

MEMORANDUM

RE: **EXPORT OF NAMIBIAN ELEPHANTS OUTSIDE OF RANGE STATES**

TO: EMS FOUNDATION

Date: 25 October 2021

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INTRODUCTION AND FACTS

1. We act for the EMS Foundation.
2. Our client has provided us with a press release issued by the Namibian Ministry of the Environment, Forestry and Tourism (MEFT) on 11 August 2021 which indicated that it had put 170 wild elephants (*Loxodonta Africana*) on tender, meaning that they would be captured and sold. The press release indicated that of those 170 animals 57 had already been sold on auction. Of the 57, 15 animals will stay in Namibia with the remaining 42 being exported. At least some of the elephants are from the Kunene region of Namibia.

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3. Namibia is a party to the Convention on International Trade in Endangered Species (CITES) which governs the import and export of species listed on the CITES Appendices. The provisions of CITES are therefore binding on Namibia.
4. Our instructions are further that the 42 elephants will be exported to a country or countries outside of the natural range of *Loxodonta Africana*. Facilities in countries outside of the natural range of a species are known as “*ex situ* operations” in the CITES context. “*Ex situ* operation” is often used in reference to captive-breeding operations.¹
5. Client wishes to know whether the export of wild-caught Namibian elephants to these countries is lawful in terms of CITES.
6. If any of these facts is incorrect, please let us know; our advice may change.

APPLICABLE LAW

International law

7. The specific legal requirements for import and export of a specimen of a CITES-listed species depends on the Appendix on which the species are listed.
8. The legal requirements for exporting species listed on Appendix I are set out in Article III while the legal requirements for trade in Appendix II species are set out in Article IV.
9. African elephants were originally all listed on Appendix I but since 1996 the populations of Botswana, Namibia, South Africa and Zimbabwe have been listed on Appendix II. The listing on Appendix II has always been subject to an “annotation” to the listing which makes it clear that the Appendix II listing applies only in very strictly-defined circumstances and in all other circumstances populations from those countries remain on Appendix I.
10. The wording of the annotation has varied over the years but it has never expressly allowed the export of wild elephants to *ex situ* programmes to be an Appendix II export.
11. The current annotation, adopted at the 14th Conference of the Parties in 2007 places the following populations on Appendix II:

“trade in live animals to appropriate and acceptable destinations, as defined in Resolution Conf. 11.20 (Rev. CoP18), for Botswana and Zimbabwe and for *in situ* conservation programmes for Namibia and South Africa.”
12. Any other export of live elephants from Namibia must be undertaken in accordance with the provisions of CITES that apply to Appendix I species.

¹ CITES glossary.



13. “*In situ*” is not defined in the Convention itself but according to the CITES glossary, the term means “within the natural range of a species.”

OPINION

Is an export of wild-caught Namibian elephants to countries other than their natural range states lawful under CITES?

14. It appears from the *Statement on trade in live African elephants under Articles III and IV of the Convention* issued by the CITES Secretariat on 17 September 2021 and updated on 27 September 2021² that Namibia has taken the view that the elephants to be exported are from a population that does not fall within the ambit of the Appendix II annotation, as the elephants are not being exported to a destination within their natural range, but that they can nevertheless be exported in terms of the requirements for Appendix I species. A report³ of the CITES Animals Standing Committee in June 2021 indicates that Namibia’s view is therefore that it does not need to follow CITES guidance on “appropriate and acceptable destinations”.⁴
15. In our view, based on the current wording of the annotation, it is clear that live Namibian elephants cannot be exported to those countries under the rules pertaining to Appendix II species. Is Namibia then correct that such an export is then lawful in terms of Appendix I?
16. In the first instance, the export would have to comply with the requirements in Article III of CITES which sets out the rules for Appendix I trade. In respect of the importing country these rules are:
- 16.1. the Scientific Authority of the importing country must be satisfied that the import will be for purposes that are not detrimental to the survival of the species;
 - 16.2. the Management Authority must be satisfied that the recipient of the elephants is suitably equipped to house and care for the elephants; and
 - 16.3. the Management Authority must be satisfied that the import is for primarily non-commercial purposes.
 - 16.4. Before granting an export permit:
 - 16.4.1. the Scientific Authority of the importing country must be satisfied that the export will be for purposes that are not detrimental to the survival of the species;
 - 16.4.2. The Management Authority must be satisfied that:
 - 16.4.2.1. the elephants were legally acquired;

² https://cites.org/eng/Statement_trade_elephants_CITES_articles3_4_17_sep_17092021

³ <https://cites.org/sites/default/files/eng/com/ac/31/Docs/E-AC31-18-01-Add1.pdf>.

⁴ Resolution Conf 11.20.



- 16.4.2.2. an export certificate has already been issued; and
- 16.4.2.3. the elephants will be prepared and shipped to minimize any risk of injury, damage to health or cruel treatment.
17. The provisions of Article III must be interpreted with reference to Article II which sets out the fundamental principles on which the Convention is based.
18. Paragraph 1 of Article II provides that –
- “Appendix I shall include all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorised in exceptional circumstances.”
19. The question is then whether the words “particularly strict regulation” and “exceptional circumstances” mean that Appendix I cannot be interpreted in such a way that an Appendix I trade of elephants is allowed in circumstances that are not provided for in an Appendix II trade. Put differently can the export of wild-caught animals outside of their natural range states ever qualify as an exceptional circumstance?
20. Our instructions are that there is a plethora of expert opinion that wild caught elephants from Namibia and other Southern African countries should not be permitted to be exported to *ex situ* conservation programmes at all as this does not promote the conservation of the Southern African population and that the Namibian elephant population is much more threatened than its listing on Appendix II suggests.
21. The IUCN African Elephant Specialist Group’s *Statement and resolutions on the role of captive facilities in in situ African elephant conservation* indicating that it “does not see any contribution to the effective conservation of the species through captive breeding per se.”⁵ In further Statement on the removal of African elephants for captive use, it indicated that:
- “Believing there to be no direct benefit for in situ conservation of African elephants, the African Elephant Specialist Group of the IUCN Species Survival Commission does not endorse the removal of African elephants from the wild for any captive use.”
22. In the “Addis Ababa Communiqué” from the African Elephant Coalition Summit, held on 1-3 June 2018, 21 representatives of African elephant range States reaffirmed the position of the 30 African States in the Coalition that the only appropriate and acceptable destinations for live wild African elephants are *in situ* conservation programmes within their wild natural range.

⁵ <https://www.iucn.org/ssc-groups/mammals/african-elephant-specialist-group/afesg-statements/role-captive-facilities>.



23. At the 70th meeting of the Standing Committee (SC70, Sochi, October 2018), Burkina Faso and Niger submitted SC70 Doc. 38.3 on “Definition of the term ‘appropriate and acceptable destinations’: trade in live elephants”, asking the Standing Committee, inter alia, to:
- “Ask that CoP18 reconsider and take decisions on the particular issues connected with trade in live wild elephants...including an option to amend Resolution Conf. 11.20 (Rev. CoP17) and include a recommendation that the only appropriate and acceptable destinations for live wild African elephants are in situ conservation programmes within their wild natural range. Further, they ask for the recognition that the only certain way to promote in situ conservation is through in situ conservation programmes within their wild natural range.”
24. At the CITES Conference of the Parties (CoP18) in August 2019, Burkina Faso, Jordan, Lebanon, Liberia, the Niger, Nigeria, the Sudan and Syrian Arab Republic asked the Conference of the Parties to adopt an amendment to the CITES Resolution Conf 11.20 on the definition of “appropriate and acceptable destinations”⁶ to indicate the parties agreement that where the term “appropriate and acceptable destinations” appears in an annotation to the listing of *Loxodonta africana* in Appendix II of the Convention with reference to the trade in live elephants from the wild, the term should be defined to mean *in situ* conservation programmes or secure areas in the wild within the species’ natural range, except in the case of temporary transfers in emergency situations.
25. In early 2020, the Animals Committee of CITES was further consulted as to whether a transfer of live elephant specimens from an Appendix II population to an ex-situ location could be considered “an exceptional circumstance” and would provide demonstrable in-situ conservation benefits for African elephants. At the 31st Meeting of the Animals Committee in June 2021, the Committee agreed to refer to the Standing Committee for its advice and recommendations the Animals Committee’s concerns about Namibia’s interpretation of its exports of live African elephants to non-range States using Appendix I. We understand that this issue is to be discussed at a Standing Committee meeting in 2022.
26. The report of an investigation by the NGO Fondation Franz Weber into the proposed export of elephants from Namibia published in September 2021 concluded that the elephant population in the Kunene region could on the verge of collapse. “The removal of any number could have severe implications on an already fragile and isolated desert elephant population.”⁷

⁶ Conf. 11.20.

⁷ <https://africanelephantjournal.com/wp-content/plugins/pdf-poster/pdfjs/web/viewer.php?file=https://africanelephantjournal.com/wp-content/uploads/2021/09/Investigation-of-Live-Elephants.pdf&download=true&print=false&openfile=false>.



27. In an open letter to the CITES Secretariat on 21 September 2021 regarding the proposed export from Namibia, the Pro-Elephant Network (PREN) advised that “the elephant experts' community is aware that the survival of the small and fragile population of desert-adapted elephants in the very dry North West, where Namibia announced to capture elephants, would be irreversibly and negatively affected by such actions. Exports from this population would contravene CITES requirements, that offtakes must not be detrimental to the species and population concerned. These desert elephants have unique morphological and behavioural adaptations to the arid environment of this region, and they play a hugely important ecological role, through the creation and remodelling of habitat and dispersal of seeds which benefits countless other species.” PREN is an international alliance of individuals and organisations including expertise from both within western academies (including the field of science, conservation, animal welfare, human and non-human rights, philosophy and ethics, advocacy, economics, community leadership, writing, the media, social justice and the law) and the indigenous paradigm.
28. We have not seen any non-detriment finding in respect of the proposed export. However, in light of the above, it is our view that the Scientific Authority of Namibia could not reasonably be satisfied that the proposed export of such a large number of animals would not be detrimental to the survival of the species. Similarly we do not believe that the Scientific Authority of a country outside of the elephants' natural range states could reasonably be satisfied that the import would be for purposes that are not detrimental to the survival of the species.
29. While it is lawful for the Namibian authorities to apply for an export permit from the CITES Management Authority, our view is that the factual circumstances do not permit the issue of an export permit. It goes against the purposes of CITES for an export that is not permitted in terms of Appendix II on grounds relating to what is an acceptable destination for elephants is nevertheless permitted in terms of Appendix I.
30. We are well aware that since the elephants are being captured and sold by MEFT itself, the issue of the export permit may well be a mere formality, but this could be challenged.

CONCLUSIONS AND RECOMMENDATIONS

31. We do not believe that it would be lawful for the Namibia CITES Management Authority to issue an export permit under either Appendix I or Appendix II of CITES. Similarly, we do not believe it would be lawful for a country outside of the range states for *Loxodonta Africana* to issue an import permit. We say so because Appendix II does not apply to the export and the available evidence indicates



that exporting the Namibian wild caught elephants to an *ex situ* programme cannot meet the requirements of Article III for trade in Appendix I species, particularly the non-detriment criterion.

DATED AT KENILWORTH THIS 26th DAY OF OCTOBER 2021

SD KVALSVIG
