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LEGISLATIVE COUNCIL BRIEF

Fugitive Offenders Ordinance (Chapter 503)

Mutual Legal Assistance in Criminal Matters Ordinance (Chapter 525)

FUGITIVE OFFENDERS (CZECH REPUBLIC) ORDER

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (CZECH REPUBLIC) ORDER

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (SPAIN) ORDER

INTRODUCTION

At the meeting of the Executive Council on 22 October 2013, the Council ADVISED and the Chief Executive ORDERED that –

- _____
- (a) the Fugitive Offenders (Czech Republic) Order, at **Annex A**, should be made under section 3 of the Fugitive Offenders Ordinance (FO Ordinance) to implement the bilateral surrender of fugitive offenders (SFO) agreement signed with the Czech Republic;
- _____
- (b) the Mutual Legal Assistance in Criminal Matters (Czech Republic) Order, at **Annex B**, should be made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (MLA Ordinance) to implement the bilateral mutual legal assistance in criminal matters (MLA) agreement signed with the Czech Republic; and
- _____
- (c) the Mutual Legal Assistance in Criminal Matters (Spain) Order, at **Annex C**, should be made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance to implement the bilateral MLA agreement signed with Spain.

JUSTIFICATIONS

2. Hong Kong is committed to playing an active role in international cooperation in law enforcement. Article 96 of the Basic Law provides that with the assistance or authorization of the Central People's Government, the Government of the Hong Kong Special Administrative Region may make appropriate arrangements with foreign states for reciprocal juridical assistance. In accordance with this article, Hong Kong has been building a wide network of bilateral agreements on MLA and SFO. The latest additions are the MLA agreement with Spain signed on 15 November 2012, and the MLA and SFO agreements with the Czech Republic signed on 4 March 2013¹.

3. The FO Ordinance and the MLA Ordinance respectively provide for the statutory frameworks for SFO and MLA arrangements. Specifically, the FO Ordinance provides for the surrender to certain places outside Hong Kong of persons wanted for prosecution, or for the imposition or enforcement of a sentence, and for the treatment of persons surrendered to Hong Kong. The MLA Ordinance regulates the provision to and obtaining from certain places outside Hong Kong of assistance in the investigation and prosecution of criminal offences, which includes the taking of evidence, search and seizure, production of material, transfer of persons to give evidence and confiscation of the proceeds of crime.

4. Section 3(1) of the FO Ordinance provides that the Chief Executive in Council may, in relation to any SFO arrangements, by order direct that the procedures in the FO Ordinance shall apply as between Hong Kong and the place outside Hong Kong to which the arrangements relate, subject to the limitations, restrictions, exceptions and qualifications contained in the order. The Fugitive Offenders (Czech Republic) Order to be made under this section will enable the FO Ordinance to be so applied as between Hong Kong and the Czech Republic. The Order is subject to negative vetting by the Legislative Council.

5. Section 4(1) of the MLA Ordinance provides that the Chief Executive in Council may, with the approval of the Legislative Council (i.e. positive vetting), in relation to any MLA arrangements, by order direct that the MLA Ordinance shall, subject to such modifications as may be specified in the order, apply as between Hong Kong and the place outside Hong Kong to which the arrangements relate. The Mutual Legal Assistance in Criminal Matters (Czech Republic) Order and the Mutual Legal Assistance in Criminal Matters (Spain) Order to be made under this

¹ The negotiation with Spain on an SFO Agreement is underway.

section will enable the MLA Ordinance to be so applied as between Hong Kong and Czech Republic and between Hong Kong and Spain, respectively.

6. Section 3(9) of the FO Ordinance and section 4(2) of the MLA Ordinance provide that the Chief Executive in Council shall not make an order unless the arrangements for SFO or MLA, as the case may be, to which the order relates are substantially in conformity with the provisions of the relevant Ordinances. The three Orders do so conform.

The Fugitive Offenders (Czech Republic) Order

7. This Order will enable the SFO agreement with the Czech Republic to be brought into force. It contains the text of the agreement as a schedule.

The Mutual Legal Assistance in Criminal Matters (Czech Republic) Order and the Mutual Legal Assistance in Criminal Matters (Spain) Order

8. These two Orders will enable the two MLA agreements to be brought into force. Schedule 1 to each of the two Orders contains the text of the respective agreement.

9. In applying the MLA Ordinance as between Hong Kong and the Czech Republic and between Hong Kong and Spain, certain provisions in the MLA Ordinance need to be modified. Such modifications are specified in Schedule 2 and summarized in Schedule 3 to each of the two Orders in accordance with section 4(3) of the MLA Ordinance.

Commencement

10. The above three Orders provide that the Secretary for Security will appoint the commencement dates of the Orders by notice in the Gazette. Such dates will coincide with the dates on which the relevant agreements enter into force. The three agreements provide that they shall enter into force on the thirtieth day after the day on which the Contracting Parties have notified each other in writing that their respective requirements for the entry into force of this Agreement have been complied with. In the present cases, Hong Kong will likely be the contracting party first to complete the domestic procedures for bringing the agreements into force. Therefore the dates of operation of the agreements will depend on when

the Czech Republic and Spain complete their respective domestic procedures and notify Hong Kong.

OTHER OPTIONS

11. There is no non-legislative means to implement the bilateral SFO and MLA agreements in question.

LEGISLATIVE TIMETABLE

12. The legislative timetable for the three Orders will be –

Fugitive Offenders (Czech Republic) Order

| | |
|------------------------------------|---|
| Publication in the Gazette | 1 November 2013 |
| Tabling at the Legislative Council | 6 November 2013 |
| Commencement | to be specified by the Secretary for Security |

Mutual Legal Assistance in Criminal Matters (Czech Republic) Order and Mutual Legal Assistance in Criminal Matters (Spain) Order

| | |
|---|---|
| Secretary for Security to give notice to the Legislative Council to move a motion | 30 October 2013 |
| Publication in the Gazette | 1 November 2013 |
| Commencement | to be specified by the Secretary for Security |

IMPLICATIONS OF THE ORDERS

13. The three Orders are in conformity with the Basic Law, including the provisions concerning human rights. They will not affect the current binding effect of the FO Ordinance and the MLA Ordinance. They have no civil service, sustainability, environmental, economic, financial or family implications.

PUBLIC CONSULTATION

14. The three Orders will enable the bilateral agreements to be brought into force under Hong Kong laws. The legislative exercise is relatively straight forward. As with similar exercises in the past, public consultation is considered unnecessary.

PUBLICITY

15. A spokesman will be available to answer enquiries.

BACKGROUND

16. Including the above agreements, Hong Kong has so far signed MLA agreements with 29 foreign jurisdictions and SFO agreements with 19. The earlier agreements have all undergone the same legislative procedures.

ENQUIRIES

17. Enquires on this brief should be directed to –

| | <u>Telephone No.</u> |
|--|----------------------|
| Mr Vic Yau Principal Assistant Secretary for Security | 2810 2329 |
| Mr Huggin Tang Assistant Secretary for Security | 2810 3523 |

Security Bureau
30 October 2013

Fugitive Offenders (Czech Republic) Order

(Made by the Chief Executive in Council under section 3 of the
Fugitive Offenders Ordinance (Cap. 503))

1. Commencement

This Order comes into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

2. Procedures in Ordinance to apply between Hong Kong and Czech Republic

In relation to the arrangements for the surrender of fugitive offenders the terms of which are recited in the Schedule, it is directed that the procedures in the Ordinance apply as between Hong Kong and the Czech Republic subject to the limitations, restrictions, exceptions and qualifications contained in those terms.

Agreement between the Hong Kong Special Administrative Region of the People's Republic of China and the Czech Republic on Surrender of Persons Wanted for Criminal Proceedings[#]

The Hong Kong Special Administrative Region of the People's Republic of China (hereinafter "the Hong Kong Special Administrative Region") having been duly authorised by the Central People's Government of the People's Republic of China to conclude this Agreement and the Czech Republic (hereinafter "the Contracting Parties");

Desiring to make provision for the reciprocal surrender of persons wanted for criminal proceedings;

Have agreed as follows:

Article 1

OBLIGATION TO SURRENDER

The Contracting Parties agree to surrender to each other, subject to the provisions laid down in this Agreement, any person who is found in the jurisdiction of the Requested Party and who is wanted by the Requesting Party for prosecution or for the

Note:[#] The Agreement between the Hong Kong Special Administrative Region of the People's Republic of China and the Czech Republic on Surrender of Persons Wanted for Criminal Proceedings was done in the Chinese, English and Czech languages, each text being equally authentic. The Czech text of the Agreement is available for inspection at the Security Bureau of the Government of the HKSAR.

imposition or enforcement of a sentence in respect of an offence described in Article 3.

Article 2

CENTRAL AUTHORITIES

(1) The Contracting Parties shall convey their requests for surrender and supporting documents through their Central Authorities.

(2) The Central Authority of the Hong Kong Special Administrative Region is the Secretary for Justice or his or her duly authorised officer. The Central Authority for the Czech Republic is the Ministry of Justice or a state authority authorised by the Ministry of Justice.

(3) The Central Authorities may communicate directly with each other for the purposes of this Agreement.

(4) Either Contracting Party may change its Central Authority in which case it shall notify the other of the change.

Article 3

OFFENCES

(1) Surrender shall be granted for an offence:

(a) which is punishable under the laws of both Contracting Parties by imprisonment or other form of detention for

more than one year or a more severe penalty; and

(b) for which surrender is permitted by the laws of both Contracting Parties.

(2) Each Contracting Party shall provide to the other a list of the offences for which surrender may be granted under its law. Each Contracting Party shall provide such a list no later than the date on which it notifies the other Contracting Party under Article 19(1) that its requirements for the entry into force of this Agreement have been complied with. Each Contracting Party shall promptly inform the other of any subsequent changes to its list.

(3) Where surrender is requested for the purpose of carrying out a sentence, a further requirement shall be that in the case of a period of imprisonment or detention at least six months remain to be served.

(4) For the purposes of this Article, in determining whether an offence is an offence punishable under the laws of both Contracting Parties the acts or omissions constituting the conduct alleged against the person whose surrender is sought shall be taken into account without reference to the elements of the offence prescribed by the law of the Requesting Party.

(5) For the purposes of paragraph (1) of this Article, an offence shall be an offence according to the laws of both Contracting Parties if the conduct constituting the offence was an offence against the law of the Requesting Party at the time it was committed and an offence against the law of the Requested Party at the time the request for surrender is received.

(6) Where the surrender of a person is requested for the purpose of carrying out a sentence the Requested Party may refuse to surrender him if it appears that the conviction was obtained in his absence, unless he has the opportunity to have his case retried in his presence. In these circumstances, the person shall be considered as an accused person under this Agreement.

Article 4

SURRENDER OF NATIONALS

The Czech Republic reserves the right to refuse the surrender of its nationals. The Hong Kong Special Administrative Region reserves the right to refuse the surrender of nationals of the People's Republic of China.

Article 5

DEATH PENALTY

If the offence for which surrender of a person is requested under this Agreement is punishable according to the law of the Requesting Party with the death penalty, and if in respect of such an offence the death penalty is not provided for by the law of the Requested Party or is not normally carried out, surrender may be refused unless the Requesting Party gives such assurances as the Requested Party considers sufficient that this penalty will not be imposed or, if imposed, will not be carried out.

Article 6

BASIS FOR SURRENDER

A person shall be surrendered only if the evidence be found sufficient according to the law of the Requested Party either to justify the committal for trial of the person sought if the offence of which that person is accused had been committed in the territory of the Requested Party or to prove that the person sought is the person convicted by the courts of the Requesting Party.

Article 7

REFUSAL OR POSTPONEMENT OF SURRENDER

- (1) A person shall not be surrendered if the Requested Party has substantial grounds for believing:
 - (a) that the offence of which that person is accused or was convicted is an offence of a political character;
 - (b) that the request for surrender (though purporting to be made on account of an offence for which surrender may be granted) is in fact made for the purpose of prosecution or punishment on account of race, religion, nationality, sex or political opinions; or
 - (c) that the person might, if returned, be prejudiced at that person's trial or punished, detained or restricted in his personal liberty by reason of race, religion, nationality, sex or political opinions.

(2) Where a person has been finally acquitted, convicted or pardoned, or a prosecution is barred or his conviction has been set aside under the law of the Requesting or Requested Party for any offence set out in the request, he shall not be surrendered for that offence.

(3) Surrender may be refused if the Requested Party considers that:

- (a) the offence is, having regard to all the circumstances, not sufficiently serious to warrant the surrender;
- (b) by reason of the passage of time since the person is alleged to have committed the offence or to have become unlawfully at large, as the case may be, it would be unjust or oppressive to surrender him having regard to all the circumstances;
- (c) the offence for which surrender is sought was committed within the jurisdiction of its courts;
- (d) the surrender might place that Party in breach of its obligations under international treaties or agreements; or
- (e) in the circumstances of the case, the surrender would be incompatible with humanitarian considerations in view of the age, health or other personal circumstances of the person sought.

(4) If the person sought is being proceeded against or is under punishment in the Requested Party for any offence other than that for which surrender is requested, surrender may be granted or

deferred until the conclusion of the proceedings and the execution of any punishment imposed.

Article 8

THE REQUEST AND SUPPORTING DOCUMENTS

(1) A request for surrender shall be in writing and shall be accompanied by:

- (a) as accurate a description as possible of the person sought, together with any other information which would help to establish that person's identity, nationality and location;
- (b) a description of each offence for which surrender is sought, and a description of the acts and omissions which are alleged against the person in respect of each offence together with the time and place they occurred; and
- (c) the text of the legal provisions, if any, creating the offence, and a statement of the punishment which can be imposed therefor and any time limit on the institution of proceedings, or on the execution of any punishment for that offence.

(2) If the request relates to an accused person it shall also be accompanied by a copy of the warrant of arrest issued by a court or other judicial authority of the Requesting Party and by such evidence as, according to the law of the Requested Party, would justify the committal of the person for trial if the offence had been

committed within the jurisdiction of the Requested Party.

(3) If the request relates to a person already convicted or sentenced, it shall also be accompanied by:

- (a) a copy of the certificate of the conviction or sentence, and any relevant judgment; and
- (b) if the person was convicted but not sentenced, a statement to that effect by the appropriate court and a copy of the warrant of arrest; or
- (c) if the person was sentenced, a statement indicating that the sentence is enforceable and how much of the sentence has still to be served.

Article 9

AUTHENTICATION

Documents supporting a request for surrender shall be admitted in evidence as proof of the facts contained therein if duly authenticated. Documents are duly authenticated if they appear to be:

- (a) signed or certified by a judge, magistrate or an official of the Requesting Party; and
- (b) sealed with the official seal of a competent authority of the Requesting Party.

Article 10

LANGUAGE OF DOCUMENTATION

- (1) All documents submitted in accordance with this Agreement to the Hong Kong Special Administrative Region shall be in, or translated into, Chinese or English.
- (2) All documents submitted in accordance with this Agreement to the Czech Republic shall be in, or translated into, Czech or English.
- (3) Any authenticated translation of documents submitted in support of a request for surrender provided by the Requesting Party shall be admitted for all purposes in proceedings for surrender.

Article 11

ADDITIONAL INFORMATION

- (1) If the information communicated by the Requesting Party is found to be insufficient to allow the Requested Party to make a decision in pursuance of this Agreement, the latter Party shall request the necessary supplementary information. The Requested Party may fix a time limit for receipt of this information and may extend the time limit as necessary.
- (2) If the person whose surrender is sought is under arrest and the additional information furnished is not sufficient in accordance with this Agreement or is not received within the time specified, the person may be discharged. Such discharge shall not preclude the Requesting Party from making a fresh request for the

surrender of the person.

Article 12

PROVISIONAL ARREST

(1) In urgent cases the person sought may, at the discretion of the Requested Party and in accordance with its law, be provisionally arrested on the application of the Requesting Party. The Requested Party shall promptly inform the Requesting Party of its decision on provisional arrest.

(2) The application for provisional arrest shall contain an indication of intention to request the surrender of the person sought, a copy of a warrant of arrest or of a judgment of conviction against that person or a statement of their existence, information concerning identity, nationality and probable location, a description of the person, a brief description of the offence and the facts of the case and a statement of the sentence that can be or has been imposed for the offence and, where applicable, how much of that sentence remains to be served.

(3) An application for provisional arrest may be transmitted by any means affording a record in writing through the Central Authorities or through the International Criminal Police Organisation (Interpol).

(4) The provisional arrest of the person sought shall be terminated upon the expiration of sixty days from the date of arrest if the request for surrender and supporting documents have not been received. The release of a person pursuant to this paragraph shall not prevent the institution or continuation of surrender proceedings if the request and the supporting

documents are received subsequently.

Article 13

CONCURRENT REQUESTS

If the surrender of a person is requested concurrently by one of the Contracting Parties and a State with whom the Hong Kong Special Administrative Region or the Czech Republic, whichever is being requested, has treaties, agreements or arrangements for the surrender of accused and convicted persons, the Requested Party shall make its decision having regard to all the circumstances including the provisions in this regard in any treaties or agreements in force between the Requested Party and the Requesting Parties, the relative seriousness and place of commission of the offences, the respective dates of the requests, the nationality and ordinary place of residence of the person sought and the possibility of subsequent surrender to another state, and furnish the other Contracting Party with information justifying its decision.

Article 14

REPRESENTATION AND COSTS

(1) The Requested Party shall make all necessary arrangements for and meet the costs of any proceedings arising out of a request for surrender and shall otherwise represent the interests of the Requesting Party.

(2) If it becomes apparent that exceptional expenses may be incurred as a result of a request for surrender the Contracting Parties shall consult with a view to deciding how these expenses

will be met.

(3) The Requested Party shall bear the expenses arising out of the arrest and detention of the person whose surrender is sought until that person is surrendered. The Requesting Party shall bear all subsequent expenses.

Article 15

ARRANGEMENTS FOR SURRENDER

(1) The Requested Party shall, as soon as a decision on the request for surrender has been made, communicate that decision to the Requesting Party.

(2) When a person is to be surrendered, that person shall be sent by the authorities of the Requested Party to such convenient place of departure within that Party's jurisdiction as the Requesting Party shall indicate.

(3) Subject to the provisions of paragraph (4) of this Article, the Requesting Party shall remove the person within the period specified by the Requested Party, which period shall be no less than 14 days from the date of communication of the decision to the Requesting Party according to paragraph (1), unless both Contracting Parties agree otherwise, and if the person is not removed within that period the Requested Party may refuse to surrender that person for the same offence.

(4) If unforeseen circumstances prevent the Contracting Parties from surrendering or taking over a person the Parties shall inform each other. In that case, the Contracting Parties shall agree a new

date for surrender and the provisions of paragraph (3) of this Article shall apply.

Article 16

SURRENDER OF PROPERTY

(1) To the extent permitted under the law of the Requested Party, when a request for surrender of a person is granted, the Requested Party:

- (a) shall hand over to the Requesting Party all articles, including sums of money,
 - (i) which may serve as proof of the offence; or
 - (ii) which have been acquired by the person sought as a result of the offence and are in that person's possession or are discovered subsequently;
- (b) may, if the articles in question are liable to seizure or confiscation within the jurisdiction of the Requested Party in connection with pending proceedings, temporarily retain them or hand them over on condition they are returned.

(2) The provisions of paragraph (1) shall not prejudice the rights of the Requested Party or of any person other than the person sought. When such rights exist the articles shall on request be returned to the Requested Party without charge as soon as practicable after the end of the proceedings.

(3) The articles in question shall, if the Requesting Party so requests, be surrendered to that Party even if the surrender cannot be carried out due to the death or escape of the person sought.

Article 17

SPECIALTY AND RESURRENDER

(1) A person who has been surrendered shall not be proceeded against, sentenced, detained or subjected to any other restriction of personal liberty by the Requesting Party for any offence committed prior to his surrender other than:

- (a) the offence or offences in respect of which his surrender was granted;
- (b) an offence, however described, based on substantially the same facts in respect of which his surrender was granted, provided such offence is one for which he could be surrendered under this Agreement, and provided further such offence is punishable by a penalty no more severe than the penalty for the offence for which he was surrendered;
- (c) any other offence for which surrender may be granted under this Agreement and in respect of which the Requested Party is asked for, and gives, consent to the person being dealt with,

unless he has first had an opportunity to exercise his right to leave the Contracting Party to which he has been surrendered and

he has not done so within forty days or has voluntarily returned to it having left it.

(2) A person who has been surrendered shall not be re-surrendered outside the jurisdiction of the Requesting Party for an offence committed prior to his surrender unless:

(a) the Requested Party consents to such re-surrender; or

(b) he has first had an opportunity to exercise his right to leave the Contracting Party to which he has been surrendered and has not done so within forty days or has voluntarily returned to it having left it.

(3) A Contracting Party whose consent is requested under paragraphs (1)(c) or (2)(a) of this Article may require the submission of any document or statement referred to in Article 8, and any statement made by the surrendered person on the matter.

Article 18

TRANSIT

To the extent permitted by its law, transit through a Contracting Party may be granted on a request in writing. The Contracting Party through which transit will occur may request the information referred to in paragraph (2) of Article 12.

Article 19

ENTRY INTO FORCE AND TERMINATION

(1) This Agreement shall enter into force thirty days after the date on which the Contracting Parties have notified each other in writing that their respective requirements for the entry into force of this Agreement have been complied with.

(2) The provisions of this Agreement shall apply to requests made after its entry into force regardless of the date of the commission of the offence or offences set out in the request.

(3) Either of the Contracting Parties may terminate this Agreement at any time by giving notice to the other Contracting Party. The Agreement shall cease to have effect six months after the receipt of notice to terminate.

In witness whereof the undersigned, being duly authorised thereto, have signed this Agreement.

Done at Hong Kong, this Fourth day of March, Two thousand and Thirteen, in two originals, in the Chinese, English and Czech languages, each text being equally authentic. In case of divergence of interpretation the English text shall prevail.

Clerk to the Executive Council

COUNCIL CHAMBER

2013

Explanatory Note

This Order applies the procedures for the surrender of fugitive offenders set out in the Fugitive Offenders Ordinance (Cap. 503) as between Hong Kong and the Czech Republic. The Order is made in consequence of the arrangements for the surrender of fugitive offenders entered into by the Hong Kong Special Administrative Region and the Czech Republic and signed in Hong Kong on 4 March 2013. The terms of those arrangements are recited in the Schedule to the Order. Those procedures are subject to the limitations, restrictions, exceptions and qualifications contained in the terms so recited.

**Mutual Legal Assistance in Criminal Matters
(Czech Republic) Order**

(Made by the Chief Executive in Council under section 4 of the
Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)
with the approval of the Legislative Council)

1. Commencement

This Order comes into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

2. Ordinance applies between Hong Kong and Czech Republic

- (1) In relation to the arrangements for mutual legal assistance a copy of which is annexed at Schedule 1, it is directed that the Ordinance, subject to the modifications specified in Schedule 2, applies as between Hong Kong and the Czech Republic.
- (2) The modifications referred to in subsection (1) are summarized in Schedule 3.

Agreement between the Hong Kong Special Administrative Region of the People's Republic of China and the Czech Republic on Mutual Legal Assistance in Criminal Matters[#]

The Hong Kong Special Administrative Region of the People's Republic of China (hereinafter "the Hong Kong Special Administrative Region") having been duly authorised by the Central People's Government of the People's Republic of China to conclude this Agreement and the Czech Republic (hereinafter "the Contracting Parties");

Desiring to improve the effectiveness of law enforcement of the Contracting Parties in criminal matters;

Have agreed as follows:

Article 1

SCOPE OF ASSISTANCE

(1) The Contracting Parties shall provide, in accordance with the provisions of this Agreement, mutual assistance in criminal matters, in particular assistance in the detection and prosecution of criminal offences, including their investigation, and in the confiscation of criminal proceeds.

Note:[#] The Agreement between the Hong Kong Special Administrative Region of the People's Republic of China and the Czech Republic on Mutual Legal Assistance in Criminal Matters was done in the Chinese, English and Czech languages, each text being equally authentic. The Czech text of the Agreement is available for inspection at the Security Bureau of the Government of the HKSAR.

- (2) Assistance shall include:
- (a) identifying and locating persons;
 - (b) serving documents;
 - (c) obtaining statements and evidence from persons;
 - (d) executing requests for search and seizure;
 - (e) facilitating the personal appearance of persons to provide assistance;
 - (f) effecting the temporary transfer of prisoners to provide assistance;
 - (g) providing information, documents and records (including judicial and any other official records);
 - (h) tracing, restraining and confiscating the proceeds and instrumentalities of criminal activities;
 - (i) delivery of articles and lending of exhibits; and
 - (j) any other assistance consistent with the laws of the Requested Party.
- (3) Proceedings relating to criminal matters do not include proceedings related to the regulations involving the imposition, calculation or collection of taxes.

(4) This Agreement is intended solely for mutual assistance between the Contracting Parties. The provisions of this Agreement shall not give rise to any right on the part of any private person to obtain, suppress or exclude any evidence or to impede the execution of a request.

Article 2

CENTRAL AUTHORITIES

(1) The Contracting Parties shall seek and provide assistance through their Central Authorities.

(2) The Central Authority of the Hong Kong Special Administrative Region is the Secretary for Justice or his or her duly authorised officer. The Central Authority for the Czech Republic is the Ministry of Justice or a state authority authorised by the Ministry of Justice.

(3) The Central Authorities may communicate directly with each other for the purposes of this Agreement.

(4) Either Contracting Party may change its Central Authority in which case it shall notify the other of the change.

Article 3

LANGUAGE OF REQUESTS

A request and all documents submitted in support of a request shall be translated, if so required by the Requested Party, into an official language of the Requested Party.

Article 4

REFUSAL OR POSTPONEMENT OF ASSISTANCE

- (1) The Requested Party shall refuse assistance if:
 - (a) granting the assistance would impair the sovereignty, security or public order of, in the case of the Hong Kong Special Administrative Region, the People's Republic of China, or of the Czech Republic;
 - (b) the request for assistance relates to an offence of a political character;
 - (c) the request for assistance relates to an offence only under military law;
 - (d) there are substantial grounds for believing that the request for assistance will result in a person being prejudiced on account of his race, religion, nationality, sex or political opinions;
 - (e) there are substantial grounds for believing that the request for assistance will result in a person being subjected to torture or other cruel or inhuman or degrading treatment or punishment;
 - (f) the request for assistance relates to the prosecution of a person for an offence in respect of which the person has been convicted, acquitted or pardoned in the Requested Party or for which the person could no longer be prosecuted by reason of lapse of time if the offence had

been committed within the jurisdiction of the Requested Party;

- (g) it is of the opinion that the granting of the request would seriously impair its essential interests;
- (h) the Requesting Party cannot comply with any conditions required by the Requested Party in relation to confidentiality or limitation as to the use of material provided; or
- (i) the acts or omissions alleged to constitute the offence would not, if they had taken place within the jurisdiction of the Requested Party, have constituted an offence.

(2) For the purpose of paragraph (1)(g) the Requested Party may include in its consideration of essential interests whether the provision of assistance could prejudice the safety of any person or impose an excessive burden on the resources of the Requested Party.

(3) The Requested Party may refuse assistance if the request relates to an offence which carries the death penalty in the Requesting Party but in respect of which the death penalty is either not provided for in the Requested Party or not normally carried out unless the Requesting Party gives such assurances as the Requested Party considers sufficient that the death penalty will not be imposed or, if imposed, not carried out.

(4) The Requested Party may postpone assistance if execution of the request would interfere with any proceedings (including any investigation) in a criminal matter in the Requested Party.

(5) Before denying or postponing assistance pursuant to this Article, the Requested Party, through its Central Authority:

(a) shall promptly inform the Requesting Party of the reason for considering denial or postponement; and

(b) shall consult with the Requesting Party to determine whether assistance may be given subject to such terms and conditions as the Requested Party deems necessary.

(6) If the Requesting Party accepts assistance subject to the terms and conditions referred to in paragraph (5)(b), it shall comply with those terms and conditions.

Article 5

REQUESTS

(1) Requests shall be made in writing. A request sent by fax shall be confirmed by mailing the original immediately.

(2) Requests for assistance shall include:

(a) the name of the authority concerned with the criminal matter to which the request relates;

(b) a description of the purpose and the nature of the assistance requested;

(c) a description of every offence to which the request relates, with a summary of the facts and text of the

relevant law;

- (d) the identity of the person, if known, by whom the offence is alleged or suspected to have been committed;
- (e) a statement whether proceedings have been instituted and, if they have, a description of them;
- (f) any requirements for confidentiality;
- (g) details of any particular procedure the Requesting Party wishes to be followed; and
- (h) details of any period within which the assistance is required, with the reasons.

Article 6

EXECUTION OF REQUESTS

- (1) The Central Authority of the Requested Party shall promptly arrange for the execution of the request through its competent authorities.
- (2) A request shall be executed in accordance with the law of the Requested Party and, to the extent not prohibited by the law of the Requested Party, in accordance with the directions stated in the request so far as practicable.
- (3) The Requested Party shall promptly inform the Requesting Party of any circumstances which are likely to cause a significant

delay in responding to the request.

(4) The Requested Party shall promptly inform the Requesting Party of a decision not to comply in whole or in part with a request for assistance and the reason for that decision.

Article 7

REPRESENTATION AND EXPENSES

(1) The Requested Party shall make all necessary arrangements for the representation of the Requesting Party in any proceeding arising out of a request for assistance and shall otherwise represent the interests of the Requesting Party.

(2) The Requested Party shall bear all the expenses incurred within its boundaries relating to the execution of the request except:

- (a) fees of counsel retained at the request of the Requesting Party;
- (b) fees of persons appointed to manage property;
- (c) fees of experts;
- (d) expenses of translation and extensive reproduction of documents; or
- (e) travel expenses and allowances of persons who travel or are transferred under Article 15 or 16 at the request of

the Requesting Party, together with the cost of any escorting officers.

(3) If during the execution of the request it becomes apparent that expenses of an extraordinary nature are required to fulfil the request, the Contracting Parties shall consult to determine the terms and conditions under which the execution of the request may continue.

Article 8

LIMITATIONS ON USE OF INFORMATION

(1) The Contracting Parties shall use their best endeavours to keep confidential a request and its contents, and the information and material supplied in response to a request, except in accordance with the purpose of the request or as agreed between the Contracting Parties.

(2) The Requested Party may, after consultation with the Requesting Party, require that information or evidence furnished by the Requested Party be disclosed or used only subject to such terms and conditions as it may specify.

(3) Where information or evidence is furnished by the Requested Party, the Requesting Party shall not use it for purposes other than those stated in the request except:

- (a) for use in other proceedings relating to the same criminal matter;

- (b) for the prevention of serious crime or of a serious threat to public order; or
- (c) with the prior consent of the Requested Party.

Article 9

OBTAINING OF EVIDENCE, DOCUMENTS, ARTICLES OR RECORDS

- (1) The Requested Party shall execute in the manner provided for by its law any request relating to a criminal matter and addressed to it by the Requesting Party for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents.
- (2) For the purposes of requests under this Article the Requesting Party shall specify the questions to be put to the witnesses or the subject matter about which they are to be examined.
- (3) Where, pursuant to a request for assistance, a person is to give evidence for the purpose of proceedings in the Requesting Party, the parties to the relevant proceedings in the Requesting Party, their legal representatives or representatives of the Requesting Party may, subject to the laws of the Requested Party, appear and question the person giving that evidence.
- (4) A person who is required to give evidence in the Requested Party pursuant to a request for assistance may decline to give evidence where either:

- (a) the law of the Requested Party would permit that witness to decline to give evidence in similar circumstances in proceedings which originated in the Requested Party; or
 - (b) the law of the Requesting Party would permit him to decline to give evidence in such proceedings in the Requesting Party.
- (5) If any person claims that there is a right to decline to give evidence under the law of the Requesting Party, the Requested Party shall with respect thereto rely on a certificate of the Central Authority of the Requesting Party.

Article 10

OBTAINING STATEMENTS OF PERSONS

Where a request is made to obtain the statement of a person for the purpose of an investigation or proceeding in relation to a criminal matter in the Requesting Party, the Requested Party shall endeavour to obtain such statement.

Article 11

LOCATION OR IDENTITY OF PERSONS

The Requested Party shall, if requested, endeavour to ascertain the location or identity of any person specified in the request.

Article 12

SERVICE OF DOCUMENTS

- (1) The Requested Party shall endeavour to serve any document transmitted to it for the purpose of service.
- (2) The Requesting Party shall transmit a request for the service of a document pertaining to a response or appearance in the Requesting Party within a reasonable time before the scheduled response or appearance.
- (3) A request for the service of a document pertaining to an appearance in the Requesting Party shall include such notice as the Central Authority of the Requesting Party is reasonably able to provide to the Requested Party of outstanding judicial orders in criminal matters against the person to be served.
- (4) The Requested Party shall, subject to its law, return a proof of service in the manner required by the Requesting Party.
- (5) A person who fails to comply with any process served on him under this Article shall not thereby be liable to any penalty or coercive measure pursuant to the law of the Requesting Party or Requested Party.

Article 13

PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS

- (1) Subject to its law the Requested Party shall provide copies of publicly available documents.

(2) The Requested Party may provide copies of any document, record or information in the possession of a government department or official authority, but not publicly available, to the same extent and under the same conditions as such document, record or information would be available to its own law enforcement and judicial authorities.

Article 14

CERTIFICATION AND AUTHENTICATION

Documents, transcripts, records, statements or other material which are to be transmitted to the Requesting Party shall only be certified or authenticated if the Requesting Party so requests. Neither Contracting Party shall require anything to be certified or authenticated by a consular or diplomatic officer.

Article 15

TRANSFER OF PERSONS IN CUSTODY

(1) A person in custody in the Requested Party whose presence is requested in the Requesting Party for the purposes of providing assistance pursuant to this Agreement shall if the Requested Party consents be transferred from the Requested Party to the Requesting Party for that purpose, provided the person consents and the Requesting Party has guaranteed the maintenance in custody of the person and his subsequent return to the Requested Party.

(2) Where the grounds for keeping in custody a person transferred pursuant to this Article no longer exist, the Requested Party shall so advise the Requesting Party which shall ensure the

person's release from custody.

Article 16

TRANSFER OF OTHER PERSONS

(1) The Requesting Party may request the assistance of the Requested Party in inviting a person to appear in the Requesting Party to provide assistance pursuant to this Agreement.

(2) Upon receipt of such a request the Requested Party shall invite the person to travel to the Requesting Party and inform the Requesting Party of the person's response.

(3) The Requesting Party shall indicate the extent to which the expenses will be paid. A person who agrees to appear may ask that the Requesting Party advance money to cover these expenses.

Article 17

SAFE CONDUCT

(1) A person who consents to provide assistance pursuant to Article 15 or 16:

(a) shall not be prosecuted, detained, or restricted in his personal liberty in the Requesting Party for any criminal offence which preceded his departure from the Requested Party, except as provided in Article 15;

(b) shall not be subject to civil suit to which the person

could not be subject if he were not in the Requesting Party.

(2) Paragraph (1) shall not apply if the person, not being a person in custody transferred under Article 15, and being free to leave, has not left the Requesting Party within a period of 15 days after being notified that his presence is no longer required, or having left the Requesting Party, has returned.

(3) A person who consents to give evidence under Article 15 or 16 shall not be subject to prosecution based on his testimony, except for perjury.

(4) A person who consents to provide assistance pursuant to Article 15 or 16 shall not be required to give evidence in any proceedings other than the proceedings to which the request relates.

(5) A person who does not consent to give evidence pursuant to Article 15 or 16 shall not by reason thereof be liable to any penalty or coercive measure by the courts of the Requesting Party or Requested Party.

Article 18

SEARCH AND SEIZURE

(1) The Requested Party shall, insofar as its law permits, carry out requests for search, seizure and delivery of any material to the Requesting Party which is relevant to a proceeding or investigation in relation to a criminal matter.

(2) The Requested Party shall provide such information as may be required by the Requesting Party concerning the result of any search, the place of seizure, the circumstances of seizure, and the subsequent custody of the property seized.

(3) The Requesting Party shall observe any conditions imposed by the Requested Party in relation to any seized property which is delivered to the Requesting Party. With the permission of the Requested Party, the Requesting Party may retain the property for disposal in accordance with its law.

Article 19

PROCEEDS OF CRIME

(1) The Requested Party shall, upon request, endeavour to ascertain whether any proceeds of crime committed against the law of the Requesting Party are located within its jurisdiction and shall notify the Requesting Party of the result of its inquiries. In making the request, the Requesting Party shall notify the Requested Party of the basis of its belief that such proceeds may be located in its jurisdiction.

(2) Where pursuant to paragraph (1) suspected proceeds of crime are found the Requested Party shall take such measures as are permitted by its law to prevent any dealing in, transfer or disposal of, those suspected proceeds of crime, pending a final determination in respect of those proceeds by a court.

(3) Where a request is made for assistance in securing the confiscation of proceeds the request shall be executed according to the law of the Requested Party. This may include enforcing an order made by a court in the Requesting Party and initiating or

assisting in proceedings in relation to the proceeds to which the request relates.

(4) The proceeds confiscated pursuant to this Agreement shall be retained by the Requested Party unless otherwise agreed upon between the Contracting Parties.

Article 20

SPONTANEOUS INFORMATION

(1) Without prejudice to their own investigations or proceedings, the competent authorities of a Contracting Party may, without prior request, forward to the competent authorities of the other Contracting Party information obtained within the framework of their own investigations, when they consider that the disclosure of such information might assist the Receiving Party in initiating or carrying out investigations or proceedings, or might lead to a request by that Contracting Party under this Agreement.

(2) The Providing Party may, pursuant to its domestic law, impose conditions on the use of such information by the Receiving Party. In such a case, the Providing Party shall give prior notice to the Receiving Party of the nature of the information to be provided and of the conditions to be imposed.

(3) The Receiving Party shall be bound by those conditions if it agrees to transmission of the information under such conditions.

Article 21

SETTLEMENT OF DISPUTES

Any dispute arising out of the interpretation, application or implementation of this Agreement shall be resolved through diplomatic channels if the Central Authorities are themselves unable to reach agreement.

Article 22

COMPATIBILITY WITH OTHER AGREEMENTS

This Agreement is not intended to prevent the Contracting Parties from seeking and granting assistance to each other through the provisions of other international treaties, agreements, arrangements or domestic laws.

Article 23

ENTRY INTO FORCE AND TERMINATION

(1) This Agreement shall enter into force on the thirtieth day after the day on which the Contracting Parties have notified each other in writing that their respective requirements for the entry into force of this Agreement have been complied with.

(2) Either Contracting Party may terminate this Agreement at any time by giving notice to the other. In that event the Agreement shall cease to have effect six months after the date of receipt of the notice.

In witness whereof the undersigned, being duly authorised thereto, have signed this Agreement.

Done at Hong Kong, this Fourth day of March, Two thousand and Thirteen, in two originals, in the Chinese, English and Czech languages, each text being equally authentic. In case of divergence of interpretation the English text shall prevail.

Schedule 2

[s. 2 & Sch. 3]

Modifications to the Ordinance

1. Section 5(1)(d) of the Ordinance is modified to read as follows—

“(d) there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of the person’s race, religion, nationality, sex* or political opinions;”.
2. Section 5(1) of the Ordinance is modified by adding—

“(da) there are substantial grounds for believing that the request will result in a person being subjected to torture or other cruel or inhuman or degrading treatment or punishment;*”.
3. Section 5(1)(e) of the Ordinance is modified to read as follows—

“(e) the request relates to the prosecution of a person for an external offence in a case where the person—^{*}

 - (i)* has been convicted, acquitted or pardoned by a competent court or other authority in the place,^{**} or Hong Kong in respect of that offence or of another external offence constituted by the same act or omission as that offence;* or
 - (ii)* has undergone the punishment provided by the law of that place or Hong Kong^{*,**} in respect of that offence or of another external offence constituted by the same act or omission as that offence;”.

4. Section 5(1) of the Ordinance is modified by adding—
- “(ea) the request relates to the prosecution of a person in respect of an act or omission that, if it had occurred in Hong Kong, could no longer be prosecuted in Hong Kong by reason of lapse of time;*”.
5. Section 17(3)(b) of the Ordinance is modified to read as follows—
- “(b) the person, being free to leave Hong Kong, has not left Hong Kong within a period of 15 days after being notified that the person’s presence is no longer required for any of the following purposes* ~~has had an opportunity of leaving Hong Kong and has remained in Hong Kong otherwise than for**—~~
- (i) the purpose to which the request relates; ~~or**~~
 - (ii) the purpose of giving assistance in relation to a criminal matter in Hong Kong certified in writing by the Secretary for Justice to be a criminal matter in relation to which it is desirable that the person give assistance.”.

* The text underlined is added. (The underlining is for ease of identifying the modification).

** The text crossed out is deleted. (The crossing out is for ease of identifying the modification).

Summary of Modifications to the Ordinance

1. Sections 1, 2, 3 and 4 of Schedule 2 specify modifications to section 5(1) of the Ordinance so that a request by a place outside Hong Kong for assistance under the Ordinance must also be refused if, in the opinion of the Secretary for Justice—
 - (a) there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of the person's sex;
 - (b) there are substantial grounds for believing that the request will result in a person being subjected to torture or other cruel or inhuman or degrading treatment or punishment;
 - (c) the request relates to the prosecution of a person for an external offence in a case where the person has been convicted, acquitted or pardoned by a competent court or other authority in Hong Kong, or has undergone the punishment provided by the law of Hong Kong, in respect of that offence or of another external offence constituted by the same act or omission as that offence;
 - (d) the request relates to the prosecution of a person in respect of an act or omission that, if it had occurred in Hong Kong, could no longer be prosecuted in Hong Kong by reason of lapse of time.

2. Section 5 of Schedule 2 specifies modifications to section 17(3)(b) of the Ordinance to more precisely delineate the circumstances under which a person who is in Hong Kong to

give assistance in relation to a criminal matter, pursuant to a request made by the Secretary for Justice, ceases to have immunities under section 17(1) of the Ordinance.

Clerk to the Executive Council

COUNCIL CHAMBER

2013

Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (***the Ordinance***) applies as between Hong Kong and the Czech Republic. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Hong Kong Special Administrative Region of the People's Republic of China and the Czech Republic and signed in Hong Kong on 4 March 2013. A copy of those arrangements is annexed at Schedule 1 to the Order. The Ordinance is to apply subject to the modifications specified in Schedule 2 to the Order. The modifications are summarized in Schedule 3 to the Order.

Mutual Legal Assistance in Criminal Matters (Spain) Order

(Made by the Chief Executive in Council under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) with the approval of the Legislative Council)

1. Commencement

This Order comes into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

2. Ordinance applies between Hong Kong and Spain

- (1) In relation to the arrangements for mutual legal assistance a copy of which is annexed at Schedule 1, it is directed that the Ordinance, subject to the modifications specified in Schedule 2, applies as between Hong Kong and Spain.
- (2) The modifications referred to in subsection (1) are summarized in Schedule 3.

**Agreement between the Hong Kong Special Administrative
Region of the People's Republic of China and Spain
Concerning Mutual Legal Assistance in Criminal Matters[#]**

The Government of the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong Special Administrative Region") having been duly authorised by the Central People's Government of the People's Republic of China to conclude this Agreement with the Government of Spain,

The Hong Kong Special Administrative Region and Spain, hereinafter referred to as the Parties,

Desiring to improve the effectiveness of law enforcement of both Parties in the investigation, prosecution and prevention of crime and the confiscation of criminal proceeds,

Have agreed as follows:

Note: [#] The Agreement between the Hong Kong Special Administrative Region of the People's Republic of China and Spain Concerning Mutual Legal Assistance in Criminal Matters was done in the Chinese, English and Spanish languages, each text being equally authentic. The Spanish text of the Agreement is available for inspection at the Security Bureau of the Government of the HKSAR.

I. GENERAL PROVISIONS

ARTICLE 1

SCOPE OF ASSISTANCE

(1) The Parties shall provide, in accordance with the provisions of this Agreement, mutual legal assistance in the investigation and prosecution of criminal offences and in proceedings related to criminal matters.

(2) Assistance shall include:

- (a) identifying and locating persons;
- (b) serving of documents;
- (c) the obtaining of evidence including documents, articles and records;
- (d) executing requests for search and seizure;
- (e) facilitating the appearance of persons to provide assistance;
- (f) effecting the temporary transfer of persons in custody to provide assistance;
- (g) tracing, restraining, forfeiting and confiscating the proceeds and instrumentalities of criminal activities;

- (h) delivery of property, including the restitution of property and lending of exhibits;
- (i) exchange of information relating to criminal acts and institution of criminal proceedings in the Requested Party; and
- (j) other assistance consistent with the objects of this Agreement which is not inconsistent with the law of the Requested Party.

(3) Assistance under this Agreement may be granted in connection with offences against a law related to taxation, customs duties, foreign exchange control or other revenue matters.

(4) This Agreement is intended solely for mutual assistance between the Parties. The provisions of the Agreement shall not give rise to any right on the part of any private person to obtain, suppress or exclude any evidence or to impede the execution of a request.

ARTICLE 2

CENTRAL AUTHORITY

(1) Each Party shall designate a Central Authority which shall be responsible for processing requests for mutual legal assistance in accordance with the provisions of this Agreement.

(2) The Central Authority for the Hong Kong Special Administrative Region is the Secretary for Justice or his duly

authorised officer. The Central Authority for Spain is the Ministry of Justice.

(3) Either Party may change its Central Authority in which case it shall notify the other Party of the change.

(4) Requests made under this Agreement shall be transmitted by the Central Authority of the Requesting Party to the Central Authority of the Requested Party. For the purposes of the Agreement, the Central Authorities may communicate directly with each other.

ARTICLE 3

GROUND FOR REFUSAL

- (1) The Requested Party shall refuse assistance if:
- (a) the request for assistance impairs the sovereignty, security or public order of the People's Republic of China in the case of the Hong Kong Special Administrative Region, or, of Spain;
 - (b) the request for assistance relates to an offence of a political character;
 - (c) the request for assistance relates to an offence considered to be exclusively military in the Requested Party;
 - (d) there are substantial grounds to believe that the request for assistance has been made to investigate or prosecute

a person for reasons of his race, religion, nationality, ethnic origin, political opinion or sex, or that the request is being made to subject that person to any form of discrimination;

- (e) the request for assistance relates to the prosecution of a person for an offence in respect of which the person has been convicted, acquitted or pardoned in the Requested Party, or for which the person could no longer be prosecuted by reason of lapse of time if the offence had been committed within the jurisdiction of the Requested Party;
- (f) it is of the opinion that the granting of the request would seriously impair its essential interests; or
- (g) in the case of requests involving compulsory measures, the acts or omissions alleged to constitute the offence would not have constituted an offence under the law of the Requested Party if they had occurred within the jurisdiction of that Party.

(2) For the purpose of paragraph (1)(b) of this Article, “an offence of a political character” does not include terrorist offences or any other offence which the Requested Party considers excluded from that category by any international agreement that applies to that Party.

(3) The Requested Party shall also refuse assistance if the request relates to an offence which carries the death penalty in the Requesting Party but in respect of which the death penalty is either not provided for in the Requested Party or not normally carried out unless the Requesting Party gives such assurances as

the Requested Party considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out.

(4) The Requested Party may refuse assistance if the request relates to an offence which is punishable according to the law of the Requesting Party with life imprisonment or carries a prison sentence of undetermined duration, unless the Requesting Party gives such assurance as the Requested Party considers sufficient that these penalties will not be imposed, or if imposed, will not be carried out.

(5) The Requested Party may refuse assistance if the Requesting Party cannot comply with any conditions in relation to confidentiality or limitation as to the use of material provided.

(6) The Requested Party may postpone assistance if execution of the request would interfere with an ongoing investigation or prosecution in the Requested Party.

(7) Before denying or postponing assistance pursuant to this Article, the Requested Party, through its Central Authority—

- (a) shall promptly inform the Requesting Party of the reason for considering denial or postponement; and
- (b) shall consult with the Requesting Party to determine whether assistance may be given subject to such terms and conditions as the Requested Party deems necessary.

(8) If the Requesting Party accepts assistance subject to the terms and conditions referred to in paragraph (7)(b), it shall comply with those terms and conditions.

ARTICLE 4

FORM AND LANGUAGE OF REQUESTS

(1) Requests shall be made in writing. In urgent cases requests may be transmitted by telex, fax, electronic mail or any other means capable of affording a written record, but shall be confirmed by the original documents within 10 days thereof.

(2) Requests for assistance addressed to the Hong Kong Special Administrative Region and any supporting documents shall be accompanied by a translation into Chinese or English. Requests for assistance addressed to Spain and any supporting documents shall be accompanied by a translation into Spanish.

ARTICLE 5

CONTENT OF REQUESTS

(1) Requests for assistance shall include:

- (a) the name of the authority on behalf of which the request is made;
- (b) a description of the purpose of the request and the nature of the assistance requested;
- (c) a description of the nature of the investigation, prosecution, offence or criminal matter and whether or not proceedings have been instituted;
- (d) where proceedings have been instituted, details of the

proceedings; and

- (e) a summary of the relevant facts and laws.
- (2) If necessary, requests for assistance may include:
- (a) any requirements for confidentiality;
 - (b) details of any particular procedure the Requesting Party wishes to be followed;
 - (c) details of the period within which the request should be complied with; and
 - (d) any other information which is required to facilitate execution of the request.

ARTICLE 6

EXECUTION OF REQUESTS

- (1) The Central Authority of the Requested Party shall promptly execute the request or transmit it to its competent authority for execution.
- (2) A request shall be executed in accordance with the law of the Requested Party and, to the extent not prohibited thereby, in accordance with the directions stated in the request so far as practicable.
- (3) The Requested Party shall promptly inform the Requesting

Party of any circumstances which are likely to cause a significant delay in responding to the request.

(4) The Requested Party shall promptly inform the Requesting Party of a decision not to comply in whole or in part with a request for assistance and the reason for that decision.

(5) The Requested Party shall use its best efforts to keep confidential a request and its contents except to the extent necessary to execute it.

ARTICLE 7

EXPENSES

(1) The Requested Party shall assume all ordinary expenses of executing a request within its boundaries, except:

- (a) fees of counsel retained at the request of the Requesting Party;
- (b) fees of experts;
- (c) expenses of translation; and
- (d) travel expenses and allowances of persons who travel between the Requesting and Requested Parties.

(2) If during the execution of the request it becomes apparent that expenses of an extraordinary nature are required to fulfil the request, the Parties shall consult to determine the terms and

conditions under which the execution of the request may continue.

ARTICLE 8

CONFIDENTIALITY

(1) The Requested Party may require, after consultation with the Requesting Party, that information or evidence furnished, including documents, articles or records, be kept confidential or be disclosed or used only subject to such terms and conditions as it may specify.

(2) The Requesting Party shall not disclose or use information or evidence furnished, including documents, articles or records, for purposes other than those stated in the request without the prior consent of the Central Authority of the Requested Party.

II. FORMS OF ASSISTANCE

ARTICLE 9

OBTAINING EVIDENCE, DOCUMENTS ARTICLES AND RECORDS

(1) Where a request is made that evidence be taken for the purpose of an investigation, prosecution or proceeding in relation to a criminal matter in the jurisdiction of the Requesting Party, the Requested Party shall arrange to have such evidence taken.

(2) For the purposes of this Agreement, the giving or taking of evidence shall include the production of documents, articles and records.

(3) For the purposes of requests under this Article, the Requesting Party shall specify the questions to be put to the witnesses or the subject matter about which they are to be examined.

(4) Where evidence is to be taken, pursuant to a request for assistance under this Article, the person to whom the investigation, prosecution or proceeding in the Requesting Party relates, the person who is to give evidence and representatives of the Requesting party may, subject to the laws of the Requested Party, appear or have legal representation or both for the purpose of questioning the person giving the evidence.

(5) A person who is required to give evidence in the Requested Party pursuant to a request for assistance may decline to do so where either:

- (a) the law of the Requested Party would permit that witness to decline to give evidence in similar circumstances in proceedings which originated in the Requested Party; or
- (b) the law of the Requesting Party would permit such witness to decline to give evidence in similar proceedings in the Requesting Party.

(6) If any person claims that there is a right to decline to give evidence under the law of the Requesting Party, the Requested Party shall with respect thereto rely on a certificate issued by a

competent authority of the Requesting Party.

ARTICLE 10

OBTAINING VOLUNTARY STATEMENTS OF PERSONS

Where a request is made to obtain a voluntary statement of a person for the purpose of an investigation, prosecution or proceeding in relation to a criminal matter in the Requesting Party, the Requested Party shall endeavour to obtain such statement.

ARTICLE 11

TESTIMONY BY VIDEO CONFERENCE

Where possible and consistent with the laws of both Parties, the Parties may agree that testimony may be taken by means of video conference under specified conditions.

ARTICLE 12

SERVICE OF DOCUMENTS

(1) The Requested Party shall serve any document transmitted to it for the purpose of service.

(2) The Requesting Party shall transmit a request for the service of a document that requires a response or appearance in the Requesting Party within a reasonable time before the scheduled response or appearance.

(3) The Requested Party shall, subject to its law, return a proof of service in the manner required by the Requesting Party.

(4) A person who fails to comply with a summons to appear in the Requesting Party shall not thereby be liable to any penalty or coercive measure pursuant to the law of either Party.

ARTICLE 13

PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS

Subject to its law, at the request of the Requesting Party, the Requested Party:

- (a) shall provide copies of official documents, records and information available to the public; and
- (b) may provide copies of any document, record or information in the possession of a government department or agency, but not publicly available, to the same extent and under the same conditions as such document, record or information would be available to its own law enforcement and judicial authorities. If assistance stipulated in this sub-paragraph is refused, the Requested Party shall not be obliged to reveal its reason for refusal.

ARTICLE 14

ASSISTANCE IN THE REQUESTING PARTY

(1) The Requesting Party may request the assistance of the

Requested Party in inviting a person to provide assistance in the Requesting Party pursuant to this Agreement.

(2) Upon receipt of such a request the Requested Party shall invite the person to travel to the Requesting Party and inform the Requesting Party of the person's response.

ARTICLE 15

TEMPORARY TRANSFER OF PERSONS IN CUSTODY TO PROVIDE ASSISTANCE

(1) A person in custody in the Requested Party whose presence is requested in the Requesting Party for the purpose of providing assistance pursuant to this Agreement shall, if the Requested Party consents, be transferred from the Requested Party to the Requesting Party for that purpose, provided the person consents and the Requesting Party has guaranteed the maintenance in custody of the person and his subsequent return to the Requested Party.

(2) Where the sentence of imprisonment of a person transferred pursuant to this Article expires whilst the person is in the Requesting Party, the Requested Party shall so advise the Requesting Party which shall ensure the person's release from custody.

ARTICLE 16

IMMUNITY

(1) A person who consents to provide assistance pursuant to

Articles 14 or 15:

- (a) shall not be prosecuted, detained, or restricted in his personal liberty in the Requesting Party for any criminal offence which preceded his departure from the Requested Party, except as provided in Article 15;
- (b) shall not be subject to a civil suit to which the person could not be subject if he were not in the Requesting Party.

(2) Paragraph (1) shall not apply if the person, not being a person in custody transferred under Article 15, and being free to leave, has not left the Requesting Party within a period of 15 days after being notified that his presence is no longer required, or having left the Requesting Party, has returned.

(3) A person who consents to give evidence under Articles 14 or 15 shall not be subject to prosecution based on his testimony, except for perjury.

(4) A person who consents to provide assistance pursuant to Articles 14 or 15 shall not be required to provide assistance in any proceedings other than the proceedings to which the request relates.

(5) A person who does not consent to provide assistance pursuant to Articles 14 or 15 shall not by reason thereof be liable to any penalty or coercive measure by the courts of the Requesting Party or Requested Party.

ARTICLE 17

SEARCH AND SEIZURE

(1) The Requested Party shall, insofar as its law permits, carry out requests for search, seizure and delivery of any material to the Requesting Party which is relevant to an investigation, prosecution or proceeding in relation to a criminal matter.

(2) The Requested Party shall provide such information as may be required by the Requesting Party concerning the result of any search, the place and circumstances of seizure, and the subsequent custody of the property seized.

(3) The Requesting Party shall observe any conditions imposed by the Requested Party in relation to any seized property which is delivered to the Requesting Party.

ARTICLE 18

EXCHANGE OF INFORMATION RELATING TO CRIMINAL PROCEEDINGS

(1) Either Party may, without prior request, submit information or evidence to the other Party with a view to the institution of criminal proceedings in that Party.

(2) The Party to whom such information or evidence is submitted shall notify the other Party of any action taken and shall forward a copy of any decision made in respect thereof.

ARTICLE 19

PROCEEDS AND INSTRUMENTALITIES OF CRIME

(1) A Party may request the identification or adoption of precautionary measures regarding property, instrumentalities or proceeds of a crime that are located in the territory of the other Party.

(2) Where, pursuant to paragraph (1), suspected proceeds or instrumentalities of crime are found, the Requested Party shall take such measures as are permitted by its law to prevent any dealing in, transfer or disposal of, those suspected proceeds or instrumentalities, pending a final determination in respect of those proceeds or instrumentalities by a court of the Requesting Party.

(3) Where a request is made for assistance in securing the confiscation of proceeds or instrumentalities such request shall be executed pursuant to the laws of the Requested Party. This may include enforcing an order made by a court in the Requesting Party and initiating or assisting in proceedings in relation to the proceeds or instrumentalities to which the request relates.

(4) The Party that has custody over proceeds or instrumentalities of crime shall dispose of them in accordance with its law. Either Party may transfer all or part of such assets, or the proceeds of their sale, to the other Party, to the extent permitted by the law of the transferring Party and upon such terms as may be agreed by both Parties.

(5) For the purposes of this Agreement:

- (a) “proceeds of crime” includes—
- (i) property which represents the equivalent value of property and other benefits derived from the commission of an offence; and
 - (ii) property derived or realized directly or indirectly from the commission of an offence;
- (b) “instrumentalities of crime” includes property used or intended to be used in connection with the commission of an offence or the equivalent value of such property.

ARTICLE 20

RETURN OF DOCUMENTS, RECORDS AND ITEMS OF EVIDENCE

Upon the request of the Requested Party, the Requesting Party shall return such documents, records or items furnished to it in execution of a request as soon as possible. If agreed between the Central Authorities, such documents, records or items shall be disposed of in a mutually acceptable manner.

III. FINAL PROVISIONS

ARTICLE 21

EXEMPTION FROM AUTHENTICATION

For the purpose of application of this Agreement documents

and translations drafted or certified by the courts or a competent authority of either Party shall be admitted in proceedings without any form of authentication.

ARTICLE 22

COMPATIBILITY WITH OTHER INTERNATIONAL AGREEMENTS

Assistance and procedures set out in this Agreement shall not prevent either of the Parties from granting assistance to the other Party through other applicable international agreements or pursuant to the law of each Party.

ARTICLE 23

CONSULTATION

The Central Authorities of the Parties may consult with each other to promote the most effective use of this Agreement and agree upon such practical measures as may be necessary to facilitate the implementation of the Agreement.

ARTICLE 24

SETTLEMENT OF DISPUTES

Any dispute arising out of the interpretation, application or implementation of this Agreement shall be resolved through diplomatic channels if the Central Authorities are themselves unable to reach agreement.

ARTICLE 25

APPLICATION

This Agreement shall apply to any request presented after the date of its entry into force even if the relevant acts or omissions occurred prior to that date.

ARTICLE 26

ENTRY INTO FORCE AND TERMINATION

(1) This Agreement shall enter into force 30 days after the date on which the Parties have notified each other in writing that their respective requirements for the entry into force of the Agreement have been complied with.

(2) Each of the Parties may terminate this Agreement at any time by giving notice to the other. In that event the Agreement shall cease to have effect 90 days after the day on which notice is received by the other Party. Requests for assistance which have been received prior to the date on which the Agreement ceases to have effect shall nevertheless be processed in accordance with the terms of the Agreement as if the Agreement were still in force.

In witness whereof the undersigned have signed this Agreement

Done in duplicate in Madrid, this Fifteenth day of November, Two thousand and Twelve in the Chinese, English and Spanish languages, each text being equally authentic.

Modifications to the Ordinance

1. Section 5(1)(d) of the Ordinance is modified to read as follows—

“(d) there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of the person’s race, religion, nationality, ethnic origin, ~~or~~** political opinions or sex”;

2. Section 5(1)(e) of the Ordinance is modified to read as follows—

“(e) the request relates to the prosecution of a person for an external offence in a case where the person—^{*}

(i)^{*} has been convicted, acquitted or pardoned by a competent court or other authority in the place,^{**} or Hong Kong in respect of that offence or of another external offence constituted by the same act or omission as that offence;^{*} or

(ii)^{*} has undergone the punishment provided by the law of that place or Hong Kong,^{**} in respect of that offence or of another external offence constituted by the same act or omission as that offence;”.

3. Section 5(1) of the Ordinance is modified by adding—

“(ea) the request relates to the prosecution of a person in respect of an act or omission that, if it had occurred in Hong Kong, could no longer be prosecuted in Hong Kong by reason of lapse of time;*”.

4. Section 17(3)(b) of the Ordinance is modified to read as follows—

“(b) the person, being free to leave Hong Kong, has not left Hong Kong within a period of 15 days after being notified that the person’s presence is no longer required for any of the following purposes* has had an opportunity of leaving Hong Kong and has remained in Hong Kong otherwise than for**—

(i) the purpose to which the request relates; ~~or**~~

(ii) the purpose of giving assistance in relation to a criminal matter in Hong Kong certified in writing by the Secretary for Justice to be a criminal matter in relation to which it is desirable that the person give assistance.”.

* The text underlined is added. (The underlining is for ease of identifying the modification).

** The text crossed out is deleted. (The crossing out is for ease of identifying the modification).

Summary of Modifications to the Ordinance

1. Sections 1, 2 and 3 of Schedule 2 specify modifications to section 5(1) of the Ordinance so that a request by a place outside Hong Kong for assistance under the Ordinance must also be refused if, in the opinion of the Secretary for Justice—
 - (a) there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of the person's ethnic origin or sex;
 - (b) the request relates to the prosecution of a person for an external offence in a case where the person has been convicted, acquitted or pardoned by a competent court or other authority in Hong Kong, or has undergone the punishment provided by the law of Hong Kong, in respect of that offence or of another external offence constituted by the same act or omission as that offence;
 - (c) the request relates to the prosecution of a person in respect of an act or omission that, if it had occurred in Hong Kong, could no longer be prosecuted in Hong Kong by reason of lapse of time.
2. Section 4 of Schedule 2 specifies modifications to section 17(3)(b) of the Ordinance to more precisely delineate the

circumstances under which a person who is in Hong Kong to give assistance in relation to a criminal matter, pursuant to a request made by the Secretary for Justice, ceases to have immunities under section 17(1) of the Ordinance

Clerk to the Executive Council

COUNCIL CHAMBER

2013

Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (***the Ordinance***) applies as between Hong Kong and Spain. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Hong Kong Special Administrative Region and Spain and signed in Madrid on 15 November 2012. A copy of those arrangements is annexed at Schedule 1 to the Order. The Ordinance is to apply subject to the modifications specified in Schedule 2 to the Order. The modifications are summarized in Schedule 3 to the Order.