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Solicitors & Notaries

URBAN PLANNING AND ENVIRONMENTAL LAW QUARTERLY

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Each year Fred Kan & Co. awards a prize for a meritorious dissertation submitted in the Master of Sciences (Environmental Management) programme at the University of Hong Kong. In 2002 the award was made to Stephen Ng for his dissertation *Transboundary Water Pollution: A Legal Perspective*. In this edition of the *Quarterly* we summarise several of the points made by Mr. Ng in his thought-provoking dissertation.

The Editors

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ADDRESSING TRANSBOUNDARY WATER POLLUTION ISSUES CONCERNING THE HKSAR AND MAINLAND CHINA

Evolution of Hong Kong's environmental law

By comparison with many western countries, both Hong Kong and China have a short history in legislating for the protection of their natural environments and prevention of air and water pollution.

Environmental legislation evolved in three phases in Hong Kong. In the first phase, immediately following British colonial occupation, there was little or no interest in protecting by legislation the environment from pollution or other damage. Statutory laws which might be considered to affect the environment usually were directed to some degree of protection of public hygiene: e.g. provisions in the *Summary Offences Ordinance* of 1845 designed to improve the cleanliness of the colony. Additionally, the government was, to some extent, able to control the worst

environmental excess arising from use of land through lease conditions, as the government was the sole owner of land in Hong Kong. There was also the possibility of redressing environmental wrongs by use of common law torts, such as private and public nuisance.

The second phase could be said to run from 1939 when legislation controlling the way land is used and the standard of housing and building construction was introduced. The legislation created the building and the planning authorities.

By the end of the 1970s Hong Kong's economic prosperity was assured, but this was demonstrably at the high price of severe environmental degradation. This led to the third phase in Hong Kong's environmental law evolution when various anti-pollution and, subsequently, broad conservation statutes were introduced. These are now a well established part of Hong Kong's legislative framework imposing a command-and-control system of protection for Hong Kong's environment. The *Water Pollution Ordinance* and *Air Pollution Ordinance* are two of the principal statutes in this framework.

Transboundary water pollution involving the Mainland

Leaving aside consideration of the serious issue of pollution of China and Hong Kong's shared marine waters, Hong Kong inevitably is affected by pollution of Guangdong Province's fresh water reserves in that we are highly dependent on such reserves for our fresh water supplies. It was clear by the early 1960s that Hong Kong could not catch and store sufficient fresh water to meet its rapidly increasing domestic needs, despite the government setting aside approximately one third of its land area for this purpose. The government therefore decided in 1960 to augment local supplies with an annually assured additional supply from Guangdong.

In 1965 the Dongshen Water Supply Scheme (DWSS) was established, primarily to recover and supply water to both Hong Kong and Shenzhen. The main source for the DWSS was the Shima River which in turn was supplied by the relatively large Dongjiang catchment area.

Rapid industrialisation and urbanisation of Guangdong since the early 1980s has resulted in the water quality of DWSS catchment and supply sources deteriorating significantly. There was also significant deterioration of the water quality in the Pearl River estuary.

Hong Kong therefore became - and remains - concerned about the general environmental quality of the Dongjiang catchment. Use of land in the catchment inevitably impacts water quality of the Shima River and therefore the quality of water DWSS is able to supply Hong Kong. Thus there is a direct, transboundary environmental/water pollution issue for both Guangdong and Hong Kong. It is not the typical situation of an up-stream nation polluting the river so as to affect adversely down-stream nations; but by virtue of the water supply agreement, environmental impacts in Guangdong similarly must have direct impact in Hong Kong (and of course will in any event, insofar as marine waters are affected by consequential pollution).

"International" environmental disputes with China

Paradoxically, were the pre-1997 political situation still to exist, Hong Kong would have more effective and direct ways of challenging water polluting activities carried on beyond the borders of Hong Kong in Guangdong. Even today, if pollution is caused by a nation other than China, Hong Kong's range of possible remedies is probably broader than where the government of Guangdong is the targeted offender. This is due to the fact that an international pollution problem is covered by general international law and states' obligations to each other under mutually signed treaties. Britain and China for many years have been signatories to significant transboundary pollution treaties, such as the *Basel Convention on Control of Transboundary Movements of Hazardous Wastes*

and their Disposal (Basel Convention). So before 1997 Hong Kong could challenge the conduct of a polluting party based in another country in an international forum such as the International Court of Justice (ICJ). Treaties and the United Nations Charter also require states to take all reasonable steps to discuss and peacefully resolve disputes, including those involving environmental harm.

Under the *Basic Law*, probably Hong Kong could still resort to the ICJ by virtue of the unique international personality conferred on the HKSAR by Articles 151 and 153.

Ironically, however, the position of Hong Kong via-a-vis Guangdong (and other mainland authorities) following implementation of the *Basic Law* - as a result of which both territories are now part of China- is weakened in terms of avenues of redress for environmental harm generated in China.

That situation could be remedied by Guangdong and the HKSAR signing a Memorandum of Understanding (MOU) by

...if pollution is caused by a nation other than China, Hong Kong's range of possible remedies is probably broader than where the government of Guangdong is the targeted offender.

which the dispute resolution procedures provided for in treaties to which both the HKSAR (as Hong Kong China) and China are signatories could be applied to transboundary pollution disputes. Or, China and HKSAR could and should introduce into their domestic law similar dispute resolution procedures.

The *Basic Law* has affected Hong Kong's position in the context of resolving disputes with the rest of the mainland in another way. The overriding principle of governance for the HKSAR mandated by the *Basic Law*

is the principle of "one country, two systems". Thus the *Law* emphasises the significant autonomy of Hong Kong within the one country of China. This has led to what is often referred to as the "isolation principle", which holds that in terms of its relationship with China many conflicts have in fact been generated as a result of the reunification with China under the one country two systems principle. This is clearly found in the important area of cross-border co-operation on environmental issues.

Article 119 of the *Basic Law* authorises Hong Kong to design its own environmental policies, which means that Hong Kong continues to devise its own laws, strategies and plans for (hopefully) responsible conservation of its environment. Thus Hong Kong might be seen by China-based authorities to be an independent party in terms of environmental protection. This perception is reinforced by Article 22 of the *Basic Law* which prevents other regions in China from interfering with the administration of Hong Kong. Added to this is a degree of hostility towards people in Hong Kong - often from commercial motives - which can work against regional co-operation on transboundary pollution issues. This unfortunate situation results probably from the fact the framers of the *Basic Law* were not being particularly aware of environmental issues, but rather focused almost exclusively on economic independence and stability for the HKSAR. This is

unfortunate because although prior to the reversion of sovereignty Hong Kong considered itself a supreme, high-class metropolitan city, in reality it had a third-class environmental protection record.

Possible steps to improve cross-border pollution controls

Incorporating international mechanisms into domestic law

As a priority, Guangdong province (or mainland China generally) and the HKSAR should take steps to incorporate the beneficial aspects of international treaties to which China and Hong Kong are signatories into their domestic law with the aim of regulating the behaviour of individuals to achieve full compliance with environmental and other objectives of those agreements and treaties. The first step towards this would be for the respective governments to agree the terms and conditions of applicable regional agreements which are to be incorporated into their domestic laws.

This in turn requires attaining a better level of regional co-operation between the governments of the HKSAR and the Mainland. It is practically and logically sensible for inter-governmental agreements concerning controlling environmental pollution from transboundary sources to be achieved in a regional, co-operative sense.

To an extent the process has begun, with Hong Kong and the State Environmental Protection Administration of China recently signing an MOU. A similar MOU was jointly signed by Hong Kong and the State Oceanic Administration in September 1999. In 1990 the Hong Kong - Guangdong Joint Environmental Liaison Group ("JLG") was formed and has met on a fairly regular basis since then to discuss regional environmental problems. An example of their work is the initiation of studies and action plans to combat water pollution in Deep Bay and Mirs Bay in 1999, and the work of a joint working group on Sustainable Development and Environmental

Protection (with emphasis on cross-border issues) from 2001.

It is extremely important that to date China's central government agencies have been involved in supporting the joint efforts of Hong Kong and Guangdong. Without central government support it is likely that the HKSAR representatives in the JLG would have difficulties in reaching favourable agreement with Guangdong in resolving issues like the cost of the supply of water to Hong Kong and ancillary environmental issues.

Criminalise environmental offences

International agreements encourage or mandate signatory countries to alter their domestic laws to criminalise environmental misconduct by their nationals. An example of this is the *Basel Convention*, which requires illegal trafficking in hazardous waste to be made a criminal offence under parties' domestic laws.

The same requirement should be applied to activities directly relating to transboundary water pollution problems between the HKSAR and the mainland. However, it is acknowledged that there could be difficulties in criminalising such activities due to the difference between the legal systems of the HKSAR and the Mainland. Accordingly, a more efficient and effective solution to transboundary pollution problems could lie in private law remedies at a domestic level, although introduction of criminal penalties for international or transboundary pollution offences should be further examined and if possible integrated into the domestic laws of the affected jurisdictions.

Private law remedies for international law offences

As between independent states - in which we can include Hong Kong, China for these purposes - transboundary pollution disputes are always justiciable in international fora established for this purpose. However, as said, this is not possible where the two parties are in fact autonomous regions of the same nation, namely China. Further, some experts in this field do not support the notion of inter-governmental disputes being

adjudicated in international courts because of their lengthy and inefficient processes. So an alternative means for China and Hong Kong to resolve cross-border environmental disputes by application of their own domestic laws is to be preferred.

Domestic alternatives should include alternative dispute resolution, such as *ad hoc* direct negotiation, establishing a standing transboundary commission with effective powers of adjudication, or laying down a mediation process to be followed in each instance of dispute.

Reciprocal enforcement is a key element

Europe provides a model for substituting domestic civil and administrative court processes for inter-governmental environmental litigation at an international level. A key to this is the amendment of domestic laws to allow for reciprocal enforcement of arbitration awards or court judgments. Thus, Hong Kong and Guangdong should amend their domestic laws in two radical ways: firstly, to enable victims of transboundary pollution to sue in their domestic courts for compensation or other relief, notwithstanding the defendant is domiciled in another jurisdiction; secondly, by incorporating reciprocal arrangements for enforcement of judgments and arbitration or mediation decisions. These amendments should ensure an effective and efficient means of civil settlements of transboundary pollution disputes.

The HKSAR already has a comprehensive legal system with an independent judiciary of international standard. The same cannot be said of the Mainland, but improvement in the Mainland's justice system continues as China's involvement in the international community increases.

Alternative dispute resolution (ADR)

Irrespective of systematising civil remedies in Hong Kong's and Guangdong's domestic laws, the governments of these regions could look at adopting an ADR process for resolving transboundary environmental disputes. This

approach to environmental problems has been implemented in sophisticated jurisdictions such as the United States, where the Environmental Protection Authority has supported the use of ADR processes since 1990. A perceived benefit of ADR is that private parties to the environmental dispute see it as providing efficiency, finality and confidentiality.

Conciliation and mediation are powerful forms of ADR for settling environmental disputes. Both China and Hong Kong have a well developed system of conciliation in commercial disputes. For example, Hong Kong has the Hong Kong Mediation Centre, and China has the Beijing Conciliation Centre. If in transboundary pollution disputes conciliation/mediation is to be the preferred ADR method adopted by Hong Kong and Guangdong there should be a degree of complimentary mandatory mechanisms added to the process to assist in achieving speedy settlements of disputes.

In arbitration of disputes, Hong Kong provides an already reliable and credible forum due to its proven record in commercial arbitration and legal development. It is likely that environmental disputes will increase as a result of China's entry into the World Trade Organisation. The world-wide enforceability of arbitral awards pursuant to the New York Convention 1958 makes arbitrating disputes with international characteristics even more effective than litigating them in domestic jurisdictions.

If litigation is the chosen method of resolving transboundary pollution (and other environmental) disputes between Hong Kong and China then China's Supreme People's Court and the High Court of Hong Kong should have cross-border jurisdiction to settle disputes.

Inter-governmental disputes

In all of the above suggested dispute resolution regimes, complainants should be entitled to bring proceedings against individuals and government agencies alike.

For disputes at an inter-governmental level, it is suggested that the National People's Congress should establish *ad hoc* commissions or arbitral tribunals to adjudicate such disputes. Such bodies would be permissible under the *Basis Law*, which otherwise prohibits China's courts from involvement in inter-governmental disputes with Hong Kong.

Although ultimate resolution of environmental disputes between governments in China and the government of the HKSAR could be achieved by *ad hoc* or arbitral commissions, the first step should always be a mandated form of regional negotiations between the governments concerned.

Conclusion

All of the author's suggested reforms are aimed at overcoming the effects of the isolation principle in the context of Hong Kong's ability to address transboundary pollution and other environmental issues involving Mainland China. More recent regional discussions between the HKSAR and Mainland governments show that environmental concerns have become a key agenda item. Increasing frequency and level of regional meetings and co-operation have led to the signing of MOUs dealing with aspects of environmental disputes. By incorporating regional MOUs into domestic legislation, legal and constitutional gaps between jurisdictions affected by transboundary environmental disputes can be minimised.

The European Union provides a model for the HKSAR and Mainland for establishing private law remedies for remedying transboundary environmental disputes. A key component of this model is the introduction into domestic law of reciprocal enforcements of judgments/arbitration etc. awards and key rules for deciding the applicable law and forum. Again, such matters can be achieved via regional MOUs and local legislative changes.

Criminalisation of environmental offences by domestic law amendments

is also a key component of any regional scheme for handling transboundary environmental disputes. However, it is recognised that the feasibility of imposing a schedule of regional environmental criminal offences will be difficult and is likely to be delayed and protracted. If established, it would be sensible to require an interim review of the effectiveness of such a system, say, five years after implementation.

LEGISLATION DIGEST

Marine Parks and Marine Reserves (Amendment) Regulation 2002
(Made under section 20(1) of the Marine Parks Ordinance (Cap. 476) (L.N. 182 of 2002) (This Regulation came into operation on 2 January 2003))

Section 20(1) of the Marine Parks Ordinance (Cap 476) empowers the Secretary for the Environment, Transport and Works ("Secretary") to make regulations to provide for the proper management and control of (including the specification of zones within and the closure or partial closure of) marine parks and marine reserves. The Secretary is also empowered to make regulations to prohibit or control various activities - including fishing and spear-fishing - within a marine park or marine reserve. By virtue of this power, the Marine Parks and Marine Reserves Regulations (Cap. 476 sub. leg.) ("Principal Regulation") has been made.

This Regulation amends the Principal Regulation to specify a special zone in Tung Ping Chau Marine Park in or from which the public will now be permitted to fish subject to the conditions that fishing is confined to angling (with one line and one hook) from the shore. The conditions do not apply to holders of permits granted under section 17(3) of the Principal Regulation.

Amendments

1. *Prohibition of fishing, hunting and collecting animals and plants, etc.*

Section 3(1) of the Principal Regulation provides that no person shall fish or hunt, injure, remove or take away any animal or plant by any means in or from a marine park or marine reserve except in a special zone specified in Schedule 1 to the Principal Regulation. This section is now repealed and the following provision substituted:

- (1) Subject to subsection (1A), no person shall fish or hunt, injure, remove or take away any animal or plant by any means in or from a marine park or marine reserve.
- (1A) A person may ---
 - (a) fish in or from a marine park under and in accordance with a permit granted under section 17(3); or
 - (b) fish in or from a special zone specified in column 2 of Part 1 of Schedule 1, subject to compliance with the conditions specified, opposite to the special zone, in column 3 of that Part.”

2. *Prohibition of water-skiing*

Section 5 of the Principal Regulation prohibited any person from carrying out water-skiing in a marine park or marine reserve except in a special zone specified in Schedule 1. This section is now repealed and the following substituted:

- 5. Prohibition of water-skiing
 - (1) Subject to subsection (2), no person shall carry out water-skiing in a marine park or marine reserve.
 - (2) A person may carry out water-skiing in a special zone in column 2 of Part 2 of Schedule 1, subject to compliance with the conditions specified, opposite to the special zone, in column 3 of that Part.

3. *Schedule 1*

- (a) The new Schedule 1 constitutes Special Zones of two parts:-
 - (i) Part 1 is made for the purposes of section 3(1A)(b). Tung Ping Chau

Marine Park Recreational Fishing Zone has been specified as the Special Zone of Part 1. Any person who fishes within that zone shall not fish on board a vessel and shall only fish by using one line and one hook.

- (ii) Part 2 is made for the purpose of section 5(2). However, no special conditions have been specified yet.

HONG KONG Briefing

Airport town fails to breathe easily

The new airport town of Tung Chung continues to experience heavy air pollution caused by a build-up of ozone. Air pollution index levels have topped 100 three times since September 9, when they reached a record high of 185 in the town, which is located at the foot of a mountain and is home to 42,000 people. On 10 October, the index at the general station in Tung Chung ranged between 115 and 131 for three hours. The next day, the reading ranged from 118 to 165 and again lasted for three hours. Hot weather and light winds contributed to the pollutants' stagnation and the build-up of ozone, a spokeswoman for the Environmental Protection Department said. The same weather conditions prevailed in the area on 7 November, when the pollution level shot up to between 120 and 140, she said.

Hong Kong's air pollution levels reached 100 on only one other day last month, at the Causeway Bay roadside station, which recorded 100 on 9 October. The roadside station at Mongkok recorded levels ranging from 101 to 103 on 7 and 8 November.

When the reading reaches 100, people with heart and respiratory problems are advised to stay indoors and avoid physical exertion. Doctors say the number of people seeking emergency and outpatient consultations usually

increases one to three days after high readings.

[SCMP, 17/11/02]

It is not too late to save our countryside from concrete

The Planning Department revealed in July 2002 that it conducted an internal review last year culminating in a recommendation that development rights with up to a plot ratio of 0.4 be granted in respect of approximately 1,400 hectares of land presently classified as agricultural or designated for recreational use. Before the review was even made known to the public, the Department started implementing its recommendations by gazetting on 28 June 2002 the rezoning of a site in Tai Tong to a new category called Other Specific Use (Rural Use). The rezoning grants the owner a previously non-existent development right on a piece of agricultural land.

The Conversancy Association of Hong Kong notes that this quiet push by the government to release a significant area of land for development not only destroys our countryside, but is ironically contrary to measures recently introduced by the government to prop up the property prices.

The government justifies the policy on the grounds that a lot of agricultural land has become degraded over the years through neglect or the violation of zoning conditions. The best solution, the review proposes, is to reward the low-grade land's hopefully conscientious owners with development rights so that these sites can retain some undefined rural character. However, the Association observes that this is a wishful thinking demonstrating a remarkable faith in developers' integrity. In truth, of implemented land – release will very probably mean that the affected land will become low-grade, and the rural character of the New Territories – plus many privately owned conservation and heritage sites – will be gone forever.

Who gains and who loses in the rural land review? Interestingly, the same parties come up on both sides.

Beneficiaries include land owners and developers, who will enjoy a rise in the value of their agricultural land, and the government, whose coffers will be boosted by land conversion premiums over the years to come. Losers, in addition to the public, include Hong Kong's developers - who will face further falls in property prices because of the land supply - and the government, whose latest housing policy and commitment to sustainable development will lose credibility.

The Conservancy Association believes that the government should not implement the review's recommendations before the completion of three important current reviews on conservation policy, population policy and the small-house policy (i.e. the unsustainable policy of giving descendants of indigenous villagers in perpetuity entitlements to develop land). Each of these reviews might render the recommendations of the rural land use review inappropriate, or unnecessary. The Association asks if the government is deliberately trying to pre-empt their findings, or perhaps there is simply a lack of co-ordination? Either way, the public deserves an explanation.

The Conservancy Association of Hong Kong believes that with a concerted effort, Hong Kong might still become a model of sustainable development. It is not too late for the Planning Department to withdraw the review and start afresh. What the Hong Kong people need to do is to encourage innovation and foster partnership and trust to tackle entrenched, difficult issues. This requires, as a minimum, that the government at least allows public participation in the formulation of land use policies, which did not occur in respect of the Department's review.

[SCMP 21/11/2002]

Wan Chai harbour plan gets go-ahead

In early December 2002, the Town Planning Board approved a 26-hectare reclamation plan along the coast from the Convention and Exhibition Centre in Wan Chai towards Causeway Bay,

on which an exhibition centre and commercial complex will be developed. However, the Board amended the plan to significantly lower the building height of the proposed development in front of the Great Eagle Centre and Harbour Centre from 100 metres to 50 metres, so as to preserve Hong Kong Island's skyline. The height of a proposed entertainment complex near Tin Hau will also be capped at 60 metres. The original proposed hotel site adjacent to the Excelsior Hotel was also changed to tourism-related use. The Board also refused to put the Wan Chai Bypass and the Island Eastern Corridor link underground on the ground that it was not technically feasible.

On completion, the reclamation will ultimately link with the Central reclamation to create a waterfront promenade stretching along the northern shore of Hong Kong Island. The Planning Department will re-draft the latest outline zoning plan taking the amendment into account. A detailed design of the Harbour Park will also be carried out.

A spokesman for the Board said, "the plan will help realise our vision of building an attractive and fragrant harbour. It will also bring the harbour to the people and people to the harbour."

But Winston Chu Ka-sun, the chairman of the Society for Protection of the Harbour, threatened to commence legal action. He alleged the Board was breaching the *Protection of the Harbour Ordinance* (Cap. 531), which was enacted in 1997 to protect the Victoria Harbour.

The Ordinance states that reclamation is allowed if only "necessary", but interpretations differ among the various stakeholders as to what might be "necessary". The Planning Board said it was its practice to weigh the pros and cons of reclamation, and the reclamation does not violate the principle of harbour protection laws because the benefits to the public will outweigh those of preserving the harbour.

Kate Choy Pui-ling, senior project officer of the Conservancy Association,

welcomed limiting the building height but urged the government to study whether there was still room for minimising the scale of the development.

[SCMP, 7/12/2002]

Whose land is it?

A recent incident has highlighted the confusion of rural land title in the New Territories. In late December 2002 it was discovered that three buildings were being erected on a plot of government land in Nam Hau Village, Yuen Long by a local villager. The Lands Department ordered the building works to be stopped on the grounds that the land in question is government land. The Department cordoned off the site.

Mr. Cheung Kwai, the local villager responsible for the building works, contends that he inherited the land from his grandfather, but the title deed was lost during the Japanese occupation in the Second World War. What he has now is an instrument which supports the previous existence of that title deed. However, the Lands Department does not recognise the validity of that instrument.

A spokesman for the Lands Department said that the land in question is government land. After investigation, the Department concluded that the instrument produced by Cheung is insufficient to support his claim to title. Nevertheless, if Cheung could produce other title documents, the Department would consider them. The spokesman also said that from January to November 2002, the Department ascertained 1060 other cases of unlawful occupation of government land.

The Hong Kong Institute of Surveyors proposes that the government should spend about HK\$1 billion to redefine rural land boundaries. However, the Department has rejected the proposal for financial reasons.

[*The Sun*, 31/12/2002]

ADVISORY COUNCIL

ON THE ENVIRONMENT (ACE)

Green purchasing of general commodities by the HKSAR government

[ACE 101st Meeting on 5th December 2002]

Environmentally responsible purchasing is an effective tool to encourage the purchase of green products with improved recyclability, reduced packaging and greater durability. The government procurement process is governed by the Stores and Procurement Regulations (SPR) issued by the Financial Secretary under the Public Finance Ordinance. The Government Supplies Department (GSD) serves as the procuring arm of the government. To participate in government-wide measures to control waste through environmentally responsible purchasing and reuse or recycling of materials, government departments are required under the SPR to consider environmental issues when drawing up tender specifications.

The GSD, in support of the government's environmental policy, has formulated an environmental goal, as follows:

"To be sensitive to the environmental impact of purchasing decisions and to take account of legitimate environmental concerns while continuing to achieve best value for money in the purchasing programme." GSD is committed to achieving this environmental goal through the following initiatives:

- ?? Using supplies and materials efficiently;
- ?? Encouraging use of minimal or reusable packaging materials;
- ?? Purchasing products with high recycled contents;
- ?? Encouraging materials recovery and recycling;
- ?? Promoting the incorporation of environmental considerations into tender specifications drawn up by departments;
- ?? Providing a new webpage on the GSD's website to promote the

- 'Green' concept within government; and
- ?? Vigorously seeking ISO 14001 (Environmental Management System) accreditation within GSD.

Implementation

Reducing consumption of environmentally damaging products is a key element of any environmental protection or waste reduction programme. In this respect, GSD has taken steps to minimise the use of paper through increased use of electronic data interchange. Examples are :

- ?? In April 2000, the Electronic Tendering System was launched by GSD. The system, which allows subscribers to download tender documents and submit tender offers through electronic means in a secured manner, has greatly reduced the volume of tender documentation that has to be distributed in paper format.
- ?? Standard terms and conditions in the tender documents have been uploaded onto the GSD website for reference by suppliers and for which no printing would be required.
- ?? 110 of the total 553 government forms under GSD's control have been identified as suitable for uploading onto the GSD website for use by departments.
- ?? departments are equipped with photocopiers and printers which use both sides of paper.

On packaging, GSD has issued the following guidelines to departments:

- a. include in all tender specifications a special requirement which obliges contractors to declare that they have avoided unnecessary packaging; and
- b. mandate the use of packaging materials (e.g. cardboard boxes must be made from 100% recovered fibre).

GSD has made efforts to expand the green products lists and to promote their use by departments. Examples are:

- ?? the recycled/recovered fibre content required in the specification of recycled paper has recently been revised from 50% to 80%;

- ?? the recycled/recovered fibre contents required for toilet paper and paper towels is 100%;
- ?? use of recycled paper for printing of government forms;
- ?? use of standard dry battery and alkaline battery with mercury content not less than 0.001% and 0.025% by weight per cell respectively; and
- ?? use of phosphate-free detergents and correction fluid and thinner containing no ozone-depleting chemicals.
- ?? GSD has encouraged waste reduction by assisting departments to establish contracts for buying and selling recyclable and reusable products. Contracts have been arranged by GSD for collection and removal of various recyclable materials from government controlled sites, including such diverse products as paper waste, used lubricants and used computers and refrigerators. GSD has also awarded contracts for the supply of ultra low sulphur diesel for use by all government diesel vehicles.

Environmental factors in the purchasing process

GSD has established a system to take account of environmental factors in the procurement process by issuing the following recommendations to departments.

- a. Avoid single-use disposable items, and purchase products with the following attributes -
 - ?? improved recyclability, high recycled content, reduced packaging and greater durability;
 - ?? greater energy efficiency;
 - ?? utilizing clean technology and/or clean fuels;
 - ?? which result in reduced water consumption;
 - ?? which emit fewer irritating or toxic substances during installation or use; and
 - ?? which result in reduced production of toxic substances or toxic emissions on disposal.
- b. Conduct regular reviews of tender specifications for items kept in the central store with a view to

removing features which might cause harm to the environment where alternative environmentally-friendly products are available;

- c. Environmental factors, such as energy consumption, should be incorporated into tender specifications wherever possible;
- d. Use 13 non-GSD stock items with green specifications which have been identified.

Webpage to promote 'green' concept

Lists of green products available from the government central store and contracts for collection and removal of recyclable materials are published on GSD's webpage.

Waste reduction task force

Relevant to government procurement policy and activities, a Government Task Force has been set up under the Waste Reduction Committee to explore measures for government departments to reduce waste. The Task Force is formulating a green procurement policy which encourages waste prevention and recycling.

[www.info.gov.hk/etwb-e, November 2002]

TOWN PLANNING

Prospects rise for disputed waste treatment plant

A long-delayed pilot incineration and waste treatment scheme proposed by Green Island Cement to be located in Tuen Mun may finally become a reality early next year in the first step towards capturing Hong Kong's refuse disposal market, a subsidiary of Cheung Kong Infrastructure said yesterday. The company, has had to delay the \$ 18 million project for more than a year because of residents' concerns that the incinerators will generate carcinogenic substances, such as dioxins.

The Environmental Protection Department (EPD) had asked Green Island Cement to improve the design of its incinerator to ensure it met emission standards.

The company said yesterday it had formally sought and is confident of gaining approval for the project, which is partly funded by the Innovation Technology Fund. An EPD spokeswoman said a 30-day public consultation would be held before deciding whether approval would be granted.

Under the trial, up to 48 tonnes of solid waste would be collected from municipal refuse stations every day and sorted for recyclable material before the rest was burned in the facility to be installed at the company's Tap Shek Kok cement plant. Energy and ash generated will be used in cement production.

The company claimed that when run on a commercial scale, the plant could handle as much as 3,500 tonnes of waste a day and provide hundreds of jobs. To allay fears dioxins would be generated by incomplete combustion, it pledged that emissions would be kept below the existing legal limit.

Cheung Kong Infrastructure executive director, Barrie Cook, said the project addressed the problems of mounting waste and shrinking landfill space in Hong Kong. "It is a win-win situation and a sustainable waste treatment model which has proven effective in some European countries," he said.

Greenpeace campaigner Miranda Yip Pui-wah said there were too many polluting facilities in Tuen Mun. "We have a steel plant, power plant, aviation fuel tanks and the central laundry for hospitals there. Now we are getting an incinerator. How can we ensure the residents' health will not be damaged by dioxins?" she asked.

Lau Wai-ping, the head of Lung Kwu Tang village, said residents objected to the project because of health concerns.

[SCMP, 31/10/02]

Row brews over scrap metal dump

Officials at the Lands Department have been accused of allowing a coastal area in Kowloon East to be turned into a dumping ground for scrap metal. Residents living near the privately owned site in Yau Tong, next to the new Yau Tong MTR Station and overlooking a cove called Kwun Tong Tsai Wan, have voiced concern about various issues, including noise.

A condition of the lease for the site states the land "shall not be used for any purposes other than shipbuilding and/or as a sawmill and timber yard". However, approximately one year ago it was converted into a storage area for scrap metal and waste, as a transit point before the materials are sent for recycling. At least four operators are using the site.

The Lands Department admitted the use was not permitted under present planning arrangements, but a spokeswoman said the landlord had applied in February for permission to change the land use and the application for a waiver was still being processed.

Democrat legislator Fred Li Wah-ming, of the Kowloon East constituency, criticised the department for ignoring residents' needs. "I have received many complaints. It is very noisy there when lorries unload the scrapped metal," he said. "They operate all day long. I have asked the Environmental Protection Department to look into the issue. The Lands Department only cares about making money. It will charge the landlord for giving him a short-term waiver to continue abusing the land."

The department said: "In accordance with the normal land administration procedures, if the lot owner applies for a waiver for non-conforming land uses beforehand, lease enforcement action against the non-conforming uses will not be taken as long as the waiver application is being processed.

"In the Yau Tong case, the proposed waiver will take effect from the date of application. In general, the term of a waiver would be one year for sure and

thereafter it would need updating quarterly."

The time a waiver application takes to process depends on the complexity of each case.

The Democratic Party spokesman for land planning affairs, Albert Chan Wai-yip, accused the department of applying double standards. "I am not aware of any policy that delays enforcement action while an application for waiver is being processed," he said. "If this is the case then all zoning or lease controls will become meaningless."

[SCMP, 11/11/02]

REGIONAL & INTERNATIONAL

AFRICA

UN decides to resume ivory sale

Parties to United Nations Convention on International Trade in Endangered Species (CITES) have decided to allow three southern African nations to sell more than 60 tonnes of elephant ivory. The three southern African nations, Botswana, Namibia and South Africa narrowly achieved the required two-thirds majority of CITES members' vote on 12 November 2002 for a one-off sale of their stockpiles of elephant tusks, worth approximately US\$5 million (HK\$39 million).

The southern African nations asked for the resumption of ivory trade because their parks are unable to cope with the growing populations of the elephants. They also said that they could maintain the elephant populations while they were allowed to sell ivory.

Conservationists are alarmed by the decision. Wildlife experts in Kenya condemned it, arguing that it will increase poaching throughout the continent. Acting director of the national Kenya Wildlife Service (KWS), Omar Bashir, said that more elephants would be killed as a result of relaxation of the rules.

Kenya's elephant population - which stood at 167,000 in 1973 - was for years severely depleted by widespread

poaching activities. Its elephant population has now grown from a low point of 16,000 to today's estimate of 27,000 since a global ban on ivory trade was imposed in 1989. The East African nation is therefore leading the opposition to moves to open up the trade. Though KWS has a stockpile of 27 tonnes of ivory worth US\$ 2.9 million, Mr. Bashir said they had no plans to sell it.

Daphne Shelrick of the David Shelrick Wildlife Trust, which runs an elephant orphanage in Nairobi, described the CITES decision as a disaster and estimated that by the time of the next convention of CITES parties, which is to be held in 2004, Kenya's elephant population will have fallen to 15,000.

Kenya's geography makes it particularly vulnerable to poaching. The country shares long and porous borders with unstable countries like Somalia, which has not had an effective government since 1991.

[SCMP, 14/11/2002]

INTERNATIONAL

UN body urges better monitoring of sea-horse trade

Despite the fact that delegates to a UN meeting in Chile agreed to protect all 32 species of the sea creature from a lucrative global trade that threatens to drive them to extinction, parties to the United Nations Convention on International Trade in Endangered Species (CITES) decided not to ban the sea-horse trade. Instead, they urged countries to better monitor and control cross-border business to make sure that it does not pose a risk to their sea-horse populations.

With the help of CITES and other international organizations, each signatory country agreed to take steps to ensure the legality of all sea horse catches and sales. The measure, suggested by the US, gained support from seventy-five member nations while twenty-four opposed it.

Scientific evidence put forward at the meeting showed that current levels of sea horse trade threatens the species' survival. The population has been reduced sharply because of high global

demand for both live and dried sea horses.

Sea horses are sold as aquarium pets, mainly to US and Western Europe customers. Indonesia, the Philippines and, increasingly, Brazil, are the main live sea horse exporters. Sea horses are also used in traditional Asian medicine. They are usually dried and used to treat ailments such as asthma and sexual impotence. Amanda Vincent, a marine scientist and director of Project Seahorse, said that dried sea horses are of high medicinal value in traditional Asian medicine because the industry believes that dried sea horses are one of their mainstay ingredients, with a role similar to aspirin. She also pointed out that the value of sea horses is much higher than that of silver, and even approaches the price of gold per kilo.

Dried sea horses are supplied by Thailand, India, Vietnam and Mexico. The mainland and Hong Kong are the biggest markets. Statistics recorded by Project Seahorse show Asian trade alone in sea horses has increased by 30 tonnes per year in the past five years, and reached 70 tonnes in 2000.

Out of the 105 countries which have sea horses in their waters, 69 are involved in trade. Ms Vincent also observed that these countries will face enormous challenges when implementing the CITES' decision to increase monitoring to ensure the sea-horse trade is not detrimental to the species' survival in the wild.

[SCMP, 15/11/2002]

SPAIN

Massive oil spill in Spain becoming an ecological catastrophe

A 243-meter tanker sank and broke-up in high winds on Spain's northwest coast on 12th November 2002. Spanish authorities reported that the ship, the *Prestige*, containing 77,000 tons of diesel fuel, was en route to Gibraltar from the Latvian port of Riga. The Bahamas-flagged, single-hulled vessel, was built in Japan in 1976 and last underwent inspection in 1999.

Twenty-four members of the ship's crew were evacuated to safety. Its

captain, first officer and chief engineer initially remained aboard, attempting to steer the tanker into the port of La Coruna, with the aid of tugboats. They were unsuccessful. The captain was arrested by police on suspicion of disobeying authorities and harming the environment on the ground that he failed to cooperate with emergency rescue vessels after issuing a call for help.

Five days after the accident, oil has already washed up along the coast and birds and other wildlife have been injured or killed by the pollution. World Wide Fund for Nature has warned that the ship may end up over the Bank of Galicia, a rich breeding ground for coral, sponges and fish located about 200 kilometres offshore. The pollution may become the worst ecological catastrophe ever in Spain.

Fishermen and sailors have complained of a lack of organization and resources for scooping up the oil, and of the government's failure to warn them about the disaster. Many volunteers were scraping off the oil using their bare hands.

A possible beneficial result of the disaster is that international shipping laws have been brought under the spotlight. The complexity of the shipping industry has generated unclear laws, and it is unknown at this stage who shall bear responsibility for the sinking of the *Prestige*.

The *Prestige's* ill-fated journey involved various nations: it was Liberian-owned, registered in the Bahamas, operated by a Greek company and chartered by a Swiss-based subsidiary of a Russian industrial conglomerate. It was classed as seaworthy by an American marine surveyor. Crown Resources loaded the cargo of Russian fuel oil in the port of Ventspils, Latvia, for delivery to Singapore. Crown is registered in Switzerland and owned by Russia's Alfa Group.

The accident has also focussed renewed attention on the environmental dangers associated with transporting potentially destructive commodities—such as oil—in single-hull vessels. The sinking of the

Prestige is the second oil tanker disaster off Europe's Atlantic coast in three years. In December 1999 the tanker Erika split in two, polluting large sections of the French coastline.

The European Union Transport Commissioner has written to the EU members urging that new inspection rules be written into national laws and implemented as quickly as possible.

[<http://www.cnn.com> dated 3/11/2002; 14/11/2002; 17/11/2002; 06/12/2002; 11/12/2002]

UGANDA

Clean environment a constitutional right

On 11 December 2002 the High Court of Uganda took the bold step of upholding a petition to prevent cigarette (etc.) smoking in public places.

Judge J.H. Ntagoba PJ ruled that smoking in public violated non-smokers' constitutional rights to life and to a clean and healthy environment. He ordered the National Environment Management Authority to make regulations within one year to prohibit smoking in public facilities and places.

[*E-law U.S. and TEAN Uganda*, 12/12/2002]

GUANGDONG, PRC

Rubbish tax to be introduced in Guangdong

The Guangdong government has announced plans to introduce a tax on rubbish in order to minimise the province's growing pollution problem. The plan has already been implemented in August 2002 in Guangzhou, where each household now has to pay five yuan as a monthly rubbish tax. Government agencies and private companies are obliged to pay five yuan for every 0.3 cubic metre of rubbish. Unemployed people and low income families will be exempt from the tax.

Guangdong's economic growth has resulted from increased industrial development in the province. However, this growth has also accelerated the

extent of pollution from waste. As most industrial waste is not processed, of the 54 rubbish dumps in 31 cities across Guangdong more than half have high levels of non-biodegradable waste. The provincial government therefore has to cope with vast amounts of industrial waste, as well as increasing volumes of household waste. There are an estimated 9 million tonnes of rubbish the province accumulates every day, more than 3 million tonnes of which is toxic.

The draft proposal has been submitted to provincial authorities for approval. Under the plan — similar to the one introduced in Guangzhou — government departments, government-funded units such as institutes and schools, companies and residents would have to pay a monthly rubbish tax. City governments will be able to set their own taxes, based on the cost of their clean-up operations.

Provincial Construction Department Deputy Director, Fang Qingfang, has proposed to speed up the process of introducing the environmental protection measures. Fang has proposed that towns and counties should cooperate in establishing high technology rubbish disposal facilities to address the growing level of pollution from rubbish and industrial waste. Small furnaces with a handling capacity of less than 300 tonnes a year will be banned, so as to centralise and improve the rubbish disposal process.

[*The Standard*, 6/12/2002]

ZHUHAI, PRC

Zhuhai Bridge preliminary environmental assessment

Preliminary environmental assessment reports on the impact of building the massive Hong Kong-Zhuhai-Macau Bridge are expected to be finished within three months. The aim of the reports is to ensure that construction will not damage the environment. Provincial Director of Environmental Protection, Yuan Zheng, stated there has been no indication that the project would damage the related environment.

Guangdong commissioned independent experts to conduct preparatory work on the environmental impact assessment. The provincial

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government is not directly involved in the assessment. Guangdong governor, Lu Ruihua, said last week the mainland and Hong Kong governments should be prudent in assessing the environmental risks.

Meanwhile, Macau Chief Executive, Edmund Ho, says that he believes that the project will eventually be approved, and Macau will benefit from the transport network of the Greater Pearl

River Delta. However, Ho said that the bridge should be planned thoroughly with the interests and views of all three parties in mind.
[*The Standard*, 16/12/2002]

This Quarterly Report does not constitute legal advice given on any particular matter. Whilst all effort has been made to ensure completeness and accuracy at the time of publication, no responsibility is accepted for errors and omissions. Further information and enquiries in respect of this quarterly should be directed to Fred Kan & Co. or any of our following associate firms:

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URBAN PLANNING AND ENVIRONMENTAL LAW QUARTERLY

Convictions under environmental legislation: October – December 2002

The EPD's summary of conviction recorded and fines imposed during the period July to September 2002 is as follows:

October 2002

A total of 49 convictions were recorded in October for breaching anti-pollution legislation enforced by the Environmental Protection Department.

Among them, 18 were convictions made under the Noise Control Ordinance, 15 under the Air Pollution Control Ordinance, eight under the Waste Disposal Ordinance and eight under the Water Pollution Control Ordinance.

The heaviest fine in October was \$100,000.

A company was fined \$100,000 for using powered mechanical equipment not in accordance with the conditions of a construction noise permit

November 2002

A total of 58 convictions were recorded in November for breaching anti-pollution legislation enforced by the Environmental Protection Department.

Among them, 19 were convictions made under the Air Pollution Control Ordinance, 15 under the Noise Control Ordinance, 14 under the Waste Disposal Ordinance and 10 under the Water Pollution Control Ordinance.

The heaviest fine in November was \$100,000.

A company was fined \$100,000 for using powered mechanical equipment without a valid construction noise permit.

December 2002

A total of 33 convictions were recorded in December for breaching anti-pollution legislation enforced by the Environmental Protection Department.

Among them, 15 were convictions made under the Air Pollution Control Ordinance, nine under the Noise Control Ordinance, five made under the Water Pollution Control Ordinance and four under the Waste Disposal Ordinance.

The heaviest fine in December was \$50,000.

A company was fined \$50,000 for using powered mechanical equipment not in accordance with the conditions of a construction noise permit.

Another company was fined \$50,000 for failing to comply with the requirements of a noise abatement notice.

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