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**To Trade or not to Trade: Examining the Impact of CoP17 on
Elephant Ivory Trade in South Africa**

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DECLARATION

I, **Akira Jaimungal**, hereby declare that:

1. the work on which this dissertation is based is my original work, except where acknowledgements indicate otherwise;
2. to my knowledge, neither the whole work, nor any part of it has been submitted, is being, or is to be submitted for any other qualification to any other tertiary institution.
3. this is an original piece of work which is made available for photocopying and for interlibrary loan.



Signature

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ABSTRACT

Elephant ivory is a rare and sought after commodity that has been traded for centuries in many ancient civilisations. Over time, the growing demand for ivory led to sharp declines in African elephant populations. The devastating effects of the ivory trade therefore raised concerns amongst the international community. After much deliberation, the idea came about to create a convention that would regulate the wildlife trade, which included the ivory trade.

In 1975, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) came into force with the aim of ensuring that the international wildlife trade did not threaten the survival of certain endangered species in the wild. Every two to three years, Parties to CITES meet to review the Convention and discuss possible changes. These meetings are known as the Conference of the Parties (CoP's). The CoP is the supreme decision-making body of the Convention. In terms of this Convention, species are listed in three different appendices depending on the level of threat to their extinction. Appendix I provides the highest level of protection by prohibiting all international trade in that species, whilst Appendices II and III allow some regulated trade depending on the severity of the threat of extinction.

In 1976, the African elephant was afforded the protection of CITES and listed under Appendix II of the Convention. However, elephant populations continued to decline. The growing demand for ivory eventually peaked during the 1980s and led to a sharp rise in poaching activity which further diminished elephant populations. At the Conference of the Parties seventh meeting (CoP 7) in 1989, parties recognised the plight of the African elephant population and decided to list the African elephant under Appendix I of the Convention, thereby banning all international trade in ivory. This international ban is also commonly referred to as the “ivory trade ban.” However, there were a few pro-trade Parties with stable elephant populations such as Botswana, Namibia, Zimbabwe and South Africa that did not agree with the Appendix I listing. Instead they petitioned CITES to list their elephant populations under Appendix II so that they would be able to conclude “one-off” ivory sales to CITES approved trading partners. These pro-trade Parties were successful in their petition and therefore have their elephant

populations listed under Appendix II of the Convention. In addition, two “one-off” sales of ivory were approved by CITES which took place in 1999 and 2008.

Since the above-mentioned one-off sales took place, pro-trade Parties have continued to petition CITES to conclude further one-off sales, at almost every CoP meeting to date. The rationale for concluding one-off sales was to raise funds for elephant conservation and for legally obtained ivory to flood the market, thereby removing the need or incentive to source ivory by illegal means. Pro-ban Parties, however, believed that the one-off sales of ivory had an adverse effect on elephant populations and that all trade in ivory should, therefore, be banned. The controversy relating to the African elephant at each CoP has been described as acrimonious, and has received much international publicity. The debate about the status of the African elephant at each conference illustrates the fact that the international community has differing perceptions regarding the conservation paradigm that should be adopted – ranging from advocates of “pure-protectionist” approaches on the one hand to supporters of “sustainable-use” approaches on the other hand.

This dissertation analyses CITES effectiveness in regulating the ivory trade and preventing further elephant population declines. The study focuses specifically on the proposals that were submitted and the decisions made at the most recent CITES CoP 17 meeting in 2016, which took place in Johannesburg, South Africa. In addition, the study will also analyse the effect of decisions made at CoP 17, on the elephant ivory trade in South Africa.

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CHAPTER ONE
GENERAL BACKGROUND

“Animals are sentient beings who can suffer and feel pain and therefore humans are obliged not to inflict it on them.”¹

1.1. INTRODUCTION: BACKGROUND TO THE STUDY

The African elephant is the largest land-dwelling animal on Earth,² and due to its large home range and fugitive nature, it moves across African borders in search of food and water.³ Unlike the Asian elephant, the tusks of the African elephant are larger, stronger⁴ and are easily carved into decorative items.⁵ As such, “human greed for trinkets and dubious tonics”⁶ has made the tusks of the African elephant a highly coveted commodity.⁷ In order to satiate the growing demand for ivory, elephants are killed by poachers, and their tusks are removed.⁸ The demand for ivory has led to the ivory trade, which is the commercial and often illegal trade in elephant ivory⁹ – more specifically the trade in ivory of the African elephant.

The Great Elephant Census (GEC), a pan-African aerial survey conceptualised by philanthropist Paul G. Allen and Elephants Without Borders (EWB), conduct standardised aerial surveys in order to gather data on the current state of elephant populations in Africa.¹⁰ The census is the largest pan-African aerial survey since the 1970s and continues to collate

¹ Jeremy Bentham – English Utilitarian philosopher.

² Hutchens, E. ‘The law never forgets: An analysis of the elephant poaching crisis, failed policies, and potential solutions’ (2013-2014) 31(4) *Wisconsin International Law Journal* 935.

³ Kreuter, U.P. and Simmons, T. Economics, politics and controversy over African elephant conservation. In: Freeman, M.M.R., Kreuter, U.P, *Elephants and Whales: Resources for whom?* Switzerland: Gordon and Breach Science Publishers (1994) Vol 3, 39.

⁴ Hutchens (note 2 above) at 935.

⁵ Philip, H. ‘A brief history of the ivory trade in Africa’ 2016 *howafrica.com*, available at <http://howafrica.com/a-brief-history-of-ivory-trade-in-africa>, accessed on 18 October 2016.

⁶ Panjabi, R.K.L. ‘For trinkets, and terrorism: International wildlife poaching in the twenty-first century’ (2014) 43(1) *Georgia Journal of International and Comparative Law* 4.

⁷ Hutchens (note 2 above) at 935.

⁸ Ibid.

⁹ English Dictionary. “Ivory trade” <http://englishdictionary.education/en/ivory-trade>, accessed: 17 October 2016.

¹⁰ Great Elephant Census (GEC) ‘The Census’, undated, *greatelephantcensus.com*, available at <http://www.greatelephantcensus.com/background-on-conservation/>, accessed on 18 October 2016.

valuable data on the status of elephant populations in Africa.¹¹ Elephant population data prior to the census has been described as disorganised and limited, but the GEC highlights some key milestones in elephant conservation over the years. Their estimate of the number African elephants on the continent during the 1500s is 26 million.¹² During the 1800s and early 1900s poachers however began hunting more aggressively as the demand for ivory increased.¹³ Since then, the African elephant population has been experiencing a catastrophic decline.¹⁴ The decline is largely due to poaching for ivory, but is also due to other underlying factors such as loss of habitat and conflict between humans and elephants.¹⁵ However, surges in poaching activity meant that the latter factors received less attention.¹⁶ The uncontrolled levels of elephant poaching and a booming global market in ivory¹⁷ pushed the African elephant to the brink of extinction.¹⁸

The threat to the survival of the African elephant population resulted in international agreements being made to prevent further population loss. International agreements regulating the trade in ivory were required to establish measures that would effectively address the threat to the African elephant population. The leading international agreement regulating global ivory trade is the Convention for International Trade in Endangered Species (CITES).¹⁹ At biennial/triennial meetings, parties that are a signatory to the convention review its implementation, and discuss possible changes.²⁰ These meetings are known as CoP

¹¹ Great Elephant Census (GEC) 'Our Vision', undated, *greatelephantcensus.com*, available at <http://www.greatelephantcensus.com/background-on-conservation/>, accessed on 18 October 2016.

¹² Great Elephant Census (GEC) 'Key milestones in elephant conservation', undated, *greatelephantcensus.com*, available at <http://www.greatelephantcensus.com/background-on-conservation/>, accessed on 18 October 2016.

¹³ Philip (note 5 above).

¹⁴ Environmental News Service '29 African nations urge EU to halt elephant slaughter', 2016, *ens-newswire.com*, available at <http://ens-newswire.com/2016/07/04/29-african-nations-urge-eu-to-halt-elephant-slaughter/>, accessed on 17 October 2016.

¹⁵ African Elephant Database. *African Elephant Status Report 2016*. International Union for Conservation of Nature (IUCN) (2016), available at <https://www.dropbox.com/s/7a8w3kk6r9hzm0r/AfESG%20African%20Elephant%20Status%20Report%202016.pdf?dl=1>, accessed on 17 October 2016 3.

¹⁶ *Ibid* at 11.

¹⁷ Maddison, J. 'Everything you ever wanted to know about the illegal ivory trade, as explained by a leading elephant expert', 2016, *Animalogic*, available at <http://community.lovenature.com/blog/everything-you-ever-wanted-to-know-about-the-illegal-ivory-trade-as-explained-by-a-leading-elephant-expert>, accessed on 17 October 2016.

¹⁸ Mukela, J. 'Threat to Africa's elephants a headache for CoP17', 2016, *Mail and Guardian Online*, available at <http://mg.co.za/article/2016-09-23-00-threat-to-africas-elephants-a-headache-for-CoP17>, accessed on 17 October 2016.

¹⁹ Montazeri, S. 'Protecting the pachyderm: The significance of the ivory trade regulation for African elephant conservation' (2013) 22(121) *Cardozo Journal of International and Comparative Law* 122.

²⁰ Barrie, G.N. 'CITES: A 2005 assessment' (2006) 182 *South African Law Journal* 184.

(Conference of the Parties) – and in 1989, at the seventh Conference of the Parties (CoP 7), a global ban on the trade in ivory was approved.²¹ The global ban on trade, or the “trade ban,” effectively prohibits all international trade in African elephant ivory.²² The trade ban came into effect in 1990, and since then levels of poaching fell dramatically and black market prices of ivory plummeted – thus allowing elephant populations to recover.²³

As elephant populations began to recover, certain southern African countries that were opposed to an outright trade ban, attempted to weaken it by petitioning CITES to sell their ivory stockpiles.²⁴ There are two types of ivory stockpiles: First, a legal ivory stockpile consisting of elephant tusks which have been recovered from elephants that have died natural deaths or due to legitimate animal management practices such as culling.²⁵ Second, there is an illegal ivory stockpile comprising ivory that was illegally sourced by poachers and has subsequently been seized by authorities.²⁶ In 1999, the opposing southern African nations obtained the approval of CITES to sell their legal ivory stockpiles in an ‘experimental one-off sale’.²⁷ Despite using the term “one-off sale” in 1999 – CITES approved a further one-off sale in 2002, which only took place in 2008.²⁸ The rationale for these ‘one-off sales’ was that legal ivory would be released in bulk and would flood the ivory market, thus removing the need or incentive to source ivory by illegal means.²⁹

According to Hutchens, the one-off sales significantly affected the trade in ivory by revitalising the ivory market and re-incentivising poaching.³⁰ Thus the rationale for the one-off sales was flawed and failed to produce the desired result. By approving one-off sales during the operation

²¹ U.S. Fish and Wildlife Service. ‘CITES & Elephants’, 2013, *U.S. Fish and Wildlife Service International Affairs*, available at <https://www.fws.gov/le/pdf/CITES-and-Elephant-Conservation.pdf>, accessed on 10 April 2016.

²² Heltberg, R. ‘Trade bans and wildlife conservation: The case of African elephant ivory’ (1999) 155 (6) *Agrekon* 405.

²³ Hutchens (note 2 above) at 941.

²⁴ *Ibid* at 939.

²⁵ Maddison (note 17 above).

²⁶ *Ibid*.

²⁷ Lemieux, A.M., Clarke, C.V. ‘The international ban on ivory sales and its effects on elephant poaching in Africa’ (2009) 49 *Brit. J. Criminol* 454.

²⁸ van Kooten, G.C. ‘Elephant economics in the rough: Modelling ivory trade’, unpublished article, University of Victoria, Canada, Department of Economics 2005 3, available at <https://conservationaction.co.za/wp-content/uploads/2014/01/Elephant-Economics-in-the-rough.pdf>, accessed on 24 May 2018.

²⁹ Maddison (note 17 above).

³⁰ Hutchens (note 2 above) at 936.

of an ivory trade ban, CITES created confusion and uncertainty regarding its position on the international trade in ivory. According to TRAFFIC – the wildlife trade monitoring network – 140 000 of Africa’s elephants were killed between 2007 and 2014.³¹ Research by the University of California, Berkeley, indicates that the root cause of the rapid increase in poaching activity is the one-off sales approved by CITES.³² According to the Berkeley team, these sales removed the stigma attached to the trade in ivory that was brought about by the international trade ban – thus allowing trade to resume.³³ It is thus strongly argued that the one-off sales had an adverse effect on the African elephant population.

Opinions are divided on the effectiveness of CITES in terms of protecting the African elephant.³⁴ Through the years, many operational and interpretational problems have arisen. The more controversial of these were dealt with at the CoP’s.³⁵ The controversy relating to the African elephant at each CoP has been described as acrimonious, and has received much international publicity.³⁶ The debate about the status of the African elephant at each conference illustrates the fact that the international community has differing perceptions regarding the conservation paradigm that should be adopted – ranging from advocates of “pure-protectionist” approaches on the one hand to supporters of “sustainable use” approaches on the other hand.³⁷ Despite decisions made at each CoP regarding the protection of the African elephant, the rates of elephant killings have reached unprecedented levels in recent years.³⁸

The fact that elephants are being poached at a rate of 8% each year – which is about 104 elephants a day and approximately 35 000-38 000 each year³⁹ – makes the negotiations surrounding the African elephant and ivory trade of paramount importance. The African Elephant Status Report (hereafter the “AESR”) produced by the African Elephant Specialist

³¹ Kings, S. ‘Rhino, elephant, lion fates to be decided at CITES’, 2016, *Mail and Guardian Online*, available at <http://mg.co.za/article/2016-09-26-00-rhino-elephant-lion-fates-to-be-decided-at-cites>, accessed on 17 October 2016.

³² Kings, S. ‘Legal ivory trade led to sharp rise in poaching’, 2016, *Mail and Guardian Online*, available at <http://mg.co.za/article/2016-06-17-00-legal-ivory-trade-led-to-sharp-rise-in-poaching>, accessed on 27 September 2016.

³³ *Ibid.*

³⁴ Barrie (note 20 above) at 185.

³⁵ *Ibid.*

³⁶ *Ibid* at 188.

³⁷ *Ibid.*

³⁸ Montazeri (note 19 above) at 151.

³⁹ *Ibid* at 122.

Group (AfESG) of the IUCN Species Survival Commission (SSC), is an authoritative source of source of data regarding the numbers and distribution of African elephant populations across the 37 African range States.⁴⁰ According to AESR 2016, in light of the surge in poaching over the past decade, Africa’s elephant population is experiencing the worst continental decline in 25 years.⁴¹ The report, which was released at the CITES Seventeenth Conference of the Parties (CoP 17) that took place in 2016 in Johannesburg, South Africa, reveals the truly alarming plight of the African elephant.⁴²

Despite efforts being made to effectively regulate the ivory trade, CITES continued to face several practical challenges in the implementation of its provisions. Some of the major weaknesses are: the non-binding nature of its CoP resolutions,⁴³ the fact that it prohibits supply to international markets while domestic markets remain legal,⁴⁴ and that it relies on its member States to pass a national legislative framework to give effect to its resolutions.⁴⁵

In order for the Convention to be effective in future, there needs to be a coordinated process of implementation.⁴⁶ This process must guarantee, in the long-term, the achievement of the Convention’s purpose and objectives by all parties.⁴⁷ It is important that the international community does not lose sight of the main objective of CITES, which is to ensure that the international trade in certain species (African elephants) – does not threaten the survival of the species in the wild.⁴⁸ This requires a stringent approach to the trade in ivory, taking into account the plight of the African elephant population, the demand for ivory, and factors threatening the survival of the population.

⁴⁰ AESR 2016 (note 15 above) at 2.

⁴¹ *Ibid* at 3.

⁴² International Union for Conservation of Nature. ‘Poaching behind worst African elephant losses in 25 years – IUCN report’, 2016, *iucn.org*, available at <https://www.iucn.org/news/poaching-behind-worst-african-elephant-losses-25-years-%E2%80%93-iucn-report>, accessed on 17 October 2016.

⁴³ Barrie (note 20 above) at 185.

⁴⁴ Stiles, D. ‘CITES-approved ivory sales and elephant poaching’ (2009) 45 *Pachyderm* 152.

⁴⁵ Lemieux (note 27 above) at 453.

⁴⁶ Barrie (note 20 above) at 189.

⁴⁷ *Ibid*.

⁴⁸ Montazeri (note 19 above) at 122.

If the Convention does not effect the necessary changes or facilitate the ability to do so by reaching a definitive approach to elephant conservation in order to achieve its objectives – other relevant international instruments may have to be called upon to redress the real and perceived shortcomings of CITES.⁴⁹ The international community should be dedicated to effecting a positive change by making every effort to facilitate the recovery of the African elephant population before it is too late.

This study is focused on the evolution of the elephant ivory trade and the impact of recent CoP negotiations, as it relates to the African elephant population. The dissertation begins by discussing the historical background and evolution of the elephant ivory trade. Thereafter, the study places the African elephant in context, with a view to understanding the manner in which the ivory trade threatens the population's survival. Further to this, the study will analyse the international legal regime regulating the trade in elephant ivory. By conducting such an analysis, this study hopes to accurately assess the effectiveness of this legal regime in ensuring the survival of African elephant populations. Special attention will be given to the manner in which the legal regime is interpreted and applied in terms of South African law.⁵⁰ The study will then focus on CITES CoP proposals and relevant decisions, which have been made in the past. The purpose of doing so is to provide a timeline leading up to the recent CoP17 negotiations – which will be discussed in detail thereafter. Lastly, the dissertation will conclude by assessing the potential impact of recent proposals on South Africa, as well as making recommendations about the future of the elephant ivory trade.

1.2. RATIONALE FOR THE STUDY

The elephant ivory trade is one of the main factors threatening the recovery of the African elephant population. The rate of poaching over the past decade has crippled elephant populations. If the current rate of killing continues, the African elephant may be in danger of becoming extinct.⁵¹ The motivation to conduct such a study is derived from the plight of the African elephant population. Unfortunately, despite it being a topical issue that has received

⁴⁹ Barrie (note 20 above) at 188.

⁵⁰ Hutchens (note 2 above) at 936.

⁵¹ Environmental News Service (note 14 above).

international attention, the killing continues. It is thus crucial for the survival of the African elephant that a solution be found.

Practical reasons for conducting this study are: As the leading international agreement regulating the trade in endangered species, CITES contains provisions to regulate the elephant ivory trade. However, parties to the Convention are not adequately enforcing these provisions to provide an effective solution to the increasing demand for elephant ivory. Their failure may be attributed to the conflicting approaches to elephant conservation adopted by member States: a pure-protectionist approach and a sustainable-use approach. The pure-protectionist approach prohibits all international trade in elephant ivory, while the sustainable-use approach promotes some regulated trade. This divide creates controversy and uncertainty in the international community. CITES is also reliant upon each member State to effectively implement national legislation. However, “less than half of CITES members have the relevant legislation in place”.⁵² Despite these problems, CITES remains the leading international agreement regulating the trade in elephant ivory. Although there is not a dearth of information provided or strategies suggested by CITES, there is a serious lack of “coherent, consistent and concrete action”⁵³ taken in accordance with such information or strategies. It is therefore important to examine CITES and its significance in regulating the trade in elephant ivory. It is also important to analyse that CITES CoP negotiations over the years, and how they have contributed to the evolution of the legal regime regulating the trade in ivory. Special attention will be given to the most recent CoP meeting, CoP17 – with a view to analysing its impact on the future of the elephant ivory trade.

1.3. RESEARCH QUESTIONS, AIMS AND STRUCTURE OF THE STUDY

The main research question of this study is to ascertain the extent to which recent discussions and decisions will impact the future of the African elephant ivory trade in South Africa. In attempting to answer this research question, several sub-questions will be asked. This dissertation is divided into five chapters containing the relevant sub-questions that are aimed at answering the main research question of the study.

⁵² Panjabi (note 6 above) at 74.

⁵³ Ibid at 5.

Chapter 2 attempts to answer the first sub-question: “What is the elephant ivory trade and how is it regulated?” In response to this sub-question, Chapter 2 is divided into two parts and is answered in the following manner. Part 1 begins by discussing the evolution of the elephant ivory trade. This includes an outline of what the trade is, factors fuelling the trade, the consequences of the trade for the African elephant population, and why there is a need for international intervention. Part 2 identifies and explains the international legal regime regulating the trade in elephant ivory, and the manner in which it has been interpreted and applied by member States. As the scope of this study is limited to the South African context, an analysis of South Africa’s legal regime regulating the trade in elephant ivory is included.

Chapter 3 focuses on the following sub-question: “To what extent has COP’s meetings contributed to the international legal regime regulating the trade in elephant ivory?” The main objective for asking this question, is to assess how past CoP meetings have contributed to shaping the international legal regime regulating the trade in elephant ivory. The study briefly explains the manner in which CITES CoP meetings are conducted. Thereafter, the study outlines relevant decisions made at past CoP meetings. This may be useful, as chapter 4 of the study examines the proposals presented at CoP17, as well as their consequences for the trade in elephant ivory in future. In essence, this chapter serves as a timeline – identifying relevant proposals and decisions of past CoP, leading up to the most recent CoP – namely CoP17.

Chapter 4 attempts to answer the sub-question: “What has been proposed at CoP17 and how will it impact the international trade in elephant ivory?” In response to this question, the study undertakes the important task of analysing the proposals relating to the elephant ivory trade that were made in 2017. This analysis will discuss each proposal individually and will determine whether it will be beneficial if adopted. It will thereafter provide an analysis of the outcomes of CoP17, as well as the manner in which it may be interpreted and applied by the international community. The main aim of the above question is to determine whether negotiations regarding the trade in elephant ivory have progressed, or whether this was just another wasted opportunity in terms of effectively addressing the crisis faced by the African elephant population.

Chapter 5 analyses the manner in which the decisions made at CoP17 are likely to be interpreted and applied in South Africa. This analysis will discuss South Africa's approach to the trade in elephant ivory, its prospects for future trade, and how the South African elephant population is likely to be affected. The study will also identify and make limited recommendations for the structure of the South African legal regime currently regulating the trade in elephant ivory. This will include possible improvements that may be made to existing legislation to ensure effective implementation of CITES. Lastly, the chapter will analyse the effectiveness of CITES as a whole, and its ability, or lack thereof, to effectively regulate the trade in elephant ivory. The study will also provide an opinion on the best way forward for the future of the trade, and how it will prove beneficial to the African elephant population, and this is followed by a conclusion.

1.4. METHODOLOGY

The research methodology used to pursue the aims and objectives of this study is entirely desk-top based. Information and data relating to the topic will be derived from primary sources (international treaties, CoP proposals and decisions, and relevant legislation) – as well as secondary sources (journal articles, text books, text book chapters, internet sources, NGO publications, reports from international meetings, and reputable media reports).

PART 1:
EVOLUTION OF THE ELEPHANT IVORY TRADE

CHAPTER TWO: PART 1

HISTORICAL EVOLUTION OF THE ELEPHANT IVORY TRADE

“Earth provides enough to satisfy every man’s needs, but not every man’s greed.”⁵⁴

2.1. INTRODUCTION

In setting out to achieve the objectives of this study, it is useful to begin by discussing the historical evolution of the elephant ivory trade. By discussing the historical origins, the study can determine exactly why the ivory trade needed to be regulated and when it first took place. The chapter will begin by introducing the topic of elephant ivory trade and its historical origins. This discussion will focus on African elephant ivory in particular, and the manner in which it was traded throughout history. The chapter will thereafter discuss the various factors contributing to the declining African elephant population – and the consequences of such a decline. In doing so, special attention will be given to the impact that poaching has had on African elephant populations.

2.2. ELEPHANT IVORY TRADE

For this dissertation, references to the ivory trade should be taken to mean the commercial and often illegal trade in the tusks of African elephant.

2.2.1. What is ivory?

The most crucial element in the elephant ivory trade is the tusk of the elephant. The tusk is essentially a large incisor that continues to grow as the elephant ages.⁵⁵ The tusk size, therefore, correlates with the age of the elephant.⁵⁶ Ivory has a unique composition, durability and ability to change colour when worked, which makes it a highly versatile substance.⁵⁷ Possession of ivory has always been regarded as a sign of wealth in Europe and North America.⁵⁸ It is also

⁵⁴ Mahatma Gandhi.

⁵⁵ Chaiklin, M. ‘Ivory in world history – Early modern trade in context’ (2010) 8(6) *History Compass* 535.

⁵⁶ Ibid.

⁵⁷ Ibid at 531.

⁵⁸ Dobson, A.P. 1995. *Conservation and biodiversity*. New York: Scientific American Library, 128.

an integral part of the Asian culture in the East.⁵⁹ Ivory is therefore a global commodity that has impacted on the ecology, economy and “material culture of most of the inhabited world”.⁶⁰

2.2.2. Historical evolution of the elephant ivory trade

It is uncertain when the ivory trade first began; however, evidence suggests that it can be traced back to antiquity.⁶¹ It was recorded as being traded in various ancient civilisations such as Mesopotamia, Egypt, Greece and Rome – and was used as jewellery, furniture and other objects.⁶² According to Parker's report to the US Department of Wildlife and Fisheries on the Ivory Trade, ivory was a sought-after commodity in most ancient civilisations, as it was a symbol of wealth and “social privilege”.⁶³ During the period of the Roman Empire (27 BCE – 1453 CE), in particular, ivory was commercially exploited by traders.⁶⁴ These traders established a trade route from Ostia, which was situated at the mouth of the River Tiber, to the North African city of Carthage.⁶⁵ It allowed the Romans to easily export large amounts of ivory from northern Africa, until the fall of the Roman Empire in the west in 476 CE.⁶⁶ Thereafter, the ivory trade slowed down for a few centuries, allowing African elephant populations to increase.⁶⁷ Trade however picked up again in the Middle Ages after the rise of the Venetian Trading Empire, which was responsible for most of the ivory entering Europe at the time.⁶⁸ During this period, ivory was also highly sought after in Asia, and although their supply was predominantly obtained from Asian elephants, the high demand resulted in African elephant ivory being exported in order to meet the demand.⁶⁹

During the age of exploration (15th to 17th century), trade in African elephant ivory increased significantly.⁷⁰ Portuguese navigators began exploring the West African coast in the early 15th century and set up trading posts along the way.⁷¹ On their voyages, they obtained African

⁵⁹ Dobson (note 58 above) at 128.

⁶⁰ Chaiklin (note 55 above) at 530.

⁶¹ Thompson, A. ‘The ivory trade in Africa’, 2017, *ThoughtCo*, available at <http://howafrica.com/a-brief-history-of-ivory-trade-in-africa>, accessed on 24 June 2017.

⁶² *Ibid.*

⁶³ Parker, I.S.C. ‘Commerce in ivory’ in report on *The ivory trade: Volume 1* Washington, D.: US Department of Fisheries and Wildlife, 1979 3.

⁶⁴ van Kooten (note 28 above) at 3.

⁶⁵ Trueman, C.N. ‘Ancient Rome and trade’, 2015, *The history learning site*, available at <https://www.historylearningsite.co.uk/ancient-rome/ancient-rome-and-trade/>, accessed on 24 May 2018.

⁶⁶ *Ibid.*

⁶⁷ Chaiklin (note 55 above) at 535.

⁶⁸ *Ibid.*

⁶⁹ *Ibid* at 536.

⁷⁰ *Ibid.*

⁷¹ Thompson (note 61 above).

elephant ivory through trade rather than through violent pursuits of the commodity.⁷² By the latter part of the 15th century, they had managed to navigate around the Cape and transported most of the ivory to Europe.⁷³ The profitability of their trading voyages eventually attracted the attention of other European powers – which included Dutch merchants.⁷⁴ By the early 17th century, the Dutch merchants entered the Portuguese trade in Africa and began setting up trading posts.⁷⁵ The Dutch West India Company set up a trading post along the Gold Coast for slaves and other African commodities such as ivory.⁷⁶ The Dutch East India Company explored further along the Southern African coast, and took over the trading post from the Portuguese at the Cape of Good Hope in 1652.⁷⁷ This stop was eventually ceded to the British in 1795.⁷⁸

By the mid-18th century, the demand for ivory in Asia had increased to the extent that Asian elephant populations declined.⁷⁹ As a result, African elephant ivory was exported to various ivory carving centres in Asia in order to meet the demand.⁸⁰ The Dutch and English East India Company ships were partially responsible for transporting African elephant ivory into Southeast Asia and Japan at the time.⁸¹ The demand for ivory also continued to increase in Europe into the early 19th century.⁸² By this time, excessive hunting and habitat loss resulted in diminished elephant populations along the West African coastline.⁸³ African hunters thereafter travelled further inland in their search of elephants to supply the ivory trade.⁸⁴

During the colonial era (1885 to 1960), British colonists moved further inland, where they began exploiting Central, East and West Africa for ivory.⁸⁵ According to Parker, Britain's ivory imports between 1800 and 1849 averaged 204 tonnes of ivory annually, between 1850 and 1899 it was 511 tonnes, and from 1900 to 1914 472 tonnes.⁸⁶ This sudden expansion into the ivory trade began during the second half of the 19th century and took place at the height of the

⁷² Chaiklin (note 55 above) at 536.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid at 537.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Thompson (note 61 above).

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Chaiklin (note 55 above) at 537.

⁸⁶ Parker, I.S.C. (note 63 above) at 26.

industrial revolution.⁸⁷ The colonisation of Africa also resulted in rapid globalisation which adversely affected elephant populations.⁸⁸ Human expansion and changes in land use often lead to habitat destruction.⁸⁹ This meant that elephants were restricted to smaller land ranges.⁹⁰ Various technological developments such as the introduction of advanced weaponry made it easier to kill elephants – not just for ivory, but as a sport.⁹¹ This notion of killing for sport was known as “trophy hunting”.⁹² It became increasingly popular among European settlers in the late 19th and early 20th centuries and contributed to the declining elephant population.⁹³

The increased consumption of ivory in both the East [Asia] and West [Europe] led to sharp declines in African elephant populations.⁹⁴ Consequently, certain measures were taken to conserve the African elephant – such as the formation of protected game parks.⁹⁵ The first of these was the Kruger National Park in South Africa, which was established in 1898.⁹⁶ Various elephant protection laws were also promulgated – such as the Cape Act for the Preservation of Game in 1886.⁹⁷ These game laws prevented Africans from hunting on their own accord.⁹⁸ It also limited hunting to those who were in possession of expensive hunting licences – which ensured that hunting became a “symbol of European dominance”.⁹⁹ Despite these measures, however, the demand for ivory increased and elephant populations continued to decline well into the early 20th century.¹⁰⁰ Around 1960, most African States had gained independence and began realising the importance of protecting their ivory resources.¹⁰¹ This gave rise to the need for legislation that would adequately regulate the ivory trade. However, the legislative measures made during this period proved inadequate for regulating the amount of ivory being exported.¹⁰² This was a cause for concern among many African range States (States with an African elephant population)¹⁰³ – as well as the international community at large.

⁸⁷ Macgregor, J. ‘The paradoxes of wildlife conservation in Africa’ (1989) 19(4) *Africa Insight* 202.

⁸⁸ Chaiklin (note 55 above) at 539.

⁸⁹ Macgregor (note 87 above) at 201.

⁹⁰ *Ibid.*

⁹¹ Chaiklin (note 55 above) at 532.

⁹² *Ibid.*

⁹³ *Ibid.* at 539.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ Macgregor (note 87 above) at 203.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² Kreuter and Simmons (note 3 above) at 43.

¹⁰³ AESR 2016 (note 15 above) at 11.

2.2.3. *Need for international intervention*

By the mid-20th century, the devastating effects of the wildlife trade raised concerns among the international community.¹⁰⁴ This included the ivory trade, which resulted in severely diminished African elephant populations. The idea of regulating the wildlife trade was introduced and discussed at a meeting of the members of the International Union for Conservation of Nature (hereafter the “IUCN”) in 1963.¹⁰⁵ At the meeting, it was decided that a convention would be drafted to regulate the wildlife trade.¹⁰⁶ This decision was adopted as a resolution to the IUCN meeting, and on 1 July 1975 the Convention on International Trade in Endangered Species of Wild Fauna and Flora (hereafter referred to as “CITES” or “the Convention”) came into force.¹⁰⁷ CITES was drafted with the aim of ensuring that the international wildlife trade did not threaten the survival of certain endangered species in the wild.¹⁰⁸ The level of protection that a species is afforded under CITES is determined by a three-tiered structure termed “Appendices”.¹⁰⁹ The degree of threat to the survival of a species determines which Appendix it will be listed under.¹¹⁰

In 1976, the African elephant was listed under Appendix II of CITES.¹¹¹ Under Appendix II, the African elephant was afforded an intermediate level of protection, which limits the amount of ivory that may be traded internationally.¹¹² Despite the listing, mass killings continued.¹¹³ In 1979, the first Pan-African elephant survey was conducted by Dr Ian Douglas-Hamilton – founder of the research and conservation organisation “Save the Elephants” (STE).¹¹⁴ The survey revealed an estimated African elephant population of 1.3 million.¹¹⁵ In 1989, a mere ten years later, the population reportedly had declined by 50 percent.¹¹⁶ Recognising the need to prevent further population loss, the international community intervened by listing the African elephant under Appendix I of CITES.¹¹⁷ Under Appendix I, the African elephant was accorded

¹⁰⁴ Montazeri (note 19 above) at 131.

¹⁰⁵ CITES ‘What is CITES?’, undated, *CITES.org*, available at <https://www.cites.org/eng/disc/what.php>, accessed on 5 November 2017.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ Montazeri (note 19 above) at 122.

¹⁰⁹ Khanna, J, Harford, J. ‘The ivory trade ban: Is it effective?’ (1996) 19 *Ecological Economics* 149.

¹¹⁰ *Ibid.*

¹¹¹ U.S. Fish and Wildlife Service (note 21 above).

¹¹² Khanna (note 109 above) at 149.

¹¹³ Dobson (note 58 above) at 129.

¹¹⁴ Save the Elephants (STE) ‘Statistics’, undated, *savetheelephants.org*, available at <http://www.savetheelephants.org/project/counting-elephants/>, accessed on 11 January 2017.

¹¹⁵ *Ibid.*

¹¹⁶ Great Elephant Census (GEC) website (note 12 above).

¹¹⁷ *Ibid.*

the highest level of protection by banning all international trade in ivory.¹¹⁸ This ban was referred to as “the trade ban”.¹¹⁹

The enactment of a ban on the international ivory trade led to a decrease in the number of elephants being killed and allowed elephant populations to recover.¹²⁰ However, some African range States did not support the ban, and instead petitioned CITES to list their elephant populations under Appendix II – in order to be able to conduct an experimental “one-off” ivory sale.¹²¹ In 1977, three African range States – Botswana, Namibia and Zimbabwe – were permitted by CITES to conduct a one-off ivory sale.¹²² The sale eventually took place in 1999 and 50 tonnes of ivory was sold to a designated trading partner: Japan.¹²³ According to Hutchens, this sale reignited the illegal ivory trade.¹²⁴ Poaching further escalated when CITES approved a second one-off ivory sale in 2002.¹²⁵ The sale eventually took place in 2008, and this time 105 tonnes of ivory from four African range States – Botswana, Namibia, South Africa and Zimbabwe – was sold to designated trading partners: China and Japan.¹²⁶ The one-off sales created controversy among the international community. Trade sceptics vehemently opposed the international sale of ivory, as they believed that it fuelled the demand for ivory and led to increased levels of poaching in order to meet the demand.¹²⁷

2.2.4. Factors contributing to the diminishing African elephant population

According to the latest AESR report (AESR 2016), the African elephant population across the continent was estimated at 415 428 (\pm 20 111) in areas that have been surveyed.¹²⁸ There are an additional 117 127 to 135 384 elephants in areas that have not been systematically surveyed.¹²⁹ Together, these figures account for 62 percent of the total elephant range.¹³⁰ There are no elephant population estimates for the remaining 38 percent of the total elephant range.¹³¹

¹¹⁸ Khanna (note 109 above) at 149.

¹¹⁹ Great Elephant Census (GEC) website (note 12 above).

¹²⁰ Hutchens (note 2 above) at 943.

¹²¹ Montazeri (note 19 above) at 134.

¹²² U.S. Fish and Wildlife Service (note 21 above).

¹²³ Lemieux (note 27 above) at 454.

¹²⁴ Hutchens (note 2 above) at 943.

¹²⁵ van Kooten (note 28 above) at 3.

¹²⁶ US Fish and Wildlife Service (note 21 above).

¹²⁷ Orr, T. ‘Re-thinking the application of sustainable use policies for African elephants in a changed world’ (SAIIA Occasional Paper 241; 2016) 13.

¹²⁸ AESR 2016 (note 15 above) at 3.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Ibid.

The report also showed that the continental total of African elephants has declined since the last AESR report that was released in 2007.¹³² The decline amounted to 104 000 in 2007, and 114 000 in the latest report.¹³³

Population losses may be attributed to factors such as loss of habitat, human-elephant conflict resulting in habitat loss, and, most importantly, poaching.¹³⁴ These factors are included in the first three objectives of the African Elephant Action Plan (AEAP).¹³⁵ The AEAP is a “joint conservation policy created by all 37 African range States to coordinate on what actions must be taken to effectively conserve their elephant populations.”¹³⁶ The above-mentioned figure that represents the most recent estimate of the African elephant population is alarming. It suggests that a concerted effort needs to be made to prevent further population loss. In doing so, it is necessary that factors contributing to the diminishing elephant population are adequately dealt with, by enforcing incentives such as the AEAP. Each of these factors will be alluded to briefly. For this study, however, emphasis will be placed on poaching.

2.2.4.1. Poaching

“Poaching” is defined as the “illegal taking of wildlife and plants protected by national and/or international laws and conventions”.¹³⁷ This includes the illegal killing of elephants for ivory. Poaching has contributed dramatically to declining elephant populations. This was confirmed by AESR 2016, which identified poaching as the main reason for the latest decline in elephant populations.¹³⁸ Although poaching losses have been reported across the continent, each region faces different threats and challenges.¹³⁹ In central Africa, political insecurity and a lack of governmental control resulted in increased levels of poaching and population loss.¹⁴⁰ East Africa had mixed results, which indicated drastic population loss in some States and increases in others.¹⁴¹ The region had a 50 percent reduction in its elephant population – which was primarily attributed to poaching in Tanzania.¹⁴² The other States in the region such as Uganda,

¹³² AESR 2016 (note 15 above) at 3.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Hutchens (note 2 above) at 955.

¹³⁶ Ibid.

¹³⁷ Biegus, O., Bueger, C. ‘Poachers and pirates – improving coordination of the global response to wildlife crime’ (2017) 60 *SA Crime Quarterly* 30.

¹³⁸ AESR 2016 (note 15 above) at 3.

¹³⁹ Ibid at 2.

¹⁴⁰ Ibid at 39.

¹⁴¹ Ibid at 90.

¹⁴² Ibid at 89.

Kenya, and Rwanda, among others, recorded stable or increasing populations.¹⁴³ The West African region has small fragmented populations of elephants which are increasing overall – despite the rapid land transformation in the region.¹⁴⁴ The Southern African region has the largest population of elephants on the continent.¹⁴⁵ Large elephant populations mean that the region has always been faced with various conservation challenges, including increased poaching in recent years.¹⁴⁶ The States in this region that have been most affected by the threat of poaching are: Zimbabwe, Angola, Mozambique and Zambia.¹⁴⁷

The AESR also relies on systematic information from MIKE (Monitoring the Illegal Killing of Elephants), which was established under CITES 1997 as a system to track illegal activities involving elephants, such as poaching.¹⁴⁸ MIKE indicated that poaching levels have risen above the sustainability threshold (where more than half of the dead elephants found are deemed to have been killed illegally).¹⁴⁹ The information from MIKE corresponds with data released on UN World Wildlife Day, which revealed that at least 60 percent of elephant deaths are at the hands of poachers.¹⁵⁰

The surge in poaching activity is driven by several factors: the high value of ivory on the international market, the renewed demand for ivory, and the potential for vast enrichment when traded illegally.¹⁵¹ The last factor pertains to the illegal ivory trade and forms part of a wider international issue, that is, Transnational Environmental Crime (hereafter ‘TEC’).¹⁵² TECs are “criminal activities undertaken by persons acting across national borders including illegal logging and timber smuggling, species smuggling, the black market in ozone depleting substances, illegal movement of toxic and hazardous waste etc.”¹⁵³ In addition, TEC may also

¹⁴³ AESR 2016 (note 15 above) at 91.

¹⁴⁴ Ibid at 201.

¹⁴⁵ Ibid at 138.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ CITES ‘MIKE and ETIS’, undated, *CITES.org*, available at https://www.cites.org/eng/prog/mike_etis.php, accessed on 5 November 2017.

¹⁴⁹ AESR 2016 (note 15 above) at 29.

¹⁵⁰ Carrington, D. ‘African elephants ‘killed faster than they are being born’, 03 March 2016, *The Guardian*, available at <https://www.theguardian.com/environment/2016/mar/03/african-elephants-killed-faster-than-they-are-being-born>, accessed on 17 October 2016.

¹⁵¹ McDonald, E. ‘Too big to fail: Rescuing the African elephant’ (2016) 40(1) *The Fletcher Forum of World Affairs* 115.

¹⁵² Wright, G. ‘Conceptualising and combating transnational environmental crime’ (2011) 14(4) *Trends in Organised Crime* 332.

¹⁵³ UN Environment ‘Transnational Environmental Crime’, undated, *unenvironment.org*, available at web.unep.org/divisions/delc/transnational-environmental-crime, accessed on 28 June 2019.

be described as a multifaceted enterprise crime that operates alongside a legal market and involves a range of actors.¹⁵⁴ The illegal ivory trade is categorised as a TEC as it involves trading in endangered species and is multifaceted in the sense that it is constituted by other crimes, such as poaching.¹⁵⁵ In most cases, the parties involved in the commission of the abovementioned TEC belong to organized crime groups such as, criminal gangs, corrupt military units, members of various militias, and terrorist groups.¹⁵⁶ These groups often display the characteristics of organized crime groups when acquiring and trafficking in wildlife.¹⁵⁷ Characteristics include: the use of violence, corruption and extortion.¹⁵⁸ All of which can jeopardise the existence of a species and greatly undermine the law enforcement capacities of the States involved.¹⁵⁹ The increased threat of TECs therefore attracted the attention of the international community and in 2014, the United Nations Security Council – acting under Chapter VII of the UN Charter¹⁶⁰ – noted TECs in its resolution.¹⁶¹ The resolution noted that “illicit natural resource exploitation, including wildlife poaching, were destabilising forces in the Central African Republic” and encouraged the State to take the necessary action to address the issue.¹⁶² Various subsequent resolutions have also noted the issue.¹⁶³ However, it is apparent that TECs, like the illegal ivory trade, are still not being treated with sufficient seriousness by the national and international community, who tend to prioritise traditional organised crimes such as human and drug trafficking.¹⁶⁴ This could be due to three reasons; firstly, TECs are governed by a different treaties, each with its own provisions, making it difficult for States to keep up with implementation and enforcement.¹⁶⁵ An example of this is the wildlife trade, which includes the illegal ivory trade, and is governed CITES, and waste

¹⁵⁴ Wright (note 152 above) at 339.

¹⁵⁵ Ibid at 337.

¹⁵⁶ McDonald (note 151 above) at 115.

¹⁵⁷ Torpy, R. ‘If criminal offences were added to CITES, would nations be better able to restrict international trade in endangered species and protect biodiversity?’ (2012) 9(3) *Brazilian Journal of International Law* 63.

¹⁵⁸ Ibid.

¹⁵⁹ Wright (note 152 above) at 333.

¹⁶⁰ Chapter VII of The Charter of the United Nations. Signed at San Francisco, 26 June 1945, available at <https://www.un.org/en/charter-united-nations/>.

¹⁶¹ Resolution 2134 (2014) ‘United Nations Security Council’, available at [unscr.com/en/resolutions/doc/2134](https://www.un.org/en/resolutions/doc/2134), accessed on 28 June 2019.

¹⁶² Ibid.

¹⁶³ UNSCR ‘Resolution 2134 – Central African Republic’, undated, *unscr.com*, available at [unscr.com/en/resolutions/2134](https://www.unscr.com/en/resolutions/2134), accessed on 28 June 2019.

¹⁶⁴ Wright (note 152 above) at 334.

¹⁶⁵ Ibid at 337.

disposal, which is governed by the Basel Convention.^{166 167} Secondly, unlike drugs and human trafficking which are expressly prohibited forms of organised crime, trade in certain natural resources are not expressly prohibited.¹⁶⁸ The presence of a legal market for some natural resources often makes it difficult for authorities on the ground to be able to distinguish between what is being traded legally and illegally.¹⁶⁹ Lastly, TECs are often perceived as “victimless crimes” which results in States allocating fewer resources for their prevention.¹⁷⁰ This is evident in the illegal ivory trade where organised crime groups are often heavily armed and, in most cases, are better equipped than local park rangers.¹⁷¹ During the past decade, over 1 000 park rangers lost their lives attempting to prevent poaching incidents.¹⁷² This figure indicates a lack of training given to park rangers and weak law-enforcement measures.¹⁷³ To address the situation on the ground, States need to perceive TEC as a “serious issue” and understand the consequences of failing to allocate adequate resources to combat them.¹⁷⁴ It is therefore important that States effectively implement, comply with, and adequately enforce the relevant environmental laws and multilateral agreements, such as CITES.

2.2.4.2. Human-elephant conflict

Human-elephant conflict is broadly defined as “any human-elephant interaction which results in negative effects on human social, economic or cultural life, on elephant conservation or on the environment”.¹⁷⁵ Conflict arises when humans and elephants compete for the same scarce resources – food, water and land.¹⁷⁶ Human-elephant conflict is also closely linked to other factors contributing to the declining population, such as habitat loss and poaching. Habitat loss often results in a reduced range area for African elephants and confines them to certain areas of suitable habitat.¹⁷⁷ Due to their range area being so small, they often come into contact with

¹⁶⁶ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. Signed at Basel, Switzerland, 22 March 1989, available at www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx.

¹⁶⁷ Wright (note 152 above) at 337.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid at 338.

¹⁷¹ McDonald (note 151 above) at 123.

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Wright (note 152 above) at 340.

¹⁷⁵ Parker, G.E., Osborn, F.V., Hoare R.E., Niskanen, L.S. (eds) (2007): Human-elephant conflict mitigation: A training course for community-based approaches in Africa. Participant’s Manual. Elephant Pepper Development Trust, Livingstone, Zambia and IUCN/SSC AfESG, Nairobi, Kenya 11.

¹⁷⁶ Helberg (note 22 above) at 406.

¹⁷⁷ IUCN ‘Human-elephant conflict’, undated, International Union for Conservation of Nature, available at <https://www.iucn.org/ssc-groups/mammals/african-elephant-specialist-group/human-elephant-conflict>, accessed on 17 October 2016.

humans, which may, at times, lead to conflict.¹⁷⁸ Conflict occurs when the elephants directly or indirectly harm humans.¹⁷⁹ This often occurs in rural communities.¹⁸⁰ These communities then begin regarding elephants as a nuisance and turn a blind eye to or even assist poaching groups.¹⁸¹ Human-elephant conflict is therefore a crucial contributing factor to the declining elephant population, and is becoming an increasingly common phenomenon.¹⁸² In an attempt to prevent conflict, States often rely on communities to assist in managing human-elephant conflict by providing incentives.¹⁸³ These incentives are in the form of funds for rural development, which are derived from the sale of ivory.¹⁸⁴ Although it is necessary that communities collaborate with wildlife enforcement to prevent incidents of human-elephant conflict, it is however not necessary that these communities benefit from the sale of ivory.¹⁸⁵ African States should, instead, adopt alternative approaches that support rural development and do not include the sale of ivory.¹⁸⁶ At meetings of the Conference of the Parties to CITES (CoP), India agreed to share their knowledge on methods to assist preventing human-elephant conflict, without recourse to the sale of Asian elephant ivory.¹⁸⁷ Violence-free alternatives include, among others, fencing, the use of bees/the sound of bees as a deterrent, chilli-based repellents on crops, and land-use planning and community conservation initiatives that do not include initiatives derived from the sale of ivory.¹⁸⁸

2.2.4.3. Loss of habitat

Though it is not the foremost threat to the African elephant population, loss of habitat is a crucial factor contributing to population loss. Loss of habitat occurs due to factors such as human development, and rapid urbanisation or expansion of agriculture that takes place over extended periods of time.¹⁸⁹ It is therefore classified as a long-term threat to elephant

¹⁷⁸ IUCN website (note 177 above)

¹⁷⁹ Parker, G.E. (note 175 above) at 12.

¹⁸⁰ Montazeri (note 19 above) at 148.

¹⁸¹ Ibid.

¹⁸² Heltberg (note 22 above) at 406.

¹⁸³ CITES 'Consideration of proposals for amendment of Appendices I and II: Submitted by Namibia', CoP 17 2016, available at <https://cites.org/sites/default/files/eng/cop/17/E-CoP17-Prop-14.pdf>, accessed on 24 June 2017 2.

¹⁸⁴ Lindsay, K, Chase, M., Nowak, K. 'The shared nature of Africa's elephants' (2017) 215 *Biological Conservation* 262.

¹⁸⁵ Ibid.

¹⁸⁶ Montazeri (note 19 above) at 149.

¹⁸⁷ CITES CoP 17 Committee I meeting, Record 13 (CoP 17 Com.1 Rec.13 (Rev.1)), 13 October 2016, available at https://cites.org/sites/default/files/eng/cop/17/Com_I/SR/E-CoP17-Com-I-Rec-13-R1.pdf, accessed on 24 June 2017 1.

¹⁸⁸ Montazeri (note 19 above) at 150.

¹⁸⁹ Panjabi (note 6 above) at 20.

populations.¹⁹⁰ African elephants are nomadic in nature,¹⁹¹ and as a result they occupy a wide range of habitats such as near-desert environments, semi-arid savannah ecosystems and tropical forests.¹⁹² These varying habitats have resulted in the evolution of two distinct African elephant populations – the Savannah elephant and the forest elephant.¹⁹³ Both populations suffer from a loss of habitat due to one or more of the above-mentioned factors. Loss of habitat can be determined by examining the range area of the African elephant. The AESR 2016 defines the range area of elephants as “the entire area where the species occurs in the wild at any time”.¹⁹⁴ According to the AESR 2016, the continental elephant range area is currently estimated at 3 312 238 km².¹⁹⁵ This is a slight change from the estimated continental range area in the previous report (AESR 2007).¹⁹⁶ The AESR 2007 reported an estimated range area of 3 335 827 km², which was 32 percent less than the range area in the previous report (AESR 2002).¹⁹⁷ Since habitat loss is a long-term threat, a reduction in the elephant range area can only be observed over long periods of time. However, according to the CITES CoP 17 proposal, the available elephant range area has already shown a steady decline.¹⁹⁸

2.2.5. Consequences of the diminishing African elephant population

It is crucial to the survival of the African elephant population that each factor threatening its survival is effectively dealt with in order to prevent further population loss. Failure to do so may have dire consequences, as the African elephant is regarded as a keystone species.¹⁹⁹ Both forest and savannah elephants play important roles in their respective landscapes.²⁰⁰ Their grazing methods enable smaller species of animals to gain access to food and materials more readily.²⁰¹ They also promote plant distribution and act as seed dispersers.²⁰² This may be their

¹⁹⁰ AESR 2016 (note 15 above) at 2.

¹⁹¹ Kreuter and Simmons (note 3 above) at 39.

¹⁹² CITES ‘Consideration of proposals for amendment of Appendices I and II: Submitted by Benin, Burkina Faso, Central African Republic, Chad, Ethiopia, Kenya, Liberia, Mali, the Niger, Nigeria, Senegal, Sri Lanka and Uganda’, CoP 17 2016, available at <https://cites.org/sites/default/files/eng/cop/17/prop/060216/E-CoP17-Prop-16.pdf>, accessed on 24 June 2017 3.

¹⁹³ Lindsay (note 184 above) at 261.

¹⁹⁴ AESR 2016 (note 15 above) at 18.

¹⁹⁵ Ibid at 31.

¹⁹⁶ Ibid at 34.

¹⁹⁷ Ibid at 21.

¹⁹⁸ CITES ‘Consideration of proposals for amendment of Appendices I and II: Submitted by Benin, Burkina Faso, Central African Republic, Chad, Ethiopia, Kenya, Liberia, Mali, the Niger, Nigeria, Senegal, Sri Lanka and Uganda’, CoP 17 2016, available at <https://cites.org/sites/default/files/eng/cop/17/prop/060216/E-CoP17-Prop-16.pdf>, accessed on 24 June 2017 6.

¹⁹⁹ IUCN website (note 177 above).

²⁰⁰ Panjabi (note 6 above) at 21.

²⁰¹ Ibid.

²⁰² Ibid.

most important role yet – as plant distribution not only benefits other species of animals, but also humans who rely on these habitats for certain vegetation.²⁰³ Without the presence of African elephants, a vital mechanism in the ecosystem goes missing.²⁰⁴ This leads to what is known as “empty forest syndrome,” which occurs when animals disappear at a faster rate than their habitats.²⁰⁵ The ecological contribution of the African elephant is therefore invaluable to the ecosystems within which they reside.²⁰⁶

In an attempt to ensure the survival of the African elephant population, the international community adopted CITES as the leading international convention regulating the ivory trade, and this will be discussed further in Part 2 of this chapter.

²⁰³ McDonald (note 151 above) at 116.

²⁰⁴ Ibid at 121.

²⁰⁵ Ibid.

²⁰⁶ Panjabi (note 6 above) at 21.

PART 2:

LEGAL REGIME GOVERNING THE ELEPHANT IVORY TRADE

CHAPTER TWO: PART TWO

LEGAL REGIME GOVERNING THE ELEPHANT IVORY TRADE

“The world is a dangerous place to live in, not because of the people who are evil, but because of the people who don’t do anything about it.”²⁰⁷

2.3. INTRODUCTION

According to Bodansky, the primary focus of international environmental law is to regulate the interaction between human beings and the natural world.²⁰⁸ International environmental law seeks to address changes to the natural world that are induced by humans – such as pollution.²⁰⁹ This purpose of this chapter is to discuss the international legal regime regulating the elephant ivory trade. The chapter will start by discussing the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). This discussion will briefly examine the historical origins and application of the Convention in greater detail. The study will thereafter examine how CITES, as an international treaty, is applied at a national level in the South African context. Lastly, the chapter will conclude by assessing how effectively the Convention has been implemented by Parties.

2.4. INTERNATIONAL REGIME GOVERNING THE ELEPHANT IVORY TRADE

2.4.1. Historical origin of CITES

Environmental awareness among the international community in the late 1960s and early 1970s resulted in the idea of regulating the international wildlife trade.²¹⁰ This idea was initially put forward at a meeting of the International Union for Conservation of Nature (hereafter referred

²⁰⁷ Albert Einstein.

²⁰⁸ Bodansky, D. 2010 *The art and craft of international environmental law*. London: Harvard University Press 10.

²⁰⁹ Ibid.

²¹⁰ Couzens, E. 2008. *Large and grey: Whales, elephants and international law and politics* (PhD) University of KwaZulu-Natal 177.

to as ‘IUCN’) General Assembly in 1963.²¹¹ The IUCN is the oldest global environmental organisation that helps find practical solutions to “pressing environmental and development challenges.”²¹² At an IUCN Conference in 1972, the idea of regulating international wildlife was researched and discussed further.²¹³ During the conference, members made the recommendation to draft a Convention that would regulate wildlife trade.²¹⁴ However, this recommendation was met with opposition from developing African countries led by Kenya.²¹⁵ These developing countries proposed that each country should reserve the right to determine which of its species would be classified as tradeable under the Convention – as opposed to a list being drawn up with the advice of experts appointed by the Convention.²¹⁶

After much discussion, two proposals emerged during the IUCN Conference, which were later consolidated into a draft text of the Convention.²¹⁷ The final text of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) was agreed upon and signed into existence on 3 March 1973 in Washington, DC by representatives of 80 countries.²¹⁸ The Convention thereafter entered into force on 1 July 1975.²¹⁹ It has since been hailed as the “*magna carta*” for the international regulation of wildlife trade.²²⁰ It is also seen as one of the “Big Five species-specific treaties.”²²¹

2.4.2. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

CITES is an international agreement/treaty, entered into between various States around the world.²²² At present, there are 183 States that have agreed to be bound by the Convention and

²¹¹ Couzens (note 210 above) at 177.

²¹² CITES ‘IUCN/TRAFFIC analyses of the proposals to amend the CITES appendices at the 17th meeting of the Conference of the Parties’, CoP 17 2016, available at <https://cites.org/sites/default/files/eng/cop/17/InfDocs/E-CoP17-Inf-11.pdf>, accessed on 24 June 2017 1.

²¹³ Couzens (note 210 above) at 177.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Ibid at 178.

²¹⁸ CITES website (note 105 above).

²¹⁹ Krieps, L. ‘Sustainable use of endangered species under CITES: Is it a suitable alternative’ (1996) 17(1) *University of Pennsylvania Journal of International Economic Law* 468.

²²⁰ Fiadjoe, Y. ‘CITES in Africa: An examination of domestic implementation and compliance’ (2004) 4 *Sustainable Development Law and Policy* 38.

²²¹ Barrie (note 20 above) at 183.

²²² CITES website (note 105 above).

this is growing.²²³ These States are referred to as ‘Parties’ as per the text of the Convention.²²⁴ As mentioned in Part 1 of this chapter, the objective of the Convention is to ensure that the trade in any specimen of plant or wildlife does not threaten its existence, to the extent that it is in danger of becoming extinct.²²⁵ CITES therefore contains a legally binding framework regulating the international trade of specimens listed under the Convention.²²⁶ This framework involves imposing controls on the import, export, re-export and introduction from the sea of species listed under the Convention.²²⁷ Controls imposed on the trade of listed species takes the form of a licensing/permit system.²²⁸

2.4.2.1. Permit system

In terms of Article IX Paragraph 1 of the Convention, each Party is obliged to appoint one or more Management and Scientific Authorities.²²⁹ The Management Authority of a State is responsible for administering the permit system.²³⁰ Its primary task is to ensure that any specimen that is to be traded, has been legally obtained and that its import or export will not be detrimental to the survival of the species.²³¹ The Scientific Authority serves an advisory role to the Management Authority, and is responsible for providing advice on the effects of the trade, on the status of any particular species listed under the Convention.²³² In a sense, one authority acts as a check on the other to ensure that the issuing of permits and certificates is reasonable, and in accordance with the Convention.²³³

²²³ CITES website (note 105 above).

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ Pambo, A.F.K., Carroll, T., Lelanchon, L., Ehi-Ebewele, E., Sonko, A., White, L. ‘International trade in endangered species: The challenges and successes of the 17th Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)’ (2016) 54(4) *African Journal of Ecology* 399.

²²⁷ CITES ‘How CITES works?’, undated, *CITES.org*, available at <https://www.cites.org/eng/disc/how.php>, accessed on 5 November 2017.

²²⁸ Ibid.

²²⁹ Article IX of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Signed at Washington, DC, 3 March 1973, available at <https://www.cites.org/eng/disc/what.php>, accessed on 12 February 2016.

²³⁰ CITES website (note 227 above).

²³¹ Ibid.

²³² Ibid.

²³³ Ibid.

2.4.2.2. Appendices to CITES

Species listed under the Convention are categorised under a “three-tiered structure”.²³⁴ This three tiered structure is included within the text of the Convention, and is referred to as the ‘Appendices’.²³⁵ Each Appendix provides a different level of protection that may be accorded to a specimen.²³⁶ The levels of protection depend on the severity of the measures that would be required to ensure the survival of a species.²³⁷

Appendix I

Appendix I includes species that are threatened with extinction and are/or may be affected by the ongoing or potential trade in such species.²³⁸ Species categorised under this Appendix are afforded the highest level of protection under the Convention, and any trade under this category is strictly monitored and may only be authorised in exceptional circumstances.²³⁹

Appendix II

Appendix II includes species that are not necessarily threatened with extinction. However, their position is such that unless trade is restricted and strictly regulated, they may become vulnerable to extinction due to increased utilisation that is incompatible with their survival as a species.²⁴⁰

Appendix III

Appendix III offers the least protection.²⁴¹ It also operates using a different listing procedure to Appendix I and II.²⁴² Appendix III includes species that have been identified by any member of CITES as requiring protection from over-exploitation, and is thereafter regulated within the

²³⁴ Khanna (note 109 above) at 149.

²³⁵ Ibid.

²³⁶ Ibid.

²³⁷ Montazeri (note 19 above) at 149.

²³⁸ Article II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Signed at Washington, DC, 3 March 1973, available at <https://www.cites.org/eng/disc/what.php>, accessed on 12 February 2016.

²³⁹ Article II of CITES (note 238 above).

²⁴⁰ Article II of CITES (note 238 above).

²⁴¹ CITES website (note 227 above).

²⁴² Ibid.

jurisdiction of such a State.²⁴³ By placing a species under the protection of this Appendix, members gain the co-operation of other State members in the effort to restrict and prevent the over-exploitation of trade in certain species.²⁴⁴

2.4.2.3. Obligations of Parties to the Convention

To achieve the objectives of the Convention, CITES created a set of guidelines or provisions to regulate the international wildlife trade.²⁴⁵ However, as a non-self-executing treaty, it relies on States to enact legislation that gives effect to its provisions.²⁴⁶ A State attracts the obligation to implement the provisions of CITES by ratifying the Convention.²⁴⁷

Though the Convention does not specifically dictate how each Party should implement its provisions, it does, however, provide a framework to assist Parties in fulfilling their obligations.²⁴⁸ As a general rule to achieve the objectives of the Convention, Parties must abide by Article II paragraph 4, which states that:

“The Parties shall not allow trade in specimens of species included in Appendices I, II and III except in accordance with the provisions of the present Convention.”²⁴⁹

The above quote therefore means that Parties must enact national legislation that regulates the trade of listed species, in accordance with the provisions of the Convention. Further to this, Parties must, in accordance with Article VIII Paragraph 1, include provisions that criminalise and enforce any violation of the Convention.²⁵⁰ Article VIII Paragraph I reads as follows:

“The Parties shall take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof. These shall include the following measures:

- (a) to penalize trade in, or possession of, such specimens, or both; and

²⁴³ Article II of CITES (note 238 above).

²⁴⁴ Article II of CITES (note 238 above).

²⁴⁵ Fiadjoe (note 220 above) at 38.

²⁴⁶ Ibid.

²⁴⁷ Bodansky, D. ‘Implementation of international environmental law’ (2011) 54 *Japanese Yearbook of International Law* 68.

²⁴⁸ CITES website (note 105 above).

²⁴⁹ Article II of CITES (note 238 above).

²⁵⁰ Torpy (note 157 above) at 62.

(b) to provide for the confiscation or return to the State of export of such specimens.”²⁵¹

It is up to State Parties to interpret how to implement these provisions of the Convention.²⁵² Many critics of the Convention argue that the freedom to interpret how the provisions of the Convention are implemented – greatly diminishes its effectiveness.²⁵³ This may be due to the fact that varied interpretations often lead to different enforcement procedures and punishments among States.²⁵⁴ In some cases, States may fail to enact legislation that gives effect to the Convention.²⁵⁵ According to Panjabi, since CITES entered into force in 1975, less than half of its Parties have implemented national legislation.²⁵⁶ Despite the fact that it is legally binding on Parties to implement the provisions of the Convention – CITES lacks the ability to impose penalties on non-compliant Parties.²⁵⁷

Parties to the Convention therefore play a pivotal role in ensuring its effectiveness.²⁵⁸ A problem remains, however, in that CITES does not provide for ongoing monitoring to ensure that its provisions are being implemented, nor does it provide financial support to help Parties fulfil their obligations.²⁵⁹

²⁵¹ Article VIII of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Signed at Washington, DC, 3 March 1973, available at <https://www.cites.org/eng/disc/what.php>, accessed on 12 February 2016.

²⁵² Torpy (note 157 above) at 63.

²⁵³ *Ibid* at 62.

²⁵⁴ Hutchens (note 2 above) at 950.

²⁵⁵ Panjabi (note 6 above) at 74.

²⁵⁶ *Ibid*.

²⁵⁷ Biegus (note 137 above) at 30.

²⁵⁸ Bodansky (note 247 above) at 68.

²⁵⁹ Barrie (note 20 above) at 182.

2.5. IMPLEMENTATION OF THE CONVENTION IN THE SOUTH AFRICAN CONTEXT

South Africa has been involved with CITES since it came into force in 1975.²⁶⁰ In fact, South Africa participated in the Washington Conference that led to the creation of CITES.²⁶¹ South Africa was also one of the first 15 Parties to ratify the Convention.²⁶²

As a Party to the Convention, South Africa is obligated to fulfil certain responsibilities. In compliance with its responsibilities, South Africa implemented the Convention's provisions by enacting legislation and systems – to ensure that its indigenous plant and wildlife populations are protected from exploitative trade.²⁶³ This is achieved largely by the Department of Environmental Affairs, which is the “central coordinating and policy making authority” with regard to wildlife conservation in South Africa and is responsible for ensuring the implementation of the Convention.²⁶⁴

2.5.1. National legislation

2.5.1.1. The Constitution of South Africa

The Constitution of South Africa makes provision for the implementation of international agreements that have been ratified by the country.²⁶⁵ The relevant section of the Constitution is as follows:

“Section 231 (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been

²⁶⁰ SA Department of Environmental Affairs ‘South Africa as a Party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)’, undated, *environment.gov.za*, available at https://www.environment.gov.za/legislation/international_agreements/sapartytocites, accessed on 15 March 2018.

²⁶¹ Ibid.

²⁶² Ibid.

²⁶³ Ibid.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”²⁶⁶

The above-mentioned section of the Constitution directs that international agreements be enacted into law by national legislation. This section is applicable to CITES – as CITES is a non-self-executing international treaty and requires national legislation to be effective.

2.5.1.2. National Environmental Management: Biodiversity Act (Act 10 of 2004) (NEMBA)

In accordance with Section 231(4)²⁶⁷ of the Constitution of South Africa and the obligations of Article VIII of the Convention,²⁶⁸ South Africa enacted the National Environmental Management: Biodiversity Act (Act 10 of 2004)²⁶⁹ (hereafter ‘NEMBA’).²⁷⁰ NEMBA provides for the management and conservation of South Africa’s biodiversity, the protection of species and ecosystems that are threatened or require national protection and the sustainable use of biological resources.²⁷¹ The objectives of NEMBA are broadly to:

- “1) Provide for the management and conservation of the country’s biodiversity;
- 2) give effect to international agreements relating to biodiversity that have been ratified by South Africa such as CITES;
- 3) provide for co-operative governance and intergovernmental relations so that State departments and functionaries are able to ensure that responsibilities under the convention are fulfilled;
- 4) provide for the appointment of a Scientific Authority and its operating procedures.”²⁷²

Although NEMBA does not specifically mention CITES, there are several provisions contained in the Act that make it clear the international agreement being referred to is CITES.²⁷³

²⁶⁶ Constitution of the Republic of South Africa, 1996.

²⁶⁷ Constitution of the Republic of South Africa, 1996.

²⁶⁸ Article VIII of the Convention relates to the measures that must be taken by Parties to implement the Convention.

²⁶⁹ South Africa, National Environmental Management: Biodiversity Act 10, 2004.

²⁷⁰ SA Department of Environmental Affairs website (note 260 above).

²⁷¹ Barrie (note 20 above) at 188.

²⁷² Cycads of South Africa ‘NEMA’, undated, *cycads.org.za*, available at <https://www.cycads.org.za/nemba.html>, accessed on 15 March 2018.

²⁷³ Couzens, E. ‘The incorporation of international environmental law (and multilateral environmental agreements) into South African domestic law’ (2005) 30 *South African Yearbook of International Law* 144.

Examples of the provisions include Sections 5, 51 and 59 of NEMBA.²⁷⁴ According to Section 5, “the Act gives effect to ratified international agreements affecting biodiversity, to which South Africa is a Party, and which bind the Republic.”²⁷⁵ This section gives effect to CITES and other conventions affecting biodiversity, such as the Convention on Biological Diversity,²⁷⁶ which will be discussed briefly later in this chapter. Section 51(c) “gives effect to the Republic’s obligation under international agreements regulating international trade in specimens of endangered species.”²⁷⁷ This specific provision gives effect to CITES as it pertains to agreements regulating the trade in endangered species, but does not specifically mention CITES as the international agreement. Section 59 of the Act directs the Minister to monitor compliance in South Africa, with an international agreement that regulates the international trade in specimens of endangered species.²⁷⁸ In addition, Section 59 also directs that the Minister appoint a scientific authority to assist with such monitoring.²⁷⁹ Monitoring compliance with the Convention and appointing a scientific authority are some of the key obligations required to be fulfilled by Parties to CITES. It is therefore clear that NEMBA gives effect to South Africa’s obligations as a Party and serves as the national legislation implementing the Convention. However, NEMBA also relies on provincial nature conservation ordinances to enforce the Act’s provisions.²⁸⁰ Examples of these ordinances include: the Natal Nature Conservation Ordinance 15 of 1974²⁸¹ and the Cape Nature and Environmental Conservation Ordinance 19 of 1974²⁸² – to name but two.²⁸³

²⁷⁴ Barrie (note 20 above) at 188.

²⁷⁵ Section 5 of the National Environmental Management: Biodiversity Act 10, 2004.

²⁷⁶ Convention on Biological Diversity (CBD). Signed at Rio de Janeiro, Brazil, 5 June 1992, available at <https://www.cbd.int/convention/articles/default.shtml?a=cbd-01>.

²⁷⁷ Section 51 of the National Environmental Management: Biodiversity Act 10, 2004.

²⁷⁸ Section 59 of the National Environmental Management: Biodiversity Act 10, 2004.

²⁷⁹ Section 59 of the National Environmental Management: Biodiversity Act 10, 2004.

²⁸⁰ Barrie (note 20 above) at 186.

²⁸¹ South Africa, Natal Nature Conservation Ordinance 15 of 1974 (KwaZulu-Natal Province).

²⁸² South Africa, Cape Nature and Environmental Conservation Ordinance 19 of 1974 (Western Cape Province)

²⁸³ Endangered Wildlife Trust (EWT), The Lewis Foundation, Centre for Environmental Rights (CER) ‘Fair Game? Improving the well-being of South African wildlife: Review of the legal and practical regulation of the welfare of wild animals in South Africa (2018), available at <https://cer.org.za/wp-content/uploads/2018/06/CER-EWT-Regulation-of-Wildlife-Welfare-Report-25-June-2018.pdf>, accessed on 17 August 2018 43.

2.5.1.3. National Environmental Management: Biodiversity Act (Act 10 of 2004): Threatened or Protected Species Regulations (TOPS Regulations)

In addition to NEMBA, the Threatened or Protected Species Regulations (hereafter ‘TOPS Regulations’) were published in the Government Gazette on 23 February 2007.²⁸⁴ The purpose of the TOPS Regulations are to further regulate the permitting system set out in Chapter 7 of NEMBA.²⁸⁵ The TOPS Regulations provide a comprehensive process for the application of permits to carry out restricted activities²⁸⁶ relating to biodiversity in terms of NEMBA.²⁸⁷

They also include procedures relating to the Authorities that a State Party to CITES is required to appoint, namely: the Management Authority and the Scientific Authority. These authorities are responsible for ensuring that any trade being conducted, is done in accordance with the conditions prescribed by the Convention.²⁸⁸ The Department of Environmental Affairs serves as the Management Authority and the South African National Biodiversity Institute (SANBI) serves an advisory role as the Scientific Authority.²⁸⁹ These authorities have various law-enforcement officers, Environmental Management Inspectors (EMI) and units for threatened species at their disposal – while also working closely with the South African Police Service (SAPS) to ensure that the import and export of wildlife and plants is controlled in line with legislation.²⁹⁰ Also assisting in the fight against illicit wildlife trade is South Africa’s customs

²⁸⁴ South Africa, National Environmental Management: Biodiversity Act 10 of 2004: Threatened or Protected Species Regulations (TOPS Regulations), available at https://www.environment.gov.za/sites/default/files/legislations/nemba_threatenedspecies_regulations_g29657rg8638gon152.pdf

²⁸⁵ Cycads of South Africa ‘TOPS Regulations’, undated, *cycads.org.za*, available at <https://www.cycads.org.za/tops.html>, accessed on 15 March 2018.

²⁸⁶ NEMBA Definitions “Restricted activity” – (a)(i) – (x)

1. Hunting, catching, capturing or killing;
2. Gathering, collecting or plucking;
3. Picking parts of, cutting, chopping off, uprooting, damaging or destroying;
4. Importing into South Africa;
5. Exporting or re-exporting from South Africa;
6. Having in possession or exercising physical control over;
7. Growing, breeding or propagating;
8. Conveying, moving or translocating;
9. Selling, trading in, buying, receiving, giving, donating or accepting as a gift, acquiring or disposing of;
- and
10. Any other prohibited activity.

²⁸⁷ SA Department of Environmental Affairs ‘TOPS permit and registration application process for the carrying out of restricted activities in terms of the NEMBA 10 of 2004’, undated, *environment.gov.za*, available at <https://www.environment.gov.za/topspermitandregistrationapplicationprocess#top>, accessed on 15 March 2018.

²⁸⁸ Barrie (note 20 above) at 184.

²⁸⁹ SA Department of Environmental Affairs website (note 260 above).

²⁹⁰ Ibid.

authorities and Department of Agriculture – since the wildlife trade involves various modes of transportation that specimens may be smuggled in.²⁹¹

2.5.1.4. Other conservation initiatives

South Africa is also an active participant in various other Multilateral Environmental Agreements (MEA) other than CITES.²⁹² One such MEA is the Convention on Biological Diversity (hereafter ‘CBD’).²⁹³ The final text of the CBD was opened for signature on 5 June 1992 at the United Nations Conference on Environment Development in Rio de Janeiro, and entered into force on 29 December 1993.²⁹⁴ South Africa ratified the CBD on 31 January 1996 and thereafter became a Party to the Convention.²⁹⁵ The CBD was developed as a response to the need for an international legal instrument that would address the conservation and sustainable use of biodiversity.²⁹⁶ It does so by means of a three primary objectives contained in Article 1 of the Conventions text which are outlined broadly as:

- “1) the conservation of biological diversity;
- 2) the sustainable use of its components, and
- 3) the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources...”²⁹⁷

Whereas CITES is concerned with addressing the specific threat that the wildlife trade poses to endangered species, the CBD goes one step further by seeking to protect entire habitats and ecosystems, which would further contribute to the protection of all species.²⁹⁸ There is a significant amount of overlap in the general aims and objectives of both conventions.²⁹⁹ It is therefore, important that both conventions work together to achieve common objectives. To

²⁹¹ SA Department of Environmental Affairs website (note 260 above).

²⁹² Ibid

²⁹³ Convention on Biological Diversity (CBD). Signed at Rio de Janeiro, Brazil, 5 June 1992, available at <https://www.cbd.int/convention/articles/default.shtml?a=cbd-01>.

²⁹⁴ Convention on Biological Diversity ‘History of the Convention’, undated, CBD.int, available at <https://www.cbd.int/history/default.shtml>, accessed on 24 June 2019.

²⁹⁵ Convention on Biological Diversity ‘List of Parties’, undated, CBD.int, available at <https://www.cbd.int/information/parties.shtml>, accessed on 24 June 2019.

²⁹⁶ Convention on Biological Diversity website (note 294 above).

²⁹⁷ Article I of the Convention on Biological Diversity (CBD). Signed at Rio de Janeiro, Brazil, 5 June 1992, available at <https://www.cbd.int/convention/articles/default.shtml?a=cbd-01>.

²⁹⁸ Couzens (note 210 above) at 421.

²⁹⁹ Cooney, R. ‘CITES and the CBD: Tensions and Synergies’ (2001) 10(3) *Review of European Community and International Environmental Law* 260.

this end, CITES and the CBD signed a Memorandum of Understanding (MoU) in 1996 with the aim of encouraging cooperation between both conventions.³⁰⁰

The CBD also plays an important role in South Africa's national legislation.³⁰¹ As a Party to the CBD, South Africa is required to implement national legislation giving effect to the Convention.³⁰² To satisfy this requirement, various provisions contained in the National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA) were intended to give effect to the CBD and South Africa's obligations as a Party.³⁰³ These obligations include, with regard to conservation and sustainable use, national strategic planning, identifying and monitoring components of biodiversity, processes and activities likely to have a significant adverse impacts, establishing measures, and conducting environmental impact assessments.³⁰⁴

2.6. CONCLUSION

Drafting CITES was regarded as an important step in the right direction for international environmental law.³⁰⁵ CITES was successful in providing a practical mechanism to regulate the wildlife trade.³⁰⁶ However, there are several critics of the Convention that frequently question its effectiveness in being able to enforce its provisions.³⁰⁷ As a non-self-executing treaty, CITES is largely reliant on State Parties to enact national legislation implementing its provisions.³⁰⁸ If a Party fails to enact the relevant legislation, the Convention cannot be enforced nationally.³⁰⁹ This impacts on the Convention's ability to regulate the wildlife trade and leads to other deficiencies in the Convention. First, Parties will not have the necessary legislative framework in place to be able to criminalise illegal or restricted activities relating to species listed under the Convention. Second, the lack of national legislation often leads to an unregulated domestic wildlife trade.³¹⁰ Last, the presence of national legislation in one country and the lack thereof in another – results in some States being targeted by organised

³⁰⁰ Nowak, K. 'CITES alone cannot combat illegal wildlife trade' (SAIIA Policy Insights 34, 2016) 6.

³⁰¹ Couzens (note 273 above) at 140.

³⁰² Cooney (note 299 above) at 260.

³⁰³ Couzens (note 273 above) at 140.

³⁰⁴ Cooney (note 299 above) at 260.

³⁰⁵ Barrie (note 20 above) at 183.

³⁰⁶ Ibid at 184.

³⁰⁷ Panjabi (note 6 above) at 16.

³⁰⁸ Fiadjoe (note 220 above) at 38.

³⁰⁹ Torpy (note 157 above) at 63.

³¹⁰ Lemieux (note 27 above) at 454.

wildlife crime more than others.³¹¹ Bodansky therefore asserts that by CITES encouraging Parties to fulfil their obligations under the Convention, this merely amounts to “words on paper”, and will not be sufficient to ensure that the provisions of the Convention are effectively enforced.³¹² It is necessary that CITES amend its provisions to encourage compliance with the provisions of the Convention, ongoing monitoring of compliance with the provisions the Convention, and must make provision for financial assistance to State Parties to effectively implement the provisions of the Convention.

³¹¹ Hutchens (note 2 above) at 950.

³¹² Bodansky (note 247 above) at 62.

CHAPTER THREE

ADDRESSING THE ELEPHANT IN THE ROOM – THE EVOLUTION OF THE STATUS OF THE AFRICAN ELEPHANT AT EACH COP

“The greatness of a nation and its moral progress can be judged by the way its animals are treated”³¹³

3.1. INTRODUCTION

Since its entry into force in 1975, CITES has provided an international platform for Parties to the Convention and NGOs to deliberate on matters threatening the survival of endangered plants and animals. These discussions take place at a Conference of the Parties (CoP).³¹⁴ This chapter will discuss how the CoP have contributed to shaping the international legal regime regulating the elephant ivory trade. The chapter will begin by discussing the Conference of the Parties. It will then identify significant decisions taken at each CoP that have impacted on the African elephant and the ivory trade. The chapter will then conclude by assessing the effectiveness of these decisions and their impact on the international legal regime regulating the elephant ivory trade.

3.2. THE CONFERENCE OF THE PARTIES (CoP)

The Conference of the Parties (CoP) is a collective body of Parties to the Convention and is the “supreme decision-making body” of the Convention.³¹⁵ This means that once a State becomes a Party to the Convention, that State is automatically included in the CoP and its decision-making process. The CoP meets every two to three years – and has been doing so since the first CoP that took place in 1976.³¹⁶ Each CoP takes place over a period of two weeks and is hosted by a different State Party.³¹⁷ The CoP provides Parties with a platform to review

³¹³ Mahatma Gandhi.

³¹⁴ CITES website (note 227 above).

³¹⁵ Ibid.

³¹⁶ Ibid.

³¹⁷ Ibid.

the overall application of the Convention and to discuss any potential amendments to the list of species published under the Convention's Appendices.³¹⁸

3.3. TIMELINE TO CoP 17

Since the first Conference of the Parties (CoP 1)³¹⁹ that took place in 1979 in Bern, Switzerland – Parties have consistently submitted proposals regarding the African elephant. This constant submission of proposals has contributed to shaping the international legal regime governing the ivory trade and will continue to do so in future. To understand this regime, it is necessary to discuss significant decisions taken at past CoP meetings.

3.3.1. CoP 1 – Bern, Switzerland (1976)

The first meeting of the Conference of the Parties (CoP 1)³²⁰ marked a turning point in the history of the elephant ivory trade.³²¹ A proposal was put forward by Switzerland to list the African Elephant under Appendix II of the Convention.³²² Parties present at the meeting accepted the proposal, which resulted in the African elephant being listed under Appendix II.³²³ Although the Appendix II listing offered a higher level of protection, it still allowed for trade in certain circumstances – which resulted in Parties continuing to trade in ivory.³²⁴

CoP 1 is also significant, as the ‘Berne Criteria’ was established during this meeting.³²⁵ The Berne Criteria are biological and trade criteria that determine whether a species may be included under the Convention, and, if so, under which Appendix it will be categorised.³²⁶ In their proposals to list a species under the Convention, Parties had to show that the Berne Criteria have been satisfied.³²⁷ Proposals aimed at amending the listing of a species already

³¹⁸ Barrie (note 20 above) at 184.

³¹⁹ CITES ‘Conference of the Parties’, undated, *CITES.org*, available at <https://www.cites.org/eng/disc/cop.php>, accessed on 12 September 2018.

³²⁰ *Ibid.*

³²¹ U.S. Fish and Wildlife Service (note 21 above).

³²² *Ibid.*

³²³ *Ibid.*

³²⁴ Hutchens (note 2 above) at 936.

³²⁵ Barrie (note 20 above) at 185.

³²⁶ CITES website (note 227 above).

³²⁷ *Ibid.*

listed under the Convention, were also required to satisfy the requirements set out in the criteria. The Berne Criteria were operational for several years until the Everglades Criteria replaced them in 1994.³²⁸

3.3.2. CoP 7 – *Lausanne, Switzerland (1989)*

The seventh meeting of the Conference of the Parties (CoP 7)³²⁹ took place at a time in history when rampant poaching threatened elephant populations in Africa.³³⁰ A year before the meeting took place, certain Parties to the Convention imposed a moratorium on all ivory imports.³³¹ The Parties that imposed the moratorium were predominantly influential western nations – such as France, the USA, West Germany and other European nations.³³² The bold decision of these influential western nations to impose a moratorium on all ivory imports, exerted pressure on the international community to increase the level of protection afforded to the African elephant.³³³ The level of protection was increased the following year at the CoP 7, meeting when the Republic of Austria put forward a proposal to amend the listing of the African elephant by transferring it from Appendix II to Appendix I.³³⁴ Appendix I affords species the highest level of protection by banning all international trade in any species listed under it.³³⁵ According to the Austrian proposal, it was hoped that the Appendix I listing would allow African elephant populations to recover.³³⁶ The proposal satisfied the Berne Criteria, as established in the first meeting of the Parties, which meant that the African elephant would qualify for an Appendix I listing.³³⁷ The proposal was adopted at the meeting and the African elephant was transferred to Appendix I, which banned all international commercial trade in ivory.³³⁸ The listing became effective on 18 January 1990 and gave rise to the well-known

³²⁸ Couzens, E. ‘Two old watchdogs: Different global perspectives of conservation, CITES, the ICRW, the African Elephant and the whale’ (2003) 10 *SAJELP* 159.

³²⁹ CITES website (note 282 above).

³³⁰ Hutchens (note 2 above) at 935.

³³¹ Khanna (note 109 above) at 149.

³³² *Ibid.*

³³³ *Ibid.*

³³⁴ CITES ‘Amendments to Appendices I and II of the Convention: Submitted by The Republic of Austria’, CoP 7 1989, available at https://www.cites.org/sites/default/files/eng/cop/07/prop/E07-Prop-26_Loxodonta_AT.PDF, accessed on 5 November 2017 1a.

³³⁵ Khanna (note 109 above) at 149.

³³⁶ CITES ‘Amendments to Appendices I and II of the Convention: Submitted by The Republic of Austria’, CoP 7 1989, available at https://www.cites.org/sites/default/files/eng/cop/07/prop/E07-Prop-26_Loxodonta_AT.PDF, accessed on 5 November 2017 4a.

³³⁷ *Ibid* at 3a.

³³⁸ Montazeri (note 19 above) at 133.

ivory trade ban.³³⁹ The decision to impose an ivory trade ban was, for the most part, unanimous.³⁴⁰ However, a few southern African countries [South Africa, Namibia, Zimbabwe, Botswana and Malawi] with strong elephant conservation programmes and stable populations refused to support the ban.³⁴¹ Their main reason for not supporting the ban was their reliance on the sale of ivory to source funds for conservation.³⁴²

Opinions were divided on whether the ban was successful. According to Hutchens, after the ban came into effect, elephant populations began to recover.³⁴³ However, Stiles believes that although the ban contributed to lowering instances of poaching, the demand persisted – which resulted in elephants still being killed.³⁴⁴ The ban was successful to an extent, but was not effectively implemented by Parties to the Convention.³⁴⁵

3.3.3. CoP 8 – Kyoto, Japan (1992) and CoP 9 – Fort Lauderdale, the United States of America (1994)

At the eighth and ninth meetings of the Parties, those present were once again faced with a question of whether to once again amend the listing of the African elephant under the Convention.

At the eighth meeting of the Conference of the Parties (CoP 8)³⁴⁶, a proposal (CoP 8 – Proposal 13)³⁴⁷ was put forward by the following Parties: Botswana, Malawi, Namibia, and Zimbabwe.³⁴⁸ These Parties sought to transfer their elephant populations from Appendix I to Appendix II.³⁴⁹ At the same meeting, a further proposal was put forward by South Africa (CoP

³³⁹ CITES website (note 227 above).

³⁴⁰ Couzens (note 210 above) at 211.

³⁴¹ Lemieux (note 27 above) at 454.

³⁴² Hutchens (note 2 above) at 939.

³⁴³ *Ibid* at 935.

³⁴⁴ Stiles, D. 'The ivory trade and elephant conservation' (2004) 31(4) *Environmental Conservation* 319.

³⁴⁵ Barrie (note 20 above) at 185.

³⁴⁶ CITES website (note 282 above).

³⁴⁷ CITES 'Amendments to Appendices I and II of the Convention: Submitted by Botswana, Malawi, Namibia and Zimbabwe', CoP 8 1992, available at https://www.cites.org/sites/default/files/eng/cop/08/prop/E08-Prop-13_Loxodonta.PDF, accessed on 5 November 2017 1.

³⁴⁸ *Ibid*.

³⁴⁹ *Ibid*.

8 – Proposal 15)³⁵⁰ to also transfer its populations from Appendix I to Appendix II.³⁵¹ The above-mentioned Parties were opposed to the Appendix I listing and were of the opinion that banning the trade in elephant ivory posed a more significant threat to the survival of the African elephant, than allowing such trade to continue.³⁵² This is because the ban prevented/reduced revenues from the sale of ivory, which would go towards elephant management and enforcing strict law-enforcement measures.³⁵³ In addition, these opposing Parties believed that the ban would make ivory more scarce, which would drive the price upwards and result in increased poaching.³⁵⁴ The motivation of the opposing Southern African range States to amend their listing, is therefore derived from their approach to conservation. The opposing Parties adopted a ‘sustainable-use’ approach to conservation, in terms of which some controlled trade is permissible and the proceeds are allocated to elephant conservation.³⁵⁵ Parties in attendance at the meeting considered both proposals. However, the proposals were rejected and the elephant population of each proponent retained its Appendix I listing.³⁵⁶

At the ninth meeting of the Conference of the Parties (CoP 9)³⁵⁷, South Africa once again put forward a proposal (CoP 9 – Proposal 15)³⁵⁸ to transfer its elephant population to Appendix II of the Convention.³⁵⁹ Upon consideration, the Secretariat recommended that the proposal be accepted, provided that the listing of the population was annotated as follows: “For the exclusive purpose of allowing trade in specimens other than ivory.”³⁶⁰ Despite the recommendation of the Secretariat, the majority of Parties present refused to accept the

³⁵⁰ CITES ‘Amendments to Appendices I and II: Submitted by South Africa’, CoP 8 1992, available at https://www.cites.org/sites/default/files/eng/cop/08/prop/E08-Prop-15_Loxodonta.PDF, accessed on 5 November 2017 1.

³⁵¹ *Ibid* at 143.

³⁵² CITES ‘Amendments to Appendices I and II of the Convention: Submitted by Botswana, Malawi, Namibia and Zimbabwe’, CoP 8 1992, available at https://www.cites.org/sites/default/files/eng/cop/08/prop/E08-Prop-13_Loxodonta.PDF, accessed on 5 November 2017 6.

³⁵³ Khanna (note 109 above) at 149.

³⁵⁴ *Ibid*.

³⁵⁵ CITES ‘Amendments to Appendices I and II: Submitted by South Africa’, CoP 8 1992, available at https://www.cites.org/sites/default/files/eng/cop/08/prop/E08-Prop-15_Loxodonta.PDF, accessed on 5 November 2017 163.

³⁵⁶ AESR 2016 (note 15 above) at 16.

³⁵⁷ CITES website (note 282 above).

³⁵⁸ CITES ‘Amendments to Appendices I and II of the Convention: Submitted by South Africa’, CoP 9 1994, available at https://www.cites.org/sites/default/files/eng/cop/09/prop/E09-Prop-15_Loxodonta.PDF, accessed on 5 November 2017 1.

³⁵⁹ *Ibid* at 61.

³⁶⁰ CITES ‘Consideration of proposals for amendment of Appendices I and II: Recommendations from the Secretariat’, CoP 9 1994, available at <https://www.cites.org/sites/default/files/eng/cop/09/doc/E9-Doc-45-47.pdf>, accessed on 17 October 2016 735.

proposal.³⁶¹ Kriepps writes that in such controversial situations when the survival of a species is threatened, most Parties tend to favour a pure-protectionist approach to conservation,³⁶² which is what occurred at this meeting.

Sudan also submitted a proposal (CoP 9 – Proposal 16)³⁶³ to transfer its elephant population from Appendix I to Appendix II.³⁶⁴ The purpose of this proposal was to allow the proponent [Sudan] to export specific stockpiles of ivory accumulated by the State.³⁶⁵ The motivation to export the stockpiled ivory was the need for funds to conserve elephant populations, as well as the need for foreign currency in Sudan.³⁶⁶ Per the recommendation made by the Secretariat of the Convention, this proposal was also rejected.³⁶⁷

Another significant decision taken during the CoP 9 meeting was the establishment of new criteria to determine the conservation status for listing species under the Convention.³⁶⁸ The new criteria were called the ‘Everglades Criteria’ and replaced the ‘Berne Criteria’.³⁶⁹ Many Parties to the Convention regarded the Berne Criteria as ‘inadequate’.³⁷⁰ The new criteria made provision for new considerations to apply.³⁷¹ These included “juxtaposing the positive and negative aspects of trade, in order to consider whether it might actually be beneficial to the conservation of a species for trade to take place”.³⁷²

³⁶¹ Kriepps (note 219 above) at 470.

³⁶² Ibid.

³⁶³ CITES ‘Amendments to Appendices I and II of the Convention: Submitted by Sudan’, CoP 9 1994, available at https://www.cites.org/sites/default/files/eng/cop/09/prop/E09-Prop-16_Loxodonta.PDF, accessed on 5 November 2017 1.

³⁶⁴ Ibid at 119.

³⁶⁵ Ibid at 125.

³⁶⁶ Ibid at 126.

³⁶⁷ CITES ‘Consideration of proposals for amendment of Appendices I and II: Recommendations from the Secretariat’, CoP 9 1994, available at <https://www.cites.org/sites/default/files/eng/cop/09/doc/E9-Doc-45-47.pdf>, accessed on 17 October 2016 736.

³⁶⁸ Couzens (note 328 above) at 159.

³⁶⁹ Ibid.

³⁷⁰ Ferrar, A.A. ‘CITES disappoints conservation lobby’ (1992) 88 *South African Journal of Science* 359.

³⁷¹ Couzens (note 328 above) at 159.

³⁷² Ibid.

3.3.4. CoP 10 – Harare, Zimbabwe (1997)

At the tenth meeting of the Conference of the Parties (CoP 10)³⁷³, a crucial decision was taken regarding the trade in African elephant ivory. Botswana, Namibia and Zimbabwe each submitted a proposal once again (CoP 10 – Proposals 10.25³⁷⁴, 10.26³⁷⁵ and 10.27³⁷⁶ respectively) to transfer their elephant populations from Appendix I to Appendix II.³⁷⁷ The objectives of these proposals were: to allow for the disposal of registered stockpiled ivory; to allow international trade in trophy tusks for non-commercial purposes; and to allow trade in live animals for non-commercial purposes.³⁷⁸ After reviewing the proposals, the Secretariat recommended that the proposals be accepted subject to a series of restrictions and precautionary measures.³⁷⁹ However, for the proposals to be accepted, a two-thirds majority vote by Parties present at the meeting was required.³⁸⁰ Several Parties who were against ivory trade opposed the proposals, but the proposals were eventually accepted – having gained the requisite number of votes.³⁸¹

The conditions of the sale and precautionary measures were recorded in an amendment to the listing and were recorded as follows:

“To allow Botswana, Namibia and Zimbabwe, to:

- 1) export hunting trophies for non-commercial purposes;
- 2) export live animals to appropriate and acceptable destinations (Namibia: for non-commercial purposes only);
- 3) export hides (Zimbabwe only);

³⁷³ CITES website (note 282 above).

³⁷⁴ CITES ‘Consideration of proposals for amendment of Appendices I and II: Submitted by Botswana, Namibia and Zimbabwe’, CoP 10 1997, available at <https://www.cites.org/sites/default/files/eng/cop/10/prop/E-CoP10-P-25.pdf>, accessed on 17 October 2016 1.

³⁷⁵ CITES ‘Consideration of proposals for amendment of Appendices I and II: Submitted by Namibia’, CoP 10 1997, available at <https://www.cites.org/sites/default/files/eng/cop/10/prop/E-CoP10-P-26.pdf>, accessed on 17 October 2016 1.

³⁷⁶ CITES ‘Consideration of proposals for amendment of Appendices I and II: Submitted by Botswana, Malawi, Namibia and Zimbabwe’, CoP 10 1997, available at <https://www.cites.org/sites/default/files/eng/cop/10/prop/E-CoP10-P-27.pdf>, accessed on 17 October 2016 1.

³⁷⁷ Lemieux (note 27 above) at 453.

³⁷⁸ CITES ‘Consideration of proposals for amendment of Appendices I and II: Comments from Parties and Comments and Recommendations from the Secretariat’, CoP 10 1997, available at <https://www.cites.org/sites/default/files/eng/cop/10/doc/E10-89.pdf>, accessed on 17 October 2016 914.

³⁷⁹ Lemieux (note 27 above) at 453.

³⁸⁰ Couzens (note 328 above) at 156.

³⁸¹ Ibid.

4) export leather goods and ivory carvings for non-commercial purposes (Zimbabwe only).

No international trade in ivory is permitted before 18 months after the transfer to Appendix II comes into effect (i.e. 18 March 1999). Thereafter, under experimental quotas for raw ivory not exceeding 25.3 tonnes (Botswana), 13.8 tonnes (Namibia) and 20 tonnes (Zimbabwe), raw ivory may be exported to Japan subject to the conditions established by the Conference of the Parties.”³⁸²

The amendment allowed for an experimental “one-off” sale of 59.1 tons of raw ivory to Japan.³⁸³ The sale eventually went ahead in 1999 and was considered a success.³⁸⁴ A total of US\$5 million was received from the sale – to be used exclusively for elephant conservation in each region.³⁸⁵

The decision which allowed the sale of ivory illustrated the support for a sustainable-use approach to conservation. At the previous CoP (CoP 9), Parties adopted a pure-protectionist approach by refusing to allow the sale of ivory. These differing approaches to conservation at each CoP indicated that the international community was not united when it came to the ivory trade.³⁸⁶

3.3.5. CoP 11 – Gigiri, Kenya (2000)

At the eleventh meeting of the Conference of the Parties (CoP 11)³⁸⁷, after having its proposals rejected at CoP 8 and CoP 9, South Africa put forward yet another proposal (CoP 11 – Proposal 11.20)³⁸⁸ to transfer its elephant populations from Appendix I to Appendix II.³⁸⁹ Upon consideration, the Secretariat recommended that the proposal be accepted.³⁹⁰ After much

³⁸² CITES ‘Amendments to Appendices I and II of the Convention adopted by the Conference of the Parties at its 10th meeting in Harare, Zimbabwe, from 9 to 20 June 1997’, available at <https://www.cites.org/sites/default/files/eng/cop/10/E10-amendments.pdf>, accessed on 17 October 2016 151.

³⁸³ Lemieux (note 27 above) at 453.

³⁸⁴ Couzens (note 328 above) at 157.

³⁸⁵ CITES website (note 227 above).

³⁸⁶ Barrie (note 20 above) at 188.

³⁸⁷ CITES website (note 282 above).

³⁸⁸ CITES ‘Amendments to Appendices I and II of the Convention: Submitted by South Africa’, CoP 11 2000, available at <https://www.cites.org/sites/default/files/eng/cop/11/prop/20.pdf>, accessed on 5 November 2017 1.

³⁸⁹ *Ibid.*

³⁹⁰ CITES ‘Consideration of proposals for amendment to Appendices I and II: Other proposals’, CoP 11 2000, available at https://www.cites.org/sites/default/files/eng/cop/11/doc/59_03.pdf, accessed on 17 October 2016 19.

deliberation by the Parties, the proposal was accepted and the South African elephant population was also listed under Appendix II, with conditions.³⁹¹

The Appendix II listing was annotated as follows:

“South Africa may allow:

- 1) trade in hunting trophies for non-commercial purposes;
- 2) trade in live animals for re-introduction purposes into protected areas formally proclaimed in terms of legislation of the importing country;
- 3) trade in hides and leather goods.

Any trade in raw ivory shall be whole tusks of government-owned stock originating from the Kruger National Park, subject to a zero quota. All other specimens shall be deemed to be specimens of species included in Appendix I and the trade in them shall be regulated accordingly.”³⁹²

The decision meant that the South African elephant population was included with the elephant populations of Botswana, Namibia and Zimbabwe under Appendix II of the Convention. Botswana, Namibia and Zimbabwe had already concluded a "one-off" sale of ivory to Japan. However, as a condition of South Africa's sale, South Africa was not permitted to trade internationally until the 12th meeting of the Parties.³⁹³

3.3.6. CoP 12 – Santiago, Chile (2002)

At the twelfth meeting of the Conference of the Parties (CoP 12)³⁹⁴, proposals were submitted by several Southern African Parties to conclude further sales of their ivory stockpiles.³⁹⁵ These Parties included Botswana, Namibia, South Africa, Zambia and Zimbabwe. After considering the proposals, only three Parties were permitted to sell their ivory stockpiles.³⁹⁶ The proposals

³⁹¹ Couzens (note 328 above) at 158.

³⁹² CITES ‘Amendments to Appendices I and II of the Convention adopted by the Conference of the Parties at its 11th meeting in Gigiri, Kenya, from 10 to 20 April 2000’, available at https://www.cites.org/sites/default/files/eng/cop/11/other/E-Amendments_App.pdf, accessed on 17 October 2016 4.

³⁹³ Couzens (note 328 above) at 158.

³⁹⁴ CITES website (note 282 above).

³⁹⁵ Couzens (note 328 above) at 172.

³⁹⁶ Ibid.

of Botswana (CoP 12- Proposal 6)³⁹⁷, Namibia (CoP 12- Proposal 7)³⁹⁸ and South Africa (CoP 12 – Proposal 8)³⁹⁹ were accepted, with conditions.⁴⁰⁰ The sale of the relevant ivory stockpiles was only to be permitted on condition that the necessary mechanisms were put in place in each of the relevant elephant range States to monitor poaching.⁴⁰¹ In each case, an assurance was also required from a CITES-approved trading partner that it would control the manner in which the ivory was used and prevent its re-export.⁴⁰²

3.3.7. CoP 14 – The Hague, Netherlands (2007)

At the fourteenth meeting of the Conference of the Parties (CoP 14)⁴⁰³, Botswana and Namibia put forward a proposal (CoP 14 – Proposal 4)⁴⁰⁴ to maintain the populations of elephants of Botswana, Namibia, South Africa and Zimbabwe under Appendix II, but to replace the existing annotations to that Appendix.⁴⁰⁵ The proposal was accepted, but unlike the outcome of CoP 12, Zimbabwe's elephant population was also included in the newly proposed annotation – which allowed Zimbabwe to trade conditionally in ivory.⁴⁰⁶ In accordance with the annotation, the four Parties (Botswana, Namibia, South Africa, and Zimbabwe) eventually concluded a second “one-off” sale of ivory in 2008 to Japan and China, which were both CITES-approved trading partners.⁴⁰⁷ The proceeds of the sale amounted to approximately US\$15 400 000, to be used exclusively for the conservation of African elephant populations.⁴⁰⁸

³⁹⁷ CITES ‘Consideration of proposals for amendment of Appendices I and II: Submitted by Botswana’, CoP 12 2002, available at <https://www.cites.org/sites/default/files/eng/cop/12/prop/E12-P06.PDF>, accessed on 17 October 2016 1.

³⁹⁸ CITES ‘Consideration of proposals for amendment of Appendices I and II: Submitted by Namibia, CoP 12 2002, available at <https://www.cites.org/sites/default/files/eng/cop/12/prop/E12-P07.PDF>, accessed on 17 October 2016 1.

³⁹⁹ CITES ‘Consideration of proposals for amendment of Appendices I and II: Submitted by South Africa, CoP 12 2002, available at <https://www.cites.org/sites/default/files/eng/cop/12/prop/E12-P08.PDF>, accessed on 17 October 2016 1.

⁴⁰⁰ Lemieux (note 27 above) at 454.

⁴⁰¹ Ibid.

⁴⁰² Ibid.

⁴⁰³ CITES website (note 282 above).

⁴⁰⁴ CITES ‘Consideration of proposals for amendment of Appendices I and II: Submitted by Botswana and Namibia’, CoP 14 2007, available at <https://www.cites.org/sites/default/files/eng/cop/14/prop/E14-P04.pdf>, accessed on 5 November 2017 1.

⁴⁰⁵ Ibid at 4.

⁴⁰⁶ CITES ‘Amendment of Appendices: Proposals to amend Appendices I and II’, CoP 14 2007, available at <https://www.cites.org/sites/default/files/eng/cop/14/doc/E14-68.pdf>, accessed on 5 November 2017 3.

⁴⁰⁷ Panjabi (note 6 above) at 15.

⁴⁰⁸ Couzens (note 210 above) at 241.

Another important decision made at the meeting was the acceptance of a nine-year moratorium on the international sale of ivory.⁴⁰⁹ Botswana, Namibia, South Africa and Zimbabwe agreed to the suspension of all international trade in ivory for nine years from the date of the conclusion of the second "one-off" sale in 2008.⁴¹⁰ The reason for implementing a nine-year moratorium was to prevent any further proposals being submitted to trade in ivory.⁴¹¹ The moratorium would be in place until the year 2017 – after which Parties would once more become eligible to propose being able to trade in ivory.⁴¹²

3.4. CONCLUSION

The decisions taken at each meeting have contributed to developing the international legal regime governing the ivory trade. After discussing many of these decisions, it is important to note that Parties continue to remain divided on the approach that should be adopted to ensure the safety of African elephant populations.⁴¹³ The decision to enact the ivory trade ban favoured a pure-protectionist approach to elephant conservation. Supporters of this approach were mainly States with poor conservation programmes and rapidly declining elephant populations due to increased poaching.⁴¹⁴ An example of one of these States was Kenya, which suffered severe elephant population losses prior to the enactment of the ivory trade ban.⁴¹⁵ After realising the urgency with which its population needed protection, Kenya, under the leadership of President Daniel Arap Moi, set fire to its elephant ivory stockpile.⁴¹⁶ Burning the ivory stockpile sent a strong message to the international community to preserve African elephant populations and to impose a ban on the ivory trade. Supporters of the preservationist approach believed that the ban was the only way to ensure the survival of African elephant.⁴¹⁷ They reasoned that since it was impossible to distinguish legally and illegally obtained ivory, this made it easier for illegally obtained ivory to enter the trade.⁴¹⁸ Their rationale for imposing the ban on ivory trade was, therefore, to restrict the trade in ivory and prevent the over-exploitative

⁴⁰⁹ Montazeri (note 19 above) at 134.

⁴¹⁰ Ibid.

⁴¹¹ Ibid at 135.

⁴¹² Ibid at 136.

⁴¹³ Barrie (note 20 above) at 188.

⁴¹⁴ Khanna (note 109 above) at 150.

⁴¹⁵ Ibid at 149.

⁴¹⁶ Ibid.

⁴¹⁷ Ibid.

⁴¹⁸ Ibid.

use of the African elephant.⁴¹⁹ Many Parties believed that the ivory trade ban contributed to recovering elephant populations and decreased levels of poaching.

On the other hand, permitting “one-off” sales in ivory favoured a sustainable-use approach to conservation, which some Parties believe is necessary to be able to fund conservation efforts. Supporters of the sustainable-use approach were predominantly southern African range States with stable elephant populations and strong conservation programmes.⁴²⁰ These opposing States argued that conserving elephant populations was a major expense, and without revenue from the sale of ivory their conservation programmes would have suffered.⁴²¹ The opposing States also argued that the ban reduced the incentive to conserve elephants among rural communities that were involved in elephant management.⁴²² In most African range States, communities played a role in conserving elephant populations and they were rewarded from sales of ivory – but by removing this incentive there was little reason for rural communities to actively conserve elephants.⁴²³ The opposing States therefore reasoned that the ban undermined conservation initiatives by reducing funding and community involvement, which resulted in more incidents of poaching.⁴²⁴

The lack of agreement on the correct approach to be adopted, largely stems from the beliefs of the opposing southern African Parties that CITES promotes a “western preservationist idealism”, which does not take into account African cultures and values.⁴²⁵ In doing so, CITES “prioritizes western values,” which views the elephant as a keystone species that must be preserved whereas it may be viewed as a source of food and wealth in Africa.⁴²⁶ The lack of consensus among the international community therefore leads to confusion about whether trade in ivory should be permitted. This impacts on the manner in which Parties apply the provisions of the Convention at a national level, as well as the manner in which each Party deals with the conservation of its elephants.⁴²⁷ Although the Convention strikes a balance between pure-

⁴¹⁹ Jung, B.D. ‘The tragedy of the elephants’ (2017) 695 *Wisconsin Law Review* 706.

⁴²⁰ Khanna (note 109 above) at 149.

⁴²¹ *Ibid.*

⁴²² van Kooten (note 28 above) at 4.

⁴²³ Jung (note 419 above) at 714.

⁴²⁴ van Kooten (note 28 above) at 4.

⁴²⁵ Jung (note 419 above) at 715.

⁴²⁶ *Ibid.*

⁴²⁷ Hutchens (note 2 above) at 937.

protectionist and sustainable-use approaches to conservation, it is necessary that Parties adopt a single approach – to ensure uniform implementation of the Convention’s provisions and similar conservation measures.

CHAPTER FOUR:

COP 17

“At his best, man is the noblest of all animals; separated from law and justice he is the worst.”⁴²⁸

4.1. INTRODUCTION

Following the account of past CoP meetings discussed in the previous chapter, this chapter discusses the events of the most recent CoP 17 meeting. CoP 17 took place at a pivotal time for African elephant populations. The meeting coincided with the publication of the 16th African Elephant Status Report (AESR 2016).⁴²⁹ The AESR 2016 alerted the international community to the continental decline in African elephant populations and the urgency of the poaching threat. With the publication of the report being so close to the date of the CoP 17 meeting, it came as no surprise that the status of the African elephant was once again on the agenda. The meeting also took place a year before the CITES moratorium on ivory trade ended (2017).⁴³⁰ The end of the moratorium meant that Parties could once again submit proposals to trade their ivory stockpiles internationally. The meeting therefore played a significant role in the future of the African elephant population and the status of the commercial trade in elephant ivory. This chapter discusses the proposals and working documents relating to the African elephant and ivory trade that were put forward at the CoP 17 meeting. It does so by assessing the contents of each proposal and working document, the discussions surrounding them, and the decisions adopted.

⁴²⁸ Charles Darwin.

⁴²⁹ AESR 2016 (note 15 above) at 2.

⁴³⁰ Reitz, M. ‘What can we expect from South Africa at CoP 17?’, 2016, *Daily Southern and East African Tourism Update*, available at <http://www.tourismupdate.co.za/article/113652/What-can-we-expect-from-sa-at-cop-17>, accessed on 18 October 2016.

4.2. CoP 17'S HOST COUNTRY

The seventeenth meeting of the Parties (CoP 17) took place from 24 September to 5 October 2016 in Johannesburg, South Africa.⁴³¹ As a country that has been a Party to the Conference since its inception in 1975, the opportunity to host the Conference on South African soil held great significance.⁴³² The CITES Secretary-General at the time, John E. Scanlon, even added that South Africa was the ideal location to host the seventeenth Conference of the Parties (CoP 17) due to its consistent participation in the endeavours of the Convention, commitment to conservation of its natural wildlife, and the vast number of indigenous species in South Africa listed under the Convention.⁴³³ One of those listed species is the African elephant. South Africa is one of 37 African elephant range States, with an estimated elephant population of \pm 18,841.⁴³⁴

4.3. CoP 17 PROPOSALS AND WORKING DOCUMENTS

During CoP 17, various proposals and working documents relating to the African elephant and the ivory trade were considered. For this study, the following proposals and working documents will be discussed:

- CoP 17 Proposals 14, 15 and 16.
- CoP 17 Documents 84.1, 84.2 and 84.3.
- CoP 17 Documents 57.2 and 27.

⁴³¹ Tsiko, M. 'SADC faces tough battle at CITES 17', 2016, *The Southern Times*, available at <https://southerntimesafrica.com/site/news/sadc-faces-tough-battle-at-cites-17>, accessed on 28 August 2017.

⁴³² CITES: Joint Press Release 'CITES CoP 17 venue and dates announced for 2016 in South Africa', 2015, *CITES.org*, available at https://www.cites.org/eng/news/pr/cites_cop17_venue_dates_south_africa_2016, accessed on 18 October 2017.

⁴³³ Ibid.

⁴³⁴ AESR 2016 (note 15 above) at 175.

4.3.1. CoP 17 Proposals 14, 15 and 16 - Consideration of proposals for amendment of Appendices I and II

4.3.1.1. CoP 17 Proposal 14 – Proposed by Namibia

Namibia put forward a proposal to continue to trade in elephant ivory.⁴³⁵ As discussed in Chapter 3 of this study, the four range States [one of which is Namibia] have their elephant populations listed under Appendix II of the Convention.⁴³⁶ The Appendix II listing contains an annotation that is also commonly referred to as the “moratorium” on ivory trade, and prevented the four range States from submitting proposals to CITES to trade in ivory until the year 2017.⁴³⁷ With the moratorium due to end soon, Namibia sought to “delete the annotation to the listing of the Namibian African elephant population in Appendix II by deleting any reference to Namibia in that annotation.”⁴³⁸ By doing so, Namibia became eligible to submit proposals to CITES to once again trade in ivory.

The proposal aimed to “establish a regular form of controlled trade in all elephant specimens, including ivory” – to support elephant conservation.⁴³⁹ In support of their argument, Namibia’s proposal stated that their growing elephant populations became a nuisance to rural communities, as elephants occupied land that communities were dependent on for farming.⁴⁴⁰ According to the proposal, the Namibian elephant population had increased from 7500 in 1995 to over 20 000 at the time of the CoP 17 meeting.⁴⁴¹ Namibia also had a National ivory stockpile that grew at a rate of 4.5 percent a year.⁴⁴² As a proponent of the trade, Namibia argued that the international trade in elephant ivory would raise much-needed funds for conservation.⁴⁴³

⁴³⁵ CITES ‘Consideration of proposals for amendment of Appendices I and II: Submitted by Namibia’, CoP 17 2016, available at <https://cites.org/sites/default/files/eng/cop/17/E-CoP17-Prop-14.pdf>, accessed on 24 June 2017 1.

⁴³⁶ Ibid.

⁴³⁷ CITES Press Release ‘Current rules on commercial international trade in elephant ivory under CITES and Proposals to CITES CoP 17’, 2016, *CITES.org*, available at https://cites.org/eng/news/Current_rules_commercial_international_trade_elephant_ivory_under_CITES_Proposals_CITES_CoP17_200716, accessed on 27 September 2016.

⁴³⁸ CITES ‘Consideration of proposals for amendment of Appendices I and II: Submitted by Namibia’, CoP 17 2016, available at <https://cites.org/sites/default/files/eng/cop/17/E-CoP17-Prop-14.pdf>, accessed on 24 June 2017 1.

⁴³⁹ Ibid at 2.

⁴⁴⁰ Ibid at 7.

⁴⁴¹ Ibid at 2.

⁴⁴² Ibid at 7.

⁴⁴³ Orr (note 127 above) at 13.

Their proposal stated that the only way the Namibian elephant population would be able to survive long-term, was if they are of value to communities.⁴⁴⁴

4.3.1.2. CoP 17 Proposal 15 – Proposed by Zimbabwe

Zimbabwe’s proposal, much like Namibia’s, sought to amend the Appendix II listing of its African elephant population.⁴⁴⁵ Zimbabwe is one of the four range States named in the annotation to the Appendix II listing that were subject to the moratorium on ivory trade. Therefore, it too proposed deleting any reference to Zimbabwe contained in the annotation to the listing.⁴⁴⁶ The proposal aimed to establish “regular open market sales of elephant ivory to fund management and enforcement actions.”⁴⁴⁷

The basis of the argument in Zimbabwe’s proposal was that after their elephant population was listed under Appendix II in 1997, it was assumed that the country would be able to continue to trade in ivory.⁴⁴⁸ However, due to the moratorium on ivory trade, Zimbabwe was prevented from conducting further sales of ivory.⁴⁴⁹ Zimbabwe viewed the inability to trade in ivory as being detrimental to the survival of their elephant populations – since there was no longer an incentive to conserve elephants.⁴⁵⁰ In supporting this argument, the proposal provided an example of the Zimbabwean crocodile and how the legal trade in specimens of the crocodile has “destroyed the illegal trade”.⁴⁵¹

⁴⁴⁴ CITES ‘Consideration of proposals for amendment of Appendices I and II: Submitted by Namibia’, CoP 17 2016, available at <https://cites.org/sites/default/files/eng/cop/17/E-CoP17-Prop-14.pdf>, accessed on 24 June 2017 7.

⁴⁴⁵ CITES ‘Consideration of proposals for amendment of Appendices I and II: Submitted by Zimbabwe’, CoP 17 2016, available at <https://cites.org/sites/default/files/eng/cop/17/prop/060216/E-CoP17-Prop-15.pdf>, accessed on 24 June 2017 1.

⁴⁴⁶ CITES CoP 17 Committee I meeting, Record 13 (CoP 17 Com.1 Rec.13 (Rev.1)), 13 October 2016, available at https://cites.org/sites/default/files/eng/cop/17/Com_I/SR/E-CoP17-Com-I-Rec-13-R1.pdf, accessed on 24 June 2017 1.

⁴⁴⁷ CITES ‘Consideration of proposals for amendment of Appendices I and II: Submitted by Zimbabwe’, CoP 17 2016, available at <https://cites.org/sites/default/files/eng/cop/17/prop/060216/E-CoP17-Prop-15.pdf>, accessed on 24 June 2017 1.

⁴⁴⁸ *Ibid* at 2.

⁴⁴⁹ *Ibid*.

⁴⁵⁰ *Ibid*.

⁴⁵¹ *Ibid* at 3.

4.3.1.3. CoP 17 Proposal 16 – Proposed by Benin, Burkina Faso, the Central African Republic, Chad, Ethiopia, Kenya, Liberia, Mali, the Niger, Nigeria, Senegal, Sri Lanka and Uganda

The four African elephant populations not included under Appendix I were the populations of Botswana, Namibia, South Africa and Zimbabwe – which are listed under Appendix II of the Convention.⁴⁵² However, many States supported Proposal 16 to transfer all African elephant populations from Appendix II of CITES, to Appendix I.⁴⁵³ The proponents of Proposal 16 argued that in light of the continental decline of African elephants, the species as a whole met the biological criteria for an Appendix I listing.⁴⁵⁴

The relevant criteria areas were:

“C. A marked decline in the population size in the wild, which has been either:

i) observed as ongoing or as having occurred in the past (but with a potential to resume); or

ii) inferred or projected on the basis of any one of the following:

– a decrease in area of habitat;

– a decrease in quality of habitat;

– levels or patterns of exploitation;

– a high vulnerability to either intrinsic or extrinsic factors; or

– a decreasing recruitment.”⁴⁵⁵

According to the proposal, data from the African Elephant Database (AED) showed a continental decline in African elephant populations of 15 percent between 2006 and 2013.⁴⁵⁶

Prior to this period, intense poaching during the 1970s and 1980s resulted in rapid population

⁴⁵² CITES ‘Consideration of proposals for amendment of Appendices I and II: Submitted by Benin, Burkina Faso, Central African Republic, Chad, Ethiopia, Kenya, Liberia, Mali, the Niger, Nigeria, Senegal, Sri Lanka and Uganda’, CoP 17 2016, available at <https://cites.org/sites/default/files/eng/cop/17/prop/060216/E-CoP17-Prop-16.pdf>, accessed on 24 June 2017 1.

⁴⁵³ Ibid.

⁴⁵⁴ Korwin, S., Lindsay, K., Reeve, R. ‘Field note from CITES CoP 17 on elephants and the ivory trade’ (2016-2017) 58 *Pachyderm* 142.

⁴⁵⁵ Resolution Conf. 9.24 (Rev. CoP 17) ‘Criteria for amendment of Appendices I and II’, available at <https://cites.org/sites/default/files/document/E-Res-09-24-R17.pdf>, accessed on 25 June 2017.

⁴⁵⁶ CITES ‘Consideration of proposals for amendment of Appendices I and II: Submitted by Benin, Burkina Faso, Central African Republic, Chad, Ethiopia, Kenya, Liberia, Mali, the Niger, Nigeria, Senegal, Sri Lanka and Uganda’, CoP 17 2016, available at <https://cites.org/sites/default/files/eng/cop/17/prop/060216/E-CoP17-Prop-16.pdf>, accessed on 24 June 2017 2.

declines.⁴⁵⁷ The African elephant population therefore continued to remain in a constant state of decline – primarily due to poaching which was projected to continue unless something was done.⁴⁵⁸ The proposal also addressed the other factors listed under criterion C and justified how the outstanding African elephant populations qualified for an Appendix I listing in terms of the above biological criteria.

The proposal thus aimed to unify all African elephant populations under one listing, which would eradicate any confusion regarding the ivory trade.⁴⁵⁹ The continued split-listing of the African elephant population was considered “difficult to enforce, sustained demand for ivory, provided an incentive to stockpile poached ivory and enabled laundering.”⁴⁶⁰

4.3.1.4. Discussion

At the CoP 17 meeting, it was decided by the Chair that proposals 14, 15 and 16 would be considered together by the Parties.⁴⁶¹ There were discussions in favour of and against the trade in ivory. Several State Parties – The Democratic Republic of Congo, Mozambique, Swaziland, the United Republic of Tanzania, Zambia and South Africa – favoured proposals 14 and 15.⁴⁶² These Parties supported the trade in ivory with the main reason being that the trade provided funding that would supposedly be used for elephant conservation.⁴⁶³ Other reasons for supporting these proposals were that rural communities would be able to benefit from the sustainable-use of the species, and that good elephant management should be rewarded.⁴⁶⁴ Other Parties, including the European Union and its 28 members, India, Israel, Kenya, Nigeria, Rwanda and the United States of America all opposed proposals 14 and 15.⁴⁶⁵ They opposed

⁴⁵⁷ CITES ‘Consideration of proposals for amendment of Appendices I and II: Submitted by Benin, Burkina Faso, Central African Republic, Chad, Ethiopia, Kenya, Liberia, Mali, the Niger, Nigeria, Senegal, Sri Lanka and Uganda’, CoP 17 2016, available at <https://cites.org/sites/default/files/eng/cop/17/prop/060216/E-CoP17-Prop-16.pdf>, accessed on 24 June 2017 2.

⁴⁵⁸ Ibid.

⁴⁵⁹ Ibid.

⁴⁶⁰ Korwin (note 454 above) at 142.

⁴⁶¹ CITES CoP 17 Committee I meeting, Record 13 (CoP 17 Com.1 Rec.13 (Rev.1)), 3 October 2016, available at https://cites.org/sites/default/files/eng/cop/17/Com_I/SR/E-CoP17-Com-I-Rec-13-R1.pdf, accessed on 24 June 2017 1.

⁴⁶² Ibid.

⁴⁶³ Couzens (note 328 above) at 173.

⁴⁶⁴ CITES CoP 17 Committee I meeting, Record 13 (CoP 17 Com.1 Rec.13 (Rev.1)), 3 October 2016, available at https://cites.org/sites/default/files/eng/cop/17/Com_I/SR/E-CoP17-Com-I-Rec-13-R1.pdf, accessed on 24 June 2017 1.

⁴⁶⁵ Ibid.

them on the basis that the recent poaching crisis had severely crippled elephant populations, and allowing any further trade in ivory would only perpetuate the problem.⁴⁶⁶

The proposals were thereafter put to a vote. Proposal 14 was the first to be voted on, with Zimbabwe requesting that Parties vote using a secret ballot.⁴⁶⁷ The result of the vote indicated that 27 Parties were in favour of the proposal, 100 were against and 9 Parties abstained from voting.⁴⁶⁸ The result was that the proposal was *rejected*.⁴⁶⁹ Parties thereafter voted on Proposal 15, which Zimbabwe also requested be conducted by secret ballot.⁴⁷⁰ The result of the vote was that 21 Parties voted in favour of the proposal, 107 against and 11 Parties abstained from voting.⁴⁷¹ The proposal therefore was also *rejected*.⁴⁷²

At the next session, Parties discussed Proposal 16, which gained the support of several Parties to the Convention, including Botswana, Côte d' Ivoire, Congo, Gabon, Guinea, Jordan, The Syrian Arab Republic, and various other organisations.⁴⁷³ The proposal was a bold move by trade opponents who argued that a total ban on the sale of ivory is the only way to ensure the safety of elephant populations.⁴⁷⁴ Though many CITES members joined the movement to ban the sale of ivory, there were a few Parties that opposed the ban which an Appendix I listing would provide. These opposing Parties included Namibia, South Africa, Zambia, Brazil, China and the European Union – together with its member States.⁴⁷⁵ The main justification for their opposition was that the African elephant did not meet the biological criteria for an Appendix I listing, as claimed in the proposal.⁴⁷⁶ Another reason for opposing the proposal is that several

⁴⁶⁶ Orr (note 127 above) at 29.

⁴⁶⁷ CITES CoP 17 Committee I meeting, Record 13 (CoP 17 Com.1 Rec.13 (Rev.1)), 3 October 2016, available at https://cites.org/sites/default/files/eng/cop/17/Com_I/SR/E-CoP17-Com-I-Rec-13-R1.pdf, accessed on 24 June 2017 2.

⁴⁶⁸ Ibid.

⁴⁶⁹ Ibid.

⁴⁷⁰ Ibid.

⁴⁷¹ Ibid.

⁴⁷² Ibid.

⁴⁷³ Ibid.

⁴⁷⁴ CITES 'Consideration of proposals for amendment of Appendices I and II: Submitted by Benin, Burkina Faso, Central African Republic, Chad, Ethiopia, Kenya, Liberia, Mali, the Niger, Nigeria, Senegal, Sri Lanka and Uganda', CoP 17 2016, available at <https://cites.org/sites/default/files/eng/cop/17/prop/060216/E-CoP17-Prop-16.pdf>, accessed on 24 June 2017 2.

⁴⁷⁵ CITES CoP 17 Committee I meeting, Record 13 (CoP 17 Com.1 Rec.13 (Rev.1)), 3 October 2016, available at https://cites.org/sites/default/files/eng/cop/17/Com_I/SR/E-CoP17-Com-I-Rec-13-R1.pdf, accessed on 24 June 2017 2.

⁴⁷⁶ Ibid.

Parties were fearful of other pro-trade Parties like South Africa, Zimbabwe and Namibia, entering “reservations”⁴⁷⁷ against the trade restrictions imposed on the ivory trade.⁴⁷⁸ By entering a reservation, the Party is thereafter regarded as a State that is not a Party to the Convention, when it comes to trade in the particular species.⁴⁷⁹ In Proposal 14, Namibia openly declared that it would enter a reservation against the ivory trade restrictions and would continue to trade in ivory.⁴⁸⁰ Parties present at the meeting reasoned that if Namibia [and other pro-trade Parties] were to enter the reservation, it would be treated as a non-Party for the purposes of trading in ivory, and would no longer be bound by the ivory trade restrictions imposed by the Convention. In this instance, elephant populations would be more vulnerable to the threats of poaching and over-exploitative trade. Parties therefore took heed of the Namibian statement and reluctantly opposed the proposal to unify all African elephants under Appendix I of the Convention, because of fear that Namibia [and other pro-trade Parties] might enter a reservation against the ivory trade.

At the end of the session, Parties were called upon to cast their votes on Proposal 16. The result of the vote indicated that 62 Parties were in favour of the proposal, 71 against and 12 abstained from voting altogether.⁴⁸¹ The proposal was therefore *rejected*.

4.3.2. CoP 17 Documents 84.1, 84.2 and 84.3 – Decision-making mechanism for a process of trade in ivory

At the 14th meeting of the Conference of the Parties (CoP 14) in 2007, South Africa, Namibia, Zimbabwe and Botswana agreed to the nine-year moratorium on ivory trade.⁴⁸² However, part

⁴⁷⁷ According to Hutchens, “reservations” occur when a Party opts out of a decision [such as a ban on the trade of ivory], and is thereafter treated as a non-Party to the Convention for the purposes of abiding by the obligations of such a decision.

⁴⁷⁸ Pambo (note 226 above) at 400.

⁴⁷⁹ Article XXIII of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Signed at Washington, DC, 3 March 1973, available at <https://www.cites.org/eng/disc/what.php>, accessed on 12 February 2016.

⁴⁸⁰ Korwin (note 454 above) at 143.

⁴⁸¹ CITES CoP 17 Committee I meeting, Record 14 (CoP 17 Com.1 Rec.14 (Rev.2)), 3 October 2016, available at https://cites.org/sites/default/files/eng/cop/17/Com_I/SR/E-CoP17-Com-I-Rec-14-R2.pdf, accessed on 24 June 2017 1.

⁴⁸² CITES ‘Decision-making mechanism for a process of trade in ivory: Submitted by Namibia, South Africa and Zimbabwe’, CoP 17 2016, Working Documents submitted by Parties, available at <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-84-03.pdf>, accessed on 18 October 2017 1.

of the agreement also included the development of a decision-making mechanism (DMM) for “a process of trade in ivory”.⁴⁸³ The decision to develop a DMM was initially adopted as Decision 14.77.⁴⁸⁴ The purpose of the DMM was to provide a set of rules and procedures for any future trade in ivory that would be sanctioned by CITES.⁴⁸⁵ The process of developing a DMM should have been completed by the 16th meeting of the Conference of the Parties (CoP 16) in 2013 – but this did not occur.⁴⁸⁶ Decision 14.77, which was initially adopted during CoP 14, was therefore amended at CoP 16 and adopted as Decision 16.55. According to Decision 16.55, a working group was established to continue developing the DMM – which would be presented for approval at CoP 17.⁴⁸⁷ However, the working group was also unable to conclude its work in time for CoP 17 – resulting in many Parties questioning whether the mandate to continue developing the DMM should, once again, be extended.⁴⁸⁸

Various working documents were submitted both in favour of and against extending the mandate to develop the DMM. Parties in favour of extending the DMM believed that it would establish a system for Parties to trade in ivory legally.⁴⁸⁹ These Parties were predominantly southern African range States that intended to continue trading in ivory. Parties against extending the mandate believed that developing the DMM was counter-productive to efforts to reduce the demand for ivory.⁴⁹⁰ Developing a DMM to facilitate the trade of ivory implies there will be an international ivory trade in future, which many Parties believe will send the wrong

⁴⁸³ CITES ‘Decision-making mechanism for a process of trade in ivory: Submitted by Namibia, South Africa and Zimbabwe’, CoP 17 2016, Working Documents submitted by Parties, available at <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-84-03.pdf>, accessed on 18 October 2017 1.

⁴⁸⁴ CITES ‘Decision-making mechanism for a process of trade in ivory: Report of the Standing Committee’, CoP 17 2016, Working Documents submitted by Parties, available at <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-84-01.pdf>, accessed on 18 October 2017 1.

⁴⁸⁵ CITES ‘Decision-making mechanism for a process of trade in ivory: Submitted by Benin, Burkina Faso, Central African Republic, Chad, Ethiopia, Kenya, Niger and Senegal’, CoP 17 2016, Working Documents submitted by Parties, available at <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-84-02.pdf>, accessed on 18 October 2017 1.

⁴⁸⁶ Ibid.

⁴⁸⁷ Ibid.

⁴⁸⁸ CITES ‘Decision-making mechanism for a process of trade in ivory: Report of the Standing Committee’, CoP 17 2016, Working Documents submitted by Parties, available at <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-84-01.pdf>, accessed on 18 October 2017 2.

⁴⁸⁹ Bega, S. 2016 ‘SA calls on CITES to regulate legal ivory trade’ *Saturday Argus* 18 June, p. 10, col. 1.

⁴⁹⁰ Korwin (note 454 above) at 141.

message to the international community.⁴⁹¹ The proposals regarding the DMM and whether or not the mandate to continue developing it was extended will be discussed below.

4.3.2.1. CoP 17 Doc. 84.1 – Report by the Standing Committee

The CITES Standing Committee was responsible for monitoring the progress of the DMM working group at each of its meetings.⁴⁹² At the 66th meeting of the Standing Committee, it was established that the working group could not conclude its work on the DMM.⁴⁹³ Various Parties such as Benin, Burkina Faso, Ethiopia and Kenya submitted a proposal to the Committee to recommend that it seek advice from the Parties at CoP 17, as to whether it should extend its mandate under Decision 16.55 to continue developing the DMM.⁴⁹⁴ The Standing Committee agreed with the proposal to seek advice at the CoP 17 meeting, and by virtue of this working document, invited the Conference of the Parties to determine whether the mandate should be extended.⁴⁹⁵

4.3.2.2. CoP 17 Doc. 84.2 – Proposed by Benin, Burkina Faso, Central African Republic, Chad, Ethiopia, Kenya, Niger and Senegal

Proponents of this document recommended that the Conference of the Parties not extend the mandate to develop a DMM.⁴⁹⁶ The basis for their argument was that when the concept was initially agreed upon in 2007, the circumstances regarding the African elephant population were different – in the sense that the population has declined severely since then.⁴⁹⁷ Since the process of developing a DMM was delayed, Parties needed to consider the status of the African elephant population at the time of the meeting when deciding whether to extend the mandate. The proposal suggested that in light of the poaching crisis and rapidly declining elephant

⁴⁹¹ Korwin (note 454 above) at 141.

⁴⁹² CITES ‘Decision-making mechanism for a process of trade in ivory: Report of the Standing Committee’, CoP 17 2016, Working Documents submitted by Parties, available at <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-84-01.pdf>, accessed on 18 October 2017 2.

⁴⁹³ Ibid.

⁴⁹⁴ Ibid.

⁴⁹⁵ Ibid.

⁴⁹⁶ CITES ‘Decision-making mechanism for a process of trade in ivory: Submitted by Benin, Burkina Faso, Central African Republic, Chad, Ethiopia, Kenya, Niger and Senegal’, CoP 17 2016, Working Documents submitted by Parties, available at <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-84-02.pdf>, accessed on 18 October 2017 1.

⁴⁹⁷ Ibid at 2.

populations, it would not make sense to pursue the development of a mechanism that is market-driven.⁴⁹⁸ The existence of such a mechanism pointed to the possibility of future international trade in ivory, and would send mixed signals to the international community.⁴⁹⁹ Ending the mandate would also have saved CITES considerable resources that could be used elsewhere.⁵⁰⁰

4.3.2.3. CoP 17 Doc. 84.3 – Proposed by Namibia, South Africa and Zimbabwe

Namibia, South Africa and Zimbabwe submitted this proposal and noted their concern that the DMM was yet to be finalised.⁵⁰¹ They argued that when they agreed to the nine-year moratorium in 2007, part of the compromise was the development of a DMM for a process of trade in ivory.⁵⁰² However, in light of the DMM working group’s failure to progress with the mandate – Namibia, South Africa and Zimbabwe prepared a DMM for a process of trade in ivory to be considered at CoP 17.⁵⁰³ They considered the failure to progress with the DMM as negatively affecting their conservation needs and objectives, as they relied on the revenue generated from the sale of ivory.⁵⁰⁴ The proposal recommended that the CoP consider the failure to develop a DMM within the agreed timeframe, as being contrary to the spirit of their original agreement and infringing on their rights as Parties to the Convention.⁵⁰⁵ They also recommended that the CoP consider adopting their DMM suggestion, failing which they would consider the annotation to the Appendix II listing [moratorium on ivory trade] as *pro non scripto* [as though it had not been written].⁵⁰⁶

⁴⁹⁸ CITES ‘Decision-making mechanism for a process of trade in ivory: Submitted by Benin, Burkina Faso, Central African Republic, Chad, Ethiopia, Kenya, Niger and Senegal’, CoP 17 2016, Working Documents submitted by Parties, available at <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-84-02.pdf>, accessed on 18 October 2017 3.

⁴⁹⁹ Ibid.

⁵⁰⁰ Ibid at 5.

⁵⁰¹ CITES ‘Decision-making mechanism for a process of trade in ivory: Submitted by Namibia, South Africa and Zimbabwe’, CoP 17 2016, Working Documents submitted by Parties, available at <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-84-03.pdf>, accessed on 18 October 2017 3.

⁵⁰² Ibid at 1.

⁵⁰³ Ibid at 2.

⁵⁰⁴ Ibid at 4.

⁵⁰⁵ Ibid.

⁵⁰⁶ Ibid.

4.3.2.4. Discussion

At CoP 17, the Secretariat suggested that the Parties discuss all three documents together.⁵⁰⁷ Parties opposing the development of the DMM believed it would be inappropriate to continue discussions to develop a trading system when elephant populations are in decline.⁵⁰⁸ South Africa led Parties in favour of the DMM to adopt the DMM created by Namibia, South Africa and Zimbabwe.⁵⁰⁹ This effort did not go unnoticed by the international community, as South Africa and its supporting range States made it clear they would not support ending the mandate to develop a DMM.⁵¹⁰ These States believed that refusing to adopt the DMM was against their best interests, and if Parties chose not to adopt the mechanism they would disregard the trade exceptions to which they initially agreed.⁵¹¹ This bold statement made it clear that South Africa and its supporting range States intended re-opening the international trade in ivory and would not support any proposals to institute a total ban.

After discussing the documents at the meeting, the Chair realised that the Parties had failed to reach consensus on what form of action should be taken regarding the DMM.⁵¹² He thereafter called for a vote on each document – to decide whether its recommendations would be accepted or rejected.⁵¹³ The Parties first voted on CoP 17 Doc. 84.2, and the results of the vote indicated there were 44 Parties in favour of the recommendation and 45 against, while 11 Parties abstained from voting.⁵¹⁴ The recommendation was therefore *rejected*, which meant that the mandate to continue developing a DMM for a process of trade in ivory would not be extended.⁵¹⁵ Parties thereafter voted on CoP 17 Doc. 84.3, which South Africa requested be conducted by secret ballot.⁵¹⁶ The result of the vote indicated that 21 Parties were in favour of

⁵⁰⁷ CITES ‘Decision-making mechanism for a process of trade in ivory: Submitted by Benin, Burkina Faso, Central African Republic, Chad, Ethiopia, Kenya, Niger and Senegal’, CoP 17 2016, Working Documents submitted by Parties, available at <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-84-02.pdf>, accessed on 18 October 2017 5.

⁵⁰⁸ CITES CoP 17 Committee II meeting, Record 3 (CoP 17 Com. II Rec. 3 (Rev.1)), 26 September 2016, available at https://cites.org/sites/default/files/eng/cop/17/Com_II/SR/E-CoP17-Com-II-Rec-03-R1.pdf, accessed on 18 October 2017 5.

⁵⁰⁹ *Ibid* at 4.

⁵¹⁰ Bega (note 489 above) at p. 10, col. 1.

⁵¹¹ *Ibid*.

⁵¹² CITES CoP 17 Committee II meeting, Record 3 (CoP 17 Com. II Rec. 3 (Rev.1)), 26 September 2016, available at https://cites.org/sites/default/files/eng/cop/17/Com_II/SR/E-CoP17-Com-II-Rec-03-R1.pdf, accessed on 18 October 2017 5.

⁵¹³ *Ibid*.

⁵¹⁴ *Ibid*.

⁵¹⁵ *Ibid*.

⁵¹⁶ *Ibid*.

the recommendations, 76 were against, and 13 Parties abstained from voting.⁵¹⁷ Therefore, with the secret ballot, even more of the Parties rejected the recommendation to adopt the DMM developed by South Africa, Namibia and Zimbabwe.⁵¹⁸ The decision by the Parties to reject the development of a DMM showed that the vast majority of States were opposed to the idea of re-opening the trade in ivory

4.3.3 CoP 17 Doc. 57.2 and CoP 17 Doc. 27 – Closure of domestic markets for elephant ivory

4.3.3.1. CoP 17 Doc. 57.2 – Proposed by Angola, Burkina Faso, Central African Republic, Chad, Côte d’Ivoire, Ethiopia, Gabon, Kenya, Niger and Senegal

Document 52.7 was submitted to the Conference of the Parties, with the aim of adopting a resolution that directs all Parties and Non-Parties to close their domestic ivory markets.⁵¹⁹ The document was submitted in light of the poaching crisis which, to a large extent, was fuelled by the illegal ivory trade.⁵²⁰ The proponents were of the opinion that any sales of ivory, including those that take place legally within domestic markets, increased the risk of laundering illegal ivory fuelled by corruption – and even provided funding for terrorist groups.⁵²¹ Since CoP 16, various political events have taken place, which encouraged the closure of domestic markets.⁵²² On 14 February 2014, the presidents of Botswana, Gabon, Chad, Tanzania, and the Ethiopian Minister of Environmental Affairs, launched the Elephant Protection Initiative (EPI), which supported the closure of domestic ivory markets.⁵²³ On 25 September 2015, former US President Barack Obama, together with President Xi Jinping of China, issued statements showing their commitment to combating illegal wildlife trafficking, which included banning the import and export of ivory.⁵²⁴ On 26 February 2016, the European Union adopted an action

⁵¹⁷ CITES CoP 17 Committee II meeting, Record 3 (CoP 17 Com. II Rec. 3 (Rev.1)), 26 September 2016, available at https://cites.org/sites/default/files/eng/cop/17/Com_II/SR/E-CoP17-Com-II-Rec-03-R1.pdf, accessed on 18 October 2017 5.

⁵¹⁸ Ibid.

⁵¹⁹ CITES ‘Closure of domestic market for elephant ivory: Submitted by Angola, Burkina Faso, Central African Republic, Côte d’Ivoire, Ethiopia, Gabon, Kenya, Niger and Senegal’, CoP 17 2016, Working Documents submitted by Parties, available at <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-57-02.pdf>, accessed on 18 October 2017 6.

⁵²⁰ Ibid at 1.

⁵²¹ Ibid.

⁵²² Ibid at 2.

⁵²³ Ibid.

⁵²⁴ Ibid.

plan that focused on closing domestic ivory markets in the European Union.⁵²⁵ The proposal mentioned these events to show that various Parties and non-Parties were changing their minds when it came to the domestic ivory trade, and were, instead, choosing to encourage closure.⁵²⁶ However, these efforts alone were not enough to ensure that elephants would no longer be exposed to the risks associated with the existence of domestic ivory markets.⁵²⁷

The proposal, therefore, put forward a draft resolution that essentially directed all Parties and non-Parties to take all legislative, regulatory and enforcement measures necessary to shut down domestic ivory markets.⁵²⁸

4.3.3.2. CoP 17 Doc. 27 – Proposed by the United States of America

The document submitted by the United States of America was similar to CoP 17 Doc. 57.2. However, it urged States to close their domestic ivory markets instead of bluntly directing them to shut them down.⁵²⁹ Unlike CoP 17 Doc. 57.2, the document recommended revising the existing Resolution Conf. 10.10 (Rev. CoP 16) – rather than adopting a new Resolution. Resolution Conf. 10.10 (Rev. CoP 16) addressed the domestic ivory trade and the duties of States with domestic ivory markets.⁵³⁰ The proposed revisions contained in the annexure to the document urged States to close their domestic markets and to report on their efforts.⁵³¹

⁵²⁵ CITES ‘Closure of domestic market for elephant ivory: Submitted by Angola, Burkina Faso, Central African Republic, Côte d’Ivoire, Ethiopia, Gabon, Kenya, Niger and Senegal’, CoP 17 2016, Working Documents submitted by Parties, available at <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-57-02.pdf>, accessed on 18 October 2017 2.

⁵²⁶ Ibid at 3.

⁵²⁷ Ibid.

⁵²⁸ Ibid at 6.

⁵²⁹ CITES ‘Actions to combat wildlife trafficking: Submitted by the United States of America’, CoP 17 2016, Working Documents submitted by Parties, available at <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-27.pdf>, accessed on 18 October 2017 7.

⁵³⁰ Resolution Conf. 10.10 (Rev. CoP 17) ‘Trade in elephant specimens’, available at

<https://cites.org/sites/default/files/document/E-Res-10-10-R17.pdf>, accessed on 18 October 2017 1.

⁵³¹ CITES ‘Actions to combat wildlife trafficking: Submitted by the United States of America’, CoP 17 2016, Working Documents submitted by Parties, available at <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-27.pdf>, accessed on 18 October 2017 4.

4.3.3.3. Discussion

At the meeting of the Parties, the Secretariat recommended that both documents be considered together.⁵³² A small group of African range States – South Africa, Namibia and Zimbabwe – opposed the documents.⁵³³ Namibia raised a point of order claiming that the documents did not fall within the scope of the Convention, as States hold “permanent sovereignty over natural resources”.⁵³⁴ A motion to dismiss discussion on the documents was put to a vote and subsequently rejected by the Parties.⁵³⁵ Discussions thereafter continued, and a working group was established to further discuss the documents.⁵³⁶ Proponents of the respective documents presented a unified proposal to the working group that focused on amending the existing Resolution Conf. 10.10 (Rev. CoP 16), by urging States to close their domestic ivory markets.⁵³⁷ Although the proposal received a fair amount of support, an important Party, the European Union and its member States, was undecided and instead insisted on a ‘qualified’ closure of domestic markets.⁵³⁸ Their hesitation to support a complete ban on the domestic ivory trade stemmed from their fear of certain range States – such as South Africa, Namibia and Zimbabwe – entering reservations against trade restrictions.

Discussions concluded when Parties reached a compromise decision.⁵³⁹ Resolution Conf. 10.10 (Rev. CoP 16) was revised, and it was decided that all Parties and non-Parties that have domestic ivory markets which contribute to poaching or the illegal trade, take all legislative, regulatory and enforcement measures to close that market.⁵⁴⁰

⁵³² CITES ‘Actions to combat wildlife trafficking: Submitted by the United States of America’, CoP 17 2016, Working Documents submitted by Parties, available at <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-27.pdf>, accessed on 18 October 2017 3.

⁵³³ Korwin (note 454 above) at 142.

⁵³⁴ CITES CoP 17 Committee II meeting, Record 3 (CoP 17 Com. II Rec. 3 (Rev.1)), 26 September 2016, available at https://cites.org/sites/default/files/eng/cop/17/Com_II/SR/E-CoP17-Com-II-Rec-03-R1.pdf, accessed on 18 October 2017 4.

⁵³⁵ *Ibid.*

⁵³⁶ Korwin (note 454 above) at 142.

⁵³⁷ *Ibid.*

⁵³⁸ *Ibid.*

⁵³⁹ *Ibid.*

⁵⁴⁰ *Ibid.*

4.4. CONCLUSION

It was clear after discussing the proposals and working documents that Parties to the Convention were still divided on the issue of whether to trade in ivory. This was primarily due to efforts by a few range States led by South Africa. These States were adamant about re-opening the international trade in ivory. These States still supported the sustainable-use approach to conservation that regards elephants as resources which can be used to derive funds.⁵⁴¹ The funds are supposedly used for conservation efforts and community programmes.⁵⁴² In this instance, the issue with the sustainable-use approach, is that CITES makes no provision for monitoring how States enforce Convention measures.⁵⁴³ This includes the manner in which certain range States such as South Africa, Namibia and Zimbabwe, conserve their elephant populations, as well as whether these States actually use the revenue from the sale of ivory toward conserving elephant populations. These Parties therefore have sovereign control over the resources allocated to elephant conservation.⁵⁴⁴ According to Jung, many of the above-mentioned African countries have little incentive to conserve elephant populations, as the benefits derived from the sale of ivory are far more beneficial.⁵⁴⁵ As developing countries, their priorities are different, and wildlife management often suffers as a result.⁵⁴⁶ It is therefore questionable whether CITES should permit any future sale of ivory, as there is little provision for monitoring how the revenue from these sales is utilised. This is especially important in light of the continuing global decline in African elephant populations.

Moreover, the idea that communities should be allowed to benefit from the trade in ivory, was debated at CoP 17. Community programmes provide incentives to protect elephants; however, human-elephant conflict sometimes results in rural communities turning a blind eye to poaching.⁵⁴⁷ At the meeting, India stated from its own experiences with Asian elephants, that there are alternative methods of advancing community programmes – without resorting to

⁵⁴¹ Hutchens (note 2 above) at 942.

⁵⁴² CITES CoP 17 Committee I meeting, Record 13 (CoP 17 Com.1 Rec.13 (Rev.1)), 3 October 2016, available at https://cites.org/sites/default/files/eng/cop/17/Com_I/SR/E-CoP17-Com-I-Rec-13-R1.pdf, accessed on 24 June 2017 1.

⁵⁴³ Barrie (note 20 above) at 182.

⁵⁴⁴ Jung (note 419 above) at 705.

⁵⁴⁵ Ibid at 714.

⁵⁴⁶ Ibid.

⁵⁴⁷ Parker, G.E. (note 175 above) at 11.

trading in ivory.⁵⁴⁸ In most cases, the negative impact on elephants greatly outweighs the benefit of funding community programmes.⁵⁴⁹ This is because African elephants are viewed as resources by the States within which they reside – to be used consumptively rather than being protected as keystone species.⁵⁵⁰ This results in elephants being exploited and the revenue generated is used toward community development programmes, rather than being allocated to improving other conservation measures.⁵⁵¹ According to Lindsay, there is little evidence to indicate that the community development programmes have greatly improved conservation or the lives of community members, and it must therefore be asked why southern African range States place such a large focus on furthering community development at the expense of their own elephant populations.⁵⁵² It is also important to consider that the extensive funds used to import and export ivory, secure ivory stockpiles, fund anti-poaching and law-enforcement efforts, greatly outweigh funds derived from the sale of ivory.⁵⁵³

Instead of re-opening the ivory trade to raise funds for conservation, States should instead use their limited resources to preserve elephant populations.⁵⁵⁴ This would eliminate costs associated with securing stockpiles and importing or exporting ivory. Enacting a ban on all trade in ivory would reduce demand, which would, in turn, reduce poaching and the amount of resources required to combat poaching.⁵⁵⁵ In a surprising turn of events, Botswana showed its support for CoP 17 Proposal 16, which proposed listing all elephant populations under Appendix I.⁵⁵⁶ Like many other Parties to the Convention, Botswana recognised that African elephant populations are in crisis, and therefore was opposed to re-opening the ivory trade.⁵⁵⁷ Although CoP 17 Proposal 16 was rejected, the level of support it achieved is promising, and

⁵⁴⁸ CITES CoP 17 Committee I meeting, Record 13 (CoP 17 Com.1 Rec.13 (Rev.1)), 3 October 2016, available at https://cites.org/sites/default/files/eng/cop/17/Com_I/SR/E-CoP17-Com-I-Rec-13-R1.pdf, accessed on 24 June 2017 1.

⁵⁴⁹ IUCN website (note 177 above).

⁵⁵⁰ Lindsay (note 184 above) at 262.

⁵⁵¹ Ibid.

⁵⁵² Ibid.

⁵⁵³ CITES ‘Consideration of proposals for amendment of Appendices I and II: Submitted by Benin, Burkina Faso, Central African Republic, Chad, Ethiopia, Kenya, Liberia, Mali, the Niger, Nigeria, Senegal, Sri Lanka and Uganda’, CoP 17 2016, available at <https://cites.org/sites/default/files/eng/cop/17/prop/060216/E-CoP17-Prop-16.pdf>, accessed on 24 June 2017 18.

⁵⁵⁴ Ibid.

⁵⁵⁵ Ibid at 19.

⁵⁵⁶ Korwin (note 454 above) at 143.

⁵⁵⁷ Ibid.

shows that the international community is moving toward a preservationist approach to conservation.⁵⁵⁸

⁵⁵⁸ Korwin (note 454 above) at 142.

CHAPTER FIVE

CONCLUSION

“Only when the last of the animals’ horns, tusks, skin and bones have been sold, will mankind realise that money cannot buy back our wildlife.”⁵⁵⁹

5.1. INTRODUCTION

Following the discussion on CoP 17, this chapter discusses how the decisions that were taken at the meeting are likely to impact on ivory trade in South Africa. The chapter begins by briefly summarising the outcomes of the CoP 17 meeting, and this is followed by a discussion of the state of affairs in South Africa. In doing so, the chapter will discuss South Africa’s approach to the ivory trade, its prospects for future trade, and how the South African elephant population is likely to be affected by the decisions made at CoP 17. The chapter will then make limited recommendations to improve the structure of South Africa’s legislative framework regulating the ivory trade. To conclude, the chapter will discuss the effectiveness of CITES in being able to regulate the trade in ivory. This discussion briefly summarises the Convention’s shortcomings and deficiencies that were identified throughout the dissertation – and makes limited recommendations on how to improve them.

5.2. SUMMARY OF OUTCOMES OF CoP 17

CoP 17 took place at an important juncture for the elephant ivory trade. With increased levels of poaching being reported and the moratorium on the ivory trade drawing to an end, the decisions made at CoP 17 were crucial for ensuring the survival of the African elephant.⁵⁶⁰ At the meeting, proposals in favour of and against the ivory trade were submitted.⁵⁶¹ The outcomes of these proposals were as follows:

⁵⁵⁹ Paul Oxtan.

⁵⁶⁰ Lindsay (note 184 above) at 262.

⁵⁶¹ Korwin (note 454 above) at 140.

5.2.1. Amendments to appendices

Proposals were submitted by Namibia and Zimbabwe to be able to continue to trade elephant ivory.⁵⁶² The proponents argued that funds derived from the sale of ivory would be required to fund conservation efforts, anti-poaching and enforcement measures, and to secure ivory stockpiles and provide incentives for community development programmes.⁵⁶³ However, after much debate, the proposals were rejected and both proponents were prevented from concluding further ivory sales.⁵⁶⁴

A further proposal was submitted by various proponents⁵⁶⁵ to list all African elephant populations under Appendix I of the Convention.⁵⁶⁶ These proponents argued that the African elephant meets the biological criteria to be listed.⁵⁶⁷ If this proposal was accepted – it would mean that the populations of certain pro-trade countries such as South Africa, Namibia, Zimbabwe and Botswana, would have to be listed under Appendix I, along with all other African elephant populations. However, the above-mentioned pro-trade countries vehemently opposed the proposal and threatened to take reservations against it if it was accepted.⁵⁶⁸ Despite vast support for the proposal, the threat of pro-trade countries taking reservations against the listing swayed Parties decisions to reject the proposal.⁵⁶⁹

⁵⁶² Korwin (note 454 above) at 140.

⁵⁶³ CITES ‘Consideration of proposals for amendment of Appendices I and II: Submitted by Benin, Burkina Faso, Central African Republic, Chad, Ethiopia, Kenya, Liberia, Mali, the Niger, Nigeria, Senegal, Sri Lanka and Uganda’, CoP 17 2016, available at <https://cites.org/sites/default/files/eng/cop/17/prop/060216/E-CoP17-Prop-16.pdf>, accessed on 24 June 2017 18.

⁵⁶⁴ Korwin (note 454 above) at 143.

⁵⁶⁵ Benin, Burkina Faso, Central African Republic, Chad, Ethiopia, Kenya, Liberia, Mali, the Niger, Nigeria, Senegal, Sri Lanka and Uganda.

⁵⁶⁶ CITES ‘Consideration of proposals for amendment of Appendices I and II: Submitted by Benin, Burkina Faso, Central African Republic, Chad, Ethiopia, Kenya, Liberia, Mali, the Niger, Nigeria, Senegal, Sri Lanka and Uganda’, CoP 17 2016, available at <https://cites.org/sites/default/files/eng/cop/17/prop/060216/E-CoP17-Prop-16.pdf>, accessed on 24 June 2017 1.

⁵⁶⁷ Korwin (note 454 above) at 140.

⁵⁶⁸ Lindsay (note 184 above) at 262.

⁵⁶⁹ CITES CoP 17 Committee I meeting, Record 14 (CoP 17 Com.1 Rec.14 (Rev.2)), 3 October 2016, available at https://cites.org/sites/default/files/eng/cop/17/Com_I/SR/E-CoP17-Com-I-Rec-14-R2.pdf, accessed on 24 June 2017 1.

5.2.2. Decision-making mechanism (DMM) for a process of trade in ivory

Working documents were submitted at the CoP 17 meeting regarding the DMM for a process of trade in ivory. The purpose of the DMM was to provide a set of rules and procedures to regulate any future trade in ivory that is sanctioned by CITES.⁵⁷⁰ The DMM was initially agreed upon at CoP 14 in 2007 and was due to be completed at CoP 16 in 2013.⁵⁷¹ However, the failure to progress with the DMM resulted in Parties questioning whether or not the mandate to continue developing the DMM should be extended at CoP 17.

One working document was submitted by various proponents⁵⁷² to end the mandate to develop a DMM.⁵⁷³ The proponents of this working document argued that the status of the African elephant population had changed considerably since 2007, when the decision to develop the DMM was first adopted.⁵⁷⁴ Since then, the African elephant population had suffered drastic declines. It therefore would not make sense to continue developing a DMM intended on facilitating a trade [ivory trade].⁵⁷⁵ Continuing to develop a DMM would point to the possibility of future trade in ivory, and send mixed signals to the international community.⁵⁷⁶

A further working document was submitted by South Africa, Namibia and Zimbabwe, which favoured the development of a DMM.⁵⁷⁷ The proponents of this working document argued that the failure to develop a DMM negatively impacted their conservation needs, as they rely on the

⁵⁷⁰ CITES ‘Decision-making mechanism for a process of trade in ivory: Submitted by Benin, Burkina Faso, Central African Republic, Chad, Ethiopia, Kenya, Niger and Senegal’, CoP 17 2016, Working Documents submitted by Parties, available at <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-84-02.pdf>, accessed on 18 October 2017 1.

⁵⁷¹ CITES ‘Decision-making mechanism for a process of trade in ivory: Submitted by Namibia, South Africa and Zimbabwe’, CoP 17 2016, Working Documents submitted by Parties, available at <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-84-03.pdf>, accessed on 18 October 2017 1.

⁵⁷² Benin, Burkina Faso, Central African Republic, Chad, Ethiopia, Kenya, Niger and Senegal.

⁵⁷³ Korwin (note 454 above) at 141.

⁵⁷⁴ Ibid.

⁵⁷⁵ CITES ‘Decision-making mechanism for a process of trade in ivory: Submitted by Benin, Burkina Faso, Central African Republic, Chad, Ethiopia, Kenya, Niger and Senegal’, CoP 17 2016, Working Documents submitted by Parties, available at <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-84-02.pdf>, accessed on 18 October 2017 3.

⁵⁷⁶ Ibid.

⁵⁷⁷ Korwin (note 454 above) at 141.

revenue derived from the sale of ivory to fund conservation efforts.⁵⁷⁸ The document therefore proposed adopting a DMM prepared by South Africa, Namibia and Zimbabwe – failing which, these Parties would disregard the agreement to institute a moratorium on ivory trade.⁵⁷⁹ After much discussion and a lack of consensus among the Parties present, the matter was put to a vote. It was decided that the mandate to continue developing a DMM would not be extended.⁵⁸⁰

5.2.3. Closure of domestic ivory markets

Two working documents were put forward proposing the closure of domestic ivory markets. The first working document was put forward by various proponents⁵⁸¹ and proposed that all Parties to the Convention take the necessary legislative, regulatory and enforcement measures to shut down their domestic ivory markets.⁵⁸² The proponents argued that any sale of ivory, including the domestic ivory trade, fuels poaching and the illegal trade of ivory.⁵⁸³

A second working document was put forward by the United States of America, with a similar purpose to the afore-mentioned working document.⁵⁸⁴ After discussing both documents at the meeting, a working group was established to further discuss the topic.⁵⁸⁵ Once discussed, both working documents were combined into a single document and a compromise was reached.⁵⁸⁶ The working group recommended that all Parties and non-Parties with a domestic ivory market that contributes to poaching or the illegal ivory trade, should take all legislative, regulatory and enforcement measures to close that market.⁵⁸⁷

⁵⁷⁸ CITES ‘Decision-making mechanism for a process of trade in ivory: Submitted by Namibia, South Africa and Zimbabwe’, CoP 17 2016, Working Documents submitted by Parties, available at <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-84-03.pdf>, accessed on 18 October 2017 4.

⁵⁷⁹ Ibid.

⁵⁸⁰ Korwin (note 454 above) at 141.

⁵⁸¹ Angola, Burkina Faso, Central African Republic, Côte d’Ivoire, Ethiopia, Gabon, Kenya, Niger and Senegal.

⁵⁸² CITES ‘Closure of domestic market for elephant ivory: Submitted by Angola, Burkina Faso, Central African Republic, Côte d’Ivoire, Ethiopia, Gabon, Kenya, Niger and Senegal’, CoP 17 2016, Working Documents submitted by Parties, available at <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-57-02.pdf>, accessed on 18 October 2017 6.

⁵⁸³ Ibid at 1.

⁵⁸⁴ CITES ‘Actions to combat wildlife trafficking: Submitted by the United States of America’, CoP 17 2016, Working Documents submitted by Parties, available at <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-27.pdf>, accessed on 18 October 2017 1.

⁵⁸⁵ Korwin (note 454 above) at 142.

⁵⁸⁶ Ibid.

⁵⁸⁷ Ibid.

By the end of the CoP 17 meeting, the status of the African elephant remained, for the most part, unchanged. There were, however, a few improvements made, which leant toward ensuring the survival of the species. These improvements included: rejecting proposals to continue to trade in ivory, ending the DMM for a process of trade in ivory, and recommending that domestic markets that contribute to illegal trade and poaching, be closed.⁵⁸⁸ The decisions made at CoP 17 therefore represented a step in the right direction – to be able to ensure the survival of the African elephant. It must also be noted that the Parties were becoming increasingly aware of the negative impact that the legal and illegal ivory trade had on the African elephant population. The one-off sales of ivory in 1999 and 2008, despite being legal, were believed to increase the levels of poaching and illegal trade that took place.⁵⁸⁹ This was mainly due to the fact that the legal sales provided opportunities to easily launder ivory.⁵⁹⁰ It is clear that the illegal trade of ivory negatively impacts elephant populations, however, more and more Parties began noticing that the legal ivory trade, although providing much needed funds, is also counter-productive to the very conservation efforts that are made by using those funds. It does not make sense for the CoP to approve requests by Southern African Parties to conclude one-off ivory sales, which only worsens the situation on the ground and results in more and more funding being required to improve conservation measures. This is an unending cycle which can be avoided by disallowing any further trade in ivory.

Unfortunately, there are a few pro-trade countries such as South Africa, Namibia and Zimbabwe, standing in the way of a unified Appendix I listing for all African elephant populations.⁵⁹¹ For now though, the possibility of any future trade in African elephant ivory has been denied.⁵⁹² It is necessary for the survival of elephant populations that the Parties, instead, focus on implementing the decisions made at CoP 17, by taking steps to enact or amend legislation and establish the requisite enforcement measures.⁵⁹³

⁵⁸⁸ Scanlon, J.E. ‘CITES CoP 17 – A CoP of “Firsts” and a turning point for the world’s wildlife’, 2016, International Institute for Sustainable Development (IISD), available at <http://sd+g.iisd.org/commentary/guest-articles/cites-cop17-a-cop-of-firsts-and-a-turning-point-for-the-worlds-wildlife/>, accessed on 15 March 2018.

⁵⁸⁹ Panjabi (note 6 above) at 35.

⁵⁹⁰ Ibid.

⁵⁹¹ Lindsay (note 184 above) at 262.

⁵⁹² Ibid.

⁵⁹³ Scanlon (note 588 above).

5.3. IMPACT OF CoP 17 DECISIONS ON IVORY TRADE IN SOUTH AFRICA

5.3.1. *South Africa's approach to the elephant ivory trade at CoP 17*

South Africa played a major role at the CoP 17 meeting. Aside from being the host nation, South Africa was an influential Party to decisions relating to the elephant ivory trade. As a pro-trade country that supports a sustainable-use approach to the conservation of its elephant populations, South Africa supported CoP 17 Proposals 14 and 15 to continue to trade in ivory.⁵⁹⁴ South Africa also led the opposition against listing the African elephant under Appendix I of the Convention and put forward a DMM for a process of trade in ivory.⁵⁹⁵ By supporting all the proposals intended on continuing to trade in ivory, South Africa made its position clear as a pro-trade country. Despite Proposals 14 and 15 being rejected, and the mandate to continue developing a DMM being terminated, South Africa's Minister of Environmental Affairs at the time, Edna Molewa, considered the meeting to have been a success for "science-based decision-making in the interests of species conservation."⁵⁹⁶ The Minister also mentioned that the role of CITES is to regulate trade in endangered species and is not to operate as an anti-trade movement.⁵⁹⁷ These statements by the Ministry further enforced South Africa's position as a pro-trade nation in respect of the ivory trade.

5.3.2. *Prospects for future trade*

The decisions made at CoP 17 reflected a need to further safeguard African elephant populations.⁵⁹⁸ All proposals aimed at any future trade of ivory were therefore rejected.⁵⁹⁹ As a Party to CITES, South Africa is obligated to implement and abide by the decisions made at

⁵⁹⁴ CITES CoP 17 Committee I meeting, Record 13 (CoP 17 Com.1 Rec.13 (Rev.1)), 3 October 2016, available at https://cites.org/sites/default/files/eng/cop/17/Com_I/SR/E-CoP17-Com-I-Rec-13-R1.pdf, accessed on 24 June 2017 1.

⁵⁹⁵ Lindsay (note 184 above) at 262.

⁵⁹⁶ SA Department of Environmental Affairs 'Minister Edna Molewa: Outcomes of CITES CoP 17', 2016, South African Government, available at <https://www.gov.za/speeches/minister-edna-molewa-outcomes-cites-cop17-5-oct-2016-0000>, accessed on 28 October 2016.

⁵⁹⁷ Ibid.

⁵⁹⁸ CITES Press Release 'Largest ever World Wildlife Conference hailed as a 'game changer'', 2016, *CITES.org*, available at https://cites.org/eng/news/pr/Largest_ever_World_Wildlife_Conference_CoP17_hailed_as_a_game_changer_04102016, accessed on 15 October 2018.

⁵⁹⁹ Ibid.

each meeting of the Parties.⁶⁰⁰ Therefore, South Africa cannot conclude any international sales of ivory until CoP 18, to be held in Sri Lanka in 2019⁶⁰¹ – when it will once again be able to petition CITES to be allowed to trade elephant ivory.

5.3.3. How are South Africa’s elephant populations likely to be affected by CoP 17 decisions?

The decisions made at CoP 17 are likely to have a positive impact on South Africa’s elephant populations. The highly contested decisions to deny further sales of ivory and to end the development of a DMM, will ensure that legal sales of ivory do not threaten continental elephant populations.⁶⁰² Many Parties believe that any legal trade in ivory provides a camouflage for illegal ivory to be laundered.⁶⁰³ This, in turn, results in increased levels of poaching.⁶⁰⁴ Since the prospects for future trade were rejected at CoP 17, illegal ivory will become more and more difficult to launder – which will lead to fewer incidents of poaching and allow elephant populations to recover.⁶⁰⁵ This includes South Africa’s elephant population, which has recently been exposed to increased levels of poaching.⁶⁰⁶

Furthermore, the agreement to close domestic markets that contribute to poaching or the illegal ivory trade will also be a vital tool to prevent further population loss.⁶⁰⁷ With regard to South Africa, its domestic ivory trade is already regulated by national legislation,⁶⁰⁸ however, its reported worrying involvement in the illegal ivory trade indicates that the effectiveness of existing legislation may need to be reviewed.⁶⁰⁹

⁶⁰⁰ CITES ‘Decisions’, undated, *CITES.org*, available at <https://www.cites.org/eng/dec/index.php>, accessed on 5 November 2017.

⁶⁰¹ CITES Press Release (note 598 above).

⁶⁰² Korwin (note 454 above) at 143.

⁶⁰³ Panjabi (note 6 above) at 35.

⁶⁰⁴ Khanna (note 109 above) at 148.

⁶⁰⁵ Hutchens (note 2 above) at 943.

⁶⁰⁶ AESR 2016 (note 15 above) at 175.

⁶⁰⁷ CITES Press Release (note 598 above).

⁶⁰⁸ The domestic ivory trade is regulated by the National Environmental Management: Biodiversity Act 10 of 2004, as mentioned in Chapter 2 Part 2 of this dissertation.

⁶⁰⁹ AESR 2016 (note 15 above) at 175.

In the build-up to CoP 17, the international community was made aware of the continental decline in the African elephant population.⁶¹⁰ Poaching was cited as being the main reason for the decline.⁶¹¹ Aware of the circumstances surrounding African elephant populations, the Parties were careful not to take any decisions that would contribute to further population loss, such as allowing any legal trade in ivory. Instead, Parties focused on combating the illegal trade of ivory and introducing stricter enforcement measures to safeguard the African elephant.⁶¹²

5.3.4. Improvements to existing legislation to ensure effective implementation of CITES

Chapter two, Part two, of this dissertation discussed the international legal regime regulating the ivory trade and how this translates into South African domestic law. According to Couzens, South Africa uses three different approaches when deciding how to incorporate international environmental conventions into South African domestic law.⁶¹³ These three approaches are best described by Couzens as follows: Firstly, “wholesale importation” which entails directly incorporating a convention into South African domestic law.⁶¹⁴ Secondly, “implementation by incorporation of principles” which entails the South African government putting in place legislation that incorporates principles from international law and international treaties.⁶¹⁵ Thirdly, “implementation through parallel or related legislation” which entails South Africa ratifying an international agreement and relying on existing legislation with a similar objective and purpose to fulfil its obligation to incorporate the agreement into domestic law.⁶¹⁶ The approach used by South Africa to incorporate CITES is the “implementation through parallel or related legislation” approach.⁶¹⁷ In terms of this approach, South Africa ratified CITES, but did not directly incorporate its provisions into domestic law.⁶¹⁸ Instead, South Africa used an indirect approach by relying on existing legislation⁶¹⁹ with a similar objective and purpose, to fulfil its obligation to incorporate CITES into domestic law.⁶²⁰ These laws, however, do not

⁶¹⁰ CITES Press Release ‘African elephants still in decline due to high levels of poaching’, 2016, *CITES.org*, available at https://cites.org/eng/news/pr/african_elephants_still_in_decline_due_to_high_levels_of_poaching_03032016, accessed on 2 May 2016.

⁶¹¹ *Ibid.*

⁶¹² CITES Press Release (note 598 above).

⁶¹³ Couzens (note 273 above) at 129.

⁶¹⁴ *Ibid.*

⁶¹⁵ *Ibid.*

⁶¹⁶ *Ibid.* at 143.

⁶¹⁷ *Ibid.*

⁶¹⁸ *Ibid.*

⁶¹⁹ Existing legislation primarily being the National Environmental Management: Biodiversity Act 10 of 2004.

⁶²⁰ Couzens (note 273 above) at 143.

directly incorporate CITES – and were not enacted for the sole purpose of implementing its provisions.⁶²¹

According to Couzens, the approach used by South Africa to incorporate an international agreement is to a large extent indicative of the governments thinking on certain environmental issues.⁶²² For instance, if the South African Government is pro-active on a particular environmental issue such as protecting the marine environment from pollution, it will directly incorporate the international agreement committed to that particular endeavour into South African domestic law. This was the case when South Africa incorporated the MARPOL Convention⁶²³ into domestic law by enacting the Marine Pollution (Prevention of pollution from ships) Act 1986⁶²⁴ (MARPOL Act).⁶²⁵ On the other hand, if the South African Government does not want to fully commit itself to fulfilling the obligations of a particular international agreement, it will take a cautious approach when incorporating such agreement into domestic law.⁶²⁶ This was the case when the South African Government used the “implementation through parallel or related legislation” approach to incorporate CITES into domestic law.⁶²⁷ This approach was the most indirect of the three above-mentioned approaches and allowed the South African Government the flexibility it needed to not over-commit itself to the provisions of CITES. Although this ensures that the South African Government maintains control over its natural resources, it is not the most effective approach to adopt when it comes to conserving the African elephant. The fact that South Africa relies on existing legislation to fulfil its obligations under CITES means that there is no central legislative authority incorporating the provisions of CITES into South African domestic law. The absence of a central legislative authority affects South Africa’s ability to effectively implement CITES and leads to various other deficiencies, examples of which will be discussed as follows:

⁶²¹ Torpy (note 157 above) at 63.

⁶²² Couzens (note 273 above) at 128.

⁶²³ The International Convention for Prevention of Pollution from Ships (MARPOL) was adopted on 2 November 1973 at the International Maritime Organisation (IMO) and is the main convention covering prevention of pollution of the marine environment by ships from operational or accidental causes. Available at [http://www.imo.org/en/about/conventions/listofconventions/pages/international-convention-for-the-prevention-of-pollution-from-ships-\(marpol\).aspx](http://www.imo.org/en/about/conventions/listofconventions/pages/international-convention-for-the-prevention-of-pollution-from-ships-(marpol).aspx), accessed on 10 December 2018.

⁶²⁴ South Africa, Marine Pollution (Prevention of pollution from ships) Act 2, 1986.

⁶²⁵ Couzens (note 273 above) at 132.

⁶²⁶ Ibid at 128.

⁶²⁷ Ibid at 143.

The lack of a central legislative authority affects South Africa’s ability to effectively carry out its duties under CITES, such as reporting consistently to the Elephant Trade Information System (ETIS)⁶²⁸ on ivory seizures. The submission of data of ivory seizures to ETIS is crucial to be able to monitor elephant populations. At the CoP 17 meeting, a report on the ETIS, administered by CITES, indicated that South Africa had a poor rule of law score based on the World Bank governance indicator⁶²⁹ for measuring the rule of law.⁶³⁰ In terms of the report, South Africa was considered as a country with “problematic governance values.”⁶³¹ In addition, the ETIS report indicated that South Africa was classified as a “country of secondary concern.”⁶³² South Africa received this classification due to its poor record for submitting ivory seizure data to ETIS – primarily due to the failure of most provinces to submit data for ivory seizures - and the lack of a centralised reporting system.⁶³³

It is important for South Africa to be consistent with providing data of ivory seizures to ETIS. Doing so would ensure that ETIS will be able to effectively monitor South Africa’s elephant populations and collect valuable data about the trade of ivory in South Africa. However, South Africa’s current legislation is not tailored to the specifications of CITES and does not make provision for a central reporting authority to ensure that its obligation to provide the necessary data to ETIS is fulfilled. Enacting legislation that directly incorporates CITES into South African domestic law would, therefore, create a central legislative authority with the ability to create mechanisms that would effectively fulfil its obligations under CITES.

The lack of a central legislative authority also impacts the way that South Africa chooses to manage its natural resources, such as the African elephant. Despite much of the world’s nations beginning to view the African elephant as more than a resource for financial gain, South Africa

⁶²⁸ The Elephant Trade Information System is one of two monitoring systems for elephants under CITES. At each meeting of the Conference of the Parties, a comprehensive report of the ETIS data is provided and discussed.

⁶²⁹ World Bank Governance Indicator – Rule of Law – “The rule of law captures perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular, the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence.” Available at <http://info.worldbank.org/governance/wgi/pdf/rl.pdf>, accessed on 10 December 2018.

⁶³⁰ CITES ‘Report on the Elephant Trade Information System (ETIS)’, CoP 17 2016, available at <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-57-06-R1.pdf>, accessed on 5 November 2017 16.

⁶³¹ Ibid.

⁶³² Ibid at 21.

⁶³³ Ibid.

still views it as such. This may prove problematic for Southern African elephant populations. By not directly incorporating CITES into its domestic law, South Africa is able to maintain control of its elephant populations. However, it must be noted that South Africa's decisions on the way that it manages its elephant populations also affects the continental elephant population. According to Harvey, Southern African elephant populations [Botswana, South Africa, Tanzania and Zimbabwe] account for more than 50 per cent of the total continental elephant population.⁶³⁴ Other regions such as West and Central Africa are among the worst affected by the threat of poaching and thus have smaller elephant populations.⁶³⁵ Once elephants become much scarcer in these regions, poaching syndicates will become more likely to target the remaining Southern African elephant populations which have already begun declining. According to the South African National Parks (SANparks), elephant poaching is on the rise at the Kruger National Park and is fuelled by the illegal wildlife trade.⁶³⁶ As a country that is pro-trade, South Africa needs to take into consideration the consequences of legalising the ivory trade and retaining its Appendix II listing for elephants under CITES. The potential for trade to resume is enough to remove any stigma that would have been attached to the trade of ivory thereby, igniting the demand for ivory and fuelling the illegal trade.⁶³⁷ Although South Africa's elephant populations are stable for now, if the domestic legislation is not improved, elephant populations may rapidly decline in future. Specific legislation, directly incorporating CITES would strengthen South Africa's legal framework in terms of ensuring the survival of the African elephant.

South Africa's current domestic legislation is outdated because it relies on parallel legislation, as opposed to enacting specific legislation that directly incorporates CITES. It is not to say that the current legislation is ineffective, but there is significant room for improvement. The acts and ordinances, as discussed in chapter 3, that give effect to CITES were not enacted for the sole purpose of incorporating CITES and are at times lacking in certain aspects that were discussed in the abovementioned paragraphs. The changing landscape in elephant conservation requires that South Africa's legislation evolves to meet new challenges. A typical example of

⁶³⁴ Harvey, R. 'Preserving the African elephant for future generations' (SAIIA Occasional Paper 219; 2015) 7.

⁶³⁵ Ibid.

⁶³⁶ Africa News Agency (ANA) 'Elephant poaching on the rise – South African National Parks', 2016, *Mail and Guardian Online*, available at <https://mg.co.za/article/2016-06-06-00-elephant-poaching-on-the-rise-south-african-national-parks/>, accessed on 17 October 2016.

⁶³⁷ Harvey (note 634 above) at 7.

this is the fact that poaching syndicates are becoming more and more sophisticated and are constantly seeking new targets. Unless the legislation is updated to meet these new challenges of the changing landscape, South Africa's elephants may not be able to be protected.

5.4. EFFECTIVENESS OF CITES IN REGULATING THE IVORY TRADE

CITES plays a vital role in ensuring that the ivory trade does not threaten the survival of the African elephant in the wild.⁶³⁸ However, there are a few deficiencies that severely impact the effectiveness of the Convention. Each of these deficiencies is discussed below.

5.4.1. Implementation of the Convention by State Parties

Chapter two of this dissertation discussed CITES and the manner in which it is applied by its member States. This dissertation observed that CITES is a non-self-executing treaty that relies entirely on member States to implement its provisions by enacting national legislation.⁶³⁹ The implementation of the Convention therefore differs from State to State, which results in varied enforcement procedures and penalties. This lack of standardised application of the Convention severely impacts its effectiveness.⁶⁴⁰

Another observation was that several member States had not implemented the Convention, or chose to only partially implement it within their legislative framework.⁶⁴¹ It should also be noted that CITES makes no provision for ongoing monitoring to ensure that member States have adequately implemented and are enforcing its provisions – nor does it penalise non-compliant States.⁶⁴²

CITES effectiveness as a wildlife trade-regulating Convention is largely dependent upon the national legislation implementing it.⁶⁴³ To improve its effectiveness, CITES needs to create a

⁶³⁸ Barrie (note 20 above) at 189.

⁶³⁹ Fiadjoe (note 220 above) at 38.

⁶⁴⁰ Torpy (note 157 above) at 67.

⁶⁴¹ Fiadjoe (note 220 above) at 39.

⁶⁴² Barrie (note 20 above) at 182.

⁶⁴³ Panjabi (note 6 above) at 17.

body to monitor Parties more closely and encourage them to comply with their obligation to implement the Convention.⁶⁴⁴ CITES must also provide explicit guidelines regarding the form and content of the national legislation that Parties are required to implement.⁶⁴⁵ This includes being specific about enforcement procedures and penalties for contravening the provisions of the Convention.⁶⁴⁶ Since CITES is completely reliant upon member States to implement the Convention, it must focus on ensuring that Parties actually do so in a manner that effectively fulfils the objective of the Convention. In doing so, these monitoring bodies should offer rewards or incentives to countries that comply with their obligation to implement the Convention. These incentives or rewards could take the form of financial contributions, received from donors internationally, to improve conservation measures. The addition of incentives would be especially useful to encourage developing countries to implement CITES.

5.4.2. Conservation approach: Sustainable-use or the Pure-protectionist approach

Chapter three of this dissertation discussed how past CoP meetings have contributed to shaping the international legal regime that regulates the ivory trade. The dissertation observed that although decisions made at past CoP meetings made invaluable contributions to the legal regime regulating the ivory trade, the Parties present remained divided on how best to conserve African elephant populations.⁶⁴⁷ The division occurred between advocates of a pure-protectionist approach on the one hand, and supporters of a sustainable-use approach on the other.⁶⁴⁸ This lack of consensus between Parties greatly diminishes the effectiveness of the Convention, and has resulted in conservation measures being carried out unevenly among African range States.⁶⁴⁹

The Convention does not specifically favour a single approach, but instead strikes a balance between the two approaches.⁶⁵⁰ However, in order to improve its effectiveness, it is necessary for the Convention to be decisive on which approach to adopt in the event that Parties are unable to reach consensus. This is especially necessary when populations of a particular

⁶⁴⁴ Bodansky (note 247 above) at 79.

⁶⁴⁵ Ibid at 71.

⁶⁴⁶ Torpy (note 157 above) at 67.

⁶⁴⁷ Barrie (note 20 above) at 188.

⁶⁴⁸ Ibid.

⁶⁴⁹ Montazeri (note 19 above) at 122.

⁶⁵⁰ Kriepps (note 219 above) at 470.

species, such as the African elephant, have displayed a steady trend of decline due to the wildlife trade.

5.5. CONCLUSION

It has been almost 42 years since the African elephant was first listed under CITES. The aim of the listing was to afford the African elephant protection, under the Convention, from the devastating effects of the ivory trade.⁶⁵¹ Although CITES succeeded in providing a practical mechanism to regulate the ivory trade, this dissertation found member States to be severely lacking in the implementation and enforcement of its provisions. It is therefore clear that CITES cannot solely rely on Parties to enact legislation giving effect to it. CITES should instead establish a body that would take the necessary steps to regularly monitor Parties and ensure that they are aware of their duties to implement the provisions of the Convention. In doing so, it must provide definitive guidelines as to how Parties should implement and enforce the provisions of the Convention. It would also be useful for CITES to make provision for financial assistance to be offered to Parties, in order to implement the Convention and reward their compliance with incentives to improve conservation measures. It must, however, be noted that implementation and enforcement go hand in hand. Without enforcement, it is as if the Convention was never implemented.⁶⁵² It is therefore important that Parties follow up the implementation of the Convention with corresponding enforcement mechanisms that fulfil its objectives.

CITES should also take a firm stand on the conservation approach needed to conserve African elephant populations.⁶⁵³ This dissertation observed that despite the African elephant being discussed at several CoP meetings, Parties continue to remain divided on whether to adopt a pure-protectionist approach or a sustainable-use approach to conservation. This division among the Parties has resulted in contrasting decisions being taken at many CoP meetings, which severely impacts the Convention's ability to effectively regulate the ivory trade. On the one hand, by banning all international ivory trade, Parties favoured a pure-protectionist approach to conservation. On the other hand, by allowing one-off ivory sales, Parties favoured a

⁶⁵¹ Barrie (note 20 above) at 185.

⁶⁵² Fiadjoe (note 220 above) at 39.

⁶⁵³ Hutchens (note 2 above) at 950.

sustainable-use approach to conservation. Although each approach has its supporters and critics, it is clear that when Parties fail to reach consensus or are at odds, the Convention ought to step in to avoid decisions being swayed. This may be done by using the recommendations of the Secretariat of the Convention as a “tiebreaker” of sorts – taking into account the objective to ensure the survival of African elephant.

The CoP 17 meeting took place at a time when African elephant populations were experiencing a severe decline. The decisions taken at this meeting, therefore, were and will remain crucial to preventing further population loss. At the meeting, proposals in favour of and against the ivory trade were submitted. Ultimately, all proposals in favour of continuing to trade in ivory were rejected. The rejection of these proposals was necessary to prevent any legal trade in ivory from exacerbating the illegal trade of ivory. The proposal to once again unify all African elephants under Appendix I – thereby banning all international trade in ivory – was also rejected. For this reason, advocates of a pure-protectionist approach may consider CoP 17 to be a missed opportunity to put an end to the possibility of any legal trade in ivory. An important reason why the proposal to unify all African elephant populations under Appendix I failed, is because pro-trade countries led by South Africa held Parties to ransom by threatening to disregard trade regulations and continue to trade independently of the Convention. This threat made Parties fearful of what would become of the African elephant if range States with the largest elephant populations chose to no longer be bound by the trade regulations under CITES. Parties, therefore, decided to reject the proposal. The decisions taken during this meeting therefore constituted Parties “playing it safe” so to speak. No proposals in favour of, nor against the trade in ivory were adopted.

South Africa, as previously mentioned, was a highly influential Party during the CoP 17 meeting, and as a pro-trade nation with stable elephant populations, it sought to continue trading in ivory. However, this dissertation observed that South Africa’s legislative framework, although successful thus far, may not be adequately equipped to deal with the consequences associated with continued trade in ivory. South Africa is considered to have implemented CITES within its national legislation, however, it has done so indirectly through pre-existing legislation. South Africa’s method of implementation may be considered to be outdated and failing to take into consideration the changing landscape. A typical example of the inadequacy

of current legislation may be demonstrated by the fact that South Africa was reported to have a worrying involvement in the illegal ivory trade.⁶⁵⁴ Further to this, the country's Kruger National Park, which is home to South Africa's largest elephant population, recently experienced incidents of poaching – which existing enforcement measures were unable to prevent.⁶⁵⁵ South African elephant populations may therefore benefit from updated legislation regulating the ivory trade and promoting stricter enforcement measures.

It is therefore imperative that South Africa, as a Party with considerable influence in the trade of ivory, re-assess its position regarding its listing of the African elephant under CITES and its decision to want to continue trade. South Africa is one of the range States with the largest elephant population and as discussed in this chapter, its decisions affect the continental population of elephants. Therefore, instead of considering its own population in isolation, the South African government should consider the consequences of its decisions on a continental scale. In conclusion, it must be taken into account that elephant ivory is a rare natural resource that requires protection. Failure to protect this resource will result in over-exploitive trade and the eventual extinction of the African elephant as a species. Mankind must therefore make every effort to prevent the devastating extinction of yet another majestic species.

⁶⁵⁴ AESR 2016 (note 15 above) at 175.

⁶⁵⁵ Africa News Agency (ANA) (note 636 above).

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