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Panel on Transport Meeting on 19 May 2017

Background brief on the Tate's Cairn Tunnel and the Government's takeover arrangements for Build-Operate-Transfer tunnels

Purpose

This paper provides background information on the Tate's Cairn Tunnel ("TCT") and the Government's takeover arrangements for other Build-Operate-Transfer ("BOT") tunnels in the past. It also summarizes the major views and concerns of members of the Panel on Transport ("the Panel") when relevant issues were discussed at its meetings.

Background

Tate's Cairn Tunnel

2. TCT is among the existing three BOT tunnels in Hong Kong.¹ Tate's Cairn Tunnel Company Limited ("TCTC") was granted a franchise under the Tate's Cairn Tunnel Ordinance (Cap. 393) ("TCTO") to build and operate TCT for 30 years starting from July 1988, inclusive of the construction period. The tunnel, which was built at a cost of \$2 billion and linking Diamond Hill of Eastern Kowloon and Siu Lek Yuen of Sha Tin, was opened to traffic in June 1991. The franchise granted to TCTC will expire in July 2018.

3. In 2016, TCT had an average daily throughput of 59 209 vehicles, against its design capacity of 78 500 vehicles. From 1 January 2016, tolls have been adjusted to a range between \$15 and \$35 for different vehicle types. There are three alternatives to TCT, namely, the Lion Rock Tunnel, the Shing Mun Tunnels as well as the Eagle's Nest Tunnel and Sha Tin Heights Tunnel.

¹ The Government had taken over two BOT tunnels, namely the Cross-Harbour Tunnel in 1999 and the Eastern Harbour Crossing in 2016 upon expiry of their respective franchises. At present, in addition to TCT, there are two other BOT tunnels, namely the Western Harbour Crossing and Route 3 (i.e. Tai Lam Tunnel) the franchises of which will expire in August 2023 and May 2025 respectively.

4. One of the key features of BOT franchises is the toll adjustment mechanism. For TCT, the legislation has provided that the tolls may be varied by agreement between the Government and the franchisee. If an agreement cannot be reached, either party may submit the question of the variation of tolls for arbitration. So far, TCT has had eight toll increases that came into effect in May 1995, November 1996, January 2000, August 2005, November 2008, December 2010, August 2013, and January 2016 respectively. The Government and TCTC have been able to reach agreement without resorting to arbitration in respect of all the eight toll increase applications.

5. In considering TCTC's applications for toll increases, the Administration would seek the views of the Panel and the Transport Advisory Committee, before seeking the approval of Chief Executive ("CE")-in-Council for the applications. After an agreement on revision to toll levels is reached between CE-in-Council and TCTC, the Commissioner for Transport ("C for T") shall amend the Schedule to TCTO by notice in the Gazette as soon as practicable.² However, according to the Administration, the power of C for T to make the Gazette notice on the toll increase of TCT does not cover the determination of toll levels and the timing for implementation of the new tolls. According to section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1), the power of the Legislative Council ("LegCo") to amend subsidiary legislation has to be consistent with the power to make such subsidiary legislation. In other words, there is little room for LegCo to amend such notices other than making minor technical amendments. Similarly, LegCo cannot repeal the notices as the exercise of such power is also inconsistent with the power of C for T to make the Gazette notice.

Takeover arrangements of other Build-Operate-Transfer tunnels

6. Under a BOT tunnel arrangement, a franchisee is responsible for the construction, operation and maintenance of the tunnel concerned during the franchise period. The two major principles of the Government in adopting the BOT mode in constructing and operating tunnels are:

- (a) the Government should encourage private participation and optimize the use of public resources; and
- (b) as investors are required to make substantial upfront capital investment, they should be given the opportunity to make a reasonable return on their investment while bearing the commercial risk.

² Such a notice is an item of subsidiary legislation subject to the negative vetting procedure of the Legislative Council.

7. Upon the expiry of the franchise, the tunnel will vest in the Government. A recent takeover of BOT franchise by the Government took place in August 2016 upon expiry of the 30-year franchise of the Eastern Harbour Crossing ("EHC"), which has since then vest in the Government and become a Government tunnel. On this, the Government introduced the Eastern Harbour Crossing Legislation (Amendment) Bill 2015,³ the main object of which was to amend the Road Tunnels (Government) Ordinance (Cap. 368) and its subsidiary legislation to extend their application to EHC and incorporate the existing tolls chargeable under the Eastern Harbour Crossing Ordinance (Cap. 215). The Bill also sought to repeal Cap. 215 and its subsidiary legislation, and provide for other transitional matters and related amendments.

8. According to the Administration, similar to the arrangements on the expiry of the BOT franchise of the Cross-Harbour Tunnel ("CHT") in 1999, the Government's takeover of EHC brought no change to the actual tunnel operation. In particular, the toll levels were not affected. The road traffic regulations in terms of traffic signs, procedures to apply for permits to carry dangerous goods, etc. were also not affected. Generally speaking, from a tunnel user's point of view, there was no difference before and after the Government's takeover.

9. In line with the practice of other Government tunnels including CHT, the Transport Department ("TD") granted, through open tender, a management, operation and maintenance ("MOM") for EHC's operation and management upon expiry of the franchise.

Major views and concerns of members

10. Major views of members of the Panel on issues relating to the toll levels of TCT and arrangements relating to the Government's recent takeover of EHC are summarized in the ensuing paragraphs.

Toll levels of the Tate's Cairn Tunnel

11. When the Panel discussed the application for the last toll increase by TCTC at its meeting on 17 April 2015, some members considered that upon expiry of the BOT franchise and taking over of TCT by the Administration in 2018, the Administration should reduce the tolls of TCT and align the tolls with those of the alternative tunnels. There was also a view that the Administration should establish a Tunnels and Bridges Authority and buy back all tunnels to solve the problems relating to tunnels.

³ The Bill was passed at the Council meeting of 19 May 2016.

12. In response, the Administration advised that it would consider a number of factors while determining the toll levels, including the adoption of "user pays" principle, the cost of operating the tunnels, and traffic implications. Furthermore, at the policy briefing for the Panel held on 20 January 2017, the Administration advised that TD had commenced a study on the overall strategy for the rationalization of traffic distribution among the three road harbour crossings, and three land tunnels between Kowloon and Sha Tin for submission of the proposed toll adjustment options to the Panel within the 2017-2018 legislative session for discussion.

Job security of employees of the current tunnel operator

13. When the Panel discussed the takeover arrangements of EHC at the meeting on 6 November 2015, some members demanded the Administration to safeguard the rights and benefits enjoyed by the employees of the then EHC operator when drawing up the terms of the MOM contract to be effective upon the expiry of the franchise. They suggested including in the contract a mechanism to improve the remuneration of the employees of the MOM contractor.

14. For the case of the taking over of EHC, the Administration advised that it would require the future MOM contractor of EHC to make first offer of employment to 85% of the original employees of the EHC franchisee at the then salary levels. The remuneration of employees which would be offered by tenderers would be one of the factors to be assessed in the tender assessment exercise. However, the suggestion to include in the MOM contract a mechanism to improve the remuneration had to be considered carefully, and the Administration should strike a balance between the business operation of the contractor and protecting the benefit of tunnel staff.

Latest developments

15. The Administration plans to brief members on the takeover arrangements of TCT upon its franchise expiry and the relevant legislative amendments at the Panel meeting to be held on 19 May 2017.

Relevant papers

16. A list of relevant papers is in the **Appendix**.

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List of relevant papers

Date of meeting	Panel/ Committee	Minutes/Paper	LC Paper No.
17.4.2015	TP	Administration's paper on application for toll increase by Tate's Cairn Tunnel Company Limited	CB(4)763/14-15(04) http://www.legco.gov.hk/yr14-15/english/panels/tp/papers/tp20150417cb4-763-4-e.pdf
		Tate's Cairn Tunnel Company Limited's paper on toll increase application	CB(4)763/14-15(05) http://www.legco.gov.hk/yr14-15/english/panels/tp/papers/tp20150417cb4-763-5-e.pdf
		Minutes of meeting	CB(4)1418/14-15 http://www.legco.gov.hk/yr14-15/english/panels/tp/minutes/tp20150417.pdf
6.11.2015	TP	Administration's paper on takeover arrangements of the Eastern Harbour Crossing	CB(4)119/15-16(05) http://www.legco.gov.hk/yr15-16/english/panels/tp/papers/tp20151106cb4-119-5-e.pdf
		Administration's follow-up paper	CB(4)263/15-16(01) http://www.legco.gov.hk/yr15-16/chinese/panels/tp/papers/tp20151106cb4-263-1-ec.pdf

Date of meeting	Panel/ Committee	Minutes/Paper	LC Paper No.
		Minutes of meeting	CB(4)513/15-16 http://www.legco.gov.hk/yr15-16/english/panels/tp/minutes/tp20151106.pdf
12.1.2016, 16.2.2016 & 1.3.2016	Bills Committee on Eastern Harbour Crossing Legislation (Amendment) Bill 2015	Legislative Council brief on Eastern Harbour Crossing Legislation (Amendment) Bill 2015	THB(T) 4/4651/85 http://www.legco.gov.hk/yr15-16/english/bills/brief/b20151211_brf.pdf
		Legal Service Division report on Eastern Harbour Crossing Legislation (Amendment) Bill 2015	LS18/15-16 http://www.legco.gov.hk/yr15-16/english/hc/papers/hc20151218ls-18-e.pdf
		Minutes of meetings	CB(4)526/15-16 http://www.legco.gov.hk/yr15-16/english/bc/bc101/minutes/bc10120160112.pdf CB(4)707/15-16 http://www.legco.gov.hk/yr15-16/english/bc/bc101/minutes/bc10120160216.pdf CB(4)906/15-16 http://www.legco.gov.hk/yr15-16/english/bc/bc101/minutes/bc10120160301.pdf

Date of meeting	Panel/ Committee	Minutes/Paper	LC Paper No.
8.4.2016	House Committee	Report of the Bills Committee on Eastern Harbour Crossing Legislation (Amendment) Bill 2015	CB(4)811/15-16 http://www.legco.gov.hk/yr15-16/english/hc/papers/hc20160408cb4-811-e.pdf

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