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The Department of Foreign Affairs of the Republic of South Africa presents its compliments to the Consulate-General of Japan and has the honour to refer to the Consulate's Note No RFA 86/89 dated 31 August 1989, regarding clarification of the implementation of the "Disclosure of Foreign Funding Act, 1989".

The Department has further the honour to convey the requested information as received from the Department of Justice. The questions raised in the Consulate's Note will be dealt with seriatim.

1. Ad Kagiso Trust

Kagiso Trust frequently receives vast amounts from donors outside the Republic of South Africa. These donations are made for specific purposes or for general purposes. The South African Government and Parliament are entitled to be informed when such donations are made, of the amount of money entering the country, and for what purpose such money is being donated.

The criteria applied by the Registrar to determine whether an organisation or person should be declared as a reporting organisation or person are the following:

- (a) The right and need of the South African Parliament to be informed about the receipt of money from outside South Africa, the purpose for which the money is received and how the money is utilized.
- (b) The implications which declaration to be a reporting organization will have for a particular organization.
- (c) The amounts received and which will probably be received in future.

It should be noted that the broad concept of this Act is not substantially different to the principles underlying the Foreign Agents Registration Act, 1938 (as amended) of the United States of America. The principle of disclosure is even taken a step further in the United States as will appear more fully in the attached press clipping marked "A".

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The information to be furnished by reporting organizations and persons in terms of the Act is to a large extent the same as the information which an organization receiving funds is in any event required to furnish to the donor in the interest of both donor and eventual beneficiary.

The letter addressed to Kagiso Trust should be viewed in the proper perspective. From the Note Verbale it appears as if the Japanese Government is under the impression that the intention is to declare Kagiso Trust as a reporting organization.

- (a) The Japanese Government can be assured that the letter referred to is only a first step in the investigation as to whether Kagiso Trust should be declared a reporting organization and does not necessarily mean that they will be declared as such. The letter invites Kagiso Trust to submit information and reasons for consideration by the Registrar when he considers whether or not they should be declared a reporting organization.
- (b) Kagiso Trust has approached the Registrar with a request to allow them additional time to submit information and reasons. The Registrar has acceded to their request.

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(c) Only after receipt of the information and reasons submitted by Kagiso Trust will serious consideration be given to the question whether Kagiso Trust should be declared to be a reporting organization.

It should further be noted that declaration as reporting organization or person does not suspend the operations of an organization or person. In fact it has no effect on the operations of such an organization or person other than to ensure that funds received for specific purposes are not utilized for other purposes.

2. The meaning of "prescribed information" in section 4(1)(c)

The information that should be furnished by a reporting organization or person in terms of section 4(1)(c) of Act 26 of 1989 is set out in Regulation 3(2) of the Foreign Funding Regulations, 1989, published in Government Gazette No 12063 dated 25 August 1989.

Attached hereto and marked "B" is a copy of the Regulations as published.

3. Ad paragraph 3 of the Note Verbale

Section 4(2)(a) of the Act refers to an account in the singular. From this it is clear that only one account has to be opened at a financial institution for the purpose of depositing all funds received from sources abroad.

Should a reporting organization or person, however, prefer to open more than one account, this will not be a contravention of the section in question. Reporting organizations or persons are, however, not obliged to do so.

Section 9(3)(a) is penal in character and as such will be strictly interpreted by the courts. Exactly how the courts will interpret the section is, of course, a matter for conjecture at this stage. Applying the normal rules of interpretation, it is anticipated that the courts will interpret the section to mean that they may only make orders in respect of money involved in the crime being adjudicated upon at that point in time. Other funds in the account, which do not form the subject matter of the criminal case, will not be subject to the jurisdiction of the court.

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South African courts are totally independent from the executive and their interpretation is not subject to any executive control.

4. Ad paragraph 4 of the Note Verbale

What may be deemed necessary will, of course, be dictated by the circumstances of each individual case and cannot be anticipated.

The South African courts have held in various cases that, when a discretion is given to a public official as is the case with section 6(1)(a) of the Act, that official should exercise his discretion subject to the following limitations.

(a) The discretion may only be exercised for the purposes of the enabling legislation and for no other purpose. Should the official's actions be motivated by any other consideration his actions will be subject to review and set aside by the court. (See in this regard Baxter, Administrative Law, First Edition, page 507 and Fernwood Estates Ltd v Cape Town Municipal Council 1933 (CPD 899)).

(b) Our courts have further ruled that a discretion given to an official may not be exercised

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arbitrarily or capriciously as this will yet again lead to intervention by the courts and result in the decision being overturned. (See Pieters v Administrateur van Suidwes-Afrika

1972(4) SA127(S) and Administrator, Cape Province v Ruyteplaats Estates (Pty) Ltd 1952(1) SA541(A)).

- (c) The Act limits information the Registrar may call for to information he reasonably deems necessary. Baxter, in his book on Administrative law referred to above, on page 490 remarks as follows:

"The criteria by which acts are adjudged unreasonable are the standards generally accepted by the public, standards which judges and lawyers would also share".

The following types of decisions have been found by the South African courts to be unreasonable:

- Decisions made without factual foundation; (SA Medical and Dental Council versus Lipron 1949(3) SA 277(A)).
- Decisions not honestly made.

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The object of the Act given in the preamble as-

"To regulate the disclosure of the receipt of money from outside the Republic by or for certain organizations and persons; and to provide for matters connected therewith".

Any information called for by the Registrar would have to relate to the purposes of the Act.

5. Ad paragraph 5 of the Note Verbale

For your convenience a copy of the Act is attached hereto and marked "C". The words in section 4 of the Act bear their normal meaning and as such do not require elaboration."

The Department of Foreign Affairs of the Republic of South Africa avails itself of this opportunity to renew to the Consulate-General of Japan the assurance of its highest consideration.

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