

CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES
OF WILD FAUNA AND FLORA



Seventy-fourth meeting of the Standing Committee
Lyon (France), 7 - 11 March 2022

LEGAL OPINION ON CITES RULES ON EXPORTS OF LIVE AFRICAN ELEPHANTS FROM NAMIBIA

This document has been submitted by Burkina Faso in relation to agenda item 50.*

1. According to SC74 Doc. 50 §9, at AC31, the Animals Committee agreed to refer the following concerns to the Standing Committee for its advice and recommendations, as appropriate:

a) Namibia's interpretation of its exports of live African elephants to non-range States outlined in paragraph 7 of document AC31 Doc. 18.1, Addendum 1;

(...)

2. In view of the Standing Committee's discussions on this agenda item, we are submitting, in Annex 1, a legal opinion on CITES rules on exports of live African elephants from Namibia.

3. The findings of the legal opinion provided in Annex 1 are as follows:

Namibia's elephant population is listed in CITES Appendix II, subject to annotation 2. The annotation clearly states that it allows trade in live elephants from Namibia exclusively for in situ conservation programmes, but by inference not to other locations or for any other purpose. Any previous or future export of live wild-caught elephants from Namibia to a destination outside the natural range of the species therefore does not comply with the provisions of CITES.

The last paragraph of annotation 2 does not apply to live wild-caught specimens and any interpretation implying that live elephants may be exported from Namibia to ex situ locations is contrary to the Convention and the fundamental principles of interpretation of treaties.

In conclusion, given that Namibia's elephant population is listed in CITES Appendix II, which is subject to a legally binding restriction on live trade, in force since 2003, limiting such trade to in situ conservation programmes only, exports of live wild-caught elephants from Namibia should only be permissible to destinations within the natural range of the species.

* *The geographical designations employed in this document do not imply the expression of any opinion whatsoever on the part of the CITES Secretariat (or the United Nations Environment Programme) concerning the legal status of any country, territory, or area, or concerning the delimitation of its frontiers or boundaries. The responsibility for the contents of the document rests exclusively with its author*

Legal Opinion on CITES rules on Exports of live African elephants from Namibia

Introduction

African elephants (*Loxodonta africana*) are considered to be threatened with extinction¹ and adversely affected by trade. Most populations are therefore listed in Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)². Under Article III of the Convention, all international trade in specimens from these populations for primarily commercial purposes is prohibited. However, trade is allowed for non-commercial purposes³.

Four populations of African elephants are listed in Appendix II of CITES (the populations of Botswana, Namibia, South Africa and Zimbabwe), and trade is therefore subject to Article IV of the Convention⁴. This listing under Appendix II is subject to an annotation (annotation 2) further restricting the trade in these specimens. In the case of international trade (commercial or non-commercial) in live wild African elephants from Namibia, the annotation specifies that trade may only be “for in situ conservation programmes”⁵.

¹ The African elephant is categorized as threatened with extinction according to IUCN Red List criteria. <http://www.iucnredlist.org/details/12392/0>

<https://www.iucn.org/news/species/202103/african-elephant-species-now-endangered-and-critically-endangered-iucn-red-list>

It is estimated there were 1.3 million elephants in Africa in 1979. A 50 percent decline was documented by 1989 when elephants were listed in Appendix I. With the current, ongoing poaching crisis, numbers have declined steeply once again. At the end of 2015, according to the African Elephant Status Report (AESR), the total number of elephants was estimated as 415,428. This latest estimate indicated that a 68 percent decline had occurred over 36 years. In just the 9 years between 2006 and 2015, the AESR calculated a loss of approximately 111,000 elephants. Thouless, C.R., Dublin, H.T., Blanc, J.J., Skinner, D.P., Daniel, T.E., Taylor, R.D., Maisels, F., Frederick, H.L. & Bouché, P. (2016). African Elephant Status Report 2016: an update from the African Elephant Database. Occasional Paper Series of the IUCN Species Survival Commission, No. 60 IUCN / SSC Africa Elephant Specialist Group. IUCN, Gland, Switzerland. vi + 309pp

² Under CITES Article II.1 “Appendix I shall include all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances.”

³ Under CITES Article III. 3 (c).

⁴ Under Article IV, the export of any specimen of a species included in Appendix II is subject to the grant of an export permit, which requires 1) a prior non-detriment finding from a Scientific Authority of the State of export; 2) a verification of legal acquisition by a Management Authority of the State of export; and 3) the State of export’s Management Authority being satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment. (Some additional requirements are applicable to trade in products subject to the rules pertaining to introduction from the sea). <https://cites.org/eng/disc/text.php#IV>

⁵ Annotation 2 paragraph (b).

On 2 December 2020, Namibia's Ministry of Environment, Forestry and Tourism (MEFT) announced its intention to offer 170 wild elephants for auction to domestic or international bidders, subject to them meeting certain criteria⁶. Although Namibia did not reveal the intended destinations, it has a history of exporting live elephants under the rules applicable to Appendix listed populations under Article III of CITES to ex situ locations, outside the natural range of the species.

It appears that Namibia is relying on a specific interpretation of the last paragraph of annotation 2 (which states that "all other specimens shall be deemed to be specimens of species included in Appendix I and the trade in them shall be regulated accordingly") to justify exports⁷.

This matter has been referred to the 74th meeting of the CITES Standing Committee

The case of Namibia was examined by the Animals Committee at AC 31. Specifically, concerns were raised regarding Namibia's interpretation of the annotation, and its justification to export live African elephants to non-range States. The issue was discussed by the in-session working group on Appropriate and acceptable destinations. Based on the working group's discussion and since the issue is related to implementation matters, the Animals Committee agreed to refer this matter to the Standing Committee for its advice and recommendations, as appropriate^{8 9}.

In accordance with the AC31 recommendation, it is expected that the CITES Standing Committee at its 74th meeting (SC74) in March 2022 will examine concerns raised about Namibia's interpretation. Of necessity, this should involve consideration of the legality of Namibia's past and intended future exports of live wild-caught African elephants.

The announcement by Namibia also gave rise to concerns expressed in the international media, a global citizen's petition condemning the sale with over 100,000 signatures, and criticism from conservation NGOs¹⁰. In response, the CITES Secretariat issued a public statement on 8 September 2021, which it then revised on 17 September 2021, providing "background information" on the trade in live African elephants under Articles III and IV of the Convention and confirming that Namibia intended to export its elephants under Article III (applicable to Appendix I listed species)¹¹.

⁶ <https://www.theguardian.com/world/2020/dec/03/namibia-to-auction-170-wild-elephants-saying-rising-numbers-threaten-people>; <https://www.reuters.com/article/us-namibia-elephants-idUSKBN28C2TH>

⁷ This interpretation was clearly outlined by Namibia in Paragraph 7 of document AC31 Doc. 18.1 Addendum 1

<https://cites.org/sites/default/files/eng/com/ac/31/Docs/E-AC31-18-01-Add1.pdf>

⁸ AC31 Com. 2 <https://cites.org/sites/default/files/eng/com/ac/31/com/E-AC31-Com-02.pdf>

⁹ AC31 SR <https://cites.org/sites/default/files/eng/com/ac/31/sum/E-AC31-SR-DRAFT-16.11.21.pdf>

¹⁰ <https://www.namibiansun.com/news/elephant-exports-reported-to-cites2021-08-17/>;
<https://news.mongabay.com/2021/01/namibia-to-sell-off-wild-elephants-in-controversial-auction/>

¹¹ https://cites.org/eng/Statement_trade_elephants_CITES_articles3_4_17_sep_17092021

This legal opinion examines the legality of Namibia's interpretation of CITES rules and concludes that exports of live wild-caught African elephants from Namibia to ex situ facilities should not be considered legitimate or legal.

Namibia's position

At its most recent meeting (CoP18, Geneva, 2019), the Conference of the Parties adopted Decision 18.153¹² which requires the Secretariat to:

"consult with Parties whose elephants are listed in Appendix II and who have exported wild caught elephants to a non-elephant range State since CoP11 on their implementation of Resolution Conf. 11.20 on Definition of the term 'appropriate and acceptable destinations', in particular considering the role and responsibility of the State of export in Article IV, Resolution Conf. 16.7 (Rev. CoP17) on Non-detriment findings and provide the information received to the Animals Committee, for its consideration".

In accordance with this Decision, on 17 April 2020, the Secretariat wrote to countries whose elephant populations are included in Appendix II and who had exported wild caught specimens to a non-African elephant range State since CoP11, requesting that these Parties submit information to the Secretariat on their implementation of Resolution Conf. 11.20.

Responses to the CITES Secretariat's April 2020 request were received from Namibia, South Africa and Zimbabwe prior to the Animals Committee's 31st meeting (AC31, Online, May-June 2021).

In 2012 and 2013, Namibia had exported live wild-caught African elephants to Mexico (18 elephants) and Cuba (6 elephants)¹³. In its response to the Secretariat's request, Namibia justified these exports of live elephants to ex situ locations, by claiming all exports of live African elephants from Namibia to non-range States were conducted under the provisions of Article III and not Article IV¹⁴.

In other words, Namibia claimed the right to export live African elephants as if they were listed in Appendix I of CITES, and inferred that it was therefore not required to comply with the annotation for Appendix II listed populations, or the obligations contained in Resolution Conf. 11.20.

¹² One of five Decisions (18.152 - 18.156) on the "Definition of appropriate and acceptable destinations".

¹³ <https://cites.org/sites/default/files/eng/com/ac/31/Docs/E-AC31-18-02.pdf>

<https://africanelephantjournal.com/namibia-elephant-exports-reported-to-cites/>

¹⁴ Paragraph 7 of document AC31 Doc. 18.1 Addendum 1

<https://cites.org/sites/default/files/eng/com/ac/31/Docs/E-AC31-18-01-Add1.pdf>

In a subsequent press statement on 11 August 2021, the MEFT confirmed that three bidders had already been found for the sale of 57 elephants, 42 of which were to be exported¹⁵. At the time of writing, the identity of the buyers and destinations of the 42 Namibian elephants due to be exported are unknown. However, based on the Secretariat's statement¹⁶ that Namibia intends to export them under Article III, there is a reasonable expectation that Namibia may export the animals outside their natural range, as it did in 2012 and 2013.

Determining the legality of Namibia's interpretation of the Convention is, therefore, time critical.

The annotation applicable to Namibia's elephant population

The elephant populations of Botswana, Namibia, South Africa and Zimbabwe are listed in Appendix II, subject to Annotation 2 which sets out conditions for trade in all specimens as follows:

"Populations of Botswana, Namibia, South Africa and Zimbabwe (listed in Appendix II):

For the exclusive purpose of allowing:

- a) trade in hunting trophies for non-commercial purposes;
- b) trade in live animals to appropriate and acceptable destinations, as defined in Resolution Conf. 11.20 (Rev. CoP18), for Botswana and Zimbabwe and for *in situ* conservation programmes for Namibia and South Africa;
- c) trade in hides;
- d) trade in hair;
- e) trade in leather goods...;
- f) trade in individually marked and certified ekipas...;
- g) trade in registered raw ivory (for Botswana, Namibia, South Africa and Zimbabwe, whole tusks and pieces); (...)

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

The trade in live elephants from Namibia is allowed for the exclusive purpose of *in situ* conservation programmes. The CITES Glossary¹⁷ defines the terms "*in situ*" as meaning

¹⁵ Ministry of Environment, Forestry and Tourism Press Release, "Ministerial update on the Elephant Auction", 11 August 2021 <https://www.namibia-forum.ch/media/kunena/attachments/102/MinisterialupdateontheElephantAuction.pdf>

¹⁶ https://cites.org/eng/Statement_trade_elephants_CITES_articles3_4_17_sep_17092021

¹⁷ <https://cites.org/eng/resources/terms/glossary.php>

“within the natural range of a species” and “often used in the phrase ‘in-situ conservation’ in reference to conservation efforts carried out within the range of a Species”. Therefore, exports of live elephants from Namibia may only take place within the natural range of the species.

The African Elephant Specialist Group of the IUCN Species Survival Commission has publicly stated that it does not endorse the removal of African elephants from the wild for any captive use, believing there to be no direct benefit for in situ conservation of African elephants¹⁸. This point of view is shared by the African Elephant Coalition (AEC), an alliance of more than 30 African States. In the Addis Ababa Communiqué (African Elephant Coalition Summit, 1-3 June 2018), the 21 member countries present¹⁹ reaffirmed that the only appropriate and acceptable destinations for live wild African elephants are in situ conservation programmes within their wild natural range²⁰. This statement in the Communiqué is acknowledged in the preamble of Resolution Conf, 11.20 (Rev. CoP18). Two African elephant range States and members of the AEC subsequently submitted a working document (AC31 Doc. 18.2) to the Animals Committee highlighting the negative impacts associated with previous elephant exports from Africa to ex situ locations and their lack of conservation benefit to in situ populations²¹.

Namibia has claimed the right to trade in live elephants to ex situ countries under Article III of the Convention. To justify this position, Namibia appears to be using the last paragraph of the annotation. That is, although the annotation clearly states that it applies, without distinction, to all trade in live animals from Namibia’s elephant population, Namibia’s position relies on the contention that it can instead choose to classify some live elephants as “other specimens” and thereby deem them to be included in Appendix I. In other words, Namibia relies upon an interpretation of “other specimens” that includes any live elephants to which the exporting country does not wish to apply the restrictions in the annotation.

The correct legal interpretation of the annotation applicable to Namibia’s elephant population

It is necessary to interpret the wording used in the annotation according to the ordinary meaning of the words in their context, and in accordance with the principles of

¹⁸ <https://www.iucn.org/ssc-groups/mammals/african-elephant-specialist-group/afesg-statements/removal-african-elephants-captive-use> : “Believing there to be no direct benefit for in situ conservation of African elephants, the African Elephant Specialist Group of the IUCN Species Survival Commission does not endorse the removal of African elephants from the wild for any captive use” and their submission in AC31 Doc. 18.1 Annex 2 that: “The AfESG is not aware of any acceptable destinations that meet the requirements for ex situ housing of forest or savanna elephants.”

¹⁹ *Benin, Burkina Faso, Central African Republic, Chad, Comoros, Republic of the Congo, Ethiopia, Gabon, Ghana, Guinea, Kenya, Liberia, Mali, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, South Sudan, Togo and Uganda.*

²⁰ <https://cites.org/sites/default/files/eng/cop/18/doc/E-CoP18-044-02.pdf>

²¹ <https://cites.org/sites/default/files/eng/com/ac/31/Docs/E-AC31-18-02.pdf>

international law, including good faith and with due consideration of the intention of the Parties during the negotiations.

The appropriate legal position is that all African elephants in Namibia (as well as the populations from Botswana, South Africa and Zimbabwe) are included in Appendix II, subject to annotation 2, and trade in those populations is regulated accordingly.

The annotation sets out a list of the various types of specimens that it covers, and then proceeds to outline specific conditions that apply to the trade of each type. If a specific type of specimen is listed in the annotation (such as live animals) then trade in that specimen is covered exclusively by the conditions set out in the annotation, and Article IV of the Convention.

The reference to "other specimens" covers only other types of specimens not otherwise included in the list, such as worked ivory, elephant meat or blood.

The definition of "specimen"

The meaning of the phrase "all other specimens" in the annotation must be determined in the context of the Convention as a whole, and in the light of its objectives and purpose. The proper interpretation can be found in the general clauses, in the title of the treaty itself, in the preamble, and when considering the full text of treaty.

In particular, the term "specimen" is defined in Article I of the Convention, which makes clear that this should be read as a reference to the various types of specimens (such as live animal, whole carcass, part or derivative) rather than to the purpose of export or intended destination.

The term "specimen" is defined in Article I of the Convention as:

- (i) any animal or plant, whether alive or dead;
- (ii) in the case of an animal: for species included in Appendices I and II, any readily recognizable part or derivative thereof; and for species included in Appendix III, any readily recognizable part or derivative thereof specified in Appendix III in relation to the species; and
- (iii) in the case of a plant: for species included in Appendix I, any readily recognizable part or derivative thereof; and for species included in Appendices II and III, any readily recognizable part or derivative thereof specified in Appendices II and III in relation to the species;

Further, Resolution 11.21 (Rev. CoP18) Use of annotations in Appendices I and II²² provides that the Conference of the Parties:

9. AGREES that, for species transferred from Appendix I to II with an annotation specifying that only certain types of specimens are subject to the provisions relating to species in Appendix II, **specimens that are not specifically included in the annotation shall be deemed to be specimens of species included in Appendix I and the trade in them shall be regulated accordingly.** (Emphasis added)
10. RECOMMENDS that the definitions of terms and expressions used in annotations in the Appendices be applied by the Parties.

Using this definition of “specimens”, it is clear that the reference to “all other specimens” as set out in the last paragraph of annotation 2 can only refer to other types of specimens not already covered by paragraphs a) to g) (such as meat and other worked ivory).

Since paragraph b) of the annotation covers all trade in live elephants, the reference to “all other specimens” in the last paragraph cannot refer to live animals. Consequently, Namibia’s interpretation of the last paragraph of annotation 2 cannot be considered to be in compliance with the Convention.

It is contrary to the literal interpretation of the sentence in the context of, and its place within, the annotation, and to a teleological or functional interpretation.

The object and purpose of the annotation

A review of the history of the negotiations clearly demonstrates the intention of the Parties when the wording of the annotation was agreed. In particular, the object and purpose of the annotation is to restrict trade in African elephants to the extent possible. It would not be in line with the Parties’ intention to support an interpretation that provides a loophole allowing a Party to arbitrarily choose between an Appendix I or Appendix II listing (depending on whichever best suited its particular trade purposes).

The annotation to the Appendix II listing of Namibia’s elephant population, which limits export of live elephants to in situ conservation programmes, dates back to CoP12 (Santiago, Chile, 2002). The annotation was amended at this meeting primarily to allow a one-off sale of ivory stockpiles from Botswana, Namibia and South Africa. The sale did not take place until after CoP14 in 2007, when the annotation was amended again and ivory stockpiles from Zimbabwe were included.

The last paragraph of the annotation (“all other specimens shall be deemed to be specimens of species included in Appendix I and the trade in them shall be regulated

²² <https://cites.org/sites/default/files/document/E-Res-11-21-R18.pdf>

accordingly") was also introduced into the annotation at CoP12 in 2002 as part of a safeguard that read:

"On a proposal from the Secretariat, the Standing Committee can decide to cause this trade to partially or completely cease in the event of non-compliance by exporting or importing countries, or in the case of proven detrimental impacts of the trade on other elephant populations. All specimens that are not allowed to be traded under the above provisions shall be deemed to be specimens of species included in Appendix I and the trade in them shall be regulated accordingly."²³

The safeguard specifically concerned the trade in registered raw ivory and was intended to guard against ivory sales other than the one-off sale of stockpiles agreed at CoP12.²⁴

The history demonstrates a clear intention of the Parties to limit trade, and only the most trade-restrictive interpretation aligns with the object and purpose of the annotation and the intention of the Parties. In this regard, the Parties to CITES have clearly expressed their will to protect African elephants from trade by placing them in Appendix I or Appendix II with a restrictive annotation. In particular, the last paragraph of annotation 2 was drafted to further restrict the sales of raw ivory, and was never intended as a means to circumvent the restriction, limiting trade in live elephants to in situ conservation programmes.

The annotation clearly provides that trade in live African elephants from Namibia has been restricted to in situ destinations. If the Parties' intention had been to provide for an exception to paragraph b) of the annotation regarding the trade in live African elephants from Botswana, Namibia, South Africa and Zimbabwe, they would have expressly done so.

The principle of good faith when interpreting the language of the annotation

The 1969 Vienna Convention on the Law of Treaties between States, which reflects customary international law²⁵, contains specific principles concerning interpretation of treaties. Article 31 paragraph 1 states that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

²³ https://cites.org/sites/default/files/eng/cop/12/Adopted_Amendments.pdf

²⁴ The text of this safeguard remained largely unchanged, even after the further annotation amendment agreed at CoP14. The safeguard currently provides that:

"On a proposal from the Secretariat, the Standing Committee can decide to cause this trade to cease partially or completely in the event of non-compliance by exporting or importing countries, or in the case of proven detrimental impacts of the trade on other elephant populations. All other specimens shall be deemed to be specimens of species included in Appendix I and the trade in them shall be regulated accordingly."

²⁵ https://brill.com/view/journals/gjcl/9/2/article-p271_271.xml?language=en

Good Faith is a basic principle in Public International Law and is also included in article 2.2 of the United Nations Charter²⁶. According to this most fundamental rule of the law of treaties, every treaty, and its interpretation when examining the ordinary meaning of the text, the context and the object and purpose, must be performed by the parties “in good faith”²⁷. In other words, Parties to a treaty must not interpret its provisions in a way that is not compatible with the obligations they agreed during the negotiation and adoption of these rules.

Since the purpose of Namibia’s interpretation of annotation 2 obviously is to circumvent the rules applicable to exports of live wild-caught African elephants (in an attempt to allow sales to locations outside the natural range of the species), it is contrary to the initial will of the Parties, including Namibia, who adopted annotation 2, including the last paragraph as a safeguard to limit the trade in ivory and other elephant parts. The interpretation proposed by Namibia is not, therefore, consistent with the principle of Good Faith.

Does the annotation make trade of Namibian elephants under Appendix II more restrictive than if the population had remained in Appendix I

The objective and purpose of CITES is to regulate wildlife trade, including where necessary by placing restrictions on that trade. There is nothing in the wording of the Convention that limits the nature or degree of the restrictions that may be imposed²⁸.

Further, it is factually incorrect to claim that annotation 2 has had the effect of making trade in the Appendix II listed African elephant populations more restrictive than trade in the elephant populations listed in Appendix I. The relevant trade restrictions under CITES that apply to the “Appendix I African elephants” compared to those applicable to the “Appendix II elephant populations” fall into three (3) categories:

- (i) Restrictions on the identity of the trading partner/importing country;
- (ii) Restrictions on the type of specimens that can be traded; and
- (iii) The administrative hurdles (“red tape”) that must be undertaken to authorise the trade.

Looking at these three categories collectively, it is clear that there are significantly fewer trade restrictions that apply to the Appendix II elephant populations.

²⁶ All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter. <https://www.un.org/en/about-us/un-charter/full-text>

²⁷ See article 26 of the Vienna Convention which sets out this universally recognised principle of *pacta sunt servanda*.

²⁸ See CITES Article XV. A two-thirds majority of Parties is also required in the case of postal voting.

Annotation 2 provides an extensive list of types of specimens (live animals, and various parts and derivatives) where trade is allowed, which do not apply in the case of the Appendix I African elephants. Further, Article IV of the Convention contains fewer procedural steps and less red tape than is required under Article III, for example, the need to obtain an import permit from the relevant government authorities.

Finally, both the Appendix I African elephant populations and the Appendix II elephant populations are subject to restrictions on the identity of the trading partner/importing country.

In the case of the Appendix II populations these restrictions include:

- (i) appropriate and acceptable destinations regarding trade in live elephants from Botswana and Zimbabwe²⁹;
- (ii) destinations within the natural range of the species (as part of an in-situ conservation programme) regarding trade in live elephants from Namibia and South Africa; and
- (iii) in the case of the trade in raw ivory from government owned stocks, only trading partners/importing countries that have been verified by the CITES Secretariat as having sufficient national legislation and domestic trade controls as set out in annotation 2 paragraph g).

Overall, When all the trade restrictions are looked at together, including the reduced red tape and procedural steps that allow trade in a range of different types of specimens, without the need for the importing country to issue an import permit, there are significantly less trade restrictions that apply to the Appendix II elephant populations (including Namibia's elephant population), even with the restrictions set out in annotation 2.

The precautionary approach

In 1994, at its 9th meeting, the Conference of the Parties to CITES adopted Resolution Conf. 9.24 "Criteria for amendment of Appendices I and II" and formally introduced the precautionary principle into the CITES framework³⁰. In Resolution Conf, 9.24 (Rev. CoP17), the Conference of the Parties recognized "the importance of the application of Rio Principle 15, the Precautionary Approach, in cases of uncertainty" and adopted Annex 4 of the same Resolution on "precautionary measures"³¹. This approach, as a fundamental

²⁹ A similar restriction appears in the annotations regarding the Appendix II listed populations of the white rhinoceros (*Ceratotherium simum simum*) of Eswatini and South Africa.

³⁰ Although this principle already underpinned the CITES system as a whole and had been applied since its adoption. See Barnabas Dickson, *The Precautionary Principle in CITES: A Critical Assessment*, 39 *Nat. Resources J.* 211 (1999), p. 212.

³¹ <https://cites.org/sites/default/files/document/E-Res-09-24-R17.pdf>

principle of environmental law, applies to all decisions taken by the CITES Parties, including amendments to Appendices I and II³².

The precautionary principle implies that if a practice may cause environmental harm, it should not be undertaken³³.

The intended future exports of live elephants will, if carried out, most likely threaten the survival of a fragile population of desert-adapted elephants in the Kunene region. A recent independent investigation on the ground indicates that this population of desert-adapted elephants in the dry north-west region of Namibia (the Kunene region) is on the verge of collapse, mainly due to drought and human-induced stress^{34 35}.

In accordance with the precautionary approach, the capture and export of live wild-caught elephants from the desert-adapted population of the Kunene region should not be carried out. These sales would be inconsistent with the provisions of the Convention, Resolution Conf. 9.24 (Rev. CoP17), and the fundamental Principle of Precaution that guides international environmental law, including wildlife law.

Conclusion

Namibia's elephant population is listed in CITES Appendix II, subject to annotation 2. The annotation clearly states that it allows trade in live elephants from Namibia exclusively for in situ conservation programmes, but by inference not to other locations or for any other purpose. Any previous or future export of live wild-caught elephants from Namibia to a destination outside the natural range of the species therefore does not comply with the provisions of CITES.

The last paragraph of annotation 2 does not apply to live wild-caught specimens and any interpretation implying that live elephants may be exported from Namibia to ex situ locations is contrary to the Convention and the fundamental principles of interpretation of treaties.

In conclusion, given that Namibia's elephant population is listed in CITES Appendix II, which is subject to a legally binding restriction on live trade, in force since 2003, limiting

³² Also confirmed by the title of Resolution Conf. 9.24 "Criteria for amendment of Appendices I and II".

³³ Barnabas Dickson, *The Precautionary Principle in CITES: A Critical Assessment*, 39 *Nat. Resources J.* 211 (1999), p. 213.

³⁴ <https://africanelephantjournal.com/investigation-of-live-elephants/>

³⁵ Namibia's export of desert-adapted elephants may cause their extinction by Dr. Adam Cruise and Dr. Keith Lindsay (<https://africanelephantjournal.com/namibias-export-of-desert-adapted-elephants-may-cause-their-extinction/>)

TerrAvocats

such trade to in situ conservation programmes only, exports of live wild-caught elephants from Namibia should only be permissible to destinations within the natural range of the species.

TerrAvocats

TerrAvocats Law Firm
Lutry, Switzerland
February 2022