

ARTICLES

U.S. IVORY TRADE: CAN A CRACKDOWN ON TRAFFICKING SAVE THE LAST TITAN?

By

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How shockingly destructive and historically shameful it would be if we did nothing while a great species was criminally slaughtered into extinction. And yet, here we are in the midst of one of the most tragic and outrageous assaults on our shared inheritance that I have seen in my lifetime—where an elephant’s dead ivory is prized over its living condition, where corruption feeds on its body and soul, and where money only makes matters worse.

—Senator John Kerry¹

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¹ Sen. Comm. on For. Rel., *Ivory and Insecurity: The Global Implications of Poaching in Africa*, 112th Cong. 1 (May 24, 2012) (opening statement of Sen. John F. Kerry) (available at <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg76689/pdf/CHRG-112shrg76689.pdf> [<http://perma.cc/0JAJZjSQAL>] (accessed Nov. 17, 2013)).

Rampant poaching has put African elephants on the verge of extinction in the wild, and the United States (U.S.) is complicit in this crisis. Despite the best efforts of federal agencies, porous national borders, legal loopholes, and deep-seated difficulties in law enforcement make the U.S. a major market for illicit ivory. While the White House, the United Nations, and the European Union, along with other voices, are sounding alarms, bold and concrete actions have been slow in coming. The U.S., in particular, is only beginning to acknowledge its own role in the slaughter, and still relies on a patchwork of inadequate laws and regulations to control its domestic ivory trade. The U.S. must quickly put a halt to its domestic ivory trade by adequately funding customs and wildlife inspectors and addressing the problem at every step along the chain of destruction—from the poachers and militants on the ground in Africa, to the international criminal syndicates underwriting the logistics of trafficking, to the consumers whose demand drives the crisis to ever-greater depths. This Article, analyzing never-before released data from the U.S. Fish and Wildlife Service, shines a light on the scope and scale of the underground trade in the U.S., unpacks the problems facing regulators and enforcement officials, and builds the case for a total ban on the commercial ivory trade, which threatens the existence of one of the planet's greatest icons.

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I. INTRODUCTION²

At the turn of the twentieth century, countless herds of elephants roamed the landscapes of Africa and the Indian subcontinent, icons of evolution and the abundance of nature.³ Today, although elephants remain one of the Earth's most charismatic and majestic animals, their populations have crashed to a fraction of historic numbers as poachers and organized crime syndicates lay siege.⁴ The statistics are grim: fewer than half a million elephants may now exist across the entire continent, down from an estimated ten million in 1930.⁵ Moreover, “[e]very [fifteen] minutes, on average, an elephant is killed illegally in Africa to feed an insatiable demand for ivory, principally from Asia.”⁶

² For a list of acronyms used throughout this Article, consult *infra* appendix A.

³ See e.g. Born Free Found., *Elephants under Threat*, <http://www.bornfree.org.uk/campaigns/elephants/elephants-under-threat> [<http://perma.cc/0GgK2R6Fr1W>] (accessed Nov. 17, 2013) (discussing the extraordinary drop in elephant populations in Africa and Asia from 1900 to present).

⁴ Wynne Parry, LiveScience, *Mob Wipes Out Elephants, Tigers, and Rhinos*, <http://www.livescience.com/15263-organized-crime-endangered-species-wildlife.html> [<http://perma.cc/0Z34Ce89KeC>] (July 27, 2011) (accessed Nov. 17, 2013).

⁵ Elephant Database, *2012 Continental Totals (“2013 AFRICA” Analysis)*, http://www.elephantdatabase.org/preview_report/2013_africa/Loxodonta_africana/2012/Africa [<http://perma.cc/05SKV9NEm8v>] (accessed Nov. 17, 2013); E/The Env'tl. Mag., *Are Elephant Populations Stable These Days?* Sci. Am. (Apr. 9, 2009) (available at <http://www.scientificamerican.com/article.cfm?id=are-elephant-populations-stable> [<http://perma.cc/0zbziWRC2Hm>] (accessed Nov. 17, 2013)).

⁶ Animal Welfare Inst., *Elephant Slaughter Escalates as Illegal Ivory Market Thrives*, AWI Quarterly (Winter 2013) (available at <http://awionline.org/awi-quarterly/2013-winter/elephant-slaughter-escalates-illegal-ivory-market-thrives> [<http://perma.cc/09rQFigmhXC>] (accessed Nov. 17, 2013)); see also Carl Safina, *Blood Ivory*, N.Y. Times (Feb. 11, 2013) (available at <http://www.nytimes.com/2013/02/12/opinion/global/blood->

And in the last decade, central Africa's total population of forest elephants has fallen 62%,⁷ with 11,000 forest elephants killed in one park alone—Gabon's Minkebe National Park.⁸ This kill rate exceeds the birth rate—a trend that, if not reversed, could lead to extinction of the African elephant from some regions in the next few years.⁹

It is easy to dismiss this tragedy as the fault of a growing Asian middle class hungry for status symbols. However, as with so many other species lost to memory, we will only find the culprit by looking in our collective mirror. While China is generally considered to be the prime market for illegal ivory, the United States (U.S.) also has a thriving trade in ivory—ranked second in the world according to the most recent global survey.¹⁰ And elephants are just one of the many species threatened by the \$20 billion illegal wildlife trade, along with iconic animals like rhinos, tigers, and chimpanzees.¹¹

The impact of the U.S. demand for ivory on the poaching crisis in Africa and Asia is not entirely clear. Inadequate, confusing, and unenforceable laws have made it difficult to tell the difference between legal and illegal ivory in the U.S. market.¹² The burden on the U.S. government to prove that someone is knowingly selling illegal ivory has made prosecution difficult and rarely pursued.¹³ This has led to a lack of data on how much of the ivory that is sold on the legal market is actually illegal ivory removed from poached elephants.

ivory.html [<http://perma.cc/0rQA8gTAdWy>] (accessed Nov. 17, 2013)) (pointing out that “if the thirty-eight tons of tusks seized in 2011 represented 10% of illegal ivory, it translates to something over 40,000 elephants killed annually—an elephant every fifteen minutes”).

⁷ Naharnet Newsdesk, *NGOs: C. Africa Elephant Population Down 62% in 10 Years*, <http://www.naharnet.com/stories/en/81060> [<http://perma.cc/0Hve8AUj6PZJ>] (Apr. 27, 2013) (accessed Nov. 17, 2013).

⁸ Jean Rovys Dabany, *Poachers Kill 11,000 Gabon Elephants in under a Decade*, Reuters (Feb. 6, 2013) (available at <http://www.reuters.com/article/2013/02/06/us-gabon-elephants-idUSBRE9150HG20130206> [<http://perma.cc/06N5Qy9rxNE>] (accessed Nov. 17, 2013)).

⁹ Animal Welfare Inst., *supra* n. 6.

¹⁰ Max Fisher, *An Alarming Map of the Global Ivory Trade That Killed 17,000 Elephants in One Year*, Wash. Post (Mar. 15, 2013) (available at <http://www.washingtonpost.com/blogs/worldviews/wp/2013/03/15/an-alarming-map-of-the-global-ivory-trade-that-killed-17000-elephants-in-one-year> [<http://perma.cc/0FbEksNYaL3>] (accessed Nov. 17, 2013)).

¹¹ See Jeremy Haken, *Transnational Crime in the Developing World* 11–12, 39–40, 44 (Global Fin. Integrity Feb. 2011) (available at http://www.gfintegrity.org/storage/gfip/documents/reports/transcrime/gfi_transnational_crime_web.pdf [<http://perma.cc/0nGNwqkvKc2>] (accessed Nov. 17, 2013)) (calculating illegal wildlife trade at as high as \$26.5 billion: unreported and unregulated fisheries trade estimated between \$4.2 billion and \$9.5 billion per year; illegal timber trade as much as \$7 billion per year; and illicit wildlife trafficking (excluding fisheries and timber) between \$7.8 billion and \$10 billion per year).

¹² See *infra* pt. IV (discussing the loopholes that make regulation of the U.S. ivory market difficult).

¹³ See *infra* pt. VII (analyzing why prosecution is so difficult and discussing a proposed solution to ease the prosecution's burden).

It is possible, however, to gauge some metrics of American involvement. The authors reviewed both the seizure data provided by the U.S. Fish and Wildlife Service (FWS) through Freedom of Information Act requests and the seizures that resulted from special U.S. government operations related to illegal ivory trade, to determine that a substantial amount of illegal ivory is being intercepted in the U.S.¹⁴ According to the data on border seizures analyzed in this Article, and using INTERPOL's assessment that seized wildlife represents only 10% of actual illegal trade, the authors estimate that the number of combined illegal ivory imports and exports in the U.S. is 3,125 specimens per year.¹⁵ In addition to border seizures, some FWS investigations and special operations highlighted in this Article indicate that the ivory market in the U.S. involves sophisticated schemes, including operatives and partners in the black market ivory trade from multiple countries.¹⁶

The U.S. has several important statutes governing the ivory trade, including the Endangered Species Act¹⁷ and the African Elephant Conservation Act.¹⁸ However, a complex system of loopholes and exceptions muddies the waters, and once ivory crosses our borders—whether legally or not—current regulations make it almost impossible to discern legal merchandise from illegal products.¹⁹ Making matters worse, the U.S. is not compliant with the international standards set by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)—the governing body for wildlife trade—to regulate our domestic market.²⁰ The authors have analyzed these current laws and identified their major weaknesses, as well as the difficulties these loopholes and lack of resources present for adequate enforcement.

¹⁴ See *infra* pt. VI (discussing the seizure data provided by the FWS).

¹⁵ *Infra* pt. VI, tbls. 5, 9; see Bryan Christy, *Ivory Worship*, Natl. Geographic (Oct. 2012) (available at <http://ngm.nationalgeographic.com/2012/10/ivory/christy-text> [<http://perma.cc/0PW44CaHkaX>] (accessed Nov. 17, 2013)) (noting that INTERPOL utilizes a rule of thumb “that says seized contraband equals 10% of actual smuggling”); see also Animal Welfare Inst., *supra* n. 6 (“Customs officers in industrialized countries candidly acknowledge that a seizure rate of 10 percent is considered good for ‘general goods’ contraband—which includes ivory. (Higher success rates are recorded in intercepting targeted contraband, such as drugs and weapons, which have dedicated teams with specialized training and high-tech detection equipment.)”).

¹⁶ See *infra* pt. VI (discussing the trade of ivory on the black market).

¹⁷ Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006).

¹⁸ African Elephant Conservation Act of 1988, 16 U.S.C. §§ 4201–4246 (2006).

¹⁹ See *infra* pt. IV (discussing the problem of discerning legal from illegal ivory in the U.S.).

²⁰ Douglas F. Williamson, *Tackling the Ivories: The Status of the US Trade in Elephant and Hippo Ivory* 35–36 (TRAFFIC N. Am., World Wildlife Fund 2004) (available at http://assets.worldwildlife.org/publications/425/files/original/Tackling_the_Ivories.pdf [<http://perma.cc/0WfWjjqD6dU>] (accessed Nov. 17, 2013)).

Despite the paucity of detailed data, it is clear that the U.S. is contributing to the elephant poaching crisis,²¹ leaving the question of how we can best reform our laws and policies to stem the tide of wildlife crime. The authors' conclusion is straightforward: the legal trade in ivory has created an unmanageable situation for law enforcement and wildlife officials. The authors analyze several options to address this problem and propose a preferred policy solution: a ban on *all* commerce in ivory in the U.S. until elephant populations are no longer threatened. The impact of a comprehensive domestic ban would reach beyond our borders to China and other major drivers of the crisis because the United States' status as a global leader still carries significant weight on this issue.²²

Fortunately, momentum appears to be building for action. President Obama, in a major speech in Tanzania in July 2013, announced an executive order that commits his administration to several important steps. These steps include new financial and technical assistance to African countries to combat poaching and the formulation of a comprehensive U.S. national strategy on wildlife trafficking—to be unveiled in 2014—that will include both domestic and international solutions.²³ Kicking off the Administration's new efforts in November 2013, the FWS crushed their nearly 6-ton stockpile of seized illegal ivory, with the stated goal of sending “a clear message that the United States will not tolerate ivory trafficking and the toll it is taking on elephant populations, particularly in Africa.”²⁴

And while American leadership is crucial, other stakeholders are also starting to make important moves. In September 2013, seven African countries and several major international conservation groups made a three-year, \$80 million Clinton Global Initiative Commitment to Action to catalyze increased global efforts to stop the slaughter of Africa's elephants for their ivory tusks by addressing poaching, trafficking, and demand.²⁵ And on that same day, heads of state and ministers at the United Nations called for a concerted international

²¹ Env. News Serv., *U.S. to Crush Six Tons of Contraband Elephant Ivory*, <http://ens-newswire.com/2013/09/09/u-s-to-crush-six-tons-of-contraband-ivory> [<http://perma.cc/0VsM6y7qH59>] (Sept. 9, 2013) (accessed Nov. 17, 2013).

²² *Id.* (“The U.S.’s leadership two decades ago in limiting domestic trade in ivory prompted action from others around the world” (internal quotations omitted)).

²³ Exec. Or. 13648, 78 Fed. Reg. 40621 (July 5, 2013).

²⁴ U.S. Fish & Wildlife Serv., *Destruction of U.S. Ivory Stockpile: Questions & Answers* 1 (Sept. 2013) (available at <http://www.fws.gov/international/pdf/factsheet-ivory-crush-qa.pdf> [<http://perma.cc/0xcKvCGsbSZ>] (accessed Nov. 17, 2013)).

²⁵ The Commitment to Action includes the following nations: Botswana, Cote D'Ivoire, Gabon, Kenya, South Sudan, Malawi, and Uganda. Nongovernmental organization partners include the following: African Parks Network, African Wildlife Foundation, Association of Zoos and Aquariums, Conservation International, Frankfurt Zoological Society, Freeland Foundation, Howard Buffett Foundation, International Conservation Caucus Foundation, International Fund for Animal Welfare, National Geographic, Save the Elephants, the wildlife traffic monitoring network TRAFFIC, WildAid, Wildlife Conservation Society, WildLifeDirect, and World Wildlife Fund. Env. News Serv., *Clinton Global Partners Commit \$80M to Save Africa's Elephants*, <http://>

crackdown on wildlife crime.²⁶ The authors hope this Article serves to inform policymakers and advance the establishing of policies that will help stabilize elephant populations and stop the illegal and inhumane slaughter of elephants.

This Article is divided into eight parts. Part II provides background on the global elephant-poaching crisis. Part III discusses the status of current international and U.S. laws related to the ivory trade. Part IV exposes the difficulties in enforcing the current U.S. laws. Part V presents an analysis of the U.S. ivory market and illegal trade. Part VI analyzes illegal trade in ivory based on seizure data from wildlife inspections at the U.S. border as well as special investigations and operations. Part VII provides recommendations for improving the current situation. Finally, Part VIII provides the conclusion.

II. BACKGROUND ON THE GLOBAL ELEPHANT POACHING CRISIS²⁷

As reported extensively by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and multiple other international organizations, illegal ivory trade activity worldwide is at its highest level in two decades and continues to surge relentlessly, having more than doubled since 2007 and more than tripled since 1998.²⁸ In 2011, almost 40 tons of smuggled ivory were seized;²⁹ in December 2012, a 6-ton seizure in Malaysia was one of the largest seizures on record;³⁰ and in July 2013, 4.5 tons of ivory were confiscated in two separate operations over the span of one week in Kenya,³¹

ens-newswire.com/2013/09/26/clinton-global-partners-commit-80m-to-save-african-elephants [http://perma.cc/4KHH-GUX4] (Sept. 26, 2013) (accessed Nov. 17, 2013).

²⁶ Env. News Serv., *Heads of State Call for UN Crackdown on Wildlife Crime*, <http://ens-newswire.com/2013/09/26/heads-of-state-call-for-un-crackdown-on-wildlife-crime> [http://perma.cc/0aqrigrtr68n] (Sept. 26, 2013) (accessed Nov. 17, 2013).

²⁷ For more information on the global elephant poaching crisis, as well as the links between ivory trafficking and global criminal and terror activity, consult Intl. Fund for Animal Welfare, *Criminal Nature: The Global Security Implications of the Illegal Wildlife Trade* 1–20, 22–26 (Intl. Fund for Animal Welfare 2013) (available at <http://www.ifaw.org/sites/default/files/IFAW-Criminal-Nature-global-security-illegal-wildlife-trade.pdf> [http://perma.cc/0Nbz3pqyk8m] (accessed Nov. 17, 2013)).

²⁸ UN Env. Programme et al., *Elephants in the Dust—The African Elephant Crisis: A Rapid Response Assessment* 6 (UN Env. Programme 2013) (available at http://www.cites.org/common/resources/pub/Elephants_in_the_dust.pdf [http://perma.cc/HJ3T-39A3] (accessed Nov. 17, 2013)).

²⁹ T. Milliken et. al, *The Elephant Trade Information System (ETIS) and the Illicit Trade in Ivory: A Report to the 16th Meeting of the Conference of the Parties to CITES* 4 (TRAFFIC Intl. 2013) (available at <http://www.cites.org/eng/cop/16/doc/E-CoP16-53-02-02.pdf> [http://perma.cc/0Yom7yJZTnP] (accessed Nov. 17, 2013)).

³⁰ TRAFFIC, *Massive African Ivory Seizure in Malaysia*, <http://www.traffic.org/home/2012/12/11/massive-african-ivory-seizure-in-malaysia.html> [http://perma.cc/08nYoo48ZSp] (Dec. 11, 2012) (accessed Nov. 17, 2013).

³¹ Associated Press, *Kenyan Officials Seize Ivory Disguised as Peanuts*, <http://news.yahoo.com/kenyan-officials-seize-ivory-disguised-peanuts-142215226.html> [http://perma.cc/0pbjHPiTPZ6] (July 9, 2013) (accessed Nov. 17, 2013); Agence France-Presse,

with similar giant hauls taken by Kenyan authorities in October 2013.³²

This industrial-scale poaching is of grave concern, even more so because some of the most violent militant groups active today, including some affiliated with al-Qaeda, are thought to be using the proceeds from wildlife trafficking for financial support.³³ In Africa, it has been reported that ivory is funding the Lord's Resistance Army (LRA),³⁴ Darfur's Janjaweed militia,³⁵ and Somalia's al-Shabaab,³⁶ posing a clear global security threat. Government armies from the Congo³⁷ and Uganda³⁸ have also been implicated in elephant poaching, and in many parts of Africa, elephant poachers have greatly increased their

Kenyan Officials Seize 1.5 Tonnes of Hidden Ivory, <http://phys.org/news/2013-07-kenyan-seize-tonnes-hidden-ivory.html> [<http://perma.cc/0JdcWbEWmn4>] (July 3, 2013) (accessed Nov. 17, 2013).

³² Agence France-Presse, *Kenya Seizes Ivory as Elephant Slaughter Surges*, <http://uk.news.yahoo.com/kenya-seizes-ivory-elephant-slaughter-surges-081447625.html> [<http://perma.cc/0bjQiTpE1t6>] (Oct. 9, 2013) (accessed Nov. 17, 2013).

³³ H.R. Subcomm. on Fisheries, Wildlife, Oceans, & Insular Affairs, *Oversight Hearing: Why Should U.S. Citizens Have to Comply with Foreign Laws*, 113th Cong. 8 (July 17, 2013) (testimony of Alexander von Bismarck, Exec. Dir., Env'tl. Investigation Agency) (available at http://democrats.naturalresources.house.gov/sites/democrats.naturalresources.house.gov/files/2013-07-13_FWOIA_vonbismarcktestimony.pdf) [<http://perma.cc/0WA3CEf7nHg>] (accessed Nov. 17, 2013)).

³⁴ Jeffrey Gettleman, *Elephants Dying in Epic Frenzy as Ivory Fuels Wars and Profits*, N.Y. Times A1 (Sept. 4, 2012) (available at <http://www.nytimes.com/2012/09/04/world/africa/africas-elephants-are-being-slaughtered-in-poaching-frenzy.html>) [<http://perma.cc/0svygiKQCug>] (accessed Nov. 17, 2013)); Kara Moses, *The Guardian, Lord's Resistance Army Funded by Elephant Poaching, Report Finds*, The Guardian, <http://www.theguardian.com/environment/2013/jun/04/lords-resistance-army-funded-elephant-poaching> [<http://perma.cc/0GnCqTeYz5A>] (June 4, 2013) (accessed Nov. 17, 2013); UN News Ctr., *Head of UN-Backed Treaty Welcomes Security Council Call for Action on LRA-Related Elephant Poaching*, <http://www.un.org/apps/news/story.asp?NewsID=43843> [<http://perma.cc/0LPksHDtUgA>] (Dec. 24, 2012) (accessed Nov. 17, 2013).

³⁵ Gettleman, *supra* n. 34; Keith Somerville, *The Ivory Wars: How Poaching in Central Africa Fuels the LRA and Janjaweed*, <http://africanarguments.org/2013/01/14/the-ivory-wars-how-poaching-in-central-africa-fuels-the-lra-and-janjaweed-%E2%80%93-by-keith-somerville> [<http://perma.cc/0vQo37Nt5Lb>] (Jan. 14, 2013) (accessed Nov. 17, 2013); Tapang Ivo Tanku, CNN, *Cameroon Elephant Slaughter Latest in String of Killings*, <http://www.cnn.com/2013/03/26/world/africa/cameroon-elephant-poaching> [<http://perma.cc/0iWW3zQDfZQ>] (updated Mar. 27, 2013) (accessed Nov. 17, 2013).

³⁶ Gettleman, *supra* n. 34; Nir Kalron & Andrea Crosta, *Africa's White Gold of Jihad: al-Shabaab and Conflict Ivory*, <http://elephantleague.org/project/africas-white-gold-of-jihad-al-shabaab-and-conflict-ivory> [<http://perma.cc/0NXn42wmVJp>] (accessed Nov. 17, 2013); Horand Knaup & Jan Puhl, *Blood Ivory: Brutal Elephant Slaughter Funds African Conflicts*, <http://www.spiegel.de/international/world/blood-ivory-brutal-elephant-slaughter-funds-african-conflicts-a-855237.html> [<http://perma.cc/0Myyx47GxDV>] (accessed Nov. 17, 2013).

³⁷ Sen. Comm. on For. Rel., *Hearing on Ivory and Insecurity: The Global Implications of Poaching in Africa*, 112th Cong. 3 (May 24, 2012) (testimony of Tom Cardamone, Managing Dir., Global Fin. Integrity) (available at http://www.foreign.senate.gov/imo/media/doc/Tom_Cardamone_Testimony.pdf) [<http://perma.cc/0m4hSiMmgqt>] (accessed Nov. 17, 2013)); Gettleman, *supra* n. 34.

³⁸ Gettleman, *supra* n. 34.

capacity to kill the animals with access to military-grade weapons.³⁹ Increased poaching and mass elephant killings are even taking place in well-protected World Heritage Sites.⁴⁰ The United Nations (UN) Security Council and the UN Secretary General,⁴¹ along with former U.S. Secretary of State Hillary Clinton,⁴² have condemned this devastation and noted that poaching and trafficking of wildlife are among the factors fueling crises in some African countries.⁴³

III. CURRENT INTERNATIONAL AND U.S. LAWS RELATED TO IVORY TRADE

The United States' ivory market is regulated by domestic federal laws, as well as an international accord.

A. *International/CITES*

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is the governing framework for global wildlife commerce, including ivory and other elephant parts.⁴⁴ CITES lists species under three appendices that define their trade restrictions and conservation status; Appendix I species, such as Asian elephants,⁴⁵ are afforded the highest level of protection, while Appendix III species are given the least oversight.⁴⁶ In 1976, CITES initially listed African elephants in Appendix III. But in 1977, the organization uplisted them to Appendix II, and in 1989, again uplisted the ele-

³⁹ Frederick Gooch, *Shoot on Sight* 90–91 (Xlibris Corp. 2011); see Gettleman, *supra* n. 34 (discussing the use of weapons and increased militarization of the underground ivory trade).

⁴⁰ Press Release, CITES, *CITES Secretary-General Calls for Urgent Action to Protect Elephants in the Dzanga-Sanga National Park from Armed Groups* (May 8, 2013) (available at http://www.cites.org/eng/news/pr/2013/20130508_elephant_dzanga_sanga.php [<http://perma.cc/0zExhG7sBA6>] (accessed Nov. 17, 2013)); Press Release, UN Educ., Sci. & Cultural Org., *The Director-General of UNESCO Expresses Deep Concern at the Rising Violence in the Central African Republic, at the Heart of the Sangha Trinational Site* (May 3, 2013) (available at <http://whc.unesco.org/en/news/1006> [<http://perma.cc/0WG7U3KsUut>] (accessed Nov. 17, 2013)).

⁴¹ UN SCOR, 7042nd mtg., UN Doc. S/RES/2121 (2013) (available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2121%282013%29 [<http://perma.cc/6QMH-T7J5>] (accessed Nov. 17, 2013)).

⁴² Hillary Rodham Clinton, Sec. of St., *Remarks at the Partnership Meeting on Wildlife Trafficking* (D.C. Nov. 8, 2012) (transcript available at <http://www.state.gov/secretary/rm/2012/11/200294.htm> [<http://perma.cc/0VhdoG9J8Kp>] (accessed Nov. 17, 2013)).

⁴³ Edith M. Lederer, Associated Press, *U.N.: Poaching Threatens Central Africa Peace*, <http://bigstory.ap.org/article/un-poaching-threatens-central-africa-peace> [<http://perma.cc/0apqZyzaLT8>] (May 21, 2013) (accessed Nov. 17, 2013).

⁴⁴ Convention on International Trade in Endangered Species of Wild Fauna and Flora Preamble (Mar. 3, 1973), 27 U.S.T. 1087 (available at <http://www.cites.org/eng/disc/E-Text.pdf> [<http://perma.cc/0599B6sR6Rr>] (accessed Nov. 17, 2013)) [hereinafter CITES].

⁴⁵ *Id.* at apps. I, II, & III 14 (June 12, 2013).

⁴⁶ *Id.* at art. II; 50 C.F.R. § 23.4 (2012).

phants at the seventh Conference of the Parties (CoP),⁴⁷ as a result of the so-called “Somalia Amendment.”⁴⁸ However, at the time of the uplisting, the CoP held that certain African states’ populations of elephants did not meet the criteria for Appendix I listing.⁴⁹ Resolution 7.9—in the vernacular, “Res. Conf. 7.9”—laid out the process for initiating downlisting efforts, with consideration going to the “status of elephant populations, the effectiveness of conservation measures, and the degree of control of the movement of ivory within and through the Parties.”⁵⁰ These downlistings were essentially a CITES stamp of approval on the countries’ conservation efforts and allowed for the sanction of one-off ivory stockpile sales from Botswana, Namibia, and Zimbabwe, which were approved in 1997 and occurred in 1999.⁵¹

In 1997, the Parties adopted Res. Conf. 10.10, which recommended that ivory carving and importing countries enact comprehensive internal legislative, regulatory, and enforcement measures.⁵² Importantly, the Resolution recommended that Parties, including the U.S., “register or license all importers, manufacturers, wholesalers and retailers” dealing in ivory products and that they “establish a nationwide procedure, particularly in retail outlets, informing tourists and other non-nationals that they should not purchase ivory in cases where it is illegal for them to import it into their own home countries.”⁵³ Res. Conf. 10.10 also recommends that Parties introduce recording and inspection procedures to monitor the flow of ivory.⁵⁴

During the twelfth CoP in 2002, the Secretariat adopted a number of other Decisions, including 12.36 to 12.39, which encourage “financial and technical support to strengthen the implementation of Resolution Conf. 10.10” and seek to assess a variety of nations with “active inter-

⁴⁷ Willem Wijnstekers, *The Evolution of CITES* 405–06 (7th ed., CITES Secretariat 2003) (available at <http://www.cites.org/eng/resources/pub/evolution.pdf> [<http://perma.cc/03ZRT6kQ2pg>] (accessed Nov. 17, 2013)).

⁴⁸ Edward B. Barbier et al., *Elephants, Economics and Ivory* 131 (Earthscan 1990).

⁴⁹ *Id.* at 132.

⁵⁰ Terms of Reference for the Panel of Experts on the African Elephant and Criteria for the Transfer of Certain African Elephant Populations from Appendix I to Appendix II, CITES Res. Conf. 7.9 (1989) (available at <http://www.cites.org/eng/res/all/07/E07-09.pdf> [<http://perma.cc/0jrNFfap3x1>] (accessed Nov. 17, 2013)). Res. Conf. 7.9 was later recalled by Res. Conf. 10.9. Consideration of Proposals for the Transfer of African Elephant Populations from Appendix I to Appendix II, CITES Res. Conf. 10.9 (1997) (available at <http://www.cites.org/eng/res/10/10-09.php> [<http://perma.cc/0qBKEAFJzZY>] (accessed Nov. 17, 2013)).

⁵¹ CITES, Decisions of the Tenth Conference of the Parties 125 (1997) (available at <http://www.cites.org/eng/cop/10/E10-Decisions.pdf> [<http://perma.cc/0cvEDtGTtnW>] (accessed Nov. 17, 2013)); Christian Nellemann et al., *Elephants in the Dust—The African Elephant Crisis: A Rapid Response Assessment* 12 (UNEP et al. 2013) (available at http://www.cites.org/common/resources/pub/Elephants_in_the_dust.pdf [<http://perma.cc/HJ3T-39A3>] (accessed Nov. 17, 2013)).

⁵² Trade in Elephant Specimens, CITES Res. Conf. 10.10 (Rev. CoP16) (2013) (available at <http://www.cites.org/eng/res/10/10-10R16.php> [<http://perma.cc/0s343tUctMk>] (accessed Nov. 17, 2013)).

⁵³ *Id.*

⁵⁴ Williamson, *supra* n. 20, at 9.

nal ivory markets.”⁵⁵ But most importantly, the Parties conditionally approved another one-time sale from South Africa and the three nations that participated in the first one-off sale (Botswana, Namibia, and Zimbabwe).⁵⁶ The decision to allow this one-off sale was accompanied by a nine-year moratorium on future ivory trade proposals so the CITES Secretariat and the Parties could monitor the effects of the legal trade on poaching and African elephant populations.⁵⁷

B. U.S. Ivory Regulations

U.S. elephant ivory regulations are deceptively complicated. Imports are banned, but there are three exceptions to this general rule.⁵⁸ First, “[a]ntique elephant ivory items may be imported or exported for commercial purposes when accompanied by a valid CITES pre-Convention⁵⁹ certificate⁶⁰ issued by the Management Author-

⁵⁵ Decisions of the Conference of the Parties to CITES in Effect after the 12th Meeting, CITES Decisions 12.36–12.39 (2002) (available at <http://www.cites.org/eng/dec/valid13/E12-Dec.pdf> [<http://perma.cc/0fUV1oCpfq1>] (accessed Nov. 17, 2013)).

⁵⁶ Joseph Vandegrift, *Elephant Poaching: CITES Failure to Combat the Growth in Chinese Demand for Ivory*, 31 Va. Env'tl. L.J. 102, 110 (2013).

⁵⁷ Consideration of Proposals for Amendment of Appendices I and II, CITES CoP15 Prop. 6 (2010) (available at <http://www.cites.org/eng/cop/15/prop/E-15-Prop-06.pdf> [<http://perma.cc/0gaSLRmYFeD>] (accessed Nov. 17, 2013)).

⁵⁸ Vandegrift, *supra* n. 56, at 123. The authors created a flow chart showing the current legal/regulatory regime for ivory in the U.S., but the size and complexity of the chart prevented its inclusion in this Article. The chart demonstrates the labyrinthine nature of the laws and regulations, taking on the appearance of an extended family tree with proscriptions for sales, possession, and imports and exports based on qualifiers in the various laws and regulations. During consultations with the U.S. Fish and Wildlife Service, staff advised the authors that mapping this system would be a difficult process, and it became clear that laying out the current legal and regulatory regime is far from a simple matter. Email from Craig Hoover, Chief, Wildlife Trade & Conserv. Branch, FWS Div. of Mgt. Auth., Intl. Affairs, to Peter LaFontaine, Author, *Ivory Paper and Flow Chart* (Nov. 20, 2013, 6:39 p.m. EST) (copy on file with *Animal Law*).

⁵⁹ A pre-Convention specimen refers to a specimen that was acquired before the Convention applied to the specimen. Res. Conf. 13.6 recommends that

- a) the date from which the provisions of the Convention apply to a specimen be the date on which the species concerned was first included in the Appendices; and
- b) the date on which a specimen is acquired be considered as the date on which the animal or plant or, in the case of parts or derivatives, the animal or plant from which they were taken, was known to be either:
 - i. removed from the wild; or
 - ii. born in captivity or artificially propagated in a controlled environment; or
 - iii. if such date is unknown or cannot be proved, the date on which the specimen was acquired shall be the earliest provable date on which it was first possessed by a person.

Implementation of Art. VII, paragraph 2, concerning ‘Pre-Convention Specimens,’ CITES Res. Conf. 13.6 (Rev. CoP16) (2013) (available at <http://www.cites.org/eng/res/13/13-06R16.php> [<http://perma.cc/0fq3CX5n9dr>] (accessed Nov. 17, 2013)).

⁶⁰ A pre-Convention certificate is a certificate that verifies a specimen is a pre-Convention specimen. Permits and Certificates, CITES Res. Conf. 12.3 (Rev. CoP16) (2013) (available at <http://www.cites.org/eng/res/12/12-03R16.php> [<http://perma.cc/0v4fU1rSkS1>] (accessed Nov. 17, 2013)).

ity⁶¹ of the exporting country.”⁶² Second, African elephant sport-hunted trophies can be brought into the U.S. with valid documentation, but cannot be sold after import.⁶³ Third, there is an exception for re-import of “personal effects”⁶⁴ that were legally acquired by U.S. residents and later exported.⁶⁵ Exports are also tightly regulated, with a total ban on exports of raw ivory and U.S. Fish and Wildlife Service (FWS)/CITES permits required for exports of worked ivory.⁶⁶

This section highlights the three major federal laws pertaining to the ivory trade—the Endangered Species Act, the Lacey Act, and the African Elephant Conservation Act—as well as the Asian Elephant Conservation Act and state laws. In Part IV, the authors discuss the real-world problems of enforcement, detailing how legal loopholes, insufficient domestic regulations, and lack of funding for inspectors and resources have allowed the domestic market in illegal ivory to flourish.

1. *The Endangered Species Act*

The Endangered Species Act (ESA) was signed into law in 1973 and remains one of the United States’ strongest environmental protection statutes.⁶⁷ Jointly administered by the FWS and the National Marine Fisheries Service (NMFS), the ESA is intended to mitigate harm to endangered and threatened wildlife by regulating human activities that could otherwise impact listed species, such as construc-

⁶¹ The “Management Authority” is responsible for issuing permits and certificates and making any findings required for issuance of a permit or certificate. CITES, *supra* n. 44, at art. IX.

⁶² Daniel Stiles & Esmond Martin, *The USA’s Ivory Markets—How Much a Threat to Elephants?*, 45 *Pachyderm* 67, 69 (July 2008–June 2009) (explaining that “[a]n antique is defined as a specimen at least 100 years old that has not been modified or repaired using ivory obtained since 28 December 1973 (the date of enactment of the ESA)”).

⁶³ *Id.*; FWS, *U.S. Efforts to Control Illegal Elephant Ivory Trade and Internal Markets* 2 (Sept. 2012) (available at <http://www.fws.gov/international/pdf/factsheet-us-efforts-to-control-illegal-ivory-trade.pdf> [<http://perma.cc/0MTFbpuomn3>] (accessed Nov. 17, 2013)) [hereinafter FWS, *U.S. Efforts*].

⁶⁴ “Personal effects” means specimens that are

- a) personally owned or possessed for non-commercial purposes;
- b) legally-acquired; and
- c) at the time of import, export or re-export either:
 - i) worn, carried or included in personal baggage; or
 - ii) part of a household move[.]

Control of Trade in Personal and Household Effects, CITES Res. Conf. 13.7 (Rev. CoP16) (2013) (available at <http://www.cites.org/eng/res/13/13-07R16.php> [<http://perma.cc/0gehGApF8Gh>] (accessed Nov. 17, 2013)).

⁶⁵ FWS, *African Elephant Ivory* 2 (Nov. 1999) (available at http://library.fws.gov/IA_Pubs/african_elephant_ivory99.pdf [<http://perma.cc/02VV2iEgD1s>] (accessed Nov. 17, 2013)). For example, if someone owned a legal ivory necklace and moved overseas, the owner would have to obtain a CITES export permit from the FWS, but would be allowed to bring it back in the country by showing the original export permit.

⁶⁶ *Id.*

⁶⁷ 16 U.S.C. §§ 1531–1540; see *Tenn. Valley Auth. (TVA) v. Hill*, 437 U.S. 153, 180 (1978) (discussing the comprehensive nature of the ESA).

tion, logging, and—as is the case for ivory—interstate and international trade.⁶⁸

Under the ESA, species may be listed as either “endangered” or “threatened”; the former, more restrictive category means that a species “is in danger of extinction throughout all or a significant portion of its range,” while the latter means that a species “is likely to become [endangered] within the foreseeable future throughout all or a significant portion of its range.”⁶⁹ These categories are roughly analogous to Appendices I and II of CITES, which the ESA implements in the U.S.⁷⁰ While Asian elephants are categorized as endangered under the ESA, African elephants are only listed as threatened despite their rapidly dwindling populations.⁷¹

Although the ESA expressly limits trade in threatened and endangered species, section 4(d) of the Act confers upon the Secretary of the Interior the authority to “issue such regulations as he deems necessary and advisable to provide for the conservation of such species.”⁷² This so-called “special rule” or “4(d) rule” has resulted in the sport hunting trophy exemption for raw African ivory.⁷³ Under the special rule, antique, worked ivory can be imported, exported, and sold.⁷⁴

The Act also sets requirements for import and export permits and licensing which, combined with Lacey Act guidelines, create a structure for regulating customs traffic of wildlife products like ivory.⁷⁵ Criminal violators of the ESA may be fined as much as \$50,000 for each infraction, while civil violations can result in fines of up to \$25,000 per infraction.⁷⁶

⁶⁸ 16 U.S.C. § 1531 (finding that “various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation[,]” and stating the purpose of the Act is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend on may be conserved . . .”); *TVA*, 437 U.S. at 184 (“The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.”).

⁶⁹ 16 U.S.C. § 1532(6), (20).

⁷⁰ *Id.* at §§ 1532(4), 1538(c).

⁷¹ FWS, *Species Profile for Asian Elephant* (*Elephas Maximus*), <http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?spcode=A059> [<http://perma.cc/0q47CrQL9py>] (updated Sept. 26, 2013) (accessed Nov. 17, 2013); FWS, *Species Profile for African Elephant* (*Loxodonta Africana*), <http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?spcode=A07U> [<http://perma.cc/0VzbWLVWqrK>] (updated Sept. 27, 2013) (accessed Nov. 17, 2013).

⁷² 16 U.S.C. § 1533(d).

⁷³ 50 C.F.R. § 17.40(e)(3)(i) (2011).

⁷⁴ *Id.* at § 17.40(e)(3)(ii); Williamson, *supra* n. 20, at 11.

⁷⁵ 16 U.S.C. §§ 1538–1539.

⁷⁶ *Id.* at § 1540.

2. *The Lacey Act*

The Lacey Act,⁷⁷ passed in 1900 and amended several times since, is one of the United States' oldest and broadest laws regulating the wildlife trade.⁷⁸ The Act built on existing state animal protection laws by prohibiting interstate or foreign commerce in "any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law . . . or in violation of any foreign law."⁷⁹

Under the Lacey Act, commercial shipments (whether international or domestic) must be properly labeled according to FWS regulations. Federal officials rely upon the Act to prosecute customs violations involving wildlife, which carry significant penalties—individual violators face misdemeanor penalties up to \$100,000 and one year in prison, while felony penalties can be up to \$250,000 and five years incarceration.⁸⁰ Other provisions of the U.S. Criminal Code, such as conspiracy, often apply in such cases.⁸¹

3. *The African Elephant Conservation Act*

Congress passed the African Elephant Conservation Act (AfECA) on October 7, 1988 due to mounting concern for the survival of the species, and acknowledged that CITES restrictions had not been effective in protecting African elephants from illegal poaching.⁸² Technically an amendment to the Endangered Species Act, the AfECA establishes even more stringent regulations on the trade of ivory and other elephant parts, while also providing financial assistance for elephant conservation projects.⁸³

Under one of the AfECA's strongest provisions, raw ivory cannot be re-exported from the U.S.,⁸⁴ which limits the potential for investment purchases (in China, ivory speculation has been part of the cause

⁷⁷ 16 U.S.C. §§ 3371–3378 (2006).

⁷⁸ See Robert S. Anderson, *The Lacey Act: America's Premier Weapon in the Fight against Unlawful Wildlife Trafficking*, 16 Pub. Land L. Rev. 27 (1995) (discussing the history and scope of the Lacey Act).

⁷⁹ 16 U.S.C. § 3372(a)(1), (3)(A).

⁸⁰ Anderson, *supra* n. 78, at 70–71.

⁸¹ Williamson, *supra* n. 20, at 10–11.

⁸² 16 U.S.C. §§ 4201–4246 (2006); see H.R. Subcomm. on Fisheries and Wildlife Conserv. and the Env., *African Elephant Conservation: Hearings on H.R. 2999, H.R. 4849*, 100th Cong. 2, 8, 19 (June 22, 1988) (statements from Rep. Claudine Schneider, Rep. Jack Fields, and elephant biologist Iain Douglas-Hamilton discussing the ineffectiveness of CITES restrictions).

⁸³ Michael Glennon, *Has International Law Failed the Elephant?*, 84 Am. J. Intl L. 1, 14 (1990) (citing 16 U.S.C. § 4212); see 16 U.S.C. §§ 4221–4222 (requiring the Secretary to "review the African elephant conservation program of each ivory producing country" and to place a "moratorium on the importation of raw and worked ivory from an ivory producing country immediately upon making a determination that the country does not meet all the criteria set forth in section 4221(b)(1)").

⁸⁴ 16 U.S.C. § 4223(2).

of price surges).⁸⁵ The Act also prohibits imports from “middleman” nations—all products must come directly from ivory producing countries, and must be accompanied by documentation from those countries’ management authorities to prove the legality of the product.⁸⁶ Following guidelines set forth in the law, on June 9, 1989 President George H.W. Bush instituted a moratorium on ivory imports, noting the “virtual impossibility of distinguishing legal from illegal ivory,” but also made an import exception for sport-hunted trophies.⁸⁷

In its original iteration, the legislation that became the AfECA prohibited the importation into or exportation from the U.S. of *any* elephant products.⁸⁸ Then-Representative Anthony Beilenson (D-CA), the bill’s sponsor, explained the need for these protections:

Some people argue that the elephants belong to Africa, and that, ultimately, it will be up to the countries there to determine whether or not the elephant will survive. However, it has become apparent that even the best-intentioned and uncorrupted African governments are limited in their ability to control poachers because, like the drug trade, there is enormous profit to be made from ivory. For that reason, I believe very strongly that the United States, and other ivory consuming nations, can and must play a bigger role in restricting the ivory trade.⁸⁹

President Bush’s import prohibition was pending Interior Department review of the conservation plans of Africa’s ivory producing nations.⁹⁰ This action served, in large part, as the impetus for the decision by the Parties to place African elephants on Appendix I of CITES; the international ban on commercial trade took effect in 1990.⁹¹ The 1998 Senate committee report reauthorizing AfECA states that immediately after the Appendix I listing and resulting international ban, “the price of ivory, trade in ivory, and poaching of elephants all decreased.”⁹² Extensive data from the United Nations Environmental Programme–World Conservation Monitoring Center (UNEP–WCMC) database, tracking CITES-registered import and export of ivory, confirms that ivory imports decreased dramatically immediately

⁸⁵ Grace Gabriel et al., *Making a Killing: A 2011 Survey of Ivory Markets in China* 13–14 (Intl. Fund for Animal Welfare 2011) (available at <http://www.ifaw.org/sites/default/files/Making%20a%20Killing.pdf> [<http://perma.cc/0k1iPhg8gim>] (accessed Nov. 17, 2013)).

⁸⁶ 16 U.S.C. § 4223(1).

⁸⁷ 54 Fed. Reg. 24758, 24761 (June 9, 1989).

⁸⁸ H.R. 2999, 100th Cong. § 4(1) (July 23, 1987).

⁸⁹ 134 Cong. Rec. 21012 (1988).

⁹⁰ 16 U.S.C. § 4221.

⁹¹ *U.S. Ivory Market Collapses after Import Ban*, N.Y. Times (June 5, 1990) (available at <http://www.nytimes.com/1990/06/05/science/us-ivory-market-collapses-after-import-ban.html> [<http://perma.cc/0m3jr4vJkb2>] (accessed Nov. 17, 2013)) [hereinafter *U.S. Ivory Market*].

⁹² Sen. Rpt. 105-222 (June 25, 1998) (available at <http://www.gpo.gov/fdsys/pkg/CRPT-105srpt222/html/CRPT-105srpt222.htm> [<http://perma.cc/0gosba9Pngf>] (accessed Nov. 17, 2013)).

after the passage of the AfECA.⁹³ But trade has quickly rebounded, although not to a level approaching historic maximums, as the market for ivory adapted to new international and domestic laws on import and export.⁹⁴ With new U.S. law distinguishing “raw” and “worked” ivory, the U.S. asserted itself as the second largest importer of African elephant worked ivory.⁹⁵

4. *The Asian Elephant Conservation Act*

The Asian Elephant Conservation Act (AsECA) was passed in 1997 to increase protections for this species.⁹⁶ In introducing the bill, Representative H. James Saxton (R-NJ) said that “the United States, as a world leader in conservation, must step forward and assist in Asian elephant conservation” with a focus on reversing the trend of habitat fragmentation (as opposed to AfECA’s emphasis on poaching).⁹⁷ As enacted, AsECA provides financial assistance for conservation projects; because Asian elephants are listed as ESA-endangered, no commercial trade is allowed and AsECA does not include 4(d) special rules allowing such trade.⁹⁸

5. *State Laws*

In addition to federal laws, various state laws apply to the ivory trade, and almost half of the U.S. states incorporate the ESA into their wildlife protection statutes.⁹⁹

IV. DIFFICULTY IN ENFORCING U.S. LAWS

A. *Weaknesses in the Laws*

The 1989 U.S. moratorium was intended to restrict trade to CITES nations that have demonstrably effective elephant conservation programs,¹⁰⁰ but despite the good intentions of Congress, the African Elephant Conservation Act has been ineffective in sufficiently restricting the illegal trade in ivory. Although the law has strong provisions limiting exports, as well as some import restrictions, there are loop-

⁹³ See CITES, *CITES Trade Database*, http://www.unep-wcmc-apps.org/citestrade/expert_accord.cfm [<http://perma.cc/04TNrGowvck>] (accessed Nov. 17, 2013) (tracking registered imports and exports of wildlife).

⁹⁴ The Humane Socy. of the U.S., *An Investigation of Ivory Markets in the United States* 1–2, 20 (2002) (available at http://www.humanesociety.org/assets/pdfs/Ivory_Trade_Report.pdf [<http://perma.cc/04JeT6Hxgk2>] (accessed Nov. 17, 2013)) [hereinafter HSUS].

⁹⁵ Stiles & Martin, *supra* n. 62, at 75.

⁹⁶ 16 U.S.C. §§ 4261–4266 (2006).

⁹⁷ 143 Cong. Rec. E1135 (1997).

⁹⁸ 16 U.S.C. § 4264(a).

⁹⁹ Williamson, *supra* n. 20, at 13.

¹⁰⁰ 16 U.S.C. § 4221.

holes for antiques and sport-hunted trophies.¹⁰¹ More importantly, in 2004 the U.S. was found to be out of compliance with CITES Res. Conf. 10.10,¹⁰² which recommended that countries adopt measures to register ivory dealers, conduct public education outreach, and monitor domestic ivory traffic.¹⁰³ Without these internal controls and monitoring, there is no “second line of defense” after an illegal ivory shipment has made it past customs inspectors.

The AfECA suffered a blow in 1997 when the Eleventh Circuit of the Court of Appeals decided, in *U.S. v. Grigsby*, that violations of that Act must be held to a higher standard—“specific intent”—than what normally governs similar cases.¹⁰⁴ Under this ruling, the court shifted the burden of proof onto the government to prove that criminal defendants (1) knew that they were performing the act; and (2) understood the illegality of their actions.¹⁰⁵ The criticism against this ruling is obvious: barring explicit evidence to the contrary, the accused can say they believed they were trading in legal material such as mastodon ivory or bone, and therefore cannot be held liable under the AfECA.

As Part V details, a significant quantity of ivory is illegally imported into the U.S. by businesses and individuals despite the laws restricting trade.¹⁰⁶ The reasons for this are apparent when considering the risk/reward calculation for traffickers. To begin with, ivory is a lucrative business, with demand sustaining prices up to \$1,000 per pound on the streets of Beijing.¹⁰⁷ Second, there is no real disincentive for illegal ivory importers in the U.S., because although a fine and/or prison sentence is possible in the large smuggling cases, in the vast majority of cases, importers simply forfeit the illegal items to government officials.¹⁰⁸ Additionally, the system fails to maximize inspections of potentially fraudulent shipments; wildlife products are supposed to be routed through a limited number of designated ports of entry in the U.S., and officials rely upon proper labeling to prioritize their inspections.¹⁰⁹ Any ivory smuggler with common sense will avoid following the rules designed to catch them.

Once ivory enters the U.S., either legally or illegally, it is difficult to assess exactly how much ivory is domestically traded or who is involved in such operations. For example, according to U.S. regulations, any legal commercial trade in raw elephant ivory would have to derive from tusks imported into the U.S. before the 1989 trade ban under the

¹⁰¹ See Williamson, *supra* n. 20 (presenting a comprehensive account of import and export restrictions).

¹⁰² *Id.* at 35.

¹⁰³ CITES Res. Conf. 10.10 (Rev. CoP16), *supra* n. 52.

¹⁰⁴ *U.S. v. Grigsby*, 111 F.3d 806, 807 (11th Cir. 1997).

¹⁰⁵ *Id.* at 819.

¹⁰⁶ Stiles & Martin, *supra* n. 62, at 71.

¹⁰⁷ Gettleman, *supra* n. 34.

¹⁰⁸ HSUS, *supra* n. 94, at 1.

¹⁰⁹ 50 C.F.R. §§ 14.11–14.12, 14.81 (2012).

AfECA.¹¹⁰ Sport-hunted ivory imported legally under CITES, the Endangered Species Act, and the AfECA since 1989 cannot be carved and sold commercially, although it can be carved for personal use.¹¹¹ Unfortunately, there is no way to determine the full extent of the ivory trade because the amount of legally imported, pre-ban African elephant tusks in domestic circulation is unknown.¹¹² Adding to the problem is the fact that no state has conducted a survey to try to determine the potential number of remaining ivory carvers, or the extent of the ivory market.¹¹³

Movement of ivory products within the U.S. is particularly difficult to track because of limited internal controls; there are no interstate border inspections and, as Stiles and Martin observe, “[c]ustomers buy ivory on the Internet, at auctions or from antique dealers, often from sellers who live in different states or even abroad and who simply send the items by mail or courier.”¹¹⁴ Inspections of retail outlets are a low priority for state officials, and there is little collaboration with federal authorities.¹¹⁵

Although CITES has put forth recommendations to control the internal ivory trade,¹¹⁶ the U.S. has not taken the necessary steps for their implementation. The Humane Society of the U.S. (HSUS) made the following findings during an investigation into the domestic market for elephant ivory:

[T]he United States does not register or license all importers, manufacturers, wholesalers, and retailers dealing in raw, semi-worked, or worked ivory products; does not have recording or inspection procedures to enable appropriate government agencies to monitor the flow of ivory within the United States; does not have compulsory trade controls over raw ivory; and does not have a comprehensive and demonstrably effective reporting and enforcement system for sale of worked ivory.¹¹⁷

The rampant online trade in the U.S. (including the auction sites described in Part V(B), as well as other online platforms such as Craigslist.org) illustrates a significant and growing problem for federal enforcement officials: how to regulate a market where buyers and sellers often remain anonymous, both in name and geographic location. Because the government must prove specific intent to prove violation of the AfECA, officials can find themselves without a leg to stand on if they do not seize ivory shipments as soon as the ivory enters the country.

¹¹⁰ HSUS, *supra* n. 94, at 3.

¹¹¹ *Id.*

¹¹² Williamson, *supra* n. 20, at 30.

¹¹³ *Id.*

¹¹⁴ Stiles & Martin, *supra* n. 62, at 73.

¹¹⁵ *Id.*

¹¹⁶ CITES Res. Conf. 10.10 (Rev. CoP16), *supra* n. 52.

¹¹⁷ HSUS, *supra* n. 94, at 1.

In general, businesses associated with ivory items often claim that their ivory is pre-Convention and therefore legal.¹¹⁸ Since it can be challenging to determine the age of the ivory, it often goes unchecked.¹¹⁹ The defense of “pre-ban” ivory is easily invoked because there is no inventory of global ivory stocks from before the ban took effect—ivory lasts forever, more or less, so the availability of this loophole is timeless.¹²⁰

B. Lack of Resources

The U.S. Fish and Wildlife Service’s Office of Law Enforcement (FWS-OLE) wildlife inspections are the nation’s front-line defense against illegal international trade in wildlife and wildlife products. FWS-OLE wildlife inspectors are responsible for monitoring wildlife imports and exports to ensure that wildlife shipments meet the requirements of U.S. laws, as well as the laws of foreign countries that have established special protections for their native animals.¹²¹ Inspectors are stationed at selected airports (including passenger terminals), seaports, and border crossings, where they maintain import/export controls and interdict smuggled wildlife and wildlife products.¹²² Inspections are also conducted at centralized mail facilities that handle international traffic.¹²³

In fiscal year (FY) 2013, the FWS-OLE employed 140 wildlife inspectors, at 38 ports of entry (out of nearly 300 points of entry into the U.S.), including 18 designated ports of entry and 20 nondesignated ports of entry.¹²⁴ The total workload in FY 2012 was 186,000 declared shipments of wildlife and wildlife products worth more than \$4.4 billion.¹²⁵ In comparison, in FY 2003 FWS-OLE inspectors processed 138,754 wildlife shipments, with a declared value around \$1.5 billion (thus showing an increase of nearly 300% in value in the last ten

¹¹⁸ *Id.* at 20.

¹¹⁹ *Id.*

¹²⁰ Christy, *supra* n. 15.

¹²¹ FWS-OLE, *Law Enforcement at a Glance 2* (Feb. 8, 2013) (on file with *Animal Law*) [hereinafter *Law Enforcement at a Glance*].

¹²² *Id.*

¹²³ FWS Div. of L. Enforcement, *Annual Report FY 1999 5* (1999) (available at <http://www.fws.gov/le/pdf/final-annual-report-fy-1999.pdf> [<http://perma.cc/0VZ2tqG7UUk>] (accessed Nov. 17, 2013)) [hereinafter *Annual Report FY 1999*].

¹²⁴ *Law Enforcement at a Glance*, *supra* n. 121, at 1; see also *Annual Report FY 1999*, *supra* n. 123. Generally, all wildlife (including parts and products) must be imported or exported through a designated port. The FWS has a system of ports to allow for the import and export of wildlife, including parts and products. These ports are used for all movement of wildlife, including for commercial, non-commercial, scientific, or personal purposes. Certain port locations are designated to allow the international movement of any lawful wildlife, while other locations are restricted to allow only certain types of wildlife for certain purposes. FWS-OLE, *Ports Importation and Exportation Wildlife*, <http://www.fws.gov/le/ports-contact-information.html> [<http://perma.cc/0JWXxr6tKAg>] (updated Mar. 29, 2013) (accessed Nov. 17, 2013).

¹²⁵ *Law Enforcement at a Glance*, *supra* n. 121, at 2.

years).¹²⁶ Contrast that workload to a marginal increase in total funding for the FWS-OLE, which went from \$51.6 million in FY 2003 to \$62.1 million in FY 2012.¹²⁷

According to a 2008 Congressional Research Service report, the

FWS reportedly inspects approximately 25% of declared wildlife shipments at the U.S. border. FWS does not inspect undeclared shipments except during planned investigations or seasonal periods when certain illegally obtained wildlife have a higher probability of being imported into the United States.¹²⁸

This is an obvious problem with the system; criminals have every incentive to avoid accurately declaring their merchandise or shipping it through designated inspection points.

As noted above, FWS-OLE efforts to police the ivory trade focus on monitoring imports and exports at the border. However, if the FWS does not have an adequate number of trained wildlife inspectors, this crucial aspect of the U.S. response to illegal ivory trade, as well as other wildlife trafficking, is weakened. The 2002 report on ivory markets by the HSUS put it clearly: “There simply are not enough FWS agents to fully inspect all shipments imported to and exported from the United States for contraband.”¹²⁹

FWS “[w]ildlife inspectors work closely with Customs and Border Protection (CBP) and other Federal trade inspection agencies to facilitate the detection and disruption of wildlife trafficking.”¹³⁰ The FWS-OLE also “provides wildlife import/export training to all new Customs and CBP agriculture inspectors and periodic ‘cross-training’ at ports of entry nationwide to broaden the reach of wildlife trade enforcement.”¹³¹ Still, it is apparent that current FWS-OLE resources are inadequate to address the ever-expanding illegal wildlife trade. According to a 2013 report from a D.C. government relations law firm,¹³² “of particular concern is the marginal increase in number of special agents. With the increased sophistication seen in today’s wildlife trafficking networks, more special agents are needed at a greater

¹²⁶ FWS-OLE, *Annual Report FY 2003* 33 (2004) (available at <http://www.fws.gov/le/pdf/final-annual-report-fy-2003.pdf> [<http://perma.cc/03Bj4G4gf9>] (accessed Nov. 17, 2013)).

¹²⁷ *Id.*; FWS-OLE, *Annual Report FY 2011* 23 (2011) (available at <http://www.fws.gov/le/pdf/final-annual-report-fy-2011.pdf> [<http://perma.cc/0hY5PnzA2Jn>] (accessed Nov. 17, 2013)).

¹²⁸ Liana Sun Wyler & Pervaze A. Sheikh, *International Illegal Trade in Wildlife: Threats and U.S. Policy* 24 (Cong. Research Serv. Mar. 3, 2008) (available at <http://fpc.state.gov/documents/organization/102621.pdf> [<http://perma.cc/0mtLrMEyHuQ>] (accessed Nov. 17, 2013)) (internal citation omitted).

¹²⁹ HSUS, *supra* n. 94, at 6.

¹³⁰ FWS, *Office of Law Enforcement Strategic Plan 2011–2015: Protecting Our Wildlife and Plant Resources* 28 (available at <http://www.fws.gov/le/pdf/OLE-Strategic-Plan.pdf> [<http://perma.cc/0jaH4ermGPu>] (accessed Nov. 17, 2013)).

¹³¹ *Id.*

¹³² Pike Associates, *About Pike Associates*, <http://pikeassoc.com/aboutus.html> [<http://perma.cc/UZL2-2ZMF>] (accessed Nov. 17, 2013).

number of ports of entry to effectively combat illegal activity.”¹³³ Ed Grace, a top law enforcement officer at the FWS, said in March 2013, “Every hour, every day, there’s a wildlife product being smuggled into the United States.”¹³⁴ The sheer volume of international traffic and correspondence makes inspectors’ tasks a logistical nightmare: “[T]housands of people arrive by air hourly and cannot all be checked; millions of packages posted abroad arrive daily and many are not marked according to the ESA and Lacey Act while others do not arrive at airports designated by USFWS as wildlife product entry points.”¹³⁵ Because FWS officials have to maximize their resources, suspicious parcels and luggage are prioritized, leaving many others to pass through unchecked.

Adding yet another stumbling block, most of the federal and state agencies charged with preventing the illegal wildlife trade are dealing with budget cuts. Due to the recent budget-cutting sequester, the FWS-OLE had to cancel plans to train 24 additional agents and will not fill 14 vacancies for wildlife inspectors at major ports of entry; overtime and weekend inspections of shipments will also be eliminated.¹³⁶ At 218 agents (the same number it had in 1978), the unit is already stretched.¹³⁷ Budget cuts have also prevented the National Fish and Wildlife Forensics Laboratory—the only forensic organization in the world dedicated to investigating wildlife crimes—from filling 3 positions.¹³⁸

V. U.S. IVORY MARKET

A. *Studies of the U.S. Ivory Market*

In discussing the regulations governing the ivory trade, it is important to note that the U.S. has a substantial legal market for ivory and other elephant parts.¹³⁹ In theory, this market exists solely for the purpose of buying and selling antique ivory; however, because of the inherent difficulties in determining the age of ivory, the legal market actually facilitates commerce in non-antique ivory.¹⁴⁰ Some unscrupulous dealers and consumers undoubtedly take advantage of the system by mislabeling or purchasing ivory they know to be illegal, but igno-

¹³³ Memo. from Jeffrey Pike, Pres., Pike Assocs. LLC, to Beth Allgood, Campaigns Manager, Intl. Fund for Animal Welfare, *Wildlife Trafficking Investments Analysis: United States Government* 4 (Jan. 10, 2013) (copy on file with *Animal Law*).

¹³⁴ Darryl Fears, *Inspectors Catch Wildlife Smugglers but Fear the Sequester’s Bite*, Washington Post (Mar. 10, 2013) (available at http://articles.washingtonpost.com/2013-03-10/national/37605551_1_wildlife-crimes-u-s-fish-fish-and-wildlife-office [<http://perma.cc/0n354ogT48y>] (accessed Nov. 17, 2013)) (quoting Edward Grace, a law enforcement officer for the U.S. Fish and Wildlife Service).

¹³⁵ Stiles & Martin, *supra* n. 62, at 73.

¹³⁶ Fears, *supra* n. 134.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ HSUS, *supra* n. 94, at 4.

¹⁴⁰ *Id.* at 20.

rance also plays a role—in the absence of a clear and simple identification method for products, even trustworthy consumers and merchants face difficulties in following the law.¹⁴¹

Recent studies have found that the U.S. is a prime market for elephant products.¹⁴² A 2008 study by Stiles & Martin for the British-based conservation group Care for the Wild International (CWI) found that the U.S. is the world's second largest retail market for elephant ivory products (behind only China), and documented 24,004 ivory products in 657 outlets in sixteen American cities.¹⁴³ The largest number was found in New York City, followed by San Francisco and Los Angeles.¹⁴⁴ The San Francisco Bay area was found to be a significant market primarily because of its large Chinatown area and its strong links with Hong Kong; it is likely that ivory items in this market were recently made.¹⁴⁵ The largest number of stores selling ivory in the U.S. was found in the greater Los Angeles area; again, many of the items appeared to be post-1989 worked ivory.¹⁴⁶ Despite its relatively small size, the city of Honolulu held a large amount of ivory, which the authors also attributed to the large East Asian community.¹⁴⁷ The study reported that large quantities of worked ivory enter the U.S. legally every year, mostly labeled as antiques, and that ivory is sold openly in markets, shops, and periodic antique fairs and auctions,¹⁴⁸ a situation that has not dissipated. It was noted that “individuals probably smuggle a significant quantity as personal effects [in luggage], while other pieces enter by post and courier in mislabeled packages and occasionally by sea.”¹⁴⁹ Additionally, the Environmental Investigation Agency has found that “the U.S. is a main destination for illegal ivory, which is imported into the U.S. by individuals and through the Internet, feeding a large market for small ivory objects.”¹⁵⁰

The Humane Society of the U.S. (HSUS) characterized the U.S. domestic ivory market as follows:

First, there is the highly lucrative market for antique ivory objects, such as carvings—some worth millions of dollars each—which are imported legally, mainly from Europe, and traded domestically in the high-end art market. Secondly, there is the market in relatively less expensive, non-antique Asian-style carvings, including the very popular small carvings of animals or people known as netsuke; the supply for this market appears to rely, at least in part, on illegal imports of ivory from Hong Kong that was carved in China. Thirdly, there is a profitable market in raw tusks, supplied by hunters who have imported the tusks as sport-hunted trophies.

¹⁴¹ *Id.* at 18–19.

¹⁴² *Id.* at 6.

¹⁴³ Stiles & Martin, *supra* n. 62, at 71.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 73.

¹⁴⁹ Stiles & Martin, *supra* n. 62, at 71.

¹⁵⁰ *Id.*

Fourthly, these tusks, in turn, supply a domestic ivory carving industry, which turns the tusks into arts and crafts objects, gun and knife handles, and the like, which are sold on the domestic market.¹⁵¹

Undercover operations by HSUS have revealed that while some of these U.S. businesses will only buy pre-ban tusks with accompanying paperwork, others are not as concerned about the legal or illegal provenance of their items.¹⁵² Finally, HSUS has noted that at least part of the ivory market in the U.S. includes products imported illegally from African countries, based on the large number of ivory import seizures originating from that continent.¹⁵³

1. Internet Trade

A number of extensive studies on wildlife trade on the Internet indicate that most Americans purchase ivory online rather than in-store. The International Fund for Animal Welfare (IFAW), which conducted the most recent and thorough study available of wildlife trade on the Internet, tracked over 180 websites around the globe to determine the extent of wildlife trade on the Internet.¹⁵⁴ During their six-week study in 2008, investigators tracked 7,122 online auctions, advertisements, and communiqués offering wildlife and wildlife products for sale domestically and internationally.¹⁵⁵ Of the countries tracked, the U.S. by far represented the highest volume of trade and the largest monetary value of items both advertised and sold.¹⁵⁶ Most U.S. sellers in this study (69.2%) fell into a category listed as “possible violation” by making a general claim of legality, but failing to list any supporting documentation attesting to the species or age of the item being sold.¹⁵⁷ Directly following the IFAW investigation and report, eBay, the largest source of online wildlife trade (99% of which was ivory in the U.S.), voluntarily announced in October 2008 that the company would ban ivory sales on all its Internet auction sites.¹⁵⁸ A follow-up to this investigation is needed to determine if ivory sales have been reduced or simply shifted to other online auction or sale sites.

The following sections include data analysis of ivory products cleared at the U.S. border as well as the ivory available for sale through U.S.-based auction houses and other venues, showing a significant ivory market in the U.S.

¹⁵¹ HSUS, *supra* n. 94, at 20.

¹⁵² *Id.* at 16.

¹⁵³ *Id.* at 20.

¹⁵⁴ IFAW, *Killing with Keystrokes: An Investigation of the Illegal Wildlife Trade on the World Wide Web 2* (available at <http://www.ifaw.org/sites/default/files/Killing%20with%20Keystrokes.pdf> [<http://perma.cc/0wXN9t4th8E>] (accessed Nov. 17, 2013)).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 3.

¹⁵⁷ *Id.* at 21.

¹⁵⁸ *Id.* at 3, 20; Richard Brewer-Hay, eBay Inc. Blog, *eBay to Institute Global Ban on Ivory Sales*, <http://blog.ebay.com/ebay-to-institute-global-ban-on-ivory-sales> [<http://perma.cc/0NfHyFGDuGb>] (Oct. 20, 2008) (accessed Nov. 17, 2013).

2. *Legal Trade Analysis: Summary of Legal Ivory Imported to and Exported from the U.S. (2009–2012)*¹⁵⁹

In the period from 2009 to 2012, the U.S. allowed the legal import of 13,221 ivory objects plus 430 kilograms of additional tusks and ivory pieces/scrap. ¹⁶⁰ Table 1 provides the total number of specimens of legal imports by ivory type per year. Over three-fourths of the cleared ivory imports listed the country of origin as “unknown.” According to the U.S. Fish and Wildlife Service (FWS), “unknown” country of origin for legal imports would have to be pre-Convention ivory, and the vast majority of this would be antique ivory. Otherwise, South Africa and Zimbabwe were listed most frequently as the country of origin for legal ivory imports. Other top countries of origin were Botswana, Tanzania, and Namibia. Most (over 75%) ivory carvings were imported from Great Britain. Other common countries of import included France, Germany, and Portugal. Importers of the largest number of cleared ivory carvings included Sotheby’s (456 specimens), MS Rau Antiques LLC (414), Sydney Moss C/O Quality International (317), Alexina Matisse (254), Hartman Rare Art Incorporated (233), Sallee Antiques (164), JELACNC NO 2, LP (105), Lockson Incorporated (90), Oracle Investment Advisors, LLC (70), Rosemary Bandini (68), Blumka Gallery (65), Metropolitan Museum of Art (61), Cheryl Harris (52), Antique Supermarket Inc. (42), Gander & White Shipping Inc. C/O de Wilde (40), and D/B/A Quality International Freight Forwarders & Customs Breakers (36). About half of all imports did not list the names of the U.S. importer (presumably individuals, such as art collectors). The FWS does not release the names of individuals.

There were a small number of ivory jewelry imports (59 specimens), which tended to be imported in small quantities (up to 20 objects) by museums and individuals from African countries of origin, or otherwise of unknown origin. ¹⁶¹ Ivory pieces tended to be imported in quantities of up to 224 specimens, by antiques dealers, museums or individuals; most of these imports had an unknown country of origin, with a few listing Japan and Zimbabwe. The largest importer of ivory piano keys, which tended to be imported in groups of 52 keys, was

¹⁵⁹ The analysis presented in Part V(A)(2) is based on data IFAW acquired on ivory trade in the U.S. from the FWS’s Law Enforcement Management Information System (LEMIS) in response to IFAW’s December 2012 and February 2013 Freedom of Information Act (FOIA), 5 U.S.C. § 552, requests. FWS, *Response to IFAW FOIA Requests, LEMIS Data* (Mar. 2013) (on file with *Animal Law*) [hereinafter *2013 LEMIS Data*]. The analyses of U.S. ivory imports and exports presented in this Article are based on an internal IFAW report initially analyzing and interpreting the data. FWS staff reviewed the IFAW report and provided feedback on the analyses. Marina S. Ratchford, *U.S. Ivory Trade Analysis: A Report Prepared for IFAW* (Mar. 19, 2013) (on file with *Animal Law*) [hereinafter Ratchford, *IFAW Report*]. For a discussion of the methodology used in this Article, consult *infra* appendix B.

¹⁶⁰ *Infra* tbl. 1 (charting legal imports of ivory objects by type, number, and weight in kilograms according to the LEMIS database).

¹⁶¹ *Infra* tbl. 1 (providing totals of legal imports of ivory items from 2009–2012).

Thomas Strange, though most imports did not list an importer.¹⁶² Most keys were imported from Great Britain and Canada. Pianos with ivory keys were imported singly by individuals and colleges; all except one had an unknown country of origin, and Canada was listed as the exporting country for about half of the pianos. There were 1,746 imports of hunting trophies,¹⁶³ which consist of two tusks each. Trophies tended to be imported one at a time by individuals and taxidermy companies (only 122 imports listed the name of the importer of record); such trophies originated mainly in Botswana, Namibia, South Africa, Tanzania, and Zimbabwe. Imports of tusks totaled 900 specimens plus 422.4 kilograms of tusks for this period, and tended to be imported one or two at a time.¹⁶⁴ Tusks were mainly imported by individuals or companies, including taxidermists, with exceptions such as Bad Boys Bail Bonds Inc. importing 42 tusks in one shipment (likely the result of a “cull” hunting).¹⁶⁵ Only 85 imports of tusks identified the name of a business as the importer of record. Most items in the “tusk” category originated from Botswana, Namibia, South Africa, Tanzania, and Zimbabwe.

¹⁶² FWS-OLE provided business names, but withheld individual names in response to IFAW’s FOIA requests. Therefore, shipments that do not list an importer or exporter can be assumed to have been imported or exported by individuals and FWS-OLE did not provide those names.

¹⁶³ *Infra* tbl. 1. “Hunting trophy” means

a whole animal, or a readily recognizable part or derivative of an animal, specified on any accompanying CITES permit or certificate, that:

- i) is raw, processed or manufactured;
- ii) was legally obtained by the hunter through hunting for the hunter’s personal use; and
- iii) is being imported, exported or re-exported by or on behalf of the hunter, as part of the transfer from its country of origin, ultimately to the hunter’s State of usual residence.

CITES Res. Conf. 12.3 (Rev. CoP16), *supra* n. 60.

¹⁶⁴ *Infra* tbl. 1.

¹⁶⁵ Ratchford, *IFAW Report*, *supra* n. 159, at 9 cmt. 14.

Table 1: Legal Ivory Imports to the U.S. from 2009–2012, by Type of Ivory Object¹⁶⁶

Year	Carvings	Jewelry	Pieces	Ivory Keys	Pianos with ivory keys	Trophies	Tusks	Total Specimens
2009	1,488	8	27	104	9	534	191+ 245.4kg	2,361+ 245.4kg
2010	3,270	9	15	88	7	427	208+ 62kg	4,024+ 62kg
2011	1,897	1	356+ 9.6kg	642	7	360	187+ 2kg	3,450+ 2kg
2012	942	41	753+ 7.5kg	909	2	425	314+ 113kg	3,386+ 120.5kg
Total	7,597	59	1,151+ 7.5kg	1,743	25	1,746	900+ 422.4kg	13,221+ 429.9kg

In addition to the legal imports of ivory, there was a significant amount of legal ivory exported from the U.S., totaling 6,753 objects for the period of 2009 to 2012. Table 2 provides the totals by type of ivory product.

Table 2. Legal Ivory Exports from the U.S. from 2009–2012, by Type of Ivory Object

Year	Carvings	Jewelry	Pieces	Keys	Pianos	Trophies	Tusks	Specimens
2009	2,374	4	19	192	57		1	2,647
2010	1,210		2	104	111	1	4	1,432
2011	436	2	7	256	47	3	1	752
2012	437	1	90	774	108		512	1,922
Total	4,457	7	118	1,326	323	4	518	6,753

B. Snapshots of Ivory Available for Sale through Auctions

Data analysis of the main U.S.-based auction houses selling ivory products was conducted using the LiveAuctioneers¹⁶⁷ and Auc-

¹⁶⁶ According to the LEMIS import/export key code, and throughout this Article when analyzing FWS data, “pieces” refer to nonmanufactured ivory pieces, including scraps; “trophies” refer to all the parts of one animal, and therefore can be assumed to include two tusks each; and “tusks” refer to substantially whole tusks, worked or not. FWS-OLE, *Import/Export Key 1* (Feb. 2013) (on file with *Animal Law*).

¹⁶⁷ LiveAuctioneers is a New York City-based company operating since 2002. By hosting thousands of auctions in real time via the Internet, the site allows unprecedented access to remote sales. More than 1,500 premier auction houses rely on LiveAuctioneers’ technology, with 7.9 million bids placed. LiveAuctioneers, *About Us*, <http://www.liveauctioneers.com/about.html> [<http://perma.cc/0ZLjqQLsdXV>] (accessed Nov. 17, 2013). “In 2009, the debut of LiveAuctioneers’ iPhone and Android apps . . . opened up a new mobile pipeline to bid anytime, from anywhere, with complete anonymity.” *Id.*

tionZip¹⁶⁸ search engines. In order to estimate the amount of ivory available for sale through auctions, the authors took an inventory of available items in March 2013. It is important to note that this inventory only reflected a snapshot of the ivory available for sale through auctions taking place at that time.¹⁶⁹ Inventory taken did not include any ivory products available at retail stores, from Internet-only marketplaces, or from auction houses located outside of the U.S. (though U.S. residents can bid on their products).

Table 3. A Snapshot of Ivory Sales through Online Auction Houses from 1999–November 2013¹⁷⁰

Year	# Sales
1999	28
2000	99
2001	75
2002	68
2003	1863
2004	2228
2005	4283
2006	4211
2007	4137
2008	5283
2009	3747
2010	6837
2011	14618
2012	17763
2013 (Jan.–Nov.)	17675

The snapshot included a total of fifty U.S.-based auction houses with ivory products listings available for sale in March 2013. These auction houses were located throughout the U.S., mainly in Florida, California,

¹⁶⁸ “AuctionZip is the world’s largest online auction marketplace . . . where more than 25,000 professional auctioneers and 13 million auction buyers come together each year to list and find auctions. AuctionZip Live! is the nation’s largest online bidding destination. Every week AuctionZip lists thousands of new items at auction, and live auctions around the world.” AuctionZip, *About Us*, <http://www.auctionzip.com/about.html> [<http://perma.cc/0mSFN1ioGrg>] (accessed Nov. 17, 2013).

¹⁶⁹ Analysis is based on the data provided in Ratchford, *IFAW Report*, *supra* n. 159, at 29 tbl. 15.

¹⁷⁰ LiveAuctioneers, <http://www.liveauctioneers.com>; search keyword “ivory,” select SOLD, select United States, view by Year, select Search titles only, deselect Require image, click GO (accessed Nov. 17, 2013). Subtract any search results that include keywords such as “rug,” “carpet,” “sofa,” “color,” “hippo,” “mammoth,” “walrus,” or “whale” to minimize inclusion of non-elephant ivory items. This is a conservative count, because each search result may include multiple items sold.

New York, North Carolina, and Texas. The inventory offered for auction by these fifty houses included 1,666 items with suggested bids totaling \$1,214,498.¹⁷¹ The auction houses dealing with the largest number of ivory items at the time of this snapshot were Elite Decorative Arts, Leslie Hindman Auctioneers, Richard D. Hatch & Associates, Heritage Auctions, Kimball M. Sterling, and I.M. Chait. The auction houses with the highest priced inventory were Rome & Associates, A.B. Levy's, Leslie Hindman Auctioneers, Doyle New York, I.M. Chait, and Antique Place. The most common types of worked ivory items for sale were netsukes (miniature sculptures), human figurines, canes with ivory handles, tusks, and jewelry.

In terms of ivory sold at auction, the following is a snapshot of ivory sales through online auction houses in the U.S. in the period from 1999 to November of 2013, using the LiveAuctioneers search engine. There were roughly 82,114 ivory sales sold from 1999 to November of 2013 (each sale may include multiple ivory items).

C. U.S. Ivory Buyers

The company Elephant Ivory Tusks claims to be one of the main buyers of ivory tusks and partials in the U.S., which it uses for resale purposes (“No one buys more or pays more than we do.”)¹⁷² The company offers to pay from \$40 up to \$135 per pound (of solid sections) for tusks and partials.¹⁷³ Similarly, David Warther in Dover, Ohio purchases antique elephant tusks from private, estate, and museum collections within the U.S.¹⁷⁴ While Warther's business purchases “uncarved ivory tusks, [it] do[es] not purchase carved tusks, scrimshaw, jewelry or other worked pieces of ivory.”¹⁷⁵ As an active purchaser of antique tusks, the company website claims to “adhere to the laws of the United States and [] not purchase tusks from outside the US.”¹⁷⁶ Ivory Crafts is another prominent buyer of ivory tusks.¹⁷⁷ The store also buys “damaged ivories for repair material or to repair and resell.”¹⁷⁸ The Boone Trading Company is both a seller and a buyer,¹⁷⁹ as is Coast Ivory, which “also buys most any type of legal ivory,

¹⁷¹ This number represents the sum of suggested bids for all ivory items listed by the fifty auction houses offering ivory inventory at the time of the snapshot.

¹⁷² Elephant Ivory Tusks, *The Real Facts*, <http://www.elephantivorytusks.com/info.html> [<http://perma.cc/08jYD7Gh1SN>] (accessed Nov. 17, 2013).

¹⁷³ *Id.*

¹⁷⁴ Ivorybuyer.com, *Elephant Tusks—Buyers of Legal Estate Ivory in USA*, <http://www.ivorybuyer.com> [<http://perma.cc/0m6pBTDCjny>] (accessed Nov. 17, 2013).

¹⁷⁵ Ivorybuyer.com, *About Us*, <http://www.ivorybuyer.com/?page=legal%20ivory> [<http://perma.cc/0VCsWLBzUj>] (accessed Nov. 17, 2013).

¹⁷⁶ *Id.*

¹⁷⁷ Ivory Crafts, *Raw Ivory*, <http://www.ivorycrafts.com/raw-ivory-crafts-supplies> [<http://perma.cc/0gwmdhHBRE6>] (accessed Nov. 17, 2013).

¹⁷⁸ Ivory Crafts, *Ivory Repair*, <http://www.ivorycrafts.com/ivory-repair> [<http://perma.cc/0hR6HNkuGHD>] (accessed Nov. 17, 2013).

¹⁷⁹ The Boone Trading Co., *Boone Trading Company—Ivory and Scrimshaw*, <http://boonetrading.com> [<http://perma.cc/0kPLDNfd3Zo>] (accessed Nov. 17, 2013).

whether it be in chunks or whole tusks.”¹⁸⁰ Ivory Heaven, operated by a collector of antique ivories, regularly purchases ivory pieces from auction houses and according to its website, it currently only purchases “pre-ban ivory jewelries of [the] highest quality.”¹⁸¹

Regarding U.S.-based auction houses as well as art and antique galleries dealing with luxury ivory products, a literature review indicates that most buyers of ivory from these sellers are Americans who are collectors of ivory antiques.¹⁸² However, gathering more specific information about the profile of ivory buyers from auction houses proves to be extremely difficult.¹⁸³

The U.S. maintains a largely unregulated ivory crafting industry. The number of U.S. artisans most recently reported is “about 200 carvers who use elephant ivory.”¹⁸⁴ Ivory artisans purchase raw ivory as well as broken ivory items.¹⁸⁵ Such ivory is available both at retail stores and from the Internet. Some of the most common products made by ivory artisans are handles for guns or knives.¹⁸⁶ In addition, specialists have pointed out that the use of “ivory for billiard cue parts, inlaying billiard cues” (ferrules, joints and butt caps), “making ornamental scrimshaw items and crafting jewelry” will likely continue to be high.¹⁸⁷ Since “the U.S. holds so many ivory objects,” ivory repair work by artisans will also continue to be in demand in the U.S.¹⁸⁸ Ivory is also the preferred material for stores specializing in musical instrument parts; ivory is used for guitar nut blanks, nuts and saddles, bassoon rings, and end caps for bagpipes, among other uses.¹⁸⁹

¹⁸⁰ Coast Ivory, *Exotic Materials for the Knifemaker and Craftsman*, <http://www.coastivory.com> [<http://perma.cc/0oQmpuLarBh>] (updated May 29, 2013) (accessed Nov. 17, 2013).

¹⁸¹ Ivory Heaven—Antique Ivory Collection, *Sell Your Ivory*, <http://www.ivoryheaven.com/id67.html> [<http://perma.cc/0etf9mGwWlR>] (accessed Nov. 17, 2013).

¹⁸² Stiles & Martin, *supra* n. 62, at 67, 73.

¹⁸³ See Email from Robert Weisblut, Intl. Ivory Socy., to Marina Ratchford, Author, *Question about Membership* (Mar. 4, 2013, 6:11 p.m. EST) (copy on file with *Animal Law*) (stating that auction houses do not provide information on their customers).

¹⁸⁴ Fisher, *supra* n. 10.

¹⁸⁵ Stiles & Martin, *supra* n. 62, at 70.

¹⁸⁶ *Id.* at 71.

¹⁸⁷ *Id.* at 75.

¹⁸⁸ *Id.*

¹⁸⁹ See e.g. Elephant Ivory Tusks, *Elephant Ivory Guitar and Instrument Parts*, <http://www.elephantivorytusks.com/elivgupa.html> [<http://perma.cc/03QFmmmMsUZ>] (accessed Nov. 17, 2013) (selling a variety of ivory products, including musical instrument parts).

VI. ANALYSIS OF ILLEGAL TRADE IN IVORY: LEMIS SEIZURE DATA/SPECIAL INVESTIGATIONS AND OPERATIONS¹⁹⁰

As discussed in Part V(A), the substantial legal market provides cover for dealers and consumers—whether intentionally or not—to sustain the trade in illegal ivory. The International Fund for Animal Welfare (IFAW) conducted an analysis of recent wildlife product seizures, based on data from the Law Enforcement Management Information System (LEMIS) of the U.S. Fish and Wildlife Service (FWS). In addition, the authors offer a summary of relevant FWS investigations and special operations related to ivory since 2008.

The data analysis described in this Article finds that from 2009 to 2012, there were close to 1000 products seized upon entry into the U.S.¹⁹¹ However, INTERPOL estimates that interdictions only represent about 10% of the actual traffic in illegal goods,¹⁹² because customs and border patrol officials have limited resources and must process an astonishing amount of merchandise every day.¹⁹³ Therefore, the illegal ivory that is smuggled into the U.S. may be closer to 2,500 specimens per year.¹⁹⁴ Additionally, about 250 ivory items were seized upon exportation from the U.S. in the same four-year period. Again, using INTERPOL's 10% estimation, the authors determine that approximately 625 additional ivory items are being smuggled out of the U.S. each year, bringing the estimated number of combined illegal ivory imports and exports in the U.S. to 3,125 per year.¹⁹⁵

In addition to border seizures, highlights from some FWS investigations and special operations related to ivory from 2008 up to and including 2012 indicate that the ivory market in the U.S. involves sophisticated schemes including operatives and partners in the black

¹⁹⁰ The analysis presented in Part VI is based on data IFAW acquired on ivory trade in the U.S. from the FWS's Law Enforcement Management Information System (LEMIS) in response to IFAW's December 2012 and February 2013 Freedom of Information Act (FOIA), 5 U.S.C. § 552, requests. *2013 LEMIS Data*, *supra* n. 159. The analyses of U.S. ivory imports and exports presented in this Article are based on an internal IFAW report initially analyzing and interpreting the data. FWS staff reviewed the IFAW report and provided feedback on the analyses. Ratchford, *IFAW Report*, *supra* n. 159. For a discussion of the methodology used in this Article, consult *infra* appendix B.

¹⁹¹ *Infra* tbl. 3.

¹⁹² Christy, *supra* n. 15.

¹⁹³ Bernard Irigia Kaaria & Ndica Lawrence Muchiri, *Enforcement Challenges across Borders: Detecting and Prosecuting Illegal Wildlife Trafficking* 204, 204 (Ninth Intl. Conf. on Env'tl. Compliance & Enforcement 2011) (available at http://inece.org/conference/9/proceedings/26_KaariaMuchiri.pdf [<http://perma.cc/0CzG51i58tR>] (accessed Nov. 17, 2013)).

¹⁹⁴ Christy, *supra* n. 15 (applying INTERPOL's 10% rule).

¹⁹⁵ *Infra* pt. VI tbls. 5, 9; see Christy, *supra* n. 15 (noting that INTERPOL utilizes a rule of thumb "that says seized contraband equals 10% of actual smuggling").

market ivory trade from multiple countries.¹⁹⁶ Ivory investigations in that five-year period involved defendants, in at least ten states, in relation to at least a dozen shipments.¹⁹⁷ In one case in 2011, FWS investigators seized one ton of elephant ivory from an individual.¹⁹⁸ A single investigation in New York confiscated \$2 million worth of ivory objects.¹⁹⁹

The lack of comprehensive trafficking data is a serious problem in its own right, as it makes it difficult to accurately assess the size of the domestic market for illegal goods. Despite these obvious limitations, the LEMIS data below, combined with the descriptions of additional FWS special investigations related to ivory, are a tool to understand the scope of illegal imports and exports.

A. *Data Analysis of Ivory Imports and Exports Seized in the U.S. (2009–2012)*

According to analysis of LEMIS data, elephant products were the fourth most common species grouping of wildlife seized upon importation in the U.S. from 2009 to 2012 (among Endangered Species Act (ESA)- and Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)-listed mammals, birds, and reptiles) based on lines of data.²⁰⁰

¹⁹⁶ Discussed *infra* pt. VI(D); see generally FWS, *Law Enforcement Annual Reports* (available at <http://www.fws.gov/le/annual-reports.html> [<http://perma.cc/0p84mV7S8Mk>] (accessed Nov. 17, 2013)) (Each annual report contains a list of accomplishments regarding investigative and enforcement efforts against the illegal trade in wildlife and wildlife products.); see e.g. FWS, *Annual Report FY 2009* 10 (available at <http://www.fws.gov/le/pdf/final-annual-report-fy-2009.pdf> [<http://perma.cc/0BxCeeaNnqk>] (accessed Nov. 17, 2013)) (“Six defendants were arrested in New York, New Jersey, Virginia, and Texas for conspiring to smuggle African elephant ivory from Ivory Coast, Cameroon, and Uganda into the United States; the group smuggled at least eight shipments through New York, falsely declared as wooden statutes or handicrafts.”); FWS, *Annual Report FY 2008* 11 (available at <http://www.fws.gov/le/pdf/final-annual-report-fy-2008.pdf> [<http://perma.cc/09oezSpU3DA>] (accessed Nov. 17, 2013)) (“A Canadian citizen was sent to prison for five years and fined \$100,000 for illegally smuggling elephant ivory valued at \$158,000 from Cameroon to the United States. . . . [She] ran a sophisticated scheme to smuggle ivory [including] operatives within international commercial shipping companies, contacts in the black market ivory trade, and partners in all three countries.”).

¹⁹⁷ See FWS, *Annual Report FY 2011*, *supra* n. 127, at 8 (detailing ivory seizures in Pennsylvania, New York, Florida, and Georgia); FWS, *Annual Report FY 2009*, *supra* n. 196, at 7–8, 10 (detailing ivory seizures in Illinois, Texas, New York, New Jersey, and Virginia); FWS, *Annual Report FY 2008*, *supra* n. 196, at 9–11 (detailing ivory seizures in Georgia, Texas, Tennessee, Kentucky, Florida, and New York).

¹⁹⁸ FWS, *Annual Report FY 2011*, *supra* n. 127, at 8.

¹⁹⁹ David M. Halbfinger, *2 Manhattan Jewelers Admit Illegal Ivory Trading*, N.Y. Times (July 12, 2012) (available at <http://www.nytimes.com/2012/07/13/nyregion/illegal-ivory-leads-2-to-plead-guilty-in-new-york.html> [<http://perma.cc/0MunQsSFSgX>] (accessed Nov. 17, 2013)).

²⁰⁰ In the period from 2009 to 2012, there were 472 import data entries of seizures containing elephant parts and derivatives, from African elephants (*Loxodonta Africana*), Asian elephants (*Elephas maximus*), as well as entries listed as “all elephants”

Table 4 focuses specifically on imports containing elephant parts and derivatives, which were seized by FWS inspectors in the period from 2009 to 2012. The table provides information on quantity of specimens or weight; wildlife descriptions (i.e., whether it contained ivory, trophies, tusks, medicinals, etcetera); country of origin; exporting country; and port of entry. The main purposes identified for these imports by the exporters were either personal or commercial, with a third category listing hunting trophies. The main sources identified by the exporters were specimens taken from the wild (most shipments); unknown source; or pre-Convention.

In the period from 2009 to 2012, the 472 import data entries containing elephant parts/products that were seized in the U.S. included 1,795 specimens plus 17.7 kilograms of elephant parts and derivatives. A look at the contents of these import entries (wildlife descriptions) reveals that ivory was present in most of them.

Table 4. Detailed Information on Seized Elephant Imports from 2009–2012

Number of Specimens or Weight	1,795 total specimens + 17.7kg
Description by Number of Specimens or Weight	Ivory carvings: 566; Leather products: 294; Ivory jewelry: 167; Skin piece: 142 + 0.955kg; Unspecified: 127 + 0.27kg; Ivory piano keys: 100 + 0.2kg; Hair: 54 + 0.058kg; Medicinals: 51; Tusks: 50 + 13.8kg; Meat: 46 + 2.419kg; Other jewelry: 44; Hair product: 32; Ivory pieces/scraps: 29; Shoe/boots: 19; Bones (including jaws, but not skulls): 18; Foot: 12; Skin (essentially whole): 11; Teeth: 9; Trophies: 6; Tails: 5; Trim: 5; Ear: 4; Bone pieces: 3; Bone product: 1
Main Countries of Origin (by import entries)	Unknown: 841 specimens; Other top countries of origin: Zimbabwe; Thailand; South Africa; Nigeria; China; Lao; Botswana; Tanzania; Vietnam
Main Exporting Countries (by import entries)	Thailand; Zimbabwe; U.K.; South Africa; Nigeria; Lao; Japan; Vietnam; France; Canada. 50 different additional countries were identified as exporting countries
Main Ports of Entry (by import entries)	Houston; San Francisco; Los Angeles; New York; Dallas/Fort Worth; Atlanta; Newark; Honolulu; Anchorage; Dulles; Chicago; Miami

In addition to the seized elephant imports, elephants were the most common wildlife species grouping (among ESA- and CITES-listed mammals, birds, and reptiles) contained in seized exports from the U.S. from 2009 to 2012 (by lines of export entries). In that period, there

(*Elephantidae*). The top three species groupings by data entries of seizures upon importation into the U.S. in the same period were crocodiles (906 entries), pythons (594), and sea turtles (544).

were a total of 387 export data entries, containing ESA- and CITES-listed mammals, birds, and reptiles, and 97 of those entries contained elephant specimens. Further analysis into such entries reveals that nearly all entries of seized elephant exports from the U.S. contained ivory products.

B. Types of Illegal Ivory Imported into the U.S.

Ivory carvings and ivory jewelry are among the items most commonly refused entry upon importation into the U.S. In the period from 2009 to 2012, officials seized nearly 1000 ivory specimens, plus an additional 14 kilograms of ivory, upon importation into the U.S. These ivory specimens included 566 ivory carvings, 167 ivory jewelry items, 50 tusks (plus an additional 13.8 kilograms of tusks), 29 ivory pieces (not manufactured, including scraps), 6 trophies, and 100 ivory piano keys (plus an additional 0.2 kilograms of ivory piano keys). The largest type of ivory by far was carvings, followed by jewelry and piano keys, and finally tusks, ivory pieces, and trophies. Table 5 provides information about each category in terms of the number of seized specimens plus additional weight.

Table 5. Ivory Imports Seized in the U.S. from 2009–2012

Ivory Type	Number of Specimens	Additional Seized Ivory Measured in Weight Only
Ivory carvings	566	
Ivory jewelry	167	
Ivory piano keys	100	0.2 kg
Tusks	50 ²⁰¹	13.8 kg
Ivory pieces	29	
Trophies	6	
Total	918	14 kg

Table 6 provides detail about the main countries of origin and countries of export for each type of ivory product seized upon importation into the U.S. in the period from 2009 to 2012. When looking at all types of ivory products together, the top countries of origin (by import lines) in this period were South Africa and Nigeria, but by far the most commonly listed country of origin was “unknown.”²⁰² The countries listed most commonly as the country of export for seized ivory imports were the United Kingdom (U.K.), Nigeria, South Africa, Zimbabwe, and Japan, noting that a large amount of countries were listed as the country of export for at least one specimen. Only a few imports had the same country listed as the country of origin and the country of export.

²⁰¹ Includes one item seized in transit.

²⁰² Assumed by FWS to be pre-Convention.

Table 6. Main Countries of Origin and Export of Seized Ivory Imports from 2009–2012

Ivory Type	Main Countries of Origin (by import entries)	Main Countries of Export (by import entries)
Ivory carvings	Unknown; South Africa; Nigeria; Zimbabwe; Thailand; Cambodia; Cameroon; Vietnam; Canada; ²⁰³ Central African Republic; U.K.; Ireland; Namibia; Zambia	U.K.; Japan; South Africa; Nigeria; France; Canada; Zimbabwe; China; Uruguay; Vietnam; Unknown; Australia; Cambodia; Germany; Ireland; Philippines; Belgium; Denmark; Greece; Indonesia; Mozambique; Netherlands; Portugal; United Arab Emirates; Burundi; Bolivia; Brazil; Cameroon; Egypt; Georgia; Hong Kong; Haiti; Israel; Italy; Kuwait; Malaysia; New Zealand; Panama; Peru; Saudi Arabia; South Korea; Syria
Ivory jewelry	Unknown; South Africa; Zimbabwe; Nigeria; Thailand; Cameroon; Vietnam; Ghana; Namibia; Sudan; Zambia	Vietnam; South Africa; Nigeria; Zimbabwe; Thailand; Cameroon; Unknown; Ghana; Japan; Lebanon; South Korea; Eritrea; Germany; Honduras; Hong Kong; India; Italy; Namibia; Netherlands; New Zealand; Peru; U.K.
Tusks	Zimbabwe; Unknown; Nigeria; Namibia; Botswana; Central African Republic; Democratic Republic of the Congo; Kenya; Tanzania	Nigeria; Zimbabwe; Namibia; Belgium; Botswana; France; U.K.; Bahamas; Ghana; Greece; South Africa; Tanzania; Thailand; Venezuela
Ivory pieces	Unknown; Congo; Laos; South Africa; Zambia	U.K.; Belgium; France; Japan; Laos; Morocco; New Zealand; South Africa
Trophies	Zimbabwe; Botswana; Tanzania	Zimbabwe; Botswana; South Africa; Tanzania
Ivory piano keys	Unknown	U.K.

Table 7 looks at the main ports of entry for seized ivory imports, by type of ivory product. When looking at all types of seized ivory imports, the most common ports of entry where seizures took place were Houston, New York, Dallas/Fort Worth, Atlanta, Anchorage, and Newark (by import entries).

²⁰³ This appears to be an error in the LEMIS data, as well as the entries listing U.K. and Ireland as the countries of origin. Ratchford, *IFAW Report*, *supra* n. 159, at 14 cmt. 22.

Table 7. Most Common Ports of Entry for Seized Ivory Imports from 2009–2012

Ivory Type	Main Ports of Entry (by import entries)
Ivory carvings	Houston; New York; Anchorage; Newark; Atlanta; Chicago; Dallas/Fort Worth; Los Angeles; Louisville; Region 4; Detroit; Dulles; Miami; Honolulu; Memphis; San Francisco; Boston; Port Huron; Region 1; Baltimore; Buffalo; Calais; Derby Line; Norfolk
Ivory jewelry	Dallas/Fort Worth; Atlanta; Houston; Dulles; Denver; Chicago; Los Angeles; New York; Honolulu; Memphis; Anchorage; Miami; Newark; Seattle; Tampa
Tusks	Houston; Miami; San Francisco; Newark; Dallas/Fort Worth; New York; Region 4; Anchorage; Boston; Dulles; Los Angeles
Ivory pieces	Memphis; Dallas/Fort Worth; Houston; Honolulu; New York; Los Angeles
Trophies	San Francisco; Dallas/Fort Worth; New York
Ivory piano keys	Region 4; Newark

Table 5 indicated that the total number of seized ivory imports in the period from 2009 to 2012 was 918 specimens plus 14 kilograms of additional ivory. Nearly half of all specimens (393) were contained in sixteen individual shipments. Table 8 takes a closer look at those sixteen shipments. All of these shipments contained either African elephant products or those listed under “all elephants.”

C. Ivory Seized upon Exportation from the U.S.

As noted in Part VI(A), in the period from 2009 to 2012, there were ninety-seven entries of seized exports containing elephant parts and products, making elephants the top species grouping for line entries of seized exports from the U.S.²⁰⁴ This total included parts and products from African elephants and entries listed as “all elephants.” Table 9 provides information about the number of specimens for each category of elephant parts and products seized upon exportation.

²⁰⁴ Because the U.S. has no indigenous elephant population, all ivory exported from the U.S. to other nations can be presumed to have originally entered the country as ivory imports. While FWS records these entries as exports, they can also be termed re-exports. “Re-export’ means export of any specimen that has previously been imported[.]” CITES, *supra* n. 44, at art. I(d).

Table 8. Contents and Other Information regarding the Sixteen Largest Ivory Shipments (Ten or More Specimens) Seized upon Importation into the U.S. from 2009–2012

Ivory Specimens/ Type	Country of Origin	Country of Export	Purpose	Port of Entry	U.S. Importer	Foreign Exporter
10 carvings	Unknown	U.K.	Personal	Newark		Anglo Pac. Intl. PLC
10 pieces, scraps	Congo	Belgium	Personal	Memphis	Added Value	
11 carvings	Unknown	Netherlands	Commercial	Atlanta	Kimball M. Sterling Inc.	
11 carvings	Unknown	U.K.	Personal	Denver		
16 jewelry items	Zimbabwe	New Zealand	Personal	Los Angeles		
16 carvings	Unknown	South Africa	Personal	Region 4		
16 carvings	Unknown	Portugal	Commercial	Houston		Cabral Moncada Leiloes
16 carvings	Unknown	U.K.	Personal	Louisville		Stacey's Auctions
21 carvings	Unknown	U.K.	Personal	Chicago		Gavin Gardiner Ltd.
23 carvings	Unknown	Australia	Commercial	Los Angeles	Joyce Berman Antiques	
27 carvings	Unknown	U.K.	Commercial	Norfolk	Red Schoolhouse Antiques	Scottish Connection
31 carvings	Unknown	Germany	Personal	Atlanta		Fuchs Interiors Antiques & Interior Design
42 carvings	Unknown	Peru	Personal	Houston		
43 carvings	Unknown	Australia	Commercial	San Francisco		
50 ivory piano keys	Unknown	U.K.	Commercial	Region 4	David Tims Antiques and Auction	
50 ivory piano keys	Unknown	U.K.	Commercial	Region 4	Atlanta Auction Co.	

Table 9. Seized Exports from the U.S. Containing Elephant Products/Parts from 2009–2012

Ivory Type	Number of Specimens ²⁰⁵
Ivory carvings	221
Ivory pieces, scraps	21
Ivory jewelry	5
Other carvings (not ivory)	3
Other jewelry (not ivory)	1
Total	251

Table 10 lists the main countries of origin and countries of import for each type of ivory product seized upon exportation from the U.S., as well as the ports of departure. When looking at all types of ivory products together, most products listed “unknown” as the country of origin, except for three entries which listed the U.S.²⁰⁶ The country listed most commonly by far as the country of import for seized ivory exports was China (by export entries). This represents a significant change from similar analyses of ivory exports covering earlier periods, when most of the U.S. ivory exports were destined for the U.K. and other European countries.²⁰⁷ Chicago was by far the port of departure most commonly used for seized ivory exports, followed by New York.

Table 10. Main Countries of Origin and Import, and Main Ports of Departure for Seized Ivory Exports from the U.S. from 2009–2012

Ivory Type	Main Countries of Origin (by export entries)	Main Countries of Import (by export entries)	Main Ports of Departure (by export entries)
Ivory carvings	Unknown, U.S. ²⁰⁸	China, Hong Kong, Saudi Arabia, Taiwan, Thailand, Japan, New Zealand, U.K., Russia, Singapore, Italy, Ukraine, Laos	Chicago, New York, Anchorage, Newark, Dulles
Ivory pieces	Unknown	China, Japan	New York
Ivory jewelry	Unknown	China	Chicago, New York

²⁰⁵ Note that nearly all specimens (247 out of 251) were ivory products.

²⁰⁶ The authors postulate that this is an error in data reporting.

²⁰⁷ Comparable analyses of ivory trade include, for example, the report *Tackling the Ivories: The Status of the US Trade in Elephant and Hippo Ivory* (2004) by TRAFFIC North America, which looked at data from 1995–2002. Williamson, *supra* n. 20, at 1.

²⁰⁸ Again, the authors postulate that this is an error in data reporting.

D. Investigative Efforts and Special Operations Focused on Illegal Ivory

In addition to the seizures of illegal wildlife shipments carried out by FWS wildlife inspectors, FWS special agents and wildlife inspectors team up to disrupt global wildlife trafficking.²⁰⁹ Seizures at ports of entry often lead to investigations that document large-scale smuggling operations.²¹⁰ Special Operations are long-term, complex investigations into the illegal commercialization or large-scale illegal taking of protected plants and animals.²¹¹ These investigations, which are sometimes conducted undercover, involve the penetration of well-organized, highly secretive groups of individuals engaged in the illegal wildlife trade.²¹² FWS investigative efforts and special inspection operations take place at air and ocean cargo facilities, passenger terminals, and international mail facilities to disrupt global wildlife trafficking and dismantle large-scale smuggling operations.²¹³

In Fiscal Year (FY) 2012, the FWS conducted a total of 12,996 investigative cases, resulting in \$9 million in fines, 56.9 prison years, 550.5 probation years, and \$1.1 million in civil penalties.²¹⁴ This was carried out with a work force of 219 special agents who actively pursued leads from confiscations and tips.²¹⁵ According to the Woodrow Wilson Center, “Comparatively, the Federal Bureau of Investigations (FBI) has 2,000 [criminal investigators] and the Drug Enforcement Agency has over 5,000 investigators.”²¹⁶

²⁰⁹ See FWS, *About Service Wildlife Inspectors*, <http://www.fws.gov/le/wildlife-inspectors.html> [<http://perma.cc/0w1EPECJ2W8>] (updated Feb. 14, 2013) (accessed Nov. 17, 2013) (“Wildlife inspectors work closely with Service special agents . . . They staff special enforcement task forces that conduct inspection blitzes at international mail processing facilities and other locations or target specific enforcement problems, such as the import and sale of medicinal products made from endangered species.”).

²¹⁰ FWS-OLE, *Strategic Plan 2011–2015*, at 10, 28 (available at <http://www.FWS.gov/le/pdf/OLE-Strategic-Plan.pdf> [<http://perma.cc/0jaH4ermGPu>] (accessed Nov. 17, 2013)).

²¹¹ FWS-OLE, *About Service Special Agents*, <http://www.fws.gov/le/special-agents.html> [<http://perma.cc/0JsJMf5u5tt>] (accessed Nov. 17, 2013).

²¹² *Id.*

²¹³ About 200 FWS special agents conduct investigations involving “both native species and global trafficking, and [a] four-person intelligence unit supports both domestic and international enforcement work. Investigative priorities focus on unlawful commercialization of protected wildlife, including species listed under CITES” and the ESA. H.R. Comm. on Nat. Resources, *Poaching American Security: Impacts of Illegal Wildlife Trade*, 110th Cong. (Mar. 5, 2008) (testimony of Benito A. Perez, Chief, FWS-OLE).

²¹⁴ *Law Enforcement at a Glance*, *supra* n. 121, at 2. This includes, in addition to investigations related to combating global wildlife trafficking, domestically focused investigations related to habitat destruction, illegal take, violations of hunting regulations, contaminants, and illegal guiding. *Id.*

²¹⁵ *Id.* at 1.

²¹⁶ Alan Campana, *Animal Investigators: Solving Wildlife Crimes and Saving Endangered Species in Brazil and China*, <http://www.wilsoncenter.org/article/animal-investigators-solving-wildlife-crimes-and-saving-endangered-species-brazil-and-china> [<http://perma.cc/0ZBLgpYFvXM>] (May 20, 2009) (accessed Nov. 17, 2013).

Since 2008, investigative efforts focusing on ivory have included the following:

- A Canadian citizen was sentenced to prison for five years and fined \$100,000 for smuggling elephant ivory from Cameroon to the U.S. The defendant's sophisticated scheme to smuggle ivory involved local artists and craftsmen, operatives within international shipping companies, and partners in the black market ivory trade in all three countries. FWS agents worked with a cooperating Ohio business owner to make large purchases of illegal raw elephant ivory. Forensic testing confirmed that the total amount of ivory intercepted during the investigation came from at least twenty-four elephants and had a resale value of about \$158,000. (2008)²¹⁷
- FWS's Special Inspectors from Memphis, Louisville, and Miami conducted a post-summer Olympics inspection blitz in search of ivory and other unlawfully imported "souvenirs" from Beijing. (2008)²¹⁸
- A similar operation in New York conducted by the port's Special Operations Team resulted in the interception of elephant ivory jewelry, among other wildlife items. (2008)²¹⁹
- Inspection efforts by New York's Special Operations Team resulted in the seizure of twenty carvings found in African cargo shipments. (2008)²²⁰
- In New York, a foreign national was arrested aboard a passenger flight for smuggling thirty-six pieces of elephant ivory from Africa; he received a prison sentence of sixteen months and was fined \$5,000. (2008)²²¹
- A Nantucket, Massachusetts scrimshander was arrested on charges including smuggling, conspiracy, and making false statements to federal agents in connection to illegally imported elephant ivory. The scrimshander used email to arrange deliveries of the illegal products via California through a Ukrainian man. The investigation involved FWS officers as well as the Massachusetts Environmental Police. (2008)²²²
- Six defendants in New York, New Jersey, Virginia, and Texas were arrested for conspiring to smuggle African elephant ivory from Ivory Coast, Cameroon, and Uganda into the U.S.; the de-

²¹⁷ *Annual Report FY 2008*, *supra* n. 196, at 11.

²¹⁸ *Id.*

²¹⁹ *Id.* at 10.

²²⁰ *Id.*

²²¹ *Id.* at 11.

²²² Press Release, U.S. Dept. of J., *Nantucket Scrimshaw Artist Guilty of Smuggling Sperm Whale and Elephant Ivory, Conspiracy, and Lying to Federal Agents* (Jan. 28, 2010) (available at <http://www.fws.gov/northeast/PDF/MANGHISverdictPR.pdf> [<http://perma.cc/0j2a2kSvwhU>] (accessed Nov. 17, 2013)) ("Manghis was indicted and arrested at his home on Nantucket in April 2008.")

- defendants smuggled at least eight shipments through New York, falsely declared as statues or handicrafts. (2009)²²³
- Seizures in Anchorage, Alaska included five shipments containing six Japanese hanging scrolls with elephant ivory knobs. (2011)²²⁴
 - A Philadelphia businessman was indicted on charges for trafficking in African elephant ivory that was smuggled into the U.S. after being carved to order and made to look “antique.” FWS investigators seized one ton of elephant ivory from this individual—“probably the largest seizure ever of this material in the U.S.” (2011)²²⁵
 - In New York, a man was sentenced to thirty-three months in prison and a \$25,000 fine for smuggling elephant ivory into the U.S. The defendant was one of six successfully prosecuted individuals involved in this trafficking scheme and was convicted for importing two shipments from Nigeria and Uganda containing seventy-one elephant ivory carvings hidden inside the hollow cavities of wooden and metal handicrafts. The carvings had an estimated market value of \$73,300. (2011)²²⁶
 - A Florida pool cue manufacturer and an Atlanta, Georgia piano import company were convicted of ivory trafficking, as a result of FWS investigations. (2011)²²⁷
 - An Indiana FWS special agent and FWS wildlife inspectors from Michigan conducted a joint enforcement blitz with customs officers at an Indianapolis FedEx facility that processes over 6,000 packages per night. FWS officers inspected 117 packages arriving from “high risk” countries over two nights. Elephant ivory was included among the seized unlawful imports. (2011)²²⁸
 - The Atlas Fibre Company, a company that manufactures billiard products in Skokie, Illinois, was fined \$150,000 for selling products containing African elephant ivory and products made from other endangered species. A division of the company called Atlas Billiard Supplies sold parts involved in fabricating billiard cue sticks, including African elephant ivory. (2012)²²⁹

In addition, some states conduct their own operations, which vary greatly in scope and frequency. A noteworthy example took place in July 2012, when the Manhattan District Attorney announced one of

²²³ FWS, *Annual Report FY 2009*, *supra* n. 196, at 10.

²²⁴ FWS, *Annual Report FY 2011*, *supra* n. 127, at 11.

²²⁵ *Id.* at 8.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 10.

²²⁹ Emily Bryson York, *Skokie Company Fined for Illegally Exporting Ivory*, Chi. Tribune (Jan. 10, 2012) (available at http://articles.chicagotribune.com/2012-01-10/business/chi-skokie-company-fined-for-illegally-exporting-ivory-20120110_1_illegal-ivory-african-ivory-billiard [http://perma.cc/0LisCmb6oe2] (accessed Nov. 17, 2013)).

the largest seizures in state history.²³⁰ More than \$2 million worth of illegal ivory was found mostly in tiny pieces used to make small jewelry, animal statues, and carved tusks.²³¹ The ivory was being sold at two shops in Manhattan, New York Jewelry Mart and Raja Jewels; two owners pled guilty to environmental crimes.²³² They forfeited all the ivory as well and were made to pay fines of \$10,000 and \$45,000, respectively, to the Wildlife Conservation Society.²³³ In early 2013, another Manhattan-based jewelry wholesaler, Stonex Corp., pled guilty to one count of illegal commercialization of wildlife, a felony offense.²³⁴ As part of the plea settlement, the store owner will forfeit more than 70 pounds of ivory worth more than \$30,000.²³⁵

Although the above is not a complete listing of investigations and special operations during the period from 2008 to 2012, it is clear even from this selection that these efforts have yielded successful results in disrupting and preventing the illegal trade of ivory. The amount of ivory intercepted through these operations, when analyzed in terms of quantity of specimens or estimated value of the confiscated ivory, likely exceeds the ivory contained in the shipments that were seized at the U.S. border, upon importation or exportation during the same period.²³⁶

Despite existing regulations and active enforcement efforts, however, the U.S. remains a large consumer of elephant ivory products, and this legal trade appears to be facilitated by the two major loopholes in the law (hunting trophies and antique ivory), which have allowed a significant amount of ivory trade to continue in the U.S. Part VII provides recommendations to address these problems.

VII. POLICY ANALYSIS AND RECOMMENDATIONS FOR IMPROVEMENT

The biggest weaknesses with the current U.S. system to control the illicit ivory trade are (1) undetected illegal imports and exports and (2) interstate and intrastate sale of illegal products that are advertised as legal. The authors have found that a significant amount of illegal ivory is being intercepted by the U.S. Fish and Wildlife Service (FWS)

²³⁰ Lorenzo Franceschi-Bicchierai, *Illegal-Ivory Bust Shows Growing U.S. Appetite for Elephant Tusks*, *Wired* (July 12, 2102) (available at <http://www.wired.com/wired/science/2012/07/2-million-illegal-ivory-bust> [<http://perma.cc/0CBZ3RmtQHx>] (accessed Nov. 17, 2013)).

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ Associated Press, *N.Y. Jewelry Company Admits Having Illegal Ivory*, *Wash. Examiner* (Mar. 8, 2013) (available at <http://washingtonexaminer.com/ny-jewelry-company-admits-having-illegal-ivory/article/feed/2077968> [<http://perma.cc/0PBQUWXsDta>] (accessed Nov. 17, 2013)).

²³⁵ *Id.*

²³⁶ *See supra* tbls. 5, 9 (providing total seized ivory imports and exports from 2009–2012).

and U.S. Customs and Border Patrol officials; however, just a small number of inspections are actually made, and if illegal ivory gets in, it is almost impossible to identify as such.²³⁷ Much of the domestic commerce—legal or not—happens without oversight or even thorough documentation, which makes it impossible to accurately assess the U.S. impact on species decline. These problems are compounded by genuine confusion over what, exactly, constitutes “legal” ivory. Thus, the time has come to address the reality facing African elephants and the role of the U.S.—federal legislation from Congress or a similar regulatory change by the executive branch is needed in order to provide the framework that will halt illegal ivory trade, and to encourage other nations to do the same.

A. *Options for U.S. Regulatory and Legislative Reforms*

Many of the options listed below can be implemented by either legislation or executive action. While laws and executive action can have the same effects, legislation is generally considered more permanent, as a future administration can relatively easily overturn rules and regulations promulgated by a predecessor. Laws can be amended or overturned, too, but these measures are subject to a more involved legislative process that requires overcoming potential opposition in Congress.

1. *Import/Export Regulations*

Ivory is not permitted to be imported into or exported from the U.S. unless it meets the criteria described in Part III.²³⁸ The main complications with imports and exports are the exceptions for sport-hunted trophies, antiques, and “personal effects,”²³⁹ and these exceptions could be changed individually by legislative or regulatory change. As noted, current regulations promulgated by the Department of the Interior (DOI) under the Endangered Species Act (ESA)’s section 4(d) “special rule” clause allow for imports of sport-hunted African elephant trophies and commercial trade (and limited imports and exports) of antique African elephant ivory.²⁴⁰

The authors hypothesize that these exceptions, combined with inadequate oversight of the domestic market, create a veneer of legality for the illegal ivory trade and allow illicit products to enter into commerce—the wildlife equivalent of money laundering. This is because there are *no* federal permitting or registration requirements for ivory once it is in the country, as long as the owner does not attempt to export it. Some purchasers require an affidavit attesting to the ivory’s

²³⁷ Discussed *supra* pt. IV.

²³⁸ See *infra* pt. VII(A)(3) (discussing the U.S. regulatory requirements imposing some restrictions on the import and export of ivory).

²³⁹ See CITES Res. Conf. 13.7 (Rev. CoP16), *supra* n. 64 (defining “personal effects”).

²⁴⁰ 50 C.F.R. § 17.40(e) (2011). The Asian Elephant is listed as ESA-endangered and is banned from imports or interstate trade in the U.S. 50 C.F.R. §§ 17.11, 17.21.

pre-ban/antique provenance, but even this small assurance is not required by law.²⁴¹ Closing the trophy and antiques loopholes would prevent new shipments of ivory from entering the stream of domestic commerce.

While not a legal reform per se, illegal shipments into or out of the U.S. could also be more tightly controlled by increasing the number of border inspections, conducting more—and more intensive—special investigations, and other law enforcement enhancements.

2. *Control of Ivory Sales within the U.S.*

The authors, in conducting research for this Article, have been struck not just by the problems posed by limited resources for enforcement and oversight, but also by the ambiguity of many of the laws and regulations governing the ivory trade, particularly as they apply to interstate commerce—and conversations with senior staff at the FWS Office of Law Enforcement (OLE) made it clear that this frustration is shared by (at least some) of the officials in charge of the system.²⁴² And as a practical matter, even if the law were straightforward, a fundamental problem is posed by the fact that antique ivory looks no different from recently-poached ivory, making enforcement even more difficult. With this all in mind, the following options could be considered for regulating the U.S. domestic ivory market.

a. *Registration System*

The Convention on International Trade of Endangered Species of Wild Fauna and Flora (CITES), with Conference Resolution 10.10 (revised at the 16th Conference of the Parties), sought to improve regulation of domestic ivory markets by making sure that parties had a system to (1) register or license importers, manufacturers, and others along the chain of commerce; (2) inform consumers of import/export restrictions; (3) assert compulsory trade controls over raw ivory; and (4) establish a comprehensive and effective reporting and enforcement system for worked ivory.²⁴³ The U.S. was found to be out of compliance with this resolution,²⁴⁴ which presents an opportunity for reform: by instituting a comprehensive ivory registration and reporting system for ivory items, the U.S. could more effectively oversee domestic trade.

²⁴¹ See *supra* pt. III(B) (discussing U.S. laws related to ivory trade).

²⁴² Conversations between Craig Hoover, Chief, Wildlife Trade & Conserv. Branch, FWS Div. of Mgt. Auth., Intl. Affairs, and Peter LaFontaine, Author (Sept. 5, 23, & 25, 2013); Conversations between Dan Rollince, Resident Agent in Charge, Richmond, Va., FWS-OLE, and Peter LaFontaine, Author (July 8, 10, & 17, 2013); see Email from Dan Rollince, Resident Agent in Charge, Richmond, Va., FWS-OLE, to Peter LaFontaine, Author, *Elephant Questions* (July 15, 2013, 5:20 a.m. PDT) (copy on file with *Animal Law*) (author commenting on shared confusion).

²⁴³ CITES Res. Conf. 10.10 (Rev. CoP16), *supra* n. 52.

²⁴⁴ Control of Internal Ivory Trade, CITES, SC50 Doc. 21.1 (Rev. 1) (2004) (available at <http://www.cites.org/eng/com/sc/50/E50-21-1.pdf> [<http://perma.cc/02P6dAMHVaH>] (accessed Nov. 17, 2013)).

However, a registration system is a complex proposition, particularly for countries with large markets like the U.S., that already have an unknown quantity of pre-ban ivory. It would require a public education blitz with the goal of near-100% awareness and compliance, a documentation method that could foil forgers, and extensive policing by wildlife officials. China is the best and biggest example of the registration system in effect,²⁴⁵ and the results are telling: According to a 2011 study from the International Fund for Animal Welfare (IFAW), Chinese dealers are guilty of “widespread abuse of the ivory trade control system . . . [and] illegal ivory, once smuggled to the country can be laundered freely through the legal market.”²⁴⁶ Not only did IFAW investigators uncover numerous unlicensed retailers—about twice as many as licensed retailers—almost 60% of the licensed retailers “were found to violate the system in some way to launder illegal ivory.”²⁴⁷

b. Prohibition of All Ivory Trade in the U.S.

One of the strongest steps the U.S. could take to protect wild elephant populations would be to institute a prohibition on the domestic sale of ivory. This prohibition could be enacted on interstate sales and, if mirrored by complimentary state laws, intrastate sales. The U.S. could enact either a permanent ban, or a temporary moratorium that has an ending or “sunset clause” so that the law remains in effect until certain conditions are met, or upon reaching a specified date.

c. Uplisting the African Elephant to ESA-Endangered and CITES Appendix I

One potential solution—a de facto ban—would require uplisting African elephants to ESA-endangered status, which would eliminate the exception for trophies and prohibit imports, exports, or interstate trade of antiques and pre-ban ivory. Additionally or alternatively, the U.S. could advocate for uplisting all populations of African elephants to CITES Appendix I which would ban international trade in this species.²⁴⁸ Currently, the populations in Namibia, South Africa, Botswana, and Zimbabwe are listed in Appendix II.²⁴⁹

²⁴⁵ Gabriel et al., *supra* n. 85, at 2.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Uplistings can only occur during the CITES Conference of the Parties (CoP). The next CoP, CITES CoP17, does not occur until 2016. See e.g. Press Release, CITES, *CITES Conference Takes Decisive Action to Halt Decline of Tropical Timber, Sharks, Manta Rays and a Wide Range of Other Plants and Animals* (Mar. 14, 2013) (available at http://www.cites.org/eng/news/pr/2013/20130314_cop16.php [<http://perma.cc/0ifnR2XoJfQ>] (accessed Nov. 17, 2013)) (discussing the adoption of strong enforcement measures to fight wildlife crime, including decisions to transfer four species from Appendix II to Appendix I).

²⁴⁹ CITES, *supra* n. 44, at app. II.

d. The Endangered Species Act 4(d) Rule and African Elephant Conservation Act Loophole Closure

Even without uplisting the African elephant, changes can be made to what is considered legal commerce in ivory. Of the two loopholes listed above, the antiques exception is the larger problem because once ivory is in the country, there is no oversight or legal requirement to prove the age of the item. Therefore, anything can be passed off as “antique” or pre-ban and accrue the benefits of these designations. Leaving aside the thorny question of the ethics of hunting threatened species, the trophy exception may be the smaller problem because it allows imports without the potential for legal sale. However, someone can import a trophy (legally) and then sell the tusks (illegally), and once this occurs the ivory is essentially “laundered.”²⁵⁰

Closing the antiques loophole would be a bigger step toward solving the problem. Without this exception, all legal interstate trade in ivory (as well as trophy tusks that were illegally repurposed for sale) would cease, although it is likely that some commerce would be conducted on the black market.²⁵¹ Still, merchants and consumers could no longer claim that their transactions were above-board.

e. A Lower Standard of Intent for Criminal Cases

The only case on record analyzing the intent requirements for criminal prosecution under the African Elephant Conservation Act (AfECA), *U.S. v. Grigsby*, requires specific intent.²⁵² This requirement is an extremely difficult burden for the prosecution to meet and thus, the government is hesitant to bring ivory smugglers to court.²⁵³ In effect, interpreting the AfECA to require specific intent provides defendants with the ready-made defense of mistaken identity (e.g., “I thought I was importing mammoth ivory”). While it is likely that different U.S. circuits would interpret the law differently, the question of intent can also be dealt with through legislative amendment, by specifying the standard of general intent.

f. Higher Penalties for Violations

If ivory traffickers and consumers remain complacent about the risk/reward tradeoffs, they will continue to break the law. Civil and criminal penalties could be raised, with higher fines and the real threat of incarceration, in order to remove convicted dealers from the marketplace and to act as a deterrent to would-be traffickers. Prosecutors could also pursue linked offenses such as money laundering, conspiracy, and tax evasion, in these cases.

²⁵⁰ Gabriel et al., *supra* n. 85, at 2.

²⁵¹ *Id.* at 3.

²⁵² *Grigsby*, 111 F.3d at 819.

²⁵³ *Id.* at 820.

B. Recommendations

It has been almost three decades since Congress enacted the AfECA,²⁵⁴ and there can be no doubt that African elephants need further protection. Until measures were taken internationally and by individual countries to stop the ivory trade, the market indicated strong and continued growth from 1950 to 1988.²⁵⁵ Since the short period of calm (roughly from 1990 to 2006) immediately following the international ivory trade ban, African elephant populations have continued their precipitous decline.²⁵⁶

The U.S. took the lead in addressing the ivory trade problem in the 1980s and other countries followed suit;²⁵⁷ the U.S. can do so again. The government's first order of business in reforming the system should be to clarify and simplify its laws and regulations. Much of the haziness stems from the ESA's "special rule" that makes allowances for antiques and trophy elephant parts;²⁵⁸ uplisting the African elephant as "endangered" under the ESA would reduce this problem (although the ESA does not restrict intrastate trade). However, there are other options to consider which may be less time-consuming and contentious. Upon thorough analysis of these options, the authors recommend the following regulatory and legislative actions (with legislative reform being the preferable route):

- (1) Prohibition on commercial trade: The authors recommend a prohibition on all domestic commerce of ivory, preferably through Congressional legislation or by uplisting the African elephant to endangered status under the ESA. However, a ban on sales through revision of the 4(d) rule and closure of AfECA loopholes would also be acceptable. As discussed above, the difference between a ban and a moratorium is the "sunset" provision (or end date) implied by the latter, and which one to choose is a bit of a political calculation—a moratorium might be easier to obtain, given that it is time-limited, and therefore, less "extreme." The authors recommend an outright ban for several reasons: (1) it may be easier for the public to understand, rather than introducing an element of time-limitation; (2) it carries a certain moral weight, indicating that the "social license" for ivory has been revoked; and (3) it elevates elephant

²⁵⁴ FWS, *U.S. Efforts*, *supra* n. 63, at 1.

²⁵⁵ *Id.*; *U.S. Ivory Market*, *supra* n. 91; American University, *TED Case Studies: Elephant Ivory Trade Ban*, <http://www1.american.edu/ted/elephant.htm> [<http://perma.cc/0N6vgvWpzTE>] (accessed Nov. 17, 2013).

²⁵⁶ BBC, *African Forest Elephants Decline by 62% in 10 Years*, <http://www.bbc.co.uk/nature/21655613> [<http://perma.cc/0iofZQ3Y8np>] (Mar. 5, 2013) (accessed Nov. 17, 2013).

²⁵⁷ FWS, *U.S. Efforts*, *supra* n. 63, at 1; Press Release, CITES et al., *Experts Report Highest Elephant Poaching and Ivory Smuggling Rates in a Decade* (June 21, 2012) (available at http://www.cites.org/eng/news/pr/2012/20120621_elephant_poaching_ivory_smuggling.php [<http://perma.cc/0eRBWMjixRf>] (accessed Nov. 17, 2013)).

²⁵⁸ 50 C.F.R. § 17.40(e)(iv)(3).

conservation as a long-term priority. However, if officials deem it politically advisable to pass a moratorium rather than a ban, the authors urge that certain safeguards be incorporated to best serve the aim of species recovery: a moratorium should end only when a comprehensive method for preventing illegal commerce can be fully implemented and vetted, and data show that poaching no longer significantly threatens elephants. A strong moratorium would not have an automatic “sunset clause”; instead, the burden of proof would be on the ivory industry to show that these conditions have been met.

- (2) Import/export loophole closures: The U.S. is currently operating under a modified version of the original 1989 moratorium, but the exceptions for antiques and sport-hunted trophies present major hurdles for enforcement.²⁵⁹ To date, strong lobbying from big game hunters has kept the trophy exemption sacrosanct, and it may be impossible to overturn. But if our goal is to minimize traffic in illegal ivory to the greatest extent possible, then both the exemption for antiques and the exemption for sport-hunted trophies should be eliminated. Barring an outright ban, closing one or both of these loopholes, either for imports or domestic trade, would be the next best step.
- (3) Raise the penalties for breaking the law, particularly targeting recidivists and large-scale violators.
- (4) Lower the standard of intent for criminal cases to general intent.
- (5) Public awareness: The U.S. government should make a concerted effort to elevate the American public’s awareness of wildlife crimes, like illegal ivory trafficking, through a coordinated education campaign. This would ideally be a collaboration of government agencies, nongovernmental organizations, the media, and other stakeholders, to help consumers understand their role in the poaching epidemic and their impacts on elephants and other wildlife. In the event that an ivory ban is implemented, efforts would need to be made to inform the public and make sure that ignorance of the law did not perpetuate a shadow market for illegal ivory.

The U.S. has the tools and resources to make a significant difference for a dwindling species, and at the time of this writing the White House is considering rule changes that may reflect some or all of these suggestions.²⁶⁰ It is important that any reforms be codified—and strengthened if necessary—by Congress, and given the urgency and rising awareness around the elephant crisis, there is hope that our elected officials will take these steps. Consumers, too, have a role to

²⁵⁹ Discussed *supra* pt. III(B)(3).

²⁶⁰ Exec. Or. 13648, 78 Fed. Reg. 40621 (July 5, 2013).

play, by making sure that they avoid ivory products overseas and at home.

VIII. CONCLUSION

It can be easy to overthink an issue as complicated as this. There are constituencies to placate, legal hurdles to surmount, and decades' worth of international red tape to cut through. These considerations have created a briar patch of "thou shalt nots" that has brought meaningful conservation to a standstill. But underneath it all is a simple truth: without our help, elephants face extinction.

The measures the authors call for are not free; they will require funding and government attention that are hard to come by in a time of austerity. And realistically, a few small businesses may suffer financially if an ivory trade ban is implemented. Ultimately, though, we have to ask ourselves, are we prepared to leave the next generation a world without elephants? What does it say about our society, if trinkets and trophies are valued more than the animals that are killed to furnish the materials? And does it matter that the animal in question is one of the most intelligent, social, and breathtaking creatures to ever walk the earth? Once you answer those questions, the path is clear—and it is up to all of us to bring these iconic species back from the brink.

APPENDIX A:
ACRONYMS

AfECA—African Elephant Conservation Act of 1989
AsECA—Asian Elephant Conservation Act of 1997
CBP—United States Customs and Border Patrol
CITES—Convention on International Trade in Endangered Species of Wild Fauna and Flora
CoP—Conference of the Parties (CITES member states)
DOI—United States Department of the Interior
ESA—Endangered Species Act
ETIS—Elephant Trade Information System
FOIA—Freedom of Information Act
FWS—United States Fish and Wildlife Service
HSUS—Humane Society of the United States
IFAW—International Fund for Animal Welfare
INTERPOL—International Criminal Police Organization
LEMIS—Law Enforcement Management Information System
LRA—Lord’s Resistance Army
OLE—Office of Law Enforcement (at FWS)
Res. Conf. [conf. no.].[res. no.]—CITES conference resolution
UNEP—United Nations Environment Program
UNESCO—United Nations Educational, Scientific and Cultural Organization
WCMC—World Conservation Monitoring Center

APPENDIX B:
METHODOLOGY OF ANALYSIS

The analysis of data derived from legal and illegal U.S. imports and exports containing elephant ivory products is based mainly on data provided by the Office of Law Enforcement at the U.S. Fish and Wildlife Service (FWS), from the declaration subsystem of its Law Enforcement Management Information System (LEMIS), in response to two Freedom of Information Act (FOIA), 5 U.S.C. § 552, requests by International Fund for Animal Welfare (IFAW). The first FOIA request (December 2012) focused specifically on the illegal trade of mammals, birds, and reptiles that are listed under the Endangered Species Act (ESA) and/or Convention on International Trade of Endangered Species of Wild Fauna and Flora (CITES) during the period from 2009 to 2012. Data provided by the FWS reflected imports and exports that were refused entry at the U.S. border, including seizures from individuals as well as commercial shipments. Importantly, data derived from seizures does not reflect the amount of undetected illegal wildlife entering or leaving the U.S., which may differ considerably from the information provided by the data on seizures.

This information was subsequently supplemented by additional related data from the FWS upon IFAW's second FOIA request in February 2013. The additional information utilized the same parameters as the original FOIA request but focused on legal imports and exports that were cleared at the U.S. border. This additional data included some records shipped in 2012 with disposition dates in 2013.

Note that whenever ivory is mentioned in this Article, it is understood that it refers to elephant ivory only (ivory from other species such as hippopotamus, walrus, whale, mammoth, etcetera, is not included in the data analysis of this Article). When looking at the trade in elephant parts and derivatives relative to other species, elephants are referred to as a "species grouping," which includes African and Asian elephants. It should be noted that the LEMIS species codes do not necessarily equate to taxonomic species (for example, some refused species codes may be species-level codes and other codes may represent genus or higher taxonomic level codes). The volume of trade involving the elephant species grouping is compared to other species groupings that include more than one species, such as crocodiles, pythons, and sea turtles.

Throughout this Article, the volume of ivory trade, both legal and illegal, is measured mainly by the number of specimens, and in some cases by weight (kilograms). Main countries of origin, export or import, as well as the main ports of entry, are identified by counting import or export lines of data. A single import or export shipment may be reported as a single line of data or multiple lines of data depending on reporting requirements and the specific items in a given shipment. In the case of elephants specifically, a shipment may be split into separate lines, usually because of differences in the "commodity" within a

shipment (for example, a sport-hunted trophy may be reported on several lines as two tusks, skin, skull, tail, feet, or it could also be recorded as one trophy).

For the purposes of this Article, the luxury ivory market includes antiques and art dealers, interior designers, art galleries, craft stores, and auctioneers, among other businesses that deal with ivory products and objects. While some, if not most, of these businesses offer services and products via the Internet, this data analysis does not include Internet-only platforms such as Craigslist, Alibaba, or Etsy.

The survey of auction houses currently selling ivory products was done using the LiveAuctioneers and AuctionZip search engines. It is important to note that this inventory only reflects a snapshot of the ivory available for sale through auctions at the time that this Article was written, because details are available only for auctions taking place one to three months into the future. Such inventory does not list any ivory products available at retail stores or from Internet-only market places. Also note that this snapshot is only a rough estimation of ivory products for sale at these online auction houses for that point in time, due to the imprecise nature of the search engines.

