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Paper for the House Committee meeting on 3 June 2005

**Report of the Subcommittee on
International Organizations (Privileges and Immunities)
(World Trade Organization) Order**

Purpose

This paper reports on the deliberations of the Subcommittee on International Organizations (Privileges and Immunities) (World Trade Organization) Order (the WTO Order).

Background

2. Hong Kong is a founding member of the World Trade Organization (WTO) which was established on 1 January 1995. Hong Kong's separate membership continues after reunification in 1997 under the name of "Hong Kong, China" and remains unchanged after China's accession to the WTO in 2001. Part of the obligations of being a WTO member is to accord privileges and immunities (P&Is) to WTO, its officials and representatives of WTO members in accordance with the Marrakesh Agreement Establishing the WTO (the Marrakesh Agreement). In accordance with Article VIII.4 of the Marrakesh Agreement, the P&Is for the WTO shall be similar to those stipulated in the 1947 United Nations Convention on the Privileges and Immunities of the Specialized Agencies (the 1947 Convention).

3. Having regard to Hong Kong's common law tradition, provisions of an international agreement applicable to Hong Kong affecting private rights and obligations or requiring exceptions to be made to the existing laws of Hong Kong must be transformed from the international legal plane to the domestic legal plane by legislation. Hence, it is necessary to enact local legislation relating to the P&Is for WTO so as to fulfil Hong Kong's obligation as a WTO member.

4. In October 2004, the WTO General Council decided that the Sixth Ministerial Conference (MC6) will be held in Hong Kong from 13 to 18 December 2005. As such, it is essential that the necessary legislation be enacted before MC6 to ensure that the WTO, its officials and the representatives of WTO members can enjoy the relevant P&Is when they exercise their functions in Hong Kong for the purposes of participating in MC6.

The WTO Order

5. The WTO Order was made under section 3 of the International Organizations (Privileges and Immunities) Ordinance (Cap. 558) and published in the Gazette on 6 May 2005. Subject to negative vetting by this Council, it will come into operation on 7 July 2005. The Order seeks to declare certain provisions of the 1947 Convention to have the force of law in Hong Kong and the main P&Is to be enjoyed by the WTO are as follows :

- (a) juridical personality for the WTO as an organization;
- (b) inviolability of premises, archives and documents for the WTO;
- (c) exemption from direct taxes and certain duties for the WTO;
- (d) freedom of communication for the WTO;
- (e) immunities from legal process for WTO officials in their official capacity;
- (f) exemption from taxation in respect of salaries and emoluments for WTO officials; and
- (g) immunity from legal process for representatives of WTO members in respect of words spoken or written and all acts done in their official capacity at meetings convened by the WTO.

The Subcommittee

6. At the meeting of the House Committee on 13 May 2005, Members agreed that a Subcommittee should be formed to study the WTO Order. The membership list of the Subcommittee is in **Appendix I**. Under the chairmanship of Hon SIN Chung-kai, the Subcommittee has held two meetings to consider the WTO Order.

Deliberations of the Subcommittee

7. In principle, the Subcommittee agrees with the need and urgency of enacting the WTO Order in time so that the WTO, its officials and the representatives of WTO members can enjoy the relevant P&Is when exercising their functions in Hong Kong in connection with the forthcoming MC6. Members also note that the Administration has briefed the Panel on Commerce and Industry (CI Panel) on its proposal on 15 February and 15 March 2005. The major issues deliberated by the Subcommittee are summarized below.

Timing for enactment of the WTO Order

8. Noting that MC6 will be held in about six months' time, some members consider that the Administration should have introduced the WTO Order into the Council much earlier. They are also concerned about the drafting process which, in their view, has taken too long to complete.

9. The Administration has explained that the WTO General Council did not decide on the exact dates of MC6 until October 2004. Prior to this, the Commerce, Industry and Technology Bureau (CITB) had already issued the relevant drafting instruction to the Department of Justice (DoJ) in August 2004. Both sides have since then worked closely and intensive inter-departmental consultation has taken place in the following months, in particular with regard to individual articles/sections in the 1947 Convention and whether or not certain provisions should be implemented in Hong Kong by local legislation. The Administration has advised that every effort has been made to speed up the drafting exercise amidst the wide range of preparatory work the MC6 Co-ordination Office has been undertaking. While drafting of the Order was still in progress, the CITB briefed the CI Panel in February and March 2005 on the legislative exercise. The Administration nevertheless agrees to take heed of members' concern in preparing future legislative proposals.

Application of the WTO Order

10. Members note that the WTO Order is not solely for the purpose of the forthcoming MC6. Once enacted, the P&Is provided in the Order will continue to apply to the WTO, its officials and representatives of WTO members in connection with all WTO-related activities held in Hong Kong in future, unless the Order is amended or repealed.

11. On the P&Is to be covered under the WTO Order, members note that the Administration has included all the P&Is listed in the 1947 Convention, except those articles/sections which

- (a) are not relevant to the WTO;
- (b) do not affect private rights and obligations;
- (c) do not require exceptions to be made to the existing laws of Hong Kong; or
- (d) can be implemented through administrative arrangements or existing laws of Hong Kong.

12. The Administration has stressed that the conferring of P&Is on WTO officials and representatives of WTO members is to ensure the independent exercise of their official functions in connection with the WTO and not for their personal benefit. It has also advised the Subcommittee that the WTO and its members have the right and the duty to waive the immunity of their officials/representatives where necessary. On the relevant sections in the 1947

Convention dealing with abuses of privileges which have not been incorporated into the WTO Order, the Administration has advised that such matters will normally be resolved through consultation between the WTO member and the WTO.

Legal and drafting aspects

Drafting format

13. The WTO Order (L.N. 62 of 2005) comprises three sections and a Schedule. Those provisions in the 1947 Convention which are to be implemented in Hong Kong are reproduced in the Schedule; and pursuant to section 3(1) of the Order, these provisions shall have the force of law in Hong Kong. Section 3(2) and (3) of the Order set out how certain expressions in the provisions of the 1947 Convention listed in the Schedule should be construed. An example of how this will work is given in **Appendix II**.

14. Noting that the provisions as specified in the Schedule should be construed with regard to section 3(2) and (3) of the Order and the need for extensive cross-referencing, some members consider the Order, as currently drafted, quite cumbersome and not reader-friendly. They have asked whether the Administration has considered other drafting approaches for the sake of brevity and easy readability.

15. In this connection, the Administration points out that as the 1947 Convention applies to specialized agencies in general, certain adaptation is necessary when the P&Is provided in the 1947 Convention are to be applied to the WTO. According to the DoJ, this is the first time that the relevant provisions in the 1947 Convention to be applied in Hong Kong are reproduced intact in a Schedule. In adopting this drafting approach, the Administration's intention is to enable the users to peruse the relevant provisions of the 1947 Convention in full while making the necessary construction with reference to section 3(2) and (3) of the Order. The Administration nevertheless acknowledges members' concern and agrees to look into its drafting practice.

16. While the Subcommittee will not object to the WTO Order as currently drafted, members consider that the subject of the drafting approaches adopted for preparing local legislation to implement provisions of international agreements in Hong Kong should be followed up, and agree that the matter be referred to the Panel on Administration of Justice and Legal Services for further consideration.

References to "Hong Kong" and "Hong Kong Special Administrative Region"

17. Noting that both "Hong Kong" and "Hong Kong Special Administrative Region" are used in the WTO Order, members have exchanged views with the Administration on whether there should be consistency in the use of the expressions and the implications, if any, of the two expressions.

18. The Administration considers that it is legally in order to use both expressions in the same Order as pursuant to section 3 of the Interpretation and General Clauses Ordinance (Cap.1), "Hong Kong" means "the Hong Kong Special Administrative Region". The Administration has also advised that in the context of international treaties and law, the use of the expression "Hong Kong" normally refers to a geographical place while the expression "Hong Kong Special Administrative Region" usually denotes a political entity and Hong Kong's status in the People's Republic of China. In this connection, members note that the expressions "Hong Kong" and "Hong Kong Special Administrative Region" are also used in the International Organizations (Privileges and Immunities) (Office of the Commission of the European Communities) Order, which is also an Order made under section 3 of Cap. 558 in 2003. They also find that Article 109 of the Basic Law contains references to the Government of the Hong Kong Special Administrative Region and the status of Hong Kong as an international financial centre.

Recommendation

19. The Subcommittee supports the enactment of the WTO Order. Both the Administration and the Subcommittee will not propose any amendments to the Order.

Advice sought

20. Members are invited to note the Subcommittee's recommendation in the preceding paragraph.

**Subcommittee on International Organizations
(Privileges and Immunities) (World Trade Organization) Order**

Membership List

Chairman Hon SIN Chung-kai, JP

Members Hon LEE Cheuk-yan
Hon Martin LEE Chu-ming, SC, JP
Hon CHAN Kam-lam, JP
Hon Jeffrey LAM Kin-fung, SBS, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon WONG Ting-kwong, BBS

(Total : 7 Members)

Clerk Miss Polly YEUNG

Legal Adviser Miss Anita HO

Date 23 May 2005

**An example of the construction of expressions
in the Schedule to the WTO Order**

Section 3(2)(a) of the Order (section 3 reproduced at Annex A) stipulates, inter alia, that a reference to any specialized agency in the Schedule, however expressed, shall be construed as a reference to the WTO. As such, when reading the Schedule, the reference to any specialized agency, however expressed, in the various sections of the Schedule has to be construed accordingly (The Schedule to WTO Order is extracted at Annex B).

Section 3 of WTO Order

3. Provisions of 1947 Convention have force of law in Hong Kong

(1) It is declared that the provisions of the 1947 Convention as specified in the Schedule shall have the force of law in Hong Kong and shall for that purpose be construed in accordance with the other provisions of this section.

(2) In applying those provisions of the 1947 Convention—

- (a) a reference to any specialized agency, however expressed, shall be construed as a reference to the WTO, and, without limiting the generality of the foregoing, the reference to “meetings convened by a specialized agency” in section 1(vi) of the 1947 Convention shall be construed accordingly;
- (b) a reference to any member, however expressed and whether with or without reference to any specialized agency (with the exception of section 13(f) of the 1947 Convention), shall be construed as a reference to a WTO member, and, without limiting the generality of the foregoing, the reference to “representatives of members” in section 1(v) of the 1947 Convention shall be construed accordingly;
- (c) (i) the reference to “will not be sold in the country into which they were imported except under conditions agreed to with the Government of that country” in section 9(b) of the 1947 Convention shall be construed as a reference to “will not be sold in the Hong Kong Special Administrative Region of the People’s Republic of China except under conditions agreed to with the Government of the Hong Kong Special Administrative Region of the People’s Republic of China”;
- (ii) the reference to “Have the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question” in section 19(f) of the 1947 Convention shall be construed as a reference to “Have the right to import free of duty their furniture and effects at the time of first taking up their post in the Hong Kong Special Administrative Region of the People’s Republic of China”;
- (d) the reference to “the territory of each State party to this Convention in respect of that agency” in section 11 of the 1947 Convention shall be construed as a reference to the area of the

Hong Kong Special Administrative Region of the People's Republic of China;

- (e) the reference to "the Government of such State" in section 11 of the 1947 Convention shall be construed as a reference to the Central People's Government of the People's Republic of China;
- (f) without prejudice to the generality of paragraph (a), the reference to "Nothing in this section shall be construed to preclude the adoption of appropriate security precautions to be determined by agreement between a State party to this Convention and a specialized agency" in section 12 of the 1947 Convention shall be construed as a reference to "Nothing in this section shall be construed to preclude the adoption of appropriate security precautions to be determined by agreement between the Hong Kong Special Administrative Region of the People's Republic of China and the WTO";
- (g) notwithstanding the generality of paragraph (b), the reference to "present in a member State" in section 15 of the 1947 Convention shall be construed as a reference to "present in the Hong Kong Special Administrative Region of the People's Republic of China";
- (h) section 17 of the 1947 Convention shall be construed as if it read as follows: "The provisions of sections 13(a), (b), (c) and (f), 14 and 15 are not applicable in relation to the authorities of the Hong Kong Special Administrative Region of the People's Republic of China in the case where the person concerned is a permanent resident of the Hong Kong Special Administrative Region of the People's Republic of China or is or has been a representative of the Hong Kong Special Administrative Region of the People's Republic of China.";
- (i) the reference to "sections 19 ..." in section 21 of the 1947 Convention shall be construed as a reference to "section 19(a), (b) and (f)".

(3) For the avoidance of doubt, a reference to any functions or duties of the representatives of WTO members in sections 13 and 14 of the 1947 Convention means the functions or duties, as the case may be, of such representatives as referred to in those sections, which are construed in accordance with subsection (2), relating to the meetings convened by the WTO.

Extract of Schedule to WTO Order
(Articles I, II and III only)

SCHEDULE

[s. 3]

PROVISIONS OF 1947 CONVENTION HAVING FORCE
OF LAW IN HONG KONG

Article I—Definitions and Scope

Section 1

In this Convention:

...

(iv) For the purposes of article III, the words “property and assets” shall also include property and funds administered by a specialized agency in furtherance of its constitutional functions.

(v) For the purposes of articles V ..., the expression “representatives of members” shall be deemed to include all representatives, alternates, advisers, technical experts and secretaries of delegations.

(vi) In sections 13, 14, 15 ..., the expression “meetings convened by a specialized agency” means meetings: (1) of its assembly and of its executive body (however designated), and (2) of any commission provided for in its constitution; (3) of any international conference convened by it; and (4) of any committee of any of these bodies.

(vii) The term “executive head” means the principal executive official of the specialized agency in question, whether designated “Director-General” or otherwise.

...

Article II—Juridical Personality

Section 3

The specialized agencies shall possess juridical personality. They shall have the capacity (a) to contract, (b) to acquire and dispose of immovable and movable property, (c) to institute legal proceedings.

Article III—Property, Funds and Assets

Section 4

The specialized agencies, their property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived their immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

Section 5

The premises of the specialized agencies shall be inviolable. The property and assets of the specialized agencies, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

Section 6

The archives of the specialized agencies, and in general all documents belonging to them or held by them, shall be inviolable, wherever located.

...

Section 9

The specialized agencies, their assets, income and other property shall be:

(a) Exempt from all direct taxes; it is understood, however, that the specialized agencies will not claim exemption from taxes which are, in fact, no more than charges for public utility services;

(b) Exempt from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by the specialized agencies for their official use; it is understood, however, that articles imported under such exemption will not be sold in the country into which they were imported except under conditions agreed to with the Government of that country;

(c) Exempt from duties and prohibitions and restrictions on imports and exports in respect of their publications.

...