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Via Certified Mail and Electronic Mail

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Re: Petition for Certification of Mexico pursuant to the Pelly Amendment for Trade in Violation of the Convention on International Trade in Endangered Species

Dear Secretary Pritzker, Secretary Jewell, Dr. Plé, and Director Arroyo,

The Center for Biological Diversity (“the Center”) submits this petition requesting certification of Mexico pursuant to the Pelly Amendment. 22 U.S.C. § 1978. Specifically, the Center seeks certification that Mexico’s failure to stem the growing trade and export of endangered totoaba (*Totoaba macdonaldi*) “diminishes the effectiveness” of the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”),¹ as it simultaneously drives the critically endangered vaquita to extinction. *Id.* § 1978(a)(2). The Center requests that the Secretaries recommend trade sanctions against Mexico for these violations, as contemplated by the Pelly Amendment. *Id.* § 1978(a)(4).²

As described in detail below, the totoaba is a large, critically endangered fish found only in Mexico’s Gulf of California. Because of the totoaba’s endangered status and past overfishing, the totoaba has been listed under Appendix I of CITES since 1976 and thus all international commercial trade in the species is prohibited.³ Yet despite the CITES trade ban – and despite a domestic ban in Mexico on totoaba fishing – totoaba trade in Mexico has surged in recent years in response to

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

² We ask that the Secretaries also consider this request to be a formal petition for agency action, pursuant to the Administrative Procedure Act (“APA”). 5 U.S.C. § 553(e).

³ CITES, at Appendix I; Art. III.

Chinese demand for the fish’s swim bladder. The bladder is used in China to make “buche” soup, which is believed to boost fertility and improve skin. A single bladder reportedly can sell for \$14,000 USD.⁴ Much of the illicit totoaba is trafficked from Mexico through the United States. While both countries have recognized the totoaba trade problem, trade appears to be growing, once again threatening the totoaba’s existence.

Additionally, Mexico’s illegal totoaba trade is also driving another critically endangered species – the vaquita – to extinction. The vaquita is a small porpoise endemic only to Mexico’s Gulf of California. The vaquita has suffered a recent, dramatic decline in numbers, in part due to entanglement in illegal totoaba gillnets. Currently, only 97 vaquita exist, dropping from just 200 vaquita in 2012.⁵ In July 2014, a group of eminent scientists urged Mexico to “immediately” take “drastic steps” to avoid the vaquita’s otherwise imminent extinction, including the use of “all available enforcement tools” to stop illegal totoaba fishing and trade.⁶

Under the Pelly Amendment, the Secretaries of Commerce and Interior are authorized to certify to the President whenever foreign nationals “directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international program” to protect endangered species. 22 U.S.C. § 1978(a)(2). Mexico’s failure to effectively implement and enforce CITES’s ban on totoaba trade violates and “diminishes the effectiveness” of the treaty and threatens to drive *two species* to extinction. *Id.* Accordingly, we ask the Secretaries to certify Mexico under the Pelly Amendment and to recommend that the President prohibit importation of certain Mexican wildlife products until Mexico takes substantive and sustained action to end the illegal harvest and trade of totoaba.

I. Legal Background

A. CITES

Recognizing that “wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems” and that “international co-operation is essential for the protection of [those] species . . . against over-exploitation through international trade,” in 1973, 80 countries agreed to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”).⁷ The treaty came into force in 1975, and now has 180 signatories, including both the United States and Mexico. In the United States, CITES is implemented through the U.S. Endangered Species Act. 16 U.S.C. §§ 1537A; 1538.

Under CITES, over 30,000 species are listed on one of three Appendices, depending on the degree of the species’ imperilment. Species listed on CITES Appendix I are “threatened with extinction” and thus subject to “particularly strict regulation in order not to endanger further their survival.”⁸ Specifically, for Appendix I species, CITES bans any international trade done “for

⁴ CIRVA (International Committee for the Recovery of the Vaquita). 2014. Report of the Fifth Meeting of the International Committee for the Recovery of the Vaquita. Ensenada, Baja California, México, 8-10 July 2014, Unpublished Report, 38pp., at 5, 12.

⁵ *Id.* at 2.

⁶ *Id.* at 5, 15.

⁷ CITES, 27 U.S.T. 1087.

⁸ *Id.* at Art. II(1).

primarily commercial purposes” and further requires both export and import permits for all permissible (generally, scientific) trade in such species.⁹ Accordingly, commercial trade in Appendix I species is banned and *all* trade in Appendix I species is strictly prohibited without a permit. CITES further requires that each Party “shall take appropriate measures to enforce the provisions of [CITES] and to prohibit trade in specimens in violation thereof.”¹⁰

B. The Pelly Amendment

Enacted in 1971 and amended in 1978, the Pelly Amendment to the Fishermen’s Protective Act (“Pelly Amendment”) provides the United States leverage to prompt other nations’ compliance with international agreements through trade restrictions. *See Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 225 (1986). The Pelly Amendment requires that:

When the Secretary of Commerce or the Secretary of the Interior finds that nationals of a foreign country, directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species, the Secretary . . . shall certify such fact to the President.

22 U.S.C. § 1978(a)(2). Upon receiving such a certification, the President is authorized “to prohibit . . . the importation into the United States of any products from the offending country” and must, within 60 days of the Secretary’s certification, notify Congress of his decision. *Id.* § 1978(a)(4), (b). The Pelly Amendment then makes any subsequent importation in violation of the prohibition illegal. *Id.* § 1978(c).

The Pelly Amendment defines an “international program for endangered or threatened species” as “any ban, restriction, regulation, or other measure in effect pursuant to a multilateral agreement which is in force with respect to the United States, the purpose of which is to protect endangered or threatened species of animals.” *Id.* § 1978(h)(4). CITES is indisputably an “international program” that “ban[s]” and “restrict[s]” trade to protect endangered animals, within the meaning of Pelly. *Id.*; *see, e.g., Florsheim Shoe Co. v. United States*, 19 C.I.T. 295, 296 (1995) (discussing CITES certification against Taiwan). The Pelly Amendment also defines “taking” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” an endangered species. 22 U.S.C. § 1978(h)(5).

The Secretary’s decision to certify a country’s “departure” from a treaty requirement may be based only on conservation concerns. *See Japan Whaling Ass’n*, 478 U.S. at 233 (suggesting the Secretary may *not* refuse to certify a treaty violation for a “reason not connected with the aims and conservation goals” of the treaty); *Greenpeace, U.S.A. v. Mosbacher*, 719 F. Supp. 21, 24 (D.D.C. 1989) (noting Supreme Court’s “dictum stating that a decision based on factors other than conservation constitutes an abuse of discretion”). Further, once a certification has been issued, and if the President takes action to prohibit importation from the country, the President may prohibit the import of *any* wildlife product from that country, not just importation of the particular wildlife species covered by the treaty. *See Florsheim Shoe*, 19 C.I.T. at 297 (approving a Pelly-based Presidential Proclamation prohibiting importation of all wildlife products from Taiwan, including elk skin shoes, even though the treaty violation involved endangered tigers and rhinos).

⁹ *Id.* at Art. III(1)-(3).

¹⁰ *Id.* at Art. VIII(1).

II. Factual Background

A. The Critically Imperiled Vaquita and Threats from the Totoaba Fishery

The vaquita (*Phocoena sinus*) is the world's most endangered cetacean. Scientists estimate that, as of July 2014, fewer than 100 vaquita remain – down from 200 in just 2012.¹¹ The species is now “in imminent danger of extinction” from entanglement in Mexican fishing gear, including illegal fishing gear for totoaba.¹²

Sporting conspicuous black patches around its eyes and mouth – sometimes described as make-up gone wrong – the vaquita is the smallest cetacean, measuring just five feet in length. Vaquita are notoriously elusive and difficult to observe, as they avoid boats, rarely jump, and inhabit turbid waters. The species occurs only in an approximately 4,000 km²-area of the northern Gulf of California in Mexico, which is the smallest geographical range of any cetacean.¹³ The vaquita is listed as “critically endangered” by the IUCN, “endangered” under the U.S. Endangered Species Act, and in danger of extinction under Mexican wildlife law.¹⁴ The vaquita is also listed under Appendix I of CITES.¹⁵

The vaquita was only identified as a species in the 1950s but even then, it was already likely in decline due to widespread gillnet use in the Upper Gulf of California.¹⁶ From approximately the 1930s to the 1970s, the vaquita's predominant threat was from entanglement in gillnet gear set for the now-endangered totoaba.¹⁷ Although Mexico banned its totoaba fishery in 1975 and instituted various conservation measures, vaquita continued to become entangled in legal shrimp and finfish gillnets, as well as in illegal totoaba nets.¹⁸

To address the vaquita's continued decline, the Mexican government established the Comité Internacional para la Recuperación de la Vaquita (“CIRVA,” or the Committee of International and National Scientists) in 1997. Following its July 2014 meeting, CIRVA published a startling report, finding that, despite over two decades of conservation action for the vaquita, only 97 individual vaquita remain.¹⁹ The report estimated the vaquita population is dropping precipitously by 18.5%

¹¹ CIRVA (2014), at 2.

¹² *Id.*

¹³ Rojas-Bracho, L., Reeves, R.R., & Jaramillo-Legorreta, A. 2006. Conservation of the vaquita *Phocoena sinus*. *Mammal Rev.* 36:179-216.

¹⁴ Rojas-Bracho, L., Reeves, R.R., Jaramillo-Legorreta, A. & Taylor, B.L. 2008. *Phocoena sinus*. The IUCN Red List of Threatened Species. Version 2014.2. <www.iucnredlist.org>; 50 Fed. Reg. 1056 (Jan. 9, 1985); NOM-059-ECOL, D.O.F. 16 de Mayo 1994.

¹⁵ CITES, at Appendix I.

¹⁶ Rojas-Bracho et al. (2008).

¹⁷ Barlow, J., L. Rojas-Bracho, C. Muñoz-Piña, & S. Mesnick. 2010. Conservation of the vaquita (*Phocoena sinus*) in the northern Gulf of California, Mexico. In: R.Q. Grafton, et al. (eds.), *Handbook of marine fisheries conservation and management*, pp. 205-214. Oxford University Press, New York.

¹⁸ See CIRVA. 2012. Report of the Fourth Meeting of the International Committee for the Recovery of the Vaquita. Ensenada, Baja California, México, 20-23 February 2012, Unpublished Report, 47pp.

¹⁹ CIRVA (2014), at 9.

per year.²⁰ CIRVA warned that the vaquita is now “in imminent danger of extinction” and *will be extinct by 2018* if the bycatch of vaquita in fisheries “is not eliminated immediately.”²¹

The CIRVA report, as well as numerous other scientific reports, identifies entanglement in gillnet gear as the vaquita’s primary threat.²² However, in addition to the threat from ongoing legal gillnet fishing, CIRVA emphasized “[t]he recent increase in the rate of decline [in vaquita] can primarily be attributed to increased illegal gillnet fishing for totoaba.”²³ Because “[t]he fates of the totoaba and the vaquita have been closely linked,” CIRVA recommended that “all available enforcement tools, both within and outside Mexico, be applied to stopping illegal fishing, especially the capture of totoabas and the trade in their products.”²⁴

B. The Imperiled Totoaba and Its Threats

The totoaba or Mexican seabass (*Totoaba macdonaldi*) is a large, schooling marine fish in the drum or croaker family (Sciaenidae) that is found exclusively in the Upper Gulf of California, in a range that overlaps with the vaquita.²⁵ The fish can grow up to 6 feet (2 m) in length and weigh 220 lbs (100 kg). Individuals can live up to 25 years and do not reach sexual maturity until they are six or seven years old.²⁶ Totoaba spawn only once a year in the Colorado River delta, where juvenile fish develop for two years before migrating south into the Gulf of California.²⁷ This life history, including the species’ late maturity and spawning cycle, make it particularly vulnerable to exploitation.

The totoaba is listed under Appendix I of CITES.²⁸ It is also listed as “critically endangered” by the IUCN, “endangered” under the U.S. ESA, and in danger of extinction in Mexico.²⁹ Although the totoaba’s current population status is unknown, it has not fully recovered.³⁰

Historically, the totoaba population was decimated due to direct overfishing,³¹ and a century of dam operations has severely restricted water flow in the Colorado River and thus altered the totoaba’s spawning habitat by increasing salinity and changing circulation patterns.³² Juvenile totoaba

²⁰ *Id.* at 2, 8.

²¹ *Id.* at 2.

²² *Id.*; see also Rojas-Bracho, L. & R.R. Reeves. 2013. Vaquitas and Gillnets: Mexico’s ultimate cetacean conservation challenge. *Endang. Species Res.* 21:77-87 (2013). DOI: 10.3354/esr00501; Barlow et al. (2010), at 208; Rojas-Bracho et al. (2008).

²³ CIRVA (2014), at 3, 10.

²⁴ *Id.* at 10, 15.

²⁵ Cisneros-Mata, M.A., G. Montemayor-López, & M.J. Román-Rodríguez. 1995. Life history and conservation of *Totoaba macdonaldi*, *Conserv. Biol.* 9(4):806-814.

²⁶ *Id.*

²⁷ *Id.*

²⁸ CITES, at Appendix I.

²⁹ Findley, L. 2010. *Totoaba macdonaldi*. The IUCN Red List of Threatened Species. Version 2014.2. <www.iucnredlist.org>; 44 Fed. Reg. 29,478 (May 21, 1979); NOM-059-ECOL, D.O.F. 16 de Mayo 1994.

³⁰ Findley (2010).

³¹ *Id.*; 44 Fed. Reg. at 29,479.

³² CITES AC17, Inf. 6 (2001); Lercari, D. & E.A. Chávez. 2007. Possible causes related to historic stock depletion of the totoaba, *Totoaba macdonaldi* (Perciformes: Sciaenidae), endemic to the Gulf of California.

are also killed as bycatch in the region's shrimp fisheries – estimates from the late 1980s suggest 120,834 juvenile totoaba were killed by shrimp vessels annually.³³ However, as detailed below, a recent resurgence in illegal take and trade in totoaba to feed the Chinese swim bladder market presents a renewed threat to the species' existence.

1. History of the Totoaba Trade

At the beginning of the last century, totoaba were so abundant they could be spear-fished as they schooled.³⁴ A market for totoaba began in the early 1900s after it was discovered that the totoaba's swim bladder resembled the swim bladder of the bahaba, a now-imperiled Chinese fish used for a delicacy soup.³⁵ By the 1920s, the United States also began importing whole totoaba for filets.³⁶ Catch reached its peak in the 1940s at approximately 1,100 metric tons annually.³⁷ Catch then declined, in part due to overfishing, but following institution of protective measures by Mexico, peaked again in 1966.³⁸ The totoaba fishery then plummeted and after reaching an all-time low in 1975, Mexico closed the fishery.³⁹ In 1976, the totoaba was included in Appendix I of CITES, banning the international commercial trade in the species and its bladder.⁴⁰

Despite Mexico's ban on totoaba fishing and CITES' ban on totoaba trade in the mid-1970s, both fishing and trade of totoaba has continued. As noted in Cisneros-Mata (1995), due to "the geographic isolation" of the area, "[p]oaching of adult totoaba in the upper Gulf was a common practice," even after the area's closure.⁴¹ In 1979, an estimated 70 metric tons of totoaba were poached from just one fishing port.⁴² There were reportedly 30 fishermen poaching totoaba in 1985, taking in an estimated 161.7 metric tons, or 6,218 adult totoaba, each year.⁴³ In 1990, the International Whaling Commission ("IWC") Scientific Committee specifically recommended that "further action be taken to stop of the major cause of [vaquita] entanglement by fully enforcing the closure of the totoaba fishery" and that "immediate action be taken to stop the illegal shipment of totoaba . . . across the U.S. border."⁴⁴ Yet poaching continued into the 1990s, when totoaba was still available in some Mexican and U.S. restaurants.⁴⁵

Fisheries Research 86(2007):136-142 (also finding totoaba decline correlated to the Pacific Decadal Oscillation Index).

³³ Cisneros-Mata et al. (1995).

³⁴ CITES AC 17, Inf. 6 (2001).

³⁵ Bahre, C.J., L. Bourillon, & J. Torre. 2000. The Seri and commercial totoaba fishing (1930-1965). JOURNAL OF THE SOUTHWEST. Vol. 42, No. 3 (Autumn 2000).

³⁶ Cisneros-Mata et al. (1995); Gwynn Guilford, *China is Plundering the Planet's Seas*, ATLANTIC (Apr. 30, 2013).

³⁷ 44 Fed. Reg. at 29,479.

³⁸ *Id.*

³⁹ *Id.*; Cisneros-Mata et al. (1995).

⁴⁰ CITES, at Appendix I.

⁴¹ Cisneros-Mata et al. (1995).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ International Whaling Commission Scientific Committee, June 10, 1990. Rep. Intl. Whal. Commn., 42 (1991), at 79.

⁴⁵ Cisneros-Mata et al. (1995).

In 1993, the Biosphere Reserve of the Upper Gulf of California and Delta of the Colorado River was declared to protect both vaquita and totoaba from gillnets.⁴⁶ Mexico claimed that it was “enforcing the closure of all commercial fisheries in the reserve” and “[a]ll ‘totoaba-type nets’” were confiscated.⁴⁷ However, it quickly became apparent that “these official statements did not reflect the true situation in the region.” Instead “[c]ommercial fishing with a variety of gill nets and trawl nets continued without interruption both inside and outside the Biosphere Reserve.”⁴⁸ Scientists have concluded that Mexico’s efforts were “ineffectual” and “half-hearted, at best.”⁴⁹

In 1997, CIRVA was established to address the vaquita’s decline, and in 2005, in response to CIRVA’s recommendations, Mexico established a refuge area for the vaquita, which again, attempted to ban certain gillnets in key vaquita and totoaba fishing areas.⁵⁰ But again, enforcement was lax, as the new “Refuge Area remained essentially unmanaged until 2008,” when a new program was instituted, officially banning all gillnets in the area.⁵¹ And while initially, Mexican enforcement authorities made a “strong effort” to enforce the new ban, “that effort . . . waned,” and the number of boats fishing illegally in the refuge reached 2007 levels by 2011.⁵² While some of the illegal fishing was shrimp gillnetting, Mexico acknowledged that a black market in totoaba existed, due to the demand for swim bladders and the difficulty in distinguishing dried totoaba swim bladders from other dried swim bladders in trade.⁵³

2. Recent Surge in Totoaba Trade

By late 2012, it became obvious that the totoaba trade had grown sharply.⁵⁴ At CIRVA’s 2014 meeting, scientists reported an “increased demand in Chinese markets for the swim bladder,” which triggered a “large increase in illegal fishing pressure” on the totoaba.⁵⁵ Additionally, the totoaba population had begun to slowly increase due to decades of protective measures,⁵⁶ and thus may have become more available to fishermen.

As noted above, the totoaba’s dried swim bladder or “buche” is a highly valued ingredient in Chinese soup, as the bladders are believed to boost fertility and improve the skin.⁵⁷ The dried totoaba bladders are often trafficked from Mexico through the United States to China, where they

⁴⁶ *Id.*

⁴⁷ Rojas-Bracho et al. (2006).

⁴⁸ *Id.*

⁴⁹ Rojas-Bracho et al. (2013).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ CITES AC 17, Inf. 6 (2001).

⁵⁴ CIRVA (2014), at 12.

⁵⁵ *Id.* at 15, 2 (describing the “resurgent” totoaba fishery); *see also* Dongguan Zhang, *China’s demand for swim bladders, gills, and shark fins catastrophic to ocean’s resources*, EPOCH TIMES (May 20, 2013) (noting black market in totoaba bladders is “raging” in China). Available at: <http://www.epochtimes.com/gb/13/5/20/n3874902.htm> (in Chinese) (last visited Sept. 25, 2014).

⁵⁶ CIRVA (2014), at 15.

⁵⁷ *See* CITES AC 17, Inf. 6 (2001); CIRVA (2014), at 5.

reportedly sell for \$5,000 to \$14,000 each.⁵⁸ Reports suggest that a single bowl of buche soup can now fetch \$25,000 in China.⁵⁹ Dubbed “aquatic cocaine,” drug cartels have been implicated the totoaba trade, which was estimated to be worth \$2.25 million in 2013 alone.⁶⁰

In its report, CIRVA noted with particular alarm that “[t]housands of swim bladders are dried and smuggled out of Mexico, often through the United States . . . Fishermen receive up to \$8,500 for each kilogram of totoaba swim bladder, equivalent to half a year’s income from legal fishing activities.”⁶¹ Mexican officials acknowledged that the resurgent “totoaba trade is a serious problem with considerable financial backing,” and that “[n]ot all agencies” in Mexico “are as yet able to deal with this complex illegal fishery and trade problem (e.g. able to quickly identify legal versus illegal fish products).”⁶²

The resurgent totoaba trade is further evidenced by a recent spate of totoaba-related enforcement actions in the United States. For example, between February and April of 2013, U.S. authorities charged seven separate individuals with smuggling totoaba across the border and seized 483 pounds of totoaba bladder, equivalent to roughly 500 fish.⁶³ In one case, U.S. border authorities seized 27 totoaba swim bladders from trafficker Song Shen Zhen. After Mr. Zhen’s release, investigators searched his home in Calexico where they discovered a “Totoaba factory” and seized 214 more bladders.⁶⁴ Agents estimated that if sold into foreign markets, the seized bladders could be worth more than \$3.6 million.

In another recent case, Jason Xie was charged with smuggling 270 totoaba bladders in early 2013. Mr. Xie claimed he ordered the fish from someone in Mexico and that he paid \$1,500-\$1,800 per bladder.⁶⁵ In April 2013, Mexican resident Raquel Castaneda was caught attempting to bring 28 totoaba swim bladders into the United States.⁶⁶

⁵⁸ See News Release: Office of the United States Attorney, Southern District of California, *Massive Trade in Endangered Species Uncovered; U.S. Attorney Charges 7 with Smuggling Swim Bladders of Endangered Fish Worth Millions on Black Market; Officials See Trend* (Apr. 24, 2013). Available at: <https://www.google.com/search?q=MASSIVE+TRADE+IN+ENDANGERED+SPECIES+UNCOVERED&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:en-US:official&client=firefox-a&channel=sb> (last visited Sept. 18, 2014) (estimating price at \$5,000-10,000); Associated Press & Zoe Szathmary, *It’s aquatic cocaine: Mexican smugglers are now selling FISH BLADDERS for thousands of dollars*, DAILYMAIL (Aug. 19, 2014). Available at: <http://www.dailymail.co.uk/news/article-2719960/Its-aquatic-cocaine-Mexican-smugglers-selling-FISH-BLADDERS-used-thousands-dollars.html#ixzz3E5TnwUds> (last visited Sept. 22, 2014) (estimating price at \$7,000-14,000).

⁵⁹ Associated Press & Szathmary (2014).

⁶⁰ *Id.*; Rodrigo Diaz, *Crimen Organizado opera tráfico ilegal de buche de totoaba*, MEXICALIDIGITAL.MX (Aug. 4, 2014). Available at: <http://mexicalidigital.mx/2014/operacion-organizada-traffic-ilegal-de-buche-de-totoaba-19992.html> (last visited Sept. 26, 2014).

⁶¹ CIRVA (2014), at 5.

⁶² *Id.* at 12.

⁶³ News Release, Office of the United States Attorney, Southern District of California (Apr. 24, 2013).

⁶⁴ *Id.*

⁶⁵ *Id.*; see also Kristina Davis, *Smuggler owes \$3M for fish bladders*, U-T SAN DIEGO (Nov. 3, 2013). Available at: <http://www.utsandiego.com/news/2013/nov/03/smuggle-mexico-totoaba-fish-bladder-restitution/> (last visited Sept. 18, 2014).

⁶⁶ News Release, Office of the United States Attorney, Southern District of California (Apr. 24, 2013).

There have also been several recent totoaba busts in Mexico. In July 2014, authorities stopped four individuals carrying a load of totoaba valued between \$35,000 and \$60,000.⁶⁷ In March 2014, Mexican authorities seized 8.2 kilograms of totoaba in San Felipe, Baja California.⁶⁸ And in 2013, authorities busted a Mexican seafood company that was selling totoaba and other endangered species directly to Asia.⁶⁹

Mexico has acknowledged the growing totoaba trade and has indicated it is stepping enforcement.⁷⁰ However, after reviewing the surging totoaba trade and its effects, in July 2014, CIRVA concluded that “[p]ast at-sea enforcement efforts have failed and illegal fishing has increased in recent years throughout the range of the vaquita – especially for . . . the totoaba.”⁷¹ CIRVA specifically recommended that “all available enforcement tools, both within and outside Mexico, be applied to stopping illegal fishing, especially the capture of totoabas and the trade in their parts.”⁷² Further, we note with concern Mexico’s unfortunate history of banning totoaba fishing and implementing various protective measures but ultimately failing to follow through with effective enforcement.⁷³

III. Pursuant to Pelly, the Secretary Should Certify Mexico for Totoaba Trade in Violation of CITES.

Under the Pelly Amendment, when either the Secretary of Commerce or Interior “finds that nationals of a foreign country . . . are engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species, the Secretary . . . shall certify such fact to the President.” 22 U.S.C. § 1978(a)(2). The President may then act to “prohibit . . . the importation into the United States of any products from the offending country.” *Id.* § 1978(a)(4).

Here, Mexican nationals in the Gulf of California are engaging in “taking” and “trade” of endangered totoaba that “diminishes the effectiveness” of CITES. *Id.* As described above, totoaba are listed on Appendix I of CITES and thus international commercial trade in the species is banned and totoaba cannot be exported from Mexico without a permit.⁷⁴ CITES specifically mandates that Mexico “shall . . . enforce” all CITES trade prohibitions.⁷⁵ However, by failing to stem its illegal totoaba fishery and the growing illicit export and trade in the species, Mexico is violating CITES and diminishing the treaty’s effectiveness.

⁶⁷ Organizasion Editorial Mexicana, *Asegura la Profepa cargamento ilegal de Totoaba* (July 21, 2014). Available at: <http://www.oem.com.mx/laprensa/notas/n3473770.htm> (last visited Sept. 22, 2014).

⁶⁸ *Asegura PROFEPA buche de totoaba en BC*, MONITOR UNIVERSITARIO (Mar. 31, 2014). Available at: <http://www.monitoruniversitario.com.mx/generales/asegura-profepa-buche-de-totoaba-en-bc/> (last visited Sept. 25, 2014).

⁶⁹ Elizabeth Vargas, *Exportaba a 1.30 pesos el kilo de productos marinos*, ENSENADA.NET (June 3, 2013). Available at: <http://ensenada.net/noticias/nota.php?id=29691> (last visited Sept. 26, 2014).

⁷⁰ CIRVA (2014), at 12; *see also Profepa fortalece combate contra tráfico y comercio ilícito del pez Totoaba*, SINEMBARGO (Jan. 19, 2014) (describing new enforcement efforts). Available at: <http://www.sinembargo.mx/19-01-2014/878084>; Joint Statement by Mexico and the United States on the Plight of the Vaquita, IWC/65/26 Rev1 (Sept. 17, 2014).

⁷¹ CIRVA (2014), at 2.

⁷² *Id.*

⁷³ *See* Rojas-Bracho et al. (2013) (describing Mexico’s history of enforcement failures).

⁷⁴ CITES, at Art. III(1)-(3).

⁷⁵ *Id.* at Art. VIII.

In addition to directly violating CITES, the continued harvest and trade in “critically endangered” totoaba threatens the totoaba’s existence.⁷⁶ The ongoing totoaba trade also threatens the existence of the vaquita, a CITES Appendix I species that is teetering on the brink of extinction. Because Mexico’s failure to implement and enforce CITES increases the already high likelihood that these endemic populations may be lost forever, Mexico “diminishes the effectiveness” of CITES, a treaty negotiated to protect these species. 22 U.S.C. § 1978(a)(2); *see also Am. Cetacean Soc’y v. Baldrige*, 768 F.2d 426, 439 (D.C. Cir. 1985) (suggesting a nation’s action need not “violate” a treaty but may still “diminish the effectiveness” of the agreement), overruled on other grounds by *Japan Whaling Ass’n*, 478 U.S. 221.

Accordingly, the Center petitions the Secretaries of Commerce and Interior to certify that Mexico’s failure to effectively prohibit fishing, trade, and export of totoaba “diminishes the effectiveness” of CITES, pursuant to the Pelly Amendment. 22 U.S.C. § 1978(a)(2). The Center further requests the Secretaries recommend that the President prohibit importation of Mexican wildlife products into the United States until Mexico effectively bans totoaba fishing, trade, and export. *Id.* § 1978(a)(4). The United States has a duty to influence Mexico to stop the illegal totoaba fishing and trade to preserve any chance the totoaba and the vaquita have for a future.

Please contact us if you have any questions, would like more information, or if there is anyway the Center can assist you in acting upon this Petition. As required by the Pelly Amendment, we expect the Secretaries will act “promptly” in investigating this issue and determining whether to certify Mexico. *Id.* § 1978(a)(3). This requirement has special urgency here, where both the totoaba and the vaquita’s survival depend on immediate conservation action.

Sincerely,



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⁷⁶ Rojas-Bracho et al. (2008).

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