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18 May 2001

Mrs Florence Lam  
Clerk to Panel  
Legislative Council  
(Fax: 2869 6794)

Dear Mrs Lam,

**LegCo Panel on Financial Affairs  
Permanent Accommodation for the HKMA**

Thank you for your letter of 4 May, in which you asked for a copy of the legal advice referred to by the Financial Secretary in his letter of 12 April 2001 to the Chairman of the Panel.

The Hong Kong Monetary Authority (HKMA) has its own dedicated legal team to advise on matters relating to the management of the Exchange Fund and other operations of HKMA. As the Controller of the Exchange Fund, the Financial Secretary asked to see the advice of the Authority's legal adviser on the legality of using the Exchange Fund for the purchase of office building for HKMA, and he referred to that legal advice in his letter of 12 April. I understand you have separately approached HKMA for the same legal advice and they will provide you with a copy.

You also said in your letter that members had asked if the Financial Secretary had sought the advice of the Department of Justice on the legality of charging the expenditure for the purchase of permanent office accommodation to the Exchange Fund, and suggested that the Administration consider inviting the Department of Justice to present their views on the matter if this step had not been taken. As mentioned in the preceding paragraph, the Financial Secretary normally relies on the advice of the legal adviser of the HKMA on matters relating to management of the Exchange Fund. However, in the light of members' suggestion, we have invited the Department of Justice to give their view on the matter. We will revert to you when we have received the Department of Justice's view.

Yours sincerely,

(Howard Lee)  
Administrative Assistant to

Financial Secretary

c.c. SFS  
CE/MA

Tel: (852) 2878 1806  
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18 May 2001

Mrs Florence Lam  
Clerk to Panel  
Legislative Council  
Legislative Council Building  
8 Jackson Road  
Central  
Hong Kong

Dear Mrs Lam,

**Legco Panel on Financial Affairs**  
**Permanent Accommodation for the HKMA**

Thank you for your letter of 4 May 2001. I now enclose the following documents:

- (a) the legal advice on the proposed acquisition of permanent office accommodation for the HKMA dated 9 April 2001;
- (b) further legal advice given on the same subject dated 27 April 2001; and
- (c) a response to the points raised in your Legal Adviser's paper entitled "Legal Adviser's view on the interpretation of Section 6(a) of the Exchange Fund Ordinance (Cap.66)".

We confirm that we have no objection to your making these documents available to the media and to the public, and on the Legislative Council's Website.

Yours sincerely,

( Eddie Yue )  
for Chief Executive  
Hong Kong Monetary Authority

Encl.

CE

**IFC2**

1. The Financial Secretary proposes to use the Exchange Fund to acquire permanent premises for the MA in IFC2. I am asked to advise whether this is a lawful use of the Fund. In my opinion, for the reasons given below, it is.
2. I am instructed that there are a number of reasons underlying the decision to acquire these premises. It is helpful in this context to look at some of those briefly.

Permanent Accommodation

3. At present, HKMA's principal offices are held on leasehold from commercial landlords in a building closely identified with an American commercial bank which has signage rights.
4. The Basic Law requires HKSARG to manage the Exchange Fund and HKMA is charged with the day-to-day task of doing so. HKMA has been delegated with functions relating to the stability of the currency and of the financial and monetary systems under the EFO. The HKMA, as banking supervisor, is also responsible for the stability of the banking system. It is therefore considered imperative that HKMA is able to conduct uninterrupted operations in the discharge of these functions, particularly at times of financial or economic volatility.
5. Unfortunately, HKMA has no security of tenure beyond the expiry of a given lease/option in its present premises. Its uninterrupted operation from 3 Garden Road is therefore dependent on the business plans of a commercial landlord. I am instructed that all of the other monetary authorities and central banks HKMA has dealings with are housed in permanent accommodation over which they, and not commercial landlords, exercise control. In this respect, HKMA is out of step with current international practice. In such circumstances, it therefore appears reasonable that the FS should take this opportunity to acquire permanent premises for the HKMA to operate from, particularly if they are situated in the central business district close to institutions which HKMA's operations directly affect and with whom HKMA frequently communicates and cooperates in the exercise of its strategic and investment powers.

### Forward Planning

6. It is necessary as part of its forward strategic planning for HKMA to ensure there is sufficient office space available to cater for the possible expansion of its range of activities. At present, I am instructed, issues such as the regulation of exempt dealers, the provision of a measure of consumer protection for bank customers and the creation of DIS are foreseeable areas of additional work requiring additional space. There may be others. It therefore seems reasonable for FS to acquire premises that allow room for expansion which is reasonably foreseeable, particularly if space which is unused initially can be let on commercial terms until it is required.

### Security

7. It has been apparent for some time that there are security issues which cannot be adequately addressed in HKMA's present accommodation :
  - (a) HKMA receives a significant number of distinguished guests from the Mainland and overseas during the course of the year. Whilst they are in HKMA's premises, their security is HKMA's responsibility. At present, they can only enter HKMA's offices through a public concourse and by the use of public lifts. It is not possible to provide adequately for their security in these circumstances and there is little that can be done to alter that position given the configuration and commercial/public use of 3 Garden Road.
  - (b) The HKMA has a substantial quantity of confidential and market sensitive information electronically stored at 3 Garden Road. The CMU is situated there and Exchange Fund assets are managed from that address. In all cases, electronic storage and communication systems are used. It is not possible to separate HKMA's cabling and telephone lines from those of the other tenants in its present premises. In IFC2, it will be possible to have all of the wiring and telephone lines laid in dedicated trunking. Further, as the top of IFC2 is not overlooked by or on a level with other buildings, the possibility of "tapping" is, we are advised, substantially reduced.

It seems reasonable for FS to take the opportunity to acquire premises in which these security concerns may be addressed.

### Cost

8. I am instructed<sup>1</sup> that over time, the acquisition of permanent premises is likely to be significantly cheaper than continuing to pay rent to commercial landlords. In acquiring the premises in IFC2, the FS will acquire an asset for the Exchange

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<sup>1</sup> Agenda Item 5, EFAC 109/00.

Fund which is likely to maintain its value or increase in value and result in a saving of rent. It therefore appears that in terms of conserving and enhancing the Exchange Fund, the acquisition of permanent premises is a prudent option.

9. However reasonable or prudent the acquisition may be, it must be squarely within FS' powers under the EFO. Section 6 of the EFO provides that,

*“There shall be charged to the Fund –*

- (a) the emoluments payable to, and other staff costs relating to, the persons employed in connection with the purposes of the Fund, ...”*

Section 5A(4) of the EFO provides that,

*“... the Monetary Authority and persons appointed to assist him under subsection (3) shall be regarded, for all purposes, as employed in connection with the purposes of the Fund.”*

It follows that all of the staff costs of the MA and his staff are to be met from the Exchange Fund. Section 6(a) specifically identifies emoluments of staff (i.e. salaries, fees etc.) as one of the relevant types of “staff costs”. However, it specifically refers to “other staff costs” as well. There is no definition of the word “costs” in the Ordinance. Therefore, regard should be had to its common usage<sup>2</sup>,

*“What must be given in order to acquire, produce or effect something, the price to be paid for a thing.”*

In my opinion, the accommodation of staff and their equipment is a “staff cost” within the meaning of section 6(a) and may be met out of the Fund provided such expenditure is reasonable and in good faith.

10. Under section 3(1) of the EFO, the Exchange Fund is placed under the control of the FS,

*“... and shall be used primarily for such purposes as the Financial Secretary thinks fit affecting either directly or indirectly the exchange value of the currency of Hong Kong and for other purposes incidental thereto.”*

HKMA conducts operations designed to effect the exchange value of the currency directly or indirectly. The term “indirect” has no specific meaning in the statute, therefore regard should be had to its current usage<sup>3</sup>

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<sup>2</sup> Shorter Oxford Dictionary.

<sup>3</sup> Shorter Oxford Dictionary.

*“... not acting or exercised with direct force.”*

Providing accommodation and systems to enable HKMA to conduct such operations from a permanent base, in my opinion, could be argued to be an example of the indirect use of the Fund for currency stability purposes. However, section 3(1) also empowers FS to use the Fund for purposes “incidental” to the primary strategic purposes of affecting the foreign exchange value of the currency. Again, the term “incidental” is to be construed by reference to its common usage<sup>4</sup>,

*“Occurring as something casual or of secondary importance; not directly relevant to; following on as a subordinate circumstance ... Of an expense or charge : incurred apart from the main sum disbursed.”*

Even if it were argued that the expense of accommodation and secure systems did not directly or even indirectly affect the currency’s exchange value, the provision of the same in order to provide a base from which operations may be conducted must, in my view, be “incidental” to those strategic purposes provided that the FS acts reasonably in incurring the same.

11. Under section 3(1A), the FS may additionally (and subordinately)

*“... with a view to maintaining Hong Kong as an international financial centre, use the Fund to maintain the stability and the integrity of the monetary and financial systems of Hong Kong.”*

Again, as the FS has appointed MA pursuant to the Ordinance to conduct operations relating to these strategic purposes, it is within his vires, provided he acts reasonably and in good faith, to provide accommodation and systems to enable HKMA to do so.

S M Gannon  
GC  
9 Apr 2001

cc DCE(B), DCE(M), DCE(D)

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<sup>4</sup> Shorter Oxford Dictionary.



Ref : LM (2) to LD/HKMA Pt. 16

CE

**IFC2**

1. I refer to our meeting earlier in the week when I reported upon my conversation with LA/LegCo. My note for file of that telephone conversation with him is enclosed for your information. Since our meeting, my colleagues and I have reviewed the EFO in the light of the Basic Law to see whether there is a case for the proposition that the EFO is inconsistent with the Basic Law. Following that exercise, I wish to confirm that I remain of the opinion that the EFO is consistent with the Basic Law and that an argument to the contrary is likely to fail.
2. We have prepared a skeleton argument, a copy of which is attached, which encapsulates the reasons underlying my advice. I propose to keep this on file for use should that become necessary.

S M Gannon  
GC  
27 Apr 2001

cc ED(CS), DGC1

Note for File

23.4.2001 am

**IFC2**

1. Jimmy Ma, Legal Adviser to LegCo telephoned me. He said that following the LegCo Panel Meeting the previous Friday, he now had to prepare a paper on the issue of FS' vires to make the purchase. He said he was not sure what he was going to be saying in the paper. However, he said he would be looking at how Article 73(3) of the Basic Law may affect FS' decision.

2. This provisions provides that,

“The Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions :

... (3) To approve taxation and public expenditure; ...”

He said that given this broad provision, the question was whether Exchange Fund expenditure should be subject to LegCo's “approval”.

3. My response was that Article 113 of the BL stipulates that the Exchange Fund shall be both managed and controlled by the Government of the Region. In the Basic Law, the Legislative Council is not part of “Government”. Control and management relates to the stewardship and use of the Fund and the concept of the Legislative Council having the power to approve any use of the Fund is inconsistent with the plain words of Article 113.

4. The LA/LegCo said that the Government only manages and controls the Fund primarily for regulating the exchange value of the Hong Kong Dollar. He seemed to be suggesting that there may be some argument that as the use of the Fund in the present case is for staff costs, that falls outside Article 113. My response was that the word “primarily” does not mean that the Fund is exclusively for exchange rate regulation and the emoluments and other staff costs payable are in respect of persons employed in connection with the purposes of the Fund. I pointed out the provisions of section 3(1A) and section 3(1B) of the EFO. He noted them. I also made the point that the Exchange Fund Ordinance has been the subject of the “localisation” exercise and that this is the first suggestion that it might be inconsistent with the Basic Law. The LA/LegCo referred to Article 160 which allows for laws to be discovered to be in contravention of the law following the resumption of sovereignty and he said it was arguable that we should be looking at

this Ordinance to see if it is not inconsistent with the Basic Law given the provisions of Article 73(3).

5. We had a further short debate in which I stressed that a specific and clear provision such as Article 113 is intended to be given effect to and is not ousted by a general provision relating to taxation and the expenditure of tax raised. We agreed he would keep in close contact as his researches proceed.

S M Gannon  
GC  
26 Apr 2001

## SKELETON ARGUMENT

### Background

- Article 160 of the Basic Law provides that “Upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People’s Congress declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law...”
- Pursuant to the “Decision of the Standing Committee of the National People’s Congress on Treatment of the Laws Previously in Force in Hong Kong in Accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China”, the Exchange Fund Ordinance (“EFO”) was adopted as the law of the Hong Kong Special Administrative Region.
- It follows that there is a presumption that the EFO is consistent with the Basic Law as the Standing Committee of the National People’s Congress (“NPC”) has not declared it to be in contravention of the Basic Law.
- The remaining question is whether the EFO has now been discovered to be in contravention of the Basic Law such that it needs to be amended or ceases to have force in accordance with the procedure as prescribed by the Basic Law.
- Specifically, the question is whether the EFO is in contravention of Article 73(3) of the Basic Law. Article 73(3) provides that -  
*“The Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions:*  
...  
*(3) To approve taxation and public expenditure”.*
- The argument is that as the Basic Law requires public expenditure to be approved by the Legislative Council, the absence of such a mechanism in the EFO is in contravention of the Basic Law.

### Power to determine consistency

- As to who has the power to determine whether the EFO is in contravention of Article 73(3) of the Basic Law, our view is that only the Hong Kong courts and/or the Standing Committee of the NPC have the power to do so<sup>1</sup>. The Hong Kong

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<sup>1</sup> Article 158 of the Basic Law provides that -  
*“The power of interpretation of this Law shall be vested in the Standing Committee of the National People’s Congress.*  
*The Standing Committee of the National People’s Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.*

courts are entitled, when adjudicating cases, to hold that a particular piece of legislation is in contravention of the Basic Law provided that they are acting within the parameters of Article 158. The likely situation that a Hong Kong court would be asked to determine whether the EFO is in contravention of the Basic Law is when a person aggrieved by the decision to purchase office accommodation seeks a declaration from the court that the decision to purchase is without the approval of the Legislative Council and is therefore ultra vires.

- In any case, the Legislative Council is not empowered to decide whether a particular piece of legislation is in contravention of the Basic Law.

### **Approach to the interpretation of the Basic Law**

- Before we proceed to analyse whether the above argument holds water, it is worthwhile outlining the principles laid down by the Court of Final Appeal<sup>2</sup> in construing the Basic Law as follows:

*“It is generally accepted that in the interpretation of a constitution such as the Basic Law a purposive approach is to be applied. The adoption of a purposive approach is necessary because a constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the constitution and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in light of the context, context being of particular importance in the interpretation of a constitutional instrument.*

...

*As to the language of its text, the courts must avoid a literal, technical, narrow or rigid approach. They must consider the context. The context of a particular provision is to be found in the Basic Law itself as well as relevant extrinsic materials including the Joint Declaration. Assistance can also be gained from any traditions and usages that may have given meaning to the language used.”*

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*The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People’s Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.*

*The Standing Committee of the National People’s Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law.”*

<sup>2</sup> Ng Ka Ling & others v. The Director of Immigration (FACV No. 14 of 1998).

### **Argument 1 : Context of Article 73(3) : Public Finance v Monetary Affairs**

- As pointed out by the Chief Justice, Mr Andrew Li, in the above judgment, “*in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in light of the context, context being of particular importance in the interpretation of a constitutional instrument*”.
- Article 73(3) deals with the general power of the Legislative Council to approve taxation and public expenditure.
- The Basic Law does not provide a definition of “public expenditure”. Its meaning has to be ascertained from other provisions of the Basic Law.
- We are of the view that Section 1 of Chapter V of the Basic Law is the relevant part. Section 1 deals with “Public Finance, Monetary Affairs, Trade, Industry and Commerce”.
- We are of the further view that the relevant provisions regarding public finance and monetary affairs are helpful in ascertaining the meaning of “public expenditure”.
- Articles 106 to 108 and 113 of the Basic Law provide that:

*“Article 106*

*The Hong Kong Special Administrative Region shall have independent finances. The Hong Kong Special Administrative Region shall use its financial revenues exclusively for its own purposes, and they shall not be handed over to the Central People’s Government. The Central People’s Government shall not levy taxes in the Hong Kong Special Administrative Region.*

*Article 107*

*The Hong Kong Special Administrative Region shall follow the principle of keeping expenditure within the limits of revenues in drawing up its budget, and strive to achieve a fiscal balance, avoid deficits and keep the budget commensurate with the growth rate of its gross domestic product.*

*Article 108*

*The Hong Kong Special Administrative Region shall practise an independent taxation system. The Hong Kong Special Administrative Region shall, taking the low tax policy previously pursued in Hong Kong as reference, enact laws on its own concerning types of taxes, tax rates, tax reductions, allowances and exemptions, and other matters of taxation.*

...

*Article 113*

*The Exchange Fund of the Hong Kong Special Administrative Region shall be managed and controlled by the government of the Region, primarily for regulating the exchange value of the Hong Kong dollar.”*

- From the above, one can see that :
  - (1) Articles 106 – 108 place obligations on “The Hong Kong Special Administrative Region” instead of the “government of the Region”;
  - (2) Article 113 provides that the obligation to manage and control the Exchange Fund is on the “government of the Region” instead of “The Hong Kong Special Administrative Region”;
  - (3) note that Article 59 of the Basic Law provides that “The Government of the Hong Kong Special Administrative Region shall be the executive authorities of the Region”.
- The combined effect of Articles 73(3), 106 – 108 and 113 is that the phrase “taxation and public expenditure” as referred to in Article 73(3) relates exclusively to the fiscal aspect, as opposed to the monetary aspect, of the Government receipts and expenditure because Articles 106 – 108 have not restricted the right of Legislative Council to participate whereas Article 113 clearly provides that the Exchange Fund shall be “managed” and “controlled” by the executive authorities of the HKSAR. It is for this reason Chapter V distinguishes between “Public Finance” and “Monetary Affairs”. Further the term “manage” refers to the administration of the Fund, that is to say, its use or its expenditure. Control denotes the overall command of the Fund. Control is the function of its regulating body. The power of another body to “approve” the use of the Fund is inconsistent with these concepts of management and control.
- In addition, the Basic Law was drafted with reference to the pre-handover system of administration of Hong Kong to ensure that there would be a smooth transaction.
- Under the Public Finance Ordinance, which was enacted prior to the coming into effect of the Basic Law, the annual estimates of the revenue and expenditure of the Government are required to be laid before the Legislative Council.<sup>3</sup> Besides, the heads contained in the estimates of expenditure for a financial year are required to be included in an Appropriation Bill which are introduced into the Legislative Council at the same time as the estimates.<sup>4</sup> These functions have broadly been entrenched in Article 73(3) when read in conjunction with Articles 106 – 108 of the Basic Law.
- However, there was no equivalent requirement under the EFO prior to the enactment of the Basic Law.

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<sup>3</sup> Section 5(1) of the Public Finance Ordinance.

<sup>4</sup> Section 6(1) of the Public Finance Ordinance.

- Article 113 of the Basic Law in our view enshrines in our constitution the government’s exclusive right to control and manage the EFO which is outside the jurisdiction of the Legislative Council. Although Article 113 specifies the primary use of the Exchange Fund, its secondary and incidental uses are governed by the terms of the EFO. Regardless of whether the Exchange Fund is used for its primary or secondary purposes the intention of the drafters of the Basic Law was to place the authority for its use in the hands of the executive, subject to the various checks and balance set out in the EFO and subject of course to the inherent supervisory jurisdiction of the courts.
- It is interesting to note that even under the EFO, the role of the Exchange Fund Advisory Committee is advisory thus leaving the control and management of the Fund in the hands of the Financial Secretary for the HKSARG.

### **Argument 2 : General v Specific**

- Additionally, Article 73(3) deals with the general power of Legislative Council to approve taxation and public expenditure. This provision is importing the general.
- Article 113 of the Basic Law provides that the Exchange Fund shall be managed and controlled by the government of the Region. “Managed” and “controlled” are given no special meaning in the Basic Law. If the government is to control and use the Exchange Fund, it should not be necessary to obtain anyone’s approval. These words should be given their literal meaning.
- It is a rule of construction that whenever there is a general enactment in a piece of legislation which, if taken in its most comprehensive sense, would override a particular enactment in the same piece of legislation, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of that piece of legislation to which it may properly apply (see para 1486 of Halsbury’s Laws of England (Vol. 44(1))). The common law including the rules relating to the interpretation of legislation are grandfathered in Article 8 of the Basic Law.<sup>5</sup>
- It follows that Article 73(3) which is a general provision should not override Article 113 but rather should be subject to it.

### **Argument 3 : “Prior” approval**

- Even if the above analysis is not accepted, it is strongly arguable that the Legislative Council has “approved” the use of the Exchange Fund for the purposes stipulated in the EFO provided the procedures under the EFO are complied with as it enacted the EFO. Note that Article 73(3) does not provide how this power of

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<sup>5</sup> Article 8 of the Basic Law provides that -  
*“The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.”*



“approval” of the Legislative Council is to be exercised. The word “approval” is defined in the New Shorter Oxford Dictionary to mean “Confirm authoritatively; sanction”. Prior approval is a form of approval.

- Another example of prior-approval is section 29 of the Public Finance Ordinance which enables the Legislative Council by resolution to provide for the establishment of funds for specified purposes to which moneys appropriated and received are credited. Also, moneys may be expended from the funds under the authority of a funds warrant issued by the Financial Secretary. Once these funds are set up, the Legislative Council does not approve every expenditure out of these funds. However, this is not to say that Legislative Council has not approved the expenditure.

### **Conclusion**

- For the reasons given above, the use of the Exchange Fund for the purchase of the office is intra vires the Basic Law as well as the EFO. Also, the provisions of the EFO are consistent with the Basic Law and were intended to have the force of law in Hong Kong.

CE

**LegCo Panel on Financial Affairs  
Permanent Accommodation for the HKMA**

1. I am asked to advise in relation to the paper dated 2 May 2001 (“Paper”) prepared by the Legal Adviser to the Legislative Council Secretariat (“Legal Adviser”).

**Introduction**

2. The Legal Adviser states that,

*“... to seek to include within the meaning of “staff costs” the purchase of a multi-billion dollar permanent office accommodation raises the issue of whether such an interpretation is in contravention of the Basic Law since it effectively nullifies the Legislative Council’s constitutional function of approving public expenditure under Article 73(3).”<sup>1</sup>*

He also says,

*“... against the constitutional requirement that public expenditure has to be approved by the Legislative Council under the Basic Law and the fact that the use of the Exchange Fund to purchase office accommodation for a government department is no doubt public expenditure, the reliance on section 6(a) to justify charging that expenditure to the Exchange Fund would need very strong and compelling arguments. To simply argue that “staff costs” means staff-related costs and therefore covers the cost of accommodating staff may not be conclusive.”<sup>2</sup>*

The Legal Adviser is not advising that the Financial Secretary’s (“FS”) use of the Exchange Fund (“Fund”) to purchase office accommodation is *ultra vires*. However, in view of the Legislative Council’s role in respect of public expenditure generally under the Basic Law, he is asking some questions about the way in which the Exchange Fund Ordinance (“EFO”) and the Basic Law interact.

3. The starting point in this discussion should be Article 160 of the Basic Law, which provides that *“Upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People’s*

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<sup>1</sup> See paragraph 15 of the Paper.

<sup>2</sup> See paragraph 16 of the Paper.

*Congress declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law...”. Pursuant to the “Decision of the Standing Committee of the National People’s Congress on Treatment of the Laws Previously in Force in Hong Kong in Accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China”, the EFO was adopted as the law of the Hong Kong Special Administrative Region (“HKSAR”). It follows that there is a presumption that the EFO is consistent with the Basic Law as the Standing Committee of the National People’s Congress has not declared it to be in contravention of the Basic Law.*

4. Article 73(3) of the Basic Law provides that the Legislative Council shall have the power,

*“To approve taxation and public expenditure”.*

However, I assume that the statement in paragraph 7 of the Paper that this power is “without qualification” is not intended to be taken literally. There are other Articles that impact on Article 73(3), for example,

- (a) Article 106 provides that the HKSAR has independent finances and that its financial revenues are to be used “... *exclusively for its own purposes, and they shall not be handed over to the Central Peoples’ Government.*” It would therefore be unlawful for the Legislative Council to approve the use of the HKSAR’s revenues for projects of the Central Peoples’ Government (“CPG”).
- (b) Article 107 requires the HKSAR to “... *follow the principle of keeping expenditure within the limits of revenues in drawing up its budget, and strive to achieve a fiscal balance, avoid deficits and keep the budget commensurate with the growth rate of its gross domestic product.*”
- (c) Article 108 requires the HKSAR to take the low tax policy previously pursued in Hong Kong as a reference when enacting fiscal legislation.

I do not imagine that it is suggested that the Legislative Council could approve taxation and public expenditure without regard to these restrictions. Similarly, it must go without saying that there can be no approval of public expenditure for purposes inconsistent with those National Laws applicable in the HKSAR or for purposes inconsistent with the CPG’s responsibility for foreign affairs relating to the HKSAR.

### **Context of Article 73(3) – Public Finance vs. Monetary Affairs**

5. This illustrates the importance of construing provisions of the Basic Law with due regard to their context and specific provisions which may, in a particular instance,

limit a statement of general principle. The importance of context has been clearly expounded by the Court of Final Appeal<sup>3</sup>. It has been held that,

*“It is generally accepted that in the interpretation of a constitution such as the Basic Law a purposive approach is to be applied. The adoption of a purposive approach is necessary because a constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the constitution and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in light of the context, context being of particular importance in the interpretation of a constitutional instrument.*

...

*The purpose of a particular provision may be ascertainable from its nature or other provisions of the Basic Law or relevant extrinsic materials including the Joint Declaration.*

*As to the language of its text, the courts must avoid a literal, technical, narrow or rigid approach. They must consider the context. The context of a particular provision is to be found in the Basic Law itself as well as relevant extrinsic materials including the Joint Declaration. Assistance can also be gained from any traditions and usages that may have given meaning to the language used.” (emphasis added)*

6. Bearing in mind what the court has said, I have the following observations on the interpretation of Article 73(3). That Article relates to the approval of “taxation and public expenditure”. The Basic Law contains no specific definition of “public expenditure”. We can however look to the Basic Law as a whole for some guidance as to what it means in this context. Article 64 requires the government of the HKSAR, amongst other things, to obtain approval from the Legislative Council for “taxation and public expenditure”. The phraseology used in the two Articles is identical.
7. Chapter V Section 1 is relevant. It deals with “Public Finance, Monetary Affairs, Trade, Industry and Commerce”. The provisions regarding public finance and monetary affairs are helpful in ascertaining the meaning of “public expenditure”. As appears above, Article 106 is concerned with “financial revenues” and the levying of “taxes”. Article 107 is concerned with the principle of keeping “expenditure” within the limits of “revenues” when the HKSAR draws up its budget. It is concerned with the attempt to achieve fiscal balance. Article 108 refers to the HKSAR’s independent taxation regime and the HKSAR’s power to enact taxation law. In each of these Articles, the focus of the language is

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<sup>3</sup> Ng Ka Ling (an infant) & Anor v Director of Immigration [1999] 1 HKC 291, 325-6.

expenditure related to the fiscal as opposed to the monetary aspect of government's receipts and expenditure. Articles 106-108 impose obligations on "The Hong Kong Special Administrative Region" as opposed to the "government of the Region". Article 73(3) embeds the Legislative Council's role prior to the resumption of sovereignty in relation to the collection of taxation and its expenditure from the general revenue. In contrast, Articles 109-113 which are concerned with monetary matters impose obligations and confer powers on the government of the HKSAR/Region i.e. the executive authorities of the HKSAR as opposed to the HKSAR. Article 59 provides that "*The Government of the Hong Kong Special Administrative Region shall be the executive authorities of the Region.*" The Legislative Council and the "government of the Region" are treated as separate entities throughout the Basic Law (e.g. Article 64 above).

8. Article 109 requires the government to provide the legal and economic environment for the HKSAR to remain an international financial centre. Article 110 requires the government to formulate monetary and financial policies, to safeguard the free operation of financial business and financial markets and to supervise them. Article 111 gives the government the authority to issue currency and requires that it is backed by a 100 per cent reserve fund. It empowers the government to authorise note-issuing banks in a manner consistent with the object of maintaining the stability of the currency. Article 112 prohibits foreign exchange control policies within the HKSAR and requires the government to safeguard the free flow of capital into, within and out of the HKSAR. Article 113 specifically relates to what is and was before the resumption of sovereignty a discrete government fund separate from the general revenue. Article 113 provides that,

*"The Exchange Fund of the Hong Kong Special Administrative Region shall be managed and controlled by the government of the Region, primarily for regulating the exchange value of the Hong Kong dollar."*

This unambiguously vests both management and control of the Fund in the "government of the Region". All of these powers, including those conferred by Article 113 relate to the HKSAR's monetary policy. The Fund is an instrument of monetary policy and therefore it is logical that reference to the government's powers in respect of the same should be in this part of Chapter V.

9. Article 113 makes no reference to the use of the Fund whether by expenditure or otherwise that is dependent on the receipt of tax revenues. Given that there is a clear distinction between fiscal and monetary activities, it is logical that the title to Chapter V distinguishes between "Public Finance" and "Monetary Affairs". If the two were intended to be synonymous, such a distinction would not be necessary.
10. The term "manage" in Article 113 refers to the administration of the Fund, that is to say, its use. "Control" denotes the overall command of the Fund. "Control" is the function of the Fund's regulating body. The concept of another body having power to approve the use of the Fund is, therefore, inconsistent with the powers of management and control conferred on the executive if one gives the words of Articles 113 their plain meaning. The conferring of powers on the "government"

in Article 113 is consistent with the policy of giving the “government” charge of “monetary” matters in Articles 109-113 inclusive.

### **The Joint Declaration**

11. The Basic Law was drafted with reference to the system of administration which existed prior to the resumption of sovereignty to ensure a smooth transition. The Court of Final Appeal has held<sup>4</sup> that the Sino-British Joint Declaration on the Question of Hong Kong (“the Joint Declaration”) can serve as an aid to the interpretation of the Basic Law. Section V of Annex 1 of the Joint Declaration deals with finance including budget, taxation and public expenditure. That section relates to the fiscal aspect of government receipts and expenditure. In contrast, section VII of Annex 1 of the Joint Declaration deals separately with the monetary system i.e., the monetary and financial systems operating prior to the resumption of sovereignty. The section provides that “...*The monetary and financial systems previously practised in Hong Kong ... shall be maintained.*” Section VII of Annex I at 104 of the Joint Declaration provides expressly that “*The Exchange Fund shall be managed and controlled by the Hong Kong Special Administrative Region Government, primarily for regulating the exchange value of the Hong Kong dollar.*”
12. Chapter V of the Basic Law reflects this distinction made in the Joint Declaration. Articles 106 – 108 deal with public finance and preserve the principles laid down in Part V of Annex 1 of the Joint Declaration. Articles 109 – 113 deal with monetary affairs and reflect Section VII of Annex 1 of the Joint Declaration. Thus, as the Fund was a discrete fund under the exclusive management and control of the Hong Kong Government before 1 July 1997, there is a presumption that this is to continue after the resumption of sovereignty. This approach is consistent with the theme of continuity in the Basic Law identified by the Court of Appeal in *HKSAR v Ma Wai Kwan David & Ors*<sup>5</sup>. Mr Justice Chan, in the first judgment regarding the Basic Law following the resumption of sovereignty, made the following statement,

*“The Basic Law is not only a brainchild of an international treaty, the Joint Declaration. It is also a national law of the PRC and the constitution of the HKSAR. It translates the basic policies enshrined in the Joint Declaration into more practical terms. The essence of these policies is that the current social, economic and legal systems in Hong Kong will remain unchanged for 50 years. The purpose of the Basic Law is to ensure that these basic policies are implemented and that there can be continued stability and prosperity for the HKSAR. Continuity after the change of sovereignty is therefore of vital importance.”<sup>6</sup>*

I would argue that this places the burden of establishing that the use of the Fund today is subject to the Legislative Council’s approval under Article 73(3) as

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<sup>4</sup> Ng Ka Ling (an infant) & Anor v Director of Immigration [1999] 1 HKC 291, 326.

<sup>5</sup> [1997] 2 HKC 315.

<sup>6</sup> Ibid, 323.

“public expenditure”, on those who suggest such a change in its control and management has been effected by the Basic Law.

13. Under the Public Finance Ordinance, which was enacted prior to the coming into force of the Basic Law, the annual estimates of the revenue and expenditure of the government are required to be laid before the Legislative Council.<sup>7</sup> In addition, the heads contained in the estimates of expenditure for a financial year are required to be included in an Appropriation Bill which is introduced into the Legislative Council at the same time as the estimates.<sup>8</sup> These functions have broadly been entrenched in Articles 73(2) and 73(3) when read in conjunction with Articles 106-108 of the Basic Law.
14. However, there was no equivalent requirement under the EFO prior to the enactment of the Basic Law. The only reference to the Legislative Council was and is in section 3(5). Under that provision, the Council may set the aggregate maximum limit on borrowing for the account of the Fund that may be secured on the general revenue - not on the Fund. This is consistent with the Legislative Council’s functions generally in relation to the general revenue.
15. Article 113 refers to the government’s management and control of the Fund “primarily” for regulating the currency’s exchange value. It does not say that the Fund can only be used by the government exclusively for the purpose of regulating the currency’s exchange value and that any secondary use must be approved by the Legislative Council as “public expenditure”. Giving Article 113 its plain meaning, it contemplates use of the Fund for both primary and secondary purposes provided for in the EFO prior to and since the resumption of sovereignty. The intention of the drafters of the Basic Law was clearly to place the authority for the use of the Fund in the hands of the executive, subject to the various checks and balances set out in the EFO and subject, of course, to the inherent supervisory jurisdiction of the courts.

### **General vs. Specific Provisions**

16. Article 73(3) deals with the general power of the Legislative Council to approve taxation and public expenditure. This provision is importing the general. As stated in Article 113 of the Basic Law, the Fund shall be managed and controlled by the “government of the Region”. If the government is to control and manage the Fund, how can it exercise those functions if it is subject to the approval of another body? Surely, that body would be the controller/manager. The words used in Article 113 are unambiguous and should be given their plain meaning.
17. The common law, including the rules relating to the interpretation of legislation are “grandfathered” by Article 8 of the Basic Law. It is a rule of statutory interpretation that whenever there is a general enactment in a piece of legislation which, if taken in its most comprehensive sense, would override a particular

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<sup>7</sup> Section 5(1) of the Public Finance Ordinance.

<sup>8</sup> Section 6(1) of the Public Finance Ordinance.

enactment in the same piece of legislation, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of that piece of legislation to which it may properly apply<sup>9</sup>. It follows that Article 73(3), which is a general provision, should not override Article 113.

### **Ultimate Approval by Legislative Council**

18. Let us assume for the sake of argument that the above analysis is not accepted. In that case, it is strongly arguable that the Legislative Council has “approved” the use of the Fund by the FS for the purposes stipulated in the EFO provided the procedures under the EFO are complied with, as it enacted the EFO and may amend or replace the same in accordance with the Basic Law. Article 73(3) does not provide how this power of “approval” of the Legislative Council is to be exercised. The common usage of the word “approve” is recorded as meaning “*Confirm authoritatively; sanction*”<sup>10</sup>. Prior approval is a form of approval.
19. Another example of prior approval, other than by the enactment of statute is to be found in section 29 of the Public Finance Ordinance, which enables the Legislative Council by resolution to provide for the establishment of funds for specified purposes to which moneys appropriated and received are credited. Also, moneys may be expended from funds under the authority of a funds warrant issued by the FS. Once these funds are established, the Legislative Council does not generally approve every individual expenditure from these funds. However, this is not to say that the Legislative Council has not approved the expenditure.
20. As mentioned by the Legal Adviser in paragraph 7 of the Paper, “... *it should be accepted that if an enactment should empower a designated person to incur public expenditure, that enactment would not contravene the Basic Law if the Legislative Council retains the ultimate control of the public expenditure in question.*” As the Legislative Council passed the EFO (including all subsequent amendments) and has power to amend the EFO in a manner consistent with the Basic Law, the Legislative Council retains the “ultimate control” over the use of the Fund.

### **Accountability to the Legislative Council**

21. Article 64 of the Basic Law provides that,

*“The Government of the Hong Kong Special Administrative Region must abide by the law and be accountable to the Legislative Council of the Region: it shall implement laws passed by the Council and already in force; it shall present regular policy addresses to the Council; it shall answer questions raised by members of the Council; and it shall obtain approval from the Council for taxation and public expenditure.”*

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<sup>9</sup> See para 1486 of Halsbury’s Laws of England, Vol. 44(1).

<sup>10</sup> The New Shorter Oxford English Dictionary.



22. In paragraph 9 of the Paper, the Legal Adviser states that “... it would be quite legitimate for the Legislative Council to ask the government questions on the management and control of the Exchange Fund as one means to hold the government accountable.” I am instructed that the government, acting on its own initiative, has been keeping the Legislative Council informed of the acquisition. The Chief Executive of the Hong Kong Monetary Authority has attended meetings of the Legislative Council Panel on Financial Affairs to brief members on the progress of the acquisition and to answer members’ questions.

### **Section 6(a)**

23. The Legal Adviser has queried the FS’ reliance on section 6(a) of the EFO. Section 6 of the EFO provides that,

*“There shall be charged to the Fund –*

- (a) the emoluments payable to, and other staff costs relating to, the persons employed in connection with the purposes of the Fund, ...”.*

Section 5A(4) of the EFO provides that,

*“... the Monetary Authority and persons appointed to assist him under subsection (3) shall be regarded, for all purposes, as employed in connection with the purposes of the Fund.”*

It follows that all of the staff costs relating to the Monetary Authority (“HKMA”) and his staff are to be met from the Fund. Section 6(a) specifically identifies emoluments of staff (i.e. salaries, fees etc.) as one of the relevant types of “staff costs” which are to be met from the Fund. However, it specifically refers to “other staff costs” as well. There is no definition of the word “costs” in the EFO. Therefore, regard should be had to its common usage,

*“What must be given in order to acquire, produce, or effect something; the price (to be) paid for a thing.”<sup>11</sup>*

24. Staff costs can take a variety of forms including the cost of accommodating staff and their equipment – the cost of providing appropriate physical space from which they can conduct operations designed to achieve the purposes for which they have been employed. The provision of equipment for staff would be another example. Staff training, to provide officers with the necessary information and skills to discharge their functions, and the cost of travel and accommodation for officers who must attend meetings connected with their duties overseas would be other examples. These costs relate to staff but are not emoluments, i.e. profits or gains arising in the hands of the staff from their employment. Section 6(a) draws the same distinction.

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<sup>11</sup> The New Shorter Oxford English Dictionary.

25. On the basis of the above, it is my opinion that the accommodation of staff and their equipment is a “staff cost” within the meaning of section 6(a) and may be met out of the Fund provided such expenditure is reasonable and is incurred in good faith.
26. I have received instructions from my clients on the reasoning behind the purchase of permanent accommodation. Briefly, the principal points are as follows:-
- (i) At present, the HKMA’s main offices are held on leasehold from commercial landlords in a building closely identified with an international commercial bank which has signage rights. The Basic Law requires the government of the HKSAR to manage the Fund and the HKMA is charged with the day-to-day task of doing so. The HKMA has been delegated with functions relating to the stability of the currency and of the financial and monetary systems under the EFO. The HKMA, as banking supervisor, is also responsible for the stability of the banking system. It is therefore considered imperative that the HKMA is able to conduct uninterrupted operations in the discharge of these functions, particularly at times of financial or economic volatility. Unfortunately, the HKMA has no security of tenure beyond the expiry of a given lease/option in its present premises. Its uninterrupted operation from 3 Garden Road and future plans for accommodation are therefore dependent on the business plans of a commercial landlord. All of the other monetary authorities and central banks the HKMA has dealings with are housed in permanent accommodation over which they exercise control. In this respect, the HKMA is out of step with current international practice. In such circumstances, it therefore appears reasonable that the FS should acquire permanent premises for the HKMA to operate from, particularly if they are situated in the central business district close to institutions which the HKMA’s operations directly affect and with whom the HKMA frequently communicates and cooperates in the exercise of its strategic and investment powers.
  - (ii) It is necessary as part of its forward strategic planning for the HKMA to ensure there is sufficient office space available to cater for the possible expansion of its responsibilities. At present, issues such as the regulation of exempt dealers, the provision of a measure of consumer protection for bank customers and the creation of a deposit insurance scheme are foreseeable areas of additional work requiring additional space. There may be others. It therefore seems reasonable for the FS to acquire premises that allow room for expansion which is reasonably foreseeable, particularly if space which is unused initially can be let on commercial terms until it is required for accommodating staff.
  - (iii) It has been apparent for some time that there are security issues which cannot be adequately addressed in the HKMA’s present accommodation:-
    - (a) the HKMA receives a significant number of distinguished guests from the Mainland and overseas during the course of the year.

Whilst they are in the HKMA's premises, their security is the HKMA's responsibility. At present, they can only enter the HKMA's offices through a public concourse and by the use of public lifts. It is not possible to provide adequately for their security in these circumstances and there is little that can be done to alter that position given the configuration and commercial/public use of 3 Garden Road; and

- (b) the HKMA has a substantial quantity of confidential and market sensitive information electronically stored at 3 Garden Road. The CMU which is connected to the RTGS payment system for banks is situated there and the Fund's assets are managed from that address. In all cases, electronic storage and communication systems are used. It is not possible to separate the HKMA's cabling and telephone lines from those of the other tenants in its present premises. In the new premises, it will be possible to have all of the wiring and telephone lines laid in dedicated trunking. Further, as the top of the new building is not overlooked by or on a level with other buildings, the possibility of "tapping" is, the HKMA is advised, substantially reduced.

It seems reasonable for the FS to take the opportunity to acquire premises in which these security concerns may be addressed.

- (iv) Over time, the acquisition of permanent premises is likely to be significantly cheaper than continuing to pay rent to commercial landlords. In acquiring the new premises, the FS will acquire an asset for the Fund which is likely to maintain its value or increase in value and result in a saving of rent. It therefore appears that in terms of conserving and enhancing the Fund, the acquisition of permanent premises is a prudent option.
27. In paragraph 5 of the Paper, the Legal Adviser suggests that "... *the term ["staff costs"] could be given a more restrictive meaning by confining the costs to expenditure which is payable because of a condition in a staff's contract of employment or is reasonably incidental to such condition.*" Section 6(a) contains no words imposing such a "restrictive" interpretation either expressly or impliedly. This is logical because a number of staff costs an employer has to meet may not arise as a term in contracts of employment enforceable by staff members against the employer. For example, training and the type of equipment provided to staff may not be the subject of rights enforceable by employees.
28. Further, section 19 of the Interpretation and General Clauses Ordinance provides that "*An Ordinance ... shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit.*" The "intent, meaning and spirit" of section 6(a) of the EFO can be ascertained from the following statement of the then Secretary for Monetary Affairs, when speaking at the Second Reading of the

Exchange Fund (Amendment) Bill 1992 (as quoted by the Legal Adviser in paragraph 13 of the Paper) :

*“The staff and operating costs of the Authority would be charged directly to the Exchange Fund instead of to the general revenue, thus taking the Authority outside the resource allocation constraints applicable to other parts of government”.*

29. In view of the plain words of section 6(a), section 19 and the above policy statement, it is difficult to support the argument that the term “other staff costs” could be given a more restrictive meaning than the plain words of section 6(a) import. It is clear that the legislative intent was to charge all of the costs of running the HKMA to the Fund whether they relate to emoluments or other staff costs and the EFO makes no distinction expressly or impliedly between costs of a capital nature or otherwise. I therefore respectfully disagree with the Legal Adviser’s views as stated in paragraph 15 of the Paper that *“Although it would seem more convenient if all the public expenditure relating to the operation of the Hong Kong Monetary Authority could be charged to the Exchange Fund, there is no clear provision in the Exchange Fund Ordinance allowing this to be so either expressly or by implication.”* There is a provision consistent with a clear policy statement that staff costs of all kinds are to be met from the Fund. Let us, however, assume for the sake of argument, that such a restrictive interpretation is correct. In that case, it could reasonably be argued that it is an implied condition of contracts of employment with the HKMA, that staff will be provided with suitable office accommodation from which they are expected to carry out their duties.
30. In paragraph 15 of the Paper, emphasis is placed on the cost of the proposed accommodation as a factor, apparently a substantial factor, in arguing that section 6(a) may not be used. Whether a given sum is too large to justify its expenditure under a statute is a relevant consideration only if it exceeds a restriction in the statute on the amount that can be used. Neither section 6 nor section 3 of the EFO contain any express words or words which may reasonably be inferred to restrict the use of the Fund by reference to a given sum of money. Of course, all expenditure must be incurred reasonably and in good faith. Contrast these provisions with section 3(4) of the EFO which imposes an unambiguous restriction by reference to an amount of borrowing secured on the general revenue. For these reasons, the FS may, in my view, rely on section 6(a) of the EFO.

### **Section 3(1)**

31. Whilst the discussion of this purchase has focused on section 6(a), I have also advised in relation to sections 3(1) and 3(1A) of the EFO.<sup>12</sup> Under section 3(1) of the EFO, the Fund is placed under the control of the FS,

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<sup>12</sup> Please see paragraphs 10 and 11 of my advice to you dated 9 April 2001.

*“and shall be used primarily for such purposes as the Financial Secretary thinks fit affecting, either directly or indirectly the exchange value of the currency of Hong Kong and for other purposes incidental thereto.”*

The HKMA conducts operations designed to effect the exchange value of the currency directly or indirectly. The term “indirect” has no specific meaning in the statute, therefore regard should be had to its current usage,

*“... not acting or exercised with direct force”.<sup>13</sup>*

Providing accommodation and systems to enable the HKMA to conduct such operations from a permanent base on an uninterrupted basis could reasonably argued to be an example of the indirect use of the Fund for currency stability purposes. However, section 3(1) also empowers the FS to use the Fund for purposes “incidental” to the primary strategic purpose of affecting the foreign exchange value of the currency. Again, the term “incidental” is to be construed by reference to its common usage,

*“Occurring as something casual or of secondary importance; not directly relevant to; following (up) on as a subordinate circumstance ... Of an expense or charge: incurred apart from the main sum disbursed.”<sup>14</sup>*

Even if it were argued that the expense of appropriate accommodation with secure systems did not directly or even indirectly affect the currency’s exchange value, the provision of the same in order to provide a base from which operations may be conducted must be “incidental” to that strategic purpose provided that the FS acts reasonably and in good faith in incurring the same.

### **Section 3(1A)**

32. Under section 3(1A), the FS may additionally (and subordinately)

*“... with a view to maintaining Hong Kong as an international financial centre, use the Fund as he thinks fit to maintain the stability and the integrity of the monetary and financial systems of Hong Kong.”*

Again, as the FS has appointed the HKMA pursuant to the EFO to conduct operations relating to these purposes, it is within his vires, provided he acts reasonably and in good faith, to provide accommodation and systems to enable the HKMA to do so.

33. In accordance with the EFO’s requirements to seek the advice of the Exchange Fund Advisory Committee (“EFAC”) in relation to the overall control of the Fund and not simply in relation to its use under section 3 as suggested by the Legal

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<sup>13</sup> The New Shorter Oxford English Dictionary.

<sup>14</sup> The New Shorter Oxford English Dictionary.

Adviser<sup>15</sup>, I am instructed that the FS sought advice from the EFAC on the pros and cons of the acquisition in the process of forming his opinion on the subject.

34. The analysis of the interaction of the EFO and the Basic Law set out above applies equally in the case of sections 3(1) and 3(1A) of the EFO. The power and control of the Fund and its use for the purposes set out in these sections is clearly vested in the “government of the Region” as required by Article 113.

### **Conclusion**

35. I regret the length of this advice and, in particular, the repetition of my earlier advices (herewith for reference). However, the Legal Adviser has raised a number of points that are probably best addressed in one paper. For the reasons given, it is my opinion that the use of the Fund by the FS to purchase the office accommodation in question is *intra vires* the EFO and that the EFO as presently drafted embodies the words and the spirit of the Basic Law on the control and management of the Fund.

Stefan M Gannon  
General Counsel  
18 May 2001

cc DCE(B), DCE(M), DCE(D), ED(CS)

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<sup>15</sup> See paragraph 13 of the Paper.