

LN278-E

L. N. 278 of 1999

MUTUAL LEGAL ASSISTANCE IN CRIMINAL
MATTERS (UNITED STATES OF AMERICA) 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 and
United States of America

In relation to the arrangements for mutual legal assistance---

(a) which are applicable to the Government of Hong Kong and the Government of the United States of America; 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 Hong Kong and the United States of America.

Schedule 1 [s. 2]

Agreement Between

the Government of Hong Kong

and

the Government of the United States of America

on

Mutual Legal Assistance in Criminal Matters

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The Government of Hong Kong, having been duly authorized by the sovereign government responsible for the foreign affairs relating to Hong Kong, and the Government of the United States of America, hereinafter called "the Parties",

Desiring to improve the effectiveness of law enforcement of both Parties in the investigation, prosecution, and prevention of crime and the confiscation or forfeiture of the proceeds and instrumentalities of crime through cooperation and mutual legal assistance related to criminal matters,

Have agreed as follows:

Article 1

Scope of Assistance

- (1) The Parties shall provide mutual assistance, in accordance with the provisions of this Agreement, in connection with the investigation, prosecution, and prevention of criminal offences, and in proceedings related to criminal matters.
- (2) Assistance shall include:
 - (a) taking evidence, testimony, or statements of persons;
 - (b) providing information, documents, records, and items;
 - (c) locating or identifying persons or items;
 - (d) serving documents;
 - (e) transferring persons in custody and others to provide assistance;
 - (f) executing requests for search and seizure;
 - (g) confiscating and forfeiting the proceeds and instrumentalities of crime and otherwise assisting in relation thereto;
 - (h) delivering property, including lending exhibits or other items; and
 - (i) any other form of assistance not prohibited by the law of the Requested Party.

(3) This Agreement shall include assistance for criminal offences related to taxation, customs duties, foreign exchange control, or other revenue matters but shall not include assistance for non-criminal proceedings relating thereto.

(4) This Agreement is intended solely for mutual legal assistance between the Parties, and is not intended or designed to provide such assistance to private parties. A private party may not rely upon any provision of this Agreement to impede the execution of a request, or to exclude or suppress evidence obtained under this Agreement.

Article 2

Central Authorities

(1) Each Party shall establish a Central Authority.

(2) The Central Authority for Hong Kong shall be the Attorney General of Hong Kong or a person duly authorized by the Attorney General. The Central Authority for the United States of America shall be the Attorney General of the United States or a person duly authorized by the Attorney General.

(3) Requests and other communications pursuant to this Agreement shall be made directly between the Central Authorities of the Parties.

Article 3

Limitations on Providing Assistance

(1) The Central Authority of the Requested Party shall refuse assistance if:

(a) the request for assistance impairs the sovereignty, security, or public order (ordre public) of the United States of America or, in the case of Hong Kong, the sovereign government responsible for the foreign affairs relating to Hong Kong;

(b) it is of the opinion that the granting of the request would impair the Requested Party's essential interests;

(c) it is of the opinion that the request for assistance relates to a political offence or that there are substantial grounds for believing the request was made for the purpose of prosecuting, punishing, or otherwise proceeding against a person on account of the person's race, religion, nationality, or political opinions; or

(d) it is of the opinion that the acts or omissions alleged to constitute the criminal offence would not have constituted a criminal offence if they had taken place within the jurisdiction of the Requested Party, or, irrespective of whether they would have done so, would not constitute in the Requesting Party an offence within any of the descriptions in the Annex to this Agreement.

(2) In considering whether acts or omissions constitute an offence for the purpose of paragraph (1) (d), it shall be irrelevant whether any of those acts or omissions involve interstate transportation or the use of the mails or other facilities affecting interstate or foreign commerce, such matters being merely for the purpose of establishing jurisdiction in a United States federal court.

- (3) The Central Authority of the Requested Party may refuse assistance if:
- (a) the request relates to an offence under military law that would not be an offence under ordinary criminal law;
 - (b) the request for assistance relates to the prosecution of a person for a criminal offence in respect of which the person has been convicted or acquitted in the Requested Party; or
 - (c) the request is not made in conformity with the Agreement.
- (4) Before refusing assistance pursuant to this Article, the Central Authority of the Requested Party:
- (a) shall promptly inform the Central Authority of the Requesting Party of the reason for considering refusal; and
 - (b) shall consult with the Central Authority of the Requesting Party to determine whether assistance may be given subject to such terms and conditions as the Central Authority of 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.
- (6) If the Central Authority of the Requested Party refuses assistance, it shall inform the Central Authority of the Requesting Party of the reasons for the refusal.

Article 4

Form and Contents of 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 promptly thereafter.
- (2) Requests and supporting documents shall be submitted in, or accompanied by a translation into, an official language of the Requested Party.
- (3) Requests shall include the following:
- (a) the name of the authority conducting the investigation, prosecution, or proceeding to which the request relates;
 - (b) a description of the subject matter and nature of the investigation, prosecution, or proceeding, including the specific criminal offences that relate to the matter;
 - (c) a description of the evidence, information, or other assistance sought;
 - (d) a statement of the purpose for which the evidence, information, or other assistance is sought; and
 - (e) a summary of the relevant facts and law.
- (4) To the extent necessary and possible, requests shall also include:
- (a) information on the identity and location of any person from whom evidence, information, or other assistance 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) a description of the manner in which any testimony, evidence, or statement is to be taken and recorded;
- (f) a list of questions to be asked of a person or a description of the subject matter about which the person is to be examined, or both;
- (g) a description of any particular procedure to be followed in executing the request;
- (h) information as to the allowances and expenses to which a person asked to appear in the Requesting Party will be entitled;
- (i) any requirements for confidentiality;
- (j) any time limits relevant to the request;
- (k) a certified copy of any court order sought to be enforced, and a statement to the effect that it is a final order not subject to appeal;
- (l) a copy of any certificates or forms to be completed in order to meet the standards of admissibility in the Requesting Party; and
- (m) any other information that may be brought to the attention of the Requested Party to facilitate its execution of the request.

Article 5

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) Such authorities shall use their best efforts to execute the request. The Courts of the Requested Party shall have authority to issue subpoenas, search warrants, or other orders necessary to execute the request.
- (3) Requests shall be executed as empowered by this Agreement or by applicable law. The method of execution specified in the request shall be followed to the extent that it is not incompatible with the law of the Requested Party.
- (4) If the Central Authority of the Requested Party determines that execution of a request would interfere with an ongoing criminal investigation, prosecution, or proceeding in that Party, it may postpone execution, or make execution subject to conditions determined necessary after consultations with the Central Authority of the Requesting Party. If the Requesting Party accepts the assistance subject to the conditions, it shall comply with the conditions.
- (5) The Requested Party shall promptly inform the Requesting Party of any circumstances that are likely to cause a significant delay in responding to the request.
- (6) The Requested Party shall use its best efforts to keep confidential a request and its contents if such confidentiality is requested by the Central Authority of

the Requesting Party. If the request cannot be executed without breaching such confidentiality, the Central Authority of the Requested Party shall so inform the Central Authority of the Requesting Party, which shall then determine whether the request should nevertheless be executed.

(7) The Central Authority of the Requested Party shall respond to reasonable requests by the Central Authority of the Requesting Party on progress toward execution of the request.

(8) The Central Authority of the Requested Party shall promptly inform the Central Authority of the Requesting Party of the outcome of the execution of the request. If the request cannot be executed in whole or in part, the Central Authority of the Requested Party shall inform the Central Authority of the Requesting Party of the reasons therefor.

Article 6

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, except:

(a) fees of counsel retained at the request of the Requesting Party;

(b) fees of experts;

(c) expenses of transcription, and language interpretation and translation; and

(d) travel expenses and allowances of persons travelling at the request of the Requesting Party.

(3) If, during the execution of the request, it becomes apparent that expenses of an extraordinary nature are required to fulfill the request, the Parties shall consult to determine the terms and conditions under which the execution of the request may continue.

Article 7

Limitations on Use

(1) The Central Authority of the Requested Party may require that the Requesting Party not use any information or evidence obtained under this Agreement in any investigation, prosecution, or proceeding other than that described in the request without the prior consent of the Central Authority of the Requested Party. In such a situation, the Requesting Party shall comply with the requirement.

(2) The Central Authority of the Requested Party may request that information or evidence furnished under this Agreement be kept confidential or be used only subject to terms and conditions it may specify. If the Requesting Party accepts the

information or evidence subject to such conditions, the Requesting Party shall comply with the conditions.

(3) Nothing in this Article shall preclude the use or disclosure in a criminal proceeding of information or evidence to the extent that there is an obligation to do so for Hong Kong under its law or for the United States under its Constitution. The Requesting Party shall notify the Requested Party in advance of any such proposed disclosure.

(4) Information or evidence that has been made public in the Requesting Party in accordance with paragraph (1) or (2) may thereafter be used for any purpose.

Article 8

Statements of Persons

Where a request is made to obtain the statement of a person for the purpose of an investigation, prosecution, or proceeding related to a criminal matter, the Requested Party shall endeavour, with the consent of the person, to obtain such statement.

Article 9

Taking of Evidence or Testimony in the Requested Party

(1) Where a request is made that evidence be taken for the purpose of an investigation, prosecution, or proceeding related to a criminal matter, the Requested Party shall arrange to have such evidence taken. A person in the Requested Party from whom evidence is requested pursuant to this Agreement shall be compelled, if necessary, to appear and give evidence.

(2) For the purposes of this Agreement, the giving or taking of evidence shall include the giving or taking of testimony and the production of documents, records, or items.

(3) Upon request, the Central Authority of the Requested Party shall furnish information in advance about the date and place of the taking of evidence pursuant to this Article.

(4) 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.

(5) If the person referred to in paragraph (1) asserts a claim of immunity, incapacity, or privilege under the law of the Requested Party, it shall be resolved pursuant to the Requested Party's law. If such a claim is asserted 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.

(6) The Requesting Party may request that documents, records, and any other items

produced in the Requested Party pursuant to this Article or that are the subject of testimony taken under this Article be certified in accordance with procedures specified in the request. If certified in accordance with such procedures, they shall be admissible in evidence in the Requesting Party as proof of the truth of the matters set forth therein.

Article 10

Publicly Available and Official Documents

(1) The Requested Party shall provide the Requesting Party with copies of publicly available records, including documents or information in any form, in the possession of government departments and agencies in the Requested Party.

(2) The Requested Party may provide copies of any documents, records, 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 copies would be available to its own law enforcement or judicial authorities.

(3) The Requesting Party may request that official records produced pursuant to this Article be certified in accordance with procedures specified in the request. If certified in accordance with such procedures, they shall be admissible in evidence in the Requesting Party as proof of the truth of the matters set forth therein.

Article 11

Transfer of Persons in Custody

(1) A person in the custody of the Requested Party whose presence in the Requesting Party is sought for the purpose of providing assistance pursuant to this Agreement shall be transferred from the Requested Party to the Requesting Party for that purpose if the person consents and if the Central Authorities of both Parties agree.

(2) Where the presence of a person in custody in the Requesting Party is desired in the Requested Party pursuant to Article 9(4) or at the request of the Requesting Party to assist in execution of a request, the person shall be transferred from the Requesting party to the Requested Party if the person consents and if the Central Authorities of both Parties agree.

(3) For the purposes of this Article:

(a) the receiving Party shall have the authority to keep the person transferred in custody and shall be obliged to do so unless otherwise authorized by the sending Party;

(b) the receiving Party shall return the person transferred to the custody of the sending Party as soon as circumstances permit or as otherwise agreed by both Central Authorities;

(c) the receiving Party shall not require the sending Party to initiate extradition proceedings for the return of the person transferred; and

(d) the person transferred shall receive credit for service of the sentence imposed

in the sending Party for time served in the custody of the receiving Party.

Article 12

Attendance of Other Persons

The Central Authority of the Requesting Party may request the assistance of the Requested Party in making a person who is not in custody available in the Requesting Party for the purpose of providing assistance pursuant to this Agreement. Upon receipt of such a request, the Central Authority of the Requested Party shall invite the person to travel to the Requesting Party to provide assistance. The Central Authority of the Requested Party shall promptly inform the Central Authority of the Requesting Party of the response of the person.

Article 13

Safe Conduct

(1) Unless otherwise specified in the request, a person transferred pursuant to Article 11 or 12 shall not be subject to any service of process or be prosecuted, punished, or subject to any restriction of personal liberty by reason of any acts or omissions that preceded the person's departure from the sending Party.

(2) If the request provides for any limitations on the safe conduct referred to in paragraph (1), the person whose presence is requested shall be advised by the Central Authority of the Requested Party of the nature of those limitations.

(3) Paragraph (1) shall not apply if the person, not being a person transferred in custody under Article 11, and 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.

(4) A person who consents to provide evidence pursuant to Article 11 or 12 shall not be subject to prosecution based on his testimony, except for perjury.

(5) A person who consents to provide assistance pursuant to Article 11 or 12 shall not be required to provide assistance other than that to which the request relates.

(6) A person who does not consent to provide assistance pursuant to Article 11 or 12 shall not by reason thereof be liable to any penalty or coercive measure by the courts of the Requesting or Requested Party.

Article 14

Location or Identity of Persons or Items

The Requested Party shall, if requested, endeavour to ascertain the location or identity of any person or item specified in the request.

Article 15

Service of Documents

(1) The Requested Party shall use its best efforts to serve any document transmitted to it pursuant to this Agreement for the purpose of service.

(2) The Requesting Party shall transmit a request for the service of a document pertaining to a response or appearance in the Requesting Party within a reasonable time before the scheduled response or appearance.

(3) The Requested Party may effect service of any document by mail or, if the Requesting Party so requests, in any other manner required by the law of the Requesting Party that is not prohibited by the law of the Requested Party.

(4) The Requested Party shall return a proof of service in the manner specified by 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 the Requesting Party unless that person is, where the United States of America is the Requesting Party, a national or permanent resident of the United States of America.

Article 16

Search and Seizure

(1) The Requested Party shall carry out a request for the search, seizure, and delivery of any item to the Requesting Party if the request includes the information justifying such action under the law 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 property seized.

(3) The Requesting Party may request that each official who has had custody of a seized item certify the identity of the item, the continuity of custody, and the integrity of its condition in accordance with procedures specified in the request. Each such certification shall be admissible in evidence in the Requesting Party as proof of the truth of the matters set forth therein.

(4) The Requesting Party shall observe any conditions imposed by the Central Authority of the Requested Party in relation to any seized property that is delivered to the Requesting Party under this Article.

Article 17

Return of Items

If required by the Central Authority of the Requested Party, the Central Authority of the Requesting Party shall return as soon as possible any documents, records, or items delivered to it in execution of a request under this Agreement.

Article 18

Confiscation and Forfeiture

(1) 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.

(2) Where, pursuant to paragraph (1), 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 by a court of the Requesting Party.

(3) Where a request is made for assistance in securing the confiscation or forfeiture of proceeds or instrumentalities of crime, such assistance shall be given by whatever means are appropriate. This may include enforcing an order made by a court in the Requesting Party or initiating or assisting in proceedings in relation to the request.

(4) The Central Authority of the Requested Party shall notify the Central Authority of the Requesting Party of any action taken pursuant to this Article.

(5) The Party that has custody over proceeds or instrumentalities of crime shall dispose of them in accordance with its law. Either Party may transfer such assets, or the proceeds of their sale, to the other Party, to the extent permitted by the transferring Party's law and upon such terms as may be agreed.

Article 19

Certification and Authentication

Documents, records, or items to be transmitted to the Requesting Party shall only be certified or authenticated if the Central Authority of the Requesting Party so requests. Such documents, records, or items shall be certified or authenticated by consular or diplomatic officers only if required by the law of the Requesting Party.

Article 20

Other Assistance

The Parties may provide assistance to each other pursuant to other agreements or to applicable laws, arrangements, or practices.

Article 21

Consultation

The Central Authorities of the Parties shall consult as appropriate to promote the most effective use of this Agreement. The Central Authorities may also agree on such practical measures as may be necessary to facilitate the implementation of this Agreement.

Article 22

Resolution 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 23

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 shall apply to requests whether or not the relevant acts or omissions occurred prior to this Agreement's entry into force.

(3) Either Party may terminate this Agreement by giving notice to the other in writing. In that event, the Agreement shall cease to have effect three months after the date of the receipt of such notice. Requests for assistance that have been received prior to receipt of notice of 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 by their respective Governments, have signed this Agreement.

Done at Hong Kong this fifteenth day of April 1997 in duplicate, in the Chinese and English languages, both texts being equally authentic.

ANNEX

The Parties recognize the importance of providing broad mutual legal assistance in relation to investigations, prosecutions, and proceedings concerning offences such as trafficking in narcotic drugs, hijacking and other terrorist offences, offences against the laws protecting intellectual property, and offences relating to illegal immigration. In addition, the Parties agree to provide assistance in investigations, prosecutions, and proceedings concerning the following offences without regard to whether the acts or omissions alleged to constitute the offence would constitute an offence under the laws of the Requested Party:

- (1) offences against the laws relating to money laundering;
- (2) fraud against the government, including behaviour that has the effect of depriving the government or its agencies of money, valuable property, or the ability to conduct its affairs free from false statements and deceit;
- (3) offences covered by Article 1(3);
- (4) offences against the laws relating to foreign corrupt practices;
- (5) export control offences, including conduct tending to evade the laws controlling the export of goods or arms, and other offences against the laws relating to the control of exportation or importation of goods of any type;
- (6) criminal exploitation of children, whether for sexual or other purposes, including commercial dealing in child pornography;
- (7) offences against the laws relating to organized crime and racketeering; and

(8) such further offences as may from time to time be agreed upon by exchange of diplomatic notes following consultation between the Central Authorities.

Schedule 2 [s. 2]

Modifications to the Ordinance

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

"(g) the request relates to an act or omission that---

(i)* if it had occurred in Hong Kong, would not have constituted a Hong Kong offence;

or*

(ii) does not constitute an external offence described in the Annex to the arrangements

for mutual legal assistance---

(A) which are applicable to the Government of Hong Kong and the Government of the United States of America; and

(B) a copy of which is annexed at Schedule 1 to the Mutual Legal Assistance in Criminal Matters (United States of America) Order (L.N. 278 of 1999).*".

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. ".

3. Section 23(1)(d) of the Ordinance shall be modified to read as follows---

"(d) the Attorney General** Secretary for Justice* is satisfied that---

(i) the place has given adequate (whether or not unqualified) undertakings in respect of the matters referred to in subsection (2) and the prisoner or other person has been

given a copy of those undertakings and has subsequently consented to giving such

assistance in that place*; and** or*

(ii) the prisoner or other person has been given a copy of those undertakings and has

subsequently consented to giving such assistance in that place,**

(ii) ~~the place has not given adequate undertakings in respect of all the matters referred~~

~~to in subsection (2) and the prisoner or other person has been given a copy of those~~

~~undertakings, advised as to the nature of the matters in respect of which adequate~~

~~undertakings have not been given and has subsequently consented to giving such~~

~~assistance in that place, *".~~

* 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).

Mable CHAN

Clerk to the Executive Council

Council Chamber

13 October 1998

Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) shall apply as between Hong Kong and the United States of America. The Order is made in consequence of the arrangements for mutual legal assistance entered into by Hong Kong and the United States of America and signed in Hong Kong on 15 April 1997. 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.