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**Subcommittee on Subsidiary Legislation
Relating to Consular Matters**

Background brief prepared by the Legislative Council Secretariat

Purpose

This paper provides background information on previous discussions by Members on subsidiary legislation relating to privileges and immunities of consular posts and their personnel in the Hong Kong Special Administrative Region (HKSAR).

Subcommittee formed in 2003 to consider subsidiary legislation relating to consular matters

2. A subcommittee was formed in October 2003 to consider four items of subsidiary legislation relating to the privileges and immunities of consular posts and international organisations. These included -

- (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).

The two Orders in (a) and (b) sought to confer additional functions on the consular post of Canada in Hong Kong. The four items of subsidiary legislation came into effect in November 2003.

3. The Subcommittee noted that consular posts established in the HKSAR enjoyed the privileges and immunities accorded under the Vienna Convention on Consular Relations (VCCR) which the People's Republic of China (PRC) acceded to in 1979. In line with the established practice under common law, the provisions of VCCR which affected private rights and obligations or which required exceptions to be made to the laws of the HKSAR had been set out in local legislation by way of the Consular Relations Ordinance (Cap.577) enacted in 2000. Apart from the provisions of VCCR, PRC had applied to HKSAR bilateral agreements with foreign States providing for matters not covered in VCCR, such as additional consular functions and privileges and immunities. In line with the common law practice, provisions of bilateral agreements applicable to HKSAR which affected private rights and obligations or required exceptions to be made to the laws of the HKSAR would also be underpinned by local legislation setting out the relevant provisions of these bilateral agreements expressly and specifically.

Subcommittee formed in 2005 to consider subsidiary legislation relating to consular matters

4. Another subcommittee was formed in April 2005 to consider the following seven items of subsidiary legislation relating to the privileges and immunities of consular posts -

- (a) Consular Relations (Additional Privileges and Immunities) (United Kingdom) Order (in respect of the consular agreement between PRC and the United Kingdom (UK)) (L.N.51);
- (b) Consular Relations (Additional Privileges and Immunities) (United States of America) Order (in respect of the consular agreement between PRC and the United States of America (USA)) (L.N. 52);
- (c) Administration of Estates by Consular Officers Ordinance (Amendment of Schedule) Order 2005 (in respect of the consular agreement between the PRC and Australia) (L.N. 53);
- (d) Consular Conventions (Application of Section 3) Order 2005 (in respect of the consular agreement between PRC and Australia) (L.N. 54);

- (e) Consular Relations (Additional Privileges and Immunities) (Vietnam) Order (in respect of the consular convention between PRC and Vietnam) (L.N. 55);
- (f) Administration of Estates by Consular Officers Ordinance (Amendment of Schedule) (No. 2) Order 2005 (in respect of the consular convention between PRC and Vietnam) (LN. 56); and
- (g) Consular Conventions (Application of Section 3) (No. 2) Order 2005 (in respect of the consular convention between PRC and Vietnam) (L.N. 57).

5. The seven Orders sought to underpin the relevant provisions in the bilateral agreements made between PRC with UK, USA, Australia and Vietnam, which accorded to the consular posts and personnel of these States additional privileges and immunities and/or functions in relation to the administration of estates in HKSAR. The seven items of subsidiary legislation came into effect in July 2005. Key issues raised by members during their scrutiny of the subsidiary legislation and the Administration's responses are summarized in the ensuing paragraphs.

Legal effect of the bilateral agreements

6. In response to members' enquiry on the legal effect of the bilateral agreements before the enactment of local legislation, the Administration explained that the relevant provision of the bilateral agreements had been given legal effect in HKSAR by way of the Regulations of the People's Republic of China Concerning Consular Privileges and Immunities, which were national laws applied to HKSAR by promulgation under Article 18 of the Basic Law. In line with the established practice under common law, provisions of bilateral agreements would be further underpinned by Orders made under local legislation, should they provide for additional privileges and immunities that affected private rights and obligations or required exceptions to be made to the laws of the HKSAR.

Residences of consular officers

7. Noting that the PRC's bilateral consular agreements with UK, USA and Vietnam had extended the inviolability of consular premises to the residences of consular officers, members enquired about the meaning of "residences of consular officers" and the action which would be taken if a consular officer's residence was different from the residence on the official record. Members also expressed concern whether the authorities of the receiving State could enter the consular premises and residences in cases of emergency, if the consent of the head of the consular post or his designee could not be obtained in time.

8. The Administration advised that the term "residences of consular officers" was not defined in VCCR. To implement the privileges and immunities accorded by PRC to consular officers in Hong Kong, the HKSAR Government required the heads of consular officers to provide, upon installation of their consular officers, the personal particulars (including the residential address) of these officers to the Protocol Division for record purpose. In case a consular officer's residential address was different from that on the Government's record, the Protocol Division would approach the head of the consular post concerned or his designee for verification. The Administration further advised that under Article 31 of VCCR, the consent of the head of the consular post might be assumed in case of fire or other disaster requiring prompt protective action. As to those consular premises and residences which were inviolable under any circumstances without the consent of the head of the consular post or his designee, law enforcement agencies might, if and when necessary, seek the assistance of the Protocol Division which maintained a database and contact numbers of representatives of consular posts.

Additional privileges and immunities to family members of consular members

9. Members sought clarification on the basis for providing additional privileges and immunities to family members of consular members, such as greater protection from arrest, detention or prosecution.

10. The Administration advised that the conferment of different levels of privileges and immunities to certain consular posts were matters of foreign affairs under the purview of the Central People's Government (CPG). The conferment of privileges and immunities on consular members was not meant for the personal benefit of individuals, but rather, to ensure the efficient performance of functions by consular personnel of the sending State. The Administration further explained that as every State was both a sending and a receiving State, the privileges and immunities were granted on a reciprocal basis, meaning a State's own consular personnel abroad enjoyed the same level of privileges and immunities as those enjoyed by the consular personnel of the sending State.

Additional functions in relation to administration of estates

11. The Subcommittee noted that VCCR provided for the safeguarding of the interest of nationals of sending States in cases of succession mortis causa in the territory of the receiving State, in accordance with the laws and regulations of the receiving State. However, there were no detailed provisions in VCCR for matters relating to the administration of their nationals' estate in the receiving State.

Panel on Administration of Justice and Legal Services

12. In February 2009, the Administration advised the Panel on Administration of Justice and Legal Services vide LC Paper No. CB(2)841/08-09(01) that CPG had so far applied to HKSAR nine bilateral consular agreements signed with separate sovereign States, namely Australia, Canada, India, Italy, New Zealand, the Russian Federation, UK, USA and Vietnam. With the enactment of subsidiary legislation to underpin the relevant provisions in the bilateral agreements of Australia, Canada, UK, USA and Vietnam in November 2003 and July 2005 respectively, the Administration was preparing subsidiary legislation, in the form of Orders to underpin the remaining bilateral agreements (i.e. those signed with India, Italy, New Zealand and the Russian Federation).

13. According to the Legislative Council Brief on Subsidiary Legislation Relating to Consular Matters issued in April 2009, the CPG's bilateral consular agreements with India, Italy and the Russian Federation accord to their consular posts and personnel additional privileges and immunities such as -

- (a) inviolability of residences for certain members of the consular posts; and
- (b) personal inviolability for certain members of the consular posts and their family members.

14. In the case of India, New Zealand and the Russia Federation, the respective bilateral consular agreements also provide for their consular posts additional consular functions relating to the administration of estates, including-

- (a) protection and preservation of the estate left in HKSAR by deceased nationals of these States;
- (b) safeguarding the interest of their nationals who have a right to property left in HKSAR by a deceased; and
- (c) the receipt for transmission to their nationals of money or property in HKSAR to which they are entitled as a consequence of the death of another person.

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