

TUSK TUSK: A COMPARATIVE ANALYSIS INTO THE EFFECTS  
OF IVORY TRADE REGULATION AND THE INTERNATIONAL  
ART MARKET

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INTRODUCTION TO THE IVORY TRADE

Elephants are the largest land mammals on the earth; they are known for their intelligence and emotional capabilities, which rival our

own.<sup>1</sup> They have roamed throughout Africa and Asia, playing a vital role maintaining the rich biodiversity of both forest and savanna ecosystems.<sup>2</sup> Elephants use their tusks to dig for water in the dry season, providing watering holes for other animals, and they create clearings and paths by moving fallen trees and shrubs, promoting forest regeneration and optimal grazing in the savannas.<sup>3</sup> Elephants have also been a cultural symbol to many nations and religions for centuries representing strength, power, peace, and intelligence.<sup>4</sup> This cultural and environmental value is the reason why countless organizations are dedicated to saving elephants from extinction. Unfortunately, the cultural value of elephants is the reason why their populations are so vulnerable and threatened in the first place. As the symbolic value was replaced with a monetary one, the hunting and trading of these animals has brought them dangerously close to disappearing from the earth forever. Of the four to six tons an average elephant weighs,<sup>5</sup> their two ivory tusks are by far the most valuable.<sup>6</sup>

The use of ivory as a medium for artistic and utilitarian endeavors has existed since prehistoric times.<sup>7</sup> Ivory is a type of dentine—a hard and dense tissue that makes up teeth and tusks in all mammals,

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1. *Why Elephants Matter*, SAVE THE ELEPHANTS, <https://www.savetheelephants.org/about-elephants-2-3-2/importance-of-elephants> (last visited Dec. 3, 2018).

2. *Id.*

3. *Id.*

4. See MADONNA GAUDING, *THE SIGNS AND SYMBOLS BIBLE: THE DEFINITIVE GUIDE TO MYSTERIOUS MARKINGS* 239 (2009); see also Leonard Yuzon Andaya, *The Social Value of Elephant Tusks and Bronze Drums Among Certain Societies in Eastern Indonesia*, 172 *BIJDRAGEN TOT DE TAAL-, LAND- EN VOLKENKUNDE* 66, 70–72 (2016).

5. *Elephant: Facts*, WWF, <https://www.worldwildlife.org/species/elephant> (last visited Mar. 31, 2019).

6. See *New Research Shows Myanmar's Growing Illegal Ivory Trade with China*, SAVE THE ELEPHANTS (Oct. 2, 2018), <http://www.savetheelephants.org/about-ste-2/press-media/?detail=new-research-shows-myanmar-s-growing-illegal-ivory-trade-with-china>. As of late 2017, wholesale prices for African elephant raw ivory was reported to be between \$770 and \$800 U.S.D. per kilogram; this has remained stable since late 2015. *Id.*

7. See *The lion man*, MUSEUM ULM, [http://www.loewenmensch.de/lion\\_man.html](http://www.loewenmensch.de/lion_man.html) (last visited Mar. 31, 2019). The oldest known ivory sculpture, known as the Lion Man, was found in Germany, and dates from the Upper Paleolithic era (40,000 BCE). *Id.*

regardless of species.<sup>8</sup> Ivory is traded in one of two ways: raw or worked.<sup>9</sup> Raw ivory<sup>10</sup> indicates that the tusk or tooth was not changed after it was removed from the animal, while worked ivory describes objects that are made of, or contain, ivory pieces.<sup>11</sup> Some examples of worked ivory include carved figurines, jewelry, buttons, bow tips, furniture inlays, and piano keys.

Ivory's popularity led to a drastic decline in elephant populations as hundreds of thousands of animals were killed each year for their tusks.<sup>12</sup> In the 1970's, the biggest loss of African elephants occurred as the prices of ivory soared from \$10 per pound in the 1960's to \$50 per pound in 1975.<sup>13</sup> That same year, the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") was drafted, which then began regulating the ivory trade to halt this rapid loss.<sup>14</sup> Throughout the years since ivory trade regulation began, CITES and its member nations have alternated on the status classification of African elephants and temporarily allowed ivory trade for certain countries.<sup>15</sup> An exception to many national bans on ivory trade is worked ivory, which is often traded in the international art market. However, this exemption is usually accompanied by strict parameters

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8. See Sarah D. Oktay, *Tooth and Nail – Ivory throughout the Ages*, YESTERDAY'S ISLAND (June 28, 2012), <http://yesterdaysisland.com/tooth-and-nail-ivory-throughout-the-ages/>. While ivory from mammoths, walruses, narwhals, hippopotamuses, rhinoceros, and humans has been used throughout history, elephant ivory remains one of the most popular and sought-after types. See *id.*

9. Daniel Stiles, *Elephant Ivory Trafficking in California*, NAT'L RESOURCE DEF. COUNCIL 1 (Jan. 6, 2015), [https://www.nrdc.org/sites/default/files/wil\\_15010601a.pdf](https://www.nrdc.org/sites/default/files/wil_15010601a.pdf).

10. Raw ivory includes sport-hunted trophies unless otherwise specified.

11. *What Can I Do With My Ivory?*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/international/travel-and-trade/ivory-ban-questions-and-answers.html> (last visited Nov. 18, 2018).

12. Jonathan Anderson, *Recent Events Affecting the International Ivory Trade*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 71, 72 (2000).

13. *Id.*

14. See

Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES].

15. Press Release, *Ivory sales get the go-ahead*, CITES (July 16, 2008), [https://www.cites.org/eng/news/pr/2008/080716\\_ivory.shtml](https://www.cites.org/eng/news/pr/2008/080716_ivory.shtml). In 1999 and in 2008, CITES allowed for the single sales of government-stockpiled African elephant ivory from which proceeds were to go into elephant conservation efforts. *Id.*

that limit tradable worked ivory pieces to only those dating back before a certain date. Despite the turmoil surrounding this trade, worked ivory has not decreased in popularity since its inception—around the world, the market is growing among art collectors and ordinary consumers alike.<sup>16</sup> As will be explored below, ivory trade regulations have had mixed effects on both this market and on elephant conservation efforts.

This note will address the problematic constraints of ivory trade regulations, their effects on the international art market, and the resulting impact on elephant conservation. *Part I* will explain why regulating ivory trade is necessary and how elephant preservation efforts are affected by the regulations. *Part II* will explore different countries' approaches to ivory trade regulation. *Part III* will examine the effects of these trade regulations on the international art market. Finally, *Part IV* will discuss current critiques of ivory trade regulations and analyze different solutions to promote the viability of both art markets and elephant conservation.

#### I. HOW TRADE REGULATIONS IMPACT ELEPHANT POPULATIONS

As the price of ivory rose steadily throughout the 1970's and 1980's, poaching—the illegal hunting of an animal—rose with it, largely affecting African elephants.<sup>17</sup> In response to diminishing elephant populations, CITES added both Asian and African elephants to their endangered species list, effectively banning all trade in elephant ivory.<sup>18</sup> This ban allowed for African elephant populations to both recover and grow.<sup>19</sup> However, changes to African elephant ivory regulations caused major population fluctuations.<sup>20</sup> At the beginning of the twentieth-century, around three to five million elephants roamed

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16. See Sandy Ong, *Why Do People Buy Ivory?*, WWF (Winter 2018), <https://www.worldwildlife.org/magazine/issues/winter-2018/articles/why-do-people-buy-ivory>.

17. See *Threats to African Elephants*, WWF, [http://wwf.panda.org/knowledge\\_hub/endangered\\_species/elephants/african\\_elephants/afelephants\\_threats/](http://wwf.panda.org/knowledge_hub/endangered_species/elephants/african_elephants/afelephants_threats/) (last visited Nov. 5, 2018). In the 1980's, studies showed an average of 100,000 elephants were killed per year. *Id.*

18. Anderson, *supra* note 12, at 73.

19. *Id.* at 71.

20. *Id.*

all throughout Africa.<sup>21</sup> Now, there are less than half a million.<sup>22</sup> Though African elephants face other threats in the form of habitat loss and hunting, the number one reason for such drastic population loss is poaching for ivory.<sup>23</sup> Several conservation groups have dedicated their efforts towards studying elephant population patterns and causes of decline in order to stop the rapid loss of these magnificent creatures.<sup>24</sup>

African elephant populations began to grow under the trade regulations until 2008 when a sudden upsurge in poaching occurred.<sup>25</sup> This was the result of a one-time sale, which legalized stockpiles of confiscated ivory in an effort to flood the market and calm demand.<sup>26</sup> However, the sale did the opposite: ivory demand increased, causing a spike in poaching.<sup>27</sup> This sale is cited by some as proof that regulating trade does benefit elephants; however, critics claim that the ban has not done anything to help them—instead, they argue that the ban drives up prices and incentivizes poaching.<sup>28</sup>

Nevertheless, trade regulations have helped curb the rate of loss and even helped bring back some populations.<sup>29</sup> Elephant poaching deaths—and the growing illegal ivory trade—are mainly caused by the

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21. *African Elephants*, WWF, [http://wwf.panda.org/knowledge\\_hub/ endangered\\_species/elephants/african\\_elephants/](http://wwf.panda.org/knowledge_hub/ endangered_species/elephants/african_elephants/) (last visited Dec. 3, 2018).

22. *Id.*

23. Peter LaFontaine et al., *Treasured to Death: Elephants, Ivory, and the Resurgence of a Crisis*, 29 A.B.A. SEC. NAT'L RESOURCES & ENV'T. 31, 31 (2014).

24. See Evan Andrews, *Were Humans Responsible for Killing Off the Woolly Mammoth?*, HISTORY (Aug. 18, 2015), <https://www.history.com/news/were-humans-responsible-for-killing-off-the-wooly-mammoth> (reporting on a recent study that revealed humans caused the woolly mammoth's extinction, which directly contradicts the belief that the extinction was caused by climate change). Although history clearly shows us our errors of the past, we are unfortunately repeating those today.

25. Karl Mathiesen, *Elephants on the path to extinction – the facts*, GUARDIAN (Aug. 12, 2016, 2:14 AM), <https://www.theguardian.com/environment/2016/aug/12/elephants-on-the-path-to-extinction-the-facts>.

26. Morgan Kelly, *After legal-ivory experiment, black markets thrive from greater demand, less risk*, PRINCETON U. (Jun. 14, 2016, 10:30 AM), <https://www.princeton.edu/news/2016/06/14/after-legal-ivory-experiment-black-markets-thrive-greater-demand-less-risk>.

27. *Id.*

28. Rebecca Drury, *A beginner's guide to ivory trade*, FAUNA & FLORA INT'L (July 19, 2017), <https://www.fauna-flora.org/news/a-guide-to-ivory-trade>.

29. LaFontaine et al., *supra* note 23.

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loopholes in ivory trading laws.<sup>30</sup> Therefore, it is critical to analyze the formation of these laws and to close the loopholes that cause the destruction of African elephant populations.<sup>31</sup>

## II. A COMPARATIVE APPROACH TO CURRENT LEGISLATION

### A. *International Treaty Agreement on Ivory Trade Regulation: CITES*

In 1963, CITES was drafted as a result of a resolution from members of the World Conservation Union (“IUCN”).<sup>32</sup> This international agreement was created “to ensure that international trade of wild animals and plants does not threaten their survival.”<sup>33</sup> CITES was signed by 80 countries (“Parties”) in 1973 and went into effect in 1975.<sup>34</sup> As of today, 183 Parties constitute the membership.<sup>35</sup> The convention is strengthened by a commitment made in the United Nations Convention Against Transnational Organized Crime, in which sanctions and mandates enforce the rules and regulations set by CITES.<sup>36</sup> In 2010, the International Consortium on Combating Wildlife Crime (“ICWC”) was formed by several inter-governmental organizations in order to support the efforts of CITES and strengthen

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30. *Id.*

31. See Lucy Campbell, *Extinct mammoths could be given protected status in bid to save elephants*, GUARDIAN (Jan. 10, 2019), <https://www.theguardian.com/environment/2019/jan/10/trade-in-ivory-from-extinct-mammoths-could-be-banned>. Current discussion within CITES has proposed to place the extinct woolly mammoth on the endangered species list in order to curb ivory trade and protect elephant populations. *Id.* Because some countries have allowed ivory trading if the ivory comes from a species other than elephants, such as the woolly mammoth, this created a major loophole which has been exploited in the ivory market. *Id.*

32. *What is CITES?*, CITES, <https://www.cites.org/eng/disc/what.php> (last visited Nov. 18, 2018).

33. *Id.*

34. *Id.*

35. *List of Parties to the Convention*, CITES, <https://cites.org/eng/disc/parties/index.php> (last visited Nov. 30, 2018).

36. U.N. OFFICE ON DRUGS AND CRIME, UNODC, LEGAL MANDATES FOR WILDLIFE AND FOREST CRIME, <https://www.unodc.org/unodc/en/wildlife-and-forest-crime/mandates.html> (last visited Nov. 30, 2018).

Parties' criminal justice systems both nationally and internationally.<sup>37</sup> Though legally binding on the Parties,<sup>38</sup> CITES does not replace national laws; rather, it establishes a framework to which the Parties can adhere when they adopt their own domestic legislation.<sup>39</sup>

CITES is organized into three Appendices which list plant and animal species that are endangered and threatened with extinction.<sup>40</sup> The three Appendices reflect the different levels of protection each species requires.<sup>41</sup> Trading specimens listed on Appendix I—the most threatened of all species—is only permitted under exceptional circumstances and is generally illegal.<sup>42</sup> Species on Appendix II require trade control and monitoring to preserve their survival, while Appendix III species must be protected in at least one country, which then asks—but does not require—other Parties to assist in controlling trade of those specimens.<sup>43</sup> Management Authorities and Scientific Authorities<sup>44</sup> of each Party are in charge of monitoring the effects of trade in the species listed in the Appendices and updating the Appendices by adding or removing certain species based on their findings.<sup>45</sup>

Proper documentation and certification is required to import and export the species listed in these Appendices.<sup>46</sup> The required

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37. U.N. OFFICE ON DRUGS AND CRIME, INTERNATIONAL CONSORTIUM ON COMBATING WILDLIFE CRIME, <https://www.unodc.org/unodc/en/wildlife-and-forest-crime/icwc.html> (last visited Nov. 30, 2018).

38. See Rosalind Reeve, *Wildlife Trade, Sanctions and Compliance: Lessons from the CITES Regime*, 82 INT'L AFFAIRS, 881, 881 (2006). CITES subjects the importation and exportation of species of animals and plants listed in the Appendices to mandatory licensing. *Id.* In each trading country, Management Authorities issue certificates and permits according to specific criteria for each species. *See id.*

39. *What is CITES?*, *supra* note 32.

40. *How CITES works*, CITES, <https://www.cites.org/eng/disc/how.php> (last visited Nov. 18, 2018).

41. *Id.*

42. *Id.*

43. *Id.*

44. *See id.* Each party must designate one or more Management Authorities and Scientific Authorities; Management Authorities are in charge of administering and managing the licensing system of their country while Scientific Authorities advise the Management Authorities on the effects trade has on the status of the monitored species. *See id.*

45. CITES, *supra* note 14, art. IX.

46. *How CITES works*, *supra* note 40.

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documents vary from country to country and therefore each individual import or export must adhere to the specific laws of the countries involved in the trade.<sup>47</sup> However, CITES has put in place basic minimum requirements for the trade in species on Appendices I and II.<sup>48</sup> As of today, the African elephant is listed on Appendix I, with some populations listed on Appendix II.<sup>49</sup> Asian elephants are also listed on Appendix I, effectively making all elephant ivory subject to trade regulations.<sup>50</sup>

### *B. The United States*

CITES regulations were enacted in the Lacey Act of 1900,<sup>51</sup> the Endangered Species Act of 1973,<sup>52</sup> and the African Elephant Conservation Act of 1988.<sup>53</sup> They are also implemented in federal regulations.<sup>54</sup> The United States Fish and Wildlife Service (“FWS”) enforces these statutes, while the U.S. National Fish and Wildlife Forensics Laboratory (“NFWFL”) tests confiscated ivory-based items for identification. The Obama Administration continued to supplement these statutes and regulations, and in 2014, the FWS issued the Director’s Order No. 210, which immediately banned all commercial imports of African elephant ivory with very limited exceptions.<sup>55</sup> In 2016, the FWS then turned the order into a final decision as a revision

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47. *Id.*

48. CITES, *supra* note 14, art. III-V.

49. *See Appendices I, II and III*, CITES (Oct. 4, 2017), <https://www.cites.org/eng/app/appendices.php>. Only the populations of Botswana, Namibia, South Africa and Zimbabwe are listed on Appendix II, and are subjected to exceptions. *See id.*

50. *Id.*

51. *See* Lacey Act of 1900, 16 U.S.C. §§ 3371–3378 (2017) (amended 2008).

52. *See* Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2017).

53. *See* African Elephant Conservation Act, 16 U.S.C. §§ 4201-4246 (2017).

54. For the regulations promulgated to implement the Lacey Act and the Endangered Species Act, see 50 C.F.R. §§ 10.1-24.12 (2018).

55. U.S. FISH AND WILDLIFE SERV., DIRECTOR’S ORDER NO. 210, ADMINISTRATIVE ACTIONS TO STRENGTHEN U.S. TRADE CONTROLS FOR ELEPHANT IVORY, RHINOCEROS HORN, AND PARTS AND PRODUCTS OF OTHER SPECIES LISTED UNDER THE ENDANGERED SPECIES ACT (Feb. 25, 2014), <https://www.fws.gov/policy/do210.pdf>.



of the Endangered Species Act special rule for African elephants.<sup>56</sup> However, in March 2018, in response to the D.C. Circuit's opinion in *Safari Club Int'l v. Zinke*,<sup>57</sup> the Trump Administration reversed this near-total ban on ivory trade and reintroduced legal importation of sport-hunted elephant trophies from certain African countries to be reviewed on a case-by-case basis.<sup>58</sup> This change is the result of closely monitoring wildlife populations. The import and export of legally hunted African elephant ivory for noncommercial purposes will be allowed if the hunting is shown to help maintain the elephant population and its survival as a species.<sup>59</sup> On top of these federal laws, states have supplemented the trade regulations with their own in order to control intrastate ivory commerce.<sup>60</sup> Some states such as California and New York have implemented stricter regulations than the federal laws, and these regulations will be examined below. Other notable states that have strict ivory trade regulations include New Jersey and Washington.<sup>61</sup>

A high-level glance at the federal regulations shows a variety of rules and exemptions regarding the import and export of African and Asian elephant ivory. At a minimum, it is always illegal to import raw or worked African elephant ivory for commercial purposes.<sup>62</sup> Raw

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56. 50 C.F.R. § 17.40(e) (2018).

57. *Safari Club Int'l & Nat'l Rifle Ass'n of Am. v. Zinke*, 878 F.3d 316 (D.C. Cir. 2017)

58. Memorandum from Principal Deputy Director, U.S. Fish and Wildlife Serv. to Assistant Dir., Int'l Affairs, U.S. Fish and Wildlife Serv. (Mar. 1, 2018), <https://www.fws.gov/international/pdf/memo-withdrawal-of-certain-findings-ESA-listed-species-sport-hunted-trophies.pdf>.

59. 50 C.F.R. § 17.40(6)(B) (2018).

60. Jonathan Riedel, *Understanding Ivory Law*, FITZ GIBBON LAW, LLC (Nov. 29, 2016), <http://fitzgibbonlaw.com/understanding-ivory-law/>.

61. See N.J. STAT. ANN. §23:2A (West 2019); see also WASH. REV. CODE ANN. §77.15.135 (West 2019).

New Jersey law provides only four, very narrow exceptions to intrastate sales, while Washington State's law is more similar to California's and New York's in terms of exceptions. See Riedel, *supra* note, 60 (citing N.J. STAT. ANN. §23:2A–13.3(c)-(f) (2016)). However, the Washington law does not specify regulations in regard to mammoth ivory and does not mention "ivory" in general, instead referencing any part or product of an elephant. See *id.* (citing WASH. REV. CODE ANN. §77.15.135 (West 2016)).

62. *What Can I Do With My Ivory*, *supra* note 11.

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ivory is also completely banned from being imported even for noncommercial purposes unless: it is as a sport-hunted trophy, of which there is a limit of two per year; it is brought in for law enforcement purposes; or it is brought in for genuine scientific purposes.<sup>63</sup> Exemptions for worked ivory importation for noncommercial purposes include ivory with the same exceptions above, as well as worked ivory that was legally obtained and removed from the wild before February 26, 1976, and is a part of either a “household move or inheritance,” a musical instrument, or traveling exhibit.<sup>64</sup>

In regards to Asian elephant ivory, importation for commercial purposes is only allowed when it is accompanied by proper documentation and the ivory qualifies as an Endangered Species Act “antique.”<sup>65</sup> To qualify as an antique, a piece must:

- (1) be at least 100 years old;
- (2) be composed of an endangered species either in whole or in part;
- (3) not have been “repaired or modified with any such species” since December 27, 1973; and
- (4) “imported through an endangered species ‘antique port.’”<sup>66</sup>

The United States Customs and Border Protection created 13 antique ports around the country in September 1982.<sup>67</sup> However, after the Director’s Order No. 210 in 2014, ivory pieces imported prior to September 22, 1982, or those created in the United States, no longer have to meet the antique port requirement.<sup>68</sup>

For noncommercial purposes, the requirements for Asian elephant ivory are similar to those stated above. The regulations require that the ivory pieces either qualify as an antique or a pre-Act<sup>69</sup> specimen.<sup>70</sup> A pre-Act specimen is one that has been held in captivity or a controlled

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*; *What is meant by the ESA antiques exemption?*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/international/travel-and-trade/ESA-antiques-exemption.html> (last visited Nov. 18, 2018).

67. *What Can I Do With My Ivory*, *supra* note 11.

68. *Id.*; *see also* U.S. FISH AND WILDLIFE SERV., *supra* note 55.

69. For the purposes of this note, the referenced act is the Endangered Species Act.

70. *What Can I Do With My Ivory*, *supra* note 11.

environment before December 28, 1973, or prior to the date the species was first listed in the Endangered Species Act.<sup>71</sup> Further, the holding of the specimen and any subsequent holding of the specimen must not have been made in the course of any commercial activity.<sup>72</sup> All imports of Asian elephant ivory must have accompanying CITES documentation from the exporting country to enter into the United States.<sup>73</sup>

Exportation of raw African elephant ivory from the United States is completely prohibited for commercial and noncommercial purposes.<sup>74</sup> The exceptions to exporting for commercial purposes include worked African elephant ivory that meets the antiques exemption.<sup>75</sup> For noncommercial purposes, the law allows worked African elephant ivory if it:

- (1) meets the antiques exemption;
- (2) “was legally acquired and removed from the wild” before February 26, 1976, and is part of a household move or inheritance, a musical instrument, a traveling exhibit, or qualifies as a pre-Act specimen; or
- (3) is for law enforcement purposes or genuine scientific purposes.<sup>76</sup>

As for Asian elephant ivory, the requirements to export for commercial and noncommercial purposes are the same as the requirements to import.<sup>77</sup> No matter the type of exemption or type of ivory, proper CITES documentation must accompany every piece that is exported.<sup>78</sup>

However, the federal regulations differ slightly when it comes to interstate and intrastate sales of ivory. As always, though, proper CITES documentation is required to sell ivory within or across state

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71. *What is a pre-Act specimen under the Endangered Species Act?*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/international/travel-and-trade/pre-act-specimen.html> (last visited Nov. 18, 2018).

Asian elephants were added on June 14, 1976 and African elephants were added on May 12, 1978. *Id.*

72. *Id.*

73. *What Can I Do With My Ivory*, *supra* note 11.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

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lines.<sup>79</sup> For African elephant ivory, intrastate commerce is allowed only if the seller can demonstrate the piece was legally acquired before January 18, 1990; for Asian elephant ivory, the piece must have been legally acquired before July 1, 1975.<sup>80</sup> This proof can come in different forms, such as a CITES pre-convention certificate, a datable photo, a dated letter or document that references the specific item, or any other evidence that can prove the date.<sup>81</sup>

Interstate selling of African elephant ivory has stricter regulations as it does not allow the interstate selling of sport-hunted trophies, pieces that are part of a household move or inheritance, or pieces for law enforcement or genuine scientific purposes.<sup>82</sup> The pieces that are allowed include those that qualify for the antiques exemption, as well as certain manufactured pieces that contain a de minimis amount of ivory.<sup>83</sup> The de minimis exemption can be met in two ways:

- (1) if the item is located within the United States, it must have either been imported prior to January 18, 1990, or imported under a CITES pre-convention certificate that specifies no limits on its commercial use; or
- (2) if the item is outside of the United States, the ivory was removed from the wild before February 26, 1976.<sup>84</sup>

Additionally, this exemption requires:

- (1) the ivory not to be raw;
- (2) that the African elephant ivory makes up for less than 50% of the item's volume;
- (3) that the total weight of the ivory is less than 200 grams; and
- (4) that the item was made before July 6, 2016.<sup>85</sup>

For Asian elephant ivory, interstate sales only require that the pieces qualify for the antiques exemption.<sup>86</sup>

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79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *What is the de minimis exemption?*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/international/travel-and-trade/de-minimis-exception.html> (last visited Nov. 18, 2018).

85. *Id.*

86. *What Can I Do With My Ivory*, *supra* note 11.

### 1. *The Lacey Act*

The Lacey Act was first passed by Congress in 1900, but it has been amended as recently as 2008. The act has three key provisions. First, the act makes it a federal offense to violate any law, treaty, or regulation of the United States or violate any Indian tribal law.<sup>87</sup> The act specifically prohibits the import, export, transport, sale, receipt, acquisition, or purchase of any fish or wildlife in violation of any law or regulation of any State or in violation of any foreign law.<sup>88</sup> Second, the act makes it “unlawful for any person to import, export, or transport in interstate commerce” any fish or wildlife in a container unless it has been plainly “marked, labeled, or tagged” in accordance with FWS requirements.<sup>89</sup> Third, the act makes it illegal to falsify any records, labels, accounts, or identification of any fish, wildlife, or plants, which have been “imported, exported, transported, sold, purchased, or received from a foreign country or transported in interstate commerce.”<sup>90</sup>

### 2. *Endangered Species Act*

The Endangered Species Act (“ESA”) was enacted in 1973 to conserve endangered species from the threat of extinction due to economic growth and development.<sup>91</sup> Under the ESA, it is illegal for any person subject to the jurisdiction of the United States to, among other things, import, export, transport, or sell any threatened or endangered species of fish or wildlife listed in this act.<sup>92</sup> The ESA provides regulations for the import and export of fish or wildlife species listed within CITES.<sup>93</sup> Additionally, the ESA requires that all imports and exports of endangered fish and wildlife pass through FWS designated ports.<sup>94</sup>

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87. 16 U.S.C. § 3372(a) (2018).

88. 16 U.S.C. § 3372(a)(2)(A) (2018).

89. 16 U.S.C. § 3372(b) (2017).

90. 16 U.S.C. § 3372(d)(1)-(2) (2017).

91. 16 U.S.C. § 1531(a)-(b) (2017).

92. 16 U.S.C. § 1538(a)(1)(A)-(G) (2017).

93. *See* 16 U.S.C. § 1538(a)-(g) (2017).

94. 16 U.S.C. § 1538(f) (2017).

### 3. *African Elephant Conservation Act*

The African Elephant Conservation Act (“AECA”) was enacted in 1989 in response to increasing African elephant poaching for ivory. This act is limited only to the African elephant; it does not apply to the Asian elephant species. The AECA bars:

- (1) “the importation of raw African elephant ivory from any country” other than the ivory-producing countries listed by CITES;
- (2) the export of raw African elephant ivory from the United States;
- (3) the importation of raw or worked African elephant ivory that was “exported from an ivory-producing country in violation of that country’s laws” or the CITES regulations or in violation of a temporary restriction; and
- (4) the importation of worked African elephant ivory, for purposes other than personal use, from any country without that country’s certification that the ivory was acquired from a legal source.<sup>95</sup>

The AECA, however, allows for the importation of sport-hunted trophies legally acquired from an ivory-producing country, which complied with CITES submission requirements of ivory quotas.<sup>96</sup>

### 4. *California*

In 1976, California enacted Penal Code section 653o, which made it unlawful to import within the State, for commercial purposes, any part of an elephant.<sup>97</sup> However, the statute contained a loophole, which rendered it basically ineffective in regulating the elephant trade because it allowed elephant parts acquired prior to June 1, 1977, to enter into the stream of commerce.<sup>98</sup> This exemption was repealed in 2016, however, which effectively closed California to any elephant ivory trade.<sup>99</sup> The revision to the law also increased both penalty fines and

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95. 16 U.S.C. § 4223(1)-(5) (2017).

96. 16 U.S.C. § 4222(e) (2017).

97. CAL. PENAL CODE § 653o(a) (Deering 2018).

98. Stiles, *supra* note 9, at 4.

99. CAL. FISH & GAME CODE § 2022 (Deering 2018).

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the jail time violators could face.<sup>100</sup> The law currently allows for some exceptions, including:

- (1) any law enforcement activity;
- (2) any activity authorized under federal law or federal permit;
- (3) musical instruments containing ivory of less than 20% of the item's volume that can be proved to have been manufactured prior to 1975, along with proper historical documentation;
- (4) an antique item with less than 5% ivory by volume, accompanied by proper historical documentation and proved to be over 100 years old; and
- (5) ivory being used for educational or scientific purposes by a bona fide educational or scientific institution, but only if the type of ivory does not fall under a federal ban and the ivory was legally acquired before January 1, 1991, and was not subsequently transferred from one person to another for financial gain after July 1, 2016.<sup>101</sup>

California's law also specifies that the mere possession of ivory in a retail or wholesale outlet—used for buying or selling similar items—is *prima facie* evidence of the intent to sell.<sup>102</sup>

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100. CAL. FISH AND GAME CODE § 2022(e-g) (Deering 2018).

101. CAL. FISH AND GAME CODE § 2022(c)(1)-(5) (Deering 2018).

102. CAL. FISH AND GAME CODE § 2022(d) (Deering 2018).

### 5. *New York*

Similar to California, New York enacted Assembly Bill 10143 and Senate Bill 7890, which restricted the sale of ivory within the State of New York.<sup>103</sup> The New York law sets out four exemptions that would-be purveyors of ivory can meet to obtain a permit from the commissioner.<sup>104</sup> These exemptions include:

- (1) bona fide antiques that contain less than 20% ivory by volume, with documented proof of provenance establishing antique status which proves the item is not less than 100 years old;
- (2) pieces used for bona fide educational or scientific purposes, or to museums that meet certain requirements;
- (3) pieces that are distributed to the beneficiary of a trust or to an heir of an estate; and
- (4) musical instruments with proper historical documentation that provides provenance and shows it was manufactured before 1975.<sup>105</sup>

Unlike the FWS regulations, however, the New York law sets out harsher penalties for violators. In New York, violations involving \$25,000 or more worth of ivory constitute a class D felony, carrying with it a fine of \$5,000 and one to seven years of imprisonment.<sup>106</sup> This regulates intrastate selling of ivory in New York; it does not apply to interstate and foreign commerce, which is regulated by the ESA and other federal laws. However, when trading interstate from New York, the permit issued to do this will specify that the item may not be displayed in New York.<sup>107</sup>

#### *C. Ivory Trade Regulations in Foreign Countries*

Recently, two CITES member nations—the United Kingdom and Hong Kong—enacted what might be the strictest ivory trade regulations in world history. The United Kingdom’s law, announced earlier in

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103. S. 7890, 2013-2014 Leg. Sess. (N.Y. 2014); Assemb. 10143, 2014 Leg. Sess. (N.Y. 2014).

104. N.Y. ENVTL. CONSERV. LAW § 11-0535-a(3) (McKinney 2019).

105. *Id.* § 11-0535-a(3)(a)-(d).

106. Stiles, *supra* note 9, at 5.

107. Riedel, *supra* note 60.



2018, was given the seal of approval from the Queen on December 20, 2018, scheduled to go into effect within the next six months.<sup>108</sup> Hong Kong's law was passed in 2018, but it is not to take full effect until the end of a five-year period in 2021.<sup>109</sup> Mainland China passed a law at the end of 2017, which went into effect immediately, closing down all government-sanctioned carving factories and retailers.<sup>110</sup>

### 1. *The United Kingdom*

The United Kingdom's law has been recognized as one of the toughest in the world due to its very narrow exemptions to ivory trade and harsh sentences. The law will ban all ivory trade except for:

- (1) items produced before 1947 and containing less than 10% of ivory material;
- (2) musical instruments produced before 1975 and containing less than 20% of ivory;
- (3) rare antiques that are over 100 years old and are assessed by a specialist; and
- (4) certain items traded between accredited museums.<sup>111</sup>

Further, anyone caught breaking the law will face up to five years in prison and an unlimited fine.<sup>112</sup> Though a tough trade restriction, the

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108. See Ivory Act 2018, c. 30 (Eng.), [http://www.legislation.gov.uk/ukpga/2018/30/pdfs/ukpga\\_20180030\\_en.pdf](http://www.legislation.gov.uk/ukpga/2018/30/pdfs/ukpga_20180030_en.pdf); see also Naomi Rea, *As the UK Bans the Sale of Elephant Ivory, What Will it Mean for Museums and the Antiques Trade?*, ARTNET (Dec. 20, 2018), <https://news.artnet.com/art-world/uk-elephant-ivory-ban-1426009>.

109. See Protection of Endangered Species of Animals and Plants Ordinance, (2018) Cap. 586, 1, § 1 (H.K.); see also *Hong Kong bans ivory trade in 'historic' vote*, BBC NEWS (Jan. 31, 2018), <https://www.bbc.com/news/world-asia-china-42891204> [hereinafter *Hong Kong Ban*].

110. Rachael Bale, *China Shuts Down its Legal Ivory Trade*, NAT'L GEOGRAPHIC (Dec. 30, 2017), <https://news.nationalgeographic.com/2017/12/wildlife-watch-china-ivory-ban-goes-into-effect/>.

111. See Ivory Act §§ 2, 7; see also Rachael Bale, *UK to Introduce 'Toughest' Ivory Ban in the World*, NAT'L GEOGRAPHIC (Apr. 3, 2018), <https://news.nationalgeographic.com/2018/04/wildlife-watch-uk-elephant-ivory-ban/>.

112. See Ivory Act § 12; see also Kate Brown, *UK to Introduce 'One of the World's Toughest Bans on Ivory,' With Only a Few Exceptions for Cultural Objects*, ARTNET (Apr. 5, 2018), <https://news.artnet.com/art-world/uk-ivory-ban-1260107>.

effort made in providing exceptions to certain pieces containing ivory indicate the historical and artistic importance ivory objects have in the United Kingdom. Allowing these historically significant objects may appease some of the would-be opposition groups, such as art dealers and museums; in addition, these exemptions have been cited as the “grayest area” of the new law.<sup>113</sup> Exempting these 100-year-old antiques will require that they be registered with the Animal and Plant Health Agency, after which a museum will advise as to whether a permit for sale should be issued.<sup>114</sup> Furthermore, only certain government-sanctioned institutions will be allowed to authenticate these pieces.<sup>115</sup>

## 2. *Hong Kong*

In Hong Kong, the law passed with a majority of 49-4.<sup>116</sup> Under this new law, violators and ivory smugglers will face a fine of \$1.3 million U.S.D. and ten years in prison.<sup>117</sup> The provisions of this law will be implemented in stages. The first stage is banning hunting trophies and ivory from after 1975.<sup>118</sup> Next, ivory acquired before 1975 will be banned, and in 2021, traders will have to dispose of their ivory stock completely.<sup>119</sup> The final stage in 2021 will be a total ban on all ivory items, including antiques.<sup>120</sup> This is a significant departure from the rest of the world’s ivory regulations.

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113. Scott Reyburn *Looming Ivory Ban Will Create a Mountain of Unsellable Antiques*, N.Y. TIMES (Apr. 12, 2018), <https://www.nytimes.com/2018/04/12/arts/design/britain-ivory-ban.html>.

114. *Id.*

115. See ELENA ARES & ALISON PRATT, HOUSE OF COMMONS LIBRARY, BRIEFING PAPER: THE IVORY BILL 14 (2018), <http://researchbriefings.files.parliament.uk/documents/CBP-7875/CBP-7875.pdf>.

116. See Kelvin Chan, *Hong Kong Approves Ban on Local Ivory Trading by 2021*, U.S. NEWS & WORLD REP. (Jan. 31, 2018), <https://www.usnews.com/news/world/articles/2018-01-31/hong-kong-approves-ban-on-local-ivory-trading-by-2021>.

117. See Protection of Endangered Species of Animals and Plants Ordinance, (2018) Cap. 586, 1, § 5 (H.K.); Chan, *supra* note 116.

118. *Hong Kong Ban*, *supra* note 109.

119. *Id.*

120. *Id.*

## III. THE EFFECTS ON THE ART MARKET

The international bans on ivory have impacted much more than elephant populations. The full weight and force of these regulations has also been felt by the art world—not only in those countries where regulations are enforced, but also in countries without enforcement. In secondary art markets across the world, auction houses and art dealers have had to reevaluate their decision to sell ivory pieces to conform to laws and avoid the penalties associated with violating them. The laws have also caused the value of ivory objects to diminish.<sup>121</sup>

Ivory holds a special place in the history of art as a luxurious and exotic medium—because of its unique qualities, it has been used for thousands of years in a vast number of ways providing a durable, easy-to-carve surface with no splintering effect.<sup>122</sup> Ivory pieces document “global encounters before modern times” and provide a glimpse into the material culture of the past.<sup>123</sup> According to art critic Jonathan Jones, ignoring the history of ivory’s role and place in human development is a narrow-minded thing to do.<sup>124</sup> Although elephant populations have become increasingly endangered, and regulations have become more widespread, the popularity of ivory in art has not decreased. However, in the past couple of decades, a subtle shift may have occurred: the demand of these art pieces might now be a result of the trade regulations making ivory rarer rather than the illustrious qualities for which ivory was previously coveted.<sup>125</sup>

In the United States, ivory trade regulation has impacted one of the most famous art markets in the world: New York. With its

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121. See *Dramatic Changes in China’s Ivory Trade*, SAVE THE ELEPHANTS (Mar. 29, 2017), <http://www.savetheelephants.org/about-ste-2/press-media/?detail=dramatic-changes-in-china-s-ivory-trade>. A 2017 study found that the price of ivory was half of what it had been four years ago; it also illustrated a continuing downward trend. See *id.*

122. Rebecca J. Rosen, *What is it About an Elephant’s Tusks that Make Them So Valuable?*, ATLANTIC (Sept. 6, 2012), <https://www.theatlantic.com/business/archive/2012/09/what-is-it-about-an-elephants-tusks-that-make-them-so-valuable/262021/>.

123. See Jonathan Jones, *Ivory tells the history of the world—it must never be banned*, GUARDIAN (Feb. 16, 2017, 11:18 AM), <https://www.theguardian.com/artanddesign/jonathanjonesblog/2017/feb/16/uk-ivory-art-ban-prince-william>.

124. See *id.*

125. Rosen, *supra* note 124.

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supplementary laws, New York is one of the toughest states for ivory trade and has been the subject of harsh criticism—including a lawsuit—because of it.<sup>126</sup> Antique dealer organizations are challenging the State on its law that they claim is in conflict with federal regulations.<sup>127</sup> They say that the New York law makes illegal what the federal regulation assigns as lawful conduct in regards to certified antiques containing more than 20% ivory.<sup>128</sup> They argue that the lawsuit is to “preserve and protect” the trade in antique pieces that are at least 100 years old.<sup>129</sup> Since its implementation in 2014, the overall effects of the New York laws are a drastic decrease in art dealers willing to trade in ivory, along with a shift of the market to other states with less rigid regulations.<sup>130</sup>

California also faced a lawsuit after revamping its law in 2016.<sup>131</sup> Led by Godfrey Harris, an avid antiques collector and executive director of the Ivory Education Institute, the suit alleged that the law would render collections of ivory valueless and asserted that the problem in ivory trade and poaching was rooted elsewhere rather than in California.<sup>132</sup> The trial court ruled in favor of California, and the court of appeal affirmed, upholding the law.<sup>133</sup> In arguing against Harris’ claim, the National Resource Defense Council (“NRDC”) presented evidence that California was in fact the second-largest ivory consuming market in the country, and that between 80% and 90% of the ivory objects for sale in Los Angeles and San Francisco came from recently killed elephants.<sup>134</sup> Moreover, investigations of antique shops

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126. See Eileen Kinsella, *Antiques Trade Groups Sue to Strike Down New York’s ‘Restrictive’ Ivory Law*, ARTNET NEWS (Apr. 23, 2018), <https://news.artnet.com/art-world/new-york-ivory-law-suit-1271663>.

127. *Id.*

128. *Id.*

129. *Id.*

130. See Rachael Bale, *Why D.C. Is the New Hub for U.S. Ivory Sales*, NAT’L GEOGRAPHIC (July 27, 2017), <https://news.nationalgeographic.com/2017/07/wildlife-watch-washington-elephant-ivory-for-sale-united-states/>.

131. Corey Binns, *The California Case of an Antique Ivory Collector v. African Elephants*, NRDC (July 31, 2017), <https://www.nrdc.org/stories/california-case-antique-ivory-collector-v-african-elephants>.

132. *Id.*

133. *Ivory Educ. Inst. v. Dep’t. of Fish and Wildlife*, 239 Cal. Rptr. 3d 609 (Ct. App. 2018).

134. Binns, *supra* note 131.

that had been flagged by NRDC revealed that many pieces were falsely aged to appear as antiques and contained elephant ivory despite being labeled as mammoth ivory.<sup>135</sup>

The strict state laws have seemingly caused the ivory markets to shrink in both California and New York, but a study shows that the regulations targeting intrastate commerce might have simply caused the markets to shift to other states, other countries, or to online platforms.<sup>136</sup> The additional ivory trade regulations implemented by states throughout the United States create an added layer of obstacles for the international art market to locate viable buyers; compliance with both and state and federal law is required. This added obstacle stands in the way of the second largest ivory market in the world, but in the grand scheme of things, it has not reduced the demand for ivory object by much, as ivory trade is still quite prominent in the United States.<sup>137</sup>

At the same time that the art world is seeing a decrease in the physical markets for ivory sales, it is also noticing distaste for ivory imitation, indicating that ivory artifacts are sought more for their genuineness and historical and cultural value than for their mere aesthetical appearance.<sup>138</sup> As recently as August of this year, an eighteenth-century Chippendale commode was stripped of its ivory

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135. Stiles, *supra* note 9, at 6–7, 9.

136. Rachel Kramer et al., *The U.S. Elephant Ivory Market: A New Baseline*, TRAFFIC 1, 67 (2017), [https://www.traffic.org/site/assets/files/1378/traffic\\_us\\_ivory\\_report\\_2017.pdf](https://www.traffic.org/site/assets/files/1378/traffic_us_ivory_report_2017.pdf).

137. Stiles, *supra* note 9, at 15.

138. See Mark Strauss, *Who Buys Ivory? You'd Be Surprised*, NAT'L GEOGRAPHIC (Aug. 12, 2015), <https://news.nationalgeographic.com/2015/08/150812-elephant-ivory-demand-wildlife-trafficking-china-world/>. A study was conducted by the National Geographic Society and GlobeScan to determine why consumers were motivated to continue purchasing ivory, despite the controversy surrounding elephant conservation and illegal ivory trade. It was discovered that for many low- to middle-income consumers, the allure real ivory holds—representing wealth and symbolizing a higher social status—outweighed the desire to help the decline of elephant populations. *Id.* Furthermore, in looking into creating a synthetic alternative to ivory, some critics have opined that providing an affordable substitute will risk raising the demand for real ivory, effectively increasing incentives for poaching. See Sasha Mushegian, *Appalled by the Illegal Trade in Elephant Ivory, a Biologist Decided to Make his Own*, SMITHSONIAN.COM (May 10, 2017), <https://www.smithsonianmag.com/science-nature/faking-elephant-ivory-180963226/>.

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inlay and replaced with ivorine<sup>139</sup> prior to its sale at Christie's in London.<sup>140</sup> Its value was estimated to be between £3 million to £5 million, but after the alteration—made by the U.S.-based seller in order to comply with the federal legislation—it failed to sell completely.<sup>141</sup>

This occurrence sheds light on the art world's dilemma with ivory regulations. On the one hand, art dealers and art collectors have an obvious preference and reverence for authentic ivory objects.<sup>142</sup> It seems they would rather overlook any detrimental aspect that ivory trade may have on wildlife populations in order to have real ivory than settle for any man-made material trying to imitate it. On the other hand, because of the severity of the punishment that accompanies violating trade regulations, some in the art world choose to abstain from ivory commerce altogether, going as far as altering existing pieces in order to remove the ivory material.<sup>143</sup> They say these narrow exemptions are doing nothing for elephants but instead penalizing innocent art dealers<sup>144</sup> and causing the destruction of art.<sup>145</sup> A main reason for this belief is that despite antique ivory pieces being of the appropriate age and meeting legal requirements, many lack the proper documentation

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139. Ivorine is a commonly used substitute for ivory; it is a man-made material resembling ivory's color and texture. See *Ivorine*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/ivorine> (last visited Apr. 1, 2019).

140. Anita Singh, *Chippendale masterpiece stripped of ivory before Christie's sale*, TELEGRAPH (Aug. 29, 2018, 6:30 AM), <https://www.telegraph.co.uk/news/2018/08/29/chippendale-masterpiece-stripped-ivory-christies-sale/>.

It had previously been sold at auction for a record price of £935,000 in 1991. *Id.* Antiques experts have described this alteration as “pure vandalism.” *Id.*

141. *Id.*

142. See Arminta Wallace, *Ban on ivory trade has art world thrown into a quandary*, IRISH TIMES (Sept. 15, 2018, 5:00 AM), <https://www.irishtimes.com/life-and-style/homes-and-property/fine-art-antiques/ban-on-ivory-trade-has-art-world-thrown-into-a-quandary-1.3628134>.

143. *See id.*

144. *See id.*

145. See Jani Actman, *Does Destroying Ivory Save Elephants? Experts Weigh In*, NAT'L GEOGRAPHIC (Aug. 2, 2017), <https://news.nationalgeographic.com/2017/08/wildlife-watch-ivory-crush-elephant-poaching/>. Several nations have destroyed stockpiles of confiscated ivory in a public display to send a message to illegal ivory traders and legislation violators. *Id.*

to prove it, which renders the pieces untradeable.<sup>146</sup> Altering art to comply with these regulations has caused anguish in the art world as art experts and collectors have had to witness the desecration of historically and artistically significant objects, despite their belief that these antique objects have not contributed to the current elephant poaching crisis.<sup>147</sup>

The impact of these trade regulations reaches beyond the sale of ivory items; museums are now starting to feel the aftershocks of recently enacted legislation. Under the United Kingdom's new legal framework, displaying ivory items is not banned, and exceptions are allocated for museum and institute purposes.<sup>148</sup> However, as ivory becomes increasingly regulated, it is becoming a taboo art form, exposing museums to harsh criticism from visitors. Just recently, the British Museum had to publicly defend its acceptance of a gift of 500 Chinese ivory items from the estate of an art collector in China.<sup>149</sup> The statement made by the museum expressed a sentiment felt across the entire art world: ivory is an integral part of human history and it plays a significant role in understanding our artistic development.<sup>150</sup> Art dealers opposed to the United Kingdom's law have repeatedly—and unsuccessfully—tried to appeal to lawmakers with this argument. Now, they wait in fear of what the United Kingdom's art market will become while the rest of Europe continues to trade under a more relaxed regime.<sup>151</sup> Countless extraordinary ivory items will no longer be tradeable in the United Kingdom due to the law's gray area for allowing exceptions to only "the rarest and most important" items, yet the law provides no guidance to meet this status. In other words, items that do not fall under this exception will cease to be collected and studied, effectively erasing them from our cultural past and depriving future generations.<sup>152</sup> Art dealers are opposing this new legislation both from a cultural and business perspective—some dealers wonder if they will

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146. Jen Fifield, *Proposed Bans on Ivory Sales Halted by Interest Groups*, PEW (Jan. 10, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/01/10/proposed-bans-on-ivory-sales-halted-by-interest-groups>.

147. See Wallace, *supra* note 142.

148. Rea, *supra* note 106.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

have to move to another country in order to continue making a living.<sup>153</sup> These strict rules are directly contributing to the relocation of the ivory trade market to other countries and to the online marketplace, and they are doing little to actually reduce elephant poaching; instead, they are harming countless legitimate art dealers.

As criticism from art viewers and decreases in ivory sales have taken hold in the art world, art experts have noticed a simultaneous rise in ivory forgeries.<sup>154</sup> It is hard, expensive, and time consuming to date ivory,<sup>155</sup> and newly acquired ivory can be made to look old through a process known as “fake antiquing.”<sup>156</sup> Due to the antiques exemption to many trade regulations, the art market is a lucrative outlet for those trading in illegal ivory, and this in turn gives rise to increased forgeries in order to sell illegally acquired ivory through legal markets.<sup>157</sup> Though a certain level of skill is required to forge the actual objects, the documents that must accompany ivory objects are much simpler to forge.<sup>158</sup> With proper documentation, it is a lot easier to pass the certification tests set forth by legislation and have the illegal ivory enter the market.<sup>159</sup>

One result of the increase in ivory forgeries—and the regulations requiring authentication—is that art experts and appraisers are in seemingly high demand.<sup>160</sup> However, reliance on these businesses can

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153. *Id.*

154. *Art history professor looks into the big business of ivory carving forgery*, PENN STATE NEWS (Sept. 6, 2013), <https://news.psu.edu/story/286592/2013/09/06/art/art-history-professor-looks-big-business-ivory-carving-forgery> [hereinafter PENN STATE NEWS]. An estimated 99% of ivory sold is identifiable as forgery. *Id.*

155. *Ivory Ban Question?*, WCS, <https://www.wcs.org/get-involved/us-ivory-ban-questions> (last visited Dec. 3, 2018). Radio carbon dating costs around \$500 per test and can be damaging to the object. *Id.* Furthermore, it does not provide conclusive results as to when the ivory was removed from the animal. *Id.*

156. Fifield, *supra* note 146.

157. See PENN STATE NEWS, *supra* note 154.

158. See *Where is Ivory?*, DISAPPEARING ELEPHANTS, <https://disappearingelephants.com/where-is-ivory/> (last visited Apr. 4, 2019).

159. See Adam Cruise, *In Fighting Illegal Ivory, EU Lags Behind*, NAT'L GEOGRAPHIC (June 17, 2017), <https://news.nationalgeographic.com/2016/06/ivory-trafficking-european-union-china-hong-kong-elephants-poaching/>.

160. See, e.g., *Ivory appraisal, identification and pre-Ban certification*, IVORY EXPERTS, <https://ivoryexperts.com> (last visited Apr. 4, 2019); *Ivory Carvings*



be questionable given how difficult dating ivory can be—the FWS in the United States does not regulate the companies that are appraising and issuing certificates, and inconsistencies plague the administration of certificates in Europe.<sup>161</sup> Because of this lack of regulation, it is difficult to distinguish legitimate appraisers with those willing to commit fraud.<sup>162</sup>

#### IV. ANALYZING CRITICISMS AND SOLUTIONS

The primary critics of ivory trade regulations come from two opposing sides: wildlife conservationists and members of the art world. Over the forty-three years since the regulation on ivory trade began, neither side seems to be content with the results. In trying to reduce elephant poaching while meeting ivory demand, some efforts have been made without resorting to legislation. For example, some researchers are working to produce synthetic ivory that captures the unique qualities of real ivory in order to create a sustainable alternative.<sup>163</sup> And interestingly, recent studies have found that elephants are now evolving to not have tusks.<sup>164</sup> This comes after a century of observing diminishing tusk sizes as the overhunting of big-tusked elephants erased the gene responsible for larger tusks from the current elephant gene pool.<sup>165</sup> However, this evolutionary transformation could cause

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*Appraisals*, CHI. APPRAISERS ASS'N, <https://chicagoappraisers.com/ivory-carvings-appraisals/> (last visited Apr. 4, 2019). These companies appraise the objects and send out the proper forms to the Fish and Wildlife Service to acquire the certificate necessary to import or trade the objects. See *What does the new US ivory ban mean for buyers, sellers, and elephants?*, IFAW, <https://www.ifaw.org/united-states/news/what-does-new-us-ivory-ban-mean-buyers-sellers-and-elephants> (last visited Apr. 4, 2019).

161. See Cruise, *supra* note 159.

162. *An Investigation of Ivory Markets in the United States*, HUMANE SOC'Y U.S. (Oct. 2002), [http://www.humanesociety.org/sites/default/files/archive/assets/pdfs/Ivory\\_Trade\\_Report.pdf](http://www.humanesociety.org/sites/default/files/archive/assets/pdfs/Ivory_Trade_Report.pdf) [hereinafter *U.S. Ivory Investigation*].

163. See Mushegian, *supra* note 138.

164. Dina Fine Maron, *Under Poaching Pressure, Elephants are Evolving to Lose Their Tusks*, NAT'L GEOGRAPHIC (Nov. 9, 2018), <https://www.nationalgeographic.com/animals/2018/11/wildlife-watch-news-tuskless-elephants-behavior-change/>.

165. *Ivory Tusks – A Blessing and Curse*, ELEAID, <http://www.eleaid.com/elephant-information/elephant-tusks/> (last visited Dec. 3, 2018).

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significant and irreversible damage to ecosystems that depend on elephants using their tusks.<sup>166</sup> In spite of these events and efforts, legislation remains a major part in the elephant and ivory crisis.

On the one hand, art dealers and collectors, and even some conservationists, are saying that the current legislation is too restrictive and problematic for both the art market and wildlife conservationism. Some argue for completely repealing ivory regulation, claiming that legalizing ivory would create a decrease in poaching and curb ivory demand, just as repealing prohibition worked in the United States with alcohol.<sup>167</sup> Furthermore, they argue that removing trade regulations on ivory would erase some the problems the art market currently faces when dealing with ivory pieces.<sup>168</sup> The Chippendale commode, which had its ivory stripped, is a perfect example of how the art market has been negatively impacted by ivory trade regulations.<sup>169</sup> Art dealers contend that allowing ivory trade both preserves historical and artistic masterpieces and eliminates the strange allure ivory currently holds simply for being a rare commodity.<sup>170</sup> Others argue for a more conservative approach: partially legalizing ivory.<sup>171</sup> The rationale is that the demand for ivory stems from “cheaper worked ivory” that comes from the illegal market, not the high-end pieces that are obtainable through legal means like art markets.<sup>172</sup>

Opponents of a total removal of ivory trade regulation argue that it might not produce its intended effect. In 2008, CITES decided to lift the ban on ivory trade to see if illegal elephant poaching would

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166. See Maron, *supra* note 164.

167. Andrew Seguya et al., *Debate: Would a legal ivory trade save elephants or speed up the massacre?*, GUARDIAN (Oct. 1, 2016, 5:13 AM), <https://www.theguardian.com/environment/2016/oct/01/debate-can-legal-ivory-trade-save-elephants>.

168. This includes the inevitable stagnation of museum collections if private collectors are no longer allowed to acquire new art pieces containing ivory; museums depend highly on gifts from private collectors. See Martin P. Levy, *Works of Art and Ivory: What are the Issues?*, 61 CURATOR: THE MUSEUM J. 47, 51-54 (Jan. 26, 2018), <https://onlinelibrary.wiley.com/doi/pdf/10.1111/cura.12220>

169. See generally Wallace, *supra* note 142.

170. See Levy, *supra* note 168, at 59.

171. Daniel Stiles, *Only Legal Ivory Can Stop Poaching*, EARTH ISLAND J., Summer 2015, <http://www.earthisland.org/journal/index.php/magazine/entry/stiles>.

172. *Id.*

decrease.<sup>173</sup> Unfortunately, the opposite occurred: illegal ivory production increased by a reported 66% while seizures of smuggled ivory increased by 71%.<sup>174</sup> As for the elephant population, an estimated 100,000 were slaughtered between 2011 and 2014.<sup>175</sup> The experiment by CITES was a one-time legal sale of approximately 108 metric tons of stockpiled ivory coming from certain countries in Africa.<sup>176</sup> After this one-time sale, researchers noticed that the demand for ivory surged because of the legality and increased public visibility.<sup>177</sup> Researchers from Princeton University and the University of California, Berkeley found that the legal market for ivory was used to conceal the even larger market of illegal ivory, a concept known as “masquerading.”<sup>178</sup>

However, proponents of legalizing ivory trade report different reasons for the results of this sale, claiming that the decision to postpone considering legal trade until 2017 is what caused people to stockpile ivory and drive up the prices in the black market.<sup>179</sup> Keeping the market indefinitely open for legal trade instead of limiting the timeframe would produce different results; it would eat away at the black market, replacing it as the source of ivory to meet the global demand.<sup>180</sup> Conversely, the legalization proponents claim that banning all ivory trade would not close the black market; instead, they claim it would increase its size and increase elephant poaching.<sup>181</sup> Researchers state that there are enough elephants to sustain a legal trade in ivory without the need for any poaching.<sup>182</sup>

Nevertheless, as opponents of legalization have pointed out, coordinating efforts to maintain sustainable elephant populations while meeting ivory demand will be extremely difficult; in fact, some studies

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173. *Ivory sales get the go-ahead*, CITES (July 16, 2008), [https://www.cites.org/eng/news/pr/2008/080716\\_ivory.shtml](https://www.cites.org/eng/news/pr/2008/080716_ivory.shtml).

174. Kelly, *supra* note 26.

175. *Id.*

176. *Ivory sales get the go-ahead*, *supra* note 173.

177. Kelly, *supra* note 27.

178. *Id.*

179. Stiles, *supra* note 171.

180. *Id.*

181. *Id.*

182. *See id.*

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have shown it is impossible.<sup>183</sup> Furthermore, ensuring that all traded ivory is legally acquired will require extreme efforts from all African nations, which might mean completely eradicating the lucrative business of illegal poaching.<sup>184</sup> The problem with the proposed solution of legalizing ivory trade is the corruption that prevails throughout all nations,<sup>185</sup> as well as the temptation to conceal illegally acquired ivory into the legal market stream to maximize profit.<sup>186</sup>

Wildlife conservationists contend that the antique exemptions in current trade regulations cause this concealment,<sup>187</sup> and they also cite problematic document forgery as a major contributor to the continuous rise in illegal ivory trade.<sup>188</sup> Wildlife conservationists have continually researched and studied the problematic parameters of ivory trade regulations.<sup>189</sup> The regulations were passed in an effort to conserve wildlife populations, including the African elephant.<sup>190</sup> However,

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183. Rachael Bale, *A Legal Trade in Ivory Would Wipe Out Elephants*, *Study Finds*, NAT'L GEOGRAPHIC (Sep. 15, 2016), <https://news.nationalgeographic.com/2016/09/wildlife-legal-ivory-trade-not-sustainable-study/>.

184. Elizabeth Bennet, *In a Corrupt World, a Legal Trade Undermines Conservation*, EARTH ISLAND J., Summer 2015, <http://www.earthisland.org/journal/index.php/magazine/entry/bennett/>.

185. *Id.*

186. Jeffrey Gettleman, *Elephants Dying in Epic Frenzy as Ivory Fuels Wars and Profits*, N.Y. TIMES (Sept. 3, 2012), [https://www.nytimes.com/2012/09/04/world/africa/africas-elephants-are-being-slaughtered-in-poaching-frenzy.html?pagewanted=all&\\_r=1&](https://www.nytimes.com/2012/09/04/world/africa/africas-elephants-are-being-slaughtered-in-poaching-frenzy.html?pagewanted=all&_r=1&). In 2012, the combination of record high ivory prices of \$1,000 per pound and low wages in countries in Africa caused many hunters to turn to poaching and the ivory trade. *Id.*

187. Frédéric Simon, *Most ivory bought in Europe is illegal, investigation finds*, EURACTIV (July 9, 2018), <https://www.euractiv.com/section/energy-environment/news/most-ivory-bought-in-europe-is-illegal-investigation-finds/>.

188. Nicole Hasham, *Probe reveals organised crime, forgery driving Australia's illegal wildlife trade*, SYDNEY MORNING HERALD (July 2, 2018, 1:18 PM), <https://www.smh.com.au/politics/federal/probe-reveals-organised-crime-forgery-driving-australia-s-illegal-wildlife-trade-20180629-p4zok2.html>.

189. Several conservation groups have released reports based on research and investigations, including organizations such as The Humane Society and TRAFFIC, the wildlife trade monitoring network. *See U.S. Ivory Investigation*, *supra* note 162; *see also* Chou, *infra* note 219. A compilation of some of these reports can be found on the World Wildlife Fund Publications Wildlife Conservation webpage. *See Publications*, WWF, [https://www.worldwildlife.org/publications?initiative\\_id=wildlife-conservation](https://www.worldwildlife.org/publications?initiative_id=wildlife-conservation) (last visited Apr. 6, 2019).

190. *What is CITES?*, *supra* note 32.

surveys of elephant populations show that the African elephant has been steadily in decline over the past several years.<sup>191</sup> The number of poaching incidents has fluctuated, but according to the survey, poaching for ivory resurged in 2006 and has firmly continued.<sup>192</sup> Opposing the art world's efforts to legalize ivory trade, conservationists argue for a total ban on ivory without exceptions for antiques or musical instruments in order to stop the masquerading effect.<sup>193</sup>

The effect a total ban would have on the ivory market at large is currently uncertain. But with nations passing new legislation restricting trade even more, and places such as Hong Kong passing an upcoming total ban, we may find out the effect a total ban could produce in the coming years. Though Hong Kong's law is not yet fully implemented, recent reports show that actual prosecution of lawbreakers remains at a long-standing low, indicating that the laws might not be enough to deter elephant poaching.<sup>194</sup> However, laws passed in China in 2018 caused significant decreases in ivory demand and sales, giving hope to those supporting a trend towards total bans.<sup>195</sup> Though many countries adhere to the CITES restrictions, there are some that do not.<sup>196</sup> A total ban on ivory in CITES member nations could produce the same results seen after states imposed strict regulations within the United States. Just as the ivory market shifted from New York to Washington, District of Columbia, a similar shift could take place on an international level, with markets moving to different countries but targeting the same

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191. C.R. Thouless et al., African Elephant Status Report 2016: An Update from the African Elephant Database, IUCN/SSC No. 60, 3 (Sep. 25, 2016), [https://portals.iucn.org/library/sites/library/files/documents/SSC-OP-060\\_A.pdf](https://portals.iucn.org/library/sites/library/files/documents/SSC-OP-060_A.pdf).

192. *Id.*

193. Bennet, *supra* note 184.

194. Karen Zhang, *Wildlife Smugglers Still at Large After Hong Kong's Biggest Ivory Seizure in 30 Years Results in Zero Prosecutions*, YAHOO! NEWS (Jan. 27, 2019), <https://sg.news.yahoo.com/wildlife-smugglers-still-large-hong-010316927.html>.

195. *Feature: China continues strengthening ivory ban*, XINHUANET (Jan. 23, 2019, 9:58 AM), [http://www.xinhuanet.com/english/2019-01/23/c\\_137767583.htm](http://www.xinhuanet.com/english/2019-01/23/c_137767583.htm).

196. See Jimmiel Mandima, *Japan's legal ivory markets are fueling the international ivory trade*, AFR. WILDLIFE FOUND. (July 24, 2018), <https://www.awf.org/blog/japans-legal-ivory-markets-are-fueling-international-ivory-trade>. For example, Japan has the basic legislation in place but has failed to enforce it over the years. *Id.*

demographic.<sup>197</sup> China was the leading hub for ivory trade until early 2018, but due to Japan's lax regulation, Japan has picked up right where China left off as the new center for ivory trade.<sup>198</sup> If countries start implementing a total ban on ivory, there is a high probability that the illegal ivory market will simply shift to other parts of the world that are without strict regulations, or move to online platforms. While a total ban might decrease overall ivory demand, it might not produce a meaningful reduction in poaching and the illegal ivory market.

Another concern for the art world is that these strict regulations—banning practically all forms of ivory products—are causing the black market to shift to other wildlife species such as the pangolin, renowned for its scales.<sup>199</sup> Though strict regulation can be seen as partially alleviating the elephant poaching problem, it has presented new issues. One concern is that there will forever be a ban on all (even legitimate) ivory items in the art markets. Another concern is if these laws are ever repealed due to a finding that illegal ivory trafficking has been resolved, trade in these items will resurge as soon as the restrictions are removed. These regulations also generate legitimate concern for other endangered species that do not yet enjoy the benefit of such strict regulations.

The problem with ivory trade is demand.<sup>200</sup> As an intangible and borderless entity, it cannot be quelled by the laws of individual nations. It is fueled by lust and a belief that ivory represents a certain status in society, with many people also believing ivory holds medicinal benefits or brings good luck and success.<sup>201</sup> So how can we fight against this force? As explored above, it is clear that going to extremes may not be the best possible solution. Creating a total ban on all ivory items would

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197. *On the First Anniversary of China's Ivory Ban, New Campaign Targets Travelers Abroad*, WILDAID (Jan. 23, 2019), <https://wildaid.org/on-the-first-anniversary-of-chinas-ivory-ban/>.

198. Rachel Nuwer, *How Japan Undermines Efforts to Stop the Illegal Ivory Trade*, NAT'L. GEOGRAPHIC (Sept. 24, 2018), <https://www.nationalgeographic.com/animals/2018/09/japan-illegal-ivory-trade-african-elephants/>.

199. *China Dismantles Major Ivory Trafficking Syndicate*, MARITIME EXECUTIVE (Jan. 14, 2019, 8:02 PM), <https://www.maritime-executive.com/article/china-dismantles-major-ivory-trafficking-syndicate>.

200. Yufang Gao, *From Supply to Demand: Diverse Perspectives on the International Ivory Trade*, TROPICAL RESOURCES, 2013-2014, at 1, 101, [http://environment.yale.edu/tri/uploads/TRIBulletin-Vols32\\_33-2013\\_2014.pdf](http://environment.yale.edu/tri/uploads/TRIBulletin-Vols32_33-2013_2014.pdf).

201. Ong, *supra* note 16.

simply drive up the demand and the value because of the risk involved in acquiring these items along with the scarcity of the items. Conversely, legalizing ivory trade would also not eradicate the illegal market; the high demand for ivory seems to be for the “cheaper” items that come from the black market, not artistic and historical items. Yet the current legislation, which falls somewhat within these two extremes, has not functioned as hoped. This may be caused by a discord between the laws of different nations, dismissing requests for strengthening regulation,<sup>202</sup> as well as the apparent failure of CITES to impose strict sanctions against nations that are not in compliance with CITES.<sup>203</sup>

Some critics of current legislation claim that part of the problem is listing certain African elephant populations in Appendix II of CITES, which allows elephant hunting and ivory trading in these specific countries, while other populations remain on Appendix I.<sup>204</sup> The split between countries with African elephants on Appendix I and those with African elephants on Appendix II has created confusion within the ivory trade market and uncertainty for the future.<sup>205</sup> The reasoning for the split is that some countries have a large, stable, and even growing elephant population, which makes them not as critically endangered as the species that belong on Appendix I.<sup>206</sup> The permitted hunting of these countries’ elephants is done for population control in order to

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202. Damian Carrington, *Bid for strongest protection for all African elephants defeated at wildlife summit*, GUARDIAN (Oct. 3, 2016), <https://www.theguardian.com/environment/2016/oct/03/bid-for-stronger-protection-for-all-african-elephants-defeated-at-wildlife-summit>.

203. See Erica Jayne Lyman & Olivier Jamin, *Japan’s Introduction from the Sea of Sei Whale Meat: The Breaking Point of CITES?*, 1 INT’L J. OF L. & PUB. ADMIN. 68, 74 (2018).

204. Grace Ge Gabriel, *No on split-listing: Give elephants equal protections across Africa*, INT’L FUND FOR ANIMAL WELFARE (Sept. 7, 2016), <https://www.ifaw.org/united-states/news/no-split-listing-give-elephants-equal-protections-across-africa>.

205. See Convention on International Trade in Endangered Species of Wild Fauna and Flora, *Consideration of Proposals for Amendment of Appendices I and II* 10 (2016), [https://cites.org/sites/default/files/eng/cop/17/prop/KE\\_Loxodonta.pdf](https://cites.org/sites/default/files/eng/cop/17/prop/KE_Loxodonta.pdf).

206. See *African Elephants*, *supra* note 21.

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maintain a viable ecosystem and unity between humans and elephants.<sup>207</sup>

Botswana, a country that now has one of the largest elephant populations, introduced a hunting ban in 2014 to aid declining elephant populations.<sup>208</sup> However, this year the new government has decided to reopen discussions regarding this ban because of too many conflicts between humans and elephants as the elephant population continues to grow.<sup>209</sup> Placing elephants on the different Appendices has paved the way for the disarmament of “anti-poaching units,” thus leaving elephant populations relatively unprotected from illegal hunting.<sup>210</sup> It has also enabled some countries, such as the United States, to reintroduce the legal importation of sport-hunted ivory.

In order to combat the illegal ivory trade and African elephant poaching, changes must be made on an international level. This starts with global cooperation and strengthening of systems that are already in place. The recent law passed in China has already succeeded in reducing the demand for ivory within the country.<sup>211</sup> More countries must also accept the reality that both the legal and illegal ivory trade

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207. A different approach to elephant population control is to use non-fatal means such as physical barriers, elephant trenches, and chili as a natural deterrent. See G.E. PARKER ET AL., HUMAN-ELEPHANT CONFLICT MITIGATION: A TRAINING COURSE FOR COMMUNITY-BASED APPROACHES IN AFRICA, IUCN 3, 36 (Mar. 2007), <https://www.iucn.org/sites/dev/files/import/downloads/heccombaptmen.pdf>. Human-elephant conflicts occur as the elephants’ habitat decreases, which forces elephants to wander into human communities. *Id.* at 14. In 1997, the IUCN and the SSC African Elephant Specialist Group created a Human-Elephant Conflict Working Group (HEC Working Group or HECWG) in order to tackle this problem with as little violence as possible. *Id.* at 7. In 2007, the group released this training manual for non-fatal means of preventing human-elephant conflicts. *Id.*

208. *Botswana may put elephants in cross-hairs as it moves to lift hunting ban*, REUTERS (July 15, 2018), <https://www.reuters.com/article/us-botswana-wildlife-hunting/botswana-may-put-elephants-in-cross-hairs-as-it-moves-to-lift-hunting-ban-idUSKBN1K50I3>.

209. *Id.*

210. See Christopher Torchia, *Botswana hits back at critics on anti-poaching policy*, AP (Sept. 9, 2018), <https://www.apnews.com/78fa9c21193a451cbe8c31762def782d>.

211. Rachael Bale, *In China, Ivory Seems to be Losing Appeal*, NAT’L GEOGRAPHIC (Sept. 28, 2018), <https://www.nationalgeographic.com/animals/2018/09/wildlife-watch-news-ivory-demand-reduction-china-ban/>.



are significant threats to elephant populations.<sup>212</sup> Enforcing CITES sanctions on non-compliant countries would help establish the legitimacy and urgency of this global crisis. In addition, repairing the split of elephant populations between CITES Appendices could send poachers and illegal ivory trade participants a signal that a global “crackdown” is taking place.<sup>213</sup> Furthermore, the recent discussion of adding woolly mammoths to the CITES Appendix would close a major loophole that enables illegal ivory traders to operate under the guise of mammoth ivory, which is nearly indistinguishable from elephant ivory.<sup>214</sup> As for elephant population control, regulated hunting could be allowed so long as enforcement is strict and limits exist to avoid a sudden depletion of elephants and an increase in ivory trading.<sup>215</sup>

As one of the leading consumers in the ivory market, the United States must revise its federal laws governing the ivory trade. First, the recent legislation allowing the importation of sport-hunted elephant trophies should be reversed. As proven through countless studies, illegal ivory pieces are concealed in legal markets.<sup>216</sup> Allowing newly-acquired ivory to enter into the United States creates the risk of introducing these pieces into the stream of commerce—both within the United States and internationally—through forgery and legislative exemptions. As seen in several markets across the globe, ivory forgery is not uncommon and it is difficult and expensive to recognize.<sup>217</sup> While some countries are passing new laws with narrower exemptions

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212. See Carrington, *supra* note 202. Countries like Namibia have refused to accept that legal ivory markets serve as an outlet for concealed illegal ivory. *Id.*

213. *Id.*

214. Campbell, *supra* note 31.

215. See Int’l Union for Conservation of Nature [IUCN], *Management Recommendations*, <https://www.iucn.org/ssc-groups/mammals/african-elephant-specialist-group/human-elephant-conflict/recommendations> (last visited Feb. 11, 2019). The HECWG states, however, that long-term policies dealing with elephant conflicts through the use of non-fatal initiatives, such as land use planning and community conservation, have a higher chance of regulating and stabilizing elephant populations than through the destruction of “a valuable resource (by frequently killing selected animals)” or by relocating them to another site. *Id.*

216. See Stiles, *supra* note 9, at 9–10.

217. See Center for Biological Diversity, Comment Letter on Proposed Rule to Revise the African Elephant Rule under Section 4(d) of the ESA 9, 16 (Sept. 28, 2015), <http://www.regulations.gov/#!documentDetail;D=FWS-HQ-IA-2013-0091-6188>.

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for trade in legal ivory, forgery of both items and documentation is still a problem.<sup>218</sup> Allowing the legal hunting of elephants to help control populations is on some level acceptable (although non-fatal solutions are gaining momentum throughout African nations), but permitting the importation of elephant ivory trophies should not be approved. Restricting the inflow of ivory within the legal market, whether in the United States or elsewhere, is an important step towards limiting the illegal ivory trade.

In regard to a total ban, removing the antique exemptions and banning all trade is not the answer. Though recent reports show significant reductions in ivory demand from mainland China following the total ban, the ivory art markets in China suffered greatly while countries around China, such as Japan, Hong Kong, and Taiwan, have seen an increase in ivory trade.<sup>219</sup> Exceptions to ivory regulation should be made in order to sustain these laws in the long-run with as little negative effects as possible.

First and foremost, it is important to point out that authentic antique pieces over 100 years old have not caused the recent decline in elephant populations or the rise in the illegal ivory market, and their legal status will not directly affect these problems. Additionally, restricting all ivory trade will hurt art markets and the dissemination of historical artifacts and knowledge. Lastly, it would render all ivory pieces valueless in the legal sector while simultaneously making them extremely valuable on the black market. This both hinders the movement of personal collections and it fails to eradicate demand. Instead, current legislation should be reinforced in order to better serve the needs of both conservation efforts and art markets.

This goal can be accomplished by modeling federal legislation after the United Kingdom's newly passed law, specifically their antique exemptions. Legislation should allow for the exchange and acquisition of ivory pieces for educational and research purposes, as well as

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218. Lauren Tavar, *New Rule, Same Loopholes? A Closer Look at the U.S. Rule to Ban African Elephant Ivory*, ANIMAL LAW (Fall 2016), [http://link.galegroup.com/apps/doc/A537983087/LT?u=cwsl\\_main&sid=LT&xid=a4fbc94a](http://link.galegroup.com/apps/doc/A537983087/LT?u=cwsl_main&sid=LT&xid=a4fbc94a).

219. Hsun-Wen Chou, *China's Ivory Auction Market: A Comprehensive Analysis of Legislation, Historical Data and Market Survey Results*, TRAFFIC vii (Sept. 2018), [http://d2ouvy59p0dg6k.cloudfront.net/downloads/chinas\\_ivory\\_auction\\_market\\_9\\_25\\_1.pdf](http://d2ouvy59p0dg6k.cloudfront.net/downloads/chinas_ivory_auction_market_9_25_1.pdf).

exempting antiques. However, reform should be sought regarding the definition and authentication of these antique pieces. Firstly, regulations should not define antiques as being simply “over 100 years old,” as this creates the inevitable consequence of having the age limit continuously increase as the years go by, eventually allowing ivory pieces created in 1990 to become legal antiques.<sup>220</sup> Instead, antiques should be authenticated and allowed on a case-by-case basis, similar to the U.K. model, or at a minimum assigned a cutoff date of when African elephants were placed on the endangered species list under the ESA. Such a date would allow for major art pieces of the early twentieth century to be included, while also providing a historically significant cutoff to exclude newly produced ivory objects. Secondly, authenticating these antiques should be a uniformed system used throughout the United States. Currently, the United States does not require artifact documentation to come from a specific source; instead, proof of age can come in any of the listed forms, including photographs.<sup>221</sup> As mentioned above, forgeries of documentation are commonplace. If federal legislation modeled itself after the United Kingdom’s law in this area, it would require the government to authorize specific institutions to handle all authentication of ivory pieces.<sup>222</sup> Limiting the pool of appraisers would create less opportunity for corruption and create more accountability, allowing for better regulation.<sup>223</sup> The U.S. National Fish and Wildlife Forensics Laboratory could also be expanded to handle authentication of ivory pieces. Designating specific institutions and providing them with funding would help achieve more accurate results by providing appraisers with important technology. In addition, this would help develop expert-level skills in a field in which it is currently difficult for non-expert appraisers to determine the authenticity of ivory objects. Making this change at a federal level would create a unified standard throughout the United States, greatly reducing ivory markets moving to states with less regulation.

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220. See Levy, *supra* note 168, at 49.

221. *What Can I Do With My Ivory*, *supra* note 11.

222. See Ares & Pratt, *supra* note 115, at 15.

223. Colin Gleadell, *Art Sales: the ivory showdown*, TELEGRAPH (Nov. 1, 2016), <https://www.telegraph.co.uk/luxury/art/art-sales-the-ivory-showdown/>.

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Other countries should also adopt this authentication requirement. A stricter look at the ivory pieces claimed to be exempt would help curb the amount of illegal ivory entering the market under the guise of antique artifacts. This would allow for these exemptions to continue, and it would also allow the art market to continue legally trading ivory objects of historic and artistic significance without jeopardizing efforts to combat the illegal ivory trade. It would create an additional obstacle that could filter out a significant portion of illegal ivory, and it would also bolster the art world's economy by creating new jobs and providing peace of mind to art dealers and buyers.

#### CONCLUSION

With the emergence of new laws passing in countries such as the United Kingdom and China, revising the United States's current laws could preserve the art market and help elephant conservationism. Being the second largest market for ivory in the world, closing loopholes in federal regulations would help decrease the illegal ivory market and elephant poaching. Furthermore, revising the parameters of the exemptions allowed under current legislation could benefit both the art market and put an end to the "masquerading" effect of letting illegal ivory come through as items exempted from regulation.

Increasing punishments for violators and strengthening nations' criminal justice systems, placing all African elephant populations onto Appendix I of CITES, restricting trade and defining exemptions, requiring a more regulated authentication process, and stopping the importation of sport-hunted ivory trophies are some steps that can be taken to curb illegal ivory entering into the legal market. As for ivory demand, this needs to be addressed through limiting illegal ivory entering markets as much as possible and creating regulated legal markets for authenticated pieces. Furthermore, tackling the root of this issue should be a primary focus for most countries. They should cooperate regarding poaching prevention instead of primarily reacting to it after it has already occurred, thereby limiting the inflow of ivory in the worldwide market before it can reach consumers. Educating people in high-demand countries should also be a priority—to truly make progress, we must find a way to reduce the allure surrounding ivory and reaffirm the concept that ivory is nothing more than elephant teeth and an art form of the past.

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