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Cover photo: Triumphant Soldier, Anonymous (Roman Empire), 4th century CE, ivory, a Roman soldier in armor, holding his sword and its sheath, stands in front of a trophy of shields, originally the right-hand corner of a large triumphal subject decorating a box, Walters Art Museum, Baltimore, Creative Commons Attribution-Share Alike 3.0 Unported license.

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African bush elephant (Loxodonta africana), Elephant Sands, Botswana, Photo by Diego Delso, 29 July 2018, delso.photo, License CC-BY-SA.
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Reports of the rate by which African elephants in particular are being poached each day – at an average of 96 per day - has led a number of legislatures to tighten restrictions on the sale of elephant ivory over the last 5 years or so, including in the US, the UK and the EU. This Art and Heritage Law Report is intended to give an overview on the international framework and the restrictions on commercial use of ivory in each of these jurisdictions as they currently stand in order to provide guidance on what can and cannot be sold.¹

The report first sets out the international framework, before turning to a section on the USA, which considers the applicable federal laws and the laws of states that have implemented ivory legislation. The final section of the report looks at the EU Regulations and the new law in the UK together, noting that the UK will be subject to EU law until 31 December 2020.

In addition, a list of further resources that may be of interest or assistance is provided at the end of the report.

I. INTERNATIONAL FRAMEWORK²

Restrictions on commercial activities in ivory are applied internationally through the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), an international conservation agreement which aims to ensure that trade in endangered species does not threaten their survival. The USA ratified the Convention in 1975 and the UK ratified it in 1976.

CITES provides for varying degrees of protection to over 30,000 species of animals and plants. The text of the Convention gives the legal framework for regulating international trade in these species. Parties to CITES are required to implement the provisions of the Convention in their domestic law, as well as to appoint Management Authorities tasked with administering the licensing system. Under CITES, international trade in species listed in one of its Appendices is only permitted if not detrimental to the survival of the species. There are three Appendices, and the restrictions imposed on trade of a particular species under CITES varies depending on which Appendix a species is listed. Appendix I species are those threatened with extinction and that are or may be affected by international trade. Generally, international commercial trade in these species is banned but some trade may be allowed in exceptional circumstances.

While CITES regulates international trade, it does not regulate domestic markets within states or regional trading groups such as the EU.³ Article 14(1)(a) of CITES recognises the "right of parties to adopt … stricter domestic measures regarding the conditions for trade, taking, possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof."

With respect to ivory, CITES restricts international commercial trade in new ivory, except in exceptional circumstances, from Asian and African elephants where the ivory was taken in or after July 1, 1975 and February 26, 1976 respectively. Asian elephants were listed on Appendix I on July 1, 1975. Although African elephants were first placed on Appendix III for the Ghanaian population in 1976, the entire population of African elephants was not listed on Appendix I until January 18, 1990.

Where import or export of ivory is authorised by the relevant country, it must be accompanied by a CITES import permit from the destination country issued by that country’s Management Authority and a CITES export permit issued by the exporting country’s Management Authority.

CITES provides that an import permit may be issued only if the specimen is not to be used for primarily commercial purposes and if the import will be for purposes that are not detrimental to the survival of the species. Export permits may be issued only if the specimen was legally obtained; the trade will not be detrimental to the survival of the species; and an import permit has already been issued. CITES allows Parties to make certain exceptions, including for specimens that were acquired before CITES provisions applied to them (Pre-Convention Specimens).⁴

¹ This article is intended as general information only and does not represent legal advice on the laws of the jurisdictions described in the article. Legal advice should be obtained from legal counsel qualified in the relevant jurisdiction(s) when dealing with specific circumstances.
⁴ https://cites.org/eng/disc/how.php
Artist Adam Lenckhardt (1610–1661), Wurzburg, Germany, Cleopatra taking her own life with the bite of a poisonous serpent, between 1632 and 1635 (Baroque), ivory, Walters Art Museum, Baltimore, Creative Commons Attribution-Share Alike 3.0 Unported license.
II. USA

A. Federal Laws

1. Introduction

In the US, the principal legislation affecting the trade in ivory is the Endangered Species Act, 1973 ("ESA"), implementing CITES. The ESA designated responsibility for CITES implementation to the Secretary of the Interior, acting through the U.S. Fish and Wildlife Service. Pursuant to the ESA, CITES restrictions on trade of ivory are implemented in the Code of Federal Regulations, Title 50, Part 23. In addition, the African Elephant Conservation Act; Director’s Order No. 210 and the final 4(d) rule for the African elephant, which came into effect July 6, 2016, provide further restrictions in respect of the trade in African elephant ivory. In particular, the amendment to section 4(d) of the ESA [50 CFR 17.40(e)] in July 2016 established a near total ban on the commercial trade of African elephant ivory.

The US federal restrictions make distinctions between commercial and non-commercial use, as well as whether the ivory is raw or worked and whether or not the ivory qualifies as an antique under the ESA.

Federal laws also distinguish between African and Asian elephant ivory, so it is important to first identify the species of ivory contained in an item that you wish to purchase or sell. It is possible to differentiate between African or Asian elephant ivory, and guidance is given by the government. However, it is important to always proceed with caution when purchasing ivory and request documentation that shows the age and species of the ivory that you are purchasing, such as for example CITES permits or certificates, certified appraisals, or documents that provide details of the date and place of manufacture.

Federal laws and regulations generally ban the commercial trade in both species of elephant ivory, subject to some exceptions including what is known as the ESA antique exemption and the de minimis exemption for African elephant ivory only. Federal laws do not, however, prohibit transferring an ivory item as a donation or a gift, provided that it had been lawfully acquired and there is no exchange for other goods or services.

This section details the Federal restrictions on import, export, intra- and inter-State trade, and foreign commerce on elephant ivory. It is divided into three sub-sections: the first dealing with African elephant ivory; the second Asian elephant ivory; and the third setting out helpful definitions, including the ESA antique criteria and de minimis criteria.

To conclude the US portion of this article, the specific and relevant State laws are detailed for New York and California, with notes on New Jersey, Washington, Hawaii, and Oregon statutes.

2. African Elephant Ivory

This sub-section explains the various restrictions applicable to the export, import, foreign commerce of, inter-State and intra-State trade of African elephant ivory. The section concludes with a look at a number of examples to illustrate how the restrictions are applied.

a. Import

There is a total ban on the commercial import of African elephant ivory, raw or worked.

b. Export

Commercial export of raw ivory is prohibited.

Commercial export of worked ivory that meets the criteria of the ESA antiques exemption is allowed (see definition below).

An ESA export permit is not required if the item meets the criteria for the ESA antiques exemption, however a CITES export permit is required. A CITES Pre-Convention Certificate for a single-use export authorisation for worked ivory items can be obtained by submitting form 3-200-23 to the U.S. Fish and Wildlife Service.

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5 https://www.fws.gov/lab/ivory.php
7 http://www.fws.gov/forms/3-200-23.pdf
c. Foreign commerce

Foreign commerce in African elephant ivory is prohibited for any person subject to the jurisdiction of the US except for the following items:
- Items that qualify as ESA antiques;
- Certain manufactured or handcrafted items that contain a *de minimis* amount of ivory and that meet specific criteria.

Foreign commerce is always prohibited for sport-hunted trophies and items that are imported or exported as part of a household move or inheritance.

d. Inter-State trade

The sale of African elephant ivory across state lines is prohibited except for items that qualify under the ESA antiques exemption and for certain manufactured or handcrafted items that contain a *de minimis* amount of ivory and meet specific criteria.

Inter-State commerce is always prohibited for sport hunted trophies; items imported under the exception for a household move or inheritance; and items imported as law enforcement or scientific specimens.

Note that there may be State laws restricting or prohibiting the inter-State sale or commerce of African elephant ivory, and these should always be consulted. Following the section on Federal laws, this report outlines these restrictions.

e. Intra-State trade

Under Federal law, African elephant ivory can be sold within a state if it can be shown that it was lawfully imported prior to the date the African elephant was listed in CITES Appendix I: January 18, 1990. Acceptable evidence of import includes a CITES pre-Conference certificate, a dateable photo, a dated letter or other document referring to the item.

A permit is not required from the US Fish and Wildlife Service, but the Service may request appropriate documentation if you are offering an item for sale.
Note that there may be State laws restricting or prohibiting the intra-State sale or commerce of African elephant ivory, and these should always be consulted.

3. Asian Elephant Ivory

This sub-section details the federal restrictions applicable to the trade of Asian elephant ivory.

a. Import

Asian elephant ivory can only be imported into the US for commercial purposes if it qualifies as an ESA antique (see below for the definition of ESA antique).

All items whether being imported for commercial or non-commercial purposes must be accompanied by a valid CITES document from the exporting country. Note this CITES export certificate will require the ivory to have been taken from the wild prior to the CITES listing date of the Asian elephant: 1 July 1975. Further, if the item is being imported as an exempt ESA antique, it must enter through one of the endangered species ports.

b. Export

Only Asian elephant items that are ESA exempt antiques are allowed to be exported for commercial purposes. An ESA export permit is not required if the ESA antiques exemption criteria are met, however a CITES pre-Convention Certificate for export is required (Form 3-200-23).

c. Foreign Commerce

Only foreign commerce in items qualifying as an ESA antique is allowed by persons subject to the jurisdiction of the US. All other foreign commerce in Asian elephant ivory is prohibited.

For what qualifies as foreign commerce, see below in the definitions section.

d. Inter-State trade

Only the sale of Asian elephant ivory that qualifies as ESA antiques is allowed across State lines. Although you do not need a permit from the US Fish and Wildlife Service to sell Asian elephant ivory ESA antiques across State lines, you do need to be prepared to provide appropriate documentation demonstrating that any ivory falls within the definition of an ESA antique to the Service if requested.

As with African elephant ivory, please note that some States have laws prohibiting or restricting the sale of Asian elephant ivory, and so you should ensure also that you are in compliance with State laws. This report considers the applicable laws in California, New York, New Jersey, Washington, Hawaii, and Oregon below.

e. Intra-State trade

If not otherwise prohibited under state law, Asian elephant ivory can be sold within your state if you can show that your ivory was lawfully imported prior to July 1, 1975, which is the date that the Asian elephant was listed on CITES Appendix I.

Although you do not need a permit, if you are offering for sale Asian ivory within the state you should be prepared to provide appropriate documentation to the US Fish and Wildlife Service, if requested.

As with African elephant ivory, please note that some States have laws prohibiting or restricting the sale of Asian elephant ivory, and so you should also ensure that you are in compliance with State laws.

4. Federal definitions

a. Raw v. Worked ivory

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9 You can find contact information for CITES offices at the following website: http://cites.org/eng/cms/index.php/component/cp
Raw ivory means an elephant tusk, or any piece of tusk, the surface of which, polished or unpolished, is unaltered or minimally carved, including ivory mounted on a stand or part of a trophy.

The term ‘worked items’ applies to anything that is not raw ivory, and includes carvings and components of larger finished products such as knife handles, billiard cues, musical instruments and furniture.

b. ESA Antique

In order to qualify as an ESA antique, the item must meet all of the following criteria, which the seller/importer/exporter must demonstrate:

A. It is 100 years or older.
B. It is composed in whole or in part of an ESA-listed species.
C. It has not been repaired or modified with any such species after December, 27, 1973.
D. It is being or was imported through an endangered species “antique port.”

As a matter of enforcement discretion, items imported prior to September 22, 1982, and items created in the US which have never been imported must comply with A-C, but not with D.16

There are 13 designated antique ports through which an item authorised to be imported/exported must travel through. These are: Boston, Massachusetts; New York, New York; Baltimore, Maryland, Philadelphia, Pennsylvania; Miami, Florida; San Juan, Puerto Rico; New Orleans, Louisiana; Houston, Texas; Los Angeles, California; San Francisco, California; Anchorage, Alaska, Honolulu, Hawaii; and Chicago, Illinois.

As set out above, items that qualify as ESA antiques can be sold in inter-State and foreign commerce without the need for an ESA permit. However, ESA antiques that are worked items only can be exported, with the necessary CITES documents. Note that no African elephant ivory items, even ESA antiques, can be imported into the US for commerce.

16 Director’s Order 210.
A person who is claiming the benefit of the antiques exemption has the burden of demonstrating that the item qualifies for exemption.11

Forensic testing is not required: provenance and age may be determined through detailing the history of the item, using, for example, family photos, ethnographic fieldwork, art history publications or other information that authenticates the work and assigns it to a period of time. Qualified appraisals can also be used.

c. De minimis

The de minimis exception is only available for worked items of African elephant ivory.

To qualify for the de minimis exception, manufactured or handcrafted items must meet (i) or (ii) and (iii) – (vii) of the following:

i. If the item is located within the United States, the ivory was imported into the United States prior to January 18, 1990, or was imported into the United States under a CITES pre-Convention certificate with no limitation on its commercial use; OR

ii. If the item is located outside the United States, the ivory was removed from the wild prior to February 26, 1976; AND

iii. The ivory is a fixed or integral component or components of a larger manufactured or handcrafted item and is not in its current form the primary source of the value of the item, that is, the ivory does not account for more than 50% of the value of the item;

iv. The ivory is not raw;

v. The manufactured or handcrafted item is not made wholly or primarily of ivory, that is, the ivory component or components do not account for more than 50% of the item by volume;

vi. The total weight of the ivory component or components is less than 200 grams; and

vii. The item was manufactured or handcrafted before July 6, 2016.

As set out above, if a worked African elephant ivory item meets the de minimis exemption, it can be traded inter-State and in foreign commerce.

According to government guidelines12, an item will be considered to be made wholly or primarily of ivory if the ivory component or components account for more than 50 percent of the item by volume. Likewise, if more than 50 percent of the value of an item is attributed to the ivory component or components, the ivory will be considered to be the primary source of the value of that item. A qualified appraisal is not required, but it or another method of documenting the relative value of the ivory can be used to demonstrate compliance with the criterium. Ivory components do not need to be removed from an item to be weighed.

A piece of ivory that weighs 200 grams is slightly larger than a cue ball. The 200-gram limit is therefore large enough to accommodate the white key veneers on an 88-key piano.13

Below are set out some examples of the types of items that may and may not qualify for the de minimis exemption as set out in guidance from the US Fish and Wildlife Service.14

Items that might qualify for the de minimis exemption include many musical instruments, for example those with ivory keys, bagpipes, or stringed instruments and bows that contain ivory parts or decorations. Knives or guns with ivory grips, certain household and decorative items, walking sticks with ivory canes and many furniture pieces with ivory inlay may qualify. However, note that an item must meet either (i) or (ii) AND (iii)-(vii) of the criteria set out above.

Items that are not likely to qualify include chess sets with ivory chess pieces because the ivory is likely to be the

11 Director’s Order 210, Appendix I.
13 Id.
primary source of value of the item; and ivory carving on a wooden base because again it is likely to be the primary source of value and it would likely be primarily made of ivory.

d. Foreign Commerce

Foreign commerce does not include import or export activities, but includes commerce between:

- persons within one foreign country, or in two or more foreign countries;
- a person within the US and a person in a foreign country; or
- persons within the US but the ivory item in question is moving in any country or countries outside the US.\(^\text{16}\)

**B. New York State Law\(^\text{16}\)**

In addition to compliance with federal laws, if you wish to trade ivory within New York, you also need to ensure that you comply with New York State laws. The relevant restrictions are provided in the New York Environmental Conservation Law, §11-0535-a (“NY ECL”)\(^\text{17}\), which came into effect in 2014. The restrictions applying to intra-State trade within NY are stricter than those under federal law.

The law prohibits the sale, offer for sale, purchase, trade, barter or distribution of elephant and mammoth ivory articles conducted wholly within New York State, with limited exceptions. The Department of Environmental Conservation (“DEC”) is authorised to issue licenses or permits to sell, offer for sale, purchase, trade, barter or distribute ivory articles that qualify as exceptions. DEC permits are valid for one year from the date of issuance.

Pursuant to New York law, raw ivory is defined as any elephant or mammoth tusk, including pieces of tusk or polished

\(\text{15}\) https://www.fws.gov/international/travel-and-trade/ivory-ban-questions-and-answers.html
\(\text{16}\) https://www.dec.ny.gov/docs/wildlife_pdf/ivoryfaqs.pdf
\(\text{17}\) https://www.nysenate.gov/legislation/laws/ENV/11-0535-A
items, which is unaltered or minimally carved. If an elephant or mammoth tusk does not meet this definition, then it is considered worked ivory. (Note that New York's ivory law also applies to objects made of or containing rhinoceros horn.)

Under the New York law, mammoth ivory is treated similarly to elephant ivory. This is so even though the mammoth, as an extinct species, is not regulated under the ESA. As it is sometimes difficult to distinguish between elephant ivory and mammoth ivory, the New York legislature determined that effective enforcement required elephant and mammoth ivory to be treated the same under the law.

### 1. Intra-State Trade

NY ECL prohibits the trade of ivory within New York (where both the buyer and the seller are in New York), subject to the following limited exceptions, which require a permit from the DEC:

- The ivory article comprises less than 20% of an antique that is at least 100 years old;
- The distribution or change in possession is for educational or scientific purposes, or to a museum chartered by the board of regents, or by special charter from the New York State Legislature;
- The distribution is to a legal beneficiary, heir or distribute of an estate; or
- The article is a museum instrument that contains ivory or horn and was manufactured prior to 1975.

The seller or person initiating the trade or distribution must obtain a DEC-issued permit and provide a copy to the purchaser. The buyer does not need a separate permit but must ensure that a valid permit has been procured for the transaction and secure a copy of it before taking possession. In addition, if the seller or person initiating the trade or distribution is located outside NYS and does not obtain a permit, the buyer has to obtain a DEC permit prior to the purchase.

In addition, a DEC permit is required to physically display ivory articles for sale in New York State. A DEC permit is also required for an ivory article offered for sale in New York via advertisement, catalogue or online.

With regard to consignment, the consignor of an ivory article does not need to obtain a license or permit to consign the ivory article to a consignee in New York State, but if the consignee offers the object for sale, the consignee must obtain a DEC licence or permit.

In applying for a permit, the applicant is required to demonstrate that the item qualifies for an exception. DEC will require substantive evidence establishing provenance and showing the age of the article or the ivory used in an article. Evidence that can be used includes US Customs records; import declarations and CITES permits; verifiable bills of sale or receipts; bona fide testing using scientifically approved aging methods by a laboratory or facility accredited to conduct such test; photographs or media articles dating the item; and other documentation that unequivocally establishes provenance, age, date of manufacture or species.\(^\text{18}\)

In addition, all applications for a permit must be accompanied by a photograph of the ivory article and a sworn affidavit from the applicant affirming that the affidavit is based upon personal knowledge as to the age of the article, validity of other required evidence and given under penalty of perjury.

a. 100 years old and 20% exception

In order to determine and to establish in your application whether the ivory in an object meets the less than 20% standard, DEC provides the following guidance\(^\text{19}\):

- "For antiques whose ivory includes one or more pieces of worked ivory attached to a body made of other material (such as a cane with an ivory handle or tip, buttons or pulls), evidence should be submitted as to the overall three-dimensional volume or weight of the ivory or horn piece(s) in relation to the overall three-dimensional volume or weight of the object.
- For antiques whose ivory consists primarily of thin slices inlaid into the surface, evidence should be submitted as to the surface area or volume of the inlays in relation to the overall surface area or volume of the object.
- A reasonable estimate of volume, weight or surface area is acceptable. Evidence may include pictures, calculations and other data.

\(^\text{18}\) [https://www.dec.ny.gov/permits/99792.html]
\(^\text{19}\) [https://www.dec.ny.gov/docs/wildlife_pdf/ivoryfaqs.pdf]
• For antiques that contain recent, non-original additions to the object, the new parts must be reasonably consistent with the original configuration of the antique as a whole. Non-original additions may not be considered in determining whether the object meets the 20% threshold for antiques to the extent that they reduce the proportion of ivory in the object. 20

Portrait miniatures, which were primarily made between the 18th century and early 20th century, using ivory as the medium for painting, are presumed to contain ivory less than 20% (intra-State) and 50% (inter-State) as appropriate.20 This is because the volume of ivory used in these portrait miniatures is approximately the same percentage for each one. This presumption is rebuttable by evidence to the contrary.

2. Inter-State Trade

As set out above, federal law prohibits inter-State sale of species listed in the ESA without a Federal ESA permit, with exceptions for items that qualify as antique and for items containing de minimis quantities of African elephant ivory. New York law, in concert with Federal law, limits inter-State sale, offer for sale, purchase or distribution of any ivory article conducted in part within New York State and in part in another state or foreign country to items that:

• Have a Federal ESA permit;
• Is an antique that
  □ Is 100 years or older
  □ Is composed in whole or in part of an ESA-listed species; and
  □ Has not been repaired or modified with any such species after December 27, 1973; or
• Contains only a de minimis quantity of ivory (African ivory only).

Inter-State sale under either of these exceptions also requires a DEC permit. Please see the Federal definitions section above for details on the de minimis exception pursuant to Federal Law.

C. California State Law21

California law imposes tighter restrictions than federal law on the intra-State sale of African and Asian elephant ivory. The ban on sale of tooth or tusk from elephants, whether raw or worked, with limited exceptions, can be found in California Fish and Game Code, section 2022, which came into effect on July 1, 2016.22 The ban also extends to tooth or tusk of hippopotamus, mammoth, mastodon, walrus, warthog, whale or narwhal, as well as rhinoceros horn.

Pursuant to this law, raw ivory cannot be purchased, sold or possessed with the intent to sell within California. Worked ivory that can be sold is limited to the following:

Activities expressly authorised by federal law, or federal exemptions or permits;
• Ivory that is part of a musical instrument manufactured before 1975 and that is less than 20% by volume of the instrument, if the owner or seller provides historical documentation demonstrating provenance and that the item was manufactured no later than 1975;
• Ivory that is part of a bona fide antique, with historical documentation demonstrating provenance and that the antique is at least 100 years old, provided that the item is less than 5% by volume; and

The purchase, sale, offer for sale, possession with intent to sell or importation with intent to sell ivory is for educational or scientific purposes by a bona fide educational or scientific institution, provided that it is not prohibited by federal law and that the ivory was legally acquired before January 1, 1991 and was not subsequently transferred for financial gain or profit after July 1, 2016.

California law also prohibits advertising the sale of any items containing ivory.

The law also provides that if you possess the ivory in a retail or wholesale outlet commonly used for trade, this is prima facie evidence of possession with intent to sell.

Sale of ivory in violation of the ban is a misdemeanor, punishable by a fine of up to $50,000 and one year in prison.

20 Id.
21 https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201520160AB96&showamends=false
22 https://cdfgnews.wordpress.com/2016/07/01/california-ivory-ban-now-in-effect/
Sword Scabbard (Japan). George Walter Vincent Smith Art Museum, Springfield, Massachusetts, USA. Photo by Daderot, December 2012. Creative Commons CC-Zero license, Creative Commons CC0 1.0 Universal Public Domain Dedication.
D. State laws in New Jersey, Oregon, Washington and Hawaii

Laws that have been enacted in several other States severely restricting trade in ivory are briefly noted below.

1. New Jersey

A 2016 law provides that no ivory may be sold in the State of New Jersey under its general endangered wildlife law. 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, except as provided pursuant to this section.” There are exceptions allowing possession of ivory that was lawfully possessed within the State prior to the effective date of the 2016 regulations. The exceptions to the New Jersey law are few and are enforced very strictly. There are four exceptions to the ban on ivory trade:

1. The ivory can be passed through inheritance.
2. Law enforcement activity is exempt from this law;
3. Ivory can be imported when expressly authorized by a federal license or permit; and,
4. The Department of Environmental Protection can authorize exemption from this rule for bona fide educational or scientific purposes.

NJSA § 23:2A-13.3(c)-(f).

If a person has a valid license or permit, New Jersey will allow ivory trade. However, intrastate trade is very difficult because requirements are strictly enforced.

Under the New Jersey Endangered and Nongame Species Conservation Act, an investigation or civil action could be commenced, and in addition to a civil administrative penalty of $25,000 for each violation (and each day during which each violation continues shall constitute an additional, separate, and distinct offense), the State could recover the costs of the investigation and of bringing a civil action. There are also penalties for making false and misleading statements, and criminal penalties for knowingly or recklessly violating.

The expanded 2016 statute adds, in addition to the above penalty, for a first offense, a fine of not less than $1,000 or an amount equal to two times the total value of the ivory, ivory products, rhinoceros horn, and rhinoceros horn products involved in the offense, whichever is greater. For a second offense, a fine of the greater of $5,000 or two times the value of the ivory or rhino horn item.

2. Oregon

Until 2016, Oregon endangered species laws previously covered only animals native to Oregon. However, the Wildlife Trafficking Prevention Act amended Oregon statute ORS 498.02226 to expressly prohibit the purchase of, sale of, offer for sale of or possession of with intent to sell a “covered animal species” part or product. The measure defines “covered animal species” to mean any species of elephant, rhinoceros, whale, tiger, lion, leopard, cheetah, jaguar, pangolin, sea turtle, ray and, with the exception of spiny dogfish, shark.

There are exceptions for (1) law enforcement activities, (2) activities otherwise expressly authorized by state or federal law, (3) activities involving federally managed fish, (4) certain antiques more than 100 years old, (5) certain fixed components of musical instruments, (6) transfers of ownership by inheritance, (7) certain donations for scientific or education purposes, and (8) covered animal species parts or products possessed by enrolled members of federally-recognized Indian tribes. The Oregon Fish and Wildlife Commission is also authorized to adopt additional rules, including prohibiting purchase/sale of parts “closely” resembling listed species parts.

Violation of the law can result in a civil penalty not to exceed $6,500 or an amount equal to two times the total value of the covered animal species part or product that is the subject of the violation, whichever is higher.

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23 NJSA, § 23:2a-13.3
24 NJSA § 23:2A-13.3(a)
25 NJSA, § 23:2A-6.1 et al
26 https://www.oregonlaws.org/ors/498.022
3. Washington State

The law makes it “unlawful for a person to sell, offer to sell, purchase, trade, barter for, or distribute any covered animal species part or product.” (This includes elephant ivory). There are six exceptions to the ban: 1) The ivory is not less than one hundred years old (antique), the owner has documentation proving the ivory is antique, and the ivory is not more than fifteen percent by volume of the antique item; 2) The ivory is used for bona fide educational or scientific purposes; 3) The ivory is part of an inheritance; 4) Law enforcement activity; 5) The ivory is part of a musical instrument and is not more than fifteen percent by volume of the instrument; and, 6) The trade of the ivory is expressly authorized by federal law or permit.

4. Hawaii

In 2016, Hawaii has added a new section 66 to chapter 183D of the Hawaii Revised Statutes. The law makes it illegal to “sell, offer to sell, purchase, trade, or possess with intent to sell” any part or product from elephants, rhinoceroses, or other numerous animal species listed in the law. Mammoth is deemed an endangered species, although extinct. Exceptions to the ban are available if the following criteria are met:

1. The covered animal species part or product is less than twenty per cent by volume of such an antique; and the covered animal species part or product is a fixed component or components of a larger manufactured item and is not, in its current form, the primary source of value of the item;

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27 Revised Code of Washington, Title 77, Chapter 77.15.
2. The distribution of the covered animal species part or product is for a bona fide educational or scientific purpose; or to or from a museum;

3. The distribution of the covered animal species part or product is to a legal beneficiary of an estate, trust, or other inheritance;

4. The covered animal species part or product is less than twenty per cent by volume of a gun, knife, or musical instrument, including without limitation string instruments and bows, wind and percussion instruments, and pianos, if the owner or seller provides historical documentation showing the item was manufactured no later than 1975 and the covered animal species part or product is a fixed component or components of a larger manufactured item and is not, in its current form, the primary source of value of the item;

5. The sale, offer for sale, purchase, trade, [possession] with intent to sell or barter of the covered animal species part or product is expressly authorized by federal law or permit; or

6. The activity is authorized under section 183D-6.

Hawaii law establishes a rebuttable presumption of possession with intent to sell a covered animal species part or product when the part or product is possessed by a retail or wholesale establishment or other forum engaged in the business of buying or selling similar items.

Hawaii law does provide an exemption for use of covered animal species for traditional cultural practices by Native Hawaiians that are expressly protected under Hawaii’s State Constitution.²⁹

²⁹ “The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua’a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.” Constitution of the State of Hawaii, article XII, § 7.
### III. SUMMARY TABLE – US RESTRICTIONS ON COMMERCIAL TRADE OF IVORY

**AFRICAN ELEPHANT**

<table>
<thead>
<tr>
<th>Inter-State</th>
<th>Federal</th>
<th>New York (NY)</th>
<th>California (CA)</th>
</tr>
</thead>
</table>
| **Inter-State** | • Inter-State sale is allowed only if the item:  
  - Qualifies as an ESA antique; or  
  - Contains a *de minimis* amount of ivory.  
  - ESA permit not required if meets exemptions but must be prepared to provide documentation to show that the item qualifies.  
  - Prohibited for sport-hunted trophies or items imported/exported as part of a household move or inheritance.  
  - Subject to relevant State and local laws. | • Trade partly conducted in NY (where buyer or seller is in another State) permitted across State lines for the following only:  
  - Ivory article with a Federal ESA permit;  
  - Ivory article that meets A-C of the ESA antiques exemption; or  
  - Contains a *de minimis* amount of ivory.  
  - DEC permit required, proof needed to apply for it:  
    • Sworn affidavit;  
    • ESA permit; or  
    • Documentation establishing age and provenance and repairs of an article; documented evidence that the article meets the federal *de minimis* criteria; and  
    • One or more photographs of the article. | • Federal rules apply. |
| **New York (NY)** |  | • Commercial intra-State trade (buyer and seller inside New York State) allowed only if the ivory article is:  
  - At least 100 years old;  
  - Contains less than 20% elephant ivory; and  
  - Has not been repaired or modified with any ESA-listed species after December 27, 1973.  
  - DEC permit required. Proof needed to obtain permit:  
    • Sworn affidavit;  
    • Historical documentation establishing provenance and showing the age of the article and any repairs;  
    • Reasonable estimate of volume, weight or surface area less than 20%; and  
    • One or more photographs of the article. |  |
| **California (CA)** |  | • Raw ivory and most worked ivory cannot be purchased, sold or possessed with the intent to sell, or advertised for sale in California, unless it meets one of the following exceptions:  
  - Activities expressly authorised by federal law, or federal exemptions or permits.  
  - Pre-1975 musical instrument, provided the item is less than 20% ivory by volume  
  • Bona fide antique that is at least 100 years old, provided that the item is less than 5% ivory by volume  
  • Bona fide educational or scientific purposes, provided not prohibited by federal law, ivory was legally required prior to January 1, 1991 and was not subsequently sold for financial gain after July 1, 2016. |  |
<table>
<thead>
<tr>
<th></th>
<th>AFRICAN ELEPHANT</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><strong>Foreign Commerce</strong></td>
</tr>
<tr>
<td>Federal</td>
<td>- Foreign commerce is allowed only if the item:</td>
</tr>
<tr>
<td></td>
<td>• Qualifies as an ESA antique; or</td>
</tr>
<tr>
<td></td>
<td>• Contains a de minimis amount of ivory.</td>
</tr>
<tr>
<td></td>
<td>- Prohibited for sport-hunted trophies or items imported/exported as part of a household move or inheritance.</td>
</tr>
<tr>
<td>New York (NY)</td>
<td>- Same rules as inter-State if partly conducted in NY and either the buyer or seller is in a foreign country.</td>
</tr>
<tr>
<td>California (CA)</td>
<td>- Federal rules apply.</td>
</tr>
<tr>
<td></td>
<td><strong>Export</strong></td>
</tr>
<tr>
<td>Federal</td>
<td>- Commercial export of raw ivory is prohibited.</td>
</tr>
<tr>
<td></td>
<td>- Commercial export of worked ivory is allowed if it qualifies as an ESA antique. CITES pre-Convention Certificate is required.</td>
</tr>
<tr>
<td>New York (NY)</td>
<td>- Federal rules apply.</td>
</tr>
<tr>
<td>California (CA)</td>
<td>- Federal rules apply.</td>
</tr>
<tr>
<td></td>
<td><strong>Import</strong></td>
</tr>
<tr>
<td></td>
<td>- All commercial import is prohibited.</td>
</tr>
<tr>
<td>New York (NY)</td>
<td>- Federal rules apply.</td>
</tr>
<tr>
<td>California (CA)</td>
<td>- Federal rules apply.</td>
</tr>
</tbody>
</table>

|                  | ASIAN ELEPHANT                                                                   |
|                  | **Inter-State**                                                                  |
| Federal          | - Inter-State sale is allowed only if the item qualifies as an ESA antique. Note the de minimis exemption does NOT apply to Asian elephant ivory. |
|                  | - ESA permit not required if qualifies for exemption but must be prepared to provide documentation to show that the item qualifies. |
|                  | - Subject to relevant State and local laws.                                      |
| New York (NY)    | - Same restrictions as applied to African elephant ivory, except that the de minimis exception does NOT apply. |
| California (CA)  | - Federal rules apply.                                                           |
### IV. EU / UK

#### A. Introduction

This section provides an overview of the EU legislation, how it applies and will apply post-Brexit transition period in the UK and the new Ivory Act passed by the UK government in 2018, which is one of the strictest bans on the trade of ivory in the world.

It remains legal to own ivory in the UK, however there are wide-ranging restrictions on the domestic trade, import and export of ivory. The current legal regime on the trade of ivory in the UK is still based on the EU Wildlife Trade Regulations of 1997 (the “EU Wildlife Trade Regulations”). However, it is due to be significantly restricted further when the recently passed Ivory Act 2018 (the “Ivory Act”) comes into force.

<table>
<thead>
<tr>
<th>ASIAN ELEPHANT</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Intra-State</strong></td>
</tr>
<tr>
<td><strong>Foreign Commerce</strong></td>
</tr>
<tr>
<td><strong>Export</strong></td>
</tr>
<tr>
<td><strong>Import</strong></td>
</tr>
</tbody>
</table>
The UK will be subject to the EU Wildlife Trade Regulations until 31 December 2020, which is the currently scheduled end-date for the Brexit transition period.30 The UK is a party to CITES in its own right, and will continue to be bound by the obligations of the Convention on exiting the EU. The UK will continue to comply with CITES upon its exit from the EU by converting the EU Wildlife Trade Regulations into a UK-specific regime pursuant to the powers set out in the European Union (Withdrawal) Bill. The EU Wildlife Trade Regulations will therefore be kept in UK law from January 1, 2021 with some changes: most significantly for the purposes of this article is that as the UK will become a third country with respect to the EU, therefore the EU rules on intra-EU trade will not be applicable and as detailed further below, CITES import/export documents will be required to move ivory specimens (where authorised) between the UK and the EU.31

In December 2018, the UK’s Ivory Act 2018 came into law, which, once it comes into effect, will apply to England and Wales, Scotland and Northern Ireland. The Ivory Act will come into force in accordance with regulations issued by the Secretary of State. Although it was expected to come into force by the end of 201932, it still has not come into force and the UK Government has not committed to a new commencement timeline.33

When the Ivory Act does come into force, it will exist alongside the EU Wildlife Trade Regulations, which will continue to also apply to the import and export of ivory to and from the UK.

This section will first look at the EU Wildlife Trade Regulations followed by an overview of the Ivory Act 2018. A summary table is provided at the end of this section comparing the legislative framework before and after the Ivory Act commences.

B. CITES and the EU Wildlife Trade Regulations

The EU Wildlife Trade Regulations34 implement the CITES Convention in the EU Member States, including the UK. The EU Wildlife Trade Regulations provide the general legal framework for intra-EU trade, as well as import, export and re-export of specimens of species listed in Annexes A-D. Annexes A-C generally correspond with Appendices I-III of CITES, but also include additional species not listed under CITES but that are regulated under EU law. For purposes of this article, Annex A is the most important as it lists all Appendix I species plus some Appendix II species, which therefore includes African and Asian elephant ivory. Member States may take additional, stricter national measures, which indeed the UK has done as further detailed below with the new Ivory Act. Like CITES, the EU Wildlife Trade Regulations cover all specimens of a species, alive or dead and including derivatives, except where exemptions are provided for.

Generally, the EU Wildlife Trade Regulations prohibit the trade within, to or from the EU for commercial purposes. However, the EU Wildlife Trade Regulations permit intra-EU trade, import and (re)-export of ivory for commercial purposes under specific limited circumstances.35

Although the EU Wildlife Trade Regulations are directly applicable in all EU Member States, enforcement provisions must be transported into national legislation. The enforcement provisions in the UK are implemented by the UK Control of Trade in Endangered Species (Enforcement) Regulations 1997 (COTES), pursuant to which it is an offence to sell, keep for sale, offer for sale, transport for sale, use for a commercial purpose, or purchase anything which claims to be made from a species in Annex A of the EU Wildlife Trade Regulations in violation of the EU Wildlife Trade Regulations.

1. Intra-EU Trade

This section details the restrictions on intra-EU trade of ivory, which the UK will be subject to until 31 December 2020.

Intra-EU Trade is authorised for ivory items that were imported into the EU before the relevant elephant species was added to Appendix I to CITES, namely, 18 January 1990 for African elephants and 1 July 1975 for Asian elephants.36

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Steve Oberholtzer, USFWS Special Agent in Charge, talking with reporters at Ivory Crush at Rocky Mountain Arsenal National Wildlife Refuge on November 14, 2013, Photo by Gavin Shire / USFWS, Creative Commons Attribution 2.0 Generic License.
Intra-EU commercial use in respect of such items is **only lawful** if accompanied by a certificate issued by the relevant EU Member State (an "**Article 10 Certificate**"). In the UK this is the UK Animal Plant and Health Authority ("**APHA**") and the Article 10 Certificate can be applied for using form FED1012.\(^{37}\) Commercial use includes use for commercial gain in any way; to keep for sale; offer for sale; transport for sale; and display to the public for commercial purposes.

Article 10 Certificates are usually transaction specific licenses to be used once when the item is sold. Once the transaction is complete, the transaction specific Article 10 Certificate must be returned to APHA for cancellation. A photocopy can be provided to the buyer as proof of legal acquisition. Specimen specific licenses can also be issued, which stay with a specimen for all transactions, but these are very unusual in the UK.

Worked specimens lawfully acquired before 3 March 1947 (50 years before the EU Wildlife Trade Regulations were passed) (known as pre-1947 antiques), can be traded in the EU without an Article 10 Certificate. The trader has a duty to demonstrate legality if requested.

EU Member States can also issue commercial Article 10 Certificates on a case by case basis for unworked pre-1947 items and some items worked post-1947. In the UK, strict measures are applied to issuing Article 10 Certificates to pre-Convention but non-antique items. The UK does not issue intra-EU certificates for commercial trade in raw ivory, and usually only issue Article 10 Certificates for small numbers of pre-Convention worked specimens such as violin bows, bagpipes and other musical instruments.\(^{38}\)

Worked specimens that were acquired more than 50 years before the EU Wildlife Trade Regulations were passed are defined as "specimens that were **significantly altered** from their natural raw state for jewellery, adornment, art, utility or musical instruments, **more than 50 years** before the entry into force of the Regulation, i.e. before 3 March 1947, and that have been, to the satisfaction of the management authority of the Member State concerned, **acquired in such conditions**" ("**Pre-1947 Antiques**"). [Article 2w] Worked specimens are often referred to as antiques, however, note that antiques acquired before 1947 that remain substantially unaltered from their natural state do not qualify as worked specimens under the EU Wildlife Trade Regulations (for example, pre-1947 elephant tusks mounted on a base).

In 2017, the EU Commission issued its latest non-binding guidance to Member States’ CITES Management Authorities


The guidance advises that where there are doubts as to whether a specimen qualifies as a Worked Specimen, a commercial certificate for intra-EU trade should be applied for.

The guidance notes that a specimen has to be shown to have been worked or manufactured prior to 3 March 1947 and that an item which was worked or reworked after 1947 would not meet this definition, even if the ivory could be dated to before 3 March 1947. The guidance gives an example: an ivory billiard ball that has been re-worked into a walking stick would not meet the derogation if it was re-worked in the 1960s into a walking stick, even if the ivory could be dated to pre-1947.

The purpose of the work or the alteration has to be clearly for jewellery, adornment, art, utility or musical instruments and the specimen should not require any further carving to effect its purpose. The guidance underlines that the worked specimen has to have been significantly altered from its natural raw state – polishing or fixing a specimen to another material (for example mounting an ivory tusk on a base) does not qualify the item as a Pre-1947 Antique.

Specifically, in relation to elephant ivory, the guidance says that "raw tusks or pieces of tusks whether or not attached to the skull, do not qualify as worked specimens." The tusk has to have been subject to "significant carving or engraving over at least 90% of its surface" to qualify as worked and "light carving, engraving or surface markings where the form of the tusk remains substantially the same as its natural wall state would not be deemed worked."

In general, Pre-1947 Antiques cannot be re-worked and must remain in their original worked state after 3 March 1947. However, the guidance acknowledges that some renovation may have been necessary and allows legitimate commercial activities involved in renovating antique items, provided it does not change the effect of the specimen as originally intended. Re-working using ivory acquired after 3 March 1947 would mean the item no longer qualified as a Pre-1947 Antique. If ivory is used to renovate, it must pre-date the species’ listing on the CITES Convention (27 February 1976 for African elephants and 1 July 1975 for Asian elephants).

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40 Id., para. 2.3.
41 Id., para 3.6.
42 Id.
43 Id., para. 4.0.
It is the owner or vendor’s responsibility to demonstrate that a particular item meets the definition of Pre-1947 Antique.\textsuperscript{44} The guidelines provide that evidence\textsuperscript{45} can be in the form of an expert verification of the age of the item and whether it qualifies as jewellery, adornment or art etc. An expert may be a person involved in the commercial use of the item, provided they have the relevant expertise. Evidence of provenance in the form of original dated receipts, bills of sale or dated newspaper articles with photographs or detailed descriptions of the specimen may also be acceptable proof of age. If the management authority (APHA in the UK) has doubts about the age or whether it is jewellery, adornment or art, etc., it may demand independent verification.

Note that Appendix 1 to the Guidance also provides helpful examples and photographs of items that would qualify / would not qualify as Pre-1947 Antiques.\textsuperscript{46}

2. Import

The EU generally prohibits the import of raw and worked ivory for commercial purposes.\textsuperscript{47} However, pre-1947 Antiques as defined above can be imported but require an import permit from the relevant EU Member State Management Authority (APHA in the UK) and a CITES pre-Convention export certificate from the exporting country.

The Management Authority, before issuing an import permit for pre-1947 Antiques must be satisfied that (a) the specimen was legally obtained in the country of origin, through the presentation of an export permit; and (b) there are no other conservation factors that prevent the issue of an import permit.\textsuperscript{48}

3. Export and Re-Export

Both a re-export certificate or export permit and an import permit from the country of destination are required for all authorised (re-)exports of ivory from the EU. Export is used to refer to specimens from species that are indigenous to the EU Member State or who were born in captivity in the EU Member State; whereas re-export is used to refer to specimens of species that were previously imported into the EU. Re-export is therefore most likely to apply to elephant ivory. In the UK, permits and certificates can be applied for from APHA.\textsuperscript{49}

\textsuperscript{44} Id., para. 5.1.
\textsuperscript{45} Id., section 5.
\textsuperscript{46} https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0517(02)&from=EN
\textsuperscript{48} Id., page 68.
\textsuperscript{49} https://www.gov.uk/government/publications/endangered-species-application-for-import-and-export-permit
Basket (Guangzhou, China), ivory, 1800-1815, Peabody Essex Museum, Salem, Massachusetts, USA, Photo by Daderot, January 28, 2020, Creative Commons CC0 1.0 Universal Public Domain Dedication.
In general, re-export of ivory out of the EU is prohibited, subject to limited exceptions.

Re-export from the EU is authorised (with relevant permits) for ivory specimens legally acquired before the date on which CITES became applicable to them ("Pre-Convention"); 27 February 1976 for African elephants and 1 July 1975 for Asian elephants, but require re-export certification.

However, the re-export of all raw ivory has effectively been suspended following guidance from the EU Commission issued on 17 May 2017, which recommended that re-export of pre-Convention raw ivory be suspended. The UK has a policy that bans the commercial trade in all raw ivory irrespective of age.

a. Pre-1947 Antiques and Pre-Convention items

(Re-)exportation of pre-1947 Antiques is authorised, subject to the acquisition of either an export permit or re-export certificate. Before the CITES Management Authority can issue an export permit / re-export certificate, it must be satisfied that there are no other factors relating to the conservation of the species which prevent issuance of the export permit. In applying for a permit, you must present evidence that:

(a) For exports, confirms that the specimens were acquired before 3 March 1947; or

(b) For re-exports, evidence that shows that the specimens were imported into the EU in accordance with the relevant regulations (i.e. with a Pre-1947 Antique import permit) or if the import occurred before 1984, in accordance with CITES or before the Convention became applicable to them (i.e. before 27 February 1976 for African elephants and 1 July 1975 for Asian elephants).

The Management Authority issuing the permit is not required to first check the import permit issued by the country of destination.

Pre-Convention items can also be re-exported subject to the issuance of a re-export certificate without sight of the import permit issued by the country of destination, subject to evidence that shows the specimen was acquired before the date on which CITES became applicable to them (i.e. before 27 February 1976 for African elephants and 1 July 1975 for Asian elephants).

With respect to worked ivory, the guidelines recommend that EU Member States’ CITES Management Authorities “exercise a high level of scrutiny in relation to applications for re-export of worked ivory”.

b. Evidence required for application of Article 10 Certificate or re-export certificate

It is the responsibility of the applicant to demonstrate that the conditions for the issuance of an Article 10 certificate or a re-export certificate have been met, in particular that the ivory specimens were legally acquired.

EU Member States Management Authorities are advised to take a risk-based approach on a case-by-case basis, taking into account the nature of the transaction in determining the type/quantity of evidence required.

Therefore, an applicant applying for an Article 10 Certificate, export permit or re-export certificate for pre-Convention non-antique items must demonstrate that the specimens were acquired before the date on which CITES became applicable to the items concerned. Such evidence can include the original CITES import permit, an Intra-EU trade certificate, results of radiocarbon dating/isotope analysis to determine age, independent expert opinion. Where such evidence is not available, applicants should be required to present a combination of other forms of evidence to demonstrate legal acquisition, for example original CITES export certificate, a receipt or invoice, deed of gift or inheritance, old photographs of the ivory item than can dated, hunting permit, letters newspaper articles, witness statement or affidavit from the owner. More detailed guidance from the EU Commission can be found in its May 2017 guidance on Intra-EU trade and re-export of raw ivory: https://ec.europa.eu/environment/cites/pdf/guidance_ivory.

51 Id., page 69.
52 Id.
53 Id., pages 69-70
55 Id.
56 Id.
Although this is directed at Member States, it provides a useful insight into what Management Authorities should require for the issuance of Article 10 or re-export certificates.

C. From 1 January 2021

From 1 January 2021, the UK will no longer be a part of the EU, and therefore the intra-EU trade rules will not apply to any trade between the UK and an EU Member State.

Thus, where import / (re-)export between the EU and a third country is authorised, the requirements as detailed in the paragraphs above will apply to imports and (re)-exports between the UK and an EU Member State, as well as a non-EU third country.

A designated port of entry will need to be used when trading with the EU, details of which can be found on the UK Government’s website: https://www.gov.uk/guidance/trading-cites-listed-species-through-uk-ports-and-airports-after-brexit.

D. The Ivory Act, 2018 - Introduction

As set out briefly above, the UK has introduced a new ban on the trade of ivory further restricting commercial activities in the form of the Ivory Act. The Ivory Act introduces additional controls to those set out in the EU Wildlife Trade Regulations and CITES, effectively prohibiting the commercial use of ‘worked’ or ‘antique’ ivory items irrespective of their age, subject to limited exceptions as set out below.

As also mentioned above, the Ivory Act will exist alongside the EU Wildlife Trade Regulations so even though the 1947 date-based restrictions will become obsolete in the UK, they do come into play when importing or exporting ivory. For example, if you wish to engage to sell a pre-1947 item of worked ivory to a third country following commencement of the Ivory Act, you will have to ensure both that it (a) falls into one of the Ivory Act exceptions; and (b) meets existing requirements under the EU Wildlife Trade Regulations on the import and export of ivory, obtaining the necessary CITES permits before commercial trade takes place.

The restrictions on displaying ivory for commercial purposes as provided for in the EU Wildlife Trade Regulations will also continue to apply. Note also that the Ivory Act addresses commercial activities concerning ivory, such that existing restrictions will continue to be applicable to non-commercial activities in ivory.

1. The Ivory Act - Prohibition

The Ivory Act imposes a total ban on dealing in ivory (s. 1), with very limited exceptions as set out in ss. 2, 6-9 of the Ivory Act. The ban will only cover elephant ivory, however the Ivory Act does provide that the definition of ivory can be amended to include ivory from any species through regulations by the appropriate national authority. It is worth noting too that in any proceedings brought under the Ivory Act, any material proved to be ivory from an animal will be presumed to be from an elephant unless proved otherwise. As such, if the prosecution proves the material under question is ivory, the burden of proof will then switch to the defendant to prove it is not elephant ivory.

Dealing is defined to include buying, selling, hiring ivory or offering (including advertisements) or arranging to do those activities; keeping ivory for sale or hire; exporting or importing ivory for sale or hire. The ban covers items made of ivory, but also those that have ivory in them (subject to the limited de minimis exception detailed below).

The Ivory Act creates an offense for breaching the ban or causing or facilitating a breach of the ban punishable by a fine or imprisonment ranging from 6 months to 5 years or both. To be guilty of an offense, the defendant must know or suspect, or ought to have known or suspected that the item is made of ivory or has ivory in it. The Ivory Act also sets out that it is a defense to prove that the defendant took all reasonable precautions and exercised all due diligence to avoid committing the offence.

2. The Ivory Act - Exemptions

There are five limited exemptions to the ban on dealing in ivory:

1. Items made of ivory or containing ivory that are pre-1918 and of “outstandingly high artistic, cultural or historical value.” The owner of such an item will have to apply for an exemption certificate. The online system of registration and application will be run by APHA – to qualify for this exemption, sellers will have
Female statuette, ivory, New Kingdom of Egypt (16th century BC – 11th century BC), Musée du Louvre, photo by Rama, Creative Commons Attribution-Share Alike 2.0 France, Wikimedia Commons
to register the item and pay a fee; APHA will then seek advice from an institution in the relevant field to determine whether the item meets the exemption. The Ivory Act provides that in considering whether an item is of outstandingly high artistic, cultural or historical value, the APHA must take account of the rarity of the item and the extent to which the item is an important example of its type. What this means in practical terms is not yet clear, but it is likely that the majority of antique worked ivory will not fall into this exemption given the relative value of the concepts of rarity and importance.58

2. Pre-1918 portrait miniatures with a surface area of no more than 320cm². The owner of such an item who wishes to deal in it will have to register the item with APHA and pay a fee.

3. Pre-1947 items with low ivory content: a pre-1947 item with ivory in it will be exempt if “all the ivory in the item is integral to it” and the volume of the ivory is less than 10% of the total volume of the material of which the item is made. The item will also have to be registered with APHA in order to qualify as an exempt item.

4. Pre-1975 musical instruments: A pre-1975 musical instrument containing ivory will be exempt if the ivory in the instrument is less than 20% of the total volume of the material of which the instrument is made. The item will have to be registered with APHA in order to qualify for the exemption.

5. Commercial activities between accredited museums: sales, loans and exchanges of items with ivory in it owned by an accredited museum to another accredited museums within the UK will be exempt. Accredited museums will also be allowed to sell to or buy from non-UK museums accredited by the International Council of Museums.

The Ivory Act is a further tightening of restrictions on the trade of African and Asian elephant ivory and will apply to the import and export of ivory to and from the UK alongside the EU Wildlife Trade Regulations. The new ban is very restrictive and one of, if not the, strongest in the world. The stated aim of the Ivory Act is to enhance the protection of both African and Asian elephant. While market participants, as well as the Government, overwhelmingly wish to prevent new ivory poaching, this new law is seen by some within the market as draconian and in actuality unlikely to have any positive impact on the reduction of illegal trade and poaching of ivory.59

The Ivory Act has been challenged in the court by the Friends of Antique Cultural Treasures (“FACT”)60, representing the interests of antique ivory dealers and collectors. FACT argued that the ban under the Ivory Act was, amongst other things, a disproportionate interference with the free movement of goods and antique dealers’ rights. The High Court dismissed the challenge, finding that, amongst other things, the ban was not disproportionate and that there were no equally effective measures to serve the stated objectives.

On appeal, the Court of Appeal handed down their judgement on 18 May 2020, upholding the High Court’s judgement that the trading bans are proportionate and lawful.61 The Court of Appeal found that there was no requirement for compensation for dealers and collectors in respect of the fall in value of their ivory antiquities because, amongst other reasons, those affected had been given some time by the government to realise the value of their ivory items (that is, to export / sell these items before the ban comes into effect). As of the date of this article, leave to appeal to the Supreme Court has not been filed.

59 https://www.theguardian.com/environment/2019/oct/13/uk-high-court-to-hear-challenge-to-total-ban-on-ivory-trading
62 Id.
XV. SUMMARY TABLE – EU/UK RESTRICTIONS ON COMMERCIAL TRADE OF IVORY

<table>
<thead>
<tr>
<th>Type of Trade</th>
<th>Current Regime – EU Wildlife Trade Regulations</th>
<th>After Ivory Act 2018 comes into force[a]</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Intra-EU Trade</strong></td>
<td>Until 31 December 2020</td>
<td>• Total ban on dealing in ivory in the UK, subject to limited exemptions:</td>
</tr>
<tr>
<td></td>
<td>• Intra-EU trade of Pre-1947 Antiques is authorised without an Article 10 Certificate.</td>
<td>• Items made of ivory or containing ivory that are pre-1918 and of “outstandingly high artistic, cultural or historical value” with a valid exemption certificate.</td>
</tr>
<tr>
<td></td>
<td>• Should be prepared to prove the item meets the Pre-1947 Antique criteria.</td>
<td>• Pre-1918 portrait miniatures with a surface area of no more than 320cm². Item has to be registered with APHA.</td>
</tr>
<tr>
<td></td>
<td>• Intra-EU trade of Pre-Convention worked ivory (imported into the EU before 18 January 1990 for African elephant ivory and 1 July 1975 for Asian elephant ivory) is authorised subject to issuance of Article 10 Certificate. Very rarely issued in the UK.</td>
<td>• Pre-1947 items with low ivory content. Item has to be registered with APHA.</td>
</tr>
<tr>
<td></td>
<td>• While technically intra-EU trade of Pre-Convention raw ivory authorised with Article 10 Certificate, these will not be issued by the UK.</td>
<td>• Pre-1975 musical instruments. Item has to be registered with APHA.</td>
</tr>
<tr>
<td></td>
<td>From 1 January 2021</td>
<td>• Commercial activities between accredited museums.</td>
</tr>
<tr>
<td></td>
<td>• N/A – the UK will no longer be a part of the EU, so the provisions on intra-EU trade are no longer applicable.</td>
<td>• Irrespective of when the Ivory Act comes into force, the Ivory Act takes precedence (although will exist alongside the EU Wildlife Trade Regulations).</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• <strong>Before 31 December 2020:</strong> If, when it comes into force the UK is still a member of the EU, Pre-Convention items with an Article 10 Certificate and Pre-1947 Antiques will not be authorised to trade between an EU country and the UK, unless the item can be shown to fall within one of the Ivory Act exemptions with any necessary certificates or registrations.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• <strong>From January 2021:</strong> If, when it comes into force, the UK is no longer a member of the EU, the Ivory Act provisions will apply to trade within the UK, and to import / export with an EU country (see below).</td>
</tr>
</tbody>
</table>

[a] As detailed above, although the Ivory Act 2018 has become law, it has not yet come into force. Although expected to have come into force at the end of 2019, there has been no further indication of when it will come into force.
<table>
<thead>
<tr>
<th>Type of Trade</th>
<th>Current Regime – EU Wildlife Trade Regulations</th>
<th>After Ivory Act 2018 comes into force$^4$</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Import</strong></td>
<td>Until 31 December 2020</td>
<td>• Total ban on import of ivory to the UK from a third country, subject to limited exemptions.</td>
</tr>
<tr>
<td></td>
<td>• Import of raw and worked ivory into the UK from a non-EU country prohibited.</td>
<td>• Must meet (i) one of the Ivory Act exemptions:</td>
</tr>
<tr>
<td></td>
<td>• Only Pre-1947 Antiques can be imported into the EU, with an import permit and a CITES pre-Convention export certificate from the exporting country.</td>
<td>• Items made of ivory or containing ivory that are pre-1918 and of “outstandingly high artistic, cultural or historical value” with a valid exemption certificate.</td>
</tr>
<tr>
<td></td>
<td><em>From 1 January 2021</em></td>
<td>• Pre-1918 portrait miniatures with a surface area of no more than 320cm². Item has to be registered with APHA.</td>
</tr>
<tr>
<td></td>
<td>• EU Member States will become a third country.</td>
<td>• Pre-1947 items with low ivory content. Item has to be registered with APHA.</td>
</tr>
<tr>
<td></td>
<td>• So import of raw and worked ivory from the EU or a non-EU country will be prohibited.</td>
<td>• Pre-1975 musical instruments. Item has to be registered with APHA.</td>
</tr>
<tr>
<td></td>
<td>• Only Pre-1947 Antiques will be able to be imported from the EU or a non-EU country, with an import permit and a CITES pre-Convention export certificate from the exporting country.</td>
<td>• Commercial activities between accredited museums.</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>AND</strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td>• (ii) the existing requirements under the EU Wildlife Trade Regulations on import: that is, it must be a Pre-1947 Antique, with an import permit and a CITES pre-Convention export certificate from the exporting country.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• The above will be the same whether or not the Ivory Act comes into force before 31 December 2020, subject to from 1 January 2021 EU Member States will be third countries in relation to the UK.</td>
</tr>
<tr>
<td>Type of Trade</td>
<td>Current Regime – EU Wildlife Trade Regulations</td>
<td>After Ivory Act 2018 comes into force&lt;sup&gt;64&lt;/sup&gt;</td>
</tr>
<tr>
<td>--------------</td>
<td>--------------------------------------------</td>
<td>-----------------------------------------------</td>
</tr>
</tbody>
</table>
| **(Re-)Export** | **Until 31 December 2020**  
- Re-export from the EU of raw ivory banned, irrespective of age.  
- (Re-)export of Pre-1947 Antiques authorised with issuance of export permit or re-export certificate and import permit from destination country.  
- (Re-)export of worked ivory legally acquired before 27 February 1976 for African elephants and 1 July 1975 for Asian elephants authorised with issuance of export permit or re-export certificate and import permit from destination country. |  
- Total ban on export of ivory from the UK to a third country, subject to limited exemptions.  
- Must (i) fall within one of the Ivory Act exemptions:  
  - Items made of ivory or containing ivory that are pre-1918 and of “outstandingly high artistic, cultural or historical value” with a valid exemption certificate.  
  - Pre-1918 portrait miniatures with a surface area of no more than 320cm². Item has to be registered with APHA.  
  - Pre-1947 items with low ivory content. Item has to be registered with APHA.  
  - Pre-1975 musical instruments. Item has to be registered with APHA.  
  - Commercial activities between accredited museums.  
  
  AND  
  - (ii) meet the existing requirements under the EU Wildlife Trade Regulations on export: that is, it must be a Pre-1947 Antique or worked ivory legally acquired before 27 February 1976 for African elephants and 1 July 1975 for Asian elephants, with an export permit and a CITES pre-Convention import permit from the destination country.  |
| | **From 1 January 2021**  
- Re-export from the UK of raw ivory will remain banned, irrespective of age.  
- (Re-)export of Pre-1947 Antiques to EU or non-EU country authorised with issuance of export permit or re-export certificate and import permit from destination country.  
- (Re-)export of worked ivory legally acquired before 27 February 1976 for African elephants and 1 July 1975 for Asian elephants to EU or non-EU country authorised with issuance of export permit or re-export certificate and import permit from destination country. |  
- The above will be the same whether or not the Ivory Act comes into force before 31 December 2020, subject to the fact that from 1 January 2021 EU Member States will be third countries in relation to the UK. |
VI. FURTHER RESOURCES

A. CITES

- Website: https://cites.org
- Information on national CITES authorities can be found here http://cites.org/eng/cms/index.php/component/cp

B. USA-Federal

Legislation:

- Director’s Order No. 210: https://www.fws.gov/policy/do210.html
- ESA: https://www.law.cornell.edu/uscode/text/16/chapter-35
- CITES implementing Code of Federal Regulations, Title 50, Part 23 https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=4660be00214e7753840ff6577803b165&ty=HTML&h=L&mc=true&n=pt50.9.23&PART#se50.9.23_113
FAQs and Guidance

- U.S. Fish and Wildlife Service:

Forms


C. New York

- FAQs: https://www.dec.ny.gov/docs/wildlife_pdf/ivoryfaqs.pdf
- Application for DEC Permit: https://www.dec.ny.gov/permits/99792.html

D. California

- Legislation: https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201520160AB96&showamends=false
Waist pendant plaque, Benin Kingdom court style, Edo peoples, Benin City, Nigeria, 18th century, ivory, Dallas Museum of Art, photo by Daderot, 7 May 2017, Creative Commons CC0 1.0 Universal Public Domain Dedication
E. EU

Legislation:


Guidance:

- European Commission Notice: Guidance on Worked Specimens under the EU Wildlife Trade Regulations (2017/C 154/07)

F. UK

Legislation:


FAQ and Guidelines:

- https://www.gov.uk/guidance/cites-imports-and-exports
- https://www.gov.uk/guidance/endangered-species-certificates-for-commercial-use

**Forms for CITES permit applications and Article 10 Certificates:**