



PM/84/167

PRIME MINISTER

Hong Kong Legislation

1. I have now completed consultations with the Lord President of the Council, the Lord Privy Seal, the Home Secretary and the Attorney General and reached agreement with them on the general form of the Bill needed to deal with the legislative implications of the draft Agreement on the future of Hong Kong. I have also consulted the Governor and Executive Council in Hong Kong.

/ 2. My conclusions are set out in attached paper, which I am simultaneously circulating to all members of QL and OD(K). In view of the urgency of bringing this Bill forward as soon as possible, may I take it that members of those Committees are content with what is proposed unless I hear to the contrary by the end of Friday 9 November? Instructions will then be delivered at once to Parliamentary Counsel.

3. I am copying this minute to all members of QL and OD(K) and to Sir Robert Armstrong.

(GEOFFREY HOWE)

Foreign and Commonwealth Office
5 November 1984

HONG KONG AGREEMENT : LEGISLATION

INTRODUCTION

1. A draft agreement with the Chinese Government on the future of Hong Kong was initialled in Peking on 26 September. A White Paper including the text of the agreement has been published in Hong Kong and in London. We envisage the following timetable for handling the agreement:-

- (a) Final date for views to reach the Assessment Office on the acceptability of the agreement in Hong Kong, 15 November.
- (b) Report of Assessment Office and independent team of Monitors to be published at the end of November.
- (c) Debates in Parliament, in the week beginning 3 December.
- (d) Signature of agreement, before the end of the year.
- (e) Introduction and enactment of legislation in first half of 1985.
- (f) Ratification by 30 June 1985.

2. At Chinese insistence the Joint Declaration states that the agreement will be ratified by 30 June 1985. It will therefore be necessary rapidly to prepare legislation to divest the UK of sovereignty over the ceded territories in 1997, so that it can be introduced into Parliament as soon as possible after the agreement is signed. The purpose of this paper is to indicate the content and form of the legislation, which must be enacted before ratification can take place and to discuss whether other matters in the agreement which require legislation by statute at some stage can usefully be dealt with in the same Bill.



THE AGREEMENT

3. The documents agreed with the Chinese are:

(a) A Joint Declaration.

(b) Annex I setting out in detail Chinese policies towards Hong Kong after 1997.

(c) Annex II setting out the terms of reference of a Joint Liaison Group to continue cooperation between the British and Chinese Governments from the entry into force of the agreement until the year 2000:

(d) Annex III dealing with land, and

(e) In addition, there will be an Exchange of Memoranda between the two Governments at the same time as signature dealing with the future status of those who are at present British Dependent Territories Citizens.

With the exception of the Memoranda on nationality, the documents are legally binding on the two sides by virtue of paragraph 7 of the Joint Declaration.

THE CONTENT OF THE LEGISLATION

4. The following aspects of these arrangements requiring UK legislation have been identified:

(a) The termination of sovereignty over the ceded territories with effect from 1 July 1997:

(b) Amendment of the British Nationality Act 1981 to create a new status for British Dependent Territory citizens who enjoy that status by virtue of their connection with Hong Kong, and to deal with related problems:

(c) Modification of United Kingdom enactments in preparation for or



consequent upon termination of United Kingdom sovereignty: these would be mainly the technical modifications customarily made in Independence Acts, often in a schedule, when a territory ceases to be a dependent territory of the UK. They are on topics such as ships, aircraft, copyright, and perhaps oil pollution and crimes against internationally protected persons. The main effect of them is to modify the law in the United Kingdom and they should not be controversial. It would be possible in this context to deal, if necessary, with the termination of appeals to the Privy Council, including pending cases.

(d) Grant of diplomatic privileges and immunities to the five Chinese members of the Joint Liaison Group when it meets in London, as provided for in paragraph 10 of Annex II to the Joint Declaration.

5. It is thought that no other aspects of the agreed documents will require legislation by Act of Parliament. Land matters are the subject of local law and should not require United Kingdom legislation. Adaptation of subordinate legislation referring or applying to Hong Kong can be considered separately.

THE FORM OF THE LEGISLATION

6. The proposed Bill would deal with the subjects in paragraph 4 as follows:

(a) The termination of sovereignty in the ceded territories could be made:

either:

(i) by a clause in the act which would itself terminate UK sovereignty over the ceded territories as from 1 July 1997: or

(ii) by an enabling clause giving power to make an Order in Council bringing into effect the termination of sovereignty from 1 July 1997.

The choice between options (i) and (ii) is essentially a matter of parliamentary tactics. Option (ii) would leave a trigger mechanism in our hands in the form of the Order in Council to bring into

effect the termination of sovereignty which would not be made until nearer to 1997. Some members of the Executive Council in Hong Kong would prefer this. This would however be of little practical use as a deterrent to the Chinese: our rights on the leased territories disappear in 1997 anyway, and the remaining territory is not viable on its own. Option (ii) would have the presentational advantages, since the transfer of sovereignty is so far in the future, of leaving the final decision to be taken after the Chinese have published their Basic Law. But there is an important consideration in the other direction. The Attorney General has advised that, if option (ii) is followed and if ratification is to precede the making of the Order in Council the latter must not be subject to either affirmative or negative Parliamentary procedure. There could well be pressure from Parliament to make it so subject, particularly as members might take the view that Parliament should see the Basic Law before taking a final decision. Although there are precedents (particularly in the case of Rhodesia) for subordinate legislation on a transfer of sovereignty not to be subject to further Parliamentary consideration, these might not be sufficient to persuade Parliament to allow the same power in this case. Finally, the Chinese would be likely to react adversely to our insisting on leaving legislation until a later date, and might fear that we were seeking to attach conditions to transfer. These considerations militate in favour of option (i). The only serious drawback of this option is that the Government might be criticised for legislating definitively so far in advance. On the other hand the Government could argue plausibly that since the date is now clearly defined, there is no reason not to legislate. Moreover, in the unlikely event of a future government not wishing to go through with the transfer of sovereignty in 1997, the legislation could be repealed before then. For these reasons option (i) therefore seems the best course open to us on the termination of sovereignty.

(b) Amendment of the British Nationality Act:

It is not necessary to include amendment of the British Nationality Act in the legislation as a preliminary to ratification, and there are arguments for and against doing so. To deal with this aspect in this Act would avoid the need for a future independent Act to amend the BNA. Such an Act could give rise to pressures in Parliament for

wider amendments to the BNA unconnected with Hong Kong. Moreover, because of the 10 year period of validity of passports, legislation may well be necessary before 1987, to allow pasports that will extend beyond 1997 to be issued in the new form. On the other hand the nationality provisions of the agreement are without doubt its most controversial aspects, and there is a danger that if they are included in the Act the controversy they give rise to might delay the enactment of the legislation. We cannot afford this, given the time limit for ratification.

In view of these factors the best procedure would be to include in the Bill an enabling clause allowing later subordinate legislation. This clause would confer powers to make provision about nationality, including powers to amend the British Nationality Act, as necessary or expedient in consequence of termination of sovereignty and the ending of the lease. Rather than confer unqualified powers in this respect, the clause would confer powers with certain stated objects, in particular removing Hong Kong from the list of dependent territories, withdrawing British Dependent Territories Citizenship from Hong Kong BDTCs and entitling them to acquire a new form of nationality. Provisions on nationality are usually set out in detail in Independence Acts, but in the Cyprus Act 1960 this was left to be done by the Order in Council, subject only to annulment procedures in Parliament. There is therefore a precedent for procedures for annulment only in this field. However substantive provisions on nationality may be of such Parliamentary interest that pressure for a full affirmative procedure would be difficult to resist. It could be explained that the nationality provisions would be left to Order in Council because they involve detailed drafting which would delay the Bill. If the pressure for such a clause on nationality in the Bill appeared likely to delay the Bill's passage unacceptably, it would have to be dropped from the Bill.

(c) Modifications of UK statutes in preparation for or consequent upon the ending of sovereignty and the lease would be dealt with in the Bill by enabling clauses allowing the detailed modifications to be made by Order in Council, or, insofar as a UK statute operates in Hong Kong, by Hong Kong legislation. The Hong Kong legislation would be subject to the normal controls including the power of

disallowance, but could have extraterritorial effect. Such Orders in Council, in accordance with precedent, could, unless Parliamentary pressures proved irresistible, be subject only to negative procedure, ie subject to annulment. Some of these modifications of statutes on termination of sovereignty cannot be definitively settled now since they depend on the status of UK legislation in 1997.

(d) The point about privileges and immunities could be dealt with by a short clause to the effect that the members of the Sino-British Joint Liaison Group nominated by the Government of the People's Republic of China will enjoy the like privileges and immunities as are accorded to diplomatic agents by the Diplomatic Privileges Act 1964.

THE PASSAGE OF THE BILL

7. Parliament will have been given an opportunity to debate the agreement in December: and it is hoped that there will not be any great difficulties in the Bill's passage through Parliament early in 1985. This issue is however a sensitive one and it is not possible to rule out some repetition of previous controversy, particularly on nationality. It would be important to introduce the Bill as early as possible in the New Year.

CONCLUSION

8. It is therefore proposed that, as envisaged above, a short Bill should be prepared dealing with the termination of sovereignty and privileges and immunities and including enabling clauses on nationality and other matters.