR REUNIFICATION

The P.R.C.'s plan for reunification with Taiwan links its increasing market capitalism to its escalating aggression towards Taiwan. China discussed this plan, which is described as "one country, two systems" (OCTS), in a 1993 White Paper intended to settle the Taiwan question.¹²² The two tenets of the White Paper are: (1) the peaceful reunification of Taiwan with mainland China; and (2) one country with *two separate* economic systems.¹²³

The White Paper cited numerous instances, dating back to the early 1950s, where P.R.C. expressed a desire to peacefully reunite with Taiwan.¹²⁴ The document then reaffirmed China's position: that Taiwan is an integral part of China and that China will not recognize any attempt to separate Taiwan from China.¹²⁵

Moreover, the White Paper asserted China's theory of "side by side" coexisting political systems,¹²⁶ encompassing both China's socialist system and Taiwan's capitalist system.¹²⁷ The White Paper asserts that

decision to disband the counsel on reunification, but China did not indicate when or how military action would commence. *Id.*

121. *Id.*

122. *See supra* note 104, art. III.

123. *See id.*

124. *Id.* The first such attempt mentioned was a 1955 statement by then-premier Zhou Enlai, who affirmed that a reunification of Taiwan and mainland China would try to be carried out by peaceful means. *Id.* Second, the White Paper notes that Mao Zedong, in 1956, thought that a peaceful reunification was "the best option." *Id.* The document goes on to say that Deng Xiaoping, in 1983, was also a proponent of peaceful reunification. *Id.*

125. *Id.* The passage reads: "There is only one China in the world, Taiwan is an inalienable part of China The Chinese Government is firmly against any words or deeds designed to split China's sovereignty and territorial integrity. It opposes 'two Chinas', 'one China, one Taiwan', 'one country, two governments' or any attempt or act that could lead to 'independence of Taiwan'." *Id.* The document goes on to state that, despite China's desire to reunify with Taiwan by peaceful means, the country does reserve the right to use military action against Taiwan. *Id.* This statement makes it clear that peaceful methods are not China's only option for reunification; they are just the preferred method. *See supra* notes 113-17 and accompanying text.

126. CCP White Paper, *supra* note 104, art. III, § 2.

127. *Id.* The passage states:

On the premise of one China, socialism on the mainland and capitalism on Taiwan can coexist and develop side by side for a long time without one swallowing up the other. This concept has largely taken account of the actual situation in Taiwan and practical interests of our compatriots there. It will be a unique feature and important innovation in the state system of a reunified China.

After reunification, Taiwan's current socio-economic system, its way of life as well as economic and cultural ties with foreign countries can remain unchanged. Private property, including houses and land, as well as business ownership, legal inheritance and overseas Chinese and foreign investments on the island will all be protected by law.

Id.

capitalism is integral to Taiwan, and that the coexistent system would be a beneficial “innovation” for both China and Taiwan.¹²⁸ Also, the document explicitly stated that China would not alter any rights under Taiwan’s current system, including property rights, business ownership, legal inheritance, and foreign investment.¹²⁹ All of these rights would be protected by law.¹³⁰ Last, and perhaps most significantly, China’s plan called for a “high degree of autonomy” for Taiwan.¹³¹ China stipulated that it would only govern Taiwan as an “administrative region” and that Taiwan could continue to run its own economic affairs in addition to keeping an independent judiciary, military forces, and political parties.¹³² China also promised that representatives from Taiwan could “be appointed to senior posts in the central government and participate in the running of national affairs.”¹³³ Although China has not set out a specific plan for how the “one country, two systems” model would work,¹³⁴ a similar application of the system in Hong Kong may provide insight.¹³⁵

A. Case Study: *The Hong Kong Administrative Region*

In 1997, China took control over Hong Kong under the OCTS model.¹³⁶ The OCTS model has been applied to Hong Kong in a way similar to the plan detailed in the 1993 White Paper.¹³⁷ The similarities between Hong Kong and Taiwan are such that Hong Kong may be considered a test-run for Taiwan.¹³⁸ Hong Kong was ceded in perpetuity, like Taiwan, to the British in 1842.¹³⁹ Before 1997, the British ruled Hong Kong in a manner comparable to the martial law Taiwan experienced until

128. *Id.*

129. *Id.*

130. *Id.*

131. CCP White Paper, *supra* note 104, art. III, § 3.

132. *Id.*

133. *Id.*

134. CCP White Paper, *supra* note 104.

135. *See infra* notes 136–74 and accompanying text.

136. Jacques deLisle & Kevin P. Lane, *Hong Kong Endgame and the Rule of Law (II): The Battle Over “The People” and the Business Community in the Transition to Chinese Rule*, 25 U. PA. J. INT’L ECON. L. 1525, 1525 (2004).

137. *See supra* notes 124–36 and accompanying text; *see also infra* notes 138–47 and accompanying text.

138. Cooney, *supra* note 21, at 498–502.

139. Hong Kong was ceded to the British in 1842, under the Treaty of Nanking, as a result of the Opium War. Michael D. Landry, *International Agreements-Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong*, 26 HARV. INT’L L.J. 249, 251 (1985).

1987.¹⁴⁰ Also, Hong Kong, like Taiwan, practiced, and continues to practice, market capitalism.¹⁴¹

When Hong Kong was turned over to China pursuant to an agreement with the British,¹⁴² China decided that it would be ruled as the Hong Kong Special Administrative Region (HKSAR).¹⁴³ To protect the autonomy of this region, China enacted the Basic Law,¹⁴⁴ which provided Hong Kong with a “high degree of autonomy . . . executive, legislative, and independent judicial power, including that of final adjudication”¹⁴⁵ The Basic Law also covers broad areas in which Hong Kong enjoys independent decision-making.¹⁴⁶ However, Hong Kong remains limited. For instance, the HKSAR is not allowed to maintain its own military,¹⁴⁷ the executive branch of HKSAR has limited accountability,¹⁴⁸ and the P.R.C. may apply its laws to HKSAR in times of “turmoil.”¹⁴⁹

140. Cooney, *supra* note 21, at 511. Under British rule, Hong Kong’s constitution could be amended, at any time, by the British and without Hong Kong’s permission. *Id.* The political system was not democratic, and the head of the executive branch was appointed by the British and had to implement British directives. *Id.* The legislative branch of the government was also largely controlled by the British. *Id.* at 511–12.

141. See Robert A. Peterson, *Lessons in Liberty: Hong Kong, “Crown Jewel” of Capitalism*, 40 THE FREEMAN 16, 16–22 (1990) (discussing the history of Hong Kong’s free market economy).

142. See Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong, Sept. 26, 1984, 23 I.L.M. 1371–87 [hereinafter Joint Declaration U.K.-P.R.C.]. The declaration was meant to “maint[ain]. . . the prosperity and stability of Hong Kong and to the further strengthening and development of the relations between the two countries” *Id.* at 1371.

143. *Id.* at 1371.

144. See The Basic Law [Constitution] (H.K.) [hereinafter Basic Law], http://www.info.gov.hk/basic_law/fulltext/index.htm. Hong Kong’s Constitution is not a constitution, *per se*, because the P.R.C. enacted the law. See *id.* Hong Kong neither ratified nor agreed to the Basic Law; it was just a legislative measure of preserving Hong Kong’s autonomy. See Cooney, *supra* note 21, at 527–28; see also Landry, *supra* note 139, at 254.

145. Basic Law, *supra* note 144, art. 2.

146. Cooney, *supra* note 7, at 525; see also *infra* notes 150–74 and accompanying text.

147. Joint Declaration U.K.-P.R.C., *supra* note 142, Annex. I, art. XII. Although Hong Kong is responsible for maintaining peace within the Hong Kong Special Administrative Region (HKSAR), the P.R.C. may send “[m]ilitary forces . . . to be stationed in the Hong Kong Special Administrative Region for the purpose of defence [sic] shall not interfere in the internal affairs of the Hong Kong Special Administrative Region. Expenditure for these military forces shall be borne by the Central People’s Government.”

148. Cooney, *supra* note 7, at 532–38. Although the executives are elected by the people of HKSAR, they are appointed by the P.R.C.’s Central People’s Government. Joint Declaration U.K.-P.R.C., *supra* note 142, Annex I, art. I. The Chief Executive must implement the directives of the CPG, and is accountable to both the P.R.C. and HKSAR. Basic Law, *supra* note 144, art. 43, 48(8). In the event of a conflict between the P.R.C. and HKSAR, the Basic Law does not provide a resolution. See Cooney, *supra* note 7, at 537. In addition, the Executive cannot act in a way inconsistent with the Basic Law, despite the fact that some actions might be in Hong Kong’s best interest. See *id.* at 533.

149. Basic Law, *supra* note 144, art. 18.

In the event that the Standing Committee of the National People’s Congress decides to declare a state of war or, by reason of turmoil within the Hong Kong Special Administrative

Despite these limitations, HKSAR is granted essentially total economic freedom.¹⁵⁰ HKSAR's finances are completely separate from those of the P.R.C..¹⁵¹ The P.R.C. cannot levy taxes on Hong Kong¹⁵² nor can it require HKSAR to remit its revenues.¹⁵³ The region is permitted to establish its own financial and monetary policies.¹⁵⁴ Also, it retains international financial center status,¹⁵⁵ maintains its own currency,¹⁵⁶ manages its own customs ports,¹⁵⁷ and regulates the structures of its professions.¹⁵⁸

The only notable limitation on Hong Kong's freedom to control its economy is the region's restricted participation in international relations.¹⁵⁹ Hong Kong may enter into international agreements, but must do so under the name "Hong Kong, China."¹⁶⁰ Hong Kong is able to participate in international organizations in which statehood is not a prerequisite,¹⁶¹ but it cannot participate in organizations that are limited to

Region . . . [or] decides that the Region is in a state of emergency, the Central People's Government may issue an order applying the relevant national laws in the Region.

Id.

150. *See infra* notes 171–81 and accompanying text.

151. *See infra* note 152 and accompanying text.

152. "The Hong Kong Special Administrative Region shall practice an independent taxation system." Basic Law, *supra* note 144, art. 108. "The Central People's Government shall not levy taxes in the Hong Kong Special Administrative Region." *Id.* art. 106.

153. "The Hong Kong Special Administrative Region shall use its financial revenues exclusively for its own purposes, and they shall not be handed over to the Central People's Government." *Id.*

154. "The Government of the Hong Kong Special Administrative Region shall, on its own, formulate monetary and financial policies, safeguard the free operation of financial business and financial markets, and regulate and supervise them in accordance with law." *Id.* art. 110.

155. "The Government of the Hong Kong Special Administrative Region shall provide an appropriate economic and legal environment for the maintenance of the status of Hong Kong as an international financial centre" *Id.* art. 109.

156. "The Government of the Hong Kong Special Administrative Region may authorize designated banks to issue or continue to issue Hong Kong currency under statutory authority . . ." Basic Law, *supra* note 144, art. 111.

157. "The Hong Kong Special Administrative Region shall be a separate customs territory." *Id.* art. 116.

158. "The Government of the Hong Kong Special Administrative Region shall, on the basis of maintaining the previous systems concerning the professions, formulate provisions on its own for assessing the qualifications for practice in the various professions." *Id.* art. 142.

159. *See id.* art. 116.

160. *Id.*

161. Joint Declaration U.K.-P.R.C., *supra* note 142, Annex. I, art. XI.

states.¹⁶² Finally, although Hong Kong was allowed to retain international agreements to which the P.R.C. was not a party,¹⁶³ in agreements to which the P.R.C. is a party, China has the authority to decide whether those agreements apply to Hong Kong.¹⁶⁴

Hong Kong's economy has greatly benefited China despite China's minimal control over HKSAR's economy and China's inability to tax the region. Now Hong Kong is "one of the most free, open, and investment-friendly economies in the world"¹⁶⁵ and has been considered a window into investing in mainland China.¹⁶⁶ During the early 1990s, investors flocked to Hong Kong, enticed partially by the Special Economic Zones (SEZ) established near Hong Kong by the P.R.C..¹⁶⁷ These SEZs increased investment in both China and HKSAR.¹⁶⁸ In addition, China benefited from Hong Kong's status as a major financial center¹⁶⁹ and the P.R.C. used Hong Kong's expertise to strengthen its own banking regulations.¹⁷⁰ Perhaps the most significant benefit for China has been the connections that it has gained through Hong Kong's relationship with the international community.¹⁷¹ These relationships have helped China strengthen its market capitalist system and develop meaningful international relationships.¹⁷²

162. *Id.* Although Hong Kong is not allowed to directly participate in these organizations, Hong Kong's "representatives will be allowed to participate as members of delegations of the government of the P.R.C. where they may express their views in the name of 'Hong Kong, China.'" Landry, *supra* note 139, at 254–55. However, Hong Kong's indirect participation is limited to fields which affect HKSAR. *Id.* at 255 n.29.

163. *Id.*

164. Joint Declaration U.K.-P.R.C., *supra* note 142, Annex. I, art. XI. China does not make this determination alone, however, and the P.R.C. will consult HKSAR before making a determination. *Id.*

165. Bradely Klein, *Democracy Optional: China and the Developing World's Challenge to the Washington Consensus*, 22 UCLA PAC. BASIN L.J. 89, 111 n.104. (2004).

166. Rolf H. Weber, *Repositioning Hong Kong as a Regional and International Financial Centre in View of China's Imminent Accession to the WTO*, 31 HONG KONG L.J. 122, 132 (2001).

167. Xiaoyong Li & Neal A. Stender, *Investing in China: Changing Roles of Shanghai and Taiwan*, 6 ACCA Docket no. 20 58, 62 (2002).

168. *Id.*

169. *See infra* note 170. Before Hong Kong was ceded to China in 1987, Hong Kong was the world's third largest financial and gold trading center. Landry, *supra* note 139, at 252.

170. Amy Chunyan Wu, *PRC's Commercial Banking System: Is Universal Banking a Better Model?*, 37 COLUM. J. TRANSNAT'L L. 623, 641 (1999) (citing *Hong Kong Shows China How to do Things*, TORONTO STAR, July 26, 1998, at 1) (noting that the Hong Kong Monetary Authority "sends missions to China to show how to develop financial markets, helps China draft banking laws, and helps China introduce international standards such as classification of loans.").

171. Peter K. Yu, *Succession by Estoppel: Hong Kong's Succession to the ICCPR*, 27 PEPP. L. REV. 53, 98 & n.265 (1999).

172. *See* China.org, CEPA Benefits Both China Mainland, Hong Kong, <http://www.china.org.cn/english/BAT/69298.htm> (last visited Mar. 9, 2006) (discussing the mutual benefits gained from international relationships and investment in Hong Kong).

The Basic Law will apply to Hong Kong for at least 50 years: from 1997 to 2047.¹⁷³ Thereafter the administration of Hong Kong is unclear.¹⁷⁴

IV. ARGUMENT

China's anti-secession law is linked, at least partially, to its increasing market capitalism.¹⁷⁵ Although reunification and economic reform may have been separate policies when they were formulated in the late 1970s,¹⁷⁶ they have since merged and become interrelated.¹⁷⁷ Initially, China's relative lack of control over Taiwan under the OCTS model would appear to decrease economic motivation for reunification.¹⁷⁸ Indeed, China would lack the ability to levy taxes or any other direct exaction on Taiwan.¹⁷⁹ However, this lack of direct control under the OCTS model is the underlying motivation for the system. The reason for this is the inherent struggle between market capitalism and socialism.

China's ideological struggle with market capitalism, within the context of a socialist system, is the motivating force behind applying the OCTS model to Taiwan. Maintaining the balance between a socialist society and a market driven economy is difficult. In fact, it is so difficult that some scholars consider market capitalism a natural forerunner to democracy.¹⁸⁰ Since the 1970s, China has struggled to remain competitive in the global

173. Joint Declaration U.K.-P.R.C., *supra* note 142, para. 3(12).

174. *See id.*

175. *See infra* notes 176–93 and accompanying text.

176. This was, perhaps, a function of the administration change that occurred after Mao's death.

177. *See supra* notes 10–27 and accompanying text.

178. Under the proposed OCTS model, China evinced a desire to have any control over Taiwan's economy whatsoever. *See supra* notes 122–74 and accompanying text.

179. *See supra* notes 150–58 and accompanying text.

180. *See generally* BRUCE GILLEY, CHINA'S DEMOCRATIC FUTURE: HOW IT WILL HAPPEN AND WHERE IT WILL LEAD (Columbia Univ. Press, 2004) (arguing that China will become a fully democratic country in the near future due to foundation laid by, *inter alia*, market capitalism); Yijiang Ding, *The Conceptual Evolution of Democracy in Intellectual Circles' Rethinking of State and Society, in* CHINA AND DEMOCRACY: RECONSIDERING THE PROSPECTS FOR A DEMOCRATIC CHINA 111, 115 (Suisheng Zhao ed., Routledge 2000) (noting that Chinese intellectuals considered market capitalism a prerequisite to complete democracy); Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1, 14–19 (1998) (discussing how market capitalism and democracy reinforce each other); Miron Mushkat & Roda Mushkat, *Economic Growth, Democracy, the Rule of Law, and China's Future*, 29 FORDHAM INT'L L.J. 229, 229 (2005) (noting that "development industrialization or modernization almost invariably lead[] to progress . . . in the political realm") (internal quotations omitted); *but see* Bradely Klein, *Democracy Optional: China and the Developing World's Challenge to the Washington Consensus*, 22 UCLA PAC. BASIN L.J. 89 (2004) (arguing that China has defied the "universal" formula for national development).

economy without deviating from its socialist doctrine.¹⁸¹ This struggle has led to the overhaul of several of China's socialist theories¹⁸² and to three constitutional amendments concerning the economy.¹⁸³ If economic growth were to remain limited by China's socialist system, China would eventually be forced to choose between democracy and socialism.¹⁸⁴ The OCTS model, however, provides the country with a middle ground. Under OCTS, China could experience the benefits of being associated with a democratic region without becoming democratic itself.¹⁸⁵ Viewed in this light, it is clear why Mao Zedong had little interest in immediate reunification with Taiwan. Taiwan was not a key component of the P.R.C.'s economy at that time.

Additionally, if the economic aspect of the OCTS model is applied to Taiwan in a way similar to the way that it has been applied to Hong Kong, China can expect to benefit greatly from Taiwan's economy.¹⁸⁶ Since ROC took over Taiwan, the territory has experienced a long period of economic prosperity and stability.¹⁸⁷ Taiwan has the 17th largest economy

181. This is perhaps most evidenced by the fact that, despite amending its constitution in order to embrace market capitalist principles, China has reemphasized its commitment to socialism. See *supra* notes 78–93 and accompanying text. This tension has led some commentators to wonder whether China is even practicing socialism. See Danielle Costa, *China's Economy: Free-markets or Socialism?*, <http://www.indyflix.com/danielle/papers/paper11.htm> (last visited Mar. 9, 2006).

182. The reinterpretation of the Marxist land-use theory, for instance, has eventually culminated in China adopting a constitutional amendment that incorporates language similar to that in the Fifth Amendment of the U.S. Constitution. Phan, *supra* note 65, at 613–14; XIAN FA art. 10 (2004) (P.R.C.).

183. See *supra* notes 70–85 and accompanying text. China amended its constitution again in 2004, but these amendments dealt mostly with the protection of human rights and private property. Killion, *supra* note 70, at 56.

184. If market capitalism does, in fact, eventually lead to democracy, this is the choice that China faces. In fact, since China's shift towards market capitalism, it has seen an increase in the desire for the rule of law, and also for political reform. See Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT'L L. 43, 43–59 (2001) (discussing the rise of the rule of law in China); Benjamin van Rooij, *China's War on Graft: Politico-Legal Campaigns Against Corruption in China and Their Similarities to the Legal Reactions to Crisis in the U.S.*, 14 PAC. RIM. L. & POL'Y J. 289, 289–336 (2005). The rule of law, political reform, market capitalism, and democracy are part of the "universal" formula for national development. See *supra* note 180 and accompanying text.

185. This is true because Taiwan, like Hong Kong, would be used as a conduit through which the benefits of democracy would flow. See *supra* text accompanying notes 166–74. China would not be directly exposed to Taiwan's democracy because the governments and economies would remain separate under the OCTS model. *Id.* and accompanying notes.

186. See *id.* and accompanying notes. Some scholars argue that the OCTS model as applied to Hong Kong would not work in regards to Taiwan, due to Taiwan's more developed political system and its developed sense of independence. See Charney, *supra* note 7, at 499–548. However, these authors focus on the political restraints placed on Hong Kong, not the relatively weak economic restraints. *Id.* In this regard, there is no reason to believe that the economic portion of the OCTS, as applied in Hong Kong, could not work in regards to Taiwan.

187. See Thayer Watkins, *The Economic History and Economy of Taiwan*, <http://www2.sjsu.edu/faculty/watkins/taiwan.htm> (last visited Mar. 9, 2006).

in the world¹⁸⁸ and the world's third largest trade surplus.¹⁸⁹ Taiwanese businesses are heavily invested in China's infrastructure.¹⁹⁰ Taiwan has also developed meaningful trade and diplomatic ties while maintaining official relationships with about 30 nations and unofficial ones with many more.¹⁹¹ Taiwan also belongs to several intergovernmental organizations.¹⁹² Assuming that Taiwan peacefully agrees to the OCTS model, China should enjoy essentially the same benefits as Taiwan.¹⁹³

Considering the two arguments above and the fact that Taiwan has grown ever closer to declaring its independence from the P.R.C., China's Anti-Secession law can only be viewed as stop-gap measure to ensure China's economic future.

CONCLUSION

In the past, China may have refused to relinquish sovereignty over Taiwan to preserve its honor after being defeated by Japan¹⁹⁴ or because of the desire to liberate the Taiwanese people.¹⁹⁵ Now, however, China's desires are economic.¹⁹⁶ China's socialist market economy has caused a ideological conflict within the country. Faced with the prospects of either a slowing economy or a slow march towards democracy, the OCTS model presents an "innovative" middle ground.¹⁹⁷ This model is the epitome of a socialist market economy¹⁹⁸ and, in it, China would experience the benefits of a democratic free market while maintaining its socialist system. Although it is unclear whether the Anti-Secession law will aid in

188. *Taiwan's Economy*, <http://www.asianinfo.org/asianinfo/taiwan/pro-economy.htm> (last visited Mar. 8, 2006).

189. *Id.*

190. See Amy Bickers, *China/Taiwan Economy*, transcript available at <http://www.fas.org/news/taiwan/1999/990811-taiwan1.htm> (last visited Nov. 14, 2006).

191. Carolan, *supra* note 13, at 455; Huang, *supra* note 33, at 146–47.

192. For instance, Taiwan is a member of the Asian development Bank, which is "aimed at improving the welfare of the people in Asia and the Pacific . . ." Asian Development Bank, <http://www.adb.org/About/default.asp> (last visited Mar. 9, 2006); Huang, *supra* note 33, at 146.

193. Some authors argue that the OCTS, applied in its entirety, would not work in regards to Taiwan. See Cooney, *supra* note 21, at 499–548. This note does not rely on that proposition.

194. Fu, *supra* note 51, at 332 (arguing that China's desire to regain Taiwan is deeply rooted in the psyche of the Chinese people, and that reunification is needed to avoid national shame).

195. *Id.*

196. See *supra* text accompanying notes 175–93.

197. See *supra* notes 78–79 and accompanying text.

198. See *supra* notes 122–35 and accompanying text.

reunifying Taiwan with China, it is clear that market capitalism is at least partially responsible for aggression.

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