

BIODIVERSITY CASE

1.- Case Background:

On January 2, 2024, Mr. Hans Obermaier travelled from Nairobi, Kenya, to Amsterdam, Netherlands, with a layover at Adolfo-Suárez Barajas Airport in Madrid. A three-hour delay in the flight from Kenya resulted in Mr. Obermaier missing his connecting flight to Amsterdam. Consequently, the airline arranged his accommodation in a hotel near the Madrid airport for an overnight stay.



On the following day, at 7:00 a.m., Mr. Obermaier returned to Madrid Airport. During the border control process, concerns arose due to the unusually heavy suitcase he tightly held. Mr. Obermaier exhibited avoidance of eye contact and nervous behaviours, prompting Civil Guard agents to conduct a search. Subsequently, Spanish police discovered three crucifixes in his possession, each weighing approximately seven kilograms. The crucifixes were intricately carved in ivory and adorned with ivory and oak inlays.

Upon inquiry by customs police regarding the origin of the ivory, Mr. Obermaier asserted its ancient provenance, predating the CITES Convention, thereby justifying its legal importation. He presented an aged and nearly illegible document, purporting that in 1878, a parish priest named Father Bauer bequeathed three ivory crucifixes to his niece Clara. The document further included a note, written in a different handwriting and ink, specifying that the carvings were made of ivory. A subsequent examination of his suitcase revealed a purchase invoice amounting to 93,000 euros, with the purpose of the purchase remaining unclear. When

questioned, Mr. Obermaier attributed the transaction to a business deal in Nairobi related to a car.

Despite Mr. Obermaier's assertion that he possessed the three crucifixes for personal and religious purposes, his identification details and photograph surfaced on the eBay website, associating him with the sale of antiques. The characteristics of the ivory, notably its whitish color and minimal yellowing, suggested a more recent origin. Customs agents opted to provisionally 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, he departed for Miami, effectively evading further scrutiny.

2. Questions

1. Can Hans cross the border without the mentioned certificate?
2. Is a certificate necessary for ivory acquired before 1973?
3. What kind of actions should be taken?
4. Is his activity legal? Has Hans committed an administrative irregularity or a crime?
5. Is there a possibility that authorities confiscate the ivory?
6. Should customs agents inform the police or the prosecutor's office of their discovery with the evidence they have?
7. Which technological devices can be employed to ascertain the antiquity of the ivory?
8. What factual circumstances would you consider when analysing the legality or illegality of the ivory?
9. Can it be relevant that it is a religious object and with artistic value?
10. Was it legally justified for the Spanish police not to apprehend Hans?

Even though the events occurred in Spain, when we need to follow national rules, each participant should come up with a solution based on their own country's regulations.

ADDITIONAL INFORMATION USEFUL FOR THE CASE

Ivory Source Species

There is ivory from different species, with the most common being:

- African Elephant

- Asian Elephant
- Hippopotamus
- Warthog or Bushpig (African)
- Cetaceans (narwhal, sperm whale, orca, etc.)
- Walrus
- Mammoth

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

Key Dates for Determining Ivory Legality

1. March 3, 1947: Carved ivory predating this date is considered antique in the EU (50 years before EC Regulation 338/97).
2. July 1, 1975: Inclusion of the Asian elephant in CITES Appendix I.
3. February 26, 1976: First listing of the African elephant in CITES appendices.]
4. May 16, 1986: Spain's accession to CITES and the commencement of mandatory CITES permits.
5. January 18, 1990: The African elephant is moved from CITES Appendix II to Appendix I, marking the end of general ivory trade.
6. 2017: Suspension of raw ivory re-exportation from the EU.

Ivory Trade Regulation

1. **Council Regulation (EC) No 338/97 of December 9, 1996,** concerning the protection of species of fauna and flora through the control of their trade.
Incorporates CITES into European legislation. Includes the African elephant and the Asian elephant in its Annex A.
Article 8: Prohibits the purchase, offer for purchase, acquisition, and public exhibition for commercial purposes, as well as the use for profit, sale, offering for sale, transportation, or possession for sale of specimens of the species listed in Annex A.
Under Regulation (EC) No 338/97:
 - a. Trade in carved ivory antiques predating 1947: can be traded within the EU without certificates.
 - b. Trade in pre-convention ivory (from 1947 to 1990): requires an intracommunity CITES certificate.
 - c. Re-export of raw ivory in these cases:

- It is part of an exchange between entities of recognized prestige (museums).
- It is part of a family heritage during relocation.
- It is transported for enforcement, scientific, or educational purposes.

The definition of "worked specimen" is outlined in Article 2, letter w), of Regulation (EC) No 338/97:

"'Worked specimens acquired more than fifty years ago': specimens that underwent significant alteration from their raw natural state to become jewellery, ornaments, art objects, utensils, or musical instruments more than fifty years before the entry into force of this Regulation (3) and concerning which the management authority of the affected Member State has ensured that they were acquired under such conditions. These specimens are only considered worked if they clearly belong to one of the mentioned categories and do not require, for their intended purpose, any further carving, craftsmanship, or manufacturing operation."

Important Note to Highlight: For a tusk or a 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 subjected to minor carving, engraving, or surface marking, where the tusk's shape remains substantially the same as in its raw natural state, will not be considered worked specimens.

2. Commission Regulation (EC) No 865/2006 of May 4, 2006, establishing provisions for the implementation of Regulation (EC) No 338/97.

In accordance with Article 11.4 bis of Regulation 865/2006, all EU Certificates related to elephant ivory specimens issued before January 19, 2022, expired on January 19, 2023. To comply with the new European regulation, holders of such certificates must apply for a new one, either for possession or for commercialization, as specified in the regulations.

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

4. **Guidelines on specimens produced within the framework of the EU regulations on the trade of wild species. (2017/C 154/07).** May 17, 2017.
5. **Spanish Royal Decree 7/2018, of January 12**, establishing requirements for documentation, possession, and marking concerning the trade of threatened species of wild fauna and flora. Under RD 7/2018, for specimens listed in Annex A:
 - A. Original CITES Import Permit.
 - B. Original CITES EU Certificate (for community use).
 - C. Original Certificate of Private Ownership. In specific cases
 - D. Original Certificate for Traveling Exhibition.
 - E. Original Certificate for Musical Instruments.

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

Ivory Marking.

Several scenarios must be distinguished:

- a) Raw Ivory: Pieces weighing over 1 kg or exceeding 20 cm in length must be marked.
- b) Hunting Trophies: All tusks must come marked from the country of origin. In both cases, permanent marking (punches, indelible ink, etc.) is required, using: the ISO two-letter country code, the last two digits of the year/the serial number corresponding to the year in question/and the weight in kg. (e.g., KE/00/127/14).
- c) Carved Ivory (manufactures): Pieces intended for trade must be marked..