

UNIVERSITY OF KWAZULU-NATAL

REGULATING THE TRADE IN RHINO HORN: A SOUTH AFRICAN PERSPECTIVE

By

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Table of Contents

Declaration	v
Abstract	vi
Acknowledgments	vii
List of Abbreviations	viii

CHAPTER ONE: INTRODUCTION

1.1. Statement of purpose	1
1.2. The context of this dissertation	2
1.3. The current state of the rhino and poaching statistics	4
1.4. A general overview of CITES	6
1.5. The demand for rhino horn	7
1.6. Research question	10
1.7. Research methodology	10
1.8. Structure of the dissertation	10

CHAPTER TWO: RHINO CONSERVATION IN SOUTH AFRICA

2.1. South African Legislation applicable to rhino conservation	12
2.1.1. The Constitution of the Republic of South Africa, 1996	13
2.1.2. National Environmental Management Act 107 of 1998 (NEMA)	14
2.1.3. National Environmental Management Act: Protected Areas Act 57 of 2003 (NEM:PA)	15
2.1.4. National Environmental Management Act: Biodiversity Act 10 of 2004 (NEM:BA)	17
2.1.5. Draft Threatened or Protected Species Regulations (2015)	18
2.1.6. Draft Regulations for the Domestic Trade in Rhinoceros Horn, or Part, Product or Derivative of Rhinoceros Horn (2017 and 2018)	21
2.1.7 Norms and Standards for the Marking of Rhinoceros and Rhinoceros Horn and for the Hunting of Rhinoceros for Trophy Hunting Purposes (2018)	21
2.1.8. Biodiversity Management Plan for White Rhinoceros (2015)	22
2.1.9. Biodiversity Management Plan for Black Rhinoceros (2013)	22
2.1.10. CITES Regulations (2010)	23
2.1.11 Draft Notice Prohibiting the Carrying out of Certain Restricted Activities Involving Rhinoceros Horn (2018)	23
2.2. Case Law applicable to rhino conservation	
2.2.1. Kruger and Another v Minister of Water and Environmental Affairs and others (2016)	23

2.2.2. Els v The State (2017)	26
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CHAPTER THREE: DOMESTIC TRADE IN RHINO HORN

3.1. History and background	29
3.2. Arguments for legalisation	
3.2.1. Legal trade could lessen the demand on the illegal “black” market	30
3.2.2. Sustainable use paradigm	32
3.2.3. Prohibition has failed	38
3.3. Arguments against legalisation	
3.3.1. Increase in demand for rhino horn	38
3.3.2. Legal trade provides a cover for illegal exports (laundering)	41
3.3.3. Tainted reputation among CITES member states	42
3.3.4. The draft regulations have too many flaws	44
3.4. South Africa and CITES	50
3.5 Summary	54

CHAPTER FOUR: RECOMMENDATIONS FOR THE APPROACH SOUTH AFRICA SHOULD ADOPT

4.1. Centralised Selling Organisation	56
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4.2. Sale of stockpiles	59
4.3. Draft regulations to be tightened	60
4.4. Compliance with CITES	61
CHAPTER FIVE: CONCLUSION	64
BIBLIOGRAPHY	69

DECLARATION

I, Shaun Neil Bergover, hereby declare that:

1. This research paper is my own work and I have not copied the work of another student or author;
2. The written work is entirely my own except where other sources are acknowledged;
3. Collaboration in the writing of this dissertation or the copying of another student's work constitutes cheating for which I may be excluded from the University; and
4. This research paper has not been submitted in this or similar module at this or any other University.

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ABSTRACT

South Africa is facing a major rhino poaching crisis. In 2015, 1175 rhinos were killed by poachers and 1054 in 2016. During the first half of 2017, 529 rhinos had been killed by poachers. South Africa can currently sustain this rate of poaching because the population growth rate (approximately 6.5% for white rhino and 5% for black rhino) is higher than the off-take (legal and illegal), but if poaching continues to escalate, a tipping point may eventually be reached forcing the population to decline for the first time in 50-100 years.

The driver for the illegal killing is a persistent demand for rhino horn from Asia, where it is used mainly for medicinal purposes. This demand cannot be met by legal supplies because international trade in rhino horn was banned by CITES in 1977 in response to long-term, high levels of rhino poaching that were threatening to push all rhino species to extinction.

In 2009, South Africa – as a member of CITES, also banned domestic trade in keeping with CITES’ vision and mission. In 2016 the ban on domestic trade was challenged in the case of *Kruger and Another v Minister of Water and Environmental Affairs*. The High Court found that the then Minister responsible for environmental affairs (“the Minister”) did not fully comply with the public consultation requirements of NEMBA and set aside the moratorium with immediate effect. In February 2017 – following the 2016 High Court judgment – draft regulations were published by the Minister effectively setting in motion the legalisation of domestic trade in rhino horn. The draft regulations were available for public comment and those comments are now being considered by the Minister.

Despite the regulations still being in draft form, this is a very new development with serious consequences for rhinos. This dissertation seeks to analyse the arguments for and against a legalised trade. The draft regulations will also be discussed and their viability – at least on paper – will be analysed. This dissertation will also look at South Africa’s obligations in terms of CITES and whether these regulations are in conflict with our obligations to CITES. Lastly this dissertation will provide recommendations for the approach that South Africa should take.

The conclusion reached is that the draft regulations appear to address various concerns regarding the legalisation of domestic trade, however, they would need to be strengthened in order for them to be effective.

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LIST OF ABBREVIATIONS

CITES	Convention for International Trade in Endangered Species of Wild Fauna and Flora
CSO	Centralised Selling Organisation
DEA	Department of Environmental Affairs
NEMA	National Environmental Management Act
NEM:BA	National Environmental Management: Biodiversity Act
NEM:PAA	National Environmental Management: Protected Areas Act
SANBI	South African National Biodiversity Institute

CHAPTER ONE: INTRODUCTION

1.1. Statement of purpose

Against the background of the 2016 High Court judgment of *Kruger and Another v Minister of Water and Environmental Affairs*¹ and the Draft Regulations for The Domestic Trade in Rhinoceros Horn which were published in February 2017,² this dissertation will look at the pros and cons of regulating the trade in rhino horn in light of the on-going challenges being faced with poaching.

In 2009, a moratorium on the domestic trade in rhino horn in South Africa was promulgated by the Minister in terms of section 57 (2) (a) of the National Environmental Management: Biodiversity Act (NEMBA).³ This section empowers the Minister to “prohibit the carrying out of any activity which is of a nature that may negatively impact on the survival of listed threatened or protected species.”⁴ The moratorium was in the context of section 24 of the Constitution of the Republic of South Africa,⁵ more particularly, paragraph (b) (iii) which is aimed at protecting the environment “for the benefit of the present and future generations, through reasonable legislative and other measures that secure ecology, sustainable development and use of natural resources while promoting justifiable economic and social development.”⁶

The moratorium placed a ban on domestic trade in rhino horn because rhinos were becoming increasingly threatened. In the *Kruger* case, the applicants – Hume and Kruger, challenged the moratorium as well as aspects of the final amendments to the Threatened or Protected Species Regulations (TOPS Regulations).⁷ The High Court set the moratorium aside on the basis that the public participation requirements of NEMBA were not fully complied with by the then Minister. Following the judgment, draft regulations for the domestic trade in rhino horn were published by the Minister.

¹ 2016 (1) All SA 565 (GP).

² GN 74 of GG 40601, 1 February 2017.

³ Act 10 of 2004.

⁴ *Ibid*, section 57 (2) (a).

⁵ Constitution of the Republic of South Africa, 1996.

⁶ *Ibid*, section 24 (b) (iii).

⁷ GN 69 of GG 30703, 28 January 2008.

At the outset, it is important to emphasise that the provisions of the 2017 Draft Regulations for the Domestic Trade in Rhino Horn have been finalised.⁸ Members of the public were invited to comment on the draft regulations and feedback from the public was considered by the Minister. However, additional draft regulations were published on 21 September 2018⁹ (hereinafter referred to as the 2018 draft regulations) which also include regulations that were not included in the 2017 regulations.

A critical discussion of the draft 2017 and 2018 regulations for the trade in rhino horn domestically will be provided. The implications of allowing the domestic trade in rhino horn in light of South Africa's international obligations in terms of the Convention on International Trade in Endangered Species of wild Fauna and Flora (CITES) will also be examined.

1.2. The Context of this dissertation

Loss of genetic diversity is one of the main threats that our planet is facing.¹⁰ Africa boasts a wide range of natural resources, which include land and water as well as minerals, gas and wild animals and plants.¹¹ Of the world's natural resources, Africa contains a large amount of those resources.¹² The continent is the second biggest in geographical size and contains the second largest human population in the world.¹³ Animals like wildebeest, elephants, giraffes and zebras can all be found in Africa which contains over 1000 species of mammals and 60 species of carnivores which include leopards, lions and cheetahs.¹⁴

Assessments have shown that Africa's environment is experiencing serious pressure at levels that are higher than other regions of the world.¹⁵ The managing of protected areas in Africa is

⁸ Department of Environmental Affairs 'Minister Molewa Highlights Progress on Integrated Strategic Management of Rhinoceros' 25 January 2018 available at: https://www.environment.gov.za/mediarelease/molewa_highlightsprogressonimplementationofintegratedstrategicmanagementofrhinoceros Accessed on 4 November 2018.

⁹ GN 986 of GG 41919, 21 September 2018.

¹⁰ UNEP 'Africa Environment Outlook 2: Our Environment Our Wealth' 2006 UNEP: Nairobi 4-5.

¹¹ UN Environment 'Our Work in Africa' Available at: <https://www.unenvironment.org/regions/africa/our-work-africa> Accessed on 18 November 2017.

¹² Ibid.

¹³ R Nichols 'African Plants and Animals' *Sciencing* 25 April 2017 available at: <http://sciencing.com/african-plants-animals-7216765.html> Accessed on 18 November 2017.

¹⁴ UN Environment, note 11 above.

¹⁵ A Gillespie 'The Conservation of Wildlife in Africa: Basic Steps for the 21st Century' (2009) *New Zealand Journal of Environmental Law* 161-188.

also becoming a serious concern.¹⁶ On-going destruction of the environment by humans, shortage of food and illnesses are the dangers to the survival of mammals in Africa.¹⁷

Rhino poaching in South Africa has increased drastically in recent years. In 2015, 1175 rhinos' deaths were caused by poachers and 1054 in 2016.¹⁸ During the first half of 2017, 529 rhinos had been killed by poachers.¹⁹ According to a 2014 study by the Department of Environmental Affairs, the population growth rate for rhinos had thus far exceeded the poaching rate.²⁰ However, the study indicated that if the poaching rate continued to escalate then a 'tipping point' could be reached and the rhino population could decline significantly.²¹

There is an on-going demand for rhino horn from Asian countries, where it is utilised predominantly for medicinal purposes.²² However, as CITES prohibits the international trade in rhino horn, this demand cannot be met by legal export.²³ This has served as a catalyst for illegal poaching. Furthermore, while the commercial export of rhino horn was prohibited as a result of CITES, domestic trade was still permissible.²⁴ There were suspicions that Asian nationals were trying to circumvent the provisions of CITES by purchasing rhino horn legally in South Africa and then exporting those horns illegally to other countries.²⁵ This suspected wildlife trafficking is what led to the South African government placing a moratorium on the domestic trade in rhino horn.²⁶

Wildlife trafficking involves "any environment-related crime that involves illegal trade, smuggling, poaching, capture or collection of endangered species, protected wildlife

¹⁶ Ibid.

¹⁷ P Cheteni 'An analysis of anti-poaching techniques in Africa: A case of rhino poaching' (2014) *Munich Personal RePEc Archive (MPRA)*.

¹⁸ Department of Environmental Affairs 'Minister Molewa Highlights Progress on Integrated Strategic Management of Rhinoceros' 24 July 2017 available at:

https://www.environment.gov.za/mediarelease/molewa_proresson_integratedstrategic_managementofrhinoceros_rhinopoaching Accessed on 9 November 2017.

¹⁹ Ibid.

²⁰ Department of Environmental Affairs 'The Viability of Legalising trade in rhino horn in South Africa' 2014 Available at:

https://www.environment.gov.za/sites/default/files/docs/rhinohorntrade_southafrica_legalisingreport.pdf Accessed on 9 November 2017

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

(including animals and plants that are subject to harvest quota and regulated by permits), derivatives or products thereof.”²⁷

Wildlife trafficking is a criminal offence and has established links to other illegal trafficking, fraud and corruption; however, it is not seen as a priority by governments due to the fact that it is largely an environmental issue and as such does not get addressed immediately.²⁸

Human trafficking and drugs are seen as more important than trafficking of wildlife, but just as we must strengthen our efforts to fight human trafficking and drugs, our efforts to fight illegal wildlife trafficking must also be strengthened.²⁹

Approximations of the value of global trafficking of wildlife vary and reliable estimations are difficult to obtain – mostly because the trade is illegal, but illicit trade in the fishing industry is likely “between US\$ 4.2 billion and US\$ 9.5 billion per year.”³⁰

1.3. The Current State of The Rhino and Poaching Statistics

Exact figures of the current rhino population are unknown, however, estimates are that the total number of rhino in the world today are about 30 000; which include between 19 666 and 21 085 White rhino, 5040 and 5458 Black rhino, about 3500 Greater one-horned rhino and between 61 and 63 Javan rhino.³¹

The White rhinoceros (*Ceratotherium*) and the black rhinoceros (*Diceros Bicornis*) have been the main victims of wildlife poaching. Rhinos used to be plentiful all through Asia and Africa with an estimated population of 500 000 globally during the early twentieth century.³² This fell to about 70,000 in 1970 and further to just about 29 000 living today.³³ Notwithstanding this sad state of affairs, population figures of rhinos globally have been increasing in the past few years.³⁴

²⁷ N South & T Wyatt ‘Comparing illicit trades in wildlife and drugs: an exploratory study’ 31 (1) *Deviant Behaviour* 538.

²⁸ Dalberg Global Development Advisors ‘Fighting Illicit Wildlife Trafficking: A Consultation with Governments’ (2012) WWF International, Switzerland.

²⁹ *Ibid.*

³⁰ J Haken ‘Transactional crime in the Developing World’ *Global Financial Integrity* (2011) Washington 44.

³¹ ‘Rhino Population Figures’ *Save the Rhino International* available at:

http://www.savetherhino.org/rhino_info/rhino_population_figures Accessed on 11 November 2017.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

There has been a 96% decline in the number of black rhino “from 65,000 individuals in 1970 to just 2,300 in 1993” due to poaching.³⁵ Tenacious conservation programmes all through Africa have yielded an increase in black rhino numbers to a current population of between 5,040 and 5,458 rhinos.³⁶

The southern white rhino is a wonderful success story. In the early 1900s, there were as little as 50 remaining, but now there are between 19,666 and 21,085 and it has the highest population among the rhino species.³⁷ Since 2008, there has been a rapid increase in poaching which threatens to destroy all the good work done for rhino conservation in Africa over the last 20 years³⁸ bringing the remaining rhino closer and closer to extinction notwithstanding the fact that populations are gradually increasing.

In a report providing an update on the “Integrated Strategic Management of Rhinoceros”, the Minister noted a decline in rhino poaching numbers in South Africa.³⁹ According to this report, “a total of 1028 rhino were poached between January 2017 and December 2017 compared to 1054 in the same period for 2016 which amounts to a decrease of 26 rhinos.”⁴⁰ TRAFFIC, a wildlife trade monitoring network⁴¹ reports the same rhino poaching figures.⁴²

African rhino numbers have dropped dramatically during the past 20 years because of poaching.⁴³ CITES statistics for 2012 reveal that the buying and selling rate of rhino horns are about US\$ 60 000 - 80 000 on the black market.⁴⁴ Because of the high poaching numbers and the lucrative illegal benefits of the horn, black rhinoceros numbers have decreased drastically to the point that it has been classified as an endangered species.⁴⁵

Conservationists have been doing great work in increasing rhino population numbers, however, increased poaching is an on-going obstacle to rhino population growth in Africa.⁴⁶

³⁵ Ibid.

³⁶ ‘IUCN Reports Deepening Rhino Poaching Crisis in Africa’ 9 March 2016 available at: <http://www.iucn.org.za/content/iucn-reports-deepening-rhino-poaching-crisis-africa> Accessed on 11 November 2017.

³⁷ Save The Rhino International, note 31 above.

³⁸ Ibid.

³⁹ Department of Environmental Affairs, note 8 above.

⁴⁰ Ibid.

⁴¹ TRAFFIC is the leading non-governmental organisation working globally on trade in wild animals and plants in the context of both biodiversity conservation and sustainable development.

⁴² ‘TRAFFIC’s engagement on African rhinoceros conservation and the global trade in rhinoceros horn TRAFFIC available at: <http://www.traffic.org/rhinos/> Accessed on 18 November 2017.

⁴³ Cheteni, note 17 above.

⁴⁴ Dalberg, note 28 above.

⁴⁵ Cheteni, note 17 above.

⁴⁶ Ibid.

South Africa alone has more than 93% of the white rhino population in Africa, but conservation efforts could be destroyed because of illegal poaching activities in countries like South Africa and Zimbabwe.⁴⁷

1.4. A General Overview of CITES

Wildlife poaching is a transnational issue, therefore a short summary of CITES will be given to provide an international legal context. It is important to highlight, however, that CITES only governs international trade and does not govern other issues such as hunting (in the case of wildlife) and domestic trade. CITES will also be discussed in more detail in chapter three.

CITES is an international convention aimed at “ensuring that international trade in specimens of wild animals and plants does not threaten their survival.”⁴⁸

Trade in plants and wild animals is a transnational issue which therefore requires international co-operation to protect those vulnerable species from over-exploitation⁴⁹ CITES was established to assist with such co-operation. Today, protection is provided to more than 35, 000 species of fauna and flora, either as “live specimens, fur coats or dried herbs.”⁵⁰

States join and adhere to CITES voluntarily and upon joining become known as Parties. States have to implement the Convention in their national laws but it does not replace national laws. In some countries a treaty does not become binding immediately after it has been signed, it is merely an indication that the country approves of it. A further process known as ratification or accession is the process where a country makes the treaty binding law for that country. This is usually accomplished after a consultation process with lawmakers. However, in some countries, a treaty is domesticated as soon as it is ratified by the country in question, meaning it does not need to be enacted into law by the legislature.

In South Africa, section 231 of the Constitution⁵¹ gives power to the National Executive to negotiate and sign treaties. The National Council of Provinces and the National Assembly

⁴⁷ Ibid.

⁴⁸ CITES, ‘What is CITES?’ available at: <https://www.cites.org/eng/disc/what.php> Accessed on 9 January 2018.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Note 5 above.

must then approve it by resolution, after which the treaty becomes binding. It then becomes law when it is enacted into national legislation.⁵²

CITES provides a structure that each party must adhere to – each party must ensure that CITES is implemented into their own domestic legislation. CITES has 183 members⁵³ and works by:

“Subjecting international trade in specimens of selected species to certain controls. All import, export, re-export and introduction from the sea of species covered by the Convention has to be authorised through a licensing system. Each party to the Convention must designate one or more Management Authority in charge of administering that licensing system and one or more Scientific Authorities to advise them on the effects of trade and the status of the species.”⁵⁴

CITES categorises species into three appendices, based on the protection required. Appendix I protects “species threatened with extinction...trade in specimens of these species is permitted only in exceptional circumstances.”⁵⁵ Appendix II protects “species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival.”⁵⁶ Appendix III contains “species which any party identifies as being subject to regulation within its jurisdiction for the purposes of preventing or restricting exploitation and as needing the co-operation of other parties in the control of trade.”⁵⁷

CITES was signed by South Africa on 15 July 1975 and ratified on 13 October 1975.⁵⁸

1.5. The Demand for Rhino Horn

Rhino horns are consumed in various ways with every part of the rhino including faeces and urine being of some value to humans.⁵⁹ The use of these rhino products dates back to

⁵² Ibid Section 231 (4).

⁵³ Note 48 above.

⁵⁴ Ibid.

⁵⁵ Ibid, article II (1).

⁵⁶ Ibid, article II (2).

⁵⁷ Ibid, article II (3).

⁵⁸ ‘List of Contracting Parties’ CITES available at: <https://www.cites.org/eng/disc/parties/chronolo.php> Accessed on 9 January 2018.

traditional Asian medicinal practices and these practices are still being followed by many people even though the practice itself is losing significance.⁶⁰ Martin indicates that demand still exists for various rhino products including its horn.⁶¹

For the most part, people are still ignorant about rhino horn and its uses.⁶² Martin highlights that “rhino horn is not used as an aphrodisiac” which is what is usually believed, but he identifies two sources of demand.⁶³ Firstly, for “medicinal purposes, since it is regarded as having potent fever-reducing qualities by many Chinese people,”⁶⁴ and secondly, for “the making of ceremonial dagger handles in Yemen.”⁶⁵

It is a long-standing tradition of using rhino horn for medicinal purposes.⁶⁶ At first Asian rhinos would have been the source of all horn, but as their numbers started dropping and they became rare, African rhinos were then utilised.⁶⁷ The Asian horn, popularly described as a “fire horn” is seemingly of better quality compared to the African “water horn”, therefore is more expensive on the black market.⁶⁸ Martin highlights the “many ornamental uses for rhino horn in the past, but this appears to be limited to Yemen at present.”⁶⁹

There is a huge demand for rhino horn amongst many Asian countries. Some previously large consumers of rhino horn (such as Japan in the 1970s⁷⁰ and South Korea in the 1980s) have ratified CITES and the utilisation of rhino horn in these countries has subsequently diminished.⁷¹ For instance, Japan ratified CITES in 1980 and through various initiatives, such as government directing manufacturers of medicines containing rhino horn to find substitutes, the need for rhino horn has reduced.⁷² In contrast, although China has joined CITES, it

⁵⁹ EB Martin ‘Rhino Exploitation: The Trade in Rhino Products in India, Indonesia, Malaysia, Burma, Japan and South Korea’ (1983) *Hong Kong: World Wildlife Fund*.

⁶⁰ EB Martin ‘The international Trade in Rhinoceros Products’ Gland: IUCN/WWF 1979.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ M Sas-Rolfes *The Economics of Rhino Conservation: An Economic Analysis of Policy Options for the Management of Wild Rhino Populations in Africa* submitted in part fulfilment of the Masters Course in Environmental and Resource Economics, University College London, July 1993.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Martin, note 60 above.

⁷⁰ K Ellis ‘Tackling the demand for rhino horn’ *Save the Rhino International* available at: https://www.savetherhino.org/rhino_info/thorny_issues/tackling_the_demand_for_rhino_horn Accessed on 12 September 2016.

⁷¹ Ibid.

⁷² Ibid.

continues to be a consumer of rhino horn and a source of illegal trade.⁷³ Similarly, there is a great demand for rhino horn in Vietnam.⁷⁴ In this country, rhino horn is seen as a status symbol of the wealthy upper class and, in its grounded powdered form, it is mixed with water and consumed as a recreational drink.⁷⁵ Furthermore, rhino horn is also perceived in Vietnam to have medicinal properties and is believed to cure cancer and detox the body after excessive alcohol consumption or rich food.⁷⁶

The variety of ways that rhino horn can supposedly be used and the worrying poaching rate highlight the need for Vietnam to take action immediately.⁷⁷ Previously, CITES played an instrumental role in demand reduction campaigns in user countries in Asia and got those countries to implement rhino horn trade bans.⁷⁸ CITES should exercise its power and force the government of Vietnam to “show political will in tackling the illegal trade in rhino horn, through rigorous law enforcement activities, arrests and sentencing.”⁷⁹ Public awareness initiatives can play a big role in changing the way people see rhino horn products and increasing people’s understanding of the detrimental effects of consuming wildlife products illegally.⁸⁰

From the mid-2000s Africa’s rhinos were under serious threat due to the increased demand for rhino horn.⁸¹ There appears to be a link in Asia’s rhino horn trade which is the increase in the levels of disposable income and rapid economic growth.⁸² In many Asian countries rhino horn and ivory (obtained from elephant tusks), are seen as social, wealth and status symbols.⁸³ This creates a demand and rhino horn and ivory have become part of this demand – the more rhinos that get poached the rarer the commodity becomes and the higher the price

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ J Shaw ‘Poaching Crisis in South Africa’ Save the Rhino International available at:

https://www.savetherhino.org/rhino_info/thorny_issues/poaching_crisis_in_south_africa Accessed on 27 July 2016.

⁸² Ellis, note 70 above.

⁸³ K Ammann ‘How Rhino Horns end up in Asian Jewellery Shops’ The Star 2 August 2013. Available at:

https://www.the-star.co.ke/news/2013/08/02/how-rhino-horns-end-up-in-asian-jewellery-shops_c810653 Accessed on 22 August 2016.

will go.⁸⁴ This is essentially what this paper comes down to whether legalising horn rhino trade will increase or decrease the demand for rhino horn.

1.6. Research Question

South Africa's rhino are decreasing at an alarming rate. The primary focus of this dissertation is the regulation of the domestic trade in rhino horn in South Africa. More specifically, I will address the following research questions:

- 1.6.1. What are the pros and cons of allowing domestic trade in rhino horn?
- 1.6.2. Are the draft regulations regulating the domestic trade in rhino horn adequately formulated?
- 1.6.3. What challenges and implications does allowing the domestic trade in rhino horn pose for South Africa in lights of its international obligations in terms of CITES?

1.7. Research Methodology

The central question of this dissertation will be answered by analysing legislation, case law, textbooks and journal articles. This will be done primarily by way of desktop research. No empirical research will be conducted.

1.8. Structure of the Dissertation

This dissertation has been divided into five chapters. **Chapter one** is the introduction and provides background information on poaching and the decline in the number of rhino in South Africa and the rest of the world generally. Also provided in this chapter is an overview of CITES which sets the international framework of the conservation of endangered species and it is also the vehicle driving the international ban on trade in rhino horn. **Chapter two** deals with rhino conservation legislation and case law in South Africa. The important case of

⁸⁴ Ibid.

*Kruger and Another v Minister of Water and Environmental Affairs*⁸⁵ is also discussed in this chapter as well as another case which demonstrates various principles. **Chapter three** looks at the pros and cons of having regulated trade in rhino horn. The South American vicuña is used as a case study both for and against the legalisation of domestic trade. Swaziland is used as a case study against the legalisation of domestic trade. Against this backdrop, **Chapter four** will offer recommendations for the approach South Africa should take. Various recommendations are put forth and discussed, and **Chapter Five** provides a conclusion.

⁸⁵ *Kruger*, note 1 above.

CHAPTER TWO: RHINO CONSERVATION IN SOUTH AFRICA

This chapter will deal with the rhino conservation legal framework. It will cover national legislation dealing with rhino conservation as well as selected cases which demonstrate the application of that legislation. The draft TOPS regulations published for comment in 2015 will be discussed in relation to permits for possession of rhino horn and the sale of black or white rhino but it is important to note that these regulations (TOPS) were effected prior to the new draft regulations of February 2017 regulating domestic trade in rhino horn.

2.1. South African legislation applicable to rhino conservation

South Africa's governance structures are separated into three tiers – the executive, the legislature and the judiciary.⁸⁶ Environmental laws, including laws on conservation, are made by national and provincial government concurrently.⁸⁷

Important laws in South Africa that address conservation threats against the rhino are the *Constitution of the Republic of South Africa*;⁸⁸ the *National Environmental Management Act (NEMA)*;⁸⁹ *National Environmental Management: Biodiversity Act*⁹⁰ (NEMBA) read with the *Threatened or Protected Species Regulations*⁹¹ (TOPS regulations); the *National Environmental Management: Protected Areas Act*⁹² (NEMPA); *Norms and Standards For the Marking of Rhinoceros and Rhinoceros Horn, and for the Hunting of Rhinoceros for Trophy Hunting Purposes*;⁹³ *Biodiversity Management Plan for White Rhinoceros*;⁹⁴ *Biodiversity Management Plan for the Black Rhinoceros*;⁹⁵ *CITES Regulations*;⁹⁶ the *Draft Notice Prohibiting the Carrying out of Certain Restricted Activities Involving Rhinoceros Horn*⁹⁷

⁸⁶ JC Knobel 'The Conservation Status of Eagles in South African Law' (2013) 16 (4) *PELJ* 167.

⁸⁷ Note 5 above, section 44 and section 104 read with schedule 4.

⁸⁸ Note 5 above.

⁸⁹ Act 107 of 1998.

⁹⁰ Note 3 above.

⁹¹ GN 255 of GG 38600, 31 March 2015.

⁹² Act 57 of 2003.

⁹³ GN 961 of GG 41913, 21 September 2018.

⁹⁴ GN 1191 of GG 39469, 2 December 2015.

⁹⁵ GN 49 of GG 36096, 25 January 2013.

⁹⁶ GN 173 of GG 33002, 5 March 2010.

⁹⁷ GN 987 of GG 41919, 21 September 2018.

and many provincial ordinances. International and regional instruments are also applicable to the protection of threatened species as laws do not exist or operate in isolation.⁹⁸

*2.1.1. The Constitution of the Republic of South Africa*⁹⁹

Environmental laws and rights in South Africa stem from the Constitution.¹⁰⁰ In addition, it has been highlighted that “a constitutionally entrenched environmental right can provide a ‘safety net’ when existing laws or policies are inadequate to address given environmental problems, and can inhibit economic programmes that are detrimental to the environment, and, by providing procedural environmental rights, should promote greater public participation in the interpreting and enforcing of substantive environmental rights.”¹⁰¹

The Constitution provides in the Bill of Rights that:¹⁰²

“Everyone has the right –

- (a) To an environment that is not harmful to their health or well-being; and
- (b) To have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
 - (i) Prevent pollution and ecological degradation
 - (ii) Promote conservation
 - (iii) Secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

The above constitutional provision explicitly gives a right to the environment to be protected and for natural resources (including wildlife) to be sustainably used and developed. The Constitution also mandates the promotion of conservation which guides NEMBA, NEMA and other conservation legislation. The Constitution is therefore the source of all rhino protection laws in South Africa.

⁹⁸ Knobel, note 86 above 168.

⁹⁹ Note 5 above.

¹⁰⁰ Knobel, note 86 above; 175.

¹⁰¹ Ibid.

¹⁰² Note 5 above, section 24.

2.1.2. *National Environmental Management Act (NEMA)*¹⁰³

The environmental rights enshrined in the Constitution are brought to life by NEMA which establishes the legal framework for environmental conservation in South Africa.¹⁰⁴ Important principles are set out that apply to organs of state and individuals.¹⁰⁵

Also incorporated is the important principle of sustainable development, which applies economically, environmentally and socially,¹⁰⁶ as well as other global principles of environmental management, such as the “precautionary principle”¹⁰⁷ and the “polluter pays principle.”¹⁰⁸ These principles apply to organs of state and individuals. Sustainable development practices strive to meet the demand of the present without compromising future supply. For rhino conservation this means using rhinos now but in a way that will not compromise their survival. This is discussed in more detail in 3.2.2. (Sustainable use paradigm). Sustainable use and the precautionary principle work hand in hand. According to the precautionary principle, future harm to human health or the environment must be avoided as much as possible. For rhino conservation, this means using rhinos in a way that does not threaten their survival or cause irreversible damage.

Environmental Management Inspectors are appointed in terms of NEMA to assist with the enforcement of environmental law and they are given wide powers to “conduct inspections and searches, to seize items and to issue compliance notices”¹⁰⁹ amongst other things. In this regard, they have had much success. These Environmental Management Inspectors are also referred to as the Green Scorpions.¹¹⁰

The Green Scorpions are a national group of more than 600 Environmental Management Inspectors (EMIs).¹¹¹ They form a network which comprises enforcement officials from

¹⁰³ Note 89 above.

¹⁰⁴ M Kidd, *Environmental Law* 2 ed (2011) 35.

¹⁰⁵ Section 2.

¹⁰⁶ Section 2 (3).

¹⁰⁷ Section 2 (4) (a) (vii). See also Kidd, note 104 above; 9 and Knobel, note 86 above; 177.

¹⁰⁸ Section 2 (4) (p). See also Knobel, note 86 above; 177.

¹⁰⁹ Sections 31B – 31P.

¹¹⁰ F Craigie, P Snijman & M Fourie ‘Environmental Compliance and Enforcement Institutions’ in A Paterson & LJ Kotze *Environmental Compliance and Enforcement in South Africa* (2009) 65 – 102.

¹¹¹ ‘What Are The Green Scorpions’ *Siyabona Africa Kruger Park* available at: <http://www.krugerpark.co.za/krugerpark-times-3-8-green-scorpions-22762.html> Accessed on 18 November 2017.

many organs of state.¹¹² This network shares “intelligence, experience and standardised training and procedures in order to enforce South Africa’s environmental laws.”¹¹³ They are empowered to “enter premises to do routine inspections to check for compliance, they can seize evidence, question witnesses, take samples, establish roadblocks, arrest people and issue compliance notices.”¹¹⁴ This is particularly important for rhino conservation.

The Green Scorpions cannot prosecute matters; however, they work closely with other government agencies.¹¹⁵ One such agency is the Directorate for Priority Crime Investigations (DPCI) also known as the Hawks. The Hawks, together with other government agencies have done sterling work in the fight against rhino poaching. From January 2017 to June 2017, the Hawks made “arrests and seizures in 9 cases involving rhino horn traffickers, 13 suspects and approximately 140 kilograms of rhino horn.”¹¹⁶

The work of the various agencies (DPCI, SARS and Green Scorpions) are starting to yield results and trafficking syndicates are being infiltrated and dismantled.¹¹⁷ Poaching and illegal trafficking continues to be combatted owing to the cooperation between the Green Scorpions and other agencies such as SARS Customs.¹¹⁸

During 2017, there were considerably more horns detected and seized at ports including OR Tambo International airport where there were several detections and seizures made between January 2017 and June 2017.¹¹⁹

2.1.3. *National Environmental Management: Protected Areas Act (NEMPA)*¹²⁰

NEMPA allows for “the declaration and management of protected areas.”¹²¹ The purpose of the Act is to “consolidate and rationalise all the laws dealing with protected areas in South

¹¹² ‘What Are The Green Scorpions’ *Siyabona Africa Kruger Park* available at: <http://www.krugerpark.co.za/krugerpark-times-3-8-green-scorpions-22762.html> Accessed on 18 November 2017.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Department of Environmental Affairs, note 18 above.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Note 92 above.

¹²¹ Section 2 (a).

Africa.”¹²² The National Parks Act¹²³ is one of the pieces of legislation that was replaced by NEMPA. The legislation of the previous Homeland States were also replaced by NEMPA.¹²⁴

The purpose of the Act includes: “to conserve biodiversity,¹²⁵ to protect areas representative of all ecosystems, habitats and species naturally occurring in South Africa,¹²⁶ and to protect South Africa’s threatened or rare species.”¹²⁷ Biodiversity also sometimes manifests in areas outside of the official areas of protection so the Act allows for “the declaration of protected environments that may be situated outside formally protected areas but are nevertheless subject to special conservation measures.”¹²⁸

The most important section in this Act in relation to rhino horn poaching and conservation is section 17 (e) which establishes that “the purpose of declaring such areas as protected is in order to protect threatened and rare species.” This is done by means of environmental agreements as set out in section 41 (1) of the Act. Section 17 (e) is given effect to by sections 45 (1)¹²⁹ and section 46 (1)¹³⁰ which state that “no person may enter a protected area or nature reserve without the written permission of the management authority of that nature reserve. Moreover, no person may fly over such a nature reserve at an altitude of less than 2500 feet without the permission of the management authority,”¹³¹ the management authority being South African National Parks (SANParks).

The aim of the above sections is to “limit access of the general public to these nature reserves or protected areas precisely for the purpose of protecting, amongst others, endangered species.”¹³²

¹²² Kidd, note 104 above; 115.

¹²³ Act 57 of 1976.

¹²⁴ Knobel, note 86 above; 179.

¹²⁵ Section 17 (c). See also Knobel, note 86 above; 179.

¹²⁶ Section 17 (d). See also Knobel, note 86 above; 179.

¹²⁷ Section 17 (e). See also Knobel, note 86 above; 179.

¹²⁸ Section 28. See also Knobel, note 86 above; 179.

¹²⁹ This section deals with access to special nature reserves and sets out who may not enter a special nature reserve.

¹³⁰ This section deals with access to national parks, nature reserves and world heritage sites.

¹³¹ Section 47 (2).

¹³² N De Wet *The South African Regulatory Framework Relating to Illegal Trade in Rhino Horn* submitted in fulfilment of the requirements for the degree Magister Legum in Import and Export Law at the Potchefstroom Campus of the North-West University, November 2014 at 46.

2.1.4. *National Environmental Management: Biodiversity Act (NEMBA)*¹³³

The most relevant and most important piece of legislation which affects the protection of rhino is the National Environmental Management: Biodiversity Act¹³⁴ (NEMBA), read with the Threatened or Protected Species Regulations (TOPS), March 2015. The purpose of the Act – which is aligned to the Convention of Biological Diversity¹³⁵ is set out in chapter 1 which is “the conservation of biodiversity, the sustainable use of its components, and the fair and equitable sharing of the benefits of the use of genetic resources.”¹³⁶ CITES, the Ramsar Convention and the Bonn Convention on Migratory Species of Wild Animals are also given effect to by the Act.¹³⁷ The State is the guardian of biodiversity in South Africa and has to “manage, conserve and sustain the biodiversity of South Africa.”¹³⁸

The South African National Biodiversity Institute (SANBI) is established by chapter 2 and it is tasked with “monitoring and reporting on biodiversity matters.”¹³⁹ Chapter 3 allows for “coordinated biodiversity planning, monitoring and research.”¹⁴⁰ There is also a responsibility on the Minister responsible for environmental affairs to “prepare a national biodiversity framework to provide for coordinated biodiversity management by organs of state and non-governmental bodies and to identify conservation priorities.”¹⁴¹

Chapter 4 deals with species and ecosystems that are threatened and the chapter’s purpose is “to provide for the protection of ecosystems and species that are threatened or in need of protection as well as ensure the sustainable use of biodiversity.”¹⁴²

The Minister is authorised to “publish a list of Critically Endangered, Endangered, Vulnerable or Protected Species” in respect of various categories of species which are defined in the Act.¹⁴³

Lists of Critically Endangered, Endangered, Vulnerable and Protected Species were published in 2007¹⁴⁴ together with the Threatened or Protected Species Regulations.¹⁴⁵ The

¹³³ Note 3 above.

¹³⁴ Ibid. See also Knobel, note 86 above; 180.

¹³⁵ 1760 UNTS 79; 31 ILM 818 (1992).

¹³⁶ Section 2 (a). See also Knobel, note 86 above; 180.

¹³⁷ Section 2(b). See also Kidd, note 104 above; 102.

¹³⁸ Section 3. See also Knobel, note 86 above; 180.

¹³⁹ Sections 10 – 36A. See also Knobel, note 86 above; 180.

¹⁴⁰ Section 37. See also Knobel, note 86 above; 181.

¹⁴¹ Section 38 and 39. See also Knobel, note 86 above; 181.

¹⁴² Section 51. See also Knobel, note 86 above; 182.

¹⁴³ Section 56. See also Knobel, note 86 above; 182.

carrying out of a “restricted activity” without a permit is prohibited for any listed, threatened or protected species.¹⁴⁶ Such activity can only be carried out if the requisite permit has been obtained in terms of Chapter 7.

The restricted activities include “hunting, capturing or killing a living specimen by any means, method or device whatsoever; injuring a living specimen with intent to hunt, catch, capture or kill; importing or exporting; having in possession; breeding; translocating; and selling or trading any specimen.”¹⁴⁷

The Minister may also “prohibit the carrying out of any activity that may impact negatively on the survival of a listed, threatened or protected species.”¹⁴⁸ In the context of conservation, these activities would include poaching and other related activities since both black and white rhinos are included on the list.

Offences and penalties are covered in chapter 9. A person convicted of an offence may be liable to imprisonment of five years, a fine or both.¹⁴⁹ Regarding a listed, threatened or protected species, carrying out of a “restricted activity” without a permit is an offence.¹⁵⁰ The amount of the fine is regulated by the Adjustment of Fines Act.¹⁵¹ This provision is not directly related to conservation efforts, but it sets out the penalties for contravening the provisions of the Act or any of the restricted activities. Penalties and sanctions are usually envisaged as deterrents but also guide the courts as to what an appropriate sanction should be.

2.1.5. Threatened or Protected Species (TOPS) Regulations

Overview

Draft TOPS Amendment Regulations in terms of NEMBA were published for comment in the Government Gazette on 16 April 2013¹⁵² and republished on 31 March 2015.¹⁵³ The 2015

¹⁴⁴ GN 151 of GG 29657, 23 February 2007.

¹⁴⁵ Note 7 above.

¹⁴⁶ Section 57 (1).

¹⁴⁷ Section 1. See also Knobel, note 86 above; 183.

¹⁴⁸ Section 57 (2). See also Knobel, note 86 above; 184.

¹⁴⁹ Section 101 (1). See also Knobel, note 86 above; 184.

¹⁵⁰ Section 101 (1) read with section 57 (1). See also Knobel, note 86 above; 184.

¹⁵¹ Act 101 of 1991. Section 1 (1) (a) stipulates that when the maximum amount of a fine is not stipulated in a penalty clause, the maximum amount is the amount stipulated in section 92 (1)(a) of the *Magistrates Court Act* 32 of 1944.

¹⁵² GN 388 of GG 36375, 16 April 2013.

¹⁵³ Note 91 above.

draft regulations include substantial amendments to the TOPS regulations originally published in 2007. The 2015 regulations do not replace the 2007 regulations, however, they introduce new provisions and they also propose substantial changes to the existing 2007 regulations. For purposes of this dissertation, reference is made to the 2015 draft regulations.

The purpose of the regulations are: “to further regulate the permit system set out in Chapter 7 of the Biodiversity Act insofar that such system applies to restricted activities involving specimens of listed, threatened or protected species;¹⁵⁴ to regulate the manner in which specific restricted activities may be carried out¹⁵⁵ and to prohibit the manner in which specific restricted activities may be carried out.”¹⁵⁶

The permitting system for listed, threatened or protected species is dealt with by Chapter Two of the regulations. These include the permit requirements authorising possession of rhinoceros horn and additional requirements involving rhinoceros and rhinoceros horn.¹⁵⁷ Chapter 8 regulates specific restricted activities that involve species that are listed or threatened. These are important as they include provisions relating to hunting of black rhinoceros or white rhinoceros¹⁵⁸ and the sale of live black rhinoceros or white rhinoceros.¹⁵⁹

Permits for Possession of Rhino Horn

Rhinoceros horn can be possessed if the requirements set out in section 31 are met. The section requires that “whenever an application for a permit relating to the possession of rhinoceros horns is submitted to the issuing authority, the following must be accompany the application: information on the circumference, inner length and outer length;¹⁶⁰ the weight of each individual detached rhinoceros horn, where practically possible;¹⁶¹ and photographs of each individual detached rhinoceros horn.”¹⁶² In addition, “the issuing authority must be satisfied that the quality of the photographs is adequate for easy identification of such horns”¹⁶³ and that any “person in possession of any rhino horn that is 5cm or more in length,

¹⁵⁴ Regulation 2(1) (a).

¹⁵⁵ Regulation 2(1) (c).

¹⁵⁶ Regulation 2(1) (d).

¹⁵⁷ Regulations 31 and 32.

¹⁵⁸ Regulation 80.

¹⁵⁹ Regulation 81.

¹⁶⁰ Regulation 31 (1) (a).

¹⁶¹ Regulation 31 (1) (b).

¹⁶² Regulation 31 (1) (c).

¹⁶³ Regulation 31 (2).

irrespective of the weight of such horn, must apply to the relevant issuing authority to have the rhino horn marked.”¹⁶⁴

If the possession of the rhino horn is lawful, and the issuing authority is satisfied it “must mark such horn by means of a micro-chip,¹⁶⁵ to the extent possible and indelible ink or punch die using the following formula: the country of origin two letter ISO (International Organisation for Standardisation) code and the last two digits of the particular year, followed by a forward slash;¹⁶⁶ the serial number for the particular year, followed by a forward slash;¹⁶⁷ and the weight of rhino horn in kilograms.”¹⁶⁸

In addition, the issuing authority “must record the weight, the circumference¹⁶⁹ and capture all the information contemplated above, including the micro-chip number in the database.”¹⁷⁰

Hunting of Black Rhino or White Rhino

Only one hunting permit can be issued by the issuing authority to an applicant (usually a hunter) within a 12 month period which allows the hunting of a white rhinoceros for trophy purposes.¹⁷¹

In all matters regarding the issuing of permits for the hunting of black or white rhinoceros in terms of these regulations, such permit can only be issued if the Department has recommended that such a permit be issued.¹⁷²

Any person that has received a permit to hunt black or white rhinoceros may only hunt if the hunt is “supervised by an official from the provincial conservation authority or an environmental management inspector.”¹⁷³

Sale of live Black Rhino or White Rhino

¹⁶⁴ Regulation 31 (5).

¹⁶⁵ Regulation 31 (6) (a) (i).

¹⁶⁶ Regulation 31 (6) (a) (ii) (aa).

¹⁶⁷ Regulation 31 (6) (a) (ii) (bb).

¹⁶⁸ Regulation 31 (6) (a) (ii) (cc).

¹⁶⁹ Regulation 31 (6) (b).

¹⁷⁰ Regulation 31 (6) (c).

¹⁷¹ Regulation 80 (1).

¹⁷² Regulation 80 (2).

¹⁷³ Regulation 80 (3).

The owner of a live black rhino or a live white rhino “may sell the live rhino only if (a) such owner is authorised by a permit issued in accordance with these regulations to sell such black rhino or white rhino;¹⁷⁴ (b) the genotyping of such black rhino or white rhino has been done in accordance with regulations 32 (4) and (5) of these regulations; and (c) such owner is in possession of a DNA certificate for each individual rhino, issued by the person responsible for the genotyping of such specimen.”¹⁷⁵ In addition “the DNA certificate issued for a particular specimen of black rhino or white rhino must accompany such specimen when it is sold by the owner thereof.”¹⁷⁶

2.1.6. Draft regulations for the domestic trade in rhinoceros horn, or a part, product or derivative of rhinoceros horn (2017) and Draft regulations relating to domestic trade in rhinoceros horn (2018)

These draft regulations were published on 8 February 2017¹⁷⁷ and 21 September 2018¹⁷⁸ The main purpose of the 2017 regulations is to “regulate the domestic selling or otherwise trading in, giving, donating, buying, receiving, accepting as a gift or donation, or in any way disposing or acquiring, rhinoceros horn within the borders of the Republic, and the export of rhinoceros horn for personal purposes, from the Republic.”¹⁷⁹ The 2018 are much the same except “personal purposes” is replaced by “primarily non-commercial purposes”.

These regulations appear to be quite comprehensive and cover all activities involving rhinoceros horn. They also cover the issuing of permits for the activities regarding rhinoceros horn. The regulations will be discussed in greater detail in section 3.3.1 below.

2.1.7. Norms and standards for the marking of rhinoceros and rhinoceros horn, and for the hunting of rhinoceros for trophy hunting purposes

On 21 September 2018, the Minister published a notice in the Government Gazette withdrawing the previous notice originally published on 10 April 2012, and issued norms and

¹⁷⁴ Regulation 81 (1) (a).

¹⁷⁵ Regulation 81 (1) (c).

¹⁷⁶ Regulation 81 (2).

¹⁷⁷ Note 2 above.

¹⁷⁸ Note 9 above.

¹⁷⁹ Note 2 above; section 2 (1).

standards for the marking of rhinoceros and rhinoceros horn and for the hunting of rhinoceros for trophy hunting purposes in terms of section 9 of NEMBA. The norms and standards relate to the marking of live rhinoceros and rhinoceros horn, the management of the hunting of rhinoceros and other related matters. These norms and standards specify, *inter alia*, when and how live rhinos should be marked – if a rhino has not been marked by a microchip before, or if the microchip is no longer detectable, then such rhino must be marked by a relevant issuing authority or a veterinarian with one microchip behind the ear and one microchip in each of the horns.¹⁸⁰ The norms and standards apply to “species of rhinoceros that are listed as threatened or protected in terms of section 56 of the Biodiversity Act”¹⁸¹ and must be read alongside the TOPS regulations.

2.1.8. Biodiversity management plan for white rhinoceros

The biodiversity management plan for white rhinoceros was published by the Minister on 2 December 2015 in terms of section 43 (1) (b) (i) read with section 43 (3) of the Biodiversity Act (NEMBA). The aim of this management plan is to ensure the long-term survival of the white rhino and to “provide for the responsible person, organisation or organ of state to monitor and report on the progress (with implementation) of the plan.”¹⁸² The five year plan sets out strategies and actions that will assist in the long-term preservation of the white rhino including key components of monitoring, sustainability and management.

2.1.9. Biodiversity management plan for black rhinoceros

The biodiversity management plan for black rhinoceros was published by the Minister on 25 January 2013 in terms of section 43 (1) (b) read with section 43 (3) of the Biodiversity Act (NEMBA). The aim of the management plan is to “promote the development and long term maintenance of viable populations of the various sub-species of African rhinos in the wild.”¹⁸³ Like the management plan for the white rhinoceros, the purpose is also to ensure long-term survival of the black rhino and to “provide for the responsible person, organisation or organ of state to monitor and report on the progress (with implementation) of the plan.”¹⁸⁴ The plan sets out strategies and actions that will assist in the long-term preservation of the

¹⁸⁰ Note 93 above.

¹⁸¹ Ibid.

¹⁸² Note 94 above.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

black rhino including key components of monitoring, sustainability, biological management and human resources.

2.1.10. CITES regulations

CITES regulations were published by the Minister on 5 March 2010 in terms of section 97 (1) (b) (iv) of NEMBA. The regulations set out, *inter alia*, the conditions for international trade, the process for registration and marking, exemptions and special procedures and offences and penalties. These regulations apply to all plant and animal species listed in schedules I, II and II which correlate to Appendix I, II and II of CITES.¹⁸⁵

2.1.11. Draft notice prohibiting the carrying out of certain restricted activities involving rhinoceros horn

On 21 September 2018 a draft notice prohibiting the carrying out of certain restricted activities involving rhinoceros horn was published by the Minister. This notice was published in terms of section 57 (2) read with section 100 of NEMBA. This notice contains provisions which were not included in the draft notice prohibiting the carrying out of certain restricted activities involving rhinoceros horn originally published on 8 February 2017.¹⁸⁶

2.2. Case Law applicable to rhino conservation

2.2.1. Kruger and Another v Minister of Water and Environmental Affairs

This is a case that was instituted in 2012, heard in 2015 and judgment granted in 2016. It is a challenge by Johann Kruger and Johan Hume (“the applicants”) who are both rhino farmers in South Africa. Both applicants were challenging the moratorium on domestic trade in rhino horn put in place in 2009 by the Minister and in addition Johann Kruger was also challenging the amendment to the Threatened or Protected Species Regulations (“TOPS Regulations”). The amendment (r.69) omitted lions as one of the listed large predators and Kruger argued that a proper consultative process had not been followed by the Minister in terms of sections 99 and 100 of NEMBA. The moratorium came into effect in 2009, after suspicions that Asian nationals bought rhino in South Africa through the legal internal permitting system and then

¹⁸⁵ Regulation 2, note 96 above

¹⁸⁶ GN 77 of GG 40601, 8 February 2017.

exported illegally.¹⁸⁷ The moratorium was in line with CITES' objective of banning international trade. This obviously meant that rhino farmers like Kruger and Hume were no longer allowed to trade domestically in rhino horn. This violated a number of their rights which will be discussed below.

In their challenge, the applicants jointly raised two issues and a third issue was raised by Kruger individually. Firstly, the applicants contended that personal notice should have been given to them before the moratorium was put in place. Hume based this argument on the premise that he is the largest rhino breeder in the world and therefore the Minister was obliged to give him personal notice of the moratorium and that failure to do so renders the moratorium reviewable and subject to be set aside. For this submission he relied on section 3 of the Promotion of Administrative Justice Act 3 of 2000 which deals with procedurally fair administrative action which materially and adversely affects the rights or legitimate expectations of any person.

The applicants also argued that there had not been sufficient consultation before the moratorium was put in place. Section 99 of NEMBA require the Minister to allow public participation in the process of exercising a power in terms of this section and section 100 requires the Minister to give notice in at least one national newspaper of the proposed exercise of power. The Applicants argued that this had not been done.

Finally, Kruger argued further that the amendment to the TOPS regulations (r.69 wherein lions were not listed as one of the large predators) was a substantial amendment and contrary to section 99 and section 100 of the Act which required a consultative process to be followed for any amendment to the regulations.

It was found by the High Court found that public participation requirements of NEMBA (publication in the Government Gazette and in at least one national newspaper) were not fully complied with by the then Minister and as a result the moratorium was set aside with immediate effect.¹⁸⁸ On the challenge of personal notice raised by the applicants, the Court found that "the Minister was not under any obligation to give personal notice to Hume or Kruger as envisaged in section 3 (1) and (2) of the Promotion of Administrative Justice Act

¹⁸⁷ Department of Environmental Affairs, note 20 above. More discussion on the background and effect of the moratorium is provided in 1.1 above.

¹⁸⁸ Para 87. The order is found at paras 90.2 and 90.3.

(PAJA)¹⁸⁹ as she (the Minister) is empowered in terms of section 100 of NEMBA to follow a different procedure, which although different from the one contemplated in subsection (2) and (3) of PAJA, is nevertheless a fair procedure.”¹⁹⁰

On the challenge of sufficient consultation, the Court said that “this must be seen in light of the diversity of the South African population and the historical background and many languages, to allow proper public participation and to submit meaningful representations or objections, especially in the present case, where the moratorium has substantial consequences, one would have expected the Minister to be more proactive and go beyond the minimum requirement.”¹⁹¹ The Court found that there was insufficient public participation and non-compliance with the most basic requirement of the proposed moratorium being advertised in “at least one national newspaper.”¹⁹²

On the final challenge of the amendment to the TOPS regulations (r.69), the Court noted that this argument had only been raised during oral argument for the first time on behalf of Kruger and as such disadvantaged the Minister because she could not deal with the allegations.¹⁹³

The Court also noted that Kruger’s business did not concern lions – his main business is farming and livestock.¹⁹⁴ The Court didn’t make an outright decision on this, except to say that they “would have found that Kruger failed to establish locus standi to raise the attack against r.69 insofar as it relates to its omission of ‘lion’ as a listed predator species.”¹⁹⁵

Following the judgment of the High Court, the Minister then applied for leave to appeal. However, this application was dismissed with costs.¹⁹⁶ A subsequent application for leave to appeal to the Supreme Court of Appeal (SCA) was also unsuccessful as was a further application that was made to the Constitutional Court.¹⁹⁷ The Constitutional Court dismissed the application ostensibly on the basis that there were “no prospects of success” but no

¹⁸⁹ Act 3 of 2000.

¹⁹⁰ Para 9.

¹⁹¹ Para 19.

¹⁹² Para 19.

¹⁹³ Para 82.

¹⁹⁴ Para 83.

¹⁹⁵ Para 83.

¹⁹⁶ See also the case discussion by Centre for Environmental Rights (CER) available at <https://cer.org.za/news/response-to-the-constitutional-court-decision-regarding-the-rhino-horn-moratorium?cv=1> Accessed on 23 January 2018.

¹⁹⁷ Ibid.

further reasons were furnished.¹⁹⁸ As a result, it is now lawful to trade rhino horns in South Africa.¹⁹⁹ (The ban was lifted in 2016 but the draft regulations only came out in 2017).

The significance of this judgment is that firstly it lifts the ban on domestic trade in rhino horn meaning that rhino horn can now be bought and sold lawfully in South Africa (obviously subject to strict regulations). Secondly, it highlights the need for a proper consultation process to be followed for the amendment of any legislation and finally and most importantly, even though the Court ruled against the Minister, the Court accepted the Minister's arguments in favour of keeping a moratorium in place and highlighted the need for a moratorium which was "to prevent the extinction of the rhinos and to ensure the conservation of natural resources and species by protecting the survival of rhinos from poaching and smuggling of horns into the international market."²⁰⁰ What is noteworthy is that the only reason the moratorium was lifted was because of significant non-compliance with the provisions of section 99 and section 100. If there was sufficient compliance the Court would have found that the moratorium was not irrational.²⁰¹

The following case demonstrates the application and development of law in matters dealing with rhino poaching. It also highlights the strict approach the courts are willing to take in the fight against poaching.

2.2.2. *Els v The State*²⁰²

This matter involved an appeal to the Supreme Court of Appeal against sentencing only. It was first heard on 2 March 2012 and sentence was handed down on 13 March 2012. The matter was taken on appeal by Mr. Jan Karel Els (Els) who is a game manager. He was charged in the Regional Court of Musina (Limpopo) with seven counts of contravening the Limpopo Environmental Management Act (LEMA).²⁰³ The first four counts related to contravention of section 31 (1) (a) of the LEMA which prohibits hunting of specially protected animals. Counts 5 to 7 contravened section 41 (1) (a) of LEMA which relates to the

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ Para 62.

²⁰¹ Para 53.

²⁰² [2017] ZASCA 117 (Case Number: 1241/2016).

²⁰³ Act 7 of 2007.

“unlawful purchasing, possessing and conveying of the horns of a specially protected wild animal without a valid permit.”

Els entered into a plea bargain with the State and pleaded guilty to counts 5, 6 and 7 and in return counts 1 to 4 were withdrawn by the State.²⁰⁴ For charges 5 and 6 the trial court sentenced him to ten years’ imprisonment with two years which would be suspended and in regarding charge 7 he was sentenced to four years’ imprisonment which was also suspended provided he does not commit the same offence within a five year period.²⁰⁵ A fine of R100 000 per month for ten months was also imposed and that is to be paid to the National Wildlife Crime Reaction Unit to assist with investigation and research into rhino related matters.²⁰⁶

Els was dissatisfied with the sentence imposed and appealed to the Gauteng division of the High Court in Pretoria.²⁰⁷ On 5 August 2014, the High Court set aside the fine of R100 000 but left the eight years’ imprisonment and the four years’ suspended sentence unaltered.²⁰⁸ On appeal, the SCA reduced the eight years’ imprisonment to four years’ imprisonment and did not alter the suspended four years sentence.²⁰⁹ The appeal court emphasised that the contraventions in the present case must be distinguished from the criminal activities of poachers.²¹⁰ The court found that both Regional and High Courts had misdirected themselves by linking the conduct of the appellant to the poaching crisis.²¹¹ The court acknowledged that:

“Threat to wildlife in South Africa has dramatically increased in recent years, and so has the illegal trade in rhino horns. As a result, this species is under a serious threat of being slaughtered or otherwise exploited, for economic gain. Sentences which reflect our censure will go a long way to safeguard the rhino from being economically exploited. Regrettably a non-custodial sentence would send out the wrong message.”²¹²

This case demonstrates the strict position that our courts are willing to take in the fight against poaching. However, the appeal court was also fair in that as much as they acknowledged the rhino-poaching crisis, they did not automatically equate the conduct of the appellant to the broader rhino-poaching crisis. They decided this matter on its own merits and imposed a sentence that was suited to the crime, the criminal and fairness to society.²¹³ The

²⁰⁴ Para 2.

²⁰⁵ Para 3.

²⁰⁶ Para 3.

²⁰⁷ Para 4.

²⁰⁸ Para 4.

²⁰⁹ Para 21.

²¹⁰ Para 12 and 16.

²¹¹ Para 14.

²¹² Para 17.

²¹³ The court relied on the *S v Zinn* (1969 (2) SA 537 (A)) triad in coming to its decision.

appellant was found in possession of rhino horn but was never charged for killing any rhino. The Magistrate had sentenced the appellant as if he were a poacher. Since this matter did not involve trade in rhino horn, it was dealt with by provincial legislation (Limpopo Environmental Management Act 7 of 2003) even though provisions of the TOPS regulations were also contravened.

CHAPTER THREE: DOMESTIC TRADE IN RHINO HORN

3.1. History and Background

This chapter will set out the pros and cons of having a regulated domestic trade in rhino horn. A brief history of international and domestic rhino trade will be set out and the events leading up to the current legislative developments will also be set out.

In the past, numerous attempts have been made by conservation organisations to curb poaching and increase measures to curb poaching, however, the first real attempt was to include rhinos and their products on the “Appendix I” list of CITES between 1975 and 1977.²¹⁴ As previously discussed, Appendix I includes “species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorised in exceptional circumstances.”²¹⁵ Unfortunately, prevention of poaching and over exploitation (the primary objectives of CITES) have not been met by the trade ban.

Attempts at curbing poaching have also been made by various African countries including Kenya, Zimbabwe and South Africa; however, many African countries cannot sustain or fund anti-poaching mechanisms and systems which include law enforcement and policing.²¹⁶ Many of these countries have had to rely on, and implement, alternative methods and techniques, which include: heavier sanctions; moving rhinos to safer areas; dehorning; trade bans by non CITES signatories and trade restrictions (such as South Africa where a moratorium on domestic trade was implemented in 2009).²¹⁷

The media and conservation campaigns have largely supported the above actions.²¹⁸ The belief that trade in rhino horn is “wrong” and must be stopped has been the driving force of previous anti-poaching techniques.²¹⁹

After various failed attempts at preventing or curbing rhino poaching, South Africa imposed a moratorium on domestic trade in 2009.²²⁰ Prior to 2009 domestic and international trade

²¹⁴ N Leader-Williams ‘The World Trade in Rhino Horn: A Review’ *TRAFFIC* (1992).

²¹⁵ Note 55 above.

²¹⁶ A Laurie ‘The Rhinos of the World’ in K Novell, W Chyi & C Pei Workshop on a Programme to Control Taiwan’s Trade in Rhino Horn: Proceedings Taipei: *TRAFFIC* (1992).

²¹⁷ *Ibid.*

²¹⁸ Sas-Rolfes, note 66 above.

²¹⁹ *Ibid.*

(arising from authorised hunting of rhino horn) were permitted in South Africa.²²¹ The moratorium continued until 2016 when the court set it aside in the *Kruger* case discussed in an earlier chapter. Three months after the *Kruger* judgment the Minister released draft regulations for the domestic trade in rhino horn. The result is that we have domestic trade made legal again only this time there is supposedly stricter trade measures put in place. The arguments for and against domestic trade will now be discussed.

3.2. Arguments for legalisation

3.2.1. Legal trade lessens the demand on the illegal “black” market

The main argument in favour of legalising domestic trade is that legal trade will lessen the demand on the black market. Put differently: if a product can be sourced legally, there is less motivation to try to obtain that product illegally since the illegal avenue comes with greater risks.²²²

It is often argued by environmentalists that legal trade will in fact provide a cover for the trade of illegal products since illegal products could be laundered through the legal permitting system, but there is no evidence to support this.²²³ There is, however, some evidence to suggest that a legal trade in rhino horn can curb poaching and assist in rhino conservation.²²⁴ During the period of the moratorium (2009 to 2016) poaching increased rapidly with the most number of rhinos poached in 2014. However, since 2015, poaching numbers have decreased.²²⁵

The question of whether legal trade will lessen the demand on the illegal market has not been conclusively established; however, we can look to other examples where regulated trade actually increased diminishing population numbers.

²²⁰ Moratorium on the Trade of Individual Rhinoceros Horns and any Derivatives or Products of the Horns GN 148 GG 31899 13 February 2009.

²²¹ *Kruger*, note 1 above.

²²² I Vegter ‘The Big Problem with Opposing Legal Rhino Horn Sales’ 22 March 2017 *Daily Maverick* available at: <https://www.dailymaverick.co.za/opinionista/2017-03-22-the-big-problem-with-opposing-legal-rhino-horn-sales/#.WhqXw9KWZ0w> Accessed on 9 September 2017.

²²³ I Vegter ‘African Nations Should Withdraw from CITES’ *Daily Maverick* 23 August 2016 available at: <https://www.dailymaverick.co.za/opinionista/2016-08-23-african-nations-should-withdraw-from-cites/#.Whqdl9KWZ0w> Accessed on 9 September 2017.

²²⁴ *Ibid.*

²²⁵ ‘TRAFFIC’s engagement on African rhinoceros conservation and the global trade in rhinoceros horn’ *TRAFFIC* available at: <http://www.traffic.org/rhinos/> Accessed on 10 September 2018.

Case Study: Crocodiles

The population numbers for crocodiles started declining from the 1950s due to high demand for, inter alia, skin and meat.²²⁶ These included Nile crocodiles in Africa and Saltwater crocodiles in South Asia, South-east Asia, Australia and the Pacific islands.²²⁷ The idea of ‘crocodile farming’ was then implemented by countries including Zimbabwe, Australia and Indonesia and this resulted in increasing population numbers and also generated money which was then reinvested into crocodile conservation.²²⁸ The Crocodile Specialist Group found that “despite predictions that legal trade would encourage illegal trade, an outstanding result of market-driven conservation of crocodilians is that illegal trade has all but been eradicated in the face of well-regulated legal trade.”²²⁹

The same strategy that worked for crocodiles in the above case study can also be applied to rhinos. A well-managed and well-regulated system would allow rhino populations to thrive and reduce the need to acquire the horn illegally.

A well-regulated system that attempts to de-value rhino horn is one of the ways that legal trade could work. This is one of two approaches submitted by Michael t’Sas-Rolfes, an environmental economist.²³⁰ The first approach which is in line with de-valuing the horn, is the conventional approach and according to this approach “the demand for more stocks of rhino horn must be reduced to a point where it is no longer worthwhile to continue illegal exploitation and trade.”²³¹ Put differently: the value associated with rhino horn should decrease to a state where it is not needed anymore.²³² The most obvious way of decreasing the value of the rhino horn is to legalise trade which would in turn decrease the value of the horn since it would now be in abundant supply and would not need to be obtained on the black market which often attracts an exorbitantly higher price. It is submitted that other alternatives could be community programmes which educate and raise awareness about not buying rhino horn.

The second approach is the alternative approach which perceives “overexploitation of biological resources as the result of underinvestment and highlights that any solutions to the

²²⁶ ‘Farming and the Crocodile Industry’ *IUCN Crocodile Specialist Group* available at:

<http://www.iucncsg.org/pages/Farming-and-the-Crocodile-Industry.html> Accessed on 19 September 2017.

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ Vegter, note 223 above.

²³⁰ Sas-Rolfes, note 66 above.

²³¹ Ibid.

²³² Ibid.

rhino problem must address the underlying economic forces driving this process.”²³³ This approach seeks to do the opposite of the conventional approach – it seeks to *increase* the monetary worth of living rhinos. Through this approach it is believed that exploitation of rhino can be prevented through sustainable, regulated trade.²³⁴

In summary, there are two main points that can be deduced from the above discussion in support of legal trade. The first is that there is some evidence that suggests that poaching numbers increased during the moratorium and this promotes the argument that legal trade would reduce poaching of rhino. If a product can be sourced legally then there would be no desire to obtain the product illegally which often attracts greater risk. The second point flows from the first which is that by allowing the horn to be sold legally, the value of the horn decreases because it is more readily available. In theory this would mean the greater the supply the cheaper the horn would be. A well-regulated legal system could allow rhino numbers to grow provided that strict monitoring structures are in place as in the case of crocodiles.

3.2.2. Sustainable Use Paradigm

The sustainable use paradigm denotes that if wildlife is able to be used in any way, then benefits can be derived from it which will ultimately sustain and save it.²³⁵ Sustainable use of biological resources is important and is enunciated as an objective in NEMBA which promotes “the use of biological resources in a sustainable manner”²³⁶ and “the fair and equitable sharing of benefits among stakeholders of benefits arising from bioprospecting involving indigenous resources.”²³⁷ Although bioprospecting in itself is not directly related to conservation, it shares the same underlying values in that it provides for the sharing of benefits in the areas where such bioprospecting takes place.²³⁸ This benefit-sharing principle provides an incentive to local communities to conserve wildlife. It is the South African

²³³ Ibid.

²³⁴ Ibid.

²³⁵ K Nowak ‘Legalising Rhino Horn Trade Won’t Save Species, Ecologist Argues’ *National Geographic* 8 January 2015. Available at: <https://news.nationalgeographic.com/news/2015/01/150106-rhino-poaching-south-africa-animals-conservation/> Accessed on 19 September 2017.

²³⁶ Note 3 above; section 2 (a) (ii)

²³⁷ Note 3 above; section 2 (a) (iii)

²³⁸ Ibid.

National Biodiversity Institute that is tasked with co-ordinating programmes in the conservation and sustainable use of indigenous biological resources.²³⁹

At an international level, sustainable use is promoted by Article 10 of the Convention on Biological Diversity²⁴⁰ which mandates contracting parties to “integrate consideration of the conservation and sustainable use of biological resources into national decision-making”;²⁴¹ to “adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity”;²⁴² to “protect and encourage customary use of biological resources in accordance with the traditional cultural practices that are compatible with conservation or sustainable use requirements”;²⁴³ to “support local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced”;²⁴⁴ and to “encourage cooperation between its governmental authorities and its private sector in developing methods for sustainable use of biological resources.”²⁴⁵

The sustainable use paradigm is deeply rooted in the above Convention and many of the principles of the Convention have been incorporated into South African environmental law which promotes sustainable use of natural resources.

This paradigm advocates for use of rhino in a sustainable way. This is because of the fact that rhinos can regrow their horns after they have been removed. This is one of the main reasons that rhino farms exist. Rhino farm owners like John Hume grow rhino for this sole purpose. The value of Hume’s stockpile as at 2016 was about \$235 million²⁴⁶ which he was later allowed to auction in 2017.

Despite the fact that the horn takes about 12 months to regrow, the rhino farmers also believe that this is one of the best methods of conserving rhino because during the slow period of regrowth rhinos have no value to poachers.²⁴⁷

²³⁹ Note 3 above; section 11 (*n*) (*i*).

²⁴⁰ 1760 U.N.T.S. 69

²⁴¹ *Ibid* subsection (a)

²⁴² *Ibid* subsection (b)

²⁴³ *Ibid* subsection (c)

²⁴⁴ *Ibid* subsection (d)

²⁴⁵ *Ibid* subsection (e)

²⁴⁶ S Schweig, ‘People Are Actually Breeding Rhinos To Cut Off Their Horn’ *Conservation Action Trust* available at: <https://conservationaction.co.za/recent-news/people-are-actually-breeding-rhinos-to-cut-off-their-horns/> Accessed on 27 November 2018.

²⁴⁷ *Ibid*.

De-horning is a practice that takes place at John Hume's farm. Hume – discussed in chapter 2 – is the largest private breeder of rhino in the world.²⁴⁸ According to Hume, rhinos can regrow their horns about a dozen times during their lifetime.²⁴⁹ It is submitted that this is a good strategy to make rhinos less attractive to poachers, but this should also be coupled with the usual security and monitoring

In addition to de-horning which promotes the sustainable use of rhino, this paradigm also highlights a close link that exists between farming and conservation of wild animals.²⁵⁰ It is submitted that poaching can be reduced or even eradicated completely when local communities get involved through sustainable farming of the wild animals which in turn also provides them with direct benefits.

Direct benefits include income from sale of livestock, meat, animal products; education, research and ecotourism. The sustainable use paradigm has been successful in various countries with different species. The first example is the vicuña which is one of two South American camelids which lives in the high alpine areas of the Andes.²⁵¹

Case Study: The South American Vicuña

During the 1960s vicuñas nearly went extinct from over hunting and CITES placed a 30 year ban on trade.²⁵² In the 1990s the idea of sustainable use of vicuña wool was introduced by the Vicuña Convention²⁵³ – this was a unique treaty between the countries which contain vicuña.

According to the Convention, local communities would benefit from the sale of vicuña fibre – the animals would be sheared alive and then returned to their natural habitat.²⁵⁴ Only after successful results were achieved (i.e. vicuñas increased in numbers) would trade in vicuña wool re-open.²⁵⁵

It is submitted that the successful increase in population numbers could only be achieved once local communities started receiving a benefit from the sale of vicuña. The local

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ Nowak, note 235 above.

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ *Convention for the Conservation and Management of the Vicuna*, 1979. IELMT 979:94.

²⁵⁴ Nowak, at note 235 above.

²⁵⁵ Ibid.

communities were more willing to cooperate with local authorities and private farm owners since their livelihood depended on the survival of the species. Through the cooperation and support of local communities, vicuña numbers increased and the species is now thriving and is being used sustainably.²⁵⁶

Case Study: Buby River Conservancy in Zimbabwe

Another good example of the sustainable use principle is the Buby River Conservancy in Zimbabwe.

During the 1900s the Buby River Conservancy was an infamous cattle farm.²⁵⁷ Through this, the idea of wildlife farming was born.²⁵⁸ This idea received further momentum by ecologists who suggested that wildlife would generate greater financial rewards compared to cattle, especially in those areas that were experiencing drought since cattle were heavily reliant on fertile grazing pastures.²⁵⁹ Plans were put into place by the local cattle farmers to create an environment where wildlife could thrive. Through this, the natural habitat was restored and indigenous animals were re-introduced.²⁶⁰

Today, large numbers of wild animals live with a sense of balance on the conservancy.²⁶¹ There are currently 34 species of wild animals living freely in the Buby Valley Conservancy including the Big Five.²⁶²

Wildlife is now thriving at this conservancy and local farm owners, local communities and the environment are benefiting from the conservation and research activities which have replaced the dusty run-down cattle farm that existed previously.²⁶³

These case studies demonstrate that with the support of local communities and/or private owners, wild animals can be managed sustainably since the local communities – including land owners – have a direct interest in the preservation of those wild animals. A direct interest can take various forms such as individuals working on the animal farms; providing

²⁵⁶ Ibid.

²⁵⁷ ‘History of Buby Valley Conservancy’ *Buby Valley Conservancy* available at: <https://www.bubyvalleyconservation.com/> Accessed on 19 September 2017.

²⁵⁸ Ibid.

²⁵⁹ Ibid.

²⁶⁰ Ibid.

²⁶¹ Ibid.

²⁶² Ibid.

²⁶³ Vegter, note 223 above.

community education about wildlife heritage and conservation, individuals benefiting from game meat and so forth.

Although the Bulye River Conservancy is an example regarding the sustainable use of land and not animals, it is still relevant because of the principle that it demonstrates – when communities have a direct interest in conservation, wildlife can be managed sustainably. In this example, it was the land that was managed sustainably, through the assistance of local communities, and it was revived to the point where it is now a thriving natural habitat. As discussed above, rhinos can regrow their horns and it is for this reason that the sustainable use of rhinos that is being advocated through de-horning.

There are, however, two main arguments opposing this paradigm of sustainable use of wild animals. The first is that the world has changed far too much and indigenous communities have become globalised. Katarzyna Nowak, a wildlife journalist, argues the world has changed too much – she believes that infrastructure has improved, linking more cities and towns to each other, and technology – including the internet, is now more readily available and because of these advances, individuals are able to easily purchase something that is banned in one jurisdiction but not in another.²⁶⁴ She is of the view that local communities using animals sustainably is a romantic idea which is not feasible in the 21st century.²⁶⁵ In response to this I'd like to submit that Ms. Nowak's view is in fact a romantic idea since her views clearly demonstrate a westernised notion of the 21st century especially in the context of Africa as a continent. Her views do not take into account the millions of people living in rural communities all around Africa without access to basic services – let alone internet access. Her ideas do not take into account that many people living in Africa rely on the continent's natural resources for their day to day living such as the Makuleke people from the region of Makuleke in the Kruger National Park who together with the private sector, have opened a six-star 36 bed lodge called the Outpost in a beautiful site in the park.²⁶⁶ Jobs at the lodge are for the locals and a skills transfer programme is also in place.

In addition to the example of the Makuleke people discussed above, there are many other examples of communities that benefit from the sustainable use of wildlife and nature.

²⁶⁴ Nowak, note 235 above.

²⁶⁵ Ibid.

²⁶⁶ Department of Environmental Affairs and Tourism (DEAT) 'Success Stories in South Africa: Community Based Natural Resource Management' available at <https://conservation-development.net/Projekte/Nachhaltigkeit/CD1/Suedafrika/Literatur/PDF/DEATGTZSuccessStoriesNew.pdf> Accessed on 1 November 2018.

Another example is the Pilansberg National Park in the North West of South Africa which was one of the first examples of integrated community development with wildlife conservation. With the establishment of the national park, local communities were displaced from their residence and lost grazing land and access to wild resources. A wide variety of benefit sharing initiatives were established to compensate these local communities for their loss. One of the initiatives was the establishment of the Community Development Organisation by the park authorities.²⁶⁷

The second argument opposing this paradigm is that it is only the game farmers, and corrupt politicians that will benefit from legal trade and therefore it is not a viable reason to advocate for legalising of rhino horn trade.²⁶⁸ In the *Kruger* case,²⁶⁹ for example, Johan Hume (second applicant) argued for the lifting of the moratorium because he is the largest breeder of rhino. In 2009, when the moratorium came into effect, he lawfully owned approximately 4000 kilograms of horn that he had obtained legally from rhino populations of his own.²⁷⁰ The court did not discuss this issue in great detail except to say that:

“The moratorium on domestic trade in rhino horns should be having a significant adverse impact on the employees and families of the rhino breeders like Hume and Kruger. The communities and business owners in the surrounding areas where rhino breeding operations are conducted could have been engaged due to possible loss of employment benefits occasioned by the moratorium.”²⁷¹

The quote above demonstrates that the court does in fact acknowledge the role that game farming plays in local communities to individuals and business owners alike. As mentioned above, to say that trade in rhino horn would only exclusively benefit local communities and farmers is irrational and does not take into the number of communities and local businesses currently benefiting from the use of wild animals and game farms.

²⁶⁷ L Emerton ‘The Nature of Benefits and the Benefits of Nature: Why Wildlife Conservation has not Economically Benefitted Communities in Africa March 1999 *Community Conservation Research in Africa: Principles and Comparative Practice* available at <https://www.cbd.int/financial/values/g-benefitsafricamunity-iucn.pdf> Accessed on 19 September 2017.

²⁶⁸ M Verwoerd ‘The big problem with legalising rhino horn sales’ *News24* 15 March 2017. Available at: <https://www.news24.com/Columnists/MelanieVerwoerd/the-big-problem-with-legalising-rhino-horn-sales-20170315> Accessed on 1 November 2018.

²⁶⁹ *Kruger*, note 1 above.

²⁷⁰ *Ibid* at para 7.

²⁷¹ *Ibid* at para 34.

There are many communities across the country that are benefiting from natural resources. In addition to communities benefiting, the economy also benefits tremendously from tourism, hunting and other wildlife-related activities.

In summary, the cases of the South American vicuña and the Bubby River Conservancy demonstrate that greater results can be achieved in the fight against poaching when local communities have a vested interest in the conservation of wildlife, for example, if they benefit from supplies of meat or if they are provided employment opportunities by the game reserve or farm.²⁷² There is a greater need or desire to conserve wildlife if there is something to be gained by such conservation. This supports the argument of legalisation of domestic rhino trade, but in a sustainable manner.

3.2.3. Prohibition has failed

The international ban on trade in rhino horn started in 1977 with CITES coming into effect. In 2009 a moratorium was placed on domestic trade in South Africa effectively prohibiting the sale of rhino horn domestically.

Prohibition is not very effective when it comes to the prevention or management of trade in “undesirable products.”²⁷³ All it does is increase the demand on the black market and raises the price of acquiring the product illegally. The demand for an illegal or “undesirable” product will never go away. If something is banned or prohibited its value increases because of the high risk involved in acquiring it and this in turn increases black market trade which becomes the only source of the product.²⁷⁴

3.3. Theories against legalisation

3.3.1. Increase in demand for rhino horn

One of the main arguments for legalising trade is that by ‘flooding’ the market with legal supplies of rhino horn (either through stockpiles or legal dehorning) the black market prices

²⁷² Vegter, note 223 above.

²⁷³ Ibid.

²⁷⁴ Vegter, note 222 above.

will decrease and the incentive to buy illegally will decline.²⁷⁵ Those that oppose legal trade believe that this, however, is not a rational argument and it has several flaws.²⁷⁶ Currently there are stockpiles that can be supplied in small batches and they will have an effect in decreasing market value, however, once those stockpiles have been depleted, the demand for rhino horn will remain but there will be an inadequate supply to meet that demand.²⁷⁷ Moreover, will there be enough rhino to meet future demand and to keep prices low? Will there be enough rhino to meet future demand to deter poaching? If the prices rise or the supply runs out, the risk of poaching will return and we will find ourselves in the same position we were in.

On 17th August 2017, the late Minister addressed this issue in a media statement published on the Department's website.²⁷⁸ The Minister, in the media statement, attempts to debunk claims that poaching has increased since the lifting of the moratorium. She highlights that “there is no evidence that has been presented to date that indicates the existence of a causal link between the moratorium and rhino poaching.”²⁷⁹ The moratorium was put in place in 2009 and since then a number of steps have been taken by the Department to regulate stockpiles in the country. Among the steps taken are:

- a. “The implementation of the Norms and Standards for the Marking of Rhinoceros and Rhinoceros Horn and the Hunting of Rhinoceros for Trophy Hunting purposes in 2012, which replaced the norms and standards of 2009;
- b. A national database has been established; and
- c. A genetic profiling system for live rhino and rhino horn.”²⁸⁰

The Minister maintains that legal trade does not mean that poaching will increase – “the increase in confiscation of rhino horn at points of entry and exit and the arrest of the alleged smugglers, is not an indication of an increase in illegal activities, but rather a demonstration of the country's improved detection capabilities, as well as improved reporting, including

²⁷⁵ T Milliken and J Shaw *The South Africa – Vietnam Trade Nexus: A Deadly Combination of Institutional Lapses, Corrupt Wildlife Industry Professionals and Asian Crime Syndicates 2012* *TRAFFIC*, Johannesburg, South Africa 58-60.

²⁷⁶ Verwoerd, note 268 above.

²⁷⁷ *Ibid.*

²⁷⁸ Minister Edna Molewa moves to restate government position regarding the domestic trade in rhino horn, 17 August 2017

http://www.environment.gov.za/mediarelease/molewa_restategovernmentpositionondeomesticrhinohorntrade
Accessed on 11 September 2017.

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

reporting by other countries.”²⁸¹ Again, the Minister emphasises that “there is no scientific evidence that the domestic sale of rhino horn will have a negative impact on the survival of the species.”²⁸²

The Minister went on further to highlight that “South African authorities have improved their ability to track the movement of rhino horn through the implementation of a national database and systems relating to the marking of rhino and genetic profiling.”²⁸³ In addition, the Department has “further improved their detection ability at ports of entry and exit by increasing awareness, human capacity, technology and skills.”²⁸⁴ This is indeed evident by the criminals that have been brought to justice through arrests, confiscations and convictions.²⁸⁵

According to another media statement by the Minister reporting on the “Progress on Integrated Strategic Management of Rhinoceros”, during January 2017 to June 2017, there have been a total number of 359 traffickers and alleged poachers arrested throughout South Africa including arrests at O.R Tambo airport²⁸⁶ and 112 individuals were arrested outside Kruger National Park and 90 arrested inside the Park.²⁸⁷ It is not clear whether the arrests at O.R Tambo and elsewhere are going to make the public feel better about domestic trade being legal, but the Minister and her team seem confident that the measures they have in place are going to deliver successes. In the bigger scheme of things, however, the arrests demonstrate that systems in place are working but those systems are mainly reactive in design i.e. apprehending criminals *after* the rhinos have already been killed and dehorned. Poachers operate in syndicates – apprehending one offender is hardly going to make a difference as there will always be someone else to take his/her place.

The Minister assured the members of the public that “the Department is working closely with the South African Police Services (SAPS), South African Revenue Services (SARS), Defence, Military Veterans, State Security Agency, the Department of Justice and Constitutional Development, National Prosecuting Authority (NPA), Correctional Services, alongside the SANParks and provincial conservation authorities and other stakeholders to implement the

²⁸¹ Ibid.

²⁸² Ibid.

²⁸³ Department of Environmental Affairs, note 18 above.

²⁸⁴ Ibid.

²⁸⁵ Ibid.

²⁸⁶ Ibid.

²⁸⁷ Ibid.

Integrated Strategic Management of Rhinoceros Approach, which is focused on the protection of the rhino.”²⁸⁸

In summary, it is apparent that the Department is aware of the risk that legal trade could cause an increase in rhino horn, however, the Minister and her team are confident that that will not be the case because of the successful interventions by SAPS and other law enforcement agencies. The Minister further highlights that there is no scientific evidence that domestic trade will threaten rhinos. It is, however, a valid concern that once stockpiles are depleted, living rhinos will be targeted in order to meet the demand but the Minister has not fully addressed that issue save to say that the presence of law enforcement authorities has increased and that more arrests have been made.

3.3.2. Legal trade provides a cover for illegal exports (laundering)

One of the primary claims is that South Africa is not equipped to control or regulate future domestic trade in rhino horn and can barely deal with current levels of poaching.²⁸⁹ The country cannot ensure that domestic trade is regulated and that it does not contribute to an increase in the international trade which is illegal. Put differently: legal domestic trade in rhino horn, which the 2017 regulations permit, may provide a cover for illegal exports which South Africa may not be able to control, as the DEA itself concluded in 2014.²⁹⁰

In the case of trophy hunting there is no way that South Africa could monitor or track what happened to the horns once they arrived in the destination country since South Africa’s hunting laws only apply within the Republic.²⁹¹ This will also be the case with horns domestically traded and allowed to leave the country.

The Minister’s response to this is that “there are legislative provisions in place to ensure the domestic trade in rhino horn is strictly controlled and that the prohibition of the commercial international trade ban by CITES is not violated.”²⁹² She also goes on further to highlight that

²⁸⁸ Ibid.

²⁸⁹ Department of Environmental Affairs, note 20 above.

²⁹⁰ Ibid.

²⁹¹ E Heitmann *A Horn of Contention: An Analysis of the Viability of a Legalised Trade in Rhino Horn* submitted in part fulfilment of the requirements for the LLM in Environmental Law, University of Cape Town, February 2014.

²⁹² Department of Environmental Affairs, note 278 above.

additional measures are being taken to tighten legislation with regard to the domestic trade in rhino horn.”²⁹³

The loopholes in the current regulations, which will be discussed later, highlight some of the challenges that are likely to be faced in the future. It is not clear whether our current statutory framework adequately addresses the glaring risk that legal trade will provide a cover for illegal exports. The only way to really overcome this challenge is to have an effective monitoring system in place once the horns leave South Africa.

3.3.3. Tainted reputation among CITES member states (Swaziland case study)

CITES is aware that there is an urgent need to reduce the demand for rhino horn products.²⁹⁴ Intensive efforts have been made by governments and NGOs to educate consumers, and to persuade them not to buy or use rhino horn in key consumer countries including Vietnam and China.²⁹⁵ These efforts have been greatly enhanced by the fact that commercial international trade in rhino horn is illegal.²⁹⁶ However, if rhino horn is legally sold within South Africa and imported into destination countries there is a great chance that the horn could be sold illegally on the black market. If this happens, it is submitted that South Africa will be placed in a vulnerable position and will be looked down upon by other member states. South Africa will be seen as the source of that illegal horn and will be perceived as undermining CITES and reversing the efforts that have been made to curb poaching. Swaziland was in a similar position in 2016 at CoP17 when they proposed the sale of their rhino horn to international partners in an effort to raise money. CITES Parties made their views on international rhino horn trade extremely clear during a discussion of Swaziland’s proposal.²⁹⁷

Case Study: Swaziland

Swaziland’s proposal was made in order to generate income (\$1.2 million per annum) to finance the management of its parks where 73 rhino live.²⁹⁸ Without that income their rhinos

²⁹³ Ibid.

²⁹⁴ Decision 16.85; Resolution Conf. 17.4

²⁹⁵ ‘Comments on South Africa’s Draft Regulations for the Domestic Trade in Rhinoceros Horn or a Part, Product or Derivative of Rhinoceros Horn’ *Species Survival Network* available at: <https://eia-international.org/wp-content/uploads/SSN-RWG-comments-on-draft-South-African-rhino-trade-regulations.pdf> Accessed on: 9 September 2017.

²⁹⁶ Ibid.

²⁹⁷ ‘Final decisions made at CoP17 on the proposals to amend CITES Appendices’ available at: <https://cites.org/sites/default/files/eng/cop/17/Decisions-on-amendment-proposals.pdf> Accessed on 1 November 2018.

²⁹⁸ Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) ‘Rational for Swaziland’s proposal to CITES to legalize trade in its rhino horn’ CoP17 inf.17 page 3. This document was

will be at greater risk to poachers. Their proposal was to sell 330kg of white rhino horn from stocks and 20kg annually from natural deaths and the harvesting of horn on a rotational basis from about 4 rhino (12kgs).²⁹⁹ Their proposal was aimed at mitigating the risk and not increasing the risk. This proposal was rejected by the Parties in a secret ballot with 26 Parties in favour, 100 against and 17 abstentions.³⁰⁰

Eustace, an economist and member of the IWMC delegation at Cop17, argues that CITES was irrational and unreasonable for rejecting Swaziland's proposal.³⁰¹ According to Eustace who was present at CoP17, the Secretariat saw harm to the species should the proposal be adopted but they did not clarify the risks and may not have understood where the real risks actually lie.³⁰²

Swaziland appeared strong-willed in their proposal and openly vented cynicism against non-governmental organisations, activists and even CITES Parties.³⁰³ They argued that despite the ban being in place for 39 years, poaching still continues and a change is needed.³⁰⁴ They argued further that trade in rhino horn is only illegal because CITES has criminalised it and they (Swaziland) would much rather use rhinos sustainably to finance conservation efforts without actually killing any rhinos.³⁰⁵ Swaziland openly criticised CITES for being counter-productive and contributing to the demise of the rhinos.³⁰⁶ They referred to the almost 40 year old ban as futile and insane.³⁰⁷ These are just some of the criticisms brought against CITES by Swaziland which could have contributed to the rejection of their proposal.

Michler, an NGO representative at CoP17 questioned Swaziland's proposal stating that "it is entirely out of step with world opinion, a situation a nation such as Swaziland can't afford to be in." This warning to the small Swazi nation seems to be exactly what they were arguing in

submitted by Swaziland, in relation to amendment proposal CoP17 Prop 17 and is available at: <https://cites.org/sites/default/files/eng/cop/17/InfDocs/E-CoP17-Inf-17.pdf> and was Accessed on 1 November 2018.

²⁹⁹ Ibid.

³⁰⁰ CITES, Conference of Parties, 'Final decisions made at CoP17 on the proposals to amend CITES Appendices' available at: <https://cites.org/sites/default/files/eng/cop/17/Decisions-on-amendment-proposals.pdf> Accessed on 1 November 2018.

³⁰¹ M Eustace 'Reject the CITES Secretariat's Recommendation on the Swaziland Proposal' *IWMC World Conservation Trust* available at: <https://www.iwmc.org/docman/cites/cites-cop17-1/priority-documents/241-reject-cites-secretariat-s-recommendation-on-the-swaziland-proposal/file.html> Accessed on 9 September 2017.

³⁰² Ibid.

³⁰³ L Coetzee and E Couzens 'Keeping the rhino (debate) alive: Swaziland's proposal at CITES CoP17 IN 2016' (2017) 23 *SAJELP* 217 at 231.

³⁰⁴ Note 298 above, pages 5 and 11.

³⁰⁵ Ibid at page 5.

³⁰⁶ Ibid at page 11.

³⁰⁷ Ibid.

their proposal – the fact that they do not share many of the same issues or conflicts as the rest of the world. It is for this reason that Vegter argues that African nations should withdraw from CITES to manage their own natural resources.³⁰⁸

It is submitted that if Swaziland were to withdraw from CITES or if they were allowed to trade, they would not be able to trade freely with potential trade partners such as China and Vietnam for example. Those countries would remain CITES Parties and would be subject to extremely strict trade requirements and possible trade sanctions would be imposed against Swaziland. Swaziland is in a vulnerable position and has left itself open to attack by the international community for its politically charged statements. The country's proposal was not accepted very well by the NGO community and CITES Parties and they were labelled by the media as acting as a 'puppet' of South Africa³⁰⁹ and that it (Swaziland) had accused South Africa of backtracking on rhino horn trade.³¹⁰

Taking into account this example of Swaziland, the real question comes down to our obligations to CITES and more importantly its effectiveness in prohibiting trade both internationally and domestically. It is clear that CITES takes a very serious view regarding the legalisation of international trade. Ideally CITES would have *no* trade in rhino horn but legalising domestic trade is out of the control of CITES, however, it still goes against the mission of CITES which is to ensure that trade in specimens of wildlife does not threaten their survival. In this case it would seem that by willingly selling rhino their survival is in fact threatened.

This issue will be discussed further in 3.5 below and also in Chapter 4 which will look at recommendations for the way forward.

3.3.4.. The draft regulations have too many flaws

This section is a discussion of the draft regulations which were published in February 2017 (hereinafter referred to as the 2017 regulations). Additional draft regulations were published on 21 September 2018³¹¹ (hereinafter referred to as the 2018 draft regulations) which include

³⁰⁸ Vegter, note 223 above.

³⁰⁹ A Vaughn 'Swaziland acting as 'puppet' to South Africa in bid to legalise rhino horn trade' 27 May 2016 *The Guardian* available at: <https://www.theguardian.com/environment/2016/may/27/swaziland-acting-as-puppet-to-south-africa-in-bid-to-legalise-rhino-horn-trade> Accessed on 4 November 2018.

³¹⁰ M Reitz 'Swaziland accuses South Africa of backtracking on rhino horn trade proposal' *Africa Geographic* 3 May 2016 available at: <https://africageographic.com/blog/swaziland-accuses-south-africa-of-backtracking-on-rhino-horn-trade-proposal/> Accessed on 4 November 2018.

³¹¹ Note 9 above.

regulations that were not included in the 2017 regulations. A short discussion of the 2018 regulations will also follow.

According to the late Minister, comments on the 2017 regulations were received and considered and the provisions of the regulatory measures have been finalised.³¹² Notwithstanding the Minister's statement, it is not entirely clear what the status of the 2017 regulations are since the final regulations have not been published. It is also not clear what the status of domestic trade is because the Minister announced that since the lifting of the ban in 2017, 28 permits have been issued – 12 permits for the sale of rhino horn, and 16 for the purchase of rhino horn.³¹³ With this in mind it seems that the Minister has been issuing permits even before the 2017 regulations were finalised which is somewhat worrying. An even greater concern is that we now have an additional set of regulations which were published for comment together with the 2017 regulations which causes a lot of confusion. The current regulatory framework includes a combination of supposedly final regulations and draft regulations in one document labelled “draft regulations relating to domestic trade in rhinoceros horn.”³¹⁴

Note though, that only the additional 2018 regulations are available for comment and not the 2017 ones.

The 2017 regulations have supposedly been finalised (but not yet published) and will still be discussed insofar as they are problematic. The Minister did take public comment into account regarding the 2017 regulations and many of the loopholes have been tightened but further loopholes have been created by the 2018 regulations.

Below are some of those flaws which have been highlighted as problematic either in terms of enforcement or from a technical point of view.

Regulation 2 (1) of the 2017 regulations sets out the purpose of the regulations which was

“to regulate the domestic selling or otherwise trading in, giving, donating, buying, receiving, accepting as a gift or donation, or in any way disposing or acquiring, rhinoceros horn within the

³¹² Department of Environmental, note 8 above.

³¹³ Department of Environmental Affairs ‘Minister Molewa Highlights Progress on Integrated Strategic Management of Rhinoceros’ 21 September 2018 available at: <https://www.environment.gov.za/mediarelease/progressonimplementationofISMR> Accessed on 4 November 2018.

³¹⁴ Note 9 above.

borders of the Republic, and the export of rhinoceros horn for personal purposes, from the Republic.”³¹⁵

The term ‘personal purposes’ was not defined in the 2017 regulations and would have had serious consequences for the regulation of trade in rhino horn. The effect would have been that any individual could leave the country with rhino horn under the guise of personal purposes. The finalised regulations omit ‘personal purposes’ and replace it with ‘primarily non-commercial purposes’ which means “for a purpose that is not directed towards the gaining of any economic benefit through sale, resale, exchange, provision or delivery of a service, or any other form of economic use or benefit.”³¹⁶ This added definition does not do much to alleviate the problem of exporting rhino horn under the guise of primarily non-commercial purposes which is essentially personal purposes.

Regulation 3 (3) of the 2017 regulations established that foreign nationals, regardless of the reason for their visit to South Africa, may export a maximum of two rhinoceros horns only for personal purposes. This, however, only pertained to persons from foreign states who visit South Africa and who have acquired rhino horn.³¹⁷ The regulations were silent on whether South African citizens or permanent residents would be able to export horn and if so whether they would also be able to export them for personal purposes. There was no clear reason why foreign nationals and South African citizens are differentiated in these circumstances, save to say that foreign nationals are more likely to export rhino horn since they are not permanently resident in South Africa and they enter and exit the Republic more frequently.

The finalised regulations have omitted the two horn requirement on the part of foreign nationals but they include an additional regulation which prohibits the sale, donation, or disposal of rhinoceros horn to any persons who are not citizens of the Republic;³¹⁸ to any company which is not registered in the Republic;³¹⁹ to any company of which any of the directors or shareholders are not citizens of the Republic;³²⁰ or to any trust of which any of the trustees are not citizens of the Republic.³²¹ Again, there is this clear distinction between South African citizens and foreign nationals which carries through from the 2017 draft regulations.

³¹⁵ Regulation 2 (1).

³¹⁶ Note 9 above, section 1.

³¹⁷ Regulation 6 (2).

³¹⁸ Note 9 above, regulation 3 (3) (a).

³¹⁹ Note 9 above, regulation 3 (3) (b).

³²⁰ Note 9 above, regulation 3 (3) (c).

³²¹ Note 9 above, regulation 3 (3) (d).

‘Personal purposes’ was widely used in the 2017 draft regulations and was not defined so it had the potential to cause enforcement challenges. The finalised regulations now make reference to ‘primarily non-commercial purposes’ which is defined but also has the potential to be challenging as it essentially still includes private use as a ground to export but extends to scientific, enforcement and education purposes too.³²² The Department attempted to provide clarity on what non-commercial purposes mean but the definition is still far too broad and will still allow a large number of rhino horns to leave the Republic under the guise of ‘scientific purposes’ or ‘private use’. This broad definition of ‘non-commercial purposes’ is problematic because it has the potential to allow rhino horns to leave the country with a mere promise by the person in possession of the horn that it will not be sold commercially. For example, the horn could leave O.R. Tambo airport and the person in possession of the horn could claim it is for research or scientific purposes. This is too broad – anyone can be said to be a researcher or a scientist. There is no cross-checking or follow-ups done once the horn reaches its destination.

As mentioned, the two-horn requirement has been omitted in the final regulations which means that there is no limit mentioned on the number of horns that can be taken out of the country. This could certainly lead to a cover for illegal exports. In the 2017 regulations, the Department tried to apply its mind to this problem by limiting the number of horns that can be exported by foreign visitors, however, the limit served more to create an illusion of control over the horn trade rather than to restrict horn exports in any meaningful way.³²³ Also, this limit does not apply to South African citizens or permanent residents. The issue regarding the limitation on the number of rhino horns that can be exported will be discussed from a different perspective further below.

Regulation 2 (4) of the 2017 regulations stated that the regulations must be applied alongside TOPS regulations,³²⁴ CITES regulations³²⁵ as well as other regulations and public notices.

³²² ‘Primarily non-commercial purpose’ means for a purpose that is not directed towards the gaining of any economic benefit through sale, resale, exchange, provision or delivery of a service, or any other form of economic use or benefit, and may include the following purposes:

(a) Purely own or private use, (b) scientific purpose, (c) enforcement purpose or (d) education or training.

³²³ See also: ‘Comments on South Africa’s Draft Regulations for the Domestic Trade in Rhinoceros Horn or a Part, Product or Derivative of Rhinoceros Horn’ *Species Survival Network* available at: <https://eia-international.org/wp-content/uploads/SSN-RWG-comments-on-draft-South-African-rhino-trade-regulations.pdf> Accessed on: 9 September 2017.

³²⁴ Note 9 above, regulation 2 (4) (c).

³²⁵ Note 9 above, regulation 2 (4) (d).

The final 2017 regulations now require them to be read with the Consumer Protection Act,³²⁶ NEMA,³²⁷ the Biodiversity Act,³²⁸ as well as the TOPS regulations³²⁹ and CITES regulations.³³⁰

Streamlining various pieces of law could become challenging as far as enforcement is concerned. For example, the 2017 draft regulations 6 (1) and (2) dealt with foreign nationals purchasing rhino horn in South Africa and subsequently exporting that horn. According to those subsections, a Management Authority from the country of the foreign national would need to issue an import permit providing written confirmation that domestic legislation provisions are in place in that country.³³¹ The Department obviously foresaw the challenges that would be faced with the monitoring of those horns once they left South Africa and as a result these provision are no longer included in the final regulations. In this context, the final regulations seem to regulate foreign nationals and South African citizens in the same way with the same requirements applying to everyone.

The main problem with these regulations is that there is no monitoring of the horn once it has left South Africa. There are no monitoring mechanisms in place to ensure that CITES provisions are not contravened. For example, the 2017 draft regulations set out the requirements to be followed when exporting a horn (specifically the duties of the Management Authority) but the final regulations are silent on this issue. Essentially the challenge is what becomes of the horn once it has arrived in the destination country and whether there is anything South Africa can do about that.

The 2017 draft regulation 3 (3) established a limit of two horns per person, however, it only applied to foreign visitors contemplated in regulation 6 (2) which referred to the procedure of obtaining a permit for the export of rhinoceros horn for foreign citizens. This provision has been omitted in the final regulations. As is stands, there are seemingly no limits in the final regulations regarding number of horns that can be exported for any citizens, residents or foreigners owning rhinos in South Africa which implies that such persons can export an unlimited number of rhino horns.³³² Considering that South Africa contains most of the rhinos worldwide, it would be unreasonable to limit each individual to a certain number of

³²⁶ Note 9 above, regulation 2 (3).

³²⁷ Note 9 above, regulation 2 (b).

³²⁸ Note 9 above, regulation 2 (c).

³²⁹ Note 9 above, regulation 2 (f).

³³⁰ Note 9 above, regulation 2 (g).

³³¹ Note 2 above, regulations 6 (1) and (2).

³³² Note 9 above.

horns (such as the previous limit of two horns per person). Johan Hume, for example, is the largest breeder of rhinos in the world and exporting two rhino horn (for whatever reason) would be highly restrictive. On the other hand, having an unlimited export limit would mean that it would be much easier for people like Hume to export large quantities of rhino horn under the guise of a donation or a gift or whatever else the regulations contemplate.

Regulation 13 (6) of the 2018 draft regulations requires that a duly authorised freight agent must report on a monthly basis to the Department “the physical address of the recipient of the rhinoceros horn in the country of import.” It is submitted that a recipient of rhinoceros horn could be anyone – a recipient of rhinoceros horn could be the leader of a trafficking syndicate. It is argued that the physical address of the recipient should be that of the person holding the permit, it should not be legal for horn to be exported unless it is to be delivered to the original purchaser.³³³

Regulation 4 (6) – in this regulation, and elsewhere in the draft, the term “permit” appears, confusingly, to be used to refer to several different documents, issued by different authorities for different purposes.³³⁴ For example, there are requirements for obtaining a permit in respect of “buying, receiving, accepting as a gift or donation or any similar way of acquiring rhino horn.”³³⁵ A person who applies for a permit must at the same time also apply for a permit to possess and transport such rhino horn.³³⁶ Then there are compulsory conditions which must be met before permits are issued (separate from the requirements).³³⁷ It is submitted that each type of permit should be specifically named and defined to clarify which permits are actually required, by whom they may be issued, and under what circumstances, in order to allow enforcement officers to determine whether the permits being presented or applied for are the appropriate ones.³³⁸

Regulation 5 (1) deals with issuance of a permit in respect of the carrying out of certain restricted activities involving rhinoceros horn. It is not clear whether this regulation is referring to domestic trade, international export or both.³³⁹ The regulations should also be

³³³ Ibid.

³³⁴ For example: Reg 3 (1) refers to a permit issued in terms of Chapter 7 of the Biodiversity Act. Reg 3 (8) says that “rhinoceros horn cannot be exported unless the export permit has been endorsed by an environmental management inspector or by an official from any other border law enforcement agency”. Reg 5 (1) says that a permit will not be issued unless an application form is lodged with the relevant issuing authority.

³³⁵ Note 9 above, regulation 6.

³³⁶ Ibid, regulation 6 (3)

³³⁷ Ibid, regulation 9.

³³⁸ See also note 295 above.

³³⁹ Ibid.

much more specific as to which authorities can receive applications and for which purpose. It is suggested that there be just one central authority responsible for issuing permits.³⁴⁰ This point will be picked up in chapter four.

In summary, these regulations comply with CITES but the concern is how the horns will be monitored once they leave South Africa. The regulations attempt to address this through regulation 6 which requires a management authority in the country of the foreign national to issue an import permit confirming that domestic legislation is in place to ensure that no provisions of CITES are contravened. There are no other requirements that are applicable to exporting of the horn by South Africans or foreign nationals. It is also crucial for the regulations to emphasise and define the meaning of trade in order not to contravene CITES.

3.4. South Africa and CITES

This paper has discussed the pros and cons of legalising domestic trade from a South African perspective. However, it is important to look at this issue from an international perspective as well. CITES has been discussed in various sections but this section is specifically going to discuss South Africa's obligations in terms of CITES and the challenges that South Africa will face with domestic trade in light of our obligations in terms of CITES.

The role of CITES is to provide an international framework on the prohibition of the international trade in threatened species. When looking at South Africa and CITES, a difficult question arises: what role does CITES play in the domestic trade of rhino horn? From a South African point of view, it would seem that this question is easily answered – once a treaty has been signed and ratified, South Africa has the option to incorporate the contents of that treaty into domestic law, if it has not already. However, the treaty first has to be tabled before Parliament which will then decide if it wants to domesticate the treaty. South Africa has recently allowed the domestic trade in rhino horn which could prove to be challenging in light of our obligations to CITES which is to prevent international trade in rhino horn. Since CITES provisions were incorporated into South African law, an on-going challenge has been the enforcement of those provisions which has been largely unsuccessful save for the few examples where poachers have been brought to justice.

³⁴⁰ Ibid.

A number of issues arise when looking at domestic trade and CITES. As a party to CITES South Africa is obliged to incorporate principles of the treaty into its domestic law which it then needs to enforce (as discussed above). CITES prohibits trade internationally so it cannot regulate what a country decides to do internally. Therein lies the problem. With domestic trade now legal, CITES' anti-trade provisions are weakened by South African trade regulations that in effect contradict CITES. This has created a loophole for a number of unlawful activities to be conducted, one of which was discussed in 3.3.2 which is that legal trade will allow a cover for illegal exports. The 2018 draft regulations in their current form are part of the problem as they allow export of rhino horn under the guise of 'non-commercial purposes' which is defined but in very broad terms. In fact, the term 'export' is also not defined. This presents a huge problem for law enforcement officials at entry ports since the regulations do allow horns to leave the country subject to the necessary permits being obtained.

Another issue that will arise is enforcement. The draft regulations allow rhino horns to be exported (for non-commercial purposes) but how does the country ensure that the horns are not sold on the black market? How does the country ensure that the horns will not end up in the hands of a syndicate which will thrive off our supply? These are the challenges that South Africa is likely to encounter with the trade in domestic horn and our international obligations in terms of CITES. There are no easy answers to the above questions and we have to depend on the strength and the success of the regulations.

The next question is how then does South Africa go forward with domestic trade in rhino horn in a manner that will not promote international trade and contravene any of the provisions of CITES. Two recommendations are provided in 4.3 and will seek to answer some of the above questions.

South Africa will have to be very mindful of CITES and not contravening any of its provisions. In the 2016 High Court application by *Kruger* and *Hume* discussed in Chapter 2, one of the primary reasons the Minister wanted to keep the moratorium was because "the moratorium is intended to stem the flow of rhino horn into the international market [which is illegal]."³⁴¹ If South Africa was no longer a part of CITES or if international trade in rhino horn was no longer illegal, the Minister would not have any concerns regarding rhino horn flowing into the international market. However, CITES safeguards not only rhinos but also

³⁴¹ *Kruger*, note 1 above, para 27.

other threatened species as well, which means that our obligations in terms of CITES have to be looked at holistically and not just in the context of rhino poaching. It simply would not make sense to withdraw from CITES in order for the country to push for international trade in rhino horns when CITES currently protects a whole range of threatened and endangered species. In addition, the Minister does not want to lift the international trade ban. Despite the push by game farmers and private entities for the international trade ban to be lifted, the Department's views were made clear in affidavits filed in the *Kruger* matter wherein the Minister emphasised that "South Africa has both an international and a domestic obligation to conserve its biodiversity and to protect threatened and endangered species including rhinos."³⁴² This is very different to the position of Swaziland.

South Africa, as member state of CITES, would not be able to sufficiently justify withdrawing from CITES nor can the country push for the international trade ban to be lifted. The Swaziland example – discussed in 3.3.3 above and also briefly discussed below – illustrates the difficulty in trying to convince CITES of the benefits of allowing international trade in rhino horn. For this reason, CITES is, and will remain to be a strong influence in the way that rhino horn trade is going to be managed in South Africa.

The lines are somewhat blurred though, because while commercial trade is banned by CITES, regular non-commercial trade is not. Non-commercial trade being for purposes of exhibitions such as zoos or museums, conservation breeding, scientific research or personal use. This is the basis on which John Hume was allowed to sell his stockpile of rhino horns during an auction in August 2017.³⁴³ The intention was to sell the stockpile internationally but it is not clear under what regulatory system the horns were sold since commercial trade is banned.

What needs to be established is the role of CITES in protecting South African and African rhino. The international ban – as it currently stands – protects African rhino in theory. African countries receive little or no financial support from CITES or its member states to protect or manage their rhino. As discussed in 3.3.3 above, in 2016 Swaziland was in a position where they believed that selling their rhino horn internationally was the best solution for them to actually protect and manage their rhino. They intended the proceeds of the sale to be reinvested into managing and protecting their rhino. However, at CoP17 CITES parties made their views on international trade in rhino horn very clear. The result was that

³⁴² *Kruger*, note 1 above. Para 26.

³⁴³ The order was granted in August 2017 but as at December 2018 there was no judgment reported.

Swaziland was not permitted to sell their rhino horn internationally. This is an example of African countries not being ‘allowed’ to manage their own rhino. Koro, an environmental journalist rightfully believes that “right now the rhino is not paying for its protection because of the international trade ban. If CITES lifts the ban, money generated from selling rhino horns would be used for conservation. Currently, Africa is depending on taxpayers’ money and a handful of donors to save its rhinos.”³⁴⁴ Koro also firmly believes that African countries should no longer be part of CITES so that they can manage their own rhino in order to generate income for the continued protection of their rhino.³⁴⁵ Koro’s views are extreme and misdirected. His passion for protecting rhino is commendable, however, his views do not take into account the fact that CITES does not just protect rhinos exclusively, it protects all endangered species. If African countries were to withdraw from CITES this could have detrimental consequences not only for rhino but many other species as well.

Conferences of the parties to CITES comprise representatives from animal rights groups as well as government representatives.³⁴⁶ These animal rights groups influence the votes of the government representatives even though they (the animal rights groups) do not have direct voting rights.³⁴⁷ The difficulty is that many countries that have to deal with poaching and conservation often make proposals to CITES on how they think they can better manage their wildlife. Unfortunately, CITES outvotes their proposals.³⁴⁸

Sustainable farming and consumptive use of wildlife have been suggested and used in some places as a means to conserve wildlife and curb poaching.³⁴⁹ Animal rights groups, however, oppose this since there is a risk of danger to the animals.³⁵⁰ The groups would prefer no use of animals at all, in any way except maybe ecotourism.³⁵¹ They oppose “sustainable utilisation” which is a way of life in many African countries.³⁵²

³⁴⁴ E Koro ‘Trade, not Aid, will help to Save Africa’s Rhinos’ *Times Live* 04 June 2017 available at: <https://www.timeslive.co.za/sunday-times/opinion-and-analysis/2017-06-04-trade-not-aid-will-help-to-save-africas-rhinos/> Accessed on 18 November 2017.

³⁴⁵ Ibid.

³⁴⁶ Vegter, note 223 above.

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ Ibid.

³⁵⁰ Ibid.

³⁵¹ Ibid.

³⁵² Ibid.

3.5. Summary

There are various schools of thought which have been discussed and arguments put forth. There are also various challenges faced with or without legalisation of domestic trade. However, what is clear and remains is that Government has taken steps to make domestic trade in rhino horn legal.

Arguments in favour of legalised trade are that it attracts great economic benefits.³⁵³ One of the main challenges faced by legalised trade, however, is the involvement of crime syndicates that exist because of the high prices fetched by rhino horns due to the international trade ban. These crime syndicates then take ownership of the illegal trade thereby increasing poaching and making conservation difficult.³⁵⁴

The demand for rhino horn is high and the prices are usually fixed with little flexibility. This makes enforcement problematic and difficult because the greater the risk of obtaining the horn, the higher the price will be and this will not reduce poaching even though supply is restricted.³⁵⁵

The above point also implies that balance in trade can be restored if the supply could meet the demand.³⁵⁶ However, if domestic trade is legalised and demand increases there is a valid concern that supply would not be able to meet that demand. Unfortunately, not much is known about demand and the factors that affect price and demand. It is submitted that the advantages of legal trade do outweigh the disadvantages especially because in South Africa, for example, poaching increased during the moratorium.³⁵⁷ Domestic legal trade can be effective subject to strict regulation

CITES cannot deal with matters regarding domestic trade, demand reduction strategies and supply.³⁵⁸ States manage and control their own territories which is known as state sovereignty. Sovereignty allows a state to exercise power within a territory without influence from other states.³⁵⁹ South Africa, therefore, tries to ensure that no other state interferes with the way it

³⁵³ Heitmann, note 291 above; 55.

³⁵⁴ Ibid.

³⁵⁵ Ibid.

³⁵⁶ Ibid at page 56

³⁵⁷ Ibid.

³⁵⁸ M 't Sas Rolfes 'Does CITES work?' Institute of Economic Affairs Environment Briefing Paper No. 4 available at http://www.rhino-economics.com/wp-content/uploads/2011/06/DoesCITESwork_t-sas-Rolfes.pdf Accessed on 18 November 2017.

³⁵⁹ J Dugard, *International Law* 4 ed 2011; 146.

exercises its governmental functions within its territory.³⁶⁰ It is for this reason that CITES is very limiting and cannot contribute to effective conservation. It does not address the declining numbers of species and it also does not create any mechanisms or strategies to regulate the supply of wildlife products.³⁶¹ The current design of CITES is restrictive rather than enabling.³⁶² It implies that all trade is bad for conservation and parties do not even begin to entertain any proposals that imply otherwise.³⁶³ Actions taken under CITES promote the strict limitations on trade rather than promoting alternative ways of facilitating trade as a means of long term sustainability.³⁶⁴

CITES is meant to provide guidance and a legal framework for the regulation of international trade but it is not intended to replace domestic control of wild species. This essentially means that each state still has the responsibility to manage and control wild species within its territory. However, CITES tends to be the only form of international regulation of wild species especially in cases where control or regulation is lacking.³⁶⁵

Rhino species currently remain critically threatened and are in need of protection. If demand increases in any way, the rhino species could become extinct. Conservation agencies and organisations require funding to continue their work of ensuring protection of the rhino populations in the field. However, funding is scarce and more often budgets are being decreased rather than increased. If high level field protection is reduced because of budget restrictions, this could have dire consequences for South Africa's rhino populations.³⁶⁶

³⁶⁰ Ibid.

³⁶¹ Ibid.

³⁶² Ibid.

³⁶³ Ibid.

³⁶⁴ Ibid.

³⁶⁵ Ibid.

³⁶⁶ Ibid.

CHAPTER FOUR: RECOMMENDATIONS FOR THE APPROACH SOUTH AFRICA SHOULD ADOPT

4.1. Centralised Selling Organisation

A Central Selling Organisation (CSO) has been suggested by Biggs, Martin and others³⁶⁷ to monitor trade in rhino horn. Biggs and others propose that “the implementation of a highly regulated trading system is through a Central Selling Organisation.”³⁶⁸ At the outset, however, it must be emphasised that the CSO proposed by Biggs et al is regarding sale of rhino horn internationally and not just in South Africa. However, it is submitted that many of the recommendations provided by Biggs et al could be incorporated and adapted into South Africa since South Africa has already legalised domestic trade in rhino horn.

It is anticipated that a CSO could be established and formalised in terms of the National Environmental Management: Biodiversity Act.³⁶⁹ The CSO could be an additional function of the South African Biodiversity Institute (SANBI)³⁷⁰ and could operate as a branch working together with the Scientific Authority which is already undertaking much of the work expected of the CSO.

The Scientific Authority is a body that has been established in terms of section 60 of NEMBA that “monitors the legal and illegal trade in specimens of TOPS species and CITES species.”³⁷¹ The Scientific Authority also “makes recommendations to issuing authorities on applications for permits to undertake restricted activities with TOPS species.”³⁷² The Scientific Authority is supported logistically, administratively and financially by the SANBI.³⁷³

³⁶⁷ D Biggs et al ‘Legal Trade of Africa’s Rhino Horns’ (2013) 339 No. 6123 Science 1038 – 1039 available at: <http://science.sciencemag.org/content/339/6123/1038.full?rss=1> Accessed on 18 November 2017.

³⁶⁸ Ibid.

³⁶⁹ Note 3 above.

³⁷⁰ The SANBI was established on 1 September 2004 in terms of NEMBA. The SANBI’s mandate is to “explore, reveal, celebrate and champion diversity for the benefit and enjoyment of all South Africans, which includes managing the National Botanical Gardens (NBG). See also: SANBI Mandate available at: <https://www.sanbi.org/about/sanbi-mandate> Accessed on 25 November 2017.

³⁷¹ South African National Biodiversity Institute (SANBI) *Scientific Authority* Accessed at: <https://www.sanbi.org/biodiversity/science-into-policy-action/scientific-authority/> Accessed on 20 October 2018.

³⁷² Ibid.

³⁷³ Note 3 above, section 60 (2).

As can be seen, NEMBA already has an established body that attempts to address monitoring and reporting issues relating to trade in rhino horns and poaching, however the success of this body is not known. It is therefore submitted that a CSO need not be a separate entity but can be incorporated into the Scientific Authority with the support of the SANBI.

Of course, ‘Central Selling Organisation’ implies an entirely separate organisation, but the wording could be amended to more adequately reflect its role within the SANBI, however, for convenience ‘CSO’ will continue to be used in this dissertation.

The SANBI has structures in place that would allow for the effective running of a CSO. For example, the SANBI is required to report to the Minister on a wide range of biodiversity issues.³⁷⁴ Part of that report could include issues relating to sales of rhino horn. The CSO could also be tasked with managing all rhino horn domestic sales, much like the SANBI is currently tasked with managing all of the country’s botanical gardens.³⁷⁵ It is not known, however, whether the SANBI would have the capacity for an additional function of managing rhino horn sales which is an extremely onerous and high-level function. It is also not known whether the SANBI would also be tasked with managing sales and issuing of permits for other threatened or protected species. A big challenge that the SANBI would face is that its resources will be over-burdened and stretched thin by the additional support which it has to provide to the Scientific Authority and the support it would have to provide to the CSO. The only way around this is for the department to provide more funds to the SANBI to allow it to be the managing body of the Scientific Authority and the CSO. This, of course, can only happen if there are surplus funds available for the additional tasks. Perhaps some of the money generated from the sale of stockpiles (discussed below) could be used to fund the CSO.

The idea of a CSO as a niche organisation seems to meet the requirements of what is needed for the managing of rhino horn sales but would be better suited as part of the SANBI. The draft regulations for trade in rhino horn could be amended (assuming they get finalised before the CSO is established) to include practical guidance of how the CSO will operate.

The CSO could also work very closely with government agencies like SANParks, the Department of Justice, SARS Customs and the South African Police Service (SAPS). Since the CSO would be responsible for managing the sale of rhino horn legally, they could easily

³⁷⁴ Note 3 above, section 11 (1) (a) – (f).

³⁷⁵ Ibid, section 11 (1) (e).

alert the relevant authorities when they have information regarding any illegal sales or suspicions of rhino horn obtained illegally. Likewise, the SAPS and SARS Customs could have access to the CSO database as a way to confirm whether rhino horns were legally bought and whether the necessary permits were obtained. This would be the case at the airport or at other points of entry and exit that are closely monitored by the SAPS and Customs.

According to Biggs, a CSO would “negotiate and manage the selling of horn so that it would be more attractive, reliable and cost-effective for buyers to obtain the product legally than through illegal means.”³⁷⁶ He goes on further to add that “a CSO would be supported by and accountable to the white rhino range states and the CITES CoP (which includes governments of demand countries) for its performance.”³⁷⁷ In South Africa, however, a CSO would be accountable to the Minister and to the public at large. The public, including civil society and animal rights groups, need to feel at ease with the way rhino are being dehorned. They also need to be reassured that the proceeds from rhino horn trade are in fact being used for the management and conservation of rhino. CITES is currently evaluating a Central Ivory Selling Organisation (CISO) for the management of ivory sales.³⁷⁸ Martin et al propose that “the CISO would have a dual objective – to obtain the best possible returns for the primary stakeholders and to gain control of the market.”³⁷⁹

A portion of the sales derived from legal trade could fund a CSO and ensure proper enforcement of such trade.³⁸⁰ The CSO could also ensure that rhino horn harvesting is done sustainably in a humane and ethical way and that the land owners and local communities where rhino occur benefit from the financial rewards.³⁸¹

The risks and uncertainties that arise from a legal trade can also be managed by a CSO.³⁸² The most important rule is that horns should be bought legally through the CSO. Stockpiles in the possession of registered buyers should be regularly audited and should be processed by buyers themselves.³⁸³ Stockpiles in South Africa – which are currently between 15 and 20

³⁷⁶ Biggs et al, note 367 above.

³⁷⁷ Ibid.

³⁷⁸ RB Martin, DHM Cumming, GC Craig, SC Gibson, DA Peake Decision-making Mechanisms and Necessary Conditions for a Future Trade in African Elephant Ivory. Standing Committee 62 Doc. 46.4 Annex, CITES, Geneva, 2012.

³⁷⁹ Ibid.

³⁸⁰ Biggs et al, note 367 above.

³⁸¹ Ibid.

³⁸² Ibid.

³⁸³ Ibid.

tons, could be used to detract buyers away from illegal trade and encourage them to buy legally.³⁸⁴

Further duties of the CSO could be to establish a list of suitable trading partners pre-approved by the Organisation and if necessary the Department. However, the main purpose of the CSO would be to lessen the administrative burden on the Department which means that the CSO will be primarily responsible for vetting of trading partners. The Organisation will need to source “willing, compliant, regulated and well-established trading partners”³⁸⁵ which could be difficult as there are only a handful of rhino owners and breeders in South Africa and even less buyers. The demand for rhino horn is far less in South Africa.

Once a CSO has been established, “a central information system” would need to be established. This system would be linked to the permitting database and also linked to the DNA database.³⁸⁶ This is crucial as it will provide pertinent information regarding the sourcing of rhino horns.³⁸⁷ Through this system legally obtained horns can be distinguished from illegally obtained horns.³⁸⁸

4.2. Sale of Stockpiles

This recommendation is largely in favour of the view that South African stockpiles of horn be sold in order to attract buyers to legal trade.³⁸⁹ Buyers operating illegally would be subject to strict penalties imposed by law.³⁹⁰ Permits would obviously have to be issued by the Government allowing these stockpiles held by private game owners to be sold. Previously, stockpiles could not be sold due to the moratorium but now the next step would be for South Africa to allow sale of its legal stockpiles of rhino horn provided that this can be managed and controlled effectively. This could also possibly assist in reducing the demand for rhino horn domestically as the horn would now be available legally. In addition, the money generated from sale of stockpiles could be used to fund rhino conservation as well as the CSO which would primarily be responsible for monitoring of domestic trade in rhino horn.

³⁸⁴ Ibid.

³⁸⁵ Ibid.

³⁸⁶ Ibid.

³⁸⁷ Ibid.

³⁸⁸ K Brebner ‘Position Statement on Legalising the International Trade in Rhino Horn’ *Endangered Wildlife Trust* available at:

<https://www.ewt.org.za/scientific%20publications/position%20statements/EWT%20Position%20Statement%20on%20Legalising%20the%20International%20Trade%20In%20Rhino%20Horn.pdf> Accessed on: 18 November 2017.

³⁸⁹ Biggs et al, note 367 above.

³⁹⁰ Ibid.

Ideally, it would be desirable to eradicate illegal sales completely and one way would be through sale of stockpiles which would attract legal buyers. This was certainly not the motivation behind John Hume's auction held in August 2017, but it was a step in the right direction for legal trade. The auction, which is the first legal auction in decades, had been advertised in Chinese and Vietnamese via Hume's website.³⁹¹ Hume had advertised 264 horns, weighing almost 500kg to local and foreign buyers.³⁹² Hume, however, would not disclose how many horns he sold or what prices they fetched but the online auction was not as successful as he had hoped. Nevertheless, Hume remained confident because "the legal domestic trade has now been re-established and the road has been paved for future sales."³⁹³ This case demonstrates that existing stockpiles can be sold provided that the sale is legal and complies with permitting requirements as set out in the regulations. It is also noteworthy that the regulations (both 2017 and 2018) have separate chapters dealing with sales of rhino horn by auction³⁹⁴ which is a further incentive to both sellers and buyers since stockpiles can be sold legally to the highest bidder.

Sale of stockpiles must, however, be approached with caution. The once-off, sale of ivory in 2008 which was approved by CITES and designed to reduce demand in Asian markets, may have unintentionally generated the current demand for ivory which contributed to the current crisis and the deaths of 30 000 African elephants annually.³⁹⁵

4.3. Draft regulations to be tightened

It is submitted that for domestic trade in rhino horn to be effective the necessary controls should be in place at a national and provincial level to enable law enforcement and permitting staff to regulate domestic trade alongside the existing levels of illegal trade in rhino horn.

Existing flaws and loopholes need to be addressed and fixed and adequate regulatory measures would need to be in place to ensure that South Africa is in compliance with its international obligations. These could include:

³⁹¹ T Carnie 'Rhino Baron Shifts Blame for 'Disappointing' First Horn Auction' *Times Live* 26 August 2017 available at: <https://www.timeslive.co.za/news/sci-tech/2017-08-26-rhino-baron-shifts-blame-for-disappointing-first-horn-auction/> Accessed on 18 November 2017.

³⁹² Ibid.

³⁹³ Ibid.

³⁹⁴ Note 2 above, section 8 and note 9 above, section 11.

³⁹⁵ 'Implications of Opening Domestic Trade Rhino Horn Trade in South Africa' *International Rhino Foundation* available at: <https://rhinos.org/tough-issues/implications-of-opening-domestic-rhino-horn-trade-in-south-africa/> Accessed on 18 November 2017.

- a. “Registering rhino horn stockpiles which have been harvested by private rhino owners;”³⁹⁶
- b. “For each permit issued, a DNA certificate will accompany such permit for each rhino and for each horn;”³⁹⁷
- c. “Stockpiles to be audited regularly in order to prevent illegal sales;”³⁹⁸
- d. “Sufficient proof of legal ownership as a prerequisite before a possession permit can be issued;”³⁹⁹ and
- e. “Strengthening and increasing of resources at borders to enable border officials to detect illegal wildlife products.”⁴⁰⁰

An important consideration in light of this recommendation is that in addition to all the regulatory systems that will have to be in place, what is needed is for greater clarity to be provided on how the income generated from rhino horn will be used. It is argued that rhino horn sales would generate extra revenue for improved law enforcement, however, a counter argument is that most of the income will go to private farmers (already discussed above) and the reality will be that the South African government would have to be responsible for funding.⁴⁰¹ A big challenge with domestic trade in rhino horn is getting the public to buy in. Perhaps as a way forward, the department can provide clarity on conservation funding and also how income will be distributed between private farmers and government.

4.4. Compliance with CITES

South Africa must not lose sight of the fact that legalising domestic trade in rhino horn needs to be monitored and evaluated closely. As discussed previously, domestic trade in rhino horn makes it more difficult to comply with CITES mainly due to all the loopholes in the draft regulations. It must not be forgotten that the country has a strict obligation in terms of CITES as a Treaty but also an obligation to the broader CITES international community. With domestic trade now legal, how does South Africa maintain compliance with CITES? Two suggestions will be discussed briefly below.

³⁹⁶ Brebner, note 388 above.

³⁹⁷ Ibid.

³⁹⁸ Ibid.

³⁹⁹ Ibid.

⁴⁰⁰ Ibid.

⁴⁰¹ Note 395 above.

i). Central Selling Organisation (CSO)

As discussed in 4.1 above, a CSO could provide a very useful platform for how South Africa could continue complying with CITES. The CSO will have first-hand information regarding the buying and selling of rhino horn and as such will be able to ensure that these sales are in accordance with CITES standards.

ii). Addressing the Loopholes in the regulations

The regulations in their current form have various loopholes which could allow or promote the illegal sale of rhino horn internationally. These loopholes have been discussed in 3.3.1 above. The loopholes and inadequacies will not be discussed again save to say that as the regulations currently stand, they provide a cover for illegal exports; for example, in the 2017 regulation 2 (1) allows rhino horn to be exported internationally for “personal purposes” which is not defined in the regulations. The 2018 regulations then changed that to ‘for primarily non-commercial purposes’⁴⁰² and provides a definition which is essentially personal use. The regulations attempt to cover all possible concerns regarding the sale of rhino horn, but they do not.

The above two suggestions are provided to assist South Africa stay compliant with CITES, however, the consequences of not complying would mean that the country would have a bad reputation in the international community as having failed the rhinos. CITES protects rhinos as well as other endangered species, so it is not clear whether a failure to uphold the principles of CITES would mean South Africa would have to resign.

CITES does not have any provisions relating to sanctions for violations of any of its provisions. However, if the Secretariat has received “information that any species included in Appendix I or II is being adversely affected by trade in specimens of that species, it shall communicate that information to the authorised Management Authority of the Party or Parties concerned.”⁴⁰³ (There is no mention of what happens where the Party is responsible for adversely affecting the specimen by trade, for example if South Africa started trading internationally in rhino horn).

Likewise, when any party receives information that specimens of species are being adversely affected by trade, it “shall as soon as possible inform the Secretariat of any relevant facts and

⁴⁰² Note 9 above, section 1.

⁴⁰³ Article XIII (1)

propose remedial action. If the Party reporting the violation proposes an inquiry, then such inquiry must be carried out by one or more persons expressly authorised by the Party.”⁴⁰⁴ “The information provided by that Party shall be reviewed by the next Conference of the Parties which may make whatever recommendations it deems appropriate.”⁴⁰⁵ As can be seen, CITES places the responsibility on the Parties to include sanction clauses in their own domestic legislation for violations, thus its effectiveness lies with each member state.

⁴⁰⁴ Article XIII (2)

⁴⁰⁵ Article XIII (3)

CHAPTER FIVE: CONCLUSION

Following the 2016 High Court decision that ordered the Minister to lift the ban on the domestic trade in rhino horn, draft regulations regulating trade in rhino horn were published by the Minister in February 2017.⁴⁰⁶ Additional draft regulations were published on 21 September 2018.⁴⁰⁷ These regulations effectively legalise trade in rhino horn in South Africa, although it is not clear whether they are binding since the Minister had already been granting permits well before the 2017 regulations had been finalised.⁴⁰⁸ The current regulatory framework includes a combination of supposedly final regulations and draft regulations in one document labelled “draft regulations relating to domestic trade in rhinoceros horn.”⁴⁰⁹

There are two schools of thought regarding the legalisation of trade in rhino horn – those that are for legalisation and those that are against it. The school of thought in favour of domestic trade believe that rhino poaching can be eliminated by legal trade. This will be done by meeting the supply legally and eliminating the desire to obtain it illegally.⁴¹⁰ The school of thought against trade believes that by legalising trade the demand for rhino horn will increase and the supply will eventually run out causing consumers to revert to obtaining the horn illegally.⁴¹¹ The reality, however, is that South Africa has legalised the trade and in February 2017 published draft regulations⁴¹² for how trade would be regulated.

One of the main benefits of legalising trade is that buyers will be able to purchase the horn legally and avoid the risk of illegal purchase.⁴¹³ Another benefit of legal trade is the sustainable use paradigm which advocates for the sustainable use of wild animals due to the facts that rhino horns can regrow.⁴¹⁴ Rhino farm owners like John Hume believe that this is one of the best ways to conserve rhino and the proceeds obtained from legal sale of rhino horn can be used to further conservation.⁴¹⁵ This is one of the strongest arguments in support of legalisation of domestic trade and is one of the pillars of sustainable use of rhino horn. If

⁴⁰⁶ Note 2 above.

⁴⁰⁷ Note 9 above.

⁴⁰⁸ Department of Environmental Affairs, note 8 above.

⁴⁰⁹ Note 9 above.

⁴¹⁰ Vegter, note 222 above.

⁴¹¹ Shaw, note 81 above.

⁴¹² Note 2 above.

⁴¹³ Vegter, note 222 above.

⁴¹⁴ Schweig, note 246 above.

⁴¹⁵ Ibid.

rhino horn can be harvested legally and safely, this will prevent merciless killing of rhinos. This will also remove the incentive for poachers to kill the animals. It is on this principle that legalisation is advanced and the proceeds generated from the sale of these rhinos to be used for conservation purposes.

Another pillar of sustainable development is the involvement of local communities. When local communities are involved, there is greater motivation and incentive for them to assist in the protection of wild animals since they are more likely to encounter poachers.⁴¹⁶ The cases of the crocodile and the vicuna were discussed as examples of wild animals that were once on the brink of extinction but through local support are now flourishing again.

There are also strong arguments that international prohibition has failed and therefore legal trade should be explored domestically.⁴¹⁷ Trade, however, was legal up until 2009 when the Government decided that trade was providing a cover for illegal international exports. We are now in the same position we were in pre-2009.

There are a few things that could be done to strengthen legal trade. However, most importantly there is a need for the draft regulations to be tightened. The regulations have some flaws, but they are not all that bad.

One of the major flaws is that rhino horns are allowed to be exported for “primarily non-commercial purposes” which is defined in the 2018 regulations to mean any purpose that has no economic value.⁴¹⁸ In practice this could mean that a Chinese national can come into South Africa, purchase rhino horns legally and then return with them to China under the guise of gifts or non-commercial purposes. Secondly, the two-horn requirement from the 2017 draft regulations⁴¹⁹ has been omitted which in effect means that there is no limit on the number horns that can be taken out of the country. This is highly problematic as it could lead to horns being exported legally but then getting sold on the international black market. Once the horns leave South Africa there is no way of tracking them or ensuring that they are in fact gifts or they are in fact going to the lawful owner. There are, of course, permitting and export requirements which have to be met but the loopholes are large enough to allow horns to be exported illegally. It is for this reason that a CSO is suggested with its primary objective being the management of rhino horn sales domestically. It would also be responsible for

⁴¹⁶ Nowak, note 235 above.

⁴¹⁷ Vegter, note 222 above.

⁴¹⁸ Note 9 above, regulation 1.

⁴¹⁹ Note 2 above.

keeping a database of all rhinos purchased legally and ensuring that horns purchased in South Africa are tracked right up until they are delivered to the registered owner (if bought through an agent). The difficulty is that there really is no way of knowing what happens to the horn after it arrives in the destination country. The black market is so advanced and sophisticated that even international law enforcement has difficulty tracking the syndicates responsible for the illegal sale of the horn.

Thirdly, there are also issues with the actual export of the horn. Regulation 13 (6) of the 2018 draft regulations requires that a duly authorised freight agent must report on a monthly basis to the department “the physical address of the recipient of the rhinoceros horn in the country of import.”⁴²⁰ It is submitted that a recipient of rhinoceros horn could be anyone – a recipient of rhinoceros horn could be the leader of a trafficking syndicate. It is argued that the physical address of the recipient should be that of the person holding the permit, it should not be legal for horn to be exported unless it is to be delivered to the original purchaser.

Finally, neither the 2017 or 2018 regulations address the issue of safety when removing the horns from the rhinos. This is an important aspect which should be included in the regulations to complement the existing trade regulations. Trade in rhino horn is not an isolated event and the regulations should include provisions governing the initial stages of de-horning right up to trade and delivery.

It is for the above reasons that tightening of the regulations is discussed and offered as a recommendation for the way forward. Once the technical flaws have been amended, the regulations will be stronger and will succeed in effectively regulating domestic trade in rhino horn. It is the regulations that will provide the much needed controls to regulate trade in rhino horn. Management of trade is only as good as the regulations which is the legal framework, therefore it is of utmost importance to get the regulations tightened.

Measuring success and effectiveness, however, is often difficult and challenging due to many varying factors, one of which is the collection of data which is often difficult to do. It is envisaged that a CSO would be in a position to manage and regulate domestic trade and one of their core functions would be to keep records of rhino horn bought and sold. This information could then be measured against current poaching statistics to reveal whether legal trade is in fact reducing poaching.

⁴²⁰ Note 9 above, regulation 13 (6).

The CSO could also assist by ensuring that trade in rhino horn complies with CITES. At present, the draft regulations attempt to address potential international trade, but those attempts are fairly weak and would need to be strengthened. It can be seen then that the establishment and operation of a CSO could address some of the challenges in respect of a legalised trade.

Legal trade can be pursued, provided that the regulations are tightened leaving no room for loopholes.⁴²¹ The biggest challenge, however, is always going to be enforcement, so while on paper South Africa's regulatory appears adequate, it is the enforcement of these measures that may prove to be unsuccessful. This dissertation did not focus on enforcement, however, on paper our law enforcement seems to be adequate in the fight against poaching. Penalties for poaching are as high as R5 million for first time offenders and R10 million for subsequent offenders⁴²² and law enforcement agencies are working well together with farm owners and game reserves. In July 2017 the Minister provided statistics that showed law enforcement agencies are successfully apprehending and prosecuting offenders.⁴²³ It would be interesting to see whether rhino numbers increase or decrease now that domestic trade has been legalised. CITES is often criticised as not being effective in curbing rhino poaching numbers so trade in South Africa should be a good indication of whether legalising trade increases or decreases poaching numbers, albeit on a national scale.

As discussed in 3.3.5 above, a number of issues arise when looking at domestic trade and CITES. Principles of CITES are incorporated into domestic legislation, however, CITES cannot regulate what a country decides to do internally – CITES just regulates international trade. With domestic trade now legal, CITES's anti-trade provisions are weakened by South African trade regulations that contradict CITES. This has created a loophole for a number of unlawful activities to be conducted, one of which was discussed in 3.3.3 which is that legal domestic trade will allow a cover for illegal exports since the regulations in their current form are part of the problem as they allow legal exports under the guise of “non-commercial purposes.”⁴²⁴ The suggestion of Koro was that African countries should no longer be part of CITES so that they can manage their own rhino in order to generate income for the continued protection of their rhino.⁴²⁵ However, South Africa cannot simply withdraw from CITES as

⁴²¹ Heitmann, note 291 above.

⁴²² Note 91 above, section 123.

⁴²³ Department of Environmental Affairs, note 18 above.

⁴²⁴ Note 9 above, regulation 1.

⁴²⁵ Koro, note 344 above.

the Convention applies to different species and not just to rhinos. The underlying challenge remains trying to ensure that regulating domestic trade does not infringe on our obligations in terms of CITES.

In addition, enforcement is and will remain a significant challenge. Specific challenges were highlighted in 3.3.5 such as how will the country prevent horns from being sold on the black market and how will the country ensure that horns will not end up in the hands of black market syndicates which will thrive off our legal supply.

Ultimately, the biggest challenge in terms of CITES is how to regulate the horns once they have left the country. The establishment of the CSO, coupled with the tightening of the draft regulations, were two suggestions offered to assist in keeping South Africa compliant with CITES and attempting to prevent the horns from infiltrating the international black market.

This process will have to be monitored and evaluated closely. CITES does not have any provisions relating to sanctions for violations, however, at the Conference of the Parties, an appropriate sanction can be decided by the Parties.⁴²⁶

The biggest problem will always be the underlying reason for poaching, which is the value associated with rhino horns. Despite the strict penalties and prison time, poachers are more than willing to take any associated risks in acquiring rhino horns. As a result, no matter how high the penalties are or how strictly Customs conducts their searches, the desire for rhino horns will always be there and therefore the long term solutions provided above will have to be implemented to reduce the number of rhinos poached. The only way to control and manage poaching is to allow rhino horns to be traded legally in South Africa subject to strict enforcement of the regulations.

⁴²⁶ Note 405 above.

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