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GOVERNMENT SECRETARIAT
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18 December 2003

Mr. CHAN Siu-lun

By Fax [2727 7509] and By Post

Dear Mr. Chan,

Section 18(3) of the
Hong Kong Court of Final Appeal Ordinance ("the Ordinance")

I refer to your letter dated 21 October 2003 and my interim reply dated 23 October. Please accept our apologies for not being able to revert earlier. Our responses towards the issues raised by you are as follows:-

(I) Your comments on my letter dated 17 October 2003

Having revisited our correspondences, I believe that my letter dated 17 October have covered the outstanding issues that you have raised, though there may be differences in terms of wording. That said, I would like to respond on the following matters in the ensuing paragraphs.

(II) Your comments on my letter dated 27 August 2003

i. Whether section 18(3) of the Ordinance reflects the practice of the Privy Council

As stated in our previous letters, there is no express provision to allow decisions of the Judicial Committee to refuse special leave to appeal to be re-considered. This already implies that there can be no more appeal against the decision of the Judicial Committee, i.e. such decision is already final. We are therefore of the view that section 18(3) reflects the practice of the Privy Council.

ii. *Vasquez and O'Neil* case
You have relied on this case again to argue that a second petition to the Appeal Committee was heard. However, as stated in my letter of 27 August, Vasquez and O'Neil are the two defendants appealing against the Queen (the name of the case should be *Vasquez v. The Queen*), and they were granted special leave to appeal respectively. We do not agree that a second petition to the Appeal Committee was heard.

iii. Passage of the Hong Kong Court of Final Appeal Bill
We note the personal opinion of that particular Member, which you have quoted from the Hansard. However, we have not noted any other suggestion that the relevant provision is defective. The treatment of another ordinance that you have quoted is also irrelevant to the issue of whether section 18(3) of the Ordinance is defective.

The issue on the number of Court of Final Appeal ("CFA") judges to hear and determine appeals against the decisions of the Appeal Committee will be dealt with in the latter part of this letter.

(III) Drafting process of the Ordinance and the issue of finality

I would like to address these two issues together, since we have already taken into account relevant common law cases when drafting the Ordinance, and hence the usual drafting process was followed.

You have quoted again from the *Sennar* case as the authority on the principle of finality, that "finality does not depend on whether a decision can be appealed. A decision is final if it is one that cannot be varied, reopened or set aside by the court that delivered it or any other court of co-ordinate jurisdiction although it may be subject to appeal to a court of higher jurisdiction."

The above principle should be true in respect of the finality of a judgment. On the other hand, a judgment delivered by a court other than the Appeal Committee, for example, a judgment of the Court of Appeal, is also final, as it cannot be "varied, reopened or set aside" by the Court of Appeal itself, and "it may be subject to appeal to a court of higher jurisdiction".

The finality of a judgment is different from having a limit to, or the finality of, legal proceedings. The threshold for the Appeal Committee to grant leave is to establish that the question involved in the appeal is one which by reason of its great general or public importance, or otherwise, ought to be submitted to the CFA for decision. In cases where even this threshold cannot be passed, there should be no reason for the whole matter to be heard by the CFA again. Providing another layer of appeal for cases that are unlikely to be meritorious would contravene such principle

and does not serve the public interest.

We consider that the principle of finality laid down in the *Sennar* case is not inconsistent with the legal policy principle of having finality in legal proceedings, as they are two different matters.

(IV) Number of CFA judges to hear and determine appeals against the decisions of the Appeal Committee

We have repeated that the policy intention of having the Chief Justice and two permanent judges of the CFA, or three permanent judges of the CFA, to sit in the Appeal Committee, is that the decision of the Appeal Committee would represent in effect the majority view of the CFA. The policy intention is reflected in the Ordinance and is so complied with in the operation of the Appeal Committee.

(V) Whether the present mechanism is consistent with the constitutional guarantee of fair trial

The present mechanism should be consistent with the constitutional guarantee of fair trial in light of the arguments we have raised in the past.

(VI) The Panel's view towards the matter

As noted from the notes of meeting of the LegCo Panel on Administration of Justice and Legal Services dated 26 November 2001, which had been cleared with Panel Members, we understand that "the Panel is of the view that the matter had been appropriately dealt with". There is no evidence drawing to a contrary conclusion.

Yours sincerely,

(Andy LAM)
for Director of Administration

cc. Clerk to AJLS Panel
DOJ (Attn: Miss Doris Lo)
JA (Attn: Mrs. Anita Lo)