

The (Unequal) Relationship between Hong Kong's Waters and China's Baselines

Abstract: This article aims to clarify the legal relationship between Hong Kong's sea territory and China's baseline system by conducting an historical inquiry into how the current status quo was reached and considering the implications for Hong Kong's future development. China's well-known position is that the treaties granting authority to the British in Hong Kong, including the ninety-nine year lease of the New Territories, were 'unequal' and therefore invalid so that sovereignty over the land and waters of Hong Kong never left Chinese hands and this position would be recognized and remedied at the appropriate time. As the Hong Kong experience illustrates, when territory is surrendered or leased, rights and claims are altered and sometimes extended. The historical evolution of those rights and claims therefore impacts on current territorial relationships. The example of Hong Kong may additionally serve as a reference point for modern day lease arrangements concerning coastal territory made outside the colonial context.

Key words: baselines, territorial sea, unequal treaty, handover of sovereignty, Hong Kong Basic Law, territorial lease.

I. Introduction

The seas around China have long since ceased to be a resting place for the fairies as Emperors Chin Shih-Huang and Han Wu-Ti are reported to have believed.¹ Having lost their mystique for

¹ Jeanette Greenfield, *China's Practice in the Law of the Sea*, Clarendon Press, Oxford, 1992, vii.

a country that historically placed emphasis on the potential of its vast land area, these ocean spaces have grown steadily in economic and strategic importance.² When the Liaoning aircraft carrier – originally a Soviet vessel that was commissioned into the People’s Liberation Army Navy in 2012 – docked in Hong Kong in celebration of twenty years since the handover of sovereignty from the United Kingdom (UK) to China, there was little doubt who controlled the seas around Hong Kong. The Liaoning was a very visible symbol of China’s increasing role as a naval power concerned not only with coastal defence but also with securing Chinese interests further afield.³

This article aims to clarify the legal relationship between Hong Kong’s sea territory and China’s baseline system by conducting an historical inquiry into how the current status quo was reached and considering the implications for Hong Kong’s future development. Security, immigration and conservation have tended to be the most important matters impacting on the need for jurisdictional competence over sea areas. At the same time, the use of the sea bed for reclamation projects was prominent at the turn of the twentieth century and continues ever more earnestly today. While private leases of portions of the sea bed to build jetties or wharfs came to be closely regulated, the juridical basis for a territorial sea measuring three nautical miles as claimed by the British in respect of their overseas territories remained unclear. Moreover, to the extent that such a claim was actively made in relation to Hong Kong, it appeared to fall away

² But see Lo Jung Pang, *China as a Sea Power 1127-1368*, NUS Press, Singapore, 2012, pp. xiv-xv: ‘during the three centuries from the Southern Song to the early Ming period, the maritime and overseas activities of the Chinese people were so great in extent and consequence that China then was more of a sea power than a land power.’

³ ‘Chinese aircraft carrier visits Hong Kong in show of force’, *Financial Times*, 7 July 2017; Hungdah Chiu, ‘China and the Question of Territorial Sea’, (1975) *Maryland Journal of International Law*, vol. 1, Issue 1, 29-77, 30. The Chinese national character was once described as a competing mix of, on the one hand, introversion, passivity and pacifism, and on the other hand, ‘a disposition for military expansion and for material self-improvement, all of which channelled China’s interests towards the sea’ leading to its emergence as a sea power. Lo Jung Pang, *China as a Sea Power 1127-1368*, 341.

during the handover negotiations. A clue as to why this occurred is contained in China's well-known position that the treaties granting authority to the British in Hong Kong, including the ninety-nine year lease of the New Territories, were 'unequal'⁴ and therefore invalid so that sovereignty over the land and waters of Hong Kong never left Chinese hands and this position would be recognized and remedied at the appropriate time.⁵

As the Hong Kong experience illustrates, when territory is surrendered or leased 'rights become altered, traditional state conduct toward territory gets distorted and states may be drawn into confronting challenges, both legal and geopolitical, relating to their existence and coexistence'.⁶ Furthermore, the effect of a bilateral lease agreement may be to permit the leased territory 'to assume global economic, strategic or legal importance'.⁷ The historical evolution of territorial rights and claims inevitably impacts on current inter-state and inter-territorial relationships and the reversion of the leased territory to the original sovereign state is unlikely to signify a return to the pre-existing situation. The example of Hong Kong may additionally serve as a reference point for modern day lease arrangements concerning coastal territory made outside the colonial context.

⁴ The phrase 'unequal treaty' is used to refer to: 'A number of treaties made between China and various Western powers in the 19th century. The Qing dynasty was generally unable to resist foreign pressure for commercial and territorial concessions and in such agreements as the Treaty of Nanjing (1842) was forced to agree to Western demands.' Edmund Wright (ed), *A Dictionary of World History*, 2nd edition, 2015.

⁵ A. Dicks, 'Treaty, Grant, Usage or Sufferance? Some Legal Aspects of the Status of Hong Kong', (1983) 95 *The China Quarterly* 427-455, 428, citing the following statement of a Chinese Foreign Ministry spokesman on 30 September 1982: 'Hong Kong is part of Chinese territory. The treaties concerning the Hong Kong area signed between the British government and the government of the Qing dynasty of China in the past are unequal treaties which have never been accepted by the Chinese people. The consistent position of the government of the People's Republic of China has been that China is not bound by these unequal treaties and that the whole Hong Kong area will be recovered when conditions are ripe.' See also Irene Chan man Tuen, 'The Sino-British Joint Declaration of 1984 on the Future of Hong Kong', (1991) *Cambridge Review of International Affairs*, vol. 5, No. 1, 40-47, 40-41.

⁶ Michael J. Strauss, *Territorial Leasing in Diplomacy and International Law*, Brill Nijhoff, Leiden, 2015, p. 1.

⁷ Michael J. Strauss, *Territorial Leasing in Diplomacy and International Law*, 2.

II. Hong Kong's Colonial Sea Boundaries

The Island of Hong Kong was ceded in perpetuity to Great Britain by the 1842 Treaty of Nanking.⁸ Upon ratification of the treaty and the proclamation of the colony of Hong Kong on 26 June 1843, the British referred to its authority over 'the island of Hong Kong and its dependencies' thereby including the small islands in the immediate vicinity of the main island.⁹ The Convention of Friendship between Great Britain and China signed at Peking on 24 October 1860 extended the colony by adding Stonecutters Island and the Kowloon Peninsula south of Boundary Street.¹⁰ The 1860 Convention superseded a lease agreement concerning the same territory according to which the British Government promised to pay the Chinese Government an annual rental of '500 silver taels' so that 'no claim can ever be made for the return of the said ground'.¹¹ On 9 June 1898 a further convention was signed at Peking, by which the New Territories, as they became known, were leased to Great Britain for a period of ninety-nine years. Ordinarily, the lessee pays an annual fee in return for the leased territory, however, '[e]ach lease under international law is sui generis and its terms depend upon the particular treaty governing it'.¹² Britain as the colonial power tended to treat Hong Kong Island, Kowloon and the New

⁸ Treaty of Peace, Friendship, Commerce, Indemnity & c., between Great Britain and China, signed at Nanking, 29 August 1842, Ratifications exchanged at Hong Kong, 26 June 1843. Text of historical treaties available at: <http://oelawhk.lib.hku.hk/items/show/3631>.

⁹ Charter for erecting the island of Hong Kong into a separate colony, and for providing for the government thereof, Letters Patent, 5 April 1843.

¹⁰ Convention of Peace and Friendship between Great Britain and China, signed at Peking, 24 October 1860.

¹¹ A. Dicks, 'Treaty, Grant, Usage or Sufferance? Some Legal Aspects of the Status of Hong Kong', (1983) 95 *The China Quarterly* 427-455, 442. Dicks notes that the map annexed to the 1860 Convention that defines the area ceded is taken from the earlier lease.

¹² Y. Ronen, 'Territory, Lease', in *Max Planck Encyclopaedia of Public International Law*, para. 1. The British lease of the New Territories is an exception to the general rule that a lease is granted in exchange for consideration.

Territories as one entity, although technically this was incorrect since the latter was subject to a lease agreement.¹³

The 1898 Convention had a map appended to it ('1898 Convention Map') indicating the general extent of the enlargement of British territory while the exact boundaries were to be fixed when 'proper surveys have been made by officials appointed by the two Governments.'¹⁴ The northern boundary of the New Territories was determined in 1899 as follows:

The Northern Boundary commences at the point of high water-mark in Mirs Bay where the meridian of 114°30' East cuts the land and follows that high water-mark to the point marked with a peg immediately to the West of the market town locally known as Tung Wo Hu and sometimes called Shat'aukok.¹⁵

It is uncommon to specify sea boundaries as control over sea areas follows from sovereignty over land territory according to the principle that 'the land dominates the sea'.¹⁶ However, the geographical layout of the islands (numbering about 235 in the New Territories lease) and mainland territory acquired by Britain and the risk of disputes with China especially over security made it practicable to indicate sea boundaries. To the extent that the 1899 boundary determination delineated the water boundary, it had 'almost the same validity as the terrestrial frontier.'¹⁷

¹³ Michael J. Strauss, *Territorial Leasing in Diplomacy and International Law*, Brill Nijhoff, Leiden, 2015, 78.

¹⁴ Convention between Great Britain and China respecting an Extension of Hong Kong Territory, signed at Peking, 9 June 1898. The 1898 Convention Map is reproduced in P. Wesley-Smith, *Unequal Treaty 1898-1997, China, Great Britain and Hong Kong's New Territories*, Oxford University Press, 1983, p. 193.

¹⁵ Memorandum on the Delimitation of the Northern Boundary of the New Territories, signed in the Council Chamber, Hong Kong, 19 March 1899.

¹⁶ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, ICJ Reports 2012, p. 624, para. 140; *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, ICJ Reports 1969, p. 51, para. 96. See also Robert Beckman, 'The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea', (2013) 107 *American Journal of International Law*, 142, 149-150.

¹⁷ International Boundary Study No. 13, China- Hong Kong Boundary, *The Geographer*, Department of State, 13

The outcome of the 1876 Privy Council case of *R v. Keyn* (or *The Franconia*) sent anxious juridical ripples throughout Britain's colonies as it cast uncertainty over the nature and extent of the Crown's authority in colonial waters. *R v. Keyn* concerned a collision between a German and a British ship within three miles of the British coastline near Dover resulting in the death of a passenger on the British ship. The question that arose was whether the English courts had jurisdiction to try the master of the German ship for manslaughter. By a majority of seven to six, the Court for Crown Cases quashed the conviction of the German master on the basis that the Admiralty of England lacked criminal jurisdiction over a foreign defendant on a foreign vessel accused of committing a crime on the 'high seas', referring to 'any tidal water outside the body of an English county'.¹⁸ There was general agreement among the judges that the UK had legislative power in the 'territorial belt' of waters measured from the low water mark along the coast but only a minority of the judges held that this 'territorial belt' was part of the territory of England.¹⁹ For the avoidance of doubt as to the scope of application of *R v. Keyn*, the UK parliament adopted the Territorial Waters Jurisdiction Act in 1878 which states in the Preamble that Crown jurisdiction 'extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions [...]'.²⁰ According to Section 2, offences committed by foreign nationals aboard foreign ships 'on the open sea within

April 1962, p. 4.

¹⁸ G. Marston, 'The Territorial Waters Jurisdiction Act 1878 Revisited: Its Relevance to Federal Offshore Disputes', (1999) 20 *Australian Yearbook of International Law*, 233-252, 233.

¹⁹ *Pianka and Another v. The Queen*, Jamaica, Judicial Committee of the Privy Council, 27 July 1977, [1977] 3 WLR 859, 864-865.

²⁰ Territorial Waters Jurisdiction Act 1878, An Act to regulate the law relating to the Trial of Offences committed on the Sea within a certain distance of the Coasts of Her Majesty's Dominions, 16 August 1878. Available at: <https://www.legislation.gov.uk/ukpga/Vict/41-42/73/introduction>.

the territorial waters of Her Majesty's dominions' are within the jurisdiction of the Admiral. The 'territorial waters of Her Majesty's dominions' was defined as follows:

such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions.²¹

Prior to the adoption of the Territorial Waters Jurisdiction Act, it had been suggested that a specific clause should be inserted to enable colonial authorities to legislate in respect of the three miles from the low water mark in which jurisdiction was admitted. This advice was not taken which meant that the 'effect of the Act on colonial legislation [...] remained doubtful'.²² However, it seems that at least in specific areas such as criminal jurisdiction, colonial legislatures were considered capable of promulgating enactments within a three nautical mile territorial sea.²³

The subsequent Privy Council case of *Secretary of State for India v. Sri Rajah Chelikani Rama Rao* concerned islands which were formed in the sea bed near the mouth of the river Godavari within three nautical miles of the mainland. The appellants wished to incorporate the lands into a reserved forest while the respondents claimed possession and title from time immemorial. The Privy Council noted that the islands had risen from the sea within three miles

²¹ Territorial Waters Jurisdiction Act 1878, Section 7. See G. Marston, 'The Territorial Waters Jurisdiction Act 1878 Revisited: Its Relevance to Federal Offshore Disputes', (1999) 20 *Australian Yearbook of International Law*, 233-252, 241: 'In the definition in section 7, "the territorial waters of Her Majesty's dominions" are measured from the low-water mark and thus embrace not only what would now be termed territorial sea but also internal waters, for example, bays and ports.'

²² G. Marston, 'Historical Aspects of Colonial Criminal Legislation Applying to the Sea', (1980) 14 *University of British Columbia Law Review*, 299, 320.

²³ *Ibid*, 325.

of British territory. Thus, they were not ‘no man’s land’ but belonged ‘in property to the British Crown’.²⁴ The controversy triggered by *Keyn* was addressed, but it was confirmed that there had never been any doubt as to the Crown’s proprietary rights in the sea bed and sea area ‘within cannon-shot or 3 miles of the shore’, subject to the public right of navigation.²⁵ The Privy Council regarded with a degree of horror the proposal that the territory of the Crown ended at the low-water mark while rights seaward of this limit were of a purely jurisdictional nature, commenting on the confusion that would result if emergent islands within the three mile limit were left open to acquisition by the first comer. ‘He might be a foreign citizen: he would of course hoist the flag of his own nation, and that nation might proceed to fortify the emergent lands...’²⁶

The 1898 Convention stipulated that the area leased to Great Britain included the waters of Mirs Bay and Deep Bay but granted the concession that Chinese vessels of war could use those waters.²⁷ Britain placed emphasis on the ‘strategical necessity of the line from Mirs Bay to Deep Bay and of the islands to the south and west’.²⁸ The 1858 Treaty of Tientsin already permitted British war ships that were not hostile to China to visit all ports within the dominions of China to suppress piracy.²⁹ At least by 1891, and possibly as early as 1866, it was an established position that a colonial territory included a three mile ‘belt’ of waters.³⁰ It remained

²⁴ In the Privy Council, *The Secretary of State for India in Council v. Sri Rajah Chelikani Rama Rao and Others*, 1916 [58] 141-37, p. 4.

²⁵ Ibid, p. 5, citing a Scottish case.

²⁶ Ibid, p. 6. See also U. Secher, ‘The Crown’s Radical Title and Native Title: Lessons from the Sea’, (2011) *Melbourne University Law Review*, vol. 35, 523-544, 529-530: ‘post-*Keyn*, there was no doubt that the Crown had property rights over the territorial seabed’.

²⁷ P. Wesley-Smith, *Unequal Treaty 1898-1997, China, Great Britain and Hong Kong’s New Territories*, 40.

²⁸ Ibid, 33.

²⁹ Treaty of Peace, Friendship and Commerce, between Great Britain and China, signed at Tientsin, 26 June 1858.

³⁰ *Pianka and Another v. The Queen*, Jamaica, Judicial Committee of the Privy Council, 27 July 1977, [1977] 3 WLR 859, 864-865, 868, referring to *Rolet v. The Queen* (1866) L.R. 1 P.C. 198. See also G. Marston, ‘Historical Aspects of Colonial Criminal Legislation Applying to the Sea’, (1980) 14 *University of British Columbia Law Review*, 299, 299-300.

open to debate whether this implied full sovereignty within the ‘territorial belt’ or merely legislative competence. Britain took the view that the colony of Hong Kong included Peaked Hill which fell outside the leased territory on available maps. Peaked Hill was connected to the island of Lantau by a 110-metre causeway and surrounded by water only at high tide. This suggests that Britain considered itself competent to claim a territorial sea around the leased islands.³¹ However, the boundary lines drawn on the 1898 Convention Map appear to deny Lantau a territorial sea on its western side.³²

A preoccupation during the early British period of administration of the New Territories was the management of claims relating to both land and sea areas, taking account of Chinese customary law. A Land Court was established in 1900 and addressed a range of private claims to sea frontages, the seabed or reclaimed land, including in one example leases of sections of the seabed around the island of Ping Chau where corals had traditionally been dredged to obtain lime used in construction.³³ The issue arose whether the land between the low water and high water marks in Mirs Bay and Deep Bay, known as the foreshores, was included in the leased territory in view of the potential for building wharves and jetties on the land exposed at low tide.³⁴ There was uncertainty over the legal status of submerged lands adjacent to colonial shores at the end of the nineteenth century.³⁵ By 1900, reclamation work for naval purposes was already in progress raising the problem of the possible interference with public rights of fishing and navigation.

³¹ P. Wesley-Smith, *Unequal Treaty 1898-1997, China, Great Britain and Hong Kong's New Territories*, 110.

³² Jeanette Greenfield, *China's Practice in the Law of the Sea*, Clarendon Press, Oxford, 1992, 70; R.A. Hodgson, ‘Islands: Normal and Special Circumstances’, US Department of State Research Study, RGE-3, 10 December 1973, 16; International Boundary Study No. 13, China- Hong Kong Boundary, *The Geographer*, Department of State, 13 April 1962, p. 4, 45: ‘Even though generally each island is entitled to a territorial sea, ‘under certain geographic and political circumstances, it may be less than the full national claim. China and the United Kingdom appear to have agreed that a sector of one island of Hong Kong will have no territorial sea.’

³³ P. Wesley-Smith, *Unequal Treaty 1898-1997, China, Great Britain and Hong Kong's New Territories*, 97.

³⁴ *Ibid*, 106.

³⁵ G. Marston, ‘Colonial Enactments relating to the Legal Status of Offshore Submerged Lands’, (1976) 50 *Australian Law Journal*, 402-409, 404-405.

Hong Kong's 1901 Foreshores and Sea Bed Ordinance validated all Crown leases of 'foreshore and submerged lands within the territorial waters of the colony for reclamation and other purposes' and legalized the making of such leases for the future.³⁶ Any mines and minerals contained in a lease were, however, reserved to the Crown. This was the first of many Hong Kong enactments concerning reclamation of the foreshore and sea bed.³⁷

It has been commented that it is beyond question that 'the Crown's prerogatives in respect of the sea prevailed in the colonies', yet it is not clear whether this implied 'the incorporation of the territorial sea within the colonial boundaries.'³⁸ In 1910, the governor of Hong Kong, Sir Frederick Lugard, raised the issue of boundaries with the Colonial Office, prompting a reaffirmation that: 'Great Britain claims territorial powers within the three mile limit of the islands included in the leased area; and claims the whole foreshore, within the limits of the territory, of Mirs Bay and Deep Bay.'³⁹ Britain was also satisfied that since the waters it claimed off Lantau were not within three miles of any Chinese territory they could not be claimed by China.⁴⁰ Still, boundary stones erected on Lantau in 1902 excluded Po Chue Tam, a promontory some distance from Tai O village that was not connected to the main island and yet was home to the police station.⁴¹ The governor also disapproved the Land Court's recommendation to grant fishing licences in the area of Swallow Rock, a small island off Tai O village within the three

³⁶ Ordinance No. 15 of 1901, 5 October 1901. Text available at: <http://oelawhk.lib.hku.hk/archive/files/11d82301ed54690c647b85309f9997c9.pdf>.

³⁷ G. Marston, 'Colonial Enactments relating to the Legal Status of Offshore Submerged Lands', (1976) 50 *Australian Law Journal*, 402-409, 405.

³⁸ D. P. O'Connell, 'The Juridical Nature of the Territorial Sea', in I. A. Shearer (ed), *The International Law of the Sea: Volume I* (1st edition), 1982, Oxford University Press, 59, 113.

³⁹ Quoted in P. Wesley-Smith, *Unequal Treaty 1898-1997, China, Great Britain and Hong Kong's New Territories*, 105.

⁴⁰ *Ibid*, 112.

⁴¹ *Ibid*, 110-111.

mile limit, because Swallow Rock was not within the leased territory and Tai O harbour was under Chinese jurisdiction.⁴²

Hong Kong issued an Interpretation Ordinance in 1911,⁴³ Section 39b of which defined ‘colonial waters’ as ‘all waters, whether navigable or not, included within the area bounded’ by straight lines following precise geographical coordinates as set out in the Ordinance. These boundaries largely corresponded to those set out in the 1898 Convention Map. Some discrepancies remained, especially as the sea territory indicated on the 1898 Convention Map did not correspond to the emerging international law on the territorial sea. In particular, while Lantau Island appeared to have been denied any territorial sea on its western side, sea areas well beyond the three nautical miles considered by Britain and many other states to be the customary limit were included to the east of the leased land territory.

Following the Second World War, the question of the extent of Hong Kong’s territorial waters resurfaced. During the Sino-Japanese hostilities between 1937 and 1939 in relation to which Britain maintained its neutrality, Hong Kong was instructed to limit its jurisdiction to territorial waters accepted under customary international law in order to avoid any incident that might draw Britain into the conflict.⁴⁴ Britain had gone so far as to inform Japan of Hong Kong’s jurisdictional limits as follows:

- (a) Waters within 3 miles of the Colony’s territory;
- (b) Waters extending 3 miles to seaward of lines drawn from S.W. Point to Black Point in Deep Bay and from Fung Head to Mirs Point in Mirs Bay, the waters of both these

⁴² Ibid, 113.

⁴³ The 1911 Interpretation Ordinance consolidated the original 1867 Interpretation Ordinance. It was subsequently replaced by the 1950 Interpretation Ordinance which was in turn superseded by the 1966 Interpretation Ordinance.

⁴⁴ National Archives, CO 129/602/5, Limits of territorial waters, 1949 Oct. 27-Dec. 9, Letter from the Colonial Office to the Admiralty dated 23 November 1949, para. 4.

bays within these closing lines being specially claimed as national waters properly leased by China.⁴⁵

In 1949, the governor of Hong Kong requested clarification from the Colonial Office as to the limits of the Colony's territorial waters off the western coast of Lantau. In a letter to the Admiralty and Foreign Office seeking their opinions on the matter, the Colonial Office suggested that to avoid future incidents that might arise from the military use of Hong Kong's waters by Chinese vessels, it would be preferable to retain the limits adopted in 1937.⁴⁶ It was also suggested that these limits should be publicised through an amendment to the Interpretation Ordinance.⁴⁷ An annotated copy of the 1898 Convention Map was circulated in the correspondence (**Map 1**).

In 1951, the International Court of Justice rendered its decision in the *Anglo-Norwegian Fisheries* case, prompting the British government to provide advice to Hong Kong on the principles established by the Court as it concerned the drawing of straight baselines. The question that arose was whether the boundary lines shown on the 1898 Convention map might have been intended by China to constitute a straight baseline system. The Secretary of State for the Colonies stated in draft correspondence that 'since Her Majesty's Government's traditional attitude to territorial waters would presumably have influenced them against taking a lease of the square-shaped area [on the 1898 Convention Map] or admitting that China had the power to grant such a lease it would be difficult now to argue that this was in fact the effect of the Convention.'⁴⁸ There was also a discussion of which waters were claimed as internal waters,

⁴⁵ Ibid.

⁴⁶ Ibid, para. 5.

⁴⁷ Ibid, para. 6.

⁴⁸ National Archives, FO 371/105752, Government advice to Hong Kong concerning application of International Court principles to identification of Territorial Waters, 1953, Savingram from the Secretary of State for the Colonies

with those of Mirs Bay, Deep Bay and Port Shelter being obvious candidates while the inclusion of Hong Kong harbour was apparently more difficult to justify ‘by reference to the principles of international law accepted by H.M. Government’.⁴⁹ The Secretary of State for the Colonies considered it preferable for political reasons not to publicise the British claim to Hong Kong harbour as internal waters. In response to this correspondence, the Military Branch of the Admiralty urged that ‘the possibility that the square shaped area [on the 1898 Convention Map] could constitute base lines for measuring the territorial sea be rejected’, arguing that baselines needed to be drawn from the land and could not ‘rest on turning points in the open sea’.⁵⁰ According to the Admiralty, if these ‘turning points’ were baselines, ‘the territorial sea would stretch 3 miles beyond them, a proposition which, so far as we know, has never been advanced by anyone’.⁵¹

When the Interpretation Ordinance was replaced in 1966, it included the following clarifications:⁵²

“Colony” and “Hong Kong” mean the area of land and the area of Deep Bay and Mirs Bay lying within the boundaries specified in the Second Schedule and the territorial waters appertaining thereto.

“[T]erritorial waters” means such part of the sea adjacent to the coast of the Colony as is deemed by international law to constitute the territorial waters of Hong Kong.”

to the Officer Administering the Government of Hong Kong, 22 September 1953, No. 1459 Saving, Territorial Waters, para. 2.

⁴⁹ Ibid, para. 3.

⁵⁰ Comments sought on draft savingram and received by Military Branch of the Admiralty, 20 July 1953, *ibid*.

⁵¹ *Ibid*.

⁵² Interpretation and General Clauses Ordinance 1966, Ord. No. 31/66, Legal Supplement No. 1 to the Hong Kong Government Gazette, 28 October 1966, Vol. CVIII, A179.

“[W]aters of the colony” and “Colonial waters” mean –

(a) all waters whether navigable or not, included in the Colony;

and

(b) territorial waters.

The colony of Hong Kong was thus deemed to include land, bays (specifically Deep Bay and Mirs Bay) and territorial waters. However, colonial waters did not include any part of the sea which fell outside ‘territorial waters’ as defined by international law.

On 19 December 1978, the Vietnamese ship, the Huey Fong, arrived ‘at the entrance to Hong Kong waters’ with approximately 3383 refugees on board.⁵³ While accounts of the progression of events vary, it is reasonably clear that until the Hong Kong government could decide what action to take with regard to the unfolding humanitarian disaster, the captain of the Huey Fong was instructed to remain ‘on the other side of the international water barrier’ (and ideally to continue its voyage to Taiwan or Guam after receiving supplies and medical assistance).⁵⁴ During this time, the Huey Fong remained at anchor approximately 1.5 nautical miles off Po Toi, an island at the edge of the southern sea boundary as defined in Schedule 2 of the 1966 interpretation ordinance. The Huey Fong finally sailed into Hong Kong on 19 January 1979. It was followed a month later by the Skylark which had remained off Lamma Island for 155 days until the refugees cut the anchor.⁵⁵ The Hong Kong government apparently took the position that these two ships were waiting on the high seas which would not be the case if Hong Kong had a three mile territorial sea.

⁵³ Leonard Davis, *Hong Kong and the Asylum-Seekers from Vietnam*, St. Martin’s Press, New York, 1991, 4-5.

⁵⁴ Ibid, 5.

⁵⁵ Ibid, 6.

In 1979, the British Foreign Office produced a map illustrating the extent of Hong Kong's territorial waters measured from the low water line along the coast of the various islands forming part of the territory (**Map 2**).⁵⁶ Notably, according to this map Lantau Island had a territorial sea on its western side. For most of its colonial rule, Britain failed unambiguously to claim and to publicise its claim to a territorial sea around Hong Kong except to the extent that the colonial waters as defined in the Interpretation Ordinance extended beyond internal waters such as those contained in bays. As the date for the expiry of the New Territories lease grew closer, Britain lacked a solid juridical and historical basis to press for the inclusion of a three nautical mile territorial sea in any final determination of Hong Kong's boundaries.

III. Mapping Hong Kong's Waters

After the signing of the 1984 Sino-British Joint Declaration, talks between the UK and China proceeded over the administrative border between Guangdong and Hong Kong. The precise demarcation of Hong Kong's boundaries remained unsettled until a late stage of the handover negotiations, in part due to lingering uncertainties over the extent of British sovereignty.⁵⁷ A sticking point in the talks was reportedly whether the UK could validly claim a three nautical mile territorial sea around Hong Kong so as to include Peaked Hill, Swallow Rock and Po Chue Tam in the colony.⁵⁸ The inclusion of the foreshores of Mirs Bay and Deep Bay was also contested.

In its Territorial Sea Act of 1987, the UK formally increased its territorial sea to twelve nautical miles measured from normal baselines (i.e. those drawn from the low water mark) or

⁵⁶ National Archives, FCO 18/313 - Hong Kong, with territorial waters, 1979 Jan 1 - 1979 Dec 31.

⁵⁷ L. Wong, 'Fresh Talks Over SAR Boundaries', *South China Morning Post*, 30 June 1992; L. Wong, 'Islands dispute delays decision on post-1997 boundary', *South China Morning Post*, 30 April 1992.

⁵⁸ L. Wong, 'Fresh Talks Over SAR Boundaries', *South China Morning Post*, 30 June 1992, citing an interview with Professor Wesley-Smith.

straight baselines (for example, across bays).⁵⁹ The 1987 Act makes no mention of colonial territories, except to the extent that it repeals the definition of ‘the territorial waters of Her Majesty’s dominions’ and removes the reference to ‘one marine league’ in Section 7 of the Territorial Waters Jurisdiction Act 1878. When the legislation to extend the territorial sea was first proposed in 1981, the impact on dependent territories was considered a major issue and a consultation took place.⁶⁰ An inter-departmental memorandum stated in relation to Cyprus, Gibraltar and Hong Kong that ‘the possibilities of extension are limited by the importance of maintaining good relations with neighbouring countries’.⁶¹ As it concerned Hong Kong, the following suggestion was made: ‘Delimitation with China. But extension only to the edges of the square boundary might be easier. Relations with China need to be taken into account.’⁶² The Interpretation and General Clauses Ordinance, as revised in 1989, merely added the words ‘waters of Hong Kong’ alongside ‘waters of the colony’ and ‘colonial waters’ and retained the reference to territorial waters as defined under international law.⁶³ As discussions over Hong Kong’s future had already commenced, there was never any formal proposal to extend the territorial sea around Hong Kong to twelve nautical miles. Indeed, to do so would have been seen as a diplomatically unfriendly act.

Hong Kong’s administrative boundaries were eventually settled at the conclusion of the handover negotiations, following a joint survey that reported on 19 June 1997. Somewhat ironically, therefore, Hong Kong acquired defined borders on the eve of its reabsorption into

⁵⁹ An Act to provide for the extent of the territorial sea adjacent to the British Islands, 15 May 1987. Territorial Sea Act 1987, Section 1(1)(a). Text available at: <https://www.legislation.gov.uk/ukpga/1987/49/contents>.

⁶⁰ National Archives, FCO 40/1295 – HK extension of territorial waters 1981, 1981 Jan 01 - 1981 Dec 31.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Interpretation and General Clauses Ordinance, Revised Edition 1989, Laws of Hong Kong, CAP. 1, p. 6.

China.⁶⁴ In the final agreement, Hong Kong was reported to have gained 91 hectares of land and one nautical mile west of Lantau off Tai O.⁶⁵ Po Chue Tam was deemed to fall under British jurisdiction. The UK apparently did not press any claim of a territorial sea around Lantau.⁶⁶ The extra nautical mile west of Lantau had the practical aim of addressing the threat posed by smugglers by facilitating the operations of marine patrol boats on the Chinese and Hong Kong sides and preventing disputes caused by the lack of clear lines of demarcation.⁶⁷ The colonial claim to the foreshores of Deep Bay and Mirs Bay was modified to allow access for mainland vessels to the Shenzhen coast.⁶⁸ When the official borders of the Hong Kong Special Administrative Region (SAR) were published on 8 August 1997, the local media reported that Hong Kong's land territory had been reduced by an area two and a half times the size of Hong Kong Island, and that its sea territory was 200 square kilometres less than depicted on maps drawn up during the British administration.⁶⁹ The gains were described as two 'bubble-shaped' areas of sea around southern Lantau and Po Toi amounting to about 50 square kilometres.⁷⁰ Nonetheless, there was little protest against the declared boundaries which may reflect Hong Kong's capacity economically, administratively, and practically, to police and preserve a larger area of water.

⁶⁴ 'Fixing Borders', *South China Morning Post*, 18 January 1997. See also Joseph Y.S. Cheng, 'Sino-British Negotiations on Hong Kong during Chris Patten's Governorship', (1994) *Australian Journal of International Affairs*, vol. 48, no. 2, 229-245, suggesting that the issue of representative government presented the most pressing concern in the later period of the negotiations.

⁶⁵ Ng Kang-Chung, 'Border formally agreed 12 days before handover', *South China Morning Post*, 20 June 1997.

⁶⁶ G. Manuel, 'New borders shrink SAR by twice the size of HK Island, Area in Deep and Mirs bays lost to mainland', *South China Morning Post*, 9 August 1997.

⁶⁷ 'Fixing Borders', *South China Morning Post*, 18 January 1997.

⁶⁸ G. Manuel, 'New borders shrink SAR by twice the size of HK Island, Area in Deep and Mirs bays lost to mainland', *South China Morning Post*, 9 August 1997.

⁶⁹ Ibid.

⁷⁰ Ibid.

The extent of Hong Kong's jurisdiction over the sea is set out in the constitutional provisions that came into effect in 1997. Article 1 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ('Basic Law') specifies that the 'Hong Kong Special Administrative Region is an inalienable part of China'.⁷¹ According to Instrument 10 of the Basic Law, 'the area of the Hong Kong Special Administrative Region covers the Hong Kong Island, the Kowloon Peninsula, and the islands and adjacent waters under its jurisdiction'.⁷² Instrument 11 specifies the geographical coordinates of Hong Kong's land and sea sectors within which the territory exercises 'a high degree of autonomy' and enjoys 'executive, legislative and independent judicial power'.⁷³ Under the heading, 'The Land and Sea Comprising the Hong Kong SAR', Schedule 2 of the current edition of the Interpretation and General Clauses Ordinance refers to the promulgation by the Order of the State Council of the People's Republic of China dated 1 July 1997 which sets out the precise geographical coordinates of Hong Kong's boundaries and includes a map.⁷⁴ The Central People's Government retains responsibility for all aspects of foreign affairs and defence.⁷⁵ International maritime zones such as the territorial sea and exclusive economic zone are a matter for China and stipulated in Chinese legislation. The drawing of baselines and measurement of maritime zones is governed by the 1982 United Nations Convention on the Law of the Sea (UNCLOS), to which China is a party, and customary international law.

⁷¹ Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Basic Law), 1 July 1997.

⁷² Basic Law, Instrument 10, p. 88, referring to Decision of the National People's Congress on the Establishment of the Hong Kong Special Administrative Region (Adopted at the Third Session of the Seventh National People's Congress on 4 April 1990).

⁷³ Basic Law, Article 2.

⁷⁴ Order of the State Council of the People's Republic of China No. 221 dated 1 July 1997 and published as S.S. No. 5 to Gazette No. 6/1997 of the Gazette. Text available at:

http://www.blis.gov.hk/blis_ind.nsf/CurAllEngDoc/F346D7A4FFE6A272482575EE000E9312?OpenDocument

⁷⁵ Basic Law, Articles 13 and 14.

IV. The Evolution of China's Baseline System

According to a Chinese textbook published in 1957, a state's territory included a territorial sea of three or twelve nautical miles measured from the low water mark.⁷⁶ An article in the *People's Daily* in 1958 rejected the view held at the time by the US and the UK that the three nautical mile limit was a norm of international law, suggesting that the breadth of the territorial sea was to be decided in accordance with 'historical usage, economic interest, and [national] security'.⁷⁷ On 4 September 1958, China issued a Declaration extending Chinese territorial waters to twelve nautical miles and, contrary to the principle put forward in the 1957 textbook (which was later withdrawn), adopting a straight baseline system:

China's territorial sea along the mainland and its coastal islands takes as its baseline the line comprising straight lines connecting base-points on the mainland coast and those on the coastal islands on the outer fringe, and the water area extending twelve nautical miles outward from the baseline is China's territorial sea. The water areas inside the baseline [...] are Chinese inland waters.⁷⁸

The proposed baselines would 'embrace vast areas of sea, including the entire Chiungchow Strait'.⁷⁹ The British government notified China that it did not recognise the Chinese claim as

⁷⁶ Hungdah Chiu, 'China and the Question of Territorial Sea', (1975) *Maryland Journal of International Law*, vol. 1, Issue 1, 29-77, 43-44.

⁷⁷ *Ibid*, 45.

⁷⁸ Text set out in E. Lauterpacht, 'The Contemporary Practice of the United Kingdom in the Field of International Law – Survey and Comment, July 1 – December 31, 1958, (1959) *International and Comparative Law Quarterly*, vol. 8, 146-212, 182, footnote 64.

⁷⁹ W. E. Butler, 'New Soviet Legislation on Straight Base Lines', (1971) *International and Comparative Law Quarterly*, vol. 20, 750-752, footnote 17.

valid under international law.⁸⁰ The US also protested.⁸¹ In 1962, the US Department of State published a report on the China-Hong Kong Boundary, measuring the total length of the land and water boundary of Hong Kong as 154.6 miles.⁸² The report notes that the land area, including 198 islands and islets, measures approximately 391 square miles and that ‘British waters’ measure 738 square miles. According to the report, while the land boundary had not been the source of any dispute (which perhaps explains why demarcating it precisely had been unnecessary), the sea boundary had been a source of friction.

Since early 1958, occasional incidents have occurred over attempts by the Chinese Communists to extend the offshore limits of territorial waters from the 3 miles recognized by the British to 12 miles and also over the use of certain fishing grounds by residents of Hong Kong.⁸³

In other words, the source of friction was deemed to be China’s attempted extension of its territorial sea claim to twelve miles contrary to the British position at the time that the limit was three miles.

One possible effect of China’s claim would have been to enclose the entire territory of Hong Kong within Chinese internal waters using straight baselines drawn from islands to the east, south and west.⁸⁴ A notice issued by China in the mid-1960s stated that ‘the waterway west of the Chiapeng and the Tankan islands at the mouth of the Pearl [Ch’u] River is part of China’s

⁸⁰ E. Lauterpacht, ‘The Contemporary Practice of the United Kingdom in the Field of International Law – Survey and Comment, July 1 – December 31, 1958, (1959) *International and Comparative Law Quarterly*, vol. 8, 146-212, p. 182. See also Jeanette Greenfield, *China’s Practice in the Law of the Sea*, Clarendon Press, Oxford, 1992, p. 67, footnote 66: ‘The UK protested the breadth of the territorial sea being claimed, and the method of its delimitation in a Note, 13 Sept. 1958’.

⁸¹ Jeanette Greenfield, *China’s Practice in the Law of the Sea*, Clarendon Press, Oxford, 1992, p. 67.

⁸² US Department of State, International Boundary Study, No. 13-April 13, 1962, China-Hong Kong Boundary, *The Geographer*, Office of the Geographer, Bureau of Intelligence and Research.

⁸³ China-Hong Kong Boundary, *ibid*, 2.

⁸⁴ Jeanette Greenfield, *China’s Practice in the Law of the Sea*, Clarendon Press, Oxford, 1992, p. 69.

inland [internal?] waters foreign vessels are prohibited to sail in the waterways west of the Chiapeng Tankan islands'.⁸⁵ Despite this notice, it has been observed that China did not continue the Tankan line far enough eastward to enclose Hong Kong in its internal waters though this was a logical extension of the straight baseline system.⁸⁶

The People's Republic of China was admitted to the United Nations in 1971 and immediately applied to have Hong Kong and Macau removed from the list of non-self-governing territories held by the UN Special Committee on Decolonization to ensure that these colonies would not be covered by the Declaration on the Granting of Independence to Colonial Countries and Peoples.⁸⁷ This served to reemphasize China's position that the occupation of Hong Kong resulted from 'unequal treaties' and that sovereignty over the territory had never been surrendered. The UN accepted China's position and there was apparently no objection by the UK.⁸⁸

By the mid-1970s, the adoption of straight baselines had increased dramatically with more than sixty countries using or permitting their use.⁸⁹ Although the legality of the baselines employed by China, Malaysia, the Philippines, Taiwan, and Vietnam has been questioned by the US and some other states, those states bordering the South China Sea have tended not to lodge formal objections to the baselines of their neighbours.⁹⁰ Despite these developments, a map from

⁸⁵ Hungdah Chiu, 'China and the Question of Territorial Sea', (1975) *Maryland Journal of International Law*, vol. 1, Issue 1, 29-77, 52.

⁸⁶ Ibid.

⁸⁷ General Assembly resolution 1514 (XV) of 14 December 1960.

⁸⁸ R. Horlemann, *Hong Kong's Transition to Chinese Rule: The Limits of Autonomy*, Taylor and Francis, 2002, 13.

⁸⁹ Jeanette Greenfield, *China's Practice in the Law of the Sea*, Clarendon Press, Oxford, 1992, p. 67.

⁹⁰ Robert Beckman, 'The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea', (2013) 107 *American Journal of International Law*, 142, 146. However, when a PRC Foreign Ministry spokesman indicated in 1996 that the baselines around Taiwan and other outlying islands would be determined in due course, the Philippines, Taiwan and Vietnam objected. See Daniel J. Dzurek, 'The People's Republic of China Straight Baseline Claim', *IBRU Boundary and Security Bulletin*, Summer 1996, 80.

1979 held in the British Foreign Office records depicts ‘Hong Kong in relation to China, with Chinese 12 mile territorial sea limit’ using the normal as opposed to straight baselines (**Map 3**).⁹¹

China ratified the UN Convention on the Law of the Sea on 7 June 1996 having participated in the negotiations to play a key role in making the ‘new law of the sea’.⁹² The relevant Chinese legislation concerning maritime zones includes the 1992 Law of the People’s Republic of China on the Territorial Sea and the Contiguous Zone (‘1992 Law on the Territorial Sea’)⁹³, and the 1996 Declaration of the Government of the People’s Republic of China on the Baselines of the Territorial Sea of the People’s Republic of China (‘1996 Declaration on Baselines’).⁹⁴ These instruments predate the Basic Law, but the 1996 Declaration on Baselines is expressly to be made applicable to Hong Kong with effect from 1 July 1997 by way of promulgation or legislation by the Hong Kong SAR.⁹⁵ A report produced by the US Department of State includes a map indicating China’s straight baselines according to the base points stated in the 1996 Declaration.⁹⁶ The lines are drawn beyond the islands to the south of the Hong Kong SAR and at a later point shift abruptly southwards to a point on the west coast of Hainan Island, cutting off the eastern approach to Hainan Strait. The report adopts the view that ‘[m]uch of

⁹¹ National Archives, FCO 18/314, Hong Kong in relation to China, with Chinese 12 mile territorial sea limit, 1979 Jan 1 - 1979 Dec 31 (record opened 31 August 2018).

⁹² Zou Keyuan, *Law of the Sea in East Asia: Issues and Prospects*, Routledge, 2005, 37.

⁹³ Law of the People’s Republic of China on the Territorial Sea and Contiguous Zone, Order No. 55 of 25 February 1992.

⁹⁴ Declaration of the Government of the People’s Republic of China on the Baselines of the Territorial Sea of the People’s Republic of China, 15 May 1996. On 26 June 1998, China enacted the Law of the People’s Republic of China on the Exclusive Economic Zone and the Continental Shelf.

⁹⁵ Basic Law, Annex III, p. 64: ‘The following national laws shall be applied locally with effect from 1 July 1997 by way of promulgation or legislation by the Hong Kong Special Administrative Region: 4. Declaration of the Government of the People’s Republic of China on the Territorial Sea.’

⁹⁶ United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas*, No. 117, Straight Baseline Claim: China, 9 July 1996. Detailed maps are also contained in Daniel J. Dzurek, ‘The People’s Republic of China Straight Baseline Claim’, *IBRU Boundary and Security Bulletin*, Summer 1996, see especially p. 81. See also J. Ashley Roach and Robert W. Smith, *Excessive Maritime Claims*, 3rd edition, Publications on Ocean Development, vol. 73, Martinus Nijhoff Publishers, 2012, 98 (referring to US protest against China’s claim on 21 August 1996).

China's coastline does not meet either of the two [1982 Law of the Sea Convention] geographic conditions required for applying straight baselines'.⁹⁷ The report also notes that Hong Kong and Macao are enclosed by straight baselines despite not being under Chinese sovereignty at the time of the Declaration.⁹⁸ However, it has been observed that '[t]he lines enclosing Hong Kong and Macao would be appropriate in 1997 and 1999, respectively, after these territories revert to PRC control'.⁹⁹ Irrespective of the validity of China's straight baseline claim under international law, according to the Basic Law which mandates the application of the 1996 Declaration in Hong Kong, the breadth of China's territorial sea is to be measured from straight baselines extending beyond Hong Kong, making the territory of Hong Kong, including its 'territorial' waters, an enclave within China's internal waters.¹⁰⁰ China has additionally made a claim on historical grounds for its 'nine-dash line' which is drawn a considerable distance from the coastline and well beyond Hong Kong. The legal effect of the 'nine-dash line' is hotly disputed internationally.¹⁰¹

V. Hong Kong's Maritime Jurisdiction in Relation to China

Under Article 151 of the Basic Law, the Hong Kong SAR, under the name 'Hong Kong, China', has the capacity to 'maintain and develop relations and conclude and implement agreements with

⁹⁷ United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas*, No. 117, Straight Baseline Claim: China, 9 July 1996, p. 4.

⁹⁸ Ibid, p. 7.

⁹⁹ Daniel J. Dzurek, 'The People's Republic of China Straight Baseline Claim', *IBRU Boundary and Security Bulletin*, Summer 1996, p. 84.

¹⁰⁰ Zou Keyuan, *Law of the Sea in East Asia, Issues and Prospects*, Routledge, 2005, 41-42: 'Hong Kong only has internal waters within the publicized baselines of the PRC in 1996'.

¹⁰¹ For the origins of the line, see e.g. Zou Keyuan, *Law of the Sea in East Asia, Issues and Prospects*, Routledge, 2005, 47-60. See also Robert Beckman, 'The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea', (2013) 107 *American Journal of International Law*, 142, 153: 'China has a historic claim to sovereignty over what it refers to as four major archipelagic groups in the South China Sea-Spratlys (Nansha), Paracels (Xisha), Pratas (Dongsha), and Macclesfield Bank (Zongsha)-as well as to Scarborough Reef (Huangyan Island). Articles summarizing China's historic claim make it clear that China has claimed the geographic features in these areas since ancient times. They do not purport to assert that China has a historic claim to all of the waters in the South China Sea.'

foreign states and regions and relevant international organizations in the appropriate fields’, including trade and shipping. Additionally, Hong Kong regularly enters into agreements with China on matters affecting the use of Hong Kong’s waters, such as the protection of the environment in Deep Bay and Mirs Bay and the building of the Hong Kong-Zhuhai-Macau Bridge. China may not engage in projects affecting Hong Kong’s waters without the Hong Kong government’s approval. For example, such approval was needed for the dredging of a deeper shipping lane through the Tonggu channel to allow easier access to Shenzhen’s ports which would run 2.7 kilometres through Hong Kong’s waters.¹⁰² Moreover, Hong Kong actively polices its waters for unlawful fishing activities, including by Chinese vessels.¹⁰³ The pollution allegedly emitted by the Liaoning was, however, beyond Hong Kong’s powers to regulate as military vessels fall outside the scope of domestic regulations concerning the use of fuel with low sulphur at berth.¹⁰⁴

Hong Kong’s current concerns and needs as it concerns control over sea areas are focused on land reclamation for economic development and housing, environmental protection and conservation.¹⁰⁵ A joint crackdown on people smugglers known as ‘snakeheads’ alleviated the problem of illegal immigration and in any case the sea route now represents only the last stretch of the journey from the mainland towards Lau Fau Shan and Sai Kung.¹⁰⁶ It has been noted that

¹⁰² Joseph Lo, ‘Officials deny stalling over Shenzhen dredging plan HK not trying to delay project to protect its interests, says bureau spokeswoman’, *South China Morning Post*, 27 July 2004.

¹⁰³ Hong Kong Government Press Release, ‘Curbing unauthorised entry of fishermen from outside the territory to fish in Hong Kong waters’, 21 June 2006.

¹⁰⁴ E. Ng, ‘Hong Kong government says it cannot regulate black smoke emitted by China’s Liaoning aircraft carrier’, *Hong Kong Free Press*, 8 July 2017.

¹⁰⁵ See e.g. Ling Zhu and Sunil Kumar Agarwal, ‘A Review of the Legal and Policy Framework for Vessel Source Pollution in Hong Kong’, (2011) *Ocean Development and International Law*, vol. 42, 264-279, noting at p. 274 the need for cooperation with mainland China, and the Framework Agreement on Hong Kong/Guangdong Co-Operation Environmental Protection and Ecology Conservation.

¹⁰⁶ Kinling Lo and Ng Kang-chung, ‘Fewer illegal immigrants arrested in Hong Kong after joint crackdown on people smugglers with mainland police’, *South China Morning Post*, 8 December 2017.

the infamous Kowloon ‘Walled City’ was about a quarter of a mile from the sea shore in 1898 but that it is now much further inland as a consequence of land reclamation.¹⁰⁷ This is merely one example of the shrinking of Hong Kong’s sea space to accommodate construction projects. The dumping of potentially contaminated dredged mud was largely unregulated until the adoption of the Dumping at Sea Ordinance in 1986.¹⁰⁸ This was followed in 1997 by the Environmental Impact Assessment Ordinance which is applicable to coastal reclamation.¹⁰⁹

One problem with the implementation of China’s straight baseline system that might be considered to affect Hong Kong as a busy port is that the rights of passage of foreign vessels are potentially limited. In this respect, Article 8(2) of the UN Convention on the Law of the Sea presumably applies, so that where the establishment of a straight baseline system has the effect of enclosing as internal waters areas that had not previously been considered as such, a right of innocent passage shall exist in those waters. It is also established under Article 126 of the Basic Law, that: ‘With the exception of foreign warships, access for which requires the special permission of the Central People’s Government, ships shall enjoy access to the ports of the Hong Kong Special Administrative Region in accordance with the laws of the Region.’

If Hong Kong were to have ambitious development projects such as constructing artificial islands for housing purposes or a wind farm to satisfy energy needs it may need to spill into Chinese internal waters.¹¹⁰ This could be done by entering into an agreement with China which

¹⁰⁷ P. Wesley-Smith, *Unequal Treaty 1898-1997, China, Great Britain and Hong Kong’s New Territories*, 18.

¹⁰⁸ Cap 466, Dumping at Sea Ordinance, 1 April 1995.

¹⁰⁹ Cap 499, Environmental Impact Assessment Ordinance, 1 April 1998.

¹¹⁰ Notably Article 7 of the Basic Law states that: ‘The land and natural resources within the Hong Kong Special Administrative Region shall be State property.’ However, the Hong Kong SAR government is ‘responsible for their management, use and development and for their lease or grant to individuals, legal persons or organizations for use or development’, and entitled to all revenues derived therefrom. In August 2018, a Hong Kong think tank proposed building a 2,200 hectare artificial island between Lantau Island and Hong Kong Island (i.e. within Hong Kong’s territorial waters) that could house more than a million people. This proposal went further in terms of the envisaged land reclamation than a government plan to build an East Lantau Metropolis as part of its vision for the city beyond

is at once an exercise of Hong Kong's autonomy and a demonstration of its inability to resolve urgent issues for its own society without assistance. The idea that the Hong Kong SAR government might seek permission from the central government to use waters outside Hong Kong's boundaries for reclamation was floated in 2018 as the problem of land supply for housing reached critical levels.¹¹¹ The proposed location was precisely the once disputed sea area west of Lantau Island. Scholars reportedly noted in response to this suggestion that there would be competition with 'land-hungry mainland cities' with their own reclamation needs and that any lease or grant of sea areas could raise the question whether the domestic legal system of China or Hong Kong would apply in the reclaimed land territory.¹¹² If the current status quo was born of an unequal treaty, it is almost inevitable that Hong Kong will be an unequal player in any matter relating to acquisition, use and control of the sea. Indeed, the Hong Kong-Zhuhai-Macau Bridge symbolises the gradual erosion of borders and a shift towards a homogenized concept of Chinese waters as these may have been perceived in pre-colonial times.

VI. Conclusion

It has been suggested that a book concerning the negotiations leading up to the Joint Declaration might be called 'The Equal Treaty' as the handover of sovereignty marked a rebalancing of historically unequal bargaining power between the UK and China.¹¹³ China's stance throughout was that the treaties concerning the colony of Hong Kong were drawn up without any mutual recognition of sovereign equality and no reciprocity of rights and obligations.¹¹⁴ The status of

2030. See Kathy Zhang and Li Bingcun, 'Think tank proposes building artificial island', *China Daily*, 8 August 2018.

¹¹¹ Li Bingcun, 'Hong Kong Land Reclamation: with mainland sea area?', *China Daily*, 2 August 2018.

¹¹² Ibid.

¹¹³ Irene Chan man Tuen, 'The Sino-British Joint Declaration of 1984 on the Future of Hong Kong', (1991) *Cambridge Review of International Affairs*, vol. 5, No. 1, 40-47, 45, as suggested by Sir Percy Cradock.

¹¹⁴ P. Wesley-Smith, *Unequal Treaty 1898-1997*, China, Great Britain and Hong Kong's New Territories, 3.

inequality does not invalidate a treaty under international law but the Chinese position may help to explain the apparent lack of interest in fixing Hong Kong's boundaries. Additionally, serious boundary disputes were a relatively rare occurrence.¹¹⁵ Britain unilaterally modified the boundaries according to its own understanding of the legal position while China was occupied with other concerns, such as internal security within its already vast land mass.

The situation of Hong Kong is unique, but the example nonetheless illustrates the potential complexities surrounding the reversion of islands and coastal territory following a long lease. It has been noted that territorial leases generate novel issues for international law to address.¹¹⁶ Modern territorial leases are sometimes viewed negatively as 'an expression of colonial or neo-colonial hegemony'.¹¹⁷ In the second half of the twentieth century, several States sought territorial leases in order to establish military bases overseas.¹¹⁸ As each lease agreement is sui generis, there is no single formula for the return of control over ports, harbour works, maritime features and sea areas that may expressly or impliedly be included in the lease. Indeed, the effect of territorial leases in modern economic, trade and security relations is unpredictable and indebted states' needs may be better served by private investments and development aid.

When control of the port of Hambantota was handed to China Merchants Port Holdings Company Limited (a company incorporated in Hong Kong) in December 2017 in accordance with the 'Concession Agreement in relation to Hambantota Port, Sri Lanka', assurances were given that the port would not be used for military ends.¹¹⁹ This was to allay fears as to possible

¹¹⁵ Ibid, 105, noting a possible exception concerning the Kowloon Walled City.

¹¹⁶ Michael J. Strauss, *Territorial Leasing in Diplomacy and International Law*, 1.

¹¹⁷ Y. Ronen, 'Territory, Lease', in *Max Planck Encyclopaedia of Public International Law*, para. 17.

¹¹⁸ Ibid, para. 2.

¹¹⁹ Ankit Panda, 'Sri Lanka Formally Hands Over Hambantota Port to Chinese Firms on 99-Year Lease', *The Diplomat*, 11 December 2017. See also China Merchants Port Holdings Company Limited, Potential Disclosable Transaction, Concession Agreement in relation to Hambantota Port, Sri Lanka, at <http://www.cmport.com.hk/UpFiles/bpic/2017-07/20170725061311456.pdf>; and updated version at

military activities by China off the Sri Lankan coast expressed by the US, India and Japan. The Chinese Ministry of Foreign Affairs reportedly stated that the development of the port was ‘aimed at spurring local economic growth based on equality and mutual benefits’.¹²⁰ The executive vice president of China Merchants reportedly also indicated that the ‘port facilities belong to the citizens of Sri Lanka but will be a key part of China’s massive One Belt One Road initiative to build trade and transport links across Asia and beyond’.¹²¹ The ninety-nine year lease granted to China was therefore presented purely as a commercial arrangement, with the creation of a joint company to manage the port’s operations in which China Merchants undertook to pay 1.12 billion US dollars for an eighty-five percent share while the Sri Lankan government retained the remaining fifteen percent.

The commercial arrangement with China appeared to be less of an issue for critics of the Concession Agreement than the ninety-nine year lease of territory and its implications for Sri Lankan sovereignty.¹²² As the Hong Kong example demonstrates, ninety-nine years is a long time for one State to establish itself on the territory of another State. If the leased area any reclaimed land essentially falls under Chinese jurisdiction, broader claims over ocean spaces may follow as the Belt and Road initiative gains pace. In view of the high financial stakes involved on both the Chinese and Sri Lankan side, the eventual return of the port is unlikely to be straightforward.

<http://www.cmport.com.hk/UpFiles/bpic/2017-12/20171208063230273.pdf>. The final agreement prohibits the use of the port by foreign countries for military purposes without the prior permission of the Sri Lankan government. See Maria Abi-Habib, ‘How China got Sri Lanka to Cough up a Port’, *The New York Times*, 25 June 2018.

¹²⁰ J. Tarabay, ‘With Sri Lankan port acquisition, China adds another “pearl” to its “string”’, *CNN*, 5 February 2018.

¹²¹ Ranga Sirilal, Shihar Aneez, ‘Sri Lanka signs \$1.1 billion China port deal amid local, foreign concerns’, *Reuters*, 29 July 2017.

¹²² K. Schultz, ‘Sri Lanka, Struggling With Debt, Hands a Major Port to China’, *The New York Times*, 12 December 2017. Deterred by the experience of Sri Lanka, Myanmar recently re-negotiated its agreement with China for the development of the Kyaukpyu deep water port which was to include a special economic zone and an industrial park. See ‘Myanmar scales back Chinese-backed port project over debt fears’, *The Guardian*, 2 August 2018.

Hong Kong is on borrowed time, but its jurisdictional control over a limited sea area is an important symbol of its autonomy guaranteed under the Basic Law. It remains to be seen whether the boundaries around Hong Kong will simply fade into China's straight baselines in 2047 when the fifty year period of 'one country, two systems' guaranteed under the Basic Law comes to an end.