

Simon Henderson, BComm/LLB/GDLP (ANU), LLM (Fletcher)
simonjhenderson@gmail.com

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Submission to Joint Standing Committee on Treaties: Australia-Hong Kong FTA Inquiry

Introduction

I greatly appreciate the opportunity to provide a submission to the inquiry by the Joint Standing Committee on Treaties (**JSCOT**) examining the Free Trade Agreement between Australia and Hong Kong (the **Inquiry**). The Inquiry provides a valuable opportunity for a wide range of stakeholders to give input on the Australia-Hong Kong FTA.

By way of personal background, I am an international human rights lawyer, with 10 years experience in public policy and advocacy issues domestically and across the Indo-Pacific. I have specialised experience in legal, political and human rights issues in Hong Kong. Over the last two years, I was Senior Policy Advisor at Justice Centre Hong Kong, a local non-government organisation (**NGO**), where I was responsible for civil society advocacy in respect of the United Nations Universal Periodic Review (**UPR**) as it relates to Hong Kong. In this role I engaged with a wide variety of stakeholders in the civil society, business and diplomatic communities. I also regularly briefed parliamentarians from a wide range of countries on Hong Kong. Additionally, I have also covered Hong Kong, and the People's Republic of China (**PRC**) more broadly, in previous roles at the Department of Foreign Affairs and Trade (**DFAT**), the Law Council of Australia (**LCA**) and Human Rights in China (**HRIC**).

Due to limited personal capacity, this submission will address the following matters:

- concerns with the content of the national interest analysis;
- contextual environment for business activities in Hong Kong;
- incorporating an enforceable human rights clause in the Australia-Hong Kong Free Trade Agreement (**AHKFTA**); and
- misuse of the “non-interference principle” as it relates to Hong Kong on human rights issues.

Australia has close economic relations with Hong Kong and it remains an important trading partner. As DFAT notes, Hong Kong was Australia's twelfth largest trading partner overall in 2018, with total two-way trade in goods and services worth \$17.8 billion.¹ In 2018, Hong Kong was Australia's seventh most important destination for merchandise exports (\$10 billion) and seventh-largest services market (\$3.0 billion). Meanwhile, Hong Kong is our fifth largest source of total foreign investment, with a stock of \$118.8 billion at the end of 2018, and our eleventh largest destination for total Australian investment, with a stock of \$52 billion at the end of 2018.

Protection of fundamental freedoms, especially those rights contained in international human rights law treaties, such as the International Covenant on Civil and Political Rights (**ICCPR**), including safeguarding the rule of law, are crucial to the successful trade relationship that Australia enjoys with Hong Kong. However, with Hong Kong's high degree of autonomy continuously being eroded and an overall declining human rights environment, due in substantial part to interference by the PRC, it is in Australia's interests to uphold those rights which protect the people of Hong Kong and at the same time ensure the success of Australian business in Hong Kong.²

¹Department of Foreign Affairs and Trade, “Australia-Hong Kong Free Trade Agreement”, <https://dfat.gov.au/trade/agreements/not-yet-in-force/a-hkfta/pages/default.aspx>

²Due to capacity constraints and focus of this submission I will not go into detail regarding the human rights environment in Hong Kong. For a recent overview, I recommend the

I am of the view that passage of the AHKFTA should be subject to amendments guaranteeing human rights and rule of law protections. In particular, I recommend the inclusion of an enforceable human rights clause to ensure greater protection and promotion of fundamental rights and the rule of law in Hong Kong. Such an approach would be both in Australia's national interest and reflective of Australia's foreign policy values.

National Interest Analysis

The National Interest Analysis (the **NIA**) is designed to provide an assessment of the economic, social, cultural and environmental effect of a treaty for the purposes of tabling to JSCOT. DFAT staff in the Office of Trade Negotiations will prepare the NIA using a template. The following headings are generally incorporated in each NIA:

- overview and national interest summary
- reasons for Australia to take the proposed treaty action
- obligations
- implementation
- costs
- future treaty action
- withdrawal or termination

Input will be obtained from multiple branches within DFAT as well as relevant government stakeholders prior to tabling. The NIA will also be influenced by consultation that DFAT has undertaken prior to the treaty being signed. The NIA is also often supplemented by additional attachments, in the case of the AHKFTA, that includes the Analysis of the Regulatory Impact on Australia (**Attachment I**), among other attachments.

In the case of the NIA for AHKFTA, there are notable gaps in the overview and national interest summary that fail to take account of Hong Kong's current political and legal environment. Paragraph 5 of the NIA states:

*"Hong Kong is a Special Administrative Region of the People's Republic of China, with longstanding trade and investment links with Australia. Australia supports the 'One Country, Two Systems' framework, with Hong Kong enjoying a high degree of autonomy, including the right to enter into its own trade agreements. The rule of law, independent judiciary and freedoms that Hong Kong enjoys under the Basic Law are the foundations of its success."*³

Additionally, Attachment I at paragraph 6 states:

*"Australia supports the "one country two systems" framework, with Hong Kong enjoying a high degree of autonomy, including the right to enter into its own trade agreements. The rule of law, independent judiciary and freedoms that Hong Kong enjoys under the Basic Law are the foundations of its success. This is one reason why Hong Kong has the second largest concentration of Australians after London (around 100,000) and Australia's largest commercial presence in Asia."*⁴

It is one matter to support the 'One Country, Two Systems' framework and Hong Kong enjoying a high degree of autonomy. It is another, the extent to which such features remain and the extent to which consideration has been taken of their future preservation. The potential for such contextual factors to be considered could have been outlined in Part 2 of Attachment I, which is intended to

³Paragraph 5, Office of Trade Negotiations, Department of Foreign Affairs and Trade, 'National Interest Analysis', [2019] ATNIA 10.

⁴Paragraph 6, Attachment I, Office of Trade Negotiations, Department of Foreign Affairs and Trade, 'National Interest Analysis', [2019] ATNIA 10.

identify potential problems that may arise through a regulatory impact assessment. However, while there are important issues covered there, including Hong Kong's economic outlook, risk for Australian service providers and outdated investment rules, among other matters, no mention is made of problems that have arisen for business in Hong Kong through interference by the PRC. The NIA also fails to reference or take into account broader human rights and rule of law concerns.

Trade cannot be seen in isolation of the political and legal environment of any jurisdiction, let alone when dealing with one in where the Chinese Communist Party (CCP) retains the authority to appoint the Chief Executive and principal officials, as is the case in Hong Kong. The CCP has several mechanisms to place pressure on business operations in Hong Kong, which, in a disturbing trend, is increasingly deploying. Specific case examples of this are detailed in the next section of this submission. To perceive of such risks as not being applicable to Australian businesses is naive at best and grossly negligent at worst.

Hong Kong's human rights environment has deteriorated quickly in recent years. This is evidenced by physical and verbal threats to pro-democracy politicians and activists, disqualification of candidates based on their political beliefs, banning political parties, media self-censorship, the failure to progress universal suffrage and the abduction and detention of the Causeway Bay booksellers. Collectively these measures, alongside the limited space for civil society engagement, have cast a shadow over the faithful implementation of "One Country, Two Systems" and the "high degree of autonomy" as contained in the Basic Law. The attempted introduction of an extradition law enabling transfers to the mainland and mass protests in opposition, have only placed further pressure upon this framework, particularly in the wake of direct and public intervention by the PRC government on these matters.⁵

Submissions from Hong Kong Watch,⁶ Australia-Hong Kong Link,⁷ Canberra Hong Kong Concern Group,⁸ Hong Kong Higher Institutions International Affairs Delegation⁹ have outlined the broader human rights concerns in Hong Kong in substantial detail. Meanwhile, the work of the Hong Kong UPR Coalition, a coalition of 45 Hong Kong based NGOs, which I established and was the spokesperson for while at Justice Centre Hong Kong, has a wide range of materials on their website which provide useful background for JSCOT members.¹⁰ This includes summaries of challenges facing freedom of expression, academic freedom, universal suffrage and more.

⁵For example, the 17 May 2019 intervention by the PRC's liaison office in Hong Kong, whereby Legislative Council members were ordered to support the extradition bill and directed on how to act in response to opposition. See Hong Kong Free Press, 'Beijing's Office in Hong Kong summons over 100 loyalists to receive marching orders on extradition bill', 18 May 2019. Available at: <https://www.hongkongfp.com/2019/05/18/beijings-office-hong-kong-summons-100-loyalists-receive-marching-orders-extradition-bill/>.

⁶Hong Kong Watch, Submission to the Joint Standing Committee on Treaties on Inquiry into the Australia-Hong Kong Free Trade Agreement, Submission 16, 23 August 2019. Available at: <https://www.apf.gov.au/DocumentStore.ashx?id=f9aff9b7-025e-494a-a2e5-6393bafaedf3&subId=668999>.

⁷Australia-Hong Kong Link, Submission with regards to the impending inquiry of the Australia-Hong Kong Free Trade Agreement, Submission 17, 23 August 2019. Available at: <https://www.apf.gov.au/DocumentStore.ashx?id=aef1fb26d-7f00-40bc-a30e-be74a273a208&subId=669022>.

⁸Canberra Hong Kong Concern Group, Submission to the Joint Standing Committee on Treaties Inquiry into the Australia-Hong Kong Free Trade Agreement, Submission 4, 23 August 2019. Available at: <https://www.apf.gov.au/DocumentStore.ashx?id=252a3d2e-72f9-4f0b-9121-00e70a4c5e57&subId=668938>.

⁹Hong Kong Higher Institutions International Affairs Delegation, Submission to the Parliament Inquiry on Australia Hong-Kong Free Trade Agreement, Submission 25. Available at: <https://www.apf.gov.au/DocumentStore.ashx?id=cd4bc3e6-5208-4ced-88b5-5d6b6a6329ff&subId=668996>.

¹⁰Hong Kong UPR Coalition, 'Joint Civil Society Submission from the Hong Kong UPR Coalition', March 2018. Available at: http://www.justicecentre.org.hk/framework/uploads/2018/UPR/HKUPRC_Submission_MARCH2018.pdf. Further materials can be found at: <https://www.justicecentre.org.hk/report/universal-periodic-review/>.

Even acknowledging that the NIA was prepared and tabled before the mass anti-extradition bill street protests, its analysis is deeply lacking. Further information regarding political and legal risks could have been obtained internally, as well as with through other Commonwealth Government agencies, and included in the NIA. This is not information that is unfamiliar to DFAT officials in the Office of Trade Negotiations, as well as colleagues in other sections, especially the East Asia Branch. The failure to adequately inform public stakeholders and JSCOT of potential risks through this NIA, unfortunately limits the level of scrutiny by which the AHKFTA should be afforded.

The lack of information in the NIA may also highlight issues with consultations mechanisms run by DFAT. Paragraphs 68 and 69 of Attachment I and the Consultation paper (**Attachment II**) provides information on the consultation undertaken since the negotiations concluded. In particular, paragraph 68 notes:

“DFAT has continued to consult stakeholders, State and Territory Governments, and interested members of the public, and other Commonwealth Government departments since the conclusion of negotiations on the A-HKFTA was announced on 15 November 2018. DFAT will also continue to make information available on the A-HKFTA publicly available in a timely fashion on its website (<https://dfat.gov.au/trade/agreements/not-yet-in-force/a-hkfta/pages/default.aspx>) and respond appropriately to emails sent by stakeholders and interested members of the public to the DFAT A-HKFTA email address (a-hkfta@dfat.gov.au).”

Consultation often requires proactive engagement. In addition to providing options for interested stakeholders to provide their own feedback, DFAT should ensure that it proactively reaches out to a broad range of stakeholders after the conclusion of negotiations, including civil society organisations, who have a broad understanding of the legal, political and economic environment. If such consultation was conducted and incorporated, then the NIA for the AHKFTA may have potentially been more reflective of the current operating environment in Hong Kong.

Recommendation 1

The National Interest Analysis for the Australia-Hong Kong Free Trade Agreement should be amended to take account of the political and legal risks currently and anticipated in Hong Kong. This should be done with the aim of providing JSCOT with a more comprehensive understanding of the relevant environment in which ratification is being sought for the Australia-Hong Kong Free Trade Agreement.

Recommendation 2

Office of Trade Negotiations should amend the existing National Interest Analysis template to include new headings that outline legal and political risk of proposed treaties, ensuring that information is provided of overall business risk.

Recommendation 3

Office of Trade Negotiations should ensure that all reasonable efforts are undertaken to proactively consult with a wide range of stakeholders following the commencement of negotiations and prior to a treaty being tabled, such that the National Interest Analysis provides an accurate assessment of the legal and political risk present in the relevant jurisdiction or country.

Contextual Environment for Business Activities in Hong Kong

Evolution of business operation environment in Hong Kong

As noted above, the business operating environment has shifted in recent years as the PRC has sought to exert greater influence in Hong Kong. In some cases, the actions are subtle, through influencing board appointments. In others, the intervention can be direct and public. Increasingly the business

environment is becoming more unpredictable, with PRC interference leading to a negative impact upon business confidence and damaging Hong Kong's long-term prospects. Interference has led in some businesses to a climate of self-censorship, whereby companies, their CEO's and senior staff are pressured into keeping quiet on certain issues for fear of angering the PRC government and facing a coordinated backlash which would be detrimental to their mainland. These pressures are likely to increase, not decrease, in the coming years.

Surveys conducted by the American Chamber of Commerce in Hong Kong (**AmCham**), the largest foreign business chamber in Hong Kong, have highlighted these concerns. In July 2019, AmCham surveyed 1,268 members to gauge the ongoing impact on sentiment from recent mass protests.¹¹ Members firmly felt that the Hong Kong Special Administrative Region (**HKSAR**) government should provide leadership to restore international confidence. Notably, out of those surveyed, 34.4% of respondents held a gloomy outlook, taking the view that Hong Kong's long-term prospects had been irreparably damaged. Meanwhile, 37.1% were pessimistic over the short-term, but confident Hong Kong will bounce back. The data highlights genuine concerns from business with the current operating environment, reflecting views that many not want to do so public for fear of reprisal. It may also be that similar views are held by Australian businesses as well.

Case study: Suspension of Victor Mallet's visa, Financial Times journalist

On 14 August 2018, the Foreign Correspondents' Club (**FCC**) of Hong Kong scheduled a lunchtime talk with Andy Chan, the convener of the Hong Kong National Party, a pro-independence political party. Victor Mallet, Asia News editor at the Financial Times, was Vice-Chairman of the FCC and scheduled to chair the talk. PRC officials called for the talk to be cancelled, arguing that the issue of independence crossed a "red line" on national sovereignty.¹² Additionally, several notable pro-CCP figures in Hong Kong, in particular the former Chief Executive, CY Leung, tried to pressure and intimidate the FCC into cancelling the talk. Chief Executive Carrie Lam said the FCC invitation was "regrettable and inappropriate".¹³

Soon after the event was held, Mallet's employer attempted to renew his visa, but were notified on 2 October 2018 that his visa, which was due to expire on 3 October 2018, would not be renewed. No reasons were provided. He was subsequently allowed to return on a seven-day visit visa following interrogation by the Hong Kong Department of Immigration. However, on 8 November 2018, when he attempted to return to formally hand over his work responsibilities at the Financial Times, he was rejected. Again, no reasons were provided.

This was the first time a foreign media outlet, let alone a local media outlet employing a foreign worker, had received a visa rejection in such circumstances. The events were reminiscent of actions that the PRC authorities have taken in response to foreign media outlets operating in the mainland, such as the New York Times or the Wall Street Journal. For such actions to be taken in Hong Kong, a city with a large foreign media presence and where freedom of expression is protected in law, was

¹¹AmCham, 'Fix Hong Kong's protest pain now or risk permanent scars: AmCham survey', 26 July 2019. Available at: <https://www.amcham.org.hk/news/fix-hong-kongs-protest-pain-now-or-risk-permanent-scars-amcham-survey>.

¹²Reuters, 'Hong Kong Foreign Correspondents' Club stands firm against Chinese pressure', 7 August 2018. Available at: <https://www.reuters.com/article/us-hongkong-politics-china/hong-kong-foreign-correspondents-club-stands-firm-against-chinese-pressure-idUSKBN1KR1JF>.

¹³South China Morning Post, 'Regrettable and Inappropriate', Hong Kong leader Carrie Lam says of Foreign Correspondents' Club talk by separatist leader Andy Chan', 5 August 2018. Available at: <https://www.scmp.com/news/hong-kong/politics/article/2158356/regrettable-and-inappropriate-hong-kong-leader-carrie-lam>.

deeply worrying.¹⁴ In doing so, the message to international media was that if you step out of line on what is acceptable in the view of PRC authorities your visa may also be terminated.

AmCham issued a press release on 8 October 2018 expressing deep concerns with the decision not to renew the visa of Mallet, warning of broader ramifications:

“These incidents cannot be brushed off as individual, isolated events every time they happen. Transparency is one of AmCham’s core values, and Hong Kong ought to make it clear to the international business community that free speech and free flow of information in this world city is still sound enough for business to consider Hong Kong as an important hub.”

“The rejection of a renewal of work visa for FT correspondent Victor Mallet sends a worrying signal. Without a free press, capital markets cannot properly function, and business and trade cannot be reliably conducted,” said AmCham President Tara Joseph.”¹⁵

Case study: Refusing entry of Albert del Rosario to attend board meeting of First Pacific Company Limited

On 21 June 2019, Albert del Rosario, was travelling to Hong Kong to attend a board and shareholder meetings of First Pacific Company Limited, a Hong Kong listed company. Del Rosario was non-executive director of First Pacific and also the former Foreign Secretary for the Philippines. He was held at the airport for 6 hours and denied entry without reason. Del Rosario was held one month after former ombudsman Conchita Carpio Morales was also detained at the airport. They had both issued a complaint to the International Criminal Court against Xi Jinping, General Secretary of the CCP and President of the PRC, and other PRC officials for alleged crimes in the West Philippines Sea.¹⁶ Following the denial of entry, del Rosario resigned from his position as non-executive director of First Pacific.¹⁷

The incident highlights the potential risks for board directors, regardless of standing, that they may be denied entry to Hong Kong if their personal actions and views are deemed unacceptable to mainland authorities. As with the case of Victor Mallet above, it calls into question the independence of the Immigration Department in certain cases and the possible intervention of the PRC where external affairs may be involved. Under the Basic Law, the HKSAR government retains control of the right of entry. However, under Article 13 of the Basic Law, the PRC government is responsible for foreign affairs of the HKSAR. Increasingly, it appears that such lines are blurring.

Case study: Cathay Pacific Airlines targeted for its staff participating in strikes

On 9 August 2019, the PRC’s Civil Aviation Administration of China (CAAC) issued a directive ordering Cathay Pacific to ban all employees who supported or joined the protests from flying to the mainland. Cathay Pacific came under attack after a number of its employees took part in a general strike that resulted in the cancellation of hundreds of flights on Monday. Global Times, a staunchly nationalist paper published by the CCP warned that the company would “pay a painful price.”¹⁸ PRC

¹⁴Hong Kong Free Press, “Shocked and baffled’: Hong Kong’s ban on journalist a ‘threat to free society’, says press club as UK demands answers”, 9 November 2018. Available at: <https://www.hongkongfp.com/2018/11/09/shocked-baffled-hong-kongs-ban-journalist-threat-free-society-says-press-club-uk-demands-answers/>.

¹⁵AmCham, ‘AmCham statement regarding the non-renewal of FT Editor Victor Mallet’s visa’, 8 October 2018. Available at: <https://www.amcham.org.hk/news/amcham-statement-regarding-the-non-renewal-of-ft-editor-victor-mallets-visa>.

¹⁶Rappler, ‘Ex-DFA chief Del Rosario denied entry to Hong Kong ‘without reason’’, 22 June 2019. Available at: <https://www.rappler.com/nation/233592-ex-dfa-chief-del-rosario-barred-entry-hong-kong-june-21-2019>.

¹⁷Rappler, ‘Del Rosario quits board of Hong Kong-listed firm’, 3 July 2019. Available at: <https://www.rappler.com/business/234505-albert-del-rosario-quits-manny-pangilinan-hong-kong-listed-firm>.

¹⁸Global Times, ‘Cathay Pacific draws backlash over protests’, 8 August 2019. Available at: <http://www.globaltimes.cn/content/1160631.shtml>.

state-run companies told their employees to avoid taking Cathay Pacific.¹⁹ China Huarong International Holdings Limited sent out a message to its workers choose airlines other than Cathay or its Cathay Dragon air unit when flying on business or personal trips. Meanwhile, finance-to-brewing conglomerate China Resources National Corporation gave similar directions to employees.

Cathay Pacific's revenue from Hong Kong and the Chinese mainland accounts for more than a half of its total in 2018. The CAAC order also had the potential to impact flights to Europe and the US, as those routes fly over PRC airspace. Facing a financial assault in multiple directions, Cathay Pacific had little choice but to act. The message was clear, if they wanted to remain in business, they had to police their employees opinions. Cathay Pacific complied, with Rupert Hogg, Chief Executive Officer, being sacrificed, albeit by resignation, John Slosar, Chairman, also resigned¹⁹ and more than a dozen employees were fired.²⁰ One of those was a union leader who was fired for the political content of her Facebook posts.²¹

As a result of the intervention, Cathay Pacific's shares slumped, closing at their lowest since 2009. Employees have complained about a "white terror" taking over the business.²² Increasingly this is going to be more common for business in Hong Kong. Show your allegiance or remain quiet. It is an ominous example, especially given that the company is still substantially owned by a foreign company, United Kingdom based John Swire and Sons, who is the majority stakeholder in Swire Pacific, which holds a 45 per cent stake in Cathay Pacific. Additionally, the airline counts state-run Air China as its second-largest shareholder.

Case study: Taipan mooncakes boss posts online about Hong Kong protests

During August 2019, Garic Kwok, Director, Taipan Bread and Cakes, a well-known Hong Kong bakery chain, made several comments on his Facebook page about the anti-extradition bill protests. In one post he included an aerial photo of a protest described as "Hong Kongers forming a pro-democracy chain across the city". Mainland media, including the People's Daily, attacked Kwok as "supporting activities of those dressed in black" and "forwarding pictures to ridicule the government and police".²³ Taipan mooncakes were subsequently pulled from shelves in mainland stores, supermarkets and online shopping sites. Kwok deleted his Facebook comments and apologised, posting a message on WeChat saying that he was Chinese and using a PRC flag emoji.

Human Rights Clauses in Free Trade Agreements

Intersection between human rights, rule of law and trade in Hong Kong

Commitment to a rules-based order is integral for the protection and maintenance of the international human rights architecture. At the centre, are the core human rights treaties, the majority of which apply in Hong Kong. This includes the ICCPR, which has only been signed, but not ratified by the

¹⁹Bloomberg, 'Chinese State-Run Firms Tell Workers Not to Fly Cathay Pacific', 12 August 2019. Available at: <https://www.bloomberg.com/news/articles/2019-08-12/china-state-run-firm-tells-staff-to-stop-flying-cathay-pacific>.

²⁰Financial Times, 'Cathay Pacific sacks staff who joined Hong Kong protests', 12 August 2019. Available at: <https://www.ft.com/content/6afd54d0-bbe9-11e9-b350-db00d509634e>.

²¹South China Morning Post, 'Sacked Cathay Dragon union leader says company asked about Facebook posts before firing her', 23 August 2019. Available at: <https://www.scmp.com/news/hong-kong/politics/article/3024171/sacked-cathay-dragon-union-leader-says-management-asked>.

²²Reuters, 'Hong Kong unions urge Cathay Pacific to end "white terror"', 23 August 2019. Available at: <https://www.reuters.com/article/us-hongkong-protests-cathay-pacific/hong-kong-unions-urge-cathay-pacific-to-end-white-terror-idUSKCN1VD0GG>.

²³South China Morning Post, 'Chinese importer says entire stock of Taipan mooncakes will be destroyed after backlash against Hong Kong baker', 5 September 2019. Available at: <https://www.scmp.com/news/china/society/article/3025883/chinese-importer-says-entire-stock-taipan-mooncakes-will-be>.

PRC. The Hong Kong government regularly argues that strong adherence to the rule of law is “a cornerstone of the legal system”.²⁴

Australia’s foreign policy in respect of Hong Kong has prioritised the intersection between human rights and the rule of law. Notably, at the United Nations Universal Periodic Review (UPR) Third Cycle hearing on China, Australia made a recommendation focusing on Hong Kong, the first time Australia had done so in a UPR process. It stated that Australia recommends China to:

*“Uphold the rights, freedoms and rule of law embodied in the ‘one country, two systems’ framework for Hong Kong.”*²⁵

Adherence to the rule of law includes complying with international legal obligations created by human rights treaties. However, the Hong Kong government is increasingly overlooking this principle of the rule of law in their public statements. Instead there is a trend towards a narrow interpretation that views rule of law from the lens of judicial independence.²⁶ Additionally, in the context of the current anti-extradition bill protests, it is being narrowly interpreted as compliance with and enforcement of the law.²⁷ This is deeply problematic. The language of the rule of law is increasingly being used as a political tool, designed to obfuscate and project a desired image of Hong Kong, especially for an international audience. It is incumbent upon States, such as Australia, to ensure that such narratives are appropriately scrutinised and challenged.

How does a human rights clause operate in a free trade agreement?

One way in which human rights can be incorporated into bilateral agreements is through an 'essential elements' human rights clause that enables one party to take appropriate measures in case of serious breaches by the other party. The clause, which could cover democratic principles and often the rule of law, enshrines the parties' commitments to human rights, creating paths to dialogue and cooperation on human rights issues.

Human rights clauses are in general based on Article 60 of the 1969 Vienna Convention on the law of treaties, entitled 'Termination or suspension of the operation of a treaty as a consequence of its breach'. It states that:

'1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. [...]
3. A material breach of a treaty, for the purposes of this article, consists in: [...]
(b) The violation of a provision essential to the accomplishment of the object or purpose of the treaty '.

The main element of variation in human rights clauses may be the reference to the international human rights norms that are binding on the parties and to the Universal Human Rights Declaration. In the

²⁴See Secretary for Justice, Ms Teresa Cheng SC, “Secretary for Justice’s speech at Ceremonial Opening of the Legal Year 2018”, 8 January 2018. Available at: <https://www.doj.gov.hk/eng/public/pdf/2018/pr20180108e1.pdf>.

²⁵Department of Foreign Affairs and Trade, ‘Universal Periodic Review Working Group - 31st Session: Universal Periodic Review of China’, National Statement of Australia as delivered on 6 November 2018. Available at: <https://dfat.gov.au/international-relations/international-organisations/un/unhrc-2018-2020/universal-periodic-review/Documents/31st-session-upr-china.pdf>.

²⁶For example, see paragraph 12, Mrs Carrie Lam, Chief Executive, “Speech by the Chief Executive in delivering “The Chief Executive’s 2018 Policy Address” to the Legislative Council”, 10 October 2018. Available at: <https://www.policyaddress.gov.hk/2018/eng/speech.html> and Brand Hong Kong, “The rule of law rules!”, date unknown. Available at: <https://www.brandhk.gov.hk/html/en/StrategicFocus/ruleoflaw.html>.

²⁷Hong Kong Free Press, ‘Hong Kong leader Carrie Lam says protests will be addressed with local laws, amid rumours of emergency legislation’, 27 August 2019. Available at: <https://www.hongkongfp.com/2019/08/27/hong-kong-leader-carrie-lam-says-protests-will-addressed-local-laws-amid-rumours-emergency-legislation/>.

case of the European Union, their policy is to include the clause in political framework agreements, to which free trade agreements should be linked. When there is no such framework agreement, the clause forms part of the agreement containing the free trade provisions.²⁸

Below is a human rights clause with reference to international human rights norms between the European Union and Korea:

*The Parties confirm their attachment to democratic principles, human rights and fundamental freedoms, and the rule of law. Respect for democratic principles and human rights and fundamental freedoms as laid down in the Universal Declaration of Human Rights and other relevant international human rights instruments, which reflect the principle of the rule of law, underpins the internal and international policies of both Parties and constitutes an essential element of this Agreement.*²⁹

Such a clause provides a party with a legal mechanism to address human rights issues with the other party in a constructive way. It is not designed to be exclusive of other mechanisms, but operates alongside existing forms of engagement. In affirming the parties' commitment to human rights, the clause opens the way to political dialogue, consultations and a range of cooperation measures on human rights and rule of law issues. In doing so, it creates incentives to improve the protection and promotion of human rights.³⁰

Coupled with an essential elements clause, is a 'non-execution' clause. It spells out the right to suspend or terminate an agreement for reasons connected with non-respect of human rights. These clauses allow either party to 'take appropriate measures' in case of breach after appropriate consultation with the other party and/or referral to a committee established by the committee. However, it should be noted that a human rights clause is not intended to lead to measures being taken every time there is a violation of rights. The European Court of Justice clarified in its judgement on the *Mugraby* case that it does not amount to an obligation:

'70 By using the words "may take" [appropriate measures], the parties to the Association Agreement indicated clearly and unequivocally that each of them had a right, and not an obligation, to take such appropriate measures.

*71 That non-binding nature, expressly envisaged in that provision, cannot be called into question in the light of Article 86(1) of the Association Agreement, which concerns the measures that the parties must take to fulfil their obligations, and not the suspension of those obligations'.*³¹

Role of a human rights clause in the Australia-Hong Kong Free Trade Agreement

Given the deteriorating human rights environment in Hong Kong, the views of the PRC on the Sino-British Joint Declaration,³² the challenges in holding the government accountable to their

²⁸European Parliamentary Research Service, 'Human Rights in EU trade agreements: The human rights clause and its application', July 2019. Available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI\(2019\)637975_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI(2019)637975_EN.pdf).

²⁹Framework Agreement with Korea, Article 1(1). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2013.020.01.0001.01.ENG&toc=OJ:L:2013:020:TOC#L_2013020EN.01000201political%20dialogue.

³⁰Ibid n28.

³¹Case T-292/09; appeal: C-581/11 P.

³²The PRC has suggested that the Sino-British Joint Declaration, is "a historical document that no longer has any practical significance". See, Reuters, 'China says Sino-British Joint Declaration on Hong Kong no longer has any meaning', 30 June. Available at: <https://www.reuters.com/article/us-hongkong-anniversary-china/china-says-sino-british-joint-declaration-on-hong-kong-no-longer-has-meaning-idUSKBN19L1J1>. However, the Joint Declaration

international human rights commitments and the declining space for civil society and human rights defenders, a human rights clause should be incorporated into the AHKFTA.

In the development of a human rights clause the Australian government should:

- use an essential elements clause, which refers to the Universal Declaration on Human Rights, the rule of law, with the addition of a reference to:
 - “other relevant human rights instruments applicable in the HKSAR”, to future-proof the clause; and
 - the ICCPR is particularly singled out, given its unique application to Hong Kong.
- human rights defenders are referred to, noting the Declaration on Human Rights Defenders.

Additionally, space should be created to ensure civil society groups can monitor parties’ obligations under the AHKFTA. This could be complimented through the work of existing parliamentary committees, including the Senate Standing Committee on Foreign Affairs, Defence and Trade, as well as the Parliamentary Joint Committee on Human Rights.

Australia-European Union Free Trade Agreement

As noted above, the inclusion of a human rights clause in an FTA is not new. Such clauses have been incorporated into the EU’s FTA’s for decades and are also used by our like-minded partners, including the US and Canada. While the proposed incorporation of such a clause in the case of the AHKFTA might be a new measure for treaties in which Australia is a party, it is not unknown to Australian officials. DFAT is currently undertaking negotiations with the EU on the development of a FTA, which commenced on 18 June 2018.³³ The EU makes human rights an important feature of its trade policy and it is highly likely that a human rights clause will be incorporated into the Australia-EU FTA, given that the European Parliament has repeatedly supported the inclusion of a human rights clause in all new trade agreements.³⁴

There are strong reasons why the EU includes human rights clauses in their FTA’s. As noted in a recent briefing by the European Parliamentary Research Service:

“All of the EU’s external action, trade policy included, should reflect its fundamental values – such as democracy, human rights, and the rule of law – which are clearly enshrined in the Treaties. In line with this, the EU has taken steps to ensure that bilaterally agreed human rights provisions also apply to its trade agreements, and thus to use its leverage as the world’s biggest trade bloc in order to promote respect for these rights together with its trade partners.”

...

“According to EU practice:

- *human rights are to be included in EU political framework agreements under ‘essential elements’ clauses;*
- *EU FTAs are to be linked to these political framework agreements, if no political framework agreement exists, essential elements clauses are to be included in FTAs; and*

remains a valid legal document, such statements by the PRC government are of particular concern given Australia’s emphasis on adherence to a rules-based order as a foreign policy principle.

³³Department of Foreign Affairs and Trade, ‘Australia-European Union Free Trade Agreement’. Available at: <https://dfat.gov.au/trade/agreements/negotiations/aeufta/Pages/default.aspx>.

³⁴For example, see its recommendation with respect to the EU-Chile Association Agreement: http://www.europarl.europa.eu/doceo/document/TA-8-2017-0354_EN.html?redirect.

- serious breaches of the essential elements clauses may trigger the suspension in whole or part of the overall framework agreement and all the linked agreements, including the trade agreement (non-execution clause). ”³⁵

Australia too should be aspiring to a position whereby our fundamental values of democracy, human rights and the rule of law, are also reflected in our trade policy. In the case of Hong Kong, it is arguable that the effect and importance of a human rights clause in the AHKFTA is even more critical at this juncture.

United Kingdom Parliament Joint Committee on Human Rights, Human Rights Protections in International Agreements Inquiry

The issue of human rights clauses in FTA's with respect to Hong Kong has received substantial attention in recent months. In particular, following the United Kingdom Joint Committee on Human Rights (the **UK Joint Committee**), Human Rights in International Agreements Inquiry.³⁶ Special attention was placed towards a post-Brexit arrangement with Hong Kong. Several submissions were provided from Hong Kong groups such as the Hong Kong UPR Coalition, Hong Kong Watch, the Civic Party and the Progressive Lawyers Group. These groups all expressed support for an essential elements clause requiring respect for human rights protections in a future trade agreement between the UK and Hong Kong.

The UK Joint Committee report was published on 12 March 2019 and contained six key proposals, including:

1. *Standard human rights protections should be included in all agreements.*
2. *The Government must ensure that human rights expertise is embedded into the negotiating teams working on all international agreements.*
3. *The Government must provide the UK Parliament's Human Rights Committee a human rights memorandum for all proposed international Agreements once there is a draft text.*
4. *The Government must inform Parliament of all international agreements that it intends to negotiate and regularly report back to the Committee on implementation so human rights standards can be monitored.*
5. *Parliament's role must be strengthened in scrutinising these agreements to ensure high human rights standards.*³⁷

The UK Joint Committee report provides useful guidance for representatives of JSCOT and other relevant committees in the Australian Parliament to consider in the context of the AHKFTA, as well as other future FTA's.

Recommendation 4

The Australia-Hong Kong Free Trade Agreement should only be passed subject to the inclusion of a human rights clause, backed by an enforceable 'non-execution' clause, which is reflective of Australia's fundamental values, including support for the protection of fundamental human rights and the rule of law in Hong Kong.

Recommendation 5

³⁵Ibid n28.

³⁶For further information, see the website of the United Kingdom Joint Committee on Human Rights, Human Rights Protections in International Agreements Inquiry at: <https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2017/parliamentary-scrutiny-international-agreements-17-19/>.

³⁷United Kingdom Joint Committee on Human Rights, 'Human Rights Protections in International Agreements', Final Report, 12 March 2019. Available at: <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1833/1833.pdf>.

The Department of Foreign Affairs and Trade should ensure that the development of trade policy, Australia's fundamental values, such as democracy, human rights and the rule of law, are clearly reflected. In line with this, all future trade agreements should include human rights clauses, to promote Australia's values, principles and interests.

The “non-interference principle” as it relates to Hong Kong and countering its misuse

“Interference in internal affairs” as a PRC principle and misuse on Hong Kong

As the focus of this submission is primarily on the AHKFTA and the interconnection with human rights and the rule of law, it is important to bring attention to a common refrain of the PRC, and increasingly now the Hong Kong government, when States comment upon human rights concerns in Hong Kong. That is the principle of non-interference in internal affairs. The principle has a long history for the PRC. Since 1954, the PRC has argued that its foreign policy is underlined by non-interventionism, in accordance with the “Five Principles of Peaceful Coexistence”. This is also reflected through the Bandung Conference in 1955 and the emergence of non-alignment movement, which the PRC played a central role in.

The PRC regularly points to the principle of non-interference today. For example, invoking it in cases when foreign leaders meet with the Dalai Lama.³⁸ Yet, depending on how ‘non-interference’ is defined by the PRC, there are limits and it is often applied with a degree of flexibility. For example, the development of China's first overseas military base in Djibouti, which was opened in August 2017, is not considered to breach such a principle. According to the Ministry of Foreign Affairs, the base was established to contribute to humanitarian relief, peace and stability in Africa.³⁹

However, one consistency in the deployment of the non-interference principle has been to fend off criticism of domestic policies and human rights concerns. This has been the case in reference to Hong Kong. The principle gained particular traction with the White Paper by the Information Office of the State Council of the PRC, released on 10 June 2014, which sought to reassert the PRC's comprehensive jurisdiction over the HKSAR, while at the same time stoking fears of the activities of ‘foreign forces’ in Hong Kong:

“...it is necessary to stay alert to the attempt of outside forces to use Hong Kong to interfere in China's domestic affairs, and prevent and repel the attempt made by a very small number of people who act in collusion with outside forces to interfere with the implementation of "one country, two systems" in Hong Kong.”⁴⁰

The White Paper made it clear that developments in Hong Kong were internal affairs of the PRC, for which foreign governments should not interfere. While not providing any evidence to the claims that “collusion” was taking place, it was signalling to the HKSAR government about transitioning to a new narrative, which they subsequently took up in their foreign policy narratives.⁴¹

³⁸ABC News, ‘Barack Obama meets with Dalai Lama, reaffirming support for Tibetan culture; China voices displeasure’, 22 February 2014. Available at: <https://www.abc.net.au/news/2014-02-22/obama-meets-with-dalai-lama2c-upsetting-china/5277402>.

³⁹Ministry of Foreign Affairs of the People's Republic of China, ‘Foreign Ministry Spokesperson Geng Shuang's Regular Press Conference’, 12 July 2017. Available at: https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1477422.shtml.

⁴⁰South China Morning Post, ‘Full text: Chinese State Council white paper on ‘One Country, Two Systems’ policy in Hong Kong’, 2014. Available at: <https://www.scmp.com/news/hong-kong/article/1529167/full-text-practice-one-country-two-systems-policy-hong-kong-special>.

⁴¹For further information, I provided a presentation on the evolution of non-interference principle as a foreign policy narrative by the Hong Kong government in a recent speech. Simon Henderson, ‘Non-interference in Hong Kong's internal affairs – A new foreign policy narrative in Asia's World City’, 16th Biennial Conference of the Chinese Studies Association of Australia, La Trobe University, 3 July 2019. Presentation and speech notes, which have not been made public, can be provided to interested JSCOT members.

The use of the non-interference principle in the current protests

Over recent weeks, the PRC government has escalated and shifted its propaganda message against the mass protests in Hong Kong, claiming that foreign forces are involved, while denouncing protesters as pawns of the West for plotting a “colour revolution” with external help.⁴² This message is an attempt to undermine the legitimacy of the protesters and deny them a sense of agency, as well expressing support for any form of crackdown. Additionally, it serves a domestic role in providing a clear message as to the appropriate line for PRC nationals to follow, reflected in state backed media campaigns, including on social media.⁴³ Despite such grand claims, no evidence has been provided by the PRC or HKSAR government that foreign forces are intervening. Notably, a senior HKSAR police official speaking on a condition of anonymity stated that “from the operational angle, I cannot see that at this stage”.⁴⁴

PRC officials have targeted the statements of foreign leaders and pro-Hong Kong rallies overseas, attempting to deter foreign governments for speaking out on the situation in Hong Kong. This has happened in many countries, including Australia. Following protests in major cities in mid-August, including in Sydney and Melbourne, Cheng Jingye, PRC Ambassador to Australia, issued a statement in which he denounced the Hong Kong protesters' actions as "radical, violent and illegal" and said they were determined to undermine its "one country, two systems" arrangement. He then went onto state that:

“Hong Kong affairs are solely the internal affairs of China. Chinese government's determination to safeguard "One Country, Two Systems" is unwavering. Foreign governments and entities should strictly abide by international law and basic norms governing international relations, not support violent radicals, not interfere in Hong Kong's affairs and China's internal affairs in whatever form. Any attempt to mess up Hong Kong is doomed to fail.”⁴⁵

In a more recent example, on 4 September 2019, United States House Speaker Nancy Pelosi issued a statement welcoming the withdrawal of the extradition bill. However, she urged the city's leadership to do more to fulfil the “legitimate aspirations” of the Hong Kong people, including universal suffrage and an investigation into police violence.⁴⁶ In response, Geng Shuang, Spokesperson, Ministry of Foreign Affairs, said that the “Hong Kong issue is purely China's internal affair. No foreign forces

⁴²Hong Kong Free Press, ‘Beijing deems Hong Kong protests ‘colour revolution’, will not rule out intervention’, 8 August 2019. Available at: <https://www.hongkongfp.com/2019/08/08/beijing-deems-hong-kong-protests-colour-revolution-will-not-rule-intervention/>. See also, Bitter Winter, Tang Zhe, ‘Chinese Authorities Are Afraid of “Colour Revolutions”’, 29 January 2019. Available at: <https://bitterwinter.org/authorities-are-afraid-of-color-revolutions/>.

⁴³Australian Strategic Policy Institute, ‘Tweeting through the Great Firewall: Preliminary Analysis of PRC-linked Information Operations on the Hong Kong Protests’, 3 September 2019. Available at: <https://www.aspi.org.au/report/tweeting-through-great-firewall>.

⁴⁴The Telegraph, ‘Protests show no sign of foreign interference Hong Kong police say, contradicting Beijing’, 15 August 2019. Available at: <https://www.telegraph.co.uk/news/2019/08/14/donald-trump-backs-chinas-xi-jinping-resolve-hong-kong-crisis/>.

⁴⁵Embassy of the People's Republic of China in the Commonwealth of Australia, ‘Remarks of Ambassador Cheng Jingye on the Current Situation in Hong Kong’, 17 August 2019. Available at: http://au.china-embassy.org/eng/sghdxwfb_1/t1689528.htm.

⁴⁶Nancy Pelosi, Speaker of the House, ‘Statement on reports that Hong Kong's pro-Beijing leadership will fully withdraw its dangerous and widely-repudiated extradition bill’, 4 September 2019. Available at: <https://www.speaker.gov/newsroom/9419>.

have the right to interfere”.⁴⁷ There have also been many other cases over the last few months when similar statements have been made.⁴⁸

Defining the principle of non-interference under international law

As noted above, a key goal by the PRC in using the non-interference principle, urging foreign governments not to “interfere”, is deterrence. The aim is to ensure that the State no longer speaks out on that particular issue and avoid an international coalescence by States against the PRC’s policies or positions. The Australian government needs to be cognisant that advocating for the protection and promotion of human rights in Hong Kong, let alone any other jurisdiction or a country, does not and will never involve interfering in internal affairs.

Human rights are universal, indivisible, interdependent and interrelated. Article 2 of the Charter of the United Nations, resolutions 25/2625 and 36/103 of the General Assembly, are the international law foundations of the non-interference principle. They are primarily concerned with the threat of force, aggression and military intervention. The formative evolution of the principle as a matter of international law came at during the 1970s and 1980s when many post-colonial states were regaining personal statehood and exercising self-determination. Of particular relevance is United Nations General Assembly Resolution 25/2625 from 24 October 1970 which states:

“The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter.

No State or of group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

...

The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention.”⁴⁹

Meanwhile, United Nations General Assembly Resolution 36/103 from 9 December 1981 is also of relevance. Its preamble states that:

“The General Assembly is [d]eeply concerned at the gravity of the international situation and the increasing threat to international peace and security owing to frequent recourse to the threat or use of force, aggression, intimidation, military intervention and occupation, escalation of military presence and all other forms of intervention or interference, direct or indirect, overt or covert, threatening the sovereignty and political independence of States, with the aim of overthrowing Governments.”⁵⁰

Activities undertaken by States towards other States sit on a spectrum as to whether they amount to interference. They must reach the required threshold, involving threats or use of force, aggression,

⁴⁷South China Morning Post, ‘China tells US politicians to stop ‘interfering’ in Hong Kong after Nancy Pelosi backs push for democracy bill’, 5 September 2019. Available at: <https://www.scmp.com/news/china/diplomacy/article/3025918/china-tells-us-politicians-stop-interfering-hong-kong-after>.

⁴⁸For example, Reuters, ‘China tells UK to back off after minister’s call for Hong Kong probe’, 10 August 2019. Available at: <https://www.reuters.com/article/us-hongkong-protests-britain/china-tells-uk-to-back-off-after-ministers-call-for-hong-kong-probe-idUSKCN1V00DG>.

⁴⁹United Nations General Assembly Resolution 25/2625, 24 October 1970.

⁵⁰United Nations General Assembly Resolution 36/103, 9 December 1981.

intimidation or military intervention, or otherwise outlined above. Making statements identifying human rights concerns or otherwise recommending particular courses of action to ensure compliance with international human rights law will never reach the required threshold.

Recommendation 6

The Australian government should make clear in public and private statements which express concerns with the human rights and rule of law environment in Hong Kong, that doing so is not “interference” under international law. Further, it should be made clear that any such suggestion by either the PRC or HKSAR governments is inconsistent with the Universal Declaration on Human Rights, the Charter of the United Nations and United Nations General Assembly resolutions.

Conclusion

This submission has sought to address some of the relevant considerations with respect to the intersection of human rights, the rule of law and trade in the context of AHKFTA. The ‘one country, two systems’ framework in the HKSAR is under excessive pressure and as time moves closer to 2047, the date when the framework is due to end, fundamental rights will only come under increasing strain. This will impact Australia’s trade and investment relationship in an important financial base in Asia. Australian interests will not be protected by ignoring the situation in HKSAR and continuing business as normal. The Australian government has the capacity and ability to utilise the AHKFTA as a mechanism to both protect Australian business and the rights of HKSAR people, while promoting Australian values. An enforceable human rights clause in the AHKFTA would send strong and necessary signal about Australia’s support for a democratic Hong Kong, in which fundamental rights and the rule of law are key to its continued success.