

# JAPAN'S DOMESTIC MARKET FOR ELEPHANT IVORY: A LEGAL ASSESSMENT

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## **Introduction**

1. In view of the closure of domestic markets for elephant ivory recommended by the Conference of the Parties to the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES)<sup>1</sup> at its 17<sup>th</sup> meeting in Johannesburg/South Africa in October 2016, a number of legal issues arise with regard to the continuing operation of Japan's ivory market and its compatibility with the CITES treaty.

2. Accordingly, the primary focus of this assessment will be the new core provisions of Resolution Conf. 10.10 (Rev. CoP17, "Trade in Elephant Specimens"), as amended in Johannesburg, reading as follows:

"THE CONFERENCE OF THE PARTIES TO THE CONVENTION . . . .

### **Regarding trade in elephant specimens**

3. RECOMMENDS that all Parties and non-Parties in whose jurisdiction there is a legal domestic market for ivory that is contributing to poaching or illegal trade, take all necessary legislative, regulatory and enforcement measures to close their domestic markets for commercial trade in raw and worked ivory as a matter of urgency;
4. RECOGNIZES that narrow exemptions to this closure for some items may be warranted; any exemptions should not contribute to poaching or illegal trade;
5. URGES those Parties in whose jurisdiction there is a legal domestic trade for ivory that is contributing to poaching or illegal trade and that have not closed their domestic ivory markets for commercial trade in ivory to implement the above recommendation as a matter of urgency."

3. In addition, reference is made to the related recommendations of Resolution Conf. 10.10 (Rev. CoP17, paragraph 2) regarding the marking of whole tusks and cut pieces of ivory; and to the recommendations contained in Resolution Conf. 11.3 (Rev. CoP17, "Compliance and Enforcement", paragraphs 11 and 12), especially regarding the e-commerce of specimens of CITES-listed species and Internet-related wildlife trade. The analysis which follows here is based on these and other official CITES materials, and on available factual information and other documentation in the public domain.

## **Japan's participation in the Convention**

4. Japan deposited its instrument of acceptance of CITES on 6 August 1980 (with effect from 4 November 1980), and its instrument of acceptance of the 1979 Bonn Amendment of article XI on the same date (in force since 13 April 1987), but so far has not accepted the 1983

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<sup>1</sup> Signed at Washington/DC, 3 March 1973, in force 1 July 1975; *United Nations Treaty Series*, vol. 993, p. 243.

Gaborone Amendment of article XXI (regarding membership of the European Union, in force since 29 November 2013).<sup>2</sup>

5. Since hosting the 8<sup>th</sup> meeting of the Conference of the Parties in Kyoto in 1992, Japan was a voting member of the CITES Standing Committee until 2000 (chairing the committee from 1994 to 1997) and again from 2005 to 2016, and will serve as alternate member for the Asian region until 2022. The Japanese Government is the second-largest single contributor (after the United States) to the CITES budget,<sup>3</sup> and in addition to its assessed contributions is a voluntary co-sponsor of the Secretariat's *National Legislation Project*<sup>4</sup> and the project on *Monitoring the Illegal Killing of Elephants (MIKE)*.<sup>5</sup> In previous years, the Japan Ivory Importers' Association (JIIA) also made annual voluntary contributions, levied from its membership, to the budget of the CITES Secretariat.<sup>6</sup>

6. Pursuant to article IX of the Convention, the Government of Japan has designated

- as national CITES **management authorities**: for terrestrial animal species the Ministry of Economy, Trade and Industry (METI); and for marine species the Japan Fisheries Agency (JFA) of the Ministry of Agriculture, Forestry and Fisheries (MAFF); and
- as national CITES **scientific authorities**: for terrestrial animal species the Ministry of the Environment (MoE); and for marine species the JFA.

Further designated as CITES **enforcement authorities** are the MoE, the JFA, the Customs Clearance Division of the Ministry of Finance (MoF), and the Director of Economic Crimes Investigation of the National Police Agency.<sup>7</sup> METI and MoE have in turn delegated some of the administrative functions for **ivory trade controls** to the non-governmental *Japan Wildlife Research Center (JWRC)* as 'registration organization'. Moreover, a *Public-Private Council for the Promotion of Appropriate Ivory Trade Measures* was created in May 2016 for consultation between the relevant government agencies and selected stakeholders, non-governmental organizations and experts.<sup>8</sup>

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<sup>2</sup> List of Contracting Parties having accepted the amendment to Article XXI of the Convention (as of 8 July 2015), available at <https://www.cites.org/eng/disc/parties/gaborone.php>.

<sup>3</sup> US\$647,393 for 2016; CITES: General Trust Fund (CTL): Status of Contributions as of 30 June 2016, CoP17 Doc. 7.3, Annex 10, Tab. 1 (2016).

<sup>4</sup> US\$50,000 annually; CITES: External Trust Fund (QTL): Status of Contributions as of 31 December 2015, CoP17 Doc. 7.3, Annex 7, Activity D-1 (2016).

<sup>5</sup> US\$60,000 in 2016; see Ministry of Foreign Affairs, 'Summary briefing on the outcomes of CITES CoP17', Third Meeting of the Public-Private Council for the Promotion of Appropriate Ivory Trade Measures (Tokyo, 2 November 2016), available at [http://www.meti.go.jp/english/policy/external\\_economy/Ivory/pdf/161102.pdf](http://www.meti.go.jp/english/policy/external_economy/Ivory/pdf/161102.pdf).

<sup>6</sup> The JIIA was established in 1984 as the ivory branch of the Japan General Merchandise Importers Association (JGMIA), at the initiative of the former Ministry of International Trade and Industry (MITI); see I. Miyaoka, *Legitimacy in International Society: Japan's Reaction to Global Wildlife Preservation* (New York: Palgrave Macmillan, 2004), pp. 105-106. Between 1985 and 1989, two-thirds of the budget of the CITES Secretariat's ivory unit were provided by the JIIA; see M. Meredith, *Africa's Elephant: A Biography* (London: Hodder & Stoughton, 2001), pp. 211-214. The list of approved donors in CITES *Notification to the Parties* No. 2004/016 (10 March 2004) included both the JGMIA and the *Japan Federation of Ivory Arts and Crafts Associations* (formerly *Japan Ivory Association, JIA*), also suggested in 1999 as a potential source of voluntary contributions to the MIKE project; see the Summary Report of the 42<sup>nd</sup> meeting of the CITES Standing Committee, SC42 (1999), p. 17. The CITES Secretariat thus "effectively accepted money from the fox for guarding the hen-house", in the sarcastic terms of E. Couzens, *Whales and Elephants in International Conservation Law and Policy: A Comparative Study* (London: Earthscan, 2014), p. 132.

<sup>7</sup> CITES list of national contacts: Japan (updated by the Secretariat as of 17 March 2017), available at the website, <https://www.cites.org/eng/cms/index.php/component/cp/country/JP>.

<sup>8</sup> See the Report of the Council, 'Current State and Further Efforts Regarding Ivory Trade in Japan', submitted to the 17<sup>th</sup> meeting of the Conference of the Parties to CITES, as Doc. Conf.17 Inf. 57 (September 2016). On the distinct Japanese tradition of governance by consensual deliberation councils (*shingikai*), see C. Johnson, *MITI and the Japanese Miracle* (Tokyo: Tuttle, 1982); J.V. Feinemann and K. Fujikura, 'Japan: Consensus-Based

7. Japan's two most recent **biennial reports** under article VIII-7-b ("legislative, regulatory and administrative measures taken to enforce the provisions of the Convention"), submitted to the CITES Secretariat on 1 December 2015 by the Ministry of Foreign Affairs, cover the years 2011-12 and 2013-14. According to sections C-5, C-6, C-8 and C-12 of the reports, there were "no significant seizures/confiscations of CITES specimens, criminal prosecutions or other court actions of significant CITES-related violations", nor any cooperative enforcement activities with other countries (exchange of intelligence, investigative assistance, joint operations, etc.) during the four-year period covered.<sup>9</sup> Curiously, the reports fail to mention the landmark *Takaichi* case decided by the Tokyo District Court in September 2011, discussed in section 12 below;<sup>10</sup> and the attempted illegal export of 63 ivory pieces to China, intercepted at Fukuoka Airport in November 2011.<sup>11</sup>

8. The principal national legal instruments currently in force to implement the Convention at the domestic level include the *Law for the Conservation of Endangered Species of Wild Fauna and Flora* (LCES);<sup>12</sup> the *Foreign Exchange and Foreign Trade Law* (FEFTL);<sup>13</sup> and the *Customs Law*,<sup>14</sup> with their respective Cabinet Orders and Ordinances. Early external evaluations of the adequacy of this implementing legislation were predominantly critical.<sup>15</sup> An expert analysis commissioned by the CITES Secretariat in 1994, as part of its comparative surveys of national legislation grading all member countries in one of three compliance categories,<sup>16</sup> had initially ranked Japan in category 2 only ("legislation believed *not* to meet

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Compliance', in E.B. Weiss and H.K. Jacobson (eds.), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (Cambridge/MA: MIT Press 2000), pp. 253-290, at 259.

<sup>9</sup> See CITES, Biennial reports: Japan (01/12/15e), available at <https://cites.org/sites/default/files/reports/11-12Japan.pdf>, and [https://cites.org/sites/default/files/reports/13-14Japan\\_0.pdf](https://cites.org/sites/default/files/reports/13-14Japan_0.pdf).

<sup>10</sup> See note 33 below. In addition, Japan's report to the 66<sup>th</sup> meeting of the CITES Standing Committee, on *Control of Trade in Elephant Ivory and Ivory Market* (Geneva, 15 September 2015) refers to the arrest of three persons in Tokyo for purchase and sale of whole ivory without permits in February 2014; see SC66 Doc. 29 (2016), Annex 20, p. 9 (case not mentioned in the 2013-2014 biennial CITES report).

<sup>11</sup> Infraction notice dated 11 November 2011 (pursuant to article 111 of the Customs Act), imposed by the Moji Customs Inspection and reported in the Finance Ministry's *Record of Infraction Cases in Violation of CITES* (Tokyo: MoF, 2011) [in Japanese]; see M. Sakamoto, *What Lies Beneath: Exposing the Loopholes within Japan's Control of Internal Ivory Trade* (Tokyo: Japan Tiger and Elephant Fund, 2013), p. 29.

<sup>12</sup> Act No. 75 of 5 June 1992 (effective 1 April 1993), as amended by Act No. 52 of 29 June 1994 (effective 28 June 1995) and Act No. 87 of 2005, supplemented on 12 June 2013 (effective 1 June 2014); English translation: <http://www.japaneselawtranslation.go.jp/law/detail/?id=2103&vm=04&re=02&new=1>. Further amendments in 2017 are not yet in force (notes 21 and 81 below). See also Cabinet Order No. 17 of 10 February 1993, as amended on 28 April 1998 and 2 July 2004.

<sup>13</sup> Act No. 228 of 1 December 1949, amended by Act No. 102 of 2005 (effective 1 October 2007) and Act No. 59 of 2009, English translation: <http://www.japaneselawtranslation.go.jp/law/detail/?id=2076&vm=&re=&new=1>.

<sup>14</sup> Act No. 61 of 2 April 1954, as amended by Act No. 13 of 31 March 2010, English translation excerpts: WIPO LEX (Geneva) Database, <http://www.wipo.int/wipolex/en/details.jsp?id=7002>.

<sup>15</sup> See Feinmann and Fujikura (note 8 above), at pp. 269-273 and 289; P.A. Mofson, 'Protecting Wildlife from Trade: Japan's Involvement in the Convention on International Trade in Endangered Species', *Journal of Environment and Development* 3 (1994), pp. 91-107, at 96; K. Ishibashi, 'The Effectiveness of Mechanisms for Supervision or Compliance Control of Multilateral Environmental Agreements: A Critical Study of Compliance with CITES' [in Japanese], *Kagawa Hōgaku* 15 (1995), pp. 53-128; and M. Taguchi, *International Regimes and Cooperation: An Analysis of the Convention on International Trade in Endangered Species of Wild Fauna and Flora and Japan* (Portland/OR: University of Oregon thesis 1996).

<sup>16</sup> 'National Laws for Implementation of the Convention', Resolution Conf. 8.4 (Rev. CoP15, 1992/2010). See R. Wolfrum, 'Means of Ensuring Compliance with and Enforcement of International Environmental Law', *Hague Academy of International Law: Collected Courses* 272 (1998), pp. 9-154, at 50 (fn. 99); R. Reeve, *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (London: Earthscan, 2002), pp. 134-147; and text at sections 19-22 (notes 65-82) below.

all the requirements for the implementation of CITES”).<sup>17</sup> Following the 1994 amendment of the LCES (effective 1995) with regard to domestic ivory trade in particular, a CITES Panel of Experts on the African Elephant found in 1996/1997 that “the control of ivory stocks in Japan is good for whole tusks but needs improvements for parts of tusks”.<sup>18</sup> Nevertheless, the CITES Secretariat then upgraded the country from category 2 to category 1 (“legislation believed to generally meet the requirements for implementation of CITES”) as from 1 May 1997,<sup>19</sup> and has since ranked Japan in category 1 in all subsequent editions of its *legislative status table*.<sup>20</sup>

9. In the wake of the 2016 Johannesburg meeting and Resolution Conf. 10.10 (Rev. CoP17), the Japanese Government has introduced further amendments to its legislation with regard to controls over the ivory trade, which are not yet in force.<sup>21</sup> The remarks which follow here will also take these future changes into account.

### Japan and the ivory trade

10. The history of Japan’s prominent role in the ivory trade is well documented.<sup>22</sup> While CITES had always prohibited international trade in Asian elephants and their products, it initially legalized commercial ivory exports from African elephant range states (under an agreed system of national export quotas since 1985), up until the dramatic 1989 Conference resolutions which upgraded all African elephants to fully protected status under Appendix I of the treaty, banning transnational ivory trade with effect from 1990.<sup>23</sup> Prior to 1990, Japan had accounted for up to 70% of the entire global trade in raw and worked ivory, with annual imports averaging some 270 tonnes.<sup>24</sup> Besides local consumption by traditional ivory-working industries (mainly for *hanko* seals, jewelry, and musical instruments),<sup>25</sup> this included re-exports to other destinations such as China and Hongkong in particular. According to the 1996/1997 report of the CITES Panel of Experts on the African Elephant, there was evidence of illegal imports of whole ivory tusks to Japan in significant quantities before 1990.<sup>26</sup>

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<sup>17</sup> CITES CoP9 Doc. 9.24/Rev., Annex 1 (1994; emphasis added). The analysis was carried out by TRAFFIC and World Wildlife Fund USA, Washington/DC; see J.E. Baker, ‘A Substantive Theory of the Relative Efficiency of Environmental Compliance Strategies: The Case of CITES’, *Journal of International Wildlife Law and Policy* 2 (1999), pp. 1-45, at 33.

<sup>18</sup> C. Thouless (chairman) et al., Report of the CITES Panel of Experts on the African Elephant (1996, submitted to the Standing Committee on 7 February 1997), Chapter 8: Country Review Japan, pp. 37-47, at 47.

<sup>19</sup> CITES CoP10 Doc. 10.31/Rev., Annex 1 (1997). Japan at that time chaired the Standing Committee; see the intervention by the chair, Summary Report of the 37<sup>th</sup> Meeting, SC37 (6 December 1996), p. 28.

<sup>20</sup> Current edition in CITES CoP17 Doc. 22, Annex 3 (Rev. 1, updated on 1 September 2016); but see sections 20-23 below.

<sup>21</sup> Cabinet Bill No. 33, based on recommendations by the Central Environmental Council of 30 January 2017 and adopted by the Diet on 26 May 2017, to become effective in mid-2018; see notes 63 and 81 below. According to a press release by the MoE of 29 August 2017, “the acquisition process for ivory is likely to be stricter after the summer of 2019”; see <http://www.env.go.jp/press/uplode/upfile/104480/106731.pdf>.

<sup>22</sup> E.g., see T. Milliken, ‘The Japanese Ivory Trade: Tradition, CITES and the Elusive Search for Sustainable Utilisation’, in S. Cobb (ed.), *The Ivory Trade and the Future of the African Elephant* (Oxford: Ivory Trade Review Group, 1989); and D.H. Chadwick, *The Fate of the Elephant* (San Francisco: Sierra Club, 1992).

<sup>23</sup> CITES Resolutions Conf. 7.8 and Conf. 7.9 (1989), since superseded by Resolution Conf. 10.10 (Rev. CoP17, 1997/2017). For background see M.J. Glennon, ‘Has International Law Failed the Elephant?’, *American Journal of International Law* 84 (1990), pp. 1-43.

<sup>24</sup> Miyaoka (note 6 above), p. 119, citing Milliken (note 22 above).

<sup>25</sup> See E.B. Martin and D. Stiles, *The Ivory Markets of East Asia* (London: Save the Elephants, 2003), pp. 11-42.

<sup>26</sup> Note 18 above, p. 44; and see Milliken (note 22 above), Annex 1, listing imports of over 2,300 tonnes from Congo Brazzaville, the Central African Republic, the Democratic Republic of Congo, Sudan, Tanzania, Uganda and South Africa, suspected to have been exported in violation of the laws of the countries of origin.

11. After the 1989 ban, the CITES Conference only authorized exceptional international auctions of government-held ivory stocks in Southern African countries on two occasions in 1998 and 2008, conditioned upon a set of special requirements.<sup>27</sup> The conditions specified, *inter alia*, (a) that deficiencies in national enforcement and control measures identified by the CITES Panel of Experts in the exporting and importing countries concerned were to be remedied; and (b) that compliance with the conditions was to be verified by the CITES Secretariat. On the basis of the Secretariat's reports on verification missions carried out in 1998/1999 and 2005/2006,<sup>28</sup> the Standing Committee then confirmed that Japan had met these conditions and consequently was admitted to participate as trading partner in the auctions,<sup>29</sup> thus authorizing further Japanese imports of 50 tonnes (in 1999) and 40 tonnes (in 2009) of raw ivory from Africa.<sup>30</sup>

12. The ban declared by CITES and the ensuing stricter national controls introduced in Japan since 1995 were not sufficient, however, to put an end to illegal trade transactions fuelling the country's domestic ivory market.<sup>31</sup> In September 2011, the Tokyo District Court convicted the former chairman of the *Japan Federation of Ivory Arts and Crafts Associations (JIA)*,<sup>32</sup> Kageo Takaichi (a prominent buyer in the 1998 and 2008 auctions), for multiple illicit ivory trade.<sup>33</sup> He had been a member of the Government's "Review Committee for the Ivory Control System" in 1992, had regularly participated in CITES Conference meetings from 1985 to 2000;<sup>34</sup> and the CITES Secretariat's verification missions to Japan – on which the Standing Committee's assessment of Japan's regulatory controls as "satisfactory" was based – had partly relied on JIA testimony.

13. At its 17<sup>th</sup> meeting in Johannesburg, the Conference of the Parties refused to continue the practice of international auction sales – after a nine-year "moratorium" – nor to develop a so-called decision-making mechanism for future authorization of ivory trade.<sup>35</sup> The 2016 report of the CITES Elephant Trade Information System (ETIS) had specifically drawn attention to

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<sup>27</sup> Conference Decision 10.1 (1997) and annotation 2.g.ii to CITES Appendix II (*Loxodonta africana*), as revised at CoP17; see W. Wijnstekers, *The Evolution of CITES*, 9<sup>th</sup> edn. (Budapest: International Council for Game and Wildlife Conservation, 2011), pp. 629 and 634.

<sup>28</sup> Mission reports in Doc. SC41.6.1 (Rev.), Annex 2 (1999), pp. 11-12; and SC54 Doc. 26.1 (Rev. 1) (2006).

<sup>29</sup> Standing Committee, Summary Reports SC41 (1999) p. 15, and SC54 (2006) p. 17.

<sup>30</sup> Secretariat report to the Standing Committee, SC58 (2009), Doc. 36.3 (Rev. 1); see also Reeve (note 16 above), pp. 77-80; and Wijnstekers (note 27 above), p. 636. – Accordingly, legal ivory imports of 49,574 kg to Japan in 1999 were recorded in CoP16 Doc. 53.2.2 (Rev. 1), p. 23; and 40,586.20 kg imported were registered by Japan in the CITES Trade Database for 2009.

<sup>31</sup> See H. Kiyono, 'The Ivory Trade in Japan', in S.V. Nash (ed.), *Still in Business: The Ivory Trade in Asia, Seven Years after the CITES Ban* (Cambridge: TRAFFIC International, 1997), pp. 6-18, and table JP-6 recording ivory seizures worldwide implicating Japan between 1989 and 1997.

<sup>32</sup> See note 6 above.

<sup>33</sup> Sentenced to one year's imprisonment on probation, and a corporate fine of one million yen (US\$12,500), for illegal purchases of 509kg of raw ivory (58 pieces) between 2005 and 2010; see the analysis of the case by Sakamoto (note 11 above), pp. 8-10. After the *Takaichi* judgment, the individual maximum penalties under the LCES were raised in 2013 from one to three years' imprisonment and from one to five million yen, and the maximum corporate fine was increased from one to one-hundred million yen; see Japan's report to the CITES Standing Committee, SC65 Doc. 42.1 (June 2014), Addendum, Annex 2, p. 1.

<sup>34</sup> See the list of participants, *Proceedings of the 5<sup>th</sup> meeting of the CITES Conference* (Buenos Aires, 1985), p. 666; and of the 11<sup>th</sup> meeting (Nairobi, 2000), p. 79. The 15<sup>th</sup> meeting of the Conference (Doha, 2010) was attended by his son, Masaya Takaichi, as representative of the JIA; see the list of participants, p. 50.

<sup>35</sup> Proposal CoP17 Doc. 84.3 (2016) was rejected by a vote of 76:21:13; see the Summary Record of the third session of Conference Committee II (26 September 2016), CoP17 Com. II Rec.3 (Rev.1), p. 5.

“regulatory loopholes and lapses” in Japan.<sup>36</sup> There also were new alarming reports by independent non-governmental observers, alleging deficits in Japan’s application of the Convention to trade in ivory.<sup>37</sup> While the CITES Secretariat had previously dismissed some of the earlier NGO criticism as “misleading and inaccurate”,<sup>38</sup> the most recent reports deserve to be taken seriously, since they raise at least two important international legal concerns:

- (i) the question whether Japan may claim an exemption from the ban on domestic ivory markets under Resolution Conf. 10.10 (Rev. CoP17); and
- (ii) the question whether Japan meets the criteria for classification in category 1 of the national legislation list under Resolution Conf. 8.4 (Rev. CoP15).

## I. Is Japan exempt from the ban on domestic ivory markets?

14. So far, at the time of writing, there has been no official statement from the Government of Japan on the outcome of the 17<sup>th</sup> CITES Conference session, except for a brief joint evaluation report by the Ministry of Foreign Affairs, METI and MoE<sup>39</sup> to the third meeting of the “Public-Private Council for the Promotion of Appropriate Ivory Trade Measures” on 2 November 2016 in Tokyo.<sup>40</sup> The report welcomes the fact that Resolution Conf. 10.10 (Rev. CoP17), as revised and adopted by consensus at Johannesburg, “is not intended to recommend closure of Japan’s domestic ivory market, which has been strictly controlled”; while affirming Japan’s intention “to continue its strict control of domestic ivory trade”.<sup>41</sup> The Government thus appears to interpret the wording in paragraphs 3 to 5 of the Resolution – even though it does not explicitly mention Japan – as a new exception clause for any legal domestic ivory market which is *not* “contributing to poaching or illegal trade”, and which therefore would be exempt from the agreed general CITES ban on domestic ivory trade.

15. Exemptions or “carve-outs” in public international law purport to exclude specific measures from the scope of an agreed primary rule.<sup>42</sup> The general principle is that in such cases the burden of proof is on the party invoking an exception from the rule. As pointed out by the International Court of Justice (ICJ) in the *Antarctic Whaling* case in 2014, however, the determination as to whether or not an exemption applies to a given case (such as whaling for scientific purposes under article VIII of the International Whaling Convention) is not simply left to a State’s unilateral perception or interpretation, but must respect objective standards.<sup>43</sup> Applying that maxim to the present case, this means that if the Government of Japan actually claims to be dispensed from the general ban agreed by the Conference of the Parties to CITES, it will have to provide tangible evidence that its domestic ivory market – or any

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<sup>36</sup> T. Milliken et al., *The Elephant Trade Information System (ETIS) and the Illicit Trade in Ivory: A Report to the 17<sup>th</sup> Meeting of the Conference of the Parties to CITES*, CoP17 Doc. 57.6 (Rev. 1) (27 May 2016), Annex, p. 22.

<sup>37</sup> Environmental Investigation Agency, *Japan’s Illegal Ivory Trade and Fraudulent Registration of Ivory Tusks* (Washington/DC: EIA, 2015); Environmental Investigation Agency, *The Dirty Secrets of Japan’s Illegal Ivory Trade* (Washington/DC: EIA, 2016); and M. Sakamoto, *The Last Ivory Ban Haven: The Drivers of Japan’s Illegal Ivory Trade and the Failure of Japan’s Domestic Ivory Legislation* (Tokyo: Japan Tiger and Elephant Fund, 2016).

<sup>38</sup> CITES Standing Committee, Summary Report of the 55<sup>th</sup> meeting, SC55 (2007), p. 2.

<sup>39</sup> See section 6 above.

<sup>40</sup> Note 8 above; summary at [http://www.meti.go.jp/english/policy/external\\_economy/Ivory/pdf/161102.pdf](http://www.meti.go.jp/english/policy/external_economy/Ivory/pdf/161102.pdf).

<sup>41</sup> *Ibid.*, p. 10, paragraph 2-2-1 (unofficial translation).

<sup>42</sup> See L. Bartels and F. Paddeu (eds.), *Exceptions in International Law* (Oxford University Press, 2017).

<sup>43</sup> *Whaling in the Antarctic* (Australia v. Japan, New Zealand intervening), Judgment of 31 March 2014, Reports of the International Court of Justice (2014), paragraphs 52, 61 and 66 (“objectively justifiable”).

exemption granted under paragraph 4 of Resolution Conf. 10.10 (Rev. CoP17) – objectively (a) does *not* contribute to poaching, and (b) does *not* contribute to illegal trade.

### **(a) Poaching**

16. International debates on the causal link between “legalized” ivory trade and elephant poaching remain controversial, mainly because of the undeniable role of extraneous factors such as economic crises and local military conflicts. Even so, a recent interdisciplinary analysis of the global impact of the ivory auctions under CITES auspices in 1998 and 2008, taking into account all available statistical information (including the data provided by Japan) and relevant econometric modeling, concluded that the over-all evidence pointed to a demonstrable contributory effect of this “experimental” legalization on the dramatic rise of poaching in subsequent years.<sup>44</sup> While these critical conclusions were challenged at the Johannesburg Conference by the CITES Secretariat and its Technical Advisory Group (TAG),<sup>45</sup> they have since been corroborated in a reasoned rebuttal by the authors of the study, and by more recent statistical comparisons.<sup>46</sup> In light of these scientific findings, it would seem difficult for the Japanese authorities to deny and disprove at least a contributory causal cross-connection between legalized ivory trade and poaching.

### **(b) Illegal trade**

17. “Trade”, as defined by CITES article I-c, is transnational (border-crossing) trade; i.e., imports and exports/re-exports. The existence of a lucrative legal (“white”) domestic ivory market inevitably tends to attract, at the same time, illicit trans-border smuggling and “black” trafficking. The 1997 Panel of Experts Report listed at least 47 cases of illegal **imports** to Japan of raw and worked or semi-worked ivory *after* the 1989 CITES trade ban;<sup>47</sup> and the Secretariat’s verification mission in 2006 noted 57 cases of attempted illegal imports since 2000.<sup>48</sup> The 2007 ETIS report identified Japan as the country of destination in large-scale seizures totaling 11.3 tonnes of smuggled ivory between 1989 and 2006;<sup>49</sup> and a series of imports of cut ivory pieces from African countries by ordinary mail (declared as “gifts” or “samples”) has been documented for 2014-2015.<sup>50</sup> However, the 2016 ETIS report concludes

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<sup>44</sup> S. Hsiang and N. Sekar, *Does Legalization Reduce Black Market Activity? Evidence from a Global Ivory Experiment and Elephant Poaching Data*, National Bureau of Economic Research Working Paper No. 22314 (Cambridge/MA: NBER, June 2016), available at <http://www.nber.org/papers/w22314>.

<sup>45</sup> F.M. Underwood et al., ‘A Statement from the MIKE and ETIS Technical Advisory Group on Recent Claims that the CITES-Approved Ivory Sales in 2008 Caused a Spike in Poaching Levels’, CITES Doc. CoP17 Inf. 42 (text submitted by the Secretariat, 19 September 2016).

<sup>46</sup> S. Hsiang and N. Sekar, ‘Evidence Should Be Used in Global Management of Endangered Species: Reply to the CITES Technical Advisory Group’, CITES Doc. CoP17 Inf. 96, Annex (text submitted by Kenya, 5 October 2016); and the CITES Secretariat Report on ‘Elephant Conservation, Illegal Killing and Ivory Trade’, SC69 Doc. 51.1 (24 October 2017), p. 3, mainly based on ETIS data and new tables for the years 2007-2016: ‘Status of Elephant Populations, Levels of Illegal Killing and the Trade in Ivory: A Report to the CITES Standing Committee’, SC69 Doc. 51.A (24 October 2017), pp. 22-30 and figures x1-x6.

<sup>47</sup> Report cited in note 18 above, at p. 41. Table 4 of the ETIS report to the 11<sup>th</sup> CITES Conference (Nairobi, 2000), Doc. 11.31.1, Annex 5, recorded 20 cases of ivory seizures in Japan between 1989 and 1997.

<sup>48</sup> See SC54 Doc. 26.1 (Rev. 1), Annex, paragraph 22. This figure did not include the seizure of 2.8 tonnes of smuggled ivory at the port of Osaka in August 2006, which apparently had not yet been notified to CITES; on this case see M. Sakamoto, *Destination Japan – An Investigation into the Osaka Seizure and Laundering of Illegal Ivory* (Tokyo: Japan Wildlife Conservation Society, 2007).

<sup>49</sup> T. Milliken et al., ‘Monitoring of Illegal Trade in Ivory and Other Elephant Species’, CoP14 Doc. 53.2 (2007), Annex 1, p. 43, Table 5.

<sup>50</sup> Sakamoto (note 37 above), pp. 6-7: When ivory is found in incoming international mail with a declared value below 200,000 yen (US\$2,000), current practice of the Japanese customs authorities is to notify the addressee

that Japan no longer appears to be a destination for the significant illegal ivory flows presently leaving Africa.<sup>51</sup> On the other hand, the report notes with great concern that ivory from Japan is now being illegally **re-exported** to China in significant quantities.<sup>52</sup> Since 2009, the Chinese authorities have made at least 54 seizures of ivory imported from Japan.<sup>53</sup> The preferred medium emerging for this growing illicit traffic are electronic **Internet** sales by leading Japanese networks such as *Yahoo! JAPAN*. For example, as documented by several recent NGO surveys, more than 12 tonnes of whole tusks and cut pieces of ivory were sold on the *Yahoo! JAPAN Auctions* site alone from 2012 to 2014.<sup>54</sup> Via on-line retail sites and bidding agencies based both in Japan and abroad (China, Hong Kong, Taiwan, South Korea), the raw and worked ivory products so acquired then frequently leave Japan by mail, only a fraction of which ends up being searched and seized by customs controls in the recipient countries.<sup>55</sup> *Yahoo! JAPAN*, considered the world's largest on-line network for ivory trading, persistently refuses to stop that traffic.<sup>56</sup> The electronic extension of Japan's domestic "white" market towards a booming global "grey" market largely beyond national control is thus likely to increase further,<sup>57</sup> especially after the closure of China's own domestic ivory market announced for the end of 2017.

18. One of the conditions for Japan's designation as trading partner for the ivory auctions under CITES auspices in 1998 and 2008, as laid down in annotation 2.g.ii to Appendix II, was indeed "to have sufficient national legislation and domestic trade controls to ensure that the imported ivory *will not be re-exported*".<sup>58</sup> Yet, there is currently no evidence of effective national control measures or sanctions to prevent dubious re-exports of ivory acquired via on-line shopping and Internet auctions in Japan, partly owing to shortcomings in the registration

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that a CITES import/export permit is required under the FEFTL (note 13 above), and in the absence of a response, to return the shipment to the sender.

<sup>51</sup> Milliken et al. (note 36 above), p. 23.

<sup>52</sup> Ibid., citing the case of a couple sentenced in China to 15 years' imprisonment for importing 3.25 tonnes of raw and worked ivory from Japan in multiple shipments between 2010 and 2012.

<sup>53</sup> Sakamoto (note 37 above), p. 4, documenting seizures in Dalian and Beijing (2014-2016); see also the interception of ivory destined for China at Fukuoka airport (2011), cited in note 11 above.

<sup>54</sup> See T. Matsumoto, 'A Review of Online Ivory Trade in Japan', TRAFFIC East Asia-Japan Briefing Document (Tokyo, 2015). Ivory sales on *Yahoo! JAPAN Auctions* from 2008 to 2014 generated revenues of over 2.3 billion yen (US\$25 million); Environmental Investigation Agency 2015 (note 37 above), p. 9. *Yahoo! JAPAN* is a member of the joint secretariat of the Public-Private Ivory Trade Council (note 8 above); see the list of participants of the third Council meeting in November 2016 (note 40 above).

<sup>55</sup> E.g., 804.4 kg of ivory from Japan seized in Beijing in October 2015; see Sakamoto (note 37 above), p. 4, and <http://www.traffic.org/home/2015/10/12/beijing-forest-police-smash-major-wildlife-trafficking-ring.html?printerFriendly=true>. The ivory in the case cited in note 52 above was also acquired via the Internet.

<sup>56</sup> See Y. Shida and D.M. Todd, 'Yahoo! JAPAN Defies Calls to Halt Ivory Sales as Poaching Soars', *Japan Times* of 20 January 2017; and the public reiteration of the company's refusal, 'Yahoo! JAPAN's Initiatives Towards the Eradication of Illegal Ivory Trade', <https://publicpolicy.yahoo.co.jp/2017/09/2014.html> (20 September 2017). By contrast, several other global on-line networks (including *Amazon*, *eBay*, *Google*, *Alibaba*, and most recently *Rakuten Ichiba*) have already discontinued ivory sales on their sites.

<sup>57</sup> Compare M. Sakamoto, *Black and Grey: Illegal Ivory in Japanese Markets* (Tokyo: Japan Wildlife Conservation Society, 2<sup>nd</sup> edn. 2004); and most recently T. Kitade, *An Updated Review of Online Ivory Trade in Japan* (Tokyo: TRAFFIC Japan Briefing, August 2017), highlighted also in the document submitted by Burkina Faso, Congo, Kenya and Niger, *Implementing Aspects of Resolution Conf. 10.10 (Rev. CoP17) on the Closure of Domestic Ivory Markets*, SC69 Doc. 51.2 (5 October 2017), pp. 3-4. The TRAFFIC "snapshot survey", carried out in May-June 2017 with a focus on "customer-to-customer" (CtoC) online trading at *Mercari* and *Yahoo! JAPAN* sites, found that "regulation over trade in any ivory items *other* than whole tusks is non-existent" (p. 2; and p. 8, table 2). See <http://www.traffic.org/home/2017/8/8/traffic-surveys-find-thousands-of-ivory-items-sold-weekly-on.html>; and D. Kikuchi, 'Online Retailers in Japan Not Doing Enough to Stop Illegal Ivory Trade', *Japan Times* (9 August 2017).

<sup>58</sup> See note 27 above (emphasis added).

system already criticized by the CITES Panel of Experts in 1997,<sup>59</sup> and further discussed in section 22 below. Japan's 2015 Report to the Standing Committee on *Control of Trade in Elephant Ivory and Ivory Market* makes no reference to re-export controls over *transnational* on-line trade.<sup>60</sup> The 2016 Report of the Public-Private Ivory Trade Council merely suggests, with regard to illegal electronic commerce, a "prohibition of placing of items that state overseas-shipping",<sup>61</sup> but affirms that such measures "are not necessarily required" under applicable national laws and regulations and should instead be "conducted voluntarily" by market place providers.<sup>62</sup> At the fourth meeting of the Council in Tokyo on 28 March 2017, the MoE made it clear that even under the new LCES amendment (scheduled to enter into force in 2018), "placement of ivory products on an Internet auction site is *not* subject to regulation if it is a 'one-off sale' by an individual", as distinct from continuous business operations.<sup>63</sup> Consequently, in the absence of mandatory (sanctioned) rules and empirical verification of their application in practice, and in the face of the damning evidence of recent seizures in recipient countries,<sup>64</sup> it is difficult to imagine how the Government could possibly prove that the country's domestic electronic market is *not* contributing to illegal international ivory trade.

19. Under these circumstances, Japan's domestic ivory market cannot be considered as meeting the requirements for an exemption from Resolution Conf. 10.10 (Rev. CoP17), paragraphs 3 to 5. Also taking into account the fundamental principle of equal treatment for all Contracting Parties to the Convention,<sup>65</sup> this national market should therefore be closed henceforth, "as a matter of urgency". In accordance with paragraph 8 of the Resolution, the Government of Japan should in due course inform the Secretariat of its efforts to this effect.

## II. Does Japan qualify for category 1 of the legislation list?

20. These findings raise the important general question whether or not Japan still meets the criteria for being ranked in the top category (1) of the CITES *National Legislation List*, to which the country was elevated by the Secretariat in 1997.<sup>66</sup> Pursuant to Resolution Conf. 8.4 (Rev. CoP15, 2010), Parties listed in category 1 ("legislation which is believed generally to

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<sup>59</sup> See note 18 above.

<sup>60</sup> See the chapter "control over online trade" in 'Japan's Report on Control of Trade in Elephant Ivory and Ivory Market', SC66 Doc. 29, Annex 20 (15 September 2015), pp. 8-9. Yet, general rules on Internet *advertising* for all CITES-listed species had been introduced by the LCES amendments of 12 June 2013 (effective 1 June 2014).

<sup>61</sup> Note 8 above, pp. 16-17. For example, one Tokyo-based website offers ivory products and whole tusks under the slogan "buy in Japan, receive anywhere in the world"; see also Matsumoto (note 54 above), p. 3 and figure 4.

<sup>62</sup> By the same token, the focus of the Government's countermeasures to illegal on-line trading as enumerated in its 2015 report to the Standing Committee (note 60 above) is on voluntary cooperation and "independent efforts" by business stakeholders at periodic compliance monitoring. See also the 'Report on Further Actions Taken by Japan to Combat Illegal Trade in Ivory', SC69 Doc. 29.3 A2 (14 August 2017, posted on the CITES website on 20 October 2017), para. 2(d), emphasizing voluntary measures by "the providers of online market place including ivory and ivory products" under the auspices of the Public-Private Ivory Trade Council.

<sup>63</sup> Meeting summary at [http://www.meti.go.jp/english/policy/external\\_economy/Ivory/pdf/170328.pdf](http://www.meti.go.jp/english/policy/external_economy/Ivory/pdf/170328.pdf), p. 3. Yet, the survey by TRAFFIC Japan in May-June 2017 found that some 38% of the ivory sellers posing as "individuals" were likely to have been unidentified business traders (Kitade, note 57 above, p. 6 and figure 7).

<sup>64</sup> E.g., see the case reported in notes 52 and 55 above.

<sup>65</sup> See A. Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 3<sup>rd</sup> edn. 2013), p. 280: "It is a cornerstone of international law that all states are equal."

<sup>66</sup> See text in section 8 (notes 12 to 20) above.

meet the requirements for CITES implementation”<sup>67</sup> must have laws to (i) designate at least one Management Authority and one Scientific Authority; (ii) prohibit trade in specimens in violation of the Convention; (iii) penalize such trade; and (iv) confiscate specimens illegally traded or possessed.<sup>68</sup> Conversely, in the absence of acceptable legal regulations regarding those four points, Parties are grouped either in category 2 (“legislation believed generally not to meet all the requirements”) or in category 3 (“legislation believed generally not to meet the requirements”), thus indicating a need for future improvements.<sup>69</sup>

21. The “core” of these criteria,<sup>70</sup> further elaborated by the Secretariat in a *Checklist for Reviewing CITES Legislation*,<sup>71</sup> is the prohibition of trade in specimens in violation of the Convention. As applied to the ivory trade, this requires adequate regulations specifying the products covered by the prohibition, usually by national administrative systems of registration and marking (internationally harmonized by resolutions and decisions of the Conference of the Parties);<sup>72</sup> and the necessary legal powers enabling the competent Management Authority and other appropriate government agencies to monitor and enforce compliance.<sup>73</sup>

22. Yet, the CITES Panel of Experts on the African Elephant had already noted in 1997 that Japan’s “control of retail trade is not adequate to differentiate the products of legally acquired ivory from those of illegal sources”;<sup>74</sup> and in 2004, the CITES Secretariat reported to the Standing Committee that the country’s “internal ivory controls do *not* meet all the required measures identified in Resolution Conf. 10.10 (Rev. CoP12)”.<sup>75</sup> Contrary to assurances given by the Japanese authorities in the course of subsequent technical verification missions,<sup>76</sup> the liberal **registration** procedure introduced in 1999 by subsidiary administrative regulations under the LCES (resulting in over 7,900 whole tusks being newly and “retroactively” registered between 2010 and 2015)<sup>77</sup> did not require certified documentary proof of the legal acquisition date and the legality of origin of the ivory stocks registered. Nor did it provide for physical inspection of the stocks, and frequently relied on simple personal declarations or mere photographic evidence presented by applicants or their straw-men.<sup>78</sup> As the criminal

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<sup>67</sup> Currently certified for 55.2% of the total CITES membership; see the table ‘National Legislation Project: 17 September 2017’ in the Secretariat Report, ‘National Laws for Implementation of the Convention’, SC69 Doc. 27 (5 October 2017), p. 4.

<sup>68</sup> ‘National Laws for Implementation of the Convention’, CoP12 Doc. 28 (Santiago, 2002).

<sup>69</sup> The categories were initially formulated in CITES Doc. 10.31 (Rev. 1994); see Reeve (note 16 above), p. 135.

<sup>70</sup> CoP12 Doc. 28 (note 68 above), at p. 2, paragraph 9(b).

<sup>71</sup> CoP14 (The Hague, 2007); update in <https://cites.org/sites/default/files/eng/prog/Legislation/ChecklistEN.pdf>.

<sup>72</sup> Starting with Resolution Conf. 3.12 (New Delhi, 1981) and repeatedly revised, consolidated in Resolution Conf. 10.10 (Rev. CoP17).

<sup>73</sup> Resolution Conf. 10.10 (Rev. CoP17), paragraph 6(c).

<sup>74</sup> Note 18 above, p. 47; see also the critical comments by Japanese scholars cited in note 15 above.

<sup>75</sup> ‘Control of Internal Ivory Trade’, SC50 Doc. 21.1 (Rev. 1), p. 3 (emphasis added).

<sup>76</sup> See the CITES Secretariat’s 2005/2006 mission reports, Doc. SC54 Doc. 26.1 (Rev.1), Annex, paragraph 13, affirming that “proof of legal origin and acquisition must be provided at the time ivory is registered.”

<sup>77</sup> See the table – based on annual MoE records – in Sakamoto (note 37 above), p. 8; these figures do *not* include the 3,365 tusks derived from the 2008 one-off sales, registered in 2009. According to an explanatory note by the Government of Japan, the high numbers recorded after 2011 “could be attributed (1) to an increase in registration cases, driven by the possessors’ will to voluntarily comply with the law, owing to the system being [publicized] and known widely, and (2) to an increase in cases, in particular, of inheritance and transfer of whole tusks that were imported legally in the past, due to the death or aging of their possessors;” Doc. CoP17 Inf. 56 (2016), p. 3.

<sup>78</sup> Article 11(2) of the MoE Enforcement Regulations for implementation of LCES article 20(2) merely requires a “written statement” by the applicant, or “any other supporting document”. The NGO *Japan Wildlife Research Centre* (JWRC, designated as registration organization under LCES article 23) currently has no powers of physical inspection; see Sakamoto (note 57 above), p. 48.

court hearings in the 2011 *Takaichi* case and the 2017 *Raftel* case publicly brought to light,<sup>79</sup> the system thus facilitated fraudulent registration and rampant “laundering” for ivory of dubious origin. Partly in response to mounting public criticism,<sup>80</sup> and to the outcome of the 2016 Johannesburg CITES Conference, the Government of Japan has since introduced a number of legislative amendments, including a future revision of the LCES notification/registration procedure.<sup>81</sup> While the improvements so envisaged may thus be interpreted as an official acknowledgment of certain notorious shortcomings in existing legislation and administrative practice, they will not close all of the known loopholes in the current system of domestic regulation.<sup>82</sup> In particular, the projected amendments do not cure the actual defects in the tusk registration procedure and cannot prevent laundering of illegal ivory via the registration mechanism. At any rate the changes will not come into force until mid-2018 – or perhaps even “after the summer of 2019”, according to the most recent MoE press release of 29 August 2017 (cited in section 9 above).

23. In light of these findings, Japan’s national legislation for the implementation of CITES cannot be considered as meeting the criteria for a listing in category 1 under the terms of Resolution Conf. 8.4 (Rev. CoP15) at this time.<sup>83</sup> The Standing Committee should therefore instruct the Secretariat to correct its current list accordingly. In addition to ensuring the full and urgent closure of the country’s domestic ivory market (as recommended in section 19 above), the Standing Committee should also reconsider its recent decision (taken by postal procedure on 16 May 2017) to exempt Japan from the follow-up obligations under the terms of Annex 3 of Resolution Conf. 10.10 (Rev. CoP17).<sup>84</sup> Japan should continue to be grouped among the Parties “important to watch” within the framework of the *National Ivory Action Plan* (NIAP) process until its legislation and administrative practice is in full conformity with CITES requirements, on a par with the other Parties concerned. Indeed, “the shared responsibility of the multitude of actors who kill and trade is matched by a shared responsibility of [all] States Parties to protect the elephant”.<sup>85</sup>

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<sup>79</sup> See notes 10 and 33 above. On 20 June 2017, the Tokyo Metropolitan Police (*Keishi-chō*) announced the initiation of criminal proceedings against the chairman of the *Raftel Antiques* company and 27 of its clients, for fraudulent registration of over 400 elephant tusks over the past five years; summary in *Sankei Shimbun News*, <http://www.sankei.com/affairs/news/170620/afr1706200026-n1.html>.

<sup>80</sup> Including “pro-elephant” demonstrations and symposia initiated by NGOs in 2016 and 2017.

<sup>81</sup> See notes 12 and 21 above; in particular, new section 7 (articles 6 to 24) of Cabinet Bill No. 33 (2017).

<sup>82</sup> See the enumeration of loopholes by Sakamoto (note 37 above), pp. 6-9; Sakamoto (note 57 above), pp. 42-58; and the comments on Bill No. 33 submitted by the *Japan Wildlife Conservation Society* on 1 March 2017, [http://www.jwcs.org/data/LCES2017JWCS\\_en.pdf](http://www.jwcs.org/data/LCES2017JWCS_en.pdf) (recommending closure of the domestic ivory market, p. 7).

<sup>83</sup> Even though the present analysis is limited to matters concerning elephants, non-compliance with the requirements of Resolution Conf. 8.4 (Rev. CoP15) regarding other species should equally be taken into account in this general context. For instance, in defiance of CITES Resolution Conf. 10.3 (1997), paragraph 2(a), Japan has still not designated an independent Scientific Authority for cetaceans: The “Resources and Environment Research Division”, so designated to the CITES Secretariat for this purpose, is in fact a mere administrative sub-section of the *Japan Fisheries Agency* designated as Management Authority for whales (section 6 and note 7 *supra*); see P.H. Sand, ‘International Protection of Endangered Species in the Face of Wildlife Trade: Whither Conservation Diplomacy?’, *Asia Pacific Journal of Environmental Law* 20 (2017), pp. 5-27, at 23-24.

<sup>84</sup> CITES Notification to the Parties No. 2017/042 (2 June 2017), para. 5(a), overruling a recommendation of the 2016 ETIS Report (note 36 above), pp. 22 and 25. But see on this point the subsequent request by four African elephant range states (Burkina Faso, Congo, Kenya and Niger) to revisit that decision; SC69 Doc. 51.2 (note 57 above), paras. 12 and 14.

<sup>85</sup> P.A. Nollkaemper, ‘The Illegal Ivory Trade Chain’, SHARES Blog (Amsterdam Center for International Law, 7 March 2013), <http://www.sharesproject.nl/the-illegal-ivory-trade-chain/>.