

LEGISLATIVE COUNCIL BRIEF

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

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (AUSTRALIA) ORDER

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (FRANCE) ORDER

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (NEW ZEALAND) ORDER

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (UNITED KINGDOM) ORDER

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (UNITED STATES OF AMERICA) ORDER

INTRODUCTION

At the meeting of the Executive Council on 13 October 1998, the Council ADVISED and the Chief Executive ORDERED that under section 4(1) of the Mutual Legal Assistance in Criminal Matters Ordinance (“the Ordinance”), the following Orders at Annex A (A1 to A5) -

- (a) the Mutual Legal Assistance in Criminal Matters (Australia) Order;
- (b) the Mutual Legal Assistance in Criminal Matters (France) Order;
- (c) the Mutual Legal Assistance in Criminal Matters (New Zealand) Order;
- (d) the Mutual Legal Assistance in Criminal Matters (United Kingdom) Order; and
- (e) the Mutual Legal Assistance in Criminal Matters (United States of America) Order,

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

BACKGROUND AND ARGUMENT

The Mutual Legal Assistance in Criminal Matters Ordinance

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

The Orders

3. We have signed five bilateral agreements (with Australia, France, New Zealand, the United Kingdom, and the United States of America). Orders made under section 4 of the Ordinance, mentioned in paragraph 1 above, will permit these agreements to be brought into force. Schedule 1 to each of the Orders contains a copy of the relevant bilateral agreement.

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

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

is only modified to the extent of the modifications actually specified in Schedule 2 to the Order.

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

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

LEGISLATIVE TIMETABLE

8. The legislative timetable is as follows-

Introduction into the Legislative Council	11 November 1998
Commencement date	to be specified by the Secretary for Security

BASIC LAW IMPLICATIONS

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

HUMAN RIGHTS IMPLICATIONS

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

BINDING EFFECT OF THE ORDERS

11. The Orders implement agreements to which the Hong Kong Special Administrative Region Government (HKSARG) is a party and accordingly apply to the HKSARG. The Orders do not apply to other parts of the “State” as defined in the Interpretation and General Clauses Ordinance (Cap. 1).

FINANCIAL AND STAFFING IMPLICATIONS

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

PUBLIC CONSULTATION

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

ENQUIRIES

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

	<u>Telephone No.</u>
Mrs Carrie Willis Principal Assistant Secretary for Security	2810 2329
Ms Eva Yam Assistant Secretary for Security	2537 7171

Security Bureau

20 October 1998

File Reference : SBCR 22/581/87 (98)

**MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS
(AUSTRALIA) ORDER**
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(FRANCE) ORDER**
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(UNITED KINGDOM) ORDER**
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(UNITED STATES OF AMERICA) ORDER**

ANNEXES

ANNEX A — THE ORDERS

Annex A1 — Mutual Legal Assistance in Criminal Matters
(Australia) Order

Annex A2 — Mutual Legal Assistance in Criminal Matters
(France) Order

Annex A3 — Mutual Legal Assistance in Criminal Matters
(New Zealand) Order

Annex A4 — Mutual Legal Assistance in Criminal Matters
(United Kingdom) Order

Annex A5 — Mutual Legal Assistance in Criminal Matters
(Australia) Order

**ANNEX B — EXPLANATORY STATEMENT ON THE MODIFICATIONS TO
THE ORDINANCE**

MUTUAL LEGAL ASSISTANCE IN CRIMINAL
MATTERS ORDINANCE

RESOLUTION OF THE LEGISLATIVE COUNCIL

Resolution made and passed by the Legislative Council under section 4 of the Mutual
Legal Assistance in Criminal Matters Ordinance (Cap. 525) on 1998.

RESOLVED that the Mutual Legal Assistance in Criminal Matters (Australia) Order,
made by the Chief Executive in Council on 1998, be approved.

Clerk to the Legislative Council

1998

**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 (Australia) Order,
made by the Chief Executive in Council on 1998, be approved.

**MUTUAL LEGAL ASSISTANCE IN CRIMINAL
MATTERS (AUSTRALIA) 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 Australia

In relation to the arrangements for mutual legal assistance -

- (a) which are applicable to the Government of Hong Kong and the Government of Australia; 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 Australia.

SCHEDULE 1

[s. 2]

**AGREEMENT BETWEEN
THE GOVERNMENT OF HONG KONG
AND
THE GOVERNMENT OF AUSTRALIA
CONCERNING MUTUAL LEGAL ASSISTANCE
IN CRIMINAL MATTERS**

The Government of Hong Kong, having been duly authorised by the sovereign government responsible for the foreign affairs relating to Hong Kong, and the Government of Australia,

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

Have agreed as follows:

Article I

Scope of assistance

(1) The Parties shall provide, in accordance with the provisions of this Agreement, mutual assistance in the investigation and prosecution of criminal offences and in proceedings related to criminal matters.

(2) Assistance shall include:

(a) identifying and locating persons;

- (b) serving of documents;
 - (c) the obtaining of evidence, articles or documents, including the execution of letters rogatory;
 - (d) executing requests for search and seizure;
 - (e) facilitating the personal appearance of witnesses;
 - (f) effecting the temporary transfer of persons in custody to appear as witnesses;
 - (g) obtaining production of judicial or official records;
 - (h) tracing, restraining, forfeiting and confiscating property used in or derived from criminal activities and the proceeds of criminal activities;
 - (i) providing information, documents and records;
 - (j) delivery of property, including lending of exhibits; and
 - (k) other assistance consistent with the objects 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 offences against a law related to taxation, customs duties, foreign exchange control or other revenue matters but not in connection with non-criminal proceedings relating thereto.
- (4) Assistance shall not include:
- (a) the surrender of any fugitive offender;
 - (b) the execution in the Requested Party of criminal judgments imposed in the Requesting Party except to the

- extent permitted by the law of the Requested Party and this Agreement; and
- (c) the transfer of persons in custody to serve sentences.

Article II

Central Authority

- (1) Each Party shall establish a Central Authority.
- (2) The Central Authority of Hong Kong shall be the Attorney General or his duly authorised officer. The Central Authority for Australia shall be the Attorney-General's Department, Canberra.
- (3) Requests under this Agreement shall be made only by the Central Authority of the Requesting Party to the Central Authority of the Requested Party.

Article III

Other assistance

The Parties may provide assistance pursuant to other 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 Australia or, in the case of Hong Kong, of the State which is responsible for the foreign affairs relating to Hong Kong;
 - (b) the request for assistance relates to an offence of a political character;
 - (c) the request for assistance relates to an offence only under military law;
 - (d) there are substantial grounds for believing that the request for assistance will result in a person being prejudiced on account of that person's race, sex, religion, nationality or political opinions;
 - (e) the request for assistance relates to the prosecution of a person for an offence in respect of which the person has been convicted, acquitted or pardoned in the Requesting or Requested Party or has served the sentence imposed in either Party;
 - (f) it is of the opinion that the granting of the request would seriously impair its essential interests; or

- (g) the acts or omissions alleged to constitute the offence would not, if they had taken place within the jurisdiction of the Requested Party, have constituted an offence.
- (2) The Requested Party may refuse assistance if:
- (a) the request for assistance relates to the prosecution or punishment of a person who could no longer be prosecuted by reason of lapse of time or for any other reason if the offence had been committed within the jurisdiction of the Requested Party;
 - (b) the Requesting Party cannot comply with any conditions relating to confidentiality or limitation as to the use of material provided; or
 - (c) the request for assistance relates to the prosecution or punishment of a person for an offence which is committed outside the area under the jurisdiction of the Requesting Party and the law of the Requested Party does not provide for the punishment of an offence committed in similar circumstances.
- (3) For the purpose of paragraph (1)(f) 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.

(4) The Requested Party may refuse assistance if the request relates to an offence which carries the death penalty in the Requesting Party but in respect of which the death penalty is either not provided for in the Requested Party or not normally carried out unless the Requesting Party gives such assurances as the Requested Party considers sufficient that the death penalty will not be imposed or, if imposed, not carried out.

(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, requests may be made orally, but shall be confirmed in writing within 10 days thereafter.
- (2) Requests for assistance shall include:
 - (a) the name of the authority on behalf of which the request is made;
 - (b) a description of the purpose of the request and the nature of the assistance requested;
 - (c) a description of the 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) the court order, if any, or a certified copy thereof, sought to be enforced and a statement to the effect that it is a final order;
 - (f) a summary of the relevant facts and laws;
 - (g) any requirements for confidentiality;
 - (h) details of any particular procedure the Requesting Party wishes to be followed;and

- (i) details of the period within which the request should be complied with.
- (3) Requests, and all documents submitted in support of requests, shall be accompanied by a translation in the language of the Requested Party.

Article VI

Execution of requests

- (1) The Central Authority of the Requested Party shall promptly execute the request or arrange for its execution through its competent authorities.
- (2) A request shall be executed in accordance with the law of the Requested Party and, to the extent not prohibited by the law of the Requested Party, in accordance with the directions stated in the request so far as practicable.
- (3) The Requested Party shall promptly inform the Requesting Party of any circumstances which are likely to cause a significant delay in responding to the request.
- (4) The Requested Party shall promptly inform the Requesting Party of a decision not to comply in whole or in part with a request for assistance and the reason for that decision.

(5) Where required by the Requested Party, the Requesting Party shall return the material provided under this Agreement when no longer needed for the relevant investigation or proceeding.

Article VII

Representation and expenses

(1) The Requested party shall make all necessary arrangements for the representation of the Requesting Party in any proceedings 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 translation;
- (d) the expenses associated with conveying any person to or from the Requested Party, and any fees, allowances or expenses payable to that person whilst in the Requesting Party pursuant to a request under this Agreement; and
- (e) the expenses associated with conveying custodial or escorting officers.

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

Article VIII

Confidentiality and limitations of use

(1) The Requested Party shall use its best efforts to keep confidential a request, its contents and the fact that it has been granted, except when otherwise authorized by the Requesting Party. If the request cannot be executed without breaching confidentiality, the Requested Party shall so inform the Requesting Party which shall then determine whether the request should nevertheless be executed.

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

(3) The 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

Obtaining of evidence, articles or documents

- (1) Where a request is made that evidence be taken for the purpose of an investigation, a prosecution of a criminal offence or a proceeding in relation to a criminal matter in the jurisdiction of the Requesting Party the Requested Party shall, subject to its laws, arrange to take such evidence.
- (2) For the purposes of this Agreement, the giving or taking of evidence shall include the production of documents, records or other material.
- (3) For the purposes of requests under this Article the Requesting Party shall specify the questions to be put to the witnesses or the subject matter about which they are to be examined.
- (4) Where, pursuant to a request for assistance, a person is to give evidence for the purpose of proceedings in the Requesting Party, the parties to the relevant proceedings in the Requesting Party, their legal representatives or representatives of the Requesting Party may, subject to the laws of the Requested Party, appear and question the person giving that evidence.
- (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 the person 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 X

Obtaining statements of persons

Where a request is made to obtain the statement of a person for the purpose of an investigation or proceeding in relation to a criminal matter in the Requesting Party, the Requested Party shall endeavour to obtain such statement.

Article XI

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 XII

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 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 which is not inconsistent with the law of the Requested Party.
- (5) The Requested Party shall, subject to its law, return a proof of service in the manner required by the Requesting Party. If service cannot be effected, the Requesting Party shall be so informed and advised of the reasons.
- (6) Persons who fail to comply with any process served on them shall not thereby be liable to any penalty or coercive measure

pursuant to the law of the Requesting Party.

Article XIII

Publicly available and official documents

- (1) Subject to its law the Requested Party shall provide copies of publicly available documents, records or information.
- (2) The Requested Party may provide copies of any document, record or information in the possession of a government department or agency, but not publicly available, to the same extent and under the same conditions as such document, record or information would be available to its own law enforcement and judicial authorities.

Article XIV

Certification and authentication

- (1) Documents or materials supporting a request for assistance involving the use of compulsory measures or the forfeiture or confiscation of the proceeds of crime shall be admissible in proceedings in the Requested Party if they -
 - (a) purport to be signed or certified by a Judge, Magistrate or other officer in or of the Requesting Party; and

(b) purport to be sealed with an official or public seal of the Requesting Party or an officer of the Requesting Party.

(2) Documents or materials furnished in response to a request shall only be signed or certified and sealed if requested. Other documents or materials shall be certified or authenticated by consular or diplomatic officers only if the law of the Requesting Party specifically so requires.

Article XV

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 if the Requested Party consents be transferred from the Requested Party to the Requesting Party for that purpose, provided the person consents and the Requesting Party has guaranteed the maintenance in custody of the person and their subsequent return to the Requested Party.

(2) Where the sentence of imprisonment of a person transferred pursuant to this Article expires whilst the person is in the Requesting Party the Requested Party shall so advise the Requesting Party which shall ensure the person's release from

custody and that the person is treated as a person referred to in Article XVI.

Article XVI

Transfer of other persons

- (1) The Requesting Party may request the assistance of the Requested Party in making a person available for the purpose of providing assistance pursuant to this Agreement.
- (2) The Requested Party shall, if satisfied that satisfactory arrangements for that person's security will be made by the Requesting Party, request the person to consent to travel to and remain in the Requesting Party to provide assistance.

Article XVII

Safe conduct

- (1) A person who consents to provide assistance pursuant to Articles XV or XVI shall not be prosecuted, detained, or restricted in their personal liberty in the Requesting Party for any criminal offence or proceeded against on a civil matter which preceded their departure from the Requested Party.
- (2) Paragraph (1) shall not apply if the person, not being a person in custody transferred under Article XV, and being free to

leave, has not left the Requesting Party within a period of 15 days after being notified that their presence is no longer required, or having left the Requesting Party, has returned.

(3) A person who consents to give evidence under Articles XV or XVI shall not be subject to prosecution based on that person's testimony, except for perjury and contempt.

(4) A person who consents to provide assistance pursuant to Articles XV or XVI shall not be required to give evidence or to assist any investigation other than the proceeding or investigation to which the request relates.

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

Article XVIII

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 provided that the information supplied would justify 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 material seized.

(3) The Requesting Party shall observe any conditions imposed by the Requested Party in relation to any seized material which is delivered to the Requesting Party.

Article XIX

Proceeds of crime

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

(2) Where pursuant to paragraph (1) suspected proceeds of crime are found the Requested Party shall take such measures as are permitted by its law to prevent any dealing in, transfer or disposal of, those suspected proceeds of crime, pending a final determination in respect of those proceeds by a Court of the Requesting Party.

- (3) Upon request, the Requested Party shall, to the extent its laws permit, give effect to a final order forfeiting or confiscating proceeds of crime made by a court of the Requesting Party.
- (4) In the application of this Article, the rights of bona fide third parties shall be respected under the law of the Requested Party.
- (5) Proceeds confiscated pursuant to this Agreement shall be retained by the Requested Party unless otherwise decided by the Parties in a particular case.
- (6) In this Article “proceeds of crime” includes:
 - (a) property used in connection with the commission of an offence;
 - (b) property derived or realized, directly or indirectly, from the commission of an offence; or
 - (c) property which represents the value of property and other benefits derived from the commission of an offence.

Article XX

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 XXI

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 entering into force.
- (3) Each of the Parties may terminate this Agreement at any time by giving notice in writing to the other. In that event the Agreement shall cease to have effect three months after the 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.

DONE at Sydney, Australia, this twenty-third day of September one thousand nine hundred and ninety six, in Chinese and English, both texts being equally authentic.

SCHEDULE 2

[s. 2]

MODIFICATIONS TO THE ORDINANCE

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

“(e) the request relates to the prosecution of a person for an external offence in a case where the person has been convicted, acquitted or pardoned by a competent court or other authority in the place or Hong Kong*, or has undergone the punishment provided by the law of that place or Hong Kong*, in respect of that offence or of another external offence constituted by the same act or omission as that offence;”.

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

“(b) the person has had an opportunity of leaving Hong Kong, 15 days have expired since that opportunity* and the person* has remained in Hong Kong otherwise than for -

(i) the purpose to which the request relates; or

- (ii) the purpose of giving assistance in relation to a criminal matter in Hong Kong certified in writing by the ~~Attorney General~~^{**} Secretary for Justice^{*} to be a criminal matter in relation to which it is desirable that the person give assistance.”.

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

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

Clerk to the Executive Council

COUNCIL CHAMBER

1998

Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) shall apply as between Hong

Kong and Australia. The Order is made in consequence of the arrangements for mutual legal assistance entered into by Hong Kong and Australia and signed in Sydney, Australia, on 23 September 1996. A copy of those arrangements is annexed at Schedule 1 to the Order. It should be noted that the Ordinance is subject to the modifications summarized in Schedule 2 to the Order.

**MUTUAL LEGAL ASSISTANCE IN CRIMINAL
MATTERS ORDINANCE**

RESOLUTION OF THE LEGISLATIVE COUNCIL

Resolution made and passed by the Legislative Council under section 4 of the Mutual
Legal Assistance in Criminal Matters Ordinance (Cap. 525) on 1998.

RESOLVED that the Mutual Legal Assistance in Criminal Matters (France) Order,
made by the Chief Executive in Council on 1998, be approved.

Clerk to the Legislative Council

1998

**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 (France) Order,
made by the Chief Executive in Council on 1998, be approved.

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (FRANCE) 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 France

In relation to the arrangements for mutual legal assistance -

- (a) which are applicable to the Government of Hong Kong and the Government of the Republic of France; 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 Republic of France.

SCHEDULE 1

[s. 2]

**AGREEMENT BETWEEN
THE GOVERNMENT OF HONG KONG
AND
THE GOVERNMENT OF THE REPUBLIC OF FRANCE
CONCERNING
MUTUAL LEGAL ASSISTANCE IN
CRIMINAL MATTERS**

The Government of Hong Kong, having been duly authorised by the sovereign government responsible for the foreign affairs relating to Hong Kong and the Government of the Republic of France,

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 measure 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) the obtaining of evidence, articles or documents;
 - (d) executing requests for search and seizure;
 - (e) facilitating the personal appearance of witnesses or experts;
 - (f) effecting the temporary transfer of persons in custody to appear as witnesses;
 - (g) obtaining production of judicial or official records;
 - (h) tracing, restraining, 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 objects 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.
- (4) This Agreement does not apply either to the execution of arrests and enforcement of verdicts or to offences under military law which are not offences under the ordinary law.

ARTICLE II

CENTRAL AUTHORITY

- (1) Each Party shall establish a Central Authority.
- (2) The Central Authority of Hong Kong shall be the Attorney General or his duly authorised officer. The Central Authority for the Republic of France shall be the Ministry of Justice.
- (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. Requests shall be in writing. In urgent cases the Central Authority may transmit requests by fax or through INTERPOL.
- (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

The Parties may provide assistance pursuant to other 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 France or, in the case of Hong Kong, the State which is responsible for the foreign affairs relating to Hong Kong;
 - (b) if 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; and

- (g) in the case of requests involving compulsory measures the acts or omissions alleged to constitute the offence would not, if they had taken place within the jurisdiction of the Requested Party, have constituted an offence.

(2) The Requested Party may refuse assistance if the request relates to an offence which carries the death penalty in the Requesting Party but in respect of which the death penalty is either not provided for in the Requested Party or not normally carried out unless the Requesting Party gives such assurances as the Requested Party considers sufficient that the death penalty will not be imposed or, if imposed, not carried out.

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

(4) Before denying or postponing assistance pursuant to this Article, the Requested Party, through its Central Authority -

- (a) shall promptly inform the Requesting Party of the reason for considering denial or postponement; and
- (b) shall consult with the Requesting Party to determine whether assistance may be given subject to such terms and conditions as the Requested Party deems necessary.

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

ARTICLE V

REQUESTS

- (1) 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;
 - (c) a description of the nature of the investigation, prosecution, offence or criminal matter;
 - (d) a summary of the relevant fact 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.
- (2) The Requested Party shall use its best efforts to keep confidential a request and its contents except when otherwise authorized by the Requesting Party.

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

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 directions 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 reason for that decision.

ARTICLE VII

REPRESENTATION AND EXPENSES

- (1) The Requested Party shall assume all ordinary expenses of executing a request within its boundaries, except:

- (a) fees of experts;
 - (b) expenses of translation; and
 - (c) travel expenses and allowances of witnesses, experts, persons being transferred in custody and escorting officers.
- (2) If during the execution of the request it becomes apparent that expenses of an extraordinary nature are required to fulfil the request, the Parties shall consult to determine the terms and conditions under which the execution of the request may continue.

ARTICLE 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 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 as a witness in the Requested Party pursuant to a request for assistance may decline to give evidence if the law of the Requested Party would permit the person to decline to give evidence in similar circumstances in proceedings which originated in the Requested Party. If the witness claims that there is a right to decline to give evidence under the law of the Requesting Party the evidence shall nonetheless be taken and the making of the claim recorded and transmitted to the Central Authority of the Requesting Party for resolution by the authorities of that Party.

ARTICLE XI

SERVICE OF DOCUMENTS

(1) The Requested Party shall effect service of writs, judicial verdicts 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 at least 40 days before the scheduled appearance.
- (4) Service may be effected by simple transmission of the document to the person to be served. If the Requesting Party expressly so requests service shall be effected by the Requested Party in the manner provided for the service of analogous documents under its own law or in a special manner consistent with such law.
- (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.

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 as a witness 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 whilst the person is in the Requesting Party the Requested Party shall so advise the Requesting Party which shall ensure the person's release from custody.

ARTICLE XV

TRANSFER OF OTHER PERSONS

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

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

ARTICLE XVI

SAFE CONDUCT

(1) A person who consents to transfer pursuant 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 Requesting Party within a period

of 30 days after being notified that his presence is no longer required, or having left 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 conditions imposed by the Requested Party in relation to any seized property which is delivered to the Requesting Party.

ARTICLE XVIII

PROCEEDS OF CRIME

- (1) The Requested Party shall, upon request, endeavour to ascertain whether any proceeds of a crime against the law of the Requesting Party are located within its jurisdiction and shall

notify the Requesting Party of the result of its inquiries. In making the request, the Requesting Party shall notify the Requested Party of the basis of its belief that such proceeds may be located in its jurisdiction.

(2) Where pursuant to paragraph (1) suspected proceeds of crime are found the Requested Party shall take such measures as are permitted by its law to prevent any dealing in, transfer or disposal of, those suspected proceeds of crime, pending a final determination in respect of those proceeds by a Court of the Requesting Party.

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

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

(5) Proceeds of crime include instruments used in connection with the commission of an offence.

ARTICLE XIX

PROVISION OF OTHER INFORMATION IN CONNECTION WITH PROCEEDINGS

Where an offence has been committed within the area of a Party and that offence may also be prosecuted by the other Party

the former Party may inform the latter Party if it decides not to prosecute the offence. Upon request, the former Party may provide information and evidence in relation to that offence.

ARTICLE XX

EXCHANGE OF INFORMATION FROM CRIMINAL RECORDS

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

ARTICLE XXI

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 XXII

ENTRY INTO FORCE AND TERMINATION

(1) This Agreement shall enter into force thirty days after the date on which the Parties have notified each other in writing that their respective requirements for the entry into force of the Agreement have been complied with.

(2) Each of the Parties may terminate this Agreement at any time by giving notice to the other. In that event the Agreement shall cease to have effect on receipt of that notice.

Requests for assistance which have been received prior to termination of the Agreement shall nevertheless be processed in accordance with the terms of the Agreement as if the Agreement was still in force.

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

DONE in duplicate at Hong Kong this twenty-fifth day of June one thousand nine hundred and ninety seven in the Chinese, English

and French 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, 30 days have expired since that opportunity* and the person* has remained in Hong Kong otherwise than for -

- (i) the purpose to which the request relates; or
- (ii) the purpose of giving assistance in relation to a criminal matter in Hong Kong certified in writing by the ~~Attorney General~~** Secretary for Justice* to be a criminal matter in relation to which it is desirable that the person give assistance.”.

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

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

Clerk to the Executive Council

COUNCIL CHAMBER

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 Republic of France. The Order is made in consequence of the arrangements for mutual legal assistance entered into by Hong Kong and the Republic of France and signed in Hong Kong on 25 June 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.

**MUTUAL LEGAL ASSISTANCE IN CRIMINAL
MATTERS ORDINANCE**

RESOLUTION OF THE LEGISLATIVE COUNCIL

Resolution made and passed by the Legislative Council under section 4 of the Mutual
Legal Assistance in Criminal Matters Ordinance (Cap. 525) on 1998.

RESOLVED that the Mutual Legal Assistance in Criminal Matters (New Zealand)
Order, made by the Chief Executive in Council on 1998, be
approved.

Clerk to the Legislative Council

1998

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 (New Zealand)
Order, made by the Chief Executive in Council on 1998, be
approved.

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (NEW ZEALAND) ORDER

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

1. Commencement

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

2. Ordinance to apply between Hong Kong Special Administrative Region and New Zealand

In relation to the arrangements for mutual legal assistance -

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

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

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 NEW ZEALAND
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 New Zealand,

Desiring to improve the effectiveness of cooperation between the Parties in the investigation, prosecution and prevention of crime and the issuing and enforcement of orders relating to property used in or derived from crime;

HAVE AGREED as follows:

ARTICLE I

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) Such assistance shall include:

- (a) identifying and locating persons;
- (b) serving documents;
- (c) obtaining and providing evidence, articles or documents;
- (d) executing requests for search and seizure;
- (e) making arrangements for the transfer of persons to give evidence or assist investigations;
- (f) obtaining and providing judicial or official records, and other information, documents and records;
- (g) tracing, restraining and confiscating property used in or derived from crime;
- (h) delivery of property, including lending of exhibits;
- (i) other assistance consistent with the objects 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 offences against a law relating to taxation, customs duties, foreign exchange control or other revenue matters but not in connection with non-criminal proceedings relating thereto.

(4) This Agreement is intended solely for mutual assistance between the Parties and shall not give rise to any right on the part of any private person to make a request under this Agreement.

(5) This Agreement shall not apply to Tokelau unless the Parties have exchanged Notes through the diplomatic channel agreeing the terms on which this Agreement shall so apply.

ARTICLE II

CENTRAL AUTHORITY

(1) Each Party shall establish a Central Authority.

(2) The Central Authority for New Zealand shall be the Attorney-General. The Central Authority for the Hong Kong Special Administrative Region shall be the Secretary for Justice. Each Party shall notify the other of any change of its Central Authority.

(3) Requests for assistance shall be made through the Central Authority which shall deal with the requests in accordance with the provisions of this Agreement.

ARTICLE III

OTHER ASSISTANCE

This Agreement shall not prevent the Parties from providing

assistance to each other pursuant to other 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 New Zealand or, in the case of the Hong Kong Special Administrative Region, the People's Republic of China;
 - (b) the request for assistance relates to an offence of a political character;
 - (c) the request for assistance relates to an offence only under military law;
 - (d) there are substantial grounds for believing that the request for assistance will result in a person being prejudiced on account of race, colour, ethnic origin, sex, religion, nationality or political opinions;
 - (e) the request for assistance relates to the prosecution of a person for an offence in respect of which that person has been convicted, acquitted or pardoned by a competent tribunal or authority or has undergone punishment provided by law;

- (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; or
- (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.

(2) For the purpose of paragraph (1)(f) of this Article 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) The Requested Party may refuse assistance if the request relates to an offence which carries the death penalty in the Requesting Party but in respect of which the death penalty is either not provided for in the Requested Party or is not normally carried out, unless the Requesting Party gives such assurances as the Requested Party considers sufficient that the death penalty will not be imposed or, if imposed, not carried out.

(4) The Requested Party may refuse assistance if the request relates to the prosecution or punishment of a person for an offence which, had it been committed within the jurisdiction of

the Requested Party, could no longer be prosecuted by reason of lapse of time.

(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 Requested 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) of this Article, it shall comply with those terms and conditions.

(8) The Requested Party shall promptly inform the Requesting Party of a decision to deny in whole or in part a request for assistance and the reasons for that decision.

ARTICLE V

REQUESTS

(1) Requests shall be made in writing except in urgent cases. In urgent cases, requests may be made orally, but shall be confirmed

in writing within 10 days thereafter.

(2) Requests for assistance shall include:

- (a) the name of the authority on behalf of which the request is made;
- (b) a description of the purpose of the request and the nature of the assistance requested;
- (c) a description of the 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) the court order, if any, sought to be enforced and a statement to the effect that it is a final order;
- (f) a summary of the relevant facts and laws;
- (g) any requirements for confidentiality and the reasons therefor;
- (h) details of any particular procedure the Requesting Party wishes to be followed including details of the manner and form in which any evidence, information, document or item is to be supplied to the Requesting Party;
- (i) details of the period within which the request should be complied with;

- (j) information as to the allowances and expenses to which a person travelling to the Requesting Party will be entitled.
- (3) All documents submitted in support of a request shall be accompanied by a translation in the language of the Requested Party and by certification or authentication required by the Requested Party.
- (4) If the Requested Party considers that the information contained in the request is not sufficient to enable the request to be dealt with, it may request additional information.

ARTICLE VI

EXECUTION OF REQUESTS

- (1) The Central Authority of the Requested Party shall promptly execute the request or arrange for its execution through its competent authorities.
- (2) A request shall be executed in accordance with the law of the Requested Party and, to the extent not prohibited by the law of the Requested Party, in accordance with the directions stated in the request so far as practicable.
- (3) The Requested Party may postpone the delivery of material requested if such material is required for criminal or civil

proceedings in its jurisdiction. The Requested Party shall, upon request, provide certified copies of relevant documents.

(4) 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.

ARTICLE VII

REPRESENTATION AND EXPENSES

(1) The Requested Party shall make all necessary arrangements for the representation of the Requesting Party in any proceedings 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
- (d) travel and accommodation expenses and allowances of persons.

(3) If during the execution of the request it becomes apparent that expenses of an extraordinary nature are required to fulfil

the request, the Parties shall consult to determine the terms and conditions under which the execution of the request may continue.

ARTICLE VIII

LIMITATIONS ON USE

- (1) The Requested Party shall use its best efforts to keep confidential a request and its contents except when otherwise authorised by the Requesting Party. If the request cannot be executed without breaching confidentiality, the Requested Party shall so inform the Requesting Party which shall then determine whether the request should nevertheless be executed.
- (2) The Requested Party may require, after consultation with the Requesting Party, that information or evidence furnished be kept confidential, or be disclosed or used only subject to such terms and conditions as it may specify.
- (3) The 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.
- (4) The Requesting Party, if so requested, shall use its best efforts to ensure that the information or evidence is protected against loss and unauthorised access, use, modification, disclosure or other misuse.

ARTICLE IX

LOCATION OR IDENTITY OF PERSONS

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

ARTICLE X

OBTAINING STATEMENTS OF PERSONS

(1) Where a request is made to obtain the statement of a person for the purpose of an investigation or proceeding in relation to a criminal matter in the Requesting Party, the Requested Party shall endeavour, with the consent of that person, to obtain that statement.

(2) For the purposes of a request under this Article the Requesting Party shall specify the subject matter about which the statement is to be taken, including any questions it seeks to be put.

ARTICLE XI

OBTAINING OF EVIDENCE, ARTICLES OR DOCUMENTS

(1) Where a request is made that evidence be taken for the purpose of the prosecution of a criminal offence or proceedings in

relation to a criminal matter in the Requesting Party, the Requested Party shall, subject to its law, arrange to have such evidence taken and transmitted to the Requesting Party.

(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 subject matter about which witnesses are to be examined, and may also specify any questions to be put to them as well as the manner and form in which evidence should be taken.

(4) Where, pursuant to a request for assistance, a person is to give evidence for the purpose of proceedings in the Requesting Party, the parties to the relevant proceedings in the Requesting Party, their legal representatives or representatives of the Requesting Party may, subject to the law of the Requested Party, appear and question the person giving that evidence.

(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 or require 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 or require that person to decline to give evidence in such proceedings in the Requesting Party.
- (6) If any person claims that there is a right or obligation to decline to give evidence under the law of the Requesting Party, the Requested Party shall with respect thereto obtain a certificate from the Central Authority of the Requesting Party.

ARTICLE XII

SERVICE OF DOCUMENTS

- (1) The Requested Party shall, in accordance with its law, arrange for service of any document transmitted to it for that purpose.
- (2) The Requesting Party shall transmit a request for the service of a document pertaining to a response to 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. If service cannot be effected, the Requesting Party shall be so informed and advised of the reasons.

(5) A person who fails to comply with any process served on that person shall not on that account be subject to any penalty, liability, or coercive measure pursuant to the law of the Requesting Party or Requested Party.

ARTICLE XIII

PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS

(1) Subject to its law the Requested Party shall on request provide copies of publicly available documents.

(2) The Requested Party may also provide copies of any document, record or information in the possession of a government department or agency, but not publicly available, to the extent its laws permit.

ARTICLE XIV

CERTIFICATION AND AUTHENTICATION

Documents, transcripts, records, statements or other material which are to be transmitted to the Requesting Party shall be

certified or authenticated if the Requesting Party so requests. The certification or authentication shall be in the manner and form required by the Requesting Party to the extent permitted by the law of the Requested Party. Material shall be certified or authenticated by consular or diplomatic officers only if the law of the Requesting Party specifically so requires.

ARTICLE XV

TRANSFER OF PERSONS IN CUSTODY

(1) A person in custody in the Requested Party whose presence is required in the Requesting Party for the purposes of giving evidence in criminal proceedings pursuant to this Agreement shall, if the Requested Party consents, be transferred from the Requested Party to the Requesting Party for that purpose. No assistance shall be given under this Article unless the person consents and the Requesting Party has agreed to comply with any conditions required by the Requested Party as to the custody or security of such person.

(2) Where a person transferred pursuant to this Article is no longer required to be held in custody, the Requested Party shall so advise the Requesting Party which shall ensure that person's release from custody.

(3) The provisions of this Article shall also apply to persons who, although not at the material time in custody, are subject to a sentence imposed for an offence other than a sentence of a monetary nature.

ARTICLE XVI

TRANSFER OF OTHER PERSONS

(1) The Requesting Party may request the transfer of persons other than those to whom Article XV of this Agreement applies to the Requesting Party for the purpose of providing assistance pursuant to this Agreement.

(2) The Requested Party shall, if the person has consented and if satisfied that adequate arrangements for that person's security will be made by the Requesting Party, request the person to travel to the Requesting Party to provide assistance.

ARTICLE XVII

SAFE CONDUCT

(1) A person who consents to provide assistance pursuant to Article XV or XVI of this Agreement shall not be prosecuted, punished, detained, or restricted in personal liberty in the

Requesting Party for any criminal offence or civil matter which preceded that person's departure from the Requested Party.

(2) Paragraph (1) of this Article shall cease to apply if the person being free and able to leave, has not left the Requesting Party within a period of 21 days after being notified that such person's presence is no longer required, or having left the Requesting Party, has returned.

(3) A person who consents to give evidence pursuant to Article XV or XVI of this Agreement shall not be subject to prosecution based on that person's testimony, except for perjury, contempt or the making of false declarations.

(4) A person who consents to provide assistance pursuant to Article XV or XVI of this Agreement shall not be required to give evidence or assist in any matter other than the matter to which the request relates.

(5) A person who does not consent to provide assistance pursuant to Article XV or XVI of this Agreement shall not by reason thereof be subject to any penalty, liability or coercive measure, notwithstanding any contrary statement in the request or in any document accompanying the request.

(6) A person who gives evidence or assistance pursuant to Article XV or XVI of this Agreement shall be returned to the Requested Party, in accordance with arrangements agreed by the Requested

Party, as soon as practicable after the evidence or assistance has been given.

ARTICLE XVIII

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 conditions imposed by the Requested Party in relation to any seized property which is delivered to the Requesting Party.

ARTICLE XIX

PROPERTY USED IN OR DERIVED FROM CRIME

- (1) The Requested Party shall, upon request, endeavour to ascertain whether any property used in or derived from crime is 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 property may be located in the latter's jurisdiction.

(2) Where the Requesting Party so requests, the Requested Party shall take such measures as are permitted by its law to :

- (a) prevent any dealing in, transfer or disposal of property, pending a final determination as to that property by a court of the Requesting Party;
- (b) monitor accounts or other mechanisms through which illegal transactions are suspected of being carried out;
- (c) obtain production of any documents or other materials which may enable property to be located.

(3) Upon request, the Requested Party shall, to the extent its laws permit, give effect to a final order forfeiting or confiscating property made by a court of the Requesting Party.

(4) Property confiscated pursuant to this Agreement shall be retained by the Requested Party unless otherwise agreed upon between the Parties.

(5) In the application of this Article, the rights of bona fide third parties shall be given effect to the extent permitted by the laws of the Requested Party.

(6) For the purposes of this Article, "property" includes property of any description which has been used for the commission

of an offence or which is, or represents, the proceeds of an offence.

ARTICLE XX

CONSULTATION

The Parties shall consult promptly, at the request of either of them, concerning any issue relating to the interpretation, application or implementation of this Agreement either generally or in relation to a particular case.

ARTICLE XXI

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 XXII

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 entering into force.

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

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

DONE at the Hong Kong Special Administrative Region this third day of April One thousand nine hundred and ninety eight in the Chinese and English languages, both texts 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 has been convicted, acquitted or pardoned by a competent court or other authority in the place, another place outside Hong Kong or Hong Kong, or has undergone the punishment provided by the law of ~~that~~** the* place, another place outside Hong Kong 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, 21 days have expired since that opportunity* and the person* has remained in Hong Kong otherwise than for -

- (i) the purpose to which the request relates; or
- (ii) the purpose of giving assistance in relation to a criminal matter in Hong Kong certified in writing by the ~~Attorney-General~~** Secretary for Justice* to be a criminal matter in relation to which it is desirable that the person give assistance.”.

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

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

Clerk to the Executive Council

COUNCIL CHAMBER

1998

Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) shall apply as between the Hong Kong Special Administrative Region and New Zealand. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Hong Kong Special Administrative Region and New Zealand and signed in Hong Kong on 3 April 1998. A copy of those arrangements is annexed at Schedule 1 to the Order. It should be noted that the Ordinance is subject to the modifications summarized in Schedule 2 to the Order.

**MUTUAL LEGAL ASSISTANCE IN CRIMINAL
MATTERS ORDINANCE**

RESOLUTION OF THE LEGISLATIVE COUNCIL

Resolution made and passed by the Legislative Council under section 4 of the Mutual
Legal Assistance in Criminal Matters Ordinance (Cap. 525) on 1998.

RESOLVED that the Mutual Legal Assistance in Criminal Matters (United Kingdom)
Order, made by the Chief Executive in Council on 1998, be
approved.

Clerk to the Legislative Council

1998

**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 (United Kingdom)

Order, made by the Chief Executive in Council on 1998, be
approved.

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (UNITED KINGDOM) ORDER

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

1. Commencement

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

2. Ordinance to apply between Hong Kong Special Administrative Region and United Kingdom

In relation to the arrangements for mutual legal assistance -

- (a) which are applicable to the Government of the Hong Kong Special Administrative Region and the Government of the United Kingdom of Great Britain and Northern Ireland; and
- (b) a copy of which is annexed at Schedule 1,

it is hereby directed that the Ordinance shall, subject to the modifications to the Ordinance summarized in Schedule 2, apply as between the Hong Kong Special Administrative Region and the United Kingdom of Great Britain and Northern 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 THE UNITED KINGDOM OF
GREAT BRITAIN AND NORTHERN 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 the United Kingdom of Great Britain and Northern Ireland ("United Kingdom");

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

Have agreed as follows:

ARTICLE I

SCOPE OF ASSISTANCE

(1) The Parties shall provide, in accordance with the provisions of this Agreement, mutual assistance in the investigation and prosecution of crime and in proceedings related to criminal matters.

(2) Assistance shall include:

- (a) identifying and locating persons;
- (b) serving of documents;
- (c) the obtaining of evidence, articles or documents, including the execution of letters rogatory;
- (d) executing requests for search and seizure;
- (e) facilitating the personal appearance of witnesses;
- (f) effecting the temporary transfer of persons in custody to appear as witnesses;
- (g) obtaining production of judicial or official records;
- (h) tracing, restraining, forfeiting and confiscating the proceeds and instrumentalities of crime;
- (i) providing information, documents and records; and
- (j) delivery of property, including lending of exhibits.

(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 II

CENTRAL AUTHORITY

- (1) Each Party shall establish a Central Authority.
- (2) The Central Authority for the Hong Kong Special Administrative Region shall be the Department of Justice. The Central Authority for the United Kingdom shall be the Home Office.
- (3) Requests under this Agreement shall be made by the Central Authority of the Requesting Party to the Central Authority of the Requested Party.

ARTICLE III

OTHER ASSISTANCE

The Parties may also provide assistance pursuant to other 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 United Kingdom or, in the case of the Government of the Hong Kong Special Administrative Region, of the People's Republic of China.
- (b) the request for assistance relates to an offence of a political character;
- (c) the request for assistance relates to an offence only under military law;
- (d) there are substantial grounds for believing that the request for assistance will result in a person being prejudiced on account of his race, 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 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; and

- (h) the request concerns restraint or confiscation of proceeds or instrumentalities of an offence which, had it occurred within the jurisdiction of the Requested Party, would not have been an offence in respect of which a confiscation order could have been made.

(2) For the purposes of paragraph (1)(f), the Requested Party may take into account whether the provision of assistance could prejudice the safety of any person.

(3) For the purposes of paragraph (1)(g):

- (a) the totality of the acts or omissions alleged to constitute the offence against the law of the Requesting State 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 shall refuse assistance if the request relates to an offence which carries the death penalty in the Requesting Party but in respect of which the death penalty is

either not provided for in the Requested Party or not normally carried out unless the Requesting Party gives such assurances as the Requested Party considers sufficient that the death penalty will not be imposed or, if imposed, not carried out.

(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 the assistance sought should only be granted in part or 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) of this Article, 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, requests may be made orally, but shall be confirmed

in writing within 24 hours.

(2) Requests for assistance shall include:

- (a) the name of the authority on behalf of which the request is made;
- (b) a description of the purpose of the request and the nature of the assistance requested;
- (c) a description of the nature of the investigation, prosecution, offence or criminal matter and whether or not proceedings have been instituted;
- (d) the court order, if any, or a certified copy thereof, sought to be enforced and a statement to the effect that it is a final order;
- (e) where proceedings have been instituted, details of the proceedings;
- (f) a summary of the relevant facts and laws;
- (g) any requirements for confidentiality;
- (h) details of any particular procedure the Requesting Party wishes to be followed;
- (i) details of the period within which the request should be complied with; and
- (j) the identity of the person or persons to be or being investigated or prosecuted.

- (3) All documents submitted in support of a request shall, if required by the Requested Party, be accompanied by a translation into an official language of the Requested Party.

ARTICLE VI

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 the directions stated in the request so far as practicable.
- (3) The Requested Party shall promptly inform the Requesting Party of any circumstances which are likely to cause a significant delay in responding to the request.
- (4) The Requested Party shall promptly inform the Requesting Party of a decision not to comply in whole or in part with a request for assistance and the reason for that decision.

ARTICLE 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 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;
- (d) travel expenses and allowances of persons; and
- (e) other expenses to the extent that these are of an extraordinary nature.

The Requested Party shall decide which expenses other than expenses at (a) to (d) in this paragraph are expenses of an extraordinary nature.

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

ARTICLE VIII
LIMITATIONS ON USE

(1) The Requested Party shall use its best efforts to keep confidential a request and its contents except:

- (a) where otherwise authorised by the Requesting Party; or
- (b) to the extent necessary to execute the request.

(2) Except in relation to any document which the Requesting Party is or would be under a legal duty in criminal proceedings to disclose, the Requested Party, after consultation with the Requesting Party, may require that information or evidence furnished or to be furnished pursuant to this Agreement be kept confidential or be disclosed or used only subject to such terms and conditions as it may specify.

(3) Except in relation to any document which the Requesting Party is under a legal duty in criminal proceedings to disclose, 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.

(4) Where the Requesting Party indicates that it would be unable to comply with any conditions in relation to confidentiality or limitation as to disclosure or use of any information or evidence

were it to be furnished under this Agreement, the Requested Party may refuse assistance.

ARTICLE IX

OBTAINING OF EVIDENCE, ARTICLES OR DOCUMENTS

- (1) Where a request is made that evidence be taken for the purpose of a criminal investigation, prosecution of a criminal offence or a proceeding in relation to a criminal matter in the Requesting Party, the Requested Party shall arrange to have such evidence taken.
- (2) For the purposes of this Agreement, the giving or taking of evidence shall include the production of documents, records or other material.
- (3) For the purposes of requests under this Article, the Requesting Party shall specify the questions to be put to the witnesses or the subject matter about which they are to be examined.
- (4) Where, pursuant to a request for assistance, a person is to give evidence for the purpose of proceedings in the Requesting Party, the parties to the relevant proceedings in the Requesting Party, their legal representatives or representatives of the Requesting Party may, subject to the laws of the Requested Party, appear and question the person giving that evidence.

(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 X

STATEMENTS OF PERSONS

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

ARTICLE XI
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 XII
SERVICE OF DOCUMENTS

(1) The Requested Party shall serve any subpoena or other process requiring the appearance of any person as a witness or defendant in criminal proceedings before a court of the Requesting Party and any document issued by a court exercising criminal jurisdiction which records a decision of that court and which is transmitted to it for the purposes of service.

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

(3) The Requested Party shall, subject to its law, provide a proof of service in the manner required by the Requesting Party.

ARTICLE XIII

PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS

(1) Subject to its law the Requested Party shall provide copies of the following documents within its jurisdiction:

- public records;
- publicly available judicial records.

(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 XIV

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 XV
TRANSFER OF PERSONS IN CUSTODY

A person in custody in the Requested Party whose presence is requested in the Requesting Party for the purposes of providing assistance pursuant to this Agreement shall, if the Requested Party consents, be transferred from that Party to the Requesting Party for that purpose, provided:

- (a) the person consents; and
- (b) the Requesting Party has guaranteed the maintenance in custody of the person while the sentence of imprisonment remains in force; and
- (c) the Requesting Party has guaranteed such person's subsequent return to the Requested Party.

ARTICLE XVI
TRANSFER OF OTHER PERSONS

- (1) The Requesting Party may request the assistance of the Requested Party in making a person available 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 and inform the Requesting Party of the person's response.

ARTICLE XVII

SAFEGUARDS

(1) A person who consents to provide assistance pursuant to this Agreement shall not be prosecuted, detained, or restricted in his personal liberty in the Requesting Party for any criminal offence which preceded his departure from the Requested Party while he is in the area of the Requesting Party giving assistance under this Agreement.

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

(3) A person who consents to provide assistance pursuant to this Agreement shall not, subject to the law of the Requested Party, be required to give evidence in any proceedings other than the proceedings to which the request relates.

(4) A person who fails to comply with a subpoena or other process served pursuant to Article XII or who does not consent to provide assistance pursuant to Article XV or Article XVI shall not by reason thereof be liable to any penalty or coercive measure under the law of either Party.

ARTICLE XVIII
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 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.

ARTICLE XIX
PROCEEDS OF CRIME

- (1) The Requested Party shall, upon request, endeavour to ascertain whether any proceeds or instrumentalities of a 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 suspected proceeds or instrumentalities of crime are found, the Requested Party shall, upon request, take such measures as are permitted by its law to prevent any dealing in, transfer or disposal of, those suspected proceeds or instrumentalities of crime, pending a final determination in respect of those proceeds or instrumentalities by a court of the Requesting Party.

(3) Where a request is made for assistance in securing the confiscation of proceeds or instrumentalities such assistance shall be given by whatever means are permitted by the law of the Requested Party.

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

(5) For the purposes of this Agreement:

- (a) “confiscation” means any measure resulting in the deprivation of property;
- (b) “proceeds of crime” means any property derived or realised, directly or indirectly, by any person as a result of criminal activity, or the value of any such property;

- (c) property includes money and all kinds of moveable or immoveable and tangible or intangible property and includes any interest in such property.

ARTICLE XX

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 XXI

APPLICATION OF THE AGREEMENT

This Agreement shall apply:

- (1) in relation to the United Kingdom:
 - (a) to England and Wales, Scotland, and Northern Ireland; and
 - (b) to any territory for whose international relations the United Kingdom is responsible and to which this Agreement shall have been extended, subject to any modifications, by an exchange of notes through the diplomatic channel;
and

- (2) In relation to the Hong Kong Special Administrative Region, to the Hong Kong Special Administrative Region.

ARTICLE XXII

ENTRY INTO FORCE AND TERMINATION

- (1) This Agreement shall enter into force thirty days after the date on which the Parties have notified each other in writing that their respective requirements for the entry into force of the Agreement have been complied with.

- (2) Each of the Parties may terminate this Agreement at any time by giving notice to the other. In that event this Agreement shall cease to have effect on receipt of that notice.

Requests for assistance which have been received prior to termination of this Agreement shall nevertheless be processed in accordance with the terms of this Agreement as if it was still in force.

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

DONE at the Hong Kong Special Administrative Region, this twenty-third day of January one thousand nine hundred and ninety eight in the Chinese 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 5(1) (f) of the Ordinance shall be modified by deleting “or” at the end.
3. Section 5(1) (g) of the Ordinance shall be modified by deleting the full stop and substituting”; or”.
4. Section 5(1) of the Ordinance shall be modified by adding -
“(h) the request relates to the enforcement of an external confiscation order, or to restraining dealing in any property against which the order may be enforced or which may be available to satisfy the order, but the act or omission constituting the external serious offence to which the order relates, if it had occurred in Hong Kong, would not have constituted a Hong Kong serious offence in respect of which a Hong Kong confiscation order could be made. * ”.
5. Section 17(1) of the Ordinance shall be modified by deleting paragraph (ii).
6. 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.”.

7. Section 23(2) (a) of the Ordinance shall be modified -

- (a) by adding “or” at the end of subparagraph (i);
- (b) by deleting subparagraph (ii).

* 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

1998

Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) shall apply as between the Hong Kong Special Administrative Region and the United Kingdom of Great Britain and Northern Ireland. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Hong Kong Special Administrative Region and the United Kingdom of Great Britain and Northern Ireland and signed in the Hong Kong Special Administrative Region on 23 January 1998. A copy of those arrangements is annexed at Schedule 1 to the Order. It should be noted that the Ordinance is subject to the modifications summarized in Schedule 2 to the Order.

**MUTUAL LEGAL ASSISTANCE IN CRIMINAL
MATTERS ORDINANCE**

RESOLUTION OF THE LEGISLATIVE COUNCIL

Resolution made and passed by the Legislative Council under section 4 of the Mutual
Legal Assistance in Criminal Matters Ordinance (Cap. 525) on 1998.

RESOLVED that the Mutual Legal Assistance in Criminal Matters (United States of
America) Order, made by the Chief Executive in Council on
1998, be approved.

Clerk to the Legislative Council

1998

**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 (United States of
America) Order, made by the Chief Executive in Council on 1998,
be approved.

**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. of 1998). * ”.

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 these 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).

Clerk to the Executive Council

COUNCIL CHAMBER

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.

Explanatory Statement on the Modifications to the Ordinance

**Mutual Legal Assistance in Criminal Matters
(Australia) Order (“Australia Order”)**

Previous Convictions etc.

Section 5(1)(e) of the Ordinance provides that the Secretary for Justice shall refuse assistance if the request relates to the prosecution of a person for an offence in respect of which he has been convicted, acquitted, pardoned or punished in the requesting jurisdiction. Article IV(1)(e) of the Hong Kong/Australia Agreement extends this protection to convictions etc. in the requested jurisdiction as well. The modification expands the scope of section 5(1)(e) to reflect the provision in the agreement.

Immunities

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

**Mutual Legal Assistance in Criminal Matters
(France) Order (“France Order”)**

Previous Convictions etc.

3. Section 5(1)(e) of the Ordinance provides that the Secretary for Justice shall refuse assistance if the request relates to the prosecution of a person for an offence in respect of which he has been convicted, acquitted, pardoned or punished in the requesting jurisdiction. Article IV(1)(f) of the

Hong Kong/France Agreement provides for this protection in relation to convictions etc. in the requested jurisdiction. The modification to section 5(1)(e) reflects the provision in the agreement; the protection in section 5(1)(e) in relation to convictions etc. in the requesting jurisdiction will continue to apply.

Lapse of Time

4. A new sub-paragraph is included in section 5(1)(e) to provide for refusal of assistance if the offence, had it occurred in Hong Kong, could no longer be prosecuted by reason of lapse of time. This modification also reflects Article IV(1)(f) of the Hong Kong/France Agreement.

Immunities

5. This modification to section 17 of the Ordinance is the same as the modification provided for in the Australia Order (see paragraph 2 above) except that the period is thirty days. This reflects the additional protection in Article XVI(6) of the Hong Kong/France Agreement.

Mutual Legal Assistance in Criminal Matters (New Zealand) Order (“New Zealand Order”)

Previous Convictions etc.

6. Section 5(1)(e) of the Ordinance provides that the Secretary for Justice shall refuse assistance if the request relates to the prosecution of a person for an offence in respect of which he has been convicted, acquitted, pardoned or punished in the requesting jurisdiction. Article IV(1)(e) of the HKSAR/New Zealand Agreement provides for this protection in relation to convictions etc. wherever incurred, i.e. in the requested jurisdiction and third jurisdictions as well. The modification to section 5(1)(e) expands the scope of the section to reflect the provision in the agreement.

Lapse of Time

7. This modification to section 5(1)(e) is exactly the same as the modification provided for in the France Order (see paragraph 4 above). This modification reflects Article IV(4) of the HKSAR/New Zealand Agreement.

Immunities

8. This modification to section 17 of the Ordinance is the same as the modification provided for in the Australia Order (see paragraph 2 above) except that the period is twenty one days. The modification reflects the additional protection in Article XVII(2) of the agreement.

Mutual Legal Assistance in Criminal Matters (United Kingdom) Order (“UK Order”)

Previous Convictions etc.

9. This modification to section 5(1)(e) of the Ordinance is exactly the same as the modification provided for in the France Order (see paragraph 3 above). This reflects the provision in Article IV(1)(e) of the HKSAR/United Kingdom Agreement.

Lapse of Time

10. This further modification to section 5(1)(e) is exactly the same as the modification provided for in the France Order (see paragraph 4 above). This reflects the provision in Article IV(1)(e) of the HKSAR/United Kingdom Agreement.

Confiscation of the Proceeds of Crime

11. A new paragraph (h) is added to section 5(1) to provide that the Secretary for Justice shall refuse assistance if the request relates to confiscation of the proceeds of crime and the underlying offence would not be a basis for confiscation in Hong Kong had the offence occurred in Hong

Kong. This modification is to reflect Article IV(1)(h) of the HKSAR/United Kingdom Agreement.

Immunities

12. This modification to section 17 of the Ordinance is exactly the same as the modification provided for in the Australia Order (see paragraph 2 above). The modification reflects the additional protection in Article XVII(2) of the HKSAR/United Kingdom Agreement.

Immunity from Civil Suit

13. Section 17 gives various immunities to persons who come to Hong Kong to provide assistance. Section 23 is designed to ensure that persons who travel from Hong Kong to other jurisdictions to render assistance receive immunities. Immunity from civil suit is one of the specific immunities in sections 17 and 23. The modifications to section 17 and 23 remove this immunity since it is not provided for in the agreement.

Mutual Legal Assistance in Criminal Matters (United States of America) Order (“US Order”)

Double Criminality

14. Section 5(1)(g) of the Ordinance provides that the Secretary for Justice shall refuse assistance if the offence in respect of which assistance is sought would, if it had occurred in Hong Kong, not be an offence under Hong Kong law. Article 3(1)(d) of the Hong Kong/US Agreement creates an exception to this “double criminality” principle by requiring that assistance is to be given in respect of certain serious offences irrespective of whether there is “double criminality”. These offences, which are listed in the Annex to the agreement, are described in general terms and are compatible with Hong Kong’s criminal law. They are offences for which double criminality would generally be expected to exist. Article 3(1)(d) was a compromise. The US government did not wish the agreement to deal with double criminality on the basis that none of their existing agreements did. They were however content

that there be such a requirement provided that certain serious offences were listed as offences for which assistance had to be given irrespective of whether double criminality existed.

Immunities

15. This modification to section 17 of the Ordinance is exactly the same as the modification provided for in the Australia Order (see paragraph 2 above). The modification reflects the additional protection in Article 13(3) of the agreement.

16. Section 23 of the Ordinance, in effect, requires the Secretary for Justice to be satisfied that persons who are to travel to other jurisdictions from Hong Kong to provide assistance receive adequate immunities. In the US, the Administration can be obliged by a Court to request that a person travel to the US to provide assistance. In certain circumstances, the Administration would not, for political reasons, wish to grant such a person immunities - the example given was if the person was a terrorist. Article 13(2) was accordingly included in the agreement to permit the requesting jurisdiction to limit the immunities to be provided. The modification proposed to section 23 reflects the fact that there can be limitations on immunities. It however ensures that the aforesaid person will know exactly what immunities he will not have before he consents to travel. In this regard, it is important to note that no person in Hong Kong can be compelled to travel to another jurisdiction to provide assistance.