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