

CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES
OF WILD FAUNA AND FLORA



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CONTROLS ON DOMESTIC TRADE IN SELECTED
APPENDIX I LISTED SPECIES

PART I: ELEPHANT IVORY

ANNEX: COUNTRY PROFILES
An analysis of Domestic Controls in nine countries

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¹ *The geographical designations employed in this document do not imply the expression of any opinion whatsoever on the part of the CITES Secretariat (or the United Nations Environment Programme) concerning the legal status of any country, territory, or area, or concerning the delimitation of its frontiers or boundaries. The responsibility for the contents of the document rests exclusively with its author.*

Controls on Domestic Trade in Selected Appendix I-Listed Species

Part I: Elephant Ivory

Annex: Country Profiles

An Analysis of Domestic Controls in Nine Countries

Prepared by the Environmental Law Institute for the CITES Secretariat

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Annex: Country Profiles

Following are the detailed profiles conducted of the following jurisdictions:

- China
 - o Hong Kong SAR
- European Union
- Japan
- Lao PDR
- Malaysia
- Philippines
- Thailand
- United States
- Viet Nam

Regulating Domestic Ivory Trade in China

I. Trade in Elephant Ivory in China

China has been a major market of ivory products, mainly for sale of finished products such as ivory carvings. China has, until recently, been the largest market for poached ivory worldwide and imports the vast majority of its raw ivory. Almost concurrently with the United States, which issued a ban on ivory trade in 2016, China also issued an outright ban on commercial processing and sale of ivory and ivory products, fully effective at the end of 2017.

In China, ivory carving is listed as one of its intangible cultural heritage. Use and consumption of ivory were mainly for luxury and cultural purposes. Consumer attitudes toward ivory consumption have shifted since the ivory ban the State Council issued in December 2016. Some consumers still demand ivory regardless of the ban due to cultural and religious importance. Such consumers are more concerned with the risks related to counterfeit ivory than the violation of the ban. Many Citizens, however, are conscious of the ban and the moral implications of the ivory trade. They reject ivory consumption because of personal beliefs and in order to abide by the comprehensive ban.

The main drivers for purchasing ivory are the beauty and rareness of the good, its high investment value as well as traditional beliefs. The main deterrents are the strong penalties associated with ivory purchase, as well as environmental concerns.

A. Demand Reduction Strategies

China has now implemented a comprehensive ban on the domestic ivory trade. The State Forestry Administration and the State Administration for Industry and Commerce have been charged with overseeing the implementation of the ban through the de-registration of ivory sellers. In 2017, the SFA published a list of nearly 200² ivory retailers that have ceased ivory related operations prior to the ban coming into effect on December 31, 2017.³

In addition to the ban and other laws regulating trade in wildlife products (see, for example, the Wild Animal Protection Law, revised in 2016), awareness raising and education have also been important parts of demand reduction in China. Regional forestry bureaus have made targeted efforts, such as in Guangdong and Guangxi, areas of relatively heavy trading and import of ivory products.⁴ The SFA has also worked with international and non-governmental organizations to promote and disseminate knowledge concerning China's ban and elephant conservation more broadly.

B. Online and Social Media Sales

Online and social media are becoming dominant platforms for monetary transactions in China.

Authorities have largely been effective in enforcing laws on ivory trade in the physical and online (web-based) markets. However, enforcement of social media trading (especially via mobile-phone apps such as WeChat) is much more challenging. Such activity can be difficult to monitor due to the rapid pace at which transactions move over social media, and because advertisers of ivory products frequently post the same item more than once in the course of a sale.

² 67 were shut down prior to March 31, 2017; an additional 105 were shut down prior to December 31, 2017.

³ State Forestry Administration, 权威发布: 国家林业局公告 (分期分批停止商业性加工销售象牙及制品活动的定点加工单位和定点销售场所名录) (2017), available at <http://www.forestry.gov.cn/main/72/content-960222.html>. (last accessed June 6, 2018).

⁴ STATE FORESTRY ADMINISTRATION, 权威发布: 国家林业局公告 (分期分批停止商业性加工销售象牙及制品活动的定点加工单位和定点销售场所名录) (2017), available at <http://www.forestry.gov.cn/main/72/content-960222.html>. (last accessed June 6, 2018).

China is currently in the process of drafting an e-commerce law⁵, which may address some of the enforcement challenges associated with online and social media-based ivory sales.

C. Price Comparisons

Since the ban was announced, many accredited dealers lowered the price of ivory products to sell off their stock before the ban came into effect.

II. Applicable Laws, Regulations and Other Legally Binding Instruments:

A. Policy Priorities

1. *Section 4 of Chapter 45 of the 13th Five Year Plan (2016-2020)*⁶
 - a. Chapter 45 of the 13th Five Year Plan covers biodiversity conservation. Section 4 of Chapter 45 states that the Chinese government will strengthen “regulation over the import and export of wild fauna and flora and crack down on the illegal trading of ivory and other wildlife products.”
 - b. The 13th Five Year Plan was adopted in March 2016 and will be in effect through 2020.

B. Administrative Notices

1. *State Council Notice on Ban on Sale of Ivory*⁷
 - a. Phased ban. The notice announced a ban on the processing and sale of ivory and ivory products by selected or designated organizations/businesses by March 31, 2017, to be determined by the State Forestry Administration (SFA), and a complete ban on all processing and sale of ivory and ivory products by December 31, 2017. The ivory processing units and dealers must apply to change and cancel their processing and dealership permits accordingly with the relevant industrial and commercial departments.⁸ The notice further directs the industrial and commercial departments not to accept applications for new establishments or change in status of commercial processing and sale of ivory and ivory products.
 - b. Transitional Assistance to Ivory Carving Artists/Practitioners. The cultural departments should assist representatives from the national and provincial intangible cultural heritage projects to preserve carving skills and techniques; encourage skilled masters to move into restoration work at museums and to use substitute materials. Nonprofit social and cultural groups and industry associations may engage in research and preservation of carving skills and techniques, but must not engage in commercial activities.
 - c. Strict Management of Legally Obtained Ivory and Ivory Products. The notice forbids the introduction of ivory and ivory products into the market, including on-line channels. Legally sourced ivory may be displayed at museums or at other noncommercial exhibitions, after being properly labeled according to law. They may be transported,

⁵ SECTION 4 OF CHAPTER 45 OF THE 13TH FIVE YEAR PLAN (2016-2020). 《电子商务法》 dianzi shangwu fa. Second draft was issued for public comment in November 2017.

⁶ ZHONGHUA RENMIN GONGHEGUO GUOMIN JINGJI HE SHEHUI FAZHAN, DI SHISANGE WUNIAN GUIHUA GANGYAO, (中华人民共和国国民经济和社会发展第十三个五年规划纲要) (THE 13TH FIVE YEAR PLAN FOR THE NATIONAL AND ECONOMIC SOCIAL DEVELOPMENT OF THE CHINA[13TH FIVE YEAR PLAN]), CHAP. 45, § 4, AT 90, (2016), available at <http://www.ndrc.gov.cn/zcfb/zcfbqhw/201603/P020160318573830195512.pdf> (last accessed Mar. 5, 2018). English translation available at <http://en.ndrc.gov.cn/newsrelease/201612/P020161207645765233498.pdf> (last accessed at Mar. 5, 2018).

⁷ GUOWUYUAN BANGGONG TING GUANYU YOU XU TINGZHI SHANGYE XING JIAGONG XIAOSHOU XIANGYA JI ZHIPIN HUODONG DE TONGZHI, (国务院办公厅关于有序停止商业性加工销售象牙及制品活动的通知) [ST. COUNCIL NOTICE ON BAN ON SALE OF IVORY] (Notice No. 103, issued on Dec. 29, 2016), available at http://www.gov.cn/qongbao/content/2017/content_5163456.htm (last accessed Mar. 5, 2018).

⁸ All processing facilities and dealers must register and receive a certificate in order to operate. GUOJIA LINYE JU GUOJIA GONGSHANG XINGZHENG GUANLI ZONGJU GONGGAO (国家林业局国家工商行政管理总局公告) [SFA AND STATE ADMIN. FOR INDUS. AND COM. (SAIC) PUB. NOTICE] (2004), available at http://www.forestry.gov.cn/portal/main/qovfile/13/qovfile_1081.html (last accessed Mar. 10, 2018).

- donated, and/or inherited according to law. Those legally sourced ivory and ivory products that have been determined to be cultural relics by a professional appraisal organization and which have obtained the necessary permits, may be auctioned under strict supervision.
- d. Enhanced enforcement and supervision. The notice instructs relevant government departments, including public security departments, customs, commercial and industry departments and state forestry departments to increase measures to enforce the ban.
 - e. The State Council announced the ban on December 30, 2016.
2. *List of Designated Processing Units and Dealers Subject to Phased Ban Issued by the SFA*⁹
 - a. This Notice identified 67 commercial ivory processing facilities and dealers to be closed by March 31, 2017, and another 105 to be closed by December 31, 2017. They must apply for change or cancellation of their registration with the industrial and commercial administrative department in a timely manner.
 - b. The Notice was issued on March 24, 2017.
 3. *State Administration for Industry and Commerce (SAIC) Notice on Enhanced Management of Ivory Processing Facilities and Dealers*¹⁰
 - a. The Notice instructs the departments for industry and commerce on the provincial and autonomous regions level, and for municipalities directly under the Central Government, to implement the State Council's Notice on Ban on Sale of Ivory by not accepting new applications for certificates to operate ivory processing and sales facilities.
 - b. The Notice instructs the departments to make an inventory as of end of 2016 of the total amount of ivory and rhinoceros horns within their management area and submit the information to the Office for the Protection of Endangered Species of Fauna and Flora (Office for the Protection of Endangered Species) within the SFA no later than April 10, 2017.
 - c. The Notice was issued on March 27, 2017.
 4. *SFA's Notice on the Cessation of Permits for Ivory Processing and Sales*¹¹
 - a. As of December 1, 2017, the SFA has stopped issuing administrative permits for processing and sale of ivory and ivory products.
 - b. The Notice was issued on November 21, 2017 and became effective on December 1, 2017.
 5. *Notice of SFA on the Implementation of the Wildlife Protection Law.*¹²
 - a. Notice of Supreme People's Court (SPC), Supreme People's Procuratorate (SPP), SFA, Public Security Bureau, and General Administration of Customs on Valuation of Terrestrial Wildlife in Criminal Cases.¹³

⁹ FENQI FENPI TINGZHI SHANGYE XING JIAGONG XIAOSHOU XIANGYA JI ZHIPIN HUODONG DE DINGDIAN JIAGONG DANWEI HE DINGDIAN XIASHOU CHANGSUO MINGLU (分期分批停止商业性加工销售象牙及制品活动的定点加工单位和定点销售场所名录) [LIST OF DESIGNATED PROCESSING UNITS AND DEALERS OF IVORY AND IVORY PRODUCTS SUBJECT TO PHASED BAN] (Notice No. 8, issued by SFA on Mar. 24, 2017), available at <http://www.forestry.gov.cn/main/4461/content-960596.html> (last accessed Mar. 10, 2018).

¹⁰ GUANYU ZHUANFA GONGSHANG ZONGJU BANGONG TING GUANYU DUI XIANGYA HE XIJIAO JI QI ZHIPIN JINGYING HUODONG JIAQIANG GUANLI DE TONGZHI (关于转发工商总局办公厅关于对象牙和犀角及其制品经营活动加强管理的通知) [PUBLICATION OF SAIC'S NOTICE ON ENHANCED MGMT. OF COM. ACTIVITIES RELATED TO IVORY AND RHINOCEROS HORNS AND RELATED PROD.] (Notice No. 14, issued by Fujian Provincial Admin. For Indus. and Com. on Apr. 5, 2017), available at http://www.fjaic.gov.cn/fjsqsj/zfxgk/gkml/201704/t20170412_239701.htm (last accessed Mar. 10, 2018) (attaching SAIC's Notice No. 62 issued on March 27, 2017).

¹¹ GUOJIA LINYE JU GONGBAO (国家林业局公告) [SFA PUB. NOTICE] (Notice No. 20, issued on Nov. 21, 2017), available at <http://zw.hainan.gov.cn/data/news/2017/11/81546/> (last accessed Mar. 12, 2018).

¹² GUOJIA LINYE JU GUANYU GUANCHE SHISHI "YESHENG DONGWU BAOHU" FA DE TONGZHI (国家林业局关于贯彻实施《野生动物保护法》的通知) [NOTICE OF SFA ON THE IMPLEMENTATION OF THE WILDLIFE PROTECTION LAW] (issued on Dec. 26, 2016), available at <http://www.forestry.gov.cn/main/3605/content-934950.html> (last accessed on Mar. 24, 2018).

¹³ ZUIGAO RENMIN FAYUAN, ZUIGAO REMIN JIANCHAIYUAN, GUOJIA LINYE JU, GONGAN BU, HAIGUAN ZONG SHU GUANYU POHUAI YESHENG DONGWU ZIYUAN XINGSHI ANJIAN ZHONG SHEJI DE CITES FULU I HE FULU II SUO LIE LU SHENG YESHENG DONGWU ZHIPIN JIAZHI HEDING WENTI DE TONGZHI (最高人民法院 最高人民检察院 国家林业局 公安部 海关总署关于破坏野生动物资源刑事案件中涉及的CITES附录I和附录II所列陆生野生动物制品价值核定问题的通知) [NOTICE OF SPC, SPP, SFA, PUB. SECURITY BUREAU, AND GEN. ADMIN. OF CUSTOMS ON VALUATION OF TERRESTRIAL

- b. The valuation of ivory and ivory products should be determined in accordance with the SFA's Notice on the Valuation of Ivory in Criminal Cases, No. 234, issued on June 13, 2001 (see **Error! Reference source not found.** below and **n.Error! Bookmark not defined.**).
6. *Joint Notice on the Prohibition of Sale of Precious Animals and Rare Plant and their Products in Port Areas*¹⁴
- a. The Notice reiterates the prohibition of sale of precious animals and rare plants that are listed as protected fauna and flora in Appendices I and II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and as protected wildlife under China's National Key Protected Wild Animals.
- b. The Notice prohibits the sale of such animals and plants and their products in the duty-free shops and other shops in quarantine areas at ports of entry and exit.
- c. The Notice directs the Customs and the industry and commerce administrative departments to strengthen the supervision and administration of these shops.
- d. The Notice was issued on August 19, 2002.
7. *SFA Notice on Valuation of Ivory in Criminal Cases*¹⁵
- a. The Notice recognizes that the Asian and African elephants are Class I nationally protected animals and that China prohibits the acquisition, transportation, sale and import and export of these animals and their products.
- b. To assist different departments in investigating and enforcing laws in cases involving illegal acquisition, transportation, sale, and import and export of ivory and ivory products, the SFA establishes the value for ivory as follows:
- i. An unprocessed elephant tusk is valued at 250,000 yuan;
 - ii. A carved ivory product from a single tusk is valued at 250,000 yuan;
 - iii. For an elephant tusk that has been cut into separate pieces or which has been processed into separate carved pieces, all the separate pieces are valued as a single tusk at 250,000 yuan;
 - iv. For those products that cannot be determined whether they come from one single tusk, the value will be set by weight at 41,667 yuan per kg; and
 - v. If the value determined herein is lower than the sales price, the sales price will govern.
 - vi. The notice was issued on June 13, 2001.
8. *Notice on the Investigation Criteria for Crimes relating to Forest and Terrestrial Animal Protection*¹⁶
- a. Forest security bureau has jurisdiction to investigate illegal purchase, transportation, and sale of rare and endangered wild animals, and the related products within their administration areas. Art. 1.

WILDLIFE IN CRIM. CASES] (Notice No. 239, issued on Sept. 17, 2012), available at <http://qfxwj.forestry.gov.cn/search/showdetail.do?id=2948&k=%25E8%25B1%25A1%25E7%2589%2599> (last accessed on Mar. 16, 2018).

¹⁴ GUOJIA BINGUAN BAN, HAIGUAN ZONG SHU, GUOJIA GONGSHANG ZONGJU GUANYU JINZHI ZAI CHURU JING KOU'AN GELI QU NEI SHANGDIAN BAI MAI ZHENGUI DONGWU HE ZHENXI ZHIWU JI QI ZHIPIN DE TONGZHI (国家濒危办、海关总署、国家工商总局关于禁止在出入境口岸隔离区内商店摆卖珍贵动物和珍稀植物及其制品的通知) [JOINT NOTICE ON THE PROHIBITION OF SALE OF PRECIOUS ANIMALS AND RARE PLANT AND THEIR PRODUCTS IN PORT AREAS] (Notice No. 53, issued by SFA Office for the Protection of Endangered Species, General Admin. Of Customs, and SAIC on Aug. 19, 2002), available at <http://qfxwj.forestry.gov.cn/search/showdetail.do?id=1063&k=%25E8%25B1%25A1%25E7%2589%2599>. (last accessed Mar. 16, 2018).

¹⁵ GUOJIA LINYE JU GUANYU FABU POHUAI YESHENG DONGWU ZIYUAN XINGSHI ANZHONG SHEJI ZOUSI DE XIANGYA JI QI ZHIPIN JIAZHI BIAOZHUN DI TONGZHI (国家林业局关于发布破坏野生动物资源刑事案件中涉及走私的象牙及其制品价值标准的通知) [SFA'S NOTICE ON VALUATION OF IVORY IN CRIM. CASES] (Notice No. 234, issued on June 13, 2001), available at <http://qfxwj.forestry.gov.cn/search/showdetail.do?id=1059&k=%25E8%25B1%25A1%25E7%2589%2599> (last accessed on Mar. 15, 2018).

¹⁶ GUOJIA LINYEJU GONG'ANBU GUANYU YINFA SENLIN HE LUSHENG YESHENG DONGWU XINGSHI ANJIAN GUANXIA JI LI'AN BIAOZHUN DE TONGZHI (国家林业局、公安部关于印发森林和陆生野生动物刑事案件管辖及立案标准的通知) [NOTICE ON THE INVESTIGATION CRITERIA FOR CRIMES RELATING TO FOREST AND TERRESTRIAL ANIMAL PROTECTION] (issued by SFA and National Pub. Security Bureau on May 9, 2001), available at <http://www.forestry.gov.cn/portal/ynb/s/4769/content-802378.html> (last accessed Apr. 9, 2018).

- b. Categorizes certain cases involving illegal purchase, transportation, and sale of protected animal products as major cases and especially serious cases as follows:
 - vii. Major cases where the value of the product is more than 100,000 yuan or the illegal profit is more than 50,000 yuan;
 - viii. Especially major cases where the value of the product is more than 200,000 yuan or the illegal profit is more than 100,000 yuan.

C. Legislation

1. *Article 341 of the Criminal Law of the People's Republic of China*¹⁷
 - a. Prohibits illegal purchases, transportation, or sales of rare and endangered wild animals under state key protection and their products.
 - b. Violators are subject to not more than five years of fixed-term imprisonment or criminal detention, and in addition, may be fined. In serious cases, violators may be sentenced to no less than five years and no more than 10 years of fixed-term imprisonment, and in addition may be fined. In especially serious cases, violators are to be sentenced to more than 10 years of fixed-term imprisonment, and in addition may be fined and subject to confiscation of their properties.¹⁸
2. *Standing Committee of National People's Congress (NPC) Interpretation of Criminal Law, art. 341 and 312*¹⁹
 - a. A person is in violation of Article 341 of the Criminal Law of China if he/she purchases an animal or an animal product, which he/she knows or should have known is a rare or endangered wild animal under key protection by the state or a product made from such an animal.
3. *Wildlife Protection Law*²⁰
 - a. Establishes state ownership of wildlife resources and state policy of protection of wildlife resources. Art. 3.
 - b. Authorizes the SFA to supervise the conservation of wildlife. Art. 7.
 - c. Places rare and endangered species of wild animals under priority protection, which are divided into Class I and Class II. Directs the relevant wildlife protection department under the State Council to determine the list of animals that are subject to priority protection. The list is to be updated every five years. Art. 10.²¹
 - d. Prohibits the sale, purchase, and use of priority protection animals and related products. Art. 27. Whoever violates this is subject to administrative enforcement by the relevant agencies and be subject to a fine of no less than two times and no more than ten times the value of the wild animal or their products and confiscation of all illegal income. If

¹⁷ XINGFA (《中华人民共和国刑法》) [CRIM. LAW] (1997), available at http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384075.htm (last accessed Mar. 16, 2018).

¹⁸ See *id.*

¹⁹ QUANGUO RENMIN DAIBIAO DAHUI CHANGWU WEIYUANHUI GUANYU "ZHONGHUA RENMIN GONGHEGUO XINGFA DE SANBAI SISHIYI TIAO, DI SANBAI YISHI'ER TIAO DE JIESHI (全国人民代表大会常务委员会关于《中华人民共和国刑法》第三百四十一条、第三百一十二条的解释) [STANDING COMM. NAT'L PEOPLE'S CONG. INTERPRETATION OF CRIM. LAW, ART. 341 AND 312] (issued Apr. 24, 2014), available at http://www.npc.gov.cn/npc/xinwen/2014-04/25/content_1861274.htm (last accessed Mar. 16, 2018).

²⁰ YUESHENG DONGWU BAOHU FA (《野生动物保护法》) [WILDLIFE PROTECTION LAW] (2017) available at http://www.npc.gov.cn/npc/xinwen/2016-07/04/content_1993249.htm (last accessed Mar. 16, 2018).

²¹ GUOJIA ZHONGDIAN BAOHU YESHENG DONGWU MINGLU (国家重点保护野生动物名录) [WILDLIFE PRIORITY PROTECTION LIST] (issued by SFA, Mar. 15, 2017), available at <http://www.forestry.gov.cn/main/3951/content-956751.html> (last accessed Mar. 16, 2018). The Asian elephant is listed for protection under Class I. In a 1993 notice issued by the SFA, the animals listed under CITES Appendices I and II, including the African elephant, are incorporated into China's wildlife priority protection. They enjoy the same protection that the animals on Wildlife Priority Protection List have. See LINYE BU GUANYU HEZHUN BUFEN BIN WEI YESHENG DONGWU WEI GUOJIA ZHONGDIAN BAOHU YESHENG DONGWU DE TONGZHI (林业部关于核准部分濒危野生动物为国家重点保护野生动物的通知) [NOTICE ON APPROVAL OF INCLUSION OF CERTAIN ENDANGERED SPECIES IN THE STATE PROTECTION LIST] (No. 48, issued by SFA Apr. 14, 1993), available at <http://aff.whu.edu.cn/riel/article.asp?id=1005> (last accessed Mar. 16, 2018).

- violation is a crime, the violator will be subject to criminal liability under the relevant law. Art. 48.
- e. The prohibition against sale, purchase and use of priority protection animals provides for exception for scientific research, artificial breeding, public display or performance, or cultural relics conservation or under other special circumstances. Exceptions need to have approval from the relevant departments and special labels must be obtained and used to demonstrate compliance. Art. 27. “The competent departments of wild animal conservation of the people’s governments at or above the county level shall supervise and administer the scientific research, artificial breeding, public display or performance, and other activities utilizing wild animals and their products.” Art. 34.
 - f. Prohibits online trading platforms, commodity trading markets, and other trading venues for the illegal sale, purchase or use of priority protection animals and related products. Art. 32. Whoever provides trading services in violation of this article is subject to an administrative order to stop the illegal act and to take corrective action; confiscation of all illegal income; and a fine of not less than two times and not more than five times the value of the illegal income, or if there is no illegal income, a fine of not less than 10,000 yuan and not more than 50,000 yuan. If the violation is criminally punishable, the offender shall be held criminally liable in accordance with the law. If the violation is a crime, the violator will be subject to criminal liability under the relevant law. Art. 51.
 - g. Provides for administrative liability for agencies failing to perform their duties. Art. 42.

D. Regulations

1. State Council Regulation on the Protection of Terrestrial Wild Animals²²

- a. Implements the Wildlife Protection Law.
- b. Prohibits the sale and purchase in trade markets of species of wildlife and their products that are under special protection by the State. Art. 26.
- c. Requires the wildlife administration and the department for industry and commerce at or above the county level to establish a supervision and inspection system over the business operation and utilization of wildlife or their products. Art. 27.
- d. Provides that anyone, who sells, purchases, transports, or carries wildlife under special protection by the State or such animal products, is subject to have the wildlife and products and any unlawful income obtained from them confiscated by the relevant department for industry and commerce or by the relevant wildlife administration, and is subject to a fine of no more than ten times the sales value of the animal and products. Art. 36.
- e. Provides for criminal prosecution for serious violations of the Wildlife Protection Law and Regulations. Art. 42.
- f. Authorizes SFA to determine how to deal with or dispose of animals and such animal products confiscated under the Wildlife Protection Law and Regulations. Art. 43.
- g. The SFA is responsible for the interpretation of these regulations. Art. 44

E. Judicial Interpretations

1. Judicial Interpretation of Applicable Laws in Criminal Cases relating to Damages to Wildlife Resources²³

- a. “Rare and endangered wild animals” in article 341 of the Criminal Law refers to animals listed as Class I and Class II animals under priority protection of the Chinese government and to animals listed for protection under Appendices I and II to CITES.²⁴

²² LU SHENG YESHENG DONGWU BAOHU SHISHI TIAOLI (陆生野生动物保护实施条例) [REGULATION ON PROTECTION OF TERRESTRIAL ANIMALS] (2016), available at <http://www.forestry.gov.cn/main/3950/content-459885.html> (last accessed Mar. 16, 2018).

²³ ZUIGAO RENMIN FAYUAN YUAN GUANYU SHENLI POHUAI YESHENG DONGWU ZIYUAN XINGSHI ANJIAN JUTI YINGYONG FALU WENTI DE JIESHI (最高人民法院原关于审理破坏野生动物资源刑事案件具体应用法律问题的解释) [JUDICIAL INTERPRETATION OF APPLICABLE LAWS IN CRIMINAL CASES RELATING TO DAMAGES TO WILDLIFE RESOURCES], (2000), available at www.forestry.gov.cn/portal/main/s/27/content-204747.html (last accessed on Mar. 19, 2018).

²⁴ CLASS I AND CLASS II NATIONAL PRIORITY PROTECTION LIST (2018), available at www.forestry.gov.cn/main/3954/content-959068.html. (last accessed June 6, 2018). See n.**Error! Bookmark not defined.** above.

- b. “Purchase” in article 341 includes a purchase made for purposes of making a profit or personal use. “Transportation” in article 341 includes methods of carrying, mail delivery, delivery by third party or other modes of transportation. “Sales” includes selling and processing and utilization for the purpose of making a profit.
- c. The following would be considered a “serious case” of illegal purchase, sale, and transportation of rare and endangered animal products:
 - i. The value of the product is more than 100,000 yuan;
 - ii. The illegal profit is more than 50,000 yuan; or
 - iii. Other serious factors.
- d. The following would be considered an “especially serious case” illegal purchase, sale, and transportation of rare and endangered animal products:
 - i. The value of the products is more than 200,000 yuan;
 - ii. The illegal profit is more than 100,000 yuan; or
 - iii. Other extremely serious factors.

F. Cases

1. Gong Su Yang Sheng, et al. (□□□□□) [People v. YANG Sheng, et al.], (Beijing Xicheng Dist. People’s Ct. Feb. 7, 2018).²⁵ This case involves the illegal sale and purchase of an ivory necklace via the social media app, Wechat, in July 2017. The prosecution claimed when the Defendant Yang, the seller, was arrested, he was in possession of 8,548 grams of ivory products, which he had planned to sell in Beijing through WeChat. Upon appraisal, the court determined that the value of the ivory products was RMB 356,169.50.²⁶ Defendant Yang was convicted of illegal sales of rare and endangered wild animal products, and the defendant FU was convicted of illegally purchasing rare, and endangered wild animal products under Criminal Law, art. 341. Defendant Yang was sentenced to prison term of 6 years and ordered to pay a fine of RMB 15,000.²⁷ Defendant FU was sentenced to a prison term of 6 months, with 1 year probation and a fine of RMB 1,000. The court also ordered the confiscation of the 42 items of ivory products found during the investigation and arrest.
2. Yuan Gong Su NIE Donghua et al. (□□□□□□□) [People v. NIE Donghua, et al.], (Zhejiang Provincial High Ct. Mar. 3, 2017).²⁸ This case is an appeal of a decision issued in Hangzhou Municipal Intermediate Court. Ten defendants were charged and convicted of smuggling ivory products into the country and selling them for a profit between 2013 and 2015. Five defendants appealed their conviction and sentence. The High Court affirmed the finding and judgment below. The court made the following findings and judgment relating to the illegal sale and purchase of ivory products that were smuggled into the country.
 - a. The court found the defendants guilty of illegal purchase and sale of ivory products because they knew or should have known the ivory products were illegally smuggled into the country.
 - b. Notably, the final judgment cited Article 341 of the Criminal Law²⁹, Interpretation of Several Issues related to Applicable Laws on Trial of Criminal Cases on Damaging Wild Animal Resources, Issued by the Supreme People’s Court (最高人民法院原关于审理破坏野生动物资源刑事案件具体应用法律问题的解释).³⁰ The final judgment further also cited to the Notice Co-Issued by the Supreme People’s Court, the Supreme People’s

²⁵ 京0102刑初98号, available at <http://wenshu.court.gov.cn/content/content?DocID=d4cc35c7-5644-4f1a-9865-a89700109873&KeyWord=象牙珍贵、濒危野生动物制品> (last accessed Mar. 20, 2018).

²⁶ While the court did not refer to the SFA Notice on Valuation of Ivory in Criminal Cases, discussed below, the court apparently applied the formula in that notice in determining the value of the confiscated ivory.

²⁷ According to the Judicial Interpretation of Applicable Laws in Criminal Cases relating to Damages to Wildlife Resources, the court might have considered this an extremely serious case because the confiscated ivory was determined to be more than 200,000 yuan. See **Error! Reference source not found.** In an extremely serious case, the sentence is more than ten year prison term. See **Error! Reference source not found.** However, in sentencing the seller to six years, the court considered as a mitigating factor the fact that the seller had not sold all of the ivory confiscated.

²⁸ 浙刑终504号 (2016), available at <http://wenshu.court.gov.cn/content/content?DocID=9393b505-cda7-4821-8913-a82b00a01418&KeyWord=濒危野生动物象牙> (last accessed Mar. 20, 2018).

²⁹ *Supra* n. 17

³⁰ *Supra* n. 19.

Procuratorate, the State Forestry Administration, the Ministry of Public Security, and the General Administration of Customs on Issues on Assessing the Value of Terrestrial Wild Animals and the Related Products Listed in Annex I and Annex II of CITES in Damaging Wild Animal Resources Criminal Cases (Bin Lin Fa [2012] No. 239) (《最高人民法院 最高人民检察院 国家林业局 公安部 海关总署关于破坏野生动物资源刑事案件中涉及的CITES附录 I 和附录 II 所列陆生野生动物制品价值核定问题的通知》林濒发 [2012]239号)³¹, and Notice on the Value Standards of Smuggled Ivory and Ivory Products in Criminal Cases of Damaging Wild Animal Resources (《国家林业局关于发布破坏野生动物资源刑事案件中涉及走私的象牙及其制品价值标准的通知》林濒发[2001]234号)³² in evaluating the value of the illegal ivory products traded.

- c. In addition, the court held that the Asian elephant and African Elephant are both national protected animals of the first grade (国家一级保护动物). Their ivory products, therefore, are ivory products of national protected animals of the first grade.
3. Gongsu Wu Peng [People v. Wu] (Guilin Intermediate Ct., Apr. 19, 2017), appeal denied, Guangxi High Ct. Dec. 8, 2017). Defendant found guilty of illegally transporting ivory valued at 1.5 million RMB.³³
4. Other Similar Cases
 - a. BIAN Jing's crime of illegal purchase, transportation and sale of rare, and endangered wild animal and rare and endangered wild animal products,³⁴ which cites the violation of Article 341 of the Criminal Law of China.
 - b. PENG Yunsong's crime of illegal transportation of rare, endangered wild animal products³⁵, which cites the violation of Article 341 of the Criminal Law of China.
 - c. ZHENG Wenjin's crime of illegal selling of rare, endangered wild animal products³⁶, which cites the violation of Article 341 of the Criminal Law of China.
 - d. HUANG Shixiong, HUANG Moujia's crime of illegal purchase, transportation, and sale of rare, endangered wild animal products,³⁷ which cites the violation of Article 341 of the Criminal Law of China.

³¹ *Supra* n. 13.

³² *Supra* n. 15.

³³ The judgment of the first (桂林市兴安县人民法院 (2015) 兴刑初字第150号刑事判决) and second instance (桂林市中级人民法院 (2016) 桂03刑终285号刑事裁定) cannot be found online, thus, the specific facts are not clear. The basic facts and judgments can be found through the two NOTICES OF DENY OF APPEAL ISSUED BY GUILIN INTERMEDIATE COURT ((2017) 桂03刑申4号) (available at [http://wenshu.court.gov.cn/content/content?DocID=de9ddf94-63b5-4a8e-82a0-a80e0136c52d&Keyword=桂林市中级人民法院\(2016\)桂03刑终285号刑事裁定](http://wenshu.court.gov.cn/content/content?DocID=de9ddf94-63b5-4a8e-82a0-a80e0136c52d&Keyword=桂林市中级人民法院(2016)桂03刑终285号刑事裁定), last accessed Feb. 23, 2018), and the HIGH COURT OF GUANGXI ZHUANG MINORITY GROUP AUTONOMOUS REGION ((2017) 桂刑申125号) (available at [http://wenshu.court.gov.cn/content/content?DocID=9edc68f7-0aa8-44e0-8b05-a85800bfd1be&Keyword=桂林市中级人民法院\(2016\)桂03刑终285号刑事裁定](http://wenshu.court.gov.cn/content/content?DocID=9edc68f7-0aa8-44e0-8b05-a85800bfd1be&Keyword=桂林市中级人民法院(2016)桂03刑终285号刑事裁定), last accessed Feb. 23, 2018).

³⁴ CRIMINAL TRIAL JUDGMENT OF THE FIRST INSTANCE ON BIAN JING'S ILLEGAL PURCHASE, TRANSPORTATION AND SALE OF RARE, AND ENDANGERED WILD ANIMAL AND RARE AND ENDANGERED WILD ANIMAL PRODUCTS (边静非法收购、运输、出售珍贵、濒危野生动物、野生动物制品罪一审刑事判决书) 内0102刑初34号 (2018), available at <http://wenshu.court.gov.cn/content/content?DocID=88126e91-b1bc-47a7-ac43-a89c00f91c09&Keyword=象牙珍贵、濒危野生动物制品>, (last accessed Mar. 19, 2018)

³⁵ CRIMINAL TRIAL JUDGMENT OF THE SECOND INSTANCE ON PENG YUNSONG'S ILLEGAL TRANSPORTATION OF RARE, ENDANGERED WILD ANIMAL PRODUCTS (彭云松非法运输珍贵、濒危野生动物制品案二审刑事判决书) 昆环保刑终字第3号 (2014), available at <http://wenshu.court.gov.cn/content/content?DocID=72e25f36-647e-4b21-a0c4-f533552b04b1&Keyword=濒危野生动物制品象牙>, (last accessed Mar. 19, 2018)

³⁶ CRIMINAL TRIAL JUDGMENT OF THE SECOND INSTANCE ON ZHENG WENJIN'S ILLEGAL TRANSPORTATION OF RARE, ENDANGERED WILD ANIMAL PRODUCTS (郑文锦非法出售珍贵、濒危野生动物制品案二审刑事判决书) 郑刑一终字第89号 (2015), available at <http://wenshu.court.gov.cn/content/content?DocID=6b5fe299-fa07-45cd-afe6-a7cc6fc331eb&Keyword=濒危野生动物制品象牙>, (last accessed Mar. 19, 2018).

³⁷ CRIMINAL TRIAL JUDGMENT ON THE SECOND INSTANCE ON HUANG SHIXIONG, HUANG MOUJIA'S ILLEGAL PURCHASE, TRANSPORTATION AND SALE OF RARE, ENDANGERED WILD ANIMAL PRODUCTS (黄诗雄、黄某甲非法收购、运输、出售珍贵、濒危野生动物制品案二审刑事判决书) 珠中法刑一终字第199号 (2015), available at <http://wenshu.court.gov.cn/content/content?DocID=e85cc9ad-eb3c-46ee-ab4b-77d804130d39&Keyword=濒危野生动物制品象牙> (last accessed Mar. 19, 2018).

- e. ZHENG Zhengquan's crime of illegal purchase, and sale of rare, endangered wild animal products,³⁸ which cites the violation of Article 341 of the Criminal Law of China.

III. Analysis

A. Legal Status

In December 2016, the State Council issued an announcement calling for a complete ban on the processing and sale of ivory and ivory products by December 31, 2017.³⁹ To implement this ban, the SFA identified 67 commercial ivory processing facilities and dealers that must close its ivory related operations by March 31, 2017, and another 105 processing facilities and dealers that must close its ivory related operations by December 31, 2017.⁴⁰ In addition, the SFA and the SAIC, which were responsible for registering and permitting such processing facilities and dealers,⁴¹ issued notices to the departments for industry and commerce on the provincial and autonomous regions level, and for municipalities directly under the Central Government, requiring them to implement the State Council's Notice on Ban on Sale of Ivory by not accepting new applications for registration of ivory processing and sales facilities.⁴²

In addition, the Wildlife Protection Law, which was revised in July 2016 and which became effective on January 1, 2017, specifically prohibits the sale, purchase, and use of animals that the government has designated as requiring priority protection and any such animal products.⁴³ The SFA has designated the Asian Elephant as an animal requiring priority protection.⁴⁴ The SFA has further announced that animals that are not native species but are listed in the appendices to the CITES, including the African Elephant, are considered state priority protection animals for the purpose of this law.⁴⁵ Thus, this law prohibits the sale, purchase, and use of ivory and ivory products.⁴⁶ Violators, who illegally sold, purchased, or used ivory, are subject to administrative enforcement

³⁸ *Criminal Trial Judgment of the second instance on Zheng Zhengquan's Illegal Purchase, Transportation and Sale of Rare, Endangered Wild Animal Products* (郑正权非法收购、出售珍贵、濒危野生动物制品案二审刑事判决书) 并刑终字第652号 (2015), available at <http://wenshu.court.gov.cn/content/content?DocID=b9e8f27b-24c3-44d6-b803-3f5ce044dbdf&KeyWord=濒危野生动物制品象牙> (last accessed Mar. 19, 2018).

³⁹ *St. Council Notice on Ban on Sale of Ivory, supra n.Error! Bookmark not defined.*. The ban provides for an exemption for certain ivory products that have been determined to be cultural relics, which may be auctioned. *Id.* The State Council is a tier below the National People's Congress on China's lawmaking hierarchy. However, it has the power to issue administrative measures, regulations, decision, and orders. See XIANFA, art. 89, § 1 (2004), http://www.npc.gov.cn/npc/xinwen/node_505.htm#43 (last accessed Mar. 9, 2018), English translation available at http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372967.htm (last accessed Mar. 9, 2018). The General Office of the State Council has the power, *inter alia*, to supervise State Council ministries and local governments in implementing State Council directives and to issue notices concerning the decision-making of state council leadership. See *id.* art. 89, § 3.

⁴⁰ *List of Designated Processing Units and Dealers of Ivory and Ivory Products Subject to Phased Ban, supra n.Error! Bookmark not defined.*

⁴¹ *SFA and SAIC Pub. Notice, supra n.Error! Bookmark not defined.*

⁴² *Publication of SAIC's Notice on Enhanced Mgmt. of Com. Activities Related to Ivory and Rhinoceros Horns and Related Prod. and SFA Pub. Notice No. 20, supra nn.Error! Bookmark not defined. and Error! Bookmark not defined., respectively.*

⁴³ WILDLIFE PROTECTION LAW, ART. 27, *supra n.Error! Bookmark not defined.* (2017). It provides an exemption for sale, purchase, and use for or scientific research, public display or performance, or cultural relic conservation, or for other special circumstances. See also Section **Error! Reference source not found.**, *infra*.

⁴⁴ WILDLIFE PRIORITY PROTECTION LIST, *supra n.Error! Bookmark not defined.*

⁴⁵ GUOJIA LINYE JU GUANYU GUANCHESHISHI "YESHENG DONGWU BAOHU" FA DE TONGZHI (国家林业局关于贯彻实施《野生动物保护法》的通知) [NOTICE OF SFA ON THE IMPLEMENTATION OF THE WILDLIFE PROTECTION LAW], para. 3 (issued on Dec. 26, 2016), available at <http://www.forestry.gov.cn/main/3605/content-934950.html> (last accessed on Mar. 24, 2018). The notice cites a 1993 notice issued by the SFA, which incorporates the animals listed under CITES Appendices I and II, including the African elephant, into China's wildlife priority protection lists. They enjoy the same protection that the animals on Wildlife Priority Protection List have. See Notice on Approval of Inclusion of Certain Endangered Species in the State Protection List, *supra n.Error! Bookmark not defined.*

⁴⁶ See Section **Error! Reference source not found.**, *infra*, for exemptions. Since the Wildlife Protection Law came into effect on January 1, 2017, unless the purchase, sale, and use of ivory fall under the exemptions, they would be strictly prohibited as of January 1, 2017. Recognizing that many of the regulations and rules on this matter may be inconsistent with the newly amended Wildlife Protection Law, however, the SFA issued an implementation notice, which provides that the permits issued before December 31, 2016, would remain in effect during the validity period. SFA Notice on the Implementation of the Wildlife Protection Law, para. 4(5), *supra n.Error! Bookmark not defined.* It presumably applied to permits for the sale, purchase, or use of ivory products that were issued prior to December 31, 2016. The SFA notice also provides that the sale, purchase and use of certain animals, including the elephants, and their products should be handled in accordance with regulations after the State Council has issued rules for the approval authorities. *Id.*, para. 4(4). At the same time this notice was issued, the State Council announced the ivory ban with the phased approach discussed above, with the complete ban to come into effect on December 31, 2017. In effect, the prohibition on the sale of ivory under the Wildlife Protection Law was not implemented until December 31, 2017.

and to a fine of no less than two times and no more than ten times the value of the ivory.⁴⁷ In addition, they are subject to forfeiture of all illegal income from such activities.⁴⁸ If the violation is a crime, the violator is subject to criminal liability under article 341 of the Criminal Law.⁴⁹

The Wildlife Protection Law also prohibits online trading platforms, commodity trading markets, and other trading venues for the illegal sale, purchase or use of ivory.⁵⁰ Whoever provides trading services in violation of this provision is subject to administrative enforcement; confiscation of all illegal income; and a fine of not less than two times and not more than five times the value of the illegal income, or if there is no illegal income, a fine of not less than 10,000 yuan and not more than 50,000 yuan.⁵¹ If the violation is a crime, the violator will be subject to criminal liability under the relevant laws.⁵²

Article 341 of the Criminal Law makes it a crime for anyone to illegally purchase, transport, or sell rare and endangered wild animals under state priority protection and their products.⁵³ Since 2000, the Supreme People's Court has interpreted "rare and endangered wild animals" to refer to animals listed as Class I and Class II animals under priority protection of the Chinese government, which includes Asian Elephant, and to animals listed for protection under Appendices I and II to CITES, including the African Elephant.⁵⁴ The Supreme People's Court interprets the term "purchase" to mean purchase made for purposes of making a profit or for personal use.⁵⁵ The Standing Committee of the National People's Congress further clarifies that a person is in violation of this article if he illegally purchases such an animal or animal product for eating or any other purpose, if he knew or should have known that the animal is a rare or endangered animal under priority protection or that the product is a product of such an animal.⁵⁶ The term "transport" includes methods of carrying, mail delivery, delivery by third party or other modes of transportation; and "sale" includes selling and processing and utilization for the purpose of making a profit.⁵⁷ The forestry security bureau has jurisdiction to investigate such crimes.⁵⁸

Punishment for the violation of article 341 is categorized by the seriousness of the crime. In serious cases, the defendant may be sentenced to no less than five years and no more than 10 years of imprisonment and may be fined.⁵⁹ A serious crime has occurred if the value of the product is more than 100,000 yuan; the illegal profit is more than 50,000 yuan, or if other serious factors exist.⁶⁰ In an extremely serious crime, the defendant may be sentenced to more than 10 years imprisonment and may be fined and subject to confiscation of their properties.⁶¹ An extremely serious crime has occurred if the value of the product is more than 200,000 yuan; the illegal profit

⁴⁷ WILDLIFE PROTECTION LAW, art. 48 (2017) *supra* n.**Error! Bookmark not defined.**; Regulation on Protection of Terrestrial Animals, art. 36, *supra* n.**Error! Bookmark not defined.**

⁴⁸ WILDLIFE PROTECTION LAW, art. 48 (2017) *supra* n.35.

⁴⁹ *Id.*; Regulation on Protection of Terrestrial Animals, art. 42, *supra* n.**Error! Bookmark not defined.** See also Criminal Law, art.341, *supra* n.**Error! Bookmark not defined.**

⁵⁰ WILDLIFE PROTECTION LAW, art. 32, (2017) *supra* n.**Error! Bookmark not defined.**

⁵¹ *Id.*, art. 51.

⁵² *Id.*

⁵³ CRIM. LAW, art.341, *supra* n.**Error! Bookmark not defined.**

⁵⁴ JUDICIAL INTERPRETATION OF APPLICABLE LAWS IN CRIMINAL CASES RELATING TO DAMAGES TO WILDLIFE RESOURCES, art. 1, *supra* n.**Error! Bookmark not defined.**

⁵⁵ *Id.*, art. 2.

⁵⁶ STANDING COMM. NAT'L PEOPLE'S CONG. INTERPRETATION OF CRIM. LAW, arts. 341 and 312, *supra* n.**Error! Bookmark not defined.**

⁵⁷ JUDICIAL INTERPRETATION OF APPLICABLE LAWS IN CRIMINAL CASES RELATING TO DAMAGES TO WILDLIFE RESOURCES, art. 2, *supra* n.**Error! Bookmark not defined.**

⁵⁸ NOTICE ON THE INVESTIGATION CRITERIA FOR CRIMES RELATING TO FOREST AND TERRESTRIAL ANIMAL PROTECTION, art. 1, *supra* n.**Error! Bookmark not defined.** The notice categorizes certain illegal sale, purchase, and use of priority protection animal products as major cases and especially major cases depending on the values of the products: Major cases where the value of the product is more than 100,000 yuan or the illegal profit is more than 50,000 yuan; and especially major cases where the value of the product is more than 200,000 yuan or the illegal profit is more than 100,000 yuan.

⁵⁹ CRIM. LAW, art. 341, *supra* n.**Error! Bookmark not defined.**

⁶⁰ JUDICIAL INTERPRETATION OF APPLICABLE LAWS IN CRIMINAL CASES RELATING TO DAMAGES TO WILDLIFE RESOURCES, art. 5, *supra* n.**Error! Bookmark not defined.**

⁶¹ CRIM. LAW, art. 341, *supra* n.**Error! Bookmark not defined.**

is more than 100,000 yuan, or if other extremely serious factors exist.⁶² In all other cases, the defendant may be sentenced to not more than five years of imprisonment or criminal detention, and may be fined.⁶³

The SFA has established the value of ivory or ivory products to assist in the investigation and prosecution of matters relating to illegal purchase and sale of such products:⁶⁴

- a. An unprocessed elephant tusk is valued at 250,000 yuan;
- b. A carved ivory product from a single tusk is valued at 250,000 yuan;
- c. For an elephant tusk that has been cut into separate pieces or which has been processed into separate carved pieces, all the separate pieces are valued as a single tusk at 250,000 yuan;
- d. For those products that cannot be determined whether they come from one single tusk, the value will be set by weight at 41,667 yuan per kg; and
- e. If the value determined pursuant to the above is lower than the sales price, the sales price will govern.

B. Treatment Based on Product

The ban covers all specimens including raw, unprocessed, semi-processed ivories, and full ivory products for commercial carving and trading.

While the State Council's December 2016 notice calls for a complete ban on the processing and sale of ivory and ivory products by December 31, 2017, it provides an exemption to this ban. Legally sourced ivory or ivory products that have been determined to be cultural relics by a professional appraisal organization and which have obtained the necessary permit may be auctioned under strict supervision.⁶⁵

Under the Wildlife Protection Law, as "rare and endangered animals," *both native and non-native species enjoy the same protection and control that the animals on Wildlife Priority Protection List have.*

C. Treatment Based on Transaction

There is no difference in control based on the actor involved. Article 27 of the Wildlife Protection law states whoever violates the ban is subject to administrative enforcement and be subject to a fine. The ban also covers all types of trades, including domestic online channels. Officials are having difficulties monitoring and tracking trades on social media. In order to address such difficulties in enforcement, China is currently in process of drafting an e-commerce law.

Furthermore, the Wildlife Protection Law provides exemptions to the prohibition against the sale, purchase, and use of ivory and ivory products. Such sale, purchase, and use are permitted for scientific research, artificial breeding, public display or performance, or cultural relic preservation or under other special circumstances.⁶⁶ The SFA is the authorized agency to review the application for the sale of certain animals, including elephants, and their products.⁶⁷

D. Registration

⁶² JUDICIAL INTERPRETATION OF APPLICABLE LAWS IN CRIMINAL CASES RELATING TO DAMAGES TO WILDLIFE RESOURCES, art. 5, *supra* n.**Error! Bookmark not defined.**

⁶³ CRIM. LAW, art. 341, *supra* n.**Error! Bookmark not defined.**

⁶⁴ SFA'S NOTICE ON VALUATION OF IVORY IN CRIM. CASES, *supra* n.**Error! Bookmark not defined.**; NOTICE OF SPC, SPP, SFA, PUB. SECURITY BUREAU AND GEN. ADMIN. OF CUSTOMS ON VALUATION OF TERRESTRIAL WILDLIFE IN CRIM. CASES, *supra* n.**Error! Bookmark not defined.**

⁶⁵ ST. COUNCIL NOTICE ON BAN ON SALE OF IVORY, *supra* n.**Error! Bookmark not defined.**

⁶⁶ WILDLIFE PROTECTION LAW, art. 27, *supra* n.**Error! Bookmark not defined.**

⁶⁷ GUOJIA LINYE JU GONGGAO (国家林业局公告) [SFA NOTICE] (2017) (accessed April 8, 2018).

China has a registration and marking system for the management and use of wildlife and their products since 2003.⁶⁸ For ivory, the SFA required that all ivory products must display a special mark “□□□□□□□□□□□□□□□□” before they can be sold, displayed, exhibited and permitted to be exported.⁶⁹

On October 31, 2016, SFA released draft “Measures on Management of Special Labels for National Priority Protection Territorial Wild Animal and the Related Products,” requesting comments from the public by November 30, 2016.⁷⁰ The draft measures propose to create a uniform special mark to be placed on state priority protection animal products to clearly identify them as legally sourced products. It is unclear whether SFA approved such measures in light of the announcement of the ivory ban by the State Council in December 2016.

E. Interpretation by the Courts

China has a civil law system, not a common law system. Cases do not have precedential value. However, the SPC selects and publicizes “guiding” and “typical” cases. While these cases do not have legal precedential effect, and courts do not cite to them as a source of law, they, especially the “guiding” cases, have very important reference value. According to SPC’s Case Guidance Rules, in the process of handling a case, a judge should consult relevant guiding cases and when quoting from a guiding case, the judge should reference the key points of the guiding case.⁷¹ The SPC has not issued any “guiding” cases relating to the sale of ivory or ivory products. We conducted a case search on the China Judgments Online (□□□□□□□□), at www.wenshu.gourt.gov.cn, which is an official judgment database site maintained by the SPC, for cases related to sale of ivory, but because the search engine is not very sophisticated, we found 610 results from the year 2012 to 2018. We selected a few of the cases, which have the typical fact patterns and demonstrated how courts handle such cases.

F. Additional Notes

Since the ban on ivory sale within China came into full effect, the SFA has engaged in several high profile enforcement actions that were reported in the media:

- a. Yunnan Branch Office of Endangered Species Import and Export Management Office of State Forestry Administration supervised and checked the status of clearing Yunnan Provincial ivory and ivory products on January 3, 2018.⁷² This activity was conducted by an investigation team lead by Yunnan Provincial Forestry Bureau, composed of public safety bureau, forestry bureau, transportation bureau, and cultural and sports bureau of provincial, municipal, and prefectural levels. The inspection team conducted on-site investigation at two major markets that involves ivory trade. The inspection unit also sealed and confiscated ivory products that are unsold, took back the sales license previously issued by SFA and State Administration for Industry and Commerce. At the same time, some other members of the investigation team

⁶⁸ XINBAN YESHENG DONGWU JINGYING LIYONG GUANLI ZHUANYONG BIAOZHIZHUYONG (新版野生动物经营利用管理专用标识启用) [LAUNCH OF NEW WILDLIFE MANAGEMENT AND UTILIZATION MANAGEMENT LOGO] (notice issued by SFA, May 5, 2015), available at <http://www.forestry.gov.cn/zrbh/1492/content-763636.html> (last accessed Mar. 23, 2018). See also, GUOJIA LINYE JU GUANYU JINYIBU JIAQIANG XIANGYA JI QI ZHIPIN GUIDAN GUANLI DE TONGZHI (国家林业局关于进一步加强象牙及其制品规范管理的通知) [NOTICE ON STRENGTHENING MANAGEMENT OF IVORY] (Notice No. 258 issued by the SFA, Dec. 16, 2008), available at <http://qfkwj.forestry.gov.cn/search/showdetail.do?id=863&k=%25E9%2587%258E%25E7%2594%259F%25E5%258A%25A8%25E7%2589%25A9%25E6%25A0%2587%25E8%25AF%2586%2520%25E9%2587%258E%25E7%2594%259F%25E5%258A%25A8%25E7%2589%25A9%2520%25E9%2587%258E%25E7%2594%259F%2520%25E7%2594%259F%25E5%258A%25A8%2520%25E5%258A%25A8%25E7%2589%25A9%2520%25E6%25A0%2587%25E8%25AF%2586> (last accessed Mar. 23, 2018), repealed by Guojia Linye Ju Guanyu Feizhi Bufen Guifan Xing Wenjian de Tongzhi (国家林业局关于废止部分规范性文件的通知) [Notice of Repeal] (Notice No. 129 issued by SFA, Dec. 5, 2017).

⁶⁹ NOTICE ON STRENGTHENING MANAGEMENT OF IVORY, para. 5, *supra* n. **Error! Bookmark not defined.** Even though this notice has been repealed right before the ivory ban came into full effect, it appears that mark would still be required.

⁷⁰ GUOJIA ZHONGDIAN BAOHU LUSHENG YESHENG DONGWU JIQI ZHIPIN ZHUANYONG BIAOSHI GUANLI BANFA (ZHENGQIU YIJIAN GAO) ZHENGQIU YIJIAN DE TONGZHI (国家林业局关于《国家重点保护陆生野生动物及其制品专用标识管理办法》(征求意见稿)公开征求意见的通知) [NOTICE FOR COMMENT ON SPECIAL LABELS REQUIRED TO BE DISPLAYED ON NATIONAL PRIORITIZED PROTECTION TERRITORIAL WILD ANIMAL AND THE RELATED PRODUCTS], (issued by the SFA Oct. 31, 2016), available at <http://zqyj.chinalaw.gov.cn/draft/Notice?DraftID=1405>. The draft measures are available at <http://zqyj.chinalaw.gov.cn/readmore?listType=2&id=1405> (last accessed on Mar. 23, 2018).

⁷¹ ZUIGAO RENMIN FAYUAN GUANYU ANLI ZHIDAO GONGZUO DE GUIDING, SHISHI XIZE (最高人民法院关于案例指导工作的规定, 实施细则) [SPC’S CASE GUIDANCE RULES] (2015), art. 11, available at <http://www.lawinfochina.com/display.aspx?id=19290&lib=law> (last accessed on Mar. 20, 2018).

⁷² Yunnan Branch Office of Endangered Species Import and Export Management Office of State Forestry Administration supervised and checked the status of clearing Yunnan Provincial ivory and ivory products (《国家濒危办云南省办事处对云南省象牙及制品清理检查工作进展督办》) (2018), available at www.forestry.gov.cn/portal/hljbs/4976/content-1076665.html, (last accessed February 18, 2018)

Regulating Domestic Ivory Trade in Hong Kong SAR

I. Trade in Elephant Ivory in Hong Kong SAR

A. Factual/Contextual Questions

1. *Who uses the ivory and for which purposes?*

Due to its geography and nature as a free port, Hong Kong SAR has been a transit and smuggling hub for both legal and illegal elephant ivory. Hence, a large part of Hong Kong SAR raw ivory consumers purportedly consist of buyers from mainland China and tourists returning home with ivory souvenirs. Raw ivory in the city has been used for carvings to produce tax-free luxury goods such as antique ornamental figures or carved tusks, jewelry, mahjong and name seals, or more common household items such as chopsticks and letter openers. Consumers of ivory have given a variety of reasons for their purchase including cultural importance as well as practical economic purposes.

2. *Have demand reduction strategies been deployed?*

Large scale public awareness and education campaigns have been initiated as part of demand reduction strategies. For example, in 2013, the Agriculture, Fisheries and Conservation Department (AFCD) launched an “Endangered Species Specimen Donation Programme,” which donated specimens of endangered species to about 130 schools for storing or displaying purposes to educate children about conservation.⁷⁹ Against this backdrop, public cultural movement against loopholes of previous control on ivory trade has been a significant force creating the momentum toward demand reduction as well as the ban.

3. *What are recent trends in the market (price, volume traded)?*

There are significant differences in market prices even for relatively homogenous items depending on the quality and the age of the ivory.

The Census and Statistics Department does not have statistics on the local trade in ivory or ivory products. The Agriculture, Fisheries and Conservation Department (AFCD) conducted an ivory trade survey from February to April 2016. The results of the survey revealed that the local ivory trade is inactive.

At the end of 2016, about 75 tonnes of Post-Convention ivory were registered under Licenses to Possess for domestic commercial purposes.⁸⁰ Physical market survey also shows that ivory continues to be readily available in Hong Kong SAR; however, the vast majority of ivory retail outlets have supplemented their operations by selling a range of other goods.

II. Enumeration of Applicable Laws, Regulations, and Other Legally Binding Instruments

1. *Protection of Endangered Species of Animals and Plants Ordinance (Cap. 586/2006)*⁸¹

- a. A local legislation adopted for the first time in 1976 to give effect to CITES. Revised regularly according to CITES latest requirements. Cap. 586 adopted in December 2006.

⁷⁹ AFCD ENDANGERED SPECIES ADVISORY COMMITTEE, CONFIRMED MINUTES OF MEETING (February 2013), available at http://www.afcd.gov.hk/textonly/english/aboutus/abt_adv/files/Minutes_of_meeting_130201Eng.pdf (last accessed April 11, 2018).

⁸⁰ *Id.*

⁸¹ PROTECTION OF ENDANGERED SPECIES OF ANIMALS AND PLANTS ORDINANCE CAP. (2006), available at https://www.ecolex.org/details/legislation/protection-of-endangered-species-of-animals-and-plants-ordinance-chapter-586-lex-faoc090260/?q=hong+kong+wildlife&type=legislation&xdate_min=&xdate_max= (last accessed Apr. 2, 2018).

- b. Regulates the international import, introduction from the sea, export, re-export, and possession or control of certain endangered species, whether alive or not, and parts and derivatives of those species.
 - i. A license from the Agriculture, Fisheries and Conservation Department must be obtained in advance for import, introduction from the sea, export, re-export, or possession or control of a specimen of a scheduled species.
 - c. Distinction of treatment for pre- and post-convention ivory (Pre-/Post- 1990)
 - i. Pre-convention Ivory
 - 1. Pre-convention ivory acquired before the international trade ban in 1990 were required to register with the Agriculture, Fisheries and Conservation Department (then Agriculture and Fisheries Department).
 - 2. No License to Possess is required for Pre-Convention ivory whether for commercial purposes or non-commercial.
 - ii. Post-Convention Ivory
 - 1. Possession of Post-Convention ivory for commercial purposes (domestic trade/business) requires a License to Possess. (PL)
2. *Protection of Endangered Species of Animals and Plants (Exemption for Appendix I Species) Order (Cap. 586 sub. leg. A)*⁸²
- a. Adopted in December 1, 2006 as a subsidiary legislation under Cap. 586/2006.
 - b. States exemptions for Appendix I species. Such exemptions include import, possession or control of specimens for conservation programmes and scientific and educational purposes as well as import, export, re-export possession or control of specimens used for non-commercial, personal or household purposes.
3. *Protection of Endangered Species of Animals and Plants (Exemption for Appendix II and III Species) Order (Cap. 586 sub. leg. B)*⁸³
- a. Adopted in December 1, 2006 as a subsidiary legislation under Cap. 586/2006
 - b. States exemptions for Appendices II and III species. Such exemptions include import, possession or control of specimens used for conservation programmes and scientific and educational purposes, import, export, re-export, possession or control of specimens used for personal or household purposes, as well as export or re-export of personal or household items acquired pre-Convention.
4. *Protection of Endangered Species of Animals and Plants (Amendment) Ordinance 2018 (Bill 2017)*⁸⁴
- a. Bill passed on Jan. 31st, 2018; With immediate effect, implementation comes into three stages:
 - i. Stage 1: Ban the import and re-export of all elephant hunting trophies and those remaining post-Convention ivory items, the import, export and re-export of which are permissible under CITES which are limited to specific and stringent

⁸² PROTECTION OF ENDANGERED SPECIES OF ANIMALS AND PLANTS (EXEMPTION FOR APPENDIX I SPECIES) Order, L.N. (2006), available at <https://www.elegislation.gov.hk/hk/cap586A!en?pmc=1&m=1&pm=0> (last accessed Apr. 3, 2018).

⁸³ DEPARTMENT OF JUSTICE, *Protection of Endangered Species of Animals and Plants (Exemption for Appendices II and III Species) Order*, L.N. 206/2006, Format changes 1/2015, available at <https://www.elegislation.gov.hk/hk/cap586B!en?pmc=1&m=1&pm=0> (last accessed Apr. 3, 2018).

⁸⁴ LEGISLATIVE COUNCIL, *Protection of Endangered Species of Animals and Plants (Amendment) Ordinance 2018 Ord. No. 7/2018*, available at <https://www.legco.gov.hk/yr17-18/english/ord/2018ord007-e.pdf> (last accessed Apr. 3, 2018).

- circumstances including scientific studies, education, law enforcement and personal or household effects.
- ii. Stage 2: Ban the import and re-export of pre-Convention ivory (save for antique ivory) and subject the commercial possession of pre-Convention ivory (save for antique ivory) in the local market to licensing control similar to the existing control on Post-Convention ivory. This stage will start in May 2018, 3 months after the law comes into effect.
 - iii. Stage 3: Ban the possession for commercial purposes of all ivory (save for antique ivory) including Pre-Convention ivory and Post-Convention ivory by restricting the issue, etc. of a License to Possess to only cases of exceptional circumstances. After implementation of this step, the local trade of all ivory (save for antique ivory) will be completely closed down. The total ban will take effect on December 31, 2021, which will have provided a grace period from the Government's announcement plan on December 21, 2016.
- b. Amendments to Cap. 586 to enhance regulation on import and re-export of elephant ivory and elephant hunting trophies, phase out the local ivory trade, and increase the penalties to provide a stronger deterrent.
 - i. Higher fines and penalties
 - ii. Added special provisions for elephant hunting trophies and elephant ivory; subject to schedule 4, Stricter Regulation of Elephant Hunting Trophies and Elephant Ivory.

III. Analysis

A. Legal Status

1. *Is domestic trade legal, completely banned, or partially banned?*

- a. Under Cap 586, domestic trade/business of pre-Convention ivory is allowed without license, while domestic commercial use of post-Convention ivory is partially banned unless it has license to possess.
- b. The second stage of Bill 2017 partially bans domestic trade of pre-Convention ivory, integrating a licensing practice similar to the existing license to possess requirement on post-Convention ivory under Cap 586. In addition, any new application for a license to possess, hence new attempt to register for domestic trade of post-Convention ivory, will not be approved, expanding the existing partial ban on domestic commercial use of post-Convention ivory.

2. *What penalties/deterrence exists?*

- a. The Bill 2017 increased penalties and deterrence from those under Cap 586.

For import, export, introduction from the sea, re-export, and possession or control of specimens of Appendix I species will result in a HK\$5,000,000 fine and imprisonment for 2 years on summary of conviction as well as HK\$10,000,000 fine and imprisonment for 10 years on conviction on indictment. For import, export, introduction from sea, re-export, and possession or control of specimens of Appendix II species will result in a fine of HK\$500,000 and imprisonment of 1 year on summary of conviction, as well as a fine of HK\$1,000,000 and imprisonment of 7 years on conviction indictment.

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B. Treatment Based on Traded Product

1. *Which specimens are covered by the domestic controls: raw/unprocessed (tusks), semi-processed and fully processed (products)?*

- a. All specimens are covered by the domestic controls.

2. *Are there any exemptions to domestic controls (pre-convention, antiquities, pieces of art)?*

⁸⁵ LEGISLATIVE COUNCIL, *Protection of Endangered Species of Animals and Plants (Amendment) Ordinance 2018 Ord. No. 7/2018*, available at <https://www.legco.gov.hk/yr17-18/english/ord/2018ord007-e.pdf> (last accessed Apr. 3, 2018).

- a. Under the ordinance Cap. 586, pre-Convention ivory registered with the Agriculture, Fisheries and Conservation Department could be used for both non-commercial and commercial purposes without PL.
 - b. Under the bill 2017, international/domestic antique ivory is exempted from the ban.⁸⁶ Antique elephant ivory is defined as:
 - i. A piece of elephant ivory that had been removed from the wild and significantly altered from its natural state for jewelry, adornment, art, utility or musical instruments before July 1, 1925, and was acquired before that date by a person in this condition requiring no further carving, crafting or processing to effect its purpose.
 - c. Under the 2017 Bill, ivory used for “scientific, education, law enforcement as well as person or household effects” are also exempted from the ban.⁸⁷
3. *Are the controls the same with respect to native and non-native (exotic) species (e.g. ivory from Asian vs. African elephants)?*
- a. Under both Cap. 586 and Bill 2017, both Asian elephant and African elephant, except the populations of Botswana, Namibia, South Africa and Zimbabwe, are included in Appendix I; African elephant populations of Botswana, Namibia, South Africa and Zimbabwe are listed in Appendix II.
 - i. Different treatment and penalties depending on Appendix I or II

C. Treatment Based on Transaction

1. *Does domestic control differ based on the use or the actor involved (residents v nonresidents)?*
 - a. Domestic controls differ based on whether ivory would be used as commercial or non-commercial purposes.
 - b. Does not depend on the actor involved.
2. *Which types of trade are covered: Business-to-business, business-to-consumer, consumer-to-consumer?*
 - a. For domestic control, all type of commercial activities are covered.
3. *Is domestic online trade regulated? And if so, how?*
 - a. Hong Kong SAR does not have special regulations for online trade.

D. Registration

1. *Are there systems/mechanisms in place for registration of possession of specimens and which controls are performed in the context of the registration?*
 - a. Under cap 586, a license from the Agriculture, Fisheries and Conservation Department must be obtained in advance for import, introduction from the sea, export, re-export, or possession or control of a specimen of a scheduled species. Pre-Convention ivory are allowed for possession for both commercial (domestic trade) and non-commercial purposes without License to Possess. Post-Convention ivory must have License to Possess to be domestically traded for commercial use.
 - b. Under the Bill 2017, any application for a PL (thereby switching the use of ivory from non-commercial to commercial purposes) will not be approved for Post-Convention ivory upon commencement of Step 1, and Pre-Convention ivory upon commencement of Step 2, unless it is covered by a valid PL issued before the commencement of the respective steps.⁸⁸ The bill will also subject the commercial purpose of Pre-convention ivory in the local market to licensing control similar to the existing control on Post-Convention ivory.

⁸⁶ LEGISLATIVE COUNCIL, *Protection of Endangered Species of Animals and Plants ordinance (Cap. 586). Protection of Endangered Species of Animals and Plants (Amendment). Bill 2017*, available at https://www.legco.gov.hk/yr16-17/english/bills/brief/b201706024_brf.pdf.

⁸⁷ *Id.*, 5.

⁸⁸ *Id.*

E. Interpretation by Courts

No relevant cases were found.

Regulating Domestic Ivory Trade in the European Union

I. Trade in Elephant Ivory in the European Union⁸⁹

The European Union (EU) is the world's largest exporter of pre-Convention ivory. It is estimated that the value wildlife trafficking, including illicit ivory trade, is between €8 and €20 billion annually.⁹⁰ This trade happens both inside and outside of EU borders. Within the EU, most of the ivory traded consists of hunting trophies and of old carvings or musical instruments imported as personal belongings.⁹¹ In the past decade, the European Union has legally exported more than 20,000 carvings and 564 tusks.⁹² From 2003-2014, 92% of the pre-Convention tusks went to China or Hong Kong SAR.⁹³ The growing export to Asia may be contributing to elephant poaching in Africa.⁹⁴

The Asian Elephant is listed in Appendix I of CITES and Annex A of the EU Wildlife Trade Regulations, therefore all commercial trade in specimens of this species (ivory, skin) is prohibited (other than in exceptional circumstances) in the EU. The African Elephant is also listed in Appendix I of CITES and Annex A of the EU Wildlife Trade Regulations, with the exception of populations in Botswana, Namibia, South Africa, and Zimbabwe: these populations are listed as Appendix II/Annex B and thus very limited commercial trade is permitted in the EU.

The European Commission has released an Action Plan against Wildlife Trafficking. The demand reduction strategies within the Action Plan are still in their infancy, however the suspension of re-exports of all raw ivory after July 1, 2017 and tougher scrutiny of worked ivory movements seems to be contributing towards reducing demand. The Action Plan calls for efforts to reduce demand both by prohibiting domestic trade and through on the ground efforts in African countries.

Enumeration of Applicable Laws, Regulations, and Other Legally Binding Instruments

Evidence shows that Member States address issues regarding the ivory trade different, and thus the EU Action Plan against wildlife trafficking (COM(2016) 87 final) was established, which covers 2016-2020. This Action Plan, while not legally binding, shows a joint effort between the EU and its Member States to fight against the illegal ivory trade. The Action Plan priorities include: preventing wildlife trafficking and addressing its root causes, implementing and enforcing existing rules and combating organized wildlife crime more effectively, and strengthening the global partnership of source, consumer, and transit countries against wildlife trafficking.⁹⁵ An important guideline within the Action Plan is the suspension of issuing permits for the export and re-export of raw pre-Convention ivory. The EU Wildlife Trade Enforcement Group, established by (EC) No. 338/97, comprises representatives of EU Member State's enforcement authorities. At bi-annual meetings, the Enforcement Group assesses the progress made towards reaching the goals of the Action Plan and will report to the Council and the

⁸⁹ This report primarily analyzes the European Union's framework for regulating the elephant ivory trade between member states. Laws regulating trade within member states themselves is included when relevant.

⁹⁰ EUROPEAN COMMISSION, EU ACTION PLAN AGAINST WILDLIFE TRAFFICKING (COM(2016) 87 FINAL) (2016), available at http://ec.europa.eu/environment/cites/pdf/WAP_EN_WEB.PDF (last accessed June 6, 2018).

⁹¹ EUROPEAN COMMISSION PRESS RELEASE DATABASE, *Commission Introduces New Measures to Fight Poaching and to End Trade in Raw Ivory* (May 16, 2017), available at http://europa.eu/rapid/press-release_MEMO-17-1307_en.htm (last accessed June 6, 2018).

⁹² DIRECTORATE-GENERAL FOR ENVIRONMENT EUROPEAN COMMISSION, ANALYSIS AND EVIDENCE IN SUPPORT OF THE EU ACTION PLAN AGAINST WILDLIFE TRAFFICKING, (February 26, 2016), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016SC0038> (last accessed June 6, 2018).

⁹³ EUROPEAN COMMISSION. EU ACTION PLAN AGAINST WILDLIFE TRAFFICKING (COM(2016) 87 FINAL) (2016), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2016%3A87%3AFIN> (last accessed June 6, 2018).

⁹⁴ EU ACTION PLAN AGAINST WILDLIFE TRAFFICKING (COM(2016) 87 FINAL).

⁹⁵ EU ACTION PLAN AGAINST WILDLIFE TRAFFICKING (COM(2016) 87 FINAL).

European Parliament by July 2018.⁹⁶ Based on the results, the Commission will consider what further action is needed.

In 2016, the European Parliament passed two resolutions related to domestic ivory markets. The first resolution, on September 15th, concerns EU strategic objectives for the 17th CITES CoP that “*recalls the call made in its resolution of 15 January 2014 on wildlife crime on all 28 of its Member States to introduce moratoria on all commercial imports, exports, and domestic sales and purchases of tusks and raw and worked ivory products until wild elephant populations are no longer threatened by poaching.*” The second resolution, passed in October 2016, called for a “*full and immediate ban at EU level on trade, export, or re-export of ivory and rhinoceros horns.*”

At present, there is no evidence to suggest that a total ban on the ivory trade or worked ivory is upcoming in the future. However, a public consultation period on ivory trade in the EU by the European Commission from September 15, 2017 – December 8, 2017 which together with the assessment provided by the Enforcement Group in July 2018 will contribute to the considerations of the European Commission regarding future action on domestic trade in ivory.

II. Analysis

A. Legal Status

Based on Regulation (EC) No. 338/97, moving a specimen of a species listed in the Annexes into, out of, or within the European Union without the appropriate paperwork could result in seizure and permanent confiscation of the specimen.⁹⁷

The penalties for the illegal trafficking of ivory vary across the European Union. Between 2013-2014, eleven Member States imposed prison sentences on wildlife criminals. Other penalties included fines and non-custodial sentences. Many states have laws imposing prison sentence of at least four years, though there is a push to have all states adopt such sentences.

B. Treatment Based on Traded Product

Antique ivory can be traded within the EU without an internal trade certificate. The EU Regulation allows Member States to issue pre-Convention certificates for ivory claimed to have been acquired before 1990.

For ivory specimens acquired before the relevant elephant species was listed in the CITES Appendices, deemed “pre-Convention,” or before the EU Regulations became applicable to the species, deemed “pre-Regulation,” commercial trade within the European Union is permitted with appropriate documentation. Non-commercial trade, such as souvenirs purchased outside of the EU will require an import and an export permit. Strict conditions must be met before a permit will be granted, and some countries may have national legislation that protects elephants and prohibits their export. For trophy hunting of all African elephant populations, regardless of Annex A or B, will require both an import and an export permit. Recent stricter controls have been instated for certain Annex B listed species/populations, including the African elephant in January of 2015.⁹⁸

Since the EU is a single market, there are no internal border controls and in general goods may be moved and traded freely. Because of this, no permits or certificates are needed for specimens listed in Annexes B, C, or D. Specimens of species listed in Annex A are generally not allowed to be used for commercial purposes and their movement inside the EU is also subject to strict regulations.

The CITES Biennial Report of Germany does not distinguish between carved and raw ivory in its reporting on ivory seizures. Biennial Reports can categorize the seized ivory as follows: carving, piece, keyboard

⁹⁶ EU ACTION PLAN AGAINST WILDLIFE TRAFFICKING (COM(2016) 87 FINAL).

⁹⁷ ENVIRONMENT EUROPEAN COMMISSION, *Frequently Asked Questions* (2016), available at http://ec.europa.eu/environment/cites/faq_en.htm#chapter17 (last visited February 9, 2018).

⁹⁸ EUROPEAN COMMISSION, *Permits, Certificates and Notifications, Wildlife Trade into, from, and inside the EU* (2016), available at http://ec.europa.eu/environment/cites/info_permits_en.htm (last visited June 6, 2018).

(ivory product).⁹⁹ Germany's Report identifies all seized ivory as ivory specimens, including both worked and raw ivory.¹⁰⁰

C. Treatment Based on Transaction

European governments attempting to put domestic controls on ivory have jurisdiction within the country, whether it is at airports or warehouses.

The EU has no additional requirements for e-trade. Some Member States, however, have made efforts to enforce national legislation on e-commerce of CITES-listed species. The Czech Republic has legislation that requires the internet seller to indicate that the item must be accompanied by valid CITES documentation.¹⁰¹ Additionally, sellers must inform buyers of their obligation to register their specimens. Website owners and operators must provide obligatory information on each specimen. The Czech Environmental Inspectorate can call for the removal of advertisements if they do not comply with international or national legislation.

Difficulties regarding the regulations for online trade include a lack of obligations for the seller to prove the legality of the ivory and law enforcement's inability to distinguish legal ivory from illegal ivory in advertisements. Thus, efforts made to track the online ivory trade result in a mixture of illegal and legal ivory trade data.

All types of commercial trade are covered by CITES, even high-end ones. For example, Christie's Auction House was fined more than £3,000 in 2016 for selling a piece of elephant ivory without the relevant documentation.

D. Registration

The European Union does not require that ivory importers, exporters, traders, and manufacturers are registered or licensed and that ivory stockpiles are inventoried.¹⁰² There are no specific recording, inspection, and enforcement procedures to monitor the movement of ivory, making it extremely difficult to distinguish legal from illegal ivory.¹⁰³

Permanent markings of ivory products are not mandatory under EU law before an intra-EU certificate is granted.¹⁰⁴ However, it is required by some Member States and the EU recommends permanent markings of whole tusks and cut pieces of ivory that are 20 cm in length or more and one kilogram or more in weight. Markings allow a certificate to be connected to the item and improves traceability in the system. This is a recommendation in accordance with CITES Resolution 10.10 (Rev. CoP 17). Once the item has been marked, the code should be entered into an electronic database to facilitate future verification together with the certificate number and all relevant information.¹⁰⁵

E. Interpretation by Courts

⁹⁹ GERMANY'S BIENNIAL CITES REPORT 2005-2006 (87)

¹⁰⁰ GERMANY'S BIENNIAL CITES REPORT 2005-2006 (87), available at <https://cites.org/sites/default/files/reports/05-06Germany.pdf> (last accessed June 6, 2018).

¹⁰¹ DEPARTMENT OF SPECIES PROTECTION AND IMPLEMENTATION OF EUROPEAN REGULATIONS, CITES LEGISLATION IN THE CZECH REPUBLIC, CZ 2010, available at [https://www.mzp.cz/C1257458002F0DC7/cz/cites_informace_cizinec/\\$FILE/ODOIEP-CITES_legislation_CZ%202012-20120214.pdf](https://www.mzp.cz/C1257458002F0DC7/cz/cites_informace_cizinec/$FILE/ODOIEP-CITES_legislation_CZ%202012-20120214.pdf) (last accessed June 6, 2018).

¹⁰² Resolution 10.10 recommends that individual Member States inventory ivory stockpiles. It is, however, beyond the scope of this study to analyze the controls of every EU Member State.

¹⁰³ CITES, IMPLEMENTING ASPECTS OF RESOLUTION CONF. 10.10 (REV. COP17) ON THE CLOSURE OF DOMESTIC IVORY MARKETS - DETAILS OF 5 MAJOR DOMESTIC IVORY MARKETS (2017), available at <https://cites.org/sites/default/files/eng/com/sc/69/E-SC69-51-02.pdf> (last accessed June 6, 2018).

¹⁰⁴ EUROPEAN COMMISSION, GUIDANCE DOCUMENT: EU REGIME GOVERNING INTRA-EU TRADE AND RE-EXPORT OF IVORY (2017), available at http://ec.europa.eu/environment/cites/pdf/guidance_ivory.pdf (last accessed June 6, 2018).

¹⁰⁵ GUIDANCE DOCUMENT: EU REGIME GOVERNING INTRA-EU TRADE AND RE-EXPORT OF IVORY.

There have been some cases and convictions for domestic ivory trade (see discussion above), but these cases do not seem to reflect any particular trends or interpretations of EU law on the matter.

F. Additional Notes

It is challenging for individual Member States to take measures affecting the trade of ivory due to EU rules.¹⁰⁶ Nevertheless, Member States are able to implement regulations that are more strict than EU guidelines in some areas.

In April 2018, the UK announced a planned ban of ivory, with limited exemptions.¹⁰⁷ These exemptions include items made prior to 1947 that are less than 10% by volume ivory, musical instruments with made before 1975 (the date at which Asian elephants were listed under CITES) that are less than 20% by volume ivory, portrait miniatures made 100 years before the implementation date of the ban, certain rare items, and museum pieces.¹⁰⁸

¹⁰⁶ CITES, IMPLEMENTING ASPECTS OF RESOLUTION CONF. 10.10 (REV. COP17) ON THE CLOSURE OF DOMESTIC IVORY MARKETS - DETAILS OF 5 MAJOR DOMESTIC IVORY MARKETS (2017), available at <https://cites.org/sites/default/files/eng/com/sc/69/E-SC69-51-02.pdf> (last accessed June 6, 2018).

¹⁰⁷ UNITED KINGDOM DEPT. FOR ENVIRONMENT FOOD AND RURAL AFFAIRS, BANNING UK SALES OF IVORY (23–25) (2018) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/696474/banning-ivory-consult-sum-resp.pdf (last accessed June 6, 2018).

¹⁰⁸ *Id.*

Regulating Domestic Ivory Trade in Japan

I. Trade in Elephant Ivory in Japan

A. Factual/Contextual Questions

1. *Who Uses the Ivory and for Which Purposes?*

a. Ivory is primarily used domestically by business operators including antiquities dealers, and private citizens possessing whole tusks and worked ivory products. Although historically Japan prized the purchase and ownership of whole tusks, as well as worked ivory products, by private citizens, and this has been fading with the developing restrictions and reductions of the market. Primarily, processed ivory is crafted into *hanko*, the name-stamps used by Japanese people in place of signatures on formal documents, into pieces used in the construction of traditional musical instruments, and into *netsuke*, small sculptural ornamental buttons traditionally hung from belts and wallets from the medieval period onward and are now primarily used as figurines.

2. *Have demand reduction strategies been employed?*

a. The Ministry of the Environment (“MOE”) and the Ministry of Economy, Trade, and Industry (“METI”), have been organizing awareness campaign to inform Japanese citizens and foreign visitors not to re-export elephant ivory, primarily worked products made from legally obtained ivory, without going through the procedures prescribed in the relevant laws and regulations. The two Ministries have also been conducting campaigns to inform the contents of the amendment to the Law on Conservation of Endangered Wild Fauna and Flora (“LCES”) to make them known to relevant business operators for their regulatory compliance. In addition, MOE has been inviting private owners to register their whole tusks across Japan.

3. *What are the recent trends in the market?*

a. Importation of new elephant ivory products has dwindled. Over 10 tons of ivory (generally over 1,000 tusks) are still being registered in the country every year. Privately owned tusks are now a major source for the Japanese ivory manufacturing industry. A large amount of pre-Convention stock remains in Japan, held in private ownership for non-commercial purposes; the owners of this stock have recently begun to dispose of it through legal trade in-country, resulting in around 10 tons of unrefined ivory being “newly” registered for trade every year. Between 2011 and 2016 roughly 1.66 tons of raw ivory and 764 kg of worked ivory exported from Japan was seized (primarily by Chinese authorities), while about 7 kg of raw ivory and 36 kg of worked ivory came into Japan over that same time-period.

b. Domestically, the ivory trade is based primarily in tourist markets, ivory manufacturing, antiquities, retail markets, online trading, and traditional consumer demand for items such as *hanko* (name stamps), *netsuke* (small sculptural ornamental buttons), and musical instruments. Tourist markets cater primarily to visitors to Japan from other nations in East Asia where the ivory demand remains high even as the ivory markets in their own countries are restricted. Online commerce (partially of Chinese citizens purchasing Japanese products, which might then be illegally exported) may be occurring. However, there has not been a comparable increase in legal ivory re-exports in Japan—namely, exporting ivory after it has been properly and legally purchased and registered—although that has occurred in the EU and UK.

c. With respect to African elephants, the definition of “illegal” ivory in Japan includes whole tusks and worked products of ivory imported into Japan after 1989, the year when African elephant was listed in Appendix I of CITES. For Asian elephants, “illegal” ivory includes any whole tusks and worked products of ivory imported after Japan’s joining to CITES in 1980. Whole tusks of African elephants imported before the 1989 restrictions, imported under a pre-Convention certificate or as specimens of African elephants then listed in Appendix II, or imported during 1999-2009 in compliance with the rules adopted by the Conference of the Parties of CITES are not in violation of trade bans, but whole tusks are required to be registered.

II. Enumeration of Applicable Laws, Regulations, and Other Legally Binding Instruments

1. *Zetsumetsu no osore no aru yasei dōshokubutsu no tane no hozon ni kan suru hōritsu [Law for the Conservation of Endangered Species of Wild Fauna and Flora (LCES)], Act No. 75 of 1992 (last amended 2017) (Japan).*
 - a. Law governing all conservation of endangered species and how trade/treatment of products is handled.
 - b. Last revision was during the National Diet Session of 2017, with entry into force in June 2018.
 - c. Relevant Articles are:
 - i. Article 7: Individual owners of organs or processed products must be aware of the importance of preserving endangered species.
 - ii. Article 12: Individuals of rare wild animals or plants shall not be transferred, delivered, or given to others without permission as described in 13-1 (described as assignment):
 - 12-iv: Organs/processed goods being used as the raw material for products in Japan, as falling under the requirements specified by Cabinet Order depending on the type of material (as described in Article 7 and Article 17); Special International Species Businesses are protected in this sort of transfer. Article 20 describes international rare species. Article 33 describes international species businesses, specifically the transfer of special organs/products.
 - iii. Article 17 describes display rules; requirement to display registration as received under Article 20 when selling individuals or processed products thereof, such as ivory.
 - iv. Article 20: Information such as name, address, species of individual, who intends to obtain registration, whether it is an organ or a processed product, etc. In order to change registration, a person must submit the requisite forms to the MOE. If a change occurs in the information on the registration card, the person must submit for a change of registration within 30 days of that change.
 - v. Article 20-2: Registration must be renewed every five years.
 - vi. Article 20-3: If a person intends to assign or deliver raw material organs, that person must list the type, number, planned destination, and other matters as required by the MOE, provided that the person is not:
 1. Someone who has been convicted of a crime as prescribed in this Act, and less than two years have passed since the sentence has been passed.
 2. Two years have not passed since the day they have received their sentence.
 - vii. Article 33 contains 33 separate parts (from 33-1 to 33-33) describing the requirements for “Specific International Species Businesses,” i.e. businesses dealing in body parts or individuals for specific international species. All these businesses must be registered, providing information such as name and address of the facility, what kinds of organs or products they are selling, and anything else as requested by the MOE and Ministry of Culture. If the business is sold to someone new, this information must be updated. If there are matters resulting in the MOE deciding that the MOE must instruct businesses regarding the preservation of wild animals and plants, the MOE will do so. If a Specified International Type of Business violates the instructions above, or if the MOE finds that the business is interfering with endangered species preservation, it may order the suspension or termination of sales for a period not exceeding three months while the business deals with its problems. All organs must be registered and classified with the appropriate ministry within the MOE (i.e. Ministry of Specially Specified Organs, Ministry of Specific International Species Relationships, etc.). When an object is registered, the MOE will inform the business without delay. If there is a false statement or if facts are missing, the registration will be rejected. Other reasons for rejection include:
 - People who do not obtain specific restoration rights after bankruptcy proceedings are initiated
 - People who have been imprisoned for a fine not less than one described in the previous version of the act, and five years have not yet passed since payment of that fine.

- The registration for a previous object has been revoked and five years have not yet passed.
 - Yakuza registration.
 - A juridical person who falls under any of the proceeding categories.
 - A minor or adult ward or a person under curatorship whose statutory agent falls under any proceeding categories.
- If the MOE or the Minister of Special Relationships on International Species have refused registration, they shall inform the applicant without delay.
 - This will not apply to minor changes specified by the MOE.
 - If a Special International Business Operator abolishes its international species trade, it must notify the MOE within 30 days.
 - Registration must be renewed every five years. If a renewal application is made and the expiration of the previous registration passes, then the new registration will be calculated from the day following the expiration date of the previous registration.
 - If a business violates any provisions of the act, fails to reregister, or lies on a form, its registration can be rescinded (all or in part) for a period of not more than six months.
 - Articles 33-23 to 33-33 deal with raw materials “appropriately obtained”; for Special International Species Businesses, the operator of the business must apply and prepare a form regarding the materials obtained for:
 - Those objects obtained with a registration card that are used to make new objects
 - Objects obtained with a management card used to create new objects
 - In addition to the previous two items, in cases where it is specified by an order of the MOE, registration must be obtained if the object clearly falls under registration requirements.
 - Businesses must, if they fall under any items concerned with Special International Species Businesses, the MOE, the Minister of Specific International Species Relations, etc., excluding those organs falling under requirements specified in the preceding paragraph, the same shall be executed when:
 - There is an assignment or delivery of a specified organ which is obtained by dividing raw materials, etc.
 - All raw materials must be registered/certified to be manufacturable. The registration is only acceptable when the applicant accepts/takes over ownership of raw material, together with a registration form as described in 33-23. If the MOE has approved the registration card, the card must be marked.
 - Institutions registered to manufacture these objects from raw materials must be accredited as such by the MOE. No person who has committed a crime listed in the Act can be accredited as an institution if less than two years has passed since the end of their convicted sentence; if the registration has been revoked and two years have not yet passed since the end of the revocation; etc.
 - “no people who have been convicted of crimes shall be accredited less than two years after the end of their sentence.”
 - Financial statements must be provided by these institutions.
 - The MOE can certify accreditation bodies to approve registration applications on behalf of the MOE; they must conduct their affairs in a “fair manner as specified by the orders issued by the MOE.” If they intend to change any information regarding the function of their agency, they must inform the MOE two weeks prior to the change. They must prepare regulations concerning the implementation of their affairs pursuant to orders issued by the MOE; permission from the MOE must be obtained if they try to change these regulations. The body must also provide financial statements within three months after the end of each business year and provide it to the MOE for five years. If the MOE finds the body has not complied with any of this, the MOE will instruct the body to correct its behavior. If the organization refuses to change its rules for no good reason, has been registered by means of fraud, etc., it will be terminated by the MOE. Someone who is dissatisfied

with the organization's actions may request an MOE review, at which point the MOE will notify METI of the situation.

2. *Zetsumetsu no osore no aru yasei dōshokubutsu no shu no hozon ni kansuru hōritsu sekōrei [Order for the Conservation of Endangered Species of Wild Fauna and Flora], Cabinet Order No. 17 of 1993 (last amended January 2018).*
 - Articles 8, 9, and 10 primarily deal with ivory shipping/elephant products (as listed in Appended Table V and VI, on African elephants). Products are restricted by Appended Table V and VI are skin, processed leather, ivory, and processed ivory goods. Elephants are restricted to those elephants from Botswana and Zimbabwe (for living individuals, leather, tusks [as limited to those specified as acceptable by METI], and Namibia and South Africa (for leather, ivory [again limited to those specified by METI ordinances] and processed goods made from elephant leather).
 - Under Article 99, the fee to register these items is 5,000 yen for any item listed in Article 20 Paragraph 1 of the Act for one individual/product; any item imported into Japan after June 2014 (i.e. raw material organs such as tusks as listed in Table 6-12 of Article 20) have a 1000 yen registration fee. It costs 500 yen for a change in registration, and 1500 yen to reissue the registration card. For certain items, such as tusks, it costs 4600 yen to re-register.
 - Article 13: Organs specified by Cabinet Order are described in Article 33-6 of the Act (tusks and their processed goods) must have a Special International Type of Business registration.
 - Processed goods as listed in Article 18 include jewelry, furnishing, musical instruments made with raw materials/organs as listed in Appended Table 5-2, *inkan*, or other products as specified by METI ordinance.
3. *Zetsumetsu no osore no aru yasei dōshokubutsu no shu no hozon ni kansuru hōritsu sekōkisoku [Ordinance for the Enforcement of the Law for the Conservation of Endangered Species of Wild Fauna and Flora], Prime Minister Ordinance No. 9, 1993 (last amended 2017).*
 - Article 1: Processed Products of Endangered Species of Wild Fauna and Flora
 - The processed goods specified by the MOE include: footwear, bags, musical instruments, indoor entertainment equipment, tableware, smoking accessories, stationary accessories, goods for daily use, Buddhist textiles, tea utensils.
 - Article 5: Exemption of Applying Prohibition of Transfer (allowing, inter alia, for legal transference of materials that are protected by the Act of the Protection of Cultural Properties, Article 27, which designates historical sites, archeological sites, scenic vistas, or monuments)
 - Article 6: Purposes for Transfer, etc.
 - Recognized purposes include education, investigation of habit status or growth of rare specimens in the wild, and “other purposes recognized as contributing to the preservation of rare wild animals and plants.”
 - Article 7: Application for Permission of Transfer, etc.
 - Article 8: the person who intends to receive the certificate set forward in Article 7 shall submit an application with the following information to the MOE:
 - Applicant's name, address, and occupation (principal office's location, representatives name, and principal business in the case of a corporation)
 - Species name
 - Classification of whether it's a living individual, an egg, stuffed specimens, individual organs or processed products, or other individual organs
 - Quantity

- Location
 - Purpose of Export
 - Destinations
 - Address, name, and occupation of recipient
 - Transportation method (only in the case of living individuals)
 - Planned expiration time
 - History of the individuals to be transported
 - Location of place, scale, and structure of breeding facility when the intent is to cultivate the exported product (living individuals)
 - The treatment of the exported items/individuals after they are exported
 - Documents that:
 - Certify that it is a legal product to be transferred under Article 13.
 - In cases where it is not possible to attach the documents listing the items history, a document certifying the lawful acquisition of said item.
- Article 9: Exemption of Applying Prohibition of Display or Advertisement
 - You may display or advertise processed materials so long as the materials have been legally harvested and processed (i.e. *netsuke*, but not tusks).
 - Article 10-2: Registrable Tusks
 - Registrable tusks are those tusks which are not in violation of CITES.
 - Article 11: Application for Registration of an Individual Organism, etc.
 - Circumstances relating to acquisition of the item or import must be described by the person importing the item.
 - Article 19: Payment of Fees for Registration, etc.
 - You must pay the registration authority pursuant to regulations set forth in LCES.
 - If the registration for that item has expired, the owner shall be notified pursuant to Article 20 paragraph 2 and the applicant may also request documents necessary to the confirmation that it falls under registration requirements in Article 20, Paragraph 1.
 - Applications must be made when the item is transferred to a new owner, providing information such as the applicant's name and address, the registration number, the content of the new registration card and the reason for the change in registration, et cetera.
 - The law has also been expanded to require registration for ivory products to be renewed every five years as per Article 11-4 in the updated version.
4. *Tokuteikokusaishujigyō ni kakaru todokede oyobi tokubetsukokusaishujigyō ni kakaru tōroku tō ni kan suru shōrei [Ministerial Ordinance Concerning the Notification, etc. of Business Activities Using Parts of Designated Internationally Endangered Species], Ministry of Economy, Trade, and Industry / Ministry of the Environment Ordinance No. 3, 2005 (last amended 2018).*
- Ordinance detailing the process of notification to METI and MOE by businesses that process or sell products from internationally endangered species.
5. *Yunyūwariate wo ukeru beki kamotsu no hinmoku, yunyū no shōnin wo ukeru beki kamotsu no gensanchi mata wa funadzumi chiiki sono ta kamotsu no yunyū ni tsuite hitsuyō na jikō no kōhyō [Public Announcement on the Items of Goods Subject to Import Quotas, the Places of Origin or Places of Shipment of Goods Requiring Approval for Import, and Other Necessary Matters Concerning Import of Goods], Public Notice No. 170 of the Ministry of International Trade and Industry, 1966 (last amended 2018).*

- Law governing all importation of goods into Japan, including how to import items of CITES-Listed Species in Appendices I, II and III, with Article II and III-7(4)(5) and III-8(2)(3) specifically involving procedures regarding items listed in CITES.
- 6. *Yushutsu bōeki kanrirei [Export Trade Control Order], Cabinet Order No. 378 of 1949 (last amended 2018).*
 - Law governing export trade control, including how to export items of CITES-Listed Species in Appendices I, II, and III.
- 7. OTHER
 - a. Has the government made political decisions that have not yet been transformed into legally binding instruments?
 - i. There were a series of Diet Sessions in 2017, which led to legislative amendments (see above).
 - b. Are there any changes underway to the legal and regulatory framework affecting domestic trade in elephant ivory?
 - i. The 2017 amendments to LCES came into effect on June 1, 2018. There has also been an order for the Conservation of Endangered Species LCES (which also took effect on June 1, 2018), and an ordinance for the Enforcement of LCES has an amendment under consideration in relation to the 2017 LCES amendments.

III. Analysis

A. Legal Status

1. *Is domestic trade legal, completely banned, or partially banned?*

- a. The types of ivory that may be sold legally in Japan are:
 - i. Whole tusks, cut pieces, and ivory products that pre-existed in Japan before the CITES trade ban (1980 for Asian elephants, and 1990 for African elephants);
 - ii. Whole tusks, cut pieces, and ivory products which were imported to Japan with pre-convention certificates; and
 - iii. Whole tusks imported to Japan in 1999 and 2009, as exceptions approved under CITES.
- b. Japan does not require proof of legality of origin and legality of acquisition of tusks presented for registration (unsworn statements are accepted regarding the age of the tusks)
- c. Businesses handling ivory products must be registered with MOE and METI. Whole ivory tusks must be registered, and the registration card must be displayed while whole tusks are put up for sale.
- d. Every cut or worked piece weighing over 1kg and exceeding 20cm must have a traceability information form attached when put up for sale, but the pieces themselves are not registered.
- e. All transactions of cut and worked products must be recorded. All cut or worked pieces mentioned in (c) above must have a traceability information form indicating such information as the registration number and name of the business operator.
- f. Cut or worked pieces that are smaller than 20cm or weigh less than 1kg do not require traceability information forms.
- g. In 2016, six arrests were made pertaining to domestic ivory trade in violation of LCES.

2. *What penalties/deterrence exist?*

- a. The regulation of domestic trade in ivory depends on the form of ivory, i.e. whole tusk or not. Businesses are required to register with MOE and METI if they sell cut pieces of ivory, semi-worked ivory tips, or ivory products; they must renew their registration every five years, and indicate information including their business registration number and business operator's name. Manufacturers of worked ivory can obtain a certified ivory product label from MOE and METI, but this is not required, and so there are no penalties associated with not obtaining a label.
- b. Penalties can be split into two categories:

- i. Administrative penalties:
 1. A person found to have registered a whole tusk imported prior to 1989, under a pre-Convention CITES certificate, or imported in 1999 or 2009 in compliance with the rules set out at the COP of CITES, with falsified documents will be punished and have their registration of that tusk nullified.
 2. A business operator that violates any provision of the LCES will have their business registration revoked, and their business can be suspended for up to six months. In addition, their registration application will be refused for five years (newly introduced administrative penalties from the 2017 LCES amendment).
- ii. Criminal penalties
 1. Whole tusks:
 - a. An individual can be imprisoned for up to five years and/or be made to pay a fine of up to five million yen if they domestically trade unregistered whole tusks (duration of imprisonment and amount of a fine were increased by the 2017 LCES amendment).
 - b. A corporation will be given a fine of up to 100 million yen (the amount of the fine was increased by the 2017 LCES amendment).
 2. Cut pieces/semi-worked tips/ivory products:
 - a. Violation of an obligation to make a traceability information form on cut pieces will result in imprisonment (for a person/corporation) of up to six months and/or a fine of up to 500 thousand yen (newly introduced penalties from the 2017 LCES amendment).
 - b. Failure to submit a report and/or illicit display of an unapproved certification will result in a fine of up to 300 thousand yen for both a person and a corporation.
 3. Falsification of registration:
 - a. An individual will be imprisoned for up to five years and/or be required to pay up to a five million yen fine (both amended penalties from the 2017 LCES amendment and duration of imprisonment and amount of a fine were increased).
 - b. Conducting business without registration and/or with falsified registration is punished by up to five year's imprisonment (individual) and a fine of up to five million yen. For a corporation, up to 100 million yen (newly added penalties from the 2017 LCES amendment).
 4. Advertisement
 - a. If a corporation is found to be in violation of the advertisement ban, there is a maximum of a 20 million yen fine.
 - b. If an individual is found to be in violation of the ban, there is a maximum of up to a one million yen fine and/or up to one year in prison.

B. Treatment Based on Traded Product

1. *What specimens are covered by the domestic controls: raw/unprocessed (Tusks), semi-processed and fully processed (products)?*

Domestic controls cover primarily ivory imported prior to 1989 or from 1999-2009 following the COP in CITES. While business operators must register all of their whole tusks with MOE, and private citizens need to do so when they domestically trade them, only those categories of tusks detailed above exist in Japan. The penalty for the violation of the law is fines and/or possible jail time. Semi-processed (i.e. cut pieces, and semi-worked tips) and fully processed products must be tracked by business operators, and extensive records must be kept.

2. *Are there any exceptions to domestic controls (pre-convention, antiquities, pieces of art?)*

Domestically, there are not many controls from prefecture to prefecture, but for import/export into the country special arrangements can be made for specimens which are personal effects, occupational tools, and household effects during moving. Those souvenirs which are listed in Appendix II of CITES and meet certain requirements may have special arrangements. If you are exporting, you must verify in advance if there are any special arrangements which need to be made. If there is no arrangement, you must export with an export permission certificate. If

there are no special arrangements for imports to Japan from a foreign country, you must get an export permission certificate from that country to get it into Japan.

3. *Are the controls the same with respect to native and non-native (exotic) species (e.g. ivory from Asian vs. African elephants)?*

All ivory in Japan is imported from non-native species, and so the controls are the same for the entirety of the stock in the country today.

C. Treatment Based on Transaction

1. *Does domestic control differ based on the use or the actor involved (residents vs. nonresidents)?*
There is no difference in domestic control based on the use or the actor involved.

2. *Which types of trade are covered: Business-to-business, business-to-consumer, consumer-to-consumer?*

Trade in Japan is primarily business-to-business and business-to-consumer, with a primary focus on dismantling whole tusks into accessories, *hanko*, *netsuke*, and jewelry. There is also a consumer-to-consumer base with internet commerce. Japanese regulations on whole tusks do not differentiate between these different types of trade.

3. *Is domestic online trade regulated? And if so, how?*

Under the law, online ivory trade is equally regulated as face-to-face sales. Necessary information including a registration number of the business operator and in case of a whole tusk, also a registration number of the whole tusk, must be displayed while ivory is put up for sale. E-commerce is presenting an enormous challenge for those who are attempting to provide further regulations to the domestic ivory trade in Japan. In 2015 the Japanese website Rakuten Ichiba had over 28,000 advertisements for ivory products. In July 2017, Rakuten Ichiba banned its ivory sales division, following Google, Amazon.com, Alibaba, and eBay, but other online marketplaces (including Yahoo!Japan, which is perhaps the most popular online marketplace in the country) still flourish.

D. Registration

1. *Are there systems/mechanisms in place for registration of possession of specimens and which controls are performed in context of the registration?*

All whole tusks which were imported before the 1989 restrictions on international trade are required to be registered with MOE prior to domestic trade through the Japan Wildlife Research Center (JWRC), a non-governmental body that serves as a registration organization under LCES. The only ivory which must be registered in Japan are whole tusks owned by business operators and by private citizens, who intend to trade domestically, provided that those tusks either were in Japan ahead of the adoption of CITES trade ban (in 1980 (when Japan joined CITES) for Asian elephants and 1990 for African elephant), those imported with pre-Convention certificates, or those imported as exceptions approved under CITES from 1999-2009. Businesses are required to be registered with the MOE and METI if they sell cut pieces of ivory, semi-worked ivory tips, and ivory products. Businesses file regular reports with MOE and METI regarding their stock. Businesses must also keep transaction records. Moreover, they must prepare traceability information forms for cut pieces, as well as indicate their registration number and the name of the business operator; this is a new requirement after LCES was amended in 2017, and came into effect in June 2018. MOE and METI are conducting on-site business inspections to ensure that all regulations are being properly followed.

E. Interpretation by Courts

1. *Have domestic controls been tried in court cases [or administrative tribunals] and if so, what were the results?*

As of August 2017, there were two separate cases of two major antiquities companies ([Raftel](#) and Flores; Raftel registered over 400 to 500 tusks between 2012 and 2017) purchasing 27 privately held, unregistered whole tusks, but both cases were dismissed. In November 2017,

two Chinese were arrested in violation of the Customs Act for attempting to smuggle 7.4 kg of ivory cut pieces out of Japan into China. Both of them were sentenced to a fine of three hundred thousand yen, and one year and six months in prison with four year's suspension of sentence.

F. Additional Notes

AEON, a large Japanese department store, has begun phasing out elephant ivory in all of its domestic malls, with a goal of full phase-out accomplished by March 2020.

Regulating Domestic Ivory Trade in Lao PDR

I. Trade in Elephant Ivory in Lao PDR

A. Factual/Contextual Questions

1. *Who uses the ivory and for which purposes?*

The consumer market for ivory in Lao PDR itself is secondary to the amount of ivory that is smuggled through the country.¹⁰⁹ However, there is an increasing retail market in ivory items, with Chinese consumers in Lao PDR constituting an estimated 80 percent of buyers.¹¹⁰ Lao people prefer whole Asian elephant tusks to keep on their altars over ivory jewelry, utilitarian objects or ornaments.¹¹¹ Tusks might be kept as an asset that can be liquidated for emergency cash, and some wear ivory amulets to ward off evil spirits.¹¹²

2. *Have demand reduction strategies been deployed?*

Recent government initiatives to push for enforcement have not yet yielded tangible results.

3. *What are recent trends in the market (price, volume traded)?*

The recent trend has been increased sales (fastest-growing market for ivory in the world) aided by slow application of anti-trafficking laws and low prices. As previously mentioned, the vast majority of domestic purchases of ivory in Laos are made by Chinese citizens, many of whom then move the illegal product into China, and a significant number of Vietnamese citizens. To that end, it is relevant that the number of Vietnamese and Chinese tourists in Laos has expanded greatly in recent decades.

II. Enumeration of Applicable Laws, Regulations, and Other Legally Binding Instruments

1. *Wildlife and Aquatic Law, No. 07/NA (2007)*¹¹³

- a. The Wildlife and Aquatic Law criminalizes the trade of prohibited animals, including parts or organs of those animals; elephants are among the prohibited animals.
- b. Date of implementation: December 24, 2007

2. *Penal Law No. 142/PO (2005)*

- a. The penal code defines the possible punishments for violating wildlife laws.
- b. Last revised: May 17, 2017

3. *Other*

- a. *Has the government made political decisions that have not (yet) been transformed into legally binding instruments?*
 - i. Much of the international community has been highly critical of Laos' inability and/or lack of commitment to crack down on illegal wildlife trade. In late 2017, at the sixty-ninth meeting of the CITES Standing Committee, the persistent lack of compliance by Lao PDR with the Convention was discussed and resulted in

¹⁰⁹ LAO PDR MINISTRY OF NATURAL RESOURCES AND ENVIRONMENT, NATIONAL IVORY ACTION PLAN 1 (2015), available at <https://cites.org/sites/default/files/common/prog/niaps/E-NIAP-LaoPDR-2015-16.pdf> (last accessed June 6, 2018).

¹¹⁰ RHINO RESOURCE CENTER, RECENT FINDINGS ON THE IVORY AND RHINO-HORN TRADE IN LAO PEOPLE'S DEMOCRATIC REPUBLIC, 36 (2013) available at http://www.rhinoresourcecenter.com/pdf_files/140/1400212262.pdf (last accessed June 6, 2018).

¹¹¹ *Id.*, 39.

¹¹² *Id.*

¹¹³ LAO PEOPLE'S DEMOCRATIC REPUBLIC NATIONAL ASSEMBLY, WILDLIFE AND AQUATIC LAW (2007), available at extwprlegs1.fao.org/docs/pdf/lao89478.pdf (last accessed June 6, 2018).

- the adoption of a set of recommendations, which also included compliance with the National Ivory Action Plan, covering controls of domestic trade in ivory.¹¹⁴
- b. *Are there any changes underway to the legal and regulatory framework affecting domestic trade in elephant ivory?*
 - i. Lao PDR has just issued a new PM Order 5/2018 of 8 May 2018 on Strengthening the Strictness of the Management and Inspection of Prohibited Wild Fauna and Flora. .

III. Analysis

A. Legal Status

1. *Is domestic trade legal, completely banned, or partially banned?*

All domestic ivory trade from Asian ivory is forbidden in Lao PDR (i.e. completely banned). Technically, the Wildlife and Aquatic Law No. 07/NA, 2007 only prohibits domestic trade and possession of *Asian* elephants.

2. *What penalties/deterrence exist?*

Potential penalties for breaking the Wildlife and Aquatic Law include a fine from \$50 to \$1225 USD and/or a prison sentence of three months to five years,¹¹⁵ and forfeiture of “unlawful earning properties...”¹¹⁶

B. Treatment Based on Traded Product

1. *Which specimens are covered by the domestic controls: raw/unprocessed (tusks), semi-processed and fully processed (products)?*

All Asian elephant ivory (tusks, semi- and fully processed products) is banned from domestic sale or trade in Laos, and as mentioned above, African elephants do not appear in the Wildlife and Aquatic Law.

2. *Are there any exemptions to domestic controls (pre-convention, antiquities, pieces of art)?*

Ivory from domesticated populations may be traded. The translated Laos NIAP interprets Article 40 of the Wildlife and Aquatic Law thusly: “The prohibited category of wildlife [which includes elephants and elephant-derived products]...can be traded from the second generation and next generation[s]...”¹¹⁷

3. *Are the controls the same with respect to native and non-native (exotic) species (e.g. ivory from Asian vs. African elephants)?*

As mentioned above, African elephants do not appear in the Wildlife and Aquatic Law, but their domestic trade is constructively prohibited by the fact that it is illegal to bring African ivory into Laos in the first place.

C. Treatment Based on Transaction

1. *Does domestic control differ based on the use or the actor involved (residents v nonresidents)?*

The majority of perpetrators, as mentioned above, are nonresidents (Chinese and Vietnamese tourists). However, there is virtually no enforcement of laws against wildlife trading, and therefore no difference in the controls based on the actor involved. .

2. *Which types of trade are covered: Business-to-business, business-to-consumer, consumer-to-consumer?*

All trade is covered by the regulations.

3. *Is domestic online trade regulated? And if so, how?*

¹¹⁴ CITES SC69 COMM. 8 (2017), available at <http://cites.org/sites/default/files/eng/com/sc/69/com/E-SC69-Com-08.pdf> (last accessed June 6, 2018).

¹¹⁵¹¹⁵ LAO PEOPLE’S DEMOCRATIC REPUBLIC NATIONAL ASSEMBLY, WILDLIFE AND AQUATIC LAW (2007), art. 71(6), available at <http://extwprlegs1.fao.org/docs/pdf/lao89478.pdf> (last accessed June 6, 2018).

¹¹⁶ WILDLIFE AND AQUATIC LAW (2007), art. 52(12).

¹¹⁷ WILDLIFE AND AQUATIC LAW, art. 40 (2007).

Lao PDR has no specific provisions related to online trade of elephant ivory.

D. Registration

- 1. Are there systems/mechanisms in place for registration of possession of specimens and which controls are performed in the context of the registration?*

There exist projects that attempt to improve registration and tracking of captive elephants in Laos by equipping the country's entire domestic elephant population with microchips. These are not, however, government efforts.

E. Interpretation by Courts

- 1. Have domestic controls been tried in court cases [or administrative tribunals] and if so, what were the results?*

No relevant cases have been identified.

Regulating Domestic Ivory Trade in Malaysia

I. Trade in Elephant Ivory in Malaysia

Although Malaysia is a major conduit for smuggled elephant ivory, it does not have a legal domestic market for trade in ivory. This analysis focuses on (i) provisions that prohibit domestic trade; (ii) provisions that allow some limited exceptions to prohibitions on use or possession of elephants; (iii) the National Heritage Act through which some limited transfer of heritage objects containing ivory might be made; and (iv) associated penalties.

II. Enumeration of Applicable Laws, Regulations, and other Legally Binding Instruments

- A. Laws of Malaysia, Act 716: Wildlife Conservation Act of 2010 (WCA).¹¹⁸
 - i. The Act regulates the hunting, sale and exchange, and keeping of wildlife, among other activities.
- B. Laws of Malaysia, Act 686: International Trade in Endangered Species Act 2008 (INTESA) (last amended 22 May 2017).¹¹⁹
 - i. The Act focuses on regulating import and export of scheduled species, requires that owners mark all scheduled species, and generally prohibits possession and commercial exchange of scheduled species.
- C. Malaysia, International Trade in Endangered Species (Permit, Certificate, Registration and Fees) Regulations, 2009.¹²⁰
 - i. The regulations set out procedures for permitting required by the International Trade in Endangered Species Act.
- D. Malaysia, International Trade in Endangered Species (Rescue Centre) Regulations, 2009.¹²¹
 - i. The regulations provide procedures for the care and handling of wildlife seized or forfeited under INTESA.
- E. Laws of Malaysia, Act 645: National Heritage Act 2005 (NHA) (incorporates amendments through 2006).¹²²
 - i. The Act regulates the registration, sale or exchange of a heritage object.
- F. Laws of Malaysia, Act 613, Anti-Money Laundering, Anti-Terrorism Financing, and Proceeds of Unlawful Activities Act 2001 (last amended P.U. (A) 294/2014).¹²³
 - i. The 2014 amendments applied the Act's provisions to sections 10-14 of the International Trade in Endangered Species Act, and to selected sections between 60 and 120 of the Wildlife Conservation Act, allowing money laundering offences involving wildlife to be prosecuted under the Act.

¹¹⁸ Laws of Malaysia, Act 716: Wildlife Conservation Act of 2010 (WCA), available at <http://www.agc.gov.my/agcportal/uploads/files/Act%20716%20-%208%2010%202014.pdf> (last visited Jan. 31, 2018).

¹¹⁹ Laws of Malaysia, Act 686: International Trade in Endangered Species Act 2008 (INTESA) available at <http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%20686%20-%205%208%202014.pdf> (last visited Jan. 31, 2018).

¹²⁰ Malaysia, International Trade in Endangered Species (Permit, Certificate, Registration and Fees) Regulations, (2009), available at <http://www.fao.org/faolex/results/details/en/?details=LEX-FAOC099055> (last visited Jan. 31, 2018).

¹²¹ Laws of Malaysia, Act 645: National Heritage Act 2005 (NHA), available at <http://www.fao.org/faolex/results/details/en/?details=LEX-FAOC099056> (last visited Jan. 31, 2018).

¹²² Laws of Malaysia, Act 645: National Heritage Act 2005 (NHA) (incorporates amendments through 2006), available at <http://www.fao.org/faolex/results/details/en/?details=LEX-FAOC107883> (last visited Jan. 31, 2018).

¹²³ Laws of Malaysia, Act 613, Anti-Money Laundering, Anti-Terrorism Financing, and Proceeds of Unlawful Activities Act 2001 (last amended P.U. (A) 294/2014), available at <http://www.agc.gov.my/agcportal/uploads/files/ACT%20613%20diluluskan%20TPPUU%20Dis%202015.pdf> (last visited Jan. 31, 2018).

- G. Malaysia, The Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) Sectoral Guidelines 3 (Sectoral Guidelines 3).¹²⁴
 - i. The sectoral guidelines provide direction for evaluating evidence of money laundering.
- H. Malaysia, the Guidelines on Anti-Money Laundering and Combating the Financing of Terrorism (Guidelines).¹²⁵
 - i. The guidelines give reporting guidelines for institutions subject to reporting.
- I. Sarawak Wildlife Protection Ordinance of 1998.¹²⁶
 - i. The Ordinance generally prohibits the hunting, capture, or sale of any protected wildlife.
- J. Sabah Wildlife Conservation Enactment 1997 and Wildlife Conservation (Amendment) Enactment 2016.¹²⁷
 - i. The Enactment prohibits hunting of totally protected wildlife and hunting of protected wildlife without a license and generally prohibits possession of wild animals without a license.
- K. Laws of Malaysia, Act 588, The Communications and Multimedia Act 1998.¹²⁸
 - i. This Act provides general authority to regulate use of media.
- L. Proposed revisions to the Wildlife Conservation Act:
 - i. The Natural Resources and Environment Ministry has stated that it is in the process of increasing penalties for violations of the Wildlife Conservation Act.¹²⁹ The Department of Wildlife and National Parks Peninsular Malaysia proposed specific increases in penalties for violations of the Wildlife Conservation Act, to be implemented in 2018. These include: “for use of elephant specimens without permit,” fine between MYR 100,000 and 500,000 and jail term not exceeding 3 years or both, and for “general offence,” fine not exceeding MYR 50,000 or jail term not exceeding 3 years or both.
 - ii. It has also been stated that there is an intention to add provisions to address transactions that take place online.¹³⁰

III. Cases

No relevant cases have been identified.

IV. Analysis

In Malaysia wildlife is governed differently in three different jurisdictions. Peninsular Malaysia relies primarily on the Wildlife Conservation Act and the International Trade in Endangered Species Act. The province of Sabah regulates wildlife trade under the Sabah Wildlife Conservation Enactment and its 2016 Amendment. The province of Sarawak regulates wildlife under the Sarawak Wild Life Protection Ordinance and the

¹²⁴ Malaysia, *The Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) Sectoral Guidelines 3 (Sectoral Guidelines 3) (2015)*, available at https://www.imolin.org/doc/amliid/Malaysia/Malaysia_Anti-Money_Laundering_and_Counter_Financing_of_Terrorism_Sectoral_Guidelines_3.pdf (last visited Jan. 31, 2018).

¹²⁵ Malaysia, *the Guidelines on Anti-Money Laundering and Combating the Financing of Terrorism (Guidelines)*, available at http://www.bnm.gov.my/guidelines/03_dfi/02_anti_money/02_standard_guidelines_amla.pdf (last visited Jan. 31, 2018).

¹²⁶ Sarawak Wildlife Protection Ordinance (1998), available at https://www.sarawakforestry.com/pdf/laws/wildlife_protection_ordinance98_chap26.pdf (last visited Feb. 14, 2018).

¹²⁷ Laws of Malaysia, Act 588, *The Communications and Multimedia Act (1998)*, available at <http://www.lawnet.sabah.gov.my/Lawnet/SabahLaws/StateLaws/viewdoc.aspx?document=WildlifeConservationEnactment1997.pdf> (last visited Feb. 14, 2018).

¹²⁸ *Laws of Malaysia, Act 588, The Communications and Multimedia Act (1998)*.

¹²⁹ CITES SC69 NATIONAL IVORY ACTION PLAN PROGRESS REPORT, MALAYSIA (2017), available at <https://cites.org/sites/default/files/eng/com/sc/69/E-SC69-29-03-A-14.pdf> (last visited June 6, 2018).

¹³⁰ UNITED NATIONS OFFICE ON DRUGS AND CRIME, *CRIMINAL JUSTICE RESPONSE TO WILDLIFE CRIME IN MALAYSIA (2017)*, available at https://www.unodc.org/documents/southeastasiaandpacific/Publications/2017/Malaysia_Assessment_-_09.pdf (last accessed June 6, 2018).

International Trade in Endangered Species Act. As discussed below, the possession of elephant products is prohibited without a license in all three regions.

A. Legal Status

A. *Peninsular Malaysia*

- i. The Wildlife Conservation Act and International Trade in Endangered Species Act prohibit domestic trade in elephant ivory. WCA Section 87 prohibits the sale of anything “which contains or is claimed to contain any derivative of any totally protected wildlife.” WCA Section 68(b) also prohibits anyone from taking or keeping “any part or derivative of a totally protected wildlife” without a special permit (Section 11(a)). “Totally protected wildlife” includes all wildlife listed in the Second Schedule, which includes both Asian and African elephants. Violators of Section 87 may be fined up to 20,000 ringgit and be imprisoned for up to one year. A violator of Section 68(b) is liable for a fine up to 100,000 ringgit or imprisonment up to three years, or to both. There is no minimum penalty.
- ii. However, the WCA does allow and regulates the use of totally protected wildlife for hunting, zoos, breeding, and research under a special permit. (Sections 66, 68, and 72). A special permit may only be granted by the Minister, though, under the Minister’s current policy, no special permits are issued to allow for hunting or selling of elephant parts or products.¹³¹ Section 63 requires a person who carries out a business of dealing or taxidermy to hold a license.
- iii. INTESA Section 12 prohibits the possession or control; sale, offer for sale, or exposure or advertisement for sale; or display to the public of any specimen of scheduled species which has been imported or introduced from the sea in contravention of [sections 10 or 11 of the Act, which prohibit importation.] Scheduled species refer to those listed in the Third Schedule of INTESA which includes elephants as part of the CITES Appendices listings. Violators are liable for a fine of up to 100,000 ringgit for each specimen, up to 1,000,000 ringgit, or imprisonment up to 7 years, or to both. Section 35 provides that any scheduled species or other article seized under the enforcement powers of the Act “shall be liable to forfeiture.”
- iv. The Anti-Money Laundering, Anti-Terrorism Financing, and Proceeds of Unlawful Activities Act 2001, has been extended to violations involving money laundering under the WCA and INTESA, including WCA Sections 68 and 87, and INTESA Section 12. (Section 4). Penalties under the Anti-Money Laundering Act are much higher than under the WCA or INTESA and set a minimum level of fines. They provide for a fine of at least 5 times the sum or value of the proceeds of the unlawful activity or 5 million ringgit, whichever is higher, and a prison term of up to 15 years.
- v. There is a very limited exception to the prohibition on domestic trade of parts or derivatives of totally protected species for the trade of heritage objects. Section 56 of the National Heritage Act allows limited sales by an individual of a heritage object; and Section 91 allows a registered dealer to deal in heritage objects. An object includes any moveable antiquity (which must be at least 50 years old, or believed to be 50 years old), tangible cultural heritage, and historic object. (Section 2). Elephant ivory is neither mentioned nor excluded by the definition and therefore could be a heritage object. Violators of sections 56 or 58 are liable for a fine of up to 10,000 ringgit or a prison term of up to 1 year, or both. Violators of section 91 are liable for a fine of up to 50,000 ringgit or prison for up to 5 years, or both.

B. *Sabah*

The Sabah Wildlife Conservation Enactment 1997 and Wildlife Conservation (Amendment) Enactment 2016 govern conservation of wildlife in Sabah.

¹³¹ Letter from Salman Bin JH. Saaban, Director of Enforcement Division, Dept. of Wildlife & Nat'l Parks Peninsular Malaysia to Nate Bishop, Environmental Law Institute (May 8, 2018) (on file with author).

- i. The Enactment regulates hunting and possession of protected and totally protected animals. Section 25 bans hunting any totally protected animal listed in Part 1 of Schedule 1. It includes the subspecies Borneo Elephant (*Elephas maximus borneensis*) which lives in Sabah. Animals listed in Appendices I, II, or III of the Convention on Trade in Endangered Species (CITES), which include all elephants, are protected animals. Hunting of protected animals requires a license and is limited to the quota of the species. Violation of Section 25 with respect to totally protected animals is subject to a fine of at least 50,000 ringgit and up to 250,000 ringgit, and imprisonment for at least 1 year and not more than 5 years. For protected animals, which include other elephants, violation results in liability for a fine at least 50,000 ringgit or imprisonment for 6 months to 5 years, or both.
- ii. Section 41 prohibits possession of animals or products of animals listed in Part 1 of Schedule 1 “unless authorized in writing by the Minister acting on the advice of the Director.” A person possessing any other protected animal or its product must be in compliance with import rules and possess a valid license or permit. Violation of this section, for a totally protected animal or its product and for an animal or product of an animal listed in Appendix I of CITES, results in liability for a fine between 50,000 and 250,000 ringgit and imprisonment for one to five years. A violation concerning an animal listed in Appendix II of CITES, or a protected animal, results in a fine between 30,000 and 100,000 ringgit or imprisonment for 6 months to 5 years, or both.

C. *Sarawak*

- i. Trade in protected species in Sarawak is governed by the Wild Life Protection Ordinance 1998, which gives elephants the status of “protected animals” as unspecified species in Part II of Schedule 1 which includes animals listed in the CITES Appendices. Under Section 29 of the Wild Life Protection Ordinance a person who without a license “hunts, kills, captures, sells, offers for sale or claims to be offering for sale, imports, exports, or is in possession of any protected animal or any recognizable part or derivative thereof” is in violation of the Act. Section 37 of the Ordinance prohibits possession of any wild animal or its part, except limited amounts for the person’s own consumption. A violator of sections 29 and 37 with respect to a protected animal is liable for imprisonment of 1 year and a fine of 10,000 ringgit. As in peninsular Malaysia, INTESA Section 12 prohibits the “possession or control; sale, offer of sale, or exposure or advertisement for sale; or display to the public of any scheduled species” which has been illegally imported, and applies the same penalties. The Anti-Money Laundering Act is also available for violations of INTESA Section 12.
- ii. Sections 33-35 allow limited breeding, rearing and keeping of wild animals, and their sale, under a licensing system which places restrictions on the activities.

B. Treatment Based on Traded Product

1. *Peninsular Malaysia*

- a. WCA Sections 68 and 87 both apply to any derivative or claimed derivative of totally protected wildlife. Thus all levels of processing are covered. Similarly INTESA makes no distinction on level of processing.
- b. The National Heritage Act potentially allows for an exemption to the prohibition on domestic trade for antiquities: it regulates registration, conservation, and sale of heritage objects. (Sections 56, 57, 58, 91, and 93). An object includes any moveable antiquity (which must be at least 50 years old, or believed to be 50 years old), tangible cultural heritage, and historic objects (Section 2).
- c. The WCA and INTESA treat both Asian and African elephants the same.

2. *Sabah*

- a. Only the Borneo subspecies of Asian elephant is covered as a totally protected animal in the Act. All other elephants are regulated as protected animals and are subject to a lower level of protection. However, penalties for illegal possession of elephants and parts of elephants that are listed in CITES Appendix I, which includes all Asian elephants and

African elephants except those from the Southern Africa, are equivalent to those for totally protected animals. (Section 41).

3. *Sarawak*

- a. Both Asian and African elephants are classified as protected animals, not totally protected animals, under the Wild Life Protection Ordinance. However, INTESA applies in Sarawak and has a heightened level of protection for both Asian and African elephants.

C. Treatment Based on Transaction

1. *Peninsular Malaysia*

- a. The WCA, INTESA, and NHA do not distinguish control of trade based on resident or nonresident status.
- b. The WCA allows, with a special permit, persons to hunt or keep, import, export, or re-export, carry on research or study, and/or use for his zoo, circus or wildlife exhibition or commercial captive breeding totally protected wildlife, which includes elephants. (Section 11).
- c. WCA Section 87 and INTESA Section 12 prohibitions apply to trade between any individuals or businesses. The limited trade in heritage objects under the NHA covers trade between individuals and by dealers.
- d. The Communications and Multimedia Act 1998 provides authority to prosecute online transactions.

2. *Sabah*

- a. Section 35 of the ordinance allows limited licensing to “breed, rear or keep” wild animals and regulates sale of any animal kept under the provisions of the section.

D. Registration

2. *Peninsular Malaysia*

- a. INTESA Section 15 gives the Management Authority the power to require scheduled species to be marked.
- b. The WCA requires a special permit to hunt, keep, import, use, or conduct research on totally protected wildlife (Sections 11, 68-72). A special permit may only be granted after approval by the Minister (Section 14(2)). A special permit is required to hunt or keep, or take or keep any part of totally protected wildlife (Section 68); to hunt or keep any immature totally protected wildlife (Section 69); to hunt the female of totally protected wildlife (Section 70); and to use totally protected wildlife (Section 72). Section 68(b) requires a special permit (Section 11(a)) to take or keep any part or derivative of protected wildlife.
- c. The NHA requires registration of heritage objects (Sections 50-52). Section 57 requires notifying the Commissioner if a person sells a heritage object; section 58 requires notification when a person purchases or acquires a heritage item; and section 93 requires a dealer to report the sale.

3. *Sabah*

- a. The Wildlife Conservation Enactment requires authorization by the Minister in order to possess an animal or its part of an animal which is listed in Part 1 of Schedule 1, which includes the Borneo subspecies of Asian elephant. In addition, a license is required for any person who “hunts, kills, captures, sells, offers for sale or claims to be offering for sale, imports, exports, or is in possession of, any protected animal” or its part or derivative. Such activities are only allowed for totally protected animals if done for scientific or educational purposes or for the protection and conservation of the animal, and the Controller gives permission in writing. (Section 29).

4. *Sarawak*

- a. The Wild Life Protection Ordinance requires a license to breed wild animals “for the purpose of trade, sale, or commercial usage.” (Section 35 (1)). The sale or offer of sale of any animal which is bred, reared, or kept is to be regulated by the conditions imposed by the license. (Section 35(2)).

E. Interpretation by Courts

In the 2015 case of Public Prosecutor v. Nguyen Thi Huong [2015] 2 CLJ 102, Nguyen was convicted of smuggling animal products, but the trial court ordered a relatively light sentence. On appeal, the High Court called upon all Magistrates and Sessions Environmental Court Judges to impose much more significant penalties in environmental crime cases, stating that inadequate penalties were currently being imposed to deter future smugglers.

F. Additional Notes

Under the Sabah Wildlife Conservation Enactment, the burden of proving lawful possession of a totally protected animal or its part is on the person found to possess such animal or animal product (Section 41(3)).

Under the Sarawak Wild Life Protection Ordinance 1998, a person found to possess a wild animal beyond amounts for personal consumption “shall be deemed to have intended to sell or offer for sale” the wild animal. (Section 37(3)).

Regulating Domestic Ivory Trade in the Philippines

I. Trade in Elephant Ivory in the Philippines

Demand for elephant ivory in the Philippines is ongoing. This demand is driven by a variety of different factors. Elephant ivory is frequently used to create religious statues and other religious items. Accordingly, Philippine priests and others associated with the Catholic Church drive demand and tend to be among the biggest collectors of ivory in the Philippines. Additionally, ivory demand is driven by the perception that it is a rare and prestigious gift to both give and receive. Finally, demand for ivory in the Philippines is driven by demand in foreign markets such as those in African and Southeast Asian nations.

II. Enumeration of Applicable Laws, Regulations, and Other Legally Binding Instruments

1. *Wildlife Resources Conservation and Protection Act, Republic Act No. 9147*

The Wildlife Resources Conservation and Protection Act (“WRCPA”) was enacted in 2001 to regulate, at least in part, the domestic trade in endangered wildlife, including endangered wildlife parts and derivatives.¹³² The WRCPA also provides wildlife enforcement officers with “full authority to seize illegally traded wildlife and to arrest violators of [the WRCPA].”¹³³ The WRCPA was implemented on July 30, 2001.¹³⁴

2. *Implementing Rules and Regulations (“IRR”) of Republic Act 9147*

The IRR simply implements the WRCPA.¹³⁵ It was enacted on May 18, 2004.¹³⁶

3. *Anti-Money Laundering Act of 2001, Republic Act No. 9160*

The Anti-Money Laundering Act (“AMLA”) makes it a crime to use proceeds acquired pursuant to unlawful activity.¹³⁷ Unlawful activity includes smuggling.¹³⁸ Smuggling includes the domestic buying and selling of an item fraudulently imported into the Philippines,¹³⁹ whereas fraudulent importation includes the importation of articles prohibited by law.¹⁴⁰ The Wildlife Resources Conservation and Protection Act prohibits the import of endangered wildlife parts and derivatives.¹⁴¹ Accordingly, the AMLA likely makes it unlawful to use and possess money

¹³² See Wildlife Resources Conservation and Protection Act, Republic Act No. 9147, ch. 1 §§ 2(b), 3, available at http://www.lawphil.net/statutes/repacts/ra2001/ra_9147_2001.html (last accessed Feb. 2, 2018); see also *id.* at ch. III, Art. II, § 23.

¹³³ See *id.* at ch. VI, § 30.

¹³⁴ See generally *id.*

¹³⁵ See *Implementing Rules and Regulations of Republic Act 9147, Rule 1.1*, available at <http://extwprlegs1.fao.org/docs/pdf/phi157501.pdf> (last visited Feb. 2, 2018).

¹³⁶ See generally *id.*

¹³⁷ See *Anti-Money Laundering Act of 2001, Republic Act No. 9160, § 4*, available at http://www.lawphil.net/statutes/repacts/ra2001/ra_9160_2001.html (last visited Feb. 6, 2018).

¹³⁸ See *id.*, § 3(a)(10).

¹³⁹ See *Revised Rules and Regulations Implementing Republic Act No. 9160, Rule 3(i)(J)(51)–(52)*, available at http://www.bsp.gov.ph/regulations/laws/RA9194_IRR.pdf (last visited Feb. 6, 2018).

¹⁴⁰ See *Tariff and Customs Code of the Philippines, Title I, § 102(k)*, available at http://www.lawphil.net/statutes/repacts/ra1957/ra_1937p1_1957.html#s102 (last accessed Feb. 6, 2018).

¹⁴¹ See *Wildlife Resources Conservation and Protection Act, supra n. 17, art. III, § 26.*

acquired through the illicit sale of elephant ivory. The AMLA was enacted on September 29, 2001.¹⁴² It was amended on March 7, 2003.¹⁴³

4. *Other: Registration of Raw and Worked Elephant Ivory (proposed guidance)*

This proposed guidance establishes a registry to better regulate the domestic trade in raw and worked elephant ivory to improve compliance with CITES.¹⁴⁴ The guidance was proposed in 2015 and is not yet in effect.¹⁴⁵

III. Analysis

A. Legal Status

The WRCPA was enacted “to regulate the collection and trade of wildlife”¹⁴⁶ in “all areas of the country.”¹⁴⁷ Moreover, the WRCPA provides that “[t]he collection of threatened wildlife . . . including its by-product and derivatives, shall be allowed only for scientific, or breeding or propagation purposes in accordance with Section 6 of [the WRCPA].”¹⁴⁸ Further, the WRCPA makes it unlawful for individuals to trade wildlife, transport wildlife, and collect, hunt, or possess “wildlife, their by-products and derivatives.”¹⁴⁹

The WRCPA provides for the imposition of penalties and fines against those who violate the Act.¹⁵⁰ An individual engaging in unlawful trade of wildlife is subject to a prison term of no less than 10 days and no more than four years and a fine of no less than P200.00 and no more than P500,000.00.¹⁵¹ The prison term and fine depend on whether the individual is trading wildlife listed as critical, endangered, vulnerable, or threatened.¹⁵² Further, an individual unlawfully collecting, hunting, or possessing wildlife, their by-products and derivatives is subject to a prison term of no less than 10 days and no more than four years and fines of no less than P1,000.00 and no more than P300,000.00.¹⁵³ The prison term and fine depend on whether the wildlife, by-products, and derivatives involved are listed as critical, endangered, vulnerable, or threatened under the WRCPA.¹⁵⁴ Additionally, an individual convicted of unlawfully transporting wildlife is subject to a prison term of no less than 5 days and no more than 1 year and a fine of no less than P200.00 and no more than P100,000.00.¹⁵⁵

The prison term and fine for unlawfully transporting wildlife is dependent on whether the wildlife involved in the violation is listed as critical, endangered, vulnerable, or threatened under the WRCPA.¹⁵⁶ The Act also provides that [a]ll wildlife, its derivatives or by-products, and all paraphernalia, tools and conveyances used in connection with violations of this Act, shall be *ipso facto* forfeited in favor of the government” and that all fines imposed under the Act shall increase by at least 10% every three years “to maintain the deterrent function of such fines.”¹⁵⁷

¹⁴² See *Anti-Money Laundering Act of 2001*, *supra* n. 137 .

¹⁴³ See *An Act Amending Republic Act No. 9160, Republic Act No. 9194*, available at http://www.lawphil.net/statutes/repacts/ra2003/ra_9194_2003.html (last accessed Feb. 6, 2018).

¹⁴⁴ See *Registration of Raw and Worked Elephant Ivory*, § 3, available at http://www.bmb.gov.ph/images/fronttabs/proposed_policy/Draft_DAO_on_Ivory_Registration.April_2015.pdf (last accessed Feb. 2, 2018).

¹⁴⁵ See generally *id.*

¹⁴⁶ See *Wildlife Resources Conservation and Protection Act*, *supra* n. 17, ch I, § 2(b).

¹⁴⁷ *Id.*, ch. I, §3.

¹⁴⁸ *Id.*, ch III., art. II, §23.

¹⁴⁹ *Id.*, ch. IV, §§ 27(e), 27(f), 27(i).

¹⁵⁰ *Id.*, ch. V.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

Despite the steep fines, the WRCPA makes it lawful to collect and/or possess by-products and derivatives if they are “not obtained in violation of this act”¹⁵⁸ and permits local transport of wildlife, by-products and derivatives unless it is “prejudicial to the wildlife and the public health.”¹⁵⁹ Accordingly, the Act likely makes it permissible to transport, collect, and possess elephant ivory assuming it is acquired in a manner that does not violate the Act. Without a formal registry, however, determining what ivory was and was not acquired in contravention of the Act may be difficult to determine and, therefore, difficult to enforce.

B. Treatment Based on Traded Product

It is permissible to trade and locally transport wildlife parts and their derivatives acquired in a manner that does not violate the Act,¹⁶⁰ suggesting that the WRCPA envisioned that some elephant ivory (i.e. antiquities) could be lawfully traded and/or possessed.

C. Treatment Based on Transaction

There are no laws that provide differential treatment based on transaction types, including online trade.

D. Registration

Currently, the Philippines does not have a system in place for registering raw and/or worked elephant ivory. Nevertheless, the legislature is currently considering guidance that would establish a registry for raw and worked ivory.¹⁶¹

E. Interpretation by Courts

Information on judicial interpretation and/or enforcement of Philippine laws related to the domestic trade in elephant ivory under the WRPCA, the IRR, and the AMLA are not easily accessible online.

¹⁵⁸ *Id.*, ch. III, § 9.

¹⁵⁹ *Id.*, ch. III, § 10.

¹⁶⁰ *Id.*, ch. III, §§ 9–10.

¹⁶¹ See *Registration of Raw and Worked Elephant Ivory*, *supra* n. 144.

Regulating Domestic Ivory Trade in Thailand

I. Trade of Elephant Ivory in Thailand

A. Factual/Contextual Questions

1. *Where possible and appropriate, briefly describe:*
 - Who uses the ivory and for which purposes?
 - Ivory is typically used for collections, spiritual belief, status symbols of wealthy elites, and personal usage such as the case of jewelry.
2. *Have demand reduction strategies been deployed?*¹⁶²
 - a. There are two strategies of demand reduction that have been implemented:
 - i. Raising awareness among youth to reduce demand of ivory uses in the future.
 - ii. Strengthening public education in relevant laws and regulations through various activities and campaigns, in particular targeted groups such as ivory shops and foreign tourists.
3. *What are recent trends in the market (price, volume traded)?*
 - a. Price of legal raw ivory is higher in comparison to prior enactment of the Elephant Ivory Act. The price of raw ivory can increase up to 60,000 baht (1,900 USD) per kilogram.
 - b. Number of ivory registered shops in Thailand has almost halved since 2015, and likely to be continuously reduced in the future. Many existing ivory shops intend to stop selling ivory when their present stock is finished.

II. Enumeration of Applicable Laws, Regulations, and Other Legally Binding Instruments

1. *Wild Animal Reservation and Protection Act (WARPA) B.E 2535 (1992)*¹⁶³ & *Ministerial Regulation Prescribing Certain Wildlife as Protected Wildlife (No.3) B.E. 2558 (2015)*¹⁶⁴
 - To reserve wild animals prescribed as protected animals, reserved animals and species (including parts and product) are prohibited to import, export, trade and sale as well as to control business related to wild animals and to protect important designated habitat areas.
 - The country made an amendment to existing WARPA and added African Elephant to the list of protected species (first non-native species to be listed).¹⁶⁵
 - WARPA's trade definition is inconsistent with that of CITES; as it neglects to include re-export and introduction from the sea specified in CITES definition.
 - The first WARPA came into effect on February 19th 1992, the third and latest version came into effect on December 31, 2014.

¹⁶² CITES, IMPLEMENTATION OF THAILAND'S NATIONAL IVORY ACTION PLAN, (2016), pp. 1, 3, 12, 13, available at <https://cites.org/sites/default/files/eng/com/sc/67/E-SC67-13-A5.pdf> (last accessed June 6, 2018).

¹⁶³ Wild Animal Reservation and Protection Act. B.E. 2535 (1992). http://thailaws.com/law/t_laws/tlaw0317.pdf

¹⁶⁴ Ministerial Regulation Prescribing Certain Wildlife as Protected Wildlife (No. 3) B.E. 2558 (2015). Available online in Thai: <http://web.krisdika.go.th/data/law/law2/%ca04/%ca04-2b-2558-a0001.pdf>

¹⁶⁵ CITES, PROGRESS REPORT ON THE IMPLEMENTATION OF REVISED THAILAND'S NATIONAL IVORY ACTION PLAN FOR SC66 (2015). <https://cites.org/sites/default/files/eng/com/sc/66/E-SC66-29-Annex8.pdf>

2. *Elephant Ivory Act*¹⁶⁶

- This act controls trade, possession, import, export and other relevant transactions of elephant ivory originating from domesticated Asian elephants, registered under the law of Beast of Burden Act. Possession of domesticated ivory requires registration and appropriate possession documents.
- Changes in ownership, relocation, and transformation must be notified.
- The act came into effect on January 16, 2015.

3. *Beast of Burden Act*¹⁶⁷

- This act protects owner's right with their working animals, including elephants, horses, cattle. The animals must be registered under the act. Notifications of changes of ownerships, appearance characteristics, or death of animals, are required.
- The amendment will lead to a new form of elephant identification certificate (ex. Microchip number, DNA code, photos and tusk information.)¹⁶⁸
- Effectiveness of first WARPA was December 25, 1939. The revision of regulation related to animal identification document came into effect on February 14, 2015.

4. *Other*

- The National Council for Peace and Order (NCPO) had issued order number 60/2559 dated 28 September 2016 instructing relevant agencies to implement comprehensive measures to address illegal elephant trading. Joint co-operation amongst 3 agencies, including Department of National Parks, Wildlife and Plant Conservation (DNP), Department of Livestock Development (DLD), and Department of Provincial Administration (DOPA) completed collection of blood and hair samples from 3,783 domesticated elephants for DNA testing. DNP is responsible for DNA analysis and the DNA result will be further recorded into the domesticated elephant database. This attempt aims to prevent laundering of wild-caught elephants into the domesticated population and to support ivory trade control for identifying origin of suspicious ivory. The NCPO's order also requested relevant agencies to draft a legislation focusing on conservation and protection of Asian elephants. The Elephant Act, therefore, was drafted and later disseminated for public hearing on May 23rd 2017. Thailand also puts effort into the management of the ivory database system by improving the system to enable effective in operating of large quantities of data. In fiscal year 2017, the budget was allocated for the system improvement under procurement process.

III. Analysis

A. Legal Status

1. *Is domestic trade legal, completely banned, or partially banned?*

- a. Ivory taken from domesticated elephants can be traded domestically under the Elephant Ivory Act. Legal acquisition of ivory needed to be verified before entering to trade. Trade in raw ivory also needs a permit under the ANIMAL EPIDEMICS ACT. Ivory of wild Asian and African elephants are prohibited from all kinds of exploitation.

2. *What penalties/deterrence exist?*

- a. Under WARPA, penalties for illegal import, export, transit and possession of CITES-listed wildlife would be 3-10 years imprisonment and a fine of 60,000 – 200,000 Baht (USD 1727-5755), or both.¹⁶⁹

¹⁶⁶ *Elephant Ivory Tusks Act*. B.E. 2558 (2015). https://www.ecolex.org/details/legislation/elephant-ivory-tusks-act-be-2558-2015-lex-faoc167051/?q=thai+elephant+ivory+act&type=legislation&xdate_min=&xdate_max=

¹⁶⁷ OFFICE OF THE COUNCIL OF STATE, *Beast of Burden Act*, B.E. 2482 (1939), available at <http://www.krisdika.go.th/wps/wcm/connect/321f8a0043c259a8a0c0af49dc260fed/BEASTS+OF+BURDEN+ACT%2C+B.E.+2482+%281939%29.pdf?MOD=AJPERES&CACHEID=321f8a0043c259a8a0c0af49dc260fed>

¹⁶⁸ CITES. (2015). *PROGRESS REPORT ON THE IMPLEMENTATION OF REVISED THAILAND'S NATIONAL IVORY ACTION PLAN FOR SC66*, pg.1., available at <https://cites.org/sites/default/files/eng/com/sc/66/E-SC66-29-Annex8.pdf>.

¹⁶⁹ UN OFFICE ON DRUGS AND CRIME, *Criminal Justice Response to wildlife crime in Thailand* (2017), available at https://www.unodc.org/documents/southeastasiaandpacific/Publications/2017/Thai_Assessment_13_16_May_2017.pdf.

- b. *Trade in ivory without permission shall be penalized with imprisonment of up to 3 years or with a fine to the amount of up to 6,000,000 Baht (USD 191,736) or with both under Elephant Ivory Act Section 13.*

B. Treatment Based on Traded Product

1. *Which specimens are covered by the domestic controls: raw/unprocessed (tusks), semi-processed and fully processed (products)?*
 - a. All kinds of traded ivory specimens of identified elephants are covered under Elephant Ivory Act, including ivory from both wild and domesticated populations.
2. *Are there any exemptions to domestic controls (pre-convention, antiquities, pieces of art)?*
 - a. There are exemptions to possession registration:
 - i. Raw ivory and finished products under possession of government authorities
 - ii. Four pieces of small finished product for personal use per person with total weight no greater than 0.5 kg.
3. *Are the controls the same with respect to native and non-native (exotic) species (e.g. ivory from Asian vs. African elephants)?*
 - a. Both wild Asian and African Elephants are protected animals in Thailand under WARPA, therefore the ivory originating from these elephants is not allowed for all commercial uses, including possession, trade, import and export. Domesticated Asian Elephants, however, are under the control of the Beast of Burden Act, ivory and products thereof can be possessed and traded domestically in accordance with comprehensive controls under the Elephant Ivory Act.

C. Treatment Based on Transaction

1. *Does domestic control differ based on the use or the actor involved (residents v nonresidents)?*
 - a. No difference in domestic control between resident and nonresidents.
2. *Which types of trade are covered: Business-to-business, business-to-consumer, consumer-to-consumer?*
 - a. All types of domestic trade are covered under the Elephant Ivory Act.
3. *Is domestic online trade regulated? And if so, how?*
 - a. All domestic trade is required to be conducted in accordance with regulations. This includes having trade permit, stock verification, product marking, as well as report on raw ivory transformation and trade record. Traders are required to issue sale document for further registration of their customers which contains information of ivory product and buyer's ID number. The copy of sale document needed to be report along with monthly trade records.

D. Registration

1. *Are there systems/mechanisms in place for registration of possession of specimens and which controls are performed in the context of the registration?*
 - a. Accordance with the Elephant Ivory Act, possession of ivory required registration within 30 days of possession. Evidence proving legal acquisition is needed. After verification, a certification will be issued. Notification is required for changes in ownerships, place of possession, and transformation in ivory. Lack of registration and notification shall be penalized with a fine to the amount of up to 3,000,000 Baht (USD 96,000) under the Act.

E. Interpretation by Courts

1. *Have domestic controls been tried in court cases [or administrative tribunals] and if so, what were the results?*
 - a. Several domestic court cases regarding ivory trade or possession offenses are shown in the following table:

Court Cases	Verdict
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In 2014, a case of African elephant ivory possession offense (51 tusks weighing 134.71 kgs) against the Wild Animal Reservation and Protection Act (No.3) B.E. 2557 (2014) that revised certain provisions of the WARPA B.E. 2535 (1992) to list African elephant as protected species in the Ministerial Regulation under WARPA. The possession of African elephant ivory without DNP's permission is illegal.	As the offender pleaded guilty, the offender got a year imprisonment (WARPA Act), with forfeiture of assets in relation to Money Laundering Act for 17,052,750Baht. (546,457.63USD)
In 2015, a case of African elephant ivory possession offense (1 piece weighing 0.507 kgs) against the WARPA (No. 3) B.E. 2557 (2014)	An offender was sentenced to 3-month imprisonment and fined for 2,500 Baht (80.11 USD)
In 2015, a case of African elephant ivory product possession offense (33 pieces) against the WARPA (No. 3) B.E. 2557 (2014)	An offender was sentenced to 9-month imprisonment and fined for 25,000 Baht (801.11 USD).
In 2015, a case of African elephant ivory product possession offense (10 pieces) against the WARPA (No. 3) B.E. 2557 (2014)	An offender was sentenced to 6-month imprisonment and fined for 10,000 Baht (320.45 USD).
In 2016, a case of transforming ivory in the possession without permission (from 4.060 kgs. of raw ivory to product) against Ivory Act B.E. 2558 (2015)	An offender was sentenced to a year on probation and fined for 50,000 Baht (1,602.26USD).

Regulating Domestic Ivory Trade in the United States

I. Trade in Elephant Ivory in the United States

A. Who uses the ivory and for which purposes?

Ivory vending is present within physical market places across the United States, including many of its major cities. Ivory buyers tend to be motivated through social, fashion, and religious reasons for purchasing their ivory. Conveying a financial and social status to the public motivates many buyers for ivory purchases, and ivory is also perceived as incredibly suitable for gifting.

B. Have demand reduction strategies been deployed?

Different methods are used to implement elephant ivory demand reduction strategies in the United States. For example, one way to reduce demand of elephant ivory is to increase penalties and prosecutions. Another way is to increase public/consumer education.

On July 1, 2013, President Obama issued an Executive Order to set up an Advisory Council on Wildlife Trafficking.¹⁷⁰ In February 2014, President Obama issued a National Strategy for Combating Wildlife Trafficking.¹⁷¹ In this strategy, Obama addressed reducing demand for illegally traded wildlife.¹⁷² President Obama suggested raising public awareness and changing behavior, building partnerships to reduce domestic demands, and promote demand reduction efforts globally.¹⁷³ Since then, both governmental and non-governmental organizations have deployed many demand reduction strategies.

For example, on February 11, 2015 the Department of Interior (DOI) released a plan to implement the National Strategy for Combating Wildlife Trafficking. Following that plan, the USFWS issued special rule §17.40(e) that created and clarified new controls for elephant ivory.¹⁷⁴

To educate the public and raise awareness, the USFWS also participated in publicly crushing tons of seized elephant ivory in Times Square. USFWS stated that “our very public and well publicized actions showed the consequences of illegal ivory to people who might not understand the connection between their decision to buy ivory and slaughtered elephants.”¹⁷⁵ They also stated, “Our Ivory Crush strengthened partnerships for sure, involving a broad diversity of NGO, governmental and private partners and attended by dignitaries from around the world. And it brought the plight of elephants to new audiences, hopefully reducing demand for ivory.” The USWS also made a Public Service Announcement video through YouTube.¹⁷⁶ They also encouraged individuals to advocate through social media and let their friends and family know that they would rather see live elephants than dead ivory.¹⁷⁷ They encouraged the use of the hashtag #IvoryCrush.¹⁷⁸ The USFWS also encouraged people to know the facts about elephant ivory, not to buy products containing elephant ivory, learn about projects funded through the USFWS’s African Elephant Conservation Fund, and buy Save Vanishing Species Stamps.¹⁷⁹ Proceeds from the Save Vanishing Species Stamp directly support the conservation of some of the most familiar

¹⁷⁰ THE WHITE HOUSE, Exec. Order No. 13648, 78 Fed. Reg. 40621 (Jul. 1, 2013), available at <https://obamawhitehouse.archives.gov/the-press-office/2013/07/01/executive-order-combating-wildlife-trafficking> (last accessed Apr 19, 2018).

¹⁷¹ THE WHITE HOUSE, National Strategy For Combatting Wildlife Trafficking, 9 (Feb. 11, 2014), <https://obamawhitehouse.archives.gov/sites/default/files/docs/nationalstrategywildlifetrafficking.pdf>.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ 50 C.F.R. §17.40(e) (2017).

¹⁷⁵ U.S. Fish & Wildlife Service, *Elephants Over Ivory: Crushing the Illegal Ivory Market* (Jul. 15, 2015), <https://www.fws.gov/news/blog/index.cfm/2015/7/15/Elephants-Over-Ivory-Crushing-the-Illegal-Ivory-Market> (last visited Apr. 19 2018).

¹⁷⁶ U.S. FISH & WILDLIFE SERVICE, #IvoryCrush- Ivory Crush PSA (Sep. 2, 2014). <https://www.youtube.com/watch?v=3bgZBTXmigE> (last visited Apr. 19, 2018).

¹⁷⁷ U.S. Fish & Wildlife Service, *supra* n. 175.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

and threatened species. A 2015 report said that, “Since its inception in 2011, more than 26 million stamps have been sold generating more than \$2 million for conservation.”¹⁸⁰

C. What are recent trends in the market (price, volume traded)?

No relevant data was identified.

II. Enumeration of Applicable Laws, Regulations, and Other Legally Binding Instruments

A. Relevant Instruments

1. *The Endangered Species Act*¹⁸¹
 - The Endangered Species Act generally prohibits all domestic trade of elephant ivory. Some exceptions exist. The ESA provides for penalties for both civil and criminal penalties.
 - Date of implementation: December 28, 1973.
2. *§ 17.40 Special rules – mammals*¹⁸²
 - Generally prohibits domestic trade of African elephant ivory with exceptions for antiques, pre-Convention, and de minimis content of ivory in the product.
 - Date of implementation: September 26, 1975.
 - Last Revision: September 6, 2017.
3. *The African Elephant Conservation Act*¹⁸³
 - The African Elephant Conservation Act (AfECA) allows the USFWS to establish and enforce controls on domestic trade, including full moratoria.
 - Date of implementation: October 7, 1988.
4. *The Asian Elephant Conservation Act of 1997*¹⁸⁴
 - Provides ways to allocate money for Asian elephant conservation.
 - Date of implementation: November 19, 1997.
5. *The Lacey Act*¹⁸⁵
 - Provides criminal and civil penalties for violating federal, international, and state domestic trade laws.
 - Date of implementation: November 16, 1981.
6. *The Smuggling Laws*¹⁸⁶
 - Allows for criminal and civil penalties for selling, purchasing, or transporting merchandise imported illegally.
 - Date of implementation: June 25, 1948.
7. *Laundering of Monetary Instruments*¹⁸⁷
 - Provides penalties for unlawful financial transactions involving illegal elephant ivory.
 - Date of implementation: October 27, 1986.
8. *Director’s Order No. 210*¹⁸⁸
 - The U.S. Fish and Wildlife Service issued this order in order to establish ways to implement the National Strategy for Combating Wildlife Trafficking. For example, ordering USFWS employees to strictly enforce all criteria under the ESA antiques exception.

¹⁸⁰ *Id.*

¹⁸¹ 16 U.S.C. §§ 1531-1544.

¹⁸² 50 C.F.R. §17.40 (e) (2017).

¹⁸³ 16 U.S.C. §§ 4201–4246.

¹⁸⁴ 16 U.S.C. §§ 4261- 4266.

¹⁸⁵ 16 U.S.C. §§ 3371-3378.

¹⁸⁶ 18 U.S.C. §554 & §555.

¹⁸⁷ 18 U.S.C. § 1956.

¹⁸⁸ U.S. DEP’T OF INTERIOR, *Director’s Order No. 210* (Feb. 25, 2014), <https://www.fws.gov/policy/do210.html> (last visited Apr. 19, 2018).

- Date of implementation: February 25, 2014.
 - Last Revision: July 18, 2016.
9. *Executive Order 13648*¹⁸⁹
- President Obama issued this Executive Order to set up an Advisory Council on Wildlife Trafficking.
 - Date of implementation: July 1, 2013.

B. Has the government made political decisions that have not (yet) been transformed into legally binding instruments?

The United States government has not indicated that there will be changes to its regulation of ivory.

C. Are there any changes underway to the legal and regulatory framework affecting domestic trade in elephant ivory?

N/A.

III. Analysis

A. Legal Status

1. *Is domestic trade legal, completely banned, or partially banned?*

The United States generally bans domestic trade of elephant ivory, but some exceptions exist. (See exceptions discussed below in Section (III)(B)(2)).

2. *What penalties/deterrence exist?*

The Lacey Act Penalties

Violation	Mental State	Market Value	Type of Penalty	Penalty
	Engages in conduct prohibited and should have known the elephant ivory was taken, possessed, transported, or sold in violation of subsection (a)	Less than US\$350	Civil	Fine not more than US\$10,000 for each violation
Subsection (a) prohibits transport, sale, purchase, acquisition, or receipt of any African or Asian elephant ivory taken, possessed, transported, or sold in violation of State law, Federal law, or Tribal law.	Knowingly engages in prohibited conduct and should have known the elephant ivory was taken, possessed, transported, or sold in violation of subsection (a)	N/A	Criminal	Fine not more than US\$10,000 for each violation; or Imprisonment not more than one year

¹⁸⁹ THE WHITE HOUSE, Exec. Order No. 13648, 78 Fed. Reg. 40621 (Jul. 1, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/07/01/executive-order-combating-wildlife-trafficking>, (last visited Apr 19, 2018).

<p>Knowingly engages in conduct prohibited and knew the elephant ivory was taken, possessed, transported, or sold in violation of subsection (a)</p>	<p>In excess of US\$350</p>	<p>Criminal</p>	<p>Not more than US\$20,000 fine for each violation; or Imprisonment not more than five years; or both</p>
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Subsection (b) makes it unlawful to “transport in interstate commerce any container or package containing any” elephant ivory “unless the container or package has previously been plainly marked, labeled, or tagged in accordance with the regulations issued pursuant to paragraph (2) of section 3376(a) of this title.”

<p>Violates subsection (b)</p>	<p>N/A</p>	<p>Civil</p>	<p>Fine not more than US\$250</p>
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Subsection (d) prohibits false labeling of any elephant ivory “transported in interstate commerce.”

<p>Knowingly violates subsection (d)</p>	<p>Less than US\$350</p>	<p>Civil</p>	<p>Fine not more than US\$10,000 for each violation</p>
<p>Knowingly violates subsection (d)</p>	<p>Greater than US\$350</p>	<p>Criminal</p>	<p>Fine under Title 18; or Imprisonment not more than five years; or Both</p>

a. Smuggling Laws

The smuggling laws provide penalties for, “Whoever... receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise, article or object, *prior to exportation*, knowing the same to be intended for exportation contrary to any law or regulation of the United States, shall be fined under this title, imprisoned not more than 10 years, or both.”¹⁹⁰

The smuggling laws also provide penalties for, “Whoever... receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise *after importation*, knowing the same to have been imported or brought into the United States contrary to law-- Shall be fined under this title or imprisoned not more than 20 years, or both.”¹⁹¹

b. Endangered Species Act

The Asian elephant is listed as endangered under the ESA and the African elephant is listed as threatened. For endangered species (Asian elephants), 16 U.S.C. §1538(a)(1)(A)-(F) prohibits delivery, receipt, carriage,

¹⁹⁰ 18 U.S.C. §554.

¹⁹¹ *Id.*, §545.

transport, or shipment in interstate commerce¹⁹² of any specimen.¹⁹³ The ESA provides for both civil and criminal penalties for violating § 1538(a)(1).¹⁹⁴

Although §1538(a)(1)(A)-(F) describes the prohibitions for Asian elephants, §1538(a)(1)(G) includes a “catch-all” provision prohibiting any act in violation of any regulation issued pursuant to the ESA.¹⁹⁵ Thus, even though 50 C.F.R. § 17.40(e) describes the prohibitions for African elephants, the civil and criminal penalties for violating §1538(a)(1) apply to both Asian and African elephants.¹⁹⁶ The penalties in §15.40 are different for Asian elephants (§1538(a)(1)(A)-(F)) versus African elephants § 1538(a)(1)(G).

The penalties include:

A knowing violation of any of the ESA provisions discussed here is a misdemeanor offense. Under current Department of Justice policy, proof of knowledge for an ESA criminal violation requires a showing that the defendant knew the biological identity of the species he or she was taking, selling, etc. Violations of §1538(a)(1)(A)-(F), (a)(2)(A)-(D), (c), (d) (other than record-keeping/filing offenses), (f), and (g), are Class A misdemeanors, punishable by a fine of no more than US\$100,000 (or twice the gross gain or loss), not more than 1 year in prison, or both. See 16 U.S.C. §1540(b)(1) (2015); 18 U.S.C. §3571(b)(5) (2015). Violation of §1538(a)(1)(G), which includes cases involving all other regulations, such as those dealing with threatened species, is a Class B misdemeanor, punishable by a fine of no more than \$25,000 (or twice the gross gain or loss), 6 months in prison, or both. See 16 U.S.C. §1540(b)(1) (2015); 18 U.S.C. §3571(d) (2015). Wildlife involved in any violation and equipment used in the context of any violation is subject to forfeiture upon conviction. 16 U.S.C. §1540(e)(4) (2015).

c. African Elephant Conservation Act

Provides penalties for import and export, which may be relevant to domestic trade because the ivory must be imported into the U.S. at some point.¹⁹⁷

d. Laundering of monetary instruments, 18 U.S.C. 1956

Provides for criminal and civil penalties for “Whoever, knowing that the property involved in a financial transaction represents the proceeds of some unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity.”¹⁹⁸ This may apply to domestic trade if a person knowing conducts a financial transaction using proceeds from illegal domestic trade of elephant ivory.

B. Treatment Based on Traded Product

1. Which specimens are covered by the domestic controls: raw/unprocessed (tusks), semi-processed and fully processed (products)?

African Elephant

According to 50 C.F.R. §17.40(e)(1):

- Ivory: “means any African elephant tusk and any piece of an African elephant tusk.”
- Raw ivory: “means any African elephant tusk, and any piece thereof, the surface of which, polished or unpolished, is unaltered or minimally carved.”
- Worked ivory: “means any African elephant tusk and any piece thereof, that is not raw ivory.”¹⁹⁹

¹⁹² “Interstate commerce” refers to transactions across state borders, but in this context the trade is considered domestic.

¹⁹³ 16 U.S.C. § 1538(a)(1)(A)-(F).

¹⁹⁴ *Id.*, §1540(a)&(b).

¹⁹⁵ *Id.*, §1538(a)(1)(G).

¹⁹⁶ *Id.*, §1540.

¹⁹⁷ 16 U.S.C. §4223.

¹⁹⁸ 18 U.S.C. § 1956.

¹⁹⁹ 50 C.F.R. § 17.40(e)(1).

Most sections under §17.40(e) that involve domestic trade use the word “Ivory.” The interstate commerce de minimis exception (see below) applies as long as the ivory is not raw ivory.²⁰⁰

Asian Elephant

For Asian elephants, there is no distinction between the ivory because “The term “fish or wildlife” means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, non-migratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.”²⁰¹

2. *Are there any exemptions to domestic controls (pre-convention, antiquities, pieces of art)?*

African Elephant Exceptions

Different exceptions exist for the African Elephant and the Asian elephant. The following exceptions apply to the African elephant.

Antiques Exception:

To qualify for the ESA antiques exemption, an item must meet all of the following criteria [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; and
- D. It is being or was imported through an endangered species “antique port.”

Under Director’s Order No. 210, as a matter of enforcement discretion, items imported prior to September 22, 1982, and items created in the United States and never imported must comply with elements A, B, and C above, but not element D.²⁰²

The U.S. Fish and Wildlife Service strengthened the requirements for antique items based on Director’s Order 210 to offer guidance on the antiques exception.²⁰³

Pre-Convention Exception:

- 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 the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) pre-Convention certificate with no limitation on its commercial use;²⁰⁴
- Most domestic trade involving pre-convention elephant ivory needs documentation. This documentation could be in the form of a CITES pre-Convention certificate, a datable photo, a dated letter or other document referring to the item, or other evidence.²⁰⁵

²⁰⁰ *Id.*, §17.40(e)(3)(iv).

²⁰¹ 16 U.S.C. §1532(8).

²⁰² 16 U.S.C. §1539 (h)(1)(A)-(D), 50 C.F.R. 17.40(e)(1)

²⁰³ U.S. DEP’T OF INTERIOR, Director’s Order No. 210 (Feb. 25, 2014), <https://www.fws.gov/policy/do210.html> (last visited Apr. 19, 2018).

²⁰⁴ 50 C.F.R. §17.40(e)(3)(1).

²⁰⁵ FISH & WILDLIFE SERVICE, *What Can I Do With My Ivory?* <https://www.fws.gov/international/travel-and-trade/ivory-ban-questions-and-answers.html> (last visited Apr. 19, 2018).

De Minimis Exception:

To qualify for the *de minimis* exception, manufactured or handcrafted items must meet all of the following criteria:

- 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 the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) with the pre-Convention certificate with no limitation on its commercial use;
- ii. If the item is located outside the United States, the ivory was removed from the wild prior to February 26, 1976;
- 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 percent 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 percent 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 the effective date of this rule.²⁰⁶

The U.S. Fish and Wildlife Service offered guidance on what they expect the *de minimis* exception to cover.²⁰⁷

What is likely to qualify for the *de minimis* exception?

“When we proposed the 200-gram limit we had a particular suite of items in mind. The following types of items may qualify for the *de minimis* exception: many musical instruments (including many keyboard instruments, with ivory keys, most stringed instruments and bows with ivory parts or decorations, and many bagpipes, bassoons and other wind instruments with ivory trim); most knives and guns with ivory grips; and certain household and decorative items (including teapots with ivory insulators, measuring tools with ivory parts or trim, baskets with ivory trim, walking sticks and canes with ivory decorations, and many furniture pieces with ivory inlay, etc.). However, to qualify for the *de minimis* exception, all of the above criteria must be met (either A or B and C- G).”

What types of items are not likely to qualify for the *de minimis* exception?

“Examples of items that we do not expect would qualify for the *de minimis* exception include chess sets with ivory chess pieces (both because we would not consider the pieces to be fixed or integral components of a larger manufactured item and because the ivory would likely be the primary source of value of the chess set), an ivory carving on a wooden base (both because it would likely be primarily made of ivory and the ivory would likely be the primary source of its value), and ivory earrings or a pendant with metal fittings (again both because they would likely be primarily made of ivory and the ivory would likely be the primary source of its value).”

Asian Elephants Exception

The only exception for Asian elephant ivory is the Antiques exception.²⁰⁸ The exception criteria are the same for Asian elephants as it is for African elephants (See Section (II)(B)(2) Antiques Exception above).

²⁰⁶ 50 C.F.R. 17.40(e)(3)(i)-(viii).

²⁰⁷ FISH & WILDLIFE SERVICE, *Revisions to the Endangered Species Act (ESA) Special Rule for the African Elephant Questions and Answers*, <https://www.fws.gov/international/pdf/questions-and-answers-african-elephant-4d-final-rule.pdf> (last accessed Apr. 19, 2018).

²⁰⁸ 16 U.S.C. §1539(h).

3. Are the controls the same with respect to native and non-native (exotic) species (e.g. ivory from Asian vs. African elephants)?

Not applicable, all elephants are non-native.

C. Treatment Based on Transaction

1. Does domestic control differ based on the use or the actor involved (residents v nonresidents)?

No because the Endangered Species Act defines the word person to mean “an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.”²⁰⁹

2. Which types of trade are covered: Business-to-business, business-to-consumer, consumer-to-consumer?

All transaction types are covered.

3. Is domestic online trade regulated? And if so, how?

Yes. Online trade is regulated in the same way non-online trade is regulated. Nothing in the Endangered Species Act or regulations makes an exception for online trade.

D. Registration

1. Are there systems/mechanisms in place for registration of possession of specimens and which controls are performed in the context of the registration?

The ESA does not require permits directly regarding domestic trade, but in order to possess a sport-hunted trophy it must have been imported and registered.

African elephant sport-hunted trophies may be imported into the United States provided:

(A) The trophy was legally taken in an African elephant range country that declared an ivory export quota to the CITES Secretariat for the year in which the trophy animal was killed;

(B) A determination is made that the killing of the trophy animal will enhance the survival of the species and the trophy is accompanied by a threatened species permit issued under § 17.32;

(C) The trophy is legibly marked in accordance with 50 CFR part 23;

(D) The requirements in 50 CFR parts 13, 14, and 23 have been met; and

(E) No more than two African elephant sport-hunted trophies are imported by any hunter in a calendar year.²¹⁰

E. Interpretation by Courts

1. Have domestic controls been tried in court cases [or administrative tribunals] and if so, what were the results?

United States v. Grigsby²¹¹

- Held that when a penalty under the African Elephant Conservation Act uses the word “knowingly,” then that penalty requires specific intent.

²⁰⁹ 16 U.S.C. §1532 (13).

²¹⁰ 50 C.F.R. 17.40(e)(6)(i)(A)-(E).

²¹¹ *United States v. Grigsby*, 111 F.3d 806, 822 (11th Cir. 1997).

United States v. Kokesh²¹²

- In general, when faced with a “use after import” case under this provision, or any other case predicted in violation of Part 23, conduct prior to June 26, 2014 could be subject to litigation regarding the applicability of Part 23 to the specimens at issue.
- In *Kokesh*, Defendant was charged with violating the Lacey Act and Endangered Species Act for importing African elephant Ivory. The court held that the attempted sale of the defendant’s hunting trophy was not a crime because there was not enough evidence to show that the tusks were subject to conditions set out on a CITES document that authorized import.
- This unfavorable ruling has not arisen elsewhere. The service’s revisions to 50 C.F.R. §23.2 on June 26, 2014, resolve the issue presented in this case.

United States v. Zaruskas²¹³

- Defendant convicted of illegally importing narwhal tusks into the United States, and money laundering violations associated with illegal importations. Since Narwhals and African Elephants are both threatened under the ESA and covered by CITES, the court could interpret a case involving African Elephant tusks similarly to this case.

United States v. Siyam²¹⁴

- Defendant pled guilty to two counts of importing and selling raw ivory and two counts of smuggling goods into the United State. The court sentenced her to 5 years incarceration and a \$100,000 fine for ivory trafficking.

²¹² *United States v. Kokesh*, No. 3:13cr48/RV, 2013 WL 6001052, (N.D. Fla., Nov. 12, 2013).

²¹³ *United States v. Zaruskas*, 814 F.3d 509 (2016).

²¹⁴ *United States v. Siyam*, 596 F.Supp. 2d 1078, 1090 (N.D. Ohio 2007).

Regulating Domestic Ivory Trade in Viet Nam

I. Trade in Elephant Ivory in Viet Nam

The elephant ivory trade in Viet Nam has grown dramatically in the past decade, with the majority of the trade concentrated in villages where there is less enforcement. The 2015 survey by Save the Elephants found open sale of mostly recently carved ivory in Hoh Chi Ming City, Hanoi, and four villages in 242 outlets, with 16,099 individual ivory pieces for sale, primarily jewelry. Three-fourths of customers in 2015 were Chinese, who were drawn to the lower ivory prices in Viet Nam, while most of the remaining customers were Vietnamese.

Enforcement of the ban against trade in ivory in Viet Nam has been relaxed, and corruption is a continuing problem.²¹⁵ Before recent amendments to the penal code, violations were treated administratively. The 2017 Penal Code, which went into effect in early 2018, significantly increased criminal penalties for qualifying violations associated with elephants and ivory, and made possession a violation and corporations culpable actors.

There has been public destruction of confiscated ivory. However, it is unclear what percentage of seized ivory has been destroyed. Under Decree 32 Viet Nam still allows legal sale of some confiscated specimens from the wildlife trade. Efforts to decrease demand are limited, and most traders were unaware that the sale of ivory is banned.

Trade in ivory through the internet is recognized as significant and growing. Although the government has the power to regulate the internet trade, there is inadequate training and resources to adequately address this trade.²¹⁶

II. Enumeration of Applicable Laws, Regulations, and Other Legally Binding Instruments

1. Penal Code 2017, Articles 234 and 244²¹⁷

- (i) increased the maximum imprisonment for wildlife crime from 7 years to 15 years;
- (ii) made possession of endangered wildlife a criminal offence; and introduced stricter criminal punishments for wildlife offences under Articles 234 and 244; including transporting, trading and possession.

2. Law on Forest Protection and Development (2004)²¹⁸

Makes it illegal to hunt, transport, keep, advertise, sell, purchase and consume wildlife without an appropriate permit to show animal of legal origin. The Law on Forestry 2017, which will come into effect January 1, 2019, will also prohibit acts of hunting, capturing, keeping, killing, transporting, storing, selling or specimen collection of illegal wildlife.

3. Law on Biodiversity (2008)²¹⁹

²¹⁵ UNITED NATIONS OFFICE ON DRUGS AND CRIME, WILDLIFE AND FOREST CRIME ANALYTIC TOOLKIT REPORT OF THE UNOC MISSION TO VIET NAM (2015), available at https://www.unodc.org/documents/southeastasiaandpacific/Publications/wildlife/Vietnam_Toolkit_Report_EN_-_final.pdf.

²¹⁶ *Wildlife and Forest Crime Toolkit*, *supra*.

²¹⁷ THE NATIONAL ASSEMBLY, *Law On Amendments to the Criminal Code (2015)*, available at https://www.enVietNam.org/images/News_Resources/Law_library/Penal-Code-2017.pdf (last accessed Mar. 30, 2018).

²¹⁸ THE NATIONAL ASSEMBLY, *Law on Forest Protection and Development (2004)*, available at https://www.enVietNam.org/images/News_Resources/Law_library/law_on_forest_protection_and_development.pdf (last accessed Mar. 30, 2018).

²¹⁹ THE NATIONAL ASSEMBLY, *Law on Biodiversity (2008)*, available at https://www.enVietNam.org/images/News_Resources/Law_library/Law-on-Biodiversity.pdf (last accessed Mar. 30, 2018).

Art. 4 prohibits “Hunting, fishing, exploiting bodily parts of, illegally killing, consuming, transporting, purchasing and selling species on the list of endangered precious and rare species prioritized for protection; illegally advertising, marketing and consuming products originated from species on the list of endangered precious and rare species prioritized for protection.”

4. *Decree 32/2006/ND-CP (March 30, 2006) by the Government on the Management of Endangered, Precious, and Rare Forest Fauna and Flora Species*²²⁰

Prohibits hunting, transporting, keeping, advertising, selling, purchasing and consuming rare and endangered species or their parts and derivatives and is applicable to Asian elephants.

5. *Decision 11/2013/QĐ-TTg (January 24, 2013) by the Prime Minister on Prohibiting Import, Export, Trade of Wildlife Specimen in CITES appendices*²²¹

Prohibits import, export, and trade of wildlife specimens including African elephant and its products/derivatives.

6. *Decree 82/2006/ND-CP on the management of export, import, re-export and introduction from the sea, transit, breeding, rearing and artificial propagation of rare, endangered and precious wild animals and plants*²²²

This Decree is focused on the import and export and not relevant to domestic trade, except that it sets out specific procedures relating for the transit, breeding, rearing and artificial propagation of animals and plants, including endangered ones.

7. *Decree 157/2013/ND-CP (November 11, 2013) by the Government on administrative sanctions imposed on violations with respect to forest control, forest development, forest protection and forest product management, as amended by Decree 40/2015/ND-CP and Decree 41/2017/ND-CP*²²³

Provides for administrative sanctions on hunting, etc. animals; extracting derivatives of animals; transporting animal or parts; purchasing, selling, keeping processing animal or parts; commercial advertising; violating the procedure.

8. *Decree 160/2013/ND-CP*²²⁴

Dated November 12, 2013, this Government Decree establishes the criteria for identification and management of endangered, rare and precious species prioritized for protection, defines species to be prioritized for protection and sets up mechanisms to manage exploitation, exchange, trading, gift, hiring, storing, transporting of specimens, breeding, and rescuing of species.

9. *Environmental Law No. 55/2014/QH13 (2014)*²²⁵

Art. 7(3) prohibits exploiting, trading, consuming, and using rare and precious wild plants and animals on the prohibited lists issued by the competent state body.

Has the government made political decisions that have not (yet) been transformed into legally binding instruments?

The Law on Forestry, 2017, will come into effect January 1, 2019.

Are there any changes underway to the legal and regulatory framework affecting domestic trade in elephant ivory?

N/A

²²⁰ THE GOVERNMENT OF VIET NAM, *On Management of Endangered, Precious, and rare Species of Wild Plants and Animals (2006)*, available at https://www.enVietNam.org/images/News_Resources/Law_library/decree_32.pdf (last accessed Mar. 30, 2018).

²²¹ THE PRIME MINISTER OF VIET NAM, *On Banning from Export, Import, Purchase and Sale of the Specimens of Some of Wild Fauna Species in Appendices to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (2013)*, available at https://www.enVietNam.org/images/News_Resources/Law_library/Decision-11_2013_QD-TTg.pdf (last accessed Mar. 30, 2018).

²²² THE GOVERNMENT OF VIET NAM, *Decision on Management of Export, Import, Re-export, Introduction from the Sea, Transit, Breeding, Rearing and Artificial Propagation of Endangered Species of Precious and Rare Wild Fauna and Flora (2006)*, available at https://www.enVietNam.org/images/News_Resources/Law_library/Decree-82_2006_ND-CP.pdf (last accessed Mar. 30, 2018).

²²³ THE GOVERNMENT OF VIET NAM, *Decree on Penalties for Administrative Violations against Regulations on Forest Management, Development, Protection and Forest Product Management (2013)*, available at https://www.enVietNam.org/images/News_Resources/Law_library/Decree_157_2013_ND-CP.pdf (last accessed Mar. 30, 2018).

²²⁴ THE GOVERNMENT, *Decree On Criteria To Determine Species and the Regime of Managing Species under Lists of Endangered, Precious and Rare Species Prioritized Protection (2013)*, available at https://www.enViet_Nam.org/images/News_Resources/Law_library/Decree-160_2013_ND-CP.pdf (last visited 3/30/18).

²²⁵ THE NATIONAL ASSEMBLY, *Law on Environmental Protection (2014)*, available at https://VietNam.wcs.org/Portals/119/Law%20Database/English/55_2014_QH13%20-%20Law%2055-2014%20-%20EN.pdf?ver=2017-08-07-052204-190 (last visited 3/30/18).

III. Analysis

A. Legal Status

1. *Is domestic trade legal, completely banned, or partially banned?*

Generally all domestic trade in ivory is banned. Domestic trade in ivory from African elephants (*Loxodonta Africana*) is banned by Decision 11/2013/QĐ-TTg. This decision bans the export, import, purchase and sale of the specimens of wild fauna which include African elephant, with the exception of specimens given an Import CITES permit before the decision took effect (March 15, 2013). Domestic commercial trade in Asian elephants or their products is generally prohibited by Decree 32/2006/ND-CP. Under Article 5, it is prohibited to exploit, hunt, shoot, trap, capture, keep, or slaughter the elephants (Art. 5(3)(a)), or to transport, process, advertise, trade, use, hide, export, or import the species (Art. 5(3)(b)). Article 9(1) prohibits the processing and trade of elephants and their products for commercial purposes, except for some endangered species and their products that originate from captive breeding (9(2)).

2. *What penalties/deterrence exist?*

The Penal Code 2017 provides for penalties of up to \$660,000 and 15 years in prison for certain violations related to elephants and elephant ivory (Article 244). Article 234 applies to species in Appendix II of CITES, which include African elephant populations from Botswana, Namibia, South Africa, and Zimbabwe, and their ivory. Article 244 applies to all other elephants and their ivory, which includes Asian elephants (including those from Viet Nam) and other African elephant populations except those from Botswana, Namibia, South Africa, and Zimbabwe. Article 21 of Decree 157 provides criminal penalties for violations against the regulations on IB forest animals, which include all elephants in CITES Appendix I species – Asian elephants and African elephant populations except the ones from Botswana, Namibia, South Africa, and Zimbabwe – as well as on IIB forest animals, which shall be dealt with as CITES Appendix II species – African elephant populations in Botswana, Namibia, South Africa, and Zimbabwe – and their body parts, where these violations do not meet the minimums required by Article 234 and 244.²²⁶

Art. 244 provides for criminal penalties for a) “illegal hunting, killing, imparking, transport, trading of animals on the list of endangered and rare species; b) Illegal possession, transport, trading of vital body parts or products of the animals; and c) An offence that involves from 2 kg to under 20 kg of elephant tusks involving ivory of 2 kilograms or greater. This provision applies to elephants and ivory from Appendix I elephants, which include Asian elephants and elephants not from southern Africa. Violations involving ivory of 2 to 20 kilograms incur penalties of VND 500 million to 2 billion or 1-5 years imprisonment for an individual. A corporation is liable for VND 1 – 5 billion. The highest penalties, for violations involving 3 or more elephants or ivory of 90 kilograms or greater, are 10 – 15 years imprisonment for an individual and VND 10 – 15 billion for a corporation.

Art 234 provides for criminal penalties for violations involving Viet Nam’s Group II B animals or Appendix II elephants (from the four countries in southern Africa) and their products valued at 150 million VND (about US\$6,500) or more, or when illegal profits exceed 50 million VND. It imposes penalties for a) Illegal hunting, killing, raising, imparking, possession, transport, trading of the animals valued at from VND 150,000,000 to under VND 500,000,000; or earning an illegal profit of from VND 50,000,000 to under VND 200,000,000; and b) Illegal possession, transport, trading of body parts of products of the animals valued at from VND 150,000,000 to under VND 500,000,000. Minimum penalties range from VND 50 to 300 million; 3 years of non-custodial reform, or 3-6 years of imprisonment for an individual; and VND 300 million to 1 billion for a corporation. The highest penalties, for violations involving products valued at greater than VND 1 billion, or illegal profits of VND 500 million or more, are 7-12 years of imprisonment for an individual or VND 1 – 3 billion for a corporation.

Differential penalties concerning specimens of Appendix I and Appendix II elephants may complicate enforcement if the origin of ivory must be proved because the higher criminal penalties in Article 244 of the 2017 Penal Code only apply to Appendix I elephants. Another issue is that worked ivory pieces for sale are frequently less than 2 kg, which may not be covered by the Penal Code.

²²⁶ UNDOC, *supra* n. 215.

For violations falling under Article 190, which makes it illegal to “hunt, kill, transport, raise, cage or traffic animals on the list of endangered, precious and rare species prioritized for protection, or illegally transport or traffic in body organs or products of these animal species,” violators incur a fine of VND 50 - 500 million, non-custodial reform of up to three years, or a prison term of between six months and three years.

Violations involving Appendix II elephants which fall below the minimum amounts in the Penal Code are covered as administrative violations under Decree 157. Decree 157 applies administrative penalties starting at VND 30 million (about US\$1,300) for illegally hunting, trapping, catching, or keeping endangered animals; and for keeping or extracting derivatives of endangered animals of Appendix II.

B. Treatment Based on Traded Product

1. Which specimens are covered by the domestic controls: raw/unprocessed (tusks), semi-processed and fully processed (products)?

All specimens are covered. The laws do not distinguish between processed and unprocessed tusks.

2. Are there any exemptions to domestic controls (pre-convention, antiquities, pieces of art)?

The ban on trade in ivory from African elephants is subject to an exemption for ivory imported before the Decision took effect, that is, before March 15, 2013. Decree 32 exempts specimens from a ban on commercial sale that originate from captive breeding. (Article 9(2)). For Group II B animals, which could include Appendix II African elephants, products that have been confiscated from the wildlife trade may be sold commercially (art. 9(2)). It is unclear whether Decision 11 overrides this exemption. Endangered species may be used for scientific purposes.

3. Are the controls the same with respect to native and non-native (exotic) species (e.g. ivory from Asian vs. African elephants)?

The controls differ somewhat between Asian and African elephants, and elephants listed in CITES Appendix I and Appendix II. Decision 11 (2013) that completely bans all purchase and sale of elephant ivory only applies to ivory from African elephants. Decree 32 prohibitions apply to Asian elephants, some of which are native to Viet Nam. The Penal Code of 2017 differs in penalties between Appendix I and Appendix II species; therefore, African elephants from the enumerated Southern African countries not classified as Appendix I species are not subject to the same level of penalty as Appendix I species, potentially creating difficulties for enforcement.

C. Treatment Based on Transaction

1. Does domestic control differ based on the use or the actor involved (residents vs. nonresidents)?

Domestic control, except for the level of penalties incurred, does not differ based on the use or actor involved. Corporations are liable for higher penalties, as discussed in Section A, above.

2. Which types of trade are covered?

All trade is covered. The language of the Penal Code, Decision 11, and Decrees 32 and 157 do not distinguish among transactions depending on a party.

3. Is domestic online trade regulated? And if so, how?

Decree 72 of 2013 provides for policing of internet communications. Article 3(22) defines a social network while Article 5(dd) identifies trading in banned goods and services as a crime. Circular 47/2014/TT-BCT prohibits the sale of endangered species on websites, and requires owners of websites to prevent such sales. There is no information readily available about how this is enforced.

D. Registration

1. Are there systems/mechanisms in place for registration of possession of specimens and which controls are performed in the context of the registration?

Decree 32 requires that the transportation or keeping of animals or their products which have been confiscated by law enforcement must be accompanied by documents proving legal origin. When these items are transported out of the cities and provinces directly under the Central government, they must be accompanied by a transport license provided by the provincial Forest Protection Department. (art. 7). Article 8 provides that “exploitation, transportation, and keeping of endangered, and rare and precious species and their products which are bred and raised under artificial propagation operations must have a Certificate of Origin (CO).” Article 9

requires organizations and individuals involved in processing and trading endangered, precious and rare species for commercial purposes to (a) “possess a trading license for processing and trading specimens of wild animals and plants and their products, authorized by local authorities;” and (c) “possess a log to record the import and export of endangered, precious and rare species and their products.”

Decree 82, which regulates import and export of all endangered species, requires a permit for the transit of live animals and animals which are bred. However, the transport of live animals is unlikely to be applicable to elephant ivory.

E. Interpretation by Courts

1. Have domestic controls been tried in court cases [or administrative tribunals] and if so, what were the results?

There is little record of trying cases of wildlife crime in the courts. Typically, only administrative sanctions have been applied and the offenders not imprisoned. The 2017 Penal Code provides criminal sanctions that could result in a greater number of court cases.