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The Elephant in the Room

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Every fifteen minutes a poacher kills an elephant for its ivory. If this rate continues, the African elephant could become extinct in twenty years. Although federal law has strictly regulated the ivory market for several decades, the United States remains one of the largest markets for illegal wildlife products in the world. Because there are little to no enforcement mechanisms or verification processes by which to definitively distinguish legal from illegal ivory after reaching domestic markets, illegal ivory is easily mixed in with legal stocks. New regulations have been promulgated, but are they enough?

INTRODUCTION

Despite some successes made under the Convention on International Trade in Endangered Species (“CITES” or the “Convention”), African elephants are prone to go extinct sometime in the 2020s. In 2014, President Barack Obama’s Administration rolled out new regulations in an effort to stem the crisis. Despite some gains, the new ivory regulations still do not adequately close domestic loopholes, provide necessary funding, reduce demand, or provide for public outreach or education. This paper posits four recommendations that correct for these deficiencies: (1) requiring forensic-analysis, (2) increasing funding, (3) increasing international pressure on nations with key ivory markets, and (4) developing public outreach initiatives.

Part I of this paper will develop the background of the crisis facing the African elephant. Part II will discuss and analyze major shortcomings of CITES as they relate to the international ivory trade. In the international context provided by Part II, Part III will analyze the shortcomings of domestic ivory regulations. As noted above, Part IV will articulate four recommendations that the United States should implement in order to actualize the objectives that underlie the new rules, i.e., to combat rising ivory demand and reverse the African elephant’s precipitous population decline. Finally, the Conclusion completes the analysis with concluding remarks.

I

BACKGROUND

An understanding of the CITES framework and organizational structure provides context to how international ivory trade developed. This provides context for how domestic ivory trade regulations developed and continued to operate until 2014. The 2014 regulations

build upon and operate within these contexts and they, as well as their enduring obstacles, are introduced accordingly.

A. CITES Framework and Organizational Structure

Since its adoption in 1975, CITES has governed international commerce in wildlife products according to a species' listing.¹ The listings are organized into one of three Appendixes, which restrict trade by imposing varying levels of import and export control. "Trade" in Appendix I specimens, for example, requires the appointed Management and Scientific Authority ("MA") of both the importing and exporting nations to issue permits based on "non-detriment findings," that trade "will not be detrimental to the survival of that species."²

CITES establishes a permanent Secretariat who:(1) provides the 180 signatory countries ("Parties") with trade information and technical support; (2) serves as a liaison among Parties; (3) contracts trade studies; (4) informs governments and the public about CITES wildlife trade developments; (5) investigates possible CITES violations and trade threats to wildlife; and (6) organizes meetings of the Conference of the Parties ("CoP").³ The CoP is composed of representatives from

¹ Convention on International Trade in Endangered Species of Wild Fauna and Flora, *opened for signature* Mar. 3, 1973, 27 U.S.T. 1087 (entered into force July 1, 1975) [hereinafter CITES]. These levels of protection are a function of the degree of threat to the survival of a species. Appendix I species are likely to become extinct absent strict restrictions on the international trade of the species. Specifically, Article II(1) of CITES states: "Appendix I shall include all 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 authorized in exceptional circumstances." Appendix II species are likely to become endangered absent moderate restrictions in the international trade of the species. Article II(2) of CITES states:

Appendix II shall include: (a) all species which although are 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; and (b) other species which must be subject to strict regulation in order that trade in specimens in certain species referred to in sub-paragraph (a) of this paragraph may be brought under effective control. Appendix III is comprised of species whose trade needs to be regulated to avoid exploitation.

² *Id.* at Art. III(2)(a). Each Party designates an MA to issue permits, make legal and scientific findings, and monitor trade. *Id.* at art I(g). See 50 C.F.R. § 23.61(a) (2007) (describing factors considered in making a non-detriment finding in the United States).

³ See *id.* at Art. XI-XII.

the Parties and meets approximately every two years to assess the implementation of the Convention.⁴

CITES recognizes two global monitoring systems for trade in elephant specimens.⁵ The Monitoring Illegal Killing of Elephants (“MIKE”), managed by the CITES Secretariat, and the Elephant Trade Information System (“ETIS”), managed by TRAFFIC, are both used to track illegal trade in ivory and other elephant specimens per Resolution Conf. 10.10 (Rev. CoP15).⁶ Thirdly, Article VIII, paragraph 7(a) of the Convention, requires CITES Parties to submit annual reports on their trade of CITES-listed species.⁷ Such data, including legal trade in all elephant specimens, are compiled by the United Nations Environmental Programme World Conservation Monitoring Centre.⁸ Fourth, the International Union for the Conservation of Nature maintains the African and Asian Elephant Database, which collects information on elephant populations, such as numbers and range.⁹

In 2010, the CITES Secretariat, INTERPOL, United Nations Office on Drugs and Crime, the World Bank, and the World Customs Organization formed the International Consortium on Combating Wildlife Crime (“ICCWC”) to raise awareness of wildlife crime, build the capacity of enforcement organizations, foster coordinated enforcement action, and address the drivers of wildlife crime to reduce demand.¹⁰ Reflecting its capacity-building focus, ICCWC developed the Wildlife and Forest Crime Analytic Toolkit to provide Parties with a framework to assess their effectiveness in preventing and responding to wildlife crime.¹¹ These information sharing regimes provide Parties

⁴ *Id.* at art. XI(2); Conference of the Parties, <http://cites.org/eng/disc/cop.php> (last visited Nov. 27, 2015).

⁵ See CITES, Fifteenth Meeting of the Conference of the Parties, *African Elephant Action Plan*, CoP15 Inf. 68 (Mar. 13–25, 2010), <http://www.cites.org/common/cop/15/inf/E15i-68.pdf>.

⁶ CITES, *Elephant Conservation, Illegal Killing and Ivory Trade*, SC62 Doc. 46.1 /Rev. 1, (July 23–27 2012), <http://www.cites.org/eng/com/sc/62/E62-46-01.pdf>; see also TRAFFIC, *ETIS: Dissecting the Illegal Ivory Trade*, (Oct. 23, 2013), <http://www.Traffic.org/home/2013/10/23/etis-dissecting-the-illegal-ivory-trade.html>.

⁷ CITES, *supra* n.1, at art. VIII(7).

⁸ CITES, *Status Of Elephant Populations, Levels of Illegal Killing and the Trade in Ivory: A Report to the Standing Committee of CITES*, SC61 Doc. 44.2/Rev 1, 3 (2011), <http://www.cites.org/eng/com/sc/61/E61-44-02-A1.pdf>.

⁹ *Id.*

¹⁰ Bruce Zagaris, *CITES Meeting Focuses on Strategic Vision and Enforcement*, 29 INT’L ENFORCEMENT L. REP. 5, 144 (2013).

¹¹ United Nations Office on Drugs and Crime, *Wildlife and Forest Analytic Toolkit*, http://cites.org/sites/default/files/eng/resources/pub/wildlife_crime_analytic_toolkit.pdf

with a system into which they can pool domestic tracking data, which can then be used by monitoring NGOs or governments to assist with their respective domestic or international tracking efforts.

B. Global Ivory Trade Development

The World Wildlife Fund (“WWF”) estimates that between three to five million African elephants once traversed the continent of Africa as recently as the 1940s.¹² In one decade of the twentieth-century, however, elephant populations were reduced by 50%, bottoming out at 625,000 in 1989.¹³ In response, the United States led an international movement to enforce unilateral bans on the export and import of African elephant ivory in 1988.¹⁴ Other countries followed and in 1989, the CoP banned the international commercial trade in African elephant ivory by uplisting the species to Appendix I.¹⁵ Initially, the ban worked. Prices fell, demand dropped, and elephant populations began to recover.¹⁶ In 1997, the Parties adopted Res. Conf. 10.10 (Rev. CoP16), which recommended that ivory carving and importing countries enact comprehensive internal legislative, regulatory, and enforcement measures.¹⁷ Critically, Res. Conf. 10.10 recommended that Parties, including the United States, “register or license all importers, manufacturers, wholesalers and retailers” dealing in ivory products.¹⁸ In addition, Parties agreed to implement recording and inspection procedures to monitor the flow of ivory within their borders.¹⁹

In 1999, CITES approved a “one-off sale” of fifty metric tons of stockpiled ivory from Botswana, Namibia and Zimbabwe to Japan. This sudden influx of legal ivory correlated with increased demand: an

(last visited Nov. 27, 2015). These databases can be drawn upon for the data collection efforts as advocated below in Part IV.

¹² World Wildlife Foundation, *Threats*, (last visited Nov. 27, 2015), <http://www.worldwildlife.org/species/African-elephant>.

¹³ See Karen Sack, *Elephant Ivory Trade Ban*, 1 TED Case Studies (Sept. 1992), <http://www1.american.edu/ted/elephant.htm>.

¹⁴ *Id.*

¹⁵ Thomas Princen, *The Ivory Trade Ban: NGOs and International Conservation*, in ENVIRONMENTAL NGOS IN WORLD POLITICS: LINKING THE LOCAL AND THE GLOBAL, 121, 127 (Thomas Princen & Matthias Finger eds., 1994).

¹⁶ *Id.* at 129.

¹⁷ CITES, *Decisions of the Conference of the Parties*, 125 (June 9–20, 1997), <http://www.cites.org/eng/cop/10/E10-Decisions.pdf>.

¹⁸ CITES, *Trade in Elephant Specimens*, Res. Conf. 10.10/Rev. CoP16 (Mar. 21, 2014), <http://www.cites.org/eng/res/10/10-10R16.php>.

¹⁹ *Id.*

additional six metric tons of ivory were seized, and 1,059 African elephants poached.²⁰ In 2004, China introduced an ivory product registration and certification system to meet the conditions of Res. Conf. 10.10, and to secure its participation in future one-off sales.²¹ In 2008, CITES approved an additional one-off sale and sixty-two metric tons of government stockpiled ivory were exported to China, resurrecting the Chinese ivory carving art markets.²²

Since 2007, the global illegal ivory trade activity has more than tripled pre-ban levels,²³ while African elephant populations face an unprecedented decline.²⁴

The United States is the world's second largest retail market for elephant ivory products, with a documented 24,004 ivory products in 657 outlets in sixteen American cities.²⁵ Studies estimate that as much as one-third of ivory items for sale in the United States were imported illegally,²⁶ while a total of 3,125 illegal ivory items are imported into and exported out of the United States per year.²⁷

China is the largest ivory consumer in the world. As the final destination of an estimated 70% of all ivory,²⁸ the price of ivory in China more than tripled between 2006 and 2011.²⁹ An investigation by the Environmental Investigation Agency ("EIA") in 2008 uncovered

²⁰ HUMANE SOC. INT'L, *Ivory Trade & CITES*, http://www.hsi.org/campaigns/dont_buy_wild/african_ivory_trade.html. (last visited Nov. 27, 2015).

²¹ GRACE G. GABRIEL ET AL., INT'L FUND FOR ANIMAL WELFARE, *MAKING A KILLING: A 2011 SURVEY OF IVORY MARKETS IN CHINA*, 2 (2012), <http://www.ifaw.org/sites/default/files/Making%20a%20Killing.pdf>.

²² Tom Milliken, TRAFFIC, *Illegal Trade in Ivory and Rhino Horn: An Assessment Report to Improve Law Enforcement Under the Wildlife TRAPS Project*, 1 (Sept. 2014), <https://www.usaid.gov/sites/default/files/documents/1865/W-TRAPS-Elephant-Rhino-report.pdf>.

²³ Int'l Fund for Animal Welfare, *Criminal Nature: The Global Security Implications Of The Illegal Wildlife Trade*, 8 (June 2013), http://www.ifaw.org/sites/default/files/ifaw-criminal-nature-2013-low-res_0.pdf.

²⁴ BBC Nature News, *African Forest Elephants Decline by 62% in 10 Years* (Mar. 5, 2013), <http://bbc.co.uk/nature/21655613>.

²⁵ Beth Allgood et al., *U.S. Ivory Trade: Can A Crackdown on Trafficking Save the Last Titan?*, 20 ANIMAL L. 27, 48 (2013) (citation omitted).

²⁶ Humane Soc. Int'l, *Ivory Trade & CITES*, HUMANE SOC. INT'L (last viewed Dec. 12, 2014), http://www.hsi.org/campaigns/dont_buy_wild/african_ivory_trade.html.

²⁷ Allgood et al., *supra* note 25, at 31 (Extrapolating border seizures data, and using INTERPOL's assessment that seized wildlife represents only 10% of actual illegal trade).

²⁸ Sharon Montazeri, *Protecting The Pachyderm: The Significance Of Ivory Trade Regulation For African Elephant Conservation*, 22 CARDOZO J. INT'L & COMP. L. 121, 127 (Fall 2013).

²⁹ *Id.*

persuasive evidence of widespread abuse and fraud in China's registration system,³⁰ reporting that an estimated 90% of the ivory for sale was laundered into the legal market.³¹ Alarmingly, official Chinese documents reveal that an estimated 110 tons of ivory, i.e., 11,000 elephant tusks, "had gone missing from government stockpiles and that illegal sales were suspected."³² Despite the registration system, a 2014 study estimates that 26.5% of the thousands of elephant ivory items for sale in major Chinese markets are illegal.³³

In the most recent Conference, CoF16, the Secretariat reported that the amount of seized ivory had greatly escalated since CoF15 in 2011, and was at its highest level since 1996,³⁴ when reporting by ETIS began.³⁵ Indeed, elephant populations have dropped well below 1989 levels, as "[e]very [fifteen] minutes, an elephant is killed illegally in Africa to feed an insatiable demand for ivory, principally from Asia."³⁶

While the issue of whether demand for ivory is "pure" or is coupled with one-off sales is hotly debated, all sources agree that demand is increasing and trade controls can work.³⁷ Nevertheless, if current rates

³⁰ See ENVTL. INVESTIGATION AGENCY, CHINA, *IVORY TRADE & THE FUTURE OF AFRICA'S ELEPHANTS* (2008), http://eiaglobal.org/images/uploads/China.Ivory_Trade_the_Future_of_Africas_Elephants.pdf.

³¹ See Dan Levin, *From Elephants' Mouths, an Illicit Trail to China*, N.Y. TIMES, (Mar. 1, 2013), http://www.nytimes.com/2013/03/02/world/asia/an-illicit-trail-of-african-ivory-to-china.html?pagewanted=all&_r=0.

³² See ENVTL. INVESTIGATION AGENCY, *supra* note 30, at 4.

³³ Lucy Vigne & Esmond Martin, *China Faces A Conservation Challenge The Expanding Elephant And Mammoth Ivory Trade In Beijing and Shanghai*, SAVE THE ELEPHANTS & THE ASPINALL FOUNDATION, 6 (2014), http://savetheelephants.org/wp-content/uploads/2014/12/2014_ChinaConservationChallenge.pdf; *see also* Levin, *supra* note 31 (estimating that current Chinese demand amounts to 40,000 tusks for a total of 20,000 elephants per year); CITES, *supra* note 6. While estimates indicate that the percentage of illegally traded ivory in China is approximately 10% less than in U.S. markets, the Chinese import approximately 140 of the 200 tons traded globally per year. *Id.*

³⁴ CITES, *ETIS Report on Traffic*, CoP16 Doc. 53.2.2, 2 /Rev. 1 (Mar. 3–14, 2013), available at <http://www.cites.org/eng/cop/16/doc/E-CoP16-53-02-02.pdf>.

³⁵ CITES, *Status Of Elephant Populations, Levels Of Illegal Killing And The Trade In Ivory: A Report To The Cites Standing Committees*, 62 Doc. 46.1/Rev. 1, annex p. 4 (July 23–27, 2012).

³⁶ Carl Safina, *Blood Ivory*, N.Y. TIMES, (Feb. 11, 2013) (visited Dec. 15, 2014), http://www.nytimes.com/2013/02/12/opinion/global/blood-ivory.html?_r=0 (noting that "if the thirty-eight tons of tusks seized in 2011 represented 10% of illegal ivory, it translates to something over 40,000 elephants killed annually—an elephant every fifteen minutes").

³⁷ Daniel Stiles, *CITES-approved ivory sales & elephant poaching*, 45 PACHYDERM 150, 152 (July 2008–June 2009) (concluding that one-off sales did not cause subsequent spike in demand; however, attention given by opponents of the CITES-authorized one-off sales has "diverted attention from the real dilemma, which is how to deal with high ivory demand."); *but see* Bryan Christy, *Blood Ivory: Ivory Worship*, NAT'L GEOGRAPHIC,

continue, the African elephant could become extinct in the next decade³⁸

C. Domestic Ivory Control (pre-2014)

The United States has three key statutory layers through which to regulate ivory; first, Congress implemented CITES into U.S. law in the Endangered Species Act (“ESA”) of 1973.³⁹ The ESA makes it unlawful to “engage in any trade in any specimens contrary to the provisions of the Convention.”⁴⁰ Mirroring the CITES Appendix system, the ESA lists species as either “endangered” or “threatened,” which trigger various interstate and international trade and use restrictions, including licensing, monitoring, and enforcement.⁴¹ The Lacey Act forms the second layer of domestic law by requiring import/export labels for wildlife shipments and allowing officials to marshal other state and international wildlife laws during prosecutions involving customs violations.⁴² The third layer, the African Elephant Conservation Act (“AfECA”), was Congress’ initial response to the early poaching crises of the 1970s and 80s, and was the domestic iteration of the United States’ international push for the 1989 ivory ban under CITES.⁴³ The AfECA limits the kinds of ivory that can be

<http://ngm.nationalgeographic.com/2012/10/ivory/christy-text> (noting that China told CITES that the 1999 one-off sale to Japan was the main cause of China’s growing ivory-smuggling problem because the sale had confused Chinese consumers, leading them to believe the international ivory trade had been resumed); see generally Allan Thornton et al., *Lethal Experiment: How the CITES-approved ivory sales led to increased elephant poaching*, ENVTL. INVESTIGATION AGENCY 5–8, 28, 32, (2001).

³⁸ Nicole Le Marie, *12 Years Until Elephants Are All Wiped Out As One Dies Every 15 Minutes*, METRO (Aug. 12, 2013).

³⁹ Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531–1544 (2006)).

⁴⁰ *Id.* at § 1538(c)(1).

⁴¹ Compare CITES Appendix, *supra* note 1, with 50 C.F.R. §§ 17.11, .21, .22, .31, .32 (2015).

⁴² See 16 U.S.C. §§ 3371–3378 (2015).

⁴³ See *id.* at §§ 4201–4245 (2015).

imported and exported⁴⁴ and creates civil and criminal penalties for anyone who “knowingly violates [the] prohibited acts.”⁴⁵

The ESA listing of the African elephant as “endangered” grants the Fish & Wildlife Service (“FWS”) the ability to create trade exceptions so long as they further conservation efforts.⁴⁶ Until early 2014, FWS maintained two such trade exceptions for African elephant ivory: (1) antiques could be imported, exported, and sold, and (2) legally sport hunted trophies, such as elephant heads or tusks shot on safari or other sanctioned events, could be imported but not sold.⁴⁷

D. U.S. Domestic Ivory Control (post-2014)

Responding to the escalating “international crisis” of wildlife trafficking and its threat to the survival of elephants, President Barack Obama took unprecedented action by issuing the Executive Order 13648 (“EO”) on “Combating Wildlife Trafficking.”⁴⁸ The EO articulated four broad policy objectives therein: the United States shall “(a) . . . seek to assist [foreign] governments in anti-wildlife trafficking activities,” as requested by foreign nations; (b) “promote and encourage the development and enforcement by foreign nations of effective laws to prohibit the illegal taking of ivory bearing species and to prosecute those who engage [in such] wildlife trafficking”; (c) “develop international community and partner organizations”; and (d) “seek to reduce the demand for illegally traded wildlife, both at home

⁴⁴ *Id.*, at § 4223 (“Except as provided in section 4222(e), it is unlawful for any person: (1) to import raw ivory from any country other than an ivory-producing country; (2) to export raw ivory from the United States; (3) to import raw or worked ivory that was exported from an ivory producing country in violation of that country’s laws or of the CITES Ivory Control System; (4) to import worked ivory, other than personal effects, from any country unless that country has certified that such ivory was derived from legal sources; or (5) to import raw or worked ivory from a country for which a moratorium is in effect under section 4222 of this title.”).

Section 4222(e) is the sport hunting exception, which allows individuals to “import sport-hunted elephant trophies that they have legally taken.” *Id.* Notably, the Secretary has no authority to abolish the exception under the AfECA. *Id.*

⁴⁵ *Id.* at § 4224.

⁴⁶ *See id.* at § 1533(d).

⁴⁷ Peter LaFontaine et al., *Treasured to Death: Elephants, Ivory, and the Resurgence of a Crisis*, 29 NAT. RESOURCES & ENV’T, 1 (Summer 2014) (noting FWS’ justification that sport hunting incentivizes elephant conservation through local communities and governments whom benefit financially from “sustainable management” of their animal populations).

⁴⁸ Exec. Order No. 13648, 78 Fed. Reg. 40621 (July 1, 2013).

and abroad.”⁴⁹ The EO established the interagency Presidential Task Force on Wildlife Trafficking and the Advisory Council on Wildlife Trafficking (“Wildlife Task Force”) to advise federal agencies on how to implement these policy objectives.⁵⁰

On February 11, 2014, Wildlife Task Force announced three strategic objectives: (1) strengthen enforcement; (2) reduce demand for illegally traded wildlife; and (3) build international cooperation, commitment, and public-private partnerships.⁵¹ In response, the White House translated these strategies into four enforcement directives by ordering federal departments and agencies to: “prohibit the commercial import and export of African elephant ivory; significantly restrict domestic resale of elephant ivory”; clarify the definition of “antique”; restore ESA protection for African elephants;⁵² and impose limits on the sport-hunting of African elephants.⁵³ As the principal federal agency responsible for implementing and enforcing the ESA and CITES,⁵⁴ the Fish and Wildlife Service (“FWS”) took the “first step by issuing a director’s order that halted the import of all commercial ivory items, clarified the definition of “antique,” and provided border and customs officials guidance for implementing the new rules.⁵⁵ Second, FWS finalized its new CITES “use after import” regulations in May 2014, which imposed stricter controls on domestic ivory sales.⁵⁶ Sellers must now obtain certification that their ivory falls under one of the narrowed ESA section 4(d) exemptions.⁵⁷

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ The White House, *National Strategy For Combating Wildlife Trafficking*, 5 (Feb. 11, 2014), <http://www.fws.gov/home/feature/2014/trafficking/national-strategy-wildlife-trafficking.pdf>.

⁵² The agency later abandoned uplisting the African elephant to ESA category I protection due to public and political protest; *see generally* LaFontaine et al., *supra* note 47.

⁵³ *See* Press Release, The White House Office of the Press Sec’y, Fact Sheet: National Strategy for Combating Wildlife Trafficking & Commercial Ban on Trade in Elephant Ivory (Feb. 11, 2014), <http://1.usa.gov/1fqJofy>.

⁵⁴ *See* U.S. Fish & Wildlife Serv., *U.S. Efforts to Control Illegal Elephant Ivory Trade & Internal Markets* (Sept. 2012), http://cqrengage.com/elephantprotection/file/mkFd0w2BLj7/Atch2_factsheet-us-efforts-to-control-illegal-ivory-trade.pdf [hereinafter FWS].

⁵⁵ *See* Revision of Regulations Implementing CITES, 79 Fed. Reg. 30,399, 30,410 (May 27, 2014) (to be codified at 19 C.F.R. pts. 10, 163, and 178); *see also* US Dep’t of Interior, Director’s Order No. 210 (Feb. 25, 2014) (amended May 15, 2014).

⁵⁶ 50 C.F.R. § 17.40(e)(3) (2014).

⁵⁷ *Id.*; *see also* 16 U.S.C. § 1533(d) (conferring upon the Secretary the authority to exempt ESA takes that advance the overall conservation of a listed species).

Further, in responding to the President’s directive, FWS is in the process of proposing rules that would: (1) prohibit all commercial imports;⁵⁸ (2) restrict exports and interstate sale to “bona fide antiques”;⁵⁹ (3) limit sport hunters to two trophies, i.e., four tusks per year for import (replacing the old rule that allowed an unlimited number of tusks); and (4) shift the burden of proof for domestic sales from the government to the person claiming the exemption by requiring CITES pre-Convention or ESA certificates to accompany the commercial transaction.⁶⁰

These proposed regulations call into question longstanding regulatory assumptions and rules regarding the domestic ivory trade, as well as the seminal Eleventh Circuit Court of Appeals decision, *U.S. v. Grigsby*, in which the Court’s statutory construction greatly impaired the government’s ability to enforce violations under the AFECA.⁶¹ The FWS claims that finalization will “place a nearly complete ban on commercial trade in [African] elephant ivory” in the United States;⁶² however, several obstacles challenge the completeness of FWS’ rules.

E. Enduring Obstacles

Although requiring sellers (and by conveyance of title, buyers) to obtain CITES and ESA certificates through FWS for domestic ivory sales is a step in the right direction,⁶³ curtailing the wholesale slaughter

⁵⁸ “[E]xcept for certain items and purposes where the ivory item will not be sold, including sport-hunted trophies, ivory for law enforcement and scientific purposes . . . musical instruments, items in museums and other exhibitions, and items that are part of a household move or inheritance.”

⁵⁹ “[And items that are either] accompanied by an ESA permit . . . or [were] lawfully imported prior to listing in CITES Appendix I (1990 for African elephant) and with no restrictions on its use after import or under a CITES pre-Convention certificate.”

⁶⁰ CITES *supra* note 55, at 30,409; *see also* Director’s Order No. 210, *supra* note 55.

⁶¹ *U.S. v. Grigsby*, 111 F.3d 806, 816 (11th Cir. 1997) (construing “knowingly violates” as a “specific intent” requirement that the state must prove under AFECA); *see* LaFontaine et al., *supra* note 47, at 4 (noting that the specific intent standard has made prosecutions under AFECA “few and far between”).

⁶² U.S. Fish & Wildlife Serv., *USFWS Moves to Ban Commercial Elephant Ivory Trade: Questions & Answers*, <http://www.fws.gov/international/travel-and-trade/ivory-ban-questions-and-answers.html#30> (last viewed Dec. 12, 2014).

⁶³ *See* Allgood et al., *supra* note 25, at 72–73 (recommending several measures, such as reinstating the general intent standard in criminal prosecutions and limiting the sport trophy exception that FWS would later propose in 2014); *see also* CITES, *Trade in Elephant Specimens*, Res. Conf. 10.10/Rev. CoP16 (2013), available at <http://www.cites.org/eng/res/10/10-10R16.php> (directing the Secretariat to “identify those Parties that have unregulated internal markets for ivory,” such as the United States, and urging the adoption of licensing

of African elephants will require more than the promulgation of these rules.

Indeed, there are four fundamental obstacles to achieving such substantiate gains where the rules, even if fully adopted, fall short. First, the rules do not adequately close the sport trophy and antique exemptions because ESA/CITES certificates are based primarily on chain of title, rather than forensic analysis, and do not meet the Convention's verification, tracking, and communication requirements. In addition, retroactive CITES certificates have an "increasingly negative impact on the possibilities for properly enforcing the Convention through the creation of loopholes for illegal trade."⁶⁴ Second, assuming a forensic-analysis requirement were in place at the agency/individual permitting level, the funding necessary to achieve such enforcement priorities, including those which the CoP agreed to in 2013, is woefully inadequate.⁶⁵ Third, even a total domestic ban fails to contemplate Chinese demand.⁶⁶ Fourth and fundamentally, the rules do not provide for public outreach and education.⁶⁷ Recommendations to help address these problems will be discussed in Part IV, below.

II

INTERNATIONAL SHORTCOMINGS OF CITES

As a Party to CITES, in order to understand the problems with the new (and existing) U.S. domestic regulations, it is essential to first consider certain weaknesses of CITES in governing the international ivory trade.

CITES alone cannot curb international demand. International demand for ivory currently exceeds what can be supplied sustainably.⁶⁸ Ivory trade controls that were "imagined by the CITES parties to exist at the heart of the ivory importing [regime], and would justify the one-

and registration requirements to "regulate the domestic trade [of] raw and worked ivory" in such countries).

⁶⁴ CITES Res. Conf. 12.3, 1/Rev. CoP16 (2012), <https://cites.org/sites/default/files/document/E-Res-12-03R16.pdf>.

⁶⁵ LaFontaine et al., *supra* note 47, at 7.

⁶⁶ See Human Society Int'l., *Background on CITES and the International Trade in African Ivory*, HUMANE SOCIETY INT'L (Apr. 17, 2007), http://www.hsi.org/campaigns/dont_buy_buy_wild/african_ivory_trade.html.

⁶⁷ See Resolution Conf. 10.10/Rev. CoP16, *supra* note 63.

⁶⁸ CHRISTIAN NELLEMAN ET AL., *ELEPHANTS IN THE DUST: THE AFRICAN ELEPHANT CRISIS*, 70 (2013), http://www.unep.org/pdf/RRAivory_draft7.pdf.

off sales of ivory, have failed.”⁶⁹ As the level of disposable income continues to reach unprecedented levels, the demand for ivory, which, for example, the Chinese regard as a status symbol, is flourishing, while the consequences of their buying illegal ivory are largely unknown.⁷⁰ CITES lacks an independent mechanism through which the consequences of consumption can be communicated so as to reduce demand.

CITES’ approach to conservation is equally problematic. The fact that CITES “does not have any direct enforcement or implementation capacity” to control domestic trade⁷¹ is the “crux of the conservation problems for African elephants.”⁷² Such capacity is instead reserved to member states and their asymmetric ability to implement the legally binding resolutions and decisions adopted by the CoP.⁷³ In other words, there is no way that one State can ensure another State complies with the treaty.

CITES approach to conservation only works in developed countries that possess sufficient resources to enforce strict legislation.⁷⁴ Developing countries’ efforts to implement CITES’ trade restrictions, on the other hand, often results in the contrary by creating a “burgeoning illegal trade of the protected species.”⁷⁵ As an iteration of the collective action problem,⁷⁶ without some other competing incentive, CITES trade restrictions have the “perverse impact” of incentivizing developing countries to engage in behavior that is “antithetical to conservation of the protected species.”⁷⁷

Despite this and other shortcomings, the impact of a comprehensive U.S. domestic ivory ban would extend well beyond U.S. borders to

⁶⁹ *Ivory & Insecurity: Global Implications of Poaching in Africa: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 61–62 (2012) (statement of Dr. Iain Douglas-Hamilton, Executive Director, Wildlife Conservation Network).

⁷⁰ *Id.*

⁷¹ R.B. Martin et al., *Decision-making Mechanisms and Necessary Conditions for a Future Trade in African Elephant Ivory, Consultancy for the CITES Secretariat*, SC62 Doc. 46.4 Annex, 7 (May 24, 2012).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Stefan Carpenter, *The Devolution of Conservation: Why CITES Must Embrace Community-Based Resource Management*, 2 ARIZ. J. ENVTL. L. & POL’Y 1, 43 (2011).

⁷⁵ *Id.*

⁷⁶ See generally Christopher Napoli, *A Decentralised Approach to Emissions Reductions*, 7 CARBON & CLIMATE L. REV. 24, 28 (2013) (under the Author’s analysis, ivory is a common pool resource because exclusion is not feasible).

⁷⁷ Carpenter, *supra* note 74, at 43.

China and other major drivers of the crisis, “because the United States’ status as a global leader still carries significant weight on [the] issue.”⁷⁸ In other words, the United States can overcome the collective action problem unilaterally if responsive legislation is adopted and adequately enforced. Thus, serious attention must be afforded to U.S. domestic policy as an international engine for change. Domestic policy shall remain in focus throughout the analysis below.

III

U.S. DOMESTIC SHORTCOMINGS UNDER THE CITES PARADIGM

To the extent the U.S. domestic shortcomings of CITES are attributable to the international ones discussed above, identifying the shortcomings of U.S. domestic ivory policy must precede any analysis that aims to address them. This Part identifies loopholes and funding gaps as two primary areas within which the recommendations discussed in Part IV are given expression.

A. Domestic Loopholes

Hundreds of tusks are imported into the United States each year as sport-hunted trophies.⁷⁹ Notwithstanding the new domestic licensing rules, “it is difficult if not impossible” to determine an ivory object’s age, origin, or species, unless forensic and other tracking techniques are employed.⁸⁰ The reasons are as follows. First, forensic dating determines whether an object is antique (older than 100 years old) or pre-convention (pre-1990). Second, DNA analyses determine whether an ivory object was harvested from an Asian (Appendix I *or* II) as opposed to an African elephant (always Appendix I) or mammoth, as the trade in mammoth ivory is unregulated. Third, DNA analyses also determine the African elephant’s origin, which answers whether the animal was harvested from a sanctioned area or population. Closing these loopholes is indispensable to bolstering the normative imperative that killing living African elephants is wrong, both domestically and abroad, while impeding smuggler’s efforts to mix illegal with legal

⁷⁸ Allgood et al., *supra* note 25, at 30 (noting U.S. leadership in 1990 when its domestic trade restrictions prompted action from others around the world) (internal citation omitted).

⁷⁹ The Humane Soc’y. of the U.S., *An Investigation of Ivory Markets in the United States* 1–2, 13 (2002), http://www.humanesociety.org/assets/pdfs/Ivory_Trade_Report.pdf [hereinafter HSUS].

⁸⁰ *Id.* at 1 (HSUS study noting how ivory sellers frequently offered to provide fraudulent documents to HSUS investigators indicating that elephant ivory was mammoth ivory, that “new” ivory was “old” ivory, or that recently imported ivory was imported a long time ago).

ivory so as to confuse consumers about their choices and bypass government controls.

B. Funding Gaps

Of the entire 2014 Federal budget, only \$64.7 million was allocated for FWS' law enforcement program to investigate and prosecute wildlife, a mere fraction of the FWS' total budget.⁸¹ The 2015 budget provides only \$2 million over the 2014 level, which falls short by half of the additional funding FWS says it needs for effective wildlife tracking, forensic testing, investigations, and reducing market demand for wildlife products.⁸² With a caseload of over 13,500 cases spread amongst only 450 agents,⁸³ it is apparent that current FWS resources are already exhausted.⁸⁴ The notion that FWS could extend its law enforcement capabilities to adequately meet the EO's policy objectives, let alone those mandated by CoP16, has no basis in fact, especially in light of the INTERPOL rule of thumb that places the actual number of ivory offenses at an order of magnitude that is ten times higher than that reported by FWS.⁸⁵ In fact, according to a 2013 report from a D.C. government relations law firm,⁸⁶ "of particular concern is the marginal increase in the number of special agents. With the increased sophistication seen in today's wildlife trafficking networks, more special agents are needed at a greater number of ports of entry to effectively combat illegal activity."⁸⁷ Critically, budget cuts have forced the FWS to maintain pre-convention personnel levels, reducing the number of agents in its Forensics Laboratory.⁸⁸ Increased

⁸¹ Compare Dep't of the Interior, *Budget Justifications and Performance Information Fiscal Year FWS* [2015] 8 (2014), http://www.doi.gov/budget/upload/FY2015_FWS_Greenbook.pdf with Consolidated Appropriations Act of 2014, H.R. 3547, 113th Cong. (2014) (allocating \$1.4 billion overall to the agency).

⁸² *Id.* (FWS law enforcement budget needs to increase by: \$500,000 to "combat expanding illegal wildlife trafficking and support conservation efforts on the ground in Africa and across the globe"; \$1.2 million to "expand the capability that evidence collected through wildlife forensics will provide needed evidence for investigating and prosecuting criminal activity"; and "\$247,000 to support FWS special agents.").

⁸³ FWS, *Annual Report: Law Enforcement Program Facts and Figures*, 23 (2014).

⁸⁴ *Id.*

⁸⁵ Aliza Kempner, *The Ivory Crush: Trumpeting In A New Stage In Crime Fighting And Conservation*, GEO. J. INT'L L. (Dec. 7 2013).

⁸⁶ PIKE ASSOCIATES, <http://pikeassoc.com/aboutus.html> (last visited Dec. 23, 2015).

⁸⁷ Allgood et al., *supra* note 25, at 46 (quoting Memo from Jeffrey Pike, Pres., Pike Assocs. LLC).

⁸⁸ Darryl Fears, *Inspectors Catch Wildlife Smugglers but Fear the Sequester's Bite*, WASH. POST (Mar. 10, 2013), <http://www.washingtonpost.com/national/healthscience>

funding is essential to effecting all of the recommendations presented below.

IV RECOMMENDATIONS

This Part posits four recommendations that correct for these deficiencies: (1) require forensic-analysis and information sharing; (2) increase funding; (3) increase international pressure on nations with key ivory markets; and (4) develop public outreach initiatives.

A. Forensic Verification & Information Sharing

CITES was one of the first multilateral environmental agreements to provide for an information and monitoring system.⁸⁹ This system relies primarily on parties' self-reporting of trade records, which have proven increasingly unreliable.⁹⁰ Sophisticated criminal syndicates in the United Kingdom, Europe, and the United States increasingly exploit legal loopholes to obtain ivory. At the national level of enforcement by many signatory states, almost no ivory seizures are properly investigated, demonstrated by the fact that "forensic evidence is rarely, if ever, taken and analyzed, and accountable and transparent ivory stockpile management remain[s] elusive in most countries."⁹¹

In response, the CoP16 directed the adoption of adequate legislation and enforcement controls to prevent ivory that was part of legally exported trophies from being used for other purposes, and to ensure that these trophies remain in the possession of their owners for the purpose indicated by the CITES export permit.⁹² It also directed Parties to adopt proper tracking, identification, communication, and verification systems.⁹³ As such, adequate legislation requires enforcement controls that employ forensic technologies to: test seized ivory; verify CITES certificates of exemption; and consolidate such

/inspectors-catch—wildlife-smugglers-but-fear-the-sequesters-bite/2013/03/10/57e0f956-80ef-11e2-a350-49866afab584_story.html; see also FWS *About Us*, FWS Forensic Lab., (last visited Dec. 22, 2014), <http://www.fws.gov/lab/about.php>.

⁸⁹ Rosalind Reeve, *Wildlife Trade, Sanctions and Compliance: Lessons from the CITES Regime*, 82 INT'L. AFF. 881, 884 (2006).

⁹⁰ CITES, *supra* note 64, at 1 (observing that "false and invalid permits and certificates are used more and more often for fraudulent purposes and that appropriate measures are needed to prevent such documents from being accepted").

⁹¹ CITES, *ETIS Report on Traffic*, *supra* note 34, at 27.

⁹² *Id.* at 29.

⁹³ *Id.*

data into international databases to be shared by the international community.⁹⁴ Thus, it is incumbent that parties develop an interconnected database into which forensic data can be entered and ivory tracked.

South Africa, Zimbabwe, and Kenya⁹⁵ answered the call. They translated the CoP16's directives for a DNA collection and enforcement regime into the first wildlife-protection DNA database, the Rhino DNA Index System ("RhoDIS").⁹⁶ The RhoDIS database is based on the Combined DNA Index System, which the FBI uses to match a suspect's DNA to a crime scene.⁹⁷ By matching samples taken from seized horns with animal carcasses from national parks, reserves, game farms and zoos, RhoDIS represents an effort to ensure that individuals who imported horns as hunting trophies do not later sell them illegally as a faux pre-convention exemption.⁹⁸ RhoDIS has proven successful: as of 2014, it has developed the DNA profile of over 4,500 rhinos, helped in over 400 forensic cases,⁹⁹ and secured twenty-five convictions.¹⁰⁰

Regulatory regimes such as RhoDIS, help establish the extent to which ivory in illegal trade is derived from poaching, laundered under an exemption, or was leaked from one-off stockpiles. Arguably, an applicant's written statement that its ivory was acquired pursuant to an exemption does little more than to reduce into writing the pre-existing presumption that the ivory in the seller's possession was obtained legally. Evidently, FWS does not believe it would be "difficult for individuals engaged in commercial activities to provide the documentation necessary to demonstrate that their specimens were acquired prior to the Appendix I listing."¹⁰¹ FWS owes a duty under the

⁹⁴ See generally CITES Secretariat Report, CoP16 Doc 54.2 /Rev. 1, at 10, 11, <https://cites.org/eng/cop/16/doc/E-CoP16-54-02.pdf>.

⁹⁵ *Id.* at 14.

⁹⁶ See Craig Donovan, *Rhinos and the Illegal Horn Trade Top Cites Agenda*, 28 NAT. RES. & ENV'T, 51-53 (2014) ("allows authorities to identify individual rhinoceroses from blood, horn, and tissue and serves as a repository for this information").

⁹⁷ *Topic Update: Rhino DNA Database Leads to Poacher Arrests*, COUNCIL FOR RESPONSIBLE GENETICS, <http://www.councilforresponsiblegenetics.org/genewatch/GeneWatchPage.aspx?pageId=426&archive=yes> (last visited Dec. 23, 2015).

⁹⁸ See Donovan, *supra* note 96, at 53.

⁹⁹ Susanna Oosthuizen, *Many DNA Successes in Poaching War*, LOWVELDER (June 17, 2014), <http://lowvelder.co.za/200337/many-dna-succeses-in-poaching-war>.

¹⁰⁰ See COUNCIL FOR RESPONSIBLE GENETICS, *supra* note 97.

¹⁰¹ Revision of Regulations Implementing CITES, 79 Fed. Reg. 30,399, 30,411 (May 27, 2014) (to be codified at 19 C.F.R. pts. 10, 163, and 178) (indicates otherwise, as they found fraud to be commonplace in the domestic ivory market, even during a period in which there

treaty to determine whether an imported specimen is used “primarily for commercial purposes” or is otherwise CITES-compliant notwithstanding that determination made by the exporting MA.¹⁰² The fact that many CITES export certificates are based primarily on the representations of the exporter¹⁰³ requires that FWS adopt more aggressive measures to bridge the information disparity between Parties¹⁰⁴ and signal minimum standards of scrutiny to MAs.¹⁰⁵

Isotope and DNA testing would determine whether the ivory matches a time and origin profile of a one-off sale or other exemption criteria under CITES. A U.S. domestic regulation that requires forensic verification of a sample’s date and origin would: decrease domestic and international fraud; encourage greater uniformity in the standards of MAs; and provide local, federal, and international law enforcement with a growing inventory of data with which to monitor the global ivory trade.¹⁰⁶ At approximately \$100 per tusk, “DNA analyses are relatively inexpensive,” and are currently the only means by which an accurate determination of a specimen’s origin, date, and species can be made.¹⁰⁷ Forensic testing also promises to alleviate the financial burden for ETIS and other international monitoring groups by bolstering their collection efforts.¹⁰⁸ When compared to the costs associated with uncertainty, such as additional elephants being killed, the ability to launder ivory, unreliable tracking, difficulty with enforcement, and inadequate deterrents to would-be smugglers, the financial burden on the applicant is proportional to the ends served. In other words, the benefits of forensic testing more than justify the costs.

was no licensing requirements for domestic sales, and while other rules and standards were far more relaxed).

¹⁰² *Id.*

¹⁰³ ENVTL. INVESTIGATION AGENCY, *supra* note 30, at 7–8 (“Chinese export firm offers undercover EIA investigators government-sanctioned ivory export licenses by falsely declaring ivory ‘old stock’ acquired prior to CITES[.]”).

¹⁰⁴ Arthur G. Blundell & Michael B. Mascia, *Discrepancies in Reported Levels of International Wildlife Trade*, 19 CONSERVATION BIOLOGY 2020, 2024 (2005).

¹⁰⁵ See Reeve, *supra* note 89, at 888.

¹⁰⁶ Blundell & Mascia, *supra* note 104; NELLEMAN ET AL., *supra* note 68, at 70 (“Better information on the age and origin of ivory is essential to improving investigations, determining sources of ivory and smuggling routes, and strengthening international enforcement.”).

¹⁰⁷ See Samuel K. Wasser et al., *Assigning African Elephant DNA to Geographic Region of Origin: Applications to the Ivory Trade*, 101 PROC. NAT’L. ACAD. OF SCI. 14847, 14852 (2004).

¹⁰⁸ *Id.*

The United States' failure to implement such reporting and enforcement scheme undermines its legal obligations under Res. CoP16, which *inter alia*, requires parties to: determine the seized specimen's country of origin; report seizures to these countries; and coordinate transnational "follow up investigations" as collaborative law enforcement efforts.¹⁰⁹ Similar to China, the new U.S. domestic registration system is also based on chain of title and is susceptible to corruption,¹¹⁰ fraud,¹¹¹ uncertainty,¹¹² and exploitation due to a lack of accurate trafficking data.¹¹³ Forensic verification of a sample's date and origin discourages such fraud and uncertainty, and would provide state, federal, and international law enforcement with a growing inventory of data with which to track the movement of illegal ivory throughout the global supply chain.¹¹⁴

Not only do the FWS rules fail to require forensic verification of the agency's CITES certificates, they do not provide any information gathering or reporting mechanisms. As noted in Part III, DNA analysis and forensic techniques are indispensable to multilateral and sub-national monitoring and enforcement efforts, because they offer the only means by which seized or sampled ivory can be verified as CITES-compliant. In other words, date/location analysis is able to determine whether the ivory item was sold legally in a one-off sale or whether the item pre-dates the convention (1990). Parties seeking to import tusks under a trophy exemption would submit sample specimens to FWS laboratory for analysis. The tusks' DNA would be analyzed, assigned a unique identifier and cataloged into a database. Parties seeking to trade raw or worked ivory under any exemption, retroactive (i.e., following but prior to interstate trade) or otherwise, must establish that their item has not been limited to non-commercial use as a trophy, originated from a non-sanctioned source, or harvested from a non-exempt/post-Convention animal.

¹⁰⁹ See CITES, INTERPRETATION AND IMPLEMENTATION OF THE CONVENTION SPECIES TRADE AND CONSERVATION RHINOCEROSSES: REPORT OF THE SECRETARIAT, 14 (2013), <https://cites.org/eng/cop/16/doc/E-CoP16-54-02.pdf>.

¹¹⁰ See ENVTL. INVESTIGATION AGENCY, *supra* note 30 (2008).

¹¹¹ GABRIEL ET AL., *supra* note 21, at 2.

¹¹² See CITES, *supra* note 109.

¹¹³ See Reeve, *supra* note 89, at 884 ("[A] shortcoming [of CITES] is the unreliability of wildlife trade records.").

¹¹⁴ See generally Press Release, CITIES, CITES Standing Committee (SC65) Conclusions: a Focus on Front Lines, (July 14, 2014), http://www.cites.org/eng/news/pr/2014/SC65_focus_on_the_front_lines.

All CITES certificates providing for commercial use should at least require isotope testing to verify the year of the death, in addition to the new permitting requirements. Where necessary, origin analysis would also be conducted. If a submitted sample fails the verification process, the parent item could then be impounded pending further investigation.¹¹⁵ From a prosecutorial perspective, the interdiction event inherently implicates the submitter as a potential suspect and provides a necessary starting point from which investigators can pursue civil or criminal prosecution under one of the domestic ivory Acts.¹¹⁶ Such prosecutions are given force by the new rules, which shift the burden back to the defendant; thus the government would need only prove general intent to prevail under AfECA.¹¹⁷

In sum, forensic testing, collecting and tracking requirements would not only advance the CoP16's commitment to implement "DNA-based and forensic identification techniques for sourcing and aging ivory,"¹¹⁸ but would increase the effectiveness of law enforcement. Despite the record high seizures between 2009 through 2011, there were almost no successful investigations of the criminals behind these transactions.¹¹⁹ In fact, forensic evidence was not collected or analyzed so as to even ascertain the origin of the ivory it seized, let alone communicate seizure activities to other countries along the supply chain in a timely manner.¹²⁰ Without collaborative law enforcement that has "the capability to bridge Africa and Asia along the primary trade routes," it is doubtful that the global trade in illicit ivory will ever be curtailed.¹²¹ As such, forensic testing helps to close U.S. domestic loopholes that undermine the law enforcement and normative imperative that commercial use of post-convention elephant tusks is wrong both

¹¹⁵ See 16 U.S.C. § 1540(e)(4)(A) (2012) (wildlife possessed or transferred in violation of the Convention, ESA, or its regulations, "shall be subject to forfeiture").

¹¹⁶ LaFontaine et al., *supra* note 47, at 5; see also 16 U.S.C. §§ 3371–3378 (2015).

¹¹⁷ LaFontaine et al., *supra* note 47, at 5.

¹¹⁸ CITES, *Monitoring of Illegal Trade in Ivory and Other Elephant Specimens*, Decisions of the Conference of Parties, CoP16, 20 (2013), <http://www.cites.org/eng/dec/valid16/216>.

¹¹⁹ Milliken, *supra* note 22, at 12 ("Available data suggest that very few large-scale ivory seizures result in successful investigations or arrests (only 9 out of 76 cases reported to ETIS indicated that suspects had been arrested), but even then judicial failure results in almost no convictions of the criminals behind these transactions.").

¹²⁰ *Id.*

¹²¹ See CITES, INTERPRETATION AND IMPLEMENTATION OF THE CONVENTION SPECIES TRADE AND CONSERVATION ELEPHANTS MONITORING OF ILLEGAL TRADE IN IVORY AND OTHER ELEPHANT SPECIMENS: ETIS REPORT OF TRAFFIC 23 (Mar. 2013), <https://www.cites.org/sites/default/files/eng/cop/16/doc/E-CoP16-53-02-02.pdf>.

domestically and abroad, and that governments have the power to require decisive answers to key enforcement questions.

B. Adequate Funding

The meager \$2 million increase from 2014 to 2015 for FWS' law enforcement budget is insufficient to match the scale of the FWS' revised policy objectives. Even if the new regulations were not flawed, the marginal increase to \$67 million simply cannot carry the rules to fruition. Torrents of new CITES applications will overwhelm the agency's already strained resources. Regulations that properly address these flaws require far more from the Appropriations Committee, especially in light of the budgetary resources that are appropriated to other agencies that contend with crises of proportional magnitude.¹²²

Despite their necessity, better national certification and monitoring techniques cannot adequately reduce demand alone. While increased funding must also augment governmental and NGO efforts to reduce consumer demand, FWS and USAID must enhance their support for urgently needed park and wildlife protection efforts in Central Africa and other range states, through support for park rangers and park guards and law enforcement training programs. Finally, the United States should work to improve intelligence sharing and cooperation through evidence gathering. Together, strategic increases to the FWS budget provide the necessary means by which the forensic testing program, advocated above, as well as increased sanctions, discussed immediately below, might be implemented.

C. Increase International Pressure

While China remains the key for stopping the growing poaching crisis facing Africa's elephants, Thailand has the largest unregulated domestic ivory market in the world and consistently fails to meet

¹²² *Compare Ivory and Insecurity: The Global Implications of Poaching in Africa: Hearing Before the S. Comm on Foreign Rel.*, 112th Cong. 11 (2012) [hereinafter *Ivory Hearing*] (indeed, the "[i]llegal wildlife trade in the 21st century has an estimated value of \$7.8-\$10 billion per year," making it the "fifth-largest illicit transnational activity worldwide, after counterfeiting and the illegal trades in drugs, people, and oil"), with U.S. DRUG ENFORCEMENT ADMIN., *DEA Staffing & Budget*, <http://www.dea.gov/about/history/staffing.shtml> (reporting 5249 special agents and \$2.882 billion in 2014), and SHAWN REESE, CONG. RESEARCH SERV., RL34603, *THE U.S. SECRET SERVICE: HISTORY AND MISSIONS*, 4 (2014), <http://www.fas.org/sgp/crs/homesec/RL34603.pdf> (reporting \$782 million for domestic and international operations, forensic support, information integration and technology transformation).

CITES requirements for internal trade in ivory.¹²³ In other words, where China's problem involves public ignorance,¹²⁴ Thailand's problem involves an inept law enforcement apparatus. Each problem requires a different international response, as discussed below.¹²⁵

The threat of trade sanctions prevents the exploitation of endangered or threatened species.¹²⁶ As a preliminary matter, the U.S. Court of International Trade maintains exclusive domestic jurisdiction over trade embargoes resulting from wildlife protection laws. In considering wildlife trade restrictions, it is critical to distinguish between import prohibitions and sanctions. The ivory ban is an example of an import prohibition because it bans a product that has a "direct nexus to an environmental harm," here the African elephant.¹²⁷ Sanctions by contrast ban unrelated products for the purpose of influencing a foreign country's policies or actions.¹²⁸ Because the United States imports only a fraction of the world's ivory compared to China, trade restrictions against Thailand and other target countries would be in the form of a sanction.

The Pelly Amendment ("Pelly") is the current instrument through which the United States could impose sanctions on Thailand. Pelly was designed to prevent trade in endangered species, whether or not those species originated in the home country.¹²⁹ In other words, the United States can use Pelly sanctions in light or in despite of CoP resolutions and Convention procedures. Pelly authorizes sanctions against any nation that "diminishes the effectiveness" of any wildlife conservation program "for endangered or threatened species."¹³⁰ Once a determination is made by the U.S. Secretary of Commerce or the Interior that a Party's actions have "diminished the effectiveness of an

¹²³ See *Ivory Hearing*, *supra* note 122, at 53 (statement of Ginette Hemley, Senior Vice President, Conservation Strategy and Science, World Wildlife Fund and Tom Milliken, Elephant and Rhino Leader, TRAFFIC).

¹²⁴ Steve Charnovitz, *Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices*, 9 AM. U. J. INT'L L. & POL'Y 751, 756 (1994).

¹²⁵ See GABRIEL ET AL., *supra* note 21.

¹²⁶ See generally Associated Press, *Canada Bans Most Seal Kills After Big Protests in Europe*, N.Y. TIMES (Jan. 1, 1988), <http://www.nytimes.com/1988/01/01/world/canada-bans-most-seal-kills-after-big-protests-in-europe.html>.

¹²⁷ Charnovitz, *supra* note 124, at 756.

¹²⁸ *Id.*

¹²⁹ Fishermen's Protective Act of 1967, Pub. L. 90-578, 82 Stat. 1108 (1968), as amended by Pub. L. 95-376, 92 Stat. 714 (1978) (codified at 22 U.S.C. § 1978 (1994)); see also Ltr. from Sec. of Interior to Pres., Sept. 7, 1993, at 1.

¹³⁰ See 22 U.S.C. § 1978(a)(1),(2) (2012).

international treaty, a certification to the President is required, which allows the discretionary imposition of sanctions.”¹³¹

Under the AfECA, the Secretary could determine that Thailand’s domestic loopholes do not adhere to the CITES Ivory Control System, such that it is “diminishing the effectiveness of an international program for endangered or threatened species [CITES].”¹³² Pelly has proven effective, at least indirectly, because the threat of trade sanctions have often caused the problem to be addressed before such unilateral action is actually taken. However, Pelly’s major strength is also its weakness, as it bypasses CITES’ processes and multilateral cooperation.

A possible improvement and instrument for semi-unilateral sanctions is the Targeted Use of Sanctions for Killing Elephants in their Range Act (“TUSKER”) (proposed in September 2014), which would amend the AfECA to “impose trade sanctions against countries involved in illegal ivory trade.”¹³³ If TUSKER is enacted, the identification of a country by the CITES Standing Committee as a “country of primary concern,” (a country is a significant source or transit or destination point for illegal ivory trade) triggers Pelly certification with respect to that country.¹³⁴ In other words, if consultations with a government are not “satisfactorily concluded within 90 days or if a government refuses to enter into consultations,” the President shall direct the Secretary to prohibit the importation of “wildlife products” from: China, Kenya, Malaysia, Philippines, Thailand, Uganda, the United Republic of Tanzania, and Vietnam.¹³⁵ Sanctions are critical to U.S. ivory policy because they deincestivize nation-state behavior that collectively undermines U.S. efforts by addressing demand from the top-down; however, sanctions must also

¹³¹ Joseph R. Berger, *Unilateral Trade Measures to Conserve the World’s Living Resources: An Environmental Breakthrough for the GATT in the WTO Sea Turtle Case*, 24 COLUM. J. ENVTL. L. 355, 393 (1999).

¹³² 16 U.S.C. § 4242 (2012); *see also* 22 U.S.C. § 1978(a)(2) (2012) (When the Secretary of the Interior “finds that nationals of a foreign country, directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species, the Secretary making such finding shall certify [such] to the President.”).

¹³³ TUSKER Act, H.R. 5454, 113th Cong. (2014).

¹³⁴ *Id.*

¹³⁵ Press Release, CITES Standing Committee (SC65) Conclusions: Roll Out of Wildlife Targeted Actions to Strengthen Enforcement and Conservation (July 14, 2014), http://www.cites.org/eng/news/pr/2014/SC65_focus_on_the_front_lines.

accompany multilateral cooperation, as well as education and stakeholder initiatives that combat rising demand from the bottom-up.

D. Education Initiatives

Pressure by CITES nations against private actors who are directly involved in illegal wildlife trade, or who facilitate such trade, have proven effective.¹³⁶ NGOs can greatly influence consumer demand by linking negative public perceptions toward the killing of wildlife with consumer demand, through NGO brokered labeling agreements, U.S. government labeling laws, UN resolutions, and public media and outreach campaigns.¹³⁷ For example, Sabena, the (former) Belgian national airline company, stopped transporting “laundered” shipments of ivory from Burundi to Belgium after intense public pressure by several multinational NGOs, including the WWF.¹³⁸ Another example occurred when the U.S.-based NGO Earth Land Institute (“ELI”) confirmed reports that the largest U.S. tuna company, Bumble Bee Tuna, was sourcing illicitly caught tuna from Thai canneries, then fraudulently obtaining dolphin-safe labels.¹³⁹ ELI launched a withering public outreach campaign¹⁴⁰ that compelled Bumble Bee to agree to an intensive monitoring program that would allow ELI monitors on Thai ships to conduct forensic analysis of the fish haul.¹⁴¹ Within a year, all the canneries in Thailand were certified dolphin-safe and dolphin deaths plummeted.¹⁴²

¹³⁶ See *infra* notes 139-42.

¹³⁷ Ian Baird & Noah Quastel, *Dolphin-Safe Tuna from California to Thailand: Localisms in Environmental Certification of Global Commodity Networks*, ANNALS OF THE ASS'N OF AM. GEOGRAPHERS, 101:2, 337, 338-49 (2011), <http://academia.edu/1049223/Dolphin-Safe-Tuna-from-California-to-Thailand-Localisms-in-Environmental-Certification-of-Global-Commodity-Networks>.

¹³⁸ Kieth Lindsay, *Africa's Ivory Exchange Shuts Down*, 1533 NEW SCIENTIST, 48-49 (Nov. 6, 1986), https://books.google.com/books?id=beBFR2Kyg3oC&pg=PA24&lpg=PA24&dq=Africa's+Ivory+Exchange+shuts+Down&source=bl&ots=oJaLroX6sq&sig=SimsKIaUI1q4JmyFyJZyfQo6wac&hl=en&sa=X&ved=0CCAQ6AEwAGoVChMIooWiv5_NyAIVSS2ICh3EPQy#v=onepage&q=Africa's%20Ivory%20Exchange%20shuts%20Down&f=false.

¹³⁹ Barry Meier, *A New Storm Erupts Over Saving The Dolphins*, N.Y. TIMES, Dec. 8, 1990, <http://www.nytimes.com/1990/12/08/news/a-new-storm-erupts-over-saving-the-dolphins.html>.

¹⁴⁰ *Id.* (ELI took out newspaper ads urging “a consumer boycott of Bumble Bee tuna”).

¹⁴¹ Baird & Quastel, *supra* note 137, at 334-45 (identifying marks appear on the necks of tuna of properly caught fish but not on fish caught using the banned method).

¹⁴² *Id.*

The initial period of success (CITES 1991-2000) had much to do with similar information sharing regimes between NGOs, governments, and the media. Once the public began seeing the mass destruction and brutal slaughtering of innocent elephants, a normative invocation immediately defined the public discourse. At one time, over 40% of commercials played in the United States in 1989 were ads calling for the wholesale banning of ivory and the prohibition of elephant poaching.¹⁴³ The fact that such intense public focus could be achieved in the United States before the proliferation of far-reaching telecommunication breakthroughs suggests that similar levels of public attention could be achieved or exceeded today, especially in light of China's burgeoning middle class who increasingly enjoy such technological innovations. To the extent that globalism has streamlined channels of international ivory commerce and exacerbated the problem, it has also provided an enormous communication apparatus through which information campaigns can travel to more people than ever before.

Along these communication channels, well-conducted and targeted awareness campaigns are necessary to reduce demand.¹⁴⁴ Any trade ban should be supplemented by public outreach and education because “[u]nless elephants have preservation value as expressed by people’s willingness to prevent them from going extinct, the elephant is most likely to remain a species under threat of extinction.”¹⁴⁵ Public education can also help dispel misconceptions people may have about the ivory trade and its connection to elephant welfare, enabling them to become more informed consumers who would decrease demand. For example, one survey found that 70% of Chinese consumers did not know that elephants were killed for ivory; “people thought elephants lose tusks the way people lose teeth.”¹⁴⁶ Education campaigns provide the necessary normative and factual landscape in which all other policy recommendations presented in this paper are given their fullest effect.

For a policy to truly succeed in the absence of a strong centralized enforcing body, which is the case with CITES, a normative shift must

¹⁴³ Douglas Chadwick, *The Fate of the Elephant*, 431–32 (1994).

¹⁴⁴ NELLEMAN ET AL., *supra* note 68, at 70.

¹⁴⁵ See G. Cornelis van Kooten, *Elephant Economics in the Rough: Modeling Ivory Trade*, 19 (Oct. 25 2005), <http://citeserx.ist.psu.edu/viewdoc/download?doi=10.1.1.379.207&rep=rep1&type=pdf>.

¹⁴⁶ GABRIEL ET AL., *supra* note 21, at 16; see Alexandra Wexler, *Chinese Demand Revives Ivory Trade*, WALL ST. J., Sept. 20, 2011, <http://www.wsj.com/articles/SB10001424053111904106704576580020012406078>.

communicate changing societal attitudes towards a particular behavior or custom. History has proven that transforming the public's perception has the potential to outcompete economic incentives at the grassroots level.¹⁴⁷ As such, public outreach campaigns are the cornerstone of successful wildlife management efforts and are indispensable to U.S. conservation policy.

CONCLUSION

The United States has the unique opportunity to again lead the vanguard of unilateral action against the international illegal ivory trade, but only if the current rule proposals incorporate the need for forensic verification, better monitoring and record keeping, as well as provide for a plan on how to consolidate new and existing data collection and law enforcement efforts into a single, reliable, and comprehensive database that would be made available to the international community. Realistic funding would allow FWS to implement an effective registration and tracking system domestically in the U.S., and fund public outreach and law enforcement campaigns abroad. Lobbying efforts should center on passing TUSKER because its sanctions are in light of—rather than in spite of—Standing Committee decisions, which legitimizes CITES and provides a model for other countries to adopt. Governmental efforts should align with NGO groups to promote public outreach.¹⁴⁸ Adoption of these recommendations would stimulate bilateral action and serve as the African elephant's best chance of survival. Indeed, at this critical stage, the consequences of under-enforcement are tantamount to no enforcement actions being taken at all.

¹⁴⁷ *Id.*

¹⁴⁸ *See* Pelly Amendment, *supra* note 129 (explaining Secretary's decision to recommend sanctions not based on Standing Committee determinations but on independent assessments by U.S. officials).