

HONG KONG STUDY

ANNEX F

OPTIONS FOR SOLUTION AND LEGISLATIVE REQUIREMENTS

A. Impracticable Options

1. The options theoretically available, but likely to be unnegotiable or otherwise impracticable, are:-

(a) Doing Nothing

This would involve sitting tight for as long as possible and refusing to contemplate any concession on Chinese claims to sovereignty until we were obliged by circumstances to do so.

i) Likely Chinese Attitude

The Chinese now seem to be aiming for early agreement on the transfer of sovereignty and control in or before 1997, and on transitorial arrangements designed to preserve the prosperity and stability of Hong Kong. They would be strongly opposed to a UK policy of sitting tight.

ii) Acceptability for HMG

The risks involved in hanging on for as long as possible would be unacceptable for HMG in anything but the short term. There would be a slide of confidence in the colony and the UK's position could become untenable.

/ iii)

iii) Effect on Hong Kong

The inhabitants of the colony would soon realise that HMG would not be able to protect their interests, and there would be a flight of persons and capital.

iv) Legal Implications

HMG are legally obliged to relinquish the New Territories in 1997. In the unlikely event that we would hang on until then we would have to make eleventh-hour attempts to make the best arrangements we could for the benefit of the inhabitants of the colony and the protection of British interests from a position of great weakness.

(b) Independence

If its political circumstances were different Hong Kong could be another and economically more powerful Singapore. But independence would be completely unacceptable to the PRC, who regard Hong Kong as an inalienable part of Chinese territory. It is therefore not worth detailed consideration.

(c) Renewal of 1898 Lease of New Territories

Legally the simplest solution for HMG but politically ruled out. The PRC regard the original lease as the result of an 'unequal treaty' and are determined on the recovery of sovereignty over the New Territories and the rest of Hong Kong in, if not before, 1997. The extension of the Lease would not in Chinese eyes be compatible with this and we see no prospect of achieving it.

/ (d)

(d) Unilateral Action by HMG to Extend Powers of Administration Over New Territories Beyond 1997

Although the existing Order in Council of 1898 providing for the government of the leased territories explicitly mentions the (99 year) time limit in the Convention of Peking of 1898, it would in municipal law be open to the UK to legislate for such powers to continue, eg by a further Order in Council. However, in international law HMG's position would be tenable only for so long as the PRC acquiesced. Once they objected, continued occupation of the New Territories by the UK would clearly be contrary to international law. PRC acquiescence would also be essential politically. Indeed they would need to make their agreement public if confidence was to be preserved. They turned down a similar suggestion proposed by HMG in 1979 as 'unnecessary and inappropriate'. We believe that their attitude would be the same now.

(e) Returning the New Territories to China in 1997 and Continuing to Govern the Ceded Territory (ie Hong Kong and Stonecutters Islands and Kowloon south of Boundary Street)

The New Territories encompass some 92% of the land area of the colony and more than half the population; they include the airport, the container port, all major reservoirs, the new towns, most of industry and most of the generating capacity. Since the economic life of Hong Kong depends upon free movement between the island of Hong Kong and the rest of the territory and free access to its commercial and economic resources, the ceded areas would be unviable as a separate UK dependency. In practical terms the existing colony is

/indivisible

indivisible and is so regarded by the PRC. They do not recognise the UK's claim to sovereignty over the ceded areas and there is no prospect that this situation would be acceptable to them.

(f) Incorporation of Hong Kong into China, Possibly as a Special Administrative Region, Without British Control

This is very likely to be the Chinese proposal. It would give considerable local autonomy including:-

- (i) retention of existing structure of government;
- (ii) employment of some expatriates in administration;
- (iii) separate currency.

The UK would no longer be responsible for the government of the territory. The PRC would assume responsibility for external affairs, though direct commercial relations with other countries would be allowed.

a) Acceptability for HMG

This could be acceptable only as a last resort, if all other attempts to reach an accommodation with the PRC had failed. The UK would be seen as having mishandled the situation and failed to protect the interests of the territory unless the new constitutional arrangements for the territory were acceptable to the majority of the inhabitants and there was reasonable protection for British investment. The PRC might of course impose this solution unilaterally, possibly with some local support, but in that event British diplomacy would be seen as having signally failed.

/ b)

b) Effect on Hong Kong

This system would not sustain confidence in Hong Kong, because:-

- (i) the constitution and the legal system would be subject to changes imposed by the PRC, whose intentions are uncertain;
- (ii) the Hong Kong dollar would be affected; capital would be withdrawn;
- (iii) many Hong Kong residents would try to leave.

c) Legal Implications

Presumably persons with no substantial connection with the UK would be deprived of their citizenship under the British Nationality Act 1981. Some might claim to be stateless or to be refugees and awkward problems might arise if there was a large exodus from the territory (see Annex K).

B. A Possible Solution

2. The only way of reconciling UK requirements with those of the Chinese is likely to be an arrangement whereby the Chinese agree to continuity of British control over the whole territory, indefinitely or for a period of years after 1997, in return for an acknowledgement of Chinese sovereignty. Possible forms which such an arrangement might take are examined below:-

- (i) A 'lease-back': UK would recognise Chinese sovereignty over whole territory. In return PRC would grant HMG a lease of the entire territory period terminable on a given (substantial) period of notice by either side.

/ a)

- a) Likely Chinese attitude: While UK recognition of Chinese sovereignty would be welcome to them, the PRC would probably find it impossible to agree to a territorial lease which would recall the 'unequal treaty' of 1898.
- b) Acceptability for HMG: Acceptable if obtainable so long as the new 'lease' did not contain unacceptable conditions.
- c) Effect on Hong Kong: Helpful to confidence since the present system of government in the colony could be preserved and existing institutions could be maintained.

(ii) UK recognition of Chinese sovereignty over the whole of Hong Kong in return for Chinese agreement that the UK should continue to administer and control the territory under a 'management contract':

No more than cosmetic changes would be made in present arrangements for administration. The UK would remain responsible for the conduct of external affairs. Change would only occur with reasonable warning; there should if possible be a period of notice of, say, 15 years.

- a) Likely Chinese attitude: Very difficult since it would require public approval by PRC of British administration after Chinese sovereignty had been 'recovered'. But easier for the PRC than 'lease-back'.
- b) Acceptability for HMG: Acceptable so long as the arrangements gave the UK an adequate degree of control of domestic and external affairs, preferably by means of an international agreement, which would be registered with the United Nations and published, ie so long as the UK was in international law entitled to exercise sufficient degree of power and jurisdiction in respect of the whole territory. Arrangements not embodied in clear language in an agreed published document would be more subject to Chinese political uncertainties.

/However,

However, given clear Chinese political will to make it work a less formal arrangement might be the only achievable compromise which would maintain confidence for the time being.

- c) Effect on Hong Kong: Would be helpful to confidence, so long as there was minimum change in present arrangements, and a clear Chinese commitment to the new arrangements.
- d) Legal Implications: The extent of UK powers and jurisdiction in respect of the territory would depend on the agreed arrangements.

(iii) As for (ii) but with Hong Kong formally designated as a Special Administrative Region of the PRC:

- a) Likely Chinese attitude: Perhaps more acceptable than (ii), since Hong Kong would be formally incorporated into the PRC; on the other hand even more difficult to reconcile with continued British administration.
- b) Acceptability for HMG: Would create serious problems if PRC attempted to exercise any sovereign powers. There could be particular difficulties over public order and defence. Responsibility of the UK (and not the PRC) for internal matters and for the conduct of external relations would have to be clearly spelled out. Acceptable provided there were clear guarantees of Chinese non-interference (see Legal Implications).
- c) Effect on Hong Kong: Impact on confidence would vary with assessment of PRC attitude. There would be doubts about Chinese intention to allow British administration to continue. Commercial and other confidence could be affected.
- d) Legal Implications: The incorporation of Hong Kong as a Special Administrative Region of the PRC would be compatible with continued British administration only if the agreed arrangements gave the UK adequate powers and jurisdiction in respect of the conduct of external affairs and internal administration without interference from the PRC.

C. Legislative Requirements

Existing Powers

3. So long as the ceded areas of Hong Kong remain under UK sovereignty or the remaining areas of the colony are held by the UK under lease, provision for their government can be made (as at present) under the Royal prerogative by means of Letters Patent, Orders in Council and Royal Instructions and the power of Parliament to legislate for them will not be impaired.

Relinquishment of sovereignty

4. In more recent times, arrangements under which HMG have ceased to be responsible for the government of a colony have invariably been sanctioned by Act of Parliament, whether the territory continued to be part of Her Majesty's dominions as (or as part of) an independent member of the Commonwealth or whether it became (or became part of) an independent republic (or separate monarchy) within the Commonwealth or a foreign state. There are nineteenth-century precedents for the cession of territory to a foreign State by the Crown under the Royal prerogative without an Act of Parliament, but since 1890 the sanction of an Act of Parliament has been considered appropriate in each case even though, as a matter of law, it might not have been strictly necessary, and this practice may well have assumed the strength of a constitutional convention. If the UK were to agree to relinquish its sovereignty over the ceded parts of the colony of

/Hong Kong

Hong Kong and HMG were to cease to be responsible for the government thereof, it must be assumed that an Act of Parliament would be required.

Expiration of New Territories Lease

5. Relinquishment of the New Territories upon the expiration of the international lease on 30 June 1997 would not in itself require an Act of Parliament. As regards the possibility of an agreement to surrender the New Territories to the PRC before that date, there exists a precedent for a comparable transaction where no Act of Parliament was passed, the surrender in 1930 of the lease granted by China in 1898 of Wei-hai-wei, which Mr Balfour had offered in 1922 to hand back to China. The fact the Orders in Council in respect of Wei-hai-wei were made under the Foreign Jurisdiction Act 1890 indicates, however, that Wei-hai-wei was not regarded as part of His Majesty's dominions during the currency of the lease. Since the New Territories are regarded as being part of a colony, their premature surrender would seem to require an Act of Parliament.

Novel Arrangements

6. There is no precedent for a situation in which the UK relinquished its sovereignty over a territory in favour of another State as part of an agreement with that State that HMG should continue to have power and jurisdiction to administer the territory and to conduct external relations in respect of the territory.

/Necessity for Act of Parliament

Necessity for Act of Parliament

7. Even if the new arrangements gave the UK power to administer Hong Kong after relinquishing sovereignty over the ceded areas (and perhaps also agreeing to premature termination of the lease of the New Territories) an Act of Parliament would seem to be required to sanction the relinquishment of sovereignty and any limitations specified in those arrangements on the powers of Parliament to legislate for Hong Kong or on the responsibility of HMG for the government of Hong Kong.

The Foreign Jurisdiction Act

8. Provision for the exercise of the Crown's power and jurisdiction in a foreign country is to be found in the Foreign Jurisdiction Act 1890 and this Act could be used to implement arrangements for the exercise of jurisdiction in Hong Kong by Order in Council once it ceased to be a colony. Given that relinquishment of UK sovereignty over the ceded areas would require an Act of Parliament, however, it would be more appropriate for that Act to include fresh enabling provisions in relation to Hong Kong.

The British Nationality Act 1981

9. Any change in the law relating to the status of persons who were or would in future be British Dependent Territories citizens by virtue of their connection with Hong Kong would require an amendment to the British Nationality Act 1981

/(because

(because Hong Kong is included in Schedule 6 of that Act as a British Dependent Territory), whether such persons were to be simply deprived of their right to that status or were to be accorded the right to some other status instead.

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THE FUTURE OF HONG KONG

A SPECIAL STUDY

BY THE FOREIGN & COMMONWEALTH OFFICE

AUGUST 1982

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FUTURE OF HONG KONG

SPECIAL STUDY

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PRIME MINISTER
FIRST LORD OF THE TREASURY

FUTURE OF HONG KONG

SPECIAL BRIEFING

To Be Retained
Do Not Destroy

FUTURE OF HONG KONG

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