

Bills Committee on Shenzhen Bay Port Hong Kong Port Area Bill

Supplement on Constitutional and Jurisdictional Issues

This paper elaborates on the Administration's views on a number of constitutional and jurisdictional issues relating to the co-location arrangement at the Shenzhen Bay Port.

Legislative Competence of the HKSAR

2. There are no provisions in the Basic Law which expressly prohibit the legislature of the HKSAR from legislating extra-territorially. Article 2 of the Basic Law authorizes the HKSAR to exercise, inter alia, legislative power in accordance with the Basic Law. Article 17 further provides that the HKSAR has legislative power. Article 73 empowers the Legislative Council to make laws in accordance with the Basic Law and the legal procedures.

3. By its decision dated 31 October 2006 (NPCSC's Decision), the Standing Committee of the National People's Congress (NPCSC) authorized the HKSAR to exercise jurisdiction over the Shenzhen Bay Port Hong Kong Port Area (SBP HKPA) according to the laws of the HKSAR from the day on which the SBP commences operation. The Bill seeks to extend the application of Hong Kong laws to the SBP HKPA pursuant to the NPCSC's Decision.

4. In its submission to the Administration dated 11 February 2006 (at Annex B to the LC Paper No. CB(2)1211/06-07(01)), the Hong Kong Bar Association (the Bar) made a distinction between the "extent" and "application" of an enactment, relying on section 102 of *Bennion on Statutory Interpretation* (4th ed). While "extent" defines the area within which the enactment is law, "application" is concerned with the persons or matters in relation to which the enactment operates, which may be within or outside the area of its extent. The Bar submitted that in the case of the HKSAR, the extent of a HKSAR Ordinance is by reference to the geographical extent of the HKSAR. Hence, it doubted whether the Legislative Council of the HKSAR, as presently empowered under the Basic Law, has the

legislative competence to enact an Ordinance whose intended extent is a geographical location outside the administrative division of the HKSAR (see paragraphs 7 – 9 of the Bar’s submission).

5. The Bar considered that a solution to the above issue is for the Central Authorities’ authorization to confer additional legislative power on the Legislative Council of the HKSAR to enact legislation extending to the location, albeit part of the Mainland China, of the declared HKPA. It wrote (at paragraph 10):

“Article 20 of the Basic Law of the HKSAR makes provision for the granting of ‘other powers’ to the HKSAR by the National People’s Congress, the Standing Committee of the NPC, and the Central People’s Government. Given that the ‘other powers’ that may have to be given in the present case is legislative power, it is appropriate for the granting authority to be the Standing Committee of the NPC.”

6. The above solution proposed by the Bar is, of course, exactly identical to the course of action taken by the NPCSC for authorizing the HKSAR to exercise jurisdiction over the SBP HKPA. The natural and logical consequence of such authorization is that the HKSAR is authorized to enact such law as is reasonably necessary for extending the application of Hong Kong laws to the SBP HKPA so that the HKSAR will be able to exercise jurisdiction over the SBP HKPA as authorized. As discussed in paragraph 5 of the Administration’s earlier paper on constitutional and jurisdictional issues (LC Paper No. CB(2)1231/06-07(02)), the HKSAR, under Article 20 of the Basic Law, is competent to acquire and exercise the powers granted to it under the NPCSC’s Decision. Hence, there is absolutely no doubt that the HKSAR, by virtue of the NPCSC’s Decision, has full legislative competence to enact the Bill for the purpose of implementing the jurisdictional arrangement provided for in that authorization.

7. In its recent paper dated 20 March 2007, the Bar wrote as follows (at paragraph 5):

“... 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.”

8. In paragraph 6 of the same paper, the Bar wrote that such a grant of additional power by the NPCSC to the HKSAR is envisaged in Article 20 of the Basic Law.

9. The Administration agrees to the above views expressed by the Bar.

Procedural and substantive matters of an authorization under Article 20

10. As regards the procedure which the Central Authorities shall follow in conferring additional powers on the HKSAR for the purpose of Article 20 of the Basic Law, it is a matter of Mainland law. This is akin to the enactment of the Basic Law under which the National People’s Congress conferred various powers on the HKSAR for the purpose of implementing the basic policies of the PRC regarding Hong Kong.

11. There is no express limitation on the scope of additional powers that the HKSAR may acquire from the Central Authorities pursuant to Article 20. However, surely, such additional powers have to be consistent with the Basic Law, and cannot deprive the HKSAR of the rights protected under the Basic Law.

Need for the NPCSC’s Decision to be included in Annex III to the Basic Law

12. As discussed in paragraphs 6 – 9 of the Administration’s earlier paper on constitutional and jurisdictional issues, the NPCSC’s Decision should be regarded as a “law” (法律) under the Mainland legal system. However, that does not necessarily entail that it has to be included in Annex III to the Basic Law for application in the HKSAR.

13. Article 18(2) provides that national laws shall not be applied in the HKSAR except for those listed in Annex III to the Basic Law. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region. Article 18(3) further provides for the procedure and scope of national laws to be included in Annex III. However, the above provisions in BL 18 have to be interpreted in the light of Article 20 which is a specific provision on additional authorization by the Central Authorities. There is nothing in Article 20 which requires that an additional authorization by the Central Authorities would need to be included in Annex III to the Basic Law for it to validly apply in the HKSAR. Indeed, such non-inclusion can be justified as follows:

- (a) the NPCSC's Decision is intended to confer, for the purpose of Article 20 of the Basic Law, additional powers on the HKSAR so that it may exercise its jurisdiction over the HKPA in accordance with Hong Kong laws;
- (b) whether the above intended effect of the NPCSC's Decision can be achieved would hinge on:
 - (i) whether the NPCSC's Decision was validly made;
 - (ii) whether the HKSAR is competent to acquire the additional powers conferred;
- (c) regarding (b)(i) above, the NPCSC's Decision was validly made by the NPCSC according to its powers under the Constitution as discussed in paragraph 4 of the Administration's earlier paper on constitutional and jurisdictional issues;
- (d) regarding (b)(ii) above, the HKSAR is competent to acquire the additional powers under Article 20;
- (e) further, the NPCSC's Decision, as an authorizing instrument, is clearly directed to, and intended to be applicable in, the HKSAR. It does not contain any provision which suggests that its coming into force is conditional upon its inclusion in Annex III to the Basic Law;

(e) hence, for the effective operation of the NPCSC's Decision, there is no requirement for its inclusion in Annex III.

14. To conclude, by virtue of Article 20 of the Basic Law, the HKSAR has full legislative competence to enact the Bill for the purpose of implementing the jurisdictional arrangement provided for in the NPCSC's Decision.

Security Bureau

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