Bills Committee on Land Titles Bill

The Constitutionality of the Indemnity Cap

Purpose

This paper sets out the Administration's response to the further submissions by the Real Estate Developers Association of Hong Kong ("REDA") and the Hong Kong Bar Association ("Bar") on the constitutionality of the proposed cap on the indemnity available in fraud cases under the Land Titles Bill. These further submissions by the REDA and the Bar are in reply to the Administration's second paper on the above subject (LC Paper No. CB(1)2089/02-03(02)) ("our Second Paper").

2. This paper also provides supplementary information on the issue of indemnity as requested by members of the Bills Committee at the eleventh meeting held on 31 July 2003.

Part A: Further submission by the REDA

Whether the Bill involves any "deprivation"/"徵用" (*zhengyong*) for the purposes of BL 105

3. In Annex A to our Second Paper, we have explained at length why the Bill does not involve any "deprivation"/"徵用" (*zhengyong*) for the purposes of BL 105, by reference to the proper approach to the interpretation of the Basic Law (at paragraph 6), the language used in BL 105 (at paragraphs 7-11), the context and purpose of BL 105 as evidenced in Section VI of Annex I to the Joint Declaration (at paragraphs 13, 14 and 18), the state of local laws at the time of the Joint Declaration and the adoption of the Basic Law (at paragraphs 15-16), the jurisprudence under section 51(xxxi) of the Australian Constitution (at paragraphs 21-25) and that under Article 1 of the First Protocol of the European Convention on Human Rights ("ECHR") (at paragraphs 26-30), and last but not least, the contents of the Bill (at paragraph 10).

4. In its further submission dated 14 July 2003, the REDA did not deal

with the above detailed arguments advanced by the Administration, save for the following:

(a) it submitted that the Administration's argument that the Bill does not involve any "deprivation"/"徵用" (*zhengyong*) because the innocent owner may still apply to the court for rectification is untenable. In its view, the rectification provision does not really safeguard the rights of the innocent owner because rectification is not a matter of course (see paragraph 2.3);

(b) it argued that on the basis that "rights concerning the ownership of property which existed prior to the unification should continue to be protected by the law, … 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" (see paragraph 3.4).

Remedy of rectification

5. The above REDA's counter-arguments are not tenable. Regarding the one mentioned in paragraph 4(a) above, it would be useful to restate briefly the reasoning of the Administration's argument. In paragraph 9 of Annex A to our Second Paper, we pointed out that the meaning of "徵用" (*zhengyong*) in ordinary language is much narrower than that of "deprivation": the former is confined to an act by the state or the government to resume or acquire property for public purposes. We also noted that the meaning of "徵用" (*zhengyong*) is close to the meaning of "compulsory acquisition" and "expropriation" in the context of constitutional provisions providing for acquisition of property in terms of the power of eminent domain. We cited the view of Professor AJ van der Walt in *Constitutional Property Clauses* (1999), at p 18, that "the fairly widely accepted interpretation is that these terms [ie "compulsory acquisition" and "expropriation"] require the state to actually *acquire property or derive a benefit* from the expropriation or acquisition in some way, thereby excluding state actions that destroy or take away property without any benefit for the state…" (emphasis original) We then (at paragraph 10) referred to the decision of the Standing Committee of the National People's Congress of

28 June 1990 that in cases of any discrepancy in the meaning of wording between the Chinese text and the English text of the Basic Law, the Chinese text shall prevail.

6. It is against the background of the above observations that we put forth the view (at paragraph 10 of Annex A) that the Bill does not involve any "deprivation"/"徵用" (*zhengyong*) for the purposes of BL 105 in the light of the following:

(a) the Bill contains no provision which **authorizes** the Government or any other person to resume or acquire property from another person;

(b) the loss of title which gives rise to concerns originates from fraud, and as discussed in paragraph 15 of our paper dated May 2003 (LC Paper No. CB(1)1664/02-03(01)) ("our First Paper"), the overall scheme under the Bill, combined with the operating procedures of the Land Registry, the Law Society's practice guidance, and checks by solicitors firms and banks, is intended to keep the risk of successful fraud in relation to property to the minimum;

(c) even where there is fraud and there is a subsequent transfer made by the fraudster in favour of a bona fide purchaser for value without notice, the original owner may still apply to the court for rectification of the Title Register to restore his title under clause 81 of the Bill;

(d) in the above application, the court will need to have regard to, inter alia, whether it would be unjust not to rectify the Title Register against the registered owner/lessee (clause 81(3)(a));

(e) the right of the innocent owner to seek personal remedies against the fraudster remains intact and is not extinguished by the Bill.

7. Hence, the remedy of rectification under clause 81 of the Bill is only one of the considerations which support our view that the Bill does not involve any "deprivation"/"徵用" (*zhengyong*) for the purposes of BL 105. Regarding

such a remedy, we are conscious that it will not be granted by the court as a matter of course. However, as noted in paragraph 10(d) of Annex A to our Second Paper (and repeated in paragraph 6(d) above), the Court in an application for rectification shall have regard to, among other things, whether it would be unjust not to rectify the Title Register against the registered owner/lessee. Further, the discretionary nature of the remedy of rectification does not affect in any way the force of the Administration's arguments referred to in paragraphs 5 and 6 above, particularly the one in paragraph 6(a) that the Bill does not authorize the Government or any other person to resume or acquire property from another person.

8. The REDA argued, at paragraph 2.3 of its above further submission, that the consideration of the factor of hardship to the parties will lead to the result that if the innocent owner is financially stronger, then he will, more likely than not, lose out. However, there is nothing in the Bill which suggests that the factor of hardship to the parties shall solely refer to the financial predicament of the parties. Further, it is clear that that factor is only one of the factors which the Court may take into account in exercising its discretion whether to order rectification: clause 81(4) provides that the Court may consider such factors as it thinks fit in all the circumstances of the case.

Implications of the theme of continuity

9. As regards the REDA's counter-argument mentioned in paragraph 4(b) above, the theme of continuity in Section VI of Annex I to the Joint Declaration as well as that in the Basic Law does not require that all property rights which predate the reunification have to be kept intact and free from any legal limitations after the reunification. This is supported by the Court of Appeal's judgment in *Kowloon Poultry Laan Merchants Association v Director of Agriculture Fisheries and Conservation* [2002] 4 HKC 277. That case involved the Public Health (Animals and Birds) (Amendment) (No.2) Regulations, a piece of subsidiary legislation that was enacted post reunification (on 27 February 1998) and required ducks and geese and other water birds to be traded at a separate location from chicken. The appellant was a poultry wholesalers' association representing 10 poultry wholesaling businesses or "laans" who from 1974 to 1997 rented stalls in Cheung Sha Wan Temporary

Poultry Market where they sold chicken and water birds. They argued that they had suffered severe financial loss as result of the decision to separate the locations for selling chicken and for selling water birds, and that the reduction of profit was a deprivation of property within the meaning of BL 105 which entitled them to compensation. The Court of Appeal held, at paragraph 15, that there had not been any deprivation made out in the case. It was because, inter alia, "[i]f the appellant be correct in the view that they have taken, then it follows that **future** legislative restrictions on land use, such as planning control and zoning, can amount to 'deprivation of property' and would have to be compensated for under art 105. That cannot be correct and underlines the fallacy of the argument presented by the appellants." (at paragraph 18; emphasis added)

10. Hence, it is evident from the above Court of Appeal's judgment that the protection of property rights under BL 105 does not go so far as precluding post-reunification changes to law that impose legitimate limitations to property rights predating the reunification. Regarding the REDA's concern that the changes to be brought about by the Bill would result in the property of the innocent owner being vested in a third party by reason of a fraud to which the innocent owner is not a party, we would restate that for reasons mentioned in paragraph 30 of our First Paper, the scheme proposed in the Bill does not amount to a disproportionate interference with property rights. Moreover, the REDA has in its above further submission failed to take on board the following arguments made by us in paragraphs 15, 16 and 18 of Annex A to our Second Paper:

(a) prior to the reunification, the *nemo dat* rule was subject to statutory exceptions without any compensation from the Government for any incidental loss of an owner's title;

(b) exceptions to the *nemo dat* rule are commonplace in common law jurisdictions. Very often, they reflect the conflict between two fundamental legal policies: the first is for the protection of property (ie no one can give a better title than he himself possesses), and the second is for protection of commercial transactions (ie the person who takes in good faith and for value without notice should get a

good title);

(c) in view of the theme of "continuity" in Section VI of Annex I to the Joint Declaration as well as that in the Basic Law as identified by the Court of Appeal in *HKSAR v Ma Wai Kwan David* [1997] HKLRD 761, the BL 105 compensation right was not intended to transform beyond recognition the system of legal protection of private property as actually enjoyed and practised in Hong Kong prior to 1 July 1997 by requiring, as from the said date, real-value compensation to limitations to the *nemo dat* principle of a nature similar to those prior to the reunification.

REDA's other constitutional arguments

11. In its above further submission, the REDA mentioned (at paragraph 3.2) that its position on BL 6 and 105 also involves the following submissions:

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

(b) the scheme is also contrary to BL 105, in that it fails to protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property.

12. The REDA argued (at paragraph 3.2) that it did not appear that their above submissions have been addressed in our Second Paper beyond a reference, in paragraph 4 of Annex A, that the Legal Services Division of the Legislative Council opined that the Bill was consistent with BL 6.

13. However, in paragraphs 28-30 of our First Paper, we have already dealt with the REDA's arguments referred to in paragraph 11 above. Particularly, we made the points that (a) the expression "in accordance with law" in BL 6 and 105 indicates that the property rights protected are subject to restrictions provided by the law and which are consistent with the Basic Law, and (b) assuming that BL 6 and 105 are subject to the fair balance test, the scheme in the Bill satisfies the test for the reasons set out in paragraph 30. The point (a)

above is clearly supported by the Court of Appeal's decision in *Kowloon Poultry Laan Merchants Association* discussed in paragraph 9 above.

14. In our Second Paper, we did mention in paragraph 4 of Annex A that the Legal Services Division opined that the Bill was consistent with BL 6, as noted by REDA in its above further submission.

15. However, in addition to that, we responded (in paragraph 4 of Annex C) to the REDA's argument (in paragraph 6.2 of its submission of 19 May 2003) that it was neither fair nor just to take away the property rights of an innocent owner who owns a property with a value in excess of the proposed cap of HK$30 million without full compensation corresponding to the real value of the property. We mentioned there that the fairness of this arrangement should be seen against the position of an innocent purchaser who has paid full value for the property without knowledge of the fraud, and other considerations set out in paragraph 30 of our First Paper.

Whether the Bill creates certainty and gives confidence to investors

16. In paragraph 4.2 of its above further submission, the REDA argued that the Bill failed to achieve certainty because there are opposing legal arguments as to whether or not the scheme provided for in the Bill would be in contravention of the Basic Law. It stated that until there is a judicial ruling or an interpretation of the Basic Law by the NPC (sic), the position will never be conclusive.

17. The Administration does not agree to the above submission. It has explained in its previous and present papers in great details why the Bill is consistent with the Basic Law. It has carefully studied the opposing views of the REDA and the Bar, and is of the considered view that the indemnity cap is consistent with the Basic Law. On the power of the Standing Committee of the National People's Congress ("NPCSC") in interpreting the Basic Law under BL 158(1), the Administration has explained in paragraph 6 of its earlier paper (LC Paper No. CB(1)2305/02-03(05)) ("our Third Paper") that the NPCSC is unlikely to exercise this power save in wholly exceptional circumstances.

18. In paragraph 4.3 of its above further submission, the REDA also argued that the scheme provided for in the Bill might damage the confidence of investors because of the changes to the *nemo dat* rule and the cap on the indemnity available in fraud cases. In paragraph 4.4, it reiterated its view on the unfairness and injustice of the scheme referred to in paragraph 15 above. These allegations were made without reference to what we discussed in paragraph 17 of Annex A to our Second Paper concerning the exceptions to the *nemo dat* rule provided in the Bill, and are therefore not tenable. For easy reference, the above paragraph 17 is repeated below:

> "The objective of the proposed title registration system is to increase the security and convenience with which property transactions can take place in Hong Kong. This is achieved by providing that title can be established as a matter of fact by reference to the title register. Purchasers need not concern themselves with matters that may lie behind the register.[1] The statutory exceptions to the *nemo dat* rule provided for in the Bill are necessary to achieve this purpose. Without them the aim of the title register would be defeated since a purchaser would have to go behind the register to investigate title before proceeding with a transaction. With them engrafted into our law, a purchaser can enter into a transaction with confidence, can enjoy greater security thereafter and be able to have greater assurance of being able to transfer the property safely in future. The conveyancing procedures involved will also be simpler and swifter, improving the overall efficiency and productivity of the property market. Despite the exceptions, the interests of an innocent owner or a holder of an equitable interest are given very extensive protection, as set out in paragraph 30 of our First Paper. Given these protections, and given the general benefits that will flow from law as proposed, the Administration is of the view that the exceptions to the *nemo dat* rule provided in the Land Titles Bill are proportionate."

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[1] See S.Rowton Simpson, *Land Law and Registration,* at paragraph 2.6.12.

<u>Part B: Further Submission by the Bar</u>

<u>Interpretation of “徵用” (*zhengyong*)</u>

19. In paragraph 8 of its further submission dated 25 July 2003, the Bar expressed agreement to the following:

(a) “徵用” (*zhengyong*) literally may mean resumption or acquisition of property by the government for public purpose;

(b) in interpreting the Basic Law, the court’s role is to construe the language in order to ascertain the legislative intent as expressed in the language and the language should not be looked at in isolation but in the light of its context or purpose;

(c) while the courts must avoid a literal, technical, narrow or rigid approach, they could not give the language a meaning which it could not bear.

20. Notwithstanding its agreement to the above propositions, the Bar went on to argue, at paragraph 9, that in reading BL 105 as a whole and looking at the word “徵用” (*zhengyong*) in the context of the entirety of BL 105, “徵用” (*zhengyong*) should not and could not be construed to mean only acts of the government acquiring or resuming property for public purpose. Rather, the Bar contended, it should be read in a wider context so that “the general purpose of BL 105 as reflected in the first part of that provision, namely ‘The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property’ is served by fully compensating the title owners who are deprived of their title because of the introduction of the system of title registration and, most importantly, at no fault of them”.

21. The Bar further argued that the above interpretation is also consistent with:

(a) the use of the English expression “deprivation” in BL 105;

(b) the part of BL 105 as quoted in paragraph 20 above (“the said part of BL 105”), and BL 6;

(c) the continuity of the common law principle of *nemo dat* and those limitations already existed prior to reunification.

22. The above arguments put forth by the Bar are untenable for the following reasons:

(a) the said part of BL 105 does not provide for the “general purpose” of BL 105. In BL 105(1), a number of things which the HKSAR shall protect in accordance with law are set out. They include the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property, and their right to compensation for lawful deprivation of their property. According to the structure of BL 105(1), the former right appears before the latter right, but that in itself does not necessarily mean that the former right provides for the “general purpose” of the latter right;

(b) if the “general purpose” of BL 105 is looked for, it probably lies in BL 6 which appears in the First Chapter of the Basic Law, entitled “General Principles”. It provides that the HKSAR shall protect the right of private ownership of property in accordance with law. Apparently, BL 105 is an elaboration of the above general provision of BL 6, as shown by the following provision in Section VI of Annex I to the Joint Declaration:

“Rights concerning the ownership of property, including those relating to acquisition, use, disposal, inheritance and compensation for lawful deprivation (corresponding to the real value of the property concerned, freely convertible and paid without undue delay) shall continue to be protected by law."

(c) even if the said part of BL 105 indeed provides for the “general

purpose" of BL 105, it is far from clear how the said part of BL 105 (or for that matter, the general provision in BL 6 that the HKSAR shall protect the right of private ownership of property in accordance with law) would help to inform the interpretation of the scope of the right to compensation for deprivation/"徵用" (*zhengyong*) under BL 105. Would the protection of the right to the acquisition, use, disposal and inheritance of property (or the protection of the right of private ownership of property) mean that any forfeiture of property wrongfully gained through the process of a prohibited act such as drug trafficking, or any imposition of tax amounts to "deprivation"/"徵用" (*zhengyong*) for which mandatory real-value compensation would be required under BL 105? While a reasonable interpretation of BL 105 should exclude the above instances from the scope of "deprivation"/"徵用" (*zhengyong*), a skewed stress on the "general purpose" as allegedly found in the said part of BL 105 may support a contrary conclusion;

(d) in paragraph 9 of Annex A to our Second Paper, we pointed out that the ordinary meaning of "徵用" (*zhengyong*) is confined to an act by the state or the government to resume or acquire property for public purposes. As noted in paragraph 19(c) above, the Bar agreed that while the courts in interpreting the Basic Law must avoid a literal, technical, narrow or rigid approach, they could not give the language a meaning which it could not bear. The Bar, however, has not shown in its above further submission how its interpretation of the scope of deprivation/"徵用" (*zhengyong*) referred to in paragraph 20 above is consistent with the meaning of "徵用" (*zhengyong*) (which meaning, as discussed in paragraph 11 of Annex A to our Second Paper, needs to be construed in the light that "剝奪" is used in BL 28 to correspond to "deprivation"). Nor has it dealt with how its above interpretation is consistent with the NPCSC's decision of 28 June 1990 that in cases of any discrepancy in the meaning of wording between the Chinese text and the English text of the Basic Law, the Chinese text shall prevail (as discussed in paragraph 10 of Annex A to our Second Paper);

(e) in defending its construction of the scope of deprivation/"徵用" (*zhengyong*), the Bar put stress on the innocence of the original title owners. This emphasis (or its emphasis on the said part of BL 105) fails to grapple with the points that we have made in paragraphs 15, 16 and 18 of Annex A to our Second Paper and reiterated in paragraph 10(a)-(c) above.

23. In paragraph 11 of its above further submission, the Bar argued that "[t]his is not a case where the statutory limitation to the *nemo dat* principle (namely no compensation from government for incidental loss) could apply because in the current situation, those aggrieved owners are deprived of titles to the land completely and their property rights are taken away definitely without any fault on their part but due to the fraud of a third party and this proposed legislation." If it is meant to suggest that the exceptions to the *nemo dat* rule provided for in the Bill are in nature different from those under the existing laws, this suggestion is fallacious. Taking section 24 of the Sale of Goods Ordinance (Cap 26) cited in paragraph 15 of Annex A to our Second Paper as an example, it provides that where goods are openly sold in a shop or market in Hong Kong, in the ordinary course of the business of such shop or market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller. Thus a member of the public who purchases goods from a shop in the normal way would obtain a good title, albeit the goods are stolen goods. This is also reflected in section 33(2) of the Theft Ordinance (Cap 210), which provides that notwithstanding any enactment to the contrary, where property has been stolen or obtained by fraud or other wrongful means the title to that or any other property shall not be affected by reason only of the conviction of the offender. Further, it should be noted that as in the case of the Bill, section 24 of Cap 26 does not affect the right of the innocent owner to seek personal remedies against the fraudster.

24. It appears from paragraph 12 of the Bar's above further submission that what the Bar sought to argue in paragraph 11 is that the exceptions to the *nemo dat* rule provided for in the Bill do not exist under the current law. It is because there it argued that "[t]hat is, even under the present land registration, these owners would and should be fully compensated or protected by the

common law principle of *nemo dat* without the application of the statutory limitation…". The Bar then made three arguments to support its contention that the scheme provided for in the Bill amounts to "deprivation"/"徵用" (*zhengyong*) under BL 105:

(a) if the original owners are not compensated fully, the protection as guaranteed and required in BL 6 and 105 is in effect useless and ineffective (paragraph 12);

(b) in view of the positive notion of protecting the right of private ownership of property as stipulated in BL 6 and 105, the part of BL 105 concerning compensation for "deprivation"/"徵用" (*zhengyong*) should not be construed in a way so that the existing protection of private ownership of property enjoyed by Hong Kong people is to be limited or even frustrated by the Basic Law (paragraph 13);

(c) the above interpretation of "deprivation"/"徵用" (*zhengyong*) which the Bar disagreed with (as mentioned in (b) above) does not reflect the legislative intent of the Basic Law: Section XI (sic) of Annex I to the Joint Declaration stipulated that private property rights which existed before the reunification should be preserved (paragraph 13).

25. The above arguments of the Bar are untenable because of the following reasons:

(a) while the exceptions to the *nemo dat* rule provided for in the Bill do not exist in our current law, they are similar in nature to those found in our laws predating the reunification (see paragraph 10(a) above and paragraphs 15-17 of Annex A to our Second Paper);

(b) BL 105 does not protect the right to compensation for "deprivation"/"徵用" (*zhengyong*) alone. It also protects the right to the acquisition, use, disposal and inheritance of property. Further, BL 6 is not expressed to protect the right to real-value compensation for "deprivation"/"徵用" (*zhengyong*). Rather, it

provides that the HKSAR shall protect the right of private ownership of property in accordance with law;

(c) when dealing with the question of whether the proposed cap on the indemnity available in fraud cases under the Bill is consistent with BL 6 and 105 in our First and Second Papers, we considered it relevant to discuss not only whether the Bill involves any "deprivation"/"徵用" (*zhengyong*), but also whether it satisfies the fair balance test;

(d) in our previous and present papers, the Administration demonstrates the case for an interpretation of "deprivation"/"徵用" (*zhengyong*) which has a scope narrower than that suggested by the Bar. Under the interpretation approach argued by the Administration, there remain many cases which would involve "deprivation"/"徵用" (*zhengyong*) (eg resumption of land or requisition of assets by the Government), and hence mandatory payment of real-value compensation under BL 105. It is therefore not convincing to suggest that the Administration's narrower interpretation of "deprivation"/"徵用" (*zhengyong*) would render the protection under BL 6 and 105 useless and ineffective;

(e) BL 6 and 105, or Section VI of Annex I to the Joint Declaration do not require that after the reunification, any additional statutory limitations to property rights predating the reunification would be unconstitutional. As discussed in paragraphs 9-10 above, it is clear from the Court of Appeal's decision in *Kowloon Poultry Laan Merchants Association* that BL 105 does not go so far as precluding post-reunification legitimate legal limitations to pre-existing property rights. While the Court of Appeal's decision was concerned with BL 105, the same principle must be true to BL 6, for otherwise a post-reunification legal limitation to pre-existing property rights permitted under BL 105 would be a breach of BL 6. Moreover, as discussed in paragraph 22(b) above, BL 6 is likely to be only a "general purpose" provision. Hence, the protection of pre-existing rights pursuant to BL 6 and 105 does not necessarily

mean that any diminution of pre-existing property rights would have to be construed as "deprivation"/"徵用" (*zhengyong*) under BL 105. Whether it does constitute the same would have to be considered in the light of the following matters (as mentioned in paragraph 2(a)-(c) of Annex B of our Second Paper):

(i) the proper approach to the interpretation of the Basic Law decided by the CFA in *Chong Fung Yuen*;

(ii) the notion of "徵用" (*zhengyong*) in BL 105, and its meaning in the light of (i) the decision of the Standing Committee of the National People's Congress of 28 June 1990, and (ii) BL 28 where "剝奪" is used to correspond to "deprivation";

(iii) the context and purpose of the BL 105 compensation right as evidenced in Section VI of Annex I of the Joint Declaration as well as the state of domestic legislation at the time of the Joint Declaration and the adoption of the Basic Law.

<u>Part C: Bills Committee's request for further information</u>

<u>Reference to NPCSC</u>

26. Members of the Bills Committee at the eleventh meeting requested the Administration to advise under what circumstances it would seek an interpretation of BL 6 and 105 from the NPCSC under the scenario mentioned in paragraph 2 of our Third Paper. To recapitulate, that scenario involves a person who lost ownership of his land that was worth $10 billion as a result of fraud by a third party. Being entitled to be indemnified by the Government up to $30 million only (the cap on the indemnity as currently planned), he challenged the cap on the indemnity in reliance on BL 6 and 105, and the cap was subsequently ruled by the court to be inconsistent with the above constitutional provisions.

27. In our First and Second Papers, we have shown that the cap on the indemnity is entirely consistent with BL 6 and 105. We have also shown in

our discussion above that neither the REDA nor the Bar in their above further submissions has sufficiently dealt with the Administration's detailed arguments set out in these Papers that the cap complies with BL 6 and 105. Such being the case, we are of the view that the scenario referred to in paragraph 26 above would not arise.

28. In paragraph 6 of our Third Paper, we emphasized that the NPCSC is unlikely to exercise its power of interpretation of the Basic Law under BL 158(1) save in wholly exceptional circumstances. In paragraph 7, we stated that the Administration is fully committed to upholding the principles of "one country, two systems", a high degree of autonomy and judicial independence, and that it would not seek an interpretation under BL 158(1) lightly. We would repeat these statements. As the concerns over the issue of reference to the NPCSC arise from doubts on the constitutionality of the cap, we consider that our detailed discussion in our past and present papers demonstrating the strength of the Administration's case that the cap is fully constitutional would address these concerns.

Housing, Planning and Lands Bureau
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