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Paper for the House Committee

**Report of the Subcommittee on
International Organizations (Privileges and Immunities)
(New Development Bank) Order**

Purpose

This paper reports on the deliberations of the Subcommittee on International Organizations (Privileges and Immunities) (New Development Bank) Order ("the Subcommittee").

Background

2. According to the Legislative Council Brief (File Ref: B&M/2/1/12C), the New Development Bank ("the NDB") is a multilateral development bank founded with the purpose to mobilize resources for funding infrastructure and sustainable development projects in BRICS¹, other emerging market economies and developing countries, thereby complementing the existing efforts of multilateral and regional financial institutions for global growth and development. The NDB commenced operation in February 2016, with its headquarters situated in Shanghai, China.

3. Articles 28 to 34 and 36 of the Articles of Agreement of the New Development Bank ("the AoA"), annexed to the Agreement on the New Development Bank ("the Agreement"), provide for the status, immunities, privileges and exemptions of the NDB and its personnel to enable the NDB to fulfil its purpose and carry out its functions.

¹ BRICS consists of China, Brazil, Russia, India and South Africa.

4. Article 35 of the AoA expressly requires all members of the NDB to make effective in their own territory all such provisions. It is incumbent upon China, as a member of the NDB, to apply the relevant provisions to its territory.

5. Under Article 13 of the Basic Law, the Central People's Government ("the CPG") shall be responsible for foreign affairs relating to the Hong Kong Special Administrative Region ("the HKSAR"). The conferment of privileges and immunities on international organizations is an act falling within the ambit of foreign affairs. The Agreement has applied to the HKSAR since August 2017 after consultation with the Government of the HKSAR ("the HKSARG").

6. The International Organizations (Privileges and Immunities) (New Development Bank) Order ("the Order"), made by the Chief Executive in Council under section 3 of the International Organizations (Privileges and Immunities) Ordinance (Cap. 558) ("the Ordinance"), declares that certain provisions (i.e. Articles 28 to 33 and 36 and some provisions of Article 34) of the AoA have the force of law in Hong Kong. The Order will come into operation on 1 June 2018.

The Order

7. The main provisions of the Order are as follows –
- (a) section 3 declares that the provisions of the AoA as specified in the Schedule to the Order have the force of law in the HKSAR; and
 - (b) the Schedule contains the provisions of the AoA that are to have the force of law in the HKSAR, viz –
 - (i) Article 28 which relates to the recognition of the status, immunities, exemptions and privileges to the NDB in the territory of each member of the NDB to fulfil its purpose and carry out its functions;
 - (ii) Article 29 which relates to the legal personality of the NDB;

- (iii) Articles 30 to 32 which relate to the immunity of the NDB from relevant judicial proceedings, and the privileges and immunities in respect of, among others, its property and assets, archives and documents and official communications;
- (iv) Article 33 which relates to the immunity of the NDB's personnel from relevant legal process with respect to acts performed in their official capacity, and their privileges and immunities in respect of, among others, immigration restrictions;
- (v) Article 34 which relates to the exemptions of the NDB and its personnel in respect of taxation; and
- (vi) Article 36 which relates to the waiver of immunities, privileges and exemptions exercisable by the NDB.

The Subcommittee

8. At the meeting of the House Committee on 13 April 2018, Members agreed to form a subcommittee to study the Order. Hon Kenneth LEUNG was elected as Chairman of the Subcommittee. The Subcommittee has held one meeting with the Administration to scrutinize the Order. The membership list of the Subcommittee is in the **Appendix**.

Deliberations of the Subcommittee

9. The Subcommittee generally supports the Order. In the course of deliberations, the Subcommittee has examined issues including the procedures for setting up representative offices in Hong Kong by international organizations on which privileges and immunities are conferred; the mechanism, if any, whereby Hong Kong can confer privileges and immunities on an international organization on its own without seeking the approval of CPG; the waiver of privileges and immunities; and the interpretation of the provisions in the Order. The Subcommittee's deliberations are set out in ensuing paragraphs.

Setting up representative offices in Hong Kong by international organizations

10. Noting that some of the 12 international organizations which have been conferred privileges and immunities under the Ordinance have not set up offices in Hong Kong, some members, including Hon CHAN Chun-ying and Hon Alvin YEUNG, enquired about the procedures for any of those international organizations to set up an office in Hong Kong.

11. The Administration has advised that the HKSARG will have to discuss with the international organization which intends to set up an office in Hong Kong the relevant specific requirements of its office and the international organization will need to conclude a host country agreement with CPG for conferment of privileges and immunities on the international organization and its personnel. To enable the privileges and immunities provided in the agreement in respect of the international organization and its personnel to have the force of law in Hong Kong, it is necessary to enact local legislation by way of an order made under the Ordinance.

Power to confer privileges and immunities

12. Members note that, under Article 151 of the Basic Law, Hong Kong may enter into some international agreements with foreign states, regions and international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports field. Some members including Hon WU Chi-wai have enquired whether any mechanism is in place whereby Hong Kong can confer privileges and immunities on such international organization (for example, if it intends to set up a regional office in Hong Kong) in such an agreement on its own without seeking the approval of the CPG; and if not, the relevant legal basis thereof.

13. The Administration has advised that conferment of privileges and immunities on an international organization is outside the scope of Article 151 of the Basic Law, and is a matter falling within the realm of foreign affairs relating to the HKSAR, for which the CPG shall be responsible under Article 13 of the Basic Law. The HKSARG on its own does not have the competence to confer privileges and immunities on an international organization while concluding an agreement with that international organization under Article 151 of the Basic Law. Authorization from the CPG would be required if the HKSARG is to confer privileges and immunities on an international organization (including one which intends to set up a regional office in Hong Kong),

regardless of whether the HKSARG is a party to the agreement establishing that international organization.

Waiver of privileges and immunities

14. Noting that under Article 36 of the AoA as set out in the Schedule to the Order, the Board of Directors of the NDB may waive the immunities, privileges and exemptions conferred on the NDB, Hon Alvin YEUNG has enquired how such waiver is invoked.

15. The Administration has advised that the privileges and immunities are conferred on the NDB's personnel for performing duties in their official capacities. Under Article 36 of the AoA, the NDB may waive the privileges and immunities conferred on its personnel in cases including the abuse of the privileges and immunities by its personnel. Generally speaking, the NDB will exercise the right of waiver on its own initiative. To exercise the waiver, the NDB will notify the HKSARG and, where appropriate, the CPG, and the HKSARG will confirm with the NDB in writing in respect of such waiver. In addition, if it comes to the notice of the HKSARG that there is abuse of any privilege or immunity by the NDB's personnel, the HKSARG may raise with the NDB whether it will waive the privilege or immunity after duly verifying and confirming with the NDB in respect of such abuse.

Interpretation of provisions

16. Dr Hon Junius HO Kwan-yiu has enquired about the reason that the definitions for expressions such as "official communications" (in Article 32 of the AoA as specified in the Schedule to the Order), and "officers" and "employees" (in Article 33 of the AoA as specified in the Schedule to the Order) are not provided in the Order, and whether the absence of such definitions will give rise to interpretation difficulties or dispute.

17. The Administration has advised that there are no express definitions for those expressions referred to by Dr Ho in the Agreement or the AoA. As the Order is to give certain articles of the AoA relating to status, privileges and immunities the force of law in Hong Kong, only those articles are set out in the Schedule to the Order.

18. The Administration has further advised that as provided in Article 45 of the AoA, any question of interpretation of the provisions of the Agreement arising between any member and the NDB or between any members of the NDB shall be submitted to the Board of Directors for

decision. In the case of litigation, the court may take into account the Agreement and the AoA as a whole as the context of interpreting the articles set out in the Schedule to the Order. In general, the court will interpret local legislation implementing an international agreement in a way that is consistent with the international agreement itself. As far as the expressions of "officers" and "employees" are concerned, the Administration has advised that it is the usual practice for the international organization concerned to provide a list of their personnel with their rankings that will be categorized as officers or employees to HKSARG and no ambiguities would be arising therefrom.

Drafting issue

19. The Legal Adviser to the Subcommittee has pointed out that unlike the International Organizations (Privileges and Immunities) (European Bank for Reconstruction and Development) Order (Cap. 558L) which contains provisions similar to those of the Order, there is no reference to the Chinese translations of the terms "Agreement on the New Development Bank", "New Development Bank", "member" and "local nationals" in the English text of sections 2, 3(3) and (4) of the Order. In response to the enquiries of the Legal Service Division ("LSD") on the reason for the different drafting approach, the Administration explained that the change was made after a recent review of the drafting practice by the Department of Justice.

20. According to the Administration, the Agreement was done in a single original in the English language which does not have an official Chinese text or an official Chinese title. To assist Chinese readers to identify the Agreement and understand the contents of the relevant provisions of the AoA, an unofficial Chinese title of the Agreement and a Chinese translation of the relevant provisions of the AoA have been prepared and set out in the Chinese text of the Order. The definition of "Agreement" and other terms in the English text of sections 2, 3(3) and (4) of the Order contain the official English title and the terms in English which by themselves are sufficient for the purpose of identifying the Agreement and the relevant terms of the AoA. It is hence not necessary to make reference to the Chinese translated title and terms in the English text. According to the Administration, the new drafting approach will be used in future legislation. With the above explanation of the Administration, the LSD considered that the new drafting approach in the Order will not give rise to interpretation difficulties.

Recommendation

21. The Subcommittee has completed scrutiny of the Order and will not propose amendments to the Order. On behalf of the Chairman of the Subcommittee, Dr Hon Junius HO Kwan-yiu has made a verbal report on the deliberations of the Subcommittee at the House Committee meeting on 27 April 2018.

Advice sought

22. Members are invited to note the deliberations of the Subcommittee as set out above.

Council Business Division 1
Legislative Council Secretariat
2 May 2018

**Subcommittee on International Organizations (Privileges and Immunities)
(New Development Bank) Order**

Membership list

Chairman	Hon Kenneth LEUNG
Members	Hon WONG Ting-kwong, GBS, JP Hon WU Chi-wai, MH Hon YIU Si-wing, BBS Hon Christopher CHEUNG Wah-fung, SBS, JP Hon Alvin YEUNG Dr Hon Junius HO Kwan-yiu, JP Hon CHAN Chun-ying

(Total : 8 members)

Clerk	Mr Derek LO
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Legal Adviser	Ms Vanessa CHENG
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