

Regulatory protection of Asian elephants in Peninsular Malaysia and Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

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Abstract: Asian elephant is categorised as 'endangered' in the IUCN Red List of Threatened Species of March 2015 and listed in Appendix I of Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) since July 1, 1975. In Malaysia, International Trade in Endangered Species Act 2008 (Act 686), hereinafter as "INTESA" is being enforced to regulate wildlife trade as required by CITES. Nevertheless, occurrences of illegal ivory trade and transit across Malaysia still happen even after the implementation of INTESA. Thus, the study is to determine the obligations of CITES in relation to Asian elephant conservation and to what extent INTESA addresses the obligations through inductive and deductive thematic content analysis method. The convention text, decisions and resolutions from CITES between 2004 and 2014 were gathered and analysed. Obligations and sub-obligations related to Asian elephant conservation were selected and categorised into themes and subthemes inductively to form a checklist. INTESA was read and analysed against the checklist to examine to what extent INTESA addresses the obligations of CITES. The study found that INTESA addresses elephant trade, including transit through systems of permit and certificate, yet, amendments in terms of import permit, definition of derivatives for ivory, regulation on ivory in transit, management of ivory stockpiles and elephant trades' records are imperative to protect Asian elephant from unlawful trade as outlined by CITES.

Keywords: Asian elephants, Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), International Trade in Endangered Species Act 2008 (Act 686), inductive and deductive thematic content analysis, obligation

I. Introduction

According to Vienna Convention on the Law of Treaties, treaty represents a written international agreement between states, however, the present convention shall not apply to any international agreement between states and other matters not included in international law, between other matters not included in international law and international agreement that is not in written form. Treaty or convention is also being defined as an international agreement between states that required states to follow a certain code of law, often presented in the form of obligations and sub-obligations, in regulating inter-state relationships [1].

Asian elephant has been listed in Appendix I of CITES since July 1, 1975. The current conservation status of Asian elephant is 'endangered' under the IUCN Red List of Threatened Species of March 2015. The categorisation signifies the population of Asian elephant decreases more than half of the population over the last 10 years and threatened by trade since 1975. Malaysia has joined CITES in October 20, 1977 and enforced CITES in January 18, 1978. This convention aims to regulate and monitor trades and markets of wildlife and its derivatives through Appendix I, II, and III which varies in accordance to the level of species endangerment [2, 3]. The trades of species in all appendices are monitored by Management Authority (MA) and Scientific Authority (SA). The MA is responsible for approving permit and certificates after obtaining appropriate advice from SA. As of March 2015, a total of 180 countries have signed CITES. Therefore, CITES might be another most important international treaty in conserving animals and plants through regulating trade and markets [4, 5].

In CITES, wild flora and fauna species threatened by trade are protected through categorising the species into three appendices, namely Appendix I, II and III. Species listed in appendix I are endangered species and is generally not allowed to be traded unless certain strict prerequisites are fulfilled. The import of species in appendix I which is not detrimental and not for commercial purposes is permitted with appropriate care and provided an import and export permits have been granted. Moreover, the re-export of species in appendix I is allowed if species is properly cared while such trade is accompanied with import permit with no contravention to the present convention. Appendix II species specifies species that are threatened with extinction if trade is not regulated. However, trade is generally permitted for Appendix II species with preconditions. An export or re-

export permit is needed to import appendix II species and if the export is not detrimental to the species and appropriate care is provided. The re-export of appendix II species will be allowed, if the species is imported with appropriate care and no contravention with the convention. Species in appendix III lists identified species by any party to prevent excessive exploitation which requires cooperation from other parties for trade regulation. Appendix III species shall only be exported if proper care is given and such export does not contravene to the convention. Meanwhile, the re-export of species in appendix III shall approve if the certificate by the re-export state has been granted with no contravention to the present convention. Therefore, Malaysia has implemented a national legislation namely International Trade in Endangered Species Act 2008 (Act 686), hereinafter as “INTESA”, to address the obligations and sub-obligations specified in CITES.

In Malaysia, INTESA is being enforced to protect, conserve and regulate trade of wildlife including Asian elephant through the system of permit, certificate and registration, as outlined in Third Schedule in accordance to CITES appendices. Nevertheless, the extent of the implementation of INTESA in regulating elephant and ivory trades involving import, export, re-export and transit in Malaysia are still remained unclear. Malaysia has been identified as one of the transshipments points for ivory trade [6, 7]. In 2015, Thailand has seized over three tones of African ivory shipped across Sri Lanka, Malaysia, Singapore to Thailand [8]. In 2013, ivory weighted in nearly 2 tonnes passed through Malaysia was seized by Vietnam in addition to another seizure made by Hong Kong with nearly a tonne of ivory from Cote d’Ivoire slipped through Malaysia within 2 weeks [9]. This has been supported by TRAFFIC reports shown that ivory seizures for nearly 34 tonnes have slipped through Malaysia between 2006 and 2013 [10]. On the other hand, 5 illegal ivory smuggling destined for Malaysia were seized in Kenya, Uganda and Tanzania in 2010, 2011 and 2012 [10]. Additionally, 775 pieces of ivory weighted 1.3 tonnes destined for Malaysia were seized at Mombasa, Kenya [11]. Since ivory trades destined to and in transit in Malaysia remained persistent although INTESA has been enforced since 2008, hence, it is imperative to analyse the obligations in relation to Asian elephant conservation from CITES and to what extent INTESA addresses the obligations.

II. Method

The convention text and decisions and resolutions formed between 2004 and 2014 were downloaded from CITES homepage. Meanwhile, INTESA primary law document was also downloaded from LawNet, the subscribed law databases in Universiti Putra Malaysia (UPM). The articles in convention text were read and the obligations related to Asian elephant conservation were identified and grouped into a checklist. The obligations were further refined to obligations directly referred to regulations of elephant trade. Obligations directing to administrative matters such as responsibilities of Management Authority (MA) and Scientific Authority (SA), adoption of guidelines and etc were excluded. Similarly, the downloaded decisions and resolutions between 2004 and 2014 were also read, however, only the valid decisions and resolutions referring to the selected obligations from the convention text were gathered and named as sub-obligations. This is simply because decisions and resolution only valid within a specific of time. The identified sub-obligations were added into the checklist and arranged following the related obligations. After the checklist was completed, themes and subthemes were formed inductively as referred to the contents in the obligations and sub-obligations. Themes and subthemes were also defined contextually. Next, the relationships between themes and subthemes were examined deductively. Aside from the reading of convention text, decisions and resolutions, the content of INTESA primary law document was also read to determine the extent of the related provisions in addressing the obligations and sub-obligations.

III. Results

3.1 Obligations of CITES in relation to Asian elephant conservation

Parties are required to regulate trade of species in Appendix I through systems of permit and certificate. In export of elephants or its derivatives, export permit will only be granted, if import permit has been granted before application for export permit was made; sources of elephant were legal; and trade was not detrimental to elephant species with safe shipment for living elephants.¹ Similarly, the import permit of elephants or its derivatives can only be granted, if the import is not detrimental to the elephant species with appropriate housing and care in addition to the import is not for commercial purposes.² Furthermore, the re-export certificate of living elephant or its derivatives shall only be granted when import permit has been granted before application to re-export certificate was made with appropriate housing and care provided during the shipment and legally imported.³ In addition, parties shall also regulate domestic raw and worked ivory trade through registration of all

¹ Article III, (2)(a), (b), (c) and (d) in CITES convention text.

² Article III, (3)(a), (b) and (c) in CITES convention text.

³ Article III, (4)(a), (b) and (c) in CITES convention text.

traders, manufacturers, wholesalers and retailers involved in ivory trade; establishment and regulation on ivory stockpiles; and collection of ivory samples from large seizures.⁴

Parties shall penalise any illegal elephant trade and possession and confiscate or return the seized living elephants or its derivatives to state of export.⁵ The confiscated living elephants shall either to be entrusted to MA followed by sending the confiscated elephants to rescue centre or returning them back to country of origin after advised by Scientific Authority (SA).⁶ Furthermore, parties also shall ensure that all formalities involving any wildlife trade shall be passed with minimum delay and living elephants shall be properly cared during transit and shipment.⁷ In addition, parties shall also keep details of trade as records, such as names and address of exporters and importers; number, type of permit and States involved; and quantity, type and name of specimens traded.⁸

3.2 The extent of INTESA in addressing the obligations

The results reveal that INTESA regulates trade of Asian elephants and its derivatives through systems of permit and certificate. However, import permit is not compulsory in INTESA for any export and re-export involving elephant specimen.⁹ Furthermore, INTESA does not categorize elephant's ivory into raw and worked ivory despite other elephant derivatives, such as meat, hide and hair were included as 'readily recognizable part or derivative of an animal'.¹⁰ Nevertheless, ivory trade is still regulated by provisions enacted for the import, export, re-export and transit of ivory.¹¹ Meanwhile, comparable document also required when elephant trade involving non parties to CITES.¹² Elephant in transit also required to be accompanied with documents such as permit, licence, certificate or written permission issued by country of export or re-export or import.¹³ Additionally, INTESA also authorises wildlife officers to collect samples of seized ivory with or without warrant to assist the prosecution and identification processes, yet, INTESA does not mentioned the management process of ivory stockpiled resulted from ivory seizures.¹⁴

INTESA also included the necessarily penalisation through seizure of living elephants and its derivatives resulted from conviction to any illegal elephant trade.¹⁵ Seized elephant's specimen can either be entrusted to MA or returned back to the country of import after advised from SA.¹⁶ Besides that, parties shall also keep trade records of wildlife trade through recording the names and addresses of exporters and importers; number, type of permit and states involved; and quantity, type and name of traded specimen. Nevertheless, INTESA legislations only require MA and captive breeder to keep and maintain records of their stocks and transactions.¹⁷ Otherwise, penalization in terms of fine, imprisonment or both will be imposed, if any captive breeder failed to keep and maintain such records.¹⁸

IV. Discussion

The less reported illegal trade from Malaysia as compared with other parties might be the possible reason that INTESA legislations do not obliged the applicant to obtain an import permit before export or re-export permit or certification applications is being processed. However, valid documents are still needed for the import, export, re-export and transshipment of elephant's derivatives. Notwithstanding that, online illegal trade of ivory seems not to be much considered even though the fast increment of thousands of new advertisements on the sale of ivory were found nearly every month between 2013 and 2014 even after the 1989 CITES trade ban [12].

Worse still, the trend of illegal wildlife trade through internet is also gaining popularity in Malaysia whereby youths have been arrested for illegal wildlife trading involving protected wildlife such as bear cub, civet cat, slow loris and etc through mobile phone [13]. Thus, the rise of internet illegal wildlife trade might further increase the existing illegal ivory trade in Malaysia. It can be argued that ivory hunting in Malaysia is not as severe as compared to other Asian elephant range states, however, the sources to the wildlife involved in

⁴ Refer to Resolution Conf. 10.10 (Rev. CoP 16) in <https://cites.org/sites/default/files/eng/res/10/E-Res-10-10R16.pdf> for more information.

⁵ Article VIII, (1)(a) and (b) in CITES convention text.

⁶ Article VIII, (4)(a), (b) and (c) in CITES convention text.

⁷ Article VIII, (3) in CITES convention text.

⁸ Article VIII, 6(a) and (b) in CITES convention text.

⁹ S11; and S16(1)(a), (2)(a), (3) and (4) in INTESA legislation.

¹⁰ S10; S11; S12; S13; S16(1)(a), (b), (2)(a), (b), (3) and (4); and S17 in INTESA legislation.

¹¹ S6(1); S8(2); S9(a), (b); S10; S11; S12; S13; S14; S15(1), (2), (3) and (4); S16(1)(a), (b), (2)(a), (b), (3) and (4); and S17 in INTESA legislation.

¹² S10; S11; and S16 in INTESA legislation.

¹³ S13(1) and (2); and S34(9), (10) and (11) in INTESA legislation.

¹⁴ S23; S24; and S25 in INTESA legislation.

¹⁵ S9(e), (f) and (g); S13(2); S23(2), (3), (4), (5) and (6); S24; S25; S27; S28; S34; and S35 in INTESA legislation.

¹⁶ S34(7), (8), (9), (10) and (11); S35; and S36 in INTESA legislation; and Regulation 3, International Trade in Endangered Species (Rescue Centre) Regulation 2009.

¹⁷ S7(1)(a); and S18(1) in INTESA legislation.

¹⁸ S18(3) in INTESA legislation.

online illegal trade in Malaysia are more likely from villagers who stay near the border between protected areas (PAs) and human-dominated areas [13]. This is simply because their living environment near PAs allows them to have better access and chances of contact with wildlife. Poverty can be another reason that caused villagers to poach [14]. They will contact the online illegal trader once they capture any animals which then pictures being posted in some Facebook pages such as Forever Pet, Dinend Sivali and Bany Isz, to attract potential customers [13].

Similarly, the less occurrence of illegal elephant trade in Malaysia might be the reason behind to why INTESA legislations only requires MA and captive breeder to keep trade and transaction records. It is also possible that captive breeding for commercial purposes requires trade and transaction records to be recorded because INTESA is being enforced to addresses obligations in relation to trade. Despite illegal elephant hunting and trade in Malaysia are low, illegal ivory trade destined to Malaysia and transited across Malaysia is commonly seized [8, 9, 15]. It can be argued that current level of illegal ivory transshipment across Malaysia is moderate, however, the increasing trend of illegal ivory trade through internet in addition to high demand and monetary return from ivory trade might have lead to increment of illegal ivory trade in Malaysia and in transit across Malaysia. Therefore, the government shall take action to tackle the increasing trend of online illegal wildlife trade.

Furthermore, the poorly known disposal or management methods of seized ivory often raises up the concern of the fate of confiscated ivory. Despite the confiscated ivory are often being kept or stockpiled in the country of confiscation, Malaysia has not shows any clear disposal methods to those confiscated ivory [16, 17, 18] even though some governments in Southeast Asia countries (eg. Philippines and Hong Kong) burned the confiscated ivory to send a clear warning to illegal ivory trader that they will not tolerate to any illegal elephant trade [19, 20]. This indicates the disposal or management of confiscated ivory in Malaysia is unclear.

Notwithstanding that, the lack of scientific technology in identification of the origin of seized ivory and difficulties in differentiating ivory from teeth from walrus, hippo and etc by human naked eye might be the reasons why confiscated ivory is being stockpiled rather than returning to the state of export. However, it can be argued that Department of Wildlife and National Parks (DWNP) is capable of identifying the origins of seized ivory, because a total of 14 carved ivories which one was originated from Asian or Africa elephants was identified [21]. Yet, the existing technology in DNA identification seems to be inadequate to determine the origins of confiscated ivory, let alone the appropriate methods to dispose them.

V. Conclusion

INTESA addresses the obligations in CITES in related to Asian elephant conservation on illegal trading of living elephant and its derivatives through systems of permit and certificate. However, INTESA should obligate import permit to be obtained before any export and re-export of living elephant or its derivatives is permissible. Provisions direct to elephant in transit shall also be amended. Furthermore, the management of ivory stockpiles in Malaysia is unclear although the appropriate disposal method of seized ivory is monitored by MA with the advice from SA. It is recommended that INTESA to include provision to address the management of ivory stockpiles since ivory seizures is expected to increase resulted from rapid human developments. Moreover, all trade involving elephants shall also be recorded. In addition, the definition of 'readily recognizable part or derivative of an animal' to include both raw and work ivory shall be improved. To this end, Malaysia government shall amend INTESA legislations in respective to permit system, transit, definition of derivatives for ivory, trade record and management of ivory stockpiles to improve the current Asian elephant conservation in Malaysia.

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