

(ELEPHANT) DEATH AND TAXES: PROPOSED TAX TREATMENT OF ILLEGAL IVORY

By
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African elephants are poached for their ivory at alarming rates. If the current level of poaching continues, it is projected they will be extinct from the wild in the year 2025. Preserving the African elephant species is important from an animal rights, conservation, ecological, economical, and crime prevention perspective. The current penalties and fines for the illegal trade in ivory are not enough of a deterrent. One method of deterrence that has not yet been explored is the imposition of tax consequences on the illegal ivory trade. This Article proposes a number of ways to use the tax system to further deter participation in the illegal ivory trade. For tax purposes, illegal ivory should be treated similarly to other activities that have both legal and illegal operations, such as marijuana, gambling, and prostitution. Congress could impose an excise tax on ivory and an occupational tax on those who make or sell ivory products. In addition, there are several tax crimes in the Internal Revenue Code that are applicable to those who sell illegal ivory and do not report the income on their tax returns. For example, tax evasion is one of the related criminal activities associated with wildlife trafficking. Tax consequences will hopefully provide a further disincentive to those participating in the illegal ivory trade.

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I. INTRODUCTION

[N]othing can be said to be certain, except death and taxes.

—Benjamin Franklin, *Letter to Jean Baptiste Le Roy*¹

Unfortunately for elephants today, death at the hands of poachers is fairly certain—elephants are being killed in increasingly alarming numbers for their ivory tusks.² For the poachers and ivory traffickers, taxes on this illegal activity are far from certain³—but they should be.

This Article examines a number of tax issues relating to illegal elephant ivory.⁴ The goal of this Article is to identify tax issues that can facilitate the elimination of illegal ivory from the market and help enforce ivory bans. Where possible, this Article also suggests other ways the tax code can create disincentives for the trade in illegal ivory. This Article helps to establish a legal framework applicable to other illicit wildlife trafficking, such as the trade in the horn of poached rhinos.

The international trade in illegal ivory is a global crisis. Currently, poachers kill one elephant every fifteen minutes, which equals about 36,000 elephants annually.⁵ At this rate, the “current offtake

¹ Letter from Benjamin Franklin to Jean Baptiste Le Roy (Nov. 13, 1789), reprinted in 10 THE WRITINGS OF BENJAMIN FRANKLIN 1789-1790, at 69 (Albert Smyth ed., The Macmillan Co. 1907).

² See *infra* notes 5–8 and accompanying text (discussing how elephants are being killed to acquire ivory at rates which presage extinction).

³ See *infra* note 152 and accompanying text (noting the federal policy statement addressing elephant poaching does not encompass using tax law as an anti-poaching tool).

⁴ This Article focuses exclusively on ivory from elephants. As explained by the U.S. Fish and Wildlife Service, “Although the tusks or teeth of several mammal species (including warthog, walrus, hippopotamus, and several whales) are used as ivory, the tusks from African and Asian elephants are most desired by the global ivory market.” *African Elephants*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/international/animals/african-elephants.html> [<http://perma.cc/4FFK-86AK>] (accessed July 6, 2015). In addition, this Article places a stronger emphasis on the plight of African elephants. While Asian elephants are also at risk for ivory poaching, they are not affected in the same way as African elephants. This is because only some male Asian elephants have tusks, while all African elephants, both male and female, have tusks. *Elephant Overview*, WORLD WILDLIFE FUND, <http://www.worldwildlife.org/species/elephant> [<http://perma.cc/YTJ3-VK7J>] (accessed Jan. 17, 2015). Both subspecies of African elephants, Savannah elephants and Forest elephants, face the threat of poaching. I WORRY, DEAD OR ALIVE?: VALUING AN ELEPHANT 5 (2014) (available at <http://iworry.org/wp-content/uploads/2013/09/Dead-or-Alive-Final-LR.pdf>) [<http://perma.cc/YXV8-868P>] (accessed Mar. 14, 2015).

⁵ I WORRY, *supra* note 4, at 1; see also Carl Safina, *Blood Ivory*, N.Y. TIMES, <http://www.nytimes.com/2013/02/12/opinion/global/blood-ivory.html> [

exceeds the intrinsic growth capacity of the species.”⁶ It is possible that elephants will become extinct in the wild by the year 2025.⁷ Poachers are killing elephants to fuel the world’s demand for ivory objects, typically jewelry and trinkets.⁸ The majority of this demand is in Asian countries, such as China and Japan.⁹ Although not as large as that of Asian countries, the United States (U.S.) does have a market for illegal ivory.¹⁰ While the U.S. does have laws banning illegal ivory these laws do little to deter importation of illegal ivory.¹¹ Thus, the government could do more to deter importation of illegal ivory, and one way to do that is through the imposition of tax consequences.

The global community has recognized the importance of saving elephants from poaching. Wildlife crime—the illegal exploitation of the world’s wild flora and fauna¹²—is the fourth most lucrative transnational crime in the world.¹³ Wildlife crime is an enterprise worth be-

LKEM] (Feb. 11, 2013) (accessed Apr. 11, 2015) (describing methodology used to arrive at the one elephant every fifteen minutes figure).

⁶ George Wittemyer et al., *Illegal Killing for Ivory Drives Global Decline in African Elephants*, 111 PROC. NAT’L ACAD. SCI. 13,117, 13,118 (Sept. 9, 2014) (available at <http://www.pnas.org/content/111/36/13117.full> [<http://perma.cc/GDB3-ZF4K>] (accessed Feb. 20, 2015)). Female elephants have a 22-month gestation period and do not ovulate again until about two years after giving birth. CYNTHIA MOSS, *ELEPHANT MEMORIES: THIRTEEN YEARS IN THE LIFE OF AN ELEPHANT FAMILY* 136 (1988).

⁷ *Why Save the Elephant?*, IWORRY, <http://iworry.org/crisis/> [<http://perma.cc/NE73-AMCJ>] (accessed Mar. 18, 2015).

⁸ Humane Soc’y of the U.S., *A Big Problem*, KIND NEWS, http://www.humanesociety.org/news/magazines/kind_news/2014/08-09/a-big-problem-elephant-ivory-trade.html [<http://perma.cc/MYX9-N6T2>] (Aug. 22, 2014) (accessed Feb. 20, 2015).

⁹ See TOM MILLIKEN, *ILLEGAL TRADE IN IVORY AND RHINO HORN: AN ASSESSMENT TO IMPROVE LAW ENFORCEMENT UNDER THE WILDLIFE TRAPS PROJECT (TRAFFIC 2014)* (available at <http://www.traffic.org/storage/W-TRAPS-Elephant-Rhino-report.pdf> [<http://perma.cc/56S7-WWLLK>] (accessed Feb. 20, 2015)) (claiming that most transnational ivory syndicates function as “Asian-run, Africa-based operations” and that most ivory is destined for China); ENVTL. INVESTIGATION AGENCY, *BLOOD E-COMMERCE 1–2* (Mar. 2014) (available at <http://www.eia-international.org/wp-content/uploads/Blood-e-Commerce-FINAL.pdf> [<http://perma.cc/K2QL-FGPY>] (accessed Feb. 20, 2015)) (discussing Japan’s involvement in the ivory trade, noting “The Rakuten Group, via its wholly owned Japanese subsidiary Rakuten Ichiba (www.rakuten.co.jp), is the world’s largest online trader in elephant ivory.”).

¹⁰ See *USFWS Moves to Ban Commercial Elephant Ivory Trade*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/international/travel-and-trade/ivory-ban-questions-and-answers.html> [<http://perma.cc/6G4B-3X9N>] (accessed Feb. 20, 2015) (noting that “a substantial amount of elephant ivory is illegally imported [in the U.S.] and enters the domestic market”).

¹¹ See *infra* Part II.C.1. (discussing current federal laws regulating the ivory trade).

¹² *Environmental Crime*, INTERPOL, <http://www.interpol.int/Crime-areas/Environmental-crime/Environmental-crime> [<http://perma.cc/F7XZ-S489>] (accessed Jan. 17, 2015).

¹³ See JEREMY HAKEN, *GLOBAL FINANCIAL INTEGRITY, TRANSNATIONAL CRIME IN THE DEVELOPING WORLD* 56 (Feb. 2011) (available at http://www.gfintegrity.org/storage/gfip/documents/reports/transcrime/gfi_transnational_crime_web.pdf [<http://perma.cc/E4T6-GMRC>] (accessed Feb. 20, 2015)) (an aggregation of the illicit markets of wildlife, timber, and fish). The top three transnational crimes by estimated value are drug trafficking, counterfeiting, and human trafficking. *Id.*

tween \$19 and \$26.5 billion per year.¹⁴ Due to the increasing value of wildlife crimes, in October 2014 INTERPOL launched the first operation specifically targeting fugitives wanted for wildlife and other environmental crimes.¹⁵ INTERPOL's list of the nine most-wanted fugitives includes several individuals wanted for ivory-related crimes.¹⁶ In December 2014, less than two months after INTERPOL released the list, one of the fugitives on the most-wanted list was arrested on charges of possessing illegal ivory, making him the first of the nine fugitives to be arrested.¹⁷ Later that same month, a crime boss and leading figure in the illegal ivory trade was the second of the nine to be arrested.¹⁸ This rapid response could be due in part to the 2014 launch of WildLeaks, "the first, secure, online whistleblower platform dedicated to Wildlife and Forest Crime."¹⁹ Altogether, this shows poachers and ivory traffickers that the international community is very serious about cracking down on wildlife crime.

Government leaders and celebrities are also using their fame to draw attention to the poaching crisis. Margaret Kenyatta, Kenya's First Lady, is the ambassador of an online campaign to stop elephant poaching.²⁰ In December 2014, Prince William, the Duke of Cambridge, spoke at the World Bank in Washington, D.C. to denounce wildlife crime, saying he was "determined not to let the world's children grow up on a planet where our most iconic and endangered species have been wiped out."²¹ In response to public support for the anti-poaching campaign led by Prince William and his father, Prince Charles, the BBC's *Antiques Roadshow* is now cracking down on ivory.²² The television show, which appraises antiques, will now only

¹⁴ *Id.* All monetary amounts in this Article are in U.S. dollars.

¹⁵ *INTERPOL Seeks Public Assistance to Locate Environmental Crime Fugitives in Global Operation*, INTERPOL, <http://www.interpol.int/News-and-media/News/2014/N2014-220> [<http://perma.cc/L46G-RAWK>] (Nov. 17, 2014) (accessed Feb. 20, 2015).

¹⁶ *Elephant Ivory Smuggling 'Kingpin' Arrested in Tanzania*, GUARDIAN, <http://www.theguardian.com/environment/2014/dec/23/elephant-ivory-smuggling-kingpin-arrested-in-tanzania> [<http://perma.cc/73FY-CARV>] (Dec. 23, 2014) (accessed Feb. 20, 2015).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *The Project*, WILDLEAKS, <https://wildleaks.org/the-project/> [<http://perma.cc/ZG72-FRA5>] (accessed Jan. 17, 2015) (noting the goal of WildLeaks is to "facilitate the identification, arrest, and prosecution of criminals, traffickers, businessmen and corrupt government officials behind the poaching of endangered species and the trafficking of wildlife and forest products").

²⁰ Lillian Leposo, *Kenya's Elephants under Siege*, CNN, <http://www.cnn.com/2013/09/18/world/africa/kenya-elephants-under-siege/> [<http://perma.cc/JQ4S-5QBY>] (updated Sept. 18, 2013) (accessed Feb. 24, 2015).

²¹ Prince William Arthur Philip Louis, Duke of Cambridge, Speech on the Illegal Wildlife Trade at the World Bank (Dec. 8, 2014) (transcript available at <http://www.princeofwales.gov.uk/media/speeches/the-duke-of-cambridges-speech-the-illegal-wildlife-trade-the-world-bank-washington-dc> [<http://perma.cc/7DAT-L84R>] (accessed Jun. 30, 2015)).

²² Valerie Elliot, *Antiques Roadshow Crackdown on Ivory as Illicit Trade Kills 30,000 Elephants: BBC to 'Increase Caution' over Items Made from Tusks due to Public Support for Prince William's Anti-Poaching Campaign*, DAILY MAIL, <http://www.daily>

film ivory pieces that are legal and are of “exceptional quality and artistic merit.”²³ Former NBA star and Chinese national Yao Ming starred in the documentary *The End of the Wild* to persuade China to stop buying elephant ivory and rhino horn.²⁴ Actress Angelina Jolie is scheduled to direct *Africa*, a film about Kenyan conservationist Richard Leakey’s campaign against ivory poachers.²⁵ These are only a few of the well-known public figures to join the anti-poaching cause.

II. ELEPHANTS

A. Importance of Protecting Elephants

The importance of protecting elephants is informed by a variety of perspectives, including those of animal rights, conservation, ecology, economics, and crime prevention. First, from an animal rights perspective, it is important to protect elephants because each elephant has inherent value.²⁶ This perspective places value on each individual elephant instead of on the species as a whole.²⁷ Contributing to this inherent value is the fact that “elephants are intelligent, complex animals”²⁸ who experience a wide range of emotions, including fear, grief, joy, and compassion.²⁹

Second, from an environmental and conservation perspective, it is important to protect elephants because the species is in danger of extinction due to the poaching crisis. As stated in the Introduction of this Article, 36,000 elephants are killed each year;³⁰ at that rate, they will be extinct from the wild in only ten years.³¹ Further, it is especially

mail.co.uk/news/article-2808009/Antiques-Roadshow-crackdown-ivory-illicit-trade-kills-30-000-elephants-BBC-increase-caution-items-tusks-public-support-Prince-William-s-anti-poaching-campaign.html [http://perma.cc/GBC3-DZM9] (updated Oct. 25, 2014) (accessed Feb. 24, 2015).

²³ *Id.*

²⁴ Simon Denyer, *Yao Ming Aims to Save Africa’s Elephants by Persuading China to Give up Ivory*, WASH. POST, http://www.washingtonpost.com/world/ex-rocket-yao-ming-aims-to-save-africas-elephants—with-china-campaign/2014/09/03/87ebbe2a-d3e1-4283-964e-8d87dea397d6_story.html [http://perma.cc/32ZR-MDEM] (Sept. 4, 2014) (accessed Feb. 24 2015); *Yao Ming Urges China to ‘Say No to Ivory and Rhino Horn’ with New Film*, WILDAID, <http://wildaid.org/news/yao-ming-urges-china-say-no-ivory-and-rhino-horn-new-film> [http://perma.cc/PZP8-2BC8] (Aug. 8, 2014) (accessed Feb. 24, 2015).

²⁵ Mary Milliken, *Angelina Jolie to Direct Richard Leakey Biopic ‘Africa,’* REUTERS, <http://www.reuters.com/article/2014/09/19/film-angelinajolie-idUSL1N0RK1ZQ20140919> [http://perma.cc/BF3R-JNXU] (Sept. 19, 2014) (accessed Feb. 27, 2015).

²⁶ See TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* 329 (2004) (stating that animals are “possessors of inherent value”).

²⁷ *Id.* at xxxix.

²⁸ MOSS, *supra* note 6, at 220.

²⁹ JEFFREY MOUSSAIEFF MASSON & SUSAN MCCARTHY, *WHEN ELEPHANTS WEEP: THE EMOTIONAL LIVES OF ANIMALS* 52, 95, 116, 159 (1995).

³⁰ iWORRY, *supra* note 4, at 1.

³¹ Zac Goldsmith, *At This Rate, Elephants Will Be Wiped Out within 10 Years*, THE INDEPENDENT, <http://www.independent.co.uk/voices/comment/at-this-rate-elephants-will-be-wiped-out-within-10-years-9012557.html> [http://perma.cc/4TWC-J4SF] (Dec. 18, 2013) (accessed Mar. 30, 2015).

important to protect the gene pool of ‘tuskers,’ elephants with tusks that weigh over 100 pounds each.³² Tuskers are considered to be “rare specimens, the pinnacle of their species.”³³ Poachers and hunters specifically target these elephants for the size of their tusks.³⁴ In the span of less than a month, poachers killed two tuskers in Kenya: the iconic Mountain Bull around May 7, 2014,³⁵ and the beloved Satao on May 30, 2014.³⁶ Both elephants were killed within the boundaries of national parks,³⁷ despite being protected by law and by armed guards.³⁸ Another Kenyan tusker, Tim, received treatment for spear wounds on November 10, 2014.³⁹ These tuskers could have benefitted from additional protection by the Kenyan president, as a tusker named Ahmed did in the 1970s.⁴⁰ President Jomo Kenyatta declared Ahmed a living monument and armed game-rangers guarded Ahmed around the clock.⁴¹ This protection allowed Ahmed to die of natural causes, instead of at the hands of poachers.⁴²

Additionally, protecting elephants is important because they serve an important ecological function. African elephants—particularly the forest-dwellers, as opposed to the savannah-dwellers—eat fruit and

³² *Extra Protection for the Last Giants of the Elephant World: Tsavo Trust “Big Tusker Project,”* TSAVO TRUST, <http://tsavotrust.org/tsavo-tuskers> [<http://perma.cc/7XPJ-M538>] (accessed Feb. 27, 2015); see also Jerome Starkey, *One of Kenya’s Last Great Tuskers Is Dead, So Have the Poachers Won?*, THE AUSTRALIAN, <http://www.theaustralian.com.au/life/weekend-australian-magazine/one-of-kenyas-last-great-tuskers-is-dead-so-have-the-poachers-won/story-e6frg8h6-1227055414928> [<http://perma.cc/N4G3-5NCM>] (Sept. 13, 2014) (accessed Mar. 25, 2015) (“‘Tusker’ was a term adopted by colonial-era trophy hunters to describe the elephants whose mighty tusks weighed more than 45kg a piece. Today, because of poaching, no more than a dozen such animals are still alive in Kenya.”).

³³ *Extra Protection for the Last Giants of the Elephant World*, *supra* note 32.

³⁴ *Id.*

³⁵ *A Blow to Conservation – Poachers Kill Iconic Elephant*, LEWA WILDLIFE CONSERVANCY, http://www.lewa.org/nc/stay-connected/news-on-lewa/news-on-lewa/article/a-blow-to-conservation-poachers-kill-iconic-elephant/?tx_ttnews%5bbackPid%5d=75 [<http://perma.cc/M272-PEHJ>] (May 16, 2014) (accessed Feb. 27, 2015).

³⁶ *Kwaheri Satao – Saying Goodbye to a Tsavo Icon*, TSAVO TRUST, <http://tsavotrust.org/news/2014/6/13/kwaheri-satao-saying-goodbye-to-a-tsavo-icon> [<http://perma.cc/F874-7QKT>] (June 13, 2014) (accessed Feb. 27, 2015).

³⁷ *Id.*; *A Blow to Conservation – Poachers Kill Iconic Elephant*, *supra* note 35.

³⁸ *Wildlife Security: Division’s Mandate*, KENYA WILDLIFE SERV., http://kws.go.ke/content/wildlife-security/qt-field_collection_quicktabs=1#qt-field_collection_quicktabs [<http://perma.cc/7Q4P-RE3H>] (accessed July 11, 2015).

³⁹ *Treating ‘Tim’*, DAVID SHELDRIK WILDLIFE TRUST, <http://www.sheldrickwildlife.org/updates/updates.asp?ID=742> [<http://perma.cc/V9CQ-Z7S6>] (Nov. 12, 2014) (accessed Feb. 27, 2015).

⁴⁰ John Heminway, *Opinion: Killing of Great Tusker in Kenya Recalls Lesson from the Past*, NAT’L GEOGRAPHIC, <http://news.nationalgeographic.com/news/2014/06/140619-satao-tusker-tsavo-kenya-ahmed-elephant-poaching/> [<http://perma.cc/BHV3-G8VS>] (June 19, 2014) (accessed Mar. 8, 2015).

⁴¹ *Id.*

⁴² *Id.*

disperse seeds through their dung.⁴³ In essence, these elephants are gardeners of the forest.⁴⁴ Elephants are particularly suited to dispersing “megafaunal-syndrome” plants, or those “plants with very large fruits and seeds that may have evolved to attract the megafauna to consume and (often exclusively) disperse them.”⁴⁵ If the population of elephants continues to decline, “megafaunal plants may lose their competitive advantage and be replaced by other less able competitors.”⁴⁶ The loss of elephants will result in “an increase in the vulnerability of ecosystem function, and changes in the demography and distribution of a considerable number of plant species.”⁴⁷

Next, protecting elephants is important because of the economic benefits they provide. Tourism is an important part of the economy in those African countries with elephants, including Kenya, Tanzania, Zambia, and South Africa.⁴⁸ In Kenya, for example, “elephants and wildlife tourism alone generate[] 12% of the Gross Domestic Product and create[] over 300,000 jobs.”⁴⁹ A single live elephant can contribute \$22,966 to tourism in one year and can generate over \$1.6 million in tourism value during its lifetime.⁵⁰ A dead elephant, providing on average ten kilograms of ivory, is worth approximately \$21,000.⁵¹ This means that a live elephant is worth more than 76 times as much as a dead elephant.⁵² From January to August 2014, about 1,940 elephants were killed for their tusks, which represent a loss of \$44,554,844 to the tourism industry during that period alone.⁵³ Protecting elephants will help protect profits for Africa’s wildlife tourism industry.

Finally, it is important to protect elephants in order to curb funding for criminal and terrorist organizations. China’s demand for ivory and the resulting market surge has tripled the price of a kilogram of raw ivory from \$750 in 2010 to \$2,100 in 2014.⁵⁴ The thriving ivory market has encouraged organized crime and terrorist groups to turn to poaching and trafficking to fund their operations.⁵⁵ Terror groups in

⁴³ Ahimsa Campos-Arceiz & Steve Blake, *Megagardeners of the Forest – The Role of Elephants in Seed Dispersal*, 37 ACTA OECOLOGICA 542, 550 (2011).

⁴⁴ See *id.* (explaining that reduction of the elephant population would result in certain plant species “being poorly dispersed or not dispersed at all”).

⁴⁵ *Id.* at 546.

⁴⁶ *Id.* at 547.

⁴⁷ *Id.* at 550.

⁴⁸ iWORRY, *supra* note 4, at 7.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 4.

⁵² *Id.*

⁵³ *Id.* at 6–7. Because these numbers are estimates, the impact has the potential to be even greater.

⁵⁴ Melissa Hellmann, *African-Elephant Poaching Soars as Ivory Prices Triple in China*, TIME, <http://time.com/2953056/african-elephant-poaching-soars-as-ivory-prices-triple-in-china/> [<http://perma.cc/7DPZ-V7ZU>] (July 3, 2014) (accessed Mar. 8, 2015).

⁵⁵ See Animal Welfare Inst., *Elephant Slaughter Escalates as Illegal Ivory Market Thrives*, AWI QUARTERLY (Winter 2013) (available at <https://awionline.org/awi-quarterly/2013-winter/elephant-slaughter-escalates-illegal-ivory-market-thrives>) [<http://perma.cc/7DPZ-V7ZU>].

Sub-Saharan Africa funded by illegal ivory include the Lord's Resistance Army, Al-Shabaab, Boko Haram, and the Janjaweed.⁵⁶ It is estimated that militia groups in the Sub-Saharan range derive between \$4 million and \$12.2 million annually from ivory.⁵⁷ With approximately 90% of illegal ivory benefitting terrorist and criminal groups,⁵⁸ combatting poaching will decrease a significant revenue stream from which these groups are currently profiting.

B. *International Ban on Ivory Trade*

Politicians and conservationists have previously recognized the harmful impacts of poaching and tried to address that concern in a variety of ways. As a result, the international community has embraced regulation of the ivory trade, grappled with what to do with stockpiles of ivory, and differentiated between legal and contraband ivory.

1. *International Treaty Approach*

The international treaty approach characterizes one attempt to stop poaching. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is a treaty aimed at ensuring "that international trade in specimens of wild animals and plants does not threaten their survival."⁵⁹ CITES was signed on March 3, 1973 and went into effect on July 1, 1975.⁶⁰ Countries adhere voluntarily to this international agreement and there are currently 180 member countries, or "Parties."⁶¹ CITES is legally binding on Parties, but does not take the place of national laws.⁶² Each Party must adopt its own domestic legislation to implement CITES at the national level.⁶³ In or-

cc/4H5N-BTH4] (accessed Apr. 5, 2015)) (discussing Interpol and U.S. acknowledgment of "the involvement of organized crime syndicates in the ivory trade," as well as the Lord's Resistance Army, Al-Shabaab, and Janjaweed, and noting "[t]he motive . . . [is], of course, money"); U.N. ENV'T PROGRAMME, THE ENVIRONMENTAL CRIME CRISIS: THREATS TO SUSTAINABLE DEVELOPMENT FROM ILLEGAL EXPLOITATION AND TRADE IN WILDLIFE AND FOREST RESOURCES 17 (Christian Nellemann et al. eds., UNEP 2014) (available at <http://www.unep.org/unea/docs/rtracrimemcrisis.pdf> [<http://perma.cc/XWK9-QLNQ>] (accessed Mar. 8, 2015)) (describing "criminal networks and non-state armed groups including militias, extremists and terroris[ts]" being financed by environmental crimes, including ivory poaching).

⁵⁶ Animal Welfare Inst., *supra* note 55, at 8; *The Facts, LAST DAYS OF IVORY*, <http://www.lastdaysofivory.com/facts/terrorist-groups-ivory> [<http://perma.cc/C5Q6-QTED>] (accessed Apr. 5, 2015).

⁵⁷ *The Facts, supra* note 56.

⁵⁸ iWORRY, *supra* note 4, at 4.

⁵⁹ *What is CITES?*, CITES, <http://www.cites.org/eng/disc/what.php> [<http://perma.cc/2AWW-YR7V>] (accessed Mar. 8, 2015).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* In the U.S., for example, the Fish and Wildlife Service is the agency tasked with implementing and enforcing the provisions of CITES and does so under the statutory authority of the Endangered Species Act. 16 U.S.C. § 1537a.

der to determine how a species should be listed, the Parties meet at the Conference of the Parties (CoP) and submit proposals based on biological and trade criteria.⁶⁴

CITES first listed African elephants on February 26, 1976.⁶⁵ At the time, African elephants were listed under Appendix III,⁶⁶ which offers the lowest level of protection for a species by “preventing or restricting exploitation.”⁶⁷ African elephants were moved to Appendix II in 1977.⁶⁸ Appendix II provides strict regulation for species that may be threatened with extinction absent this strict regulation.⁶⁹ This intermediate level of regulation did not prove to be strict enough given that the population of African elephants declined by almost 50% in the following decade.⁷⁰ Due to this decline, African elephants were listed under Appendix I in 1990; most national populations of African elephants remain listed as such.⁷¹ CITES imposes particularly strict regulation of trade in Appendix I species, as they are threatened with extinction.⁷² Trade in these species must not further endanger their survival “and must only be authorized in exceptional circumstances.”⁷³ The relisting of African elephants to Appendix I is referred to as the “global ban” or “international moratorium” on the ivory trade because the restrictions on trade include not only the elephants themselves but also products made from the elephants.⁷⁴ This ivory ban resulted in countries stockpiling ivory seized from illegal trade because it could not be legally used or sold.⁷⁵

⁶⁴ *How CITES Works*, CITES, <http://www.cites.org/eng/disc/how.php> [<http://perma.cc/762U-H6F4>] (accessed Mar. 8, 2015).

⁶⁵ 50 C.F.R. § 23.15(f)(2) (2014); U.S. FISH & WILDLIFE SERV., CITES & ELEPHANTS: WHAT IS THE “GLOBAL BAN” ON IVORY TRADE? 1 (2013) (available at <http://www.fws.gov/le/pdf/CITES-and-Elephant-Conservation.pdf> [<http://perma.cc/3KKM-DBUR>] (accessed Mar. 8, 2015)) [hereinafter CITES & ELEPHANTS] (the Asian elephant was first listed in 1975 under Appendix I).

⁶⁶ CITES & ELEPHANTS, *supra* note 65.

⁶⁷ Convention on International Trade in Endangered Species of Wild Fauna and Flora, art. II, § 3, *opened for signature* Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (available at <https://treaties.un.org/doc/publication/unts/volume%20993/volume-993-i-14537-english.pdf> [<http://perma.cc/4FC3-PGBK>] (accessed Mar. 19, 2015)) [hereinafter CITES].

⁶⁸ CITES & ELEPHANTS, *supra* note 65.

⁶⁹ CITES, *supra* note 67, at art. II, § 2(a).

⁷⁰ CITES & ELEPHANTS, *supra* note 65.

⁷¹ *Id.*; CITES, *supra* note 67, at app. I.

⁷² CITES, *supra* note 67, at art. II, § 1.

⁷³ *Id.*

⁷⁴ CITES & ELEPHANTS, *supra* note 65 (any Appendix I species “is effectively banned from international commercial trade”).

⁷⁵ U.S. FISH & WILDLIFE SERV., U.S. IVORY CRUSH 1 (2013) (available at <http://www.fws.gov/international/pdf/factsheet-ivory-crush-qa.pdf> [<http://perma.cc/265T-9MSF>] (accessed Mar. 8, 2015)).

2. Ivory Stockpiles

The global ban on African elephant ivory led to the recovery of some elephant populations.⁷⁶ As a result, the CoP approved a conditional transfer of the elephant populations of Botswana, Namibia, Zimbabwe, and South Africa back to the intermediate level of protection under Appendix II.⁷⁷ Along with the transfer of their elephant populations back to Appendix II, the CITES nations agreed to allow these countries to conditionally sell their government-owned ivory stockpiles, with the proceeds to be used exclusively for elephant conservation.⁷⁸ Two one-off sales of the ivory stockpiles took place: one to Japan in 1999 and one to both Japan and China in 2008.⁷⁹ The proceeds from the sales totaled approximately \$5 million and \$15.5 million, respectively.⁸⁰ However, rather than satisfy the ivory market, these sales seem to have increased market demand: “The result [of the one-off sales] has not been a well-regulated international ivory market. The result has been record killing of elephants.”⁸¹ While the one-off sales may not account for all of that increase, the market confusion between legal and illegal ivory certainly contributes to the demand and the poaching problem.⁸²

Increasingly, many countries have responded to the worsening poaching crisis by destroying their ivory stockpiles. Kenya was the first to do so in 1989.⁸³ Twelve tons of tusks, worth \$3 million at the time, were burned in a symbolic gesture of the country’s desire to end

⁷⁶ CITES & ELEPHANTS, *supra* note 65.

⁷⁷ U.N. ENV’T PROGRAMME, *ELEPHANTS IN THE DUST: THE AFRICAN ELEPHANT CRISIS* 12 (Nellemann et al. eds., 2013) (available at http://www.cites.org/common/resources/pub/Elephants_in_the_dust.pdf [<http://perma.cc/8QGQ-BKC2>] (accessed Feb. 20, 2015)) (Botswana, Namibia, and Zimbabwe transferred their populations in 1997 while South Africa transferred their population in 2000); *see also supra* text accompanying notes 68–69 (noting Appendix II offers an intermediate level of protection).

⁷⁸ U.N. ENV’T PROGRAMME, *supra* note 77.

⁷⁹ CITES & ELEPHANTS, *supra* note 65, at 2 (noting though “commonly referred to as ‘one-off ivory sales,’” these transactions—where stockpiled ivory owned by the governments of several sub-Saharan African nations were auctioned off to designated trading partners—actually took place twice, once in 1999 and again in 2008).

⁸⁰ *Id.*

⁸¹ Christina Russo, *Can Elephants Survive a Legal Ivory Trade? Debate Is Shifting against It*, NAT’L GEOGRAPHIC, <http://news.nationalgeographic.com/news/2014/08/140829-elephants-trophy-hunting-poaching-ivory-ban-cities> [<http://perma.cc/797Q-6TB9>] (Aug. 29, 2014) (accessed Feb. 20, 2015); *see* U.N. ENV’T PROGRAMME, *supra* note 77, at 22 (“Poaching levels have been increasing steadily across much of [Africa] since 2006.”).

⁸² *See infra* Part II.B.3 (discussing difficulty distinguishing legal from contraband ivory).

⁸³ Svati Kirsten Narula, *Crush and Burn: A History of the Global Crackdown on Ivory*, ATLANTIC, <http://www.theatlantic.com/international/archive/2014/01/crush-and-burn-a-history-of-the-global-crackdown-on-ivory/283310/> [<http://perma.cc/JR7F-Y65B>] (Jan. 27, 2014) (accessed Feb. 20, 2015).

poaching.⁸⁴ The U.S. crushed six tons of ivory in November 2013 “to send a clear message that the United States will not tolerate ivory trafficking and the toll it is taking on elephant populations”⁸⁵ Other countries that have destroyed ivory stockpiles include Zambia in 1992; Gabon in 2012; the Philippines in 2013; and France, Chad, and Belgium in 2014.⁸⁶ China destroyed its mainland ivory stockpiles in 2014, with plans to complete ivory stockpile destruction in Hong Kong by the end of 2016.⁸⁷ As the global poaching crisis continues, it is likely that more countries will destroy their stockpiles to take a stand against poaching.⁸⁸

3. *Difference between Legal and Illegal Ivory*

To further complicate this issue, CITES has several exemptions from its ivory ban. The CITES ban applies only to international trade of ivory—domestic trade within the U.S., for example, is covered by U.S. law.⁸⁹ In addition, elephant-range countries have an annual export quota for hunting trophies—including ivory taken as a trophy—taken for non-commercial purposes.⁹⁰ CITES also allows exceptions for ivory used for educational and scientific purposes.⁹¹ Finally, the ban only applies to ivory obtained after elephants were listed under CITES

⁸⁴ Jane Perlez, *Kenya, in Gesture, Burns Ivory Tusks*, N.Y. TIMES, <http://www.nytimes.com/1989/07/19/world/kenya-in-gesture-burns-ivory-tusks.html> [http://perma.cc/T96S-WMR9] (July 19, 1989) (accessed Feb. 20, 2015).

⁸⁵ Narula, *supra* note 83; U.S. FISH & WILDLIFE SERV., U.S. IVORY CRUSH, *supra* note 75.

⁸⁶ Christina Russo, *Belgium Crushes Its Elephant Ivory as Europe Takes Harder Look at Wildlife Trafficking*, NAT'L GEOGRAPHIC, <http://news.nationalgeographic.com/news/2014/04/140409-elephant-ivory-trafficking-eu-brussels-ifaw-ivory-crushes-world> [http://perma.cc/EAT4-3SCV] (Apr. 9, 2014) (accessed Feb. 20, 2015).

⁸⁷ *Id.*

⁸⁸ Indeed, thus far 2015 has seen an increasing number of nations destroy—or announce plans to destroy—their ivory stockpiles. In early March, Kenya burned fifteen tons of stockpiled ivory, promising to destroy the remainder of its stockpile later in the year. Humphrey Malalo, *Kenya Burns 15 Tonnes of Ivory in Anti-Poaching Fight, to Destroy its Stockpile by Year-End*, REUTERS, <http://www.reuters.com/article/2015/03/03/kenya-ivory-idUSL5N0W51TE20150303> [http://perma.cc/6LLA-9BRP] (Mar. 3, 2015) (accessed Apr. 12, 2015). Ethiopia followed suit seventeen days later, burning its six ton stockpile. *Ethiopia Destroys Six-Tonne Stockpile of Poached Ivory*, BBC NEWS, <http://www.bbc.com/news/world-africa-31983727> [http://perma.cc/6FKS-ACQ8] (Mar. 20, 2015) (accessed Apr. 12, 2015). Similarly, Malawi has announced plans to destroy their stockpiles. See Tiksa Negeri, *Malawi Government to Burn \$7.5m Ivory Stockpile*, NEWSWEEK, <http://www.newsweek.com/malawi-government-burn-75m-ivory-stockpile-318727> [http://perma.cc/4R7B-4FL5] (Apr. 1, 2015) (accessed Apr. 12, 2015) (Malawi initially announced they would destroy their stockpile on Apr. 2, 2015, but have postponed in order to be able to include 2.6 tons of ivory currently being held as evidence).

⁸⁹ CITES & ELEPHANTS, *supra* note 65; see also *infra* Part II.C (further discussing U.S. law addressing domestic trade).

⁹⁰ CITES & ELEPHANTS, *supra* note 65.

⁹¹ *Id.*

Appendix I in 1990.⁹² These exemptions mean there are a number of sources for the legal ivory trade.

A major problem with ivory is that it is not easy to distinguish legal ivory from illegal ivory. The distinction cannot be made on sight alone: ivory pre-dating elephants being listed under CITES looks no different than that post-dating listing. In order to address this date restriction, ivory must be carbon-dated to determine whether it is legal, pre-Convention ivory, or banned, post-Convention ivory.⁹³ Without documentation, such as a CITES permit or certificate, it is also difficult to differentiate between elephant ivory and ivory from another species, all of which are essentially tooth structures.⁹⁴ In order to obtain a positive identification of the species source of ivory, a trained scientist must examine the ivory.⁹⁵ There are also products made of synthetic ivory or natural ivory substitutes,⁹⁶ the existence of which further adds to the confusion between legal and illegal ivory. Finally, these forensic challenges in identifying illegal ivory are compounded by a lack of facilities able to overcome those challenges. Currently, there is only one National Fish and Wildlife Forensics Laboratory to perform this type of analysis.⁹⁷ Other countries also have difficulty providing these resources to law enforcement efforts.⁹⁸

C. Current United States Laws Affecting Trade in Ivory

It is heartening to know that, even though elephants are not a species native to the U.S., the U.S. does have several laws protecting

⁹² *Id.*

⁹³ See Roff Smith, *Cold War Radioactivity Can Date Illegal Elephant Ivory*, NAT'L GEOGRAPHIC, <http://news.nationalgeographic.com/news/2013/06/130701-elephants-ivory-poaching-trade-science-animals/> [<http://perma.cc/N88D-XXBC>] (July 1, 2013) (accessed Feb. 20, 2015) (explaining how differences in the concentration of Carbon-14 help scientists distinguish legal ivory from illegal ivory).

⁹⁴ See *USFWS Moves to Ban Commercial Elephant Ivory Trade*, *supra* note 10 (noting that buyers should exhibit caution when purchasing ivory products and request documentation verifying what animals their ivory comes from); see also Edgard O. Espinoza & Mary-Jacque Mann, *IDENTIFICATION GUIDE FOR IVORY AND IVORY SUBSTITUTES* 5 (2d ed. 1992) ("The word 'ivory' was traditionally applied only to the tusks of elephants. However, the chemical structure of the teeth and tusks of mammals is the same regardless of the species Therefore, 'ivory' can correctly be used to describe any mammalian tooth or tusk of commercial interest which is large enough to be carved").

⁹⁵ *Introduction to the Ivory Identification Guide*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/lab/ivory.php> [<http://perma.cc/8ESG-6QJ6>] (updated Jan. 27, 2010) (accessed Feb. 24, 2015); see also Espinoza & Mann, *supra* note 94, at 5–6 (explaining the scientific complexities of ivory species identification).

⁹⁶ Espinoza & Mann, *supra* note 94, at 21.

⁹⁷ *Introduction to the Ivory Identification Guide*, *supra* note 95.

⁹⁸ See, e.g., Jeff Otieno, *Kenya's New Forensic Lab to Help Trace the Origin of Seized Wildlife Products*, E. AFRICAN, <http://www.theeastafrican.co.ke/news/Kenya-s-new-forensic-lab-to-trace-origin-of-wildlife-products/-/2558/2453232/-/xriw8q/-/index.html> [<http://perma.cc/HG8T-32PF>] (Sept. 15, 2014) (accessed Feb. 27, 2015) (noting a Kenyan government official's comments on a lack of capacity to test ivory and rhino horn and his hopes for improving the system).

these animals. The U.S. recognizes that elephants are an iconic species, known and loved by many, and action needs to be taken before the loss of elephants is irreversible.⁹⁹

1. Federal Laws

At the federal level, the U.S. has a number of laws protecting elephants. The Endangered Species Act of 1973 (ESA) provides for the conservation of endangered and threatened species and the ecosystems on which they depend.¹⁰⁰ Under the ESA, it is generally illegal to import, export, transport, or sell in interstate or foreign commerce any listed species.¹⁰¹ The U.S. Fish and Wildlife Service listed the African elephant as a threatened species under the ESA on May 12, 1978.¹⁰² The agency cited illegal poaching as one factor in the species' decline as well as justification for the species' listing as threatened.¹⁰³ Although the African elephant is a Threatened species under the ESA, a "regulatory exemption [] allows African elephant ivory to be traded in ways that would otherwise be prohibited by the [ESA]."¹⁰⁴

Congress has also enacted legislation specifically focused on elephant conservation, passing the African Elephant Conservation Act, 16 U.S.C. § 4201, in 1988 to "assist in the conservation and protection of the African elephant."¹⁰⁵ The Act prohibits the exportation of raw ivory and prohibits the importation of raw ivory subject to certain conditions.¹⁰⁶ In 1997, Congress passed the Asian Elephant Conservation Act, 16 U.S.C. §§ 4261–4266.¹⁰⁷ The Act provides funding for projects that promote the conservation of Asian elephants.¹⁰⁸

The Lacey Act, 16 U.S.C. §§ 3371–3378, makes it illegal "to import, export, transport, sell, receive, acquire or purchase any . . . wildlife . . . taken, possessed, transported, or sold in violation of any law,

⁹⁹ WHITE HOUSE, NATIONAL STRATEGY FOR COMBATING WILDLIFE TRAFFICKING 1, 4 (2014) (available at http://www.whitehouse.gov/sites/default/files/docs/nationalstrategy_wildlifetrafficking.pdf [<http://perma.cc/SLC6-YSU3>] (accessed Mar. 19, 2015)).

¹⁰⁰ 16 U.S.C. § 1531(b).

¹⁰¹ *Id.* § 1538(a)(1)(A), (E), (F). Exceptions to this provision are outlined in 16 U.S.C. § 1535(g)(2) and 16 U.S.C. § 1539.

¹⁰² Listing of the African Elephant as a Threatened Species, 43 Fed. Reg. 20,499, 20,499 (May 12, 1978) (to be codified at 50 C.F.R. pt. 17). The U.S. Fish and Wildlife Service listed the Asian elephant as a threatened species in 1976. Endangered Status for 159 Taxa of Animals, 41 Fed. Reg. 21,062, 21,064, 21,066 (June 14, 1976) (to be codified at 50 C.F.R. pt. 17).

¹⁰³ Listing of the African Elephant as a Threatened Species, 43 Fed. Reg. at 20,503.

¹⁰⁴ WHITE HOUSE, *supra* note 99, at 6. The regulatory exemption allows for trade of antique ivory over 100 years old, as well as some ivory acquired as sport-hunted trophies. 50 C.F.R. § 17.40(e)(3)(ii)–(iii) (2011).

¹⁰⁵ 16 U.S.C. § 4203(1).

¹⁰⁶ *Id.* § 4223. An exception states that "individuals may import sport-hunted elephant trophies that they have legally taken in an ivory producing country that has submitted an ivory quota." *Id.* § 4222(e).

¹⁰⁷ *Id.* §§ 4261–4266.

¹⁰⁸ *Id.* § 4264(a).

treaty, or regulation of the United States¹⁰⁹ This prohibition also applies to interstate and foreign commerce.¹¹⁰

Recently, Congress introduced several bills relating to elephant poaching and ivory. The Targeted Use of Sanctions for Killing Elephants in Their Range (TUSKER) Act of 2014 was introduced to “[p]rovide for trade sanctions against countries involved in illegal ivory trade”¹¹¹ The Wildlife Trafficking Enforcement Act of 2015 would make “wildlife trafficking a predicate offense under racketeering and money laundering statutes”¹¹² While the 2014 bill was not enacted,¹¹³ and the 2015 bill has little chance of being enacted,¹¹⁴ they are a measure of how seriously American politicians consider the problems of elephant poaching and the illegal ivory trade.

2. *President Obama’s Executive Order*

Setting the tone for the recent U.S. recognition of, and response to, the poaching crisis, President Barack Obama issued an Executive Order titled “Combating Wildlife Trafficking” on July 1, 2013.¹¹⁵ The Executive Order explicitly stresses it is in the nation’s interest to combat trafficking of elephants and other wildlife because their survival “has beneficial economic, social, and environmental impacts that are important to all nations.”¹¹⁶ One objective of the Executive Order is to reduce the demand for illegally traded wildlife in the U.S. and abroad, while allowing legal commerce in wildlife.¹¹⁷ The Executive Order established an Advisory Council on Wildlife Trafficking,¹¹⁸ which has so far concentrated its efforts on the crisis affecting elephants and rhinos.¹¹⁹

¹⁰⁹ *Id.* § 3372(a)(1).

¹¹⁰ 16 U.S.C. § 3372(a)(2)(A).

¹¹¹ Targeted Use of Sanctions for Killing Elephants in Their Range Act of 2014, H.R. 5454, 113th Cong. (2014) (available at <https://www.congress.gov/113/bills/hr5454/BILLS-113hr5454ih.pdf> [<http://perma.cc/L6QD-9G9V>] (accessed Mar. 17, 2015)).

¹¹² Wildlife Trafficking Enforcement Act of 2015, S. 27, 114th Cong. (2015) (available at <https://www.congress.gov/114/bills/s27/BILLS-114s27is.pdf> [<http://perma.cc/YQ5B-LLV5>] (accessed Mar. 17, 2015)).

¹¹³ See *H.R. 5454 – Targeted Use of Sanctions for Killing Elephants in Their Range Act of 2014*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/5454> [<http://perma.cc/LUD9-QUNW>] (accessed Mar. 17, 2014) (showing no action on the bill after it was introduced).

¹¹⁴ *S. 27: Wildlife Trafficking Enforcement Act of 2015*, GOVTRACK, <https://www.govtrack.us/congress/bills/114/s27> [<http://perma.cc/AG2P-WZQZ>] (accessed Mar. 17, 2015) (scoring the bill as having a 1% chance of being enacted).

¹¹⁵ Exec. Order No. 13,648, 3 C.F.R. § 314 (2014) (available at <http://www.gpo.gov/fdsys/pkg/CFR-2014-title3-vol1/pdf/CFR-2014-title3-vol1-chapI.pdf> [<http://perma.cc/MA5N-3RHT>] (accessed Mar. 14, 2015)).

¹¹⁶ *Id.*

¹¹⁷ *Id.* § 315.

¹¹⁸ *Id.* § 316.

¹¹⁹ Meeting Notice, 79 Fed. Reg. 56,823, 56,824 (Sept. 23, 2014) (available at <http://www.gpo.gov/fdsys/pkg/FR-2014-09-23/pdf/2014-22538.pdf> [<http://perma.cc/JX35-J5GL>] (accessed Mar. 14, 2015)).

Following the Executive Order, the U.S. released its *National Strategy for Combating Wildlife Trafficking* on February 11, 2014, establishing “guiding principles and strategic priorities for U.S. efforts to stem illegal trade in wildlife.”¹²⁰ At the same time, the U.S. enacted a ban on the commercial trade of elephant ivory.¹²¹ The ban prohibits all commercial imports of African elephant ivory and most commercial exports of ivory, with a few exceptions.¹²² For non-commercial ivory, there is a prohibition on the import and export of raw ivory, with an exception for the import of sport-hunted trophies.¹²³ The ban also revokes a previous U.S. Fish & Wildlife Service (FWS) special rule that had relaxed ESA restrictions on African elephant ivory trade.¹²⁴

3. State Laws

In addition to federal legislation regulating ivory trafficking, two states now have laws banning the sale of ivory within their borders. On August 5, 2014, New Jersey became the first state to enact such a law.¹²⁵ The New Jersey law generally makes it unlawful for anyone to “import, sell, offer for sale, purchase, barter, or possess with intent to sell, any ivory [or] ivory product.”¹²⁶ New Jersey’s statute, however, does offer exceptions for the legal beneficiaries of estates, law enforcement activities, imports authorized by federal license or permit, and bona fide educational and scientific purposes.¹²⁷ For the first offense, the law imposes a fine of “not less than \$1,000 or an amount equal to two times the total value of the ivory [or] ivory products . . . involved in the offense, whichever is greater.”¹²⁸ For subsequent offenses, the fine is “not less than \$5,000 or an amount equal to two times the total value of the ivory [or] ivory products . . . involved in the offense, whichever is greater.”¹²⁹ New Jersey enacted the law to close “loopholes in ivory

¹²⁰ WHITE HOUSE, *supra* note 99 at 2.

¹²¹ Press Release, Office of the Press Sec’y, White House, Fact Sheet: National Strategy for Combating Wildlife Trafficking & Commercial Ban on Trade in Elephant Ivory (Feb. 11, 2014) (available at <http://www.whitehouse.gov/the-press-office/2014/02/11/fact-sheet-national-strategy-combating-wildlife-trafficking-commercial-b> [<http://perma.cc/7TA5-UKKN>] (accessed Mar. 14, 2015)) [hereinafter *Strategy for Combating Wildlife Trafficking*].

¹²² *Id.* The exceptions to commercial exports are “bona fide antiques, certain noncommercial items, and in exceptional circumstances [other items] permitted under the Endangered Species Act.” *Id.*

¹²³ *USFWS Moves to Ban Commercial Elephant Ivory Trade*, *supra* note 10.

¹²⁴ Press Release, *Strategy for Combating Wildlife Trafficking*, *supra* note 121.

¹²⁵ Marianne Levine, *States are Eyeing Stiffer Ivory Laws amid a Surge in Elephant Poaching*, LOS ANGELES TIMES, Sept. 2, 2014 (available at <http://www.latimes.com/business/la-fi-ivory-bans-20140902-story.html> [<http://perma.cc/XGZ4-H2W5>] (accessed Apr. 5, 2015)).

¹²⁶ N.J. STAT. ANN. § 23:2A-13.3(a) (West 2015).

¹²⁷ *Id.* § 23:2A-13.3(c)–(f).

¹²⁸ *Id.* § 23:2A-13.4(a)(1).

¹²⁹ *Id.* § 23:2A-13.4(a)(2).

commerce prohibitions that allowed New Jersey to foster the blood ivory trade and poaching profits for terrorist organizations”¹³⁰

On August 12, 2014, New York became the second state to enact a law making the sale of ivory illegal.¹³¹ New York’s law declares, “[N]o person shall sell, offer for sale, purchase, trade, barter, or distribute an ivory article.”¹³² However, there are exceptions for ivory articles that are bona fide antiques, are for bona fide educational or scientific purposes, are distributed to a legal beneficiary of a trust or an heir of an estate, or are part of a musical instrument.¹³³ New York legislators passed the law because they recognized that New York City was a receptive market for poachers and that New York can have a significant impact “on clamping down on illegal ivory sales.”¹³⁴

As of April 2015, several other states have already introduced or plan to introduce bills banning the trade of ivory. The states that have already introduced bills include Arkansas,¹³⁵ California,¹³⁶ Connecticut,¹³⁷ Florida,¹³⁸ Hawaii,¹³⁹ Illinois,¹⁴⁰ Iowa,¹⁴¹ Mary-

¹³⁰ Press Release, Office of the Governor, State of N.J., Governor Christie Signs Bipartisan Legislation to Crack Down on Black Market Ivory Trafficking (Aug. 5, 2014) (available at <http://www.state.nj.us/governor/news/news/552014/approved/20140805c.html> [<http://perma.cc/V6ND-3V4U>] (accessed Mar. 5, 2015)).

¹³¹ See Gil Aegerter, *Saving the Elephants? State Bans on Ivory Trade Gather Steam*, NBC News, <http://www.nbcnews.com/science/environment/saving-elephants-state-bans-ivory-trade-gather-steam-n179121> [<http://perma.cc/MY32-XAL6>] (Aug. 12, 2014) (accessed Mar. 15, 2015) (discussing the movement to enact state bans and its success in New Jersey and New York, with the latter state’s statute being enacted on World Elephant Day); Levine, *supra* note 125 (noting New Jersey and New York were the first two states, respectively, to pass such bills).

¹³² N.Y. ENVTL. CONSERV. LAW § 11-0535-a(2) (McKinney 2015).

¹³³ *Id.* § 11-0535-á(3)(a)–(d).

¹³⁴ Press Release, New York State, Governor Cuomo Signs New Law to Combat Illegal Ivory Trade and Protect Endangered Species (Aug. 12, 2014) (<http://www.governor.ny.gov/news/governor-cuomo-signs-new-law-combat-illegal-ivory-trade-and-protect-endangered-species> [<http://perma.cc/7NQF-PHJB>] (accessed Mar. 6, 2015)).

¹³⁵ S. 928, 90th Gen. Assemb. (Ark. 2015) (available at <http://www.arkleg.state.ar.us/assembly/2015/2015R/Bills/SB928.pdf> [<http://perma.cc/6SNP-C3W4>] (accessed July 13, 2015)).

¹³⁶ Assemb. 96, 2015–2016 Leg., Reg. Sess. (Cal. 2015) (available at http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_0051-0100/ab_96_bill_20150107_introduced.pdf [<http://perma.cc/PFK3-JJB7>] (accessed Mar. 15, 2015)).

¹³⁷ H.R. 5470, 2015 Gen. Assemb., Jan. Sess. (Conn. 2015) (available at <http://www.cga.ct.gov/2015/TOB/h/pdf/2015HB-05470-R00-HB.pdf> [<http://perma.cc/83YB-EX9E>] (accessed Mar. 15, 2015)).

¹³⁸ S. 1120, 2015 Leg. (Fla. 2015) (available at <http://www.flsenate.gov/Session/Bill/2015/1120/BillText/Filed/PDF> [<http://perma.cc/S6QV-E3S7>] (accessed Apr. 17, 2015)).

¹³⁹ S. 674, 28th Leg. (Haw. 2015) (available at http://www.capitol.hawaii.gov/session/2015/bills/SB674_.pdf [<http://perma.cc/WYE3-JU32>] (accessed Feb. 26, 2015)).

¹⁴⁰ S. 1858, 99th Gen. Assemb. (Ill. 2015) (available at <http://www.ilga.gov/legislation/99/SB/PDF/09900SB1858lv.pdf> [<http://perma.cc/PKC5-LME6>] (accessed Apr. 17, 2015)).

¹⁴¹ S. 30, 86th Gen. Assemb. (Iowa 2015) (available at <https://www.legis.iowa.gov/docs/Published/LGI/86/SF30.pdf> [<http://perma.cc/U338-D2MR>] (accessed Mar. 15, 2015)).

land,¹⁴² Massachusetts,¹⁴³ Michigan,¹⁴⁴ Nevada,¹⁴⁵ Oklahoma,¹⁴⁶ Oregon,¹⁴⁷ Rhode Island,¹⁴⁸ Vermont,¹⁴⁹ Virginia,¹⁵⁰ and Washington.¹⁵¹

III. PROPOSED TAX TREATMENT

In its *National Strategy for Combating Wildlife Trafficking*, the Executive Branch described how it will work with Congress “to assess whether current fine and penalty provisions provide adequate deterrence” to wildlife trafficking.¹⁵² Though the *National Strategy* does not address imposing tax consequences on illegal ivory,¹⁵³ doing so would provide the federal government with an additional means of reaching the *National Strategy*’s goals.

For tax purposes, illegal ivory should be treated similarly to other activities that have both legal and illegal operations, such as marijuana production or sale, gambling, and prostitution.¹⁵⁴ While proceeds from illegal activity are already considered taxable income,¹⁵⁵ there are several ways to impose tax consequences on ivory that should disincentivize people from trading in it illegally. These include denying deductions for business expenditures, denying restitution as a busi-

¹⁴² H.R. 713, 2015 Reg. Sess. (Md. 2015) (available at <http://mgaleg.maryland.gov/2015RS/bills/hb/hb0713f.pdf> [<http://perma.cc/D2RC-HE8L>] (accessed July 13, 2015)).

¹⁴³ S. 440, 189th Leg. (Mass. 2015) (available at <https://malegislature.gov/Document/Bill/189/Senate/S440.pdf> [<http://perma.cc/J6WM-EUG4>] (accessed Apr. 17, 2015)).

¹⁴⁴ H.R. 4509, 98th Leg. (Mich. 2015) (available at <http://www.legislature.mi.gov/docu-ments/2015-2016/billintroduced/House/pdf/2015-HIB-4509.pdf> [<http://perma.cc/C7MZ-A57X>] (accessed July 13, 2015)).

¹⁴⁵ S. 398, 78th Leg. (Nev. 2015) (available at <http://www.leg.state.nv.us/Session/78th2015/Bills/SB/SB398.pdf> [<http://perma.cc/9W6X-CL9U>] (accessed Apr. 17, 2015)).

¹⁴⁶ H.R. 1787, 55th Leg., 1st Sess. (Okla. 2015) (available at http://webserver1.lsb.state.ok.us/cf_pdf/2015-16%20INT/hB/HB1787%20INT.PDF [<http://perma.cc/3AH8-7WH9>] (accessed Mar. 15, 2015)).

¹⁴⁷ S. 913, 78th Leg. Assemb., Reg. Sess. (Or. 2015) (available at <https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/SB0913/Introduced> [<http://perma.cc/V2B3-2FUM>] (accessed Mar. 15, 2015)).

¹⁴⁸ H.R. 5660, 2015 Reg. Sess. (R.I. 2015) (available at <http://webserver.rilin.state.ri.us/BillText/BillText15/HouseText15/H5660.pdf> [<http://perma.cc/J448-DBUX>] (accessed July 13, 2015)).

¹⁴⁹ H.R. 297, 2015–2016 Session (Vt. 2015) (available at <http://legislature.vermont.gov/assets/Documents/2016/Docs/BILLS/H-0297/H-0297%20As%20Introduced.pdf> [<http://perma.cc/YCB3-EKYT>] (accessed Apr. 17, 2015)).

¹⁵⁰ S. 1215, 2015 Sess. (Va. 2015) (available at <http://lis.virginia.gov/cgi-bin/legp604.exe?151+ful+SB1215+pdf> [<http://perma.cc/8VU4-9ETR>] (accessed Mar. 15, 2015)).

¹⁵¹ H.R. 1131, 64th Leg., 2015 Reg. Sess. (Wash. 2015) (available at <http://lawfileext.leg.wa.gov/biennium/2015-16/Pdf/Bills/House%20Bills/1131.pdf> [<http://perma.cc/GZ6Y-U9Z7>] (accessed Feb. 26, 2015)).

¹⁵² WHITE HOUSE, *supra* note 99, at 7.

¹⁵³ See generally *id.* (giving no mention of tax policy as a mechanism to address illegal ivory).

¹⁵⁴ Compare, e.g., 18 U.S.C. § 1955 (2012) (defining when a gambling business is an “illegal gambling business”), with I.R.C. § 165(d) (2012) (explaining when a person may deduct gambling losses from taxes).

¹⁵⁵ See *James v. United States*, 366 U.S. 213, 218 (1961) (“unlawful, as well as lawful, gains are comprehended within the term ‘gross income’”).

ness expenditure, imposing excise and occupational taxes on ivory and its trade, and charging illegal ivory traders with corresponding tax crimes. Similarly, in order to remove even more ivory from the marketplace, a system of tax credits could be developed for individuals who give up ivory items they currently possess legally.

A. *Current Treatment of Proceeds from Illegal Activity*

[G]ross income means all income from whatever source derived
—Internal Revenue Code¹⁵⁶

The proceeds from both legal and illegal activity are treated as income under our tax system.¹⁵⁷ For example, the U.S. Tax Court found a narcotics trafficker to be liable for federal income taxes on over \$7 million of unreported income from his illegal activities.¹⁵⁸ This means that individuals and companies with income from the sale of illegal ivory must report that income on their tax returns.

People involved in illegal activity are unlikely to report illegal proceeds on their tax returns.¹⁵⁹ Because income from illegal wildlife trafficking is taxable, those who prosecute wildlife crimes should work with the Internal Revenue Service (IRS) to identify these individuals and pursue enforcement actions against them. Law enforcement agencies have diligently worked with the IRS for decades to report suspected or convicted drug traffickers.¹⁶⁰ Now that the U.S. has a heightened focus on prosecuting wildlife crimes, cooperation between law enforcement and the IRS can lead to higher legal penalties and costs of doing business for ivory traffickers. It can also provide an additional law enforcement approach in an area that is hard to police.

B. *Denial of Business Expenditures for Illegal Ivory*

Under the Internal Revenue Code (Code), deductions for the ordinary and necessary expenses of a business are allowed.¹⁶¹ These deductions for business expenditures are available to all businesses, whether legal or illegal.¹⁶² However, the Code does not allow business deductions for illegal bribes, kickbacks, and other payments.¹⁶³

Congress does have the ability to disallow deductions as it chooses,¹⁶⁴ and it did so with the illegal sale of marijuana and other

¹⁵⁶ I.R.C. § 61(a) (2012 & Supp. 2012).

¹⁵⁷ *James*, 366 U.S. at 218.

¹⁵⁸ *Curtis v. Comm'r*, 59 T.C.M. (P-H) 548 (1990).

¹⁵⁹ See Elizabeth M. Rutherford, *Taxation of Drug Traffickers' Income*, 33 ARIZ. L. REV. 701, 704 (1991) (“[D]rug dealers rarely report their illegal income to the government.”).

¹⁶⁰ *Id.* at 701 n.1.

¹⁶¹ I.R.C. § 162(a).

¹⁶² See *Comm'r v. Tellier*, 383 U.S. 687, 691 (1966) (“[T]he statute does not concern itself with the lawfulness of the income that it taxes.”).

¹⁶³ I.R.C. § 162(c).

¹⁶⁴ *Comm'r v. Sullivan*, 356 U.S. 27, 28 (1958).

drugs. Section 280E of the Code disallows business deductions and credits for trafficking in controlled substances under Schedules I and II of the Controlled Substances Act;¹⁶⁵ marijuana is listed under Schedule I of the Controlled Substances Act.¹⁶⁶ Congress denied these business deductions to drug dealers on public policy grounds: “There is a sharply defined public policy against drug dealing. To allow drug dealers the benefit of business expense deductions . . . is not compelled by the fact that such deductions are allowed to other, legal, enterprises.”¹⁶⁷

Just as Congress has disallowed deductions and credits for the illegal sale of marijuana, it should do the same for the sale of illegal ivory. Because there is also public policy against trafficking in illegal ivory, it should be treated the same as drug dealing in terms of the denial of business deductions. Congress can easily modify the language of § 280E to add a new Code section applicable to illegal ivory, for example:

No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in illegal ivory which is prohibited by Federal law or the law of any State in which such trade or business is conducted.

C. Restitution

Restitution is the “full disgorgement of profit by a conscious wrongdoer . . . because any lesser liability would provide an inadequate incentive to lawful behavior.”¹⁶⁸ Essentially, payment of restitution requires a defendant, through a monetary payment, to return monetary gain to a victim. Defendants ordered to pay restitution may not deduct this payment from their income tax returns. Although, in general, ordinary and necessary business expenses are deductible,¹⁶⁹ no deduction is allowed “for any fine or similar penalty paid to a government for the violation of any law.”¹⁷⁰ A “fine or similar penalty” includes an amount paid pursuant to conviction or a plea of guilty in a criminal proceeding, or an amount paid as a civil penalty.¹⁷¹ The U.S. Tax Court has determined that if a defendant pled not guilty and was subsequently acquitted, the court could not have ordered payment of restitution; thus, the restitution was paid pursuant to the guilty plea

¹⁶⁵ I.R.C. § 280E.

¹⁶⁶ Controlled Substances Act, 21 U.S.C. § 812 (Schedule I)(c)(10) (2012).

¹⁶⁷ S. REP. NO. 97-494(I), at 309 (1982) (available at <http://www.finance.senate.gov/library/reports/committee/download/?id=D21ca218-2e81-4d29-928f-8df397a7c96c> [<http://perma.cc/7CMQ-ZMFY>] (accessed Mar. 17, 2015)).

¹⁶⁸ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 3 (2010).

¹⁶⁹ I.R.C. § 162(a).

¹⁷⁰ *Id.* § 162(f).

¹⁷¹ Treas. Reg. § 1.162-21(b)(1)(i)–(ii) (2014) (available at <http://www.gpo.gov/fdsys/pkg/CFR-2014-title26-vol4/pdf/CFR-2014-title26-vol4-part1.pdf> [<http://perma.cc/PT3G-FRCC>] (accessed Mar. 17, 2015)).

and was therefore a “fine or similar penalty” not allowable as a deduction for income tax purposes.¹⁷²

A case involving the unlawful export of ivory illustrates this point. A division of Atlas Fibre Company sold billiard products made of African elephant ivory.¹⁷³ Atlas pleaded guilty to violating the Endangered Species Act (ESA),¹⁷⁴ and the court ordered Atlas to pay restitution in the amount of \$12,273.¹⁷⁵ Because the restitution was paid pursuant to a guilty plea, it is a “fine or similar penalty” under Code § 162(f),¹⁷⁶ and it is therefore not deductible as a business expense by Atlas.

The *National Strategy for Combating Wildlife Trafficking* states that the U.S. must provide “restitution for those victimized by wildlife crimes.”¹⁷⁷ This can be achieved through the Mandatory Victims Restitution Act of 1996 (MVRA)¹⁷⁸ and the Victim and Witness Protection Act of 1982 (VWPA).¹⁷⁹ In *U.S. v. Bengis*, the Second Circuit Court of Appeals held that South Africa had a property interest in illegally harvested rock lobsters and that South Africa was a “victim” under the MVRA and VWPA.¹⁸⁰ As a result, the court ordered the defendants to pay restitution to South Africa for their illegal harvesting of rock lobsters.¹⁸¹ Based on the decision issued by the Second Circuit in *Bengis*, a court could find that an elephant poacher owes restitution to the country where a slain elephant had lived. The possibility of recovery under these statutes should enhance cooperation among nations and provide economic incentives to address poaching both where it originates and in the countries driving demand for ivory.

D. Excise and Occupational Taxes

1. Excise Tax

The Code defines an excise tax as one “paid when purchases are made on a specific good, such as gasoline” or on a particular activity, such as gambling.¹⁸² An excise tax is frequently part of a product’s price.¹⁸³ Excise taxes may be imposed when an economic activity pro-

¹⁷² *Waldman v. Comm’r*, 88 T.C. 1384, 1387 (1987).

¹⁷³ DEP’T OF JUSTICE, ENVIRONMENTAL CRIMES SECTION MONTHLY BULLETIN 12 (Feb. 2012) (available at http://www.justice.gov/enrd/2012/monthly-bulletin-feb2012_208.pdf [<http://perma.cc/B67G-5VV5>] (accessed Mar. 8, 2015)).

¹⁷⁴ Plea Agreement at 2, *United States v. Atlas Fibre Co.*, No. 1:11-CR-00897 (N.D. Ill. Jan. 10, 2012); DEP’T OF JUSTICE, *supra* note 173, at 12.

¹⁷⁵ Judgment in a Criminal Case at 5, *Atlas Fibre Co.*, No. 1:11-CR-00897.

¹⁷⁶ I.R.C. § 162(F).

¹⁷⁷ WHITE HOUSE, *supra* note 99, at 7.

¹⁷⁸ Mandatory Victims Restitution Act, 18 U.S.C. § 3663A.

¹⁷⁹ Victim and Witness Protection Act, 18 U.S.C. § 3663.

¹⁸⁰ *United States v. Bengis*, 631 F.3d 33, 40–41 (2d Cir. 2011).

¹⁸¹ *Id.* at 42.

¹⁸² *Excise Tax*, IRS, <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Excise-Tax> [<http://perma.cc/TZ7M-ZJTW>] (updated Jan. 22, 2015) (accessed Mar. 8, 2015).

¹⁸³ *Id.*

duces “adverse effects on the environment or on the well-being of the population at large.”¹⁸⁴ Examples of Congress imposing this corrective policy on harmful activities include excise taxes on marijuana,¹⁸⁵ tobacco,¹⁸⁶ alcohol,¹⁸⁷ firearms,¹⁸⁸ wagering,¹⁸⁹ and tanning-bed usage.¹⁹⁰ Likewise, the ivory trade produces adverse effects on the environment via the slaughter of elephants, providing Congress with ample justification to impose an excise tax on ivory.

If Congress were to introduce an excise tax on ivory, it should be imposed on both legal and illegal ivory. This would be similar to the excise tax for wagering, which taxes both state-authorized wagers as well as unauthorized wagers.¹⁹¹ One reason to tax both legal and illegal ivory is that it is hard to tell the difference between the two, so it would be more effective to impose the tax on all ivory.¹⁹² Another reason is that those who sell illegal ivory are unlikely to charge tax on it (or if they do charge the tax, they will not likely remit that amount to the government), thereby eliminating the efficacy of the excise tax.

The rates of excise taxes vary depending on what is being taxed. For example, the excise tax on state-authorized wagers is 0.25% of the amount of the wager,¹⁹³ while the tax on unauthorized wagers is 2% of the amount of the wager.¹⁹⁴ The excise tax on indoor tanning services is 10% of the price of the service.¹⁹⁵ Congress should impose a higher tax rate on ivory, similar to that for tanning, to reflect the public policy against trade in ivory. Though it is hard to tell the difference between legal and illegal ivory, a higher tax rate should be imposed on illegal ivory. My proposed statutory language for the excise tax is:

(a) Legal ivory products. There is hereby imposed on any legal elephant ivory product an excise tax equal to 5 percent of the amount paid for such product.

(b) Illegal ivory products. There is hereby imposed on any illegal elephant ivory product an excise tax equal to 10 percent of the amount paid for such product.

¹⁸⁴ John R. McGowan, *Excise Taxes and Sound Tax Policy*, in TAX FOUNDATION 9 (Tax Found., Background Paper No. 18, May 1997) (available at <http://taxfoundation.org/sites/taxfoundation.org/files/docs/85a28cc81aa689fcf22192219331d87c.pdf> [<http://perma.cc/WG5Q-NFC8>] (accessed Mar. 16, 2015)).

¹⁸⁵ Marihuana Tax Act of 1937, 50 Stat. 551 (1937) (codified at I.R.C. § 1399a (1934 & Supp. 1937)), *invalidated by* Leary v. United States, 395 U.S. 6, 37 (1969).

¹⁸⁶ I.R.C. §§ 5701–5763.

¹⁸⁷ *Id.* §§ 5001–5690.

¹⁸⁸ *Id.* §§ 5801–5872.

¹⁸⁹ *Id.* §§ 4401–4405.

¹⁹⁰ *Id.* § 5000B.

¹⁹¹ *Id.* § 4401(a).

¹⁹² See *supra* Part II.B.3 (explaining the difficulties of distinguishing between legal and illegal ivory).

¹⁹³ I.R.C. § 4401(a)(1).

¹⁹⁴ *Id.* § 4401(a)(2).

¹⁹⁵ *Id.* § 5000B(a).

2. Occupational Tax

Occupational taxes are taxes imposed on the manufacturers or providers of certain goods or services.¹⁹⁶ They are generally companions to excise taxes, which target consumers of those goods or services.¹⁹⁷ Along with the excise taxes, there are currently correlating federal occupational taxes on tobacco,¹⁹⁸ firearms,¹⁹⁹ and wagering.²⁰⁰

In addition to an excise tax on ivory, Congress should impose an occupational tax on those who make or sell ivory products. The occupational tax would be another financial disincentive for people who produce or sell legal or illegal ivory products. This tax would also allow for better regulation of the industry for ivory products. Congress should follow the rate structure for occupational taxes on tobacco and firearms: charging a yearly tax of \$1,000 for taxpayers with gross receipts of \$500,000 or more and a yearly tax of \$500 for taxpayers with gross receipts of less than \$500,000.²⁰¹ As with the other occupational taxes, Congress should enforce a penalty if the occupational tax is not paid before the provider sells ivory products.²⁰² Taxpayers are allowed to deduct occupational taxes paid as a miscellaneous deduction subject to the 2% limit.²⁰³ However, to further public policy against trade in ivory, Congress should disallow the deduction of ivory occupational taxes on income tax returns. Additionally, the proceeds of both occupational and excise taxes should be designated for elephant conservation methods and for funding to combat wildlife trafficking.

E. Tax Crimes

There are several tax crimes in the Code that are applicable to those who sell illegal ivory and do not report the income on their tax returns. Tax evasion, the “willful[] attempt[] . . . to evade or defeat any tax imposed . . . or the payment thereof,” is a felony punishable by a fine of up to \$100,000 for an individual (\$500,000 for a corporation), not more than five years imprisonment, or both.²⁰⁴ The failure to file a tax return or to pay any tax or estimated tax is a misdemeanor punishable by a fine of not more than \$25,000 (\$100,000 for a corporation),

¹⁹⁶ BLACK'S LAW DICTIONARY 1687 (10th ed. 2014).

¹⁹⁷ *E.g.*, GLENN CUNNINGHAM & CONRAD ROSENBERG, EXCISE TAX AND OCCUPATIONAL TAX ON WAGERING 55 (1997) (available at <http://www.irs.gov/pub/irs-tege/eotopice97.pdf> [<http://perma.cc/M6RU-94CF>] (accessed Mar. 10, 2015)) (“The occupational tax [on wagering] is a companion to the excise tax on wagering.”).

¹⁹⁸ I.R.C. §§ 5731–5734.

¹⁹⁹ *Id.* § 5801.

²⁰⁰ *Id.* §§ 4411–4414.

²⁰¹ *Id.* §§ 5731(a)–(b), 5801(a)–(b).

²⁰² *Id.* §§ 5731(c), 7272.

²⁰³ *Id.* § 67(a); INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUB. 17, YOUR FEDERAL INCOME TAX 196 (2014) (available at <http://www.irs.gov/pub/irs-pdf/p17.pdf> [<http://perma.cc/QU6T-RUU9>] (accessed Mar. 17, 2015)).

²⁰⁴ I.R.C. § 7201.

not more than one year imprisonment, or both.²⁰⁵ Filing a fraudulent tax return, also known as tax perjury,²⁰⁶ is a felony punishable by a fine of not more than \$100,000 for an individual (\$500,000 for a corporation), not more than three years imprisonment, or both.²⁰⁷ These issues are implicated in the context of ivory when illegal ivory traffickers and dealers fail to report income from illegal ivory on their federal tax returns.

Tax evasion is one of the related criminal activities associated with wildlife trafficking.²⁰⁸ There are several reasons why tax evasion is associated with criminal activities in general. People are required to maintain records that substantiate their tax liabilities.²⁰⁹ Most drug traffickers, for example, “have nonexistent or incomplete records.”²¹⁰ Transactions are often conducted in cash so third parties will not have records.²¹¹ Drug traffickers are unwilling to report their illegal income because they do not want to reveal their illegal activities to the government.²¹²

Oftentimes, it is easier to prosecute people for tax crimes than for the underlying crime.²¹³ Examples of notorious organized crime figures and professional athletes illustrate this point. Mobster Al Capone was convicted of tax evasion and failing to file tax returns rather than for any of the gang-related activity in which he participated.²¹⁴ Baseball player-turned-manager Pete Rose was convicted of failure to report income instead of being charged for gambling on baseball games.²¹⁵

Because tax evasion is often easier to prosecute than the underlying crime, prosecutors should file any applicable tax charges along with wildlife trafficking charges for those who sell illegal ivory. Another advantage of prosecutors including tax crimes is that the penalties imposed for tax crimes are generally higher than those imposed

²⁰⁵ *Id.* § 7203.

²⁰⁶ Keith J. Benes et al., *Tax Violations*, 35 AM. CRIM. L. REV. 1219, 1249 (1998).

²⁰⁷ I.R.C. § 7206(1).

²⁰⁸ *The Human Toll & Cost of Wildlife Crime*, WILDLEAKS, <https://wildleaks.org/the-human-toll-of-wildlife-crime/> [<http://perma.cc/QU7N-PY4L>] (accessed Mar. 10, 2015).

²⁰⁹ I.R.C. § 6001.

²¹⁰ Rutherford, *supra* note 159, at 704.

²¹¹ *Id.*

²¹² *Id.*

²¹³ Interview with Jack Bogdanski, Professor, Lewis & Clark Law Sch., in Portland, Or. (Oct. 3, 2014).

²¹⁴ Ian M. Comisky et al., 1 TAX FRAUD AND EVASION ¶ 1.01[2] (6th ed. 2007). “Al Capone was not charged with income tax crimes to deter the general public from cheating; he was prosecuted because President Herbert Hoover wanted him in jail and the Federal Bureau of Investigations (FBI) could not find a way to do it.” *Id.*; see also *Capone v. United States*, 56 F.2d 927, 931 (7th Cir. 1932) (holding that Capone was convicted of tax evasion without alleging particularities).

²¹⁵ Associated Press, *Pete Rose Sent to Prison*, L.A. TIMES (July 19, 1990) (available at http://articles.latimes.com/1990-07-19/news/mn-564_1_pete-rose [<http://perma.cc/E63Z-ZQZM>] (accessed Mar. 10, 2015)).

under the Lacey Act and the ESA.²¹⁶ The higher likelihood of being convicted of a tax crime and the higher penalties upon conviction of a tax crime will hopefully provide more of a deterrent to sellers of illegal ivory.

One successful example of wildlife traffickers also being charged with tax evasion involved a rhino horn smuggling ring.²¹⁷ Jimmy Kha and Felix Kha, two members of the smuggling ring, were found with nine rhino horns and six rhino feet: a total fair market value between \$1 and \$2.5 million.²¹⁸ The Khass both pled guilty to Lacey Act trafficking and tax evasion, among other charges.²¹⁹ Defendants each paid a \$2,000 fine for violating the Lacey Act and a \$2,000 fine for tax evasion.²²⁰ The two defendants were also ordered to pay a total of \$185,000 for the tax fraud penalty and assessment.²²¹ While in this case the penalty for tax fraud was only a fraction of the value of the illegal rhino products, it is still important that the wildlife smugglers were held accountable for the tax crimes. Any increase in penalties will reduce the profit from these activities and thereby create further disincentives for people to engage in wildlife trafficking.

F. Miscellaneous Additional Possibilities

While the proposals in this Article are a start, they do not form a comprehensive list of all possible ways to impose tax consequences on illegal ivory. Other potential tax consequences for illegal ivory could address the valuation of illegal ivory for estate tax purposes, denial of non-profit status for entities dealing in illegal ivory, and disallowing charitable deductions entirely for donations of ivory. I consider these approaches unlikely to present significant deterrence to the illegal ivory trade at present.²²² Therefore, they are not discussed in detail here but may warrant further consideration in the future.

²¹⁶ Compare 16 U.S.C. § 3373(d)(1) (Lacey Act criminal penalties are up to \$250,000, five years imprisonment, or both), and 16 U.S.C. § 1540 (b)(1) (ESA criminal penalties are up to \$50,000, one year imprisonment, or both), with I.R.C. § 7201 (noting penalties for tax evasion may be as high as \$100,000 (\$500,000 for a corporation), five years imprisonment, or both).

²¹⁷ DEP'T OF JUSTICE, ENVIRONMENTAL CRIMES SECTION MONTHLY BULLETIN 13 (June 2013) (available at http://www.justice.gov/enrd/2013/ENV_CRIMES-401230-v1-Public_Bulletin_June_2013_508_Review_5_29_2014.pdf [<http://perma.cc/56GN-YFR6>] (accessed Feb. 15, 2015)).

²¹⁸ Press Release, Office of Pub. Affairs, Dep't of Justice, Smuggling Ring Sentenced in Los Angeles for Criminal Trafficking of Endangered Rhinoceros Horn (May 15, 2013) (available at <http://www.justice.gov/opa/pr/smuggling-ring-sentenced-los-angeles-criminal-trafficking-endangered-rhinoceros-horn> [<http://perma.cc/G9AW-MQD8>] (accessed Feb. 25, 2015)) [hereinafter Press Release, Smuggling Ring Sentenced].

²¹⁹ DEP'T OF JUSTICE, *supra* note 217.

²²⁰ Judgment & Probation/Commitment Order at 1, United States v. Kha, No. CR12-202(B)-CAS (D. Cal. May 15, 2013).

²²¹ Press Release, Smuggling Ring Sentenced, *supra* note 218.

²²² These consequences are mainly focused on the consumers of ivory products, not the ivory traffickers. Because these consequences would not be directly imposed on traffickers of illegal ivory, they would not present much of a deterrence to traffickers.

G. Tax Credits for Legal Ivory

In addition to imposing negative tax consequences on illegal ivory, Congress should also offer tax credits to individuals who relinquish legal ivory. For instance, musical instruments and guns are two goods that may contain legal ivory, but because ivory is not necessary for either guns or musical instruments, those items are replaceable with ivory-free alternatives. Following is a detailed example of a credit that should be offered for musical instruments.

Many decades-old musical instruments—including string, woodwind, brass, and percussion instruments—contain a small amount of ivory.²²³ The bows of string instruments crafted before bans on ivory sale regularly contained ivory to protect the tips of the bows and to hold the bow hair in place.²²⁴ While many of these instruments and bows containing pre-ban ivory are still in use today, currently there is no market for elephant ivory in the musical community.²²⁵ Instrument makers switched to mastodon ivory and synthetics when the ban on elephant ivory was enacted in 1976.²²⁶ To this day, however, musicians continue to use instruments containing pre-ban ivory because replacing the ivory components often risks significant damage to the instruments themselves.²²⁷

The U.S. Fish & Wildlife Service Director's Order 210—issued on February 25, 2014 and revised on May 15, 2014—imposes serious obstacles on musicians who travel internationally with instruments containing legal ivory.²²⁸ Musicians may only import and export instruments containing worked ivory that was legally acquired before February 26, 1976, has not been transferred for financial gain or profit after February 25, 2014, and is accompanied by a valid Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) musical instrument certificate.²²⁹ Musicians with U.S.-issued permits face confusion and delays due to foreign customs officials' un-

²²³ Heidi Waleson, *Saving Elephants and Instruments*, SYMPHONY 58, 61 (2014) (available at http://americanorchestras.org/images/stories/adv_gov_pdf/SYMPHONY-Ivory.pdf [<http://perma.cc/AE6Q-VQDM>] (accessed Feb. 23, 2015)).

²²⁴ *Id.*

²²⁵ *The U.S. Fish and Wildlife Service's Plan to Implement a Ban on the Commercial Trade in Elephant Ivory: Oversight Hearing before the H. Subcomm. on Fisheries, Wildlife, Oceans, and Insular Affairs of the H. Comm. on Natural Res.*, 113th Cong. (2014) [hereinafter *Hearing*] (statement of Arian Sheets, Curator of Stringed Instruments, National Music Museum) (available at http://naturalresources.house.gov/uploadedfiles/tesimony_sheetsfwoia6.24.14.pdf [<http://perma.cc/J5KF-QLGW>] (accessed Mar. 16, 2015)).

²²⁶ Waleson, *supra* note 223, at 61.

²²⁷ *Hearing*, *supra* note 225.

²²⁸ *Id.*

²²⁹ U.S. FISH & WILDLIFE SERV., DIRECTOR'S ORDER NO. 210, ADMINISTRATIVE ACTIONS TO STRENGTHEN U.S. TRADE CONTROLS FOR ELEPHANT IVORY, RHINOCEROS HORN, AND PARTS AND PRODUCTS OF OTHER SPECIES LISTED UNDER THE ENDANGERED SPECIES ACT (ESA) (May 15, 2014) (available at <http://www.fws.gov/policy/do210.pdf> [<http://perma.cc/9UCQ-QSG7>] (accessed Mar. 15, 2015)).

familiarity with the permits.²³⁰ Due to these complications, musicians are currently being advised either not to travel with instruments containing ivory or to have the ivory in their instruments replaced with other materials.²³¹

In order to ease the burden on these musicians, Congress could offer a tax credit to musicians who relinquish their instruments and bows made with ivory. For the tax year the instrument is relinquished, the musician should receive a tax credit for the fair market value of a replacement instrument that does not contain ivory. This incentive will both remove ivory from the market and help alleviate the cost of purchasing a replacement instrument.

Although this credit would benefit musicians, there may be pushback against the idea. First, handmade instruments are unique and no two instruments will produce an identical sound.²³² Second, musicians may have strong emotional attachments to their instruments.²³³ A musician may be unwilling to give up an instrument containing ivory because she likes the sound that instrument produces or because the instrument has sentimental value to her. Third, the instruments relinquished would typically only have minimal amounts of legal ivory²³⁴ and the credit would not further the public policy of deterring the current trade in illegal ivory. Those critical of an ivory-relinquishment tax credit could argue it is better to focus efforts on curtailing trade in illegal ivory rather than wasting energy on small amounts of legal ivory. Although these are valid arguments, a tax credit may still benefit musicians worried about traveling with ivory-containing instruments and may still deter trade by removing some ivory from the marketplace.

A similar credit can be offered for owners of guns containing ivory. Ivory is used for ornamental purposes and in the sights of some firearms.²³⁵ The National Rifle Association (NRA) opposes any action that limits gun owners' ability to possess firearms, and thus believes "the effects of the ivory ban would be *disastrous* for American gun owners and sportsmen."²³⁶ However, the possibility of a gun owner getting a tax credit—which may free up funds for a gun owner to purchase a new, ivory-free gun—may make a strict ivory ban more palatable to the NRA.

²³⁰ See Waleson, *supra* note 223, at 59 (describing two musicians' lengthy encounter with customs officers unfamiliar with instrument passports).

²³¹ *Id.* at 64–65.

²³² *Hearing, supra* note 225.

²³³ Waleson, *supra* note 223, at 65.

²³⁴ See, e.g., *Hearing, supra* note 225 (noting one popular guitar manufacturer used "only a few grams" of ivory per instrument, amounting to "less than 2% by weight of the entire instrument," and that other manufacturers used even less).

²³⁵ *Ivory Ban Fact Sheet*, NRA-ILA, <https://www.nraila.org/articles/20140305/ivory-ban-fact-sheet> [http://perma.cc/9KG4-EEMF] (Mar. 5, 2014) (accessed Mar. 16, 2015).

²³⁶ *Id.* (emphasis added).

IV. CONCLUSION

In conclusion, the poaching crisis must be addressed quickly to prevent the extinction of elephants. While international, U.S., and now state laws exist, these laws have not proven to be enough of a deterrent to ivory traffickers. Imposing tax consequences on the illegal ivory trade is one potential solution to this problem. The threat of additional fines, penalties, and jail time may provide an extra push to disincentivize ivory trafficking. Hopefully these proposals will work to reverse "death and taxes" to the benefit of elephants and to the detriment of traffickers: death to elephants will no longer be certain, while taxes to traffickers will be.

