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The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate over Sustainable Use

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COMMENT

**The Convention on International Trade in
Endangered Species of Wild Fauna
and Flora (CITES) and the Debate
Over Sustainable Use**

JOHN L. GARRISON*

In the twenty years that the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) has been in existence, Parties to the Convention continue to debate the issue of the inherent tension between conservation and trade. This debate has been further complicated by the advent of "sustainable use." At the 1992 Meeting of the Conference of the Parties (held in Kyoto, Japan), a select group of countries challenged, under the guise of sustainable use, the Convention's method for categorizing species according to the relative risks of extinction they face (the Berne Criteria). Parties charged that under the Berne

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Criteria, species that could withstand international trade were erroneously listed as endangered. Although unsuccessful in their attempts to modify the Berne Criteria, sustainable use proponents succeeded in continuing the debate such that the Berne Criteria will again be reviewed at the November 1994 Meeting of the Conference of the Parties to be held in Florida. This comment analyzes the debate over sustainable use of flora and fauna within CITES and addresses select resolutions adopted by the Parties to provide for the sustainable use of species that are endangered or threatened. The comment also focuses on the treatment of the African elephant under CITES and also examines the crocodilian trade as an example of the successes and failures of sustainable use.

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I. Introduction

Many species and their habitats are diminishing at an incredible rate due to human consumption and habitat loss. Now, more than ever, international cooperation is needed to protect these species from extinction. However, the need for species and habitat conservation conflicts at times with the need for economic development, especially in those countries where international trade in fauna and flora serves as a vital source of income. One step taken to address this tension between conservation and trade is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),¹ currently an agreement between 120 member states.² However, since its inception in 1973, the purpose of CITES remains unsettled. After decades of rampant wildlife trade caused the extinction of numerous species and threatened many more, CITES was drafted based on the premise that "international cooperation is essential for the protection of certain species of wild fauna and flora against

1. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243, [hereinafter CITES]. CITES is not the first international agreement on wildlife protection. The Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, Oct. 12, 1940, 56 Stat. 1354, was the first international agreement which advocated both the protection of commercially valuable wildlife and the conservation of all threatened species. See SARAH FITZGERALD, *INTERNATIONAL WILDLIFE TRADE: WHOSE BUSINESS IS IT?* 11 (1990); SIMON LYSTER, *INTERNATIONAL WILDLIFE LAW* 239 (1985).

2. Bill Tarrant, *The Swiftlet Birds' Nests Get Saved From the Dinner Table*, CHI. TRIB., Dec. 2, 1993, at C7.

over-exploitation through international trade.”³ In using the words “over-exploitation,” CITES recognizes that too much international trade can be detrimental to a species. However, the CITES language indicates that some “exploitation” will be tolerated.

Thus, CITES seeks to balance the tension between the needs for conservation and trade of these species by the Parties to the Convention (Parties). However, the question remains: Where does or should this balance lie? “Is CITES designed to protect species or is it designed to promote controlled trade that is not detrimental?”⁴ If the answer is the latter, a second question follows: When is international trade detrimental? CITES does not clearly answer these questions.

Diverging ideologies and economic interests exist between developed and underdeveloped countries, range states and non-range states,⁵ and government and non-governmental organizations (NGOs).⁶ These differing interests lead inevitably to differing views over how CITES should be interpreted and what its primary purpose should be.⁷ Thus some view CITES as “an international endangered species list, a trade agreement like any other, the world’s premier conservation treaty or, as is quite often the case, an endless stream of costly and time-consuming paperwork.”⁸

3. CITES, *supra* note 1, pmb1. (emphasis added).

4. Interview with Dorene Bolze, Policy Analyst, The Wildlife Conservation Society, in Bronx, New York (Feb. 11, 1993).

5. Range states are generally those states in which a species lives or occupies. However, CITES has yet to formally define what a range state is. Telephone Interview with Dr. Ronald I. Orenstein, Canadian attorney and member of the Species Survival Network (May 16, 1994). The Species Survival Network is made up of North American environmental conservation organizations.

6. Absent objection by at least one-third of the Parties present, NGOs may attend and participate at meetings of the Conference of the Parties. See CITES, *supra* note 1, art. XI, para. 7(b).

7. AMIE BRAUTIGAM, CITES: A CONSERVATION TOOL iii (1991) (copies of the booklet may be obtained by contacting IUCN/SSC Trade Specialist Group, 1725 DeSales St., NW, Suite 500, Washington, D.C. 20036). The introduction points out that “[w]hile the treaty’s diverse constituency inevitably accounts for [a] broad range of viewpoints, there is little doubt that some of the debate and, at times, antagonism is the result of confusion as to the treaty’s intent and operations.” *Id.*

8. *Id.*

CITES classifies species⁹ of flora and fauna by placing them in lists, called appendices, according to how endangered each species is. Those "threatened with extinction" are listed in Appendix I and commercial trade in those species is essentially prohibited;¹⁰ those that are not as threatened are placed in Appendix II and limited commercial trade in these species is permitted.¹¹ Appendix III pertains to species regulated by a party within its borders and "require[s] the cooperation of other parties in the control of trade."¹²

This classification system is the center of the CITES controversy. There is considerable disagreement as to how species are categorized, when commercial trade should be permitted, and who should bear the burden of proof for changing a species' categorization. Currently, species are listed and/or removed from the appendices according to the Berne Criteria, a listing of biological and trade factors agreed to at the First Meeting of the Conference of the Parties (held in Berne, Switzerland).¹³ However, their continued applicability has been severely questioned and the advent of the theory of sustainable use¹⁴ of fauna and flora further complicates

9. "Species' means any species, subspecies, or geographically separate population." CITES, *supra* note 1, art. I, para. a. This definition is very important. One normally assumes that the word species applies to the "entire species" as a whole; however, it does not. This classification scheme allows different populations of species to be treated and protected differently. The issue of split-listing, as it is referred to, is discussed later in this comment in greater detail. See generally *infra*, Section V.

10. CITES, *supra* note 1, art. II, para. 1.

11. *Id.* art. II, para. 2.

12. *Id.* art. II, para. 3. "Appendix III shall include all species which any Party identified as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the cooperation of other parties in the control of trade." *Id.*

13. *Criteria for the Addition of Species and Other Taxa to Appendices I and II and for the Transfer of Species and Other Taxa from Appendix II to Appendix I*, CITES, 1st mtg., Conf. 1.1 (Berne, 1976) in BRAUTIGAM, *supra* note 7, at 44-45 [hereinafter Conf. 1.1]; *Criteria for the Deletion of Species and Other Taxa from Appendix I and Appendix II*, CITES, 1st mtg., Conf. 1.2 (Berne, 1976) in BRAUTIGAM, *supra* note 7, at 46-47 [hereinafter Conf. 1.2]. Although Conf. 1.1 and Conf. 1.2 are separate resolutions, with Conf. 1.1 pertaining to the addition and transfer of species and other taxa and Conf. 1.2 to the deleting of species and other taxa, the "Berne Criteria" refer to both resolutions.

14. Sustainable use has been defined as the "use of a population or ecosys-

the debate.

During the Eighth Meeting of the Conference of the Parties (held in Kyoto, Japan), Botswana, Malawi, Namibia, Zambia and Zimbabwe introduced a series of resolutions (the Zimbabwe Resolutions) that, among other things, sought to replace the Berne Criteria: these proposals promoted sustainable use of wildlife as a viable means of conservation and economic development, challenging the basic principles upon which CITES was founded.¹⁵

The Zimbabwe Resolutions did not receive wide approval by the Parties; most were either withdrawn by their sponsors in committee or were redrafted into less controversial resolutions. However, the authors of the Zimbabwe Resolutions did achieve their goal of promoting debate over the continued use of the Berne Criteria.¹⁶ The Parties agreed that the Berne Criteria needed review, and a special committee was formed to devise new listing criteria to be presented at the Ninth Meeting of the Conference of the Parties (to be held in Florida in November 1994).¹⁷

This comment explores the conflicting views over the purpose of CITES, the inherent conflict between trade and conservation, and the role of sustainable use of fauna and flora within the CITES framework. CITES text and subsequent resolutions fully support the concept of sustainable use

tem at a rate within its capacity for renewal and in a manner compatible with conservation of the diversity and long term viability of the resource and its supporting ecosystems." IUCN/SSC Specialist Group on Sustainable Use of Wild Species, Criteria and Requirements for Sustainable Use of Wild Species, Proposed Policy, Second Draft, para. 13, (July 15, 1992) (unpublished document available from IUCN) [hereinafter IUCN/SSC Draft Sustainable Use Policy].

15. See generally *infra* Section V. Following the Convention, one commentator wrote that "the conservation rift between anti-trade interests and sustainable-use advocates appeared wider than ever." See Ginette Hemley, *CITES 1992: Endangered Treaty?*, TRAFFIC (U.S.A.), Aug. 1992 at 1 [hereinafter, Hemley, *Endangered Treaty*].

16. While the Parties in Kyoto recognized that trade based on sustainable use could be beneficial to wildlife, they refused to adopt a *universal criteria* for categorizing species that failed to take into account the potential detrimental effects of international trade. *Recognition of the Benefits of Trade in Wildlife*, CITES, 8th mtg., Conf. 8.3 (Kyoto, 1992) [hereinafter Conf. 8.3].

17. *Development of New Criteria for Amendment to the Appendices*, CITES, 8th mtg., Conf. 8.20 (Kyoto, 1992) [hereinafter Conf. 8.20].

but resolutions to CITES regarding the amendments to Appendix I or II rightfully treat international commercial trade of fauna and flora as suspect, requiring a high standard be met to assure that trade is conducted in a sustainable manner. If sustainable use of flora and fauna is to function under the CITES system, the Parties must improve their management practices and Convention enforcement. The prospects for combating illegal trade in flora and fauna seem highly uncertain given the tremendous economic pressures driving trade and the lack of funding and political will at a national and international level to improve CITES implementation and enforcement. Given the inability and at times unwillingness of the Parties to implement and enforce CITES, sustainable commercial international trade of fauna and flora, even with high standards, will remain an elusive goal. The Parties will have few options but to ban the international trade of some species to ensure their survival.

This comment is divided into five main parts. Section II analyzes CITES' text, examines the requirements and the burden of proof required for including, transferring or deleting a species in or from CITES' Appendix I or Appendix II (the Berne Criteria),¹⁸ and the Convention's acceptance of the "precautionary principle." Section III provides a brief overview of the concept of sustainable use, its means as a conservation tool and the difficulties at arriving at a definition acceptable to all.

Finally, section IV addresses subsequent CITES resolutions that modify and create exceptions to the Berne Criteria. The willingness of the Parties to allow for the commercial sustainable use of species listed in Appendix I and their flexibility in addressing the inherent conflict between trade and conservation are demonstrated. Section V analyzes the Zimbabwe Resolutions submitted at the 1992 Conference of the Parties in Kyoto, Japan and their attempt to amend CITES in the name of sustainable use. The numerous conflicts between the resolutions and CITES and the assumptions upon which the proposed resolutions were based are

18. Conf. 1.1, *supra* note 13, at 44-45; Conf. 1.2, *supra* note 13, at 46-47.

highlighted. This section also reviews the debate over down-listing select populations of the African elephant and the different factors considered by the Parties when determining whether to split-list species between two different appendices.

Section VI looks at the future of sustainable use of fauna and flora within CITES and explores some problems encountered in its implementation, particularly in a commercial international trade context. The requirements necessary to implement sustainable use — accurate data and strong trade controls are examined — and some of its limitations as a conservation tool are revealed.

II. A Description of CITES and Its Principles

A. The Convention

CITES' principal function is to protect endangered "species of wild fauna and flora against over-exploitation through international trade."¹⁹ CITES recognizes "that wild flora and fauna in their *many beautiful and varied forms* are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come."²⁰ While CITES addresses only international fauna and flora trade, it acknowledges that wild fauna and flora possess "aesthetic, scientific, cultural, recreational and economic" values.²¹ Although the value most often given species in international commercial trade is economic, CITES does not favor one particular value over another.²² Species which may be affected by international trade are assigned by the Parties to one of three appendices ranked according to the threat to each species²³ and are subject to an import and export permit system.²⁴

19. CITES, *supra* note 1, pmb1.

20. *Id.* (emphasis added).

21. *Id.*

22. *Id.*

23. *Id.* art. II.; See, e.g., William C. Burns, *CITES and the Regulation of International Trade in Endangered Species of Flora: A Critical Appraisal*, 8 DICK. J. INT'L L. 203, 208-10 (1990).

24. See generally Laura H. Kosloff and Mark C. Trexler, *The Convention on*

Species "threatened with extinction which are or may be affected by trade" are listed in Appendix I and may be traded internationally only in exceptional circumstances.²⁵ Appendix I species may only be traded for *non-commercial purposes* and only if both the importing and exporting countries issue permits indicating that the transaction will "not [be] detrimental to the survival of the species involved" and the shipment (if carrying live specimens) will be conducted in a manner that will not result in injury or cruel treatment.²⁶

Appendix II lists "all species which although not necessarily now threatened with extinction *may become so* unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival."²⁷ Unlike Appendix I, Appendix II species may be traded for commercial purposes if the export country provides a permit indicating that (1) the species was obtained legally and (2) its "export will not be detrimental to the survival of that species."²⁸ To ensure the effective control of threatened species that might be undermined by the trade in look-alike species, species which are similar in appearance to other threatened species may also be placed in Appendix II, regardless of whether the look-alike species is in danger.²⁹ Appendix III pertains to species regulated by a party within its

International Trade in Endangered Species: Enforcement Theory and Practice in the United States, 5 B.U. INT'L L.J. 327 (1987).

25. CITES, *supra* note 1, art. II, para. 1. Thus, even if a threatened species is not subject to "over-exploitation through international trade," it may still be protected by Appendix I if it "may be affected by trade." *Id.* pmb., art. II, para. 1.

26. *Id.* art. III, paras. 3(a), (b), (c). See DORENE BOLZE, WILDLIFE CONSERVATION INTERNATIONAL, THE WILD BIRD TRADE: WHEN A BIRD IN THE HAND MEANS NONE IN THE BUSH, 10 (1992). According to the Policy Report by Wildlife Conservation International (WCI), at least sixty percent of birds captured in the wild for legal trade die before reaching their final destination. *Id.* at 8.

27. CITES, *supra* note 1, art. II, para. 2(a) (emphasis added). Article I defined "specimen" as "any animal or plant, whether alive or dead . . . [and] any readily recognizable part or derivative thereof." *Id.* art. I, paras. (b)(i), (ii).

28. *Id.* art. IV, para. 2(a).

29. *Id.* art. II, para. 2(b). Appendix II shall include: "(b) other species which must be subject to regulation in order that trade in specimens of certain species referred to in sub-paragraph (a) of this paragraph may be brought under effective control." *Id.*

borders and requires "the cooperation of other parties in the control of trade."³⁰ The Parties may move a species from one appendix to another through adoption of an amendment by a two-thirds majority vote of the Parties present and voting at the bi-annual Conference.³¹

Since CITES does not possess any regulatory powers of its own, the Parties are responsible for passing national laws and regulations implementing CITES' provisions and for ensuring that it is enforced.³² Each Party must establish Management and Scientific Authorities to grant and monitor export and re-export permits and ensure that exports are not "detrimental to the survival" of a species.³³ In theory, the

30. *Id.* art. II, para. 3.

31. *Id.* art. XV, para. 2.

32. CITES, *supra* note 1, art. VIII.

1. The Parties shall take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof. These shall include measures:

- (a) to penalize trade in, or possession of, such specimens, or both; and
- (b) to provide for the confiscation or return to the State of export of such specimens.

Id. art. VIII, para. 1. In addition, CITES' preamble recognizes "that peoples and States are and should be the best protectors of their own wild fauna and flora." *Id.* pmb1.

33. *Id.* art. III, para. 2(a). The duties and powers of the Management and Scientific Authorities are outlined in Articles III through IX. Article VIII sets forth the measures to be taken by the Parties to enforce the Convention. Parties may "penalize" those involved in illegal trade and confiscate any illegal specimens. *Id.* art. VIII, paras. 1(a), (b). Live specimens confiscated by a State must be returned to the State of export with notice and at its expense. *Id.* art. VIII, paras. 4(a), (b). In addition, the Parties must "maintain records of trade in specimens of species included in Appendices I, II, and III," *Id.* art. VIII, para. 6, and submit annual and bi-annual reports to the CITES Secretariat documenting trade information and efforts taken to effectively enforce CITES' provisions. *Id.* art. VIII, para. 7. If one of the Parties fails to meet its obligations, the Secretariat may recommend to the Parties that some form of remedial action be taken. *Id.* art. XII, para. 2(h).

"The functions of the Secretariat shall be: . . . to make recommendations for the implementation of the aims and provisions of the present Convention." *Id.* Appointed by the United Nations Environmental Programme, the Secretariat is a central figure uniting the Parties involved in the continuous CITES debates. *Id.* art. XII, para. 2. The Secretariat arranges for the meetings of the Parties and studies and prepares the Parties' reports, highlighting the pertinent CITES matters. *Id.* Furthermore, the Secretariat publishes and distributes the appendices editions. *Id.* art. XVII, para. 2(f). The Secretariat also accepts pro-

Scientific Authority plays an important role in implementing CITES. It must monitor export permits and determine whether the export of a "species should be limited in order to maintain that species throughout its range at a level consistent with its role in the ecosystems in which it occurs and well above the level at which that species might become eligible for inclusion in Appendix I."³⁴

B. The Berne Criteria & the "Precautionary Principle"

Although CITES was ratified in 1975, the criteria used to list in or remove a species from Appendix I or II (the Berne Criteria) were not adopted until 1976 at the First Meeting of the Conference of the Parties (held in Berne, Switzerland).³⁵ In determining the appendix in which a species should be listed, neither CITES nor the Berne Criteria provide any concrete gauge on which to base a decision.³⁶ For inclusion in Appendix I, for example, CITES and the Berne Criteria (Conf. 1.1) require that a species be "*threatened with extinction*,"³⁷ but the words "threatened" and "extinction" are not defined. Disagreement over what actually constitutes "threatened with extinction" under CITES is a source of friction among the Parties.

In an attempt to define or at least categorize "threatened with extinction" the Berne Criteria use a combination of bio-

posed amendments which he or she later communicates to the other Parties. *Id.* art. XV, para. 1(a).

34. *Id.* art. IV, para. 3.

35. DAVID S. FAVRE, INTERNATIONAL TRADE IN ENDANGERED SPECIES 32 (1989) [hereinafter FAVRE, INTERNATIONAL TRADE]. See Conf. 1.1, *supra* note 13, at 44-45; Conf. 1.2, *supra* note 13, at 46-47.

36. FAVRE, INTERNATIONAL TRADE, *supra* note 35, at 32; Letter from Dr. Ronald I. Orenstein, International Wildlife Coalition, on behalf of the NGO Working Group on CITES Revision Criteria, to Dr. John G. Robinson, Director, Wildlife Conservation International (Oct. 2, 1992) and accompanying report; Dr. Ronald I. Orenstein et al., CITES and the Revision of the Berne Criteria (Oct. 1992) (unpublished material on file with the *Pace Environmental Law Review*) [hereinafter Orenstein, Revision of the Berne Criteria].

37. CITES, *supra* note 1, art. II, para. 1; Conf. 1.1, *supra* note 13, at 44 (emphasis added). Determining that a species is threatened with extinction depends on the rate of species' decline and the potential for its extinction. Feb. 11, 1993 Bolze Interview, *supra* note 4.

logical³⁸ and trade factors³⁹ as guidelines for determining in which appendix a species should be listed.⁴⁰ This system allows for flexibility in listing⁴¹ and permits the Conference of the Parties to consider the unique factors affecting each species.⁴² Some believe that "listing decisions were clearly intended by the signers to include a political, or at least a diplomatic, component. The listing process was never intended to be an 'impartial' or strictly 'scientific' one."⁴³ However, this flexibility also results in greater controversy

38. Conf. 1.1, *supra* note 13, at 44. The following factors should be considered in determining the biological status of species and other taxa for purposes of adding or transferring the species or taxa to Appendix I:

Information of any of the following types should be required in order of preference: a) scientific reports on the population size or geographic range of the species over a number of years b) scientific reports on the population size or geographic range of species based on single surveys c) reports by reliable observers other than scientists on population size or geographic range of the species over a number of years or d) reports from various sources on habitat destruction, heavy trade or other potential causes of extinction. Genera should be listed if most of their species are threatened with extinction and if identification of individual species within the genus is difficult.

Id.

39. *Id.* The following factors should be considered in determining the trade status of species and other taxa for purposes of adding or transferring the species or taxa to Appendix I:

Particular attention should be given to any species for which such trade might, over a period of time, involve numbers of specimens constituting a significant portion of the total population size necessary for the continued survival of the species. The biological status and trade status of a species are obviously related. When biological data show a species to be declining seriously, there need only be a probability of trade. When trade is known to occur, information on the biological status need not be as complete. This principle especially applies to groups of related species, where trade can readily shift from one species that is well-known to another for which there is little biological information.

Id.

40. Orenstein, Revision of the Berne Criteria, *supra* note 36, at 2. "The Berne Criteria are not definitional criteria at all; their main function is to specify what sort of information should guide the parties in making their decisions."

Id. at 2.

41. FAVRE, INTERNATIONAL TRADE, *supra* note 35, at 34.

42. Orenstein, Revision of the Berne Criteria, *supra* note 36, at 2, 9.

43. *Id.* at 2. Dr. Orenstein views this as a strength. He questions, for example, whether "biological criteria could have been used, in the mid 1960's, to

because the process is inherently subjective and ultimately relies on a Party's values, interests and policies in reaching a decision.

Some consider the process for removal of a species from Appendix I to be even more controversial because when deleting or transferring a species from Appendix I, the Berne Criteria require that a Party meet a heavier burden of scientific proof that a species can withstand a lesser degree of protection than is needed to justify listing the species in Appendix I initially.⁴⁴ Conf. 1.2 explains why greater caution is needed when deleting a species or taxa from Appendix I or Appendix II or when transferring a species or taxa from Appendix I to II:

The addition to and deletion from the appendices [are] different problems requiring different approaches by the Conference. If an error is made by the Conference by unnecessarily placing a plant or animal on an appendix, the result is the imposition of a documentation requirement. If however, it errs in prematurely removing a plant or animal from protection, or lowering the level of protection afforded, the result can be the permanent loss of the resource. *If it errs it should be therefore toward protection of the resource.*⁴⁵

That the Berne Criteria view trade as suspect is further

predict that the black rhinoceros was in greater danger of extinction than the white rhinoceros." *Id.* at 9.

44. Conf. 1.2, *supra* note 13, at 46 states:

Criteria for deletion, or transfer from Appendix I to Appendix II, should require positive scientific evidence that the plant or animal can withstand the exploitation resulting from the removal of protection. This evidence must transcend informal or lay evidence of changing biological status and any evidence of commercial trade which may have been sufficient to require the animal or plant to be placed on an appendix initially. Such evidence should include at least a well documented population survey, an indication of the population trend of the species, showing recovery sufficient to justify deletion, and an analysis of the potential for commercial trade in the species of population.

Id.; See also David S. Favre, *Tension Points Within the Language of the CITES Treaty*, 5 B.U. INT'L L.J. 247, 253 (1987) [hereinafter Favre, *Tension Points*].

45. Conf. 1.2, *supra* note 13, at 46 (emphasis added).

evidenced by the fact that when adding a species to Appendix I the biological status of the species "need not be as complete" if "trade is known to occur."⁴⁶ However, the biological status required for removing a species from Appendix I must be supported by "positive scientific evidence that the plant or animal can withstand the exploitation"⁴⁷ This higher standard for removing species from appendices⁴⁸ is an example of the "precautionary principle," which is also exhibited in the Convention preamble.⁴⁹

According to David Favre, professor at Detroit College of Law and a CITES specialist, "[t]he precautionary principle represents the realization that human activities impacting the natural environment often have negative consequences which can not be fully predictable or provable in advance of action."⁵⁰ In its application "the precautionary principle suggests that an action should not be undertaken if it poses an unknown risk, if not a certainty, of harm."⁵¹ The precautionary principle places the burden of proof on those wishing to undertake an action to prove that it will not harm the environment.⁵²

This approach has been highly controversial. Critics of the Berne Criteria contend that "CITES has become a vehicle, not for regulating the wildlife trade, but for stopping the use of wildlife altogether."⁵³ Both range states and consumer states which rely on the commercial trade of fauna or flora have vested economic interests in seeing a species removed from Appendix I so that they may continue to benefit from its commercial trade. Logically, those with commercial trade interests will have a different view of when a species is or con-

46. Conf. 1.1, *supra* note 13, at 44.

47. Conf. 1.2, *supra* note 13, at 46.

48. *Id.*

49. CITES, *supra* note 1, pmb.; Orenstein, Revision of the Berne Criteria, *supra* note 36, at 4.

50. David S. Favre, A Precautionary Tale 6 (Sept. 18, 1993) (unpublished document on file at the *Pace Environmental Law Review*) [hereinafter, Favre, Precautionary Tale].

51. *Id.* at 7.

52. *Id.*

53. Orenstein, Revision of the Berne Criteria, *supra* note 36, at 5.

tinues to be "threatened with extinction," than those that rely upon a species for its non-consumptive use (eco-tourism, for example).

The number of species added to CITES appendices or uplisted from one appendix to another has exceeded the number of species removed or downlisted.⁵⁴ While some may hold this as proof that CITES is an obstruction to commercial wildlife use, it may be that this result "has far more to do with an increase in wildlife trade affecting many more species and an increase in our knowledge of the effects of that trade, than to the structure of the Berne Criteria."⁵⁵

III. Understanding the Debate Over Sustainable Use

"Sustainability" has become a household word among the environmental and development community. Many have articulated the need for sustainable development and use of natural resources.⁵⁶ Yet reference to "sustainable use" is sometimes made without a full understanding of its true

54. *Id.* at 4.

55. *Id.* The Parties later recognized that many initial species listings in appendices occurred "with little or no information," *Special Criteria for the Deletion of Species and Other Taxa Included in Appendix I or II Without Application of the Berne Criteria for Addition*, CITES, 2d mtg., Conf. 2.23 (San José, 1979) in BRAUTIGAM, *supra* note 7, at 62 [hereinafter Conf. 2.23], without regard to the Berne Criteria and many countries of origin were not given an opportunity to comment on the listing of species. FAVRE, INTERNATIONAL TRADE, *supra* note 35, at 49. Since some species were listed with "less than the level of proof required," Parties felt it was unfair to subject these species to the Berne Criteria. *Id.* at 48-49; Conf. 2.23 *supra* this note, at 62.

In an attempt to ease the stringent downlisting requirements while maintaining scientific validity, the Parties approved separate delisting criteria for all species listed "during or before the first meeting of the Conference of the Parties . . ." Conf. 2.23 *supra* this note, at 62. Instead of meeting the scientific requirements of the Berne Criteria, the Parties need only show that "a careful review of all available information" indicates that the species does not warrant its retention in the appendix. *Id.* at 62-63. The Parties still must vote on the downlisting, removal or addition of the species. CITES, *supra* note 1, art. XI, para. 3(b) (Parties may "consider and adopt amendments to Appendices I and II in accordance with Article XV."). Factors such as enforcement and the effect of international trade must still be considered. *See, e.g.*, Conf. 1.1, *supra* note 13, at 44; Conf. 1.2, *supra* note 13, at 46.

56. *See, e.g.*, IUCN/SSC Draft Sustainable Use Policy, *supra* note 14, para. 11.

meaning, partly because its definition is not entirely settled. In theory, sustainable use is not overly controversial: Natural resources should be used "at a rate within their capacity for renewal."⁵⁷ Over the past 30 years the understanding of sustainable use has changed.⁵⁸ As IUCN notes:

In the days when 'maximum sustainable yield' was the objective of fisheries and game management, it was considered appropriate for harvest levels to be set to provide the highest yield of the desired product indefinitely. The impact of such harvest levels on the genetic diversity of the harvested population, on other species or on associated ecosystems was generally ignored. This is no longer considered acceptable practice.⁵⁹

The controversy over sustainable use lies primarily with its application and its use as a conservation tool. The debate over sustainable use of fauna and flora as a means of conservation focuses largely on three issues: (1) which uses will further conservation,⁶⁰ (2) is a particular use sustainable, and (3) "who should bear the burden of proof in the absence of full information about a species."⁶¹

57. John G. Robinson, *The Limits to Caring: Sustainable Living and the Loss of Biodiversity*, CONSERVATION BIOLOGY, Mar. 1993, at 20, 23. The requirement for ecological sustainability according to Robinson "is that harvest from the population must not exceed the potential yield. Yield is total production subtracting natural mortality." *Id.*

58. IUCN/SSC Draft Sustainable Use Policy, *supra* note 14, para. 12.

59. *Id.*

60. John G. Robinson & Kent H. Redford, *The Use and Conservation of Wildlife*, in NEOTROPICAL WILDLIFE USE AND CONSERVATION 3 (John G. Robinson & Kent H. Redford eds., 1991).

61. Favre, Precautionary Tale, *supra* note 50, at 11. In a special report on Using Wildlife Wisely, IUCN posed the following questions regarding the sustainable use of wildlife:

1. Is wildlife unitization ethically justifiable?
2. Is wildlife use really compatible with conservation?
3. Can wildlife use projects be justified if they compete with traditional activities like farming?
4. What makes a sustainable use project successful?
5. What standards should IUCN apply when setting up a project?

Steve Edwards, *Sustainable Wildlife Use*, IUCN BULLETIN, Dec. 1990, at 13.

A. Valuing Species

Sustainable use as a conservation tool centers around ascribing value to species.⁶² Robinson and Redford, editors of the book *Neotropical Wildlife Use and Conservation*, contend “that unless wildlife has some use to people, then wildlife will not be valued by people. If wildlife has no value, then wildlife and its habitat will be destroyed to make way for other land uses. . . .”⁶³

While we tend to “equate value with use, . . . not all value can be measured using economic indices.”⁶⁴ People may value species for “commercial, recreational, scientific, aesthetic, or spiritual reasons.”⁶⁵ Recognizing (as does CITES) that fauna and flora possess many different values, IUCN lists three different approaches to “determining the value of biological resources:”⁶⁶

[1] assessing the value of the nature’s products — such as firewood, fodder, and game meat — that are consumed directly, without passing through a market (“consumptive use value”);

[2] assessing the value of products which are commercially harvested, such as game meat sold in a market, tim-

62. See Favre, *Precautionary Tale*, *supra* note 50.

63. Robinson & Redford, *supra* note 60, at 3. However, Favre disputes the notion “that human domination of all the species on earth is ethically acceptable.” Favre, *Precautionary Tale*, *supra* note 50, at 12.

Even if a use is sustainable, I do not accept the premise that the highest use of wildlife is as commodities for human use. Wildlife are not commercial products of human enterprise [sic], but are our neighbors on this incredible diverse, but ultimately limited planet. There is an ethical perspective that ought to guide human decisions in this very important area of human actions. We are sharing the earth with millions of other creatures. Just because we have the power to consume and destroy millions of animals [and plants] does not mean that it is ethically justifiable. All living things have an interest in continuing their natural life. Our management decisions about human activities should seek the maximum protection for our coinhabitants of the planet.

Id.

64. Robinson & Redford, *supra* note 60, at 4.

65. *Id.* at 3.

66. Jeffrey A. McNeely, *What Value of Wildlife?*, IUCN BULLETIN, Dec. 1990, at 4.

ber, fish, ivory, and medicinal plants ("productive use value");

[3] and assessing indirect values of ecosystem functions, such as watershed protection, photosynthesis, regulation of climate, and production of soil ("non-consumptive use value"), along with the intangible values of keeping operations open for the future and simply knowing that certain species exist ("option value" and "existence value", respectively).⁶⁷

Thus, the value that people assign fauna and flora may be "productive," "consumptive," or "non-consumptive,"⁶⁸ and is not limited to just economic value. However, the value most often assigned in international trade is economic and some sustainable use advocates argue that this is necessary to assure a species' conservation. Critics of contemporary conservation measures argue that efforts by nations to halt the loss of wildlife and biodiversity through the use of "trade restrictions" have had at best mixed results.⁶⁹

[I]f property rights and incentives for private sector management and maintenance of species and their habitat are established, then trade in wild species, either wild or captive reared, can contribute to conservation. If the wildlife and habitat have a marketable value, landowners or lessees vested with enforceable property rights have an incentive to nurture and protect these resources.⁷⁰

67. *Id.*

68. *Id.*

69. See Jon H. Goldstein, *The Prospects For Using Market Incentives to Conserve Biological Diversity*, 21 ENVTL. L. REP. 985 (1991). Mr. Goldstein is an Economist at the Office of Program Analysis, United States Department of the Interior.

70. *Id.* at 989. But see Valerius Geist, *Wildlife Conservation as Wealth*, 368 NATURE 491 (Apr. 7, 1994). Geist contends that: "[w]ildlife conservation is incompatible with global markets or private ownership. What is needed is a 'tribal' system of management such as that in North America that creates both wealth and jobs while sustaining resources." *Id.* See also JOHN THORBJARNARSON, IUCN/SSC CROCODILE SPECIALIST GROUP, CROCODILES, AN ACTION PLAN TO THEIR CONSERVATION 4 (Harry Messel et al. eds., 1992) [hereinafter THORBJARNARSON, ACTION PLAN]. "The reality of the situation in the developing world is that wildlife is competing with mankind for limited resources. Denying wildlife a commercial value denies it the opportunity to compete successfully

Others agree that economic considerations can play an important role in the conservation of biological resources, but contend that such resources “need to be judged in economic terms which consider both market and non-market values.”⁷¹ While people must assign some value or use to natural resources to effectively compete with other land uses, there are important differences between promoting the use of wildlife as a means of conservation and the economic use of wildlife as grounds for its conservation:⁷²

Accepting use as a means to conserve wildlife is not the same as providing economic justifications for conserving wildlife. . . . To the extent that the use of wildlife brings animals or their products into the marketplace, wildlife will also have economic value. But economic value *does not supersede other values*; it augments them. Debates over the assignment of value to wildlife frequently confuse the terms use, value and commerce. While it follows that if wildlife is used for some purpose it will have value, *it does not follow* that value will be economic value, or that once wildlife enters the commercial world, decisions concerning conservation must be based solely on economic considerations. Value cannot be completely described in economic terms. Value transcends economics.⁷³

B. Determining When a Use is Sustainable

Determining what use provides the best incentive for the conservation of a species is just one issue surrounding the concept of sustainable use. A second issue focuses on the problems associated with determining when in fact a particular use is sustainable.

Ecological sustainability must be distinguished from socioeconomic sustainability. The sustainable use concept is

with alternative land use practices such as agriculture.” *Id.* (citations omitted).

71. McNeely, *supra* note 66, at 4. McNeely also points out that “simplistic attempts to put a price tag on nature are hampered by the reality that market values can change suddenly and unexpectedly.” *Id.*

72. Robinson & Redford, *supra* note 60, at 3-4.

73. *Id.* at 4 (emphasis added).

based on the notion that “resources are renewable,” and “that people can balance their consumption with resource production.”⁷⁴ However, people tend to have “a popular misunderstanding of natural systems — that they exist at equilibrium, and that there is a ‘balance of nature,’” which is not always the case.⁷⁵ For example, not all species occur in high enough densities to be sustainably used.⁷⁶ In addition, the removal of a species has ramifications on the biological community from which it is taken.⁷⁷

During the 1994 General Assembly of the International Union of Conservation and Nature (IUCN) in Buenos Aires, Argentina, the IUCN Draft Guidelines for the Ecological Sustainability of Non-Consumptive and Consumptive Use of Wild Species (Draft Guidelines) were proposed.⁷⁸ According to the Draft Guidelines, the “use of a wild species is likely to be sustainable if:”

- a. it does not reduce the future use potential of the target population or impair its long term viability;
- b. it is compatible with maintenance of the long

74. Robinson, *supra* note 57, at 23.

75. *Id.* (citations omitted).

76. *Id.* at 24. Robinson explains that “[t]he extent to which a species can be harvested or used by humans depends in large part on whether it exhibits density compensation Use is . . . much more feasible when people are exploiting species that show strong density compensation and have high rates of renewability.” *Id.* Such species tend to be found in ecosystems which are “at younger successional stages” while species with minimal density compensation tend to be found in more mature and “high diversity ecosystems” such as tropical forests which are more difficult to exploit. *Id.*

77. *Id.* at 21, 23. Robinson notes that “while improving the quality of life, we will inevitably decrease the diversity of life.” *Id.* at 21.

78. See IUCN - THE WORLD CONSERVATION UNION, GENERAL ASSEMBLY, WORKSHOP 3: SUSTAINABLE USE OF LIVING NATURAL RESOURCES, DRAFT GUIDELINES FOR THE ECOLOGICAL SUSTAINABILITY OF NON-CONSUMPTIVE AND CONSUMPTIVE USES OF WILD SPECIES, para. 18 (Jan. 1994) [hereinafter DRAFT GUIDELINES]. According to Bolze, who attended the Conference and the sessions on the Draft Guidelines, conservationists criticized the document. Interview with Dorene Bolze, Policy Analyst, The Wildlife Conservation Society, in Bronx, New York (Mar. 4, 1994). Sustainable use advocates also opposed the Draft because they believed it was too stringent and that ultimately, if passed, it would be used against them later to deny approval of their sustainable use projects. *Id.*

term viability of supporting and dependent ecosystems;

c. it does not reduce the future use potential or impair long term viability of other species.⁷⁹

In applying the precautionary principle to the concept of sustainable use, the Draft Guidelines note that:

The precautionary principle *requires* approaching questions of sustainability of use with the commitment to act in the way *least likely* to impair the viability of the species or the integrity of the ecosystem affected. This may result in decisions *not to use*. This precautionary principle is especially important when estimating sustainable use levels.⁸⁰

The members elected not to adopt the Draft Guidelines but to test and revise them with the assistance of the IUCN membership for presentation at the next General Assembly.⁸¹

This definition of sustainable use focuses solely on the ecological requirements necessary for the sustainable use of wild species and addresses both the effects a use will have on the target population and the effects on the supporting ecosystem and other species. However, these ecosystem effects are difficult to predict or assess.

Robinson contends that it is impossible to speak of "ecological sustainability" without also incorporating the concepts of "socioeconomic sustainability" as well.⁸² He defines socio-

79. DRAFT GUIDELINES, *supra* note 78, at para. 18.

80. *Id.* at para. 49 (emphasis added). The Draft Guidelines add that "use levels should always be cautious and well within the calculated capacity of the target populations and its supporting ecosystems. Target populations and supporting ecosystems may need to be safeguarded by management regimes that include the designation of protected areas." *Id.*

81. IUCN - THE WORLD CONSERVATION UNION, 19TH SESSION OF THE GENERAL ASSEMBLY, SUSTAINABILITY OF NONCONSUMPTIVE AND CONSUMPTIVE USES OF WILD SPECIES (1994). The resolution noted "that the development of guidelines for ecologically sustainable use does not imply, where existing range State legislation sets an effective standard of protection for a specific wild species within that State, that such protection should be removed." *Id.*

82. Robinson, *supra* note 57, at 23-26. In order to fully understand sustainable use, Robinson claims that three interdependent questions must be asked: (1) "What will be the impact of human use on the *environment* or the *biological*

economic sustainable activities “as those that meet the economic needs and aspirations of the human users.”⁸³ However, not all users possess the same needs.

Most discussions of sustainable use assume that it is in the interest [] of all social groups that resource use be sustainable. This is frequently not the case. . . . Sustainable use only occurs when the rights of different user groups are specified, when human needs are met, and when the losses in biodiversity and environmental degradation are acceptable.⁸⁴

Without even addressing the practical issues associated with its implementation, it is evident that sustainable use is an elusive concept which is difficult to define.

IV. Balancing the Trade/Conservation Tension: Sustainable Use & the Different Methods for Downlisting or Transferring Species From Appendix I to Appendix II

Although the text of the Convention never actually mentions the words “sustainable use,” CITES does adhere to this

resource?;” (2) “What are the *needs* and *aspirations* of resource users?;” and (3) “[W]hat are the *rights* of different user groups to the resource?” *Id.* at 23 (emphasis added).

83. *Id.* at 25.

84. *Id.* Robinson notes the Brazilian rubber tappers as an example: [T]he decision, at the national level, to create rubber “extractive reserves” in western Brazil — areas managed by local communities and reserved for specific resource extraction — is commonly trumpeted as a successful approach to sustainable resource use. But the applicability of this approach depends on the political power of the rubber tappers union, the interests of the local cattle ranchers, the market demand for their products, the ability of local communities to get their products to the market, to name a few considerations. The international political and economic structures will also have an impact on the long-term viability of such extractive endeavors. Until these influences are understood, it is unclear whether a resource use will be socioeconomically sustainable. In isolation, a local community might be able to meet their socioeconomic needs, but when national or international politics or markets are considered, they might be unable to do so.

Id.

principle. The CITES drafters were not solely concerned with the mere "survival" of a species, but were also concerned with maintaining a species "at a level consistent with its role in the ecosystem"⁸⁵ — a concept consistent with the notion of sustainable use.⁸⁶ A subsequent resolution adopted by the Parties (Conf. 2.6) entrusts importing nations with the responsibility of assuring that international trade is not detrimental to a species' survival.⁸⁷

However, CITES ultimately defers the question of sustainable use and conservation to the Parties, premised on the theory "that peoples and States are and should be the best protectors of their own wild fauna and flora."⁸⁸ CITES is not

85. CITES, *supra* note 1, art. IV, para. 3.

86. See CITES, *supra* note 1, art. III, paras. 2(a), (3)(a), (3)(c), (5)(a), art. IV, paras. 2(a), (3), (6)(a). CITES' use of the words "survival" and "maintenance" of species raises the question: What is CITES' actual objective? The wording of CITES is not clear. Nevertheless, what constitutes "survival" and maintenance of a species "consistent with its role in the ecosystem[.]" *Id.* art. IV, para. 3, are subjective criteria which provides ample room for differing interpretations.

[T]he term 'survival' is subject to a wide range of pragmatic and theoretical definitions. The domestic legislation of the United States protecting endangered species specifically states as a goal of the federal law, the elimination of the species from the protected list; in other words, to re-establish its population and habitat at levels where special protection is no longer needed. CITES seeks to assure the survival of species at a level allowing international trade while assuring its viable role in the local ecosystem. Beyond establishing that minimum level, the goals of the Treaty are unclear.

FAVRE, INTERNATIONAL TRADE, *supra* note 35, at 40-41. For example, a species' role in the ecosystem may once have been expansive, but, for some reason, its numbers may have diminished over time due to habitat loss or species depletion. If the species is still not threatened with extinction, what then is its role in the ecosystem? Is it the species' present role as a diminished factor in the ecosystem used to determine its "survival" or the species' former role when its population was larger? The only guidance provided by CITES on these questions is that the Parties maintain a species at a level that does not allow it to become eligible for inclusion in Appendix I. CITES, *supra* note 1, art. IV, para. 3.

87. *Trade in Appendix II and III Species*, CITES, 2d mtg., Conf. 2.6 (San José, 1979) in BRAUTIGAM, *supra* note 7, at 50-51 [hereinafter Conf. 2.6]. Conf. 2.6 recommends that importing countries consult with exporting countries or the Secretariat and "apply stricter domestic measures" when it "deems that an Appendix II or III species is being traded in a manner detrimental to . . . [its] survival." *Id.*

88. CITES, *supra* note 1, pmbl.

a comprehensive conservation treaty; it does not address many issues pertaining to fauna and flora.⁸⁹ For example, CITES does not address the issue of habitat loss, commonly recognized as a principal threat to fauna and flora in addition to human consumption and trade.⁹⁰ From CITES' perspective, the use of a species only becomes an issue when a Party engages in its international trade.

The Berne Criteria assume that international trade will have a detrimental effect on a species since trade normally requires killing or removing a species from its natural habitat.⁹¹ However, the advent of sustainable use has created somewhat of a paradox. Trade can have a detrimental effect upon a species; yet it has the potential to be beneficial when conducted in a sustainable manner and when monies derived from international trade are allocated for conservation and/or enforcement purposes, or for local rural communities; however, arriving at a balance between commercial trade and species preservation is not easy.⁹²

89. Kosloff & Trexler, *supra* note 24, at 327. "At its best, CITES only regulates international trade. Domestic trade, even if its effects are felt internationally, is not addressed. Moreover, domestic activities that indirectly jeopardize endangered species, through habitat destruction, exotic species introduction, pesticide application, waste disposal, or otherwise, are also not covered by CITES." *Id.* at 336.

90. *Id.* at 337, n. 44, citing NORMAN MYERS, *THE SINKING ARK* 57 (1979), and P. EHRLICH & A. EHRLICH, *EXTINCTION: THE CAUSES AND CONSEQUENCES OF THE DISAPPEARANCE OF SPECIES* 53 (1981).

91. FAVRE, *INTERNATIONAL TRADE*, *supra* note 35, at 34.

92. The Crocodile Specialist Group (CSG), which is a part of the IUCN World Conservation Union, Species Survival Commission, notes one of the problems confronting Madagascar's crocodilian sustainable use programs: "Madagascar now represents a dilemma for the CSG and CITES as an economic incentive to encourage conservation is very much needed but ranching cannot be initiated while Madagascar continues to be a source of international illegal trade." *Crocodile Specialist Group Minutes, Steering Committee Aug. 1-2, & Aug. 6, 1992*, CROCODILE SPECIALIST GROUP NEWSLETTER (IUCN - World Conservation Union, Species Survival Comm'n, Crocodile Specialist Group, Gainesville, Fla.), July-Sep. 1992, at 11 [hereinafter *CSG Steering Comm. Aug. 1992 Minutes*].

A. Delisting Appendix I Species: Exceptions to the Berne Criteria

After the Berne Criteria were adopted, the Parties reverted to the resolution process in an attempt to alter the perceived bias toward listing species on Appendix I and the preclusive effect of such listing on commercial trade. Recognizing that the Berne Criteria for transferring species from Appendix I to Appendix II were at times overly stringent and difficult to meet, the Parties adopted a series of exceptions to the Berne Criteria which allowed for greater flexibility in the appendix downlisting system, and under special circumstances, for limited commercial trade in Appendix I species. These exceptions include captive breeding, ranching, the use of quotas (possibly the most controversial) and the adoption of specific criteria to downlist select African elephant populations.

1. Captive Breeding

The first exception that the Parties may use to commercially trade Appendix I species internationally is captive breeding (otherwise known as "farming").⁹³ Pursuant to Conf. 2.12, all captive breeding programs of Appendix I species for commercial purposes must be conducted in a "controlled environment . . . maintained without augmentation from the wild . . . [and] managed in a manner designed to maintain the breeding stock indefinitely."⁹⁴ In addition, the Parties have adopted several other resolutions further regulating captive breeding programs.⁹⁵

93. CITES, *supra* note 1, art. VII, para. 4. Captive breeding is the raising of species in captivity in controlled conditions entirely independent from wild populations. FITZGERALD, *supra* note 1, at 386. This exception was adopted after forceful lobbying by Argentina on behalf of its chinchilla captive breeding operations. FAVRE, INTERNATIONAL TRADE, *supra* note 35, at 187.

94. *Specimens Bred in Captivity or Artificially Propagated*, CITES, 2d mtg., Conf. 2.12 (San José, 1979) in BRAUTIGAM, *supra* note 7, at 52-53. Supporters of captive breeding argue that removing a species from the wild and raising it independently of wild populations does not have a detrimental effect on species' survival.

95. There are now eleven Appendix I species raised under the captive-breeding exception. BRAUTIGAM, *supra* note 7, at 25. Following the second

At the Eighth Meeting of the Conference of the Parties in Kyoto, the Parties acknowledged that "breeding a species in captivity for commercial purposes can be an economic alternative to domestic livestock production in its place of origin and thus provide an incentive for rural populations . . . to develop an interest in its conservation."⁹⁶ However, sustainable use advocates, such as the IUCN/SSC Crocodile Specialist Group (CSG),⁹⁷ have generally been critical of the conservation benefits purportedly provided by captive breeding. The CSG agrees that captive breeding can benefit wild populations if breeders are obligated to release a certain percentage of their production back into the wild.⁹⁸ However, the CSG argues captive breeding programs "usually have no direct conservation benefits . . . [and do] not foster the economic dependence on the maintenance of healthy wild populations"⁹⁹ necessary to provide an incentive for its

CITES Conference, the Parties adopted additional controls for captive breeding programs. Under Resolution Conf. 4.15, the Parties must notify the Secretariat of all captive breeding operations for which the Secretariat must establish a register. *Control of Captive Breeding Operations in Appendix I Species*, CITES, 4th mtg., Conf. 4.15 (Gaborone, 1983) in BRAUTIGAM, *supra* note 7, at 68-69. All captive breeding operations registered after July, 1987, must be approved by a two thirds vote of the Parties in order to be included in the Register and may similarly be removed by a two-thirds vote. *Control Procedures for Commercial Captive Breeding Operations*, CITES, 6th mtg., Conf. 6.21 (Ottawa, 1987), in BRAUTIGAM, *supra* note 7, at 90-92. All breeding operations must also use a uniform marking system for captive-bred specimens. *Id.* at 91. In addition, Resolution Conf. 7.10 recommends that when a species depends on captive-breeding for its survival, commercial captive breeding should not be permitted. *Format and Criteria for Proposals to Register the First Commercial Captive-Breeding Operation for an Appendix I Animal Species*, CITES, 7th mtg., Conf. 7.10 (Lausanne, 1989) in BRAUTIGAM, *supra* note 7, at 100-02. However, in 1992, the Parties in Kyoto passed a resolution redrafting the procedures for registering and monitoring commercial captive-breeding operations for Appendix I species. *Guidelines for a Procedure to Register and Monitor Operations Breeding Appendix I Animal Species for Commercial Purposes*, 8th mtg., Conf. 8.15 (Kyoto, 1992) [hereinafter Conf. 8.15]. The resolution effectively repealed Resolution Conf. 4.15, 6.21 and 7.10. *Id.*

96. Conf. 8.15, *supra* note 95, at 1.

97. Harry Messel and J. Perran Ross, *Crocodile Issues at CITES*, 18 SPECIES 60 (June 1992). The CSG general strategy is to promote sustainable use programs to conserve crocodilians while also "intervening forcefully to ensure that they are sustainable." *Id.* at 61.

98. THORBJARNARSON, ACTION PLAN, *supra* note 70, at 6.

99. *Id.* The CSG is also critical of the captive breeding of "exotic

protection.¹⁰⁰ In addition, captive breeding often requires considerable capital investment which many rural communities do not have.¹⁰¹

Favre also contends that the captive breeding exception "sets up a legal and philosophical tension within the treaty" by allowing Appendix I commercial trade when CITES specifically provides that species threatened with extinction and

crocodilians" which it views as a potential threat to conservation efforts. *Id.* at 10. It fears that "exotic species" might escape into the wild and have detrimental effect on the native crocodilian populations or that breeding of exotic species (such as the Nile crocodile which has a very high skin quality for tanning purposes) will compete with local sustainable use conservation activities and thereby "reduce the economic incentives for developing conservation-oriented ranching programs." *Id.*

100. Curtis H. Freese and Carlos J. Saavedra, *Prospects for Wildlife Management in Latin America and the Caribbean*, in NEOTROPICAL WILDLIFE USE AND CONSERVATION 430 (John G. Robinson & Kent H. Redford eds., 1991).

The misconception that almost anything that breathes and breeds can be profitably raised in a cage, corral, or artificial pond is still widely spread among the new generation of Latin American wildlife students. We believe that there is still far too much emphasis being given to captive breeding by wildlife institutions in the region. Many efforts directed at captive management are wasting valuable time and limited funds that could be better spent on wild populations. As Terborgh, Emmons and Freese (1986) and Emmons (1987) point out, most wild species are ill suited for domestication and captive management. Furthermore, even the successful captive breeding of wildlife for economic purposes will have little or no significance for the conservation of wild populations, since it provides limited incentive for conserving free-ranging populations or their habitats.

Id. at 438. A 1992 study of the wild bird trade published by TRAFFIC International also questions the conservation incentives produced by captive breeding. "[W]hether in range states or consumer countries, captive breeding does not address the more fundamental problem posed to wild bird populations: habitat loss through conversion of wild lands for agriculture and other income-producing purposes. Captive breeding offers little incentive to maintain bird populations in their natural habitat." Teresa A. Mulliken et al., *The Wild Bird Trade — An Overview*, in SPECIES IN DANGER: PERCEPTIONS, CONSERVATION & MANAGEMENT OF WILD BIRDS IN TRADE 1, 19 (Jorgen B. Thomsen et al. eds., 1992).

101. See THORBJARNARSON, ACTION PLAN, *supra* note 70, at 6. See also Mulliken et al., *supra* note 100, at 19. Not only are most captive bird breeding operations located in consumer countries, but "[t]he difficulties of obtaining material resources and expertise necessary to establish successful breeding programs are likely to limit captive breeding operations in lesser-developed countries for some time to come." *Id.*

placed in Appendix I should not be commercially traded.¹⁰² Critics of captive breeding also argue that it creates a potential market in illegal trade under the guise that the species is being bred in captivity.¹⁰³ Despite these fears, the Parties have not yet cited illegal trade from captive breeding of Appendix I species as a major problem.

2. Ranching

The second exception to the Berne Criteria is ranching, the rearing in a controlled environment of specimens taken from the wild.¹⁰⁴ Ranching Appendix I species is an alternative means to downlisting under the Berne Criteria which was adopted in 1981 in New Delhi during the Third Meeting of the Conference of the Parties.¹⁰⁵ Supporters argued that closed cycle captive breeding was not realistically feasible due in part to the degree of capital required, but open cycle farming and ranching was.¹⁰⁶

To establish a ranching program, a Party's Management Authority must submit a proposal to the Secretariat showing that ranching of the species will not have a "significant detrimental impact on wild populations."¹⁰⁷ In addition, a Party

102. FAVRE, *INTERNATIONAL TRADE*, *supra* note 35, at 187. Favre notes that "[captive-breeding], which is in effect a downlisting for population of an Appendix I species, runs counter to the fundamental policy point of the previous protective provisions of the treaty." *Id.*

103. *Id.*

104. *Ranching*, CITES, 3rd mtg., Conf. 3.15 (New Delhi, 1981) in BRAUTIGAM, *supra* note 7, at 64-65 [hereinafter Conf. 3.15]. Ranching differs considerably from captive breeding or farming because it relies directly on the wild population for its stock (eggs and young), while captive breeding programs are self enclosed and function independently from the wild population. See FAVRE, *INTERNATIONAL TRADE*, *supra* note 35, at 205-06.

105. Conf. 3.15, *supra* note 104, at 64-65. The resolution allows for species in Appendix I to be transferred to Appendix II under a ranching program approved by a majority of the Parties in accordance with Article XV of the Convention. *Id.*

106. Telephone interview with J. Don Ashley, Alligator and Crocodile Consultant with Ashley Associates (Nov. 12, 1992).

107. Conf. 3.15, *supra* note 104, at 65. Ranching programs tend to be most successful with species that have a high infant mortality rate. FAVRE, *INTERNATIONAL TRADE*, *supra* note 35, at 206. This is true of turtles and alligators but not elephants. *Id.* Ranching of crocodylians can actually increase the wild population because removing eggs or infants from the wild and raising them in

must provide "an assessment of the likelihood of . . . biological and economic success . . ." and show that "the operation will be *beneficial to the wild population* through reintroduction or in other ways."¹⁰⁸ Ranching programs must institute a "uniform marking system"¹⁰⁹ and provide the Secretariat with detailed information regarding the program in the Parties' annual report.¹¹⁰

The Parties vote on all ranching programs after close scrutiny of the proposals.¹¹¹ Crocodilian ranching programs

captivity increase their chances of survival: When some are returned back, more are added than would naturally have survived. Interview with John Thorbjarnarson, Program Officer for Latin America, The Wildlife Conservation Society, in Bronx, New York (Oct. 29, 1992).

108. Conf. 3.15, *supra* note 104, at 65 (emphasis added). In 1992, the Parties also adopted an additional crocodilian ranching criteria. See *Additional Criteria for the Establishment of Captive-Breeding Operations and for the Assessment of Ranching Proposals for Crocodilians*, CITES, 8th mtg., Conf. 8.22 (Kyoto, 1992) [hereinafter Conf. 8.22].

109. *Trade in Ranched Specimens*, CITES, 5th mtg., Conf. 5.16 (Buenos Aires, 1985) in BRAUTIGAM, *supra* note 7, at 82-85 [hereinafter Conf. 5.16]. The purpose of the resolution is to provide for a different and uniform marking system for products derived from ranched populations to avoid confusion with other products and to provide "adequate protection . . . [to] wild populations of species for which ranching has been approved . . ." *Id.* at 82.

110. *Monitoring and Reporting Procedures for Ranching Operations*, CITES, 6th mtg., Conf. 6.22 (Ottawa, 1987) in BRAUTIGAM, *supra* note 7, at 93-94 [hereinafter Conf. 6.22].

111. In Kyoto, only four of the six crocodilian ranching resolutions were approved. Indonesia and Madagascar withdrew their resolutions due to lack of support from the Secretariat and the Crocodile Specialist Group. CITES, 8th mtg., 6th sess., Comm. I 8.6, (Kyoto, Mar. 6, 1992) [hereinafter Comm. I 8.6]; *Crocodile Specialist Group Steering Committee, Minutes, 9-11 Nov. 1991*, CROCODILE SPECIALIST GROUP NEWSLETTER (IUCN—The World Conservation Union, Species Survival Comm'n, Crocodile Specialist Group, Gainesville, Fla.) Oct.-Dec. 1991, at 9-10 [hereinafter *CSG Steering Comm. Nov. 1991 Minutes*].

The Crocodile Specialist Group carries great weight when it considers or endorses resolutions pertaining to crocodilians. Telephone interview with Peter Brazaitis, Head Curator of the Central Park Zoo, in New York, N.Y. (July 24, 1992). The Parties know that without the CSG's support there is little likelihood of their resolutions being passed and the CSG is able to put considerable pressure on countries to compel them to improve CITES compliance. *Id.* The Parties openly seek out CSG's assistance and review. The fact that the CSG incorporates members from the crocodilian skin and tanning industry also gives it credibility as having balanced views on the issues of trade and conservation. *Id.* However, some feel that the interests of the crocodilian trade industry dominate the policy decisions of the CSG and that the group has veered too far from

in the United States, New Guinea, Australia, and other countries have been particularly successful.¹¹² Initially, some Parties expressed concern that the ranching provision and the downlisting of the American alligator would stimulate an illegal market.¹¹³ However, supporters insisted that endangered species and their habitats could only be protected from agricultural and developmental pressures if some form of economic gain could be derived from their use.¹¹⁴ While the controls placed on species downlisted to Appendix II under the ranching resolution have been very effective, illegal trade in other Appendix II species, such as Latin and Central American crocodylian skins remains a considerable problem.¹¹⁵

3. Quotas for Appendix I Species

Although not mentioned in the original CITES' text, the Parties adopted the use of two types of trade quotas for Appendix I species as a third exception to the Berne Criteria: a specific leopard quota and a general quota open to all Appendix I species which meet set criteria and are captively bred or farmed.¹¹⁶

its original focus on crocodylian conservation to its present emphasis on crocodylian management. *Id.*

112. *Ranching Stimulates Growth in Crocodile Market; Trade Controls Still Inadequate In Many Areas*, TRAFFIC (U.S.A.), June 1990, at 1 [hereinafter *Ranching Stimulates Growth*]. The Crocodile Specialists Group (CSG) has long advocated the sustainable use of alligators and crocodylians through ranching to provide economic benefits to local communities and to "maintain a direct link between the health of wild populations and the ability to obtain a rearing stock." THORBJARNARSON, ACTION PLAN, *supra* note 70, at 5-6.

113. Nov. 12, 1992 Ashley Interview, *supra* note 106. This issue was initially debated at the Second Conference of the Parties (held in San José, in 1979). *Id.* "The risk of ranching is that trade will occur not only with the raised young, but with illegally caught adults. At the point of Customs control, it may be very difficult to distinguish between ranched adults and wild caught adults." FAVRE, INTERNATIONAL TRADE, *supra* note 35, at 206.

114. Nov. 12, 1992 Ashley Interview, *supra* note 106. See THORBJARNARSON, ACTION PLAN, *supra* note 70, at 4; Goldstein, *supra* note 69, at 987.

115. *Ranching Stimulates Growth*, *supra* note 112, at 1-2.

116. Favre, *Tension Points*, *supra* note 44, at 255. Quotas may be used to control ranched species or harvests (i.e. hunting). *Id.*

a. Leopard Quotas

In 1983, upon determining that select leopard populations in some sub-Saharan countries were not endangered, the Parties approved Conference 4.13 which allows leopard hunting under an export quota for *non-commercial trade only*.¹¹⁷ This resolution, however, does not change the species' Appendix I listing but falls within CITES' requirements: that (1) trade is not for "primarily commercial purposes,"¹¹⁸ (2) it is "not detrimental to the survival of the species;"¹¹⁹ and (3) it is "subject to particularly strict regulation."¹²⁰ The leopards must be shipped with a "self-locking tag attached which indicates the state of export, the number of the specimen in relation to the annual quota and the calendar year to which the quota applies" ¹²¹

b. Conference 5.21 and 7.14

At the 1985 Meeting of the Conference of the Parties in

117. BRAUTIGAM, *supra* note 7, at 20 (emphasis added). Conf. 4.13 was subsequently revised by Resolution Conference 7.7 which defines non-commercial use as follows:

[T]he Management Authority of the state of import may be satisfied that the said skins are not to be used for primarily commercial purposes if:

- i) the skins are acquired by the owner in the country of export and are being imported as personal items that will not be sold in the country of import; and
- ii) the owner imports no more than two skins any calendar year if this is authorized by the legislation of the country of export

Quotas for Leopard Hunting and Skins for Personal Use, CITES, 7th mtg., Conf. 7.7 (Lausanne, 1989) in BRAUTIGAM, *supra* note 7, at 95-96 [hereinafter Conf. 7.7].

118. CITES, *supra* note 1, art. III, para. 3(c).

119. *Id.* art. III, para. 3(a).

120. *Id.* art. II, para. 1.

121. Conf. 7.7 *supra* note 117, at 96. The Conference of the Parties at Kyoto approved an export quota of 2,050 leopard skins for sub-Saharan Africa. *Eighth Meeting of the Conference of the Parties to CITES*, TRAFFIC (U.S.A.), Aug. 1992 at 13-14 [hereinafter *Eighth Meeting of CITES*]. The countries of Botswana, Malawi, Namibia, Zambia and Zimbabwe had originally proposed that the leopard be downlisted from Appendix I to Appendix II as its populations had recovered to the point where it was considered a pest in some areas. *Id.* Nonetheless, after lengthy debate the Parties agreed to keep the leopard on Appendix I pursuant to the quota system. *Id.*

Buenos Aires, the Parties adopted a second quota system, Resolution 5.21, which allowed for commercial international trade and transfer of a species from Appendix I to Appendix II if approved by the Parties.¹²² Like Conf. 2.23, the new quota system was also limited to species in Appendix I which were not listed using the Berne Criteria.¹²³

Nonetheless, the requirements of Conf. 5.21 were weak,¹²⁴ and in 1989, the Parties repealed the resolution and

122. *Special Criteria for the Transfer of Taxa from Appendix I to Appendix II*, CITES, 5th mtg., Conf. 5.21 (Buenos Aires, 1985) in BRAUTIGAM, *supra* note 7, at 78-79 [hereinafter Conf. 5.21]. Resolution 5.21 noted "that the establishment of quotas for the management and exploitation of wildlife is a conservation procedure used in many cases at the national level . . ." *Id.* at 78. The main justification for downlisting under the quota system was that the Berne Criteria made it exceedingly difficult to remove Appendix I species and that the quota system was warranted in order to allow the Parties an opportunity to utilize and benefit from their natural resources in international trade. *Id.* Interestingly enough, the same reasoning was also used six years earlier at the second meeting of the Conference of the Parties in the adoption of Resolution Conf. 2.23. See Conf. 2.23, *supra* note 55 at 62.

123. Conf. 5.21, *supra* note 122, at 78. Similar to Resolution 2.23, Resolution 5.21 justified itself by the fact that the Berne Criteria were not applied to all species equally and that they posed considerable obstacles to downlisting a species from Appendix I. Resolution 5.21 states:

NOTING that the Berne Criteria for the addition of species and other taxa to Appendices I and II (Resolution Conf. 1.1) have not been applied to those species which have been listed by the Plenipotentiary Conference (Washington, D.C., 1973), or, in some cases, by the Conference of the Parties at its first (Berne, 1976) or second meeting (San José, 1979);

ACKNOWLEDGING that the Berne Criteria for the deletion of species and other taxa from Appendices I and II (Resolution Conf. 1.2) are very difficult to fulfil [sic] in the case of some of these species because they require positive scientific evidence of changing biological status showing recovery sufficient to justify deletion;

RECOGNIZING that there are obviously some taxa listed in Appendix I that either never met the Berne Criteria for inclusion or have recovered since their inclusion, although this cannot be demonstrated today because their population status was not determined when they were included in the appendix . . .

Id. In order to downlist under the quota system, the Parties had to show that it was "virtually impossible to supply the data required by [the Berne Criteria for downlisting] within reasonable time or with reasonable effort," and that there were "populations of such species [that could] withstand a certain level of exploitation for commercial trade . . ." *Id.* at 79.

124. Conf. 5.21 simply requires that there be "sufficient basis to establish that the species should be included in Appendix II rather than Appendix I

adopted a new quota resolution to temporarily downlist qualifying Appendix I species to Appendix II (Conference 7.14).¹²⁵ The new resolution sets out three requirements: Parties must show difficulty in meeting the Berne Criteria; “demonstrate” that the subject species is “non-migratory” (i.e., able to be managed by a single Party); and that it is “capable of withstanding a certain level of exploitation . . . [without] endanger[ing] the survival of the species in the wild.”¹²⁶ The word “demonstrate” requires a Party to provide “sufficient evidence from a well-documented scientific report on population size and geographical range” that indicates that the species should be transferred to Appendix II.¹²⁷ This language is very similar to the scientific requirements of the Berne Criteria.

Downlisting from Appendix I to II under the quota system is not permanent. Under 7.14, the quota system is temporary, allowing the Parties to trade in a species while working to meet the downlisting requirements either under the Berne Criteria or the ranching program (Conf. 3.15).¹²⁸ If after “two intervals between regular meetings” a species is not downlisted to Appendix II under either of these criteria, the species is to be returned to Appendix I.¹²⁹ Thus, the reso-

under the terms of Resolution Conf. 1.1 [of the Berne Criteria].” Conf. 5.21, *supra* note 122, at 79. However, the resolution did not indicate what was meant by “sufficient basis.” *Id.*

125. *Special Criteria For the Transfer of Taxa from Appendix I to Appendix II*, CITES, 7th mtg., Conf. 7.14 (Lausanne, 1989) in BRAUTIGAM, *supra* note 7, at 105, 106 [hereinafter Conf. 7.14].

126. *Id.* at 106 (emphasis added).

127. *Id.* While Resolutions 2.23 and 7.14 both seek to reduce the burden of downlisting pre-Berne Criteria Appendix I listings, the standard of proof which the two resolutions employ are different. Conf. 2.23 requires “a careful review of available information on the status of the species.” Conf. 2.23, *supra* note 55, at 62-63. Conf. 7.14 requires “sufficient evidence from a well-documented scientific report on population size and geographical range . . . to establish that the species should be included in Appendix II rather than Appendix I” Conf. 7.14, *supra* note 125, at 106. Conf. 2.23 also deletes species from Appendix I thereby allowing for commercial trade, while Conf. 7.14 temporarily transfers a species to Appendix II allowing for commercial trade under a limited quota system. See Conf. 2.23, *supra* note 55, at 62; Conf. 7.14, *supra* note 125, at 106.

128. Conf. 7.14, *supra* note 125, at 107.

129. *Id.* An interesting question is the effect that Conf. 2.23 and Conf. 7.14 have on each other. Both resolutions apply to the downlisting of species listed

lution allows flexibility in meeting the Parties' economic needs while remaining true to CITES' conservation objectives.

Quotas for Appendix I species temporarily downlisted to Appendix II have not been granted to many species,¹³⁰ but the system has been relatively successful. Four countries (Botswana, Malawi, Mozambique, and Zambia) in 1989 and two countries (Ethiopia and Kenya) in 1992 successfully transferred their Nile crocodile populations from a quota system to permanent Appendix II status under the ranching program (Conf. 7.14).¹³¹ However, three crocodile species were transferred back to Appendix I because Conf. 7.14's requirements were not met.¹³²

c. Deciding When to Draw the Line With Appendix I Quotas

Although the quota system has been relatively successful, it is not entirely free from controversy. One problem is assuring that management programs do not have a detrimental impact on a species and that they adhere to standards set by the Parties. For example, three quota listings approved at the 1992 Conference (the Nile crocodile in Madagascar and Sudan and the Salt Water crocodile in Indonesia) drew considerable criticism because of the questionable compliance records of the Parties involved.¹³³ Although both Madagas-

on Appendix I that were not subject to the Berne Criteria. However, while Conf. 7.14 is a temporary delisting system which eventually requires a Party to fulfill either the Berne Criteria or the ranching criteria under Conf. 3.15 (New Delhi, 1981), Conf. 2.23 employs its own criteria requiring simply "a careful review of available material" for delisting to occur permanently. Conf. 2.23, *supra* note 55, at 63. Technically, both resolutions apply.

130. See *Eighth Meeting of CITES*, *supra* note 121. During the 1992 meeting of the Conference of the Parties in Kyoto, Japan, only five species were accepted for export quotas and three of the five were crocodiles: Leopard, Nile crocodile, African slender-snouted crocodile, Dwarf crocodile and the Asiatic bonytongue. *Id.* at 8.

131. *Id.*

132. *Id.* The African slender-snouted crocodile and the West African Dwarf crocodile in the Congo and the Nile crocodile in the Congo, Cameroon and Sudan were all returned to Appendix I status as none of the countries submitted proposals to extend the quotas or employ ranching programs. *Id.*

133. *Id.* at 8-9.

car's and Indonesia's quota programs had been in existence since 1985 (a longer period than the requisite two intervals between meetings), Madagascar's exports for 1987 and 1989 exceeded the number of skins recorded in its CITES annual report and serious questions remained regarding both countries' ability to prevent illegal trade,¹³⁴ their requests for quotas were nonetheless extended.¹³⁵

The CSG supported the downlisting of Indonesia's Salt Water crocodile (*C. porosus*) to Appendix II under the ranching provision and also supported the eventual quota program. In response to criticism by some NGOs, the CSG defended its stance, arguing that the "transfer of the Indonesian populations of *C. porosus* to Appendix I would not be beneficial to conservation of crocodiles in Indonesia or the development of sustainable management plans."¹³⁶ The CSG further noted that "support of the Indonesian program was a continuing process that would not allow Indonesia to revert to ineffective management following CITES and noted that return of Indonesia's *porosus* populations to Appendix I could be quickly and easily accomplished."¹³⁷ Indonesia's request was granted "contingent upon [its] meeting commitments" under the quota resolution.¹³⁸

134. IUCN Species Survival Commission Trade Specialist Group et al., *Analyses of Proposals to Amend the CITES Appendices*, 5-6, 9-10 (Jan. 1992) (unpublished document, on file with the *Pace Environmental Law Review*) [hereinafter *IUCN Analyses of Proposals*].

135. *Id.* at 9. Madagascar and Indonesia originally submitted resolutions for the permanent downlisting of the Nile crocodile (Madagascar) and Salt Water crocodile (Indonesia) pursuant to the ranching program (Conf. 3.15). However, Indonesia and Madagascar both withdrew their ranching resolutions with the understanding that they would be allowed to continue trading under the quota provision. CITES, *Summary Report of the Plenary Meeting*, 8th Meeting of the Conference of the Parties, 9th Sess., Plen. 8.9, at 4 (Mar. 12, 1992) [hereinafter *Plen. 8.9 summary*].

136. *Crocodile Specialist Group Steering Co., Minutes, 29 Feb. 1992, Kyoto, Japan*, CROCODILE SPECIALIST GROUP NEWSLETTER (IUCN World Conservation Union, Species Survival Commission, Crocodile Specialist Group, Gainesville, Fla.), Jan.-Mar. 1992, at 8 [hereinafter *CSG Steering Comm. Feb. 1992 Minutes*].

137. *Id.* at 7.

138. *CSG Steering Comm. Aug. 1992 Minutes, supra* note 92, at 11. Following the Kyoto Convention, a group of three CSG members traveled to Indonesia at that country's expense to monitor its continued progress in crocodile manage-

The CSG initially opposed Sudan's request to continue its Nile crocodile Appendix II status and to receive a one-time quota to export a stockpile of 8,000 skins.¹³⁹ Until 1990, Sudan had a reservation on the Nile crocodile and a wild quota of 5,000 skins.¹⁴⁰ In 1989, at the Seventh Meeting of the Parties, Sudan's request for a similar export quota was refused.¹⁴¹ The CSG later conditionally supported the resolution provided that certain conditions were met.¹⁴² As a compromise between these trade/conservation tensions, the Parties transferred the Sudan Nile crocodile to Appendix I, and permitted sale of its stockpile to Egypt for domestic use

ment and prevention of illegal trade. The study found that declining skin sales had reduced the funds to implement management actions and that a lack of uniformity existed in farm stock reports. *Id.* at 10. Noting that continuation of Indonesia's export quota depended on their compliance with CITES, Ginette Hemley of TRAFFIC concluded that "little concrete progress appeared to have been made." *Id.* at 11. CSG's Chairman further insisted that a lack of funds was no excuse for Indonesia's failure to comply with CITES. *Id.* At its spring 1993 meeting, the CSG voted to withdraw its support for Indonesia's crocodilian management program due to its continued failure to institute changes in its program. Oct. 29, 1992 Thorbjarnarson Interview, *supra* note 107.

139. *Id.* at 6. Sudan's stockpile was the result of hunting which took place due to the country's failure to repeal local hunting laws after the CITES quota had expired and Sudan could have legally traded its stockpile had it requested a quota in 1990. CSG Steering Comm. Nov. 1991 Minutes, *supra* note 111, at 10. Although the CSG sympathized with Sudan, it felt that "any support or continued precedent for special quotas [would only] encourage irregular trade and discourage effective management." *Id.* TRAFFIC also recommended rejecting the proposal. TRAFFIC, RECOMMENDATIONS ON PROPOSALS TO AMEND THE CITES APPENDICES AT THE EIGHTH MEETING OF THE CONFERENCE OF THE PARTIES TO CITES, 16 (March 1992).

140. IUCN Analyses of Proposals, *supra* note 134, at 41. IUCN reported that Sudan had not issued annual reports for 1986-88 and was late in issuing its 1989 report by nine months. *Id.* The report stated:

Sudan reported exporting 5012 *C. niloticus* [Nile crocodile] skins in 1990, but, before then, all the evidence of trade derived from the reports of the importing countries. Although Sudan held a reservation on *C. niloticus* until 1990, it was required to report on its crocodile skin trade under the terms of Resolution Conf. 5.21. It is also in breach of Resolution Conf. 4.25, which recommends that Parties holding reservations for Appendix I species should treat them as if they were in Appendix II.

Id. The report also indicated that war in the southern part of the country made it impossible to control hunting. *Id.*

141. *Id.*

142. CSG Steering Comm. Feb. 1992 Minutes, *supra* note 136, at 6.

only, provided that proceeds went to TRAFFIC for surveys in the region.¹⁴³

The development and implementation of a management program is a complex process. But just how much time should a Party be given to develop and implement a management program? What if a country's management program is ineffective but shows signs of improvement? Should a species be returned to Appendix I until the Party improves its program? How rampant must abuses be before one draws the line and completely restricts trade? There are no clear cut answers to these questions and drawing the line is no easy task.

B. Downlisting the African Elephant: Conference 7.9

The most recent exception to the Berne Criteria is Conference 7.9 "Terms of Reference for the Panel of Experts on the African Elephant and Criteria for the Transfer of Certain African Elephant Populations from Appendix I to Appendix II."¹⁴⁴ In 1977 the African elephant was initially listed in Appendix II.¹⁴⁵ However, over slightly more than ten years African elephant populations were reduced by nearly half.¹⁴⁶

143. Comm. I 8.6, *supra* note 111, at 5. Following the Convention in Kyoto, Dietrich Jeldon of the CSG successfully inspected and tagged all of the 8,000 skins, accompanied by a Sudanese army escort. *CSG Steering Comm. Aug. 1992 Minutes, supra* note 92, at 6.

144. *Terms of Reference for the Panel of Experts on the African Elephant and Criteria for the Transfer of Certain African Elephant Populations from Appendix I to Appendix II*, CITES, 7th mtg., Conf. 7.9 (Lausanne, 1989) in BRAUTIGAM, *supra* note 7, at 97 [hereinafter Conf. 7.9].

145. Michael J. Glennon, *Has International Law Failed the Elephant?*, 84 AM. J. INT'L L. 1, 12.; FAVRE, *INTERNATIONAL TRADE, supra* note 35, at 125.

146. Glennon, *supra* note 145, at 18. However, there may be hope after all for the elephant. One conservation method that CITES has not contemplated and that Zimbabwe has recently begun is "ecohunting." Bill Keller, *Splatball Safari Owner Says Shooting Animals With Paint Is Better for the Environment*, DAL. MORN. NEWS, Sept. 25, 1994 at 1A. Ecohunting is also referred to as "splatball." *Id.* In splatball, a hunter stalks his prey in the usual manner, but instead of killing the animal (usually elephants), he shoots it with a paintball containing a water based paint. *Id.* Here, everyone wins; the hunter gets his trophy (a videotape of his excursion), Zimbabwe gets revenue and animal continues to live. *Id.* For the most part, the elephants seem only mildly distracted by this practice. *Id.* at 32A. However, all is not fun and games. On a more serious note, if the animal becomes so enraged that he must be killed to protect

Approximately 78% of all the ivory on the market during the late 1970's and early 1980's came from illegally poached elephants.¹⁴⁷ High profits,¹⁴⁸ demand,¹⁴⁹ corruption, poverty, and a lack of resources and control in worked ivory contributed to poaching and the demise of the African elephant.¹⁵⁰ Despite numerous efforts to improve regulations, CITES was unable to prevent illegal ivory from entering the market¹⁵¹ largely because of its inability to "sufficiently diminish the incentives of producers, middlemen or consumers"¹⁵² and the inability to distinguish legal and illegal ivory even with the CITES marking system.¹⁵³

In the 1980's, the effects of elephant poaching began to

the "ecohunting" party, the splatball hunter is required to pay the \$6000 fee that Zimbabwe requires for actually killing any elephant. *Id.* In addition, some groups object to this practice as degrading to the animals. *Id.*

147. Orenstein Interview, *supra* note 5. Kevin D. Hill, Associate Professor of Law, at Ohio Northern University describes the "methodical pattern" followed by poachers. "Poachers, seeking the animals with the largest tusks, first hunt the males and the older matriarchs. When the supply of older elephants is exhausted, the poachers hunt the medium aged ones, including prime breeding-age females. Eventually, the populations are reduced to only young elephants with very small tusks." Kevin D. Hill, *The Convention on International Trade in Endangered Species: Fifteen Years Later*, 13 *LOY. L.A. INT'L & COMP. L.J.* 231, 258 (1990) (citations omitted).

148. From the late 1960's to the mid-1980's the price of ivory jumped from \$5 per kilogram to \$100 per kilogram. Hill, *supra* note 147, at 259.

149. World demand for ivory in the 1980's was estimated to be 800 tons annually. *Id.*

150. Glennon, *supra* note 145, at 20-22; see also Hill, *supra* note 147, at 259-64 (1990).

151. Hill, *supra* note 147, at 260-62. Recognizing the increase in the ivory trade and the ineffectiveness of the permit process, in 1981 the Parties adopted a new ivory marking system "using punch dies." *Id.* at 260-61. The system had little effect in stopping the illegal trade of ivory. *Id.* Four years later, at the Fifth Conference of the Parties, further attempts were made to improve ivory controls through the implementation of "a more centralized regulatory structure." *Id.* at 261. The Parties established an Ivory Control Unit and "ivory quota procedures to regulate trade between CITES member and nonmember countries." *Id.* "Despite high hopes, the 1986 quota system failed just as its two predecessors. Even though high quotas were established to draw stockpiles of illegal ivory into the officially regulated system, most traders preferred to smuggle the ivory rather than bother with the paperwork to obtain a quota authorization." *Id.* at 262.

152. Glennon, *supra* note 145, at 20.

153. Orenstein Interview, *supra* note 5. According to Dr. Orenstein, attempting to construct a dam half way across the river simply did not work. *Id.*

receive world-wide attention. In 1988, Kenyan Wildlife authorities called for a complete ban on ivory trade, and in June 1989, England, France, the United States, West Germany and the European Community also issued moratoria on its trade.¹⁵⁴ Kenya, Tanzania and other east African countries whose elephant populations were nearly decimated, favored a new Appendix I listing.¹⁵⁵ However, southern African countries such as Zimbabwe, Botswana and South Africa, opposed it as their elephant populations were not as badly affected by poaching.¹⁵⁶ During the 1989 Conference of the Parties, efforts by southern African nations to "split-list" the African elephant to allow selected states to continue trading in ivory¹⁵⁷ were rejected and the African elephant was transferred from Appendix II to Appendix I.¹⁵⁸

Recognizing the interests of states with more abundant elephant populations that were unable to meet the Berne Criteria (Conf. 1.1) for transferring the species to Appendix II, the Parties adopted new elephant downlisting criteria (Conf. 7.9).¹⁵⁹ Conf. 7.9 provides for the creation of a panel of experts on the African elephant to evaluate a Party's request to downlist its populations to Appendix II, and instructs it to draft a final report of its findings to be presented to the Parties.¹⁶⁰ The Resolution establishes guidelines for the expert

154. Glennon, *supra* note 145, at 15-17; but see Raymond Bonner, *Crying Wolf Over the Elephants, How the International Wildlife Community Got Stampeded Into Banning Ivory*, N.Y. TIMES, Feb. 7, 1993, § 6 (Magazine), at 17-19, 30 (Bonner contends that not all elephants were threatened by poaching and that wildlife organizations such as the World Wildlife Foundation supported the ban on ivory for political and economic reasons).

155. Hill, *supra* note 147, at 262.

156. *Id.*

157. Glennon, *supra* note 145, at 17.

158. See Philippe J. Sans & Albert P. Bedecarré, *Convention on International Trade in Endangered Species: The Role of Public Interest Non-Governmental Organizations in Ensuring the Effective Enforcement of the Ivory Trade Ban*, 17 ENVTL. AFF. 799, 799-800 (1990).

159. Conf. 7.9, *supra* note 144, at 97.

160. *Id.* The resolution seeks to assure that the interests of the African nations are fairly represented in the downlisting process and that the basis for its removal from Appendix I should rest largely on the findings of experts in the field. *Id.* at 97-99. This is the first time that CITES has resorted to a comprehensive group of "experts" with no particular Party affiliation to evaluate a spe-

panel¹⁶¹ and the Parties¹⁶² to consider when deciding whether to downlist, covering three main areas: 1) the state of the elephant populations themselves; 2) a Party's ability to conserve and manage its elephant populations; and 3) the adequacy of its ivory trade controls.¹⁶³

These guidelines do not differ substantially from the Berne Criteria downlisting procedures,¹⁶⁴ in that they re-

cies standing and the potential effects delisting will have upon it. The CITES Standing Committee nominates the Panel of Experts (not to exceed six) "after consultation as appropriate with UNEP, IUCN, TRAFFIC International, the affected range state and the region concerned." *Id.* at 98.

161. *Id.* at 97-99. Conf. 7.9 states:

- h) that in evaluating the status and management of an elephant population the Panel of Experts shall take into account:
 - i) the viability and *sustainability* of the population, and potential risks;
 - ii) the affected range state's demonstrated ability to monitor the subjected population; and
 - iii) the effectiveness of current anti-poaching measures;
- i) that in evaluating the affected range state's ability to control trade in ivory from African elephants, the Panel of Experts shall take into account:
 - i) whether total levels of offtake from both *legal and illegal killing* are sustainable;
 - ii) whether control of ivory stocks is adequate to prevent the mixing of legal and illegal ivory;
 - iii) whether law enforcement is effective; and
 - iv) whether enforcement controls are sufficient to ensure that no significant amounts of ivory taken or traded illegally from other countries are traded within or through the territory of the affected range state

Id. at 98-99 (emphasis added).

162. *Id.* at 99. Section (j) of the resolution defines the criteria by which Parties decide on the transfer of an elephant population:

Parties should take into account the report of the Panel of Experts and in particular:

- i) the status of the elephant populations in the affected range state;
- ii) the affected range state's *ability to manage and conserve* its population effectively; and
- iii) the affect of range state's ability to control trade in elephant ivory

Id. (emphasis added).

163. *Id.* at 97-99.

164. The Berne Criteria require:

positive scientific evidence that the plant or animal can withstand the exploitation resulting from the removal of protection Such

quire "scientific evidence" of elephant "numbers and trends,"¹⁶⁵ assurances that elephant populations will remain "sustainable" with legal and illegal hunting, and detailed analysis of likely commercial trade effects.¹⁶⁶ This is the first time a CITES resolution considered the effects of both legal and illegal trade in its analysis. In addition, the resolution directly refers to a species' sustainability to assure that it will be maintained "at a level consistent with its role in the ecosystems in which it occurs," as required by CITES Article IV.¹⁶⁷

V. The 1992 Kyoto Conference and the Zimbabwe Resolutions: Attempts to Amend the Convention Under the Guise of Sustainable Use

A. The Zimbabwe Resolutions: An Overview

Following the 1989 Appendix I listing of the African elephant, South Africa, Zimbabwe, Zambia, Botswana and Malawi decided to continue selling ivory and entered reservations on the species.¹⁶⁸ Zimbabwe, Zambia, Botswana, Namibia and Malawi (but not South Africa) signed a treaty establishing the Southern African Center for Ivory Marketing (SACIM).¹⁶⁹ In fall 1991, South Africa, the four SACIM nations and various other representatives attended an "invitation-only" meeting in Zimbabwe to discuss CITES and its future.¹⁷⁰ Following the meeting, Zimbabwe, Zambia,¹⁷¹ Botswana, Namibia and Malawi drafted and submitted a series

evidence should include at least a well documented population survey, an indication of the population trend of the species, showing recovery sufficient to justify deletion, and an analysis of the potential for commercial trade in the species of population.

Conf. 1.2, *supra* note 13, at 46.

165. Conf. 7.9, *supra* note 144, at 97.

166. *Id.* at 99.

167. CITES, *supra* note 1, art. IV, para. 3.

168. Glennon, *supra* note 145, at 17.

169. Orenstein, Revision of the Berne Criteria, *supra* note 36, at 7.

170. *Id.*

171. With the election of a new government in January 1992, Zambia changed its position on the African elephant and withdrew its reservation. Orenstein Interview, *supra* note 5.

of resolutions at the 1992 CITES Conference of the Parties (held in Kyoto, Japan).¹⁷²

Five of these resolutions (the Zimbabwe Resolutions), differed considerably from past resolutions submitted at the Conference of the Parties. The premise underlying the Zimbabwe Resolutions was that CITES should allow international commercial trade of fauna or flora, even in Appendix I species, if the traded species is the product of legitimate sustainable use practices. In essence, the proposed Resolutions sought to change the Berne Criteria and to alter the principles on which CITES was formed.¹⁷³

The first two Zimbabwe Resolutions (Documents 8.48 and 8.49) interpreted CITES Article III to allow commercial trade in Appendix I species if it was the product of sustainable use.¹⁷⁴ The third draft resolution (Document 8.50), proposed new listing criteria (the Kyoto Criteria) based on more scientific data to replace the Berne Criteria.¹⁷⁵ A fourth draft resolution (Document 8.51), sought to provide range states with greater authority over amendments to Appendix I or II for species within their borders.¹⁷⁶ The fifth resolution (Document 8.52) attempted to limit the ability of importing nations to adopt rules and regulations stricter than CITES'

172. Orenstein, Revision of the Berne Criteria, *supra* note 36, at 7-8. The resolutions introduced were:

Doc. 8.48* Recognition of the Benefits of Trade in Wildlife

Doc. 8.49* Reconsideration of Primarily Commercial Purposes

Doc. 8.50 Criteria for Amendments to the Appendices

Doc. 8.51* Support of Range States For Amendments to Appendices I and II

Doc. 8.52* Stricter Domestic Measures

* Zambia withdrew its co-sponsorship of Documents 8.48, 8.49, 8.51, 8.52 during the Conference. CITES, 8th mtg., 4th sess., Plen. 8.4 (Kyoto, Mar. 3, 1992) [hereinafter Plen. 8.4].

173. See *infra* Section V.

174. *Recognition of Benefits of Trade in Wildlife*, CITES, 8th mtg., Doc. 8.48 at 5 (Kyoto, 1992) [hereinafter Doc. 8.48]; *Reconsideration of "Primarily Commercial Purposes"*, CITES, 8th mtg., Doc. 8.49 at 5 (Kyoto, 1992) [hereinafter Doc. 8.49].

175. *Criteria for Amendment to the Appendices*, CITES, 8th mtg., Doc. 8.50 (Kyoto, 1992) [hereinafter Doc. 8.50].

176. *Support of the Range States for Amendments to Appendices I and II*, CITES, 8th mtg., Doc. 8.51, at 3 (Kyoto, 1992) [hereinafter Doc. 8.51].

provisions.¹⁷⁷ Finally, the drafters of the Zimbabwe Resolutions proposed to downlist select African elephant populations to Appendix II to allow for limited international commercial trade in ivory and other elephant parts from countries with sustainably managed, stable elephant populations.¹⁷⁸

The Zimbabwe Resolutions were not widely approved by the Parties and most were withdrawn or redrafted into less controversial forms when it became evident they would not win approval.¹⁷⁹ However, the resolutions expressed their authors' frustration over barriers they believed CITES and importing nations erected against sustainable use and the fundamental differences they perceived between the way in which countries approached conservation within CITES.¹⁸⁰ In addition, the Zimbabwe Resolutions drafters succeeded in provoking a continued debate over the use of the Berne Criteria.

B. Proposed Resolution 8.48: The Benefits of Trade

Trade in Appendix I species may only occur if it: (1) "will not be detrimental to the survival of the species involved"¹⁸¹ and (2) "is not to be used for primarily commercial purposes."¹⁸² The first Zimbabwe Resolution, "Recognition of the Benefits of Trade in Wildlife," (Doc. 8.48) addressed the CITES "nondetrimental" requirement and challenged the notion that commercial trade has "only negative effects on the conservation of species."¹⁸³ The background document ac-

177. *Stricter Domestic Measures*, CITES, 8th mtg., Doc. 8.52, at 5 (Kyoto, 1992) [hereinafter Doc. 8.52].

178. See Tape of CITES, 8th mtg., Comm. I mtg., Debate on the African Elephant, taped and transcribed by Ronald Orenstein, (Kyoto, Mar. 10, 1992) [hereinafter Elephant Debate].

179. CITES, 8th mtg., 9th sess., Comm. I 8.9 (Kyoto, Mar.10, 1992) [hereinafter Comm. I 8.9].

180. Plen. 8.4, *supra* note 172.

181. CITES, *supra* note 1, art. III, paras. 3(a), (5)(a). The Scientific Authorities of both the exporting and importing states must make this determination. *Id.*

182. *Id.* art. III, paras. 3(c), (5)(c). This determination is to be made by the importing state Management Authority. *Id.*

183. Doc. 8.48, *supra* note 174, at 6.

companying this resolution argued that:

Trade is too often viewed in the CITES context as a simple matter of harvesting wild resources for financial gain. In practice, many of the most valuable wildlife products available for international trade from developing countries do not result from deliberate exploitation policies to obtain the products. They may result from natural mortality or they may arise as a *by-product* of management of species populations to maintain habitats. Legal trade in such products can be used to enhance species populations

....

....

... [and this] trade should also be viewed as *non-detrimental*.¹⁸⁴

Doc. 8.48 proposed that the Parties view trade as *beneficial* when: (1) it is "based upon sustainable use," (2) the monies raised are used to benefit wildlife management or "to provide income at a national level to developing countries," and (3) the country's Scientific Authority has assured that the "export will not be detrimental to the survival of the species involved."¹⁸⁵

Those present at the Kyoto conference generally agreed that commercial trade can potentially be beneficial to wildlife conservation.¹⁸⁶ Beyond this, however, there was much disa-

184. *Id.* at 2, 6. The drafters recommended "that rules adopted by the Parties do not penalise [sic] ranching, breeding or propagation operations but rather encourage them where appropriate." *Id.* at 6.

185. *Id.* at 5. The draft recommends:

a) that trade be viewed as *beneficial* when it is based upon sustainable use and the financial returns are used:

i) to provide income to rural wildlife-producer communities; or ii) to meet the costs of protected-area maintenance; or iii) to further invest in wildlife development by landholders; or iv) to provide income at a national level to developing countries; or v) for any combination of these purposes; and, in the context of species listed in the appendices to CITES, the Scientific Authorities comply fully with the provisions of Article III, para. 2(a) and IV, para. 2(a) of the Convention

Id. See also CITES, *supra* note 1, art. III, para. 2(a), art. IV, para. 2(a).

186. Plen. 8.4, *supra* note 172. As the CITES Secretariat noted: An affirmation that there are circumstances in which wildlife trade

greement over the proposed resolution.¹⁸⁷ Western conservation NGOs argued that "CITES should be used as a tool to regulate and manage wildlife trade, not enhance it."¹⁸⁸ Other NGOs contended that the proposed resolution went against the CITES presumption "that trade in Appendix I specimens is not beneficial."¹⁸⁹

The primary problem with the draft resolution was that it dealt in absolutes and was based on false premises not in accord with CITES. Document 8.48 focused solely on species' economic value and failed to account for wildlife's other values, such as aesthetic, ecological, scientific, cultural and recreational uses, all mentioned in CITES' preamble.¹⁹⁰ Although the Parties may consider a species' economic value

can be beneficial to species conservation is in accord with modern conservation thought, such as was expressed in the 1990 IUCN Resolution on 'Conservation of wildlife through wise use as a renewable natural resource.' . . . The Secretariat is broadly in agreement with the recommendations in the draft resolution.

Interpretation and Implementation of the Convention, Comments of the Secretariat on Documents Doc. 8.48 to Doc. 8.52, CITES, 8th mtg., Doc. 8.52.1 at 1 (Kyoto, 1992) [hereinafter Secretariat Comments]. The United States' negotiating position on Document 8.48 was to "[s]upport the concept that commercial trade can provide conservation benefits to species and ecosystems, although economic values are no greater weight that scientific, aesthetic, cultural and recreational values, as stated in the CITES preamble." 57 Fed. Reg. 7779 (1992).

187. Plen. 8.4, *supra*, note 172. See generally 57 Fed. Reg. 7779-80 (1992).

188. 57 Fed. Reg. 7780 (1992).

189. *Id.*

190. 57 Fed. Reg. 7779-80 (1992). See CITES, *supra* note 1, pmb1. Chris Wold of the Center for International Environmental Law-U.S., articulated his criticism in the following manner:

Proponents claim that this statement merely reaffirms paragraph 2 of the Convention's preamble, which states that wild flora and fauna have economic value as well as aesthetic, scientific, cultural, and recreational value. Economic value is not synonymous with commercial trade, however. . . . [A] statement that trade is beneficial to species listed under CITES is fundamentally at odds with the basic purpose of CITES to prevent trade from becoming detrimental. Instead, CITES has developed mechanisms to facilitate non detrimental trade, such as captive breeding and ranching.

Chris Wold, *The Zimbabwe Resolutions — A Threat to CITES?* at 2 (1992) (unpublished policy paper prepared for the Eighth Meeting of the Conference of the Parties to CITES on behalf of conservation, environment, and animal protection NGOs, on file at the *Pace Environmental Law Review*).

(including eco-tourism) its greatest asset, CITES does not prefer one value over another.¹⁹¹

Secondly, even if the draft resolution requirements were satisfied, international trade, albeit beneficial, would not automatically be non-detrimental.¹⁹² International trade could be detrimental by stimulating illegal trade,¹⁹³ regardless of the wildlife management policies of the range state.¹⁹⁴ As Kenya noted, the resolution "confused the issues of international wildlife trade and national use of wildlife resources."¹⁹⁵

In Committee, the Parties revised the draft resolution and the final version approved by the Parties confirmed that "trade *may be* beneficial to the conservation of species and ecosystems and/or to the development of local people when carried out at levels that are not detrimental to the survival of the species in question."¹⁹⁶ This recognizes the *potential* benefits of sustainable use¹⁹⁷ while acknowledging that the principles of sustainable use may not apply equally to all species.¹⁹⁸ The approved resolution also recognizes that "legal

191. CITES, *supra* note 1, pmb1.

192. Wold, *supra* note 190, at 3.

193. See 57 Fed. Reg. 7779, 7780 (1992). Greenpeace, speaking for a number of NGOs, contended that "the resolution provides a mechanism whereby detrimental trade could occur because some trade was beneficial." *Id.*

194. Wold, *supra* note 190, at 3-4. CITES by no means opposes sustainable use; rather it "regulates international trade because it recognizes that international trade often is detrimental to a species' survival." *Id.*

195. Plen. 8.4, *supra* note 172.

196. Conf. 8.3, *supra* note 16 (emphasis added).

197. Conf. 8.3 states in relevant parts:

RECOGNIZING that the sustainable use of wild fauna and flora whether consumptive or non-consumptive, provides an economically competitive land use option;

BEING AWARE that, unless conservation programs take into account the needs of local people and provide incentives for sustainable use of wild fauna and flora, conversion to alternative forms of land use may occur;

RECOGNIZING that over-utilization is detrimental to the conservation of wild fauna and flora;

. . . .

RECOGNIZING further that the returns from legal use may provide funds and incentives to support the management of wild fauna and flora to contain the illegal trade

Id.

198. *Id.*

trade should not lead to increases in illegal trade anywhere in the range” and “that the aesthetic, scientific, cultural, recreational and other largely non-consumptive uses of wild fauna and flora are also of enormous importance.”¹⁹⁹

C. Proposed Resolution 8.49: Reconsideration of “Primarily Commercial Purposes”

To trade an Appendix I species internationally, the Scientific Authorities of the exporting and importing nations must make a finding that the trade will be “non-detrimental” to the species.²⁰⁰ In addition, the Management Authority of the importing nation must determine “that the specimen is not to be used for primarily commercial purposes.”²⁰¹ The second Zimbabwe Resolution, “Reconsideration of ‘Primarily Commercial Purposes,’” (Doc. 8.49) sought to bypass CITES and allow *commercial* trade in Appendix I species (those in danger of extinction) by having the “Management Authority of the State of import interpret the term ‘not to be used for primarily commercial purposes’ as being applicable *only* to those cases of commercial trade which are clearly non-beneficial to the species concerned.”²⁰²

The meaning of “primarily commercial purposes” was previously addressed at the Fifth Meeting of the Conference of the Parties (held in Buenos Aires, Argentina, in 1985). In Conf. 5.10, the Parties agreed to follow a general set of principles in interpreting the term “primary commercial purposes”:

1. Trade in Appendix I species must be subject to particularly strict regulation and authorized only in exceptional circumstances;

199. *Id.*

200. CITES, *supra* note 1, art. III, paras. 2(a), (3)(a), (5)(a).

201. *Id.* art. III, paras. 3(c), (5)(c).

202. Doc. 8.49, *supra* note 174, at 5 (emphasis added). The United States pointed out that the “benefit” of trade bears no relation to “primary commercial purpose.” 56 Fed. Reg. 67,627, 67,630-31 (1991). When an Appendix I species is exported, the country of import determines whether it is for a “primary commercial purpose.” The benefit determination, that is, the maintenance of the species in relation to its environment, is the responsibility of the exporting State. *Id.*

2. An activity can generally be described as "commercial" if its purpose is to obtain economic benefit, including profit (whether in cash or kind) and is directed toward resale, exchange, provision of a service or other form of economic use or benefit;
3. The term "commercial purposes" should be defined by the country of import as broadly as possible so that any transaction which is not wholly "non-commercial" will be regarded as "commercial."²⁰³

The drafters of Doc. 8.49 considered the use and interpretation of "primarily commercial purposes" to be flawed and "prejudicial."²⁰⁴ Zimbabwe argued that CITES should not focus on commercial trade, but that it should concentrate on sustainable use.²⁰⁵ The authors of this draft resolution believed that the all or nothing approach of the CITES appendix system, allowing commercial trade in one group but not the other, impedes the "legitimate sustainable use" of Appendix I species,²⁰⁶ and they questioned "whether there are *any*

203. *Definition of "Primarily Commercial Purposes,"* CITES, 5th mtg., Conf. 5.10 (Buenos Aires, 1985) in BRAUTIGAM, *supra* note 7, at 74 [hereinafter Conf. 5.10].

204. Doc. 8.49, *supra* note 174, at 1, 2. The authors of Resolution 8.49 cited Willem Wijnstekers, former CITES Secretariat, in support of its assertion that the term "primarily commercial purposes" is unwarranted: "[t]he term *not to be used for primarily commercial purposes* cannot be applied in general and can, in addition, hardly be defined. One might therefore say that it should not have been used." *Id.* at 1, (citing WILLEM WIJNSTEKERS, *THE EVOLUTION OF CITES*, 20, n.33 (1990)). The authors further noted that "the draft resolution seeks to mitigate the prejudicial nature of the clause by suggesting that it should only be applied when the 'commercial purposes' can be clearly demonstrated to be non-beneficial to the species concerned." Doc. 8.49, *supra* note 174, at 2.

205. Doc. 8.49, *supra* note 174, at 1-2.

206. *Id.* at 2. The drafters claim that "there should be no stigma attached to direct exploitation itself if it is sustainable and carried out within society's accepted norms of animal welfare." *Id.* at 1. Paragraph 10(c) of the background document expands on the notion of unwarranted restriction:

[T]here is a tendency to assume that 'commercial' trade must always be traded on a large scale and therefore incompatible with endangered species. The Convention tends to prejudice those successful examples of conservation based on small-scale commercial trade arising from sustainable use. Whilst the commercial trade may appear insignificant on an international scale, it may be very

conditions of endangerment of species under which *all* commercial trade should be prohibited."²⁰⁷

This second Zimbabwe Resolution had both procedural and substantive flaws. Procedurally, Doc. 8.49 violated CITES²⁰⁸ by attempting to amend the treaty by resolution, which is prohibited.²⁰⁹ Substantively, the proposed resolution ignored the Conf. 5.10 interpretation of "for primarily commercial purposes" and directly conflicted with CITES' main presumption that trade is suspect.

The proposed resolution attempted to shift the premise of trade being suspect to an assumption that trade in Appendix I species, if conducted in a sustainable manner, is beneficial until proven otherwise.²¹⁰ However, "conservation benefit is independent of a finding of primarily commercial purpose."²¹¹ "[S]ustainable use is irrelevant to a determination of primary commercial use because it is related to management within the range country and is not a trade factor."²¹² Algeria, Ger-

important in the livelihood of rural communities and it may be the determining factor in species survival.

Id. at 2.

207. *Id.*

208. The Secretariat specifically noted that the proposed resolution allowed for commercial trade in Appendix I species which was "*deliberately excluded* by the Convention in order to avoid the normal processes of commerce generating a demand for specimens of highly endangered species that cannot be met by legal trade." *Secretariat Comments, supra* note 186, at 2 (emphasis added).

209. CITES may only be changed by amendment which must be "adopted by a two-thirds majority of Parties present and voting" at the Conference of the Parties. CITES, *supra* note 1, art. XVII, para. 1.

210. Doc. 8.49, *supra* note 174, at 5.

211. 57 Fed. Reg. 7780 (1992). The United States made this point clear when it explained its rationale for opposing the resolution:

Conservation benefit to the species is relevant to the Scientific Authority finding of "nondetriment" under Article III, paragraph 3(a). It is not however relevant to the Management Authority finding of whether an Appendix I specimen is to be used for primarily commercial purposes, as per Article III, paragraph 3(c). Since the "primarily commercial purposes" finding is made by the importing country, conservation benefits which normally occur in the exporting country are not relevant to that finding.

Id.

212. Wold, *supra* note 190, at 5.

many, Japan, Kenya,²¹³ the United Kingdom, the United States,²¹⁴ Zambia and the Secretariat opposed the resolution; Botswana and Zimbabwe withdrew the draft resolution with the understanding that their concerns would be addressed by the working group established to consider the Zimbabwe Resolutions.²¹⁵

D. Proposed Resolution 8.50: The Kyoto Criteria

The third Zimbabwe Resolution, "the Kyoto Criteria," (Doc. 8.50) sought to replace the Berne Criteria for listing and delisting species in the CITES appendices.²¹⁶ Zimbabwe stressed three main points: "[1] the need for more-objective criteria for assessing the biological status of species; [2] the need to recognize when trade is beneficial to conservation; and [3] the need for criteria which do not make removal of species from Appendix I more difficult than the inclusion of species therein."²¹⁷

The drafters of the Kyoto Criteria argued that the "present state of the appendices is not enhancing conservation of wild flora and fauna," because the appendices include far too many species that are not necessarily "threatened by commercial trade" and the Berne Criteria have failed to delete or transfer those species which were "inappropriately listed" (essentially the African elephant).²¹⁸ They argued the Berne

213. Kenya charged that the real "intent of the draft resolution was to allow trade in African elephant ivory." *Plen. 8.4, supra note 172.*

214. 56 *Fed. Reg.* 67,627, 67,630-31 (1991).

215. *Plen. 8.4, supra note 172.*

216. *See Doc. 8.50, supra note 175.* The criteria encompassed all of the theories espoused by the other Zimbabwe Resolutions, principally Doc. 8.48 and 8.49.

217. *Plen. 8.4, supra note 172.*

218. *Doc. 8.50, supra note 175, at 13.* The inappropriate listing of species in appendices, according to Zimbabwe and its supporters, arise from a lack of objective criteria to define the term "threatened with extinction." *Id.* at 2.

Article II(1) of the Convention and Resolution Conf. 1.1 [the Berne Criteria] refer to species "threatened with extinction," yet nowhere in the Resolutions of the Convention has an attempt been made to provide an objective criteria for defining the threshold at which a species should be considered in such a state.

This has resulted in very large numbers of species and taxa being included in the appendices or being placed in inappropriate

Criteria are overly prejudicial²¹⁹ and that the two conditions for deletion — (1) “positive scientific evidence” that a species can “withstand exploitation” and (2) a “showing [of] recovery sufficient to justify deletion”²²⁰ — are “virtually impossible to meet” and “entail unreasonable costs for producer

appendices. The fault lies partly in the criteria being vague and partly in the failure to apply the criteria objectively.

Recent advances in conservation biology give a basis for predicting the likelihood of extinction due to various factors. Such criteria are now being applied by the Captive Breeding Specialist Group (Foose, 1991) and will be used by IUCN in reviewing the Red Data Books. CITES should incorporate such objective criteria in its system of appendices.

Id.

219. The background document accompanying the Kyoto Criteria articulates with specificity the philosophical and technical problems that the drafters of the resolution have with the Berne Criteria:

The Berne Criteria are heavily prejudiced to listing species in the appendices and make it extremely difficult to delete them once listed, even where there is general agreement that they were wrongly listed in the first place. . . .

. . . . [Conf. 1.2] firstly, assumes that CITES is the only protection afforded to species, secondly, does not envisage that there could be any beneficial effects of trade, and, thirdly, assumes that CITES works as it should.

CITES does not, in fact, *protect*, species. It controls (and may even ban) international trade, but it has no powers to provide *protection*. The listing of species in Appendix I is often interpreted as conferring a high level of *protection*. This interpretation is false. There is no difference in the levels of protection between Appendix I and Appendix II since they are not *protective* devices.

Doc. 8.50, *supra* note 175, at 5-6. The drafters' arguments are circular and conclusory. To say that there is “no difference in the levels of protection between Appendix I and Appendix II” is simply wrong. While it may be correct to say that a total ban on a species, such as the African elephant, may have a detrimental impact upon local peoples who depend upon the international trade of the species, it is another thing entirely to claim that CITES does not protect species. Through universal action by the Parties, CITES does protect species, albeit within the context of international trade. One reason to list the African elephant in Appendix I in 1989 was because its listing in Appendix II failed to curtail the rampant killing of the species. Hill, *supra* note 147, at 261-62; *but see* Bonner, *supra* note 154, at 18, 30, 53. One may disagree with the motives of the ban on ivory, but it is difficult to dispute the fact that illegal poaching has been drastically reduced as a result. AFRICAN ELEPHANT CONSERVATION COORDINATING GROUP, THE AFRICAN ELEPHANT CONSERVATION REVIEW 1 (1991).

220. Conf. 1.2, *supra* note 13, at 46.

countries.”²²¹

The Kyoto Criteria proposed a list of general principles for listing, delisting and transferring species in the appendices. Somewhat similar to the Berne Criteria, they proposed a dual system to evaluate a species' biological and trade status to determine its appropriate appendix listing.²²² However, unlike the Berne Criteria, the Kyoto Criteria attempted to apply what its authors deemed a “more-objective” scientific criteria to assess a species' biological status.²²³ The Kyoto Criteria also applied the same standard when listing or delisting a species or transferring it to another appendix.²²⁴

In addition, the Kyoto Criteria recommended that “look-alike” species, mentioned in CITES Article II, “be listed in

221. Doc. 8.50, *supra* note 175, at 7.

222. *Id.* at 15-16.

223. Plen. 8.4, *supra* note 172. The Kyoto Criteria divided the probability of a species' extinction into three categories: critical, endangered, and vulnerable. Doc. 8.50, *supra* note 175, at 15. “If the probability of extinction within 10 years is higher than 20% the species would qualify for listing in Appendix I, provided the trade criteria are satisfied.” *Id.* Such a determination would be made “through population models using the best available data for the species.” *Id.* If there was not enough information to construct a model then the criteria referred to the Mace-Lande criteria for threatened taxa categories for mammals. *Id.*

While the Kyoto Criteria criticized the Berne Criteria for being overly stringent when it came to proving scientific evidence for downlisting a species from Appendix I, *see* Doc. 8.50, *supra* note 175 at 7, the Secretariat pointed out that the data required to construct the populations' models or apply the biological criteria proposed by the resolution did not exist for the majority of species. *Secretariat Comments, supra* note 186, at 3. The Secretariat also noted that the resolution's reliance on the Mace-Lande criteria was misplaced. *Id.* The CITES Secretariat wrote in its comment of Doc. 8.50:

[T]he “Mace-Lande criteria” were proposed by the authors primarily with higher vertebrates in mind. They may not be suitable for other taxa. Although it is stated in the draft resolution that criteria are being developed for other taxa, there is no suggestion as to what criteria should apply to them for the time being.

It should be stressed that Mace and Lande recommended that their proposed criteria not be generally accepted until they had been assessed by practical comparative application. This assessment has not yet been done.

Id.

224. Doc. 8.50, *supra* note 175, at 15-16.

Appendix II in preference to Appendix I"²²⁵ and that "split-listings" be avoided whenever possible.²²⁶ When split-listing was necessary, the Kyoto Criteria recommended listing a species in Appendix II and not Appendix I.²²⁷ The proposed Resolution stated: "[i]f the *global population of a species* is not threatened with extinction, the problem of geographically separate populations or marginal populations at the edge of a species range should be tackled through national legislation or through listing in Appendix III."²²⁸

225. *Id.* at 14. In its background document, the authors explained the basis for their proposal:

Article II(1) of the Convention does not provide for look-alike species to be listed in Appendix I and specifically designates Appendix II for this purpose in Article II(2)(b). Yet Resolution Conf. 1.1 [the Berne Criteria] reverses this by providing for genera to be listed in Appendix I if most of their species are threatened with extinction and if the identification of the individual species within the genus is difficult. Wijnstekers (1990, Notes 12a and 12b) notes the inconsistency. This has resulted in a number of somewhat sweeping and arbitrary inclusions of unthreatened species in Appendix I.

Id. at 3.

226. *Id.* at 13. A species is "split-listed" when a population in one country is listed in Appendix I, for example, because it has been "threatened with extinction" in that state, while the same species in another state may be listed in Appendix II because its populations are not as endangered. *Id.* at 2.

227. *Id.* at 13. The background document further states:

A disturbing trend in the Convention is the tendency to move away from considerations of the overall status of a species and to focus on the status of each population within a range state.

Id. at 10.

On issues of 'populations' and split-listings, if the global population of a species is not in danger of extinction but the species is in trouble in some Range States, it is recommended not to place the species in Appendix I.

Id. at 8.

228. *Id.* at 2. (emphasis added). The background document adds:

The question has to be asked whether, if a species is secure in a viable population in one Range State, it can in any way be considered in danger of extinction.

A further problem arises under the definition of population when certain Range States contain marginal populations at the edge of a species range and, from this parochial point of view, the species is endangered. The criteria for listing species should not be influenced by individual Parties seeking to use the Convention for such marginal populations. Their problems can only be solved by domestic measures and/or Appendix III listings.

However, the Kyoto Criteria ignored the fact that species, by definition, encompasses "species, subspecies, or geographically separate population."²²⁹ The use of the word "global" in the Kyoto Criteria was merely an attempt to alter the defined meaning of species and limit its application to only one of the three defined terms. Interestingly, the original CITES drafters contemplated a policy similar to that of the Kyoto Criteria but rejected it.²³⁰

The proposed criteria shifted the burden of proof to delist a species from a showing that trade was safe to a requirement by those opposed to the downlisting that international trade was actually harmful. The Kyoto Criteria also proposed that a Party be required to provide "no more than a nominally supporting statement" to downlist a species listed in the appendices prior to 1992.²³¹ Furthermore, Parties opposed to a downlisting were obliged to draft a "proposal to justify the retention of the species" in its present appendix.²³² This requirement of the Kyoto Criteria clearly sought to repeal the precautionary principle embodied in CITES and the Berne Criteria: that it is better to err in favor of protecting a resource,²³³ than to prematurely subject it to the pressures of trade.²³⁴

Although the Parties and the Secretariat were opposed to many Kyoto Criteria provisions,²³⁵ many Parties agreed that

Id. at 2-3.

229. CITES, *supra* note 1, art. I, para. a.

230. Wold, *supra* note 190, at 7 (citing DAVID FAVRE, RESOLUTIONS CHALLENGE FUNDAMENTAL PREMISES OF CITES 1 (1992) (unpublished draft)). According to Wold, "the word 'worldwide' modified 'threatened with extinction'" in four of the early drafts of CITES. However, the drafters removed the word in CITES' final draft thereby "ensur[ing] that geographically separate species would be protected." *Id.* While the Secretariat agreed that split-listings should be avoided whenever possible, it recommended that split-listing should be "made on a case-by-case basis." *Secretariat Comments, supra* note 186, at 2.

231. Doc. 8.50, *supra* note 175, at 16.

232. *Id.* at paras. 2(C)(d)(i)-(ii).

233. Conf. 1.2, *supra* note 13, at 46.

234. *See generally* Doc. 8.50, *supra* note 175, at 7.

235. "There is no 'symmetry' in a process which allows only a nominal statement to downlist a species and a full report simply to keep the species' present status." Wold, *supra* note 190, at 8. He points out that:

All countries have an opportunity to air grievances concerning any

the Berne Criteria need revision.²³⁶ Recognizing that they could not effectively review the entire proposal at the 1992 Conference, the Parties assigned the Standing Committee and the Plants and Animals Committee the task of working with the Secretariat, IUCN and other organizations to develop new criteria for listing species in the appendices to be presented to the Parties at least 300 days before the 1994 Conference of the Parties.²³⁷ The first draft of the recommendations for new criteria prepared by IUCN and submitted to the CITES Standing Committee in March 1993 was severely criticized by conservation groups which launched an international drive to protest the draft proposal.²³⁸ Following comments by the Parties, the IUCN draft criteria were modified and resubmitted to the Parties.²³⁹ The proposed resolution has been revised again and although still controversial, will be submitted to the Conference of the Parties in Florida, in November, 1994.

species that they believe were wrongly listed. As early as 1981, regional committees were created to review trade and biological status of species indigenous to particular regions. Unfortunately, only two of the regions have met to consider the status of species within their regions.

Id. at 8-9.

236. *Eighth Meeting of CITES*, *supra* note 121, at 11-12. The United States' position was that "[t]he Berne Criteria needed to be reviewed and adapted to address a broader array of taxa and to be more descriptive and definitive, to the extent possible." 57 Fed. Reg. 7789 (1992).

237. *Development of New Criteria for Amendments to the Appendices*, CITES, 8th mtg., Comm. 8.11 (Rev.) adopted as Conf. 8.20, (Kyoto, 1992).

238. The Species Survival Network, a coalition of NGOs in Washington, D.C. sent faxes to non-governmental organizations around the world informing them of the new criteria and urging them to reject the proposal and submit their comments to their governments. Facsimile in Spanish from Juan Gruss and Tomas Waller, Traffic South America - Argentina, to Species Survival Network (June 1993) (on file at the *Pace Environmental Law Review*). The IUCN Preliminary Results of the Application of the Criteria to a Sample of Species, released in July 1993, drew even more criticism. Under the proposed IUCN criteria a number of species currently listed in Appendix I and considered by many conservation groups still to be endangered or threatened, would have been removed to Appendix II. Mar. 4, 1994 Bolze Interview, *supra* note 78.

239. See *Notification to the Parties Concerning Criteria for Amendment of Appendices I and II*, CITES Secretariat, No. 773 (Geneva, Oct. 15, 1993).

E. Proposed Resolutions 8.51 & 8.52: Greater Say and Control for Range States

The last two Zimbabwe Resolutions — “Support of Range States for Amendments to Appendices I and II” (Doc. 8.51) and “Stricter Domestic Measures” (Doc. 8.52) — sought to provide range states with more input and control over their natural resources and to offset a perceived bias against sustainable use.²⁴⁰

1. Proposed Resolution 8.51: Support of Range States for Amendments to Appendices I and II

Proposed resolution 8.51 was divided into two parts. The first part required the Parties to inform and consult range states regarding any proposal to downlist a species that exists within a range state’s borders.²⁴¹ The second part essentially provided range states with the power to veto any proposed appendix listing affecting a species within its borders.²⁴² Parties and NGOs alike supported efforts for a more

240. See Doc. 8.51, *supra* note 176; Doc. 8.52, *supra* note 177.

241. Doc. 8.51, *supra* note 176, at 3. The background document accompanying the proposed resolution noted “that there is a minimum obligation to consult Range States before submitting proposals which may place trade restrictions on species occurring in their countries.” *Id.* at 1. The CITES Secretary concurred: “Since it is agreed by the Parties that peoples and states are and should be the best protectors of their own wild fauna and flora, it is important that the range states of each species have the opportunity to influence the process of deciding on its listing in the CITES appendices.” *Id.*; see also *Secretariat Comments, supra* note 186, at 5.

242. Doc. 8.51, *supra* note 176. The proposed resolution provided that:

- a) any Range State may request a vote, which is restricted to countries of origin of the species, immediately prior to the consideration of such a proposal by the Conference of the Parties in the appropriate Committee session;
- b) the issue to be voted on is whether the Parties will consider the proposal;
- c) the vote shall be conducted without adjournment, only Parties who are Range States shall vote, and the vote will be a secret vote if so proposed by a Range State and seconded; and
- d) if a majority of two-thirds (or, if there are fewer than three Range States, a unanimous vote) of the Range States are opposed to consideration of the proposal, it will be withdrawn;

Id. at 3-4.

formal notification and comment process.²⁴³ However, they overwhelmingly opposed the second part of the resolution (the range states veto), a direct violation of CITES.²⁴⁴ CITES states that a single party veto is not permitted; a resolution is only defeated if its sponsors withdraw it from consideration or if a requisite two-thirds majority vote at the Conference of the Parties is not attained.²⁴⁵

The Secretariat acknowledged that range states at times had not been adequately consulted.²⁴⁶ Under Conf. 6.7 (Ottawa, 1987), the Parties are required to communicate with range states before imposing "stricter domestic measures"²⁴⁷ but no formal notice requirements previously existed for proposed appendix listings. Doc. 8.51 was redrafted in Committee to provide for more formal consultation procedures by the Parties proposing to amend Appendix I or II and was adopted by the Parties (later renumbered Plen. 8.21).²⁴⁸

243. 57 Fed. Reg. 7789 (1992). The United States supported the "recommendation that a Party proposing to amend the Appendices notify and consult with the range States concerned, and include any range State opinions in the proposal." *Id.*

244. *Secretariat Comments*, *supra* note 186, at 5-6. CITES cannot be amended by resolution. As previously indicated, this was not the only attempt by the drafters of the Zimbabwe Resolutions to effectively alter CITES.

245. CITES, *supra* note 1, art. XV, para. 2(j).

246. Plen. 8.4, *supra* note 172.

247. 57 Fed. Reg. 7789.

248. CITES, 8th mtg., 9th sess., Plen. 8.9, (Kyoto, Mar. 12, 1992) [hereinafter Plen. 8.9]. The adopted resolution provided for two means of consultation. CITES, 8th mtg., Plen. 8.21, (Kyoto, 1992) [hereinafter Plen. 8.21]. The first option provides that Parties consult both the Management and Scientific Authorities of the range states and include their opinions in its proposal. *Id.* The second option does not require direct consultation with range states but requires a Party to submit its proposal to the Secretariat at least eleven months (330 days) before the upcoming Conference of the Parties for other Parties to comment. *Id.* Upon receiving the proposal, the Secretariat will circulate copies to all the Parties who in turn will "send their comments [back] to the proposing Party in order to allow it to submit a revised proposal at least 150 days prior to the meeting." *Id.* In both instances, the Parties are required to comply with Resolution Conf. 2.17, Format for Proposals to Amend Appendix I or II, which requires that the Parties submit biological and trade data and outline the protection status of the species at both the national and international level. *Format for Proposals to Amend Appendix I or II*, CITES, 2d mtg., Conf. 2.17 (San José, 1979) in BRAUTIGAM, *supra* note 7, at 26 [hereinafter Conf. 2.17].

2. Proposed Resolution 8.52: Domestic Measures No Stricter Than CITES Appendices Provisions

The last of the Zimbabwe Resolutions, "Stricter Domestic Measures" (Doc. 8.52) objected to the ability of States to go beyond CITES and adopt legislation prohibiting the importation of species that may be traded under Appendix II or III.²⁴⁹ Botswana postulated that some consumer states used stricter domestic measures under Article XIV "to close off markets to range states even for species which [were] not endangered, thus preventing any potential conservation benefits from international trade."²⁵⁰ Resolution 8.52 sought to provide range states greater control over their wildlife exports by circumventing CITES' language and recommending that the Parties ensure that their rules and regulations regarding the importation of species were not "more or less restrictive than the existing provisions of CITES."²⁵¹

However, "the draft resolution conflict[ed] with the text of the Convention, by proposing to restrict a right which the Convention assures to the Parties."²⁵² CITES states:

1. The provisions of the present Convention shall in no way affect the right of Parties to adopt:

249. Doc. 8.52, *supra* note 177, at 5. See CITES, *supra* note 1, art. XIV, para. 1.

250. CITES, 8th mtg., 11th sess., Comm. II 8.11 (Kyoto, Mar. 10, 1992) [hereinafter Comm. II 8.11]. See also *Eighth Meeting of CITES*, *supra* note 121, at 13. The background document accompanying the proposed resolution further articulated the drafters' concern that stricter domestic legislation will inhibit sustainable use management practices of wildlife.

Management of wildlife in some producer countries is now recognized as a valid form of land use and, because it is profitable, it is leading to greater tracts of land under wildlife. For such positive developments to continue, international trade measures are required which treat wildlife products no differently than those domestic livestock. Prejudice against the trade in products of wildlife will drive land out of wildlife production. Stricter domestic legislation in importing countries, underpinned by the assumption that the additional protection is enhancing conservation, is likely to produce the opposite effect.

Doc. 8.52, *supra* note 177, at 3.

251. Doc. 8.52, *supra* note 177, at 5.

252. *Secretariat Comments*, *supra* note 186, at 6.

- (a) stricter domestic measures regarding the conditions for trade, taking, possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof; or
- (b) domestic measures restricting or prohibiting trade, taking, possession or transport of species not included in Appendices I, II, III.²⁵³

The background document accompanying Resolution 8.52 recognized that CITES Article XIV gives Parties the right to adopt stricter domestic trade regulations.²⁵⁴ Yet proponents of the resolution interpreted Article XIV simply to mean "that a Range State was entitled to afford species within its country greater legal protection than that provided by CITES."²⁵⁵ They argued that the "provision has been used more by importing countries to restrict trade than it has by Range States for protection purposes."²⁵⁶ The Secretariat again refuted the

253. CITES, *supra* note 1, art. XIV, paras. 1(a), (b). The Secretariat also noted that the IUCN Environmental Law Center had already provided two legal opinions on the interpretation of Article XIV para. 1 which had been distributed to all the Parties (Technical Committee Document Doc. TEC. 2.5 and Notification to the Parties No. 611, Oct. 31, 1990). *Secretariat Comments, supra* note 186, at 6.

254. Doc. 8.52, *supra* note 177, at 1. Proponents of Resolution 8.52 did not object to stricter domestic measures per se when "a Party ha[d] reason to believe that a species is being traded illegally" as recommended by Resolution Conf. 2.6 (b). *Id.* They did, however, question Resolution Conf 2.6 (a) which advises that stricter domestic measures be considered when "an Appendix II or III species is being traded in a manner detrimental to the survival of that species." *Id.* Proponents seemed to view illegal trade and unsustainable use as two distinct and unrelated problems:

[[If a] species is being exploited unsustainably it is unlikely that stricter domestic measures imposed by an importing country will correct the problem. If the Scientific and Management Authorities in an importing state are better able to determine that a species is being exploited unsustainably in a Range State than its own Scientific and Management Authorities then they have a *moral responsibility* to assist the exporting Party with management programme for the species.

Id. (emphasis added).

255. *Id.*

256. *Id.* An example of stricter measures can be seen in the case of the United States, which lists the Nile Crocodile (except for populations from Zimbabwe), and Yacare Caiman as "endangered" under the Endangered Species Act of 1973 (ESA). 55 Fed Reg. 43,387 (1990). Yacare Caiman is listed in

drafters' arguments, claiming: "There is no evident basis for the suggestion in the draft resolution that Article XIV(1) was intended to apply primarily to countries of origin of CITES-listed species."²⁵⁷ The merits of Resolution 8.52 were never debated as Botswana withdrew the resolution from consideration upon its introduction in Committee.²⁵⁸

F. The Debate Over Split-Listing the African Elephant in Appendices I and II

While the drafters (minus Zambia) argued for the Zimbabwe Resolutions, their sustainable use ideologies faced a more immediate test in the efforts to downlist the African elephant to Appendix II. The primary focus of the debate was whether downlisting the African elephant to Appendix II and the resumption of international trade in ivory would be sustainable. In international commercial trade, sustainability must be viewed from a broad international perspective and must account not only for the impact on local ecologies and

Appendix II and the Nile Crocodile is listed in Appendix I except where it is permitted to be traded under the ranching programs (Conf. 3.15) and export quotas (Conf. 7.14). 56 Fed. Reg. 49,708, 49,720-21 (1991). The U.S. is considering downlisting both species from endangered to threatened under the ESA which would greatly increase the trade for those species. 55 Fed Reg. 43,387-88 (1990). The Crocodile Specialist Group and TRAFFIC strongly support the delisting of the species. *CSG Steering Comm. Aug. 1992 Minutes, supra* note 92, at 12.

257. *Secretariat Comments, supra* note 186, at 6. A plain reading of Article XIV, para. 1 indicates that the right to adopt stricter domestic measures fell equally on exporting as well as importing nations. Chris Wold pointed out the importance of importing nations' ability to act independently:

If passed, this proposal would seriously limit importing countries' ability to protect species. It would ensure that nonrange countries could not impose precisely the type of unilateral import bans that reduced the ivory trade and helped place the elephant on Appendix I. Nor will importing countries be able to require import permits for Appendix II species. Both these measures have demonstrated the ability of nonrange countries to protect species and effect unsustainable exploitation in exporting countries. Moreover, importing countries likely will not be able to make "no detriment" findings inconsistent with those of the range country, because they will be limited by the law of range states.

Wold, *supra* note 190, at 11 (citations omitted).

258. Comm. II 8.11, *supra* note 250.

targeted populations, but also for the effect that a use will have on similar or different populations elsewhere. The concept put forth by the Zimbabwe Resolutions that sustainable use of a species is purely a local issue was rejected by the Parties.

1. The Sustainable Use of the African Elephant

Botswana, Malawi, Namibia and Zimbabwe introduced a joint proposal before Committee I to downlist their (*Loxodonta africana*) elephant populations to Appendix II. The Minister of Commerce and Industry of Botswana said that his country's concern was not trading ivory *per se*, but was with environmental protection and ecologically sustainable development.²⁵⁹ He noted that:

Appendix II listing is a case for sustainable use of whole elephants or products, not just ivory. The current Appendix I listing for the African elephant under CITES blocks us from following our strategy, since our domestic market is potentially very small. It is primarily for this reason that Botswana seeks the restoration of its elephant population to Appendix II.²⁶⁰

Zimbabwe reiterated the benefits of wildlife sustainable use and its vital importance to rural communities as an alterna-

259. Elephant Debate, *supra* note 178, at 1; Comm. I 8.9, *supra* note 179.

260. Elephant Debate, *supra* note 178, at 1. The Minister from Botswana further outlined the state of its African elephant populations:

Distinguished delegates, Botswana has a significant population of the African elephant in its care. Scientifically conducted aerial surveys [unintelligible] indicate that in 1991 Botswana had some 60,000 elephants occupying up to 25,000 square kilometers. The same work has revealed that during the dry season, 75% of that population concentrate themselves on some 16% of the range, around a few northern waterways. I would welcome anyone who wants to come and check these figures for themselves. Botswana's elephant population now poses a potential risk to the woodlands and the existence of other wildlife species in its range. . . . Botswana has a comprehensive national conservation strategy. Some 17% of Botswana is set aside for national parks and a further 23% for wildlife management areas.

Id.

tive to subsistence agriculture,²⁶¹ arguing that

[t]he trade ban initiated by CITES in 1989 did not accommodate the fact that not all African elephant populations were in crisis The ban may seem to have addressed some short-term problems in those countries where elephants were declining, [b]ut it has also threatened the demonstrated successes in our countries, which now contain one-quarter of the elephants in Africa.²⁶²

As required under Resolution Conf. 7.9 (the elephant downlisting resolution), a Panel of Experts reviewed the scientific evidence of the numbers and trends of elephants in each country, the conservation and management practices employed and the adequacy of the trade controls.²⁶³ The Panel's report questioned "the viability of elephant populations in Namibia and Malawi" and observed a need for improved "trade controls."²⁶⁴ However, the panel concluded

261. Comm. I 8.9, *supra* note 179. Zimbabwe's Minister of Environment and Tourism:

In many areas, we are watching a transition from subsistence agriculture to wildlife producer communities. We are also planning a new coalition between the rural wildlife producers and national wildlife management authorities. We are planning to have progress in turning a conflict situation into one where wildlife is now an asset. However, for this position of positive development to continue, the full economic value of wildlife must be realized, including any advantages offered by international cooperation. In short, wildlife must be enabled to secure its own survival through sustainable utilization.

Elephant Debate, *supra* note 178, at 2-3.

262. Elephant Debate, *supra* note 178, at 2.

263. See generally Conf. 7.9, *supra* note 144, at 97-98. In considering a downlisting proposal, the Panel must address four factors:

- i) whether total levels of offtake from both *legal and illegal killing* are sustainable;
- ii) whether control of ivory stocks is adequate to prevent the mixing of legal and illegal ivory;
- iii) whether law enforcement is effective; and
- iv) whether enforcement controls are sufficient to ensure that no significant amounts of ivory taken or traded illegally from other countries are traded within or through the territory of the affected range state

Id. at 99 (emphasis added).

264. Elephant Debate, *supra* note 178, at 3.

“that Botswana and Zimbabwe met the criteria for a transfer of their elephant populations to Appendix II.”²⁶⁵

2. Compromises Offered

Recognizing the sensitivity of the issue, Zimbabwe, speaking for the group of southern African nations, offered as a measure of good faith, a “self imposed moratorium on raw ivory sales” until the necessary methods of control had been addressed “both in southern Africa and in the importing countries.”²⁶⁶ In addition, Zimbabwe noted the advances it believed had been made in the area of monitoring and trade control:

In southern Africa, we have examined our joint needs for wildlife management. This includes cooperation in research, management, law enforcement and marketing. Through the creation of the central marketing system and other coordinated activities we have achieved a remarkable level of regional cooperation in wildlife management in southern Africa, which we value very highly. This is why we have submitted our joint proposal. We have no intention of abandoning this unity, nor do we have any intention of putting in place a system of trading which will jeopardize the remainder of Africa’s elephants.²⁶⁷

However, Parties still opposed the downlisting and Botswana, Malawi, Namibia and Zimbabwe sought a further compromise.²⁶⁸ On behalf of the group, Malawi submitted a revision to the original downlisting proposals which called for:

1. A mandatory moratorium on “all ivory except hunting trophies and local sales of worked ivory;”
2. The establishment of a working group which would ad-

265. *Eighth Meeting of CITES*, *supra* note 121, at 13.

266. Elephant Debate, *supra* note 178, at 3. The Summary Report of the Committee I Meeting, however, makes it appear as though only Zimbabwe would observe a moratorium. See CITES, 8th mtg., 4th sess., Comm. I 8.4 (Kyoto, Mar. 5, 1992).

267. Elephant Debate, *supra* note 178, at 3.

268. Hemley, *Endangered Treaty*, *supra* note 15, at 2.

dress transit and border controls and draft a proposal to be submitted to the next Conference of the Parties concerning the reopening of "limited trade in ivory from SACIM under strictly controlled conditions;"

3. Review by the Parties of the working group's proposal at the following Conference with the understanding that the elephant would be returned to Appendix I should the proposal fail;
4. All four countries to be treated as one unit while the working group would "establish appropriate mechanisms to allow the different treatment of each member state within an Appendix II listing;"
5. Initially limiting commercial trade in ivory to specified importing countries that prohibit re-export.²⁶⁹

Malawi urged approval of the compromise resolution, stating that the moratorium would "be lifted very carefully, very slowly, step by step," so the process could be monitored and suspended if problems arose.²⁷⁰ "We do not prefer to leave Kyoto with our elephants still on Appendix I with our reservations in place. We feel that our proposal, as amended, is better for elephants, better for people, better for conservation, and better for CITES."²⁷¹

The Secretariat considered Botswana and Zimbabwe to have met the biological criteria and noted that under the new proposal "the criteria on ivory trade controls were not relevant . . ."²⁷² Switzerland also supported the compromise²⁷³

269. Elephant Debate, *supra* note 178, at 4.

270. *Id.*

271. *Id.*

272. Comm. I 8.9, *supra* note 179, at 2.

273. Switzerland's delegate, Peter Dollinger, in supporting the resolution expressed his country's frustration with what he termed "the lack of consistency" demonstrated by the Parties to the Conference. Elephant Debate, *supra* note 178, at 6. He went on to say:

Very often we behave, in fact, rather like some local rabbit-breeders' association than like a Conference made up of responsible representatives of sovereign nations. . . . [T]his Conference accepted Resolution Conf. 7.9, by which a split-listing of the African elephant was accepted in principle. This decision was taken by a vast majority of the Conference. . . . By Resolution Conf. 7.9, a Panel of Experts was established. It is disturbing to note that many Parties have made up their minds before they were in possession of the

and, recognizing the differences between the four countries, proposed that each one be considered separately.²⁷⁴

3. Opposition to the Downlisting Due to Biological and Enforcement Factors

According to TRAFFIC's account of the Conference, compromise efforts came too late.²⁷⁵ Despite the changes offered, a majority of the Parties, including other African range states, believed that it was simply too soon to consider downlisting any African elephant populations. Contrary to the Secretariat's statements, the Parties did consider the issue of trade controls to be of vital importance and also questioned the delisting on biological grounds.²⁷⁶ Perhaps Zambia, which withdrew its co-sponsorship of the downlisting proposal, best expressed the sentiments of the majority of Parties in opposition to the resolution:

- (1) elephant populations in the subregion remained far lower than they had been ten or fifteen years ago and that the environment was still able to handle an increase;
- (2) controls were not in place to prevent illegal trade;²⁷⁷

Panel of Experts' report. . . . [T]he proponents, following the Secretariat's recommendation, have amended their proposal in the sense that no commercial trade in ivory will take place until the next meeting of the Conference of the Parties. Switzerland, as the Depository Government, wishes to be consistent, wishes to be honest towards the range states concerned. This delegation will, therefore, support the proposal with regard to those populations meeting the biological criteria.

Id.

274. *Id.* at 7. See also Comm. I 8.9, *supra* note 179.

275. Hemley, *Endangered Treaty*, *supra* note 15, at 2.

276. Elephant Debate, *supra* note 178, at 5-6; but see *Eighth Meeting of CITES*, *supra* note 121, at 13 ("[F]ew questioned the evidence that populations were locally large and well-managed").

277. Elephant Debate, *supra* note 178, at 5. Zambia added:

There are no controls in all of the countries in the subregion today that can take care of the illegal trade in elephant ivory and products. This includes South Africa, which has one of the most sophisticated police networks, law enforcement networks in the region. Indeed, it is the biggest transit route, as Africa exists today, for ivory. How, then, can we turn around and say, we in Zambia, with meager resources, Zimbabwe, these other countries, have the resources to take care of the control of trade controls.

(3) virtually no cooperation existed in the area of enforcement, and what little there was, occurred on an ad hoc basis and lacked the backing of an international treaty or accord;²⁷⁸

(4) government officials were inadequately trained and lacked the ability "to effectively monitor . . . trade in the region,"²⁷⁹ and

(5) many of the elephants claimed by Zimbabwe also belonged to Zambia as populations freely crossed the borders of the two countries.²⁸⁰

Other countries such as Tanzania,²⁸¹ the United King-

Id. at 5-6.

278. *Id.* at 6. Israel pointed to the lack of an international accord to address the management of migratory elephant populations.

When biologically discrete wildlife populations straddle international frontiers elsewhere in the world, the states involved normally agree to bilateral or multilateral treaties on common conservation and management moves. There are numerous European accords of this nature; in North America there are formal agreements on migratory birds, fish, marine mammals, polar bears, and even a caribou herd. In South America the vicuna is subject to joint conservation and management under the terms of the La Paz Convention. We are unaware of any analogous agreement in southern Africa to share responsibility for conservation and management of biologically discrete elephant populations which traverse national frontiers. The only agreement we are aware of is a marketing agreement, SACIM, which does not address the conservation and management of live elephants.

Id. at 11.

279. *Id.* at 6.

280. *Id.*

281. *Id.* at 7. Tanzania not only questioned the ability to control trade but also questioned the motivation to downlist the elephant:

The delegates of the four countries have spoken of good will when they came to us Mr. Chairman, I must say that our colleagues have presented their proposal from outside the Convention. All of them have not renounced the reservations they entered following of African elephant to Appendix I in 1989. The clear message that the rest of the African elephant range states are getting is to downlist a species to allow SACIM to trade in the four countries' elephants as well as ours. In the latest [reports] that we have studied, the proponents will admit that there are no controls in place to stop the flow of ivory into any illegal trade which may be established as a result of the downlisting.

Id.

dom,²⁸² and the United States reiterated their apprehension over the level of controls in place to prevent illegal trade.²⁸³ Tanzania feared that downlisting the African elephant to Appendix II would ultimately force it "to spend resources, and much time and energy, [on] anti-poaching and law enforcement instead of deliberating on the development of the wildlife sector meaningful national development."²⁸⁴ Tanzania and other nations were also concerned with the message that downlisting the elephant would send to poachers, even if the ivory trade moratorium remained in place.²⁸⁵ Tanzania warned:

Mr. Chairman, the poachers in Africa are waiting for a

282. Elephant Debate, *supra* note 178, at 8. The United Kingdom praised efforts to improve law enforcement but maintained that controls were inadequate to allow the resumption of trade in ivory:

We have examined all the available evidence, and in particular the Panel of Experts' reports, which make clear that in some places excellent law enforcement and management procedures have been established, and the countries concerned should be proud of their efforts. They offer an example to all. But the Panel also made clear that this was not so in other countries, and, most critically, the Panel found continuing illegal trade everywhere in southern Africa; and the Panel concluded that evidence exists that ivory has been and continues to be shipped through all the SACIM countries for [sic] neighboring states. And, further, the Panel commented on the problems of marketing [unintelligible] to prevent poached and legally-taken tusks from being mixed. And, as the Panel of Experts concluded, Botswana is the country hosting the Southern African Center for Ivory Marketing, SACIM, where according to the Panel, the system of control of raw ivory is inherently unsound and largely ignored. And we therefore remain unconvinced that any country can prevent the mixing of legal and illegal ivory.

Id. at 8.

283. *Id.* at 12.

284. *Id.* at 7.

285. *Id.* at 9. The United Kingdom feared that even trade in elephant products would have a detrimental impact upon the species:

[W]e further believe that to allow trade in other elephant products will inevitably be seen by some as a rehearsal for the resumption of trade in ivory. To allow trade at this moment in other elephant products would send all of the wrong signals to the poachers. It could only encourage further poaching and stockpiling of ivory, and would jeopardize the progress that has been made under the trade ban that was introduced.

Id. at 9.

message from us. If they should get the message that trade will continue, they will start poaching before we leave Kyoto. If we make the mistake of downlisting any elephant population from Appendix I to II, the 8th Conference of the Parties will be remembered as having sentenced both the African elephant, and the other species that rely on the elephant, to death.²⁸⁶

The fear over resumed poaching (which had almost entirely ceased) with the African elephant's listing in Appendix II was not unwarranted. Several countries reported a rise in poaching during the Kyoto conference due in part to the belief that trade in ivory would soon resume.²⁸⁷ Kenya, which derives considerable revenues from eco-tourism based largely on the healthy existence of its elephant populations,²⁸⁸ stressed that "any reopening of any form of trade" in ivory would "lead to disaster."²⁸⁹ Kenya's delegate, Richard Leakey, whose conservation ideologies differ considerably from those expressed by Zimbabwe,²⁹⁰ urged proponents of the resolution not to view the effort to keep the African elephant in Appendix I as "a foreign initiative" and requested, "for the sake of unity," that the proposal be withdrawn.²⁹¹

286. *Id.* at 7.

287. Orenstein Interview, *supra* note 5.

288. *Id.*

289. Elephant Debate, *supra* note 178, at 10.

290. Michael Satchell, *Wildlife's Last Chance*, U.S. NEWS & WORLD REP., Nov. 15, 1993, at 68.

291. Elephant Debate, *supra* note 178, at 10. Leakey's full comments follow: First, I would like to appeal to our colleagues from the proponent countries not to continue to believe that this initiative to keep elephants on Appendix I is a foreign initiative. It is an African concern, and we as Africans in the majority at this meeting truly and firmly believe that course of action is the correct action. To say that we are being manipulated externally is an insult to our intelligence. Secondly, Mr. Chairman, I believe that it is important to make it clear that many countries have nothing fundamentally against the principle of wildlife utilization.

Nonetheless, the very reasons that were there for the decision to put elephants on Appendix I remain today. To talk of a moratorium for a period of two years or three years is inappropriate. Let us speak clearly: there should be no ivory trade, period. If at some future date there are adequate controls to cover the international trade in ivory, the matter can be reconsidered; but at the moment,

Faced with insurmountable opposition, Botswana reluctantly withdrew the proposal.²⁹² South Africa also withdrew its proposal to downlist its elephant populations after Parties aired similar concerns over the enforcement implications.²⁹³

4. The African Elephant, Split-Listing & Sustainable Use

Was CITES' integrity jeopardized by the vote not to de-

there simply are not those controls in place, and any reopening of any form of trade, or any message that suggests that trade will be reopened in the foreseeable future, will lead to a disaster for those countries.

Id.

292. *Id.* at 13. Ginette Hemley, in describing the Conference claimed that "industrialized nations" managed to prevent any further debate on the issue. Hemley, *Endangered Treaty*, *supra* note 15, at 2. However, a review of the transcript of the debate over the resolution indicates otherwise. Not only did "industrialized nations" not prevent debate but, as Richard Leakey of Kenya noted, a majority of the opposition to the downlisting came from African nations. Elephant Debate, *supra*, note 178, at 10.

293. Hemley, *Endangered Treaty*, *supra* note 15, at 13. Despite the reasons cited by opponents of the resolution, the Botswana delegation could not hide its frustration and anger with the Parties. Elephant Debate, *supra* note 178, at 13. The Minister of Commerce and Industry of Botswana spoke on behalf the South African nations that had submitted the Zimbabwe Resolutions.

We are indeed extremely perplexed. In 1989, when the entire elephant population of Africa was listed in Appendix I of CITES, the Parties simultaneously adopted a set of criteria and procedures for transferring that portion, those elephant populations which clearly did not belong on Appendix I. We assume that this was because the Parties were not entirely comfortable with their decision. We have now complied with those criteria, submitted proposals based on those criteria, satisfied those criteria and, prior to this meeting, expected to have our elephant transferred back to Appendix II according to those criteria. It seems to us that the goalposts have been moved and this brings into doubt the integrity, objectives and long-term motives of CITES. . . .

. . .

. . . The question which remains is what will we do next? The choice which the Parties have effectively made is to reject an offer of a continued moratorium (which belies the assertion that we are selfish) and to accept the risk that we will not legally trade in ivory outside the CITES umbrella. Mr. Chairman, it is no wonder that we are puzzled and saddened.

Id.

list select African elephant populations?²⁹⁴ Ironically, the decision not to downlist the African elephant symbolized everything that the Zimbabwe Resolutions sought to change in the CITES system — perceived indifference to sustainable use, the weight given commercial versus non-commercial trade, the consideration of international enforcement measures, and the potential effects on illegal trade as factors to determine whether to downlist a species.

CITES has always considered the effect that listing, delisting, or, as in the case of the African elephant, split-listing will have on remaining populations or other species within the genus. The Berne Criteria acknowledge that non-endangered species may be listed on Appendix I or II if they are difficult to distinguish from taxa endangered or threatened with extinction.²⁹⁵ Similarity of appearance, geography, the migratory nature of a species, product demand and the level of enforcement controls are issues which affect the decision whether to split-list a species. The Secretariat, in response to proposed resolution 8.50 (the Kyoto Criteria), recommended that three factors be considered by the Parties in determining whether to split-list a species:

- [1] the biological status of each population of the species concerned;
- [2] the potential benefits of permitting trade in specimens from the healthy populations and the potential disad-

294. Ginette Hemley, Director of TRAFFIC U.S.A. characterized the decision as being “political expediency rather than practical conservation.” Hemley, *Endangered Treaty*, *supra* note 15, at 1.

295. Conf. 1.1, *supra* note 13, at 8, states:

Genera should be listed if most of their species are threatened with extinction and if identification of individual species within the genus is difficult. The same should apply to the listing of any smaller taxa within larger ones.

If most of the smaller taxa are not threatened but identification of individual species is difficult, the entire larger taxon should be placed on Appendix II.

Taxa listed in Appendix I, because of difficulty in separating them from endangered forms within the same taxa should be annotated as such in the appendix.

Id.

- vantages to these populations if they are included in Appendix I; and
- [3] the potential enforcement problems, to the detriment of the endangered populations, if only the latter were to be included in Appendix I.²⁹⁶

While Parties questioned the biological status of some elephant populations concerned and the benefits of allowing even non-ivory trade, the issue of “law enforcement”²⁹⁷ — the prevention of poaching and the control of cross boarder smuggling — led the Parties to reject the downlisting proposals. The Parties opposed to the downlisting concluded that proponents had not met their burden of proof under Conf. 7.9 and had failed to show that the “total levels of offtake from both *legal and illegal killing* are sustainable”²⁹⁸ Normally, if enforcement controls are sufficient such that trade in one population of a species does not affect another, then split-listing is possible.²⁹⁹ However, even if a species is harvested sustainably and effective control measures exist within the range state, if international trade has the effect of stimulating illegal poaching and trade in other countries, then the use of the natural resource, on the whole, is technically unsustainable. Such was the case with the African elephant.

CITES fundamentally requires that “international cooperation is essential for the protection of certain species . . . against over-exploitation through international trade.”³⁰⁰ Cooperation at times calls for trade restrictions in the best interests of an entire species. However, uniformly listing an

296. *Secretariat Comments*, *supra* note 186, at 2.

297. *See* Conf. 7.9, *supra* note 144, at 99. Under Conf. 7.9, Parties must demonstrate that “law enforcement is effective” and “enforcement controls are sufficient to ensure that no significant amounts of ivory taken or traded illegally from other countries are traded within or through the territory of the affected range state” *Id.* (emphasis added).

298. *Id.* (emphasis added).

299. As already seen in the ranching resolution, CITES recognizes that “the populations of species included in Appendix I may vary between the countries in which they occur in the degree to which they are endangered” Conf. 3.15, *supra* note 104, at 64. Ranching is a good example of where split-listing is allowed, with some population of species listed on Appendix I and others on Appendix II.

300. CITES, *supra* note 1, pmb1.

entire species on Appendix I and restricting its commercial trade poses political and economic problems. While critics ask whether it is fair that a few nations are denied the opportunity to benefit economically from their natural resources while other states benefit from the same type of resource,³⁰¹ one must also ask if it is fair that other range states incur the costs of preventing poaching and illegal trade within their borders for the sake of allowing a few select states to trade in ivory. The real question is: whose ox gets gored? One must question the cost-benefit of controlled ivory trade in light of pressures from poaching, high cost of governmental controls and the low reproductive rate of the elephant.³⁰² Given the failed efforts to control poaching and past illegal ivory trade practices, it is questionable if any control measures are sufficient for authorized international ivory trade to ever be a sustainable and properly controlled enterprise.

VI. The Future of Commercial Sustainable Use Within CITES

The Parties' debate over sustainable use of fauna and flora in international trade will likely continue for some time. CITES resolutions on captive breeding, ranching and quotas demonstrate the willingness of Parties to allow commercial sustainable use of Appendix I species under limited and controlled circumstances. The international commercial use of Appendix II species by its very definition should always be sustainable if conducted in accord with CITES Article IV para. 3. However, the sustainable commercial use of Appendix II species is not always achieved.

The debate over downlisting the African elephant shows that many factors must be considered when determining the sustainability of international commercial use of fauna and

301. When the ivory ban was first proposed in 1989, David Pearce, a professor of environmental economics in London and a member of the Ivory Trade Review Group, who opposed the ban, considered "depriving African countries of ivory sales to be equivalent to levying a \$50 million tax on their governments." Bonner, *supra* note 154, at 17, 52. Pearce recommended that the African nations be compensated \$100 million a year for their losses. *Id.*

302. Hill, *supra* note 147, at 263-64.

flora. The next section illustrates the difficulties in implementing international commercial sustainable use and some of the limitations of sustainable use as a conservation tool. This section also examines the international crocodylian skin trade including the success of sustainable use of some species (primarily from ranching) and the inability of CITES to prevent and curtail the unsustainable caiman skin trade. As this checkered past shows, until the Parties improve CITES compliance, international commercial sustainable use will be difficult to achieve.

A. The International Commercial Sustainable Use of Fauna and Flora & the Need for Accurate Scientific Data and Trade Controls

There are few examples in which sustainable use of fauna and flora (consumptive and non-consumptive uses) has been successfully employed.³⁰³ Nevertheless, many conservationists and wildlife managers have recognized and accepted sustainable use as a conservation tool and its application will certainly increase. While it can provide conservation incentives, sustainable use, in and of itself, is by no means the cure-all for conservation's ills.

303. "It is easy to agree with the principle of sustainable use in the abstract. It is much more difficult to implement it in the real world where greed, ignorance and the general pressures of progress impede wildlife management plans." Favre, *Precautionary Tale*, *supra* note 50, at 1. For different examples and case studies of the sustainable use of fauna and flora see generally *NEOTROPICAL WILDLIFE USE* (John G. Robinson & Kent H. Redford eds., 1991) (exploring subsistence hunting, market hunting and collecting, wildlife farming and ranching, sport hunting, and commercial uses of wildlife); FITZGERALD, *supra* note 1, at 317 (cites crocodile raising in Papua, New Guinea and ecotourism involving Rwanda's mountain gorilla as two examples of how economic incentives and sustainable use are being applied to protect species from external pressures); Goldstein, *supra* note 69, at 985 (points to the sustainable use of crocodiles in Papua, New Guinea, along with butterfly farming and seabirds farming in Iceland); Christin and Robert Prescott-Allen, *Wildlife and Rural Development: Case Studies in Sustainable Rural Development Using Native Biological Diversity*, (Jan. 1992) (case studies include butterfly and crocodile rearing in Papua, New Guinea, the Vicuña in Peru, snake venom production in India, and handmade paper production and community forestry in Nepal).

1. Species Applicability & The Limitations on the Conservation Benefits of Sustainable Use

The applicability and success of sustainable use, particularly for commercial purposes, depends largely on the species and its habitat.³⁰⁴ Not all species are created equally. "Every species has different pressures on it. . . . Sustainable use is more likely where you have a high biological potential."³⁰⁵ For example, species "with large home ranges, long life spans, and [a] low recruitment rate will be least likely to be able to sustain a commercial offtake."³⁰⁶ "Such species are often the most desirable species in trade; elephants, rhinos, and many parrots provide examples."³⁰⁷ However, many of the most endangered species do not fit into this category, and their protection is often overshadowed by species that attract commercial interest.³⁰⁸ In its 1992 Action Plan, the CSG addressed some of the limitations of sustainable use as a means of conservation:

Although the development of [sustainable use] projects is of considerable importance for a number of crocodilians, and will take on an increasingly large role in years to come, significantly *more emphasis needs to be placed now on the implementation of recovery programs for the truly endangered crocodilians* for which commercial utilization is not an immediate option and for some never will be.³⁰⁹

It is important to reiterate that sustainable use of fauna and flora need not always be economic in nature; it can be for either consumptive or non-consumptive purposes. A species may be used in a sustainable manner for food consumption, medical purposes, or for its aesthetic or recreational value in the form of eco-tourism (an economic but non-consumptive use).

304. JONATHAN FISHER *Carving Up Tomorrow's Planet*, Interview with John G. Robinson, INT'L WILDLIFE (Jan./Feb. 1994) at 35.

305. *Id.*

306. Orenstein, Revision of the Berne Criteria, *supra* note 36, at 6.

307. *Id.*

308. THORBJARNARSON, ACTION PLAN, *supra* note 70, at 7.

309. *Id.* (emphasis added).

2. Requirements for the Sustainable Use of Fauna and Flora

“Even if some uses are conceivably compatible with conservation, the question of appropriate management remains.”³¹⁰ The CSG actively incorporates sustainable use of crocodylians for commercial purposes as a means of conservation and agrees that sustainable use must be “carefully planned and implemented” to be successful.³¹¹ IUCN’s Draft Criteria for the Ecological Sustainability of Non-Consumptive and Consumptive Uses of Wild Species set out five requirements for making uses sustainable:

- [1] Information on the target population and its associated ecosystems, on current and proposed uses, and on social and economic factors affecting them;
- [2] A management system that can respond rapidly to changing conditions or better information;
- [3] A supportive and effective legal framework;
- [4] Social or economic incentives for the people living with the target population or its supporting ecosystems to conserve them;
- [5] Acceptance of the precautionary principle and safeguards to ensure the survival of wild species, populations and supporting ecosystems.³¹²

The issue of scientific data is of primary importance in the sustainable use debate. Sustainable use “requires accurate, up-to-date and reliable baseline data on the current population, natural mortality, age structure, recruitment rate, population trends and fluctuations and other aspects of the species in question”³¹³ before determining the appropriate level of use. Information is needed for both the targeted population and its associated ecosystem. Determining what level of proof is necessary to justify a species’ use and the level at

310. Robinson and Redford, *supra* note 60, at 3. See also Robinson, *supra* note 57, at 25-26; Donald Ludwig et al., *Uncertainty, Resource Exploitation, and Conservation: Lessons from History*, 260 SCIENCE 17 (Apr. 2, 1993).

311. THORBJARNARSON, ACTION PLAN, *supra* note 70, at 4.

312. DRAFT GUIDELINES, *supra* note 78, at para. 29.

313. Orenstein, Revision of the Berne Criteria, *supra* note 36, at 6.

which the use will be sustainable is difficult. Views differ on the need for conservation and the validity of scientific studies which are not always completely accurate or conclusive.

Commercial fishing is a classic example of over-exploitation despite the potential extent of species renewability.³¹⁴ Approximately 45 percent of the fish populations in the United States and 59 percent in European waters are deemed to be overutilized.³¹⁵ There are often conflicting scientific views over a system's vulnerability, e.g., the California sardine and the Canadian codfish.³¹⁶ Even when strong scientific evidence exists, it does not necessarily assure a resource's proper management: "[m]any practices continue even in cases where there is abundant scientific evidence that they are ultimately destructive."³¹⁷

314. A. A. Rosenberg et al., *Achieving Sustainable Use of Renewable Resources*, 262 SCIENCE 828 (Nov. 5, 1993). See also Robinson, *supra* note 57, at 25-26. John Robinson remarks in his article on Sustainable Living and the Loss of Biodiversity:

The history of natural resource use in modern times bears witness to the frequency that resource potential and human needs are incompatible. Even systems like marine fisheries, which are highly productive and heavily managed, have been consistently exploited, and stocks of many economically important species are today highly precarious.

Id. (citations omitted).

315. Rosenberg et al., *supra* note 314, at 828.

316. William K. Stevens, *Biologists Fear Sustainable Yield Is Unsustainable Idea*, N.Y. TIMES, Apr. 20, 1993 at C4; Ludwig et al., *supra* note 310, at 17.

317. Ludwig et al., *supra* note 310, at 36; Rosenberg et al., *supra* note 314, at 828. "[O]verexploitation often results from the failure of resource managers to follow scientific advice." *Id.* Evidence is unfolding that indicates that Russia reported only half the number of whales that it actually killed between the 1960's and 1980's. Peter James Spielmann, *Soviets Lied For Years About Whale Killings*, S.F. CHRON., Feb. 21, 1994, at A8. Minutes obtained by the Humane Society International from a meeting of Zimbabwe's National Parks and Wildlife Management Department on June 13, 1990, indicate that ground staff and game wardens disputed the Department's 1988 elephant population estimates and allegations of habitat damage by elephant populations and objected to further culling. C. Tshuma, Department of National Parks and Wildlife Management, Minutes of the Management Meeting, June 13, 1990, in TERESA M. TELECKY & DAVID K. WILLS, ZIMBABWE: DRIVING WILDLIFE TO EXTINCTION, at Annex II (Oct. 12, 1993) (on file with the *Pace Environmental Law Review*). The Humane Society charges that "[e]lephant populations sizes are grossly overstated by the Zimbabwe government to justify killing elephants for economic purposes." *Id.* at 6.

There is a tendency in fish and wildlife management to keep a harvest rate constant, often for political or economic reasons.³¹⁸ Given the uncertainty of scientific data and very often the lack of information regarding the target population and its supporting ecosystems, IUCN contends that “[u]se levels must be conservative to minimize the negative effects of miscalculation or unforeseen factors (such as disease, natural disasters, drought).”³¹⁹ This is particularly true when sustainable use is placed in an international commercial trade context subject to outside market demands.³²⁰ The International Wildlife Coalition points out that:

318. Rosenberg et al., *supra* note 314, at 828-29. Ludwig, also in reference to fisheries, outlines the strong role that governments play in over-exploiting natural resources and the phenomenon he calls the “ratchet effect”:

Harvesting of irregular or fluctuating resources is subject to a ratchet effect: during relatively stable periods, harvesting rates tend to stabilize at positions predicted by steady-state bioeconomic theory. Such levels are often excessive. Then a sequence of good years encourages additional investment in vessels of processing capacity. When conditions return to normal or below normal, the industry appeals to the government for help; often substantial investments and many jobs are at stake. The governmental response typically is direct or indirect subsidies. These may be thought of initially as temporary, but their effect is to encourage overharvesting. The ratchet effect is caused by the lack of inhibition on investments during good periods, but strong pressure not to disinvest during poor periods. The long-term outcome is a heavily subsidized industry that overharvests the resource.

Ludwig et al., *supra* note 310, at 17.

319. IUCN/SSC Draft Sustainable Use Policy, *supra* note 14, at para. 41. See also Ludwig et al., *supra* note 310, at 17. “Effective policies are possible under conditions of uncertainty, but they must take uncertainty into account.” *Id.* at 36. This concept essentially reiterates the “precautionary principle” expressed by CITES, the Berne Criteria and IUCN’s Draft Guidelines. See DRAFT GUIDELINES, *supra* note 78, at para. 29.

320. See Orenstein, Revision of the Berne Criteria, *supra* note 36, at 5-6.

“Sustainable utilization” is most likely to be successful in cases of local use of wildlife resources, in which both the producers and consumers may be covered by a single management regime and for which there may be long-standing cultural tradition that prevent or limit over harvesting. It is less likely to be achieved when a species is subject to the international trade with which CITES concerns itself, for which international levels of demand and market forces, rather than wildlife management considerations, may drive the levels of exploitation.

Id.

Even if a carefully-controlled regime of utilization can be established in one or more areas, if international demand remains high this demand is frequently met by illegal trade. Any species for which illegal trade represents a significant component of use cannot be said to be sustainably utilized in any real sense.³²¹

Sustainable use for consumptive commercial purposes requires an elaborate infrastructure to oversee its implementation, its regulation, and the collection of reliable data on species. Many developing countries where economic pressures are high and funds are low lack such an infrastructure.

3. The Crocodylian Skin Trade: An Example of the Challenges Confronting Commercial Sustainable Use

The current use of crocodylians is often cited as an example of successful sustainable use.³²² However, it also illustrates some of the problems with its implementation.³²³

a. Trade in "Classic" Crocodylians

The depletion of crocodylian species such as the salt water crocodile is mainly attributable to the short term economic interests of the leather industry.³²⁴ The crocodylian skin trade reached its peak in the 1950's and early 1960's when 5 to 10 million hides were traded annually worldwide.³²⁵ Driven by high demand for their skins, many "classic" crocodylian species³²⁶ were driven to near extinction:

321. *Id.*

322. Goldstein, *supra* note 69, at 999-1000.

323. The problem of CITES enforcement is not new and has been well documented. *See, e.g.*, Burns, *supra* note 23; Kosloff and Trexler, *supra* note 24; Jorgen B. Thomsen and Amie Brautigam, *CITES in the European Economic Community: Who Benefits?* 5 B.U. INT'L L.J. 269 (1987); Eric McFadden, *Asian Compliance with CITES: Problems and Prospects*, 5 B.U. INT'L L.J. 311 (1987).

324. McFadden, *supra* note 323, at 315 n.27.

325. THORBJARNARSON, ACTION PLAN, *supra* note 70, at 3.

326. These include the American alligator (*Aligator mississippiensis*) as well as select crocodiles (*Crocodylylus* spp.) from Australia (*C. porosus* and *C. johnson*), Papua, New Guinea (*C. porosus* and *C. novaeguineae*) and southern Africa (*C. niloticus*). *Ranching Stimulates Growth*, *supra* note 112, at 1.

"[t]oday, of the 23 species of crocodilians, 17 have some or all of their populations included on CITES Appendix I."³²⁷

As wild populations of classic crocodilians decreased, the commercial tanning industry turned to the more plentiful but less desirable caiman crocodilian skins from Latin America.³²⁸ However, the classic crocodilian and the caiman skin trades have developed differently. Protected by CITES Appendix I status and aided by closely managed conservation and ranching programs, many populations of classic crocodilians (primarily in Australia, Papua, New Guinea, Zimbabwe and the United States) began to rebound in the late 1970's and early 1980's.³²⁹

The American alligator was removed from CITES Appendix I in 1979 and commercial trade resumed.³³⁰ By the mid-1980's a number of other classic crocodilian populations were downlisted to Appendix II under the CITES ranching criteria and quota system.³³¹ Between 1984 and 1989, authorized trading in classic crocodilian skins doubled to approximately 150,000.³³² While illegal trade in classic skins does exist and the Appendix I quota system is not without its problems,³³³ according to U.S. alligator consultant J. Don Ashley, illegal trade in classic skins remains the exception rather than the norm (less than five percent of the total trade).³³⁴

b. Trade in Latin American Caiman Crocodilians

In contrast, the caiman crocodilian trade continues to be

327. THORBJARNARSON, ACTION PLAN, *supra* note 70, at 3.

328. *Id.* "Caiman had not been previously utilized commercially because of the presence of extensive dermal ossifications (osteoderms) in the ventral scales, allowing the use of only a lateral flank of skin." *Id.*

329. Andrea L. Gaski and Ginette Hemley, *The Ups and Downs of the Crocodilian Skin Trade*, TRAFFIC (U.S.A.), Feb. 1988, at 5-6.

330. Ginette Hemley, *Alligator Exports Boom in '86*, TRAFFIC (U.S.A.), Feb. 1988, at 3.

331. Gaski and Hemley, *supra* note 329, at 6.

332. *Ranching Stimulates Growth*, *supra* note 112, at 1.

333. Gaski and Hemley, *supra* note 329, at 6. Indonesia continues to be the focal point of illegal trade in classic crocodilians, particularly the salt water crocodile. *Id.*

334. Telephone Interview with J. Don Ashley, Alligator and Crocodile Consultant with Ashley and Associates (Nov. 18, 1992).

plagued by illegal trade.³³⁵ Despite well established trade laws³³⁶ and outright bans on trade in some species, caiman skins, mostly exported illegally from Latin America, continue to provide the majority of the world's 1.5 to 2 million commercially traded skins.³³⁷ In Brazil, caiman skins continue to be "routinely laundered"³³⁸ and other Latin American countries, such as Bolivia and Paraguay, have been unable to control their illegal caiman trade.³³⁹

Venezuela is perhaps the only Latin American country with a viable caiman harvest program. Its efforts to implement a commercial sustainable use system illustrate the

335. *Ranching Stimulates Growth*, *supra* note 112, at 1.

336. Kathryn S. Fuller et al., *Wildlife Trade Law Implementation in Developing Countries: The Experience in Latin America*, 5 B.U. INT'L L.J. 290, 291 (1987). The article points out that failure to implement CITES is not a product of weak laws:

Domestic legislation itself is seldom to blame; most countries appear to have adequate wildlife trade laws in place. For instance, Bolivia, a major exporter in recent years of illicit caiman skins and other wildlife items smuggled from neighboring countries, has had a comprehensive wildlife law since 1986. . . .

One major difficulty which Latin American countries face in implementing wildlife trade laws arise because federal authorities charged with enforcing controls often lack the political power, institutional stability, or popular support to muster adequate resources for enforcement. . . . In addition, corruption among enforcement officers can hinder national efforts to control trade.

Id. at 291-92 (citations omitted).

337. Peter Brazaitis, *Trade in Crocodilian Hides and Products in the USA*, TRAFFIC (U.S.A.), June 1990, at 4. Peter Brazaitis, Head Curator of Animals at the Central Park Zoo in New York City and a specialist on crocodilians, provides a very interesting account of legal and illegal trade in crocodilian skins:

Legal skins account for less than a quarter of the skins in trade or about 360,000 skins from all species worldwide. In 1991, while only 25,977 skins originated from commercial captive breeding farms, 103,303 came from ranches drawing on wild populations and 229,887 were taken directly from wild populations. The remainder of the 1.5 to 2,000,000 skins estimated in trade were contraband.

Peter Brazaitis and Mark Wise, *Crocodilian Conservation Today: A Dissection 19-20* (July 23, 1992) (unpublished policy report on file at the *Pace Environmental Law Review*).

338. Gaski and Hemley, *supra* note 329, at 14.

339. CITES prohibited Bolivia from trading internationally in the 1980's due to repeated violations. Brazaitis and Wise, *supra* note 337, at 25; *see also* Fuller et al., *supra* note 336. Illegal trade has also been cited in Colombia, Guatemala, Guyana, and El Salvador. Gaski and Hemley, *supra* note 329, at 14-15.

need for strong controls and accurate scientific data. In 1982, Venezuela lifted its ten year ban on hunting caiman and instituted a permit system which allowed harvesting of mostly adult males.³⁴⁰ In its first year of existence, there was little interest in the program and only 20,000 permits were distributed.³⁴¹ Permit sales, however, jumped to around 70,000 in the following year and by 1985 the demand for permits was 253,575.³⁴²

This quota was too high and turned out to be detrimental to wild populations.³⁴³ Therefore, in 1986, Venezuela's Ministry of the Environment (ProFauna) issued a one year ban on crocodilian hunting to evaluate its program.³⁴⁴ The program resumed in 1987 with half the number of 1985 permits.³⁴⁵ This was still too high, and the number was nearly halved again in 1988.³⁴⁶ The main problem was that the Ministry of the Environment failed to effectively monitor the effect of hunting on wild caiman populations.³⁴⁷

340. John B. Thorbjarnarson, *An Analysis of the Spectacled Caiman Harvest Program in Venezuela*, in NEOTROPICAL WILDLIFE USE AND CONSERVATION 217, 224-25 (John G. Robinson & Kent H. Redford eds., 1991) [hereinafter Thorbjarnarson, *Caiman Harvest*].

341. *Id.* at 224.

342. *Id.* at 225.

343. *Id.*

344. "[S]ustainable exploitation cannot be achieved without first overexploiting the resource." Ludwig et al., *supra* note 310, at 17, 36. Here as in many instances, Venezuela, ran its permit system on a "wait and see" system. *Id.* at 36.

345. Thorbjarnarson, *Caiman Harvest*, *supra* note 340, at 225.

346. Oct. 29, 1992 Thorbjarnarson Interview, *supra* note 107. "Unfortunately, wildlife authorities today are under such intensive pressure to deregulate species for utilization, they may base regulatory measures on cursory site estimates of current populations, regardless of actual populations depletion and vulnerability or the implications of pollution and adverse environmental trends." Brazaitis and Wise, *supra* note 337, at 11.

347. Oct. 29, 1992 Thorbjarnarson Interview, *supra* note 107. There are many differences among countries in establishing quotas:

[O]ne country may do little more than a cursory estimate of crocodilian populations, cite attacks on humans, and receive a harvest quota, while another may develop a highly efficient and elaborate system of population assessment and continual annual monitoring under a well enforced program. Good examples of the latter are the United States, Australia, Zimbabwe and South African crocodilian programs. . . . Harvest quotas are most abusive to wild populations

Another problem is that for each animal killed legally under the permitted harvesting program there is approximately one animal killed illegally.³⁴⁸ In an effort to reduce abuses and illegal bribes, the Venezuelan government instituted joint inspections conducted by members of its armed services (Guardia Nacional) and one member of the Ministry of the Environment.³⁴⁹ Additionally, Venezuela requires farmers to keep the caiman bones as proof that the animals had been killed and skinned on the premises.³⁵⁰ To further combat illegal trade, all skin sales must also go through a central brokering agency.³⁵¹

Today, Venezuela's crocodilian permit program has been considerably reduced in size, approximately 20,000 to 30,000 permits are issued each year.³⁵² The reduction has been partly due to the drop in crocodilian skin prices in the world market in the late 1980's and early 1990's and economic crises in Venezuela.³⁵³ At the March, 1993 CSG Steering Committee meetings in Darwin, Australia, it was noted that the 20 caiman ranches in Venezuela "were seriously overstocked and having difficulty selling [their] products."³⁵⁴ The issue of

in the absence of a strong, established and effective law enforcement presence. This is all too often the case in developing countries and, in particular, those countries whose rural areas are dominated by traffic in contraband. Lack of national wildlife law enforcement capabilities result in animals being taken year round and stored illegally for future sale. Undersized animals may be taken and others may be lost to hunters after being wounded. Many skins may deteriorate under hot tropical conditions in storage and are not counted in the quota.

Brazaitis and Wise, *supra* note 337, at 24.

348. Illegal skins were reported to have been shipped into Venezuela from Columbia and passed on as having been part of the harvesting program. Oct. 29, 1992 Thorbjarnarson Interview, *supra* note 107.

349. *Id.*

350. *Id.* One opportunist reportedly offered to rent crocodilian bones for inspections. *Id.*

351. *Id.*

352. Telephone interview with John Thorbjarnarson, Program Officer for Latin America, The Wildlife Conservation Society, in Bronx, New York (Apr. 18, 1994).

353. *Id.* Alligator and crocodile skin prices dropped from \$57 per foot in 1990 to \$35 per foot. Brazaitis and Wise, *supra* note 337, at 25.

354. *Crocodile Specialist Group, Steering Committee Minutes, 12-13 Mar.*

the economic viability of Venezuelan farms in general was also raised.³⁵⁵

It was concluded that while caiman farming was economically viable under some circumstances, that a real danger was the raising of unreal expectations in prospective ranchers of any species. When farms and ranchers encounter economic difficulty there is strong temptation to turn to wild stock to subsidize poor husbandry practice, either by replacing lost animals or by illegal laundering of wild skins. Effective enforcement is necessary to prevent this.³⁵⁶

Downsizing the Venezuelan harvest program also had economic impacts on government wildlife projects which derive substantial income from permits issued.³⁵⁷ Some, however, consider Venezuela's crocodylian permit program to be a success.³⁵⁸ The program has shown willingness to reduce permit issues when signs of over-exploitation become evident³⁵⁹ and has had relative success controlling its caiman crocodylian harvesting program and preventing illegal trade from infiltrating the system.

1993, CROCODYLIDIAN SPECIALIST GROUP NEWSLETTER (IUCN - World Conservation Union, Species Survival Comm'n, Crocodile Specialist Group, Gainsville, Fla.), Jan.-Mar. 1993, at 12 [hereinafter *CSG Steering Comm. Mar. 1993 Minutes*].

355. *Id.*

356. *Id.* In addition,

[f]arms may be the product of considerable financial investment, and reflect relatively good levels of animal care, or, in some cases may also become poorly operated consumers of wild populations. There are no universally applied international standards of operation. Animals on some commercial farms and ranches in developing countries may experience up to 50 percent mortality from disease, infection, and poor nutrition, in first year animals and 25 percent or more for incubating egg mortality.

Brazaitis and Wise, *supra* note 337, at 18.

357. *CSG Steering Comm. Mar. 1993 Minutes, supra* note 354, at 12.

358. Apr. 18, 1994 Thorbjarnarson Interview, *supra* note 352.

359. Fortunately, crocodylians are very resilient and have a tremendous ability to withstand considerable environmental pressures. However, this is not the case for all species.

B. Improving Trade Controls and Assuring Greater Compliance with CITES: Prerequisites for Sustainable Use

Given CITES' management problems and the inability and, at times, the unwillingness of the Parties to enforce CITES, it seems unlikely that sustainable use will soon succeed at an international level. The main problem with CITES is not its "philosophy" but its "implementation."³⁶⁰ However, some question any "incrementalist approach to CITES' implementation in which progress is measured by adding 'key' missing parties, passing 'key' missing pieces of legislation, and filling in 'key' loopholes."³⁶¹ "Incremental progress' appears unlikely to ever complete the regulatory framework required for treaty success."³⁶²

The Parties continue to address the many problems

360. TRAFFIC, POSITIVE LISTING OF ANIMALS (Draft Mar. 1991) at 13.

361. Mark C. Trexler, *The Convention on International Trade in Endangered Species of Wild Fauna and Flora: Political or Conservation Success?* (Dec. 1989) at 130 (unpublished doctoral thesis at the Graduate School of Public Policy, University of California, Berkeley on file at the *Pace Environmental Law Review*). Trexler's thesis is one of the most in depth studies evaluating the successes and failures of CITES to date. A copy of Mr. Trexler's thesis can be obtained by writing to him at Trexler & Associates, 1131 S.E. River Forest Road, Oak Grove, Oregon 97267. A minimal fee for copying and postage is requested. A brief summary of Mr Trexler's assessment of CITES follows:

There is, for example, no consensus on the nature and severity of the problem posed by the wildlife trade. . . . Regulating the trade is costly, and developed countries have not proven willing to absorb a disproportionate share of the costs of CITES' implementation. . . .

CITES' implementation has been chaotic and often counter-productive from a species conservation perspective. The bottom line is that although much has been learned about the trade, very little is known about the relationships between trade flows and species' status in the wild. There is no evidence that CITES has ended the overexploitation of any species, and many species have been added to Appendix I since CITES came into force. Species removed from Appendix I had either been listed in error or were moved as a result of political pressure rather than documented improvement in their biological condition. It cannot even be assumed that CITES' implementation has been at worst neutral with respect to the conservation status of any given species.

Id. at 98-99 (citations omitted).

362. *Id.* at 131.

which have plagued CITES since its inception.³⁶³ With the assistance of funding from governments and NGOs, CITES has conducted enforcement and training seminars.³⁶⁴ In Kyoto, the Parties passed many resolutions seeking to improve CITES' implementation.³⁶⁵ In an effort to stem illegal trade, the Parties adopted a tagging system for live animals³⁶⁶ and crocodile skins.³⁶⁷ It will probably take fifteen to twenty years to effectively implement the new tagging system for crocodiles and alligators.³⁶⁸ However, United States crocodile farmers are hopeful the system will substantially reduce illegal trade as the prospect for expanding the market depends on their ability to market products as legal, sustainable, non-endangered species.³⁶⁹

363. Recommendations for improving CITES include: better trade controls, greater inspection of goods, reduced bureaucracy, uniform identification and marking systems, better record keeping, increased training of customs inspectors, stiffer penalties and economic sanctions for violators, improved domestic wildlife regulations, increased focus on consumer markets and "species for which wildlife trade may pose a threat," greater assistance to developing countries in conducting biological studies, implementing CITES and in establishing conservation and sustainable use programs. See generally Trexler, *supra* note 361, at 125-27; Hill, *supra* note 147, at 276.

364. Kosloff and Trexler, *supra* note 24, at 335-36.

365. See generally *Trade With States Not Party to the Convention*, CITES, 8th mtg., Conf. 8.8 (Kyoto, 1992); *National Laws for the Implementation of the Convention*, CITES, 8th mtg., Conf. 8.4 (Kyoto, 1992); *Improving the Regulation of Trade in Plants*, CITES, 8th mtg., Conf. 8.17 (Kyoto, 1992); *Implementation of the Convention in the European Economic Community (EEC)*, CITES, 8th mtg., Conf. 8.2 (Kyoto, 1992). Other resolutions adopted by the Parties included *The Trade in Wild-Caught Animal Specimens*, CITES, 8th mtg., Conf. 8.9 (Kyoto, 1992) and *Trade in Live Birds Experiencing High Mortalities in Transport*, CITES, 8th mtg., Conf. 8.12 (Kyoto, 1992) (cited in *Eighth Meeting of CITES*, *supra* note 121, at 6, 7, 9).

366. *Use of Coded-Microchip Implants for Marking Live Animals in Trade*, CITES, 8th mtg., Conf. 8.13 (Kyoto, 1992) (cited in *Eighth Meeting of CITES*, *supra* note 121, at 10).

367. *Universal Tagging System for the Identification of Crocodylian Skins*, CITES, 8th mtg., Conf. 8.14 (Kyoto, 1992).

368. According to Ashley, this is not a long time considering the extent of the problem of illegal trade in the present system (one to two million skins per year). Nov. 18, 1992 Ashley Interview, *supra* note 334.

369. *Id.* The 1950's and 1960's marked the peak of the classic skin trade with a market of about 500,000 classic skins. In 1970, the figure dropped to about 300,000 skins. *Id.* At present, the number of classic skins on the world market remains at about 300,000. *Id.* Currently, nearly seventy percent of the

Although recent efforts to improve CITES' implementation are laudable, two fundamental problems inhibit CITES' success. The first problem is the lack of resources presently being devoted to inspections and controls by industrialized nations at their borders. If Parties such as the United States continue to inspect only twenty-five percent of all imports of fauna and flora into their countries, little change can be expected in the fight against illegal trade and the ability of CITES to effectively monitor and ensure sustainable use.³⁷⁰

In addition, enforcement must be given greater importance within CITES' framework. The CITES Animals and Plants Committee has proposed that a separate Law Enforcement Network be formed, consisting of officers from different countries nominated by the Parties.³⁷¹ Such a Committee would be an important first step in increasing cooperation among the Parties in the area of enforcement and in assuring that the Parties that fail to comply with the CITES' provisions are exposed. "In the final analysis, the only truly effective enforcement techniques are the use of public pressure

classic skins' raw and finished products go to Singapore, Hong Kong, Taiwan, Korea and Japan. *Id.* Part of the decline in demand for alligator products is attributed to an increase in environmental awareness worldwide and the belief that the crocodile is still endangered or illegal. *Id.* In order for ranching programs in the United States to remain successful, says Ashley, the American market must expand. *Id.*

370. Telephone interview with Jerome S. Smith, Chief, International Affairs, United States Department of the Interior, U.S. Fish and Wildlife Service, Division of Law Enforcement (Apr. 19, 1994). According to one expert, the United States government would have to hire an additional 113 special agents and 340 wildlife inspectors at a cost of \$31 million to achieve 100 percent inspection of all wildlife entering the country. Statement of Dr. Allen Rutberg, Senior Scientist for Wildlife and Habitat Protection, the Humane Society of the United States, before the House Committee on Appropriations, Subcommittee on Interior and Related Agencies, on Mar. 1, 1994 (unpublished Humane Services document on file at the *Pace Environmental Law Review*). In comparison to other countries, the United States' twenty-five percent inspection rate may be high but to fully implement the Convention, it must be higher.

371. *Proposal to form a Law Enforcement Network*, CITES Standing Comm., 31st mtg., Doc. SC.31.13 (Geneva, March, 1994). Unfortunately only nine parties responded to the proposal, and the Secretariat's response was not supportive. *Id.* Uruguay contended that the Secretariat already performs the tasks that the proposed Network seeks to do. *Id.* But a closer look at the facts shows that not to be the case.

and higher profile legal action by conservation groups.³⁷²

The second factor hindering improvements in CITES efficiency pertains to funding. At the Second Meeting of the Conference of the Parties, a trust fund to be managed by the United Nations Environmental Program was established.³⁷³ Monies for the fund come from the Parties and are based on the United Nations scale.³⁷⁴ The Secretariat has struggled to compel the Parties to pay their dues.³⁷⁵ Unlike the Convention on Biological Diversity, which has a funding mechanism designed to assist Parties in implementing sustainable use projects at the national level,³⁷⁶ CITES' trust fund only covers CITES administrative operations. Each year the CITES Secretariat is forced to rely on outside funds for its special

372. Hill, *supra* note 147, at 274.

373. FAVRE, INTERNATIONAL TRADE, *supra* note 35, at 290-91; Trexler, *supra* note 361, at 142-43. Favre provides some background information on the issue:

The Secretariat has neither a product to sell nor a tax authority which allows a firm base of income upon which he can depend. Words of support for the goals of CITES are easily given. The signing of the checks to transfer funds has not been so readily accomplished. In the beginning the IUCN and the UNEP provided the start up cost of CITES, but fairly quickly it became obvious that the Parties must bear the ultimate responsibility for the raising of funds to support the Treaty (see Conf. 2.1). Over the years there has been a considerable amount of discussion about the obtaining and spending of money at the meetings of the Conference of the Parties.

FAVRE, INTERNATIONAL TRADE, *supra* note 35, at 289.

374. FAVRE, INTERNATIONAL TRADE, *supra* note 35, at 291. In 1979, the Parties amended CITES to allow the Parties to be able to make such provisions as may be necessary to enable the Secretariat to carry out its duties, "and adopt financial provisions." *Id.* at 292; CITES, *supra* note 1, art. XI, para. 3(a).

375. FAVRE, INTERNATIONAL TRADE, *supra* note 35, at 292.

376. Convention on Biological Diversity of the United Nations Conference on the Environment, arts. 20, 21, 31, opened for signature June 5, 1992, U.N. Doc. DPI/1307, reprinted in 31 I.L.M. 818 (1992). The United Nations Convention on Biological Diversity, signed at the Earth Summit in Brazil in 1992, seeks to integrate the "conservation and sustainable use of biological diversity." *Id.* art. 6. CITES also acknowledges "that substantial investments are required to conserve biological diversity and that there is the expectation of a broad range of environmental, economic and social benefits from those investments." *Id.* pmb1. The temporary funding mechanism, the Global Environmental Facility (GEF) operates under the auspices of the World Bank, United Nations Development Program and the United Nations Environmental Program. *Id.* art. 39.

projects.³⁷⁷

Outside funding for projects such as surveys, training sessions, publications and the like has consistently fallen short of meeting CITES' needs.³⁷⁸ Left out of the equation are developing countries' needs for technical and administrative assistance in CITES' implementation as well as financial assistance.³⁷⁹ Instituting sustainable development projects also requires funding. However, "there is no way to impose a tax and collect it against [a Party's] will."³⁸⁰ Parties must unilaterally consider tax initiatives on flora and fauna to compel users to pay their share of the world's conservation costs. This idea is not new.³⁸¹ In 1991, a report on sustainable use prepared by the Joint Nature Conservation Committee recommended that "the government consider[] mechanisms such as import taxes or charges for license applications whereby wildlife traders could contribute financially

377. FAVRE, *INTERNATIONAL TRADE*, *supra* note 35, at 292-94. Favre writes: "[s]pecial project funding is critical to the success of CITES as that is how much of the needed information is generated." *Id.* at 294.

378. *Id.* at 289. Favre points out that:

The lack of money has always acted as a significant constraint on the operations of the Secretariat. The seeking of funding undoubtedly consumes a measurable portion of the time and resources of the Secretariat. Millions of dollars are spent around the world every year on CITES activities, yet millions more could easily be consumed in increased activities of scientific research, management, data analysis and enforcement efforts.

Id.

379. The need for financial independence is another argument in favor of commercial sustainable use of fauna and flora.

The desire of countries to exploit their wildlife resources under the CITES umbrella could be used to provide needed resources and expertise to undertake ranching and sustained exploitation-for-export programs in native habitats, with the incentives they would bring for habitat conservation and even the creation of protected areas.

Trexler, *supra* note 361, at 126. He criticizes the bureaucracy of CITES, claiming that millions of dollars are spent by governments in implementing CITES and by wildlife industry in "paperwork and opportunity costs." *Id.* at 102.

380. FAVRE, *INTERNATIONAL TRADE*, *supra* note 35, at 292.

381. See Hill, *supra* note 147, at 277. For example, a tax on the \$600 million a year U.S. importation of wildlife or the annual \$5 billion world trade could raise significant funds. *Id.*

towards investigating the impact of trade."³⁸²

The need for consumers to contribute to conservation efforts is now more urgent than ever. Governments are financially strapped, and it is becoming increasingly difficult politically to allocate funds for overseas conservation and development projects when the monies are also desperately needed at home. Politics and logistics obstruct new tax proposals. Wildlife trade groups have strong lobbies. The international trend toward the lowering of tariffs in the General Agreements on Tariffs and Trade (GATT) is another obstacle.³⁸³ Countries also have an interest in protecting their own industries dependent on wildlife. The issue needs to be explored. Until sufficient funds are raised to effectively assist the Secretariat and the Parties in implementing CITES, it will fail to live up to its goal.

VII. Conclusion

The picture for many wildlife species is bleak.³⁸⁴ New measures must be taken to preserve the world's fauna and flora. Though CITES is important to this preservation, it is also only one piece of a much larger puzzle and must be viewed for what it is: a limited treaty designed to ensure that international trade of fauna and flora is not detrimental to the survival of a species. CITES recognizes that international trade in flora and fauna is inevitable and must be controlled. Such controls ideally seek to ensure that the international trade in species occurs in a sustainable man-

382. JOINT NATURE CONSERVATION COMMITTEE, INTERNATIONAL TRADE IN WILDLIFE: A REVIEW OF SUSTAINABLE USE 4 (1991).

383. See generally CONGRESS OF THE UNITED STATES OFFICE OF TECHNOLOGY ASSESSMENT, TRADE AND ENVIRONMENT: CONFLICTS AND OPPORTUNITIES (1992); Durwood Zaelke, *Trade, Environment, and Sustainable Development: A Primer*, 15 HASTINGS COMM. & ENT. L.J. 535 (Summer 1992); John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict*, 49 WASH. & LEE L. REV. 1227 (Fall 1992).

384. In 1989, Trexler predicted that "incremental progress in CITES' geographic coverage, implementation legislation, and identification techniques will likely continue to be overwhelmed by weaknesses in its regulatory structure, growth of the wildlife trade, changing international trade patterns, difficulties in maintaining CITES' momentum, and implementation difficulties of the Parties' own making." Trexler, *supra* note 361, at 128.

ner.³⁸⁵ However, the ultimate purpose of CITES is not to promote trade even if such trade is sustainable; to do so would violate CITES' stated neutrality toward placing a value on flora and fauna.³⁸⁶

The sustainable use debate will undoubtedly continue. Although the Parties at Kyoto recognized that commercial international trade could be beneficial to a species if conducted in a sustainable manner, they acknowledged numerous other values as well and the potentially detrimentally impact that international trade might have on a species' survival.

At the Ninth Meeting of the Conference of the Parties (to be held in Florida in November 1994), the Parties will debate the benefits of new proposed listing criteria. While there is an understandable desire to employ listing criteria which are as biologically sound as possible, care must be taken to avoid overvaluation of scientific studies. Scientific conclusions are only as good as the data used and science is not foolproof.

CITES must remain true to its founding principle: to continue to seek ways of assuring that international trade of flora and fauna does not endanger a species nor disrupt a species' role in the ecosystem. The Parties must make a greater commitment to conservation, both financially and politically. The delegate from Botswana stated during the debate over the downlisting of the African elephant that "CITES has been reluctant to examine the flaws in its own systems that have encouraged illegal trade."³⁸⁷ "What is needed is a system with sufficient controls to allow sustainable utilization without benefitting illegal traders and poachers, and without unwittingly destroying the very environment which we purport to protect."³⁸⁸ Ultimately, the greatest overriding factor af-

385. CITES "is both a conservation and trade instrument. Although its primary goal is to preserve endangered species, its secondary goal is to allow a sustainable level of exploitation of those species." Hill, *supra* note 147, at 245. He notes that CITES' main theoretical weakness is a result of these competing interests which "attempt[] to balance the vague intuitive notion that the preservation of species is good, against commercial demands for its exploitation." *Id.* at 246.

386. See CITES, *supra* note 1, pmb1.

387. Elephant Debate, *supra* note 178, at 2.

388. *Id.*

fecting the success of sustainable use in an international trade context will be the ability of the Parties to effectively implement and enforce CITES' provisions. Time will tell if international cooperation will effectively stem the tide.