

Shenzhen Bay Port Hong Kong Port Area Bill

Submission of the Hong Kong Bar Association

1. The Shenzhen Bay Hong Kong Port Area Bill (“the Bill”) was gazetted on 6 February 2007. The Bill has been introduced into the Legislative Council and a Bills Committee is studying it.

2. The Bar was asked on a confidential basis in 2006 for its views on the proposed framework of HKSAR legislation that would extend HKSAR laws and jurisdiction to the Shenzhen Bay Port Hong Kong Port Area (“SBPHKPA”). In the paper submitted to the Administration in February 2006, the Bar made reference to two matters of constitutional importance. The Bar raised firstly the manner in which the Central Authorities’ authorization was to be made and applied to the HKSAR in accordance with the Basic Law of the HKSAR and solicited for the inclinations of the Central Authorities and the Administration at the time. The Bar received no response. The second matter raised was a concern as to whether the Legislative Council of the HKSAR had the competence to enact an Ordinance whose intended extent was geographically outside the administrative boundary of the HKSAR. The Bar suggested that the Central Authorities’ authorization should include the conferral of legislative

power to the Legislative Council to enact legislation extending to the location of the SBPHKPA and that the Standing Committee of the National People's Congress ("NPCSC") should be the one granting such authority. The Bills Committee has been supplied with a copy of the February 2006 paper.

3. The NPCSC made a Decision on Authorizing the Hong Kong Special Administrative Region to Exercise Jurisdiction over the Hong Kong Port Area at the Shenzhen Bay Port ("the NPCSC Decision") on 31 October 2006 after examining a motion of the State Council for the authorization and considering a draft decision. The NPCSC Decision has three operative paragraphs:

"1. The Hong Kong Special Administrative Region is authorized to exercise jurisdiction over the Hong Kong Port Area at Shenzhen Bay Port according to the laws of the Hong Kong Special Administrative Region from the day on which the Shenzhen Bay Port commences operation.

The Hong Kong Special Administrative Region is to administer the Hong Kong Port Area at the Shenzhen Bay Port as a closed area.

2. The area of the Hong Kong Port Area at the Shenzhen Bay Port will be stipulated by the State Council.

3. The land use period of the Hong Kong Port Area at the Shenzhen Bay Port will be determined by the State Council according to the provisions of the relevant laws.”
4. This Submission will comment on how the two constitutional matters referred to in paragraph 2 above are resolved in or in relation to the NPCSC Decision.
5. The second constitutional matter, which turns on the legislative competence of the HKSAR in respect of the SBPHKPA, can be conveniently discussed ahead of the first. The first operative paragraph of the NPCSC Decision is *unambiguous*. It is the HKSAR (with all its powers and governmental authorities (see Basic Law of the HKSAR, Articles 2, 16, 17, 19)) that has jurisdiction over the SBPHKPA. The HKSAR thus may exercise the powers it has been granted under the Basic Law of the HKSAR (including legislative power) in respect of the SBPHKPA. Such jurisdiction is to be exercised in accordance with the laws of the HKSAR. By necessary implication, the HKSAR may legislate in respect of the SBPHKPA, including enacting an Ordinance whose intended extent is the SBPHKPA.
6. The Bar acknowledges that the language of the first operative paragraph of the

NPCSC Decision does not contain an express grant of additional legislative power. There may be a query as to whether the authorization in the first operative paragraph only authorizes exercise of jurisdiction of the HKSAR in the specified location with powers presently existing under the Basic Law of the HKSAR or authorizes exercise of jurisdiction of the HKSAR in the specified location with all necessary and incidental grant of power to make the exercise of jurisdiction effective. The latter approach is to be preferred even though that would involve a teleological or purposive interpretation of the NPCSC Decision. Such a grant of additional power is envisaged in Article 20 of the Basic Law of HKSAR.

7. The first constitutional matter, turning on the manner and probably also the form of the Central Authorities' authorization, merits further consideration. The NPCSC Decision has not been included in Annex III of the Basic Law of the HKSAR. Nor was it promulgated or published in the Gazette.
8. The Bar has considered whether the NPCSC Decision qualifies as an Annex III law.
9. Article 18 of the Basic Law of the HKSAR provides –

- National laws are not to be applied in the HKSAR except for those listed in Annex III to the Basic Law.
- Annex III laws will be applied in the HKSAR by way of promulgation or legislation by the HKSAR.
- The NPCSC is empowered to add to or delete from the list of Annex III laws after consulting the Basic Law Committee and the Administration.
- Annex III laws are confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the HKSAR as specified by the Basic Law.

Thus, firstly, an Annex III law must be a national law. Secondly, it must be one relating to either defence, or foreign affairs or any other matters outside the limits of the autonomy of the HKSAR as specified by the Basic Law.

10. The Bar is inclined to the view that the NPCSC Decision does not qualify as an Annex III law, notwithstanding that it could be reasonably argued that the subject matter of the NPCSC Decision (as explained in its preamble) is a matter relating to Central-regional relationship.

11. As far as the Bar understands, there does not appear to be any statutory definition of “laws” either in the Constitution of the People’s Republic of China or the Law on Law-making. “Laws” in its narrow sense are defined by Mainland legal scholars as those normative rules enacted by the NPC and the NPCSC which have general binding effect. In this connection, operative paragraph 1 of the NPCSC Decision merely authorizes the HKSAR to exercise its jurisdiction in SBPHKPA, it does not contain any normative rules with general binding effect.

12. The NPCSC Decision authorizes the HKSAR to exercise jurisdiction in and apply its laws to the SBPHKPA. The NPCSC Decision is a decision dealing with a specific case and is not to be applied in the HKSAR, bearing in mind that notwithstanding the lease contract for State-owned land with the People’s Government of the Shenzhen Municipality of Guangdong Province, the SBPHKPA remains not part of the HKSAR. Rather, after the authorization from the NPCSC, the Bill seeks to extend existing laws of the HKSAR to SBPHKPA.

13. Further support of this view can come from Article 18, paragraph 2 of the Basic Law of the HKSAR which provides that an Annex III national law shall

be applied in Hong Kong by either promulgation or legislation. It is clear that the NPCSC Decision cannot be applied in Hong Kong by promulgation. Furthermore, in constitutional theory of the People's Republic of China, the NPCSC has four kinds of powers, of which one is decision-making power.

Dated 20th March 2007.

The Hong Kong Bar Association