

# JAPAN'S IVORY TRADE IN THE FACE OF THE ENDANGERED SPECIES CONVENTION

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## 1. Introduction

In October 2016, the Conference of the Parties (CoP) to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),<sup>1</sup> at its 17<sup>th</sup> meeting in Johannesburg, South Africa, adopted – by consensus – Resolution Conf. 10.10 (Rev. CoP17). The new core provisions of the resolution read as follows:

“THE CONFERENCE OF THE PARTIES TO THE CONVENTION

....

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

....

3. RECOMMENDS that all Parties and non-Parties in whose jurisdiction there is a legal domestic market for ivory that is contributing to poaching or illegal trade, take all necessary legislative, regulatory and enforcement measures to close their domestic markets for commercial trade in raw and worked ivory as a matter of urgency;
4. RECOGNIZES that narrow exemptions to this closure for some items may be warranted; any exemptions should not contribute to poaching or illegal trade;
5. URGES those Parties in whose jurisdiction there is a legal domestic trade for ivory that is contributing to poaching or illegal trade and that have not closed their domestic ivory markets for commercial trade in ivory to implement the above recommendation as a matter of urgency”.<sup>2</sup>

In the wake of the Johannesburg meeting, a number of CITES member countries, including France, the United States, and China in particular, publicly announced the closure of their domestic ivory markets. By contrast, Japan's Ministry of the Environment affirmed, during parliamentary hearings on May 25, 2017, that “Japan should not be requested to close its domestic ivory market by the resolution”,<sup>3</sup> and in defiant response to a subsequent enquiry by the Secretary General of CITES, the Government of Japan on August 14, 2017, reiterated “its determination to continue implementing a thorough and strict control over trade in ivory”.<sup>4</sup>

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<sup>1</sup> Signed at Washington/DC, March 3, 1973, in force July 1, 1975; 993 UNTS 243 (hereafter CITES).

<sup>2</sup> The Resolution continues by specifying in detail the measures to be taken by “Parties in whose jurisdiction there is an ivory carving industry, a legal domestic trade in ivory, an unregulated market for or illegal trade in ivory, or where ivory stockpiles exist” (paragraph 6); and requesting Parties to inform the Secretariat “of the status of the legality of their domestic ivory markets and efforts to implement the provisions of this Resolution, including efforts to close those markets that contribute to poaching or illegal trade” (paragraph 8). Furthermore, paragraph 2 provides standards for the uniform marking of ivory tusks and cut pieces; see note 101 *infra*.

<sup>3</sup> Natsumi Higa, Parliamentary Secretary of the Ministry of the Environment, statement at the 15<sup>th</sup> meeting of the House of Councillors (the Upper House of Japan's Diet) Environment Committee; as quoted by MASAYUKI SAKAMOTO, WHY SHOULD THE JAPANESE DOMESTIC IVORY MARKET BE CLOSED? (2017), summary p. 2.

<sup>4</sup> *Report on Further Actions Taken by Japan to Combat Illegal Trade in Ivory*, CITES SC69 Doc. 29.3 Annex 2 (October 20, 2017), 1.

This article assesses the background to and the implications of these apparent contradictory interpretations of the obligations international wildlife law places on contracting parties.

## 2. Japan's participation in the Convention

Japan deposited its instrument of acceptance of CITES on August 6, 1980, with effect from November 4, 1980, and its acceptance of the 1979 Bonn Amendment of art. XI specifying the powers of the CoP on the same date (in force April 13, 1987), but has not yet accepted the 1983 Gaborone Amendment of art. XXI (regarding membership of the European Union, in force November 29, 2013).<sup>5</sup>

After hosting the 8<sup>th</sup> meeting of the CoP in Kyoto in 1992, Japan became a voting member of the CITES Standing Committee until 2000, chaired the committee from 1994 to 1997 and again from 2005 to 2016, and now serves as alternate regional member for Asia until 2022. The Japanese Government happens to be the second-largest single contributor (after the United States) to the CITES budget,<sup>6</sup> and in addition to its assessed contributions is a voluntary co-sponsor of the Secretariat's *National Legislation Project*<sup>7</sup> and of the project on *Monitoring the Illegal Killing of Elephants (MIKE)*.<sup>8</sup> In previous years, the Japan Ivory Importers' Association (JIIA) made additional voluntary contributions, levied annually from its membership, to the budget of the CITES Secretariat.<sup>9</sup>

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

- as national CITES management authorities: for terrestrial animal species the Ministry of Economy, Trade and Industry (METI); and for marine species the Japan Fisheries Agency (JFA) of the Ministry of Agriculture, Forestry and Fisheries (MAFF); and
- as national CITES scientific authorities: for terrestrial animal species the Ministry of the Environment (MoE); and for marine species the JFA.<sup>10</sup>

Further designated, as CITES enforcement authorities, were the MoE, the JFA, the Customs Clearance Division of the Ministry of Finance (MoF), and the Director of Economic Crimes Investigation of the National Police Agency.<sup>11</sup> METI and MoE have in turn delegated some of the administrative functions for ivory trade controls to the non-governmental Japan Wildlife Research Center (JWRC) as 'registration organization'. Moreover, a Public-Private

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<sup>5</sup> See the list of Contracting Parties having accepted the amendment to art. XXI of the Convention (as of July 8, 2015), <https://www.cites.org/eng/disc/parties/gaborone.php>.

<sup>6</sup> US\$579,891 for 2017; *CITES General Trust Fund (CTL): Status of Contributions as of July 31, 2017*, SC69 Doc. 7, Annex 4, (October 4, 2017).

<sup>7</sup> US\$50,000 annually; *CITES External Trust Fund (QTL): Status of Contributions as of December 31, 2015*, CoP17 Doc. 7.3, Annex 7, Activity D-1 (June 9, 2016).

<sup>8</sup> US\$60,000 in 2017; *CITES Extrabudgetary Funds as of August 25, 2017*, SC69 Doc. 8.2 (October 4, 2017).

<sup>9</sup> The JIIA was established in 1984 as the ivory branch of the *Japan General Merchandise Importers Association (JGMIA)*, at the initiative of the former Ministry of International Trade and Industry (MITI); see ISAO MIYAOKA, *LEGITIMACY IN INTERNATIONAL SOCIETY: JAPAN'S REACTION TO GLOBAL WILDLIFE PRESERVATION* 105-106 (2004). Between 1985 and 1989, two-thirds of the budget of the CITES Secretariat's ivory unit were provided by the JIIA; see MARTIN MEREDITH, *AFRICA'S ELEPHANT: A BIOGRAPHY* 211-214 (2001). The list of approved donors in CITES *Notification to the Parties* No. 2004/016 (March 10, 2004) included both the JGMIA and the *Japan Federation of Ivory Arts and Crafts Associations* (formerly *Japan Ivory Association, JIA*), chaired by Kageo Takaichi (see text at notes 37-38 *infra*). The CITES Secretariat thus "effectively accepted money from the fox for guarding the hen-house", in the sarcastic terms of ED COUZENS, *WHALES AND ELEPHANTS IN INTERNATIONAL CONSERVATION LAW AND POLICY: A COMPARATIVE STUDY* 132 (2014).

<sup>10</sup> On potential conflicts of interest arising from some of these designations, see note 108 *infra*.

<sup>11</sup> See the CITES Secretariat's list of national contacts: *Japan* (updated March 17, 2017), <https://www.cites.org/eng/cms/index.php/component/cp/country/JP>.

Council for the Promotion of Appropriate Ivory Trade Measures was created in May 2016 for consultation between the relevant government agencies and selected stakeholders, non-governmental organizations and experts.<sup>12</sup>

Japan's two most recent biennial reports under art. VIII(7)(b) ("legislative, regulatory and administrative measures taken to enforce the provisions of the Convention"), submitted to the CITES Secretariat on December 1, 2015 by the Ministry of Foreign Affairs, cover the years 2011-2012 and 2013-2014. According to sections C-5, C-6, C-8 and C-12 of the reports, there were "no significant seizures/confiscations of CITES specimens, criminal prosecutions or other court actions of significant CITES-related violations", nor any cooperative enforcement activities with other countries (exchange of intelligence, investigative assistance, joint operations, etc.) during the four-year period covered.<sup>13</sup> Curiously, the reports fail to mention the landmark *Takaichi* case decided by the Tokyo District Court in September 2011, discussed below;<sup>14</sup> and the attempted illegal export of 63 ivory pieces to China, intercepted at Fukuoka Airport in November 2011.<sup>15</sup>

The principal national legal instruments currently in force to implement the Convention at the domestic level include the Law for the Conservation of Endangered Species of Wild Fauna and Flora (LCES);<sup>16</sup> the Foreign Exchange and Foreign Trade Law (FEFTL);<sup>17</sup> and the Customs Law,<sup>18</sup> with their respective Cabinet Orders and Ordinances. Early external evaluations of the adequacy of this implementing legislation were predominantly critical.<sup>19</sup>

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<sup>12</sup> *Current State and Further Efforts Regarding Ivory Trade in Japan*, Report submitted by Japan to the 17<sup>th</sup> meeting of the Conference of the Parties, as Doc. Conf.17 Inf. 57 (September 2016). On the distinct Japanese tradition of governance by consensual deliberation councils (*shingikai*), see CHALMERS JOHNSON, *MITI AND THE JAPANESE MIRACLE* (1982); James V. Feinerman and Koichiro Fujikura, *Japan: Consensus-Based Compliance*, in ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS (Edith Brown Weiss and Harold K. Jacobson eds. 2000) 253-290, at 259.

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

<sup>14</sup> See text at note 37 *infra*. In addition, Japan's report to the 66<sup>th</sup> meeting of the CITES Standing Committee, on *Control of Trade in Elephant Ivory and Ivory Market* (Geneva, September 15, 2015) refers to the arrest of three persons in Tokyo for purchase and sale of whole ivory without permits in February 2014; see SC66 Doc. 29 (2016), Annex 20, 9 (case not mentioned in the 2013-2014 biennial CITES report).

<sup>15</sup> Infraction notice dated November 11, 2011 (pursuant to article 111 of the Customs Act), imposed by the Moji Customs Inspection and reported in the Finance Ministry's *Record of Infraction Cases in Violation of CITES* (2011) [in Japanese]; see MASAYUKI SAKAMOTO, *WHAT LIES BENEATH: EXPOSING THE LOOPHOLES WITHIN JAPAN'S CONTROL OF INTERNAL IVORY TRADE* 29 (2013).

<sup>16</sup> Act No. 75 of June 5, 1992 (effective April 1, 1993), as amended by Act No. 52 of June 29, 1994 (effective June 28, 1995) and Act No. 87 of 2005, supplemented on June 12, 2013 (effective June 1, 2014); English translation: <http://www.japaneselawtranslation.go.jp/law/detail/?id=2103&vm=04&re=02&new=1>. Further amendments in 2017 are not yet in force (*infra* notes 25 and 94). See also Cabinet Order No. 17 of 10 February 1993, as amended on April 28, 1998 and July 2, 2004.

<sup>17</sup> Act No. 228 of December 1, 1949, amended by Act No. 102 of 2005 (effective October 1, 2007) and Act No. 59/2009, English translation: <http://www.japaneselawtranslation.go.jp/law/detail/?id=2076&vm=&re=&new=1>; administrative sanctions increased by Revised Act adopted on May 24, 2017 (effective October 1, 2017); see [http://www.meti.go.jp/english/press/2017/0714\\_003.html](http://www.meti.go.jp/english/press/2017/0714_003.html).

<sup>18</sup> Act No. 61 of April 2, 1954, as amended by Act No. 13 of March 31, 2010, English translation excerpts in WIPO LEX (Geneva) Database, <http://www.wipo.int/wipolex/en/details.jsp?id=7002>.

<sup>19</sup> See Feinerman and Fujikura (*supra* note 12), at 269-273 and 289; Phyllis A. Mofson, *Protecting Wildlife from Trade: Japan's Involvement in the Convention on International Trade in Endangered Species*, 3 J. ENV'T & DEVELOPMENT 91-107 (1994), at 96; Kanami Ishibashi, *The Effectiveness of Mechanisms for Supervision or Compliance Control of Multilateral Environmental Agreements: A Critical Study of Compliance with CITES* [in Japanese], 15 KAGAWA HÖGAKU 53-128 (1995); and MIYUKI TAGUCHI, *INTERNATIONAL REGIMES AND COOPERATION: AN ANALYSIS OF THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA AND JAPAN* (Univ. of Oregon thesis 1996).

An expert analysis commissioned by the CITES Secretariat in 1994, as part of its comparative surveys of national legislation grading all member countries in one of three compliance categories,<sup>20</sup> had initially ranked Japan in category 2 only (“legislation believed *not* to meet all the requirements for the implementation of CITES”).<sup>21</sup> Following the 1994 amendment of the LCES (effective 1995) with regard to domestic ivory trade in particular, a CITES Panel of Experts on the African Elephant found in 1996/1997 that “the control of ivory stocks in Japan is good for whole tusks but needs improvements for parts of tusks”.<sup>22</sup> Nevertheless, the CITES Secretariat then upgraded the country from category 2 to category 1 (“legislation believed to generally meet the requirements for implementation of CITES”) as from May 1, 1997,<sup>23</sup> and has since ranked Japan in category 1 in all subsequent editions of its legislative status table.<sup>24</sup>

In the wake of the 2016 Johannesburg meeting and Resolution Conf. 10.10 (Rev. CoP17), the Japanese Government introduced further amendments to its legislation with regard to controls over the ivory trade, which are not yet in force.<sup>25</sup> These future changes are taken into account in what follows.

### 3. Japan and the ivory trade

The history of Japan’s prominent role in the ivory trade is well documented.<sup>26</sup> While CITES had always prohibited international trade in Asian elephants and their products, it initially legalized commercial ivory exports from African elephant range states under an agreed system of national export quotas since 1985, until the dramatic 1989 Conference resolutions upgraded all African elephants to fully protected status under Appendix I of the treaty, banning transnational ivory trade with effect from 1990.<sup>27</sup> Prior to 1990, Japan had accounted for up to 70% of the entire global trade in raw and worked ivory, with annual imports averaging some 270 tonnes.<sup>28</sup> Besides local consumption by traditional ivory-working

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<sup>20</sup> *National Laws for Implementation of the Convention*, Resolution Conf. 8.4 (Rev. CoP15, 1992/2010). See Rüdiger Wolfrum, *Means of Ensuring Compliance with and Enforcement of International Environmental Law*, 272 HAGUE ACADEMY OF INT’L LAW: COLLECTED COURSES 9-154 (1998), at 50 (fn. 99); ROSALIND REEVE, *POLICING INTERNATIONAL TRADE IN ENDANGERED SPECIES: THE CITES TREATY AND COMPLIANCE* 134-147 (2002); and text at notes 75-94 and 108 *infra*.

<sup>21</sup> CITES CoP9 Doc. 9.24/Rev., Annex 1 (1994; emphasis added). The analysis was carried out by TRAFFIC and World Wildlife Fund USA; see Joni E. Baker, *A Substantive Theory of the Relative Efficiency of Environmental Compliance Strategies: The Case of CITES*, 2 JIWLP 1-45 (1999), at 33.

<sup>22</sup> Chris Thouless (chairman) et al., *Report of the CITES Panel of Experts on the African Elephant* (1996, submitted to the Standing Committee on February 7, 1997), Chapter 8: Country Review Japan, 37-47, at 47.

<sup>23</sup> CITES CoP10 Doc. 10.31/Rev., Annex 1 (1997). Japan at that time chaired the Standing Committee; see the intervention by the chair, *Summary Report of the 37<sup>th</sup> Meeting*, SC37 (December 6, 1996), 28.

<sup>24</sup> Current edition in the Secretariat Report to the Standing Committee, SC69 Doc. 27 (Rev.1) of November 9, 2017, referring to the table on the CITES website updated on September 17, 2017; but see section II *infra*, and text at notes 74-94 and 108.

<sup>25</sup> Cabinet Bill No. 33, based on recommendations by the Central Environmental Council of January 30, 2017 and adopted by the Diet on May 26, 2017, to become effective in mid-2018; see notes 91-95 below. According to a press release by the MoE of August 29, 2017, “the acquisition process for ivory is likely to be stricter after the summer of 2019”; see <http://www.env.go.jp/press/uplode/upfile/104480/106731.pdf>.

<sup>26</sup> E.g., see Tom Milliken, *The Japanese Ivory Trade: Tradition, CITES and the Elusive Search for Sustainable Utilisation*, in *THE IVORY TRADE AND THE FUTURE OF THE AFRICAN ELEPHANT* (Stephen Cobb ed. 1989); and DOUGLAS H. CHADWICK, *THE FATE OF THE ELEPHANT* (1992).

<sup>27</sup> CITES Resolutions Conf. 7.8 and Conf. 7.9 (1989), since superseded by Resolution Conf. 10.10 (Rev. CoP17, 1997/2017). For background see Michael J. Glennon, *Has International Law Failed the Elephant?*, 84 AM. J. INT’L L. 1-43 (1990).

<sup>28</sup> Miyaoka (*supra* note 9), 119, citing Milliken (*supra* note 26).

industries (mainly for *hanko* seals, jewelry, and musical instruments),<sup>29</sup> this included re-exports to other destinations such as China and Hongkong in particular. According to the 1996/1997 report of the CITES Panel of Experts on the African Elephant, there was evidence of illegal imports of whole ivory tusks to Japan in significant quantities before 1990.<sup>30</sup>

After the 1989 ban, the CITES Conference only authorized exceptional international auctions of government-held ivory stocks in Southern African countries on two occasions in 1998 and 2008, conditioned upon a set of special requirements.<sup>31</sup> The conditions specified, *inter alia*, (a) that deficiencies in national enforcement and control measures identified by the CITES Panel of Experts in the exporting and importing countries concerned were to be remedied; and (b) that compliance with the conditions was to be verified by the CITES Secretariat. On the basis of the Secretariat's reports on verification missions carried out in 1998/1999 and 2005/2006,<sup>32</sup> the Standing Committee then confirmed that Japan had met these conditions and consequently was admitted to participate as trading partner in the auctions,<sup>33</sup> thus authorizing further Japanese imports of 50 tonnes (in 1999) and 40 tonnes (in 2009) of raw ivory from Africa.<sup>34</sup>

The ban declared by CITES and the ensuing stricter national controls introduced in Japan since 1995 were not sufficient, however, to put an end to illegal trade transactions fuelling the country's domestic ivory market.<sup>35</sup> In September 2011, the Tokyo District Court convicted the former chairman of the Japan Federation of Ivory Arts and Crafts Associations (JIA),<sup>36</sup> Kageo Takaichi, a prominent buyer in the 1998 and 2008 auctions, for multiple illicit ivory trade transactions.<sup>37</sup> He was a member of the Government's Review Committee for the Ivory Control System in 1992, regularly participated in CITES Conference meetings from 1985 to 2000;<sup>38</sup> and the CITES Secretariat's verification missions to Japan, on which the Standing Committee's assessment of Japan's regulatory controls as "satisfactory" was based, had in part relied on JIA testimony.

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<sup>29</sup> See ESMOND B. MARTIN & DANIEL STILES, *THE IVORY MARKETS OF EAST ASIA* 11-42 (2003).

<sup>30</sup> *Supra* note 21, at 44; and see Milliken (*supra* note 26), Annex 1, listing imports of over 2,300 tonnes from Congo Brazzaville, the Central African Republic, the Democratic Republic of Congo, Sudan, Tanzania, Uganda and South Africa, suspected to have been exported in violation of the laws of the countries of origin.

<sup>31</sup> Conference Decision 10.1 (1997) and annotation 2(g)(ii) to CITES Appendix II (*Loxodonta africana*), as revised at CoP17; see WILLEM WIJNSTEKERS, *THE EVOLUTION OF CITES*, 9<sup>th</sup> ed. (2011), at 629 and 634.

<sup>32</sup> Mission reports in Doc. SC41.6.1 (Rev.), Annex 2 (1999), 11-12; and SC54 Doc. 26.1 (Rev.1) (2006).

<sup>33</sup> Standing Committee, *Summary Reports* SC41 (1999) 15, and SC54 (2006) 17.

<sup>34</sup> Secretariat report to the Standing Committee, SC58 (2009), Doc. 36.3 (Rev.1); see also Reeve (*supra* note 20), 77-80; and Wijnstekers (*supra* note 31), 636. – Accordingly, legal ivory imports of 49,574 kg to Japan in 1999 were recorded in CoP16 Doc. 53.2.2 (Rev.1), 23; and 40,586.20 kg imported were registered by Japan in the CITES Trade Database for 2009.

<sup>35</sup> See Hisako Kiyono, *The Ivory Trade in Japan*, in *STILL IN BUSINESS: THE IVORY TRADE IN ASIA, SEVEN YEARS AFTER THE CITES BAN* (Stephen V. Nash ed. 1997) 6-18, and table JP-6 recording ivory seizures worldwide implicating Japan between 1989 and 1997.

<sup>36</sup> *Supra* note 9.

<sup>37</sup> Sentenced to one year's imprisonment on probation, and a corporate fine of one million yen (US\$12,500), for illegal purchases of 509 kg of raw ivory (58 pieces) between 2005 and 2010; see the analysis of the case by Sakamoto (*supra* note 15), 8-10. After the *Takaichi* judgment, the maximum individual penalties under the LCES were raised in 2013 from one to three years' imprisonment and from one to five million yen, and the maximum corporate fine was increased from one million to 100 million yen; see Japan's report to the CITES Standing Committee, SC65 Doc. 42.1 (June 2014), Addendum, Annex 2, p. 1.

<sup>38</sup> See the list of participants, *PROCEEDINGS OF THE 5<sup>TH</sup> MEETING OF THE CITES CONFERENCE* (Buenos Aires, 1985), p. 666; and of the 11<sup>th</sup> meeting (Nairobi, 2000), p. 79. The 15<sup>th</sup> meeting of the Conference (Doha, 2010) was attended by his son, Masaya Takaichi, as representative of the JIA; see the list of participants, p. 50.

At its 17<sup>th</sup> meeting in Johannesburg, the CoP refused to continue the practice of international auction sales – after a nine-year “moratorium” – and did not approve the development of a so-called decision-making mechanism for future authorization of ivory trade.<sup>39</sup> The 2016 report of the CITES Elephant Trade Information System (ETIS) had specifically drawn attention to “regulatory loopholes and lapses” in Japan.<sup>40</sup> There were also new alarming reports by independent non-governmental observers, alleging deficits in Japan’s application of the Convention to trade in ivory.<sup>41</sup> While the CITES Secretariat had previously dismissed some of the earlier NGO criticism as “misleading and inaccurate”,<sup>42</sup> the recent reports deserve to be taken seriously, since they raise at least two important international legal concerns:

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

### 3.1 Is Japan Exempt from the Ban on Domestic Ivory Markets?

The public comments by the Government of Japan on the outcome of the Johannesburg Conference, as communicated to Parliament and to the CITES Secretariat,<sup>43</sup> appear to interpret paragraphs 3 to 5 of revised Resolution 10.10 – even though that Resolution does not explicitly mention any particular country – as a new exception clause for any legal domestic ivory market which is *not* “contributing to poaching or illegal trade”, and which therefore would be exempt from the agreed general CITES ban on domestic ivory trade.

Exemptions or “carve-outs” in public international law purport to exclude specific measures from the scope of an agreed primary rule.<sup>44</sup> The general principle is that in such cases the burden of proof is on the party invoking an exception from the rule. As pointed out by the International Court of Justice (ICJ) in the *Antarctic Whaling* case in 2014, however, the determination as to whether or not an exception applies to a given case, such as whaling for scientific purposes under art. VIII of the International Whaling Convention, is not simply left to a state’s unilateral/subjective perception or interpretation, but must respect objective standards.<sup>45</sup> Applying that maxim to the present case, this means that if the Government of Japan actually claims to be dispensed from the general ban agreed by the Conference of the Parties to CITES, it will have to demonstrate that its domestic ivory market – or any

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<sup>39</sup> Proposal CoP17 Doc. 84.3 (2016) was rejected by a vote of 76:21:13; *Summary Record of the 3<sup>rd</sup> session of Conference Committee II* (September 26, 2016), CoP17 Com. II Rec.3 (Rev.1), 5.

<sup>40</sup> Tom Milliken et al., *The Elephant Trade Information System (ETIS) and the Illicit Trade in Ivory: Report to 17<sup>th</sup> Meeting of the Conference of the Parties to CITES*, CoP17 Doc. 57.6 (Rev.1) (May 27, 2016), Annex, 22.

<sup>41</sup> ENVIRONMENTAL INVESTIGATION AGENCY (EIA), *JAPAN’S ILLEGAL IVORY TRADE AND FRAUDULENT REGISTRATION OF IVORY TUSKS* (2015); EIA, *THE DIRTY SECRETS OF JAPAN’S ILLEGAL IVORY TRADE* (2016); MASAYUKI SAKAMOTO, *THE LAST IVORY BAN HAVEN: THE DRIVERS OF JAPAN’S ILLEGAL IVORY TRADE AND THE FAILURE OF JAPAN’S DOMESTIC IVORY LEGISLATION* (2016); and TOMOMI KITADE & RYOKO NISHINO, *IVORY TOWERS: AN ASSESSMENT OF JAPAN’S IVORY TRADE AND DOMESTIC MARKET* (TRAFFIC/WWF, December 2017).

<sup>42</sup> CITES Standing Committee, *Summary Report of the 55<sup>th</sup> meeting*, SC55 (2007), 2.

<sup>43</sup> *Supra* notes 3 and 4.

<sup>44</sup> See generally EXCEPTIONS AND DEFENCES IN INTERNATIONAL LAW (Lorand Bartels and Federica Paddeu eds., forthcoming 2018).

<sup>45</sup> *Whaling in the Antarctic* (Australia v. Japan, New Zealand intervening), Judgment of March 31, 2014, REPORTS OF THE INTERNATIONAL COURT OF JUSTICE (2014), paragraphs 52, 61 and 66 (“objectively reasonable”, in the terms agreed by Japan during the oral proceedings).

exemption granted under paragraph 4 of Resolution Conf. 10.10 (Rev. CoP17) – objectively does not contribute *either* to elephant poaching *or* to illegal international ivory trade.

### **3.1.a Poaching**

International debates on the causal link between “legalized” ivory trade and elephant poaching remain difficult and controversial, mainly because of the undeniable role of extraneous factors, such as economic crises and local military conflicts. A now classic example involves the controversy over the global impact of the official ivory auctions under CITES auspices in 1998 and 2008, with over 90 tonnes of the total ivory stocks then auctioned going to Japan.<sup>46</sup> An independent interdisciplinary study completed in June 2016 concluded, taking into account all available statistical information and relevant econometric modeling, that the over-all evidence pointed to a demonstrable contributory effect of this “experimental” legalization of trade on the dramatic rise of elephant poaching in subsequent years.<sup>47</sup> While these conclusions were challenged at the Johannesburg Conference by the Technical Advisory Group (TAG) of the Secretariat,<sup>48</sup> they have since been corroborated in a reasoned rebuttal by the authors of the study and by more recent statistical comparisons.<sup>49</sup> In light of these scientific findings in a global context, it would seem difficult for the Japanese authorities to deny or to disprove at least a contributory causal cross-connection between legalized ivory trade and poaching.<sup>50</sup>

### **3.1.b Illegal trade**

“Trade”, as defined by CITES article I(c), is transnational (border-crossing) trade; i.e., imports and exports/re-exports. The existence of a lucrative legal (or “white”) domestic ivory market inevitably tends to attract, at the same time, illicit trans-border smuggling and “black” trafficking/funneling.<sup>51</sup> The 1997 report of the CITES Panel of Experts listed at least 47 cases of illegal *imports* to Japan of raw and worked or semi-worked ivory *after* the 1989 CITES trade ban,<sup>52</sup> and the Secretariat’s verification mission to Japan in 2006 noted 57 cases of attempted illegal imports since 2000.<sup>53</sup> The 2007 ETIS report identified Japan as the country

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<sup>46</sup> *Supra* notes 31-34.

<sup>47</sup> SOLOMON HSIANG & NITIN SEKAR, DOES LEGALIZATION REDUCE BLACK MARKET ACTIVITY? EVIDENCE FROM A GLOBAL IVORY EXPERIMENT AND ELEPHANT POACHING DATA, National Bureau of Economic Research Working Paper No. 22314 (June 2016), <http://www.nber.org/papers/w22314>.

<sup>48</sup> Fiona M. Underwood et al., *A Statement from the MIKE and ETIS Technical Advisory Group on Recent Claims that the CITES-Approved Ivory Sales in 2008 Caused a Spike in Poaching Levels*, CITES Doc. CoP17 Inf. 42 (text submitted by the CITES Secretariat, September 19, 2016).

<sup>49</sup> See Solomon Hsiang and Nitin Sekar, *Evidence Should Be Used in Global Management of Endangered Species: Reply to the CITES Technical Advisory Group*, Doc. CoP17 Inf. 96, Annex (text submitted by Kenya, October 5, 2016); and the CITES Secretariat Report on *Elephant Conservation, Illegal Killing and Ivory Trade*, SC69 Doc. 51.1 (October 24, 2017), 3, mainly based on ETIS data and new tables for the years 2007-2016: *Status of Elephant Populations, Levels of Illegal Killing and the Trade in Ivory: A Report to the CITES Standing Committee*, SC69 Doc. 51.A (October 24, 2017), 22-30 and figures x1-x6.

<sup>50</sup> In the words of one of the co-authors of the study, “we looked for alternative explanations in the data, but the best evidence still indicates that the legal sale exacerbated the destruction of elephant populations across Africa”; Dr. Nitin Sekar (Princeton University, subsequently Science Policy Fellow, USAID Office of Forestry and Biodiversity), as quoted in the *GUARDIAN* (June 13, 2016).

<sup>51</sup> Annecoos Wiersema, *CITES and the Whole Chain Approach to Combating Illegal Wildlife Trade*, 20:3-4 *JWLP* (forthcoming 2017), sec. 3.3.2.

<sup>52</sup> Report cited in note 22 *supra*, at 41. Table 4 of the ETIS report to the 11<sup>th</sup> CITES Conference (Nairobi, 2000), Doc. 11.31.1, Annex 5, recorded 20 cases of ivory seizures in Japan between 1989 and 1997.

<sup>53</sup> See SC54 Doc. 26.1 (Rev.1), Annex, paragraph 22. This figure did not include the seizure of 2.8 tonnes of smuggled ivory at the port of Osaka in August 2006, which apparently had not yet been notified to CITES; on

of destination in large-scale seizures totaling 11.3 tonnes of smuggled ivory between 1989 and 2006;<sup>54</sup> and a series of imports of cut ivory pieces from African countries by ordinary mail (declared as “gifts” or “samples”) has been documented for 2014-2015.<sup>55</sup> However, the 2016 ETIS report concluded that Japan no longer appeared to be a destination for the continuing illegal ivory flows presently leaving Africa, a view shared by the most recent report of TRAFFIC Japan in December 2017.<sup>56</sup> On the other hand, both reports note with great concern that ivory from Japan is now being increasingly and illegally *re-exported* to China in significant quantities.<sup>57</sup> From 2011 to 2016, the Chinese authorities made at least 106 seizures of ivory, totaling 2.155 tonnes, that were illegally imported from Japan.<sup>58</sup>

A preferred medium for the growing illicit traffic in ivory are *internet* sales by leading Japanese networks such as Yahoo! JAPAN. For example, as documented by several recent NGO surveys, more than 12 tonnes of whole tusks and cut pieces of ivory were sold on Yahoo! JAPAN Auction sites from 2012 to 2014,<sup>59</sup> and more than 9,000 ivory items over a four-week period from May to June 2017 alone.<sup>60</sup> Via online retail sites and bidding agencies based both in Japan and abroad (China, Hong Kong, Taiwan, South Korea), the raw and worked ivory products so acquired then frequently leave Japan by mail, and only a fraction of them end up being searched and seized by customs controls in the recipient countries.<sup>61</sup> Yahoo! JAPAN, considered the world’s largest on-line network for ivory trading, persistently refuses to stop this traffic.<sup>62</sup> This internet extension of Japan’s domestic “white” market

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this case see MASAYUKI SAKAMOTO, DESTINATION JAPAN – AN INVESTIGATION INTO THE OSAKA SEIZURE AND LAUNDERING OF ILLEGAL IVORY (2007).

<sup>54</sup> Tom Milliken et al., *Monitoring of Illegal Trade in Ivory and Other Elephant Species*, CoP14 Doc. 53.2 (2007), Annex 1, p. 43, Table 5.

<sup>55</sup> Sakamoto (*supra* note 41), 6-7: When ivory is found in incoming international mail with a declared value below 200,000 yen (US\$2,000), current practice of the Japanese customs authorities is to notify the addressee that a CITES import/export permit is required under the FEFTL (*supra* note 17), and in the absence of a response, to return the shipment to the sender.

<sup>56</sup> Milliken et al. (*supra* note 40), 23; Kitade and Nishino (*supra* note 41), 51.

<sup>57</sup> Milliken et al., *id.*, citing the case of a couple sentenced in China to 15 years’ imprisonment for importing 3.25 tonnes of raw and worked ivory from Japan in multiple shipments between 2010 and 2012. Kitade and Nishino (*supra* note 41), at 19-20, point to the involvement of transnational criminal networks; see also *Watchdog Urges Tokyo to Curb ‘Rampant’ Illegal Ivory Exports to China*, JAPAN TIMES (21 December 2017).

<sup>58</sup> Kitade and Nishino (*supra* note 41), 19 (table 3, based on ETIS data as of August 17, 2017); Sakamoto (*supra* note 41), 4, documenting seizures in Dalian and Beijing between 2014 and 2016. E.g., in August 2016, 101.4 kg of ivory pieces from Japan were seized by customs in Langfang/China; <http://www.ecns.cn/visual/hd/2016/08-15/102308.shtml>. See also the interception of ivory destined for China at Fukuoka airport (2011), *supra* note 15.

<sup>59</sup> See TOMOMI MATSUMOTO, A REVIEW OF ONLINE IVORY TRADE IN JAPAN (TRAFFIC Japan, 2015). Ivory sales on Yahoo! JAPAN Auctions from 2008 to 2014 generated revenues of over 2.3 billion yen (US\$25 million); EIA 2015 (*supra* note 41), 9. – Yahoo! JAPAN is a member of the joint secretariat of the Public-Private Council for the Promotion of Appropriate Ivory Trade Measures (*supra* note 12); see the list of participants at the 3<sup>rd</sup> Council meeting on November 2, 2016, [http://www.meti.go.jp/english/policy/external\\_economy/Ivory/pdf/161102.pdf](http://www.meti.go.jp/english/policy/external_economy/Ivory/pdf/161102.pdf).

<sup>60</sup> TOMOMI KITADE, AN UPDATED REVIEW OF ONLINE IVORY TRADE IN JAPAN (TRAFFIC Briefing: August 2017). The TRAFFIC “snapshot survey”, carried out in May-June 2017 with a focus on “customer-to-customer” (CtoC) online trading at *Mercari* and *Yahoo! JAPAN* sites (*Mercari* has since ceased to sell ivory), found that “regulation over trade in any ivory items *other* than whole tusks is non-existent” (p. 2; and p. 8, table 2). See <http://www.traffic.org/home/2017/8/8/traffic-surveys-find-thousands-of-ivory-items-sold-weekly-on.html>; and Daisuke Kikuchi, *Online Retailers in Japan Not Doing Enough to Stop Illegal Ivory Trade*, JAPAN TIMES (August 9, 2017).

<sup>61</sup> E.g., 804.4 kg of ivory from Japan seized in Beijing in October 2015; see Sakamoto (*supra* note 41), 4, and <http://www.traffic.org/home/2015/10/12/beijing-forest-police-smash-major-wildlife-trafficking-ring.html?printerFriendly=true>. The ivory in the case cited in note 57 *supra* was also acquired via the internet.

<sup>62</sup> See Yoshiyasu Shida and Deborah M. Todd, *Yahoo JAPAN Defies Calls to Halt Ivory Sales as Poaching Soars*, JAPAN TIMES (January 20, 2017); and the public reiteration of the company’s refusal, *Yahoo! JAPAN’s Initiatives Towards the Eradication of Illegal Ivory Trade*, <https://publicpolicy.yahoo.co.jp/2017/09/2014.html>

towards a booming, worldwide “grey” market in ivory is largely beyond national control and is likely to increase further,<sup>63</sup> especially after the closure of China’s domestic ivory markets in 2017.<sup>64</sup> The global dimension of the issue was acknowledged at the Johannesburg Conference in paragraphs 11 and 12 of Resolution Conf. 11.3 (CoP17), on compliance and enforcement regarding e-commerce in CITES-listed species and internet-related wildlife trade. As cautioned in a report on the US ivory market, in the absence of effective domestic regulation in this field “it is highly likely that physical trade may be offset by virtual commerce”.<sup>65</sup>

One of the conditions for Japan’s designation as a trading partner for the “legalized” ivory auctions conducted under CITES auspices in 1998 and 2008, as laid down in annotation 2.g.ii to Appendix II of the Convention, was that the country would “have sufficient national legislation and domestic trade controls to ensure that the imported ivory *will not be re-exported*”.<sup>66</sup> However, there is currently no evidence of effective national control measures or sanctions to prevent dubious re-exports of ivory acquired via online shopping and Internet auctions in Japan, partly because of shortcomings in the registration system already criticized by the CITES Panel of Experts in 1997,<sup>67</sup> and further discussed in section II below.

Japan’s 2015 Report to the Standing Committee on Control of Trade in Elephant Ivory and Ivory Market makes no reference to any re-export controls over transnational online trade.<sup>68</sup> The 2016 Report of the Public-Private Ivory Trade Council merely suggests, with regard to illegal electronic commerce, a “prohibition [on the] placing of items that state overseas-shipping”,<sup>69</sup> but affirms that such measures “are not necessarily required” under applicable national laws and regulations and should instead be “conducted voluntarily” by market place providers.<sup>70</sup> At the fourth meeting of the Council in Tokyo on 28 March 2017, the MoE made it clear that, even under the new LCES amendment, scheduled to enter into force in 2018, “placement of ivory products on an internet auction site is *not* subject to regulation if it is a ‘one-off sale’ by an individual”, as distinct from continuous business operations.<sup>71</sup> Yet, the survey by TRAFFIC Japan in May-June 2017 found that some 38% of the ivory sellers posing as “individuals” were likely to be unidentified business traders.<sup>72</sup> Consequently, in the absence of mandatory (sanctioned) rules and empirical verification of their application in practice, and in the face of the irrefutable evidence of recent seizures in China of ivory

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(September 20, 2017). By contrast, several other global on-line networks (including *Amazon*, *eBay*, *Google*, *Alibaba*, and most recently *Rakuten Ichiba*) have already discontinued ivory sales on their sites.

<sup>63</sup> MASAYUKI SAKAMOTO, BLACK AND GREY: ILLEGAL IVORY IN JAPANESE MARKETS (2<sup>nd</sup> ed. 2004); Kitade and Nishino (*supra* note 41), 53, recommending a ban on all online ivory trade in Japan.

<sup>64</sup> As from December 31, 2017; see the survey by YUANKUN ZHAO et al., REVISITING CHINA’S IVORY MARKETS IN 2017 (TRAFFIC Briefing, August 2017), [http://www.wwfchina.org/content/press/publication/2017/Briefing-Revisiting%20Chinas%20Ivory%20Markets%20in%202017\(4\).pdf](http://www.wwfchina.org/content/press/publication/2017/Briefing-Revisiting%20Chinas%20Ivory%20Markets%20in%202017(4).pdf).

<sup>65</sup> RACHEL KRAMER et al., THE US ELEPHANT IVORY MARKET: A NEW BASELINE (TRAFFIC/WWF Report, July 2017), 84.

<sup>66</sup> *Supra* note 31 (emphasis added).

<sup>67</sup> *Supra* note 22.

<sup>68</sup> See the chapter on “control over online trade” in *Japan’s Report on Control of Trade in Elephant Ivory and Ivory Market*, SC66 Doc. 29, Annex 20 (September, 15, 2015), 8-9. Yet, general rules on internet advertising for all CITES-listed species had been introduced by the LCES amendments of June 12, 2013 (*supra* note 16).

<sup>69</sup> *Supra* note 12, at 16-17. For example, one Tokyo-based website offers ivory products and whole tusks under the slogan “buy in Japan, receive anywhere in the world”; see also Matsumoto (*supra* note 59), p. 3 and figure 4.

<sup>70</sup> Along the same lines, the focus of the Government’s countermeasures to illegal on-line trading as enumerated in its 2015 report to the Standing Committee (*supra* note 68) is on voluntary cooperation and “independent efforts” by business stakeholders at periodic compliance monitoring. See also the Japanese Government’s 2017 report (*supra* note 4), paragraph 2(d), emphasizing voluntary measures by “the providers of online market place including ivory and ivory products” under the auspices of the Public-Private Ivory Trade Council.

<sup>71</sup> Meeting summary at [http://www.meti.go.jp/english/policy/external\\_economy/Ivory/pdf/170328.pdf](http://www.meti.go.jp/english/policy/external_economy/Ivory/pdf/170328.pdf), p. 3.

<sup>72</sup> Kitade (*supra* note 60), p. 6 and figure 7.

acquired online in Japan,<sup>73</sup> it is difficult to imagine how the Japanese Government could possibly prove that the country's open domestic electronic market is *not* contributing to illegal international trade in ivory.

Under these circumstances, Japan's domestic ivory market cannot be considered as meeting the requirements for an exception from Resolution Conf. 10.10 (Rev. CoP17), paragraphs 3 to 5. Also taking into account the fundamental principle of equal treatment for all Contracting Parties to the Convention,<sup>74</sup> this national market should therefore be closed henceforth, "as a matter of urgency", lest it lead, after the ongoing closure of other domestic ivory markets elsewhere, and in China in particular, to the perverse result of ensuring that Japan acquires a virtual global monopoly for "legalized" trade in elephant ivory.

### 3.2 Does Japan Qualify for Inclusion in Category 1 of the Legislation List?

The preceding discussion raises the important consequential question as to whether or not Japan still meets the criteria for being ranked in the top category of the CITES National Legislation List, to which the country was elevated by the Secretariat in 1997.<sup>75</sup> Pursuant to Resolution Conf. 8.4 (Rev. CoP15, 2010), Parties listed in category 1 ("legislation which is believed generally to meet the requirements for CITES implementation")<sup>76</sup> must have laws to (i) designate at least one Management Authority and one Scientific Authority; (ii) prohibit trade in specimens in violation of the Convention; (iii) penalize such trade; and (iv) confiscate specimens illegally traded or possessed.<sup>77</sup> In the absence of acceptable legal regulations regarding those four points, Parties are grouped either in category 2 ("legislation believed generally not to meet all the requirements") or in category 3 ("legislation believed generally not to meet the requirements"), thus indicating a need for future improvements.<sup>78</sup>

The "core" of these criteria,<sup>79</sup> further elaborated by the Secretariat in its Checklist for Reviewing CITES Legislation,<sup>80</sup> is the prohibition of trade in specimens in violation of the Convention. As applied to the ivory trade, this requires adequate regulations specifying the products covered by the prohibition, usually by national administrative systems of registration and marking that are internationally harmonized by resolutions and decisions of the CoP,<sup>81</sup> and the necessary legal powers for the competent Management Authority and other appropriate government agencies to monitor and enforce compliance.<sup>82</sup> To prevent the CITES

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<sup>73</sup> E.g., see the case reported in notes 57 and 61 *supra*.

<sup>74</sup> See generally R.P. Anand, *Sovereign Equality of States in International Law*, 197 RECUEIL DES COURS 9-228 (1986 II); and ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* (3<sup>rd</sup> edn. 2013), 280: "It is a cornerstone of international law that all states are equal."

<sup>75</sup> See text at notes 20 to 24 *supra*.

<sup>76</sup> Currently certified for 55.2% of the total CITES membership; see the Secretariat Report, *National Laws for Implementation of the Convention*, SC69 Doc. 27 (Rev.1) (November 9, 2017), referring to the legislative status table on the CITES website dated September 17, 2017, pp. 1-2.

<sup>77</sup> *National Laws for Implementation of the Convention*, CoP12 Doc. 28 (Santiago, 2002).

<sup>78</sup> The categories were initially formulated in CITES Doc. 10.31 (Rev. 1994); see Reeve (*supra* note 20), 135; and Fazeela Ahmed Shaheem, 'Effectiveness of CITES: Analysis in Relation to National Implementing Legislation', in *INTERNATIONAL ENVIRONMENTAL LAW-MAKING AND DIPLOMACY REVIEW 2016* (Melissa Lewis, Tuula Honkonen and Seita Rampponen eds. 2017) 121-131, at 126-130.

<sup>79</sup> CoP12 Doc. 28 (*supra* note 77), at p. 2, paragraph 9(b).

<sup>80</sup> CoP14 (The Hague, 2007); update in <https://cites.org/sites/default/files/eng/prog/Legislation/ChecklistEN.pdf>.

<sup>81</sup> Starting with Resolution Conf. 3.12 (New Delhi, 1981) and repeatedly revised, consolidated in Resolution Conf. 10.10 (Rev. CoP17).

<sup>82</sup> Resolution Conf. 10.10 (Rev. CoP17), paragraph 6(c).

provisions from ending up as mere “empty threats”,<sup>83</sup> their effectiveness at the national level thus needs continuous assessment.

In the case of Japan, however, the CITES Panel of Experts on the African Elephant had already noted in 1997 that the country’s “control of retail trade is not adequate to differentiate the products of legally acquired ivory from those of illegal sources”<sup>84</sup> Moreover, the CITES Secretariat reported to the Standing Committee in 2004 that Japan’s “internal ivory controls do *not* meet all the required measures identified in Resolution Conf. 10.10 (Rev. CoP12)”.<sup>85</sup> More specifically and contrary to assurances given by the Japanese authorities in the course of subsequent technical verification missions,<sup>86</sup> the liberal registration procedure, more appropriately described as “declaratory notification” and introduced in 1999 by subsidiary administrative regulations under the LCES, resulted in over 7,900 whole tusks being newly and retroactively declared as legal “pre-ban imports” between 2010 and 2015.<sup>87</sup> Even more importantly, declaratory notification did not require certified, documentary proof of the legal acquisition date and the legality of origin of the ivory stocks registered. Nor did it provide for physical inspection of the stocks, frequently relying instead on simple personal declarations or mere photographic evidence presented by applicants or their substitutes.<sup>88</sup> As the criminal court hearings in the 2011 *Takaichi* case and the 2017 *Raftel* case brought to light,<sup>89</sup> the system in reality facilitated fraudulent registration and rampant “laundering” for ivory of dubious origin.

Partly in response to mounting public criticism,<sup>90</sup> and to the outcome of the 2016 Johannesburg CITES Conference, the Government of Japan has since introduced a number of legislative amendments, including a future revision of the LCES notification procedure.<sup>91</sup> While the improvements so envisaged and notified to CITES on August 14, 2017<sup>92</sup> can be interpreted as an official acknowledgment of notorious shortcomings in existing legislation and administrative practice, they will *not* close all of the known loopholes in the current system of domestic regulation.<sup>93</sup> In particular, the projected amendments do not cure the very

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<sup>83</sup> See Geoffrey Wandesforde-Smith, *Looking for Law in All the Wrong Places? Dying Elephants, Evolving Treaties, and Empty Threats*, 19 *JWLP* 365-381 (2016).

<sup>84</sup> *Supra* note 22, at 47; see also the critical comments by Japanese scholars cited in note 19 *supra*.

<sup>85</sup> *Control of Internal Ivory Trade*, SC50 Doc. 21.1 (Rev.1), p. 3 (emphasis added).

<sup>86</sup> See the CITES Secretariat’s 2005/2006 mission reports, Doc. SC54 Doc. 26.1 (Rev.1), Annex, paragraph 13, affirming that “proof of legal origin and acquisition must be provided at the time ivory is registered.”

<sup>87</sup> See the table – based on annual MoE records – in Sakamoto (*supra* note 41), p. 8; these figures do *not* include the 3,365 tusks derived from the 2008 one-off sales, registered in 2009. According to an explanatory note by the Government of Japan, the high numbers recorded after 2011 “could be attributed (1) to an increase in registration cases, driven by the possessors’ will to voluntarily comply with the law, owing to the system being [publicized] and known widely, and (2) to an increase in cases, in particular, of inheritance and transfer of whole tusks that were imported legally in the past, due to the death or aging of their possessors;” Doc. CoP17 Inf. 56 (2016), p. 3.

<sup>88</sup> Art. 11(2) of the MoE *Enforcement Regulations* for the implementation of LCES Article 20(2) merely requires a “written statement” by the applicant, or “any other supporting document”. The NGO *Japan Wildlife Research Centre* (JWRC, designated as registration organization under LCES art. 23) currently has no powers of physical inspection; see Sakamoto (*supra* note 63), p. 48.

<sup>89</sup> See notes 14 and 37 *supra*. On 20 June 2017, the Tokyo Metropolitan Police (*Keishi-chō*) announced the initiation of criminal proceedings against the chairman of the *Raftel Antiques* company and 27 of its clients, for fraudulent registration of over 400 elephant tusks over the past five years; summary in *Sankei Shimbun News*, <http://www.sankei.com/affairs/news/170620/afr1706200026-n1.html>; Kitade and Nishino (*supra* note 41), 25.

<sup>90</sup> Including “pro-*elephant*” demonstrations and symposia initiated by NGOs in 2016 and 2017.

<sup>91</sup> See notes 15 and 24 *supra*; in particular, new section 7 (articles 6 to 24) of Cabinet Bill No. 33 (2017).

<sup>92</sup> See the Japanese Government’s 2017 report cited in notes 4 and 69 *supra*.

<sup>93</sup> See the enumeration of loopholes by Sakamoto (*supra* note 41) 6-9; and Sakamoto (*supra* note 63) 42-58. See also the comments on Bill No. 33 submitted by the *Japan Wildlife Conservation Society* on March 1, 2017,

real defects in the tusk registration/notification process and cannot prevent laundering of illegal ivory via the present “declaratory” mechanism. At any rate, the changes will not come into force until mid-2018 – or perhaps even “after the summer of 2019”, according to an MoE press release of August 29, 2017, publicly soliciting ivory “legalization” under the old, un-amended system.<sup>94</sup> As a practical matter, then, the Ministry’s nationwide campaign amounts to little more than a two-year amnesty for illegally imported ivory, mainly in the interest of securing a supply of raw material for Japan’s ivory carving industry.<sup>95</sup>

The accountability of Japan for the serious shortcomings of its regulatory system has been noted in the context of the CITES National Ivory Action Plans (NIAP) process. The 2016 ETIS report to the Johannesburg Conference expressly recommended to keep Japan on the list of “Parties important to watch” in the NIAP process.<sup>96</sup> Surprisingly, however, following a recommendation by the CITES Secretariat, the Standing Committee decided by “postal procedure” on May 16, 2017, to overrule the ETIS recommendations to the Conference, and instead to *exempt* Japan from any follow-up obligations under the terms of Annex 3 of Resolution Conf. 10.10 (CoP17).<sup>97</sup> Four African elephant range states formally objected to that decision and requested the Standing Committee to reconsider it at the subsequent 69<sup>th</sup> meeting of the Committee in Geneva in November 2017 (SC69).<sup>98</sup> As a result, the Committee softly “encouraged Japan to remain vigilant in its efforts to combat illegal trade in ivory, and to closely review trends to ensure that the activities and measures it is implementing responded effectively to illegal trade in ivory as it affects the country.” It further invited Japan to report, through the Secretariat, to its 70<sup>th</sup> meeting in Sochi, Russia on the implementation of Resolution Conf. 10.10 (Rev. CoP17), and requested the Secretariat to continue to monitor progress in accordance with the provisions of paragraph 9 of the Resolution, bringing any issues of concern to the attention of the Committee at its 70<sup>th</sup> meeting.<sup>99</sup> After SC69, the Secretariat then issued a Notification to all Parties, referring to paragraphs 3 and 8 of Resolution Conf. 10.10 (Rev. CoP17) and inviting “concerned Parties to provide relevant information pursuant to paragraph 8 of the said Resolution to the Secretariat”;<sup>100</sup> and a reminder regarding paragraphs 2 and 6 of the Resolution on ivory marking and inventories.<sup>101</sup>

#### 4. Conclusion

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[http://www.jwcs.org/data/LCES2017JWCS\\_en.pdf](http://www.jwcs.org/data/LCES2017JWCS_en.pdf) (recommending closure of the domestic ivory market, p. 7); and the critical analysis by Kitade and Nishino (*supra* note 41), 5-8 (also recommending market closure).

<sup>94</sup> See note 25 *supra*. According to MoE Reference Document No. 7 submitted to Parliament in February 2017 (*Strengthening Program on Ivory Trade Control*), the Ministry plans to await the results of a further feasibility study before amending its administrative procedures; see Sakamoto (*supra* note 3), 82 and xviii.

<sup>95</sup> EIA, *Japan’s Illegal Ivory Trade: Briefing Document for Delegates to SC69* (Geneva 2017), at 2.

<sup>96</sup> Milliken et al. (*supra* note 40), pp. 22-23 and 25; and *National Ivory Action Plan Process: Report of the Secretariat to the Standing Committee*, SC69 Doc. 29.3 (October 20, 2017), p. 1, paragraph 3.

<sup>97</sup> SC69 Doc. 29.3 (*supra* note 96), p. 2; and CITES *Notification to the Parties* No. 2017/042 (June 2, 2017), paragraph 5(a): “Japan should *not* participate in the National Ivory Action Plans (NIAP) process at this time.”

<sup>98</sup> *Implementing Aspects of Resolution Conf. 10.10 (Rev. CoP17) on the Closure of Domestic Ivory Markets*, SC69 Doc. 51.2, submitted by Burkina Faso, Congo, Kenya and Niger (October 5, 2017), paragraphs 12 and 14.

<sup>99</sup> See the Standing Committee’s decision at its third session on agenda item 51.2 (c), *Executive Summary* SC69 Sum. 3 (Rev.1) (November 30, 2017), as amended in SC69 Sum. 7 (Rev. 1) (December 1, 2017); the related In-Session Doc. SC69 Com. 7 (*National Ivory Action Plans Process: Report of the Working Group on National Ivory Action Plans*), p. 3, paragraphs (iii) and (iv); and SC69 Sum. 10 (Rev. 1) on 18 December 2017.

<sup>100</sup> *Notification to the Parties* No. 2017/077 (December 19, 2017). The information is to be provided by April 15, 2018, to be available in time for the 70<sup>th</sup> meeting of the Standing Committee in October 2018.

<sup>101</sup> *Notification to the Parties* No 2017/079 (December 29, 2017), deadline February 28, 2018; see note 2 *supra*.

Critical observers have characterized the outcome of the 2017 Geneva meeting of the CITES Standing Committee as an “ivory non-ban”.<sup>102</sup> In fact, the Committee’s deferral of a decision to its 2018 Sochi meeting, and eventually to the next meeting of the CoP in 2019,<sup>103</sup> amounts to a temporary reprieve from an all-out trade ban. However, Japan is not entirely off the hook. While the Government might of course refuse to respond to Notification 2017/077, contending that it is not a “concerned Party”, it still needs to discharge a burden of proof for its claim to a singular exception from the ban.<sup>104</sup> Failing this, in view of the overwhelming new evidence assembled and analyzed by Japanese scholars,<sup>105</sup> and in response to an urgent appeal by the International Union for Conservation of Nature (IUCN) at its 2016 World Conservation Congress in Hawai’i,<sup>106</sup> the country’s domestic ivory market, including online trade, should be closed forthwith – albeit possibly with cautiously defined “narrow exemptions to this closure for some items”, as provided for in paragraph 4 of Resolution Conf. 10.10 (Rev. CoP17).<sup>107</sup>

By the same token, Japan should now be moved from category 1 to category 2 of the Secretariat’s national legislation list under Resolution Conf. 8.4 (Rev. CoP15), until such time as its legislative and administrative system is demonstrably in full conformity with CITES.<sup>108</sup> Equality of treatment for all Parties to the Convention, be they producers or consumers of wildlife products, “ranked” in terms of their compliance with the treaty, is indeed essential to preserve the credibility and legitimacy of CITES in general.<sup>109</sup> With regard

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<sup>102</sup> Andy Coghlan, *Ivory Non-Ban*, 236:3155 NEW SCIENTIST 6-7 (December 9, 2017), warning that Japan’s refusal to stop its domestic ivory trade undermines bans elsewhere.

<sup>103</sup> See CITES Conference Decision 17.88 (2016), *Domestic Markets for Frequently Illegal Trade Specimens*, directing the Standing Committee, at its 70<sup>th</sup> meeting, “to review the findings and recommendations of the Secretariat ... and make recommendations for consideration at the 18<sup>th</sup> meeting of the Conference of the Parties, including appropriate revisions to existing resolutions, to strengthen domestic controls addressing illegal trade in specimens of CITES-listed species for which international trade is predominantly illegal.” The 30<sup>th</sup> Standing Committee meeting, to which the Secretariat is to report, is scheduled to be held in Sochi/Russia on October 1, 2018; and the 18<sup>th</sup> CITES Conference, to which the Standing Committee would then report, will meet in Colombo/Sri Lanka from May 23 to June 3, 2019.

<sup>104</sup> *Supra* notes 44-45.

<sup>105</sup> The full report by Sakamoto alone (*supra* note 3, submitted to the CITES Standing Committee in English in November 2017) comprises a total of 254 pages, 53 figures, 67 tables and 4 annexes.

<sup>106</sup> IUCN Resolution WCC-2016-Res-011 (adopted by a 91% majority vote on September 10, 2016) “urges the governments of countries in which there is a legal domestic market for elephant ivory, or any domestic commerce in elephant ivory, to make all necessary legislative and regulatory efforts to close their domestic markets for commercial trade in raw or worked ivory.” The registered IUCN membership includes the Government of Japan (represented by the Ministry of Foreign Affairs), the Ministry of the Environment (as a governmental agency) and seven Japanese non-governmental organizations.

<sup>107</sup> Kitade and Nishino (*supra* note 41), 57.

<sup>108</sup> *Supra* notes 20-24 and 75-82. Although the present analysis is limited to matters concerning elephants, non-compliance with the requirements of Resolution Conf. 8.4 (Rev. CoP15) regarding *other* species should also be taken into account in this general context. For instance, in defiance of CITES Resolution Conf. 10.3 (1997), paragraph 2(a), Japan has still not designated an independent Scientific Authority for cetaceans: The “Resources and Environment Research Division”, so designated to the CITES Secretariat for this purpose, is in fact a mere administrative sub-section of the *Japan Fisheries Agency* designated as Management Authority for whales; see text at note 10 *supra*.

<sup>109</sup> On equality of treatment as a function of the long-term acceptability of international treaty regimes, see Peter H. Sand, *Enforcing CITES: The Rise and Fall of Trade Sanctions*, 22 REV. EUR., COMP. & INT’L ENVTL L. 251-263 (2013), at 261. See generally THOMAS M. FRANK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 26 (1995); Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law*?, 93 AM. J. INT’L L. 596-624 (1999), at 614; and Laurence Boisson de Chazourne, *Gouvernance et régulation au 21<sup>ème</sup> siècle: quelques propos iconoclastes*, in UNE SOCIÉTÉ INTERNATIONALE EN MUTATION: QUELS ACTEURS POUR UNE NOUVELLE GÉNÉRATION ? 19-40 (Laurence Boisson de Chazourne and Rostane Mehdi eds. 2005), 40: “La viabilité du phénomène ‘régulateur’ est liée à un défi majeur: celui de sa légitimité”.

to ivory trade in particular, “the shared responsibility of the multitude of actors who kill and trade is matched by a shared responsibility of [all] States Parties to protect the elephant”.<sup>110</sup>

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<sup>110</sup> P. André Nollkaemper, *The Illegal Ivory Trade Chain*, SHARES Blog (Amsterdam Center for International Law, March 7, 2013), <http://www.sharesproject.nl/the-illegal-ivory-trade-chain/>. To end on a historical note: The iconic and globally copyrighted CITES logo, representing an elephant and his tusk, was designed in 1991 by the late French artist and IUCN illustrator Patrick Virolle, to whose memory this essay is dedicated.