



## HONG KONG BAR ASSOCIATION

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18 April 2007

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for Clerk to Bills Committee  
Legislative Council Secretariat  
3/F Citibank Tower  
3 Garden Road, Central  
Hong Kong.

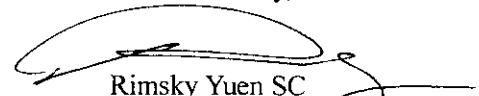
Dear *Raymond,*

### Shenzhen Bay Port Hong Kong Port Area Bill - Committee Stage Amendment to Clause 6

I refer to your letter dated 3 April 2007.

I am pleased to enclose herewith a copy of the comments of the Bar Association on the Shenzhen Bay Port Hong Kong Port Area Bill, amendment to Clause 6, for your consideration.

Yours sincerely,



Rimsky Yuen SC  
Chairman

cc: Mr. Alan Chu, for Secretary for Security  
(by fax: 2868-1552)

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香港金鐘道三十八號高等法院低層二樓

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Shenzhen Bay Port Hong Kong Port Area Bill:

Committee Stage Amendment to Clause 6

**Submission of the Hong Kong Bar Association**

1. The Bills Committee on the Shenzhen Bay Hong Kong Port Area Bill (“the Bill”) has sought the views of the Hong Kong Bar Association (“the HKBA”) on the Administration’s Committee Stage Amendment (“CSA”) to Clause 6 of the Bill.
  
2. The marked up version of the CSA to Clause 6 of the Bill reads as follows:

**“6. Land in Hong Kong Port Area be regarded as Government land**

(1) Land Notwithstanding that the land use right of the Hong Kong Port Area is acquired by way of a lease as mentioned in paragraph (3)(b) of the preamble, land within the Hong Kong Port Area is regarded, for the purpose of applying the laws of Hong Kong in the Hong Kong Port Area, as part and parcel of the Government land lying within Hong Kong.

(2) Any right or interest in any such land disposed of by virtue of a dealing on or subsequent to the Relevant Date is regarded as a right or interest derived

directly or indirectly (as the case may be) from the Government.”

3. Paragraph (3) of the preamble to the Bill refers to an Official Reply of the State Council dated 30 December 2006 containing a reply that “the land use right of the [Hong Kong Port Area] be acquired by the HKSAR by way of a lease under a lease contract for State-owned land signed between HKSAR Government and the People’s Government of the Shenzhen Municipality of Guangdong Province”. It is understood that discussion and drafting of the terms of the lease contract has been finalized and such terms relate, inter alia, to –

- the use of the land in the Hong Kong Port Area for the purposes of the boundary crossing facilities in the control point;
- the power of the HKSAR Government to rent out some parts of the buildings, structures or areas within the Hong Kong Port Area in order to provide for complementary facilities necessary for the operation of the control point;
- the stipulation that the ownership of the Hong Kong Port Area shall rest with the State;
- the exclusion from the land use right granted under the lease contract of underground natural resources and anything buried under the Hong Kong Port

Area; and

- the stipulation that the HKSAR Government must keep and maintain the Hong Kong Port Area in good conditions.

4. (a) The relevant regulations governing the lease contract for State-owned land to be signed between the People's Government of the Shenzhen Municipality of Guangdong Province and the HKSAR Government appear to be the Temporary Regulations on the Granting and Transfer of the Right to Use State-owned Land in Cities and Townships of the People's Republic of China (19 May 1990: Order of the State Council No 55) ("the 1990 Temporary Regulations").

(b) The 1990 Temporary Regulations presumably were adopted following the 1988 Amendment to the Constitution of the People's Republic of China whereby Article 10 of the Constitution was amended to provide that "[the] right to the use of land may be transferred according to law". This is illustrated by reg 2 of the 1990 Temporary Regulations which, *inter alia*, provides that "[the] State implements the system for the granting and transfer of the right to use State-owned land in cities and townships in accordance with the principle of separation between right of ownership and right to use".

(c) Regulation 3 of the 1990 Temporary Regulations provide that companies, enterprises, other organizations and individuals may acquire the right to use State-owned land under these temporary regulations. Regulation 4 provides that the user of land who acquires the right to use State-owned land under these temporary regulations may transfer, rent out, mortgage or place into other economic activities his right to use land and his lawful rights and interests are protected by national laws. Regulation 19 of the 1990 Temporary Regulations provides that transfer of the right to use land within the meaning of these temporary regulations include sale, exchange and gift.

(d) Regulation 7 of the 1990 Temporary Regulations make provision for the registration of grants, transfers, renting, mortgages, terminations and buildings and other fixtures on the ground.

(e) Regulation 48 of the 1990 Temporary Regulations provides that the right to use land acquired by an individual under these temporary regulations may be the subject of succession.

5. The HKBA notes the deliberations of the Bills Committee over Clause 6 as recorded in paragraphs 45 to 49 of the committee's report to the House Committee. The HKBA notes that the Hon Margaret Ng queried how the

Hong Kong Port Area could be regarded as Government land and whether the HKSAR Government would have the right to lease out or grant land within the Hong Kong Port Area to other persons, bearing in mind that the HKSAR Government merely acquires a right to use land under the lease contract for State-owned land. The Administration considered that Article 7 of the Basic Law of the HKSAR would apply to the Hong Kong Port Area by virtue of clause 5 of the Bill so that the HKSAR Government would be responsible for the management, use and development of the Hong Kong Port Area and for the leasing or granting of land in the Hong Kong Port Area to others for use or development save and except that the terms and conditions provided for in the lease contract for State-owned land would be complied with when the HKSAR Government disposed of any right or interest in land in the Hong Kong Port Area.

6. The Administration has also written to the HKBA to elaborate the policy intent of clause 6 of the Bill. Since the NPCSC Decision of 31 October 2006 puts the Hong Kong Port Area under the jurisdiction of the HKSAR, clause 6(1) is drafted to provide for the status to be accorded to land within the Hong Kong Port Area for the purpose of applying the laws of Hong Kong. Clause 6(2) is drafted to cater for subsequent dealings in land within the Hong Kong Port Area so that by virtue of this sub-clause, lessees or licensees of land

within the Hong Kong Port Area will not need to refer to the lease contract for State-owned land to ascertain the right of the HKSAR Government to grant the lease or licence to him.

7. The HKBA makes its observations in the light of the above matters.
8. The HKBA considers that clause 6(1) as proposed in the CSA is drafted for a legitimate legal policy purpose.
9. The HKBA recognizes that clause 6(2) is drafted, inter alia, to remove the need to conduct title investigation where the HKSAR Government, acting consistently with the terms of the lease contract for State-owned land, disposes of a right or interest in a part of the land within the Hong Kong Port Area by virtue of a dealing. See *Halsbury's Laws of England* (4th Ed) Vol 27(1) (1994 Reissue) para 67. Another possible rationale for this sub-clause is to provide in statutory form a provision similar to the doctrine whereby a tenant is estopped from denying his landlord's title (see Megarry & Wade on Law of Real Property (6<sup>th</sup> Ed, 2000) 14-095; Woodfall on Landlord and Tenant, 1-037); and to ensure the successful invocation of the ground of forfeiture of impugning the Government landlord's title (see Woodfall on Landlord and Tenant, 17.302; Merry, *Domestic Tenancies* (1997) p 37). These

rationales appear to sustain a legitimate legislative policy purpose for drafting this sub-clause, so long as the HKSAR Government does not dispose what it has not been granted of under the lease contract for State-owned land. In this respect, clause 6(2) can be more precisely formulated to indicate that the HKSAR Government may not dispose of a right or interest in land in the Hong Kong Port Area beyond what it has acquired or is authorized to deal in respect of such land under the lease contract for State-owned land.

10. The HKBA however has reservations on the justifications put forward by the Administration on the HKSAR Government's right to dispose of land within the Hong Kong Port Area. In so far as the Administration suggests that Article 7 of the Basic Law of the HKSAR would apply to the Hong Kong Port Area by virtue of clause 5 of the Bill, the HKBA does not share that view. An Ordinance cannot possibly have the effect of applying the constitutional instrument that provides for the legislative power to make the Ordinance to a place outside the administrative limits of the territory stipulated in the constitutional instrument. If Article 7 of the Basic Law were to apply to the Hong Kong Port Area, that would have to be by reason of the NPCSC Decision of 31 October 2006.
11. The NPCSC Decision of 31 October 2006 has not expressly stipulated how



the land comprising the Hong Kong Port Area is to be turned over to the administration of the HKSAR Government, though its operative paragraphs 2 and 3 specifically provides for the determination of the area of the Hong Kong Port Area and the land use period of the Hong Kong Port Area. Yet, operative paragraph 3 makes reference to “the relevant laws”, which, when the contextual materials are considered, include the 1990 Temporary Regulations, on the basis of or by reference to which the lease contract for State-owned land in respect of the Hong Kong Port Area has been negotiated.

12. The lease contract for State-owned land in respect of the Hong Kong Port Area makes provision for the granting of land use right in respect of the Hong Kong Port Area, a piece of land within Mainland China, to the HKSAR Government. The Hong Kong Port Area remains state property (*guoyou caichan*), a species of public property (*gonggong caichan*) under Mainland law. In so far as the HKSAR Government disposes parts of the Hong Kong Port Area, it is exercising the land use right granted to it under Mainland laws and regulations, subject to the terms and conditions under the lease contract for State-owned land.
  
13. Therefore, the proper understanding of operative paragraph 1 of the NPCSC Decision of 31 October 2006 must take account of this arrangement. The

jurisdiction to be exercised by the HKSAR over the Hong Kong Port Area according to the laws of the HKSAR (including the Basic Law of the HKSAR) by virtue of operative paragraph 1 is accordingly, in the field of management, use, development and disposal of land, not the full scope provided for in Article 7 of the Basic Law, but only such powers provided for in the laws of the HKSAR as are consistent with the land use right granted under the lease contract for State-owned land, together with such terms and conditions stipulated therein for its exercise.

Dated 18th April 2007.

Hong Kong Bar Association