

**Administration's Response to the Issues raised by  
Bills Committee on International Organizations  
(Privileges and Immunities) Bill**

- (a) The Basis upon which the Memorandum of Administrative Arrangements Relating to the Representative Office of the Bank for International Settlements in the Hong Kong Special Administrative Region of the People's Republic of China signed by the HKSAR can automatically have the force of law in HKSAR

The Regulations of the People's Republic of China (PRC) Concerning Diplomatic Privileges and Immunities (the Regulations) is a national law listed in Annex III of the Basic Law which is applied to the Hong Kong Special Administrative Region (HKSAR) by way of promulgation in accordance with Article 18 of the Basic Law. Article 27 of the Regulations provides that “(w)here there are other provisions in international treaties to which China is a contracting or acceding party, the provisions of those treaties shall prevail, with the exception of those provisions on which China has expressed reservations.”.

By virtue of Article 27 of the Regulations, the Host Country Agreement between the Government of the People's Republic of China and the Bank for International Settlements Relating to the Establishment and Status of a Representative Office of the Bank for International Settlements in the Hong Kong Special Administrative Region of the People's Republic of China (the Host Country Agreement), signed between the Government of the PRC and the Bank for International Settlements (the Bank) shall prevail. In effect, Article 27 has given the provisions in the Host Country Agreement the force of law in Hong Kong.

Article 22(3) of the Host Country Agreement provides that “(f)or the purpose of implementation of this Agreement, the necessary administrative arrangements shall be made between the HKSAR Government and the Bank in the form of a memorandum of administrative arrangements.” In accordance with the said Article of the Host Country Agreement, the Memorandum of Administrative Arrangements Relating to the Representative Office of the Bank for International Settlements in the Hong Kong Special Administrative Region of the People's Republic of China (the Memorandum)\* was signed between the Government of the HKSAR and the Bank. Although the Memorandum was not signed by the Government of the PRC but by the HKSAR Government, the facts that the Memorandum is to implement the Host Country Agreement and its provisions are derived from the Host Country Agreement signed by the PRC enable the Memorandum to be regarded as being in an analogous position as the Host Country Agreement.

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\* Paragraph 15 of the Memorandum clearly provides that it shall not affect or add to the privileges and immunities granted to the Bank under the Host Country Agreement.

While the privileges and immunities provided for in the above mentioned HCA (which are further elaborated in the Memorandum) have been given the force of law in Hong Kong by way of the PRC Regulations, given that the HKSAR is a common law jurisdiction (whereas the legal system in the Mainland is based on civil law), it is necessary for us to transform the international agreements onto the domestic legal plane by legislation, especially if the implementation of such international agreements would affect private rights and obligations. The enactment of the International Organization (Privileges and Immunities) Bill will provide the necessary vehicle for the proper implementation of such international agreements in the HKSAR.

(b) Comparison of the privileges and immunities granted to the Bank for International Settlements and the privileges set out in the First Schedule of Cap. 190

- (1) Privileges and immunities provided in the Host Country Agreement made with the Bank for International Settlements (the Bank) which require legislative implementation but do not correspond with the First Schedule of Cap. 190 –

***For the Bank***

(i) Article 3 (Freedom of Action of the Bank)

- Paragraph 5 provides that the Bank shall not be subject to any form of financial or banking supervision etc. which means that it may be outside the regulations and control of Banking Ordinance Cap. 155, and the First Schedule does not provide for such exemptions. Such exemption is required for the proper functioning of the Bank as a central banker for national central banks.

(ii) Article 5 (Immunities from Jurisdiction and Execution)

- Paragraph 1 provides that all deposits entrusted to the Bank, all claims against the Bank etc. be immune from any form of seizure, attachment, sequestration etc.
- Paragraph 2 makes provision that the Bank, including the Representative Office, shall enjoy immunity from every form of legal process in the People's Republic of China, including the HKSAR with some exceptions.

(iii) Article 8 (Tax Exemptions)

- Paragraph 3 of Article 8 provides that the operations of the Bank shall be exempt from all taxes, dues, duties or rates of any kind. Such provisions could be interpreted as wide enough to include exemption from profits tax. The Bank is different from other international organizations in the sense that it may be involved with banking transactions which are profit-making whereas other international organizations under Cap. 190 are generally not. Although paragraph 3 of Part 1 in the First Schedule provides that the international organization shall have ‘the **like exemption or relief from taxes and rates**, other than taxes on the importation of goods, **as is accorded ..... to a foreign sovereign power**’ which provisions may be argued as wide enough to exempt profits tax as well, it is difficult to envisage that a **foreign sovereign power** would in actual fact engage in profit-making business in the HKSAR. Therefore, the Bank may, under the Host Country Agreement, enjoy profits tax exemption which may be at variance with the provisions of the First Schedule of Cap. 190.

(iv) Article 9 (Customs Treatment)

- Paragraph 1 provides, inter alia, that goods or articles imported into the HKSAR by the Bank under exemptions can be disposed of locally whereas the First Schedule does not have such provision.
- Paragraph 2 provides that the Bank shall have the same preferential customs treatment granted to any Specialized Agency of the United Nations in the HKSAR. This includes future commitments which may fall outside the provisions of Cap. 190.

(v) Article 10 (Free Disposal of Funds and Freedom to Conduct Operations)

- Paragraph 1 provides that the Bank may receive and hold funds, gold, currency, cash etc., and carry out without any restriction all operations permitted by its Statutes within the HKSAR, which is a similar case as paragraph 5 of Article 3. This represents exemption from HKSAR’s securities regulations, which is required for the proper functioning of the Bank as a central banker for national central banks.

- Paragraph 2 refers to unrestricted right to transact business which is similar to above.

(vi) Article 12 (Social Welfare)

- Paragraph 1 provides exemption (except in relation to local employees) from the Employment Ordinance, the Employees' Compensation Ordinance etc., which is outside the provisions of Cap. 190.

**For the personnels of the Bank**

(vii) Article 13 (Privileges, Immunities and Exemptions of Members of the Board of Directors, the President of the Bank, the General Manager and Assistant General Manager of the Bank and Representatives of the Bank's Member Central Banks)

- Paragraph (d) provides immunity from the jurisdiction of any PRC Court or Tribunal, including HKSAR, with respect to things done or omitted to be done in connection with the official Bank activities. This is a similar case as Paragraph 2 of Article 5.

(viii) Article 16 (Privileges, Immunities and Exemption Granted to Personnel of the Representative Office Who are neither Chinese Nationals nor HKSAR Permanent Residents)

- Paragraph (b) (reference to immigration facilities).
- Paragraph (c) (reference to exchange facilities).
- Paragraph (d) (reference to repatriation facilities).
- Paragraph (f) (reference to customs privileges and facilities).

The above paragraphs all provide for the enjoyment of similar privileges as those granted to the personnel of any Specialized Agency of the United Nations in the HKSAR. Again, this is a case of undertaking an open commitment to grant similar Ps and Is that may be afforded to the personnel of any Specialized Agency in the future, which is outside the provisions of Cap. 190.

- (ix) Article 18 (Experts)
  - To cater for the special need of the Bank, paragraphs 1 and 2 refer to experts who carry out temporary missions. These are not provided for in the First Schedule.
  
- (2) Privileges and immunities provided in the Host Country Agreement which are not governed by the existing legislation but undertaking has been given in effect, to pre-empt application of legislation that may be enacted in the future regarding the following -
  - (i) Taxation on rent or lease (Article 8(2));
  - (ii) Pension Fund (Article 11);
  - (iii) Mandatory Contribution to Insurance or Welfare Scheme (Article 12(2));
  - (iv) National Service (Article 16(a)); and
  - (v) Tax on capital payments (Article 16(h)).
  
- (c) Comparison between Provisions in the International Organizations (Privileges and Immunities) Bill and those dealing with diplomatic privileges and immunities in the International Organizations and Diplomatic Privileges Ordinance (Cap. 190)

Currently, the International Organizations and Diplomatic Privileges Ordinance (Cap. 190) is the legislation giving effect to both diplomatic privileges and immunities and privileges and immunities accorded to international organizations. The Administration do not find such an arrangement satisfactory because the nature of privileges and immunities for international organizations and diplomatic privileges and immunities are quite different in nature. It is considered more neat and tidy to have separate legislation to deal with the two types of privileges and immunities. After the enactment of International Organizations (Privileges and Immunities) Bill (the Bill), the existing International Organizations and Diplomatic Privileges Ordinance (Cap. 190) (the Ordinance) will be the primary legislation to give effect to diplomatic privileges and immunities.

Privileges and immunities to be accorded to international organizations are based on international agreements signed between the PRC/HKSAR and the international organizations concerned, and the privileges and immunities provided to one international organization may be different from those provided to another. Therefore, the Bill is designed to provide a framework to enable privileges and immunities conferred on an international organization to be given

the force of law in the HKSAR by way of an order to be made by the Chief Executive in Council under the enabling provisions contained in the Bill. The provisions in the Bill mainly provide for :

- the definitions necessary for the interpretation of the Bill (Clause 2);
- the power for the Chief Executive in Council to declare by order that the provisions of certain international agreement relating to the privileges and immunities of international organizations and of persons connected with such organizations shall have the force of law in Hong Kong, as well as to make provisions in the orders for carrying in effect those provisions of these agreement relating to privileges and immunities (Clause 3);
- the proof of whether a person is entitled to a privilege or immunity under an order made by the Chief Executive in Council (Clause 4); and
- the relationship between the Bill and the Regulations of the People's Republic of China Concerning Diplomatic Privileges and Immunities and the Regulations of the of the People's Republic of China Concerning Consular Privileges and Immunities, which are national laws that relate to diplomatic or consular privileges and immunities listed in Annex III of the Basic Law applied to the HKSAR by way of promulgation in accordance with Article 18 of the Basic Law (Clause 5).

As regards diplomatic privileges and immunities, they are conferred on different individuals to facilitate their work as representatives of the sending States and international institutions during their stay in Hong Kong. Such privileges are conferred on such persons along the same principles. The specific provisions of the Ordinance concerning diplomatic privileges and immunities (after the enactment of the Adaptation of Laws No. 10 Bill) provide for :

- the diplomatic immunities of representatives attending international conferences held in Hong Kong (Section 3);
- the immunity and privileges of judges and suitors to the International Court of Justice (Section 4);
- reciprocity regarding the provision of such immunities and privileges (Section 5); and
- the status of the customs of China relating to such immunities and privileges in Hong Kong vis-à-vis local legislation (Section 6).

(d) Power of scrutiny by the Legislative Council regarding the Orders to be made by the Chief Executive in Council under the Bill

Members will appreciate that according to Article 13 of the Basic Law, the Central People's Government (CPG) is responsible for the foreign affairs relating to the HKSAR. The granting of privileges and immunities to international organizations as well as the conclusion of international agreements concerning privileges and immunities unquestionably fall within the scope of foreign affairs. It is therefore important that such implementing legislation must be consistent with the international rights and obligations of the CPG.

The Administration fully respect the status and power of the Legislative Council as the legislature of the HKSAR as provided for in the Basic Law. In the light of the comments received regarding the disapplication of section 34 of the Interpretation and General Clauses Ordinance (Cap. 1) as provided for in Clause 3(2) of the Bill, we have carefully considered the desirability of clause 3(2) of the Bill. Our considered view is that section 34(2) of Cap. 1 already provides that the Legislative Council may amend subsidiary legislation only "in any manner whatsoever consistent with the power to make such subsidiary legislation", and we believe that the Legislative Council would not act in any way that is ultra vires.

If the Bills Committee shares our understanding regarding the effect of section 34(2), the Administration will introduce a Committee Stage amendment to remove clause 3(2) of the Bill so that section 34 of Cap. 1 will apply to Orders made by the Chief Executive in Council under clause 3(1) of the Bill.