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Paper for the House Committee meeting on 20 November 2015

Report of the Subcommittee on Consular Relations (Additional Privileges and Immunities) (Cambodia) Order and Consular Relations (Additional Privileges and Immunities) (Philippines) Order

Purpose

This paper reports on the deliberations of the Subcommittee on Consular Relations (Additional Privileges and Immunities) (Cambodia) Order and Consular Relations (Additional Privileges and Immunities) (Philippines) Order ("the Subcommittee").

Background

Underlying principles of the granting of privileges and immunities

2. Consular relations are established, on the basis of mutual consent, between sovereign States to facilitate the protection of the rights and interests of the nations and nationals, and to promote friendly relations and cooperation. It is a common and well-established practice for the receiving State to accord to the consular post and personnel of the sending State privileges and immunities ("Ps&Is") not made available to ordinary residents or visitors in the receiving State. These Ps&Is are granted on a reciprocal basis, meaning that the consular personnel of both the receiving and the sending States enjoy the same level of Ps&Is in the respective consular district to which they are accredited.

3. The conferment of Ps&Is on consular members is not meant for the personal benefit of individuals, but rather to ensure the efficient performance of functions by consular members on behalf of their respective States. The functions of a consular post include –

- (a) protecting the interests of the sending State and of its nationals in the receiving State;

- (b) furthering the development of commercial, economic, cultural and scientific relations between the sending and the receiving States; and
- (c) rendering necessary assistance of various sorts to the nationals of the sending State.

The granting of Ps&Is (e.g. inviolability of consular premises) is necessary for facilitating the relevant consular posts and their personnel to effectively carry out their consular functions, and is therefore part of the establishment of consular relations between sovereign States.

Vienna Convention on Consular Relations

4. The 1963 Vienna Convention on Consular Relations ("VCCR") is a multilateral international convention which codifies the relevant international laws on consular relations and matters relating to the establishment of consular posts and consular Ps&Is. Article 73 of VCCR provides that nothing in the Convention shall preclude States from concluding international agreements confirming, supplementing, extending or amplifying the provisions of VCCR. In broad terms, the Ps&Is stipulated under VCCR include -

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

In line with the common law practice, provisions of VCCR, which affect private rights and obligations or require exceptions to be made to the existing laws, have already been specifically set out in the laws of the Hong Kong Special Administrative Region ("the HKSAR") by way of the Consular Relations Ordinance (Cap. 557) ("CRO").

Bilateral Consular Agreements

5. The Central People's Government ("CPG") has so far applied to the HKSAR 13 bilateral consular agreements signed with separate sovereign States (a list of these agreements is set out at **Appendix I**). The People's Republic of China ("PRC") has concluded bilateral consular agreements with the Kingdom of Cambodia and the Republic of the Philippines respectively which are applicable to the HKSAR. The agreements accord to the consular posts and their personnel in the HKSAR additional Ps&Is.

The Subsidiary Legislation

6. The Consular Relations (Additional Privileges and Immunities) (Cambodia) Order ("the Cambodia Order") and the Consular Relations (Additional Privileges and Immunities) (Philippines) Order ("the Philippines Order") are made by the Chief Executive in Council under section 4(1) of CRO respectively to declare that the additional Ps&Is accorded to the consular posts of the Kingdom of Cambodia and of the Republic of the Philippines, or to persons connected with the consular posts, or to both, as specified in the respective Orders, shall have the force of law in the HKSAR.

7. The additional Ps&Is include -

- (a) the acting head of a consular post shall enjoy the same rights, facilities, Ps&Is as enjoyed by a head of a consular post;
- (b) inviolability of consular premises and the residences of consular officers;
- (c) inviolability of the consular archives and documents;
- (d) personal inviolability of consular officers and their family members;
- (e) immunity from any form of requisition of consular premises, their furnishings and the property and means of transport of the consular post;
- (f) immunity from the judicial and administrative jurisdiction except in certain civil proceedings for a consular officer, a member of the administrative and technical staff and of the service staff of the consular post, and their family members; and
- (g) in the event of the death of a member of a consular post or a member of his family, exemption of the movable property of the deceased from estate duties and all duties concerned.

8. The two Orders were gazetted on 25 September 2015 and tabled at the Legislative Council ("LegCo") meeting on 14 October 2015.

The Subcommittee

9. At the House Committee meeting held on 9 October 2015, members agreed that a subcommittee should be formed to study the two Orders in detail.

10. Under the chairmanship of Hon James TO Kun-sun, the Subcommittee held one meeting. The membership list of the Subcommittee is at **Appendix II**. To allow more time for the Subcommittee to prepare its report, the Chairman moved a motion at the Council meeting of 4 November 2015 to extend the scrutiny period of the two Orders to the Council meeting of 2 December 2015.

Deliberations of the Subcommittee

11. The Subcommittee has noted that the two Orders are substantially the same, and agreed to make reference to the Cambodia Order during the scrutiny.

Major additional Ps&Is

12. Members have noted that in response to legal adviser's request (LC Paper No. CB(4)78/15-16(01)), the Administration has provided a summary table on the seven major additional Ps&Is (as described in 7(a) to (g) above) conferred on consular posts, or to persons connected with the consular posts, or to both, in respect of 13 foreign States that have signed bilateral consular agreements with PRC, which are applicable to the HKSAR (**Appendix III**), with particular reference to the following –

- (a) Canada, Australia, New Zealand and Korea: The bilateral consular agreements do not confer the seven additional Ps&Is as described in 7(a) to (g) above and thus no notation has been made in the table.
- (b) Italy: Since only the additional Ps&Is which substantially match with those described in 7(a) to (g) above will be included in the table, no notation has been made in the table in respect of Italy.

Consular archives

13. Addressing members' concern, the Administration has advised that the definition of "consular archives" in Article 30 of the Schedule to the Cambodia Order, which reads "[t]he consular archives and documents shall be inviolable at all times and whenever they may be", has been expanded to include also the data stored in memory medium (Article 1(k) of the Schedule to the Cambodia Order). According to the Administration, the definition of "consular archives" in the Orders made under the CRO reflects the corresponding provision in the relevant bilateral consular agreements some of which were entered before the use of electronic devices became common.

14. The Administration was requested to provide information on the stance of the HKSAR Government and its legal interpretation of the term "consular archives", i.e. whether it only means physical form archives or it also covers archives stored in electronic form, in the bilateral consular agreements that have been entered before the use of electronic devices became common.

15. The Administration has explained that Article 1(k) of the VCCR, which was drafted before the era of electronically stored data, provides that "consular archives" includes all the papers, documents, correspondence, books, films, tapes and registers of the consular post, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safekeeping. From the international law perspective, the definition of "consular archives" in VCCR is non-exhaustive and could cover documents stored in electronic form. Therefore, consular archives of the consular missions in the HKSAR include documents stored in electronic form.

Residence of consular officers

16. Members have noted that while VCCR only stipulates inviolability of consular premises, eight out of the 13 foreign States that have signed bilateral consular agreements with PRC have extended the inviolability to residence of consular officers. The Cambodia Order under scrutiny has reflected such extension in Article 28 of its Schedule.

Personal inviolability of family members

17. Members further note that in addition to personal inviolability of consular officers stipulated in VCCR, seven foreign states have extended the personal inviolability to family members of consular officers. According to Article 41 of the Schedule to the Cambodia Order, family members of a consular officer and family members of a member of the administrative and technical staff of the consular post shall enjoy respectively the Ps&Is to which the

consular officer and the member of the administrative and technical staff are respectively entitled. For example, family members of consular officers are entitled to personal inviolability under Article 34 of the Schedule to the Cambodia Order, i.e. they shall not be liable to detention or arrest, and appropriate measures shall be taken to prevent any attack on their freedom of person and dignity.

18. In response to members' enquiry, the Administration has advised that in the absence of any express definition of "family members" in the relevant bilateral consular agreement, from the international law perspective, the term "family members"¹ usually refers to the spouse and minor children of the consular post living together in the same household. According to the established practice, upon the arrival of the members of the consular post, the Protocol Division will request for copies of the identity documents of the members of the consular post and their family members with a view to ascertaining their relationship.

Immunity from jurisdiction and official functions of consular officers

19. Members have expressed concern about the delineation of official functions, in particular when a consular officer is engaging in commercial activities.

20. With reference to the Consular Convention Between the People's Republic of China and the Kingdom of Cambodia ("the Convention"), the Administration has drawn members' attention to Article 9 which sets out the general consular functions. According to Article 46(4), "[m]embers of the consular post who are sent by the sending State to the receiving State shall not engage in any professional or commercial activities in the receiving State other than their official functions". As such, under the Convention, members of the consular post shall not engage in any commercial activities other than their official functions.

Consular functions concerning administration of estates in the HKSAR

21. Members have noted from the relevant LegCo Brief (File Ref. SF(10) in PROT CR 6/1126/98) that the bilateral consular agreements with Cambodia and the Philippines respectively also provide for additional consular functions as follow –

- (a) protect and preserve the estates left in the HKSAR by deceased nationals of the two States;

¹ According to Article 1(h) of the Schedule to Cambodia Order, "family members" means the spouse of a member of the consular post and their minor children who live with them in the same household. The term "family members" is not defined in the Philippines Order.

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

22. In response to members' enquiry, the Administration has explained that the matters are related to other two pairs of Orders relating to the administration of estates in the HKSAR made under the Administration of Estates by Consular Officers Ordinance (Cap. 191) and the Consular Conventions Ordinance (Cap. 267).

Power of LegCo to repeal or amend the two Orders

23. There is a concern about the power of LegCo to repeal or amend the two Orders and the consequence of such repeal. The Administration has cited the view of the legal adviser to the Subcommittee on Subsidiary Legislation relating to Consular Matters expressed at the meeting held on 13 October 2003 (LC Paper No. CB(2)215/03-04), who advised that "although the four items of subsidiary legislation were subject to the negative vetting procedure under section 34 of Cap. 1, LegCo could only repeal them or make some limited linguistic amendments, but not amend their substantive contents, as they were related to foreign affairs relating to the HKSAR".

24. The Administration has further explained that the bilateral consular agreements are given legal effect in the HKSAR by the "Regulations of the People's Republic of China Concerning Consular Privileges and Immunities", which is a national law applicable to the HKSAR by promulgation under Article 18 of the Basic Law. Hence, the bilateral consular agreements signed with Cambodia and the Philippines already have the force of law in the HKSAR. Nonetheless, in line with the established practice under common law, it is prudent to underpin the relevant provisions of the bilateral agreements by way of local legislation.

25. In connection to textual amendments, legal adviser to the Subcommittee has drawn members' attention to the Schedule to the Cambodia Order in respect of the following –

- (a) the words "and documents ("及文件")" in the heading of Article 30, which reads "Inviolability of the consular archives and documents" are not found in the Chinese rendition ("領館檔案不受侵犯"); and

- (b) the Chinese renditions of "official functions" and "professional" in Article 35(e) are respectively "職務" and "職業" whereas the corresponding renditions in previous similar Orders made for other foreign States are "公務" and "專業".

26. Members have noted the Administration's explanation that the Schedule to the Cambodia Order reproduces relevant provisions of the Convention, and should be read with the provisions of Article 1 (except paragraphs (b) and (i)), and Articles 42, 44 and 45 of the Convention. Moreover, according to its Article 50, the Convention was done in duplicate in the Chinese, Khmer and English languages, all three texts being equally authentic. By reproducing the relevant provisions of the Convention, it is necessary for local legislation to follow the exact wording in the official texts of the relevant bilateral consular agreement, if any.

Recommendation

27. The Subcommittee has no objection to the two Orders and will not propose any amendment to it.

Advice sought

28. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 4
Legislative Council Secretariat
18 November 2015

**List of the Bilateral Agreements between the Central People's Government
and Foreign States Relating to Privileges and Immunities
Conferred on Consular Posts**

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

	Date of Application to the HKSAR
8. Consular Convention Between the People's Republic of China and the Russian Federation	23 October 2003
9. Agreement on Consular Relations Between the People's Republic of China and New Zealand	23 April 2006
10. Agreement on Consular Relations Between the People's Republic of China and Japan	16 February 2010
11. Consular Convention Between the People's Republic of China and the Kingdom of Cambodia	12 January 2011
12. Consular Agreement Between the People's Republic of China and the Republic of the Philippines	13 July 2013
13. Consular Agreement Between the People's Republic of China and the Republic of Korea	12 April 2015

Appendix II

Subcommittee on Consular Relations (Additional Privileges and Immunities) (Cambodia) Order and Consular Relations (Additional Privileges and Immunities) (Philippines) Order

Membership list

Chairman	Hon James TO Kun-sun
Members	Hon Dennis KWOK Hon SIN Chung-kai, SBS, JP (Total : 3 members)
Clerk	Ms Debbie YAU
Legal Adviser	Miss Rachel DAI

Appendix III

**Summary Table – Comparison on Major Additional Privileges and Immunities
Conferred on Consular Posts and Persons Connected with the Consular Posts**

Additional Ps&Is State ⁽¹⁾	(a)	(b)	(c)	(d)	(e)	(f)	(g)
Italy (1 Jul 1997)							
UK (1 Jul 1997)		✓ ²		✓		✓	
USA (1 Jul 1997)		✓		✓		✓	
Canada (11 Mar 1999)							
Vietnam (26 Jul 2000)	✓	✓		✓		✓	
Australia (15 Sept 2000)							
India (28 Jul 2001)	✓	✓		✓	✓	✓	✓
Russian Federation (23 Oct 2003)	✓	✓	✓	✓	✓	✓	✓
New Zealand (23 Apr 2006)							
Japan (16 Feb 2010)		✓	✓				
Cambodia (12 Jan 2011)	✓	✓	✓	✓	✓	✓	✓
Philippines (13 Jul 2013)	✓	✓	✓	✓	✓	✓	✓
Korea (12 Apr 2015)							

¹ () : Commencement date of the application of the relevant bilateral consular agreement to the HKSAR.

² ✓ : The additional privileges and immunities are substantially the same as those described under the relevant item.

Summary Table – Comparison on Major Additional Privileges and Immunities Conferred on Consular Posts and Persons Connected with the Consular Posts

The additional privileges and immunities listed above refer to ³:

- (a) the acting head of a consular post shall enjoy the same rights, facilities, privileges and immunities as enjoyed by a head of a consular post;
- (b) inviolability of consular premises and the residences of consular officers;
- (c) inviolability of the consular archives and documents;
- (d) personal inviolability of consular officers and their family members;
- (e) immunity from any form of requisition of consular premises, their furnishings and the property and means of transport of the consular post;
- (f) immunity from the judicial and administrative jurisdiction except in certain civil proceedings for a consular officer, a member of the administrative and technical staff and of the service staff of the consular post, and their family members; and
- (g) in the event of the death of a member of a consular post or a member of his family, exemption of the movable property of the deceased from estate duties and all duties concerned.

³ Items (a) to (g) are the additional privileges and immunities listed in paragraph 6 of LC Paper No. LS82/14-15.