

# **LEGISLATIVE COUNCIL BRIEF**

## *Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)*

### **MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (ITALY) ORDER**

### **MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (SOUTH KOREA) ORDER**

#### **INTRODUCTION**

At the meeting of the Executive Council on 14 September 1999, the Council ADVISED and the Chief Executive ORDERED that under section 4(1) of the Mutual Legal Assistance in Criminal Matters Ordinance (“the Ordinance”), the following Orders:-

- (a) the Mutual Legal Assistance in Criminal Matters (Italy) Order (at Annex A); and
- (b) the Mutual Legal Assistance in Criminal Matters (South Korea) Order (at Annex B)

should be made, subject to the approval of the Legislative Council, to implement the bilateral arrangements for mutual legal assistance (“MLA”) in criminal matters with these countries.

## **BACKGROUND AND ARGUMENT**

### **The Mutual Legal Assistance in Criminal Matters Ordinance**

2. The Ordinance became fully operational on 20 February 1998. Section 4 of the Ordinance provides that the Chief Executive in Council may, with the approval of the Legislative Council, in relation to any arrangements for MLA, by order direct that the Ordinance shall, subject to such modifications as may be specified in the order, apply as between Hong Kong and the country to which the arrangements relate.

### **The Orders**

3. Bilateral agreements have been signed with Italy and South Korea respectively. Orders made under Section 4 of the Ordinance, mentioned in paragraph 1 above, will permit these agreements to be brought into force. Schedule 1 to each of the Orders contains a copy of the relevant bilateral agreement.

4. Section 4(2) of the Ordinance provides that the Chief Executive in Council shall not make an order unless the arrangements for MLA to which the order relates are substantially in conformity with the provisions of the Ordinance. All two agreements do so conform.

5. Section 4(3) of the Ordinance provides that where an order specifies modifications to the Ordinance, those modifications shall be summarized in a schedule to the order. The modifications which are set out in Schedule 2 to each of the Orders reflect areas in which the relevant agreement varies from the Ordinance. These variations reflect the practice of the particular negotiating partners. Such modifications to the Ordinance are necessary to enable Hong Kong to comply with the obligations in the particular agreements. It should be noted that it is not a matter for interpretation whether a particular agreement has the effect of modifying the Ordinance. The application of the Ordinance to the particular country is only modified to the extent of the modifications actually specified in Schedule 2 to the Order.

6. At Annex C is an explanatory statement in relation to the modifications to the Ordinance.

7. These Orders will come into operation on a day to be appointed by the Secretary for Security by notice in the Gazette. That day will coincide with the day on which the relevant agreement enters into force. This will be settled after consultation with the countries concerned and will depend upon when the necessary domestic procedures of those countries have been completed.

### **LEGISLATIVE TIMETABLE**

8. The legislative timetable is as follows:-

Introduction into the Legislative Council	19 January 2000
Commencement date	to be specified by the Secretary for Security

### **BASIC LAW IMPLICATIONS**

9. The Department of Justice advises that the making of these Orders do not conflict with those provisions of the Basic Law carrying no human rights implications.

### **HUMAN RIGHTS IMPLICATIONS**

10. The Department of Justice advises that the proposed Orders are consistent with the human rights provisions of the Basic Law.

## **BINDING EFFECT OF THE ORDERS**

11. The Orders will not affect the current binding effect of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525).

## **FINANCIAL AND STAFFING IMPLICATIONS**

12. The making of these Orders will not have financial or staffing implications.

## **PUBLIC CONSULTATION**

13. The Orders will permit the arrangements to be brought into force in accordance with the existing legal framework. Public consultation is not, therefore, considered necessary.

## **ENQUIRIES**

14. Enquiries on the contents of this paper should be directed to:-

	<u>Telephone No.</u>
Mrs. Carrie Willis Principal Assistant Secretary for Security	2810 2329
Mr. W Y Man Assistant Secretary for Security	2810 2918

**Security Bureau**  
**30 December 1999**

File Reference: SBCR 3/5691/95

**MUTUAL LEGAL ASSISTANCE IN CRIMINAL  
MATTERS (ITALY) ORDER.**

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

**1. Commencement**

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

**2. Ordinance to apply between Hong Kong  
Special Administrative Region and  
Italian Republic**

In relation to the arrangements for mutual legal assistance -

- (a) which are applicable to the Government of the Hong Kong Special Administrative Region and the Government of the Italian Republic; and
- (b) a copy of which is annexed at Schedule 1,

it is hereby directed that the Ordinance shall, subject to the modifications to the Ordinance summarized in Schedule 2, apply as between the Hong Kong Special Administrative Region and the Italian Republic.

AGREEMENT BETWEEN  
THE GOVERNMENT OF THE HONG KONG SPECIAL  
ADMINISTRATIVE REGION OF  
THE PEOPLE'S REPUBLIC OF CHINA  
AND  
THE GOVERNMENT OF THE ITALIAN REPUBLIC  
CONCERNING  
MUTUAL LEGAL ASSISTANCE IN  
CRIMINAL MATTERS

The Government of the Hong Kong Special Administrative Region of the People's Republic of China, having been duly authorised by the Central People's Government of the People's Republic of China, and the Government of the Italian Republic,

Desiring to improve the effectiveness of their co-operation in criminal investigations and proceedings, and in the confiscation of criminal proceeds,

Have agreed as follows:

**ARTICLE I**

**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, articles or documents;
  - (d) executing requests for search and seizure;
  - (e) facilitating the personal appearance of witnesses and experts;

- (f) effecting the temporary transfer of persons in custody to appear as witnesses;
  - (g) obtaining production of judicial or official records;
  - (h) tracing, restraining, and forfeiting or confiscating the proceeds and instrumentalities of criminal activities;
  - (i) providing information, documents and records;
  - (j) delivery of property, including lending of exhibits; and
  - (k) other mutual legal assistance consistent with the objects of this Agreement, which is not inconsistent with the law of the Requested Party.
- (3) Assistance under this Agreement shall include assistance in connection with offences against a law relating to taxation, customs duties, foreign exchange control or other revenue matters, but not in connection with non-criminal proceedings relating thereto.
- (4) Assistance shall not include:
- (a) the surrender of any fugitive offender;
  - (b) the execution in the Requested Party of criminal judgments imposed in the Requesting Party, without prejudice to the provisions of Article XVII;
  - (c) the transfer of persons in custody to serve sentences.
- (5) This Agreement is intended solely for mutual legal assistance between the Parties and, for the avoidance of doubt, no private person is entitled under this Agreement to make or oppose any request for assistance.

## **ARTICLE II**

### **CENTRAL AUTHORITY**

- (1) Each Party shall establish a Central Authority.
- (2) The Central Authority for the Government of the Hong Kong Special Administrative Region shall be the Secretary for Justice or his

duly authorised officer. The Central Authority for the Government of the Italian Republic shall be the Ministero di Grazia e Giustizia.

(3) Requests under this Agreement shall be made by the Central Authority of the Requesting Party to the Central Authority of the Requested Party.

### **ARTICLE III**

#### **LIMITATIONS ON COMPLIANCE**

- (1) The Requested Party shall refuse assistance if:
- (a) the request for assistance impairs the sovereignty, security or public order of the Italian Republic or, in the case of the Government of the Hong Kong Special Administrative Region, the People's Republic of China;
  - (b) the request for assistance would seriously impair its essential interests;
  - (c) the request for assistance relates to an offence of a political character;
  - (d) the request for assistance relates to an offence only under military law, which is not an offence under the ordinary criminal law;
  - (e) there are substantial grounds for believing that the request for assistance will result in a person being prejudiced on account of race, sex, religion, nationality or political opinions;
  - (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;
  - (g) the request for assistance relates to the prosecution of a person for an offence which was committed within the jurisdiction of the Requested Party and is an offence for which, under the law of that Party, the person cannot be prosecuted by reason of lapse of time;

- (h) the Requesting Party cannot comply with any conditions in relation to confidentiality or limitation as to the use of material provided;
  - (i) in the case of requests involving compulsory measures, 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;
  - (j) the assistance requested consists of actions that would be contrary to the Requested Party's law had the offence to which it relates been the subject of criminal proceedings under its own jurisdiction, except that assistance shall not be refused on the sole ground that the actions would not be permitted at the investigation stage of such an offence under the Requested Party's law;
  - (k) the request for assistance relates to an offence which carries the death penalty under the law of the Requesting Party.
- (2) The Requested Party may postpone assistance if execution of the request would interfere with an ongoing investigation or prosecution in the Requested Party.
- (3) 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.
- (4) If the Requesting Party accepts assistance subject to the terms and conditions referred to in paragraph (3)(b), it shall comply with those terms and conditions.

## **ARTICLE IV**

### **REQUESTS**

- (1) Requests shall be in writing. In urgent cases, requests may be

transmitted by fax or through Interpol, without prejudice to the right of the Requested Party to seek the original of the request.

(2) 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) where possible, information which is relevant to the identification or location of persons for the purpose of executing the request;
- (d) a description of the nature of the investigation, prosecution, offence or criminal matter;
- (e) a summary of the relevant facts and laws;
- (f) any requirements for confidentiality;
- (g) details of any particular procedure the Requesting Party wishes to be followed; and
- (h) details of the period within which the request should be complied with.

(3) The Requested Party shall use its best efforts to keep confidential a request and its contents except when otherwise authorised by the Requesting Party.

(4) A request and all documents submitted in support of it shall be accompanied by a translation in an official language of the Requested Party, unless the Requested Party dispenses with this requirement.

## **ARTICLE V**

### **EXECUTION OF REQUESTS**

(1) The Central Authority of the Requested Party shall promptly execute the request or arrange for its execution through its competent authorities.

- (2) A request shall be executed in accordance with the law of the Requested Party and, to the extent not contrary to the law of the Requested Party, in accordance with any feasible procedures indicated in the request.
- (3) If the Requesting Party expressly so requests, the Central Authority of the Requested Party shall inform it of the date when and the place where the request will be executed.
- (4) If the Requesting Party expressly so requests, the authorities involved in, and persons affected by, the request for assistance and their legal representatives may be present at the execution of the request if the Requested Party agrees.
- (5) 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.
- (6) 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 VI**

### **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 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 witnesses, experts, persons being transferred in custody and 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 Parties shall consult to determine the terms and conditions under which the execution of the request may continue.

## **ARTICLE VII**

### **LIMITATIONS OF USE**

(1) After consultation with the Requesting Party, the Requested Party may require that, insofar as the law of the Requesting Party permits, information or evidence furnished be kept confidential or be disclosed or used only subject to such terms and conditions as the Requested Party may specify.

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

## **ARTICLE VIII**

### **OBTAINING OF EVIDENCE, ARTICLES OR DOCUMENTS**

(1) Where a request is made that evidence be taken for the purpose of an investigation or prosecution of criminal offence or a 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, records or other material.

(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, 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, to the

extent not contrary to the law of the Requested Party, appear and question the person giving that evidence.

(5) If a person who is required to give evidence asserts a claim of immunity, incapacity, or privilege, which is provided for under the law of the Requesting Party, the evidence shall nonetheless be taken and the claim made known to the Central Authority of the Requesting Party for subsequent resolution by the authorities of that Party. If a claim is asserted for immunity, incapacity, or privilege, which is provided for under the law of the Requested Party, it shall be resolved pursuant to the Requested Party's law.

## **ARTICLE IX**

### **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 X**

### **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 pertaining to a response in the Requesting Party within a reasonable time before the scheduled response.

(3) The Requesting Party shall transmit a request for the service of a document pertaining to an appearance in the Requesting Party at least forty days before the scheduled appearance.

(4) Proof of service shall be given:

(a) by means of a receipt dated and signed by the person served; or

(b) by means of a declaration made by the relevant authority of the Requested Party that service has been effected and stating the form and date of such service; or

- (c) in any other feasible manner required by the Requesting Party.

The relevant document shall be sent immediately to the Requesting Party.

- (5) A person who fails to comply with any process served on him shall not thereby be liable to any penalty or coercive measure pursuant to the law of either Party, unless subsequently he voluntarily enters the jurisdiction of the Requesting Party and is there again duly served.

## **ARTICLE XI**

### **PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS**

- (1) The Requested Party shall provide copies of documents which are publicly available under its law.
- (2) The Requested Party 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.

## **ARTICLE XII**

### **CERTIFICATION AND AUTHENTICATION**

Evidence, 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. Material shall be certified or authenticated by consular or diplomatic officers only if the law of the Requesting Party specifically so requires.

## **ARTICLE XIII**

### **TRANSFER OF PERSONS IN CUSTODY**

- (1) A person in custody in the Requested Party whose presence is

requested in the Requesting Party as a witness 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 within the period indicated by the Requested Party or at any earlier time when his presence in the Requesting Party is no longer required. The Requested Party may, upon the request of the Requesting Party, extend the period for returning the person in custody.

(2) Where a person in custody who is transferred pursuant to this Article becomes entitled under the law of the Requested Party to be released from custody whilst he is in the Requesting Party, the Requested Party shall so advise the Requesting Party which shall ensure the person's release.

(3) A person who does not consent to be transferred under this Article shall not by reason thereof be liable to any penalty or coercive measure pursuant to the law of either Party.

#### **ARTICLE XIV**

##### **TRANSFER OF OTHER PERSONS**

(1) If the Requesting Party considers that the personal appearance of a witness or expert in the Requesting Party is necessary it shall so inform the Requested Party. The Requested Party shall, if satisfied that arrangements for that person's security will be made by the Requesting Party, request the witness or expert to appear and advise the Requesting Party of the reply from the witness or expert.

(2) Where a request is made pursuant to this Article the Requesting Party shall advise the approximate amounts of allowances payable, including travelling and accommodation expenses.

(3) A person who declines to appear as witness or expert, when requested under this Article, shall not by reason thereof be liable to any penalty or coercive measure pursuant to the law of either Party.

#### **ARTICLE XV**

##### **IMMUNITY**

(1) A person who consents to transfer pursuant to Article XIII or XIV 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, nor be subject to civil suit to which the person could not be subjected if he were not in the Requesting Party.

(2) Paragraph (1) shall not apply if the person, being free to leave, has not left the Requesting Party within a period of fifteen 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 XIII or XIV shall not be subject to prosecution based on his testimony, except for perjury or any comparable offence related to the giving of false evidence under the law of the Requesting Party.

(4) A person who consents to transfer pursuant to Article XIII or XIV shall not be required to give evidence in any proceedings other than the proceedings to which the request relates.

## **ARTICLE XVI**

### **SEARCH AND SEIZURE**

(1) The Requested Party shall carry out requests from the Requesting Party for search, seizure and delivery of any material which:

- (a) there are reasonable grounds to believe is in the Requested Party; and
- (b) is relevant to a proceeding or investigation relating to an offence the maximum penalty for which is at least two years' imprisonment under the law of the Requesting Party.

(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.

## **ARTICLE XVII**

### **PROCEEDS OF CRIME**

(1) The Requested Party shall, upon request, endeavour to ascertain whether any proceeds of a crime 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 of the Requesting Party.

(3) Where a request is made for assistance in securing the confiscation of proceeds such assistance shall be given by whatever means are permitted by 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) Proceeds confiscated pursuant to this Agreement shall be retained by the Requested Party unless otherwise agreed upon between the Parties.

(5) Requests made for the purpose of this Article shall:

- (a) indicate, as much as possible, the description and location of the proceeds of crime and of any other property liable to preventive measures and confiscation, and their connection with the person charged with, or convicted of, the offence;
- (b) be accompanied, where appropriate, by a copy of any order for preventive measures made by the judicial authorities of the Requesting Party, or of the order of confiscation made by a court of the Requesting Party and the certification that it is final.

## **ARTICLE XVIII**

### **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 XIX**

### **ENTRY INTO FORCE AND TERMINATION**

(1) This Agreement shall enter into force thirty 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 on receipt of that notice. Requests for assistance which have been received prior to termination of the Agreement shall nevertheless be processed in accordance with the terms of the Agreement as if the Agreement was still in force.

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto by their respective Governments, have signed this Agreement.

DONE in duplicate at Rome, Italy this twenty-eighth day of October 1998 in the Chinese, English and Italian languages, each text being equally authentic.

## SCHEDULE 2

[s. 2]

## MODIFICATIONS TO THE ORDINANCE

1. Section 5(1)(e) of the Ordinance shall be modified to read as follows -

"(e) the request relates to the prosecution of a person -\*

(i)\* for an external offence in a case where the person -\*

(A)\* has been convicted, acquitted or pardoned by a competent court or other authority in the place,\*\* or Hong Kong:\* or

(B)\* 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;

(ii) in respect of an act or omission that had occurred in Hong Kong and could no longer be prosecuted in Hong Kong by reason of lapse of time:\*".

2. Section 17(3)(b) of the Ordinance shall be modified to read as follows -

"(b) the person has had an opportunity of leaving Hong Kong , 15 days have expired since that opportunity\* and the person\* 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 ~~Attorney General~~\*\* Secretary for Justice\* to be a criminal matter in relation to which it is desirable that the person give assistance."

\* The words underlined are added. (The underlining is for ease of identifying the modification).

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

Clerk to the Executive Council

COUNCIL CHAMBER

14 September 1999

#### Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) shall apply as between the Hong Kong Special Administrative Region and the Italian Republic. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Government of the Hong Kong Special Administrative Region and the Government of the Italian Republic and signed in Rome, Italy, on 28 October 1998. A copy of those arrangements is annexed

at Schedule 1 to the Order. It should be noted that the Ordinance is subject to the modifications summarized in Schedule 2 to the Order.

**MUTUAL LEGAL ASSISTANCE IN CRIMINAL  
MATTERS (SOUTH KOREA) ORDER**

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

**1. Commencement**

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

**2. Ordinance to apply between Hong Kong  
Special Administrative Region and  
Republic of Korea**

In relation to the arrangements for mutual legal assistance -

- (a) which are applicable to the Government of the Hong Kong Special Administrative Region and the Government of the Republic of Korea;  
and
- (b) a copy of which is annexed at Schedule 1,

it is hereby directed that the Ordinance shall, subject to the modifications to the Ordinance summarized in Schedule 2, apply as between the Hong Kong Special Administrative Region and the Republic of Korea.

AGREEMENT BETWEEN  
THE GOVERNMENT OF THE HONG KONG SPECIAL  
ADMINISTRATIVE REGION OF  
THE PEOPLE'S REPUBLIC OF CHINA  
AND  
THE GOVERNMENT OF THE REPUBLIC OF KOREA  
CONCERNING  
MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

The Government of the Hong Kong Special Administrative Region of the People's Republic of China having been duly authorised by the Central People's Government of the People's Republic of China and the Government of the Republic of Korea (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 other forms of mutual assistance in criminal matters,

Have agreed as follows:

Article 1  
Scope of Assistance

1. The Parties shall provide, in accordance with the provisions of this Agreement, mutual 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 or items;
  - (b) serving of documents;
  - (c) the obtaining of evidence, articles or documents;
  - (d) executing requests for search and seizure;

- (e) facilitating the personal appearance of persons to give testimony or to assist in investigations;
- (f) effecting the temporary transfer of persons in custody to give testimony;
- (g) tracing, restraining, forfeiting and confiscating the proceeds and instrumentalities of criminal activities;
- (h) providing information, documents and records, including judicial or official records;
- (i) delivery of property, including lending of items which have been produced in evidence; and
- (j) other form of assistance not prohibited by the laws 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, but not in connection with non-criminal proceedings relating thereto.

4. The present Agreement does not apply to:

- (a) the surrender of any person;
- (b) the execution in the Requested Party of criminal judgments imposed in the Requesting Party except to the extent permitted by the law of the Requested Party and this Agreement;
- (c) the transfer of prisoners to serve sentences; or
- (d) the transfer of proceedings in criminal matters.

5. This Agreement is intended solely for mutual assistance between the 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  
Other Arrangements

This Agreement shall not affect obligations subsisting between the Parties whether pursuant to other agreements, arrangements or otherwise, or prevent the Parties from providing or continuing to provide assistance to each other pursuant to other agreements, arrangements or otherwise.

Article 3  
Central Authority

1. Each Party shall designate a Central Authority.
2. The Central Authority of the Hong Kong Special Administrative Region shall be the Secretary for Justice or his or her duly authorised officer. The Central Authority for the Republic of Korea shall be the Minister of Justice or an official designated by that Minister.
3. Requests under this Agreement shall be made by the Central Authority of the Requesting Party to the Central Authority of the Requested Party, either directly or through such other channel as their law may require.

Article 4  
Limitations on Compliance

1. The Requested Party shall refuse assistance if:
  - (a) the request for assistance impairs the sovereignty, security or public order of the Republic of Korea or, in the case of the Government of the Hong Kong Special Administrative Region, of the People's Republic of China;

- (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, sex, religion, nationality or political opinions;
- (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) if it is of the opinion that the granting of the request would seriously impair its essential interests; or
- (g) if 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(f) the Requested Party may include in its consideration of essential interests whether the provision of assistance could unduly prejudice the safety of any person.

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 an ongoing investigation or prosecution 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 except in urgent cases. In urgent cases, requests may be made orally, but shall be confirmed in writing within 14 days thereafter.

2. Requests for assistance shall include:

- (a) the name of the authority conducting the investigation or proceedings to which the request relates;
- (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 a summary of the relevant fact and laws, including the maximum penalty for the offence in relation to which the assistance is requested;

- (d) whether or not proceedings have been instituted, and where proceedings have been instituted, details of the proceedings;
- (e) any requirement for confidentiality and the reasons therefor;
- (f) where the Requesting Party wishes a particular procedure to be followed, details of that procedure; and
- (g) details of the period within which the request should be complied with.

3. Requests for assistance, to the extent necessary and possible, shall also include:

- (a) information on the identity, nationality and location of any person from whom evidence is sought;
- (b) information on the identity and location of a person to be served, that person's relationship to the proceedings, and the manner in which service is to be made;
- (c) information on the identity and whereabouts of a person to be located;
- (d) a description of the place or person to be searched and of the items to be seized;
- (e) information as to the allowances and expenses to which a person asked to appear in the Requesting Party will be entitled; and
- (f) such other information as is necessary for the proper execution of the request.

4. If the Requested Party considers that the information contained in the request is not sufficient to enable the request to be dealt with, it may request additional information.

5. All documents submitted in support of a request shall be in or translated into an official language of the Requested Party, unless the Requested Party dispenses with this requirement.

#### Article 6 Execution of Requests

1. Requests for assistance shall be executed promptly through the Central Authority of the Requested Party.

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 Limitations of Use

1. The Requesting Party shall not disclose or use information or evidence furnished for purposes other than those stated in the request without the prior consent of the Central Authority of the Requested Party.

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

3. The assistance shall be refused if the Requesting Party cannot comply with any conditions in relation to confidentiality or limitation as to the use of material provided.
4. Information and evidence which has been made public in the Requesting Party in accordance with paragraphs 1 or 2 may thereafter be used for any purpose.

Article 8  
Protection of Confidentiality

The Requested Party, if so requested, shall use its best efforts to keep confidential a request, its contents, supporting documents and any action taken pursuant to the request. If the request cannot be executed without breaching the requested confidentiality, the Requested Party shall so inform the Requesting Party, which shall then determine whether the request should nevertheless be pursued.

Article 9  
Obtaining of Evidence, Articles or Documents

1. The Requested Party shall, in conformity with its law and upon request, take testimony, or otherwise obtain statements of persons or require them to produce items of evidence or other material for transmission to the Requesting Party.
2. For the purpose 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. The Requested Party shall permit such persons as are specified in the request to be present during the execution of the request and, to the extent permitted by its law, shall allow such persons to question the person giving the testimony or evidence or to submit the questions to be posed to that person.

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) where 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 Service of Documents

1. The Requested Party shall serve any document transmitted to it for this purpose.
2. The Requesting Party shall transmit a request for the service of a document pertaining to a response or appearance in the Requesting Party not less than thirty days before the scheduled response or appearance. In urgent cases, the Requested Party may waive this requirement.
3. The Requested Party shall, subject to its law, return a proof of service in the manner required by the Requesting Party. If service cannot be effected, the Requesting Party shall be so informed and advised of the reasons.
4. A person who fails to comply with any process served on him shall not thereby be liable to any penalty or coercive measure pursuant to the law of the Requesting Party or Requested Party.

Article 11  
Return of Material to the Requested Party

Where required by the Requested Party, the Requesting Party shall return as soon as possible any material provided under this Agreement.

Article 12  
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 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.

Article 13  
Availability of Persons in Custody to Give Evidence or  
Assist Investigations

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 to the Requesting Party for that purpose, provided that 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.

3. For the purpose of this Article, the person transferred shall receive credit for service of the sentence imposed in the Requested Party for time served in the custody of the Requesting Party.

#### Article 14

##### Availability of other Persons to Give Evidence or Assist Investigations

1. The Requesting Party may request the assistance of the Requested Party in inviting a person to appear as a witness in the proceedings or assist in the investigations. That person shall be informed of any expenses and allowances payable.

2. The Requested Party shall, if satisfied that satisfactory arrangements for that person's security will be made by the Requesting Party, request the person to travel to the Requesting Party to provide assistance.

3. The Requested Party shall promptly inform the Requesting Party of the person's response.

#### Article 15

##### Safe Conduct

1. A person who consents to provide assistance pursuant to Articles 13 or 14 shall not be prosecuted, detained, or restricted in his personal liberty in the Requesting Party for any criminal offence or civil matter which preceded his departure from the Requested Party.

2. Paragraph 1 shall not apply if the person, not being a person in custody transferred under Article 13, 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 13 or 14 shall not be subject to prosecution based on his testimony, except for perjury or contempt of court.

4. A person who consents to provide assistance pursuant to Article 13 or 14 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 13 or 14 shall not by reason thereof be liable to any penalty or coercive measure by the courts of the Requesting Party or Requested Party.

#### Article 16 Search and Seizure

1. The Requested Party shall, in so far as its law permits, carry out a request for search, seizure and delivery of any material to the Requesting Party provided that the request includes the information justifying such action under the laws of the Requested Party.

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 material seized.

3. The Requesting Party shall observe any conditions imposed by the Requested Party in relation to any seized material which is delivered to the Requesting Party, including any terms and conditions to protect third party interests in the material.

#### Article 17 Proceeds of Crime

1. The Requested Party shall, upon request, endeavour to ascertain whether any proceeds of a crime 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 of the Requesting Party.

3. Where a request is made for assistance in securing the confiscation of proceeds such assistance shall be given by whatever means are appropriate within the limits permitted by 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 Requested Party in control of forfeited proceeds shall dispose of them in accordance with its law. To the extent permitted by its laws and upon such terms as it deems appropriate, the Requested Party may transfer forfeited proceeds to the Requesting Party.

#### Article 18

##### 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. Material shall be certified or authenticated by consular or diplomatic officers only if the law of the Requesting Party specifically so requires.

#### Article 19

##### 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 assume all ordinary expenses of executing a request within its boundaries, except:

- (a) the expenses associated with conveying any person to or from the territory of the Requested Party at the request of the Requesting Party, and any allowances or expenses payable to that person while in the Requesting Party pursuant to a request under Article 13 or 14;
- (b) fees and expenses of experts;
- (c) fees of outside counsel retained at the request of the Requesting Party; and
- (d) expenses of translation.

3. 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 or whether assistance shall be discontinued.

#### Article 20 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 21 Entry into Force and Termination

1. This Agreement shall enter into force thirty 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. This Agreement applies to any requests presented after its entry into force even if the relevant acts or omissions occurred prior to this Agreement entering into force.

3. Each of the Parties may terminate this Agreement at any time by giving notice in writing to the other. In that event the Agreement shall cease to have effect three months after the receipt of that notice. Requests for assistance which have been received prior to termination of the Agreement shall nevertheless be processed in accordance with the terms of the Agreement as if the Agreement was still in force.

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto by their respective Governments, have signed this Agreement.

Done in duplicate at the Hong Kong Special Administrative Region, this Seventeenth day of November One Thousand Nine Hundred and Ninety Eight in the Chinese, Korean and English languages, each text being equally authentic.

## SCHEDULE 2

[s. 2]

## MODIFICATIONS TO THE ORDINANCE

1. Section 5(1) (e) of the Ordinance shall be modified to read as follows -

"(e) the request relates to the prosecution of a person —\*

(i)\* for an external offence in a case where the person —\*

(A)\* has been convicted, acquitted or pardoned by a competent court or other authority in the place,<sup>—</sup>\*\* or Hong Kong;\* or

(B)\* 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;

(ii) 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 17(3) (b) of the Ordinance shall be modified to read as follows -

"(b) the person has had an opportunity of leaving Hong Kong, 15 days have expired since that opportunity\* and the person\* 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 ~~Attorney General~~\*\* Secretary for Justice\* to be a criminal matter in relation to which it is desirable that the person give assistance."

\* The words underlined are added. (The underlining is for ease of identifying the modification).

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

Clerk to the Executive Council

COUNCIL CHAMBER

14 September 1999

#### Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) shall apply as between the Hong Kong Special Administrative Region and the Republic of Korea. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Government of the Hong Kong Special Administrative Region and the Government of the Republic of Korea and signed in Hong Kong on 17 November 1998. A copy of those arrangements is annexed at

Schedule 1 to the Order. It should be noted that the Ordinance is subject to the modifications summarized in Schedule 2 to the Order.

**MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS  
(SWITZERLAND) ORDER**

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

**1. Commencement**

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

**2. Ordinance to apply between Hong Kong  
Special Administrative Region and  
Switzerland**

In relation to the arrangements for mutual legal assistance -

- (a) which are applicable to the Government of the Hong Kong Special Administrative Region and the Swiss Federal Council; and
- (b) a copy of which is annexed at Schedule 1,

it is hereby directed that the Ordinance shall, subject to the modifications to the Ordinance summarized in Schedule 2, apply as between the Hong Kong Special Administrative Region and Switzerland.

AGREEMENT BETWEEN  
THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE  
REGION OF THE PEOPLE'S REPUBLIC OF CHINA  
AND  
THE SWISS FEDERAL COUNCIL CONCERNING MUTUAL LEGAL  
ASSISTANCE IN CRIMINAL MATTERS

**TABLE OF CONTENTS**

<b>CHAPTER I</b>	<b>-</b>	<b>GENERAL PROVISIONS</b>
ARTICLE 1		OBLIGATION TO PROVIDE MUTUAL ASSISTANCE
ARTICLE 2		EXCLUSION
ARTICLE 3		GROUND FOR REFUSAL OR POSTPONEMENT
ARTICLE 4		APPLICABLE LAW
ARTICLE 5		COMPULSORY MEASURES
<b>CHAPTER II</b>	<b>-</b>	<b>OBTAINING EVIDENCE</b>
ARTICLE 6		GENERAL PRINCIPLES
ARTICLE 7		LIMITATION OF USE
ARTICLE 8		SEARCH AND SEIZURE
ARTICLE 9		PRESENCE OF PERSONS
ARTICLE 10		TAKING TESTIMONY OR OTHER STATEMENTS
ARTICLE 11		TRANSMISSION OF OBJECTS, DOCUMENTS, RECORDS AND EVIDENCE
ARTICLE 12		RESTITUTION OF PROPERTY AND MONEY
ARTICLE 13		PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS
ARTICLE 14		JUDICIAL RECORDS
ARTICLE 15		EXCHANGE OF INFORMATION FROM CRIMINAL RECORDS
ARTICLE 16		SUBMITTING INFORMATION IN CONNECTION WITH PROCEEDINGS
<b>CHAPTER III</b>	<b>-</b>	<b>SERVICE OF DOCUMENTS, APPEARANCE OF PERSONS</b>
ARTICLE 17		SERVICE OF DOCUMENTS
ARTICLE 18		APPEARANCE OF WITNESSES AND EXPERTS IN THE REQUESTING PARTY
ARTICLE 19		TRANSFER OF PERSONS IN CUSTODY
ARTICLE 20		FAILURE TO APPEAR
ARTICLE 21		SAFE CONDUCT
<b>CHAPTER IV</b>	<b>-</b>	<b>PROCEEDS OF CRIME</b>
ARTICLE 22		TRACING
ARTICLE 23		PROVISIONAL MEASURES

ARTICLE 24	CONFISCATION
ARTICLE 25	SPONTANEOUS INFORMATION
<b>CHAPTER V -</b>	<b>PROCEDURE</b>
ARTICLE 26	CENTRAL AUTHORITY
ARTICLE 27	CONTENTS OF REQUESTS
ARTICLE 28	EXECUTION OF REQUESTS
ARTICLE 29	CONFIDENTIALITY
ARTICLE 30	OBLIGATION TO INFORM IN CASES OF REFUSAL
ARTICLE 31	FORMALITY REQUIREMENTS
ARTICLE 32	LANGUAGE
ARTICLE 33	REPRESENTATION AND EXPENSES
<b>CHAPTER VI -</b>	<b>OTHER ASSISTANCE</b>
ARTICLE 34	POLICE COOPERATION
ARTICLE 35	OTHER BASES FOR ASSISTANCE
<b>CHAPTER VII -</b>	<b>FINAL PROVISIONS</b>
ARTICLE 36	CONSULTATIONS
ARTICLE 37	SETTLEMENT OF DISPUTES
ARTICLE 38	ENTRY INTO FORCE AND TERMINATION

The Government of the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong Special Administrative Region"), having been duly authorized to conclude this Agreement by the Central People's Government of the People's Republic of China, and the Swiss Federal Council, hereinafter called the "Parties"

Desiring to improve the effectiveness of law enforcement of both Parties in the investigation, prosecution and suppression of crime

Have agreed as follows:

## **CHAPTER I - GENERAL PROVISIONS**

### **ARTICLE 1**

#### **OBLIGATION TO PROVIDE MUTUAL ASSISTANCE**

1. The Parties shall provide, in accordance with the provisions of this Agreement, the widest measure of mutual assistance in investigations, prosecutions or proceedings in respect of offences the punishment of which, at the time of the request for mutual

assistance, falls within the jurisdiction of the Requesting Party.

2. Assistance shall include all measures, including compulsory measures, taken to advance investigations, prosecutions or related proceedings in the Requesting Party, and in particular:

- (a) identifying and locating persons;
- (b) serving of documents;
- (c) taking testimony or other statements;
- (d) producing objects, documents, records and evidence, including exhibits;
- (e) restitution of property and money;
- (f) providing information;
- (g) executing requests for search and seizure;
- (h) facilitating the appearance of persons to give evidence or to provide other assistance;
- (i) obtaining production of judicial records or publicly available and official documents;
- (j) tracing, restraining and confiscating the proceeds and instrumentalities of crime.

## ARTICLE 2 EXCLUSION

This Agreement shall not apply to the following cases:

- (a) surrender of fugitive offenders;
- (b) the enforcement or execution of final criminal judgments regarding the deprivation of liberty except to the extent permitted by the law of the Requested Party and this Agreement;
- (c) investigations or proceedings relating to an offence under military law which is not an offence under ordinary criminal law.

## ARTICLE 3 GROUNDS FOR REFUSAL OR POSTPONEMENT

1. The Requested Party shall refuse assistance if:
  - (a) the request for assistance impairs the sovereignty, security or public order of Switzerland or, in the case of the Hong Kong Special Administrative Region, the People's Republic of China;
  - (b) it is of the opinion that the granting of the request would seriously impair its essential interests;
  - (c) the request for assistance relates to an offence of a political character;
  - (d) the request relates to an offence considered by the Requested Party to be a fiscal offence; however the Requested Party has the option of complying with the request if the investigation or proceeding concerns a fraudulent scheme or a fraud relating to a fiscal matter;
  - (e) 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 or political opinions;
  - (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
  - (g) in the case of requests involving compulsory measures, 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. The Requested Party may refuse assistance if:
  - (a) the request for assistance relates to the prosecution of a person who could no longer be prosecuted by reason of lapse of time if the offence had been committed within the jurisdiction of the Requested Party;
  - (b) the Requesting Party cannot comply with any conditions relating to confidentiality or limitation as to the use of material provided; or
  - (c) 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.
3. The Requested Party may postpone assistance if execution of the request would

interfere with an ongoing investigation or prosecution in the Requested Party.

4. 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.

5. If the Requesting Party accepts assistance subject to the terms and conditions referred to in paragraph 4(b), it shall comply with those terms and conditions.

#### ARTICLE 4 **APPLICABLE LAW**

A request shall be executed in accordance with the law of the Requested Party.

#### ARTICLE 5 **COMPULSORY MEASURES**

When compulsory measures are requested in relation to the obtaining of evidence, the production of documents, including bank documents, search and seizure or the restraint and confiscation of criminal proceeds, these measures may not be replaced by different measures unless the Requesting Party gives its prior consent.

### **CHAPTER II - OBTAINING EVIDENCE**

#### ARTICLE 6 **GENERAL PRINCIPLES**

- 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, records, material or objects.

ARTICLE 7  
**LIMITATION OF USE**

The Requesting Party shall not disclose or use information or evidence furnished for purposes other than those stated in the request without the prior consent of the Central Authority of the Requested Party.

ARTICLE 8  
**SEARCH AND SEIZURE**

1. The Requested Party shall carry out requests for search, seizure and delivery of any material to the Requesting Party which is relevant to an investigation 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 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.

ARTICLE 9  
**PRESENCE OF PERSONS**

1. If the Requesting Party expressly so requests, the Central Authority of the Requested Party shall inform it of the date when and place where the request will be executed.
2. The authorities and persons involved and their legal representatives may be present at such execution if the Requested Party agrees.

ARTICLE 10  
**TAKING TESTIMONY OR OTHER STATEMENTS**

1. 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 person 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 that person to decline to give evidence in such proceedings in the Requesting Party.

2. 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.

3. For the purpose of requests under this Article the Requesting Party shall specify the questions to be put to the person or the subject matter about which he or she is to be examined.

4. If necessary any questions additional to those specified in paragraph 3 of this Article may be put to the person by the competent authority of the Requested Party, either of its own volition or if requested by any of the persons referred to in paragraph 2 of Article 9.

#### ARTICLE 11

#### **TRANSMISSION OF OBJECTS, DOCUMENTS, RECORDS AND EVIDENCE**

1. Rights claimed by third parties to objects, documents, records or other evidence in the Requested Party shall not prevent their transmission to the Requesting Party.

2. Unless otherwise agreed the Requesting Party shall return what was transmitted as quickly as possible and at the end of the proceedings at the latest.

#### ARTICLE 12

#### **RESTITUTION OF PROPERTY AND MONEY**

Property and money obtained in connection with the commission of an offence and seized by the Requested Party may also be returned to the Requesting Party for the purpose of its restitution, having due regard to any claim concerning rights of property raised by a third person.

#### ARTICLE 13

#### **PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS**

1. 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 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.

#### ARTICLE 14

## **JUDICIAL RECORDS**

The Requested Party shall make available to the authorities of the Requesting Party its records of courts or other judicial authorities, including judgments and decisions, on the same conditions and to the same extent as it does to its own authorities.

### **ARTICLE 15**

#### **EXCHANGE OF INFORMATION FROM CRIMINAL RECORDS**

Each Party shall, subject to the requirements of its law, inform the other Party of all sentences of imprisonment imposed in respect of persons who are, in the case of the Hong Kong Special Administrative Region, permanent residents or, in the case of Switzerland, nationals. Such information shall be communicated through the Central Authority at least once per year.

### **ARTICLE 16**

#### **SUBMITTING INFORMATION IN CONNECTION WITH PROCEEDINGS**

1. Either Party may, without prior request, submit information or evidence to the other Party with a view to 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.

### **CHAPTER III -**

#### **SERVICE OF DOCUMENTS** **APPEARANCE OF PERSONS**

### **ARTICLE 17**

#### **SERVICE OF DOCUMENTS**

1. The Requested Party shall effect service of writs and records of judicial verdicts and other documents which are transmitted to it for this purpose by the Requesting Party.
2. Service may be effected by simple transmission of the writ, record or other documents to the person to be served. If the Requesting Party expressly so requests, service shall be effected by the Requested Party in the manner provided for the service of analogous documents under its own law or in a special manner consistent with such law.

3. Proof of service shall be given by means of a receipt dated and signed by the person served or by means of a statement made by a competent authority in the Requested Party that service has been effected and stating the form and date of such service. One or other of these documents shall be sent immediately to the Requesting Party. The Requested Party shall, if the Requesting Party so requests, state whether service has been effected in accordance with the law of the Requested Party. If service cannot be effected, the reasons shall be communicated immediately by the Requested Party to the Requesting Party.

4. A request for the service of a summons on an accused person who is in the Requested Party shall be sent to the Central Authority of that Party at least 30 days before the date set for the appearance. Where the person to be served is not an accused person, the request for service shall be sent to the Central Authority of the Requested Party within a reasonable time.

#### ARTICLE 18

#### **APPEARANCE OF WITNESSES AND EXPERTS IN THE REQUESTING PARTY**

1. Any person in the Requested Party may be called upon to appear as a witness or as an expert in an investigation or proceeding underway in the Requesting Party, if he or she is not the subject of that investigation or proceeding.

2. The Requested Party shall invite the person to appear and shall communicate the person's reply to the Requesting Party without delay.

3. Allowances and expenses shall be payable by the Requesting Party. The witness or expert shall be informed of the allowances or expenses to which he or she will be entitled and may require an advance of such allowances or expenses.

#### ARTICLE 19

#### **TRANSFER OF PERSONS IN CUSTODY**

1. A person in custody in the Requested Party whose appearance is requested in the Requesting Party for the purposes of providing assistance pursuant to this Agreement shall, subject to paragraph 2, be transferred from the Requested Party to the Requesting Party for that purpose, provided that the Requesting Party has guaranteed the maintenance in custody of the person and his or her subsequent return to the Requested Party.

2. Transfer may be refused if:

(a) the person in custody does not consent to appear;

- (b) his or her presence is required for an investigation or proceeding underway in the Requested Party;
  - (c) the transfer is likely to prolong detention; or
  - (d) there are other overriding grounds against transfer.
3. The person transferred shall remain in detention while in the Requesting Party unless the Requested Party asks that he or she be released.
4. 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 20 **FAILURE TO APPEAR**

A person who fails to answer a request for his or her appearance shall not, even if a document served on him or her contains a notice of penalty, be subjected to any punishment or compulsory measure unless, subsequently, he or she voluntarily enters the Requesting Party and is there again duly served.

#### ARTICLE 21 **SAFE CONDUCT**

1. A person who consents to appear pursuant to Articles 18 or 19 shall not be prosecuted, detained, or restricted in his or her personal liberty in the Requesting Party for any criminal offence or be subject to civil suit being a civil suit to which the person could not be subjected if the person were not in the Requesting Party for any act or omission which preceded his or her departure from the Requested Party.
2. A person who consents to appear pursuant to Articles 18 or 19 shall not be subject to prosecution based on his or her testimony, except for perjury.
3. A person who consents to appear pursuant to Articles 18 or 19 shall not be required to give evidence in any proceedings other than the proceedings to which the request relates.
4. A person who responds to a summons from the Requesting Party to answer for acts forming the subject of proceedings against him or her shall not be prosecuted or detained or restricted in his or her personal liberty in the Requesting Party for acts or omissions which preceded his or her departure from the Requested Party and which are not specified in the summons.

5. Paragraphs 1 and 4 shall not apply if the person, being free to leave, has not left the Requesting Party within a period of 30 days after being notified that his or her appearance is no longer required, or having left the Requesting Party, has returned.

## **CHAPTER IV - PROCEEDS OF CRIME**

### **ARTICLE 22 TRACING**

The Requested Party shall, upon request, endeavour to ascertain whether any proceeds or instrumentalities of a crime 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 or instrumentalities may be located in its jurisdiction.

### **ARTICLE 23 PROVISIONAL MEASURES**

Where pursuant to Article 22 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 of crime, pending a final determination in respect of those proceeds or instrumentalities by a Court of the Requesting Party.

### **ARTICLE 24 CONFISCATION**

1. Where a request is made for assistance in securing the confiscation of proceeds or instrumentalities of crime such assistance shall be given by whatever means as appropriate. 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 of crime to which the request relates.

2. Proceeds or instrumentalities of crime confiscated pursuant to this Agreement shall be retained by the Requested Party unless otherwise agreed upon between the Parties.

### **ARTICLE 25 SPONTANEOUS INFORMATION**

Without prejudice to its own investigations or proceedings a Party may, without prior request, forward to the other Party information on proceeds or instrumentalities of crime when it considers that the disclosure of such information might assist the receiving Party in carrying out investigations or proceedings or might lead to a request by that Party under this Agreement.

## **CHAPTER V - PROCEDURE**

### **ARTICLE 26 CENTRAL AUTHORITY**

1. Each Party shall establish a Central Authority.
2. The Central Authority of the Hong Kong Special Administrative Region shall be the Secretary for Justice or his or her duly authorized officer. The Central Authority for Switzerland shall be the Federal Office for Police Matters of the Federal Department of Justice and Police in Bern.
3. Requests under this Agreement shall only be made by the Central Authority of the Requesting Party to the Central Authority of the Requested Party.
4. The Central Authorities of the Parties shall communicate directly with each other.
5. The Central Authority may also transmit requests through Interpol.

### **ARTICLE 27 CONTENTS OF REQUESTS**

1. Requests for assistance shall be in writing and 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;
  - (d) a summary of the relevant facts (date, place and circumstances in which the offence was committed) giving rise to the investigation or proceedings in the Requesting Party, unless the request is one for service within the meaning of Article 17;

- (e) the text of the statutory provisions or where this is not possible a statement of the relevant law applicable;
  - (f) where possible, the complete name, place and date of birth, nationality and address of the person who is the subject of the investigation or proceedings as of the date the request is made;
  - (g) any requirements for confidentiality;
  - (h) details of any particular procedure the Requesting Party wishes to be followed;
  - (i) details of the period within which the request should be complied with.
2. In addition, requests for assistance shall include:
- (a) in the case of service of documents, the name and address of the person to be served;
  - (b) in the case of a request for the taking of testimony or other statements, the subject matter regarding which the person is to be heard, including, if necessary, a list of questions to be asked;
  - (c) in the case of a request for the transfer of a person in custody, the person's identity and a description of the persons responsible for his or her custody during the transfer, of the place to which he or she will be transferred and the maximum length of the period of the transfer.
3. Subject to Article 16 of this Agreement, the Requested Party shall not ask that the request be accompanied by evidence.

## ARTICLE 28 EXECUTION OF REQUESTS

1. The Central Authority of the Requested Party shall promptly execute the request or arrange for its execution through its competent authorities.
2. In cases of urgency, the Central Authority of the Requested Party shall use its best endeavours to commence action on a request in advance of receipt of all the documentation.
3. If the request does not conform with the provisions of this Agreement, the Central Authority of the Requested Party shall inform the Central Authority of the Requesting Party without delay with a view to having the request appropriately amended.

4. 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.

5. 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.

6. After the request has been executed, the competent authority shall forward to the Central Authority of the Requested Party the original of the request and the information and evidence gathered. The Central Authority shall be responsible for ensuring that the execution is complete and accurate and shall communicate the results thereof to the Central Authority of the Requesting Party.

#### ARTICLE 29 **CONFIDENTIALITY**

Subject to the provisions of its domestic law the Requested Party shall keep the request and the information contained therein confidential except when otherwise authorized by the Requesting Party.

#### ARTICLE 30 **OBLIGATION TO INFORM IN CASES OF REFUSAL**

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 31 **FORMALITY REQUIREMENTS**

1. Documents, transcripts, records, statements, as well as other material or objects shall be exempted from any legalization requirement.

2. Documents, transcripts, records, statements as well as other material or objects which are to be transmitted to the Requesting Party shall only be certified if the Requesting Party so requests. For that purpose certification by the Central Authority of the Requested Party shall be sufficient.

3. Documents, transcripts, records, statements as well as other material or objects shall not be required to be certified or authenticated by consular or diplomatic officers.

ARTICLE 32  
**LANGUAGE**

All documents submitted in support of a request shall be accompanied by a translation into an official language of the Requested Party to be specified by the Requested Party in each case.

ARTICLE 33  
**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 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 interpretation; and
- (d) travel expenses and allowances of persons involved in the execution of a request.

3. 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.

**CHAPTER VI - OTHER ASSISTANCE**

ARTICLE 34  
**POLICE COOPERATION**

When compulsory measures are not required assistance may be provided between the respective police or other law enforcement agencies of the Parties. Communications in relation to such assistance shall normally be through Interpol.

ARTICLE 35

## **OTHER BASES FOR ASSISTANCE**

The Parties may provide assistance pursuant to other agreements or arrangements as well as assistance consistent with the objects of this Agreement which can be otherwise provided for under domestic law.

## **CHAPTER VII - FINAL PROVISIONS**

### **ARTICLE 36 CONSULTATIONS**

If they think it useful, the Central Authorities shall exchange views, orally or in writing, on the application or implementation of this Agreement, in general terms or in a particular case.

### **ARTICLE 37 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 38 ENTRY INTO FORCE AND TERMINATION**

1. This Agreement shall enter into force thirty 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 on receipt of that notice. Requests for assistance which have been received prior to termination of the Agreement 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, being duly authorized thereto by their respective Governments, have signed this Agreement.

DONE at the Hong Kong Special Administrative Region this fifteenth day of March One Thousand Nine Hundred and Ninety Nine in duplicate, in Chinese, German and

English, each text being equally authentic.

SCHEDULE 2

[s. 2]

MODIFICATIONS TO THE ORDINANCE

1. Section 5(1)(e) of the Ordinance shall be 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,\* 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;"
  
2. Section 17(3)(b) of the Ordinance shall be modified to read as follows -
 

"(b) the person has had an opportunity of leaving Hong Kong. 30 days have expired since that opportunity\* and the person\* 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 ~~Attorney General~~\*\* Secretary for Justice\* to be a criminal matter in relation to which it is desirable that the person give assistance."

\* The words underlined are added. (The underlining is for ease of identifying the modification).

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

Clerk to the Executive Council

COUNCIL CHAMBER

14 September 1999

### Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) shall apply as between the Hong Kong Special Administrative Region and Switzerland. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Hong Kong Special Administrative Region and the Swiss Federal Council and signed in the Hong Kong Special Administrative Region on 15 March 1999. A copy of those arrangements is annexed at Schedule 1 to the Order. It should be noted that the Ordinance is subject to the modifications summarized in Schedule 2 to the Order.

**Explanatory Statement on the Modifications to the Ordinance**

***Mutual Legal Assistance in Criminal Matters  
(Italy) Order ("Italy Order")***

**Previous Convictions etc.**

Section 5(1)(e) of the Ordinance provides that the Secretary for Justice shall refuse assistance if the request relates to the prosecution of a person for an offence in respect of which he has been convicted, acquitted, pardoned or punished in the requesting jurisdiction. Article III(1)(f) of the Hong Kong/Italy Agreement provides for this protection in relation to convictions etc. in the requested jurisdiction. The modification to section 5(1)(e) reflects the provision in the agreement; the protection in section 5(1)(e) in relation to convictions etc. in the requesting jurisdiction will continue to apply.

**Lapse of Time**

2. Section 5(1)(e) is also modified to provide for refusal of assistance if the relevant offence had been committed in Hong Kong and could not as a matter of Hong Kong law be prosecuted by reason of lapse of time. This modification reflects Article III(1)(g) of the Hong Kong/Italy Agreement.

**Immunities**

3. Section 17 of the Ordinance gives a person who comes to Hong Kong from another jurisdiction to render assistance certain immunities. These immunities cease to apply if the person has had the opportunity of leaving Hong Kong and has remained in Hong Kong otherwise than for the purpose of rendering assistance. Article XV(2) of the Hong Kong/Italy Agreement provides that the immunities will continue to be applicable for a period of fifteen days after the person has had the opportunity of leaving Hong Kong. The modification reflects the additional

protection in the agreement by providing for a fifteen day period in section 17.

***Mutual Legal Assistance in Criminal Matters  
(South Korea) Order ("South Korea Order")***

**Previous Convictions etc.**

4. This modification to section 5(1)(e) of the Ordinance in respect of previous convictions, acquittals and pardons is exactly the same as the modification provided for in the Italy Order (see paragraph 1 above). It reflects Article 4(1)(e) of the Hong Kong/South Korea Agreement.

**Lapse of Time**

5. A new sub-paragraph is 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. This modification also reflects Article 4(1)(e) of the Hong Kong/South Korea Agreement.

**Immunities**

6. This modification to section 17 of the Ordinance is the same as the modification provided for in the Italy Order [see paragraph 3 above]. It reflects the additional protection in Article 15(2) of the Hong Kong/South Korea Agreement.

***Mutual Legal Assistance in Criminal Matters  
(Switzerland) Order ("Switzerland Order")***

**Previous Convictions etc.**

7. This modification to section 5(1)(e) of the Ordinance in respect of previous convictions, acquittals and pardons is exactly the same as the modification provided for in the Italy Order (see paragraph 1 above). It reflects Article 3(1)(f) of the Hong Kong/Switzerland Agreement.

**Immunities**

8. This modification to section 17 of the Ordinance is exactly the same as the modification provided for in the Italy Order (see paragraph 3 above) except that the period is thirty days. The modification reflects the additional protection in Article 21(5) of the Hong Kong/Switzerland Agreement.