

Petition to Certify Vietnam as Diminishing the Effectiveness of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) for Trade in Rhinos

December 21, 2012

I. INTRODUCTION

The rhinoceros has long been valued as a “big five” hunting trophy and the rhino’s horn has been prized in traditional Asian medicine for centuries. That value has decimated rhinoceros populations in both Africa and Asia, with three subspecies already extinct and some species and subspecies currently critically endangered, such as the black rhinoceros (*Diceros bicornis*).

To curb the international trade in rhino horn and other parts and derivatives that has led to diminished rhino populations, the Parties to the Convention on International Trade in Endangered Species of Flora and Fauna (CITES) have placed all but two populations of rhinos in Appendix I to prohibit international trade for commercial purposes.¹ Populations of the southern white rhino (*Ceratotherium simum simum*) in South Africa and Swaziland are included in Appendix II with an annotation limiting trade to hunting trophies and live rhinos to appropriate and acceptable destinations. The CITES Parties have also agreed to take a number of other steps to conserve rhinos, such as restricting domestic trade, verifying rhino stocks, and undertaking campaigns to reduce demand for rhino horn.² These actions, coupled with other conservation efforts, helped to stabilize or, in the case of South Africa, dramatically increase rhino populations. South Africa’s white rhino population has increased from approximately 20 to 50 individuals in 1895 to approximately 18,800 today.³

Despite these efforts, rhino populations are again under threat, because of rising demand in Vietnam and the failure of Vietnam to implement its CITES obligations. In some cases, Vietnam has refused to implement the recommendations of the CITES Parties or even respond to requests for information from the Parties. In fact, Vietnamese CITES officials continue to deny the role of Vietnam and its nationals in the illegal rhino horn trade,⁴ statements that defy all reports to the contrary. As described in this Petition, Vietnam is believed to be driving the

¹ Convention on International Trade in Endangered Species of Flora and Fauna, March 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (entered into force July 1, 1975) [hereinafter CITES].

² Resolution Conf. 9.14 (Rev. CoP15), *Conservation of and Trade in African and Asian Rhinoceroses* (2010).

³ TOM MILLIKEN & JO SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS: A DEADLY COMBINATION OF INSTITUTIONALIZED LAPSES, CORRUPT WILDLIFE INDUSTRY PROFESSIONALS AND ASIAN CRIME SYNDICATES 9 (TRAFFIC, 2012), available at www.traffic.org/species-reports/traffic_species_mammals66.pdf [hereinafter MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS].

⁴ See e.g., Vietnam Environment Administration, *Rhino Horn Claim Unfounded*, Sept. 4, 2012, available at <http://vea.gov.vn/en/news/news/Pages/Rhino-horn-claim-unfounded.aspx>. This press release quotes Do Quang Tung, Vietnam’s CITES Deputy Director, as saying “Vietnam could not be the main market for South African rhino horn, not even close.” *Id.* It also claims that Vietnam is not a market country for rhino horn but rather a transit country for rhino horn destined for another country. *Id.* See also Asia News Network, *Vietnam Denies Being Main Rhino Horn Market* (Aug. 27, 2012), available at <http://www.thejakartapost.com/news/2012/08/27/vietnamdeniesbeing-main-rhino-horn-market.html>.

“rapacious illegal trade in rhino horn”⁵ with Vietnamese nationals at the center of the illegal trade. As TRAFFIC states, in a recent report by Tom Milliken and Jo Shaw:

[F]or nearly a decade [Vietnam] has been the paramount destination for a resurgent illegal commerce out of Africa, especially from South Africa, where Vietnamese criminal operatives have become firmly embedded in the trade.⁶

Despite the numerous reports of Vietnamese nationals’ involvement in the illegal trade, and arrests and prosecutions of Vietnamese nationals in the United States,⁷ South Africa, and elsewhere, Vietnam itself has reportedly not seized a single illegally imported rhino horn or prosecuted a single individual for illegal trade since 2008. Vietnam has clearly turned a blind eye to its own involvement. Indeed, Vietnam has failed to provide the CITES Parties with information concerning its stocks of rhino horn, as well as other information requested by the Parties. Vietnam’s continued flouting of its international responsibilities is devastating rhino conservation efforts everywhere but particularly in South Africa where more than 1,269 rhinos have been poached in the last three years,⁸ primarily for trade to Vietnam. The involvement of Vietnamese nationals in the illegal trade is so transparent that South Africa has adopted new rules that prohibit the issuance of rhino hunting permits to Vietnamese nationals.

As such, Petitioners urge the Secretary of Interior, as the head of the agency responsible for implementation of CITES in the United States, to certify that Vietnam nationals are diminishing the effectiveness of an international endangered species program, CITES, pursuant to the Pelly Amendment of the Fishermen’s Protective Act.⁹ Given the seriousness of Vietnam’s actions and inactions, Petitioners also request that the United States impose trade sanctions against Vietnam for these ongoing failures until it fully embraces its responsibilities to conserve rhinos consistently with CITES and the recommendations and requests of the Parties.

We note that the use of the Pelly Amendment resulted in improvements in the implementation of CITES with respect to rhinos and tigers in China, Taiwan, Yemen, and Korea in the mid-1990s.¹⁰ For example, both Korea and Yemen agreed to accede to CITES and to prohibit domestic sales of rhino horn after the United States engaged them through the Pelly Amendment process. China and Taiwan also took actions to improve their implementation of CITES.¹¹ We believe that the Pelly Amendment process can similarly lead to improved implementation of CITES by Vietnam, with corresponding conservation benefits for rhinos.

⁵ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 14.

⁶ *Id.*

⁷ Kerry Sheriden, *U.S. Rhino Horn Trafficking Draws Motley Profiteers*, AFP, May 10, 2012, available at <http://www.allvoices.com/news/12126350-us-rhino-horn-trafficking-draws-motley-profiteers>.

⁸ South Africa Dep’t. Env’tl. Affairs, Press Release, *Update on Rhino Poaching Statistics* (Oct. 30, 2012), available at http://www.environment.gov.za/?q=content/update_rhinopoaching_statistics.

⁹ 22 U.S.C. §1978, as amended Pub. L. No. 95-376, 92 Stat. 714 (Sept. 18, 1978).

¹⁰ U.S. Dep’t of Interior, Press Release, *Administration Moves to Halt International Trade in Tiger and Rhino Parts*, June 9, 1993, available at <http://www.fws.gov/news/historic/1993/19930609.pdf>.

¹¹ See Summary Report of Thirty-first Meeting of the Standing Committee, SC31 Summary Report, at 17 (March 1994).

The Pelly Amendment establishes a two-part test for determining whether the Secretary of Interior or Secretary of Commerce must certify a country. The Secretary of Interior or Secretary of Commerce must determine that:

1. nationals of a foreign country,
2. directly or indirectly, are
 - a. conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, or
 - b. engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species.¹²

If the Secretary of Interior or Secretary of Commerce makes this determination, the Secretary “shall certify such fact to the President.”¹³ Upon receipt of such certification, the President may direct the Secretary of the Treasury to prohibit the importation into the United States of any product from the offending country for any duration, provided that the restrictions are consistent with the General Agreement on Tariffs and Trade (GATT).¹⁴ The President must also notify Congress of any action taken within 60 days of certification.¹⁵

Vietnam’s actions and inactions clearly diminish the effectiveness of CITES, an “international program for endangered or threatened species.” As this Petition describes, Vietnam is currently the largest market for rhino horn from both legally hunted rhinos in South Africa and poached rhinos in South Africa and elsewhere. Significant quantities of rhino horn are easily found in Vietnamese markets, yet Vietnam does little to confiscate rhino horn in domestic markets or rhino horn being imported into Vietnam illegally. In addition, despite high levels of illegal trade in rhino horn to Vietnam, Vietnamese officials have reportedly failed to make even a single prosecution since 2008.¹⁶ Vietnam’s inability or unwillingness to control and enforce this illegal trade undermines the significant rhino conservation gains made in South Africa and elsewhere. In addition, Vietnam has failed to take actions to diminish public demand for a product known to have no therapeutic value for treating cancer or curing hangovers, two of the principal reasons for increased demand for rhino horn in Vietnam. All these actions and inactions convey to the public that rhino horn trade and consumption is permissible. These actions clearly diminish the effectiveness of CITES.

Section II of this Petition begins by summarizing the conservation status of rhinos worldwide and the current threats posed to those populations, principally demand for rhino horn in Vietnam. Section III reviews the efforts of CITES to curb international trade in rhino horn and other rhino parts. Section IV describes the role of Vietnamese nationals in the illegal trade for rhino horn and the failures of the Vietnamese authorities to adopt measures to reduce demand and implement CITES. It concludes that Vietnam’s failures to adopt adequate measures

¹² 22 U.S.C. § 1978(a)(1)–(2).

¹³ *Id.*

¹⁴ *Id.* at § 1978(a)(4).

¹⁵ *Id.* at § 1978(b).

¹⁶ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 141, 144.

consistent with CITES recommendations diminishes the effectiveness of CITES and that trade sanctions should be imposed to promote rhino conservation and implementation of CITES by Vietnam. Section V proposes restrictions on all trade with Vietnam in all CITES-listed specimens. As explained in Section VI, trade sanctions barring trade in CITES-protected wildlife with Vietnam would be consistent with U.S. obligations under the GATT, one of the primary agreements administered by the World Trade Organization (WTO).¹⁷ More specifically, the general structure and design of the Pelly Amendment, as well as its application in this specific context, meet the criteria established under GATT Article XX(g) and the chapeau of Article XX. For these and other reasons, Petitioners respectfully request that you, in your capacity as Secretary of Interior, certify pursuant to the Pelly Amendment that Vietnamese nationals are diminishing the effectiveness of CITES and recommend to the President that he prohibit all trade in CITES-listed wildlife with Vietnam.

II. THE DECLINING CONSERVATION STATUS OF RHINOCEROS SPECIES

A. The Precarious Conservation Status of Rhinos Worldwide

During the past several hundred years, many rhino subspecies or populations have had their populations decimated to the point of near extinction. In 1895, the total population of southern white rhinos was between 20 to 50 individuals;¹⁸ by the early 1900s, fewer than 200 Indian rhinos remained.¹⁹ Similarly, in Africa between 1970 and 1992 the population of black rhinos decreased by 96%, and the population of northern white rhinos decreased by 99% between 1960 and 1984.²⁰ Asian rhino populations which once ranged across numerous States have dwindled and become isolated into small groups of individuals.²¹

As a result of stricter conservation measures in many range States, however, the decline in many rhino populations has slowed and in some cases has reversed.²² The southern white rhino population in Africa has risen dramatically from an estimated 20 to 50 individuals in South

¹⁷ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A11, 55 U.N.T.S. 187 [hereinafter GATT]. Prior to the Final Act, the original GATT was applied through the Protocol of Provisional Application. Protocol of Provisional Application of the General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A2051, 55 U.N.T.S. 308. The GATT is now incorporated into the World Trade Organization (WTO). Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 108 Stat 4809, 19 U.S.C. 3501 *et. seq.*, reprinted in 33 I.L.M. 1145 (1994).

¹⁸ MILLIKEN & SHAW, THE SOUTH AFRICA-VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 9.

¹⁹ IUCN, *IUCN Red List of Endangered Species, Rhinoceros unicornis* (2012), <http://www.iucnredlist.org/details/19496/0> (last visited Nov. 6, 2012).

²⁰ WWF, SPECIES FACT SHEET: AFRICAN RHINOS 1 (2006), available at http://wwf.panda.org/who_we_are/wwf_offices/wwf_zambia_nature_conservation/wwf_zambia_news_and_publications/?uNewsID=62800.

²¹ MOHD. KHAN BIN MOMIN KHAN, IUCN/SSC ASIAN RHINO SPECIALIST GROUP, ASIAN RHINOS: AN ACTION PLAN FOR THEIR CONSERVATION 1 (1989), available at http://www.rhinoresourcecenter.com/pdf_files/117/1178936603.pdf.

²² CITES Secretariat, *Conservation of and Trade in Rhinoceroses*, Doc 11.32 at 5 (Apr. 2000), available at <http://www.cites.org/eng/cop/11/doc/32.pdf>; see also TOM MILLIKEN ET AL., AFRICAN AND ASIAN RHINOCEROSSES-STATUS, CONSERVATION AND TRADE, CoP15 Doc. 45.1 Annex 2-3, 13 (Nov. 20, 2009), available at <http://www.cites.org/common/cop/15/doc/E15-45-01A.pdf>.

Africa in 1895 to an estimated 20,160 wild southern white rhinos in Africa today.²³ The population of Indian rhinos has been increasing for the past 100 years,²⁴ and in September 2009 was estimated at 2,800 individuals.²⁵

Despite efforts by South Africa and other range States to protect rhinos, a recent, dramatic surge in poaching is significantly affecting rhino populations in Africa and Asia and threatening to reverse the efforts to conserve and rebuild rhino populations.²⁶ For example, between 2000 and 2005, an estimated 3.5 rhinos were illegally killed each month across the African continent.²⁷ In 2009, that number had risen to 12.4 rhinos per week in South Africa and Zimbabwe alone.²⁸ In 2011, the population of black rhinos and white rhinos in South Africa decreased by 448, which represented a 2.03% decrease in black and white rhino populations since the beginning of that year.²⁹ Poaching rates have surged to a record high in 2012, with a recorded loss of 488 rhinos between January and October.³⁰ This increasing rate of population decline has the potential to negate current growth rates.³¹

The illegal poaching of Asian rhinos is also of grave concern. Between 2005 and 2009, poachers killed at least 48 Asian rhinos.³² While the total number of Asian rhinos killed by poachers is smaller than the total number of African rhinos killed, the population sizes of Asian rhinos are significantly smaller than those of the African rhinos. Thus, even a small number of Asian rhinos killed by poachers may have a significant impact on the species. For example, the last Javan rhino was poached in a national park in Vietnam, causing the extinction of this subspecies.³³ Similarly, in one national park in Nepal in 2008, poachers killed seven rhinos out of a population of 68—about 10% of the park’s rhino population—and poachers killed four additional rhinos from the same park by July 2009.³⁴

All species of rhino are listed in CITES Appendix I, except for the southern white rhino in South Africa and Swaziland, which are listed on CITES Appendix II “[f]or the exclusive purpose of allowing international trade in live animals to appropriate destinations and hunting

²³ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 27.

²⁴ IUCN, *IUCN Red List of Endangered Species, Rhinoceros unicornis* (2012), <http://www.iucnredlist.org/details/19496/0> (last visited Nov. 6, 2012).

²⁵ TOM MILLIKEN ET AL., AFRICAN AND ASIAN RHINOCEROSSES- STATUS, CONSERVATION AND TRADE, CoP15 Doc. 45.1 Annex, *supra* note 22, at 13.

²⁶ *Id.* at 3–5, 15.

²⁷ IUCN, TRAFFIC, & WWF, STATUS, CONSERVATION AND TRADE IN AFRICAN AND ASIAN RHINOCEROSSES, SC58 Inf. 10 Annex 3 (July 2009), available at <http://www.cites.org/common/com/SC/58/E58i-10.pdf>.

²⁸ *Id.*

²⁹ Mike Knight, *African Rhino Specialist Group Report: Poaching Continues at an Alarming Rate*, 50 PACHYDERM 7 (July–Dec. 2011).

³⁰ South Africa Dep’t. Envtl. Affairs, Press Release, *Update on Rhino Poaching Statistics* (Oct. 30, 2012), available at http://www.environment.gov.za/?q=content/update_rhinopoaching_statistics.

³¹ Knight, *African Rhino Specialist Group Report: Poaching Continues at an Alarming Rate*, *supra* note 29.

³² IUCN, TRAFFIC, & WWF, STATUS, CONSERVATION AND TRADE IN AFRICAN AND ASIAN RHINOCEROSSES, SC58 Inf. 10 Annex, *supra* note 27, at 3; see also MILLIKEN ET AL., AFRICAN AND ASIAN RHINOCEROSSES- STATUS, CONSERVATION AND TRADE, CoP15 Doc. 45.1 Annex, *supra* note 22, at 15.

³³ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 14 (stating that “[b]y early 2010, however, the last animal had been poached for its horn”).

³⁴ IUCN, TRAFFIC, & WWF, STATUS, CONSERVATION AND TRADE IN AFRICAN AND ASIAN RHINOCEROSSES, SC58 Inf. 10 Annex, *supra* note 27, at 3.

trophies.”³⁵ Similarly, the United States lists all rhino species—with the exception of the southern white rhino—as “endangered” under the Endangered Species Act.³⁶ However, these protections have proven to be inadequate. As discussed below, scientists believe two subspecies of rhinos went extinct in the past decade, and all rhino species are currently threatened by a rise in poaching.

Three Extinct Subspecies. Three rhinoceros subspecies have become extinct since the beginning of the twentieth century. The IUCN listed the western black rhino (*Diceros bicornis longipes*) as extinct in 2011, based on the lack of any reports or sightings since 2006, and due to widespread poaching, lack of political will and conservation effort by Cameroon authorities, and the growing demand for rhino horn.³⁷ In October 2011, conservationists announced the extinction of the Indochinese Javan rhino (*Rhinoceros sondaicus annamiticus*) in Vietnam.³⁸ The final member of this subspecies was likely killed by poachers.³⁹ *R. sondaicus inermis*, another subspecies of the Javan rhino formerly found in northeastern India, Bangladesh, and Myanmar, went extinct at the beginning of the twentieth century.⁴⁰

White Rhinoceros. The white rhinoceros (*Ceratotherium simum*) has two subspecies: the southern white rhinoceros (*C. simum simum*) and the northern white rhinoceros (*C. simum cottoni*). The southern white rhino is the most abundant of all living rhino species.⁴¹ Credit for this conservation success story lays in large part with South Africa, which has restored its southern white rhino population from an estimated 20 to 50 individuals in 1895 to approximately 18,800 southern white rhinos today.⁴² The total global population of southern white rhinos is approximately 20,160 individuals, with another 750 in captivity.⁴³ South Africa’s white rhino population comprises 93.2% of the total white rhino population in Africa.⁴⁴ The next largest populations of southern white rhinos are in Namibia, Zimbabwe, and Kenya⁴⁵; none of these

³⁵ CITES, *Appendices I, II, and III*, 10–11 (valid from Sept. 25, 2012), available at <http://www.cites.org/eng/app/2012/E-2012-09-25.pdf>.

³⁶ U.S. Fish and Wildlife Service, Endangered Species Database, <http://www.fws.gov/endangered/> (last visited Nov. 6, 2012). The southern white rhino is not listed on the ESA at all. *See id.*

³⁷ IUCN, *IUCN Red List of Endangered Species: Diceros bicornis ssp. Longipes* (2012), <http://www.iucnredlist.org/details/39319/0> (last visited Nov. 6, 2012); *see also* Daniel Boettcher, *Western Black Rhino Declared Extinct*, BBC NEWS, Nov. 9, 2011, <http://www.bbc.co.uk/news/science-environment-15663982>.

³⁸ Ker Than, *Javan Rhino Extinct in Mainland Asia*, NATIONAL GEOGRAPHIC, Oct. 28, 2011, available at <http://news.nationalgeographic.com/news/2011/10/111028-vietnam-javan-rhinos-extinct-species-science-animals/>.

³⁹ *Id.*

⁴⁰ IUCN, *IUCN Red List of Endangered Species: Rhinoceros sondaicus* (2012), <http://www.iucnredlist.org/details/summary/19495/0> (last visited Nov. 6, 2012); *see also* Rees Rookmaaker, *Records of the Sundarbans Rhinoceros (Rhinoceros sondaicus inermis) in India and Bangladesh*, 24 PACHYDERM 44 (July–Dec. 1997), available at http://www.rhinoresourcecenter.com/pdf_files/117/1175861857.pdf.

⁴¹ IUCN, *IUCN Red List of Endangered Species: Ceratotherium simum* (2012), <http://www.iucnredlist.org/details/4185/0> (last visited Nov. 6, 2012).

⁴² MILLIKEN & SHAW, *THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS*, *supra* note 3, at 9.

⁴³ IUCN, *IUCN Red List of Endangered Species: Ceratotherium simum* (2012), <http://www.iucnredlist.org/details/4185/0> (last visited Nov. 6, 2012).

⁴⁴ MILLIKEN & SHAW, *THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS*, *supra* note 3, at 9.

⁴⁵ IUCN, *IUCN Red List of Endangered Species: Ceratotherium simum* (2012), <http://www.iucnredlist.org/details/4185/0> (last visited Nov. 6, 2012).

populations number more than 500 individuals.⁴⁶ Other current range states include Botswana, Swaziland, Mozambique, Uganda, and Zambia.⁴⁷ The IUCN lists the southern white rhino as “near threatened.”⁴⁸

In contrast, the northern white rhino population has sharply declined since 1960, when the population was estimated to be around 2,360 individuals.⁴⁹ Today, the subspecies likely no longer exists in the wild, and the only known four potentially breeding northern white rhinos are located in a private sanctuary in Kenya.⁵⁰ There is an unsubstantiated claim that a small number of northern white rhinos may exist in Southern Sudan, but the subspecies has likely gone extinct in the Democratic Republic of the Congo.⁵¹ The IUCN lists the northern white rhino as “critically endangered,” and concludes that “in the absence of finding any additional rhino in the wild, this subspecies is highly unlikely to be viable in the longer term.”⁵² Moreover, the IUCN concludes that the best hope for this subspecies is “to conserve as many adaptive Northern White Rhino genes as possible for eventual reintroduction back to the wild, but this will require intercrossing with Southern White Rhino.”⁵³ In other words, this is another subspecies that will likely become extinct.

Black Rhinoceros. There are currently three subspecies of black rhinoceros (*Diceros bicornis*): *Diceros bicornis bicornis*, *D. bicornis michaeli*, and *D. bicornis minor*.⁵⁴ As noted above, a fourth subspecies, *D. bicornis longipes*, is thought to be extinct.⁵⁵ Overall, the species has drastically decreased during the twentieth century; the population may have numbered as many as 850,000 individuals, but by 1960 had been reduced to 100,000, and by 1995 only 2,410 remained.⁵⁶ As TRAFFIC notes, “[the] 97% decrease in African black rhino numbers [between 1960 and 1995] represents one of the most dramatic crashes of any large mammal species in recent history.”⁵⁷ The population has since risen to an estimated 4,880 black rhinos in December 2010⁵⁸; as of December 2005, there were an additional 240 black rhinos in captivity worldwide.⁵⁹ As of December 2010, the total population of *D. bicornis bicornis* was estimated at 1,922

⁴⁶ IUCN, *White Rhinoceros (Ceratotherium Simum) Table 1* (Dec. 2010), http://jr.iucnredlist.org/documents/attach/Mammals/4185_Ceratotherium%20simum.pdf (last visited Nov. 6, 2012).

⁴⁷ IUCN, *IUCN Red List of Endangered Species: Ceratotherium simum* (2012), <http://www.iucnredlist.org/details/4185/0> (last visited Nov. 6, 2012).

⁴⁸ IUCN, *IUCN Red List of Endangered Species: Ceratotherium simum simum* (2012), <http://www.iucnredlist.org/details/39317/0> (last visited Nov. 6, 2012).

⁴⁹ IUCN, *IUCN Red List of Endangered Species: Ceratotherium simum* (2012), <http://www.iucnredlist.org/details/4185/0> (last visited Nov. 6, 2012).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² IUCN, *IUCN Red List of Endangered Species: Ceratotherium simum cottoni* (2012), <http://www.iucnredlist.org/details/4183/0> (last visited Nov. 6, 2012).

⁵³ *Id.*

⁵⁴ IUCN, *IUCN Red List of Endangered Species: Diceros bicornis* (2012), <http://www.iucnredlist.org/details/6557/0> (last visited Nov. 6, 2012).

⁵⁵ IUCN, *IUCN Red List of Endangered Species: Diceros bicornis ssp. Longipes* (2012), <http://www.iucnredlist.org/details/39319/0> (last visited Nov. 6, 2012).

⁵⁶ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 22.

⁵⁷ *Id.*

⁵⁸ IUCN, *IUCN Red List of Endangered Species: Diceros bicornis* (2012), <http://www.iucnredlist.org/details/6557/0> (last visited Nov. 6, 2012).

⁵⁹ *Id.*

(mostly in Namibia and South Africa), the total population of *D. bicornis michaeli* was estimated at 742 (mostly in Kenya), and the total population of *D. bicornis minor* was 2,216 (mostly in South Africa and Zimbabwe).⁶⁰ Other current range states for the species include Angola, Mozambique, Tanzania, Botswana, Malawi, Swaziland, and Zambia.⁶¹ However, of the eleven States with black rhino populations, the total population in six of these States is fewer than 30 individuals.⁶² South Africa has taken a lead in black rhino conservation; the black rhino population in South Africa has been increasing since the 1980s, and the country currently has an estimated 1,915 black rhinos—the most of any range state and nearly 40% of the current worldwide population of wild black rhinos.⁶³ The IUCN lists the species as a whole, as well as the subspecies *D. bicornis michaeli* and *D. bicornis minor*, as “critically endangered.”⁶⁴ The IUCN lists the subspecies *D. bicornis bicornis* as “vulnerable.”⁶⁵

Javan Rhinoceros. The Javan rhino (*Rhinoceros sondaicus*) is the rarest of all existing rhino species.⁶⁶ The IUCN, the Zoological Society of London, and the Species Survival Network have recently listed the Javan rhino as one of the 100 most threatened species in the world.⁶⁷ Previously there were three subspecies of the Javan rhino, *R. sondaicus sondaicus*, *R. sondaicus annamiticus*, and *R. sondaicus inermis*, but two of these subspecies have gone extinct.⁶⁸ Scientists estimate the remaining subspecies of Javan rhinos, *R. sondaicus sondaicus* at between 40 to 60 individuals and, because of the low population numbers, the population is continually declining.⁶⁹ *R. sondaicus sondaicus* once ranged from Thailand through Malaysia to Indonesia.⁷⁰ However, the subspecies has been extirpated in Thailand and Malaysia and now only resides within a national park in Java, Indonesia.⁷¹ With the extinction of the two other subspecies, Javan rhinos also no longer exist in their historical range States of India, Bangladesh, Myanmar, Lao

⁶⁰ IUCN, *Black Rhinoceros (Dicerus bicornis) Table 1* (Dec. 2010),

http://jr.iucnredlist.org/documents/attach/Mammals/6557_Dicerus%20bicornis.pdf (last visited Nov. 6, 2012).

⁶¹ IUCN, *IUCN Red List of Endangered Species: Dicerus bicornis* (2012), <http://www.iucnredlist.org/details/6557/0> (last visited Nov. 6, 2012).

⁶² IUCN, *Black Rhinoceros (Dicerus bicornis) Table 1* (Dec. 2010),

http://jr.iucnredlist.org/documents/attach/Mammals/6557_Dicerus%20bicornis.pdf (last visited Nov. 6, 2012).

⁶³ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 9.

⁶⁴ IUCN, *IUCN Red List of Endangered Species: Dicerus bicornis* (2012), <http://www.iucnredlist.org/details/6557/0>

(last visited Nov. 6, 2012); IUCN, *IUCN Red List of Endangered Species: Dicerus bicornis michaeli* (2012), <http://www.iucnredlist.org/details/39320/0> (last visited Nov. 6, 2012); IUCN, *IUCN Red List of Endangered Species: Dicerus bicornis minor* (2012), <http://www.iucnredlist.org/details/39321/0> (last visited Nov. 6, 2012).

⁶⁵ IUCN, *IUCN Red List of Endangered Species: Dicerus bicornis bicornis* (2012),

<http://www.iucnredlist.org/details/39318/0> (last visited Nov. 6, 2012).

⁶⁶ JONATHAN E.M. BAILLIE & ELLEN R. BUTCHER, PRICELESS OR WORTHLESS?: THE WORLD’S MOST THREATENED SPECIES 64 (2012), available at <http://static.zsl.org/files/priceless-or-worthless-final-wq-2040.pdf>.

⁶⁷ *Id.*

⁶⁸ IUCN, *IUCN Red List of Endangered Species: Rhinoceros sondaicus* (2012),

<http://www.iucnredlist.org/details/summary/19495/0> (last visited Nov. 6, 2012); Ker Than, *Javan Rhino Extinct in Mainland Asia*, *supra* note 38.

⁶⁹ IUCN, *IUCN Red List of Endangered Species: Rhinoceros sondaicus* (2012),

<http://www.iucnredlist.org/details/summary/19495/0> (last visited Nov. 6, 2012).

⁷⁰ *Id.*

⁷¹ *Id.*

PDR, Cambodia, and Vietnam, and the potential historical range State of China.⁷² The IUCN lists the Javan rhino as “critically endangered.”⁷³

Sumatran Rhinoceros. The Sumatran rhino (*Dicerorhinus sumatrensis*) was also recently listed by the IUCN, the Zoological Society of London, and the Species Survival Commission as one of the 100 most threatened species in the world.⁷⁴ There are two existing subspecies of the Sumatran rhino: *D. sumatrensis sumatrensis* and *D. sumatrensis harrissoni*.⁷⁵ A third subspecies, *D. sumatrensis lasiotis*, is probably extinct, although there may be a population in northern Myanmar.⁷⁶ The total population size of all subspecies of Sumatran Rhino has declined by 80% over the past three generations and is currently estimated at fewer than 250 mature individuals, with no subpopulation of more than 50 individuals.⁷⁷ Due to these low numbers and the expected decline of at least 25% of the population per generation, the species population is expected to continually decline.⁷⁸

The subspecies *D. sumatrensis harrissoni* historically existed in Borneo, but now only occurs in Malaysia and potentially Indonesia.⁷⁹ The subspecies *D. sumatrensis sumatrensis* historically occurred in Thailand, Malaysia, and Indonesia, but no longer exists in Thailand.⁸⁰ The IUCN lists all the subspecies as “critically endangered.”⁸¹

Indian Rhinoceros. The Indian rhino (*Rhinoceros unicornis*) has recovered from an estimated population of 200 animals in 1900 to a population of approximately 2,800 in September 2009.⁸² The majority of Indian rhinos are in India, although there is also a population in Nepal, and two Indian rhinos were introduced into a national park in Pakistan in 1983.⁸³ A major concern for the Indian rhino is that 70% of the population is located in one national park in India, and thus any major event occurring in the park may endanger the future of the entire species.⁸⁴ While current population trends indicate that Indian rhino populations in India are increasing, the Nepalese population of Indian rhinos has decreased from an estimated 612 individuals in 2000 to fewer than 372 individuals in 2005 due to poaching and habitat changes.⁸⁵ However, a recent CITES Secretariat report indicates that this trend may be reversing and that

⁷² *Id.*

⁷³ *Id.*

⁷⁴ BAILLIE & BUTCHER, PRICELESS OR WORTHLESS?: THE WORLD’S MOST THREATENED SPECIES, *supra* note 66, at 78.

⁷⁵ IUCN, *The IUCN Red List of Endangered Species: Dicerorhinus sumatrensis* (2012), <http://www.iucnredlist.org/details/6553/0> (last visited Nov. 6, 2012).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² MILLIKEN ET AL., AFRICAN AND ASIAN RHINOCEROSSES- STATUS, CONSERVATION AND TRADE, CoP15 Doc. 45.1 Annex, *supra* note 22, at 13.

⁸³ IUCN, *IUCN Red List of Endangered Species, Rhinoceros unicornis* (2012), <http://www.iucnredlist.org/details/19496/0> (last visited Nov. 6, 2012).

⁸⁴ *Id.*

⁸⁵ *Id.*

rhino populations in Nepal may be increasing due to successful anti-poaching efforts and community-based conservation programs.⁸⁶ The IUCN lists the species as “vulnerable.”⁸⁷

B. Threats to Rhinos

Poaching presents the greatest threat to rhino populations worldwide as international demand for rhino horns continues to increase.⁸⁸ From the late 1970s through the mid-1990s, most African rhino populations were decimated by poaching.⁸⁹ In 1960, there were an estimated 100,000 black rhinos in Africa;⁹⁰ by 1995, only 2,410 remained.⁹¹ Civil unrest and widespread poverty have led to an increase in poaching and a decrease in protection efforts for the black rhino.⁹² Poaching rates for the southern white rhino have increased dramatically since 2007, and hit a record high in the first ten months of 2012.⁹³ Poaching of the small northern white rhino subpopulation increased in 2003, and no wild rhinos have been seen since 2006.⁹⁴ Several important subpopulations of Indian rhinos have been reduced by poaching, and the species has experienced additional population declines as a result of habitat degradation and human encroachment.⁹⁵ Poaching has reduced Javan rhino populations to the brink of extinction; most remaining Javan rhinos are found in a small, single population that faces continued threats from poaching, disease, and dwindling breeding capacity.⁹⁶ Centuries of over-hunting have decimated Sumatran rhino populations, and the remaining population is threatened by poaching and loss of population viability.⁹⁷

In the late 1990s, outcry over diminishing rhino populations led to a concerted international effort to protect what remained of the species.⁹⁸ Through implementation of CITES,

⁸⁶ CITES Secretariat, *Species Trade and Conservation—Rhinoceroses: Report of the Secretariat*, SC62 Doc. 47.2 at 3 (July 2012), available at <http://www.cites.org/eng/com/SC/62/E62-47-02.pdf>.

⁸⁷ IUCN, *IUCN Red List of Endangered Species, Rhinoceros unicornis* (2012), <http://www.iucnredlist.org/details/19496/0> (last visited Nov. 6, 2012).

⁸⁸ See, e.g., IUCN, *IUCN Red List of Endangered Species*, <http://www.iucnredlist.org>.

⁸⁹ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 18.

⁹⁰ RICHARD EMSLIE & MARTIN BROOKS, IUCN/SSC AFRICAN RHINO SPECIALIST GROUP, AFRICAN RHINO: STATUS SURVEY AND CONSERVATION ACTION PLAN 5 (1999), available at <http://data.iucn.org/dbtw-wpd/edocs/1999049.pdf>.

⁹¹ RICHARD H. EMSLIE ET AL., REPORT OF THE IUNC/SSC AFRICAN AND ASIAN RHINO SPECIALIST GROUPS AND TRAFFIC, AFRICAN AND ASIAN RHINOCEROSSES: STATUS, CONSERVATION AND TRADE, CoP14 Doc. 54 Annex 1, 8 (June 2007), available at <http://www.cites.org/eng/cop/14/doc/E14-54.pdf>.

⁹² IUCN, *IUCN Red List of Endangered Species: Diceros bicornis* (2012), <http://www.iucnredlist.org/details/6557/0> (last visited Nov. 6, 2012).

⁹³ IUCN, *IUCN Red List of Endangered Species: Ceratotherium simum* (2012), <http://www.iucnredlist.org/details/4185/0> (last visited Nov. 6, 2012); South Africa Dep’t. Env’tl. Affairs, Press Release, *Update on Rhino Poaching Statistics* (Oct. 30, 2012),

http://www.environment.gov.za/?q=content/update_rhinopoaching_statistics.

⁹⁴ IUCN, *IUCN Red List of Endangered Species: Ceratotherium simum* (2012), <http://www.iucnredlist.org/details/4185/0> (last visited Nov. 6, 2012).

⁹⁵ IUCN, *IUCN Red List of Endangered Species, Rhinoceros unicornis* (2012), <http://www.iucnredlist.org/details/19496/0> (last visited Nov. 6, 2012).

⁹⁶ IUCN, *IUCN Red List of Endangered Species: Rhinoceros sondaicus* (2012), <http://www.iucnredlist.org/details/summary/19495/0> (last visited Nov. 6, 2012).

⁹⁷ IUCN, *The IUCN Red List of Endangered Species: Dicerorhinus sumatrensis* (2012), <http://www.iucnredlist.org/details/6553/0> (last visited Nov. 6, 2012).

⁹⁸ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 18.

range States increased efforts to prevent poaching, consumer countries implemented rhino horn trade bans, and rhino populations slowly began to recover.⁹⁹ Recently, however, demand for rhino horn has surged, most notably in Vietnam,¹⁰⁰ and the number of rhinos poached each year has risen dramatically since 2005.¹⁰¹ In 2010, 333 rhinos were poached in South Africa alone;¹⁰² an additional 448 rhinos were poached in 2011,¹⁰³ and another 488 have been poached through the end of October 2012,¹⁰⁴ resulting in a 34-month total of 1,269. Organized crime syndicates are engaged in poaching and smuggling activities in both range and consumer countries, and the CITES Secretariat believes that rhino horn trade “is one of the most structured criminal activities currently faced by CITES.”¹⁰⁵

The poaching crisis is believed to be fueled by increased demand for rhino horn in Vietnam¹⁰⁶ and to a lesser extent in China and Thailand.¹⁰⁷ Japan, South Korea, Taiwan, and Yemen were once major consumers of rhino horn, but are no longer a significant factor in the rhino horn trade.¹⁰⁸ Rhino horn has historically been used as an ingredient in traditional medicine throughout Eastern Asia; China began using rhino horn powder thousands of years ago, and use of the horn later spread to Japan, Korea, and Vietnam.¹⁰⁹ In Vietnam, it has most commonly been used as a treatment for fevers or convulsions.¹¹⁰ A new trend has emerged among Vietnamese mothers to keep supplies of rhino horn on-hand to treat fevers in children.¹¹¹ While there continues to be demand for horn for these traditional applications, there has been a recent emergence in the use of rhino horn as a treatment for cancer and other life-threatening diseases.¹¹² The myth that rhino horn can both prevent and cure cancer has prompted a significant increase in Vietnamese demand for illegal horn imports.¹¹³ The horn’s purported efficacy as a cure for cancer has been publicly debunked by several traditional medicine authorities; however, it continues to be perpetuated by businesses selling rhino horn.¹¹⁴

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 68.

¹⁰¹ *Id.* at 11.

¹⁰² South Africa Dep’t. Env’tl. Affairs, Press Release, *Update on Rhino Poaching Statistics* (Sept. 12, 2012), http://www.environment.gov.za/?q=contene/rhino_poaching_update11sept.

¹⁰³ *Id.*

¹⁰⁴ South Africa Dep’t. Env’tl. Affairs, Press Release, *Update on Rhino Poaching Statistics* (Oct. 30, 2012), http://www.environment.gov.za/?q=content/update_rhinopoaching_statistics.

¹⁰⁵ CITES Secretariat, *Species Trade and Conservation—Rhinoceroses: Report of the Secretariat*, SC62 Doc. 47.2, *supra* note 86, ¶ 30.

¹⁰⁶ MILLIKEN & SHAW, *THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS*, *supra* note 3, at 14; *see also* WORLD WILDLIFE FUND, *WILDLIFE CRIME SCORECARD 17* (2012), *available at* http://awsassets.panda.org/downloads/wwf_wildlife_crime_scorecard_report.pdf (stating that “it is Viet Nam that appears to be the major destination market” for rhino horn)[hereinafter WWF, *WILDLIFE CRIME SCORECARD*].

¹⁰⁷ MILLIKEN & SHAW, *THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS*, *supra* note 3, at 145.

¹⁰⁸ *Id.* at 104.

¹⁰⁹ *See* KRISTIN NOWELL, *ASSESSMENT OF RHINO HORN AS A TRADITIONAL MEDICINE*, SC62 Doc. 47.2 Annex 2, 19 (April 2012), *available at* <http://www.cites.org/eng/com/SC/62/E62-47-02-A.pdf>.

¹¹⁰ *Id.* at 25.

¹¹¹ MILLIKEN & SHAW, *THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS*, *supra* note 3, at 15.

¹¹² NOWELL, *ASSESSMENT OF RHINO HORN AS A TRADITIONAL MEDICINE*, *supra* note 109, at 25.

¹¹³ *Id.* at 26.

¹¹⁴ *Id.* at 27.

Vietnamese demand for rhino horn is not limited to medicinal consumption. Recently, affluent Vietnamese have started to consume rhino horn recreationally.¹¹⁵ The horn is most commonly consumed as a cure for hangovers,¹¹⁶ but an emerging group of male consumers also believe that the horn is an aphrodisiac and can enhance sexual performance.¹¹⁷ Affluent, non-traditional consumers may currently present the greatest demand for rhino horn, due to the extravagance associated with the consumption of such a rare and expensive product.¹¹⁸ Rhino horn has been embraced as a luxury item or status symbol among some rich Vietnamese.¹¹⁹ Wealthy consumers may purchase art carvings or wine made with rhino horn, or may offer pieces of horn as an expensive, status-conferring gift.¹²⁰ This demand is largely influenced by the rarity of rhino horns and appears driven by rising affluence in Southeast Asia.¹²¹ Vietnam is projected to be one of the fastest growing economies by 2025;¹²² if action is not taken to prevent illegal imports and enforce existing trade bans, it is likely that rhino poaching will continue to increase.

III. CITES, RHINOS, AND VIETNAM

In 1977, the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES or the Convention) included all rhino subspecies in Appendix I—the designation for species “threatened with extinction which are or may be affected by trade.”¹²³ CITES prohibits the importation of Appendix I species and specimens for primarily commercial purposes and requires import and export permits for all permissible trade in Appendix I species.¹²⁴ The Parties downlisted the southern white rhino population of South Africa to Appendix II in 1994¹²⁵ and the southern white rhino population of Swaziland in 2004.¹²⁶ Appendix II species are not currently threatened by extinction, but may become threatened if trade is not strictly regulated.¹²⁷ The annotation to the listing for southern white rhinos specifies that the Appendix II listing only applies to the South Africa and Swaziland subpopulations “[f]or the exclusive purpose of allowing international trade in live animals to appropriate and acceptable destinations and hunting trophies.”¹²⁸ The annotation further specifies that all other

¹¹⁵ CITES Secretariat, *Species Trade and Conservation—Rhinoceroses: Report of the Secretariat*, SC62 Doc. 47.2, *supra* note 86, at ¶ 6.

¹¹⁶ *See id.* at 1–2.

¹¹⁷ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 15.

¹¹⁸ *Id.*

¹¹⁹ *Id.*; CITES Secretariat, *Species Trade and Conservation—Rhinoceroses: Report of the Secretariat*, SC62 Doc. 47.2, *supra* note 86, at 2.

¹²⁰ NOWELL, ASSESSMENT OF RHINO HORN AS A TRADITIONAL MEDICINE, *supra* note 109, at 2–3; MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 15–16.

¹²¹ NOWELL, ASSESSMENT OF RHINO HORN AS A TRADITIONAL MEDICINE, *supra* note 109, at 2–3.

¹²² MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 14.

¹²³ CITES, *supra* note 1, art. II(1); CITES, Appendices I and II as of 4 February 1977.

¹²⁴ CITES, *supra* note 1.

¹²⁵ CITES, *Amendments to Appendices I and II of the Convention*, CoP 9 (Nov. 1994).

¹²⁶ CITES, *Amendments to Appendices I and II of the Convention*, Notification to the Parties No. 2004/073 (Nov. 2004).

¹²⁷ CITES, *supra* note 1, art. II(2)(a).

¹²⁸ *Id.* at Appendices (valid as of Sept. 24, 2012).

specimens from these populations “shall be deemed to be specimens of species included in Appendix I and the trade in them shall be regulated accordingly.”¹²⁹

As a consequence of these decisions, an importer of a rhino specimen must present a valid export permit prior to import¹³⁰ and imports of any Appendix I specimen must not be for “primarily commercial purposes.”¹³¹ All Parties must “take appropriate measures” to prohibit trade that violates the provisions of the Convention.¹³²

Recognizing that substantial demand for and illegal trade in rhino horn were continuing the rapid decline in rhino populations worldwide, the Parties have adopted additional resolutions calling for range states and other implicated states to adopt adequate legislation and strengthen enforcement efforts to counter illegal killing and trade in Asian and African rhinos.¹³³ At the third meeting of the CoP (CoP3) in 1981, the Parties recommended that the Secretariat ask consumer countries to take measures to prevent the commercial import or export of rhino parts or derivatives.¹³⁴ Rhino populations continued to decline, however, and at CoP6 in 1987 the Parties acknowledged that drastic measures were necessary to protect the continued existence of the species. As a result, the Parties called for a complete prohibition on all sales and trade in rhino products, with the exception of solely non-commercial exports of legitimate hunting trophies.¹³⁵

By 1994, in the run up to CoP9, it was clear that still more needed to be done. Despite these efforts taken under CITES, the world rhino population decreased by more than 90% from 1970 to 1994.¹³⁶ The only populations to recover following the initial 1977 listing were the greater one-horned rhino in India and Nepal and the southern white rhino in Africa.¹³⁷ In contrast, black rhino populations declined by 95 percent, and the Javan rhino population declined to fewer than 100 animals.¹³⁸ Thus, at CoP9 in 1994, the Parties commended the successful efforts of some nations to protect existing rhino populations and reduce consumption of rhino products, but concluded that these measures had failed to stem the decline in rhino populations.¹³⁹ Concerned about the continued survival of rhino species, the Parties repealed the two earlier, ineffective resolutions aimed at preventing trade in rhino products, and adopted Resolution Conf. 9.14 regarding the Conservation of Rhinoceroses in Asia and Africa.¹⁴⁰

¹²⁹ *Id.*

¹³⁰ *Id.* art. IV(4).

¹³¹ *Id.* art. III(3)(c).

¹³² *Id.* art. VIII(1).

¹³³ CITES, Resolution Conf. 9.14 (Rev. CoP15), *supra* note 2.

¹³⁴ CITES, *Trade in Rhinoceros Horn*, Resolution Conf. 3.11 (1981)(repealed by Res. Conf. 9.14).

¹³⁵ CITES, *Trade in Rhinoceros Products*, Resolution Conf. 6.10 (1987)(repealed by Res. Conf. 9.14).

¹³⁶ CITES Secretariat, *Trade in Rhinoceros Specimens: Report of the Secretariat*, Doc. 9.28 § 1 (1994).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ CITES, Resolution Conf. 9.14 (Rev. CoP15), *supra* note 2.

¹⁴⁰ CITES, *Conf. 9.14, Conservation of Rhinoceros in Asia and Africa*, in *Resolutions of the Conference of the Parties*, 69, available at <http://www.cites.org/eng/cop/09/E9-Res.pdf>.

Resolution 9.14 continued to evolve. After rhino populations in Africa began to increase slowly in the years following Resolution Conf. 9.14's adoption,¹⁴¹ reports in 2007 indicated rising illegal rhino horn trade and that some of this trade appeared to involve legally obtained horns from hunting trophies that were later used for commercial purposes.¹⁴² Concerned by these reports, the Secretariat recommended that a CITES Rhinoceros Enforcement Task Force be convened to address these issues.¹⁴³ In 2008, this Task Force concluded that CITES and wildlife law enforcement officers could not effectively combat the criminal activity associated with illicit rhino horn trade unless international, multi-agency enforcement efforts were implemented.¹⁴⁴

These and other conclusions led the Parties to revise Resolution 9.14 several times, most recently in 2010 at CoP15. Resolution Conf. 9.14 (Rev. CoP15) now "urges" the following actions:

- a) all Parties that have stocks of rhinoceros horn to identify, mark, register and secure such stocks;
- b) all Parties to adopt and implement comprehensive legislation and enforcement controls, including internal trade restrictions and penalties, aimed at reducing illegal trade in rhinoceros parts and derivatives;
- c) range States to be vigilant in their law enforcement efforts, including the prevention of illegal hunting, the early detection of potential offenders and the application of appropriate penalties to act as effective deterrents;
- d) that law enforcement cooperation among range and implicated States be increased through existing international, regional and national law enforcement mechanisms and, where necessary, through the creation of such mechanisms in order to curtail illegal trade in rhinoceros horn; and
- e) the implicated States, as a matter of priority, to work with all user groups and industries to develop and implement strategies for reducing the use and consumption of rhinoceros parts and derivatives and to report on progress for inclusion into the joint IUCN/TRAFFIC reports.¹⁴⁵

Revised Resolution Conf. 9.14 (Rev. CoP15) also now recommends that the IUCN/SSC African and Asian Rhino Specialist Groups and TRAFFIC submit a report to the Secretariat on the conservation of and trade in rhinos and rhino parts and derivatives.¹⁴⁶ The Parties further adopted Decisions 14.88 and 14.89, which asked countries with stocks of rhino horns to declare their stocks to the Secretariat, and invited TRAFFIC to review this information.¹⁴⁷

At CoP15, it was also apparent that illegal poaching presented a serious threat to African rhino populations, especially in South Africa and Zimbabwe, and that particular consumer

¹⁴¹ EMSLIE ET AL., AFRICAN AND ASIAN RHINOCEROSSES: STATUS, CONSERVATION AND TRADE, CoP14 Doc. 54 Annex 1, *supra* note 91, at 7–8.

¹⁴² CITES Secretariat, *Species Trade and Conservation—Rhinoceroses*, SC57 Doc. 34 ¶ 5 (July 2008).

¹⁴³ *Id.* ¶ 11.

¹⁴⁴ CITES Secretariat, *Species Trade and Conservation—Rhinoceroses*, SC58 Doc. 37 ¶ 8 (July 2009).

¹⁴⁵ CITES, Resolution Conf. 9.14 (Rev. CoP15), *supra* note 2.

¹⁴⁶ CITES, *Conservation of and Trade in African and Asian Rhinoceroses*, Resolution Conf. 9.14 (Rev. CoP14).

¹⁴⁷ CITES, *Rhinoceroses*, Decision 14.88 (June 2007); CITES, *Rhinoceroses*, Decision 14.89 (June 2007).

countries were at the heart of the illegal trade.¹⁴⁸ As a consequence, the Parties directed the Secretariat to 1) examine the implementation of Resolution Conf. 9.14 (Rev. CoP15) by range states that have experienced an increase in poaching that poses a significant threat to rhino populations, 2) examine the progress of implicated states—“particularly Viet Nam”—in preventing illegal trade in rhino parts, and 3) “report on the implementation of Resolution Conf. 9.14 (Rev. CoP15) at the 61st, 62nd, and 63rd meetings of the Standing Committee.”¹⁴⁹ In order to facilitate the Secretariat’s duties under this directive, several Parties reported on their progress in implementing Resolution Conf. 9.14 (Rev. CoP15).¹⁵⁰ These reports show that some implicated States have implemented a variety of measures in an effort to prevent poaching and illegal trade in rhino parts and derivatives.¹⁵¹ The measures adopted differ from country to country, but include prohibiting imports of rhino parts for personal or commercial purposes, prohibiting domestic or international trade in rhino horn, and improving prosecutions through use of forensic technologies.¹⁵²

In accordance with Decision 15.71, the Secretariat reported on the implementation of Resolution Conf. 9.14 (Rev. CoP15) at the sixty-second meeting of the Standing Committee.¹⁵³ The Secretariat’s report, as well as those submitted by range and implicated States, paint a bleak picture for rhinos. In its report, the Secretariat stated that it “continues to believe that the illegal trade in rhinoceros horn is one of the most structured criminal activities faced by CITES,” and “increased international cooperation and a well-coordinated law enforcement response will be required to address this threat effectively.”¹⁵⁴

In addition, South Africa is now home to 80% of the world’s rhinos, and is one of the primary sources of rhino exports,¹⁵⁵ yet even this stable population is at risk due to surges in poaching and rising demand for rhino horn in Vietnam. To implement its annotation, applications for South African-issued export permits for live rhinos “must include a letter from the CITES Scientific Authority from the importing country stating that the Scientific Authority of the State of import is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it in accordance with Resolution Conference 11.20.”¹⁵⁶ This letter must also state that the country of import has implemented “adequate legislation to ensure that live specimen[s] will only be used for the purpose as indicated on the CITES export and import permit.”¹⁵⁷ South Africa prohibits domestic trade in rhino horns, and requires South African

¹⁴⁸ See CITES, Decision 15.71, *Conservation of and Trade in African and Asian Rhinoceroses* (2010).

¹⁴⁹ *Id.*

¹⁵⁰ CITES Secretariat, *Species Trade and Conservation—Rhinoceroses*, SC62 Doc. 47.2, *supra* note 86, at ¶ 2.

¹⁵¹ *Id.* ¶ 3.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* ¶ 33.

¹⁵⁵ *Id.* ¶ 23.

¹⁵⁶ CITES Secretariat, *Illegal Killing of Rhinoceros in South Africa: Report by South Africa*, CoP15 Inf. 32 Annex at 2 (Mar. 2010). The annotation accompanying the South African white rhino Appendix II listing limits trade in live animals “to appropriate and acceptable destinations;” Resolution Conf. 11.20 defined this term to mean destinations “suitably equipped to house and care for” live rhinos. CITES, *Definition of the Term ‘Appropriate and Acceptable Destinations,’* Resolution Conf. 11.20 (2000).

¹⁵⁷ CITES Secretariat, *Illegal Killing of Rhinoceros in South Africa*, CoP15 Inf. 32 Annex, *supra* note 156, at 2.

hunting permits and CITES export permits for all hunting trophy exports.¹⁵⁸ The CITES export permit must be approved by a conservation official at the port of exit before a trophy can be exported from South Africa.¹⁵⁹

Vietnam is currently believed to be one of the primary destinations for both legal and illegal rhino horn exports.¹⁶⁰ In August 2009, the Secretariat traveled to Vietnam to meet with the country's CITES Management Authority in order to raise awareness of the levels of illegal trade entering the country, and to identify ways in which Vietnam's enforcement efforts could be improved.¹⁶¹ In December 2010, a workshop on multi-agency national and international coordination and collaboration was held in Vietnam, which addressed the problem of illegal trade in rhino horn.¹⁶² The Secretariat noted that while South Africa and Vietnam had taken steps to exchange information regarding horn exports and smuggling, the demand for rhino horn continued to increase in Vietnam.¹⁶³ Vietnam has indicated to the Secretariat that they are performing a stock check of rhino hunting trophies, and the Secretariat has urged Vietnam to perform follow up investigations of all instances where a trophy is no longer in the possession of the importer.¹⁶⁴ As discussed below, there is little indication that Vietnam has made any significant progress in implementing Resolution Conf. 9.14 (Rev. CoP15) or in stemming the influx of illegal trade.

IV. VIETNAMESE NATIONALS ARE DIMINISHING THE EFFECTIVENESS OF CITES

As noted in the previous section, all trade in rhino specimens should either be for non-commercial purposes or, in the case of southern white rhinos from South Africa and Swaziland, for the narrow purposes of the trade in hunting trophies or live animals. Nonetheless, over the last decade, Vietnam has become the major destination for both legal and illegal rhino horn as demand for it soars for new, unproven medicinal purposes.

Vietnam's demand for rhino horn "is believed to be driving the rapacious illegal trade in rhino horn today."¹⁶⁵ Indeed, since 2003 Vietnam has transformed from a previously "dormant and generally overlooked" market for rhino horn¹⁶⁶ into the world's largest importer of both legal and illegal rhino horn from South Africa.¹⁶⁷ The illicit commercial trade in rhino horn appears to

¹⁵⁸ Republic of South Africa, Norms and Standards for the Marking of Rhinoceros and Rhinoceros Horn, and for the Hunting of Rhinoceros for Trophy Hunting Purposes, National Environmental Management: Biodiversity Act No. 10 of 2004 § 2.1 [hereinafter Republic of South Africa, *Norms and Standards*].

¹⁵⁹ *Id.* § 2.11.

¹⁶⁰ See, e.g., CITES Secretariat, *Species Trade and Conservation—Rhinoceroses*, SC62 Doc. 47.2, *supra* note 86; see also CITES Secretariat, *Species Trade and Conservation—Rhinoceroses: Implementation of Res. Conf. 9.14 (Rev. CoP15) and Decisions from CoP15*, SC61 Doc. 45.1 ¶ 15 (Aug. 2011).

¹⁶¹ CITES Secretariat, *Species Trade and Conservation—Rhinoceroses: Report of the Secretariat*, CoP15 Doc. 45.1 ¶¶ 15–18 (Mar. 2010).

¹⁶² CITES Secretariat, *Species Trade and Conservation—Rhinoceroses*, SC61 Doc. 45.1, *supra* note 160, ¶¶ 6, 8.

¹⁶³ *Id.* ¶ 9.

¹⁶⁴ CITES Secretariat, *Species Trade and Conservation—Rhinoceroses*, SC62 Doc. 47.2, *supra* note 86, ¶ 6.

¹⁶⁵ MILLIKEN & SHAW, *THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS*, *supra* note 3, at 14.

¹⁶⁶ *Id.* at 18.

¹⁶⁷ *Id.* at 19.

be supplemented, at least in part, by legal imports of rhino horn hunting trophies into Vietnam.¹⁶⁸ The illegal trade is flourishing in Vietnam, because, as described below, Vietnam is failing to adequately implement and enforce both national and international law regulating the importation of rhino hunting trophies from South Africa.¹⁶⁹ Research indicates that Vietnam is not adequately enforcing its CITES obligations to monitor imports of rhino horn and to prosecute importers and possessors of illegal rhino horn. While recognizing that illegal rhino horn trade is a serious problem,¹⁷⁰ Vietnam denies its involvement in that trade¹⁷¹ and, while it has reported taking some action to control rhino horn trade,¹⁷² it is clear that Vietnam must do much more.¹⁷³ Vietnam's failure to effectively control legal imports and prevent illegal trade in rhino parts and derivatives are in contravention of CITES Resolution Conf. 9.14 (Rev. CoP15) on *the Conservation of and Trade in African and Asian Rhinoceroses*, and diminishing the effectiveness of CITES.¹⁷⁴

In sum, Vietnamese nationals are diminishing the effectiveness of CITES because:

- 1) Vietnamese nationals are fueling demand for rhino horn and are engaged in rhino poaching and illegal trade in rhino horn;
- 2) Vietnam is failing to enforce its CITES implementing legislation;
- 3) Vietnam is failing to implement its CITES obligations, including by failing to verify permits, maintain trade records, and identify, mark, register and secure its rhino horn stocks;
- 4) Vietnam is failing to develop and implement strategies and programs to reduce demand and consumption of rhino horn and other rhino horn parts and derivatives.

A. Vietnamese Nationals Are Fueling Demand for Rhino Horn, Are Involved in Poaching and Illegal Trade, and Are Diminishing the Effectiveness of CITES

In the past ten years, Vietnam has grown from an “overlooked” market for rhino horn into the world’s largest importer of legal and illegal rhino horn from South Africa.¹⁷⁵ Rhino horn entering Vietnamese markets is sourced from legally hunted trophies as well as illegally poached

¹⁶⁸ *Id.* at 138.

¹⁶⁹ *See, e.g., id.* at 147 (“[T]here does not appear to be any kind of regulatory framework in place [in Vietnam] to ensure that these ‘personal effects’ [rhino horn hunting trophies] are not used for “commercial purposes” in violation of CITES. The failure to regulate such trade constitutes an avenue of trade and should be addressed as a matter of urgency.”).

¹⁷⁰ *See* WWF, *Vietnam Acknowledges Severity of Rhino Trade* (Sept. 20, 2012),

<http://wwf.panda.org/?206240/VietNam-acknowledges-severity-of-rhino-trade> (last visited Nov. 6, 2012).

¹⁷¹ *See e.g.,* Vietnam Environment Admin., *Rhino Horn Claim Unfounded*, *supra* note 4 (claiming that Vietnam is not a market country for rhino horn but rather a transit country for rhino horn destined for another country).

¹⁷² *See* CITES Secretariat, *Species Trade and Conservation—Rhinoceroses: Report of the Working Group*, CoP16 Doc. 54.1, ¶ 10 (2012), available at <http://www.cites.org/common/cop/16/doc/E-CoP16-54-01.pdf>.

¹⁷³ In the report of the CITES Rhino Working Group, for example, it was reported that South Africa will continue to deny hunting permits to Vietnamese nationals until Vietnam “can confirm whether the rhino horn trophies exported to Vietnam are still in the possession of the hunters.” *Id.* ¶ 13.

¹⁷⁴ Resolution Conf. 9.14 urges all parties to “adopt and implement comprehensive legislation and enforcement controls...aimed at reducing illegal trade in rhinoceros parts and derivatives.” CITES, Resolution Conf. 9.14 (Rev. CoP15), *supra* note 2.

¹⁷⁵ MILLIKEN & SHAW, *THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS*, *supra* note 3, at 19.

rhinos, primarily from South Africa. As TRAFFIC recently reported, “[b]eyond sport hunting, illegal trade networks supplying Viet Nam have also acquired hundreds of rhino horns from other illegal sources in South Africa, including poaching, theft and unregistered stocks held in the private sector.”¹⁷⁶ Additionally, thieves have stolen rhino horn from museums across the world.¹⁷⁷

At the heart of this legal and illegal activity is a boom in demand for rhino horn in Vietnam that has become manifest and transparent. Prior to Vietnam’s accession to CITES in 1994, rhino horn was “noticeably absent” from Vietnamese markets.¹⁷⁸ In the past decade, however, rhino horn has become increasingly available at Vietnamese traditional medicine and wild meat markets, retail outlets, on the internet, and through informal communication channels and networks.¹⁷⁹ It is now an “open secret” that rhino horn is available in many local markets in Vietnam,¹⁸⁰ and TRAFFIC has identified numerous communities, markets, and shops engaged in what is believed to be illegal domestic rhino horn trade.¹⁸¹

The increase in demand for rhino horn in Vietnam has coincided with rising affluence of Vietnamese citizens. Over the past three decades, the annual per capita income of Vietnam has increased eleven-fold, from US\$100 in 1986 to US\$1,130 in 2010.¹⁸² Rhino horn is viewed as a luxury item and a symbol of social status by many Vietnamese who, with their newly-found affluence, can afford to purchase such luxury.¹⁸³ As a consequence, rhino horn has become increasingly expensive. In 2009, a kilogram of rhino horn was worth approximately \$60,000, more than a kilogram of gold at \$40,600.¹⁸⁴ In fall 2011, the resale price of rhino horn in Vietnam ranged from \$33 to \$133 per gram,¹⁸⁵ although product priced at the lower end of the spectrum may actually be imitation horn.¹⁸⁶ On the black market, an eight-pound rhino horn can sell for up to \$360,000.¹⁸⁷ Significantly, the rise in price has not dampened Vietnamese demand, which appears to be price inelastic.¹⁸⁸

¹⁷⁶ *Id.* at 16.

¹⁷⁷ Kate Katharina Ferguson, *Rhino Horn Thefts a Growing Problem in Europe*, SPIEGEL ONLINE INTERNATIONAL, Mar. 13, 2012, <http://www.spiegel.de/international/europe/rhino-horn-thefts-a-growing-problem-in-europe-a-821132.html> (last visited Nov. 6, 2012); Thilo Thielke, *Africa Losing the Battle against Rhino Poachers* Sept. 8, 2012, <http://www.spiegel.de/international/world/africa-seeks-solution-to-poachers-selling-rhino-horns-to-asia-a-846605.html> (last visited Nov. 6, 2012).

¹⁷⁸ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 16.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 125.

¹⁸¹ *Id.* at 124-128.

¹⁸² The World Bank, *Vietnam Overview*, <http://www.worldbank.org/en/country/vietnam/overview> (last visited Sept. 30, 2012).

¹⁸³ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 134.

¹⁸⁴ Jeremy Hance, *In Midst of Poaching Crisis, Illegal Rhino Horn Tops Gold*, MONGABAY, Nov. 25, 2009, available at http://news.mongabay.com/2009/1126-hance_rhino_gold.html.

¹⁸⁵ Peter Gwin, *Rhino Wars*, NATIONAL GEOGRAPHIC MAGAZINE, March 2012, at 114, available at <http://ngm.nationalgeographic.com/2012/03/rhino-wars/gwin-text>.

¹⁸⁶ See MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 130.

¹⁸⁷ Gwin, *Rhino Wars*, *supra* note 185, at 113.

¹⁸⁸ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 54.

In addition, reports indicate that the increase in demand and price of rhino horn has induced Vietnamese nationals to enter the rhino horn market.¹⁸⁹ For example, trophy hunters in South Africa have traditionally come from North America or Europe, but recently “non-traditional” hunters from Vietnam have joined the hunt.¹⁹⁰ South Africa issued its first-ever CITES hunting trophy export permits to Vietnamese nationals in 2003, including nine permits for trophies (trophies of southern white rhinos include both horns from a single rhino) and two permits for rhino horns.¹⁹¹ Since then, Vietnamese hunters have become the “dominant force” in the hunting of southern white rhinos in South Africa.¹⁹² Between July 2009 to May 2012, 185 Vietnamese nationals engaged in rhino hunts in South Africa, which represented 48% of the total hunts during that period.¹⁹³

These Vietnamese nationals are referred to as “pseudo-hunters,” because they appear to have little to no interest in sport hunting.¹⁹⁴ In fact, evidence indicates that these trophy hunts are conducted as a means of securing rhino horns for commercial sale in Vietnam.¹⁹⁵ There are reports of Vietnamese hunters who do not know how to use a gun,¹⁹⁶ and many are not interested in having the trophies mounted.¹⁹⁷ In several instances, a professional hunter has done the shooting, rather than the Vietnamese client.¹⁹⁸ Despite this apparent lack of interest, hunters pay \$50,000 or more for hunts conducted by certified safaris,¹⁹⁹ and Vietnamese nationals have spent more than \$22 million on rhino hunting between 2003 and 2010.²⁰⁰ Notably, many of the Vietnamese nationals engaging in trophy hunts are believed to work for crime syndicates.²⁰¹

The increase in demand for rhino horn, as well as the scarcity of the product and its limited availability, has led to the dramatic rise in the poaching of rhinos and the illegal trade in rhino horn. Between 2000 and 2005, a minimum of 664 horns from poached rhinos, natural mortalities, government stockpiles, private stockpiles, legal trophy hunts, and other thefts and illegal exports “were acquired for illicit trade purposes” in Africa alone.²⁰² The number of horns entering illegal trade more than doubled between 2006 and 2009 to a minimum of 1,521 horns.²⁰³ As noted in Section II.B, more than 1,269 rhinos have been poached in South Africa since the

¹⁸⁹ CITES Secretariat, *Conservation of and Trade in African and Asian Rhinoceroses*, SC61 Doc. 45.2 at 4 (Aug. 2011), available at <http://www.cites.org/eng/com/sc/61/E61-45-02.pdf>.

¹⁹⁰ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 10.

¹⁹¹ MILLIKEN ET AL., AFRICAN AND ASIAN RHINOCEROSSES: STATUS, CONSERVATION AND TRADE, CoP15 Doc. 45.1 Annex, *supra* note 22, at 7.

¹⁹² MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 53.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *See id.* at 138; Gwin, *Rhino Wars*, *supra* note 185 at 116.

¹⁹⁶ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 54.

¹⁹⁷ *Id.* at 55.

¹⁹⁸ *Id.* at 54.

¹⁹⁹ Gwin, *Rhino Wars*, *supra* note 185, at 116.

²⁰⁰ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 54.

²⁰¹ Gwin, *Rhino Wars*, *supra* note 185 at 116.

²⁰² MILLIKEN ET AL., AFRICAN AND ASIAN RHINOCEROSSES: STATUS, CONSERVATION AND TRADE, CoP15 Doc. 45.1 Annex, *supra* note 22, at 6; Simon Milledge, *Rhino-Related Crimes in Africa: An Overview of Poaching, Seizure and Stockpile Data for the Period 2000-2005*, CoP14 Inf. 41, 9 (TRAFFIC, June 2007).

²⁰³ MILLIKEN ET AL., AFRICAN AND ASIAN RHINOCEROSSES: STATUS, CONSERVATION AND TRADE, CoP15 Doc. 45.1 Annex, *supra* note 22, at 6.

beginning of 2010.²⁰⁴ In contrast, between 1990 and 2005, poachers killed an average of only 14 rhinos in South Africa each year.²⁰⁵ While the exact destination of each poached and stolen rhino horn cannot be determined, reports indicate that many, if not most, illegally acquired rhino horns are likely destined for Vietnam. As TRAFFIC has reported,

Beyond sport hunting, illegal trade networks supplying Viet Nam have also acquired hundreds of rhino horns from other illegal sources in South Africa, including poaching, theft and unregistered stocks held in the private sector.²⁰⁶

Moreover, the number of rhino horns reportedly exported from South Africa to Vietnam is likely much higher than the actual number of rhino horns exported. For example, between 2005 and 2007, Vietnamese nationals reportedly participated in 203 rhino hunts in South Africa, which should have resulted in 406 rhino horn exports to Vietnam (because southern white rhinos have two horns).²⁰⁷ However, South African trade data reports 268 rhino horns exported from South Africa to Vietnam during that same time period.²⁰⁸

As a result of the demand for rhino horn in Vietnam, Vietnamese nationals are now engaging in a range of illegal activities. For example, Vietnamese diplomatic officials in South Africa have been implicated in the illegal rhino horn trade.²⁰⁹ In one remarkable instance, an employee at the Vietnamese embassy in South Africa was caught on tape conducting a rhino horn trade in front of the Vietnamese embassy in Pretoria, South Africa.²¹⁰ Vietnamese government officials also serve as “conduits” for rhino horns between Africa and Vietnam.²¹¹

In addition, Vietnamese nationals are exploiting South Africa’s hunting trophy regulations. For example, while South Africa limits each hunter to one rhino hunt per year,²¹² reports indicate that Vietnamese hunters hire non-hunters to act in their stead.²¹³ Further, although a CITES export permit is required for each horn leaving South Africa,²¹⁴ it has been “widely alleged” that export permits are being used more than once before their six-month expiration date.²¹⁵ There have also been reports of Vietnamese nationals obtaining false export permits for trophies from rhinos that they did not personally hunt.²¹⁶ These false export permits are used as a means of circumventing South Africa’s law restricting hunters to one rhino hunt per

²⁰⁴ South Africa Dep’t. Envtl. Affairs, Press Release, *Update on Rhino Poaching Statistics* (Oct. 30, 2012), http://www.environment.gov.za/?q=content/update_rhinopoaching_statistics.

²⁰⁵ MILLIKEN & SHAW, *THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS*, *supra* note 3, at 11.

²⁰⁶ *Id.* at 16.

²⁰⁷ *Id.* at 58.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 82-84.

²¹⁰ *Id.* at 82-83.

²¹¹ *Id.* at 126. The TRAFFIC Report notes that Vietnamese government officials are allegedly involved in the illegal trade of rhino horn in the following manners: allowing “free passage” and “protection” to smugglers; providing immunity from law enforcement action for well-connected dealers and consumers; and diplomats and airport officials functioning as sources of rhino horn. *Id.* at 17.

²¹² Republic of South Africa, *Norms and Standards*, *supra* note 158, § 3.6.

²¹³ MILLIKEN & SHAW, *THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS*, *supra* note 3, at 54.

²¹⁴ CITES, *supra* note 1, art. IV(2); Republic of South Africa, *Norms and Standards*, *supra* note 158, § 3.1.

²¹⁵ MILLIKEN & SHAW, *THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS*, *supra* note 3, at 58, 132.

²¹⁶ *Id.* at 55.

year.²¹⁷ TRAFFIC estimates that between one-third and two-thirds of Vietnamese trophy hunts do not involve valid export permits.²¹⁸

Vietnam's recent emergence as a major new market for rhino horn diminishes the effectiveness of CITES by encouraging international trade in the species. As TRAFFIC has noted, “[t]he emergent rhino horn trade between South Africa and Viet Nam stands as the most serious challenge to rhino conservation in Africa over the past 15 years and threatens to undermine decades of conservation achievement.”²¹⁹

B. Vietnam Is Failing to Enforce its CITES Implementing Legislation and Is Thus Diminishing the Effectiveness of CITES

Since acceding to CITES in 1994,²²⁰ Vietnam has issued a number of decrees and circulars aimed at protecting wildlife and plants in Vietnam.²²¹ Although the CITES Secretariat believes that Vietnam's national legislation generally conforms with CITES implementation requirements,²²² Vietnam has failed to adequately implement and enforce these laws,²²³ as described below. This failure has resulted in the dramatic increase in illegal importation and domestic trade of rhino horn that has been practically unchallenged by Vietnamese enforcement

²¹⁷ *See id.*

²¹⁸ *Id.* at 58.

²¹⁹ *Id.* at 18.

²²⁰ CITES, List of Contracting Parties, <http://www.cites.org/eng/disc/parties/chronolo.php>.

²²¹ *See* CITES, *Report on the Review of Vietnam's Wildlife Trade Policy* 22-24 (2008), available at http://www.cites.org/common/prog/policy/Vietnam_wildlife_trade_policy_review.pdf.

²²² CITES Secretariat, *National Laws for Implementation of the Convention: Status of Legislative Progress for Implementing CITES*, SC62 Doc. 23 Annex, 6, 10 (June 15, 2012), available at <http://www.cites.org/eng/com/SC/62/E62-23.pdf>.

²²³ Vietnam implements CITES through Government Decree No. 82/2006/ND-CP, which regulates the “export, import, re-export, introduction from the sea, transit, breeding, rearing and artificial propagation” of specimens listed on the CITES Appendices. Republic of Viet Nam, Government Decree No. 82/2006/ND-CP on Management of Export, Import, Re-export, Introduction from the Sea, Transit, Breeding, Rearing and Artificial Propagation of Endangered Species of Precious and Rare Wild Fauna and Flora (Aug. 10, 2006), available at http://vbqpl.moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=5158 [hereinafter Decree No. 82/2006/ND-CP]. Violations of Vietnam's CITES implementing legislation are criminalized under the penal code because CITES-listed species and specimens are treated the same as domestic species protected under Decree No. 32/2006/ND-CP. Republic of Vietnam, Government Decree No. 32/2006/ND-CP on Management of Endangered, Precious and Rare Forest Plants and Animals art. 25(2), (March 30, 2006), available at http://envietnam.org/library/Law%20articles/Decree_32_30_March_06_EN.pdf. For purposes of “[i]nvestigation, examination and settlement of violations,” species listed on Appendix I of CITES are treated the same as Group I species under Decree 32/2006/ND/CP; species listed on Appendix II of CITES are treated the same as Group II species. *Id.* The Vietnamese penal code makes it a crime for persons to illegally “hunt, catch, kill, transport, raise, cage or traffic in animals on the list of endangered, precious and rare species prioritized for protection or illegally transport or traffic in body organs or products of these animal species.” Persons or entities that violate the wildlife protection laws “shall be” fined between fifty million Vietnamese dong (US\$2400) and five hundred million Vietnamese dong (US\$23,996), subject to “non-custodial reform for up to two years” or receive a prison sentence of between six months and three years. Republic of Vietnam, Penal Code, No. 15/1999/QH10 art. 190(1) (Dec. 21, 1999), available at http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=610, as amended by Law No. 37/2009/QH12, Article 1(21) (amending Article 190 of the Penal Code), available at http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10467. Under certain circumstances, offenders can be sentenced to between two and seven years imprisonment. *Id.* at art. 190(2).

officials since 2008. Additionally, the Vietnamese government has done little to ensure that Vietnam complies with its CITES obligations and otherwise assists the international communities' efforts to conserve rhinos.

Article VIII of CITES requires Parties to take appropriate measures to enforce the provisions of the Convention, including the establishment of measures to penalize trade in, or possession of, illegally traded CITES-listed specimens. Moreover, Resolution Conf. 9.14 (Rev. CoP15) urges all the Parties to adopt comprehensive enforcement controls with respect to rhinos. While Vietnam may have written legislation relating to enforcement, Vietnam is clearly failing to take on-the-ground action to enforce those provisions.

For example, although wildlife traffickers are likely importing significant amounts of rhino horn into Vietnam illegally,²²⁴ Vietnam enforcement officials have reportedly failed to seize any rhino horns entering the country between 2008 and the present, a period in which Vietnam has been named the principal importer of rhino horn.²²⁵ In addition, the CITES Secretariat reported in July 2012 that it was “not aware of any arrests or prosecutions in Vietnam related to illegal trade in rhinoceros horn in recent years.”²²⁶

Vietnam claims that the lack of seizures is evidence that illegal trade in rhino horn is decreasing.²²⁷ In making this claim, Vietnam is willfully ignoring reports and trade data indicating that a significant number of rhino horns are illegally imported into Vietnam. Between 2003 and 2010, 657 rhino horns were legally exported as hunting trophies from South Africa to Vietnam.²²⁸ However, during the same period only 170 rhino horns were legally imported into Vietnam from South Africa.²²⁹ Thus, 487 rhino horns are unaccounted for, suggesting that traffickers imported these rhino horns into Vietnam in contravention of CITES and Vietnam's CITES-implementing legislation. Similarly, the arrests and prosecution of Vietnamese citizens by other States for their involvement in the illegal rhino horn trade also indicate Vietnamese citizens' involvement in the illicit rhino trade.²³⁰

Prior to 2009, Vietnam made some effort to enforce its laws to prevent the illegal trade in rhino horn. Vietnam reported twelve instances of officials seizing rhino horn at Vietnamese international airports between 2006 and 2008.²³¹ In at least three of these instances, Vietnam prosecuted the trafficker.²³² One trafficker, a student, received a two-year suspended prison sentence with probation and was expelled from school.²³³ It is unclear whether the other two

²²⁴ See *supra* section IV.A.

²²⁵ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 144. However, in 2011, Vietnamese police found one rhinoceros horn while searching the home of a person involved in endangered wildlife trade. Dam Huy, *Endangered Wildlife Dealers Arrested in Southern Vietnam*, THANH NIEN NEWS, Dec. 27, 2011, available at <http://www.vnnnews.net/endangered-wildlife-dealers-arrested-in-southern-vietnam>.

²²⁶ CITES Secretariat, *Species Trade and Conservation—Rhinoceroses*, SC62 Doc. 47.2, *supra* note 86, at 2.

²²⁷ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 144.

²²⁸ *Id.* at 138.

²²⁹ *Id.*

²³⁰ *Id.* at 17.

²³¹ *Id.* at 141.

²³² *Id.* at 141-142. One of these prosecutions started in 2008 and continued through at least March 2011. *Id.* at 141.

²³³ *Id.* at 141.

traffickers prosecuted were ever sentenced or served jail time for their crimes.²³⁴ For the remaining nine instances, there is no available information indicating whether Vietnam prosecuted the traffickers.²³⁵ Additionally, Vietnamese officials report that between 2004 and 2008, there were at least ten instances where rhino horn was sold illegally in domestic markets.²³⁶

Vietnam's reported failure to seize any rhino horn entering Vietnam is underscored by other States' recent seizures. Enforcement officials in other countries have seized large amounts of rhino horn since 2008. For example, between 2009 and 2012, South African officials seized 162 rhino horns in more than 50 separate enforcement actions,²³⁷ and Kenyan authorities' seized five rhinos horns (and raw ivory) at a Kenyan airport in August 2010.²³⁸ Additionally, importing countries have seized rhino horn, including a September 2012 seizure of six rhino horns in the Philippines²³⁹ and a November 2011 seizure of 33 rhino horns (and ivory products) in China.²⁴⁰ Considering the volume of illegal rhino horn trade occurring in Vietnam, it is implausible that Vietnam would have zero seizures in the last five years, unless it is turning a blind eye to such illegal trade.

Vietnam's reported failure to prosecute importers and possessors of rhino horn is even more evident in light of other States' prosecution of Vietnamese citizens for their involvement in the illegal rhino horn trade. Since 2008, South Africa has arrested Vietnamese citizens for their involvement in fourteen separate rhino crimes.²⁴¹ In seven of these cases, the Vietnamese individuals were found guilty.²⁴² In the United States in 2012, two men pled guilty to violating U.S. law for their involvement in the illegal rhino horn trade, and "acknowledged making payments to Vietnamese customs officials to ensure clearance of horn shipments sent to that country."²⁴³ Also, in August 2010, a Chinese court sentenced a person to twelve years imprisonment and imposed a US\$4,500 fine for illegally transporting rhino horns, which the person claimed he purchased from a Vietnamese citizen at the Chinese-Vietnamese border.²⁴⁴

²³⁴ *Id.* at 141-142.

²³⁵ *Id.* at 141.

²³⁶ *Id.* at 17.

²³⁷ *Id.* at 94, 162-66 (Appendix 2).

²³⁸ CNN, *Elephant Tusks, Rhino Horns Seized in Kenya*, CNN JUSTICE, Aug. 23, 2010, http://articles.cnn.com/2010-08-23/justice/kenya.seized.cargo_1_elephant-tusks-convention-on-international-trade-kenya-wildlife-service?s=PM:CRIME (last visited Nov. 6, 2012).

²³⁹ AFP, *Philippines Seizes Smuggled Rhino Horns*, INQUIRER NEWS, Sept. 7, 2012, <http://newsinfo.inquirer.net/265918/philippines-seizes-smuggled-rhino-horns>.

²⁴⁰ Rachel Nuwer, *After Rhino Horn Seizure, Conservationists Seek Enforcement*, NEW YORK TIMES, Nov. 21, 2011, <http://green.blogs.nytimes.com/2011/11/21/after-rhino-horn-seizure-conservationists-seek-enforcement/>.

²⁴¹ MILLIKEN & SHAW, *THE SOUTH AFRICA-VIET NAM RHINO HORN TRADE NEXUS*, *supra* note 3, at 170-173 (Appendix 4).

²⁴² *Id.* Four of the cases are still pending, in two of the cases the verdict is unknown, and in one case the defendants entered a guilty plea. *Id.*

²⁴³ U.S. Dep't of Justice, Press Release, *Members of Smuggling Ring Plead Guilty in Los Angeles to Crimes Relating to Illegal Trafficking of Endangered Rhinoceros Horn* (Sept. 14, 2012), <http://www.justice.gov/opa/pr/2012/September/12-enrd-1120.html>.

²⁴⁴ TRAFFIC, *SEIZURES AND PROSECUTIONS: MARCH 1997-APRIL 2012* 198 (2012), available at <http://www.traffic.org/seizures-journal-legacy/month/november-2007?currentPage=2>.

The CITES Secretariat has stated that it “believes that the illegal trade in rhinoceros horn is one of the most serious criminal activities currently faced by CITES.”²⁴⁵ The evidence suggests that rhino horn seizures and prosecutions of individuals involved in the illegal rhino horn trade should be *rising*, not halting. Logic suggests that there should be a corresponding increase in Vietnam’s arrest and prosecution of individuals involved in the illegal rhino horn trade, including individuals from whom Vietnamese enforcement officials seized illegal horn. Yet, Vietnam has reportedly been unable or unwilling to seize a single shipment of rhino horn or prosecute a single violation of its CITES implementing legislation when dealers openly trade in and sell rhino horn. Vietnam’s failure to act has clearly had a negative impact on other CITES Parties. As TRAFFIC reports:

South African authorities have also provided more information than ever before to their Vietnamese counterparts concerning the names, addresses and details of Vietnamese nationals that are conducting rhino hunts in Africa and identified as exporters and importers on CITES export permits. These individuals essentially constitute an obvious list of suspects engaged in rhino horn trade in Viet Nam, but their activities do not seem to have garnered much oversight attention. And finally, since 2008, the number of arrests of Vietnamese nationals trafficking in rhino horns in South Africa has been at its highest. African law enforcement authorities are increasingly of the view that their Vietnamese counterparts are failing to address the issue seriously and reports of official corruption and complicity in the trade only exacerbate this perception.²⁴⁶

Clearly, Vietnam’s failure to enforce its CITES implementing legislation and prosecute individuals involved in the illegal rhino horn trade is diminishing the effectiveness of CITES.

C. Vietnam Is Failing to Implement Its CITES Obligations and Is Thus Diminishing the Effectiveness of CITES

To protect CITES-listed species from over-exploitation due to trade, the Convention requires Parties to adopt adequate implementing legislation that, among other things, requires an importer to present a valid export permit.²⁴⁷ In addition, recognizing the precarious conservation status of rhino species, the CITES Parties adopted Resolution Conf. 9.14 (Rev. CoP15), which urges Parties to take a series of actions intended to conserve rhinos and protect them from illegal trade in rhino horn.²⁴⁸ Vietnam, as an “implicated state” for purposes of this Resolution and, at the time of its adoption, as a range State, was tasked with reducing its role in illegal rhino trade. As shown below, Vietnam has failed to adequately implement the trade measures required by the Convention and its additional obligations pursuant to Resolution Conf. 9.14 (Rev. CoP15).

²⁴⁵ CITES Secretariat, *Species Trade and Conservation—Rhinoceroses*, CoP15 Doc. 45.1, *supra* note 161, ¶ 22.

²⁴⁶ MILLIKEN & SHAW, *THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS*, *supra* note 3, at 144.

²⁴⁷ CITES, *supra* note 1, art. IV(4).

²⁴⁸ CITES, Resolution Conf. 9.14 (Rev. CoP15), *supra* note 2, at “Urges.”

1. Vietnam Is Failing to Verify Permits and Monitor and Control Trade in Rhino Hunting Trophies from South Africa.

Vietnam is failing to adequately implement and enforce both national and international law regulating the importation of hunting trophies from South Africa. In accordance with CITES, Vietnam must require valid South African export permits for all rhino hunting trophies imported into Vietnam.²⁴⁹ According to TRAFFIC, Vietnam claims to have additional requirements for rhino hunting trophy imports from South Africa: importers reportedly must provide the CITES Management Authority in Vietnam with the CITES export permit and hunting permit issued by South Africa, the hunter's passport (to verify that the individual stayed in South Africa), and a residence certificate issued by the local police.²⁵⁰ For hunted specimens, Vietnam also requires importers to submit a letter of request for permit certification to the Vietnam CITES Management Authority.²⁵¹ It appears, however, that Vietnam is failing to adequately implement or enforce these requirements—657 rhino horns have been legally exported to Viet Nam as hunting trophies from 2003 through 2010, yet Vietnam has reported imports of only 170 rhino horns.²⁵² Moreover, reports indicate government complicity in relation to these undeclared imports.²⁵³ For example, reports indicate that Vietnamese embassy personnel in South Africa are assisting in the procurement and transport of horns obtained through illegal channels.²⁵⁴ In 2008, Vietnam recalled one of its diplomats after the official was secretly filmed acquiring a rhino horn from an agent of a smuggling syndicate.²⁵⁵

CITES mandates that Vietnam maintain records of trade in specimens of all CITES-listed species—including hunting trophies—imported into the country that includes the name and address of the importer.²⁵⁶ In order to ensure that hunting trophies do not enter the commercial market, Vietnam needs to establish mechanisms to track and monitor hunting trophies after they enter the country.²⁵⁷ Available data, however, shows that Vietnam has yet to implement an effective system to register and track imported hunting trophies. For example, Vietnam noted in a document submitted to CoP15 that the number of horns imported legally into Vietnam dropped

²⁴⁹ CITES, *supra* note 1, art. IV(4).

²⁵⁰ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 114, 139. Vietnam has failed to make these procedures available for review by the international community, and therefore there is no available evidence indicating that these requirements have been implemented or enforced. Vietnam did amend its CITES implementing legislation in 2011 but it is not clear that it was amended as described in the Milliken and Shaw report. See Republic of Viet Nam, Decree 98/2011/ND-CP (Oct. 26, 2011), available at <http://faolex.fao.org/docs/pdf/vie108679.pdf>; Decree 82/2006/ND-CP (Aug. 10, 2006), *supra* note 223.

²⁵¹ Decree 82/2006/ND-CP, *supra* note 223, art. 18.3, Appendix 1.

²⁵² MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 138.

²⁵³ See *id.* at 141.

²⁵⁴ MILLIKEN ET AL., AFRICAN AND ASIAN RHINOCEROSSES: STATUS, CONSERVATION AND TRADE, CoP15 Doc. 45.1 Annex, *supra* note 22, at 8.

²⁵⁵ AFP, *Vietnam to Recall Diplomat Filmed Taking Rhino Horn*, MAIL AND GUARDIAN, Nov. 19, 2008, <http://mg.co.za/article/2008-11-19-vietnam-to-recall-diplomat-filmed-taking-rhino-horn>.

²⁵⁶ CITES, *supra* note 1, art. VIII(6); see also CITES, Resolution Conf. 11.17 (Rev. CoP14), *National Reports* (2007) (establishing guidelines for submission of annual reports).

²⁵⁷ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 138.

from 42 in 2007 to 14 in 2009.²⁵⁸ These statistics give the impression that rhino horn imports into Vietnam have decreased in recent years, but corresponding data from South Africa indicates that this is not the case. In 2008, South Africa reported 48 hunting trophy exports to Vietnam; in 2009, it reported 62 single horns and 37 trophies, and in 2010 South Africa reported 91 horns and 20 trophies exported to Vietnam.²⁵⁹ Clearly, Vietnam is unable or unwilling to accurately record and monitor trade in rhino horns. Either way, Vietnam is diminishing the effectiveness of CITES.

Vietnam's failure to accurately account for legal rhino horn imports helps foster the illegal horn trade. In fact, South Africa has adopted measures to monitor and control legal trophy exports in an effort to suppress this illegal trade to Vietnam. Since 2010, South Africa has provided Vietnamese authorities with export permit information for all hunting trophy exports bound for Vietnam.²⁶⁰ In addition, South Africa requires all hunting trophies to be micro-chipped and have DNA samples taken prior to export.²⁶¹ For these measures to be effective, however, Vietnam must accurately account for hunting trophies at the time of importation,²⁶² something Vietnam has been unable or unwilling to do.²⁶³ Moreover, Vietnam has not yet reported any arrests or prosecutions of importers who cannot account for their trophies, and there is little evidence to indicate that Vietnam has established an effective regulatory system to prevent legal hunting trophies from entering the illegal market.²⁶⁴

In response to growing concern over the questionable legality of Vietnamese rhino hunts, South Africa has suspended the issuance of hunting permits to Vietnamese nationals.²⁶⁵ In 2009, the Professional Sport Hunters Association of South Africa warned its members to avoid Vietnamese clients.²⁶⁶ In January 2012, South Africa's Minister of Water and Environmental Affairs issued a press release stating that the Department intended to deny hunting permits to hunters from countries that do not have effective legislation in place to monitor whether hunting trophies were being used for the purpose indicated on the CITES export permit.²⁶⁷ South Africa's *Norms and Standards for the Marking of Rhinoceros and Rhinoceros Horn, and for the Hunting of Rhinoceros for Trophy Hunting Purposes*, which was amended in April 2012, now mandates that permit-issuing authorities consider the adequacy of legislation in a hunter's home nation

²⁵⁸ CITES Secretariat, *Rhino Horn Trade Management in Viet Nam, Including Legally Acquired Horns from Trophy Hunting: Report by Viet Nam*, CoP15 Doc. 62.2 (March 2010).

²⁵⁹ *Rhino Horns and Trophies Exported to Asia from South Africa 2000–2010*, SAVINGRHINOS.ORG, <http://www.rhinoconservation.org/2012/05/15/rhino-horns-and-trophies-exported-to-asia-from-south-africa-2000-2010-infographic/> (last visited Nov. 6, 2012).

²⁶⁰ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 16.

²⁶¹ Republic of South Africa, *Norms and Standards*, *supra* note 158, at 10.

²⁶² MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 138.

²⁶³ The Standing Committee Working Group on Rhinoceroses, for example, reported that South Africa would continue to deny hunting permits to Vietnamese nationals until Vietnam can “confirm whether the rhino horn trophies exported to Vietnam are still in the possession of the hunters.” CITES Secretariat, *Species Conservation and Trade—Rhinoceros: Report of the Working Group*, CoP16 Doc. 54.1, *supra* note 172, ¶ 13.

²⁶⁴ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 139–40.

²⁶⁵ *Id.* at 10, 53.

²⁶⁶ *Id.* at 10.

²⁶⁷ Media Statement, Minister of Water and Environmental Affairs, *Minister Edna Molewa Addressed the National Press Club on the Ongoing Scourge of Rhino Poaching and Interventions Aimed at Addressing this Problem*, Jan. 15, 2012, available at <http://www.sanparks.org/docs/news/2012/2012-edna-molewa.pdf>.

before granting a hunting permit.²⁶⁸ In March 2012, the Department of Environmental Affairs denied hunting permits to five Vietnamese nationals and stated that the Department was undergoing a diplomatic consultation that would allow it to deny rhino hunting permits to all Vietnamese nationals.²⁶⁹

These extraordinary measures taken by South Africa, all designed to squelch illegal activity by Vietnamese nationals, underscore Vietnam's failure to adopt and implement an effective regulatory system to monitor legal hunting trophy imports and prevent trophy horns from entering into illegal commercial trade. Clearly, Vietnam's actions are undermining international efforts to protect rhinos and diminishing the effectiveness of CITES.

2. Vietnam Is Failing to Identify, Mark, Register and Secure Rhino Stocks²⁷⁰

Resolution Conf. 9.14 (Rev. CoP15) urges all Parties that have stocks of rhinoceros horn to identify, mark, register, and secure rhino stocks.²⁷¹ Moreover, the CITES Parties directed all Parties with rhino horn stocks to "declare the status of their stocks of rhinoceros horns and derivatives before [CoP15]."²⁷² The Secretariat reported that only seven countries provided this information prior to the CoP.²⁷³ While Vietnam did provide a short document to the Secretariat for CoP15, the document did not mention rhino horn stocks.²⁷⁴ Evidence indicates that Vietnam has stocks of rhino horn: as of mid-2009, the Vietnamese government reported that it was storing 100 kg of seized rhino horns at the National Treasury.²⁷⁵ Consistent with Resolution Conf. 9.14 (Rev. CoP15), the Secretariat requested information from Vietnam and other countries about their stocks of rhino horn.²⁷⁶

²⁶⁸ Republic of South Africa, *Norms and Standards*, *supra* note 158, § 3.5.

²⁶⁹ Rhino Horn is NOT Medicine, *South Africa: Five Vietnamese 'Trophy Hunters' Denied Permits*, RHINOCONSERVATION.ORG, Apr. 4, 2012, <http://www.rhinoconservation.org/2012/04/04/south-africa-five-vietnamese-trophy-hunters-denied-permits/> (last visited Nov. 6, 2012).

²⁷⁰ Rhino horn stockpiles are collections of rhino horns, either possessed by the government or private owners. The main sources of the rhino horns in stockpiles are (1) horns taken from rhinos that died of natural causes, (2) horns removed during management actions, such as animal control operations, or horns broken off accidentally during management actions, (3) horns that are part of legal hunting trophies, (4) horns in stockpiles acquired before rhinos were listed on CITES, and (5) horns confiscated or seized from poachers or stockpile thefts. Effective stockpile management helps prevent rhino horn movement from stockpiles into illegal trade. SIMON MILLEDGE, TRAFFIC EAST/SOUTHERN AFRICA, RHINO HORN STOCKPILE MANAGEMENT: MINIMUM STANDARDS AND BEST PRACTICES FROM EAST AND SOUTHERN AFRICA 2 (2005), available at <http://www.traffic.org/mammals/>.

²⁷¹ CITES, Resolution Conf. 9.14 (Rev. CoP15), *supra* note 2, ¶ f of "Urges."

²⁷² CITES, *Rhinoceroses*, Decision 14.88 (June 2007), available at http://www.cites.org/eng/dec/valid14/14_88-90.shtml.

²⁷³ See MILLIKEN ET AL., AFRICAN AND ASIAN RHINOCEROSSES: STATUS, CONSERVATION AND TRADE, CoP15 Doc. 45.1 Annex, *supra* note 22, at 10–11 (noting that, as of November 2009, the IUCN Species Survival Commission African and Asian Rhino Specialist Groups and TRAFFIC had no data on Vietnam's rhino horn stocks).

²⁷⁴ CITES Secretariat, *Rhino Horn Trade Management in Viet Nam, Including Legally Acquired Horns from Trophy Hunting*, CoP15 Doc. 62 Annex, *supra* note 258.

²⁷⁵ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 141.

²⁷⁶ CITES, Notification of the Parties No. 2012/053, *Conservation of and Trade in African and Asian Rhinoceroses* (Aug. 27, 2012).

Vietnam has also been asked to provide information on the status of its stock check of rhino hunting trophies. This information is directly related to the request in Resolution Conf. 9.14 (Rev. CoP15) for CITES Parties to “identify, mark, register and secure [rhino horn stocks].”²⁷⁷ The CITES Secretariat specifically requested the Standing Committee to “encourage” Vietnam to provide this information.²⁷⁸ Reports indicate that at least some rhino horns legally imported into Vietnam as hunting trophies are later removed from the trophies and sold in the domestic market, which is helping fuel the rhino horn trade and undermining the effectiveness of CITES.²⁷⁹ Thus, the Secretariat “believes that it will be vital for the authorities in Viet Nam to conclude [the verification of stocks of rhino horn hunting trophies] as a matter of urgency.”²⁸⁰

Vietnam has reported on its stocks to the Secretariat,²⁸¹ but it is clear that at least some members of the Rhinoceros Working Group were not satisfied. For example, South Africa, which already bars the issuance of hunting permits to Vietnamese citizens, reported that “this restriction will remain in place until Viet Nam can confirm whether the rhino horn trophies exported to Vietnam are still in the possession of the hunters.”²⁸² In addition, the Rhinoceros Working Group has recommended that CoP 16 “consider adopting a decision requiring Viet Nam to report to the Standing Committee “on measures it has taken to tackle illegal trade in rhino horn, including the following: a) Measures that it has undertaken to regulate the possession of rhino hunting trophies, including a requirement that all relevant permits be retained with the trophy and that it not be altered from the condition in which it was imported.”²⁸³ South Africa’s continued refusal to issue hunting permits to Vietnamese nationals and the Working Group’s specific request to Vietnam suggests that Vietnam’s report on its stocks, in particular with respect to rhino horn hunting trophies, was less than satisfactory.

Vietnam’s failure to provide adequate information on its rhino horn stocks and its rhino hunting trophy stock check diminishes the effectiveness of CITES. Effective rhino horn stock management helps prevent the leakage of rhino horn stocks into illegal trade.²⁸⁴ For example, registering all rhino horn stocks—which includes creating a paper trail and comprehensive register of all horns in the stock—reduces the likelihood of horns being diverted from the stock into illegal trade.²⁸⁵ Thus, Vietnam’s failure to adequately manage its rhino horn stocks and provide a stock check of rhino hunting trophies indicates that Vietnam is not taking appropriate measures to reduce the illegal trade in rhino horn, and is diminishing the effectiveness of CITES.

²⁷⁷ CITES, Resolution Conf. 9.14 (Rev. CoP15), *supra* note 2, ¶(a) at “Urges.”

²⁷⁸ At the Sixty-second Meeting of the Standing Committee, the Committee endorsed the proposals of the Rhino Working Group, as detailed in document SC62 Inf. 13, which included that the Secretariat should send to the countries concerned the requests for information contained in document SC62 Inf. 13 and that the responses should be sent to the Secretariat, which would forward them to the Rhinoceros Working Group. CITES Secretariat, *Note and Conclusion of the Rhino Working Group Meeting*, SC62 Inf. 13, 2 (July 2012), available at <http://www.cites.org/eng/com/SC/62/Inf/E62i-13.pdf>.

²⁷⁹ CITES Secretariat, *Species Trade and Conservation—Rhinoceroses*, SC62 Doc. 47.2, *supra* note 86, at 3.

²⁸⁰ *Id.* at 2.

²⁸¹ See CITES Secretariat, *Species Conservation and Trade—Rhinoceroses: Report of the Working Group*, CoP16 Doc. 54.1, *supra* note 172.

²⁸² *Id.* ¶ 13.

²⁸³ *Id.* at 8, Recommendation 10.

²⁸⁴ MILLEDGE, TRAFFIC EAST/SOUTHERN AFRICA, RHINO HORN STOCKPILE MANAGEMENT, *supra* note 270, at 2.

²⁸⁵ *Id.* at 10.

3. Vietnam Failed To Be Vigilant in its Law Enforcement Efforts as a Range State, Including Prevention of Illegal Hunting

The death of the last remaining Javan rhino from Vietnam in 2010 plainly suggests that Vietnamese law enforcement was not vigilant in its efforts to protect the Javan rhino.²⁸⁶ Although a World Wildlife Fund (WWF) Conservation Project provided park rangers and staff at Cat Tien National Park (home to the last remaining wild rhino population in Vietnam) support and training courses on patrolling techniques, the staff and rangers failed to maintain adequate patrols.²⁸⁷ The park staff failed to send patrol data to WWF on a monthly basis, and “[w]hen data were received, it was clear that the teams were not achieving sufficient coverage within [the park] and were not patrolling for the minimum time stipulated, or even at all in some months.”²⁸⁸ Insufficient patrols likely made it easier for poachers to enter Cat Tien National Park and kill the last remaining Javan rhino in Vietnam. The failure to follow protocols, to the detriment of the last remaining few individual Javan rhinos in Vietnam, even when the resources were provided, is another way in which nationals of Vietnam are diminishing the effectiveness of CITES.

4. Vietnam Is Failing to Adopt and Implement Comprehensive Legislation and Enforcement Controls, Including Internal Trade Restrictions and Penalties Aimed at Reducing Illegal Trade in Rhinoceros Parts and Derivatives

Resolution Conf. 9.14 (Rev. CoP15) urges all CITES Parties “to adopt and implement comprehensive legislation and enforcement controls, including internal trade restrictions and penalties, aimed at reducing illegal trade in rhinoceros parts and derivatives.”²⁸⁹ A 2009 IUCN and TRAFFIC report stated that “the implementation of Viet Nam’s legislation with respect to internal trade in rhino horn medicines remains to be assessed.”²⁹⁰ However, as noted above, domestic trade of rhino horn is an “open secret.” One survey found that medicinal wildlife products, including rhino horn, in Ho Chi Minh City were “conspicuously and routinely available for sale . . . provided the price negotiated was high enough.”²⁹¹ Vietnam’s failure to adopt and implement legislation to control the internal trade in rhino horn and deter persons from engaging in illegal trade of rhino horn is inconsistent with Resolution Conf. 9.14 (Rev. CoP15) and is diminishing the effectiveness of CITES.

Vietnam claims that it prohibits the internal sale of rhino horn but English translations of Vietnamese legislation referred to by Vietnam do not clearly prohibit domestic trade in CITES-listed species, including rhino species other than the Javan rhino. Government Decree No.

²⁸⁶ WWF, EXTINCTION OF THE JAVAN RHINOCEROS (*RHINOCEROS SONDAICUS*) FROM VIETNAM 27–28 (2011), available at http://wwf.panda.org/what_we_do/endangered_species/rhinoceros/asian_rhinos/javan_rhinoceros/.

²⁸⁷ *Id.* at 27.

²⁸⁸ *Id.* at 28.

²⁸⁹ CITES, Resolution Conf. 9.14 (Rev. CoP15), *supra* note 2, ¶ b of “Urges.”

²⁹⁰ MILLIKEN ET AL., AFRICAN AND ASIAN RHINOCEROSES: STATUS, CONSERVATION AND TRADE, CoP15 Doc. 45.1 Annex, *supra* note 22, at 9.

²⁹¹ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 125 (citing D.N.V. Nguyen & T. Nguyen, *An Overview of the Use of Plants and Animals in Traditional Medicine Systems in Viet Nam* (TRAFFIC Southeast Asia Nguyen and Nguyen, 2008), available at www.traffic.org).

59/2006/ND-CP regulates domestic trade-related activities in CITES species and specimens.²⁹² The law bans domestic trade in “[w]ild plant and animal species (including also live plants and their processed parts) by treaties to which Vietnam is a contracting party [(including CITES)], and precious and rare animal species on the lists of those banned from exploitation and use.”²⁹³ The law “restricts” trade in “precious and rare wild plants and animals (including live plants and animals and their processed parts), including trade in CITES-listed species.”²⁹⁴ However, the law does not indicate to which CITES Appendices the trade ban applies and to which CITES Appendices the trade restriction applies. Vietnam claims trade in rhino horn from all species is illegal.²⁹⁵ If true, this further underscores how Vietnam is diminishing the effectiveness of CITES since there is so much rhino horn openly sold in Vietnam with no seizures or prosecutions occurring.

To the extent there is ambiguity, this ambiguity has serious implications for rhino horn trade and demand in Vietnam. For example, under Vietnam’s laws it may be legal for individuals to sell horns from rhinos other than the Javan rhino—subject to certain restrictions²⁹⁶—regardless of whether the horn was legally imported into the country. Moreover, as mentioned above, Vietnamese hunters are legally importing rhino horn trophies and then selling the horns into commercial trade. The CITES Parties have defined the term “hunting trophy” for purposes of Resolution Conf. 12.3 (Rev. CoP15) on Permits and Certificates, to mean “a whole animal, or a readily recognizable part or derivative of an animal, specified on any accompanying CITES permit or certificate, that ... was legally obtained by the hunter through hunting *for the hunter’s personal use*.”²⁹⁷ This definition clearly signifies that the CITES Parties intend that legitimate hunting trophies remain in the possession of the hunter and are not sold into commercial trade. Thus, Vietnam’s failure to enact and implement legislation that clearly prohibits hunters from selling their rhino hunting trophies into commercial trade is contrary to the spirit of CITES and diminishes the effectiveness of the Convention.

²⁹² Republic of Viet Nam, Decree No. 59/2006/ND-CP, Detailing the Commercial Law Regarding Goods and Services Banned From Business, Subject to Business Restriction or to Conditional Business arts. 4(1)(a), 5, and Appendix I (June 12, 2006), *available at* http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=5384.

²⁹³ *Id.* at Appendix I, Item 8.

²⁹⁴ *Id.* at Appendix II, Item 5.

²⁹⁵ Quang Duan, *Vietnam Bank Tycoon Says His Rhino Horn Legally Imported*, THANH NIEN NEWS, Oct. 5, 2012, <http://www.thanhniennews.com/index/pages/20121005-bank-tycoon-says-missing-rhino-horn-legally-imported-into-vietnam.aspx> (citing Do Quang Tung, the deputy director of Vietnam’s CITES Management Authority, as saying that “under CITES regulations and Vietnamese laws, the trade of rhino horns is banned but the export and import of rhino horns as hunting trophies for non-commercial purposes is allowed”).

²⁹⁶ Restrictions include the requirements that goods and services comply with the law, that traders in restricted goods and services are established and registered, that established businesses “satisfy the requirements on techniques, equipment, facilities, business process and other standards,” that staff involved in the sale, purchase, or provision of restricted goods and be qualified, experienced, and physically fit, that business follow particular management and planning requirements, and that business traders have all applicable permits. REPUBLIC OF VIET NAM, Decree No. 59/2006/ND-CP, *supra* note 292, art. 6.

²⁹⁷ CITES Secretariat, *Permits and Certificates*, Resolution Conf. 12.3 (Rev. CoP15) “Recommends that” at ¶(h), *available at* <http://www.cites.org/eng/res/all/12/E12-03R15.pdf> (emphasis added).

Relatedly, Vietnam does not have “a coherent monitoring protocol and regulatory framework” in place for legally imported rhino hunting trophies.²⁹⁸ Such a protocol and framework could assist Vietnamese authorities in registering imported hunting trophies and subsequently tracking the trophies to ensure that they are not used for commercial trade. The following “wild goose chase” by Vietnamese enforcement officials illustrates the importance of adequate legislation covering hunting trophies:

In September 2011, one Forest Protection Department official described to TRAFFIC their first attempt to track a single rhino horn trophy that had previously been imported from South Africa to an address in Ho Chi Minh City. Apparently the importer was duly located at the address on the import document but was unable to produce the rhino horns in question, claiming that it had been taken to another family home in a province hundreds of kilometres to the north. It was then reported that, at considerable expense, Forest Protection Department officials subsequently made a follow-on attempt to visit this new location and view the horn trophy, only to be told upon arrival that it had been removed to yet another location in the custody of a sick uncle. The described “wild goose chase” scenario apparently never resulted in the rhino horn trophy being produced and was offered as an example of Viet Nam’s difficulties in monitoring the possession of rhino horns once they have been legally imported into the country.²⁹⁹

Without an effective protocol and framework governing hunting trophies, Vietnamese officials cannot monitor and track hunting trophies to ensure that they are not sold into commercial trade.

As reported by TRAFFIC, Vietnam has implemented new procedures to help crack down on the illegal importation of rhino horns into the country. Under these procedures, importers of rhino hunting trophies must submit to the Vietnamese CITES Management Authority “(1) a CITES export permit from the country of origin; (2) the hunting permit issued by the government authority in the country of origin; (3) a copy of the passport of the Vietnamese hunter to verify that the person stayed in the country where the rhino was hunted; and (4) a residence certificate issued by the local police.”³⁰⁰ Furthermore, these new procedures allegedly forbid the sale of hunting trophies and impose a 3% tax rate on the value of the imported hunting trophy.³⁰¹ However, while these procedures may help reduce illegal trade of rhino horn in Vietnam, there is no evidence that Vietnamese officials are implementing the procedures or, if there is prohibition against domestic sales, enforcing that prohibition. Moreover, these procedures will only be effective for individuals who attempt to import rhino horn legally by presenting the required documentation to the authorities. The procedures will have no impact on importers who smuggle rhino horn or bypass the legal trade channels by other means.

In addition to having inadequate laws in place to protect rhinos, the penalties imposed by Vietnamese law are not strict enough to deter persons from engaging in illegal wildlife trade and poaching. Depending on the severity of the offense, a person charged with violating Vietnam’s

²⁹⁸ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 139.

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 114.

³⁰¹ *Id.* at 139.

wildlife protection laws may face administrative penalties or criminal liability. The maximum criminal penalty for violating the wildlife protection laws is 500 million VND (US\$23,995),³⁰² and violators may face jail sentences of two to seven years.³⁰³ Yet rhino horn has sold for as high as US\$20,000 to US\$30,000 per kilogram.³⁰⁴ Thus, the value of rhino horn may significantly outweigh the fines that a person or entity might receive for engaging in the illegal wildlife trade.³⁰⁵

D. Vietnam Is Failing to Develop and Implement Strategies and Programs to Reduce Demand and Consumption of Rhino Parts and Derivatives

Resolution Conf. 9.14 (Rev. CoP15) urges all implicated States, including Vietnam, “to work with all user groups and industries to develop and implement strategies for reducing the use and consumption of rhinoceros parts and derivatives and to report on progress for inclusion into the joint IUCN/TRAFFIC reports.”³⁰⁶ At the most recent meeting of the Standing Committee in July 2012, the Secretariat encouraged consumer countries to engage in public awareness campaigns emphasizing the criminality associated with the rhino horn trade, the exploitation associated with the horn’s medicinal consumption, and the brutality and environmental consequences associated with rhino poaching.³⁰⁷ These calls for action reflect the growing understanding among the Parties that unrestrained Asian demand for rhino horn will compromise the effectiveness of even the most concerted efforts by range States to protect rhino populations. For CITES to function effectively, efforts must be made to reduce demand for rhino parts in consumer countries.

As described below, however, Vietnam has failed to work with user groups to develop effective strategies to reduce demand for rhino parts, has failed to enact and implement programs to reduce availability and consumption of rhino parts, and has failed to report on the progress of any of these efforts to the Standing Committee. As a result, Vietnam is diminishing the effectiveness of CITES.

1. Vietnam Is Failing to Adequately Reduce Demand for Rhino Parts and Derivatives

As described in Section IV.A, Vietnam is the primary destination for rhino horn from South Africa, and Vietnam’s dramatic increase in demand for rhino parts is believed to be

³⁰² Republic of Viet Nam, *Penal Code*, No. 15/1999/QH10, art. 190 (Dec. 21, 1999), available at http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=610, as amended by Law No. 37/2009, Article 1(21) (amending Article 190 of the Penal Code), available at http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10467.

³⁰³ Republic of Viet Nam, *Penal Code*, No. 15/1999/QH10, art. 190.2 (Dec. 21, 1999), available at http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=610.

³⁰⁴ CITES Secretariat, *Conservation of and Trade in African and Asian Rhinoceroses*, SC61 Doc. 45.2, *supra* note 189, at 4.

³⁰⁵ See David Western, *The Undetected Trade in Rhino Horn*, 11 PACHYDERM 26, 28 (1989), available at http://www.rhinoreourcecenter.com/pdf_files/117/1175862863.pdf (noting that the average weight of black rhino horn entering the market is 2.88kg and the average weight of white rhino horn entering the market is 3.68kg).

³⁰⁶ CITES, Resolution Conf. 9.14, *supra* note 2, ¶ f of “Urges.”

³⁰⁷ CITES Secretariat, *Species Trade and Conservation—Rhinoceroses*, SC62 Doc. 47.2, *supra* note 86, ¶ 33.

driving the recent surge in rhino poaching and illegal trade in rhino horns.³⁰⁸ Vietnamese demand is largely based on unsubstantiated claims that rhino horn has therapeutic value as a cancer and hangover cure. Rhino horn has historically been used in Vietnamese traditional medicine, but recently it has been claimed to be a treatment for cancer and other serious illnesses.³⁰⁹ Research studies performed by the United Kingdom and South Africa found no pharmacological effects for rhino horn.³¹⁰ Vietnam, however, has done little to dispel these myths,³¹¹ and no evidence indicates that it has made an organized effort to reduce demand through public education or promotion of alternatives to rhino horn consumption.³¹² This failure to reduce demand for rhino parts and derivatives in accordance with Resolution Conf. 9.14 (Rev. CoP15) is diminishing the effectiveness of CITES.

Vietnam has failed to adequately discourage the medicinal consumption of rhino horn by Vietnamese citizens. In the past decade, at least five Vietnamese traditional medicine pharmacopoeias have been published that have sections devoted to rhino horn as medicine.³¹³ One recent compendium states that rhino horn can cure impotence.³¹⁴ The Vietnamese government has failed to rebut the claims made by these pharmacopoeias, despite the overwhelming lack of scientific evidence to support rhino horn's alleged medicinal value.³¹⁵ It also appears that ingestion of rhino horn medications may cause an allergic reaction and poisoning, although the reports do not clearly state whether this is due to the rhino horn itself or additives added to the rhino horn powder.³¹⁶ Despite these potential adverse impacts, the Vietnamese government has failed to educate consumers of the dangers of ingesting rhino horn.

In fact, statements by government employees may be having the opposite effect—encouraging the use of rhino horn and trumpeting its positive health effects. One senior policeman recently boasted about using rhino horn regularly “to counterbalance heavy work pressure and a large drinking habit.”³¹⁷ In addition, despite no clinical evidence supporting rhino horn's pharmacological value as a cancer treatment,³¹⁸ the director of the National Hospital of

³⁰⁸ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 14.

³⁰⁹ NOWELL, ASSESSMENT OF RHINO HORN AS A TRADITIONAL MEDICINE, *supra* note 109, at 2.

³¹⁰ *Id.*

³¹¹ The Vietnamese NGO, Education for Nature—Vietnam, is currently planning a public education campaign intended to educate consumers in order to reduce demand. See Education for Nature—Vietnam, *Convincing Consumers that Killing Rhinos for Medicine Brings No Benefits, Only False Hope*, <http://envietnam.org/our-work/rhino-campaign.html> (last visited Nov. 6, 2012).

³¹² See MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 148 (stating there is a “compelling need” for Vietnam to develop and implement demand-reduction strategies that focus on dispelling myths, promoting acceptable alternatives, and creating awareness of consequences of illegal trade and the conservation implications associated with rhino horn use).

³¹³ *Id.* at 116.

³¹⁴ *Id.* at 122.

³¹⁵ See *id.* at 15; see also NOWELL, ASSESSMENT OF RHINO HORN AS A TRADITIONAL MEDICINE, *supra* note 109, at 1.

³¹⁶ Dr. Nguyen Huu Truong, a physician at the Center for Allergy Clinical Immunology in Hanoi, reports seeing a handful of patients a year suffering from rashes associated with rhino horn consumption, which he identifies as “an allergic reaction and poisoning due to unfamiliar ingredients in the mixture.” MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 122.

³¹⁷ Cat Barton, *Vietnam ‘Cancer-Cure’ Horn Habit Threat to World Rhinos*, AFP, May 7, 2012, http://www.google.com/hostednews/afp/article/ALeqM5imXr49_v8-CLm_hqhlEvQsX2zSIQ?docId=CNG.0b56c9d1f731dad8edbde60d173e91c.701 (last visited Nov. 6, 2012).

³¹⁸ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 15.

Traditional Medicine, which is part of Vietnam's Ministry of Health, claimed that the horn can block the growth of cancer cells (though he could not cite any peer-reviewed studies to support this assertion).³¹⁹ In 2010, the Vice President of the Vietnam Oriental Traditional Medicine Association defended the use of rhino horn in cancer treatment.³²⁰ Vietnamese cancer sufferers have reported varying results after consuming rhino horn. One leukemia patient reported spending more than two months of wages on a piece of horn, which had no effect on his disease.³²¹ Another wealthy Hanoi resident claims to have "tried everything" to treat his stomach cancer, and has used rhino horn every day since his original diagnosis nine years earlier.³²² Reporters from AFP, a French-based international news agency, contacted two other patients who were using rhino horn to treat their cancers, but both patients died before they could be interviewed.³²³ Vietnam's failure to inform cancer patients and traditional medicine practitioners on the inefficacy of rhino horn as a cancer treatment has likely contributed to loss of life for both humans and rhinos.

Statements from Vietnam's Management Authority also evince a lack of interest in reducing demand and taking action to dispel claims that rhino horn has therapeutic value. According to Do Quang Tung, the deputy director of Vietnam's CITES Management Authority, Vietnam has not performed any comprehensive studies on rhino horn consumption.³²⁴ Tung admitted that no Vietnamese cancer sufferer would hesitate to use rhino horn if given the opportunity; yet he denied that Vietnam could be a primary market for rhino horn, because Vietnamese citizens could not afford to purchase the amount of rhino horn that has allegedly been imported into the country, and that "there could be no criminal network which is capable of moving such a large amount of an illegal commodity via multiple countries."³²⁵ Tung denied that Vietnam is the destination for illegal horn imports, and instead claimed that the horn is only transported through Vietnam on the way to other countries.³²⁶ By denying the existence of a consumer market for rhino horn imports, Vietnam is attempting to avoid any official obligation to reduce demand in accordance with Resolution Conf. 9.14, and is thus diminishing the effectiveness of CITES.

2. Vietnam Is Failing to Adequately Reduce the Availability and Consumption of Rhino Parts and Derivatives

Rhino horn consumption in Vietnam is influenced in part by the availability of illegal horn imports. Undercover "buyers" have had no difficulties procuring rhino horn in Vietnam, and it is apparent that rhino horn is easily available in Vietnam for those who can afford it.³²⁷

³¹⁹ Gwin, *Rhino Wars*, *supra* note 185, at 117.

³²⁰ MILLIKEN & SHAW, *THE SOUTH AFRICA-VIET NAM RHINO HORN TRADE NEXUS*, *supra* note 3, at 119.

³²¹ *Id.* at 123.

³²² Barton, *Vietnam 'Cancer-Cure' Horn Habit Threat to World Rhinos*, *supra* note 317.

³²³ *Id.*

³²⁴ *See, e.g.*, Vietnam Environment Admin., *Rhino Horn Claim Unfounded*, *supra* note 4.

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *See* Gwin, *Rhino Wars*, *supra* note 185, at 117 ("Our travels took us from cancer hospitals and traditional clinics in Hanoi and Ho Chi Minh City to herbal shops, boutiques selling exotic animal skins, and private homes in small towns. We found rhino horn every place we looked."); Hannah Beech & Alex Perry, *Killing Fields: Africa's Rhinos Under Attack*, *TIME MAGAZINE*, Jun. 13, 2011, *available at*

Tom Milliken, co-author of TRAFFIC’s report *South Africa–Vietnam Rhino Horn Trade Nexus*, stated: “In all my years of monitoring rhino horn, I’ve never seen entire local industries catering to the consumption of horn like I have seen in Vietnam.”³²⁸ In addition to traditional medicine shops, rhino horn can be purchased through internet websites and informal social networks that may have links to government officials.³²⁹ Cancer patients may be approached by rhino horn “touts:” hospital staff who offer to put patients in touch with traders.³³⁰ Though Vietnam claims that sales of rhino horn are illegal in Vietnam,³³¹ many of these outlets openly advertise horn sales,³³² and sales of fake horns and rhino horn paraphernalia are common.³³³ These illicit sales appear to be largely unregulated in Vietnam, and there is evidence that government officials may be complicit or in some cases directly involved in the illegal horn trade.³³⁴

Traditional medicine shops routinely offer wild animal products for sale, and a 2004 survey found specimens of protected species that were publicly displayed for sale.³³⁵ When shop-owners were asked if they were afraid of law enforcement, they stated that they had secured protection from enforcement officials, and were shielded from investigation.³³⁶ In addition to retail shops, there are at least two rhino horn “wholesalers” that supply traditional medicine shops, hospitals, and clinics.³³⁷ Rhino horn sales are also advertised on Vietnamese-language websites, and recreational use has been promoted on popular websites, including an influential site that is linked to the official government newspaper *Security of the Capital*.³³⁸

The illegal rhino horn market has spawned a series of peripheral industries in Vietnam. High demand for authentic horn has led to production of fake horns, which are widely available in urban areas.³³⁹ Some fake horns are actually black cow or buffalo horns, but other fake horns are manufactured from hair and plastic that have been pressed together.³⁴⁰ According to TRAFFIC, fake horn production has become a “cottage industry” in some Vietnamese villages.³⁴¹ The availability of fake horns perpetuates the demand for authentic rhino horns by increasing the available supply of horn while preserving the public perception of rhino horns as rare, luxury items.³⁴² Fake horn production also contributes to the introduction of legally imported hunting trophies into the commercial market, because importers remove the original

<http://www.time.com/time/magazine/article/0,9171,2075283,00.html> (“The friendly pharmacist listens to a story about a grandfather with cancer and nodules. ‘We can get it for you,’ she says. . . The price: \$3,500 for 100 grams.”).

³²⁸ Beech & Perry, *Killing Fields: Africa’s Rhinos under Attack*, *supra* note 327.

³²⁹ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 15–16.

³³⁰ *Id.* at 128.

³³¹ At the 15th Conference of the Parties, Vietnam submitted a report on rhino horn trade management, in which it stated, “our country’s law does not allow the sale or advertising of protected wildlife products.” CITES Secretariat, *Rhino Horn Trade Management in Viet Nam*, CoP15 Doc. 62, *supra* note 258, at 2.

³³² See MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 15.

³³³ *Id.* at 129; Beech & Perry, *Killing Fields: Africa’s Rhinos Under Attack*, *supra* note 327.

³³⁴ See MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 146.

³³⁵ *Id.* at 125.

³³⁶ *Id.*

³³⁷ *Id.* at 126.

³³⁸ *Id.* at 121–22.

³³⁹ *Id.* at 129.

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² See *id.* at 147.

horns from the trophies and replace them with fake horns.³⁴³ Fake horns produced from high-quality resin are difficult to identify visually, but a small amount of dust can easily be scraped from the horn and ignited—burning resin gives off a distinctive odor, which allows for easy identification.³⁴⁴ Bovine horns, however, can only be detected through forensic testing, but there is no evidence that Vietnam is engaging in such testing.³⁴⁵

In addition to fake horn production, the demand for rhino horn has also created a market for rhino horn grinding bowls. These are specially manufactured ceramic bowls that have serrated bottoms; pieces of rhino horn are rubbed along the bottom of the bowls until a fine powder is produced, which is then mixed with water and consumed.³⁴⁶ TRAFFIC's Tom Milliken visited a factory that produced 30,000 grinding bowls; he noted that Vietnam is the only country in the world that mass-produces these items, which are offered for sale in shops throughout Vietnam.³⁴⁷ One Vietnamese shop owner estimated that he sells 10 bowls a week to government bureaucrats who use rhino horn to aid recovery following nights of indulgence.³⁴⁸ He explained that the bowls are a fashionable gift to give government officials.³⁴⁹ Reports such as these highlight the extent of government complicity in perpetuating the market for rhino horn and the illegal rhino horn trade, and are yet another example of how Vietnamese nationals are diminishing the effectiveness of CITES.

3. Vietnam Is Failing to Report on Its Progress in Reducing Demand for and Consumption of Rhino Parts and Derivatives

Resolution Conf. 9.14 (Rev. CoP15) urges all implicated Parties to report on their progress in reducing demand for and consumption of rhino parts and derivatives, for inclusion in the joint IUCN/TRAFFIC reports that are submitted to the Secretariat six months prior to each Conference of the Parties.³⁵⁰ Vietnam failed to report its progress by CoP15, as requested by Resolution Conf. 9.14 (Rev. CoP14),³⁵¹ and in doing so is diminishing the effectiveness of CITES.

In 2010, the Conference of the Parties adopted Decision 15.71, which called on the Secretariat to “examine progress with regards to curtailing illegal trade in rhinoceros parts and derivatives by implicated states, particularly Viet Nam,” and report on the implementation of

³⁴³ CITES Secretariat, *Species Trade and Conservation—Rhinoceroses*, SC62 Doc. 47.2, *supra* note 86, ¶ 11

³⁴⁴ *Id.*

³⁴⁵ MILLIKEN & SHAW, *THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS*, *supra* note 3, at 129.

³⁴⁶ *Id.* at 117.

³⁴⁷ David Smith, *Rhino Horn: Vietnam's New Status Symbol Heralds Conservation Nightmare*, *THE GUARDIAN*, Sept. 3, 2012, <http://www.guardian.co.uk/environment/2012/sep/04/rhino-horn-wildlife-trade-vietnam>.

³⁴⁸ Beech & Perry, *Killing Fields: Africa's Rhinos Under Attack*, *supra* note 327.

³⁴⁹ *Id.*

³⁵⁰ CITES, Resolution Conf. 9.14 (Rev. CoP15), *supra* note 2, ¶ f of “Urges.”

³⁵¹ Vietnam instead submitted a brief report detailing its national legislation regarding trade in CITES-listed or nationally-protected species, in which it requested guidance from the Parties regarding management of hunting trophies. See CITES Secretariat, *Rhino Horn Trade Management in Viet Nam*, CoP15 Doc. 62 Annex, *supra* note 258.

Resolution Conf. 9.14 (Rev. CoP15) at meetings of the Standing Committee.³⁵² To facilitate this reporting, the Secretariat issued Notification No. 2012/014, which invited all Parties to submit information on the implementation of Resolution Conf. 9.14 (Rev. CoP15), along with information on the measures taken to reduce illegal trade in rhino parts, and measures taken to enhance existing controls on rhino horn trade.³⁵³ The Secretariat requested the information to be submitted by April 15, 2012.³⁵⁴ Eight Parties and the European Union submitted this information, but Vietnam did not.³⁵⁵ At the 62nd meeting of the Standing Committee in July 2012, Vietnam was again asked to report on its progress on the implementation of Resolution Conf. 9.14 (Rev. CoP15); this report was requested by September 2012.³⁵⁶ On August 27, 2012, the Secretariat asked all Parties that had failed to respond to Notification No. 2012/014 to submit the requested information by September 10, 2012.³⁵⁷ While Vietnam has reported on its efforts to reduce demand, the Rhinoceros Working Group noted that, with respect to the efforts made by Vietnam, China, Kenya, and South Africa, that “it is not fully clear how those programmes were developed or the potential for such experiences to be shared amongst those and other countries, and in some cases it is too early to judge the effectiveness of such programmes.”³⁵⁸ Clearly more can be done.

Vietnam’s continued failure to make significant commitments to reduce demand and consumption of rhino parts and derivatives indicates a lack of commitment in complying with Resolution Conf. 9.14 (Rev. CoP15) and disregard for the CITES process. Vietnam persists in denying its status as one of the world’s largest rhino horn markets,³⁵⁹ and refuses to publicly acknowledge the scope of Vietnamese demand for rhino horn and other rhino products.³⁶⁰ Vietnam’s failure to report on its progress in implementing Resolution Conf. 9.14 (Rev. CoP15) is indicative of a national reluctance to curb demand and suppress the illegal trade flowing across its borders. Vietnam’s obstinate refusal to implement Resolution Conf. 9.14 (Rev. CoP15) is diminishing the effectiveness of CITES, and is putting rhino populations in jeopardy.

V. REQUEST FOR CERTIFICATION AND TRADE SANCTIONS

Section IV provides substantial information upon which to base a finding that Vietnamese nationals are diminishing the effectiveness of CITES. We note that use of the Pelly Amendment resulted in improvements in the implementation of CITES with respect to rhinos

³⁵² CITES, Decision 15.71, *supra* note 148. Specifically, the Secretariat was directed to report on the implementation of Resolution Conf. 9.14 (Rev CoP15) at the 61st, 62nd and 63rd meetings of the Standing Committee. *Id.*

³⁵³ CITES, Notification to the Parties No. 2012/014, *Conservation of and Trade in African and Asian Rhinoceroses* (Feb. 2012).

³⁵⁴ *Id.*

³⁵⁵ CITES Secretariat, *Species Trade and Conservation—Rhinoceroses: Report of the Working Group*, SC62 Doc. 47.1 ¶ 6 (July 2012).

³⁵⁶ CITES Secretariat, *Species Trade and Conservation—Rhinoceroses*, SC62 Doc. 47.2, *supra* note 86, at 2.

³⁵⁷ CITES, Notification to the Parties No. 2012/053, *Conservation of and Trade in African and Asian Rhinoceroses* (Aug. 2012).

³⁵⁸ CITES Secretariat, *Species Conservation and Trade—Rhinoceroses: Report of the Working Group*, CoP16 Doc. 54.1, *supra* note 172, ¶ 19.

³⁵⁹ Asian News Network, *Vietnam Denies Being Main Rhino Horn Market*, JAKARTA POST, Aug. 27, 2012, <http://www.thejakartapost.com/news/2012/08/27/vietnam-denies-being-main-rhino-horn-market.html>.

³⁶⁰ See Vietnam Environment Admin., *Rhino Horn Claim Unfounded*, *supra* note 4.

and tigers in China, Taiwan, Yemen, and Korea in the mid-1990s.³⁶¹ For example, both Korea and Yemen agreed to accede to CITES and to prohibit domestic sales of rhino horn after the United States engaged them through the Pelly Amendment process. China and Taiwan also took actions to improve their implementation of CITES.³⁶² We believe that the Pelly Amendment process can similarly lead to improved implementation of CITES by Vietnam and corresponding conservation gains for rhinos.

As a result, Petitioners request the Secretary of Interior to certify pursuant to the Pelly Amendment that Vietnamese nationals are diminishing the effectiveness of CITES pursuant to the information provided in Section IV. Moreover, we request that the United States prohibit all trade with Vietnam in all CITES-listed specimens.

Such trade sanctions are warranted in this situation. As explained above, Vietnamese nationals are playing a central role in the “rapacious illegal trade in rhino horn.”³⁶³ Vietnamese CITES authorities continue to deny the role of Vietnam in this illegal trade. Moreover, Vietnamese CITES authorities have failed to implement their CITES obligations and cooperate with the CITES community. The time has come for the United States to adopt the type of trade restrictions that will encourage Vietnam, finally, to help the international community conserve rhinos through improved implementation of CITES, including CITES Resolutions. In the absence of measures, the conservation gains of past decades may vanish.

VI. TRADE RESTRICTIONS TAKEN PURSUANT TO THE PELLY AMENDMENT AND ARE CONSISTENT WITH THE GATT

Once the Secretary of the Interior or Secretary of Commerce certifies that nationals of a foreign country are diminishing the effectiveness of an international program for endangered or threatened species, the President may direct the Secretary of the Treasury to prohibit the importation of products from the offending foreign country for an appropriate duration.³⁶⁴

Upon receipt of any certification . . . the President may direct the Secretary of [Homeland Security] to prohibit the bringing or the importation into the United States of any products from the offending country for any duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the World Trade Organization . . .³⁶⁵

Any trade restrictions the Secretary of the Treasury imposes must be consistent with U.S. obligations within the World Trade Organization (WTO).³⁶⁶ While the Pelly Amendment allows the United States to prohibit trade in any goods, Petitioners propose that the United States

³⁶¹ U.S. Dep’t of Interior, Press Release, *Administration Moves to Halt International Trade in Tiger and Rhino Parts*, June 9, 1993, available at <http://www.fws.gov/news/historic/1993/19930609.pdf>.

³⁶² See CITES, Summary Report of Thirty-first Meeting of the Standing Committee, SC31 Summary Report, at 17 (March 1994).

³⁶³ MILLIKEN & SHAW, SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 14.

³⁶⁴ 22 U.S.C. § 1978(2–4) (1999).

³⁶⁵ *Id.* at §1978(a)(4).

³⁶⁶ The GATT 1947 was in existence prior to the creation of the WTO. It was updated when the WTO was established and is now called GATT 1994.

prohibit trade only in specimens of CITES-listed species with Vietnam. As described below, these trade restrictions would be consistent with the General Agreement on Tariffs and Trade (GATT)), the WTO agreement that disciplines trade in goods.

Prior dispute settlement panels have found that the Pelly Amendment itself is consistent with the GATT because it authorizes, but does not require, measures that may be inconsistent with the GATT.³⁶⁷ The dispute settlement panel in *Tuna/Dolphin I* said, “[b]ecause the Pelly Amendment did not require trade measures to be taken, this provision as such was not inconsistent with the General Agreement.”³⁶⁸ While the GATT contracting parties never adopted this report, that panel’s logic remains sound and no subsequent WTO jurisprudence indicates that a panel or the Appellate Body would reach a contrary conclusion.³⁶⁹

As described below, any trade restrictions adopted pursuant to the Pelly Amendment, while likely inconsistent with Article III or Article XI of the GATT, are nonetheless justified by the exception found in Article XX(g) of the GATT allowing for measures “relating to the conservation of exhaustible natural resources.” Such measures would also satisfy the criteria under the GATT Article XX chapeau. The GATT Article XX chapeau and subsection (g) read in relevant part:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . .

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

For a measure to be consistent with the GATT, it must provisionally fall under a specific exception in Article XX, such as paragraph (g). If it is provisionally justified under an exception,

³⁶⁷ *United States—Restrictions on Imports of Tuna*, GATT Panel Report, GATT Doc. No. DS21/R, ¶¶ 5.30-5.34 (Sept. 3 1991) (unadopted), *reprinted in 1993 BDIEL AD LEXIS 1*; 30 I.L.M. 1594 (1991) [hereinafter *Tuna/Dolphin I*].

³⁶⁸ *Tuna/Dolphin I*, *supra* note 366, at ¶ 5.21.

³⁶⁹ Panels have found unenforced quotas to violate Article XI of the GATT, because even an unenforced quota could change the conditions of competition. *Japan—Measures on Imports of Leather*, GATT Panel Report, L/5623, GATT B.I.S.D. (31st Supp.) at 94 (adopted May 15–16, 1984) (1985); *see also Argentina—Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, Panel Report, WT/DS155/R, ¶ 11.17 (Feb. 16, 2001) (stating that “[t]here can be no doubt . . . that the disciplines of Article XI:1 extend to restrictions of a *de facto* nature.”). The Pelly Amendment is not analogous. The Pelly Amendment is designed to enforce the provisions of relevant existing multilateral environmental agreements and to protect those species within the scope of the agreement. As such, it does not force importers and exporters to adjust production or make other business decisions in light of one country’s quota or other regulatory requirements. To the contrary, it is designed to restore the agreed upon conditions of competition *vis-à-vis* those species falling within the scope of the relevant multilateral environmental agreement and subject to trade.

it then must be justified with the Article XX introductory clause, the chapeau.³⁷⁰ Section A below concludes that the trade restrictions taken pursuant to the Pelly Amendment on CITES-protected specimens would be consistent Article XX(g). Section B concludes that those trade restrictions would also be consistent with the chapeau of Article XX.

A. Trade Restrictions Taken Pursuant to the Pelly Amendment Are Consistent with Article XX(g)

Under Article XX(g), WTO Members may justify the imposition of measures relating to the conservation of exhaustible natural resources if they meet a three-part test outlined by the Appellate Body::

1. The policy for which the disputed trade measure is invoked falls within the range of policies for conservation measures relating to exhaustible natural resources.
2. The measure “relates to” the conservation of that exhaustible natural resource.
3. The measure is made effective in conjunction with restrictions on domestic production or consumption.³⁷¹

As explained below, trade restrictions under the Pelly Amendment satisfy this three-part test. First, the Pelly Amendment establishes a policy of conserving exhaustible natural resources. Second, the Pelly Amendment and associated trade restrictions relate to the conservation of that exhaustible natural resource. Third, the Pelly Amendment trade restrictions would be made effective in conjunction with restrictions on domestic production or consumption.

1. The Pelly Amendment Establishes a Policy of Conserving Exhaustible Natural Resources

In order to determine whether a measure can be provisionally justified under Article XX(g) a panel will begin by answering the threshold question of whether the measure is concerned with the conservation of an “exhaustible natural resource.”³⁷² The Pelly Amendment seeks to protect endangered and threatened species through implementation of, among other things, international endangered and threatened species programs. Species generally and rhinos specifically are clearly “exhaustible natural resources” within the meaning of Article XX(g). The Appellate Body in *Shrimp-Turtle* explained that “natural resources” include both living and non-living things. Moreover, the Appellate Body emphasized that living resources are also “exhaustible natural resources” within the meaning of Article XX(g):³⁷³

³⁷⁰ *United States—Standards for Reformulated and Conventional Gasoline*, Appellate Body Report, WT/DS2/AB/R, at 22 (decided Apr. 29, 1996) (adopted May 20, 1996), reprinted in 35 I.L.M. 603 (May 1996) [hereinafter *Reformulated Gasoline*].

³⁷¹ Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, ¶ 358, WT/DS394/AB/R (Jan. 30, 2012) [hereinafter *China – Raw Materials* Appellate Body Report]; *See also, e.g., United States—Restrictions on Imports of Tuna*, GATT Panel Report, DS29/R, paras. 5.12, 5.28 (June 16, 1994 (unadopted)).

³⁷³ *Shrimp/Turtle I* Appellate Body Report, at ¶ 128 (emphasis in original).

³⁷³ *Shrimp/Turtle I* Appellate Body Report, at ¶ 128 (emphasis in original).

We do not believe that “exhaustible” natural resources and “renewable” natural resources are mutually exclusive. One lesson that modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense, “renewable”, are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities. Living resources are just as “finite” as petroleum, iron ore and other non-living resources.³⁷⁴

In addition to sea turtles³⁷⁵ prior WTO and GATT trade panels concluded that clean air,³⁷⁶ tuna,³⁷⁷ herring,³⁷⁸ and salmon³⁷⁹ are exhaustible natural resources.

The Pelly Amendment seeks to protect the range of species protected by CITES, the International Convention for the Regulation of Whaling, and other fisheries and endangered and threatened species programs. CITES by its very nature relates to exhaustible natural resources: it establishes a regime of international cooperation to protect from overutilization due to trade those species that are threatened with extinction (Appendix I species) or which may become so unless trade is strictly regulated (Appendix II species).

Rhinos symbolize the precarious existence—the exhaustible nature—of many species. As noted in Section II.A of this petition, three subspecies of rhinos have gone extinct, including the Javan rhino in Vietnam. Many populations of Sumatran, black, and white rhinos number fewer than 100 individuals. In South Africa, the southern white rhino dwindled to just 20 to 50 individuals in 1895. It has since increased to 18,800 but the current poaching siege puts even this population at risk.

The United States recognizes the precarious conservation status of rhinos and their exhaustibility. Rhinos were listed as endangered under the Endangered Species Act in 1970. Further, the United States bars trade in rhino parts under the Endangered Species Act³⁸⁰ and the Rhinoceros and Tiger Conservation Act.³⁸¹ The international community has also acknowledged the plight of the rhino. The decline of rhinos due to overexploitation has led the International Union for the Conservation of Nature and Natural Resources (IUCN) to designate various rhino species as critically endangered, endangered, or vulnerable in its Red List. The CITES Parties designated rhinos as “threatened with extinction” in 1977. Only the South African and Swaziland populations of white rhino are included in Appendix II, subject to an annotation that limits trade

³⁷⁴ *Id.* ¶ 128.

³⁷⁵ *Id.* at ¶¶ 128-131.

³⁷⁶ *Reformulated Gasoline*, Appellate Body Report, *supra* note 369, at 19.

³⁷⁷ *United States—Prohibition of Imports of Tuna and Tuna Products from Canada* BISD 29S/91, adopted February 22, 1982, ¶ 4.9; *Tuna/Dolphin I*, *supra* note 366, at ¶¶ 5.30-5.34; *United States — Restrictions on Imports of Tuna*, GATT Panel Report, DS29/R, ¶ 5.15 (June 1994), *reprinted in* 33 I.L.M. 839 (1994) (unadopted) [hereinafter *Tuna/Dolphin II*].

³⁷⁸ *Canada — Measures Affecting the Exports of Unprocessed Herring and Salmon*, 35S/98, adopted March 22, 1988, ¶ 4.4 [hereinafter *Herring/Salmon*].

³⁷⁹ *Id.*

³⁸⁰ Endangered Species Act, 16 U.S.C. §§ 1531–1544.

³⁸¹ Rhinoceros and Tiger Conservation Act, 16 U.S.C. §§ 5301–5306.

to hunting trophies and live animals to appropriate and acceptable destinations. Rhinos are clearly an exhaustible natural resource that the Pelly Amendment aims to protect.

2. Trade-Related Measures Under the Pelly Amendment “Relate to” the Conservation of Exhaustible Natural Resources

In addition to constituting a measure concerning “exhaustible natural resources,” a measure must also “relate to” the conservation of those resources within the meaning of Article XX(g). The Appellate Body has determined that the relevant relationship to analyze is not solely the relationship of the trade sanction itself to conservation, but rather the general structure and design of the measure as it relates to conservation. The general structure and design of the Pelly Amendment and trade restrictions taken pursuant to it clearly “relate to” conservation of exhaustible natural resources.

The Appellate Body has clearly stated that whether a measure “relates to” conservation is determined based on an analysis of the measure “*as a whole*,” not just the trade restriction. In *Reformulated Gasoline*, the Appellate Body evaluated whether the baseline establishment rules for gasoline, “*taken as a whole*,”³⁸² related to the policy objective. According to the Appellate Body, this broader review of a measure is necessary, because the GATT-inconsistent trade restrictions cannot be “totally divorced from other sections of the Gasoline Rule which certainly constitute part of the context of these provisions.”³⁸³ Using this analytical framework, the Appellate Body analyzed the relationship between the rules for establishing baseline pollutant levels in gasoline and the goal of conserving clean air; it did not analyze whether the GATT-inconsistent baseline rules were needed to conserve clean air. It concluded, using this broader framework, that the rules for determining baseline pollutant levels were designed to permit scrutiny and monitoring of compliance with the “non-degradation” requirements and lack of baselines of some sort would make scrutiny impossible. Without this scrutiny, the policy objective of “stabilizing and preventing future deterioration of the level of air pollution prevailing in 1990, would be *substantially frustrated*.”³⁸⁴ By evaluating the measure taken as a whole, the Appellate Body concluded that the baseline rules were substantially related to the policy objective and not “merely incidentally or inadvertently aimed at the conservation of clear air.”³⁸⁵ Therefore, the baseline establishment rules were related to the conservation of exhaustible natural resources.

As in *Reformulated Gasoline*, the Appellate Body in *Shrimp/Turtle I* examined the “relationship between *the general structure and design of the measure* ... and the policy goal it purports to serve.”³⁸⁶ It asked whether the measure as a whole “related to” conservation instead

³⁸² *Reformulated Gasoline*, Appellate Body Report, *supra* note 369, at 19 (emphasis added).

³⁸³ *Id.*

³⁸⁴ *Id.* (emphasis added).

³⁸⁵ *Id.*

³⁸⁶ *Shrimp/Turtle I*, Appellate Body Report, *supra* note 371, ¶ 137 (emphasis added). A WTO panel has also examined the “structure and design” of the entire measure for assessing whether a measure is “necessary” for the protection of human, animal, or plant life or health under Article XX(b). *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, Panel Report, WT/DS246/R, ¶¶ 7.201–7.202 (published Dec. 1, 2003) (adopted Apr. 20, 2004) [hereinafter *EC—Tariff Preferences*]. This part of the Panel’s report was not

of the import ban only. In that case, the measure at issue was Section 609, which imposed an import ban on shrimp harvested with commercial fishing technology that may adversely affect sea turtles. Section 609 allowed a country to be certified to import shrimp into the United States if 1) that country's environment does not pose a threat of incidental taking of sea turtles in the course of the commercial shrimp harvesting or 2) the country adopts a regulatory program that is comparable to the U.S. program and the incidental take is also comparable to the average rate of U.S. vessels. The Appellate Body concluded that Section 609 taken as a whole directly related to the goal of conserving sea turtles and was "not a simple, blanket prohibition." Section 609, in its structure and design, was "not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species."³⁸⁷ The Appellate Body concluded:

The means are, in principle, reasonably related to the ends. The means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, is observably a close and real one, a relationship that is every bit as substantial as that which we found in *United States–Gasoline* between the EPA baseline establishment rules and the conservation of clean air in the United States.³⁸⁸

Two significant aspects of the Appellate Body's analysis emerge from *Reformulated Gasoline* and *Shrimp/Turtle I*. First, the Appellate Body did not require a direct nexus between the import restriction and the protected resource; that is, the United States was not required to bar the importation of sea turtles to conserve sea turtles. Instead, the Appellate Body asked whether "the means are, in principle, reasonably related to the ends."³⁸⁹ Thus, the Appellate Body in *Shrimp/Turtle I* concluded that import restrictions on shrimp along with the imposed certification regulations were reasonably related to sea turtle conservation given the circumstances of the case—that sea turtles are likely to be intercepted in a commercial shrimp fishery.³⁹⁰ Second, the Appellate Body concluded that the actual import restriction constitutes just one consideration in the evaluation of whether a measure "relates to" the conservation of an exhaustible natural resource. *The main determination is based on whether the general structure and design of the measure is reasonably related to the policy goal.*

Viewed in light of these two aspects of the Appellate Body's jurisprudence, trade restrictions taken pursuant to the Pelly Amendment to protect rhinos "relate to" the policy goal of conserving exhaustible natural resources.

The legislative history of the Pelly Amendment confirms that it is intended to "reduc[e] the alarming international trade in endangered and threatened species"³⁹¹ by providing the President

appealed. *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, Panel Report, WT/DS246/AB/R (published Apr. 7, 2004) (adopted Apr. 20, 2004).

³⁸⁷ *Shrimp/Turtle I*, Appellate Body Report, *supra* note 371, ¶ 141.

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ *Id.* ¶ 140.

³⁹¹ H.R. No. 95-1029, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 1768, 1773.

“with authority to encourage other nations to comply with [CITES].”³⁹² In other words, the goal of the Pelly Amendment is to conserve those exhaustible natural resources like rhinos that are regulated by CITES (as well as other endangered and threatened species programs or fisheries agreements). To accomplish the goal of conserving species threatened by trade, the Pelly Amendment establishes a two-step general structure and design to conserve exhaustible natural resources at risk due to actions that diminish the effectiveness of endangered or threatened species programs.

- First, the Secretary of the Interior or Secretary of Commerce must determine that nationals of a foreign country are engaged in trade or taking of an endangered or threatened species that diminishes the effectiveness of an international program for endangered or threatened species. Only after this finding is made may the relevant Secretary recommend trade restrictions to the President.
- Second, the President may then prohibit the importation of goods from the offending country.

The Pelly Amendment’s certification process, which comes with the threat of trade restrictions and considerable diplomatic efforts, has often encouraged countries to implement their international obligations to conserve exhaustible natural resources.³⁹³ When certification alone is inadequate, the Pelly Amendment reinforces its policy objective by allowing the President to impose trade restrictions. The trade restrictions themselves become just one element of this process to encourage a country to comply with its international obligations to conserve the exhaustible natural resources. **Thus, both steps in the Pelly process relate to the conservation of exhaustible natural resources, and in this case, the conservation of rhinos.**

In the current situation, nationals of Vietnam are engaging in trade and killing of rhinos that diminishes the effectiveness of CITES. As described fully in Section IV, Vietnam has become the major destination for both legal and illegal rhino horn. Vietnamese nationals located in South Africa and elsewhere are engaged in poaching of rhinos, and illegal trade in rhino horn parts.³⁹⁴ The demand for rhino horn in Vietnam threatens to reverse the significant conservation gains for rhinos and has clearly undermined CITES’ efforts to control illegal trade and create a small, legal trade in hunting trophies. Indeed, South Africa has been required to establish a number of new rules specifically to address the problematic role of Vietnamese hunters.³⁹⁵

In addition, and as discussed in Section IV, Vietnam is not complying with the provisions of CITES and the recommendations of the Parties. For example, Vietnam is failing to verify permits; its recorded number of imports is far lower than South Africa’s exports to Vietnam.³⁹⁶

³⁹² H.R. No. 95-1029, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 1768, 1775.

³⁹³ Steve Charnovitz, *Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices*, 9 AM. U. J. INT’L L. & POL’Y 751 (1994)(reviewing the success of the Pelly Amendment up to 1994); *see also*, Gene S. Martin, Jr., & James W. Brennan, *Enforcing the International convention for the Regulation of Whaling: The Pelly and Packwood-Magnuson Amendments*, 17 DEN. J. INT’L L. & POL’Y 293, 298-308 (1989).

³⁹⁴ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 14 (stating that “for nearly a decade the country has been the paramount destination for a resurgent illegal commerce out of Africa, especially from South Africa, where Vietnamese criminal operatives have become firmly embedded in the trade”).

³⁹⁵ *Id.* at 56 (describing efforts to prevent the issuance of hunting permits to Vietnamese and other Asians).

³⁹⁶ *See also supra* Section IV.C.1.

Resolution Conf. 9.14 (Rev. CoP15) urges Parties to verify rhino horn stocks. Not only has Vietnam failed to do this, it has ignored requests from the Parties to provide that information.³⁹⁷ Resolution Conf. 9.14 (Rev. CoP15) also urges Parties to restrict domestic sales of rhino parts. Vietnam’s legislation, however, does not clearly prohibit internal sales of specimens of species protected by CITES.³⁹⁸ This resolution also urges “implicated States” such as Vietnam to work with user groups to develop and implement strategies for reducing the use and consumption of rhino parts. Vietnam, however, appears not to have taken any action to dissuade the public from using rhino horn and some statements by government officials could be taken as encouraging the use of rhino horn. Taken as a whole, Vietnam’s response to the rhino crisis is inadequate given its central role in creating the crisis. Vietnam’s actions and inactions fail to comply with CITES and are insufficient to conserve rhinos.

The continuing illegal trade in rhinos, the failure to comply with CITES resolutions, and the ongoing domestic trade highlight how Vietnam is jeopardizing exhaustible natural resources and diminishing the effectiveness of CITES. Without CITES implementation by Vietnam, the world’s rhinos, and the valuable conservation gains made over previous decades, are at considerable risk. The Pelly Amendment’s certification process, which comes with the threat of trade restrictions and considerable diplomatic efforts, has often encouraged countries to implement their international obligations to conserve exhaustible natural resources.³⁹⁹ When certification alone is inadequate, the Pelly Amendment reinforces its policy objective by allowing the President to impose trade restrictions. The trade restrictions themselves become just one element of this process to encourage a country to comply with its international obligations to conserve exhaustible natural resources.

A unique aspect of the Pelly Amendment is that it generally cannot target its trade restrictions in the same way that the *Shrimp/Turtle* regulations linked the conservation of sea turtles to the product and activity that causes sea turtle mortality: shrimp and shrimping. With respect to rhinos, CITES already prohibits trade for primarily commercial purposes. The United States also already bars trade in rhino parts under the Endangered Species Act and the Rhinoceros and Tiger Conservation Act. It clearly follows that imposing trade restrictions on rhino parts would be fruitless. To achieve the policy objective of conserving rhinos, other trade restrictions are the only reasonable means to the end.⁴⁰⁰

Barring trade in other CITES-listed species is the most practical means to achieve this policy objective, because Vietnam is diminishing the effectiveness of CITES. By linking compliance with CITES to trade restrictions on CITES-listed specimens, the United States establishes the “reasonable” or “substantial relationship” between means and ends that the

³⁹⁷ See also *supra* Section IV.C.2.

³⁹⁸ See also *supra* Section IV.C.4.

³⁹⁹ Steve Charnovitz, *Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices*, 9 AM. U. J. INT’L L. & POL’Y 751 (1994)(reviewing the success of the Pelly Amendment up to 1994); see also Gene S. Martin, Jr., & James W. Brennan, *Enforcing the International Convention for the Regulation of Whaling: The Pelly and Packwood–Magnuson Amendments*, 17 DEN. J. INT’L L. & POL’Y 293, 298-308 (1989).

⁴⁰⁰ Similarly, in the case of whales, no member of the International Whaling Commission may kill any whale for commercial purposes. CITES prohibits all trade in whale products. Thus, import restrictions on whale products would be totally ineffectual.

Appellate Body has called for. The United States would also ensure that the Pelly Amendment is “not disproportionately wide in its scope and reach in relation to the policy objective.”⁴⁰¹

The link proposed here is simply a variation of the general rule established in *Shrimp/Turtle I* and other cases. In *Shrimp/Turtle I* and *Tuna/Dolphin*, the product subject to import restrictions related to the resource to be conserved because the harvest of the product affected the resource to be conserved. In the present circumstances, rhinos are being killed for personal use and benefit, not incidentally killed as part of some other economic activity. As such, it is impossible to find a product that has an economic relationship with rhinos as was possible in *Shrimp/Turtle I* and *Tuna/Dolphin*. Nonetheless, a trade restriction on CITES-protected specimens has an important treaty relationship with rhinos. This relationship is arguably stronger, but is certainly no less strong, than an economic relationship. Indeed, because the purpose of the Pelly Amendment is to promote implementation and compliance with CITES, the imposition of trade restrictions on CITES-protected specimens would have the “substantial relationship” of means and ends that the Appellate Body has required.

Moreover, with the dramatic surge in rhino poaching and with Vietnamese nationals at the center of this poaching, trade restrictions under the Pelly Amendment may be the only reasonable means to protect rhinos from the continuing slaughter. Indeed, when the Secretary of the Interior certified China and Taiwan and engaged Yemen and Korea under the Pelly Amendment in 1994 for their trade in rhino and tiger parts, these countries took significant actions to improve their implementation of CITES to protect rhinos and tigers.⁴⁰² Prior Panels have emphasized the importance of considering the general design and structure of the measure as a whole and whether the measure as a whole relates to the legitimate policy objective of conserving exhaustible natural resources. The Pelly Amendment as a whole, and not just trade restrictions imposed pursuant to it, clearly relates to the conservation of rhinos. In addition, the means it uses to achieve the policy goal, trade restrictions to promote the enforcement of CITES, is also directly related to conservation of rhinos. But, trade restrictions are just one element to consider when determining whether a measure relates to the policy objective. Imposing trade restrictions will encourage Vietnam to improve its implementation of its CITES obligations, which directly relates to the conservation of rhinos. The measure to consider, the Pelly Amendment, was specifically constructed by Congress to conserve exhaustible natural resources. Such trade restrictions approved by the President under the Pelly Amendment as a whole would therefore constitute a “close and genuine relationship of ends and means.”⁴⁰³

3. The Trade-Related Measures of the Pelly Amendment Are Made Effective in Conjunction with Restrictions on Domestic Production and Consumption

Finally, in order to gain a provisional justification under Article XX(g), the Appellate Body has required that the party instituting trade restrictions ensure that such measures are made

⁴⁰¹ *Shrimp/Turtle I*, Appellate Body Report, *supra* note 371, ¶ 141.

⁴⁰² Letter from President William J. Clinton to Thomas S. Foley, Speaker of the U.S. House of Representatives (Apr. 11, 1994).

⁴⁰³ *China – Raw Materials*, Appellate Body Report, at ¶ 355; *see also U.S.-Shrimp/Turtle*, Appellate Body Report, at ¶ 141.

effective in conjunction with similar restrictions on domestic production or consumption. Sometimes referred to as the “even-handedness” requirement, the Appellate Body described this requirement in *U.S. – Reformulated Gasoline*, stating that Article XX(g):

. . . is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline. The clause is a requirement of *even-handedness* in the imposition of restrictions in the name of conservation, upon the production or consumption of exhaustible natural resources.⁴⁰⁴

The “even-handedness” requirement allows panels to engage in a broad review of the laws of a country. For example, the Appellate Body in *U.S.-Shrimp/Turtle* analyzes whether the Endangered Species Act (ESA) in its entirety, as domestic implementing legislation, imposed restrictions similar to Section 609 and made clear that the entire statutory scheme is relevant for determining whether an even-handed approach is taken. The Appellate Body clarified that Article XX(g) does not require the trade restrictions on domestic production or consumption to be found in the same law as the restrictions on importation.⁴⁰⁵ The Appellate Body found that domestic regulations under Section 609 and the Endangered Species Act (ESA) were sufficiently effective counterparts to the Section 609 import restrictions. Section 609 domestic restrictions alone would not have satisfied the requirement because, in and of themselves, they were not restrictive enough. However, because the ESA imposed additional domestic restrictions two years earlier, the ESA and Section 609 together imposed sufficient restrictions on domestic production and consumption to meet the requirement of even-handedness.

While the Pelly Amendment itself does not restrict U.S. citizens from taking, killing or trading rhinos, the ESA does. The ESA generally implements CITES for the United States.⁴⁰⁶ It also prohibits the taking, killing, harming, and harassing of, and trade in, endangered species⁴⁰⁷ like the rhino. This law applies to international trade and interstate commerce. The ESA also makes it unlawful to sell or offer to sell in interstate or foreign commerce any endangered species⁴⁰⁸ and to deliver, receive, carry, transport, or ship endangered species in interstate or foreign commerce in the course of a commercial activity.⁴⁰⁹ The ESA further bars import and export for captive breeding purposes unless the specimen was held in captivity prior to the date the ESA came into force or the date of publication of a final regulation to list a species as endangered. The ESA provides only limited exceptions to these prohibitions.⁴¹⁰ For example, a private landowner may submit a Habitat Conservation Plan that minimizes and mitigates the impacts of the take. If the Secretary of the Interior approves of this plan, the landowner can receive an incidental take permit. Another exception is for federal agencies; if a federal agency

⁴⁰⁴ *U.S.-Reformulated Gasoline*, Appellate Body Report at pp. 20-21 (emphasis in original).

⁴⁰⁵ *China – Raw Materials*, Appellate Body Report, *supra* note 373, at ¶ 361; *see also Shrimp/Turtle I*, Appellate Body Report, *supra* note 371, ¶ 144 (analyzing the civil and criminal penalties of the Endangered Species Act as well as the regulations requiring U.S. shrimp trawlers to use approved turtle excluder devices and restrict the duration of tow-times in areas where significant turtle mortality occurs due to shrimping).

⁴⁰⁶ 16 U.S.C. § 1537a.

⁴⁰⁷ 16 U.S.C. § 1538(a).

⁴⁰⁸ *Id.* § 1538(a)(1)(F).

⁴⁰⁹ *Id.* § 1538(a)(1)(E).

⁴¹⁰ 16 U.S.C. § 1539.

proposes an action to the Endangered Species Committee and the Committee finds that the benefits of the action outweigh the benefits of conserving the species and that there are no other reasonable alternatives to the action, then the federal agency may receive an exemption from the law.⁴¹¹

In addition, the Rhinoceros and Tiger Conservation Act (RTCA) “[p]rohibits the sale, import, or export, or the attempted sale, import, or export, of any product, item, or substance (product) intended for human consumption or application, containing, labeled or advertised as containing, and substance derived from any species of rhinoceros or tiger.”⁴¹² The ESA and the Lacey Act only apply to international trade and interstate commerce. As such, the RTCA fills a gap by applying its prohibition to intrastate trade.⁴¹³ It also supports conservation through funding, programs, habitat management, campaigns, and other measures.⁴¹⁴

The ESA and the RTCA are substantial restrictions on the domestic production and consumption of rhino horn and other rhino parts; however, the United States has gone further than this in its domestic legislation. For one, the Lacey Act makes it illegal to falsify information, records, or accounts in regards to species that have been imported, exported, transported, sold, purchased, or received in interstate or international trade unless it has already been cleared through a U.S. Fish and Wildlife Service inspection.⁴¹⁵ This practice further decreases illegal international trade in rhino horn and other rhino parts because most packages containing rhino horn derivatives seized are clearly labeled as medicine containing rhino horn.

These domestic laws clearly show that any Pelly Amendment measures are operating in conjunction with restrictions on domestic production and consumption. Moreover, the significant restrictions imposed by the ESA and the RTCA on U.S. citizens clearly show that any trade sanctions imposed by the Pelly Amendment will be applied in an even-handed manner.

B. Trade-Related Measures Taken Pursuant to the Pelly Amendment Are Consistent with the Chapeau of Article XX

Once provisionally justified under one of the Article XX exceptions, such as paragraph (g), the measure must also be found to be consistent with the Article XX chapeau. The chapeau consists of three elements:

1. The measure is not applied in a manner which would constitute a means of arbitrary discrimination between countries where the same conditions prevail.

⁴¹¹ *Id.*

⁴¹² 16 U.S.C. § 5305(a).

⁴¹³ 16 U.S.C. § 1538(a)(1)(F) (making it unlawful to “sell or offer for sale in interstate or foreign commerce any such species.”).

⁴¹⁴ 16 U.S.C. § 5304.

⁴¹⁵ 16 U.S.C. §§ 3371-3378.

2. The measure is not applied in a manner which would constitute a means of unjustifiable discrimination between countries where the same conditions prevail.
3. The measure is not a disguised restriction on international trade.⁴¹⁶

Four important principles frame the interpretation of the chapeau. First, the Appellate Body in *Shrimp/Turtle I* explained that the preamble to the WTO Agreement provided useful insight into interpreting whether or not these conditions of the chapeau are met. The first paragraph of the WTO Agreement's preamble states the desire to "protect and preserve the environment and to enhance the means for doing so in a manner consistent with [the Member's] respective needs and concerns at different levels of economic development." That language "must add colour, texture and shading" in the interpretation of the WTO Agreements, including the Article XX's chapeau.⁴¹⁷ As such, the purpose of the chapeau is to prevent a country's abuse of the provisional exceptions under Article XX by ensuring that the application of any measure imposed pursuant to a legitimate policy objective is exercised in good faith for attainment of that policy objective. In other words, "the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned."⁴¹⁸

Second, the Appellate Body in *Retreaded Tyres* emphasized that there is a delicate balance when analyzing the rights of a Member under substantive WTO provisions and the right of a Member to invoke an Article XX exception.⁴¹⁹ When evaluating this balance, the Appellate Body stated in *Shrimp/Turtle I* said and reiterated in *Retreaded Tyres* that "[t]he location of this line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up the specific cases differ."⁴²⁰ In other words, the analysis is extremely fact intensive; what is arbitrary and unjustifiable in one situation may not be arbitrary or justifiable in another. Where, as here, a measure is designed to protect an endangered species, the line should move to allow a greater range of trade restrictions.

Third, "[t]he focus of the chapeau, by its express terms, is on the application of a measure."⁴²¹ When analyzing whether a measure is applied so as to constitute arbitrary or unjustifiable discrimination, the analysis should focus on whether there is a legitimate cause or rationale for the application of the measure that results in discrimination. A legitimate cause or rationale for any discrimination, however, must bear a rational connection to the objective falling within the purview of a paragraph of Article XX.⁴²² In other words, any discrimination under

⁴¹⁶ *China – Raw Materials*, Appellate Body Report, at ¶ 358; see also *Shrimp/Turtle I*, Appellate Body Report, at ¶ 150.

⁴¹⁷ *Shrimp/Turtle I*, Appellate Body Report, *supra* note 371, ¶ 153.

⁴¹⁸ *Reformulated Gasoline*, Appellate Body Report, *supra* note 369, at 22.

⁴¹⁹ *Brazil—Measures Affecting Imports of Retreaded Tyres*, Appellate Body Report, WT/DS332/AB/R, ¶ 224 (published Dec. 3, 2007, adopted Dec. 17, 2007) [hereinafter *Retreaded Tyres*].

⁴²⁰ *Shrimp/Turtle I*, Appellate Body Report, *supra* note 371, ¶ 153; see also *China – Raw Materials*, Appellate Body Report, *supra* note 373, at ¶ 355; *Retreaded Tyres*, Appellate Body Report, *supra* note 414, ¶ 224 (quoting the passage from the *Shrimp/Turtle* report).

⁴²¹ *Retreaded Tyres*, Appellate Body Report, *supra* note 414, ¶ 215.

⁴²² *Id.* ¶¶ 227–30.

Article XX(g) must relate to the conservation of an exhaustible natural resource; it may not, as it did in *Retreaded Tyres*, result from decisions of trade tribunals or domestic courts.⁴²³

Fourth, the Appellate Body has not clearly distinguished between “arbitrary” and “unjustifiable” discrimination. The WTO dispute settlement reports that interpret the chapeau have either conflated the discussion and analysis of unjustifiable discrimination and arbitrary discrimination, as in *Reformulated Gasoline*, or failed to explain why certain factors are considered as unjustifiable discrimination whereas other factors are considered as arbitrary discrimination, as in *Shrimp/Turtle I*, and *Retreaded Tyres*. For this reason, this petition addresses all the various issues considered as unjustifiable discrimination and arbitrary discrimination in subsection 1, below.

1. The Measures do Not Constitute Arbitrary or Unjustifiable Discrimination

For a measure to satisfy the requirements of Article XX chapeau, it cannot be applied in a manner that would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail. First, the application of the measure must result in discrimination. Second, the application of the measure that led to the discrimination must be arbitrary or unjustifiable. Third, the discrimination must occur between countries where the same conditions prevail. As described below, any discrimination resulting from the imposition of sanctions against Vietnam are not arbitrary or unjustifiable; nor is any discrimination between countries where the same conditions prevail.

WTO and GATT dispute settlement panels have considered several factors when identifying whether a measure constitutes arbitrary or unjustifiable discrimination. First, panels have said that the measure must be flexible; a Member may not use a measure as a coercive ploy to make the laws of the other countries essentially the same as its own. Second, panels have ascertained whether the Member invoking the exception had other options available to it. Third, panels have investigated whether the measure is applied in a random or capricious way. Fourth, panels have examined whether the Member invoking the exception has applied the measure in a transparent and fair way. Considering these factors below, the Pelly Amendment and the trade restrictions proposed in Section V do not constitute arbitrary or unjustifiable discrimination.

a. The Measures are Flexible and Not Coercive

The Appellate Body in *Shrimp/Turtle I* concluded that the coercive effect of the U.S. Shrimp/Turtle Guidelines constituted unjustifiable discrimination because the Guidelines established a single, rigid standard to be met by all countries that was “essentially the same” as U.S. standards.⁴²⁴ In practice, the only way a country could be certified was to use Turtle

⁴²³ *Id.* ¶¶ 232, 247. This decision in *Retreaded Tyres* was based on Article XX(b), but because the analysis discussed above applies to the chapeau as a whole, the reasoning is equally applicable to measures invoked under Article XX(g).

⁴²⁴ *Shrimp/Turtle I*, Appellate Body Report, *supra* note 371, ¶¶ 161–64. The Appellate Body concluded by saying:

Excluder Devices or fall within an extremely limited exception. In other words, the United States required other countries to maintain sea turtle conservation laws that were “essentially the same” as U.S. practices and procedures. The United States later amended its Shrimp/Turtle Guidelines to require foreign practices and procedures to be “comparable in effectiveness” to U.S. standards.⁴²⁵ The Appellate Body found that this requirement did not constitute arbitrary or unjustifiable discrimination, because it allowed the United States to take into account specific prevailing conditions in its country.⁴²⁶

Whereas the Appellate Body found the measure at issue in *U.S.—Shrimp/Turtle I* to be unjustifiably discriminatory in its coercive effect requiring adoption of essentially the same regulatory program; that is not the case with the proposed trade restrictions to be imposed on Vietnam. Under the Pelly Amendment, the United States investigates whether particular countries are diminishing the effectiveness of a relevant program. The very nature of this petition, focusing solely on Vietnam, indicates that the Pelly Amendment does not impose a single inflexible standard applicable to all countries. This petition and others before it are highly fact specific, taking into account the specific action or inaction of specific countries. Any restrictions taken under the Pelly Amendment would not require Vietnam to meet U.S. standards. Rather, it asks Vietnam to comply with its own international obligations under CITES. Thus, the U.S. measures are not aimed at forcing Vietnam to adopt a substantially identical regulatory program and, as such, the Pelly Amendment is not coercive.

b. The United States Has Exhausted Other Options

The Appellate Body has found trade-related measures to be unjustifiable and/or arbitrary if, prior to imposition of measures, the WTO Member invoking the exception has failed to make good faith efforts to achieve the policy objective by alternate routes. In *Reformulated Gasoline*, for example, the Appellate Body found that “[t]here was more than one alternative course of action available,”⁴²⁷ including cooperative arrangements with both foreign refiners and foreign governments.⁴²⁸ Similarly, the Appellate Body in *Shrimp/Turtle I* found that the failure of the

The actual application of the measure, through the implementation of the 1996 Guidelines and the regulatory practice of administrators, requires other WTO Members to adopt a regulatory program that is not merely comparable, but rather essentially the same, as that applied to the United States shrimp trawl vessels. Thus, the effect of the application of Section 609 is to establish a rigid and unbending standard by which United States officials determine whether or not countries will be certified, thus granting or refusing other countries the right to export shrimp to the United States.

Id. ¶ 163.

⁴²⁵ *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/RW, Panel Report, at ¶ 5.93 (adopted 15 June 2001) [hereinafter *Shrimp/Turtle II*, Panel Report].

⁴²⁶ *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, Appellate Body Report, ¶ 144 (adopted 15 June 2001) [hereinafter *Shrimp/Turtle II*, Appellate Body Report].

⁴²⁷ *Reformulated Gasoline*, Appellate Body Report, *supra* note 369, at 25.

⁴²⁸ *Id.* at 27. The Appellate Body later concluded:

We have above located two omissions on the part of the United States: *to explore adequately means, including in particular cooperation with the governments of Venezuela and Brazil*, of

United States to attempt negotiations with the complainants was unjustifiable because 1) a legitimate course of action was reasonably open to the United States; 2) other methods should first be considered because unilateral trade restrictions are the heaviest measure; and 3) unilateral trade restrictions tend to heighten the discriminatory influence of a measure.⁴²⁹ Significantly, however, the duty requires serious good faith efforts to reach an agreement; the duty does not impose an obligation to reach an agreement.

The Appellate Body in *Shrimp/Turtle I* considered the particular conservation concerns relating to sea turtles when determining what was required of the United States. This fact-specific analysis concerned the species being conserved and methods for conserving that species. In that situation, there was a “decided preference for multilateral approaches voiced by WTO Members and others in the international community in various international agreements for the protection and conservation of endangered sea turtles” that required the United States to make a good faith effort to reach an international agreement before imposing trade restrictions.⁴³⁰ This preference was due to the highly migratory aspect of sea turtles. The migratory aspect “demands concerted and cooperative efforts on the part of many countries whose waters are traversed in the course of recurrent sea turtle migrations.”⁴³¹ In addition to this fact, there was general agreement that measures affecting transboundary problems should be dealt with through multilateral agreements. The United States chose cooperation with some trading partners, such as Latin American countries through the Inter-American Convention for the Protection and Conservation of Sea Turtles (the Inter-American Convention). However, the United States chose not to pursue negotiation and cooperation with other WTO Members, including the Southeast Asian countries that brought the WTO dispute. The Appellate Body in *Shrimp/Turtle II* “saw the Inter-American Convention as evidence that an alternative course of action based on cooperation and consensus was reasonably open to the United States” which the United States chose not to pursue.⁴³² Further, the language of Section 609 actually required the United States to initiate negotiations. On these facts, the Appellate Body concluded that the United States should have engaged in good faith negotiations to resolve the problem prior to imposing trade restrictions.⁴³³

The concerns of the panel and the Appellate Body are not at issue here, because the United States has a long history of working cooperatively to protect and conserve rhinos. In addition to implementing CITES for rhinos and other species through the ESA, the United States also helps enforce the wildlife laws of other countries through the Lacey Act. If rhinos or other wildlife have been acquired or exported illegally, the United States may seize those specimens. Moreover, the United States provides significant funding, technical assistance, education, and

mitigating the administrative problems relied on as justification by the United States for rejecting individual baselines for foreign refiners; and to count the costs for foreign refiners that would result from the imposition of statutory baselines.

Id. at 28 (emphasis added). The Appellate Body concluded that such discrimination constituted “unjustifiable discrimination” and a “disguised restriction on international trade.” *Id.* at 28–9.

⁴²⁹ *Shrimp/Turtle I*, Appellate Body Report, *supra* note 371, ¶ 166-171.

⁴³⁰ *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/RW, AB-2001, at ¶ 122 (adopted 22 October 2001).

⁴³¹ *Shrimp/Turtle I*, Appellate Body Report, *supra* note 371, ¶ 168.

⁴³² *Shrimp/Turtle II*, Appellate Body Report, *supra* note 421, ¶ 128.

⁴³³ *Shrimp/Turtle I*, Appellate Body Report, *supra* note 371, ¶ 168.

other measures to support the rhino conservation through the RTCA.⁴³⁴ A significant amount of funding has been directed at Vietnam for rhino conservation. From 2001 to 2003, the United States, through the Fish & Wildlife Service, provided \$114,395 for 6 rhino-specific conservation programs relating to law enforcement and genetic testing of rhinos, among other things; another \$53,420 funded 3 programs relating to tiger and rhino conservation.⁴³⁵ From 2004 to 2009, the U.S. Fish & Wildlife Service provided an additional \$183,310 for 4 programs to conserve rhinos in Vietnam.⁴³⁶ A significant portion of these funds went to fund efforts to conserve Javan rhinos in Vietnam's Cat Tien National Park, but as the World Wildlife Fund has reported, Vietnamese officials failed to fulfill their duties⁴³⁷ and, as a consequence, Vietnam's rhinos have been lost forever.

Moreover, the United States has actively pursued rhino conservation efforts through CITES since 1977, when the Parties placed rhino populations in Appendix I. As illustrated in Section III of this petition, the United States and other CITES Parties have worked for more than 30 years, through listings in the appendices, Resolutions of the Parties, and Decisions of the Parties to control trade generally and to encourage Vietnam to implement its CITES obligations. These efforts exemplify the United States history of cooperation and leadership within CITES on rhino conservation.

The application of trade restrictions under the Pelly Amendment to the conservation of rhino species may be the action needed to get Vietnam to implement its multilaterally agreed obligations. As noted above, the United States and the international community as a whole have attempted many other courses of action to no avail. With many populations of rhino critically endangered, the threat of extinction for many rhino species is real. The imposition of trade sanctions on Vietnam is justified, because rhinos are poached mainly to sell rhino horn to Vietnamese consumers and because Vietnam has allowed domestic demand to flourish. **In sum, it cannot reasonably be said that “serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements”⁴³⁸ have not been pursued prior to the instant request for trade restrictions.**

⁴³⁴ See generally project summaries reports relating to rhino conservation projects funded by the Fish & Wildlife Service. Fish & Wildlife Service, Rhinoceros and Tiger Conservation Fund, at:

<http://www.fws.gov/international/wildlife-without-borders/rhino-and-tiger-conservation-fund.html>.

⁴³⁵ USFWS, *Rhinoceros & Tiger Conservation Act: Summary Report 2001-2003*, 47 (2004),

http://www.fws.gov/international/DIC/species/rhino/pdf/rhino_tigerconservation99-00.pdf; USFWS, *Rhinoceros & Tiger Conservation Act: Summary Report 2001-2003*, (2004),

http://www.fws.gov/international/DIC/species/rhino/pdf/rhino_tigerconservationfund01-03.pdf.

⁴³⁶ USFWS, *Wildlife Without Borders – Rhinoceros and Tiger Programs: Summary of Projects 2004*,

<http://www.fws.gov/international/DIC/species/rhino/pdf/RTSP04.pdf>; USFWS, *Wildlife Without Borders – Rhinoceros and Tiger Programs: Summary of Projects 2005*,

http://www.fws.gov/international/DIC/species/rhino/pdf/rhino_tiger_project_summaries_2005.pdf; USFWS,

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http://www.fws.gov/international/DIC/species/rhino/pdf/Rhino-Tiger_Project_Summaries_2006.pdf; USFWS,

Rhino Tiger Conservation Fund Summary of Projects FY 2009, http://www.fws.gov/international/pdf/project_summaries-rhino-tiger-2009.pdf.

⁴³⁷ WWF, EXTINCTION OF THE JAVAN RHINOCEROS, *supra* note 286, at 27–28.

⁴³⁸ *Shrimp/Turtle I*, Appellate Body Report, at ¶ 166.

c. Application of Trade-Related Measures Under the Pelly Amendment Would not Result in Arbitrary Discrimination under the Article XX Chapeau and Its Rationale Bears a Direct Relationship to Conservation of Rhinos

As noted in the introduction to Section B above, a discriminatory measure is considered arbitrary if the discrimination is unrelated to the policy goal. In such circumstances, the Appellate Body has said that the measure is random or capricious and constitutes arbitrary or unjustifiable discrimination. In *Retreaded Tyres*, Brazil barred trade in retreaded tires from all countries except those in MERCOSUR, because a MERCOSUR tribunal concluded that the ban violated MERCOSUR rules. The Panel concluded that the resulting discrimination was not arbitrary because it was necessary to comply with a MERCOSUR ruling and it was implemented in the narrowest way possible.⁴³⁹ The Appellate Body overruled this conclusion. It agreed that Brazil's selective import ban was not arbitrary or random, but said that the ban still constituted arbitrary discrimination within the meaning of Article XX, because the rationale for the discrimination bore no relationship to the declared policy objective of protecting public health.⁴⁴⁰

Contrary to *Retreaded Tyres*, any discrimination that results from application of the Pelly Amendment is directly related to the policy objective of conserving rhinos through the implementation of CITES. The discrimination would not be capricious or random because its sole purpose is Vietnam's compliance with an international obligation to conserve rhinos. The rationale behind the Pelly Amendment and any trade restrictions bears a direct relationship to the objective of the conservation of rhinos. As noted in Section IV, Vietnam is currently the main destination for both legally and illegally obtained and traded rhino horn.⁴⁴¹

The rationale underlying the Pelly Amendment is to increase Vietnam's compliance with CITES, which would improve implementation of CITES and reduce illegal international trade, thereby helping to conserve rhino species.

d. Trade-Related Measures under the Pelly Amendment Will Be Applied in a Transparent and Fair Way

The Appellate Body has also embraced transparency and fairness as elements of whether a measure unjustifiably or arbitrarily discriminates between countries where the same conditions prevail. In *Reformulated Gasoline*, the Appellate Body concluded that U.S. measures establishing pollutant levels in gasoline constituted "unjustifiable discrimination" and a "disguised restriction on international trade" because the United States failed to "count the costs" for foreign refiners of implementing statutory baselines for pollutant levels in gasoline.⁴⁴²

⁴³⁹ *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, Panel Report, ¶ 7.279 (published June 12, 2007) (adopted Dec. 17, 2007).

⁴⁴⁰ *Retreaded Tyres*, Appellate Body Report, *supra* note 414, ¶ 232.

⁴⁴¹ MILLIKEN & SHAW, *THE SOUTH AFRICA–VIET NAM RHINO HORN NEXUS*, *supra* note 3, at 14, 138.

⁴⁴² *Reformulated Gasoline*, Appellate Body Report, *supra* note 369, at 28–9.

The Appellate Body expanded on this theme in *Shrimp/Turtle I*, deciding that the administration of the measure must be transparent and predictable.⁴⁴³ The purpose of the transparency and fairness requirement is to assure WTO Members that their rights will not be restricted arbitrarily. This requirement promotes the general purpose of the chapeau: to make sure that any Article XX exceptions are applied in good faith and are not a means of circumventing a Member's obligations towards another Member. Transparency imposes a measure of predictability, which also promotes fairness. Lastly, these requirements reassure a sanctioned country that the measure is being applied in a fair and just manner and not for any improper purposes.⁴⁴⁴

The Appellate Body concluded in *Shrimp/Turtle I* that the U.S. Shrimp/Turtle Guidelines were not transparent and predictable enough. The Guidelines did not include a clear procedure for a country to follow for certification; the certification procedure was contradictory. In addition, the procedure did not provide, prior to certification, any formal opportunity for an applicant country to be heard or to respond to arguments against it; the procedure gave no written explanation of why a country's application was accepted or rejected; the procedure gave no specific notification of whether a country was accepted or rejected; and lastly, the procedure provided no review of, or appeal from, a denial of certification.⁴⁴⁵ As a consequence, the Appellate Body concluded that:

The certification processes followed by the United States thus appear to be singularly informal and casual, and to be conducted in a manner such that these processes could result in the negation of rights of Members. There appears to be no way that exporting Members can be certain whether the terms of Section 609, in particular, the 1996 Guidelines, are being applied in a fair and just manner by the appropriate governmental agencies of the United States. It appears to us that, effectively, exporting Members applying for certification whose applications are rejected are denied basic fairness and due process, and are discriminated against, vis-à-vis those Members which are granted certification.⁴⁴⁶

The Shrimp/Turtle Guideline's lack of transparency, predictability, and formality led the *Shrimp/Turtle I* Appellate Body to conclude that the Guidelines were "contrary to the spirit, if not the letter, of Article X:3 of the GATT 1994."⁴⁴⁷ A transparent and predictable administration of the measure assures WTO Members that the measure is not being applied arbitrarily.

In *Shrimp/Turtle II*, the Panel found that the United States' revised Guidelines complied with Article X:3 and fairness or "due process" requirements being read into the chapeau. The revised Guidelines were fair because they were more formal, transparent, and predictable in their requirements. Some of the specific procedures that satisfied the Appellate Body's concerns regarding fairness and due process were:

⁴⁴³ *Shrimp/Turtle I*, Appellate Body Report, *supra* note 371, ¶ 180.

⁴⁴⁴ *Id.* ¶ 181.

⁴⁴⁵ *Id.* ¶ 180.

⁴⁴⁶ *Id.* ¶ 181.

⁴⁴⁷ *Id.* ¶ 183.

1. The Guidelines allowed a country to learn of any certification problems it might have and how it could correct those problems.
2. U.S officials were required to visit with applicant countries to discuss and review any application deficiencies.
3. The Guidelines provided for two assessments of a country's program, a preliminary one by 15th of March, and a formal one, by the 1st of May, each year.
4. After the preliminary assessment, countries have the option to schedule face-to-face meetings about their application.
5. Countries are notified in writing about any possible options a country can take to become certified, given a chance to submit new information, and later, if the application is rejected, given a written notification of the reasons for rejection and possible certification options in the future.
6. If a country would like to review or appeal the decision, it can request reconsideration of the decision or bring the matter to suit in the US Court System.⁴⁴⁸

These changes to the Guidelines were sufficient to establish transparency, predictability, and formality in the measure's administration so that certification determination was no longer arbitrary. Foreign countries could now understand the basis for a determination and respond with additional documents and information. They also knew exactly what the procedure was and avenues for participation. The changes in Guidelines show that "the implementing measure is no longer primarily based on the application of certain methods or standards, but on the achievement of certain objectives, even though the term 'objective' may, in this case, have a relatively broad meaning."⁴⁴⁹

Any trade restrictions imposed pursuant to the Pelly Amendment can easily comply with these fairness and due process requirements. Notice, administration, and application of a measure comparable to the approved *Shrimp/Turtle II* Guidelines can be achieved so that the entire process is formal, transparent, and predictable and there is no arbitrary administration or application of a measure. The Secretary of the Interior could accomplish these goals by acknowledging receipt of this petition in the *Federal Register* and in that notice request additional information from the public and Vietnam and establish the process described above.

e. Countries Where the Same Conditions Prevail

In order for the discrimination to be "arbitrary" or "unjustifiable," it must be against countries where the same conditions prevail. Although no panel has ever provided a clear interpretation of this requirement, the purpose of the chapeau allows some insight into which conditions to consider. Because the purpose of the chapeau is to prevent a Member from abusing

⁴⁴⁸ *Shrimp/Turtle II*, Panel Report, *supra* note 420, ¶¶ 5.129-5.135.

⁴⁴⁹ *Id.* ¶ 5.124.

an exception, the conditions to consider should be those that relate to the exception. The policy goal that is to be promoted by the measure at issue should be relevant to this analysis.

The panel in *EC–Tariff Preferences* used this approach without explicitly saying so. In that case, countries were eligible for the European Communities’ preferential tariff rates based on the gravity of drug problems in those countries. While 12 countries received preferential tariffs, the Panel noted that seizures of opium and heroin in Iran, a non-recipient, were substantially higher than in Pakistan, a recipient. The Panel could find

no evidence to conclude that the conditions in respect of drug problems prevailing in the 12 beneficiary countries are the same or similar, while the conditions prevailing in other drug-affected developing countries not covered by any other preferential tariff schemes are *not* the same as, or sufficiently similar to, the prevailing conditions in the 12 beneficiary countries.⁴⁵⁰

As a consequence, the Panel found that the EU had not established that the application of the EU’s measure did not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.⁴⁵¹

In the situation relating to rhino conservation and the Pelly Amendment, the policy goal is conservation of rhinos through effective implementation of CITES. When considering whether discrimination occurs, it is necessary to look at conditions relating to rhino horn trade and CITES implementation in Member countries. In particular, the conditions that should be considered are:

1. the amount of illegal international trade in rhino horn in the Member country,
2. the level of involvement of Vietnamese nationals in the illegal trade and poaching of rhinos, and
3. the consumer demand for rhino horn and efforts to reduce that demand.

Illegal Trade. Recent reports have identified Vietnam as “the major destination for South African rhino horn.”⁴⁵² Also, while other countries such as China and Thailand are involved in the illegal international rhino horn trade, Vietnam has been identified as the major destination for illegal rhino horn⁴⁵³ with Vietnamese nationals at the center of that trade. As TRAFFIC recently reported,

for nearly a decade the country has been the paramount destination for a resurgent illegal commerce out of Africa, especially from South Africa, where Vietnamese criminal operatives have become firmly embedded in the trade.⁴⁵⁴

⁴⁵⁰ *EC–Tariff Preferences*, Panel Report, *supra* note 384, ¶ 7.234 (emphasis in original).

⁴⁵¹ *Id.* ¶ 7.235.

⁴⁵² WWF, WILDLIFE CRIME SCORECARD, *supra* note 106, at 16; MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 14.

⁴⁵³ WWF, WILDLIFE CRIME SCORECARD, *supra* note 106, at 17; MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS, *supra* note 3, at 14.

⁴⁵⁴ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN NEXUS, *supra* note 3, at 14.

This international trade data provided in Section IV.C.1 of this Petition highlight how Vietnam is the leading supporter of illegal international trade in rhino parts and derivatives. Because no other Member country has an amount of illegal international trade similar to Vietnam, there is no discrimination in countries where the same conditions prevail.

Involvement of Vietnamese Nationals. TRAFFIC has recently documented the role of Vietnamese nationals in rhino hunting in South Africa. As just quoted above, Vietnamese nationals are embedded in the illegal trade in rhino horns from Africa. TRAFFIC also reports that rhino hunting occurred in South Africa without apparent problems for 35 years. Since 2003, however,

there has been an insidious increase in non-traditional hunters, especially Vietnamese nationals, who purposely began to exploit loopholes in South Africa's legislation to obtain hunting trophies for a revived rhino horn market in Asia.⁴⁵⁵

TRAFFIC further reports that many of these Vietnamese hunters are “unable to shoot or disinterested in having trophies mounted for display.”⁴⁵⁶ Nonetheless, Vietnamese interest in hunting rhinos continued to increase, with Vietnamese accounting for 185 (48%) of the 384 foreign nationals authorized to hunt rhinos in South Africa between July 2009 and May 2012.⁴⁵⁷ The problems with Vietnamese hunters became so great that South Africa moved to suspend hunting permits to Vietnamese nationals.⁴⁵⁸ While this hunting was legal, it is clear that the purpose of this hunting was not for legitimate hunting trophies but rather to sell the rhino horn in Vietnamese markets.

Consumer demand. No other country has consumer demand that is as high as it is in Vietnam. Since 2003, there has been a “dramatic increase in demand for rhinoceros horn” driven largely by a belief that rhino horn may prevent or cure cancer.⁴⁵⁹ Others note a “‘mania’ surrounding use of rhino horn in Vietnam is more likely linked to its perceived general health benefits.”⁴⁶⁰ Together, the beliefs in rhino horn's therapeutic value for cancer, hangovers, and other ailments has led to an insatiable demand for rhino horn in Vietnam that is unrivaled in other countries. See Section IV.A for more on Vietnamese demand for rhino horn.

Despite this demand, Vietnamese officials have taken few, if any, steps to reduce demand. This contrasts with other importing countries, such as China, which have taken steps to curb demand for rhino horn. As TRAFFIC reports, “by 1993, a number of key Asian countries and territories that were major rhino horn consumers, most notably China, Taiwan and South Korea, all imposed internal rhino horn trade bans, severely curtailing usage by their traditional medicine industries.”⁴⁶¹ China and other rhino horn importing countries have taken other steps to

⁴⁵⁵ *Id.* at 10.

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.*

⁴⁵⁹ CITES Secretariat, *Species Trade and Conservation—Rhinoceroses: Report of the Secretariat*, CoP15 Doc. 45.1 ¶ 19, *supra* note 161.

⁴⁶⁰ ENV (Education for Nature Vietnam), *Conspicuous Consumption of Rhino Horn*, NEWS FROM THE FRONTLINE, May 2012, at 2.

⁴⁶¹ MILLIKEN & SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN NEXUS, *supra* note 3, at 68.

curb demand, steps not taken by Vietnam.⁴⁶² As noted in Section IV.C of this Petition, statements by government officials may be encouraging demand for rhino horn rather than discouraging it.

Based on these factors, it is clear that Vietnam is in a class by itself. In other words, no other country has the same or similar conditions that now prevail in Vietnam. Any trade restrictions would be targeted at the country posing the major threat to rhinos. Therefore, any discrimination resulting from sanctions imposed pursuant to the Pelly Amendment would not occur between countries where similar conditions prevail.

2. The Trade-Related Measures under the Pelly Amendment Are Not a Disguised Restriction on International Trade

Trade restrictions imposed pursuant to the Pelly Amendment would not be a disguised restriction on international trade. In *Retreaded Tyres*, the Panel analyzed this factor “with a reasoning almost identical to that it had developed in respect of the existence of arbitrary or unjustifiable discrimination.”⁴⁶³ The Appellate Body followed this analysis. It reasoned that since it reversed the Panel’s arbitrary and unjustifiable discrimination analysis, it therefore must reverse the Panel’s disguised restriction on trade analysis since that analysis is essentially the same as the arbitrary and unjustifiable analysis.⁴⁶⁴ Following this reasoning, since the Pelly Amendment does not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail, it does not constitute a disguised restriction on trade.

In addition, *Reformulated Gasoline* said that, at a minimum, disguised restriction on international trade means more than a “concealed or unannounced restriction.”⁴⁶⁵ The application of the Pelly Amendment to CITES-listed species in Vietnam is not a disguised restriction on international trade. For one, the Pelly Amendment establishes a test that is directly

⁴⁶² TRAFFIC reports:

It is an established fact that demand for rhino horn has been dramatically reduced in many former major markets in the past and some observers believe that this may be possible to achieve again in new markets such as Viet Nam. For example, Japan, South Korea, Taiwan and Yemen all were once major consumers of rhino horn, but no longer feature in the present rhino horn trade in a significant way. Even mainland China falls into this category to some extent as entire avenues of trade, for example the use of rhino horn in manufactured traditional medicines, is no longer occurring.

Id. at 104.

⁴⁶³ *Retreaded Tyres*, Appellate Body Report, *supra* note 414, ¶ 238.

⁴⁶⁴ *Id.* ¶ 239.

⁴⁶⁵ *Reformulated Gasoline*, Appellate Body Report, *supra* note 369, at 25 (emphasis in original). The Appellate Body in *Reformulated Gasoline* also stated:

We consider that “disguised restriction”, whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX.

Id. at 25. Defined in this way, however, it is unclear how to distinguish a “disguised restriction” from an “arbitrary” or “unjustifiable” one.

related to a country's diminishment of a threatened or endangered species program. The intent of the trade restrictions are clear; to encourage compliance with international agreements in order to protect the threatened or endangered species covered by the agreement. The sole intention of the trade restrictions is to encourage Vietnam to help conserve rhinos through the implementation of its CITES obligations. With the number of poached rhinos escalating due to demand in Vietnam, any trade restrictions imposed would be directly related to that purpose and not for any protectionist purposes. Therefore, any trade restrictions imposed pursuant to the Pelly Amendment are not disguised restrictions on international trade.

VII. CONCLUSION

This petition has shown that nationals of Vietnam are diminishing the effectiveness of CITES, an endangered or threatened species program, as defined by the Pelly Amendment, by failing to control trade in rhino horn. Further, Vietnam is also reportedly failing to prosecute those engaged in illegal international trade, as required by CITES. Moreover, it is failing to restrict domestic trade in rhino horn and develop programs to reduce demand for rhino horn, as agreed by the CITES Parties in Resolution Conf. 9.14 (Rev. CoP15). For these and other reasons articulated in this petition, the Secretary of Interior must certify Vietnam as diminishing the effectiveness of CITES.

Based on the conclusions in this petition, we respectfully request that you certify Vietnam because its nationals diminish the effectiveness of CITES, and that you recommend to the President that he impose trade sanctions against Vietnam in CITES-listed wildlife. As described in Section VI, the Pelly Amendment and its trade restrictions are consistent with the GATT. Given the substantial but failed efforts by the United States, as well as the international community through CITES, to encourage Vietnam to control trade, reduce demand for rhino horn, and improve implementation of CITES with respect to rhinos, no other course of action will compel Vietnam to implement its CITES obligations to conserve rhinos.

* * * * *

We look forward to your prompt investigation and determination consistent with the conclusions made in this petition. If you have any questions, please feel free to contact me.

Respectfully submitted by,



Allan Thornton
Environmental Investigation
Agency
PO Box 53343
Washington, DC 20009 USA
(202) 483-6621



Azzendine Downes
International Fund
for Animal Welfare
290 Summer Street
Yarmouth Port, MA 02675



Cathy Liss
Animal Welfare Institute
900 Pennsylvania Avenue SE
Washington, DC 20003

