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From:

Date: 2004/02/26 Thu AM 11:49:59 CST

To: <views@cab-review.gov.hk>

Subject: CAB Review Views

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Dear Sir,

Please find attached my views to your consultation announced on 18 February 2004.

Yours faithfully,

T. W. Hung

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Summary

Hong Kong is an unalienable part of China, even if the Chief Executive is selected by universal suffrage and all the members of the Legislative Council are elected by universal suffrage. Amending the method for selecting the Chief Executive requires amending Annex I and local legislation. On the contrary, amending the composition of the Legislative Council does not require amendment to Annex II but requires only local legislation passed by a simple majority vote of the members of the Legislative Council present.

A1(1). Hong Kong is an unalienable part of China?

Yes, Hong Kong is an unalienable part of China. Even if the selection of the Chief Executive is by universal suffrage and the election of all the members of the Legislative Council is by universal suffrage, Hong Kong is still an unalienable part of China.

In fact, the Basic Law has spelled out the aims to universal suffrage in Articles 45 and 68. When those aims are met, Hong Kong is still an unalienable part of China and is still consistent with the Basic Law.

A1(2). Hong Kong comes directly under Central People's Government?

Yes, Hong Kong comes directly under Central People's Government. China's various administrative units are basically organised in a 3-tier system. The top level units are provinces, autonomous regions, centrally-administrated municipalities and special administrative regions, and they all come directly under Central People's Government. Hong Kong is special administrative region and therefore comes

directly under Central People's Government. Changing the method for the selection of the Chief Executive and the method for the formation of the Legislative would not alter such relationship.

A1(3). The Chief Executive is appointed by the Central People's Government. He is accountable to both Central People's Government and the Hong Kong Special Administrative Region?

Yes, the Chief Executive is appointed by the Central People's Government, and he is accountable to both Central People's Government and the Hong Kong Special Administrative Region. No matter how the Chief Executive was selected, the Chief Executive must be appointed by the Central People's Government. There is no problem about that. Similarly, no matter how the Chief Executive was selected, the Chief Executive is accountable to both Central People's Government and the Hong Kong Special Administrative Region. There is also no problem about that.

A2.(1) What should "actual situation" constitute?

"Actual situation" should be the actual objective situation of Hong Kong, and not a subjective comment of any individuals, officials, organizations or authorities. A public consultation, if not a poll, would be able to reveal such actual situation.

A2(2). How "gradual and orderly progress" should be understood?

Gradual and orderly progress should be understood as a non-one-step change from the formation of the first government and of the first Legislative Council to the achievement of universal suffrage.

The first Chief Executive was selected by a selection committee composed of 400 members. The second Chief Executive was selected by a selection committee composed of 800 members. It would be a gradual and orderly progress if the next step to select the Chief Executive is by universal suffrage upon nomination by a committee composed of 800 members. And the second next step is to select the Chief Executive by universal suffrage upon nomination by a committee composed of 800 members in accordance with democratic procedures. And the third next step would be to increase the membership of such committee.

The number of Legislative Council members returned by geographical constituencies through direct elections of the first, second and third terms are 20, 24 and 30 respectively. This is already a non-one-step, gradual and orderly progress to the election of all members of the Legislative Council by universal suffrage. It would still be a gradual and orderly progress if the next step is to elect all members of the Legislative Council by universal suffrage.

A3(1). Meet "the interests of the different sectors of society"?

The phrase "consideration must be given to " which precedes "the interests of the different sectors of society" must also be taken into account, which means we must consult the different sectors of Hong Kong.

It does not have the meaning of certain committee must compose of the different sectors of society. Also, it does not have the meaning of the Legislative Council must compose of the different sectors of society. This is consistent with the Basic Law as Article 45 provides the aim to have a broadly representative nominating committee, and Article 68

provides the aim to elect all Legislative Council members by universal suffrage, thereby removing functional constituencies.

Therefore, to meet "the interests of the different sectors of society", this and subsequent consultations is the answer.

A3(2). "Facilitate the development of the capitalist economy"?

An accountable government is the key to facilitate the development of the capitalist economy.

A truly accountable Chief Executive must be selected by universal suffrage. Currently, the secretaries of the government of the Hong Kong Special Administrative Region are accountable only to the Chief Executive, and are not accountable to the people of Hong Kong. Likewise, when the Chief Executive is not selected by universal suffrage, he or she is hardly accountable to the people. Furthermore, if there is no universal suffrage, an unwelcome Chief Executive may still be re-selected for a second term.

B1. What is the most appropriate legislative procedure for amending the methods for selecting the Chief Executive and forming the Legislative Council set out in Annexes I and II?

When we look at Annex I, the method for the selection of the Chief Executive is provided in its paragraphs 1 to 5, except that for the first Chief Executive is provided in its paragraph 6. Therefore, amendments to Annex I, are required in addition to local legislation.

On the contrary, when we look at Annex II, the method for the formation of the Legislative Council other than the first, second and

third terms are not provided in it. Therefore, amendment to Annex II is not required in addition to local legislation, except when we are going to change the membership of the Legislative Council to other than 60 members.

Currently, there is a group voting procedure provided in Annex II which says "The passage of motions, bills or amendments to government bills introduced by individual members of the Legislative Council shall require a simple majority vote of each of the two groups of members present: members returned by functional constituencies and those returned by geographical constituencies through direct elections and by the Election Committee.". If we are going to have a Legislative Council with all members returned by geographical constituencies through direct elections, do we need to amend Annex II to delete this provision? It is not necessary, and the provision would be considered as lapsed or spent. In fact, the third term Legislative Council has no members returned by the Election Committee, and the provision would not cause any problem.

In conclusion, assuming we are going to change the method for the selection of the Chief Executive and the composition of the Legislative Council, but not going to change the membership of the Legislative Council to other than 60 members, **we need local legislation and amendments to Annex I, but not Annex II.**

B2. Do we need to follow the procedures set out in Article 159 of the Basic Law, if we amend the methods for selecting the Chief Executive or forming the Legislative Council as specified in Annexes I and II of the Basic Law?

The design of the Basic Law specifically distinguishes between Articles and Annexes for different amendment procedures. In fact, Annex III has been amended twice by decisions of the Standing Committee of the National People's Congress on 1 July 1997 and 4 November 1998. Those amendments were not made pursuant to Article 159. Similarly, **amending Annexes I or II should not require procedure under Article 159.**

Paragraph 7 of Annex I requires amendments to the method for the selection of the Chief Executive be reported to the Standing Committee of the People's Congress for approval. The approval should be given by way of a decision. The decision will have the effect of amending Annex I. Invoking Article 159 is not required.

B3. How should any amendment relating to the methods for selecting the Chief Executive and for forming the Legislative Council be initiated?

In Annex I, paragraph 7 requires amendments to the method for selecting the Chief Executive be reported to the Standing Committee of the People's Congress for approval. We should not secure a local legislation before approval is obtained because the provisions of such local legislation would contravene the provisions in Annex I of the Basic Law. Therefore, **to change the method for selecting the Chief Executive, firstly, the Legislative Council should pass a resolution by two-thirds majority of all the members of the Legislative Council, and secondly, obtain the consent of the Chief Executive, and thirdly, report to the Standing Committee of the National People's Congress for approval and a decision to amend Annex I, and fourthly, pass a bill to amend existing local legislations.**

In Annex II, paragraph 3 in the Chinese version or paragraph III in the English version requires amendments to the method for the forming of the Legislative Council etc. be reported to the Standing Committee of the People's Congress for record, and not for approval. Additionally, it provides that "if there is a need to amend the provisions of this Annex, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Council and the consent of the Chief Executive" and in that case a decision of the Standing Committee of the People's Congress is required to amend Annex II.

If we are only changing the composition of the Legislative Council (that is the number of members returned by functional constituencies, if any, and the number of members returned by geographical constituencies through direct elections), then amendments to Annex II is not required and we requires only local legislation and therefore a bill passed by a simple majority vote of the members of the Legislative Council present and the consent of the Chief Executive will be sufficient. Such amendments does not require approval by the Standing Committee of the National People's Congress, but they should be reported for the record.

In conclusion, assuming we are only **changing the composition of the Legislative Council** (that is the number of members returned by functional constituencies, if any, and the number of members returned by geographical constituencies through direct elections), **the government should first lay a bill to amend the existing local legislation, and secondly, obtain the consent of the Chief Executive, and thirdly, publish the Ordinance(s) in the Government Gazette, and fourthly, report to the Standing Committee of the National People's Congress for record.**

B4. Whether the method for formation of the third term Legislative Council could be used for the fourth term Legislative Council, if no consensus were reached on whether to amend the method for forming the Legislative Council after 2007?

As I have mentioned above that only local legislation is required to amend the method for forming the Legislative Council. Therefore, if there is no consensus were reached on whether to amend the method for forming the Legislative Council after 2007, then **the method for formation of the third term Legislative Council could be used for the fourth term Legislative Council.**

B5. Whether the phrase "subsequent to the year 2007" should be understood to include 2007?

To understand the meaning of the phrase "subsequent to (以後)" in Annex I, we can examine the meanings of the same phrase of other occurrences in the Basic Law. In the Chinese version, there are 7 such occurrences, namely, Articles 24(1), 24(2), 24(4), 24(5), 122, 123 and 160, and Annex II. In the English version, there is only 1 such occurrence, namely, Annex II. There is only 1 occurrence in the English version because it uses "after" instead of "subsequent to" in Articles 24(1), 24(2), 24(4), 24(5), 122 and 123 while using "later" instead of "subsequent to" in Article 160. In the following quotations, exact wordings are used in the Chinese version. In the English version "after" are replaced by "*subsequent to*" and "later" is replaced by "*subsequently*".

Each of the Articles 24(1), 24(2), 24(4), 24(5) says "在香港特別行政區成立以前或以後 (before or *subsequent to* the establishment of the Hong Kong Special Administrative Region)". The semantics of these

wordings must mean an unbroken chain of time, and therefore indicates that the phrase "subsequent to" includes the day and from the very first moment of the establishment of the Hong Kong Special Administrative Region it refers to.

Article 122 says "原舊批約地段、鄉村屋地、丁屋地和類似的農村土地，如該土地在一九八四年六月三十日的承租人，或在該日以後批出的丁屋地承租人 (In the case of old schedule lots, village lots, small houses and similar rural holdings, where the property was on 30 June 1984 held by, or, in the case of small houses granted *subsequent to* that date)". This is a condition consists of two legs. Fulfilling either or both legs will satisfy the condition. If we first assume that in the second leg, subsequent to 30 June 1984 would not include 30 June 1984, then small houses were granted on 30 June 1984 would still satisfy the first leg of that condition. In other words, no matter "subsequent to" includes or does not include 30 June 1984, the meaning of this Articles would not differ. Therefore, this Article is neutral on the meaning of the phrase "subsequent to".

Article 123 says "香港特別行政區成立以後滿期而沒有續期權利的土地契約 (Where leases of land without a right of renewal expire after the establishment of the Hong Kong Special Administrative Region)". The semantics of these wordings must mean from and including the very first moment of 1 July 1997, and therefore indicates that the phrase "subsequent to" includes the very first moment it refers to.

Article 160 says "香港特別行政區成立時，... 如以後發現有的法律與本法抵觸，可依照本法規定的程序修改或停止生效。(Upon the establishment of the Hong Kong Special Administrative Region, ... If any laws are *subsequently* discovered to be in contravention of this

Law , they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law.)". Since "midnight legislation" is possible, the semantics of these wordings must mean from and including the very first moment of 1 July 1997. Therefore, the phrase "subsequent to" includes the very first moment it refers to.

Annex II is not useful in determination of the meaning of the phrase because it is the same case as Annex I.

Having examined the meaning of all other occurrences of the phrase "subsequent to (以後)" in the Basic Law, **we can conclude that the phrase "subsequent to the year 2007" should be understood to include 2007.**

W. Hung

26 February 2004