IN THE MATTER OF STOP IVORY

OPINION

A. Introduction and executive summary

1. In this Opinion we seek to address some potential legal mechanisms by which the group "Stop Ivory" might effectively lobby for and achieve a ten-year moratorium on all domestic and international trade in ivory.

2. We have been asked specifically to address a number of questions. For presentational purposes, it is convenient to identify these questions as Questions 1 to 5, as follows. We also give a very brief summary response, which is addressed in more detail below.

(1) Questions and executive summary

3. Question 1: What are the options for implementing a ten-year moratorium on *international* trade in ivory under the existing CITES regime? In particular:
   3.1. Is it possible for CITES member states to agree a further moratorium on all international trade for 10 years?
   3.2. Is it possible to amend the agreement reached by CITES member states in 1989, to remove or amend the 'Somali amendment' which permits application by member states to participate in one-off sales?
   3.3. For each, what are the options and consequences for member states which refuse to agree?

   Answer 1:

   It is indeed possible for States Parties to CITES to agree such a moratorium. We have discussed the possible steps in Section F(1) below. In addition to proposing a formal re-

listing under CITES, another route which could helpfully be deployed is to advocate for the agreement of a non-binding Resolution. This Resolution should be framed so as to make clear that further trade in ivory for a period of at least 10 years would be 'detrimental to the survival of the species.' States practice would then enable the case under international law for treaty amendment to be made more cogently at the next available opportunity.

4. Question 2: Would it be possible to create a new "Appendix" under CITES, under which species that are endangered in certain member states (but not as a whole) could be categorised; and for certain specific action (such as a complete ban for a specified period) to be attributed to those species? If so, how might this be implemented and what would the implications be?

   Answer 2

   This is a similar suggestion to the legislation that has been adopted at a European level, which is summarised in section F(5) below. That legislation permits Member States of the European Union to adopt more severe domestic measures to respond, on a case by case basis, to identified threats to wildlife outside of the formal listing system between Appendices I and II to CITES. We do not see why legislative amendments could not be drafted for CITES itself to give effect to a similar mechanism.

5. Question 3: What are the alternative options to CITES for achieving a ten-year moratorium on international trade, and what are their respective merits?

   Answer 3

   The alternative legal regimes that have a potential impact in this area have been identified in Sections D(2) and D(3) below. While there is no harm in pursuing suggested changes in these areas in tandem, we remain of the view that the best prospect for securing Stop Ivory's objectives lies in a combined approach to the full and effective implementation of elephant protection measures under the auspices of CITES. This should involve the dual approaches of advocating changes to the international law regime and domestic law

regimes, particularly in the range states and those States with the greatest annual demand for raw ivory.

6. Question 4: What are the options for implementing a complete moratorium on *domestic* trade for 10 years; and what are their advantages and disadvantages? In particular:

   6.1. Is it possible for CITES member states to agree between themselves a moratorium on all domestic trade for 10 years?
   6.2. Is it possible for decisions or rulings made under CITES to have direct effect – and if so, how could they be used to ban domestic trade in each member state?
   6.3. For each, what are the options and consequences for member states which refuse to agree?
   6.4. Is it possible to increase CITES' power to enforce (by itself or through a third agency) breaches of decisions/directions made under CITES, or to implement sanctions? How would this work?

   Answer 4

   The answers are as follows:

   (1) Yes.
   (2) No, unless the constitutional arrangements in the domestic State in question recognise conventional public international law as being directly applicable in its domestic legal order.
   (3) The problem of practical enforcement is a very real one. It is addressed below.
   (4) To an extent. Some practical suggestions are identified below.

7. Question 5: what are the alternative options to CITES in a domestic sphere, and what are their respective merits? Is there another body capable of operating / would a new body be more appropriate than CITES to implement a ten-year moratorium?

   Answer 5

We suggest some alternative targets for proposed reform in the Advice below. Ultimately, if a State Party to CITES is determined to avoid its international obligations towards the elephant population, it is likely that it can do so without practical censure. However, we consider that preparation of a form of "health check" document, by which the effectiveness of domestic law regimes can be assessed and "graded" for compliance, would bring considerable public pressure to be brought to bear on those domestic law regimes which fail to give effect to their international law obligations.

(2) Structure of the Advice

8. In this Advice, having set out the factual background to the issue, and summarised the existing legal regime, we shall then recite some of the recent proposals for enhanced protection of elephants which have recently been made. We will then seek to analyse the relevant issues. We consider that the questions raised identify a number of common themes that can conveniently be addressed before giving a specific answer to the individual questions. The issues are identified by reference to the following topics:

   8.1. What amendments can be made to CITES to achieve Stop Ivory's Objectives?
   8.2. Would any Treaty amendments have direct effect?
   8.3. What other sources of "soft law" or other norms of public international law might be brought to bear?
   8.4. Can other inter-governmental systems and Non-Governmental Organisations assist?
   8.5. Is there any scope for invoking EU law and/or international trade law under the auspices of the World Trade Organisation?
   8.6. What changes might be made to domestic legal systems to assist?

9. Finally, we shall turn to give our more detailed, direct answers to Questions 1 to 5 above.

B. Factual Background

(1) The illegal Ivory Trade

10. The illegal trade in ivory and the poaching of elephants (the "Ivory Trade") continues to increase on a massive and unsustainable scale across Africa. Indeed, 2011 was defined as the *"annus horribilis"* for elephants.[1] Since 2010, the Ivory Crisis has gravely worsened – over 17,000 elephants were illegally killed in 2011; and almost certainly significantly more were killed in 2012. Killings have become more professional and contraband ivory shipments larger.

11. A system for Monitoring the Illegal Killing of Elephants ("MIKE") became operational in 2002 with the objectives of measuring levels and trends of illegal elephant killing, monitoring trends and determining the factors influencing the trends. The system's monitoring across 45 MIKE sites in Africa and 18 sites in Asia has established continuing increases in the levels of illegal killing of elephants since 2006. 2011 saw the highest levels of poaching since 2002, when MIKE began collecting data.[2]

12. The Elephant Trade Information System ("ETIS") was mandated by the CITES parties in 1997. It is principally a database, which is managed by TRAFFIC on behalf of the CITES parties. It contains details of all recorded seizures of elephant specimens worldwide since 1989. ETIS data indicates that illegal trade in ivory has progressively escalated since the Conference of the Parties to CITES ('CoP14') in 2007. It has now reached its highest level in at least the last 16 years. This increase is reflected across both metrics of the weight of illicit ivory in trade and the number of illicit ivory trade transactions occurring globally each year.[3]

13. Several significant incidents of elephant poaching and related illegal trade in elephant ivory came to the attention of the CITES Secretariat in the course of 2012. In particular:

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[1] Rhodes, A. "The Illegal Ivory Trade and the Poaching Crisis: An Analysis and a Proposal in Response to the Call for a New International Approach," 1 August 2012, at [5], quoting Tom Milliken, elephant expert for the wildlife trade monitoring network TRAFFIC.

[2] "Monitoring of Illegal Trade in Ivory and Other Elephant Specimens: Report of the Secretariat": CITES 16th Conference of the Parties (2013), Document CoP16 Doc. 53.2.1 ("Cites 16 – Report of the Secretariat") at [3].

[3] "Monitoring of Illegal Trade in Ivory and Other Elephant Specimens: ETIS Report of TRAFFIC": CITES 16th Conference of the Parties (2013), Document CoP16 Doc 53.2.2 ("Cites 16 – ETIS Report") at [47].

13.1. The illegal killing of a large number of elephants for their ivory in February 2012 in Bouba N'Dijda National Park, in northern Cameroon, by heavily armed and well organised groups;[4]

13.2. The illegal killing of 22 elephants in the Garamba National Park, in the Democratic Republic of Congo, in April 2012;[5]

13.3. An attack on the headquarters of the Okapi Wildlife Reserve in the Democratic Republic of Congo, where staff were attacked by heavily armed rebels (known to be involved in poaching, as well as illegal mining in the Reserve) on 24 June 2012;[6]

13.4. The murder of five park rangers in Zakouma National Park, Chad on 3 September 2012. A sixth park ranger remains missing since the attack.[7]

14. The resurgence in the Ivory Trade has occurred despite the establishment of the existing international framework under CITES.

(2) Effect of the increase in the illegal ivory trade

15. The increase in the illegal trade in ivory is now a true crisis. In the decade before the 1989 ban, the number of African elephants across the continent fell by as many as 600,000, resulting in a decrease in the continental population from an estimated 1.3 million to an estimated 600,000. Many populations, particularly in Western Africa, are now extremely small and fragile. The loss of just a few elephants from a single population can have a severe impact on the viability of that population.[8]

16. The rise in levels of illegal killing and the dynamics surrounding it are worrying, not only for the small and fragmented elephant populations that could face extermination, but also for previously secure large populations. Data indicates that the proportion of illegally

[4] http://www.cites.org/eng/news/pr/2012/20120228_elephant_cameroon.php

[5] Cites 16 – Report of the Secretariat, at [6].

[6] Cites 16 – Report of the Secretariat, at [7].

[7] Cites 16 – Report of the Secretariat, at [8].

[8] "Consideration of Proposals for Amendment of Appendices I and II" [Withdrawn Amendment]. *16th Conference of the Parties*. CoP16 Prop. 12, Page 1. March 2012, at [4.4].

killed elephants (known by its acronym 'PIKE') is now for the first time above the threshold at which elephant populations are likely to be in decline across all four regions.[9] Moreover, the trade in ivory has contributed significantly to the contraction of the range of the species. Pressure from poaching has, in many areas, either eliminated entire elephant populations or reduced population densities to very low levels.[10]

17. The implications of the destruction of Africa's elephants go far beyond the loss of one of the world's most charismatic species. It is evident that, in many protected areas, conservation can no longer be seen as an issue for environmental authorities alone. Poaching and illegal trade in wildlife are happening on a scale that poses an immediate risk both to wildlife and to people and their livelihoods.

18. Elephants play a vital role in the ecology of their habitations. For example, their feeding habits open up thick bush and forest for grazing species; they also maintain waterholes and keep open forest pathways used by wildlife and humans.[11] Elephants are also important seed dispersal agents for a number of species. African elephants disperse seeds from at least 355 plant species, some of which are exclusively or almost exclusively dispersed by elephants, over vast distances. As a recent study in 2011 notes,[12] "large numbers of forest elephants ranging over large areas may be essential for ecosystem function. The loss of elephants will have important negative consequences for the ecological trajectories of some plant species and whole ecological communities, yet the conservation status of forest elephants is catastrophic in Asia and rapidly becoming so in Africa due to hunting and other conflicts with people."[13]

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[9] *Ibid*., at [4.4]; SC62 Doc 46.1

[10] *Ibid*., at [4.5].

[11] *Ibid* .,at [3.5].

[12] Ahimsa Campos-Arceiz and Steve Blake, "Megagardeners of the forest – the role of elephants in seed dispersal," *Acta Oecologica*, Volume 37, Issue 6, November–December 2011, pages 542–553.

[13] Article accessed at: http://faculty.washington.edu/timbillo/Readings%20and%20documents/CO2%20and%20Forests%20readings/Campos%20Arceiz%202011%20Elephant%20seed%20dispersal.pdf

19. People's lives and jobs are at stake. The countries in which African elephants live continue to suffer the economic and administrative burden of dealing with the Ivory Trade, and the crisis impacts on the foundation of economic and social stability in those African countries which host herds of elephants - the "Range States."

(3) Cause of the increase in the illegal ivory trade

20. It is now recognised that the Ivory Trade is driven by demand for ivory as a consumer good; and is controlled by international criminal networks involved in human trafficking, drugs, the corruption of Governments and funding armed militias.[14] Those instructing us have referred to this as the "Ivory Crisis".

21. The sharp upward trend is being driven by a major increase in the weight of ivory being moved in the >100kg weight class.[15] Indeed, in 2011 alone, at least 14 seizures were over 800kg in size, and over 20 tonnes of ivory were seized en route to either Thailand or China.[16] The increasing pattern of large movements of ivory represents the involvement of international criminal syndicates in the trade operating through sophisticated networks that link Africa with Asia.[17]

22. The recognition of China as a legitimate buyer of ivory in 2008 appears to have reinvigorated the domestic market demand for ivory in that country, thus fuelling an increase in illegal smuggling as well.[18] The Wall Street Journal noted in an article entitled "Chinese Demand Revives Ivory Trade" dated 20 September 2011 that there had been at least a 100% increase in the price of ivory in China between 2008 and 2011.[19] An article in *The Times* described "strong evidence that the country's illegal ivory market now

[14] Cites 16 – ETIS Report, at [44].

[15] Cites 16 – ETIS Report, at [44].

[16] "Consideration of Proposals for Amendment of Appendices I and II" [Withdrawn Amendment]. *16th Conference of the Parties*. CoP16 Prop. 12, Page 1. March 2012, at [6.4].

[17] Cites 16 – ETIS Report, at [44].

[18] Gettleman, Jeffrey, *The New York Times* (3 September 2012), "Elephants Dying in Epic Frenzy as Ivory Fuels Wars and Profits".

[19] Article accessed at: http://online.wsj.com/article/SB10001424053111904106704576580020012406078.html

dwarfs its legal counterpart by a ratio of nine to one and routinely exploits the licensed trade in elephant tusk as cover for grand-scale smuggling and dealing."[20]

(4) The specific issue of Chinese demand as a factor in the illicit trade

23. The two countries most heavily implicated as destinations for illicit trade in ivory are China and Thailand.[21] Over the last three years, in terms of frequency and scale, the Chinese market has been more heavily implicated in illicit trade in ivory than any other country. Indeed, China remains the single most important contemporary player in the illicit trade in ivory.[22]

24. In China, ivory factories produce an array of elaborate carvings as well as figurines and smaller items. Guangzhou and Fuzhou in southern China are cities famous for their ivory carvers. The surrounding countryside is being converted into factory estates and high-rise housing to accommodate thousands of workers in the business.[23] Indeed, the number of elephant ivory items seen for sale in Guangzhou rose by about 50% from 4,406 in 2004 to 6,437 in 2011.[24]

25. China introduced domestic trade regulations in 2004, whereby all ivory pieces weighing less than 50g must be accompanied by a paper CITES permit which should be displayed alongside the piece; anything over 50g must have a photographic ID card which must also be displayed alongside the piece.[25]

26. However, a number of analyses between 2004 and 2008 have indicated that China's control system remained flawed. These have described the adoption of the certification

[20] "Legal trade in ivory for China 'being used as a cover for poaching'," 22 May 2013, at http://www.thetimes.co.uk/tto/environment/article3771149.ece

[21] Cites 16 – ETIS Report.

[22] Cites 16, - ETIS Report, at [28]

[23] Martin, E., Vigne, L. "The Ivory Dynasty: A Report on the Soaring Demand for Elephant and Mammoth Ivory in Southern China". *Elephant Family*. 2011, ("The Ivory Dynasty") at p.5.

[24] The Ivory Dynasty, at p.14.

[25] The Ivory Dynasty, at p.14.

system as patchy, with some merchants, including many large-scale traders, continuing to deal in ivory from illicit sources.[26] Indeed, there is a large illegal trade in retail ivory items without ID cards. For example, the authors of a recent study have estimated that 63% of the items counted in a sample in Guangzhou and Fuzhou did not have an ID card in the shop.[27]

27. The presence of hundreds of thousands of Chinese expatriates in Africa has increased the efficacy of the ivory market, with Chinese nationals able to place orders directly from poachers themselves. Indeed, in 2011 more than 150 Chinese citizens were arrested across Africa and, according to the Kenya Wildlife Service, 90% of ivory seized at Kenya's airports involves Chinese citizens.[28]

(5) "One-off sales" and illicit trade

(a) The 1999 "one-off" ivory sale

28. In 1999, a "one-off" sale of ivory stocks took place from the three Appendix II African countries to Japan. This sale was authorised by the CITES Secretariat as an approved trading partner. Namibia sold 12,367 kg of ivory; Botswana sold 17,171 kg of ivory and Zimbabwe sold 19,900 kg. The combined purchase price of ivory from the three African countries was US$4,682,433.

29. The effects of the 1999 sale on poaching and the illegal trade are disputed. TRAFFIC, on behalf of CITES, found that the ETIS data strongly indicated a decline in illegal Ivory Trade following the 1999 sale. According to Steven Broad, Executive Director of TRAFFIC speaking in 2008:[29]

[26] "Blood Ivory: Exposing the Myth of a Regulated Market". *EIA*. 2012 at p.1.

[27] The Ivory Dynasty, at p.16.

[28] Kahumbu, Paula, *The Guardian*, 4 March 2013, "China must send a clear message to consumers on ivory trade".

[29] Rhodes, A. *CITES, ETIS and the Illicit Trade in Ivory*, TRAFFIC (2010), at [148 (a)].

"The ETIS data strongly indicate a fall in illegal ivory trade levels following [the 1999 sale]. Whether this was cause and effect or a coincidence, we don't know, but TRAFFIC and WWF will be watching closely to see what happens to ivory seizure and elephant poaching levels once these auctions have taken place."

30. In its report to the CITES parties in 2010, TRAFFIC concluded that: "Overall, … the trend in the ETIS analysis provides no evidence that the first one-off ivory sale under CITES resulted in any overall increase in illicit trade in ivory."[30]

31. However, the Environmental Investigation Agency ('EIA') maintain that on their analysis the 1999 sale caused an increase in the illegal trade. In the three years following the 1999 sale, there were increased reports of seizures: in 2000, 20,041 tonnes were seized, in 2001, 19,310 tonnes were seized and in 2002, 34,115 tonnes. The 2002 seizure was the highest in terms of total weight between 1989 and 2009.[31]

32. In terms of the global number of seizures, in 1999 there were 681 seizures. In the two years following the sale, the total number of seizures increased: in 2000, there were 858 seizures and in 2001 there were 817.[32]

(b) The second "one-off" ivory sale in 2008

33. At the CITES CoP in 2007, Zimbabwe was given permission to join Botswana, Namibia and South Africa in participating in a second sale of ivory to be held in 2008. The original stockpile sale of 60 tonnes approved in 2002 was increased to allow 110 tonnes to be sold. In addition, China was given permission to purchase ivory, alongside Japan, as an approved trading partner.[33] A total of 102 tonnes was sold to Chinese and Japanese buyers raising a total of US $15,400,000. The average price paid was US $157 per kg.[34]

[30] Rhodes, A. *ibid* at [148 (b)];

[31] Rhodes, A. *ibid* at [147]

[32] Rhodes, A. *ibid* at [148]

[33] Rhodes, A. *ibid* at [153]

[34] Rhodes, A. *ibid* at [153]

34. There is some uncertainty as to the precise impact of the one-off sales, and it is difficult to extract meaningful conclusions from CITES research on this.[35]

35. Nonetheless, in view of the events of 2011 and the data so far available in 2012, it appears to be beyond question that consumer demand for ivory, the Ivory Trade and the killing of elephants for ivory is yet again on a dramatic upwards trajectory. Most credible authorities agree that this surge was stimulated by the 2008 sale.[36]

35.1. In the report co-authored by Martin and Vigne in 2011, which investigated the Ivory Trade in two Chinese cities, it was noted that: "several vendors openly said their ivory was new and illegal and occasionally pretended new items were old. This suggests official inspections and confiscations have not taken place in most shops."[37]

35.2. In relation to trade, Tom Milliken of TRAFFIC, who also maintains and analyses the ETIS database, has said, "Did allowance of ivory to go into China exacerbate a situation? One could probably argue now, with hindsight, that indeed it did. It created perhaps an image in the minds of many potential Chinese consumers that it was okay to buy ivory."[38]

35.3. In relation to poaching. Dr Douglas-Hamilton, in his testimony to the Senate Foreign Relations Committee in May 2012, said that: [39]

> "In hindsight, it looks as if the new spike in demand for ivory and the resulting poaching crisis was exacerbated by the decision in 2008 to allow a one-off sale to China of legal ivory… Where up until that point, all ivory had been illegal under the ban, this influx of "good" ivory into the market no doubt created the perception in the minds of potential Chinese consumers that it was no longer problematic to buy ivory in general, undermining the effectiveness of the ban."

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[35] Rhodes, A. *ibid* at [153]

[36] Rhodes, A. *ibid* at [156]

[37] Rhodes, A. at [158], quoting The Ivory Dynasty: A report on the soaring demand for elephant and mammoth ivory in southern China", Esmond Martin and Lucy Vigne, published in London by Elephant Family, The Aspinall Foundation and Columbus Zoo and Aquarium (2011).

[38] Rhodes, A. at [159], citing Tom Milliken as quoted in BBC Panorama Special "Ivory Wars" (broadcast April 2012).

[39] Rhodes, A. at [160].

(6) Recognition of the need for a response

36. African Range States and international NGOs have urgently called for a new approach to address the Ivory Crisis. In 2010, the Range States agreed on a list of activities to address the Ivory Crisis "which MUST be implemented and most urgently require funding".[40] These activities were set out in the African Elephant Action Plan (the "AEAP"), with a three-year budget of US$100 million. An African Elephant Fund, managed by the United Nations Environment Programme ('UNEP'), was established and donors were called for. To date a total of US$600,000 has been raised; and the agreed activities have not taken place across all Range States.

37. The AEAP has as its vision to ensure a secure future for African Elephants and their habitats to realise their full potential as a component of land use for the benefit of human populations. Its goal is to secure and restore where possible sustainable elephant populations throughout their present and potential range in Africa recognising their potential to provide ecological, socio-, cultural and economic benefits.[41]

38. Further recommendations for action were adopted by the Standing Committee in July 2012; and proposed by the CITES secretariat to the 16th conference of the parties in March 2013, in Thailand. The conference restated the urgent need for the recommended actions to be carried out. It also agreed that further actions were required (the "Agreed Actions"). However, no mechanism has been advanced to deliver these urgently required Agreed Actions in a coordinated and effective manner, nor to raise the funds needed to bring them about. Tom Milliken, head of the elephant and rhino team at wildlife trade monitoring network TRAFFIC, stated at the 16th CITES conference in Bangkok that: "This time people are listening because everything is pointing in the same direction: poaching is up to a record high, as is illegal ivory trading and elephants seem to be down."[42] According to the press report, about 25,000 elephants were killed by poachers in 2012.

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[40] "African Elephant Action Plan" (All Range States). *15th Conference of the Parties*. CoP 15 Inf. 68. March 2010, at p.2

[41] *Ibid*., at p.5

[42] *The Guardian*, 7 March 2013.

39. The CITES Secretary-General, Mr. John Scanlon, was invited to address the 2013 WCO IT Conference & Exhibition as a keynote speaker held in Dubai, United Arab Emirates from 14 to 16 May 2013. Mr. Scanlon highlighted the worst spike in decades in the illegal killing of elephants and rhinos for their ivory and horn. He identified the imminent threat it poses for these animals, and for people, and of the need to work together, including through the International Consortium on Combatting Wildlife Crime (ICCWC), to end this crime.[43]

C. The aims of Stop Ivory

40. Stop Ivory is part of a co-ordinated campaign that aims to offer a range of measures by which the Agreed Actions can be delivered. In 2012, a small group of Africa-based wildlife experts came together to explore new possible opportunities to achieve a lasting solution to the Ivory Crisis. Stop Ivory is the product of that collaboration. It is an independent, single purpose, not-for-profit initiative with a three-year time horizon to impose a worldwide ten -year moratorium on all trade in ivory by 2016.

41. Stop Ivory recognises:

41.1. The Ivory Crisis is severely damaging to all Range States and is of concern to the world as a whole;

41.2. The Ivory Crisis is driven by consumer demand, which far outstrips supply and cannot now sustainably be met through trade;

41.3. The Ivory Crisis appears to be worsening and immediate action must be taken;

41.4. The Agreed Actions agreed by the Range States and CITES member states to tackle the Ivory Crisis must now be funded and implemented;

41.5. The absence of a common approach; and the existence of legal markets (both domestic markets and 'one off' sales under CITES) have impeded the funding and implementation of the Agreed Actions.

[43] http://www.cites.org/eng/news/sundry/2013/20130514_wco_it.php

42. Stop Ivory is a new approach to fund and implement the Agreed Actions. It will enable the Range States and other CITES member states to adopt a common policy on elephant conservation; and to bring an end to the ivory trade. It will do this by:

42.1. Securing funding for the African Elephant Fund and procuring national ivory stockpiles as a combined and comprehensive solution;

42.2. Destroying, or otherwise putting beyond any commercial use, all existing national ivory stockpiles and 10 years' future natural accrual;

42.3. Enabling access to private sector skills and expertise in the delivery of the Agreed Actions, including in protection, enforcement, governance and consumer education.

43. Recognising the complexity of the problem and accepting that outcomes are difficult to predict, Stop Ivory is working with expert partners to design, model and stress-test each aspect of the approach; as well as in conducting extensive consultation and engagement with Range States and other stakeholder groups. The procurement of this legal opinion is part of that process.

D. The existing legal regime

44. The current focus of Stop Ivory's approach is to target trade in ivory, primarily through the existing framework of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ('CITES'). Our understanding is that the current view is that a ten year moratorium on international trade under the auspices of CITES is likely to be the most politically expedient route to an agreement. Accordingly, the CITES Treaty framework will be the key focus of this Opinion.

45. Targeting trade under the CITES framework is, however, just one among a range of possible measures that might be taken under international law to achieve the objective of halting the slide to extinction of African elephants and other wildlife. As will be discussed below, it may be fruitful to consider, if possible, how Stop Ivory's campaign complements or could complement and support non-trade initiatives, either through Stop

Ivory itself or through working with other NGOs or intergovernmental organisations as part of an overall coordinated campaign. For example:

45.1. by encouraging and facilitating international cooperation through the United Nations Commission on Crime Prevention and Criminal Justice and the Organized Crime Convention to prosecute poachers and traffickers;

45.2. working to list ivory as a sanctioned good where a relevant sanctions regime is already in place, eg the United Nations' sanctions regime aimed at the armed conflict in the Democratic Republic of the Congo;[44]

45.3. supporting initiatives under other biodiversity treaties, such as the Convention on Biological Diversity 1992, the Convention on Migratory Species 1979 (the 'Bonn' or 'CMS' Convention), or the World Heritage Convention 1972.

46. As described further below, various international biodiversity treaties conventions and the UN Commission on Crime Prevention and Criminal Justice are already being invoked in wildlife campaigns, including campaigns to save elephants.

47. It may also be useful to think about how general international law might more generally be used and/or developed to address this crisis. For example, whether international criminal law could be expanded to include within its remit a serious crime against wildlife, or whether the scope of States' jurisdiction under public international law to criminalise certain acts carried out outside their territory by non-nationals (universal or protective jurisdiction) could be developed so that states could prescribe and prosecute serious crimes against wildlife committed anywhere in the world. In this regard, there is some indication that extra-territorial jurisdiction over such matters might be developing already. There may also be some scope for invoking the law of armed conflict/international humanitarian law ('IHL'), although this would only be helpful in very specific contexts: where wildlife is actually being targeted as part of military operations (which would seem to be unlikely) or to fund the war effort by armed forces in an occupation (less unlikely perhaps, but possibly restricted to international armed conflicts).

[44] Summarised on the United Nations website at http://www.un.org/sc/committees/1533/

48. This is just a brief sketch of some of the areas of international law which might be used or developed to achieve Stop Ivory's objective. Even if some of the suggested routes now appear somewhat radical, the proposed developments can be used as campaign tools with the added benefit that they help in sowing the seed for future legal developments.

49. However, as Stop Ivory is no doubt already aware, success in this area is likely in the short to medium term to be a question of the 'art of the possible'. That is, it will be a political and resource issue. In short, the focus of this Opinion will primarily be on steps that can be taken to implement existing law, propose modest amendments to the existing legal regime, to sanction States for non-compliance with their treaty obligations or punish individuals for committing crimes against wildlife. These involve the vexed question of persuading States to act and, more fundamentally, persuading them to adopt the capability to act, by putting in place infrastructure and technical expertise to address the issues.

(1) Controls on trade, import and export: Convention on International Trade in Endangered Species of Wild Fauna and Flora ('CITES')

50. The Convention on International Trade in Endangered Species of Wild Fauna and Flora ('CITES') was adopted in Washington D.C. in the United States on 3 March 1973. It was subject to an amendment agreed in Bonn in 1979. The overall aim of the CITES convention is neatly summarised on the CITES website in the following terms:[45]

> "CITES 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 authorized through a licensing system. Each Party to the Convention must designate one or more Management Authorities in charge of administering that licensing system and one or more Scientific Authorities to advise them on the effects of trade on the status of the species."

[45] http://www.cites.org/eng/disc/how.php

51. Appendix I to the Convention contains the list of animals benefitting from the highest level of protection in the light of their highly endangered status. Pursuant to Article II of CITES, this list includes "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 authorised in exceptional circumstances."

52. Asian elephants[46] are on the list within Appendix I and have been since 1973. Initially, following the "Somalia proposal", which led to an amendment of CITES in 1989,[47] so too were African elephants.[48] However, following sustained lobbying from certain Southern African states, in 1997 (and 2000 for South Africa), CITES was amended yet again to allow elephant populations within Botswana, Namibia, South Africa and Zimbabwe to be included in Appendix II, subject to certain end-use restrictions.[49] Pursuant to Article II(2) of CITES, this Appendix covers "all 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 utilisation incompatible with their survival." The end-use restrictions which must be met for African elephants from those specified countries to come within Appendix II rather than Appendix I are set out in footnote 5. The trade must be:

"For the exclusive purpose of allowing:
a) trade in hunting trophies for non-commercial purposes;
b) trade in live animals to appropriate and acceptable destinations, as defined in Resolution Conf. 11.20, for Botswana and Zimbabwe and for in situ conservation programmes for Namibia and South Africa;
c) trade in hides;
d) trade in hair;
e) trade in leather goods for commercial or non-commercial purposes for Botswana, Namibia and South Africa and for non-commercial purposes for Zimbabwe;

[46] PROBOSCIDEA, Elephantidae, *Elephas maximus*.

[47] The African elephant, *Loxodonta africana*, was transferred from Appendix II to Appendix I at the seventh meeting of the Conference of the Parties (Lausanne, 1989)

[48] PROBOSCIDEA, Elephantidae, *Loxodonta Africana*.

[49] The Botswanan, Namibian and Zimbabwean populations were transferred back to Appendix II, under a set of conditions, at the 10th meeting (Harare, 1997) and the South Africa population at the 11th meeting (Gigiri, 2000).

f) trade in individually marked and certified ekipas[50] incorporated in finished jewellery for non-commercial purposes for Namibia and ivory carvings for non-commercial purposes for Zimbabwe;

g) **trade in registered raw ivory (for Botswana, Namibia, South Africa and Zimbabwe, whole tusks and pieces) subject to the following:**

i) only registered government-owned stocks, originating in the State (excluding seized ivory and ivory of unknown origin);

ii) only to trading partners that have been verified by the Secretariat, in consultation with the Standing Committee, to have sufficient national legislation and domestic trade controls to ensure that the imported ivory will not be re-exported and will be managed in accordance with all requirements of Resolution Conf. 10.10 (Rev. CoP14) concerning domestic manufacturing and trade;

iii) not before the Secretariat has verified the prospective importing countries and the registered government-owned stocks;

iv) raw ivory pursuant to the conditional sale of registered government-owned ivory stocks agreed at CoP12, which are 20,000 kg (Botswana), 10,000 kg (Namibia) and 30,000 kg (South Africa);

v) in addition to the quantities agreed at CoP12, government-owned ivory from Botswana, Namibia, South Africa and Zimbabwe registered by 31 January 2007 and verified by the Secretariat may be traded and despatched, with the ivory in paragraph g) iv) above, in a single sale per destination under strict supervision of the Secretariat;

vi) the proceeds of the trade are used exclusively for elephant conservation and community conservation and development programmes within or adjacent to the elephant range; and

vii) the additional quantities specified in paragraph g) v) above shall be traded only after the Standing Committee has agreed that the above conditions have been met; and

h) no further proposals to allow trade in elephant ivory from populations already in Appendix II shall be submitted to the Conference of the Parties for the period from CoP14 and ending nine years from the date of the single sale of ivory that is to take place in accordance with provisions in paragraphs g) i), g) ii), g) iii), g) vi) and g) vii). In addition such further proposals shall be dealt with in accordance with Decisions 14.77 and 14.78 (Rev. CoP15)

On a proposal from the Secretariat, the Standing Committee can decide to cause this trade to cease partially or completely in the event of non-compliance by exporting or importing countries, or in the case of proven detrimental impacts of the trade on other elephant populations.

All other specimens shall be deemed to be specimens of species included in Appendix I and the trade in them shall be regulated accordingly." [Emphasis added]

53. Article II(4) of CITES provides that contracting states shall not allow trade in specimens of species in Appendix I or II except in accordance with the provisions of the Convention.

[50] These are traditional ivory amulets, often said to be made from "pre-Convention" ivory.

54. In relation to species within Appendix I, Article III of the Convention establishes an export permit system. Pursuant to Article IX of CITES, each contracting state is required to designate one or more Management Authorities in that state, competent to grant relevant permits and certificates. It must also appoint one or more Scientific Authorities for the purposes of giving effect to the Convention. The name of the Management Authority in each state is required to be deposited with the Secretariat, established in accordance with the provisions found in Article XII of the Convention. The Secretariat was initially provided by the Executive Director of UNEP. The Secretariat presently has a largely administrative and advisory role. It has not had any enforcement powers conferred on it.

55. The export permit system under Article III(2) mandates that an export of a specimen of a species within Appendix I shall only take place after the prior grant and presentation of an export permit. The conditions governing the grant of an export permit for non-living specimens (such as consignments of elephant tusks) are as follows:

    55.1. The Scientific Authority of the contracting state of export must have advised that such export will not be detrimental to the survival of that species;

    55.2. The Management Authority established in the state of export must be satisfied that the specimen was not obtained in contravention of the laws of that state for the protection of flora and fauna;

    55.3. The Management Authority must also be satisfied that an import permit has been granted for the specimen.

56. This latter requirement relates to the parallel permit regime for imports of Appendix I species which has been established by Article III(3) of CITES. The requirements for a compliant import permit are:

    56.1. The Scientific authority in the state of import must have advised that the import will be for purposes which are not detrimental to the survival of the species involved;

56.2. The Management Authority of the state of import must be satisfied that "the specimen is not to be used for primarily commercial purposes."

57. Similarly there is a separate "re-export" licensing system established under Article III(4). The only requirement for a grant of a "re-export" permit is that the Management Authority of the state of re-export is satisfied that the specimen was imported into that state in accordance with the provisions of the Convention.

58. The export permit system for species falling within Appendix II (elephants in Botswana, Namibia, South Africa and Zimbabwe) contains similar requirements to those set out above for Appendix I species, save that the Management Authority in the state of export need not be satisfied that an import permit has been granted. The Scientific Authority established in the state of export must monitor both the level of export permits granted and the overall level of exports. Lower levels of restrictions are placed on imports and re-exports. Imports require only the presentation of an export certificate from the state of export.

59. The export, import and re-export permit arrangements do not apply to the transit or transhipment of specimens which remain in Customs control: see Article VII(1) of CITES. Article VII(2) also allows a Management Authority to issue a certificate confirming that the permit requirements shall not apply to 'pre-Convention' ivory, that is, a specimen which was acquired before the provisions of CITES applied to it.

60. Article VIII of CITES contains the enforcement measures. Article VIII(1) states:

"The Parties shall take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof. These shall include measures:
(a) to penalize trade in, or possession of, such specimens, or both; and
(b) to provide for the confiscation or return to the State of export of such specimens."

61. Aside from these provisions, contracting States are also required to maintain records of trade in specimens of species included in Appendix I and II. They are required to prepare periodic reports and submit them to the Secretariat: see Article VIII(7).

62. The Convention also requires periodic Conferences of the Parties to be held at least one every two years: see Article XI(1) and (2). These Conferences enable the contracting States to review the implementation of CITES, including provision for amendments to Appendices I and II in accordance with Article XV of the Convention. Article XV sets down the detailed arrangements for listing species in either Appendix I or II or changing their listing.

63. The effect of these provisions has been as follows:

63.1. The effect of the listing of the African elephant in Appendix I was essentially to impose a worldwide ban on the commercial exportation and importation of raw ivory. That *de facto* ban took effect from 1989;

63.2. The CITES Parties have twice relaxed the ban since that point. First in 1999 to allow a "one-off" sale of ivory from Botswana, Namibia and Zimbabwe to Japan. Secondly, in 2008 to allow further one-off sales from those three countries, plus South Africa, to China and Japan;

63.3. There is presently lawful trade in raw ivory sanctioned in respect of certain stocks of ivory held by Botswana, Namibia, South Africa and Zimbabwe;

63.4. In passing, we note that certain far-Eastern markets for ivory exist in certain states that have acceded to CITES, in particular China, Japan and South Korea; and that the second largest market for ivory in the world,[51] the United States, has also ratified the Convention.

64. China and Japan have each been granted approved status as buyers of Ivory under CITES.[52] China and Japan bought 108 tonnes of ivory in another "one-off" sale in November 2008 from Botswana, South Africa, Namibia and Zimbabwe. At the time the idea was that these legal ivory sales may depress the price, thereby removing poaching pressure, an idea supported at the time by both TRAFFIC and the World Wildlife Fund.

[51] National Geographic News, 5 May 2008, http://news.nationalgeographic.co.uk/news/2008/05/080505-us-ivory.html reporting on a study conducted by British conservation group Care for the Wild International ('CWI').

[52] CITES summary record of Standing Committee 57, 2008.

65. Since 2000, two monitoring systems have been developed and established to monitor trends illegal killing of elephants and in the levels of illegal trade in ivory respectively. These two further bodies have been established specifically to assist with the illegal trade in ivory from African elephants. These bodies are Monitoring the Illegal Killing of Elephants ("MIKE")[53] and the Elephant Trade Information System ("ETIS"). Set up initially in 2002,[54] these bodies collate information on poaching and seizures as provided by member states.

66. The CITES Programme for Monitoring the Illegal Killing of Elephants (CITES-MIKE) has been monitoring trends in elephant poaching in some 60 sites in Africa and 27 sites in Asia since 2002. These sites include many of the largest elephant populations on both continents. The operation of the MIKE programme in Africa between 2007 and 2012 was made possible thanks to the support of the European Union.

67. CITES has also recognized the role of the International Union for the Conservation of Nature's ('IUCN') Elephant Specialist Groups, which monitor the status of elephant populations, and UNEP-WCMC, which monitors the legal trade in ivory. Together, these four systems deliver consistent, evidence-based information to assist in CITES decision-making.[55]

68. Among the various wildlife and biodiversity treaties concluded at an international level (discussed further below), CITES is considered to be the best developed because it has an established permanent secretariat and administrative structure to facilitate implementation and enforcement. Furthermore, the States Parties have a developed practice of filling in the 'gaps' of broadly worded treaty articles through recommendations adopted by the

[53] http://www.cites.org/eng/prog/mike/intro/index.shtml and Conf 10.10 (Rev. CoP 15).

[54] At its 11th meeting (in Gigiri, 2000), the CITES Conference of the Parties approved both systems for implementation. It confirmed this decision at its 12th meeting (Santiago, 2002) with a few refinements: see Resolution Conf. 10.10 (Rev. CoP14).

[55] http://www.cites.org/eng/news/pr/2012/20120621_elephant_poaching_ivory_smuggling.php.

Conferences of the Parties ('CoPs'), including the establishment of a Standing Committee.[56]

(2) Other biodiversity treaties

69. In terms of what Stop Ivory hopes to achieve – assessed realistically to be the imposition of a 10 year moratorium on all ivory sales – we consider that appropriate amendments to CITES are likely to be "the best bet." This is because CITES provides the most natural framework for the proposed moratorium, both in terms of the subject-matter of the treaty and its operation in practice. Before considering what amendments might be made, however, it is worth briefly considering what other international obligations exist in Treaties which may be of possible assistance. These other international conventions may be used to complement and reinforce the legal and policy arguments for seeking a moratorium under the CITES framework. For example, agreement to a moratorium would also help a range State or an importing State which are also parties to the Convention on Biological Diversity to meet their obligations under that Convention. For convenience, we also briefly explore how these other international conventions might usefully be brought to bear in aid of Stop Ivory's cause.

(a) Convention on Biological Diversity 1992 ('the CBD')

70. Nearly all States are parties to the CBD.[57] States' key obligations under the CBD include the following:

> *"Article 8: In-situ Conservation*
> Each Contracting Party shall, as far as possible and as appropriate:
> …
> (c) Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use;
> …
> (k) Develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations;

[56] M. Bowman, P. Davies, C. Redgwell, Lyster's International Wildlife Law (2nd, ed., 2010) ('*Lyster's*'), p. 484; see generally chapter 15.

[57] Except for the US, Andorra, the Holy See and South Sudan.

…
(l) Where a significant adverse effect on biological diversity has been determined pursuant to Article 7, regulate or manage the relevant processes and categories of activities: and
(m) Cooperate in providing financial and other support for *in-situ* conservation outlined in subparagraphs (a) to (l) above, particularly to developing countries."

Article 9. Ex-situ Conservation
"Each Contracting Party shall, as far as possible and as appropriate, and predominantly for the purpose of complementing *in-situ* measures:
(a) Adopt measures for the *ex-situ* conservation of components of biological diversity, preferably in the country of origin of such components;
…
(e) Cooperate in providing financial and other support for *ex-situ* conservation outlined in subparagraphs (a) to (d) above and in the establishment and maintenance of *ex-situ* conservation facilities in developing countries."

Article 14. Impact Assessment and Minimizing Adverse Impacts
1. Each Contracting Party, as far as possible and as appropriate, shall:
…
(c) Promote, on the basis of reciprocity, notification, exchange of information and consultation on activities under their jurisdiction or control which are likely to significantly affect adversely the biological diversity of other States or areas beyond the limits of national jurisdiction, by encouraging the conclusion of bilateral, regional or multilateral arrangements, as appropriate;
(d) In the case of imminent or grave danger or damage, originating under its jurisdiction or control, to biological diversity within the area under jurisdiction of other States or in areas beyond the limits of national jurisdiction, notify immediately the potentially affected States of such danger or damage, as well as initiate action to prevent or minimize such danger or damage."

71. Article 5 requires that "Each Contracting Party shall, as far as possible and as appropriate, cooperate with other Contracting Parties, directly or where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity."

72. Target 12 of the Aichi Biodiversity Targets agreed by member States at the 2010 Conference of the Parties is that:

"By 2020, the extinction of known threatened species has been prevented and their conservation status, particularly of those most in decline, has been improved and sustained."

73. In May 2013, the IUCN in conjunction with the CBD and other "Friends of Target 12" launched a joint initiative to support States Parties to the CBD in their effort to achieve Aichi Target 12.[58] This will include channelling resources from Save Our Species, the Global Environment Facility and the World Bank and "identify[ing] important issues related to species conservation that might be addressed via decisions of the CBD or other conventions".

74. A case can thus be made that States' obligations under the CBD, whether a range State or a potential importing State or a State whose nationals are otherwise involved in the ivory trade (eg, as shippers), require them to take action to preserve the African elephant from extinction or extirpation.

75. The potential drawback with the CBD is that the provisions are general in nature. They are not readily amenable to a rigorous enforcement regime. Substantive obligations are qualified by "as far as possible" and there are no substantive requirements as to what actions must be taken to preserve biodiversity through national measures: such questions are left for each State.[59] There is no compulsory binding judicial settlement of disputes arising under the CBD, unless the State party accepts arbitration or referrals to the International Court of Justice by written declaration (Article 27).[60]

76. Nevertheless, States' CBD obligations can be invoked in support of Stop Ivory's arguments with a view to lending moral suasion to the proposed changes to the CITES framework. The "Friends of Target 12" partnership might also be approached as part of Stop Ivory's campaign.

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[58] From words to action – key organizations team up to stop the extinction crisis, 28 May 2013 http://www.cbd.int/doc/press/2013/pr-2013-05-27-target12-friends-en.pdf . Further information can be found at http://www.iucn.org/about/work/programmes/species/our_work/species_and_policy/friends_of_target_12/

[59] The authors of *Lyster's International Wildlife Law* observe "the CBD's provisions neither compel uniformity nor create collective powers to mandate measures at the international level": M. Bowman, P. Davies, C. Redgwell, *Lyster's International Wildlife Law* (2nd, ed., 2010), 604.

[60] States Parties are required to submit to conciliation if they fail to reach agreement by negotiation, but the recommendations of the conciliation committee are not binding: parties are required only to consider them in good faith (Annex II, Part 2, Article 5).

(b) Convention on Migratory Species 1979 (Bonn Convention)

77. The principal focus of the Convention on the Conservation of Migratory Species of Wild Animals 1979, also known as the Bonn Convention ('the Bonn Convention') is, as its name suggests, protection of those species which migrate across or outside national jurisdictional boundaries. States Parties are obliged to list migratory species in Appendix I if they are endangered or II if they have 'an unfavourable conservation status.' States Parties' obligations in respect of Appendix I species are to conserve their environment, help their migration and prohibit taking, but also include the obligation to prevent or control factors that further endanger the species (Article III(4)(c)). The Conference of the Parties may recommend further measures (Article III(6)). It could be argued that these two provisions could go so far as to require prohibitions on trade.

78. The practice of the parties in identifying threatened species is to follow the IUCN's Red List of Threatened Species[61] and interpret 'endangered' as meaning 'facing a very high risk of extinction in the wild'. The IUCN Red List currently lists *Africana loxodonta* as 'vulnerable', rather than 'endangered' or 'critically endangered'[62], but according to IUCN's definition of its categories, species categorised as vulnerable are 'considered to be facing a high risk of extinction in the wild.'[63]

79. Unfortunately African elephants appear only on Appendix II, not Appendix I.[64] The appendices may be amended at any ordinary or extraordinary meeting of the Conference of the Parties by a two-thirds majority of those parties present and voting and a species can be listed on both appendices at the same time[65]. Texts of proposed amendments and the reasons for them 'based on best scientific evidence available' must be communicated

[61] *Lyster's*, at 541.

[62] http://www.iucnredlist.org/details/12392/0

[63] http://www.iucnredlist.org/static/categories_criteria_3_1

[64] States may also make specific reservations with regard to the listing of a species in Appendix I or II, which would mean it opts out of the obligations relating to that species (Article XIV).

[65] *Lyster's*, at 537.

to the Secretariat at least 150 days before the meeting. Other parties may then submit comments on the proposal.[66]

80. Appendix II species have lesser levels of protection. They are required to be the subject of international agreements for their conservation and management, which 'should' include provision for, *inter alia*, periodic review of the conservation status, procedures for coordinating action to suppress illegal taking and emergency procedures 'whereby conservation action would be considerably and rapidly strengthened when the conservation status of the migratory species is seriously affected.'[67] There is already a Memorandum of Understanding concerning Conservation Measures for the West African Populations of the African Elephant (Loxodonta africana) ('West African MoU') to which Benin, Burkina Faso, Ivory Coast, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo are parties.[68] It is not legally binding, but sets up a procedure for regular meetings to take steps to conserve the African elephant.

81. As regards Stop Ivory's objectives, there are two possibilities: (i) States Parties to the Bonn Convention which are Range States but not parties to any CMS agreement could be lobbied to comply with their obligations by negotiating a new agreement or signing up to the West African MoU; (ii) States parties to the West African MoU could be lobbied to either amend that MoU to include a complete trade ban on ivory or include a complete ban as part of measures taken under the MoU.

82. 'Range State' is defined widely to include 'a State, flag vessels of which are engaged outside national jurisdictional limits *in taking that migratory species*'. Thus it appears that every State Party – of which there are 119[69] – as a potential flag State could have an obligation *qua* Range State to protect elephants as a protected migratory species under the Bonn Convention by legislating, for example, to prevent and criminalise the transport of poached ivory on vessels flagged to that State.

[66] Article XI.

[67] Article V(5)(a), (k) and (m).

[68] http://www.cms.int/species/elephants/moutxt.htm

[69] See the list at http://www.cms.int/about/all_countries_e.pdf

83. It is true that the authors of *Lyster's* suggest that the Bonn Convention 'avoids the issue of international trade entirely, leaving that to be regulated under CITES' (at p. 578). However, the support for this proposition is rather thin. The provisions are worded widely enough to include obligations to restrict trade and transport. Indeed the reference to a flag State 'involved in taking' in the definition of Range State appears to suggest it, otherwise why would it have been included? There is no logical reason to exclude them as measures a Range State might be expected to take. Furthermore, not all States Parties will necessarily be party to CITES and it is not uncommon under international law for the same or similar obligation to arise under more than one treaty.[70]

84. It appears from Article VI that such flag States would have to nominate themselves to be listed as a Range State:[71] they are obliged to do so if they consider themselves to fall within the definition of such a State. The Secretariat is also obliged to keep itself up to date and may receive information from non-States Parties.[72] The benefit is that common flag States that are also party to the Bonn Convention, eg Liberia, could be lobbied to nominate themselves and introduce such legislation; the downside is that many 'flags of convenience' have neither the desire nor the capacity to proscribe or prosecute, although Liberia may have the desire to legislate. If such flag States can be persuaded to legislate, there may be a real practical benefit. If the experience of EU sanctions is anything to go by, owners of vessels and their insurers may be reluctant knowingly to involve themselves in the carriage of ivory which would be illegal under the laws of the flag State. While such a proposal may be rather speculative, as it does not appear this

[70] Moreover, the most recent action plan of the parties to the West African MoU includes provision for implementation of CITES: see Medium Term International Work Programme concerning Conservation Measures for the West African Populations of the African Elephant, 2012-2014 (http://www.cms.int/species/elephants/MTIWP/MTIWP_2012_2014_E.pdf).

71 The Range States for the African elephant are currently listed as Angola; Benin; Botswana; Burkina Faso; Burundi (ex); Central African Republic; Cameroon; Chad; Congo (Brazzaville); Cote d'Ivoire; Democratic Republic of the Congo; Equatorial Guinea; Eritrea; Ethiopia; Gabon; Gambia (ex); Ghana; Guinea; Guinea-Bissau (ex); Kenya; Lesotho (ex); Liberia; Malawi; Mali; Mauritania; Mozambique; Namibia; Niger; Nigeria; Rwanda; Senegal; Sierra Leone; Somalia; South Africa; Sudan; Swaziland; Togo; Uganda; United Republic of Tanzania; Zambia; Zimbabwe: http://www.cms.int/pdf/en/CMS_Range_States_by_Species.pdf

[72] *Lyster's*, 543.

approach has been taken by the CMS secretariat or States parties (yet), but the argument may be worth making, even if just to set in train further discussion as to the possibilities.[73]

85. Disputes under the Bonn Convention, for example for non-implementation, shall be subject to negotiation between the relevant parties. If that fails, there is no compulsory judicial settlement mechanism: parties must agree to submit the dispute to arbitration (Article XIII(2).

(c) World Heritage Convention 1972

86. The UNSECO Convention Concerning the Protection of the World Cultural and Natural Heritage 1972 (the 'World Heritage Convention') has limited application to Stop Ivory's campaign, as it deals with physical immovable areas, features and formations, rather than specific species. It is mentioned here for the sake of completeness. Criterion (x) of the guidelines for listing natural heritage sites includes areas that 'contain the most important and significant natural habitats for in situ conservation of biological diversity, including those containing threatened species of outstanding universal value from the point of view of science or conservation.'[74]

87. The benefits of a listing under the World Heritage Convention are first, that the obligations of any State which has a World Heritage site are relatively strong and the treaty institutional infrastructure quite well developed. It would therefore be worth identifying any World Heritage Site established in a target State to protect African

[73] It is not uncommon to see wide-ranging articles by NGOs' legal advisers published in leading law journals and presented at conferences where they canvass the law quite broadly, even if the object of the immediate campaign is more limited. For example, the coalition of NGOs that promoted the small arms trade treaty successfully from its conception to a concluded text adopted by the UN General Assembly on 2 April 2013 (The Arms Trade Treaty) presented conference papers at key international law conferences (eg the annual American Society of International Law), and regional conferences (organised by local NGOs) and published articles pointing out all of the overlapping legal rules and principles that had a bearing on States' obligations, including international human rights and State responsibility (liability) for aiding and abetting another State in a breach of international law, eg genocide, by allowing the continued trade of small arms from its territory or by its nationals.

[74] http://whc.unesco.org/archive/opguide12-en.pdf, para 77.

elephants, as the World Heritage Convention obligations might be raised with that State alongside obligations under other treaties or customary international law.

88. Secondly, Stop Ivory might consider lobbying a State or States to promote World Heritage Sites that protect elephants, which has certain attractions because of the available funding[75] (although we understand this may already have been explored[76] and/or is problematic because of the tensions between local communities and elephant herds.[77])

(d) African Convention on the Conservation of Nature and Natural Resources 1968 ('the 1968 Algiers Convention')

89. States Parties to the 1968 Algiers Convention are required to 'ensure conservation, wise use and development of faunal resources and their development', primarily through the creation of protected areas and sustainable exploitation outside protected areas (Article VII(1)).[78] They are also required to adopt adequate legislation on hunting which, *inter alia*, prohibits hunting methods liable to cause a mass destruction of wild animals and, specifically, the use of machine guns and hunting at night (Article VII(2)).

90. Animals threatened with extinction may be listed in Class A or B, according to the level of protection required (Article VIII). Class A species attract total protection, whereas Class B species may be hunted and killed under special authorisation granted by the

[75] See *Lyster's*, pp. 474-477 and, eg, 'Rapid Response Grants awarded to protect elephants, help with oil spill clean-up', http://whc.unesco.org/en/news/682, 19 November 2010.

[76] See the entry for 'Chobe Linyanti System' in Botswana in the Tentative Lists, submitted on 27 May 2010 (http://whc.unesco.org/en/tentativelists/5556).

[77] See e.g. 'Human - Elephant conflict: Rapid Response Facility awards emergency grant to the Wildlife Conservation Society of Tanzania', http://whc.unesco.org/en/news/744, 10 May 2011.

[78] Available on the African Union's website at http://www.africa-union.org/root/au/Documents/Treaties/Text/nature%20and%20natural%20recesource.pdf. A list of the current States parties can be found at http://au.int/en/sites/default/files/Nature%20and%20Natural%20Resources_0.pdf. As in other areas of international environmental law, the 1968 Algiers Convention focusses on 'sustainable development' and 'optimum utilisation' and 'optimum yield', rather than contemplating no exploitation. The question is the extent to which the provisions of these treaties can or would be interpreted to reflect modern approaches which hold that only 'no take' zones and measures are capable of protecting biological diversity.

competent authority (Article VIII(1)). Elephants (*loxodonta africana*) are listed in Class B. Traffic in specimens listed under Article VIII is subject to special requirements: Contracting States shall regulate and control trade and make export subject to an authorisation on a standard form which shall not be given unless the specimens or trophies have been obtained legally, and must be examined prior to exportation (Article IX(2)).

91. While the Algiers Convention requires States to examine the necessity of adding new animals not listed in the annex, there is no equivalent provision for upgrading an animal from Class B to Class A protection, although it might be argued that the chapeau of Article VIII(1) could be interpreted to require this. Thus States' obligations under the 1968 Convention are rather limited, but can be listed alongside others as part of the overall legal framework.

92. Disputes arising under the 1968 Algiers Convention regarding its interpretation or application – which may only be raised by other States Parties - must be first subject to negotiation between the State invoking the breach and the respondent State. If negotiations fail, the dispute may be referred to the Commission of Mediation, Conciliation and Arbitration (Article XVIII). Accordingly, there is no international court or tribunal having compulsory jurisdiction over a dispute under the Convention.[79]

93. The difficulty with the Algiers Convention is that it lacks a standing secretariat and administrative structure and regular meetings of the parties, which hinders its implementation.[80] It has been updated by a new treaty concluded in 2003 of the same name which is intended to build on and develop States' obligations under the 1968 Algiers Convention (the '2003 African Convention', also known as the Maputo Convention). It does so by, *inter alia*, making express provision for the application of the precautionary principle (Article IV), extra-territorial jurisdiction ('activities' under a State's 'control' but beyond its national jurisdiction (Article I(2)), more developed provisions for threatened species and trade therein (Articles IX and X), including various

[79] In addition, States parties can make reservations opting out of the mechanisms for settlement of disputes under Article XVIII, although we could not find a list of reservations online to check this.

[80] *Lyster's*, 265.

obligations of cooperation (an obligation to cooperate through bilateral or sub-regional agreements with a view to eliminating illegal trade in wild fauna (Article XI(2)), to make further provision for the protection of the environment during armed conflicts (Article XV(2)) and to give effect to the Convention (Article XXII(1)). It also makes provision for the creation of a permanent institutional framework for implementation, conferences of the parties, reporting and the jurisdiction of the Court of Justice of the African Union over disputes that cannot be settled by negotiation. The 2003 African Convention does not repeat the listing of Class A and B species, but instead provides for annexes to be adopted by conferences of the parties.

94. The 2003 Convention has not yet entered into force, because not enough States have ratified it (the 2003 African Convention requires 15 ratifications and so far only 9 States have done so). If the 2003 African Convention enters into force, it will be a significant development, not least because it provides for compulsory judicial settlement of disputes. This would mean that, for example, one State Party might bring a claim against another for breaching Articles IX, X, XI and XV of the Convention by failing to protect and cooperate in the protection of elephants. Stop Ivory might therefore usefully seek to promote the ongoing ratification of the 2003 Convention.[81] Decision 14/9 adopted by Ministers of the Environment of the States of the African Union last year at the African Ministerial Conference on the Environment, Arusha 12-14 September 2012, urged Afrian Union States to become party to, among others, the 2003 Maputo Agreement.[82]

(3) International criminal law enforcement cooperation against wildlife crime

95. It is evident that one of the key issues for protecting elephants is the enactment and enforcement of national criminal law against illegal poachers and traffickers in elephants and ivory. Clearly a total ban on trade in ivory at both an international and a domestic level would facilitate such enforcement. The absence of any nuance as to the correct legal

[81] As to which, see Report of the Study on the Development of Strategy to Guide the Promotion of the Ratification of the Revised African Convention on the Conservation of Nature and Natural Resources (i.e. The Maputo Convention), 3 March 2012, Amcen/14/Ref/8-E, www.unep.org/roa/amcen/Amcen.../AMCEN_14_REF_8Eng.doc

[82] AU Doc AMCEN/14/6.

status of commercially available ivory would avoid the difficulties currently experienced in distinguishing between lawful and unlawful trading.

96. In addition, more might be done to strengthen the implementation of the existing rules. This could be achieved, for example, by assisting States with the financial requirements and technical expertise to: (i) draft and enact CITES obligations in domestic legislation, for example through settling model laws;[83] and (ii) enforce national legislation and international obligations through national investigations and prosecutions and international police and judicial cooperation. As there are already existing models and programmes along these lines, a first step would be to review and assess the current initiatives to see where Stop Ivory could assist or how they could be developed to meet Stop Ivory's policy goal of a complete ban on ivory trade.

97. There is nothing to prevent a State from implementing national law which provides additional protection to elephants and other wildlife beyond that required by its international obligations. Thus Stop Ivory could lobby States to adopt and implement a total ban on trade in all ivory in national policy and legislation. States which suffer as a result of a national ban might respond by arguing that the national ban imposed by a neighbouring state breaches obligations to allow free trade in goods under the WTO GATT or the principle of non-intervention in domestic affairs by, eg purporting to criminalise trade in ivory lawfully collected and sold by non-nationals in the territory of another State.[84] There are various responses that can be made to these arguments. First, reliance might be placed on the exceptions under Article XX of GATT, to the effect that it was necessary as a countermeasure to respond to a breach of another obligation by the other State under international law. This would be on the basis that the other State had not complied with its obligations under the CBD; or had failed to cooperate in relation to multi-jurisdictional law enforcement. The interaction between different treaty frameworks or 'regimes' and rules of international law is complex and still being worked through by academics and various international and regional courts and tribunals: there is a vast and

[83] There is a model law already, but this could be reviewed and developed. It would be useful to find out whether there is a database of national legislation implementing CITES and, if not, to collate one.

[84] For example, a range State which wishes to trade in ivory through one off sales of ivory confiscated from poachers or collected from controlled hunting.

increasing literature which will not be summarised here. Suffice to say there are good arguments in response available to NGOs and States who wish to promote unilateral total bans on the trade of all ivory.

(a) Under the auspices of the United Nations[85]

98. Environmental crime, in particular criminal activity targeting wildlife, has been identified by the United Nations as requiring an international response. There are two main UN bodies which work in this area:

98.1. The Crime Prevention and Criminal Justice Commission is a functional commission of the Economic and Social Council, itself an organ of the UN established by the United Nations Charter (Article 7(1) and Article 61). The Commission is the central body within the UN dealing with crime prevention and criminal justice policy.

98.2. The United Nations Office on Drugs and Crime ('UNODC'), a programme and fund of the UN, established by the UN General Assembly and the Economic and Social Council. The UNODC, which is a permanent office within the UN,[86] is mandated to assist Member States with illicit drugs, crime and terrorism.

99. The two main treaties which underpin the work of the UNODC are the United Nations Convention Against Transnational Organized Crime 2000 and the United Nations Convention Against Corruption 2003. Both treaties have wide coverage: 177 and 167 States Parties respectively.[87]

[85] http://www.unodc.org/unodc/en/wildlife-and-forest-crime/index.html

[86] See the organizational chart at http://www.unodc.org/documents/about-unodc/UNODC_Organigram_3_August_2012.pdf

[87] The lists of parties and status to UN treaties is available online on the UNTS website, http://treaties.un.org/Pages/ParticipationStatus.aspx. Both treaties allow reservations, which allow a State to modify its obligations under a treaty provided the reservation is not contrary to its object and purpose (see Articles 19-22 of the Vienna Convention on the Law of Treaties, 1969). States may also make declarations, which may be relevant to the interpretation of the provisions to which they relate. The reason for explaining this is that, in order to work out a State's obligations under a particular multilateral treaty, it is necessary to look at the network of reservations and declarations: one cannot simply read the text of the treaty.

100. The UN General Assembly in 2000 affirmed the relevance of the Convention Against Transnational Organized Crime in the fight against trafficking in wildlife.[88] Wildlife and forest crime is one of the topics the UNODC is mandated to address,[89] as affirmed in 2007 by the Commission on Crime Prevention and Criminal Justice in Resolution 16/1 on 'International cooperation in preventing and combating illicit international trafficking in forest products, including timber, wildlife, and other forest biological resources' and UNGA Resolution 96/195 of 10 March 2009. Environment crime was identified as an emerging crime by the Conference of the Parties to the United Nations Convention on Transnational Organized Crime United Nations at the 2010 conference of the parties. The UNODC Eastern Africa has, since 2009, adopted a programme to address rising environmental crime, including in elephant tusks and ivory products.[90]

101. These developments also need to be seen alongside steps taken by the UN's Economic and Social Council ('ECOSOC'). ECOSOC adopted Resolution 2001/12 in 2001, urging UN Member States to 'adopt the legislative or other measures necessary for establishing illicit trafficking in protected species of wild fauna and flora as a criminal offence in their domestic legislation.' In 2003, it urged UN members to cooperate with the UNODC and the secretariats of CITES and the CBD to prevent, combat and eradicate trafficking in protected species (see Resolution 2003/27). In 2008, ECOSOC reiterated the need for international cooperation in this area (Resolution 2008/25). In 2011, ECOSOC invited UN Member States to consider making illicit trafficking in endangered species of wild fauna and flora a serious crime and requested UNODC to provide technical assistance to States, particularly as regards the prevention, investigation and prosecution of trafficking in endangered species of wild fauna and flora, in cooperation with Member States, relevant international organizations and the private sector (Resolution 2011/36). In 2012 it adopted a further resolution (Resolution 2012/07) on strengthening international cooperation in combating transnational crime.

[88] UNGA Resolution 55/25 of 15 November 2000.

[89] See further http://www.unodc.org/unodc/en/wildlife-and-forest-crime/index.html

[90] http://www.unodc.org/unodc/en/frontpage/2009/November/eastern-africa_-unodc-to-address-rising-environmental-crime.html

102. The most recent UN General Assembly resolution addressing this area is Resolution 66/288 of 11 September 2012, 'The future we want.' This endorsed the outcome of Rio 20+, the United Nations Conference on Sustainable Development, and was expressed in the following terms:

> "203. We recognize the important role of the Convention on International Trade in Endangered Species of Wild Fauna and Flora,[54] an international agreement that stands at the intersection between trade, the environment and development, promotes the conservation and sustainable use of biodiversity, should contribute to tangible benefits for local people and ensures that no species entering into international trade is threatened with extinction. We recognize the economic, social and environmental impacts of illicit trafficking in wildlife, where firm and strengthened action needs to be taken on both the supply and demand sides. In this regard, we emphasize the importance of effective international cooperation among relevant multilateral environmental agreements and international organizations. We further stress the importance of basing the listing of species on agreed criteria."

103. Resolutions of the UN General Assembly, ECOSOC and other UN entities are not legally binding on UN Member States, unlike treaties and customary international law. They may, however, be legally important instruments (and are thus often referred to as 'soft law'). They may be evidence of a new or amended rule of customary international law;[91] relevant to the interpretation of treaty provisions;[92] or relevant to an assessment of the lawfulness of derogations under trade treaties (eg TFEU and WTO/GATT) and countermeasures.

(b) Lusaka Agreement on Cooperative Enforcement Actions Directed at Illegal Trade in Wild Fauna and Flora 1994 ('Lusaka Agreement')

[91] For example, by way of promoting or establishing a new category of international criminal law of 'wildlife crime' or extending the scope of State's extraterritorial prescriptive jurisdiction so they can criminalise wildlife crime carried out outside their territory by non-nationals (ie the only connection with the proscribing State is the nature of the crime as one of international public order or in which the entire international community has an interest).

[92] See Article 31 of the Vienna Convention on the Law of Treaties 1969.

104. The Lusaka Agreement[93] establishes a framework between the contracting States to reduce and ultimately eliminate illegal trade in wild flora and fauna by taking appropriate measures to investigate and prosecute cases of illegal trade (Article 4). It also establishes a Task Force ('LATF') to facilitate cooperation among national bureaux[94] in carrying out investigations, investigating violations of national laws at their request and collecting, processing, and disseminating information and any other tasks established by the Governing Council (Article 9). Unusually, the Lusaka Agreement contains a binding judicial dispute settlement provision: if disputes are not settled by negotiation, they shall be referred to arbitration (Article 10).[95]

105. There are currently only seven parties to the Lusaka Agreement: The Republic of Congo (Brazzaville), Kenya, Liberia, Tanzania, Uganda, Zambia and the Kingdom of Lesotho. It is open for accession by other African States, which could be encouraged by Stop Ivory as part of its campaign. South Africa, Ethiopia and Swaziland are signatories, but have not ratified the Agreement. Decision 14/8 'Management of Biodiversity in Africa', adopted by Ministers of the Environment of the States of the African Union at the African Ministerial Conference on the Environment, Arusha 12-14 September 2012, urged AU States to become parties to, *inter alia*, the Lusaka Agreement, as well as the AEAP.[96]

106. UNEP carried out a review of the operation of the Lusaka Agreement in 2005 for the contracting parties, which made a number of recommendations.[97] It concluded that the primary challenge was lack of financial resources to implement the work plan developed by the Governing Council under the Agreement and too few field officers to carry out the work of the Task Force.

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[93] Available at http://www.lusakaagreement.org/about.html. The preamble of the Lusaka Agreement makes specific reference to the 1968 Algiers Agreement, CITES and the CBD, illustrating the interconnection between these various treaties.

[94] Which contracting States are obliged to designate or establish (Article 6).

[95] By contrast, while Article XVIII of CITES provides for the submission of disputes to binding adjudication by an arbitral tribunal, it requires the consent of the parties.

[96] AU Doc AMCEN/14/6.

[97] http://www.lusakaagreement.org/Documents/Microsoft%20Word%20-%20LATF%20Evaluation%20Report.pdf

107. The information provided on the website for the Agreement indicates positive developments since 2005: the LATF has active in recent investigations and prosecutions of illegal trade in ivory.[98]

(c) United States Executive Order, 1 July 2013

108. The most recent significant step towards addressing extinction or extirpation of wildlife through criminal law and international cooperation is the United States Executive Order of 1 July 2013, entitled 'Combating Wildlife Trafficking'. Elephants are expressly identified as a protected wildlife species. One of the objectives set out in the Order is that the United States shall seek to reduce the demand for illegally traded wildlife (section 1(d)). The Order establishes a multi-agency Presidential Task Force on Wildlife Trafficking consisting of senior representatives.[99] One of the functions of the taskforce and the advisory council, set up to assist it, is to develop strategies to reduce consumer demand for trade in protected species (section 4(a)(iv)).[100] Finding ways to feed into the work of the US taskforce or advisory council would seem an obvious target for Stop Ivory's campaign, not least because of the size of the US domestic market for ivory.

E. Existing proposals for strengthening the legal regime of protection

109. The above analysis of the international legal regimes demonstrates that there are a number of different ways of strengthening the legal protection for African elephants through restrictions on the existing legal trade in ivory. However, we consider that the seed which would be most likely to take the firmest root would be strengthening the legal regime established by CITES. To this end:

109.1. One method of restricting the trade in ivory (and imposing a *de facto* 10 year moratorium on commercial sales) would be through amendments to restore the

[98] See http://www.lusakaagreement.org/lawenforcement.html

[99] Available at http://www.whitehouse.gov/the-press-office/2013/07/01/executive-order-combating-wildlife-trafficking. The taskforce is to be established within 180 days of the Order.

[100] The US and China have agreed to work together on combating wildlife crime: see http://www.state.gov/r/pa/prs/ps/2013/07/212058.htm

position under CITES to its 1989 *status quo ante*. This would see the transfer of African elephants back to Appendix I in their entirety.

109.2. Another method would be to advocate enhanced protection regimes in Range States generally and Botswana, Namibia, South Africa and Zimbabwe in particular;

109.3. Other trade in ivory is confined to trade between Convention states and the state of import must certify that the importation is not to be used for "primarily commercial purposes." It would seem that some contracting States have been following procedures more readily than others.[101] This raises the question of what steps might be taken to enhance the existing control and enforcement mechanisms adopted by the Secretariat and the contracting States. One option considered in section F below is the strengthening of national legislation as necessary, and the strict enforcement of relevant domestic law provisions, to eradicate illegal or unregulated domestic ivory markets, especially in Africa and Asia.

110. The possibility of improving the implementation of the existing regime (which recognises the ability of contracting States to set more rigorous controls under domestic law) is examined in Section F below. There appears to be some political support for such a route. 19 African countries signed the "Accra Declaration" in 2006 calling for a total ivory trade ban, and 20 range states attended a meeting in Kenya calling for a 20 year moratorium in 2007.[102] At the recent Conference of Parties in Bangkok, Burkina Faso and Kenya cited the "merciless slaughter of elephants" in their attempt to extend to a wider group of nations a pledge from some countries not to sell ivory stockpiles before 2016. But the proposal was seen as legally flawed by many delegates and failed to get support.[103]

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[101] See, for example, Resolution Conf. 11.3 (Rev. CoP 15) dealing with the Compliance and Enforcement of CITES which acknowledged in its preamble that "several cases of violation of the Convention have occurred because of inadequate or insufficient implementation by Management Authorities in both exporting and importing countries regarding surveillance, issuance of documentation and control of compliance with the provisions regulating trade in . . . dead animals . . . and their parts and derivatives."

[102] http://www.ssn.org/Meetings/cop/cop14/Factsheets/Elephant_EN.pdf and http://www.savetheelephants.org/news-reader/items/tourism-dependent-nations-value-elephants.html

[103] *The Guardian*, 7 March 2013.

111. In addition, a number of recommendations have been made by contracting States in conjunction with the Secretariat under the auspices of CITES. A number of recommendations were adopted by the Standing Committee at its 62nd meeting (Geneva, July 2012).[104] Yet further recommendations were proposed by the Secretariat to the Conference of the Parties to CITES at its 16th meeting (Bangkok, March 2013).[105] These complement activities proposed in the African Elephant Action Plan, agreed by the African elephant range States in the margins of the 15th meeting of the Conference of the Parties (Doha, 2010).[106] These proposed measures are not ones that depend upon a modification of the legal regime under CITES as such. They fall outside the scope of this Opinion but are included in outline here for completeness.

112. The proposed measures include:

112.1. To support and enhance anti-poaching tracking and intelligence operations, through the development, training and education of tactical tracker and intelligence units in all protected areas;

112.2. To facilitate appropriate mandates to allow park rangers to pursue poachers and conduct patrols outside park boundaries, and develop international agreements to facilitate cross border cooperation to pursue, arrest and extradite poachers and illegal traders.

112.3. To strengthen anti-smuggling operations, customs controls and container search programmes (including the controls of small airstrips, and boats in ports and estuaries).

112.4. To enhance and improve the use of controlled deliveries and forensic analysis to identify the source of ivory and support the investigations of the criminal networks operating along the entire illegal ivory supply chain;

112.5. To enhance national and international interagency collaboration to fight organized wildlife crime by supporting programmes that target enforcement along the entire illegal ivory supply chain, such as through the ICCWC and regional

[104] These were based on document SC62 Doc. 46.1 (Rev. 1).

[105] As contained in documents COP16 Doc. 53.1, CITES 16 – Report of the Secretariat and Cites 16 – ETIS Report.

[106] See document CoP 15 Inf. 68.

criminal intelligence units and networks, as well through judiciary training and the practical application of 'best practice' techniques and methodologies for conducting investigations and joint enforcement activities;

112.6. To address weak governance and corruption at all levels, including in customs, the military, the police, the wildlife departments and other governmental agencies, using trans-boundary criminal intelligence units and further improving training and organization of specialized, well-paid and strongly-mandated anti-poaching units working inside and outside protected areas to undertake both intelligence and enforcement operations;

112.7. To reduce market demand for illegal ivory by conducting targeted and effective awareness-raising campaigns about the devastating impacts of the illegal trade in ivory, and aimed at potential or current buyers in East and South East Asia;

112.8. To maintain and improve the connectivity of elephant landscapes in Africa by increasing the extent of conservation areas and the investment in their effective management and protection to help reduce habitat loss and consequent range loss. This requires prioritized land use planning in non-protected elephant habitat, and is particularly critical for regions with growing human population densities and agricultural pressures. This, in turn, will help mitigate human- elephant conflict;

112.9. To assist and financially support the African Elephant Fund to enable elephant range States to improve their capacity to manage and conserve their elephant populations through improved law enforcement and anti-poaching activities, habitat restoration and conservation, dealing with human-elephant conflicts, and monitoring and research, as laid out in the African Elephant Action Plan;

112.10. To provide access to the Global Environment Facility to support the implementation of the African Elephant Action Plan;

112.11. To establish sustainable funding mechanisms for the continued implementation of MIKE, ETIS and the African and Asian Elephant Database, to ensure continuous monitoring of the overall status of African and Asian elephant populations and their habitats, levels of illegal killing of elephants and the international trade in illegal ivory.

113. More recently, African envoys met in Nairobi, Kenya in late August 2013, organised by Kenya's Mission to the UN Office in Nairobi. They urged the African Diplomatic

Corps ('ADC') to pursue a tougher regime against poachers within Africa.[107] The Kenyan Wildlife Service is seeking to impose sentences of life imprisonment on poachers, and an upcoming Wildlife Bill spearheaded by Kenya seeks to punish poachers with substantial fines.

F. Analysis of the common themes raised

114. Having analysed the need for further action to be taken, and the existing legal regime, we here set out our thoughts on how Stop Ivory might use legal mechanisms or redress to assist in the enforcement of a ten-year moratorium on the commercial trade in ivory. In order to do so, we shall analyse a series of distinct themes that emerge.

(1) What amendments can be made to CITES to achieve Stop Ivory's Objectives?

115. We cannot see any legal reason why all African elephants cannot be re-listed to Appendix I under the CITES Convention. The mechanism for doing so is detailed in Article XV of CITES and the Rules of Procedure of the Conferences of the Parties. Amendments may be made to Appendices I and II in one of two ways: (i) at the tri-annual meetings of the CoP; or (ii) by a postal procedure.

116. **First**, by way of summary, the steps in the **CoP procedure** are as follows:

116.1. A proposal to amend by a State Party to the Treaty must be sent by the proposing party to the Secretariat either: (i) at least 150 days before the next meeting of the CoP (now 2016) where the proposing party has consulted with all range States; or (ii) 330 days in advance of the next meeting where it has not consulted with range States.[108] The proposal must comply with the criteria for amending Appendices I and

[107] Njoroge Kaburo, *Coastweek*, 29 August 2013.

[108] Resolution Conf. 8.21 (Rev.CoP16) 'Consultation with range States on proposals to amend Appendices I and II': http://www.cites.org/eng/res/08/08-21R16.php

II, which are set out in Lauderdale Criteria, as amended, in CoP resolution 9.24 (Rev CoP 16) and the format for proposals (annex 6 to CoP 9.24 (Rev CoP 16);[109]

116.2. The Secretariat will communicate the proposal to other States Parties. It is required to do so 'immediately.'

116.3. The Secretariat must (i) as soon as possible after communicating the proposal to States Parties send them its own recommendations on the proposal; and (ii) consult with the other States Parties and interested bodies on the amendment;

116.4. The Secretariat shall communicate the results of the consultation to State Parties not less than 30 days before the next meeting;

116.5. The proposed amendment will be put to the vote at the CoP. To be passed, the proposed amendment must secure two-thirds of the votes of all States parties present and voting (abstentions are not counted in the figure of 'parties present and voting'). According to Rule 23 of the Rules of Procedure of the CoP, the CoP shall as far as possible decide on proposals by consensus;[110]

116.6. Successful amendments enter into force 90 days after the CoP.

117. **Secondly**, the steps in the **postal procedure** in summary are as follows:

117.1. A proposal to amend by a State Party to the treaty may be sent by a proposing State Party to the Secretariat between meetings of the CoP. It must contain the information set out in paragraph 116.1 above.

117.2. The Secretariat will communicate the proposal to other States Parties. It is required to do so 'immediately.'

117.3. The Secretariat must as soon as possible after communicating the proposal to States Parties send them its own recommendations on the proposal.

117.4. If a State Party wishes to comment on the Secretariat's recommendations, it must send the comments together with any relevant scientific data and information within 60 days of the Secretariat's communication of its recommendations;

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[109] Available at http://www.cites.org/eng/res/09/09-24R16.php. Resolutions of CoPs regarding improvements to the operation of CITES are 'recommendations' (Article XI(3)(e)) and therefore not legally binding as such. They are however to be regarded as 'soft law' in nature (see *Lyster's,* p. 488).

[110] Rules of Procedure of the Conference of the Parties (as amended at the 14th meeting, The Hague, 2007): http://www.cites.org/eng/cop/E14-Rules.pdf

117.5. The Secretariat shall communicate any comments/replies received and its own recommendations thereon to the Parties as soon as possible;

117.6. If there is no objection to the proposed amendment that is received by the Secretariat within 30 days of the date on which the comments/replies were communicated, the amendment will enter into force 90 days later;

117.7. On the other hand, if an objection is received, then the proposal shall be put to a postal vote, as follows:

117.7.1. The Secretariat shall notify the Parties that notification of objection has been received.

117.7.2. If votes (in favour, against or abstentions) of fewer than 50% of States Parties are received by the Secretariat within 60 days of the date of notification, the proposed amendment is referred to the next CoP;

117.7.3. On the other hand, if votes are received from at least 50% of the States Parties and it secures a majority of two-thirds of those cast (counting only votes in favour or against, not abstentions), it will enter into force 90 days later.

118. In practice, amendment proposals are normally considered at CoPs.[111] The CoP has established several committees to assist it with its task, including the Standing Committee and the Animals Committee. We consider that Stop Ivory could usefully liaise with these committees to ascertain whether any proposals for amendments to CITES would be well-received; and to further its lobbying objective.

119. NGOs which are technically qualified in the protection, conservation and management of wildlife may also attend CoP meetings as observers (and therefore be 'on the ground' to promote its initiatives[112]), unless at least one-third of the parties present object[113]. The requirements for the participation of observers are set out in Resolution Conf. 13.8 (Rev. CoP16) 'Participation of observers at meetings of the Conference of the

[111] *Lyster's*, p. 496.

[112] Which in practical terms it will have started some time before, by developing a policy and approaching States and/or international organisations to promote its initiative, persuade them to adopt it as their own and assist with proposal drafting.

[113] Article XI(7).

Parties'[114]: if Stop Ivory wishes to take advantage of this possibility, it will need to comply with the requirements therein. In practice, the role of NGOs is increasingly important in implementing environment and human rights treaties, as sources of revenue and relevant information and data.[115]

120. If one of the key interests likely to be adversely affected by the proposed amendment (principally Botswana, Namibia, South Africa, Zimbabwe, China or Japan) took against the proposed amendment of Appendices I and II they could not veto it, although they would likely lobby other governments to ensure that it failed to secure the necessary two-thirds majority of votes cast in favour of it. Stop Ivory can anticipate resistance to any proposed re-categorisation of elephants to Appendix I from at least some of those adverse interests.

121. In truth, however, the casting of votes against any proposed amendments are not the main problem with the CITES process: the main difficulty is that any State Party can, within the 90 day period before the amendment enters into force, lodge a reservation against the proposed change (Article XV(3) and Article XXIII(2)-(3)). Malawi made a reservation to the inclusion of *loxodonta Africana* on 18 January 1990.[116] The effect of this reservation is that 'the Party shall be treated as a State not Party to the present Convention with respect to trade in the species concerned.' This is a drastic result. No doubt the reason that States Parties agreed to the populations of loxodonta Africana in Botswana, Namibia, South Africa and Zimbabwe being listed in appendix II was because that was a far less worse result than having these States make reservations which would mean they had no obligations whatsoever under CITES as regards their elephant

[114] http://www.cites.org/eng/res/13/13-08R16.php

[115] We note in this regard that Stop Ivory plans to commission research on the impact of continued trade in ivory from leading academics and universities. Obviously, the better the methodology and data, the more persuasive and welcome it is likely to be.

[116] See the reservations page on the CITES website, at http://www.cites.org/eng/app/reserve.php

populations.[117] This way, the CoP was enabled to impose quotas on sales under Appendix II.[118] In many respects, it was the lesser of two evils.

122. A distinct question is whether relisting all African elephants to Appendix I will solve the problem. Put another way, can the CITES framework be used to implement a total ban (or 10 year moratorium) on *all* trade in ivory?

123. Trade in Appendix I species 'must only be authorised in exceptional circumstances' (Article II(1)). While this does not exclude all trade (and perhaps its very formulation starts from the wrong premise), the provision is strong enough to be equivalent to the total ban Stop Ivory seeks (exceptional circumstances would be, for example, sale or transfer for research or zoos).[119]

124. The greater difficulty is governing the trade in pre-Convention or pre-amendment specimens, such as the sale of antiques, even if sold with proof of age documentation (Article VII(2))[120] and the exemption for personal effects (Article VII(3)).[121] We understand that the continued trade in these items is likely to continue to create consumer demand for ivory.[122] Treaties and amendments thereto (in this case to the Appendices to CITES) generally only have prospective effect on the parties from the date they ratified the treaty or amendment, unless the treaty or amendment states otherwise. What this has

[117] See further the discussion in *Lyster's*, at p. 498, on the African elephant population and the debate between advocates of sustainable use (usually range States) and those adopting a more protectionist stance.

[118] See Resolution Conf. 10.10 (Rev. CoP16) 'Trade in elephant specimens' (http://www.cites.org/eng/res/10/10-10R16.php) and Resolution Conf. 10.9 'Consideration of proposals for the transfer of African elephant populations from Appendix I to Appendix II' (http://www.cites.org/eng/res/10/10-09.php).

[119] *Lyster's* refers to CITES as 'prohibit[ing], with a few exceptions, international commercial trade in species that are threatened with extinction (they are listed in Appendix I)' (at p. 484).

[120] Resolution Conf. 13.6 (Rev. CoP16)* Implementation of Article VII, paragraph 2, concerning 'pre-Convention specimens' (http://www.cites.org/eng/res/13/13-06R16.php). As to which see the recent article in *The Economist* of 6 July 2013 on new techniques in dating ivory to prevent it being 'aged' to look as though it is not caught by the trade restrictions: http://www.economist.com/news/science-and-technology/21580442-dating-ivory-has-just-become-easier-poachers-beware-elephant-room.

[121] See the CoP guidance on personal effects at http://www.cites.org/eng/res/13/13-07R16.php

[122] There are many references in documents on the CITES website to data which suggests that counterfeit antique ivory from China is contributing to the trade in illegal ivory.

meant as regards CITES is that States Parties have argued that they can trade in listed species which were acquired before CITES came into force or before they became party to CITES. Current guidance is that, for the purpose of Article VII(2),[123] the date on which CITES will apply to a specimen is the date on which the species was first included in the Appendices. Furthermore, the date on which a specimen is acquired is considered as the date on which the animal or plant or, in the case of parts or derivatives, the animal or plant from which they were taken, was known to be killed.[124] This does not therefore resolve the problem of trade in pre-Convention specimens, which continues to be allowed.

125. One way to rectify the problems identified with CITES that would prevent Stop Ivory achieving a total ban on sales would be to seek amendments to CITES to (i) provide for retroactive application to all specimens, whether they were acquired before or after CITES came into force or the amendment, and (ii) remove the reservations provision or amend it in respect of certain species (although the provisions of a general framework treaty would be unlikely to be drafted so specifically).

126. Securing the amendment of a multilateral treaty with 178 States parties is no easy task. In practice, it is rarely sought or achieved, especially where there is controversy over the objectives of amendment. Even where the States are in broad agreement on the objectives, agreement on the detail and wording can be difficult and time consuming. The amendment procedure is set out in Article XVII. It is as follows:

126.1. 33% or more of the States Parties (i.e. at least 60 States) must make a written request to the Secretariat to consider and adopt amendments to CITES.

126.2. The text of the proposed amendment must be communicated by the Secretariat to all Parties at least 90 days before the date of the extraordinary meeting.

126.3. The amendment will be adopted if 66% or more of the States parties present at the CoP and voting vote in favour of it (abstentions are not counted in the 66%).

[123] Which states Articles III, IV and V shall not apply to a specimen that was acquired before the provisions of this Convention applied to that specimen.

[124] *Lyster's*, p. 511.

126.4. To enter into force, an adopted amendment must be ratified by 66% of the States Parties (i.e. at least 120 States), by depositing an acceptance with the depository government (Switzerland). The amendment will enter into force 60 days after this threshold is met; any other State Party may subsequently accede to the amendment.

127. There is nearly always what can be described as a two-step process in multilateral treaty-making. First, States negotiate and agree on the text and sign it, but this does not bind them legally as a party.[125] Secondly, States signal their intent to be legally bound by ratifying or acceding to the treaty (by depositing an instrument of ratification, acceptance, approval or accession with the State or organisation which is the depository for that treaty). This has two implications. First, even if an amendment to CITES is adopted, it will not necessarily enter into force: there are many examples of treaties and amendments to treaties that never entered into force or took many years to do so because not enough States ratified the treaty or the amendment. Secondly, if a State Party does not ratify the amendment, it will not be bound by it: in its relations with the other States Parties it will be bound by the original terms of CITES.[126]

128. If each of these hurdles to amendment of CITES were overcome, the effect may in any event be undermined if States Parties withdraw from CITES as a result. Article XXIV allows them to do so, by giving 12 months' notice.[127] Stop Ivory will therefore need to

[125] Although they may have other obligations as a signatory under Article 18 of the Vienna Convention on the Law of Treaties 1969 not to defeat the object and purpose of a treaty prior to ratification or acceptance unless it has made its intention not to become a party clear. This is the reason for the complaints often heard against certain Western states. They may be heavily involved in negotiating treaties, such as the Rome Statute on the International Criminal Court and the Kyoto Protocol to the Climate Change Treaty 1992 and may well sign them. But, whether for internal constitutional reasons or otherwise, those states may then not ratify the treaties and so not become legally bound to observe their terms.

[126] See the Vienna Convention on the law of Treaties, Article 40(4). There are already examples of this under CITES: the 1979 Bonn Amendment has been accepted by only 141 parties; the 1983 Gaborone Amendment has been accepted by only 94 parties.

[127] Of course, the incentive to do so for 'problem' range states is considerably diminished if China agrees to a total ban on trade.

judge whether securing the desired amendments would risk the departure of a number of Range States from the framework of the CITES convention as a whole.

129. An alternative and more simple way forward (although it will not address the problem of trade in ivory already on the market) might be simply to use the existing framework and argue that Appendix II States cannot allow any further trade in ivory for 10 years or more, because it would be 'detrimental to the survival of the species.' If this were to be recognised, the terms of Article IV(2) of CITES would preclude Range States from issuing export certificates for raw ivory.

130. In practice, CoPs have addressed the problem of the decline of African elephants - and the split between Appendix I and II States - through CoP recommendations.[128] It would therefore appear to be possible in principle to use this same system to secure a 10 year moratorium on exports. Under the current Rules of Procedure for the CoPs, resolutions and decisions that do not relate to amendments to Appendices I and II and cannot be agreed by consensus shall be passed by a majority vote of two-thirds of those States Parties present and voting.[129]

131. The advantage is that there is no ability to make a reservation to the application of a duly passed Resolution. A potential drawback is that technically such a Resolution will not be legally binding and will neither amend the Convention itself nor the Appendices. It will, however, become legally relevant as establishing a subsequent State practice on the part of the States Parties; or through representing a collective agreement by the States Parties as to the appropriate interpretation or application of CITES, in particular Article IV. That construction will then have to be taken into account in the ongoing interpretation of the treaty.[130]

132. Thus, resolutions are useful tools to employ in support of legal arguments that, for example, a given Range State was not complying with its obligation under Article IV(1) and (2) to cease trading in ivory, notwithstanding it is from a species listed in Appendix II, because it will be detrimental to the survival of the species.

[128] See, for example, paragraph 111 above and footnote 118 above.

[129] See footnote 110 above, Rules 20, 21 and 26.

[130] See the Vienna Convention on the law of Treaties, Article 31(3).

133. If a State is in breach of its treaty obligations, it gives rise to State responsibility under international law. This carries with it an obligation of "cessation and non-repetition", and an obligation to make appropriate reparations for any injury.[131] An alleged breach of Article IV can be formally raised by one or more other parties to the treaty with the offending State. If negotiations between those States fail to resolve the dispute (and prior communications must make it clear that the claimant State(s) considers a dispute under CITES to have arisen and what, precisely, that dispute is[132]), the dispute may be submitted to binding arbitration, but *only* if all parties agree. There is no agreement in advance by States parties to submit to binding adjudication. This is a considerable drawback of the CITES dispute settlement mechanism. Another possibility for a judicial determination of whether allowing further trade in ivory would breach CITES is if both claimant and respondent State have recognised the compulsory jurisdiction of the International Court of Justice by making a declaration under Article 36 of the ICJ Statute.[133]

134. As regards the problem of trade in pre-Convention ivory, it is difficult to see how the promotion of a CITES CoP resolution could outlaw that trade as such. This is because an appropriately worded resolution would run counter to an express provision of the treaty. On the other hand, if States Parties were prepared to agree to such a resolution, it might still be a worthwhile exercise, because it appears that notwithstanding the absence of any formal legal effect under public international law, there is a good track record of States complying with CoP resolutions under CITES. Many States have considered that they ought to follow such resolutions. The drawback might be that a State that considered that

[131] See the Articles on the Responsibility of States for Internationally Wrongful Acts 2001, Articles 28-39. The Articles on State Responsibility are not a legally binding instrument, but Articles 28-39 are generally considered to represent customary international law, and are therefore binding on all States as *jus cogens*.

[132] See, for example, the ICJ's judgment in *Georgia v Russia* on the interpretation of dispute settlement provisions in treaties which contain a negotiation requirement as a precondition to submission of the dispute to an international court or tribunal.

[133] The list of States which have done so can be found on the UNTS website at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-4&chapter=1&lang=en. States may make reservations to their declarations, and these must be read carefully to ensure they have not carved out the dispute in question.

such a resolution went outside the competence of the CoP because of Article VII(2) might decline to follow the resolution. But there is no court or tribunal with compulsory jurisdiction to hold against an expansive interpretation of the CoP's competence, which may be helpful in this context. Furthermore, the moral effect of such a resolution would not depend on the validity of its strict legal basis, although it may make the agreement to such a resolution harder to achieve in practice.

(2) Would any Treaty amendments have direct effect?

135. International law depends for its implementation and enforcement on States. The international legal system governs relations between States, not individuals, and is a separate legal system. Whether a rule of international law (a treaty provision or a customary rule) has effect in domestic law depends on the rules of reception of each national legal system. For example, under English law, treaties have to be transformed into English law by domestic legislation before they can impose obligations on individuals. While customary international law is a source of obligations for the common law which will generally respect any obligation which is *jus cogens*, this is subject to any relevant constitutional rule.[134] This means, for example, that inconsistent domestic legislation will prevail over a customary rule of public international law.

136. Generally, States implement framework treaties by enacting national legislation to give it effect.[135] They then enforce that legislation through their domestic legal systems (i.e. police and judiciary, etc). This is what the UK has done for both the European Convention on Human Rights and the founding treaty of the EU, the Treaty of Rome. The first was implemented into domestic UK law only with the Human Rights Act 1998, although a right of individual petition to the European Court of Human Rights in Strasbourg was granted to UK citizens from 1966. As for the EC Treaty (now to be found in the combined Treaties on European Union ('TEU') and Treaty on the Functioning of

[134] See generally R (Gentle) v. The Prime Minister [2008] UKHL 20; [2008] 1 AC 1356, HL; and R v Jones (Margaret) [2006] UKHL 16; [2007] 1 AC 136, HL.

[135] This includes States whose domestic rules on the reception of international law allow for some 'direct effect' of treaties (i.e. 'monist' systems). This is because framework treaties will not contain the necessary detail, leaving that to States parties, eg appropriate levels of criminal sanctions, which State agency has responsibility for issuing export certificates, etc.

the European Union ('TFEU')), that has been put on a statutory footing in the UK by the European Communities Act 1972 ('ECA 1972'). While certain Treaty articles and provisions of EU Directives have direct effect – and EU Regulations are directly applicable in the Member States of the EU under Article 288 TFEU – they are recognised by the UK Courts only by virtue of the Courts giving effect to the terms of the 1972 Act.

137. It is accordingly quite possible for a treaty to fail to achieve its desire effect because of a lack of bite at a domestic level. It is one thing to have international obligations binding on States protecting the status of African elephants. But those obligations also need to be enforced. There are many instances of a treaty being agreed by States, but no or no sufficient steps being take to give it practical effect. For example, States may simply fail to pass any domestic legislation to implement the treaty at all. If this happens, then the State will be in breach of its obligations under international law. But without any effective enforcement regime – and in the absence of any other State willing to raise the issue in an appropriate international court or arbitral tribunal - the breach will go uncorrected.

138. It is difficult to think of a mechanism by which CITES might be given automatic direct effect in the domestic legal systems of the States Parties without any form of transposing national legislation. Certainly the Court of Justice of the European Union ('ECJ') in some seminal judgments has sought to impose the doctrines of "supremacy" and "direct effect" under EU law, which gives a great deal of practical bite to relevant EU law provisions. The ECJ in Case 26/62 *Van Gend en Loos* [1963] ECR 1, ECJ described EU law as a new supranational legal order to which Member States had surrendered their sovereignty, albeit in limited areas of defined competence. But even with these pronouncements, the position as a matter of English constitutional law is that EU law is supreme and directly applicable only because the ECA 1972 says so.

139. While CITES could attempt to require direct effect to be give to its provisions through Treaty amendment, this would not by itself achieve the desired result. Such a provision would itself be subject to national law rules on the reception of international law, many of which have a constitutional basis in the domestic laws of the State. For example, any attempt to enforce the mandatory recognition of CITES in Germany would run into the clear opposition derived from the German constitutional concept of the supremacy of the

German parliament. This has even threatened to cut across EU principles of supremacy and direct effect in the well-known *'Solange'* series of case.

140. As to enforcement, this has been covered to a certain extent above. As noted, the ICJ may not have jurisdiction either, depending on who the claimant and respondent States are and whether they have submitted to the jurisdiction of the ICJ. In those circumstances, the best that might be hoped for CITES is the promulgation of model or paradigmatic domestic law provisions, which give effect to an enhanced enforcement regime for the detection and abolition of the commercial ivory trade. These are considered in section F(6) below.

(3) What other sources of "soft law" or other norms of public international law might be brought to bear?

141. As outlined above, there are other international obligations that might be invoked to assist in the achievement of Stop Ivory's campaign. CITES is probably the best and most developed of the treaty frameworks and probably offers the best chance of achieving a positive outcome. That should not, however, preclude using available mechanisms under other treaties to achieve the same result of a total trade ban, eg the Bonn Convention and a sanctions listing under the DRC UN sanctions regime, or to assist in implementation of a trade ban, eg the international and regional criminal cooperation treaties and institutional frameworks. None of the sources of public international law that bear on the protection of elephants is mutually exclusive.

142. Thought should also be given to identifying evidential sources to support the following proposed rules of customary international law: (i) wildlife crime is a crime of international law; (ii) States may prescribe (and therefore enforce) wildlife crime committed outside their jurisdiction by non-nationals; (iii) States have an obligation to protect wildlife of international importance and prosecute wildlife crime. The reason for doing so is to facilitate enforcement by allowing the national systems of all States to pursue prosecutions and support derogations from trade treaties and countermeasures in response to a State's failure to protect wildlife.

143. As to the machinery that might be needed, once the key objective is finalised, how it m be implemented under each treaty system can be systematically worked out by

sitting down with the treaties, supporting instruments (most of which are on websites) and, ideally, identifying and talking to NGOs and government contacts with experience in such campaigns about how each treaty framework and institution works in practice. This will enable Stop Ivory to ascertain and then seek to implement the most successful strategies for bringing about the required amendments.

(4) Can other inter-governmental systems and Non-Governmental Organisations assist?

144. One possible avenue to consider is the introduction of a recommended text for proposal to the UN Sanctions Committee operating in respect of the Democratic Republic of the Congo ('DRC'). The DRC Sanctions Committee is imposing a variety of asset freezing measures and other related sanctions on individuals involved in illegal activity in the DRC, including criminal activity. We might well be able to build a case for such sanctions to pay specific regard to "wildlife crime" and unlawful ivory trading in particular. The practical benefit of such a step may be rather limited. But such a step could still be beneficial, since all UN members are bound by the rulings. In addition, it is a useful source of state practice. There would be a useful cross-fertilisation with existing State (and EU practice) which is to achieve the sanctions' objectives by targeting the 'second tier' contracts as well. In other words, once criminal activity is identified, States then ensure that other associated parties cannot participate in the spill-over markets. So there are *de facto* or *de jure* restrictions on insurers, owners of vessels carrying goods, financiers, many of which (unlike the traffickers and criminals directly involved) are subject to the jurisdiction of States Parties and easily caught. Existing data suggests that shutting them down is quite effective in constraining the unlawful trade in the underlying good – here ivory.

145. We also consider that collaboration between Stop Ivory and other NGOs (and possibly Governmental bodies tasked with combatting the illegal ivory trade) would be useful. It is apparent from Section E above that a number of different interests are keen to take action to prevent or minimise the risk of the extinction of African elephants through poaching and the commercial ivory trade.

146. Those instructing us have taken steps to instruct other professionals who may be able to assist in the campaign to impose a 10 year moratorium on international and domestic commercial trade in ivory. In this regard, we think it would be useful to consider advancing the following non-legal steps in conjunction with other NGOs:

146.1. On the demand side, Stop Ivory will doubtless seek to diminish the demand for ivory in those markets where it is able to make an impact. It has been the goal of other ivory campaigns to place a stigma on the good. This could be rejuvenated or tried once again;

146.2. On the supply side, Stop Ivory can campaign for the greater protection of elephants and their environments. The role of NGOs in preventing and patrolling infringements of anti-whaling treaties has been significant. Stop Ivory can also campaign against any extensive interpretation of an exception for "research" or "scientific" purposes.

(5) Is there any scope for invoking EU law and/or international trade law under the auspices of the World Trade Organisation?

147. Another option which could usefully be considered would be recourse to the EU legislative frameworks on protection for endangered species. The EU's competence to legislate in this area is conferred by Articles 191 to 193 TFEU. Pursuant to Article 191(1) TFEU, the EU shall contribute to environmental policies which pursue objectives that include "promoting measures at international level to deal with regional or worldwide environmental problems." Under Article 191(4) TFEU, the EU is given competence to negotiate with third countries and international organisations in this area. Unfortunately, the legislative competence under Article 192 TFEU is rather narrowly circumscribed. Article 192(3) states that:

> "General action programmes setting out priority objectives to be attained shall be adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions."

148. The EU Council and Commission have adopted a series of EU Wildlife Trade Regulations to address issues arising from CITES. The principal legislative instrument is

Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein ('the Basic Regulation').[136] The Basic Regulation is supported by Commission Implementing Regulation (EU) No 792/2012 ('the Implementing Regulation'). The Implementing Regulation gives effect to many of the currently applicable recommendations of the Conference of the Parties on the interpretation and implementation of CITES provisions.

149. In addition, the EU legal regime has the following instruments which contribute to the implementation of the principles behind CITES on a pan-EU basis:

149.1. Commission Implementing Regulation (EU) No 792/2012 of 23 August 2012 laying down rules for the design of permits, certificates and other documents provided for in Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating the trade therein and amending Regulation (EC) No 865/2006 ('the Permit Regulation')[137];

149.2. Commission Implementing Regulation (EU) No 578/2013 of 17 June 2013 suspending the introduction into the Union of specimens of certain species of wild fauna and flora ('the Suspension Regulation')[138]. This legislation confers a power on the Commission to restrict the introduction of threatened species into the European Union. This is done after consultation with the countries of origin concerned and taking into account any opinion of the Scientific Review Group.

150. Finally, a Commission Recommendation to Member States,[139] commonly referred to as the 'EU Enforcement Action Plan,' specifies further the measures that should be taken for enforcement of the EU Wildlife Trade Regulations. According to the EU Commission

[136] [1997] OJ L No. 61, 3.3.97, p. 1. The Regulation has been amended on many occasions, but a consolidated version of the Regulation as it stands is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1997R0338:20100815:EN:PDF.

[137] OJ [2006] L No 166, 19.6.2006, p. 1.

[138] OJ [2013] L No. 169, 21.6.2013, p. 1.

[139] Commission Recommendation No 2007/425/EC identifying a set of actions for the enforcement of Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein, OJ [2007] L No 159, 20.6.2007, p. 45.

website,[140] this sets out a series of measures that Member States should implement in order to enhance their efforts to combat illegal trade. The suggested measures include national action plans for enforcement, imposing sufficiently high penalties for wildlife trade offences and using risk and intelligence assessments to detect illegal and smuggled wildlife products. The Recommendation also addresses the need for increased public awareness about the negative impacts of illegal wildlife trade and for greater co-operation and exchange of information within and between Member States as well as with third countries and relevant international organizations (e.g. Interpol, World Customs Organization).

151. Under the Basic Regulation, common provision is made for all Member States concerning the import, export and re-export, as well as internal EU trade, in species listed in Annexes A to D to the Regulation. African elephants are listed in Annex A, save for certain populations in Botswana, Namibia, South Africa and Zimbabwe, which are included in Annex B. Nonetheless, a footnote to the relevant entry in Annex B incorporates *verbatim* the wording found accompanying the classification of these elephant populations in Annex II to the CITES Convention.

152. The Basic Regulation provides for procedures and documents required for such trade (import and export permits, re-export certificates, import notifications and internal trade certificates) and it regulates the movement of live specimens. It also sets out specific requirements for Member States to ensure compliance with the Regulation and to impose adequate sanctions for infringements. Article 8(1) imposes a complete ban on commercial trade in Annex A species. Article 8(3)(a) nonetheless contains an exemption for *inter alia* pre-Convention specimens, such as pre-Convention ivory. Nonetheless, there are a number of areas where the EU has consciously chosen to adopt a more rigorous regime than that mandated by CITES.

153. Article 3(1)(b) of the Basic Regulation, for example, provides that Annex A to the Regulation "shall contain" not just species listed in Annex I to CITES itself, but also details of any species that *inter alia* "is, or may be, in demand for utilization in the Community or for international trade and which is either threatened with extinction or so

[140] http://ec.europa.eu/environment/cites/legislation_en.htm#chapter8

rare that any level of trade would imperil the survival of the species." This permits the EU as a whole to adopt a greater degree of protection for certain species than is found in CITES.

154. The Basic Regulation also provides for a variety of different bodies to be established with jurisdiction to consider issues arising under CITES and the EU Wildlife Trade Regulations. At an EU level, there are now the Committee on Trade in Wild Fauna and Flora, the Scientific Review Group and the Enforcement Group, all of which consist of representatives of the Member States. These bodies are convened and chaired by the European Commission.

155. We consider that Stop Ivory could usefully lobby the EU Commission and the associated Wildlife bodies to have all African elephants included in Annex A to the Regulation. Amendments to Annex A can be carried out by an EU Commission Regulation, thus avoiding the need for a large amount of political dispute at Council level. Such a move would help neutralise the commercial demand for ivory within the EU, since it would preclude any commercial trade in products derived from the "one off sales" that the CITES amendments have permitted. Furthermore, this step can be justified as a measure that is required, even if its effect is to provide stricter protection at an EU level.

156. An alternative option would be to lobby for African elephants to be brought within the scope of the Suspensions Regulation. This may, if anything, be the politically more expedient route to pursue in the first instance. It will require Stop Ivory presenting a case to the Scientific Review Group to permit them to conclude that the conservation status of African elephants will be seriously jeopardised if their introduction into the Union from certain countries of origin is not suspended. The disadvantage of this route is that it relates only to the introduction of such species into the EU, not all commercial trade in them. There is also a sense in which the inclusion of the species on this list is designed to be a temporary, rather than a permanent measure. For example, the most recent iteration of the Suspensions Regulation also saw certain species removed from the list which received protection.

157. The strong advantage of securing a change in the legislative landscape in the EU is that it might well send a welcome signal to the African nations that western countries are concerned by the plight of the African elephant as well. It would help show the

seriousness with which the situation is viewed. Any failure by the EU institutions to comply with the request could then be the subject of legal proceedings before the ECJ, if needed. That would assist in bringing the need for firmer enforcement measures to a wider public attention, but would potential expose Stop Ivory to a risk of an adverse costs order before the EU Courts.

158. We consider that the scope for using the General Agreement on Tariffs and Trades and international conventions under the World Trade Organisation is less promising. If anything, these provisions are likely to be preyed in aid against any proposed moratorium on the international and domestic sale of ivory for commercial purposes. However, in its ruling dated 6 November 1998, the Appellate Body of the WTO's Dispute Settlements Board in case Nos. 58 (and 61) India and others v. USA (shrimp imports) ruled that, under WTO rules, countries have the right to take trade action to protect the environment (in particular, human, animal or plant life and health) and endangered species and exhaustible resources). The WTO does not have to "allow" them this right. Furthermore, Article XX of GATT provides for exceptions to the general rules in the following terms:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
> . . .
> (b) necessary to protect human, animal or plant life or health;
> . . .
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

159. Furthermore, the preamble of the Marrakesh Agreement Establishing the WTO includes among its objectives, optimal use of the world's resources, sustainable development and environmental protection.

160. It therefore seems to us that while GATT is unlikely to provide any positive assistance for a ten-year moratorium, it is unlikely to preclude it either. There is a chance that any such measures will have to be adopted at both international and domestic level to escape censure. This is because a prohibition on international trade which tolerated unlimited domestic trade in ivory would probably be condemned as a discriminatory treatment of

foreign traders under WTO rules. But it seems to us that this might actually be used to help Stop Ivory's case. We can press for a moratorium at both international and domestic levels.

(6) What changes might be made to domestic legal systems to assist?

161. Any amendments to CITES or the Appendices are likely to require amendments to national implementing legislation. While this is likely to cause further delays in achieving the objectives of the campaign in the short to medium term, it also provides a useful opportunity to press for the ongoing implementation of the CITES (and other international law obligations) into national law. We therefore think that Stop Ivory could put together a proposal which pursued not only legislative changes to CITES and the EU law regime, but also proposed amendments to the existing national legal regimes (particularly in the Range States and in the States Parties of the principal importers of raw ivory) which gave effect to a ten year moratorium on international and domestic trade in ivory.

162. CITES has been operating a national legislation project for some time. The National Legislation Project began after the adoption of Resolution Conf. 8.4 at the eighth meeting of the Conference of the Parties (Kyoto, 1992). Guyana was then selected to be a worked example of the implementation of the project. According to the 14th meeting of the CoP at the Hague in June 2007, "legislative efforts by Parties and territories have been assisted through guidance documents, sample legislation, written comments or advice, country missions and workshops. The primary aim of the National Legislation Project has been to promote and facilitate the enactment of adequate legislation."[141] At that meeting, the Secretariat set a single deadline for the adoption by countries of adequate legislation at a domestic level.

163. On 16 May 2013, the Secretariat of CITES announced that it had received "National Ivory Action Plans" from the first group of countries identified as primary source, transit and import countries affected by illegal trade in ivory. These countries were China,

[141] http://www.cites.org/eng/cop/14/doc/E14-24.pdf.

Kenya, Malaysia, the Philippines, Thailand, Uganda, the United Republic of Tanzania and Vietnam.[142] NGOs can usefully monitor the implementation of these action plans. They can also push for the extended roll out of equivalent action plans in other States Parties to CITES. NGOs can use as a platform for their approach the developed practice under the CITES framework of "sanctioning" States which fail to meet their obligations by, for example, in failing to implement or amend national legislation. This is described in *Lyster's*, at pp. 518-525

164. Nonetheless, it would appear that steps to ensure that all countries have implemented adequate legal protection regimes - and are *enforcing* them – have been rather less successful. We consider that the EU Commission's Recommendation[143] in this area could serve as a helpful blueprint. According to this Recommendation, national legislation should cover:

> "the preparation of dissuasive penalties in cases of infringement of this Regulation, the appropriate provision of agencies responsible for the enforcement of the Regulation in terms of human and financial resources and training, the provision of adequate information to the public, regular checks of traders and holders of flora and fauna such as pet shops, breeders and nurseries, the appointing of national focal points for the exchange of information and intelligence, support for management and control capacity-building programmes in third countries as well as inter-departmental cooperation and exchange of information between Member States and with the appropriate management authorities."

165. The following steps were recommended in particular:

> "II. In order to increase enforcement capacity, Member States should take the following actions:
> (a) adopting national action plans for coordination of enforcement; these should have clearly defined objectives and time frames, and should be harmonised and reviewed on a regular basis;
> (b) ensuring that all relevant enforcement agencies have adequate financial and personnel resources for the enforcement of Regulation (EC) No 338/97 and that they have access to specialized equipment and relevant expertise;
> (c) ensuring that penalties for infringements of Regulation (EC) No 338/97 act as a deterrent against wildlife trade crime, in accordance with settled case law of the Court of Justice, are consistent as to their application and, in particular, that they take into account

[142] http://www.cites.org/eng/news/pr/2013/20130516_elephant_action_plan.php

[143] See footnote 139 above, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:159:0045:01:EN:HTML

inter alia the market value of the specimens, the conservation value of the species involved in the offence and the costs incurred;
(d) for the purpose of point (c), carrying out training or awareness raising activities for enforcement agencies, prosecution services and the judiciary;
(e) ensuring that all relevant enforcement agencies have access to adequate training on Regulation (EC) No 338/97 and on identification of species;
(f) ensuring the provision of adequate information to the public and stakeholders with a view, in particular, to raising awareness about the negative impacts of illegal wildlife trade;
(g) in addition to the checks at border-crossing points required under Regulation (EC) No 338/97, ensuring in-country enforcement, in particular through regular checks on traders and holders such as pet shops, breeders and nurseries;
(h) using risk and intelligence assessments systematically in order to ensure thorough checks at border-crossing points as well as in-country;
(i) ensuring that facilities are available for the temporary care of seized or confiscated live specimens and mechanisms are in place for their long-term re-homing, where necessary.

III. In order to increase co-operation and information exchange, Member States should take the following actions:
(a) establishing procedures for co-ordinating enforcement among all their relevant national authorities through, inter alia, the establishment of inter-agency committees as well as memoranda of understanding and other inter-institutional cooperation agreements;
(b) facilitating access for relevant enforcement officers to existing resources, tools and channels of communication for the exchange of information relating to the enforcement of Regulation (EC) No 338/97 and CITES, so that all relevant information is made available to enforcement officers at all levels, including front line staff;
(c) appointing national focal points for the exchange of wildlife trade information and intelligence;
(d) sharing relevant information about significant trends, seizures and court cases at the regular meetings of the Enforcement Group as well as intersessionally;
(e) co-operating with relevant enforcement agencies in other Member States on investigations of offences under Regulation (EC) No 338/97;
(f) using the means of communication, coordination and know-how of the European Anti-fraud Office in co-ordinating investigations at Community level;
(g) exchanging information on penalties for wildlife trade offences to ensure consistency in application;
(h) assisting in capacity building for application of the Regulation (EC) No 338/97 in other Member States including through training programmes and by sharing training manuals and materials;
(i) making available to other Member States, existing awareness-raising tools and materials aimed at the public and stakeholders;
(j) assisting other Member States with the temporary care and long-term re-homing of seized or confiscated live specimens;
(k) liaising closely with CITES Management Authorities and law enforcement agencies in source, transit and consumer countries outside of the Community as well as the CITES Secretariat, ICPO Interpol and the World Customs Organization to help detect, deter and prevent illegal trade in wildlife through the exchange of information and intelligence;
(l) providing advice and support to CITES Management Authorities and law enforcement agencies in source, transit and consumer countries outside of the Community to facilitate legal and sustainable trade through correct application of procedures;

(m) supporting capacity-building programmes in third countries in order to improve implementation and enforcement of CITES, inter alia, through Development Co-operation funds and in the framework of a future "Aid for Trade Strategy" [3];
(n) fostering inter-regional collaboration to combat illegal wildlife trade inter alia by building links with other regional and sub-regional initiatives."

166. We consider that Stop Ivory could usefully put together a briefing document based on the Model Law and these recommendations. It could be used to provide a "health assessment" of the domestic laws of States Parties to CITES. By means of a series of questions and checklists, Stop Ivory could produce a document which enabled NGOs or interested individuals in Range States and elsewhere to identify the key deficiencies in the national implementing regimes. This would then permit targeted lobbying of the governmental bodies in those States, to enable the national legislation to be more adequately drafted and implemented.

G. Response to questions 1 to 5

167. The above analysis enables the following responses to be given to the questions set in our instructions.

Question 1: What are the options for implementing a ten-year moratorium on international trade in ivory under the existing CITES regime?

(a) Is it possible for CITES member states to agree a further moratorium on all international trade for 10 years?

168. It is indeed possible for States Parties to CITES to agree such a moratorium. We have discussed the possible steps in Section F(1) above. We note that in addition to proposing a formal re-listing under CITES, we believe that another route which could helpfully be deployed is to advocate for the agreement of a non-binding Resolution. This Resolution should be framed so as to make clear that further trade in ivory for a period of at least 10 years would be 'detrimental to the survival of the species.' States practice would then enable the case under international law for treaty amendment to be made more cogently at the next available opportunity.

(b) Is it possible to amend the agreement reached by CITES member states in 1989, to remove or amend the 'Somali amendment' which permits application by member states to participate in one-off sales?

169. This amendment is as possible in principle as any other amendment to the CITES treaty. But there are the practical difficulties identified in Section F(1) above. We have outlined some courses of potentially lesser resistance in that section.

(c) For each, what are the options and consequences for member states which refuse to agree?

170. If States Parties to CITES agree to the amendments *and* also ratify the amended Treaty, then they will be bound to comply with it. For those States Parties that do not do so, the original version of CITES will continue to apply. Even if agreement is reached in principle, certain States Parties might enter reservations against the amendments or even seek to pull out of the Convention entirely, which would be counter-productive for the campaign as a whole.

171. Another major problem is the lack of effective enforcement of international law obligations at a domestic level. It is because of these difficulties that we consider that any strategy for Stop Ivory should involve a combined international and domestic approach. Not only should suggestions be made for appropriate amendments to CITES and/or non-binding Resolutions. We also think that suggestions should be made for appropriate amendments to the CITES Model Law and the implementation provisions that govern enforcement of domestic law regimes. To this end, we have suggested using both the Model Law and the EU Commission's Recommendation to put together a useful "health check" document. This can be drafted so as to set out an analytical framework for testing the compatibility of domestic laws with the CITES regime – and the efficacy of their enforcement measures. By securing responses from a variety of States to the analytical framework, the worst offenders can be identified and targeted.

Question 2: Would it be possible to create a new "Appendix" under CITES, under which species that are endangered in certain member states (but not as a whole) could be categorised; and for certain specific action (such as a complete ban for a specified period) to be attributed to those species?

172. This is a similar suggestion to the legislation that has been adopted at a European level, which is summarised in section F(5) above. That legislation permits Member States to adopt more severe domestic measures to respond, on a case by case basis, to identified threats to wildlife outside of the formal listing system between Appendices I and II to CITES. We do not see why legislative amendments could not be drafted for CITES itself to give effect to a similar mechanism. Furthermore, legislative amendments might be drafted which gave different treatment to different species in different countries, depending on local conditions. The difficulty would be drafting such a provision in a way that minimised the risk of challenge under the WTO GATT rules. Any differential treatment in practice would also have to be objectively justified, in order to avoid falling foul of the WTO prohibition on discriminatory treatment.

Question 3: What are the alternative options to CITES for achieving a ten-year moratorium on international trade, and what are their respective merits?

173. The alternative legal regimes that have a potential impact in this area have been identified in Section D(2) and D(3) above. While there is no harm in pursuing suggested changes in these areas in tandem, we remain of the view that the best prospect for securing Stop Ivory's objectives lies in a combined approach to the full and effective implementation of elephant protection measures under the auspices of CITES. This should involve the dual approaches of advocating changes to the international and domestic law regimes. We also think that Stop Ivory should consider lobbying for changes to the EU legal regime identified in Section F(5) above. We believe such changes would send a clear signal of support to those Range States which are currently very active in seeking to do more to protect the African elephant populations.

Question 4: What are the options for implementing a complete moratorium on domestic trade for 10 years; and what are their advantages and disadvantages?

174. We believe that it is possible for States Parties to CITES to agree between themselves a moratorium on all domestic trade for 10 years. This would involve some amendments to

the existing terms of the Treaty. The process of Treaty amendment is fully described in section F(1) above.

175. However, even if such amendments are agreed, there remains the problem of practical enforcement. Prohibitions on domestic trade will not be recognised as binding under domestic legal regimes unless either: (i) the constitutional arrangements of the States Parties permit international obligations to have automatic direct effect before their national courts (and there is an effective and willing enforcement regime); or (ii) specific national legislation and enforcement bodies are put in place giving effect to it. It is for this reason that we have advocated a combined approach to securing not only changes to CITES, but also a standardised system of monitoring the compliance of a host of States Parties to ensure that effective implementation of the obligations by NGOs or other interested parties is possible.

176. Ultimately, if a State Party to CITES is determined to avoid its international obligations towards the elephant population, it is likely that it can do so without practical censure. However, we consider that preparation of the type of "health check" document identified above will enable considerable public pressure to be brought to bear on those domestic law regimes which fail to give effect to their international law obligations. Such public pressure might then persuade a friendly State to take legal action before the ICJ; or, more likely, might prompt a change of heart on the part of the recalcitrant government.

177. More generally, the disadvantage generally for any absolute prohibition on trade in a product (at international level or domestic level) is that it risks driving demand and supply for the product "underground", without curing the overall problem that there is in fact a demand for the good in the black market. Raising awareness in the far Eastern markets is a particularly important part of any co-ordinated response to the very serious risk of extinction facing the African elephant now.

Question 5: what are the alternative options to CITES in a domestic sphere, and what are their respective merits?

178. We have not identified any obvious candidates with a better prospect of success than an enhanced domestic enforcement regime for modified CITES obligations.

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