Sent by email (mso@legco.gov.hk)

June 22, 2002

Ms Doris Chan
Clerk to Bills Committee
Legislative Council
Hong Kong Special Administrative Region of the PRC

Dear Ms Chan:

Re: **United Nations (Anti-Terrorism Measures) Bill**
Comments on Committee Stage Amendments (CSAs)

Thank you for your faxes of June 18 and 19, 2009 containing the Administration's latest proposed amendments to the above-mentioned Bill. My personal comments on these proposed amendments are provided below:

A. Scheme for Specifying 'Terrorists', 'Terrorist Associates', 'Terrorist Property' and Revoking Specifications

1. The scheme has been substantially modified. There are now two methods to specify 'terrorists', 'terrorist associates' and 'terrorist property'. The first method, under s. 4, is by the Chief Executive's (CE's) published notice. This method is limited to persons and property designated by the United Nations (UN). While the CE's power to specify here is discretionary, there is no express obligation on the CE is verify or confirm the factual basis of each UN designation. But in practice, the CE will need to have regard to the reliability of both the specific designation and the system of designation in properly exercising his or her discretion.

2. Revocation of specifications made under this first method is possible in only one instance: when the UN ceases to maintain the relevant designation. When this occurs, the CE must "as soon as practicable" revoke the notice by publishing a new notice in the Gazette. The revocation does not take effect until the new notice has been published. It is unclear why the revocation needs to await the publication of the new notice. Since the CE's specification is almost wholly dependent on whether there exists an applicable UN designation, it would seem that the cessation of the UN designation should automatically trigger a revocation under our domestic law. An automatic revocation will help prevent any unjustified enforcement measures from being taken in the period pending the CE's publication of the new notice. ***It is***

recommended that s. 4(6) be amended to provide for the automatic revocation of the CE's notice upon the cessation of designation by the relevant UN Committee. It is further recommended that the duty and power of the CE in s. 4(6) to revoke be replaced with the lesser authority of "specifying that the original notice has been revoked", much like in s. 4A(7).

3. The second method of specification, under s. 4A, is by application to the Court of First Instance (CFI) for an order making the relevant specification. The CFI must believe on reasonable grounds that the person or property the subject of the application is a "terrorist, terrorist associate or terrorist property, as the case may be" before making the order. I believe this newly added method, which involves a system of prior judicial authorization, is a positive amendment and should be maintained.

4. However, the avenues for revoking orders made under this method are somewhat problematic. There are two ways of seeking a revocation. The first way allows the Secretary for Justice, on behalf of the CE, to make an application in the CFI to have the order revoked. There is no suggestion that the application must go before the same CFI judge who made the original order. The second way allows affected persons to bring applications to the Court of Appeal (CA) to have the order revoked. There are no express rights conferred for appealing these CA decisions to the Court of Final Appeal (CFA), so presumably any available appeal rights will be governed by the Hong Kong Court of Final Appeal Ordinance.

5. I see a number of problems with this proposed system of revocation. It strikes me as being illogical, unworkable in practice, inefficient, and unfair to specified and other affected persons. Indeed, I find the previous s. 16, which provided for review applications in the CFI, as being preferable. A distillation of various points is provided below:

a. I am unclear why there is not simply a single avenue of review in the CFI available to both the government and affected persons for the purposes reviewing and possibly revoking the original order. Indeed. such an arrangement is ***the norm in criminal procedure*** where the original order was made *ex parte.* For example, under the existing money laundering laws (Drug Trafficking (Recovery of Proceeds) Ordinance and Organized and Serious Crimes Ordinance), an *ex parte* application in the CFI to restrain property is usually followed by an *inter partes* motion in the CFI to have the merits of the restraint order reviewed.

b. ***By forcing affected persons to bring their review in the CA, the scheme effectively denies an affected person the right to appeal the review decision to a higher court.*** While it may be possible to bring a further appeal to the CFA, given that Court's stringent leave requirement, such appeals are more theoretical than real. By having a single avenue of review in the CFI, however, allows for more regular appeals of CFI reviews to the CA. It would also be a good idea to confer an equal right of appeal to both the government and affected persons given the overall importance of these specifications.

c. The scheme effectively turns the CA into a 'court of first instance' when it comes to reviewing specifications. The wording of s. 16 suggests that the CA is not simply to perform an appellate review function of the original judge's

order, but rather to make *a de novo* determination of whether there exists reasonable grounds to believe that a person is a 'terrorist' or 'terrorist associate' or property is 'terrorist property'. The necessary implication of this is that the CA must perform a fact-finding role, which is rather extraordinary given the amount of time this function normally requires. Burdening the CA with this jurisdiction is not a wise decision, especially at this moment when there has been recent reports that the caseload of the CA has sharply increased.[1]

B. Schemes for Freezing Terrorist Property (ss. 5 & 19)

6. It seems the Administration has made little changes to the Freezing Schemes. Accordingly, I maintain my previous comments and concerns with the proposals. Additionally, the proposal would make the CA the first judicial body to consider the merits of the freezing order. For the reasons given in the previous paragraph, this arrangement is highly problematic and makes even less sense in the context of restraining property.

7. ***For the reasons I stated in paragraph 5(c) of my previous letter, I believe the two year expiry period is still too long when it comes to freezing, orders.*** In the Bill Committee proceedings for the Drug Trafficking and Organized Crimes (Amendment) Bill 2000, it appears the Administration has agreed to an expiry period of six months for restraint orders made where a defendant has been arrested and released on bail (see http://www.legco.gov.hk/yr00-01/english/bc/bc53/papers/bc53_0527cb2-2044-1e.pdf). It is hard to understand how a freezing order with respect to property of a person who has not even been arrested can be allowed to stand for two years without expiration.

C. The Prohibition on Recruitment, etc.

8. Section 9 makes it an offence for a person to "become a member of a person" specified in a notice or order. How does one 'become a member of a person'? If 'person' is simply referring to a corporate person than this makes sense. But what if we take 'person' in the individual sense? Is mere association enough? If so, then the offence has been drawn quite broadly. What about family relations? Does the offence automatically engulf all family members of terrorists and terrorist associates? ***I recommend more consideration be given to s. 9 and to the use of more precise language in carving out an offence that is tailored to the mischief that is targeted.***

D. The Reporting Duty and Offence

9. I want to highlight that my concerns with having lawyers make secret disclosures of suspected terrorist property is not simply a concern about disclosing privileged information. This is because confidential information about the client may not necessarily be covered by legal professional privilege, but would have to be secretly disclosed to the State if it formed the basis of the suspicion. It is the secret disclosure itself which hampers the essential trust in the relationship necessary for the full and effective representation of the client. ***It follows that***

[1] See A. Lo & P. Moy, "Caseload triples for appeal court judges", S.C.M.P., 3 Dec 2001.

the new s. 2(5) will not adequately address these concerns. The only adequate solution to the problem is an express exemption from disclosure.

E. Powers to Obtain Evidence and Information

10. Other than preserving the privilege against self-incrimination, the Administration has not made any substantial changes to the powers contained in Schedules 2 and 3. This is extremely unfortunate. As mentioned in my previous letter, these powers are coercive, and lacking in proportionality and rational restriction. They invite abuse.

F. Forfeiture of Terrorist Property

11. No changes have been proposed. I maintain my previous comments.

Thank you again for the opportunity to make these additional comments.

Yours truly,

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Assistant Professor