

立法會
Legislative Council

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(These minutes have been seen by
the Administration)

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**Minutes of the second meeting of the
Subcommittee to study the Italy Order, the South Korea Order and the
Switzerland Order made under section 4
of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) held
on Tuesday, 14 December 1999 at 10:45 am
in Conference Room B of the Legislative Council Building**

Members Present : Hon James TO Kun-sun (Chairman)
Hon Jasper TSANG Yok-sing, JP
Hon Mrs Miriam LAU Kin-yee, JP

Absent with Apology : Hon David CHU Yu-lin
Hon Margaret NG

Public Officers attending : Mrs Carrie Willis
Principal Assistant Secretary for Security

Mr John Hunter
Deputy Principal Government Counsel (International Law)

Mr MAN Wing-yiu
Assistant Secretary (Security)

Clerk in Attendance : Mr LAW Wing-lok
Chief Assistant Secretary (2) 5

Staff in Attendance : Mr Stephen LAM
Assistant Legal Adviser 4

Miss Mary SO
Senior Assistant Secretary (2)8

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I. Confirmation of minutes of meeting held on 18 November 1999
(LC Paper No. CB(2) 600/99-00)

The minutes were confirmed.

II. Meeting with the Administration

(LC Paper No. CB(2) 572/99-00 already issued on 7 December 1999)

2. The Chairman welcomed representatives of the Administration to the meeting.

3. At the invitation of the Chairman, Deputy Principal Government Counsel (International Law) (Dep PGC) introduced the paper which detailed further clarifications to queries raised by members at the last Subcommittee meeting held on 18 November 1999 concerning Article 15 of the HKSAR/Switzerland Agreement and Article 4 of the HKSAR/Korea Agreement.

4. Dep PGC said that Article 15 of the HKSAR/Switzerland Agreement, which obliged each party to provide information concerning nationals of the other party who had been sentenced to imprisonment within its jurisdiction, was requested by the Swiss Government for inclusion in the Agreement to facilitate the provision of consular assistance. Article 22 of the European Convention on Mutual Assistance in Criminal Matters made similar provision. Dep PGC further said that Article 15 was consistent with similar provisions in the Consular Agreements with the United States of America (US), Canada and the United Kingdom (UK) which also did not require the consent of the person concerned prior to informing his consular post of his detention. Dep PGC pointed out that there was no international unanimity that consent be a prerequisite to informing a consular post of the detention of one of its nationals. Whereas Article 36 of the Vienna Convention on Consular Relations (VCCR) provided for consent, there was considerable opposition from many countries which nearly resulted in the Convention not being settled at all. Dep PGC further opined that he could not see how Article 15 would greatly infringe on the privacy of Hong Kong permanent residents sentenced to imprisonment in Switzerland, as there was no question that the HKSAR Government would publicise advice received as to their imprisonment. Moreover, the fact of their imprisonment would be in the public forum in Switzerland.

5. In regards to the query raised by Miss Margaret NG at the last meeting, Dep PGC said that the reference to paragraph 1 under Article 4 of the HKSAR/Korea Agreement should not have been included. He confirmed that Article 4 of the HKSAR/Korea Agreement, in its entirety, was substantially the same as Article IV of the Model Agreement.

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6. Mrs Miriam LAU expressed reservation on Article 15 of the HKSAR/Switzerland Agreement, as some Hong Kong permanent residents might not wish the fact of their imprisonment to be known by the HKSAR Government without their prior consent. In her view, such a provision should only be included in a mutual legal assistance agreement where the procedure of the other party in obtaining consent was suspect. Noting that some bilateral agreements which were applicable to the HKSAR had different provisions requiring the consent of the person concerned, Mrs LAU enquired about the Government's position on the matter. Principal Assistant Secretary (Security) (PAS(S)) replied that with a few exceptions, Article 36 of the VCCR was adopted in the bilateral agreements which were applicable to the HKSAR.

7. The Chairman enquired whether it was possible, by way of some administrative means, for the HKSAR Government to unilaterally forfeit its rights provided under Article 15 of the HKSAR/Switzerland Agreement and require the Swiss Government to obtain the prior consent of HKSAR residents detained in Switzerland before informing the HKSAR Government of their detention.

8. Dep PGC replied that if the Chairman's request was acceded to, it would put the Swiss Government in a difficult situation, given that Article 15 of the HKSAR/Switzerland Agreement required that both parties to the Agreement must act in accordance with the provision in the Article. Dep PGC further said that the Administration would bear in mind members' views expressed in its future negotiations with other jurisdictions on mutual legal assistance agreements. PAS(S) supplemented that it was not desirable that the Chairman's suggestion be dealt with administratively. Moreover, there would be implications for other Consular Agreements which contained similar provision.

9. Mr Jasper TSANG enquired about the reasons why the specific provisions in the VCCR were not adopted in the three Consular Agreements with the US, Canada and the UK.

10. Dep PGC replied that he would need to look up past records before he could give a reply to Mr TSANG's question. Nevertheless, he pointed out that as the Consular Agreements with the US and the UK which were applicable to Hong Kong prior to reunification had a provision which did not require the consent of the person concerned, it was reasonable to infer that the US and the UK would want to have the same provision in the Consular Agreements which applied to the HKSAR. Dep PGC added that the fact that other countries adopted the VCCR did not mean that they strongly believed that consent should be a pre-requisite to informing a consular post of the detention of one of its

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nationals. Indeed, as indicated above, many countries were strongly opposed to the request that the individual should consent.

11. At the request of members, PAS(S) agreed to seek legal opinions as to whether it would be feasible for the HKSAR to forfeit its right of being informed by the Swiss side that one of its permanent residents was imprisoned in Switzerland without consent of the person concerned by administrative means. PAS(S) also agreed to provide further explanation on the merit of the provision.

12. The Subcommittee next proceeded to scrutinize the remaining Articles of the HKSAR/Switzerland Agreement. The Subcommittee's deliberations on the queries raised by members at the meeting were set out in the ensuing paragraphs.

Article 22 - Tracing

13. The Chairman enquired about the extent to which the HKSAR Government would render assistance in locating the proceeds or instrumentalities of a crime against the law of Switzerland. For example, whether the HKSAR Government would make enquiries to find out whether a person under investigation by the Swiss Government had accounts with the local banks.

14. Dep PGC replied that upon request from the Switzerland Government, the HKSAR Government would seek the assistance of the Police to find out whether a person under investigation held any bank accounts in Hong Kong. In doing so, the Police would be bound by all the constraints under the existing laws of Hong Kong. Dep PGC pointed out that the Requesting Party in practice would provide detailed information to the Requested Party in locating the proceeds or instrumentalities of a crime against the law of the Requesting Party. Moreover, the Requested Party would not accede to such a request without the Requesting Party first notifying the Requested Party of the basis of its belief that such proceeds or instrumentalities might be located in its jurisdiction. Dep PGC further said that Article 22 was a standard provision in a mutual legal assistance agreement. He reiterated that although each contracting party to the agreement was obliged to endeavour to ascertain that such proceeds or instrumentalities might be located in its jurisdiction, its action would be circumscribed by the laws of its own jurisdiction.

Article 25 - Spontaneous information

15. The Chairman expressed reservation about Article 25 which sought to provide the other Party with spontaneous information on proceeds or instrumentalities of crime if it was considered that the disclosure of such

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information might assist the other Party in carrying out their investigations or proceedings, as such exchange of information might put the persons/organizations concerned in a compromising position.

16. Dep PGC said that the intention of Article 25 was to enhance the administration of justice and the co-operation with overseas law enforcement agencies in the prevention and detection of crime. He assured members that the Police in providing spontaneous information on proceeds or instrumentalities of crime to the other Party would have regard to the fact that they would not be in breach of any laws of Hong Kong.

17. Mrs Miriam LAU said that even without Article 25, it was normal for a law enforcement agency to notify its overseas counterpart if something which was clearly indicative of wrong-doing had come to its attention.

18. Mr Jasper TSANG said that as Article 25 did not add anything new to mutual legal assistance and that both parties in implementing the provision had to abide by the laws of its own jurisdiction, he saw no problem for the inclusion of the provision in the HKSAR/Switzerland Agreement.

19. At the request of the Chairman, Dep PGC agreed to provide more information on the need for such a provision.

Article 28 - Execution of requests

20. The Chairman expressed concern about Article 28 which required the Requested Party to commence action on a request in advance of receipt of all the documentation in cases of urgency. He asked whether Article 28 was a new provision not provided for in other mutual legal assistance agreements applicable to the HKSAR.

21. Dep PGC replied that Article 28 was a new provision. He added that all the HKSAR Government would be required to do under such circumstances would be to use its best endeavour to do whatever it was possible within the laws of the Hong Kong, in anticipation of the receipt of all the necessary documentation.

22. Mrs Miriam LAU said that Article 28 was a reasonable provision, as it would be absurd for the Requested Party not to render assistance on an urgent request simply because all the necessary documentation had not yet arrived.

Article 34 - Police cooperation

23. The Chairman enquired about the circumstances under which the liaison with overseas law enforcement agencies would not be conducted through the

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Adm Interpol. PAS(S) undertook to provide the information.

24. The Chairman suggested that subject to members' views on the responses to be provided by the Administration on the points raised in paragraphs 11, 19 and 23 above, no further meeting would need to be held. Members agreed.

25. The meeting ended at 12:05 pm.

Legislative Council Secretariat

9 March 2000