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Panel on Security

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 7 November 2011**

Amendments to the United Nations (Anti-Terrorism Measures) Ordinance

Purpose

This paper provides background information on anti-terrorism legislation in Hong Kong and summarizes the discussion of the Legislative Council ("LegCo") on the subject.

Background

2. The United Nations Security Council Resolution ("UNSCR") 1373 was adopted by the United Nations Security Council at its 4 385th meeting on 28 September 2001. It aims at combating international terrorism on various fronts, including the prevention and suppression of terrorist financing, criminalizing direct, indirect and wilful provision or collection of funds, establishing terrorist acts as serious criminal offences in domestic laws with appropriate penalties and enhanced exchange of information and intelligence to fight terrorism. By virtue of Chapter VII of the Charter of the United Nations, UNSCR 1373 is binding on all States. In October 2001, the Central People's Government gave instructions to the Hong Kong Special Administrative Region to implement the resolution.

3. Hong Kong is a member of the Financial Action Task Force on Money Laundering ("FATF"), an international body specializing in recommending standards and best practices in countering money laundering. Following the attacks in the United States on 11 September 2001, FATF made eight Special Recommendations to tackle terrorism financing.

4. Hong Kong did not have any anti-terrorism legislation of general application before 2002. Offences which were typically committed by terrorists or associated with terrorism were however offences against the laws of Hong Kong. These included laws which gave effect to multilateral conventions, bilateral agreements and UNSCRs, and the ordinary criminal laws of Hong Kong. As there were areas of UNSCR 1373 which the laws of Hong Kong could not cover without new legislative measures, the Administration adopted a two-stage approach to implement the anti-terrorism requirements of UNSCR 1373.

5. On 17 April 2002, the Administration introduced the United Nations (Anti-Terrorism Measures) Bill ("the Bill") into LegCo. A Bills Committee was formed to study the Bill which was passed at the Council meeting of 12 July 2002.

6. On 21 May 2003, the Administration introduced into LegCo the United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003 ("the Amendment Bill"), which sought to implement relevant international conventions against terrorism, and to provide for the Secretary for Security ("S for S") to effectively freeze terrorist assets which were not funds. A Bills Committee was formed to study the Amendment Bill which was passed at the Council meeting of 30 June 2004. During the resumption of the Second Reading debate on the Amendment Bill, the Administration advised that it would review the reporting requirements under section 12 of the United Nations (Anti-Terrorism Measures) Ordinance (Cap.575) ("the Ordinance") and section 25A of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) ("DTRPO") and the Organized and Serious Crimes Ordinance (Cap. 455) ("OSCO") in the context of the exercise to put in place the Forty Recommendations of FATF.

Issues and concerns raised by members

7. The legislative proposals and measures against terrorism and terrorist financing were discussed at the Panel meetings on 5 February 2002, 16 January 2003, 20 February 2003 and 2 December 2008 as well as meetings of the Bills Committee on United Nations (Anti-Terrorism Measures) Bill and the Bills Committee on United Nations (Anti-Terrorism Measures)(Amendment) Bill 2003. The deliberations are summarized in the following paragraphs.

Definition of terrorist act

8. Queries were raised as to whether the definition of terrorist act as proposed by the Administration was too wide and might catch innocent persons and non-terrorist associations, and whether the definition would substantially

increase the power of law enforcement agencies. There were also concerns that terrorist acts outside Hong Kong would fall within the definition of terrorist act in Hong Kong.

9. According to the Administration, the definition of terrorist act reflected modern day requirements, and was similar to those adopted by other common law jurisdictions. The enactment of legislative proposals that would increase the power of law enforcement agencies had always been made under the principle of striking a balance between the protection of personal freedom and human rights, and the safety of the public. It was necessary to include acts outside Hong Kong in the definition of terrorist act, and anti-terrorism legislation in most countries had extra-territorial effect. After considering the views of members of the Bills Committee, the Administration moved amendments to narrow down the scope of the definition by extending the coverage of exclusions to normal demonstrations and industrial actions which did not constitute acts of terrorism, even if those actions endanger public health or safety or cause serious interference of electronic systems and essential service facilities. The Administration also moved amendments to narrow down the scope of the definition to actions which would lead to serious consequences. The amendments were passed.

Power of the Chief Executive ("CE") to list terrorists or terrorist organizations

10. Concerns were raised over the Administration's proposal to empower CE to list terrorists or terrorist organizations and amend the list through an administrative process. There was a suggestion that the listing should be made through a legislative process.

11. Having regard to the views of members of the Bills Committee, the Administration moved amendments to provide for the Secretary for Justice to make an application, on behalf of CE, to the Court of First Instance ("CFI") for an order to specify a person or property as a terrorist, terrorist associate or terrorist property. CFI should make the order only if it was satisfied, on the balance of probabilities, that the person or property was a terrorist, terrorist associate or terrorist property, as the case may be. CE would then arrange the court order to be published in the Gazette. The amendments were passed.

Prohibition on recruitment to specified terrorist groups

12. Another concern of the Bills Committee was whether the scope of section 10 of the Ordinance in relation to prohibition on recruitment to specified terrorist groups was so wide that it would unnecessarily cover many people who were completely unrelated to terrorist organizations. Having regard to the views of members of the Bills Committee, the Administration moved

amendments to narrow down the scope by replacing the mental element of "having reasonable grounds to believe" in the section with "recklessness". The amendments were passed.

Freezing of property other than funds

13. There were concerns about the wide power in relation to the freezing of property other than funds, having regard to the fact that UNSCR 1373 only stipulated the freezing of funds and other financial assets or economic resources committed or attempted to commit a terrorist act. After consideration of the views of members of the Bills Committee, the Administration moved amendments to make it clear that if there was reasonable grounds to suspect any property to be terrorist property, S for S might give a direction that no one could deal with the property and might seize a property only when he had reasonable grounds to suspect that the relevant property would be removed from Hong Kong. The amendments were passed.

Powers of authorized officers in seizure, investigation and detention

14. There was a suggestion that the wide powers of seizure, investigation and detention of authorized officers contained in the Bill should be narrowed down. After considering the views of members of the Bills Committee, the Administration moved amendments to require law enforcement officers to meet statutory requirements similar to those under DTRPO and OSCO. The amendments were passed.

Obligation to disclose knowledge or suspicion of terrorist property

15. The Bills Committee noted that section 12 of the Ordinance, which imposed an obligation on any person to disclose knowledge or suspicion that any property was terrorist property, was at variance with UNSCR 1373 and FATF as neither UNSCR 1373 nor FATF required Hong Kong to make it a potential criminal liability for failure on the part of an ordinary citizen to disclose information on suspected terrorist transaction. FATF only imposed the obligation on "financial institutions, or other business or entities subject to anti-money laundering obligations".

16. According to the Administration, it would continue to review and consider what could be done to further improve the legislative and regulatory regime for combating money laundering and terrorist financing to meet the latest international standards.

Review of anti-terrorism measures

17. The Bills Committee called on the Administration to review the anti-terrorism measures set out in the Ordinance periodically to ensure that they were in line with the international trend. Noting that both Australia and Canada had established a mechanism under which the government would provide statistics on anti-terrorism cases to the parliament, members requested the Administration to consider introducing a similar reporting mechanism under the Ordinance.

18. According to the Administration, it would review anti-terrorism measures set out in the Ordinance periodically to ensure that they were in line with the international trend. Reference had been drawn from a number of common law jurisdictions, namely, Australia, Canada, Singapore, the United Kingdom and the United States, in relation to the salient provisions of their anti-terrorism laws. It was noted that some jurisdictions had introduced new terrorism offences and enhanced enforcement powers to increase their capability to combat terrorism.

Commencement of outstanding provisions in the Ordinance

19. The Rules of the High Court (Amendment) Rules 2009 ("the rules of court"), which set out the procedures for applications to CFI for specification of persons and property as terrorists, terrorist associates or terrorist property, forfeiture of terrorist property, and production of information and material etc., were published in the Gazette on 9 October 2009. At the Council meeting of 7 July 2010, S for S moved a resolution on the code of practice governing the requirement of persons to answer questions, furnish information or produce material relevant to the investigation of an offence under the Ordinance. The motion was passed. The Administration published in the Gazette on 15 October 2010 two commencement notices to appoint 1 January 2011 as the commencement date for the outstanding provisions of the Ordinance.

Relevant papers

20. A list of the relevant papers on the Legislative Council website is in the **Appendix**.

Appendix

List of relevant documents on anti-terrorism legislation

| Committee | Date of meeting | Paper |
|--|-------------------------|---|
| Panel on Security | 5.2.2002 (Item I) | <u>Agenda</u> <u>Minutes</u> |
| Panel on Security | 16.1.2003 (Item IV) | <u>Agenda</u> <u>Minutes</u> |
| Panel on Security | 20.2.2003 (Item III) | <u>Agenda</u> <u>Minutes</u> |
| Bills Committee on United Nations (Anti-Terrorism Measures) Bill | | <u>Report of the Bills Committee to the Legislative Council</u> |
| Bills Committee on United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003 | | <u>Report of the Bills Committee to the Legislative Council</u> |
| Panel on Security | 2.12.2008 (Item VI) | <u>Agenda</u> <u>Minutes</u> |
| Subcommittee on Rules of the High Court (Amendment) Rules 2009 | | <u>Report of the Subcommittee to the House Committee</u> |
| Subcommittee on Proposed Resolution under section 12A of the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) | | <u>Report of the Subcommittee to the House Committee</u> |

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