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**The University of Hong Kong  
Faculty of Law**

**Monday, 16<sup>th</sup> December 2013**

**Public Interest Law Lecture  
“Judicial Reviews & Harbour Reclamation”**

**Winston Ka-Sun Chu  
Honorary Lecturer**

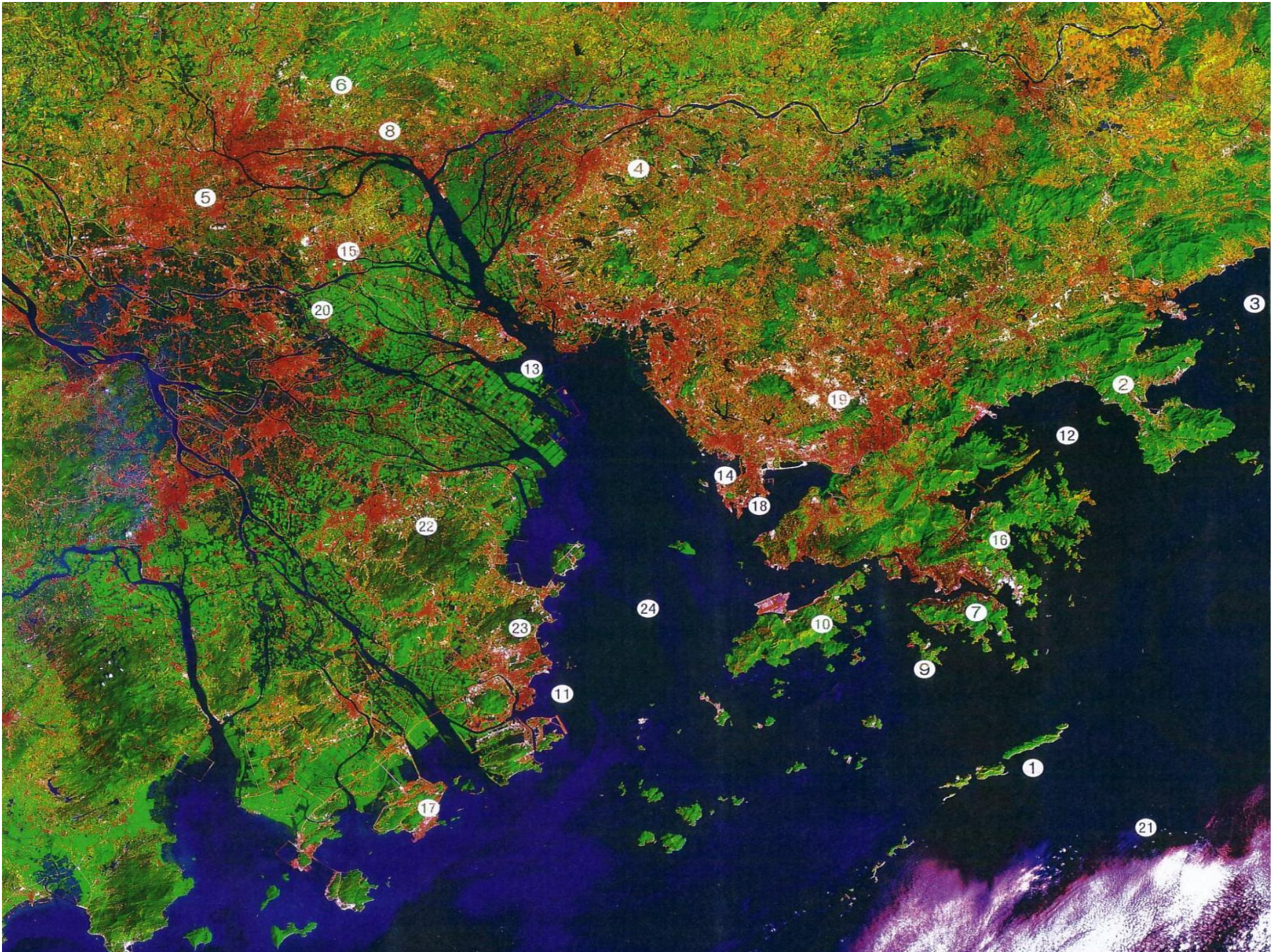
## **Historical Background**

- **One of the best harbours in the world**
- **Geographically, an archipelago with 218 islands**
- **Past 150 years, already reclaimed 2,500 hectares (9 square miles)**
- **1994 - Town Planning Board paper proposed 15 new reclamation projects totalling 1,297 hectares five sq.miles**



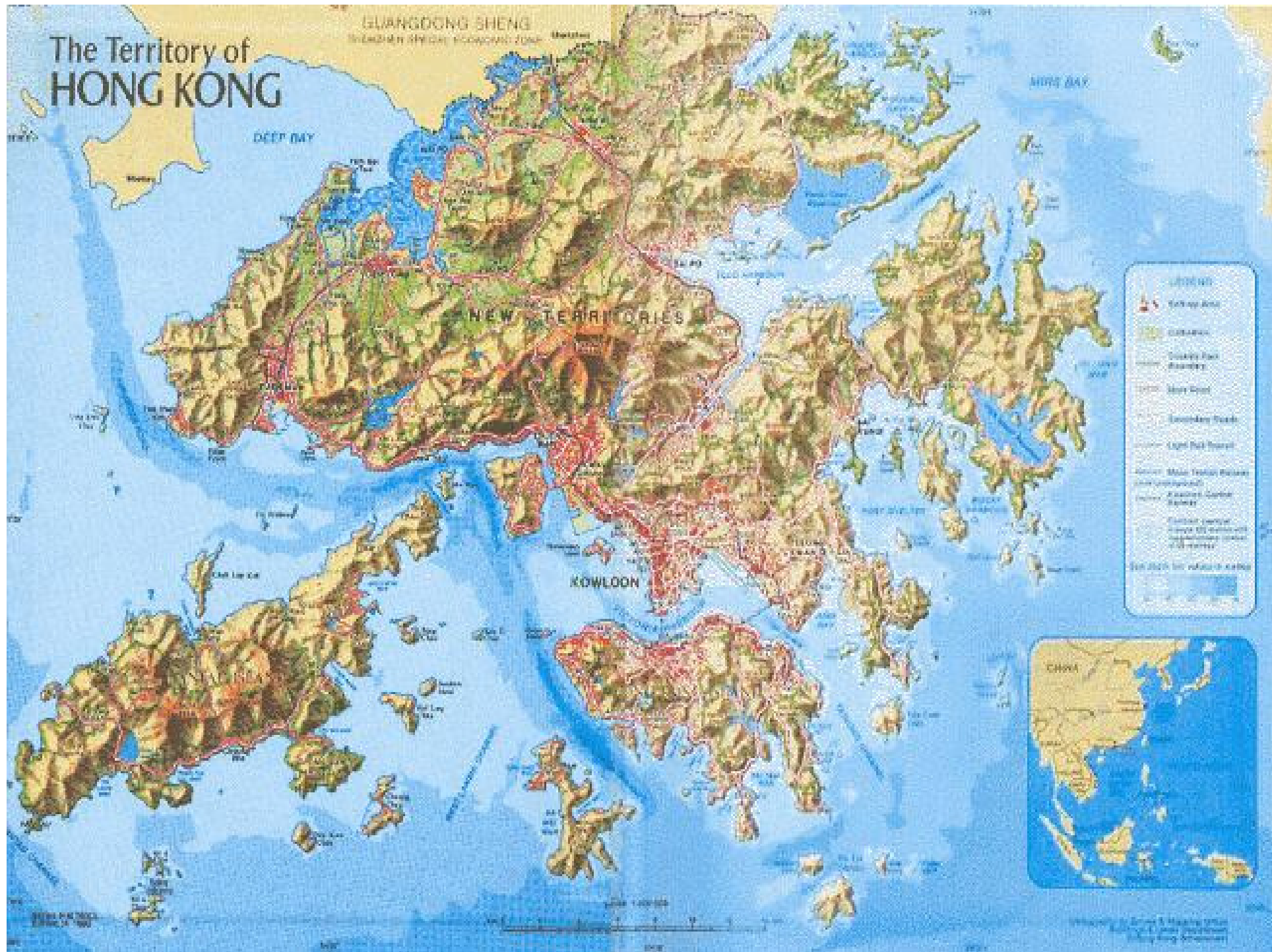






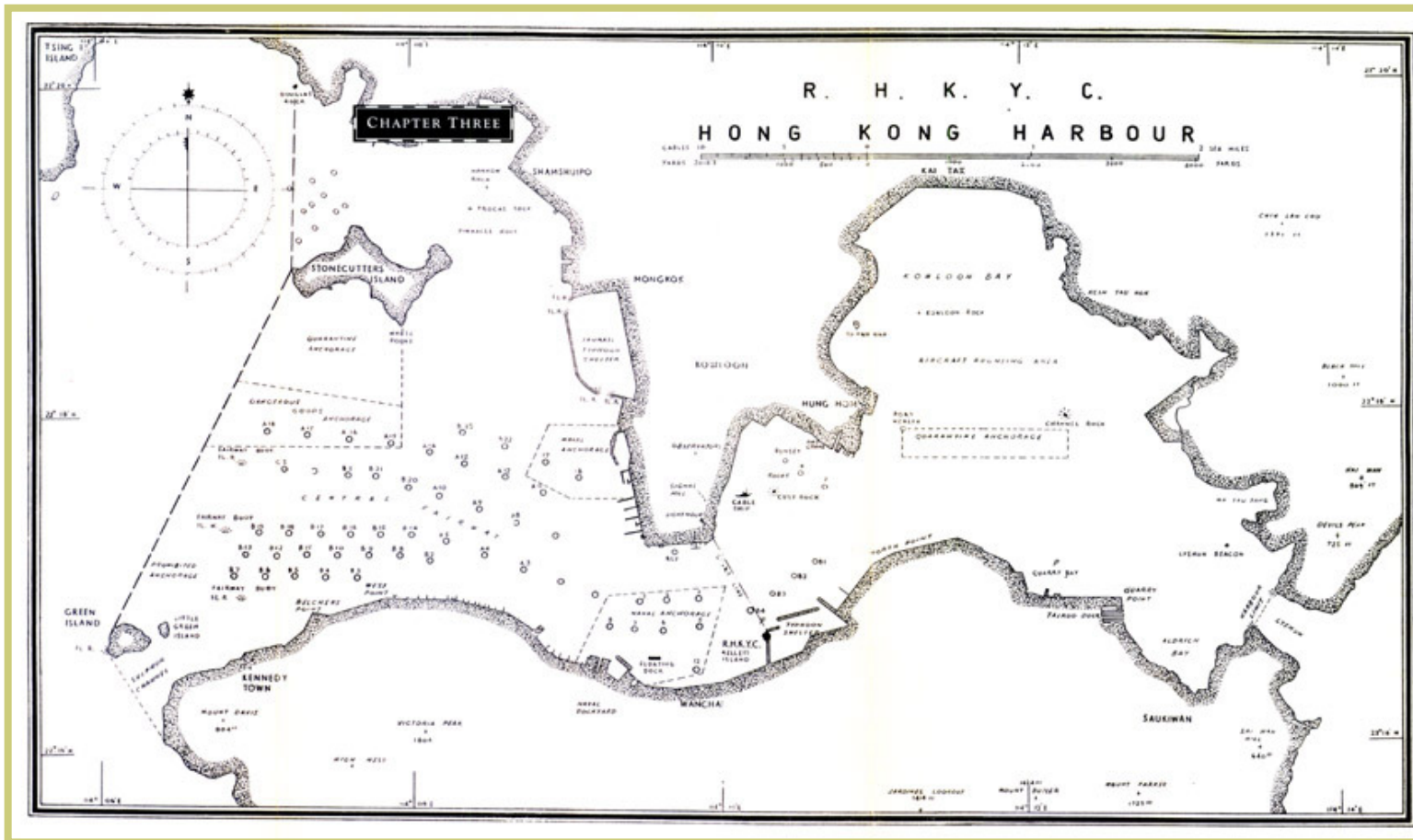


# The Territory of HONG KONG





# Hong Kong Harbour before reclamation



**Reclamation in the Victoria Harbour**  
**Town Planning Board Paper No. 2880**

**Dated 14<sup>th</sup> October 1994**

**Table of Reclamation Proposed by Government**



## **Existing and Committed Reclamation Areas**

<b>(1)</b>	<b>West Kowloon Reclamation</b>	<b>340</b>
<b>(2)</b>	<b>Hung Hom Bay Reclamation</b>	<b>35</b>
<b>(3)</b>	<b>Central Reclamation Phase I</b>	<b>20</b>
<b>(4)</b>	<b>Wanchai Reclamation Phase I</b>	<b>6</b>
<b>(5)</b>	<b>Aldrich Bay Reclamation</b>	<b>28</b>
<b>(6)</b>	<b>Container Terminal No. 8</b>	<b>97</b>
<b>(7)</b>	<b>Central Reclamation Phases 2 and 3</b>	<b>45</b>
<b>(8)</b>	<b>Container Terminal No. 9</b>	<b>90</b>

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**661 hectares**

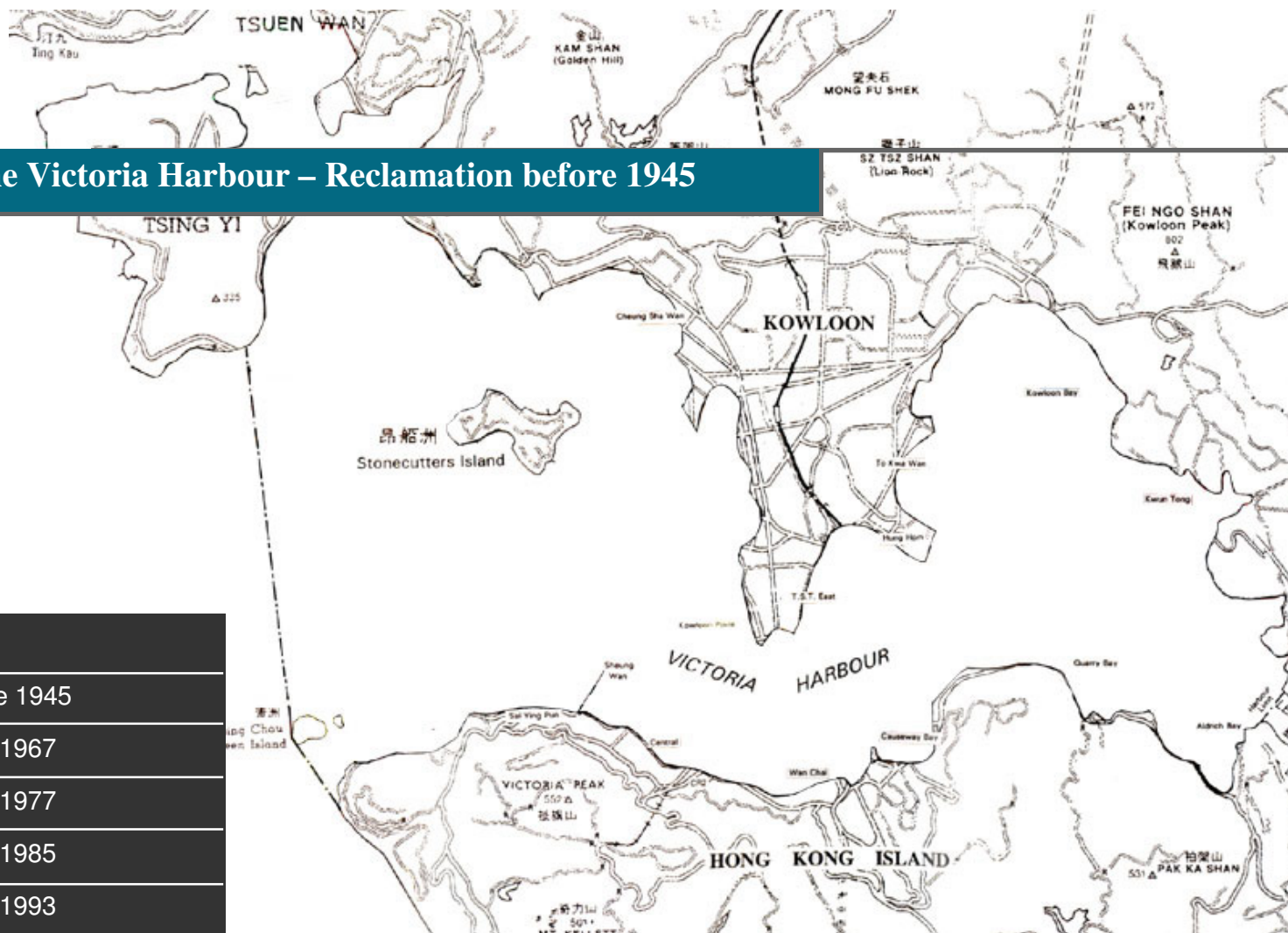
## Proposed Reclamation Areas

<b>(9) Green Island</b>	190	
<b>(10) Central Reclamation Phase 4</b>	18	
<b>(11) Wanchai Reclamation Phase 2</b>	52	
<b>(12) South East Kowloon</b>	300	
<b>(13) Kowloon Point</b>	40	
<b>(14) Tsim Sha Tsui East</b>	6	
<b>(15) Tsuen Wan Bay</b>	30	
	<hr/>	<b>636 hectares</b>
	<b>Total</b>	<hr/>
		<b>1,297 hectares</b>
		<b>=====</b>



## Reclamation in the Victoria Harbour – Reclamation before 1945

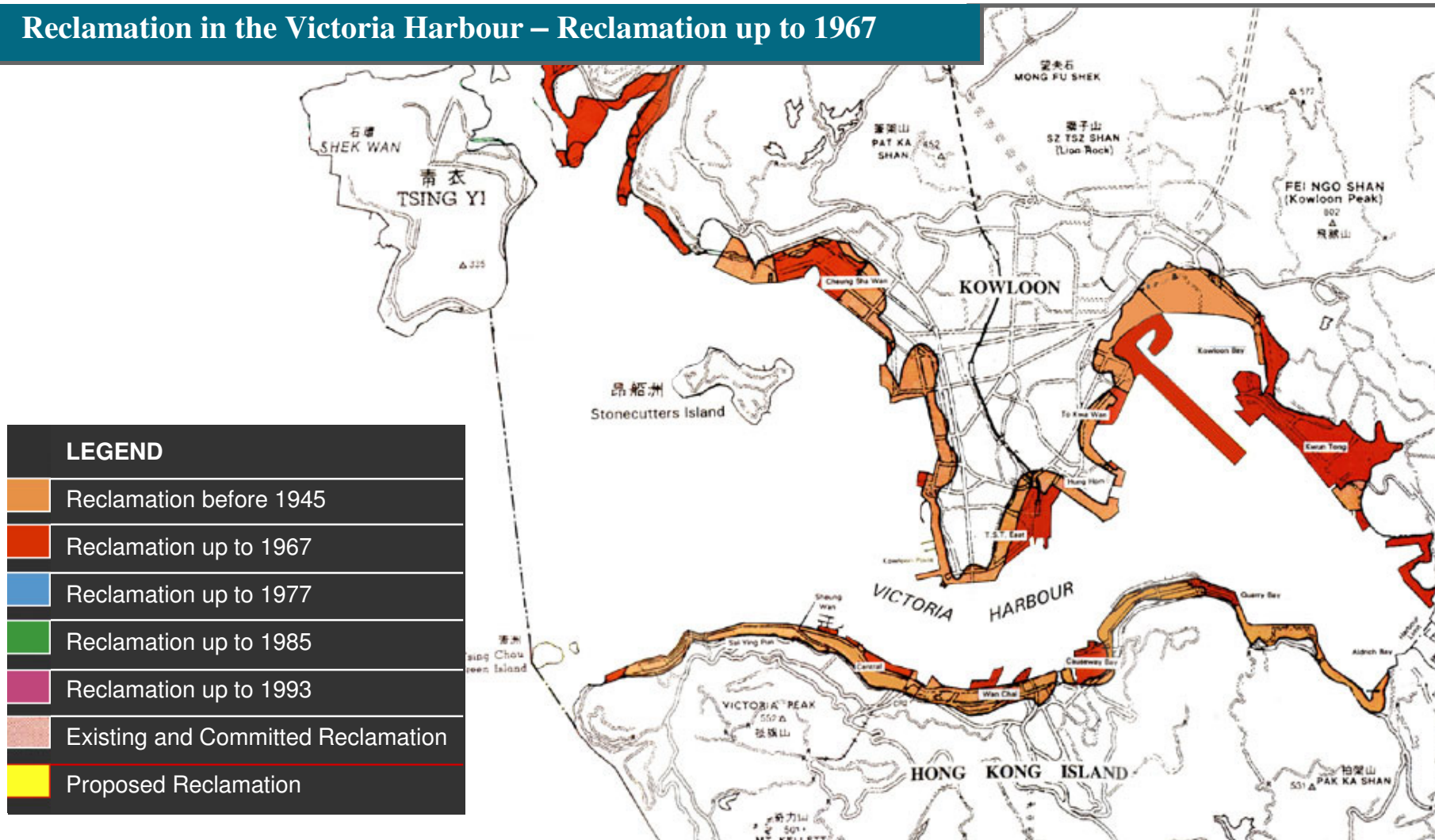
LEGEND	
	Reclamation before 1945
	Reclamation up to 1967
	Reclamation up to 1977
	Reclamation up to 1985
	Reclamation up to 1993
	Existing and Committed Reclamation
	Proposed Reclamation



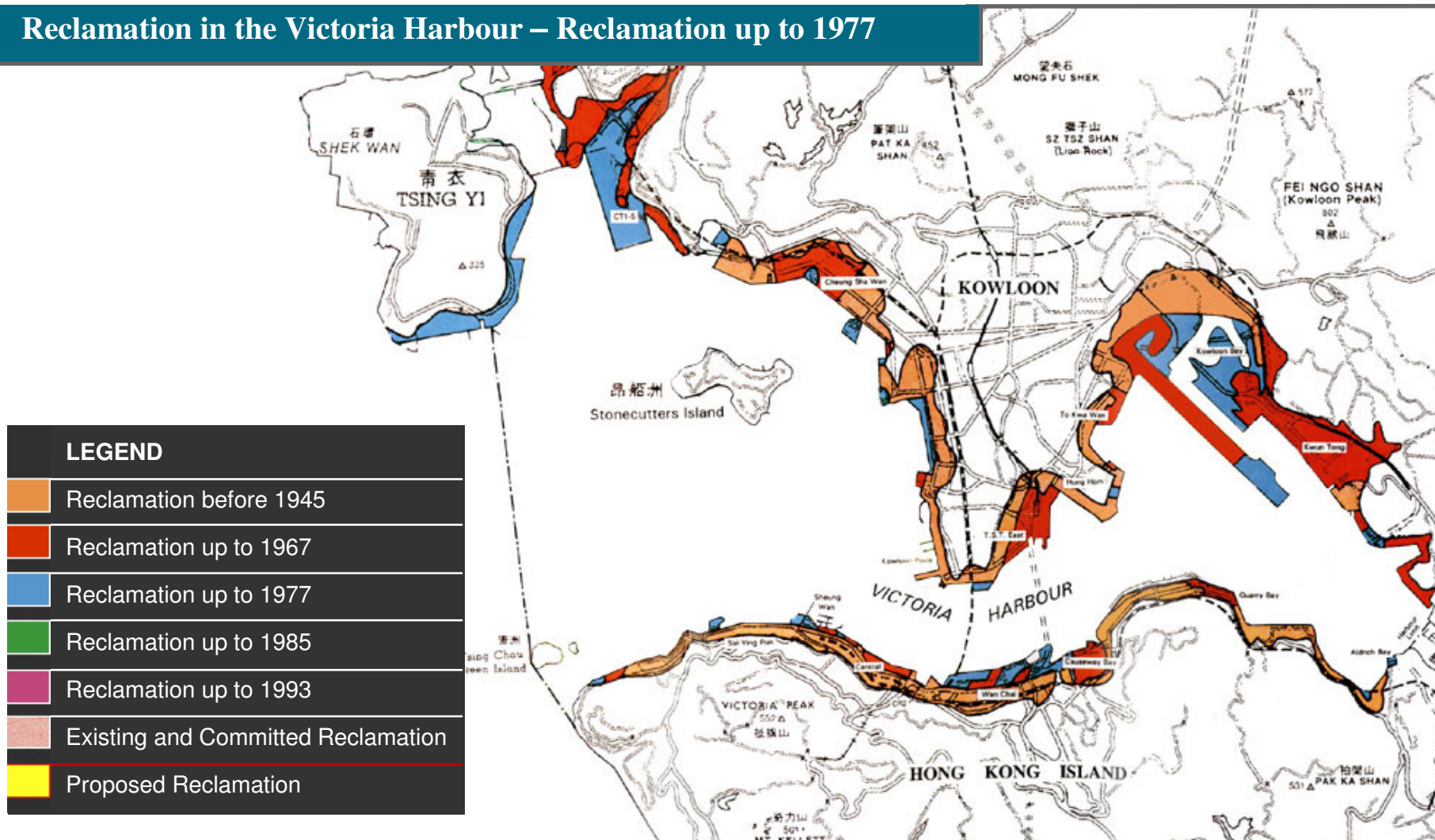




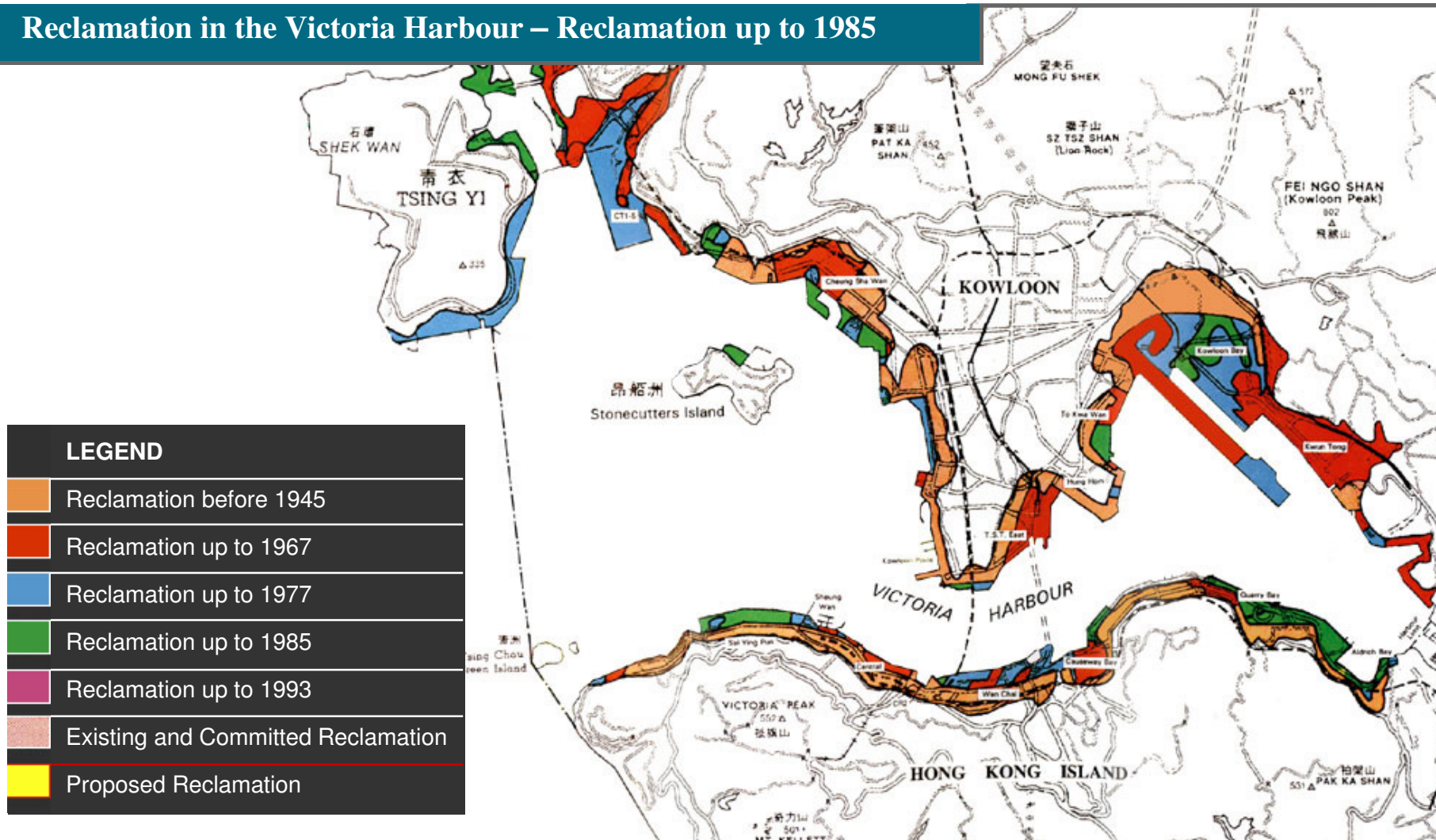
## Reclamation in the Victoria Harbour – Reclamation up to 1967



## Reclamation in the Victoria Harbour – Reclamation up to 1977

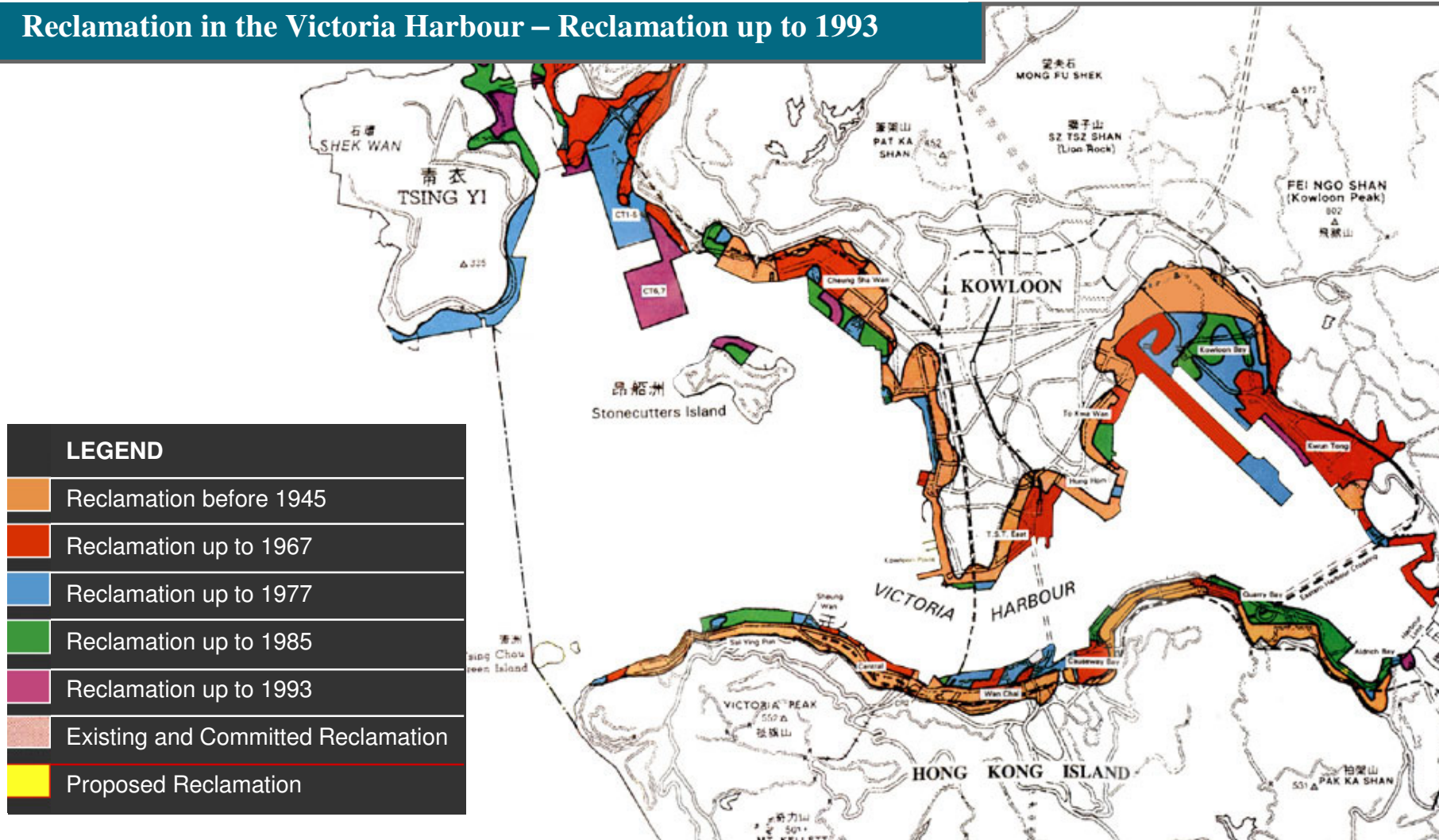


## Reclamation in the Victoria Harbour – Reclamation up to 1985



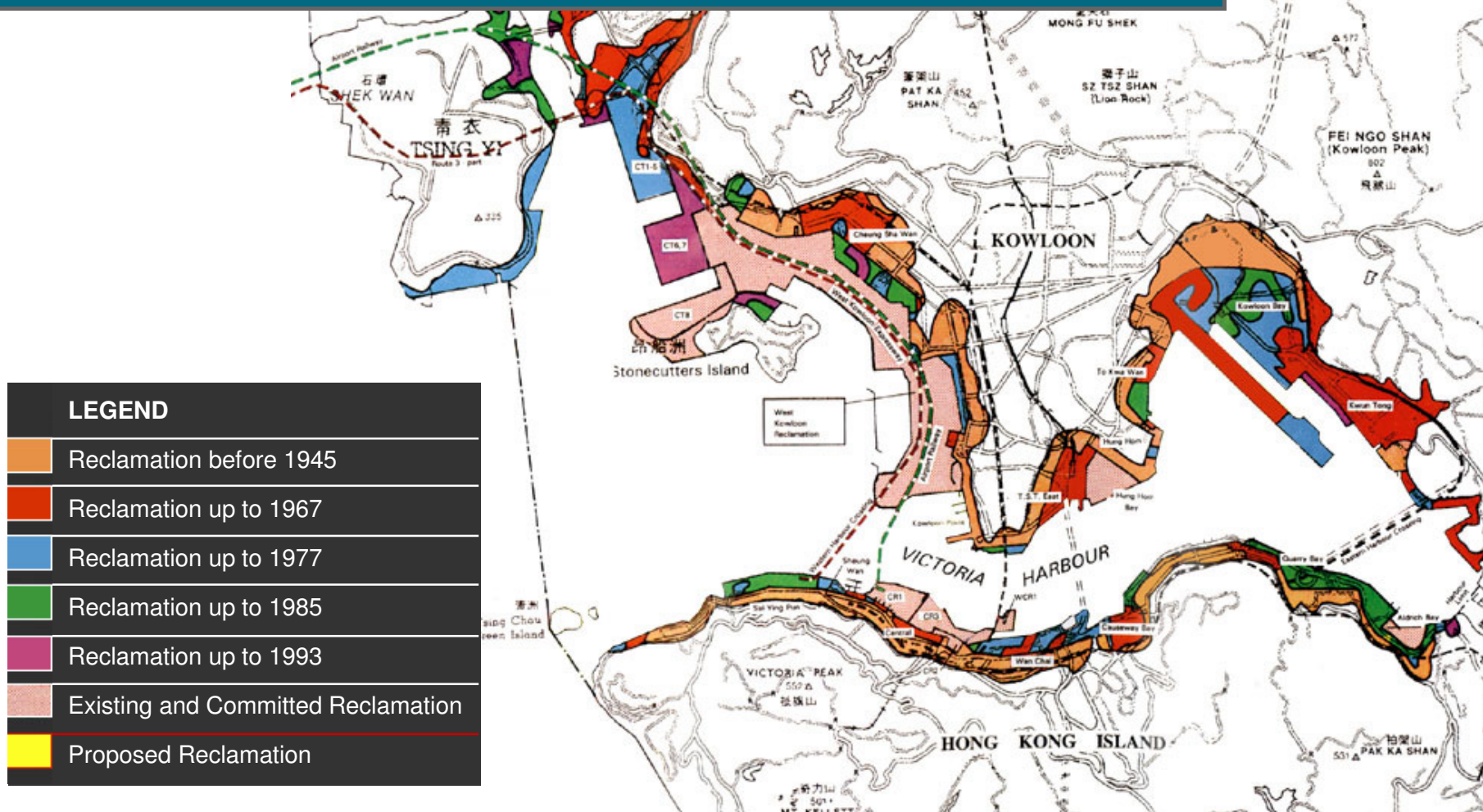


## Reclamation in the Victoria Harbour – Reclamation up to 1993

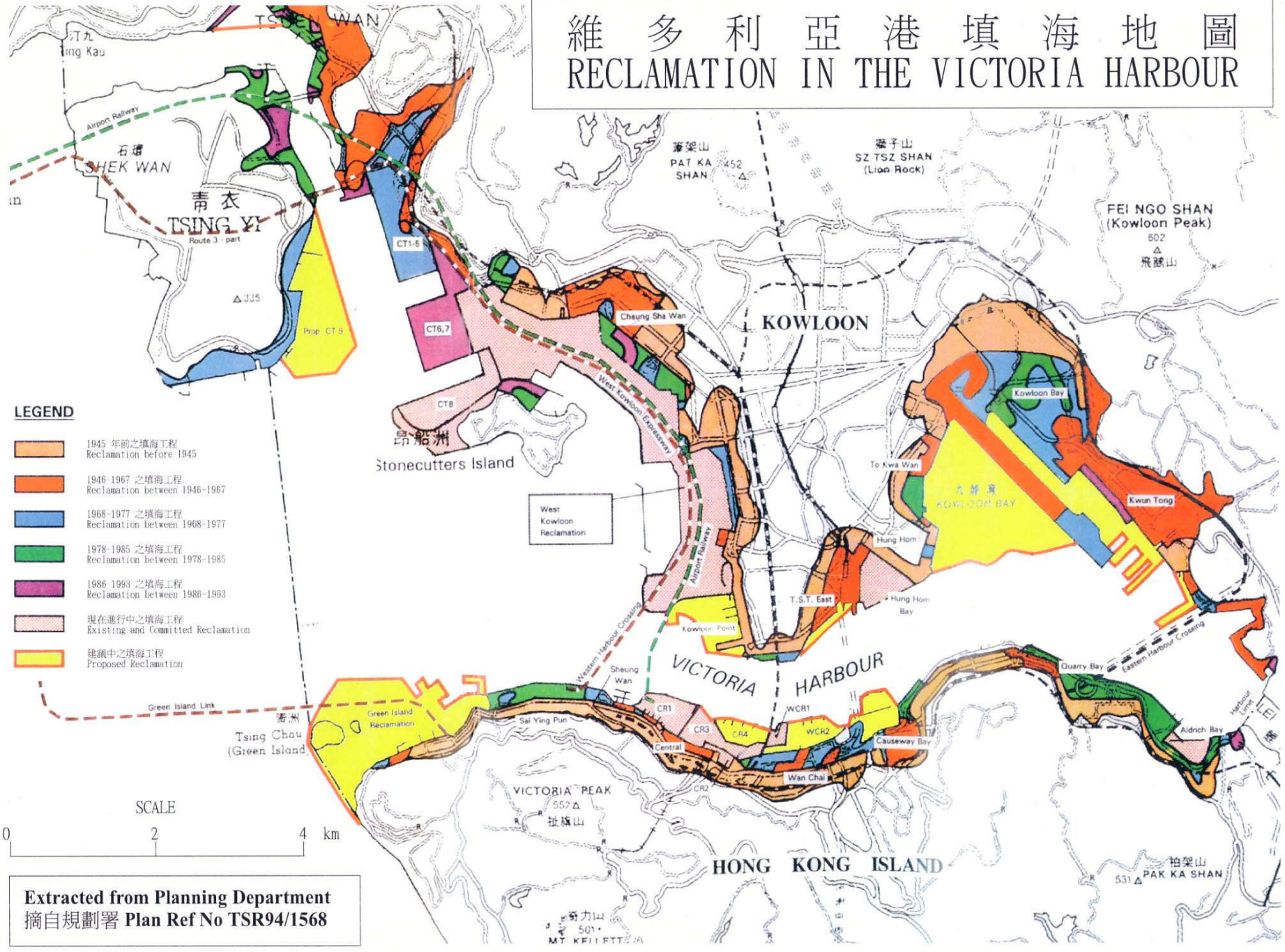




## Reclamation in the Victoria Harbour – Existing and Committed Reclamation



# 維多利亞港填海地圖 RECLAMATION IN THE VICTORIA HARBOUR



## LEGEND

- 1945 年前之填海工程  
Reclamation before 1945
- 1946-1967 之填海工程  
Reclamation between 1946-1967
- 1968-1977 之填海工程  
Reclamation between 1968-1977
- 1978-1985 之填海工程  
Reclamation between 1978-1985
- 1986-1993 之填海工程  
Reclamation between 1986-1993
- 現在進行中之填海工程  
Existing and Committed Reclamation
- 建議中之填海工程  
Proposed Reclamation

SCALE



Extracted from Planning Department  
 摘自規劃署 Plan Ref No TSR94/1568

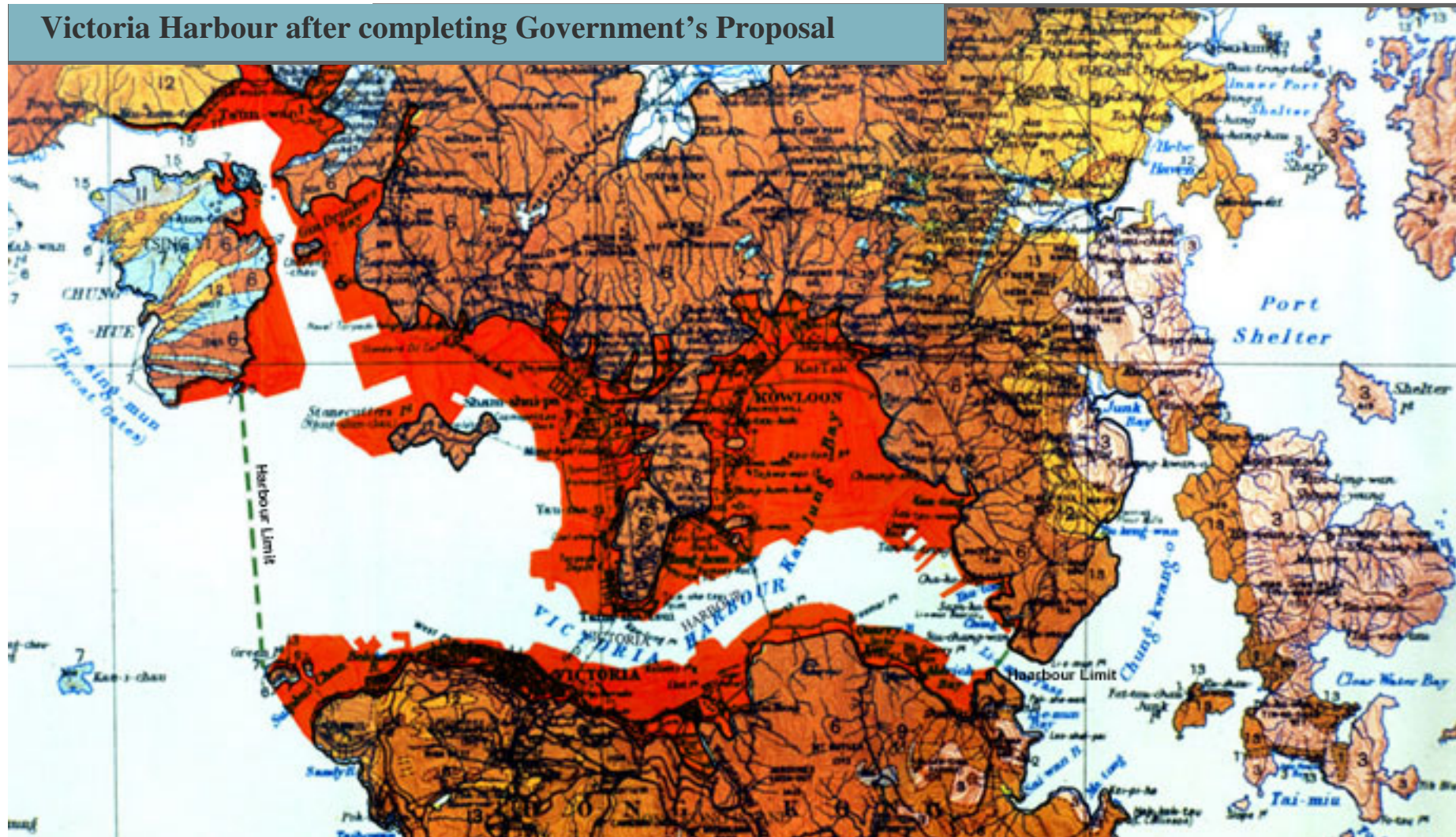


# Original Victoria Harbour





# Victoria Harbour after completing Government's Proposal





• **STOP RECLAMATION** •





## **Foreshore & Sea-bed (Reclamation) Ordinance**

- **Reclamation only have to satisfy Ordinance**
- **No right of public objections**
- **No condition or criterion**
- **No legal recourse to challenge**
- **Merely compensating persons with ‘an interest, right or easement’**
- **Reclamation not need approval by Town Planning Board**

## **Drafting the Protection of the Harbour Bill**

- **No precedent anywhere invented original expressions ‘special public asset’ and ‘natural heritage of Hong Kong people’**
- **Private member’s bill no charging effect**
- **Power of approving reclamation by Legislative Council**
- **Only to rely upon the law courts through judicial review**
- **Passed into law on 27<sup>th</sup> June 1997**

## CHAPTER 531

## PROTECTION OF THE HARBOUR

An Ordinance to protect and preserve the harbour by establishing a presumption against reclamation in the harbour.

*(Replaced 9 of 1998 s. 2. Amended 75 of 1999 s. 2)*

[30 June 1997]

**1. Short title**

This Ordinance may be cited as the Protection of the Harbour Ordinance.

**2. Interpretation**

In this Ordinance, unless the context otherwise requires—

“reclamation” (填海) means any works carried out or intended to be carried out for the purpose of forming land from the sea-bed or foreshore;  
*(Added 9 of 1998 s. 3)*

“relevant Ordinance” (有關條例) means—

- (a) the Foreshore and Sea-bed (Reclamations) Ordinance (Cap. 127);
- (b) the Cross-Harbour Tunnel Ordinance (Cap. 203)\*;
- (c) the Eastern Harbour Crossing Ordinance (Cap. 215);
- (d) the Mass Transit Railway (Land Resumption and Related Provisions) Ordinance (Cap. 276);
- (e) the Roads (Works, Use and Compensation) Ordinance (Cap. 370);
- (f) the Western Harbour Crossing Ordinance (Cap. 436); or
- (g) any other Ordinance under which reclamation is authorized or which otherwise provides for reclamation.

*(Amended 9 of 1998 s. 3; 75 of 1999 s. 3)*

**3. Presumption against reclamation in the harbour**

*(Amended 9 of 1998 s. 4)*

(1) The harbour is to be protected and preserved as a special public asset and a natural heritage of Hong Kong people, and for that purpose there shall be a presumption against reclamation in the harbour. *(Amended 75 of 1999 s. 4)*

(2) All public officers and public bodies shall have regard to the principle stated in subsection (1) for guidance in the exercise of any powers vested in them.

**4. Transitional**

(1) This Ordinance does not apply to any reclamation authorized under a relevant Ordinance before the commencement of this Ordinance. *(Amended 75 of 1999 s. 5)*

(2) The Protection of the Harbour (Amendment) Ordinance 1999 (75 of 1999) (“the Amendment Ordinance”) does not apply to any reclamation authorized under a relevant Ordinance before the commencement of the Amendment Ordinance. *(Added 75 of 1999 s. 5)*

SCHEDULE 1

*(Repealed 75 of 1999 s. 6)*



## **Harbour Ordinance – First Part**

Preamble – clearly sets out purpose to protect and preserve harbour against reclamation

Section 3(1) – directs that “the harbour is to be protected and preserved”

Section 3(2) – requires all public officer and public bodies to have regard to Ordinance

Town Planning Board must comply when it prepares outline zoning plans

## **Harbour Ordinance – Second Part**

Section 3(1) – elevates the legal status of harbour to ‘special public asset and natural heritage of Hong Kong people’

Legal standing – any member of the public can meet the requirement that applicant must have sufficient interest in subject matter

Memorandum of Incorporation – sets out special object(s) for Society to take action to protect the harbour

## **Harbour Ordinance – Third Part**

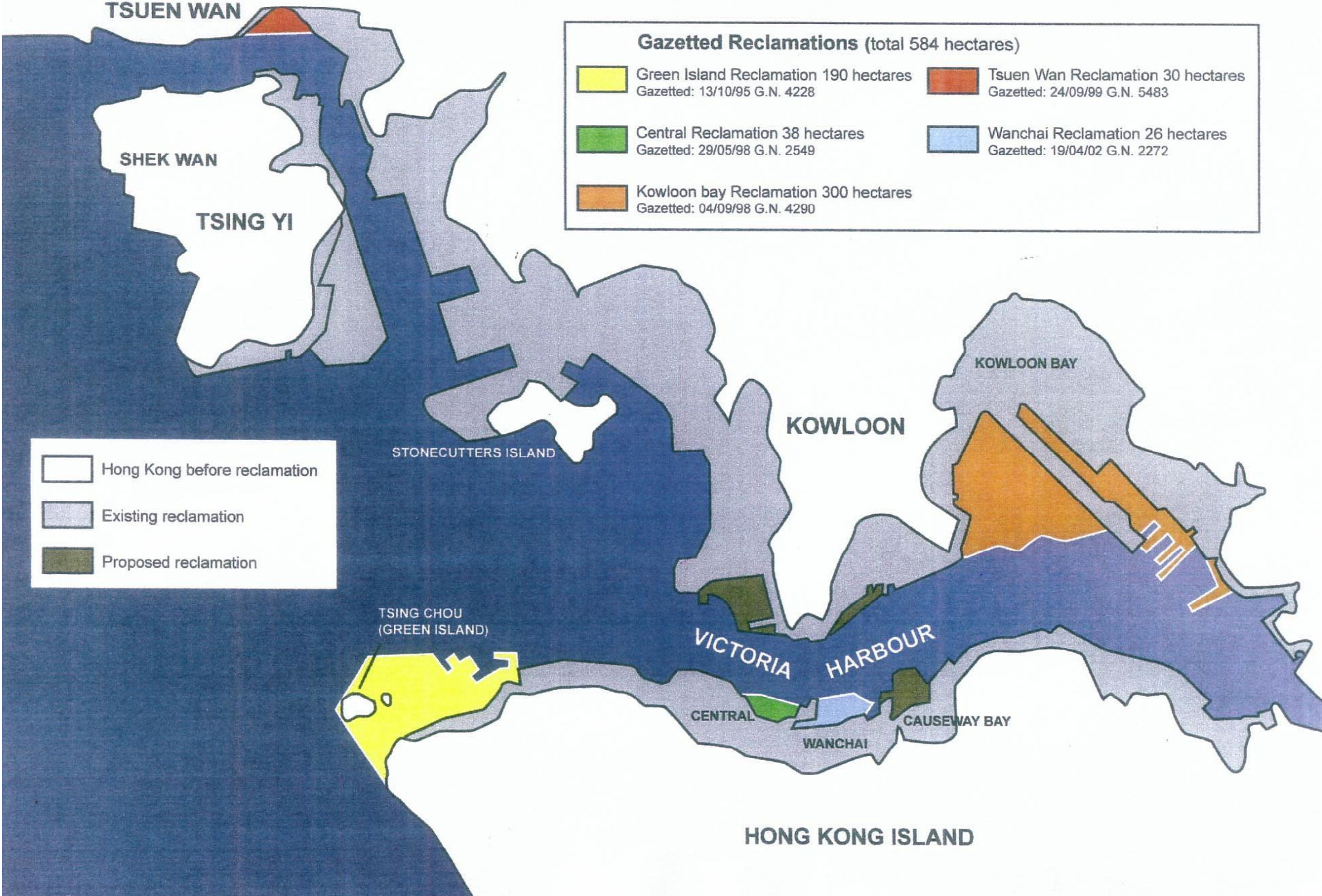
Prescribes legal presumption against reclamation

Burden of justifying reclamation is placed on proponent

Judicial review – to enforce Ordinance by testing justification



# RECLAMATIONS PROPOSED BY GOVERNMENT



### **Gazetted Reclamations (total 584 hectares)**



Green Island Reclamation 190 hectares  
Gazetted: 13/10/95 G.N. 4228



Tsuen Wan Reclamation 30 hectares  
Gazetted: 24/09/99 G.N. 5483



Central Reclamation 38 hectares  
Gazetted: 29/05/98 G.N. 2549



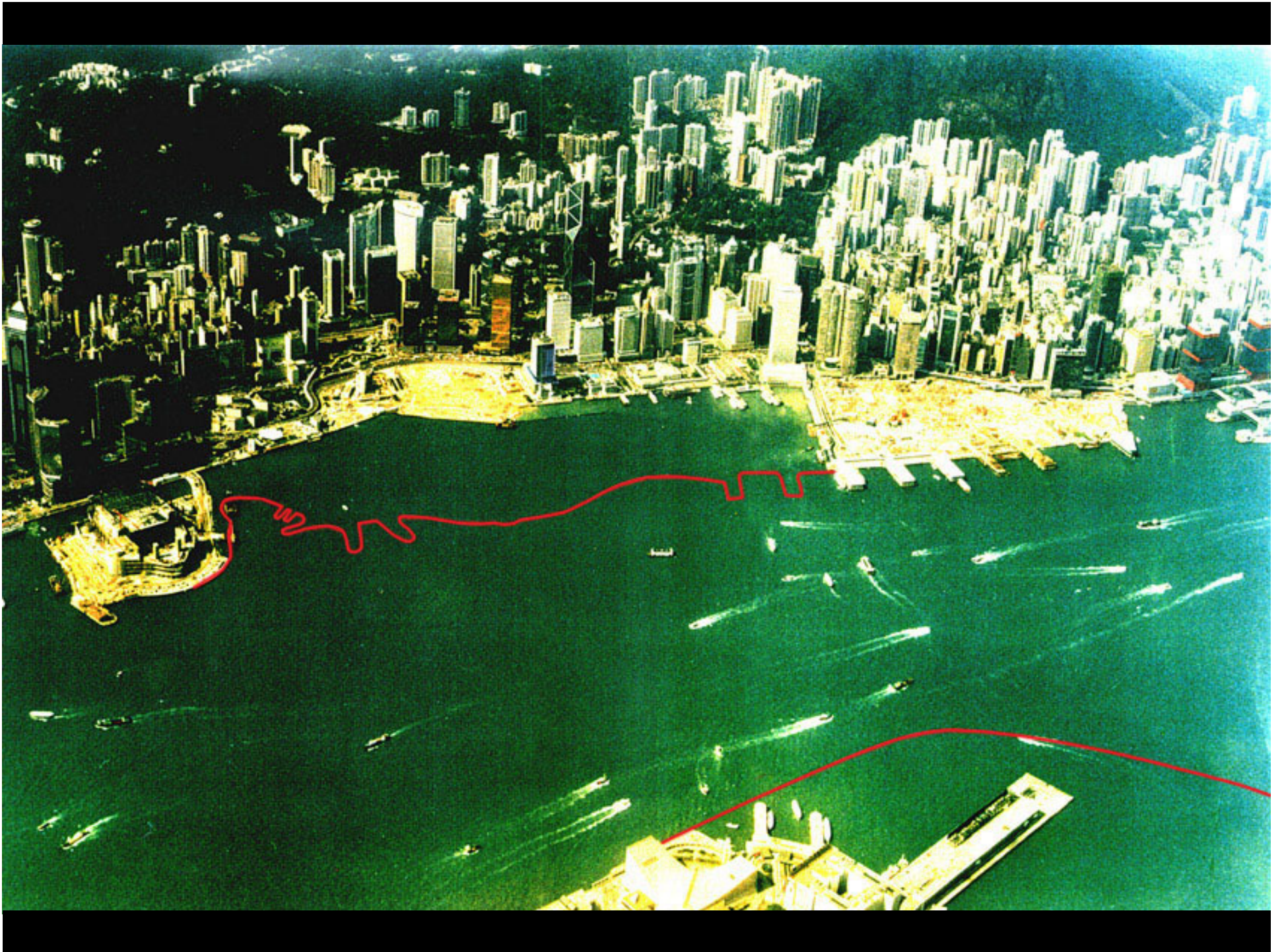
Wanchai Reclamation 26 hectares  
Gazetted: 19/04/02 G.N. 2272



Kowloon bay Reclamation 300 hectares  
Gazetted: 04/09/98 G.N. 4290

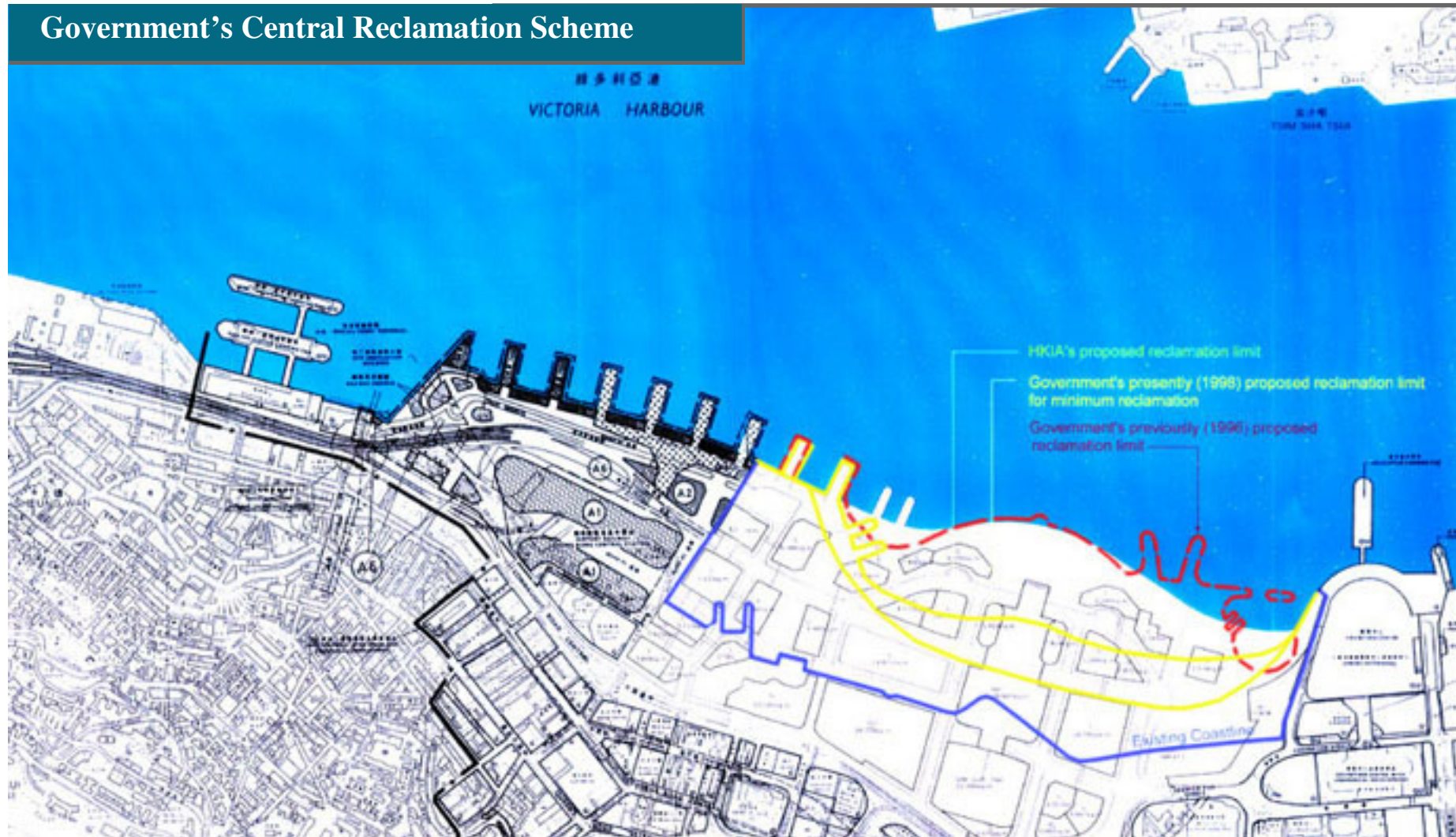
# **Proposed Central Reclamation**







# Government's Central Reclamation Scheme





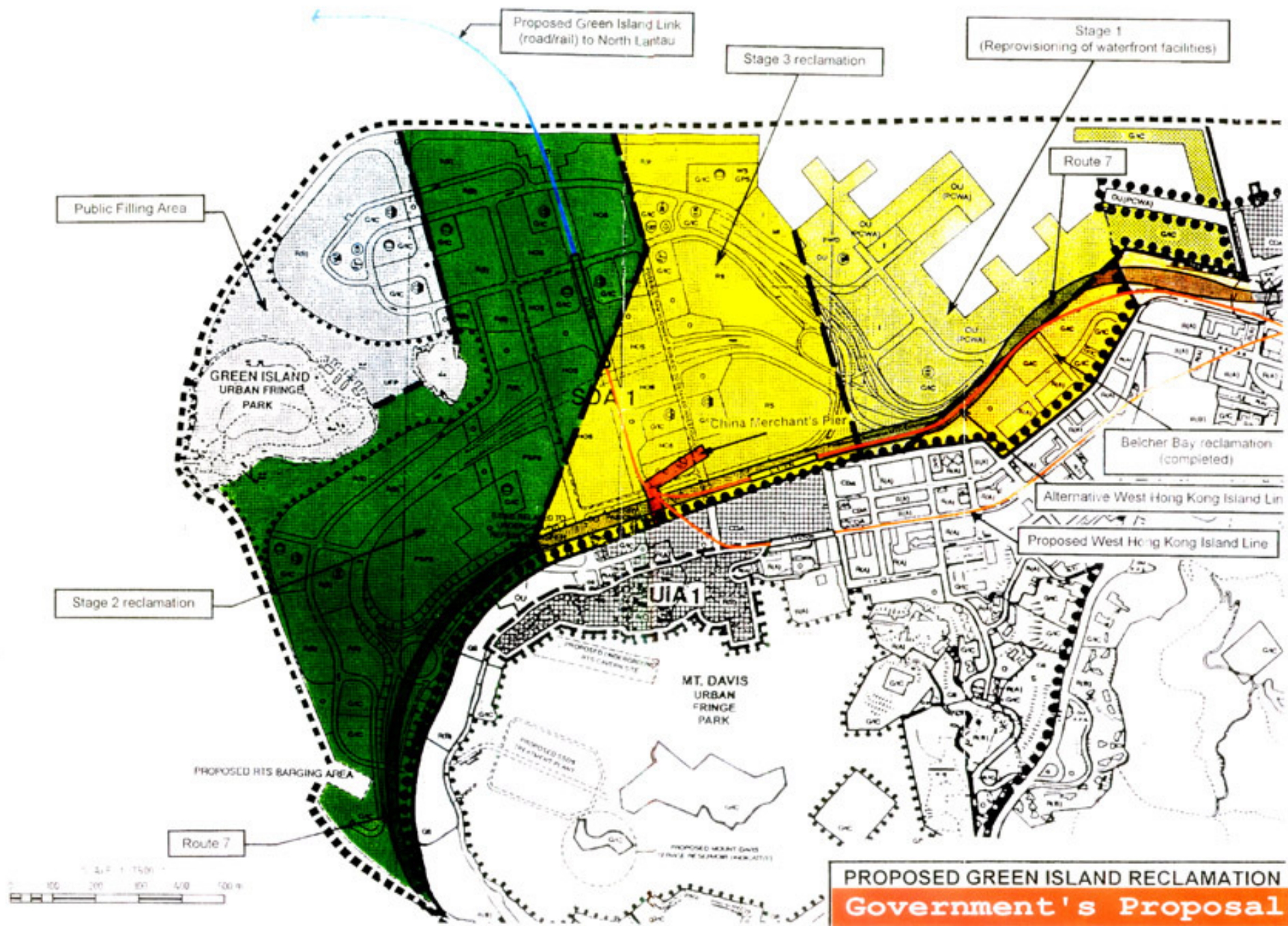




# **Proposed Green Island Reclamation**







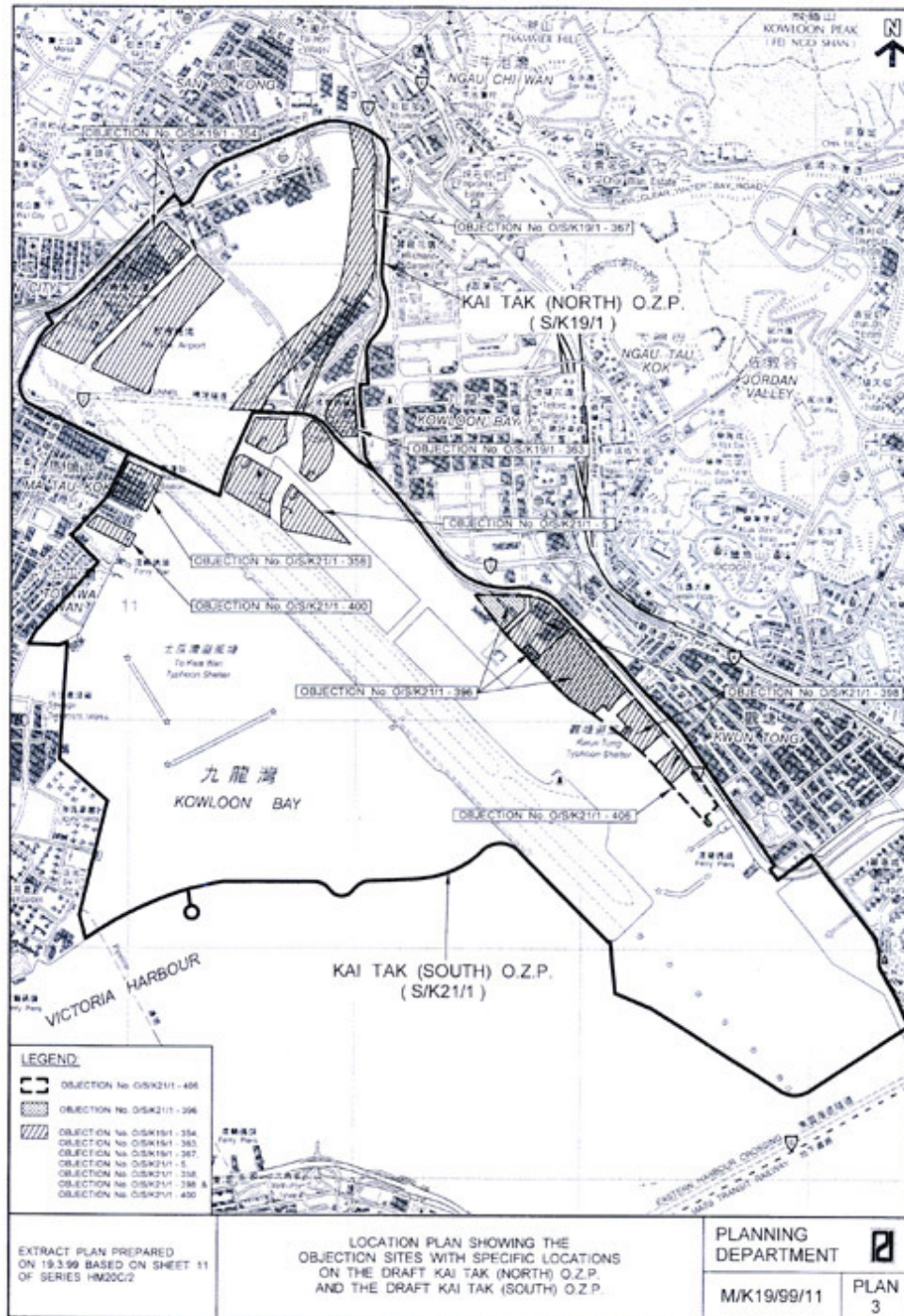
**PROPOSED GREEN ISLAND RECLAMATION**  
**Government's Proposal**



## Western Reclamation Development Plan

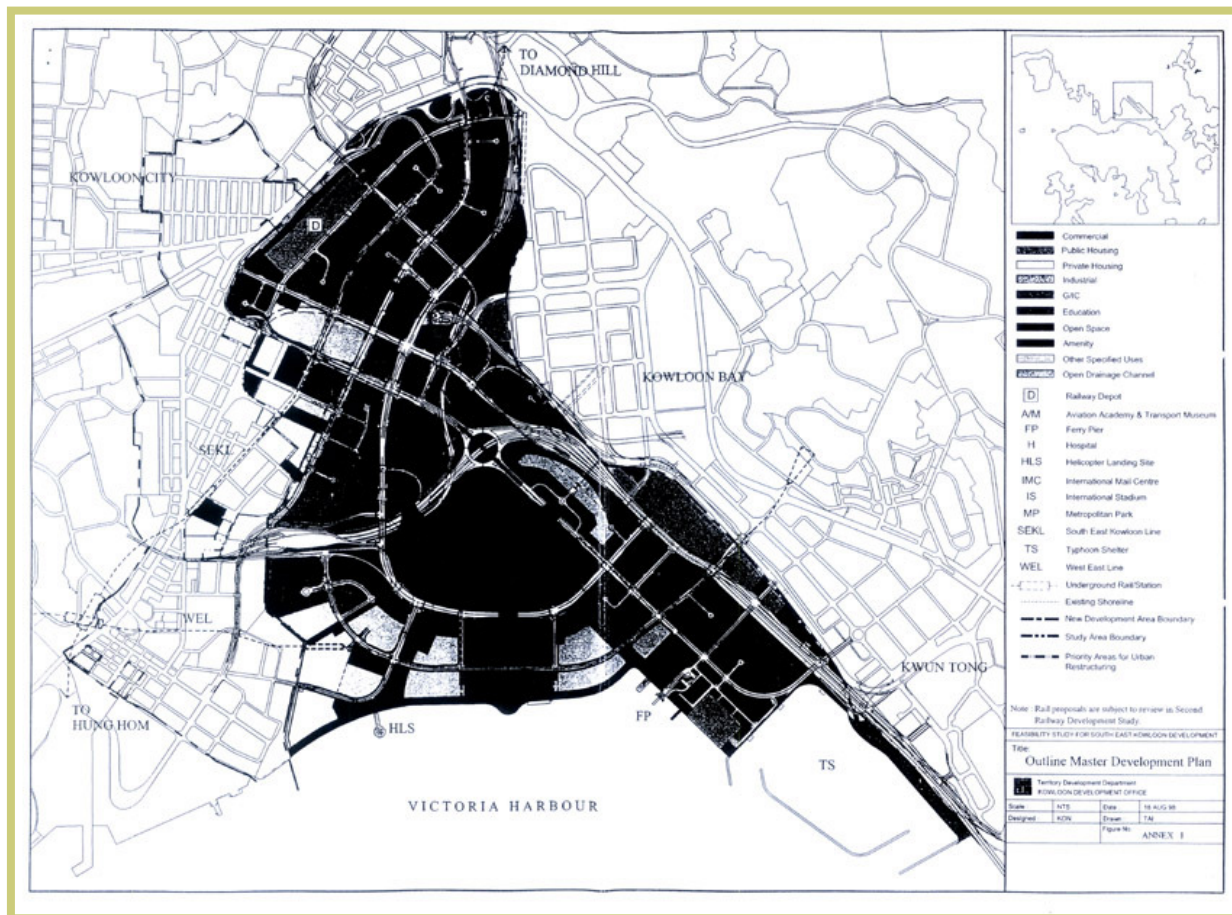


# **Proposed Kai Tak Reclamation**





# Proposed Kowloon Bay Reclamation



附件A  
Annex A



環保連接系統的建議走線圖  
Proposed EFLS Alignment Plan





# Proposed Wanchai Reclamation





Typhoon Shelter in Causeway Bay





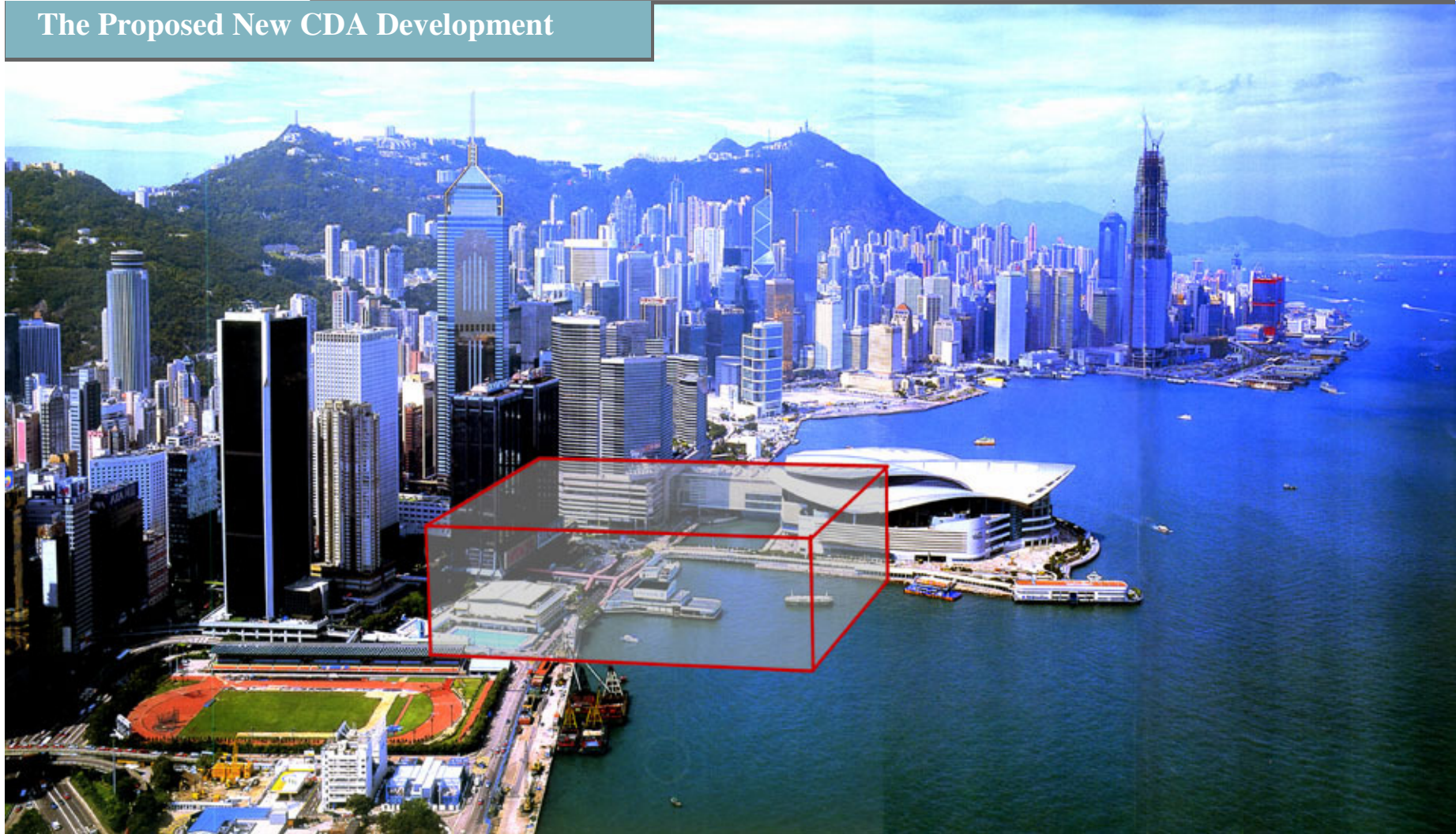








## The Proposed New CDA Development



**Society for Protection of the Harbour Ltd.**

**and**

**Town Planning Board [2003] 2 HKLRD 787**

**Three tests: (a) compelling overriding public need, (b) no reasonable alternative, (c) minimum impairment**

**Preferable or desirable - not sufficient**

**Each proposed reclamation should be individually assessed**

**Interpretation of s.3 as “No more than a compulsory material consideration which could be overridden by public benefits” was erroneous - the decision of Town Planning Board flawed as a matter of law**

**The Board failed to apply the three tests in approving the harbour park and promenade - decision “Wednesbury unreasonable”**

## **Three Grounds of Judicial Review**

**Illegality – misinterpreted, misunderstood or incorrectly applied the law**

**Irrationality – *Wednesbury* unreasonableness, no sensible person could have arrived at the decision**

**Procedural impropriety - failure to observe basic rules of natural justice, or procedural rules or to act with procedural fairness**



## **Summary Of Court of Final Appeal Judgment Interpretation of Protection of the Harbour Ordinance**

**Effect of Judgment** - The CFA pronounced on 9<sup>th</sup> January 2004 that the Town Planning Board had erred in law in the correct interpretation of the Harbour Ordinance; that the Board's decisions must be quashed; that the Wanchai Outline Zoning Plan must be remitted back to the Board for reconsideration; and that the Judgment applies to any reclamation proposal in the Harbour.

**Importance of Harbour** - The CFA pronounced that the Harbour is undoubtedly a central part of Hong Kong's identity. It is the heart of the metropolis and something extraordinary to be transmitted from generation to generation. Reclamation that had already taken place renders what remains of the Harbour even more precious and makes the need to protect and preserve it more important and compelling.

**Legislative Intention** - The Harbour Ordinance accords to the Harbour a unique legal status. There is a great public need to protect and preserve it having regard to its unique character. There must be preservation which means maintenance and conservation in its present state. It must be kept from harm, defended and guarded. Such a principle is strong and vigorous.

**Overriding Public Need Test** - The presumption prescribed by the Harbour Ordinance can only be rebutted by establishing an overriding public need for reclamation. Such need must be of greater public importance than the importance of the Harbour.



**Overriding** – means a compelling and present need which has the requisite force to prevail over the strong public need for protection and preservation

**Present** – means that the need must arise within a definite and reasonable time frame

**Public needs** – include economic, environmental and social needs of the community

**Minimum** – means not to go beyond what is required

**No Reasonable Alternative** – where costs, time and delay would be relevant

**Rebuttal of Presumption** - Each area proposed to be reclaimed must be justified. It is imperative that there shall be no reclamation unless the Overriding Public Need Test is satisfied. The Test is by its nature a demanding one and the burden to rebut the presumption is therefore a heavy one.

**Cogent & Convincing Materials** - Due to the demanding nature of the Test, it is not sufficient to incant the Test or just to pay lip service to it. The materials relied on must be cogent and convincing.



**Sliding scale of judicial review, intensity depending on the subject-matter of the decision**

**More generous interpretation in constitutional challenges , where it concerns a fundamental human right, whether the restriction is necessary between the means employed and the legitimate aim, heightened scrutiny of the decision**

**Whether the traditional standard of irrationality or a higher standard due to the unique legal status of the harbour would apply remained for future consideration**

**Must not be any undue delay in applying for judicial review, challenge should be promptly taken, three months rule is not as of right, courts have the discretion to refuse relief**

**Society for Protection of the Harbour Ltd.**

**and**

**Town Planning Board (No.2)**

**(2004) 7 HKCFAR 127**

**O.62 r.28(3) Rules of the High Court – court has wide discretion, can award costs on an indemnity basis where it thinks fit**

**Not limited to the conduct of the litigation, cases of abuse of process, ulterior motive, improper purpose**

**Underlying rationale not to punish the losing party, to indemnify the successful party, otherwise out of pocket, avoid element of unfairness**



**Town Planning Board  
and  
Society for Protection of the Harbour Ltd.  
[2004] 2 HKLRD 95**

- **Not confined to cases brought with an ulterior motive, for an improper purpose, or where there was some deception or underhand conduct on the part of the losing party**
- **Attributes of the parties, character of the proceedings, parties' conduct, circumstances leading to the litigation are all relevant**
- **Judge's discretion rightly exercised because proceedings to protect a public asset rather than to assert a private right; public interest in securing compliance with the law, resolution of fundamental legal issues; manifest public importance, Society's limited finances dependent on public donations**

## **Important Legal Precedent**

- **Decision of the highest court of the land, important legal precedent, persuasive authority in all Common Law jurisdiction**
- **Major social impact by removing disincentive**
- **The CFA Judgment is fair, successful litigant can recover indemnity costs, unsuccessful litigant will not be penalized in costs**
- **Contributes to the rule of law, unless the law is enforced vigorously even against government authorities, the law will be no more than merely words on paper**
- **Importance of CFA Judgment clearly demonstrated in subsequent cases**



2<sup>nd</sup> Wanchai Reclamation Case

“Temporary Reclamation”







## **Temporary Reclamation**

- **Revised Wanchai Reclamation Plan - four public consultation documents for the revised Wanchai Reclamation, reduced from the previous 26 hectares to 15 hectares, no mention of any temporary reclamation**
- **July 2007, the Government gazetted new proposal for reclamation, reference to ‘temporary reclamation works’ but no particulars was given**
- **Government claimed that public consultation was not necessary as ‘temporary reclamation’ was not subject to the Harbour Ordinance**

**Society for Protection of the Harbour Ltd.**

**and**

**Secretary for Justice [2008] 4 HKLRD 417**

**Government acting in error of the law that temporary reclamation works are not subject to the Ordinance**

**No distinction should be drawn between permanent and temporary reclamation**

**“Reclamation” defined as “any work carried out or intended to be carried out for the purpose of forming land from the sea-bed or foreshore”.**

**Must demonstrate an overriding public need to comply with Court of Final Appeal Judgment**

**Indemnity Costs was duly granted**



## **Conclusions**

**Raised the awareness of Hong Kong people about the importance of the harbour and the environment**

**The public have been encouraged to institute judicial reviews against the Government over environmental issues**

**What remains of the harbour has been saved, only 5% of the 584 hectares gazetted by the Government have been reclaimed**

**Instead of having just a narrow channel like a river, Hong Kong still has a harbour**

**Judicial Review is an effective means to control Government's actions and decisions**

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