Feasibility Study on the Ban of Hong Kong's Ivory Trade

Report prepared by

Global Rights Compliance LLP

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Introduction[1]

1. Despite a global ban on international trade of elephant ivory under the Convention on International Trade in Endangered Species of Wild Fauna and Flora ('CITES') since 1989, more than 30,000 elephants are still killed each year for their tusks to satisfy the demand for ivory products. Demand is focused heavily in Asia.

2. CITES outlaws the international trade in ivory, but does not *require* States parties to ban purely domestic trade – although they remain free to do so, as a matter of best practice. Under Hong Kong law, any ivory removed from the wild before 1976 (i.e. pre-CITES ivory) can be freely traded, while ivory lawfully imported into Hong Kong between 1976 and 1990 (i.e. pre-ban ivory) may be traded within Hong Kong subject to the possession of a licence. There also exist exceptions for personal and household effects, scientific and educational samples, and so forth.

3. Unfortunately, there is clear evidence indicating that the system is being abused. Graphic evidence of the illegal ivory trade in Hong Kong was documented recently by independent investigators, who published undercover footage demonstrating that Hong Kong ivory traders can easily engage in the illegal sale of ivory trade.[2] Persons identified by investigators as licenced ivory traders can be seen candidly admitting that they can supplement their stocks with tusks of recently killed elephants. One ivory trader in Hong Kong frankly admitted that he could deal in illegally imported ivory removed from the wild after the ban in 1990. Proof of illegal trade is further corroborated by the fact that the diminution of ivory stocks reported to the Agriculture, Fisheries and Conservation Department ("**AFCD**") appears to be inconsistent with the

[1] The Introduction is based on various reports from World Wildlife Fund for Nature Hong Kong.

[2] See WWF's 2015 report: *"The Hard Truth: a report on how Hong Kong's ivory trade is fueling the African elephant poaching crisis"*, available at:

http://assets.worldwildlife.org/publications/816/files/original/wwf_ivorytrade_eng_eversion.pdf?1442844784&_ga=1.27258814.226526283.1462527543

large number of commercial ivory licence holders, their stocks, and their businesses in high rent-locations in the city.

4. The current Hong Kong regulatory scheme is not up to the task. While the approach of the Hong Kong government to regulate the trade of the remaining legal stockpile through a system of licensing is pragmatic, it is clear that the failure to effectively regulate the trade or completely ban the ivory trade altogether has contributed to the illegal trading market, and in turn to the poaching of more elephants in the wild. There is an overwhelming case for change. The Government of the Hong Kong SAR agrees, and we note that Chief Executive Leung Chun-ying has publicly committed to taking *"appropriate measures, such as enacting legislation to further ban the import and export of ivory and phase out the local ivory trade"* on January 13, 2016.[3]

5. In the following sections, this Report examines the route to accomplishing the Government's goal. First, we analyse Hong Kong's current legislative framework in detail. The study then goes on to consider comparable measures adopted in other states and jurisdictions that have instituted bans or significant restrictions on the trade of ivory. Particular attention is paid to the United States, where the most significant bans and considerable restrictions are under way. The Report then goes on to consider other bans initiated by the Hong Kong Government in response to environmental and health concerns, including the pig and poultry bans, as well as the ban on trawling.

6. After these sections, the study then considers the relevant legal and policy matters, focusing in particular on whether a ban on the sale and purchase of ivory would give rise to an obligation to compensate traders for their remaining legal commercial stock. The study concludes with a proposed action plan for the Government in order to rapidly follow through on their commitment to ban the local trade, and a suggested strategy and other recommendations to World Wide Fund for Nature Hong Kong.

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[3] http://www.policyaddress.gov.hk/2016/eng/p204.html

http://edition.cnn.com/2016/01/13/asia/hong-kong-ivory-trade/

Executive Summary

7. A detailed action plan and timeline outlining the best way forward is set out at the end of this study (see §290 *et. seq.*). In short, this study recommends the outlawing the domestic ivory trade in Hong Kong and sets out a list of specific actions and measures that can be taken to facilitate the transition. The implementation of the ban could be achieved either through executive action or by way of a legislative amendment – or a combination of both. Specific measures are proposed.

8. The key measured recommended are:

   a. Executive action: Agriculture, Fisheries and Conservation Department ("**AFCD**") to cease issuing Possession Licences[4] which contain a term permitting any sale or purchase of ivory. (This would outlaw the trade in "post-Convention, pre-ban ivory", i.e. that imported into Hong Kong lawfully between 1976 and 1990); and

   b. Legislative action: Legislation be introduced to outlaw the sale and purchase of pre-Convention ivory (i.e. ivory removed from the wild before 1976).

9. These measures should be subject to limited exemptions which, it is anticipated, are unlikely to significantly undermining the effectiveness of the proposed measures. The Administration should consider allowing the following further exemptions:

   a. Personal possession of post-Convention, pre-ban ivory for any non-commercial purpose, including ivory which constituted traders' legal stock prior to the trade ban but was thereafter kept for personal possession;

[4] Defined at §§28-38 below.

b. Dealings with ivory as part of legitimate law enforcement activities;

c. Dealings with ivory that is part of a documented *bona fide* antique of antiquity dated before 1940 – at least 50 years before the entry into force of the domestic ivory trade ban (including, if the Administration deems it expedient, subject to a licencing regime);

d. Ivory sold for educational or scientific purposes by education or scientific institutions (subject to the possession of an appropriate licence); and

e. Ivory used for commercial purposes other than dealing, i.e. exhibitions.

f. Other miscellaneous, Hong Kong-specific activities authorised under the law.

10. It is furthermore suggested that the intended implementation of the domestic ivory trade ban could be announced in advance, specifying the date of future implementation, allowing time for ivory traders to liquidate their current ivory stocks. This report's finding aligns in principle with Hong Kong government's proposed ivory ban (see appendix I) which states that no compensation is needed, as traders have had 26 years to get rid of their stocks. However the government has proposed a longer timeframe of five years to implement a ban. This is understandable, because if government moves more quickly then they may face opposition from legislators, whose support is vital in order to secure the ban.

Status Quo: the Present Regulatory Framework

A. The CITES Ordinance

11. The import, export, re-export, and possession of ivory in Hong Kong is regulated under the Protection of Endangered Species of Animals and Plants

Ordinance (Cap. 586) (the "**CITES Ordinance**" or the "**Ordinance**").[5] The prime purpose of the CITES Ordinance, as recited in section 1, is to give effect to the provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("**CITES**")[6], which is in force in relation to the HKSAR.

12. The scheme of the Ordinance closely tracks CITES itself (although there are material differences). It imposes a tiered system of bans and regulations in relation to specimens of the various endangered species protected under CITES. African and Asian Elephants are "Appendix I" species – i.e. the most endangered species, therefore listed in Appendix I of CITES and, accordingly, also listed in the first column in Schedule 1 of the Ordinance. This is the most stringently regulated category. Asian elephants were listed on Appendix I when CITES came into force on 1 July 1975; African elephants were initially an Appendix III species, but were upgraded to Appendix II in 1976 and further to Appendix I in 1989.[7]

13. According to Article II of CITES, entitled *"Fundamental Principles"*:

> *"Appendix I shall include all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances."*

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[5] CITES has been implemented in Hong Kong since 1976 through the enactment of the Animals and Plants (Protection of Endangered Species) Ordinance, Cap. 187. It was repealed and replaced by the Protection of Endangered Species of Animals and Plants Ordinance, Cap. 586, in December 2006.

[6] Adopted 3 March 1973, 993 United Nations Treaty Series 243 (as amended). Entry into force 1 July 1975.

[7] The amendment took effect from 20 January 1990. Note, however, that the United Kingdom Government appended a reservation to this amendment in respect of Hong Kong. This postponed the effect of the re-classification for as regards Hong Kong for a further 6 months (in addition to the usual 90-day grace period), so that the re-classification did apply to Hong Kong until 20 July 1990. Furthermore, CITES allowed Botswana, Namibia, Zimbabwe and subsequently South Africa to transfer their elephant populations to Appendix II in 1997 and 2000.

1. The General Ban

14. Pursuant to sections 5-9 of the Ordinance, Appendix I species are subject to a general ban (although there are important exceptions, discussed below). These sections outlaw, respectively, the import (section 5), introduction from the sea (section 6), export (section 7), re-export (section 8) possession and control (section 9) in Hong Kong of all Appendix I species including ivory.

15. Each of these provisions creates a criminal offence and stipulates the penalty for such unauthorised instances of import, introduction from the sea, export, re-export or possession and control of Appendix I species. The penalties under each of sections 5 to 9 inclusive are six months' imprisonment and a fine. (The actual penalty meted out in any given case is likely to turn on a number of factors including the quantity involved; whether the defendant has offended before; whether s/he pleads guilty; and a range of other relevant aggravating or mitigating circumstances). The seized specimens will, without further order, also be forfeited to the government.

16. Section 10 then further mandates an enhanced penalty for any conduct contrary to these sections if it is proven to have been done for a "commercial purpose". The definition of "commercial purposes" is provided in section 2 of the Ordinance as follows:

> *"'commercial purposes' (商業目的) means—*
>
> *(a) a purpose relating to trade or business; or*
>
> *(b) a purpose of obtaining profit or other economic benefit (whether in cash or in kind) and directed towards sale, resale, exchange, provision of a service or other form of economic use or benefit, whether direct or indirect"*

17. Thus although the Ordinance does not say so in terms, the sale and purchase of Appendix I species such as ivory is in fact generally banned (subject to the specific exceptions discussed below). The phrase "possess or have under control" within section 9 is not expressly defined. However, read together

with section 10, it is plain that possession for a commercial purpose would on a proper interpretation include possession for, or in the course of, a sale. Where section 10 applies, the maximum penalty is increased to two years' imprisonment and a fine of HK$5,000,000.

2. Exceptions to the General Ban

18. As just mentioned, the general ban against the import, export and possession (etc.) of Appendix I species such as ivory is subject to a number of exceptions. These need to be properly understood in order to test the efficacy of the present regime and analyse what solutions are necessary to fix the serious problems that have built up under the present system. The relevant exceptions are as follows:

a) Pre-Convention Ivory

19. The general ban outlined above does not apply to 'pre-Convention ivory', which is provided for in Part 4 of the CITES Ordinance (entitled *"Circumstances in which dealings in Scheduled species without licence are permitted"*).

20. The relevant provisions are sections 17 and 20 of Part 4 of the CITES Ordinance. These create certain limited exemptions to the general ban upon proof that the specimens are "pre-Convention specimens".[8] The study describes these as 'limited' exemptions because they apply only to import, possession or control of such "pre-Convention specimens"; they do not cover export, re-export or introduction from the sea.

21. These provisions reads as follows:

Section 17:

[8] This exemption is based on Article VII(2) of CITES, while provides that: *"Where a Management Authority of the State of export or re-export is satisfied that a specimen was acquired before the provisions of the present Convention applied to that specimen, the provisions of Articles III, IV and V shall not apply to that specimen where the Management Authority issues a certificate to that effect."*

"A person may import a specimen of a scheduled species if, upon the landing of the specimen in Hong Kong—

(a) he produces, or causes to be produced, to an authorized officer a pre-Convention certificate, or a Convention certifying document containing the particulars required to be specified in a pre-Convention certificate, in respect of the specimen;

(b) an authorized officer has inspected the specimen to compare it with the particulars on that pre-Convention certificate or Convention certifying document and is satisfied that the particulars tally; and

(c) where a Convention certifying document is produced under paragraph (a), that person surrenders, or causes to be surrendered, to the authorized officer that document for retention and cancellation."

Section 20:

"A person may have in his possession or under his control a specimen of an Appendix I species or Appendix II species if he proves the following to the satisfaction of the Director—

(a) that he possesses a pre-Convention certificate in respect of the specimen;

(b) that the specimen was imported, or introduced from the sea, before 6 August 1976; or

(c) if the specimen was imported, or introduced from the sea, on or after that date, the import or introduction from the sea was not in contravention of any provision of the repealed Ordinance or this Ordinance, whichever was in force at that time."

22. Accordingly, notwithstanding the general ban, it is not an offence to import or be in possession or control of a specimen certified as pre-Convention ivory, or which can be shown to have been imported into Hong Kong before 6 August 1976. The relevant offence provisions, namely section 5 (the import ban) and section 9 (the possession and control ban), are expressly made subject to sections 17 and 20 respectively.

23. The procedure for certification as "pre-Convention specimen" is set out in Part 2 to Schedule 3 of the CITES Ordinance. The power to issue

certification vests in the Management Authority of each CITES party – in Hong Kong's case, the AFCD.

24. A specimen may be certified as a "pre-Convention specimen" only if the applicant for such certification can satisfy AFCD (or an overseas Management Authority) that the specimen was "acquired" on a date before the provisions of CITES applied to the species in question. The date of "acquisition" is ascertained in accordance with section 6 of Schedule 3 to the CITES Ordinance,[9] which provides:

"6. For the purposes of determining whether a specimen was acquired before the provisions of the Convention applied to the specimen ("pre-Convention")—

(a) the date from which the provisions of the Convention apply to a specimen shall be the date on which the species concerned was first included in the Appendices to the Convention; and

(b) the date on which a specimen was acquired is—

(i) the date on which the specimen was known to be removed from the wild;

(ii) the date on which the specimen was known to be born in captivity or artificially propagated in a controlled environment; or

(iii) if the date referred to in sub-subparagraph (i) or (ii) is unknown or cannot be proved, the earliest provable date on which it was first possessed by any person."

25. So, summarising: if the holder of a given specimen of ivory can demonstrate that it is pre-Convention ivory s/he may freely import it into Hong Kong, and when in Hong Kong, have it in his/her possession and under his/her control without the need for any licence or other permission.

26. It would appear to follow that certified pre-Convention ivory may, under the present regulatory framework, be imported for commercial purposes and may

[9] The definition of "acquired" provided in section 6 of Schedule 3 is based on the definition adopted by the Conference of the Parties to CITES in Resolution 13.6 (revised) entitled: *"Implementation of Article VII, paragraph 2, concerning 'pre-Convention' specimens".*

be freely bought or sold in Hong Kong without the need for any licence. This is the case since the import, possession and control offences (in sections 5 and 9 of the CITES Ordinance) simply do not apply at all in respect of pre-Convention ivory; it must follow that the enhanced penalty in section 10 (in respect of import, possession or control for commercial purposes) likewise cannot apply.

27. It should be mentioned that historical artefacts or family heirlooms containing ivory fall within this category – provided, of course, that the constituent ivory can be demonstrated to be pre-CITES. No special permission is therefore presently required to possess, buy or sell such items.

b) Licensed Possession

28. The second relevant exception to the general ban on the possession of ivory in Hong Kong is under the licensing regime set out in Part 5 of the CITES Ordinance.

29. Under the provisions of Part 5, the domestic ivory trade is regulated by requiring persons keeping or dealing in ivory (including for commercial purposes) to apply for a licence to possess ("**Possession Licence**").[10] The Ordinance stipulates, accordingly, that no offence is committed under sections 5-9 of the CITES Ordinance if the relevant act of import, introduction, export, re-export, possession or control of an Appendix I species was done pursuant to a licence issued under Part 5.

30. In order to understand the scope of this exception to the general ban, it is necessary to look first at the legislation, and then to analyse the licensing policy operated by AFCD.

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[10] For the application form for a Possession Licence, see (accessed 14 April 2016):
https://www.afcd.gov.hk/english/conservation/con_end/con_end_lc/con_end_lc_app/files/AF246e06.pdf

31. The statutory basis and discretion for issuance of such licences arises under section 23 of the CITES Ordinance, which provides as follows:

"(1) The Director may, on application made to him in the specified form and on payment of the fee prescribed in Schedule 2, issue a licence for the—

(a) import;

(b) introduction from the sea;

(c) export;

(d) re-export; or

(e) possession or control,

of a specimen of a scheduled species.

(2) The Director shall not approve an application made under this section if such approval would contravene any requirement under the Convention.

(3) On issuing any such licence, the Director may impose such conditions as he considers appropriate, including conditions that are more stringent than any requirement under the Convention.

(4) A licence issued under this section shall—

(a) be in the specified form;

(b) specify the name and address of the holder of the licence;

(c) specify the quantity and description of the specimen concerned;

(d) specify the conditions, if any, of the licence; and

(e) specify the period of validity of the licence.

(5) If any condition of a licence issued under this section is contravened, the holder of the licence commits an offence and is liable on conviction to a fine at level 5."

32. The CITES Ordinance sections 24-26 provide powers for AFCD to: (i) extend, renew or vary licences, (ii) refuse applications in relation to licences, and (iii) cancel a licence only where a licence condition is contravened or was obtained as a result of false representation. Those provisions state:

Section 23 Extension, renewal and variation of licences

(1) The Director may, on application made to him in the specified form and on payment of the fee prescribed in Schedule 2—

(a) extend the period of validity of a licence issued under section 23(1)(a), (b), (c) or (d);

(b) renew a licence issued under section 23(1)(e); or

(c) vary a licence issued under section 23 in any other way.

(2) The Director shall not approve an application made under this section if such approval would contravene any requirement under the Convention.

Section 26 Cancellation of licences

(1) The Director may cancel a licence that is issued under section 23 or extended, renewed or varied under section 24 if—

(a) any condition of the licence is contravened; or

(b) the Director is satisfied that the licence was issued, extended, renewed or varied as a result of a false representation of any fact made by the applicant or an unlawful act of the applicant.

(2) If the Director cancels a licence under subsection (1), he shall give written notice of the cancellation to the holder of the licence stating the reason for the cancellation. …"

33. In accordance with the above provisions (and with the exception of pre-Convention ivory) it is within the power of AFCD to decide who may lawfully engage in the trading of ivory, for what purposes and under what conditions. One must therefore turn to the administrative policy under which these provisions are operated in order to understand the extent to which the Possession Licences exception functions in practice.

34. AFCD's stated position is that it will issue Possession Licences permitting the sale, within Hong Kong, of ivory that was legally imported into Hong Kong

prior to 1990, when elephant ivory was upgraded to an Appendix I species,[11] that is to say the "pre-CITES ban" ivory described in the Introduction above. AFCD Circular No. ES 01/14 (dated 28 February 2014)[12] states, in relevant part, that:

"The international trade in ivory has been banned by CITES since 1990. But for the ivory which has been legally imported before the ban, they can be traded locally in Hong Kong if they have been registered with this department and are kept under a valid Possession Licence issued by this department. However such ivory cannot be re-exported out of Hong Kong for commercial purposes.

Each Possession Licence is valid for one keeping premises only. The licence shall be kept and displayed in a conspicuous position in the keeping premises specified in the licence. The licensee must record every transaction in a specified form, such as acquisition, consumption and sale, and attach to the form relevant documents in connection with such transaction. …" {Sic}.

35. Although this circular does not say so expressly, it appears that AFCD would not issue licences for the import, export or re-export of post-Convention ivory for commercial purposes. This accords with the HKSAR Government's official position, as stated in its briefings on the subject to the Legislative Council's Panel on Environmental Affairs.[13]

36. As for the actual application process, the Administration explained to the Legislative Council Panel that:

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[11] Note that elephants were re-categorized by the Conference of the Parties to CITES as Appendix I species in 1989. However the United Kingdom Government appended a reservation to this amendment in respect of Hong Kong lasting for a period of 6 months (in addition to the usual 90-day grace period), so that the re-classification did not take effect as regards Hong Kong until 1990.

[12] The Circular appears here (accessed 14 April 2016):

https://www.afcd.gov.hk/english/conservation/con_end/files/ES0114_e.pdf

[13] Background brief on protection of endangered species and biodiversity in Hong Kong prepared by the Legislative Council Secretariat, LC Paper No. CB(1)557/15-16(05), para. 3

http://www.legco.gov.hk/yr15-16/english/panels/ea/papers/ea20160222cb1-557-5-e.pdf

"The Administration explained that applications for Possession Licences for commercial purposes were strictly scrutinized by AFCD in accordance with the relevant provisions of the Ordinance. When vetting the applications, AFCD would require the applicants to prove that the ivory involved had been legally imported into Hong Kong before the ban and that they were registered at that time. The vetting and approval mechanism included inspection of documents and relevant transaction records certifying that the ivory was imported legally and examination of the types, quantities and markings (if applicable) of the ivory against AFCD's records. If the applicant failed to provide relevant documentary proof, AFCD would reject the application. A person with a Possession Licence issued by AFCD would be allowed to conduct commercial transaction of ivory in Hong Kong according to the conditions listed on the Licence."[14]

37. Each Possession Licence is valid for one keeping premises only and is valid for 5 years.[15]

38. It should be noted that despite this being the standard practice in the past, AFCD was (and remains) under no legal obligation to adopt a policy of permitting licenced trading of ivory imported lawfully into Hong Kong between 1976 and 1990. It has decided to do so purely as a matter of executive discretion.

c) Household/Personal Effects

39. Possession, import or export of ivory as part of a private citizen's personal or household effects is exempted from the statutory scheme, so long as the ivory in question owned or possessed for non-commercial purposes. No Possession Licence is required in such a case. Ivory covered by this category cannot, however, be the subject of commercial transactions – otherwise it would lose its non-commercial purpose.

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[14] Background brief on protection of endangered species and biodiversity in Hong Kong prepared by the Legislative Council Secretariat, LC Paper No. CB(1)557/15-16(05), para. 9.

http://www.legco.gov.hk/yr15-16/english/panels/ea/papers/ea20160222cb1-557-5-e.pdf

[15] See (accessed 14 April 2016):

https://www.afcd.gov.hk/textonly/english/conservation/con_end/con_end_lc/con_end_lc_app/con_end_lc_app.html

40. The legal mechanism by which this has been accomplished is by an exemption order published in the Government Gazette pursuant to section 47(1) and (3) of the CITES Ordinance, which was published in 2006 (the "**2006 Exemption Notice**").[16] This instrument defines "personal or household effects" as follows:

"4. Meaning of personal or household effects

[…] a specimen shall be treated as part of the personal or household effects of a person if-

(a) the specimen is personally owned or possessed by the person for non-commercial purposes only; and

(b) where the specimen is being imported, exported or re-exported-

(i) it is worn or carried by the person included in his personal baggage; or

(ii) the import, export or re-export forms part of a household move of the person."

41. Paragraphs 5, 6 and 7 of the 2006 Exemption Notice then provide certain exemptions from the general prohibitions against import, export, re-export, possession or control of Appendix I species, subject to certain further conditions:

a. Paragraph 5 provides that a specimen of an Appendix I species that are personal or household effects may, notwithstanding sections 5(1), 7(1) and 8(1) of the CITES Ordinance, be imported, exported or re-exported. It must, however, be shown (*inter alia*) that the specimen was lawfully acquired, and that the specimen was acquired in the person's usual place of residence.

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[16] *Protection of Endangered Species of Animals and Plants (Exemption for Appendix I Species) Order*, L.S. No.2 to Gazette No. 20/2006 (L.N. 105 of 2006), pp. B607-B615.

https://www.afcd.gov.hk/english/conservation/con_end/con_end_info/con_end_info_gazette/files/exemption_I_e.pdf

b. It will be recalled from above that the exemptions for pre-Convention ivory apply only in respect of import, possession or control. Under paragraph 6 of the 2006 Exemption Notice, however, pre-Convention specimens may be exported or re-exported if: (i) they are household or personal effects, (ii) they were lawfully acquired, and (iii) a pre-Convention certificate can be produced.

c. As regards possession or control of specimens of Appendix I species, paragraph 6 of the 2006 Exemption Notice offers an exemption to the general ban (in section 9 of the Ordinance) for household and personal effects. Such specimens must have been lawfully acquired in Hong Kong.

42. It would appear that persons in possession of ivory as personal effects or for non-commercial purposes before the ban would be required to apply for Possession Licences if and when they intended to change the use of the ivory in their possession for commercial purposes after the ban.[17] It is unclear, however, whether AFCD would give permission for such a change in the status of a given specimen.

d) Further Miscellaneous Exceptions

43. There are a number of other miscellaneous exceptions to the general ivory ban, for example:

a. Specimens for co-operative conservation programmes (2006 Exemption Notice §2);

b. Possession for scientific or educational study, or for display in any museum or herbarium (2006 Exemption Notice §3); and

[17] See the discussion at para 8 of the Background brief on protection of endangered species and biodiversity in Hong Kong prepared by the Legislative Council Secretariat, LC Paper No. CB(1)557/15-16(05) http://www.legco.gov.hk/yr15-16/english/panels/ea/papers/ea20160222cb1-557-5-e.pdf

c. Ivory in transit is exempt from the licencing requirements if certain Convention certifying documents are produced.[18]

44. It does not appear that these exceptions have been regularly used as a means for smuggling or surreptitiously introducing post-CITES ivory into the market. We do not therefore analyse them in detail in this report.

Discussion

A. Legal Measures Regulating the Ivory Trade

1. Trade Bans and Restrictions in Other Jurisdictions

a) United States

45. In the U.S., illegal ivory has entered the market despite prohibitions in existing federal and international laws. The recent passage of near-complete ivory bans by the states of California, New Jersey and New York, all of which house key ports that are connected to the illegal ivory trade, is an attempt to eliminate unlawful trade on the intrastate level. Over the past year, bills or ballot initiatives that would restrict intrastate trade in ivory have been proposed in various other states, including Hawaii, Connecticut, Florida, Illinois, Massachusetts, Nevada, Oklahoma, Oregon, Virginia and Washington State. On the interstate and international level, the Obama administration has proposed strengthening its restrictions on the ivory trade, justified by elephant conservation as well as the connection between organised crime, insurgency groups and illegal ivory.

46. The state ivory bans in New York, New Jersey and California restrict all ivory trade within their borders with limited exceptions. Exceptions generally include legal ivory that is included in antiques, inherited, moved as part of law enforcement-related activities, or is part of a scientific or educational purpose. The state bans are broad in scope, generally extending beyond African elephant ivory. None of the state laws involve any outright seizure or

[18] See CITES Ordinance s. 22.

confiscation of ivory, though confiscation is allowed in some states upon violation of the new restrictions. Personal possession of lawfully acquired ivory without the intent to sell is permitted.

(1) Federal regulation

47. President Obama issued Executive Order 13648 on July 1, 2013 that included several goals, including to combat wildlife trafficking and reduce the demand for illegally traded wildlife domestically and abroad. In February 2014, the Obama administration issued the National Strategy for Combating Wildlife Trafficking and announced that a near-complete ivory ban would be implemented on the commercial trade of ivory. In July 2015, the U.S. Fish and Wildlife Service ("FWS") proposed regulations--50 C.F.R. Part 17--that would tighten restrictions on the commercial and non-commercial trade of ivory ("Proposed Rule").[19] The Proposed Rule only covers African elephant ivory.

48. Under current federal regulation on African ivory:[20]

    a. No commercial imports are allowed. However, certain non-commercial imports are allowed, being: sport-hunted trophies; law enforcement and bona fide scientific specimens; worked ivory that is part of a household move or inheritance, part of a musical instrument, or part of a traveling exhibition, and that was legally acquired and removed from the wild prior to 26 February 1976 and has not been sold since 25 February 2014.

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[19] 80 Fed. Reg. 45154 (29 July 2015). The publication of the final version of the Proposed Rule has not yet occurred. Purportedly, the White House's Office of Management and Budget--an office that reviews all federal regulations prior to finalization--is reviewing the regulation. A time for release has not been publicized.

[20] Pursuant to revisions made by the FWS to Director's Order 210 (effective 31 July 2015) and U.S. CITES implementing regulations [50 CFR part 23] (effective 26 June 2014).

b. Regarding exports, commercial export of CITES Pre-Convention worked ivory (including antiques) is allowed. Non-commercial export of worked ivory is allowed.

c. Interstate commerce is allowed for ivory lawfully imported prior to the date the African elephant was listed in CITES Appendix I (18 January 1990) and for ivory imported under a CITES pre-convention certificate.

d. Intrastate commerce is allowed for ivory lawfully imported prior to the date the African elephant was listed in CITES Appendix I (18 January 1990) and ivory imported under a CITES pre-Convention certificate.

e. Non-commercial use, including interstate and intrastate movement within the United States, of legally acquired ivory is allowed.

f. Possession and non-commercial use of legally acquired ivory is allowed.

49. The most significant changes set out by the Proposed Rule are tighter restrictions on the export of ivory, foreign commerce and the interstate sale of ivory. The Proposed Rule involves the following changes:

a. For non-commercial imports, the Proposed Rule limits sport-hunted trophies to two per hunter per year whereas previously they were unlimited. It also removes the requirement that worked ivory must not be sold since 25 February 2014.

b. It restricts the commercial export of ivory to only those items that meet the antiques exemption, which is narrower than the current regulation. Non-commercial exports are made subject to more restrictions than the current regulation, allowing non-commercial

export of worked ivory only in certain circumstances. It also creates an additional category of allowed non-commercial export, being law enforcement and *bona fide* scientific specimens.

c. Whereas there were previously no restrictions foreign commerce, the Proposed Rule restricts foreign commerce to ivory that meets the Endangered Species Act ("ESA") antiques exemption and certain items that contain a *de minimis* amount of ivory. It also prohibits foreign commerce in sport-hunted trophies and ivory imported/exported as part of a household move or inheritance.

d. It narrows the allowed scope of interstate commerce, prohibiting interstate sales of ivory unless the ESA antiques or the *de minimis* exemption applies, as opposed to current regulation which allows interstate sale of ivory lawfully imported prior to 18 January 1990 and ivory imported under a CITES pre-Convention certificate. It also prohibits interstate commerce in sport-hunted trophies, ivory imported under the household move or inheritance exception, or for law enforcement or genuine scientific purposes.

50. The Proposed Rule does not alter the current regulation's permission of personal and non-commercial possession of legally acquired ivory. The Proposed Rule would not affect the possession of lawfully acquired ivory or the donation or non-commercial interstate movement of lawfully acquired ivory. The Proposed Rule does not change the prohibition of the commercial import of ivory, which is comprehensive and extends to antiques.

51. The Proposed Rule does not amend the regulations related to intrastate commerce or non-commercial movement within the U.S. However, state ivory bans could restrict this commerce even if the Proposed Rule does not.

52. With any restriction or ban on private property comes the potential of a "takings claim".[21] The Fifth Amendment to the United States Constitution prohibits the government from taking private property for public use without just compensation, pursuant to the Takings Clause.[22] Takings claims generally fall within two categories: (i) a taking in which the government seizes property; or (ii) a "regulatory" taking in which a regulation requires physical invasion, the taking of title or a diminution in the use of the property. Because the Proposed Rule would not directly appropriate the ivory or require the transfer of the ivory to the government, the alleged takings would likely not qualify as a *per se* taking, which triggers compensation. Instead, the claim would be analysed under the diminution in value "regulatory" takings jurisprudence.

53. Under Supreme Court jurisprudence involving diminution in value takings claims, there is no set formula under which a regulation would be prohibited without just compensation. In general, the analysis for a regulatory takings determines whether the regulation goes "too far", a consideration involving factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action.[23] As such, cases involving diminution in use are more fact-specific than those involving straightforward government seizure of real or personal property.

54. To date, takings claims have been unsuccessful under the ESA.[24] Notably, the Supreme Court, in *Andrus v. Allard* upheld a ban on the trade of protected eagle feathers as constitutional (we analyse this case in some detail below under the topic of deprivations under Hong Kong law).[25] In *Andrus*, traders in

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[21] We analysed only a takings claim under the U.S. Constitution and not individual state constitutions but note that many state constitutions contain clauses similar to the Fifth Amendment Takings Clause.

[22] The Takings Clause applies to the states as well as the federal government, through the Fourteenth Amendment to the United States Constitution.

[23] *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

[24] *See Note: The International Strategy: An Ivory Trade Ban in the United States and China*, 38 Fordham Int'l L. J. 1511, 1560 (2015).

[25] *See Andrus v. Allard*, 444 U.S. 51 (1979)(holding that the Eagle Protection Act and the Migratory Bird Treaty Act did not constitute a compensable taking of the personal property of appellees who were

Indian artefacts argued that regulations under the Bald and Golden Eagle Protection Act limiting the transport of eagle feathers amounted to a regulatory taking. The Court stated there remained other economic uses of the feathers aside from selling, including displaying and charging a fee for viewing. The Court stated that it was "crucial" that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.[26] The Court found it "undeniable that the regulations here prevent the most profitable use of appellees' property" but did not find that dispositive.[27] The *Andrus* court noted that "a reduction in the value of property is not necessarily equated with a taking."[28] Further, the Court stated that the "loss of future profits -- unaccompanied by any physical property restriction -- provides a slender reed upon which to rest a takings claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests."[29]

55. The *Andrus* Court did not address the interference with investment-backed expectations in the trade in eagle feathers, noting that the ban served a substantial public purpose in protecting eagles from extinction. In *Andrus*, the Court held that "the simple prohibition of the sale of lawfully acquired property in this case does not effect a taking in violation of the Fifth Amendment."[30] The Court in *Andrus* also cited other regulations that bar trade in certain goods and have been upheld against claims of unconstitutional taking.[31]

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engaged in the trade of Native American artifacts with bird feathers because the whole "bundle" of property rights were not destroyed by the regulation).

[26] *Id.* at 66.

[27] *Id.* at 65-66.

[28] *Id.*

[29] *Id.* at 66.

[30] *Id.* at 67-68

[31] *Id.* at 67.

56. Recent Supreme Court cases have relied on *Andrus*. In *Horne vs. Department of Agriculture,* the Court, citing *Andrus*, stated that to avoid being considered an impermissible taking, the Court considers whether the regulation at issue deprives the property holder of all property rights in the personal property or compels the surrender of the property.[32] Relying on *Andrus,* the Court in *Tahoe-Sierra Pres. Council vs. Tahoe Reg'l Planning Agency* stated that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking."[33] The Court has further recognized that *Andrus* supports that an owner of personal property "ought to be aware of the possibility that new regulation might even render his property economically worthless" and noted that new appreciation of the significance of endangered species shapes our understanding of property rights.[34]

57. The Proposed Rule does not involve the transfer of ivory to the government or the seizure of ivory. The Proposed Rule restricts the trade in ivory but does not destroy all of the individual's property rights in the ivory. The rights to possession, donation or non-commercial interstate movement of lawfully acquired ivory are not affected by the Proposed Rule. Furthermore, the ivory trade is a highly regulated area of trade with the expectation of regulation, and the alleged loss of profits from the restrictions in the trade in ivory is not an area courts have historically focused on in takings analyses. Based on the takings jurisprudence to date, in light of the public purpose of the regulation to protect African elephants and stem funds flow to organized crime and that the regulation does not eliminate all property rights in the ivory or directly confiscate ivory, we believe the Proposed Rule would survive a takings claim.

58. Below the study will discuss the details of the ivory bans that have been passed in California, New York and New Jersey and the proposed legislation in Hawaii.

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[32] *See Horne v. Dep't of Agriculture*, 135 S. Ct. 2419, 2429 (2015)(citing *Andrus*).

[33] *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002)(citing *Andrus*, 44 U.S. at 65-66).

[34] *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1027-1028, 1069 (1992).

(2) California

59. Assembly Bill 96 (AB 96 "Animal parts and products: importation or sale of ivory and rhinoceros horn") was passed by the State of California legislature and signed by Governor Jerry Brown on 5 October 2015. In passing AB 96 (named after the 96 elephants that are killed every day for ivory), the legislature intended to shut down illegal intrastate sales of ivory that had thrived in San Francisco and Los Angeles, which were known as the top trading markets for illegal ivory in the United States.

60. AB 96 removes the exemption in the existing law that allows the importation and sale of pre-1977 ivory. The prohibitions in the bill became operative on 1 July 2016. Once effective, unless exempted, the law would prohibit a person from purchasing, selling, offering for sale, possessing with intent to sell, or importing with intent to sell ivory or rhinoceros horn within the state of California. "Ivory" is defined in the legislation as including a tooth or tusk from all elephant species, hippopotamus, mammoth, walrus, whale or narwhal. Exemptions from the prohibition include:

    a. Law enforcement activities;

    b. Activities authorised by exception or permit under federal law;

    c. Ivory that is part of a musical instrument manufactured no later than 1975 and that is less than 20% by volume of the instrument;

    d. Ivory that is part of a documented bona fide antique that is less than 5% by volume of the antique and is not less than 100 years old; and

    e. Ivory sold for educational or scientific purposes by education or scientific institutions that meet specified criteria.

61. The possession of ivory in a retail or wholesale outlet commonly used for the buying or selling of similar items shall be presumptive evidence of possession with intent to sell. The new bill codifies the provision placing the burden of

proof on the defendant to show the ivory meets the limited exceptions. Existing law in California provided for the burden of proof to be on the defendant to demonstrate that the ivory was pre-1977 ivory, but that provision of the law was uncodified and thus rarely applied in court.

62. AB 96 provides for civil, criminal and administrative penalties for violations of the prohibition set forth in the legislation. For a first conviction of ivory worth less than $250, the maximum fine is $10,000 and/or imprisonment of no more than 30 days. For ivory worth more than $250 (or a second conviction of ivory worth less than $250), the fine increases to $40,000 and/or imprisonment for not more than one year. For a second conviction of ivory worth more than $250, the maximum fine is the greater of $50,000 or two times the value of the ivory and/or imprisonment for a year. Civil fines up to $10,000 are also authorised so long as the procedure set forth in the regulation (e.g. issuance of a complaint, opportunity for a hearing) is followed. The Legislature may pay up to 50% of a fine (not to exceed $500) to a person providing information that leads to a conviction under the regulations. Seized ivory shall be forfeited and destroyed or donated for educational or scientific purposes.

63. The California ivory law is currently being challenged in state court. The Ivory Education Institute filed a lawsuit in January 2016 against the State of California and requested an injunction to prohibit implementation of the law. The petitioner alleges that the ivory law is unconstitutional because it violates the petitioner's due process, the dormant commerce clause and the takings provisions of the U.S. Constitution. Various wildlife conservation groups have intervened in support of the State of California. The case is pending.

(3) New York

64. The New York legislature passed a ban on the intrastate sale of elephant and mammoth ivory and rhinoceros horn on 16 June 2014. The legislation was signed by the Governor on 12 August 2014. The ban is currently effective and broadly prohibits any person from selling, offering for sale, purchasing,

trading, bartering or distributing an ivory article in New York. The law recognises the following limited exemptions from the ban:

a. For antiques not less than 100 years old with ivory constituting less than 20% of the item;

b. The distribution or change in possession is for scientific or educational purposes, or to a museum chartered by the board of regents or by a special charter from the New York State legislature;

c. The distribution is to a legal beneficiary, heir or distributee of an estate; and

d. The article is a musical instrument with ivory parts manufactured no later than 1975.

65. The New York Department of Environmental Conservation is authorised to issue licenses or permits for ivory that meet the conditions of the exemption. Documentation establishing that the ivory article or rhinoceros horn qualifies for one of the exceptions will be required with the permit application.

66. The burden is on the seller to demonstrate that the exemption applies. Any person with a license or permit issued prior to the ban may continue to sell ivory articles and rhinoceros horn under the terms of that license or permit until it expires. Mammoth ivory was included along with elephant ivory due to the difficulties in distinguishing between mammoth and elephant ivory.

67. If the ivory value exceeds $25,000, the offense constitutes a class D felony under the New York penal law. For a first violation, the fine is the greater of $3,000 or two times the value of the ivory. For a subsequent violation, the fine is the greater of $6,000 or three times the value of the ivory.

68. Intrastate sales are allowed, with a permit, if the ivory article is at least 100 years old, contains less than 20% ivory and has not be repaired or modified with an ESA listed species after 27 December 1973.

69. We are not aware of any legal challenge being launched in respect of these measures, either under the 'takings clause' or otherwise.

70. The New York Department of Environmental Conservation ("DEC") was contacted in the course of preparing the present study. DEC informed Global Rights Compliance that it was not aware of any significant black market activity in ivory following the introduction of the present measures.

(4) New Jersey

71. The Governor of New Jersey, Chris Christie, signed New Jersey's ivory ban (S2012/A3128) on 6 August 2014. In passing its ban on ivory, the New Jersey Legislature stated that it is "an important public purpose to protect all species of rhinoceros and all species of animals with ivory teeth and tusks by prohibiting the import, sale, purchase, barter, or possession with intent to sell, of any ivory, ivory product, rhinoceros horn, or rhinoceros horn product". The law covers "ivory", which is defined to include ivory from elephant, hippopotamus, mammoth, narwhal, walrus, or whale, as well as rhino horn.

72. The New Jersey law makes it unlawful for "any person" "to import, sell, offer for sale, purchase, barter, or possess with intent to sell, any ivory, ivory product, rhinoceros horn, or rhinoceros horn product" unless an exception applies. Similar to AB 96 in California, the possession of ivory or an ivory product in a "retail or wholesale outlet commonly used for the buying or selling of similar product" is presumptive evidence of possession with intent to sell. Exceptions to the prohibition include:

a. Transfers to legal beneficiaries of the ivory or ivory product upon the death of the owner;

b. Possession for education or scientific purposes;

c. Possession by law enforcement; and

d. When importation is expressly authorized by a federal license or permit.

73. The law became effective six months after the date of enactment. For a first offence, the fine is the greater of $1,000 or an amount equal to two times the total value of the ivory. For a subsequent offense, the fine is the greater of $5,000 or an amount equal to two times the total value of the ivory. Upon conviction, the ivory will be seized and disposed of by the state, which can include destruction or donation to a museum or research group.

(5) Hawaii

74. Concerned that the success of ivory bans in other states and the federal efforts to tighten regulation of the ivory trade may result in making Hawaii more attractive as an illegal ivory market, the Hawaiian legislature is currently considering ivory ban legislation. The legislation is also designed to demonstrate Hawaii's commitment to stemming wildlife trafficking as the host of the September 2016 World Conservation Congress held by the International Union for the Conservation of Nature ("IUCN").

75. According to SB2647 SD1 HD2, no person shall sell, offer to sell, purchase, trade, barter for, or distribute any animal listed in the legislation, including elephants along with other trafficked animals like panthers, great apes and lions. Marine mammals that are listed on CITES, the ESA or the IUCN list are also protected. The list is the broadest of the state ivory bans, including not only elephants but also panthers, great apes, lions, leopards, sharks, sea turtles, whales, narwhal and other animals susceptible to wildlife trafficking. Exemptions from the prohibitions include:

a. Antiques;

b. The distribution for educational or scientific purposes;

c. Inheritance;

d. Part of a musical instrument manufactured no later than 1975;

e. Guns and knives with minor amounts of ivory;

f. Federally authorized transactions; and

g. Traditional cultural practices that are protected by the Hawaiian constitution.

76. The possession of ivory or an ivory product in a retail or wholesale establishment or other forum engaged in the business of buying or selling animal products is presumptive evidence of possession with intent to sell. The Senate Bill will take effect upon approval, but no enforcement actions will be pursued before 30 June 2017.

77. For a first conviction of ivory, the minimum mandatory fine is $200 and/or imprisonment of no more than one year. For a second conviction of ivory, the minimum mandatory fine is $1,000 and/or imprisonment of no more than one year. For a third conviction of ivory, the minimum mandatory fine is $2,000 and/or imprisonment of no more than one year. For second and third convictions, prohibited animal parts shall be considered contraband to be forfeited and disposed of by the state.

b) China

(1) Restrictions Enacted to Restrict Trade in Ivory

78. The Government of the People's Republic of China has taken both political and regulatory steps to restrict the ivory trade. On 11 July 2014, political commitments were made during a high-level meeting between the United States and China concerning the need to combat wildlife trafficking. Among other commitments made between the two States, strict law enforcement against illegal ivory sales was promised, as was continued close collaboration with the US and other members of the international community. China had started with a relatively strict regulatory regime even before the announcement, whereas enforcement has faced some challenges. Both China

and the US have destroyed around six tonnes of seized ivory, "signalling a determination to stamp out the illegal trade".[35]

79. On 24-25 September 2015, President Barack Obama hosted President Xi Jinping of China for a State visit in Washington, DC. Discussions touched on a number of global, regional and bilateral subjects, including wildlife trafficking. The US and China agreed upon the following official communique at the conclusion of their meetings:

> "recognising the importance and urgency of combating wildlife trafficking, commit to take positive measures to address this global challenge. The United States and China commit to enact **nearly complete bans on ivory import and export**, including significant and timely restrictions on the import of ivory as hunting trophies, and to take significant and timely steps to halt the domestic commercial trade of ivory. The two sides decided to further cooperate in joint training, technical exchanges, information sharing, and public education on combating wildlife trafficking, and enhance international law enforcement cooperation in this field. The United States and China decided to cooperate with other nations in a comprehensive effort to combat wildlife trafficking."[36] (emphasis added)

80. Concerning regulatory measures, the Chinese government has implemented other major changes that affect the future of the ivory trade. For example, in February 2015, it imposed a one-year ban on ivory imports.[37] This regulation "closed down legal imports of some European pre-CITES Convention (July 1975) tusks that had been given CITES export permits, and worked ivory

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35 http://savetheelephants.org/blog/?detail=china-and-the-us-meet-in-beijing-to-further-cement-their-commitment-to-end-the-ivory-crisis (accessed 5 May 2016).

36 https://www.whitehouse.gov/the-press-office/2015/09/25/fact-sheet-president-xi-jinpings-state-visit-united-states (accessed 5 May 2016).

37 http://www.bbc.com/news/world-africa-31648475 (accessed 5 May 2016).

items for personal use."[38] Furthermore, China has expanded the import ban of pre-convention ivory and pre-ban ivory carvings to December 31, 2019.[39]

81. On 29 May 2015, Zhao Shucong, minister of the State Forestry Administration, stated that "[w]e will strictly control ivory processing and trade until the commercial processing and sale of ivory and its products are eventually halted". Although no official dates were given, the Chinese government formally announced its intention to end the legal ivory trade in China.[40] Zhang Shanning, Director of Enforcement Division, Chinese CITES MA, stated about the Chinese authorities' preparative work for realizing President Xi Jinping's ivory ban commitment, "Chinese authorities are adopting various ways to implement the ivory trade ban. A specific timeline has not been published but it is understood to be taking place within the lifetime of this administration"[41]

82. Earlier in 2015, the Chinese government began to restrict the number of mainland visitors from the city of Shenzhen to neighbouring Hong Kong. The regulation is expected to significantly reduce the number of Chinese shoppers visiting Hong Kong. This could adversely affect the retail ivory industry of Hong Kong because the majority of the retail buyers of Hong Kong ivory products (the city with the largest number of ivory items on display for sale in the world) are mainland Chinese. Some of these buyers smuggle ivory objects out of Hong Kong and bring them into mainland China illegally.[42]

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[38] http://savetheelephants.org/blog/?detail=china-s-ivory-market-slowing-perhaps-decreasing (accessed 5 May 2016).

[39] http://www.forestry.gov.cn/main/4461/content-854385.html

[40] *Ibid.*

[41] http://www.traffic.org/home/2016/3/15/reducing-demand-for-illegal-wildlife-products-and-embracing.html (accessed 5 May 2016).

[42] http://savetheelephants.org/blog/?detail=china-s-ivory-market-slowing-perhaps-decreasing (accessed 5 May 2016). GRC is grateful to the Save the Elephants NGO in China for a descriptive, comprehensive recitation on the current state of affairs concerning ivory trade in China.

(2) Punishing the trade in illegal ivory

83. China's criminal law to combat wildlife crime is among the strictest in the world. Whilst China abolished the death penalty for the smuggling of endangered species two years ago, those involved in illegal wildlife trade in the country still face severe penalties, which can include a maximum penalty of life imprisonment.

84. According to China's Supreme Court, "nearly 700 individuals were prosecuted for wildlife-related crimes over the past 10 years, with subsequent sentences ranging from three years to life imprisonment. They stated that ivory-related offences represented more than half of these cases".[43]

85. Commenting on the increase in the number of prosecutions in China, Mr John E. Scanlon, the Secretary-General of CITES, stated that "the efforts made in China to bring criminals involved in illegal ivory trade to justice are very encouraging. The high penalties being imposed by Chinese courts send a strong message to the people involved in this illegal trade and serve as a deterrent to others."[44]

86. According to the CITES website, "[r]eports from the Supreme Court of China reveal that many other examples of individuals buying, selling or transporting ivory without proper documentation issued by wildlife authorities are being sentenced to imprisonment, although the quantities of ivory involved can often be relatively small. These prosecutions send a message that the risk of facing severe penalties does not stop at the border".[45]

(3) Compensating ivory dealers

87. One solution to ban ivory is through an ivory buyback programme, according to Li Zhang, a professor at Beijing Normal University. He is currently studying the

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[43] https://cites.org/eng/news/sundry/2013/20131128_china_ivory_prosecutions.php (accessed 5 May 2016).

[44] *Ibid.*

[45] *Ibid.*

feasibility of such a plan. The idea is that the government would use an eco-compensation fund, similar to funds previously used to improve watersheds, to buy back legal raw and unfinished ivory owned by licensed carving factories.[46]

88. Mr Zhang published his recommendation for a buyback programme in an article in the journal Nature.[47] He found that it would cost about $500 million to buy back the legal ivory already distributed to carving workshops. While costly, he believes that it remains one of the fastest ways China could implement a total trade ban. While buying back all the ivory is one of the solutions, other organizations such as WWF and TRAFFIC are conducting feasibility studies on phasing out the ivory trade in China and US.

89. "The Chinese government can use other methods to handle this, not only buybacks," he says, suggesting a government-funded programme that would help ivory carvers and retailers transition to a different business. However, he said, "I think a buyback with an eco-compensation fund is the quickest one. We need an immediate ban so we can have more time to save the elephants".[48]

c) Japan

90. The Japanese use ivory for, *inter alia*, carvings, traditional instruments and signature seals (known as hanko in Japanese). During the 1950s, Japan imported 70 tonnes of ivory annually. Consumption of ivory in Japan appears to have peaked in the period from the 1970s-1980s, when imports involved several hundred tonnes annually. Even with an Appendix I CITES listing, domestic ivory trade in Japan and elsewhere continued.[49]

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46 http://news.nationalgeographic.com/2015/11/151112-ivory-china-elephants-poaching-wildlife-trafficking-conservation/ (accessed 5 May 2016).

47 http://www.nature.com/news/china-must-act-decisively-to-eradicate-the-ivory-trade-1.18763 (accessed 5 May 2016).

48 http://news.nationalgeographic.com/2015/11/151112-ivory-china-elephants-poaching-wildlife-trafficking-conservation/ (accessed 5 May 2016).

49 Hisako Kiyono (2002). Japan's Trade in Ivory after the Tenth Conference of the Parties to CITES. TRAFFIC International p.4 . (accessed 5 May 2016).

(1) Japan and the Trade in Illegal Ivory

91. CITES is implemented in Japan by primary legislation and through Cabinet Orders that impose regulations governing the administration of control systems.[50] Imports and exports are governed by Foreign Exchange and Foreign Trade Control Law and Customs Law. Ivory trade control is primarily achieved "through the main domestic legislation that implements the Convention, namely the Law for the Conservation of Endangered Species of Wild Fauna and Flora (June 5, 1992, Law No. 75) ('LCES') and the relevant Cabinet Order".[51] Trade controls such as the registration process for ivory traders is overseen by the Ministry of Environment, but its implementation is "assigned to a non-government organisation, the Japan Wildlife Research Center".[52]

92. While these legal measures create the appearance of control and surveillance of ivory trading, Japan's regulatory system is not without its critics. For example, a recent report by the Environmental Investigation Agency noted that, while Japan is sometimes presented as a model of domestic ivory control, its system "is plagued by loopholes and undercut by weak legislation to such an extent that no meaningful control exists at even the most basic level".[53]

93. The system was supposed to operate differently in Japan, whose ivory trade levels have declined in recent years[54]. After the 2007 partial dismantling of the ban on ivory trade specifically for Japan and China's benefit, stringent domestic controls were supposed to ensure that trade would be severely regulated. It has not been

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[50] Control of trade in African elephant ivory SC54 Doc 261 (Rev 1)' (*Convention on International Trade in Endangered Species of Wild Fauna and Flora Website*, 15 August 2006) <https://cites.org/sites/default/files/eng/com/sc/54/E54-26-1.pdf> accessed 5 February 2016.

[51] *Ibid.*

[52] http://eia-global.org/images/uploads/EIA_Japans_Illegal_Ivory_Trade_12102015.pdf, p.4.

[53] Environment Investigation Agency, "Japan's Illegal Ivory Trade and Fraudulent Registration of Ivory Tusks", 15 December 2015 <http://eia-global.org/images/uploads/EIA_Japans_Illegal_Ivory_Trade_12102015.pdf.> accessed 15 March 2016.

[54] http://static1.1.sqspcdn.com/static/f/157301/26990748/1461562210200/settingsuns-rev.pdf?token=srwRYiTZ4xudgCDRAf764DgP3OY%3D

successful. Instead, investigations have demonstrated that up to 80% of all ivory traders were "willing to engage in illegal tusk registration activity".[55]

94. Further, all ivory dealers in Japan are required to be authorized by the Ministry of Environment and the Ministry of Economy, Trade and Industry. An authorized certificate with the dealer's number is given to each authorised ivory dealer. However, investigations determined that the certificate papers were confirmed in fewer than half of the shops. Accordingly, more than half of the shops are operating illegally without authorisation certificates.[56]

(2) Steps Taken to Ensure that Illegal Ivory is Not Traded

95. Even though the system has failed to successfully counter the trade in illegal ivory, a brief description can still be provided for illustrative purposes of legal restrictions concerning ivory trade. However, and even though countries such as the United States and China are leading the movement to ban the trade of elephant ivory, banning (or even further regulating the trade) seems a distant prospect in Japan.

96. In 1999, orders made pursuant to LCES established an ivory trade control system. This system required, *inter alia*, mandatory registration of those who deal in ivory. However, this ostensible protection of registration did not apply to all sectors of the ivory trade. Japan subsequently amended its Cabinet Order so that all importers, manufacturers, wholesalers and retailers who deal in ivory must register with the authorities.[57]

97. Persons owning whole ivory tusks in Japan are legally required to register the tusks before they are traded. Upon successful registration, the Japan Wildlife Research Center issues a registration card, which must be returned within 30 days if the owner processes or otherwise no longer possesses the tusk. Only raw ivory that is

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[55] *Ibid.*

[56] Tomoaki Nishihara, "Demand for forest elephant ivory in Japan" <http://www.pachydermjournal.org/index.php/pachy/article/viewFile/267/201>.

[57] 'Control of trade in African elephant ivory SC54 Doc 261 (Rev 1)' (*Convention on International Trade in Endangered Species of Wild Fauna and Flora Website*, 15 August 2006) <https://cites.org/sites/default/files/eng/com/sc/54/E54-26-1.pdf> accessed 5 February 2016.

legally acquired and of legal origin may be registered in Japan under the LCES, essentially limiting ivory that can be legally registered to:

a. Ivory imported into or acquired within Japan before the CITES ban was in effect; and

b. Ivory imported into Japan as part of the two CITES-authorised ivory auctions.[58]

98. Finally, considering the online ivory market trade of Japanese websites - the government has approached major e-commerce companies to ask for their co-operation, while several awareness-raising and communication projects are planned. Overall, both of the e-commerce companies, Yahoo Japan, Corp. and Rakuten, Inc, showed a positive attitude toward co-operation.[59] In 2013, the Japanese Ministry of the Environment made it mandatory that online dealers of LCES-regulated species (including ivory) display their registration information.[60]

(3) Punishing dealing in illegal ivory

99. Chapter VI, Penal Provisions, Article 58 of LCES provides that the maximum penalty is one year of imprisonment with work or a fine of one million yen (USD $8,873).[61] Analysis of the Penal Code and Act on Conservation of Endangered Species of Wild Fauna and Flora of Japan reveals no reference to criminal punishment for attempting to deal illegal ivory.[62]

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[58] Environment Investigation Agency, "Japan's Illegal Ivory Trade and Fraudulent Registration of Ivory Tusks", 15 December 2015 <http://eia-global.org/images/uploads/EIA_Japans_Illegal_Ivory_Trade_12102015.pdf.> accessed 15 March 2016.

[59] Tomomi Matsumoto, TRAFFIC, "A review of online ivory trade in Japan" (2014) <www.traffic.org/species-reports/traffic_species_mammals82.pdf>

[60] EIA, "Japan's Illegal Ivory Trade and Fraudulent Registration of Ivory Tusks" <http://eia-global.org/images/uploads/EIA_Japans_Illegal_Ivory_Trade_12102015.pdf>

[61] 'Act on Conservation of Endangered Species of Wild Fauna and Flora No 75 of 1992' (*Japanese Law Translation Database System*)

<http://www.japaneselawtranslation.go.jp/law/detail/?id=2103&vm=04&re=02&new=1> accessed 5 February 2016.

[62] Penal Code of Japan (Act No. 45 of 1907) http://www.cas.go.jp/jp/seisaku/hourei/data/PC.pdf

100. The environment ministry in Japan has announced it intends to raise the maximum penalty for individuals convicted of trafficking wildlife from one year in prison or a fine of JPY1 million (US$10,400) to five years behind bars or a fine of JPY 5 million (US$52,000). The ministry also plans to raise the fine companies found guilty of trafficking endangered species face by one-hundred fold, to a maximum JPY100 million (US$1.04 million). It is the first time penalties against wildlife trafficking have been raised in Japan since the law on the conservation of endangered species took effect in 1993, though more work is still needed to bring wildlife trade laws fully into line with modern practices. At the same time, the ministry also announced its intentions to ban advertisements selling threatened wildlife.[63]

d) Thailand

101. Thailand joined CITES in 1983, accepting the obligation to verify the origins of its existing ivory stockpiles and prevent any unauthorized importation of new ivory or exportation of worked ivory products.[64]

(1) Restrictions on Trade in Illegal Ivory

102. The primary laws restricting trade in ivory adopted by Thailand are the Elephant Ivory Act[65] and Wild Animals Reservation and Protection Act ('WARPA')[66].

103. On 21 January 2015, Thailand passed the Elephant Ivory Act, the first ever piece of legislation to control domestic ivory market.[67] The new Act "had a

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[63] Traffic, 'Japan and Russia increase penalties for wildlife crimes' (*TRAFFIC*, 19 April 2013) <http://www.traffic.org/home/2013/4/19/japan-and-russia-increase-penalties-for-wildlife-crimes.html> accessed 30 March 2016.

[64] Naomi Doak "Polishing off the Ivory Trade: Surveys of Thailand's Ivory Market" (*Traffic International*, 2014) <http://static1.1. sqspcdn.com/static/f/157301/25148087/1404461118560/Thailand-market-survey-report.pdf?token=VfwjNoAgBpuclnaGJjt9v06rLIE%3D> accessed 1 February 2016.

[65] The Elephant Ivory Act B.E. 2558 (2015) (entered into force since February 22th, 2015).

[66] Wild Animals Reservation and Protection Act (WARPA) (No.3) B.E. 2557(2014) (entered into force since February 22th, 2015).

[67] http://www.wwf.or.th/en/wildlifetradecampaignth/.

90-day period for traders and possessors to register all their ivory and after that time having non-registered ivory would be illegal and punishable under this act. The act allowed Thai authorities to understand the size of the ivory market, screen for illegal items and control the domestic trade. Over 44,000 people registered their ivory possessions before the April 21, 2015 deadline amounting to over 220 tonnes of ivory, including 210 ivory shops".[68]

104. On 14 March 2015, the Thai Government prohibited the possession, trade and sale of ivory from African elephants by enacting an amendment to the country's existing Wild Animal Reservation and Protection Act ('WARPA').[69] Under this law, "the possession and trading of African elephant ivory is illegal and shall be punishable by up to 4-years imprisonment".[70] Upon this law's passing, those with African ivory were permitted to handover the ivory to the government within 60 days of the law's passage with no penalty.[71] No compensation was provided to those handing over the ivory.[72] For those who did not, they were in violation of WARPA and could face criminal sanction, as described below.

105. Subordinate laws, such as regulations under the Ministry of Interior's Beasts of Burden Act, prescribe a new form of Elephant Identification Certificate. Each elephant's identification information and scientific information (such as DNA) is stored in digital form (microchip), preventing the registration of smuggled wild elephants as domesticated ones.[73]

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[68] http://www.wwf.or.th/en/wildlifetradecampaignth/.

[69] *Ibid.*

[70] https://cites.org/sites/default/files/eng/com/sc/66/E-SC66-29-Annex8.pdf, p. 1.

[71] Conversation with Ms. Janpai Ongsiriwittaya, Manager of Illegal Wildlife Trade campaign, WWF-Thailand, 12 May 2016.

[72] *Ibid.*

[73] 'Progress report on National Ivory Action Plan sent to CITES' (*The Nation*, 18 January 2015) <http://www.nationmultimedia.com/national/Progress-report-on-National-Ivory-Action-Plan-sent-30252128.html> accessed 1 February 2016.

(2) Steps taken to ensure that illegal ivory was not traded

106. On 15 September 2015, the Government of Thailand submitted its progress report on the implementation of Thailand's National Ivory Action Plan ("National Action Plan") for submission to the 66th Standing Commission of CITES.[74] According to the National Action Plan, steps taken to ensure that illegal ivory is not traded include the following:

a. Improvement in its registration systems, including the registration system of ivory traders and ivory products list, as well as the registration systems for legal ivory possession from domesticated and African elephants and for confiscated ivory. It will give the concerned authorities an opportunity to access information about traders, ivory possessors, ivory product movement, changes in ownership and monitor confiscated ivory movements effectively;

b. Establishment of 22 ivory trade patrol teams throughout the country, 11 joint task force teams to increase enforcement of ivory smuggling in high-risk areas and at borders, seaports, airports and post offices;

c. Continuously raising awareness among the main target groups, which are primarily foreign tourists, ivory traders, ivory owners and the general public; and

d. Establishment of four sub-committees to carry out, monitor, evaluate and regularly report to Thailand's National Committee on CITES and the Prime Minister.[75]

(3) Punishment for attempting to deal illegal ivory

107. Existing penalties for illegal import and export of African elephant ivory include the following:

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[74] https://cites.org/sites/default/files/eng/com/sc/66/E-SC66-29-Annex8.pdf.
[75] *Ibid.*

a. Imprisonment for a maximum 4 years or fine of a maximum 40,000 Baht or both under WARPA; and

b. Imprisonment for a maximum 10 years or fine of a maximum of 4 times of goods value or both under the Customs Act.[76]

108. The penalties have been criticised as insufficiently punitive and inadequately enforced.[77] The Government is considering whether to increase the penalty under WARPA, but has been restrained, in its view, due to a "lengthy review deliberation process".[78]

B. Precedents of bans on other items in Hong Kong

1. Poultry / Pig Farming

109. Following the avian influenza, the Hong Kong Government launched, in relation to poultry, a Voluntary Surrender Scheme in 2004-05 and a Buy-out Scheme in 2008, which can be briefly summarised as follows:

a. On 2 July 2004, the Legislative Council Finance Committee introduced a one-year incentive package to encourage live poultry retailers to surrender their licences/tenancies as appropriate and to cease operation permanently on a voluntary basis.[79]

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[76] https://cites.org/sites/default/files/eng/com/sc/66/E-SC66-29-Annex8.pdf, p. 35.

[77] Conversation with Ms. Janpai Ongsiriwittaya, Manager of Illegal Wildlife Trade campaign, WWF-Thailand, 12 May 2016.
[78] https://cites.org/sites/default/files/eng/com/sc/66/E-SC66-29-Annex8.pdf, p.35.

[79] Health, Welfare and Food Bureau, "Ex-gratia payment to live poultry retailers surrendering their licences with endorsement to sell live poultry or public market tenancies" FCR(2004-05)25, 2 July 2004 <http://www.legco.gov.hk/yr03-04/english/fc/fc/papers/f04-25e.pdf> accessed 15 March 2016.

b. On 8 July 2005, the Legislative Council Finance Committee approved a Voluntary Surrender Scheme including live poultry farmers, wholesalers and transporters.[80]

c. On 4 July 2008, the Legislative Council Finance Committee introduced a Buy-out Scheme to end the sale of live poultry.[81]

110. Besides the Voluntary Surrender Scheme and Buy-out Scheme, the Government also put in place the other restrictions regarding poultry including *inter alia* a ban on the keeping of backyard poultry and a prohibition of sale of live waterfowl in retail outlets since 1998[82] (resulting in an unsuccessful "takings claim",[83] discussed in the legal analysis below) and a prohibition of overnight stocking of live poultry at all retail outlets since 2008[84] (also resulting in an unsuccessful "takings claim",[85] discussed in the legal analysis below).

111. The ban on the keeping of backyard poultry was put in place in 2006, in the context of which the Department of Justice considered the possibility of a "takings claim" under the Basic Law of the Hong Kong Special Administrative Region (the "**Basic Law**"), concluding that such a claim would be unsuccessful.[86] Prior to the ban, persons who kept no more than 20 poultry in or on his premises were exempted from licensing requirement for

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[80] Health, Welfare and Food Bureau, "[e]x-gratia payments to live poultry farmers, wholesalers and related transporters" FCR(2005-06)28, 8 July 2005 < http://www.legco.gov.hk/yr04-05/english/fc/fc/papers/f05-28e.pdf> accessed 15 March 2016.

[81] Health, Welfare and Food Bureau, "Ex-gratia payments to live poultry farmers, wholesalers and related transporters and one-off grants to assist affected live poultry farm, wholesale and transport workers under the buyout package" FCR(2008-09)39, 4 July 2008 < http://www.legco.gov.hk/yr07-08/english/fc/fc/papers/f08-39e.pdf> accessed 15 March 2016.

[82] Food and Health Bureau, AFCD, Food and Environmental Hygiene Department, 16 April 2013, para. 3(g)

[83] *Kowloon Poultry Laan Merchants Association v. Director of Agriculture Fisheries and Conservation* [2002] 4 HKC 277 (CA).

[84] Food and Health Bureau, AFCD, Food and Environmental Hygiene Department, 16 April 2013, para. 3(h)

[85] *HKSAR v Asaduzzaman*, unreported, HCMA 314/2009, 7 May 2010.

[86] Department of Justice, "BL 105 and Backyard Poultry Farming" LC Paper No. CB(2) 1226/05-06(04), February 2006 <http://www.legco.gov.hk/yr05-06/english/hc/sub_leg/sc52/papers/sc520224cb2-1226-04-e.pdf > accessed 5 May 2016

livestock-keeping. On 1 February 2006, after detection of avian influenza in backyard poultry, the AFCD appealed to nearby backyard famers to voluntarily surrender their backyard poultry but to no avail. The Administration then pursued the legislative approach to ban the keeping of backyard poultry by amending various regulations; the amendments came into operation on 13 February 2006.[87]

112. The ban also affected the keeping of racing pigeons. The Government stated that it saw no justification to exclude pigeons from the ban but that, recognising that some people had kept pigeons as pets (without need of licence or permission) before the implementation of the ban, provided an exemption. Accordingly, persons who kept less than 20 specified birds as pets immediately before 13 February 2006 were eligible to apply for an exemption permit. Those wishing to keep any number of new racing pigeons in or on his premises after 13 February 2006 had to apply for an exhibition licence.[88] An owner of racing pigeons unsuccessfully mounted a judicial review challenging the refusal to grant him a Livestock Keeping Licence (although he had been granted an exhibition licence).[89]

113. The paper issued by the Department of Justice on the backyard poultry ban considered that Article 105 of the Basic Law ("**BL105**"), which provides for *inter alia* the right to compensation for lawful deprivation of property, did not impose any legal obligation on the government to pay compensation under the legislative amendments.[90] The legal analysis of a claim under Article 105 in the context of ivory trade is discussed at length below in the next section and the considerations of the Department of Justice in many instances overlap

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[87] The Waste Disposal Ordinance (Cap. 354) and the Public Health (Animals and Birds) (Licensing of Livestock Keeping) Regulation (Cap. 139L)

[88] Food and Health Bureau, AFCD, Food and Environmental Hygiene Department, "Avian Influenza Prevention Measures (Including Ban on Keeping Backyard Poultry)" LC Paper No. CB(2)944/12-13(03), 16 April 2013, <http://www.legco.gov.hk/yr12-13/english/panels/fseh/papers/fe0416cb2-944-3-e.pdf> paras. 6-9, accessed 5 May 2016.

[89] *Lin Kai Yuen v Director of Agriculture, Fisheries and Conservation*, unreported, HCAL 134/2009, 16 February 2011

[90] Department of Justice, February 2006, para 4. See also letter from Secretary for Health, Welfare and Food Bureau to Legislative Council Secretariat dated 22 February 2006, <http://www.legco.gov.hk/yr05-06/english/hc/sub_leg/sc52/papers/sc520224cb2-1226-03-e.pdf> accessed 5 May 2016.

with that analysis; briefly and without overstepping into the legal analysis discussed later, the reasoning of the Department of Justice can be briefly summarized as follows:

a. There was no deprivation of property in the poultry in the formal sense, as the amendments do not by themselves transfer or extinguish the title of poultry owners to their property;[91]

b. The doctrine of "*de facto*" deprivation was potentially relevant, raising the question of whether there was any meaningful alternative use of the property. The Department of Justice conducted a comparative review of Hong Kong, European and American jurisprudence on the doctrine.[92] In respect of backyard poultry farming, the small number of poultry kept by a particular owner could be slaughtered for private consumption (which was in line with the purpose of backyard farming) in anticipation of the commencement of the legislative amendments. Given the availability of that option, neither the voluntary surrender of poultry prior to commencement of the amendments nor the seizure of poultry kept by persons reasonably suspected to be in breach of such amendments would amount to a *de facto* deprivation. In the special cases of racing pigeons and pet poultry, it was open to the owners to apply for an exhibition licence or other regulatory licence, or sell to local or overseas racing pigeons associations. Thus such property was not left without any meaningful alternative use nor did the restrictions deny all economically viable use. [93]

c. Insofar as the ban did not amount to deprivation but constituted interference with or control of property rights, if the ban were required to be scrutinized under the "fair balance" test as would appear to be required under European jurisprudence, the ban satisfied that test. The

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[91] Department of Justice, February 2006, para 10.

[92] *Ibid.* Annex A.

[93] *Ibid.* paras 11-15.

reasoning being *inter alia* that the legislative amendments were reasonable as backyard poultry keeping was found to be the source of many past avian influenza outbreaks, and recent developments showed that threat of outbreak arising from backyard poultry keeping was imminent and swift action was required.[94]

114. On 28 April 2006, the Government formulated a Voluntary Licence Surrender Scheme to encourage pig farmers to surrender their Livestock Keeping Licences, providing an ex-gratia payment in exchange for surrendering their Livestock Keeping Licences and ceasing operation on a permanent basis, introducing it in June 2006. The proposed package also covered assistance to workers who would be indirectly affected by the phasing out of the industry, providing one-off grants to assist affected industry workers.[95]

a) Justifications

115. Concerning poultry farming, the scheme was largely motivated by public health concerns; namely, the avian influenza. The Administration decided to implement a comprehensive plan of action to reduce the risk of avian influenza outbreaks, but recognised that the comprehensive plan of action would bring about fundamental changes to the existing *modus operandi* of the live poultry farm, wholesale and transport industry. The Administration therefore considered it appropriate, to introduce a voluntary surrender scheme, as it had already done for poultry retailers.[96]

116. Concerning pig farming, it was not subject to any strict regulation or control until the 1980s. A livestock licensing regulatory framework incorporating various environmental control measures was eventually introduced to improve

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[94] *Ibid.* Annex B.

[95] Health, Welfare and Food Bureau, "*Ex-gratia* payments to pig farm licencees" FCR(2006-07)5, 28 April 2006 <http://www.legco.gov.hk/yr05-06/english/fc/fc/papers/f06-05e.pdf> accessed 15 March 2016.

[96] *Ibid.* paras. 3 and 4.

waste control in livestock production.[97] The eventual scheme to restrict pig farming was also motivated by environmental and public health concerns, including pollution to streams and rivers, indiscriminate dumping of dead pigs, illegal pig slaughtering, and threat of Japanese Encephalitis to humans.[98]

117. The last concern was likely the most significant. Following several incidents and the further risk of an outbreak of Japanese Encephalitis, the Health Welfare and Food Bureau ('HWFB') and the Environmental Protection Department ('EPD') concluded that the sustainable development of pig farming was no longer a realistic long-term policy option, and furthermore placed the proposed package as an item on the Finance Committee's agenda as a matter of urgency so that the proposal could be approved in time for implementation before the high risk season of Japanese Encephalitis outbreak.[99]

b) Compensation Scheme

118. Concerning the poultry package, under the 2004 scheme, ex-gratia payments ('EGP') were given to live poultry retailers who choose to surrender their fresh provision shop licences with endorsement to sell live poultry or public market tenancies, as appropriate. The total budget for the EGP was HK $236.4 million. In addition, the Finance Committee also approved eight weeks of retraining courses and one-off grants to assist affected live poultry retail workers (83 million individuals) as well as a loan commitment of HK $9 million to retailers who wish to continue operating to upgrade the hygienic condition of their shops.[100]

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[97] Health, Welfare and Food Bureau, "LegCo Panel on Food Safety and Environmental Hygiene: Voluntary Surrender of Pig Farming Licences", LC Paper No. CB(2) 1663/05-06(05) April 2006, para. 6- < http://www.legco.gov.hk/yr05-06/english/panels/fseh/papers/fe0411cb2-1663-05-e.pdf > accessed 15 March 2016.

[98] Health, Welfare and Food Bureau, "LegCo Panel on Food Safety and Environmental Hygiene: Voluntary Surrender of Pig Farming Licences", LC Paper No. CB(2) 1663/05-06(05) April 2006, paras. 2-7 - < http://www.legco.gov.hk/yr05-06/english/panels/fseh/papers/fe0411cb2-1663-05-e.pdf > accessed 15 March 2016.

[99] *Ibid.* paras. 7 and 23.

[100] Health, Welfare and Food Bureau, "Ex-gratia payment to live poultry retailers surrendering their licences with endorsement to sell live poultry or public market tenancies" FCR(2004-05)25, 2 July 2004 <http://www.legco.gov.hk/yr03-04/english/fc/fc/papers/f04-25e.pdf> accessed 15 March 2016.

119. The Food and Environmental Hygiene Department, which is responsible for administering the incentive package, invited live poultry retailers to submit EGP applications within the one-year period from 13 July 2004 to 12 July 2005.[101]

120. Under the 2005 scheme, EGP were given to farmers, wholesalers, and transporters who fell into one of the following categories:

    a. Poultry farmers who voluntarily surrendered their Livestock Keeping Licences and permanently stopped rearing live poultry;

    b. Live poultry wholesalers who voluntarily surrendered their poultry stall tenancies at the Cheung Sha Wan Temporary Wholesale Poultry Market and/or Western Wholesale Food Market and ceased operation at these wholesale markets; and

    c. Live poultry transporters who voluntarily surrendered their monthly car park tenancies at these wholesale markets and ceased operation of delivery of live poultry permanently and upgraded/converted their vehicles for other business operations.[102]

121. The total budget was HK $344.5 million.[103] In addition, a one-off grant (with a budget of $21.6 million) was adopted to assist affected local workers of the live poultry farm/wholesale/transport industry.[104]

122. The 2004 financial assistance arrangement for live poultry retail workers was also amended to provide a one-off grant of HK $18,000 to each of the

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[101] *Ibid.*

[102] Health, Welfare and Food Bureau, "Ex-gratia payments to live poultry farmers, wholesalers and related transporters" FCR(2005-06)28, 8 July 2005 < http://www.legco.gov.hk/yr04-05/english/fc/fc/papers/f05-28e.pdf> accessed 15 March 2016.

[103] *Ibid.*

[104] *Ibid.*

affected retail workers and to withdraw the provision of retraining courses so as to tally with the similar arrangement for the affected local workers of the live poultry farm/wholesale/transport industry. A "loans to live poultry transporters" was created under the Loan Fund with a commitment of HK $14.0 million for making loans to live poultry transporters who ceased operation of delivery of live poultry permanently and upgraded/converted their vehicles for other business operations.

123. Under the 2008 package, the Finance Committee approved funds of HK $1.1 billion to implement a buyout scheme for the live poultry trade. The following measures were adopted in relation to farmers:

a. EGP (HK $520.5 million) to live poultry farmers who surrender their Livestock Keeping Licences and cease rearing live poultry permanently;

b. EGP to live poultry wholesalers who surrender their poultry stall tenancies at the Cheung Sha Wan Temporary Wholesale Poultry Market and cease operation at the wholesale market permanently.

c. EGP to live poultry transporters who cease operation of the delivery of live poultry permanently and surrender their monthly car park tenancies at the wholesale market (if applicable);

d. One-off grants to assist the affected local workers of the live poultry farm/wholesale/transport industry; and

e. EGP to live poultry farmers as a relief to deal with their chickens past the average marketable age.[105]

124. With regards to poultry retailers:

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[105] Health, Welfare and Food Bureau, "Ex-gratia payments to live poultry farmers, wholesalers and related transporters and one-off grants to assist affected live poultry farm, wholesale and transport workers under the buyout package" FCR (2008-09)39, 4 July 2008 < http://www.legco.gov.hk/yr07-08/english/fc/fc/papers/f08-39e.pdf> accessed 15 March 2016.

a. EGP (HK $602.5 million) to live poultry retailers who surrender the permission to sell live poultry with their Fresh Provision Shop licences or public market tenancies permanently, as appropriate;

b. Providing a one-off grant to assist the affected local workers of the live poultry retail industry; and

c. Providing compensation to live poultry retailers for live poultry slaughtered as well as dressed poultry and chilled/frozen poultry products seized.[106]

125. Concerning the pig package, an EGP was given to eligible pig farmers who voluntarily surrendered their Livestock Keeping Licences and ceased rearing pigs permanently (HK $920 million).

126. In addition, one-off grant to assist affected local workers of the live pig farming/transport industry was provided (HK $14.4 million), as well as loans to live pig transporters under the Loan Fund with a commitment of HK $6.5 million for making loans on an unsecured basis to affected live pig transporters who cease operation of delivery of local live pigs permanently and upgrade/convert their vehicles for other business operations.[107] The total budget was HK $941.7 million.[108]

127. In 2009, there were 34 poultry farms and 43 pig farms left after the voluntary buyback schemes. Following the successive schemes in the poultry industry,

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[106] Health, Welfare and Food Bureau, "Ex-gratia payments to live poultry farmers, wholesalers and related transporters and one-off grants to assist affected live poultry farm, wholesale and transport workers under the buyout package" FCR(2008-09)39, 4 July 2008 < http://www.legco.gov.hk/yr07-08/english/fc/fc/papers/f08-39e.pdf> accessed 15 March 2016.

[107] Health, Welfare and Food Bureau, "LegCo Panel on Food Safety and Environmental Hygiene: Voluntary Surrender of Pig Farming Licences", LC Paper No. CB(2) 1663/05-06(05) April 2006, paras. 2-7 - < http://www.legco.gov.hk/yr05-06/english/panels/fseh/papers/fe0411cb2-1663-05-e.pdf > accessed 15 March 2016.

[108] *Ibid.*

in 2014 the number of retail outlets was reduced from over 800 to 132 at present; wholesalers down from 87 to 23; and poultry farms from 192 to 30.[109]

2. *Trawling*

128. The legislation for a ban on trawling was passed by the Legislative Council ('LegCo') in May 2012 and came into effect on 31 December 2012.[110]

a) *Justifications*

129. The ban was largely motivated by environmental concerns.[111] The ban takes its origin from recommendations formulated by the Committee on Sustainable Fisheries.[112] The ban addresses concerns which started as early as 1998, when a study by the AFCD at that time revealed that 12 of the 17 evaluated fish species were heavily over-exploited while the remaining 5 were fully exploited[113]

130. In 2010, among the 3,700 fishing vessels in Hong Kong, 1,100 were trawlers, of which around 400 operated partly or wholly in Hong Kong waters.[114] These 400 trawlers accounts for roughly 80% of the total engine power of the fishing fleet operating in Hong Kong waters, which is nearly double the environmentally sustainable level according to a study conducted by the Chinese Academy of Fishery Science in 2006. [115]

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[109] Para 5 http://www.legco.gov.hk/yr13-14/english/fc/fc/papers/f13-61e.pdf. Corresponding data for pig farms was not available in this report.

[110] Fisheries Protection Regulations (Cap. 171 sub. leg. A, Regulation 4A) which prohibits the use any apparatus of a class or description specified by the Director of Agriculture, Fisheries and Conservation (DAFC) by notice published in the Gazette. The Fisheries Protection (Specification of Apparatus) (Amendment) Notice 2011 to the Legislative Council was then amended on 30 March 2011 to provide for prohibiting the use of trawling devices for fishing in Hong Kong waters - L.N. 45 of 2011 < http://www.legco.gov.hk/yr10-11/english/subleg/negative/ln045-11-e.pdf > (last visited 05 February 2016).

[111] Food and Health Bureau, "Legislative Council Brief: a Ban on Trawling Activities in Hong Kong Waters", FH CR 1/2576/07 13 October 2010, para. 2 - < http://www.fhb.gov.hk/download/press_and_publications/otherinfo/101013_f_hkwaters/e_hk_waters.pdf > (last visited 05 February 2016).

[112] Food and Health Bureau, 13 October 2010, Annex A.

[113] *Ibid.* para. 4.

[114] *Ibid.* para. 2.

[115] *Ibid.*

131. Trawling has reduced the quantity, species diversity and size of marine organisms, as well as deterioration of the marine environment.[116] It had been argued that the ban offers the following benefits:

a. Marine conservation;

b. Sustainable development;

c. Sustainable supply of marine fish; and

d. Eco-tourism.[117]

b) Compensation Schemes

132. Concerning the assistance package, 400 trawlers were identified as being potentially adversely affected.[118]

133. In June 2011, the Finance Committee (FC) of LegCo approved a one-off assistance package (the 'Package'), with a commitment of HK $1,726.8 million,[119] which includes:

a. Providing ex-gratia allowance (EGA) payment to affected trawler owners for the permanent loss of fishing ground arising from the trawling ban, depending on the affected trawler's categorization as "insore trawler" or "larger trawler", including (i) a total amount of $1,190 million to be fully disbursed to, and apportioned among, "inshore trawlers"; and (ii) a lump sum of $150,000 for each "larger trawler";

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[116] *Ibid.* para. 3.

[117] *Ibid.*, para. 5.

[118] *Ibid.*

[119] Food and Health Bureau, "Note for Finance Committee: One-off Assistance to Fish Collector Owners Affected by the Trawl Ban", FCRI(2014-15)6, October 2014, para. 8 - < http://www.legco.gov.hk/yr14-15/english/fc/fc/papers/fi14-06e.pdf > (last visited 5 February 2016).

b. Providing a total amount of HK $240 million for buying out affected inshore trawler vessels from trawler owners who voluntarily surrender their vessels;

c. Providing a one-off grant of HK $34,000 to each affected local deckhand;

d. Providing EGA of HK $90,000 to each eligible owner to mitigate the difficulties faced by them during their migration to another business; and

e. An interest subsidy (capped at HK $30,000) for payment of the interest of the loan taken up by the owner of an eligible fish collector.[120]

134. An Inter-Departmental Working Group ('IWG') has since been established to handle matters relating to the processing of applications received under the Package.[121] The IWG comprises representatives from AFCD, the Marine Department, and the Home Affairs Department. The Department of Justice and the Independent Commission Against Corruption also advise the IWG on legal matters and corruption prevention.[122] The IWG is a non-statutory administrative body, and its terms of reference include *inter alia*:[123]

a. EGA to Owners of Affected Trawlers:

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[120] Food and Health Bureau, "Legislative Council, Panel on Food Safety and Environmental Hygiene Implementation of the Trawl Ban", LC Paper No. CB(2)1621/14-15(05), 9 June 2015, para. 3 - < http://www.legco.gov.hk/yr14-15/english/panels/fseh/papers/fseh20150609cb2-1621-5-e.pdf > (last visited 5 February 2016). See also Panel on Food Safety and Environmental Hygiene, "Information note prepared by the Legislative Council Secretariat for the meeting on 9 June 2015: Implementation of the trawl ban", 5 June 2015, LC Paper No. CB(2)1621/14-15(06), para. 2 - < http://www.legco.gov.hk/yr14-15/english/panels/fseh/papers/fseh20150609cb2-1621-6-e.pdf > (last visited 5 February 2016).

[121] Food and Health Bureau, 9 June 2015, para. 3.

[122] Legislative Council, Panel on Food Safety and Environmental Hygiene, "Ex-gratia Allowance for Trawler Vessel Owners Affected by the Trawl Ban", LC Paper No. CB(2)572/12-13(05), 29 January 2013, para. 3 - < http://www.legco.gov.hk/yr12-13/english/panels/fseh/papers/fe0205cb2-572-5-e.pdf > (last visited 5 February 2016).

[123] *Sin Sup Chat v The Inter-Departmental Working Group*, Fishermen Claims Appeal Board (Trawl Ban) Case No. SW0072, 10 April 2015, Decision and Reasons for Decision, para 6

i. To determine the total amount of EGA to be paid to inshore trawler owners in accordance with the approved calculation formula.

ii. To decide on the eligibility criteria for EGA and the criteria for distinguishing between inshore and larger trawlers according to the principles laid down in the relevant policies, having regard to the views from fishermen representatives.

iii. To vet all claims in accordance with the decided eligibility criteria to ensure that only those claims that comply with the eligibility criteria are recommended.

iv. To decide on the disbursement arrangement for eligible claimants taking into consideration any possible appeal cases.

v. To formulate and endorse an appropriate apportionment method for calculating the amount of EGA for each eligible claimant of inshore trawler.

b. To decide and approve any other *bona fide* cases under the one-off assistance according to the principles laid down in the relevant policies.

135. Eligibility criteria for applicants of the one-off assistance package and apportionment criteria and estimate of EGA payable to eligible trawler fishermen were adopted.[124] The "guiding principle" was said to be that "an approved sum of EGA would be apportioned to different groups of claimants, which in turn should be proportional to the impact on them caused by the trawl ban".[125]

136. The assessment process was as follows. First, the relevant vessel would be categorized as "inshore trawler" or "larger trawler", taking into account data and information including *inter alia* particulars of the vessel, information as

[124] Panel on Food Safety and Environmental Hygiene, 5 June 2015, Appendix*). See also* Item for Finance Committee, FCR(2011-12)22 < http://www.legco.gov.hk/yr10-11/english/fc/fc/papers/f11-22e.pdf > (last visited 5 February 2016).

[125] *Sin Sup Chat v The Inter-Departmental Working Group*, para 8.

captured by licence and documentation, number of deckhands, AFCD field validation surveys and patrols, and sales of catch. If categorized as "larger trawler, it was considered far less impacted by the trawl ban and as noted above a lump sum was awarded. If categorized as "inshore trawler", the category expected to be most affected by the ban and therefore to be awarded a greater amount of EGA, the relevant vessel would be further categorized as "higher tier" (i.e. is highly dependent on Hong Kong waters) or "lower tier" (i.e. is not mainly dependent on Hong Kong waters). The actual amount of EGA payable to those trawlers also depended on the total number of successful applications (the greater the number of successful applications, the lesser the average amount payable to each applicant) as well as other apportionment criteria determined by the IWG. [126]

137. The deadline for the applications under the buy-out scheme or the one-off assistance was the end of 2015.[127] Appeals are handled by the Fishermen Claims Appeal Board ('FCAB'), which was rapidly expanded to a pool of five Chairmen and 20 members.[128] The terms of reference of the FCAB are as follows:[129]

a. To see that the criteria established by the IWG for processing and/or vetting applications for the EGA comply with the government policy, and are fair and reasonable (in the public law sense) to the applicants.

b. To see that the IWG's decisions on eligibility and the amount of EGA granted comply with the government policy and are fair and reasonable (in the public law sense) to the applicants.

c. To examine any new or additional information/evidence provided by the appellants (or their representatives) who have lodged an appeal

[126] *Ibid.*, paras 9-14.

[127] Food and Health Bureau, 9 June 2015, para. 9.

[128] *Ibid.*, paras. 12-13.

[129] http://www.fhb.gov.hk/en/committees/fcab.html (accessed 5 May 2016).

against the IWG's decisions or by the relevant departments, and to consider the relevance of and the weight to be given to such information/evidence.

d. To consider whether to uphold the IWG's decisions on the appellants' cases or to revise the decisions, and to determine the type and amount of EGA payable to the appellants, as appropriate.

138. As of April 2015, HK $950.3 million was distributed to 1,117 applicants.[130] The FCAB received 858 appeal applications.[131] Apart from the package, the Government of Hong Kong assists fishermen to switch to sustainable operations (i.e. credit facilities, training, and establishment of a Sustainable Fisheries Development Fund (SFDF), granting of new marine fish culture licences, etc.).[132]

c) *Enforcement of the Trawling Ban*

139. The AFCD is in charge of enforcing the trawling ban. Between January 2013 and March 2015, AFCD conducted 14,505 patrols and 18,297 inspections in Hong Kong waters. [133] In addition, special operations have also been organised to target trawling at black spots in the southern and western waters. [134]

140. The AFCD also works with the Marine Police. They work in intelligence sharing, case investigation, and devising strategy to tackle problems encountered during enforcement.[135]

141. Further, the AFCD also works closely with the Guangdong Fisheries Administration General Brigade and its sub-offices (i.e. exchange of

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[130] Food and Health Bureau, 9 June 2015, para. 11. A total of 1,577 applications were received.

[131] *Ibid.* para. 12.

[132] For more details *see ibid.* paras 14-21.

[133] *Ibid.* para. 4.

[134] *Ibid.*

[135] *Ibid.* para. 5.

information on the identity of the Mainland fishing vessels found operating illegally in Hong Kong waters).[136]

142. The three departments also organise joint operations to combat illegal cross-boundary fishing activities.[137]

d) Punishment

143. Any person who contravenes the ban can be sentenced to imprisonment for a term of up to six months and to a fine of up to HK $200,000.[138] As of 9 June 2015, 25 cases of trawling were initiated.[139] Please see the table below[140]:

	2013	2014	2015*
Number of successful prosecution	13	10	2
Fine (HK$)**	2,000 to 85,000	800 to 85,000	85,000
Imprisonment**	0	2 days to 4 weeks	1 month imprisonment, suspended for 24 months

* Up to 31 March 2015
**Maximum penalty prescribed under the Fisheries Protection Regulation (Cap. 171A) is a fine of $200,000 and imprisonment for 6 months

3. Summary of Matters Raised in Precedents of Bans

144. The Administration's measures relating to poultry, pig-farming and trawling highlight legal concerns that generally arise in the context of a ban on a certain trade or industry and solutions to address those concerns. Whilst the tailoring

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[136] *Ibid.*, para. 6.

[137] *Ibid.*

[138] Fisheries Protection (Specification of Apparatus) Notice (Cap. 171B), Section 4(2).

[139] Food and Health Bureau, 9 June 2015, para. 7.

[140] Annex 2, Food and Health Bureau, "Legislative Council, Panel on Food Safety and Environmental Hygiene Implementation of the Trawl Ban", LC Paper No. CB(2)1621/14-15(05), 9 June 2015, para. 3 - < http://www.legco.gov.hk/yr14-15/english/panels/fseh/papers/fseh20150609cb2-1621-5-e.pdf >.

of the solutions is invariably industry-specific, upon legal analysis there are common concerns of interest to an ivory ban.

145. From the experience of the bans on backyard poultry and trawling, it is apparent that the Administration has the ability to effect a complete ban on an industry, despite the fact that stakeholders in that industry own property that is affected, to varying extents, by that ban. In response to the impact on stakeholders, the Administration, in the trawling ban, adopted a compensation policy. Conversely in the case of backyard poultry the Administration decided to not grant compensation and stated its view that it was under no legal obligation to do so.

146. There is a spectrum of options for phasing out trade with different degrees of efficacy and engaging different legal concerns. Measures may involve a voluntary licence surrender scheme without a mandatory ban (e.g. for poultry and pig-farming), a mandatory ban with voluntary buy-out scheme (e.g. for fish-trawling) or mandatory ban without compensation (e.g. for backyard poultry).

a. The voluntary schemes without mandatory ban encouraged the poultry/pig-farming industries to wind itself down at an accelerated pace, but a limited number of farms continued to exist years after implementation.

b. The mandatory ban on trawling with voluntary buy-out option involved compensation in the buy-out was distributed on the guiding principle of apportionment proportional to the impact caused by the ban. Vessels highly dependent on trawling in Hong Kong waters were compensated, potentially comparable to traders for whom the sole business is ivory. However, vessels less impacted were also compensated but to a lesser extent, potentially comparable to traders for whom ivory is but one aspect of the trader's business. Claimants were examined on a case-by-case basis to determine their eligibility and apportionment amount,

using defined criteria and field data obtained prior to the announcement of the ban to determine likely impact of the ban on each claimant. The Administration did not state that it was awarding such compensation on the basis of legal obligation. However, once it had decided to do so, the Administration was clearly concerned that it had to carefully adhere to public law principles with regards to the administrative determination of individual eligibility and apportionment of payment, creating an administrative appellate body that was required to *inter alia* scrutinize whether the decisions made in respect of compensation are "fair and reasonable (in the public law sense)" to the claimants.

c. In the backyard poultry experience, the government first made requests for voluntary surrender and when results were not forthcoming, quickly changed to a legislative approach to institute a mandatory ban without compensation. This approach will raise the question of a takings claim, analysed in-depth below.

147. The Administration in some cases took measures addressing the impact on industry workers who are affected despite not being persons owning property the subject of the ban/phase-out. This may be of relevance when considering the position of local workers in the ivory trade. The Administration's measures in this respect, did not, however, purport to be based on any particular legal obligation for compensation. For poultry and pig farming, one-off grants were available to assist local workers of the relevant farm/wholesale/transport industry. For trawling, one-off grants were available to assist affected local deckhands.

148. Where a blanket ban is put in place, the Administration might consider carving out exemptions by creating licences for special categories (as in the case of granting exhibition licences and pet licences when the ban on backyard poultry farming was implemented). This is potentially of relevance to exemptions in ivory in respect of antiques and items containing *de minimis* amounts of ivory, in line with the approach in US jurisdictions discussed above. We return to this below.

C. Potential Obstacles to Ban on Ivory Trade which Factors in Legal, Policy, and Compensation Matters

149. The study will now turn to potential obstacles to introducing enhanced measures to combat the problems arising out of Hong Kong's present legislative framework. We look first at the position under Hong Kong domestic law. In particular, we consider:

a. What (if any) legal constraints exist upon the adoption of enhanced measures to control the domestic ivory trade – or even stamp it out altogether?

b. Would compensation be required to holders of ivory, or of commercial licences to deal in ivory, and if so in what circumstances?

150. The study then goes on to consider Hong Kong's international obligations. Specifically, we analyse whether restrictions upon, or a ban of, the ivory trade in Hong Kong could be inconsistent with any international obligations owed by Hong Kong, including under the World Trade Organization agreements or any of Hong Kong's bilateral investment treaties.

1. Legal Issues

a) Article 105 of the Basic Law of the HKSAR

151. The most obvious possible source of a legal challenge against restrictions upon – or a ban of – the ivory trade in Hong Kong is under the Basic Law, which is essentially Hong Kong's 'mini-constitution'. Relevantly, BL105 (which the Administration considered in the context of the backyard poultry ban as noted above) provides protections for private property rights in Hong Kong in these terms:

"*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."

152. It should also be noted that article 6 of the Basic Law provides that "*The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law.*" However, the Courts of Hong Kong have repeatedly indicated that article 6 does not add anything where a challenge is brought against a measure that is said to be expropriatory under BL105.[141] Therefore, the focus of the analysis will be on the latter.

153. The first thing to note about BL105 is that it is concerned with the various rights attaching to "property". A definition of the term "property" appears in section 3 of the Interpretation and General Clauses Ordinance (Cap. 1). It includes (although is not limited to): money, goods, choses in action and land, obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property. Quite clearly a chattel such as a piece of ivory, or a thing containing ivory, is capable of constituting property within the meaning of BL105.

154. Turning to the substance of the provision, as can be seen from the text of BL105 itself the protection comprises two distinct elements. These are:

    a. First, a requirement that the Region maintain legal protection for the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property; and

    b. Secondly, a right to compensation for lawful deprivation of property.

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[141] *Man Yee Transport Bus Co Ltd v Transport Tribunal & Anor.*, unreported, 23 October 2008, HCAL 122/2008 §15; *Fine Tower Associates Ltd v Town Planning Board* [2008] 1 HKLRD 553 §13; *cf.* also *Law of the Hong Kong Constitution*, 2nd ed, p.1106 (at §31.071).

155. So BL105 can broadly be regarded as including: (i) a right to *have* one's property, the corollary of not being *"deprived"* of it (at least not without compensation), and (ii) a right to *enjoy* one's property, such as by using it or disposing of it. That includes disposing of it for profit.

156. These two elements are quite distinct, and it is necessary to understand each in order to test whether a given measure is compliant with BL105. We will first summarise the main differences between these two elements, and then explain the legal test for each of the two aspects in some detail by reference to the applicable case law. In broad outline:

    a. The right to *enjoyment* property is a very broad right. It is *prima facie* engaged whenever a given measure limits or restricts what a person can do with his or her own property;

    b. However this right to enjoyment of one's property is <u>not</u> an absolute right. It is perfectly open to the Government to enact laws that limit in various ways citizens' enjoyment of their own property, providing that such measures are justified in the public interest.[142] Limitations of this type do not violate BL105;

    c. The right to compensation under BL105 arises, however, only where there is an actual "*deprivation*" of property;

    d. A *"deprivation"* in its most obvious sense is a 'taking', i.e. a full transfer of all title in the property concerned to the State (as where the State exercises eminent domain);

    e. Measures falling short of an outright transfer of title may yet constitute a "deprivation" of property, for example where the owner retains title but

[142] To take two obvious examples: anyone can buy and own a car, but the owner may not drive it without a valid driver's licence; and the right to enjoyment of one's land is subject to the government lease conditions, to the payment of land tax, and to various restrictions on the use of the land imposed under the general law. These are *restrictions* on the right to enjoyment of property, but they are perfectly lawful and do not violate BL105 because they are lawful measures justified in the public interest.

all possible use and enjoyment of the thing has been utterly stultified by the measure. In short, a *de facto* deprivation will do[143]; and

f. Where this threshold is met, so that there has been a "deprivation" of property, the State is required to pay compensation. A public interest justification will not obviate the need to do so.

157. Accordingly, one legal scholar has (correctly, in our view) summarised the effect of BL105 as follows:

> *"The constitutional guarantee in Art 105 of the Basic Law of the HKSAR is not confined to instances in which the deprivation suffered by the owner is accompanied by a corresponding acquisition by the State.*[144] *In general, regulatory restriction on use imposed [in] the public interest that does not amount to a taking or deprivation of the property, gives no rise to compensation. But action adversely affecting the use of property, despite falling short of formal expropriation, may in certain circumstances nonetheless properly described as deprivation, in which case there is a right to compensation. Whether there has been a de facto deprivation of property is perforce case specific, a question of fact and degree. Comparative jurisprudence from the United States, European Court of Human Rights and the United Kingdom courts all make the point that de facto deprivation for the purpose of establishing a right to compensation contemplates the removal of any meaningful use – all economically viable use.*[145] *In this respect, the Courts of the HKSAR have largely followed* Grape Bay Ltd v Attorney General of Bermuda.[146]*"*[147]

158. In order to consider the impact of BL105 on possible measures that might be adopted in relation to the trade in ivory, it will be useful first to consider the

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[143] Such measures are sometimes referred to as 'regulatory takings' or 'creeping expropriations'.

[144] *Ying Ho Co Ltd & Ors v Secretary for Justice* [2007] 4 HKC 442 (CFI).

[145] *Fine Tower Associates Ltd v Town Planning Board* [2008] 1 HKLRD 553 (CA) (followed in *Man Yee Transport Bus Co Ltrd v Transport Tribunal & Anor.* (unreported, 28 October 2008, HCAL 122/2008) (CFI)). See also *Kowloon Poultry Laan Merchants Association v Director of Agriculture Fisheries and Conservation* [2002] 4 HKC 277 (CA); *Kaisilk Development v Urban Renewal Authority* [2002-2003] CPR 670 (CFI); and *HKSAR v Asaduzzaman* (unreported, 7 May 2010, HCMA 314/2009) (CA).

[146] [1999] UKPC 43 (PC).

[147] PY Lo, *The Hong Kong Basic Law,* p. 565 §105.08

case law on the legal test for what amounts to a "deprivation" of property, since that is the trigger requirement for a right to compensation.

a) "Deprivation" of property

159. The most straightforward case of expropriation is where the Government takes property belonging to a private person and transfers full title in it to itself, for example where it exercises the right of eminent domain. The courts of the Region have held that this is what BL105 is predominantly concerned with.

160. In *Hong Kong Kam Lan Koon v Realray Investment Ltd (No* 5) [2007] 5 HKC 122 certain land had been acquired by adverse possession.[148] Hon Lam J (as he then was) was asked to consider if this doctrine contravened BL105. His Lordship considered both the English and Chinese texts[149], noting that in the event of inconsistency the latter was to prevail. In this connection, the learned Judge pointed out:

> *"23. The Chinese text refers to "徵用" (in simplified Chinese "征用"). Literally, the expression means resumption, expropriation or compulsory acquisition by the state for public purposes. […]*
>
> *24. The dictionary meaning of the expression "徵用" also confines it to situations where title, possession, control or use of the property has been acquired by the government (see Albert Chen, The Basic Law and the Protection of Property Rights (1993) HKLJ 31 at p.60 n.32 and 35)."*

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[148] "Adverse possession" refers to the doctrine by which the owner of land loses the right to enforce her title against a squatter following a number of years' occupation by the latter. See section 7 of the Limitation Ordinance (Cap. 347).

[149] Article 105 in Chinese reads '**第一百零五條香港特別行政區依法保護私人和法人財產的取得、使用、處置和繼承的權利,以及依法徵用私人和法人財產時被徵用財產的所有人得到補償的權利。徵用財產的補償應相當於該財產當時的實際價值,可自 由兌換,不得無故遲延支付。企業所有權和外來投資均受法律保護。**'

161. This, the judge pointed out, was consistent with that the Hon Tang VP (as he then was) had earlier said in *Weson Investment Ltd v Commissioner of Inland Revenue* [2007] 2 HKLRD 567 (CA), at §79, namely that:

> *"'Deprivation', in BL 105, is used in the sense of expropriation, which is the expression used in its original Chinese. In my opinion, BL 105 concerns essentially a taking, as under eminent domain."*

162. Applying this approach in to the case at hand, Lam J was content to hold that:

> *"… on proper construction, the protection of right to compensation for lawful deprivation of property under Article 105 of the Basic Law does not extend to a case in which a paper title owner of land lost his right to assert his title against a squatter by reason of the Limitation Ordinance."*

163. Hon Hartmann J (as he then was) reached a similar conclusion in *Harvest Good Development Ltd v Secretary For Justice & Ors* [2007] 4 HKC 1, §§137-138 & 145.

164. However the concept of a "deprivation" does not merely cover formal acquisitions or expropriations of property – that is to say, measures involving a transfer of title from a private citizen to the State. As the Court of Appeal held in *Fine Tower Associates Ltd v Town Planning Board* [2008] 1 HKLRD 553 (CA) (*"Fine Tower Associates"*) at §17:

> *"[I]t is well established that action adversely affecting use of property, despite falling short of formal expropriation, may in certain circumstances nonetheless properly be described as deprivation, in which case there is a right to compensation. To ascertain whether there has been a deprivation, the court looks to the substance of the matter rather than to the form:*
>
> > *'In the absence of a formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the appearances and investigate the realities of the situation complained of. Since the [European] Convention [on Human Rights] is intended to guarantee rights that are 'practical and effective', it has to be ascertained whether that situation amounted to a de facto expropriation ….'*

Sporrong and Lonnroth v Sweden[5]"

165. This further category of deprivations is sometimes referred to as a "regulatory taking", which accurately recognises the sense that regulations may be oppressive of property rights as to amount to a *de facto* taking notwithstanding that title still resides with the affected person. Their Lordships then went on to explain the fact-sensitive nature of the enquiry into whether a given measure amounted to a *de facto* deprivation:

> *"18. Absent a formal expropriation, the question whether there has been a de facto deprivation of property is perforce case specific, a question of fact and degree:*
>
> > *'The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'*
> >
> > *Pennsylvania Coal Co v Mahon[7]"*

166. This of course raises the question: how far is "too far"? Affirming the United States jurisprudence on the subject, the Court eschewed the notion that it was possible to set down rigid categories or rules; rather it would be necessary to engage in *"essentially ad hoc, factual inquiries"* (at §20). Such a statement is as entirely accurate as it is unhelpful, and it is useful therefore to go on to look at both the underlying rationales for the rule, and its application in the case law.

167. The Court in *Fine Tower Associates* also made liberal reference to the United States jurisprudence in cases concerning the 'takings clause' in the Fifth Amendment to the United States Constitution.[150] In this connection, their Lordships approved of what the US Supreme Court had said in *Lucas v South Carolina Coastal Council* 505 US 1003 at 1015 to 1019 (1992), in which two discrete – although non-exhaustive – categories of deprivations had been identified:

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[150] The Fifth Amendment provide, in relevant part, that: *"No person shall … be deprived of … property without due process of law; nor shall private property be taken for public use, without just compensation".*

"In 70-odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any "'set formula'" for determining how far is too far, preferring to 'engag[e] in … essentially ad hoc, factual inquiries.' Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978) (quoting Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)). See Epstein, Takings: Descent and Resurrection, 1987 S.Ct. Rev. 1, 4. We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. For example, in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), we determined that New York's law requiring landlords to allow television cable companies to emplace cable facilities in their apartment buildings constituted a taking, id., at 435-440, even though the facilities occupied, at most, only 1 1/2 cubic feet of the landlords' property, see id., at 438, n. 16. See also United States v. Causby, 328 U.S. 256, 265, and n. 10 (1946) (physical invasions of airspace); cf. Kaiser Aetna v. United States, 444 U.S. 164 (1979) (imposition of navigational servitude upon private marina).

The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. See Agins, 447 U.S., at 260; see also Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987); Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 495 (1987); Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 [505 U.S. 1003, 1016] U.S. 264, 295-296 (1981). 6 As we have said on numerous occasions, the Fifth Amendment is violated when land use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.' Agins, supra, at 260 (citations omitted) (emphasis added)."

(Emphasis added)

168. The Supreme Court went on in the ensuing paragraphs to explain the fundamental rationales for this second rule, including the following:

a. Where all possible economic use of land had been stultified it was, as far as the landowner was concerned, the equivalent of a physical expropriation;

b. It could not be realistically said of a measure that removed *all* possible economic benefit of landed property that the legislature was simply *"adjusting the benefits and burdens of economic life … in a manner that secures an 'average reciprocity of advantage' to everyone concerned"*;

c. The functional basis for permitting the government, by regulation, to affect property values without compensation – namely, that Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law – does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses; and

d. Cases of total deprivation of the any economic value involved a heightened risk of private property being pressed into public service under the guise of regulation.

169. Accordingly, the Supreme Court concluded that:

> *"We think, in short, that there are good reasons for our frequently expressed belief that, when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."*
>
> (Emphasis added)

170. The notion of a total stultification of economic value also comes in through the European jurisprudence under article 1 of the First Protocol to the European Convention on Human Rights ("**A1P1**"). Thus the Court of Appeal in *Fine Tower Associates* cited (at §21) from the following passage from a leading text concerning A1P1:

"A de facto expropriation of this kind can only occur where there has been so substantial an interference with the ownership and use of the possession concerned that it effectively equates to the total extinction of ownership notwithstanding the fact that the owner retains legal title. Deprivation may thus occur if the owner is deprived of all meaningful use of his property. However, any form of provisional or temporary loss of rights is very unlikely to constitute deprivation. Equally, interferences which do not affect the value of the possession at all, or which affect its value to a severe degree but not so as to render it worthless, are also unlikely to be considered deprivations. A finding of de facto expropriation is accordingly, and is likely to remain, extremely rare."

171. Accordingly *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'*). For reasons developed below, this aspect is potentially of some moment in the present context.

172. So, accordingly, while the legal test

"*requires one to ask whether, despite the newly imposed restriction on use, the owner nonetheless enjoys an interest that is economically viable, and if it has a meaningful market value then he clearly does",*[151]

one has to keep in mind what reasonably held expectations can be attributed to the owner of the property.

173. A case in point of the application of the 'loss of all economic viability' aspect is *Man Yee Transport Bus Co Ltd v Transport Tribunal & Anor.*, unreported, 23 October 2008, HCAL 122/2008. That case involved the cancellation of a

[151] *Fine Tower Associates Ltd v Town Planning Board* [2008] 1 HKLRD 553 at §31.

licence to use a bus as a commercial vehicle for transporting passengers. The bus owner claimed that the cancellation infringed his that his right to own or keep the bus, as a motor vehicle, and his right to personal property (*viz.*, the bus itself); accordingly, he contended, compensation had to be paid. The Court there summarized the definition of "deprivation"[152] and demonstrated application of the "economically viable" test as follows:

"13. … *deprivation may occur where the interference with 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. The burden of establishing removal of all meaningful or economically viable use resides with the party asserting a violation of art 105.*

14. Likewise, in the present case, although without a vehicle licence, the applicant cannot use the bus on the roads in Hong Kong, this does not mean that it has lost all meaningful or economically viable use of the vehicle. 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.

15. In those circumstances, there is no deprivation within the meaning of art 105. Art 6 does not add anything to the applicant's argument."[153]

174. In *Kowloon Poultry Laan Merchants Association v. Director of Agriculture Fisheries and Conservation* [2002] 4 HKC 277 (CA), as noted in previous section discussing precedents of bans in Hong Kong, a public health measure had been adopted to combat avian influenza. The measure, which took the form of subsidiary legislation, prohibited the selling of waterfowl, including ducks and geese, at the same locations as chicken (under a "segregation policy", sale of live waterfowl in retail outlets was prohibited).[154] Accordingly certain traders were

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[152] As laid down by the Hong Kong Court of Appeal in *Fine Tower Associates Ltd v Town Planning Board* [2008] 1 HKLRD 553, a case concerning restrictions on use of two pieces of land imposed by an outline zoning plan; leave to appeal to the Court of Final Appeal refused: FAMV 20/2008, 8 September 2008.

[153] *Man Yee Transport Bus Co Ltd v Transport Tribunal & Anor.*, unreported, 23 October 2008, HCAL 122/2008.

[154] Food and Health Bureau, AFCD, Food and Environmental Hygiene Department, 16 April 2013, para. 3(g)

prohibited from selling waterfowl at their rented stalls at a given market. They could still sell chickens at that market, and were permitted to carry on their duck and goose wholesaling business from another location. The traders claimed that the measure had resulted in a diminution of their profits, and that the small size and inconvenient location of the new location had effectively foreclosed their goose and duck selling business altogether. They mounted a challenged against the measure as deprivation of property requiring compensation under BL105.

175. The Court of Appeal, applying the jurisprudence of the European Court of Human Rights under A1P1, held that there was no deprivation of property on facts of the case. Their Lordships reasoned as follows:

"15. The crux of this dispute as we see it is whether or not the appellant had made out an arguable case that they have suffered a 'deprivation of property' as it is understood in Article 105 of the Basic Law such that they should be given leave for judicial review. Accepting for present purposes that the profit, business or goodwill, even relating to the future, can amount to 'property' has there been any deprivation? In our view, there has not been any deprivation made out in this case for the following reasons. The appellants have not been deprived of the use of the land rented to them by the Government at the Cheung Sha Wan Temporary Poultry Market. 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. Moreover and so far as their businesses of selling water birds is concerned, they have not been deprived of that business either by the new regulations and/or by the new By-laws. Their reduction of profit, if any, does not result from any 'deprivation of property'.

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. To that extent, we agree with the judge below that the appellants have not made out any case to show that there has been a deprivation of property under Article 105."

176. Accordingly, the claim for compensation under BL105 was dismissed.

177. *Sporrong and Lnnroth v Sweden* (1982) 5 EHRR 35 (European Court of Human Rights), has been cited in Hong Kong courts.[155] In that case, a series of 'expropriation notices' had been issued, which provided for the government to exercise eminent domain over the relevant properties at some time in the future, and prohibiting any redevelopment in the meantime. The notices were repeatedly extended, but after 18 years were finally cancelled without any expropriation ever actually being affected. The Strasbourg Court held that there had been an interference with the protected property right in the first sentence of A1P1 (*"[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions"*) but not a deprivation within the meaning of the second sentence (*[n]o one shall be deprived of his possessions…"*). It reasoned that:

> *"In the Court's opinion, all the effects complained of (see paragraph 58 above) stemmed from the reduction of the possibility of disposing of the properties concerned. Those effects were occasioned by limitations imposed on the right of property, which right had become precarious, and from the consequences of those limitations on the value of the premises. However, although the right in question lost some of its substance, it did not disappear. The effects of the measures involved are not such that they can be assimilated to a deprivation of possessions."*[156]

178. A very important case in the present context is the *Eagle Feathers* case decided by the US Supreme Court: *Andrus v Allard* 444 U.S. 51 (1979). Given its relevance to the issues considered here, we consider it at some length. The issue in that case was crisply stated by Brennan J (giving the unanimous judgment of the Court):

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[155] Note, as can be seen below, that in one case the Court of Appeal has questioned the relevance of *Sporrong* in Hong Kong insofar as it deals with interferences with property rights falling short of a deprivation: see the discussion of *Hysan Development Co* below at §§198-199. However the European jurisprudence, including *Sporrong*, remains highly persuasive in Hong Kong at the first stage – i.e. in assessing whether or not there has been a deprivation of property.

[156] *Fine Tower Associates Ltd v Town Planning Board* [2008] 1 HKLRD 553 §22..

"The Eagle Protection Act and the Migratory Bird Treaty Act are conservation statutes designed to prevent the destruction of certain species of birds. Challenged in this case is the validity of regulations promulgated by appellant Secretary of the Interior that prohibit commercial transactions in parts of birds legally killed before the birds came under the protection of the statutes."

179. The relevant regulations under the statute at issue called for an interpretation of the Act whereby:

"Bald eagles, alive or dead, or their parts, nests, or eggs lawfully acquired prior to June 8, 1940, and golden eagles, alive or dead, or their parts, nests, or eggs lawfully acquired prior to October 24, 1962, may be possessed, or transported without a Federal permit, but may not be imported, exported, purchased, sold, traded, bartered, or offered for purchase, sale, trade or barter…"

180. A legal challenge was brought against these provisions by persons engaged in the trade of Indian artefacts, which were composed *inter alia* of feathers which had been acquired lawfully before the coming into force of the legislation. At issue was: (i) the propriety of regulations under the Eagle Protection Act applying to specimens acquired before the Act entered into force, and (ii) whether, if such regulations were *intra vires* the Act, the legislative scheme involved a "taking" under the Fifth Amendment sounding in compensation.

181. On the first issue, the Court held that Congress had clearly intended the legislation to apply to specimens acquired before the Acts had come into force. This was so both as a matter of ordinary principles construction, but also because such a result was consonant with the purposes and objects of the statutes:

"The prohibition against the sale of bird parts lawfully taken before the effective date of federal protection is fully consonant with the purposes of the Eagle Protection Act. It was reasonable for Congress to conclude that the possibility of commercial gain presents a special threat to the preservation of the eagles because that prospect creates a powerful incentive both to evade statutory prohibitions against taking birds and to take a large volume of birds. The

legislative draftsmen might well view evasion as a serious danger because there is no sure means by which to determine the age of bird feathers; feathers recently taken can easily be passed off as having been obtained long ago.

Appellees argue that even if the age of feathers cannot be ascertained, it is still possible to date the Indian artifacts of which the feathers are a constituent. Thus, they contend that the goal of preventing evasion of the statute could have been achieved by means less onerous than a general sales ban: for example, by requiring documentation and appraisal of feathered artifacts. The short answer is that this legislation is not limited to the sale of feathers as part of artifacts; it broadly addresses sale or purchase of feathers and other bird parts in any shape or form. The prohibitions of the statute were devised to resist any evasion, whether in the sale of feathers as part of datable artifacts or in the sale of separate undatable bird products. Moreover, even if there were alternative ways to insure against statutory evasion, Congress was free to choose the method it found most efficacious and convenient."

(Emphasis added)

182. Having established that both Acts were intended to apply to specimens lawfully acquired prior to their enactment, the Court then went on to consider whether they were consistent with the Fifth Amendment. The Court resoundingly rejected the suggestion that the Acts engaged the takings clause:

"The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety. … In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds."

183. We have noted above that, *in certain circumstances*, stultification of the economic utility of property may, when viewed in the context of the reasonable investment expectations of the owner, carry some significant weight in determining whether or not a deprivation of property has occurred. But in this context it did not support the Fifth Amendment challenge, as Brennan J reasoned in these terms:

"It is, to be sure, undeniable that the regulations here prevent the most profitable use of appellees' property. Again, however, that is not dispositive. When we review regulation, a reduction in the value of property is not necessarily equated with a taking. … In the instant case, it is not clear that appellees will be unable to derive economic benefit from the artifacts; for example, they might exhibit the artifacts for an admissions charge. At any rate, loss of future profits – unaccompanied by any physical property restriction – provides a slender reed upon which to rest a takings claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests."

184. The Court found strong support for this reasoning in the earlier Fifth Amendment cases:

"Regulations that bar trade in certain goods have been upheld against claims of unconstitutional taking. For example, the Court has sustained regulations prohibiting the sale of alcoholic beverages despite the fact that individuals were left with previously acquired stocks. Everard's Breweries v. Day, 265 U.S. 545 (1924), involved a federal statute that forbade the sale of liquors manufactured before passage of the statute. The claim of a taking in violation of the Fifth Amendment was tersely rejected. Id., at 563. 23. Similarly, in Jacob Ruppert, Inc. v. Caffey, 251 U.S. 264 (1920), a federal law that extended a domestic sales ban from intoxicating to nonintoxicating alcoholic beverages 'on hand at the time of the passage of the act,' id., at 302, was upheld. Mr. Justice Brandeis dismissed the takings challenge, stating that 'there was no appropriation of private property, but merely a lessening of value due to a permissible restriction imposed upon its use'."

185. Viewed in the round, therefore, the measure at issue did not constitute a taking:

"It is true that appellees must bear the costs of these regulations. But, within limits, that is a burden borne to secure "the advantage of living and doing business in a civilized community." Pennsylvania Coal Co. v. Mahon, supra, at 422 (Brandeis, J., dissenting).

We hold that the simple prohibition of the sale of lawfully acquired property in this case does not effect a taking in violation of the Fifth Amendment."

186. Contrast this case with the *Penny's Bay* case,[157] which was one of involving a true deprivation. The applicant had acquired land in Penny's Bay, Lantau Island. As part of the terms of the acquisition, the applicant had been required to reclaim a large portion of land and to construct a sea wall; and thereafter had enjoyed a marine right in and over areas of the foreshore and seabed.

187. Subsequently, a notice under a local ordinance was posted delineating and describing proposed reclamation of land in the sea immediately abutting the land in question. The applicant lodged a claim for compensation due to extinguishment of his rights – in particular its sea access. This was opposed. The ordinance was withdrawn but the government sought to reclaim the land for a theme park. The land was surrendered by deed. The applicant sought compensation. A question arose as to the distinction between reclamation and extinguishing a right such as the applicant's "marine right". The Court of Final Appeal held that, where there has been resumption of property or someone's marine rights have been extinguished by statute, there was no real distinction between reclamation of property and extinguishment of rights for the purposes of compensation.[158] (The application was ultimately dismissed because the property had not been quantified, so an order pursuant to BL105 was held to be premature).[159]

188. Tying the threads together, therefore, a range of factors must be assessed when considering whether there has been deprivation of property entitling compensation:

    a. Is it "property"?

    b. Has the individual's property been appropriated formally?

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[157] *Gold Shine Investment Ltd v Secretary For Justice* [2010] 1 HKC 212, §§67 – 69.

[158] *Ibid.*

[159] *Ibid.* §183.

c. Do the measures affect the substance of the property to such a degree there has been *de facto* transference of rights to the Government?

d. Is the legislation of a general regulatory nature controlling the manner in which the goods are used?

e. Does there remain an alternative means of using or disposing of the property?

f. Could the goods still be used?

g. Are the goods not valueless and can they still be sold, and if not could they be used in some other economically valuable way?

h. Is it possible to seek permission to use the goods as they choose?

189. Before leaving the topic of deprivations, it be mentioned that discretionary licences issued by a governmental authority are not usually themselves considered to be 'property' within the sense contemplated by BL105. In English law it has long been the case that a licence passes no interests in property but only makes an action lawful which without it had been unlawful.[160] Accordingly the cancellation or non-renewal of a licence will not trigger a right to compensation under BL105, even if it may separately unlawful at public law.

190. A South African case neatly demonstrates this. The Constitution of South Africa contains a prohibition against "arbitrary" deprivation of property. In one case, the Government had introduced an Act (The Eastern Cape Liquor Act 2003) which regulated the sale of liquor. The applicant was licensed to sell wine with food in its grocery stores. The provisions of the Act permitted the holder of a licence to continue to sell wine with food for ten years after the commencement of the Act. The licensee could apply to sell liquor after five

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[160] *Heap v Hartley* 42 Ch. D. 461; *Muskett v Hill* 5 Bing N. C. 694; N*ewby v. Harrison* 1 J. & H. 393; *The Smelting Company Of Australia, Limited v The Commissioners Of Inland Revenue* [1896] 2 QB 179. *Cf.* liquidation cases in which licences have held to be "property" for that particular purpose, such as *Re Mineral Resources Ltd, Environment Agency v Stout* [1999] 1 All ER 746; *Re Celtic Extraction Ltd (in liquidation), Re Bluestone Chemicals Ltd (in liquidation)*[2001] Ch 475, [1999] 4 All ER 684. These situations are distinguishable, since "property" has a particular meaning with the Liquidation Act.

years. After ten years, the licence lapsed. The applicant argued this amounted to an arbitrary deprivation of its property. The Court assessed, among other questions, whether the licence to trade commercially in this manner amounted to "property" for the purposes of deprivation of property. The majority of the Court found that a licence was not property; a mere preference in a business model was not property requiring protection under the constitutional provisions.[161]

191. Finally we should briefly mention that, as will be plain from the above analysis, a person who runs or employed by a business affected by governmental measures does not enjoy a right under BL105 in respect of her future profits or employment. According to a report by Save the Elephants, following the global ban in 1990, the Hong Kong Government set up a scheme to re-train several hundred ivory craftsmen by offering them expertise in jewellery making, printing, and in other professions. While they were being re-trained they were given HK$ 2,500 (USD 320) a month subsistence allowance. Some of these courses lasted several weeks, and most of the former ivory artisans obtained jobs.[162] By mid-1990s, almost all ivory workshops had closed down and by 2002, there were probably no full-time ivory craftsman left in Hong Kong with only approximately five or six occasional ivory craftsmen remained to help repair ivory artefacts.

b) Measures affecting property less than deprivations

192. As noted above, BL105 is concerned with more than merely ensuring that deprivations of property are met with fair compensation. It is a wider right that protects the enjoyment of property. Accordingly, BL105 will be *prima facie* engaged whenever a measure affects the enjoyment of private property.

193. However, as we have emphasised, this wider right to the enjoyment of property is not an absolute right. The enjoyment by the owners of property

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[161] *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and others* [2015] ZACC 23, §§94, 95 and 130. The application was dismissed for different reasons: §§90-91.

[162] Martin, E (2004) 'The Ivory Markets of East Asia'

may be subject to restrictions provided for in law that are in the public interest. The courts of Hong Kong have therefore repeatedly found:

"*a general proposition that regulatory restriction on use of the relevant property, imposed in the public interest, that does not amount to a taking or deprivation of the property, gives no right to compensation*".[163]

194. The classic statement of this principle, which has been repeatedly affirmed in Hong Kong, is that of Lord Hoffmann giving the advice of the Board in *Grape Bay Ltd v Attorney General of Bermuda*:[164]

"*It is well settled that restrictions on the use of property imposed in the public interest by general regulatory laws do not constitute a deprivation of that property for which compensation should be paid. … The give and take of civil society frequently requires that the exercise of private rights should be restricted in the general public interest. The principles which underlie the right of the individual not to be deprived of his property without compensation are, first, that some public interest is necessary to justify the taking of private property for the benefit of the state and, secondly, that when the public interest does so require, the loss should not fall upon the individual whose property has been taken but should be borne by the public as a whole. But these principles do not require the payment of compensation to anyone whose private rights are restricted by legislation of general application which is enacted for the public benefit. This is so even if, as will inevitably be the case, the legislation in general terms affects some people more than others.*"

195. The position is similar in European human rights law under A1P1, where the Strasbourg Court held in *Banér v Sweden*, App. No.11763/1985, 60 D.R. 128, 139-140, that:

"Legislation of a general character affecting and redefining the rights of property owners cannot normally be assimilated to expropriation even if some aspect of the property right is

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[163] See *Fine Tower Associates Ltd v Town Planning Board* [2008] 1 HKLRD 553 §17 citing *Grape Bay Ltd v Attorney General of Bermuda* [2003] 1 WLR 574 (PC); see also *Kowloon Poultry Laan Merchants Association v. Director of Agriculture Fisheries and Conservation* [2002] 4 HKC 277 at § 17 citing *Baner v. Sweden.*

[164] [2000] 1 W.L.R. 574, 583.

thereby interfered with or even taken away. There are many examples in the Contracting States that the right to property is redefined as a result of legislative acts. Indeed, the wording of Article 1 para. 2 shows that general rules regulating the use of property are not to be considered as expropriation. The Commission finds support for this view in the national laws of many countries which make a clear distinction between, on the one hand, general legislation redefining the content of the property right and expropriation, on the other."

196. In a very similar vein, the High Court of Australia has authoritatively held that under section 51(xxxi) of that country's Constitution:

"Obviously, many general laws which regulate the rights and conduct of individuals may, for any number of legitimate legislative purposes, effect or authorize an 'acquisition of property' within the wide meaning of those words as used in s.51(xxxi). If every such law which incidentally altered, modified or extinguished proprietary rights or interests in a way which constituted such an 'acquisition of property' were invalid unless it provided a quid pro quo of just terms, the legislative powers of the Commonwealth would be reduced to an extent which could not have been intended by those who framed and adopted the Australian Constitution."[165]

197. Returning to Hong Kong, then, it is well settled that the restrictions on use of property of a general nature, and imposed in the public interest, do not constitute deprivations of property.[166] This includes zoning laws (which restrict the right to make certain economic uses of land)[167] or rent control legislation restricting the rent levels landlords could be permitted to charge.[168] There can be no doubt that the legislature can indeed place restrictions on the use of property in the public interest without running afoul of BL105.

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[165] *Harvest Good Development Ltd v. Secretary For Justice & Ors* [2007] 4 HKC 1, para. 142; *Mutual Pools & Staff Pty Ltd v. The Commonwealth* (1993-94) 179 CLR 155, at 189.

[166] *Harvest Good Development Ltd v. Secretary For Justice & Ors* [2007] 4 HKC 1, §139; *Grape Bay Ltd v. Attorney General of Bermuda* [2000] 1 WLR 574, at 583.

[167] *Westminster Bank Ltd v. Beverley Borough Council* [1971] AC 508.

Village of Euclid v. Ambler Realty Co (1926) 272 US 365.

[168] *Harvest Good Development Ltd v. Secretary For Justice & Ors* [2007] 4 HKC 1, §139; *Grape Bay Ltd v. Attorney General of Bermuda* [2000] 1 WLR 574, 583.

198. We should just mention that, as at the time of writing, there is at least some divergence in the authorities about how precisely to test the propriety of restrictions on property rights that fall short of deprivations. The possibility of constituting restrictions on property rights falling short of deprivation was similarly considered by the Department of Justice in the context of backyard poultry as noted above. This divergence is not of real relevance in the instant context and does not affect the outcome of our analysis in any way. For the sake of completeness, the different approaches can be explained briefly as follows:

a. The first view is that the test for restrictions upon property no amounting to deprivations should be subject to the familiar requirement of proportionality. This means that such measures must: (i) prescribed by law, (ii) pursue a legitimate aim, (iii) be necessary for accomplishment of the legitimate aim, but not go further than necessary to do so, and (iv) viewed in the round, strike a fair balance between the rights of the individual and the interest of the community.[169]

b. This approach to BL105 was adopted by the Court of Appeal in *HKSAR v Asaduzzaman*, unreported, 7 May 2010, HCMA 314/2009 concerning dealing with personal property, being the keeping of live chickens at premises overnight, one of the restrictions discussed under the previous section on precedents of bans in Hong Kong. Their Lordships stated: "*that any restriction imposed by law upon the right to hold property must satisfy the well-known proportionality test, namely, that the restriction pursues a legitimate aim; that the restriction is rationally connected to the legitimate aim; and that the restriction is no more than is necessary to accomplish the aim*."[170]

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[169] See *Leung Kwok Hung Leung Kwok Hung & Ors. v HKSAR* (2005) 8 HKCFAR 229, *§§17, 34, 126-131, 164-170; Ho Choi Wan v Hong Kong Housing Authority* (2005) 8 HKCFAR 628, *§§62-63; Chan Kim Sum v Secretary of Justice* [2009] 2 HKLRD 166, *§§59, 64-78, 81.Huang v Secretary of State for the Department* [2007] 2 AC 167 at §19 per Lord Bingham, followed in *R (Quila) v Secretary of State for the Home Department* [2012] 1 AC 621 (UKSC) at §45.

[170] *HKSAR v Asaduzzaman*, unreported, HCMA 314/2009, 7 May 2010 para 25.

c. However a subsequent decision of the Court of Appeal casts some doubt upon this approach: *Hysan Development Co Ltd v Town Planning Board*, unreported, CACV 232/2012 & CACV 233/2012, 13 November 2014. See §§54-89. Their Lordships suggested that the courts ought not under BL105 adopt a granular approach whereby the proportionality of each instance of interference with property rights would be tested individually; it would be sufficient for the State to demonstrate that the measure *viewed as a whole* was a proportionate one.

d. In doing so, the Court in *Hysan Development Co* also suggested that the European authorities under A1P1 may not be perfectly analogous with the correct approach under BL105 for testing restrictions on property rights falling short of a deprivation. To that extent, the reasoning would have to be examined in each case and caution exercised.

199. As matters stand, the *Hysan Development Co* case is under appeal to the Court of Final Appeal. A definitive resolution of this issue can accordingly be expected in the near future. As noted above, however, the resolution of the divergent approaches is not material to any of the matters considered in this report.

200. What is perfectly clear is that general legislative measures limiting the enjoyment of (but not extinguishing) property rights in the public interest will not contravene BL105 or trigger a right to compensation.

c) Application of BL105 to enhanced ivory measures

201. Having explained the legal principles, it is necessary to consider what enhanced measures to bolster Hong Kong's contribution to the global fight against elephant poaching might look like, and how BL105 might apply to them.

202. Since, as the authorities show, the application of BL105 to a particular measure must turn on its particular factual and legal context, it will be necessary to analyse individually possible enhanced measures as they apply to the separate categories of ivory possession that are lawful under the existing

legislative framework. It will be convenient to begin with the position of ivory traders dealing commercially pursuant to a Possession Licence. We will then consider persons in possession of pre-Convention ivory, and those in possession of ivory by way of household or personal effects.

(1) Commercial dealing pursuant to a Possession Licence

203. The commercial trade in ivory in Hong Kong is carried out primarily through possession licences pertaining to ivory imported into Hong Kong between 1976 and 1990, when further imports were outlawed. Given the existing abuse attendant upon the commercial trade in ivory in Hong Kong – and its role in sustaining an industry of illegal poaching elephants in other countries – a compelling case has been made for a total ban on all commercial trading of ivory in the HKSAR.

204. As to how this might be accomplished, the starting point of course is that ivory is not treated as some ordinary chattel that may be freely bought and sold. Indeed, quite the reverse: as has been shown (see above at §§14-17) it is generally a criminal offence to be in possession of ivory (*per* section 9 of the CITES Ordinance). From 1990 onwards, possession of post-1976 for a commercial purpose was not a matter of *right*, but rather, a matter of administrative discretion – in the form of Possession Licences issued pursuant to section 23 of the CITES Ordinance.

205. Given that starting point, it follows that if Possession Licences no longer existed, the result would automatically return to the default position, namely that all commercial trade in ivory imported lawfully between 1976 and 1990 would be unlawful under sections 9 and 10 of the Ordinance.

206. By what modality could such a result be achieved? There are at least four obvious possibilities:

    a. All existing Possession Licences could be cancelled by way of an administrative decision;

b. The conditions of all existing Possession Licences could be varied to ban any sale or purchase of ivory;

c. AFCD could simply let the presently valid Possession Licences expire by effluxion of time, and thereafter refuse to issue any further such licences containing a condition permitting any sale or purchase of ivory; or

d. There could be an amendment to the legislation to modify of cancel the existing Possession Licences.

207. The authors of this study are of the opinion that the first option – cancellation – is not viable. As noted above, AFCD's power to cancel licences is limited by statute. Pursuant to section 26(1) of the CITES Ordinance the power arises only when a licence condition is contravened, or it is shown that the licence had been obtained as a result of false representation. Absent proof of one of these two aspects in respect of a particular licensee, any cancellation of a Possession Licence would be liable to challenge by way of judicial review.

208. Turning to variation of conditions, the power to vary arises under section 24(1)(c) of the Ordinance. It appears, at least on its face, from the structure of that provision that the power of amendment is contemplated to be exercised only upon an application by the holder of the licence. Thus section 24(1) begins: *"The Director may, application made to him in the specified form and on payment of the fee prescribed in Schedule 2 […] (c) vary a licence issued under section 23 […]"*. It would therefore seem that the legislation does not contemplate AFCD (the Director's delegate for this purpose) varying the conditions *proprio motu* (i.e. of their own motion).

209. We turn, then, to blanket non-renewal. Under section 24 of the Ordinance, the Director *"may"*, on an application made to him, renew or extend any Possession Licence. Quite obviously this is not obligatory; he may also decide he will not renew a given licence. If he does refuse, there is a duty (under section 25) to give reasons.

210. An alternative would be to renew or extend Possession Licences, but decline to include a condition permitting possession or control of ivory for commercial trade, .i.e. obtaining profit or other economic benefit (whether in cash or in kind) and directed towards sale, resale, exchange.

211. We have carefully considered whether AFCD might, by adopting a general policy against issuing, renewing or extending any further Possession Licences covering commercial trade in ivory, be said to be fettering its discretion. As a matter of general public law, there can be no dispute that a decision-maker vested with a statutory power should exercise it based on the merits of each individual case; s/he should avoid adopting overly rigid policies that foreclose the possibility of the power being exercised in a given way.[171] S/he must 'keep her mind ajar'. However, we do not think that a challenge of this nature brought against a decision of the Director not to extend, renew or issue any Possession Licences covering domestic commercial trade in ivory would be likely to succeed. Our reasons are outlined below.

212. The power under section 23 is a broad one. It authorises the Director to issue licences for all manner of activities. The licences can be for import, introduction from the sea, export, re-export, possession or control. They can be issued for any purpose or purposes. And they may be issued in respect of any specimen (including live animals or plants), of any species listed in all three Appendices. Moreover section 23(3) of the CITES Ordinance expressly states that the Director on issuing Possession Licences may impose "*such conditions as he considers appropriate, including conditions that are more stringent than any requirement under [CITES].*"

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[171] See, e.g., *de Smith's Judicial Review* at §§9-002 and 9-023; *R v Hampshire Count Council ex p W* [1994] ELR 460, 476B per Sedley J. In the context of licensing, it has been said that: "*licensing justices must exercise their discretion in each case that comes before them and cannot properly determine an application simply by reference to a pre-ordained policy relating to applications of a particular class, without reference to the particular facts of the application before them.*" See *Wise Union Industries Ltd v Hong Kong Science and Technology Parks Corp* [2009] 5 HKLRD 620 citing *R v Secretary of State for the Home Department, ex p Venables* [1993] AC 407; see also the observations on exceptions in the dissenting judgment of Le Pichon JA in *Durga Maya Gurung v Director of Immigration*, unreported, CACV 1077/2001, 19 April 2002 at §§24-25.

213. In view of the statutory purpose of the CITES Ordinance, we do not think the Director would be acting unlawfully in adopting a policy against issuing Possession Licences for commercial trade of ivory (the effect of which would be to outlaw the commercial sale and purchase of post-CITES, pre-ban ivory). That would simply be an exercise of the broad power – and a very particular one at that. It is far cry from the true fettering cases in which public authority refuses to exercise a power at all, or adopts an unwavering policy as to how the power will be exercised in each case.

214. One can of course see that the CITES Ordinance is in general concerned with *regulating* the trade in endangered or threatened species, not at stamping it out altogether. But that is not the fundamental purpose of the Ordinance as a whole. The more fundamental purpose of the legislation is to ensure that Hong Kong has in place the measures to play its part, *in an effective way*, in a global regime that offers meaningful protection of such species. Careful regulation can achieve this in respect of many species, depending upon *inter alia* the precariousness of their position and the level of commercial demand for them. But there can be little doubt that the legislature must have contemplated that, in certain cases, the Director would quite legitimately decide, in accordance with sound scientific views, that the legislative purpose would be best accomplished by declining to licence any commercial trade in specimens of a given species. Indeed it would seem absurd to suggest that the Director is *always* required to authorise at least some commercial domestic trade in a given species, no matter what the circumstances.

215. On this basis, it would be open to the Director to adopt a policy of declining to issue any further Possession Licences permitting commercial dealings with ivory.

216. A legislative amendment (the fourth option) could put this beyond any doubt. It could be very simply accomplished. For example, a new section could be inserted in Part 5 of the CITES Ordinance reading as follows:

"The Chief Executive may by notice in the Gazette designate any species as being one in respect of which no licence shall be issued, extended or renewed under this Part containing a

condition permitting the holder to have in his possession or under his control any specimen of that species for commercial trade."

217. It would then be a matter for the Chief Executive to publish a notice declaring African and Asian elephants to be such a species. Thereafter the Director would be prohibited from issuing any licence permitting commercial dealing in ivory. With the statutory power to issue such a Possession Licence removed, there could be no question of the Director fettering any discretion.

218. This would of course not deal with extant Possession Licences permitting commercial domestic trade in ivory. Since such licences cannot be cancelled under the existing legislation absent a proven breach of the conditions or fraud, immediately extinguishing the conditions permitting commercial dealings in ivory would require legislation. A suggested text might read:

"(1) For the purposes of this section, a "relevant condition" means a condition permitting the holder to have in his possession or under his control any specimen of a species for its sale .

(2) The Chief Executive may by notice in the Gazette designate any species as being one in respect of which no licence shall be issued under this Part containing a relevant condition.

(3) Where any species has been designated under subsection (2), any relevant condition contained within an existing licence shall be deemed cancelled from the date of the notice."

219. Would the above actions be consistent with BL105?

220. The starting point is that the proposed change would make a legal difference *only* to post-CITES pre-ban ivory (i.e. that imported lawfully between 1976 and 1990). All other categories of lawful ivory possession would remain unaffected – so it would remain lawful to be in possession of pre-Convention ivory (including as a constituent part of antiques or heirlooms), scientific and educational stocks, and so forth.

221. Focusing therefore on the post-CITES pre-ban ivory, in our view if the Director were to issue fresh Possession Licences but without the condition

permitting commercial dealing with the ivory concerned, this would not amount to a deprivation of property.

222. Under this approach, the State is not conferring upon itself (or anyone else) the title in any ivory. Clearly, therefore, such a measure does not involve a formal expropriation. The only question is whether it would amount to a *de facto* taking. To assess that, one has to look at the effect of the measure in the round, taking into account the reasonable investment expectations of the licence holders.

223. Under the amended or newly issued Possession Licences we are here testing, the licence holder can do absolutely anything he wishes with the ivory in his possession that he could previously do – e.g. to display it, exhibit it, or donate it to a museum – save only that he may now no longer sell it or otherwise deal with it commercially. The restriction is therefore not a *total* one, for the ivory can still be used and enjoyed in any number of ways.

224. What must be acknowledged, however, is that the much of *economic* value of the ivory to the trader would have been lost as a result of a measure of this type. That would no doubt be the high point of any BL105 challenge brought against the measure. However, there are two key points that demonstrate why the economic stultification is not decisive in this situation.

225. The first reason was explained by the United States Supreme Court in the *Eagle Feathers* case, which has been analysed above. As was pointed out in that case (see above at §§182-183), the mere prohibition against *selling* a thing involved a restraint on but one strand within a bundle of rights that comes with ownership. 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 one example, still have be used to derive economic benefit by being exhibited for an admissions charge.

226. The second reason we think that the diminution of economic value resulting from the proposed measures is not dispositive of this issue is that one must look at loss of future potential profits in given property in the context of the *reasonable* investment expectations of the holder.

227. In our view a compelling case can be made that the economic stultification brought about by the operation of the CITES Ordinance, the licencing regime under it, and the proposed changes under consideration here do not defeat reasonable investment expectations. The following aspects of the factual and legal context show why this is so:

    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.

228. Viewed in its proper context, therefore, one may well think it hardly a fair complaint for anyone importing stocks of African elephant ivory into Hong Kong between 1976 and 1990 to say that she had been somehow wrong-footed or caught by surprise. Far from it; the law was always in place *before* the importation of the ivory, and the importers were simply prepared to take the risk. Consider, further, that such investors have enjoyed a full 26 years to sell off those stocks, by reason only of the administrative discretion exercised by the Director. To say now that the removal of that administrative grace involves an upsetting of their legitimate or reasonable investment expectations is, we think, to rather strain at credulity. This is also in tandem with the Administration's position vis-à-vis the backyard poultry ban –that the owners had to option of slaughtering their poultry for private consumption in anticipation of the commencement of the legislative amendments, the availability of that option meant that the legislative amendments were not inconsistent with BL105.

229. For these reasons, we think the better view is that the non-renewal of the condition permitting commercial trade in ivory within all Possession Licences, or the cancellation of those conditions (by legislation), would not amount to a "deprivation" of property within the meaning of BL105. We are strongly fortified in this view by the *Eagle Feathers* case. We cannot see any valid reason why it should be distinguishable in the present circumstances; indeed if anything, given the points of context mentioned above, the present case is *a fortiori* not a deprivation.

230. For the sake of completeness, although such a measure would *engage* the broader right to the enjoyment of property under BL105, it is amply justified in the public interest and is therefore a lawful restriction.

231. The position might arguably be different if no Possession Licences at all were issued or renewed (or, similarly, if they were cancelled by legislation). In that case, the default position under the Ordinance would be restored: namely, that it is a criminal offence to be in possession of any post-CITES elephant ivory from Africa or Asia.

232. The more accurate way to analyse this is not that the present measure – non-renewal or cancellation of licences – has the effect of stripping all possession rights in ivory. The CITES Ordinance did so all along – at any rate from 1990, when African elephant became an Appendix I species. The present measure simply takes away an exception that had been in place since.

233. The reason that a measure of this type more arguably amounts to a *deprivation* of property is that it involves a total stripping of any right to enjoy the ivory concerned at all. Banning possession of a thing on pain of criminal penalty is, if not an outright taking, such an obliteration of any right to enjoy the thing as to amount to a deprivation.

(2) Pre-Convention ivory

234. The position with pre-Convention ivory is somewhat different. Under the existing legislation, certified pre-Convention ivory may be freely imported into Hong Kong, and once here can be bought and sold without restriction. The CITES Ordinance does, however, already preclude any export or re-export without a relevant licence. See above at §§19-26.

235. In order to outlaw any commercial dealing in pre-Convention ivory, therefore, fresh legislation would be required. There currently exists no administrative power which could be brought to bear to close this loophole.

236. There is a choice of legislative options here. The minimalistic option would be legislating against any commercial dealing in pre-Convention ivory, leaving its import and all other forms of possession and enjoyment intact. The effect of this would be to criminalise the sale and purchase of all specimens of, or containing, ivory acquired from the wild pre-1976. Unless an exemption were provided for (which will be discussed below) this would likewise outlaw any dealing in antiques or heirlooms containing ivory.

237. To accomplish a ban on commercial dealing in pre-Convention ivory, it would be possible either to introduce a prohibition against commercial dealing either: (i) in relation to Appendix I and/or Appendix II species generally, or (ii) in respect only of African and Asian elephant ivory only.

238. As to option (i), a rider could be added to section 20 of the CITES Ordinance could be amended to add the following rider (in boldface, underlined text):

"A person may have in his possession or under his control a specimen of an Appendix I species or Appendix II species if he proves the following to the satisfaction of the Director—

(a) that he possesses a pre-Convention certificate in respect of the specimen;

(b) that the specimen was imported, or introduced from the sea, before 6 August 1976; or

(c) if the specimen was imported, or introduced from the sea, on or after that date, the import or introduction from the sea was not in contravention of any provision of the repealed Ordinance or this Ordinance, whichever was in force at that time,

save that he shall not have any such specimen in his possession or under his control for commercial trade.*"*

239. If one returns to section 9 of the Ordinance, it can be seen that possession of an Appendix I species is generally a criminal offence *"except as provided for in sections 20 and 22"*. So if, in accordance with the suggested amendment above, section 20 no longer provided permission for possession of Appendix I species for commercial purposes, it follows that such commercial possession would now be an offence under section 9 of the Ordinance.

240. If the objective were to confine the change to elephant ivory from Africa and Asia only, one would re-word the rider just mentioned to read:

"save that he shall not have in his possession or under his control for commercial purposes a specimen in any such species as the Chief Executive may by notice in the Gazette designate for this purpose."

241. It would then be open to the Chief Executive to designate any particular species as being one in respect of which commercial possession of pre-Convention specimens would cease to be lawful.

242. The above is the minimalistic option to closing the pre-Convention ivory loophole. A more far-reaching option would be to abolish the distinction between pre and post-Convention ivory altogether. One would accomplish this simply by repealing sections 17, 20 and 22 – either altogether, or at least insofar as they apply to Appendix I elephant ivory. The effect of such an amendment would be that pre-Convention ivory would now be in exactly the same legal position as post-Convention ivory. That is to say, all import, export, possession (etc.) would be unlawful absent a Possession Licence. Any commercial dealing in it would, absent a Possession Licence authorising this, constitute an offence.

243. On either approach, if it were thought appropriate an exemption could be included to exclude from its remit artefacts and antiques containing ivory (sometimes referred to as "worked" ivory). As a pure question of policy, we anticipate that it may be felt excessively harsh to strip the right to buy and sell antiques of genuine age; and as a matter of constitutional law, it may be thought that a measure that did not apply to such items was a more proportionate one. *A fortiori* so if the ivory makes up only a small part of it.

244. As to the scope of such an exemption, we have reviewed the U.S. position above, in particular the New York State exemptions to this effect (see §§46-50) and those applicable in respect of Hawaii (see §75). Under the New York exemption, it will be recalled, an exemption applies:

    a. Where an antique not less than 100 years old with ivory constituting less than 20% of the item; or

    b. In respect of a musical instrument, providing that (i) it was manufactured no later than 1975, and (ii) ivory makes up less than 20% of the instrument by volume.

245. In the EU, an exemption applies if the item dates more than 50 years before the current regulation (Council Regulation (EC) No. 338/97) – i.e. before 3

March 1947 – without a certificate.[172] In respect of antiques, licences are needed for import and re-export.

246. The New York measure is therefore more stringent than the EU regulations concerning antiques – both as to age and in imposing an upper limit of 20% on constituent volume – but more permissive in respect of musical instruments. The EU exemption has the benefit of simplicity: there is only one critical date, and it applies uniformly to all antiques, whether musical instruments or otherwise. For these reasons, we think absent any particular reason to believe that an EU-type regulation would leave open a window for abuse, it is overall more lenient and more straightforward.

247. The text of such an exemption, setting the date 50 years prior to the entry into force of Hong Kong's ivory ban (which took effect on 20 July 1990) could be drafted in the following terms:

"(1) Notwithstanding anything in this Ordinance, it shall be lawful for a person to have in his possession within Hong Kong, including for a commercial purpose, a specimen of elephant ivory constituting, or forming part of, a bona fide *antique which dates from prior to 20 July 1940.*

(2) Where in any legal proceedings it is asserted that a specimen is an antique within the meaning of subsection (1) above, the burden of proving that shall rest upon the person who makes that assertion."

248. A provision of this nature would temper the general ban on the commercial trade in pre-Convention ivory. Meanwhile the proposed clause (2) would mean that, in the event of any dispute on the subject – for example where a prosecution was brought in respect of the commercial sale of something claimed to be an 'antique' within clause (1) –the burden will rest with the person who says it is an antique to prove it.

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[172] In respect of antiques, see Article 62(3) of Regulation (EC) No 865/2006. Note, however, that pre-Convention ivory, whether worked or unworked, may be lawfully traded but only with the benefit of a certificate: see Articles 8 and 10 of Regulation (EC) No. 338/97.

249. We return, then, to the question of the remaining general ban proposed in respect of commercial dealing in pre-CITES ivory. The next issue is: would the above legislative changes be compatible with BL105?

250. In our view, either of the minimalistic options mentioned above would not constitute a deprivation of property within the meaning of BL105. The owner of a pre-Convention specimen of ivory would retain her title to it; she could still possess it and generally enjoy any use of it. The fresh restriction against dealing with it commercially is not so total a diminution of her rights in respect of it as to constitute a regulatory expropriation.

251. In relation to the second, farther-reaching option, the BL105 analysis would be likely to turn on whether the Administration adopted a policy by which he would issue Possession Licences for pre-Convention ivory (such a permit now being required, following the amendment) and the terms on which such licences were extended.

252. So if, for example, the distinction between pre and post-Convention ivory were collapsed altogether, and the Director declined to issue a Possession Licence to a person who had previously been in possession of pre-Convention ivory, that person could plausibly contend that their ownership rights had been totally nullified: whereas they could previously own and deal with the pre-Convention ivory, any possession of it at all would now be a criminal offence. In that case, we think such a person would have an arguable claim to compensation under the takings limb of BL105.

253. But if, on the other hand, the new policy were generally to issue Possession Licences permitting simply possession and control (but not commercial sale), such an argument would become more difficult for the ivory owner to mount. Although his ownership is no longer a matter of *right,* but one of administrative discretion, if it were clear that the discretion would generally be exercised in favour of a continued permission to possess (but not sell), then what he has *in substance* lost is really just the right to deal commercially with it. For the reasons mentioned above in relation to the minimalistic option, it

would appear that such a loss would not sound in compensation under BL105.

(3) Ivory forming household or personal effects

254. As noted above, there exists standing permission to possess ivory that constitutes household or personal effects. However no commercial use may be made of such ivory. Since the very definition of household and personal effects includes only possession for non-commercial purposes, to attempt to deal commercial in such ivory would *ipso jure* deprive it of its status as a household or personal effect, and amount to an offence under sections 9 and 10 of the Ordinance.

255. Given that any commercial dealing in ivory within this category is already impermissible, on pain of criminal penalty, a legal mechanism is in place to deal with abuse of this exception to the general ivory ban. To go further, therefore, and introduce a total ban on possession of ivory as household or personal effects would require some empirical justification for the proposition that the continued existence of the exception was a mechanism too readily abused, and therefore justified in the public interest.

256. It is really a matter of policy and sound judgment whether such additional measures are needed to close an active loophole arising here. In making such policy decision, it ought to be borne in mind that ivory within the household/personal effects category is likely to include items that, although commercially neutered, are considered of some sentimental and personal value – such as family heirlooms or items viewed as having some historical or artistic value.

257. Turning to the legal consequences of such a ban, under the aegis of BL105, the position is very like that in relation to pre-Convention specimens. Although commercial trade in household/personal effects has long been unlawful, private ownership of such artefacts has been recognised as an exception to the general ban on the possession of ivory. Such owners can enjoy these artefacts in a number of ways, and can pass them down within their own families.

258. A total ban on possession of such ivory would be tantamount to a complete taking of title. We therefore think that there is a risk of such a measure sounding in a right to compensation by affected persons.

(4) Other categories

259. As noted above, we are not presently aware of evidence supporting the notion that other lawful bases for the possession of ivory – e.g. possession for scientific or educational study; specimens in transit – have, to date, been abused for illicit or commercial purposes. That being the case, we have not considered enhanced measures that might be adopted in relation to these types of possession.

d) Legal Texts of the World Trade Organization

260. A ban on the trade in ivory appears to *prima facie* engage core legal tenets of the World Trade Organization ('WTO'). This section considers the compatibility of the enhanced measures under consideration with the applicable legal texts that make up WTO law (referred to as the "covered agreements").

261. By way of brief background, the HKSAR is a member of the WTO and its core legal texts are binding upon it as a matter of public international law. International law is not generally part of the domestic law of Hong Kong (*"It has long been established under Hong Kong law (which follows English law in this respect), that international treaties are not self-executing and that, unless and until made part of our domestic law by legislation, they do not confer or impose any rights or obligations on individual citizens."*[173]). However, member States of the WTO may challenge measures adopted by other members before the Dispute Settlement Body – essentially the WTO court – where they are said to infringe obligations under the covered agreements.

262. Since its inception, the WTO has faced criticism that the free trade regime it promotes causes significant damage to the environment. WTO member States

[173] *Ubamaka Edward Wilson v Secretary for Security* (2012) 15 HKCFAR 743, §43.

can be quite defensive concerning this criticism, with many insisting that their rules endeavour to promote the goals delineated in multilateral environmental agreements, domestic environmental legal measures, as well as the WTO legal texts equally. In fact, WTO members would argue that they have covenanted in many covered agreements to respect the principle of sustainable development.[174] For example, during the Doha round negotiations, Members-states were instructed as follows:

> *"31. With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on: (i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs).*
>
> *The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question."*[175]

263. During the Hong Kong ministerial conference in December 2005, the Members stated:

> *"30. We reaffirm the mandate in paragraph 31 of the Doha Ministerial Declaration aimed at enhancing the mutual supportiveness of trade and environment…[w]e instruct Members to intensify the negotiations, without prejudging their outcome, on all parts of paragraph 31 to fulfil the mandate.*

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[174] This includes the preamble to the Marrakesh Agreement Establishing the World Trade Organisation (15 April 1994) LT/UR/A/2 <http://docsonline.wto.org>; Article XX(b) and (g) of the General Agreement on Tariffs and Trade (15 April 1994) LT/UR/A-1A/1/GATT/1 <http://docsonline.wto.org>; the preamble and Articles 2.1, 2.2, and 2.4 of the Agreement on Technical Barriers to Trade (15 April 1994) LT/TR/A/5 <http://docsonline.wto.org>; Annex A to the Agreement on Sanitary and Phytosanitary Measures (15 April 1994) LT/UR/A/6 <http://docsonline.wto.org>; Annex 2 to the Agreement on Agriculture (15 April 1994) LT/UR/A-1A/2 <http://docsonline.wto.org>; Article 27 to the Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) LT/UR/A-1C/1 <http://docsonline.wto.org>; and Article 14 on the General Agreement on Trade in Services (15 April 1994) LT/UR/A-1B/1 <http://docsonline.wto.org>.

[175] Doha Ministerial Declaration, para. 31(i) (20 November 2001) WT/MIN(01)/DEC/1.

31. We recognize the progress in the work under paragraph 31(i) based on Members' submissions on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements."[176]

264. However, underneath these insistent proclamations and optimistic mandates lies a reality feared by those advocating for greater environmental protection – that WTO member States have hoodwinked environmentalists into believing that all policy matters are equal, while continuing to prioritise free trade above all else. WTO jurisprudence emanating from the Appellate Body of the Dispute Settlement System appears to support this fear, as it is a rare day that trade-restrictive environmental rules prevail against the general requirement of free trade.

265. While this would typically be a cause for concern, there are reasons to be optimistic that a trade ban in ivory would withstand legal challenge at the WTO. In short, even in light of the WTO's poor record concerning respect for environmental protection measures, if there are cases that can be successful, this is likely one.

266. The General Agreement on Tariffs and Trade ("**GATT**") is one of principal legal texts of the WTO. While its provisions largely focus on creating a trading regime free of tariff barriers and other restrictive domestic measures, it provides situations where environmental legal measures, such as those under CITES, may contravene the rules. Article XX provides:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement [the GATT] shall be construed to prevent the adoption or enforcement by any contracting party of measures: ...

(b) necessary to protect human, animal or plant life or health;

…

[176] Hong Kong Ministerial Declaration, paras. 30, 31 (22 December 2005) WT/MIN(05)/DEC/1.

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.
..."[177]

267. Relying upon article XX of GATT, WTO jurisprudence sets forth a two-part test for satisfying the general requirements to exempt a measure for environmental purposes:

a. The measure must fall under one of the exceptions in Article XX (usually Articles XX(b) or XX(g)); and

b. It must satisfy the 'chapeau elements' of Article XX, i.e. that it is not applied in a manner which would constitute *"a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail' and is not 'a disguised restriction on international trade"*.[178]

(1) A *prima facie* infringement?

268. Before it is necessary to come to the defences under article XX of GATT, there must first be a primary infringement of one of the substantive norms within that agreement. The principle norms the frequently arise in the contested cases are:

a. GATT article I:1, the requirement of equality of treatment between importing countries (the most favoured nation or "MFN" obligation);

b. GATT article III:1 and III:2, requiring that imported products not be subject to any internal taxes or charges on a different basis from domestic products; and

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[177] Article XX(b) and (g) of the General Agreement on Tariffs and Trade (15 April 1994) LT/UR/A-1A/1/GATT/1 <http://docsonline.wto.org>.

[178] https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm <accessed 15 March 2016>; *see also United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 12 October 1998, WT/DS58/AB/R. https://www.wto.org/english/tratop_e/dispu_e/58abr.doc , paras 146-147 <accessed 15 March 2016>.

c. GATT article III:4, requiring that imported products be treated in regulatory terms in a manner no less favourable than like domestic products.

269. In the present case, we think it extremely unlikely that any of the measures discussed in this report would provoke a challenge by another WTO States party under any of the covered agreements. The import of ivory into Hong Kong has long been subject to severe restrictions. The only ivory capable of being lawfully imported is pre-Convention ivory or that contained in the household or personally effects of a private individual. Accordingly there is no exporting market with a vested interest in ivory exports to Hong Kong.

270. Furthermore, the burden of the measures suggested in this report will affect Hong Kong traders and/or owners to a far greater extent than they would foreign nationals or investors. That being so, it is very unlikely that administrative or legislative changes of this nature could amount to a violation of any provision of the GATT.

271. Nevertheless, and for the sake of completeness, we briefly outline the reasons why any challenge to enhanced ivory measures would be most likely to be found compatible with the GATT on the basis of the provisions of article XX.

(2) XX(g): The Ivory trade ban relates "to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption"

272. As an ivory trade ban is trade-restrictive and relates to the environment, it should rely upon either Article XX(b) or XX(g) to exempt it from the general prohibition on trade-restrictive measures. Article XX(g) is preferable to XX(b) because the phrase 'exhaustible natural resources' "has been interpreted broadly to include not only 'mineral' or 'non-living' resources but also living species which may be susceptible to depletion, such as sea turtles".[179] In the

[179] https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm <accessed 15 March 2016>. The WTO has identified cases relating to the conservation of tuna, salmon, herring, dolphins, and turtles as falling under this Article XX(g) exemption.

US-Shrimp case, one of the most famous environmental cases addressed by the Appellate Body of the Dispute Settlement System, it supported this by noting that "the exhaustibility of all of the seven recognized species of sea turtles are today listed in Appendix I of [CITES]…[t]he list in Appendix I includes 'all species 'threatened with extinction which are or may be affected by trade".[180] Elephants, also listed under Appendix I, would be considered similarly as an 'exhaustible natural resource'.

273. Under Article XX(g), the proposed ivory trade ban must "relate" to the conservation of an exhaustible natural resource. For this to be satisfied, a member has to establish that the means (the law banning the trade in ivory) is "reasonably related" to the ends (preventing the illegal killing of elephants in Africa)".[181] The Government of the HKSAR would have little difficulty in demonstrating this if it faced a WTO challenge to the measures under consideration. The basis for it has already been thoroughly documented in publications, including by WWF, showing that a law banning the trade in ivory may be the only measure that satisfies the "end" of reducing the poaching of wild elephants, particularly in Africa.

274. The final requirement of the first part of the test under Article XX(g) requires that the measure must be "made effective in conjunction with restrictions on domestic production and consumption". This is clearly satisfied, as the ban is a wholesale ban on all trade in ivory – it applies to everyone equally, irrespective of nationality. Indeed it can safely be assumed that the burden of the measure will fall most heavily on Hong Kong-based parties.

(3) Chapeau elements under Article XX are satisfied

275. Next, a measure must satisfy what is known as the "chapeau elements" of Article XX. The purpose for these requirements are to ensure "that Members' rights to avail themselves of exceptions [under Article XX] are exercised in good faith to protect interests considered legitimate under Article XX, not as

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[180] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 12 October 1998, WT/DS58/AB/R. https://www.wto.org/english/tratop_e/dispu_e/58abr.doc accessed 15 March 2016.

[181] https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm <accessed 15 March 2016>.

a means to circumvent one Member's obligations towards other WTO members".[182] In short, to prevent abuse and promote measures that are initiated in good faith.[183]

276. Concerning the issue of whether an ivory trade ban would result in arbitrary or unjustifiable discrimination between countries where the same conditions prevail, this chapeau requirement is not relevant to the contemplated ivory trade ban, as there is no discriminatory treatment – the ban applies to all commercial ivory dealers. For the same reason, this measure cannot be seen as a disguised restriction on international trade as the ban on trade applies to everyone equally.

277. Accordingly, while the proposed measure to ban the commercial trade in ivory would contravene the WTO legal texts (specifically GATT) as an illegal trade restriction, it should survive a legal challenge, as it would likely qualify for exemption under Article XX(g). As described above, the measure 'relates' to conserving an 'exhaustible natural resource' and would likely be passed into law in good faith and for its stated purpose – to protect the lives of the dwindling elephant population in Africa that are being killed for the ivory trade.

e) ***Bilateral investment treaties***

278. Hong Kong has 17 bilateral investment treaties ('BITs') currently in force. Each BIT follows a similar structure, with all of them including a provision covering the consequences of a contracting party being deprived of their investments or expropriation.

279. For example, Article 5 in the BIT between Hong Kong and the United Kingdom provides:

"ARTICLE 5

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[182] *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, 3 December 2007, p.47.

[183] *Ibid*, p. 49.

Expropriation

1. Investors of either Contracting Party shall not be deprived of their investments nor be subjected to measures having effect equivalent to such deprivation in the area of the other Contracting Party except lawfully, for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against compensation."

280. These BITs contain similar wording to the Hong Kong / UK BIT:

- Australia, Article 6*:* "except under due process of law*,* for a public purpose related to the internal needs of that Party, on a non-discriminatory basis, and against compensation."

- Austria, Article 6: Same wording as Article 5 of the UK treaty.

- BLEU (Belgium-Luxembourg Economic Union), Article 5: "except lawfully, for a public purpose related to the internal needs of that Party, and against compensation".

- Denmark, Article 5: Same wording as Article 5 of the UK treaty.

- Finland, Article 5: Same wording as Article 5 of the UK treaty.

- France: *Only accessible in French online.*

- Germany, Article 4(2): Same wording as Article 5 of the UK treaty.

- Italy, Article 5: Same wording as Article 5 of the UK treaty.

- Japan, Article 5: "except under due process of law, for a public purpose, on a non-discriminatory basis, and against compensation"

- Korea, Article 6: "except for a public purpose related to the internal needs of that Party, under due process of law, on a non-discriminatory basis and provided that it is accompanied by compensation."

- Kuwait, Article 5: "except lawfully, for a public purpose related to the internal needs of that Party, and against compensation."

- Netherlands, Article 5: Same wording as Article 5 of the UK treaty.

- New Zealand, Article 6: Same wording as Article 5 of the UK treaty.

- Sweden, Article 5: "under due process of law, on a non-discriminatory basis, for a public purpose related to the internal needs of that Party, and against compensation".

- Switzerland, Article 5: Same wording as Article 5 of the UK treaty.

- Thailand, Article 5: Same wording as Article 5 of the UK treaty.

281. The provisions for compensation differ depending on the country. Normally, for example in Article 5 of the Italian agreement:

> *"such compensation shall amount to the real value of the investment immediately before the deprivation or before the impending deprivation became public knowledge whichever is the earlier."*

(1) Consequences of a total ban on ivory trade in Hong Kong

282. The concept of expropriation under international investment law, including under the various BITs to which Hong Kong is party, is very closely related to the constitutional rules against deprivation of property discussed above. "Expropriation" for this purpose includes indirect acts (including legal, tax or administrative measures) that effectively and substantially deprive an investor of the use, value and enjoyment of its investment.

283. Just as with constitutional takings clauses, in the cases of alleged expropriation the difficulty lies in drawing the line between improper expropriation and

legitimate regulatory measures. Investors are protected against changes in the host State's policy that arbitrators may characterize as "regulatory expropriations" on the basis that a law or other measure has reduced the value of an investment. Arbitral tribunals have made clear that compensation may even be required for investors challenging measures that address legitimate public interest concerns – if they amount to a complete deprivation of the relevant investment. A country cannot be forced to repeal a law or regulation, but the threat compensation for such deprivations may deter proposed policy initiatives.

284. In the present situation, a risk of action under a BIT against Hong Kong could arise only if a national of one of the 17 countries or customs territories with which Hong Kong has BITs could claim that it had an "investment" in Hong Kong constituting ivory. Given the long-standing ban on the import of ivory into Hong Kong, it seems vanishingly unlikely that any foreign national could satisfy this threshold requirement of having an investment in Hong Kong in the form of any substantial quantity of ivory.

285. Let us assume, *arguendo*, that such a situation did exist. For the reasons indicated above, we think it very likely that the measures discussed in this report would not be considered to constitute a deprivation of property; and accordingly they are also not likely to be considered to amount to an expropriation under international investment law. The law is even-handed and based squarely in the public interest.

286. Accordingly, we think the risk of any claim being brought against Hong Kong under any of its BITs is extremely low, and that the measures proposed would not in any event amount to an expropriation.

Summary of Conclusions

287. Hong Kong's current regulatory regime allows for the commercial trade in pre-1990 ivory. A substantial illegal market of post-1990 ivory exists beneath the surface of this lawful trade, and is symbiotic upon it. This illegal trade contributes in a material way to the poaching of elephants, particularly in Africa. Change is urgently needed.

288. A ban on the commercial trade in ivory is required. This can be accomplished through a combination of executive and legislative measures. Their broad effect would be ban the sale and purchase of all ivory, subject to certain narrow exceptions (including for law enforcement, scientific and educational purposes, old antiques and *bona fide* personal possession). The adoption of such measures, coupled with appropriate enforcement action, is likely to diminish the illegal ivory trade in (and through) Hong Kong to a very substantial extent.

289. The adoption of the measures proposed in this Report would be consistent with the laws of the Region, including the Basic Law, and is not likely to trigger any obligation to pay compensation under Article 105 of the Basic Law.

Recommendations and Timeline for Implementation

A. Recommendation 1: Administration should Announce its Intention to Outlaw the Commercial Ivory Trade.

290. The first step is for the Administration **to announce a firm policy of shutting down the domestic ivory trade in Hong Kong**. It should **state in**

clear terms what measures it intends to adopt, and its proposed timeline for doing so.

291. This gives ivory traders some time to liquidate the current ivory stock (similar to the approach taken by the California legislature), setting up the institution of the ban at a certain date in the future (six months).

292. **Enhanced customs inspections and other attendant measures** during this grace period would be a prudent step, as some black market participants may seek to export stock illegally and/or conclude any planned imports of illegal ivory.

B. Recommendation 3: Phase-out of Possession Licence Conditions Permitting Commercial Trade

293. Within 6 months after the announcement in Recommendation 1, **AFCD should halt the practice of issuing Possession Licences that permit the sale, purchase or possession for commercial trade of post-Convention, pre-ban ivory (i.e. ivory lawfully imported into Hong Kong between 1976 and 1999).**

C. Recommendation 4: Introduce Legislation Outlawing the Domestic Trade in Ivory

294. Within one year, the Administration should introduce into the Legislative Council a bill to bring up the following amendments to the Protection of Endangered Species of Animals and Plants Ordinance (Cap. 586) (the "Ordinance"):

295. First, dealing with Possession Licences, either:

a. A new section in Part 5 of the Ordinance providing that:

"The Chief Executive may by notice in the Gazette designate any species as being one in respect of which no licence shall be issued, extended or renewed under this Part containing a condition permitting the holder to have in his possession or under his control any specimen of that species for commercial trade."

b. Or, alternatively to (a) above, a new provision of Part 5 of The Ordinance providing that:

"(1) For the purposes of this section, a "relevant condition" means a condition permitting the holder to have in his possession or under his control any specimen of a species for commercial purposes.

(2) The Chief Executive may by notice in the Gazette designate any species as being one in respect of which no licence shall be issued under this Part containing a relevant condition.

(3) Where any species has been designated under subsection (2), any relevant condition contained within an existing licence shall be deemed cancelled from the date of the notice."

296. Secondly, in order to outlaw the trade in pre-Convention ivory, and provide exemptions for antiques:

a. Add either one of following riders to section 20 of the Ordinance:[184]

"save that he shall not have any such specimen in his possession or under his control for commercial trade."

[184] See above at §§238-241.

OR

"save that he shall not have in his possession or under his control for commercial trade a specimen in any such species as the Chief Executive may by notice in the Gazette designate for this purpose."

b. And in either event, add a new section 20A of the Ordinance providing an exemption for antiques in these terms:[185]

"1. Notwithstanding anything in this Ordinance, it shall be lawful for a person to have in his possession within Hong Kong, including for a commercial trade, a specimen of elephant ivory constituting, or forming part of, a bona fide antique which dates from prior to 20 July 1940.

2. Where in any legal proceedings it is asserted that a specimen is an antique within the meaning of section 20A(1) above, the burden of proving that shall rest upon the person who makes that assertion."

297. Pursuant to the above legislative amendments, the Chief Executive would then be empowered to (and should) **Gazette elephant ivory as a relevant species** for the purposes of the new sections proposed above at §295(a) and/or (b) and, if relevant, §296(b).

[185] See above at §§243-248.

CB(1)1054/15-16(06)

For discussion on
27 June 2016

Legislative Council Panel on Environmental Affairs

Proposed Plan for
Phasing out the Local Trade in Elephant Ivory

PURPOSE

This paper seeks Members' views on the Government's proposals to strengthen control of trade in elephant ivory and the phasing out of the local trade in elephant ivory.

BACKGROUND

2. The Government is committed to the protection of endangered species. Hong Kong regulates the import, re-export and domestic sale of elephant ivory and other specimens of endangered species under the Protection of Endangered Species of Animals and Plants Ordinance (Cap 586) (the Ordinance), the local legislation that gives effect to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

3. The Chief Executive (CE) announced in the 2016 Policy Address that the Government would kick start legislative procedures as soon as possible to ban the import and export of elephant hunting trophies and actively explore other appropriate measures, such as enact legislation to further ban the import and export of ivory and phase out the local ivory trade, and impose heavier penalties on smuggling and illegal trading of endangered species.

4. At the Legislative Council (LegCo) Panel on Environmental Affairs meeting on 22 February 2016, we briefed Members on the existing regulatory system to control the import, re-export and domestic sale of ivory, as well as the new and enhanced enforcement measures that were being taken by various Government departments. We also presented the Government's initial thinking on the proposed strategy to ban the import and re-export of elephant hunting trophies, to ban the import and re-export of pre-Convention ivory and to phase out the local ivory trade eventually. Earlier this year, the Agriculture, Fisheries

and Conservation Department (AFCD) also consulted the relevant trades on the proposed action plan.

PROPOSED IVORY PHASE-OUT PLAN

5. We have reviewed our strategy and considered how best the initiatives set out in the CE's 2016 Policy Address should be taken forward. We now **propose** to amend the Ordinance in **a single legislative exercise** to effect a three-step plan (Plan) to phase out the local trade in ivory. We believe this is the fastest and most efficient way to achieve our purpose. Our intention is to put the bill to the LegCo in the first half of 2017.

6. The detailed considerations are presented in the paragraphs below.

LEGISLATIVE AMENDMENTS

7. The Ordinance will be amended in a single legislative exercise with different stages of implementation as follows:

Step 1: Ban the import and re-export of hunting trophies, ekipa and certain ivory carvings which are currently treated as specimens of CITES Appendix II under the "split listing" arrangement of CITES for African elephants;

Step 2: Ban the import and re-export of pre-Convention[1] ivory except "antique ivory" after an appropriate grace period and subject pre-Convention ivory in the local market to licensing control similar to the existing control of pre-ban[2] ivory; and

Step 3: Ban the local sale of pre-ban and pre-Convention ivory after a grace period for the traders / owners to dispose of their commercial stock and/or

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[1] Pre-Convention ivory refers to ivory products which were acquired before 1975 for Asian elephants and 1976 for African elephants. Import and re-export of pre-Convention ivory for commercial purpose are currently allowed subject to the production of a pre-Convention certificate or meeting the relevant licensing requirement. The requirement of a Licence to Possess for pre-Convention ivory, no matter for personal or commercial purposes, is exempted under the Ordinance.

[2] Pre-ban ivory refers to those acquired before Hong Kong implemented the international trade ban in 1990 and have been registered by AFCD.

undergo business transformation.

8. The effective dates of the above three steps would be different, and separately specified as per paragraph 18 below.

PENALTY REVIEW

9. Moreover, the penalties under the Ordinance, which are now under review for the purpose of providing a much stronger deterrent effect, would also be amended in the same exercise. Currently, a person who commits an offence of illegal import, introduction from the sea, export, re-export or possession of specimen of Appendix I species is liable on conviction to a fine at level 6 (i.e. $100,000) and imprisonment of 1 year. Heavier penalties (a fine of $5,000,000 and imprisonment of 2 years) will be imposed for offences committed for commercial purposes. In respect of specimen of Appendix II and Appendix III species, similar offences may attract a fine at level 5 (i.e. $50,000) and imprisonment of 6 months, and heavier penalties (a fine of $500,000 and imprisonment of 1 year) will be imposed for offences committed for commercial purposes. The burden of proof that an act is carried out for commercial purpose rests on the prosecution. Experience reveals that such burden of proof is not easy to discharge.

10. To increase the deterrent effect, we propose to impose uniform maximum penalties for both commercial and non-commercial offences. To reflect the severity of the offences, we also propose to make the offence under the Ordinance an indictable offence in line with other similar offences in Hong Kong and to increase the maximum fine and imprisonment term by drawing an analogy with other local ordinances concerning trade in controlled items, the penalties of similar offences in other jurisdictions, and international references on offences of similar nature. In addition, to reflect the seriousness of illegal ivory trade and the Government's determination, we have already started to explore with all relevant Government departments to identify the most effective and suitable means of enforcement and prosecution to achieve the necessary deterrent effect.

ENHANCED ENFORCEMENT AND COLLABORATION

11. To combat wildlife crimes including illegal trade in ivory, the Customs

and Excise Department (C&ED), AFCD and the Hong Kong Police Force (HKPF), have stepped up their enforcement actions. While AFCD will enhance regulatory measures and step up inspection to the local ivory trade, C&ED and AFCD will step up joint operations with the support of their ivory sniffer dogs to target air parcels and passengers from high risk ports at the Hong Kong International Airport, as well as north-bound passengers, vehicles and cargo at various land boundary and railway control points. As for cases where investigations indicate that there are offences of an organised and serious nature and that such falls under the Police and C&ED's purview, the two departments will conduct investigations and take enforcement actions as appropriate. AFCD's investigative capability will also be enhanced through suitable training provided by C&ED and HKPF.

12. To further strengthen the inter-departmental collaboration on combating wildlife crime, we have recently set up a "Wildlife Crime Task Force". The Task Force comprising representatives from AFCD, the Environment Bureau, C&ED and HKPF will develop strategies and protocols for enforcement operations as well as gather, analyze, exchange and review intelligence for more effective and targeted actions. The Task Force will also plan and coordinate major joint enforcement operations and co-ordinate liaison with other national and international agencies, including overseas CITES Management Authorities, Interpol, the World Customs Organisation and non-governmental organisations in relation to wildlife crimes.

COMPENSATION

13. We have considered the compensation issue from various legal and policy perspectives. Taking into account, inter alia, that a sufficiently long grace period will be given to the trade (see paragraphs 16 and 17 below), we are of the view that no compensation should be provided to the ivory trade. We consider that the proposed measures of the Plan are justifiable on the grounds that such measures aim to address the public concerns over the survival of African elephants which are under imminent threat of extinction, and are necessary in light of the latest situation of elephant poaching and ivory smuggling trend.

14. To ascertain the impacts of the proposed Plan on the traders' business, AFCD has conducted a survey to better understand the general pattern of the

ivory trade. The findings are summarised at the **Annex**. The findings show that in general the sale of ivory does not constitute any substantial part of the traders' business. Moreover, AFCD met representatives of the ivory trade in March 2016, including the major trade associations on ivory, some licensees holding large pre-ban ivory stock and some frequent importers or re-exporters of pre-Convention ivory. At the meeting, the traders expressed that many ivory traders had already undergone business transformation or switched to trade other commodities not under CITES control such as mammoth ivory.

15. As regards workers (e.g. ivory crafters) that might be affected by the ban, the Government will explore suitable assistance measures for them.

GRACE PERIOD

16. We consider that there should be a grace period to allow the ivory trade as a whole to dispose of the ivory in their possession and/or to undergo business transformation. In considering the length of the grace period, we need to take into account factors such as how much time is considered reasonably sufficient for the relevant traders to transform their businesses, and the validity period of the existing Possession Licences (PLs). Currently, the validity period of a PL is five years, with the expiry date(s) of the recently renewed/issued PLs in the year of 2021. According to Section 26(1) of the Ordinance, the Director of Agriculture, Fisheries and Conservation (the Director) may only cancel a licence that is issued under Section 23 or extended, renewed or varied under Section 24 of the Ordinance, if (a) any condition of the licence is contravened; or (b) the Director is satisfied that the licence was issued, extended, renewed or varied as a result of a false representation of any fact made by the applicant or an unlawful act of the applicant. In other words, the Director has no legal power to cancel a valid PL unless the above conditions are met; and implementing the proposed ban is not one of the prescribed conditions for cancellation. Hence, the date for Step 3 (i.e. a total ban of local ivory trade) to take effect will have to fall on a date after all the existing PLs expire. To pave the way for the total ban of local ivory sale, arrangements will have to be made so that no new or renewed PLs would be issued with a validity date beyond the effective date for Step 3 of the Plan.

17. It is our estimate that a period of about 5 years until 2021 should be reasonably sufficient to enable the trade to either transform their businesses or to

clear their existing stock, having regard to the result of the trade survey at **Annex** which reveals that the ivory trade is generally inactive.

TIMETABLE

18. To demonstrate Government's commitment and give advance notice to the trade, we propose the following timetable to effect the proposed ivory phase-out plan described above:

Step 1 to ban the import and re-export of hunting trophies, ekipa and certain ivory carvings: to take effect **immediately after the enactment of the Bill**;

Step 2 to ban the import and re-export of pre-Convention ivory except a few exceptions such as "antique ivory" and subject pre-Convention ivory in the local market to licensing control: to take effect **three months after the enactment of the Bill**; and

Step 3 to totally ban the local sale of pre-ban and pre-Convention ivory: to take effect when all PLs that currently exist (in 2016) expire after their five-years validity period. In other words, we estimate the total ban would be achieved by the end of 2021.

WAY FORWARD

19. Subject to the comments from Members, we will further develop the proposed legislative framework and further consult the trade on the proposed ivory phase-out plan described above, in particular, the timing for phasing out the trade. Meanwhile, various departments including AFCD, C&ED and HKPF will continue to take vigorous enforcement actions before the total ban takes effect. We aim to submit a bill to implement the Plan to the LegCo in the first half of 2017.

ADVICE SOUGHT

20. Members are invited to comment on the Government's proposals set out above in this paper.

Environment Bureau/Agriculture, Fisheries and Conservation Department
June 2016

Annex

Findings of Ivory Trade Survey

The Agriculture, Fisheries and Conservation Department (AFCD) conducted an ivory trade survey from February to April 2016. The findings are summarised in the following paragraphs.

2. Regarding pre-ban ivory, there were, as at January 2016, about 370 licensed stocks of pre-ban ivory and they amounted to about 77 tonnes. 54% of these stocks (200 nos.) had been covered in the survey. The majority (76%) of these 200 stocks were small stocks covering less than 100 kg of ivory. Many (67%) of these 200 stocks were kept at residential premises with remote chance for sale. Over the past five years, there were only some small-scale (i.e. less than 100 kg) commercial transactions or processing activities in a small proportion (20%) of these 200 stocks. The finding suggested that the ivory trade was generally inactive.

3. Moreover, pre-ban ivory did not seem to constitute an essential part of the licensees' business in general. Out of the 200 stock holders covered in the survey, we had conducted more detailed interviews with 88 licensees. The majority (88%) of them expressed that their businesses were not related to ivory at all. Most of these 88 licensees (74%) were just storing the stocks and would trade the ivory only when the opportunity arises. For the few licensees (9 nos.) who claimed that ivory constituted a part of their business, all of them also trade other commodities such as mammoth ivory. Only two traders claimed that they were trading ivory solely. However, the stock quantity of one of them remained unchanged for the past five years so his claim was doubtful. For the remaining trader, he had reported sale and consumption of stock in the past 5 years with an annual consumption rate of 16.5 kg on average. He had about 57 kg ivory remained and should be able to dispose of his stock in about 3.5 years from now based on the aforesaid annual consumption rate.

4. Possession of pre-Convention ivory for commercial purpose is exempted from the licensing control under the Protection of Endangered Animals and Plants Ordinance, Cap. 586. According to our record, there were about 100 companies or individuals who had imported or re-exported pre-Convention ivory in the past three years. To study the trade pattern of

pre-Convention ivory, we interviewed 28 of them. The results of our interviews showed that more than half (53%) of these importers or re-exporters were in fact not involved in the pre-Convention ivory business. For example, they imported or re-exported pre-Convention ivory for non-commercial purposes like personal collection. For the majority (61%) of those who traded pre-Convention ivory as part of their business, pre-Convention ivory constituted less than half of their business. Only one trader was fully committed in the pre-Convention ivory trade but he expressed that he was actively exploring other alternatives for business transformation irrespective of the proposed ivory phase-out plan.

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