

**Petition to Certify Mozambique as Diminishing the Effectiveness of
the Convention on International Trade in Endangered Species of
Wild Fauna and Flora (CITES)**

Environmental Investigation Agency, Petitioner
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I. INTRODUCTION

Mozambican nationals are at the center of the dramatic increase in poaching of rhinos and elephants and the illegal trade in rhino horn and elephant ivory that is devastating populations across southern Africa. As demonstrated in great detail in this petition, the illegal activities of Mozambican nationals and the Mozambican government's failure to enact meaningful wildlife protections together constitute one of the greatest threats to the survival of elephants, and particularly rhinos, in Africa. Mozambican nationals are clearly diminishing the effectiveness of the Convention on the International Trade in Endangered Species of Flora and Fauna (CITES) and the protection it aims to provide for these two species.

Under the Pelly Amendment, the Secretary of Interior may determine "that nationals of a foreign country, directly or indirectly are . . . engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species."¹ If the Secretary of Interior makes this determination, the Secretary "shall certify such fact to the President."² Upon receipt of such certification, the President may direct the Secretary of the Treasury to prohibit the importation into the United States of any product from the offending country for any duration, provided that the restrictions are consistent with the General Agreement on Tariffs and Trade (GATT) and other trade agreements.³

This petition demonstrates that Mozambican nationals are diminishing the effectiveness of CITES in the following ways:

Mozambican nationals commit extensive poaching throughout southern Africa.⁴ Mozambique no longer has a rhino population of its own due to uncontrolled poaching by Mozambicans. Meanwhile, 80 to 90 percent of rhino poaching in South Africa can be attributed to Mozambican nationals. Elephant poaching in northern Mozambique is now occurring at a rate of three to four elephants per day.

Mozambique fails to effectively enforce trade controls.⁵ The open sale of rhino horn and elephant ivory has historically been commonplace in Mozambique. Maputo is emerging as a major new staging base for the export of rhino horns from Africa and ivory originating or transiting through Mozambique has recently been seized in Vietnam, China and Kenya.

Mozambique has failed to adopt adequate CITES implementing legislation, lacks adequate penalties to deter poaching and illegal trade and suffers from rampant corruption.⁶ Despite

¹ 22 U.S.C. §1978, *as amended* Pub. L. No. 95-376, 92 Stat. 714 (Sept. 18, 1978).

² *Id.* at § 1978(a)(2).

³ *Id.* at § 1978(a)(4). More specifically, this provision allows the President to bar imports into the United States "of any products from the offending country for any duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the World Trade Organization (as defined in section 3501 (8) of title 19) or the multilateral trade agreements (as defined in section 3501 (4) of title 19)." However, the relevant provisions of the World Trade Organization and other multilateral trade agreements are those found in the provisions of the GATT. The President must also notify Congress of any action taken within 60 days of certification. *Id.* at § 1978(b).

⁴ *See infra* Section II.A.

⁵ *See infra* Section II.B.

⁶ *See infra* Section II.C.

17 years of capacity-building efforts and outreach, Mozambique's legislation remains inadequate to implement CITES and its penalties for violating wildlife protection laws have been ineffective at deterring criminals.

Mozambique has failed to secure stocks of government-held rhino horn and elephant ivory.⁷ Notwithstanding CITES calls to secure government and privately held stockpiles of rhino horn and elephant ivory, no record exists that Mozambique has controls on stocks of seized rhino horn. Mozambique last comprehensively reported its ivory stockpiles in 1997.

Mozambique fails to comply with CITES reporting requirements.⁸ Mozambique has persistently either failed to report or failed to adequately report, despite numerous general requests and specific requests, on a wide variety of matters important for rhino and elephant conservation.

Therefore, petitioners urge the Secretary of Interior to certify that Mozambican nationals are diminishing the effectiveness of an international endangered species program, CITES, pursuant to the Pelly Amendment of the Fishermen's Protective Act. Given the seriousness of these actions and inactions, Petitioners also request that the United States impose trade sanctions against Mozambique for all CITES-listed species, and other sanctions as appropriate, until it fully implements CITES measures to conserve rhinos and elephants.

II. HOW CITES PROTECTS RHINOS AND ELEPHANTS

It is well known and widely accepted as fact that Mozambicans play a leading role in rhino and elephant poaching operations and illicit trade in South Africa and Tanzania, as well as within Mozambique. Since at least 2004, the CITES Parties have identified Mozambique as a Party of concern regarding elephant conservation due to the number of poaching incidents in-country, its porous borders through which illegal ivory flows, and its domestic ivory markets, which have historically been largely unregulated.

CITES contributes to the conservation of species by limiting and regulating the international trade in specimens of species listed in the CITES Appendices. CITES Parties often adopt additional measures in resolutions and decisions when a species' conservation status warrants them. Of particular relevance to this petition are CITES Resolution Conf. 9.14 (Rev. CoP15), regarding Conservation of and trade in African and Asian rhinoceroses, and Resolution Conf. 10.10 (Rev. CoP16), regarding Trade in Elephant Specimens.

Resolution Conf. 9.14 (Rev. CoP15), focused on rhinos, calls for heightened attention on cross-border law enforcement collaboration, internal trade restrictions and the development of range State rhino recovery plans.⁹ In addition, the resolution urges Parties to have adequate legislation (consistent with the requirement found in Article VIII(1) of the Convention), emphasizes early detection of potential poachers, directs the Standing Committee to continue to pursue illegal trade reduction strategies with ongoing evaluation and the development of indicators, and calls for

⁷ See *infra* Section II.D.

⁸ See *infra* Section II.E.

⁹ CITES, *Conservation of Rhinos in Asia and Africa*, Resolution 9.14 (1994).

increased funding for range State efforts.¹⁰ The resolution also recommends that the IUCN/SSC African and Asian Rhino Specialist Groups and TRAFFIC submit a report to the Secretariat on the conservation of and trade in rhinos and rhino parts and derivatives, in lieu of range State reporting.¹¹

Rhino range states, including Mozambique, also participate in the Rhino Enforcement Task Force.¹² The Task Force concluded after its first meeting that any Party that seizes rhino specimens or becomes aware of illegal trade or poaching should report all relevant information using the Interpol Ecomessage format.¹³ The Task Force makes recommendations dealing with a range of issues relevant to rhino poaching and illegal rhino horn trafficking.¹⁴ The recommendations vary from greater collaboration with INTERPOL and better sharing of seizure data to identification of prominent entry and exit points and designation of a national rhino focal point.¹⁵

Although the Parties have adopted many decisions and multiple resolutions pertaining to elephants, Resolution Conf. 10.10 (Rev. CoP16) outlines the core expectations of all Parties regarding the illegal trade in and illegal killing of elephants. As a means of broadly tackling illegal ivory trade, the resolution urges relevant Parties to ensure that national legislation exists to: regulate the domestic trade in ivory, register or license any individual who deals in ivory, including importers, exporters, manufacturers, and sellers, provide for inspection and recordkeeping authority to monitor domestic ivory movements and stockpiles, engage in public awareness activities, and maintain inventories of ivory stockpiles, whether government-held or private, and report information annually to the Secretariat.¹⁶ The resolution also recommends a number of enforcement-related actions.

Following the initial adoption of Resolution Conf. 10.10 in 1997, the Parties began to design and implement a more comprehensive and cohesive elephant conservation strategy, largely built on improving their understanding of both illegal trade in elephant specimens and the illegal killing of elephants. This effort evolved into two elephant conservation programs: the Elephant Trade Information System (ETIS) and Monitoring the Illegal Killing of Elephants (MIKE).¹⁷ Both of these data systems rely heavily on input from relevant countries.

Please see Appendix A for a detailed history of CITES decisions and actions related to Mozambique's role in elephant and rhino poaching.

Section III demonstrates in detail how Mozambican nationals and/or the Mozambique government consistently undermine the effectiveness of CITES by committing extensive poaching, failing to effectively enforce trade controls, failing to implement adequate legislation and penalties, failing to secure government stockpiles and failing to comply with CITES reporting requirements. The

¹⁰ *Id.*

¹¹ *Id.*

¹² CITES, SC57 Summary Record, pg. 21 (2008).

¹³ *Id.*

¹⁴ CITES, *Rhinoceroses (Rhinocerotidae spp.)*, Notification to the Parties, No. 2014/006 (Jan. 23, 2014).

¹⁵ *Id.*

¹⁶ CITES, *Trade in Elephant Specimens*, Resolution Conf. 10.10 (Rev. CoP16).

¹⁷ See generally http://www.cites.org/eng/prog/mike_etis.php.

details provided in this Petition tell a devastating story of chronic and entrenched inaction and corruption that can only be viewed as undermining the role that CITES plays in rhino and elephant conservation.

III. MOZAMBICAN NATIONALS ARE DIMINISHING THE EFFECTIVENESS OF CITES

A. Mozambican Nationals Commit Poaching Throughout Southern Africa

Mozambique shares large transboundary national parks with Tanzania to the north and South Africa to the south. Poaching takes place along each of these two borders as well as within the country. Poaching in each of these three zones has different characteristics and enforcement challenges.¹⁸ Elephant tusks are the primary illicit target in the Selous-Niassa reserve, located in the north, while in the south along the Kruger-Limpopo Transfrontier Park, rhino horn is the focus of poaching activities.¹⁹ Rhino horn and elephant poaching operations are becoming increasingly organized and sophisticated and often include involvement of corrupt police and border guards and political criminal networks.²⁰

1. Rhino Poaching and the Role of Mozambican Nationals

Mozambican nationals are diminishing the effectiveness of CITES by committing extensive poaching of rhinos throughout southern Africa while the government of Mozambique is consistently failing to control poaching within Mozambique's borders. Resolution 9.14 (Rev. CoP15)²¹ urges range States, "to be vigilant in their law enforcement efforts, including the prevention of illegal hunting, the early detection of potential offenders and the application of appropriate penalties to act as effective deterrents." The control of poaching, particularly with respect to rhinos and elephants, is essential to CITES' efforts to control international trade because almost all poached rhino horn and ivory is destined for international markets.

Rhinos have been poached into extinction three times in Mozambique, including most recently in 2013.²² In Kruger National Park (KNP), poaching has reached the point where a joint task force of rangers and South African military has been unable to prevent its increase.²³ Poaching incidents increased 300 percent between 2010 and 2013, with 2,778 rhinos (approximately 25 percent of the park's estimated total of 9,000-12,000) poached since 2008.²⁴ A record 1,004 rhinos were killed

¹⁸ Varun Vira & Tomas Ewing, *Ivory's Curse: The Militarization & Professionalization of Poaching in Africa*, (April 2014), <http://www.bornfreeusa.org/downloads/pdf/Ivorys-Curse-2014.pdf>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ CITES, Resolution Conf. 9.14, *Conservation of and Trade in Rhinoceroses in Asia and Africa* (1994) (amended most recently at CoP15).

²² Varun Vira & Tomas Ewing, *Ivory's Curse: The Militarization & Professionalization of Poaching in Africa*, (April 2014), <http://www.bornfreeusa.org/downloads/pdf/Ivorys-Curse-2014.pdf>.

²³ *Id.*

²⁴ *Id.*

in 2013, a huge increase over the 668 killed in 2012.²⁵ The South African military engages in constant battle with Mozambican poachers.²⁶

The vast majority of existing rhinos in Africa inhabit South Africa,²⁷ many in KNP, making it an ideal target for Mozambican rhino poachers, particularly because KNP shares a porous, 200-plus mile border with Mozambique. Previously, a fence separated the countries, but the governments jointly removed portions of it to establish the Great Limpopo Transfrontier Conservation Area.²⁸ The heads of state of the three partner countries signed a treaty establishing Great Limpopo on 9 December 2002.²⁹ The purpose of the Greater Limpopo was to improve species conservation by expanding their range, but unfortunately removing the fences made it relatively easy for Mozambican poachers to slip undetected into KNP. Given the recent poaching issues, South Africans now call for re-fencing the shared border.³⁰

In March 2013 alone, KNP recorded 72 cross-border armed incursions from Mozambique,³¹ and Mozambicans constitute the highest number of foreign arrests for poaching in South Africa.³² South African wildlife organizations report that anywhere between 10 and 15 hunting parties are present inside Kruger on any given night.³³

As of June 6, 2014, 442 rhinos have been poached in South Africa, with 292 of those killings occurring in KNP³⁴ where Mozambicans are the most likely poachers. As of this same date, 123 poachers had been arrested,³⁵ a majority likely Mozambican nationals. Indeed, SANParks estimates that 80 to 90 percent of all rhino poaching in South Africa can be attributed to Mozambican nationals.³⁶ Unfortunately, South African anti-poaching units are unable to chase Mozambican poachers back across the border due to a lack of “hot pursuit” regulation. Recently

²⁵ TRAFFIC (2014), *2013 Worst Ever Rhino Poaching in South Africa*, Press Release, available at: <http://www.traffic.org/home/2014/1/17/2013-worst-ever-for-rhino-poaching-in-south-africa.html>.

²⁶ Varun Vira & Tomas Ewing, *Ivory's Curse: The Militarization & Professionalization of Poaching in Africa*, (April 2014), <http://www.bornfreeusa.org/downloads/pdf/Ivorys-Curse-2014.pdf>.

²⁷ CITES, *Rhinoceroses: Report of the Secretariat*, *supra* note 17.

²⁸ MOSES MONTESH, RHINO POACHING: A NEW FORM OF ORGANISED CRIME, 10 (College of Law Research & Innovation Committee of the University of South Africa, 2012), *available at* http://www.unisa.ac.za/news/wpcontent/uploads/2013/03/Rhino_poaching_organised_crime.pdf [hereinafter MONTESH, RHINO POACHING: A NEW FORM OF ORGANISED CRIME]; *see also* Save the Rhino, *Why Are Kruger's Rhinos Being Hit so Hard?*, *available at* http://www.savetherhino.org/latest_news/news/667_why_are_krugers_rhinos_being_hit_so_hard.

²⁹ *See generally* Peace Parks Foundation, *available at* <http://www.peaceparks.org/story.php?pid=1&mid=2>.

³⁰ Varun Vira & Tomas Ewing, *Ivory's Curse: The Militarization & Professionalization of Poaching in Africa*, 75 (April 2014), <http://www.bornfreeusa.org/downloads/pdf/Ivorys-Curse-2014.pdf>.

³¹ Save the Rhino, *Why Are Kruger's Rhinos Being Hit so Hard?* *supra* note 20.

³² CITES, *Rhinoceroses: Report of the Secretariat*, *supra* note 17, at 17.

³³ Varun Vira & Tomas Ewing, *Ivory's Curse: The Militarization & Professionalization of Poaching in Africa*, 75 (April 2014), <http://www.bornfreeusa.org/downloads/pdf/Ivorys-Curse-2014.pdf>.

³⁴ Department of Environmental Affairs, Republic of South Africa, Statement by the Department of Environmental Affairs on the issue of trade in rhino horn, June 6, 2014, *available at* <https://www.environment.gov.za/mediarelease/rhinohorntrade>.

³⁵ *Id.*

³⁶ Irvine Makuyana, *Assault on SA rhinos intensifies*, THE NEW AGE ONLINE (Feb. 13, 2013), http://www.thenewage.co.za/82907-1100-53-Assault_on_SA_rhinos_intensifies/?switcher=1 (last visited Apr. 28, 2014).

however, a “hot pursuit strategy” has been forwarded to the South African National Parks head office for approval.³⁷

Mozambican poaching is escalating both in frequency and sophistication. In the past, poachers generally hailed from local communities living near protected areas and poaching was less sophisticated; now it is clear that poaching is more systematic, integrated into globalized illegal trade, and run by organized criminal syndicates.³⁸ These criminal syndicates are supplying Mozambican poachers with weaponry, funding, and easy links to global markets. Thus, in recent years, a new breed of poacher has entered the game—highly skilled, and likely well-funded, marksmen. These poachers rely on high-caliber rifles, silencers, restricted immobilization drugs shot from helicopters, and even silent but deadly cross bows—methods previously unseen in the poaching trade.³⁹ Crime syndicates are most likely responsible for employing these highly skilled poachers and supplying them with the necessary tools and funding. Further, rhino poachers that function within organized crime syndicates have cross-boundary operational support within Mozambique and Zimbabwe.⁴⁰

Further driving the poaching crises in Mozambique is the high level of corruption plaguing the country,⁴¹ amplifying the ability of the crime syndicates to operate poaching crews, which reportedly include members of the Mozambican army or police.⁴² Raids of poaching camps in Mozambique have turned up army boots and uniforms, automatic weapon ammunition, and other army supplies.⁴³ Rebel militias are also players in rhino and elephant poaching in Mozambique and by Mozambicans. Links between African militia rebels and poaching go back several decades, and while the complicity of military operations in illegal trade in certain countries has now been eradicated, it remains a serious issue in Mozambique.⁴⁴

Recently, Mozambique’s role in rhino poaching and illegal trafficking in rhino horn became a focal point of the CITES Parties’ attention. Last year, the CITES Secretariat reported that:

[i]n the wake of scaled-up law enforcement actions against rhino crime in South Africa, neighbouring Mozambique appears to be emerging as a highly important entrepot and transit country as well as the source of many of the poachers operating in South Africa constituting the highest number of foreign national arrests.⁴⁵

³⁷ Save the Rhino, Mozambique Taking Steps to Tackle Rhino Poaching, *available at* http://www.savetherhino.org/latest_news/news/788_mozambique_taking_steps_to_tackle_rhino_poaching.

³⁸ MONTESH, RHINO POACHING: A NEW FORM OF ORGANISED CRIME, *supra* note 25, at 6.

³⁹ MONTESH, RHINO POACHING: A NEW FORM OF ORGANISED CRIME, *supra* note 25, at 8.

⁴⁰ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 10, at 81.

⁴¹ See CITES, *Interpretation and Implementation of the Convention*, Doc. 53.2 at 6, 8, 34, 35 (2007), *discussing* corruption indices.

⁴² Vidhi Doshi, Army Uniforms found at poachers’ camps in Mozambique, INDEPENDENT VOICE, Feb. 11, 2014, *available at* <http://www.independent.co.uk/voices/comment/army-uniforms-found-at-poachers-camps-in-mozambique-9120484.html>.

⁴³ *Id.*

⁴⁴ For an overview of historical military involvement in rhino and elephant poaching, see Julian Rademeyer, KILLING FOR PROFIT (2012).

⁴⁵ CITES Secretariat, *Conservation of and Trade in Rhinoceroses*, CoP16 Doc 54.2 (Rev. 1), 20 (2013).

Some recent examples of Mozambican rhino poaching include:

- In January 2014, five Mozambican policemen were detained in the southern province of Gaza, Mozambique for their role in an armed robbery in conjunction with rhino horn trafficking.⁴⁶
- In May 2012, two rhinos were poached at the Sabie Game Park in Mozambique. The rhinos were being held at the park awaiting transfer to a safer rhino preserve in South Africa and usually received protection from an anti-poaching unit, as well as aerial surveillance from a micro light aircraft, but the rhinos were left unguarded for a few hours and were found dead 200 meters from where they were last seen.⁴⁷
- Also in May 2012, five Mozambicans were arrested in Polokwane (Limpopo) for illegal possession of rhino horns. A search of their vehicle yielded a rifle, ten rounds of ammunition, and an axe.⁴⁸
- In March 2012, the manager at the Atherstone Nature Preserve in Limpopo committed suicide after his alleged involvement in a rhino-poaching incident that also included three Mozambican nationals.⁴⁹
- In March 2011, three Mozambicans were convicted in the Nelspruit Regional Court for illegally hunting rhino in the Crocodile Bridge section of KNP.⁵⁰
- In January 2012, three Mozambicans were each sentenced to 25 years imprisonment by the Phalaborwa Regional Court for illegally hunting rhinos in KNP. They were caught in the Mooiplaas section of KNP in July 2010 with two rhino horns and an axe, as well as an illegal firearm and ammunition.⁵¹

2. Elephant Poaching and the Role of Mozambican Nationals

Mozambican nationals diminish the effectiveness of CITES by committing extensive poaching of elephants within its own borders and in Tanzania. The Parties have issued numerous decisions and guidance aimed at addressing the illegal killing of elephants in range states (see Appendix A for more details). Range states are expected to vigilantly enforce CITES requirements at each point in the supply chain, including at field level. This expectation is embodied in Res. Conf. 10.10 (Rev. CoP16) which urges “all Parties to assist elephant range States to improve their capacity to manage and conserve their elephant populations, including through community-based actions, improved law enforcement, surveys, habitat protection and monitoring of wild populations.” Parties are also expected to collect and share poaching data, as outlined in Res. Conf. 10.10 (Rev. CoP16), which expands the MIKE and ETIS programs. Furthermore, range states have committed to

⁴⁶ All Africa, Mozambique: Policemen Detained for Trafficking in Rhino Horn, Jan. 24, 2014, *available at* <http://allafrica.com/stories/201401250169.html>.

⁴⁷ Anti-Poaching Intelligence Group Southern Africa, *available at* <http://www.clubofmozambique.com/solutions1/sectionnews.php?secao=mozambique&id=24911&tipo=one> (last visited Feb. 6, 2014).

⁴⁸ MONTESH, RHINO POACHING: A NEW FORM OF ORGANISED CRIME, *supra* note 25, at 10.

⁴⁹ *Id* at 8.

⁵⁰ *Id* at 10.

⁵¹ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 10, at 98.

implementing African elephant action plans, which are specifically designed to halt rampant poaching on the ground, and to report the results to the CITES Standing Committee.

Despite the deepening elephant poaching crisis and the above-mentioned CITES' efforts to address it, elephant poaching by Mozambican nationals remains at crisis levels. In Mozambique, the poaching problem is most serious in the Niassa National Reserve in the northern part of the country on the border with Tanzania. Niassa's elephant numbers have dropped from more than 20,000 in 2009 to 9,000 in 2013,⁵² and the reserve has an especially high "proportion of illegally killed elephants" (PIKE) level.⁵³ In fact, PIKE data since 2008 indicates that PIKE levels at Niassa have stayed above 0.5, indicating that at least half of elephant carcasses found were poached.⁵⁴ In 2011, of the 85 elephant carcasses registered at the Niassa PIKE site, 75 were identified as being illegally killed.⁵⁵ In 2012, it was estimated that Niassa experienced a four-fold increase in elephant carcasses since 2009.⁵⁶ Niassa only has 120 rangers and many of these have been linked to poachers.⁵⁷

Poaching is so severe in Niassa that it is losing elephants at the rate of three to four a day, and poachers are now targeting elephants in Tanzania, smaller reserves in southern Mozambique, Limpopo and KNP.⁵⁸ PIKE levels are above 0.5 in Cabora Bassa in northwest Mozambique.⁵⁹ Mozambicans have also been caught on poaching excursions in KNP, as well as on Mozambique's side of the park.⁶⁰ Late last year, conservationists warned SANParks that elephant poaching was likely to increase in KNP, with poachers entering the park looking for a "double hit"—both rhinos and elephants.⁶¹

Some recent examples of Mozambican elephant poaching include:

- In November 2013, a private tourism operator in Quirimbas National Park in Cabo Delgado in northern Mozambique said at least 89 elephants had been poached in his concession area of the park during that year.⁶²

⁵² Oxpeckers, *Ivory Poaching in Mozambique* (Feb. 12, 2013), available at <http://oxpeckers.org/2013/12/ivory-poaching-in-mozambique/>.

⁵³ UNEP, CITES, IUCN, TRAFFIC, *ELEPHANTS IN THE DUST* 37 (2013), available at http://www.unep.org/pdf/RAAivory_draft7.pdf [hereinafter UNEP, ET AL., *ELEPHANTS IN THE DUST*]

⁵⁴ CITES, *Monitoring the Illegal Killing of Elephants*, CoP16 Doc. 53.1, 14 (2013).

⁵⁵ *Id.*

⁵⁶ Varun Vira & Tomas Ewing, *Ivory's Curse: The Militarization & Professionalization of Poaching in Africa*, 75 (April 2014), <http://www.bornfreeusa.org/downloads/pdf/Ivorys-Curse-2014.pdf>.

⁵⁷ *Id.*

⁵⁸ Oxpeckers, *Mozambique Poachers Set Sights on Kruger Ivory*, available at <http://oxpeckers.org/2013/10/mozambique-poachers-set-sights-on-kruger-ivory-2/>.

⁵⁹ CITES, *Monitoring the Illegal Killing of Elephants*, CoP16 Doc. 53.1, 14 (2013).

⁶⁰ Fiona Macleod, *Poachers Set Sights on Kruger Ivory*, MAIL & GUARDIAN (Apr. 5, 2013), available at <http://mg.co.za/article/2013-04-05-00-poachers-set-sights-on-kruger-ivory>.

⁶¹ Look Local, *Elephant Poaching May Hit South Africa Next Year* (Dec. 3, 2013), available at <http://www.looklocal.co.za/looklocal/content/en/lowveld/lowveld-mobile-news?oid=7994262&sn=Mobile-Detail&pid=4732825&Elephant-poaching-may-hit-South-Africa-next-year>.

⁶² Hongxiang Huang and Estacio Valoi, *Ivory Poaching in Mozambique*, LE MONDE DIPLOMATIQUE, Nov., 2013, available at <http://mondediplo.com/blogs/ivory-poaching-in-mozambique>.

- In June 2013, 64 elephants were killed in the Niassa Reserve.⁶³
- In April 2013, poachers killed at least six elephants on the Mozambican side of the border with KNP.⁶⁴
- In May 2013, Mozambican poachers in South Africa’s Tembe Elephant Park killed an elephant cow.⁶⁵
- In November 2012, it was reported that at least two elephants are killed per week in the Mozambique’s Mareja Reserve in Cabo Delgado.⁶⁶
- The Director of Mozambique’s National Conservation areas, Francisco Pariela, said there have been many poachers caught in Niassa over the past few years.⁶⁷
- In 2011, poachers wearing military uniforms and armed with AK47s killed at least 12 elephants in Mozambique’s Quirimbas National Park in one week.⁶⁸
- In 2011, two Mozambican poachers were killed in a shoot-out in Kruger National Park.⁶⁹
- Poachers are reported to have killed at least 12 big tuskers on the Mozambican side of the border with KNP, raising fears that the ivory wars afflicting other parts of Africa have filtered through to the tip of the continent.⁷⁰

B. Mozambique Fails to Effectively Enforce Trade Controls

The Mozambican government’s failure to effectively enforce CITES trade controls and the involvement of Mozambican nationals in illegal ivory sales seriously undermine CITES conservation efforts. The CITES Parties have focused on border control and enforcement as key aspects of controlling illegal trade for much of CITES’ history, and the Parties have specifically addressed these issues in the context of illegal trade in both rhino horn and elephant ivory. Mozambique has been implicated repeatedly and evidence suggests the escalation of illegal sale of rhino horn and elephant ivory by Mozambican nationals on both domestic and international markets.⁷¹

1. Illegal Trade in Rhino Horn

Resolution Conf. 9.14 (Rev. CoP15) on rhinos urges “all Parties to adopt and implement comprehensive legislation and enforcement controls, including internal trade restrictions and

⁶³ Yuan Duanduan, The Blood Ivory Behind the Largest Ivory Smuggling Cases in China, SOUTHERN WEEKEND, Nov. 15, 2013, *available at* <http://www.savetheelephants.org/news-reader/items/the-blood-ivory-behind-the-largest-ivory-smuggling-cases-in-china.html>.

⁶⁴ Fiona Macleod, Poachers set sights on Kruger Ivory, *supra* note 279.

⁶⁵ Open letter from Earth Afrika to Adv. J. H. de Lange, May 26, 2013, *available at* <http://vivaafrika.wordpress.com>.

⁶⁶ Global Voices, Widespread Elephant Poaching in Mozambique Reserve Uncovered, *available at* <https://globalvoicesonline.org/2012/11/25/mozambique-elephant-poaching/> (last visited Feb. 23, 2014).

⁶⁷ Jinty Jackson, Elephant Poachers Plague Mozambique, VOICE OF AMERICA, Apr. 23, 2013, *available at* <http://www.voanews.com/content/elephant-poachers-plague-mozambique/1647285.html>.

⁶⁸ All Africa, Mozambique: Poachers Kill 12 Elephants in Quirimbas Park, Sept. 17, 2011, *available at* <http://allafrica.com/stories/201109180133.html> (last visited Feb. 24, 2014).

⁶⁹ Rademeyer, *supra* note ____, at 211-213 (although family members claim that they men were not poaching).

⁷⁰ Oxpeckers, Mozambique sets sights on Kruger ivory (Oct. 8, 2013), *available at* <http://oxpeckers.org/2013/10/mozambique-poachers-set-sights-on-kruger-ivory-2/> (last visited Mar. 3, 2013).

⁷¹ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE, *supra* note 34, at 142.

penalties, aimed at reducing illegal trade in rhinoceros parts and derivatives.”⁷² Parties have continuously urged implementation of Resolution 9.14 (Rev. CoP15); in fact, the Secretariat has requested information from Parties regarding measures taken to reduce illegal trade in rhino parts, among other things.⁷³

An increasing number of rhino horns are suspected to be moving out of Mozambican exit ports, including the international airport in Maputo, with the horns then moving on to airports in Kenya, Ethiopia and Mauritius for export to Asia.⁷⁴ In fact, Maputo is emerging as a new staging base for the export of rhino horns from Africa.⁷⁵ Most Mozambican smugglers are young or middle-aged males, and some have reportedly made multiple trips as regular couriers.⁷⁶ Rhino horns are also being transported by sea in shipping containers, and Mozambique’s Beira port has been highlighted as a particular concern.⁷⁷ Other reports indicate that the Nacala port is also a smuggling hot spot where space can be rented to pack containers, making it easy to add ivory or rhino horn undetected.⁷⁸ Additionally, a *TIME* magazine reporter indicated that Hanoi-based rhino horn dealers frequently mentioned the Vietnamese Embassy in Mozambique as a source of rhino horn from Africa.⁷⁹ In the Secretariat’s recent report, a number of rhino horn seizures made since CoP16 with suspected Mozambican origin or links are highlighted, indicating that criminal syndicates are targeting Mozambique as a country from which rhino horn can be obtained and smuggled.⁸⁰

Several other specific incidents demonstrate that Mozambique is ineffective at enforcing rhino horn trade controls at its borders:

- In 2013, reports surfaced of shop owners offering rhino horns for sale at a Saturday market in Maputo. One particular shop owner offered rhino horn priced at US\$15,000 per kilogram. Though offered to shoppers at the market, the rhino horn was kept at a separate location away from the marketplace due to its high value and risk.⁸¹
- In September 2013, a Vietnamese man was arrested at an airport in Kenya while trying to smuggle five rhino horns out of the country. He was in transit from the Maputo airport en route to Hong Kong.⁸²

⁷² Resolution Conf. 9.14 (Rev. CoP15), *supra* note 16.

⁷³ CITES, *Conservation of and Trade in African and Asian Rhinoceros*, Notification to the Parties, No. 2012/014 (Feb. 20, 2012).

⁷⁴ CITES, *Rhinoceroses: Report of the Secretariat*, *supra* note 17, at 6.

⁷⁵ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 34, at 6.

⁷⁶ *Id.*

⁷⁷ *Id.* at 85.

⁷⁸ See generally Charles Goredema, *Getting Smart and Scaling Up: The Impact of Organized Crime on Governance in Developing Countries: A Case Study of Mozambique*, 146-147 (2013), available at http://cic.nyu.edu/sites/default/files/kavanagh_crime_developing_countries_mozambique_study.pdf (describing the Nacala route as a major smuggling pathway).

⁷⁹ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE, *supra* note 34, at 129 citing H. Beech, pers. comm., Oct. 20 2010.

⁸⁰ CITES Secretariat, *Species trade and conservation: Rhinoceroses. Report of the Secretariat*, SC65 Doc. 43.2, at 34 (2014).

⁸¹ Oxpeckers, *Chinese Connections in African Ivory & Rhino Horn Markets*, available at <http://oxpeckers.org/2013/10/chinese-connections-in-african-ivory-rhino-horn-markets/> (last visited Mar. 20, 2014).

⁸² Joseph Muraya, *Vietnamese Arrested with Rhino Horns at JKIA*, CAPITAL NEWS (Sept. 17, 2013), available at <http://www.capitalfm.co.ke/news/2013/09/vietnamese-arrested-rhino-horns-jkia/>.

- In May 2013, six rhinoceros horns, allegedly originating from Mozambique, were seized in Cambodia.⁸³
- In August 2012, a parcel that was declared to be a “ceramic sculpture” was seized in Hong Kong, and it actually contained five pieces of rhino horn. The package was en route from Mozambique to Vietnam.⁸⁴
- Also in August 2012, the Bureau of Customs of Manila, Philippines, seized six pieces of rhino horn that had arrived at the Manila International Container Port from Mozambique.⁸⁵

South African officials have made several other arrests of Vietnamese couriers in transit through Johannesburg via Maputo, further highlighting Mozambique’s lax border control.⁸⁶ Additionally, “runners” connected with rhino horn dealers have been tracked driving from South Africa’s Gauteng province to key Mozambican border crossings.⁸⁷ The runners stay at the border crossings for short periods of time before traveling back to Gauteng in what are likely pick-ups or transfers of rhino horn.⁸⁸

Reports of rhino horn sales by Mozambicans to tourists indicate that unregulated domestic markets also undermine CITES conservation efforts. Several news sources have reported instances of individuals illegally obtaining elephant ivory and rhino horn through open markets in Mozambique. For example, in 2013 reports surfaced of shop owners offering rhino horns for sale at a Saturday market in Maputo.⁸⁹ One particular shop owner offered rhino horn priced at US\$15,000 per kilogram. Though offered to shoppers at the market, the rhino horn was kept at a separate location away from the marketplace due to its high value and risk.⁹⁰

2. Illegal Trade in Elephant Ivory

The Mozambican government’s failure to cooperate in crucial data gathering efforts and the involvement of Mozambican nationals in the rampant illegal ivory trade both seriously impair CITES elephant conservation efforts. A primary focus of CITES in terms of elephant conservation is tracking illegal trade and strengthening enforcement efforts. The Parties recognize that they must strengthen their law enforcement and border control activities, as well as better coordinate their activities to counter the extensive criminal networks that regularly work across borders.

To this end, the Parties rely heavily on the data range states report to ETIS, especially with respect to seizures of ivory products. Because Mozambique is a key player in terms of its role in illegal trade, Mozambique should regularly share information with the program. Since it began reporting to the CoP in 2002, ETIS reports have noted that Mozambique stands out for not reporting to either

⁸³ CITES Secretariat, *Species trade and conservation: ELEPHANT CONSERVATION, ILLEGAL KILLING AND IVORY TRADE*, SC65 Doc. 42.1 (2014).

⁸⁴ CITES Secretariat, *Conservation of and Trade in Rhinoceroses*, *supra* note 17, at 7.

⁸⁵ *Id.*

⁸⁶ MILLIKEN & SHAW, *THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS*, *supra* note 10, at 133.

⁸⁷ *Id.* at 87 *citing* R. Taylor, pers. comm., 2009.

⁸⁸ *Id.*

⁸⁹ Oxpeckers, *Chinese Connections in African Ivory & Rhino Horn Markets* (Mar. 10, 2013), *available at* <http://oxpeckers.org/2013/10/chinese-connections-in-african-ivory-rhino-horn-markets/>.

⁹⁰ *Id.*

TRAFFIC or the Secretariat, despite the recommendation to do so in Resolution Conf. 10.10 (Rev. CoP16).⁹¹ Mozambique's failure to report is a consistent trend. In its report to the Parties at CoP16, TRAFFIC noted again that Mozambique rarely reports seizure data to ETIS, even when specifically requested to do so by the Parties or the Secretariat.⁹²

Ivory trade is a significant problem at Mozambique's borders as the following recent incidents reveal:

- In February 2014, a Chinese ivory smuggler was apprehended aboard a Kenya Airways flight while trying to smuggle 0.68 kilos of ivory from Maputo to China.⁹³
- In January 2014, a Chinese national who commenced his travels in Napula, Mozambique was arrested while transiting through a Kenyan airport after he was found with 3.4 kilos of ivory disguised as cups in his luggage.⁹⁴
- In 2013, journalists documented Chinese nationals purchasing ivory products from open markets in Mozambique. Some market vendors reserved boxes of ivory products to be shown only to Chinese shoppers. Many employees sent to Mozambique by their companies easily smuggle ivory out of the country in the form of small souvenirs such as bracelets or carvings.
- In November 2012, ivory pieces weighing 2,475 kilograms that originated in Mozambique were seized in Ho Chi Minh City, Vietnam.⁹⁵
- In January 2011, illegal ivory was found at the Pemba port in shipping containers belonging to the company Miti Mda.⁹⁶
- In May 2010, ivory pieces weighing 383 kilograms, which had originated in Mozambique, were seized in Chua Ve, Hai Phong, Vietnam.⁹⁷
- DNA testing on 2600 kilograms of ivory seized in Hong Kong and 5200 kilograms of ivory seized in Taiwan confirmed that the ivory originated in part from the Niassa Game Reserve in Mozambique.⁹⁸
- In 2010, a Thai national was arrested at Kenya's Jomo Kenyatta International Airport en route from Mozambique to Thailand. She pleaded guilty to being in possession of 19.5 kilograms of assorted ivory cargo. The woman claimed to have purchased the

⁹¹ *ETIS Report of TRAFFIC*, *supra* note 35, at 22.

⁹² *Id.*

⁹³ Jemimah Wangui, *Another Chinese Ivory Smuggler Nabbed at JKIA*, CAPITOL NEWS, Feb. 15, 2014, available at <http://www.capitalfm.co.ke/news/2014/02/another-chinese-ivory-smuggler-nabbed-at-jkia/>.

⁹⁴ Space for Giants, 40-year-old Chinese man arrested at JKIA with ivory disguised as cups (Kenya) (Jan. 19, 2014), available at <http://www.spaceforgiants.org/?q=ele-news/40-year-old-chinese-man-arrested-at-jkia-with-ivory-disguised-as-cups-kenya>. See also BBC News Africa, *Chinese Ivory Smuggler Gets Record Kenyan Fine*, Jan. 28, 2014, available at <http://www.bbc.co.uk/news/world-africa-25925176>.

⁹⁵ CITES, *Elephants*, CoP16 Inf. 50, 5 (2013).

⁹⁶ All Africa, *Mozambique: Illegal Ivory Found at Pemba Port* (Jan. 13, 2011), available at <http://allafrica.com/stories/201101140219.html>.

⁹⁷ CITES, *Elephants*, CoP16 Inf. 50, 5 (2013).

⁹⁸ Sam Wasser *et al.*, *Elephants, Ivory and Trade*, SCIENCE, Vol. 327, Mar. 12, 2010.

ivory goods in the open market in Mozambique, calling it “a free trade in Mozambique.”⁹⁹

Unregulated internal ivory markets within Mozambique also diminish the effectiveness of CITES. In order to combat the open sale of elephant ivory, Resolution Conf. 10.10 (Rev. CoP16) urges Parties with ivory carving industries, legal domestic trade, or unregulated markets within their jurisdictions to adopt comprehensive internal legislative, regulatory and enforcement measures to control internal ivory trade.¹⁰⁰ Additionally, the resolution urges Parties to register or license all wholesalers and retailers dealing in raw, semi-worked, or worked ivory products and introducing inspection and recording measures.¹⁰¹

As a result of international pressure, the National Directorate of Forestry and Wildlife of the Ministry of Agriculture of Mozambique began to take steps to control ivory trade within the country.¹⁰² It published a notice in 2005 calling for individuals and collectors of wildlife trophies to register possession of any “animal products or trophies” by June 30, 2005.¹⁰³ Because public access to a database of registered individuals, collectors, or vendors of animal products or trophies is not available to date, it is unclear whether such a database actually exists or is maintained. It is equally unclear whether Mozambique enforces the registration requirement in a meaningful way.

Because of the crucial link between internal markets and international trade, the Parties adopted at CoP13 the Action Plan for the Control of Trade in African Elephant Ivory, which declared that African elephant range States “should urgently . . . prohibit the unregulated domestic sale of ivory.”¹⁰⁴ The Action Plan also asked Parties to report on progress made in this regard by the 53rd meeting of the Standing Committee.¹⁰⁵ Mozambique failed to report by this deadline but had reported by CoP14.¹⁰⁶ Concerned that Mozambique had not reported by the original deadline and alarmed at the rampant growth rate of Mozambique’s internal markets, TRAFFIC and WWF, among others, advocated for trade sanctions against Mozambique at the 53rd meeting of the Standing Committee.¹⁰⁷ Although never agreed to, even the threat of these trade sanctions may have motivated Mozambique to comply with its reporting requirements under the Action Plan by CoP14.

By CoP14, Mozambique’s classification among ranked “clusters”—groupings of countries exhibiting similar trade patterns—in ETIS analyses had become notable. TRAFFIC emphasized

⁹⁹ Richard Munguti, Kenya Court Fines Thai Woman \$500 over Illegal Ivory, *available at* <http://www.africareview.com/News/Kenya-court-fines-Thai-woman-over-illegal-ivory/-/979180/1079216/-/14oavc5/-/index.html> (last visited Mar. 20, 2014).

¹⁰⁰ CITES, *Trade in Elephant Specimens*, Resolution Conf. 10.10 (Rev. CoP16).

¹⁰¹ *Id.*

¹⁰² TOM MILLIKEN ET AL., NO PEACE FOR ELEPHANTS: UNREGULATED DOMESTIC IVORY MARKETS IN ANGOLA AND MOZAMBIQUE 28 (TRAFFIC, 2006) *available at*: www.traffic.org/species-reports/traffic_species_mammals26.pdf [hereinafter TOM MILLIKEN ET AL., NO PEACE FOR ELEPHANTS].

¹⁰³ *Id.*

¹⁰⁴ CITES, *Trade in Elephant Specimens*, CoP13 Doc. 29.1 Annex (Rev. 1). The Action Plan was adopted as proposed in Doc. 29.1. *See* CITES, Summary Report of the Plenary Session, CoP13 Plen. 4 (Rev. 1), 7 (2004).

¹⁰⁵ CITES, *Trade in Elephant Specimens*, CoP13 Doc. 29.1 Annex (Rev. 1).

¹⁰⁶ CITES, *Trade in Elephant Specimens*, CoP14 Doc. 53.1, 2 (2007).

¹⁰⁷ *See* TOM MILLIKEN ET AL., NO PEACE FOR ELEPHANTS, *supra* note 66, at viii.

that although Mozambique was not among the most problematic countries, it “could move into more prominent clusters unless the authorities move aggressively to curtail illicit trade in ivory, particularly that associated with their domestic ivory markets.”¹⁰⁸ Despite this plea and forewarning, Mozambique did in fact move to a cluster of countries considered more problematic.¹⁰⁹

In fact, the scale of Mozambique’s ivory trade dramatically increased by 2005, with some experts postulating that it at least doubled between 2002 and 2005.¹¹⁰ In 2005, TRAFFIC conducted an investigative survey of major retail markets throughout Mozambique and found ivory items or composite pieces for sale from 45 vendors in 14 locations in Maputo.¹¹¹ For example, one of the largest craft markets in Maputo, the Polana Hotel Open-air Pavement Market, attracts customers from the nearby upscale hotel.¹¹² The market stretches almost the entire street length of the hotel and local vendors openly display items, while maintaining additional inventory in unpacked boxes.¹¹³ During the survey, 303 ivory items were observed for sale ranging from Maasai figures to jewelry.¹¹⁴ The separate Polana Shopping Center Open-air Pavement Market, located at a busy intersection in front of the Polana Shopping Center in the downtown area of Maputo, is another major outlet for ivory.¹¹⁵ Here, more than 700 ivory pieces were observed for sale at this market during the survey, including three polished whole tusks, three carved whole tusks, 22 small carved tusks, and many carved tusk segments.¹¹⁶

Since the 2005 TRAFFIC report, new stories have continued to show that elephant ivory is still widely available at markets throughout the country, especially in Maputo. Furthermore, Mozambique remains a country of concern in ETIS analyses due to its continued unregulated domestic ivory market.¹¹⁷ In 2013, journalists documented Chinese nationals purchasing ivory products from open markets in Mozambique.¹¹⁸ Some market vendors reserved boxes of ivory products to be shown only to Chinese shoppers. Many employees sent to Mozambique by their companies easily smuggle ivory out of the country in the form of small souvenirs such as bracelets or carvings.

3. Mozambique Has Failed to Implement Adequate CITES Legislation, Lacks Adequate Penalties to Deter Poaching and Illegal Trade and Suffers from Rampant Corruption

¹⁰⁸ CITES, *Monitoring Illegal Trade in Ivory and Other Elephant Specimens*, CoP14 Doc. 53.2, 35 (2007).

¹⁰⁹ T. Milliken, R.W. Burn, & L. Sangalakula, *The Elephant Trade Information System (ETIS) and the Illicit Trade in Ivory*, CoP15 Doc. 44.1 Annex, 19 (2009).

¹¹⁰ See TOM MILLIKEN ET AL., NO PEACE FOR ELEPHANTS, *supra* note 66, at 37 (noting that the ivory trade doubled from 2002 to 2005).

¹¹¹ *Id.* at 34.

¹¹² *Id.* at 31.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 32.

¹¹⁶ *Id.*

¹¹⁷ *ETIS Report of TRAFFIC*, *supra* note 35, at 22.

¹¹⁸ Huang Hongxiang, *The Chinese Ivory-Smugglers in Africa*, CHINA DIALOGUE (Nov. 27, 2013), available at <https://www.chinadialogue.net/article/show/single/en/6540-The-Chinese-ivory-smugglers-in-Africa>; see also Oxpeckers, *The Chinese Ivory Smugglers in Mozambique* (June 12, 2013), <http://oxpeckers.org/2013/12/the-chinese-ivory-smugglers-in-mozambique/>.

1. Mozambique's Inadequate Legislation

Despite the critical importance of adopting adequate legislation to implement CITES effectively, as well as ongoing efforts by the Secretariat and repeated requests by the Standing Committee and the Conference of the Parties, Mozambique has failed to adopt national legislation that meets the basic requirements for implementation of CITES. Mozambique became a Party to CITES in 1981 and has failed to adopt adequate CITES implementing legislation during the entire 30 years it has been a Party. Mozambique has failed to adopt adequate legislation even though the Parties have specifically asked Mozambique to strengthen its CITES implementation efforts since at least 1997. In fact, Mozambique continues to be classified as a Category 2 Party, meaning that its legislation does not meet all requirements for implementing CITES, despite 17 years of concerted capacity-building efforts and much outreach.¹¹⁹

On April 8, 2014, Mozambique's parliament passed the Conservation Areas Act, which includes increased penalties for violating CITES and for hunting protected species.¹²⁰ Although a step in the right direction, it is not clear to what extent the bill will contribute to the systematic improvement of CITES implementation within Mozambique.

2. Mozambique's Inadequate Penalties

The CITES Parties view penalties and fines, when sufficient, as necessary deterrents in the fight against poaching and illegal trade. While Mozambique does have laws that criminalize wildlife offenses, historically, the potential punishments have been too weak to be effective. The country also suffers from a lack of enforcement capacity and high levels of corruption that make prosecuting cases related to poaching and illicit trade difficult.¹²¹

The CITES Parties view penalties and fines, when sufficient, as necessary deterrents in the fight against poaching and illegal trade. In fact, the Secretariat's *Checklist for Reviewing CITES Legislation* indicates that penalties outlined in national legislation must be high enough to constitute an effective deterrent.¹²² With respect to rhino poaching and illegal trade, the Parties have specifically asked that governments increase penalties to more adequately deter criminals.¹²³

¹¹⁹ CITES, *National Laws for the Implementation of the Convention*, CoP16 Doc. 28, 7 (2013). Adequate domestic legislation is so crucial to the effectiveness of CITES that the Parties have developed a National Legislation Project through which the Secretariat reviews and analyzes each Party's domestic legislation, categorizing it as generally meeting the requirements of CITES, generally not meeting all of the requirements for implementation of CITES, or generally not meeting any of the requirements for domestic legislation. Resolution 8.4 (Rev. CoP15), *National Laws for Implementation of the Convention*, provides that domestic legislation must, at a minimum, designate at least one Management Authority and one Scientific Authority, prohibit trade in specimens in violation of the Convention, penalize such trade, and provide authority to confiscate specimens illegally traded or possessed.

¹²⁰ All Africa, *Moambique: Stiff Penalties for Poaching in New Conservation Law*, (April 9, 2014), available at: <http://allafrica.com/stories/201404100710.html>.

¹²¹ See CITES, *Monitoring Illegal Trade in Ivory and Other Elephant Specimens*, CoP14 Doc. 53.2, 6, 8, 34, 35 (2007); see also Tim Jackman, *Ivory Apocalypse*, AFRICA GEOGRAPHIC, 41, Apr. 2013; see also Overview of corruption and anti-corruption in Mozambique, Anti-Corruption Resource Center, available at <http://www.u4.no/publications/overview-of-corruption-and-anti-corruption-in-mozambique/>.

¹²² CITES, *A Checklist for Reviewing CITES Legislation*, SC Doc. 41.12, Annex 1 (1999).

¹²³ See e.g., CITES, *Trade in Rhinoceros Products*, Resolution Conf. 6.10 (1987) (repealed by Res. Conf. 9.14).

Because Mozambique failed to do so, the Parties directed Mozambique specifically to enact legislation with sufficient deterrent penalties and to report to the Secretariat by January 31, 2014 on measures implemented in response to the decision.¹²⁴

As noted in the previous section, Mozambique's parliament passed the Conservation Areas Act in May 2014.¹²⁵ The new law imposes a USD90,000 fine for poaching an endangered species, including rhinos and elephants.¹²⁶ It remains to be seen whether the prison and fine increases outlined in the new legislation will have sufficient deterrent value.

3. Corruption Exacerbates Poor Legislation and Inadequate Penalties

Unfortunately, corruption in Mozambique weakens wildlife conservation efforts. Many studies and indicators suggest that Mozambique remains confronted with challenges of widespread corruption, including within the judicial and criminal enforcement systems.¹²⁷ Conservationists and other analysts have factored perceived corruption levels and law enforcement efforts into analyses regarding poaching and illicit trade trends, and Mozambique has received poor scores on both counts.

For example, at CoP14 in 2007, TRAFFIC submitted a report about the illegal trade in ivory and elephant specimens that included extensive data covering the time period between 1998 and 2006. The data analyzed trends in ivory seizures and included a Corruption Perception Index (CPI) score and a law enforcement effort, effectiveness, and rate of reporting (LE) score. For the CPI, scores ranged from 1.0 (highest perception of corruption) to 10.0 (lowest perception of corruption). The LE ratios ranged from 0.00 (no law enforcement effort) to 1.00 (best law enforcement effort). Mozambique was included in a group with a mean CPI of 3.6 and a mean LE of 0.11, indicating a high perception of corruption and one of the poorest values for law enforcement effort—both of which give rise for concern.¹²⁸

In Mozambique, police and military authorities are often complicit in poaching. A sizable number of Mozambican poachers arrested or killed have been members of the army, border guard, and

¹²⁴ CITES, *Rhinoceroses (Rhinocerotidae spp.)*, Decision 16.87 (2013).

¹²⁵ All Africa, *Mozambique: Stiff Penalties for Poaching in New Conservation Law*, (April 9, 2014), available at: <http://allafrica.com/stories/201404100710.html>.

¹²⁶ See Franz Wild, Mozambique's Chissano Starts Campaign to End Poaching, BLOOMBERG SUSTAINABILITY, Nov. 5, 2013 available at <http://www.bloomberg.com/news/2013-11-05/mozambique-s-chissano-starts-campaign-to-end-poaching.html>; see also All Africa, Mozambique: Police Seize Seven Rhino Horns, Dec. 18, 2013, available at <http://allafrica.com/stories/201312190477.html> (last visited Mar. 7, 2014); see also Sharon Van Wyk, *Death In China, One Dollar in Africa—The Irony of Ivory Poaching Penalties*, DAILY MAVERICK (Oct. 22, 2013), available at <http://www.dailymaverick.co.za/article/2013-10-22-death-in-china-one-dollar-in-africa-the-irony-of-ivory-poaching-penalties/#.UyqEXNyQaf0>.

¹²⁷ Maira Martini, *Overview of Corruption and Anti-corruption in Mozambique*, 2 (Mar. 5, 2012), available at <http://issuu.com/cmi-norway/docs/322?e=0>.

¹²⁸ See CITES *Interpretation and Implementation of the Convention*, CoP14 Doc 53.2 (2007); see also *Ivory's Curse*, supra note 21, at 75 (citing *Mozambique: Criminal Justice*, Africa Governance Monitoring and Advocacy Project, <http://www.afriamap.org/english/images/report/moz-eng-art-2-chapter-5.pdf>).

police forces.¹²⁹ A recent report describes the high-level collusion typical of poaching in Mozambique:¹³⁰

In December 2011, eight members of the frontier guard in Niassa were involved in the sale of 350 kg of seized ivory to Tanzanian citizens. Instead of receiving an aggravated punishment, they were transferred to a different location. In June 2012, six tons of ivory was stolen from a stockpile in Maputo. That followed another heist of an undisclosed amount approximately one year earlier, also from a warehouse in Maputo. Nearly 1.1 tons reportedly went missing from the central ivory stockpile in Maputo in February 2012, and since then it appears that the ivory stockpile in Pemba in Cabo Delgado Province has also disappeared, for the second time now.

In the case of a 2010 massacre of 12 elephants near the Mbama village in Mecula district, the investigation led to police in Balama, who supplied the poachers with weapons. Mozambique army uniforms have been discovered at poaching sites, and in yet another report, a PRM district commander collaborated with the chief of the town of Mpamanta to provide an AK-47 to a local gang in order for them to poach game within the LUWIRE (L-7) concession. Shortly after this scandal, the FRELIMO party head in Mpamanta resigned.

The corruption rampant in Mozambique's system of governance allows wildlife criminals to act with impunity and fosters a sense of Mozambique as a safe haven for criminal syndicates. When poaching and illegal trade offer financial opportunity with low risk to well-being and livelihood, many Mozambicans willingly chose a life of crime, whether they are low-level poachers, middle men, complicit government officials, or criminal masterminds. In one case, police in Balama supplied poachers with guns, which led to the poaching of 12 elephants in 2010.¹³¹ In other cases, official uniforms have been found at poaching sites, and known officials have supplied poaching gangs with weapons.¹³² The warden of the Great Limpopo Transfrontier Park has reported that 30 of the park's 100 rangers are alleged to be abetting poachers.¹³³

4. Mozambique Has Failed to Secure Stocks of Government-held Rhino Horn and Elephant Ivory

Mozambique's failure to secure ivory and rhino horn stocks diminishes CITES enforcement capacity. CITES Resolution Conf. 9.14 (Rev. CoP15) urges Parties in control of stocks of rhinoceros horn to mark, register and secure the stocks.¹³⁴ It also urges Parties to adopt legislative

¹²⁹ See *Ivory's Curse*, *supra* note 21, at 75 ("Of the hundreds of Mozambican poachers arrested or killed, a sizable number have been members of the army, border guard, and police forces, both active and demobilized.").

¹³⁰ Varun Vira & Tomas Ewing, *Ivory's Curse: The Militarization & Professionalization of Poaching in Africa*, at 75 (April 2014), <http://www.bornfreeusa.org/downloads/pdf/Ivorys-Curse-2014.pdf>.

¹³¹ See *id.* (citing "Caça furtiva em alta: Abatidos 12 elefantes na Reserva do Niassa," *Moçambique para todos* (Aug. 2, 2010), http://macua.blogs.com/moambique_para_todos/2010/08/ca%C3%A7a-furtiva-em-alta-abati-dos-12-elefantes-na-reserva-do-niassa.html)

¹³² *Id.*

¹³³ Ed Joyce, Expert: Rhinos extinct in Mozambique, elephants may be next (May 2, 2013), at <http://www.scp.org/news/2013/05/02/37098/expert-rhinos-extinct-in-mozambique-elephants-next/>

¹³⁴ Resolution Conf. 9.14 (Rev. CoP15), *supra* note 16, at "Urges."

and enforcement controls to ensure appropriate control of stocks.¹³⁵ CITES Resolution Conf. 10.10 (Rev. CoP16) urges Parties in control of elephant ivory stocks to maintain an inventory of government-held ivory stockpiles and report the details of the pieces of ivory included in the stock to the Secretariat each year.¹³⁶ The CITES Parties recognize that theft from stockpiles, including government-held stockpiles, “further adds to wildlife crime.”¹³⁷ This is such an important issue that priority assistance from donor countries is given to African elephant range States that have not yet been able to register and develop adequate controls over their ivory stocks.¹³⁸

1. Rhino Horn Stockpiles

To date, no record exists that the government of Mozambique controls any stocks of seized rhino horn as Mozambique has failed to provide any information regarding rhino horn stockpiles to IUCN or the CITES Secretariat in contravention of requests for such information.¹³⁹ Stockpile reporting by other CITES Parties has generally improved over the last several years;¹⁴⁰ however, Mozambique continues to be an outlier, failing to provide updated data on stockpiles.¹⁴¹ While some press reports describe seizures of rhino horn in Mozambique,¹⁴² Mozambique has not reported these seizures and neither TRAFFIC nor any other independent source has verified that rhino horn from these seizures is being stockpiled. Therefore, while it is difficult to estimate how many, if any, rhino horns are present in government-held stocks, it can be assumed that Mozambique holds at least some rhino horns in government stockpiles that have gone unreported. Given the lack of security provided ivory stockpiles, it may well be that at least some seized rhino horn has found its way back onto the black market.

2. Elephant Ivory Stockpiles

Many believe that Mozambique continues to accumulate ivory stocks in various parts of the country,¹⁴³ though Mozambique rarely reports ivory seizure data for entry into the ETIS database.¹⁴⁴ Ivory is seized through various law enforcement actions and elephant management initiatives but, problematically, no centralized system for tracking or auditing ivory stock exists in Mozambique.¹⁴⁵ Additionally, a range of provincial authorities have jurisdiction over various stocks, meaning that no central authority has control over all stockpiles and that information is

¹³⁵ *Id.*

¹³⁶ Resolution Conf. 10.10 (Rev. CoP16), *supra* note 64, at “Urges” (e).

¹³⁷ *Id.* at “Recognizing.”

¹³⁸ *Id.* at “Directs” (b); *see also* CITES, CoP10 Decision 10.2(a) and (d), *available at* <http://cites.org/sites/default/files/eng/cop/10/E10-Decisions.pdf>.

¹³⁹ CITES, *Rhinoceroses: Report of the Secretariat*, *supra* note 17, at 26 (Mozambique did not provide data on stockpiled rhino horn.).

¹⁴⁰ CITES, *Species Trade and Conservation: Rhinoceroses*, CoP14 Doc. 54, 14 (2007).

¹⁴¹ *ETIS Report of TRAFFIC*, *supra* note 35, at 26.

¹⁴² All Africa, *Mozambique: Police Seize Seven Rhino Horns* (Dec. 18, 2013) (stating that Mozambican police seized 7 rhino horns at Maputo International Airport before leaving for Vietnam. The suitcases also contained 44 kg of ivory and 8 kg of ivory bracelets.), *available at* <http://allafrica.com/stories/201312190477.html>

¹⁴³ TOM MILLIKEN ET AL., *NO PEACE FOR ELEPHANTS*, *supra* note 66, at 42.

¹⁴⁴ *ETIS Report of TRAFFIC*, *supra* note 35, at 14; *see also* CITES, *TRAFFIC East/Southern Africa*, CoP15 Doc. 44.1, Annex , (2009); *see also* CITES, *Illegal Trade in Ivory and Other Elephant Specimens*, CoP12 Doc. 34.1, 21 (2002) (Mozambique has failed to report ivory seizures through 2002).

¹⁴⁵ TOM MILLIKEN ET AL., *NO PEACE FOR ELEPHANTS*, *supra* note 66, at 42.

decentralized and fragmented.¹⁴⁶ As such, not much is known about exactly how much ivory has accumulated in the country.¹⁴⁷ Evidence indicates that Mozambique has failed to secure existing stocks of government held ivory resulting in vulnerability to theft and entry into illicit trade, thereby diminishing the effectiveness of CITES.

Mozambique last comprehensively reported its stockpiles in January 1997, when it declared a total of 2,000 kg of government-held ivory stock.¹⁴⁸ Pursuant to Decision 10.2, agreed upon at CITES CoP10 in 1997,¹⁴⁹ the government of Mozambique formally declared stockpiles of ivory in Cabo Delgado, Manica, Maputo, Diassa and Tete Provinces to the CITES Secretariat in September 1997.¹⁵⁰ Mozambique reported stockpiles of 266 elephant tusks weighing a total of 1846.8 kg.¹⁵¹ A subsequent audit by TRAFFIC, however, revealed stockpiles of 269 tusks weighing 1840.4 kg.¹⁵²

Mozambique remains a country of concern under ETIS for several reasons, including reoccurring thefts of ivory stocks from government custody.¹⁵³ Theft of elephant ivory from government-held stockpiles throughout Mozambique has been a continuous problem over the last decade. Major thefts from 2006 to 2012 have resulted in the disappearance of several tons of ivory:

- According to TRAFFIC, 1.5 tons of ivory disappeared from a government stockpile in Pemba in Cabo Delgado Province in mid-2006.¹⁵⁴
- On February 27, 2012, 266 pieces of elephant ivory reportedly went missing from a central ivory stockpile in Maputo.¹⁵⁵ The ivory pieces, totaling nearly 1.1 metric tons,

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 29.

¹⁴⁸ CITES, *Trade in African Elephant Specimens Stockpiles of Ivory*, CoP10 Doc 10.46 (Rev.) (1997); *see also* CITES Decision 10.2(c), subsequently repealed, which provides that this

decision provides for one-off purchase for non-commercial purposes of government stocks declared by African elephant range States to the CITES Secretariat within the 90-day period before the transfer to Appendix II of certain populations of the African elephant takes effect. The ivory stocks declared should be marked in accordance with the ivory marking system approved by the Conference of the Parties in Resolution Conf. 10.10. In addition, the source of ivory stocks should be given. The stocks of ivory should be consolidated in a pre-determined number of locations. An independent audit of any declared stocks shall be undertaken under the auspices of TRAFFIC International, in co-operation with the CITES Secretariat.

¹⁴⁹ *See* CITES, Decisions 10.1 and 10.2 (1997).

¹⁵⁰ TOM MILLIKEN ET AL., NO PEACE FOR ELEPHANTS, *supra* note 66, at 29.

¹⁵¹ *Id.*

¹⁵² *Id.*; *see also* CITES, *Trade in African Elephant Specimens*, Doc 10.46 (1997) (directing an independent audit of declared stocks by TRAFFIC.).

¹⁵³ *ETIS Report of TRAFFIC*, *supra* note 35, at 14; *see also* All Africa, *Mozambique: Six Tonnes of Ivory Stolen* (Jul. 9, 2012), available at <http://allafrica.com/stories/201207091550.html>.

¹⁵⁴ Tom Milliken & Louisa Sangalakula, *Progress in the Implementation of the Elephant Trade Information System (ETIS)*, PACHYDERM 89-93 (2012) [hereinafter Milliken and Sangalakula, *Progress in the Implementation of the Elephant Trade Information System (ETIS)*].

¹⁵⁵ CITES, *Elephant Conservation, Illegal Killing and Ivory Trade*, SC62 Doc. 46.1 (Rev. 1), 23 (2012).

had been stored in a Ministry of Agriculture building in downtown Maputo.¹⁵⁶ One news outlet claimed that the ivory was stolen from inside a safe that was supposed to be guarded by a private security company and surveillance cameras, adding that sources claim the Mozambican authorities did not question the security guards on duty or review the security footage.¹⁵⁷ Notably, the CITES Secretariat was not informed of this loss until April 2012.¹⁵⁸

- Later in 2012, another ivory stockpile disappeared from Pemba in Cabo Delgado Province.¹⁵⁹

The CITES Secretariat and ETIS recommend that in cases where the stolen ivory can be uniquely identified, incidents of thefts should be reported in a timely manner to the Secretariat.¹⁶⁰ Additionally, other international organizations, such as ICPO-INTERPOL and the World Customs Organization, request information.¹⁶¹ While Mozambique has reported stolen ivory to the CITES Secretariat in some instances, no indication exists that Mozambique took efforts to inform other international organizations or that Mozambique consistently reports thefts of stockpiled ivory or rhino horn. Corruption, ivory stockpile thefts, and subsequent reporting failures indicate the inability of the Mozambican government to secure government-held stocks of either ivory or rhino horn adequately.

5. Mozambique Fails to Comply with CITES Reporting Requirements

Mozambique's repeated failure to comply with CITES reporting requirements seriously undermines the Parties' ability to implement effective, cooperative conservation measures. Reporting is essential to ensuring that Parties implement treaty provisions, recommendations, and decisions. Reporting is also essential for determining whether Parties are accomplishing their conservation goals. For these reasons, the Parties have adopted numerous reporting requirements with respect to rhino and elephant conservation. Nonetheless, Mozambique has consistently failed to provide information to the Parties, as required by the Convention or recommended by resolutions and decisions of the Parties.

For example, at CoP10, the Parties directed rhino range States to report on measures taken to conserve their rhino populations.¹⁶² Mozambique failed to report.¹⁶³ At CoP11, the Parties amended Resolution Conf. 9.14 to "strongly urge" range States to report the status of captive and wild rhino populations, a summary of incidents of illegal hunting and illegal trade, information regarding law environment activities and monitoring programs, efforts to develop and implement

¹⁵⁶ *Id.*; see also Milliken and Sangalakula, *Progress in the Implementation of the Elephant Trade Information System (ETIS)*, *supra* note 177, at 92 (listing the total tons missing as 1,094 kg and also identifying the ivory as "stolen.").

¹⁵⁷ All Africa, *Mozambique: Six Tonnes of Ivory Stolen*, available at <http://allafrica.com/stories/201207091550.html>.

¹⁵⁸ CITES, SC62 Doc. 46.1 (Rev. 1), *supra* note 178, at 23.

¹⁵⁹ *ETIS Report of TRAFFIC*, *supra* note 35, at 6 (citing M. Foloma, pers. comm. to TRAFFIC).

¹⁶⁰ CITES, *Report of the Secretariat*, CoP16 Doc. 53.2.1, 4 (2013); see also CITES, SC62 Doc. 46.1 (Rev. 1), *supra* note 178, at 23.

¹⁶¹ *Id.*

¹⁶² CITES, Decision 10.45, *Regarding the Conservation of Rhinoceros*, (1997).

¹⁶³ CITES, Summary Record Committee I, 6 (2000).

relevant national legislation, and the status of rhino horn stocks.¹⁶⁴ Mozambique failed to report.¹⁶⁵ Even by CoP13, Mozambique had failed to report.¹⁶⁶

Mozambique also failed to respond to the Secretariat when it issued two requests for information from Parties regarding their implementation of Resolution Conf. 9.14 (Rev. CoP15) and measures taken to reduce illegal trade, among other things in between CoP15 and CoP16.¹⁶⁷ The Secretariat posted a further request for information from Parties regarding measures taken to deal with the poaching and illegal trade crises, and Mozambique again failed to respond.¹⁶⁸

Between CoP14 and CoP15, the Standing Committee established a Rhino Enforcement Task Force,¹⁶⁹ with Mozambique as a member.¹⁷⁰ The Task Force asked any Party that seizes rhino specimens or becomes aware of illegal trade or poaching to report all relevant information using the Interpol Ecomessage format.¹⁷¹ The Task Force also recommended that after CoP16 greater collaboration with INTERPOL and better sharing of seizure data, identification of prominent entry and exit points, and designation of a national rhino focal point.¹⁷² Although Mozambique participates on this Task Force, it is unclear whether Mozambique has taken any steps toward fulfilling any of the Task Force's recommendations.

In 2013, the ETIS report authors noted that Mozambique stands out for failing to report ETIS data to either TRAFFIC or the Secretariat, despite the recommendation to do in Resolution Conf. 10.10 (Rev. CoP16).¹⁷³ The 2013 ETIS report to CoP16 also states that Mozambique rarely reports seizure data to ETIS, even when specifically requested to do so by the Parties or the Secretariat.¹⁷⁴

Most recently, at CoP16, Mozambique was directed to provide a comprehensive report on the implementation of Resolution Conf. 9.14 (Rev. CoP15) and legislative progress¹⁷⁵ as well as the status of its bilateral cooperation with South Africa,¹⁷⁶ both to be submitted to the Secretariat by January 31, 2014. Mozambique responded to the Secretariat's request approximately two months after the deadline with a four-page document describing its efforts to combat poaching, but as noted in the Report of the Working Group, "On the basis of the limited information provided it is difficult for the Group to draw any meaningful conclusions on the steps taken by Mozambique to effectively implement Resolution Conf. 9.14 (Rev. CoP15)."

¹⁶⁴ CITES, Revised Resolutions of the Conference of the Parties, CoP11, 11 (2000).

¹⁶⁵ CITES, *Rhinoceros Trade and Conservation Issues*, CoP12 Doc. 35, 1 (2002).

¹⁶⁶ CITES, *Conservation of and Trade in Rhinoceros*, CoP13 Doc. 30 (Rev. 1), 2 (2004).

¹⁶⁷ CITES, *Conservation of and Trade in African and Asian Rhinoceros*, Notification to the Parties, No. 2012/014 (Feb. 20, 2012).

¹⁶⁸ CITES, *Conservation of and Trade in African and Asian Rhinoceros*, Notification to the Parties, No. 2012/053 (Aug. 27, 2012); see also CITES, *Rhinoceroses: Report of the Working Group*, CoP16 Doc. 54.1 (Rev. 1), 3, 4 (2013) (noting that only a few countries responded to each request).

¹⁶⁹ CITES, SC57 Summary Record, at 21 (2008).

¹⁷⁰ CITES, Notification to the Parties, *Illegal Trade in Rhinoceros Horn*, No. 2008/069 (Dec. 16, 2008).

¹⁷¹ *Id.*

¹⁷² CITES, *Rhinoceroses (Rhinocerotidae spp.)*, Notification to the Parties, No. 2014/006 (Jan. 23, 2014).

¹⁷³ *ETIS Report of TRAFFIC*, *supra* note 35, at 22.

¹⁷⁴ See TOM MILLIKEN ET AL., NO PEACE FOR ELEPHANTS, *supra* note 66, at 29-30.

¹⁷⁵ CITES, *Rhinoceroses (Rhinocerotidae spp.)*, Decision 16.87 (2013).

¹⁷⁶ CITES, *Rhinoceroses (Rhinocerotidae spp.)*, Decision 16.88 (2013).

Mozambique also failed to submit a report on Decision 16.88, though cross-border cooperation was mentioned in their response to Decision 16.87.¹⁷⁷ A Memorandum of Understanding was signed with South Africa on April 17, 2014.

Given the vital need for international cooperation to protect rhinos and elephants, these failures to report at all or to inadequately report clearly diminish the effectiveness of CITES. Without this information, the Parties are unable to identify where rhino horn may be originating from or how much rhino horn exists in stockpiles or how much elephant ivory is illegally traded.

IV. REQUEST FOR CERTIFICATION AND TRADE SANCTIONS

This petition has shown that nationals of Mozambique are diminishing the effectiveness of CITES, an endangered or threatened species program, as defined by the Pelly Amendment, by failing to control poaching and trade in rhino horn and elephant ivory. As described in Section III, Mozambicans poach rhinos and elephants, both in Mozambique and elsewhere, including in South Africa and Tanzania. Mozambicans openly sell rhino horn and elephant ivory in public markets. The government is doing little, if anything, to prevent these activities. Moreover, Mozambique is failing to implement the resolutions and decisions of the Parties with respect to rhinos and elephants, including Resolution Conf. 9.14 (Rev. CoP15) and Resolution Conf. 10.10 (Rev. CoP16).

Petitioners request the Secretary of Interior to certify pursuant to the Pelly Amendment that Mozambican nationals are diminishing the effectiveness of CITES based on the information provided in Section III. Moreover, we request that the United States prohibit all trade with Mozambique in all CITES-listed specimens and consider additional trade sanctions, as appropriate. Mozambique's continued diminishment of the effectiveness of CITES in relation to rhino horn and elephant ivory warrants, at a minimum, sanctions in all CITES-listed specimens.

Mozambique's weak laws, weak enforcement, porous borders, and corruption with respect to wildlife trade are evidenced across all aspects of wildlife trade, even extending to illegal timber trade. For example, vast information shows that trafficking of rhino horn and ivory often occurs in the same areas as logging projects and accompanies rampant illegal timber exports from Mozambique.¹⁷⁸ The same problems motivating the illegal trade in rhino horn and ivory—weak

¹⁷⁷ CITES Secretariat, *Species trade and conservation: Rhinoceroses. Report of the Secretariat*, SC65 Doc. 43.1 (2014).

¹⁷⁸ EIA, FIRST CLASS CONNECTIONS: LOG SMUGGLING, ILLEGAL LOGGING, AND CORRUPTION IN MOZAMBIQUE 1 (2013), available at <http://www.eia-international.org/wp-content/uploads/EIA-First-Class-Connections.pdf>; see also *Mozambique: Timber Rackets, Gas Booms*, 7 AFRICA CONFIDENTIAL, 12 (Jun. 7, 2013) (stating that Mozambique is a transit point for the trafficking of rhino horn and the trafficking of rhino horn and elephant ivory occurs in the same areas as logging, infrastructure, and mining projects); see also Conservation Action Trust, *The Chinese Ivory Smugglers in Mozambique*, supra note 127 (stating that in 2011, 126 tusks, one rhino horn, pangolin scales, and a tiger skin were found in a timber container belonging to the Chinese company Tienhe; see also *Mozambique: Timber Companies Lose Their Licenses*, THE ZIMBABWEAN, Nov. 1, 2011, supra note 128 (stating that the Nationale Directorate of Land and Forests canceled the licenses of 16 Mozambican and Chinese timber companies between December 2010 and July 2011 after the companies attempted to export a total of 807 containers full of mostly hardwoods that cannot be exported legally unless processed in Mozambique. Some of the containers included rhino horn and elephant ivory, including 126 elephant tusks as well as ivory necklaces and bracelets).

governance, corruption, and poverty—also motivate illegal trade in other species. Thus, trade sanctions in all CITES-listed species are appropriate against Mozambique. Certification is consistent with GATT (See Appendix C).

We note that use of the Pelly Amendment resulted in improvements in the implementation of CITES with respect to rhinos and tigers in the mid-1990s. Taiwan was certified under the Pelly Amendment for undermining CITES and trade sanctions were imposed until Taiwan took serious strides to end its leading role in the rhino horn trade.¹⁷⁹ China was also certified but took actions to improve implementation of CITES by banning domestic trade in rhino horn and tiger bones thereby avoiding US-imposed sanctions.¹⁸⁰ We believe that the Pelly Amendment process can similarly lead to improved implementation of CITES by Mozambique and corresponding conservation gains for rhinos and elephants.

The time has come for the United States to adopt substantial trade sanctions that will encourage Mozambique, finally, to cooperate with the international community to conserve rhinos and elephants by demonstrably improving its implementation of CITES. Without direct, particularized, and concrete action against the key players in the rhino and elephant conservation crises, these species will move closer to the brink of extinction.

* * * * *

We look forward to your prompt investigation and determination consistent with the conclusions made in this petition. If you have any questions, please feel free to contact me.

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¹⁷⁹ Department of the Interior Fish and Wildlife Service, *Termination of the Pelly Amendment Certification of Taiwan*, Federal Register Vol. 62, No. 83 (April 1997), available at <http://www.gpo.gov/fdsys/pkg/FR-1997-04-30/pdf/97-11092.pdf>

¹⁸⁰ Edith Weiss and Karan Jacobson, Eds. *Engaging Countries: Strengthening Compliance with International Environmental Accords* (1998), p. 365, available at http://books.google.com/books?id=W_JAw31U5qQC&pg=PA365&lpg=PA365&dq=china+rhino+pelly+ban&source=bl&ots=loHN8oHVaz&sig=Gdb8V89wBqQDNjOI-b6bZCTuoJg&hl=en&sa=X&ei=0yCWU83xKdWgyASvs4HgDg&ved=0CD8Q6AEwAw#v=onepage&q=china%20rhino%20pelly%20ban&f=false

Petition to Certify Mozambique as Diminishing the Effectiveness of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

Environmental Investigation Agency, Petitioner
International Rhino Foundation, Petitioner

June 27, 2014

Appendix A

ELEPHANTS, RHINOS, MOZAMBIQUE AND CITES

Conservation of rhinos and elephants has long been a focus of CITES. CITES contributes to the conservation of species by limiting and regulating the international trade in specimens of species listed in the CITES Appendices. Appendix I includes species “threatened with extinction which are or may be affected by trade.”¹ CITES prohibits the importation of specimens of Appendix I species for primarily commercial purposes and requires import and export permits for any permissible trade.² Appendix II species are those not currently threatened by extinction, but that may become threatened if trade is not strictly regulated.³ CITES allows both commercial and non-commercial trade in Appendix II species but requires that permits accompany all exports and that each export is “non-detrimental to the survival of that species.”⁴ As documented throughout this section, CITES Parties often adopt additional measures in resolutions and decisions when a species’ conservation status warrants them.

A. Rhinos, CITES and Mozambique

In 1977, the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES or the Convention) included all rhino subspecies in Appendix I. However, as certain rhino populations began to recover—namely the southern white rhino populations in southern Africa—the CITES Parties provided certain countries with healthier populations some flexibility in terms of exporting rhino specimens.⁵ The Parties down-listed the southern white rhino population of South Africa to Appendix II in 1994⁶ and the southern white rhino population of Swaziland in 2004.⁷ The annotation to these listings specifies that it only applies to the South Africa and Swaziland subpopulations “[f]or the exclusive purpose of allowing international trade

¹ CITES, *supra* note XX, art. II(1); CITES, Appendices I and II as of 4 February 1977.

² CITES, *supra* note XX.

³ CITES, *supra* note XX, art. II(2)(a).

⁴ CITES, *supra* note XX, art. II(1); CITES, Appendices I and II as of 4 February 1977.

⁵ See CITES, *Trade in Rhinoceros Specimens: Report of the Secretariat*, Doc. 9.28, pg. 1 (1994) (noting that by 1994, the southern African white rhino and the one-horned rhino of India and Nepal began to experience population increases).

⁶ CITES, *Amendments to Appendices I and II of the Convention*, CoP 9 (Nov. 1994).

⁷ CITES, *Amendments to Appendices I and II of the Convention*, Notification to the Parties No. 2004/073 (Nov. 2004).

in live animals to appropriate and acceptable destinations and hunting trophies.”⁸ The annotation further specifies that all other specimens from these populations “shall be deemed to be specimens of species included in Appendix I and the trade in them shall be regulated accordingly.”⁹ Additionally, by 2004, the Parties also recognized that certain populations of black rhino could sustain limited off-takes and granted South Africa and Namibia each an export quota of five black rhino hunting trophies.¹⁰

At the same time, Parties recognized that substantial demand for and illegal trade in rhino horn were contributing significantly to the rapid decline in overall rhino population numbers worldwide, even while some range States made progress in their rhino conservation efforts. As a result, the Parties have adopted a string of resolutions that have attempted to address the poaching and illegal trade crises. At the third meeting of the Conference of Parties (CoP3) in 1981, the Parties adopted Resolution Conf. 3.11, recommending that the Secretariat ask non-Party States to take measures to prevent the commercial import or export of rhino parts or derivatives.¹¹ Additionally, the resolution recommended that the Secretariat ask all relevant States to impose a moratorium on the sale of government-held stocks of rhino horn as well as to report on their stockpiles in their annual reports.¹²

Illegal trade and poaching continued, however, and at CoP6 in 1987, the Parties acknowledged that drastic measures were necessary to protect rhinos. In fact, a report prepared by the African Elephant and Rhino Specialist Group specifically indicated that poaching had escalated and was particularly severe in Mozambique.¹³ The report further explained that Mozambique once was home to several thousand black rhinos but that heavy poaching, mostly at the hands of armed resistance fighters, reduced the population to fewer than 500.¹⁴ It also notes that large quantities of rhino horn left Mozambique during the early 1980s.¹⁵ In response to this report, the Parties adopted Resolution Conf. 6.10, which, among other things, urged a complete prohibition on all international and domestic sales and trade of rhino parts and derivatives, an increase in penalties for those convicted of rhino related crimes, and strategic action against cross-border poaching.¹⁶

By 1994, in the run up to CoP9, it was clear that still more needed to be done. The world rhino population decreased more than 90 percent from 1970 to 1994.¹⁷ Black rhino populations declined by 95 percent, and the Javan rhino population declined to fewer than 100 animals.¹⁸ Thus, at CoP9 in 1994, the Parties commended the successful efforts of some range States to protect existing

⁸ *Id.* at Appendices (valid as of Sept. 24, 2012).

⁹ *Id.*

¹⁰ CITES, *Establishment of export quotas for black rhinoceros hunting trophies*, Resolution Conf. 13.5 (Rev. CoP14).

¹¹ CITES, *Trade in Rhinoceros Horn*, Resolution Conf. 3.11 (1981) (repealed by Res. Conf. 9.14).

¹² *Id.*

¹³ CITES, *Trade in Rhinoceros Products*, pg. 631 (1987) (the report also noted troublesome poaching in Chad, Central African Republic, all countries in East Africa, Zambia, and Angola).

¹⁴ *Id.* at 632.

¹⁵ *Id.*

¹⁶ CITES, *Trade in Rhinoceros Products*, Resolution Conf. 6.10 (1987)(repealed by Res. Conf. 9.14) (the recommended prohibition specifically excluded non-commercial trade in legitimate hunting trophies).

¹⁷ CITES Secretariat, *Trade in Rhinoceros Specimens: Report of the Secretariat*, Doc. 9.28 § 1 (1994).

¹⁸ *Id.*

rhino populations and reduce consumption of rhino products but concluded that these measures had failed to stem the decline in rhino populations.¹⁹ Concerned about the continued survival of rhinos worldwide, the Parties repealed the two earlier, largely unimplemented resolutions and adopted Resolution Conf. 9.14 regarding the Conservation of Rhinoceroses in Asia and Africa.²⁰

Resolution 9.14 reflected a more comprehensive approach to rhino conservation. The resolution continued to call for some of the same measures as Resolution 6.11, including a heightened focus on cross-border law enforcement collaboration, internal trade restrictions, and the development of range State rhino recovery plans.²¹ In addition, the resolution urges Parties to have adequate legislation (consistent with the requirement found in Article VIII(1) of the Convention), emphasizes early detection of potential poachers, directs the Standing Committee to continue to pursue illegal trade reduction strategies with ongoing evaluation and the development of indicators, and calls for increased funding for range State efforts.²²

In the following years, Resolution Conf. 9.14 continued to evolve, and the Parties took additional measures. At CoP10, the Parties directed rhino range States to report on measures taken to conserve their rhino populations.²³ In its initial report to CoP11, the Secretariat reported that the only reports it received in response to Decision 10.47 were from a handful of range States, including Botswana, India, Namibia, Nepal, and South Africa.²⁴ Mozambique did not report. At CoP11, the Parties amended Resolution Conf. 9.14 to “strongly urge” range States to report at each meeting of the CoP regarding the status of captive and wild rhinoceros populations, a summary of incidents of illegal hunting and illegal trade, information regarding law environment activities and monitoring programs, efforts to develop and implement relevant national legislation, and the status of rhino horn stocks.²⁵ As noted by the Secretariat at CoP12, the only range States to comply with this request were Namibia and South Africa; again, Mozambique did not submit a report.²⁶ At CoP13, the Secretariat again noted that few range States reported; the only reports it received were from Namibia, Swaziland, and China.²⁷ Yet again, Mozambique failed to report, and by this time, its rhino populations had declined precipitously.

These and other conclusions, as well as the evolving state of rhino conservation led the Parties to revise Resolution 9.14 several times, most recently in 2010 at CoP15. Resolution Conf. 9.14 (Rev. CoP15) now “urges” the following actions:

- a) all Parties that have stocks of rhinoceros horn to identify, mark, register and secure such stocks;

¹⁹ CITES, Resolution Conf. 9.14 (Rev. CoP15), *supra* note ____.

²⁰ CITES, Resolution Conf. 9.14, *Conservation of Rhinoceros in Asia and Africa*, in *Resolutions of the Conference of the Parties*, 69, available at <http://www.cites.org/eng/CoP/09/E9-Res.pdf>.

²¹ CITES, *Conservation of Rhinos in Asia and Africa*, Resolution 9.14 (1994).

²² *Id.*

²³ CITES, *Regarding the conservation of Rhinoceros*, Decision 10.45 (1997).

²⁴ CITES, Summary Record Committee I, pg. 6 (2000).

²⁵ CITES, Revised Resolutions of the Conference of the Parties, CoP11, pg. 11 (2000).

²⁶ CITES, *Rhinoceros Trade and Conservation Issues*, CoP12 Doc. 35, pg. 1 (2002).

²⁷ CITES, *Conservation of and Trade in Rhinoceros*, CoP13 Doc. 30 (Rev. 1), pg. 2 (2004).

- b) all Parties to adopt and implement comprehensive legislation and enforcement controls, including internal trade restrictions and penalties, aimed at reducing illegal trade in rhinoceros parts and derivatives;
- c) range States to be vigilant in their law enforcement efforts, including the prevention of illegal hunting, the early detection of potential offenders and the application of appropriate penalties to act as effective deterrents;
- d) that law enforcement cooperation among range and implicated States be increased through existing international, regional and national law enforcement mechanisms and, where necessary, through the creation of such mechanisms in order to curtail illegal trade in rhinoceros horn; and
- e) the implicated States, as a matter of priority, to work with all user groups and industries to develop and implement strategies for reducing the use and consumption of rhinoceros parts and derivatives and to report on progress for inclusion into the joint IUCN/TRAFFIC reports.²⁸

Since CoP14 in 2007, Resolution Conf. 9.14 (Rev. CoP15) also now recommends that the IUCN/SSC African and Asian Rhino Specialist Groups and TRAFFIC submit a report to the Secretariat on the conservation of and trade in rhinos and rhino parts and derivatives, in lieu of range State reporting.²⁹

In 2007, the Parties further adopted Decisions 14.88 and 14.89, which directed countries with stocks of rhino horns to declare their stocks to the Secretariat by CoP15, and invited TRAFFIC to review this information.³⁰ As of CoP15, only two range States submitted information regarding their stockpiles, and the Secretariat expressed disappointment at the rate of noncompliance as well as in the effectiveness of its work and the work of the CITES Parties given the disregard affected Parties seem to have for implementing agreed measures.³¹ Even as of CoP16 in 2013, Mozambique had failed to report on its rhino horn stocks, even as knowledge of arrests for possession of rhino horn in Mozambique became well known.³²

Between CoP14 and CoP15, the Standing Committee took the important step of endorsing the establishment of a Rhino Enforcement Task Force.³³ Importantly, Mozambique participated as a member of the Task Force.³⁴ The Task Force concluded after its first meeting that any Party that seizes rhino specimens or becomes aware of illegal trade or poaching should report all relevant information using the Interpol Ecomessage format.³⁵ The Task Force, including Mozambique, met again after CoP16 and made a number of recommendations dealing with a range of issues relevant to rhino poaching and illegal rhino horn trafficking.³⁶ The recommendations range from greater collaboration with INTERPOL and better sharing of seizure data to identification of prominent

²⁸ CITES, Resolution Conf. 9.14 (Rev. CoP15), *supra* note ____.

²⁹ CITES, *Conservation of and Trade in African and Asian Rhinoceroses*, Resolution Conf. 9.14 (Rev. CoP14).

³⁰ CITES, *Rhinoceroses*, Decision 14.88 (June 2007); CITES, *Rhinoceroses*, Decision 14.89 (June 2007).

³¹ CITES, *Rhinoceroses: Report of the Secretariat*, CoP15 Doc. 45.1 (Rev. 1) (2010).

³² CITES, *Rhinoceroses: Report of the Secretariat*, CoP16 Doc. 54.2 (Rev. 1), pg. 26 (2013)

³³ CITES, SC57 Summary Record, pg. 21 (2008).

³⁴ CITES, Notification to the Parties, *Illegal trade in rhinoceros horn*, No. 2008/069 (Dec. 16, 2008).

³⁵ *Id.*

³⁶ CITES, *Rhinoceroses (Rhinocerotidae spp.)*, Notification to the Parties, No. 2014/006 (Jan. 23, 2014).

entry and exit points and designation of a national rhino focal point.³⁷ Although Mozambique participates on this Task Force, it is unclear whether Mozambique has taken any steps toward fulfilling any of the Task Force's recommendations. To date, information about Mozambique is often from secondary and non-governmental sources.³⁸

Despite this history of extraordinary measures, the situation for rhinos continues to be of grave concern for the CITES Parties and the Secretariat. In accordance with Decision 15.71, the Secretariat reported on the implementation of Resolution Conf. 9.14 (Rev. CoP15) at the sixty-second meeting of the Standing Committee.³⁹ The Secretariat's report, as well as those submitted by range and implicated States, paint a bleak picture for rhinos. In its report, the Secretariat stated that it "continues to believe that the illegal trade in rhinoceros horn is one of the most structured criminal activities faced by CITES," and "increased international cooperation and a well-coordinated law enforcement response will be required to address this threat effectively."⁴⁰ As long as Parties like Mozambique fail to comply with the requirements and recommendation of CITES, the situation for rhinos will continue to decline and recent history indicates that Mozambique will indeed continue its failure to comply.

In between CoP15 and CoP16, the Secretariat issued two requests for information from Parties regarding their implementation of Resolution Conf. 9.14 (Rev. CoP15) and measures taken to reduce illegal trade, among other things.⁴¹ The Secretariat posted a further request for information from Parties regarding measures taken to deal with the poaching and illegal trade crises, but Mozambique failed to respond to either request for information.⁴²

By CoP16, Mozambique's role in rhino poaching and illegal trafficking in rhino horn became a focal point of the Parties' attention. In fact, the Parties took decisions specifically targeting Mozambique. The Secretariat reported that

[i]n the wake of scaled-up law enforcement actions against rhino crime in South Africa, neighbouring Mozambique appears to be emerging as a highly important entrepot and transit country as well as the source of many of the poachers operating in South Africa constituting the highest number of foreign national arrests.⁴³

³⁷ *Id.*

³⁸ See CITES, *African and Asian Rhinoceroses – Status, Conservation, and Trade: A report from the IUCN Species Survival Commission (IUCN/SSC) African and Asian Rhino Specialist Groups and TRAFFIC to the CITES Secretariat pursuant to Resolution Conf. 9.14 (Rev. CoP14) and Decision 14.89*, CoP15 Doc. 45.1 (Rev. 1), pg. 18 (2010).

³⁹ *Id.*

⁴⁰ *Id.* ¶ 33.

⁴¹ CITES, *Conservation of and Trade in African and Asian Rhinoceros*, Notification to the Parties, No. 2012/014 (Feb. 20, 2012).

⁴² CITES, *Conservation of and Trade in African and Asian Rhinoceros*, Notification to the Parties, No. 2012/053 (Aug. 27, 2012); see also CITES, *Rhinoceroses: Report of the Working Group*, CoP16 Doc. 54.1 (Rev. 1), pg. 3, 4 (2013) (noting that only a few countries responded to each request).

⁴³ CITES, *Rhinoceroses: Report of the Secretariat*, CoP16 Doc. 54.2 (Rev. 1), pg. 20 (2013).

As a result of these concerns, the Parties directed Mozambique to take steps to implement Resolution Conf. 9.14 (Rev. CoP15) and to enact legislation with sufficient deterrent penalties.⁴⁴ In the same decision, the Parties further requested Mozambique to report to the Secretariat by January 31, 2014 on measures implemented in response to the decision.⁴⁵ In a separate decision, the Parties directed Mozambique and South Africa to enhance bilateral cooperation to fight the rhino poaching and trade crises and requested a report on the matter by January 31, 2014.⁴⁶ Mozambique filed a 5-page report in March 2014, well after the deadline. The report catalogues anti-poaching measures taken since 2012 in Limpopo National Park, but the working group noted, “It is difficult to draw conclusions about the scale and impact of this activity, given the limited information provided.”⁴⁷ The report also stated that arrests increased from 14 in 2012 to 43 in 2013, and fines issued increased tenfold (to 10,912,250Mt), but the working group note that less than 3% of these fines have been paid, and that “improvement in the judicial system is thus required.”⁴⁸ The working group concluded that, “On the basis of the limited information provided it is difficult for the Group to draw any meaningful conclusions on the steps taken by Mozambique to effectively implement Resolution Conf 9.14 (Rev. CoP15).”⁴⁹

B. Elephants, CITES and Mozambique

The CITES Parties have long considered Asian and African elephants species of concern and, as such, have taken extraordinary measures to improve the conservation status of elephants. In fact, as the conservation status of elephants has evolved, the conservation measures deployed by CITES Parties have evolved. In the face of the most recent poaching crises, the Parties have become increasingly concerned about elephant populations, especially African elephant populations, and considerable attention has been directed to combating rampant poaching and the extraordinary scale of illegal ivory trafficking.

Although the Parties have adopted many decisions and multiple resolutions pertaining to elephants, Resolution Conf. 10.10 (Rev. CoP16) outlines the core expectations of all Parties regarding the illegal trade in and illegal killing of elephants. Resolution Conf. 10.10 (Rev. CoP16) recommends actions regarding marking, national legislation, stockpile security, domestic ivory markets and enforcement. As a means of broadly tackling illegal ivory trade, the resolution urges relevant Parties to ensure that national legislation exists to

- regulate the domestic trade in ivory;
- register or license any individual who deals in ivory, including importers, exporters, manufacturers, and sellers;
- provide for inspection and recordkeeping authority to monitor domestic ivory movements and stockpiles;
- engage in public awareness activities; and

⁴⁴ CITES, *Rhinoceroses (Rhinocerotidae spp.)*, Decision 16.87 (2013).

⁴⁵ *Id.*

⁴⁶ CITES, *Rhinoceroses (Rhinocerotidae spp.)*, Decision 16.88 (2013).

⁴⁷ Sixty Fifth Meeting of the Standing Committee, Geneva (Switzerland), 7-11 July 2014, Interpretation and implementation of the Convention Species trade and conservation, Rhinoceroses, report of the working group.

⁴⁸ *Id.*

⁴⁹ *Id.*

- maintain inventories of ivory stockpiles, whether government-held or private, and report information annually to the Secretariat.⁵⁰

The resolution also recommends a number of enforcement-related actions. Significantly, it recommends that Parties mark all whole tusks and sizable pieces of ivory with information that would help with tracking the ivory should it make its way into illegal trade.⁵¹ Additionally, when a Party intercepts illegal ivory, the resolution asks Parties to collect samples for forensic purposes when the seizure is of 500 kilograms or more of ivory.⁵² The Parties have also recognized that Parties must strengthen their law-enforcement and border control activities, as well as better coordinate their activities to counter the extensive criminal networks that regularly work across borders.⁵³ To strengthen enforcement of international trade controls, Resolution 10.10 (Rev. CoP16) also recommends that all Parties and non-Parties prohibit the unregulated domestic sale of ivory through legislation designed to effectively control the possession, sale and trade of ivory domestically.⁵⁴

Following the adoption of Resolution Conf. 10.10 in 1997, the Parties began to design and implement a more comprehensive and cohesive elephant conservation strategy, largely built on improving their understanding of both illegal trade in elephant specimens and the illegal killing of elephants. This concerted effort evolved into two, now integral, elephant conservation programs: the Elephant Trade Information System (ETIS) and Monitoring the Illegal Killing of Elephants (MIKE).⁵⁵ Both of these data systems rely heavily on input from relevant countries. As Mozambique is a key player both in terms of its role in illegal trade and as a range State for elephants, it should regularly share information with both programs. Because MIKE is more of a collaborative project with in-country field researchers and other partners, individual countries themselves are less responsible for reporting. However, ETIS depends heavily on government reporting, especially with respect to seizures of ivory products. Since it began reporting to the CoP in 2002, the ETIS report authors have noted that Mozambique stands out for not reporting to either TRAFFIC or the Secretariat, despite the recommendation to do in Resolution Conf. 10.10 (Rev. CoP16).⁵⁶ Mozambique's failure to report is a consistent trend: In its report to the Parties at CoP16, TRAFFIC noted again that Mozambique rarely reports seizure data to ETIS, the Elephant Trade Information System, even when specifically requested to do so by the Parties or the Secretariat.⁵⁷

One of the main data sets that ETIS analyzes is the scale of domestic ivory markets, but the role of internal markets in the ivory black market has been a focus of CITES even before the prevalence of ETIS analyses. As early as 1997, with the original adoption of Resolution Conf. 10.10, the Parties recognized the link between internal ivory markets and illicit trade and prompted Parties with open markets and carving industries to bring them under government control.⁵⁸ At CoP12, in

⁵⁰ CITES, *Trade in Elephant Specimens*, Resolution Conf. 10.10 (Rev. CoP16).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See generally http://www.cites.org/eng/prog/mike_etis.php.

⁵⁶ CITES, *ETIS Report of TRAFFIC*, CoP16 Doc. 53.2.2 (Rev. 1), pg. 22 (2013).

⁵⁷ *Id.*

⁵⁸ CITES, *Trade in Elephant Specimens*, Resolution Conf. 10.10 (1997).

the ETIS Summary Report, the authors noted that diverse, large-scale markets are typically more highly correlated with influencing illegal trade, especially when these markets operate in a regulatory framework that is weak or non-existent, as is the case in Mozambique.⁵⁹

At CoP13, domestic ivory markets were again a concern of the Parties. At this CoP, the Parties adopted the Action Plan for the Control of Trade in African Elephant Ivory, which declared that African elephant range States “should urgently . . . prohibit the unregulated domestic sale of ivory.”⁶⁰ The Action Plan also asked Parties to report on progress made in this regard by the 53rd meeting of the Standing Committee.⁶¹ Mozambique failed to report by this deadline but had reported by CoP14.⁶² Concerned that Mozambique had not reported by the original deadline and alarmed at the rampant growth rate of Mozambique’s internal markets, TRAFFIC and WWF, among others, advocated for trade sanctions against Mozambique at the 53rd meeting of the Standing Committee.⁶³ Although never agreed to, even the threat of these trade sanctions may have motivated Mozambique to comply with its reporting requirements under the Action Plan by CoP14.

By CoP14, Mozambique’s classification among ranked “clusters” in ETIS analyses had become notable. TRAFFIC emphasized that although Mozambique was not among the most problematic countries, it “could move into more prominent clusters unless the authorities move aggressively to curtail illicit trade in ivory, particularly that associated with their domestic ivory markets.”⁶⁴ Despite this plea and forewarning, Mozambique did in fact move to a cluster of countries considered more problematic.⁶⁵ In their report to the Parties, the authors noted again that Mozambique did not appear to make ivory seizures or report them to ETIS.⁶⁶ Additionally, the authors highlighted that another particularly troublesome factor with respect to Mozambique was its link to large-scale ivory seizures, which indicates that organized criminal networks play a major role in the domestic and international trade in ivory arising from Mozambique.⁶⁷

At CoP16, in March 2013, the Parties took decisions that emphasized these core principles and specifically requested that the Secretariat liaise with certain Parties identified as playing a significant role in poaching and illegal trade. Specifically, the Parties directed, as opposed to “urged” in Resolution Conf. 10.10 (CoP16), that samples should be taken from ivory seizures of 500 kilograms or more in a timeframe that facilitates forensic analysis and law enforcement purposes.⁶⁸ Additionally, the Parties directed the Secretariat to cooperate with the United Nations

⁵⁹ CITES, *Illegal Trade in Ivory and Other Elephant Specimens*, CoP12 Doc. 34.1, pg. 37 (2002).

⁶⁰ CITES, *Trade in Elephant Specimens*, CoP13 Doc. 29.1 Annex (Rev. 1). The Action Plan was adopted as proposed in Doc. 29.1. See CITES, Summary Report of the Plenary Session, CoP13 Plen. 4 (Rev. 1), pg. 7 (2004).

⁶¹ CITES, *Trade in Elephant Specimens*, CoP13 Doc. 29.1 Annex (Rev. 1).

⁶² CITES, *Trade in Elephant Specimens*, CoP14 Doc. 53.1, pg. 2 (2007).

⁶³ See TOM MILLIKEN ET AL., NO PEACE FOR ELEPHANTS: UNREGULATED DOMESTIC IVORY MARKETS IN ANGOLA AND MOZAMBIQUE viii (TRAFFIC, 2006) available at: www.traffic.org/species-reports/traffic_species_mammals26.pdf [hereinafter TOM MILLIKEN ET AL., NO PEACE FOR ELEPHANTS]

⁶⁴ CITES, *Monitoring Illegal Trade in Ivory and Other Elephant Specimens*, CoP14 Doc. 53.2, pg. 35 (2007).

⁶⁵ T. Milliken, R.W. Burn and L. Sangalakula, *The Elephant Trade Information System (ETIS) and the Illicit Trade in Ivory*, CoP15 Doc. 44.1 Annex, pg. 19 (2009).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ CITES, *Monitoring of illegal trade in ivory and other elephant specimens (Elephantidae spp.)*, Decision 16.83 (2013).

Office on Drugs and Crime regarding illegal killing, the involvement of organized criminal syndicates, and the commensurate security implications in Africa and convene a CITES Ivory Enforcement Task Force, if funding becomes available.⁶⁹ In response to the highest levels of poaching seen since 2006 and the highest seizure quantities recorded in the last 16 years, the Parties also again identified Mozambique as a country of “secondary concern,” and tasked the Secretariat with communicating directly with Mozambique to clarify the country’s implementation of CITES and with reporting its findings to the Standing Committee.⁷⁰ The Parties identified Mozambique as a country of secondary concern based on TRAFFIC’s identification of three primary issues: “the continuation of its unregulated domestic ivory market, the ongoing flow of raw ivory to neighbouring Tanzania or directly to Asia, . . . and reoccurring thefts of ivory stocks from government custody.”⁷¹

⁶⁹ CITES, *Monitoring of illegal trade in ivory and other elephant specimens* (Elephantidae spp.), Decisions 16.81 and 16.78 (2013).

⁷⁰ CITES, *Monitoring of illegal trade in ivory and other elephant specimens* (Elephantidae spp.), Decision 16.79 (2013).

⁷¹ CITES, *Monitoring of illegal trade in ivory and other elephant specimens: ETIS Report of TRAFFIC*, CoP16 Doc. 53.2.2 (Rev. 1), pg. 22 (2013).

Petition to Certify Mozambique as Diminishing the Effectiveness of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

Environmental Investigation Agency, Petitioner
International Rhino Foundation, Petitioner

June 27, 2014

Appendix B

THE CONSERVATION STATUS OF RHINOS AND ELEPHANTS

A. Rhinoceroses

During the past several hundred years, many rhino subspecies or populations have experienced declines that have brought them to the point of near extinction. In 1895, the total population of southern white rhinos was between 20 to 50 individuals;¹ by the early 1900s, fewer than 200 Indian rhinos remained.² Similar declines were prevalent in the later part of the twentieth century as well: in Africa between 1970 and 1992 the population of black rhinos decreased by 96 percent, and the population of northern white rhinos decreased by 99 percent between 1960 and 1984.³ Asian rhino populations, which once ranged across numerous States, have dwindled and have become isolated groups of few individuals.⁴

Eventually, strict conservation measures in many range States slowed the decline of many rhino populations, in some cases even reversing it.⁵ For example, the southern white rhino population in Africa has increased dramatically from the low population numbers in 1895 to an estimated 20,405 wild southern white rhinos in Africa today.⁶ The black rhino unfortunately has not experienced a population rebound as strong as the white rhino; in February 2013, only 5,055 individuals were

¹ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 34, at 9.

² IUCN, *IUCN Red List of Endangered Species, Rhinoceros unicornis* (2012), <http://www.iucnredlist.org/details/19496/0>.

³ WWF, SPECIES FACT SHEET: AFRICAN RHINOS 1 (2006), *available at* http://wwf.panda.org/who_we_are/wwf_offices/wwf_zambia_nature_conservation/wwf_zambia_news_and_publications/?uNewsID=62800.

⁴ MOHD. KHAN BIN MOMIN KHAN, IUCN/SSC ASIAN RHINO SPECIALIST GROUP, ASIAN RHINOS: AN ACTION PLAN FOR THEIR CONSERVATION 1 (1989), *available at* http://www.rhinoresourcecenter.com/pdf_files/117/1178936603.pdf.

⁵ CITES Secretariat, *Conservation of and Trade in Rhinoceroses*, *supra* note 17, at 5; *see also* TOM MILLIKEN ET AL., AFRICAN AND ASIAN RHINOCEROSSES- STATUS, CONSERVATION AND TRADE, CoP15 Doc. 45.1, Annex at 2-3, 13 (Nov. 20, 2009), *available at* <http://www.cites.org/common/CoP15/doc/E15-45-01A.pdf>.

⁶ CITES Secretariat, *Rhinoceroses*, CoP16 Inf. 51, 2 (Mar. 2013).

identified.⁷ The population of Indian rhinos has been increasing for the past 100 years⁸ and in February 2013 was estimated at 3,624 individuals.⁹

Despite efforts by South Africa and other range States to protect rhinos, the dramatic surge in poaching is now significantly affecting rhino populations in Africa and Asia, threatening to reverse the efforts to conserve and rebuild rhino populations.¹⁰ For example, between 2006 and 2012, at least 2,387 rhino were reportedly poached in 11 of the 12 rhino range States in Africa.¹¹ Further, rhino poaching in South Africa increased by more than 7,000 percent since 2007.¹² The total of rhinos poached across Africa in 2012 was 745, which represents a 43% increase from 2011.¹³ The average number of rhinos poached per day across the continent increased from 1.70 per day in the first nine months of 2012 to 3.07 per day in the last quarter of that year, with poaching increasing significantly in Kenya and Zimbabwe as well as South Africa during this period.¹⁴

The trend continued in 2013; the average poaching rate for January and February that year was equivalent to one rhino taken every 11 hours. South Africa reported that poaching left 1004 rhinos dead within its borders in 2013—a historically high number.¹⁵ Sources speculate that many of the South African rhino deaths were at the hands of Mozambican poachers who are increasingly crossing the border into South Africa in search of rhinos.¹⁶ The last few known Mozambican rhinos lived in the Great Limpopo Trans-frontier Park but were killed by poachers in 2013¹⁷—likely extinguishing the country’s rhino population and further driving poachers into other southern African range States. In January of 2014 alone, poachers killed 86 rhinos in South Africa.¹⁸ If poaching rates continue along this trajectory, modeling indicates that rhino deaths will exceed births as soon as 2015.¹⁹

Poaching in Asia is also still of grave concern, though when compared to many African range States, poaching rates are lower. However, the significantly smaller population sizes of Asian

⁷ WWF, PRIORITY SPECIES: BLACK RHINOCEROS *available at* http://wwf.panda.org/what_we_do/endangered_species/rhinoceros/african_rhinos/black_rhinoceros/.

⁸ IUCN, *IUCN Red List of Endangered Species, Rhinoceros unicornis* (2012), <http://www.iucnredlist.org/details/19496/0>.

⁹ CITES Secretariat, *Conservation of and Trade in Rhinoceroses*, *supra* note 17, at 3.

¹⁰ TOM MILLIKEN ET AL., AFRICAN AND ASIAN RHINOCEROSSES- STATUS, CONSERVATION AND TRADE, CoP15 Doc. 45.1 Annex, *supra* note 223, at 3-5, 15.

¹¹ CITES Secretariat, *Rhinoceroses*, CoP16 Inf. 51, *supra* note 224, at 3.

¹² EIA, IN COLD BLOOD COMBATting ORGANISED WILDLIFE CRIME 2 (Feb. 2014), *available at* <http://www.eia-international.org/in-cold-blood-combating-organised-wildlife-crime>.

¹³ See WWF, *Illegal Wildlife Trade Summary*, <http://awsassets.panda.org/downloads/illegalwildlifetradeexternalsummaryoct30.pdf>.

¹⁴ CoP16 Inf. 51, *supra* note 224, at 4.

¹⁵ South Africa Dep’t. Env’tl. Affairs, Press Release, *Update on Rhino Poaching Statistics* (Jan. 17, 2014), *available at* https://www.environment.gov.za/mediarelease/rhinopoaching_statistics_17jan2014.

¹⁶ MONTESH, RHINO POACHING: A NEW FORM OF ORGANISED CRIME, *supra* note 20, at 10.

¹⁷ See Save the Rhino, Mozambique’s Role in the Poaching Crisis, http://www.savetherhino.org/rhino_info/thorny_issues/mozambiques_role_in_the_poaching_crisis.

¹⁸ South Africa Dep’t. Env’tl. Affairs, Press Release, *Submissions on National Rhino Strategy Close on 31 January 2014* (Jan. 30, 2014), *available at* https://www.environment.gov.za/mediarelease/rhinostrategy_safetysecurity_poachingstats.

¹⁹ CoP16 Inf. 51, *supra* note 224, at 4.

rhinos means that even lower levels of poaching are a threat to populations.²⁰ Between 2005 and 2009, poachers killed at least 48 rhinos in Asia.²¹ In 2010, poachers killed the last Javan rhino in a national park in Vietnam, causing the extinction of this subspecies.²² Similarly, in one national park in Nepal in 2008, poachers killed seven rhinos out of a population of 68—about 10% of the park’s rhino population—and poachers killed at least four additional rhinos from the same park in 2009.²³

Three Extinct Subspecies. Three rhinoceros subspecies are now extinct, with two of these subspecies recently declared as such. The IUCN listed the western black rhino (*Diceros bicornis longipes*) as extinct in 2011, based on no reported sightings since 2006, widespread poaching, the growing demand for rhino horn, and lack of political will and conservation efforts by Cameroonian authorities.²⁴ In October 2011, conservationists announced the extinction of the Indochinese Javan rhino (*Rhinoceros sondaicus annamiticus*) in Vietnam.²⁵ A poacher shot and removed the horn of the last individual of this subspecies in Cat Tien National Park in 2010.²⁶ *R. sondaicus inermis*, another subspecies of the Javan rhino formerly found in northeastern India, Bangladesh, and Myanmar, went extinct at the beginning of the twentieth century.²⁷

White Rhinoceros. The white rhinoceros (*Ceratotherium simum*) comprises two subspecies: the southern white rhinoceros (*C. simum simum*) and the northern white rhinoceros (*C. simum cottoni*). The southern white rhino is the most abundant of all extant rhino species.²⁸ Credit for this conservation success story is due in large part to the efforts of South Africa, which has restored its southern white rhino population from between 20 to 50 individuals in 1895 to approximately 18,800 today.²⁹ The total global population of southern white rhinos is approximately 20,170 individuals, with another 750 in captivity.³⁰ South Africa’s white rhino population comprises

²⁰ CITES, *Rhinoceroses: Report of the Secretariat*, *supra* note 17, at 28.

²¹ IUCN, TRAFFIC, & WWF, STATUS, CONSERVATION AND TRADE IN AFRICAN AND ASIAN RHINOCEROSSES, SC58 Inf. 10 Annex at 3 (July 2009), available at <http://www.cites.org/common/com/SC/58/E58i-10.pdf>; see also TOM MILLIKEN ET AL., AFRICAN AND ASIAN RHINOCEROSSES- STATUS, CONSERVATION AND TRADE, CoP15 Doc. 45.1 Annex, *supra* note 223, at 2-3, 13.

²² MILLIKEN & SHAW, THE SOUTH AFRICA-VIET NAM RHINO HORN TRADE NEXUS, *supra* note 34, at 14 stating that “[b]y early 2010, however, the last animal had been poached for its horn.”

²³ IUCN, TRAFFIC, & WWF, STATUS, CONSERVATION AND TRADE IN AFRICAN AND ASIAN RHINOCEROSSES, SC58 Inf. 10 Annex, *supra* note 239, at 3.

²⁴ IUCN, *IUCN Red List of Endangered Species: Diceros bicornis ssp. Longipes* (2012), <http://www.iucnredlist.org/details/39319/0>; see also Daniel Boettcher, *Western Black Rhino Declared Extinct*, BBC NEWS, Nov. 9, 2011, <http://www.bbc.co.uk/news/science-environment-15663982>.

²⁵ Ker Than, *Javan Rhino Extinct in Mainland Asia*, NATIONAL GEOGRAPHIC, Oct. 28, 2011, available at <http://news.nationalgeographic.com/news/2011/10/111028-vietnam-javan-rhinos-extinct-species-science-animals/>.

²⁶ CITES Secretariat, *Conservation of and Trade in Rhinoceroses*, *supra* note 17, at 27.

²⁷ IUCN, *IUCN Red List of Endangered Species: Rhinoceros sondaicus* (2012), <http://www.iucnredlist.org/details/summary/19495/0>; see also Rees Rookmaaker, *Records of the Sundarbans Rhinoceros (Rhinoceros sondaicus inermis) in India and Bangladesh*, 24 PACHYDERM 44 (July–Dec. 1997), available at http://www.rhinoresourcecenter.com/pdf_files/117/1175861857.pdf.

²⁸ IUCN, *IUCN Red List of Endangered Species: Ceratotherium simum* (2012), <http://www.iucnredlist.org/details/4185/0>.

²⁹ MILLIKEN & SHAW, THE SOUTH AFRICA-VIET NAM RHINO HORN TRADE NEXUS, *supra* note 34, at 9.

³⁰ IUCN, *IUCN Red List of Endangered Species: Ceratotherium simum* (2013), <http://www.iucnredlist.org/details/4185/0>.

93.2% of the total white rhino population in Africa.³¹ The next largest populations of southern white rhinos are in Namibia, Zimbabwe, and Kenya,³² though none of these populations numbers more than 500 individuals.³³ Other current range States include Botswana, Swaziland, Mozambique, Uganda, and Zambia,³⁴ though as of 2013, all of Mozambique's known rhinos had been poached.³⁵ The IUCN lists the southern white rhino as “near threatened.”³⁶

In contrast, the northern white rhino population has sharply declined since 1960, when the population was estimated to be around 2,360 individuals.³⁷ Today, the subspecies likely no longer exists in the wild, and only four potentially breeding northern white rhinos are located in a private sanctuary in Kenya.³⁸ The IUCN lists the northern white rhino as “critically endangered” and concludes: “in the absence of finding any additional rhino in the wild, this subspecies is highly unlikely to be viable in the longer term.”³⁹ However, IUCN notes that a small number of northern white rhinos may exist in South Sudan, though this claim is largely unsubstantiated.⁴⁰ Without concrete proof that northern white rhinos exist in the wild, the IUCN concludes that the best hope for this subspecies is “to conserve as many adaptive Northern White Rhino genes as possible for eventual reintroduction back to the wild, but this will require inter-crossing with Southern White Rhino.”⁴¹ In other words, this subspecies is likely to become extinct.

Black Rhinoceros. There are currently three subspecies of black rhinoceros (*Diceros bicornis*): *Diceros bicornis bicornis*, *D. bicornis michaeli*, and *D. bicornis minor*.⁴² As noted above, a fourth subspecies, *D. bicornis longipes*, is extinct.⁴³ Overall, the species has drastically decreased during the twentieth century; the population may have numbered as many as 850,000 individuals at one point, but by 1960 had been reduced to 100,000 and by 1995 only 2,410 remained.⁴⁴ As TRAFFIC notes, “[the] 97% decrease in African black rhino numbers [between 1960 and 1995] represents one of the most dramatic crashes of any large mammal species in recent history.”⁴⁵ As of December

³¹ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 34, at 9.

³² IUCN, *IUCN Red List of Endangered Species: Ceratotherium simum* (2013), <http://www.iucnredlist.org/details/4185/0>.

³³ IUCN, *White Rhinoceros (Ceratotherium Simum) Table 1* (Dec. 2010), http://jr.iucnredlist.org/documents/attach/Mammals/4185_Ceratotherium%20simum.pdf.

³⁴ IUCN, *IUCN Red List of Endangered Species: Ceratotherium simum* (2013), <http://www.iucnredlist.org/details/4185/0>.

³⁵ Aislinn Laing, *Last Rhinos in Mozambique Killed by Poachers*, *supra* note 7.

³⁶ IUCN, *IUCN Red List of Endangered Species: Ceratotherium ssp. simum* (2013), <http://www.iucnredlist.org/details/39317/0>.

³⁷ IUCN, *IUCN Red List of Endangered Species: Ceratotherium simum* (2013), <http://www.iucnredlist.org/details/4185/0>.

³⁸ *Id.*

³⁹ IUCN, *IUCN Red List of Endangered Species: Ceratotherium simum cottoni* (2013), <http://www.iucnredlist.org/details/4183/0>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² IUCN, *IUCN Red List of Endangered Species: Diceros bicornis* (2013), <http://www.iucnredlist.org/details/6557/0>.

⁴³ IUCN, *IUCN Red List of Endangered Species: Diceros bicornis ssp. Longipes* (2013), <http://www.iucnredlist.org/details/39319/0>.

⁴⁴ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 34, at 22.

⁴⁵ *Id.*

2012, the population had risen to an estimated 5,055,⁴⁶ with an additional 240 black rhinos held in captivity worldwide.⁴⁷

As of December 2012, the total population of *D. bicornis bicornis* was estimated at 1,957 (mostly in Namibia and South Africa), the total population of *D. bicornis michaeli* was estimated at 799 (mostly in Kenya), and the total population of *D. bicornis minor* was 2,299 (mostly in South Africa and Zimbabwe).⁴⁸ Other current range states for the species include Angola, Tanzania, Botswana, Malawi, Swaziland, and Zambia.⁴⁹ However, of the eleven States, the total combined population of rhinos in the six states with the fewest rhinos is less than 80.⁵⁰ South Africa has taken a lead in black rhino conservation; the black rhino population in South Africa has been increasing since the 1980s, and the country currently has an estimated 2,044 black rhinos—the most of any range State and nearly 40% of the current worldwide population of wild black rhinos.⁵¹ The IUCN lists the species as a whole, as well as the subspecies *D. bicornis michaeli* and *D. bicornis minor*, as “critically endangered.”⁵² The IUCN lists the subspecies *D. bicornis bicornis* as “vulnerable.”⁵³

Javan Rhinoceros. The Javan rhino (*Rhinoceros sondaicus*) is the most rare of all extant rhino species.⁵⁴ The IUCN, the Zoological Society of London, and the Species Survival Network have recently listed the Javan rhino as one of the 100 most threatened species in the world.⁵⁵ Of the three subspecies of the Javan rhino, *R. sondaicus annamiticus* and *R. sondaicus inermis* have gone extinct.⁵⁶ Scientists estimate the population of *R. sondaicus sondaicus* to include between 40 to 60 individuals, but because of how few individuals remain they suffer a continual population decline.⁵⁷ This subspecies once ranged from Thailand through Malaysia to Indonesia but now only resides within a single national park in Java, Indonesia.⁵⁸ The IUCN lists the Javan rhino as “critically endangered.”⁵⁹

⁴⁶ CoP16 Inf. 51, *supra* note 224, at 2-3.

⁴⁷ IUCN, *IUCN Red List of Endangered Species: Diceros bicornis* (2013), <http://www.iucnredlist.org/details/6557/0>.

⁴⁸ CoP16 Inf. 51, *supra* note 224, at 3; *see also* IUCN, *Black Rhinoceros (Diceros bicornis) Table 1* (Dec. 2010), http://jr.iucnredlist.org/documents/attach/Mammals/6557_Diceros%20bicornis.pdf.

⁴⁹ IUCN, *IUCN Red List of Endangered Species: Diceros bicornis* (2013), <http://www.iucnredlist.org/details/6557/0>.

⁵⁰ IUCN, *Black Rhinoceros (Diceros bicornis) Table 1* (Dec. 2010), http://jr.iucnredlist.org/documents/attach/Mammals/6557_Diceros%20bicornis.pdf.

⁵¹ CoP16 Inf. 51, *supra* note 224, at 3; *see also* MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE, *supra* note 34, at 9.

⁵² IUCN, *IUCN Red List of Endangered Species: Diceros bicornis* (2013), <http://www.iucnredlist.org/details/6557/0>; IUCN, *IUCN Red List of Endangered Species: Diceros bicornis michaeli* (2013), <http://www.iucnredlist.org/details/39320/0>; IUCN, *IUCN Red List of Endangered Species: Diceros bicornis minor* (2013), <http://www.iucnredlist.org/details/39321/0>.

⁵³ IUCN, *IUCN Red List of Endangered Species: Diceros bicornis bicornis* (2013), <http://www.iucnredlist.org/details/39318/0>.

⁵⁴ JONATHAN E.M. BAILLIE & ELLEN R. BUTCHER, PRICELESS OR WORTHLESS?: THE WORLD’S MOST THREATENED SPECIES 64 (2012), available at <http://static.zsl.org/files/priceless-or-worthless-final-wq-2040.pdf>.

⁵⁵ *Id.*

⁵⁶ IUCN, *IUCN Red List of Endangered Species: Rhinoceros sondaicus* (2013), <http://www.iucnredlist.org/details/summary/19495/0>; *see also* Ker Than, Javan Rhino Extinct in Mainland Asia, *supra* note 243.

⁵⁷ IUCN, *IUCN Red List of Endangered Species: Rhinoceros sondaicus* (2013), <http://www.iucnredlist.org/details/summary/19495/0>.

⁵⁸ *Id.*

⁵⁹ *Id.*

Sumatran Rhinoceros. The IUCN, the Zoological Society of London, and the Species Survival Network also list the Sumatran rhino (*Dicerorhinus sumatrensis*) as one of the 100 most threatened species in the world.⁶⁰ Two subspecies of the Sumatran rhino are extant: *D. sumatrensis sumatrensis* and *D. sumatrensis harrissoni*.⁶¹ A third subspecies, *D. sumatrensis lasiotis*, is probably extinct, although a population in northern Myanmar may still exist.⁶² The total population size of all subspecies of Sumatran Rhino has declined by 80% over the past three generations and is currently estimated at fewer than 100 mature individuals, likely with no subpopulation of more than 50 individuals.⁶³ The subspecies *D. sumatrensis harrissoni* historically existed in Borneo but likely now only occurs in Malaysia and potentially Indonesia.⁶⁴ The subspecies *D. sumatrensis sumatrensis* historically occurred in Thailand, Malaysia, and Indonesia but no longer exists in Thailand.⁶⁵ The IUCN lists all the subspecies as “critically endangered.”⁶⁶

Indian Rhinoceros. While the Indian rhino (*Rhinoceros unicornis*) has recovered from an estimated population of 200 animals in 1900 to a population of approximately 3,333 in 2013⁶⁷, it is still rated as “vulnerable” and mainly resides only in the eastern part of its former range.⁶⁸ The majority of Indian rhinos are in India, although a small population also exists in Nepal, and two Indian rhinos were introduced into a national park in Pakistan in 1983.⁶⁹ A major concern for the Indian rhino is that 70% of the population is located in one national park in India and thus any major event occurring in the park may endanger the future of the entire species.⁷⁰ Twenty-two Indian rhinos have been reintroduced into Manas National Park, 18 as part of the Indian Rhino Vision 2020 program, which aims to repatriate rhinos into areas where they were previously extirpated.⁷¹ Seven of those animals have been poached to-date.⁷² While still precarious, current population trends indicate that Indian rhino populations in India are once again increasing.⁷³

On the other hand, the Nepali population is only slowly beginning to see a recent increase in numbers. The Nepalese population of Indian rhinos had decreased from an estimated 612 individuals in 2000 to fewer than 372 individuals in 2005, as a result of heavy poaching during a

⁶⁰ BAILLIE & BUTCHER, PRICELESS OR WORTHLESS?: THE WORLD’S MOST THREATENED SPECIES, *supra* note 272, at 78.

⁶¹ IUCN, *The IUCN Red List of Endangered Species: Dicerorhinus sumatrensis* (2013), <http://www.iucnredlist.org/details/6553/0>.

⁶² *Id.*

⁶³ ZAFIR, A. W. A., PAYNE, J., MOHAMED, A., LAU, C. F., SHARMA, D. S. K., ALFRED, R., WILLIAMS, A. C., NATHAN, S., RAMONO, W. S. & CLEMENTS, G. R. (2011), Now or never: what will it take to save the Sumatran rhinoceros *Dicerorhinus sumatrensis* from extinctions? *Oryx* 45: 225-233.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ International Rhino Foundation, Greater One-Horned Rhino, *available at* <http://www.rhinos.org/greater-one-horned-rhino>.

⁶⁸ CoP16 Inf. 51 *supra* note 224, at 27; *see also* MILLIKEN ET AL., AFRICAN AND ASIAN RHINOCEROSSES—STATUS, CONSERVATION AND TRADE, CoP15 Doc. 45.1 Annex, *supra* note 223, at 13.

⁶⁹ IUCN, *IUCN Red List of Endangered Species, Rhinoceros unicornis* (2013), <http://www.iucnredlist.org/details/19496/0>.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

period of socio-political unrest and habitat changes.⁷⁴ The situation is slowly improving, though numbers have not reached what they were in 2000; 534 Indian rhinos resided in Nepal as of 2011.⁷⁵ The improvement seen since 2005 is likely due to successful anti-poaching efforts and community-based conservation programs;⁷⁶ in 2013, no rhinos were poached in Nepal.⁷⁷ The IUCN lists the species as “vulnerable.”⁷⁸

B. Threats to Rhinos

The historically high rhino poaching rates noted above pose the greatest threat to rhino populations worldwide,⁷⁹ though other concerns include loss of habitat and ineffective conservation efforts.⁸⁰ Agriculture production and human settlement are the greatest contributors to habitat loss, along with logging activity.⁸¹ In Indonesia, the Arenga palm tree, an invasive species that chokes out rhino food sources is a grave threat to the Javan rhino’s habitat.⁸² Arenga palm eradication efforts are underway in a rhino preserve in Ujung Kulon National Park to ensure sufficient stocks of rhino food plants survive to support the rhino population living in the park.⁸³ In addition, political instability and war have hampered conservation efforts, especially in Africa.⁸⁴

1. Poaching Background

As detailed above, from the late 1970s through the mid-1990s, poaching decimated most African rhino populations.⁸⁵ Civil unrest and widespread poverty led to an increase in poaching and a decrease in protection efforts for rhinos.⁸⁶ Asian poaching has had an effect on several important subpopulations of Indian rhinos⁸⁷ and has driven Javan rhino populations to the brink of extinction;

⁷⁴ *Id.*

⁷⁵ CoP16 Inf. 51, *supra* note 224, at 27.

⁷⁶ CITES Secretariat, *Species Trade and Conservation—Rhinoceroses: Report of the Secretariat*, SC62 Doc. 47.2 at 3 (July 2012).

⁷⁷ IUCN, Nepal celebrates ‘zero poaching year’ for rhino, tiger and elephant, *available at* http://iucn.org/knowledge/focus/reaching_conservation_goals/?14555/Nepal-celebrates-zero-poaching-year-for-rhino-tiger-and-elephant.

⁷⁸ IUCN, *IUCN Red List of Endangered Species, Rhinoceros unicornis* (2013), <http://www.iucnredlist.org/details/19496/0>.

⁷⁹ *See, e.g.,* Carol Williams, *1,000+ Rhinos Poached in South Africa in 2013, Worst Year on Record*, LOS ANGELES TIMES (Jan. 17, 2014), *available at* <http://www.latimes.com/world/worldnow/la-fg-wn-rhinos-poaching-africa-20140117,0,4978534.story#axzz2ruay1I3W>; *see also* IUCN, *IUCN Red List of Endangered Species*, <http://www.iucnredlist.org>.

⁸⁰ WWF, Black Rhinoceros, *available at* http://wwf.panda.org/what_we_do/endangered_species/rhinoceros/african_rhinos/black_rhinoceros/.

⁸¹ Save the Rhino, Habitat Loss, *available at* http://www.savetherhino.org/rhino_info/threats_to_rhino/habitat_loss.

⁸² International Rhino Foundation, Javan Rhino Conservation Program, *available at* <http://www.rhinos.org/javan-rhino-conservation-program>.

⁸³ *Id.*

⁸⁴ *See* WWF, Black Rhinoceros, *available at* http://wwf.panda.org/what_we_do/endangered_species/rhinoceros/african_rhinos/black_rhinoceros/.

⁸⁵ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 34, at 18.

⁸⁶ IUCN, *IUCN Red List of Endangered Species: Diceros bicornis* (2013), <http://www.iucnredlist.org/details/6557/0>.

⁸⁷ IUCN, *IUCN Red List of Endangered Species, Rhinoceros unicornis* (2013), <http://www.iucnredlist.org/details/19496/0>.

likely all remaining Javan rhinos are contained in a small, single population in Indonesia.⁸⁸ Centuries of over-hunting also decimated Sumatran rhino populations, and poaching and loss of population viability now threaten the remaining individuals.^{89,90}

In the late 1990s, outcry over diminishing rhino populations led to a concerted international effort to protect what remained of the species.⁹¹ Through CITES, range States increased efforts to prevent poaching, consumer countries implemented rhino horn trade bans, and rhino populations slowly began to recover.⁹² Unfortunately, some countries, such as Mozambique, have not complied with CITES requirements and recommendations, which has hindered recovery.⁹³ Lax conservation efforts in historic range States like Mozambique, coupled with continued illegal rhino horn activity in consumer countries, have led to a dramatic and unprecedented rise in poaching, fueled by the astronomical prices that rhino horns can command today.⁹⁴ Rhino horn is valued more than gold and other precious metals.⁹⁵

2. The Modern Face of Poaching

As a result of the current high price for rhino horn, increasingly sophisticated organized crime syndicates are engaged in poaching and smuggling activities in both range and consumer countries, and the CITES Secretariat believes that rhino horn trade “is one of the most structured criminal activities currently faced by CITES.”⁹⁶ Today’s poaching techniques, especially in southern African range States, employ highly technical equipment, including military-grade weapons, night vision apparatuses, helicopters, and immobilization drugs obtained illegally from veterinarians.⁹⁷ Many task forces that fight poaching do not have the same level of technology, creating an uneven fight. For instance, anti-poaching units in Mozambique are only given pepper spray to deter heavily armed poachers.⁹⁸

3. Rhino Horn Demand

That increased demand for rhino horn in Vietnam⁹⁹ and, to a lesser extent, in China and Thailand

⁸⁸ *Id.*

⁸⁹ IUCN, *The IUCN Red List of Endangered Species: Dicerorhinus sumatrensis* (2013), <http://www.iucnredlist.org/details/6553/0>.

⁹⁰ ZAFIR, A. W. A., PAYNE, J., MOHAMED, A., LAU, C. F., SHARMA, D. S. K., ALFRED, R., WILLIAMS, A. C., NATHAN, S., RAMONO, W. S. & CLEMENTS, G. R. (2011), Now or never: what will it take to save the Sumatran rhinoceros *Dicerorhinus sumatrensis* from extinctions? *Oryx* 45: 225-233.

⁹¹ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 34, at 18.

⁹² *Id.*

⁹³ *See supra* Sec. II.

⁹⁴ *See supra* note 145 and accompanying text.

⁹⁵ *See e.g.*, East Africa: On the Horn of a Dilemma, Ivo Vegter, ALL AFRICA, Feb.1, 2014, *available at* <http://allafrica.com/stories/201402031345.html> at 1.

⁹⁶ CITES Secretariat, *Species Trade and Conservation—Rhinoceroses: Report of the Secretariat*, SC62 Doc. 47.2, *supra* note 290, at ¶ 30.

⁹⁷ MONTESH, RHINO POACHING: A NEW FORM OF ORGANISED CRIME, *supra* note 20, at 8.

⁹⁸ Fiona Macleod, *Poachers Set Sights on Kruger Ivory*, *supra* note 42.

⁹⁹ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 34, at 14; *see also* WWF, *Wildlife Crime Scorecard 17* (2012), *available at*

has driven the poaching crisis is well-documented.¹⁰⁰ Japan, South Korea, Taiwan, and Yemen were once major consumers of rhino horn but are no longer significant players in today's rhino horn trade.¹⁰¹ Rhino horn has historically been used as an ingredient in traditional medicine throughout Eastern Asia; China began using rhino horn powder thousands of years ago, and use of the horn later spread to Japan, Korea, and Vietnam.¹⁰²

In Vietnam, rhino horn has been used most commonly as a treatment for fevers or convulsions,¹⁰³ and Vietnamese mothers are known to keep supplies of rhino horn on-hand to treat fevers in children.¹⁰⁴ While demand for horn continues for these traditional applications, the recent emergence of rhino horn as a purported treatment for cancer and other life-threatening diseases has put increased pressure on rhino horn suppliers.¹⁰⁵ In fact, the myth that rhino horn can both prevent and cure cancer has prompted a significant increase in Vietnamese demand for illegal horn imports.¹⁰⁶ The horn's alleged efficacy as a cure for cancer has been publicly debunked by several traditional medicine authorities, but it continues to be perpetuated by businesses selling rhino horn.¹⁰⁷

New uses for rhino horn in Vietnam have also increased demand.¹⁰⁸ Recently, affluent Vietnamese have started to consume rhino horn recreationally.¹⁰⁹ Among these individuals, the horn is most commonly consumed as a cure for hangovers,¹¹⁰ but an emerging group of male consumers also believe that the horn is an aphrodisiac and can enhance sexual performance.¹¹¹ Affluent, non-traditional consumers, who revel in the extravagance associated with the consumption of such a rare and expensive product, and who often bestow it as a high-value gift item, may currently represent the greatest demand for rhino horn.¹¹²

C. Elephants

1. African Elephants

http://awsassets.panda.org/downloads/wwf_wildlife_crime_scorecard_report.pdf *stating* Viet Nam appears to be the major destination market for rhino horn, [hereinafter WWF, WILDLIFE CRIME SCORECARD].

¹⁰⁰ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 34, at 145.

¹⁰¹ *Id.* at 104.

¹⁰² See KRISTIN NOWELL, ASSESSMENT OF RHINO HORN AS A TRADITIONAL MEDICINE, SC62 Doc. 47.2 Annex 2, 19 (April 2012), *available at* <http://www.cites.org/eng/com/SC/62/E62-47-02-A.pdf>.

¹⁰³ *Id.* at 25.

¹⁰⁴ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 34, at 15.

¹⁰⁵ NOWELL, ASSESSMENT OF RHINO HORN AS A TRADITIONAL MEDICINE, *supra* note 314, at 25.

¹⁰⁶ *Id.* at 26.

¹⁰⁷ *Id.* at 27.

¹⁰⁸ In addition to the other uses mentioned, wealthy consumers also purchase art carvings or wine made with rhino horn, additionally, pieces of horn are offered as an expensive, status-conferring gift. See NOWELL, ASSESSMENT OF RHINO HORN AS A TRADITIONAL MEDICINE, *supra* note 314, at 2–3; see also MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 34, at 15–16.

¹⁰⁹ CITES Secretariat, *Species Trade and Conservation—Rhinoceroses: Report of the Secretariat*, SC62 Doc. 47.2, ¶ 6 (2012).

¹¹⁰ *Id.* at 1–2.

¹¹¹ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 34, at 15.

¹¹² *Id.*

African elephants (*Loxodonta africana*) now occur in approximately 37 sub-Saharan African countries,¹¹³ though prior to colonization they were much more widely distributed south of the Sahara.¹¹⁴ At least two distinct species of African elephants exist, the savanna elephant (*Loxodonta africana*) and the forest elephant (*Loxodonta cyclotis*).¹¹⁵ However, since savanna and forest elephants are currently only officially recognized as subspecies, species assessment is generally conducted for the African elephant as a whole, including the two subspecies.¹¹⁶ Due to high rates of poaching for ivory between 1970 and 1990, African elephant populations crashed to an estimated 300,000 to 600,000 individuals.¹¹⁷ Since the 1990s, African elephant populations have generally grown, but concern exists that overall population numbers are on the decline or will be soon.¹¹⁸ The African elephant population currently comprises between approximately 419,000 and 686,674 individuals.¹¹⁹

The reliability of information on elephant populations varies across ranges but estimates indicate that southern Africa is home to approximately 55 percent of the elephants found on the African continent; eastern Africa 28 percent; and central Africa 16 percent.¹²⁰ The remaining 2 percent of the continent's known elephants are spread out over the remaining 13 elephant range States in West Africa.¹²¹ Decline is most dramatic in elephant populations in Central Africa, as well as in some fragmented populations in West Africa.¹²² Though populations remain stable in much of southern Africa, where most of elephant range currently exists, poaching is rising and spreading east and south in Africa.¹²³ The African elephant is currently listed as “vulnerable” on the IUCN Red List.¹²⁴

¹¹³ IUCN, *Loxodonta Africana* map, <http://maps.iucnredlist.org/map.html?id=12392>; see also CITES SECRETARIAT, IUCN/SSC AFRICAN ELEPHANT SPECIALIST GROUP, TRAFFIC INTERNATIONAL, STATUS OF AFRICAN ELEPHANT POPULATIONS AND LEVELS OF ILLEGAL KILLING AND THE ILLEGAL TRADE IN IVORY: A REPORT TO THE AFRICAN ELEPHANT SUMMIT 2 (2013) [hereinafter STATUS OF AFRICAN ELEPHANT POPULATIONS], available at https://cmsdata.iucn.org/downloads/african_elephant_summit_background_document_2013_en.pdf (estimating that African elephants occur in 35 to 28 range States).

¹¹⁴ STATUS OF AFRICAN ELEPHANT POPULATIONS, *supra* note 325, at 2.

¹¹⁵ IUCN, *IUCN Red List of Endangered Species, Loxodonta africana* (2013), <http://www.iucnredlist.org/details/12392/0>; see also Rohland, Nadin, et al., *Genomic DNA Sequences from Mastodon and Woolly Mammoth Reveal Deep Speciation of Forest and Savanna Elephants*, PLOS BIOLOGY 8(12) (2010).

¹¹⁶ IUCN, *Loxodonta africana* (2013), *supra* note 327.

¹¹⁷ UNEP, ET AL., ELEPHANTS IN THE DUST, *supra* note 37, at 22 (citing Said, et. al., African Elephant Database 1995. Occasional Paper of the IUCN Species Survival Commission, 225 (1995)).

¹¹⁸ IUCN, *Loxodonta africana* (2013), *supra* note 327.

¹¹⁹ UNEP, ET AL., ELEPHANTS IN THE DUST, *supra* note 37, at 22 (estimating the total number of African elephants between 419,000 and 650,000); see also Elephant Database, Mozambique, 2012 (“2013 AFRICA” analysis), available at http://www.elephantdatabase.org/preview_report/2013_africa/Loxodonta_africana/2012/Africa (estimating the total number of African elephants between 436,395 and 686,674).

¹²⁰ STATUS OF AFRICAN ELEPHANT POPULATIONS, *supra* note 325, at 2.

¹²¹ *Id.*

¹²² UNEP, ET AL., ELEPHANTS IN THE DUST, *supra* note 37, at 22.

¹²³ *Id.*

¹²⁴ IUCN, *Loxodonta africana* (2013), *supra* note 327.

a. Forest Elephants

The African forest elephant (*Loxodonta cyclotis*) is a species of the African elephant inhabiting the densely wooded rainforests of West and Central Africa.¹²⁵ Physical differences between forest elephants and other African elephants include smaller stature, oval-shaped ears, and straighter downward pointing tusks.¹²⁶ Isolated segments of elephant range in West and Central Africa are scattered throughout the region.¹²⁷ The species is most commonly found in Gabon, the Democratic Republic of Congo, Cameroon, Central African Republic, Cote d'Ivoire, Liberia, and Ghana where there are relatively large blocks of dense forest.¹²⁸ Estimates of elephant populations in West Africa are highly speculative.¹²⁹ In 2006, 7,487 confirmed elephants inhabited West Africa, but the population decreased to approximately 7,100 in 2013.¹³⁰ Similarly, estimates of elephant populations in Central Africa are highly speculative but most recent assessments estimate that approximately 20,000 elephants currently reside in the region.¹³¹

b. Savanna Elephants

The savanna elephant (*Loxodonta africana*) inhabits the grassy plains and bushlands of eastern and southern Africa.¹³² Physical differences between savanna elephants and forest elephants include a larger stature, larger ears, and tusks with greater curvature. The highest densities of savanna elephants are found in Botswana, Kenya, Mozambique, Namibia, South African, and Zimbabwe.¹³³ Eastern African elephant populations were hit hard by poaching in the 1970s and 1980s.¹³⁴ Due to strict conservation measures, poaching levels decreased and the population started to recover in the 1990s. In fact, the population grew from approximately 105,000 individuals in 1995¹³⁵ to 160,000 individuals in 2006,¹³⁶ however, recent estimates suggest a decrease to approximately 130,000 elephants in 2013.¹³⁷ Notably, savanna elephant populations

¹²⁵ World Wildlife Fund, Forest Elephant, <http://worldwildlife.org/species/forest-elephant> (stating that while traditionally considered to be a subspecies of the African elephant, a recent DNA study indicates that forest elephants are a distinct species from savanna elephants. However, the African Elephant Specialist Group believes that more extensive research is required to support the proposed re-classification of the forest elephant as a distinct species; see also IUCN, *Loxodonta africana* (2013), *supra* note 327).

¹²⁶ WWF, Forest Elephant, <http://worldwildlife.org/species/forest-elephants>.

¹²⁷ BLANC, J.J., BARNES, R.F.W., CRAIG, G.C., DUBLIN, H.T. THOULESS, C.R., DOUGLAS-HAMILTON, I., AND HART, J.A. AFRICAN ELEPHANT STATUS REPORT 2007: AN UPDATE FROM THE AFRICAN ELEPHANT DATABASE (IUCN, 2007) 26, 162. [hereinafter BLANC ET. AL., AFRICAN ELEPHANT STATUS REPORT 2007].

¹²⁸ WWF, Forest Elephant, <http://worldwildlife.org/species/forest-elephant>.

¹²⁹ UNEP, ET AL., ELEPHANTS IN THE DUST, *supra* note 37, at 23; See also BLANC ET. AL., AFRICAN ELEPHANT STATUS REPORT 2007, *supra* note 339, at 166.

¹³⁰ UNEP, ET AL., ELEPHANTS IN THE DUST, *supra* note 37, at 23 (citing IUCN/African Elephant Specialist Group (2013). Unpublished updated numbers of total African elephant population numbers).

¹³¹ *Id.*

¹³² WWF, Savanna Elephant, <http://worldwildlife.org/species/savanna-elephant>.

¹³³ *Id.*

¹³⁴ BLANC ET. AL., AFRICAN ELEPHANT STATUS REPORT 2007, *supra* note 339, at 67.

¹³⁵ UNEP, ET AL., ELEPHANTS IN THE DUST, *supra* note 37, at 23 (citing Said et. al.).

¹³⁶ BLANC ET. AL., AFRICAN ELEPHANT STATUS REPORT 2007, *supra* note 339, at 69.

¹³⁷ UNEP, ET AL., ELEPHANTS IN THE DUST, *supra* note 37, at 23 (citing IUCN/African Elephant Specialist Group (2013) Unpublished updated numbers of total African elephant population numbers).

in southern Africa have consistently increased since the early 20th century and latest estimates suggest that the population currently comprises about 250,000 individuals.¹³⁸

As of 2012, approximately 20,000 individuals compose the elephant population in Mozambique.¹³⁹ The largest population occurs in and around the Niassa Game Reserve in the far north, while smaller populations occur in the west and south.¹⁴⁰ The population in the Niassa Game Reserve is part of a transboundary population whose range includes Tanzania.¹⁴¹ Population surveys of this population repeatedly show a demonstrable decline in confirmed individuals.¹⁴² Additionally, carcass ratios indicate that illegal killing is increasingly worrisome.¹⁴³ In many areas of Mozambique, reliable data on elephant distribution is sparse,¹⁴⁴ largely because Mozambique fails to consistently report summary data for the established MIKE sites in Cabora Bassa and Niassa Game Reserves.¹⁴⁵ However, the data provided demonstrates that the Proportion of Illegally Killed Elephants to elephants dying of natural mortality or other means (PIKE) are steadily increasing since data collection began in 2002:¹⁴⁶

Site	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Cabora Bassa	0	.33	1.0	No data	No data	No data	No data	No data	.58	.83
Niassa	No data	No data	0	No data	.33	No data	.88	No data	.84	.89

2. Asian Elephants

Asian elephants (*Elephas maximus*) now occur in only 13 range States, though the species formerly ranged from West Asia into the Indian subcontinent, eastward into Southeast Asia, and into China as far as the Yangtze-Kiang rivers.¹⁴⁷ Subspecies taxonomy is varied among authors, but three subspecies are generally recognized: *E. m. indicus* on the Asian mainland, *E. m. maximus* on Sri Lanka, and *E. m. sumatranus* on Sumatra.¹⁴⁸ Asian elephant population numbers have exhibited a downward trend for centuries and global population size estimates of the Asian elephant vary but

¹³⁸ *Id.* at 24.

¹³⁹ Elephant Database, Mozambique, *supra* note 400.

¹⁴⁰ *Id.*; see also BLANC ET. AL., AFRICAN ELEPHANT STATUS REPORT 2007, *supra* note 339, at 136.

¹⁴¹ BLANC ET. AL., AFRICAN ELEPHANT STATUS REPORT 2007, *supra* note 339, at 136.

¹⁴² Elephant Database, Mozambique, 2012, *supra* note 331.

¹⁴³ *Id.*

¹⁴⁴ BLANC ET. AL., AFRICAN ELEPHANT STATUS REPORT 2007, *supra* note 339, at 132.

¹⁴⁵ CITES, *Monitoring the Illegal Killing of Elephants*, CoP16 Doc. 53.1, 14 (2013).

¹⁴⁶ *Id.* stating “PIKE may be affected by a number of potential biases related to data quality, carcass detection probabilities and other factors, hence results need to be interpreted with caution. However, the fact that the quantitative results presented . . . are in good agreement with quantitative information available from the Elephant Trade Information System (ETIS), as well as with qualitative information from IUCN/SSC African Elephant Specialist Group, give confidence as to the robustness of the results.

¹⁴⁷ IUCN, *IUCN Red List of Endangered Species, Elephas maximus* (2013), <http://www.iucnredlist.org/details/full/7140/0>.

¹⁴⁸ *Id.*

tend to be between 40,000 and 50,000.¹⁴⁹ Almost 90 percent of the species' historical range is lost, and the species remains in highly fragmented populations.¹⁵⁰ The location of the populations is unknown for large parts of the species' range, but more than 50 percent of the remaining wild Asian elephants occur in India.¹⁵¹ The Asian elephant is currently listed as Endangered on the IUCN Red List¹⁵² and has been listed in CITES Appendix I since 1975.¹⁵³

3. Threats to Elephants

Poaching is the most significant threat to elephants. The illegal killing of elephants for the illegal international trade in ivory is currently a very serious threat to elephant populations in many range States.¹⁵⁴ Data show a steady increase in the levels of African elephants killed illegally starting in 2006.¹⁵⁵ In 2010, poaching rates crossed the threshold of sustainability, and they continue to remain above a level that allows for overall population growth. In 2011, the proportion of illegally killed elephant (PIKE) levels were above a ratio of 0.5, indicating that more than half of elephants found dead were deemed illegally killed.¹⁵⁶ As of 2012, the estimated poaching rate was 7.4 percent while the natural population growth rate remained no more than 5 percent.¹⁵⁷

Poaching operations and methods range from old-fashioned marauders to military-style active intelligence with high-powered rifles and helicopters. In some instances, transnational criminal organizations are using sophisticated military equipment to kill elephants.¹⁵⁸ The organizations are likely taking advantage of high-level corruption and lack of border security to move ivory across borders.¹⁵⁹ The number of large-scale ivory movements, both in shipments and the quantity of ivory illegally traded, has grown steadily from 2000 through 2013.¹⁶⁰ Raw data for large-scale ivory seizures in 2013 represents the greatest quantity of ivory confiscated in 25 years.¹⁶¹

¹⁴⁹ CITES, *Status of Elephant Populations: A Report to the Standing Committee of CITES*, SC61 Doc. 44.4 (Rev. 1), 4 (May 2011).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² IUCN, *Elephas maximus*, *supra* note 359.

¹⁵³ U.S. FISH & WILDLIFE SERVICES, CITES & ELEPHANTS 2013, available at <http://www.fws.gov/le/pdf/CITES-and-Elephant-Conservation.pdf>.

¹⁵⁴ CITES, *Monitoring the Illegal Killing of Elephants*, CoP16 Doc. 53.1, 9 (2013).

¹⁵⁵ STATUS OF AFRICAN ELEPHANT POPULATIONS, *supra* note 325, at 4.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

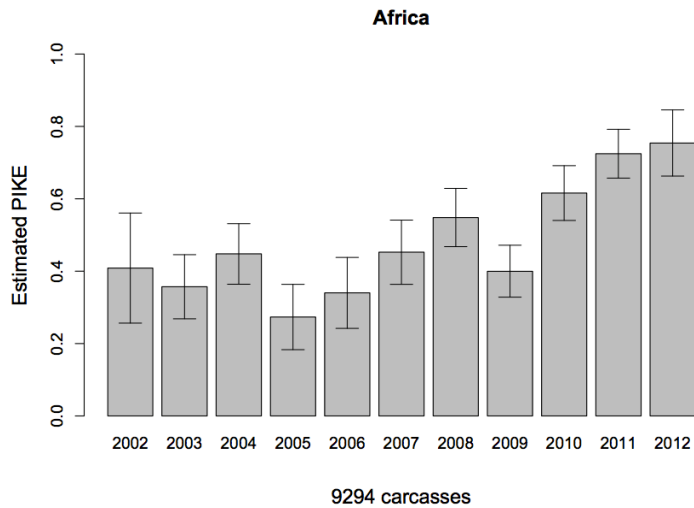
¹⁵⁸ IUCN and the Republic of Botswana, *African Elephant: Summit Urgent Measures*, 1 (Dec. 3 2013), available at https://cmsdata.iucn.org/downloads/african_elephant_summit_final_urgent_measures_3_dec_2013_1.pdf.

¹⁵⁹ *Id.*

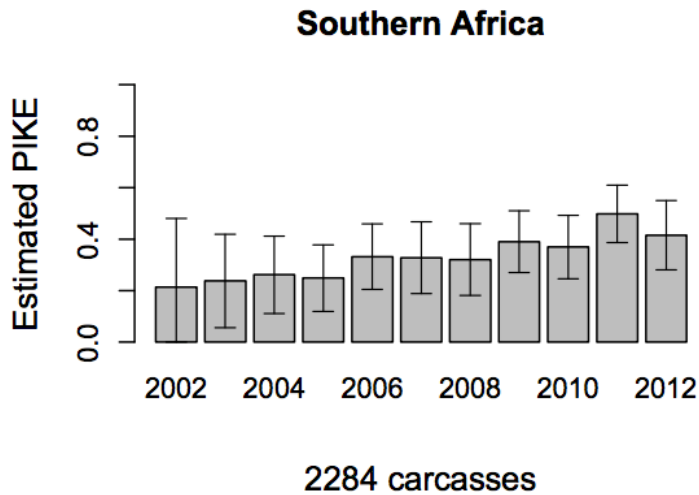
¹⁶⁰ CITES et al., Press Release, New Figures Reveal Poaching for the Illegal Ivory Trade Could Wipe Out a Fifth of Africa's Elephants over Next Decade (Dec. 2, 2013), available at http://www.cites.org/eng/news/pr/2013/20131202_elephant-figures.php.

¹⁶¹ *Id.*

PIKE trends in continental Africa:¹⁶²



PIKE trends in Southern Africa:¹⁶³



Weak governance in elephant range States, rising demand for illegal ivory in consumer nations, and poverty in range states are driving the increasing levels of poaching.¹⁶⁴

- **Weak governance.** Weak governance is the strongest correlate of PIKE at the national level.¹⁶⁵ Where governance is weaker, high poaching levels are more prevalent.¹⁶⁶ The relationship is likely to be causal.¹⁶⁷ Poor governance facilitates the illegal killing of elephants and movement of illegal ivory through ineffective law enforcement or active

¹⁶² CITES, *Monitoring the Illegal Killing of Elephants*, CoP16 Doc. 53.1, Addendum, 2 (2013).

¹⁶³ *Id.* at 3.

¹⁶⁴ CITES et al., Press Release, *supra* note 372.

¹⁶⁵ STATUS OF AFRICAN ELEPHANT POPULATIONS, *supra* note 325, at 7.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

aiding and abetting by officials.¹⁶⁸ Market and shops in many African cities, operating with impunity due to lack of law enforcement action, openly display ivory.¹⁶⁹ Transnational criminal networks take advantage of profit opportunities unbolted by consumer demand and the prevalence of unregulated markets.¹⁷⁰

- **Rising demand in consuming nations.** Demand from consumers who are willing to pay for illegal ivory drives and sustains the illegal killing of elephants.¹⁷¹ China is the world's largest consumer of illegal ivory,¹⁷² but rapid economic development and changes in consumption pattern have increased demand across Asia.¹⁷³ The demand for ivory products derives from their use as symbols of status.¹⁷⁴ An influx of ivory buyers is attributed to growing numbers of foreign investors and businessmen in the mining and timber sectors of Africa. Similarly, growing numbers of infrastructure development projects have attracted foreign investors, who have increased demand for ivory and contributed to higher levels of elephant poaching.¹⁷⁵
- **Poverty.** Poverty, interpreted by a human infant mortality rate in and around MIKE (Monitoring the Illegal Killing of Elephants) sites, is the correlate of PIKE at a local, community level.¹⁷⁶ Higher levels of elephant poaching occur at sites with higher levels of poverty.¹⁷⁷ A greater incentive to facilitate or participate in the illegal killing of elephants may exist in areas where human livelihoods are insecure. A close linkage between the well-being of local communities and the health of elephant populations is highlighted by the relationships among poverty, food security, and PIKE.¹⁷⁸

¹⁶⁸ *Id.*

¹⁶⁹ UNEP, ET AL., ELEPHANTS IN THE DUST, *supra* note 37, at 40.

¹⁷⁰ *Id.*

¹⁷¹ CITES SECRETARIAT ET. AL., STATUS OF AFRICAN ELEPHANT POPULATIONS AND LEVELS OF ILLEGAL KILLING AND THE ILLEGAL TRADE IN IVORY: A REPORT TO THE AFRICAN ELEPHANT SUMMIT, *supra* note 325, at 7.

¹⁷² *ETIS Report of TRAFFIC*, *supra* note 35, at 14.

¹⁷³ UNEP, ET AL., ELEPHANTS IN THE DUST, *supra* note 37, at 11.

¹⁷⁴ UNEP, ET AL., ELEPHANTS IN THE DUST, *supra* note 37, at 11 (citing Christy, B., *Ivory Worship*, NATIONAL GEOGRAPHIC 28-62 (October 2012) and Martin, E., et al., *The Importance of Ivory in Philippine Culture*, PACHYDERM 56-67 (2011)).

¹⁷⁵ Stephen Blake et al., *Forest Elephant Crisis in the Congo Basin*, 5 PLOS BIOLOGY 945, 949–51 (2007); *see also* Yaw Bofo & Massalatchi M. Sani., *Status of the Sapo National Park Elephant Population and Implications for Conservation of Elephants in Liberia*, 50 PACHYDERM 18, 23 (2011).

¹⁷⁶ STATUS OF AFRICAN ELEPHANT POPULATIONS, *supra* note 325, at 7.

¹⁷⁷ *Id.*

¹⁷⁸ CITES, *Monitoring the Illegal Killing of Elephants*, CoP16 Doc. 53.1, 4 (2013).

Petition to Certify Mozambique as Diminishing the Effectiveness of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

Environmental Investigation Agency, Petitioner
International Rhino Foundation, Petitioner

June 27, 2014

Appendix C

GATT ANALYSIS REGARDING TRADE RESTRICTIONS IMPOSED PURSUANT TO THE PELLY AMENDMENT

Once the Secretary of the Interior or Secretary of Commerce certifies that nationals of a foreign country are diminishing the effectiveness of an international program for endangered or threatened species, the President may direct the Secretary of the Treasury to prohibit the importation of products from the offending foreign country for an appropriate duration.¹ Any trade restrictions the Secretary of the Treasury imposes must be consistent with U.S. obligations within the World Trade Organization (WTO).² While the Pelly Amendment allows the United States to prohibit trade in any goods, Petitioners propose that the United States prohibit trade only in specimens of CITES-listed species with Mozambique. As described below, these trade restrictions would be consistent with the General Agreement on Tariffs and Trade (GATT), the WTO agreement that disciplines trade in goods.

Prior dispute settlement panels have found that the Pelly Amendment itself is consistent with the GATT because it merely authorizes and does not require measures that may be inconsistent with the GATT.³ The dispute settlement panel in *Tuna/Dolphin I* found that “[b]ecause the Pelly Amendment did not require trade measures to be taken, this provision as such was not inconsistent with the General Agreement.”⁴ While the GATT contracting parties never adopted the *Tuna/Dolphin I* panel’s report, its logic remains sound and subsequent WTO jurisprudence does not indicate that a panel or the Appellate Body would reach a contrary conclusion.⁵

¹ 22 U.S.C. § 1978(2–4) (1999).

² *Id.* at § 1978.

³ *United States—Restrictions on Imports of Tuna*, GATT Panel Report, GATT Doc. No. DS21/R, ¶¶ 5.30–5.34 (Sept. 3 1991) (unadopted), reprinted in 1993 BDIEL AD LEXIS 1; 30 I.L.M. 1594 (1991) [hereinafter *Tuna/Dolphin I*].

⁴ *Id.* at ¶ 5.21.

⁵ Panels have found unenforced quotas to violate Article XI of the GATT, because even an unenforced quota could change the conditions of competition. *Japan—Measures on Imports of Leather*, GATT Panel Report, L/5623, GATT B.I.S.D. (31st Supp.) at 94 (adopted May 15–16, 1984) (1985); see also *Argentina—Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, Panel Report, WT/DS155/R, ¶ 11.17 (Feb. 16, 2001) (stating that “[t]here can be no doubt ... that the disciplines of Article XI:1 extend to restrictions of a *de facto* nature.”). The Pelly Amendment is not analogous. The Pelly Amendment is designed to enforce the provisions of relevant existing multilateral environmental agreements and to protect those species within the scope of the agreement. As such, it does not force importers and exporters to adjust production or make other business decisions in light of one

With respect to specific trade restrictions adopted pursuant to the Pelly Amendment, which would likely be inconsistent with Article III or Article XI of the GATT, the exception found in Article XX(g) of the GATT would nonetheless justify the specific trade restrictions sought here. Article XX reads in relevant part:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . .

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

For a measure to be consistent with the GATT, it must provisionally fall under a specific exception in Article XX, such as paragraph (g). If it is provisionally justified under an exception, it then must be consistent with the Article XX introductory clause, the chapeau.⁶ Section A below concludes that the trade restrictions taken pursuant to the Pelly Amendment on CITES-protected specimens would be consistent Article XX(g). Section B concludes that those trade restrictions would also be consistent with the chapeau of Article XX.

A. Trade Restrictions Taken Pursuant to the Pelly Amendment Are Consistent with Article XX(g)

Under Article XX(g), WTO Members may impose a trade measure on other Members if the measure relates to the conservation of exhaustible natural resources and the measure is made effective in conjunction with restrictions on domestic production and consumption. Thus, GATT and WTO panels have established the following three-part test to satisfy the Article XX(g) exception:

1. The policy for which the disputed trade measure is invoked falls within the range of policies for conservation measures relating to exhaustible natural resources.
2. The measure “relates to” the conservation of that exhaustible natural resource.
3. The measure is made effective in conjunction with restrictions on domestic production or consumption.⁷

country’s quota or other regulatory requirements. To the contrary, it is designed to restore the agreed upon conditions of competition *vis-à-vis* those species falling within the scope of the relevant multilateral environmental agreement and subject to trade.

⁶ *United States—Standards for Reformulated and Conventional Gasoline*, Appellate Body Report, WT/DS2/AB/R, at 22 (decided Apr. 29, 1996) (adopted May 20, 1996) [hereinafter *Reformulated Gasoline*].

⁷ See, e.g., *Shrimp/Turtle I*, *supra* note 209, at ¶¶ 127, 135, 143; see also *United States—Restrictions on Imports of Tuna*, GATT Panel Report, DS29/R, paras. 5.12, 5.28 (June 16, 1994) (unadopted).

The Pelly Amendment, including trade restrictions adopted pursuant to it [collectively referred to hereinafter as the “Pelly Amendment”], satisfies this three-part test. First, the Pelly Amendment establishes a policy of conserving exhaustible natural resources. Second, the Pelly Amendment relates to the conservation of that exhaustible natural resource. Third, the Pelly Amendment is made effective in conjunction with restrictions on domestic production or consumption.

1. The Pelly Amendment Establishes a Policy of Conserving Exhaustible Natural Resources

The Pelly Amendment is a measure that establishes a policy of conserving exhaustible natural resources. The Pelly Amendment seeks to protect endangered and threatened species through implementation of, among other things, international endangered and threatened species programs. Species generally and rhinos and elephants specifically are clearly “exhaustible natural resources” within the meaning of Article XX(g). The Appellate Body has explained that “natural resources” include both living and non-living things.⁸ Moreover, the Appellate Body in *Shrimp/Turtle I* emphasized that living resources are also “exhaustible natural resources” within the meaning of Article XX(g):

We do not believe that “exhaustible” natural resources and “renewable” natural resources are mutually exclusive. One lesson that modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense, “renewable”, are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities. Living resources are just as “finite” as petroleum, iron ore and other non-living resources.⁹

In addition to sea turtles,¹⁰ prior WTO and GATT trade panels have concluded that clean air,¹¹ tuna,¹² herring,¹³ and salmon¹⁴ are exhaustible natural resources.

The Pelly Amendment seeks to protect the range of species protected by CITES, the International Convention for the Regulation of Whaling, and other fisheries and endangered and threatened species programs. CITES by its very nature relates to exhaustible natural resources: it establishes a regime of international cooperation to protect from overutilization due to trade those species that are threatened with extinction (Appendix I species) or which may become so unless trade is strictly regulated (Appendix II species). Rhinos and elephants symbolize the precarious existence—the exhaustible nature—of many species. As noted in Section III of this petition, unsustainably high levels of poaching threaten the continued existence of these species.

⁸ *Shrimp/Turtle I*, *supra* note 209, at ¶ 131.

⁹ *Id.* at ¶ 128.

¹⁰ *Id.* at ¶¶ 128-131.

¹¹ *Reformulated Gasoline*, Appellate Body Report, *supra* note 211, at 19.

¹² *United States—Prohibition of Imports of Tuna and Tuna Products from Canada* BISD 29S/91, adopted February 22, 1982, ¶ 4.9; *Tuna/Dolphin I*, *supra* note 485, at ¶¶ 5.30-5.34; *United States—Restrictions on Imports of Tuna*, GATT Panel Report, DS29/R, ¶ 5.15 (June 1994), *reprinted in* 33 I.L.M. 839 (1994) (unadopted) [hereinafter *Tuna/Dolphin II*].

¹³ *Canada—Measures Affecting the Exports of Unprocessed Herring and Salmon*, 35S/98, adopted March 22, 1988, ¶ 4.4 [hereinafter *Herring/Salmon*].

¹⁴ *Id.*

The United States recognizes the precarious conservation status of rhinos and elephants, including the threat of exhaustion. Further, the United States bars trade in rhino parts under the Endangered Species Act¹⁵ and the Rhinoceros and Tiger Conservation Act.¹⁶ It also has a national policy on ivory trade as dictated by the African Elephant Conservation Act.¹⁷ The international community has also acknowledged the plights of rhino and elephants, as described in Section III. Rhinos and elephants are clearly the types of exhaustible natural resources that the Pelly Amendment aims to protect.

2. The Pelly Amendment “Relates to” the Conservation of Exhaustible Natural Resources

The Pelly Amendment is also a measure “relating to” the conservation of exhaustible natural resources within the meaning of Article XX(g). The Appellate Body has determined that the relevant relationship to analyze is not solely the relationship of the trade restriction itself to conservation, but rather the general structure and design of the measure as it relates to conservation. The general structure and design of the Pelly Amendment and trade restrictions taken pursuant to it clearly “relate to” conservation of exhaustible natural resources.

The Appellate Body has clearly stated that whether a measure “relates to” conservation is determined based on an analysis of the measure “*as a whole*,” not just the trade restriction found to be inconsistent with the GATT. In *Reformulated Gasoline*, the Appellate Body evaluated whether the baseline establishment rules for gasoline, “*taken as a whole*,”¹⁸ related to the policy objective. According to the Appellate Body, this broader review of a measure is necessary because the GATT-inconsistent trade restrictions cannot be “totally divorced from other sections of the Gasoline Rule which certainly constitute part of the context of these provisions.”¹⁹ Using this analytical framework, the Appellate Body analyzed the relationship between the rules for establishing baseline pollutant levels in gasoline and the goal of conserving clean air; it did not analyze whether the GATT-inconsistent baseline rules were needed to conserve clean air. It concluded, using this broader framework, that the rules for determining baseline pollutant levels were designed to allow scrutiny and monitoring of compliance with the “non-degradation” requirements and that the lack of baselines of some sort would make scrutiny impossible. Without this scrutiny, the policy objective of “stabilizing and preventing future deterioration of the level of air pollution prevailing in 1990, would be *substantially frustrated*.”²⁰ By evaluating the measure taken as a whole, the Appellate Body concluded that the baseline establishment rules were substantially related to the policy objective and thus to the conservation of exhaustible natural resources and not “merely incidentally or inadvertently aimed at the conservation of clear air.”²¹

As in *Reformulated Gasoline*, the Appellate Body in *Shrimp/Turtle I* examined the “relationship

¹⁵ Endangered Species Act, 16 U.S.C. §§ 1531–1544.

¹⁶ Rhinoceros and Tiger Conservation Act, 16 U.S.C. §§ 5301–5306.

¹⁷ African Elephant Conservation Act, 16 U.S.C. §§ 4201–4245.

¹⁸ *Reformulated Gasoline*, Appellate Body Report, *supra* note 211, at 19 (emphasis added).

¹⁹ *Id.*

²⁰ *Id.* (emphasis added).

²¹ *Id.*

between the general structure and design of the measure ... and the policy goal it purports to serve.”²² It asked whether the measure as a whole “related to” conservation instead of the import ban only. In that case, the measure at issue was Section 609, which imposed an import ban on shrimp harvested with commercial fishing technology that may adversely affect sea turtles. Section 609 allowed a country to be certified to import shrimp into the United States if 1) that country’s environment does not pose a threat of incidental taking of sea turtles in the course of the commercial shrimp harvesting or 2) the country adopts a regulatory program that is comparable to the U.S. program and the incidental take is also comparable to the average rate of U.S. vessels. The Appellate Body concluded that Section 609 taken as a whole directly related to the goal of conserving sea turtles; it was “not a simple, blanket prohibition.”²³ In addition, Section 609, in its structure and design, was “not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species.”²⁴ The Appellate Body concluded:

The means are, in principle, reasonably related to the ends. The means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, is observably a close and real one, a relationship that is every bit as substantial as that which we found in *United States—Gasoline* between the EPA baseline establishment rules and the conservation of clean air in the United States.²⁵

Two significant aspects of the Appellate Body’s analysis emerge from *Reformulated Gasoline* and *Shrimp/Turtle I*. First, the Appellate Body did not require a direct nexus between the import restriction and the protected resource; that is, the United States was not required to bar the importation of sea turtles to conserve sea turtles. Instead, the Appellate Body asked whether “the means are, in principle, reasonably related to the ends.”²⁶ Thus, the Appellate Body in *Shrimp/Turtle I* concluded that import restrictions on shrimp along with the imposed certification regulations were reasonably related to sea turtle conservation given the circumstances of the case: sea turtles are likely to be intercepted in a commercial shrimp fishery.²⁷ Second, the Appellate Body concluded that the actual import restriction constitutes just one consideration in the evaluation of whether a measure “relates to” the conservation of an exhaustible natural resource. The main determination is based on whether the general structure and design of the measure is reasonably related to the policy goal.

Viewed in light of these two aspects of the Appellate Body’s jurisprudence, the Pelly Amendment

²² *Shrimp/Turtle I*, Appellate Body Report, *supra* note 209, at ¶ 137 (emphasis added). A WTO panel has also examined the “structure and design” of the entire measure for assessing whether a measure is “necessary” for the protection of human, animal, or plant life or health under Article XX(b). *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, Panel Report, WT/DS246/R, ¶¶ 7.201–7.202 (published Dec. 1, 2003) (adopted Apr. 20, 2004)[hereinafter *EC—Tariff Preferences*]. This part of the Panel’s report was not appealed. *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, Panel Report, WT/DS246/AB/R (published Apr. 7, 2004) (adopted Apr. 20, 2004).

²³ *Shrimp/Turtle I*, Appellate Body Report, *supra* note 209 at ¶ 141.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at ¶ 140.

and any trade restrictions taken pursuant to the Pelly Amendment to protect rhinos and elephants “relate to” the policy goal of conserving exhaustible natural resources. The Pelly Amendment is intended to “reduc[e] the alarming international trade in endangered and threatened species” by providing the President “with authority to encourage other nations to comply with [CITES].”²⁸ In other words, the goal of the Pelly Amendment is to conserve exhaustible natural resources, such as rhinos and elephants, that are regulated by CITES (as well as other endangered and threatened species programs or fisheries agreements).

To accomplish the goal of conserving species, the Pelly Amendment establishes a two-step general structure and design. First, the Secretary of the Interior or Secretary of Commerce must determine that nationals of a foreign country are diminishing the effectiveness of an international program for endangered or threatened species. Only after this finding is made may the relevant Secretary recommend trade restrictions to the President. Second, the President may then prohibit the importation of goods from the offending country.

In the current situation, nationals of Mozambique are engaging in the killing and trade of rhinos and elephants in a manner that diminishes the effectiveness of CITES. As described fully in Section III, Mozambicans are widely known to be engaging in the illegal killing of rhinos in South Africa and of elephants primarily in the northern regions of Mozambique. Additionally, Mozambique, because of its weak enforcement, lax laws, open markets, and high levels of corruption is increasingly a known entrépot for illegal trading of rhino horn and elephant ivory. As also discussed in Section III, Mozambique has a long history of not complying with CITES or with the requests of the CoP. Despite being a party since 1981, Mozambique has yet to adopt adequate implementing legislation, and it regularly fails to respond to requests for information and routinely ignores or disregards reporting deadlines.

The continuing illegal killing of and trade in rhinos and elephants, as well as the failure to comply with CITES resolutions, highlight that Mozambique is jeopardizing exhaustible natural resources and diminishing the effectiveness of CITES. The Pelly Amendment’s certification process, which comes with the threat of trade restrictions and considerable diplomatic efforts, has often encouraged countries to implement their international obligations to conserve exhaustible natural resources.²⁹ When certification alone is inadequate, the Pelly Amendment reinforces its policy objective by allowing the President to impose trade restrictions. Thus, the trade restrictions themselves are just one element of the Pelly Amendment process, which is designed to encourage a country to comply with its international obligations to conserve exhaustible natural resources.

A unique aspect of the Pelly Amendment is that it generally cannot target its trade restrictions in the same way that the Shrimp/Turtle regulations linked the conservation of sea turtles to the product and activity that causes sea turtle mortality: shrimp and shrimping. With respect to rhinos and elephants, both the international community through CITES and the United States through its

²⁸ H.R. No. 95-1029, 95th Cong., 2d Sess. (1978), reprinted in 1978 U.S.C.C.A.N. 1768, 1773.

²⁹ Steve Charnovitz, *Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices*, 9 AM. U. J. INT’L L. & POL’Y 751 (1994)(reviewing the success of the Pelly Amendment up to 1994); see also Gene S. Martin, Jr., & James W. Brennan, *Enforcing the International Convention for the Regulation of Whaling: The Pelly and Packwood –Magnuson Amendments*, 17 DEN. J. INT’L L. & POL’Y 293, 298-308 (1989).

own legislation already prohibit trade in rhino horn and elephant ivory for primarily commercial purposes. Thus, other trade restrictions are the only reasonable means to achieving the policy objective of conserving rhinos and elephants.³⁰ By linking Mozambique’s diminishment of CITES to trade restrictions on CITES-listed specimens, the United States establishes the “reasonable” or “substantial relationship” between means and ends that the Appellate Body has called for. That link would also ensure that the Pelly Amendment is “not disproportionately wide in its scope and reach in relation to the policy objective.”³¹

The link proposed here is simply a variation of the general rule established in *Shrimp/Turtle I* and other cases. In *Shrimp/Turtle I* and *Tuna/Dolphin*, the product subject to import restrictions related to the resource to be conserved because the harvest of the product affected the resource to be conserved. In the present circumstances, rhinos and elephants are killed for personal use and benefit, not incidentally killed as part of some other economic activity. As such, it is impossible to find a product that has an economic relationship with rhinos or elephants that is similar to the relationships relevant to *Shrimp/Turtle I* and *Tuna/Dolphin*. Nonetheless, a trade restriction on all CITES-protected specimens has an important treaty relationship with rhinos and elephants. This relationship is arguably stronger, but is certainly no less strong, than the economic relationship at issue in *Shrimp/Turtle I* and *Tuna/Dolphin*. Indeed, because the purpose of the Pelly Amendment is to promote implementation and compliance with CITES, the imposition of trade restrictions on CITES-protected specimens would have the “substantial relationship” of means and ends that the Appellate Body has required. Moreover, with the dramatic surge in rhino and elephant poaching and illegal trade in specimens of these species and with Mozambican nationals at the center of this activity, trade restrictions under the Pelly Amendment may be the only reasonable means to protect rhinos and elephants from the continuing slaughter.

In sum, the Appellate Body has emphasized the importance of considering the general design and structure of the measure as a whole and whether the measure as a whole relates to the legitimate policy objective of conserving exhaustible natural resources. As such, trade restrictions are just one element to consider when determining whether a measure relates to the policy objective. The Pelly Amendment as a whole clearly relates to the conservation of rhinos and elephants. In addition, the means it uses to achieve the policy goal, trade restrictions in CITES-listed specimens to promote the enforcement of CITES, is also directly related to conservation of rhinos and elephants because imposing such trade restrictions will incentivize Mozambique to improve its implementation of its CITES obligations, thus securing a more effective conservation program for rhinos and elephants under CITES.

3. The Pelly Amendment Is Made Effective in Conjunction with Restrictions on Domestic Production and Consumption

The Pelly Amendment and trade restrictions taken pursuant to it are made effective in conjunction with U.S. restrictions on domestic production and consumption of rhinos. The Appellate Body in *Reformulated Gasoline* explained that the clause “made effective in conjunction with” is “a

³⁰ Similarly, in the case of whales, no member of the International Whaling Commission may kill any whale for commercial purposes. CITES prohibits all trade in whale products. Thus, import restrictions on whale products would be totally ineffectual.

³¹ *Shrimp/Turtle I*, Appellate Body Report, *supra* note 209, at ¶ 141.

requirement of *even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.”³² However, identical treatment of the domestic and imported products is not a requirement.³³

The Appellate Body has clarified that Article XX(g) does not require the trade restrictions on domestic production or consumption to be found in the same law as the restrictions on importation.³⁴ In *Shrimp/Turtle I*, the Appellate Body found that domestic regulations under Section 609 and the Endangered Species Act (ESA) were sufficiently effective counterparts to the Section 609 import restrictions. Section 609 domestic restrictions alone would not have satisfied the requirement because, in and of themselves, they were not restrictive enough. However, because the ESA imposed additional domestic restrictions two years earlier, the ESA and Section 609 together imposed sufficient restrictions on domestic production and consumption to meet the requirement of even-handedness.

While the Pelly Amendment itself does not restrict U.S. citizens from taking, killing or trading rhinos and elephants, the ESA and other legislation does. The ESA generally implements CITES for the United States.³⁵ It also prohibits the taking, killing, harming, and harassing of, and trade in, endangered species³⁶ like rhinos and elephants. This law applies to international trade and interstate commerce. The ESA also makes it unlawful to sell or offer to sell in interstate or foreign commerce any endangered species³⁷ and to deliver, receive, carry, transport, or ship endangered species in interstate or foreign commerce in the course of a commercial activity.³⁸ The ESA further bars import and export for captive breeding purposes unless the specimen was held in captivity prior to the date the ESA came into force or the date of publication of a final regulation to list a species as endangered. The ESA provides only limited exceptions to these prohibitions.³⁹ For example, a private landowner may submit a Habitat Conservation Plan that minimizes and mitigates the impacts of the take. If the Secretary of the Interior approves this plan, the landowner can receive an incidental take permit. Another exception is for federal agencies; if a federal agency proposes an action to the Endangered Species Committee and the Committee finds that the benefits of the action outweigh the benefits of conserving the species and that there are no other reasonable alternatives to the action, then the federal agency may receive an exemption from the law.⁴⁰

For rhinos, the Rhinoceros and Tiger Conservation Act (RTCA) also “[p]rohibits the sale, import, or export, or the attempted sale, import, or export, of any product, item, or substance (product) intended for human consumption or application, containing, labeled or advertised as containing, and substance derived from any species of rhinoceros or tiger.”⁴¹ The ESA and the Lacey Act only apply to international trade and interstate commerce. As such, the RTCA fills a gap by applying

³² *Reformulated Gasoline*, Appellate Body Report, *supra* note 211, at 21.

³³ *Id.*

³⁴ *Shrimp/Turtle I*, Appellate Body Report, *supra* note 209, at ¶ 144.

³⁵ 16 U.S.C. § 1537a.

³⁶ 16 U.S.C. § 1538(a).

³⁷ *Id.* § 1538(a)(1)(F).

³⁸ *Id.* § 1538(a)(1)(E).

³⁹ 16 U.S.C. § 1539.

⁴⁰ *Id.*

⁴¹ 16 U.S.C. § 5305(a).

its prohibition to intrastate trade.⁴² It also supports conservation through funding, programs, habitat management, campaigns, and other measures.⁴³

The ESA and the RTCA are substantial restrictions on the domestic production and consumption of rhino horn and other rhino parts; however, the United States has gone further than this in its domestic legislation. For one, the Lacey Act makes it illegal to falsify information, records, or accounts in regards to species that have been imported, exported, transported, sold, purchased, or received in interstate or international trade unless it has already been cleared through a U.S. Fish and Wildlife Service inspection.⁴⁴ This practice further decreases illegal international trade in rhino horn and other rhino parts because most packages containing rhino horn derivatives seized are clearly labeled as medicine containing rhino horn.

For elephants, the prohibitions of the ESA are supplemented by the African Elephant Conservation Act (AECA) and new regulations. The AECA requires the Secretary of Interior to impose a moratorium on the importation of raw and worked ivory from an ivory producing country that does not have an approved African elephant conservation program.⁴⁵ It further prohibits the export of raw and worked ivory and the import of worked ivory, other than personal effects, from any country unless that country has certified that such ivory was derived from legal sources.⁴⁶ It also establishes the African Elephant Conservation Fund to finance conservation programs of African countries to protect the African elephant.⁴⁷ New rules and regulations will ban commercial imports of ivory as well as elements of domestic ivory trade.⁴⁸

These domestic laws clearly show that any Pelly Amendment measures are operating in conjunction with restrictions on domestic production and consumption. Moreover, the significant restrictions imposed by the ESA and the RTCA on U.S. citizens clearly show that any trade sanctions imposed by the Pelly Amendment will be applied in an even-handed manner.

B. The Pelly Amendment, and Trade Restrictions Taken Pursuant to It, Are Consistent with the Chapeau of Article XX

Once provisionally justified under one of the Article XX exceptions, such as paragraph (g), the measure must also be found to be consistent with the Article XX chapeau. The chapeau consists of three requirements:

1. The measure must not be applied in a manner that would constitute a means of arbitrary discrimination between countries where the same conditions prevail.

⁴² 16 U.S.C. § 1538(a)(1)(F) (making it unlawful to “sell or offer for sale in interstate or foreign commerce any such species.).

⁴³ 16 U.S.C. § 5304.

⁴⁴ 16 U.S.C. §§ 3371-3378.

⁴⁵ *Id.* §§ 4222.

⁴⁶ *Id.* §§ 4223.

⁴⁷ *Id.* §§ 4203, 4212.

⁴⁸ For more information on pending changes to U.S. law and regulations, see <http://www.fws.gov/international/travel-and-trade/ivory-ban-questions-and-answers.html>.

2. The measure must not be applied in a manner that would constitute a means of unjustifiable discrimination between countries where the same conditions prevail.
3. The measure must not be a disguised restriction on international trade.

Four important principles frame the interpretation of the chapeau. First, the Appellate Body in *Shrimp/Turtle I* explained that the preamble to the WTO Agreement provided useful insight into interpreting whether or not these conditions of the chapeau are met. The first paragraph of the WTO Agreement's preamble states the desire to "protect and preserve the environment and to enhance the means for doing so in a manner consistent with [the Member's] respective needs and concerns at different levels of economic development." That language "must add colour, texture and shading" in the interpretation of the WTO Agreements, including Article XX's chapeau.⁴⁹ As such, the purpose of the chapeau is to prevent a country's abuse of the provisional exceptions under Article XX by ensuring that the application of any measure imposed pursuant to a legitimate policy objective is exercised in good faith for attainment of that policy objective. In other words, "the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned."⁵⁰

Second, the Appellate Body in *Retreaded Tyres* emphasized that a delicate balance exists when analyzing the rights of a Member under substantive WTO provisions and the right of a Member to invoke an Article XX exception.⁵¹ When evaluating this balance, the Appellate Body in *Shrimp/Turtle I* said and in *Retreaded Tyres* confirmed that "[t]he location of this line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up the specific cases differ."⁵² In other words, the analysis is extremely fact intensive; what is arbitrary and unjustifiable in one situation may not be arbitrary or unjustifiable in another. Where, as here, a measure is designed to protect an endangered species, the line should move to allow a greater range of trade restrictions.

Third, "[t]he focus of the chapeau, by its express terms, is on the application of a measure."⁵³ When analyzing whether a measure is applied so as to constitute arbitrary or unjustifiable discrimination, the analysis should focus on whether there is a legitimate cause or rationale for the application of the measure that results in discrimination. A legitimate cause or rationale for any discrimination, however, must bear a rational connection to the objective falling within the purview of a paragraph of Article XX.⁵⁴ In other words, any discrimination under Article XX(g) must relate to the

⁴⁹ *Shrimp/Turtle I*, Appellate Body Report, *supra* note 209, at ¶ 153.

⁵⁰ *Reformulated Gasoline*, Appellate Body Report, *supra* note 211, at 22.

⁵¹ *Brazil—Measures Affecting Imports of Retreaded Tyres*, Appellate Body Report, WT/DS332/AB/R, ¶ 224 (published Dec. 3, 2007, adopted Dec. 17, 2007) [hereinafter *Retreaded Tyres*].

⁵² *Shrimp/Turtle I*, Appellate Body Report, *supra* note 209, at ¶ 153. *See also Retreaded Tyres*, Appellate Body Report, *supra*, ¶ 224 (quoting the passage from the *Shrimp/Turtle* report).

⁵³ *Retreaded Tyres*, Appellate Body Report, *supra* note 441, at ¶ 215.

⁵⁴ *Id.* at ¶¶ 227–30.

conservation of an exhaustible natural resource; it may not, as it did in *Retreaded Tyres*, result from decisions of trade tribunals or domestic courts.⁵⁵

Fourth, the Appellate Body has not clearly distinguished between “arbitrary” and “unjustifiable” discrimination. The WTO dispute settlement reports that interpret the chapeau have either conflated the discussion and analysis of unjustifiable discrimination and arbitrary discrimination, as in *Reformulated Gasoline*, or failed to explain why certain factors are considered as unjustifiable discrimination and other factors are considered as arbitrary discrimination, as in *Shrimp/Turtle I* and *Retreaded Tyres*. For this reason, this petition addresses all the various issues considered as unjustifiable discrimination and arbitrary discrimination in subsection 1, below.

1. The Pelly Amendment Does Not Constitute Arbitrary or Unjustifiable Discrimination

For a measure to satisfy the requirements of Article XX chapeau, it cannot be applied in a manner that would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail. Failure to meet this standard requires a measure to meet three elements. First, the application of the measure must result in discrimination. Second, the application of the measure that led to the discrimination must be arbitrary or unjustifiable. Third, the discrimination must occur between countries where the same conditions prevail. As described below, any discrimination resulting from the imposition of sanctions against Mozambique under the Pelly Amendment is not arbitrary or unjustifiable; nor is any discrimination between countries where the same conditions prevail.

WTO and GATT dispute settlement panels have considered several factors when identifying whether a measure constitutes arbitrary or unjustifiable discrimination. First, panels have said that the measure must be flexible; a Member may not use a measure as a coercive ploy to make the laws of the other countries essentially the same as its own. Second, panels have ascertained whether the Member invoking the exception had other options available to it. Third, panels have investigated whether the measure is applied in a random or capricious way. Fourth, panels have examined whether the Member invoking the exception has applied the measure in a transparent and fair way. Considering these factors below, the Pelly Amendment and the trade restrictions proposed in Section IV do not constitute arbitrary or unjustifiable discrimination.

a. The Measure is Flexible and Not Coercive

The Appellate Body in *Shrimp/Turtle I* concluded that the coercive effect of the U.S. Shrimp/Turtle Guidelines constituted unjustifiable discrimination because the Guidelines established a single, rigid standard to be met by all countries that was “essentially the same” as U.S. standards.⁵⁶ In

⁵⁵ *Id.* at ¶¶ 232, 247. This decision in *Retreaded Tyres* was based on Article XX(b), but because the analysis discussed above applies to the chapeau as a whole, the reasoning is equally applicable to measures invoked under Article XX(g).

⁵⁶ *Shrimp/Turtle I*, Appellate Body Report, *supra* note 209, at ¶¶ 161–64 *stating* The Appellate Body concluded by saying:

practice, the only way a country could be certified was to use Turtle Excluder Devices or fall within an extremely limited exception. In other words, the United States required other countries to maintain sea turtle conservation laws that were “essentially the same” as U.S. practices and procedures. The United States later amended its Shrimp/Turtle Guidelines to require foreign practices and procedures to be “comparable in effectiveness” to U.S. standards.⁵⁷ The Appellate Body found that this requirement did not constitute arbitrary or unjustifiable discrimination, because it allowed the United States to take into account specific prevailing conditions in a foreign country.⁵⁸

As this requirement applies to Mozambique and rhino and elephant conservation, the Pelly Amendment is not coercive in the ways found discriminatory by the panels and the Appellate Body. Under the Pelly Amendment, the United States investigates whether particular countries are diminishing the effectiveness of a relevant program. The very nature of this petition, focusing solely on Mozambique, indicates that the Pelly Amendment does not impose a single inflexible standard applicable to all countries. This petition and others before it are highly fact specific, taking into account the specific action or inaction of specific countries. Significantly, the Pelly Amendment does not impose inflexible U.S. standards on Mozambique. Rather, it asks Mozambique to comply with its own international obligations under CITES. As such, the Pelly Amendment is not coercive.

b. The United States Has Exhausted Other Options

The Appellate Body has found trade-related measures to be unjustifiable and/or arbitrary if, prior to imposition of measures, the WTO Member invoking the exception has failed to make good faith efforts to achieve the policy objective by alternate routes. In *Reformulated Gasoline*, for example, the Appellate Body found that “[t]here was more than one alternative course of action available,”⁵⁹ including cooperative arrangements with both foreign refiners and foreign governments.⁶⁰

The actual application of the measure, through the implementation of the 1996 Guidelines and the regulatory practice of administrators, requires other WTO Members to adopt a regulatory program that is not merely comparable, but rather essentially the same, as that applied to the United States shrimp trawl vessels. Thus, the effect of the application of Section 609 is to establish a rigid and unbending standard by which United States officials determine whether or not countries will be certified, thus granting or refusing other countries the right to export shrimp to the United States.

⁵⁷ *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/RW, Panel Report, at ¶ 5.93 (adopted 15 June 2001) [hereinafter *Shrimp/Turtle II*, Panel Report].

⁵⁸ *Shrimp/Turtle II*, Appellate Body Report, *supra* note 215, at ¶ 144.

⁵⁹ *Reformulated Gasoline*, Appellate Body Report, *supra* note 211, at 25.

⁶⁰ *Id.* at 27. The Appellate Body later concluded:

We have above located two omissions on the part of the United States: *to explore adequately means, including in particular cooperation with the governments of Venezuela and Brazil, of mitigating the administrative problems relied on as justification by the United States for rejecting individual baselines for foreign refiners; and to count the costs for foreign refiners that would result from the imposition of statutory baselines.*

Id. at 28 (emphasis added). The Appellate Body concluded that such discrimination constituted “unjustifiable discrimination” and a “disguised restriction on international trade.” *Id.* at 28–9.

Similarly, the Appellate Body in *Shrimp/Turtle I* found that the failure of the United States to attempt negotiations with the complainants was unjustifiable because 1) a legitimate course of action was reasonably open to the United States; 2) other methods should first be considered because unilateral trade restrictions are to be avoided in preference to multilateral measures; and 3) unilateral trade restrictions tend to heighten the discriminatory influence of a measure.⁶¹ Significantly, however, the duty requires serious good faith efforts to reach an agreement; the duty does not impose an obligation to reach an agreement.

The Appellate Body in *Shrimp/Turtle I* considered the particular conservation concerns relating to sea turtles when determining what was required of the United States. This fact-specific analysis concerned the species being conserved and methods for conserving that species. In that situation, there was a “decided preference for multilateral approaches voiced by WTO Members and others in the international community in various international agreements for the protection and conservation of endangered sea turtles” that required the United States to make a good faith effort to reach an international agreement before imposing trade restrictions.⁶² This preference was due to the highly migratory nature of sea turtles, a characteristic that “demands concerted and cooperative efforts on the part of many countries whose waters are traversed in the course of recurrent sea turtle migrations.”⁶³ In addition to this fact, there was general agreement that measures affecting transboundary problems should be dealt with through multilateral agreements. The United States chose cooperation with some trading partners, such as Latin American countries through the Inter-American Convention for the Protection and Conservation of Sea Turtles (the Inter-American Convention). However, the United States chose not to pursue negotiation and cooperation with other WTO Members, including the Southeast Asian countries that brought the WTO dispute. The Appellate Body in *Shrimp/Turtle II* “saw the Inter-American Convention as evidence that an alternative course of action based on cooperation and consensus was reasonably open to the United States” which the United States chose not to pursue.⁶⁴ Further, the language of Section 609 actually required the United States to initiate negotiations. On these facts, the Appellate Body concluded that the United States should have engaged in good faith negotiations to resolve the problem prior to imposing trade restrictions.⁶⁵

The concerns of the panel and the Appellate Body are not at issue here, because the United States has a long history of working cooperatively to protect and conserve rhinos and elephants. In addition to implementing CITES for rhinos, elephants, and other species through the ESA, the United States also helps enforce the wildlife laws of other countries through the Lacey Act. If rhinos, elephants, or other wildlife have been acquired or exported illegally, the United States may seize those specimens. Moreover, the United States provides significant funding, technical assistance, education, and other measures to support the rhino and elephant conservation through

⁶¹ *Shrimp/Turtle I*, Appellate Body Report, *supra* note 209, at ¶ 166-172.

⁶² *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/RW, AB-2001, at ¶ 122 (adopted 22 October 2001).

⁶³ *Shrimp/Turtle I*, Appellate Body Report, *supra* note 209, at ¶ 168.

⁶⁴ *Shrimp/Turtle II*, Appellate Body Report, *supra* note 215, at ¶ 128.

⁶⁵ *Shrimp/Turtle I*, Appellate Body Report, *supra* note 209, at ¶ 168.

the RTCA⁶⁶ and AECA.⁶⁷ A significant amount of funding has been directed at Mozambique for rhino and elephant conservation. In 2012, for example, the Fish and Wildlife Service provided \$99,841 to combat elephant poaching in Mozambique's Niassa National Reserve through aerial surveillance, deployment of a rapid reaction anti-poaching team, field ranger training, and supplying salaries and rations to anti-poaching patrols.⁶⁸ In 2011, the Fish & Wildlife Service provided \$49,913 to install a new security radio network in and around the Niassa Reserve.⁶⁹

Moreover, the United States has actively pursued rhino and elephant conservation efforts through CITES since 1977, when the Parties placed rhino populations in Appendix I. As illustrated in Section III of this petition, the United States and other CITES Parties have worked for more than 30 years, through listings in the appendices, resolutions, and decisions to control trade and illegal killing of rhinos and elephants and to encourage Mozambique to implement its CITES obligations generally and to implement its obligations and recommendations of the Parties relating to rhinos and elephants specifically. These efforts exemplify the United States' cooperation and leadership within CITES on rhino and elephant conservation.

The application of trade restrictions under the Pelly Amendment to the conservation of rhinos and elephants may be the action needed to get Mozambique to implement its multilaterally agreed obligations. As noted above, the United States, the international community as a whole, and the CITES Secretariat have attempted many other courses of action to no avail. With many populations of rhino critically endangered, the threat of extinction for many rhino species is real. Similarly, poaching and illegal trade is ravaging African elephant populations. The imposition of trade sanctions on CITES-listed specimens from Mozambique is justified because Mozambicans are playing a central role in the declines of both rhinos and elephants.

c. The Pelly Amendment is Not Capricious or Random and Its Rationale Bears a Direct Relationship to Conservation of Rhinos and Elephants

As noted in the introduction to Section B above, a discriminatory measure is considered arbitrary if the discrimination is unrelated to the policy goal. In such circumstances, the Appellate Body has said that the measure is random or capricious and constitutes arbitrary or unjustifiable discrimination. In *Retreaded Tyres*, Brazil banned imports of retreaded tires from all countries except those in MERCOSUR because a MERCOSUR tribunal concluded that the ban violated MERCOSUR rules. The Panel concluded that the resulting discrimination was not arbitrary

⁶⁶ See generally Fish & Wildlife Service, Rhinoceros and Tiger Conservation Fund (providing project summaries reports relating to rhino conservation projects funded by the Fish & Wildlife Service), available at <http://www.fws.gov/international/wildlife-without-borders/rhino-and-tiger-conservation-fund.html>.

⁶⁷ See generally Fish & Wildlife Service, African Elephant Conservation Fund (providing project summaries reports relating to elephant conservation projects funded by the Fish & Wildlife Service), available at <http://www.fws.gov/international/wildlife-without-borders/african-elephant-conservation-fund.html>.

⁶⁸ USFWS, Wildlife Without Borders - African Elephant Conservation Fund: Project Summaries 2012, 4-5 (2012), available at <https://www.fws.gov/international/wildlife-without-borders/multinational-species-conservation-acts-african-elephant.html>.

⁶⁹ USFWS, African Elephant Conservation Fund Summary FY 2011, 4 (2011), available at <https://www.fws.gov/international/wildlife-without-borders/multinational-species-conservation-acts-african-elephant.html>.

because it was necessary to comply with a MERCOSUR ruling and it was implemented in the narrowest way possible.⁷⁰ The Appellate Body overruled this conclusion. It agreed that Brazil's selective import ban was not arbitrary or random, but said that the ban still constituted arbitrary discrimination within the meaning of Article XX because the rationale for the discrimination bore no relationship to the declared policy objective of protecting public health.⁷¹

Contrary to *Retreaded Tyres*, any discrimination that results from the Pelly Amendment is directly related to the policy objective of conserving rhinos and elephants through the implementation of CITES. The discrimination would not be capricious or random because its sole purpose is Mozambique's compliance with its international obligations to conserve rhinos and elephants. The rationale behind the Pelly Amendment and any trade restrictions taken pursuant to it bears a direct relationship to the objective of the conservation of rhinos. As noted in Section III, Mozambicans openly sell rhino horn and elephant ivory in public markets and engage in poaching of rhinos and elephants in Mozambique and South Africa, while the Mozambican government does little, if anything, to control this poaching and illegal trade or comply with its CITES obligations and recommendations of the Parties with respect to rhinos and elephants. The rationale behind the Pelly Amendment is to increase Mozambique's compliance with CITES, which would improve implementation of CITES and reduce illegal international trade, thereby helping to conserve rhinos and elephants.

d. The Pelly Amendment Measure Will Be Applied in a Transparent and Fair Way

The Appellate Body has also embraced transparency and fairness as elements of whether a measure unjustifiably or arbitrarily discriminates between countries where the same conditions prevail. In *Reformulated Gasoline*, the Appellate Body concluded that U.S. measures establishing pollutant levels in gasoline constituted "unjustifiable discrimination" and a "disguised restriction on international trade" because the United States failed to "count the costs" for foreign refiners of implementing statutory baselines for pollutant levels in gasoline.⁷²

The Appellate Body expanded on this theme in *Shrimp/Turtle I*, deciding that the administration of the measure must be transparent and predictable.⁷³ The purpose of the transparency and fairness requirement is to assure WTO Members that their rights will not be restricted arbitrarily. This requirement promotes the general purpose of the chapeau: to make sure that any Article XX exceptions are applied in good faith and are not a means of circumventing a Member's obligations towards another Member. Transparency imposes a measure of predictability, which also promotes fairness. Lastly, these requirements reassure a sanctioned country that the measure is being applied in a fair and just manner and not for any improper purposes.⁷⁴

⁷⁰ *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, Panel Report, ¶ 7.279 (published June 12, 2007) (adopted Dec. 17, 2007).

⁷¹ *Retreaded Tyres*, Appellate Body Report, *supra* note 441, at ¶ 232.

⁷² *Reformulated Gasoline*, Appellate Body Report, *supra* note 211, at 28–9.

⁷³ *Shrimp/Turtle I*, Appellate Body Report, *supra* note 209, at ¶ 180.

⁷⁴ *Id.* at ¶ 181.

The Appellate Body concluded in *Shrimp/Turtle I* that the U.S. Shrimp/Turtle Guidelines were not transparent and predictable enough. The Guidelines did not include a clear procedure for a country to follow for certification. In addition, the procedure did not provide, prior to certification, any formal opportunity for an applicant country to be heard or to respond to arguments against it; the procedure gave no written explanation of why a country's application was accepted or rejected; the procedure gave no specific notification of whether a country was accepted or rejected; and lastly, the procedure provided no review of, or appeal from, a denial of certification.⁷⁵ As a consequence, the Appellate Body concluded that:

The certification processes followed by the United States thus appear to be singularly informal and casual, and to be conducted in a manner such that these processes could result in the negation of rights of Members. There appears to be no way that exporting Members can be certain whether the terms of Section 609, in particular, the 1996 Guidelines, are being applied in a fair and just manner by the appropriate governmental agencies of the United States. It appears to us that, effectively, exporting Members applying for certification whose applications are rejected are denied basic fairness and due process, and are discriminated against, vis-à-vis those Members which are granted certification.⁷⁶

The Shrimp/Turtle Guideline's lack of transparency, predictability, and formality led the *Shrimp/Turtle I* Appellate Body to conclude that the Guidelines were "contrary to the spirit, if not the letter, of Article X:3 of the GATT 1994."⁷⁷ A transparent and predictable administration of the measure assures WTO Members that the measure is not being applied arbitrarily.

In *Shrimp/Turtle II*, the Panel concluded that the United States' revised Guidelines complied with Article X:3 and fairness or "due process" requirements being read into the chapeau. The revised Guidelines were fair because they were more formal, transparent, and predictable in their requirements. Some of the specific procedures that satisfied the Appellate Body's concerns regarding fairness and due process were:

1. The Guidelines allowed a country to learn of any certification problems it might have and how it could correct those problems.
2. U.S officials were required to visit with applicant countries to discuss and review any application deficiencies.
3. The Guidelines provided for two assessments of a country's program, a preliminary one by 15th of March, and a formal one, by the 1st of May, each year.
4. After the preliminary assessment, countries have the option to schedule face-to-face meetings about their application.

⁷⁵ *Id.* at ¶ 180.

⁷⁶ *Id.* at ¶ 181.

⁷⁷ *Id.* at ¶ 183.

5. Countries are notified in writing about any possible options a country can take to become certified, given a chance to submit new information, and later, if the application is rejected, given a written notification of the reasons for rejection and possible certification options in the future.
6. If a country would like to review or appeal the decision, it can request reconsideration of the decision or bring the matter to suit in the US Court System.⁷⁸

According to the Appellate Body, these changes to the Guidelines were sufficient to establish transparency, predictability, and formality in the measure's administration so that certification determination was no longer arbitrary. Foreign countries could now understand the basis for a determination and respond with additional documents and information. They also knew exactly what the procedure was and avenues for participation. The changes in Guidelines show that "the implementing measure is no longer primarily based on the application of certain methods or standards, but on the achievement of certain objectives, even though the term 'objective' may, in this case, have a relatively broad meaning."⁷⁹

Any trade restrictions imposed pursuant to the Pelly Amendment can easily comply with these fairness and due process requirements. Notice, administration, and application of a measure comparable to the approved *Shrimp/Turtle II* Guidelines can be achieved so that the entire process is formal, transparent, and predictable and there is no arbitrary administration or application of a measure. The Secretary of the Interior could accomplish these goals by acknowledging receipt of this petition in the *Federal Register* and in that notice request additional information from the public and Mozambique and establish the process described above.

e. Countries Where the Same Conditions Prevail

In order for the discrimination to be "arbitrary" or "unjustifiable," it must be against countries where the same conditions prevail. Although no panel has ever provided a clear interpretation of this requirement, the purpose of the chapeau provides some insight into which conditions to consider. Because the purpose of the chapeau is to prevent a Member from abusing an exception, the conditions to consider should be those that relate to the exception. The policy goal that is to be promoted by the measure at issue should be relevant to this analysis.

The panel in *EC-Tariff Preferences* used this approach without explicitly saying so. In that case, countries were eligible for the European Communities' preferential tariff rates based on the gravity of drug problems in those countries. While 12 countries received preferential tariffs, the Panel noted that seizures of opium and heroin in Iran, a non-recipient, were substantially higher than in Pakistan, a recipient. The Panel could find

no evidence to conclude that the conditions in respect of drug problems prevailing in the 12 beneficiary countries are the same or similar, while the conditions prevailing in other drug-affected developing countries not covered by any other

⁷⁸ *Shrimp/Turtle II*, Panel Report, *supra* note 215, at ¶¶ 5.129-5.135.

⁷⁹ *Id.* at ¶ 5.124.

preferential tariff schemes are *not* the same as, or sufficiently similar to, the prevailing conditions in the 12 beneficiary countries.⁸⁰

As a consequence, the Panel found that the EU had not established that the application of the EU's measure did not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.⁸¹

In the situation relating to rhino and elephant conservation and the Pelly Amendment, the policy goal is conservation of rhinos and elephants through effective implementation of CITES. When considering whether discrimination occurs, it is necessary to look at conditions relating to rhino horn and elephant ivory trade and CITES implementation in Member countries. In particular, the conditions that should be considered are:

1. the amount of illegal international trade in rhino horn and elephant ivory in the Member country,
2. the level of involvement of Mozambican nationals in the illegal trade and poaching of rhinos and elephants, and
3. the engagement of the Mozambican government in controlling this trade, in particular by implementing its CITES responsibilities with respect to rhinos and elephants.

As Section III makes clear, Mozambicans are playing a central role in the continuing decline of rhinos and elephants. Mozambicans poach rhinos and elephants, both in Mozambique and in South Africa. Mozambicans openly sell rhino horn and elephant ivory in public markets. The government is doing little, if anything, to prevent these activities. In fact, Mozambique is failing to implement the resolutions and decisions of the Parties with respect to rhinos and elephants, including Resolution Conf. 9.14 (Rev. CoP15) and Resolution Conf. 10.10 (Rev. CoP16). For example, it is failing to identify and report on rhino horn and ivory stockpiles and seizures of rhino horn and ivory, two critical features of the CITES regime for ensuring that illegally obtained rhino horn and elephant ivory does not enter international trade. Further, Mozambique has failed for more than 30 years to adopt legislation that adequately implements CITES; current legislation, for example, fails to impose penalties significant enough to deter illegal international trade. Whether for rhinos in Decisions 16.87 and 16.88 or in ETIS reports, Mozambique continues to be specifically identified by the CITES Parties for its central role in the rhino horn and ivory trade. For these and other reasons articulated in this petition, the Secretary of Interior must certify Mozambique as diminishing the effectiveness of CITES.

2. The Trade Related Measures under the Pelly Amendment Are Not a Disguised Restriction on International Trade

Trade restrictions imposed pursuant to the Pelly Amendment would not be a disguised restriction on international trade. In *Retreaded Tyres*, the Panel analyzed this factor “with a reasoning almost identical to that it had developed in respect of the existence of arbitrary or unjustifiable

⁸⁰ *EC–Tariff Preferences*, Panel Report, *supra* note 408, ¶ 7.234 (emphasis in original).

⁸¹ *Id.* at ¶ 7.235.

discrimination.”⁸² The Appellate Body followed this analysis. It reasoned that since it reversed the Panel’s arbitrary and unjustifiable discrimination analysis, it therefore must reverse the Panel’s disguised restriction on trade analysis since that analysis is essentially the same as the arbitrary and unjustifiable analysis.⁸³ Following this reasoning, since the Pelly Amendment does not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail, it does not constitute a disguised restriction on trade.

In addition, *Reformulated Gasoline* said that, at a minimum, disguised restriction on international trade means more than a “concealed or unannounced restriction.”⁸⁴ The application of the Pelly Amendment to CITES-listed species in Mozambique is not a disguised restriction on international trade. For one, the Pelly Amendment establishes a test that is directly related to a country’s diminishment of a threatened or endangered species program. The intent of the trade restrictions are clear; to encourage compliance with international agreements in order to protect the threatened or endangered species covered by the agreement. The sole intention of the trade restrictions is to encourage Mozambique to help conserve rhinos and elephants through the implementation of its CITES obligations. With the number of poached rhinos and elephants escalating, and Mozambicans involved in both the poaching and illegal trade in the horn and ivory, any trade restrictions imposed would be directly related to that purpose and not for any protectionist purposes. Therefore, any trade restrictions imposed pursuant to the Pelly Amendment are not disguised restrictions on international trade.

⁸² *Retreaded Tyres*, Appellate Body Report, *supra* note 441, at ¶ 238.

⁸³ *Id.* at ¶ 239.

⁸⁴ *Reformulated Gasoline*, Appellate Body Report, *supra* note 211, at 25 (emphasis in original). The Appellate Body in *Reformulated Gasoline* also stated:

We consider that “disguised restriction”, whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX.

Id. at 25. Defined in this way, however, it is unclear how to distinguish a “disguised restriction” from an “arbitrary” or “unjustifiable” one.



June 27, 2014

The Honorable Sally Jewell
Secretary
U.S. Department of the Interior
1849 C Street NW
Washington, DC 20240

Dear Secretary Jewell:

We are submitting the attached Petition and supporting Appendices under the Pelly Amendment to the U.S. Fisherman's Protective Act to certify Mozambique for diminishing the effectiveness of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) for rhinos and elephants.

Mozambique's large scale poaching and illegal trade in rhino horn and elephant ivory directly undercut President Obama's July 2013 Executive Order on Combating Wildlife Trafficking. Available evidence indicates that Mozambican nationals constitute the highest number of foreign arrests for poaching in South Africa. Organized crime syndicates based in Mozambique are driving large scale illegal trade in rhino horn and elephant ivory and subsequent smuggling to Vietnam and other consuming nations such as China.

Given the scope and depth of the illegal killing and trade in rhino and elephant products by Mozambican nationals, we urge the United States to certify Mozambique and enact substantial trade sanctions that include, but are not limited to, all CITES-listed specimens exported to the United States. Due to the egregious circumstances, we request urgent certification and subsequent enactment of trade sanctions.

Thank you in advance for the prompt consideration of our appeal to help protect the world's dwindling rhino and elephant populations from the illegal activities of Mozambican nationals and the long-term failure of the Mozambican government to enact meaningful wildlife protections.

Our organizations look forward to working with your representatives to provide any additional information that may be helpful in consideration of the attached Petition.

Sincerely,

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