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Date : 13 June 2003

From : Clerk to the Legislative Council

To : All Members of the Legislative Council

Council meeting of 2 July 2003

**Proposed resolution under the
Mutual Legal Assistance in Criminal Matters Ordinance**

I forward for Members' consideration a proposed resolution which the Secretary for Security will move at the Council meeting of 2 July 2003 under the Mutual Legal Assistance in Criminal Matters Ordinance. The President has directed that "it be printed in the terms in which it was handed in" on the Agenda of the Council.

2. The speech, in both English and Chinese versions, which the Secretary for Security will deliver when moving the proposed resolution, is also attached.

(Ray CHAN)
for Clerk to the Legislative Council

Encl.

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS ORDINANCE

RESOLUTION

(Under section 4 of the Mutual Legal Assistance in
Criminal Matters Ordinance (Cap. 525))

RESOLVED that the Mutual Legal Assistance in Criminal Matters
(Ireland) Order, made by the Chief Executive in Council
on 10 December 2002, be approved.

**MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS
(IRELAND) 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 published in the Gazette.

2. Ordinance to apply between Hong Kong and Ireland

In relation to the arrangements for mutual legal assistance –

- (a) which are applicable to the Government and the Government of Ireland; and
- (b) a copy of which is annexed at Schedule 1,

it is directed that the Ordinance shall, subject to the modifications summarized in Schedule 2, apply as between Hong Kong and Ireland.

SCHEDULE 1

[s. 2]

AGREEMENT BETWEEN

THE GOVERNMENT OF THE HONG KONG SPECIAL

ADMINISTRATIVE REGION OF THE PEOPLE'S

REPUBLIC OF CHINA

AND

THE GOVERNMENT OF IRELAND

CONCERNING

MUTUAL LEGAL ASSISTANCE IN CRIMINAL

MATTERS

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

Desiring to improve the effectiveness of law enforcement of both Parties in the investigation, prosecution and prevention of crime and the tracing, restraint and confiscation of criminal proceeds and instrumentalities of crime,

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;
 - (b) serving of documents;
 - (c) the obtaining of evidence, including testimony or statements of persons;
 - (d) executing requests for search and seizure;
 - (e) facilitating the personal appearance of persons to give evidence or provide other assistance;
 - (f) effecting the temporary transfer of persons in custody to give evidence or provide other assistance;
 - (g) identifying, tracing, restraining, forfeiting and confiscating the proceeds and instrumentalities of crime;
 - (h) providing information, articles, documents and records, including judicial or official records;
 - (i) delivery of property, including lending of exhibits;
 - (j) such other assistance as may be agreed between the Parties and which is consistent with the objectives of this Agreement.
- (3) 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

CENTRAL AUTHORITY

- (1) Each Party shall designate a Central Authority to make and receive requests pursuant to this Agreement.
- (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 Ireland shall be the Minister for Justice, Equality and Law Reform or a person designated by the Minister. Either Party may change its Central Authority in which case it shall notify the other of the change.
- (3) The Central Authorities may communicate directly with one another for the purposes of this Agreement.

ARTICLE 3

OTHER AGREEMENTS OR ARRANGEMENTS

This Agreement shall be without prejudice to other rights and obligations between the Parties pursuant to other agreements and shall not prevent the Parties or their law enforcement authorities from providing assistance to each other pursuant to other agreements or formal or informal arrangements.

ARTICLE 4

FORM AND CONTENTS OF REQUESTS

- (1) A request for assistance shall be in writing except that the Central Authority of the Requested Party may accept a request in another form in emergency situations. In the latter case, the request shall be confirmed in writing within ten days thereafter unless the Central Authority of the Requested Party agrees otherwise. The request shall be in an official language of the Requested Party unless otherwise agreed.
- (2) Requests for assistance shall include the following:
 - (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 subject matter and nature of the investigation, prosecution, offence or criminal matter and whether or not proceedings have been instituted;
 - (d) where proceedings have been instituted, details of the proceedings;
 - (e) a summary of the relevant facts and laws; and
 - (f) the identity of any person or persons being investigated or prosecuted.
- (3) To the extent necessary and possible, a request shall also include:
- (a) information on the identity and location of any person from whom evidence is sought;
 - (b) information on the identity and location of any 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 possible whereabouts of any person to be located;
 - (d) a precise description of any place or person to be searched and of any articles to be seized;
 - (e) a description of the manner in which any evidence or statement is to be taken and recorded;
 - (f) a list of questions to be asked of any person;
 - (g) a description of any particular procedure to be followed in executing the request;
 - (h) information as to the allowances and expenses to which any person asked to appear in the Requesting Party will be entitled;
 - (i) any requirements for confidentiality;

- (j) details of the period within which the request should be complied with;
 - (k) any court order, or a certified copy thereof, sought to be enforced and a statement to the effect that it is a final order;
 - (l) any other information which may facilitate the execution of the request.
- (4) All documents submitted in support of a request shall if required by the Requested Party be accompanied by a translation in an official language of the Requested Party.

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) A request shall be executed subject to the law of the Requested Party and, to the extent not prohibited by the law of the Requested Party, in accordance with any 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 6

LIMITATIONS ON ASSISTANCE

- (1) The Requested Party shall refuse assistance if:

- (a) the request for assistance impairs the sovereignty, security or public order of Ireland 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 that is regarded by the Requested Party as an offence of a political character;
- (c) the request relates to an offence under military law that would not be an offence under ordinary criminal law;
- (d) it considers that there are substantial grounds for believing that the request for assistance will result in a person being prejudiced on account of his or her race, 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) it is of the opinion that the granting of the request would seriously impair its essential interests;
- (g) the Requesting Party cannot comply with any conditions in relation to confidentiality or limitation as to the use of material provided;
- (h) 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;
- (i) 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;
- (j) in relation to the investigation of taxation offences, the primary purpose of the investigation is the assessment or collection of tax.

(2) For the purpose of paragraph (1)(f) the Requested Party may take into account whether the provision of assistance could prejudice the safety of any person or impose an excessive burden on the resources of the Requested Party.

- (3) For the purpose of paragraph (1)(h):
- (a) the totality of the acts or omissions alleged to constitute the offence against the law of the Requesting Party shall be considered and not merely the legal elements of that offence;
 - (b) for offences relating to taxes, duties, or customs controls, it shall be immaterial that the law of the Requested Party does not impose the same kind of tax, duty or customs control or does not contain a tax, duty or customs regulation of the same kind as the law of the Requesting Party.
- (4) The Requested Party may postpone assistance if execution of the request would interfere with an ongoing criminal investigation, prosecution or proceeding under the law of that 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 the assistance sought should only be granted in part or 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 7

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 jurisdiction except:
- (a) fees of counsel retained at the request of the Requesting Party;

- (b) fees of experts;
- (c) expenses of translation and interpretation;
- (d) travel expenses and allowances of persons travelling between the Parties; and
- (e) other expenses to the extent that these are of an extraordinary nature.

(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 8

LIMITATIONS ON USE

(1) The Requested Party shall, to any extent requested, keep confidential a request for assistance, its contents and any supporting documents, and the fact of granting such assistance except to the extent that disclosure is necessary to execute the request. If the request cannot be executed without breaching such confidentiality as may be requested, the Requested Party shall so inform the Requesting Party which shall then determine the extent to which it wishes the request to be executed.

(2) The Requesting Party shall, to any extent requested, keep confidential any evidence and information provided by the Requested Party, except to the extent that disclosure is necessary for the investigation, prosecution or proceeding described in the request.

(3) The Requesting Party shall not use for purposes other than those stated in a request evidence or information obtained as a result of it, without prior consent of the Requested Party and subject to such terms and conditions as the Requested Party considers necessary.

ARTICLE 9

OBTAINING OF EVIDENCE, ARTICLES OR DOCUMENTS

- (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 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 evidence is to be taken pursuant to a request for assistance under this Article, the person to whom the investigation, prosecution or proceeding in the Requesting Party relates, the person who is to give evidence and representatives of the Requesting Party may, subject to the law of the Requested Party, appear or have legal representation or both for the purpose of questioning the person giving the evidence.
- (5) If a person who is required to give evidence pursuant to a request for assistance 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) 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.

ARTICLE 10

OBTAINING STATEMENTS OF PERSONS

Where a request is made to obtain the statement of a person 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 endeavour to obtain such statement.

ARTICLE 11

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 12

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 or appearance in the Requesting Party within a reasonable time before the scheduled response or appearance.
- (3) A request for the service of a document pertaining to an appearance in the Requesting Party shall include such notice as the Central Authority of the Requesting Party is reasonably able to provide of outstanding warrants or other judicial orders in criminal matters against the person to be served.
- (4) The Requested Party shall, subject to its law, return a proof of service in the manner required by the Requesting Party.
- (5) A person who fails to comply with any process served on him or her shall not thereby be liable to any penalty or coercive measure pursuant to the law of the Requesting Party or Requested Party.

ARTICLE 13

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 at its discretion 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

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 15

TRANSFER OF PERSONS IN CUSTODY

- (1) A person in the custody of one Party whose presence in the other Party is sought for purposes of assistance under this Agreement shall be transferred for those purposes if the person and both Parties consent.
- (2) For the purpose of this Article:
 - (a) the receiving Party shall have the obligation to keep the person transferred in custody unless otherwise authorised 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, unless otherwise agreed by both Parties and the person transferred;
- (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.

(3) Where the sentence of imprisonment of a person transferred pursuant to this Article expires whilst the person is in the receiving Party the sending Party shall so advise the receiving Party which shall ensure the person's release from custody, and where appropriate facilitate the person's return to the sending Party.

ARTICLE 16

TRANSFER OF OTHER PERSONS

- (1) The Requesting Party may request the assistance of the Requested Party in inviting a person to appear in the Requesting Party for the purpose of providing assistance pursuant to this Agreement.
- (2) Upon receipt of such a request, the Requested Party shall invite the person to travel to the Requesting Party to provide assistance and shall inform the Requesting Party of the person's response.

ARTICLE 17

SAFE CONDUCT

- (1) A person who consents to provide assistance pursuant to Articles 15 or 16 of this Agreement shall, while he or she is in the jurisdiction of the Requesting Party giving assistance under this Agreement, not be prosecuted, detained, or restricted in his or her personal liberty for any criminal offence, or subject to suit in any civil matter, which preceded his or her departure from the Requested Party.

(2) Paragraph (1) shall not apply if the person, not being a person in custody transferred under Article 15, and being free to leave, has not left the Requesting Party within a period of 15 days after being notified that his or her presence is no longer required, or having left the Requesting Party, has returned.

(3) A person who consents to give evidence under Articles 15 or 16 shall not be subject to prosecution based on his or her testimony, except for perjury or contempt.

(4) A person who consents to provide assistance pursuant to Articles 15 or 16 shall not be required to give assistance in any proceedings other than the proceedings to which the request relates.

(5) A person who does not consent to provide assistance pursuant to Articles 15 or 16 shall not by reason thereof be liable to any penalty or coercive measure by the courts of the Requesting Party or Requested Party.

ARTICLE 18

SEARCH AND SEIZURE

(1) The Requested Party shall, insofar as its law permits, carry out requests for search, seizure and delivery of any material to the Requesting Party which is relevant to an investigation, prosecution 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 as to return and safe custody imposed by the Requested Party in relation to any seized property which is delivered to the Requesting Party, including any terms and conditions to protect third party interests in the property.

ARTICLE 19

ASSISTANCE IN PROCEEDINGS RELATING TO PROCEEDS OF CRIME

- (1) The Requested Party shall, upon request, endeavour to ascertain whether any proceeds or instrumentalities of crime 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 proceeds or instrumentalities pending a final determination in respect of them by a court of the Requesting Party.
- (3) Where a request is made for assistance in securing the confiscation of proceeds or instrumentalities of crime such request shall be executed subject to 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 or instrumentalities of crime to which the request relates.
- (4) The Party that has custody over proceeds or instrumentalities of crime shall dispose of them in accordance with its law. Either Party may transfer all or part of 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 the Parties may agree.

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) Either Party may terminate this Agreement at any time by giving notice to the other Party. In that event the Agreement shall cease to have effect three months following the date of notification. 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 it was still in force.

In witness whereof the undersigned, being duly authorised by their respective Governments, have signed this Agreement.

Done in duplicate at the Hong Kong Special Administrative Region this nineteenth day of September Two thousand and one in the Chinese, Irish 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, ** 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 Secretary for Justice to be a criminal matter in relation to which it is desirable that the person gives 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

10 December 2002

Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) shall apply as between Hong Kong and Ireland. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Government of Hong Kong and the Government of Ireland and signed in Hong Kong on 19 September 2001. 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.