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Mrs Sharon Tong
Subcommittee on United Nations Sanctions (Liberia) Regulations 2003
The Legislative Council
8 Jackson Road
Central
Hong Kong

Dear Mrs Tong

I thank you for your letter of 8 June 2004 and apologise that I have not been able to reply to you before now. I have not had time to study all the issues that are raised in the Paper of 25 May 2004 that you have kindly sent me. This has been an extraordinarily busy period for me. I am therefore going to comment, briefly, on those aspects that relate to the Basic Law. If the matter is not concluded by August 2004, I shall be willing to do a more detailed note for you, when I return to Hong Kong.

Foreign affairs in respect of Hong Kong fall within the responsibilities of the Central Authorities. But unlike other autonomy systems, Central Authorities do not have powers of direct legislation for Hong Kong. So Central Government's responsibilities in Hong Kong are usually discharged through Hong Kong institutions. Mainland law which needs to be applied in Hong Kong is enacted either through local proclamation or legislation. So there is nothing unusual in the Central Authorities' responsibilities being discharged through local legislation. My understanding is that the Subcommittee has raised no query on this point.

Difficulties arise as to the method by which effect is given to the obligations of the Central Authorities. The procedure adopted here is to enact a brief ordinance enabling the Chief Executive to implement directives from the Central Authorities through subsidiary legislation. The problem with this method is that the most far reaching regulations can be made in this way, without any criteria or substantial or procedural safeguards prescribed in the Ordinance. Under general principles of national and international law (reflected in art. 39, para 2 of the Basic Law), restrictions on human rights and freedom must be 'prescribed by law'. 'Law' is given a broad interpretation but I doubt if in the context of this exiguous ordinance, subsidiary legislation would qualify. The reason that the rule requires 'law' to limit rights is of course that restrictions must undergo proper scrutiny by

the legislature, in an open, transparent and deliberative process. To have restrictions on rights (as in some regulations under the UNSO) by the direction of one administrative authority to another without any public scrutiny or possibility of amendment is to seriously derogate from this important principle of human rights law.

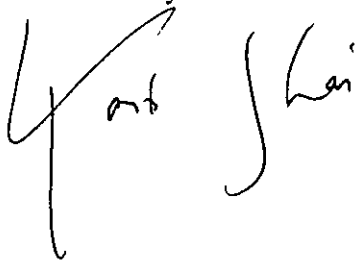
The matter is even more grave when the regulations need not be tabled in the Legco and cannot be amended by it. The primary law making body in Hong Kong is the Legco (art. 66 describes it as the 'legislature' of the HKSAR). The way the UNSO is structured, law making power with tremendous consequences is taken away from the Legco. This not only puts our liberties in jeopardy, but violates another important constitutional principle, that of the separation of powers. I consider that a procedure under which the Legco divests itself of law making power, as it effectively has done in the UNSO, is unconstitutional. Legco cannot divest itself of a power that is given to it (carrying with not only authority but also responsibilities) by the Basic Law.

I consider that the refusal of the Administration to disclose the instructions from the CPG is unreasonable and unjustified in law. The scope of regulations under the UNSO is specific. It is to give effect to UN Security Council resolutions on sanctions. To ensure that the UNSO is used legitimately only for this purpose, the Legco (and the general public) needs to know what the scope of the UN resolutions is and how they have been interpreted by the CPG. This is a matter of public interest and security and should not be hidden from the public. The processes of the UN Security Council are open and there is no reason why the resolutions and the obligations that states assume under them should be matters of secrecy.

It is not clear to me whether the Administration takes the position that all instructions from the CPG that result in regulations under the UNSO are protected and liable to article 48(11) or just in this case. If the former, this is abuse of power, for a determination made in advance without examining the instructions and the context in which they are made is clearly to bind the CE's discretion in an unlawful manner. A general rule that all instructions from the CPG on matters relating to UNSO are confidential is overly broad and unreasonable. If an issue were taken in a court as to the legality of restrictions on rights expressed in the regulations (especially dealing with proportionality), the Administration would have to disclose instructions it received. Why cannot the same disclosure be made to the Legco?

I am sorry that I do not have time to elaborate the above arguments or to deal with other important issues raised in your paper as I am leaving Hong Kong tonight. But as I have already said, I would be willing to prepare a longer memorandum on my return, if the issue is still pertinent.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Yau Jee Kai'. The signature is fluid and cursive, with the first name 'Yau' being the most prominent part.