

立法會
Legislative Council

LC Paper No. LS15/17-18

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

At the Bills Committee's meeting on 8 November 2017, members requested the Legal Service Division to advise whether the plan to phase out local ivory trade as proposed in the Bill without compensation to affected parties is consistent with Articles 6 and 105 of the Basic Law ("BL").

Rights protected by the Basic Law

2. The right of private ownership of property is guaranteed by BL 6 and 105.

BL 6 provides:

"The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with 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 ivory ban proposed in the Bill

3. The Bill seeks, inter alia, to take forward a three-stage plan to provide stricter regulation for elephant hunting trophies and elephant ivory so as to phase out the local ivory trade by 31 December 2021. The first stage (which would take effect on the first commencement date of the Amendment Bill ("1st Commencement Date")) is to ban the import and re-export of all

elephant hunting trophies and the remaining post-Convention ivory items except with a licence issued in limited circumstances. Possession licence applications may only be approved if the Director of Agriculture, Fisheries and Conservation is satisfied that the specimen is pre-Convention, covered by a valid licence issued before the 1st Commencement Date or there are exceptional circumstances justifying the approval. The second stage (which would take effect three months after the 1st Commencement Date) is to ban the import and re-export of pre-Convention ivory (save for antique elephant ivory) and subject the possession and control of ivory (save for antique elephant ivory) to stricter licensing control or there are exceptional circumstances justifying the approval of the licence application for commercial possession or control of ivory. The third stage (which would take effect on 31 December 2021) is to ban the possession for commercial purposes of all ivory (except antique elephant ivory) by restricting the issue of a possession licence to cases of exceptional circumstances only.

Whether the proposed ivory ban amounts to deprivation of property under BL 105

4. In order to determine if compensation would be required under BL 105 for the owners/traders of ivory affected by the legislative proposals, it is necessary to determine if the proposed measures under the Bill would constitute any deprivation of ivory owners' property and therefore trigger the right to compensation.

Relevant legal principles

5. Based on decided cases, the following legal principles are applicable in determining whether there is deprivation of property:

- (a) deprivation of property refers to cases where property is formally expropriated, i.e. where there is a transfer of title of the property¹;

¹ The concept of "deprivation" was discussed in *Kowloon Poultry Laan Merchants Association v Director of Agriculture Fisheries and Conservation* [2002] 4 HKC 277. The following observations made by the European Commission in the case of *Baner v Sweden* (App No. 11763/1985, 60 DR 128) were cited with approval (at paragraph 17): "As regards the question whether the applicant has been deprived of property, the Commission recalls that, according to the established case law, deprivation of property within the meaning of Article 1 of Protocol No. 1 is not limited to cases where property is formally expropriated, i.e. where there is a transfer of the title to the property. "Deprivation" may also exist where the measure complained of affects the substance of the property to such a degree that there has been a *de facto* expropriation or where the measure complained of 'can be assimilated to a deprivation of possessions'."

- (b) deprivation may also exist where the measure complained of affects the substance of the property to such a degree that there has been a *de facto* expropriation or where the measure complained of "can be assimilated to a deprivation of possessions"²;
- (c) the right to compensation under BL 105 was guaranteed only when there was expropriation of property by the state for some public purposes³;
- (d) to ascertain whether there has been a deprivation, the court looks to the substance rather than to the form. Absent a formal expropriation, the question whether there has been a *de facto* expropriation is perforce case specific, a question of fact and degree. There is *de facto* deprivation under BL 105 in cases where all meaningful use or all economically viable use of the property is removed or denied⁴;
- (e) the burden of establishing the removal or denial of all meaningful or economically viable use of the property resides with the party asserting a violation of BL 105⁵.

Application of the legal principles

Formal expropriation

6. In the present case, there is no deprivation in the formal sense or expropriation of property for some public purposes. The proposed ivory ban in the Bill does not lead to any transfer of the title of the ivory to the Government of the Hong Kong Special Administrative Region. The owners of ivory would retain the title and possession of their ivory.

De facto deprivation

7. While the proposed ivory ban in the Bill prohibits the ivory owners/traders from dealing commercially with the elephant ivory/or elephant hunting trophies, it is noted that ivory traders or owners could still have the ivory under their physical possession and could use and dispose of

² Ibid.

³ See *Harvest Good Development Limited v Secretary for Justice & Others* [2007] 4 HKC 1.

⁴ See *Fine Tower Associates Ltd v Town Planning Board* [2008] 1 HKLRD 553.

⁵ Ibid.

them by other means (such as display, exhibition and donation) and the trade of antique elephant ivory would be allowed. In the circumstances, it is arguable that there is no removal or denial of all meaningful use or all economically viable use of the ivory, and thus the restrictions as proposed in the Bill would not constitute a *de facto* deprivation of property.

8. Whilst it may be argued that much of the economic value of the ivory to the traders could have been lost due to the proposed ban, it is a question of fact for the ivory traders/owners to establish that the restrictions would constitute removal or denial of all meaningful or economically viable use of the ivory.

Whether the proposed ivory ban satisfies the proportionality test

9. Although it is not likely that there is deprivation of property in the present case, the proposed ivory ban in the Bill would constitute restrictions on the use of property. In this regard, it is relevant to consider whether such restrictions on the use of property would be consistent with BL 105. It is noted that the property right under BL 105 is not absolute and the law may validly create restrictions limiting such right, and any such restrictions should satisfy the four-step proportionality test as laid down in *Hysan Development Co. Ltd v Town Planning Board* [2016] 9 HKCFAR 372.

Four-step proportionality test

10. The proportionality analysis requires that the restrictions must (1) pursue a legitimate aim, (2) be rationally connected to that legitimate aim and (3) be no more than is necessary to accomplish that legitimate aim. Where an encroaching measure had passed the three-step test, that analysis should include a fourth step, asking (4) whether a reasonable balance had been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, asking in particular whether pursuit of the societal interest resulted in an unacceptably harsh burden on the individual⁶.

Application of the proportionality test

11. Regarding the first two steps of the proportionality analysis, it appears that they are likely to be satisfied as the proposed three-step plan in the Bill could be argued as rationally connected to the legitimate aim of combating poaching of elephants and smuggling of ivory in Hong Kong by

⁶ See the case of *Hysan Development* which was followed by *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* [2017] 5 HKC 242.

phasing out the trading of elephant ivory in Hong Kong by 31 December 2021.

12. The third step of the proportionality analysis involves asking whether an impugned measure is a proportionate means of achieving the legitimate aim in question. The Administration has explained their justifications and argued that the measures of the proposal are no more than is necessary to accomplish the legitimate aim mentioned above⁷. If the courts accept the justifications provided by the Administration, the courts may consider the proposed ivory ban in the Bill is not manifestly without reasonable foundation and is a proportionate means of achieving the legitimate aim of combating ivory poaching.

13. The fourth step of the proportionality analysis requires the court to make a value judgment as to whether the impugned law or governmental decision, despite having satisfied the first three requirements, operates on particular individuals with such oppressive unfairness that it cannot be regarded as a proportionate means of achieving the legitimate aim in question⁸. In this regard, the court should take an overall, balanced view in making a value judgment⁹. It is noted that the Government has given the affected traders advance alert regarding the proposed trade ban and a grace period of five years to undergo business transformation and/or dispose of the ivory in their possession. According to the Administration, the legislative proposal has struck a reasonable balance between the societal benefits of the encroachment and the inroads made into the property rights of ivory traders who are not subjected to unacceptably harsh burden¹⁰.

Some relevant factors that may be taken into consideration

14. In order to determine whether the proposed ivory ban in the Bill is no more than is necessary to accomplish the legitimate aim and whether a reasonable balance had been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, the following may be some of the relevant factors for consideration:

⁷ See paragraph 15 of the Administration's reply dated 6 October 2017 to the Assistant Legal Adviser's letter (LC Paper No. CB(1)11/17-18(01)).

⁸ See *Hysan Development & Ors v Town Planning Board* [2016] HKC 58 at pages 85 and 86.

⁹ See *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* [2017] 5 HKC 242 at page 244.

¹⁰ See paragraph 16 of the Administration's reply dated 6 October 2017 to the Assistant Legal Adviser's letter (LC Paper No. CB(1)11/17-18(01)).

- (a) the seriousness of elephant poaching and the scale of smuggling of ivory in Hong Kong;
- (b) the benefits that could be brought to the community by the implementation of the proposal;
- (c) the effectiveness of the enforcement actions taken under the existing regulatory regime;
- (d) whether there are ways other than what is proposed in the Bill in order to achieve the policy objective of combating elephant poaching and smuggling of ivory in Hong Kong; what are the other alternatives that have been explored by the Administration and why these other alternatives are not considered to be feasible and cannot achieve the policy objective;
- (e) the quantity of undisposed ivory owned by traders/owners;
- (f) whether the proposal represents the minimum impairment on the property right guaranteed by BL; what are the justifications for setting the grace period for phasing out ivory trade at five years and whether the grace period could be longer;
- (g) whether there are any other measures to minimize the impairment or damage that may be caused to the ivory owners/traders apart from what is proposed in the Bill.

Conclusion

15. (a) There appears to be no formal deprivation of ivory or expropriation as the proposal in the Bill does not involve the transfer of title of the property to the Government.
- (b) As to *de facto* deprivation, it appears that the proposed ivory ban in the Bill would not have rendered ivory wholly worthless and constitute removal or denial of all meaningful use or all economically viable use of ivory since the ivory may still have other uses (such as donation, display, exhibition and other artistic or cultural uses).
- (c) It seems likely that the proposed ivory ban in the Bill can satisfy the first two steps of the proportionality test.

- (d) Subject to the availability of further information on matters set out in paragraph 14 above, it is difficult to come to a definite view at this stage as to whether the proposed ivory ban in the Bill can satisfy the third and the fourth steps of the proportionality test, i.e. whether it is a proportionate means of achieving the legitimate aim in question and whether a reasonable balance has been struck.

Prepared by

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