

LS/B/22/01-02

Secretary for Security
F Division
Security Bureau
6/F, Main & East Wings
Central Government Offices
Lower Albert Road
Hong Kong

2 May 2002

BY FAX

Total no. of page(s) : 9

(Attn : Mr Johann Wong, Principal Assistant Secretary)

Dear Mr Wong,

United Nations (Anti-Terrorism Measures) Bill

I am scrutinizing the above Bill with a view to advising Members on the legal and drafting aspects. I shall be grateful if you would clarify the questions set out in the Schedule attached. Please let me have your reply before the first meeting of the Bills Committee.

Yours sincerely,

(Bernice Wong)
Assistant Legal Adviser

Encl

c.c. LA
SALA2
D of J (Attn : Mr Geoffrey Fox, SALD)
(Attn : Mr Lawrence Peng, SGC)

United Nations (Anti-Terrorism Measures) Bill

General

According to paragraph 3 of the Administration's paper on the Instructions received from the Ministry of Foreign Affairs, PRC (LC Paper No. CB(2) 1057/01-02(02)), the Central People's Government has instructed the HKSAR Government to take necessary measures to implement the relevant provisions of the United Nations Security Council Resolution 1373 ("the Resolution") in HKSAR. Please clarify whether the Instructions specify the provisions that are considered relevant.

Paragraph 3 of the LegCo Brief states that FATF members are expected to implement the Special Recommendations by mid-2002. Does HKSAR face any legal consequence as a FATF member if the Bill is not passed by June 2002?

Long title

Please explain why the word "further" is used. If there is any existing measure that implements the decision of the Resolution, please give details.

Clause 2 Interpretation

Schedule 1 Funds

"entity"

What is the purpose of the words "(including individuals)"?

"funds"

Please explain the reasons for including the seven types of "funds" in Schedule 1. By using the word "includes", is the list intended not to be exhaustive? If so, what other types of property would the Administration consider as "funds" in the absence of an express definition in Clause 2?

"property"

I understand that the terms "financial assets" and "economic resources" are used in the Resolution. Please set out the types of property that the Administration intends the terms to cover.

"terrorist act"

Paragraph 5(a) of the LegCo Brief states that the proposed definition is a "modern" one. What is the existing definition of "terrorist act" applicable to HKSAR?

Why does paragraph (a)(i)(E) and (F) refer to an action "designed seriously to interfere with or seriously to disrupt" an electronic system or an essential service, facility or system? Why is this test different from the test for other actions?

Please give examples of public and private essential service, facility and system. What is the policy intent of paragraph (b)?

Please explain why the use or threat has to be made for the purpose of advancing a political, religious or ideological cause.

"terrorist associate"

Please let us know by which United Nations Security Council ("UNSC") Resolution(s) is the Committee authorized to designate persons and the criteria for such designation. Please supply the latest consolidated list of the United Nations. As the names of the individuals or entities may be added or removed from time to time, is there a mechanism in the Bill to provide for such changes to the list? Is it the policy that a person so designated automatically becomes a terrorist associate?

"weapons"

What does "paramilitary equipment" mean in paragraph (b)? Why is "component" rendered "元件"?

Clause 3 Application of certain provisions outside HKSAR

Clause 14 Offences

How does the Administration intend to enforce sections 6, 7, 8 or 9 on persons outside HKSAR? Does Clause 14(11) apply to individuals only? If so, how

would the Administration enforce those provisions on a body outside HKSAR but incorporated or constituted under the law of HKSAR?

Clause 4 **Specification of persons and property as terrorists, terrorist associates or terrorist property**

Please justify the proposed test ("the Chief Executive having reasonable grounds to believe") for specifying persons and property as terrorists, terrorist associates or terrorist property under Clause 4. What factors would the Chief Executive take into consideration?

Is it the intent for the Chief Executive to specify all of the names of those persons designated by the Committee of the UNSC from time to time as terrorist associates?

Please explain why the notices under Clause 4(1), (2) and (3) are not subsidiary legislation. Paragraph 8 of the LegCo Brief states that in order to maintain transparency, the lists of terrorists, terrorist associates or terrorist property will be made available to the public. Please clarify whether there are measures other than publication of the notices in the Gazette. Would the Administration notify the specified persons, or those persons by, for or on behalf of whom the specified property is held or who otherwise have an interest in that property?

Please explain the need for Clause 4(5). What happens if there is evidence to the contrary? What kind of evidence to the contrary would rebut the presumption?

Is the notice made under Clause 4(6) (revoking the notice under Clause 4(1), (2) or (3)) subsidiary legislation? If it is subsidiary legislation, why is the notice for specification under Clause 4(1), (2) or (3) not subsidiary legislation?

What happens if the Court of First Instance grants an application under Clause 16? If the notice specifying the persons or property is revoked only on publication of a notice under Clause 4(6), does the presumption under Clause 4(5) cease to take effect in the interim?

Please explain why it is proposed that a notice under Clause 4(1), (2) or (3) not previously been revoked would expire on the 3rd anniversary of the date of its

publication. Is there any administrative measure to inform the affected persons or the public of the expiry?

Please explain the policy intent of Clause 4(8). Should it be subject to certain conditions such as the availability of new evidence?

Clause 5 **Freezing of funds**

Please justify the proposed test ("the Secretary having reasonable grounds to suspect") for freezing funds under Clause 5. Why is the standard lower than that prescribed in Clause 4?

On what grounds and by what procedures is a licence granted?

Please explain why it is proposed that a notice under Clause 5(1) not previously been revoked would expire on the 3rd anniversary of the date on which it was signed. Is there any administrative measure to inform the holders of the specified funds of the expiry?

Please explain the policy intent of Clause 5(4)(a). Should it be subject to certain conditions such as the availability of new evidence?

Please explain the policy intent of Clause 5(4)(b).

Who are the persons holding the funds referred to in Clause 5(5)? Why does the duty to notify the owner rest with the recipient? Would the owner's right of appeal to the Court of First Instance under Clause 16 be affected if he does not receive a copy of the notice?

Clause 6 **Prohibition on supply of funds**

Paragraph 1(b) of the Resolution requires all states to criminalize the *wilful* provision or collection of funds with the intention that the funds should be used, or *in the knowledge that they are to be used*, in order to carry out terrorist acts (my italics). By prescribing the test of "having reasonable grounds to believe", Clause 6 is wider in scope than the requirements under Paragraph 1(b). Please explain.

Please clarify whether references to terrorist and terrorist associate in Clause 6 includes a person whom the Chief Executive has reasonable grounds to believe to be a terrorist or terrorist associate and who has been specified in a notice under Clause 4. If so, why does Clause 6 prohibit a person from providing or collecting funds to another person whom he does not know but has reasonable grounds to believe that such person is specified under Clause 4?

Clause 7 **Prohibition on making funds available**

What is the difference between making funds available under Clause 7 and providing funds under Clause 6 (both terms are rendered "提供")?

What services does the term "financial or related services" refer to?

On what grounds and by what procedures is a licence granted?

Please clarify whether references to terrorist and terrorist associate in Clause 7 includes a person whom the Chief Executive has reasonable grounds to believe to be a terrorist or terrorist associate and who has been specified in a notice under Clause 4. If so, why does Clause 7 prohibit a person from making funds or financial or related services available to or for the benefit of another person whom he does not know but has reasonable grounds to believe that such person is specified under Clause 4?

Clause 8 **Prohibition on supply of weapons**

Please clarify whether references to terrorist and terrorist associate in Clause 8 includes a person whom the Chief Executive has reasonable grounds to believe to be a terrorist or terrorist associate and who has been specified in a notice under Clause 4. If so, why does Clause 8 prohibit a person from providing or collecting weapons to another person whom he does not know but has reasonable grounds to believe that such person is specified under Clause 4?

Clause 9 **Prohibition on recruitment**

Is it the policy intent that the prohibition in Clause 9 applies to specified persons and not terrorists or terrorist associates?

What does the phrase "serving in any capacity with" intend to cover?

Clause 10 **Prohibition against false threats of terrorist acts**

Please consider whether the drafting of the Chinese version of Clause 10(2)(d) can be improved.

Clause 11 **Disclosure of knowledge or suspicion that property is terrorist property**

Recommendation IV requires financial institutions, or other businesses or entities subject to anti-money laundering obligations to report suspicious transactions. Why does Clause 11 impose the obligation on any person?

Clause 13 **Forfeiture of certain terrorist property**

Please clarify if the Court of First Instance may order forfeiture of any property under Clause 13(1) if the conditions set out in the following are satisfied :

- (a) paragraph (a)(i) *and* (ii); or
- (b) paragraph (a)(i) *and* (iii); or
- (c) paragraph (b).

Would the Administration consider improving the drafting to reflect the policy clearly?

Clause 14 **Offences**

Please justify why personal liability for officers of body corporate (proposed under Clause 14(10)) is considered necessary.

How does the concept of entry into HKSAR under Clause 14(11) apply to a body corporate?

Please explain the reason for Clause 14(12).

Clause 16 Applications to Court of First Instance

Please indicate the scope of "interest" to be prescribed by the rules referred to in Clause 16(1)(c)(ii)(B).

Please consider amending the Chinese version of Clause 16(2)(a) to specify "any other person", otherwise a person making an application under subclause (1)(b) or (c) is required to give a copy of the specified documents to himself.

Please clarify the intended effect of Clause 16(3)(b). Does the burden of proof lie with the Administration? How does an applicant satisfy the Court that the Administration had not and does not continue to have reasonable grounds to believe that he is a terrorist or terrorist associate or that the property is terrorist property?

If the application is subject to appeal under Clause 16(4), is the Court of Appeal bound by Clause 16(3)(b)?

Clause 17 Procedure

Please explain the meaning of "provision may be made by rules of court" in Clause 17(1). Who would make the rules? Are these rules subsidiary legislation?

Please consider whether the Chinese text of Clause 17(1)(a)(iv) may be improved along the following lines :

"向附表 3 所指的法庭提出該附表所指的申請；"

Why is "satisfying an order" in Clause 17(1)(d) rendered "圓滿執行"?

Is it necessary to provide for amendment of section 13(5) or section 5(2) of Schedule 3 in Clause 17(3) since those provisions are expressed to be made subject to section 17(3)?

Clause 18 **Amendment of Schedules 1, 2 and 3**

Please confirm that the notice to amend Schedule 1, 2 or 3 is subsidiary legislation.

Clause 19 **Regulations - freezing of property (other than funds)**

Please justify the proposed test ("the Secretary having reasonable grounds to suspect") for freezing property.

On what grounds and by what procedures is a licence granted?

Please explain why Clause 19(2) proposes that the regulations "may" provide for applications to be made to and orders to be made by the Court of First Instance. Why is Clause 5 (freezing of funds) different? Under what circumstances would the Administration consider that application to the Court of First Instance not necessary? If those circumstances arise, would the affected persons have the right to apply to the Court of First Instance under Clause 16?

Schedule 3 **Seizure and detention of property suspected to be terrorist property**

Section 2(3)(b) refers to the Chief Secretary for Administration. Would there be any need to change the name of the public officer if the proposed accountability system is implemented?

Section 4 provides that the interest accruing on seized property which is money shall be added to the property on its release. Is it necessary to provide that such interest be added to the property on its forfeiture as well?