

立法會
Legislative Council

LC Paper No. CB(2)50/03-04(02)

Ref : CB2/SS/17/02

**Background paper for Subcommittee on
subsidiary legislation relating to consular matters**

Purpose

This paper provides a summary of the discussion of the Legislative Council (LegCo) concerning subsidiary legislation relating to privileges and immunities conferred on consular posts and specified International Organizations (IOs).

Meeting of the Panel on Administration of Justice and Legal Services

2. At its meeting on 29 July 2003, the Panel was briefed by the Administration on -

- (a) the grant of privileges and immunities by the Central People's Government to consular posts and designated offices of IOs established in the Hong Kong Special Administrative Region (HKSAR), as well as their personnel; and
- (b) the Administration's work programme of preparing subsidiary legislation relating to these privileges and immunities and other consular matters, for the approval of the LegCo.

3. At present, a total of 54 career consular posts are established in the HKSAR. Five IOs have established/maintained their offices in the HKSAR under their respective bilateral arrangements with the People's Republic of China (PRC), which are applied to the HKSAR. There are 11 bilateral agreements between PRC and foreign States/IOs which applied to the HKSAR to deal with privileges, immunities and additional consular functions. According to the Administration, the best means of underpinning the relevant provisions in the 11 bilateral arrangements between PRC and consular posts/IOs is to enact local legislation in the form of subsidiary legislation, and the relevant items of subsidiary legislation will be introduced into the LegCo by batches.

4. The paper provided by the Administration on the subject matter to the Panel is in **Appendix I**. The relevant extract from the minutes of the Panel meeting is in **Appendix II**.

Meeting of the House Committee

5. The following four items of subsidiary legislation relating to consular matters were gazetted on 9 July 2003 -

- (a) the Registration of Persons (Amendment) Regulation 2003 made under section 7 of the Registration of Persons Ordinance (Cap. 177) (L.N. 165);
- (b) the International Organizations (Privileges and Immunities) (Office of the Commission of the European Communities) Order made under section 3 of the International Organizations (Privileges and Immunities) Ordinances (Cap. 558) (L.N. 166);
- (c) the Administration of Estates by Consular Officers Ordinance (Amendment of Schedule) Order 2003 made under section 3 of the Administration of Estates by Consular Officers Ordinance (Cap. 191) (L.N. 167); and
- (d) the Consular Conventions (Application of Section 3) Order made under section 5 of the Consular Conventions Ordinance (Cap. 267) (L.N. 168).

6. At its meeting on 3 October 2003, the House Committee agreed to set up a subcommittee to study the four items of subsidiary legislation.

7. Members are invited to refer to the two Reports of the Legal Service Division dated 10 July and 26 August 2003 on subsidiary legislation relating to consular matters issued for the House Committee meeting on 3 October 2003 (**Appendix III**). The relevant correspondence between the Division and the Administration on the former's observations and the latter's responses are attached to the Report dated 26 August 2003.

LegCo Panel on Administration of Justice and Legal Services

Subsidiary Legislation relating to Privileges and Immunities Conferred on Consular Posts and Specified International Organizations

PURPOSE

This paper briefs the Panel on Administration of Justice and Legal Services on –

- (a) the grant of privileges and immunities by the Central People's Government (CPG) to consular posts and designated offices of International Organizations (IOs) established in the HKSAR, as well as their personnel; and
- (b) the Administration's work programme of preparing subsidiary legislation relating to these privileges and immunities and other consular matters, for the approval of the Legislative Council.

BACKGROUND

Privileges and Immunities

2. Consular relations are established, on the basis of mutual consent, between sovereign States to facilitate the protection of the rights and interests of their nations and nationals, and to promote friendly relations and cooperation among them. It is a common and well-established practice that following the establishment of a consular post by a sending State, the post and its members will be accorded with privileges and immunities not made available to ordinary resident aliens in the receiving State.

3. The conferment of privileges and immunities on consular members, which is a cornerstone of the consular relations between sovereign States, is not meant for the personal benefit of individuals but

rather, to ensure the efficient performance of functions by consular members on behalf of the sending State. Consular members could not effectively carry out their functions if their official acts or words in their consular districts would render them liable to prosecution. As a matter of principle, any act performed in the discharge of consular functions is in the nature an act of the sending State. Given the equality of sovereign States, such act lies outside the jurisdiction or competence of the law and authority of the receiving State.

International Conventions and Bilateral Treaties

4. The Vienna Convention on Consular Relations (VCCR) has codified the international law on consular relations, matters relating to the establishment and maintenance of consular missions and consular privileges and immunities. 165 States are signatories to the VCCR, including the People's Republic of China (PRC). Without prejudice to the privileges and immunities conferred under the VCCR, it is also a well-established principle set out in the VCCR that consular members have the duty to respect local laws and regulations.

5. Apart from the VCCR, a State may conclude bilateral agreements with other States regarding the establishment of or facilitation for consular posts to deal with matters not covered in the VCCR, including according privileges and immunities *exceeding* those provided for in the VCCR to the consular posts of those other states.

6. For IOs, which are not sovereign States and whose representatives are not covered under the VCCR, their entitlements to privileges and immunities are provided for under their respective statutes (e.g. its Articles of Agreement in the case of the International Monetary Fund), or relevant international agreements (e.g. the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialised Agencies of the United Nations). In addition, a host country may also enter into bilateral agreements with IOs, providing them with tailor-made privileges and immunities. The privileges and immunities granted to IOs serve to enable the IOs concerned to carry out their functions more effectively. In the same way, privileges and immunities are not conferred on IO personnel for their personal benefit, but rather to ensure the independent exercise of their functions in connection with the IOs.

SITUATION IN HONG KONG

Standard Privileges and Immunities for Career Consular Posts

7. At present, a total of 54 career consular posts are established in the HKSAR. These consular posts enjoy the privileges and immunities accorded to them under the VCCR, to which the PRC acceded in 1979. Such privileges and immunities include –

- (a) inviolability of consular premises, its archives and documents;
- (b) personal inviolability of consular officers except in the case of grave crime;
- (c) immunity from jurisdiction in respect of acts performed in the exercise of consular functions;
- (d) exemption from giving evidence concerning matters connected with the exercise of consular functions; and
- (e) exemption from taxation, customs duties, inspection and personal services and contributions, etc.

In line with the established practice under common law, provisions of the VCCR which affect private rights and obligations have already been specifically set out in local legislation by way of the Consular Relations Ordinance. Please refer to **Annex A** for a list of such provisions.

Additional Privileges and Immunities and Consular Functions for Career Consular Posts

8. On top of the provisions in the VCCR, the PRC has so far applied to the HKSAR seven bilateral agreements providing for matters not covered in the VCCR, ranging from additional consular functions relating to the administration of deceased nationals' estates in the HKSAR (e.g. conferred on the consular posts of Canada and Australia) to enhanced privileges and immunities comparable to those for diplomatic agents (e.g. conferred on the consular posts of the United Kingdom and the United States). Save for individual agreements which specifically provide for the maintenance / establishment of consular posts in the HKSAR (e.g. those signed by the CPG with the United States and the

United Kingdom), all these bilateral agreements are concluded on a reciprocal basis, meaning that the facilities, privileges and immunities provided therein apply also to the PRC's consular posts in the receiving States concerned.

Privileges and Immunities for IOs

9. Separately, five IOs have established / maintained their offices in the HKSAR under their respective bilateral arrangements with the PRC, which are applied to the HKSAR. They are granted privileges and immunities having regard to their operational needs in the HKSAR under four bilateral agreements with the PRC. Some of these privileges and immunities are similar in nature to those granted to consular posts in Hong Kong (e.g. inviolability of premises and archives, functional immunity, immunity from taxation). Some others are specific to the IOs concerned (e.g. immunity from seizure, expropriation, freeze in respect of their deposit, property and assets, etc).

10. These 11 bilateral agreements between the PRC and foreign States / IOs that are applied to the HKSAR to deal with privileges, immunities and additional consular functions are set out at **Annex B**. We have published the texts of the relevant agreements in Special Supplement No. 5 to the Gazette for the information of the general public.

LEGISLATIVE PROPOSALS

11. At present, international agreements signed by the CPG which confer privileges and immunities on consular posts or IOs, and their respective personnel, and which are applied to the HKSAR, are given effect in Hong Kong generally by the following national laws applicable to the HKSAR –

- (a) Regulations of the People's Republic of China Concerning Consular Privileges and Immunities; and
- (b) Regulations of the People's Republic of China Concerning Diplomatic Privileges and Immunities.

12. Having regard to our common law tradition, provisions of international agreements applicable to Hong Kong will be transformed onto the domestic legal plane, should they affect private rights and

obligations or require exceptions to be made to the existing laws of the HKSAR. In this regard, the Consular Relations Ordinance (Cap 557) and the International Organizations (Privileges and Immunities) Ordinance (Cap 558) were enacted in 2000 to provide a more flexible framework for the localization of the relevant international agreements signed by the CPG. In addition, the Administration of Estates by Consular Officers Ordinance (Cap 191) and the Consular Conventions Ordinance (Cap 267) provide a framework for giving effect to certain additional consular functions relating to administration of estates by consular officers in the HKSAR, as may be agreed between the CPG and the sending State concerned.

13. With the legislative framework in place, we consider that the best means of underpinning the relevant provisions in the 11 bilateral agreements between the PRC and Consular Posts / IOs mentioned above is to enact local legislation setting them out expressly and specifically in the laws of Hong Kong. We have since embarked on a programme of preparing the necessary subsidiary legislation in the form of Orders to cover such agreements. We shall introduce those Orders into LegCo in batches for negative vetting, as soon as the drafting and consultation of the relevant Orders have been completed.

Administration Wing
Chief Secretary for Administration's Office
June 2003

**Provisions of the Vienna Convention on Consular Relations
having the force of law under the Consular Relations Ordinance**

ARTICLE 1 Definitions

1. For the purposes of the present Convention, the following expressions shall have the meanings hereunder assigned to them:
 - (a) "consular post" means any consulate-general, consulate, vice-consulate or consular agency;
 - (b) "consular district" means the area assigned to a consular post for the exercise of consular functions;
 - (c) "head of consular post" means the person charged with the duty of acting in that capacity;
 - (d) "consular officer" means any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions;
 - (e) "consular employee" means any person employed in the administrative or technical service of a consular post;
 - (f) "member of the service staff" means any person employed in the domestic service of a consular post;
 - (g) "members of the consular post" means consular officers, consular employees and members of the service staff;
 - (h) "members of the consular staff" means consular officers, other than the head of a consular post, consular employees and members of the service staff;
 - (i) "member of the private staff" means a person who is employed exclusively in the private service of a member of the consular post;
 - (j) "consular premises" means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used exclusively for the purposes of the consular post;
 - (k) "consular archives" includes all the papers, documents, correspondence, books, films, tapes and registers of the consular post, together with the ciphers and codes, the card-indices and any article or furniture intended for their protection or safe-keeping.
2. Consular officers are of two categories, namely career consular officers and honorary consular officers. The provisions of Chapter II of the present Convention apply to consular posts headed by career

consular officer; the provisions of Chapter III govern consular posts headed by honorary consular officers.

3. The particular status of members of the consular posts who are nationals or permanent residents of the receiving State is governed by Article 71 of the present Convention.

CHAPTER I CONSULAR RELATIONS IN GENERAL

ARTICLE 5 Consular functions

Consular functions consist in:

- (a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;
- (b) furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention;
- (c) ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting thereon to the Government of the sending State and giving information to persons interested;
- (d) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State;
- (e) helping and assisting nationals, both individuals and bodies corporate, of the sending State;
- (f) acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving State;
- (g) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending State in cases of succession mortis causa in the territory of the receiving State, in accordance with the laws and regulations of the receiving State;
- (h) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons;
- (i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for

- nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests;
- (j) transmitting judicial and extra-judicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State;
 - (k) exercising rights of supervision and inspection provided for in the laws and regulations of the sending State in respect of vessels having the nationality of the sending State, and of aircraft registered in that State, and in respect of their crews;
 - (l) extending assistance to vessels and aircraft mentioned in subparagraph (k) of this Article and to their crews, taking statements regarding the voyage of a vessel, examining and stamping the ship's papers, and, without prejudice to the powers of the authorities of the receiving State, conducting investigations into any incidents which occurred during the voyage, and settling disputes of any kind between the master, the officers and the seamen in so far as this may be authorized by the laws and regulations of the sending State;
 - (m) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.

ARTICLE 15 Temporary exercise of the functions of the head of a consular post

1. If the head of a consular post is unable to carry out his functions or the position of head of consular post is vacant, an acting head of post may act provisionally as head of the consular post.
2. The full name of the acting head of post shall be notified either by the diplomatic mission of the sending State or, if that State has no such mission in the receiving State, by the head of the consular post, or, if he is unable to do so, by any competent authority of the sending State, to the Ministry for Foreign Affairs of the receiving State or to the authority designated by that Ministry. As a general rule, this notification shall be given in advance. The receiving State may make

the admission as acting head of post of a person who is neither a diplomatic agent nor a consular officer of the sending State in the receiving State conditional on its consent.

3. The competent authorities of the receiving State shall afford assistant and protection to the acting head of post. While he is in charge of the post, the provisions of the present Convention shall apply to him on the same basis as to the head of the consular post concerned. The receiving State shall not, however, be obliged to grant to an acting head of post any facility, privilege or immunity which the head of the consular post enjoys only subject to conditions not fulfilled by the acting head of post.
4. When, in the circumstances referred to in paragraph 1 of this Article, a member of the diplomatic staff of the diplomatic mission of the sending State in the receiving State is designated by the sending State as an acting head of post, he shall, if the receiving State does not object thereto, continue to enjoy diplomatic privileges and immunities.

ARTICLE 17 Performance of diplomatic acts by consular officers

1. In a State where the sending State has no diplomatic mission and is not represented by a diplomatic mission of a third State, a consular officer may, with the consent of the receiving State, and without affecting his consular status, be authorized to perform diplomatic acts. The performance of such acts by a consular officer shall not confer upon him any right to claim diplomatic privileges and immunities.
2. A consular officer may, after notification addressed to the receiving State, act as representative of the sending State to any inter-governmental organization. When so acting, he shall be entitled to enjoy any privileges and immunities accorded to such a representative by customary international law or by international agreements; however, in respect of the performance by him of any consular function, he shall not be entitled to any greater immunity from jurisdiction than that to which a consular officer is entitled under the present Convention.

CHAPTER II FACILITIES, PRIVILEGES AND IMMUNITIES RELATING TO CONSULAR POSTS, CAREER CONSULAR OFFICERS AND OTHER MEMBERS OF A CONSULAR POST

SECTION I FACILITIES, PRIVILEGES AND IMMUNITIES

RELATING TO A CONSULAR POST

ARTICLE 31 Inviolability of the consular premises

1. Consular premises shall be inviolable to the extent provided in this Article.
2. The authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending State. The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.
4. The consular premises, their furnishings, the property of the consular post and its means of transport shall be immune from any form of requisition for purposes of national defence or public utility. If expropriation is necessary for such purposes, all possible steps shall be taken to avoid impeding the performance of consular functions, and prompt, adequate and effective compensation shall be paid to the sending State.

ARTICLE 32 Exemption from taxation of consular premises

1. Consular premises and the residence of the career head of consular post of which the sending State or any person acting on its behalf is the owner or lessee shall be exempt from all national, regional or municipal dues and taxes whatsoever, other than such as represent payment for specific services rendered.
2. The exemption from taxation referred to in paragraph 1 of this Article shall not apply to such dues and taxes if, under the law of the receiving State, they are payable by the person who contracted with the sending State or with the person acting on its behalf.

ARTICLE 33 Inviolability of the consular archives and documents

The consular archives and documents shall be inviolable at all times and wherever they may be.

ARTICLE 35 Freedom of communication

1. The receiving State shall permit and protect freedom of communication on the part of the consular post for all official purposes. In communicating with the Government, the diplomatic

missions and other consular posts, wherever situated, of the sending State, the consular post may employ all appropriate means, including diplomatic or consular couriers, diplomatic or consular bags and messages in code or cipher. However, the consular post may install and use a wireless transmitter only with the consent of the receiving State.

2. The official correspondence of the consular post shall be inviolable. Official correspondence means all correspondence relating to the consular post and its functions.
3. The consular bag shall be neither opened nor detained. Nevertheless, if the competent authorities of the receiving State have serious reason to believe that the bag contains something other than the correspondence, documents or articles referred to in paragraph 4 of this Article, they may request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.
4. The packages constituting the consular bag shall bear visible external marks of their character and may contain only official correspondence and documents or articles intended exclusively for official use.
5. The consular courier shall be provided with an official document indicating his status and the number of packages constituting the consular bag. Except with the consent of the receiving State he shall be neither a national of the receiving State, nor, unless he is a national of the sending State, a permanent resident of the receiving State. In the performance of his functions he shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.
6. The sending State, its diplomatic missions and its consular posts may designate consular couriers ad hoc. In such cases the provisions of paragraph 5 of this Article shall also apply except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the consular bag in his charge.
7. A consular bag may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a consular courier. By arrangement with the appropriate local authorities, the consular post may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

ARTICLE 39 Consular fees and charges

1. The consular post may levy in the territory of the receiving State the fees and charges provided by the laws and regulations of the sending State for consular acts.
2. The sums collected in the form of the fees and charges referred to in paragraph 1 of this Article, and the receipts for such fees and charges, shall be exempt from all dues and taxes in the receiving State.

SECTION II FACILITIES, PRIVILEGES AND IMMUNITIES RELATING TO CAREER CONSULAR OFFICERS AND OTHER MEMBERS OF A CONSULAR POST

ARTICLE 41 Personal inviolability of consular officers

1. Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority.
2. Except in the case specified in paragraph 1 of this Article, consular officers shall not be committed to prison or liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect.

ARTICLE 43 Immunity from jurisdiction

1. Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.
2. The provisions of paragraph 1 of this Article shall not, however, apply in respect of a civil action either:
 - (a) arising out of a contract concluded by a consular officer or a consular employee in which he did not contract expressly or impliedly as an agent of the sending State; or
 - (b) by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft.

ARTICLE 44 Liability to give evidence

1. Members of a consular post may be called upon to attend as witnesses in the course of judicial or administrative proceedings. A consular employee or a member of the service staff shall not, except

in the cases mentioned in paragraph 3 of this Article, decline to give evidence. If a consular officer should decline to do so, no coercive measure or penalty may be applied to him.

2. The authority requiring the evidence of a consular officer shall avoid interference with the performance of his functions. It may, when possible, take such evidence at his residence or at the consular post or accept a statement from him in writing.
3. Members of a consular post are under no obligation to give evidence concerning matters connected with the exercise of their functions or to produce official correspondence and documents relating thereto. They are also entitled to decline to give evidence as expert witnesses with regard to the law of the sending State.

ARTICLE 45 Waiver of privileges and immunities

1. The sending State may waive, with regard to a member of the consular post, any of the privileges and immunities provided for in Articles 41, 43 and 44.
2. The waiver shall in all cases be express, except as provided in paragraph 3 of this Article, and shall be communicated to the receiving State in writing.
3. The initiating of proceedings by a consular officer or a consular employee in a matter where he might enjoy immunity from jurisdiction under Article 43 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.
4. The waiver of immunity from jurisdiction for the purposes of civil or administrative proceedings shall not be deemed to imply the waiver of immunity from the measures of execution resulting from the judicial decision; in respect of such measures, a separate waiver shall be necessary.

ARTICLE 48 Social security exemption

1. Subject to the provisions of paragraph 3 of this Article, members of the consular post with respect to services rendered by them for the sending State, and members of their families forming part of their households, shall be exempt from social security provisions which may be in force in the receiving State.
2. The exemption provided for in paragraph 1 of this Article shall apply also to members of the private staff who are in the sole employ of members of the consular post, on condition:
 - (a) that they are not nationals of or permanently resident in the

- receiving State; and
- (b) that they are covered by the social security provisions which are in force in the sending State or a third State.
3. Members of the consular post who employ persons to whom the exemption provided for in paragraph 2 of this Article does not apply shall observe the obligations which the social security provisions of the receiving State impose upon employers.
 4. The exemption provided for in paragraphs 1 and 2 of this Article shall not preclude voluntary participation in the social security system of the receiving State, provided that such participation is permitted by that State.

ARTICLE 49 Exemption from taxation

1. Consular officers and consular employees and members of their families forming part of their households shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:
 - (a) indirect taxes of a kind which are normally incorporated in the price of goods or services;
 - (b) dues or taxes on private immovable property situated in the territory of the receiving State, subject to the provisions of Article 32;
 - (c) estate, succession or inheritance duties, and duties on transfers, levied by the receiving State, subject to the provisions of paragraph (b) of Article 51;
 - (d) dues and taxes on private income, including capital gains, having its source in the receiving State and capital taxes relating to investments made in commercial or financial undertakings in the receiving State;
 - (e) charges levied for specific services rendered;
 - (f) registration, court or record fees, mortgage dues and stamp duties, subject to the provisions of Article 32.
2. Members of the service staff shall be exempt from dues and taxes on the wages which they receive for their services.
3. Members of the consular post who employ persons whose wages or salaries are not exempt from income tax in the receiving State shall observe the obligations which the laws and regulations of that State impose upon employers concerning the levying of income tax.

ARTICLE 50 Exemption from customs duties and inspection

1. The receiving State shall, in accordance with such laws and

regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:

- (a) articles for the official use of the consular post;
 - (b) articles for the personal use of a consular officer or members of his family forming part of his household, including articles intended for his establishment. The articles intended for consumption shall not exceed the quantities necessary for direct utilization by the persons concerned.
2. Consular employees shall enjoy the privileges and exemptions specified in paragraph 1 of this Article in respect of articles imported at the time of first installation.
 3. Personal baggage accompanying consular officers and members of their families forming part of their households shall be exempt from inspection. It may be inspected only if there is serious reason to believe that it contains articles other than those referred to in subparagraph (b) of paragraph 1 of this Article, or articles the import or export of which is prohibited by the laws and regulations of the receiving State or which are subject to its quarantine laws and regulations. Such inspection shall be carried out in the presence of the consular officer or member of his family concerned.

ARTICLE 51 Estate of a member of the consular post or of a member of his family

In the event of the death of a member of the consular post or of a member of his family forming part of his household, the receiving State:

- (a) shall permit the export of the movable property of the deceased, with the exception of any such property acquired in the receiving State the export of which was prohibited at the time of his death;
- (b) shall not levy national, regional or municipal estate, succession or inheritance duties, and duties on transfers, on movable property the presence of which in the receiving State was due solely to the presence in that State of the deceased as a member of the consular post or as a member of the family of a member of the consular post.

ARTICLE 52 Exemption from personal services and contributions

The receiving State shall exempt members of the consular post and members of their families forming part of their households from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

ARTICLE 53 Beginning and end of consular privileges and immunities

1. Every member of the consular post shall enjoy the privileges and immunities provided in the present Convention from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when he enters on his duties with the consular post.
2. Members of the family of a member of the consular post forming part of his household and members of his private staff shall receive the privileges and immunities provided in the present Convention from the date from which he enjoys privileges and immunities in accordance with paragraph 1 of this Article or from the date of their entry into the territory of the receiving State or from the date of their becoming a member of such family or private staff, whichever is the latest.
3. When the functions of a member of the consular post have come to an end, his privileges and immunities and those of a member of his family forming part of his household or a member of his private staff shall normally cease at the moment when the person concerned leaves the receiving State or on the expiry of a reasonable period in which to do so, whichever is the sooner, but shall subsist until that time, even in case of armed conflict. In the case of the persons referred to in paragraph 2 of this Article, their privileges and immunities shall come to an end when they cease to belong to the household or to be in the service of a member of the consular post provided, however, that if such persons intend leaving the receiving State within a reasonable period thereafter, their privileges and immunities shall subsist until the time of their departure.
4. However, with respect to acts performed by a consular officer or a consular employee in the exercise of his functions, immunity from jurisdiction shall continue to subsist without limitation of time.
5. In the event of the death of a member of the consular post, the members of his family forming part of his household shall continue to enjoy the privileges and immunities accorded to them until they leave the receiving State or until the expiry of a reasonable period enabling them to do so, whichever is the sooner.

ARTICLE 54 Obligations of third States

1. If a consular officer passes through or is in the territory of a third State, which has granted him a visa if a visa was necessary, while

proceeding to take up or return to his post or when returning to the sending State, the third State shall accord to him all immunities provided for by the other Articles of the present Convention as may be required to ensure his transit or return. The same shall apply in the case of any member of his family forming part of his household enjoying such privileges and immunities who are accompanying the consular officer or travelling separately to join him or to return to the sending State.

2. In circumstances similar to those specified in paragraph 1 of this Article, third States shall not hinder the transit through their territory of other members of the consular post or of members of their families forming part of their households.
3. Third States shall accord to official correspondence and to other official communications in transit, including messages in code or cipher, the same freedom and protection as the receiving State is bound to accord under the present Convention. They shall accord to consular couriers who have been granted a visa, if a visa was necessary, and to consular bags in transit, the same inviolability and protection as the receiving State is bound to accord under the present Convention.
4. The obligations of third States under paragraphs 1, 2 and 3 of this Article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and to consular bags, whose presence in the territory of the third State is due to force majeure.

ARTICLE 55 Respect for the laws and regulations of the receiving State

2. The consular premises shall not be used in any manner incompatible with the exercise of consular functions.
3. The provisions of paragraph 2 of this Article shall not exclude the possibility of offices of other institutions or agencies being installed in part of the building in which the consular premises are situated, provided that the premises assigned to them are separate from those used by the consular post. In that event, the said offices shall not, for the purposes of the present Convention, be considered to form part of the consular premises.

ARTICLE 57 Special provisions concerning private gainful occupation

2. Privileges and immunities provided in this Chapter shall not be

accorded:

- (a) to consular employees or to members of the service staff who carry on any private gainful occupation in the receiving State;
- (b) to members of the family of a person referred to in sub-paragraph (a) of this paragraph or to members of his private staff;
- (c) to members of the family of a member of a consular post who themselves carry on any private gainful occupation in the receiving State.

CHAPTER III REGIME RELATING TO HONORARY CONSULAR OFFICERS AND CONSULAR POSTS HEADED BY SUCH OFFICERS

ARTICLE 58 General provisions relating to facilities, privileges and immunities

- 1. Articles 35, and 39, paragraph 3 of Article 54 and paragraphs 2 and 3 of Article 55 shall apply to consular posts headed by an honorary consular officer. In addition, the facilities, privileges and immunities of such consular posts shall be governed by Articles 60, 61 and 62.
- 2. Articles 43, paragraph 3 of Article 44, Articles 45 and 53 shall apply to honorary consular officers. In addition, the facilities, privileges and immunities of such consular officers shall be governed by Articles 66 and 67.
- 3. Privileges and immunities provided in the present Convention shall not be accorded to members of the family of an honorary consular officer or of a consular employee employed at a consular post headed by an honorary consular officer.

ARTICLE 60 Exemption from taxation of consular premises

- 1. Consular premises of a consular post headed by an honorary consular officer of which the sending State is the owner or lessee shall be exempt from all national, regional or municipal dues and taxes whatsoever, other than such as represent payment for specific services rendered.
- 2. The exemption from taxation referred to in paragraph 1 of this Article shall not apply to such dues and taxes if, under the laws and regulations of the receiving State, they are payable by the person who contracted with the sending State.

ARTICLE 61 Inviolability of consular archives and documents

The consular archives and documents of a consular post headed by an honorary consular officer shall be inviolable at all times and wherever they may be, provided that they are kept separate from other papers and documents and, in particular, from the private correspondence of the head of a consular post and of any person working with him, and from the materials, books and documents relating to their profession or trade.

ARTICLE 62 Exemption from customs duties

The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of, and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services on the following articles, provided that they are for the official use of a consular post headed by an honorary consular officer: coats-of-arms, flags, signboards, seals and stamps, books, official printed matter, office furniture, office equipment and similar articles supplied by or at the instance of the sending State to the consular post.

ARTICLE 66 Exemption from taxation

An honorary consular officer shall be exempt from all dues and taxes on the remuneration and emoluments which he receives from the sending State in respect of the exercise of consular functions.

ARTICLE 67 Exemption from personal services and contributions

The receiving State shall exempt honorary consular officers from all personal services and from all public services of any kind whatsoever and from military obligations such as those connected with requisitioning, military contributions and billeting.

CHAPTER IV GENERAL PROVISIONS

ARTICLE 70 Exercise of consular functions by diplomatic missions

1. The provisions of the present Convention apply also, so far as the context permits, to the exercise of consular functions by a diplomatic mission.
2. The names of members of a diplomatic mission assigned to the consular section or otherwise charged with the exercise of the consular functions of the mission shall be notified to the Ministry for

Foreign Affairs of the receiving State or to the authority designated by that Ministry.

4. The privileges and immunities of the members of a diplomatic mission referred to in paragraph 2 of this Article shall continue to be governed by the rules of international law concerning diplomatic relations.

ARTICLE 71 Nationals or permanent residents of the receiving State

1. Except in so far as additional facilities privileges and immunities may be granted by the receiving State, consular officers who are nationals of or permanently resident in the receiving State shall enjoy only immunity from jurisdiction and personal inviolability in respect of official acts performed in the exercise of their functions, and the privilege provided in paragraph 3 of Article 44.
2. Other members of the consular post who are nationals of or permanently resident in the receiving State and members of their families, as well as members of the families of consular officers referred to in paragraph 1 of this Article, shall enjoy facilities, privileges and immunities only in so far as these are granted to them by the receiving State. Those members of the families of members of the consular post and those members of the private staff who are themselves nationals of or permanently resident in the receiving State shall likewise enjoy facilities, privileges and immunities only in so far as these are granted to them by the receiving State.

**List of the International Agreements between
CPG and Foreign States/International Organizations
Relating to Privileges and Immunities**

**Date of
Application to
the HKSAR**

Consular Agreements

- | | | |
|----|--|--------------|
| 1. | Agreement Constituted by Exchange of Notes Between the Government of the People's Republic of China and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning the Establishment of a British Consulate-General in the Hong Kong Special Administrative Region of the People's Republic of China | 1 Jul 1997 |
| 2. | Agreement Between the Government of the People's Republic of China and the Government of the United States of America Regarding the Maintenance of the United States Consulate-General in the Hong Kong Special Administrative Region | 1 Jul 1997 |
| 3. | Agreement Constituted by Exchange of Notes Between the Government of the People's Republic of China and the Government of the Republic of Italy Concerning the Maintenance of the Consulate-General of Italy in the Hong Kong Special Administrative Region of the People's Republic of China | 1 Jul 1997 |
| 4. | Consular Agreement Between the Government of the People's Republic of China and the Government of Canada | 11 Mar 1999 |
| 5. | Consular Convention Between the Socialist Republic of Vietnam and the People's Republic of China | 26 Jul 2000 |
| 6. | Agreement on Consular Relations Between the People's Republic of China and Australia | 15 Sept 2000 |
| 7. | Agreement Constituted by Exchange of Notes Between the Government of the People's Republic of China and the Government of the Republic of India on Matters Concerning the Consular Convention Between the People's Republic of China and the Republic of India | 28 Jul 2001 |

**Date of
Application to
the HKSAR**

Agreements with International Organizations

- | | | |
|----|---|--------------|
| 1. | Agreement Constituted by Exchange of Letters Between the Government of the People's Republic of China and the Commission of the European Communities Concerning the Maintenance of the Office of the Commission of the European Communities in the Hong Kong Special Administrative Region of the People's Republic of China | 1 Jul 1997 |
| 2. | Host Country Agreement Between the Government of the People's Republic of China and the Bank for International Settlements Relating to the Establishment and Status of a Representative Office of the Bank for International Settlements in the Hong Kong Special Administrative Region of the People's Republic of China | 11 May 1998 |
| 3. | Memorandum of Understanding Between the Government of the People's Republic of China and the International Monetary Fund Concerning the Establishment of a Sub-Office in the Hong Kong Special Administrative Region by the Resident Representative Office of the Fund in the People's Republic of China | 23 Sept 2000 |
| 4. | Memorandum of Understanding Between the Government of the People's Republic of China and the International Bank for Reconstruction and Development and the International Finance Corporation Concerning the Establishment of the IFC Regional Office for East Asia and Pacific and the World Bank Private Sector Development Office for East Asia and Pacific in the Hong Kong Special Administrative Region of the People's Republic of China, Memorandum of Administrative Arrangements Relating to the IFC Regional Office for East Asia and Pacific and the World Bank Private Sector Development Office for East Asia and Pacific in the Hong Kong Special Administrative Region of the People's Republic of China and Letters between the Hong Kong Monetary Authority and the International Bank for Reconstruction and Development and the International Finance Corporation Relating to the Memorandum of Understanding | 28 Sept 2000 |

**Extract from minutes of meeting of Administration of Justice
and Legal Services Panel held on 29 July 2003**

X X X X X X

IV. Privileges and immunities conferred on consular posts and specified international organizations

(LC Paper No. CB(2)2547/02-03(01) and 2888/02-03(02))

40. At the invitation of the Chairman, Deputy Director of Administration (Acting) (DDA(Ag)) briefed members on the Administration's paper (LC Paper No. CB(2)2547/02-03(01) and the LegCo Brief (LC Paper No. CB(2)2888/02-03(02)) which set out -

- (a) standard and additional privileges and immunities for career consular posts;
- (b) privileges and immunities for international organizations (IOs); and
- (c) proposals for enacting local legislation to set out privileges and immunities conferred on consular posts and specified IOs.

41. In relation to (c) above, the four items of subsidiary legislation, which were gazetted on 4 July 2003 and would be introduced into LegCo for negative vetting, were as follows -

- (a) the Administration of Estates by Consular Officers Ordinance (Amendment of Schedule) Order 2003 made under section 3 of the Administration of Estates by Consular Officers Ordinance (Cap. 191);
- (b) the Consular Conventions (Application of Section 3) Order made under section 5 of the Consular Conventions Ordinance (Cap. 267);
- (c) the International Organizations (Privileges and Immunities) (Office of the Commission of the European Communities) Order made under section 3 of the International Organizations (Privileges and Immunities) Ordinance (Cap. 558); and
- (d) the Registration of Persons (Amendment) Regulation 2003 made under section 7 of the Registration of Persons Ordinance (Cap. 177).

Action

42. In reply to the Chairman, DDA(Ag) advised that international agreements signed by the Central People's Government (CPG) which conferred privileges and immunities on consular posts or IOs, and their respective personnel, and which were applied to the Hong Kong Special Administrative Region (HKSAR), were given effect in Hong Kong generally by the following two national laws applicable to the HKSAR -

- (a) Regulations of the People's Republic of China Concerning Consular Privileges and Immunities; and
- (b) Regulation of the People's Republic of China Concerning Diplomatic Privileges and Immunities.

The enactment of the Consular Relations Ordinance (Cap. 557) and the International Organizations (Privileges and Immunities) Ordinance (Cap. 558) in 2000 provided a flexible framework for the localization of the relevant international agreements signed by the CPG. With the legislative framework in place, and having regard to the common law tradition, the Administration considered that the best means of underpinning the relevant provisions in the bilateral agreements between CPG and Consular Posts/IOs was to enact local legislation setting them out expressly and specifically in the laws of Hong Kong.

43. DDA(Ag) further advised that at present, there were 11 bilateral agreements between CPG and Consular Posts/IOs, which included seven consular agreements with foreign States and four agreements with five IOs. The 11 bilateral agreements were specified at Annex B of LC Paper No. CB(2)2547/02-03(01)). The Administration had embarked on a programme of enacting local legislation, in the form of subsidiary legislation, to cover the 11 bilateral agreements. The subsidiary legislation would be introduced by batches as soon as drafting and the consultation process had been completed.

44. Regarding the four items of subsidiary legislation to be introduced into LegCo, DDA(Ag) said that the three Orders set out in paragraph 41(a), (b) and (c) above sought to underpin the relevant provisions of the following two bilateral agreements -

- (a) Consular Agreement between the Government of the People's Republic of China and the Government of Canada (Article 10(3), (4) and (5) of the Agreement); and
- (b) Agreement Constituted by Exchange of Letters Between the Government of the People's Republic of China and the Commission of the European Communities Concerning the Maintenance of the Office of the Commission of the European

Action

Communities in the Hong Kong Special Administrative Region of the People's Republic of China (Articles 3, 4 and 5 of the Agreement).

The Amendment Regulation mentioned in paragraph 41(d) above, on the other hand, sought to amend the relevant provisions of the Registration of Persons Regulations so that the accredited Head and accredited members of the European Community Office, and their family members in HKSAR, might be issued with Consular Corps Identity Cards (CCICs) in the same manner as CCICs were issued to consuls, consular staff and their family members in HKSAR. DDA(Ag) advised that the three Orders would, subject to the outcome of the negative vetting procedure, come into operation on 14 November 2003, whereas the Amendment Regulation would come into operation on a date to be appointed.

45. There being no other business, the meeting ended at 6:30 pm.

Council Business Division 2
Legislative Council Secretariat
9 October 2003

立法會
Legislative Council

**Legal Service Division Report on
Subsidiary Legislation Gazetted on 4 July 2003**

Date of Tabling in LegCo : 9 July 2003

Amendment to be made by : 15 October 2003 (or 5 November 2003 if extended by resolution)

PART I SUBSIDIARY LEGISLATION RELATING TO CONSULAR MATTERS

Background

The "Consular Agreement Between the Government of the People's Republic of China and the Government of Canada" was signed in 1997 and came into effect in March 1999 (the Canadian Consular Agreement). It contains provisions entitling consular officers to protect and conserve estates and safeguard the interests in and rights of property in China of Canadian nationals.

2. The Agreement Constituted by Exchange of Letters Between the Government of the People's Republic of China and the Commission of the European Communities Concerning the Maintenance of the Office of the Commission of the European Communities in the Hong Kong Special Administration Region of the People's Republic of China (the EC Agreement) was made in June 1997. Article 4 of the EC Agreement confers on the Office of the Commission of EC (the EC office), its accredited Heads and accredited members (who are nationals of the Members States of the EC but not permanent residents of the HKSAR) and their household family members certain consular privileges and immunities corresponding to those enjoyed by consular posts, Heads and members of consular posts under the Vienna Convention.

3. According to the Administration, both the Canadian Consular Agreement and the EC Agreement have since been applied to the Hong Kong Special Administrative Region by virtue of the national laws promulgated under Article 18 of the Basic Law. The relevant national laws are: the Regulations of the People's Republic of China concerning Consular Privileges and Immunities, and the Regulations of the People's Republic of China concerning Diplomatic Privileges and Immunities. The Administration now seeks to make the relevant

provisions of the two agreements part of the domestic law of the HKSAR by appropriate subsidiary legislation.

4. The accredited Head and accredited members (inclusive of their respective family members) of the EC Office in Hong Kong have since the establishment of the Office in 1993 been issued with ordinary identity cards with EC-prefixed identity card numbers. The Administration has found that the existing administrative arrangement has not made the relevant officials of the EC Office readily identifiable. Since they enjoy privileges and immunities comparable to those conferred on consular staff, it is decided that they should be issued Consular Corps Identity Cards (CCICs) in the same manner as CCICs are issued to consuls and consular members. Accordingly, the Registration of Persons Regulation (Cap. 177 sub. leg. A) has to be amended to implement the decision. Members may refer to the LegCo Brief (Ref.: CSO/ADM CR/3/2071/97(02)) issued in June 2003 by the Administration Wing of the Chief Secretary for Administration's Office for background and further information.

Registration of Persons Ordinance (Cap. 177)

Registration of Persons (Amendment) Regulation 2003 (L.N. 165)

5. By this Amendment Regulation made under section 7 of the Registration of Persons Ordinance (Cap. 177) by the Chief Executive in Council, the Registration of Persons Regulation (Cap. 177 sub. leg. A) (the Regulation) is amended to enable CCICs to be issued to the Head and members of the EC Office and their spouses and dependent children.

6. A definition of "Head of the EC Office" and "a member of the EC Office" is added to Regulation 2(1) of the Regulation. Regulation 4(4) is repealed and substituted by a new provision that includes a reference to the Head and any member of the EC Office and their spouses and dependent children. Regulations 5(1)(b) and 25(f) as well as item 2 in Schedule 2 are similarly amended.

7. The Amendment Regulation shall come into operation on a day to be appointed by the Chief Secretary for Administration by notice published in the Gazette. By reason of the fact that the definition of "Head of the EC Office" and "a member of the EC Office" makes reference to the International Organizations (Privileges and Immunities) (Office of the Commission of the European Communities) Order (L.N. 166 of 2003) that is to come into operation on 14 November 2003, the Amendment Regulation should not come into effect before that date.

**International Organizations (Privileges and Immunities) Ordinance (Cap. 558)
International Organizations (Privileges and Immunities) (Office of the
Commission of the European Communities) Order (L.N. 166)**

8. This Order is made under section 3 of the International Organizations (Privileges and Immunities) Ordinance (Cap. 558) by the Chief Executive in Council and is to come into operation on 14 November 2003.

9. The Order declares Articles 3, 4 and 5 of the EC Agreement to be part of the domestic law of the HKSAR. This gives each of the European Community, the European Coal and Steel Community and the European Atomic Community legal personality in the HKSAR together with the capacity to contract, to acquire and dispose movable and immovable property, and to conduct legal proceedings. The EC Office, its Head and members accredited by the Commission of EC as well as members of their family forming part of their respective households are conferred such rights, consular privileges and immunities as are corresponding to those enjoyed by consular post, its Heads and members in accordance with the provisions of the Vienna Convention on Consular Relations of 24 April 1963 (the Convention) and are necessary for the effective fulfilment of their duties. The laissez-passers issued by EC to officials and other servants of its institutions shall be recognized as a valid travel document.

10. The Order also empowers the Chief Executive to authorize the Commissioner of Customs and Excise to refund duties imposed on hydrocarbon oils under the Dutiable Commodities Ordinance (Cap. 109) where such hydrocarbon oils are imported into Hong Kong and used for such purpose that had they been imported for that use, exemption from custom duty would have been required to be granted under Article 50 of the Convention.

**Administration of Estates by Consular Officers Ordinance (Cap. 191)
Administration of Estates by Consular Officers Ordinance (Amendment of
Schedule) Order 2003 (L.N. 167)**

11. This Order is made under section 3 of the Administration of Estates by Consular Officers Ordinance (Cap. 191) (the Ordinance) by the Chief Executive after consultation with the Executive Council and is to come into operation on 14 November 2003.

12. The Order has varied the Schedule to the Ordinance by adding a reference to the Canadian Consular Agreement.

Consular Conventions Ordinance (Cap. 267)
Consular Conventions (Application of Section 3) Order (L.N. 168)

13. This Order is made under section 3 of the Consular Conventions Ordinance (Cap. 267) (the Ordinance) by the Chief Executive after consultation with the Executive Council and is to come into operation on 14 November 2003.

14. The Order directs that section 3 of the Ordinance shall apply to Canada. Section 3 of the Ordinance confers on consular officers the power -

- (a) to apply for grant of representation on behalf of a national of his country not resident in Hong Kong to the estate of a deceased in Hong Kong; and
- (b) to receive money or other property in Hong Kong forming part of the estate of a deceased or receive payment in Hong Kong of money due on the death of a deceased person, and to give a valid discharge for such money or property on behalf of a national of his country not resident in Hong Kong.

15 The Order gives effect to the provisions contained in the Canadian Consular Agreement relating to the protection of interests of Canadian nationals who has a right to property left in the HKSAR by a deceased.

Consultation

16. According to the Administration, the Consulate General of Canada and the EC Office in the HKSAR have been consulted on the draft of the relevant subsidiary legislation. The Administration of Justice and Legal Service Panel will be briefed of the matter at its meeting on 28 July 2003.

Conclusion

17. The Legal Service Division is seeking clarification from the Administration on a few legal and drafting matters. A further report will be issued if necessary.

Prepared by

KAU Kin-wah
Assistant Legal Adviser
Legislative Council Secretariat
10 July 2003

立法會
Legislative Council

**Legal Service Division Further Report on
Registration of Persons (Amendment) Regulation 2003 (L.N. 165 of 2003)
International Organizations (Privileges and Immunities) (Office of the
Commission of the European Communities) Order (L.N. 166 of 2003)
gazetted on 4 July 2003**

In its report dated 10 July 2003, the Division reported that it was seeking clarification from the Administration on a few legal and drafting matters. Through the exchange of correspondence, the matters have since been clarified. Copies of the relevant correspondence are attached as Annex A for Members' reference.

2. The Division does not observe any difficulties in the drafting and legal aspects of the subsidiary legislation.

Encl

Prepared by

KAU Kin Wah
Assistant Legal Adviser
Legal Service Division
Legislative Council Secretariat
26 August 2003

CSO/ADM CR 2/2071/00(01)

Tel No. : 2810 2132

Fax No. : 2842 8897

21 July 2003

Mr Kau Kin-wah
Assistant Legal Adviser
Legislative Council
8 Jackson Road
Central
Hong Kong

Dear Mr Kau

**Subsidiary Legislation relating to Consular Matters
gazetted on 4 July 2003**

Thank you for your letters of 9 and 16 July 2003. Our response is enclosed for your consideration please.

Yours sincerely,

(LAI Yiu-kei, Samson)
for Director of Administration

I. General

Q1 Please clarify when the People’s Republic of China acceded to the Vienna Convention on Consular Relations.

Our record confirms that the People’s Republic of China acceded to the Vienna Convention on Consular Relations in 1979, as stated in the LegCo Brief issued on 2 July 2003.

Q2 Please clarify when the Agreement by Exchange of Letters with the Commission of the European Communities came into force.

The PRC/EC Agreement entered into force on 1 July 1997.

II. Registration of Persons (Amendment) Regulation 2003

Clause 5

Q3 Please consider whether it is necessary to substitute “or” and “and” in the proposed new Regulation 25(f). This is to avoid the ambiguity that the children must have all the statuses described in paragraph (f) before they may be exempted.

The proposed new Regulation 25(f) reads “children under 11 years of age of consuls, consular staff and the Head and members of the EC Office”. It is a collective description of a group of children, each being a child of –

- (i) a consul;
- (ii) a member of consular staff;
- (iii) the Head of the EC Office; or
- (iv) a member of the EC Office.

Similar references can be found in other existing legislation. For example, “children of Assistant Officers and equivalent grades” under section 3(3)(a) of the Correctional Services Children’s Education Trust Ordinance (Cap. 1131) refers to a group of children each of which is a child of an Assistant Officer in the Correctional Services Department, or is a child of an officer of a grade equivalent to an Assistant Officer. The child needs not be a child of an Assistant Officer as well as of an officer of equivalent grade. Similarly, “representatives of the press, television and radio” in the definition of “precincts of the Chamber” under section 2 of the

Legislative Council Ordinance refers to three groups of representatives – one representing the press, one representing the television and one representing the radio. It does not however refer to persons representing the press, television and radio at the same time.

Therefore, we consider that the present drafting of the proposed new Regulation 25(f) is in order.

Clause 6

Q4 Please consider describing “Head of the EC Office” and “member of the EC Office” separately in the proposed addition as is done in the Chinese text.

Clause 6 amends Schedule 2 to the Registration of Persons Regulations by adding “the Head and members of the EC Office” (“歐共體辦事處主任、歐共體辦事處人員” in the Chinese text) to item 2 of the Schedule.

In the English text, it is clear that both “Head” and “members” should be read together with “of the EC Office” in the phrase “the Head and members of the EC Office”. There is no need to say “the Head of the EC Office and the members of the EC Office”.

As regards the Chinese text, it is clearer to use “歐共體辦事處主任、歐共體辦事處人員” as proposed in the Amendment Regulation to avoid any doubt that may arise in the expression “(領事、領事館職員、)歐共體辦事處主任及人員” as to whether “歐共體辦事處” relates to “人員”.

Given the foregoing, we consider that no amendment to the Amendment Regulation is necessary.

Clause 2 (Chinese text)

Q5 In paragraph (b) of the definition of “Head of the EC Office” and “a member of the EC Office”, “but” has been rendered as “且” in Chinese. However, the usual rendering is “但”. Please clarify why the normal rendering is not followed in this instance.

The wording in paragraph (b) of the “Head of the EC Office” and “a

member of the EC Office” are adopted from Article 4 of the PRC/EC Agreement, i.e. “... who are nationals of the Member States of the European Communities but not in their capacity as the permanent residents of the Hong Kong Special Administrative Region ...” in the English text or “... 具有歐洲共同體成員國國籍且不具有香港特別行政區永久性居民身份的 ...” in the Chinese text. While “but” is usually rendered as “但”, the present Chinese rendering (i.e. “且”) in this specific context does not affect the effect of the provision.

III. International Organizations (Privileges and Immunities) (Office of the Commission of the European Communities) Order

Clause 4

Q6 The provision appears to be incomplete. It has not specified whom would be entitled to the proposed refund. Nothing in the provision appears to relate it to the Office of the EU Commission. Please clarify.

Clause 4 is a complete provision in that the clause “as read with Article 4 of the Office Agreement [i.e. the PRC/EC Agreement]¹” in subsection (1)(b) has provided a reference to the EC Office and its personnel, as well as the members of their families forming part of their respective households such that they could be entitled to, among other things, the exemption of custom duties enjoyed by their consular counterparts under Article 50(1) of the Vienna Convention².

¹ Article 4 of the PRC/EC Agreement confers on the EC Office, its Head and members and their families consular privileges and immunities corresponding to those enjoyed by their consular counterparts in accordance with the Vienna Convention.

² Article 50(1) of the Vienna Convention provides that –

The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:

- (a) articles for the official use of the consular post;
- (b) articles for the personal use of a consular officer or members of his family forming part of his household, including articles intended for his establishment. The articles intended for consumption shall not exceed the quantities necessary for direct utilization by the persons concerned.

It is not necessary to specify in clause 4 to whom a refund should be made. This is because to “refund” means to “pay the money back”.

Separately, clause 4 authorizes the making of arrangements for securing refund. This includes the decision on details of the refund arrangements. Given that to “refund” means to “pay the money back”, the Commissioner of Customs and Excise would, in exercising the Chief Executive’s authorization under clause 4, construe that the person who pays the duties concerned should be entitled to the proposed refund.

Q7 Please clarify whether the clause would have retrospective effect, i.e. the refund of duties would cover hydrocarbon oils consumed before the Order comes into effect. If not, please advise whether the Office of the EU Commission is entitled to any refund of duties. If yes, please state the legal basis for such refund.

The clause does not have retrospective effect. That said, by virtue of the PRC/EC Agreement (as read with the Vienna Convention), the EC Office has been entitled to exemption from payment of duties on hydrocarbon oils since 1 July 1997. At present, this exemption is given effect through an arrangement, under which oil suppliers (through whom duties on hydrocarbon oils are collected) issue qualified personnel of the EC Office with oil cards. Upon presentation of the oil cards, duties will not be charged on the hydrocarbon oils purchased.

LS/S/38/02-03
2869 9467
2877 5029

The Director of Administration
Administration Wing
Chief Secretary for Administration's Office
(Attn: Mr LAI Yiu Kei, Samson
AS (Admin)1)
12/F, West Wing
Central Government Offices
Hong Kong

By Fax (2501 5779)

23 July 2003

Dear Mr LAI

**Subsidiary Legislation relating to Consular Matters
gazatted on 4th July 2003**

Thank you for your letter of 21 July 2003 with the Administration's response attached.

Having perused the Administration's response, I have the following observations for your further consideration:-

Registration of Persons (Amendment) Regulation 2003

Clause 1

Please confirm that the Amendment Regulation will not come into operation before the International Organizations (Privileges and Immunities) (Office of the European Communities) Order (L.N. 166 of 2003).

Clause 5

The intention of the Administration is not in dispute. When the description is really to be understood disjunctively, it is not clear why the use of "and", a conjunction, is being insisted upon. The definition of "precincts of the Chamber" in section 2 of the Legislative Council Ordinance is not comparable to the provision under consideration.

Clause 6

The explanation offered is beside the point. In the context of item 2, separate description for "the Head" and "the member" of the EC office is both grammatically appropriate and drafting wise necessary to make clear that the identity card for each of

them requires no payment of fees.

International Organizations (Privileges and Immunities) (Office of the Commission of European Communities) Order

Clause 4

The Administration relies on the reference to Article 4 of the EC Agreement in subsection (1)(b) as sufficient to show that the refund arrangement is intended for the EC Office. We accept that this is arguable. However, the provision authorizes an appropriation of public revenue, it seems that it should be made very clear who are entitled to refund. We do not mean that individual persons should be specified but the class or group of persons entitled to refund should be sufficiently prescribed without ambiguity.

The clause has a further problem. The International Organizations (Privileges and Immunities) Ordinance (Cap. 558) (IOPIO) does not contain any enabling provision similar to section 5 of the Consular Relations Ordinance (Cap. 557). It is not clear on what legal basis the CE could make this clause 4.

We are given to understand that regulation 15 of the Dutiable Commodities Regulations (Cap. 109 sub. leg. A) (the Regulations) already serves the purposes of this clause 4. We have observed that (a) regulation 15 authorizes refund to **suppliers** of hydrocarbon oils, and (b) such refund is only permitted when the person or body supplied is exempted under one of the relevant ordinances. In the circumstances, what is needed is to provide that the EC Office and etc. are exempted from the duties imposed on hydrocarbon oils. That would be sufficient to cause regulation 15 to apply.

We are also given to understand that by virtue of the administrative measure of issuing "oil cards", the EC Office and its accredited staff are in fact not paying any duties on gasoline. This further supports our view that what is really needed is to include in the Order a provision allowing regulation 15 to apply.

We have further observed that regulation 12(1)(m) of the Regulations exempts from the payment of duties all goods which are shown to the satisfaction of the Commissioner of Custom and Excise to be for the use or consumption of any person who is entitled to be accorded immunities or exemptions from duties by the operation of the IOPIO. As clause 4 has only mentioned hydrocarbon oils, please clarify whether the Administration intends that the exemption from Cap. 109 of the EC Office is limited to hydrocarbon oils only. If not, it is not clear why only such oils are expressly mentioned.

I would be grateful if you could let me have the Administration's response at your earliest convenience so that I may prepare a further report to the House Committee.

Yours sincerely

(KAU Kin-wah)
Assistant Legal Adviser

c.c. DoJ (Attn: Betty CHEUNG, SGC)
LA
SALA2

CSO/ADM CR 2/2071/00(00)
LS/S/38/02-03

Tel No. : 2810 3946
Fax No. : 2842 8897

13 August 2003

Mr Kau Kin-wah
Assistant Legal Adviser
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Mr Kau,

**Subsidiary Legislation relating to Consular Matters
gazatted on 4th July 2003**

Thank you for your letter of 23 July 2003 which set out your further observations on the above subject. I now enclose the Administration's response for your necessary action please.

Yours sincerely,

(David Leung)
for Director of Administration

Encl.

Registration of Persons (Amendment) Regulation 2003

Clause 1

The Amendment Regulation will become effective after the expiry of the negative vetting period and when the necessary preparatory work for the issue of identity cards is completed. We envisage that the Amendment Regulation will come into effect after the commencement of the International Organizations (Privileges and Immunities) (Office of the Commission of the European Communities) Order.

Clause 5

The expression “children under 11 years of age of consuls, consular staff and the Head and members of the EC Office” clearly means a group of persons comprising –

- (a) children of consuls;
- (b) children of consular staff;
- (c) children of the Head of the EC Office; and
- (d) children of members of the EC Office.

In addition to the examples given in our response of 21 July 2003, some examples are found in the Vienna Convention on Consular Relations itself (please see the Schedule to the Consular Relations Ordinance (Cap. 557)) –

- (a) Under Article 5(h), consular functions consist in safeguarding “the interests of minors and other persons lacking full capacity”, which means collectively –
 - (i) the interests of minors; and
 - (ii) the interests of other persons lacking full capacity,

but not necessarily the common interest of minors and others lacking full capacity.

- (b) In paragraph 1 of Article 45, the sending State may waive any of the “privileges and immunities provided for in Articles 41, 43 and 44”, which means collectively –

- (i) privileges and immunities provided for in Articles 41;
- (ii) privileges and immunities provided for in Articles 43; and
- (iii) privileges and immunities provided for in Articles 44,

but not necessarily privileges and immunities provided for in Article 41 and 43 and 44, all at the same time.

- (c) In paragraph 3 of Article 50, “personal baggage accompanying consular officers and members of the families forming part of their households” shall be exempt from inspection. The expression means –

- (i) personal baggage accompanying consular officers; and
- (ii) personal baggage accompanying members of the families forming part of the households of consular officers,

but not necessarily personal baggage accompanying both consular officers and members of their families at the same time.

Clause 6

We consider that the expression “the Head and members of the EC Office” is appropriate, as it is clear that under the revised Schedule 2 to the Registration of Persons Regulations, the issue of identity cards to these EC personnel requires no payment of fee. Similar expressions are used in existing legislation, for example –

- (a) “the Chairman and members of the Commission” in section 7(1) of the Public Service Commission Ordinance (Cap 93);
- (b) “the Chairman, Deputy Chairmen and members of the Board” in section 26(1) of the Administrative Appeals Board Ordinance (Cap 442); and
- (c) “the Chairman and members of the Appeal Board” in section 37 of the Entertainment Special Effects Ordinance (Cap 560).

International Organizations (Privileges and Immunities) (Office of the Commission of the European Communities) Order

Clause 4

Class or group of persons entitled to refund

A person's entitlement to refund of duty depends on whether he is exempted from duty. In the context of consular relations, exemption is provided for under the Vienna Convention. In the context of the EC Office, exemption is determined by Article 4 of the PRC/EC Agreement, which draws reference to the Vienna Convention. We therefore consider that the reference in Clause 4 to Article 4 of the PRC/EC Agreement is sufficient to show that the refund arrangement is intended for the EC Office.

Legal basis of and need for Clause 4

We consider that section 3 of the International Organizations (Privileges and Immunities) Ordinance (Cap. 558) gives the power to make Clause 4. Section 3 of Cap. 558 provides that the CE in Council may –

- “(a) by order in the Gazette, declare that the provisions of an international agreement relating to the status, privileges and immunities of an international organization and of persons connected with such organization, and which are specified in the order, shall have the force of law in Hong Kong; and
- (b) in such order make such provisions as the Chief Executive in Council may consider necessary for carrying into effect the provisions of any such agreement in connection with such privileges and immunities.”

Article 4 of the PRC/EC agreement provides that the EC Office, its head and members and their family members shall enjoy consular privileges and immunities as correspond to those enjoyed by consular posts etc in accordance with the provisions of the Vienna Convention on Consular Relations of 24 April 1963 which include exemption of duty on hydrocarbon oil (Article 50 of the Vienna Convention refers). The privilege of exemption of duty on hydrocarbon oil accorded to consular posts etc under the Vienna Convention is implemented by section 5 of the

Consular Relations Ordinance (Cap. 557). There is no similar provision under Cap. 558 or any other legislation that confers similar privilege on the EC Office and its personnel etc.

Regulation 15 of the Dutiable Commodities Regulations (Cap. 109 sub. leg. A) only provides refund to oil suppliers and not to the persons enjoying the privileges. In practice, the regulation is seldom invoked because of the arrangement (as described in our letter dated 21 July) under which the oil suppliers could sell duty-free oil to persons enjoying the privileges. Although the exemption may be given effect by this arrangement with the oil companies, it is only an administrative measure. Besides, there are circumstances (e.g. loss or mal-functioning of oil cards or termination of the administrative arrangement which was initiated by oil suppliers on a voluntary basis) which make it necessary to refund the duty paid on hydrocarbon oil to persons enjoying the privileges.

Clause 4 of the EC Order is therefore necessary for carrying into effect the provisions of Article 4 of the PRC/EC agreement and is intra vires section 3(b) of Cap. 558.

Explicit exemption of duties on hydrocarbon oils

Under the Dutiable Commodities Ordinance (Cap. 109), duties are assessed and payable on 4 types of dutiable goods, namely alcohol liquors, tobacco, hydrocarbon oils and methyl alcohol. The EC Office may directly import alcohol liquors, tobacco and methyl alcohol with duties exempted, or obtain them from the authorized sources, who import the goods on their behalf with duties exempted.

However, the amount of each single import of hydrocarbon oils far exceeds the demand of the EC Office and its personnel. Oil suppliers cannot arrange for the EC Office individually the import of duty-exempted hydrocarbon oils. Due to this operational problem, the EC Office cannot directly import hydrocarbon oils nor can they import the oil through the wholesalers with duties exempted. We therefore need to make a specific provision in the EC Order for the refund of duties paid on hydrocarbon oils.