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Secretary for the Environment, Transport
and Works
Environment, Transport and Works Bureau
(Attn: Mr Eric CHAN, AD (CV))
46/F, Revenue Tower
5 Gloucester Road
Wan Chai
Hong Kong

By Fax (2834 5648) and By Post

16 June 2005

Dear Mr CHAN

Protection of Endangered Species of Animals and Plants Bill (“the Bill”)

I refer to your letter of 14 May 2005 and have the following comments:

Section 2

Convention Instrument

Your view is that the instruments cover mostly guidelines that are more technical in nature and will not affect the basic principles of CITES that are incorporated in the main body of this Bill. As the contents of these instruments may need to be updated or modified from time to time by the Conference of Parties, you therefore consider it more appropriate to set out these elaborate guidelines in Schedule 3 of the Bill and to empower the SETW to amend the Schedule by an Order published in the Gazette so as to ensure the timely incorporation of the relevant changes into the Hong Kong domestic law.

I concur that some of the provisions in Schedule 3 are technical in nature. However, some of the terms are defined under section 2 by drawing references to the meaning assigned to them in Schedule 3 and change of meaning of these terms may have impact on the implementation of the provisions of the Bill. For example, a person who commits an offence under section 5 is liable on conviction to a fine of \$100,000 and to imprisonment for 1 year. But under section 10, if the court is satisfied that his act was carried out for commercial purposes, that person,

instead of being liable to the penalty prescribed under section 5, is liable to a fine for \$5,000,000 and to imprisonment for 2 years. Therefore, a change in the definition of “commercial purposes” in Schedule 3 will affect the operation of the other sections in the Bill.

Re-export Certificate

“Export” is a general term and should apply to the whole Bill.

Section 3 and 22

Article VII of CITES stipulates that the regulations of trade in specimens of species included in Appendix I, Appendix II and Appendix III shall not apply to the transit or transshipment of specimens through or in the territory of a Party while the specimens remain in Customs control.

Your view, which I do not share, is that “remain in customs control” may be interpreted to mean direct control such as taking into possession or custody, or other indirect control such as when the goods or objects are subject to any specific directions by the relevant authority. Goods or objects brought into Hong Kong by a carrier are subject to customs control before clearing customs even if they are not under direct control of a customs officer.

In the light of your interpretation, all the goods or objects brought into Hong Kong by a carrier are subject to customs control and thus fall within the boundary of “remain in custom control” as provided in Article VII of CITES. Is there any goods or objects brought into Hong Kong by a carrier not subject to customs control? If the goods and objects are exempted from CITES, should they also be excluded from the Bill, the main purpose of which is to give effect to CITES?

Clauses 23 and 52

I note that the policy intent is that re-export certificates will be issued under section 53 when newly added CITES species are already subject to control in some importing countries but yet to have been included in our local Ordinance pending legislative amendments.

As the policy intent of section 48 is to ensure timely incorporation of the relevant changes into our domestic law, should SETW exercise her power under this section to incorporate the newly added CITES species in the relevant Schedule so that the Director can issue the certificates under section 23 instead of issuing certificates for species not covered by the Bill under section 52?

Section 26

Section 26(4) of the Bill provides that if the holder lodges an appeal under section 46(1) against the Director's decision relating to the cancellation of the relevant licence, the Director shall return the licence to that holder pending the determination of the appeal by the Administrative Appeals Board.

If the licence holder will not be able to use the licence for the export or re-export of specimens before the determination of the appeal by the Administrative Appeals Board due to administrative measures, what is the purpose of returning the licence to him? If the Administrative Appeals Board subsequently revokes the Director's decision relating to the cancellation of the relevant licence and the holder suffers loss or damage due to delay of the export or re-export of the specimens, can the licence-holder recover the loss or damage from the Government?

This policy does not appear to be congruent with the policy manifested in section 46, in particular subsection (4) which provides that where the appeal is against a decision relating to the cancellation of a licence under section 26, the decision shall not become effective pending the determination of the appeal by the Administrative Appeals Boards. Please clarify.

It is appreciated that your reply in both Chinese and English could reach us by close of play, 22 June 2005.

Yours sincerely

(Monna LAI)
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