

14 July 2003

Ms. Sarah Yuen
Clerk to Bills Committee
The Legislative Council
Secretariat
3/F Citibank Tower
3 Garden Road
Central
Hong Kong

Dear Ms Yuen

Land Titles Bill

Thank you for your letter of 26 June 2003 enclosing a copy of the Administration's paper of June 2003 (the "second paper").

1. **The expression "deprivation" in Article 105 of the Basic Law and the corresponding expression "徵用" in the Chinese text thereof**
 - 1.1 In its first paper, the Administration argued that the scheme proposed under the Bill does not amount to a "deprivation" of property for the purposes of Article 105 of the Basic Law.
 - 1.2 In its second paper, the Administration put forward a further argument that :-
 - (a) In the Chinese text of Article 105, the expression "徵用", as opposed to "剝奪" is used;
 - (b) The meaning of "徵用" is much narrower than that of "deprivation", and is confined to an act by the State or the Government to resume or acquire property for public purposes;
 - (c) The scheme proposed under the Bill, and the changes that it will make to the nemo dat rule, does not amount to "徵用" for the purposes of Article 105; and

(d) The NPCSC has resolved that in case of discrepancy in the meaning of wording between the Chinese text and the English text of the Basic Law, then the Chinese text shall prevail.

2. Meaning of the expression “徵用”

2.1 The Administration argued that the meaning of “徵用” is confined to an act by the State or the Government to resume or acquire property for public purposes, and is close to the meaning of “compulsory acquisition” and “expropriation”.

2.2 We reiterate our view that the scheme of the Bill in effect amount to an expropriation of the property of an innocent owner, by virtue of the fact that the title to his property could be taken away from him and conferred upon a third party, notwithstanding that he had not sold or transferred the property to such third party.

2.3 The Administration’s argument, in paragraph 10 of its second paper, that the Bill does not involve any “deprivation”/“徵用” because the innocent owner may still apply to the Court for rectification, is untenable. The rectification provision, as presently drafted, does not really safeguard the rights of the innocent owner. Although the Bill provides that the Court may rectify the Register and restore the title of the innocent owner, such rectification is not a matter of course. Instead, the Court has a discretion in deciding whether or not to order the rectification of the Register. Clause 81(4) of the Bill provides that, in exercising such discretion, the Court is to consider, among other things, hardship to the parties, with the result that if the innocent owner is financially stronger, then he will, more likely than not, lose out.

3. REDA’s position on Article 6 and Article 105 of the Basic Law

3.1 In its second paper, the Administration surmised that the whole issue on the constitutionality of the indemnity turns on the proper interpretation of the expression “deprivation” and “徵用” in Article 105.

3.2 With respect, the Administration has failed to fully appreciate our submission, which is as follows :-

(a) The scheme as proposed is contrary to Article 6 of the Basic Law, in that it fails to protect the right of private ownership of property in accordance of the law;

(b) The scheme is also contrary to Article 105 of the Basic Law, in that it fails to protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property; and

- (c) If and to the extent that the scheme can be upheld as a lawful deprivation of the property of individuals, it is still contrary to Article 105 in that the innocent owner's right to receive fair compensation for lawful deprivation is seriously eroded by the limit placed by Clause 83 of the Bill on the amount of the indemnity.
- 3.3 It does not appear that our point in paragraph 3.2 (a) & (b) above has been addressed in the Administration's second paper beyond a reference, in paragraph 4 of annex A, that the Legislative Council Secretariat opined that the Bill was consistent with Article 6.
- 3.4 In its first and second paper, the Administration argued that the Basic Law should be interpreted on the premise that the tenor of the Basic Law, following the Joint Declaration, is to establish continuity save for those changes necessary upon the Chinese resumption of sovereignty. On the footing, rights concerning the ownership of property which existed prior to the unification should continue to be protected by the law, and it would not be right for the law to be changed such that the property of the innocent owner may become vested in a third party by reason of a fraud to which the innocent owner is not a party.
- 3.5 It is our submission that, if the scheme of the Bill does not amount to any lawful "deprivation"/"徵用", then it would be in contravention of Article 6 and the first sentence of Article 105.

4. Fairness and Justice of The Bill

- 4.1 It is not our intention to present a point by point response to each legal argument in the Administration's second paper, or each legal authority referred to by the Administration. There is a danger that the legal argument has eclipsed what, in our view, the Bill should seek to achieve, namely a title registration system that creates certainty and, at the same time, gives confidence to foreign investors. The legal arguments on constitutionality have, to a certain extent, detracted from this crucial point.
- 4.2 At the end of the day, there are opposing legal arguments as to whether or not the scheme of the Bill would be in contravention of the Basic Law. The Administration argued that there would not be any contravention, but the Hong Kong Bar Association (and eminent counsel representing the Bar) have strong arguments to the contrary. Unless and until there is a ruling from the Court or an interpretation of the Basic Law by the NPC, the position will never be conclusive.
- 4.3 For that reason, the scheme will have failed to achieve certainty. At the same time, the scheme may damage the confidence of investors, both local and overseas, as soon as it is realized that the title to any property which an

investor purchases in Hong Kong may not be fully protected by reason of the changes to nemo dat rule which the Bill introduces, and that the indemnity under the scheme is but a limited indemnity.

- 4.4. We disagree with the view expressed by the Administration that the scheme of the Bill strikes a fair balance between the benefits to Hong Kong as a whole for having a title registration system, and its detrimental effect to private ownership rights. We believe that it is possible for the Bill to be amended to achieve a title registration system without damaging private ownership rights. We reiterate our view that it is neither fair nor just to take away the property rights of an innocent owner who owns property with a value in excess of the proposed cap of HK\$30 million, without full compensation corresponding to the real value of the value.
- 4.5 We repeat our submission that, in order to instill confidence in investors, the Bill should be amended so that :-
- (a) An innocent owner should always be entitled to have the Register rectified and his name restored to the Register; or
 - (b) If the innocent owner is not to be so entitled, then there should not be any cap on the indemnity.

Yours sincerely

Louis Loong
Secretary General

c.c. Mr. Kim Salkeld, Land Registrar