
U.S.-HONG KONG EXTRADITION TREATY

AUGUST 19, 1997.—Ordered to be printed

Mr. HELMS, from the Committee on Foreign Relations, submitted
the following

REPORT

[To accompany Treaty Doc. 105-3]

The Committee on Foreign Relations to which was referred the Agreement Between the Government of the United States of America and the Government of Hong Kong for the Surrender of Fugitive Offenders signed at Hong Kong on December 20, 1996, having considered the same, reports favorably thereon with two understandings, two declarations, and one proviso, and recommends that the Senate give its advice and consent to the ratification thereof as set forth in this report and the accompanying resolution of ratification.

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I. PURPOSE

This agreement: (1) identifies the offenses for which extradition will be granted, (2) establishes procedures to be followed in presenting extradition requests, (3) enumerates exceptions to the duty to extradite, (4) specifies the evidence required to support a finding of a duty to extradite, and (5) sets forth administrative provisions for bearing costs and legal representation.

II. BACKGROUND

On December 20, 1996, the United States and Hong Kong signed the Agreement for the Surrender of Fugitive Offenders. That agreement will replace the existing extradition relationship with Hong Kong, which is governed by the United States-United Kingdom extradition treaty.

Because of Hong Kong's unique status, the Agreement was signed by Hong Kong with the "authorization" of its sovereign nation (People's Republic of China (PRC)) following a negotiation conducted under the auspices of the "Joint Liaison Group" (JLG) established by the Sino-British Joint Declaration on the Question of Hong Kong.¹ The People's Republic of China approved the text of the Agreement in September, permitting the U.S. and Hong Kong to sign in December. The Government of the People's Republic of China transmitted a diplomatic note to the United States on March 31, 1997, affirming that the Agreement will continue to apply to the Hong Kong Special Administrative Region (HKSAR) after July 1, 1997, when Hong Kong formally reverted to the PRC.

As the U.S.-Hong Kong Agreement is an unprecedented U.S. treaty relationship, it is important to note the negotiation history that led to the agreement between the U.S. and Hong Kong. Under the JLG process, four members each from the U.K. and the PRC (with support staff and experts as needed) review international agreements with regard to continuing obligations under them. In the case of new agreements, including this extradition agreement, the negotiation partners played the following roles: (1) the JLG agreed to a model agreement; (2) the U.K. Government, on behalf of the Hong Kong Government, asked the PRC to approve a list of negotiating partners (including the U.S.); (3) after approval of a negotiating partner, the British Foreign Secretary executed a formal entrustment to empower the Hong Kong Government to conduct negotiations on its behalf with the approved partner (in this case the U.S.) on the basis of the model agreement; (4) after the Hong Kong Government and the approved partner initialed the text of the agreement, the text was passed by the British Government to the PRC Government through the JLG for its approval (the PRC Government was permitted to seek clarification if the initialed text departed significantly from the model agreement and further negotiations would then be required); and (5) the PRC approved the text of the agreement, permitting its signature by the Government of Hong Kong and the negotiating partner (the U.S. in this case).

Unlike in the United States, Hong Kong requires additional implementing legislation, extradition heretofore having been conducted under the U.K. authority. The State Department has informed the Committee that the Surrender of Fugitive Offenders Ordinance went into force on April 25, 1997. Subordinate legislation

¹Under the Joint Declaration, sovereignty over Hong Kong was transferred to the PRC on July 1, 1997. Hong Kong is organized as a Special Administrative Region (HKSAR) with a "high degree of autonomy" except in foreign and defense affairs. Among the incidents to this autonomy is the ability of the HKSAR to maintain its own executive, legislative, and independent judicial systems for a least 50 years under a "one country, two systems" policy. Though the PRC assumed ultimate power over Hong Kong's foreign affairs, the Joint Declaration nonetheless envisions the HKSAR maintaining its own external relations in many fields through a network of international agreements. However, the permissible reach of this network and the role of the PRC are not always clear.

under the Ordinance, the Fugitive Offenders (United States of America) Order, specifically permitting the Agreement to be implemented, has also been approved. It will become effective on the same day that the Agreement enters into force.

Because of this unprecedented relationship with the PRC, a country with which the United States does not have an extradition treaty relationship, there are several key provisions in the treaty permitting the United States to reject an extradition request. Under the proposed Hong Kong Agreement the Secretary retains independent authority to determine whether a request may be denied because it is politically motivated (Art. 6). Specifically, the treaty gives the Secretary of State² the ability to reject an extradition request (even after a U.S. court recommends extradition) if she determines that the requesting party is attempting to try the individual sought on account of his or her race, religion, nationality, or political opinion, or that the individual will be prejudiced in his or her trial or punishment on these grounds. Under traditional U.S. extradition practice the Secretary of State has exercised similar authority (even absent express treaty provisions).

In addition, the Hong Kong Agreement contains a humanitarian provision (Art. 7) similar to those found in a number of U.S. extradition agreements. This provision permits the Secretary of State to refuse surrender if it “is likely to entail exceptionally serious consequences related to age or health.”

Finally, the treaty places limitations on the surrender of nationals (Art. 3). Specifically, the treaty gives the United States the right to refuse to surrender a U.S. citizen when it implicates the “defense, foreign affairs or essential public interest or policy” of the United States. Hong Kong has a similar right of refusal when surrender implicates the “defense, foreign affairs or essential public interest or policy” of the PRC.

III. SUMMARY

A. GENERAL

An extradition treaty is an international agreement in which the Requested State agrees, at the request of the Requesting State and under specified conditions, to turn over persons who are within its jurisdiction and who are charged with crimes against, or are fugitives from, the Requesting State. The United States is a party to approximately 100 bilateral extradition treaties, and several multilateral extradition treaties.

In recent years the Departments of State and Justice have led an effort to modernize U.S. bilateral extradition treaties to better combat international criminal activity, such as drug trafficking, terrorism and money laundering. Modern extradition treaties (1) identify the offenses for which extradition will be granted, (2) establish procedures to be followed in presenting extradition requests, (3) enumerate exceptions to the duty to extradite, (4) speci-

² The Hong Kong Agreement gives this authority to the “executive authority” for the United States. U.S. statute names the Secretary of State as the “executive authority.” (18 U.S.C. §3184). The Agreement does not designate Hong Kong’s executive authority. The State Department has informed the Committee that it understands that in that the “competent authority” in Hong Kong under this article is likely to be the judiciary.

fy the evidence required to support a finding of a duty to extradite, and (5) set forth administrative provisions for bearing costs and legal representation.

The importance of extradition treaties as a tool for law enforcement is reflected in the increase in the number of extraditions of individuals under treaties. In 1995, 131 persons were extradited to the U.S. for prosecution for crimes committed in the U.S, and the U.S. extradited 79 individuals to other countries for prosecution. Since 1991, in Hong Kong alone, 56 persons were extradited to the U.S. for narcotics-related crimes, 12 for white collar crimes, and 23 for violent and other crimes.

In the United States, the legal procedures for extradition are governed by both federal statute and self-executing treaties. Federal statute controls the judicial process for making a certification to the Secretary of State that she may extradite an individual under an existing treaty. Courts have held that the following elements must exist in order for a court to find that the Secretary of State may extradite: (1) the existence of a treaty enumerating crimes with which a defendant is charged; (2) charges for which extradition is sought are actually pending against the defendant in the requesting nation and are extraditable under the treaty; (3) the defendant is the same individual sought for trial in the requesting nation; (4) probable cause exists to believe that the defendant is guilty of charges pending against him in the requesting nation; and (5) the acts alleged to have been committed by the defendant are punishable as criminal conduct in the requesting nation and under the criminal law of the United States.

Once a court has made a determination that an individual may be extradited under U.S. law, and so certifies to the Secretary of State, she may still refrain from extraditing an individual on foreign policy grounds, as defined in the treaties themselves (or even absent express treaty provisions).

B. MAJOR PROVISIONS

1. *Extraditable Offenses (Article 2)*

The Hong Kong Extradition Agreement identifies an extraditable offense as either a crime enumerated in a long list of covered felonies (punishable by imprisonment of more than one year), or any other offense that is punishable by imprisonment of more than one year by both the requesting and requested Party³ (Art. 2(1)). Although many modern U.S. treaties merely apply such a “dual criminality test,” to determine whether an offense is extraditable, the hybrid application of dual criminality in addition to a listing of felonies has precedent in many modern U.S. extradition treaties.

Like other recent extradition agreements, the Hong Kong Agreement contains provisions to facilitate transfer where jurisdictional elements or defined terms differ in the particular elements of the criminal act under the laws of the respective parties, but where both Parties still regard the underlying conduct as punishable. In the past, differences in how each legal system defines a crime for the same criminal conduct has hampered extradition. To avoid this

³ This concept is termed “dual criminality.”

problem when both parties consider an act to be criminal, the Hong Kong Agreement directs a requested party to examine an extradition request with “reference to the totality of the acts or omissions alleged” and not with “reference to the elements of the offense prescribed by the law of the requesting Party” (Art. 2(3)). The Agreement further directs that extradition not be denied on the basis of differences in terminology or classification or on the basis of an element of a U.S. federal offense that has been included solely to establish U.S. federal jurisdiction. (Art. 2(4)(b)).

2. Extraterritorial Offenses (Article 1)

With very limited exceptions, recent extradition treaties make express provision for extraterritorial crimes.⁴ The Hong Kong Agreement differs from most modern agreements in not having any express reference to extraterritorial crimes. At the same time, it also differs from other modern U.S. agreements that do not have explicit extraterritoriality clauses (including the U.K., New Zealand, and Belgium agreements) in not expressly limiting coverage to offenses within the jurisdiction or territory of one of the parties. Instead, the Hong Kong Agreement broadly states the obligation to surrender in terms of persons found in the jurisdiction of the requested party who are wanted “in respect of” a covered offense (Art. 1). This language may appear to make the place the crime is committed irrelevant, but more limited interpretations certainly are possible. For example, it may be intended that extradition for extraterritorial crimes be guided by a dual criminality standard that would limit extradition for extraterritorial offenses to those that would still be within the criminal jurisdiction of the requested Party even if committed outside its territory. According to the technical analysis submitted by the Executive Branch (the analysis is included in this report), the United States is relying on existing precedent to require extradition of certain extraterritorial crimes. Specifically the technical analysis states that should the U.S. request extradition for an offense committed outside the territory of the U.S., Hong Kong will surrender the fugitive if Hong Kong would enjoy extraterritorial jurisdiction in similar circumstances.

3. Surrender of Nationals (Article 3)

The Hong Kong Agreement provides for limited discretion to refuse to extradite nationals. The “executive authority” of the Government of the United States is given the right to refuse the surrender of its nationals if surrender implicates the “defense, foreign affairs or essential public interest or policy” of the United States (Art. 3(2)). The “executive authority” of the Government of Hong Kong is similarly given a right of refusal.

Although this is a reciprocal right, it is important to note the inclusion of the PRC in this right of refusal. Specifically, the treaty permits Hong Kong to refuse extradition if the PRC (not the Government of Hong Kong) has an interest relating to defense, foreign affairs, or essential public interest or policy (Art.3 (3)(a)). Further,

⁴ “Extraterritorial offenses,” under the treaties are those that occur outside a nation’s jurisdiction, but are punishable under the criminal law of the requested party. Prior to 1960, the obligation to extradite under U.S. treaties was typically limited to offenses committed within a nation’s territory.

Hong Kong has the right to refuse surrender of nationals of the PRC located in Hong Kong, but who do not have a right of abode or have not settled in Hong Kong, if the PRC has jurisdiction over the person subject to extradition and has commenced or completed proceedings for the prosecution of that person (Art. 3(3)(b)). An extradition request may also be deferred for such person if the PRC is investigating that person for the same offense. (Art. 3(4)).

4. Political Offense/Political Motivation Exceptions (Article 6)

In general, the Hong Kong Agreement excepts political offenses from the obligation to surrender. Even though U.S. extradition practice universally has precluded extradition for political offenses, there has been a trend over the past 20 years toward narrowing the scope of the political offense exception to exclude from its protections crimes such as terrorism, hijacking, and murder of political leaders. The Hong Kong Agreement comports with that trend.

Under the Hong Kong Agreement, there are three instances in which the exception to the obligation to surrender does not apply: (1) the murder or other willful crime against the Head of State (or his or her immediate family) of the United States or the PRC (Art. 6(2)(a)); (2) an offense for which both parties (the U.S. and Hong Kong) have an obligation under a multilateral agreement to surrender (Art. 6(2)(b)); and (3) a competent authority of the requested party, which is specified as the executive authority in the case of the United States, determines that a request was either (i) politically motivated; (ii) made primarily to try or punish an individual on account of race, religion, political opinion, or nationality; or (iii) would deny the person sought a fair trial or would punish that person on account of race, religion, nationality, or political opinion (Art. 6(3)). The first two exceptions—relating to political offenses—are matters for the courts to decide. The third exception—relating to political motivation—is a matter for the Secretary of State to decide.

5. Humanitarian Exception (Article 7)

The Hong Kong Agreement contains a separate provision that permits the parties to refuse to extradite for humanitarian considerations. Specifically, if the surrender is “likely to entail exceptionally serious consequences related to age or health” the competent authority (the Agreement expressly provides in Article 7 that it shall be the executive authority in the U.S.) may refuse to surrender an individual. A similar provision is found in a number of U.S. extradition treaties.

6. Speciality (Article 16)

The Hong Kong Agreement prohibits the requesting party from prosecuting a person surrendered under the treaty for any crime except that which the person was surrendered or for an offense that is a lesser included offense⁵ of that for which the person is surrendered, but only if the lesser included offense itself is an ex-

⁵ A lesser included offense is one which is composed of some, but not all elements of a greater offense and which does not have any element not included in greater offense so that it is impossible to commit the greater offense without necessarily committing the lesser offense.

traditible offense (Art. 16(1)(b))⁶. For example, if kidnaping is a lesser included offense of a murder, the person surrendered may also be prosecuted for kidnaping as it is also an extraditable offense. A surrendered individual also may be tried for a different offense than was the subject of an extradition request if the requested party consents to prosecution of that offense (Art. 16(1)(c)). A surrendered individual loses protection under the rule of speciality if the individual has not left the territory of the requesting party within 30 days of having an opportunity to do so or if the individual has left the territory and voluntarily returned. (Art. 16(3)).

7. Third Party Transfers (Article 16)

The Hong Kong Agreement combines the rule of speciality provisions with restrictions on the transfer of a surrendered person to jurisdictions outside that of the Parties to the Agreement (the Government of Hong Kong and the Government of the United States). Unless the requested party consents, a surrendered individual may not be surrendered or transferred beyond the jurisdiction of the requesting party for the purposes of trial or punishment for any offense committed prior to transfer to the requesting party (Art. 16(2)). As with the rule of speciality this restriction lapses if the individual has not left the territory of the requesting party within 30 days of having an opportunity to do so or if the individual has left that territory and voluntarily returned. This limitation is increasingly common in U.S. extradition treaties, although some agreements contain less restrictive limits on third party transfers.

8. Capital Punishment (Article 4)

The Hong Kong Agreement provides that the requested Party may refuse extradition whenever the extraditable offense is punishable by death in the jurisdiction of the requesting, but not the requested, Party, unless the requesting Party furnishes such assurances as the requested Party considers sufficient that the death sentence will not be imposed and executed (Art. 4(1)).⁷ The Hong Kong Agreement also has an additional provision barring a Party from carrying out a death sentence handed down by a court in a case in which the requesting Party had given assurances that capital punishment would not be imposed (Art. 4(2)).

9. Prior Prosecution (Article 5)

Like other recent treaties, the Hong Kong Agreement bars extradition for an offense for which the person sought has been convicted or acquitted in the requested Party. Because the restriction is limited to offenses and not acts, it appears that extradition may be permissible where extradition is sought for a different offense arising from the same pattern of conduct that was the basis of the requested Party prosecution (Art. 5(1)). The Hong Kong Agreement

⁶ This provision is called the "rule of speciality" and is designed to assure that an extradited individual is not extradited for one offense as a subterfuge for obtaining the defendant to stand trial on unrelated matters. Though the rule applies under every U.S. bilateral extradition treaty, many exceptions commonly are included.

⁷ Death penalty provisions have become standard in recent U.S. extradition agreements. These provisions permit extradition for serious crimes when one Party, whose laws do not permit capital punishment, might otherwise deny surrender of individuals detained for such crimes.

also states that investigations or prosecutions that have been dropped by the requested Party do not preclude extradition based on the same facts (Art. 5(2)). Unlike some recent treaties, the Agreement does not permit discretionary denials of extradition in such cases.

10. Retroactivity and Lapse of Time

The Agreement covers offenses committed before its date of entry into force if the offense is punishable under the laws of both Parties at the time the request is made (Art. 20(4)). Retroactivity is typical in U.S. bilateral extradition treaties and does not raise an ex post facto issue so long as the activity for which extradition is being sought was criminal when the person committed the act.

The Hong Kong Agreement does not contain an express provision on the statutes of limitation. Some, but not all, recent U.S. bilateral extradition treaties contain provisions that expressly bar extradition for offenses whose prosecution would be barred by an applicable statute of limitations.

IV. ENTRY INTO FORCE AND TERMINATION

A. ENTRY INTO FORCE

This Treaty enters into force thirty days after the date on which the parties have notified each other that their respective requirements for the entry into force have been complied with. (Art. 20(1)).

B. TERMINATION

This Treaty contains a standard termination clause providing for withdrawal six months after notice by a Party of an intent to terminate the Treaty. (Art 20(2)).

V. COMMITTEE ACTION

The Committee on Foreign Relations held a public hearing on the proposed treaty on Wednesday, June 3, 1997. (See appendix.) The hearing was chaired by Senator Thomas. The Committee considered the proposed treaty on Wednesday, July 30, 1997, and ordered the proposed treaty favorably reported by voice vote, with two understandings, two declarations, and one proviso and with the recommendation that the Senate give its advice and consent to the ratification of the proposed treaty.

VI. COMMITTEE COMMENTS

The treaty raised several key questions for the Committee and the Senate to consider, not least of which is the unique nature of the treaty itself. The agreement is with a sub-sovereign entity, not a sovereign state. Such an arrangement is not the norm. It raises, in particular, a fundamental question about whether the treaty partner has the power to enter such an agreement. It is clear that Hong Kong does; the Agreement has been authorized by both the previous sovereign (the United Kingdom) and the current sovereign (the People's Republic of China).

It bears noting, however, that the United States does not have an extradition treaty with the PRC (nor with any other communist

country), in large measure because the concept of extraditing individuals to a system which does not afford basic due process rights to criminal defendants runs counter to American notions of justice and fundamental fairness. Because of that concern, and the concern that Beijing may not adhere to its promise to permit Hong Kong to maintain a high degree of autonomy, the Senate must scrutinize this Agreement with particular care. The judgment about whether to proceed with this extradition treaty rests, ultimately, not on the good faith of the government in Beijing, but on the following considerations: (1) whether the agreement is adequately drafted to protect extradited persons against Chinese interference with the Hong Kong judicial system; (2) whether U.S. law enforcement interests require an extradition agreement with Hong Kong; and (3) whether the Administration is committed to vigilant monitoring of the treaty and prepared to stop implementing the agreement, or abrogate it if PRC disregards its provisions.

The Committee has answered these questions in the affirmative and recommends that the Senate give its advice and consent to ratification of the extradition agreement, subject to the conditions contained in the resolution of ratification. The Committee is persuaded that the agreement is adequately drafted to protect extradited persons against Chinese interference with Hong Kong's judicial system, and that the Administration is committed to vigilant monitoring of the agreement. The Committee emphasizes that U.S. law enforcement interests dictate concluding an extradition agreement on Hong Kong.

Equally important, the conclusion and effective implementation of bilateral agreements with Hong Kong serves another important American policy interest: the enhancement of the Hong Kong government's ability to maintain the "high degree of autonomy" promised by the Sino-British Joint Declaration. In supporting ratification of the treaty, the Committee believes that the Senate would send a clear message that bilateral treaty relationships with Hong Kong serve to strengthen, not diminish, the autonomy of the Hong Kong government. Another message is provided in the resolution of ratification itself: the strong belief of the Committee that PRC must respect the independence of the judicial system in Hong Kong. In the Sino-British Joint Declaration, the PRC government made a solemn pledge to respect the autonomy of Hong Kong, and promised that the Hong Kong judicial power would be exercised "independently" and would be "free from any interference." Adherence to this commitment by Beijing must be considered an essential element to continued U.S. participation in this Agreement. The Committee's resolution of ratification includes a strong and unequivocal statement of the Senate's expectations regarding the autonomy of the Hong Kong courts, particularly in the area of final adjudication.

Furthermore, the Committee notes that the treaty includes a number of safeguards which address concerns about Beijing's interference with Hong Kong's judicial system. These include: prohibitions on the transfer of extradited persons to Beijing without U.S. consent, prohibition on prosecution of an extradited person for offenses other than those for which the person was surrendered, and the U.S.'s ability to decline to extradite anyone "likely to be denied

a fair trial or punished on account of his race, religion, nationality, or political opinions.”

The Committee notes with concern that the Technical Analysis submitted by the Executive Branch indicates that the Hong Kong delegation informed the U.S. delegation that it is possible that the PRC will require requests for extradition involving Hong Kong to be made through Beijing. This possibility is plainly inconsistent with Hong Kong’s authority to enter into this agreement. The treaty partner here is Hong Kong, not the government in Beijing, and as such the Committee expects that formal requests for extradition by the United States will be submitted to the government in Hong Kong.

It is abundantly clear that U.S. law enforcement interests require a mechanism to extradite fugitives to and from Hong Kong. The extradition relationship, in the past and at present, is decidedly one-sided—in favor of the United States. Since 1991, the Hong Kong has returned 64 fugitives to the U.S., and the U.S. has returned 7 to Hong Kong. The U.S. has returned no U.S. citizens to Hong Kong. Eleven U.S. citizens have been returned to the U.S. to face charges here. At present, there are 51 pending extradition requests made by the United States to Hong Kong. By contrast, Hong Kong has but five requests pending with the United States. The majority of the fugitives extradited to the U.S. faced narcotics trafficking charges. Indeed, of the 51 pending U.S. requests, 35 involve narcotics charges. Hong Kong is also a center for alien smuggling, illegal customs transshipment, counterfeiting and other crimes that have direct effect on the U.S. The Committee fears that without this treaty, there is a strong possibility that Hong Kong will become a “safe haven” for drug dealers and other criminals, enabling them to elude the long arm of U.S. justice.

The Committee strongly urges the Departments of State and Justice to monitor the agreement with great vigilance and be prepared to stop extraditing people under it if the PRC fails to respect its terms. The Committee’s hearing on the extradition treaty elicited commitments from the State and Justice Departments that the U.S. government will “monitor implementation of this agreement very closely, and to ensure that all of its terms are complied with, both in form as well as in substance.”

In any treaty relationship, there is always a risk that the treaty partner will turn out to be unreliable. That risk is particularly acute here, where the treaty partner is, ultimately, subject to the control of another government. That government, a communist government going through a dramatic economic transformation, and a political transition brought about by the death of its long-time leader, has not always proven to be reliable in upholding its international commitments. Nonetheless, the Committee believes that the safeguards inherent in the treaty, and the important benefits to U.S. law enforcement interests that will flow from the treaty, argue for proceeding with Senate advice and consent.

VII. EXPLANATION OF PROPOSED TREATY

The following is the Technical Analysis of the Extradition Treaty submitted to the Committee on Foreign Relations by the Depart-

ments of State and Justice prior to the Committee hearing to consider pending extradition treaties:

On December 20, 1996, the United States signed an Agreement for the Surrender of Fugitive Offenders with the Government of Hong Kong ("the Agreement"). The Agreement is the result of three years of negotiation, and is of particular importance because our current extradition relationship with Hong Kong, a crown colony of the United Kingdom, is governed by our extradition treaties with the United Kingdom,⁸ and on July 1, 1997, Hong Kong will revert to the sovereignty of the People's Republic of China, with which we have no extradition treaty.

The Hong Kong Government was granted an entrustment by the British Government authorizing it to negotiate this extradition agreement directly with the United States and bring it into force. In order to insure that the Agreement will remain in force after 1997, a draft text of the Agreement was presented to the Joint Liaison Group (JLG), which is composed of representatives of both the British and Chinese Governments, and meets periodically to discuss issues related to the status of post-1997 Hong Kong. The JLG approved the commencement of negotiations, and the final text was approved by the JLG prior to signing. Thus, the People's Republic of China agreed, through the JLG, to permit Hong Kong to negotiate this Agreement, approved its final terms, and has indicated that it will remain in force after July 1, 1997. In addition, the People's Republic of China has provided a diplomatic note confirming that this Agreement will continue in force after the date of reversion.

This instrument is being submitted to the Senate for advice and consent to ratification, and, upon ratification and entry into force, it will be a treaty for purposes of U.S. law. At the request of the Hong Kong delegation, and in keeping with other agreements for the surrender of fugitives Hong Kong has concluded with other countries, the instrument is entitled an "agreement" rather than "treaty." Similarly, the instrument is described as one for the "surrender" of fugitives instead of for "extradition," at the request of Hong Kong. The United States accommodated the Hong Kong delegation's semantic preferences, but this agreement is nevertheless intended to be a "treaty or convention for extradition between the United States and a foreign government" for purposes of Title 18, United States Code, Section 3184.

It is anticipated that the Agreement will be implemented in the United States pursuant to the procedural framework provided by Title 18, United States Code, Section 3184 et seq. No new implementing legislation will be needed. Hong Kong has enacted its own internal extradition ordinance that will apply to requests under the Agreement⁹.

⁸ U.S.-U.K. Extradition Treaty signed June 8, 1972, entered into force January 21, 1977 (28 UST 227, TIAS 8468) and the Supplementary Treaty signed June 25, 1985, entered into force December 23, 1986 (TIAS 12050).

⁹ Currently, Hong Kong carries out the extradition obligations contained in British extradition treaties applicable to Hong Kong via the British Extradition Act. The Hong Kong Government has enacted a new Fugitive Offenders Ordinance that will enable Hong Kong to implement its new extradition agreements, including this one and those with Australia, the Netherlands, Canada, Malaysia, the Philippines and Indonesia, beyond July 1, 1997.

ARTICLE 1—OBLIGATION TO SURRENDER

The first article of the Agreement formally obligates each party to surrender to the other persons found within the jurisdiction of the requested party who are wanted by the requesting party for prosecution, or for the imposition or enforcement of a sentence, for those offenses described in Article 2 of the Agreement. In other words, this article requires the parties to surrender both fugitives who have been formally charged with crimes covered by Article 2, but who have not yet been tried and convicted, and fugitives who have been tried and convicted for such offenses, but who have fled prior to sentencing or before completion of an imposed sentence. The obligation to surrender is subject to the other provisions of the Agreement.

ARTICLE 2—DESCRIPTION OF OFFENSES

This article contains the basic guidelines for determining what are extraditable offenses. Paragraph 1 contains a list of offenses for which, as long as they are punishable by both Parties¹⁰ by more than a year imprisonment or some more severe punishment, surrender must be granted.¹¹ The list is comprehensive, and includes both offenses of traditional importance to federal and state law enforcement authorities in the United States, (e.g., drug trafficking, crimes of violence including those terrorist offenses covered by the multilateral conventions, various forms of fraud), and crimes of more recent interest and concern (e.g., money laundering, child pornography, alien smuggling). In addition, paragraph 1 of this article follows the modern dual criminality model by requiring surrender for any other offense punishable by the laws in each Party by more than one year imprisonment or by a more severe penalty, so long as surrender is not prohibited by the laws of the requested Party. This “catch all” provision will obviate the need to renegotiate the Agreement or supplement it when both Parties pass laws dealing with new types of criminal activity. Finally, paragraph 1 follows the practice of recent U.S. extradition treaties in stating that surrender should be granted for attempting to commit, conspiring to commit, or otherwise participating in an offense covered by the Agreement.

Paragraph 2 of Article 2 requires that in a request for a fugitive already convicted and sentenced in the requesting country, at least six months remain to be served on that sentence. This provision is sometimes included in U.S. extradition treaties in an attempt to limit extradition, because of the significant costs associated with the process, to serious cases. (See, for example, Article 2(2) of the U.S. extradition treaty with Mexico). Hong Kong is willing to sur-

¹⁰ The term “laws of both Parties” is intended to include state and local criminal laws in the United States, as well as those federal criminal statutes enacted by the U.S. Congress.

¹¹ Some provisions of the Agreement, while fully consistent with U.S. law enforcement interests, differ from those contained in several recently negotiated U.S. extradition treaties. This is due largely to the unique nature of the current and future status of Hong Kong. The inclusion of a list of specific extraditable offenses (provided that the offense is punishable by both parties by imprisonment or other form of detention for more than one year) was deemed by Hong Kong to be an important part of the draft text approved by the JLG. The U.S. delegation agreed to accept the list, once Hong Kong agreed to include in it a “catch-all” double criminality provision permitting surrender for all other offenses punishable in both jurisdictions by more than a year imprisonment (provided the law of the requested party does not prohibit surrender).

render in post-conviction cases only when the fugitive has a significant amount of time to serve on the outstanding sentence, so the U.S. delegation agreed to the inclusion of this paragraph.

Paragraph 3 of Article 2 provides guidance on the type of analysis to be conducted by the requested Party in determining whether an offense for which surrender is requested is covered by the Agreement. The paragraph makes it clear that the requested Party shall look to the conduct, or the totality of the underlying acts and omissions, alleged to have been committed by the fugitive in order to determine whether such conduct would constitute an offense under its laws.¹² It is not necessary for the requested party to examine the elements of the offense prescribed by the law in the requesting state. For example, should the United States seek the extradition of an accused drug kingpin wanted for prosecution on Continuing Criminal Enterprise (CCE) charges, Hong Kong will examine the underlying conduct which led to the U.S. charges, and determine whether similar conduct in Hong Kong would constitute an offense covered by the Agreement. Under such an analysis, since the conduct necessary to violate the CCE statute would constitute violations of Hong Kong narcotics laws if committed in that jurisdiction, and since narcotics offenses are covered by the extradition agreement, surrender of fugitives on the CCE charges would be required.¹³

Paragraph 4 of this article further reflects the intention of both parties to interpret the principles of this article broadly. The first subparagraph makes it clear that in determining whether an offense is covered by the Agreement, it makes no difference whether the requested and requesting Parties place it within the same category of offenses, or describe it by the same terminology. Thus the parties are to disregard differences in the categorization of an offense in determining whether it falls within the list of offenses contained in Article 2(1), or in determining whether double criminality exists under the "catch all" provision in Article 2(1)(xxxvi). The second subparagraph addresses the confusion faced by some foreign judges by the fact that many United States federal statutes require proof of certain elements (such as use of the mails or interstate transportation) solely to establish jurisdiction in United States federal courts. Foreign judges may know of no similar requirement in their own criminal law, and on occasion have denied the extradition of fugitives sought by the United States on federal charges on this basis. The subparagraph requires that such elements be disregarded in determining whether an offense is covered by the list, or in applying the double criminality principle. For example, it will ensure that the Hong Kong authorities treat United States mail fraud charges (18 U.S.C. §1341) in the same manner as fraud charges under state laws, and view the federal crime of interstate transportation of stolen property (18 U.S.C. §2314) in the same

¹² Should the United States request extradition for an offense committed outside the territory of the U.S., Hong Kong will surrender the fugitive if Hong Kong would enjoy extraterritorial jurisdiction in similar circumstances. See *Liangsiriprasert (Somchai) v. Government of the United States of AMERICA*, [1991] 1 A.C. 225, a decision of the Privy Council in London, dealing with this issue under similar language in the US- UK treaty currently applicable to Hong Kong.

¹³ See *In re Lawrence Louis Levy*, 1987 Hong Kong Supreme Court and Court of Appeals decisions, making clear the extraditability of CCE from Hong Kong, and describing the kind of dual criminality analysis to be conducted by Hong Kong extradition courts.

manner as unlawful possession of stolen property. Provisions similar to those in paragraph 4 of this article are contained in all recent United States extradition treaties.

Paragraph 5 of article 2 provides that an offense under military law, which is not an offense under ordinary criminal law, is not an offense under paragraph 1 of this article.¹⁴

ARTICLE 3—SURRENDER OF NATIONALS

Paragraph 1 of Article 3 states that surrender shall not be refused, except under certain circumstances, on the ground of the nationality of the person sought. The exclusion of nationality as a ground for refusal of extradition is consistent with the longstanding U.S. policy in favor of governments extraditing their own citizens or nationals. However, the Hong Kong delegation made it clear throughout the negotiations that it would refuse to sign any extradition agreement that failed to provide the requested Party with the right, in narrowly defined circumstances, to deny the extradition of nationals. According to Hong Kong, such discretion was essential in obtaining PRC approval of the extradition agreement with the United States.

Accordingly, the third paragraph of Article 3 states that the executive authority in Hong Kong reserves the right to refuse the surrender of nationals of the State whose government is responsible for its foreign affairs (*i.e.*, for Hong Kong, the United Kingdom prior to July 1, 1997, and the People's Republic of China after that date), if (a) the requested surrender relates to the defense, foreign affairs or essential public interest or policy of that State or (b) the person neither has the right of abode in Hong Kong nor has entered Hong Kong for the purpose of settlement,¹⁵ and the State whose government is responsible for Hong Kong's foreign affairs has jurisdiction over the offense and has commenced or completed proceedings for the prosecution of that person. The Hong Kong delegation repeatedly assured the U.S. delegation that this discretion to deny surrender will rarely, if ever, be used.

The second paragraph of Article 3, for the purposes of creating reciprocal rights and obligations under the Agreement, provides the executive authority of the United States with the same narrowly drawn discretion to deny the extradition of U.S. nationals if the requested surrender relates to the defense, foreign affairs or essential public interest or policy of the United States. The U.S. delegation expressed its expectation that this provision will rarely, if ever, be used; nevertheless, it would provide an important protection for our nationals if we found it necessary in a particular case.

Under this new agreement, Hong Kong will continue to surrender Hong Kong residents¹⁶ to the United States. Hong Kong will also surrender, subject to the aforementioned exceptions, nationals of both the United Kingdom and the People's Republic of China (who are located in Hong Kong) to the United States.

¹⁴ An example of such a crime is desertion. *Matter of Extradition of Suarez-Mason*, 694 F. Supp. 676, 702-703 (N.D. Cal. 1988).

¹⁵ The Hong Kong delegation explained that the phrase "has entered Hong Kong for the purpose of settlement" is a term of art, referring to an immigration policy aimed at family unification.

¹⁶ As a sub-state entity, Hong Kong does not have its own "nationals."

Paragraph 4 of Article 3 provides that in a case in which the PRC (after July 1, 1997) has jurisdiction and is investigating an offense by a person who neither has the right of abode in Hong Kong nor has entered Hong Kong for the purpose of settlement, extradition may be deferred until the investigation has been expeditiously concluded.

The fifth paragraph of Article 3 permits the requesting Party to request, in a case in which surrender is denied under the circumstances described in Article 3(2) or 3(3)(a), that the case be submitted to the competent authorities of the requested Party for possible prosecution. So if in an exceptional case involving an essential public interest or policy of the PRC (again, after July 1, 1997), the executive authority of Hong Kong were to refuse to surrender a PRC national to the United States, the United States could request that Hong Kong submit the case to its domestic authorities so that proceedings for the PRC national's prosecution in Hong Kong could be considered.

ARTICLE 4—CAPITAL PUNISHMENT

The first paragraph of Article 4 permits the requested Party to refuse surrender in cases in which the offense for which extradition is sought is punishable by death in the requesting Party, but is not punishable by death in the requested Party, unless the requesting Party provides assurances that the death penalty will not be imposed, or if imposed, will not be carried out. Similar provisions are found in many recent United States extradition treaties.¹⁷ Hong Kong has repealed the death penalty for all offenses, and it is likely that Hong Kong would require assurances pursuant to this article should the United States seek the surrender of a fugitive wanted for a capital offense. However, the decision concerning whether to provide such assurances will remain with the appropriate authorities in the United States. In a state case, it is the practice of the U.S. Government to provide death penalty assurances only when, and to the extent that, state authorities are willing to do so.

Paragraph 2 of this article provides that when the requesting Party gives assurances in accordance with paragraph 1, the assurances shall be respected, and the death penalty, if imposed, shall not be carried

ARTICLE 5—PRIOR PROCEEDINGS

This article will permit surrender in situations in which the fugitive is charged with different offenses in both countries arising out of the same basic transaction.

Article 5(1), which prohibits surrender if the offender has been convicted or acquitted in the requested Party for the offense for which extradition is requested, is similar to language found in many United States extradition treaties. This paragraph will, however, permit extradition in situations in which the activities of the fugitive result in his being charged with different offenses in each jurisdiction arising out of the same basic transaction.

¹⁷ E.g., Article 7, U.S.-Netherlands Treaty; Article 6, U.S.-Ireland Treaty.

Article 5(2) makes it clear that neither Party can refuse to surrender an offender to the other on the ground that the requested Party's authorities declined to prosecute the offender, or instituted criminal proceedings against the offender and thereafter elected to discontinue the proceedings. This provision was included because the decision of the requested Party to forego prosecution, or to drop the charges already filed, may have resulted from failure to obtain sufficient evidence or witnesses available for trial, and the requesting Party may not suffer from the same impediments. This provision should enhance the ability to surrender to the jurisdiction that has the better chance of a successful prosecution.

ARTICLE 6—POLITICAL OFFENSES

Paragraph 1 of this article prohibits surrender for political offenses. This is a common provision in United States extradition treaties.

Paragraph 2 describes several categories of offenses which shall not be considered to be political offenses.

First, Article 6(2)(a) states that the political offense exception does not apply where there is a murder or other willful crime against the life of the Head of State of the United States, or against the life of the Head of State of the government responsible for the foreign affairs of Hong Kong, or a member of either Head of State's family.

Second, Article 6(2)(b) states that the political offense exception does not apply to offenses for which both Parties have an international obligation pursuant to a multilateral international agreement to either surrender the person sought, or to submit the matter for domestic prosecution. The conventions to which this clause will apply until July 1, 1997 include the Convention for the Suppression of Unlawful Seizures of Aircraft (Hijacking)¹⁸, the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage)¹⁹, the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents²⁰, and the International Convention Against the Taking of Hostages²¹. After July 1, 1997, this clause will continue to apply to those international conventions containing "extradite or prosecute provisions" applicable to Hong Kong. The presumption under the Joint Declaration and Basic Law is that these and other multilateral treaties currently applicable to Hong Kong will continue to apply, and indeed it appears that the PRC will extend the applicability of some multilateral treaties to Hong Kong that were not extended by the UK. A formal process has been established for confirming the applicability to Hong Kong of each such treaty as well as any relevant reservations of understandings.

Third, Article 6(2)(c) states that the political offense exception does not apply to conspiring or attempting to commit, or for aiding

¹⁸ Done at the Hague December 16, 1970, and entered into force October 14, 1971 (22 UST 1641; TIAS 7192).

¹⁹ Done at Montreal September 23, 1971, entered into force January 26, 1973 (24 UST 564; TIAS 7570).

²⁰ Done at New York December 14, 1973, entered into force February 20, 1977 (28 UST 1975; TIAS 8532).

²¹ Done at New York December 17, 1979, entered into force June 3, 1983 and for the United States January 6, 1985 (TIAS 11081).

or abetting the commission or attempted commission of the foregoing offenses under 6(2)(a) and (b).

Paragraph 3 of the article describes other situations in which the competent authority in the requested Party, which for the United States shall be the executive authority,²² shall refuse surrender.

First, Article 6(3)(a) states that surrender must be denied if the competent authority determines that the request was politically motivated. Similar provisions appear in other U.S. extradition treaties.²³ In the United States, the longstanding law and practice has been that the Secretary of State alone has the discretion to determine whether an extradition request is based on improper political motivation.²⁴

Second, Article 6(3)(b) states that a request for surrender must be denied if, though purporting to be made on account of an offense covered by the Agreement, it was in fact made for the primary purpose of prosecuting or punishing the person sought on account of his race, religion, nationality or political opinion. Similar provisions appear in some recent U.S. extradition treaties.²⁵

Third, Article 6(3)(c) states that surrender must be denied if the person sought is likely to be denied a fair trial or punished on account of his race, religion, nationality, or political opinions. Again, a similar provision appears in some other recent U.S. extradition treaties.²⁶

ARTICLE 7—HUMANITARIAN CONSIDERATIONS

This article provides the competent authority of the requested Party, which again for the United States shall be the executive authority, with the discretion to refuse the surrender of a fugitive when such surrender is likely to entail exceptionally serious consequences related to age or health. This type of provision, although normally deemed unnecessary by U.S. negotiators, does appear in a few other U.S. extradition treaties.²⁷

ARTICLE 8—REQUIRED DOCUMENTS

This article sets out the documentary and evidentiary requirements for a request for surrender, and is generally similar to articles in the United States' recent extradition treaties.

Article 8(1) states that requests for the surrender of a fugitive offender shall be made in writing by and to the appropriate authori-

²² The competent authority in Hong Kong for making decisions pursuant to this paragraph is likely to be the judiciary.

²³ See Article III(3), U.S.-Jamaica Extradition Treaty, signed at Kingston June 14, 1983, entered into force September 24, 1984; Article 5(4), U.S.-Spain Extradition Treaty, signed May 29, 1970; Article 4, U.S.-Netherlands Extradition Treaty, signed at The Hague June 24, 1980, entered into force September 15, 1983 (TIAS 10733); and Article IV(c), U.S.-Ireland Extradition Treaty, signed at Washington July 13, 1983, entered into force December 15, 1984 (TIAS 10813).

²⁴ See *Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981); *In re Lincoln*, 288 F. 70, (E.D.N.Y. 1915); *Koskotas v. Roche*, 740 F.Supp. 904 (D.Mass. 1990), *aff'd* 931 F.2d 169 (1st Cir. 1991); *Matter of Extradition of Singh*, 123 F.R.D. 127 (D.N.J. 1987); *Quinn v. Robinson*, 783 F.2d 776 (9th Cir. 1986); *Sindona v. Grant*, 461 F.Supp 199 (1978).

²⁵ See Article IV(c), U.S.-Ireland Extradition Treaty, signed at Washington July 13, 1983, entered into force December 15, 1984 (TIAS 10813); Article III(2)(b), U.S.-Jamaica Extradition Treaty, signed at Kingston June 14, 1983, entered into force September 24, 1984.

²⁶ See Article III(2)(c), U.S.-Jamaica Extradition Treaty, signed at Kingston June 14, 1983, entered into force September 24, 1984.

²⁷ See Article 7(2)(b), U.S.-Norway Extradition Treaty, signed at Oslo June 9, 1977; entered into force March 7, 1980; Article V(6), U.S.-Sweden Extradition Treaty, signed October 24, 1961, entered into force December 3, 1963.

ties of the Parties as may be notified between them from time to time. It is anticipated that requests both from and to Hong Kong will be channeled through the U.S. Consulate in Hong Kong²⁸. Currently, U.S. requests for extradition from Hong Kong are presented to Hong Kong by the U.S. Consulate, at the direction of the U.S. Department of State and in consultation with the U.S. Department of Justice. That practice will continue. Hong Kong requests for extradition from the United States are currently presented to the United States through the British Embassy in Washington. This practice will change after the Agreement enters into force. It is our understanding that requests will be presented directly to the U.S. Consulate in Hong Kong for transmission by the Consulate to the State Department in Washington, and then on to the Justice Department. However, a formal extradition request either to or from Hong Kong may be preceded by a request for the provisional arrest of the fugitive pursuant to Article 10 of the Agreement. Such requests for provisional arrest may be made through the same channel required for making formal requests, or forwarded through the International Criminal Police Organization (INTERPOL).

Article 8(2) outlines the information which must accompany every request for surrender under the Agreement. Most of the items will assist the requested Party in identifying and locating the fugitive, and in determining the exact nature of, and punishment for, the offense for which surrender is being requested.

Article 8(3) describes the additional information needed when the person is sought for trial by authorities in the requesting Party; Article 8(4) lists the information needed, in addition to the requirements of Article 8(2), when the person sought has been tried and convicted in the requesting Party.

Article 8(3) states that if the fugitive is a person who has not yet been convicted of the crime for which surrender is requested, the requesting Party must provide a copy of the arrest warrant, and "such evidence as, according to the law of the requested Party, would justify his committal for trial if the offense had been committed within the jurisdiction of the requested Party." This is consistent with fundamental extradition jurisprudence in the United States, under which this language is interpreted to require countries seeking extradition from the U.S. to provide evidence establishing probable cause.²⁹ However, Hong Kong under its current law requires *prima facie* evidence of guilt in order to either extradite a fugitive, or to commit a case for trial in Hong Kong. During the negotiations, the Hong Kong delegation indicated that Hong Kong does not plan to change this evidentiary standard for either extradition, or committal for trial. Consequently, U.S. requests to Hong Kong for the surrender of fugitives will likely require *prima facie* evidence even after the Agreement enters into force, i.e., the

²⁸ The Hong Kong delegation informed the U.S. delegation that it is possible that after 1997, the PRC will require requests for extradition involving Hong Kong to be made through Beijing. However, it is hoped that the speedy and efficient practice of direct requests both to and from Hong Kong will continue even after Hong Kong's reversion to PRC sovereignty.

²⁹ Courts applying 18 U.S.C. §3184 have long required probable cause for international extradition. Restatement (Third) of the Foreign Relations Law of the United States, Section 476, comment b.

same quantum of evidence we provide under the current extradition treaty.

Article 8(4) lists the information needed to surrender a person already found guilty, convicted or sentenced in the requesting Party. Once a conviction has been obtained, no showing of either probable cause or *prima facie* evidence of guilt is required. In essence, the fact of conviction speaks for itself, a position taken in recent United States court decisions.³⁰ What is required are (a) a copy of a certificate or record of the finding of guilt, conviction, or sentence, and (b) if the person was found guilty or convicted but not sentenced, a statement or record to that effect and a copy of the arrest warrant, or (c) if the person was sentenced, a statement that the sentence remains enforceable and an indication of how much of it remains to be served.

Article 8(5) states that all documents submitted by the requesting Party shall be in or translated into an official language of the requested Party, or any other language agreed upon by the Parties. Currently, extradition requests both to and from Hong Kong are made in English. That practice will continue under this Agreement. However, this paragraph recognizes that in the years after 1997, an increasing percentage of judges in Hong Kong may be local Hong Kong Chinese. Should the official language of the courts in Hong Kong change from English to Chinese, U.S. requests for fugitives would then need to be in or translated into Chinese. However, even if the official language of Hong Kong becomes Chinese, upon agreement of the Parties, our requests may still be made in English.

ARTICLE 9—ADMISSIBILITY AND AUTHENTICATION

Article 9 governs the authentication procedures for documents intended for use in extradition proceedings.

Article 9(a) deals with requests for surrender made by the United States to Hong Kong. Documents accompanying such requests shall be received and admitted as evidence in Hong Kong if they are signed or certified by a state or federal judge, magistrate or official³¹ of the United States of AMERICA, and they are sealed with the official seal of the competent authority³² of the United States.

Article 9(b) deals with surrender requests made by Hong Kong to the United States. Documents accompanying such requests shall be received and admitted as evidence in the United States if they are certified by the principal U.S. consular officer resident in Hong Kong. This provision reflects a slight variation of procedure described in 18 U.S.C. §3190. That statute ensures the admissibility in extradition proceedings of evidence that is certified by “the principal diplomatic or consular officer of the United States resident in such foreign country...” However, Hong Kong is not a country. Thus, this paragraph will ensure that extradition documents may be certified and made admissible in U.S. extradition proceedings by

³⁰ See *Spatola v. United States*, 741 F.Supp. 362, 374 (E.D.N.Y. 1990), *aff'd*, 925 F.2d 615 (2nd Cir. 1991); *United States v. Clark*, 470 F. Supp. 976 (D.Vt. 1979).

³¹ For example, pursuant to Federal Rule of Criminal Procedure 9(b), the clerk of court shall sign arrest warrants issued for persons charged by information or indictment.

³² The competent authority for the United States is the executive authority. The seals of both the Department of Justice and the Department of State are routinely attached to documents submitted in support of U.S. requests for extradition.

the certificate of the principal U.S. consular officer at our consulate in Hong Kong, without having to be sent for certification to either London (pre-July 1 1997) or Beijing (post- July 1 1997).

Article 9(c) provides a second method for authenticating evidence in an extradition proceeding, by permitting such evidence to be admitted if it is authenticated in any manner accepted by the laws of the requested Party. This paragraph should ensure that relevant evidence, which would normally satisfy the evidentiary rules of the requested Party, is not excluded at the extradition hearing because of an inadvertent error or omission in the authentication process.

ARTICLE 10—PROVISIONAL ARREST

This article describes the process by which a person located in the territory of one Party may be arrested and detained while the formal extradition papers are being prepared.

Article 10(1) states that in urgent cases and upon request of the requesting Party, the requested Party may provisionally arrest a fugitive, in accordance with its law. An article governing provisional arrest of fugitives is standard in all modern U.S. extradition treaties.

Paragraph 2 of Article 10 sets forth the information which the requesting Party must provide in support of such a request.

Paragraph 3 of the article states that the requesting Party must be notified without delay of the outcome of the request for provisional arrest and the reasons for any refusal to execute it.

Paragraph 4 of Article 10 describes the procedure for making a provisional arrest request. The paragraph makes it clear that the request shall be in writing, and made either through the same channels as a formal surrender request, or through INTERPOL.

Article 10(5) states that if the formal surrender request with the necessary supporting documents has not been received by the requested Party within sixty days of arrest, the provisional arrest—and thus the custody of the fugitive—shall be terminated. However, the paragraph goes on to state that the person may be taken into custody again, and surrendered, if the surrender request is received subsequently.

ARTICLE 11—CONCURRENT REQUESTS

This article reflects the practice of many recent United States extradition treaties and lists factors which the executive authority of the requested Party must consider in determining to which jurisdiction a person should be surrendered when reviewing competing requests from a Party to the Agreement and one or more other countries for the extradition of the same person. For the United States, the Secretary of State would make this decision.³³

ARTICLE 12—REPRESENTATION AND EXPENSES

The first paragraph of Article 12 states that the requested Party shall, at its own expense, make the necessary arrangements for the requesting Party's legal representation and assistance in any pro-

³³ See *Cheng Na-Yuet v. Hueston*, 734 F. Supp. 988 (S.D. Fla. 1990), *aff'd* 932 F.2d 977 (11th Cir. 1991).

ceedings arising out of the request for surrender. The United States will represent Hong Kong in connection with court proceedings related to requests from Hong Kong for persons located in the United States. Hong Kong, through its Attorney General's Office, will represent the United States in connection with court proceedings related to requests from the United States for persons located in Hong Kong. In addition, the paragraph states that if the requesting Party decides to arrange for additional legal representation and assistance (i.e., above and beyond that provided on a cost-free basis by the requested Party, such as the hiring of private counsel to assist in the presentation of the extradition request), the requesting Party shall bear any additional expenses incurred.

Paragraph 2 of Article 12 provides that the requested Party will bear all expenses of extradition incurred in its jurisdiction except those relating to the international transportation of the fugitive to the requesting Party, and the translation of documents, which expenses are to be paid by the requesting Party.

Article 12(3) provides that neither Party shall make a pecuniary claim against the other in connection with matters arising out of a request for surrender, including arrest, detention, examination, and surrender of the fugitive. This includes any claim by the fugitive for damages, reimbursement, or legal fees, or other expenses occasioned by the execution of the surrender request.

ARTICLE 13—STANDARD OF PROOF

This article sets out the quantum of evidence needed for surrender of a fugitive. For an accused person, the evidence must be sufficient according to the law of the requested Party to justify committal for trial if the offense had been committed in the territory of the requested Party. As explained in the analysis of Article 8(3), *supra*, this means that under the current law of the Parties, requests by the U.S. for fugitives located in Hong Kong must be accompanied by *prima facie* evidence, and requests by Hong Kong for fugitives located in the United States must be supported by evidence establishing probable cause. For a person found guilty, convicted or sentenced by the courts of the requesting Party, all that this paragraph requires is evidence to establish that the person sought is actually the person found guilty, convicted or sentenced. Such evidence of identity is in addition to the information regarding such persons required by Article 8(4) of the Agreement.

ARTICLE 14—TERMS OF SURRENDER

This article deals with matters related to the ultimate surrender of fugitives at the end of the extradition process.

Paragraph 1 of Article 14 states that when available for surrender, the fugitive shall be sent by the authorities of the requested Party to such convenient place of departure within that Party's jurisdiction as agreed upon by the Parties. Thus, for example, if Hong Kong were to seek the surrender of a fugitive located in Kansas City, the Parties may agree for U.S. authorities to escort him in custody to a city on the West Coast, so that he may be handed over to the Hong Kong escort agents at the port of exit from the United States.

Paragraph 2 requires that the requested Party promptly notify the requesting Party of its decision on the request for surrender. If the request is denied, the requested Party must provide an explanation of the reasons for the denial. In addition and upon request, the requested Party must provide the requesting Party with copies of pertinent judicial decisions related to the request.

Paragraph 3 of the Article states that if the requesting Party does not remove the fugitive on the agreed upon date, he may be released from custody, and the executive authority of the requested Party may subsequently refuse to surrender him for the same offense. United States law requires that such surrender occur within two calendar months of the finding that the offender is extraditable³⁴, or of the conclusion of any litigation challenging that finding³⁵, whichever is later.

Paragraph 4 of Article 14 states that if circumstances beyond its control prevent a Party from surrendering or picking up the person to be surrendered, it shall notify the other Party. Then, except to the extent inconsistent with the law of the requested Party, the two Parties shall agree on a new date for surrender—and the provisions of paragraph 3 shall apply. Thus, if it becomes necessary for either Party to re-schedule the pick up or transfer of a fugitive, that will be possible. However, if the transfer of a fugitive from the U.S. to Hong Kong is delayed beyond two calendar months from the finding of extraditability or the conclusion of litigation challenging that finding, and the fugitive applies for release, it will be up to a U.S. judge to determine whether the circumstances which led to the delay constituted “sufficient cause”³⁶ not to order the fugitive’s release.

ARTICLE 15—TRANSFER OF PROPERTY

This article requires the requested Party to, consistent with its laws and subject to conditions related to the rights of other claimants, furnish the requesting Party with certain categories of things along with the person surrendered. Specifically, money and other articles which may serve as proof of the offenses to which the request for surrender relates, and money or other articles which may have been acquired by the person sought as a result of the offense and are in his possession, are to be furnished. Thus, for example, physical or documentary evidence of the crime for which surrender is sought, and any proceeds of such crime found on the fugitive at the time of his arrest, are to be turned over.

ARTICLE 16—SPECIALITY

This article covers the principle known as the rule of speciality (or speciality), which is a standard aspect of United States extradition practice. The rule of speciality insures that a fugitive surrendered for one offense is not tried or punished for other crimes subject to certain specific exceptions. In other words, the rule prevents a request for extradition from being used as a subterfuge to obtain

³⁴ Title 18, United States Code, Section 3188.

³⁵ *Jimenez v. United States District Court*, 84 S. Ct. 14, 11 L.Ed. 2d 30 (1963)(decided by Goldberg, J., in chambers). See also *Liberto v. Emery*, 724 F.2d 23 (2d Cir. 1983); *In Re United States*, 713 F.2d 105 (5th Cir. 1983); *Barrett v. United States*, 590 F.2d 624 (1978).

³⁶ Title 18, United States Code, Section 3188.

custody of a person for trial or service of sentence on charges which may not be extraditable under the Agreement, or which are not properly documented at the time that the request is granted. This paragraph contains a variety of exceptions to the rule that have developed over the years. It states that a person surrendered under the Agreement may only be proceeded against, sentenced, or detained with a view to the carrying out of a sentence for (1) the offense for which surrender was ordered, (2) lesser offenses revealed by the facts in respect of which request for surrender was ordered, provided such offenses are covered by the Agreement, and (3) any offenses for which the requested Party consents³⁷. The paragraph also makes it clear that the rule applies only to offenses committed prior to the surrender of a fugitive.

Paragraph 2 of this article prohibits the requesting Party from re-surrendering a person, or transferring him beyond its jurisdiction, without the consent of the requested Party. These limitations on further surrender and transfer apply to offenses for which the person was originally surrendered, and to any other offenses he may have committed prior to his original surrender. Thus, absent U.S. consent, a person surrendered to Hong Kong pursuant to this Agreement may not be further surrendered for the same crimes, or for other offenses committed prior to his surrender, to any third country, or even to the People's Republic of China (other parts of the PRC being "beyond the jurisdiction" of Hong Kong). Nor may Hong Kong unilaterally decide to transfer a person surrendered pursuant to this Agreement, (either to a third country or to the PRC), for the service of his Hong Kong imposed sentence. In addition, pursuant to Article 20(3) of the Agreement, the provisions of Article 16 shall also apply to fugitives extradited pursuant to requests pending when the Agreement enters into force, and to any other fugitive offenders previously surrendered between the parties. Consequently, persons extradited to Hong Kong under the terms of our existing treaty with the United Kingdom will not, even after 1997, be surrendered or transferred to other jurisdictions (including the PRC) for the offenses for which their extradition was granted, or for any other offenses committed prior to their extradition, absent the consent of the United States. The Agreement meets a goal of U.S. negotiators in ensuring that persons extradited to Hong Kong (in the past or in the future) will be prosecuted and punished for those crimes in Hong Kong.

Finally, Paragraph 3 of the article permits the trial, sentencing, detention, or surrender to another jurisdiction of a surrendered person if (1) he has had an opportunity to leave the jurisdiction to which he was surrendered and has not done so within thirty days, or (2) he voluntarily returns to the jurisdiction having left it.

³⁷ In the United States, the Secretary of State has the authority to grant such consent. See *Berenguer v. Vance*, 473 F. Supp. 1195 (D.D.C. 1979). It should be noted that in cases in which consent is requested to try, sentence, or punish a person for an offense other than that for which surrender was ordered, the requested Party may require submission of the documents called for in Article 8, and may detain the fugitive in custody for up to ninety days while the request is being processed.

ARTICLE 17—TEMPORARY AND DEFERRED SURRENDER

Paragraph 1 of this article addresses those situations in which a surrender request is made for a person already serving a sentence for a conviction in the requested Party. The paragraph states that the requested Party may temporarily surrender such a person to the requesting Party for purpose of prosecution.

Paragraph 2 deals with requests for surrender made for persons being proceeded against by the requested Party. The requested Party must proceed with the surrender proceedings after the prosecution against the person sought has been concluded and he is acquitted.³⁸ Implicit in this provision is the notion that a prosecution in the requested Party permits that Party to defer surrender proceedings while its own criminal proceedings are pending. Pursuant to this paragraph, if the person sought is convicted and sentenced to imprisonment, the requested Party may continue surrender proceedings and, upon committal, temporarily surrender him to the requesting Party for purpose of prosecution. Implicit in this provision is the notion that the requested Party may choose to wait until completion of the service of sentence before continuing with the surrender proceedings.

The temporary transfer provisions of paragraphs 1 and 2 further the interests of justice. They permit trial of the person sought while evidence and witnesses are more likely to be available, thereby increasing the likelihood of successful prosecution. Such transfer may also be advantageous to the person sought in that : (1) it allows him to resolve the charges sooner; (2) it may make it possible for him to serve any sentence in the requesting Party concurrently with the sentence in the requested Party; and (3) it permits him to defend against the charges while favorable evidence is fresh and more likely to be available to him. Similar temporary surrender provisions are found in many recent extradition treaties.

Paragraph 3 of the article states that when a person is temporarily surrendered, he shall be kept in custody by the requesting Party. He shall also be returned to the requested Party after the conclusion of the proceedings against him, in accordance with conditions to be determined by agreement of the Parties.

ARTICLE 18—SURRENDER BY CONSENT

Persons sought for extradition frequently elect to waive their right to extradition proceedings and to expedite their return to the requesting State. Paragraph 1 of this article provides that when a fugitive consents to be surrendered to the requesting Party, the requested Party may surrender the person as expeditiously as possible without further proceedings. The Parties anticipate that in such cases there would be no need for the formal documents described in Article 8 or for further judicial proceedings of any kind.

Paragraph 2 of Article 18 states that to the extent required under the law of the requested Party, the provisions of Article 16 (rule of speciality) shall apply to a person surrendered pursuant to this Article. Since surrender pursuant to this article would amount

³⁸ Article 17(2)(a) should be read in a manner which is compatible with Article 5, which prohibits surrender if the person sought has been convicted or acquitted in the requested Party for the same offense.

to voluntary return of the fugitive, and not a formal surrender pursuant to the Agreement, the United States does not view the rule of speciality as applicable to such surrenders.

ARTICLE 19—TRANSIT

Article 19(1) gives each Party the power to authorize transit through its jurisdiction of a person being surrendered to the other Party by a third country, and to hold such persons in custody during the period of transit. Transit requests shall be in writing. Each request for transit must contain a description of the person whose transit is proposed, and a brief statement of the facts of the case with respect to which he is being surrendered to the requesting Party.

Article 19(2) makes it clear that no advance authorization is needed if the person is being transported by air, and no landing is scheduled in the jurisdiction of the Party to be transited. Should an unscheduled landing occur, a written request for transit as provided for in Paragraph 1 may be required at that time. However, the person must be kept in custody before the request for transit is received and until the transit is effected, so long as the request is received within ninety-six hours of the unscheduled landing.

ARTICLE 20—ENTRY INTO FORCE, TERMINATION AND APPLICATION

Paragraph 1 of Article 20 states that the Agreement shall enter into force thirty days after the date on which the Parties have notified each other in writing that their respective requirements for the entry into force of this Agreement have been complied with.

Paragraph 2 of the article states that either Party may terminate the Agreement by giving notice to the other in writing, however the Agreement shall only cease to have effect six months after the receipt of such notice.

Paragraph 3 of the article sets out those categories of cases to which this Agreement applies. It shall apply to all requests for surrender made after its entry into force. It shall also apply to requests for surrender pending at the date of its entry into force. Finally, Articles 4 (capital punishment) and 16 (speciality) shall apply to fugitive offenders surrendered between the Parties prior to the Agreement's entry into force.

Paragraph 4 of Article 20, like most of the other United States extradition treaties negotiated in the past two decades, makes the Agreement retroactive, in that it covers offenses committed before as well as after it enters into force.

VIII. RESOLUTION OF RATIFICATION

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Agreement Between the Government of the United States of America and the Government of Hong Kong for the Surrender of Fugitive Offenders signed at Hong Kong on December 20, 1996 (Treaty Doc. 105-3), subject to the understandings of subsection (a), the declarations of subsection (b), and the proviso of subsection (c).

(a) UNDERSTANDINGS.—The Senate's advice and consent is subject to the following two understandings, which shall be in-

cluded in the instrument of ratification, and shall be binding on the President:

(1) **THIRD PARTY TRANSFERS.**— The United States understands that Article 16(2) permits the transfer of persons surrendered to Hong Kong under this Agreement beyond the jurisdiction of Hong Kong when the United States so consents, but that the United States will not apply Article 16(2) of the Agreement to permit the transfer of persons surrendered to the Government of Hong Kong to any other jurisdiction in the People's Republic of China, unless the person being surrendered consents to the transfer.

(2) **HONG KONG COURTS' POWER OF FINAL ADJUDICATION.**— The United States understands that Hong Kong's courts have the power of final adjudication over all matters within Hong Kong's autonomy as guaranteed in the 1984 Sino-British Joint Declaration on the Question of Hong Kong, signed on December 19, 1984, and ratified on May 27, 1985. The United States expects that any exceptions to the jurisdiction of the Hong Kong courts for acts of state shall be construed narrowly. The United States understands that the exemption for acts of state does not diminish the responsibilities of the Hong Kong authorities with respect to extradition or the rights of an individual to a fair trial in Hong Kong courts. Any attempt by the Government of Hong Kong or the Government of the People's Republic of China to curtail the jurisdiction and power of final adjudication of the Hong Kong courts may be considered grounds for withdrawal from the Agreement.

(b) **DECLARATIONS.**—The Senate's advice and consent is subject to the following two declarations, which shall be binding on the President:

(1) **REPORT ON THE HONG KONG JUDICIAL SYSTEM.**— One year after entry into force, the Secretary of State, in coordination with the Attorney General, shall prepare and submit a report to the Committee on Foreign Relations that addresses the following issues during the period after entry into force of the Agreement:

(i) an assessment of the independence of the Hong Kong judicial system from the Government of the People's Republic of China, including a summary of any instances in which the Government of the People's Republic of China has infringed upon the independence of the Hong Kong judiciary;

(ii) an assessment of the due process accorded all persons under the jurisdiction of the Government of Hong Kong;

(iii) an assessment of the due process accorded persons extradited to Hong Kong by the United States;

(iv) an accounting of the citizenship and number of persons extradited to Hong Kong from the United States, and the citizenship and number of persons extradited to the United States from Hong Kong;

(v) an accounting of the destination of third party transfer of persons who were originally extradited from the United States, and the citizenship of those persons;

(vi) a summary of the types of crimes for which persons have been extradited between the United States and Hong Kong;

(2) TREATY INTERPRETATION.—The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification with respect to the INF Treaty.

(c) PROVISIO.— The resolution of ratification is subject to the following proviso, which shall not be included in the instrument of ratification to be signed by the President:

(1) SUPREMACY OF THE CONSTITUTION.—Nothing in the Treaty requires or authorizes legislation or other action by the United States of America that is prohibited by the Constitution of the United States as interpreted by the United States.

APPENDIX

**THE AGREEMENT BETWEEN THE
GOVERNMENT OF THE UNITED STATES OF AMERICA
AND THE GOVERNMENT OF HONG KONG
FOR THE SURRENDER OF FUGITIVE OFFENDERS,
SIGNED AT HONG KONG ON DECEMBER 20, 1996
(TREATY DOC. 105-3)**

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THE AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF HONG KONG FOR THE SURRENDER OF FUGITIVE OFFENDERS, SIGNED AT HONG KONG ON DECEMBER 20, 1996 (TREATY DOC. 105-3)

TUESDAY, JUNE 3, 1997

U.S. SENATE
COMMITTEE ON FOREIGN RELATIONS
Washington, DC.

The committee met, pursuant to notice, at 10:05 a.m., in room SD-419, Dirksen Senate Office Building, Hon. Craig Thomas, presiding.

Present: Senators Thomas, Ashcroft, Kerry, and Robb.

Senator THOMAS. We will begin. Thank you very much for being here, the witnesses, and also the rest of you. Glad to have you.

Today the committee will consider the agreement for the surrender of fugitive offenders between the United States and Hong Kong, signed in December of last year, the Hong Kong Extradition Treaty. Criminal activities originating in Hong Kong and aimed at the United States or U.S. interests for a variety of reasons is on the rise — software, intellectual property, smuggling of illegal immigrants, and drug smuggling, to name just a few of the problem areas. With that rise in crime, there will become an increasing need for the United States to seek extradition of individuals from Hong Kong.

At present, these extraditions are governed by an agreement between the United States and the United Kingdom. This agreement expires, however, upon Hong Kong reversion to the PRC. The treaty we consider today will replace the expired agreement, and ensure the continuation of the important cooperation between the law enforcement communities of Hong Kong and the United States. It is especially important because the U.S. lacks an extradition treaty with the People's Republic of China, and the treaty will provide the means for continuation of an extradition relationship with Hong Kong after reversion, and avoid a gap in law enforcement.

Most of the provisions of this treaty follow the form and the content of extradition treaties presently in force with the U.S. In addition, it contains several provisions especially designed in light of the peculiar status of Hong Kong as a special administrative region of the PRC. I support the movement of this treaty and will work

to move it as quickly as possible for the advice and consent of the full Senate.

We are especially pleased that you came to talk with us about it. I think it is not generally controversial, but it is very important. I am pleased to be joined by the Senator from Missouri. Would you have any comments, Senator Ashcroft?

Senator ASHCROFT. Thank you, Mr. Chairman. I want to thank you for this series of hearings that you have been holding on Hong Kong, including the broader relationship between the United States and China. I think these are well worth our inquiry, and I appreciate the fact that you have focussed the attention of the full committee as well as the subcommittee on these issues.

Hong Kong certainly serves as a prism through which to evaluate the future course of United States-China relations, and determine which policies the United States should adopt to best encourage the growth of free markets and democracy in the People's Republic of China. To most Americans, a hearing on the seemingly nebulous topic of extradition treaties is not particularly important. But let us not be distracted by the complex legal jargon that accompanies such treaties. Extradition agreements strike at the very heart of equality before the law, one of the most cherished freedoms that people should enjoy, I believe, around the globe. It certainly is a cherished freedom in America.

Our judicial system seeks to protect the due process rights of foreigner and native citizen alike. Our extradition treaties with our nations are based on the premise that any person we transfer to a foreign court system will receive similarly just treatment. The extradition treaty with Hong Kong is thus a very important consideration in assessing the future prospects of freedom for the Colony under Chinese rule. We need to consider the extradition treaty in light of China's overall behavior toward Hong Kong in recent months.

China's actions to undermine democracy in Hong Kong cast doubt on the future of civil liberties in the British Colony. China has declared the elected Hong Kong legislature invalid, and appointed a handpicked provisional legislative body.

China's appointed chief executive of Hong Kong, Chi Hua, recently announced additional measures to restrict civil liberties in the colony. Public protests will have to receive prior approval, and could be banned to protect national security. Hong Kong political organizations will be required to register with the government, and will be prohibited from seeking or receiving funds from overseas organizations. Under China's definition of a Hong Kong political group, international organizations that expose China's human rights abuses will also be banned from receiving critical foreign funding.

In light of these troubling steps being taken by Beijing, not to mention China's violation of trade agreements, weapons proliferation commitments, and human rights standards, there are few doubts in my mind that China will violate this extradition treaty that we are considering today.

The extradition treaty contains provisions that supposedly preserve due process and the ability of the U.S. to refuse extradition requests that are politically motivated. As with all international

agreements, however, effective enforcement is essential to protect American interests. The strongest treaty language in the world is meaningless without Presidential vigilance — a vigilance I find appallingly lacking in the current administration.

This administration has failed to confront consistently China on human rights violations, trade barriers and weapons proliferation. I am concerned that the administration will adopt a similarly lax attitude in the enforcement of this treaty. The Clinton administration's defense of Hong Kong in other areas has been weak at best. The White House has been hesitant to meet with political activists from the Colony, and Vice President Gore failed to include Hong Kong in the itinerary of his recent trip to East Asia. The 6 million people in Hong Kong deserve better treatment from America. The fight to preserve liberty in Hong Kong could be the battle that determines the outcome of the overall campaign to cultivate democracy in China.

Hong Kong serves as yet another example of liberty to over 1 billion Chinese. The effective removal of that example would set back the march of freedom.

Mr. Chairman, tomorrow, will be the 8th anniversary of the Tiananmen Square massacre. Several thousand heroes of liberty lost their lives in that bloodbath. Several hundred more were tortured and imprisoned without the due process protections of a fair court system. Let us be honest. We are not signing this extradition treaty with Hong Kong, but with Beijing. By doing so, we are placing our stamp of approval on Chinese control of Hong Kong's court system, a court system that will increasingly be an extension of the Chinese Communist Party.

The United States has never before signed a treaty to extradite human beings to a totalitarian communist regime. China has already amended Hong Kong's Bill of Rights to strip the courts of the power to strike down laws which violate civil liberties guaranteed in the Hong Kong Constitution. As Beijing continues its assault on Hong Kong's court system, we could see more egregious violations of due process. The heroes of Tiananmen Square truly loved their country and were willing to make the personal sacrifice to take a determined stand against political tyranny.

The Clinton administration could learn a lesson from these demonstrators, who shook the foundations of the Chinese Communist Party 8 years ago. In the long run, honesty is the best policy, and the forthright stand against the atrocities being committed by Beijing will do more for a stable United States-China relationship than repeated acts of appeasement.

We in America need to realize what the Tiananmen Square protesters recognized long ago — that the forces of justice and liberty are at work in the Chinese people just as they have been at work with such stunning effect in other nations around the world. When China embraces democracy, along with a just court system and an open press, just as South Korea, Taiwan and Japan have done, it will be good to say we have been at the side of the Chinese people all along.

Thank you, Mr. Chairman.

[The prepared statement of Senator Ashcroft follows:]

PREPARED STATEMENT OF SENATOR JOHN ASHCROFT

I want to thank Chairman Helms for his careful consideration of the U.S.-Hong Kong Extradition Treaty. Hong Kong certainly serves as a prism through which to evaluate the future of United States-China relations. The policies which the United States adopts to preserve liberty in the former British colony should help to determine the policies that will help promote the growth of freedom in China itself.

While extradition treaties can be rather nebulous documents, let us not be distracted by the complex legal jargon that accompanies such treaties. Extradition agreements strike at the very heart of equality before the law, one of our most cherished freedoms in America. Our judicial system seeks to protect the due process rights of foreigner and native citizen alike, and our extradition treaties with other nations are based on the premise that any person the United States transfers to a foreign court system will receive similarly just treatment.

The extradition treaty with Hong Kong is thus very important in assessing the future prospects for freedom in Hong Kong under Chinese rule. China's actions to undermine democracy in Hong Kong cast doubt on the future of civil liberties in the British colony, and we need to consider this extradition treaty in that light. China has declared the elected Hong Kong legislature invalid and, in its stead, appointed a hand-picked provisional legislative body. China's appointed chief executive of Hong Kong, Tung Chee-hwa, recently announced additional measures further restricting civil liberties in the colony.

For instance, public protests must receive prior approval and could be banned to protect "national security." Hong Kong's political organizations will be required to register with the government and will be prohibited from seeking or receiving funds from overseas organizations. Under China's new definition of a Hong Kong political group, international organizations that expose China's human rights abuses also will be banned from receiving critical foreign funding.

China has already amended Hong Kong's Bill of Rights to strip the courts of the power to strike down laws which violate civil liberties guaranteed in the Hong Kong constitution. Further assaults on Hong Kong's court system by Beijing could set the stage for intolerable and egregious violations of due process.

In light of these troubling steps taken by Beijing, not to mention China's violation of trade agreements, weapons proliferation commitments, and human rights standards, the United States must be on guard against any attempts by China to violate this extradition treaty in the future.

The U.S.-Hong Kong extradition treaty contains provisions that preserve the ability of the United States to refuse extradition requests that are politically motivated. Article 6 of the extradition treaty also gives the United States the prerogative to refuse extradition requests where the offender is "likely to be denied a fair trial or punished on account of his race, religion, nationality, or political opinions." Finally, and perhaps most importantly, the extradition treaty forbids third party transfers of persons extradited to Hong Kong beyond the jurisdiction of Hong Kong without the consent of the United States.

The resolution of ratification drafted by the Foreign Relations Committee strengthens these safeguards by requiring the consent of the fugitive offender before a third party transfer can take place. The resolution also requires the Secretary of State to issue a report one year after the treaty takes effect on the independence of Hong Kong's court system. Finally, the resolution states that any attempt by China to curtail the jurisdiction or final adjudication of the Hong Kong courts could be considered grounds for withdrawal from the extradition treaty.

As with all international agreements, however, effective enforcement is essential to protect American interests. The strongest treaty language in the world is meaningless without presidential vigilance, a vigilance too often lacking in this Administration. This Administration has failed to confront China consistently on human rights violations, trade barriers, and weapons proliferation. I am concerned that the Administration may adopt a similar indifference in the enforcement of this treaty.

The United States needs to stand by Hong Kong now more than ever, and I want to do just that. However, the United States has never before signed a treaty to extradite accused individuals to a totalitarian communist regime. To the extent that Hong Kong's court system becomes a mere extension of the Communist Party in China, the United States must have the resolve not to cooperate with that court system. If we will use them, the resolution of ratification and the extradition treaty contain the provisions to address future attempts by China to subvert judicial independence in Hong Kong.

In light of these safeguards, I will not challenge the U.S.-Hong Kong extradition treaty at this time. However, should China encroach on the autonomy of Hong

Kong's judicial system, then I will be among the first calling for the United States to withdraw from the treaty.

Mr. Chairman, thank you for allowing me to speak on this important subject. I look forward to working with you to ensure that this extradition treaty is honored by China and enforced by the United States.

Senator THOMAS. Thank you, Senator.

We have as witnesses this morning Mr. Mark Richard, Deputy Assistant Attorney General of the Criminal Division, U.S. Department of Justice; and Ms. Jamison S. Borek, Deputy Legal Advisor, U.S. Department of State.

Mr. Richard, would you care to begin, sir.

STATEMENT OF MARK RICHARD, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. RICHARD. Thank you very much, Mr. Chairman.

With your permission, I would submit my complete statement for the record and merely summarize it.

Senator THOMAS. For both of you, your complete statements will be part of the record.

Mr. RICHARD. As you have indicated, Hong Kong is currently one of our most closest and reliable law enforcement partners. Since 1991, under the existing U.S.-U.K. treaty, Hong Kong has returned 64 fugitives to the United States for prosecution. The vast majority of these fugitives were in the field of narcotics trafficking. During the same period, the United States returned seven fugitives to Hong Kong. Most of these crimes ranged from fraud to violent crimes.

There is, as reflected in these statistics, a compelling law enforcement need to continue our extradition relationship with the authorities in Hong Kong. As a stable and sophisticated financial center, Hong Kong has long been an attractive place for money-laundering activity. Significantly, Hong Kong has also been known as an important site for narcotics trafficking. Incidentally, these crimes are directed principally at the United States. Hong Kong's location also makes it an attractive center for schemes involving the smuggling of aliens into the United States. It is also a natural hub for illegal customs transshipment, counterfeiting and other criminal activities that have direct effects in the United States.

In negotiating this new agreement, we made every effort to ensure that extradition will be available for the widest possible range of offenses. Let me, if I may, turn to some specific provisions of the agreement itself that hopefully will address at least in part some of the concerns expressed by Senator Ashcroft in his opening statement. I would like to just highlight some.

One, we have the modern concept of dual criminality, which permits extradition for any crime punishable in both jurisdictions by imprisonment of more than 1 year. That is incorporated into this agreement. In practice, this agreement will expand the range of extraditable offenses. Customs offenses such as smuggling and export control violations will now be extraditable, as will intellectual property offenses, computer crimes, gambling, money laundering related to any extraditable offense, and weapons offenses.

The agreement envisions that, as a general rule, extradition will not be denied on the basis of nationality. However, the agreement

contains narrow exceptions that take into account Hong Kong's unique status.

Under Article 3 of the agreement, the executive authorities of both the United States and Hong Kong have the right to refuse the surrender of nationals if the requested surrender relates to the defense, foreign affairs or essential public interests in the requested parties.

Article 16 of the agreement, I think, is of critical importance, because it incorporates a principle of extradition law known as a rule of specialty. It provides the legal basis to ensure that fugitives surrendered by the United States to Hong Kong will not be prosecuted for additional offenses or resurrendered beyond Hong Kong's borders without the permission of the United States.

Fugitives, therefore, extradited by the United States to Hong Kong cannot be resurrendered by the Hong Kong special administrative region to the mainland PRC. Moreover this protection, rule of specialty, is specifically extended to all persons who have been extradited by the United States prior to the time the new agreement comes into force.

In conclusion, I would like to just point out that as in other extradition areas with other countries, the extradition process is a cumbersome one and it is a technical one, but it is one that must be constantly monitored for compliance with fundamental fairness and conformity with the agreement.

I certainly agree with the Senator that in this, we have to be particularly vigilant. I think, speaking certainly for the Department of Justice — and I would be presumptuous enough to speak for the State Department in this regard — to say that we both intend to monitor implementation of this agreement very closely, and to ensure that all of its terms are complied with, both in form as well as in substance.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Richard follows:]

PREPARED STATEMENT OF MARK M. RICHARD

Mr. Chairman, I am pleased to appear before the Committee today to present the views of the Department of Justice on an extradition agreement that is of great importance to the future of United States - Hong Kong law enforcement relations.

The Department of Justice participated in the negotiation of this agreement with Hong Kong and joins the Department of State in urging the Committee to report favorably to the Senate and recommend that the Senate give its advice and consent to ratification.

Hong Kong is currently one of our closest and most reliable law enforcement partners. Overall, the United States - Hong Kong law enforcement relationship can be described as excellent. This is particularly true with respect to extradition.

In 1991, the United States began negotiating the agreement that is now before you for advice and consent to ratification. Since that time, under the existing U.S.-U.K. treaty, Hong Kong has returned 64 fugitives to the United States for prosecution and/or punishment. The vast majority of those fugitives were accused narcotics traffickers wanted by either state or federal prosecutors. During that same period, the United States has returned 7 fugitives to Hong Kong for prosecution and/or punishment for offenses ranging from fraud to violent crimes.

There is a compelling law enforcement need to continue our extradition relationship with the authorities in Hong Kong. As a stable and sophisticated financial center, Hong Kong has long been an attractive place for money laundering activity, despite aggressive law enforcement efforts to combat the problem.

Significantly, Hong Kong has also been known as an important site for narcotics trafficking. In addition to serving as a conduit for the flow of drugs, Hong Kong is often chosen as the place where illicit narcotics deals are consummated. In fact,

many of the traffickers extradited to the United States by the Hong Kong Government were later prosecuted for conspiring in Hong Kong to import heroin into the United States. The Royal Hong Kong Police and the Hong Kong Customs and Excise Department work closely with the U.S. law enforcement community in sharing information and conducting joint investigations. Similar cooperation between the Department of Justice and the Hong Kong Attorney General's Chambers has resulted in many successful extradition cases.

Hong Kong's location also makes it an attractive center for schemes involving the smuggling of aliens into the United States. Hong Kong immigration officials have conducted numerous joint investigations with our Immigration and Naturalization Service to detect and arrest alien smugglers and to intercept persons who attempt to enter the United States illegally.

Hong Kong is also a natural hub for illegal customs transshipment, counterfeiting and other criminal activities that have direct effects in the United States. Due to limitations of scope of the existing U.S.-U.K. extradition treaty and Hong Kong's domestic laws implementing that treaty, some of the aforementioned offenses, including alien smuggling and most customs crimes, are not presently extraditable. In negotiating our new extradition agreement, we made every effort to ensure that extradition will be available for the widest possible range of offenses. Our goal is to provide all U.S. law enforcement agencies, both those with representatives stationed in Hong Kong, including the FBI, DEA, Customs Service, INS, Secret Service and Diplomatic Security, and those federal, state and local agencies who do not have representatives posted in Hong Kong, with the benefits of a comprehensive, modern extradition treaty.

Our current and projected law enforcement needs provide sound policy reasons to both maintain and strengthen our ties with Hong Kong, as reflected by the letter and spirit of the Hong Kong Policy Act passed by Congress. Our support for swift approval of this agreement is premised upon our recognition of the continuing need for an extradition relationship with Hong Kong. In implementing the new agreement, we will continue to monitor closely the status of the legal system of Hong Kong.

Under the Sino-British Joint Declaration on the Question of Hong Kong, the U.N.-registered bilateral treaty between the U.K. and the P.R.C., Hong Kong will retain both its capitalist system and its British-based common law system until at least the year 2047. The People's Republic of China has undertaken an international legal obligation under the Joint Declaration to preserve the independence of Hong Kong's judiciary and to maintain the same system of laws and due process that exists in Hong Kong today.

Two weeks ago, it was announced in Hong Kong that Andrew Li Kwok-nang will become the first Chief Justice of the Hong Kong Special Administrative Region's (HKSAR) Court of Final Appeal. Provided for under the Basic Law and described further in a subsequent Sino-British Joint Liaison Group (JLG) agreement, the Court of Final Appeal will replace the British Privy Council as Hong Kong's highest appellate court.

According to press reports, the choice of Mr. Li as future Chief Justice has received immediate and widespread support in London, Beijing, and perhaps most importantly, Hong Kong. Governor Patten, future Secretary of Justice Elsie Leung, along with academics, members of the Hong Kong Bar Association, and others have made public statements endorsing the appointment of Andrew Li as a strong indication that judicial independence and the rule of law will continue in Hong Kong. The Department of Justice views the appointment of Mr. Li as a positive sign and, along with the Department of State, will pay close attention to developments in Hong Kong as additional members of the Court of Final Appeal are nominated in the coming weeks.

I would like to turn now to the extradition agreement itself. Because the Departments of Justice and State have prepared and submitted to the Committee a detailed technical analysis of the various articles of this agreement, I will simply highlight some of the important features of the agreement. Many of those features are found in other U.S. extradition treaties that have recently come into force. This agreement also contains certain provisions that reflect Hong Kong's unique situation and our concomitant interests.

The term "agreement" was used instead of "treaty" at the request of the Hong Kong Government. However, this agreement will be a treaty for purposes of United States law.

The modern concept of "dual criminality," which permits extradition for any crime punishable in both jurisdictions by imprisonment of more than one year, is incorporated into Article 2 of the agreement. In this context, a dual criminality clause

is used to supplement a comprehensive list of offenses designed to underscore the availability of extradition for crimes that are of particular interest to each party.

In practice, this agreement will expand the range of extraditable offenses. For the first time, the United States will be able to extradite fugitives from Hong Kong directly for alien smuggling and visa fraud. Until now, we have had to limit our extradition requests in alien smuggling cases to situations in which extraditable crimes, such as extortion or kidnapping, have occurred.

Likewise, customs offenses such as smuggling and export control violations will become extraditable. In the past, due to restrictions under the U.S.-U.K. treaty and Hong Kong law, extradition in this area has been limited to fraud cases involving clear financial loss.

Among the other crimes that will become extraditable for the first time are intellectual property offenses, computer crimes, bail jumping, gambling, money laundering related to any extraditable crime, and weapons offenses.

The agreement envisions that as a general rule, extradition will not be denied on the basis of nationality. This principle, found in Article 3, is consistent with long-standing U.S. policy favoring the extradition of nationals. However, the agreement contains narrow exceptions that take into account Hong Kong's unique status under the Chinese "one country, two systems" approach to reversion.

Under Article 3 of the agreement, the executive authorities of both the United States and Hong Kong have the right to refuse the surrender of nationals (in the case of Hong Kong, this means Chinese nationals) if the requested surrender relates to the defense, foreign affairs, or essential public interest of the requested Party.

Article 3 also permits the executive authority in Hong Kong to refuse the surrender of a Chinese national who does not have what is called the "right of abode" in Hong Kong or has not "entered Hong Kong for the purpose of settlement," if the P.R.C. has jurisdiction over the offense and has commenced or completed proceedings for the prosecution of that person. (The term "right of abode" refers to legal residents of Hong Kong, and the language concerning entry "for the purpose of settlement" is a term of art referring to an ongoing family reunification policy in Hong Kong).

Article 3 also provides that in the event that the surrender of a national is refused, the case may be submitted to the competent authorities of the requested Party for possible domestic prosecution.

Article 16 of the agreement incorporates a principle of extradition law known as the "rule of specialty." That principle is also reflected in Section 17 of Hong Kong's new Surrender of Fugitive Offenders (SFO) Ordinance, which will serve as Hong Kong's domestic implementing legislation for new extradition agreements, including this one. Article 16 of the extradition agreement provides the legal basis to ensure that fugitives surrendered by the United States to Hong Kong will not be prosecuted for additional offenses or re-surrendered beyond Hong Kong's borders without the permission of the United States. Under the formulation of the language used in Article 16, which prohibits transfer of extradited persons "beyond the jurisdiction of the requesting Party," fugitives extradited by the United States to Hong Kong cannot be re-surrendered by the Hong Kong Special Administrative Region to the mainland People's Republic of China.

Under Article 20 of the agreement, the protection of the rule of specialty is specifically extended to all persons who have been extradited by the United States to Hong Kong prior to time that the new agreement comes into force.

There is clear justification for continuing an effective and vibrant bilateral law enforcement relationship with Hong Kong. Future cooperation with Hong Kong will be an integral part of the U.S. Government's strategy to combat Asian organized crime. It is also important that Hong Kong does not become a haven for fugitives from U.S. justice due to the lack of an extradition treaty.

Since 1991, the Departments of Justice and State have been working to build an infrastructure for our future law enforcement relationship with Hong Kong. We believe that the extradition agreement now before you is the cornerstone, which, together with agreements in the areas of mutual legal assistance and prisoner transfer that are also before the Committee, will protect U.S. law enforcement interests and support the autonomy of Hong Kong.

Thank you, Mr. Chairman.

Senator THOMAS. Thank you, sir. Ms. Borek.

**STATEMENT OF JAMISON S. BOREK, DEPUTY LEGAL ADVISOR,
U.S. DEPARTMENT OF STATE**

Ms. BOREK. Thank you, Mr. Chairman.

I am pleased to appear before you today to testify in support of this extradition treaty. As you know, as was clear at our earlier hearing and as Mr. Richard has testified, we have a very important law enforcement relation with Hong Kong, and we wish to preserve this law enforcement relationship. Extradition is an essential part of the relationship. Since 1991 alone, Hong Kong has extradited over 60 fugitives to the United States and we have sent seven to Hong Kong.

In the Hong Kong Policy Act, the Congress in fact already authorized and approved the continuance in force of our extradition relationship. Section 201(b) of the Hong Kong Policy Act provided that we could continue, in effect, treaties that currently applied to Hong Kong, such as the U.S.-U.K. Extradition Treaty with Hong Kong, after reversion. Unfortunately, it was the uniform view of the United Kingdom, the Hong Kong Government, and the People's Republic of China that it was not appropriate to continue a treaty we had with the United Kingdom as applied to Hong Kong; and the preference was to negotiate a new treaty, as they have done with a number of other countries, such as Netherlands, Canada, Australia, Malaysia, and the Philippines.

We do understand that it will be possible to continue our relationship with Hong Kong in very much its current form because of two features of the arrangements for the future of Hong Kong. As you know, the status of Hong Kong after reversion is spelled out in two important documents, the 1984 Joint Declaration between the People's Republic of China and the United Kingdom on the question of Hong Kong. This is an international agreement, registered with the U.N. second, the 1990 Basic Law, which was promulgated by the People's Republic of China as internal law for the imitation of the Joint Declaration.

These provide fundamentally for continuity in the legal system and autonomy for the criminal justice system in Hong Kong. This is the central feature of maintaining a separate and independent extradition law enforcement relationship with Hong Kong, apart from that with the People's Republic of China.

There are numerous provisions, and I will not go into them all, in the Joint Declaration and Basic Law, which speak to the separateness of the criminal justice system. Basically, there is a separate executive authority, separate courts, separate prisons, separate prosecution. There are special guarantees and express guarantees of due process rights, and continuation of the general common law legal system, and certain features which are unusual, such as the trial by jury. There is an express guarantee of independence in the prosecution of cases.

As it appears from these documents, and as we have been assured by the Secretary of Security and the Solicitor General and others in Hong Kong, there is simply no machinery for intervention by the Central People's Government in Hong Kong in the criminal justice system. While you cannot rule out the possibility of influence, the Hong Kong Government officials remain responsible for their own criminal justice system and for the fulfillment of the obligations under the extradition agreement.

This is not to say, of course, that there are no risks associated with reversion. Consistent with the Hong Kong Policy Act, how-

ever, we seek to maintain those agreements and ties which are consistent with the autonomy which Hong Kong will enjoy under the Joint Declaration and Basic Law.

We have been over these arrangements very carefully with the Government of Hong Kong to see that this will be an arm's length relationship between their criminal justice system and the criminal justice system of the People's Republic of China. There will be some changes undoubtedly. There will be some turnover of personnel. I think generally, however, people have been very pleased with some of the new appointments. The new Chief Justice of the Court of Final Appeals, for example, who was recently announced, the new Secretary of Justice, and others, who will be continuing in place, such as the Secretary of Security.

There will be a new Court of Final Appeal to replace the Privy Council of the House of Lords, which obviously becomes an inappropriate mechanism. This will, however, be a Hong Kong institution, which is separate and independent.

Most troubling perhaps, and the one clear point of contact is that there is a degree of ultimate authority in the Standing Committee of the National People's Congress to interpret the Basic Law. This is not a blank check. It is a procedure which is expected fairly rarely. It operates only after the Hong Kong courts have had a full and independent review of a case. It has certain safeguards as to the restricted scope and the procedures by which it can be invoked. Most fundamentally, it does not bear affirmatively on a criminal trial.

It is easy to see that the People's Republic of China might be able to prevent, for example, a central government official from being tried in Hong Kong, but the same ability to interfere affirmatively with a trial does not exist. We have been assured by the Solicitor General of Hong Kong that this mechanism cannot negate the fundamental fair trial guarantees which are clearly set forth in the Basic Law. As I say, this is the one point of contact in an otherwise completely independent system.

Moreover, as Mr. Richard has testified, to the extent there are risks, the extradition agreement also contains tools to address these risks. Before we would extradite someone, we would be able to assess the nature of the charge, the reasons for which it is brought, the possibility that there is a political aspect, and the overall state of due process in the Hong Kong legal system.

We are not obliged to extradite for political offenses or where there is a political motivation for the offense. We are not obliged to extradite our nationals where we feel that there is an official public interest or policy at stake for any reason which we choose.

There are other factors as well. I will not go into all of them, but the basic conclusion is that this agreement is designed to take account of the future situation in Hong Kong, the potential for good, and the risks for problems. We believe that this will provide a sound basis to continue our important extradition relation and to support also the institutions and people of Hong Kong in the future.

Thank you, Mr. Chairman.

[The prepared statement and information submitted by Ms. Borek follows:]

PREPARED STATEMENT OF JAMISON S. BOREK

Mr. Chairman and members of the Committee: I am pleased to appear before you today to testify in support of a new extradition treaty between the United States and Hong Kong. The Department of State greatly appreciates this opportunity to move toward ratification of this important treaty. Combating international crime is a major focus of United States foreign policy. President Clinton has repeatedly highlighted the threat posed to our national security and the need for international cooperation in fighting transborder criminal activity, especially violent crime, terrorism, drug trafficking, alien smuggling and the laundering of proceeds of organized crime.

Hong Kong is one of our most valuable allies in this fight against international crime, and law enforcement is an important and vital element of our bilateral relationship. The ability to pursue fugitives who flee to Hong Kong and extradite them to the United States for trial is an essential part of that relationship. Since 1991 alone, Hong Kong has extradited over 60 fugitives to the United States and we have sent seven to Hong Kong under the 1972 treaty between the United States and the United Kingdom and the 1985 Supplementary Treaty, both made applicable to the Crown Colony of Hong Kong. This treaty, however, will cease to be effective for Hong Kong as of July 1, 1997, when Hong Kong reverts to the sovereignty of the People's Republic of China. Because of the importance of our law enforcement relationship with Hong Kong, we have anticipated this change and have negotiated the new treaty that you have before you. To complete the picture, we have also negotiated new treaties in the areas of mutual legal assistance and prisoner transfer which have recently been submitted to you as well for advice and consent.

This new treaty, the Agreement Between the Government of the United States of America and the Government of Hong Kong for the Surrender of Fugitive Offenders ("the Treaty") will, when ratified, provide the basis under U.S. law for extraditions from the United States and for requesting extraditions from Hong Kong. The Treaty is entered into with the sovereign assent and authorization of both the United Kingdom and the People's Republic of China ("PRC"). The Treaty itself expressly provides that Hong Kong enters into it with the authorization of "the sovereign government which is responsible for its foreign affairs." At present, that is the United Kingdom. However, the PRC has also specifically authorized the negotiation and conclusion of the Treaty, as well as its continuation in force after the reversion on July 1, 1997.

To date Hong Kong has followed this same process to negotiate and sign agreements for surrender of fugitive offenders with six countries in addition to the United States: the Netherlands, Canada, Australia, Malaysia, Philippines, and Indonesia. With your permission, I would also provide the committee with a diplomatic note for the record from the Government of the United Kingdom explaining in some detail the process established for authorizing and approving these new agreements and the role of the Joint Liaison Group.

After July 1, Hong Kong will continue to operate autonomously in the field of law enforcement. The status of Hong Kong after reversion is spelled out in two important documents. First, the 1984 Sino-British Joint Declaration on the Quest for Hong Kong, which is an international agreement registered with the United Nations, provides for the transition of sovereignty from the United Kingdom to China. In so doing it embodies the concept of "one country, two systems" for Hong Kong, under which Hong Kong will retain a high degree of autonomy in all matters except foreign affairs and defense. In addition, the 1990 Basic Law promulgated by the People's Republic of China provides the fundamental governing framework for implementing the principles of the Joint Declaration in the future Hong Kong Special Administrative Region.

Together these instruments explicitly provide for the continuation of the capitalist system and way of life unchanged in the HKSAR for 50 years; for continuity of the legal system and laws; for an independent judiciary and for independent prosecution. They also provide for the continued applicability of the International Covenant on Civil and Political Rights to the HKSAR and provide other specific protections for individual rights and basic freedoms. The Basic Law expressly prohibits interference by the PRC in affairs administered by the HKSAR. In sum, they provide that law enforcement and criminal justice, including police force, prosecution, trial and imprisonment will be a matter administered independently by the HKSAR by Hong Kong courts under Hong Kong law.

The continued ability to extradite and to request extradition is an essential element in preserving our important law enforcement relationship with Hong Kong. It will avoid the possibility that Hong Kong could become a refuge for fugitives escaping justice from the United States. At the same time, it will allow us to return fugi-

tives wanted in Hong Kong. Apart from law enforcement considerations, ratification of this Treaty would also be an important step in putting US-Hong Kong relations on a stable footing for the post-1997 period, and would support the goals of the US-Hong Kong Policy Act in continuing separate legal arrangements between the United States and Hong Kong after reversion.

The Treaty will not require implementing legislation in the United States. For its part, Hong Kong enacted the Fugitive Offenders Ordinance on April 25, 1997, providing the general statutory basis for Hong Kong to implement its agreements in this area. Subsidiary legislation required by the Ordinance to bring the Treaty within the general framework is pending and we are advised that it will be brought into force on the day the Treaty enters into force.

Overall, the Treaty provides significant advantages to the United States, particularly when compared to the absence of any agreement on these issues. Most of the Treaty's provisions are those found in other recently negotiated bilateral extradition treaties. This treaty incorporates the revised and modernized features contained in the treaties presented to you last year. First, it defines extraditable offenses to include conduct which is punishable by imprisonment or deprivation of liberty for a period of one year or more in both states (the so-called "dual criminality" approach). Although there is an extensive list of specific offenses for which the parties agree to extradite fugitives, the last item in the list is a blanket reference to all other offenses that are punishable under the laws of both parties by more than one year imprisonment. Of particular importance in our extradition relationship with Hong Kong is the fact that this provision will for the first time make crimes such as alien smuggling, intellectual property violations and customs offenses extraditable. More generally, the dual criminality approach obviates the need to renegotiate treaties to cover new offenses should both states pass laws to address new types of criminal activity. Second, this treaty provides that attempts and conspiracies to commit extraditable offenses are themselves extraditable offenses. This ensures that certain drug-related offenses and offenses under our continuing criminal enterprise and racketeer influence and corrupt organization statutes are covered by the treaties.

Third, it provides for the extradition of nationals by both Parties. This provision is specially adapted to the circumstances of Hong Kong, but also provides for the fact that the great majority of our extradition requests, according to past practice, will likely be for Chinese nationals resident in Hong Kong.

Finally, it contains a provision which permits the temporary surrender of a fugitive to the Requesting Party when that person is facing prosecution for, or serving a sentence on, charges within the Requested Party.

Certain other provisions have been included that are of particular value given the special circumstances of Hong Kong, including protections for fugitives after Hong Kong's reversion. Article 16, for instance, provides the customary protections referred to as the "rule of specialty." This provides that an extradited fugitive cannot be tried or punished nor transferred outside the jurisdiction of the requesting Party for crimes committed prior to surrender unless the sending Party consents or the person has had an opportunity to leave the jurisdiction and has chosen not to do so or has left and voluntarily returned. In the Treaty, the specialty provision has been specifically adapted to take account of the precise situation of Hong Kong, and thus prohibits the surrender or transfer of a fugitive anywhere beyond the jurisdiction of the Special Administrative Region of Hong Kong.

Furthermore, under Article 20, these protections are made expressly applicable to persons who have been surrendered between the parties prior to its entry into force. That is, the Treaty expressly extends these protections to persons who have already been extradited under the existing treaty. We believe that the specialty protection of the current treaty would continue to apply to such persons even in the absence of the new treaty. These provisions, however, make clear that anyone we extradite to Hong Kong is fully protected from being tried for other crimes or surrendered outside of Hong Kong to other parts of the PRC or anywhere else for the same or prior crimes without the express consent of the United States.

Article 3 of the Treaty provides that each Party shall normally surrender its nationals, except in special circumstances. It grants the executive authority of the United States the right to refuse surrender of a U.S. national if the requested surrender relates to the defense, foreign affairs or essential public interest or policy of the United States. It reserves the same right to the executive authority of Hong Kong. In addition, the executive authority of Hong Kong may refuse surrender if the person neither has the right of abode in Hong Kong nor has entered Hong Kong for the purpose of settlement. In that event, however, the PRC must have jurisdiction over the offense and must have commenced or completed proceedings for the prosecution of the person. The Hong Kong Government believes that its discretion to deny extradition on these grounds would rarely, if ever, be used. Similarly, the

United States does not anticipate the need to exercise this right, but it would provide an important protection for our nationals if we found it necessary in a particular case.

Further protections, applicable to both U.S. nationals and aliens, include the discretion in Article 7 to refuse surrender of a fugitive when the surrender is likely to entail exceptionally serious consequences related to the fugitives age or health. In addition, Article 6 provides that surrender shall be refused if it is determined that (1) the request was politically motivated, (2) the primary purpose of the request was to prosecute or punish a person for reasons of race, religion, nationality or political opinion, or (3) the person sought is likely to be denied a fair trial or be punished account of his race, religion or national origin. Finally, if the death penalty were to be re-enacted under Hong Kong law, Article 4 provides for conditioning surrender on assurances that it will not be imposed or carried out if surrender is sought for an offense punishable by death under Hong Kong law but not under U.S. law.

Taken together these provisions of the treaty give us a solid framework for maintaining the important law enforcement relationship with Hong Kong while also establishing the necessary protections for individuals whose extradition might be requested.

Thank you, Mr. Chairman, for this opportunity to testify before you today. I will be happy to answer any further questions that the Committee may have.

NOTE NO: 12/97

Her Britannic Majesty's Embassy present their compliments to the United States Department of State and have the honour to inform the United States Department of State of the arrangements agreed between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China relating to the application to Hong Kong after 30 June 1997 of bilateral agreements and, in particular, to extradition arrangements between the United States and the Hong Kong Special Administrative Region of the PRC (HKSAR).

The Status of the Sino-British Joint Declaration on the Question of Hong Kong

The Sino-British Joint Declaration on the Question of Hong Kong, signed on 19 December 1984, is an international treaty, registered at the United Nations, under which the United Kingdom undertakes to restore sovereignty over Hong Kong to China with effect from 1 July 1997 and the Chinese Government sets out the basic policies that it undertakes to implement regarding Hong Kong, including that the HKSAR shall have a high degree of autonomy except in the fields of foreign affairs and defence. The HKSAR will be vested with executive, legislative and independent judicial power, including that of final adjudication. It will retain the status of a free port and a separate customs territory as well as an international financial centre, and it will have independent finances. The HKSAR may on its own maintain and develop economic and cultural relations and conclude relevant agreements with states, regions and relevant international organisations. The HKSAR Government may on its own issue travel documents for entry into an exit from Hong Kong. Annex I to the Joint Declaration elaborates these basic policies. The Joint Declaration and its Annexes are equally binding.

The Authority of the Sino-British Joint Liaison Group

The British and Chinese Governments agreed in the Joint Declaration to establish a Joint Liaison Group to discuss the effective implementation of the Joint Declaration as well as matters relating to the smooth transfer of government at midnight; on 30 June 1997. In accordance with Annex II to the Joint Declaration, the Joint Liaison Group consists of a Senior Representative of Ambassadorial rank and four members from each side, with support staff and experts as needed.

General principles relating to the continued application of existing bilateral agreements to HKSAR

During the Joint Declaration negotiations, Britain and China agreed that, in line with the high degree of autonomy to be enjoyed by the HKSAR in the areas described in para 3 above, the HKSAR could have its own network of agreements with third countries, separate from China, in these areas. The Joint Declaration provides that:

“International agreements to which the People’s Republic of China is not a party but which are implemented in Hong Kong may remain implemented in the HKSAR.” (sentence 138)

But Section 1(1) of the Hong Kong Act 1985 provides that:

“As from 1st July 1997 Her Majesty shall no longer have sovereignty or jurisdiction over any part of Hong Kong.”

One consequence of the provision for the transfer of sovereignty was uncertainty as to the continued application to Hong Kong after the handover of existing bilateral agreements between the UK and third countries at present extended to Hong Kong.

Accordingly, the British and Chinese Governments had to consider how to ensure that Hong Kong has in place before 1 July 1997 a network of Hong Kong/third country bilateral agreements, replacing the UK/third country agreements extended to Hong Kong, capable of remaining in effect as provided for by JD 138.

The process the two governments agreed in the Joint Liaison Group enables the Hong Kong Government to negotiate the agreements it needs and allows these agreements to continue in effect after the handover without any further action or checking by China, since the entire process will have been scrutinised and agreed by the Chinese Government through the Joint Liaison Group.

The basic steps in the process carried out through exchanges in the Joint Liaison Group are:

- a Model Agreement, eg a model Surrender of Fugitive Offenders Agreement, is negotiated and agreed;
- on behalf of the Hong Kong Government, the British Government asks the Chinese Government to approve a list of negotiating partners;
- once the Chinese Government approves the proposed partners, the British Foreign Secretary signs a formal entrustment authorising the Hong Kong Government to negotiate on its own behalf with those partners on the basis of the Model Agreement;
- once the Hong Kong Government and an approved partner reach agreement, they initial the text. The British Government pass the initialled text to the Chinese Government through the Joint Liaison Group for approval.

The Chinese Government may seek clarification if the initialled text departs significantly from the Model Agreement. Further negotiations between the Hong Kong Government and the approved partner may be necessary. Once the Chinese Government has approved the initialled text, the Hong Kong Government and the approved partner can sign the agreement.

An agreement so concluded and brought into force before the handover will remain in effect after the handover, notwithstanding that China may itself separately have concluded a bilateral agreement in the same area with the same approved partner.

The process described above is already well underway to ensure that existing UK/third country bilateral agreements which have been extended to Hong Kong are, where appropriate, replaced before 1 July 1997 by a Hong Kong/third country bilateral agreement capable of continuing in effect in the HKSAR.

The HK/US Agreement for the Surrender of Fugitive Offenders

In line with the process described above, the Joint Liaison Group has agreed a Model Surrender of Fugitive Offenders Agreement and the Chinese Government has approved a number of negotiating partners, including the United States, with which the Hong Kong Government has, under entrustment by the British Foreign Secretary, concluded new agreements for the surrender of fugitive offenders to replace the existing agreements extended to Hong Kong by the United Kingdom, and to continue in force after the handover.

In the case of the HK/US Surrender of Fugitive Offenders agreement, the Chinese Government approved the text of the agreement during the thirty-seventh plenary meeting of the Joint Liaison Group, held in Peking from 17 to 19 September 1996.

A copy of the Joint Communique issued after that meeting is at Annex A. A copy of the press statement released by the British Senior Representative to the Joint Liaison Group in conjunction with the Joint Communique, recording at paragraph 7 the approval of the Chinese Government to the initialled agreement, is at Annex B. The HK/US Agreement for the Surrender of Fugitive Offenders was duly signed in Hong Kong on 20 December 1996 the United States Consul-General in Hong Kong and the Hong Kong Secretary for Security. The British Senior Representative to the Joint Liaison Group and a Chinese Representative to the Joint Liaison Group were present at the signing ceremony.

Her Britannic Majesty's Embassy wishes to draw to the attention of the United States Department of State a statement issued by the Chinese Ministry of Foreign Affairs spokesman on 21 January, at Annex C. The British Government endorses the Chinese Government's statement that the Hong Kong-US Surrender of Fugitive Offenders Agreement shall remain valid after 30 June 1997.

For Hong Kong's part, it will be necessary to enact legislation to enable this Agreement, and others like it, to be implemented in Hong Kong. Accordingly, a Fugitive Offenders Bill, which has been agreed by the Chinese Government through the Joint Liaison Group, has already been introduced into the Hong Kong Legislative Council. We are confident that this legislation will be enacted before 30 June.

Her Britannic Majesty's Embassy avail themselves of this opportunity to renew to the United States Department of State the assurances of their highest considerations.

BRITISH EMBASSY,
WASHINGTON, DC,
24 January 1997.

ANNEX A

JOINT COMMUNIQUE ISSUED AFTER THE 17-18 SEPTEMBER 1996 MEETING OF THE
JOINT LIAISON GROUP

1. The Joint Liaison Group held its thirty-seventh meeting in Peking from 17 to 19 September 1996.

2. The Group had a discussion about the Transfer of Government, including the transitional Budget and related matters, transfer of Archives, Government assets, the Handover Ceremony etc; matters relating to Hong Kong's international rights and obligations; Hong Kong's Air Services Agreements; Civil Service matters; the Defence of Hong Kong and Public Order; franchises and contacts extending beyond 1997 and related matters (including the Railway Development strategy and Container Terminals); Investment Promotion and Protection Agreements between Hong Kong and relevant countries; Surrender of Fugitive Offenders Agreements between Hong Kong and certain countries; the Reciprocal Recognition and Enforcement of Judgements in civil and commercial matters between Hong Kong and foreign countries; Localisation of Laws, Adaptation of Laws; the Court of Final Appeal; the implementation of the provisions of the Joint Declaration relating to the Right of Abode in Hong Kong after 1997; Visa Abolition Agreements; and Vietnamese Migrants in Hong Kong (boat people and refugees).

3. The next meeting of the Joint Liaison Group will take place in Hong Kong at a time to be decided.

ANNEX B

PRESS STATEMENT RELEASED BY THE BRITISH SENIOR REPRESENTATIVE TO THE JOINT
LIAISON GROUP AFTER THE 17-19 SEPTEMBER 1996 MEETING OF THE JOINT LIAISON
GROUP

1. I hope that you have all received copies of the press communique, which lists the subjects we discussed at this week's meeting. Before taking your questions, I would like to expand a bit on what is in the communique and give you a few personal impressions of how the meeting went.

2. There are now less than 300 days to go before the handover, and both sides are acutely aware of the need to accelerate the pace of our work if we are to complete our agenda by 30 June 1997. This will be a key theme of Mr. Rifkind's meeting with Vice Premier Qian in New York. Since JLG XXXVI, we have held a record number of expert meetings—22 in all—and a further three expert meetings have taken place in the margins of this Plenary. Those meetings have produced good results, and we have thus been able to gather a very respectable harvest of agreements this week.

3. First, and perhaps most important, we have reached agreement on CT9. Ambassador Zhao and I signed an Agreed Minute earlier today, which makes it possible for the project to proceed without further delay. The HKG will now be submitting

the matter to their Land Commission for approval of the Land Grant. This is excellent news for Hong Kong, not only because of the economic benefits that will flow from this agreement, but also because of the positive signal it sends to the international investment community. The HKG's objectives to enlarge the capacity of the container port and to introduce more competition among operators have been achieved. Everyone regrets the long delay in achieving the result, but the important point is that the deal is now agreed.

4. We also signed an Agreed Minute on the Galaxy Satellite TV Licence—another franchise straddling 1997. That was very welcome, as it means there are now no long-outstanding contracts or franchises on the JLG agenda: (you will recall that the PCS issue licenses for the next generation of mobile phones) was successfully resolved last July.

5. The second area where we made good progress was air services. We reached agreement on 2 ASAs—with Thailand and Burma (Myanmar). We also reached agreement on Hong Kong negotiating its own overflight agreements with various countries. Those are of vital importance to Hong Kong's civil aviation interest and we expect negotiations to begin in the near future. We still have a substantial backlog of work on air services, and little time in which to complete it.

6. Further progress was made on the localisation of laws programme. Agreement was reached on the introduction in Hong Kong of Bills first relating to the Surrender of Fugitive Offenders and second relating to Civil Aviation, Carriage by air, replacing UK legislation on compensation for people who sustain injury or loss while using international air services.

7. We also approved for signature an important new agreement with the USA on the Surrender of Fugitive Offenders. Arrangements can (copy unreadable) for the Hong Kong Government to sign the agreement with (copy unreadable).

8. It was also agreed that Hong Kong could continue to participate in the International Civil Aviation Organisation. Our agreement ensures that Hong Kong will continue to be able to play a full role in the business of ICAO and derive the full benefits if ICAO membership.

9. We also confirmed agreement at this meeting on the continued application to Hong Kong of a large number of multilateral agreements—58 in all: a record number. These include 46 International Labour Conventions and 12 Conventions relating to amongst other things, the rights of women, and the elimination of racial discrimination. We also continued to make progress on the mechanism for the continued application of international rights and obligations to the Hong Kong SAR.

10. We also made important progress on travel documents such as Documents of Identity, Hong Kong Re-entry Permits, and Seamen's Identity Books. The Chinese side confirmed that such travel documents in use before 1 July 1997 would continue to be issued until such time as new SAR documents were available. We have welcomed this sensible and pragmatic solution. Details will be worked out later between experts.

11. In sum, this was a good JLG. We are not making serious progress. But we remain very conscious of the need to resolve many important issues including those relating to continuity of law in Hong Kong. Progress on adaptation of laws is not as fast as I would like, although experts agreed to meet again in early October. And the Chinese side have yet to live up to their undertaking, given at JLG XXXVI, to discuss with us the Garrison Law. Further discussions will also be needed on important immigration issues including Right of Abode and Visa Abolition Agreements, although good progress was made on those subjects at export level this week.

12. During this JLG we also had a vigorous series of exchanges on the Provisional legislature. I made the British side's view very plain. We believe firmly that it is unjustified, unnecessary, and a serious disruption at a time when the great majority of people in Hong Kong want continuity and a smooth transition. I cannot claim that there was any meeting of minds on this matter. Finally, Ambassador Ahaio and I have continued our discussions about the Handover Ceremony, but there is still more work to be done. We intend to press on hard with our exchanges in order to deliver a result in time for the Foreign Ministers' meeting in New York next week.

CHINESE SPOKESMAN SAYS INDEPENDENCE OF JUDICIAL SYSTEM NOT AN ISSUE

TEXT OF REPORT BY XINHUA NEWS AGENCY

Beijing, 21st January: It is groundless to question the independent nature of the judicial system of the future Hong Kong Special Administrative Region (HKSAR), Chinese Foreign Ministry spokesman Shen Guofang stated at a regular press conference in Beijing today [21st January].

Some correspondents asked: Recently, when a US district court was trying a case involving the extradition to Hong Kong of a Hong Kong resident named Jerry Lui Hin-kong, the independent nature of the judicial system of the future Hong Kong Special Administrative Region was called in question by some people. How would you comment on this?

Shen answered: The Chinese government will resume the exercise of sovereignty over Hong Kong and establish the Hong Kong Special Administrative Region [HKSAR] on 1st July 1997. The Sino-British Joint Declaration and the Basic Law of the HKSAR stipulate that the laws currently in force in Hong Kong will remain basically unchanged; the laws previously enforced in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene the Basic Law, and subject to any amendment by the legislature of the HKSAR. The HKSAR shall be vested with independent judicial power, including that of final adjudication, and the courts of the HKSAR shall independently adjudicate cases in accordance with the laws applicable in the region, free from any interference.

He continued: The agreement between Hong Kong and the United States on the surrender of fugitive offenders which had been approved through discussions by the Sino-British Joint Liaison Group and was recently signed shall remain valid after 1st July 1997.

He said: In view of the foregoing, it is groundless to question the independent nature of the judicial system of the future Hong Kong Special Administrative Region. Source: Xinhua news agency, Beijing, in English 1007 GMT 21 Jan 97

Senator THOMAS. Thank you very much.

The concern will likely be the involvement of the PRC. What is the difference between this treaty, Mr. Richard, and the one that was in place, basically, with Great Britain?

Mr. RICHARD. Well, of course, this treaty provides a broader scope of offenses that are covered by the agreement. Significantly, it has greater discretion with respect to the ultimate decision to extradite. It contains express provisions regarding political motivation and political offenses. It has limitations on extradition. It provides a humanitarian basis for denying extradition, which is not contained, to my recollection, in the U.K. treaty.

The agreement with the U.K. does not provide assurances against transfers beyond the jurisdiction. The rule of specialty, I do not believe, is as well articulated in the existing agreement as it is in the current proposed extradition treaty. Finally, the political offense exception contained in this agreement is far more narrow than the U.K. treaty provides. The U.K. treaty provides that a political offense exception should not, in effect, be available involving any crime of violence.

This agreement with Hong Kong is much more narrow in its scope, and just provides a political offense exception to extradition will only be available, if you will, for multilateral conventions that we are both parties to, as well as attacks on the head of state and close family members.

So there is a lot of differences in form between the existing treaty and the new agreement. Many of them are designed to ensure

that we have maximum flexibility in the administration of the agreement and a broader scope of coverage than exists in the current agreement.

Senator THOMAS. Who negotiated the agreement?

Mr. RICHARD. The current agreement? A joint team between the State Department and the Department of Justice, along with—

Senator THOMAS. With whom? With whom did you negotiate?

Mr. RICHARD. With the Hong Kong authorities, after receiving the appropriate endorsement for the beginning, or commencement, of extradition arrangements with the coordinating committee of the British, and the PRC.

Senator THOMAS. So this is unique, then? This is not a sovereign that you are dealing with, so there is approval, then, from the PRC for this treaty?

Mr. RICHARD. That is correct.

Senator THOMAS. And is that why it is different from the previous one?

Mr. RICHARD. Well, certainly that is a major difference. This is a unique situation. I am not familiar that we have any similar or analogous arrangement with any other subgovernmental component. I may be mistaken on that point. But it is unique and fashioned to accommodate the uniqueness of the situation. I think, as I indicated, it satisfies both our law enforcement needs and our need to ensure that we have maximum flexibility in its administration.

Senator THOMAS. Would you anticipate, Ms. Borek, any change or that there be any difference after the changeover? Do you think that there will be — I presume that is one reason we are seeking to do it now, before the changeover, is that correct?

Ms. BOREK. Well, primarily, we would like to have it in force, to continue our extradition relationship. There is a 30-day entry into force provision. So there is already going to be a bit of a gap. That interrupts the extradition relationship. That was the primary reason for trying to do it before the changeover. I do not think there should be any significant change as of July 1.

As I say, there are some personnel changes, but they do not seem to be — by and large, they seem to be encouraging. As Mr. Richard said, we do have the specific approval of the final agreement, specific authorization for its continuation in force by the PRC, as well as the U.K. so that is, I think, clearly established on all sides.

Senator THOMAS. I think you indicated in your statement that it prohibits interference under the Basic Law. Or on the other hand, is it not true that the PRC does retain control over foreign affairs, and that interpretation will be theirs as to whether or not the foreign affairs are the issue? Is that not true?

Ms. BOREK. Well, there is this one point of contact only I think in the criminal justice system. There is no mechanism or means by which they can interfere directly in the prosecution of cases and the actual actions of the executive branch simply by saying it is a foreign affairs matter. They have retained a certain ability in the extradition agreement, and this was something we negotiated and it was a fairly narrow exception, to refuse to extradite someone who was a Chinese national for foreign affairs reasons.

They have also retained some flexibility — basically a priority — for Chinese nationals who are not Hong Kong residents, where there is a Chinese interest in prosecution. But the points of contact, I think, are specific. It is not like a wholesale ability to go in and just say, well, today I am going to do this because it is a foreign affairs thing.

While they have authority over foreign affairs, there are particular mechanisms by which they are to exercise that authority. In the case of prosecution, there is no mechanism. In the case of the courts, there is this reserved authority for the National People's Congress Standing Committee, which I mentioned before.

Senator THOMAS. This is not a matter of prosecution; it is a matter of extradition, is it not?

Ms. BOREK. But I guess what I am thinking is what we are concerned about is that when we do extradite someone, that it be a fair prosecution and a fair trial.

Senator THOMAS. I see. You indicated, I think also in your statement, that the majority of our extradition requests have been for Chinese nationals who are residents in Hong Kong.

Ms. BOREK. Yes.

Senator THOMAS. Would you not expect there to be some sort of resistance to that sort of extradition, maybe based on foreign policy or foreign affairs?

Ms. BOREK. Not as a general principle. The agreement establishes the presumption that there would be extradition of nationals. This is something that was clearly articulated and understood by everyone in the negotiation process. Also I might say that, in the areas which we are talking about — for example, drugs — the People's Republic of China does have an interest also in seeing that people are prosecuted. At the higher levels, they have a very aggressive policy against drugs independently, even though we do not have a very much cooperative effort in that regard.

Senator THOMAS. What if you, Mr. Richard, did not have cooperation on the extradition, and let us say it is claimed foreign involvement, what would you do about it? What is the relief valve for the United States?

Mr. RICHARD. Well, that would be a very significant event if we did not have an extradition relationship, given the significant role that Hong Kong currently plays.

Senator THOMAS. Excuse me a second. Can you hear in the back of the room?

Mr. RICHARD. I am sorry.

Senator THOMAS. Pull that up a little closer, if you will, sir, please.

Mr. RICHARD. Given the nature of the law enforcement problem that we have been confronting in Hong Kong for quite a while, with respect to money laundering and other related offenses, the failure to have a viable extradition relationship would be a very significant blow to our law enforcement interests. It would, in effect, establish Hong Kong as a major safe haven, if you will, for criminal activity.

Senator THOMAS. I understand that. I think my question is, if you ask for extradition, but for some reason or other, you think it should be done under the treaty, but the PRC steps in and refuses it, what do you do about it? We just had a hearing last week, for

instance, on I think prison work or something. In 4 years, we were never given the chance to do anything about it. So I guess a lot of people will be a little concerned that we are going into a treaty, but is it enforceable? What do you do?

Mr. RICHARD. Well, the treaty uniquely provides that a denial should be accompanied by an explanation of why it was denied. If we see that the agreement is of course being perverted, if you will, in its application, we would then have to assess it.

We would determine or attempt to determine where that is coming from, and whether it is unique to the nature of the persons we are seeking or the nature of the crimes we are looking at and then, hopefully, in conjunction with our State Department colleagues, devise an effective response. This, though, is no different than other extradition relationship we have around the world.

Senator THOMAS. It is different in that you are not dealing with a sovereign here, is it not?

Mr. RICHARD. Well, it is in the sense that, yes, our initial contact points are with the Hong Kong authorities. But in the sense that we have a treaty partner who is not implementing the agreement in good faith, it presents us with the same types of challenges — how do we bring the appropriate pressure and in what arena and in what multiple arenas? And that is not going to be unique to this particular situation.

Senator THOMAS. I see.

We have been joined by two other Senators.

Senator Robb, do you have a comment, sir, and questions?

Senator ROBB. Thank you, Mr. Chairman. I apologize. I had two other meetings and I was unable to be here for the opening testimony, but I have been visited over the last couple of years by individuals who were concerned about the prospects that are addressed in this particular hearing. One in particular, I just might ask you, because of his prior relationship to the State Department and what have you, Judge Abe Sofaer, had expressed real concern about the extradition treaty as it appeared to be developing at that time.

Now, I do not know whether you covered this in your opening statements, and if you have, you need not go into any great detail, but I would be interested in terms of the objections that he raised generally.

First of all, have either of you had an opportunity to discuss those concerns that he raised with him, particularly with respect to extradition, where there might be political motivation involved or extra territorial allegations of extra territorial conduct that might or might not fall under the treaty?

Ms. BOREK. He has not raised with the State Department, at least to my knowledge, specific concerns about the extradition treaty. I do not know at what stage he would have been talking about it. At present, there is a protection against having to extradite when there is a politically motivated prosecution. That is one of the somewhat unusual features.

Senator ROBB. But who makes the determination? I guess that is the question.

Ms. BOREK. The Secretary of State.

Senator ROBB. And that is not subject to interpretation or review?

Ms. BOREK. No, it is in the category of considerations to which the Secretary usually looks at.

Also on the extra territoriality, I do not think we expect that to be a problem. That is something which we would be having a relationship in those areas in which Hong Kong and the United States both approach the question in the same way as far as extra territorial crimes. Obviously, when you are dealing with international organized crime and money laundering and drugs, you do have activities which take place in those two countries.

Senator ROBB. Specifically, and I apologize, it has been some period of time since I discussed this and I have just been involved in other matters this morning, but have either of you or your respective Departments of State or Justice had occasion to deal with the concerns that were raised at the time?

I state it in this manner only because it seemed to me that this was the kind of thing that there ought to have been some consultation, if indeed there were legitimate concerns that might have been addressed in that way. My question has to do with whether or not there has been consultation between the Department of State and/or the Department of Justice with him, or if you have had any communications one way or another?

Mr. RICHARD. I cannot answer that question at the moment. I assume there was plenty of opportunities, if you will, between the prosecutors that handled the case and the defense counsel for this issue to come up. But I do not know specifically if that did. I would be glad to find out and let you know.

Senator ROBB. I would not normally state it in terms of a specific individual, but I remember there were concerns that, at least as they were presented, seemed to me were worthy of consideration. I did not know whether those had been resolved.

One last question, if I may. What kind of signal would this send to both the Hong Kong and the PRC and other nations if the Senate did not ratify in this particular instance?

Mr. RICHARD. Well, I mean, from a law enforcement point of view, it would be a very significant step. It would certainly undercut our ability to try to maintain, if not improve upon, our current law enforcement arrangements. It would certainly weaken our ability to respond to international organized crime and narcotics, and it would be a very significant blow, not just to our relationship with Hong Kong or the PRC, but also to our attempt to mobilize the international community, as a community, to address these problems.

It requires a matrix of agreements and arrangements around the world. For us not to have a viable relationship with the Hong Kong authorities would be a very significant message and a significant blow to our effectiveness.

Ms. BOREK. Let me add that I think I can say that, with regard to the specific case that Mr. Sofaer was concerned about, this treaty speaks very directly to helping that case. Because the particular concern there was that someone might be surrendered to the PRC. This treaty contains express, specific safeguards that no one who is extradited either under it or prior, even now, would be surrendered for other crimes as this individual was concerned

about. We think that is, in any case, the rule. But the treaty would be of assistance in that it makes that rule very clear.

The reaction in Hong Kong demonstrates that they are very much concerned to have an extradition relationship and very much distressed, I think, across the board — people of all different political opinions — to think that we would take the position now that they have no autonomy, that there is no point in even pursuing the agreement because they are just puppets of the PRC. I think that is a very negative and distressing signal from the point of view of even in Hong Kong.

Senator ROBB. A final question. Did either one of you during the course of your testimony — and I will rely on the testimony that you have submitted and the record of this hearing for any additional information, and if there are other questions, I will submit them in writing — but were there any reservations that either of you expressed about the treaty at this point, or are both Departments solidly behind ratification?

Mr. RICHARD. I think, speaking for the Department, we are very pleased with the agreement. But it would be foolish for any of us not to be sensitive toward these concerns. I think we all have concerns. But they are not unique in the sense that we have concerns under other extradition treaties that require a certain level of vigilance to ensure that the systems are in fact affording extraditees due process and the like.

The system as currently established, and which has worked very effectively over these years, is to provide the Secretary of State the final judgment of whether or not to issue the surrender warrant after a judicial finding of extraditability. That has always been a safeguard, if you will, to address problems across the board, regardless of the provisions in the treaty. This treaty, though, goes further, because it articulates in greater detail all of the variety of considerations that can be taken into account in making a decision of extraditability, and a decision to in fact issue the surrender warrant.

So it is not a question of reservations, it is a question of ensuring that we monitor the situation as we go along, in consultation with the Congress, and evaluate if there are emerging trends that give us concerns.

Senator ROBB. Thank you.

Ms. Borek, would you like to add anything to that?

Ms. BOREK. No, I think that is exactly right. This is a good treaty for the situation. We will have to, obviously, pay attention to the administration of the treaty.

Senator ROBB. Thank you.

Thank you, Mr. Chairman.

Senator THOMAS. Senator Kerry, glad to have you, sir.

Senator KERRY. Thank you, Mr. Chairman.

Thank you for proceeding forward in a timely manner on this treaty, which is obviously important in the context of events coming up at the end of the month.

Since 1991, I think 64 people have been extradited from Hong Kong to the United States, 56 of whom were extradited for drug-related offenses — drug crimes, drug-related offenses — whereas, in that same span of time, only seven people have been extradited

from the United States to Hong Kong. So there is clearly a compelling need for the United States to continue to have this relationship in place. Obviously, I guess there were 13 white collar crimes and 24 violent crimes, including murder and rapes. So, on all levels, it has proven to be very important to us.

The principal concern I guess most of us have is the sort of escape hatches and their definitions, the Article 16 prohibition — are you confident, both of you — and this is the principal concern I think I have — that the insurance represented in Article 16 is adequate?

Mr. RICHARD. Well, I think even without the provision, under existing arrangements and domestic law, the Secretary of State would always retain the option to deny extradition in circumstances where she feels uncomfortable for whatever reason. I think this goes a step further, because it incorporates that concept in the context of the agreement itself.

Senator KERRY. Well, it goes a little further than that, does it not, Mark, in the sense that it — you are not allowed to transfer somebody from Hong Kong to Beijing without our agreement?

Mr. RICHARD. Our consent, that is correct.

Senator KERRY. But that is after we have already agreed to transfer him. We could transfer them to Hong Kong, and they could subsequently make a decision to send them to Beijing?

Mr. RICHARD. Well, they would have to seek our concurrence.

Senator KERRY. Correct. I am asking you whether we are feeling safe enough about the context of the treaty that that request is going to be forthcoming, or that we have adequate recourse in the event it were not?

Mr. RICHARD. I would have to say, under the circumstances, this probably goes as far as one could imagine going to ensure that we have maximum control and authority here. The difficulty may be, and I cannot address it, is our ability to monitor, for example, subsequent incarceration and location.

I would hope, and I cannot speak from special knowledge, that there would be a sufficient continued nexus between our consular in Hong Kong and these individuals, so that we are monitoring them where they are incarcerated, and if there are any other proceedings instituted against them. Obviously, if there is any indication that we have a problem with that, we would have to respond to it in a forceful, diplomatic fashion.

Senator KERRY. I would think it would have to be a requisite that there be that kind of accountability or tracking.

Mr. RICHARD. Sure.

Senator KERRY. It would be critical, obviously.

When you say respond to it, what would the treaty, per se, allow us to do in response to it? I assume we would hold up on any further extraditions.

Mr. RICHARD. Well, I would hope — I mean it is not explicitly contained there — but I would hope that we would have the ability to interview the individuals directly, to gather information as to his or her treatment and to take whatever action we think is appropriate in response to what we perceive to be a violation. I assume that the primary response would be in the diplomatic arena, to bring pressure for compliance.

This is an agreement that, based on prior statistics, is somewhat lopsided, in that we are getting more people back than we are given. The fact that we are expanding the number of offenses suggests that this disparity in usage will expand with the years under this agreement, because we now have more offenses that we are particularly interested in. So, if anything, this disparity will continue and expand.

But with respect to these individuals that are extradited from the U.S. there, we will have to establish regimes to position ourselves so as to effectively monitor it. But I am not sure, again, given the 90 or so extradition arrangements we already have with countries, that we do not have the same obligation, if you will, with respect to those individuals. We should be always monitoring what happens. All of the treaties we have preclude prosecution for offenses not covered by the extradition request.

We have to ensure that wherever the treaty is, that that is adhered to. It is a fundamental principle of extradition. Especially in this circumstance, we would have to monitor it even more closely, to ensure that we have full compliance.

Ms. BOREK. May I add to that?

I think we do not really have to wait until there is a problem. Right now, under Hong Kong law, in fact it is not possible to transfer someone to the PRC. But they will be expecting to develop arrangements. The arrangements they now have make it clear, as a matter of domestic law, that they cannot transfer someone to another jurisdiction without the consent of the United States. So even leaving aside the treaty obligation, even under Hong Kong law at present, there is no way that they could violate that obligation.

We will, of course, be watching any developments in this area that are relevant. If there seem to be a potential even for something to occur which was not consistent with the treaty, then I think we could intervene at that stage. Hong Kong is not a big place, and I think we should be able to have a very detailed idea of what is going on.

Mr. RICHARD. Let me, if I may, just add one thought. We had specifically included in our statements the fact that this extradition arrangement is analogous to other countries arrangements with the PRC and Hong Kong. There are, at least at this present time, I think five or six additional countries that have similar agreements, and I suspect — I mean these are all of our allies — I suspect that we will be in consultation with them, to the extent that we detect problems emerging in their extradition relationships.

We have a variety of additional options of working, even in a concerted way, to ensure that there is full compliance. So, it is a situation that is going to have take careful monitoring in the years ahead. But I think the risks, while apparent, are nevertheless, appropriate to be taken under the circumstances.

Senator KERRY. I assume, in your opening testimony, which I apologize also for not being able to be here for, that you commented on the general sort of importance of this. But could you just underscore, in the context of the interests we have in the region and of our crime fighting, how critical it is in your judgment to have this or not have this and what it might mean? Just underscore that.

Mr. RICHARD. Well, Hong Kong is unique in so many different ways. It is a financial center, and is one that has historically been a hub of money laundering. We enjoy an extremely good relationship with the Hong Kong authorities addressing this problem. We now have, under this agreement, an expansion of the coverage in money laundering. So it is not just money laundering predicated on narcotics offenses, but it is money laundering predicated on any other extraditable offense. So money laundering is a major problem in Hong Kong, and one that this agreement is critical for. Otherwise, we are creating a safe haven for offenders. But it is not just limited to narcotics trafficking.

Because of its location, it has been a major source of customs violations. It is a major source of white collar crime, of actual narcotics trafficking, a whole litany of offenses, including intellectual property offenses, all of which are frequently centered out of Hong Kong because of the financial nature of the Colony, the transportation ease and the location, and the fact that it plays a critical part in regional law enforcement events.

Our whole Asian organized crime strategy, in part, is predicated on the availability of a good and viable law enforcement relationship with Hong Kong authorities. Remove that relationship, and I think we have significant impediments to devising effective responses. So I see dire consequences to U.S. interests, both law enforcement and interests across the board, if we do not maintain a viable relationship with this entity.

Senator KERRY. Thank you, sir. I appreciate your comments. I just wanted the record to reflect that.

Thank you, Mr. Chairman.

Senator THOMAS. Thank you very much.

This agreement gives the sovereign the right to refuse extradition where the surrender would implicate defense, foreign affairs, essential public interests of policy, or other sovereignty. How do you interpret this provision, Ms. Borek?

Ms. BOREK. Well, this is up to each party to interpret for themselves. We are assured — we were assured, in the course of negotiations by the Hong Kong Government and also after consultations with the PRC, that this would not be an everyday exception, that this would be something they expected to invoke, if at all, very, very rarely. I think the same is true for us.

In our case, I think if we had a concern about — if for some reason we did have a concern that there was a request for extradition that just presented sort of an insurmountable temptation for someone to do something untoward, that might — I would consider that an essential public interest on our part.

On the part of China, I expect that this would operate if we sought the extradition of someone who was in fact an official or for something which the central government had done which it did not wish to be subjected to jurisdiction for. I think that is the most likely thing in that case.

There are many countries with whom we do not have any provision for the extradition of nationals as a matter of obligation. But we thought it was very important in this case because we do seek a lot of Hong Kong residents.

Senator THOMAS. Sure. I think the concern, and I think a legitimate one, is that you talk about other countries, and certainly there are, but this is a unique agreement. This is an agreement with a party that is not a sovereign.

Now, you say, and it is true apparently, there is agreement with the PRC. Nevertheless, I think it is fair to say that one of the difficulties has been the enforcement of treaties with the PRC. I cited one a few moments ago, about the prison labor and some others. So there is an inquiry, at least on the part of Members of Congress, as to what you are going to do about it. What we usually hear from the State Department or Justice is, well, we will talk to them at the highest levels.

Well, that is not a very satisfactory answer. That is kind of what we hear all the time. So I think that is where you will find some concern in this particular agreement, which is unique.

On Article 16 and the idea of a transfer, but no transfer without consent, so it does not prohibit such transfers, what would be your view if the Senate changed that to prohibit transfers?

Mr. RICHARD. Well, one, it would be problematic whether the other side would agree to such a change. It would probably incur a very significant hiatus in any agreement and, in effect, terminate for an unspecified period of time an extradition relationship. Frankly, I think to the extent we already are required to give our approval before it is done, I am not sure that we do not have sufficient assurances.

Let me give you an example. Let us assume that an individual extradited there wishes to be transferred for the fact that his or her family is located in the PRC and would like to be situated in such a location where he or she has more frequent contact with them and that the prisoner wants to move and we are convinced that this is done in sincerity, would we agree or not agree? I do not know. But that provision would preclude us even considering it for humanitarian reasons.

I would suggest that it just might not be necessary to accomplish that purpose. If they are going to ignore the agreement, they will ignore that provision, just like any other provision, if they choose to do that. The key, I would suggest, is oversight and monitoring, rather than worrying about specific provisions.

Your opening remark, I think was right on the money when you said the best agreement is worthless if it is not implemented in good faith and effectively. I think we have a good agreement. Whether it will be implemented in good faith is of course the question and one that we will have to monitor and work with you to ensure that we have compliance in the spirit of the agreement.

Senator THOMAS. The agreement explicitly recognizes the executive authority as the competent authority in the United States. It is silent about the issue for Hong Kong. What entity is the competent authority for Hong Kong?

Mr. RICHARD. My understanding is, and I may be mistaken, is that it is anticipated that it will probably, at least in part, be their judicial authorities.

Senator THOMAS. Why do we be explicit about it for the United States and not for Hong Kong?

Mr. RICHARD. Because we have historically tried to avoid taking what we consider to be essentially political issues and making them subject to judicial review. We think it is a separation of powers issue on our part. These are essentially judgments to be made by the Secretary of State, rather than our courts.

Senator THOMAS. But we could accomplish that without having it in the agreement, if they do not have it in their agreement.

Mr. RICHARD. Well, without it in the agreement, we are laying ourselves open to an assertion as to who makes those calls. You have a litigable issue immediately presenting itself to our courts. By articulating who has the authority, which is a reflection of existing authority—

Senator THOMAS. We do not normally articulate how we are going to behave in the United States in treaties with others, do we?

Mr. RICHARD. No, but we are trying to avoid unnecessary litigation in the United States on this point.

Senator THOMAS. So we do it through a treaty with another country?

Mr. RICHARD. No, no. We do it through articulating what is in fact the common practice.

Senator THOMAS. It just seems a little odd that we would articulate our behavior but not expect them to articulate theirs in a treaty.

Mr. RICHARD. Well, I am not sure that, for our purposes, it matters that much as to who is making the decision. Now, it is the same thing in many other treaties, where decisions that are traditionally made by our executive branch in the U.S. are, in other countries, traditionally made by the courts.

Senator THOMAS. Well, we are not communicating. I am saying, if it is our decision, we make that decision without putting it in a treaty with another country.

Mr. RICHARD. Sure. Sure.

Senator THOMAS. Well, I think we have covered — Article 16 seems to be the most contentious among the articles, as you have pointed out.

Do you have any further comment? Yes, ma'am?

Ms. BOREK. Could I speak a little bit to the question of compliance? Because this is something that we started out with as well.

The original thought was very much more focussed on how to ensure the compliance by the People's Republic of China in this agreement, given that they were not a direct party. But the more we went into the actual arrangements for Hong Kong, the more it became clear that the Hong Kong Government actually has the power itself, and we were assured of this — it is not only our reading, but we were also assured of this by everyone we met with in the Hong Kong Government — to comply or not comply with the agreement.

So what we are really talking about here, fundamentally, is will the Hong Kong Government comply with this agreement? If the People's Republic of China is going to interfere with the agreement, it is going to be in some very dramatic, wholly flagrant fashion, like just grabbing somebody completely off the street. But under the agreement, the Hong Kong Government really does have the power itself to decide whether to comply with the agreement or not.

In that area, I think the risks are more subtle and long term, and that if we were looking at a deteriorating situation, it would be something not overnight, but something where we would have an opportunity to see that things were deteriorating and to take steps before there was a problem, rather than afterwards. I think that is the most comforting feature of this treaty, is that we are not really looking to the People's Republic of China to comply with it, we are looking to the Hong Kong Government.

Senator THOMAS. Sure. Well, and of course, that is the concern everyone has, in terms of the turnover, is, will Hong Kong have the ability to do that? We hope so. Expect so. But if they do not, then it will be another question.

In addition to U.S. ratification, Hong Kong needs to approve legislation to bring this into force. Do you know the status of that?

Ms. BOREK. They have general legislation in force, and the special legislation that will add us to it is basically laid on the table so that they can bring it into force as soon as we are ready to bring it into force.

Senator THOMAS. Then this will be done by the original Legco?

Ms. BOREK. Well, it is an executive order. No, the way it works is it is an executive order that adds us to the general legislation, which has already been passed. So it designates us under it.

Senator THOMAS. Thanks to both of you, I appreciate your being here. Thank you very much for your response. You may get some more questions in writing as the record stays open.

Mr. RICHARD. Thank you.

Senator THOMAS. The committee will be adjourned.

[Whereupon, at 11:05 a.m., the hearing was adjourned, subject to the call of the Chair.]

APPENDIX

UNITED STATES DEPARTMENT OF STATE,
WASHINGTON, DC 20520,
July 11, 1997.

THE HON. JESSE HELMS,
Chairman,
Committee on Foreign Relations,
U.S. Senate.

DEAR MR. CHAIRMAN: Following the June 3, 1997 hearing at which the Honorable Jamison S. Borek testified, additional questions were submitted for the record. Please find enclosed the responses to those questions.

If we can be of further assistance to you, please do not hesitate to contact us.

Sincerely,

BARBARA LARKIN,
ASSISTANT SECRETARY,
Legislative Affairs.

RESPONSES OF JAMISON S. BOREK TO QUESTIONS ASKED BY SENATOR HELMS

Question 1. The Hong Kong Agreement is unprecedented in that the U.S. has negotiated a treaty with a party that is not a sovereign, has been signed by the party not the sovereign, yet the authority to sign the treaty is granted by the sovereign (but in this case both the United Kingdom and the People's Republic of China have given that authority through the process established by the Joint Liaison Group, established to facilitate the transfer of Hong Kong rule).

- Is the precedent of this Agreement limited to the Hong Kong situation?
- Will this Agreement provide the State Department with a precedent for other unusual treaty relationships?
- What are the potential pitfalls of treaty enforcement as a result of this unusual treaty relationship?
- Are you confident that the PRC will respect this Agreement and involve itself only where its authority is explicitly recognized?

Answer. Hong Kong presents a unique situation. The United States has a long history of direct involvement with Hong Kong as a crown colony of Great Britain, including an active law enforcement relationship. Given the importance of our law enforcement interest and the autonomy of the Hong Kong criminal justice system after reversion, as set forth in the Joint Declaration and Basic Law, we have every reason to continue that relationship. We do not know of or currently anticipate another situation that would be addressed in the same way.

We believe that the treaty can be successfully implemented because it is the Hong Kong government and not the PRC which has the power and authority to fulfill its obligations under the treaty.

We expect that the PRC will respect this Agreement; indeed, it has provided us with a diplomatic note expressly confirming its support of the treaty. Furthermore, the relationship between the PRC and Hong Kong in this area is spelled out in the Joint Declaration and Basic Law, and we expect the PRC to honor its commitments under both.

Question 2. The treaty gives the Secretary of State the ability to refuse extradition where there is a concern that the request for extradition is politically motivated. What investigation will be undertaken prior to extradition to ensure a request is not politically motivated? Are you confident that this provision will give the U.S. adequate basis for refusal of extradition if the U.S. loses confidence in the Hong Kong judicial system?

Answer. This provision exists in most modern treaties. For Hong Kong, as with other countries, the Department will review any requests that might be politically

motivated and determine in each case how best to proceed, including how best to obtain further information. The fugitive will also be likely to raise the issue if he or she believes that such a finding should be made and has the right to present written materials to the Secretary of State for her consideration in making the determination.

This and other provisions of the treaty provide the United States with ample grounds for refusing extradition of a fugitive if circumstances warranted that result. If the United States were to lose confidence in the Hong Kong judicial system altogether, however, it would be able to terminate the treaty.

Question 3. What recourse does the U.S. have when the Hong Kong Government refuses to extradite in contradiction to a treaty provision?

Answer. As with any other treaty partner, the United States would assess the circumstances giving rise to the refusal to extradite and take whatever steps it felt were appropriate with the government of Hong Kong to reach a satisfactory resolution. Successful implementation of extradition treaties depends on the continued willingness to extradite on both sides. Ultimately, the treaty is terminable by either party with six months notice.

Question 4. Article 16 of the treaty regarding the transfer of persons to third parties does not completely prohibit such transfers. Instead, Article 16 provides that persons may be transferred with the express consent of the Requested country. Is there any instance in which the United States would consent to a transfer to the PRC? If so, please explain. If not, why did negotiators not agree to a prohibition against transfers to other jurisdictions?

Answer. Under current circumstances, the United States would not anticipate consenting to the transfer of a person by Hong Kong to other parts of the PRC except as an exceptional matter. While any circumstances in which we might consent are at this point hypothetical, one could imagine, a situation in which the prisoner wished to be transferred to the PRC, for instance to be reunited with family.

Re-transfer with the consent of the Requested party is a standard provision in modern extradition treaties. While it would give the Secretary of State the discretion to consent to transfer to other parts of the PRC, its reach is much broader. If a fugitive were extradited by one Party to the other on fraud or other charges, for instance, this language provides a means for either Hong Kong or the United States to agree to re-transfer to another treaty partner, such as the United Kingdom, for trial for murder or terrorist offenses.

Question 5. Would you support the addition of such a prohibition by the Senate in its resolution of ratification?

Answer. We would not support the addition of such a prohibition, which would delete a valuable authority in the treaty. The ability of one treaty partner to agree to a request from the other for the re-transfer of a fugitive is a recognized principle of international law and a valuable tool in fighting international crime. As noted above, the re-transfer provision is not limited to transfers from Hong Kong to other parts of the PRC but provides a mechanism for transfers by either Party to a third state. Without the ability of the requested Party to consent to re-transfer, a fugitive extradited to either Hong Kong or the United States could effectively find refuge from being sent to a third State that sought him for other, possibly more serious, offenses.

Even assuming that a limitation concerned only United States consent to transfers to other parts of the PRC, such a prohibition is unnecessary and could even be harmful in some cases, for instance where the goal is reuniting a family and the prisoner consents. Furthermore, such a prohibition would be a permanent restriction on what would otherwise give the Secretary of State the ability to respond to changing circumstances. Extradition treaties have been in force with some of our treaty partners for over a hundred years, a period of time in which the PRC could evolve in such a manner that decisions on transfer would be viewed in a different light.

Question 6. The Agreement does not explicitly apply to extraterritorial offenses, although the State Department's Legal Adviser's Office has said that the parties will determine its application on a negotiated case-by-case basis. Does the failure to explicitly provide for extraterritorial offenses make the treaty sufficiently vague to give a reluctant Requested State "wiggle room" to avoid its possible obligation to extradite individuals for crimes committed outside its territory?

Answer. The understanding between the parties is that Hong Kong would extradite for extraterritorial offenses if it would have extraterritorial jurisdiction over an offense committed outside its territory in similar circumstances. This is the agreement embodied more often than not in modern U.S. extradition treaties. We do not anticipate that either Hong Kong or the United States will use the absence of such language as a basis for refusing extradition.

Question 7. The Agreement gives the sovereign the right to refuse extradition when surrender would implicate the “defense, foreign affairs or essential public interest or policy” of either sovereign. How does the State Department Legal Adviser’s Office interpret this provision? Can you cite an example of a case in which this would be applied?

Answer. This provision was included at the request of Hong Kong, primarily in recognition of the role of the PRC as the sovereign responsible for Hong Kong’s foreign affairs and defense. We anticipate that this provision would, for instance, be relied upon if we were to request extradition of a PRC government official for offenses that the PRC regarded as official acts. While both sides indicated that they did not anticipate exercising this authority except in rare instances, for the United States, the reference to “essential public interest or policy” could conceivably be a relevant protection in an individual case, especially if conditions were to change significantly in Hong Kong.

Question 8. The Agreement explicitly recognizes the executive authority as the competent authority for the United States but is silent on the issue for Hong Kong. What entity is the competent authority for Hong Kong? What role will the PRC play in the designated competent authority?

Answer. We understand that for Hong Kong the “competent authority” in Articles 6(3) and 7 is likely to be the judiciary. In Article 8 (3) , concerning the issuance of arrest warrants, the “competent authority” for both the United States and Hong Kong would be a member of the judiciary empowered to issue such warrants. In other articles (e.g., Articles 3 and 11), as indicated in the treaty, the competent authority for Hong Kong is the executive. In each case these will be authorities of the Hong Kong Special Administrative Region, not of the central government of the PRC.

Question 9. What were some of the principal disagreements between the Parties during the negotiations?

Answer. The negotiation of this treaty began with the rather unusual situation of each Party presenting a model text, thus giving rise to a number of issues to be addressed. These included, for instance, Hong Kong’s preference for a list of all extraditable offenses in Article 2 as opposed to our strong preference for “dual criminality” language, which avoids the need to amend a treaty as changes are made to one or both Parties, criminal laws. In the end, the two approaches were combined so that, although the list remains, the last item in the list captures the dual criminality approach. Similarly, the two Parties had different approaches to the extradition of nationals. Hong Kong wanted rather broad exceptions to the obligation to extradite nationals while the United States preferred narrower grounds for denial of a request to extradite. The result in Article 3 provides a balanced compromise, with potentially useful protections for both Parties.

Question 10. Unlike the U.S., in addition to ratification of the Agreement, Hong Kong must approve legislation to bring this Agreement into force. What is the status of that legislation?

Answer. Hong Kong had no requirement for ratification but did have to enact a Surrender of Fugitive Offenders ordinance to provide a legislative basis for implementing the treaty. That Ordinance went into operation April 25, 1997. Subordinate legislation under the Ordinance, the Fugitive Offenders (United States of America) Order, specifically permitting the U.S.-Hong Kong agreement to be implemented, has also been made. It will be brought into operation on the same day that the Treaty enters into force.

RESPONSES OF JAMISON S. BOREK TO QUESTIONS ASKED BY SENATOR BIDEN

Question 1. Does the term “any lesser offence” in Article 16(1)(b) mean a lesser included offense as that term is understood in U.S. law?

Answer. Yes, this language would cover a lesser included offense. It is possible in a given case, depending on the facts, that other related offenses of a less serious nature could be covered, even if they were not technically “lesser included offenses,” so long as they were themselves extraditable offenses.

Question 2. What is the “competent authority” for Hong Kong?

Answer. Articles 6(3) and 7 prohibit surrender in situations where “the competent authority of the requested Party, which for the United States shall be the executive authority,” finds that the request was politically motivated, would result in discriminatory treatment or would entail exceptionally serious consequences related to age or health. We understand that for Hong Kong the “competent authority” in these two situations is likely to be the judiciary. In Article 8(3), concerning the issuance

of an arrest warrant, the “competent authority” for Hong Kong refers to a member of the judiciary empowered to issue such warrants. In other articles (e.g., Articles 3 and 11), as indicated, the competent authority for Hong Kong is the executive.

Question 3. In Article 6(3) and Article 7, the treaty states that the “competent authority of the requested party, which for the United States shall be the executive authority”

- Who is the “competent authority” for the United States under Article 8(3) and Article 9(a)(ii)?

Answer. In Article 8(3), for the United States the “competent authority” would always be a judge or magistrate judge.

In Article 9(a)(ii), the United States will use the official seal of the Attorney General, which is in turn authenticated by the Secretary of State.

Question 4. What does the offense “criminal damage” set forth in Article 2(1)(xviii) encompass?

Answer. “Criminal damage” covers the broad category of vandalism, including property damage. As with any other offense, to be extraditable, it would have to be punishable by imprisonment for more than one year or by a more severe penalty.

Question 5. Does the term “kidnapping” as used in Article 2(1)(v) include parental abduction, such as the offense of international parental abduction set forth in 18 U.S.C. 1204?

Answer. Yes, in the view of the United States the term “kidnapping” includes parental child abduction, so long as that offense is punishable by imprisonment or other form of detention for more than one year, or by a more severe penalty. International parental abduction (18 U.S.C. 1204) meets that test. Whether or not Hong Kong views “kidnapping” as extending to this offense, the offense is covered by Article 2(1)(xxxvi), which covers any dual criminality offense so long as it is punishable by more than one year, or by a more severe penalty, and so long as surrender is not prohibited by the laws of the requested Party.

Question 6. The Sino-British Joint Declaration states that the basic policies of the People’s Republic of China regarding Hong Kong will “remain unchanged for 50 years.” (para. 3(12))

- Is there any understanding between the parties that the Agreement will be formally reviewed prior to the end of this period?

Answer. The United States will, of course, be monitoring the situation in Hong Kong at all times. Although there is no understanding that the Agreement will be formally reviewed prior to the end of the 50 years stated in the Joint Declaration, the United States can request review whenever it believes such review is warranted. Furthermore, under Article 20(2), the United States can terminate the Agreement with six months notice at any time.

Question 7. Please provide a list of the “multilateral international agreement[s]” which are encompassed by the terms of Article 6(2)(b).

Answer. The Sino-British Joint Liaison Group has announced that many multilateral conventions are agreed to be applicable to Hong Kong after its reversion to the sovereignty of the People’s Republic of China. Included in those conventions are the following encompassed by the terms of Article 6(2)(b):

- The Convention for the Suppression of Unlawful Seizure of Aircraft (“the Hague Convention”), done at The Hague, December 16, 1970, entered into force October 14, 1971 (22 U.S.T. 1641; TIAS No. 7192).
- The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (“the Montreal Convention”), done at Montreal September 23, 1971, entered into force January 26, 1973 (24 U.S.T. 564; TIAS No. 7570).
- Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation done at Montreal on 23 September 1971, done at Montreal February 24, 1988, entered into force August 6, 1989, and for the United States November 18, 1994.
- Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, done at New York, December 14, 1973, entered into force February 20, 1977 (28 U.S.T. 1975; TIAS No. 8532).
- International Convention Against the Taking of Hostages, done at New York, December 17, 1979, entered into force June 3, 1983, and for the United States January 6, 1985 (TIAS No. 11081).
- United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, done at New York December 10, 1984, entered into force June 26, 1987 and for the United States November 20, 1994.

- United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna December 20, 1988, entered into force November 11, 1990.

The Convention on the Prevention and Punishment of the Crime of Genocide (done at Paris December 9, 1948, entered into force January 12, 1951 and for the United States February 23, 1989), which provides that genocide and other enumerated acts are not to be considered as political crimes for the purpose of extradition, will also apply to the HKSAR.

Question 8. What does the term “upon his committal” in Article 17(2)(b) refer to? That is, does it refer to his committal to prison for the offense in the requested Party, or does it refer to committal to the requesting Party pursuant to this Agreement?

Answer. The reference to committal in Article 17(2)(b) is to the committal for extradition to the requesting Party pursuant to this Agreement.

Question 9. The Technical Analysis submitted by the Administration states that “implicit [in Article 17(2)(b)] is the notion that the requested Party may choose to wait until completion of the service of sentence before continuing with the surrender proceedings.”

- What purpose would be served by delaying the surrender proceedings until completion of service of sentence in the requested Party?
- Under what circumstances would such delay be undertaken by the United States?

Answer. Article 17(2)(b) provides a firm treaty basis for accommodating requests for extradition for a person who is being proceeded against by the requested Party. Either Party might prefer to wait until the completion of the service of sentence in a particular case before extraditing a fugitive. The United States might choose to do so, for instance, in a case where deferral would not jeopardize Hong Kong’s case, particularly if there was only a short period of imprisonment at issue.

Question 10. The Technical Analysis states that “the United States does not view the rule of speciality as applicable” to cases where a person consents to surrender under Article 18.

- Does the Hong Kong government view the rule of speciality to apply to such a situation?

Answer. In Hong Kong, the Fugitive Offenders Ordinance requires that fugitives who consent to surrender shall not be surrendered by order of the Governor unless they will be entitled to speciality protection.

Question 11. What is the “requirement for entry into force,” set forth in Article 20(1) under Hong Kong law?

Answer. Hong Kong had to enact its Surrender of Fugitive Offenders Ordinance to provide a legislative basis for implementing the treaty. That Ordinance went into operation April 25, 1997. Subordinate legislation under the Ordinance, the Fugitive Offenders (United States of America) Order, specifically permitting the U.S. - Hong Kong agreement to be implemented, has also been made. It will be brought into operation on the same day that the Treaty enters into force.

Question 12. If this Agreement does not enter into force by July 1, 1997, will any extradition arrangement be in effect between the United States and Hong Kong?

- If not, what are the consequences for U.S. interests?

Answer. Hong Kong is currently one of our closest and most reliable law enforcement partners. We enjoy an excellent relationship, particularly with respect to extradition. As of July 1, 1997, there will be no extradition arrangement in effect between the United States and Hong Kong. The treaty, on its terms, comes into force 30 days after the two governments notify each other in writing that their respective requirements for the entry into force of the treaty have been complied with. Hong Kong has already passed legislation to fulfill its domestic requirements but we will not be able to notify Hong Kong until such time as the Senate gives advice and consent and the President ratifies the treaty. Thus, we know there will be a gap on July 1, 1997, when the US-UK extradition treaty currently applicable to Hong Kong ceases to apply.

The lack of an extradition treaty will mean that under U.S. law we will have no ability to surrender persons to Hong Kong (unless a case fits a narrow statutory exception for non-Americans committing violent crimes against Americans abroad). On this basis, we have recently agreed to the release on bail of a fugitive being sought by Hong Kong.

The majority of the 64 fugitives Hong Kong has returned to the United States since 1991 were accused narcotics traffickers wanted by either state or federal prosecutors. In addition, Hong Kong is an attractive site for money laundering, alien smuggling, illegal customs transshipment and counterfeiting. Hong Kong has indi-

cated to us informally that cases commenced under the current treaty will continue even in the absence of a new treaty and last week arrested a U.S. fugitive who is an alleged narcotics trafficker. For requests made in the interim between reversion on July 1, 1997, and the entry into force of the new extradition agreement, however, the United States probably will be unable to secure the extradition, or even arrest pending extradition, from Hong Kong of fugitives charged with these serious crimes.

As a result, if the gap is of very short duration, we expect only minimal disruption of pending cases. If the gap is prolonged, the consequences would be much more serious, due to our inability to continue to extradite persons either to or (in the case of new requests) from Hong Kong.

Question 13. How many extradition requests made by the United States to Hong Kong are currently pending?

- Please provide a list containing (1) the name of the person sought for surrender (if release of such name is permissible under the Privacy Act); (2) the offenses for which surrender of that person is sought; and (3) the jurisdiction in which such person faces indictment or has already been convicted.

Answer. Attached is a list of 51 currently pending requests by the United States for the extradition or provisional arrest pending extradition of fugitives from Hong Kong. These include cases in which the provisional arrest request was submitted to Hong Kong because of a likelihood that the person would travel to Hong Kong although such travel may not yet have occurred. Each number represents a different individual. We have omitted the names of these fugitives, most of whom have not yet been arrested, because release of the names publicly would risk jeopardizing on-going law enforcement investigations.

There are 51 pending extradition requests to Hong Kong from the United States. The offenses and jurisdictions are provided below.

Pending Case—U.S. Requests to Hong Kong

June 10, 1997

OFFENSE CATEGORY	JURISDICTION
1. Narcotics	Eastern District of Virginia
2. Narcotics	Eastern District of New York
3. White Collar (mail fraud, money laundering, firearms offenses)	Districts of New Jersey and Maryland
4. Narcotics	Eastern District of New York
5. Persons (conspiracy to commit murder, assault, robbery, murder)	Southern District of New York
6. Narcotics	Northern District of Florida
7. Narcotics	Eastern District of New York
8. Persons (ransom, kidnapping, hostage taking, extortion, conspiracy)	Southern District of New York
9. Persons (ransom, kidnapping, extortion, hostage taking, conspiracy)	Southern District of New York
10. Persons (extortion, obstruct justice, kidnapping, hostage taking)	District of New Jersey
11. Narcotics	Eastern District of New York
12. White Collar, Property (racketeering, extortion, arson)	Northern District of California
13. Narcotics	Northern District of California
14. White Collar (mail fraud, forgery)	Northern District of California
15. Narcotics	Eastern District of New York
16. Persons (murder, assault w/intent to commit murder, conspiracy)	State of Massachusetts (Suffolk County)
17. Narcotics	Eastern District of New York
18. Narcotics, Persons (murder, firearm offenses, interstate commerce)	Eastern District of New York
19. Narcotics	Northern District of Florida
20. Narcotics	District of Northern Mariana Islands
21. Narcotics	Eastern District of New York
22. Persons, Misc (racketeering; firearms, alien smuggling, hostage taking)	Southern District of New York
23. Narcotics	Southern District of New York

Pending Case—U.S. Requests to Hong Kong—Continued

June 10, 1997

24. Narcotics	Eastern District of New York
25. Persons (hostage taking, aiding/abetting)	Southern District of New York
26. Narcotics, White Collar (money laundering, conspiracy)	Central District of California
27. Narcotics, White Collar (money laundering, conspiracy)	Central District of California
28. Persons (murder, assault w/intent to murder, conspiracy)	State of Massachusetts (Suffolk County)
29. Persons, White Collar (hostage taking, money laundering)	Southern District of New York
30. Narcotics	Eastern District of New York
31. Narcotics	Eastern District of New York
32. Persons (murder, assault w/intent to murder, conspiracy)	State of Massachusetts (Suffolk County)
33. Narcotics	Eastern District of New York
34. Narcotics, White Collar (money laundering)	Eastern District of New York
35. Narcotics	Eastern District of New York
36. Narcotics	District of Nevada
37. Narcotics	District of New Jersey
38. Narcotics	Eastern District of New York
39. Narcotics	Eastern District of New York
40. Narcotics	Eastern District of New York
41. Persons, Misc (hostage taking, alien smuggling, racketeering, firearms)	Southern District of New York
42. Narcotics	Eastern District of New York
43. Narcotics	Eastern District of New York
44. Narcotics	Southern District of New York
45. White Collar, Misc (extortion, firearm offenses)	Central District of California
46. Narcotics	Southern District of New York
47. White Collar (conspiracy to defraud U.S., mail fraud, false claims)	Middle District of Florida
48. Narcotics	Southern District of New York
49. Narcotics	Eastern District of New York
50. Narcotics	Eastern District of New York
51. Narcotics	Central District of California

Question 14. How many extradition requests made by Hong Kong to the United States are currently pending?

Answer. Five requests from Hong Kong are pending with the United States.

Question 15. Article 16(2) permits the surrender or transfer beyond the jurisdiction of the requesting Party if the requested Party consents.

- Does the term “jurisdiction of the requesting Party,” as it applies to Hong Kong, refer to the territory of the Hong Kong Special Administrative Region?
- With regard to requests by Hong Kong to transfer a person surrendered under this Agreement to the People’s Republic of China, will the United States have a presumption against such transfers? Under what circumstances will the United States consent to such transfers?

Answer. Yes, the “jurisdiction of the requesting Party” for Hong Kong is the Hong Kong Special Administrative Region. Thus, Article 16 covers transfer even to other parts of the People’s Republic of China.

Under current circumstances, the United States would not anticipate consenting to the transfer of a person by Hong Kong to other parts of the PRC except as an exceptional matter. While any circumstances in which we might consent are at this point hypothetical, one could imagine a situation in which the prisoner wished to be transferred to the PRC, for instance to be reunited with family.

Question 16. The Technical Analysis submitted to the Committee states on page 17, footnote 21, that the Hong Kong delegation informed the U.S. delegation that “it is possible that after 1997, the PRC will require requests for extradition involving Hong Kong to be made through Beijing.”

- What would be the purpose for the PRC requiring requests to be transmitted through Beijing?
- Has the United States conducted any diplomatic discussions, formal or informal, in writing or orally, with the People's Republic of China regarding this matter? If so, please describe the substance of those discussions.

Answer. A request from the PRC that all extradition requests be transmitted through Beijing would have the effect of keeping the requests in formal diplomatic channels between the two sovereigns. This would also give the PRC the ability to track requests so that it would know when its nationals are involved, although the PRC could also accomplish this by requiring advance notice from the Hong Kong government of any requests. We have had no discussion on this issue with the PRC.

Question 17. Compare the standard of the prima facie case required under Hong Kong law (pursuant to Articles 8(3) and 13) to the standard of probable cause under U.S. law.

Answer. Under Hong Kong law, a prima facie case is a case supported by evidence which, if unexplained or uncontradicted, is sufficient to carry the case to the jury (or trier of fact) and to sustain a verdict (or finding) in favor of the side of the issue which it supports, but which may be contradicted by other evidence.

Under United States law, probable cause requires a lesser quantum of evidence, i.e., sufficient to establish a reasonable basis to believe the crime was committed and that the person before the court is the person accused of the crime.