

Bills Committee on Shenzhen Bay Port Hong Kong Port Area Bill

Second Supplement on Constitutional and Jurisdictional Issues

Following the discussion at the Bills Committee meeting on 24 March 2007, this paper further elaborates on the Administration's views on some constitutional and jurisdictional issues relating to the co-location arrangement at the Shenzhen Bay Port.

Status of the NPCSC's authorization decision

2. At the above Bills Committee meeting, Members noted that while the Administration and the Hong Kong Bar Association (the Bar Association) agreed that the decision of the Standing Committee of the National People's Congress (NPCSC) on authorizing the HKSAR to exercise jurisdiction over the Hong Kong Port Area at the Shenzhen Bay Port (SBP HKPA) dated 31 October 2006 (NPCSC's Decision) needed not be included in Annex III to the Basic Law, their arguments for the non-inclusion are different. The major difference was that the Administration was of the view that the NPCSC's Decision was a national law, whereas the Bar Association considered otherwise.

3. The Administration's position has been explained in paragraphs 6 – 9 of the Administration's first paper on constitutional and jurisdictional issues (LC Paper No. CB(2)1231/06-07(02)). The Administration stands by its view that the NPCSC's Decision is a "law" (法律) under the Mainland legal system. As the NPCSC's Decision in substance provides for a port area in Shenzhen where Hong Kong laws will apply to the exclusion of Mainland laws, it is clearly normative (規範性) in nature. Further, since it has legal force throughout the country, it is a national law (全國性法律).

Annex III issue

4. Referring to the Administration's view that the NPCSC's Decision is a national law under the Mainland legal system, some Members queried why the NPCSC's Decision as a national law needed not be included in Annex III to the Basic Law. The Administration shares the Bar Association's view that there is no need for the NPCSC's Decision to be included in Annex III for application in the HKSAR on the ground that it is not to be applied (實施) in the HKSAR under Article 18 of the Basic Law. As observed by the Bar Association in paragraph 12 of its recent paper dated 20 March 2007, notwithstanding the lease contract for State-owned land to be entered into between the Government of the HKSAR and the People's Government of the Shenzhen Municipality of Guangdong Province, the SBP HKPA remains to be not part of the HKSAR. The Administration concurs with this rationale. The NPCSC's Decision is thus not required to be included in Annex III.

5. The Administration noted that the Bar Association, the Legal Service Division of the Legislative Council (LSD), and the Administration all take the view that by virtue of Article 20 of the Basic Law and the NPCSC's Decision, the HKSAR has full legislative competence to enact the present Bill. This view necessarily implies that the effective operation of the NPCSC's Decision is not conditional upon its inclusion in Annex III to the Basic Law.

Conclusion

6. The Administration agrees that the critical constitutional issue in the present legislative exercise is whether the HKSAR has the legislative competence to enact the Bill. It is evident from the papers prepared by the Bar Association, LSD and the Administration that all are agreed that this question be firmly answered in the affirmative.

Security Bureau
29 March 2007