
Submission of the Hong Kong Bar Association

In respect of the

Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Bill

(“the Bill”)

1. Under Article 11 of the Basic Law, “no law enacted by the legislature of the Hong Kong Administrative Region shall contravene the Basic Law.” When the Legislative Council (“Legco”) enacts a piece of legislation, it has a constitutional duty to ensure and be satisfied that the legislation under deliberation does not contravene the Basic Law. Legco has **no authority** to enact, and it cannot and may not pass an Ordinance that contravenes the Basic Law.
2. The Hong Kong Bar Association (“HKBA”) is of the firm view that the Bill, premised upon and made pursuant to the Co-operation Arrangement between the Mainland and the Hong Kong Special Administrative Region on the Establishment of the Port at the West Kowloon Station of the Guangzhou-Shenzhen-Hong Kong Express Rail Link for Implementing Co-Location Arrangement (“Co-location Arrangement”), has **no constitutional foundation** and cannot be enacted **save** in contravention of the Basic Law.
3. The Bill seeks to establish a "Mainland Port Area" (“MPA”) in West Kowloon Station (“WKS”) – which comprises the “designated area” within the WKS as delineated in Annex 1 of the Bill as well as a “train compartment” – pursuant to Clauses 4 and 5. Under Clause 6, the MPA will be regarded as “an area lying outside Hong Kong but lying within the Mainland” for the purpose of “the application of the laws of the Mainland” and “the delineation of jurisdiction (including the jurisdiction of the courts)” over the MPA (save for the reserved matters provided under Clauses 7 and 8).

4. In effect, the Bill seeks to "**de-establish**" a part of the HKSAR that is squarely **within** the territorial and jurisdictional boundary of HKSAR as defined by a decision of the NPCSC dated 4 April 1990, which provides that "the area of the Hong Kong Special Administrative Region covers the Hong Kong Island, the Kowloon Peninsula, and the islands and adjacent waters under its jurisdiction". Pursuant to this decision, the precise boundary of the HKSAR was promulgated by the Order of the State Council of the People's Republic of China No. 221 dated 1 July 1997 (and published as SS No. 5 to Gazette No. 6/1997 of the Gazette). Clause 6 renders the MPA Mainland territory.
5. None of the provisions in the Basic Law provides the basis or foundation for HKSAR to undertake such "de-establishment", which entails **divesting** the area in question (the MPA) of the application of Hong Kong law and the jurisdiction of the Hong Kong courts provided for under respectively articles 18(1), 19(1) and (2) and 82 of the Basic Law.
6. In the HKBA's Statement dated 28 December 2017 ("HKBA Statement")¹ on the Decision of the Standing Committee on the National People's Congress ("NPCSC") adopted on 27 December 2017 on the Co-operation Arrangement (the "Decision") and the Explanations given by Director Zhang Xiaoming of the State Council Hong Kong and Macao Affairs Office to the NPCSC session on 22 December 2017 ("Explanations"), it has been pointed out that none of the provisions of the Basic Law referred in the Explanations, viz, articles 7², 118 and 119³ and 154(2)⁴ provides legal justification of the Co-location Arrangement. We note that, in seeking to respond to the HKBA Statement,⁵ the Administration has still failed to take the discussion beyond the Explanations and provide a sound legal basis for the Bill.

¹ Annexed to this Submission for easy reference.

² Which authorises the HKSAR Government to enter into an agreement with another person in respect of the granting of and the use of a piece of land.

³ which authorises the HKSAR Government to formulate policies to promote and co-ordinate the development, inter alia, of trade and investment.

⁴ Which authorizes the HKSAR Government to maintain immigration control.

⁵ See Annex 1 of the Administration's response to the List of follow-up actions arising from the discussion of the Bills Committee meeting on 23 February 2018 issued on 7 March 2018.

7. On the contrary, as stated in the HKBA Statement, the Co-location Arrangement, now sought to be enacted in the Bill, contravenes article 18(3) of the Basic Law which provides that only the Mainland laws listed in Annex III of the Basic Law apply to HKSAR. Clause 6 of the Bill seeks precisely the application of the **entire body** of Mainland laws (save the reserved matters) in the MPA, being a part of the territory of the HKSAR, regardless of Annex III of the Basic Law.
8. HKBA does not accept that the Decision has the effect of conferring constitutional foundation for the Co-location Arrangement and the Bill. The Decision does not constitute any part of the Basic Law. The NPCSC, whose functions and powers are provided in article 67 of the Constitution of the People's Republic of China, must itself abide by the provisions of the Basic Law. HKBA notes that it is not purported by the Administration that the Decision constitutes or amounts to an "interpretation" of any provision of the Basic Law (let alone those referred to in the Decision or Explanations) pursuant to article 158 or otherwise. Clearly, no such interpretation has taken place in accordance with article 158.
9. The Administration seeks to draw parallels between the Bill and provisions under the Shenzhen Bay Port Hong Kong Port Area Ordinance (Cap 591).⁶ There is a fundamental distinction between establishing an MPA at WKS, which is part of the HKSAR at all times, and establishing a "Hong Kong Port Area" at the Shenzhen Bay Port, which is not part of the HKSAR at any time. Cap. 591 provides, against the background of the authorization by the NPCSC, that the Hong Kong Port Area at the Shenzhen Bay Port, which is outside the HKSAR and is not part of the HKSAR, shall be regarded as an area inside the HKSAR with the laws of the HKSAR implemented there. This involves an **augmentation** of the jurisdictional scope and authority of the HKSAR and not vice versa. The Basic Law provides that no Mainland law shall apply to Hong Kong save under Annex III. The extension of Mainland law and jurisdiction to Hong Kong is a matter of compliance with the Basic Law, and not just a matter of agreement. In contrast, there is no similar legal or constitutional provision in Shenzhen to the effect that no Hong Kong law shall apply in Shenzhen. Hence, the

⁶ See p.13 of the Administration's letter to Legco dated 22 February 2018 and reference to schedules 3 and 4 of Cap. 591 and of the Bill.

establishment of the Hong Kong Port Area in Shenzhen is a matter of agreement between Shenzhen authority and the HKSAR.

10. The mere fact that clause 6 takes the form of a deeming provision does not change the position. There is no power to deem an area in the HKSAR to be part of the Mainland and subject to Mainland law and jurisdiction when this is in contradiction of the clear provisions of the Basic Law. Indeed, clause 6(2), which states that the boundary of the HKSAR remains unaffected, makes no sense and is in contradiction with clause 6(1).
11. In conclusion, the HKBA is of the firm view that the Bill is **not** Basic Law-compliant. It would be wrong for Legco to disregard such non-compliance and take the attitude that it should first pass and enact the Bill and wait for a court's ruling on its validity and constitutionality if and when a party seeks to challenge it. This would not be a responsible approach to take in the legislative process.
12. The HKBA reserves its right to make further submissions on specific clauses of the Bill in due course without prejudice to its position as stated above. For the avoidance of doubt, the HKBA takes no position on the desirability, the economic advantages and viability of the High Speed Rail, save that any arrangement of co-location has to be constitutional and in compliance with the Basic Law and the laws of the HKSAR.

12th March 2018

Annex

**STATEMENT OF THE HONG KONG BAR ASSOCIATION ON THE DECISION
OF THE NPCSC OF 27 DECEMBER 2017 ON THE CO-OPERATION
AGREEMENT BETWEEN THE MAINLAND AND THE HKSAR ON THE
ESTABLISHMENT OF THE PORT AT THE WEST KOWLOON STATION OF
THE GUANGZHOU-SHENZHEN-HONG KONG EXPRESS RAIL LINK FOR
IMPLEMENTING CO-LOCATION ARRANGEMENT**

1. The Hong Kong Bar Association (**HKBA**) refers to –
 - (a) The Decision of the Standing Committee of 12th National People’s Congress adopted on 27 December 2017 at its 31st Session on Approving the Co-operation Agreement between the Mainland and the HKSAR on the Establishment of the Port at the West Kowloon Station of the Guangzhou-Shenzhen-Hong Kong Express Rail Link for Implementing Co-location Arrangement (**the NPCSC Co-location Decision**);
 - (b) The Explanations given by Director Zhang Xiaoming of the State Council Hong Kong and Macao Affairs Office to the NPCSC Session on 22 December 2017 in respect of the Draft NPCSC Co-location Decision (**the Explanations**); and
 - (c) The Co-operation Agreement between the Mainland and the HKSAR on the Establishment of the Port at the West Kowloon Station of the Guangzhou-Shenzhen-Hong Kong Express Rail Link for Implementing Co-location Arrangement (**the Co-operation Agreement**) that the HKSAR Government published on 27 December 2017.

2. The HKBA notes that the Co-operation Agreement provides in –
 - (a) Paragraph 2 that the HKSAR provides to the Mainland the Mainland Port Area of the Port at the Hong Kong West Kowloon Station (**WKS**) of the Guangzhou-Shenzhen-Hong Kong Express Rail Link (**XRL**) for use and

exercise of jurisdiction by the Mainland in accordance with the Co-operation Agreement; and that the acquisition, duration and fees for the use of the site of the Mainland Port Area shall be provided by a contract between the said parties.

- (b) Paragraph 4 that the Mainland Port Area shall, from the date of its commencement of operation, be subject to Mainland jurisdiction in accordance with the Co-operation Agreement and Mainland laws (including judicial jurisdiction), with the Mainland Port Area being regarded as within the Mainland for such purpose.
- (c) Paragraphs 5 and 6 that Mainland authorities shall be stationed at the Mainland Port Area to carry out duties under Mainland laws in respect of entry/exit border check, customs supervision and examination and quarantine.
- (d) Paragraph 9 that passengers bound for the HKSAR shall be treated as within the Mainland before they leave the Mainland Port Area and if any one of them contravenes a Mainland law, the Mainland authorities stationed there shall take appropriate legal measures according to the law and the specific circumstances.
- (e) Paragraph 10 that passengers bound for the Mainland shall be treated as within the Mainland after they have entered the Mainland Port Area and if any one of them contravenes a Mainland law, the Mainland authorities stationed there shall take appropriate legal measures according to the law and the specific circumstances.
- (f) Paragraph 12 that HKSAR officers may enter the Mainland Port Area to assist in respect of sudden and emergency incidents only at the request and authorization of the Mainland authorities stationing there.

3. On 19 October 2017, the HKBA issued a statement indicating that it has been monitoring the development in respect of the “Three-step Process” closely and will publish its views if and when appropriate. Now that the HKBA has access to the details of the first two steps of the “Three-step Process” following yesterday’s events, we consider it necessary to state our views on the legal and constitutional issues involved.

4. The HKBA refers to the Explanations and considers that its claim at page 5 that the high degree of autonomy enjoyed by the HKSAR is the source of authority for the HKSAR to enter into the Co-location Arrangement with the Mainland is erroneous in material respects. The HKBA makes the following observations on the provisions of the Basic Law used to support this claim:
 - (a) The HKSAR’s authority to maintain its own immigration control system pursuant to Article 154(2) of the Basic Law is the reason for the HKSAR, not the Mainland authority, to maintain exit control check for Mainland-bound passengers using the XRL and entry control check for Hong Kong-bound passengers using the XRL.

 - (b) Although the directions in Articles 118 and 119 of the Basic Law for the HKSAR to formulate appropriate policies to promote and co-ordinate the development of various trades and to provide an economic and legal environment for encouraging investments, technological progress and the development of new industries may suggest or make it desirable for the adoption of certain policies by the HKSAR Government to promote, co-ordinate or facilitate economic development, they do not authorize the HKSAR Government to act inconsistently with the systems provided for under the Basic Law.

 - (c) While Article 7 of the Basic Law may enable the HKSAR Government to enter into an agreement with another person in respect of the granting of

the use of a piece of land within the HKSAR, it does not authorize the HKSAR Government to divest all institutions of the HKSAR (including the HKSAR courts) from having the jurisdiction they have pursuant to the various provisions of the Basic Law over that piece of land.

5. Accordingly, the HKBA is of the firm view that none of the Basic Law provisions referred to the Explanations provide the source of authority for the Co-location Arrangement in the Co-operation Agreement, the implementation of which will clearly mean the disapplication of the systems of the HKSAR provided for by and under the provisions of the Basic Law, pursuant to Article 31 of the Constitution of the People's Republic of China and Article 11 of the Basic Law, in respect of the land within the HKSAR at the Mainland Port Area at WKS. Given that Article 11(2) of the Basic Law provides that not even legislation of the HKSAR can contravene Article 11 of the Basic Law, the Co-operation Agreement (being an agreement entered into between the HKSAR Government and the Guangdong Provincial Government), by itself, has no authority to override Article 11.
6. In this regard, the HKBA considers that the suggestion in the Explanations that the Co-location Arrangement does not contravene Article 18 of the Basic Law because Mainland laws only apply to a part of the HKSAR (i.e. the Mainland Port Area) – which will be regarded under the Co-location Arrangement as being situated in the Mainland – and not the entire HKSAR, goes against any plain reading of the Article. Such logic, if extended, is capable of authorizing the application of Mainland laws to *any part* of the HKSAR designated by the HKSAR Government (e.g. the High Court Building) as long as it does not cover the whole of the HKSAR, and completely by-passes and emasculates the requirement under Article 18(3) of the Basic Law that only national laws listed in Annex III of the Basic Law shall be applied to the HKSAR.
7. The HKBA is appalled by the NPCSC Co-location Decision, which merely states that the NPCSC approves the Co-operation Agreement and “confirms” that the

Co-operation Agreement is consistent with the Constitution of the People's Republic of China and the Basic Law without stating how this is so. This is followed by a provision phrased in terms of an "obligation" of the HKSAR to legislate to ensure the implementation of the Co-operation Agreement. This plainly amounts to an announcement by the NPCSC that the Co-operation Agreement complies with the Constitution and the Basic Law **"just because the NPCSC says so"**. Such an unprecedented move is the most retrograde step to date in the implementation of the Basic Law, and severely undermines public confidence in "one country, two systems" and the rule of law in the HKSAR.

8. The NPCSC does not exercise power out of a vacuum. Its functions and powers are provided in Article 67 of the Constitution of the People's Republic of China, and its functions and powers are prescribed (and circumscribed) in Articles 17, 18, 20, 90, 158, 159 and 160, and Annexes I and II to the Basic Law. The NPCSC must abide by these provisions of the Constitution of the People's Republic of China and the Basic Law when it makes a decision in respect of the HKSAR.
9. The HKBA considers that the assertion in the NPCSC Co-location Decision that the stationing of Mainland authorities at the Mainland Port Area at WKS to exercise their duties under Mainland laws there is different from the situation under Article 18 of the Basic Law of national laws being implemented in the whole of the HKSAR begs the question of how this is different. The assertion that it is appropriate to make provision under the Co-operation Agreement to provide for the division of jurisdiction and the application of laws in the WKS Port and to confirm that the Mainland Port Area (a part of the HKSAR) shall be regarded as "being in the Mainland" again begs the question of why this is appropriate. The assertion that the establishment of the Mainland Port Area in the Port at WKS does not alter the extent of the HKSAR, does not affect the high degree of autonomy of the HKSAR enjoyed according to law, and does not limit the rights and freedoms the Hong Kong residents enjoy according to law, plainly begs the question of how and why they are so.

10. The NPCSC Co-location Decision is both wholly unconvincing and unsatisfactory in achieving its purported purpose, namely to provide a **firm legal basis** for the Step 3 local legislation being the last of the “Three-step Process”. The Co-location Arrangement’s disapplication of the systems of the HKSAR provided for by and under the provisions of the Basic Law means that the Step 3 local legislation will, by reason of Article 11(2) of the Basic Law, appear to be inconsistent with specific provisions of the Basic Law, including Articles 4, 11, 19, 22(3), 31, 35, 38, 39, 41, 80, 87. The HKBA does not regard as a satisfactory explanation any reliance by the HKSAR Government of the NPCSC Co-location Decision in answer to any of the above questions of inconsistency.

11. The HKBA considers that the NPCSC has, by reason of the NPCSC Co-location Decision and the way the NPCSC has adopted it, generated a strong perception among the legal community in Hong Kong and in the wider legal and political communities outside Hong Kong that the NPCSC is prepared to make decisions at the request of the Chief Executive of the HKSAR and the HKSAR Government under her leadership just because the subject matter concerned “is a good thing”, without due regard and respect for the provisions of (and restrictions in) the Constitution of the People’s Republic of China and the Basic Law. The HKBA notes, with utmost concern and regret, that such a strong perception will surely impair and undermine the confidence of the local and international communities on the maintenance of the rule of law and the “one country, two systems” policy in Hong Kong, both of which are provided for by the Basic Law, which was enacted pursuant to Article 31 of the Constitution of the People’s Republic of China. Through the combined efforts of the HKSAR Government, the State Council and the NPCSC in producing NPCSC Co-location Decision, the integrity of the Basic Law has now been irreparably breached.

Dated 28th December 2017

HONG KONG BAR ASSOCIATION