

**Subcommittee Meeting on
the Mutual Legal Assistance in Criminal Matters (USA) Order**

At the last meeting of the Subcommittee on 20 September 1999, we undertook to provide Members with further clarifications. These are set out below: -

(a) Members have raised questions on the application of the “essential interests” clause under Article 3(1) of the HKSAR/US Agreement on Mutual Legal Assistance in Criminal Matters. As we have explained at the meeting, the reference to “country” in the extract from the Senate Foreign Relations Committee (para. 5 of LC Paper No.CB (2) 2768/98-99) is not significant in the present context. We have since obtained confirmation from the US Administration that the term “country” in this context means “contracting party” and the HKSAR is clearly encompassed within its meaning. The HKSAR is therefore entitled to refuse assistance in death penalty cases pursuant to this Article of the Agreement. Members should also be aware that we have been advised by the US administration that the ‘essential interests’ exception should not be construed as a vehicle for a blanket prohibition of assistance in all cases that might theoretically involve the death penalty as this would unduly hamper law enforcement co-operation. In considering this concern, Members will recall that in our earlier paper (the last sentence of paragraph 4 of LC Paper No. CB(2) 2768/98-99) we made the point that at the investigation stage it may not be clear what offences will be charged. The US side’s concern reflects this same point.

(b) Members have asked –

- (1) whether the fact that the Mainland has the death penalty will be taken into account by the Secretary for Justice in deciding whether to grant assistance to the US; and

- (2) whether the fact that informal assistance is currently provided to the Mainland in death penalty cases will be a factor in deciding whether to grant assistance to the US.

The Secretary for Justice has advised that she does not consider either of these considerations is relevant to the exercise of her discretion to grant or refuse assistance to the USA in relation to offences which carry the death penalty, and they are therefore not factors which will influence a decision whether to grant assistance.

- (c) Members have asked about the use of the word “shall” in Article 1(3) of the Agreement and pointed out that the word “may” is used in the other Agreements. The corresponding articles in these agreements are intended to have the same effect. These provisions make it clear that the agreements comprehend assistance for ‘offences related to taxation, customs duties, foreign exchange control or other revenue matters but not non-criminal proceedings relating thereto’. The use of the word “may” in the context of provisions like this does not give the Requested Party a discretion as such. “Shall” was used in the USA Agreement at the suggestion of the US delegation to make the position absolutely clear and avoid any possible implication that there is a discretion to refuse assistance for offences of this type.

Security Bureau/Department of Justice
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