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By Fax (2575 3371)

7 August 2017

Mr AU Wai Kwong, Elvis, JP
Asst Dir (Nature Conservation
& Infrastructure Planning)
Environmental Protection Department
Nature Conservation and
Infrastructure Planning Division
16/F, East Wing
Central Government Offices
2 Tim Mei Avenue, Tamar
Hong Kong

Dear Mr AU,

**Protection of Endangered Species of Animals and Plants
(Amendment) Bill 2017**

We are scrutinizing the legal and drafting aspects of the captioned Bill and should be grateful if you could clarify the following matters:

Articles 6 and 105 of the Basic Law

The right of private ownership of property is guaranteed by Articles 6 and 105 of the Basic Law. Article 6 provides that the Hong Kong Special Administrative Region ("HKSAR") shall protect the right of private ownership of property in accordance with law. Article 105 provides that HKSAR shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property. Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay. The meaning of deprivation or *de facto* deprivation of property in the context of Article 105 was discussed in various cases, including *Kowloon Poultry Laan Merchants Association v Director of Agriculture Fisheries and Conservation* [2002] 4 HKC 277, *Harvest Good Development Ltd v Secretary for Justice & Others* [2007] 4

HKC 1 and *Fine Tower Associates Ltd v Town Planning Board* [2008] 1 HKLRD 553.

Would the plan to phase out local ivory trade as proposed in the Bill without compensation to affected parties be consistent with Articles 6 and 105 of the Basic Law? In this regard, please clarify with detailed analysis on:

- (a) whether the proposed ban would amount to deprivation of property or *de facto* deprivation of property in light of the cases mentioned above; and
- (b) whether the proposed ban could satisfy the "fair balance" test or the four-step proportionality test as laid down in the case of *Hysan Development & Others v Town Planning Board* [2016] 6 HKC 58 (which was referred to in the case of *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs*, FACV No. 12 of 2016, [2017] HKCU 1728) as follows:
 - (i) whether the restriction or limitation pursues a legitimate aim;
 - (ii) whether the restriction or limitation is rationally connected to that legitimate aim;
 - (iii) whether the restriction or limitation is no more than is necessary to accomplish that legitimate aim; and
 - (iv) whether a reasonable balance has been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, in particular whether pursuit of the societal interest would result in an unacceptably harsh burden on the individual.

Step 1 ban - remaining post-Convention ivory items

According to paragraph 5 of the Legislative Council ("LegCo") Brief (with no file reference number) issued by the Environment Bureau in June 2017, the Government announced a three-step plan to phase out local ivory trade. Step 1 is to ban the import and re-export of all elephant hunting trophies and those remaining post-Convention ivory items, i.e. individually marked and certified ekipa incorporated in finished jewellery of the population of Namibia, and ivory carvings of the population of Zimbabwe, when being imported, exported or re-exported for non-commercial purposes (see footnote no. 3 of the LegCo Brief) ("Step 1 ban"). Are there any other post-Convention ivory items

that would be covered by Step 1 ban? Please also advise whether registered raw ivory set out in paragraph (g) of section 5 in Part 2 of Schedule 1 to the Protection of Endangered Species of Animals and Plants Ordinance (Cap. 586) would be considered as post-Convention ivory items that would be subject to stricter regulation under Step 1 ban.

Clauses 4 to 15 – sections 5 to 16 of Cap. 586

The maximum penalties for offences in relation to the import, introduction from the sea, export, re-export or possession or control of specimens of Appendix I species are proposed to be increased as follows: (a) on summary conviction – a fine of \$5,000,000 and imprisonment for two years; or (b) on conviction on indictment – a fine of \$10,000,000 and imprisonment for 10 years. For Appendix II or III species, the maximum penalties for similar offences are proposed to be increased as follows: (a) on summary conviction – a fine of \$500,000 and imprisonment for one year; or (b) on conviction on indictment – a fine of \$1,000,000 and imprisonment for seven years. The proposed maximum penalties would apply regardless of whether or not commercial purposes are involved. Please advise whether reference has been made to penalties of similar offences in other jurisdiction(s) and other legislation in Hong Kong, and if so, please identify the relevant provision(s) for members' reference.

Clauses 3 and 26 – section 1(1) of new Schedule 4 (definitions of "elephant hunting trophy" and "elephant ivory")

"Elephant hunting trophy" is proposed to mean a whole elephant, or a part or derivative of an elephant, ("item") that – (a) is raw or processed; (b) was acquired by a person through hunting; and (c) is being imported, exported or re-exported by or on behalf of the person as part of the transfer of the item from its place of origin to the person's usual place of residence. "Elephant ivory" is proposed to mean the ivory of an elephant.

- (a) As the ivory of an elephant is a part of an elephant, please clarify whether the ivory of an elephant (under the proposed definition of "elephant ivory") can fall within the proposed definition of "elephant hunting trophy" if other conditions under paragraphs (a) to (c) of the proposed definition are satisfied.
- (b) Subject to your response to (a) above, please advise whether the proposed definitions of "elephant hunting trophy" and "elephant ivory" are drafted with sufficient clarity that the ivory of an elephant would not be caught by the proposed definition of

"elephant hunting trophy". Otherwise the application of various provisions under the Bill relating to different regulatory control on "elephant hunting trophy" and "elephant ivory" in different steps of the proposed ivory ban would be rendered unclear. In this regard, please also consider whether "elephant ivory" should be expressly excluded from the definition of "elephant hunting trophy" for clarity sake.

- (c) Please clarify whether the proposed definition of "elephant hunting trophy", as presently drafted, would include an item which is manufactured from a whole elephant, a part or derivative of an elephant, and if so, please consider spelling out the same in paragraph (a) of the definition. Reference can be made to the definition of "hunting trophy" in paragraph 3(h) under Article 1 of the Resolution Conf. 12.3 (Rev. CoP17) adopted at the Twelfth meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Santiago (Chile), 3-15 November 2002.
- (d) How can it be proved that an item was acquired by a person through hunting rather than other means for the purpose of the proposed definition of "elephant hunting trophy"?
- (e) What documentary evidence would be required to be adduced to show the place of origin of the item and the usual place of residence of the person under paragraph (c) of the proposed definition of "elephant hunting trophy"?

Clause 26 – section 1(1) of new Schedule 4 (definition of "pre-Convention")

It is noted that the Chinese rendition of the definition of "pre-Convention" is "《公約》前標本". Please clarify whether the phrase "標本" in the Chinese text is necessary and whether it corresponds with the English text.

Clause 26 – section 2 of new Schedule 4

It is noted that "pre-Convention specimens" is rendered as "《公約》前標本" in Chinese in existing sections 17 and 20 of Cap. 586. Subject to your clarification of the definition of "pre-Convention" in section 1(1) of the new Schedule 4 as stated above, please consider whether "《公約》前標本的標本" corresponds with its English text of "pre-Convention specimens" in the heading of section 2 of the new Schedule 4.

Application of section 21 of Cap. 586

Section 21(1) of Cap. 586 provides that a person may have in his possession or under his control a specimen of an Appendix II species if he proves to the satisfaction of the Director (which means the Director of Agriculture, Fisheries and Conservation, the Deputy Director of Agriculture, Fisheries and Conservation or an Assistant Director of Agriculture, Fisheries and Conservation under section 2(1) of Cap. 586) ("the Director") by documentary evidence or otherwise (a) that the specimen is not a live animal or plant of wild origin, nor is it a live animal or plant that shall be treated as a specimen of an Appendix II species under section 2(2) of Cap. 586; and (b) that the species is not of a population included in Appendix I if the species is specified in both Appendix I and Appendix II. Please clarify whether the exemption from the licensing requirement under section 21 of Cap. 586 would be applicable to the possession or control of elephant hunting trophy and elephant ivory under the proposed ivory ban.

Application of section 22 of Cap. 586

Under section 22(1) and (2) of Cap. 586, a person may import, re-export or have in his possession or under his control a specimen of a scheduled species (other than a live animal) or a live animal of a scheduled species (as the case may be) in transit if, upon the landing of the specimen or the animal (as the case may be) in Hong Kong, he produces, or causes to be produced, to an authorized officer a Convention certifying document or certificate in lieu in respect of the specimen or the animal (as the case may be) and/or upon the fulfillment of other conditions. Would the proposed ivory ban under the Bill involve the prohibition of import, re-export and possession or control of specimens of elephant hunting trophy and elephant ivory in transit? If so, please consider whether section 22 of Cap. 586 should be disappplied to elephant hunting trophy and elephant ivory in the proposed phasing-out plan.

Clause 26 – sections 4, 6 and 10 of new Schedule 4

For a specimen that is an elephant hunting trophy, it is proposed that the Director may approve an import or re-export licence application only if the Director is satisfied that there are exceptional circumstances justifying the approval (see sections 4(1) and 6(1) of the new Schedule 4).

For a specimen that is elephant ivory, it is proposed that the Director may approve an import or re-export licence application only if the Director is satisfied that the specimen is pre-Convention, the specimen is intended for use for scientific, educational or law enforcement purposes, or there

are exceptional circumstances justifying the approval (see sections 4(2) and 6(2) of the new Schedule 4). The Director may approve a possession licence application in relation to a specimen that is elephant ivory only if the Director is satisfied that (a) the specimen is pre-Convention; (b) the specimen is covered by a specified licence that is valid on the date of the application; or (c) there are exceptional circumstances justifying the approval (see section 10 of the new Schedule 4).

- (a) Please provide examples that would be considered as "exceptional circumstances justifying the approval" of the relevant licence applications in relation to the import or re-export of specimens of elephant hunting trophy and elephant ivory, and possession or control of elephant ivory.
- (b) Would it be considered as "exceptional circumstances justifying the approval" of a licence application in relation to the import or re-export of a specimen that is an elephant hunting trophy if the Director is satisfied that the specimen is intended for use for scientific, educational or law enforcement purposes? If so, please consider spelling it out in the Bill.
- (c) If your answer to (b) above is in the negative, please explain why similar circumstances (the specimen is intended for use for scientific, educational or law enforcement purposes) provided for elephant ivory as an alternative justification for the approval of an import or re-export licence application do not apply to elephant hunting trophy. What are the different considerations?
- (d) In considering whether a specimen is intended for use for scientific or educational purposes, please clarify whether such intended use should be on a non-commercial or non-profitable basis. What are the relevant factors that would be taken into account?

Clause 26 – section 5 of new Schedule 4

Under section 5(1) of the new Schedule 4, section 5 of Cap. 586B (which provides for exemption in respect of import, export or re-export of an Appendix II species on the ground that the specimen (other than a live animal and a specified hunting trophy) or live animal (as the case may be) of an Appendix II species is part of the personal or household effects of the person, and the specimen or the animal (as the case may be) was legally acquired by the person) would not apply to the import of a specimen that is an elephant hunting trophy. Please clarify why a similar exemption as provided for in section 5 of

Cap. 586A for a specimen of an Appendix I species is not proposed to be disappplied to the import or re-export of a specimen that is an elephant hunting trophy under the proposed ivory ban.

Clause 27(1) – section 1(1) of new Schedule 4 to be amended (definition of "antique elephant ivory")

"Antique elephant ivory" is proposed to be defined as (a) a piece of elephant ivory that was, before 1 July 1925 (i) removed from the wild; (ii) significantly altered from its natural state for jewellery, adornment, art, utility or musical instruments; and (iii) acquired by a person after the alteration in such altered state that required no further carving, crafting or processing to effect its purpose; and (b) does not include an elephant hunting trophy.

- (a) What are the considerations for setting the reference date at 1 July 1925 apart from modelling on Article 2(w) of the Council Regulation (EC) No. 338/97 of the European Union (see paragraph 14(c) of the LegCo Brief)? Has reference been made to the legislation of other jurisdiction(s) in relation to the proposed definition? If so, please identify the relevant provision(s) for members' reference.
- (b) What documentary evidence would be required to be adduced to prove that a piece of elephant ivory is an antique elephant ivory? Would any certification of forensic tests conducted for verifying the authenticity of antique elephant ivory be accepted as proof? Are there any accredited bodies for conducting such forensic tests in Hong Kong?

We would be grateful if your reply in both English and Chinese could reach us as soon as practicable.

Yours sincerely,

(Vanessa CHENG)
Assistant Legal Adviser

c.c. DoJ (Attn.: Mr Peter SZE (SGC) (By Fax: 3918 4613)
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