

立法會
Legislative Council

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Tel : 2869 9205

Date : 25 February 2011

From : Clerk to the Legislative Council

To : All Members of the Legislative Council

Council meeting of 16 March 2011

**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 16 March 2011 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 Chinese and English, which the Secretary will deliver when moving the proposed resolution is also attached.

(Mrs Justina LAM)
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 (India) Order, made by the Chief Executive in Council on 15 February 2011, be approved.

Mutual Legal Assistance in Criminal Matters (India) Order

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

1. Commencement

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

2. Ordinance applies between Hong Kong and India

- (1) In relation to the arrangements for mutual legal assistance a copy of which is annexed at Schedule 1, it is directed that the Ordinance, subject to the modifications specified in Schedule 2, applies as between Hong Kong and the Republic of India.
 - (2) The modifications referred to in subsection (1) are summarized in Schedule 3.
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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 the Republic of India Concerning Mutual Legal Assistance in Criminal Matters

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 the Republic of India (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 the confiscation of the proceeds and instruments of crime;

Have agreed as follows:

ARTICLE I

SCOPE OF ASSISTANCE

(1) The Parties shall provide, in accordance with the provisions of this Agreement, the widest measures of mutual legal assistance in the investigation and prosecution of criminal offences falling within the jurisdiction of the Requesting Party and in proceedings related thereto.

(2) Assistance shall include:

- (a) identifying and locating persons;
- (b) serving of documents;
- (c) obtaining of information, statements, evidence, articles or documents;

- (d) executing requests for search and seizure;
 - (e) facilitating the personal appearance of persons to provide assistance;
 - (f) effecting the temporary transfer of persons in custody to provide assistance;
 - (g) obtaining production of judicial or official records;
 - (h) tracing, restraining, forfeiting and confiscating the proceeds and instruments of crime;
 - (i) providing information, documents and records;
 - (j) delivery of property, including lending of exhibits; and
 - (k) other assistance consistent with the objectives of this Agreement which is not inconsistent with the law of the Requested Party.
- (3) Assistance under this Agreement may be granted in connection with criminal offences against a law related to taxation, customs duties, foreign exchange control or other revenue matters but not if the primary purpose of the request for assistance is the assessment or collection of tax.
- (4) This Agreement shall not apply to:
- (a) the execution of arrests or detention of any person with a view to that person being surrendered as a fugitive offender;
 - (b) the enforcement of criminal judgments imposed in the Requesting Party except to the extent permitted by the law of the Requested Party;
 - (c) the transfer of persons in custody to serve sentences; and
 - (d) the transfer of proceedings in criminal matters.
- (5) This Agreement is intended solely for mutual legal 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.

(6) For the purpose of this Agreement, mutual legal assistance shall be granted irrespective of whether the assistance is sought or to be provided by a Court or some other authority.

ARTICLE II

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 the Republic of India shall be the Ministry of Home Affairs.
- (3) Requests under this Agreement shall only be transmitted by the Central Authority of the Requesting Party to the Central Authority of the Requested Party.
- (4) The Central Authority of the Requested Party shall promptly comply with requests or, as appropriate, forward them to its competent authorities for them to carry out.

ARTICLE III

OTHER ASSISTANCE

This Agreement shall not affect subsisting obligations between the Parties pursuant to other agreements, arrangements or practices or otherwise, nor prevent the Parties from providing assistance pursuant to such agreements, arrangements or practices.

ARTICLE IV

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 India 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) 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;
 - (e) the Requesting Party cannot comply with any conditions in relation to confidentiality or limitation as to the use of material provided;
 - (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 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;
 - (g) the request relates to an act or omission that would not, if it had occurred in the Requested Party, have constituted an offence; and
 - (h) the request for assistance relates to an offence only under military law.
- (2) For the purpose of paragraph (1)(b) the Requested Party may include in its consideration of essential interests 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)(c) in considering whether a request relates to a political offence, the Requested Party shall take into account the relevant facts, the supporting documents provided by the Requesting Party and provisions of international conventions which are

applicable to both parties. The Requested Party shall particularly give due consideration to not regarding offences against life, physical integrity, property or freedom of persons as political offences.

(4) A request shall not be refused under paragraph (1)(g) on the basis that it is not known at the time of making the request what offence will be charged.

(5) The Requested Party may postpone assistance if execution of the request would interfere with an ongoing investigation or prosecution in the Requested Party.

(6) 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.

(7) If the Requesting Party accepts assistance subject to the terms and conditions referred to in paragraph (6)(b), it shall comply with those terms and conditions.

ARTICLE V

REQUESTS

(1) Requests shall be made in writing except in urgent cases. In urgent cases or where otherwise permitted by the Requested Party, requests may be made orally, but shall be confirmed in writing within ten (10) days thereafter.

(2) Requests 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;

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- (c) a description of the nature of the investigation, prosecution, offence or criminal matter;
 - (d) a summary of the relevant facts and laws;
 - (e) any requirements for confidentiality;
 - (f) details of any particular procedure the Requesting Party wishes to be followed; and
 - (g) 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, its contents, supporting documents and any action taken pursuant to the request except when otherwise authorized by the Requesting Party.
- (4) Requests shall be in, or translated into, an official language of the Requested Party. All documents submitted in support of a request shall be accompanied, if so required by the Requested Party, by a translation into an official language of the Requested Party.

ARTICLE VI

EXECUTION OF REQUESTS

- (1) 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 requirements stated in the request so far as practicable.
- (2) 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.
- (3) 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 reasons for that decision.

ARTICLE VII

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 experts;
 - (b) expenses of translation;
 - (c) travel expenses and allowances of witnesses, experts, persons being transferred in custody and escorting officers; and
 - (d) fees of counsel retained 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 VIII

LIMITATIONS OF USE

- (1) 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.
- (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 IX

ATTENDANCE OF PERSONS

For the purposes of requests under this Agreement, the Requested Party may, subject to its law, authorise persons affected by the relevant proceedings in the Requesting Party, their legal representatives and representatives of the Requesting Party to be present at the execution of the request.

ARTICLE X

OBTAINING OF EVIDENCE, ARTICLES OR DOCUMENTS

- (1) Where a request is made that evidence be taken, 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 witness or person giving evidence and the subject matter about which they are to be examined.
- (4) If necessary, any questions additional to those specified in paragraph (3) of this Article, may be put to the witness or person giving evidence by the competent authority of the Requested Party, either of its own volition or if requested by any of the persons referred to in Article IX.
- (5) 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.
- (6) 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 XI

SERVICE OF DOCUMENTS

- (1) The Requested Party shall effect service of judicial process and other documents which are transmitted to it for this purpose by the Requesting Party.
- (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 within a reasonable time, and if possible at least 40 days, before the scheduled appearance.
- (4) Service may be effected by mail. 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.
- (5) The Requested Party shall, insofar as its law permits, return a proof of service in the manner required by the Requesting Party.
- (6) 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 XII

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 competent authorities.

ARTICLE XIII

CERTIFICATION AND AUTHENTICATION

Evidence, documents, records or other material transmitted pursuant to this Agreement shall not require any form of certification or authentication unless expressly requested by the Central Authority of the Requesting Party. Material shall be certified or authenticated by consular or diplomatic officers only if the law of the Requesting Party specifically so requires.

ARTICLE XIV

TRANSFER OF PERSONS IN CUSTODY

- (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 be transferred from the Requested Party to the Requesting Party, provided the Requested Party and the person consent 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 while 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 XV

TRANSFER OF OTHER PERSONS

(1) If the Requesting Party considers the personal appearance of a person for the purpose of providing assistance necessary it shall so inform the Requested Party. The Requested Party shall invite that person to appear and advise the Requesting Party of the reply from that person.

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

ARTICLE XVI

SAFE CONDUCT

(1) A person who consents to transfer pursuant to Articles XIV or XV shall not be prosecuted, detained, or restricted in his 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 departure from the Requested Party.

(2) A person who consents to transfer pursuant to Articles XIV or XV shall not be subject to prosecution based on his testimony, except for perjury.

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

(4) A person who does not consent to transfer pursuant to Articles XIV or XV shall not by reason thereof be liable to any penalty or coercive measure by the courts of the Requesting Party or Requested Party.

(5) A person who responds to a summons from the Requesting Party to answer for acts forming the subject of proceedings against him shall not be prosecuted or detained or restricted in his personal liberty in the Requesting Party for acts or omissions which preceded his departure from the Requested Party and which are not specified in the summons.

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

ARTICLE XVII

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 a proceeding or investigation 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 reasonable conditions imposed by the Requested Party in relation to any seized property which is delivered to the Requesting Party.

ARTICLE XVIII

PROCEEDS AND INSTRUMENTS OF CRIME

(1) The Requested Party shall, upon request, endeavour to ascertain whether any proceeds or instruments of 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 instruments may be located in its jurisdiction.

(2) Where pursuant to paragraph (1) suspected proceeds or instruments 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 instruments of crime, pending a final determination in respect of those proceeds or instruments by a Court of the Requesting Party.

(3) Where a request is made for assistance in securing the confiscation of proceeds or instruments of crime such request shall be executed pursuant to the laws of the Requested Party.

(4) Proceeds or instruments of crime confiscated pursuant to this Agreement shall be retained by the Requested Party unless otherwise agreed upon between the Parties.

(5) Where action has been taken in the Requested Party pursuant to a request for assistance under paragraph (1) or (3) of this Article, and there is a representation to either of the Parties by a person affected by a court order, the Party receiving that representation shall inform the other Party of it as soon as possible and shall also inform the other Party promptly of the outcome of that representation.

(6) For the purposes of this Agreement:

- (a) “confiscation” means any measure resulting in the deprivation of property;
- (b) “instruments of crime” means any property which is, or is intended to be, used in connection with the commission of an offence;
- (c) “proceeds of crime” includes any property that is derived or realised directly or indirectly by any person from an offence or offences or the value of any such property; and

- (d) “property” includes money and all kinds of movable or immovable, tangible or intangible property, and includes any interest in such property.

ARTICLE XIX

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 XX

ENTRY INTO FORCE AND TERMINATION

- (1) This Agreement shall enter into force thirty (30) 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 its entering into force.
- (3) Either Party may terminate this Agreement by giving prior notice to the other in writing. In that event, the Agreement shall cease to have effect six (6) months after the date of 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.

Mutual Legal Assistance in Criminal Matters (India) Order

Schedule 1

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DONE at New Delhi, this 14th day of September 2009 in two originals, each in Chinese, Hindi and English languages, all texts being equally authentic.

Schedule 2

[s. 2]

Specifications of Modifications to the Ordinance

1. Section 5(1)(e) of the Ordinance is 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 in respect of that offence or of another external offence constituted by the same act or omission as that offence;* 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 5(1) of the Ordinance is modified by adding—
 - “(ea) the request relates to the prosecution of a person 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;***”.
3. Section 17(3)(b) of the Ordinance is modified to read as follows—
 - “(b) the person, being free to leave Hong Kong, has not left Hong Kong within a period of 30 days after being notified that the person’s presence is no longer required for any of the following purposes* has had an opportunity of leaving Hong Kong and 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 give assistance.”.

* The text underlined is added. (The underlining is for ease of identifying the modification).

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

Schedule 3

[s. 2]

Summary of Modifications to the Ordinance

1. Sections 1 and 2 of Schedule 2 specify modifications to section 5(1) of the Ordinance so that a request by a place outside Hong Kong for assistance under the Ordinance must also be refused if, in the opinion of the Secretary for Justice—
 - (a) the request relates to the prosecution of a person for an external offence in a case where the person has been convicted, acquitted or pardoned by a competent court or other authority in Hong Kong, or has undergone the punishment provided by the law of Hong Kong, in respect of that offence or of another external offence constituted by the same act or omission as that offence;
 - (b) the request relates to the prosecution of a person 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 3 of Schedule 2 specifies modifications to section 17(3)(b) of the Ordinance to more precisely delineate the circumstances under which a person who is in Hong Kong to give assistance in relation to a criminal matter, pursuant to a request made by the Secretary for Justice, ceases to have immunities under section 17(1) of the Ordinance.

Clerk to the Executive Council

COUNCIL CHAMBER

15 February 2011

Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (*the Ordinance*) applies as between Hong Kong and the Republic of India. 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 India and signed in New Delhi on 14 September 2009. A copy of those arrangements is annexed at Schedule 1 to the Order. The Ordinance is to apply subject to the modifications specified in Schedule 2 to the Order. The modifications are summarized in Schedule 3 to the Order.

(Translation)

Mutual Legal Assistance in Criminal Matters (India) Order

**Draft Speech by the Secretary for Security on the Resolution
at the Legislative Council Meeting on 16 March 2011**

Mr President,

I move that the motion, as printed on the Agenda, on the resolution to make the Mutual Legal Assistance in Criminal Matters (India) Order be passed by this Council.

2. Hong Kong has been actively cooperating with other jurisdictions in combating serious crime, and is committed to concluding bilateral agreements with partners who wish to have closer cooperation with us in mutual legal assistance in criminal matters. These bilateral agreements ensure reciprocal assistance between the contracting parties, and are conducive to enhancing international cooperation in the fight against cross-border crime.

3. The Mutual Legal Assistance in Criminal Matters Ordinance provides the statutory framework for implementing agreements on mutual legal assistance signed between Hong Kong and other jurisdictions, enabling assistance to be provided to or obtained from foreign jurisdictions in the investigation and prosecution of criminal offences. Such assistance includes the taking of evidence, search and seizure, production of material, transfer of persons to give evidence and confiscation of crime proceeds.

4. Pursuant to the Ordinance, the Chief Executive in Council has made the Mutual Legal Assistance in Criminal Matters (India) Order to implement the bilateral agreement on mutual legal assistance in criminal matters signed with India. By applying the Ordinance to the cooperation between Hong Kong and India, the Order allows Hong Kong to provide and obtain mutual legal assistance in accordance with the procedures set out in the Ordinance and the provisions under the agreement. As the legislation and the arrangements on mutual legal assistance in criminal matters vary from jurisdiction to jurisdiction, it is often necessary for the implementing order of a bilateral agreement to modify certain provisions of the Mutual Legal Assistance in Criminal Matters Ordinance to a limited extent in order to reflect the practices of individual jurisdictions. Such modifications are necessary to enable Hong Kong to discharge its obligations under the relevant bilateral agreement. The modifications made for the bilateral agreement between Hong Kong and India are specified in Schedule 2 and summarized in Schedule 3 to the Order. These modifications do not affect the substantial conformity of the Order with the provisions of the Mutual Legal Assistance in Criminal Matters Ordinance.

5. I now invite Members to approve the making of the Mutual Legal Assistance in Criminal Matters (India) Order.

6. Thank you, President.