

BIODIVERSITY CASE STUDY

1.- Instructions

For the case study, we will generally follow the following work structure:

- Formation of four groups.
- 10 to 15 minutes to present the facts and questions.
- 30 to 45 minutes for participants to discuss and solve in groups.
- Around 30 minutes in a plenary session to discuss findings and present solutions.

The EU is the only branch of the global ivory market that is regionally controlled and heavily dependent on import and export controls at the EU's external borders. Countries with the weakest external border controls will inevitably be targeted by those wishing to evade import controls or re-export ivory. The absence of border controls between the 28 EU member states means that ivory, including illegal ivory, can easily move within the entire region without adequate enforcement or inspection measures.

Legal loopholes arising from exemptions for pre-1947 and pre-Convention specimens are being detected. The EU's attempts to control the internal trade of ivory are seriously hampered by the fact that certificates are not required to move ivory within the EU, or to buy and sell ivory if it is claimed to be "antique" (i.e., a worked item predating 1947). Reports on online trade, recent carbon dating of alleged "antique" items by the BBC, and the convictions of antique dealers and auction houses clearly show that this loophole is being exploited by unscrupulous traders.

2.- Background of the case:

On 2 February 2024, Mr. Hans Obermaier travelled from Nairobi, Kenya, to Amsterdam, the Netherlands, with a stopover at Adolfo-Suárez Barajas airport in Madrid. An unsuspected three-hour delay on the flight from Kenya caused him to miss his connecting flight to Amsterdam. Consequently, the airline arranged for him to stay in a hotel near Madrid airport for the night.

The next day, at 7:00 a.m., Mr. Obermaier returned to Madrid airport. When passing through border control, Mr Obermaier attracted attention because of the unusually heavy suitcase which he was holding firmly by the handle without taking off from it. In addition, Mr Obermaier displayed a shy attitude

towards the officers, in particular by avoiding eye contact and behaving in a somewhat agitated manner, which led the Guardia Civil officers (Spanish Police) to carry out a routine check.

Subsequently, during the search, the Spanish police discovered three crucifixes in his possession, each weighing approximately seven kilograms. The crucifixes were carved in ivory and decorated with ivory and oak inlays.



When questioned by the customs police about the origin of the ivory, Mr. Obermaier stated that they were very old art objects, well before the CITES Convention, thus explaining their legal importation. By way of justification, he presented an old and almost illegible document, stating that in 1878 a parish priest named Father Bauer bequeathed three ivory crucifixes to his niece Clara. The document also included a note, written in a different handwriting and ink from the original text, specifying that the carvings were made of ivory. A subsequent examination of his suitcase revealed a purchase invoice for a total of 93,000 euros, the purpose of the purchase being unclear. When questioned, Mr. Obermaier attributed the transaction to a business deal in Nairobi related to the purchase of a car in Kenya.

Despite Mr. Obermaier's claim that he possessed the three crucifixes for personal and religious purposes, his identification details and photograph appeared on the eBay website, linking him to the sale of antiques. The characteristics of the ivory, especially its whitish color without any yellowing, suggested a more recent origin. Customs officers chose to temporarily seize the ivory but refrained from detaining Mr. Obermaier.

Subsequently, without the confiscated material, Mr. Obermaier boarded a flight to Amsterdam and, two days later, departed for Miami, avoiding European justice's action against him.

3.- Questions

1. Would a certificate be necessary for Hans to cross the border with the mentioned ivory, even if it was acquired before 1973?
2. What kind of legal actions on-site should be taken? Is there a possibility that the authorities could confiscate the ivory?
3. At the time of his detention, could his activity have been legal? Has Hans committed an administrative offense or a crime?
4. Should customs officers inform the police or the public prosecutor about their discovery with the evidence they have?
5. What technological devices can be used to determine the age of the ivory?
6. What factual circumstances would you consider when analyzing the legality or illegality of the ivory?
7. Could the fact that it is a religious object with artistic value be relevant?
8. Do you think the Spanish police's decision not to detain Hans was legally justified?

Although the events took place in Spain, when we need to follow national regulations, each participant should propose a solution based on the regulations of their own country.

ADDITIONAL INFORMATION

Ivory source species

There are different species that provide ivory, the most common being:

- African Elephant
- Asian Elephant
- Hippopotamus
- Wild boar
- Cetaceans (narwhal, sperm whale, killer whale, etc.)
- Walrus
- Mammoth

In this particular case, we focus on elephant ivory, specifically African elephant ivory.

4.- Key dates for determining the legality of ivory

- □ 3 March 1947: Ivory carved before this date is considered old in the EU (50 years before EC Regulation 338/97).
 - □ 1 July 1975: Inclusion of the Asian elephant in Appendix I of CITES.
 - □ 26 February 1976: First listing of the African elephant in the CITES appendices.
 - □ 16 May 1986: Accession of Spain to CITES and commencement of compulsory CITES permits.
 - □ 18 January 1990: The African elephant is downlisted from CITES Appendix II to Appendix I, marking the end of the general ivory trade.
 - □ 2017: Suspension of re-export of raw ivory from the EU.
- 5.- Regulations on the Ivory Trade

Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of fauna and flora by regulating trade therein. Incorporates CITES into European legislation. Includes the African elephant and the Asian elephant in its Annex A. Article 8: Prohibits the purchase, offer to purchase, acquisition and public display for commercial purposes, as well as the use for commercial gain, sale, offer for sale, transport or possession for sale of specimens of species listed in Annex A. Under Regulation (EC) No 338/97:

a. Trade in pre-1947 antique carved ivory: may be traded within the EU without certificates.

b. Trade in pre-Convention ivory (1947 to 1990): requires an intra-EU CITES certificate.

c. Re-export of raw ivory in these cases:

- It is part of an exchange between reputable entities (museums).
 - It is part of a family estate during a move.
 - It is transported for enforcement, scientific or educational purposes.
- The definition of 'worked specimens' is set out in Article 2(w) of Regulation (EC) No 338/97:

"Worked specimens acquired more than 50 years ago' means specimens that underwent significant alteration from their natural raw state to become jewellery, ornaments, art objects, implements or musical instruments more than 50 years before the entry into force of

this Regulation (3) and for which the management authority of the Member State concerned has provided assurance that they were acquired under such conditions. Such specimens are only considered to be worked if they clearly belong to one of the above categories and do not require, for their intended purpose, any additional carving, crafting or manufacturing operations'. Important Note to Note: For a tusk or portion of a tusk to be considered worked, the specimen must have undergone a significant carving or engraving operation on at least 90% of its surface. Tusks that have undergone a minor carving, engraving or surface marking process, where the shape of the tusk remains substantially the same as in its natural raw state, will not be considered worked specimens.

2. Commission Regulation (EC) No 865/2006 of 4 May 2006, laying down provisions for the implementation of Regulation (EC) No 338/97. According to Article 11.4 bis of Regulation 865/2006, all EU certificates related to elephant ivory specimens issued before 19 January 2022 expired on 19 January 2023. To comply with the new European regulations, holders of these certificates must apply for a new one, either for possession or for commercial purposes, as specified in the regulations. Commission Communication. Guidance Document. EU regime governing intra-EU trade and re-export of ivory. (2017/C 154/06). 17 May 2017. It establishes the suspension of the re-export of raw ivory.
3. Guidelines on specimens produced under EU wildlife trade regulations (2017/C 154/07). 17 May 2017.

Royal Decree 7/2018, of 12 January, establishing the documentation, possession, and marking requirements related to the trade of endangered species of wild fauna and flora.

According to RD 7/2018, for specimens listed in Annex A:

- A. Original CITES Import Permit.
- B. Original EU CITES Certificate (for community use).
- C. Original Private Property Certificate. In specific cases:
- D. Original Certificate for Traveling Exhibitions.
- E. Original Certificate for Musical Instruments.

In all cases, the documents must be issued by the Administrative Authority, and the applicant must prove their legal acquisition, assuming the burden of proof.

Regulation (EU) 2018/1805 of the European Parliament and the Council, of 14 November 2018, on the mutual recognition of freezing orders and confiscation orders.

a) "Freezing order" means a decision issued or validated by an issuing authority to prevent the destruction, transformation, removal, transfer, or disposal of property with a view to its confiscation.

b) "Confiscation order" means a final penalty or measure imposed by a court following criminal proceedings, resulting in the permanent deprivation of property from a natural or legal person.

Article 3

Freezing or confiscation orders shall be executed without verification of the dual criminality of the acts giving rise to such orders, where such acts are punishable in the issuing State by a maximum custodial sentence of at least three years and constitute one or more of the following criminal offenses according to the law of the issuing State:

(12) Environmental crime, including illicit trafficking in endangered animal species and endangered plant species and varieties.

5.- Commission Communication. Guidance Document. EU regime regulating intra-EU trade and the re-export of ivory (2017/C 154/06), 17 May 2017. Establishes the suspension of the re-export of raw ivory.

6.- EU Action Plan against Wildlife Trafficking of 26 February 2016. COM(2016) 87 final.

In Annex I.2, to further limit the trade of ivory within the EU, the Commission has published guidelines to ensure a uniform interpretation of EU rules, suspending the export of pre-Convention raw ivory and ensuring that only legal ivory antiques are traded within the EU. This came into effect at the end of 2016.

7.- Commission Communication. Guidelines on worked specimens under the EU rules on wildlife trade (2017/C 154/07), 17 May 2017.

8.- Revised guidance of 16 December 2021 on the EU regime regulating ivory trade. C(2021) 9168 final, European Commission.

6.- In order to solve the case, three scenarios must be distinguished:

a) Raw Ivory: Pieces weighing more than 1 kg or exceeding 20 cm in length must be marked.

b) Trophies: All tusks must be marked from the country of origin. In both cases, permanent marking (punches, indelible ink, etc.) is required, using: the two-letter ISO country code, the last two digits of the year/serial number for the year in question/and the weight in kg (e.g. KE/00/127/14).

c) Carved ivory (manufactured): Pieces intended for trade must be marked.

Note of interest: Under the current CITES regime, international trade in ivory is prohibited, with strictly limited exceptions (for items acquired before CITES began to apply to ivory). However, CITES does not regulate domestic or internal trade in ivory.