

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

**Government's Response to the List of Follow-up Actions
Arising from the Discussion at the Meeting on 7 July 2017**

This paper sets out the Government's responses to the matters raised by Members at the meeting of the Bills Committee on Protection of Endangered Species of Animals and Plants (Amendment) Bill 2017 (the Bill) on 7 July 2017.

(a) in respect of elephant ivory (ivory) items that were acquired before the application of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) to elephants (commonly referred to as pre-Convention ivory) and those acquired thereafter but before the international ivory trade ban (commonly referred to as post-Convention ivory), information on when the import and export of such ivory items were prohibited in France, Germany, the Netherlands and the United Kingdom

2. The CITES began to regulate the international trade in Asian elephants and African elephants on 1 July 1975 and 26 February 1976 respectively. The ivory that was acquired before the aforesaid dates is referred to as "pre-Convention ivory" and the ivory that was acquired thereafter is referred to as "post-Convention ivory".

3. Since 18 January 1990, all elephant species have been listed in Appendix I to CITES and the international trade (i.e. import, export and re-export) in post-Convention ivory has virtually been banned.

4. Pre-Convention ivory is exempted by CITES which allows its international trade to continue under a permit system. However, some countries have adopted measures stricter than the requirements of CITES to control the import and re-export of pre-Convention ivory.

5. According to a report¹ prepared for the European Commission in August 2014, pre-Convention ivory items cannot be imported into the European Union (EU) for commercial purposes as a general rule unless it is a

¹ Mundy, V. (2014). *The Re-export of pre-Convention/antique ivory from the European Union*. Report prepared for the European Commission.
http://ec.europa.eu/environment/cites/pdf/Ivory%20report_Nov%202014.pdf

“re-introduction” (i.e. the specimen has previously been exported or re-exported), whereas antique items can be imported for commercial purposes under an import permit. In March 2015, some EU Member States including France, Germany, the Netherlands and the United Kingdom announced that they had banned the re-export of pre-Convention raw ivory. The ban does not affect worked pre-Convention ivory. Recently, the European Commission has adopted a guidance document² recommending that, from 1 July 2017, the EU Member States stopped issuing export documents for raw pre-Convention ivory. Again, such recommendation does not affect worked pre-Convention ivory.

(b) figures on (i) the total amount of ivory items imported into Hong Kong from European countries (European imports) since the implementation of the CITES provisions in Hong Kong, and (ii) the amount of European imports that are still possessed by traders in Hong Kong for commercial purposes

6. As mentioned in paragraph 3 above, the international trade in post-Convention ivory has virtually been banned since 18 January 1990 whereas pre-Convention ivory is exempted by CITES which allows its international trade to continue under a permit system. Hong Kong implements the provisions of CITES and therefore has continued to allow the import and re-export of pre-Convention ivory after 1990. In other words, the import and re-export of pre-Convention ivory after 1990 have existed internationally and are not limited to Hong Kong or the European countries. According to the records of the Agriculture, Fisheries and Conservation Department (AFCD), some 13.9 tonnes plus some 19,700 pieces of pre-Convention ivory have been imported into Hong Kong since 1990. Among these pre-Convention ivory, some 13.8 tonnes plus some 19,100 pieces came from European countries.

7. According to the import and re-export records of AFCD, a large portion of the pre-Convention ivory (some 10.9 tonnes plus some 380 pieces) has been re-exported after they were imported into Hong Kong. However, as the possession of pre-Convention ivory for commercial purposes does not require a Licence to Possess (provided that the ivory can be proven to be pre-Convention) under the Protection of Endangered Species of Animals and Plants Ordinance (Cap. 586) (the Ordinance), we do not have statistics on the

² European Commission - Press release. *Commission introduces new measures to fight poaching and to end trade in raw ivory*. Brussels, 16 May 2017. http://europa.eu/rapid/press-release_IP-17-1308_en.htm

amount of pre-Convention ivory being kept in Hong Kong for commercial purposes.

(c) **whether pre-Convention ivory items that were available in the local market before the CITES application to elephants and those imported into Hong Kong thereafter are subject to the same regulatory control on export and local trade**

8. Given the history of Hong Kong as a centre of ivory trade in the Asian region in the 1980s, a substantial amount of post-Convention ivory had been imported into Hong Kong before the international trade ban in 1990. Such ivory entering Hong Kong has been registered with the then Agriculture and Fisheries Department (now AFCD). Post-Convention ivory is allowed for local sale provided that each of the ivory-keeping premises has obtained a Licence to Possess issued by AFCD. However, re-export of post-Convention ivory has been banned since 1990.

9. As regards pre-Convention ivory, it is exempted from the ban under CITES which allows its international trade to continue under a permit system. Under the Ordinance, the import of pre-Convention ivory requires a pre-Convention certificate issued by the previous place of export certifying that the ivory is pre-Convention, and subject to satisfactory inspection by an authorised officer upon arrival of the ivory in Hong Kong. The possession of pre-Convention ivory for commercial purposes without a Licence to Possess is permitted provided that the ivory can be proven to be pre-Convention. Re-export of pre-Convention ivory is permissible but requires a Licence to Re-export issued by AFCD.

(d) **the Government's position with detailed legal analysis on why the proposals in the Bill are considered to be in conformity with Articles 6 and 105 of the Basic Law on protection of the right of private ownership of property and the right to compensation for lawful deprivation of property of individuals and legal persons**

10. The Bill seeks to –

- (a) amend the Ordinance to take forward a three-step plan to enhance regulation on import and re-export of ivory and elephant hunting trophies and to phase out the local ivory trade; and
- (b) increase the penalties under the Ordinance to provide a stronger deterrent against the smuggling and illegal trading of endangered species.

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

Articles 6 and 105 of the Basic Law

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

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

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

“The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.

Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay.

The ownership of enterprises and the investments from outside the Region shall be protected by law.”

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

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

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

16. The Court of Appeal (CA) in the cases of *Weson Investment Ltd v Commissioner of Inland Revenue*³ and *Mo Chun Hon v Agriculture, Fisheries and Conservation Department*⁴, as well as the Court of First Instance (CFI) in the cases of *Harvest Good Development Ltd v Secretary for Justice*⁵ and *Hong Kong Kam Lan Koon Ltd v Realray Investment Ltd*⁶, have accepted this construction of the term “deprivation.” In *Weson*, Tang V-P (as he then was) held that the word “deprivation” in BL105 was used in the sense of “expropriation” which was the expression used in its original Chinese text (namely, “徵用” ; at 585F). His Lordship applied the same principle in *Mo* (at 385, para. 35).

17. However, in *Fine Tower Associates Ltd v Town Planning Board*⁷, the CA held that to ascertain whether there had been a deprivation, the Court looked to the substance of the matter rather than to the form. Absent a formal expropriation, the question whether there had been a *de facto* deprivation of property is case specific, a question of fact and degree. The Court, having considered the jurisprudence of the European Court of Human Rights and of the U.S. courts, held that *de facto* deprivation for the purpose of establishing a right to compensation contemplates the removal or denial of all meaningful use, or all economically viable use, of the property (paras. 19-25).

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

- (a) where property is formally expropriated, i.e. where there is a transfer of the title to the property; and
- (b) where the measure complained of affects the substance of the property to such a degree that there has been a *de facto* expropriation.

19. In the present case, the Government considers that the legislative proposals as explained in paragraphs 5 to 12 of the Legislative Council Brief

³ [2007] 2 HKLRD 567

⁴ [2008] 1 HKCLR 386

⁵ [2007] 4 HKC 1

⁶ HCA 15824 of 1999

⁷ [2008] 1 HKLRD 553

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

20. Based on the information available from trade surveys and trade consultations conducted by AFCD⁸, the legislative proposals would not cause an immediate failure or collapse of a trader's business. Separately, as explained above, the legislative proposals would not leave the trader's business without any meaningful or beneficial use. The Government takes the view that the legislative proposals would not amount to deprivation of the trader's business. In the absence of deprivation, it is unlikely that the right to compensation protected under BL 105 would be triggered. Further, as stated in paragraph 13 of the Background Brief (LC Paper No. CB(1)1265/16-17(02), ref. CB1/BC/6/16) dated 6 July 2017, the Government considered that no compensation should be made to affected traders since the latter had already been given advance alert regarding the proposed trade ban and a reasonable and sufficiently long grace period of five years from 21 December 2016 to undergo business transformation and/or dispose of the ivory in their possession.

Interference with property right

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

22. In *Hysan Development Co. Ltd v Town Planning Board*⁹, the CFA held that where an encroaching measure had passed the above three-step test, the analysis should incorporate a fourth step, asking whether a reasonable balance had been struck between the societal benefits of the encroachment

⁸ According to the findings of the ivory trade survey conducted by AFCD, from February to April in 2016, many ivory traders have already undergone business transformation or switched to the trading of other commodities not under the control of CITES such as mammoth ivory.

⁹ (2016) 19 HKCFAR 372, 26 September 2016

and the inroads made into the constitutionally protected rights of the individual, asking in particular whether pursuit of the societal interest resulted in an unacceptably harsh burden on the individual.

23. In the present case, the first two steps of the proportionality analysis are satisfied since the proposed three-step plan is rationally connected to the legitimate aim of combating poaching of elephants and illegal smuggling of ivory in Hong Kong by phasing out the trading of elephant ivory in Hong Kong by 31 December 2021. The Government also takes the view that the proposal is also no more than is necessary to accomplish that legitimate aim because of the reasons provided below. The international trade ban in ivory was introduced in 1990. Since then, Hong Kong has adopted domestic measures stricter than the requirements of CITES in controlling the local trade in ivory¹⁰. However, it was reported that an increase of ivory poaching and trafficking had been observed in recent years. From 2011 to 2013, about 20,000-30,000 elephants were reportedly poached each year in Africa, primarily for the tusks. In parallel, Hong Kong has recorded a number of large-scale ivory seizures. Recently, non-governmental organisations, the mass media and some Members of the Legislative Council have raised serious concerns about the poaching of elephants in Africa and the large retail market for ivory in Hong Kong. There have been frequent criticisms against Hong Kong for providing a front for the illegal ivory with its local trade in registered ivory. AFCD has reviewed the regulatory regime of ivory trade and has introduced a suite of enhanced measures to step up enforcement against smuggling of ivory and strengthen the control of local trade in ivory in cooperation with the Customs and Excise Department and the Hong Kong Police Force¹¹. Yet, there is still a substantial scale of local ivory trade serving as a potential front for the illegal market which has a direct impact on the survival of elephants¹². In this regard, the measures of the proposal including a total ban of local trade in phases are considered the last resort for the control of ivory. As a matter of fact, in the Seventeenth

¹⁰ CITES has banned the commercial import, export or re-export of elephant ivory since 1990. For better control, Hong Kong has adopted stricter domestic measures to regulate the commercial possession of ivory through a licensing system.

¹¹ These measures include comprehensive stocktaking of registered ivory, increasing the frequency of surprise inspections to licensed shops selling ivory, employing radiocarbon dating to determine the legality of ivory, deploying sniffer dogs at borders to detect smuggled ivory, strengthening collaboration and co-ordination of efforts of the enforcement agencies, enhancing intelligence gathering and information exchange with relevant overseas and international bodies and strengthening liaison and cooperation with relevant NGOs.

¹² Indeed, in a control buy operation conducted in August 2016, it was found that a pair of ivory chopsticks in an art and craft shop was obtained from elephant ivory after the international trade ban was introduced in 1990. The proprietor and operator of the shop in question were prosecuted, convicted and sentenced.

Meeting of the Conference of the Parties to CITES held in September to October 2016, the Parties adopted a resolution recommending that all Parties and non-Parties in whose jurisdiction a legal domestic market for ivory exists that is contributing to elephant poaching or illegal ivory trade, should take all necessary legislative, regulatory and enforcement measures to close their domestic markets for commercial trade in raw and worked ivory as a matter of urgency. The Government therefore considers that the measures of the proposal are no more than is necessary to accomplish the legitimate aim mentioned above and to address the international and public concerns over the survival of elephants which are under imminent threat of extinction, in light of the latest trend of elephant poaching and ivory smuggling as well as the international call for closure of domestic markets for ivory.

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

(e) whether the Government would consider advancing the total ivory trade ban through cancellation of existing Licences to Possess and offering ex-gratia payments to affected licensees, and the reasons if the Government would not consider so

25. There have been growing concerns over the poaching of elephants in Africa and the global smuggling of ivory in recent years. Further restricting or banning ivory trade has become a global trend. So far, we have not heard of any compensation provided in other countries or regions as a result of measures to enhance the control over ivory trade. We do not see reasons for the Government to deviate from common practices elsewhere and offer compensation to the ivory trade. Such deviation may inadvertently build up negative pressure on other countries or regions when they implement relevant policies to ban the ivory trade.

26. Besides, the Government is very concerned that the provision of compensation to licensed ivory traders may send a wrong message to lawbreakers that there is prospect of compensation which may exaggerate the poaching of elephants and stimulate smuggling of large amount of illegal ivory into Hong Kong to launder with the legal stock for compensation. It

will not only significantly reduce the effectiveness of the Plan, but also run contrary to the global efforts on conservation of elephants and severely damage the international image of Hong Kong.

27. Based on the above considerations, the Government considers that we should not provide compensation in any form including ex-gratia payments to the licensed ivory traders. It should also be noted that the Government cannot cancel a valid Licence to Possess for the purposes of implementing the Plan.

(f) **the total number of ivory craftsmen in Hong Kong and their age profile, and how the Government would assist ivory traders in their business transformation and the ivory craftsmen in meeting their employment needs**

28. As ivory craftsmen are not required to register with AFCD, the Government does not have the exact figure on the number of ivory craftsmen in Hong Kong and their age profile. However, according to a survey conducted by AFCD in September to October 2016 and AFCD's communication with the ivory trade, we estimated that there are around 100 ivory craftsmen in Hong Kong. About two-third of them are aged 60 or above and the remaining one-third are aged between 31 and 59.

29. AFCD will work out with relevant Government departments and organisations such as the Employees Retraining Board (ERB) for suitable re-employment training courses to assist ivory craftsmen that might be affected by the ban to switch to other employment. According to AFCD's discussion with ERB, there are more than 700 existing retraining programmes available to the ivory craftsmen. AFCD will further consult the ivory craftsmen in order to ascertain their training needs.

30. As for the ivory traders, many of them have already undergone business transformation or switched to the trading of other commodities not under CITES control such as mammoth ivory. For the ivory traders who remain in the ivory trade, as there is a grace period of five years from the announcement of the Plan (21 December 2016), such traders should have enough time to undergo business transformation.

(g) **total number of prosecutions made under Cap. 586 for offences related to illegal ivory in the past few years, and the following details for each case: (i) whether the offence was committed for commercial or non-commercial purposes, (ii) the amount of illegal ivory involved, (iii) whether the defendant was convicted, and (iv) the penalties handed down by the Court (if convicted)**

31. The number of ivory smuggling cases detected, quantity of ivory seized, number of convictions and the maximum and minimum penalties imposed by the court during 2014-2017 (up to end of July) are tabulated below –

	2014	2015	2016	2017 (Jan to Jul)¹³
Number of cases	106	105	41	39
Quantity of ivory seized	2,200 kg and 35 pieces	1,600 kg	530 kg	7,385 kg
Number of persons convicted	65	30	25	26
Maximum penalty / /Quantity involved	8 months*/ 3 cases: 15.6 kg, 35 kg and 36 kg respectively	6 months*/ 2 cases: 19.9 kg and 19 kg respectively	8 months^/ 47.36 kg	3 months/ 61.88 kg
Minimum penalty /Quantity involved	10,000/ 2 cases: 1.21 kg and 9.18 kg respectively	30,000/ 2 cases: 8.4 kg and 8.8 kg respectively	2,000/ 0.2 kg	2,000/ 0.044 kg

Note:

- * - penalty of the convicted case was a fine. In default of payment, the offender was sentenced to an imprisonment for the specified period.
- ^ - penalty was laid in concurrent with an offence under Import and Export Ordinance (Cap.60)

32. As stipulated in section 10 of the Ordinance, if a person has been convicted of an offence with respect to illegal import, introduction from the sea, export, re-export or possession of CITES Appendix I species and the court is satisfied that the act is for commercial purposes, that person, is liable to a higher penalty of fine of \$5,000,000 and to imprisonment for two years. However, our experience reveals that the burden of proof for the act to be carried out for commercial purposes is not easy to discharge. Besides, whether the court considers the offence is for commercial purposes is not

¹³ Some cases are still under investigation and hence verdict results not yet available.

expressed in the sentence. The proposal to unify the penalty for both commercial and non-commercial offences and to increase the penalties are intended to address the burden of proof issue above and provide a stronger deterrent against illicit wildlife trade.

(h) information on the starting points of sentencing for offences under Cap. 586 in relation to illegal ivory

33. There is no precedent set by a higher court on the starting point of sentencing for offences under the Ordinance.

**Environment Bureau
Agriculture, Fisheries and Conservation Department
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