Bills Committee on Smoking (Public Health) (Amendment) Bill 2005
Administration's Response to Questions Raised by Members of the Bills Committee at the Meeting of 19 June 2006

This paper sets out the comments of the Administration on the following issues raised by members of the Bills Committee at its meeting of on 19 June 2006:

(a) the meaning of the Chinese expression of "徵用" (zhengyong) in BL 105 with reference to the expression of "deprivation" in the English text of BL 105;

(b) whether it would be feasible to proceed with clause 11 of the Bill (without the proposed "grandfathering and notation" provision) subject to a transitional period for the owners of the affected trade marks to take legal proceedings to test the constitutionality of the enacted clause 11 ("the Preliminary Proposal").

Summary

2. In summary, the views of the Administration on the questions stated above are as follows:

(a) It is possible to reconcile the Chinese and English texts of BL 105 as far as the words "徵用" (zhengyong) and "deprivation" are concerned. "徵用" (zhengyong) may be more broadly interpreted in the light of the English text to cover what is covered by the term "deprivation".

(b) The Preliminary Proposal cannot adequately address the Administration's concern that there is a serious risk of successful legal challenge against clause 11.

The Chinese expression of "徵用" (zhengyong) in BL 105

Approach to Interpret the Basic Law

3. In *Director of Immigration v Chong Fung Yuen* [2001] 2 HKLRD 533, the Court of Final Appeal of the HKSAR, at pp 546C-547F, set out comprehensively the proper approach to interpret the Basic Law :

"The court's role under the common law in interpreting the Basic Law is to construe the language used in the context of the instrument in order to ascertain *the legislative intent as expressed in the language.* ...

The courts do not look at the language of the article in question in isolation. The language is considered in the light of its context and purpose. See *Ng Ka Ling* at pp.28-29. The exercise of interpretation requires the courts to identify the meaning borne by the language when considered in the light of its context and purpose. This is an objective exercise. Whilst the courts must avoid a literal, technical, narrow or rigid approach, they cannot give the language a meaning which the language cannot bear. As was observed in *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 at p.329E, a case on constitutional interpretation: 'Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language'.

...

To assist in the task of the interpretation of the provision in question, the courts consider what is within the Basic Law, including provisions in the Basic Law other than the provision in question and the Preamble. These are internal aids to interpretation.

Extrinsic materials which throw light on the context or purpose of the Basic Law or its particular provisions may generally be used as an aid to the interpretation of the Basic Law. Extrinsic materials which can be considered include the Joint Declaration ... The state of domestic legislation at the time and the time of the Joint Declaration will often also serve as an aid to the interpretation of the Basic Law ..." (emphasis original)

Sino-British Joint Declaration

4. In construing the expression "deprivation" in BL 105, it is relevant to consider the corresponding provision of the Sino-British Joint Declaration on the Question of Hong Kong between the Chinese and British Governments signed on 19 December 1984 (JD). BL105 implements the relevant provision of Part VI of Annex I to the Sino-British Joint Declaration (JD 86) which read as follows :

> "Rights concerning the ownership of property, including those relating to acquisition, use, disposal, inheritance and compensation for lawful deprivation (corresponding to the real value of the property concerned, freely convertible and paid without undue delay) shall continue to be protected by law."

5. The corresponding Chinese text for "deprivation" under JD 86 is "徵用" (zhengyong) which arguably bears a narrower meaning than the English text of "deprivation" and is arguably confined to acts by the state or government to resume or acquire property for public purposes.

6. The text of the Joint Declaration (JD) expressly provides for both the Chinese and English "texts being equally authentic". Para. 7 of the JD provides that the two governments "agree to implement the preceding declarations and the Annexes to this Joint Declaration". Para. 8 provides, inter alia, that "[t]his Joint Declaration and its Annexes shall be equally binding".

7. As regards the interpretation of plurilingual treaties, Article 33 of the Vienna Convention on the Law of Treaties provides, inter alia, that "the terms of a treaty are presumed to have the same meaning in each authentic text", and "where a comparison of the authentic texts discloses a difference of meaning ... the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted." It may be observed that this approach is similar to that applicable to the interpretation of bilingual legislation in Hong Kong as prescribed by the Interpretation and General Clauses Ordinance (Cap. 1) (part IIA thereof).

8. The Preamble to the Basic Law states, inter alia, that "[t]he basic policies of the People's Republic of China regarding Hong Kong have been elaborated by the Chinese Government in the Sino-British Joint Declaration", and that the Basic Law is enacted "in order to ensure the implementation of the basic policies of the People's Republic of China regarding Hong Kong". BL 159(4) provides that "[n]o amendment to this Law shall contravene the established basic policies of the People's Republic of China regarding Hong Kong".

9. It is therefore arguable that, as BL 105 is to give effect to the Sino-British Joint Declaration, the expression "徵用" (zhengyong)/"deprivation" should be approached by adopting an interpretation which best reconciles the Chinese and the English languages having regard to the context and purpose of the provision when the Sino-British Joint Declaration was signed in 1984.

Meaning of "徵用" (zhengyong)

10. According to the *Chong Fung Yuen* case (cited above), it is relevant to consider the ordinary meaning of the expression of "deprivation" in the English text and expression of "徵用" (zhengyong) in the Chinese text of BL 105. In *Oxford English Dictionary* (2nd ed, 1989), "deprivation" is defined to mean "the action of depriving or fact of being deprived; the taking away of anything enjoyed; dispossession, loss". "Deprive" is defined in turn to mean "to divest, strip, bereave, dispossess of … a possession …; to deprive (a person) of (a thing) = to take it away from."

11. The dictionary meaning of the expression "徵用" (zhengyong) can be found in a number of leading Chinese dictionaries, e.g. in 《漢語大詞典》(1997), the expression "徵用" (zhengyong) was defined to mean "國家依法將個人或集體所有的土地或其他生產資料收歸公用" (acquisition of land or other production material owned by an individual or collectively for public purposes by the state in accordance with law). Similarly, in 《辭海》(1989), the expression was defined to mean "國家依法將土地或其他生產資料收作公用的措施" (measures to acquire land or other production material for public purposes by the state in accordance with law).

12. The English text of the Basic Law, albeit an official version promulgated by the Chinese authorities, does not have the same status as the Chinese text enacted by the National People's Congress. The Decision made by the NPC Standing Committee on 28 June 1990 on the English version of the Basic Law expressly provides that in case of any discrepancy in the meaning of words in the Chinese and English versions of the Basic Law, the Chinese version shall prevail. According to this rule, if there is a discrepancy in the meaning of "徵用" (zhengyong) and "deprivation" in the Chinese and English versions of BL 105 respectively, the meaning of the Chinese term shall prevail.

13. The next question is whether the expression "徵用" (zhengyong) should be construed in accordance with its ordinary meaning and whether it is possible to identify a meaning in BL 105 which reconciles the two language versions. If it is possible to do so, then no real question of discrepancy arises as between the two versions, and it is not necessary to apply the rule that in case of discrepancy, the Chinese version shall prevail.

14. It is considered that it is legitimate to take into account how the expression "徵用" (zhengyong) is used and understood by users of the Chinese language in the Mainland for the purpose of interpreting the authentic Chinese

text of BL 105. Some may argue that if the common law approach is to be adopted for the interpretation of the Basic Law and the common law system is to be maintained in Hong Kong, any attempt to introduce the meaning of Mainland Chinese legal terms into Hong Kong law should be resisted. On the other hand, it may be pointed out that the Chinese text of the Basic Law is the authentic text and prevails over the official English translation in case of discrepancy. Thus the Chinese text of the Basic Law should not be disregarded in its interpretation, particularly where a possible discrepancy exists between the Chinese text and the English text. Inquiries into the meaning of a Chinese word used in the Basic Law are therefore legitimate. If the word is a word commonly used by lay people, it is legitimate to consult ordinary dictionaries. If the word is a technical legal term, it is legitimate to consult legal dictionaries, scholarly works on law or legislative texts that may throw light on the meaning of the word.

15. Another reason that supports the legitimacy of inquiries into the Chinese meaning of a word such as "徵用" (zhengyong) is that it is used in the Chinese version of the JD where both the Chinese and English versions are equally authentic. The meaning attached to it by the draftsmen (or negotiators) of the Chinese version of the JD deserves to be taken into account, just as the meaning attached to the word "deprivation" by the draftsmen (or negotiators) of the English version deserves to be taken into account.

16. It is arguable that "徵用" (zhengyong) in BL105 is a technical legal term rather than an ordinary term. Its meaning has never been precisely formulated in Mainland Chinese jurisprudence. "徵用" (Zhengyong) and related terms such as "徵收" (zhengshou) have been used in various contexts, but no well-established principle had been developed regarding how they should be used until the 2004 constitutional amendment to the Constitution of the People's Republic of China which for the first time formally recognizes the distinction between "徵用" (zhengyong) and "徵收" (zhengshou).

17. Furthermore, in Mainland China there is apparently no wel-established legal term that can serve as the functional equivalent of "deprivation." This contrasts with Commonwealth jurisprudence on the constitutional protection of property rights where the distinction between "acquisition" (whose meaning is close to "徵用" (zhengyong)) and "deprivation" has been well-established.[1]

[1] See generally Tom Allen, *The Right to Property in Commonwealth Constitutions* (Cambridge University Press 2000), chapter 6.

18. Given that the Chinese term "徵用" (zhengyong) is an artificial legal term used to express a legal concept, and given that the legal concept relating to "徵用" (zhengyong) has not been well-settled and is still in a process of evolution, it is considered that it is possible and legitimate to give it a broader interpretation (than that mentioned in para. 10 above) in the context of BL 105 so as to reconcile its meaning with the term "deprivation".

19. The above view is fortified by three developments. First, some courts in common law jurisdictions have sought to overcome the distinction between "acquisition" (whose meaning is close to "徵用" (zhengyong)) and "deprivation" by giving "acquisition" a broad interpretation so that it covers situations where the property owner suffers loss without the state gaining the property. [2] Secondly, in some Commonwealth constitutions, the word "acquisition" has been broadly defined to include "extinguishing or curtailing" the relevant interest in or right over property.[3] Thirdly, in *Fine Tower Associates Ltd v Town Planning Board* HCAL 5/2004, the CFI, for the first time in local jurisprudence, has applied the doctrine of de facto deprivation and held that restrictions imposed by a draft OZP are capable in law of constituting a de facto deprivation of property.

The Preliminary Proposal

20. At the meeting of Bills Committee held on 19 June 2006, one member has put forward a preliminary suggestion that instead of introducing a "grandfathering and notation" provision to be added to clause 11 of the Bill, a cooling off or transitional period should be provided during which the offence under section 10(3) of the Smoking (Public Health) Ordinance (Cap. 371) (as amended by clause 11 without the proposed "grandfathering and notation" provision) will not be enforced so that the owners of the affected trade marks may take legal proceedings to test the constitutionality of the amended section 10(3) of Cap. 371.

21. It is noted that the Preliminary Proposal adopts a very unusual approach. It is premised on the basis that the constitutionality of clause 11 of the Bill is not free from doubt. Otherwise, it would not be necessary to allow for a transitional period so that the constitutionality of the amended section 10(3)

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2 *Dwarkadas Shrinivas v Sholapur Spinning and Weaving Co Ltd* AIR 1954 SC 119 (Supreme Court of India). See the discussion of this case and the reference to 2 other Indian cases in Allen (op. cit.) at 164-5, 172. *Societe United Docks v Government of Mauritius* [1985] LRC (Const) 801 is also relevant. In this case, Lord Templeman pointed out (at p. 841) that "[l]oss caused by deprivation and destruction is the same in quality and effect as loss caused by compulsory acquisition". See the discussion of this case in Allen (ibid.), pp. 168, 172.

3 Allen (ibid.), at 64.

may be tested. However, as the Administration has explained to the Bills Committee at the meetings of 15 and 19 June 2006, there is a serious risk that the cumulative effect of clause 11 and other provisions of the Bill (particularly those relating to tobacco advertisements) and the existing law as contained in Cap. 371 would amount to a de facto deprivation of property. Given that the CE is responsible for implementing the Basic Law under BL48(2), it is important that the issue of the constitutionality of a legislative proposal be properly addressed during the legislative stage. It is not considered advisable to leave the question of the constitutionality of clause 11 to be resolved by the court (whether within or outside a transitional period) when there is a serious risk that it could be successfully challenged. Even if the legislation had not been brought into operation by the time the court determined the challenge, there would still be the risk that the legislature would have contravened Article 11 of the Basic Law viz "No law enacted by the legislature of the HKSAR shall contravene (the Basic) Law." The Preliminary Proposal cannot adequately address the Administration's concern that there is a serious risk of successful legal challenge against clause 11. In short, it is considered prudent to introduce the proposed "grandfathering and notation" provision to clause 11 of the Bill.

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