

LN292-E

L.N. 292 of 2001

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.

(3) 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 to 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 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.

(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 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.

(7) If the Requesting 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 request 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 Requesting 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 give 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 request 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).

CHENG Mei-sze, Maisie

Clerk to the Executive Council

Council Chamber

18 September 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 Government of 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.