

**HONG KONG SPECIAL ADMINISTRATIVE REGION / INDIA
AGREEMENT ON
MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS
("THE AGREEMENT")**

**ARTICLE BY ARTICLE COMPARISON
WITH THE MODEL AGREEMENT**

TITLE AND PREAMBLE

Substantially the same as the model Agreement. Confiscation of "instruments of crime" is included so as to be consistent with Article XVIII. Similar formulation can be found in the Agreements with France, Belgium and Malaysia.

ARTICLE I : SCOPE OF ASSISTANCE

Paragraph (1) is substantially the same as the model Agreement.

Paragraph (2) is substantially the same as the model Agreement (Article I(2)), but slightly expanded. A "catch-all" provision, paragraph (k) is added to provide for other assistance consistent with the laws of the Requested Party. Similar clauses appear in other signed Agreements such as Sri Lanka (Article 1(2)(j)), Finland (Article 1(2)(1), Germany(Article 1(3)(9) and Malaysia (Article 1(2)(k)).

Paragraph (3) confirms that assistance may be rendered in respect of offences related to revenue matters, but not if the primary purpose of the request is for the assessment or collection of tax. This is consistent with section 5(2) of the Mutual Legal Assistance in Criminal Matters Ordinance [CAP 525] (the "MLAO"). Similar formulation can be found in the Agreement with Belgium (Article 1(3)).

Paragraph (4) confirms that the Agreement does not apply to surrender of fugitive offenders, enforcement of criminal judgments, transfer of sentenced persons and transfer of criminal proceedings. It is similar to the formulation in the Agreement with Australia (Article I(4)) (see also similar provisions in Agreements with Indonesia (Article 2(1)) and Malaysia (Article 2(1))).

Paragraph (5) is the same as the model Agreement (Article I(4)).

Paragraph (6) reflects the reality that requests will emanate from and be executed by a variety of “competent authorities”. Pursuant to Article II (CENTRAL AUTHORITY) however all such requests must be transmitted via the Central Authorities.

ARTICLE II : CENTRAL AUTHORITY

The first three paragraphs of Article II are substantially the same as the model Agreement (Article II). Paragraph (4) is similar to Article VI(1) of the model Agreement and is the same as Article II(4) of the Agreements with Belgium and France.

ARTICLE III : OTHER ASSISTANCE

This is an expanded version of Article III of the model Agreement. It confirms that the Agreement does not affect the existing obligations or prevent the Parties from rendering assistance under other agreements or arrangements.

ARTICLE IV : LIMITATIONS ON COMPLIANCE

Paragraph (1)(a) is substantially the same as the model Agreement (Article IV(1)(a)).

Paragraph (1)(b) is the same as the model Agreement (Article IV(1)(f)).

Paragraph (1)(c) is the same as the model Agreement (Article IV(1)(b)).

Paragraph (1)(d) is the same as the model Agreement (Article IV(1)(d)).

Paragraph (1)(e) is the same as the model Agreement (Article IV(1)(g)).

Paragraph (1)(f) is the same as the model Agreement (Article IV(1)(e)).

Paragraph (1)(g) is substantially the same as the model Agreement (Article IV(1)(h)).

Paragraph (1)(h) is the same as the model Agreement (Article IV(1)(c)).

Paragraph (2) is the same as Article IV(2) of the model Agreement.

Paragraph (3) reflects the fact that the Requested Party should carefully consider any decision to find that a request relates to a political offence and

should in particular have regard to all the relevant facts and relevant conventions.

Paragraph (4) confirms that as far as double criminality is concerned it is the conduct that is critical rather than the precise offence which is or is to be charged.

Paragraphs (5) to (7) are the same as the model Agreement (Article IV(4) to (6)).

N.B. Article IV(3) of the model Agreement (in relation to the death penalty) is not included on the basis that the Requested Party may refuse assistance in death penalty cases on the ground of “essential interests”.

ARTICLE V : REQUESTS

This Article is substantially the same as the model Agreement (Article V).

ARTICLE VI : EXECUTION OF REQUESTS

This Article is substantially the same as Article VI of the model Agreement. Article VI corresponds precisely to Article VI of the Agreement with France.

ARTICLE VII : REPRESENTATION AND EXPENSES

This Article is substantially the same as Article VII of the model Agreement.

ARTICLE VIII : LIMITATIONS OF USE

Article VIII is the same as the model Agreement (Article VIII).

ARTICLE IX : ATTENDANCE OF PERSONS

This Article is consistent with Article IX(4) of the model Agreement and section 10(4) of the MLAO. Similar formulations can be found in the Agreements with France (Article IX), Denmark (Article 8(3)) and Switzerland (Article 9).

ARTICLE X : OBTAINING OF EVIDENCE, ARTICLES OR DOCUMENTS

This Article is substantially the same as Article IX of the model Agreement.

Paragraph (4) clarifies that in the course of obtaining evidence from a witness, additional questions may be asked. Similar formulations can be found in the Agreement with France (Article X(4)) and Belgium (Article X(4)).

ARTICLE XI : SERVICE OF DOCUMENTS

Paragraph (1) is substantially the same as the model Agreement (Article XII(1)).

Paragraphs (2) and (3) are substantially the same as the model Agreement (Article XII(2)) but distinguish between “responses” and “appearances”, the reason being that “appearances” require travel arrangements to be made and accordingly more notice may be required, hence, the suggested lead period of at least 40 days advance notice. Similar clauses can be found in the Agreement with France (Article XI(2) and (3)) and Belgium (Article XI(2)).

Paragraph (4) sets out the logistics of service. It is consistent with Hong Kong’s practice. A similar clause can be found in the Agreements with Finland (Article 12(2)), Belgium (Article XI(3)), France (Article XI(4)) and Switzerland (Article 17(2)).

Paragraphs (5) and (6) are substantially the same as the model Agreement (Article XII(4) to (5)).

Article XII(3) of the model Agreement is omitted as India does not have the capacity to provide notice of outstanding warrants etc. This paragraph has been omitted in other Agreements (e.g. Indonesia, Germany, Belgium and Denmark).

ARTICLE XII : PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS

Article XII is substantially the same as Article XIII of the model Agreement.

ARTICLE XIII : CERTIFICATION AND AUTHENTICATION

Article XIII is substantially the same as the model Agreement (Article XIV).

ARTICLE XIV : TRANSFER OF PERSONS IN CUSTODY

This Article is substantially the same as Article XV of the model Agreement.

ARTICLE XV : TRANSFER OF OTHER PERSONS

Paragraph (1) is substantially the same as the model Agreement (Article XVI(1)), but is more specific. Similar provision can be found in Article XV(1) of the Belgium Agreement.

Paragraph (2) deals with the question of the person's allowances and expenses. There is similar provision in other signed Agreements : Finland (Article 16(3)), Malaysia (Article 15(3)(a)) and Belgium (Article XV(2)).

Article XVI(2) of the model Agreement is omitted as it is already covered by paragraphs (1) and (2).

ARTICLE XVI : SAFE CONDUCT

Paragraph (1) is substantially the same as Article XVII (1) of the model Agreement but more closely reflects the wording of Section 17(1)(ii) of the MLAO with respect to immunity from civil suits. Similar formulation can be found in the Agreements with Finland (Article 17(1)), Indonesia (Article 14(1)(a) and (b)) and Malaysia (Article 17(1)).

Paragraph (2) is substantially the same as Article XVII (3) of the model Agreement.

Paragraph (3) is substantially the same as Article XVII(4) of the model Agreement.

Paragraph (4) is substantially the same as Article XVII (5) of the model Agreement.

Paragraph (5) deals with the immunity of persons responding to a summons. Similar formulation can be found in the Agreements with France (Article XVI(5)), Germany (Article 16(2)), Belgium (Article XVI(5)) and Switzerland (Article 21(4)).

Paragraph (6) is similar to Article XVII(2) of the model Agreement but provide a longer safe conduct period of 30 days instead of 15 days after being notified that the person's presence is no longer required. Similar formulation can be found in the Agreements with France (Article XVI(6)), Belgium (Article XVI(6)) and Switzerland (Article 21(5)).

ARTICLE XVII : SEARCH AND SEIZURE

This Article is substantially the same as Article XVIII of the model Agreement.

ARTICLE XVIII : PROCEEDS AND INSTRUMENTS OF CRIME

Paragraphs (1), (2) and (4) are substantially the same as the model Agreement (Article XIX(1), (2) and (4)). Consistent with other signed Agreements as well as the type of property capable of being subject to restraint and confiscation under the MLAO, “instruments” as well as “proceeds” of crime are covered. Please also see paragraph (6) below.

Paragraphs (3) replaces Article XIX(3) of the model Agreement and restricts the execution of the request to what is available under the laws of the Requested Party. This is appropriate since the Hong Kong SAR can only provide assistance pursuant to CAP. 525, in cases where the offence carries a maximum penalty of 2 years or more. Similar formulations can be found in the Agreements with Finland (Article 19(3)), Denmark (Article 15(3)), France (Article XVIII(3)) and Ukraine (Article 19(3)).

Paragraph (5) has been added to require the Parties to communicate representation by a person affected by a court order as well as their response to each other. This reflects Hong Kong’s practice.

Paragraph (6) defines “confiscation”, “instruments of crime”, “proceeds of crime” and “property”. Similar definitions of “confiscation”, “proceeds of crime” and “property” can be found in the Agreement with the UK (Article XIX(5)) and similar definition of “instruments of crime” is found in the Agreement with Malaysia(Article 19(6))

ARTICLE XIX : SETTLEMENT OF DISPUTES

Article XIX is identical to Article XX of the model Agreement.

ARTICLE XX : ENTRY INTO FORCE AND TERMINATION

Paragraphs (1) and (3) are substantially the same as Article XXI(1) and (2) of the model Agreement. However, termination only takes place six months after receipt of the notice to terminate. This is similar to Article 22(3) of the

Agreement with Indonesia , Article 20 of the Agreement with Japan and Article 20 of the Agreement with Germany.

Paragraph (2) has been added to clarify that the Agreement applies to request whether or not the criminal act or omission in question took place before or after the Agreement enters into force. Similar formulation can be found in other Agreements such as Indonesia (Article 22(2)), Japan (Article 20(2)) and Finland (Article 21(2)).

ARTICLES NOT INCLUDED

Article X (Obtaining Statement of Persons) and Article XI (Location or Identity of Persons) of the model Agreement are not included, but the assistance can be provided pursuant to Article 1(2)(a) and (c) of the Agreement.