

# *Fordham International Law Journal*

---

*Volume 38, Issue 5*

2015

*Article 6*

---

## The (Inter)national Strategy: An Ivory Trade Ban in the United States and China

Morgan V. Manley\*

\*Fordham University School of Law

Copyright ©2015 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

# The (Inter)natioanl Strategy: An Ivory Trade Ban in the United States and China

Morgan V. Manley

## Abstract

This Note argues that a near-complete ban in ivory trade not only raises difficult domestic legal issues, but also does little to stop elephant poaching in Africa. Further, enacting a similar ban in China is not only unrealistic, but also would increase the illegal trade and, therefore, the slaughter of elephants in Africa. Part I explains the history of illegal ivory trade and describes the current legal environments in the United States and China. Part II presents the domestic legal and policy implications of an ivory ban, and analyzes the potential difficulties with implementing a similar ban in China. Part III argues that while the United States should stringently regulate the domestic ivory market, a near-complete ban is unreasonable. Further, a similar ban in China is not a practical solution; Chinese officials must consider strategies to optimize existing laws and gain public support.

**KEYWORDS:** International Law, Ivory Trade, China, APA, Director's Order, FWS

NOTE

THE (INTER)NATIONAL STRATEGY: AN IVORY  
TRADE BAN IN THE UNITED STATES AND CHINA

*Morgan V. Manley\**

INTRODUCTION ..... 1513

I. THE DEATH OF THE AFRICAN ELEPHANT: THE  
DEMAND FOR IVORY, THE INTERNATIONAL  
FAILURE TO SAVE THE ELEPHANT, AND  
DOMESTIC LEGAL FRAMEWORKS EXPLAINED ..... 1516

A. The Illegal Ivory Trade is a Lucrative Business for  
Criminal Syndicates ..... 1518

B. Demand: Two Distinct Curves ..... 1520

1. US Demand: An Antique Collector’s Pursuit ..... 1521

2. Chinese Demand: Ivory, Pure and Simple ..... 1522

C. International Obligations Have Failed to Help the  
Elephants ..... 1525

1. What is CITES? ..... 1525

2. CITES and African Elephants ..... 1528

3. CoP16: All Eyes on the African Elephant ..... 1532

i. ETIS and MIKE ..... 1533

ii. Responses by the Parties, Resolutions, and  
Decisions ..... 1534

D. Legal Landscape: United States and China ..... 1535

1. US Laws and Regulations: A Strong Legal  
Framework ..... 1535

2. China’s Legal Framework: A Complex Framework. 1539

---

\* J.D. Candidate 2016, Fordham University School of Law. I would like to thank Professor Aaron J. Saiger for his constant support, guidance, and suggestions throughout the writing process; Marcus Asner, Esq and Christopher Wlach, Esq for feedback on the tougher legal points; Professor Claire Huntington for the introduction to administrative law; Professor Carl Minzner for invaluable suggestions; Alison Shea, for hours of help with research; Hui Fang, for help with translating Chinese documents and insight into Chinese culture; and Maria Teresa Vanikiotis, for help throughout the editing process. Thank you to those who introduced me to this topic and to the many who furthered my understanding of it. Finally, thank you to my family and friends for your love and support.

E. United States Pushes for A Total Ban: 2014 and Proposed Action .....	1543
1. The Executive Order and the “Strategy” .....	1544
2. The FWS: The Beginning of the Ban.....	1544
3. The United States Pressures China to Reduce the Illegal Ivory Trade .....	1547
II.THE LEGAL AND POLICY CHALLENGES OF A COMPLETE IVORY BAN .....	1548
A. Legal Implications of a Near-Complete Ban in the United States .....	1549
1. Regulatory Implications: Can the Director’s Order Survive the APA? .....	1550
2. Regulatory Takings: Personal Property and the Fifth Amendment.....	1557
B. Criticisms and Practical Challenges Caused by the FWS’ Actions.....	1564
1. Bright Line Rules: Making Enforcement Easier While Limiting Ivory Owners’ Bundle of Rights .....	1564
2. Industry Halts: Challenges for Antique Business and Museums .....	1567
C. Will a US Ban Reduce the Illegal Ivory Trade and Poaching? .....	1569
D. Foreign Policy: Is a Similar Ban Feasible in China? .....	1570
1. Disagreements about the Source of Demand in China Make Finding a Solution Challenging.....	1571
2. The Ivory Ban Debate in China and Other Solutions..	1575
III.MOVING FORWARD: AMEND THE BAN, BUT DO NOT RESCIND IT .....	1578
A. The Director’s Order Should be Reconsidered through Notice-and-Comment Rulemaking .....	1578
B. The National Strategy Should be Considered a Fifth Amendment Taking.....	1580
C. The Director’s Order and National Strategy Should Be Amended .....	1581
D. Fully Implementing the National Strategy is Unlikely to Decrease Domestic or International Demand for Illegal Ivory .....	1583
E. China: A Total Ban Unlikely Feasible .....	1583
F. The COP Can Do A Better Job to Reduce Poaching .....	1584

“We should remember that the ultimate objective is to stop elephant killing for ivory, not killing ivory trade. The anti-trade movement seems to have lost sight of that fact . . . .”

–Daniel Stiles<sup>1</sup>

### INTRODUCTION

In February 2014, newspapers and commentators broadcasted the news: the United States is banning ivory sales.<sup>2</sup> The US Fish and Wildlife Service, in a Director’s Order, imposed a moratorium on the importation of all ivory with limited exceptions for non-commercial use.<sup>3</sup> The agency further promises to restrict exports and domestic trade in the future, thereby enacting a near-complete ban on ivory trade.<sup>4</sup> Environmental groups are thrilled to see the United States take a stand against “loopholes” that create a cover for the illegal ivory trade, which in turn promote poaching.<sup>5</sup> Yet, what is seen as a triumph for many conservationists is causing panic among other interest groups, creating some unlikely bedfellows: politicians, gun enthusiasts, art collectors, antique dealers, museum directors, and

---

1. Daniel Stiles, *CITES-Approved Ivory Sales and Elephant Poaching*, 45 PACHYDERM 150, 152 (2008) [hereinafter *CITES-Approved*].

2. See, e.g., *Banning Ivory Sales in America*, N.Y. TIMES, Feb. 17, 2014, at A22 (“[I]f rigorously enforced, the new rules should help slow the killings in Africa.”); Bryan Christy, *United States Tightens the Noose on the Ivory Trade*, NAT’L GEOGRAPHIC, Feb. 12, 2014 [hereinafter *US Tightens the Noose*], <http://news.nationalgeographic.com/news/2014/02/140211-united-states-rules-wildlife-trafficking-ivory-science/> (discussing the policy implications of the ban on commercial ivory imports).

3. See US Dep’t of Interior, Director’s Order No. 210, Amendment 1 (May 15, 2014), available at <http://www.fws.gov/policy/a1do210.pdf> (declaring the new agency policy for imports of ivory).

4. See Press Release, US Dep’t of Interior, Interior Announces Ban on Commercial Trade of Ivory as Part of Overall Effort to Combat Poaching, Wildlife Trafficking (Feb. 11, 2014) [hereinafter *Interior Announces Ban*], available at <http://www.doi.gov/news/press-releases/interior-announces-ban-on-commercial-trade-of-ivory-as-part-of-overall-effort-to-combat-poaching-wildlife-trafficking.cfm> (releasing a press statement about the US Fish and Wildlife Service).

5. See, e.g., John F. Calvelli, Letter to the Editor, *Limiting Ivory, Saving Elephants*, N.Y. TIMES, Mar. 28, 2014, at A26 (responding to Tom Mashberg, *Limits on Ivory Sales, Meant to Protect Elephants, Set off Wide Concerns*, N.Y. TIMES, Mar. 21, 2014, at A15); Ginette Hemley, Letter to the Editor, *Limiting Ivory, Saving Elephants*, N.Y. TIMES, Mar. 28, 2014, at A26 (“There are too many loopholes in the existing system . . . . By limiting ivory sales, the United States is sending an unequivocal message that it will not tolerate the senseless slaughter of wildlife and the global criminal syndicates it supports.”).

musicians.<sup>6</sup> Anxious about the future of the *legal* ivory trade and furious that they are being punished for owning antique items that they legally purchased or inherited, some owners and businesses are challenging the government's premise that banning the trade of legal ivory will stop the illegal poaching and trade of African elephants.<sup>7</sup>

On the other side of the world, China, a country accused of harboring the largest illegal ivory trade, has taken few steps to combat the ivory black market.<sup>8</sup> The United States, other governments, and non-state actors are pressuring China to take similar actions as the United States to implement a complete ban on ivory trade.<sup>9</sup> Despite the fact that in 2014 the Chinese government crushed six tons of confiscated illegal ivory (a small portion of its illegal stockpile) and in 2015 imposed an import moratorium on ivory carvings, China has enacted no new domestic regulations or legislation on this matter.<sup>10</sup>

---

6. See, e.g., Nick Wing, *The NRA is Quietly Fighting for Your Right to Kill Elephants for their Ivory*, HUFFINGTON POST, Aug. 12, 2014, [http://www.huffingtonpost.com/2014/08/12/nra-ivory-elephant-hunting\\_n\\_5671332.html](http://www.huffingtonpost.com/2014/08/12/nra-ivory-elephant-hunting_n_5671332.html) (reporting on the National Rifle Association (NRA) and Senator Lamar Alexander's opposition to the FWS's actions); Tom Mashberg, *supra* note 5, at A15 (considering the impact of the ban on ivory imports and restriction of domestic trade on antique dealers and musicians).

7. See Wing, *supra* note 6; Mashberg, *supra* note 5, at A15 (discussing opposition to the near-complete ban).

8. See John Brinkley, *China's Temporary Ivory Import Ban Will Have Zero Effect on African Elephant Conservation*, FORBES, Mar. 23, 2015, <http://www.forbes.com/sites/johnbrinkley/2015/03/23/chinas-temporary-ivory-import-ban-will-have-zero-effect-on-african-elephant-conservation/> (comparing the recent Chinese ivory import moratorium to the author's daughter's promise to not eat chocolate candy during lent, but allowing herself chocolate ice cream, cake, and milkshakes); *Prince William Meets Elephant on Final Day of China*, ASSOCIATED PRESS, reprinted in N.Y. TIMES, Mar. 4, 2015, available at <http://www.nytimes.com/aponline/2015/03/04/world/asia/ap-as-china-britain-royal-visit.html> (speculating that despite the Chinese import ban on ivory, the "thriving black market" will likely continue).

9. See *The Escalating International Wildlife Trafficking Crisis: Ecological, Economic and National Security Issues: Joint Hearing Before the Subcomm. on Afr. Affairs and the Subcomm. on E. Asian and Pac. Affairs of the S. Comm. on Foreign Relations*, 113th Cong. 6 (2014) (statement of Daniel M. Ashe, Director, US Fish & Wildlife Serv., US Dep't of Interior) [hereinafter *Ashe Testimony May 21, 2014*] (reporting on the Chinese role in the illegal ivory trade); Env'tl. Investigation Agency (EIA), *Vanishing Point: Criminality, Corruption and the Devastation of Tanzania's Elephants 2* (Nov. 2014), available at <http://eia-international.org/wp-content/uploads/EIA-Vanishing-Point-lo-res1.pdf> (arguing that all trade in ivory should be banned, especially in China).

10. See sources cited *supra* note 8 (noting the criticism of the Chinese import moratorium); Svati K. Narula, *Crush and Burn: A History of the Global Crackdown on Ivory*, ATLANTIC, Jan. 27, 2014, <http://www.theatlantic.com/international/archive/2014/01/crush-and-burn-a-history-of-the-global-crackdown-on-ivory/283310/> (analyzing the current elephant crisis and contextualizing the crushing of ivory around the world). As ivory is resistant to fire, ivory is "crushed" by placing it into a steel rock crusher that reduces the ivory to bits of gravel

Instead, Chinese officials suggest that China's system against illegal ivory trade is sufficient because Chinese laws regarding ivory trade are stricter than many foreign countries.<sup>11</sup> In November 2014, however, international news reports accused President Xi Jinping's entourage of smuggling illegal ivory from Tanzania aboard the President's plane.<sup>12</sup> This series of recent events begs the question: why is China failing to deter the illegal ivory trade even with strict laws?

---

and dust. See US Fish & Wildlife Serv., *U.S. Ivory Crush: Questions & Answers* (Nov. 2013), available at <http://www.fws.gov/international/pdf/factsheet-ivory-crush-qa.pdf> (answering questions on the ivory crush); Bryan Christy, *Historic U.S. Ivory Crush a Call to Global Action: Six Tons of Seized Ivory Destroyed in Effort to Fight Global Wildlife Crime*, NAT'L GEOGRAPHIC, Nov. 16, 2013, <http://news.nationalgeographic.com/news/2013/13/131115-united-states-ivory-crush-ivory-trafficking-philippines-clinton-global-initiative-world/> (describing the ivory crush process). The United States and seven other countries also have crushed illegal ivory. See Christina Russo, *Belgium Crushes its Elephant Ivory as Europe Takes Harder Look at Wildlife Trafficking*, NAT'L GEOGRAPHIC, Apr. 9, 2014, <http://news.nationalgeographic.com/news/2014/04/140409-elephant-ivory-trafficking-eu-brussels-ifaw-ivory-crushes-world/> (showing a map of all the places and dates that "ivory crushes" have taken place).

11. See Ren Pan 任晓攀 & Yangqing Jun 杨庆军, 我国首次公开销毁6.1吨查没象牙 销毁是国际惯例 [*Our Country (China) Publicly Destroyed 6.1 Tons of Confiscated Ivory for the First Time: It is Common International Practice to Destroy Ivory*], PEOPLE.CN 人民网-人民日报, Jan. 7, 2014, <http://xz.people.com.cn/n/2014/0107/c138901-20327100.html> (arguing that China's laws on ivory are strict). In 2013, however, the US-China Strategic and Economic Dialogue specifically addressed problems with wildlife trafficking. See Press Release, US Dep't of State, US-China Strategic and Economic Dialogue Outcomes of the Strategic Track (July 12, 2013), available at <http://www.state.gov/r/pa/prs/ps/2013/07/211861.htm> (outlining the negotiations between the United States and China regarding certain trade protocol).

12. *Tanzania Ivory: China Officials 'Went On Buying Spree'*, BBC NEWS, Nov. 6, 2014, [http://www.bbc.com/news/world-asia-china-29929423?post\\_id=100002956556933\\_625358977572648](http://www.bbc.com/news/world-asia-china-29929423?post_id=100002956556933_625358977572648) (accusing the Chinese delegation of smuggling ivory into China after a visit to Tanzania); Philippe Grangereau, *Ivoire, Mon Bel Ivoire: Le P  ch   Africain du Pr  sident Chinois [Ivory, My Beautiful Ivory: The African Transgression of the Chinese President]*, LIB  RATION, Nov. 6, 2014, [http://www.liberation.fr/monde/2014/11/06/ivoire-mon-bel-ivoire-le-peche-africain-du-president-chinois\\_1138009](http://www.liberation.fr/monde/2014/11/06/ivoire-mon-bel-ivoire-le-peche-africain-du-president-chinois_1138009) ("The diplomats from the Chinese Embassy are their biggest clients 'because no one verifies the contents of diplomatic baggage.'). Chinese officials denied the allegations and scolded the EIA's report as "highly irresponsible[] for spreading rumors and damaging China's image without any evidence." Dan Levin, *Report Implicates Chinese Officials in Smuggled Tanzanian Ivory*, N.Y. TIMES, Nov. 4, 2014, at A14 [hereinafter *Report Implicates Chinese*] (quoting Dr. Meng Xianlin, Exec. Dir.-Gen., CITES Mgmt. Auth., China) (internal quotation marks omitted) (reporting on the alleged smuggling); 中国驻布隆迪使馆: 中方官员走私象牙言论"子虚乌有" [*Chinese Embassy in Republic of Burundi: Chinese Officials' Engagement in Smuggled Ivory "Non-Existent"*], PEOPLE.CN, Nov. 15, 2014, <http://world.people.com.cn/n/2014/1115/c157278-26030831.html> (quoting Yu Zhong, Chinese Ambassador, Burundi) (denying any involvement in smuggling by the Chinese government).

This Note argues that a near-complete ban in ivory trade not only raises difficult domestic legal issues, but also does little to stop elephant poaching in Africa. Further, enacting a similar ban in China is not only unrealistic, but also would increase the illegal trade and, therefore, the slaughter of elephants in Africa. Part I explains the history of illegal ivory trade and describes the current legal environments in the United States and China. Part II presents the domestic legal and policy implications of an ivory ban, and analyzes the potential difficulties with implementing a similar ban in China. Part III argues that while the United States should stringently regulate the domestic ivory market, a near-complete ban is unreasonable. Further, a similar ban in China is not a practical solution; Chinese officials must consider strategies to optimize existing laws and gain public support.

I. *THE DEATH OF THE AFRICAN ELEPHANT: THE DEMAND FOR IVORY, THE INTERNATIONAL FAILURE TO SAVE THE ELEPHANT, AND DOMESTIC LEGAL FRAMEWORKS EXPLAINED*

Enacting a ban on the ivory trade is meant to significantly reduce the illicit killing of elephants.<sup>13</sup> There are two species of elephants: the African Elephant, *loxodonta africana*, and the Asian Elephant, *elephas maximus*.<sup>14</sup> Both species provide essential ecological benefits to their habitats.<sup>15</sup> The African elephant and the Asian elephant are

---

13. See *USFWS Moves To Ban Commercial Elephant Ivory Trade: Questions & Answers*, FWS [hereinafter *FWS Moves to Ban*], <http://www.fws.gov/international/travel-and-trade/ivory-ban-questions-and-answers.html> (last visited July 1, 2015) (answering frequently asked questions regarding the Obama Administration's movement toward a near-complete ban); Beth Allgood et al., *U.S. Ivory Trade: Can A Crackdown on Trafficking Save the Last Titan?*, 20 *ANIMAL L.* 27, 32 (2013) [hereinafter *US Ivory Trade*] (proposing a “ban on all commerce in ivory . . . until elephant populations are no longer threatened”).

14. See JACQUELINE L. SCHNEIDER, *SOLD INTO EXTINCTION: THE GLOBAL TRADE IN ENDANGERED SPECIES* 98–99 (2012) (providing basic information about elephants); CAROLINE ARNOLD, *ELEPHANT* 9 (2d ed. 2013) (tracing the two species of elephants to ancestors such as mammoths and mastodons).

15. See SCHNEIDER, *supra* note 14, at 102 (“Elephants play . . . a productive role in their habitats . . . . The dung left by the animals—an average of 500 pounds per animal each day—is rich in seeds, which are carried by birds to resow the land, enabling vegetation to re-establish. Additionally . . . elephant dung is . . . collected and processed into stationary paper. Sales from dung-based paper help to support local farmers.”); see also Brad Scriber, *100,000 Elephants Killed by Poachers in Just Three Years, Landmark Analysis Finds*, *NAT'L GEOGRAPHIC*, Aug. 18, 2014, <http://news.nationalgeographic.com/news/2014/08/140818-elephants-africa-poach>



both endangered for a variety of reasons, including poaching.<sup>16</sup> Elephants are poached for food or resources, such as ivory.<sup>17</sup> Ivory costs approximately US \$1,000–\$1,500 per pound in its raw state.<sup>18</sup> While many of the laws and regulations mentioned throughout this Note apply to both African and Asian elephants, the instant analysis focuses specifically on the poaching of African elephants because most of the illegal ivory trade involves African ivory.<sup>19</sup>

Part I.A describes the sources of the illegal ivory trade and explains why poaching is rampant. Part I.B discusses the current level of demand for ivory in the United States and China. Part I.C examines the international laws regulating the ivory trade. Part I.D summarizes the domestic efforts of the United States and China with the common goal of eliminating elephant poaching and the illegal ivory trade. Finally, Part I.E outlines the recent steps that the United States took in 2014 to implement a complete ban and demonstrates how the United States has collaborated with China in hopes that the Chinese government will take action to eliminate its own illegal ivory trade.

---

ing-cites-census/ (explaining that elephants open up “forest land to create firebreaks and grasslands, dig[] to create water access for other animals, and leav[e] nutrients in their wake”).

16. See SCHNEIDER, *supra* note 14, at 104–09 (citing loss of habitat from deforestation, scarce resources, range fragmentation, illegal coffee farming, oil plantations, human-animal conflict, and poaching as some of threats to elephant populations).

17. See Rachel Nuwer, *Closing in on Africa’s Bush Meat Trade*, N.Y. TIMES BLOG (Dec. 29, 2011, 12:02 PM), <http://green.blogs.nytimes.com/2011/12/29/closing-in-on-africas-bush-meat-trade/?module=Search&mabReward=relbias%3Aw%2C%7B%221%22%3A%22RI%3A7%22%7D> (discussing types of bush meat); Jody Rosen, *Animal Traffic*, N.Y. TIMES BLOG (Sept. 5, 2014, 11:00 AM), <http://tmagazine.blogs.nytimes.com/2014/09/05/animal-trafficking-black-market/> (featuring a photograph by Richard Barnes of an elephant foot turned into a footstool and discussing the illegal wildlife market, including the illegal ivory trade); see also SCHNEIDER, *supra* note 14, at 105 (stating that elephants are also hunted for leather and hair).

18. See Daniel Stiles, *Opinion: Can Elephants Survive a Continued Ivory Trade Ban?*, Post to *A Voice for Elephants*, NAT’L GEOGRAPHIC, Sept. 15, 2014 [hereinafter *Ivory Trade Ban*], <http://voices.nationalgeographic.com/2014/09/15/opinion-can-elephants-survive-a-continued-ivory-trade-ban/> (replying to Christina Russo’s article on the ivory trade); Bettina Wassener, *Destruction of Ivory By China Wins Praise*, N.Y. TIMES, Jan. 7, 2014, at A4 (citing Dan Levin, *From Elephants’ Mouths, An Illicit Trail to China*, N.Y. TIMES, Mar. 2, 2013, at A1 [hereinafter *From Elephants’ Mouths*]).

19. See SCHNEIDER, *supra* note 14, at 108 (“Most of the illegal ivory seems to come from African elephants . . . [however, m]ale Asian elephants continue to be hunted for their ivory.”). Only male Asian elephants grow tusks; therefore, their survival is dependent upon other factors. See *id.* Some evidence shows that African ivory is historically favored for its ability to be highly polished and not yellow with exposure to light. See *Sources of Ivory*, N.Y. TIMES, Feb. 18, 1894, at 22 (discussing the differences between African and Asian elephant ivory); see also *Elephants Slain for their Tusks*, TIMES-DISPATCH: RICHMOND, July 5, 1908, at 25 (“African ivory brings the highest prices in the markets. It is superior to any other in the size of the tusks.”).

A. *The Illegal Ivory Trade is a Lucrative Business for Criminal Syndicates*

The illegal ivory trade is rooted in elephant poaching, which is the process by which elephants are killed in contravention of local, national, or international laws and regulations.<sup>20</sup> African nations regulate poaching through domestic legislation that imposes heavy penalties on offenders.<sup>21</sup> For example, in Botswana, elephant hunting is legal with a license.<sup>22</sup> Hunting without a license can result in a fine of US \$6,400 and ten years in prison.<sup>23</sup> Additionally, exporting any part of the elephant can result in a fine of US \$5,400 and ten years in prison.<sup>24</sup>

Despite the existence of these laws, the level of poaching and rapid decline of African elephants is at “crisis” levels.<sup>25</sup> While the actual quantity of African elephants remaining in the wild is unclear, conservationists believe that the species is at risk of extinction.<sup>26</sup>

---

20. See *Poaching*, HUMANE SOCIETY, <http://www.humanesociety.org/issues/poaching/> (last visited July 1, 2015) (defining “poaching”); see also AM Lemieux, *Introduction*, in SITUATIONAL PREVENTION OF POACHING 2 (2014) (citing Robert M. Muth & John F. Bowe Jr., *Illegal Harvest of Renewable Natural Resources in North America: Toward a Typology of the Motivations for Poaching*, 11 Soc’y & Nat. Res. 9–24 (1998)) (explaining the basic definitions of poaching).

21. See generally Center for Global Research, *Wildlife Trafficking and Poaching* (US Library of Congress Legal Report, Jan. 2013) [hereinafter *Wildlife Trafficking*], available at <http://www.loc.gov/law/help/wildlife-poaching/wildlife-trafficking-and-poaching.pdf> (discussing the anti-poaching and wildlife trafficking laws of Botswana, the Central African Republic, Kenya, Mozambique, South Africa, and Tanzania); see also Hanibal Goitom, *Wildlife Trafficking and Poaching: South Africa*, LIBRARY OF CONG. <http://www.loc.gov/law/help/wildlife-poaching/southafrica.php> (last updated June 9, 2015) (providing an in-depth analysis of the South African ivory trade laws).

22. See *Wildlife Trafficking*, *supra* note 21, at 3 (citing Wildlife Conservation and National Parks Act of 1992, VI LAWS OF BOTSWANA, Cap. 38 § 18 (rev. ed. 2011) [hereinafter WCNPA]). Botswana implemented the Convention for International Trade of Endangered Species of Wild Fauna and Flora, discussed *infra*, through the enactment of the Wildlife Conservation and National Park Act of 1992. See *id.* (citing *About Us*, DEP’T OF WILDLIFE & NAT’L PARKS, [http://www.mewt.gov.bw/DWNP/article.php?id\\_mnu=41](http://www.mewt.gov.bw/DWNP/article.php?id_mnu=41) (last visited July 1, 2015)).

23. See *id.* at 5 (citing WCNPA, *supra* note 22, at § 19).

24. See *id.* at 7 (citing WCNPA, *supra* note 22, at § 64).

25. Wassener, *supra* note 18 (emphasizing the importance of the ivory crush in reversing this effect); see also Enough Project, *Poachers Without Borders: New Satellite Imaging and Predictive Mapping to Empower Park Rangers to Combat Ivory Traffickers in Garamba National Park*, 5–6, 9–13 (Jan. 28, 2015), available at [http://www.enoughproject.org/files/PoachersWithoutBorders\\_28Jan2015.pdf](http://www.enoughproject.org/files/PoachersWithoutBorders_28Jan2015.pdf) (reviewing satellite data detailing poaching “incidents” in Garamba National Park in the Democratic Republic of the Congo).

26. See Press Release, Office of the Press Sec’y, White House, Fact Sheet: U.S. Support for Combating Wildlife Trafficking (Aug. 4, 2014) [hereinafter US Support for Combatting

Because of poaching, approximately 30,000–35,000 African elephants are killed every year, mainly in central Africa.<sup>27</sup>

Enforcing these laws is dangerous and expensive.<sup>28</sup> Evidence reveals that the potential financial gain from poaching, “coupled with low risk of detection and often inadequate penalties,” attracts known terrorist groups, such as the Lord’s Resistance Army (LRA), al-Shabaab, the Xaysavang Network, and the Janjaweed.<sup>29</sup> These groups use such violent and aggressive hunting methods that park rangers cannot protect the elephants or, in some cases, themselves.<sup>30</sup> As a result, poached ivory has earned the name “Blood Ivory.”<sup>31</sup>

---

Trafficking], available at <https://www.whitehouse.gov/the-press-office/2014/08/04/fact-sheet-us-support-combating-wildlife-trafficking> (“Today, because of the actions of poachers, species such as elephants . . . face the risk of significant decline or even extinction.”). The last comprehensive numerical survey of the population, which was conducted in 2007, estimated 475,000–690,000 African elephants remain. See Scriber, *supra* note 15. The Great Elephant Census, an updated “continent-wide” numerical survey of the elephant population, is expected to be complete by mid-2015. See *id.* (referencing *Great Elephant Census: A Paul G. Allen Project*, PAUL G. ALLEN FAMILY FOUND., <http://www.greatelephantcensus.com/the-census/> (last updated Mar. 13, 2014)).

27. See *International Wildlife Trafficking Threats to Conservation and National Security: Hearing Before the Comm. on Foreign Affairs*, 133th Cong. 11 (2014) (statement of Kerri-Ann Jones, Assistant Sec’y, Bureau of Oceans and Int’l Envtl. and Sci. Affairs, US Dep’t of State) [hereinafter *Hearing Before the H. Comm. on Foreign Affairs*] (noting that 13,000 more elephants were killed in 2012 than in 2011); Scriber, *supra* note 15 (citing George Wittemyer et al., *Illegal Killing for Ivory Drives Global Decline in African Elephants*, PNAS (2014)) (noting that the Wittemyer study found that “three-quarters of local elephant populations are declining”).

28. See Kasper Agger & Jonathan Hutson, *Kony’s Ivory: How Elephant Poaching in Congo Helps Support the Lord’s Resistance Army*, THE ENOUGH PROJECT 2–4 (2013); see also R.B. Martin et al., *Decision-Making Mechanisms and Necessary Conditions for a Future Trade in African Elephant Ivory*, Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES), SC62 Doc. 46.4 Annex, 8, 14 (May 24, 2012) (calculating the cost of protecting the elephants as: “Total Cost = US\$  $A \times \text{Illegal Hunting Challenge} \times \text{Annual Scout Salary} \times \sqrt{\text{Area}}$ —where  $A$  is a constant of 4 for savanna parks and 2 for desert parks, *Illegal Hunting Challenge* is a constant taking the values: 1 = Low, 2 = moderate, 3 = High, 4 = Severe; the *Annual Scout Salary* is expressed in US\$; park *Area* is expressed in square kilometers”).

29. See generally Agger & Hutson, *supra* note 28 (revealing compelling evidence that the LRA is poaching elephants on a large scale). See also *Hearing Before the H. Comm. on Foreign Affairs*, *supra* note 27, at 2, 9, 13 (discussing American efforts to combat the terrorists involved in poaching). But see Tristan McConnell, *Illegal Ivory May Not be Funding African Terror Group*, USA TODAY, Nov. 14, 2014, <http://www.usatoday.com/story/news/world/2014/11/14/globalpost-al-shabaab-africa-ivory/19020563/> (discussing author Christian Nelleman’s research, finding that “the whole issue of terrorists getting income from poaching is vastly exaggerated”).

30. See Agger & Hutson, *supra* note 28, at 6–8 (citing Interview by Kasper Agger & Jonathan Hutson with Luis Arranz, Garamba Nat’l Park, Dem. Rep. Congo (Jan. 20, 2013)) (showing images of what park rangers must endure). Hunting techniques range from shooting

While some governments, including the Kenyan Government, are increasing enforcement measures, government officials from other countries believe that the illegal ivory trade “cannot be curtailed without an offensive against overseas buyers . . . .”<sup>32</sup> Some conservationists argue that, like the drug trade, enforcement is simply a stopgap and the only way to end the illegal ivory trade is to “choke off demand” abroad.<sup>33</sup> As a result, some African nations have called upon the international community to help save the elephants.<sup>34</sup>

### B. *Demand: Two Distinct Curves*

Both the United States and China have a market for ivory.<sup>35</sup> The illegal ivory market in the United States, however, is small, while the

---

poisoned arrows or propelling grenades from the ground to using helicopters to shoot with rifles. See Jeffery Gettleman, *Elephants Dying in Epic Frenzy as Ivory Fuels Wars and Profits*, N.Y. TIMES, Sept. 4, 2012, at A1 (commenting on the methods used by poachers to kill elephants); Scriber, *supra* note 15 (noting the use of “automatic weapons in Boubia Ndjidah National Park in Cameroon”). Reports of vulture poisoning have also surfaced, as vultures can locate a carcass within thirty minutes, whereas de-tusking an elephant takes forty-five to seventy-five minutes. See Darcy L. Ogada, Op-Ed., *The Poisoning of Africa’s Vultures*, N.Y. TIMES, Aug. 28, 2014, at A25 (discussing vulture poisoning in Africa).

31. *Hearing Before the H. Comm. on Foreign Affairs*, *supra* note 27, at 66 (statement of Eliot L. Engel, Member, H. Comm. on Foreign Affairs).

32. See *id.* at 50 (statement of Edward R. Royce, Chairman, H. Comm. on Foreign Affairs) (citing President Kenyatta of Kenya). See also Martin et al., *supra* note 28, at 14 (estimating that the cost of protecting ivory is beyond the means of many developing countries).

33. See *The Ivory Trade: Up in Smoke*, ECONOMIST, Feb. 8, 2014 [hereinafter *Up In Smoke*], <http://www.economist.com/news/international/21595932-push-stop-poaching-and-save-elephants-extinction-up-smoke> (citing Peter Knights of WildAid) (“[E]nforcement is a losing battle.”); see also Daniel Ashe, *Bad News on Poaching Must Strengthen Our Resolve to Protect African Elephants*, US FISH & WILDLIFE SERV., Sept. 2, 2014, <http://www.fws.gov/director/dan-ashe/index.cfm/2014/9/2/Bad-News-on-Poaching-Must-Strengthen-Our-Resolve-to-Protect-African-Elephants> (“[L]aw enforcement can only take us so far. We can’t ensure the future of elephants unless we can reduce demand for ivory where it is popular.”).

34. See, e.g., *Hearing Before the H. Comm. on Foreign Affairs*, *supra* note 27, at 50 (statement of Royce) (citing President Kenyatta’s request for help from other countries to stop the illegal ivory trade); Int’l Union for Conserv. of Nature (IUCN), *Botswana and IUCN call for Global Action to Stop African Elephant Poaching*, Oct. 10, 2013, [http://www.iucn.org/news\\_homepage/news\\_by\\_date/?13833/Botswana-and-IUCN-call-for-global-action-to-stop-African-elephant-poaching](http://www.iucn.org/news_homepage/news_by_date/?13833/Botswana-and-IUCN-call-for-global-action-to-stop-African-elephant-poaching) (discussing a conference convened by President H.E. Lieutenant General Seretse Khama Ian Khama of Botswana to raise support from other countries, especially in Asia, to stop wildlife trafficking).

35. See *Hearing Before the H. Comm. on Foreign Affairs*, *supra* note 27, at 20 (statement of Hon. Daniel M. Ashe, Dir., US Fish & Wildlife Serv., US Dep’t of Interior) (“Improved economic conditions in markets such as China . . . are fueling an increased demand for . . . elephant ivory . . . . Although the primary markets are in Asia, the United States continues to play a role as a consumer and transit country for illegally trade wildlife.”).

illegal ivory market in China accounts for most of the world's illegal ivory market.<sup>36</sup> While the demand for ivory in the United States is mainly for antiques, Chinese demand for ivory is based on a cultural and historical importance of the ivory itself.<sup>37</sup>

### 1. US Demand: An Antique Collector's Pursuit

The United States was once a major importer of ivory, mainly as a result of industrialization.<sup>38</sup> Since the invention of plastic in the 1950s, however, demand in the United States has dwindled.<sup>39</sup> Today, studies show that the US ivory market is of “minimal threat to elephants.”<sup>40</sup> In fact, “[m]ost Americans are not interested in buying ivory.”<sup>41</sup> One study shows that most of the US demand for ivory is for antiques.<sup>42</sup>

---

*See also* Int'l Found. for Animal Welfare (IFAW), *Bidding Against Survival: The Elephant Poaching Crisis and the Role of Auctions in the U.S. Market*, 1 (Aug. 2014) [hereinafter *Bidding Against Survival*] (describing the United States as a “prime market”).

36. *See infra* notes 40, 49 and accompanying text (describing the US and Chinese illegal ivory markets).

37. *See infra* notes 41–42 and accompanying text (revealing that most US consumers are mostly not interested in buying ivory per se, but are interested in buying antiques which may be made of ivory in whole or in part).

38. *See* JOHN FREDERICK WALKER, *IVORY'S GHOSTS: THE WHITE GOLD OF HISTORY AND THE FATE OF ELEPHANTS* 87 (2009) [hereinafter *IVORY'S GHOSTS*] (noting that between the nineteenth and early twentieth centuries, the United States was a major importer of ivory, which was used for all types of objects); Max Fisher, *An Alarming Map of the Global Ivory Trade that Killed 17,000 Elephants in One Year*, WASH. POST, Mar. 15, 2013 [hereinafter *Global Ivory Trade*], <http://www.washingtonpost.com/blogs/worldviews/wp/2013/03/15/an-alarming-map-of-the-global-ivory-trade-that-killed-17000-elephants-in-one-year/>.

39. *See* *Elephant's Slaughter, African Slavery and America's Pianos*, National Public Radio (Aug. 18, 2014) (downloaded at <http://www.npr.org/2014/08/18/338989248/elephant-slaughter-african-slavery-and-americas-pianos>) (summarizing how plastic replaced ivory for piano keys); *Global Ivory Trade*, *supra* note 38 (recounting the decline of the US ivory market).

40. Esmond Martin & Daniel Stiles, *The USA's Ivory Markets—How Much a Threat to Elephants?*, 45 *PACHYDERM* 67, 75 (2008) [hereinafter *USA's Ivory Markets*] (analyzing a study on the US ivory market). *See also* Doug Bandow, *Punishing Ivory Owners Rather than Saving Elephants: When Ideologues Take Over the Regulatory State*, FORBES, Jun. 6, 2014 [hereinafter *Punishing Ivory Owners*], <http://www.forbes.com/sites/dougbandow/2014/06/09/punishing-ivory-owners-rather-than-saving-elephants-when-ideologues-take-over-the-regulatory-state/> (“[T]he size of the U.S. ivory market is a reflection of its historical size and not current poaching levels.”).

41. *See USA's Ivory Markets*, *supra* note 40, at 75 (analyzing sources for US demand for ivory). *But see infra* note 42 and accompanying text (summarizing conflicting arguments about the effect of the US market on poaching).

42. *See USA's Ivory Markets*, *supra* note 40, at 73, 75. *Compare Bidding Against Survival*, *supra* note 35, at 8 (“[W]e . . . know that the broader U.S. market helps drive illegal poaching”), and Beth Allgood et al., *Treasured to Death: Elephants, Ivory, and the*

The United States does have an illegal ivory market, particularly in cities such as San Francisco, Los Angeles, and New York.<sup>43</sup> Most of the illegal ivory is imported from East Asia.<sup>44</sup> Officials occasionally find illegal ivory in antique shops.<sup>45</sup> Most illegal ivory found in the United States is a result of Internet sales.<sup>46</sup>

## 2. Chinese Demand: Ivory, Pure and Simple

Ivory carving is part of Chinese culture.<sup>47</sup> Ivory carving can be traced as far back as the Shang Dynasty (1600-1050 BCE) and was subsequently enhanced by trade on the Silk Road.<sup>48</sup> Today, while the

---

*Resurgence of a Crisis*, 29 NAT. RES. & ENV'T 5 (2014) [hereinafter *Treasured to Death*] (arguing that CITES one-off sales revived demand for ivory in the United States), with *CITES-Approved*, *supra* note 1, at 151 (reporting that the US ivory market has remained static at a scale lower than before 1990), and T. Milliken et al., *ETIS Report on Traffic*, CITES, CoP16 Doc. 53.2.2 (Rev. 1), 23–24 (Mar. 3–14, 2013) (arguing that it was unlikely that CITES one-off sales increased the demand for ivory).

43. See *USA's Ivory Markets*, *supra* note 40, at 71–72 (identifying the largest US markets); *Bidding Against Survival*, *supra* note 35, at 26 (same).

44. See *USA's Ivory Markets*, *supra* note 40, at 71–72; see also Daniel Stiles, *Elephant Ivory Trafficking in California, USA*, NAT. RES. DEF. COUNCIL, 6 (2015) (reporting that most illegal ivory is imported from countries like China, Japan, and Thailand, with China “predominating”).

45. See *Hearing Before the H. Comm. on Foreign Affairs*, *supra* note 27, at 34 (statement of Robert Dreher, Acting Assistant Att’y Gen., Enforcement and Nat. Res. Div., US Dep’t of Justice) (citing several cases of illegal ivory trafficking in the United States); Kate Siber, *Why is the U.S. Government Crushing Six Tons of Valuable Ivory?*, SMITHSONIAN.COM, Nov. 20, 2013, <http://www.smithsonianmag.com/science-nature/why-is-the-us-government-crushing-six-tons-of-valuable-ivory-180947789/?no-ist> (“FWS agents intercept many illegal imports, using x-rays to sleuth tusks hidden in wooden furniture and even finding it in plain sight in the windows of tony Manhattan antiques shops.”); see also *U.S. Ivory Trade*, *supra* note 13, at 64–67. Illegal smuggling of wildlife crimes are prosecuted under the Lacey Act Amendments of 1981, which prohibit interstate and foreign trade in violation of domestic and foreign law. See generally 16 U.S.C. § 3372 (2012); see also *infra* Part I.D (discussing the US laws on ivory trade).

46. See *Global Ivory Trade*, *supra* note 38 (citing *USA's Ivory Markets*, *supra* note 40, at 68–69) (identifying the Internet as driving the illegal trade in the United States); see also *Bidding Against Survival*, *supra* note 35, at 1, 15 (estimating that LiveAuctioneers.com sells approximately US \$13 million worth of ivory per year).

47. See generally Carl W. Bishop, *The Elephant and its Ivory in Ancient China*, 41 AM. ORIENTAL SOC'Y 290 (1921) (analyzing the ancient origins of the Chinese ivory trade); see also Yufan Gao & Susan G. Clark, *Elephant Ivory Trade in China: Trends and Drivers*, 180 BIOLOGICAL CONSERVATION 23, 27 (2014) (“[T]he social value of ivory[] [is] both as monetary wealth and a status symbol . . . [C]arvers and collectors cherish ivory for its cultural and aesthetic value as historic fine art.”).

48. See MICHAEL SULLIVAN, *THE ARTS OF CHINA* 33–34 (5th ed. 2005) (explaining the history of ivory from a historical perspective); see also *IVORY'S GHOSTS*, *supra* note 38, at 43 (noting the history of the ivory trade). Twenty ivory carvings were also found in the Zhejiang Province, dating to around 5000 BCE. See Esmond Martin & Daniel Stiles, *The Ivory Markets*

legal market for ivory is small, China's illegal ivory market accounts for forty to seventy percent of the global ivory black market.<sup>49</sup> In fact, the demand is so high that many conservationists say that China's illegal market is "fueling poaching."<sup>50</sup> The Chinese government has made efforts to eliminate the illegal trade through its "zero tolerance policy against online wildlife trading" and the 2012 ban of the sale of endangered species in auctions.<sup>51</sup> Yet the illegal trade continues to grow, with even government officials allegedly participating in the illegal trade.<sup>52</sup>

---

of East Asia, SAVE THE ELEPHANTS 61 (2003) [hereinafter *Markets of East Asia*], available at <http://savetheelephants.org/wp-content/uploads/2014/03/2003EasftAsiaMarkets.pdf> (explaining the history of ivory in China).

49. See Kirsten Conrad & Brendan Moyle, *The Legal Ivory Market in China: Part 2*, 7 SULI NEWS (IUCN), Dec. 2013 (on file with the author) [hereinafter *Market in China 2*]. As a result of the CITES-ban period, there has been a decline in the number of skilled ivory carvers. Factories attempted to survive the ban by shifting to other related products, the most common being mammoth tusks. See *id.*; see also CITES et al., *Elephants in the Dust: The African Elephant Crisis*, 13 (Christian Nellemann et al. eds., 2013), available at [https://cites.org/com mon/resources/pub/Elephants\\_in\\_the\\_dust.pdf](https://cites.org/com mon/resources/pub/Elephants_in_the_dust.pdf) ("China today has the largest ivory market in the world, much of it carved from poached African elephant tusks."). But see *From Elephants' Mouths*, *supra* note 18, at A1 ("Legalized ivory sales have been a boon to carvers and brokers, who have helped fuel the demand for ever greater supplies.").

50. See *Tanzania Ivory China Officials "Went on a Buying Spree"*, BBC NEWS, Nov. 6, 2014, <http://www.bbc.com/news/world-asia-china-29929423> (discussing the state of the ivory market shortly after delegates from China visited Tanzania); *ETIS Report on Traffic*, *supra* note 46, at 12 tbl.2 (calculating that between 2009–2011, China reported 2008 seizures of illegally imported ivory).

51. Grace Ge Gabriel, *Opinion: Elephants are Not Widgets*, Post to *A Voice for Elephants*, NAT'L GEOGRAPHIC, Sept. 24, 2014, <http://voices.nationalgeographic.com/2014/09/24/opinion-elephants-are-not-widgets/> (analyzing the Chinese government's actions in regards to ivory). But see Dinny McMahon, *China Destroys Six Tons of Confiscated Ivory: Move Marks First Time Country has Crushed Ivory that Had Been Smuggled In*, WALL ST. J., Jan. 6, 2014, <http://topics.wsj.com/person/M/dinny-mcmahon/7507> (reporting that online auctions still persist on specialty websites, where ivory is sold under pseudonyms).

52. See *Report Implicates Chinese*, *supra* note 12, at A14 ("The Chinese government has been trying to prove itself a responsible state actor that is serious about abolishing corruption and abiding by international law. But the report[s] . . . detail[] Chinese diplomats and military personnel colluding with Tanzanian officials and Chinese crime syndicates to send illegal ivory to China."); see also Christina Russo, *Q&A: Report Alleges Governments' Complicity in Tanzanian Elephant Poaching*, NAT'L GEOGRAPHIC, Nov. 8, 2014, <http://news.nationalgeographic.com/news/2014/11/141108-tanzania-ivory-smuggling-china-world-elephants-animals/> ("Before a . . . visit to Tanzania by China's President . . . Chinese buyers began purchasing . . . ivory, later sent to China in diplomatic bags on the presidential plane."). The Chinese and Tanzanian governments deny these allegations and claim that while there are criminals from both countries involved in the illegal trade, the governments are not involved. See *Report Implicates Chinese*, *supra* note 12, at A14; Press Release, Embassy of the United Republic Of Tanzania, Statement by the Minister for Foreign Affairs and International

While conservationists disagree about the current status of the Chinese ivory market, conservationists agree that one of the factors driving the market for ivory is China's economic growth.<sup>53</sup> While foreigners and wealthy imperial officials historically drive the Chinese ivory market, in recent years, a growing middle class enables more people to buy luxury products.<sup>54</sup> Estimates show that about "half of the world's luxury spending will come from Chinese wallets next year."<sup>55</sup> Luxury goods like ivory are in high demand as status symbols of newly acquired wealth.<sup>56</sup> Ivory carving is so integral to the Chinese culture that in 2006, ivory carving was officially dubbed part of China's intangible cultural heritage.<sup>57</sup>

China's current demand for ivory is likely the primary catalyst in the world for the illegal ivory trade.<sup>58</sup> Scholars and conservationists have traced direct routes between Africa and China, as well as routes in which countries like Malaysia act as transit countries between the

---

Cooperation on Allegations that the Government of China and Tanzania Engaged in Illegal Ivory Trade (Nov. 7, 2014), available at <http://tanzaniaembassy-us.org/?p=1167>.

53. Compare Gabriel, *supra* note 51 (arguing that current demand in China is a product of the CITES one-off sales, discussed *infra*, as well China's "economic reform that shifted state enterprises to a private economy"), with Gao & Clark, *supra* note 47, at 28 (agreeing that the "booming Chinese economy" is a critical factor in the increase in Chinese demand for ivory, but rejecting "concentrating on a possible exogenous trigger (i.e., the CITES decision)" and, instead, focusing on broader cultural implications, such as the social significance of ivory).

54. See Gao & Clark, *supra* note 47, at 24 ("There [were] almost no ivory sale[s] in the domestic market, and ivory products were almost all exported through Hong Kong to the international market."); Bettina Wassener, *As Incomes Rise, So Does the Animal Trade*, N.Y. TIMES, Dec. 19, 2010, <http://www.nytimes.com/2010/12/20/business/energy-environment/20green.html> (reporting that Credit Suisse estimated the average wealth per adult in China has increased 400 percent since 2000).

55. See S.N., *China's Addiction to Luxury Goods*, ECONOMIST, Apr. 29, 2014, <http://www.economist.com/blogs/economist-explains/2014/04/economist-explains-17> (discussing Chinese consumer trends).

56. See *id.* ("In a country that is finely attuned to social-status signals, branded goods and sophisticated travel are high on many people's wish lists."); Damian Grammaticas, *Uncovering China's Illegal Ivory Trade*, BBC NEWS, Feb. 13, 2014, <http://www.bbc.com/news/world-asia-china-26167893> ("Some think it is lucky, while for some it is a way to display their status. Others see it as a good investment and many give ivory as a gift or bribe to win favour with an official or business contact.").

57. See *From Elephants' Mouths*, *supra* note 18, at A1 (noting that along with kung fu and acupuncture, ivory carving was added to the Cultural Heritage register); see Gao & Clark, *supra* note 47, at 28 (explaining that by deeming ivory carving intangible cultural heritage, the industry was "guaranteed . . . substantial support from the state.").

58. See John Frederick Walker, *Rethinking Ivory: Why Trade in Tusks Won't Go Away*, 30 WORLD POL'Y J. 91, 93 (2013) [hereinafter *Rethinking Ivory*] ("China [is] widely thought to absorb most of the contraband ivory bleeding from Africa.").



two continents.<sup>59</sup> As a result, the increase in Chinese demand for ivory and growth of the illegal ivory trade is directly correlated to the increase in elephant poaching.<sup>60</sup>

### *C. International Obligations Have Failed to Help the Elephants*

The United States and China are signatories of the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (“CITES” or the “Convention”), the central international convention governing all wildlife trade.<sup>61</sup> As Parties to CITES, the United States and China must “take appropriate measures to enforce the provisions of the . . . Convention and to prohibit trade in specimens in violation thereof.”<sup>62</sup> This Subpart provides background on the text of CITES and the bi-annual Conferences of the Parties, demonstrates how CITES relates to the illicit ivory trade, and discusses the sixteenth and most recent Conference of the Parties, which sparked the United States’ urgency to protect African elephants.

#### 1. What is CITES?

CITES was first conceived in 1963 through the International Union for Conservation of Nature (the “IUCN”), the first global organization to promote environmental conservation and to combat

---

59. See *Global Ivory Trade*, *supra* note 38 (showing a map of the main trade routes between Africa and China). For a more detailed map, see T. Milliken, *Illegal Trade in Ivory and Rhino Horn: An Assessment to Improve Law Enforcement Under the Wildlife TRAPS Project*, TRAFFIC, 10–11 (2014). Demand in Thailand also plays a significant role in the illegal ivory trade. See *id.*

60. See WildAid, *Ivory Demand in China 2012–2014*, 2 (Zach Weismann ed., 2014), available at [http://www.wildaid.org/sites/default/files/resources/Print\\_Ivory%20Report\\_Final\\_v3.pdf](http://www.wildaid.org/sites/default/files/resources/Print_Ivory%20Report_Final_v3.pdf) (discussing the impact of the ivory trade in China on poaching); Godfrey Harris, Op-Ed, *How to Save Both Elephants and the Ivory Trade*, L.A. TIMES, July 21, 2014, <http://www.latimes.com/opinion/op-ed/la-oe-harris-ivory-collecting-20140722-story.html> (“Today’s poaching problems has its roots in East Asia, where there is still a strong demand for and an active trade in new ivory objects.”).

61. See Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) § IX(1)(b) (Mar. 3, 1973), 27 U.S.T. 1087, 993 U.N.T.S. 243 (entered into force July 1, 1975); see also *List of Contracting Parties*, CITES, <http://www.cites.org/eng/disc/parties/chronolo.php> (last visited July 1, 2015) (listing the Parties to the Convention). The United States ratified CITES on January 14, 1974, and it entered into force on July 1, 1975. See *id.* China acceded to CITES on January 8, 1981, and it entered into force April 8, 1981. See *id.*

62. CITES, *supra* note 61, § VIII(1) (requiring trade restrictions on wildlife).

climate change.<sup>63</sup> Entered into force on July 1, 1975, CITES promotes international cooperation to ensure that “international trade in specimens of wild animals and plants does not threaten their survival.”<sup>64</sup> While CITES imposes obligations on the Parties, and certain provisions are self-enacting, these provisions only provide a broad framework.<sup>65</sup> Conversely, most of the CITES provisions are not self-executing and countries must enact domestic legislation to fully implement the treaty.<sup>66</sup> In that regard, CITES only controls international trade and has no control over domestic trade.<sup>67</sup> CITES does require, however, that each Party designate one or more scientific authority and a management authority that will monitor wildlife trade and the status of individual species.<sup>68</sup> The scientific and management authorities in the United States are divisions of the Fish and Wildlife Service (the “FWS”).<sup>69</sup> In China, the management authority is the Endangered Import and Export Management Office of the People’s Republic of China (the “Chinese Management Authority”) and the scientific authority is the Endangered Species Scientific Commission of the People’s Republic of China.<sup>70</sup>

---

63. See *What is CITES?*, CITES, <http://www.cites.org/eng/disc/what.php> (last visited July 1, 2015) (answering most commonly asked questions about CITES); *About IUCN*, IUCN <http://www.iucn.org/about/> (last visited July 1, 2015). For further background on CITES, see Christine Fuchs, *Convention on International Trade in Endangered Species of Wild Fauna and Flora (Cites)—Conservation Efforts Undermine the Legality Principle*, 9 GERMAN L.J. 1565, 1566 (2008) (giving a detailed analysis of CITES); Ruth A. Braun, *Lions, Tigers and Bears (Oh My): How to Stop Endangered Species Crime*, 11 FORDHAM ENVTL. L.J. 545, 547 (2000).

64. *What is CITES?*, *supra* note 63 (noting that 180 countries are Parties to CITES).

65. See *id.* (explaining how CITES coexists with domestic legislation); Cyrille de Klemm, *Guidelines for Legislation to Implement CITES*, IUCN ENVIR. POL'Y & L. PAPER NO. 26, 5-8 (1993) (commenting on domestic implementation of CITES).

66. *What is CITES?*, *supra* note 63.

67. See James B. Murphy, *Alternative Approaches to the CITES “Non-Detriment” Finding for Appendix II Species*, 36 ENVTL. L. 531, 536 (2006) (noting that CITES does not affect domestic trade); Chris Wold, *Multilateral Environmental Agreements and the Gatt: Conflict and Resolution?*, 26 ENVTL. L. 841, 876 (1996) (“CITES only mandates restrictions on international trade and not restrictions on domestic trade or consumption.”).

68. See CITES, *supra* note 61, § IX(1)(b). Scientific authorities are charged with issuing “non-detriment” findings, whereby a specimen may only be exported or imported if in doing so the survival of that species will not be affected. See *id.*; Murphy, *supra* note 67, at 537–38. The management authority is responsible for overseeing the permitting process for imports and exports. See CITES, *supra* note 61, § IX(1)(a).

69. CITES, US Fish & Wildlife Serv., <http://www.fws.gov/international/cites/> (last visited July 1, 2015) (explaining the purpose and structure of the FWS); see also 16 U.S.C. § 742b(b) (2012) (creating the FWS as a division within the Department of the Interior).

70. See *China: Management Authority*, CITES, <http://www.cites.org/eng/cms/index.php/component/cp/country/CN> (last visited July 1, 2015) (discussing the implementation of CITES in China); see also *21 Branch Offices of the Chinese CITES Management Authority Meet With*

Every two to three years, all Parties to CITES meet at the Conference of the Parties (the “CoP”).<sup>71</sup> The CoP, as the “supreme decision making body,” adopts various resolutions and decisions drafted by the Standing Committee and proposed by the Secretariat.<sup>72</sup> Another task of the CoP is to review all progress in conservation of wildlife, as well as consider and amend the Appendix system.<sup>73</sup> As the central tenant of the CITES text, the Appendix System is a three-category classification (Appendix I, II, and III) of wildlife species based on a species’ risk of extinction.<sup>74</sup> A permit is required for all exports, imports, and re-exports of wildlife within one of these Appendices, but the ease with which an individual may obtain a permit depends on the Appendix in which the species is listed.<sup>75</sup>

Appendix I is the most stringent level and is reserved for species near extinction.<sup>76</sup> Appendix II is for species “not necessarily” at risk of extinction, but trade in the species is still regulated to ensure such a risk does not occur.<sup>77</sup> The key difference between the two is that Appendix I involves a more rigorous process to obtain a permit. Further, unlike species in Appendix II, a permit is required for all

---

*the CITES Secretary-General*, CITES, [http://www.cites.org/eng/news/sundry/2013/20130802\\_china\\_cites.php](http://www.cites.org/eng/news/sundry/2013/20130802_china_cites.php) (last visited July 1, 2015) (describing how the Management Authority works closely with the State Forestry Administration, the Ministry of Foreign Affairs, and twelve other agencies through China’s National Inter-Agencies CITES Enforcement Coordination Group).

71. See CITES, *supra* note 61, § XI(2) (“[T]he Secretariat shall convene regular meetings at least once every two years.”); *What is CITES?*, *supra* note 63 (explaining how CITES and its members interact).

72. *What is CITES?*, *supra* note 63; *Conference of the Parties*, CITES, <http://www.cites.org/eng/disc/cop.php> (last visited July 1, 2015) (describing the CoP). The Standing Committee provides guidance to the Secretariat regarding policy and CITES implementation. See *Standing Committee*, CITES, <http://www.cites.org/eng/disc/sc.php> (last visited July 1, 2015) (explaining the functions of the Standing Committee). The Secretariat acts as a coordinator and is responsible for planning the meetings of the CoP, collecting reports from the Parties, and providing legislative and enforcement guidance when requested. See *The CITES Secretariat*, CITES, <http://www.cites.org/eng/disc/sec/index.php> (last visited July 1, 2015) (discussing the Secretariat’s role).

73. See CITES, *supra* note 61, § XV(1)(b) (outlining the amendment process); *Conference of the Parties*, *supra* note 72 (same).

74. See *CITES Appendices I, II, and III (valid from 5 February 2015)*, CITES, <https://www.cites.org/eng/app/appendices.php> (last visited July 1, 2015); Murphy, *supra* note 67, at 536 (introducing the Appendix system).

75. See CITES, *supra* note 61, § II(4) (“The Parties shall not allow trade in specimens of species included in Appendices I, II and III except in accordance with the . . . Convention.”). For the purposes of this Note, “species” shall only refer to dead specimens or parts of the dead specimen. CITES does, however, cover live specimens. See *id.* § II–IV.

76. See *id.* § II(1) (presenting the trade requirements for Appendix I species).

77. See *id.* § II(2) (outlining trade obligations under Appendix II).

imports of Appendix I specimens.<sup>78</sup> Appendix I import permits are granted only in exceptional circumstances and never for commercial purposes.<sup>79</sup> Appendix III, not relevant for the purposes of the African elephant, protects species from specific origins.<sup>80</sup> The requirements under the Appendices are baselines; countries may impose more stringent requirements on imports and exports of any species.<sup>81</sup>

## 2. CITES and African Elephants

In 1976, the African Elephant was first listed on Appendix III by Ghana, but the CoP voted to designate the African elephant as Appendix II the following year.<sup>82</sup> In 1989, the CoP raised the designation of the African elephant to Appendix I.<sup>83</sup> Today, the African elephant is the only “split listing,” meaning that African elephants from Botswana, Namibia, and Zimbabwe, are listed on Appendix II, while African elephants from all other origins are listed on Appendix I.<sup>84</sup> As mentioned in Part I.C.2, *supra*, this means that most elephants are at risk of extinction, but in the specific countries

---

78. *See id.* § III(2)(d). Under Appendix I, an import permit from another country must be granted before an export permit will be issued. *See id.*; see also Michael J. Glennon, *Has International Law Failed the Elephant?*, *AM. J. INT’L LAW* 1, 11 (1990), for a full explanation of the requirements for export/import in each Appendix.

79. *See* CITES, *supra* note 61, § II(3) (specifying import requirements).

80. *See id.* § V (characterizing Appendix III requirements); *Appendices*, CITES, <http://www.cites.org/eng/app/appendices.php> (last visited July 1, 2015) (assessing trade requirements under CITES). For example, sea cucumbers from Ecuador are protected under Appendix III, but sea cucumbers from other countries are unlisted. *See id.* All importers of an Appendix III species must present a certificate of origin and, if from an origin specified in Appendix III, an importer must also present an export permit from that country. (e.g. an importer of sea cucumbers must present a certificate of origin and, if that origin is Ecuador, then the importer must also present an export permit from Ecuador). *See id.*

81. *See id.* § XIV(1) (providing that countries may impose “stricter domestic measures regarding the conditions for trade . . . of species included in Appendices . . .”); *What is CITES?*, *supra* note 63 (explaining that CITES “provides a framework to be respected by each Party, which has to adopt its own domestic legislation”).

82. US Fish & Wildlife Serv., *CITES & Elephants: What is the “Global Ban” on Ivory Trade?*, 1 (2013) [hereinafter *CITES & Elephants*], available at <http://www.fws.gov/le/pdf/CITES-and-Elephant-Conservation.pdf> (giving a brief history of elephants and CITES); see also *U.S. Ivory Trade*, *supra* note 13, at 35–36 (providing an Appendix history of the elephant).

83. *See CITES & Elephants*, *supra* note 82, at 1.

84. ROSALEEN DUFFY, *NATURE CRIME: HOW WE'RE GETTING CONSERVATION WRONG* 48 (2010) (explaining “split listing”); *African Elephant*, CITES, [http://www.cites.org/eng/gallery/species/mammal/african\\_elephant.html](http://www.cites.org/eng/gallery/species/mammal/african_elephant.html) (last accessed July 1, 2015) (listing all elephants as Appendix I except for those in Botswana, Namibia, Zimbabwe, and South Africa, which are listed on Appendix II).

mentioned, populations are such that a small, but heavily regulated trade is permissible.<sup>85</sup>

Scholars note that the protection of African elephants under CITES has some weaknesses.<sup>86</sup> For example, CITES gives the management and scientific authority of countries broad discretion to decide whether or not to grant a permit.<sup>87</sup> Further, regardless of the Appendix status, specimens of African elephants removed from the wild pre-1976—i.e., if the elephant was killed before 1976—are exempted from CITES requirements.<sup>88</sup> Also, African elephant hunting trophies are often given import or export permits, as long as they are for noncommercial purposes.<sup>89</sup>

The CoP attempts to minimize the effect of existing limitations through various Resolutions and Decisions.<sup>90</sup> For example, the Resolution Conference 10.10: Trade in African Specimens (the “Resolution Conf. 10.10”), one of the key resolutions regarding

---

85. See *supra* notes 74–81 and accompanying text (explaining the key differences between Appendix I and Appendix II species). With the current levels of poaching, this “split listing” is highly controversial. See DUFFY, *supra* note 84, at 137–39 (recounting the protests that occurred at the time CITES adopted the “split listing” and the subsequent fracture of opinion that occurred, apart from that of groups like the World Wildlife Fund, a NGO and strong advocate against the ivory trade); Fuchs, *supra* note 63, at 1577–78 (presenting the “much contested question[:] whether or not to permit the split-listing”).

86. See *CITES & Elephants*, *supra* note 82, at 1 (“CITES ‘ban’ on ivory trade has several limitations.”); Robert W.G. Jenkins, *An Overview of the Fundamental Principles of CITES as a Mechanism for Regulating Trade in Listed Species*, 1–2 (CITES Workshop on Introduction from the Sea Issues, Nov. 30–Dec. 2, 2005), available at <https://cites.org/sites/default/files/eng/news/meetings/IFS-05/IFS05-principle.pdf> (listing some limitations of CITES).

87. See de Klemm, *supra* note 65, at 25 (explaining permit requirements under CITES); CITES, *Implementation of the Convention in individual Countries*, Doc. SC.41.12, 4 (Feb. 8–12, 1999) (expounding on the implementation of CITES through national legislation).

88. See *CITES & Elephants*, *supra* note 82, at 1 (explaining the application of CITES). Import-export laws regarding pre-CITES ivory may be subject to stricter laws such as US law, discussed *infra*.

89. See *id.* (“Elephant range countries issue an annual export quota for hunting trophies taken for non-commercial purposes.”); CITES, *Permits and Certificates*, Resolution Conf. 12.3 (Rev. CoP16), 4 (June 12, 2013) (defining hunting trophy as an “animal, or readily recognizable part . . . [with] any accompanying CITES permit or certificate, that: (i) is raw . . . (ii) was legally obtained by the hunter through hunting for the hunter’s personal use; and (iii) is being imported, exported, or re-exported by or on behalf of the hunter . . .”).

90. See Fuchs, *supra* note 63, at 1575 (“These [R]esolutions have brought about a considerable reform of the Convention’s mode of work . . . . The success of the treaty . . . depends on its adaptation capacities.”); Jenkins, *supra* note 86, at 2 (emphasizing the importance of Resolutions and Decisions of the Parties). Resolutions provide “long-standing guidance” to the Parties, while Decisions are instructions to individual committees or to the CITES Secretariat. See *Decisions of the Conference of the Parties*, CITES, [www.cites.org/eng/dec/intro.php](http://www.cites.org/eng/dec/intro.php) (last visited July 1, 2015).

African elephants, provides an international definition of raw ivory.<sup>91</sup> While later amended, the Resolution Conf. 10.10 also provided the first international definition of worked ivory.<sup>92</sup> In addition to creating these definitions, the Resolution Conf. 10.10 makes recommendations about creating and enforcing domestic legislation and regulations to monitor the ivory trade.<sup>93</sup> It further directs the Secretariat to identify countries not enforcing the Appendix requirements.<sup>94</sup> Finally, the Resolution Conf. 10.10 provides for the assessment of trade restrictions against those Parties not in compliance.<sup>95</sup>

The Resolution Conf. 10.10 also created two crucial programs: CITES Monitoring the Illegal Killing of Elephants (“MIKE”) and Elephant Trade Information System (“ETIS”).<sup>96</sup> MIKE monitors eighty sites between Africa and Asia and reports to the CoP, enabling the Parties to make decisions about enforcement and management.<sup>97</sup> Specifically, MIKE monitors poaching levels and reports on factors

---

91. CITES, *Draft Revision of the Resolution of Conf. 10.10 (Rev. CoP15) on Trade in Elephant Specimens*, CoP16 Doc. 26 (Rev. 1), 5 (Mar. 3–14 2013) [hereinafter *Revision of 10.10*] (defining “raw ivory” as “all whole elephant tusks, polished, or unpolished and in any form whatsoever, and all elephant ivory in cut pieces, polished or unpolished and howsoever changed from its original form, except for ‘worked ivory.’”).

92. *See id.* The Resolution Conf. 10.10 originally defined “worked ivory” as “readily recognizable . . . [and includes] all items made of ivory for jewelry, adornment, art utility or musical instruments (but not including whole tusks in any form, except where the whole surface has been carved), provided that such items are clearly recognizable as such and in forms requiring no further carving, crafting or manufacture to effect their purpose.” *Id.* at 5–6 (amending the definition to “ivory that has been carved, shaped, or processed, either fully or partially, but shall not include whole tusks in any form except where the whole surface has been carved.”).

93. *See id.* at 6 (“URGES those Parties in whose jurisdiction . . . a legal domestic trade in ivory . . . exist[s] . . . ensure that they have put in place comprehensive international legislative, regulatory, [ ] enforcement and other measures.”).

94. *See id.* at 7. This includes Parties with “unregulated . . . markets for ivory . . . [or] significant quantities of ivory . . . found to be illegally traded[,] . . . ivory stockpiles . . . not well secured, or . . . [have] significant levels of illegal trade in ivory.” *See id.*

95. *See id.* (“[T]he Standing Committee . . . may consider appropriate measures . . . including *recommendations to restrict*[ ] . . . or *suspend* commercial trade in specimens of CITES-listed species to or from such Parties *in case of failure to achieve compliance.*”) (emphasis added).

96. *See* CITES, *Monitoring the Illegal Killing of Elephants*, CoP16 Doc. 53.1, 1 (Mar. 3–14, 2013) [hereinafter *MIKE Report*] (calculating the number of incidents of poaching as a means of analyzing the illegal trade); *ETIS Report on Traffic*, *supra* note 46, at 1 (using the number of reported seizures of illegally traded ivory as a means of analyzing the illegal trade).

97. *See* CITES, *CITES MIKE Programme*, available at <http://www.cites.org/common/prog/mike/brochure.pdf> (characterizing MIKE); *MIKE*, CITES, <http://www.cites.org/eng/prog/mike/intro/index.shtml> (last visited July 1, 2015) (providing general background on MIKE).

that affect population levels, such as human conflict and ivory trade patterns.<sup>98</sup> ETIS is similar to MIKE in its purpose, but its monitoring system is quite different.<sup>99</sup> Instead of poaching, ETIS tracks seizures of illegally imported or exported elephant specimens, including ivory.<sup>100</sup> ETIS' main goal is to map illegal trade routes, report on smuggling trends, and give recommendations for enforcement personnel.<sup>101</sup> While ETIS and MIKE have limitations, they provide important data regarding the current status of the illegal ivory trade.<sup>102</sup>

Recently, the CoP increased efforts to reduce the illegal ivory trade through the Action Plan for the Control of Trade in Elephant Ivory (the "Control of Trade Plan"), the African Elephant Action Plan (the "AEAP"), and the Decision Making Mechanism for Future Trade in Elephant Ivory (the "DMM").<sup>103</sup> The Control of Trade Plan urges Parties to enact legislation to regulate domestic trade that would put the burden of proof of lawful possession upon the possessor.<sup>104</sup> Further, it directs the Secretariat to report countries where significant illegal trade pervades; recommends trade sanctions against countries in which there is a large illegal ivory trade; and urges countries to cooperate with scientific studies involving ivory recognition.<sup>105</sup> The AEAP is a proposed plan based on the data collected by MIKE, ETIS,

---

98. See sources cited *supra* note 97 (discussing MIKE).

99. *What is ETIS?*, CITES, <http://www.cites.org/eng/prog/etis/index.php> (last visited July 1, 2015) (providing general background on ETIS). See also *Revision of 10.10*, *supra* note 91, at 11 (explaining that ETIS enhanced the Bad Ivory Database System (BIDS) developed by the wildlife trade-monitoring network, TRAFFIC, in 1992). TRAFFIC was created by IUCN and the World Wildlife Fund (WWF) in 1976 and monitors the trade of wildlife internationally. See *Traffic: the Wildlife Monitoring Trade Networks*, WWF, <http://www.worldwildlife.org/initiatives/traffic-the-wildlife-trade-monitoring-network> (last visited July 1, 2015).

100. *CITES & Elephants*, *supra* note 82, at 2; *ETIS*, *supra* note 99 (describing the duties of ETIS).

101. See sources cited *supra* note 100 (providing background of ETIS).

102. See, e.g., *MIKE Report*, *supra* note 96, at 9; *ETIS Report on Traffic*, *supra* note 46, at 4–5 (admitting that ETIS requires that seizures actually occur (the "seizure rate") and that those seizures are then reported (the "reporting rate"), and further explaining that if a country's reporting rate increases, it may distort the seizure rate). Both ETIS and MIKE take steps to mitigate these limitations. See *MIKE Report*, *supra* note 96, at 9; *ETIS Report on Traffic*, *supra* note 46, at 4–5.

103. See CITES, *Proposed New Resolution Concerning the African Elephant Action Plan and African Elephant Fund*, CoP16 Doc. 53.3 (Rev. 2), 1 (Mar. 3–14, 2013); CITES, *Decisions of the Conference of the Parties to CITES in Effect After its 15th Meeting*, 34 n.6 (Mar. 13–25, 2010) [hereinafter *Control of Trade Plan*]; CITES, *Proposal to Amend Decision 14.77 on a Decision-Making Mechanism for Future Trade in Elephant Ivory*, CoP16 Doc. 37 (Rev. 1), 1 (Mar. 3–14, 2014) [hereinafter *DMM*].

104. See *Control of Trade Plan*, *supra* note 103, at 32.

105. See *id.* at 35.

and the Secretariat to aid in the implementation of the Control of Trade Plan and to promote conservation programs.<sup>106</sup> Finally, the DMM is a proposal to explore conditions in which a legal ivory trade could continue based on an independent study commissioned by the Secretariat.<sup>107</sup>

The CoP, however, also has taken some controversial actions.<sup>108</sup> For example, the CoP allowed “one-off” sales, the most recent being in 2008, in which China and Japan purchased approximately 107,770 kg of raw ivory from Botswana, Namibia, South Africa, and Zimbabwe for a collective total of nearly US\$15.5 million.<sup>109</sup> In exchange for allowing the 2008 one-off sale, a nine-year moratorium on ivory trade from these countries is currently in effect.<sup>110</sup>

### 3. CoP16: All Eyes on the African Elephant

The sixteenth Conference of the Parties (“CoP16”) was held on March 3–14, 2013 in Bangkok, Thailand.<sup>111</sup> The focus was the illegal trade of wildlife, particularly ivory.<sup>112</sup> The MIKE and ETIS reports discussed at the CoP16 revealed troubling statistics with respect to the survival of the African Elephant. The CoP16 discussions resulted in a

---

106. See CITES, *Decisions of the Conference of the Parties to CITES in Effect after the 14th Meeting*, CoP14 §§ 14.75, 14.78–79, 20–21 (Jun. 03–15, 2007).

107. See *DMM*, *supra* note 103, at 1.

108. Compare David J. Hayes et al., *Comments and Recommendations for the Advisory Council on Wildlife Trafficking*, STANFORD L. POLICY LAB CLASS 413P, 15–16, Mar. 20, 2014 (criticizing some of the Parties’ decisions as “undermining [CITES]’ success in reducing wildlife trafficking”), with *Rethinking Ivory*, *supra* note 58, at 96–97 (pointing out that many of the criticisms of CITES’ controversial actions are contrary to what the raw data reveals).

109. See *ETIS Report on Traffic*, *supra* note 46, at 24.

110. See *id.* at 23–24; *Sixteenth Meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 21 EARTH NEGOTIATIONS BULL. 1, 2 (IISD Mar. 3, 2013), available at <http://www.iisd.ca/cites/cop16/compilation.pdf>.

111. See *Conference of the Parties*, CITES, <http://www.cites.org/eng/cop/index.php> (last visited July 1, 2015) (includes links to agenda, working documents, reports, and daily journals of the CoP); Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); Sixteenth Regular Meeting; Provisional Agenda; Announcement of Public Meeting, 77 Fed. Reg. 67390 (Nov. 9, 2012) (announcing the United States’ attendance at the CoP16 and soliciting comments on the agenda items).

112. Sara Vinson et al., *Year In Review: International Environmental Law*, 48 A.B.A. SEC. INT’L LAW 435, 446–48 (2013); Damian Carrington, *More Valuable than Gold or Heroin—the Illegal Trade Driving Wildlife to the Brink*, GUARDIAN, Mar. 2, 2013, at 21. (“[O]fficials from 177 countries gather in Bangkok for the first [CITES] summit for three years, with major battles expected over protection for polar bears, ending ‘trophy’ hunting for rhinos and the free trade in ivory in the host nation, Thailand.”).



better understanding of the role that supply and demand economics play in perpetuating the illegal ivory trade, but did not produce any tangible plans to combat it.

i. ETIS and MIKE

ETIS and MIKE reports demonstrated the dire situation of African elephants.<sup>113</sup> Collectively, nearly 300 tons of ivory were seized between 2009 and 2011, the majority of which was worked ivory, each piece weighing less than 10 kg per piece.<sup>114</sup> Additionally, the incidents of poaching, especially in Central Africa, and the number of seizures of illegally imported and exported ivory have steadily increased since 2005.<sup>115</sup>

While an increased seizure rate is encouraging, ETIS found that “almost none of the seizures . . . resulted in successful investigations of the criminals behind these transactions.”<sup>116</sup> China and Thailand were identified as having the largest domestic ivory trade and weakest laws.<sup>117</sup> China alone reported 2,008 seizures between 2009 and 2011.<sup>118</sup> ETIS identified Hong Kong as one of the main ports of transit.<sup>119</sup> In contrast, ETIS reported that the United States’ role in the illegal ivory trade is *de minimus*.<sup>120</sup> While the United States’ market score for ivory is moderate, only 200 pieces of illegal ivory were seized between 2009 and 2011.<sup>121</sup> Further, ETIS found that US laws

---

113. See generally MIKE Report, *supra* note 96; ETIS Report on Traffic, *supra* note 46.

114. See CITES, *Status of the African Elephant Populations and Level of the Illegal Killing and the Illegal Trade in Ivory: A Report to the African Elephant Summit*, 4, 6 fig.3 (2013) (providing graphic reports on the illegal trade). Numbers for the years 2012–2013 are very similar to those of 2011, with “unsustainable” poaching levels at approximately 8% (5% is considered “healthy”). See *id.* at 5, 9.

115. See *id.* at 8 fig.4 (summarizing poaching data); Bruce Zagaris, *CITES Meeting Focuses on Strategic Vision and Enforcement*, 29 INT’L ENFORCEMENT L. REP. 144, 144 (2013) (“2011 display[ed] the highest levels of poaching since 2002 when MIKE started collecting data.”).

116. ETIS Report on Traffic, *supra* note 46, at 20–22 (providing the most recent seizure rate data).

117. See *id.* at 12 tbl.2 (explaining that China’s law enforcement is among the best).

118. See *id.* (charting China’s seizure rate in comparison to other countries).

119. See CITES, *Report of the Secretariat*, CoP16 Doc. 53.2.1, 5 (Mar. 3–14, 2014) (identifying the most troubling areas in regards to the illegal trade).

120. See ETIS Report on Traffic, *supra* note 46, at 12–13 tbl.2 (comparing the US ivory trade to other countries).

121. See *id.* (highlighting that ETIS found that between 2009 and 2011, the US mean market score was 3.7 on a scale between -2.5 and 12). But see CITES-Approved, *supra* note 1, at 151 (arguing that the US market for ivory is “large,” but consists mainly of legal ivory). The mean market score is derived from the *Domestic Ivory Market Database* in ETIS. See T.

regulating the ivory trade are among the strongest and best enforced in the world.<sup>122</sup>

Both MIKE and ETIS reported that there is no evidence that any of the CoP decisions, such as the Control of Trade Plan and the Resolution Conf. 10.10, have affected the illegal ivory trade.<sup>123</sup> ETIS points out that the Parties have only imposed sanctions once, in 2008, against thirteen countries for failure to respond to a questionnaire and that the Parties have never imposed trade sanctions for failure to implement measures required under the CoP decisions.<sup>124</sup> Finally, both ETIS and MIKE suggested the 2008 one-off sale and subsequent moratorium might have negatively impacted the illegal trade; however, contradicting or inadequate data precluded a conclusion either way.<sup>125</sup>

## ii. Responses by the Parties, Resolutions, and Decisions

The discussion at the CoP16 was heavily focused on the consumer demand for ivory.<sup>126</sup> The Secretariat, echoed by representatives from Kenya, Chad, the DRC, and Swaziland, expressed concern that consumer demand is a major influence on poaching.<sup>127</sup> The Secretariat specifically named China as being the “only destination country . . . where trends of household consumption expenditure were strongly related to levels of illegal killing of elephants.”<sup>128</sup> Chinese representatives acknowledged China’s role in

---

Milliken et al., *The Elephant Trade Information System (ETIS) and the Illicit Trade in Ivory: A Report to the 14<sup>th</sup> Meeting of the Conference for the Parties to CITES*, CoP14 Doc. 53.2 Annex 1 (2007).

122. *See id.* (ranking the US mean score for governance performance as 1.66 on a scale between -2.5 and 2.5 and the level of law enforcement effort in the United States as .79 on a scale between 0 and 1).

123. *See id.* at 10 (“[T]here is little evidence to suggest that implementation of the *Action Plan for the Control of Trade* . . . has had any impact in reducing the upward trend in illicit trade in ivory . . . .”); *MIKE Report*, *supra* note 96, at 7 (“[I]f these decisions had any effect on poaching, that effect was not discernible from the available data.”).

124. *See ETIS Report on Traffic*, *supra* note 96, at 26 (stating that the sanctions against the thirteen countries have since been revoked).

125. *See id.* at 23–24 (explaining that in the period after the first one-off sale, the increase in demand was marginal as compared to the period after the second sale); *MIKE Report*, *supra* note 96, at 7 (noting that MIKE has not found any “discernable” evidence that the one-off sales or moratorium caused the increase in demand).

126. *See CITES, Summary Record of the Sixth Session of Committee II*, CoP16 Com. II Rec. 6 (Rev. 1) 1 (Mar. 7, 2013) [hereinafter *Summary Record 6*] (providing a summary of the different opinions by different member states).

127. *See id.*

128. *Id.*

the illegal ivory trade, but stated that African nations with elephant populations were best suited to combat it.<sup>129</sup>

Finally, the CoP16 yielded no progress toward the creation of the DMM.<sup>130</sup> Parties had different opinions about its purpose: some parties thought the DMM should be criteria for a continuing ivory trade, while the Secretariat and other Parties believed the DMM should create a process by which the parties could decide whether an international trade in ivory could persist at all.<sup>131</sup> The CoP16 decided to table the discussion until CoP17.<sup>132</sup>

#### D. Legal Landscape: United States and China

The United States and China have an obligation under CITES to strictly regulate the ivory trade, including forbidding commercial imports of ivory removed from the wild post-1989 and allowing only non-commercial imports of post-ban ivory in exceptional circumstances.<sup>133</sup> Each country has enacted domestic legislation and subsequent legal frameworks intending to protect the African elephant. While the United States has a broad, but strong legal framework for exports and imports, this Subpart first discusses how federal law is limited in regards to interstate trade. Second, this Subpart elucidates the complex Chinese laws on the ivory trade.

##### 1. US Laws and Regulations: A Strong Legal Framework

There are two key pieces of legislation regulating the ivory trade in the United States: the Endangered Species Act and the African

---

129. See *Summary Record 6*, *supra* note 126, at 2 (summarizing the Chinese statements in regards to the ivory trade).

130. *Summary of the Sixteenth Meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora: 3–14 March 2013*, 21 EARTH NEGOTIATIONS BULL. 1, 27 (Mar. 18, 2014) [hereinafter *March 18 Summary*], available at <http://www.iisd.ca/cites/cop16/compilation.pdf> (summarizing the Parties' ongoing to debate as to whether the DMM should be created at all).

131. See CITES, *Decision-Making Mechanism for a Process of Trade in Ivory*, CoP16 Doc. 36 (Rev. 1) 3 (Mar. 3–14 2013) (outlining the CoP16 discussion about the DMM).

132. See *CITES CoP16 Highlights: Thursday, 7 March 2013*, 21 EARTH NEGOTIATIONS BULL. 1, 4 (Mar. 8, 2014), available at <http://www.iisd.ca/download/pdf/enb2178e.pdf> (“[T]he Secretariat directed the [Standing Committee] to postpone approval of the mechanism to CoP17.”); *March 18 Summary*, *supra* note 130, at 13 (“South Africa and Botswana expressed disappointment in delaying [DMM’s] implementation.”).

133. See *supra* notes 62, 75–84 and accompanying text (describing the CITES requirements).

Elephant Conservation Act.<sup>134</sup> The Endangered Species Act (the “ESA”) fulfills the United States’ international obligations under CITES.<sup>135</sup> Enacted in 1973, it protects endangered or threatened wildlife through a category system similar to CITES Appendices but, instead, marks species as “endangered” or “threatened.”<sup>136</sup> The ESA delegates power to the Secretary of the US Department of the Interior (the “Secretary”) to regulate trade in endangered or threatened species, with the express exception that the Secretary may not regulate antiques made of endangered species more than 100 years old unless they were repaired or modified after December 28, 1973 (the date the ESA was enacted).<sup>137</sup> Specific to the African elephant, the ESA prohibits imports and exports of raw or worked ivory without the permission of the Secretary.<sup>138</sup> It also grants permission to an agent of the Secretary to, upon notice, inspect the inventory and records of any business that exports or imports ivory.<sup>139</sup>

The African Elephant Conservation Act (the “AECA”), enacted in 1988, strictly regulates the ivory trade.<sup>140</sup> The AECA prohibits exports of raw ivory and prohibits imports of raw or worked ivory in violation of CITES, another country’s laws, or any import moratorium, discussed *infra*.<sup>141</sup> Hunters may import their sport-hunted

---

134. *See* African Elephant Conservation Act, 16 U.S.C. §§ 4201-4245 (2012); Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2012). A third important law, not discussed in this Note, is the Lacey Act, enacted in 1900, which provides for criminal and civil sanctions against those involved in the illegal trade of wildlife. *See* 16 U.S.C. § 3373 (2012); Braun, *supra* note 63, at 565. As amended in 1981, the Lacey Act prohibits wildlife trafficking and false labeling of endangered species in contravention of the law. *See* Braun, *supra* note 63, at 565. (citing Robert S. Anderson, *The Lacey Act: America’s Premier Weapon*, 16 PUB. LAND L. REV. 27, 31 (1995)); *Hearing Before the H. Comm. on Foreign Affairs, supra* note 27, at 33 (statement of Dreher).

135. *See* 16 U.S.C. § 1531(a)(4) (“[T]he United States has pledged . . . to conserve to the extent practicable the various species of . . . wildlife . . . pursuant to [CITES] . . .”).

136. *U.S. Ivory Trade, supra* note 13, at 38–39 (providing background information about the ESA); *Treasured to Death, supra* note 42, at 4 (explaining the relationship between the ESA and other legislation). The African Elephant was listed as threatened under the ESA in 1978. Listing of the African Elephant as a Threatened Species, 43 Fed. Reg. 20,504 (May 12, 1978); *U.S. Ivory Trade, supra* note 13, at 38–39.

137. 16 U.S.C. §§ 1532(15), 1533(d), 1539(h) (2012) (listing the various powers and limitations of the Department of the Interior under the ESA).

138. *See id.* § 1538(d)(1).

139. *See id.* §§ 1538(d)(1)–(2).

140. *See id.* §§ 4201–02; *U.S. Ivory Trade, supra* note 13, at 36, 40. The AECA was enacted one year prior to CITES upgrading the African Elephant to Appendix I. *See U.S. Ivory Trade, supra* note 13, at 36, 40.

141. *See id.* § 4223.

trophies, but may not sell them after import.<sup>142</sup> Further, without a moratorium on imports, worked ivory may be imported only as personal effects, unless the exporting country certifies the ivory is derived from a legal source.<sup>143</sup>

Under the AECA, the Secretary must impose moratoria on imports of ivory from countries that are (a) not Parties to CITES or (b) not adhering to CITES, the country's own ivory laws, or the ivory laws of another country.<sup>144</sup> The Secretary may suspend a moratorium, but only pursuant to a Notice and Comment period.<sup>145</sup> Any moratorium cannot, however, affect sport-hunted trophies imported from countries that have quotas on legal hunting.<sup>146</sup> The AECA is silent as to the regulation of antique ivory.<sup>147</sup>

On June 9, 1989, the FWS, on behalf of the Secretary, acted pursuant to this power and imposed a moratorium on all importation of ivory from all nations.<sup>148</sup> The FWS believed that because poaching was rampant and no country could guarantee that the ivory being imported into the United States derived from legal sources, a complete import ban was necessary.<sup>149</sup> There is some legislative history to suggest that Congress disfavored the imposition of a complete moratorium; however, the final legislation did provide for that possibility.<sup>150</sup>

---

142. *See id.* §§ 4222(e), 4223. *See also* Adam Welz, *Amid Elephant Slaughter, Ivory Trade in U.S. Continues*, YALE ENVIR. 360, Feb. 13, 2014, [http://e360.yale.edu/feature/amid\\_elephant\\_slaughter\\_ivory\\_trade\\_in\\_us\\_continues/2738/](http://e360.yale.edu/feature/amid_elephant_slaughter_ivory_trade_in_us_continues/2738/) (last accessed on July 1, 2015) (discussing why the US ivory crush was important).

143. *See* 16 U.S.C. § 4223. Personal effects are “articles . . . not intended for sale and are part of a shipment of the household effects of a . . . [move] to or from the United States . . . .” *See id.* § 4244(9).

144. *See id.* §§ 4202, 4221–4222.

145. *See id.* § 4222(c).

146. *See id.* § 4222(e). Congress found “no evidence that sport hunting is part of the poaching that contributes to the illegal trade in African elephant ivory, [but instead found] that the proper utilization of well-managed elephant populations provides an important source of funding for African elephant conservation programs.” *Id.* § 4202(9).

147. *See* African Elephant Conservation Act, 16 U.S.C. §§ 4204–4245 (2012); *see also* Hayes et al., *supra* note 108, at 22 (noting that the AECA lacks a provision regarding “antique ivory”).

148. *See* Moratorium Notice, 54 Fed. Reg. 24,758 (June 9, 1989).

149. *See id.* The FWS service claimed that due to the intricacy of global trade, where ivory may pass through several “transit” countries before its ultimate destination, it is nearly impossible to ensure that all ivory is, in fact, legally obtained. *See id.* at 24,760.

150. *See* H.R. Rep. No. 100-827, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2719 (rejecting the possibility of complete moratoria on importation in favor of “selective moratoria”); 134 CONG. REC. H6583 (daily ed. Aug. 8, 1988) (statement of Rep. Beilenson) (explaining the structure of the selective moratorium). Former Representative Anthony

The FWS permitted broad exceptions to the moratorium.<sup>151</sup> For example, the FWS codified a special rule that applied the ESA antique exception to imports under the AECA.<sup>152</sup> This special rule, however, is less stringent than the one under the ESA: while antiques less than 100 years old cannot enter, the regulation is silent on antiques recently restored or modified.<sup>153</sup> Further, worked ivory constituting household or personal effects can be imported or exported, for noncommercial reasons, with a CITES certificate and proof that the ivory was harvested from the wild pre-February 1973.<sup>154</sup>

The AECA, the ESA, and the regulations created thereof provide limited regulatory structure for domestic trade.<sup>155</sup> The only provision

---

Beilenson, who sponsored the bill, withdrew support for a complete ban, which was echoed by all witnesses at a House hearing, except for those from the Humane Society. *See* H.R. Rep. No. 100-827, at 13. The general sentiment was that a “selective moratoria” would “cut down on ivory demand without penalizing . . . other acceptable trade.” *See id.* at 14. A compromise was reached through African Elephant Conservation Act, Pub. L. 100-478, 102 Stat. 2322 (1988), (“[I]f the Secretary determines that the importation of illegally harvested ivory has not been substantially stopped, the Secretary *shall recommend* to Congress amendments to this chapter or other actions that may be necessary to achieve the purpose of [the AECA], including the establishment of a complete moratorium on the importation of elephant ivory into the United States.”) (emphasis added).

151. *See* 50 C.F.R. § 17.40(e) (2014). *See also* E. Donald Elliott, Muftiah McCartin, Thomas Brugato, & Kamila Lis, *E-Alert: Fish and Wildlife Service Tightens Restrictions on Imports Under the Endangered Species Act*, COVINGTON & BURLING LLP, 2 (2014) (explaining the differences between the FWS’ previous policy and the Director’s Order).

152. *See* 50 C.F.R. § 17.40(e) (providing exceptions to the moratorium).

153. *Compare* 16 U.S.C. § 1539(h)(1) (“[The provisions under ESA do] not apply to any article which-- (A) is not less than 100 years of age; (B) is composed in whole or in part of any endangered species or threatened species . . . ; (C) has not been repaired or modified with any part of any species on or after December 28, 1973; and (D) is entered at a [designated] port.”), *with* 50 C.F.R. § 17.40(e)(3)(ii)(A) (“Raw or worked ivory (other than sport-hunted trophies) may be imported only if: (1) it is a bona fide antique of greater than 100 years of age on the day of import, or (2) it was exported from the United States after being registered with the [FWS]”).

154. *See* 50 C.F.R. §§ 23.15(c), (f) (2014). *See also*, FWS, *U.S. Efforts to Control Illegal Elephant Ivory Trade and Internal Markets* 2 (2012) (on file with author) [hereinafter *Efforts to Control Illegal Trade*]. “Household effects” means “part of a household move” to or from the United States. The ivory must be legally acquired under CITES and must be shipped within one year of the move, but acquired before the change in residence. *See* 50 C.F.R. §§ 23.5, 23.15(e)–(f). “Commercial” is defined as “all activities of industry and trade . . . . This does not include exhibition of commodities by museums or similar . . . organizations.” 16 U.S.C. § 1532.

155. *See U.S. Ivory Trade*, *supra* note 13, at 43–44 (emphasizing that “[o]nce ivory enters the U.S., either legally or illegally . . . there is no way to determine the full extent of the ivory trade . . . . Movement of ivory products within the U.S. is . . . difficult to track because of

regarding domestic trade stipulates that the sale or purchase of items imported after February 26, 1976 and not considered antique is prohibited.<sup>156</sup> It is legal to sell recently worked African elephant, as long as the raw ivory entered the United States before 1989.<sup>157</sup> While the United States' ivory legislation regulating foreign trade is a strong example of CITES implementation, domestic trade regulation is arguably inadequate.<sup>158</sup>

## 2. China's Legal Framework: A Complex Framework

In 1988, China enacted the law of the People's Republic of China on the Protection of Wildlife (the "Wildlife Protection Law"), which, like the ESA in the United States, provides for the protection of wildlife and regulation of wildlife trade.<sup>159</sup> As amended in 2004, China's Wildlife Protection Law specifies that imports and exports of wildlife of which trade is restricted by international conventions to which China is a party, must be approved and have a certificate of import or export.<sup>160</sup> Pursuant to this law, commercial ivory imports are prohibited except for limited imports from Appendix II species (Botswana, Namibia, Zimbabwe, and South Africa).<sup>161</sup> However, while China's Wildlife Protection Law prohibits all "sale and purchase of wildlife under special state protection," it only protects

---

limited internal controls."); Interior Announces Ban, *supra* note 4 ("The largely unregulated trade in elephant ivory has served as a loophole that gives cover for illegal trade.").

156. See *U.S. Ivory Trade*, *supra* note 13, at 43 (explaining the regulations prior to the Director's Order).

157. Fisher, *Global Ivory Trade*, *supra* note 38 (citing *USA's Ivory Markets*, *supra* note 40, at 70–71).

158. See *supra* notes 120–23 and accompanying text (analyzing the impact of US laws on the ivory trade). See also *U.S. Ivory Trade*, *supra* note 13, at 44 ("Although CITES has put forth recommendations to control the internal ivory trade, the U.S. has not taken the necessary steps for their implementation.").

159. See generally Law of the People's Republic of China on the Protection of Wildlife ("Wildlife Protection Law"), 4th meeting of the Standing Comm., 7th Nat'l People's Cong., Order No. 9, 1988. See also Denise M. Sofranko, *Laws and Legislation*, in *BIOLOGY, MEDICINE, AND SURGERY OF ELEPHANTS* 23, 28 (Murray E. Fowler & Susan K. Mikota, ed., 1st ed. 2006) (explaining the various laws that protect elephants).

160. See Wildlife Protection Law, *supra* note 159, § 24.

161. See EIA, *Made in China: How China's Illegal Ivory Trade is Causing a 21st Century African Elephant Disaster*, 2 (2007) [hereinafter *Made in China*], available at [http://eia-global.org/images/uploads/Made\\_in\\_China\\_Report.pdf](http://eia-global.org/images/uploads/Made_in_China_Report.pdf) (outlining the history of Chinese law on the ivory trade); Esmond Martin & Lucy Vigne, *The Ivory Dynasty: A Report on the Soaring Demand for Elephant and Mammoth Ivory*, 7 (Elephant Family, The Aspinall Found. & Columbus Zoo and Aquarium, 2011), available at [http://www.indiaenvironmentportal.org.in/files/file/EF\\_Ivory\\_Report\\_2011\\_web.pdf](http://www.indiaenvironmentportal.org.in/files/file/EF_Ivory_Report_2011_web.pdf) (reporting on the illegal ivory trade in China).

domestic animals.<sup>162</sup> Therefore, the domestic sale of ivory—which are harvested from African elephants abroad—was permitted under this law.<sup>163</sup> When China first enacted the Wildlife Protection Law, the law only protected domestic species, as China refused to accept the 1989 CITES import ban.<sup>164</sup> It was not until 1993 that the State Forestry Administration (the “SFA”) issued a regulation that protected foreign wildlife such as the African elephant.<sup>165</sup> Further, before the 2004 amendment, pre-convention ivory could be imported, creating a loophole whereby importers would pre-date their ivory to circumvent the law.<sup>166</sup> Finally, despite the enactment of the Wildlife Protection Act, in 2002 ETIS reported that China had one “of the largest unregulated ivory markets in the world” and that the Chinese government “demonstrate[d] very poor law enforcement effort and efficiency, and consequently exert[ed] the greatest contemporary influence on illegal trade in ivory.”<sup>167</sup>

In 2004 and 2006, China enacted the regulatory system it has today.<sup>168</sup> In May 2004, in addition to amending the Wildlife Protection Act, the SFA issued a notification requiring that all ivory be registered and sold with a certificate, called a “Certificate of Ivory Products Collection.”<sup>169</sup> If an item weighs over 50 grams (about 1.8

---

162. See Wildlife Protection Law, *supra* note 159, §§ 8, 22.

163. See Caitlin O’Connell-Rodwell & Rob Parry-Jones, *An Assessment of China’s Management of Trade in Elephants and Elephant Products*, 3 TRAFFIC ONLINE REPORT SERIES 9 (2002) (noting that before 1993, only Asian elephants were protected under the Wildlife Protection Act); Peter J. Li, *Enforcing Wildlife Protection in China: The Legislative and Political Solutions*, 21 CHINA INFO. 71, 76–77 (2007).

164. See *Made in China*, *supra* note 161, at 4; *U.S. Ivory Market Collapses After Import Ban*, N.Y. TIMES, Jun. 5, 1990, <http://www.nytimes.com/1990/06/05/science/us-ivory-market-collapses-after-import-ban.html> (analyzing the effect of listing the African Elephant as Appendix I); see also *Markets of East Asia*, *supra* note 48, at 68 (discussing China’s previous reservation to the CITES 1990 ivory ban).

165. See Wang Xinxia, *The Implementation of CITES in China*, in IMPROVING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL LAW 206 (Jacob Werksman et al. eds., 1996) (explaining that in April of 1993, the African Elephant was “approved by the Ministry of Forestry to be . . . under state protection”); *Made in China*, *supra* note 161, at 4 (summarizing the laws in China).

166. See *Made in China*, *supra* note 161, at 4.

167. CITES, *Illegal Trade in Ivory and Other Elephant Specimens: Summary Report on the Elephant Trade Information System (ETIS)*, CoP12 Doc. 34.1, 5 (Nov. 3–15 2002).

168. See *id.*

169. WildAid, *supra* note 60, at 2; Esmond Martin & Lucy Vigne, *Consumption of Elephant and Mammoth Ivory Increase in Southern China*, 49 PACHYDERM 79, 81 (Jan.–June 2011) [hereinafter *Consumption of Elephant Ivory*].



ounces), the object must be displayed next to a photograph.<sup>170</sup> Further, ivory may be carved by only certain factories and sold by certain dealers, as approved and licensed by the SFA.<sup>171</sup> Factories receive an allocation of legal ivory every year from state stocks.<sup>172</sup> In 2005 there were eleven authorized factories and fifty-one authorized wholesalers and retailers.<sup>173</sup> By the summer of 2013, the SFA approved a total of thirty-seven factories and 145 retailers.<sup>174</sup>

In 2006, the State Council issued the Regulation of the People's Republic of China on the Administration of the Import and Export of Endangered Wild Fauna and Flora (the "Administration Regulation").<sup>175</sup> This regulation brought China's wildlife trade directly in line with CITES trade system.<sup>176</sup> Specifically, whatever CITES prohibits or requires, the SFA ensures that China is in line with that decision.<sup>177</sup> Therefore, commercial imports and exports of ivory are prohibited.<sup>178</sup> The regulation further specifies that imports and exports of non-commercial ivory must meet stringent requirements such as those for loading and transporting ivory.<sup>179</sup> Finally, the

---

170. See *Consumption of Elephant Ivory*, *supra* note 169, at 81; *Market in China 2*, *supra* note 49.

171. See IFAW, *Analysis of the Chinese Ivory Registration and Certification System*, 2 (2005) [hereinafter *Certificate System Analysis*], available at <http://www.ifaw.org/sites/default/files/Analysis%20of%20the%20Chinese%20Ivory%20Registration%20and%20certification%20system%20-%202005.pdf>; *Made in China*, *supra* note 161, at 9.

172. See McMahon, *supra* note 51; Gao & Clark, *supra* note 47, at 24 (citing State Forest Association [PRC], Notice on Strengthening the Management of Ivory and its Products, 2008) ("The amount of raw ivory released to the current market is controlled to about 5 tons per year.").

173. See *Certificate System Analysis*, *supra* note 171, at 2; *Made in China*, *supra* note 161, at 10.

174. See *Rethinking Ivory*, *supra* note 58, at 98; Gao & Clark, *supra* note 47, at 254.

175. See generally Regulations of the People's Republic of China on Administration of Import and Export of Endangered Wild Animals and Plants (promulgated by St. Council, Apr. 29, 2006, effective Sept. 1, 2006), Decree No. 465 (2006) (China).

176. See *id.* § 2 ("Where the . . . [CITES] restricts the import or export of endangered fauna and flora as well as the products thereof, it shall be governed by the present Regulation.").

177. See *id.* § 3 ("The administrative department[] of forestry . . . shall . . . take charge of the administration of the import and export of endangered fauna and flora . . . throughout the country and do a good job in the relevant work relating to the performance of the Convention.").

178. See *id.* § 6 ("It is prohibited to import or export any endangered wild fauna and flora as well as the products thereof whose import or export is prohibited by the Convention for any purpose of commercial trade.").

179. See *id.* §§ 6, 8–10.

regulation criminalizes the issuance of permits by state officials in contravention of the regulation.<sup>180</sup>

Despite this robust regulatory structure, many conservationists and scholars claim that the system “seems to have little effect on the illegal trade in ivory.”<sup>181</sup> Some scholars estimate that up to ninety percent of ivory in China is illegal.<sup>182</sup> Certificates are often reused and photographs do not match the item for sale.<sup>183</sup> One report found that a factory owner purchased a license to sell ivory for US \$321,000.<sup>184</sup> Conversely, new reports are issued frequently announcing the arrest and prosecution of illegal ivory traders in China.<sup>185</sup> Overall, however, the Chinese laws and regulations regarding the ivory trade are complex, but poorly enforced.<sup>186</sup> While China has taken other symbolic actions, the Chinese government has not pursued legislative or regulatory remedies to rectify the current regulatory gaps in the Chinese system.<sup>187</sup>

---

180. *See id.* §§ 24–27; *see also Made in China*, *supra* note 161, at 4 (discussing relevant portions of the Chinese import regulations).

181. *See, e.g., Market in China 2*, *supra* note 49. *See also* Joseph Vandegrift, *Elephant Poaching: CITES Failure to Combat the Growth in Chinese Demand for Ivory*, 31 VA. ENVTL. L.J. 102, 119 (citing *Made in China*, *supra* note 161, at 3–11) (“China’s regulations of the domestic ivory trade leave many loopholes for companies still attempting to produce and sell illegal ivory.”).

182. *See From Elephants’ Mouths*, *supra* note 18, at A1; Ana Swanson, *How China’s Ivory Addiction Explains the New World Economy*, WASH. POST, Nov. 7, 2014, <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/11/07/how-chinas-ivory-addiction-explains-the-new-world-economy/>.

183. *See From Elephants’ Mouths*, *supra* note 18, at A1; Grammaticas, *supra* note 56.

184. *See From Elephants’ Mouths*, *supra* note 18.

185. *See, e.g., 14 Arrested for Ivory Trading in North China*, CHINADAILY.COM.CN, Jan. 20, 2015, [www.chinadaily.com.cn/china/2015-01/20/content\\_19360436.htm](http://www.chinadaily.com.cn/china/2015-01/20/content_19360436.htm) (announcing the arrest of fourteen suspects involved in an ivory trading ring as a result of a ten month investigation by the public security bureau in the Hebei Province); *Man Imprisoned for Smuggling Tiger Bones, Ivory*, CHINADAILY.COM.CN, Nov. 17, 2014, [www.Chinadaily.com.cn/china/2014-11/17/content\\_18929088.htm](http://www.Chinadaily.com.cn/china/2014-11/17/content_18929088.htm) (reporting the sentencing of a smuggler to a six-year imprisonment term by a court in Shandong, China).

186. *See* John Frederick Walker, *The Case for a legal Ivory Trade: It Could Help Stop the Slaughter*, YALE ENVIR. 360, Oct 13, 2014 [hereinafter *Case for a Legal Trade*], [http://e360.yale.edu/feature/point\\_the\\_case\\_for\\_a\\_legal\\_ivory\\_trade\\_it\\_could\\_help\\_stop\\_the\\_slaughter/2814/](http://e360.yale.edu/feature/point_the_case_for_a_legal_ivory_trade_it_could_help_stop_the_slaughter/2814/) (arguing that China’s legal ivory trade provides a cover for illegal ivory because of “lax” enforcement of Chinese laws); WildAid, *supra* note 60 (“Unfortunately, within the legal channels of the [Chinese] ivory trade, there are many ways to easily acquire and sell ivory illegally.”).

187. *See, e.g.,* Press Release, CITES, China and CITES Secretariat to Tackle the Demand for Illegal Ivory (Jan. 28, 2015), *available at* [cites.org/eng/China\\_ivory\\_workshop\\_release](http://cites.org/eng/China_ivory_workshop_release) (announcing a two-day workshop held in Hangzhou, China co-organized by the government of China and CITES that analyzed the ivory market); *Up In Smoke*, *supra* note 33

E. *United States Pushes for A Total Ban: 2014 and Proposed Action*

While China has not issued any new domestic laws or regulations, the United States is enhancing its regulatory and enforcement structure regarding the ivory trade.<sup>188</sup> After the CoP16, the United States made counteracting the illegal ivory trade and poaching a priority.<sup>189</sup> The Federal Government takes the position that continuous poaching coupled with the evidence that illegal ivory trade funds terrorism is a threat to national security.<sup>190</sup> The Obama Administration is taking action to close domestic “loopholes” that provide a means through which the illegal ivory trade persists.<sup>191</sup> In doing so, the United States hopes to be a role model to other countries like China by encouraging these countries to take similar actions.<sup>192</sup> This Subpart first explores the initial Executive Order and subsequent National Strategy for Combating Wildlife Trafficking, which sets out the US agenda for counteracting the international and domestic illegal ivory trade. Second, a discussion follows of the regulations the FWS has taken or plans to take pursuant to this Strategy. Finally, this Subpart discusses the United States' work with China and its attempt

---

(discussing the Chinese ivory crush). This, however, may change in the near future. *See* Press Release, CITES, CITES Secretary-General meets Chinese Vice Prime Minister in Beijing (Jan. 30, 2015), *available at* [cites.org/eng/CITES\\_SG\\_meets\\_China\\_Vice\\_Premier](http://cites.org/eng/CITES_SG_meets_China_Vice_Premier) (summarizing the meeting between Secretary-General of CITES and Administrator Zhao Shucong of the SFA, which focused on “reducing the demand for illegally sourced wildlife . . . and cracking down in illegal wildlife trade through enforcement measures”).

188. *See* Exec. Order No. 13,648, 78 Fed. Reg. 40,621, 40,621 (July 5, 2013) (“In order to enhance domestic efforts to combat wildlife trafficking . . . agencies[] shall . . . promulg[ate] . . . rules and regulations . . . to combat wildlife trafficking.”); *FWS Moves To Ban*, *supra* note 13 (“We are currently undertaking a series of administrative actions to implement a nearly complete ban on commercial elephant ivory trade.”).

189. *Ashe Testimony May 21, 2014*, *supra* note 9, at 6 (“The decisions agreed upon at [the] CoP16 to address the elephant poaching crisis were a significant step in the right direction. The United States . . . is committed to playing a significant role in their implementation . . . .”); *Top Priorities for the United States at COP16*, FWS, <http://www.fws.gov/international/cites/cop16/top-priorities.html> (last visited July 1, 2015).

190. *See Ashe Testimony May 21, 2014*, *supra* note 9, at 6.

191. Exec. Order No. 13,648, 78 Fed. Reg. at 40,621–40,623 (laying out the agenda regarding reducing wildlife trade, including the trade of elephant specimens); *see also Ashe Testimony May 21, 2014*, *supra* note 9, at 7 (explaining the steps the FWS will take to close legislative and regulatory “loopholes . . . that are exploited by illegal ivory traders”).

192. *See Hearing Before the H. Comm. on Foreign Affairs*, *supra* note 27, at 47 (statement Gerald E. Connolly, Member, H. Comm. on Foreign Affairs) (“We have got to look at best practices and try to encourage them elsewhere.”); *see also Ashe Testimony May 21, 2014*, *supra* note 9, at 8 (“Taking these measures will establish U.S. leadership and support diplomatic efforts to encourage demand reduction in consumer nations. The United States . . . must lead by example.”).

to influence the Chinese government to take similar actions as the United States.

### 1. The Executive Order and the “Strategy”

In July 2013, President Obama issued an Executive Order that outlined four clear goals: (1) assist other countries in combating illegal trade, (2) help other countries create and enforce effective laws to prohibit and prosecute illegal trade, (3) combat trafficking, and (4) reduce the demand for illegally traded wildlife both domestically and abroad, “while allowing legal and legitimate commerce involving wildlife.”<sup>193</sup> The Executive Order also created a Presidential Task Force chaired by the Secretary of the Department of the Interior, the Secretary of State, and the Attorney General with senior level membership of most Executive Departments.<sup>194</sup> President Obama charged the Task Force with creating a strategy consistent with domestic and international law within 180 days to support anti-poaching activities and coordinate law enforcement, as well as develop effective legal enforcement mechanisms and “develop strategies to reduce illicit trade and reduce consumer demand for trade in protected species.”<sup>195</sup>

In February 2014, the administration approved the National Strategy for Combating Wildlife Trafficking (the “National Strategy”).<sup>196</sup> This document is geared toward encouraging other countries to enact and better enforce anti-smuggling legislation.<sup>197</sup> While dealing with each of the topics identified in the Executive Order, the Strategy mainly focused on the last objective: reduce demand through enacting a near-complete ban.<sup>198</sup>

### 2. The FWS: The Beginning of the Ban

In February 2014, the FWS and the Department of the Interior (the “DOI”) announced that the FWS would take steps to enact a

---

193. Exec. Order No. 13,648, 78 Fed. Reg. at 40,621 (announcing that besides elephants, the Strategy is also focused on the trade of rhinoceros, great apes, tigers, sharks, tuna, and turtles).

194. *See id.* at 40621–22.

195. *See id.* at 40622–23.

196. National Strategy for Combating Wildlife Trafficking, Exec. Office of the President, 1, *passim* (Feb. 11, 2014).

197. *See generally id.*

198. *See generally id.*

near-complete ban on the commercial trade of ivory.<sup>199</sup> The current Secretary of the Department of the Interior, Sally Jewell, announced, “a commercial ban is a critical element in the President’s strategy to stop illegal wildlife trafficking and to shut down criminal markets that encourage poaching.”<sup>200</sup> Daniel Ashe, the Director of the FWS, echoed this view and added that the basis of the ban is that the US “market is contributing to the crisis now threatening the African elephant.”<sup>201</sup> The plan was to eliminate exceptions to the AECA moratorium, which allowed the import of commercial antique ivory.<sup>202</sup> Further, the FWS intends to impose a quota on imports of sport-hunted trophies.<sup>203</sup> With the exception of “a narrow class of antiques,” exports of ivory will be prohibited and the domestic sale will be restricted.<sup>204</sup> Under the proposed regulations only ivory legally imported pre-1990, with the exception of antiques, may be sold.<sup>205</sup> The burden is on the owner to prove that the ivory is, in fact, an

---

199. See *Wildlife Trafficking: New Restrictions on Commercial Elephant Ivory and Rhinoceros Horn Trade*, FWS [hereinafter *New Restrictions*], <http://www.fws.gov/wildlife-trafficking-questions-and-answers.html> (last updated Feb. 11, 2014) (answering questions about the new ban); Interior Announces Ban, *supra* note 4 (announcing the ban).

200. See Interior Announces Ban, *supra* note 4 (publicizing the US plan to enact a near-complete ban on the ivory trade); see also Press Release, DOI, Presidential Taskforce Releases Plan for the National Strategy for Combating Wildlife (Feb. 11, 2015), available at <http://www.doi.gov/news/pressreleases/presidential-taskforce-releases-implementation-plan-for-the-national-strategy-for-combating-wildlife-trafficking.cfm> (announcing the subsequent release of the implementation plan for the National Strategy).

201. See Interior Announces Ban, *supra* note 4 (demonstrating Daniel Ashe’s support for proposed ban); Press Release, FWS, Service Takes Next Steps in Commercial Elephant Ivory Trade Ban, Eases Restrictions on Musical Instruments and Other Uses (May 15, 2015) (“By implementing a near complete ban on trade . . . we are effectively closing loopholes and eliminating the cover provided by legal commercial trade . . .”).

202. See *New Restrictions*, *supra* note 199 (outlining the two steps the FWS anticipated taking by June 2014 to prohibit commercial imports); see also Interior Announces Ban, *supra* note 4 (explaining what the FWS intends to do regarding ivory).

203. *FWS Moves to Ban*, *supra* note 13 (revealing that sport-hunted trophies will be limited to two per person per year); see also FWS, *Importation of Elephant Hunting Trophies Taking in Tanzania and Zimbabwe in 2015 and Beyond: Questions and Answers*, July 10, 2015 (extending a moratorium on imports of sport trophies from Tanzania and Zimbabwe enacted on April 4, 2014), available at <http://www.fws.gov/international/pdf/questions-and-answers-suspension-of-elephant-sport-hunted-trophies.pdf>

204. Interior Announces Ban, *supra* note 4 (expounding on how the National Strategy will impact domestic ivory sales); *New Restrictions*, *supra* note 199 (explaining that domestic sales were to be limited as far as constitutionally and statutorily possible).

205. See *supra* note 204 (noting the effect of the National Strategy on domestic policy).

antique.<sup>206</sup> This shift in burden would align the United States with the CITES' Control of Trade Plan.<sup>207</sup>

As of July 1, 2015, the FWS has implemented the first of the actions.<sup>208</sup> On February 25, 2014, the FWS released Director's Order 210 (the "Director's Order").<sup>209</sup> The Director's Order "establishes the policy and procedure for [FWS] employees to implement the National Strategy."<sup>210</sup> Specifically, it forbids all imports of commercial ivory, even antique ivory.<sup>211</sup> Certain noncommercial imports of African elephant ivory are permitted.<sup>212</sup> These include raw or worked ivory by an agency for law enforcement purposes and raw or worked ivory for "genuine scientific purpose" that will further conservation efforts.<sup>213</sup> Worked ivory may also be imported for personal use as part of a household move or inheritance.<sup>214</sup> Worked ivory that is part of a

---

206. See *FWS Moves To Ban*, *supra* note 13 (listing the requirements for permissible sales of ivory); Doug Bandow, *Obama Administration Treats Antique Collectors and Dealers as Criminals: New Ivory Rules Put Elephants at Risk*, FORBES, Feb. 17, 2014 [hereinafter *Administration Treats Collectors as Criminals*], [http://www.forbes.com/sites/dougbandow/2014/02/17/obama-administration-treats-antique-collectors-and-dealers-as-criminals-new-ivory-rules-put-elephants-at-increased-risk/?\\_suid=141437116561707074179877527058](http://www.forbes.com/sites/dougbandow/2014/02/17/obama-administration-treats-antique-collectors-and-dealers-as-criminals-new-ivory-rules-put-elephants-at-increased-risk/?_suid=141437116561707074179877527058) (noting that the new requirements shift the burden of proof from the government to ivory owners).

207. See *supra* note 104 and accompanying text (discussing the Control of Trade Plan).

208. See Director's Order No. 210, Amendment 1.

209. See *id.* On May 15, 2014, the FWS amended the Director's Order to take into account some of the domestic pushback, discussed *infra*. See *id.* The amendment eased the requirements under the noncommercial import exceptions such as for musical instruments. See *infra* notes 214–16 and accompanying text.

210. See Director's Order No. 210, Amendment 1. The Director's Order was not published in either the Federal Register or the Code of Federal Regulations. See 16 U.S.C. § 724b(b) (2012) ("The functions of the United States Fish and Wildlife Service shall be administered under the supervision of the Director . . .").

211. See *FWS Moves to Ban*, *supra* note 13 (answering questions about the Director's Order); Notification to the Parties, CITES, United States of America: Stricter Domestic Measures Regarding Import of African Elephant Ivory, No. 2014/045 (Oct. 10, 2014) [hereinafter Notification No. 2014/045] (announcing the new US policy regarding import of African elephant ivory).

212. See *FWS Moves to Ban*, *supra* note 13; Notification No. 2014/045, *supra* note 211 (describing the import ban). These items may not be sold within the United States. See 50 C.F.R. § 23.5 (2014) (defining noncommercial as activity not "likely to result in economic use, gain, or benefit, including, but not limited to profit (whether cash or in kind)"); see also 50 C.F.R. § 23.55 (2014) (discussing the so-called "use after-import" rules, which as of the June 26, 2014 amendments, allow Appendix I species to be used for only noncommercial purposes after import).

213. See Director's Order No. 210, Amendment 1.

214. See *id.* As of the May 2014 amendment, the requirements for importing under this exception requires the ivory be legally acquired before February 26, 1976, has not been traded for profit post-February 25, 2014, and item has a CITES Certificate. *Id.* §§ 2(b)(3)–(4).

musical instrument may also be imported.<sup>215</sup> Finally, imports of ivory as part of traveling exhibition are permitted.<sup>216</sup> While further action is expected in the near future, the Director's Order constitutes the only action in regards to the US ivory trade the FWS has taken as of July 1, 2015.<sup>217</sup>

### 3. The United States Pressures China to Reduce the Illegal Ivory Trade

The United States has taken other actions internationally pursuant to the Executive Order, particularly in collaboration with China.<sup>218</sup> Through collaborating with China, the United States hopes to influence the Chinese government to take similar actions and impose a complete ban.<sup>219</sup> In January 2014, after encouragement from the United States, China destroyed six tons of seized illegally traded ivory.<sup>220</sup> Also in January, as part of the National Strategy, the United States joined China in a global anti-illegal trade operation called

---

215. *See id.* This portion of the Director's Order is likely a result of CITES' new certificate system for musical instruments, created at the CoP16. *See* CITES, *Frequent Cross-Border Non-Commercial Movements of Musical Instruments*, Resolution Conf. 16.8 (Mar. 2013). For a detailed analysis, see Nicole Blumenkehl, *Out of Tune Ivory Policy: Unintended Consequences for Musicians* (Nov. 19, 2014) (unpublished Note), available at [http://law.duke.edu/sites/default/files/academics/studentscholars/Blumenkehl\\_paper.pdf](http://law.duke.edu/sites/default/files/academics/studentscholars/Blumenkehl_paper.pdf).

216. *See* Director's Order No. 210, Amendment 1, § 2(b). As of the May 2014 amendment, the requirements for importing under this exception the ivory must have legally acquired before February 26, 1976, has not been traded for profit since February 25, 2014, the individual or group has a CITES certificate, and the exhibition meets the requirements for an exhibition traveling internationally pursuant to 50 C.F.R. § 23.49 (2012). *See id.* § 2(b)(5).

217. *See FWS Moves to Ban*, *supra* note 13 (discussing future expected FWS actions). *See also* Interior Announces Ban, *supra* note 4, for the press announcement on the issue.

218. In late 2013/early 2014, the Task Force took other actions pursuant to the Executive Order's objectives, including crushing six tons of seized ivory in Colorado; pursuing the capture of Vixay Keosavang, leader of the Xaysavang Network; and allocating US \$60 million to support the National Strategy. *See* US Support for Combating Trafficking, *supra* note 26; *Hearing Before the H. Comm. on Foreign Affairs*, *supra* note 27, at 2 (statement of Royce).

219. *See Hearing before the H. Comm. on Foreign Affairs*, *supra* note 27, at 47 (statement of Jones) (discussing the US partnership with China in reducing the illegal market for ivory); (Rep.) Peter DeFazio, *Illegal Ivory Trade and Administration Actions to Combat Wildlife Trafficking*, NAT. RES. COMM. (June 24, 2014), available at <http://democrats.naturalresources.house.gov/sites/democrats.naturalresources.house.gov/files/404/Ivory%20Press%20Packet%206-24-14.pdf> ("The Presidential Task Force . . . made the case for the U.S. to . . . clos[e] loopholes . . . as a means of setting an example and putting more pressure on China.").

220. *See* McMahon, *supra* note 172.

“Operation Cobra II.”<sup>221</sup> Coordinating with law enforcers from twenty-six other countries, China and the United States led a task force resulting in 400 arrests and over 350 wildlife seizures, including three metric tons of elephant ivory.<sup>222</sup> As the next step, the FWS service hoped China would enact an ivory trade ban similar, if not stricter, than the one proposed in the United States.<sup>223</sup> On February 26, 2015, China’s State Forestry Administration announced it was imposing a one-year moratorium on all imports of ivory carvings.<sup>224</sup>

In summary, after the bleak reports and slow progress of the CoP16, the United States has taken significant measures to reduce the overall demand for ivory. It has done so by creating and beginning to implement policies to decrease the trade in all ivory. Also, the United States is working with trade partners in China in hopes that it too will enact similar policies that will decrease the illegal trade of ivory and, as a result, poaching in Africa.

## II. *THE LEGAL AND POLICY CHALLENGES OF A COMPLETE IVORY BAN*

The FWS’ proposed and realized actions have legal and policy implications that have caused domestic pushback.<sup>225</sup> In China, while

---

221. Press Release, FWS, Conservationists Applaud Global Wildlife Protection Operation: “Operation Cobra II” Nets Traffickers in Africa and Asia, 1 (Feb. 11, 2014), available at <http://www.fws.gov/home/feature/2014/pdf/1-Operation-Cobra-II-PR-FN-FWS.pdf>, *CITES Secretariat Welcomes Operation Cobra II Results*, CITES, [http://www.cites.org/eng/news/sundry/2014/20140210\\_operation\\_cobra\\_ii.php](http://www.cites.org/eng/news/sundry/2014/20140210_operation_cobra_ii.php) (last updated Feb. 10, 2014). “Operation Cobra” was the name of the 1944 attack under Lieutenant Bradley to repel German ground troops during World War II and transformed the war from one “of attrition into a war of movement.” See Rick Atkinson, *Operation Cobra and the Breakout of Normandy*, U.S. ARMY, [http://www.army.mil/article/42658/\\_quot\\_Operation\\_COBRA\\_and\\_the\\_Breakout\\_at\\_Normandy\\_\\_quot\\_/](http://www.army.mil/article/42658/_quot_Operation_COBRA_and_the_Breakout_at_Normandy__quot_/) (last updated July 22, 2010).

222. See Press Release, Operation Cobra II, African, Asian, and North American Law Enforcement Officers Teams up to Apprehend Wildlife Criminals (Feb. 10, 2014), available at [http://cites.org/sites/default/files/eng/news/sundry/2014/operation\\_cobra\\_ii\\_pr.pdf](http://cites.org/sites/default/files/eng/news/sundry/2014/operation_cobra_ii_pr.pdf).

223. *Latest News Archive*, FWS, <http://www.fws.gov/international/latest-news-archive.html> (last visited July 1, 2015) (“With the support of the [FWS . . . Yao Ming delivered a petition to the Chin[a] . . . asking that China’s government ban the sale of ivory.”).

224. See Dan Levin, *China Bans Import of Ivory Carvings for One Year*, N.Y. TIMES, Feb. 27, 2015, at A12 [hereinafter *One Year Ban in China*] (reporting on the temporary moratorium and questioning whether it will have any effect on the ivory trade); *China Imposes One-Year Ban on Ivory Imports*, BBC NEWS, Feb. 26, 2015, <http://www.bbc.com/news/world-africa-31648475> (announcing the one-year moratorium in China).

225. Doug Bandow, *The Administration’s New Ivory Ban: I’m From the Government and I’m Here to Kill Elephants and Treat Americans as Criminals*, FORBES, Mar. 17, 2014 [hereinafter *The Administration’s New Ivory Ban*], <http://www.forbes.com/sites/dougbandow/>



some conservationists, activists, and scholars (including Chinese students) call for a domestic ban similar to the one the United States proposes, other conservationists, activists, and scholars argue that such a ban is not only unlikely to happen, but also that ban in China would not resolve the illegal trade and may even enhance it.<sup>226</sup> This Part focuses on the legal and policy implications of the FWS' proposed plan, with special attention to the Director's Order, and the problems with creating a similar ban in China. Part II.A explores potential legal claims under the Administrative Procedure Act and under the Fifth Amendment's Takings Clause. Part II.B discusses US domestic pushback from antique dealers, museums, and other interested parties. Part II.C discusses policy implications of imposing a similar ban in China.

#### A. *Legal Implications of a Near-Complete Ban in the United States*

The FWS' taken and proposed actions, particularly the Director's Order, raise statutory and constitutional questions under the Administrative Procedure Act and the Fifth Amendment's Takings Clause.<sup>227</sup> Some lawyers and commentators maintain that the Director's Order should have been issued pursuant to Notice and Comment.<sup>228</sup> Some commentators further claim that the National Strategy will result in the diminution of individual property rights,

---

2014/03/17/the-administrations-new-ivory-ban-im-from-the-government-and-im-here-to-kill-  
elephants-and-treat-americans-as-criminals/ (discussing some of the legal and practical  
implications of the Director's Order and the FWS proposed actions); Mashberg, *supra* note 5,  
at A15 (exploring the various reactions the FWS' actions).

226. Compare Mary Rice, *The Case Against a Legal Ivory Trade: It Will Lead to More Killing of Elephants*, YALE ENVIR. 360, Oct. 13, 2014, [http://e360.yale.edu/feature/counterpoint\\_the\\_case\\_against\\_a\\_legal\\_ivory\\_trade\\_it\\_will\\_lead\\_to\\_more\\_killing\\_of\\_elephants/2815/](http://e360.yale.edu/feature/counterpoint_the_case_against_a_legal_ivory_trade_it_will_lead_to_more_killing_of_elephants/2815/) (advocating for a complete ivory ban), and Laurel Neme, *In Hong Kong, Kids Take Action to Stop the Illegal Ivory Trade*, NAT'L GEOGRAPHIC, Apr. 24, 2014, <http://news.nationalgeographic.com/news/2014/04/140425-hong-kong-ivory-trafficking-elephants-china-world/> (reporting on an anti-trade campaign in Hong Kong spearheaded by children), with *Ivory Trade Ban*, *supra* note 18 ("I am convinced that attempts to completely restrict all ivory sales . . . are backfiring tragically on elephants."), and Dalya Alberge, *Dealers Defend Trade in Ivory Objects*, FINANCIAL TIMES, Mar. 7, 2014, <http://www.ft.com/cms/s/2/d1d013e0-a2c8-11e3-ba21-00144feab7de.html> (elucidating pushback by art dealers).

227. See U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); see also Administrative Procedure Act, 5 U.S.C. §§ 501-559, 701-706, 1305 (2012), for the complete Administrative Procedures Act (APA).

228. See *infra* note 243 and accompanying text (noting concern that FWS allegedly did not follow APA procedure).

amounting to a regulatory taking.<sup>229</sup> Precedent interpreting the Administrative Procedure Act, discussed herein, suggests there may have been a potential deficiency in procedure on the part of the FWS in creating the Director's Order.<sup>230</sup> Similarly, fundamental jurisprudence regarding the Fifth Amendment is instructive on potential regulatory takings claims.<sup>231</sup>

### 1. Regulatory Implications: Can the Director's Order Survive the APA?

This section examines whether the FWS adhered to the procedures prescribed by law in creating the Director's Order.<sup>232</sup> The following analysis will proceed assuming that standing is not at issue and that the FWS will act pursuant to the Director's Order, i.e. seize or permanently confiscate ivory being imported into the United States.<sup>233</sup> Without this action, the Director's Order is not ripe for judicial review.<sup>234</sup>

Enacted in 1946, the Administrative Procedure Act (the "APA") is the statutory codification of the procedure an agency must take when creating regulations pursuant to its statutory obligations and power delegated by Congress.<sup>235</sup> This procedure is meant to "temper"

---

229. *See infra* note 278 and accompanying text (raising the question of whether the National Strategy effectuates a taking of personal property).

230. *See discussion infra* Part II.A.1 (illuminating possible arguments under the APA).

231. *See discussion infra* Part II.A.2 (exploring potential takings claims).

232. *See* 5 U.S.C. §§ 706(a), (c)–(d) (2012) (codifying the scope of judicial review under the APA).

233. *See* 5 U.S.C. § 704 (requirements for review of agency action); *see also* *Broadgate, Inc. v. U.S. Citizenship & Immigration Serv.*, 730 F. Supp. 2d 240, 243 (2010) (holding that the requirement for standing is agency action, and that the plaintiff has no other remedy).

234. *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 807–808 (2003) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–49 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)) ("Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decisions has been formalized and its effects felt in a concrete way by the challenging parties.'"); *see also Ripe*, LEGAL INFORMATION INSTITUTE, CORNELL UNIVERSITY LAW SCHOOL, <http://www.law.cornell.edu/wex/ripe> (last visited July 1 2015) (citing U.S. CONST. art. III, § 2, cl. 1) (explaining that claims are ripe for judicial review when "the facts of a case have matured into an existing substantial controversy warranting judicial intervention").

235. *See* Administrative Procedure Act, 5 U.S.C. §§ 501-559, 701-706, 1305 (2012), for the codified APA. *See also* Isabel Salovarra & Adam Augusiak-Boro, *A Guide to Careers in Administrative Law*, PRESIDENT AND FELLOWS OF HARVARD COLLEGE 4 (2011), available at <http://www.psjd.org/getResourceFile.cfm?ID=116> (explaining the structure and background of

abuses of power by executive agencies.<sup>236</sup> Under authority delegated by Congress through statutes, agencies create regulations either through formal or informal rulemaking—a.k.a. Notice-and-Comment Rulemaking—or through adjudication in the form of orders.<sup>237</sup> However, agencies are entitled to issue interpretations of statutory clauses, make procedural rules, and issue policy statements without rulemaking or adjudication.<sup>238</sup> One of the litigious areas of administrative law is defining the boundary between a “substantive rule,” which is given a high level of judicial deference and, therefore, must be promulgated through rulemaking or adjudication, and these other types of “rules” and statements, which do not have the force of law, but are still given a level of judicial deference.<sup>239</sup> When an agency issues a statement without some form of rule-making process, the agency action is “more vulnerable to attack.”<sup>240</sup>

---

the APA); WILLIAM N. ESKRIDGE ET AL., *CASES AND MATERIALS ON LEGISLATION AND REGULATION STATUTES AND THE CREATION OF PUBLIC POLICY* 894–95, 899–900, 937–39 (5th ed. 2014) (recounting how President Roosevelt's New Deal gave birth to administrative law as it is known today). Agencies are “units of government” comprised of fifteen Executive Cabinet Departments (e.g. DOI) and other Independent Agencies (e.g. Environmental Protection Agency).

236. See Martin Shapiro, *Golden Anniversary: The Administrative procedure Act of 1946*, A, 19 REGULATION 40, 41 (1996) (explaining the purpose of the APA); Vanessa K. Burrows, *Administrative Law Judges: An Overview*, CRS REPORT, 1 (Apr. 13, 2010) (“The [APA] was enacted . . . to ensure fairness and due process in executive agency actions or proceedings involving rulemaking and adjudications.”).

237. See JACOB A. STEIN ET AL., ADMINISTRATIVE LAW § 1.01 (2014) (explaining the basic principles of administrative law); *Guide to Administrative Law*, LIBRARY OF CONG., <http://www.loc.gov/law/help/administrative.php> (last updated Jan. 5, 2015) (paraphrasing regulatory procedure). Most rules are created by Notice and Comment or through adjudication. See *id.* Adjudication is much like any court proceeding that has precedential status, except the proceedings are before an administrative law judge. See ESKRIDGE ET AL., *supra* note 235, at 960–61. Rules created pursuant to Notice and Comment are issued in the Federal Register and then, once the public has a chance to comment, are codified in the Code of Federal Regulations. See STEIN ET AL., *supra* note 237, § 1.02 (describing the rulemaking process).

238. See ESKRIDGE ET AL., *supra* note 235, at 973–74 (defining interpretive rules and policy statements); Robert Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use them to Bind the Public?*, 41 DUKE L. J. 1311, 1315 (1992) (“[U]nder the taxonomy of the APA, a rulemaking action that the agency wishes to make binding upon affect persons must be either a legislative rule (which binds legally) or an interpretive rule (which may bind practically). All other . . . ‘policy statements[]’ . . . the agency is not entitled to make binding, either as a legal matter or as a practice matter.”).

239. See 5 U.S.C. § 553(b) (2012) (listing the exceptions to rulemaking procedures); ESKRIDGE ET AL., *supra* note 235, at 1039–44, 1171–72 (expounding on judicial review and levels of deference given to agency actions).

240. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111 (D.C. Cir. 1993) (finding that requirements for certain x-ray reading levels were interpretive rules

The FWS issued the Director's Order without Notice and Comment or publication in the Federal Register.<sup>241</sup> Through the Director's Order, the FWS is enforcing the moratorium and eliminating the importation exceptions.<sup>242</sup> Some practitioners and commentators question whether the FWS should have issued the content of the Director's Order pursuant to Notice and Comment.<sup>243</sup> Other lawyers, however, argue that the Director's Order is a statement of the FWS' policy not to enforce the moratorium to the fullest extent possible.<sup>244</sup>

According to the text, the Director's Order "establishes policy and procedure for [FWS] employees to implement the National Strategy as it relates to the trade in elephant ivory . . . ." <sup>245</sup> The Director's Order, therefore, purports to be a policy statement, telling employees and the public how the FWS will enforce the moratorium.<sup>246</sup> General statements of policy advise the public on how

---

and, therefore, were not subject to APA rulemaking requirements); CHARLES H. KOCH, JR. ET AL., *ADMINISTRATIVE LAW: CASES AND MATERIALS* 237 (6th ed. 2010) ("[A]ny agency statement not subjected to Notice and Comment will be more vulnerable to attack not only in court but also within the agency itself.") (emphasis omitted).

241. See *supra* note 210 and accompanying text (discussing the circumstances in which the Director's Order was created).

242. See *New Restrictions*, *supra* note 199. While the statute of *limitations* has run for an abuse of discretion claim under the APA, Congress arguably wanted to reserve the power to enforce a complete moratorium or any other action outside the scope granted by 50 U.S.C. § 4222. See *supra* note 150 and accompanying text ("[T]he secretary shall recommend to Congress amendments to this chapter or other actions . . . including the establishment of a complete moratorium.") (emphasis added).

243. See E. Donald Elliott, McCartin, Brugato, & Lis, *supra* note 151, at 3 (noting that part of the public outcry against the ban as the FWS's failure to provide for a period of Notice and Comment); Rick St. Hilaire, *Ivory Ban Dispute Requires Consensus-Building If Future TOC Task Forces are to be Formed*, CULTURAL HERITAGE LAWYER RICK ST. HILAIRE BLOG (Mar. 11, 2014), <http://culturalheritagelawyer.blogspot.com/2014/03/ivory-ban-dispute-requires-consensus.html> (noting the "arguments that collective punishment is being exacted on innocent citizens and that there has been no opportunity for a public hearing . . .").

244. See Daniel T. Shedd & Todd Garvey, *A Primer on the Reviewability of Agency Delay and Enforcement Discretion*, CRS REPORT 4 (Sept. 4, 2014) (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1995)) (internal quotation marks omitted) (arguing that *Heckler* is applicable to the Director's Order).

245. Director's Order No. 210, Amendment 1 (emphasis added) (explaining the purpose of the Director's Order).

246. See Shedd & Garvey, *supra* note 244, at 10, n.71 (arguing that Director's Order was created within the legal confines of the APA). For example, household objects in a move or those in an inheritance may be imported but not antiques. See *supra* notes 211–14 and accompanying text (explaining the Director's Order).

an agency proposes to act in the future.<sup>247</sup> Of key importance is that policy statements simply note the agency's "leaning" in regards to a particular issue and sets the agenda for future action.<sup>248</sup> Certainly, language in the Director's Order, such as emphasizing employees' discretionary power with regards to implementation, supports this theory.<sup>249</sup> Previous orders issued by the FWS' director, however, were never in regards to enforcement action against the public, but are more administrative in nature.<sup>250</sup> Therefore, while the Director's Order purports to be a policy statement, it could be considered substantive such that Notice-and-Comment Rulemaking was required?<sup>251</sup>

As mentioned above, policy statements need not be promulgated pursuant to Notice and Comment.<sup>252</sup> However, if the rule imposes a substantive requirement on the public, then it must be promulgated

---

247. See *Am. Mining Cong.*, 995 F.2d at 1109 (explaining the differences between the different types of rules under the APA); see also *Syncor Intern. Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (citing *Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir. 1993); *Vietnam Veterans of Am. v. Secretary of the Navy*, 843 F.2d 528, 537–39 (D.C. Cir. 1988); *Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38–39 (D.C. Cir. 1974)) ("Policy Statements are binding on neither the public, nor the agency.").

248. See Anthony, *supra* note 238, at 1324 (explaining policy statements). See also *Hudson v. F.A.A.*, 192 F.3d 1031, 1034 (D.C. Cir. 1999) (citing *United States Tel. Ass'n v. FCC*, 28 F.3d 1232, 1234 (D.C. Cir. 1994) (holding that policy statements are "only supposed to indicate an agency's inclination or leaning, not in any way binding on the agency.")).

249. See Director's Order No. 210, Amendment 1 ("employees must strictly implement and enforce the . . . moratorium . . . as a matter of law enforcement discretion."). See also *Am. Mining Cong.*, 995 F.2d at 1109 (citing *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320–21 (D.C. Cir. 1988)) (noting that agency actions are "less likely to be general policy statements when it purports . . . to restrict agency discretion").

250. See, e.g., U.S. Dep't of the Interior, Director's Order No. 69. (Mar. 30, 1994), available at <http://www.fws.gov/policy/do69.html> ("All Service units shall expeditiously transfer salvageable eagle carcasses and eagle parts to the National Eagle Repository."); U.S. Dep't of the Interior, Director's Order No. 194 (Apr. 17, 2008), available at <http://www.fws.gov/policy/do194.html> (describing the "responsibilities for making intra-Service [ESA] section 7 determinations (or findings) of effects for endangered, threatened, [etc.] . . . species" and extending "redelegation of authority . . . for making these determinations from officers in the Endangered Species Program to officers within other Service programs"). This may also be an indication that the Director's Order is more substantive in nature. See *infra* notes 259–69 and accompanying text (exploring the substantive qualities of the Director's Order).

251. The Federal Court of Appeals notes that first impressions of a rule can deceive and that an agency's action may be more than it purports. See *U.S. Dept. of Transp. v. Outdoor Adver. Assoc. of Am., Inc.*, \_\_\_ F. Supp. 2d \_\_\_, No. 13-93 (JEB), 2014 WL 2803084, at \*4 (2014).

252. See *supra* note 238 and accompanying text.

pursuant to Notice and Comment.<sup>253</sup> While interpretive rules, another type of rule subject to the exception for rulemaking, have an express four-factor test outlined in *American Mining Congress v. Mine Safety & Health Administration*; the courts have not identified a preferred test to differentiate between policy statements and substantive rules.<sup>254</sup> Further complicating such an analysis is the fact that most precedent lumps policy statements and interpretive rules together, despite their vast differences.<sup>255</sup> What is clear is that the fact that a regulation impacts private interests, such as ivory owners' rights to import antiques, is not enough to indicate that the FWS was invoking its legislative authority.<sup>256</sup>

Some lawyers argue that under the Supreme Court's holding in *Heckler v. Chaney*, the Director's Order is a statement of the FWS' decision to not enforce the moratorium to the fullest extent

---

253. See *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) (quoting *Nat'l Family Planning & Reprod. Health Ass'n Inc.*, 979 F.2d 227, 237 (1992) ("A legislative rule . . . 'is one that does more than . . . confirm a regulatory requirement[] or maintain a consistent agency policy.' A rule is legislative if it supplants a statute, adopts a new position inconsistent with existing regulations, or otherwise a substantive change in existing law or policy.")); see also *Am. Mining Cong.*, 995 F.2d at 1109 (defining substantive rules as rules "issued by an agency pursuant to a statutory authority and which implement the statute").

254. Compare *Am. Mining Cong.*, 995 F.2d at 1109 (noting that the fulfillment of any of the following factors signals a substantive rule: (1) without the new rule, would there be "an adequate legislative basis" to enforce the same duty the rule creates; (2) is the rule published in the code of federal regulations; (3) did the agency "explicitly invoke its general legislative authority;" and (4) did the rules amend a prior substantive rule?), with *General Elec. Co. v. E.P.A.*, 290 F.3d 377, 382–83 (D.C. Cir. 2002) (citing *Appalachian Power Co. v. E.P.A.*, 208 F. 3d 1015, 1023 (D.C. Cir. 2000); *Molycorp, Inc. v. E.P.A.*, 197 F.3d 543 (D.C. Cir. 1999); *McLouth Steel Prods.*, 838 F.2d at 1321) (holding that while *Molycorp* offers a three-part test that analyzes (1) how the agency characterizes "its action; (2) whether the action was published in the Federal Register or in the Code of Federal Regulations; and (3) whether the actions has binding effects on private parties or on the agency," under *Appalachian Power* and *McLouth*, a rule will be considered substantive if it appears binding on its face or it is binding as applied by the agency). See also Thomas J. Fraser, *Interpretive Rules: Can the Amount of Deference Accorded Them Offer Insight Into the Procedural Inquiry?*, 90 B.U. L. Rev. 1303, 1310–14 (explaining the "Legal Effects" Test; the "Substantial Impact" Test; and the "Impact on Agencies" Test).

255. See *Syncor Intern. Corp.*, 127 F.3d at 94 (citing *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987)) ("[C]ourts and litigants [tend] to lump interpretive rules and policy statements together in contrast to substantive rules . . . . Th[is] causes added confusion because interpretive rules and policy rules and policy statements are quite different agency instruments.").

256. See *Central Texas Telephone Co-Op., Inc. v. F.C.C.*, 402 F. 3d 205, 214 (2005) (citing *Am. Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987); *Cabais v. Egger*, 690 F.2d 234, 237–38 (D.C. Cir. 1983)) (holding that both legislative rules and statements of policy may "vitaly affect private interests") (internal quotation marks omitted).

possible.<sup>257</sup> In *Heckler*, an agency's "decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion."<sup>258</sup> In fact, under one interpretation of the special rule for antiques, this argument seems plausible.<sup>259</sup> The special rule provides that antiques "may be imported only if," while, within the same subsection, the rule states that sport-hunted trophies "may be imported . . . provided."<sup>260</sup> This difference in language could suggest that the first are necessary, but not sufficient conditions for import; thereby permitting FWS to apply the antiques exception only to non-commercial imports.<sup>261</sup>

In analyzing the broader context of the special rule for antiques, there is some evidence that the Director's Order is more than the agency merely exercising its discretion within what is permissible. For example, the ESA antique exception prohibiting the regulation of "any article which . . . is not less than 100 years of age" was read into the AECA, as was noted by the FWS when it promulgated the special rule for antiques.<sup>262</sup> This is also evidenced by the fact that,

---

257. See Daniel T. Shedd & Todd Garvey, *A Primer on the Reviewability of Agency Delay and Enforcement Discretion*, CRS REPORT, 4 (Sept. 4, 2014) (quoting *Heckler*, 470 U.S. at 832) (arguing that this statement is applicable to the Director's Order).

258. See *supra* note 244 and accompanying text (expounding on the *Heckler* argument). The judicial deference in *Heckler* signals the Court's acknowledgement that agencies have discretion in how they allocate their limited resources. See Harold H. Bruff, *Availability of Judicial Review*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 1, 15 (John F. Duffy & Michael Herz eds., 2005) (explaining that Justice Rehnquist's opinion for the Court in *Heckler* generally permits agencies "absolute discretion" regarding whether to initiate enforcement actions).

259. See notes 152–54 *supra* and accompanying text (recounting the creation of the antiques exception codified in the CFR).

260. Compare 50 C.F.R. § 17.40(e)(ii)(A) (codifying the antiques exception), with 50 C.F.R. § 17.40(e)(iii) (permitting sport-hunted trophies to be imported if certain requirements are met).

261. See *California v. Hodari D.*, 499 U.S. 621, 628 (1991) (holding that "only if" language is interpreted as a necessary but not a sufficient condition); *In re Application of the United States for an Order Directing a Provider of Elec. Comm'n Serv. to Disclose Recs. to Gov't*, 620 F.3d 304, 316 (3d Cir. 2010) (quoting *Twp. of Tinicum v. U.S. Dep't of Transp.*, 582 F.3d 482 (3d Cir. 2009)) ("while a 'necessary condition describes a prerequisite . . . [a] sufficient condition is a guarantee.>"). *But see* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 154–55 (2012) (noting the confusion that the proviso "provided" has caused in interpreting statutes because of the "regular abuse" of its use).

262. See 16 U.S.C. § 1539(h)(1) (codifying the ESA antique exception); *Endanger and Threatened Wildlife; Proposed Endangered Status for Certain Populations of the African Elephant and Revision of Special Rule*, 56 Fed. Reg. 11,392, 11,393 (Mar. 18, 1991) ("The Service . . . impos[ed] a moratorium on ivory imports . . . . This action halted import of all ivory products, except sport-hunted trophies under certain conditions, and antique ivory more than 100 years old, into the United States.").

historically, the FWS never enforced a complete moratorium on the imports of commercial antique ivory.<sup>263</sup>

Finally, while not determinative, FWS officials had more discretion in the past, whereas officials must now “strictly implement and enforce the . . . moratorium on the importation of raw and worked African elephant ivory while, as a matter of law enforcement discretion, allowing importation of certain parts and products . . .” that are enumerated in the Director’s Order.<sup>264</sup> As held in *Broadgate, Inc. v. U.S. Citizenship & Immigration Services*, one of the clues to differentiate between policy statements and substantive rules, “is the agency’s use of permissive, rather than binding, language.”<sup>265</sup> The FWS employees arguably have no discretion in regards to commercial antiques or noncommercial items not enumerated in the Director’s Order.<sup>266</sup> Therefore, the Director’s Order may be more than a policy statement.<sup>267</sup> Acknowledging the criticisms and potential legal claims against the FWS for not creating the Director’s Order pursuant to Notice and Comment, FWS Director Ashe stated that “though th[e] Order was issued as a policy action, we intend to incorporate provisions in the Order into our regulations through a public rule-making process, with opportunity for public comment.”<sup>268</sup> As of July 1, 2015, the FWS has yet to issue a proposed rule for Notice and Comment.<sup>269</sup>

---

263. See 50 C.F.R. § 17.40(e) (permitting an antiques exception to the moratorium); see also FWS, *Efforts to Control Illegal Trade*, *supra* note 154, at 2 (stating that commercial and non-commercial antique’s may be imported).

264. Director’s Order No. 210, Amendment 1.

265. *Broadgate*, 730 F. Supp. 2d at 245.

266. See *supra* note 264 and accompanying text (noting the language of the Director’s Order); see also *General Elec. Co.*, 270 F.3d at 297 (“[A]n agency pronouncement will be considered binding as a practical matter if it either appears binding on its face . . . or is applied by the agency in a way that indicates it is binding.”).

267. See sources cite *supra* note 266; *Appalachian Power*, 208 F.3d at 1023 (holding that even when an agency states that a document is “intended solely as guidance” can be held to be substantive if “from beginning to end . . . [it] reads like a ukase. It commands, it requires, it orders, it dictates.”).

268. *Ashe Testimony May 21, 2014*, *supra* note 9, at 7–8 (explaining the next steps the FWS intends to take); see also Letter from Daniel Ashe, Dir., FWS, to Congressman Edward Royce, Chairman of the Comm. on Foreign Affairs (May 14, 2014), available at [http://www.eenews.net/assets/2014/06/20/document\\_gw\\_02.pdf](http://www.eenews.net/assets/2014/06/20/document_gw_02.pdf).

269. See *FWS Moves To Ban*, *supra* note 13 (noting that publication of the proposed rule was expected in mid-2015); 1 C.F.R. § 1 (2015) through 50 C.F.R. § 697 (2015) (publishing no new regulations regarding ivory).



## 2. Regulatory Takings: Personal Property and the Fifth Amendment

The Director's Order and the FWS' proposed actions under the National Strategy also raise constitutional questions under the Fifth Amendment.<sup>270</sup> Under the takings provision of the Fifth Amendment to the U.S. Constitution (the "Takings Clause"), the Federal Government cannot seize personal property without just compensation.<sup>271</sup> There are two types of claims under the Takings Clause: an actual and physical taking (better known as eminent domain) and a regulatory taking, which is at issue here.<sup>272</sup>

While the government may enact regulations that restrict the use of property, "if [a] regulation goes too far it will be recognized as a taking."<sup>273</sup> Regulatory takings are compensable if the level of interference amounts to one of two scenarios.<sup>274</sup> The first scenario involves regulations that restrict the use of property so substantially as to amount to a categorical taking, in which the government "denies all

---

270. Bandow, *Administration Treats Collectors as Criminals*, *supra* note 206 (arguing that an ivory trade ban will cause litigation under the takings clause); *Washington: Ivory Regulation Bill Passes Out of Committee with Amendments*, NRA-ILA, <https://www.nra-ila.org/articles/20150205/washington-ivory-regulation-bill-passes-out-of-committee-with-amendments> (last updated Feb. 5, 2015) ("The bottom line is: any property made from a lawful product that was lawfully acquired should not be made illegal to sell; such an action is effectively a taking of property without compensation.")

271. The Fourteenth Amendment makes the Fifth Amendment applicable to states because state governments cannot "deprive any . . . property without due process of the law." U.S. CONST. amend. XIV, § 1. There is likely a stronger takings argument to be made against specific state governments that eliminated all trade in ivory, including antiques. *See e.g.*, N.Y. Envir. Conser. Law § 11-0535-a (McKinney 2014) (banning all sale of ivory and only permitting ivory to "change possession" unless it is given to an authorized museum, inherited, or sold as part of a musical instrument with proper documentation); *see also Ivory Fight Moves to the States*, MAINE ANTIQUE DIGEST, May 2015, at 10A, for a list of all of the states that have enacted, or are in the process of enacting, ivory trade bans as of May 2015.

272. Eminent domain is when property, usually real property, is acquisitioned by the government for public use. *See Franco-Italian Packing Co. v. United States*, 128 F. Supp. 408, 413 (Ct. Cl. 1955) (holding that governmental acquisition of land for public use amounts to a taking and must be compensated, even if the acquisition is only a small strip of land); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430 (1982) (holding governmental actions that physically intrude on property, especially when the intrusion reaches a permanent level of occupation, must be compensated no matter how minor the intrusion).

273. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (setting the foundation for regulatory takings claims); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (providing the seminal decision on categorical takings).

274. *See Robert Meltz, Takings Law Today: A Primer for the Perplexed*, 34 *ECOLOGY L.Q.* 307, 328 (2007) (explaining the "Lucas 'Total Taking' Rule" and the "Penn Central 'Partial Regulatory Taking' Test."); JAMES A. KUSHNER, 1 *SUBDIVISION LAW AND GROWTH MGMT.* § 3:7 (2d ed. 2014) (analyzing takings jurisprudence).

economically beneficial or productive use” of the property.<sup>275</sup> The second scenario involves a partial taking in which the property retains some value.<sup>276</sup> Analyzed under a three-factor test defined in *Penn Central*, courts will ask to what extent the regulation economically impacts the owner; the extent to which the regulation hinders the reasonable investment-backed expectations of the owner; and the character of the regulatory action.<sup>277</sup>

The actions of the FWS raise a potential regulatory takings claim: whether prohibiting the export and intrastate sale of all but antique ivory, as well as prohibiting the import of any ivory, constitute a regulatory taking of personal property or, for ivory dealers, of a business interest?<sup>278</sup> While no claims have tested this question as of the publication of this article, the facts are extremely similar to the 1979 Supreme Court case *Andrus v. Allard*.<sup>279</sup>

One of the first cases decided after *Penn Central*, *Allard* involves commercial traders in Indian artifacts that contained eagle feathers.<sup>280</sup> The traders challenged two rules promulgated by the DOI

---

275. See *Lucas*, 505 U.S. at 1015–16 (holding that when “a regulation declare ‘off-limits’ all economically productive economically productive or beneficial uses of land . . . compensation must be paid to sustain it.”); see also *Brace v. United States*, 72 Fed. Cl. 337, 347 (Fed. Cir. 2007) (holding that where the entire property is not affected by the regulation, as prescribed by the “parcel as a whole rule,” a categorical takings claim will fail).

276. See *Palazzolo v. R.I.*, 533 U.S. 606, 631 (2001) (emphasizing that *Lucas* claims are precluded where some value remains); *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1349 (Fed. Cir. 2001) (citing *Lucas*, 505 U.S. at 1019–20) (noting that a 95% diminution in value will not withstand a categorical taking claim).

277. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 125 (1978) (finding no partial taking where the use of airspace was restricted and the current use was not affected). An investment-backed expectation is how an owner expects to use his property and whether those expectations were reasonable based on the regulatory environment in which the property interest was acquired. See *Cienega Gardens v. United States*, 503 F.3d 1266, 1288 (Fed. Cir. 2007) (holding that restricting prepayment of subsidized mortgages for low-income housing did not effect a regulatory taking); *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1350 (Fed. Cir. 2004) (setting the factors to be considered under the investment-backed expectations prong of the *Penn Central* test). A further distinction could be made between permanent and temporary takings, in which owners are compensated for a discrete time period in which the regulation interfered. See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 306 (2002) (holding that temporary takings are analyzed under the *Penn Central* test).

278. See *Bandow, The Administration's New Ivory Ban*, *supra* note 225 (calling the ban a taking of property); *Hilaire*, *supra* note 243 (“[B]an opponents will rest their core points on [Fifth Amendment] exhortations.”).

279. See generally 444 U.S. 51 (1979) (analyzing claims under the APA and Fifth Amendment Takings Clause).

280. See *id.* at 65 (analyzing the regulatory takings claim under *Penn Central*).

that interpreted the Eagle Protection Act and Migratory Bird Treaty Act to apply to objects that had been acquired prior to the passage of these Acts.<sup>281</sup> The traders argued that limiting transport of property containing eagle feathers violated the Fifth Amendment because their property rights, such as the right to sell, were significantly reduced without any compensation for the loss.<sup>282</sup> The Supreme Court reversed the Appellate Court's decision and found that a taking had not occurred.<sup>283</sup> The Court, in unanimous decision written by Justice Brennan, held that merely depriving the property owner of the "opportunity to earn a profit from those relics" was insufficient to amount to a regulatory taking.<sup>284</sup> The Court stated:

[T]he denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one strand of the bundle is not a taking, because the aggregate must be viewed in its entirety . . . . It is, to be sure, undeniable that the regulations here prevent the most profitable use of appellees property. Again, however, that is not dispositive.<sup>285</sup>

This decision seems to leave little room for a takings claim for ivory owners and dealers because, like in *Allard*, the imposition of the National Strategy would not impede on an owners right to inherit and own artifacts containing ivory.<sup>286</sup> Second, unlike *Allard*, there is no proposal for a complete federal ban on all ivory sales.<sup>287</sup>

---

281. *See id.* at 53–54 (providing quotations of the specific regulations considered). The regulations stated that bids, especially bald eagles, and their parts acquired prior to the enactment of the Migratory Bird Treaty and Eagle Protection Act could be possessed or transported without a federal permit, but it was prohibited to import, export, sell, trade, etc. *See id.* (citing 50 C.F.R. §§ 21.2(a), 22.2(a) (1978)).

282. *See id.* (providing the facts of the claim).

283. *See id.* at 65–66 (rejecting that a regulatory taking had occurred).

284. *See Allard*, 444 U.S. at 64 (completing the *Penn Central* analysis).

285. *Id.* at 65–66 (citing *United States v. Virginia Electric & Power Co.*, 365 U.S. 642 (1961); *United States v. Twin City Power Co.*, 350 U.S. 222 (1956); *Penn Central*, 438 U.S. at 130–31; *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 413, 413 (1922); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1230–33 (1967)).

286. Compare *Hearing Before the H. Comm. on Foreign Affairs*, *supra* note 27, at 54 (statement of Ashe) ("I would say unequivocally that people who have a family heirloom . . . can continue to pass that heirloom. They can own it. They can possess it. They can move it."), with *Allard*, 444 U.S. at 66 ("[I]t is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.").

287. *See FWS Moves To Ban*, *supra* note 13 (explaining that interstate sales will be allowed if the object has an ESA permit and is an antique; and intrastate sales will be

In general, takings claims are difficult and are often unsuccessful, especially when the regulation does not involve a “physical property restriction.”<sup>288</sup> While the Supreme Court has not directly ruled that personal property cannot be the subject of a takings claim, in *Lucas v. South Carolina Coastal Council*, Justice Rehnquist, in a dissenting opinion, differentiated between land and personal property.<sup>289</sup> He argued that States have broad discretion to regulate commercial dealings and that regulations that render personal property “economically worthless” are not compensable takings.<sup>290</sup> After the Court's decision in *Lucas*, many courts held that personal property is not compensable under the Takings Clause.<sup>291</sup>

Eight years after *Allard* was decided, however, Justice Scalia, in a concurring opinion, wrote that *Allard* was limited to its facts.<sup>292</sup> Additionally, in 2003, the Federal Circuit held that “[r]eal property, tangible property, and intangible property all may be the subject of takings claims.”<sup>293</sup> In response to the National Strategy, some scholars

---

permitted if it was lawfully imported prior to 1990). In practice, however, some argue the “nominal right to sell” is just an attempt to “thwart” Fifth Amendment claims and that the heightened and expensive requirements for proving that the ivory falls under one of the exceptions will effectively cause a complete ban. See *The Administration's New Ivory Ban*, *supra* note 225 (arguing vehemently against the FWS' plans to restrict property rights of ivory owners).

288. *Allard*, 444 U.S. at 66 (describing when the government must compensate for a taking); Robert Meltz, *supra* note 274, at 311 (explaining why takings claims are difficult to win).

289. See *Lucas*, 505 U.S. at 1027–28 (Rehnquist, J. dissenting), as discussed in Bridget C.E. Dooling, *Take It Past the Limit: Regulatory Takings of Personal Property*, 16 *FED. CIR. B.J.* 445, 446 (2007) (arguing that the Court should find a cognizable claim for takings of personal property).

290. See sources cited *supra* note 289 (discussing personal property takings claims).

291. See, e.g., *United States v. Kornwolf*, 276 F.3d 1014, 1014–15 (8th Cir. 2002) (holding that seizure of a headdress by an undercover law enforcement after transferring US \$5,000 to the defendant was sufficient compensation and no taking had occurred); *Holliday Amusement Co. of Charleston v. S. Carolina*, 493 F.3d 404, 410–11 (4th Cir. 2007) (holding that regulation prohibiting video poker gaming machines did not constitute a regulatory taking).

292. See *Hodel v. Irving*, 481 U.S. 704, 719 (1987) (Scalia, J., concurring). *But see id.* at 718 (Brennen, J., concurring) (finding nothing “that would limit [*Allard*]”). See also Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International 'Regulatory Takings' Doctrine*, 78 *N.Y.U. L. REV.* 30, 143 n.163 (2003) (describing takings jurisprudence).

293. *Maritrans, Inc. v. United States*, 342 F.3d 1344 (Fed. Cir. 2003) (finding no taking of eight single hull tank barges, but remanded for further proceedings on seven other barges). The court, however, found no taking occurred in that particular case. See *id.*; see also *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 35 (1st Cir. 2002) (leaving open the possibility for a cause of action under the Takings Clause for personal property).

argue that because so many different groups, including art and antique dealers, gun owners, and musicians, would be affected by the ban, the ban “may force the Supreme Court to reconsider” their position in *Allard*.<sup>294</sup> Before June 2015, several scholars argued that Justice Rehnquist and the lower courts’ distinction between real and personal property was unjustified.<sup>295</sup> At least at one meeting during the drafting process of the Director’s Order, the FWS considered whether the substance of the Director’s Order had Fifth Amendment implications; but noted that *Allard* set precedent giving the DOI broad regulatory power.<sup>296</sup>

In June 2015, however, the Supreme Court held that the Constitution provides a cognizable claim for takings of personal property.<sup>297</sup> Based on New Deal Era initiatives, *Horne v. Department of Agriculture* presented the question of whether the government’s requirement that a “reserve pool” of raisins be set aside every year is a taking requiring compensation under the Fifth Amendment.<sup>298</sup> *Horne* differs, however, from any potential claims challenging the Director’s Order in that *Horne* was based on a physical taking, while the Director’s Order would likely be argued as a regulatory taking.<sup>299</sup> Specifically, the court differentiated between

---

294. *Administration Treats Collectors as Criminals*, *supra* note 206 (discussing potential taking claims against the government). See also *Treasured to Death*, *supra* note 42, at 6 (acknowledging takings arguments).

295. Eduardo Moisés Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 *ECOLOGY L.Q.* 227, *passim* (2004) (arguing that there is no difference between real property and personal property in regards to takings claims); Dooling, *supra* note 289, at 447 (challenging the distinction between real and personal property).

296. See Advisory Council on Wildlife Trafficking Meeting, FWS, 4–5 (Dec. 16, 2013) available at <http://www.fws.gov/international/pdf/12-16-13-acwt-meeting-summary2.pdf> (providing the minutes for the Advisory Counsel meeting).

297. *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2424 (2015) (“Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.”).

298. For a complete analysis of the facts, See Lyle Denniston, *Argument Preview: Regulation or Confiscation?*, SCOTUSblog, Apr. 21, 2015, <http://www.scotusblog.com/2015/04/argument-preview-regulation-or-confiscation/> [hereinafter *Argument Preview*] (stating the facts of *Horne*); *Horne v. Dep’t of Agric.*, 750 F.3d 1128 (9th Cir. 2014), *petition for cert. filed*, (U.S. Sept. 8, 2014) (No. 14-275) at p. 56 (providing the background information on regulatory environment).

299. See *Horne v. Dep’t of Agric.*, 750 F.3d at 1128, *petition for cert. filed*, (U.S. Sept. 8, 2014) (No. 14-275) at p. 20–29 (distinguishing between a claim for per se taking and regulatory taking for personal property); Richard A. Epstein, *Physical and Regulatory Takings One Distinction Too Many*, 64 *STAN L. REV. ONLINE* 99, 101 (Mar. 1, 2012) (“In the case of a

the situation in *Allard*, a regulatory taking, and the claim in *Horne*, a physical taking.<sup>300</sup> That being said, the holding in *Horne* makes clear that personal property is protected under the Takings Clause, which may pave the way for future claims for a regulatory taking of personal property under the *Lucas* and *Penn Central* tests.<sup>301</sup>

Finally, antique ivory dealers may have a cognizable claim for a taking of their business interest if the National Strategy is implemented.<sup>302</sup> For example, using an analysis under the first prong of the *Penn Central* three-prong test, the Court in *Kimble Laundry Co. v. United States* recognized the loss of the going-concern value and good will as sufficient to show severe economic impact.<sup>303</sup> The Court found that if a business owner's patronage is lost or appropriated as a direct result of the regulation, the economic impact

---

per se physical taking, the government must pay . . . full compensation for the value. . . . Regulatory takings, in contrast, leave [owners in possession, but subject them to restrictions on the ability to use, develop, or dispose of the [property] . . . [R]egulatory takings are only compensable when the government cannot show some social justification, broadly conceived, for its imposition.") Although, because ivory sold not in compliance with any new regulations would be subject to forfeiture, there may be an opportunity to argue that the regulations affect a per se taking. *But see* *Bennis v. Michigan*, 516 U.S. 442, 452 (1996) (denying a cognizable takings claim for forfeiture).

300. *Horne*, 135 S. Ct. at 2429 (2015) (differentiating between *Allard* and *Horne*).

301. *See* Epstein, *supra* note 300, at 105 ("There is no intellectual warrant for making the categorical distinction between physical and regulatory takings, so that distinction should be abolished."); Dooling, *supra* note 289, at 446 ("A regulation . . . that makes personal property 'economically worthless' is *not* a loss of value that is compensable under the Takings Clause.") (emphasis in original).

302. *See, e.g.,* *Kimball Laundry Co. v. United States*, 338 U.S. 1, 11 (1949) (compensating lost good will and earning power due to a temporary taking of business); *Huntleigh USA Corp. v. United States*, 63 Fed. Cl. 440, 444 (2005) ("*Huntleigh USA I*") (denying motion to dismiss and holding that the Plaintiff had a cognizable claim for a government taking of business assets); *United States v. 0.88 Acres of Land*, 670 F. Supp. 210, 213 (W.D. Mich. 1987) (Compensating landowners "for the loss of the[ir] business as whole, including any good will and going-concern value.").

303. *See generally* *Kimball Laundry Co.*, 338 U.S. at 11; *see also* *Huntleigh USA Corp. v. United States*, 525 F.3d 1370, 1375 (Fed. Cir. 2008) ("*Huntleigh USA II*") (quoting BLACK'S LAW DICTIONARY 715 (8th ed. 2004)) (explaining that goodwill is defined as "[a] business's reputation, patronage, and other intangible assets that are considered when appraising the business."). *See also* BLACK'S LAW DICTIONARY (10th ed. 2014) ("The value of a commercial enterprise's assets or of the enterprise itself as an active business with future earning power, as opposed to the liquidation value of the business or of its assets."); *Kimball Laundry Co.*, 338 U.S. at 9 (1949) (defining going concern value as the capacity of a business of greater skill and "more effective solicitation of patronage than are commonly given to such a combination of land, plant, and equipment."). Going concern value is partially determined by identifying the good will and "earning power" of an effective business organization. *See id.* at 11. *But see* *Huntleigh USA II*, 525 F.3d at 1382 n.3 (citation omitted) (holding that going concern value is compensable only in temporary takings).

prong favors the owner.<sup>304</sup> Based on this theory, antique ivory dealers could have a cognizable claim based on the loss of patronage, earning power, and reputation.<sup>305</sup> Courts, however, have been reluctant to find a taking for lost business interest, no matter how severe the taking, because it is difficult to calculate such a loss.<sup>306</sup> Further, the economic factor of *Penn Central* must be balanced against the character of the regulation.<sup>307</sup> Here, the government would likely argue that because the illegal ivory trade funds poaching, which in turn funds terrorism, the government is preventing a public harm, not merely providing a public benefit.<sup>308</sup> To date, takings claims have been unsuccessfully brought under the ESA and none have been brought under the AECA.<sup>309</sup>

In summary, the Director's Order clearly raises procedural and constitutional questions. Given current regulatory takings jurisprudence under *Allard*, a takings claim is not likely to succeed unless courts are willing to extend the Takings Clause to regulatory takings of personal property and not just merely per se takings of personal property, as held in *Horne*. Similarly, under the APA, there

---

304. See *Kimball Laundry Co.*, 338 U.S. 1, 11 (1949) (finding no taking had occurred in a claim against the government for the temporary occupancy of laundry and dry cleaning service for the Army).

305. See *id.*

306. See, e.g., *Huntleigh USA II*, 525 F.3d at 1375 (holding no taking had occurred for "frustrating" the business contracts with airlines); *Kafka v. Montana Dep't of Fish, Wildlife & Parks*, 348 Mont. 80, 104 (2008) (holding intangible assets were not compensable property interests); see also Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation*, 32 B.C. L. REV. 283, 292 (1991) ("Business losses . . . because of their intangible nature, pose much more difficult issues. Although these losses arise directly out of a physical taking, they themselves are nonphysical in nature, and hence are considered noncompensable in most jurisdictions.").

307. *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 388 (1988) (explaining that the character prong asks whether the government is attempting to prevent a public harm or merely conferring a benefit); *Res. Invs., Inc. v. United States*, 85 Fed. Cl. 447, 517–18 (2009) (holding that three inquiries must be made: "the degree of harm created by the [owner's] prohibited activity, its social value and location, and the ease with which any harm stemming from it could be prevented").

308. See *Lucas*, 505 U.S. at 1010 (finding that the preservation of wetlands to be conferring a public benefit rather than preventing a public harm); *Maritrans*, 342 F.3d at 1357–58 (Fed. Cir. 2003) ("The purpose of the Just Compensation Clause is . . . to discourage the government from requiring a few select individuals to bear the burdens of [a] public benefit.").

309. See, e.g., *United States v. Hill*, 896 F. Supp. 1057, 1062–63 (D. Colo. 1995) (holding that enforcement of the ESA does not effect a taking); *Conti v. U.S.*, 291 F.3d 1334, 1335–36 (2003) (finding that a ban on gillnet fishing did not constitute a regulatory taking).

may be a cognizable claim for failing to follow proper procedures in rulemaking.

B. *Criticisms and Practical Challenges Caused by the FWS' Actions*

The National Strategy is meant to close “loopholes” that have provided a cover for illegal trade.<sup>310</sup> In addition, the Director’s Order creates a bright line rule thus shifting the burden of proof from the government to property owners.<sup>311</sup> The policy of the US Government to impose a trade ban and encourage other countries to follow suit, however, is criticized by museums, antique dealers, and other interested parties.<sup>312</sup> These constituents argue that the legal ivory trade should not be punished because of the illegal trade.<sup>313</sup>

1. Bright Line Rules: Making Enforcement Easier While Limiting Ivory Owners’ Bundle of Rights

The government contends that the practical effect of the National Strategy, particularly under the Director’s Order, is the creation of bright line rules.<sup>314</sup> First, under *United States v. Grigsby*, the government has the burden to prove that an individual bringing in black market ivory knew it was illegal and the individual had the specific intent to break the law.<sup>315</sup> The Director’s Order, however, now shifts that burden to the owner because importing ivory for

---

310. See *supra* notes 191–92 (discussing the purpose of the ban).

311. See *infra* notes 314–16 (explaining how the Director’s Order shifts the burden of proof to the owner).

312. See *infra* notes 319–24 (discussing collectors’ arguments against the National Strategy); see also discussion *infra* Part II.B.2 (exploring business owners and museums’ sentiments about the National Strategy).

313. See *infra* Part II.B.1–2, for a complete discussion of the opposition to the National Strategy.

314. See Director’s Order No. 210, Amendment 1 (requiring the person claiming the benefit of import, export, or sale to bear the burden of proof); see also *FWS Moves To Ban*, *supra* note 13 (“[T]hese administrative actions, if finalized, [will shift] the burden of proof . . . upon the person claiming the exception. Importers, exporters, and sellers should be prepared to provide documentation that exempts them from the prohibitions . . .”).

315. See *United States v. Grigsby*, 111 F.3d 806, 819 (11th Cir. 1997) (“[I]n the final version of the [AECA], the adverb ‘knowingly’ modifies the verb ‘violates’ and connotes deliberate, cognitive or specific intent as a requirement for criminal violation of [the AECA].”); see also Allgood et al., *U.S. Ivory Trade*, *supra* note 13, at 43 (criticizing the *Grigsby* standard).



commercial purposes is now per se prohibited.<sup>316</sup> Second, the government claims that these rules will make it easier for law enforcement, because it is difficult for FWS agents to tell that ivory is indeed antique.<sup>317</sup>

Reflecting on the effect of the Director's Order, Marcus Asner, member of the Advisory Council to the Presidential Task Force on Wildlife Trafficking, notes:

The advantage of the Director's Order is that it creates a bright line rule. The approach simplifies things for the enforcement authorities, and makes it relatively easy for individuals and [stakeholders] to figure out how to comply with the rules. The disadvantage of having a simple, bright line rule, of course, is that it can cast too wide a net. Here, the Director's Order sweeps in people and groups that otherwise would have legitimate uses for antique ivory, such as . . . antique art collectors.<sup>318</sup>

The Director's Order and the National Strategy, once fully implemented, will limit the "bundle of rights" of antique and ivory owners.<sup>319</sup> As a result, some collectors argue their valuable art will be "worthless and uninsurable."<sup>320</sup> The items affected by the National Strategy include, but are not limited to, "clarinets, canes, pistols,

---

316. See Elliott, McCartin, Brugato, & Lis, *supra* note 151, at 3 (citing Director's Order No. 210, Amendment 1 (noting that the Director's Order places the burden of proof on the "importer, exporter, or seller."); Christy, *U.S. Tightens the Noose*, *supra* note 2 (maintaining that smugglers have benefited from the *Grigsby* standard).

317. See *Hearing Before the Comm. on Foreign Affairs*, *supra* note 27, at 54 (statement of Ashe) (answering questions from Congresswoman Karren Bass). *But see Nuke Test Radiation Can Fight Poachers: Age and Legality of Ivory Revealed by Carbon-14 Dating*, UNIV. MICH. NEWS, <http://ns.umich.edu/new/releases/21563-nuke-test-radiation-can-fight-poachers-age-and-legality-of-ivory-revealed-by-carbon-14-dating> (last updated July 1, 2013) (last visited Aug. 24, 15) (explaining that ivory can be dated since the year the atomic bomb was dropped using carbon testing).

318. Email from Marcus Asner, member, Advisory Council to the Presidential Task Force on Wildlife Trafficking, and Partner, Arnold & Porter, LLP, to author (Feb. 18, 2015 15:55 EST) (on file with author) (discussing the new ivory policies).

319. See *supra* note 201–05 and accompanying text (discussing the ways that the ivory trade will be limited under the National Strategy); see also John Leydon, Op-Ed., *Grandma's Cameo Becomes Yard-Sale Contraband: How Will a Government Ban on Selling or Trading Antique Ivory Help Save the Endangered Elephants?*, WALL ST. J., Jun. 23, 2014, <http://online.wsj.com/articles/john-leydon-grandmas-cameo-becomes-yard-sale-contraband-1403563976> ("You own it, you're stuck with it.").

320. Leydon, *supra* note 320 (contending that the "government is overreaching"); see also Brook Mason, *Save the Elephants! Antiques Mkt Hit by Federal Ban on Ivory Sales*, OBSERVER, Oct. 15, 2014, <http://observer.com/2014/10/antiques-mkt-shaken-by-federal-ban-on-ivory-sales/> (discussing a conference hosted in October 2014 by Herrick, Feinstein LLP & Volunteer Lawyers for the Arts on the ivory ban).

crucifixes, timepieces, chess sets, cameos, guitars, mahjong sets, pianos[,] [and] furniture.”<sup>321</sup> Musicians are also affected; any time a musician wishes to import an instrument containing ivory, they must prove that the instrument is over 100 years old in order to perform in the United States.<sup>322</sup> Even collectors who have ivory that fit into the criteria for export or interstate sale will have difficulty proving legitimacy because the requisite documentation is a recent requirement.<sup>323</sup> Finally, some collectors feel that the National Strategy creates an aura of immorality around owning any ivory, regardless of its age, and are upset that “their collections have been likened to blood diamonds.”<sup>324</sup>

The days after the release of the Director’s Order, Congressman Matthew Salmon, a supporter of limiting the ivory trade, questioned Director Ashe about the impact the ban would have on owners and was “particularly concerned about families that might have a family heirloom . . . which has been passed down from generation to generation with little regard of paperwork . . . .”<sup>325</sup> Mr. Ashe responded, “[I]f it is a family heirloom it strikes me that the value is in the generational value of the product.”<sup>326</sup> The effect of the proposed plan on collectors is viewed as an unfortunate consequence of a necessary measure.<sup>327</sup> Some believe that while change is difficult

---

321. Leydon, *supra* note 320 (projecting the impracticality of enforcing such a ban); *see also* Bandow, *Punishing Ivory Owners*, *supra* note 40 (listing additional objects that will be affected).

322. *See* Mason, *supra* note 321 (quoting David Freundenthal, Director, Government Relations, Carnegie Hall) (“Musicians from abroad have to document that their instruments over 100 years old just to come and perform here.”); Blumenkehl, *supra* note 215, at 11 (noting the requirements musicians will need to meet).

323. *See* Mashberg, *supra* note 5, at A15 (hypothesizing that few owners have the required documents); Elliott, McCartin, Brugato, & Lis, *supra* note 151, at 3 (noting that because the documentation is relatively new, owners would “run afoul” with the new requirements).

324. Harris, *supra* note 60 (writing from the perspective of an ivory collector); *see also* *U.S. Ivory Trade*, *supra* note 13, at 72 (calling for a complete ban in the ivory trade because “it carries a certain moral weight, indicating that the ‘social license’ for ivory has been revoked”).

325. *See* *Hearing Before the H. Comm. on Foreign Affairs*, *supra* note 27, at 54 (statement of Matthew Salmon, Member, H. Comm. on Foreign Affairs).

326. *See id.* (statement of Ashe).

327. *See* *Treasured to Death*, *supra* note 42, at 6 (supporting the National Strategy); *see also* IFAW, *Video: Actress Kristin Bauer Throws Personal Ivory Trinkets On Crush Pile in Denver*, Nov. 18, 2013, <http://www.ifaw.org/united-states/news/video-actress-kristin-bauer-throws-personal-ivory-trinkets-crush-pile-denver> (highlighting that during the ivory crush in Denver, actress Kristin Bauer threw in her mother’s ivory bracelet brought back from Japan after World War II and stated “this heirloom is just a thing.”).

and the ban would levy a burden on individual owners, the change must happen.<sup>328</sup> As one FWS agent said, “No guts, no glory—and no elephants.”<sup>329</sup>

## 2. Industry Halts: Challenges for Antique Business and Museums

Like collectors, antique dealers, auction houses, and museums are also affected by the Director’s Order and National Strategy.<sup>330</sup> In fact, entire businesses may not survive if the National Strategy is carried out and its content becomes law.<sup>331</sup> While those in favor of the ban acknowledge the potential effect of implementing the National Strategy on businesses and owners, the ultimate focus is on stopping ivory trafficking and not on those that will bear the burden of any new regulations.<sup>332</sup>

Art dealers respond by pointing out the hypocrisy in a regulatory regime that allows imports of sport-hunted trophies, but not antiques.<sup>333</sup> Scott Defrin, a European decorative arts dealer and former specialist in nineteenth century works of art at Sotheby’s,

---

328. See Peter LaFontaine, *What Does the New US Ivory Ban Mean for Buyers, Sellers, and Elephants?*, IFAW, Mar. 3, 2014, <http://www.ifaw.org/united-states/news/what-does-new-us-ivory-ban-mean-buyers-sellers-and-elephants> (praising the proposed rule and sarcastically noting that “if you’re planning to wear [ivory], sell it, or show it off to your neighbors, it won’t make it past the border”).

329. See *Treasured to Death*, *supra* note 42, at 6 (quoting another source) (internal quotation marks omitted).

330. See St. Hilaire, *supra* note 243 (“Personal property issues likely to arise as a result of the moratorium on pre-existing elephant ivory goods include potential problems for individuals, businesses, and museums.”); Letter from Marcus Asner to author, *supra* note 319 (noting that auction houses and museums are equally effected by the Director’s Order).

331. See Mason, *supra* note 321; Kathleen Caulderwood, *Illegal Ivory Trade: US Authorities Target American Auction Houses*, INT’L BUS. TIMES, Aug. 12, 2014, <http://www.ibtimes.com/illegal-ivory-trade-us-authorities-target-american-auction-houses-1656750> (“Auction houses and dealers argued the new ban was unfair and could seriously harm their business.”); see also Mashberg, *supra* note 5, at A15 (quoting Craig Hoover, Chief of the Wildlife Trade and Conservation branch at the FWS) (acknowledging the impact the National Strategy will have various industries).

332. *Treasured to Death*, *supra* note 42, at 6 (quoting another source) (emphasis in original) (arguing that the FWS’ job is to promulgate new regulations); see *Hearing Before the H. Comm. on Foreign Affairs*, *supra* note 27, at 54 (statement of Ashe) (responding to questions about different groups that would be affected by the National Strategy by stating: “[O]ur priority for law enforcement is syndicated commercial-scale trafficking.”).

333. Letter from Clinton Howell, President, Art and Antique Dealers League of America, & James McConnaughy, President, Nat’l Art and Antique Dealers Assoc. of America, to Daniel Ashe, Dir., FWS (Mar. 7, 2014) (“It is unfair to permit freshly-killed ‘sport-hunted trophies’ while banning certified antiques.”); Alberge, *supra* note 226 (discussing various reactions to the National Strategy).

remarked, “They’ll allow hunters to bring home trophies from Africa, but not antiques!”<sup>334</sup> Further, some dealers and critics of the ban believe that the National Strategy is baseless and will only increase the illegal trade of ivory.<sup>335</sup> They argue that enacting a near-complete ban on the ivory trade will create an effect similar to Prohibition where “merging the illegal and legal markets . . . create[s] greater economic incentives for illicit sales.”<sup>336</sup> For the ethical dealers, some fear the only way to continue their business is to “gouge the ivory inlay” from antiques.<sup>337</sup>

Museums that are interested primarily in antiques are concerned about restrictions on their ability to acquire, exhibit, and loan pieces containing ivory.<sup>338</sup> For example, as a result of the Director’s Order, museums will be unlikely to receive donations from abroad because the tax benefit for such charitable donations is commercial in nature and, therefore, prohibited.<sup>339</sup> Even without this tax incentive, ivory

---

334. Alberge, *supra* note 226 (quoting another source) (internal quotation marks omitted).

335. See Scott Simmons, *The Antiques World is Reeling from Federal Restrictions on the Sale of Ivory*, FLORIDA WEEKLY, Sept. 24, 2014, [http://fortmyers.floridaweekly.com/news/2014-09-24/Top\\_News/The\\_antiques\\_world\\_is\\_reeling\\_from\\_federal\\_restric.html](http://fortmyers.floridaweekly.com/news/2014-09-24/Top_News/The_antiques_world_is_reeling_from_federal_restric.html) (quoting a Florida art dealer) (“When you make something completely illegal, you create a larger black market, you create a larger demand.”) (internal quotation marks omitted); *Administration Treats Collectors as Criminals*, *supra* note 206 (arguing that an ivory ban will “weaken conservation efforts by expanding the ivory black market, diverting enforcement resources away from true contraband ivory, and enriching those engaged in the illegal ivory trade”).

336. *Punishing Ivory Owners*, *supra* note 40 (hypothesizing that the National Strategy will only increase the illegal trade and, thus, increase poaching); see also *Hearing Before the H. Comm. on Foreign Affairs*, *supra* note 27, at 65 (statement of the NRA) (claiming that the National Strategy will “result in losing a new-gain in African Wildlife Conservation”).

337. Mashberg, *supra* note 5, at A15 (quoting Mike Clark, owner of Collectors Firearms in Houston). See also Telephone interview with Larry Feinberg, Director, Santa Barbara Museum (Aug. 31, 2014) (explaining to the author the repercussions the National Strategy will have if realized).

338. Telephone interview with Larry Feinberg, *supra* note 337 (answering the author’s questions regarding museums’ main concerns about the National Strategy and the Director’s Order); Association of Art Museum Directors (AAMD), *[AAMD]’s Presentation, Oversight Hearing on “The [FWS] Plan to Implement a Ban on Commercial Trade in Elephant Ivory,”* (June 24, 2014), available at [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAAahUKewjvzIHDlIvHAhXJ1R4KHdvBCko&url=https%3A%2F%2Ffaamd.org%2Fsites%2Fdefault%2Ffiles%2Fkey-issue%2FFINALS~1.DOC&ei=I3O-Va-vHsmre9uDq9AE&usq=AFQjCNGEemV9XYeZ5\\_aBZNFQkz7FiAe0pQ&sig2=i4umS1Noz8x2qJ89RlkfjA&bvm=bv.99261572,d.dm](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAAahUKewjvzIHDlIvHAhXJ1R4KHdvBCko&url=https%3A%2F%2Ffaamd.org%2Fsites%2Fdefault%2Ffiles%2Fkey-issue%2FFINALS~1.DOC&ei=I3O-Va-vHsmre9uDq9AE&usq=AFQjCNGEemV9XYeZ5_aBZNFQkz7FiAe0pQ&sig2=i4umS1Noz8x2qJ89RlkfjA&bvm=bv.99261572,d.dm), (expressing concern about whether museums would be in breach of the Director’s Order for importing donations from abroad).

339. See sources cited *supra* note 338 (discussing the response from museums to the Director’s Order and National strategy); see also *supra* note 212 and accompanying text (explaining what is permitted to be imported); 50 C.F.R. § 23.5 (2014) (defining commercial

removed from the wild pre-1976, but traded abroad after February 14, 2014, cannot be imported.<sup>340</sup> Larry Feinberg, Director of the Santa Barbara Museum of Art, notes that while congressional members are sympathetic to museums, there is concern about political backlash for opposing the ban.<sup>341</sup>

C. *Will a US Ban Reduce the Illegal Ivory Trade and Poaching?*

Conservationists are split on whether a US ban of ivory sales will reduce the demand for ivory and whether that demand will affect poaching in Africa.<sup>342</sup> Dr. Daniel Stiles, researcher and member of the IUCN, and John Frederick Walker, author and reporter on Africa, believe that a complete ban is counterintuitive to lowering the demand for ivory.<sup>343</sup> Dr. Stiles and Walker argue that instead of creating more regulations, funds should be poured into enforcement.<sup>344</sup> Further, Dr. Stiles argues that there are alternatives to a complete ban, such as levying a tax on ivory sales.<sup>345</sup>

Others, who agree with Dr. Stiles and Walker, argue that the ban is not based in science and will not actually have an effect on reducing poaching in Africa.<sup>346</sup> Several *Economist* articles maintain that trade bans make the situation worse.<sup>347</sup> As some scholars note,

---

to include “transfer, donation, [and] exchange . . . that is reasonably likely to result in economic . . . benefit”).

340. See sources cited *supra* note 338 (discussing the response from museums to the Director’s Order and National strategy).

341. Telephone interview with Larry Feinberg, *supra* note 337 (recounting his trip to Washington D.C., in the summer of 2014 to advocate on behalf of AAMD).

342. See *supra* note 42 and accompanying text (comparing the different views as the effect of an ivory trade ban).

343. See Walker, *Case for a Legal Trade*, *supra* note 186 (arguing against the implementation of a near-complete ban); Stiles, *CITES-Approved*, *supra* note 1, at 152 (examining the ivory trade).

344. See sources cited *supra* note 343 (listing the conservationists in opposition to the ivory ban).

345. See Stiles, *CITES-Approved*, *supra* note 1, at 152 (presenting alternatives to a complete ban); Stiles, *Ivory Trade Ban*, *supra* note 18 (laying out several approaches to reduce demand for ivory and the illegal ivory trade).

346. See sources cited *supra* note 336 (providing some of the dissent to the National Strategy).

347. *Use Them or Lose Them*, *ECONOMIST*, Mar. 6, 2008, <http://www.economist.com/node/10808550> (providing a negative view of the an ivory ban from an economist’s perspective); see also N.L., *Trade Protection*, *ECONOMIST*, Mar. 5, 2013, <http://www.economist.com/blogs/babbage/2013/03/conservation> (“Combine inelastic demand, lack of substitutes, scarcity and open access to habitats with a trade ban . . . and a black market will flourish.”).

when legal trade is prohibited, the black market increases; whereas a legal, well regulated market can effectively control and increase populations of animals once in danger of extinction.<sup>348</sup>

Other conservationists, such as Mary Rice, the Executive Director of the Environmental Investigative Agency, and Beth Allgood, US Campaigns Director for the International Foundation Fund for Animal Welfare, argue that an inherent immorality is attached to selling ivory and that “[a] legal trade in any commodity provides a laundering mechanism for illegal goods.”<sup>349</sup> Further, pro-ban scholars argue that if prominent nations like the United States ban ivory trade, the United States will be a “trendsetter,” encouraging other countries to do the same.<sup>350</sup>

#### D. *Foreign Policy: Is a Similar Ban Feasible in China?*

Part of the National Strategy is to work with foreign nations in creating and enforcing similar ivory trade bans.<sup>351</sup> As a main source of demand for ivory and illegal trade, the United States has focused much of its efforts on China.<sup>352</sup> This Subpart explores the

---

348. See Diana S. Weber et al., *Unexpected and Undesired Conservation Outcomes of Wildlife Trade Bans—An Emerging Problem for Stakeholders?*, 3 *GLOBAL ECOLOGY & CONSERVATION* 389, 391 (2015) (noting that CITES repopulated the once endangered crocodile by creating commercial entities to farm crocodiles and, thus, create a steady supply); *On the Way Out*, *ECONOMIST*, Mar. 16, 2013, <http://www.economist.com/blogs/banyan/2013/03/endangered-species-trade> (summarizing both sides of the argument).

349. See Rice, *supra* note 226 (reasoning that a total ivory ban is the best way to protect the elephants); Allgood et al., *U.S. Ivory Trade*, *supra* note 13, at 72–73 (approving of a ban on the import of antiques and offering other loopholes should be closed).

350. See Hayes et al., *supra* note 108, at 45–46 (providing comments and recommendations for the Advisory Counsel on Wildlife Trafficking); *Hearing Before the H. Comm. on Foreign Affairs*, *supra* note 27, at 17 (statement of Ashe) (“United States leadership is vital.”).

351. See Exec. Office of the President, *supra* note 196, at 2 (“Through our diplomacy, we will mobilize global support for, and encourage partners to actively participate in, the fight against wildlife trafficking . . . We will build partnerships with governments . . . to address this issue to develop and implement innovative and effective approaches to combating wildlife trafficking.”).

352. See *supra* note 218 and accompanying text (describing US efforts abroad). The United States is also putting pressure on China through other trade initiatives. See Press Release, White House, Fact Sheet: APEC Leaders Commit to Protect the Environment (Nov. 11, 2014), *available at* <https://www.whitehouse.gov/the-press-office/2014/11/11/fact-sheet-apec-leaders-commit-protect-environment> (“APEC serves as a valuable forum to pursue efforts to combat [wildlife] trade by tackling the demand side of the economic equation, shifting consumer purchasing patterns in tandem with bolstering law enforcement cooperation.”).

complexities of the ivory trade and analyses whether an ivory trade ban is possible in China.

### 1. Disagreements about the Source of Demand in China Make Finding a Solution Challenging

As discussed in Part I, the Chinese market for ivory is extremely complex.<sup>353</sup> Conservation consultant Kirsten Conrad recently wrote about the ivory market in China, “The concept that there is one market for ivory is as nonsensical as there being one population of elephants in Africa.”<sup>354</sup> In other words, there are many sources that drive the demand for ivory in China and, as a result, the illegal ivory market. Due partially to the complexity of the market, conservationists disagree about the actual state of market demand in China, which complicates finding a meaningful solution to the problem.<sup>355</sup>

For example, some groups like the Environmental Investigation Agency and conservationists like Grace Ge Gabriel, Asia Regional Director of IFAW, claim that legal ivory is so expensive as a result of the government artificially inflating the price that factories seek out illegal sources of ivory.<sup>356</sup> Dr. Stiles, however, claims that such data is “nonsense, fabricated to suit [the] argument” that a total ban is necessary.<sup>357</sup> Instead, Dr. Stiles and others researchers argue that the illegal ivory is actually more expensive than legal ivory because, with a shortage of legal ivory, the price of illegal ivory has “skyrocketed.”<sup>358</sup>

---

353. See *supra* notes 53–57 and accompanying text (explaining the demand for ivory in China).

354. Kristen Conrad, *The Ivory Market in China*, 4 SULINEWS (IUCN Mar. 2013) (on file with author) (reporting on initial findings from Conrad’s and Brendan Moyle’s investigation).

355. See sources cited *supra* note 53 (comparing the different analyses of the Chinese ivory market).

356. See Gabriel, *supra* note 51 (responding to Dr. Stiles’ suggestions for reducing the illegal ivory trade); see also Rice, *supra* note 226 (identifying administrative costs as raising the price of legal ivory).

357. See Daniel Stiles, Comment to *Opinion: Elephants are Not Widgets*, Post to *A Voice for Elephants*, NAT’L GEOGRAPHIC, (Sept. 29, 2014, 12:05 AM), <http://voices.nationalgeographic.com/2014/09/24/opinion-elephants-are-not-widgets/> (responding to Gabriel, *supra* note 51).

358. See *id* (citing his own 2009 research and pointing to IFAW’s research from 2012 to support the fact that legal ivory prices are lower than illegal prices); Michael’t Sas-Rolfes et al., *The Complex Policy Issue of Elephant Ivory Stockpile Management*, 55 PACHYDERM 62, 67–68 (Jan.–June 2014) (comparing the black market prices with the legal ivory trade prices).

Further, scholars disagree as to what extent the 2008 CITES one-off sale had on the level of demand in China.<sup>359</sup> Some supporters of a total ban in China claim that the one-off sale confused consumers, directly causing a surge in the illegal trade and poaching.<sup>360</sup> Conversely, some conservationists argue that the 2008 sale had little to do with demand, as Japan's market (the other location where one-off sales were allowed that same year) was unaffected and demand there has been steadily decreasing since the 1990s while China's illegal trade has been a concern since 1996.<sup>361</sup> These conservationists and scholars argue that the 1989 CITES trade ban is the direct cause of the increase in demand.<sup>362</sup> Official reports for CITES have not found conclusive evidence to support either conclusion with absolute certainty.<sup>363</sup>

Certain external world economic factors may also have driven increased demand, such the 1997 Asian Financial Crisis.<sup>364</sup> While China was not as affected as other countries, it caused many to speculate that the Chinese Yuan Renminbi would depreciate like the currencies of neighboring countries and, as a result, caused the

---

359. See *supra* notes 42, 53 and accompanying text (discussing the debate regarding the 2008 CITES one-off sales).

360. See Carl Safina, Op-Ed, *Blood Ivory*, N.Y. TIMES, Feb. 11, 2013, [http://www.nytimes.com/2013/02/12/opinion/global/blood-ivory.html?\\_r=0](http://www.nytimes.com/2013/02/12/opinion/global/blood-ivory.html?_r=0) (discussing the increase in poaching in recent years. Safina is the founding president of Blue Ocean Institute at Stony Brook University, where he is also co-chairman of the Center for Communicating Science); Hayes et al., *supra* note 108, at *passim* (making recommendations to lawmakers regarding next steps to reduce the illegal trade based on a current market analysis); see also Christina Russo, *Can Elephants Survive a Legal Ivory Trade? Debate Is Shifting Against It*, NAT'L GEOGRAPHIC, Aug. 29, 2014, <http://news.nationalgeographic.com/news/2014/08/140829-elephants-trophy-hunting-poaching-ivory-ban-cities/> (analyzing the debate regarding how to best address the illegal ivory trade).

361. See Gao & Clark, *supra* note 47, at 28 (rejecting the idea that one-off sales were the main source of the increased demand); Stiles, Comment, *supra* note 357 (noting ETIS' findings that China's black market for ivory is "clearly driven by other factors . . . independent[] of the CITES ivory sale event").

362. See *Ivory Trade Ban*, *supra* note 18 ("With the trade ban in place, the ivory could only be obtained from poaching.").

363. See *supra* note 125 and accompanying text (discussing ETIS and MIKE findings regarding the 2008 one-off sale); see also Martin, *supra* note 28, at 17 (finding no "clear link" between the one-off sales and the increase of illegal trade).

364. See *Ivory Trade Ban*, *supra* note 18, at tbl. (showing various economic factors that may have played into the increase demand for ivory); Wen Hai & Kaifeng Zhong, *The Impacts of the Asian Economic Crisis on China's Foreign Trade*, CHINA CEN. FOR ECON. RESEARCH, PEKING U., 1 (June 1999) ("Since China has similar financial and economic problems as many . . . neighbor[ing] countries, many people . . . predicted in 1998 that China would be the next victim in the Asian crisis dominos.").



Chinese to save less.<sup>365</sup> Further, even well after the Financial Crisis, Chinese stock prices continued to fall between 2002 and 2005, causing the Chinese to seek investments in commodities.<sup>366</sup> The 2008 recession, which happened to coincide with the 2008 CITES sale, further aggravated this.<sup>367</sup>

At the same time, China has become the world's largest exporter, causing an increase in demand for raw materials and increases in personal income.<sup>368</sup> This growth pattern began in the 1980s, but increased partially due to China becoming a member of the World Trade Organization in 2001.<sup>369</sup> As a result of the increases in personal income, as well as broad money supply, low trust in the press (as it is censored), and other economic factors, the Chinese have seen "boom-to-bust" cycles of speculative assets.<sup>370</sup> A wide variety of luxury goods such as salt, mastiff dogs, black Audis, and real estate

---

365. See Hai & Zhong, *supra* note 364, at *passim* (explaining the impact the 1997 Financial Crisis had on China's economy); C.H. Kwan, *The Yen, the Yuan, and the Asian Currency Crisis: Changing Fortune between Japan and China*, *passim* (Asia-Pacific Research Ctr., Stanford University, Working Paper, 1998) (explaining why China was not exempt from the crisis).

366. See Jong-Wha Lee & Warwick J. McGibbin, *Domestic Investment and External Imbalances in East Asia*, 172 BROOKINGS INSTITUTE 1, 10, 13 (2006) (discussing the aftermath of the 1997 Asian Financial Crisis); Linyue Li et al., *The Effects of the Global Financial Crisis on China's Financial Market and Macroeconomy*, 2012 ECONOMIC RESEARCH INT'L 1, 2–3 (2012) (showing that the rise in Chinese stocks did not begin until 2005).

367. See Li et al., *supra* note 366, at 3 fig.1 (showing the sharp fall in stock prices in 2008); Gao & Clark, *supra* note 47, at 28 ("In an economy facing great inflationary pressure, when mainstream investments such as real estate and stocks and bonds fail to perform well, art investment makes sense.").

368. See Gao & Clark, *supra* note 47, at 28 (noting that personal income has increased); WTO, *World Trade Report 2014: Trade and Development—Recent Trends and the Role of the WTO*, 24, 42 (2014) [hereinafter *World Trade Report 2014*], available at [https://www.wto.org/english/res\\_e/booksp\\_e/world\\_trade\\_report14\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/world_trade_report14_e.pdf) (discussing Chinese exports).

369. See *World Trade Report 2014*, *supra* note 368, at 6, 70 (describing the growth China has made since becoming a member of the WTO); Jeffery D. Sachs & Wing Thye Woo, *Economic Growth After the WTO Membership*, J. CHINESE ECON. & BUS. STUDIES, *passim* (2002), available at [http://www.earth.columbia.edu/sitefiles/file/about/director/pubs/China\\_CBB03.pdf](http://www.earth.columbia.edu/sitefiles/file/about/director/pubs/China_CBB03.pdf) (analyzing China's economy since becoming a member of the WTO).

370. See Tadashi Nakamae, *Can the Earth Support Chinese Growth?*, INT'L ECONOMY 11, 12 (2004), available at [http://www.international-economy.com/TIE\\_F04\\_Nakamae.pdf](http://www.international-economy.com/TIE_F04_Nakamae.pdf) (discussing China's boom-and-bust steel industry); Adam Wolfe, *Great Speculations: Why China is So Bubble-Friendly*, FORBES, Apr. 7, 2011, <http://www.forbes.com/2011/04/06/china-bubble-economy-opinions-roubini-economics.html> (listing the factors that cause these bubbles); see also Andrew Jacobs, *Once-Prized Tibetan Mastiffs are Discarded as Fad Ends in China*, N.Y. TIMES, Apr. 18, 2015, at A1 (discussing the "boom-to-bust luxury landscape").

have been subject to these bubbles.<sup>371</sup> Normally in these cycles, the booms cause shortages, leading to price inflation, followed by an increased supply, leading to deflation.<sup>372</sup> The increasingly limited supply of ivory may be fueling the trade, as the downward “bust” has not occurred.<sup>373</sup>

Finally, the demand for increased raw materials has caused the Chinese government to become a large investor in African economies.<sup>374</sup> According to a recent report published in the *Economist*, China has played an important economic and diplomatic role in Africa, helping to stave off conflict and enhance local African economies through spending, job creation, and increased infrastructure.<sup>375</sup> As Chinese travel to Africa has increased, so too has the illegal trade routes.<sup>376</sup>

---

371. See Wolfe, *supra* note 370 (“China can blow bubbles faster and bigger than just about any other country.”); Jacobs, *supra* note 370, at A1 (reporting that the most expensive Mastiff dog sold for US\$1.6 million, with the majority selling at one point around US \$250,000. Today, they are worth less than US\$2,000).

372. See Chow Hwee Kwan & Peter Wilson, *Monetary Policy in Singapore and the Global Financial Crisis*, in CHALLENGES FOR THE SINGAPORE ECONOMY AFTER THE GLOBAL FINANCIAL CRISIS 139, 158 (Peter Wilson ed., 2011) (explaining asset bubbles); Nakame, *supra* note 371, at 13, 88 (explaining common trends in boom-and-bust cycles).

373. See Gao & Clark, *supra* note 47, at 28 (“Ivory, similar to rhino horn . . . are seen to offer a fair return on investment.”); John R. Platt, *China’s Wealthy Are Banking On Extinction*, TAKE PART BLOG, Mar. 24, 2015, [www.takepart.com/feature/2015/03/24/china-endangered-species-banking-extinction-poaching-elephants-tigers-rhinos](http://www.takepart.com/feature/2015/03/24/china-endangered-species-banking-extinction-poaching-elephants-tigers-rhinos) (quoting J.A. MILLS, BLOOD OF THE TIGER: A STORY OF CONSPIRACY, GREED, & THE BATTLE TO SAVE A MAGNIFICENT SPECIES (1st ed. 2015)) (“People are ‘banking on extinction’—buying products hoping that wild species will soon disappear . . . [because] [t]hese items will become priceless if these species become extinct.”) (internal quotation marks omitted).

374. See *World Trade Report 2014*, *supra* note 368, at 88 (noting that in 2013 China was cited as among the top five investors in Africa); *More Than Minerals*, *ECONOMIST*, Mar. 23, 2013, <http://www.economist.com/news/middle-east-and-africa/21574012-chinese-trade-africa-keeps-growing-fears-neocolonialism-are-overdone-more> (discussing Chinese investment in Africa for raw materials).

375. *More Than Minerals*, *supra* note 374 (reporting on Chinese presence in Africa); Howard W. French, *Into Africa: China’s Wild Rush*, *N.Y. TIMES*, May 16, 2014, <http://www.nytimes.com/2014/05/17/opinion/into-africa-chinas-wild-rush.html> (analyzing the pros and cons of a Chinese influence in Africa).

376. See Gao & Clark, *supra* note 47, at 29 (“China’s increasing presence in Africa makes access to an ivory supply easier.”); Swanson, *supra* note 182 (discussing the ties between China and Africa in trade); see also *Made in China*, *supra* note 161, at 29 (showing map of ivory trade flows within and out of Africa).

## 2. The Ivory Ban Debate in China and Other Solutions

Given the complexities in the market, is an ivory ban the best solution or even feasible? As discussed above, many proclaim that a ban in China is the only option that will be effective at ending the illegal ivory trade.<sup>377</sup> Dr. Daniel Stiles, however, argues a ban is not the best solution and that if China was given a steady supply of ivory (40–50 tons per year), the demand for illegal ivory would decrease, driving down the price and causing traffickers to either enter the legal trade or go out of business altogether.<sup>378</sup> Some criticize these ideas as “flawed” and based on “economic theories found in textbooks;” several economists agree that, although less popular, Dr. Stiles’ ideas are a viable option.<sup>379</sup>

Within China, there are mixed opinions about the ivory trade. As Yufang Gao, Research Affiliate and graduate of Yale University, recently summarized in a report, the dominant sentiment is either in favor of trade or is against illegal trade, with an “emerging” sentiment that all trade should be banned.<sup>380</sup> Mr. Gao states:

Awareness about ivory trafficking has substantially increased in the past two years. The anti-all-trade perspective is gaining momentum. However, a ban on domestic ivory trade remains elusive. The current social context is not conducive to a trade ban[,] which would be a radical departure from existing policy. A moratorium may become possible if . . . the pro-trade group is convinced that the elephant crisis undermines their interests . . .<sup>381</sup>

On February 26, 2015, China did impose a temporary moratorium on imports, but it has been criticized as “symbolic” and unlikely to make

---

377. See Vandegrift, *supra* note 181, at 134 (arguing that the demand for ivory in China is too high for other methods to have an impact needed to stop poaching); Rice, *supra* note 226 (proposing that a ban is the least complicated, most effective means of reducing the illegal ivory trade).

378. See *Ivory Trade Ban*, *supra* note 18 (presenting his solution and alternative to an ivory ban).

379. See Gabriel, *supra* note 51 (responding to *Ivory Trade Ban*, *supra* note 18); *Use Them or Lose Them*, *supra* note 347 (discussing alternatives to trade bans).

380. See Yufang Gao, *From Supply to Demand: Diverse Perspectives on the International Ivory Trade*, MESC (2014) <http://environment.yale.edu/tri/fellow/1898/> (summarizing his study of Chinese newspapers, magazines, and news websites between January 2003 to September 2013).

381. See *id.*

an impact on the illegal market.<sup>382</sup> While some conservationists see this move as, at least, a step in the right direction, other conservationists say that the Chinese government may use the temporary moratorium as “an excuse to say a ban failed to stop poaching and then call for the reopening of international trade in ivory at the next major CITES conference . . . .”<sup>383</sup> Further, this temporary ban does not affect domestic trade.<sup>384</sup>

Other scholars and economists offer non-legal methods as potential solutions and suggest that promoting increased Chinese tourism to Africa is a viable option, making elephants more valuable alive than dead for their tusks.<sup>385</sup> Most agree that directing attention toward public opinion is key.<sup>386</sup> Recently, for example, CITES translated its “Virtual College” into Chinese, making CITES materials more accessible to a larger audience.<sup>387</sup> Some demonstrations also

---

382. See *One Year Ban in China*, *supra* note 224, at A12 (“[I]nternational conservation organizations said the moratorium would do little to slow the surge in poaching . . . .”). But see Patrick Bergin, *Opinion: China Announces One-Year Ban on Imports of African Ivory Carvings*, Post to *A Voice for Elephants*, NAT’L GEOGRAPHIC, Mar. 13, 2015, <http://voices.nationalgeographic.com/2015/03/13/opinion-china-announces-one-year-ban-on-imports-of-african-ivory-carvings/> (“Even if the ivory ban was largely symbolic, symbolism has its place too. It can prove an effective tool by way of drawing attention to a problem in desperate need of a solution.”).

383. *One Year Ban in China*, *supra* note 224, at A12 (summarizing general reactions to the Chinese import moratorium); see also *China Announces First-Ever Ban on Ivory Imports*, CBS NEWS, Feb. 27, 2015, <http://www.cbsnews.com/news/china-announces-ban-on-ivory-imports-which-have-fueled-poaching-of-elephants/> (“[T]he country [is] finally showing leadership on the issue but need[s] to go much further . . . .”).

384. See *One Year Ban in China*, *supra* note 224, at A12 (explaining the legal implications of the import moratorium); see also Simon Denyer, *China Suspends Ivory Carving Imports, But Move Won’t Stop Poaching*, WASHINGTON POST, Feb. 27, 2015, [http://www.washingtonpost.com/world/china-suspends-ivory-carving-imports-but-move-wont-stop-poaching/2015/02/27/7c8dbe35-9d10-4859-9bed-24f14bb4c9cc\\_story.html](http://www.washingtonpost.com/world/china-suspends-ivory-carving-imports-but-move-wont-stop-poaching/2015/02/27/7c8dbe35-9d10-4859-9bed-24f14bb4c9cc_story.html) (“But experts said that the move . . . failed to address what conservationists were asking for—a ban on Chinese domestic trade.”).

385. See *Use Them or Lose Them*, *supra* note 347 (listing alternatives to an ivory ban); Jeffrey Gettleman, *To Save Wildlife, and Tourism, Kenyans Take Up Arms*, N.Y. TIMES, Dec. 29, 2012, at A6 (suggesting that tourism may be the best route).

386. See Swanson, *supra* note 182 (listing five sources that is fueling Chinese demand for ivory); Max Fisher, *Obama Wants to Curb Africa’s Ivory Trade. Here’s What He’s Up Against*, WASH. POST, July 1, 2013, <http://www.washingtonpost.com/blogs/worldviews/wp/2013/07/01/obama-wants-to-curb-africas-ivory-trade-heres-what-hes-up-against/> (listing public awareness campaigns as one of the main reasons why US ivory demand declined).

387. See *The CITES Virtual College Now Available in Chinese*, CITES, [http://cites.org/eng/vc\\_cn](http://cites.org/eng/vc_cn) (last visited July 1, 2015). CITES Virtual College is online courses geared toward enforcement officers and customs agents to ensure officials are enforcing obligations under CITES. See *id.*; see also *The CITES Virtual College*, CITES, <https://cites.unia.es/index.php?> (explaining the CITES Virtual College).

have been successful, which try to inform the Chinese public about poaching and stigmatize the ivory trade.<sup>388</sup> Chinese “rule by law” government, however, limits freedom of expression and collective organizing, making it difficult for local demonstrations.<sup>389</sup> Recent celebrity initiatives, however, may be able to help ameliorate this problem. For example, basketball star Yao Ming participated in a documentary shown in China about ivory poaching.<sup>390</sup> Prince William has also voiced his concern about the illegal trade in China and threatened to destroy all of the ivory in Buckingham Palace.<sup>391</sup> In addition, Hillary and Chelsea Clinton, as part of their work through the Clinton Foundation, have campaigned against poaching.<sup>392</sup> Recently, perhaps as a result of these efforts, the Chinese government began its own public outreach campaign that is meant to inform the public about Chinese import laws and has invested in assisting African nations with wildlife protection.<sup>393</sup>

---

388. See generally Austin Ramzy, *Conservationists Continue to Push to Block Hong Kong Ivory Sales*, N.Y. TIMES: SINOSPHERE, Nov. 29, 2014, <http://sinosphere.blogs.nytimes.com/2014/11/29/conservationists-continue-push-to-block-hong-kong-ivory-sales/> (“Over the past year, at least three Hong Kong stores have stopped selling ivory after complaints by local conservationists.”); Laurel Neme, *In Hong Kong, Kids Take Action to Stop the Illegal Ivory Trade*, NAT’L GEOGRAPHIC, Apr. 24, 2014, <http://news.nationalgeographic.com/news/2014/04/140425-hong-kong-ivory-trafficking-elephants-china-world/> (reporting on a campaign begun by school children to stop the ivory trade).

389. Swanson, *supra* note 182 (listing the suppression of the environmental movement as a source of the continuing illegal ivory trade). See also Susan V. Lawrence & Michael F. Martin, *Understanding China’s Political System*, CRS REPORT, 2, 16 (Mar. 20, 2013), available at <https://www.fas.org/sgp/crs/row/R41007.pdf> (explaining that “rule by law,” as opposed to the United States’ “rule of law,” refers to the Chinese governments’ general use of “law as a tool for governance”).

390. Swanson, *supra* note 182.

391. See Robert Jobson, *Prince William Does it His Way*, NEWSWEEK, Mar. 21, 2014, <http://www.newsweek.com/prince-william-does-it-his-way-232412>; Ian Jonston, *Prince William Attacks China Over ‘Ignorant Craving’ for Ivory*, INDEPENDENT, Dec. 8, 2014, <http://www.independent.co.uk/environment/nature/prince-william-attacks-china-over-ignorant-craving-for-ivory-9909382.html>.

392. See Monica Medina, Op-Ed, *The White Gold of Jihad*, N.Y. TIMES, Sept. 30, 2013, [http://www.nytimes.com/2013/10/01/opinion/the-white-gold-of-jihad.html?\\_r=0](http://www.nytimes.com/2013/10/01/opinion/the-white-gold-of-jihad.html?_r=0); see also Christine Dell’Amore, *Clintons Say to End Ivory Trade Everyone Needs to Act*, NAT’L GEOGRAPHIC, Feb. 24, 2014, <http://news.nationalgeographic.com/news/2014/02/140224-hillary-chelsea-clinton-ivory-elephants-animals-science-trade-africa-rhino/>.

393. Bergin, *supra* note 382 (“[T]he Chinese SMS text alert system for all Chinese citizens traveling to Kenya, reminding them . . . not to buy ivory . . . during their stay.”); Malcolm Moore, *Ivory Trade: Can China Get Tough on Tusks?*, TELEGRAPH, Feb. 13, 2014, <http://www.telegraph.co.uk/news/worldnews/asia/china/10636306/Ivory-trade-Can-China-get-tough-on-tusks.html> (reporting on all of the different wildlife campaigns in China).

In summary, the proposal for a near-complete ivory ban has significant legal and policy implications in the United States because it was not published for a comment period, affects the property rights of owners and businesses, and significantly hinders museums and auction houses. Conservationists still disagree about what effect a total ban on trade would have on poaching. Conservationists further disagree as to whether a ban is feasible in a country like China, where ivory is intertwined with their economy and their cultural heritage.

### III. *MOVING FORWARD: AMEND THE BAN, BUT DO NOT RESCIND IT*

The National Strategy, while well intentioned, must be reconsidered. This Part offers some suggestions about how the United States and Chinese governments, as well as other interested parties, may resolve some of these issues. Ultimately, the FWS should have issued the Director's Order pursuant to Notice and Comment. Moving forward, the United States needs to focus its attention on enforcement, not creating more laws. Also, while the United States can pressure China to create new laws, a cultural change in China is necessary. The focus of the US Government should be aiding African nations in pursuit of preventing poaching.

#### A. *The Director's Order Should be Reconsidered through Notice-and-Comment Rulemaking*

The FWS should have created the substance of the Director's Order through Notice-and-Comment Rulemaking as prescribed by the APA.<sup>394</sup> First, the Director's Order is unlike any policy statement previously issued by the FWS, which were purely administrative.<sup>395</sup> Legally, the Director's Order does not merely implement the Moratorium, but restricts rights granted under the ESA antiques exception and enforces new obligations never before required.<sup>396</sup> If

---

394. *See supra* note 243 (citing other scholars who agree with the author's assertion). *But see supra* notes 257–61 and accompanying text (discussing an argument under *Heckler* that there is no APA issue).

395. *See supra* note 250 and accompanying text (showing that previous orders issued by the FWS were administrative and mainly only affected the FWS employees).

396. *See supra* notes 210–16 and accompanying text (explaining the new requirements under the Director's Order such as forbidding the import of noncommercial ivory that is sold after February 25, 2014); *see also supra* notes 262–63 and accompanying text (arguing that

the absence of discussion regarding antiques during the creation of AECA by congress is any indication, the moratorium was never meant to include antiques, as Congress likely saw the AECA as an additional way to protect African elephants and never meant to exclude the ESA requirements and exceptions.<sup>397</sup> Further, when the FWS implemented the Moratorium, they codified exceptions for antiques, in which the antiques' exception of the ESA was read into the proposed rule.<sup>398</sup> Finally, the definitive language used in the Director's Order appears binding on its face, as it does not give the agency employees discretion regarding enforcement.<sup>399</sup> While the "binding language" is not necessarily determinative, under current jurisprudence cited above, the Director's Order should be considered substantive and, therefore, invalid.<sup>400</sup>

If the FWS used Notice-and-Comment Rulemaking, they could have considered and, perhaps, avoided some of the pushback the FWS received.<sup>401</sup> It is true that the proposed amendments to the antiques exception likely will be published in 2015 for a comment period; however, as Director Ashe stated, that the contents of the Director's Order would not be reconsidered; the decision to enact a complete import ban on commercial ivory has already been made, leaving little room for consideration.<sup>402</sup> While the Director's Order and National

---

when the special rule for antiques was codified, the ESA antiques exception restricting regulation of "any article" which is an antique was read into the regulation).

397. See *supra* notes 146–47 (explaining that that only sport-hunted elephants were discussed in both legislative history and the AECA, and both are also silent as to antiques).

398. See *supra* notes 151–54 and accompanying text (reviewing the special rule for antiques, codified in the Code of Federal Regulations); see also sources cited *supra* note 242 (arguing that congress may well have never intended for a complete moratorium to exist without the FWS first consulting congress).

399. See *supra* notes 264–66 (showing how the Director's Order could be considered "binding," which under *Broadgate*, is considered a substantive rule rather than a policy statement).

400. See *supra* note 254 (identifying the tests used to differentiate between policy statements and substantive rules); see also *supra* note 258–66 (offering arguments why the Director's Order should be considered substantive).

401. See, e.g., *supra* note 338–40 and accompanying text (explaining one of the unnecessary results of the Director's Order affecting museums, which likely could have been avoided had the FWS received comments prior to the creation of the rule); see also *supra* notes 318 (noting Advisory Council member, Marcus Asner, and Congressman Salmon's concerns regarding the effect of the Director's Order and National Strategy on individual legal property owners).

402. See *supra* note 268 and accompanying text (quoting Daniel Ashe as stating that the Director's Order will be "incorporated" into the revised rule for antiques); see also *supra* note 269 (noting that the FWS proposed rule is likely to be issued in mid-2015).

Strategy likely are intended to bring the United States' rules in line with the CITES Control of Trade Plan, the FWS should follow procedure and allow experts involved in the ivory trade to have a voice in the outcome, adding legitimacy to the rule and ensuring the best possible outcome is achieved.<sup>403</sup>

B. *The National Strategy Should be Considered a Fifth Amendment Taking*

Until June 2015, takings jurisprudence likely would have lead the author to believe that it was unlikely that a court would find the National Strategy to constitute a Taking requiring compensation.<sup>404</sup> Lower courts did not recognize a cognizable regulatory takings claim for personal property and the Supreme Court had discussed it only in dicta.<sup>405</sup> The Supreme Court in *Horne*, however, found that a cognizable takings claim for personal property exists under the Takings Clause.<sup>406</sup> *Horne* will likely open the door to new takings claims for personal property, such as one brought as a result of the implementation of the National Strategy.<sup>407</sup>

The National Strategy and the facts in *Horne* do differ, as regulatory takings do not affect possession.<sup>408</sup> Further, the rights of ivory owners could be considered less affected than those affected by the regulation in *Allard*.<sup>409</sup> The distinction between a physical taking and a regulatory taking, however, should not be considered when the value of an object is economically worthless, as was the case in

---

403. See *supra* notes 104–05 and accompanying text (explaining the CITES Control of Trade Plan).

404. See *supra* notes 284–87 and accompanying text (expounding on the Supreme Court ruling in *Allard* that compensation for a Taking is unavailable for personal property).

405. See *supra* notes 289–90, 292 and accompanying text (expounding on Justice Rehnquist's dissent in *Lucas*, as well as Justice Scalia's and Justice Brennan's differing opinions on whether the Fifth Amendment protects personal property). *But see supra* note 293 and accompanying text (noting that some courts that left open the possibility for regulatory taking of personal property).

406. See *supra* note 297 and accompanying text (discussing *Horne*).

407. See *supra* note 302 and accompanying text (noting that despite the fact that *Horne* is a physical taking, *Horne* might open the door for new takings jurisprudence).

408. Compare *supra* notes 284–85 and accompanying text (quoting *Allard* as holding that forbidding the sale only removes one of strand of a bundle of rights), with *supra* notes 298–99 and accompanying text (explaining that *Horne* involved a physical taking of personal property).

409. See *supra* notes 286–87 and accompanying text (describing the differences between *Allard* and a potential takings claim as a result of the National Strategy).



*Allard* and is the case for most ivory under the National Strategy.<sup>410</sup> There is no reason to believe that takings cases will be any less difficult to win; however, there is certainly an argument to be made that this should effectuate a taking.<sup>411</sup>

If a *Penn Central* analysis is applied to businesses, the economic impact to commercial enterprises is undeniably significant.<sup>412</sup> The investment-back expectations factor of the *Penn Central* test is less likely to favor a potential claimant, as the market for ivory is highly regulated.<sup>413</sup> Similarly, the character prong may also weigh in the government's favor, as the purpose of the National Strategy is to prevent a public harm, especially if demand for ivory and poaching is funding terrorism.<sup>414</sup> Given the legal environment for takings claims for businesses' good will and going concern value, advocates may do better to direct their efforts in convincing the FWS to amend the National Strategy and the Director's Order.<sup>415</sup>

### C. *The Director's Order and National Strategy Should Be Amended*

The Director's Order and the National Strategy should both be amended to avoid harming legitimate businesses.<sup>416</sup> When President Obama issued the Executive Order, he specifically stated that

---

410. See *supra* note 302 (quoting Professor Richard Epstein's argument that the distinction between regulatory and physical takings should be abolished); see also *Lucas*, 505 U.S. at 1015-16 (holding that where economical use is destroyed, "compensation must be paid.").

411. See *supra* note 288 and accompanying text (explaining that most takings claims are unsuccessful); see also *supra* notes 274, 277, 319 and accompanying text (summarizing the *Penn Central* Test and considering potential takings claims as a result of the National Strategy).

412. See *supra* notes 330-32, 337 (discussing the damage to antique businesses).

413. See *supra* notes 277, 308 (defining the investment-back expectations and character prong of the *Penn Central* test); see also Part 2.D.1 (discussing the legal environment of the ivory trade in the United States).

414. See *supra* note 15 and accompanying text (noting the ecological benefits that elephants provide); see also *supra* notes 29-31 and accompanying text (explaining how poaching has given ivory the name of "blood ivory"). But see *supra* note 364 and accompanying text (presenting Dr. Stiles and Walker's argument that the National Strategy will not actually affect poaching); *Res. Invs.*, 85 Fed. Cl. at 517-18 (considering whether the harm could be prevented in an alternative way).

415. See *supra* note 319 and accompanying text (noting that courts are often unwilling to find a taking for loss of good will and going concern value).

416. See *supra* note 318 and accompanying text (quoting Advisory Counsel member, Marcus Asner, as noting that "the Director's Order sweeps in people and groups that otherwise would have legitimate uses for antique ivory").

legitimate trade should be allowed to continue.<sup>417</sup> The National Strategy and Director's Order currently do not reflect this and, instead, have restricted individual owners' rights.<sup>418</sup>

The anti-trade conservationists and scholars argue that there is no legitimate trade in ivory, as it is stained with immorality.<sup>419</sup> The author questions arguments that would find owning or selling of ivory from elephants killed long ago immoral; nevertheless, whatever the immorality, the purpose of the Director's Order and the National Strategy is to reduce demand for ivory and to reduce poaching.<sup>420</sup> Artwork and other objects containing ivory brought legally into the United States prior to the creation of the AECA should have an economic value beyond mere possessory value.<sup>421</sup> Further, making it nearly impossible for owners of antique ivory to sell their ivory domestically by requiring paperwork not previously required or provided will likely do little to reduce poaching in Africa.<sup>422</sup>

As conservationists have shown, some illegal ivory in the United States is sold under the guise of the legal ivory trade.<sup>423</sup> The answer, then, is not more law, but more law enforcement.<sup>424</sup> The US \$60 million dollars allocated to implementing the National Strategy should be passed on to hiring more FWS agents and improving enforcement tactics.<sup>425</sup>

---

417. *See supra* note 193 and accompanying text (quoting the Executive Order).

418. *See supra* notes 196–207 and accompanying text (outlining the National Strategy and its implementation beginning with the Director's Order); *see also supra* notes 330–42 and accompanying text (analyzing the policy implications of the Director's Order and the National Strategy in regards to their effect on antiques and arts businesses).

419. *See supra* note 381 and accompanying text (discussing conservationists who believe in the inherent immorality of owning ivory); *see also supra* note 349, 324 and accompanying text (noting arguments that owning ivory is amoral and likened to owning "blood diamonds").

420. *See supra* note 193 and accompanying text (noting the four key purposes of the Executive Order, one of them being to reduce demand). *But see supra* notes 40–42 (discussing the low demand for illegal ivory in the United States).

421. *See supra* note 204 and accompanying text (explaining the effect that the National Strategy will have on domestic sales and exports on those who own antiques).

422. *See supra* note 46, 376, 380 (explaining that the US ivory market minimally affects poaching and that trade bans can increase demand for legal ivory); *see also supra* 323 and accompanying text (showing that few owners likely have the requisite documentation). *Cf. supra* note 381 (arguing that legal trade provides a cover for illegal trade).

423. *See supra* notes 49, 51–52 (analyzing the illegal ivory market in the United States).

424. *See supra* notes 77, 344 and accompanying text (citing Dr. Stiles and Walker as arguing that enforcement should be the priority). *But see* note 216 (explaining that one of the priorities of the executive order is enforcement).

425. *See supra* note 241 and accompanying text (noting that US \$60 million has been allocated to support the national strategy).

D. *Fully Implementing the National Strategy is Unlikely to Decrease Domestic or International Demand for Illegal Ivory*

Pro-ban scholars argue that a legal trade in any commodity can provide a cover for an illegal market.<sup>426</sup> The National Strategy and the Director's Order, however, are unlikely have a substantial impact on reducing the demand for ivory within the United States and may not have any effect on reducing international demand.<sup>427</sup> The concern that the National Strategy, once fully enacted, will create an incentive for a large illicit market is real: the United States has seen this with Prohibition.<sup>428</sup>

E. *China: A Total Ban Unlikely Feasible*

The complexities of the market for ivory are not as simple as in the United States, where consumers are mostly interested in ivory for decorative purposes.<sup>429</sup> For the Chinese, ivory provides a means of investment in an uncertain market.<sup>430</sup> Further, ivory is one of the many assets in which the Chinese have invested recently.<sup>431</sup> The difference other assets in China and ivory, however, is that supply has increased in other assets, causing a "boom-and-bust" effect.<sup>432</sup>

From a consumer perspective, the supply of ivory is threatened by proposed bans.<sup>433</sup> Banning the ivory trade likely will continue to drive up demand for illegal ivory in China, rather than produce the desired "bust" effect that happened to other similar assets.<sup>434</sup> Pro-trade conservations may be right that CITES 2008 sales did, in fact,

---

426. *See supra* note 249 and accompanying text (presenting an argument in favor of a completely ban).

427. *See supra* notes 343, 346–49 and accompanying text (presenting arguments as to why a ban on ivory trade will not lower demand, and may even increase it).

428. *See supra* note 368–69 (arguing that the national strategy may increase demand for illegal ivory).

429. *See supra* note 48 (noting that the US market is for antique ivory); *see also supra* notes 71–72, 79–80 (outlining the complexity of the Chinese ivory market).

430. *See supra* note 396–98 (discussing the commodities market in China).

431. *See supra* notes 371–73 and accompanying text (describing the "boom-to-bust" cycles of speculative assets in China).

432. *See supra* note 373–75 (noting the difference between previous investment assets).

433. *See supra* note 378 and accompanying text (presenting Dr. Stiles' argument that a steady supply of ivory is a better solution to lowering demand).

434. *See supra* note 370–73 and accompanying text (discussing bust-and-boom economics and offering a reason why the "bust" effect has not occurred).

increase demand for ivory.<sup>435</sup> The author proposes that this increase in demand stems not from the sales themselves, but by the threat that there will be no more supply and those imports were the last to enter China.<sup>436</sup>

Further, given the historical and cultural importance that ivory holds, a ban on domestic ivory trade in China is unrealistic at this time.<sup>437</sup> While no objects can truly replace ivory, promoting other sources of stable investments may help to diminish trade.<sup>438</sup> Further, as more Chinese travel to Africa, tourism coupled with education about how ivory is cultivated may help increase the worth of live elephants and, therefore, decrease the worth of dead ones.<sup>439</sup>

#### F. *The COP Can Do A Better Job to Reduce Poaching*

CITES and the CoP have made great efforts in attempt to save the elephants.<sup>440</sup> Recent CITES and CoP initiatives, however, have failed to bring results.<sup>441</sup> This is especially true in regards to the DMM, about which members cannot even agree as to its purpose.<sup>442</sup> Even if the DMM were created in CoP17, the process would be only in its beginning stages of deciding whether to enact a complete moratorium on all trade, even domestically, or whether to have some consensus on how a legal trade might work moving forward.<sup>443</sup> The constant threats of a complete ban or further regulation cause

---

435. *See supra* note 360 and accompanying text (providing the pro-ban prospective on the 2008 CITES sale).

436. *See supra* note 348 and accompanying text (hypothesizing that a steady supply of wildlife is actually the way to repopulate endangered species).

437. *See supra* note 58–68 (summarizing the history of ivory in China).

438. *See N.L., supra* note 347 (predicting that lack of substitutes and scarcity is driving the illegal market for ivory); *see also supra* note 366–68 and accompanying text (showing a recent history of undependability in the stock market, causing the Chinese to search for other investments).

439. *See supra* note 385 and accompanying text (suggesting that making elephants worth more alive than dead may be one solution); *see also supra* note 386 and accompanying text (finding that public awareness campaigns may be the best method to fight the illegal trade).

440. *See supra* notes 82–110 and accompanying text (summarizing the history of CITES and the elephant).

441. *See, e.g. supra* note 124 and accompanying text (reporting that trade sanctions have not been utilized to enforce compliance with trade regulations); *see also supra* note 123 (showing that CITES decisions have been unsuccessful).

442. *See supra* notes 130–32 and accompanying text (explaining the failure of the DMM).

443. *See supra* note 107 and accompanying text (mentioning that DMM is a proposal to explore a legal ivory trade).

speculation in the market, both in the United States and China.<sup>444</sup> The CoP needs to come to a consensus, even if it is simply holding countries accountable for current laws that are not being enforced. Market stability may be the best route to stopping further increases in demand for illegal ivory.

### CONCLUSION

As this Note has distilled, the National Strategy raises several policy concerns in the United States and in China.<sup>445</sup> The implementation of an ivory ban, in particular the Director's Order, also solicits legal questions under the Takings Clause and the APA.<sup>446</sup> The Obama Administration's motivation for focusing on the illegal ivory markets and reducing demand is constructive: poaching in Africa must be diminished, if not eradicated. As the President wrote:

[T]o enhance domestic efforts to combat wildlife trafficking, to assist foreign nations in building capacity to combat wildlife trafficking, and to assist in combating transnational organized crime, executive departments and agencies (agencies) shall take all appropriate actions within their authority, including the promulgation of rules and regulations and the provision of technical and financial assistance, to combat wildlife trafficking.<sup>447</sup>

It is the author's opinion that by mainly focusing on creating a ban, the FWS has failed in its mission to meet what the Executive Order seeks to do. The focus should be on enforcement and providing support to FWS agents. The FWS can and should create domestic regulations, but without also destroying the rights of legitimate owners.

---

444. *See supra* notes 359–63 (showing uncertainty about the ivory market and prices).

445. *See supra* notes 330–32 (presenting the effects of the proposed plans under the National Strategy will have on collectors and businesses); *see also supra* notes 218–24, 377–80 and accompanying text (expounding on the National Strategy foreign policy and the debate surrounding an ivory ban in China).

446. *See supra* notes 243, 246–63 and accompanying text (introducing the potential procedural deficiencies of the Director's Order); *see also supra* notes 269, 294–96 and accompanying text (noting constitutional concerns of the FWS' proposed action under the National Strategy).

447. Exec. Order No. 13648, 78 Fed. Reg. at 40621.

