



WWF

SUMMARY

HK

2016

HOW TO BAN THE IVORY TRADE IN HONG KONG BEGINNING TODAY

INTRODUCTION

Every year, over 30,000 African elephants are killed for their tusks to service the demand for ivory products, which primarily originates in Asia. While the international trade in ivory has been banned since 1990, smuggling and illegal trading is still rampant around the world. To address this problem, the governments of many nations and states are adopting new measures to restrict or phase out the ivory trade in their territories. Hong Kong has joined this effort: on January 13, 2016, Hong Kong's Chief Executive C Y Leung announced that the government "...is very concerned about the illegal poaching of elephants in Africa", and will "...actively explore other appropriate measures, such as ... phas[ing] out the local ivory trade". The Chief Executive then stated to CNN that the government's firm intention was to:



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**"TAKE STEPS TO BAN TOTALLY
THE SALE OF IVORY IN HONG KONG"**

In light of this declaration, it is therefore crucial that the authorities develop an action plan and announce a timetable which will bring Hong Kong's ivory trade to a swift end. With the political will to phase out the trade in ivory now in place, the key challenges that remain relate to policies and laws. WWF-Hong Kong (WWF) recently commissioned Hong Kong Barrister Tim Parker and international legal consultancy Global Rights Compliance LLP to undertake a study on how to implement an ivory ban under Hong Kong law.

The findings of this study show that commercial ivory sales can be phased out within two years; that the Chief Executive can begin this phase-out within his current term of office (which runs until March 2017); and that there is no obligation to provide financial compensation to ivory traders. This report's finding aligns in principle with Hong Kong government's proposed ivory ban which states that no compensation is needed, as traders have had 26 years to get rid of their stocks. However 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. Therefore the onus is on legislators and other stakeholders to encourage government to ban the trade as soon as possible.

This summary paper explains the legal and policy aspects of the ban, and is based on the 124-page legal analysis called Feasibility Study on the Ban of Hong Kong's Ivory Trade, which examines both the local Hong Kong and the global dimensions of a ban on ivory.



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REGULATION OF COMMERCIAL IVORY SALES IN HONG KONG AND BEYOND

The international (i.e. cross-border) commercial trade in ivory has long been outlawed, however in Hong Kong its domestic sale remains lawful. The ban on international trade was brought about by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which lists African and Asian elephants as Appendix I species – meaning they are among the most seriously endangered animals in the world. Asian elephants were listed in 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.

In Hong Kong, CITES has been implemented through the Protection of Endangered Species of Animals and Plants Ordinance (Cap. 586 – “the CITES Ordinance” or “the Ordinance”). African and Asian elephants are listed in the first column of Schedule 1 of the Ordinance, which reproduces Appendix I of CITES. This means that the commercial import or export of elephant ivory is unlawful. However under current 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.

Other jurisdictions are also taking steps to end the ivory trade. China, for example, has introduced strict new interim measures and has committed to implementing a full ban “...within the lifetime of the administration”; California has banned the selling, offering for sale or possession of ivory with intent to sell; and New York has banned almost all trading in ivory, with a few exceptions such as antiques. A summary table of regulations and actions taken can be found at the end of this report.

When the international trade was banned in 1990, ivory traders in Hong Kong collectively possessed some 665 tonnes of ivory. They have had 26 years to sell this ivory, yet, as of 2015, 77 tonnes of ivory remained on sale in the city. Today, there are fewer than 400 licensed ivory traders. Very few carvers remain active in Hong Kong (the government offered a retraining programme for carvers in 1990). Hong Kong traders claim that their ivory sales are legal, because they are drawn from a stockpile of ivory which was lawfully imported into the city before 1990. However, a 2015 WWF study uncovered several fundamental flaws in the current regulatory system and evidence of a black market operating under cover of the legal trade – in one instance, a trader claimed it was easy to undertake illegal trafficking and smuggle illegal ivory directly from Africa which could then be sold in Hong Kong. The study demonstrated that this difficult-to-regulate trade is directly contributing to the current elephant poaching crisis in Africa.

The current report addresses the legal aspects of ending the commercial ivory trade in Hong Kong, and in particular whether the Hong Kong government might be obliged to pay compensation with respect to the existing 77-tonne ivory stock which, it is claimed, was lawfully imported into Hong Kong before 1990. The report provides a detailed examination of Article 105 of the Basic Law of the Hong Kong SAR (“BL105”), which protects private property rights and provides for a “right to compensation for lawful deprivation of ... property”. BL105 recognises a “deprivation” of property in three main types of cases:

- **Formal expropriation of property** – all title to an interest in the property concerned is transferred to the State;
- **Physical taking** – where the title to the property remains with its owner but the property itself has been appropriated;
- **Regulatory taking** – a governmental measure stultifies **all** meaningful and economically viable use of the property.

A mere bar on the commercial sale of ivory would not likely be considered a deprivation of property under BL105 (rather than taking or confiscating the ivory). Since the ban is being proposed in the public interest on the grounds of conservation and sustainability, it is a legitimate and lawful restriction on the right to property. There is no provisional loss of rights – the ban does not compel the surrender of any ivory, and there is no physical invasion of or restraints placed upon the stock. Rather, a significant restriction is being imposed only on a single means of disposing of the artefacts. Reducing the value of property is not considered “taking”. Therefore there is no right to compensation.

In addition, the trade in pre-ban ivory (i.e. ivory imported lawfully between 1976 and 1990) is already subject to licensing. The cancellation or variation of licences to prevent the commercial sale of pre-ban ivory neither engages nor offends property rights. Discretionary licences issued by a government authority are not usually themselves considered to be “property” within the sense envisaged by BL105.



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This legal analysis strengthens the conclusion that the Hong Kong government bears no legal obligation to buy out the remaining ivory stock from the traders when the sale of ivory is no longer allowed.

There are two key precedents which further underline why compensation is not payable in these circumstances:



1. EAGLE FEATHER CASE – ANDRUS V ALLARD 444 U.S. 51 (1979) (UNITED STATES SUPREME COURT)

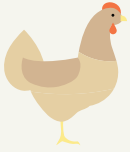
The Bald and Golden Eagle Protection Act, enacted in 1940, banned the trade of eagle body parts, nests, or eggs. Since the ban included the feathers attached to Native Indian artefacts, the notion of whether they had been acquired before or after the ban came into effect became significant (since it



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was difficult to differentiate between feathers obtained in the two time periods). The measure was challenged on the grounds that it violated the “takings clause” in the Fifth Amendment, which protects the right to private property – similar to Article 105 of the Hong Kong Basic Law.

The U.S. Supreme Court reasoned that “feathers recently taken can easily be passed off as having been obtained long ago”, and “the prospects [of a regulated legal trade] creates a powerful incentive ... to evade statutory prohibitions against taking birds”. Deciding that no compensation was payable, the Court held that there was no “taking” in the legal sense. This was because first, the title of the feathers (or the artefacts comprised of them) remained with private owners, and had not been co-opted by the State; rather, the owners’ right to sell the feathers had been stripped. Second, the ban on sales did not remove all economic benefit that might be derived from the artefacts – for example, the owners could still exhibit the feathers for profit. Third, the court traditionally does not speculate as to the economic profits that any future trade might bring. The Supreme Court therefore held that the measure did not infringe the Fifth Amendment or give rise to any right to compensation, concluding that “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’”. By their very nature, businesses bear many risks and regulatory change is one such risk.



2. BACKYARD POULTRY CASE - HONG KONG (2006)

Due to concerns over avian influenza, in 2006 the Hong Kong government put in place a ban on the keeping of backyard poultry and racing pigeons. The administration first made requests asking for the voluntary surrender of poultry. When this proved to be ineffective, the administration quickly adopted a legislative approach, instituting a ban and providing no compensation.

Despite the fact that stakeholders in that industry owned property which was affected by the ban, the administration decided not to grant compensation and stated that it was under no legal obligation to do so. When the measure was challenged in legal proceedings claiming an infringement of BL105, the Court upheld the lawfulness of the ban, dismissing a judicial review initiated by a racing pigeon owner challenging the refusal to grant a livestock keeping licence.

The Court reasoned that the ban did not amount to deprivation; nor did it constitute an unjustified interference with or control of property rights. Furthermore, the threat of an influenza outbreak arising from backyard poultry keeping was imminent.

3. OTHER CONSIDERATIONS



IMPACT ON INDUSTRY WORKERS

There are only a small number of ivory craftspeople active in Hong Kong today, and the government is under no legal obligation to provide them with compensation. In 1990, soon after the ivory trade was banned globally, the Hong Kong government set up a scheme to re-train several hundred ivory craftspeople, offering them expertise in other professions. The ex gratia offer of re-training came with a subsistence allowance of HKD 2,500 (USD 320) a month. WWF has consulted with ex-crafters who stated that there are ‘barely any carvers remaining active in Hong Kong’. Today, a person who runs or is employed by a business affected by an ivory ban would not be granted any rights with respect to their future profits or employment under BL105. WWF recommends Government to explore suitable assistance measures for any ivory crafters who might be affected by the ban.



THE WORLD TRADE ORGANIZATION (WTO)

A ban on the domestic commercial trade in ivory would be consistent with Hong Kong’s obligations as a member of the WTO. The international trade in ivory has been severely restricted for many years. Moreover ivory is an “exhaustible natural resource”, and a ban on the ivory trade is “reasonably related” to the primary objective of protecting African elephants, especially in light of the challenges in regulating the illegal trade in ivory. Lastly, the ban applies equally to all traders, irrespective of nationality or origin.

HOW TO BAN THE COMMERCIAL SALE OF IVORY IN HONG KONG: A TWO-PHASE ACTION PLAN

THE STATUS QUO

Under the current law, there are three categories of ivory:

POST-1990 IVORY	PRE-BAN IVORY	PRE-CONVENTION IVORY
<p>Ivory removed from the wild after 1990</p> <p>It is a criminal offence to be in possession of any ivory which postdates the upgrading of African elephants to an Appendix I species under CITES.</p>	<p>Ivory lawfully imported into Hong Kong between 1976 and 1990</p> <p>It is an offence under sections 9 and 10 of the CITES Ordinance to be in possession of such pre-ban ivory for any commercial purpose without a valid possession licence (which may be issued by the Director of Agriculture, Fisheries and Conservation through his Department (the AFCD) under section 23 of the CITES Ordinance.</p>	<p>Ivory removed from the wild before 1976, i.e. pre-CITES</p> <p>This may be imported into Hong Kong and traded locally without restriction, providing that the holder is able to provide official certification from the country of origin demonstrating its pre-convention status.</p>
ALREADY BANNED	PHASE ONE	PHASE TWO

*Certain exemptions exist for personal possession by local residents, for licensed educational, scientific purposes or law enforcement purposes, and others.

PHASE ONE - STOP ISSUING POSSESSION LICENCES THAT PERMIT THE COMMERCIAL TRADE OF IVORY

The bulk of legally-traded ivory in Hong Kong is pre-ban ivory. The Director of the AFCD is entitled by statute (section 23 of the CITES Ordinance) to issue licences with respect to this ivory: “as he considers appropriate, including conditions that are more stringent than any requirement under CITES”. Currently, possession licences are granted for five years and give the holder permission to sell pre-ban ivory. The Director can phase out the trade in pre-ban ivory by, when renewing all possession licences, making them subject to an express condition that the holder does not engage in any commercial sale or purchase of ivory. This follows the California model, which gave licence holders a six-month notice period following which it would no longer renew trading licences.

This is, however, an incomplete solution. It only covers pre-ban ivory (since no licence is needed to sell pre-convention ivory) and it would make a stronger statement if government can ban the trader sooner than five years. It is a worthwhile starting point though.

PHASE TWO - ENACT LEGISLATIVE AMENDMENTS FOR A COMPLETE BAN ON THE DOMESTIC COMMERCIAL TRADING OF IVORY

Together with the administrative measure just mentioned, legislation should be introduced to ensure that all commercial sale of all ivory is banned.

Legislative amendments are needed within the CITES Ordinance, Cap. 586, to ensure that the commercial trade is no longer allowed and that a comprehensive ban on commercial trade is enacted for all ivory products. This report proposes an amendment empowering the Chief Executive to gazette and designate specific species for which no commercial licence may be issued or maintained.

Exemptions to the general ban should be made for bona fide antiques proven to date from before 1940, i.e. at least 50 years before the entry into force of the domestic ivory trade ban, and the right to exhibit or display ivory (including for a fee). These exceptions are reasonable and draw on precedents set in the United States.

Considering that ivory traders have enjoyed a full 26 years since elephants became an Appendix I species to sell off pre-existing stocks, and because the government is not conferring upon itself, or anyone else, the title to any ivory; these measures are entirely reasonable, proportionate and lawful. They pursue the legitimate aim of making an important contribution to reversing the decline of African elephant populations – a vital global conservation goal.

It would also be prudent for the government to step up customs inspections and other such measures during the phase-out period, to ensure that traders do not attempt to smuggle ivory out of Hong Kong.

A summary of the action plan is provided as follows:



TABLE SUMMARIZING HONG KONG, CHINA AND U.S. COMMERCIAL IVORY TRADE REGULATION

	HONG KONG “BUSINESS AS USUAL”		PROPOSED LEGISLATION			
			“2 YEARS PLAN” BY WWF		“5 YEARS PLAN” BY HONG KONG GOVERNMENT	
	Pre convention ivory (removed from the wild before 1976)	Pre-ban ivory (removed from the wild between 1976-1990)	Pre convention ivory (removed from the wild before 1976)	Pre-ban ivory (removed from the wild between 1976-1990)	Pre convention ivory (removed from the wild before 1976)	Pre-ban ivory (removed from the wild between 1976-1990)
DOMESTIC TRADE	Supporting documents are required to trade domestically, such as CITES export permit	Trade is operated under a licensing system Possession licence is required to trade domestically, it is unlawful to trade ivory without a licence	Enact new legislation to ban the trade Exemptions: antiques, including musical instruments (pre-1940)	Continue to issue possession licences but ban all commercial trade Exemptions: license the commercial use of ivory for exhibitions	Ban the local sale of pre-ban and pre-Convention ivory after a five-year grace period During grace period: Subject to licensing control	[status quo: Subject to licensing control]
IMPORT AND EXPORT FOR COMMERCIAL PURPOSE	Allowed to import with approved documentation Export requires re-export licence	Import and export are not allowed	[The government is “...exploring enacting legislation to further ban the import and export of ivory...”]		Ban the import and export except for antique	[status quo: Import and export are not allowed]
NON-COMMERCIAL IMPORT / EXPORT	Allowed to import with approved documentation Export requires re-export licence	Imports and exports are prohibited, with a few exemptions	[The government is “...exploring enacting legislation to further ban the import and export of ivory...”]		Ban the import and export of hunting trophies for all ivory and certain ivory carvings	
NON-COMMERCIAL DOMESTIC POSSESSION	Possession licence is not required	Possession licence is not required	[status quo]	[status quo]	[status quo]	[status quo]
MAXIMUM PENALTY UNDER LAW	CITES ordinance Cap. 586 Two years imprisonment and fines of up to HKD5 million		Revise CITES ordinance Cap. 586 The government will be “...imposing heavier penalties on smuggling and illegal trading of endangered species”		Government will review the current penalties with the aim of strengthening them such as through making them an ‘...indictable offence...’ and ‘...to increase the maximum fine and imprisonment term...’	
NOTES AND OTHER COMMENTS	Note: the export of pre-convention ivory also requires an import licence for some destination country					

(This table only includes key ivory markets with commitment to end the ivory trade, namely Hong Kong. Other key markets such as Japan and Thailand are not included as they have not yet committed to a ban)

CHINA	UNITED STATES			
	Federal	California *to become operative on July 1, 2016*	New York	Hawaii *to become operative on 1 July 2017 if signed by governor*
Trade is operated under a licensing system. Chinese authorities have committed to implementing a ban “...within the lifetime of the administration”	Pre-convention and pre-ban ivory may be traded within a state, while interstate trade is banned with a few exemptions such as antique	Selling, offering for sale, possessing ivory with intent to sell are all banned	Almost all ivory trade is banned, with a few exemptions such as for antiques	Almost all ivory trade is banned, with a few exemptions such as for antiques
Import of pre-convention ivory is banned until Dec. 31, 2019 Import and export of post-convention ivory are banned	All import is banned Export of all ivory is banned except for antiques	Covered by federal laws Interstate commerce is banned, with few exceptions such as antiques		
Import of hunting trophies, ekipa and ivory carvings is banned until Dec. 31, 2019	Prohibited except for limited hunting trophies, scientific specimens, antiques (older than 100 years), pre-convention ivory (inherited artefacts, musical instrument components)			
Possession licence is not required	Possession licence is not required			
Breaking criminal law and regulations on endangered wildlife could lead to imprisonment of 10 or more years	Endangered Species Act, the African Elephant Conservation Act, and the Lacey Act, among others	Proposed Assembly Bill 96 The maximum fine is the greater of USD50,000 or two times the value of the ivory and/or imprisonment for one year	Felony under New York penal law The maximum fine is the greater of USD6,000 or three times the value of the ivory	Minimum mandatory fine of USD2,000 and / or imprisonment of no more than one year
		The ban covers both rhinos and elephants The definition of ivory covers elephants, hippos, mammoths, walruses, whales and narwhals	Ivory covers elephants and mammoths, due to difficulties in distinguishing between ivory obtained from the two	The ban also covers seals, lions, hippos, jaguars, tigers, leopards, great apes, whales, walruses, monk seals, cheetahs and other species

100%
RECYCLED



HOW TO BAN THE IVORY TRADE IN HONG KONG BEGINNING TODAY

30,000

African elephants are killed for their tusks every year to satisfy the global demand for ivory

470,000

elephants are left in Africa



1990

The year the international trade in ivory was banned

2

years will be needed to permanently phase out the ivory trade in Hong Kong



Why we are here

To stop the degradation of the planet's natural environment and to build a future in which humans live in harmony with nature.

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