

Adaptation of Laws (No.3) Bill

**Proposed Repeal of
the Smuggling into China (Control) Ordinance (Cap.242) and
the Smuggling into China (Control) Specification (Cap.242 sub. leg.)**

At the meeting of the Bills Committee held on 30 December 1998 to consider the Adaptation of Laws (No.3) Bill, Members requested the following in respect of the proposed repeal of the Smuggling into China (Control) Ordinance (SCCO) (Cap.242) and its subsidiary legislation -

- (a) a comparison of the provisions in the Import and Export Ordinance (I&EO) (Cap.60) and the SCCO;
- (b) the provisions in the SCCO which do not conform with the status of the HKSAR and require adaptation;
- (c) explanation of the rationale for the repeal of the SCCO under the adaptation of laws exercise, particularly the point as regards the customary line laid down in the SCCO following the promulgation of the boundary of the HKSAR by the State Council in its Order No.221 on 1 July 1997;
- (d) the legal implications of the enactment of the I&EO without repealing the SCCO; and
- (e) consideration of introducing an amendment bill to repeal the SCCO.

2. Having consulted the Civil Division, the Legal Policy Division, the Prosecution Division and the Law Drafting Division of the Department of Justice, as well as the Departments concerned, i.e., the Customs & Excise Department and the Hong Kong Police Force, the information sought by Members has been compiled and is set out in the paragraphs below and in the attached Annex.

(a) Comparison of the SCCO and the I&EO

3. Columns II, III and IV of the Annex compare the provisions of the two Ordinances with remarks.

(b) Provisions in the SCCO which do not conform with the status of the HKSAR and require adaptation

4. Column V of the Annex identifies those provisions in the SCCO which either do not conform with the status of the HKSAR or are inconsistent with the provisions of the Basic Law. Column VI of the Annex describes the adaptations required if the SCCO were to be retained on the statute.

(c) Rationale for the repeal of the SCCO under the adaptation of laws exercise

5. As shown in Column V of the Annex, some of the specific clauses in the SCCO have been identified as being either not in conformity with the status of the HKSAR, or inconsistent with the provisions of the Basic Law. While the same argument could not be applied to the other provisions, if taken in isolation, we feel that the rationale for repealing the SCCO under the adaptation of laws programme should be examined from a broader perspective.

6. The SCCO was enacted to give effect to the 1948 agreement between the then UK Government and the then Chinese National Government. The agreement had never been ratified by the CPG of the PRC. Available records show that since the introduction of the I&EO in 1970, all the provisions in the SCCO had not been invoked except in respect of the customary line north of which Mainland security patrol vessels were allowed access into Hong Kong waters. This provision was previously

invoked because of practical considerations having regard to that the former northern boundary between Hong Kong and the Mainland went right up to the Mainland shoreline. With the promulgation by the State Council of the boundary of administration of the HKSAR in its Order No.221 with effect from 1 July 1997, the previous “buffer area” and the customary reference line as laid down in the SCCO were no longer required, and the purpose of the SCCO is totally spent.

7. The 1948 agreement is irrelevant for Hong Kong and the continued implementation of that agreement is incompatible with the present status of the HKSAR. It follows that the SCCO which gives effect to that agreement is likewise considered as incompatible with the status of the HKSAR from a policy point of view. From this angle, we consider that the proposed repeal of the SCCO falls within the Adaptation of Laws programme, though there are also policy considerations that the preventive measures against smuggling activities to China under the SCCO are no longer necessary given the comprehensive coverage of the I&EO.

(d) The legal implications of the enactment of the I&EO without repealing the SCCO

8. As advised by the Department of Justice, the two Ordinances co-exist with each other and there are two schemes of control, with the SCCO being inactive. Although the I&EO has not repealed the SCCO impliedly, the control system under the SCCO has fallen into desuetude and has become obsolete after the enactment of the I&EO. There are no legal complications for the purpose of controlling import and export as only I&EO is enforced and I&EO has covered most, if not all, of the goods or situations intended to be controlled under SCCO.

(e) Consideration of introducing an amendment bill to repeal the SCCO

9. As explained in paragraph 6 above, we consider that the substratum of the SCCO had become irrelevant for today's HKSAR and is incompatible with its status. In our view, therefore, the consequential repeal of the SCCO is justified on adaptation grounds and falls within the Adaptation of Laws programme. As can be seen in the Annex, the SCCO contravenes the Basic Law in several ways. The fact that, for practical purposes, the SCCO has fallen into desuetude because it has been “superseded” by the I&EO does not alter the requirement for it to be amended to conform with the Basic Law. In this case, the need for compliance with the Basic Law and conformity with the status of the HKSAR happens to overlap with the desirability of removing a defunct Ordinance from the Statute book. We are of the view that achievement of both purposes by way of the adaptation bill would not be inappropriate and would be a convenient and efficient use of legislative time.

Security Bureau
18 January 1999

Analysis of SCCO and I&EO

<i>Comparison of Provisions</i>					
<i>(I)</i>	<i>(II)</i>	<i>(III)</i>	<i>(IV)</i>	<i>(V)</i>	<i>(VI)</i>
	<i>Cap. 242</i>	<i>Cap. 60</i>	<i>Remarks</i>	<i>Provisions of SCCO not in conformity with HKSAR status / not consistent with Basic Law</i>	<i>Individual provisions in SCCO requiring adaptations if retained on the statute</i>
Purpose And Ambit	<p>“To give effect to an agreement negotiated in 1948 by Her Majesty’s Government in the United Kingdom and the Chinese National Government on behalf of the Hong Kong Government and the Chinese Maritime Customs respectively.” [Long Title]</p>	<p>“To provide for the regulation and control of the import of articles into Hong Kong, the export of articles from Hong Kong, the handling and carriage of articles within Hong Kong which have been imported into Hong Kong or which may be exported from Hong Kong, and any matter incidental to or connected with the foregoing.” [Long Title]</p>	<p>SCCO provides for a number of control measures to prevent smuggling activities from Hong Kong to Chinese ports, to give effect to the 1948 agreement between the then UK Government and the Chinese National Government.</p> <p>I&EO provides for a more comprehensive regulatory and control framework in respect of all kinds of goods and cargoes being imported into or exported out of Hong Kong from / to all destinations outside Hong Kong. The Ordinance also provides for preventive measures against smuggling activities. The scope of I&EO is much wider.</p>	<p>The 1948 agreement had never been ratified by the CPG of the PRC. Following the reunification, continued implementation of this agreement through the SCCO is incompatible and not in conformity with the status of Hong Kong as a SAR of the PRC.</p>	<p>Adaptation for the purpose of retaining on the statute is considered inappropriate.</p>

(I)	Comparison of Provisions			(V) <i>Provisions of SCCO not in conformity with HKSAR status / not consistent with Basic Law</i>	(VI) <i>Individual provisions in SCCO requiring adaptations if retained on the statute</i>
	(II) <i>Cap. 242</i>	(III) <i>Cap. 60</i>	(IV) <i>Remarks</i>		
Interpretation	<p>“Harbour” has the meaning assigned to it by the Interpretation and General Clauses Ordinance (Cap.1)</p> <p>“junk” includes lorcha and any sea-going sailing-vessel of Chinese or other Asiatic build, construction, and rig.</p> <p>“master” includes every person (except a pilot) having command or charge of any ship.</p> <p>“tons” and “tonnage” means tons and tonnage as calculated according to British measurement of registered tonnage.</p> <p>“vessel” includes any ship or boat or any other description of vessel used in navigation.</p> <p><i>[section 2]</i></p>	<p>No definition for “Harbour”</p> <p>No definition for “junk”.</p> <p>Similar definition provided. “master” means, in respect of a vessel, the person (except a pilot) having for the time being, command or charge of the vessel.</p> <p>No definition for “tons” and “tonnage”.</p> <p>Similar definition provided. “vessel” includes every description of vessel used in navigation for the carriage of persons or articles, whether or not the vessel is mechanically propelled and whether or not the vessel is towed or pushed by another vessel.</p> <p><i>[section 2]</i></p>	-	Not applicable.	Not required.

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	(II) <i>Cap. 242</i>	(III) <i>Cap. 60</i>	(IV) <i>Remarks</i>		
Control Measures	<ul style="list-style-type: none"> except the Harbour to load on any vessel of 200 net registered tons or more; and except the Yau Ma Tei Typhoon Shelter or the Port of Tai Po to load on any vessel of less than 200 net registered tons any cargo destined for China. [section 3] <p>Unlawful to land any cargo destined for China from any vessel loaded in Hong Kong in any place except the port for which such cargo was cleared. Director of Marine could refuse clearance in respect of any cargo destined for China. [section 4]</p> <p>Unlawful for any vessel carrying cargo destined for China to enter the prohibited areas (Deep Bay and Mirs Bay) without having previously cleared in Hong Kong. [section 5]</p>	<p>I&EO operates a more comprehensive control system, in relation to vessels -</p> <p>(a) restricts any person to place or cause to be placed or possess prescribed articles on board a vessel in Hong Kong waters. It is however lawful if the vessel is -</p> <ul style="list-style-type: none"> 250 tons or more and the article is for bona fide import or export; or a passenger vessel of 250 tons or more; or a ferry vessel; [section 6E] <p>(b) prohibits, inter alia, owner of a vessel, from accepting prohibited articles for export without an export licence; [section 10]</p> <p>(c) prohibits any person from placing any cargo in or on any vessel without the consent of the owner [section 16].</p>	<p>Sections 3, 4 and 5 of the SCCO restrict the places for loading of cargoes in Hong place for landing articles; and prohibit entry into the area north of the customary line as preventive measures against smuggling into China. The provisions under the I&EO regulate, inter alia, the export system with a more comprehensive coverage.</p> <p>The I&EO also -</p> <p>(a) restricts the import and export of strategic commodities; [section 6A]</p> <p>restricts the import and export of prohibited articles; [sections 6C&D]</p> <p>(c) introduced a system of licences; [section 3]</p> <p>(d) requires delivery of import / export licences and manifest; [section 8 to 11]</p> <p>(e) requires particulars of all cargo to be recorded in a manifest; [section 17]</p> <p>(f) prohibits any alteration or construction of vessel, aircraft or vehicle for the purpose of smuggling; [sections 14&14A]</p>	<p>The “prohibited area” in sections 5, 6 and specified in the Second Schedule; and the “land frontier” in section 8 do not conform with the new boundary of administration promulgated by the State Council vide Order No. 221 on 1.7.97. [Sections 5, 6, 8 and Second Schedule]</p>	<p>All references to “China”, “Governor - in - Council”, “Chinese Maritime Custom’s’ in sections 3 to 8 require adaptation.</p> <p>References to “prohibited area” and “land frontier” also need to be adapted to conform with the new boundary of administration of HKSAR with effect from 1.7.97.</p>

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Control Measures	Prohibits export of goods (except any commodity the product of or utilised in animal or vegetable husbandry or goods of aggregate value not exceeding \$200, etc.) into China except at specified places across the land frontier. <i>[section 8]</i> Allows Chinese Maritime Customs to patrol the prohibited areas, and to stop and board any vessel therein for examination of its papers. <i>[section 6]</i>	Prohibits, inter alia, owner of a vehicle from accepting prohibited articles for export without an export licence. <i>[section 10]</i> and requires, inter alia, the person in charge of a vehicle to provide a manifest of all cargo on entering or leaving Hong Kong <i>[section 15]</i> -	No similar provision in I&EO.	This provision <i>[section 6]</i> is, in this context, inconsistent with the Basic Law <i>[BL14 & BL22]</i> which provides that the HKSAR should be responsible for the maintenance of public order in the Region and that no Mainland authorities may interfere in the affairs of which the HKSAR administers on its own in accordance with the Basic Law.	The provision should be repealed because the Basic Law <i>[BL8 & BL160]</i> states that the laws previously in force in Hong Kong shall be maintained, except for any that contravenes the Basic Law.

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Control Measures	Empowers the police and harbour authorities to inquire into offence and prosecute the offender on the complaint from the Chinese Maritime Customs. <i>[section 7]</i> Provides for the forfeiture of goods or cargo and the forfeiture and sale of vessel. <i>[sections 9(2)&(3)]</i>	The I&EO gives investigation powers (e.g. enter, stop, board, search, require information or document, examine and take away information or document etc.), power to use force and power of arrest to members of the Customs and Excise Service and any authorised persons. <i>[sections 20, 21 & 23]</i> Provides for the seizure, forfeiture, release and disposal of articles, vessels and vehicles. <i>[sections 27, 29, 29A]</i>	However, there is no similar provision in I&EO for the HKSAR authorities to act on complaint from Chinese Maritime Customs.	This provision <i>[section 6]</i> is, in this context, inconsistent with the Basic Law <i>[BL14 & BL22]</i> which provides that the HKSAR should be responsible for the maintenance of public order in the Region and that no Mainland authorities may interfere in the affairs of which the HKSAR administers on its own in accordance with the Basic Law. Not applicable.	The provision should be repealed because the Basic Law <i>[BL8 & BL160]</i> states that the laws previously in force in Hong Kong shall be maintained, except for any that contravenes the Basic Law. Not required.
Saving	The SCCO is not applicable to Her Majesty's ships of war or the ships of war of any foreign Government. <i>[section 10(1)]</i> Nothing contained in the Ordinance shall be construed as giving the Chinese Maritime Customs any right other than such rights expressly provided in the Ordinance. <i>[section 10(2)].</i>	- -	There is no express provision in I&EO that applies to ships of war. No similar provision.	Not applicable. This provision <i>[section 10]</i> is, in this context, inconsistent with the Basic Law <i>[BL14 & BL22]</i> which provides that the HKSAR should be responsible for the maintenance of public order in the Region and that no Mainland authorities may interfere in the affairs of which the HKSAR administers on its own in accordance with the Basic Law.	Reference to "Her Majesty" need to be adapted. The provision should be repealed because the Basic Law <i>[BL8 & BL160]</i> states that the laws previously in force in Hong Kong shall be maintained, except for any that contravenes the Basic Law.

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Penalties	<p>Maximum penalty : A fine not exceeding \$2,000 or by imprisonment for any term not exceeding 1 year [section 9].</p> <p>In addition, offenders will also be subject to any fine or punishment under the Merchant Shipping Ordinance or the Merchant Shipping (Seafarers) Ordinance [section 11].</p>	<p>Maximum penalty :</p> <ul style="list-style-type: none"> • Unlimited fine [section 6A(2)(b)] ; and • Imprisonment for 7 years [sections 6A, 6C, 6E, 14, 14A, 18, 18A, 35A] 	<p>Penalties under the SCCO have never been revised since its enactment and hence are not commensurate with the seriousness of the offence.</p>	Not applicable.	Not required.
Specification	<p>A map with specification. [Smuggling into China (Control) Specification (Cap. 242 sub. leg.)]</p>	<p>No specification by reference to a map.</p>	-	<p>The provision is not in conformity with the boundary of administration of the HKSAR w.e.f. 1.7.97.</p>	<p>Adaptation is required.</p>

Security Bureau
18 January 1999

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