

For discussion
on 7 March 2006

Legislative Council Panel on Security

Legislative Proposals for the Implementation of the Co-location Arrangement

Purpose

This paper briefs Members on the proposed approach for the legislation to underpin the implementation of the arrangement to co-locate the customs and immigration facilities of both the Mainland and Hong Kong on the Mainland (“the co-location arrangement”).

Background

2. The Shenzhen Bay Port, where the co-location arrangement will be implemented, is a new control point to be set up at Shekou in Shenzhen. It will be linked to Ngau Hom Shek in the north-western part of the New Territories of the Hong Kong Special Administration Region through the Hong Kong-Shenzhen Western Corridor (HKSWC). According to the latest estimates, we believe that major construction works for the project will be completed by end 2006, and our current goal is to open the HKSWC to traffic within the first half of 2007. These estimates will be reviewed nearer the time in view of actual progress on the ground.

3. The Shenzhen Bay Port will be divided into a Hong Kong Port Area (HKPA) and a Shenzhen Port Area. The HKPA will include the piece of land where the new control point of Hong Kong will be located, as well as the Shenzhen section of the HKSWC linking the said piece of land with the territory of Hong Kong. A location plan of the HKPA is at Annex A. With the requisite authorisation from the relevant Central Authorities, Hong Kong will be authorized to exercise jurisdiction over the HKPA, and the laws of Hong Kong shall be applied to the HKPA.

4. Operationally, Shenzhen and Hong Kong will conduct its own customs and immigration examinations according to its own laws

and regulations within their respective port areas, i.e. the existing *modus operandi* will be followed basically. The two port areas will be immediately adjacent to each other but will not overlap so as to avoid any vacuum or confusion in jurisdiction.

5. Legislation will be required for the implementation of the co-location arrangement to –

- (a) enable certain areas in China that are outside Hong Kong to be declared as HKPAs pursuant to the relevant Central Authorities' authorisation;
- (b) apply the laws of Hong Kong to HKPAs and provide for the court's jurisdiction in this connection;
- (c) extend the territorial limit of certain rights and obligations (including those that are granted or imposed by certain court orders) acquired or incurred before the declaration of any HKPA to include the HKPA; and
- (d) assist in the construction of certain documents (including court orders) made on or after the declaration of any HKPA.

Proposals in relation to matters that will need to be dealt with under the co-location legislation

Main purpose of the co-location legislation

6. The main purpose of the co-location legislation is to apply the laws of Hong Kong to any HKPA (whether or not the laws so applied relate to customs and immigration and whether the whole or a part only of the HKPA is used for customs and immigration clearance).

Declaration of HKPAs

7. We propose to empower the Chief Executive in Council to declare an area in China that is outside Hong Kong to be a HKPA (a HKPA declaration) pursuant to the relevant Central Authorities' authorisation.

8. We propose to provide for the flexibility of declaring different HKPAs at different times. Maps and plans may be annexed to the relevant HKPA declaration to delineate the boundary of the HKPA for

the Shenzhen Bay Port.

Application of laws of Hong Kong to HKPAs

9. Our proposed approach is to apply the laws of Hong Kong (i.e. the laws for the time being in force in, having legislative effect in, extending to, or applicable in, Hong Kong) to a HKPA except for those laws whose application to the HKPA will give rise to grave difficulties in enforcement or implementation. In effect, it is an extension of Hong Kong's jurisdiction without changing Hong Kong's boundary.

10. Accordingly, we propose to provide that –

- (a) the laws of Hong Kong shall apply to any HKPA;
- (b) the Chief Executive in Council may by order modify or exclude any legislation in their application to any HKPA; and
- (c) for the purpose of applying the laws of Hong Kong to a HKPA, the HKPA shall be regarded as an area lying within Hong Kong.

Jurisdiction of Hong Kong courts

11. We consider that specific provisions will be required to deal with the jurisdiction and power of Hong Kong courts. Specifically, we propose to provide that Hong Kong courts shall have jurisdiction to hear or determine any cause or matter, civil or criminal, arising from the operation of the co-location legislation and the court may make orders that adjudicate on a right or obligation the territorial limit of which is confined to or includes any HKPA.

Territorial limit of rights and obligations

12. When implementing the co-location arrangement, one of the key issues is whether the territorial limit of pre-existing and future rights and obligations should include HKPAs. Our proposed approach is set out below.

Private contracts

13. In view of possible property rights implications, we intend to

leave private contracts, whether pre-existing or new ones, untouched. It will be up to the contracting parties to negotiate an extension of their contracts to cover the HKPAs as they see fit.

Pre-existing rights and obligations proposed to be dealt with by the co-location legislation

14. As regards pre-existing rights and obligations, basically, we propose to extend the territorial limit of those rights and obligations that arise from certain court orders or statutory powers or duties, and that are required for ensuring effective law enforcement or continuity of certain essential services in the HKPA. For example, a pre-existing warrant of arrest can be enforced in a HKPA; a qualified lawyer, doctor, or other recognised professional will be qualified to practise in a HKPA; and a driving licence will be valid in a HKPA, as they are in Hong Kong. The details of this proposed approach are set out in paragraphs 16-19 below.

15. The major problem of extending the territorial limit of pre-existing rights and obligations is that it could interfere with the rights and obligations of the parties concerned. Under our proposal, pre-existing rights and obligations, unless expressly provided for in the co-location legislation, will not be extended to include a HKPA.

Pre-existing rights and obligations arising from ordinances or statutory powers or duties

16. Under our proposed approach regarding pre-existing rights and obligations, we propose to extend the territorial limit of certain pre-existing rights and obligations that are conferred or imposed by certain Ordinances or arise by the exercise or performance of certain statutory powers or duties to include the HKPAs. These are rights and obligations –

- (a) that are of a description to be expressly specified in the co-location legislation;
- (b) that have been acquired or incurred before the commencement of a HKPA declaration; and
- (c) that subsist, or the legal effect of which is suspended, as at that commencement.

If such a right or obligation has a territorial limit (whether express or not)

confined to or including Hong Kong as a whole, then, the territorial limit of the right or obligation shall be extended to include the relevant HKPA.

17. For the purpose of paragraph 16 above, we consider that pre-existing rights or obligations which do not arise from court orders set out at Annex B, for example, should be expressly specified.

Pre-existing rights and obligations arising from court orders

18. Court orders may be made under the inherent jurisdiction of the courts, rather than statutory powers or duties. Hence, we consider specific provisions will be required to extend the territorial limit of pre-existing rights or obligations granted or imposed by certain court orders to include HKPAs. These are pre-existing rights and obligations granted or imposed by court orders –

- (a) that are of a description to be expressly specified in the co-location legislation;
- (b) that have been made before the commencement of a HKPA declaration; and
- (c) that subsist, or the legal effect of which is suspended, as at that commencement.

If such a right or obligation has a territorial limit (whether express or not) confined to or including Hong Kong, then, the territorial limit of the right or obligation shall be extended to include the relevant HKPA.

19. For the purpose of paragraph 18 above, we consider that the court orders set out at Annex C, for example, should be expressly specified.

Future rights and obligations proposed to be dealt with by the co-location legislation

20. As regards future documents made on or after the declaration of any HKPA, we intend the co-location legislation to deal with the construction of court orders and documents arising from statutory powers or duties, for the sake of certainty and clarity.

Future documents arising from statutory powers or duties

21. Under our proposed approach regarding future documents, we propose to assist in the construction of references to Hong Kong in future documents (other than court orders) that are made by the exercise or performance of such statutory powers or duties as expressly specified in the co-location legislation on or after the commencement of a HKPA declaration. If any such reference describes the territorial limit of a right or obligation, then, unless the contrary intention appears, the territorial limit shall be construed as including the relevant HKPA.

22. The application of a general construction aid to all documents indiscriminately may invite questions. Hence, the construction aid will not apply to rights or obligations that arise other than by the exercise or performance of a statutory power or duty as expressly specified. For the purpose of paragraph 21 above, we consider that it would be sufficient for us to expressly specify, for example, the following statutory powers or duties –

- (a) a statutory power or duty conferred or imposed on a public officer, public body or public authority; and
- (b) a statutory power or duty conferred or imposed on a regulatory body for it to –
 - (i) admit (howsoever described) a person to a profession, trade or business; or
 - (ii) permit a person to engage in (howsoever described) a profession, trade or business.

Future court orders

23. We also propose to make specific provisions to assist in the construction of references of Hong Kong in court orders that are made on or after the commencement of a HKPA declaration. If any such reference describes the territorial limit of a right or obligation granted or imposed by the court order, then, unless the contrary intention appears from the court order, the territorial limit shall be construed as including the relevant HKPA.

Land in HKPAs to be regarded as Government land

24. For the purposes of applying the laws of Hong Kong to a HKPA, we propose to provide that –

- (a) land within a HKPA shall be regarded as part and parcel of the Government land lying within Hong Kong;
- (b) any right or interest in the land that may be disposed of by any subsequent dealings shall be regarded as a right or interest derived directly or indirectly (as the case may be) from the HKSAR Government; and
- (c) the Chief Executive may, on behalf of the HKSAR Government, dispose of land lying within a HKPA.

Legislative timetable

25. Subject to the progress of addressing the relevant complex legal and jurisdictional issues, we aim to introduce the relevant bill into the Legislative Council with the current legislative session.

Advice sought

26. Members are invited to comment on the above proposals.

Security Bureau
February 2006



深圳灣口岸及大橋平面圖
SITE PLAN OF
SHENZHEN BAY PORT
AND BRIDGE

drawn by K.H. CHAN

date 27-02-2006

approved K.C. TAM

date 27-02-2006

drawing no.
AB/6596/XA110

scale
1:15000
(in A4 SIZE)

PROJECT MANAGEMENT BRANCH



ARCHITECTURAL
SERVICES
DEPARTMENT

Pre-existing rights and obligations (other than those granted or imposed by court orders) to be extended to HKPAs

For the purpose of paragraph 16 of the paper, we consider that pre-existing rights and obligations granted or imposed by virtue of, for example, the following documents (other than court orders) should be expressly specified –

- (a) a deportation order made under the Immigration Ordinance;
- (b) a removal order made under the Immigration Ordinance;
- (c) a warrant for the arrest of a person made under an Ordinance;
and
- (d) a licence, permit, approval, registration, enrolment or any other authority (howsoever described), or exemption (howsoever described) –
 - (i) issued or given under an Ordinance by a public officer, public body or public authority; or
 - (ii) issued or given under an Ordinance by a regulatory body (proposed to mean a person that regulates standards of competence within a profession, trade or business) for the purpose of –
 - (A) admitting (howsoever described) a person to a profession, trade or business; or
 - (B) permitting a person to engage in (howsoever described) a profession, trade or business.

Pre-existing court orders to be specified

For the purpose of paragraph 18 of the paper, we consider that the following pre-existing court orders, for example, should be expressly specified –

- (a) an order or direction to the effect that a person shall not leave or be removed from Hong Kong;
- (b) a warrant for the arrest of a person;
- (c) a notice issued under section 17A(1) of the Prevention of Bribery Ordinance (Cap.201) (i.e. a notice requiring a person to surrender any travel document in his possession; a person to whom such notice is addressed shall not leave Hong Kong under certain circumstances);
- (d) a detention order authorizing the seizure or detention of any plants, animals, goods, articles, or any other things on or after its or their importation into Hong Kong; and
- (e) an injunction prohibiting the importation into or exportation from Hong Kong of any plants, animals, goods, articles, or other things.