

**Legislative Council Brief**  
*Mutual Legal Assistance*  
*in Criminal Matters Ordinance (Chapter 525)*

**MUTUAL LEGAL ASSISTANCE  
IN CRIMINAL MATTERS (CANADA) ORDER**

**MUTUAL LEGAL ASSISTANCE  
IN CRIMINAL MATTERS (PHILIPPINES) ORDER**

**MUTUAL LEGAL ASSISTANCE  
IN CRIMINAL MATTERS (PORTUGAL) ORDER**

**Introduction**

At the meeting of the Executive Council on 18 September 2001, the Council ADVISED and the Chief Executive ORDERED that –

- (a) the Mutual Legal Assistance in Criminal Matters (Canada) Order at Annex A;
- (b) the Mutual Legal Assistance in Criminal Matters (Philippines) Order at Annex B; and
- (c) the Mutual Legal Assistance in Criminal Matters (Portugal) Order at Annex C;

should be made under section 4 of the Mutual Legal Assistance (“MLA”) in Criminal Matters Ordinance, subject to the approval of the Legislative Council, to implement the bilateral arrangements for MLA in criminal matters with these countries.

## **BACKGROUND AND ARGUMENT**

### **The Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)**

2. Section 4(1) of the Ordinance provides that the Chief Executive in Council may, with the approval of the Legislative Council, in relation to any arrangements for MLA, by order direct that the Ordinance shall, subject to such modifications as may be specified in the order, apply as between Hong Kong and the place outside Hong Kong to which the arrangements relate.

## **THE ORDERS**

3 We have signed bilateral agreements with Canada, the Philippines and Portugal respectively. The three proposed Orders to be made under section 4(1) of the Ordinance will enable these agreements to be brought into force and enable the Ordinance, subject to the modifications summarized in the schedule to the relevant Order, to be applicable as

..... between Hong Kong and these countries. **Schedule 1** to each of the Orders contains a copy of the relevant bilateral agreement.

4. Section 4(2) of the Ordinance provides that the Chief Executive in Council shall not make an order unless the arrangements for MLA to which the order relates are substantially in conformity with the provisions of the Ordinance. All three agreements do so conform.

5. Section 4(3) of the Ordinance provides that where an order specifies modifications to the Ordinance, those modifications shall be summarized in a schedule to the order. The modifications, which are set out in **Schedule 2** to each of the Orders, reflect the areas in which the relevant agreement varies from the Ordinance. These variations reflect the practice of the countries concerned and such modifications to the Ordinance are necessary to enable Hong Kong to comply with the obligations in the particular agreements.

6. An explanatory statement in relation to the modifications to the Ordinance is at Annex D.

7. The commencement dates of the proposed three Orders will be appointed by the Secretary for Security by notice in the Gazette. These dates will coincide with the dates on which the relevant agreements enter into force. The commencement dates will be settled after consultation with the

countries concerned and will depend upon when the necessary domestic procedures of those countries have been completed.

## **LEGISLATIVE TIMETABLE**

8. The Legislative timetable is as follows:-

Introduction into the Legislative Council	17 October 2001
Commencement dates	To be specified by the Secretary for Security

## **BASIC LAW IMPLICATIONS**

9. The Department of Justice advises that the proposed Orders do not conflict with those provisions of the Basic Law carrying no human rights implications.

## **HUMAN RIGHTS IMPLICATIONS**

10. The Department of Justice advises that the proposed Orders are consistent with the human rights provisions of the Basic Law.

## **BINDING EFFECT OF THE ORDERS**

11. The Orders will not affect the current binding effect of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525).

## **FINANCIAL AND STAFFING IMPLICATIONS**

12. The making of these Orders will not have any financial or staffing implications.

## **PUBLIC CONSULTATION**

13. The Orders will permit the agreements to be brought into force in accordance with the existing legal framework. Public consultation is, therefore, considered not necessary.

## **Enquiries**

14. Enquiries on the content of this paper should be directed to:-

	<u>Telephone No.</u>
Mrs. Margaret CHAN	2810 2329
Principal Assistant Secretary for Security	
Ms. Angelina Kwan	2537 7171
Assistant Secretary for Security	

**Security Bureau**

**21 September 2001**

(SBCR 3/5691/95 Pt.19)

**MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS  
(CANADA) ORDER**

(Made by the Chief Executive in Council under section 4 of the  
Mutual Legal Assistance in Criminal Matters Ordinance  
(Cap. 525) subject to the approval of  
the Legislative Council)

**1. Commencement**

This Order shall come into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

**2. Ordinance to apply between Hong Kong and Canada**

In relation to the arrangements for mutual legal assistance-

- (a) which are applicable to the Government and the Government of Canada;  
and
- (b) a copy of which is annexed at Schedule 1,

it is directed that the Ordinance shall, subject to the modifications summarized in Schedule 2, apply as between Hong Kong and Canada.

SCHEDULE 1

[ s.2]

AGREEMENT BETWEEN  
THE GOVERNMENT OF THE HONG KONG  
SPECIAL ADMINISTRATIVE REGION  
OF THE PEOPLE' S REPUBLIC OF CHINA  
AND  
THE GOVERNMENT OF CANADA  
ON  
MUTUAL LEGAL ASSISTANCE IN  
CRIMINAL MATTERS

The Government of the Hong Kong Special Administrative Region of the People' s Republic of China, having been duly authorised by the Central People' s Government

of the People' s Republic of China, and the Government of Canada, Desiring to improve the effectiveness of both Parties in the investigation, prosecution and prevention of crime and the confiscation of criminal proceeds;

Have agreed as follows:

## **ARTICLE 1**

### **SCOPE OF ASSISTANCE**

(1) The Parties shall provide, in accordance with the provisions of this Agreement, mutual assistance in the investigation and prosecution of criminal offences and in proceedings related to criminal offences. Such assistance shall be given by the Requested Party, irrespective of whether the assistance is sought or to be provided by a court or some other authority.

(2) For the purposes of paragraph (1) of this Article, the term " offences" means, in the case of the Hong Kong Special Administrative Region, offences under Hong Kong law, and in the case of Canada, offences created by a law of Parliament or by the legislature of a province.

(3) Assistance under this Agreement may be granted in connection with offences against a law related to taxation, customs duties, foreign exchange control or other revenue matters but not in connection with non-criminal proceedings relating thereto.

(4) Assistance shall include:

- (a) identifying and locating persons and objects;
- (b) service of documents;
- (c) provision of information, documents and other records, including judicial records and official records;
- (d) taking evidence, including the production of articles and documents and obtaining statements of persons;
- (e) delivery of property, including lending of exhibits;
- (f) executing requests for search and seizure;

- (g) making detained persons and others available to give evidence or assist investigations;
  - (h) tracing, restraining, forfeiting and confiscating the proceeds and instrumentalities of criminal activities; and
  - (i) other assistance consistent with the objects of this Agreement which is not inconsistent with the law of the Requested Party.
- (5) This Agreement is intended solely for mutual assistance between the Parties. The provisions of this Agreement shall not give rise to any right on the part of any private person to obtain, suppress or exclude any evidence or to impede the execution of a request.

## **ARTICLE 2**

### **CENTRAL AUTHORITY**

- (1) Each Party shall establish a Central Authority.
- (2) The Central Authority of the Hong Kong Special Administrative Region shall be the Secretary for Justice or his or her duly authorized officer. The Central Authority for Canada shall be the Minister of Justice or an official designated by that Minister.
- (3) Central Authorities shall transmit and receive all requests and responses thereto for the purposes of this Agreement.

## **ARTICLE 3**

### **EXECUTION OF REQUESTS**

- (1) The Central Authority of the Requested Party shall promptly execute the request or arrange for its execution through its competent authorities.
- (2) Requests for assistance shall be executed in accordance with the law of the Requested Party and, insofar as it is not prohibited by that law, in the manner requested by the Requesting Party.
- (3) The Requested Party shall, upon request, inform the Requesting Party

of the time and place of execution of the request for assistance.

(4) The Requested Party shall promptly inform the Requesting Party of any circumstances which are likely to cause a significant delay in responding to the request.

## **ARTICLE 4**

### **CONTENT OF REQUESTS**

(1) Requests shall be made in writing except in urgent cases. In urgent cases, requests may be made orally, but shall be confirmed in writing promptly thereafter.

(2) Requests for assistance shall include:

- (a) the name of the authority conducting the investigation, prosecution or proceedings to which the request relates;
- (b) a description of the purpose of the request and the nature of the assistance requested;
- (c) a description of the nature of the investigation, prosecution or proceedings;
- (d) a summary of the relevant facts and laws;
- (e) any requirements for confidentiality;
- (f) details of the period within which the request should be complied with;
- (g) details of any particular procedure the Requesting Party wishes to be followed;
- (h) where possible, the identity and location of the person or persons who are the subject of the investigation, prosecution or proceedings;
- (i) in the case of requests for the taking of evidence or search and seizure, a statement indicating the basis for belief that evidence may be found in the jurisdiction of the Requested Party;

- (j) in the case of requests to take evidence from persons, a statement as to whether sworn or affirmed statements are required, a list of questions to be put to the persons or a description of the subject-matter about which they are to be examined;
- (k) in the case of lending of exhibits, the person or class of persons who will have custody of the exhibit, the place to which the exhibit is to be removed, any tests to be conducted and the date by which the exhibit will be returned;
- (l) in the case of making detained persons available, the person or class of persons who will have custody during the transfer, the place to which the detained person is to be transferred and the date of that person' s return; and
- (m) the court order, if any, or a certified copy thereof, sought to be enforced and a statement to the effect that it is a final order.

(3) If the Requested Party considers that the information contained in the request is not sufficient to enable the request to be dealt with, that Party may request that additional details be furnished.

(4) Requests and supporting documents shall be either in an official language of the Requested Party or accompanied by a translation into an official language of the Requested Party.

## **ARTICLE 5**

### **LIMITATIONS ON COMPLIANCE**

(1) The Requested Party shall refuse assistance if:

- (a) in the case of Canada, the request for assistance would, in the opinion of the Government of Canada, impair its sovereignty, security or public order or, in the case of the Hong Kong Special Administrative Region, the request would, in the opinion of the Central People' s Government of the People' s Republic of China, impair the sovereignty, security or public order of the People' s Republic of China;

- (b) it is of the opinion that the granting of the request would seriously impair its essential interests; or(c)
  - (c) the request for assistance relates to an offence only under military law.
- (2) The Requested Party shall, if required by its laws, refuse assistance if:
- (a) the request for assistance relates to an offence of a political character;
  - (b) there are substantial grounds for believing that the request for assistance will result in a person being prejudiced on account of his race, religion, nationality or political opinions;
  - (c) the request for assistance relates to the prosecution of a person for an offence in respect of which the person has been convicted, acquitted or pardoned in the Requesting or Requested Party;
  - (d) the acts or omissions alleged to constitute the offence would not, if they had taken place within the jurisdiction of the Requested Party, have constituted an offence.
- (3) The Requested Party may refuse assistance if:
- (a) the request for assistance relates to the prosecution of a person for an offence for which the person could no longer be prosecuted by reason of lapse of time if the offence had been committed within the jurisdiction of the Requested Party;
  - (b) the Requesting Party cannot comply with any conditions in relation to confidentiality or limitation as to the use of material provided.
- (4) For the purpose of paragraph (1)(b) of this Article, the Requested Party may include in its consideration of essential interests whether the provision of assistance could prejudice the safety of any person or impose an excessive burden on the resources of the Requested Party.

(5) The Requested Party may refuse assistance if the request relates to an offence which carries the death penalty in the Requesting Party but in respect of which the death penalty is either not provided for in the Requested Party or not normally carried out unless the Requesting Party gives such assurances as the Requested Party considers sufficient that the death penalty will not be imposed or, if imposed, not carried out.

(6) The Requested Party may postpone assistance if execution of the request would interfere with an ongoing investigation or prosecution in the Requested Party.

(7) Before denying or postponing assistance pursuant to this Article, the Requested Party, through its Central Authority:

(a) shall promptly inform the Requesting Party of the reason for considering denial or postponement, and

(b) shall consult with the Requesting Party to determine whether assistance may be given subject to such terms and conditions as the Requested Party deems necessary.

(8) If the Requesting Party accepts assistance subject to the terms and conditions referred to in paragraph (7)(b) of this Article, it shall comply with those terms and conditions.

## **ARTICLE 6**

### **LOCATION AND IDENTITY OF PERSONS AND OBJECTS**

The Requested Party shall, if requested, endeavour to ascertain the location and identity of persons or the location of objects specified in the request.

## **ARTICLE 7**

### **SERVICE OF DOCUMENTS**

(1) The Requested Party shall serve any document transmitted to it for the purpose of service.

(2) The Requesting Party shall transmit a request for the service of a

document pertaining to a response or appearance in the Requesting Party within a reasonable time before the scheduled response or appearance.

(3) The Requested Party shall, subject to its law, return a proof of service in the manner required by the Requesting Party.

(4) A person who fails to comply with any process served shall not thereby be liable to any penalty or coercive measure pursuant to the law of the Requesting Party or Requested Party.

## **ARTICLE 8**

### **TRANSMISSION OF DOCUMENTS AND OBJECTS**

(1) When the request for assistance concerns the transmission of records and documents, other than publicly available records and documents, the Requested Party may transmit certified true copies thereof. Originals may be transmitted at the discretion of the Requested Party.

(2) Original records or documents or objects transmitted to the Requesting Party shall be returned to the Requested Party as soon as possible, upon the latter's request.

(3) In the case of publicly available records and documents, the Requested Party shall only be obliged to provide copies thereof.

(4) The Requested Party may provide copies of any document, record or information in the possession of a government department or agency, but not publicly available, to the same extent and under the same conditions as such document, record or information would be available to its own law enforcement and judicial authorities.

(5) Insofar as not prohibited by the law of the Requested Party, all records, documents or objects shall be transmitted in a form or accompanied by such certification as may be requested by the Requesting Party in order to make them admissible according to the law of the Requesting Party.

## **ARTICLE 9**

### **TAKING OF EVIDENCE**

(1) Where a request is made that evidence be taken for the purpose of an investigation, prosecution of a criminal offence or proceeding in relation to a criminal matter, the Requested Party shall, to the extent not prohibited by its laws, arrange to take such evidence.

(2) For the purposes of this Agreement, the giving or taking of evidence shall include the production of documents, records or other material.

(3) Where, pursuant to a request for assistance a person is to give evidence, the parties to the relevant proceedings in the Requesting Party, their legal representative or representatives of the Requesting Party may, to the extent not prohibited by the laws of the Requested Party, appear and question the person giving that evidence.

(4) The persons present at the execution of a request shall be permitted to make a verbatim transcript of the proceedings. The use of technical means to make such a verbatim transcript may be permitted.

(5) If permitted by their laws, the Parties may agree in specific cases that the taking of evidence of a witness in accordance with this Article may take place by means of video conference or other technological means.

(6) A person who is required to give evidence in the Requested Party pursuant to a request for assistance may decline to give evidence where either:

- (a) the law of the Requested Party would permit that witness to decline to give evidence in similar circumstances in proceedings which originated in the Requested Party; or
- (b) the law of the Requesting Party would permit that person to decline to give evidence in such proceedings in the Requesting Party.

(7) If any person claims that there is a right to decline to give evidence under the law of the Requesting Party, the Requested Party shall with respect thereto rely on a certificate of the Central Authority of the Requesting Party.

## **ARTICLE 10**

### **OBTAINING STATEMENTS OF PERSONS**

Where a request is made to obtain the statement of a person for the purpose of an

investigation, prosecution or proceeding in relation to a criminal offence in the Requesting Party, the Requested Party shall endeavour to obtain such statement.

## **ARTICLE 11**

### **SEARCH AND SEIZURE**

(1) The Requested Party shall, insofar as its law permits, carry out requests for search, seizure and delivery of any material to the Requesting Party which is relevant to an investigation, prosecution or proceeding in relation to a criminal offence.

(2) The Requested Party shall provide such information as may be required by the Requesting Party concerning the result of any search, the place of seizure, the circumstances of seizure and the continuity of possession of the material seized.

(3) The Requesting Party shall observe any conditions imposed by the Requested Party in relation to any seized material which is delivered to the Requesting Party.

## **ARTICLE 12**

### **AVAILABILITY OF PERSONS IN CUSTODY TO GIVE ASSISTANCE**

(1) A person in custody in the Requested Party whose presence in the Requesting Party is requested for the purpose of providing assistance pursuant to this Agreement shall, if the Requested Party consents, be transferred from the Requested Party to the Requesting Party for that purpose, provided the person consents.

(2) Where the person transferred is required to be kept in custody under the law of the Requested Party, the Requesting Party shall hold that person in custody and shall return the person in custody at the conclusion of the execution of the request.

(3) Where the sentence of imprisonment of a person transferred pursuant to this Article expires while the person is in the Requesting Party, the Requested Party shall so advise the Requesting Party which shall ensure the person's release from custody and that the person is treated as a person referred to in Article 14(3) of this

Agreement.

### **ARTICLE 13**

#### **AVAILABILITY OF OTHER PERSONS TO GIVE ASSISTANCE**

- (1) The Requesting Party may request the assistance of the Requested Party in making a person available for the purpose of providing assistance pursuant to this Agreement.
- (2) The Requested Party shall invite the person to provide assistance and seek that person' s concurrence thereto. That person shall be informed of any expenses and allowances payable.

### **ARTICLE 14**

#### **SAFE CONDUCT**

- (1) Subject to Article 12(2) of this Agreement, a person who consents to provide assistance pursuant to Articles 12 or 13 shall not be prosecuted, detained or restricted in their personal liberty in the Requesting Party for any acts or omissions which preceded that person' s departure from the Requested Party, nor shall that person be obliged to provide assistance other than the assistance to which the request relates.
- (2) Persons who consent to give evidence under Articles 12 or 13 of this Agreement shall not be subject to prosecution based on their testimony, except for perjury, contempt and contradictory evidence.
- (3) Paragraphs (1) and (2) of this Article shall not apply if the person, not being a person in custody transferred under Article 12 of this Agreement and being free to leave, has not left the Requesting Party within a period of 30 days after being notified that that person' s presence is no longer required, or having left the Requesting Party, has returned.
- (4) Any person who fails to appear in the Requesting Party may not be subjected to any sanction or compulsory measure in the Requested or Requesting Party.

## **ARTICLE 15**

### **PROCEEDS OF CRIME**

(1) The Requested Party shall, upon request, endeavour to ascertain whether any proceeds or instrumentalities of crime are located within its jurisdiction and shall notify the Requesting Party of the result of its inquiries. In making the request, the Requesting Party shall notify the Requested Party of the basis of its belief that such proceeds or instrumentalities may be located in its jurisdiction.

(2) Where, pursuant to paragraph (1) of this Article, suspected proceeds or instrumentalities of crime are found, the Requested Party shall take such measures as are permitted by its law to prevent any dealing in, transfer or disposal of, those suspected proceeds or instrumentalities of crime, pending a final determination in respect of those proceeds or instrumentalities by a court of the Requesting Party.

(3) Where a request is made for assistance in securing the confiscation of proceeds or instrumentalities such request shall be executed pursuant to the laws of the Requested Party. This may include enforcing an order made by a court in the Requesting Party and initiating or assisting in proceedings in relation to the proceeds or instrumentalities to which the request relates.

(4) Proceeds or instrumentalities confiscated pursuant to this Agreement shall be retained by the Requested Party unless otherwise agreed upon between the Parties.

## **ARTICLE 16**

### **LIMITATIONS OF USE**

(1) The Requested Party may require, after consultation with the Requesting Party, that information or evidence furnished or the source of such information or evidence be kept confidential or be disclosed or used only subject to such terms and conditions as it may specify.

(2) The Requesting Party shall not disclose or use information or evidence furnished for purposes other than those stated in the request without the prior consent of the Central Authority of the Requested Party.

(3) The Requested Party shall, to the extent requested, keep confidential a request, its contents, supporting documents and any action taken pursuant to the request except to the extent necessary to execute it.

#### **ARTICLE 17**

#### **CERTIFICATION AND AUTHENTICATION**

Subject to the provisions of Article 8(1) of this Agreement, documents, transcripts, records, statements or other material which are to be transmitted to the Requesting Party shall only be certified or authenticated if the Requesting Party so requests. Material shall be certified or authenticated by consular or diplomatic officers only if the law of the Requesting Party specifically so requires.

#### **ARTICLE 18**

#### **REPRESENTATION AND EXPENSES**

(1) The Requested Party shall make all necessary arrangements for the representation of the Requesting Party in any proceedings arising out of a request for assistance and shall otherwise represent the interests of the Requesting Party.

(2) The Requested Party shall assume all ordinary expenses of executing a request within its boundaries, except:

- (a) fees of counsel retained at the request of the Requesting Party;
- (b) fees of experts;
- (c) expenses of translation; and
- (d) travel expenses and allowances of persons.

(3) If during the execution of the request it becomes apparent that expenses of an extraordinary nature are required to fulfil the request, the Parties shall consult to determine the terms and conditions under which the execution of the request may continue.

#### **ARTICLE 19**

## **OTHER ASSISTANCE**

The Parties may request or provide assistance pursuant to other agreements, arrangements or practices.

## **ARTICLE 20**

### **CONSULTATIONS AND DISPUTE SETTLEMENT**

(1) The Central Authorities shall consult promptly, at the request of either of them, concerning the interpretation, application or implementation of this Agreement.

(2) Any dispute arising out of the interpretation, application or implementation of this Agreement shall be resolved through diplomatic channels if the Central Authorities are themselves unable to reach agreement.

## **ARTICLE 21**

### **ENTRY INTO FORCE AND TERMINATION**

(1) This Agreement shall enter into force on the first day of the second month after the date on which the Parties have notified each other that their legal requirements have been complied with.

(2) This Agreement shall apply to any requests presented after its entry into force even if the relevant acts or omissions occurred before that date.

(3) Each of the Parties may terminate this Agreement at any time by giving notice to the other. In that event the Agreement shall cease to have effect on receipt of that notice. Requests for assistance which have been received prior to termination of the Agreement shall nevertheless be processed in accordance with the terms of the Agreement as if the Agreement were still in force.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Agreement.

Done at the Hong Kong Special Administrative Region on the sixteenth day of February Two Thousand and One in two copies, in Chinese, French and English, each text being equally authentic.

## SCHEDULE 2

### MODIFICATIONS TO THE ORDINANCE

[ s. 2]

1. Section 5(1)(e) of the Ordinance shall be modified to read as follows-

" (e) the request relates to the prosecution of a person for an external offence in a case where the person-\*

(i)\* has been convicted, acquitted or pardoned by a competent court or other authority in the place,\* \* or Hong Kong;\* or

(ii)\* has undergone the punishment provided by the law of that place or Hong Kong\* ,

in respect of that offence or of another external offence constituted by the same act or omission as that offence;" .

2. Section 17(3)(b) of the Ordinance shall be modified to read as follows-

" (b) the person has had an opportunity of leaving Hong Kong, 30 days have expired since that opportunity\* and the person\* has remained in Hong Kong otherwise than for-

(i) the purpose to which the request relates; or

(ii) the purpose of giving assistance in relation to a criminal matter in Hong Kong certified in writing by the Secretary for Justice to be a criminal matter in relation to which it is desirable that the person give assistance." .

\* The words underlined are added. (The underlining is for ease of identifying the modification).

\* \* The words crossed out are deleted. (The crossing out is for ease of identifying the modification).

Clerk of the Executive Council

COUNCIL CHAMBER

2001

### **Explanatory Note**

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) shall apply as between Hong Kong and Canada. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Government of Hong Kong and the Government of Canada and signed in Hong Kong on 16 February 2001. A copy of those arrangements is annexed at Schedule 1 to the Order. It should be noted that the Ordinance is subject to the modifications summarized in Schedule 2 to the Order.

**MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS  
(PHILIPPINES) ORDER**

(Made by the Chief Executive in Council under section 4 of the  
Mutual Legal Assistance in Criminal Matters Ordinance  
(Cap. 525) subject to the approval of  
the Legislative Council)

**1. Commencement**

This Order shall come into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

**2. Ordinance to apply between Hong Kong  
and Republic of the Philippines**

In relation to the arrangements for mutual legal assistance-

- (a) which are applicable to the Government and the Government of the Republic of the Philippines; and
- (b) a copy of which is annexed at Schedule 1,

it is directed that the Ordinance shall, subject to the modifications summarized in Schedule 2, apply as between Hong Kong and the Republic of the Philippines.

**SCHEDULE 1**

[s. 2]

**AGREEMENT BETWEEN  
THE GOVERNMENT OF THE HONG KONG  
SPECIAL ADMINISTRATIVE REGION  
OF THE PEOPLE'S REPUBLIC OF CHINA  
AND  
THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES  
CONCERNING  
MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS**

The Government of the Hong Kong Special Administrative Region of the People's Republic of China (" the Hong Kong Special Administrative Region" ), having been duly authorized by the Central People's Government of the People's Republic of

China, and the Government of the Republic of the Philippines;

Desiring to improve the effectiveness of law enforcement of both Parties in the investigation, prosecution and suppression of crimes such as public corruption and narcotics trafficking;

Have agreed as follows:

## ARTICLE I

### SCOPE OF ASSISTANCE

(1) The Parties shall provide, in accordance with the provisions of this Agreement, mutual assistance in the investigation and prosecution of criminal offences and in proceedings related to criminal matters.

(2) Assistance shall include:

- (a) identifying and locating persons;
- (b) serving of documents;
- (c) the obtaining of evidence, articles or documents;
- (d) executing requests for search and seizure;
- (e) facilitating the personal appearance of witnesses;
- (f) effecting the temporary transfer of persons in custody to appear as witnesses;
- (g) obtaining production of judicial or official records;
- (h) tracing, restraining, forfeiting and confiscating the proceeds and instrumentalities of criminal activities and recovering pecuniary penalties in respect of offences including restraining of dealings in property or the freezing of assets alleged to be related to a criminal matter;

- (i) providing information, documents and records;
- (j) delivery of property, including lending of exhibits; and
- (k) other assistance consistent with the objects of this Agreement which is not inconsistent with the law of the Requested Party.

(4) For the purposes of this Agreement, criminal matter includes:

- (a) a criminal matter relating to revenue (including taxation and customs duties);
- (b) a criminal matter relating to graft and corruption, unlawfully acquired or acquiring property, bribery, frauds against the public treasury, or misappropriation or fraudulent conversion of public funds or property;
- (c) a matter relating to the forfeiture or confiscation of property in respect of an offence;
- (d) a matter relating to the imposition or recovery of a pecuniary penalty in respect of an offence; and
- (e) a matter relating to the restraining of dealings in property, or the freezing of assets that may be forfeited, confiscated or used to satisfy a pecuniary penalty imposed in respect of an offence.

(4) Assistance under this Agreement may be granted in connection with offences against a law related to taxation, customs duties, foreign exchange control or other revenue matters but not in connection with non-criminal proceedings relating thereto.

(5) This Agreement is intended solely for mutual assistance between the Parties. The provisions of this Agreement shall not give rise to any right on the part of any private person to obtain, suppress or exclude any evidence or to impede the execution of a request.

## **ARTICLE II**

### **CENTRAL AUTHORITY**

- (1) Each Party shall establish a Central Authority.
- (2) The Central Authority for the Hong Kong Special Administrative Region shall be the Secretary for Justice or his duly authorized officer. The Central Authority of the Republic of the Philippines shall be the Secretary of Justice or his duly authorized officer.
- (3) Requests under this Agreement shall be made by the Central Authority of the Requesting Party to the Central Authority of the Requested Party.

## **ARTICLE III**

### **OTHER ASSISTANCE**

This Agreement shall not affect subsisting obligations between the Parties pursuant to other agreements, arrangements or practices or otherwise nor prevent the Parties from providing assistance pursuant to such agreements, arrangements, or practices.

## **ARTICLE IV**

### **LIMITATIONS ON COMPLIANCE**

- (1) The Requested Party shall refuse assistance if:
  - (a) the request for assistance impairs the sovereignty, security or public order of the Republic of the Philippines or, in the case of the Hong Kong Special Administrative Region, the People' s Republic of China;
  - (b) the request for assistance relates to an offence of a political character;
  - (c) the request for assistance relates to an offence only under military law;
  - (d) there are substantial grounds for believing that the request for assistance

will result in a person being prejudiced on account of his race, religion, sex, nationality or political opinions;

- (e) the request for assistance relates to the prosecution of a person for an offence in respect of which the person has been acquitted or has served the sentence imposed or has been pardoned in the Requested Party;
  - (f) it is of the opinion that the granting of the request would seriously impair its essential interests;
  - (g) the acts or omissions alleged to constitute the offence would not, if they had taken place within the jurisdiction of the Requested Party, have constituted an offence.
- (2) The Requested Party may refuse assistance if:
- (a) the request for assistance relates to the prosecution of a person who could no longer be prosecuted by reason of lapse of time or for any other reason if the offence had been committed within the jurisdiction of the Requested Party;
  - (b) the Requesting Party cannot comply with any conditions relating to confidentiality or limitation as to the use of material provided;
  - (c) the request for assistance relates to the prosecution or punishment of a person for an offence which is committed outside the area under the jurisdiction of the Requesting Party and the law of the Requested Party does not provide for the punishment of an offence committed in similar circumstances; or
  - (d) the provision of the assistance sought could prejudice an investigation or proceeding in the Requested Party, or endanger the safety of any person or impose an excessive burden on the resources of that Party.

## **ARTICLE V**

### **REQUESTS**

- (1) Requests shall be made in writing except in urgent cases. In urgent cases, requests may be made orally, but shall be confirmed in writing as soon as practicable.

(2) Requests for assistance shall include:

- (a) the name of the authority on behalf of which the request is made;
- (b) a description of the purpose of the request and the nature of the assistance requested;
- (c) a description of the nature of the investigation, prosecution, offence or criminal matter and whether or not proceedings have been instituted;
- (d) the court order, if any, or a certified copy thereof, sought to be enforced and a statement to the effect that it is a final order;
- (e) where proceedings have been instituted, details of the proceedings;
- (f) a summary of the relevant facts and laws;
- (g) any requirements for confidentiality;
- (h) details of any particular procedure the Requesting Party wishes to be followed; and
- (i) details of the period within which the request should be complied with.

(3) Requests for assistance, to the extent necessary and insofar as possible, shall also include:

- (a) the identity, nationality and whereabouts of the person or persons who are the subject of the investigation or proceedings;
- (b) a statement as to whether sworn or affirmed evidence or statements are required;
- (c) a description of the information, documents, records or articles of evidence to be produced as well as a description of the appropriate person to be asked to produce them and, to the extent not otherwise provided for, the form in

which they should be reproduced and authenticated;

(d) information as the allowances and expenses to which a person appearing in the Requesting Party will be entitled; and

(e) a description of any property sought to be restrained, frozen or forfeited.

(4) All documents submitted in support of a request shall be in, or accompanied by a translation into, an official language of the Requested Party.

## **ARTICLE VI**

### **EXECUTION OF REQUESTS**

(1) The Central Authority of the Requested Party shall promptly execute the request or arrange for its execution through its competent authorities.

(2) A request shall be executed in accordance with the law of the Requested Party and, to the extent not prohibited by the law of the Requested Party, in accordance with the directions stated in the request so far as practicable.

(3) The Requested Party shall promptly inform the Requested Party of any circumstances which are likely to cause a significant delay in responding to the request.

(4) The Requested Party shall promptly inform the Requested Party of a decision not to comply in whole or in part with a request for assistance and the reason for that decision.

(5) The Requested Party may postpone execution of the request if it would interfere with an ongoing investigation or prosecution or proceeding in relation to a criminal matter or a related civil matter in the Requested Party. Where the request relates to the delivery of documents, the Requested Party shall upon request provide certified copies of those documents.

(6) Before denying or postponing assistance pursuant to this Article, the Requested Party, through its Central Authority:

(a) shall promptly inform the Requested Party of the reason for considering denial or postponement; and

(b) shall consult with the Requested Party to determine whether assistance may be given subject to such terms and conditions as the Requested Party deems necessary.

(7) If the Requested Party accepts assistance subject to the terms and conditions referred to in paragraph 6(b) of this Article, it shall comply with those terms and conditions.

## **ARTICLE VII**

### **LIMITATIONS OF USE**

(1) The Requesting Party, if so requested, shall protect the confidentiality of the evidence and information provided by the Requested Party, except to the extent required for the investigation and proceeding described in the request.

(2) The Requested Party, if so requested, shall keep the requested for assistance, its contents and supporting documents, and the fact of granting of such assistance, confidential. If the request cannot be executed without breaching confidentiality, the Requested Party shall so inform the Requested Party which shall then determine whether the request should nevertheless be executed.

(3) The Requesting Party shall not use evidence obtained, nor information derived therefrom, for purposes other than those stated in a request without the prior consent of the Requested Party.

## **ARTICLE VIII**

### **OBTAINING OF EVIDENCE, ARTICLES OR DOCUMENTS**

(1) Where a request is made that evidence be taken for the purpose of an investigation, a prosecution of a criminal offence or a proceeding in relation to a criminal matter in the jurisdiction of the Requesting Party the Requested Party shall, subject to its laws, arrange to take such evidence.

(2) For the purposes of this Agreement, the giving or taking of evidence shall include the production of documents, records or other material.

(3) For the purposes of requests under this Article the Requesting Party shall specify the questions to be put to the witnesses or the subject matter about which they are to be examined.

(4) Where, pursuant to a request for assistance, a person is to give evidence for the purpose of proceedings in the Requesting Party, the parties to the relevant proceedings in the Requesting Party, their legal representatives or representatives of the Requesting Party may, subject to the laws of the Requested Party, appear and question the person giving that evidence.

(5) A person who is required to give evidence in the Requested Party pursuant to a request for assistance may decline to give evidence where either:

- (a) the law of the Requested Party would permit that witness to decline to give evidence in similar circumstances in proceedings which originated in the Requested Party; or
- (b) where the law of the Requesting Party would permit him to decline to give evidence in such proceedings in the Requesting Party.

(6) If any person claims that there is a right to decline to give evidence under the law of the Requesting Party, the Requested Party shall, with respect thereto, rely on a certificate of the Central Authority of the Requesting Party as prima facie evidence of the existence of that right.

## **ARTICLE IX**

### **OBTAINING STATEMENTS OF PERSONS**

Where a request is made to obtain the statement of a person for the purpose of an investigation or proceeding in relation to a criminal matter in the Requesting Party, the Requested Party shall endeavour to obtain such statement.

## **ARTICLE X**

### **LOCATION OR IDENTITY OF PERSONS**

The Requested Party shall, if requested, endeavour to ascertain the location or identity of any person specified in the request.

## **ARTICLE XI**

### **SERVICE OF DOCUMENTS**

(1) The Requested Party shall serve documents transmitted to it for the purpose of service.

(2) The Requesting Party shall transmit a request for the service of a document pertaining to a response or appearance in the Requesting Party within a reasonable time before the scheduled response or appearance.

(3) A request for the service of a document pertaining to an appearance in the Requesting Party shall include such notice as the Central Authority of the Requesting Party is reasonably able to provide of outstanding warrants or other judicial orders in criminal matters against the person to be served.

(4) The Requested Party shall, subject to its law, return a proof of service in the manner required by the Requesting Party.

(5) A person who fails to comply with any process served on him shall not thereby be liable to any penalty or coercive measure pursuant to the law of the Requesting Party.

## **ARTICLE XII**

### **PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS**

(1) Subject to its law the Requested Party shall provide copies of publicly available documents.

(2) The Requested Party may provide copies of any document, record or information in the possession of a government department or agency, but not publicly available, to the same extent and under the same conditions as such documents, record or information would be available to its own law enforcement and judicial authorities.

## **ARTICLE XIII**

### **SIGNING CERTIFICATION AND SEALING**

A request for mutual assistance and the supporting documents thereto, as well as documents or other material supplied in response to such a request shall:

- (a) be signed or certified by a Judge, magistrate or other official authorized by the relevant Party; and
- (b) be sealed with an official or public seal of the relevant Party, or of an officer of the relevant Party.

## **ARTICLE XIV**

### **TRANSFER OF PERSONS IN CUSTODY**

(1) A person in custody in the Requested Party whose presence is requested in the Requesting Party for the purposes of providing assistance pursuant to this Agreement shall, if the Requested Party consents, be transferred from the Requested Party to the Requesting Party for that purpose, provided the person consents and the Requesting Party has guaranteed the maintenance in custody of the person and his subsequent return to the Requested Party.

(2) Where the sentence of imprisonment of a person transferred pursuant to this Article expires while the person is in the Requesting Party the Requested Party shall so advise the Requesting Party which shall ensure the person's release from custody. Such person shall thereafter be treated as a person referred to in Article XV of this Agreement.

## **ARTICLE XV**

### **TRANSFER OF OTHER PERSONS**

(1) The Requesting Party may request the assistance of the Requested Party in making a person available for the purpose of providing assistance pursuant to this Agreement.

(2) The Requested Party shall, if satisfied that satisfactory arrangements for that person' s security will be made by the Requesting Party, request the person to travel to the Requesting Party to provide assistance.

## **ARTICLE XVI**

### **SAFE CONDUCT**

(1) A person who consents to provide assistance pursuant to Articles XIV or XV shall not be prosecuted, detained, or restricted in his personal liberty in the Requesting Party for any criminal offence or civil matter which preceded his departure from the Requested Party.

(2) Paragraph (1) shall not apply if the person, not being a person in custody transferred under Article XV, and being free to leave, has not left the Requesting Party within a period of 15 days after being notified that his presence is no longer required, or having left the Requesting Party, has returned.

(3) A Person who consents to give evidence under Articles XIV or XV shall not be subject to prosecution based on his testimony, except for perjury or contempt.

(4) A person who consents to provide assistance pursuant to Articles XIV or XV shall not be required to give evidence in any proceedings other than the proceedings to which the request relates.

(5) A person who does not consent to provide evidence pursuant to Articles XIV or XV shall not by reason thereof be liable to any penalty or coercive measure by the courts of the Requesting or Requested Party.

## **ARTICLE XVII**

### **SEARCH AND SEIZURE**

(1) The Requested Party shall insofar as its law permits carry out requests for search, seizure and delivery of any material to the Requesting Party provided the request contains information that would justify such action under the law of the Requested Party.

(2) The Requested Party shall provide such information as may be required by the Requesting Party concerning the result of any search, the place of seizure, the circumstances of seizure, and the subsequent custody of the property seized.

(3) The Requesting Party shall observe any conditions imposed by the Requested Party in relation to any seized property which is delivered to the Requesting Party.

## **ARTICLE XVIII**

### **RESTRAINT, FORFEITURE AND CONFISCATION OF PROPERTY**

(1) The Requested Party shall, upon request, endeavour to ascertain whether property which may become the subject of a forfeiture or confiscation order or which may be required to satisfy a pecuniary penalty is located within its jurisdiction and shall notify the Requesting Party of the results of its inquiries.

(2) Where pursuant to paragraph (1) such property is found, the Requested Party shall take such measures as are permitted by its law to prevent any dealing in, transfer or disposal of that property pending a final determination in respect of that property by a Court of the Requesting Party.

(3) The Requested Party shall give effect to a final decision by a court of the Requesting Party imposing a pecuniary penalty or ordering confiscation or forfeiture and shall return or deliver the property to the Requesting Party unless otherwise agreed between the Parties.

(4) Where the property referred to in paragraph (3) of this Article is real property the Requested Party shall sell that property and deliver the proceeds of the sale to the Requesting Party.

(5) In this Article " property" includes:

- (a) property used in connection with the commission of an offence;
- (b) property derived or realized, directly or indirectly, from the commission of an offence;

- (c) property which represents the value of benefits derived from the commission of an offence.

## **ARTICLE XIX**

### **REPRESENTATION AND EXPENSES**

(1) The Requested Party shall make all necessary arrangements for the representation of the Requesting Party in any proceeding arising out of a request for assistance and shall otherwise represent the interests of the Requesting Party.

(2) The Requested Party shall assume all ordinary expenses of executing a request within its boundaries except:

- (a) fees of counsel retained at the request of the Requesting Party;
- (b) fees of experts;
- (c) expenses of translation;
- (d) the expenses associated with conveying any person to or from the Requested Party, and any fees, allowances or expenses payable to that person while in the Requesting Party pursuant to a request under this Agreement; and
- (e) the expenses associated with conveying custodial or escorting officers.

(3) If during the execution of the requested it becomes apparent that expenses of an extraordinary nature are required to fulfill the request, the Parties shall consult to determine the terms and conditions under which the execution of the request may continue.

## **ARTICLE XX**

### **SETTLEMENT OF DISPUTES**

Any dispute arising out of the interpretation, application or implementation of this Agreement shall be resolved through diplomatic channels if the Central

Authorities are themselves unable to reach agreement.

## **ARTICLE XXI**

### **ENTRY INTO FORCE AND TERMINATION**

(1) This Agreement shall enter into force thirty days after the date on which the Parties have notified each other in writing that their respective requirements for the entry into force of the Agreement have been complied with.

(2) This Agreement shall apply to requests made pursuant to it whether or not the relevant acts or omissions occurred prior to this Agreement entering into force.

(3) Either Party may terminate this Agreement by notice in writing at any time and it shall cease to be in force on the ninetieth day after the day on which notice is given.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Agreement.

DONE at the Hong Kong Special Administrative Region on the twenty-third day of February Two Thousand and One in Chinese and English, both texts being equally authentic.

## SCHEDULE 2

[ s. 2]

### MODIFICATIONS TO THE ORDINANCE

1. Section 5(1)(e) of the Ordinance shall be modified to read as follows-

" (e) the request relates to the prosecution of a person for an external offence in a case where the person-\*

(i)\* has been convicted, acquitted or pardoned by a competent court or other authority in the place,\* \* or Hong Kong;\* or

(ii)\* has undergone the punishment provided by the law of that place or Hong Kong\* ,

in respect of that offence or of another external offence constituted by the same act or omission as that offence;" .

2. Section 17(3)(b) of the Ordinance shall be modified to read as follows-

" (b) the person has had an opportunity of leaving Hong Kong, 15 days have expired since that opportunity\* and the person\* has remained in Hong Kong otherwise than for-

(i) the purpose to which the request relates; or

(ii) the purpose of giving assistance in relation to a criminal matter in Hong Kong certified in writing by the Secretary for Justice to be a criminal matter in relation to which it is desirable that the person give assistance." .

\* The words underlined are added. (The underlining is for ease of identifying the modification).

\* \* The words crossed out are deleted. (The crossing out is for ease of identifying the modification).

COUNCIL CHAMBER

2001

**Explanatory Note**

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) shall apply as between Hong Kong and the Republic of the Philippines. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Government of Hong Kong and the Republic of the Philippines and signed in Hong Kong on 23 February 2001. A copy of those arrangements is annexed at Schedule 1 to the Order. It should be noted that the Ordinance is subject to the modifications summarized in Schedule 2 to the Order.

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (PORTUGAL) ORDER

(Made by the Chief Executive in Council under section 4  
of the Mutual Legal Assistance in Criminal Matters  
Ordinance (Cap. 525) subject to the approval of  
the Legislative Council)

**1. Commencement**

This Order shall come into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

**2. Ordinance to apply between Hong Kong  
and Portugal**

In relation to the arrangements for mutual legal assistance-

- (a) which are applicable to the Government and the Government of the Portuguese Republic; and
- (b) a copy of which is annexed at Schedule 1,

it is directed that the Ordinance shall, subject to the modifications summarized in Schedule 2, apply as between Hong Kong and the Portuguese Republic.

SCHEDULE 1

[ s. 2]

**AGREEMENT BETWEEN  
THE GOVERNMENT OF THE HONG KONG  
SPECIAL ADMINISTRATIVE REGION OF THE  
PEOPLE'S REPUBLIC OF CHINA**

**AND**

**THE GOVERNMENT OF THE PORTUGUESE REPUBLIC  
CONCERNING  
MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS**

The Government of the Hong Kong Special Administrative Region of the People' s Republic of China (" Hong Kong Special Administrative Region" ) having been duly authorised by the Central People' s Government of the People' s Republic of China and the Government of the Portuguese Republic,

Desiring to improve the effectiveness of law enforcement of both Parties in the investigation, prosecution and prevention of crime and the confiscation of criminal proceeds;

Have agreed as follows:

## **ARTICLE 1**

### **SCOPE OF ASSISTANCE**

(1) The Parties shall provide, in accordance with the provisions of this Agreement, mutual assistance in the investigation and prosecution of criminal offences and in proceedings related to criminal matters.

(2) Assistance shall include:

- (a) identifying and locating persons;
- (b) serving of documents;
- (c) the obtaining of information, statements, evidence, articles or documents, including the execution of letters rogatory;
- (d) executing requests for search and seizure;
- (e) facilitating the personal appearance of persons to provide assistance;
- (f) effecting the temporary transfer of persons in custody to provide assistance;
- (g) obtaining production of judicial or official records;
- (h) tracing, restraining, forfeiting and confiscating the proceeds and instrumentalities of criminal activities;

- (i) providing information, documents and records; and
- (j) delivery of property, including lending of exhibits.

(3) Assistance under this Agreement may be granted in connection with offences against a law related to taxation, customs duties, foreign exchange control or other revenue matters but not in connection with non-criminal proceedings related thereto.

(4) This Agreement is intended solely for mutual assistance between the Parties. The provisions of this Agreement shall not give rise to any right on the part of any private person to obtain, suppress or exclude any evidence or to impede the execution of a request.

## **ARTICLE 2**

### **CENTRAL AUTHORITIES**

(1) The Central Authorities of the Parties shall process requests for assistance in accordance with the provisions of this Agreement.

(2) The Central Authority for the Portuguese Republic is the Procuradoria-Geral da Republica. The Central Authority for the Hong Kong Special Administrative Region is the Secretary for Justice or an officer authorized by the Secretary for Justice. Either Party may change its Central Authority in which case it shall notify the other of the change.

(3) The Central Authorities may communicate directly with each other for the purposes of this Agreement.

## **ARTICLE 3**

### **OTHER ASSISTANCE**

The Parties may provide assistance pursuant to other agreements, arrangements or practices.

## **ARTICLE 4**

### **LIMITATIONS ON COMPLIANCE**

(1) The Requested Party shall refuse assistance if:

- (a) the request for assistance impairs the sovereignty, security or public order of the Portuguese Republic or, in the case of the Government of the Hong Kong Special Administrative Region, the People' s Republic of China;
- (b) the request for assistance relates to an offence of a political character;
- (c) the request for assistance relates to an offence only under military law;
- (d) there are substantial grounds for believing that the request for assistance will result in a person being prejudiced on account of his race, religion, nationality or political opinions;
- (e) the request for assistance relates to the prosecution of a person for an offence in respect of which the person has been convicted, acquitted or pardoned in the Requested Party or for which the person could no longer be prosecuted by reason of lapse of time if the offence had been committed within the jurisdiction of the Requested Party;
- (f) if it is of the opinion that the granting of the request would seriously impair its essential interests;
- (g) the Requesting Party cannot comply with any conditions in relation to confidentiality or limitation as to the use of material provided; and
- (h) if the acts or omissions alleged to constitute the offence would not, if they had taken place within the jurisdiction of the Requested Party, have constituted an offence.

(2) For the purpose of paragraph (1)(f) the Requested Party may include in its consideration of essential interests whether the provision of assistance could prejudice the safety of any person or impose an excessive burden on the resources of the Requested Party.

(3) The Requested Party shall refuse assistance if the request relates to an offence which carries the death penalty in the Requesting Party or if the request relates to an offence which is punishable, according to the law of the Requesting Party, with life imprisonment or a prison sentence of undetermined duration, unless the Requesting Party gives such assurances as the Requested Party considers sufficient that these penalties will not be imposed, or if

imposed, will not be carried out.

(4) The Requested Party may postpone assistance if execution of the request would interfere with an ongoing investigation or prosecution in the Requested Party.

(5) Before denying or postponing assistance pursuant to this Article, the Requested Party, through its Central Authority-

(a) shall promptly inform the Requesting Party of the reason for considering denial or postponement; and

(b) shall consult with the Requesting Party to determine whether assistance may be given subject to such terms and conditions as the Requested Party deems necessary.

(6) If the Requesting Party accepts assistance subject to the terms and conditions referred to in paragraph (5)(b), it shall comply with those terms and conditions.

## **ARTICLE 5**

### **REQUESTS**

(1) Requests shall be made in writing.

(2) Requests for assistance shall include:

(a) the name of the authority on behalf of which the request is made;

(b) a description of the purpose of the request and the nature of the assistance requested;

(c) a description of the nature of the investigation, prosecution, offence or criminal matter and whether or not proceedings have been instituted;

(d) where proceedings have been instituted, details of the proceedings;

(e) a summary of the relevant fact and laws;

- (f) any requirements for confidentiality;
  - (g) details of any particular procedure the Requesting Party wishes to be followed;  
and
  - (h) details of the period within which the request should be complied with.
- (3) The Requested Party shall use its best efforts to keep confidential a request and its contents except when otherwise authorized by the Requesting Party.
- (4) Requests shall be in, or translated into, an official language of the Requested Party. All documents submitted in support of a request shall be accompanied, if so required by the Requested Party, by a translation into an official language of the Requested Party.

## **ARTICLE 6**

### **EXECUTION OF REQUESTS**

- (1) The Central Authority of the Requested Party shall promptly execute the request or arrange for its execution through its competent authorities.
- (2) A request shall be executed in accordance with the law of the Requested Party and, to the extent not prohibited by the law of the Requested Party, in accordance with the directions stated in the request so far as practicable.
- (3) The Requested Party shall promptly inform the Requesting Party of any circumstances which are likely to cause a significant delay in responding to the request.
- (4) The Requested Party shall promptly inform the Requesting Party of a decision not to comply in whole or in part with a request for assistance and the reason for that decision.

## **ARTICLE 7**

### **REPRESENTATION AND EXPENSES**

- (1) The Requested Party shall make all necessary arrangements for the representation of the Requesting Party in any proceeding arising out of a request for

assistance and shall otherwise represent the interests of the Requesting Party.

(2) The Requested Party shall assume all ordinary expenses of executing a request, except:

- (a) fees of counsel retained at the request of the Requesting Party;
- (b) fees of experts;
- (c) expenses of translation; and
- (d) travel expenses and allowances of persons travelling at the request of the Requesting Party.

(3) If during the execution of the request it becomes apparent that expenses of an extraordinary nature are required to fulfil the request, the Parties shall consult to determine the terms and conditions under which the execution of the request may continue.

## **ARTICLE 8**

### **LIMITATIONS OF USE**

(1) The Requested Party may require, after consultation with the Requesting Party, that information or evidence furnished by the Requested Party including documents, articles or records be kept confidential or be disclosed or used only subject to such terms and conditions as it may specify.

(2) The Requesting Party shall not disclose or use information or evidence furnished by the Requested Party including documents, articles or records for purposes other than those stated in the request without the prior consent of the Central Authority of the Requested Party.

## **ARTICLE 9**

### **OBTAINING OF EVIDENCE, ARTICLES OR DOCUMENTS**

(1) Where a request is made that evidence be taken for the purpose of an investigation, prosecution or proceeding in relation to a criminal matter the Requested Party

shall, subject to its laws, arrange to have such evidence taken.

(2) For the purposes of this Agreement, the giving or taking of evidence shall include the production of documents, records or other material.

(3) For the purposes of requests under this Article the Requesting Party shall specify the questions to be put to the witnesses or the subject matter about which they are to be examined.

(4) Where, pursuant to a request for assistance, a person is to give evidence for the purpose of proceedings in the Requesting Party, the Parties to the relevant proceedings in the Requesting Party, their legal representatives or representatives of the Requesting Party may, subject to the laws of the Requested Party, appear and question the person giving that evidence.

(5) A person who is required to give evidence in the Requested Party pursuant to a request for assistance may decline to give evidence where either:

- (a) the law of the Requested Party would permit that witness to decline to give evidence in similar circumstances in proceedings which originated in the Requested Party; or
- (b) where the law of the Requesting Party would permit him to decline to give evidence in such proceedings in the Requesting Party.

(6) If any person claims that there is right to decline to give evidence under the law of the Requesting Party, the Requested Party shall with respect thereto rely on a certificate of the Central Authority of the Requesting Party.

## **ARTICLE 10**

### **OBTAINING STATEMENTS OF PERSONS**

Where a request is made to obtain the statement of a person for the purpose of an investigation, prosecution or proceeding in relation to a criminal matter in the Requesting Party, the Requested Party shall endeavour to obtain such statement.

## **ARTICLE 11**

### **LOCATION OR IDENTITY OF PERSONS**

The Requested Party shall, if requested, endeavour to ascertain the location or identity of any person specified in the request.

**ARTICLE 12**  
**SERVICE OF DOCUMENTS**

(1) The Requested Party shall serve any process relating to a criminal matter which has been transmitted to it for the purposes of service.

(2) The Requesting Party shall transmit a request for the service of a document pertaining to a response or appearance in the Requesting Party within a reasonable time before the scheduled response or appearance.

(3) A request for the service of a document pertaining to an appearance in the Requesting Party shall include such notice as the Central Authority of the Requesting Party is reasonably able to provide of outstanding warrants or other judicial orders in criminal matters against the person to be served.

(4) The Requested Party shall, subject to its law, return a proof of service in the manner required by the Requesting Party.

(5) A person who fails to comply with any process served on him shall not thereby be liable to any penalty or coercive measure pursuant to the law of the Requesting Party or Requested Party.

**ARTICLE 13**  
**PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS**

(1) Subject to its law the Requested Party shall provide copies of publicly available documents.

(2) The Requested Party may provide copies of any document, record or information in the possession of a government department or agency, but not publicly available, to the same extent and under the same conditions as such document, record or information would be available to its own law enforcement and judicial authorities.

**ARTICLE 14**  
**CERTIFICATION AND AUTHENTICATION**

Documents, transcripts, records, statements or other material which are to be transmitted to the Requesting Party shall only be certified or authenticated if the Requesting Party so requests. Material shall be certified or authenticated by consular or diplomatic officers only if the law of the Requesting Party specifically so requires.

## **ARTICLE 15**

### **TRANSFER OF PERSONS IN CUSTODY**

(1) A person in custody in the Requested Party whose presence is requested in the Requesting Party for the purpose of providing assistance pursuant to this Agreement shall be transferred from the Requested Party to the Requesting Party, provided the Requested Party and the person consent and the Requesting Party has guaranteed the maintenance in custody of the person and his subsequent return to the Requested Party.

(2) Where the sentence of imprisonment of a person transferred pursuant to this Article expires whilst the person is in the Requesting Party the Requested Party shall so advise the Requesting Party which shall ensure the person's release from custody.

## **ARTICLE 16**

### **TRANSFER OF OTHER PERSONS**

(1) The Requesting Party may request the assistance of the Requested Party in making a person available for the purpose of providing assistance pursuant to this Agreement.

(2) The Requested Party shall, if satisfied that satisfactory arrangements for that person's security will be made by the Requesting Party, request the person to travel to the Requesting Party to provide assistance and shall inform the Requesting Party of the response of that person.

## **ARTICLE 17**

### **SAFE CONDUCT**

(1) A person who consents to provide assistance pursuant to Articles 15 or 16 shall not be prosecuted, detained, or restricted in his personal liberty in the Requesting Party for any criminal offence or civil matter which preceded his departure from the Requested Party.

(2) Paragraph (1) shall not apply if the person, not being a person in custody transferred under Article 15, and being free to leave, has not left the Requesting Party within a period of 45 days after being notified that his presence is no longer required, or having left the Requesting Party, has returned.

(3) A person who consents to give evidence under Articles 15 or 16 shall not be subject to prosecution based on his testimony, except for perjury.

(4) A person who consents to provide assistance pursuant to Articles 15 or 16 shall not be required to provide assistance in any proceedings other than the proceedings to which the request relates.

(5) A person who does not consent to provide assistance pursuant to Articles 15 or 16 shall not by reason thereof be liable to any penalty or coercive measure by the courts of the Requesting Party or Requested Party.

## **ARTICLE 18**

### **SEARCH AND SEIZURE**

(1) The Requested Party shall, insofar as its law permits, carry out requests for search, seizure and delivery of any material to the Requesting Party which is relevant to a proceeding or investigation in relation to a criminal matter.

(2) The Requested Party shall provide such information as may be required by the Requesting Party concerning the result of any search, the place of seizure, the circumstances of seizure, and the subsequent custody of the property seized.

(3) The Requesting Party shall observe any conditions imposed by the Requested Party in relation to any seized property which is delivered to the Requesting Party.

## **ARTICLE 19**

### **PROCEEDS OF CRIME**

(1) The Requested Party shall, upon request, endeavour to ascertain whether any proceeds of a crime against the law of the Requesting Party are located within its jurisdiction and shall notify the Requesting Party of the result of its inquiries. In making the request, the Requesting Party shall notify the Requested Party of the basis of its belief that such proceeds may be located in its jurisdiction.

(2) Where pursuant to paragraph (1) suspected proceeds of crime are found the Requested Party shall take such measures as are permitted by its law to prevent any dealing in, transfer or disposal of, those suspected proceeds of crime, pending a final determination in respect of those proceeds by a Court of the Requesting Party.

(3) Where a request is made for assistance in securing the confiscation of proceeds such assistance shall be given by whatever means are appropriate. This may include enforcing an order made by a court in the Requesting Party and initiating or assisting in proceedings in relation to the proceeds to which the request relates.

(4) Proceeds confiscated pursuant to this Agreement shall be retained by the Requested Party unless otherwise agreed upon between the Parties.

(5) Proceeds of crime include instruments used in connection with the commission of an offence.

## **ARTICLE 20**

### **SETTLEMENT OF DISPUTES**

Any dispute arising out of the interpretation, application or implementation of this Agreement shall be resolved through diplomatic channels if the Central Authorities are themselves unable to reach agreement.

## **ARTICLE 21**

### **ENTRY INTO FORCE AND TERMINATION**

(1) This Agreement shall enter into force thirty days after the date on which the Parties have notified each other in writing that their respective requirements for the entry into force of the Agreement have been complied with.

(2) Each of the Parties may terminate this Agreement at any time by giving notice to the other. In that event the Agreement shall cease to have effect on receipt of that notice. Requests for assistance which have been received prior to termination of the Agreement shall nevertheless be processed in accordance with the terms of the Agreement as if the Agreement was still in force.

In witness whereof the undersigned, being duly authorised by their respective governments, have signed this Agreement.

Done at the Hong Kong Special Administrative Region, this twenty-fourth day of May Two Thousand and One in duplicate in the Chinese, Portuguese and English languages, each text being equally authentic.

[ s. 2]

## MODIFICATIONS TO THE ORDINANCE

1. Section 5(1)(e) of the Ordinance shall be modified to read as follows-

" (e) the request relates to the prosecution of a person-\*

(i)\* for an external offence in a case where the person-\*

(A)\* has been convicted, acquitted or pardoned by a competent court or other authority in the place, \* \* or Hong Kong;\* or

(B)\* has undergone the punishment provided by the law of that place or Hong Kong\* ,

in respect of that offence or of another external offence constituted by the same act or omission as that offence;

(ii) in respect of an act or omission that, if it had occurred in Hong Kong, could no longer be prosecuted in Hong Kong by reason of lapse of time;\* " .

2. Section 17(3)(b) of the Ordinance shall be modified to read as follows-

" (b) the person has had an opportunity of leaving Hong Kong, 45 days have expired since that opportunity\* and the person\* has remained in Hong Kong otherwise than for-

(i) the purpose to which the request relates; or

(ii) the purpose of giving assistance in relation to a criminal matter in Hong Kong certified in writing by the Secretary for Justice to be a criminal matter in relation to which it is desirable that the person give assistance." .

\* The words underlined are added. (The underlining is for ease of identifying the modification).

\* \* The words crossed out are deleted. (The crossing out is for ease of identifying the modification).

COUNCIL CHAMBER

2001

**Explanatory Note**

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) shall apply as between Hong Kong and Portuguese Republic. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Government of Hong Kong and the Government of Portuguese Republic and signed in Hong Kong on 24 May 2001. A copy of those arrangements is annexed at Schedule 1 to the Order. It should be noted that the Ordinance is subject to the modifications summarized in Schedule 2 to the Order.

**Explanatory Statement on the Modifications to the Ordinance**

**Mutual Legal Assistance in Criminal Matters  
(Canada) Order (“Canada Order”)**

**Previous Convictions etc.**

Section 5(1)(e) of the Ordinance provides that the Secretary for Justice shall refuse assistance if the request relates to the prosecution of a person for an offence in respect of which he has been convicted, acquitted, pardoned or punished in the requesting jurisdiction. Article 5(2)(c) of the Hong Kong/ Canada Agreement provides for this protection in relation to convictions etc. in the requesting or requested jurisdiction. The modification to section 5(1)(e) reflects the provision in the agreement by extending the protection to cover convictions etc in the requested jurisdiction.

Immunities

2. Section 17 of the Ordinance gives a person who comes to Hong Kong from another jurisdiction to render assistance certain immunities. These immunities cease to apply if their person has had the opportunity of leaving Hong Kong and has remained in Hong Kong otherwise than for the purpose of rendering assistance. Article 14(3) of the Hong Kong/Canada Agreement provides that the immunities will continue to be applicable for a period of 30 days after the person has had the opportunity of leaving Hong Kong. The modification reflects the additional protection in the agreement by providing for a 30 day period in section 17.

***Mutual Legal Assistance in Criminal Matters  
(Philippines) Order ("Philippines Order")***

Previous Convictions etc.

3. This modification to section 5(1)(e) of the Ordinance in respect of previous convictions etc is exactly the same as the modification provided for in the Canada Order (see paragraph 1 above). Article IV(1)(e) of the Hong Kong/Philippines Agreement provides for this protection in relation to convictions etc in the requested jurisdiction. The modification to section 5(1)(e) reflects the provision in the Agreement; the protection in section 5(1)(e) in relation to convictions etc in the requesting jurisdiction will continue to apply;

Immunities

4. This modification to section 17 of the Ordinance is the same as the modification provided for in the Canada Order [ see paragraph 2 above] except that the period is fifteen days. It reflects the additional protection in Article XVI(2) of the Hong Kong/Philippines Agreement.

***Mutual Legal Assistance in Criminal Matters  
(Portugal) Order ("PortugalOrder")***

Previous Convictions etc.

5. This modification to section 5(1)(e) of the Ordinance in respect of previous convictions etc is exactly the same as the modification provided for in the Canada and Philippines Orders (see paragraphs 1 and 3 above). Articles 4(1)(e) of the Hong Kong / Portugal Agreement provides for this protection in relation to convictions etc in the requested jurisdiction. The modification to section 5(1)(e) reflects the provision in the Agreement; the protection in section 5(1)(e) in relation to convictions etc in the requesting jurisdiction will continue to apply.

### Lapse of Time

6. Section 5(1)(e) is also modified to provide, additionally, for refusal of assistance if the relevant offence has been committed in Hong Kong and could not as a matter of Hong Kong law be prosecuted by reason of lapse of time. This modification also reflects Article 5(1)(e) is also modified to provide, additionally, for refusal of assistance if the relevant offence had been committed in Hong Kong and could not as a matter of Hong Kong law be prosecuted by reason of lapse of time. This modification also reflects Article 4(1)(e) of the Hong Kong/ Portugal Agreement.

### Immunities

7. This modification to section 17 of the Ordinance is exactly the same as the modification provided for in the Canada and Philippine Orders (see paragraphs 2 and 4 above) except that the period is forty-five days. The modification reflects the additional protection in Article 17(2) of the Hong Kong/Portugal Agreement.