

Bills Committee on Shenzhen Bay Port Hong Kong Port Area Bill

Constitutional and Jurisdictional Issues

Following the discussion at the Bills Committee meeting on 1 March 2007, this paper sets out the Administration's views on a number of constitutional and jurisdictional issues relating to the co-location arrangement at the Shenzhen Bay Port (Co-location Arrangement).

Constitutional background of the NPCSC's authorization decision

2. The Shenzhen Bay Port (SBP) is physically located at Shekou in Shenzhen. Under the Co-location Arrangement, the HKSAR will exercise jurisdiction over the Hong Kong Port Area within the SBP (SBP HKPA) according to the laws of Hong Kong. However, under the Basic Law and particularly the scheme of "one country, two systems" provided for therein, this jurisdictional arrangement cannot be unilaterally effected by the Hong Kong Special Administration Region (HKSAR) without additional authorization by an appropriate organ of the Central Authorities.

3. Against the above background, the Standing Committee of the National People's Congress (NPCSC) decided on 31 October 2006 that the HKSAR is authorized to exercise jurisdiction over the HKPA according to the laws of the HKSAR from the day on which the SBP commences operation, and the HKSAR is to administer the SBP HKPA as a closed area (NPCSC Decision).

4. The above authorization was given by the NPCSC in accordance with its powers under the *Constitution*. Article 57 of the *Constitution* provides that the National People's Congress (NPC) is the highest organ of state power. Its permanent body is the NPCSC. Article 58 further provides that the NPC and the NPCSC exercise the legislative power of the State. Such legislative power of the NPCSC is more particularly provided for in Article 67 of the *Constitution*. Extracts of these constitutional provisions are at **Annex A**.

5. Under Article 20 of the Basic Law, the HKSAR is competent to acquire and exercise the powers granted to it under the NPCSC's Decision. That Article provides that the HKSAR may enjoy other powers granted to it by the NPC, the NPCSC or the Central People's Government. It enables further powers to be delegated to the HKSAR by the Central Authorities if and when appropriate.

Status of the NPCSC's Decision

6. The NPCSC's authorization of 31 October 2006 is considered part of the law under the Mainland legal system.

7. As commented by some leading Mainland legal academics,¹ "laws" (法律) in the Mainland refer to the following documents which are of the same legal force and status (具有同等的法律效力和法律地位):

- (a) basic laws (基本法律) enacted by the NPC;
- (b) other laws other than the basic laws (基本法律以外的其他法律) enacted by the NPCSC; and
- (c) resolutions or decisions which are regulatory in nature (規範性決議和決定) made by the NPC & the NPCSC.

8. Examples of the documents referred in (c) include the 《關於嚴懲嚴重危害社會治安的決定》 (Decision Regarding the Severe Punishment of Criminals Who Seriously Endanger Public Security) and 《關於修正〈中華人民共和國憲法〉若干規定的決議》 (Resolution on the Amendment to the Provisions of the PRC Constitution).

9. Given that the purpose of the NPCSC's Decision is to authorize the HKSAR to exercise jurisdiction over the SBP HKPA according to Hong Kong laws, it is clearly regulatory in nature. In the light of the discussion above, it should be regarded as a "law" (法律) under the Mainland legal system.

¹周旺生 (Zhou Wangsheng), 《規範性文件起草》 (The Drafting of Regulatory Documents) (China Democratic Legal System Press, 1998), at pp. 43-44. See also 沈宗靈 (Shen Zongling), 《法學基礎理論》 (Basic Theories of Legal Study) (Peking University Press, 1988), at p. 344.

10. Under Article 79 of the *Legislation Law of the PRC* (《中華人民共和國立法法》), the NPCSC's Decision, as a law, will have a higher status when compared with administrative regulations, local regulations and rules. Further, by virtue of Article 83 of the same law, the NPCSC's Decision will prevail over any prior inconsistent laws.

11. In his *Explanations on the Proposal for Authorizing the Hong Kong Special Administrative Region to Administer the Hong Kong Port Area at the Shenzhen Bay Port* delivered at the 23rd session of the Standing Committee of the 10th NPC on 22 August 2006 (a copy at **Annex B**), Mr Chen Zuoer, Deputy Director of the Hong Kong and Macau Affairs Office, State Council, considered that a decision made by the NPCSC for the purpose of the Co-location Arrangement has a legal status-cum-authority which is most sufficient according to the *Constitution*.

HKSAR's jurisdiction over the SBP HKPA

12. The NPCSC's Decision clearly states that the HKSAR is authorized to exercise jurisdiction over the HKPA according to the laws of the HKSAR. By necessary implication of the above authorization, Mainland laws shall not apply to the HKPA, as if it were a part of the HKSAR.

13. In the *Report of the Law Committee of the National People's Congress on the Result of Its Deliberation over the "Proposal for Authorizing the Hong Kong Special Administrative Region to Exercise Jurisdiction over the Hong Kong Port Area at the Shenzhen Bay Port"* delivered at the 24th session of the Standing Committee of the 10th NPC on 27 October 2006 (a copy at **Annex C**), Mr Qiao Xiaoyang, Vice Chairman of the Law Committee of the NPC, made it clear that upon the implementation of the Co-location Arrangement, only Hong Kong laws would apply in the SBP HKPA.

14. Under Article 18 of the Basic Law, the laws of Hong Kong include the Basic Law, the laws previously in force in Hong Kong as provided for in Article 8 of the Basic Law, the laws enacted by the legislative of the HKSAR, and the national laws applied to the HKSAR as listed in Annex III to the Basic Law.

15. Hence, under the Co-location Arrangement, the HKSAR would be able to exercise jurisdiction over the SBP HKPA as fully as if it were a part of Hong Kong.

SBP HKPA as a closed area

16. Paragraph 1 of the NPCSC's Decision provides that the HKSAR is to administer the SBP HKPA as a closed area. This provision is an integral part of the NPCSC's authorization to the HKSAR exercising jurisdiction over the SBP HKPA according to the laws of Hong Kong.

State Council's Official Reply of 30 December 2006

17. The legal basis of the above State Council's Official Reply is paragraphs 2 and 3 of the NPCSC's Decision, which provide that the area of the SBP HKPA will be stipulated by the State Council and that the land use period of the SBP HKPA will be determined by the State Council according to the provisions of the relevant laws.

18. In its above Official Reply, the State Council, among other things, endorsed the HKSAR's acquisition of the right to use the land of the SBP HKPA by way of a lease. It also determined the term of such a lease. Such determination is in accordance with the *Tentative Provisions of the PRC on the Assignment and Transfer of Use of the State-owned Land in Urban Areas* (《中華人民共和國城鎮國有土地使用權出讓和轉讓暫行條例》).

19. It may also be noted that under the *Provisions of the State Council on the Opening of Ports* (《國務院關於口岸開放的若干規定》), the State Council has the authority to approve the opening and closing of ports in accordance with the provisions therein.

Security Bureau
5 March 2007

第五十四條 中華人民共和國公民有維護祖國的安全、榮譽和利益的義務，不得有危害祖國的安全、榮譽和利益的行爲。

第五十五條 保衛祖國、抵抗侵略是中華人民共和國每一個公民的神聖職責。

依照法律服兵役和參加民兵組織是中華人民共和國公民的光榮義務。

第五十六條 中華人民共和國公民有依照法律納稅的義務。

第三章 國家機構

第一節 全國人民代表大會

✓ 第五十七條 中華人民共和國全國人民代表大會是最高國家權力機關。它的常設機關是全國人民代表大會常務委員會。

✓ 第五十八條 全國人民代表大會和全國人民代表大會常務委員會行使國家立法權。

and respect social ethics.

Article 54 It is the duty of citizens of the People's Republic of China to safeguard the security, honour and interests of the motherland; they must not commit acts detrimental to the security, honour and interests of the motherland.

Article 55 It is the sacred duty of every citizen of the People's Republic of China to defend the motherland and resist aggression.

It is the honourable duty of citizens of the People's Republic of China to perform military service and join the militia in accordance with law.

Article 56 It is the duty of citizens of the People's Republic of China to pay taxes in accordance with law.

Chapter III The Structure of the State

Section 1 The National People's Congress

✓ Article 57 The National People's Congress of the People's Republic of China is the highest organ of state power. Its permanent body is the Standing Committee of the National People's Congress.

✓ Article 58 The National People's Congress and its Standing Committee exercise the legislative power of the State.

Article 59 The National People's Congress is composed of deputies elected from the provinces, autonomous regions, and municipalities directly under the Central Government and of deputies elected from the armed forces. All the minority nationalities are entitled to appropriate representation.

Election of deputies to the National People's Congress is

國家行政機關、審判機關和檢察機關的職務。

第六十六條 全國人民代表大會常務委員會每屆任期同全國人民代表大會每屆任期相同，它行使職權到下屆全國人民代表大會選出新的常務委員會為止。

委員長、副委員長連續任職不得超過兩屆。

✓ 第六十七條 全國人民代表大會常務委員會行使下列職權：

(一) 解釋憲法，監督憲法的實施；

(二) 制定和修改除應當由全國人民代表大會制定的法律以外的其他法律；

(三) 在全國人民代表大會閉會期間，對全國人民代表大會制定的法律進行部分補充和修改，但是不得同該法律的基本原則相抵觸；

(四) 解釋法律；

(五) 在全國人民代表大會閉會期間，審查和批准國民經濟和社會發展計劃、國家預算在執行過程中所必須作的部分調整方案；

(六) 監督國務院、中央軍事委員會、最高人民法院和最高人民檢察院的工作；

(七) 撤銷國務院制定的同憲法、法律相抵觸的行政法規、決定和命令；

(八) 撤銷省、自治區、直轄市國家權力機關制定的同憲法、法律和行政法規相抵觸的地方性法規和決議；

(九) 在全國人民代表大會閉會期間，根據國務院總

✓ Article 67 The Standing Committee of the National People's Congress exercises the following functions and powers:

(1) to interpret the Constitution and supervise its enforcement;

(2) to enact and amend laws, with the exception of those which should be enacted by the National People's Congress;

(3) to partially supplement and amend, when the National People's Congress is not in session, laws enacted by the National People's Congress, provided that the basic principles of these laws are not contravened;

(4) to interpret laws;

(5) to review and approve, when the National People's Congress is not in session, partial adjustments to the plan for national economic and social development or to the State budget that prove necessary in the course of their implementation;

(6) to supervise the work of the State Council, the Central Military Commission, the Supreme People's Court and the Supreme People's Procuratorate;

(7) to annul those administrative regulations, decisions or orders of the State Council that contravene the Constitution or other laws;

(8) to annul those local regulations or decisions of the organs of state power of provinces, autonomous regions, and municipalities directly under the Central Government that contravene the Constitution, other laws or administrative regulations;

(9) to decide, when the National People's Congress is not in session, on the choice of Ministers in charge of ministries or commissions, the Auditor-General or the Secretary-General of the State Council upon nomination by the Premier of the State Council;

(10) to decide, when the National People's Congress is not in session, on the choice of other members of the Central Military Commission upon nomination by the Chairman of the Commission;

(11) to appoint or remove, at the recommendation of the

理的提名，決定部長、委員會主任、審計長、秘書長的人選；

(十) 在全國人民代表大會閉會期間，根據中央軍事委員會主席的提名，決定中央軍事委員會其他組成人員的人選；

(十一) 根據最高人民法院院長的提請，任免最高人民法院副院長、審判員、審判委員會委員和軍事法院院長；

(十二) 根據最高人民檢察院檢察長的提請，任免最高人民檢察院副檢察長、檢察員、檢察委員會委員和軍事檢察院檢察長，並且批准省、自治區、直轄市的人民檢察院檢察長的任免；

(十三) 決定駐外全權代表的任免；

(十四) 決定同外國締結的條約和重要協定的批准和廢除；

(十五) 規定軍人和外交人員的銜級制度和其他專門銜級制度；

(十六) 規定和決定授予國家的勳章和榮譽稱號；

(十七) 決定特赦；

(十八) 在全國人民代表大會閉會期間，如果遇到國家遭受武裝侵犯或者必須履行國際間共同防止侵略的條約的情況，決定戰爭狀態的宣布；

(十九) 決定全國總動員或者局部動員；

(二十) 決定全國或者個別省、自治區、直轄市的戒嚴；

(二十一) 全國人民代表大會授予的其他職權。

President of the Supreme People's Court, the Vice-Presidents and Judges of the Supreme People's Court, members of its Judicial Committee and the President of the Military Court;

(12) to appoint or remove, at the recommendation of the Procurator-General of the Supreme People's Procuratorate, the Deputy Procurators-General and procurators of the Supreme People's Procuratorate, members of its Procuratorial Committee and the Chief Procurator of the Military Procuratorate, and to approve the appointment or removal of the chief procurators of the people's procuratorates of provinces, autonomous regions, and municipalities directly under the Central Government;

(13) to decide on the appointment or recall of plenipotentiary representatives abroad;

(14) to decide on the ratification or abrogation of treaties and important agreements concluded with foreign states;

(15) to institute systems of titles and ranks for military and diplomatic personnel and of other specific titles and ranks;

(16) to institute State medals and titles of honour and decide on their conferment;

(17) to decide on the granting of special pardons;

(18) to decide, when the National People's Congress is not in session, on the proclamation of a state of war in the event of an armed attack on the country or in fulfilment of international treaty obligations concerning common defence against aggression;

(19) to decide on general or partial mobilization;

(20) to decide on the imposition of martial law throughout the country or in particular provinces, autonomous regions, or municipalities directly under the Central Government; and

(21) to exercise such other functions and powers as the National People's Congress may assign to it.

Article 68 The Chairman of the Standing Committee of the National People's Congress directs the work of the Standing Committee and convenes its meetings. The Vice-Chairmen and

全国人民代表大会常务委员会公报 2006·8

全国人民代表大会常务委员会 关于授权香港特别行政区对深圳湾口岸 港方口岸区实施管辖的决定

(2006年10月31日第十届全国人民代表大会常务委员会第二十四次会议通过)

第十届全国人民代表大会常务委员会第二十三次会议审议了国务院关于提请审议授权香港特别行政区对深圳湾口岸港方口岸区实施管辖的议案，第二十四次会议审议了关于授权香港特别行政区对深圳湾口岸港方口岸区实施管辖的决定(草案)。会议认为，为了缓解内地与香港特别行政区交往日益增多带来的陆路通关压力，适应深圳市与香港特别行政区之间交通运输和便利通关的客观要求，促进内地和香港特别行政区之间的人员交流和经贸往来，推动两地经济共同发展，在深圳湾口岸内设立港方口岸区，专用于人员、交

通工具、货物的通关查验，是必要的。全国人民代表大会常务委员会决定：

一、授权香港特别行政区自深圳湾口岸启用之日起，对该口岸所设港方口岸区依照香港特别行政区法律实施管辖。

香港特别行政区对深圳湾口岸港方口岸区实行禁区式管理。

二、深圳湾口岸港方口岸区的范围，由国务院规定。

三、深圳湾口岸港方口岸区土地使用期限，由国务院依照有关法律的规定确定。

关于《国务院关于提请审议授权 香港特别行政区对深圳湾口岸港方口岸区 实施管辖的议案》的说明

——2006年8月22日在第十届全国人民代表大会常务委员会第二十三次会议上

国务院港澳事务办公室副主任 陈佐洱

全国人民代表大会常务委员会：

我受国务院委托，现对《国务院关于提请审

议授权香港特别行政区对深圳湾口岸港方口岸区实施管辖的议案》作如下说明：

香港回归祖国9年来,内地与香港特别行政区的交往日益增多,陆路通关压力不断增大。为了适应深圳市与香港特别行政区之间交通运输和便利通关的实际需要,在深港西部连接的深圳湾水域正在建设一座跨境大桥。由于大桥港方一侧条件所限,香港特别行政区政府提出,希望把整个口岸区建在深圳一侧,实行“一地两检”模式。2002年3月,国务院同意在深港西部通道建立口岸,口岸区整体设在深圳一侧,分为深、港两个口岸区。深圳湾口岸建成后,深、港两方在各自口岸区按照各自的法律规定和执法程序,使用各自的查验手段对进出口岸的旅客、交通工具和货物实施查验。为此,香港特别行政区政府提出:由于深圳湾口岸港方口岸区位于深圳市行政区域范围内,由香港特别行政区实施管辖,适用香港特别行政区法律,需要事先获得中央的授权;有关授权不仅涉及行政管理权,还涉及司法管辖权,由全国人大常委会作出授权决定较为适宜;香港特别行政区将根据中央的授权完善有关的特区立法。

国务院认为,深圳湾口岸港方口岸区设深圳市行政区域范围内,要使香港特别行政区对港方口岸区进行有效管理,涉及行政管理权和司法管辖

权,涉及香港特别行政区法律在港方口岸区的适用问题。依照宪法,由全国人大常委会作出决定,具有最为充分的法律地位和权威。为此,港澳办会同外交部、公安部、海关总署、质检总局、国土资源部等有关部门草拟了《关于授权香港特别行政区对深圳湾口岸港方口岸区实施管辖的决定(草案代拟稿)》(以下简称草案),草案已经国务院同意,建议由全国人大常委会作出授权决定。建议全国人大常委会的授权决定规定:“授权香港特别行政区自深圳湾口岸启用之日起,对该口岸所设港方口岸区依照香港特别行政区法律实施管辖。”

全国人大常委会作出授权决定后,香港特别行政区将采用租赁的方式从深圳市人民政府有偿取得土地使用权,港方口岸区的范围将由广东省人民政府、深圳市人民政府与香港特别行政区政府共同协商提出方案,报请国务院批准。为此,草案还规定:“深圳湾口岸港方口岸区的范围,由广东省人民政府、深圳市人民政府与香港特别行政区政府协商提出方案,报国务院批准。”关于深圳湾口岸的运作、设施维护、管理等事项,将由国务院口岸管理部门和广东省、深圳市人民政府与香港特别行政区政府协商解决。

请审议。

全国人大法律委员会关于 《国务院关于提请审议授权香港特别行政区对 深圳湾口岸港方口岸区实施管辖的议案》 审议结果的报告

——2006年10月27日在第十届全国人民代表大会常务委员会第二十四次会议上

全国人大法律委员会副主任委员 乔晓阳

全国人民代表大会常务委员会：

常委会第二十三次会议对国务院关于提请审议授权香港特别行政区对深圳湾口岸港方口岸区实施管辖的议案及所附决定草案代拟稿进行了初步审议。会后，法律委员会、法制工作委员会围绕常委会组成人员在审议中提出的问题和意见，会同国务院港澳办、法制办、国办秘书二局赴深圳对正在建设中的深圳湾口岸进行调研，并与广东省政府、深圳市政府有关负责同志座谈了解情况；约请国务院港澳办、法制办、国办秘书二局三局、广东省政府、深圳市政府、香港特区政府，就这个议案所附决定草案代拟稿征求意见；还组织法律专家就有关法律问题进行论证。在此基础上，提出调研情况报告。10月10日，法律委员会召开会议，根据常委会组成人员的审议意见和各方面的意见，对关于授权香港特别行政区对深圳湾口岸港方口岸区实施管辖的决定（草案代拟稿）进行了审议。国务院法制办、港澳办的有关负责同志列席了会议。10月25日，法律委员会再次进行了审议。法律委员会认为，考虑到深圳湾大桥香港一侧填海造地设置口岸有实际困难，在深圳湾大桥深圳一侧口岸区内设立港方口岸区，

并提请全国人大常委会作出授权香港特别行政区对深圳湾口岸港方口岸区实施管辖的决定，是必要的；同时，根据常委会组成人员的审议意见，对决定草案代拟稿提出以下修改意见：

一、有的常委委员提出，决定草案代拟稿的内容只有两条，不够完整，看不出人大常委会作这个授权决定的缘由。法律委员会经研究，建议在决定草案代拟稿开头增加一段文字，说明在深圳湾口岸设立港方口岸区的必要性及其用途，表述为：“全国人民代表大会常务委员会审议了国务院关于提请审议授权香港特别行政区对深圳湾口岸港方口岸区实施管辖的议案。会议认为，为了缓解内地与香港特别行政区交往日益增多带来的陆路通关压力，适应深圳市与香港特别行政区之间交通运输和便利通关的客观要求，促进内地和香港特别行政区之间的人员交流和经贸往来，推动两地经济共同发展，在深圳湾口岸内设立港方口岸区，专用于人员、交通工具、货物的通关查验，是必要的。”

二、有的常委委员提出，决定应明确香港特区政府应加强对港方口岸区的管理，不允许在港方口岸区内从事危害国家安全的活动。香港特区政府表

示,依据香港的《公安条例》,设于粤港陆地边界线的所有口岸都是列为禁区,实行封闭式管理的。香港特区政府宣布港方口岸区为禁区后,整个港方口岸区将实行封闭式管理。依据香港的《公安条例》有关规定,除正在执勤或往返值班途中的执法人员和其他获得许可的人员外,只有过境司机和旅客才能获准进入禁区,不允许没有通行许可证的任何车辆通过;不允许任何个人和团体在禁区内进行游行、示威、静坐等与进出境通关查验无关的活动,对未经许可或未获授权而进入禁区内的人员;执法人员根据《公安条例》,可采取逮捕、羁留或逐离禁区的措施。据此,法律委员会经研究,建议在决定草案代拟稿第一条中增加规定:“香港特别行政区对该口岸区实行禁区式管理。”

三、有的常委委员提出,深圳市隶属于广东省,广东省人民政府、深圳市人民政府和香港特别行政区政府不是同一个级别,决定草案代拟稿规定由这三方协商提出深圳湾口岸港方口岸区范围的方案不妥。法律委员会研究认为,提出港方口岸区范围的方案属于具体工作程序问题,决定可以不作规定。有的常委委员提出,深圳湾大桥深圳段由谁管理,应在确定港方口岸区范围时一并加以考虑。法律委员会研究认为,深圳湾大桥是按照“一地两检”方案设计建造的,大桥两端直接连接香港特区和口岸,在实施国务院批准的深圳湾大桥和口岸查验区的工程设计方案过程中,深港双方已基本确定了港方查验区和整个大桥桥面由香港特区进行管理的模式,这有利于香港特别行政区实行封闭式禁区管理,将深圳湾大桥深圳段桥面纳入港方口岸区范围是适宜的,深圳湾口岸港方口岸区的具体范围可由国务院规定。因此,法律委员会建议将决定草案代拟稿第二条修改为:“深圳湾口岸港方口岸区的范围,由国务院规定。”

四、有的常委委员提出,应对港方口岸区土

地的使用期予以明确。关于这个问题,依据《中华人民共和国海域使用管理法》和《中华人民共和国城镇国有土地使用权出让和转让暂行条例》的规定,港方口岸区使用的土地属于“综合或其他用地”,最长出让期限为50年。深港双方已初步商定,在全国人大常委会作出授权决定后,深港双方将按照国务院依法作出的决定,签署《土地使用权协议》,约定港方口岸区土地使用权出让年限为50年,且双方可协商提前终止土地租期,也可在到期后协商续期。据此,法律委员会建议增加一条,作为第三条,规定:“深圳湾口岸港方口岸区土地使用期限,由国务院依照有关法律的规定确定。”

这里还有一个问题需要说明。有的常委委员提出,在港方口岸区适用的香港法律应限于与口岸管理和旅客、交通工具、货物出入境通关查验有关的法律。关于这个问题,法律委员会、法制工作委员会同有关部门进行了研究,听取了法律专家的意见,并与香港特区政府进行了沟通。经反复研究认为,如果港方口岸区只适用与口岸管理和旅客、交通工具、货物出入境通关查验有关的香港法律,就意味着将来港方口岸区内将由香港的和内地的两个执法主体分别执行香港的和内地的两套法律,由此出现内地执法机关和香港执法机关都对港方口岸区实行管辖的情况。这在管辖理论和实际操作上都会遇到难以解决的问题。首先,管辖权必须是完整的、明确的。如果在港方口岸区内,内地的和香港的两个执法机关分别依据不同的法律进行管辖,难以避免管辖矛盾。其次,在港方口岸区内不仅会因通关查验产生行政管理关系,还会不可避免地产生民事法律关系和刑事法律关系,仅仅适用香港有关通关查验的法律,难以实施有效管理。当然,港方口岸区的特定功能决定,这个口岸区不同于香港特别行政区区域内的地方,口岸区内没有居民、没有社会活

动，客观上并不可能适用香港所有的法律。第三，在同一个管辖区内，由两个执法主体依照两种不同的法律进行管理，往返人员将无所适从。因此，法律委员会研究认为，决定草案代拟稿第一条关于“授权香港特别行政区自深圳湾口岸启用之日

起，对该口岸所设港方口岸区依照香港特别行政区法律实施管辖”的规定是适宜的。

决定草案已按上述意见作了修改，法律委员会建议本次常委会会议审议通过。

决定草案和以上报告是否妥当，请审议。