

Revoking Hong Kong's Preferential Trade Status: Legal Framework and Implications

June 5, 2020

On May 30, 2020, President Trump [announced](#) that his Administration would begin the process of eliminating U.S. policies that provide Hong Kong with special and different treatment from the People's Republic of China (China), including revocation of "Hong Kong's preferential treatment as a separate customs and travel territory from the rest of China." The President also indicated the potential to sanction officials from Hong Kong and China directly or indirectly involved in eroding Hong Kong's autonomy. This Sidebar presents the legal framework that currently applies to Hong Kong's status as a separate customs territory from China and several potential implications of such a revocation.

Background

On May 28, 2020, the National People's Congress of China [approved](#) a decision authorizing its Standing Committee to enact laws to prohibit acts and activities in the Hong Kong Special Administrative Region that it considers as undermining its national security. The same day, the United States, United Kingdom, Canada, and Australia issued a [joint statement](#) expressing "deep concern" about the decision, suggesting that such a law would "dramatically erode Hong Kong's autonomy" and conflict with China's international obligations stemming from, among other things, a Sino-British Joint Declaration on the Question of Hong Kong to respect such autonomy. In addition, the U.S. Secretary of State issued a [report](#) (State Department Report) finding that Hong Kong is no longer sufficiently autonomous from China to warrant certain privileges under U.S. law that allow Hong Kong to be treated differently than China. Following the State Department Report, the President [announced](#) on May 30, 2020, that his Administration will take actions to curtail these privileges, including by no longer treating Hong Kong, the United States' [15th-largest export market](#), as a separate customs territory from China.

Legal Framework for Hong Kong's Preferential Trade Status

The current U.S. legal framework that applies to Hong Kong was initially enacted in 1992 in anticipation of Hong Kong's transfer from British to Chinese control. This section first provides a brief overview of

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the legal status of Hong Kong vis-à-vis China, and then sets out how the U.S. legal framework applies this status.

Hong Kong's Legal Status as a Special Administrative Region

From 1842 to 1997, the United Kingdom exercised sovereignty over Hong Kong. In 1984, the Chinese and British governments negotiated the [Sino-British Joint Declaration on the Question of Hong Kong](#) (Joint Declaration), which transferred control of Hong Kong to China in 1997 while articulating certain rights for Hong Kong. In particular, the Joint Declaration states that Hong Kong shall be designated a “special administrative region” of China, as permitted by [Article 31](#) of the Chinese Constitution. It also stipulates that Hong Kong “will enjoy a high degree of autonomy, except in foreign and defence affairs” for fifty years after 1997. Additionally, the Joint Declaration states that Hong Kong “will retain the status of a free port and a separate customs territory” and may enter into international agreements and participate in international organizations under the name “Hong Kong, China.”

These guarantees are codified in Hong Kong's [Basic Law](#), passed by the National People's Congress of China in 1990. The Basic Law also adds that, as part of Hong Kong's status as a [separate customs territory](#), its “[e]xport quotas, tariff preferences and other similar arrangements . . . remain valid” and it “may issue its own certificates of origin.” Pursuant to this arrangement, Hong Kong has remained a member of the World Trade Organization (WTO) and negotiated a number of [trade agreements](#), including one with [China](#).

U.S. Legal Framework on Hong Kong's Status

To recognize the Joint Declaration, the United States enacted the [U.S.-Hong Kong Policy Act of 1992](#), which it later amended in the [Hong Kong Human Rights and Democracy Act of 2019](#). Under this legal framework, Congress [states](#) that, among other things, the “United States should continue to fulfill its obligations to Hong Kong under international agreements, so long as Hong Kong reciprocates,” and the “United States should respect Hong Kong's status as a separate customs territory, and as a WTO member country.” Further, it [adds](#) that the United States should “grant the products of Hong Kong nondiscriminatory trade treatment by virtue of Hong Kong's membership in the General Agreement on Tariffs and Trade” (i.e., GATT, the WTO's predecessor) and “recognize certificates of origin for manufactured goods issued by” Hong Kong.

To implement these policy statements, these acts [approve](#) the following: (1) continued application of existing U.S. laws to Hong Kong in the same manner as they applied prior to July 1, 1997, unless otherwise provided for by law or executive order; and (2) continuation of all international agreements to which the United States and Hong Kong are members, provided these agreements were in force on or after July 1, 1997, and entered into before November 27, 2019.

The President may [decide](#) to suspend application of a U.S. law that provides Hong Kong with treatment different from that accorded to China if he determines that “Hong Kong is not sufficiently autonomous to justify” such different treatment. Such a determination must be done via executive order and may be rescinded by a subsequent executive order if the President determines that Hong Kong has regained sufficient autonomy to qualify for differential treatment.

In addition, the President may [determine](#) whether Hong Kong is legally competent to carry out its international obligations or “that the continuation of Hong Kong's obligations or rights under any such treaty or other international agreement is not appropriate under the circumstances.” Such a finding must be [reported](#) to Congress. The precise consequences of the President's exercise of this authority are unclear, as the statute does not set out what the President may do following such a finding. This may

reflect the fact that the processes for suspending, terminating, or withdrawing from treaties and other international agreements [differ](#) depending on the terms of the agreements.

When executing his powers under these acts, the President must [consult](#) with Congress, a requirement that reflects the executive branch's sole authority to [recognize](#) governments and their boundaries (i.e., to recognize that China is not only sovereign over but also controls Hong Kong) *and* Congress's role in certain [foreign affairs](#), including regulating [foreign commerce](#).

Implications of Revoking Hong Kong's Trade Status

The President has not specified precisely when or how his Administration intends to withdraw Hong Kong's trade status under U.S. law. This section discusses several options that the Administration may be considering under the current legal framework, and the implications of doing so.

Hong Kong's Customs Status Under U.S. Law

The U.S. [Department of Commerce](#) and U.S. [Customs Service](#) (now U.S. Customs and Border Protection) promulgated regulations to continue to treat Hong Kong as a separate customs territory, as it had been treated while under British control. Under the [U.S.-Hong Kong Policy Act of 1992](#), the President may issue an executive order suspending application of these regulations if the President determines in that order that Hong Kong is not sufficiently autonomous to justify this differential treatment.

Absent this separate treatment, Hong Kong may be subject to the same tariffs and other trade determinations that apply to China. However, there may be questions about whether all such treatment can be extended immediately if the President revokes Hong Kong's special status. Some of the uncertainty arises from whether the United States still intends to acknowledge Hong Kong as a member of the WTO separate from China. If the United States intends to continue treating Hong Kong and China as distinct members, then the United States may impose the same tariffs on Hong Kong as apply to China only insofar as they are consistent with WTO rules, including the most-favored-nation principle, which generally requires a WTO member to extend the same trade benefits to all other members. However, if the United States intends to stop recognizing Hong Kong as a separate WTO member, then it could argue that these WTO obligations do not apply.

Hong Kong and the WTO

Hong Kong retains its own [membership](#) in the WTO (separate from China), as the organization [permits](#) customs territories, in addition to countries, to join. As stated above, the Joint Declaration and Basic Law permitted Hong Kong to retain its membership in the WTO's predecessor (i.e., GATT) and carry over this membership to the WTO in 1995 (which China did not join until 2001). Other nonsovereign customs territories are also WTO members, including [Macao](#) and [Taiwan](#), which has led to what some refer to as a "[One China, Four WTO Memberships](#)" phenomenon.

It is unclear whether the Trump Administration intends to revoke its recognition of Hong Kong as an independent WTO member. The 2020 State Department [Report](#) appears limited to finding that Hong Kong lacks sufficient autonomy to justify differential treatment "under U.S. law," and makes no express finding that Hong Kong is not "legally competent" to carry out its WTO obligations, or that it would be inappropriate to continue recognizing Hong Kong as a WTO member. That said, should the Trump Administration consider taking steps in this direction, there are several legal issues to consider.

First, any actions that President Trump may take under U.S. law do not affect Hong Kong's status as a WTO member vis-à-vis other WTO members. In other words, Hong Kong would not lose its WTO

membership due to any potential U.S. actions to revoke its trade privileges under U.S. law, and other WTO members are not required to adhere to a U.S. decision on the matter.

Second, the question whether a determination that Hong Kong is effectively no longer autonomous from China relieves the United States from its international obligations to Hong Kong is more complex. Hong Kong is not a sovereign State—although its independent legal personality from China has led some to describe it as a “[quasi-State](#).” Thus, if the United States concludes that Hong Kong no longer has a separate legal personality or legal capacity from China, one might argue that the United States no longer needs to respect its WTO obligations to Hong Kong, as only actors with [international legal personality](#) may incur or be owed international obligations. Hong Kong could, however, argue that it retains its legal personality, at least with respect to trade, as this status remains in effect under the [Basic Law](#). Thus, if future U.S. actions raise questions about WTO compliance, Hong Kong could [take actions](#) separate and apart from China against the United States, including raising questions in the relevant WTO committees, or initiating a dispute by requesting consultations under the WTO’s [Dispute Settlement Mechanism](#). The United States may refuse to participate in such proceedings, but its unilateral determination cannot prevent Hong Kong from seeking to assert its rights as a WTO member.

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