APPENDIX
SUMMARIES OF THE CASES COMMENCED FOR INVESTIGATION UNDER THE AMBIT OF OMBUDSMANSHIP

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Summaries of the Cases Commenced for Investigation under the Ambit of Ombudsmanship

File No. 13 / 2008

Subject: The Subsidy Assessment Scheme of the Macao Foundation and the Science and Technology Development Fund.

During the handling of a case, the CCAC discovered that some members of the Macao Foundation (FM) and the Science and Technology Development Fund (FDCT) did not recuse themselves from the assessment of application for subsidies submitted by private associations, allegedly violating the recusal provisions. Moreover, there have been deficiencies in the subsidy assessment and approval scheme. Therefore, the CCAC commenced an investigation:

1. On 10th October 2007, a report was made to the CCAC, alleging that the FM, which is a public legal person, has allotted considerable funds to the Macao University of Science and Technology (MUST) from the later half of 2001 to the first half of 2007. The FM has also granted huge amounts of financial subsidies to the Macao Federation of Trade Unions (FAOM), the Department of Service of Employment Agent under the FAOM, the General Union of Neighborhood Associations of Macao (UGAM) and the Women's General Association of Macau (AGM) during the first quarter of 2007. However, some of the holders of offices of the FM were also members of the Council of the MUST / Committee of the MUST Foundation Trustees / holders of offices of the associations applying for subsidy but they did not recuse themselves from the proceedings in accordance with law. Another public legal person, the FDCT, granted subsidies to the MUST, the MUST Foundation and the Macau New Technologies Incubator Centre Co. Ltd. (Manetic) from the 3rd quarter of 2005 to the 4th quarter of 2006. Some holders of offices of the FDCT, who were also holders of offices of the MUST and the MUST Foundation / Directors of Manetic, did not recuse themselves from the proceedings either. Therefore, the FM and the FDCT's approvals of the relevant subsidies were allegedly illegal in the sense of administration.

2. The alleged problems concerning recusation involved consideration and approvals over the years. Under Article 53, Section 1 of the *Code of Administrative Procedure*, violation of recusal provisions may lead to repeal of related administrative acts. Under Article 25, Section 2 of the *Code of Administrative Litigation*, the maximum period of time to dispute a revocable act is one year. Upon the lapse of time, the deficiency that might result a repeal of the act would be redressed. Therefore, the CCAC's analysis has only focused on the applications on which the decisions were made within one year before the day when the report was received (including the applications which were not mentioned by the complainant), and the process of application by the Manetic, which has been granted subsidy only once, before the report was received.

3. Following the initial investigation, it was discovered that some holders of offices of the FM and the FDCT were, de facto, members of the entities applying for the subsidies. Therefore, it was necessary to further analyze whether or not this dual capacity had inevitably constituted violation of the recusal provisions as the complainant mentioned.

4. Under the current legal systems, especially the principle of impartiality provided by the *Code of Administrative Procedure*, any holders of offices or personnel of the administrative authorities and their relatives shall not have any interests in the administrative acts they participate in. In order to reinforce the principle, the Code provides for the recusal system, stipulating that any holders of offices and personnel of the authorities shall prevent themselves from participating in any administrative acts and other acts or contracts executed in the name of the authorities which are directly or indirectly related to their personal interests. The mandatory nature of "prevention from participation" is divided into two tiers, namely "absolute prohibition" (mandatory recusation) and "relative prohibition" (self-recusation / requested recusation).

5. For "absolute prohibition", Article 46 of *Code of Administrative Procedure* states the 8 situations in which holders of offices and personnel of the authorities are absolutely prohibited from participating in administrative procedures. Their participation under those circumstances is presumed to pervert public interest due to their personal interest. In this case, among these several assessment and

approval procedures, only one situation fell into the prohibition stipulated by Section 1a) of the article mentioned above, because the holder of office who participated in the procedure allegedly held the position as the "representative" for the entity that applied for the subsidy.

6. Under Article 251 of the *Civil Code*, representative refers to anyone "carries out legal acts on behalf of the represented individual according to the power the former was conferred upon, while the legal acts are effective within the scope of rights and obligations of the represented individual".

7. Except Manetics, the subsidized entities empowered to carry out legal acts in the name of the subsidized entities are the administrators of those entities as well, such as the Administrative Committee of the MUST Foundation, the Council / Executive Committee of the MUST, the Board of Directors / Executive Directors of the AGM (FAOM / UGAM). The holders of offices of the FM and the FDCT, who possess dual capacity, are at most one of the members or a minority of the administrative organs of the applicants. These members themselves did not suffice for representing the applicants and therefore could not be regarded as representatives of those entities.

8. The Chairman and two members of the Board of Directors of the Manetic (one of them was the representative of the government) were the Chairman of the Executive Committee and members of the Board of Trustees and the Committee of Project Consultants of the FDCT respectively. Under the rules of the company, a sole Director can carry out management routines and his signature thereof would suffice for incurring liability. That means it is effective within the scope of right and obligation of the company. In this sense, a sole Director can be considered as the representative for the Manetic. Moreover, as the application did not bring any onus or risk to the company, the Directors' position as representatives was not questioned in this case. The grant of the subsidy would doubtlessly benefit the operation, the overall functioning and the fulfilment of objectives of the company, while the "pursue for overall interests in order to ensure management of the company" is exactly the premier mission of the Directors and even the whole Board of Directors. Therefore, the Directors had interests in the procedure of the relevant application.

9. Indeed, the holders of offices of the FDCT who were also the Directors / the Chairman of the Manetic included the Chairman of Administrative Committee, A, member of Board of Trustees, B, and member of the Committee of Project Consultants, C. Since C did not participate in the relevant assessment and approval procedure and A was the Official Director, their roles in the Manetic were not related to their personal interests, i.e., conflict between the public interests and their private interests did not exist. Therefore, it was only B who had allegedly violated the recusal provisions. As B held the position of Director on behalf of himself, the company's interests directly linked to his own interests. Since he was also the representative for the company, his participation in the procedure of assessment and approval of the company's application in the name of member of the Board of Trustees of the FDCT has breached the aforementioned provision under the *Code of Administrative Procedure*, causing the approval to be revocable. However, the decision, which was made on 17th August 2005, stood over one year and the irregularity has been redressed, so the approval could no longer be revoked under the law.

10. As to the level of "relative prohibition", Article 50, Section 1 of the *Code of Administrative Procedure* establishes the criteria for having self-recusation / requested recusation through an open ordinary provision, stipulating with examples that "in circumstances that give rise to reasonable doubt about the impartiality and the integrity of a holder of office or staff of the authorities", analysis on the fact from the stance of people being governed is required. If there is reasonable suspicion on the honesty, just and impartiality of the holder of office or the staff during the execution of duties, s/he shall request for recusation from participation in the relevant procedure, and the parties concerned may request for his / her recusation as well. The entity (i.e. the senior / chairman of the collegiate panel) which has the capacity to make the decision on recusation shall consider beforehand whether or not the integrity and impartiality of the holder of office / staff will be perverted and the credibility towards the administrator will be shattered if it allows the individual to continue to participate in the procedure.

11. Among the subsidized entities in the case, the MUST and the MUST Hospital are subordinate to the MUST Foundation. The MUST Foundation, as well as the AGM and the UGAM, all possess legal personality for administrative public welfare. Since

the cooperation between the administrative authorities and a legal person of public welfare was for the fulfilment of the latter's objective so as to promote and develop activities for public good, individual assuming of positions in legal persons of public welfare by holders of offices of the subsidy-approving entities, in fact, also aims at achieving goals of public interest. Therefore, there was no conflict between "public interest" and "private interest" in the related assessment and approval procedures.

12. In respect of the FAOM, though its Executive Director, D, was also a member of the Board of Trustees of the FM, which was the body approving subsidies, and even the FAOM was not recognized as a legal person of administrative public welfare but an ordinary private society, D's participation in related assessment and approval procedures did not constitute" not being recused from the procedures though self-recusation is required". The main reasons were: members of the Board of Trustees of the FM were nominated by the Chief Executive among the Macao citizens who were considered to be contributive, venerable, competent or representative. Certainly, the appointment was made after assessing on their background and it confirmed that the member fulfiled the statutory prerequisites, while the reappointment meant that the reappointed members still fulfiled those statutory prerequisites. Since the Chief Executive appointed D as a member early in 2001 and reappointed him in 2004, it was impossible for the Chief Executive not to know that D had been serving FAOM for a long time (D had been working as the Vice President of Executive Committee of the UGAM before he was appointed). Therefore, D did not need to notify the Chairman of the Board of Trustees (the Chief Executive) of his position in the FAOM despite his participation in the assessment and approval of the application by the FAOM. On the other hand, if the Chairman thought that D's involvement might pervert the principle of impartiality due to his dual capacity, he should have instructed D to withdraw from the procedure, yet the Chairman did not do so. This implied that the Chairman, who had the right to decide whether or not D should recuse himself from the case according to law and actual situation, had implicitly decided that that D's recusation was not needed.

13. As for the Manetic, as mentioned above, the procedure has breached the provisions of mandatory recusation. Yet even this deduction was not recognized, B's participation in the assessment and approval procedure on the application by the company had also breached the norm of self-recusation. The reason was that as the company is a commercial enterprise, "profit-making" should be its operational objective according to law. As a Director of the Manetic, B had an obligation to do whatever that benefited the operation of the company. Whatever that benefited the company also benefited B, who was the Director on behalf of himself, so his participation in the assessment as a member of the Board of Trustees of the FM might reasonably give rise to the question of his partiality towards the company during the course of assessment. As a result, it made grounds for suspicion of his impartiality. Nevertheless, the Manetic was established in 2001 with 15% stake owned by the government. As B has been working as a Director since its establishment, the Chief Executive should have known the facts mentioned above before he appointed B as a member of the Board of Trustees of the FDCT. Therefore, it was not necessary for B to notify the Chief Executive of his position in the company when he assessed and approved as a member of the Board of Trustees. Moreover, as the Chairman of the Board, the Chief Executive was also present at the meeting for the resolution to approve the application, but he did not request B to withdraw from the procedure. In this sense, dual capacity shall not be the only basis for administrative illegality from the standpoint of the mechanism of "relative prohibition from participation" under the recusal system in D and B's cases.

14. Therefore, in practice, if the competent entity determines, from the view of "outsiders", that the question about "the impartiality and justice of a staff of the administrative authority" who were non-public servants carried certain objectivity, the entity should declare recusation in order to ensure that the relevant administrative decisions were fair and just and thus conformed to the values established by the discretion conferred upon by the law. The entity has to require recusation unless there are some other reasons (for example, conduct and manner of the relevant staff, the supervisory power of other staff who also participated in the procedures could guarantee that the fairness and justice of the procedure would not be affected by the staff's conflict

of identities; and recusation would pervert the prompt operation of the authority and thus bringing more serious effects on the public interests). However, if these reasons are not comprehensible by ordinary people (the ones being governed), the administrative authority has to consider whether or not the public will question such doing and the public's confidence in the administration will then be shattered.

15. On the other hand, the majority of members of the FM, its Administrative Committee and the FDCT were not public servants and many of them did not serve on a full-time basis. They did not necessarily familiarize themselves with the basic principles and mechanisms, including the requirements and practices of the recusal system, as the other public servants when carrying out their duties. Therefore, the reinforcement of their awareness of the resusal system which should be abided by in execution of public duties would help avoid the occurrence of illegality and uphold the image of impartiality and reputation of the administrative authority. Based on this, it is necessary to provide relevant guidances for the non-public servants who serve in the public positions of these two foundations.

16. It should be emphasized that the holders of offices of the Board of Trustees of the FM, which operate under a collegiate panel, could be absent from meetings due to recusation and other reasons. For example, on 17th April 2007, a meeting of the Board of Trustees, which comprised 17 members, took place with absence of 8 members. The number of members present has just reached the quorum. In this case, in order to avoid affecting the operation of the collegiate panel, the FM may consider nominating the maximum statutory number (19) of members of the Board (ranging from 15 to 19) and stipulating in the charter that the minimum number of members present shall be the majority (8) of the minimum statutory number (15). In this case, even if the number of members who are absent due to recusation and other reasons reaches 11 (more than half of the maximum number 19), the committee may still proceed the meeting under the regulation on the minimum number of members present. This solution leads to greater flexibility of the operation of the committee as there is no need to nominate alternate members but effects a substitution in fact.

17. Before the FDCT approved the subsidies, they should take into account the opinions of the Committee of Project Consultants according to law. For applications of less than MOP500,000, the Administrative Committee should make the decision after taking full account of the opinions and grading if any by the Committee of Project Consultants and the eventual grading. For applications exceeding MOP500,000, the Board of Trustees should make the decision after receiving the proposal made by the Administrative Committee and the Committee of Project Consultants respectively and the grading if any. The proposals mentioned above were not binding but were necessary under Article 91, Section 2 of the *Code of Administrative Procedure*. Therefore, they were the necessary statutory parts of the procedure. Without them, there would be an irregularity of formality in the administrative act, causing the act to be revocable.

18. Nevertheless, during the assessment of the application for subsidy by the Manetic, the Board of Trustees of the FDCT had already approved the application before the proposals by the Administrative Committee and the Committee of Project Consultants were submitted. Thus, the approval bore a defect, rendering it revocable. However, since the administrative act has been executed for over one year, the defect has been redressed.

19. In respect of subsidy approval, the FM has fully subsidized a project of the MUST Hospital. Such doing differed from the statutory method that "the amount being granted is, in principle, not the total amount of expenditure of the project, and the organizer shall estimate other receipts". Besides, the FM did not make any explanation for this act. Moreover, the FM increased the decided amount of a subsidy granted to another applicant of funds by the reason of "increase where necessary", yet the reason was vague and equivocal, which was unable to explain why the Foundation increased the amount. Under Article 115, Section 2 of the *Code of Administrative Procedure*, this situation could be considered as no reasons had been provided. The applicant seemed not to have identified "other expected receipts and relevant means of income" as prescribed by law and the FM did not adopt any measures against it. All these are prone to cause questions about whether or not the FM has adopted any set standards for the assessment and whether or not the standards have conformed to law.

20. As to the FDCT, the "Regulations of Subsidy Assessment and Approval" had particularly laid down the assessment for the Committee of Project Consultants and the Administrative Committee. The latter was responsible for assessment of "the reasonableness of the budget". However, the minutes of the meetings of the Committee of Project Consultants, even the evaluations written by the consultants all indicated that the committee had contemplated excluding this item from assessment criteria. Moreover, there was no implication that the Administrative Committee had assessed the application according to the statutory criteria.

21. Following the analysis on the procedures of the FDCT's various assessments and approvals, the CCAC discovered the following unreasonable cases: Some consultants who disagreed on the approval had graded the project higher than those who agreed. Some consultants graded the projects although they considered that the application should be referred to experts for assessment, i.e. they declared themselves to be unqualified for assessing the application. Some of them gave low grade to application due to the reason that the application was considered as unqualified to be submitted for the time being / lacking of data / unable to solve the actual problems, but the Administrative Committee classified these comments as "no decision on whether or not to approve the application". Despite the fact that one consultant seconded the approval, one rendered conditional approval, one suggested referring the application to experts and two other had doubts, the Administrative Committee still confirmed its stance in favour of the approval. However, the minutes of the meetings of the Committee made no reference on the reasoning, the votes of such resolution and the outcome (under Article 29, Section 1 of the *Code of Administrative Procedure*). In light of the possible influence on the members of the Committee of Project Consultants by factors beyond their assessing scope, the imperfect reflection on the grounds of whether or not subsidies should be granted and the relevant subsidizing extent, false classification of the consultants' opinions by the Administrative Committee, approval of subsidies without explanation where discrepancies existed in consultants' opinions and the lack of information which would be able to reveal that the Administrative Committee had assessed under the statutory standards, would lead to doubts on the legality and fairness of the FDCT's approval and the appropriateness of utilization of funds, which would eventually jeopardize the credibility of the government.

22. In fact, even it is considered to be necessary to classify the consultants' comments, it would be more appropriate for the consultants to classify their own comments, so that wrong classification would not occur due to misunderstanding. Moreover, it would be appropriate to set a qualifying grade so that grades lower than that shall be construed as disapproval. As a result, the consultants' grades could be consistent with their comments and the grades could reflect the consultants' standpoints about whether or not the application shall be approved so as to avoid the unreasonable situation in which the grades given by consultants who favour the approval are lower than that given by those who stand for the opposite side. Furthermore, the FDCT might consider introducing a mechanism to have all consultants discussed about the reasons for their grades and comments (especially the comments of the consultants who have given the highest and the lowest grades) after grading the project. If some consultants regard it as necessary to adjust their own positions after making references to other consultants' opinions, the FDCT shall allow them to do so and make a suitable record, so that the assessment effects more objectively, reasonably and effectively.

23. Moreover, many other public departments / entities under the large structure of the Administration are empowered to grant subsidies. For example, the MUST Hospital may submit applications of subsidies for acquisition of medical equipments to the FM as well as the Health Bureau (SS), but the FM seemed not to have communicated with the SS in order to "control the amount of subsidies" in accordance with law. Also, the SS and the Social Welfare Bureau granted subsidies to the subsidiary organizations of the FAOM, the UGAM and the AGM in 2006 and 2007. When assessing the applications for subsidies of operating funds submitted by these associations, will the FM take into account the fact that they have obtained subsidies granted by other government departments? Are there any mechanisms of coordination among the departments / entities which have the powers to grant subsidies? It would be appropriate to explore these issues more thoroughly.

24. In addition, as grant of subsidy is related to the appropriation of public money and the amount involved in every application very often ranges from hundred thousands to millions, it is therefore necessary to supervise and control the use of the subsidies in order to verify whether the subsidized projects have been carried out. The current legislations prescribe that the subsidized entities shall submit reports on the subsidized

activities. Nevertheless, do the departments adopt measures to follow up on this in accordance with law after grant of subsidies? How they deal with the cases of subsidized entities which do not submit reports or carry out the activities according to the plans is very important, so it is necessary to conduct more in-depth analysis.

25. It is necessary to emphasize that many of the entities subsidized by the government are legal persons of public welfare. The law provides incentives including exemption of tax and administrative charges and other benefits for these private entities / fundations but also establishes obligations for them, such as "submitting annual reports and previous operating accounts" (under Article 11a) of Law no. 11 / 96 / M). However, there are no relevant regulations in Macao about this aspect. Even the regulations on grant of financial support, (such as Order no. 54 / GM / 97) do not require the legal persons of public welfare which apply for subsidies to do so. In other words, such annual supervisory mechanism is not able to function due to lack of regulation. Although the competent authorities can request these legal persons to provide relevant information (under Article 11b) of Law no. 11 / 96 / M) in order to verify whether or not the elements of such legal personality subsist, yet the existing regulations do not include specific norms in this respect. As legal persons of public welfare are considered as legal persons "which jointly promote ordinary social interest with the administrative authorities of Macao" and they have become beneficiaries of many public subsidies due to their functions of achieving public interest goals. This means there are always large amounts of funds circulating from the administrative authorities to these legal persons by ways of "subsidies". The public interest goals would then be fulfiled through the activities organized by these legal persons. Therefore, it is necessary to be aware of the way they use the funds received from the administrative authorities and whether or not the competent authorities have supervised them in practice.

26. To address the above issues, the CCAC make following suggestions to Chief Executive in order to hasten improvements of operation of the two foundations:

a. To provide guidance regarding the mechanisms and principles including recusation that should be abided by for the non-public servants who assume public positions in the two foundations.

b. To adopt proper measures to enhance the transparency of subsidy assessment conducted by the Boards of Trustees of the two foundations; In particular, if they do not require recusation despite "dual capacities" which easily raise doubts, they should make the public understand their rationales in order to uphold the reputation and credibility of the administrative authorities.

c. If it is considered to be necessary to advance the flexibility of operation of the Board of Trustees of the FM in order to ensure that the operation will not be impeded by the minority number of committee members present at meetings. It is possible to contemplate nominating the maximum statutory number of members of the Board and stipulating in the rules the minimum number of members present shall be the majority of the minimum statutory number. This solution leads to greater flexibility of operation as there is no need to nominate alternative members.

d. To establish a consultation team under the FM according to the needs brought by assessments, so that the Boards may obtain professional opinions before making the decision. Also, records of the processes of obtaining opinions should be made in order to show that the reasons for the decisions and guarantee on the credibility of the use of funds. To set up assessment criteria in accordance with law and to list the reasoning in minutes of the meetings of resolution.

e. The Committee of Project Consultants and the Administrative Committee of the FDCT should assess the applications according to statutory criteria and the basis of assessment should be recorded clearly in minutes (especially the minutes of meetings of the Administrative Committee); to improve the operational mechanism of Committee of Project Consultants and allow the consultants to classify their own comments; to consider setting a qualifying grade and introducing the grading explanation mechanism so that the consultants may have chances to explain their grading. Such records should be made as well so that assessments will be more objective, reasonable and effective.

Regarding the coordination between the subsidy-granting departments / entities and their follow-up and evaluation on the subsidized entities, further analysis and research will be conducted.

27. The two foundations accepted the CCAC's suggestions about improvement of operation. Currently, the Commission is still following up the new operational mechanisms of the collegiate panels, especially the Committee of Trustees in the FM.

File No. 03 / 2008

Subject: Establishment of an Elderly Home at a Commercial Unit

In 2007 and 2008, there were cases about private entities planning to establish elderly homes at the commercial units of residential properties. The CCAC has received complaints lodged by operators and proprietors of the units at those properties, alleging administrative illegalities and maladministration during the license assessment and approval procedures conducted by the Land, Public Works and Transport Bureau (DSSOPT) and the Social Welfare Bureau (IAS). Therefore, the CCAC initiated an investigation. The points below were made following investigation and analysis:

1. The use of property is subjected to its designated purpose. This restriction is related to the condominium regime adopted by developers. Since the proprietors of separate units of a condominium are neighbours to each other, the *Civil Code* in 1966 established special restrictions on proprietors' disposal (including use) of their own units, including the requirement not to use the units for the purpose different with its designated usage.

2. On the other hand, when the lawmaker formulated the *Regulation of Urban Buildings* (Decree Law no. 79 / 85 / M) in the 1980s, the authorities were empowered to approve the "initial" constitutive title (the "Description of Separate Unit") which had been used for distinguishing each separate unit of a condominium. The specific purposes of buildings and the units within were

established through the license of utilisation issued by the authorities after the development of buildings has been completed. At that time, the lawmaker stipulated that the statutory purposes of urban buildings should be classified into 6 types only.

3. In 1999, the lawmaker formulated Law no. 6/99/M which further regulated the utilisation of urban buildings, stipulating that if a property, whether in law or in fact, is used for a purpose different from that indicated in its license of utilisation or the activity allowed under the administrative license, summary infringement would be constituted. The authorities (i.e. the DSSOPT and the competent department which is empowered to issue administrative licenses for the activities carried out at the buildings/units), under the law, should supervise any misuse of property.

4. By then, the purposes of urban buildings established by the lawmaker (including 1. as residence or dwelling; 2. industrial use; 3. commercial use; 4. for service, office work and freelance; 5. as hotels and for activity of the similar nature; 6. as social, collective or public facility; and for vehicle parking) basically coincided with those provided by Decree Law no. 79/85/M, yet the lawmaker allowed properties to be designated for other legitimate purposes other than the ones designated above.

5. Nevertheless, it is worth pointing out that neither Decree Law no. 79/85/M nor Law no. 6/99/M has specified the kinds of business/activity suitable to be operated in the properties of designated purposes and whether or not these statutory purposes are compatible. Therefore, in reality, defining whether or not a proprietor has used his/her own unit differently from its designated purpose leads to controversy easily.

6. It is true that ambiguities do exist in the provisions, but the law enforcement agencies have been lacking criteria to define the scope of legal business activities to be carried out at the buildings, bringing further confusion to citizens. As a result, the controversy has become a high-profile focus in the society.

DSSOPT's Discharging of Duties on Supervision Against Misuse of Property

7. According to the dossiers provided by the DSSOPT concerning licenses for the construction of elderly homes, the CCAC discovered the problems below concerning the Bureau's handling of the cases:

(I) Longstanding lack of law enforcement criteria and not having a standardized stance and assessment criteria regarding the purposes of property

8. In fact, even though Decree Law no. 79 / 85 / M has come into effect for years, the DSSOPT has never conducted analysis on the relationship between the assessment and approval of application for licenses of constructions and the supervision on use of property so as to establish a standard for the technical staff to abide by.

9. The DSSOPT assessed case no. XXX / 93 / L between December and June in 1993. At that time, the Bureau approved the construction project without considering whether or not the purpose of building (i.e. for residential purpose) was applicable to the establishment of an elderly home.

10. While assessing case no. XXX / 96 / L (between May and December in 1996), there were suggestions inside the Bureau that the construction plans which involved change of property use should not be approved and hence legal opinions were sought. As the legal opinions indicated that the Decree Law no. 90 / 88 / M on 27th September empowered the licensing department, the IAS, to issue licenses for social facilities (including elderly homes) established at units not used as social facilities, the DSSOPT should only verify whether or not the project met the standards of passage, hygiene and safety of social facilities under the decree law while assessing the applications for the construction licenses and should not reject the project solely because those facilities were not established at units of social purpose. Therefore, the DSSOPT changed its stance and issued the licenses.

11. However, after obtaining the abovementioned legal opinion, the DSSOPT only treated the opinion as a solution of that particular case but not a criterion for the assessment and approval of the same kind of applications. Also, it did not further explore and set up the standard for the assessment and approval of various kinds of constructions, nor did it further clarify the scope of each purpose on use of properties.

12. In fact, while assessing similar subsequent cases, the staff of the DSSOPT again disputed over whether or not establishment of elderly home at commercial unit constituted change of use. Some perceived that it had changed the use of property (because elder home contains bedrooms and its purpose does not accord with the nature of commercial purpose), but others thought that it had not (since elderly home operates in a commercial way).

(II) DSSOPT's decisions were often based on the leadership's "arbitrariness" and lacked justification

13. When the DSSOPT was assessing case no. XXX/00/L (during which Law no. 6/99/M had come into effect) between October 2000 and April 2001, some experienced public servants thought that the establishment of elderly home at commercial unit constituted change of purpose. Therefore, the applicant should embark on the procedure of modifying the constitutive title in order to obtain a construction license. However, the then Head of the Urbanization Department thought that commercial unit met the technical requirements for establishing elderly home, so it was feasible to establish elderly home at commercial unit in principle. However, he neither pointed out the relevant rationale nor explained why the Bureau was only required to verify whether or not the amenities of the facilities were technically applicable for the purpose when approving the projects after Law no. 6/99/M had come into force. It is necessary to point out that the authorities' supervision on use of properties, as required by Law no. 6/99/M, did not only lie on the issue whether the unit had been used for purposes the amenities might not endure, but also centred on the question whether the units had been used for purposes different from that indicated in the "licenses of use."

14. The case was then passed to the Deputy Director for comments. He thought that the social facility purpose was not totally incompatible with commercial purpose, so the project could be approved without modifying the constitutive title. It seemed that the Deputy Director had brought up an opinion different from that of the department head yet the former only stated " not totally incompatible " was obscure. In addition, the fact that he had not stated any reasoning undoubtedly

reflected the "arbitrariness" of this opinion. Nevertheless, in this case, the Director of the DSSOPT eventually agreed with the Deputy Director's opinion and approved the project subsequently.

15. Similar situation also took place in case no. XX/02/L. (The Deputy Director adopted "not totally incompatible" as the reason for approval.)

16. It is worth pointing out that the *Code of Administrative Procedure* requires the authorities to clarify the administrative acts carried out and its legal basis expressly (obligation to "explain") in order to ensure the justice and legality of the administrative decisions. In the aforementioned case, although the Bureau finally made the beneficial decision to the applicant (i.e. approved the application of construction license), it does not imply that the Bureau's decision could be based on the decision-maker's "arbitrary" opinion. Moreover, the proprietors of other units at the building where the elderly home was established also had the right to raise objection against the decision to the Bureau for the reason that the approval had caused detriments to their interests. Under such situation, the Bureau had the responsibility to explain the basis for the approval. If its decision was merely based on the "arbitrary" opinion of the decision-maker, it would be unconvincing indeed or even damage the Bureau's image of impartiality and objectivity.

17. In the case of H Garden (case no. XXX/06/L), when the DSSOPT first received the application of a refitting project, the application was passed to specialized technicians of the Bureau for comments. However, the staff did not analyze on the matters concerning whether or not the purpose of the proposed project had conflicted with the designated purpose as in the cases no. XXX/00/L and no. XX/06/L. Whereas the then Head of the Urbanization Department agreed to refer the application to the superior for approval without requiring the staff to supplement with analysis and finally it approved the application. Only after some proprietors' queries about a change of purpose in the project, the Bureau sought internal legal opinions about this issue and required the applicant to submit the letter of consent signed by other proprietors.

(III) Contradiction between the legal opinions in 1996 and 2007

18. It is worth pointing out that concerning the assessment and approval of construction of elderly home at unit of non-social purpose, the legal opinion in 2007 was different from that of 1996. It merits emphasis that in 2007, the legal department of the DSSOPT asserted that under Law no. 6/99/M, the use of urban building should conform to the purpose stated in the constitutive title; otherwise, summary infringement could be constituted. Therefore, while assessing application for administrative license of elderly home, if the IAS found that this type of activity was not allowed under the license, the applicant should be requested to change the purpose of the property first. According to the comprehension above, unless the legal department construed that Law no. 6/99/M had already repealed the IAS's power, which had been conferred upon by Decree Law no. 90/88/M, to issue licenses for social facilities not established at units of the public utility purpose, its legal opinion in 2007 would contradict with that brought up in 1996.

19. However, Law no. 6/99/M does not repeal the IAS's "exceptional licensing power" conferred by Decree Law no. 90/88/M.

20. One thing which shall not be neglected is that although Law no. 6/99/M defines "using the landed property for a purpose different from that indicated in its license, whether in fact or in law" or "for activity which is different from that designated in the administrative license" to be "misuse" and stipulates that the public works department and the relevant licensing departments shall conduct supervision on the "misuse" of property. However, under Decree Law no. 90/88/M, the establishment of a social facility (such as an elderly home) at a unit which is not to be used as a "social, collective or public facility" (hereinafter simplified as "social facility") is legally allowed if it is licensed. This is a special provision concerning the social facility licensing system formulated by the lawmakers. Since special law is prioritized and Law no. 6/99/M does not repeal the relevant regulations by Decree Law no. 90/88/M, the IAS may still "exceptionally" ignore whether or not the property where the social facility is located is designated as "public utility" during the assessment and approval of license. At the same time, the operator of social facility licensed by the IAS shall not be charged with "misuse" due to violation of Law no. 6/99/M, as the use of property as a "social facility" conforms to the purpose designated in the administrative license.

21. Therefore, this standpoint would not be sufficiently justified if the contradiction between the DSSOPT's legal opinions in 2007 and that in 1996 was based on the assumption that Law no. 6 / 99 / M had repealed the IAS's power to "exceptionally" approve the establishment of social facilities at units which were not designated for public utility. In other words, the DSSOPT's legal opinions in 2007 and 1996 are intrinsically contradictory.

(IV) Insufficient justification for making decisions without applying legal opinions

22. In the cases of H garden and K building, the legal department of the DSSOPT thought that construction of elderly homes at commercial units had constituted an alteration of purpose, so the applicant should have obtained other proprietors' consent before issuance of construction license. However, the DSSOPT eventually did not adopt this opinion but agreed on the one made by the then Head of the Urbanization Department, who indicated that the issuances of construction license and administration license were two different administrative procedures, so the DSSOPT was only responsible for the assessment of the construction project from a technical perspective.

23. It is necessary to point out that, as to the application for construction license by applicant who intends to operate a business subject to the administrative license, if the DSSOPT only assesses the project from a technical perspective based on the assumption that the assessments of construction license and administrative license are two different administrative procedures, then the Bureau, in principle, shall not need to check whether or not the project will occupy the public areas of the property or require the applicant to submit the letter of consent signed by a sufficient number of proprietors when the project is discovered to be occupying public areas of the building. However, licensing a project that occupies the public area at the building touches upon the issue that using of public area is not permitted without proprietors' consent. This applies identically to cases involving licensing a project of alteration of purpose, which is not related to engineering technically. That is, without proprietors' consent, change is not permitted. In this sense, the department head's argument of "two different procedures" is apparently untenable.

24. It is important to emphasize that when applicants apply for undergoing constructions, the units usually have not yet been used for the purposes scheduled after constructions have been completed. Strictly speaking, the applicants "have not yet" used the properties for purposes different from that indicated in their licenses of use or the activities allowed under the administrative licenses; therefore, misuse of property "has not been constituted". Based on this premise, if the DSSOPT thought that the applicants could "legalize / legitimize" the misuse by obtaining other proprietors' consent in the course of construction and hence issued the licenses before submission of consent, it should unequivocally notify the applicants and the relevant licensing departments of whether or not "potential" change of purpose existed. The DSSOPT should not change its standpoint when some proprietors opposed to the projects after issuance of construction license and shift the responsibility of supervising misuse of properties to the licensing departments.

25. Therefore, the CCAC advised the DSSOPT to adopt the measures below to rectify the illegality and impropriety in its operation:

a. The DSSOPT should conduct a research on the classification of business activities to be engaged in according to the statutory purposes (especially the activities restrained by the administrative license) stipulated by Law no. 6 / 99 / M and the compatibility between different purposes in order to establish the criteria adopted to carry out the duties to supervise the use of property within its scope of duty (especially the power to assess and approve the applications for construction licenses).

b. As to the "potential" alteration of purpose acknowledged in the course of assessment on application for construction project, if the DSSOPT thinks that it is possible to first assess the application from a technical perspective so that the applicant may obtain other proprietors' consent in the course of construction, the DSSOPT should explain the situation clearly to the applicant and notify the relevant licensing department.

c. In the cases of applications for licenses of construction projects which are exempted by special law from conforming to the requirements of property use, such as the

development of elderly home, the DSSOPT should also clearly notify the applicants of whether or not "potential" alteration of purpose exists, so that they will realize about the risk of objection filed by other proprietors by civil means.

IAS's Handling of Applications for Administrative Licenses for Elderly homes

26. According to the information provided by the IAS, the CCAC realized that it had been allowing establishment of elderly homes at commercial units, but the basis had changed. Initially, the approvals were based on the fact that the DSSOPT had not raised any objection to the establishment of elderly homes at commercial units. Later, the IAS stated that operation of an elderly home was a commercial activity due to reasons such as its profit-making nature or the levy of business tax; therefore elderly homes could be established at commercial units.

27. Although these bases were untenable, the IAS, in the course of the CCAC's investigation into this case, finally declared that its permission of establishment of social facilities at units of non-public utility purpose was founded on the prerogative conferred upon by Law no. 90/88/M and this power was not repealed by Law no. 6/99/M. Therefore, the CCAC concluded that the IAS's ultimate standpoint was not illegitimate.

28. It should be emphasized that though the lawmaker's conferment upon the IAS regarding the power to exempt in the relevant administrative procedures did not rule out the proprietors' right to object to misuse of property via civil means. In fact, under the *Civil Code*, modification of constitutive title, in principle, has to be passed unanimously by all proprietors of the units at the building. Even consent of majority (two-thirds) has been obtained, the remaining proprietors' consent is still replaceable only by legal proceedings. In this sense, if a proprietor does not use his/her own unit according to the registered purpose, modifies the constitutive title without other proprietors' consent or allows any activity different from the registered purpose to be carried out the unit, other proprietors have the right to raise objection against the misuse of the property by civil means. Therefore, the authority's administrative decision to issue an administrative license, without the involvement of interested parties, cannot totally override the proprietors' power of disposition regarding the use of property.

29. As a result, although the IAS has the discretion to allow social facilities establishment at units of non-public utility purpose, it shall remind the applicants about the "potential" change of purpose of the units so that the applicants may either obtain consent from sufficient proprietors of the units at the same buildings regarding the alteration or find another location. Otherwise, they may face the risk of objection raised by other proprietors against the misuse of properties by civil means.

30. For this reason, the CCAC also provided recommendation to the IAS to urge the Bureau to take measures to improve the procedures of assessment and issuance of the relevant licenses.

In fact, the CCAC perceives that the administrative illegalities or improprieties existed in the aforementioned case are related to the deficiencies existing in the current law. Especially, the law does not lucidly define the various types of statutory purposes of urban buildings and the compatibility between them but stipulates that the authorities have the power and responsibility to conduct supervision against the misuse of properties. Hence, the CCAC commenced and completed the examination and research on system *Analysis on Current Regulations on Use of Property and the Relevant Supervisory Mechanism* last year, clarifying the deficiency in the current regime and making recommendations for improvement through in-depth analysis on the relationship between the current regulations on use of property, the construction license and other kinds of administrative licenses.

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According to official information, in early January 2009, the DSSOPT and the IAS had a meeting with some of the parties concerned (representatives for the proprietors of the units at H garden). At the meeting, the representatives of the authorities pointed out that there was certain extent of compatibility between commercial units and the purposes of public utilities and offices, so the establishment of "social facilities" (such as elderly homes) at "commercial units" did not constitute alteration of purpose. Due to the reality in Macao, the IAS would exercise the power of exemption conferred upon by Article 5 of Decree Law no. 90/88/M to approve the establishment of this kind of facilities at commercial units once the technical requirements of the elderly homes, including the conditions of hygiene, fire control and structure, are met.

This demonstrates that the DSSOPT has "conducted research on problems concerning whether or not different purposes are compatible" according to the CCAC's recommendation. The result of the research shows that "some of them are compatible."

After analyzing on the authorities' standpoints mentioned above, the CCAC concluded that the current specific regulations on the purpose of property (Decree Law no. 79 / 85 / M and Law no. 6 / 99 / M) do not clearly delineate whether or not there is compatibility between different purposes. According to the documents about the legislation, the legislative intention of Law no. 6 / 99 / M did not totally deny the compatibility which could exist among the purposes. While in practice, (whether before and after the commencement of Law no. 6/99/M) the authorities' enforcement of law has long been demonstrating the existence of the "compatibility" (though lacked criteria for objective law enforcement). For example, some elderly homes were established at units bearing the "public utility" purpose, while others were established at commercial units. The same situation occurs in other businesses as well. Due to the reasons mentioned above, the CCAC thought that there were no sufficient signs showing that illegalities exist in the results of the DSSOPT's research on the compatibility between the commercial purpose and the "public utility" purpose. However, it is still necessary to comprehensively follow up on the Bureau's research on "compatibility" according to the results of the examination and research on system conducted by the CCAC.

As the DSSOPT did not respond to the CCAC to declare its rejection of the advice and the relevant rationale for over 90 days since it received the advice, according to the inverse interpretation of Article 12, Section 5 of Law no. 10 / 2000, the CCAC considered the advice as accepted.

File no. 18 / 2008

Subject: Inappropriate Land Grant Procedure Concerning Travessa do Fogo

In the course of handling a complaint over the occupation of government land, the CCAC discovered that the former Secretary for Transport and Public Works had permitted an individual to return a 21m^2 site within a piece of land leased by the government on a long term basis so that the site will be developed as part of a public road. Then the government, in return, granted a 23m^2 site which constituted part of a public street to the individual so that he could jointly develop the site and the adjoining land. However, the former Secretary

had not altered the nature of the 23m^2 site from public land to private land in accordance with the current land law before he approved the land grant. Also, there was no cadastral information showing the legal status of the land, the CCAC hence commenced investigation. After verifying and establishing the facts, the CCAC rendered advice to the Secretary for Transport and Public Works, requesting him to take appropriate measures for remedy and suggesting the Director of Land, Public Works and Transport Bureau (hereafter referred to as the DSSOPT) to pay attention to the handling of land grant procedures in order to avoid the same kind of mistake in the future.

Thereafter, the Secretary for Transport and Public Works redressed the defect in the procedure by categorizing the public land involved in the case to be private in accordance with law. Also, the DSSOPT reached an agreement with the Cartography and Cadastre Bureau to indicate the legal status of lands while drawing the cadastre. The CCAC subsequently filed this case.

File no. 29 / 2008

Subject: No Renewal of Employment Contracts of Teaching Staff of the Education Bureau and Youth Affairs Bureau.

1. In mid-September 2008, L and C, who were employed as teachers of a public school (hereinafter designated as P school) on non-permanent terms, lodged a complain to the CCAC, stating that after they criticized the principal at a teachers' meeting in the presence of the Director of the Education and Youth Affairs Bureau (DSEJ), the principal therefore proposed the DSEJ not to renew their contracts and his proposal was accepted. Both of them thought that the principal did not recuse himself from the case in accordance with law and made the proposal for "not renewing contracts" without the involvement of the two vice-principals. Also, the Director of DSEJ decided not to renew the contracts without obtaining evidence from L and C or stating any reasons. Therefore, they questioned the sufficiency of the basis of the decision. Contract renewal involves the exercise of discretion, which was solely for the purpose of fulfilling the objective of the power-conferred law - the public interest of "official education", but one of the reasons publicized by the DSEJ was that "the two did not agree on the sponsoring

philosophy". However, the philosophy itself was not substantial enough to have influence on the public interest of fulfilling "official education", resulting controversy on the aforementioned reason. Therefore, the CCAC commenced investigation on the case in order to further analyse any possible administrative illegalities or improprieties.

2. According to the information provided by the complainants, they openly criticized the principal at the meeting between the teachers of P school and the Director in November 2007. L also pointed out that the expert who was responsible for student-based education acted inappropriately and expressed his negative perception about this.

3. Later, the DSEJ further consulted L about his statement. The principal of P school also requested detailed information about some of their opinions from the two. As they were fear of vengeance afterwards, they sought help from the Association of Public Education of which they were members. The association intended to mediate in the matter but was refused by the Director.

4. In July, the two were notified by the DSEJ that their contracts, which were due 31st August, would not be renewed.

5. According to the information which the DSEJ provided for the complainants and the public, the bases for a public school's proposal for the renewal of employment contract of a teaching staff included: (1) the number of students; (2) the teaching staff's performance; (3) recognition of the sponsoring philosophy and compliance with the work schedule of the school. The DSEJ would decide whether or not to renew the contract according to the proposal. Moreover, the reasons for not renewing the contracts publicized by the DSEJ included: C has been advocating admitting students with distinctive conduct and academic results, yet his opinion was against the sponsoring philosophy of public school – education for all. As the representative of the school's music department, the teacher had never arranged for or led students to join any external musical contests and were absent from duty in the previous academic year and no improvements were made after exhortation. While L had been opposing the student-based education implemented in the school and even

overtly questioned the qualification of an eminent expert of student-based education during a seminar. He lacked basic respect for others in academic discussion and even sneered at students.

6. L admitted saying that student-based education was not effective in mathematics, but he had been implementing the plan earnestly and his personal record had been satisfactory. On the other hand, he was unable to recall whether he had sneered at students. C asserted that he had been teaching according to the arrangements made by the school. The opinion about admission of students was brought out only at a discussion about the future development of public schools. Also, the school had never requested him to arrange for students to participate in contests and had never given him any suggestion or warning regarding this issue. C also pointed out that the duty arrangements were improper. His workload of the day would be excessively heavy on duty. At that time, one of the vice-principals expressed his understanding after knowing his reason of not working on duty and submitted a report to the principal. However, the school had not given any response.

7. According to Article 2, Section 4 of the *Code of Administrative Procedure*, the general principles of administrative acts provided by the Code are applicable to all acts carried out by the authorities. In this sense, the general principles, such as the principle of legality, impartiality and good faith, bind the recruitment by public departments / bodies. Article 26, Section 4 of the *General Regulations of the Public Administration of Macao* (hereafter known as "the Regulation") is also applicable to the teaching staffs employed by the DSEJ on non-permanent terms. It stipulates that "if the administrative authorities do no express the will of contract renewal 60 days before the contract is due, the contract shall expire when it is due". Therefore, as to the personnel who are employed in this way, if the authorities do not intend to renew their contracts, they need not do anything or bear the responsibility to explain the reasons to the party concerned.

8. It is not difficult to understand that as the personnel employed on non-permanent terms are not indissolubly connected with the administrative authorities, the lawmaker considered the department employing them as the most competent one

to determine whether or not the need for the personnel still exists and define the circumstances which determine the contract renewal. Therefore, the administrative authorities are conferred upon the discretion to make the decision and hence there is no regulation that concretely defines under what situations or conditions will the contract not be renewed.

9. Nevertheless, discretion, a power originated from law, is only exercised for fulfilling the objective of the power-conferring law, while the exercise of discretion should be fettered by the general principles of administrative activities. Regarding the employment of staff on non-permanent terms and the renewal of their contracts, though discretion is conferred upon the authorities, since the purpose of employment is fulfilment of relevant needs with public interest, the renewal should centre on the public interest underlying in the staff's position and duties and is subject to the general principles of administrative activities such as the principles of legality and good faith.

10. In fact, the DSEJ was not obliged to explain the reason for not renewing the contracts, though it had indeed. As the Bureau should take responsibility for its open speech, its public statement of the reasons for not renewing the contracts should certainly be trusted. These reasons should be considered as the rationale for the Bureau's exercise of discretion of "the decision of not renewing contracts," so the rationale should not exceed the restrictions on the exercise of the discretion.

11. Undoubtedly, employment of the complainants by the Bureau was due to the need to fulfil the public interest of "public education". Since the number of students had direct influence on the need while the teachers' performance was a key to effective fulfilment, the first two reasons provided by the DSEJ did not go beyond the intended objective of the power-conferring law regarding the contract renewal. As for the third reasons, it is necessary to point out that if the teacher was unable to comply with the work schedule of the school due to his disagreement on the sponsoring philosophy, then it should be attributed to his performance. If the teaching staff merely expressed his different concept but has duly fulfilled his duties, the Bureau should not impose any restriction or exploitation on him by any means (including the exercise of discretion). This is due to the application

of Article 27 of the *Basic Law of the Macao Special Administrative Region (the Basic Law)* and Article 19 of the *International Covenant on Civil and Political Rights* which protect the freedom of speech, an entitled basic right. Article 40, Clause 2 of the *Basic Law* stipulated that basic rights can only be fettered by law. Therefore, listing the teaching staff's disagreement on the sponsoring philosophy as one of the rationales deviated from the purpose of the law which conferred discretion.

12. In this case, the DSEJ listed L's objection to student-based education implemented by the school and C's favor on admitting students with distinctive conduct and academic results which conflicted with the school's philosophy – education for all, as one of the rationales for not renewing their contracts. However, the Bureau did not indicate any breach of duty by the two. Though L admitted expressing his objection, he stressed that he had been implementing the plan earnestly. C also asserted that he had also been teaching according to the arrangements made by the school. Therefore, the aforementioned rationales provided by the Bureau is suspected to be merely based on ideological values, illegally restricting or even depriving them of the basic right of freedom of speech, which went beyond the restriction on exercise of the relevant discretion.

13. Regarding the accusation that C had never arranged for students to join any external musical contests, it is important to point out that the DSEJ had not mentioned its stance on C's not making such arrangements over the years (such as pointing out that C did not make any improvement despite repeated warnings in order to show the Bureau's negative attitude towards his "omission"). Moreover, the DSEJ did not reflect this in C's performance appraisals, while C pointed out that the school had never made such request and that his superior had never given him any suggestion or warning in respect of this. In the sense, C believed that the school had agreed on or did not mind about his arrangement and hence continued this "omission", but the school only declared its negative stance on his not arranging any students participation in contests several years after by using its discretion regarding contract renewal. Such practice has breached the principle of good faith.

14. L did not deny that he had openly queried the qualification of a student-based education expert and sneered at students as pointed out by the DESJ. As to the

Bureau's accusation that C did not carry out his duty in the previous academic year, although C declared his "ineffable difficulties", he admitted that it was true. According to this, C had been aware of the job arrangement. Though difficulties of execution (not inability in execution) existed, C's decision of not carrying out the duty jobs without the school's consent or rearrangement, allegedly constituted breach of academic staff's duty to obey. As the behavior of criticizing experts at seminars, sneering at students and non-execution of duty jobs affected the appraisal of the complainants' performance, the authority's evaluation on the necessity of their service in achieving the public good based on their performance did not surpassed the restriction on exercise of discretion.

15. Therefore, part of the rationales for the DSEJ's decision not to renew the complainants' contracts might have overstepped the restriction on exercise of discretion, yet it could not be considered to be revocable. As the decision was still supported by other rationales that did not go beyond the restriction.

16. The complainants stated that the proposal about the non-renewal was made by only one of the members of the leadership, the principal, who had not recused himself from the case as required by law. Also, the Director of the DSEJ did not obtain evidence from them. It is necessary to point out that even if the complainants' statement about "the proposal was made solely by the principal" was true, since the current legislations governing public services did not consist of any requirement for "fact-finding" from parties concerned regarding the proposal / suggestion for the contract renewal of the staffs employed on non-permanent terms, which caused the "proposal from the school" to be dispensable. In other words, the Bureau was at liberty to decide whether this procedure was necessary and the person to make the proposal.

17. As for the question of whether the proposal by the principal involved recusation, it is necessary to point out that the principal's involvement in the non-renewal of their contracts was not under the circumstances of mandatory resusation under Article 46 of the *Code of Administrative Procedure*.

18. After the complainants openly criticized the principal at the meeting between the Director of the DSEJ and the teachers of P school, the authority and the school took follow-up measures respectively. However, the hierarchical seniors had the inherent

powers and obligations to arrange the juniors' works and supervise their fulfilment of duties in order to make evaluation, guidance and correction. Therefore, as a member of the leadership of P school, the principal should supervise the performance of the teachers and other subordinates. If he should not exercise the powers or fulfil the obligation, such as arranging for his subordinate's works and making evaluation, guidance and correction, merely because his subordinate had openly criticized him at an internal meeting, the juniors' criticism of the superiors would be considered as the basis for the existence of "confrontation" or "antagonism" between them. In a society that protects freedom of speech, this would provoke a trend of disaggregation of the hierarchical structure, which is the main structure of public administration, hindering the administrative authorities from fulfilling their statutory duties which should be carried out by their personnel at different hierarchical level.

19. In fact, even though the principal's proposal of non-renewal of their contracts was considered to be giving rise to suspicion about his impartiality or justness of his conduct, the Director of the DSEJ, present at the meeting at which the complainants expressed their opinions about the principal, should have knowledge about the course of the case. Therefore, it was unnecessary for the principal to notify the Director of "the circumstance of recusation". In other words, the principal needed not recuse himself from the case under Article 50 of the *Code of Administrative Procedure*. Moreover, if the Director considered that the principal's proposal might constitute breach of the principle of impartiality, he should have arranged another person to make the proposal. However, the Director did not do so. Hence, the principal's act of making the proposal about the renewal of the complainants' contracts could not be construed as a breach of the provisions of "self-recusation" or an illegality of the Director's implied decision on the principal's exemption from recusation.

20. On the other hand, according to the information provided by the complainants and possessed by the CCAC, the DSEJ had never conducted appraisal on teachers' performance. The basis was Article 14, Section 4 of the *General Principles Governing Teaching Personnel of the Education and Youth Affairs Bureau* (hereafter referred to as the *General Principles Governing Teaching Personnel*) which stipulated that "when there is no regulation for the appraisal procedure, for all of the effects, a

teaching staff's performance is considered to be satisfactory if there is no disciplinary record unfavourable to the teaching staff." The regulation for the appraisal procedure refers to the "regulation for the appraisal procedure established by the Governor through administrative orders" stated in the Section 3 of the same article, but such regulation had not yet been formulated.

21. In fact, as teaching staff's performance appraisal, according to law, aims to "enhance the quality of teaching and learning through teaching staff's personal and vocational development and enable the organization of the educational system to respond to the public need in educational field", "facilitate the improvement of their teaching activities and working efficiency", "facilitate their self-improvement and self-perfection", "facilitate the investigation into their need for training and changing of duties", "explore the factors that influence the effectiveness of teaching staff's performance" and "provide guidance for teaching staff's management of their work", for a long period of time the authority has been using Section 4 of Article 14, which was a transitional presumption (the *General Principles Governing Teaching Personnel* has been promulgated for almost 9 years), and hence did not regulate the teaching staff's appraisal procedure. As a result, this certainly impedes the fulfilment of the aforementioned aims. In the case of C, one of the reasons for not renewing his contract as publicized by the DSEJ was that "he had never arranged students to participate in external musical contests". If the authority had conducted performance appraisal, its negative attitude towards C's "omission" should have been reflected in the appraisal and the case would not have evolved into this state. Therefore, the DSEJ should adopt measures to facilitate the formulation of regulations on the appraisal procedure of teaching staff's performance.

22. As to the teaching staff employed on non-permanent terms, the renewal of their contracts depends on the "act" of the administrative authorities in accordance with law, which expresses the intention to renew the contracts. Regardless of the length of time of their service, the authorities only have to make unequivocal expression when they have the intention to renew the contract. The authorities would bear the duty of elucidation if they decided not to renew the contract. Nevertheless,

as for the teaching personnel of private schools to whom the *Labour Law* was applicable, even though they are employed on fix term contracts, they will be considered as permanent personnel as long as their contracts are renewed thrice. Moreover, if their contracts are terminated by the schools with reasons which are not attributable to them, they are entitled to receive compensations according to law. In other words, in reality, protection for non-permanent teaching staffs of public schools is weaker than that for teachers of private schools.

23. Nevertheless, while introducing the policy for 2008, the Secretary for Social Affairs and Culture stated that the government would continuously increase educational resources, improve the benefits for teachers and enhance the quality of education. Though the "teachers" mentioned on it should be referring to those of private schools, if it has only taken the benefits for private school's teachers into account while the vocational protection for the non-permanent staff of public schools, who undertook the responsibility for public education, was ignored, it would demonstrate unfairness. Based on this, the government should not neglect providing vocational protection for non-permanent teaching staff of public schools as well as adopting a mechanism to guarantee their performance by "performance appraisal".

24. Therefore, the CCAC has taken the following measures:

(1) To make an advice to the DSEJ, urging it to pay attention to the restrictions on the exercise of discretion in order to avoid making any decisions on renewal of the contracts of teaching staff employed on non-permanent terms based on their ideological values, such as "recognition on the sponsoring philosophy".

(2) To make a proposal to the Secretary for Social Affairs and Culture to evoke formulation of provisions on the procedure of teaching staff's performance appraisal and conducting studies / researches on how to enhance the necessary protection for non-permanent teaching staff of public schools, especially the regulations on contract renewal.

25. The DSEJ accepted the CCAC's advice.

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