

立法會
Legislative Council

LC Paper No. LS74/20-21

**Further Report by Legal Service Division on
Mercury Control Bill**

Members may recall from LC Paper No. LS70/20-21 dated 6 May 2021 and issued to Members vide LC Paper No. CB(2)1062/20-21 that the Legal Service Division ("LSD") was scrutinizing the legal and drafting aspects of the Bill. At the meeting of the House Committee on 7 May 2021, Members decided not to form a Bills Committee to study the Bill.

2. To recap, the main purpose of the Bill is to implement the Minamata Convention on Mercury ("Convention") by, among others, regulating the import and export of mercury and mercury mixtures. The Bill also seeks to introduce a permit system under which the Director of Environmental Protection ("Director") may issue, renew, suspend and cancel import or export permits for mercury and mercury mixtures. LSD has sought clarifications from the Environmental Protection Department ("EPD") on certain legal aspects of the Bill. LSD's enquiries and EPD's response (at Appendix) are summarized below.

Implementation of the Convention

3. LSD has noted that the Bill contains no provisions to implement paragraph 8 of Article 3 of the Convention which provides that import of mercury from a non-party to the Convention ("non-Party") should be prohibited unless the non-Party has provided certification that the mercury is not from certain prohibited sources ("Import Requirement"). In response to LSD's enquiry, EPD has explained that while the Bill makes no express reference to the Import Requirement, the Director will take it into account when considering an application for an import permit and in particular whether refusing such application is necessary for protecting the public health or environment under clause 21(d) of the Bill.

Proposed permit system

4. LSD has sought clarification from EPD on why three factors to be considered by the Director¹ before the issuance of import and export permits

¹ Please see paragraph 7 of the Legislative Council Brief (File Ref.: EP CR 90/C1/05 Pt.2) issued by the Environment Bureau and EPD in April 2021.

have not been reflected in the provisions of the Bill. Those factors are (i) whether the source of mercury is allowed under the Convention (for import permit), (ii) whether the import of mercury is agreeable to the Central People's Government (for import permit) and (iii) whether the use of the mercury is allowed under the Convention (for export permit). EPD has replied that the Director will assess the information provided by the applicants for import and export permits and consider whether refusing such application is necessary for protecting the public health or environment under clause 21(d) (for import permit) or clause 19(b) (for export permit) of the Bill. EPD also intends to publish administrative guidelines for applicants of import and export permits, which will set out, among others, factors to be considered by the Director in processing the applications, and documents and information which are required to be submitted by the applicants.

5. In response to LSD's enquiry on the reasons for the difference on the standard of compliance with environmentally sound storage requirement under clause 21(b) (i.e. the imported chemicals would be kept in an environmentally sound manner) and clause 23(a) (i.e. the applicant for a possession permit has the ability to keep the chemicals in an environmentally sound manner) of the Bill, EPD has replied that clauses 21(b) and 23(a) deal with the issue of an import permit and a possession permit respectively. Different requirements apply because an importer is not necessarily responsible for keeping the imported mercury while a user who applies for a possession permit will be personally responsible for keeping the imported mercury.

Transitional arrangement

6. LSD notes that there is a three-year transitional period for the proposed prohibition on the supply of regulated mercury-added products under clause 16 of the Bill but no transitional arrangements have been proposed for other prohibitions in the Bill. EPD has explained that there is no transitional arrangement for the prohibitions that have been developed to comply with the Convention because of the urgent need to ensure compliance with the obligations under the Convention which entered into force in 2017. The proposed prohibition on the supply of regulated mercury-added products is not an obligation under the Convention and the proposed transitional period is to allow the trade to exhaust the existing stock of regulated mercury-added products within a reasonable period of time.

Commencement date

7. Upon LSD's enquiry on the intended commencement date of the Bill (if passed), EPD has replied that in order to allow sufficient time for EPD to finalize the relevant guidelines on applications for import and export permits,

provide training to the enforcement teams and explain the provisions of the Bill to relevant trades and professional bodies, EPD intends to bring the Bill into operation around four months after the Bill is passed by the Legislative Council.

8. LSD has completed the scrutiny of the Bill. Subject to Members' views on the above matters, no difficulties have been identified in relation to the legal and drafting aspects of the Bill.

Encl

Prepared by

Mark LAM
Assistant Legal Adviser
Legislative Council Secretariat
1 June 2021

LS/B/27/20-21



中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China



立法會秘書處 法律事務部
LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

Appendix

來函檔號 YOUR REF : EP CR 90/C1/05 Pt. 2
本函檔號 OUR REF : LS/B/27/20-21
電話 TELEPHONE : 3919 3528
電郵 EMAIL : mkylam@legco.gov.hk

By Email (dorothyma@epd.gov.hk)

10 May 2021

Mrs Dorothy MA
Assistant Director of Environmental Protection
(Cross-Boundary and International)
Environmental Protection Department
16/F, East Wing
Central Government Offices
2 Tim Mei Avenue
Tamar
Hong Kong

Dear Mrs MA,

Mercury Control Bill

We are scrutinizing the captioned Bill with a view to advising Members on its legal and drafting aspects. We should be grateful if you could clarify the following issues.

Implementation of the Minamata Convention on Mercury ("Convention")

2. According to paragraph 8 of Article 3 of the Convention, each party to the Convention shall not allow the import of mercury (includes mercury mixture) from a non-party to the Convention ("non-Party") to whom it will provide its written consent unless the non-Party has provided certification that the mercury is not from sources identified as not allowed under paragraph 3 (primary mercury mining) or paragraph 5(b) (excess mercury from the decommissioning of chloro-alkali facilities) of that Article. Please let us know whether the Administration would consider adding a provision to the Bill to reflect this import requirement.

Proposed permit system

3. Paragraph 7 of the Legislative Council Brief (File Ref.: EP CR 90/C1/05 Pt.2) issued by the Environment Bureau and the Environmental Protection Department in April 2021 stated the Director of Environmental Protection ("Director") would consider the following factors before issuing an import or export permit:

- (a) whether the source of the mercury is allowed under the Convention (for import permit);
- (b) whether the import of mercury is agreeable to the Central People's Government (for import permit); and
- (c) whether the use of the mercury is allowed under the Convention (for export permit).

Please explain why these factors have been not reflected in the provisions of the Bill in relation to the issuance of import and export permit.

Prohibitions

4. Under clause 21(b) of the Bill, one of the grounds for refusing to issue import permit is the Director being not satisfied that the batch of chemicals, if imported, would be kept in an environmentally sound manner as required by the Convention. However, under clause 23(a) of the Bill, one of the grounds for refusing to issue possession permit is the Director being not satisfied that the applicant has the ability to keep the batch of chemicals in an environmentally sound manner as required by the Convention. Please explain the reasons for the difference on compliance with environmentally sound storage requirement in these two clauses.

5. Under clause 15(3) of the Bill, a person would be prohibited from incorporating a regulated mercury-added product into another things as component. Please consider if it is appropriate to have a definition of "incorporating" in the Bill to explain whether "incorporating" would refer to physical mixing, combining through chemical reaction or other ways of combining.

Other issues

6. For the proposed prohibition on supply of regulated mercury-added product under clause 16 of the Bill, there is a three year period for

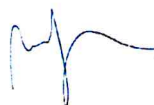
the transition while there is no transitional arrangements for other prohibitions proposed in the Bill. Please explain the reasons for such arrangements.

7. Please clarify whether "secretary" in clause 66(2)(a) of the Bill means company secretary. If not, please explain if including "secretary" in the category of "officer of the body corporate" in clause 66(2)(a) is consistent with the definition of "officer" in section 2 of the Companies Ordinance (Cap. 622) which provides that "officer (高級人員), in relation to a body corporate, includes a director, manager or company secretary of the body corporate."

8. Please let us know whether the Administration has any intended commencement date for the Bill (if passed).

9. I look forward to receiving your reply in both English and Chinese as soon as possible, preferably by **14 May 2021**.

Yours sincerely,



(Mark LAM)
Assistant Legal Adviser

c.c. Department of Justice
(Attn: Ms Amy CHAN, Senior Assistant Law Draftsman)
(By Email: amywychan@doj.gov.hk)
Legal Adviser
Senior Assistant Legal Adviser 2

本署檔案
OUR REF: EP CR 90/C1/05 Pt.2
來函檔案
YOUR REF: LS/B/27/20-21
電話
TEL. NO.: 3509 8615
圖文傳真
FAX NO.: 2110 4172
電子郵件
E-MAIL:
網址
HOMEPAGE: <http://www.epd.gov.hk>

Environmental Protection Department
Headquarters
15 & 16/F, East Wing,
Central Government Offices,
2 Tim Mei Avenue,
Tamar, Hong Kong



環境保護署總部
香港添馬
添美道二號
政府總部東翼
十五及十六樓

By Email

26 May 2021

Mr. Mark LAM
Assistant Legal Adviser
Legal Service Division
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Mr Lam,

Mercury Control Bill

Thank you for your letter of 10 May 2021. I attach at **Annex** our response to your questions. Our response in Chinese will be provided separately.

Yours sincerely,

(Dorothy MA)

for Director of Environmental Protection

Encl.

c.c.:

Department of Justice

(Attn: Ms. Amy CHAN)

Fax: 3918 4613

**Government's Responses to
Legislative Council Assistant Legal Adviser's Questions on
the Mercury Control Bill**

Q1. According to paragraph 8 of Article 3 of the Convention, each party to the Convention shall not allow the import of mercury (includes mercury mixture) from a non-party to the Convention ("non-Party") to whom it will provide its written consent unless the non-Party has provided certification that the mercury is not from sources identified as not allowed under paragraph 3 (primary mercury mining) or paragraph 5(b) (excess mercury from the decommissioning of chloro-alkali facilities) of that Article. Please let us know whether the Administration would consider adding a provision to the Bill to reflect this import requirement.

The above-mentioned requirement under Article 3 of the Convention will be considered by the Director under clause 21(d) of the Bill before issuing an import permit.

The Administration will consider a host of factors when an application for an import permit should be refused. Factors that are relevant to activities within HKSAR, such as the intended use and the storage of the mercury following importation to Hong Kong, are specified as the grounds for refusing to issue import permits under clauses 21(a), (b) & (c) of the Bill respectively.

For the requirements under Article 3 of the Convention involving the assessment of the mercury source at the exporting side and whether the mercury import is agreeable to the Central People's Government (CPG), they relate to activities outside the territory of HKSAR. The Director will assess with the information provided by the applicant, and consider whether refusing the application is necessary for protecting the public health or environment under clause 21(d).

We will publish guidelines for applicants applying for import and export permits. The guidelines will set out, among others, the factors to be considered by the Director in processing the applications, and the documents and information that should be submitted by the applicants. The guidelines would be similar to the existing guidelines on application for import and export licence for **elemental** mercury under the Import and Export Ordinance (Cap.60):

https://www.epd.gov.hk/epd/sites/default/files/epd/english/resources_pub/policy/files/mercury_import_export_eng.pdf

Q2. Paragraph 7 of the Legislative Council Brief (File Ref.: EP CR 90/C1/05 Pt.2) issued by the Environment Bureau and the Environmental Protection Department in April 2021 stated the Director of Environmental Protection ("Director") would consider the following factors before issuing an import or export permit:

(a) whether the source of the mercury is allowed under the Convention (for import permit); (b) whether the import of mercury is agreeable to the Central People's Government (for import permit); and (c) whether the use of the mercury is allowed under the Convention (for export permit). Please explain why these factors have been not reflected in the provisions of the Bill in relation to the issuance of import and export permit.

The above-mentioned three factors would be considered in clauses 21(d), 19(a) and 19(b) respectively in relation to the issuance of the respective import or export permits, with a view to ensuring HKSAR fulfills the Convention's objective to protect the public health and environment. Detailed explanations are set out below:-

(a) whether the source of the mercury is allowed under the Convention (for import permit): The applicant for an import permit would need to demonstrate the source of the mercury is allowed under the Convention at the exporting side. The question concerning the source of the mercury relates to activities outside the HKSAR. In line with the principle set out in our reply to Q1, the Director will assess the information provided by the applicant, and consider whether refusing the application is necessary for protecting the public health or environment under clause 21(d).

(b) whether the import of mercury is agreeable to the Central People's Government (for import permit): The applicant for an import permit would need to demonstrate that the import of mercury is agreeable to the CPG before applying for the permit. In line with the principle set out in our reply to Q1, the Director will assess the information provided by the applicant, and consider whether refusing the application is necessary for protecting the public health or environment under clause 21(d).

(c) whether the use of the mercury is allowed under the Convention (for export permit): The applicant for an export permit would need to demonstrate that the use of the mercury is allowed under the Convention. The question on the use of the mercury in the importing place relates to activities outside the HKSAR. In line with the principle set out in our reply to Q1, activities that do not relate to activities within HKSAR are not specified as the grounds for refusing to issue export permit. They will be considered by the Director under clause 19(a). When assessing whether the use of the mercury in the importing place is allowed under the

Convention, the Director will take into account whether the mercury is exported to a Party or a non-Party. For mercury exported from HKSAR to a Party, the applicant shall provide relevant information to demonstrate that the importing Party agrees to the import of such mercury. It is the obligation of the importing Party under the Convention to ensure that the mercury, after imported, will be of a use allowed under the Convention. If the applicant fails to provide relevant information to show that the export of mercury is agreeable to the importing Party, the Director may consider refusing the application on the ground that refusal is necessary for protecting the public health or environment under clause 19(b).

For mercury proposed to be exported from HKSAR to a non-Party, the Director will consider whether the use of the mercury at the importing side is allowed under the Convention by assessing the information provided by the applicant. Clause 19(b) provides the ground for the Director to refuse to issue an export permit on the ground that refusal is necessary for protecting the public health or environment, if the Director is not satisfied that the use of the mercury is allowed under the Convention.

We will publish guidelines for applicants applying for import and export permits. The guidelines will set out, among others, the factors to be considered by the Director in processing the applications, and the documents and information that should be submitted by the applicants. The guidelines would be similar to the existing guidelines on application for import and export licence for **elemental** mercury under the Import and Export Ordinance (Cap.60):

https://www.epd.gov.hk/epd/sites/default/files/epd/english/resources_pub/policy/files/mercury_import_export_eng.pdf

Q3. Under clause 21(b) of the Bill, one of the grounds for refusing to issue import permit is the Director being not satisfied that the batch of chemicals, if imported, would be kept in an environmentally sound manner as required by the Convention. However, under clause 23(a) of the Bill, one of the grounds for refusing to issue possession permit is the Director being not satisfied that the applicant has the ability to keep the batch of chemicals in an environmentally sound manner as required by the Convention. Please explain the reasons for the difference on compliance with environmentally sound storage requirement in these two clauses.

Clause 21(b) deals with the issue of an import permit. The applicant for an import permit, or the importer, is not necessarily responsible for keeping the mercury. In most cases, the imported mercury will be delivered to the user who will be responsible for the storage of the mercury. We have therefore provided a more general description in Clause

21(b) to cover situations where the importer is not responsible for keeping the imported mercury. As for Clause 23(a) which deals with the issue of a possession permit, the applicant for the permit is also responsible for the keep of the mercury in question. Therefore, Clause 23(a) specifically provides that the Director may refuse to issue a possession permit if the Director is not satisfied that the applicant has the ability to keep the batch of chemicals in an environmentally sound manner as required by the Convention.

Q4. Under clause 15(3) of the Bill, a person would be prohibited from incorporating a regulated mercury-added product into another things as component. Please consider if it is appropriate to have a definition of "incorporating" in the Bill to explain whether "incorporating" would refer to physical mixing, combining through chemical reaction or other ways of combining.

Clause 15(3) aims to prohibit the incorporation of a regulated mercury-added product into another thing in all forms and ways. It would not be possible to form an exhaustive list of definition of "incorporating" in the Bill. The term "incorporating" should be construed in its ordinary meaning, which is "to include something as part of something larger".

Q5. For the proposed prohibition on supply of regulated mercury-added product under clause 16 of the Bill, there is a three year period for the transition while there is no transitional arrangements for other prohibitions proposed in the Bill. Please explain the reasons for such arrangements.

There is no transitional arrangement for the prohibitions that have been developed to comply with the Convention's obligations due to the urgent need to ensure HKSAR's compliance with the obligations under the Convention which entered into force in 2017. As for the proposed prohibition on supply of regulated mercury-added product under clause 16, it is not an obligation under the Convention. This prohibition has been included to further remove any incentive for the illegal import of regulated mercury-added product into Hong Kong. As explained in paragraph 9 of the LegCo brief, the three-year transitional period has been introduced to allow the trade to exhaust the existing stock of regulated mercury-added products within a reasonable period of time.

Q6. Please clarify whether "secretary" in clause 66(2)(a) of the Bill means company secretary. If not, please explain if including "secretary" in the category of "officer of the body corporate" in clause 66(2)(a) is consistent with the definition of "officer" in section 2 of the Companies Ordinance (Cap. 622) which provides that "officer (高級人

員), in relation to a body corporate, includes a director, manager or company secretary of the body corporate."

"Secretary" in clause 66(2)(a) of the Bill refers to company secretary (by whatever name called). Provisions similar to section 66 appear in various pieces of legislation such as the Conservation of Antarctic Marine Living Resources Ordinance (Cap. 635, in section 29), Private Columbaria Ordinance (Cap. 630, in section 100), Food Safety Ordinance (Cap. 612, in section 51) and Bunker Oil Pollution (Liability and Compensation) Ordinance (Cap. 605, in section 32).

Q7. Please let us know whether the Administration has any intended commencement date for the Bill (if passed).

Following the passage of the Bill, we will finalise the relevant guidelines on application for export and import permits, conduct training to the enforcement teams and organise publicity activities to explain the provisions in the Bill to the relevant trades and professional bodies. To allow sufficient time for the trades and other stakeholders to prepare for the new statutory requirement, we aim to bring the Ordinance into operation around four months after the passage of the Bill.