

立法會
Legislative Council

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(These minutes have been seen
by the Administration)

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**Minutes of the first 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 Thursday, 18 November 1999 at 10:45 am
in Conference Room B of the Legislative Council Building**

Members Present : Hon James TO Kun-sun (Chairman)
Hon David CHU Yu-lin
Hon Margaret NG
Hon Jasper TSANG Yok-sing, JP
Hon Mrs Miriam LAU Kin-ye, JP

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. Meeting with the Administration
(*LC Paper No. CB(2) 407/99-00(01)*)

The Chairman welcomed representatives of the Administration to the meeting.

2. At the invitation of the Chairman, Deputy Principal Government Counsel (International Law) (DPG) took members through the paper detailing the article-by-article comparison between the Model Agreement and the Italy Order, the South Korea Order and the Switzerland Order. The Subcommittee's deliberations on the queries raised by members at the meeting were set out in the ensuing paragraphs.

The Italy Order

Article I - Scope of Assistance

Paragraph (2)(k)

3. The Chairman said that although paragraph (2)(k) of Article I of the Hong Kong/Italy Agreement was intended to permit greater flexibility in providing assistance in the investigation and prosecuting of criminal offences and in proceedings related to criminal matters, he nevertheless expressed concern that the scope of assistance to be provided was too wide.

4. DPG replied that paragraph (2)(k) of Article I was included to ensure that types of assistance which were not specifically listed would nevertheless be provided so long as such assistance was consistent with the objects of the Hong Kong/Italy Agreement and with the law of the Requested Party. He said that paragraph (2)(k) should, for example, cover assistance in obtaining production of records held by banks.

5. Miss Margaret NG opined that paragraph (2)(k) did not bind the Parties to any specific assistance. In fact, it was an expression of good wishes for the parties concerned to go into other agreements if the need arose.

6. The Chairman enquired whether paragraph (2) would reflect changes in the relevant legislation. For example, if the Organized and Serious Crimes Ordinance (Cap. 455) was later amended to provide greater power to the law enforcement agencies to search and seize property, the Requesting Party could request Hong Kong to render assistance under the amended legislation. DPC reiterated that the request would be acceded to so long as the assistance was not inconsistent with the objects of the Hong Kong/Italy Agreement and with the law of Hong Kong.

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7. In response to Miss Margaret NG, DGC said that orders made under the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (the Ordinance) were subject to positive vetting by the Legislative Council regardless of whether or not the provisions in the orders concerned deviated from the Model Agreement.

Article VIII - Obtaining of Evidence, Articles or Document

Paragraph (5)

8. Miss Margaret NG expressed concern that the protection of evidence being used was not sufficient, having regard to the fact that a person who asserted a claim of immunity, incapacity or privilege was required to give evidence first before such claim was made known to the authorities concerned for subsequent resolution as to whether the claim was valid.

9. DGC replied that the situation mentioned by Miss NG only referred to the circumstances where the claims were not covered by the law of the Requested Party. He said that if Hong Kong was the Requested Party, a Hong Kong resident would not be required to give evidence if he/she asserted a valid claim for immunity, incapacity or privilege which was provided for under the law of Hong Kong. Hence, it was only when such claim was not provided for under the law of Hong Kong that the circumstances mentioned by Miss NG would occur. DGC pointed out that the reason for allowing the Requesting Party to determine whether a claim for immunity, incapacity or privilege was valid under the Requesting Party's law was that it was more practical for the Requesting Party to rule on questions that arose pursuant to its law.

10. Members raised no queries on the other Articles in the Italy Order.

Schedule 2 - Modifications to the Ordinance

11. DGC explained that section 5(1)(e) of the Ordinance provided that the Secretary for Justice could refuse assistance if the request related to the prosecution of a person for an offence in respect of which he had been convicted, acquitted, pardoned or punished in the requesting jurisdiction. Article III(1)(f) of the Hong Kong/Italy Agreement extended this protection to convictions etc. in the requested jurisdiction. The modification to section 5(1)(e) of the Ordinance reflected the provision in the Agreement.

12. DGC added that a new sub-paragraph was included in section 5(1)(e) to provide for refusal of assistance if the offence, had it occurred in Hong Kong, could no longer be prosecuted by reason of lapse of time. The further modification to section 5(1)(e) was the same modification provided for the France, the New Zealand and the United Kingdom Orders. The modification

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reflected Article III (1)(g) of the Hong Kong/Italy Agreement.

13. DGC further said that section 17(3)(b) of the Ordinance accorded a person who came to Hong Kong from another jurisdiction to render assistance certain immunities. These immunities ceased to apply if the person had had the opportunity of leaving Hong Kong and had remained in Hong Kong otherwise than for the purpose of rendering assistance. Article XV(2) of the Hong Kong/Italy Agreement provided that the immunities would continue to be applicable for a period of fifteen days after the person had had the opportunity of leaving Hong Kong. The modification reflected the additional protection in the Agreement by providing for a fifteen day period in section 17(3)(b).

14. Members raised no other queries on the modifications to the Ordinance set out in Schedule 2 of the Italy Order.

The South Korea Order

Article 4 - Limitations on Compliance

15. Miss Margaret NG said that according to the paper, paragraph 1 of Article 4 of the Hong Kong/South Korea Agreement was substantially the same as Article IV of the model agreement. Miss NG enquired whether this meant that the remaining paragraphs of the Article were different from Article IV of the model agreement. DGC replied that there was an oversight in the drafting of this paragraph, as Article 4 of the Agreement was virtually identical to Article IV of the model agreement. At the request of Miss NG, DGC undertook to ascertain this point.

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Article 7 - Limitations of Use

Paragraph 4

16. Referring to paragraph 4 of Article 7 of the Hong Kong/South Korea Agreement, Miss Margaret NG expressed concern that confidential information and evidence made public by mistake or in contravention of an agreement might be used for other purposes.

17. Mrs Miriam LAU opined that the words "which has been made public in the Requesting Party in accordance with paragraphs 1 or 2" in paragraph 4 of Article 7 of the Agreement meant that the disclosure of confidential information and evidence could only be made after the Central Authority of the Requested Party had given consent. Under this circumstance, there was no question that confidential information and evidence improperly made public could be used for any purpose other than its original purpose. DGC concurred with Mrs LAU.

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18. Members noted that Schedule 2 to the South Korea Order was identical to that of the Hong Kong/Italy Agreement.

19. Miss Margaret NG enquired whether the Department of Justice, when conducting negotiations with an overseas jurisdiction on mutual legal assistance agreement, would obtain information on the legal system of that particular jurisdiction.

20. DGC replied that although the Administration would not conduct exhaustive study on the criminal justice system of the other Party, attempts would generally be made to obtain information on the mutual legal assistance legislation of the other Party.

The Switzerland Order

Article 11 - Transmission of Objects, Documents, Records and Evidence

Paragraph 1

21. The Chairman expressed concern that paragraph 1 of Article 11 of the Hong Kong/Switzerland Agreement, which stipulated that rights claimed by third parties to objects, documents, records or other evidence in the Requested Party would not prevent their transmission to the Requesting Party, would oblige Hong Kong to transmit such materials irrespective of whether the owners of these materials had successfully obtained an injunction from the court for the transmission.

22. Miss Margaret NG and Mrs Miriam LAU said that paragraph 1 was intended to ensure that the transmission of objects, documents, records or other evidence would not be deterred by a mere assertion of right to such materials by a third party. Miss NG further said that if there was a court order preventing the Hong Kong Special Administrative Region Government (HKSARG) from transmitting such materials, that would be an entirely different matter. DGC concurred with Miss NG and Mrs LAU.

Article 15 - Exchange of Information from Criminal Records

23. Miss Margaret NG expressed objection to the provision in Article 15 which allowed the contracting Parties to exchange information on the criminal records of its citizens without first seeking the prior consent from the persons concerned.

24. The Chairman enquired whether it was the stance of the HKSARG that it would not wish to be informed of the imprisonment of its permanent residents

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in Switzerland unless it was requested by the persons concerned.

Adm

25. DGC said that the intention of this provision was to enable appropriate consular assistance to be rendered to its citizens imprisoned in another jurisdiction. At the request of members, the Administration undertook to provide further information in relation to this Article.

26. The Chairman suggested and members agreed to continue the scrutiny of the Switzerland Order at the next meeting to be held on 14 December 1999 at 10:45 am in Conference Room B of LegCo Building.

27. The meeting ended at 12:27 pm.

Legislative Council Secretariat
13 December 1999