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

A. Introduction

1. On 2nd June 2017, the Government took a long-awaited step and gazetted the Protection of Endangered Species of Animals and Plants (Amendment) Bill 2017 ("**the Draft Bill**"), seeking to amend the **Protection of Endangered Species of Animals and Plants Ordinance** (Cap. 586) ("**the Ordinance**"). The gist of the **Draft Bill** is to provide stricter regulations for elephant hunting trophies and elephant ivory in an effort to phase out the local ivory trade by 31st December 2021.

2. The **Ordinance** was enacted in 2005 to replace the **Animals and Plants (Protection of Endangered Species) Ordinance** (Cap. 18) ("**the APPESO**") which was enacted in 1976 to give effect to the **Convention on International Trade in Endangered Species of Wild Fauna and Flora** ("**the CITES**"). Under the current regulatory regime, ivory of both African and Asian elephants are generally regarded as specimens scheduled under **Appendix I** of the **Ordinance**.[1] Hence, it is an offence to import,[2] export,[3] re-export[4] and to possess or control[5] post-Convention ivory[6].

[1] With the exception of the specimen of the populations of Botswana, Namibia, South Africa and Zimbabwe which may be regarded as a specimen under **Appendix II** if it is, inter alia, imported, exported or re-exported as hunting trophies for non-commercial purposes.
[2] **Section 5(1)** of the **Ordinance**.
[3] Ibid, **Section 7(1)**.
[4] Ibid, **Section 8(1)**.
[5] Ibid, **Section 9(1)**.
[6] Ivory acquired after the CITES application to elephants on 1st July 1975 for Asian elephant and on 26th February 1976 for African elephant respectively.

3. For any possession and control to be legal,[7] the **Ordinance** provides for the following main exceptions:-

a) That the ivory is a "pre-Convention specimens"[8] in that the owner possesses a pre-Convention certificate or that ivory in question was legally imported into Hong Kong: **section 20**.

b) That a licence to possess ("**Licence**") has been issued by the Director of Agriculture, Fisheries and Conservation ("**the Director**") in respect of the ivory: **section 23(1)(e)**.

c) That an exemption order has been published in the Gazette by the Chief Executive in Council: **section 47(3)**. By virtue of the **Protection of Endangered Species of Animals and Plants (Exemption for Appendix I Species) Order** (Cap. 586A) ("**the Order**"), an owner is exempted if the ivory he possessed or controlled is:-

1) for scientific or educational purposes or for display in museum or herbarium: **section 3**.

2) for non-commercial purposes only so that it is regarded as part of the personal or household effects: **sections 4(a)** and **7(1)**.

4. The **Draft Bill** proposes by adding a new **Schedule 4** to the **Ordinance** to phase out the ivory trade in three stages. In essence, the Administration intends to, at the first stage, ban the import and re-export of elephant hunting trophies and all post-Convention ivory by disapplying the exceptions under the **Ordinance** and the **Order**. Whereas at the second stage, the ban would be extended to pre-Convention ivory in a similar manner. At the third stage, from 31st December 2021 onwards, possession for commercial purposes of all ivory (save for antique elephant ivory)

[7] See Legislative Council Brief on Protection of Endangered Species of Animals and Plants (Amendment) Bill 2017 (June 2017) ("LegCo Brief"), §2.
[8] Ivory that was acquired before the CITES provisions started to apply to elephants.

("**the Targeted Ivory**") would be banned by restricting the issue of Licences to cases of exceptional circumstances. By that time, Licences already issued before the announcement of this three-stage plan would have already expired.[9]

5. This blanket non-renewal is substantively the same as the proposals put forward by Global Rights Compliance LLP in a report commissioned by the WWF-Hong Kong ("**the GRC Report**").[10] In that report, the authors suggested that:-

   a) the Director should allow the presently valid Licences to expire by the effluxion of time, and thereafter to refuse the issuance of any further Licences which permit possession for commercial purposes.[11]

   b) the Legislative Council ("**the LegCo**") should amend the Ordinance to modify or cancel the existing Licences to the above effect.[12]

6. In the Legislative Council Brief, the Administration took the view that their proposal conforms with the human rights provisions of the **Basic Law**.[13] The authors of the GRC Report, WWF-Hong Kong[14] and various NGOs[15] argued the same for not dissimilar reasons as those advanced by the Administration[16] (Annex hereof). Notwithstanding the **Draft Bill**'s

[9] See Legal Service Division Report on Protection of Endangered Species of Animals and Plants (Amendment) Bill 2017 (15th June 2017) ("LSD Report"), §10; LegCo Brief (n7), §5.
[10] Global Rights Compliance LLP & WWF-Hong Kong, Feasibility Study on the Ban of Hong Kong's Ivory Trade Report (June 2016) ("GRC Report").
[11] Ibid, §§209-215.
[12] Ibid, §§218-223.
[13] LegCo Brief (n7), §16 and Appendix D.
[14] WWF-Hong Kong, How to Ban the Ivory Trade in Hong Kong Beginning Today (2016) ("WWF Legal Analysis").
[15] See WildAid's Submission (LC Paper No. CB(1)1018/16-17(25), 24th May 2017); WWF's Submission (LC Paper No. CB(1)1018/16-17(02), 24th May 2017); SPCA (Hong Kong)'s Submission (LC Paper No. CB(1)1018/16-17(11), 26th May 2017); Humane Society International's Submission (LC Paper No. CB(1)1018/16-17(151), 29th May 2017); The Nature Conservancy's Submission ("NC") (LC Paper No. CB(1)1064/16-17(21), 1st June May 2017); ADM Capital Foundation's Submission (LC Paper No. CB(1)1064/16-17(01), 25th May 2017).
[16] Minutes of Panel on Environmental Affairs meeting (27th March 2017) (LC Paper No. CB(1)1268/16-17, 10 July 2017) ("The 27th March Minutes"), §44 (per Deputy Director of Environmental Protection (2)); LegCo Brief (n7), §11.

commendable object, i.e. to combat against elephant poaching and ivory smuggling, I object to the assertion that compensation is not payable.[17]

B. Framework for Analysis

7. In **Official Receiver v Zhi Charles** (2015) 18 HKCFAR 467 at §22, the Court of Final Appeal ("**the CFA**") explained the approach to analyzing any issue of constitutionality:-

   a) Is a constitutional right engaged?
   b) Does the conduct under complaint restrict that right?
   c) Is that right absolute?
   d) Can the restriction be justified on the proportionality analysis?

8. The proportionality analysis is in turn a four-step inquiry:-

   a) Do the restrictions pursue a legitimate aim?
   b) Are they rationally connected with advancing that aim?
   c) Do they represent a proportionate means of achieving that end?
   d) Has a reasonable balance has been struck between the societal benefits of the encroachment and the inroads made into the constitutional right of the individual?

   See **Hysan Development Co Ltd and Others v Town Planning Board** (2016) 19 HKCFAR 372 at §§134-135.

9. The constitutional protection afforded to the right to property in Hong Kong is established most particularly in **Article 105** of the **Basic Law**[18] the relevant part of which reads as follows:

   "The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal

[17] The amount of compensation payable to the affected ivory owners/traders is not within the scope of this comment.

[18] **Article 6** which provides that "[t]he Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law" is a declarative statement which "adds nothing" to **Article 105**: **Fine Tower Associates Limited v Town Planning Board** [2008] 1 HKLRD 553 at §13.

and inheritance of property and their right to compensation for lawful deprivation of their property." (emphasis added)

10. It is now beyond doubt that **Article 105** protects the right of property owners to compensation for deprivation of their property and the right to acquire, use, dispose of and inherit the same. It is also trite that such rights are not absolute: **Hysan Development (CFA)** at §§18, 43-44. For the present purpose, the word "property" shall refer to the Targeted Ivory.[19]

11. Therefore, the denial of compensation to the ivory owners/traders can therefore be justified only on three bases:-

    a) First, that **Article 105** is not engaged in the first place.

    b) Second, that there are only restrictions on the use of the Targeted Ivory instead of deprivation of property for which compensation is payable

    c) Third, that the denial of compensation is a proportional measure which does not result in an unacceptably harsh burden on the ivory owners/traders.

12. In my view, the denial of compensation to the ivory owners/traders is consequently unconstitutional for three reasons:-

    a) First, the ivory owners/traders' right to property is obviously engaged.

    b) Second, the blanket non-renewal is not a case where mere restrictions are imposed upon the use of property. Instead, the **Draft Bill** would give rise to a situation where the Targeted Ivory are deprived so that compensation must follow as prescribed by the **Basic Law**.

[19] It should be noted that "property" may have three possible characterizations: (1) the post-Convention and pre-Convention ivory itself which are excepted under the current **Ordinance**; (2) the extant Licences granted by the Director; or (3) the economic interests connected with the running of ivory businesses. However, despite the differences in expression, the market value at issue is ultimately derived from that of the Targeted Ivory.

c) Third, in any event, the denial of compensation to the ivory owners/traders is disproportionate.

C. Analysis

C.1. Is Article 105 Engaged?

13. The authors of the GRC Report acknowledged that "[the right to enjoyment property] is prima facie engaged whenever a given measure limits or restricts what a person can do with his or her own property" so that **Article 105** is engaged.[20] The authors, while short of arguing that **Article 105** is not engaged, suggested that "ivory is not treated as some ordinary chattel that may be freely bought and sold" because the "possession of post-1976 [ivory] [sic.] for a commercial purpose was not a matter of right but … a matter of administrative discretion" after the introduction of a licensing regime in 1990.[21] The authors then concluded that if the existing Licences cease to be effective, the "default position" would then be that "all commercial trade in [post-Convention ivory] would be unlawful under sections 9 and 10 of the Ordinance".[22]

14. This point can be disposed of shortly. In my view, this line of argument rests on the flawed assumption that the licensing regime itself constitutes an "intrinsic restriction" on the ivory owners/traders' right to the Targeted Ivory.[23] In essence, the logic seems to be this: because the owners/traders' rights are "intrinsically defined by and subject to legal restrictions" (i.e. the Director's power under **section 24** of the **Ordinance** to not renew the extant Licences), the non-renewal of Licences is a

[20] GRC Report (n10), §§156, 192. It appears however the authors have conflated the concept of "engagement" and "deprivation" in that they suggested that the right to property is not engaged because it is open for the government to impose restrictions on private property: §§182, 193.
[21] Ibid, §204.
[22] Ibid, §205.
[23] **Hysan Development (CFA)** at §36. While the decision relates to the control on the use of property (in that case various development sites), as far as the engagement of **Article 105** is concerned, the reasoning also applies to the deprivation of property.

incident of their ownership and hence is not an incursion into the right protected under **Article 105**.[24]

15. This line of argument has been fully canvassed and definitively rejected[25] by the CFA in **Hysan Development (CFA)** at §40 in the context of planning restrictions the nature of which is no different from what have already been imposed on the Targeted Ivory under the **Ordinance**:

> "A fortiori, in cases like the present, the fact that the statutory power to impose planning restrictions existed prior to the owner's acquisition of the site does not mean that new and more intrusive constraints imposed by a TPB decision made after the land's acquisition can be disregarded as mere incidents of ownership so as to exclude the protection of Articles 6 and 105. Interference with the owners' protected rights occurs when the new restrictions take effect, derogating from those rights and thus engaging those Articles."

16. Furthermore, it is wrong, with respect, to assert that the owners/traders' property right to the Targeted Ivory became an outgrowth of "administrative grace".[26] The matter can be further tested this way. Suppose that the owner of a unit in a building has carried out small-scale building works designated as minor works without complying with the relevant requirements under the **Building Ordinance** (Cap. 123) and is therefore criminally liable. If the reasoning of the authors of the GRC Report holds, it would naturally follow that the ownership of the unit itself would become unlawful and that the unit would be converted into something other than an "ordinary" property. It can hardly be conceived that it was the Legislature's intention to undermine the integrity of the constitutional right to property as such.

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[24] Ibid, §21.
[25] In fairness to the authors of the GRC Report, the CFA only handed down it judgment in **Hysan Development (CFA)** in December 2016, six months after the publication of the report.
[26] GRC Report (n10), §228.

C.2. Is there deprivation of property?

17. It is common ground that "deprivation of property" includes both formal and de facto expropriation. The latter refers to a situation where "the interference with the use of the property is so substantial that the owner is deprived of any meaningful use of the property or, in other words, all economically viable use": **Fine Tower Associates Ltd v Town Planning Board** [2008] 1 HKLRD 553 at §§17, 24.

18. In arguing for the prohibition of ivory owners/traders from dealing commercially with the Targeted Ivory, the authors of the GRC Report did concede that "much of economic value of the ivory to the trader would have been lost". However, they maintained that, by virtue of two US Supreme Court's decisions[27] which the Hong Kong court had allegedly approved of in **Fine Towers Associates (CA)**, there is no de facto expropriation because of two reasons:-

    a) First, prohibition against the sale of the Targeted Ivory involves a restraint on but one strand within a bundle of rights that comes with ownership since ivory owners/traders can still "display it, exhibit it, or donate it to a museum".

    b) Second, when one "look at [the] loss of future potential profits in given property in the context of the reasonable investment expectations of the holder", "the economic stultification brought about by the operation of the CITES Ordinance, the licencing regime under it, and the proposed changes… do not defeat reasonable investment expectations".[28]

19. While the Administration took the view that the **Draft Bill** has no human rights implications and therefore declined to formally articulate its view

[27] They are respectively **Penn Central Transportation Co v New York City** 438 US 104 (1978) and **Andrus v Allard** 444 US 51 (1979) (the Eagle Feathers case).
[28] GRC Report (n10), §§222-229.

on the constitutionality issue, one of the reasons given by the Deputy Director of Environmental Protection resonates with the first argument in the GRC Report: ivory owners/traders could possess ivory for non-commercial purposes since there is no confiscation.[29]

20. Insofar as the second argument is concerned, it is worthy to note that both the Administration and the NGOs have placed heavy emphasis on the element of expectations, albeit having different references to the relevant timeframe:-

a) The Administration suggested that advance alert was given as early as in March 2016 regarding the proposed measures.[30]

b) Various NGOs suggested that with the introduction of the licensing control system, the ivory traders have been forewarned for around three decades to liquidate their ivory since the imposition of the international ban in 1990.[31]

21. The disposal of these two arguments turns on the role of US takings jurisprudence in Hong Kong, in particular the factor of "reasonable investment-backed expectations". This factor does not in any way however lead to the conclusion that there is no de facto expropriation:-

a) First, **Fine Tower Associates (CA)** does not save the blanket non-renewal because the basis upon which the CA relied to find "reasonable investment-backed expectations" applicable, i.e. **Article 7** of the **Basic Law**, is irrelevant in the present context. In any event, the "transplant" of US jurisprudence is not uncontroversial.

b) Second, the case for denying compensation is less than compelling in that **(i)** the regulatory taking arising from the blanket non-renewal is total instead of partial[32] and therefore **(ii)** the Administration's

[29] The 27th March Minutes (n16), §44.
[30] LegCo Brief (n5), §11.
[31] The 27th March Minutes (n16), §44.
[32] This is in fact the first argument advanced by the authors of the GRC Report: see §18(a).

duty to compensate would inevitably follow barring any consideration of "reasonable investment-backed expectations".

c) Third, even if one were to find the taking in question to be partial, the factual matrix strongly attests to the fact that the ivory owners/traders would satisfy the test for "reasonable investment-backed expectations" as formulated by the American appeal courts.

d) Fourth, in the event that the blanket non-renewal resulted in a total regulatory taking, it is also unlikely that the Administration may avail of the exception of "background principles".

C.2.1. The applicability of Fine Tower Associates Ltd (CA)

22. As far as Hong Kong jurisprudence is concerned, the only reference to "reasonable investment-backed expectations" was made by Stock JA in **Fine Tower Associates Ltd (CA)**. As the GRC Report described:[33]

> "…de facto deprivation of property for the purpose of establishing compensation contemplates the removal of any meaningful use, of all economically viable use. But this is not looked at in the abstract. The court in determining this must consider the "reasonable, investment-backed expectations" that the claimant for compensation held in relation to the property: see Fine Tower Associates at §§20 and 33 (where the Court itself emphasised the word 'reasonable')." (emphasis added)

23. It is therefore crucial to consider in detail the judgment in **Fine Tower Associates Ltd (CA)**, a case concerning newly imposed restrictions on the use of two lots of land by the Town Planning Board. At §20, citing **Penn Central Transportation Co v New York City** 438 US 104 (1978), the CA observed that in determining whether there has been a de facto deprivation of property, it is relevant to consider the factor of "reasonable investment-backed expectations" apart from the economic impact of the restrictions and the character of the government's action ("the three Penn Central factors").

[33] Ibid, §171.

24. His Lordship then attempted to rationalize the virtual certainty of lease modification with the concept of "reasonable investment-backed expectations" by construing **Article 105** in tandem with **Article 7**:

> "33. Article 105 of the Basic Law does not sit alone. It is to be read in conjunction with art.7 which provides that:
>
> > ... the Government of the Hong Kong Special Administrative Region shall be responsible for [the] management, use and development [of land and natural resources within the Region].
>
> There can be no expectation upon the purchase of land that the use permitted by the lease will forever after match the use permitted by town planning regulation. It is an incident of ownership that the uses permitted by the authorities may change. Land is purchased with that knowledge, actual or imputed. The value of these lots upon acquisition were enjoyed under the limitation that is implied by this knowledge: see Pennsylvania Coal Co v Mahon. The approach which we are invited to adopt ignores this reality. So if we talk of investment-backed expectations, such expectations are always qualified by that knowledge." (emphasis added)

25. It is thus crystal clear that **Article 7** forms the only legal basis of "reasonable investment-backed expectations" as part of Hong Kong's takings jurisprudence. It is submitted that because of the reasons detailed below the CA's reasoning does not support the argument of either the Administration or the GRC Report that "reasonable investment-backed expectations" shall be a relevant factor in this case.

26. First, **Article 7** is plainly inapplicable. It is indisputable that the Targeted Ivory are chattels instead of land or natural resources. Hence, even assuming that the blanket non-renewal only leads to partial regulatory takings, the investment-backed expectations concerning the Targeted Ivory are not qualified by the knowledge that the right to disposal may be lifted. Second, in view of the CFA's ruling in **Hysan Development (CFA)** at §34, as far as construction of **Article 105** is concerned, **Article 7** has not bearing to the constitutional right protected therein.

27. Third, the "transplant" of US jurisprudence on regulatory takings to jurisdictions based on English common law is not uncontroversial. In **Smith Kline & French Laboratories (Australia) Ltd v Secretary, Department of Community Services and Health** (1990) 95 ALR 87, 130-134, the Federal Court of Australia cautioned against applying such jurisprudence in construing **section 51(xxxi)** of the Australian Constitution. Adopting Mason J's reasoning in **Commonwealth of Australia v State of Tasmania** (1983) 46 ALR 625, the following was said as are relevant to **Article 105**:

> "Secondly, the material part of the Fifth Amendment, 'the taking clause', follows the due process clause and cannot be dissociated from it, so that in some decisions the question has been whether there has been a taking without due process, or just compensation, as the case might be…
>
> Thirdly, many of the United States decisions turn upon the Fifth Amendment as made applicable to the States by the Fourteenth Amendment…
>
> Eighthly, the course of decision in the United States has produced the result that the Supreme Court has generally been unable to develop any 'set formula' for determining when economic injuries caused by public action must be deemed to be a compensable 'taking'; the inquiry into whether a 'taking' has occurred has become essentially an 'ad hoc, factual' inquiry into the circumstances as they affect each litigant…"

C.2.2. Total regulatory takings

28. Granted that the CA's exposition in **Fine Tower Associates (CA)** on "reasonable investment-backed expectations" is applicable to this case to justify a de facto expropriation, the blanket non-renewal nevertheless falls outside the ambit of that justification because the measure invariably results in a <u>total</u> instead of a partial regulatory taking.

29. As Stock JA noted in **Fine Tower Associates (CA)** at §19, it is now trite in American law as stated in **Lucas v South Carolina Coastal Council** 505 US 1003 (1992) that there are two broad categories of takings under the **Fifth Amendment**: physical and regulatory. It is obvious, as the Administration highlighted, that there is no confiscation of the Targeted

Ivory so that there is no, in the words of the US Supreme Court, "a physical invasion of [the owners/traders'] property".

30. However, it is of crucial importance to emphasize that, as suggested by Scalia J in **Lucas** at 1015 for the majority, the "categorical rule" is that regulatory takings which goes "too far" can be either partial or total.[34] The former refers to regulation which deprives owners of "use and value beyond the normal reduction" as determined by a consideration of the three Penn Central factors. Whereas the latter refers to regulation which "denies all economically beneficial or productive use of land"[35] (which usually means a one hundred percent loss of use[36]).

31. It is therefore critical to determine into which category does the proposed blanket non-renewal fall. In my view, the taking in question were total (a "relatively rare" situation) so that the Administration must therefore award just compensation, subject to an exception which does not apply in this case (see below at §§57-64).[37]

32. The Administration suggested that ivory owners/traders can still possess or control the Targeted Ivory for non-commercial purposes.[38] The authors of the GRC Report similarly relied on **Andrus v Allard** 444 US 51 (1979) to say that the prohibition of sale is not equivalent to takings:[39]

> "The owners still had the eagle feathers under their physical control, and could use and dispose of them as they pleased. Moreover even in pure economic terms, a ban just on selling the eagle feathers did not mean they had been rendered wholly valueless – they could, as Brennan J pointed out by way of just

[34] See also **Palazzolo v Rhode Island** 533 US 606, 617 (2001); **Murr v Wisconsin** 582 US ___, 7 (2017).
[35] See David L Callies, 'Takings: Physical and Regulatory' (2007) 15 Asia Pacific Law Review 77.
[36] Gavin S Frisch, 'What is the Relevant Parcel? Clarifying the 'Parcel as a Whole' Standard in Murr v Wisconsin' (2017) 12 Duke Journal of Constitutional Law & Public Policy 253, 259-260.
[37] See eg **Lingle v Chevron** 544 US 528 (2005); **Murr v Wisconsin** 582 US ___, 8 (2017). See also See also John A Kupiec, 'Returning to Principles of "Fairness and Justice": The Role of Investment-Backed Expectations in Total Regulatory Taking Claims' (2008) 49 Boston College Law Review 865, n10.
[38] The 27th March Minutes (n16), §44.
[39] GRC Report (n10), §225.

one example, still have be used to derive economic benefit by being exhibited for an admissions charge." (emphasis added)

33. **Andrus** involved a challenge of the **Eagle Protection Act** which made it unlawful to "take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import" bald or golden eagles or any part thereof. The syllabus of the opinion summarizes Brennan J's reasoning as follows:

"The simple prohibition of the sale of lawfully acquired property does not effect a taking in violation of the Fifth Amendment. The challenged regulations do not compel the surrender of the artifacts in question, and there is no physical invasion or restraint upon them. The denial of one traditional property right does not always amount to a taking. Nor is the fact that the regulations prevent the most profitable use of appellees' property dispositive, since a reduction in the value of property is not necessarily equated with a taking". (emphasis added)

34. Helpful as **Andrus** is for advancing the proposition that the government has the well-established power to "adjus[t] rights for the public good",[40] it must however be interpreted in light of the fact that Brennan J delivered this decision without the benefit of **Lucas** (a 1992 decision) and subsequent cases such as **Lingle v Chevron** 544 US 528 (2005) where the US Supreme Court clarified how the categorical rule in **Lucas** is to be applied. In **Lingle v Chevron** 544 US 528, 539 (2005), O'Connor J said the following in relation to total regulatory takings:

"In the Lucas context, of course, the complete elimination of a property's value is the determinative factor. See Lucas, supra, at 1017 (positing that "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation")." (emphasis added)

35. While there may be dispute as to whether value rather than use should be emphasized in the application of the **Lucas** categorical rule,[41] in a recent decision **Murr v Wisconsin** 582 US ___, 19-20 (2017), Kennedy J looked at both and rejected the petitioners' claim that there is a total regulatory taking resulting from a local ordinance which effectively merged two lots

[40] **Murr v Wisconsin** 582 US ___, 9 (2017).
[41] Callies (n35), 106-107.

of lands owned by them so that they could only sell or build on the single combined lot:

> "They can use the property for residential purposes, including an enhanced, larger residential improvement. See Palazzolo, 533 U. S., at 631 ("A regulation permitting a landowner to build a substantial residence … does not leave the property 'economically idle'"). The property has not lost all economic value, as its value has decreased by less than 10 percent. See Lucas, supra, at 1019, n. 8 (suggesting that even a landowner with 95 percent loss may not recover)." (emphasis added)

36. The position in the Hong Kong jurisprudence is, I think, substantively the same. One earlier case as cited in the GCR Report is **Kowloon Poultry Laan Merchants Association v Director of Agriculture Fisheries and Conservation** [2002] 4 HKC 277 in which the Director's decision to prohibit the selling of waterfowl at the same locations as chicken was challenged.[42] The CA ruled that there is no deprivation:

> "15. They are still selling chicken there. They are prohibited by the new regulations and By-laws to sell water birds there. That is not deprivation but rather control of use of land…
>
> 16. Indeed, Government has provided them with an alternative location, namely the Western Wholesale Food Market, from which to sell water birds. In that sense, there is no deprivation. Even if they have suffered a reduction of profit selling water birds at this alternative location for the reasons advanced by them, that does not equate with a 'deprivation of property' under Article 105 of the Basic Law." (emphasis added)

37. In another case **Man Yee Transport Bus Co Ltd v Transport Tribunal & Anor** (HCAL 122/2008, 23rd October 2008), the court held that the cancellation of a licence to use a bus as a commercial vehicle for transporting passengers is not deprivation for similar reasons:

> "14. …First, it could be sold for good value as a second-hand bus. There is no suggestion in the evidence to the contrary. Moreover, unlike a piece of land, the bus may also be used elsewhere by the applicant subject to the applicant's fulfilling the relevant importation and licensing requirements of the place where it intends to use the bus." (emphasis added)

[42] See GRC Report (n10), §§174-176.

38. In some cases, the court also considered the depletion of the value of the property in question. See **Michael Reid Scott v The Government of the Hong Kong Special Administrative Region** (HCAL 188/2002, 7 November 2003) at §§82-85; **Harvest Good Development Limited v Secretary for Justice and Ors** [2007] 4 HKC at §§10-11, 146.

39. In **Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency** 535 US 302 (2002), the US Supreme Court cited **Andrus** and emphasized that "the aggregate must be viewed in its entirety". Applying **Tahoe-Sierra** and **Andrus**, the US Court of Appeals for the Federal Circuit in **Paul CONTI and Conti Corporation (as owner of F/V Providenza) v United States** 291 F3d 1334 (Fed Cir 2002) rejected the claim of the plaintiff swordfisherman that a ban on drift gillnet fishing had led to a compensable taking because he may still offer for sale, and can sell, his property. How does the intended effect of the **Draft Bill** fit with this analysis? As said at §4 above, the non-renewal of extant licences for the Targeted Ivory would make the possession or control of such ivory illegal other than for non-commercial purposes under the amended **Ordinance**.

40. It is therefore submitted **Andrus** is readily distinguishable on the ground that the ivory owners/traders would be prohibited from <u>all profitable use</u> of the Targeted Ivory because of the non-renewal since they, unlike the owners of the Indian artefacts partly composed of the banned feathers, could not even exhibit the Targeted Ivory for an admissions charge. The non-renewal of Licences would therefore leave the ivory owners/traders with no viable use of those ivory from which they may derive some economic benefits and would render their personal property "economically idle". Consequently, that the owners/traders could retain the Targeted Ivory in their possession is neither here nor there because, without any prospect of sale, the market value of the Targeted Ivory would certainly extinguish. This is precisely the same as the extinguished

marine rights in **Penny's Bay Investment Co Ltd v Director of Lands** (CACV 177/2007, 8th January 2009), a case described as involving a "true deprivation".[43] Since this case falls squarely within the ambit of **Lucas**, whether or not the owners/traders have any reasonable investment-backed expectations is therefore altogether irrelevant.

C.2.3. The true meaning of "reasonable investment-backed expectations"

41. Even if one assumes that the blanket non-renewal would result in a partial taking so that the factor of "reasonable investment-backed expectations" is to be given some weight, could the Administration make out a compelling case? The answer, I think, must be negative.

42. It is apt, at this point, to first look at what "reasonable investment-backed expectations" as a legal concept entails. It has been pointed out that while the US Supreme Court has refused to offer detailed guidelines to ascertain whether such expectations exist, state courts have developed their own formulations.[44] In **Appolo Fuels Inc v United States** 381 F3d 1338, 1349 (2004), the Court of Appeals for the Federal Circuit framed the test as follows:

> "[T]hree factors relevant to the determination of a party's reasonable expectations: (1) whether the plaintiff operated in a highly regulated industry; (2) whether the plaintiff was aware of the problem that spawned the regulation at the time it purchased the allegedly taken property; and (3) whether the plaintiff could have reasonably anticipated the possibility of such regulation in light of the regulatory environment at the time of purchase."

43. While the US Supreme Court ruled in **Palazzolo v Rhode Island** 533 US 606 (2001)[45] that "[a] blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument

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[43] GRC Report (n10), §186.
[44] J David Breemer, 'Playing the Expectations Game: When Are Investment-Backed Land Use Expectations (Un)reasonable in State Courts?' (2006) 38 The Urban Lawyer 81, 82-83; Thomas Ruppert, 'Reasonable Investment-backed Expectations: Should Notice of Rising Seas Lead to Falling Expectations for Coastal Property Purchasers?' (2011) 26 Journal of Land Use 239, 253-254.
[45] Also cited in **Fine Tower Associates (CA)** at §20.

to accord with the duty to compensate for what is taken", notice remains a relevant factor in practice,[46] which include (1) notice of existing regulations and (2) notice of context/appropriateness of land use. For the present purpose, it is helpful to focus on the first category which is in turn divided into (1a) notice that a proposed use is prohibited and (1b) that an existing regulatory framework indicates the likelihood of future changes.[47] In this case where chattels are concerned, with the ivory trade being described as a "highly regulated area of trade with the expectation of regulation",[48] it can be argued that "when one involves oneself in an area of business that is already highly regulated, one must expect that further regulation may occur" because:[49]

> "1) the businesses involved in highly regulated areas are already aware of the existence of complex regulation and the dynamic nature of that regulation and 2) based on knowledge of past change in regulations, such businesses should plan on future changes to regulations that may not be [favourable]. After all, accounting for uncertainty is a landmark of business planning."

44. Having briefly outlined these basic principles, it is appropriate to examine whether the following three types of notice suggested by the Administration and the NGOs satisfy the test in **Appolo Fuels** so that "[t]hose who do business in … [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end": **Federal Housing Administration v The Darlington Inc** 358 US 84, 91 (1958).[50] Firstly, the Administration suggested that advance alert had been given by the Administration in March 2016 through a briefing conducted by the Agriculture, Fisheries and Conservation Department ("the AFCD") with the trade.[51] Secondly,

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[46] John D Echeverria, 'Making Sense of Penn Central', (2005) 23 UCLA Journal of Environmental Law and Policy 171, 183; Breemer (n44) 93-98.
[47] Ruppert (n44), 257.
[48] GRC Report (n10), §57.
[49] Ruppert (n44), 258.
[50] See also **Connolly v Pension Benefit Guaranty Corporation** 475 US 211, 227 (1986).
[51] LegCo Brief (n10), §17. See also the 27th March Minutes (n16), §48 (it was also said that "AFCD had kept the trade updated since mid-2015 of the latest control on ivory and the three-step plan to phase out the local trade. The direction to further ban the import and export of ivory and phase

various NGOs argued that the ivory owners/traders have been forewarned for three decades since the international trade ban on ivory in 1990, the same year in which the **Basic Law** was promulgated. Thirdly and most importantly, the authors of the GRC Report posited that the ivory owners/traders could not have formed a reasonable expectation because the they could only have reasonably assumed that the local ivory trade would eventually be phased out at an uncertain point in time in the future:[52]

> "a. The freedom to deal in ivory under the Possession Licences covers only the elephant ivory imported into Hong Kong lawfully between 1976 and 1990. Therefore, in testing legitimate investment expectations, it is necessary to consider the factual and legal context at the time that the relevant stocks in this particular class if ivory were formed;
>
> b. As noted above, Asian elephant was already listed as an Appendix I species when CITES came into effect on 1 July 1975. African elephant, meanwhile, was initially listed as an Appendix II species but was upgraded to an Appendix I species with effect from 1990
>
> c. Anyone investing in stocks an Appendix II species and importing it into Hong Kong would know that, under the CITES Ordinance, as soon as the species was upgraded to an Appendix I species, then by operation of law it would become unlawful to possess it for commercial purposes; and
>
> d. During the period from 1976 to 1990, as any reasonable, prudent commercial trader sourcing ivory from Africa would well have known, global concern grew at the dwindling elephant populations in Africa as a result of poaching. Indeed, the movement to upgrade African elephant to an Appendix I species towards the end of the 1980s was loud and prominent."

45. A convenient starting point is **Appollo Fuels**:

> "First, as we explained in Rith II, the coal mining business is obviously 'a highly regulated industry.' One has to look no farther than the SMCRA itself to reach this conclusion, and the SMCRA's comprehensive statutory and regulatory system has been in effect since Appolo's early years in the industry and predates Appolo's purchases of any of the leases at issue in this litigation. Second, there is no suggestion here that Appolo was unaware that surface mining was a potentially environmentally hazardous activity. Third, in light of the regulatory environment at the time Appolo purchased the leases at issue, it could have

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out the local ivory trade was affirmed when the Chief Executive announced in the 2016 Policy Address that the Government would kick start relevant legislative procedures").

[52] GRC Report (n10), §227.

'reasonably anticipated' the possibility of a LUM decision prohibiting the mining of part or all of its leases." (emphasis added)

46. **Appollo Fuels**, however, must be viewed against **Cienega Gardens v United States** 331 F3d 1319 (2003) ("**Cienega VIII**") in which the same court held that federal housing programmes do not belong to a "highly regulated" field so that the deliberate abrogation of the developers' contractual rights to prepay their mortgages brought about by newly passed laws is not a change which the plaintiff should have expected. In so doing, the court looked at whether there was "consistent, intrusive and changing government regulation of all facets of all transactions":

"A business that operates in a heavily-regulated industry should reasonably expect certain types of regulatory changes that may affect the value of its investments. But that does not mean that all regulatory changes are reasonably foreseeable or that regulated businesses can have no reasonable investment-backed expectations whatsoever.

…For expectations to be 'greatly reduced' does not mean that the reasonableness of every expectation of the status quo is by definition eliminated. It is our task then to determine whether the expectations the Model Plaintiffs had were reasonable ones. The range of expectations that is reasonable may be reduced in proportion to the amount of regulation, but this is not a blanket rule that disqualifies parties' expectations without inquiry. Also, what 'highly regulated' and 'field' are is not self-defining. … All this shows is that at the extremes, where history shows consistent, intrusive and changing government regulation of all facets of all transactions even arguably within a field, for example, banking, the effect of being in so highly a regulated field is clear. We have no evidence that the housing programs involved here were part of such an extreme field and therefore cannot, as the government urges, rely solely on the fact of regulation, but must probe into its content and other considerations." (emphasis added)

47. In **Cienega VIII**, the court also clarified the application of the "foreseeability test" in **Darlington**:

"The trial court's reliance on [Darlington] was also misplaced. First, the court's quotation that 'those who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end,' was, in its original context, referring to legislation that merely clarified the originally-intended meaning of an existing statute, not, as in this case, legislative amendments that fundamentally changed the scheme legislated previously." (emphasis added)

48. Relatedly, in **Chancellor Manor v United States** 331 F3d 891 (2003) which was decided on the same day as **Cienega VIII** in relation to the same statutory change that altered the right of property owners to prepay a mortgage loan, the Court of Appeals rejected both the plaintiffs' and the defendant's argument, and ordered a fresh factual inquiry. It is pertinent to highlight that the court placed much focus on the level of regulation:

> "We agree with Cienega VIII that the highly regulated nature of the subsidized housing industry 'does not mean that all regulatory changes are reasonably foreseeable or that regulated businesses can have no reasonable investment-backed expectations whatsoever.' … But that does not suggest the level of regulation of the low-income housing industry is irrelevant. On the contrary, in Cienega VIII we explicitly recognize that 'the range of expectations that is reasonable may be greatly reduced in proportion to the amount of regulation, but this is not a blanket rule that disqualifies parties' expectations without inquiry.' … Indeed, in Commonwealth Edison we held that the extent of regulation is a relevant factor in the determination of reasonable expectations. On remand, the court should consider the level of regulation of the low-income housing industry as a pertinent but not determinative factor." (emphasis added)

49. The Court of Federal Claims in **Norman v United States** 63 Fed Cl 231 (2004) summarized the effect of **Cienega VIII** and **Chancellor Manor**:

> "Two general principles may be discerned from this precedent. First, simply because a private property owner is in a highly-regulated field, does not, by itself, mean that the owner has no reasonable investment-backed expectations in its ability to develop or otherwise utilize its property. Second, the holding in Palazzolo that a property owner may still argue that it maintains a reasonable investment-backed expectation in property purchased while the challenged regulatory scheme was already in effect and known by the owner at the time of purchase is not an absolute renunciation of the 'notice rule.' The Palazzolo court specifically stated that there could be 'circumstances when a legislative enactment can be deemed background principle.' (emphasis added)

50. In **Resource Investments Inc v United States Army Corps of Engineers** 85 Fed Cl 447 (2009), the Court of Federal Claims in looking at the pervasiveness of the regulations in the municipal solid waste disposal industry, suggested that for an industry to be "highly regulated", the industry or area of regulation is usually one of great risk or exigency:

> "As the foregoing recitation of regulations governing plaintiffs' landfill project demonstrates, municipal solid waste disposal, especially landfills, is an industry

> regulated at the federal, state, and local levels. The number of permits required of plaintiffs – 17, not including the 404 permit – only reinforces that plaintiffs operated in a regulated industry. But as was the case in Cienega Gardens VII, we cannot conclude that the solid waste disposal is so 'highly regulated' that plaintiffs cannot have reasonable expectations to use their property for investment purposes. … It is only where a scheme of regulation is so pervasive, generally because the industry or area of regulation is one of great risk or exigency, that the regulated entity has little or no reasonable expectation for unrestrained use of the property. … Unlike the 'so heavily-regulated' banking industry that the Cienega Gardens VII court discussed, the history of solid waste disposal does not 'show[] consistent, intrusive and changing government regulation of all transactions even arguably within' the field." (emphasis added)

51. Having reviewed the relevant US authorities, it would now be obvious that, applying the **Appollo Fuels** test, the ivory owners/traders did in fact expect to retain the right to possess and control the Targeted Ivory for commercial purposes after 1990 by applying for a Licence. First, the mere fact that the local ivory trade has been subject to the regulation of the **Ordinance** does not necessarily lead to the conclusion that it is a "highly regulated field". As the authors of the GRC Report noted, the only change to the **Ordinance** relevant to ivory was the "upgrade" of African elephants from **Appendix II** species to **Appendix I** in 1990. More importantly, that change took place within the original regulatory framework as set out in the **Ordinance**.

52. Moreover, unlike the banking or the coal mining industry such as in **Resources Investments** where 17 permits must be applied for, the ivory owners/traders only have to apply for one permit under **section 17** of the **Ordinance** to possess or control the Targeted Ivory for commercial purposes. In addition, the Administration in 2005 had even taken the view that, since "illegal trade in endangered species is in general under control", it was then possible to "remove certain local controls that are over and above CITES requirements to minimize inconvenience and cost of compliance to the trade/users".[53] Therefore, it is beyond doubt that the various "facets of all transactions" in the lcoal ivory trade have never

[53] Legislative Council Brief on the Protection of Endangered Species of Animals and Plants Bill (April 2005), §5.

been subject to "consistent, intrusive and changing government regulation".

53. Second, I think it is undisputed that the ivory owners/traders should have understood the ivory trade is closely connected with potentially environmentally hazardous activities such as elephant poaching.

54. Third, the regulatory environment in 1990 did not give rise to a reasonable anticipation of the possibility of the introduction of the blanket non-renewal either because the **Draft Bill** is not a clarification of the existing statute (as the amendments in **Darlington** did) but represents a "legislative amendment[] that fundamentally changed the scheme legislated previously". As the Court of Federal Claims pointed out in **Cane Tennessee Inc v United States** 57 Fed Cl 115 (2003), if there is an actual expectation of, or reliance on the Administration's action or inaction, one must turn to reasonableness of those expectations. At the time when the international ban was imposed in 1990, it can hardly be said that the ivory owners/traders could have "reasonably anticipated the possibility of such regulation in light of the regulatory environment". As the Administration conceded, there is simply no evidence to show that, prior to March 2016, they as private and unsophisticated individuals had even the faintest idea or any reason to believe that it was the Administration's intention [54] that the trade would be phased out eventually:[55]

> "48. …no record was found to confirm whether the ivory trade had been informed of the Government's intention to phase out the local trade in ivory as early as when the international trade ban was imposed." (emphasis added)

[54] This confession is intriguing: does it mean that the Administration had always been committed to phasing out the ivory trade in 1990 but somehow decided to keep it secret until 2016?
[55] The 27th March Minutes (n16), §48 (per Deputy Director of Agriculture, Fisheries and Conservation).

In fact, in October 2015, by a circular letter, the AFCD even reaffirmed the fact that the sale of Targeted Ivory is legal so long as such ivory are accompanied by corresponding Licences issued by the AFCD.[56]

55. Therefore, it can hardly be said that the owners/traders' expectation to continue their commercial operation is unreasonable. Contrary to what is suggested in the GRC Report, it is clear that the regulatory framework as conceived by the **Ordinance** in 1990 was not merely an "administrative grace". Rather, having incorporated the purpose of implementing the **CITES**, the overriding objective of the **Ordinance** is to regulate the trade in endangered or threatened species instead of stamping it out. All in all, since the ivory owners/traders have indeed been "somehow wrong-footed or caught by surprise",[57] the denial of compensation must be unconstitutional.

C.2.4. Background principles[58]

56. Where there is deprivation of all economically beneficial use of property in "categorical cases", it is now settled law in the wake of the US Supreme Court's decisions in **Lucas** and **Palazzolo** that some pre-existing federal and state statutes or regulations may be regarded as "background principles" against which a property owner's entitlement to compensation is "confined by limitations on the use of land which 'inhere in the title itself'".[59] In **Palazzolo**, Kennedy J also made the following remarks: (1) "[t]he determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of land use proscribed" and (2) "[a] law does not become a

[56] AFCD Circular Letter on New Controls on Ivory Trade under the Protection of Endangered Species of Animals and Plants Ordinance (October 2015).
[57] GRC Report (n10), §§214, 228.
[58] Another exception relates to the law of nuisance which relates to the use of land: **Lucas** at 1029.
[59] Callies (n35), 106; Michael C Blumm and Lucus Ritchie, 'Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Taking Defenses' (2005) 29 Harvard Environmental Law Review 321, 354-361; James L. Huffman, 'Background Principles and the Rule of Law: Fifteen Years after Lucas' (2008) 35 Ecology Quarterly 1, 6-12.

background principle for subsequent owners by enactment itself". As the Court of Appeals for the Ninth Circuit observed in **Guggenheim v City of Goleta** 582 F3d 996 (2009), **Palazzolo** has drawn a clear distinction between "purchasing a property subject to a challenged land-use regulation" and "purchasing a property whose contours are shaped by background principles of state law".

57. At this point, it should be pointed out that in order for the **Ordinance** (which replaced the repealed **APPESO** in 2006) to become a "background principle", it must first have been enacted prior to the acquisition of the Targeted Ivory.[60] Thus, even if the Administration were to be allowed to rely on this exception, the denial of compensation for pre-Convention ivory cannot be justified whatsoever because the application of the **CITES** (i.e. the enactment of **APPESO** in 1976) must have come after such ivory were acquired by the ivory owners/traders. In that case, what is left are the post-Convention ivory. However, in my view, even if such ivory are concerned, the Administration would also not be in a position to rely on that exception in light of the following case authorities.

58. In **Reeves v United States** 54 Fed Cl 652 (2002), the plaintiffs were mineral exploration partners who were aggrieved by the Bureau of Land Management's decision which denied them the right to explore and mine their mining claims on the ground that these claims were already designated as Wilderness Study Area. The Court of Federal Claims found that a background principle of the law of property existed to the extent that the claims in question would continue to be subject to certain non-impairment standard:

> "Property interests 'are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.' … In this case, the restricting source of federal law is section 1782 of the FLPMA [Federal Land Policy and Management Act]. The nature of the plaintiffs' property interests, therefore, determines the extent FLPMA can proscribe the use

[60] Blumm and Ritchie (n60), 355-357.

of plaintiffs' mining claims. The government 'may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.'

Although a validly located mining claim can entitle the locator to certain possessory rights and may give rise to a meritorious takings action …, the area on which plaintiffs' mining claims are located was a designated WSA [Wilderness Study Area] before plaintiffs staked their claims. …

In the present case, Congress imposed the nonimpairment standard until final congressional action to further the legitimate goal of ensuring an objective, in-depth review of each WSA and preserving the status quo until each party to the decision, the Secretary, the President, and the Congress, have had an opportunity to be heard. Plaintiffs' had notice in the statute, the regulations, and the IMP [the Bureau of Land Management's Interim Management Plan] … As discussed above, a WSA being reviewed for wilderness preservation remains subject to the nonimpairment standard established by § 1782(c) until Congress has acted. Because Congress has not made a final determination, the plaintiffs in this case have acquired mining claims limited by the restrictions of the nonimpairment standard." (emphasis added)

59. A similar case is **West Maricopa Combine Inc v Arizona Department of Water Resources** 200 Ariz 400 (2001) where the Court of Appeals of Arizona held that:

"Any inquiry into a governmental taking from a private party must first address whether the private party ever had the 'right' at issue. Specifically, [it] requires inquiry into the nature of the owner's title to see whether it is subject to any 'pre-existing limitation' authorizing the governmental action. In other words, the court must ascertain whether the owner's title is subject to an inherent limitation that 'background principles of the State's law of property and nuisance already place upon land ownership' …

10K's title to the land adjacent to the Hassayampa River was taken subject to existing water rights. Specifically, 10K took its title subject to the inherent limitations arising from the state's reservation of the natural channels to move and store water. No taking can arise by this pre-existing limitation and this result is entirely harmonious with ARS [Arizona Revised Statutes] § 45-814.01(H)."

60. It is clear that, unlike **Reeves** and **West Maricopa**, at the time when the post-Convention ivory were acquired between 1976 and 1990, there were no limitations contained in the **APPESO** or any other effective instruments which were capable of proscribing the property rights of the ivory owners/traders so that such rights would be subject to a possibility

of extinguishment in the future. Hence, there is nothing inhered in the titles to the ivory in question.

61. It is worthwhile to also look at a decision the facts of which bear some resemblance to that of the present. **American Pelagic Fishing Co v United States** 379 F3d 1363 (2004) is a case which involved a fishery challenging an appropriation act which revoked its permits and barred it from receiving future permits effected a temporary taking of the fishery's vessel. The Court of Appeals for the Federal Circuit held that the **Magnuson-Stevens Fishery Conservation and Management Act** ("**the Magnuson Act**") was a background principle of federal law that inhered in the plaintiff's title to the vessel Atlantic Star:

> "Pursuant to the Magnuson Act, the 'conservation and management of the [Exclusive Economic Zone]' belongs to the sovereign, and this necessarily includes the right to fish in the zone. … It was against this framework of existing federal restrictions on fishing in the EEZ that American Pelagic invested in the Atlantic Star. As of 1996, when the Atlantic Star was purchased, the Magnuson Act and the attendant regulatory scheme precluded any permitted fisherman from possessing a property right in his vessel to fish in the EEZ. The revocation of American Pelagic's permits, therefore, did not 'go[] beyond what the relevant background principles would dictate.'
>
> The Magnuson Act is consistent with the historical role played by the sovereign, state or federal, with respect to its waters. …
>
> We are not persuaded by American Pelagic's contention that there exists a historical common law right to use vessels to fish in the EEZ that was not abrogated by the Magnuson Act. … Magnuson Act expressly asserts the United States' 'sovereign rights for the purposes of exploring, exploiting, conserving, and managing all fish' within the EEZ. The statute does not explicitly, or implicitly, preserve any potentially pre-existing common law right to fish in the EEZ." (emphasis added)

62. While one might well be tempted to draw analogies between the **Magnuson Act** in **American Pelagic** and the **APPESO**, in so doing one should not lose sight of the material differences between the many aspects of the two statutes, both in terms of context and language. In **American Pelagic**, the **Magnuson Act** is a codification of a presidential proclamation by which President Reagan established and assumed

sovereign rights over the Exclusive Economic Zone for the US. The Congress enacted the **Magnuson Act** to "take immediate action to conserve and manage the fishery resources found off the coast of the United States" and the various provisions did just this by "asserting sovereignty with respect to the exploration, exploitation, conservation, and management of the natural resources of the Exclusive Economic Zone", including establishing national standards, setting up various fishery management councils to prepare fisheries management plans, and barring foreign fishing entirely.

63. In contrast, the text of **APPESO** clearly shows that the Administration did not at that time intend to interfere with the ivory owners/traders' right to property through the statute. In fact, the only purpose of the **APPESO** is, according to its long title, "to restrict the importation, exportation and possession of certain animals and plants, and parts of such animals and plants". Similar to its predecessor, the **Ordinance** was enacted simply "regulate[s] the import, introduction from the sea, export, re-export, and possession or control of certain endangered species of animals and plants and parts and derivatives of those species". Even when one looks at the **CITES** itself, it would be obvious that the obligation that Hong Kong undertakes is no more than to "[protect] [] certain species of wild fauna and flora against over-exploitation through international trade". It does not require and has not necessitated any "encumbrances" on the post-Convention ivory at all. Apart from that, needless to say, the Administration, unlike the US as the sovereign, has not any historical role in connection with the Targeted Ivory.

64. In any event, applying the reasoning of the Federal Court of Claims noted in **John R Sand & Gravel Co v United States** 60 Fed Cl 230, 240 (2004), even if the **Ordinance** is found to be a background principle of state law, it is unlikely to be robust enough to fall within the **Lucas** exception since could only in this case rely on mere "generalized invocation of public

interests" instead of a constitutional provision declaring natural resource conservation "to be of paramount public concern".

C.3. Is the denial of compensation proportional?

65. Since **Article 105** is structured in a way that compensation must follow if there is a deprivation of property, it is strictly speaking unnecessary to evaluate whether the denial of compensation would satisfy the proportionality analysis. However, for the sake of completeness, it is pertinent to highlight that the jurisprudence of the European Court of Human Rights ("**the ECtHR**") strongly supports the award of compensation under **Article 1** of the **First Protocol to the European Convention on Human Rights** ("**A1P1**"), a provision which corresponds to **Article 105**. Indeed, "[i]n cases of deprivation of property, proportionality is respected if the dispossessed owner is awarded compensation".[61]

66. Adopting the four-step inquiry as laid down in **Hysan Development (CFA)**, it is acknowledged that the non-renewal of Licences does pursue and is rationally connected with the advancement of legitimate aims such as to send a signal to the international community that Hong Kong is determined to close its local ivory market and stop poaching activities at source. The CFA maintained in **Hysan Development (CFA)** at §§126-129 that whether a means is proportionate in the context of planning restrictions is to be assessed by adopting the "a broad margin of discretion near the 'manifestly without reasonable foundation' end of the spectrum". To simplify the matter, I shall assume that this test has been satisfied.

67. For the present purpose, the crucial point on which one should place real emphasis shall be the fourth step, namely whether the "pursuit of the

[61] Laurent Sermet, The European Convention on Human Rights and Property Rights (Council of Europe 1998) 36.

societal interest results in an unacceptably harsh burden on the individual" (per Ribeiro PJ). The ECtHR has on various occasions held that this step is closely connected with the entitlement of compensation. In **Lithgow and others v United Kingdom** [1986] ECHR 9006/80 at §120, the general approach was described as follows:

> "In this connection, the Court recalls that not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim "in the public interest," but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. This latter requirement was expressed in other terms in the above-mentioned Sporrong and Lönnroth judgment by the notion of the "fair balance" that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights). …
>
> Clearly, compensation terms are material to the assessment whether a fair balance has been struck between the various interests at stake and, notably, whether or not a disproportionate burden has been imposed on the person who has been deprived of his possessions." (emphasis added)

68. In a more recent exposition, the ECtHR in **Scordino v Italy (No 1)** [2006] ECHR 36813/97 at §95 reiterated the same position and noted that denial of compensation may be possible only under "exceptional circumstances":

> "95. Compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it does not impose a disproportionate burden on the applicants. In this connection the Court has already found that the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under art 1 of Protocol No 1 only in exceptional circumstances… Article 1 of Protocol No 1 does not, however, guarantee a right to full compensation in all circumstances…" (emphasis added)

69. In **Jahn v Germany** [2005] ECHR 46720/99 at §116, such exceptional circumstances which justify the denial of compensation were found to exist concerning land expropriated in 1945 in the former Soviet Occupied Zone of Germany in light of the unique context of German reunification:

> "116. Three factors seem to it to be decisive in that connection:
>
> (i) firstly, the circumstances of the enactment of the Modrow Law, which was passed by a parliament that had not been democratically elected, during a

transitional period between two regimes that was inevitably marked by upheavals and uncertainties. …

(ii) secondly, the fairly short period of time that elapsed between German reunification becoming effective and the enactment of the second Property Rights Amendment Act. Having regard to the huge task facing the German legislature when dealing with, among other things, all the complex issues relating to property rights during the transition to a democratic, market-economy regime, including those relating to the liquidation of the land reform, the German legislature can be deemed to have intervened within a reasonable time to correct the – in its view unjust – effects of the Modrow Law. …

(iii) thirdly, the reasons for the second Property Rights Amendment Act. In that connection the FRG parliament cannot be deemed to have been unreasonable in considering that it had a duty to correct the effects of the Modrow Law for reasons of social justice…"

70. Similarly, in **Mago and others v Bosnia and Herzegovina** [2012] ECHR 12959/05, the compensation claims for the cancellation of occupancy rights regarding certain pre-war flats were rejected for similar reasons:

"104. As regards Mr Ivan Antonov and Mr Milutin Radojević, the Court notes that they were allocated tenancy rights of unlimited duration on flats in Serbia and Montenegro respectively. In order to qualify for those rights in Serbia and Montenegro, they had to renounce the equivalent rights on their pre-war flats in Sarajevo (see para 59 above). It is true that States must normally offer compensation if taking a property. Furthermore, the fact that a person has acquired a property right in one State is normally not sufficient in itself to justify a taking of his or her property in another State. That being said, in the exceptional circumstances of the dissolution of the SFRY [the former Socialist Federal Republic of Yugoslavia] and the wars in the region, the Court considers that the respondent State has not been required under art 1 of Protocol No. 1 to pay compensation to the applicants for the cancellation of their occupancy rights given that they have meanwhile been granted equivalent rights in other former Republics of the SFRY (see Jahn, cited above, para 117). There has hence been no breach of art 1 of Protocol No. 1 with respect to Mr Ivan Antonov and Mr Milutin Radojević." (emphasis added)

71. In **Scordino** the ECtHR also described the threshold that the government must pass to justify a less than full compensation:

"97. Legitimate objectives in the "public interest", such as those pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value (see James v UK [1986] ECHR 8793/79 at para 54).

98. In the case of James v UK [1986] ECHR 8793/79, the issue was whether, in the context of leasehold-reform legislation, the conditions empowering long-

term leasehold tenants to acquire their property struck the fair balance. The Court found that they did, holding that the context was one of social and economic reform in which the burden borne by the freeholders was not unreasonable, even though the amounts received by the interested parties were less than the full market value of the property. …

The Court has held that less than full compensation may also be necessary a fortiori where property is taken for the purposes of "such fundamental changes of a country's constitutional system as the transition from monarchy to republic" (see The former King of Greece v Greece [2000] ECHR 25701/94 at para 89). … The Court has reaffirmed this principle in the case of Broniowski v Poland [2004] ECHR 31443/96 at para 182, in the context of the country's transition towards a democratic regime, and has specified that rules regulating ownership relations within the country "involving a wide-reaching but controversial legislative scheme with significant economic impact for the country as a whole" could involve decisions restricting compensation for the taking or restitution of property to a level below its market value." (emphasis added)

72. The brief survey of the relevant authorities above points categorically to the conclusion that the factual context underlying the **Draft Bill** falls well short of what can properly be regarded as one that arise from the pursuit of "legitimate objectives in the public interest", let alone the "exception circumstances" referred to in **Jahn** or **Mago**.

D. Conclusion

73. In the premises, I urge the Administration to reconsider the advisability of the proposed blanket non-renewal afresh so as to balance both the interests of environmental protection and the sanctity of private property. Subject to the above, I wish to commend the Administration again for demonstrating its commitment to effectively implement the **CITES**.

24 August 2017

T F Yau
Hong Kong

Annex

A. Is Article 105 engaged?	
(A.1.) Ivory is not ordinary chattel since the possession of which is generally a criminal offence. Thus, owners/traders' ownership is no longer a matter of right, but one of administrative discretion.	NGOs
B. Is there deprivation of property?	
(B.1.) Advance alert was given as early as in March 2016 regarding the proposed measures.	The Administration
(B.2.) Owners could possess ivory for non-commercial purposes since there is no confiscation.	The Administration
(B.3.) Traders' business would not be significantly impacted since the trade is already inactive having undergone business transformation.	The Administration & NGOs
(B.4.) The Administration has provided financial subsidies and re-training programmes to the ivory carvers over the years to assisting their transitioning into other industries.	The Administration & NGOs
(B.5.) With the introduction of the licensing control system, the ivory traders who have been forewarned for around three decades to liquidate their ivory merely took an ill-fated business risk.	NGOs
C. Is the denial of compensation proportional?	
(C.1.) A five-year grace period will have been provided by the time when the total ban takes effect (i.e. 31 December 2021) for traders to undergo business transformation.	The Administration
(C.2.) There is a need to send a strong signal to the international community that Hong Kong is determined to	The Administration

close its local ivory market and stop poaching activities at source.	
(C.3.) Other jurisdictions which had banned the trade did not provide compensation to affected traders.	The Administration & NGOs
(C.4.) Individuals who speculate and store ivory to sell in the future can legally sell the ivory now.	NGOs
(C.5.) Compensation will motivate dishonest traders to increase their stock in the short term from illegal sources before the ban becomes effective.	NGOs
(C.6.) Provision of compensation sends a dangerous signal to the market and fuels the poaching of ivory in preparation for similar bans in other countries	NGOs
(C.7.) Public funds should not be made available to a trade adversely affected by changes in economic or commercial circumstances in a capitalist society.	NGOs