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Ms Vanessa CHENG
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6 October 2017

Dear Ms. CHENG,

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

I refer to your letter dated 7 August 2017 regarding the captioned. We would like to provide the following responses to your questions.

Articles 6 and 105 of the Basic Law

2. The Protection of Endangered Species of Animals and Plants (Amendment) Bill 2017 ("the Bill") seeks to –

(a) amend the Protection of Endangered Species of Animals and Plants Ordinance (Cap. 586) ("Cap. 586") to take forward a three-step plan to enhance regulation on import and re-export of ivory and elephant hunting trophies and to phase out the local ivory trade; and

(b) increase the penalties under Cap. 586 to provide a stronger deterrent against the smuggling and illegal trading of endangered species.

3. The Government considers that the legislative proposal set out in the Bill is in conformity with the Basic Law, including the provisions concerning human rights.

Articles 6 and 105 of the Basic Law

4. Article 6 of the Basic Law ("BL 6") provides :

"The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law."

Article 105 of the Basic Law ("BL 105") provides :

> "The Hong Kong Special Administrative Region 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 ownership of enterprises and the investments from outside the Region shall be protected by law."

5. BL 6 sets out the general principle of protection of property rights under the Basic Law. BL 105 is the substantive provision focusing on protection of property rights with a right to compensation for lawful deprivation of property. Therefore, the ensuing paragraphs will focus on analysing BL 105.

6. It seems clear that "ivory" constitutes "property" for the purpose of BL 105. To determine if "compensation" would be required under BL 105 for the owners of ivory affected by the legislative proposals, it would be necessary to determine if the proposed measures would constitute any deprivation of ivory owners' property and therefore trigger the right to real value compensation.

7. The Court of Final Appeal ("CFA") is yet to provide an authoritative decision on the scope of deprivation under BL 105. One view is that, on its true construction, the term "deprivation" in BL 105 should be given a narrow meaning, i.e. compulsory acquisition of property by the Government or government authority for public purpose.

8. The Court of Appeal ("CA") in the cases of *Weson Investment Ltd v Commissioner of Inland Revenue*[1] and *Mo Chun Hon v Agriculture, Fisheries and Conservation Department*[2], as well as the Court of First Instance ("CFI") in the cases of *Harvest Good Development Ltd v Secretary for Justice*[3] and *Hong Kong Kam Lan Koon Ltd v Realray Investment Ltd*[4], have accepted this construction of the

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[1] [2007] 2 HKLRD 567

[2] [2008] 1 HKCLRT 386

[3] [2007] 4 HKC 1

[4] HCA 15824 of 1999

term "deprivation." In *Weson*, Tang V-P (as he then was) held that the word "deprivation" in BL105 was used in the sense of "expropriation" which was the expression used in its original Chinese text (namely, "徵用"; at 585F). His Lordship applied the same principle in *Mo* (at 385, para. 35).

9. However, in *Fine Tower Associates Ltd v Town Planning Board*[5], the CA held that to ascertain whether there had been a deprivation, the Court looked to the substance of the matter rather than to the form. Absent a formal expropriation, the question whether there had been a *de facto* deprivation of property is case specific, a question of fact and degree. The Court, having considered the jurisprudence of the European Court of Human Rights and of the U.S. courts, held that *de facto* deprivation for the purpose of establishing a right to compensation contemplates the removal or denial of all meaningful use, or all economically viable use, of the property (paras. 19-25).

10. In general, a *de facto* deprivation would not arise unless the property affected is left without any meaningful alternative use or the restrictions have denied all economically viable use. Deprivation of property therefore takes place under one of the following two situations:

(a) where property is formally expropriated, i.e. where there is a transfer of the title to the property; and

(b) where the measure complained of affects the substance of the property to such a degree that there has been a *de facto* expropriation.

11. In the present case, the Government considers that the legislative proposals as explained in paragraphs 5 to 12 of the Legislative Council Brief ("LegCo Brief") dated June 2017 in respect of the Bill do not involve any formal expropriation of property or any *de facto* expropriation. Under the current legislative proposals, the owners would retain possession of their ivory and there would not be any transfer of title of the owner's property. Moreover, the owners' ivory would not be denied all meaningful use. The ivory would still have other beneficial uses such as possession, donation, exhibition, etc. The ivory may also have artistic or cultural uses.

12. Based on the information available from trade surveys and trade consultations conducted by the Agriculture, Fisheries and Conservation Department

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[5] [2008] 1 HKLRD 553

("AFCD")[6], the legislative proposals would not cause an immediate failure or collapse of a trader's business. Separately, as explained above, the legislative proposals would not leave the trader's business without any meaningful or beneficial use. The Government takes the view that the legislative proposals would not amount to deprivation of the trader's business. In the absence of deprivation, it is unlikely that the right to compensation protected under BL 105 would be triggered. Further, as stated in paragraph 13 of the Background Brief (LC Paper No. CB(1)1265/16-17(02), ref. CB1/BC/6/16) dated 6 July 2017, the Government considered that no compensation should be made to affected traders since the latter had already been given advance alert regarding the proposed trade ban and a reasonable and sufficiently long grace period of five years from 21 December 2016 to undergo business transformation and/or dispose of the ivory in their possession.

Interference with property right

13. BL 105 also protects the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property. However, property right is not absolute but the law may validly create restrictions limiting such right. Any restriction on property right is subjected to a proportionality analysis which requires that the restriction must pursue a legitimate aim, be rationally connected to that legitimate aim and be no more than is necessary to accomplish that legitimate aim.

14. In *Hysan Development Co. Ltd v Town Planning Board*[7], the CFA held that where an encroaching measure had passed the above three-step test, the analysis should incorporate a fourth step, asking whether a reasonable balance had been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, asking in particular whether pursuit of the societal interest resulted in an unacceptably harsh burden on the individual.

15. In the present case, the first two steps of the proportionality analysis are satisfied since the proposed three-step plan is rationally connected to the legitimate aim of combating poaching of elephants and illegal smuggling of ivory in Hong Kong by phasing out the trading of elephant ivory in Hong Kong by 31 December 2021. The Government also takes the view that the proposal is also no more than is necessary to accomplish that legitimate aim because of the reasons provided

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[6] According to the findings of the ivory trade survey conducted by AFCD, from February to April in 2016, many ivory traders have already undergone business transformation or switched to the trading of other commodities not under the control of CITES such as mammoth ivory.

[7] (2016) 19 HKCFAR 372, 26 September 2016

below. The international trade ban in ivory was introduced in 1990. Since then, Hong Kong has adopted domestic measures stricter than the requirements of Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") in controlling the local trade in ivory[8]. However, it was reported that an increase of ivory poaching and trafficking had been observed in recent years. From 2011 to 2013, about 20,000-30,000 elephants were reportedly poached each year in Africa, primarily for the tusks. In parallel, Hong Kong has recorded a number of large-scale ivory seizures. Recently, non-governmental organisations, the mass media and some Members of the Legislative Council have raised serious concerns about the poaching of elephants in Africa and the large retail market for ivory in Hong Kong. There have been frequent criticisms against Hong Kong for providing a front for the illegal ivory with its local trade in registered ivory. AFCD has reviewed the regulatory regime of ivory trade and has introduced a suite of enhanced measures to step up enforcement against smuggling of ivory and strengthen the control of local trade in ivory in cooperation with the Customs and Excise Department and the Hong Kong Police Force[9]. Yet, there is still a substantial scale of local ivory trade serving as a potential front for the illegal market which has a direct impact on the survival of elephants[10]. In this regard, the measures of the proposal including a total ban of local trade in phases are considered the last resort for the control of ivory. As a matter of fact, in the Seventeenth Meeting of the Conference of the Parties to CITES held in September to October 2016, the Parties adopted a resolution recommending that all Parties and non-Parties in whose jurisdiction a legal domestic market for ivory exists that is contributing to elephant poaching or illegal ivory trade, should take all necessary legislative, regulatory and enforcement measures to close their domestic markets for commercial trade in raw and worked ivory as a matter of urgency. The Government therefore considers that the measures of the proposal are no more than is necessary to accomplish the legitimate aim mentioned above and to address the international and public concerns

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[8] CITES has banned the commercial import, export or re-export of elephant ivory since 1990. For better control, Hong Kong has adopted stricter domestic measures to regulate the commercial possession of ivory through a licensing system.

[9] These measures include comprehensive stocktaking of registered ivory, increasing the frequency of surprise inspections to licensed shops selling ivory, employing radiocarbon dating to determine the legality of ivory, deploying sniffer dogs at borders to detect smuggled ivory, strengthening collaboration and co-ordination of efforts of the enforcement agencies, enhancing intelligence gathering and information exchange with relevant overseas and international bodies and strengthening liaison and cooperation with relevant NGOs.

[10] Indeed, in a control buy operation conducted in August 2016, it was found that a pair of ivory chopsticks in an art and craft shop was obtained from elephant ivory after the international trade ban was introduced in 1990. The proprietor and operator of the shop in question were prosecuted, convicted and sentenced.

over the survival of elephants which are under imminent threat of extinction, in light of the latest trend of elephant poaching and ivory smuggling as well as the international call for closure of domestic markets for ivory.

16. Further, the Government also takes the view that since the affected traders had already been given advance alert regarding the proposed trade ban and a reasonable and sufficiently long grace period of five years to undergo business transformation and/or dispose of the ivory in their possession, the legislative proposal has struck a reasonable balance between the societal benefits of the encroachment (i.e. to address the international and public concerns over the survival of elephants which are under imminent threat of extinction) and the inroads made into the constitutionally protected rights of the individuals (i.e. the property rights of ivory traders) who are not subjected to unacceptably harsh burden.

Step 1 ban –remaining post-Convention ivory items

17. Step 1 of the plan to phase out local ivory trade ("the Plan") covers all elephant hunting trophies and post-Convention elephant ivory, no matter Appendix I or II. It should be noted that in practice, ekipa and ivory carvings within the meaning of section 5(f) of Part 2 of Schedule 1 to Cap. 586 are the only remaining post-Convention ivory items currently allowed to be imported into and re-exported from Hong Kong. Hence, it is specified in the LegCo Brief that step 1 is to ban the import and re-export of ekipa and ivory carvings within the meaning of section 5(f) of Part 2 of Schedule 1 to Cap. 586, which are the remaining post-Convention ivory items. Another type of potential ivory items that may be post-Convention elephant ivory and hence subject to the proposed ban in Step 1 is registered raw ivory within the meaning of section 5(g) of Part 2 of Schedule 1, i.e. registered raw ivory which is only to be traded between specified governments under very stringent conditions as verified and supervised by CITES. Such "registered raw ivory" falls within the definition of ***elephant ivory*** in the Bill. Although there is currently no such registered raw ivory in Hong Kong, the import and re-export of such ivory, if any, into and from Hong Kong will be subject to the proposed ban in Step 1.

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

18. We have made reference to the penalties of local ordinances governing the import, export or possession of controlled items including the Import and Export Ordinance (Cap. 60) and the Dangerous Drugs Ordinance (Cap. 134). The proposed penalty levels (both the amount of fine and imprisonment terms) are generally in line and consistent with the penalties of other local ordinances governing the import, export or possession of controlled items.

19. We have also made reference to the penalties of legislation implementing

CITES in other jurisdictions, and the relevant references of the United Nations on wildlife trafficking. The United Nations' resolution on *Tackling Illicit Trafficking in Wildlife* adopted on 30 July 2015 urged member countries to consider the trafficking of protected species involving organised criminal groups as a "serious crime", and the maximum penalty of a "serious crime" as defined by the United Nations Convention Against Transnational Organized Crime shall be imprisonment of at least four years (paragraph 13 of LegCo Brief issued by the Environment Bureau in December 2016 (File Ref.: EP CR 9/15/29) refers). According to AFCD's research, a number of jurisdictions impose a maximum imprisonment of 10 years or more. To our knowledge, Greece, Australia and Botswana impose a maximum penalty of 10 years of imprisonment; and Mexico, Namibia and Zimbabwe, of 20 years of imprisonment. In China and Kenya, offenders may be subject to a maximum penalty of life imprisonment for very serious cases. The imprisonment terms in other jurisdictions under research range from 6 months to 8 years.

20. We are mindful that the proposed penalties, particularly the imprisonment terms, are more stringent than the references from the United Nations on wildlife crimes and are on the high side in comparison with the international norm. That said, taking into account all the relevant considerations, we are of the view that the proposed penalties are of an appropriate level of severity, given the necessity to pitch the revised penalties at a level that is severe enough to provide a strong deterrent against illicit wildlife trade and to show that the Government is very serious about deterring these crimes.

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

Parts (a) and (b)

21. A piece of ivory, depending on how it was obtained, may also be an elephant hunting trophy. Having said that, we are of the view that it is not necessary to exclude "elephant ivory" from the definition of ***elephant hunting trophy*** because the regulation for elephant hunting trophy is stricter than that for elephant ivory. If a piece of ivory is also an elephant hunting trophy, the stricter regulation for elephant hunting trophy will apply to that specimen. There is no ambiguity or contradictions in terms of the applicable regulatory regime.

Part (c)

22. We note that the word "manufactured" is included in addition to "raw" and "processed" in the definition of "hunting trophy" in paragraph 3 h) under section I of CITES Resolution Conf. 12.3 (Rev. CoP17). The element "manufactured" is not included in the proposed definition of ***elephant hunting trophy*** in the Bill because the subject of the definition is "a whole elephant, or a part or derivative of an elephant" (collectively referred to as "elephant part" below), and an elephant part

itself cannot be "manufactured" at all.

23. For "an item which is manufactured from [an elephant part]" as mentioned in your letter, we assume you are referring to an item which contains not only an elephant part but also manufactured non-elephant parts. Such an item is defined in section 2(3) of Cap. 586 which provides, among others, that a thing[11] (including a thing contained in any receptacle) that appears to contain a specimen is to be treated as such a specimen. Therefore, an item containing both an elephant part (which fulfils the definition of ***elephant hunting trophy***) and a non-elephant part that is manufactured, would still be treated as an elephant hunting trophy for the purpose of the new Schedule 4.

Parts (d) and (e)

24. In practice, a shipment of an elephant hunting trophy would have to be accompanied with a CITES permit or certificate issued by the CITES Management Authority of the place of previous export in respect of the item. The permit or certificate would specify that the item is a hunting trophy only if the CITES Management Authority of the place of previous export is satisfied that the item was obtained by the hunter through hunting, and is being imported, exported or re-exported by or on behalf of the hunter, as part of the transfer from its country of origin to the hunter's usual place of residence ultimately. Therefore, the relevant permit or certificate can serve as a documentary evidence to prove that the item meets the proposed definition of "elephant hunting trophy".

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

25. We confirm that the English and Chinese versions of the defined term ***pre-Convention*** (《公約》前標本) tally with each other. In the Chinese text, "《公約》前標本" is used because it fits the sentence flow of the Chinese text better than "《公約》前" does. See section 1(2) of the new Schedule 4, where ***pre-Convention*** is defined, as well as sections 4(2)(a), 6(2)(a) and 10(1)(a) of the new Schedule 4, in which the term is used. The sentence "該標本[即]屬《公約》前標本" reads better than "該標本[即]屬《公約》前". Hence, "《公約》前標本" is chosen as the Chinese equivalent of "pre-Convention".

Clause 26 – section 2 of new Schedule 4

26. Since "《公約》前標本" is used as the Chinese equivalent of "pre-Convention" in the new Schedule 4, "屬《公約》前標本的" is used to correspond to the adjective "pre-Convention", while "標本" corresponds to

[11] "thing" includes any animal and plant, whether live or dead (section 2(1) of Cap 586).

"specimens", which the adjective "pre-Convention" qualifies. The Chinese heading of section 2 in Schedule 4 (進口屬《公約》前標本的標本) therefore corresponds to the English heading (Import of pre-Convention specimens). On the other hand, as the terms defined in section 1(1) of the new Schedule 4 apply only to the new Schedule 4, the label ***pre-Convention*** (《公約》前標本) does not apply to the headings of the existing sections 17 and 20 of Cap. 586.

Application of section 21 of Cap. 586

27. Currently, section 21 (exemption regarding Appendix II species) does not apply to the possession or control of the elephant specimens because an elephant specimen will be regarded as Appendix II only if belongs to the populations of Botswana, Namibia, South Africa and Zimbabwe imported, exported or re-exported, and satisfies the specifications in section 5 of Part 2 of Schedule 1 (see section 5 of Part 2 of Schedule 1). If the specimen is for possession purpose, it will be treated as a specimen of Appendix I species. Therefore, it is not necessary to disapply section 21 for the possession or control of elephant hunting trophy and elephant ivory.

Application of section 22 of Cap. 586

28. A specimen is in transit only if it remains under the control of the Director or an authorized officer (as defined in Cap 586) from the time it is brought into Hong Kong up to the time it is taken outside Hong Kong (see section 3 of Cap. 586). It is our policy not to cover specimen in transit under the proposed ban and hence there is no need to disapply section 22 of Cap 586 for elephant hunting trophy and elephant ivory.

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

Part (a)

29. The Director of Agriculture, Fisheries and Conservation will consider whether there is any exceptional circumstance justifying the approval of a licence application on a case-by-case basis based on the available information. Any exceptional circumstance justifying the approval should not contravene the principle of elephant conservation. Examples that might be considered as "exceptional circumstances justifying the approval" include import or re-export of elephant hunting trophy or elephant ivory which is part of an inheritance for non-commercial purposes, or possession or control of ivory where an application for licence has been submitted before step 1/step 2 of the Plan but has yet to be approved by the commencement date of that step (not due to the applicant's fault).

Parts (b) and (c)

30. Unlike elephant ivory, elephant hunting trophy is by nature a specimen acquired by a hunter outside the hunter's usual place of residence and is being imported, exported or re-exported as part of the transfer of the item from its place of origin to the hunter's usual place of residence. The elephant hunting trophy is not acquired for scientific, educational or law enforcement purposes. Therefore, scientific, educational or law enforcement purposes would not serve as justifications for approving the import or re-export of elephant hunting trophy.

Part (d)

31. There is no express provision requiring that the intended use for scientific or educational purposes should be on a non-commercial or non-profitable basis. The main factor for consideration is whether the intended use of the specimen is primarily for scientific or educational purposes.

Clause 26 – section 5 of new Schedule 4

32. According to paragraph (c) of the definition of ***elephant hunting trophy*** in the Bill and section 5(3) of the Protection of Endangered Species of Animals and Plants (Exemption for Appendix I Species) Order (Cap. 586 sub. leg. A) ("Cap. 586A"), an "elephant hunting trophy" will not enjoy any exemption for Appendix I species as "personal or household effects" under section 5(1) of Cap. 586A . Therefore, there is no need to disapply section 5 of Cap. 586A for Appendix I elephant hunting trophy.

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

Part (a)

33. In formulating the proposed definition for "antique ivory", we have made reference to the practice in the European Union ("EU"), which defines an antique ivory as a piece of worked ivory significantly altered from its natural state since a specified year. Under this definition, whether a piece of worked ivory is antique ivory will not be determined by its age but by its coming into existence before a specified year. By this definition, all worked ivory coming into existence after the specified year will not be regarded as antique ivory and restrictions in trade will be imposed on all such ivory. In EU, the specified year is 50 years before EU Wildlife Trade Regulations (i.e. Council Regulation (EC) No. 338/97), which give effect to CITES in EU, came into effect, i.e. 1947. In the Bill, it is proposed that the reference date of antique ivory is 50 years before CITES entered into force, i.e. 1 July 1925.

Part (b)

34. Making reference to the practice in some other jurisdictions, we propose that examples of acceptable proof of antique may include a qualified appraisal or other method that documents the age of the ivory by establishing the provenance of the article. Results of tests using scientifically approved aging methods carried out by an accredited laboratory or facility, local or overseas, are also acceptable.

(Samuel CHUI)
for Director of Environmental Protection

c.c.
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DAFC