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## Debate within the CITES Community: What Direction for the Future?

### INTRODUCTION

This year, 1993, is the twentieth anniversary of the signing of the Convention on International Trade in Endangered Species of Fauna and Flora (CITES).<sup>2</sup> Over the past 20 years 118 countries have become Party States.<sup>3</sup> The biennial meeting of the member States is the premiere international forum for discussion about protection of endangered species, both plants and animals.<sup>4</sup> Both States and nongovernmental organizations (NGOs) participate in the meetings.<sup>5</sup> The Party States to the treaty have dealt with species as diverse as the big cats of Africa, elephants, sea turtles, rhinos, butterflies and bats. In each case CITES seeks to protect species from exploitation by international trade.

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1. Professor Favre has attended the last three Conferences of the Parties for the treaty CITES as head of delegation for the Animal Legal Defense Fund. He has written a book about the legal operation of the treaty and teaches wildlife and international environment law at the Detroit College of Law.

2. Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243, ELR Stat. 40336. The prior citation refers only to the treaty itself. The Proceeding of each Conference of the Parties are published by the Secretariat of CITES. These materials, e.g. CITES Doc. 8.19, CITES Plen. 8.2, and CITES Com. 6.12, are available within the published Proceedings. Which of the proceedings is being referred to can be determined by the number to the left of the period in the number portion of the reference, e.g. CITES Doc. 8.12 refers to the 12th document published in the Proceedings of the Eighth Meeting of the Conference of the Parties.

3. During 1992-93, seven additional countries joined the CITES community, Djibouti (#113), Czechoslovakia (#114), Equatorial Guinea (#115), Estonia (#116), Greece (#117), Barbados (#118), and Republic of Korea (#119). The breakup of the Soviet Union and the Eastern European countries will result in the addition of a number of countries. Taiwan and North Korea are countries of some significance in wildlife trade who are not members.

4. The member states of the treaty, along with interested nongovernmental organizations, meet every two to three years in order to decide which species need to be added or deleted to the list of protected species (CITES Article XI, Conference of the Parties). See D. Favre, *INTERNATIONAL TRADE IN ENDANGERED SPECIES* 257-73 (1989). These Conferences also adopt resolutions concerning the policies of the treaty and the practices of the party states under their CITES obligations. The 1992 meeting, the 8th Conference of the Parties, was held in Kyoto, Japan. The next meeting will be in the Fall of 1994 in the United States. For an account of the 1992 meeting, see generally C. Beasley Jr., *Live and Let Die*, BUZZWORM, July/Aug. 1992 at 28; 13 TRAFFIC BULLETIN 9, (1992).

5. Article XI(7) specifically provides for the admission of nongovernmental organizations as observers. "Once admitted, these observers shall have the right to participate but not to vote." *Id.* A short sample of the organizations at the 1992 Kyoto Conference of the

The treaty is based upon 1960s perceptions of wildlife issues, as seen by North American and European drafters. With the passage of time new ideas and perceptions have developed. Many of the developing countries have a different perspective about wildlife management arising out of their own philosophy, economic reality and social needs.<sup>6</sup> At the 1992 Conference of the Parties in Kyoto, Japan, developing countries began a serious debate about their permitting and management responsibilities under CITES.<sup>7</sup> The buzzword of the halls, as well as of the formal meetings of the Party States, was "sustainable utilization."<sup>8</sup> Was CITES outmoded? Should there be a major overhaul of CITES? Is it working at all? During a two week conference it was impossible for the debate to come to closure, but many issues were fairly raised. The degree to which new issues are satisfactorily resolved will determine the continued viability of the treaty.<sup>9</sup>

### ORIGINS OF THE CURRENT DEBATE

The present debate is the result of two threads which have become intertwined. The first is a concept. The second is the debate over the fate of the African elephant. There is an interesting historical irony

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Parties includes: African Wildlife Foundation (U.S.A.), All Japan Seamen's Union, American Fur Merchants Association, Animal Legal Defense Fund (U.S.A.), Camara Industriales Curtidores Reptiles (Argentina), Campfire Association (Zimbabwe), Japan Ivory Fine Arts Association, and Wild Animal Rescue Foundation of Thailand. CITES Part. 8.2 "List of Participants" (1992).

6. Convention on International Trade in Endangered Species of Wild Fauna and Flora, CITES Doc. 8.48, at 1:

It is unreasonable to expect human populations, particularly in the most impoverished countries, to neglect an available source of food or money or to tolerate dangerous or destructive wild animals in the name of conservation. Conservation programs need to be developed which take into account the needs of local people, which provide incentives for sustainable management of wildlife and which, where appropriate, ensure economic benefits to them.

7. Much of the discussion is difficult to footnote, as it arose in oral conversations and comments during sessions that do not appear in the minutes of the meetings. The author of this article was present for the entire two-week conference and has had this material reviewed by a number of other full conference attendees to assure accuracy.

8. For example, one delegate stated:

The issue of ivory is a trivial sideshow. The real issue is sustainable utilization, which countries like South Africa have successfully practiced for 40 years, but which is being willfully undermined by the liberal media and humane society NGOs from the developed countries. After exterminating their own megafauna, these people are trying to pontificate to the underdeveloped nations about what to do with their own.

Beasley, *supra* note 4, at 53.

9. The Eighth Meeting . . . ended on a disappointing note as the conservation rift between anti-trade interest and sustainable-use advocates appeared wider than ever. Frustration over the political nature of conference deliberations, coupled with the lack of progress in resolving numerous complex wildlife trade problems, was felt by both delegates and observers.

that the same organization which sponsored the initial drafting of CITES is also the promoter of a concept which now represents a threat to the viability of CITES. The World Conservation Union (IUCN), sponsor of CITES in the late 1960s, during the 1980s fostered the concept of "sustainable development." In 1980 the IUCN adopted the World Conservation Strategy, which seeks to establish a plan by which preservation of the ecosystems and the needs of humans can coexist. The plan promotes sustainable use of natural resources, including wildlife.<sup>10</sup>

The second thread began in 1989 at the 7th Conference of the Parties. After a long and emotional debate, the Conference of the Parties listed the African elephant on Appendix I, prohibiting the international commercial sale of ivory. This decision was disputed at the time by a block of South African countries, who ultimately took reservations on the listing.<sup>11</sup> The group, lead primarily by Zimbabwe, came to the Kyoto Conference in 1992 with a number of draft resolutions dealing with basic policy issues,<sup>12</sup> as well as a proposal for downlisting the elephant to Appendix II within their countries. The downlisting would have allowed the resumption of commercial export of ivory from their countries.

### CONCEPTS AND CONTEXT FOR THE DEBATE

To understand the richness and the fundamental nature of the debate within the international CITES community it is important to break out the mixture of beliefs, attitudes and concepts which are held by the debaters. The nature of the debate, occurring in a two-week meet-

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Many departed Kyoto sensing that, if cooperation and dialogue between industrialized consumer nations and wildlife produces countries does not improve soon, CITES itself faces an uncertain future.

G. Hemley, *CITES 1992: Endangered Treaty? Kyoto Decisions Political, Not Practical*, TRAFFIC USA, Aug. 1992, at 1. However, threats to leave the treaty may all be bluster, as a country cannot obtain any financial or trade advantage in withdrawing from the treaty so long as the major importing states are still members of the treaty.

10. See *infra* text accompanying notes 25-39.

11. The block included Botswana, Malawi, Zambia and Zimbabwe. South African was also of the same opinion but not necessarily part of the block. In 1991 when Namibia became a member of CITES, they took a reservation on the African Elephant and joined the block. Just prior to the 8th Conference of the Parties, Zambia, after a change of government, withdrew its reservation on the elephant and its support for a number of the positions taken by the group in Kyoto. Zimbabwe was the primary leader and spokesperson for the group. For a discussion of the reservation process under CITES, see Favre *supra* note 4, at 322.

12. The five resolutions were proposed in the following documents:

- 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 - Interpretation and Implementation of the Convention
- Doc. 8.52 - Stricter Domestic Measures

ing every two or so years, does not allow a reflective examination of all the premises held by the debaters. Outcome has to be the focus of efforts, not a understanding of other perspectives, or the seeking of accommodation and compromise on points of belief and principle. The following article is presented so that readers and debaters can better comprehend the diversity of views that are part of the debate, as well as gain an understanding of key concepts upon which the debate is founded.

### A. Ethics

Among the CITES community there is a great diversity of views concerning wildlife. Most of the world's political, ethical, religious and cultural differences are reflected by the government representatives and the nongovernmental organizations (NGOs) present at a Conference of the Parties. Much of the diversity of opinions within CITES debates arises out of the different ethical perspectives concerning humankind's relationship with the wildlife of this planet.

The following five categories of attitudes toward wildlife represent a Western perspective. There are many possible subcategories and specific individuals may have feelings and beliefs that are a blend of more than one position. An Eastern view of wildlife might recast these categories entirely. The debate within the CITES community to date has been almost entirely in terms of the various Western views; those holding Eastern religious or ethical views are either not present at the meetings or have chosen to not speak out thus far.<sup>13</sup>

(1) Survivor: "If I do not use this animal now I may not survive to worry about tomorrow. It is an issue of my survival, species and animals interests do not overcome my interests even if I did give any consideration to them."

Someone faced with the problem of physical survival does not have a real choice and therefore the killing or use of wildlife is not an ethical issue. In the international arena a State could seldom take this position. In all the subsequent examples, choices or courses of action are possible for individuals and States, and therefore subject to ethical debate.

(2) Exploiter: "Wildlife are a resource for economic gain. Exploitation should occur now while I can make the money, before anyone else can use the wildlife. The future will take care of itself. My personal interests exceed any interests of the species or individual animals that I will kill or capture." "Man is the center of the Chinese cosmos, and all nature exist to please him. Animals are here to be eaten,

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13. This may be a function of the fact that many government delegates have received training about wildlife management in western universities.

to be pets or to be harnessed as laborers."<sup>14</sup> States do take this view of wildlife. This view might not be considered an ethical one. It is not clear if it arises out of reflective contemplation or is an unthinking attitude or habit.

(3) Conservationist: "Wildlife may be used by humans. However, it is against the best interests of humans to allow a species to go extinct, as its benefits to humans would then be lost. The interests of humans, not the animals or species is the issue." This is the traditional view of wildlife and over the past 50 plus years has been a part of the wildlife management community.<sup>15</sup> Some may also consider this the "utilitarian" view. It is a view held by many states, perhaps by a majority of them. Often conservationists express their views by speaking in terms of "harvesting" wildlife. The killing of whales and elephants are not viewed any differently than cutting a field of wheat. Those promoting sustainable use come out of this tradition, although the concerns of the conservationist today are broader and more sophisticated than that of the wildlife manager of fifty years ago.<sup>16</sup>

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14. M. Browning, *China Unbound*, Detroit Free Press, Aug. 16, 1992, at F1, F5 (concerning the general state of affairs in China). His article continues:

The fauna of China are being hunted into extinction, driven into zoos and circuses, carved up in restaurants or converted to hard currency for their skins and organs, staples of Chinese traditional medicine. Red deer antlers fetch \$1,800 and are prized as a folk remedy promoting longevity, Chinese black-bear gallbladders fetch \$1,500 apiece in apothecary shops in Hong Kong. Turtles, monkeys, pangolins and pythons are all being swallowed up in tens of thousands by jaded Chinese gourmands.

15. Within the United States the use of the term has the following history:

The word "conservation" as it applies to natural resources did not come into the English language until 1907. In his autobiography, *Breaking New Ground*, Pinchot wrote that, while riding in Rock Creek Park in Washington, D.C., the thought occurred to him that there was no single word to describe the interrelationship and sustained-yield use of forests, soils, waters, fish, wildlife, minerals, and all other natural resources. "Protection" and "preservation," then in common use by contemporary authorities on natural-resource matters, implied non-use—a locking up of resources—a concept that grated on Pinchot's practical sensibilities. He discussed this gap in the vocabulary with a number of friends, among them Overton Price, an associate in the Forest Service. In this discussion, either he or Price came up with the word "conservation." The word apparently was derived from "conservator," the title of an office in colonial India under the British Civil Service. When Pinchot discussed the newly coined term with Roosevelt, the President adopted it immediately and, from that point on, "conservation" became the keynote of the Roosevelt Administration. Conservation also was the theme of the White House Conference of Governors called by Roosevelt for May 12-15, 1908. As used by Pinchot and Roosevelt, conservation meant prudent use without waste of natural resources, tempered by reason and consideration for the basic supply. It implied the restoration or expansion of the bases of renewable natural resources and the protection of reserves as a hedge against unprecedented demands. J. Trefethen, *AN AMERICAN CRUSADE FOR WILDLIFE* 126-27 (1975). See generally, D. Poole & J. Trefethen, *The Maintenance of Wildlife Populations*, in *WILDLIFE AND AMERICA* 339 (Council on Environmental Quality, 1978).

16. Within the U.S. John Muir and Aldo Leopold stand out as forming the transition between the conservation and the ecological perspective. See R. Nash, *THE RIGHTS OF NATURE* 39-42, 63-73 (1989).

(4) Environmentalist: "In addition to, or notwithstanding the interests of humans in preserving species, the interests of the species, as components of the natural ecosystems of the planet, should receive such priority so as to assure the continued, ecologically functional existence of all the species on Earth." This view or ethic is held by many individuals who are part of the CITES family, including those that are Party State representatives, and it is sometimes articulated as a State policy.

(5) Animal Protectionist: "Beyond the ecological interests that species represent, there is the interest of the individual animals. These interests, e.g., in continued life and freedom from pain, should also be taken into account when decisions are made that will cause pain, suffering and death for nonhuman animals."<sup>17</sup> This view is held by some members of the NGO community that participate in CITES and by an occasional delegate. While many individuals are sensitive to issues of animal pain and death and presumably no Party State would promote cruelty,<sup>18</sup> few Party States could be considered to be within the animal protectionist spectrum of views.

The distinction between the conservationist and the animal protectionist view is a critical one. Are elephants merely large turnips, to be harvested and consumed so long as they are sustainable, or are they intelligent mammals with a complex social structure and interests of their own, independent of the existence of humans? The animal protectionist perspective demands that elephants and other animals be respected for who they are, not for what economic or other value they represent to humans.<sup>19</sup> Animal protectionists are also concerned about the pain and suffering inflicted upon animals such as parrots that are part of the international wildlife trade.<sup>20</sup>

The language of CITES is sparse in the area of ethics. The precursory language of the treaty provides only two clauses suggesting reasons why the drafters were concerned about wildlife:

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17. Many individuals possessing this view support the proposition that the human economic and vanity interests in possessing and wearing leopard skins do not outweigh the interests of the leopard in a continued natural life. Use of the skin after natural death is another matter.

18. Not all party states are sensitive to the pain and death of wildlife. At the Kyoto, Conference one delegate stated that while he could understand all the concern about the death of birds during the transportation process if the birds were particularly valuable, he did not have any concern for the less valuable.

19. The animal rights perspective would argue that elephants should be allowed to experience as natural a life as possible. While human interests may sometimes outweigh that of the elephants, e.g. protection of crops and villages, they will not always outweigh the interests of elephants.

20. The pain, suffering and death are present at all stages of the bird trade: capture, collection, national and international transportation, quarantine, retail sale. P. Knight & D. Currey, *Will Europe Ban Wild-Bird Imports?* in DEFENDERS, Nov/Dec 1990, at 20.

*Recognizing* that wild fauna and flora 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;

*Conscious* of the ever growing value of wild fauna and flora from aesthetic, scientific, cultural, recreational and economic points of view; . . .

*Recognizing*, in addition, that international co-operation is essential for the protection of certain species of wild fauna and flora against over exploitation through international trade . . . .<sup>21</sup>

This language clearly does promote the view that species are to be protected. The motivation for this goal is not as clear and allows for differing motivations. This is as expected. An international document which seeks to invite the participation of all the world community cannot afford to offend potential Party States by setting as a premise an offensive ethical position. While accepting the existence of wildlife trade, implicit in the language is a rejection of the "exploiter" perspective. But, it is not clear whether either the "conservationist" or "environmentalist" could claim a dominant position within CITES. One must remember that at the time of the drafting of the treaty, environmentalism and animal rights as ethical positions were in the initial stages of formation.<sup>22</sup>

Beyond species protection issues, the treaty expresses concern for the pain, suffering and death of individual animals subject to the international transportation process, but not as they are taken by humans from their natural habitat. Articles III, IV, V all have provisions for the protection of live specimens that are shipped.<sup>23</sup> At the Kyoto Conference the United States submitted a proposed resolution which restricted the trade in bird species that were known to have high levels of suffering and death during transportation. The Party States accepted a modified version of this resolution.<sup>24</sup>

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21. CITES Preamble.

22. Language from the more recent Convention on Biological Diversity is reflective of the environmentalist perspective; "*Conscious* of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components, *Conscious also* of the importance of biological diversity for evolution and for maintaining life sustaining systems of the biosphere . . ." Preamble; 22 *Envir. Policy & Law* (Vol. 4), 251 (1992).

23. For example, in the granting of an export permit for a Appendix I species, the Management Authority of the party state must "be satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment." Article III (2)(c). This provision has been weakly implemented, if at all, within most party states. It has been the subject of a number of CITES resolutions, Conf. 3.16 (1981), 4.20 (1983), 6.24 (1987), 7.13 (1989) and at the most recent Conference of the Parties, Conf. 8.9 and 8.12 (1992). see Favre, *supra* note 4 at 73-79.

24. CITES Conf. 8.12, "Trade in Live Birds Experiencing High Mortalities in Transport" (1992). see CITES Doc. 8.24 (1992).



The extremes of the spectrum of views are usually represented at the CITES conference by the NGOs. Government positions tend to be in the middle of the spectrum, even though individuals representing various governments may hold personal views across the spectrum. It is doubtful that any one perspective will win the ethical debate and convert all participants to their view at any time in the near future.

## B. Sustainable Utilization

As mentioned previously "sustainable utilization" is a concept first promoted in the international arena by the IUCN's World Conservation Strategy and more recently in the document referred to as the Brundtland Report<sup>25</sup> as well as *Caring for the Earth: A Strategy for Sustainable Living*. The definition of the term appears simple, yet may vary when more details are sought or policy implemented.<sup>26</sup> While the concept is familiar to wildlife managers, what is new is its application to all human development activities.<sup>27</sup> By the time of the Earth Summit in June of 1992, sustainable development was the accepted principle from which all international environmental discussions started. The Rio Declaration and its 27 Principles focused on how to achieve the goal, not whether the concept ought to be a goal. For example, Principle 3 states, "the right to development must be fulfilled so as to eq-

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25. The report was formally published as *OUR COMMON FUTURE: THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT* (Chair, G.H. Brundtland)(Oxford Univ. Press, 1987).

26. The document *CARING FOR THE EARTH* sets out a general definition.

¶ 13. "sustainable use" means use of a population or ecosystem 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." For a discussion of some of the potential confusion see P. Elder, *Sustainability*, 36 McGill L. J. 831, 833-36 (1991).

27. From the executive summary of *CARING FOR THE EARTH*:

Part 1, Principles for Sustainable Living-Respect and Care for the Community of Life

An ethic based on respect and care for each other and the Earth is the foundation for sustainable living. Development ought not to be at the expense of other groups or later generations, nor threaten the survival of other species.

The benefits and costs of resource use and environmental conservation should be shared fairly among different communities, among people who are poor and those who are affluent and between our generation and those who will come after us.

All life on earth, with soil, water and air, constitutes a great, interdependent system—the biosphere. Disturbing one component can affect the whole. Our survival depends on the use of other species, but it is a matter of ethics, as well as practicality, that we ensure their survival and safeguard their habitats.

**Improve the quality of human life**

The aim of development is to improve the quality of human life. It should enable people to realize their potential and lead lives of dignity and fulfillment. Economic growth is part of development, but it cannot be a goal in itself; it cannot go on indefinitely. Although people differ in the goals they would set for development, some are virtually universal. These include a long and healthy life, education, access to the resources needed for a decent standard of living, political freedom guaranteed human rights and freedom from violence. Development is real only if it makes our lives better in all these respects.

uitably meet development and environmental needs of present and future generations."<sup>28</sup>

Wildlife as a renewable resource is generally within the concept of sustainable use. However, the concept itself is neutral on the issue of whether to use wildlife at all. It merely suggest parameters that ought to be used if wildlife are removed from their natural setting. At the Kyoto Conference the "Consumptive Use Block"<sup>29</sup> with its series of proposed resolutions<sup>30</sup> went a step beyond sustainable use. They promoted the view that the economic value of wildlife, as realized through international trade, must be fostered and encouraged by the CITES process in order to realize the goal of protection and recovery of listed species.<sup>31</sup> In their view the value of wildlife is perceived almost entirely within the framework of removal of individual specimens for purposes of trade. The tenor of the documents submitted by the Consumptive Use Block suggest that economic value, as realized through international trade, is the only value of wildlife that will help conserve species.

28. Rio Declaration on Environment and Development; 22 *Envir. Pol. & L.* 4, 268 (1992).

29. While this term shall primarily refer to the five countries previously discussed, *supra* note 11, it also includes a number of other countries, depending on the particular point under discussion.

30. *Supra* note 12 (list of five resolutions).

31. While the resolutions should be read in their entirety to obtain a complete sense of their views, the following are offered as samples of their perspective:

CITES recognizes the economic value of wildlife and the principle of sustainable use as an option for management of populations of wild species. However, commercial trade in wildlife and wildlife products has been increasingly portrayed in some quarters as having only negative effects on the conservation of species . . . .

In many cases wildlife can provide an attractive alternative land use *provided its products are not undervalued* . . . . Whenever such beneficial forms of wildlife use lead to international trade, CITES should not prevent their development . . . .

When a program of sustainable use of wild flora and fauna is implemented, the economic benefits that are derived ensure the maintenance of the habitat. All the species sharing that habitat are beneficiaries, thus contributing to the maintenance of biodiversity.

CITES Doc. 8.48, note 1-2 (1992).

8. Sustainable use leads inevitably to commercial trade—if not internationally, certainly in domestic markets. It is **pointless to talk about sustainable use if not for commercial trade**. The draft resolution in Doc. 8.48 states that commercial trade should be viewed as beneficial to wild flora and fauna wherever the returns so derived are reinvested to maintain or increase wild populations.

9. This raises the question whether there are *any conditions* of endangerment of species under which *all* commercial trade should be prohibited. As long as it is sustainable or causing an increase in the species, it would appear beneficial. Only where it is non-sustainable and causing declines in populations should it be restricted.

CITES Doc. 8.49, at 2 (1992).

A broader view of the use of wildlife has been set out by John Robinson and Kent Redford:

[W]e and most other authors agree 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. That use of wildlife can be consumptive or nonconsumptive. People can value wildlife for commercial, recreational, scientific, aesthetic or spiritual reasons. But people must use and therefore value wildlife, otherwise wildlife will be lost.

The pragmatic debate is concerned with whether the use of wildlife furthers or hinders its conservation . . . It is unclear, however, what uses will further conservation . . . . Accepting use as a means to conserve wildlife is not the same as providing economic justifications for conserving wildlife. We do equate value with use, but not all value can be measured using economic indices. 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 . . . . Value cannot be completely discredited in economic terms. Value transcends economics.<sup>32</sup>

This suggests the core of the present debate within CITES. All agree that wildlife must have value to people. However, some seem to be pushing an agenda that focuses exclusively on consumptive economic value. Since CITES does deal with trade issues, they seek to have CITES adopt the policy of saving or conserving specimens through economic exploitation. Some within the CITES community fear that this line of argument is being pursued by exploiters in disguise, that under the pretense of consumptive use programs specimens will be consumed in ever greater numbers to the ultimate detriment of the entire species.

A key premise for those promoting consumptive use of wildlife is that it would be done only within the context of "sustainable use." Initially this seems logical and unassailable; if a use is sustainable, then by definition it can not threaten the population of a species. However, closer examination reveals it is not all that simple.

Representative of those seeking to focus on the economic utilization of wildlife is the IUCN subgroup referred to as the IUCN/SSC Specialist Group on Sustainable Use of Wild Species ("Sustainable Use

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32. J. Robinson & K. Redford, *The Use and Conservation of Wildlife*, in NEOTROPICAL WILDLIFE USE AND CONSERVATION, 3-4 (1991) [hereinafter Neotropical].

Committee").<sup>33</sup> While there is no formal tie between CITES and this IUCN group, there is significant crossover of participants, and the policy document developed by this organization will most likely be the base point for discussions within the CITES community as well.<sup>34</sup>

The Sustainable Use Committee has produced a draft document, *Criteria and Requirements for Sustainable Use of Wild Species*.<sup>35</sup> The drafters of this document seem to hold the same view as that of the Consumptive Use Block at the Kyoto Conference. "The social and economic benefits from sustainable use can provide a powerful incentive to conserve wild species and their supporting ecosystem, provided the people most likely to have an impact on the species and ecosystems concerned receive an adequate share of those benefits."<sup>36</sup> The factual basis for such a statement has been contested by at least one reviewer of the document.<sup>37</sup>

This document is an example of how a logical proposition can be twisted when specific policies are adopted. The logical start point for a sustainable use management program is the determination that a particular use is sustainable. Yet in the specifics of the 2nd Draft of the Guideline, it is quite clear that use of wildlife can proceed without that determination, and indeed that only upon a showing of declining pop-

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33. This group was created after the IUCN General Assembly adopted Resolution 18.24 at the Perth, Australia meeting in December 1990. The text of the resolution can also be found as an appendix to CITES Doc. 8.48 (1992).

34. For example, in December 1992 arrangements were being made for the Chairman of the CITES Animal Committee to leave his position with the Australian government, while remaining chairman of the CITES committee, to become an employee of the IUCN's Sustainable Use of Wildlife Programme to help implement their program in the Southeast Asia and Southern Pacific region. Letter from Stephen Edwards to Martin Holdgate, Dec. 17, 1992.

35. Second Draft July 15, 1992. While this article is being written, the Sustainable Use Committee is producing draft documents. These drafts do not represent a final policy position of the IUCN but are simply examples of views expressed on the topic.

36. *Id.* at ¶ 14.

37. In a letter commenting on the provisions of the second draft, the Humane Society of the United States, on behalf of itself and nine other organizations, stated:

We strongly object to the way that this paragraph links "social and economic benefits from sustainable use" with the conservation of "wild species and their supporting ecosystems." In reality, such a linkage has rarely, if ever, been demonstrated; indeed the relationship between these two factors is merely theoretical. There is reason to question the widespread applicability of the theory depending on the species used, the type of use, and the social and economic factors involved in the use. Simply stated, the link between conservation and use, particularly consumptive use, of wild species is weak, untested, and should not be promoted as though it is fact. To do so is irresponsible and not in the best interest of conservation of wild species.

Letter from Teresa Telecky, Humane Society of United States, to Christine and Robert Prescott-Allen, co-chairs of the IUCN/SSC Specialist Group on Sustainable Use of Wild Species, (Sept. 14, 1992).

ulations would the use of a species be reduced or stopped.<sup>38</sup> This reversal of position has been accomplished by a shift of the burden of proof. In this document the burden is placed on those who seek to stop exploitation, rather than on those who wish to engage in the exploitation.<sup>39</sup>

CITES is not silent on the issue of sustainable use, although that term is not used. It is fundamental to the permit granting process that an export permit may be granted only so long as the Scientific Authority of the exporting country advises "that such export will not be detrimental to the survival of that species."<sup>40</sup> Therefore, any State program or practice that is sustainable should also be non-detrimental and allowable under the treaty. Given that CITES accommodates the practice of sustainable use, it is not clear why so many Party States and individuals are attacking CITES as inadequate.<sup>41</sup> Like the concept of sustainable use, CITES is silent on the necessity or appropriateness of engaging in international trade.

### C. Economics

As CITES specifically seeks to deal with international trade, it is important to consider some of the potential economic forces at work. Good law and policy decisions should take into account the economic consequences of a decision. Several different kinds of economic issues need to be mentioned briefly: first, how economic motivation of individuals leads to over-use of a public resource; second, there is a high motivation for illegal wildlife trade; third, which persons in the chain of trade realize the financial benefits of wildlife trade.

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38. Paragraph 20 of the IUCN draft document presents the position that existing uses are presumed sustainable, apparently on the bare fact that the use has been occurring over a period of time. Paragraph 21 states that when there is reason to suspect an existing use may not be sustainable it is not necessary to stop the use, but to make the use sustainable. Finally, as for new uses of wildlife, paragraph 26 states that because of the difficulty in obtaining information, it is allowable to begin use of wildlife before obtaining the necessary information so long as there is monitoring to obtain the information as the use progresses. The effect of this provision is to allow a use until it can be shown to be detrimental. Critics of this position suggest: "Uses must be demonstrated to be sustainable. It is unacceptable to consider uses to be sustainable without documentary evidence. Although use levels and target populations may have persisted at the same site for many years, or even when use levels are low or non-consumptive, this does not ensure that the use is sustainable in the long term." Humane Society of the United States letter, *id.* at 10.

39. Burden of proof is discussed in full, *supra* text accompanying note 71.

40. CITES, *supra* note 2, at Art. III (2)(a) for Appendix I species and Art. IV (2)(a) for Appendix II species.

41. One limitation of the treaty language, troublesome to some, is that Appendix I exports, even if non-detrimental, may not be allowed if for a commercial purpose. See *supra* text accompanying notes 108-13.

The full value of legal international wildlife trade is difficult to ascertain, in part because documentation is difficult to obtain. Estimates of the extent of trade vary within the range of \$5 - \$17 billion per year.<sup>42</sup> A few examples of country- and species-specific trade will help give a sense of the amounts involved. In 1992 it was estimated that Zimbabwe has a stock pile of 2.5 tons of rhino horn, worth an estimated \$5 million.<sup>43</sup> One giant bluefin tuna from the Atlantic Ocean may be worth \$30,000 (\$25/pound) in the Japanese sushi market.<sup>44</sup> Parrot exports from neotropical countries during 1982 to 1986 had an estimated retail value of \$1.6 billion.<sup>45</sup>

The need for a CITES-like treaty is apparent when considering the phenomenon which has come to be known as the "Tragedy of the Commons," as first articulated by Gary Harden.<sup>46</sup> As explained in his article, it is in the nature of individual economic decision making to seek to maximize individual financial return even if it is at the cost of reducing the resource base being used.<sup>47</sup>

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42. All currency in this article is U.S. unless noted otherwise. Beasley, *supra* note 4, at 30. S. Fitzgerald, *INTERNATIONAL WILDLIFE TRADE: WHOSE BUSINESS IS IT* 3 (1989) (\$5 billion per year). *Also see*, NEOTROPICAL, *supra* note 32, at 6-23 (wildlife use in South America); J. Thomsen, et al., *PERCEPTIONS, CONSERVATION & MANAGEMENT OF WILD BIRDS IN TRADE*, 2-8 (Traffic International, 1992) [hereinafter *Bird Trade*] (international trade in birds is estimated at between two and five million specimens per year).

43. 13 *TRAFFIC BULLETIN* 2, (1992).

44. *Id.* at 5.

45. *BIRD TRADE*, *supra* note 42, at 11. The difficulties in obtaining timely information often results in a delay of two years or more.

46. 168 *Science* 1243 (1968).

47. For example, assume that there is a forest with population a of 1000 turtles. Local people have collected on average 10 turtles per year for a century without a drop in population level (presumably a sustainable use). Now assume that three outside collectors start to use the same population base, taking out twenty turtles each. After five years collection becomes increasingly difficult (suggesting unsustainable use). When the individual collectors become aware of the decreasing population, will they increase or decrease the number taken?

While the long term economic value of the resource would be sustained only if all three restrain their present collection, this may not happen. Consider the three options available to each individual. If individual A decreases the number collected, A will reduce present income without any guarantee of future benefit for the present sacrifice. Secondly, A can simply proceed with the usual collection process. This will cause a detriment to the general population and ultimately his collection process will become less efficient. Thirdly, A can increase his effort and collect more turtles. If the turtle market becomes aware of the declining population of turtles then the demand may increase, as the supply decreases, ensuring a higher price for the turtles and thus increased incentives for seeking short term economic gain. If any one collector continues to collect at the old rate or increases the rate of collection, then there is no economic incentive for the others to restrain their collection, as short term economic sacrifice will not be rewarded. As Hardin pointed out, this result comes about because the turtles are a public resource and the negative effects of the detrimental use are borne by the entire community. Thus, if any or all three collectors seek economic maximization, the species will become endangered, perhaps extinct. This result is more likely when the exploiters are not part of the local human community, as they can simply move on to another species at another location around the world if the species becomes economically extinct. The local people and local ecosystem are left to bear the entire cost of the loss without having realized any of the benefit from the trade.

While in the Hardin example individuals are the decision-makers, the same economic decision matrix exists if States are the decisionmakers. The classic example of shortsighted decision making by States is that of whales. The world watched as one whale population after another crashed, even though there was in existence an international treaty with the expressed purpose of keeping whale killing at a sustainable level.<sup>48</sup> One clear lesson from the whaling debacle is that even States are not immune to the powers of the economic market place. States will also seek short term maximization at the cost of long term sustainability of a resource. It is the goal of CITES, like that of the International Whaling Convention ("IWC"),<sup>49</sup> to use legal restraints to overcome economic pressures to use wildlife when that use is unsustainable. However, while the IWC was adopted to promote the killing of whales,<sup>50</sup> CITES was not adopted to promote any particular use of wildlife.

A major economic wildlife issue is that of illegal trade. The United States Fish and Wildlife Service has estimated that illegal animal and plant smuggling into the United States is worth \$100 million a year.<sup>51</sup> There are a number of aspects of human nature that combine to create an illegal market demand for wildlife products. First is ignorance. An average consumer in a pet store has no way of knowing whether or not a beautiful bird in a cage has been wild caught and illegally imported. Likewise, the consumers of carved ivory, until recently, seemed unconcerned about how the ivory was obtained. There are others who have a desire to possess the unique, and many do not care whether they obtain the items legally or illegally.<sup>52</sup> The retail demand creates economic value for wildlife-alive, dead or as products-and therefore creates an incentive for illegal activity. There is clearly an ever-present portion of the human population willing to engage in illegal activity for short term economic benefit. For example, "a single tiger can reportedly earn a poacher as much as \$10,000, more than 20 times the average Russian's annual salary."<sup>53</sup>

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48. See generally J. Cherfas, *THE HUNTING OF THE WHALE: A TRAGEDY THAT MUST END* (1988).

49. International Convention for the Regulation of Whaling, Dec. 2, 1946, 161 U.N.T.S. 72, T.I.A.S. No. 1849, stat. 1716.

50. The Whaling Commission is to adopt regulations with respect to the "conservation and utilization of whale resources." *Id.* Art. V(1).

51. NEOTROPICAL, *supra* note 32, at 390.

52. See J. Speart, *Orang Odyssey*, WILDLIFE CONSERVATION, Nov/Dec 1992, at 18. "Rivalling the drug trade both in its ruthlessness and its power, an international wildlife smuggling network preys on orangutans in the rainforest of Borneo-and casts its net all the way to Belgrade."

53. H. Bernton, *Open Boarders Bring Peril for Rare Tiger: Russian Poachers Tap World Market*, WASH. POST., Jan. 3 1993, at A18.

Another aspect of economic analysis, particularly in a debate about trying to make wildlife commercially valuable to the local human populations, is determining who receives the proceeds for the captured or killed wildlife. The economic system is such that the initial collector in the forest or jungle receives a pittance of the ultimate fair market value that the wildlife or its products represent in the retail market. One article states that the collector receives as low as 2.5 percent of the final value for a bird, e.g., the collector may receive \$10 for a bird sold at retail for \$400.<sup>54</sup> "These figures indicate that the trade in wildlife does not benefit the country as a whole, nor does it profit the trapper in the field. Profits accrue mostly to a few influential Mexican citizens and pet dealers in the United States."<sup>55</sup>

#### D. Science

The successful operation of CITES is dependent upon the availability and utilization of detailed scientific information about flora and fauna. Scientific information is particularly needed for two critical areas: whether a species should be listed or delisted, and whether a permit for import or export should be issued. The first issue is decided by the Conference of the Parties. For the second, CITES depends upon the Scientific Authorities within each Party States. Article IX of CITES requires all Party States to designate a Scientific Authority. It is the State's Scientific Authority that must decide whether, and how many, specimens of a listed species may be exported or imported.<sup>56</sup> Whether or not within the context of CITES, the concept of sustainable use has parallel needs of scientific information and scientific infrastructure.

While details of the scientific issues will be discussed subsequently, two general points should be made. First, it is important to understand the limitations of science. Science is at its best when it is used to attempt to understand and describe a *present* state of affairs. Scientists, with enough time and money, ought to be able to explain or describe the interactions of species within a particular ecosystem to understand the role a species plays within it and what population level is necessary for its ecological functioning. But, more difficult is the question of what will be a species' population ten years from now, because this is not a determination of existing fact but a prediction of the *future*. The number of variables that must be considered make predic-

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54. NEOTROPICAL, *supra* note 32, at 390. Also see T. Swanson, *Economics and Animal Welfare: The Case of the Live Bird Trade* in BIRD TRADE *supra* note 42, at 43-57. In FLIGHT TO EXTINCTION, a report by the Animal Welfare Institute and the Environmental Investigation Agency (1992), the figures show that collectors may receive as little as 1 percent of the final retail value for the more expensive birds. *Id.* at 20.

55. NEOTROPICAL, *supra* note 32, at 390.

56. See *supra* note 2, at Art. III (2)(a), (3)(a)&(b), and Art. IV (2)(a) &(3).



tions unreliable. For example, increasing human population will normally be a significant factor in creating habitat loss for wildlife, but who can guess what government policies will exist in five or ten years about either human population levels or habitat loss. Likewise, how can a scientist predict the international market demand, legal and illegal, for species? At best, a scientist might be able to say, "assuming that present conditions and forces continue to operate for the next five or ten years then species X is at Y risk of Z population decline." But conditions seldom remain the same. Predictions of the future are ultimately not matters of pure science, but that of public policy based upon risk analysis.

Secondly, any management plan seeking to implement sustainable economic use, consumptive use in particular, is dependent upon sound science to provide the necessary information for management decisions. It is a fear of those wary of the new emphasis on consumptive use programs that a number of Party States seem especially eager to proceed to the economic rewards of wildlife utilization without establishing the necessary scientific support structure as a preliminary step. The mere existence of a management plan should not be considered as evidence of a functional scientific authority. A management program may or may not be based upon scientific information and principles. Management plans are tools for implementing the goals of the political decisions of a government. In addition, the goals of the government may be contrary to the goals of CITES. If a species is considered a pest then the law may allow their summary destruction.<sup>57</sup> If the goal of the state is to raise money through sale of hunting licenses or wildlife products, then the immediate need for money may overwhelm the ability or desire for obtaining the necessary scientific base population studies and for providing the necessary law enforcement.

### E. Sovereigns

The question of the appropriate roles of sovereign States in today's interconnected world is a critical one for many international issues, including CITES.<sup>58</sup> Traditionally, a State, as a sovereign government beholden to no other State or government, decided what to do within its own borders.<sup>59</sup> Today there is a growing interdependence

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57. One country in South America had the Tucuman Amazon parrot listed as a domestic pest, thus allowing exportation, even though the estimated population was 1,000-10,000. This was at the time the parrot was placed on Appendix I by the Conference of the Parties (1989).

58. For a general discussion of the problem that state sovereignty poses to environmental issues see, *Developments in the Law-International Environmental Law*, 104 Harv. L. Rev. 1484 (1991).

59. For a brief history of the principle of sovereignty over natural resources see N. Schrijver, *Permanent Sovereignty Over Natural Resources Versus The Common Heritage of Mankind*, in *INTERNATIONAL LAW AND DEVELOPMENT* 87-93 (P. De Waart, P. Peters and E. Denters eds. 1988).

of States, economically and environmentally. It is almost impossible to accomplish important goals like controlling the emission of ozone-depleting chemicals<sup>60</sup> or preserving biological diversity<sup>61</sup> without international cooperation.

In agreeing to become a member of CITES, States give up some of this sovereign independence. The provisions make it clear that some results can occur despite the vigorous objection of specific States. For example, at the Kyoto Conference the United States energetically opposed listing the American Black Bear on Appendix II, but they were on the losing side of the vote and are now bound by that decision.<sup>62</sup>

Under the concept of sovereignty no State can force another to accept an obligation. Even if a hundred countries agree that it is critical for country X to join CITES and limit wildlife trade, X can not be compelled to sign the treaty and assume the obligations of its provisions. The much more delicate international legal issue today is what remedies are available when a State makes an international commitment but then refuses to carry out its obligations. What if a country promises to protect endangered species but adopts no national law empowering custom officials to confiscate shipments imported without the necessary CITES permits? Can States or groups of States under the authority of a treaty such as CITES punish member States for non-compliance? Historically the answer is "no." CITES has no provision remedies against non-complying Party States.<sup>63</sup>

## F. The Common Heritage of Humankind-Wildlife

One example of an internationally accepted principle that is juxtaposed to that of sovereignty, and that builds upon the concept of wildlife as a "commons" resource, is the Common Heritage of Humankind.<sup>64</sup> Under this concept there are some resources that have im-

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60. Vienna Convention for the Protection of the Ozone Layer (1985), 26 I.L.M. 1516 (1987); Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541 (entered into force Jan. 1, 1989).

61. *Id.*

62. See CITES Plen. 8.9, at 6 (1992). The vote was 46 in favor of listing and 20 against. On the issue of listing species party states under the provisions of CITES do have the option of taking a reservation on a species listing. See *supra* note 2, at Art. XXIII; Favre, *supra* note 4, at 322-24. However, most party states, under considerable political pressure to abide by the will of the majority, do not exercise this option. For example, even though the United States lost the vote on listing of the American Black Bear on Appendix II at the 1992 Conference of the Parties, no reservation on the listing was taken by the United States.

63. A process for enforcement outside the formal language of the treaty may be developing, see *infra* text accompanying notes 124-31.

64. For a brief history of this concept within the context of the open oceans see Schrijver, *supra* note 59, at 93-99.

portance beyond the boundary of any one sovereign state in which they may be located. This concept was dominant in the development of Law of the Sea negotiations during the 1970's.<sup>65</sup> It is also a concept used in the Moon Treaty.<sup>66</sup>

While no one suggests that individual animals within the border of a sovereign State should be within the control of other States, the existence of species and the gene pool they represent is another matter. Species represent a world resource and as such it is inappropriate to leave the fate of species in the hands of only one State, whose ignorance or short-term needs may result in the loss of a species forever. This was recognized in Principle 4 of the 1972 Stockholm Declaration.<sup>67</sup> Concern for wildlife has naturally expanded to include concern about habitat<sup>68</sup> and ultimately the genetic diversity of which ecosystems are composed.

There is another aspect of wildlife that supports this broader view of control and concern. Wildlife often move between countries. Whose wildlife is it, if specific animals move between, or over, two or more countries? It does not seem to be fair to country A, who may be investing considerable resources in protecting a species, to have the species captured and killed when they are in country B. Assertions of total, unilateral control by one sovereign are inappropriate in such circumstances.

CITES supports this principle, even though the phrase, "Common Heritage of Humankind," was not in common use during its drafting. The sentiment of the first of the introductory paragraphs conveys the idea that species are a resource of all people, both present and future generations.<sup>69</sup> By the time of the Biological Diversity Treaty, such language had become more succinct, "Affirming that the conservation of biological diversity is a common concern of humankind."<sup>70</sup> The ac-

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65. Article 136 of the 1982 Convention on the Law of the Sea states: "The Area and its resources are the common heritage of mankind."

66. Article 11 of the 1979 Moon Treaty provides: "The moon and its natural resources are the common heritage of mankind."

67. Principle 4 states: "Man has a special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat which are now gravely imperiled by a combination of adverse factors. Nature conservation, including wildlife, must therefore receive importance in planning for economic development." *Also see* principles 2 and 3 of the World Charter for Nature (Oct. 28, 1982).

68. *See generally*, A. Kiss & D. Shelton, *INTERNATIONAL ENVIRONMENTAL LAW*, 243-68 (1991).

69. "The Contracting States, Recognizing that wild fauna and flora 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 of the future . . ." *see supra* note 2, at preamble.

70. *Id.*

ceptance of this concept allows the international community to impose its judgment upon an unwilling State.

### G. Risk Taking-Burden of Proof

A threshold issue for the CITES community is at what level of risk of extinction should species receive international protection by being placed on Appendix I or II. For species already listed, and therefore judged at risk, there is the issue of deciding when international trade should be allowed. One method used by the legal community for allocating risk is placing different levels of "burdens of proof" on parties before allowing one side to "win." There are two aspects to a legal burden of proof problem. First, who has the burden? Second, what is the level of proof that the side with the burden must meet in order to win? In a world which has less than the ideal amount of information available, the person with the burden is at risk.

A fundamental beginning point of analysis, when dealing with sustainable use issues, is determining which side should have the burden of proof. Must it be shown by those seeking to remove specimens from the wild that the removal is *not harmful*, or is the burden on those trying to stop the removal of specimens to show that the action is *harmful*? If no population data exist for the species, then theoretically the side with the burden will lose. The exploiters seek to impose the burden upon the environmentalists and animal protectionists to show declining population levels before they stop the existing or proposed exploitation. The environmentalists and animal protectionists seek to impose the burden upon the exploiter to show the use is sustainable before the species can be removed.

Under CITES the issue of who has the burden of proof is usually clear. For example, any State desiring to change the status of species on Appendix I or II, by adding, shifting or delisting, is the party with the burden of proof. The second aspect of the problem, the level of proof required to win, is not always clear. On the issue of when to grant a permit for the trade of a listed species, the treaty provides a standard. The Scientific Authority of the State of export must be willing to state that the proposed transaction will not be detrimental to the species.<sup>71</sup> For the issue of when the risk of endangerment is sufficiently high to justify the listing of a species, the treaty language is vague.<sup>72</sup> On the issue of when to remove a species from the protection of the Appendices, the treaty provides no standard by which to judge the issue.<sup>73</sup>

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71. See Favre, *supra* note 4 at 61-73. See *infra* text accompanying notes 117-23.

72. "Appendix I shall include all species threatened with extinction which are or may be affected by trade." see *supra* note 2, at Art II (1). See Favre, *supra* note 4, at 31-38. See *infra* text accompanying notes .

73. See *infra* text accompanying note 78.

## H. The Precautionary Principle

Within the broad international environmental arena the "precautionary principle" has received growing acceptance. "The precautionary principle ensures that a substance or activity posing a threat to the environment is prevented from adversely affecting the environment, even if there is no conclusive scientific proof linking that particular substance or activity to environmental damage."<sup>74</sup> In effect this concept reflects a reallocation of the burden of proof for environmental issues. Rather than requiring that those wishing to stop the action show in advance the harm of an action, application of the precautionary principle suggests that an action should not be undertaken if it poses a risk, if not a certainty, of harm. In effect this places the burden of proof on those wishing to proceed with an action to prove lack of environmental harm before proceeding. The principle acknowledges that much of the human activity which causes environmental harm cannot be scientifically proven to cause such harm before or even after an event. The Bamako Convention dealing with hazardous waste within Africa contains a specific provision implementing the precautionary principle.<sup>75</sup> This concept is also contained in the Biological Diversity Treaty.<sup>76</sup>

While the usual statement of the principle is directed at pollution issues, it also applies to wildlife issues. In the context of wildlife the principle requires that when the impact of a proposed action upon a species is not known, then the benefit of the doubt should be given to the species and the action not be undertaken until it can be shown that the action will not impose an unacceptable cost or loss to the species. In the absence of complete information, it is better to take no action rather than risk the loss of a species.

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74. J. Cameron & J. Abouchar, *The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment*, 14 Boston Col. Int'l & Comp. L. Rev. 1, 2 (1991).

75. (f) "Each Party shall strive to adopt and implement the preventive, precautionary approach to pollution problems which entails, *inter alia*, preventing the release into the environment of substances which may cause harm to humans or the environment without waiting for scientific proof regarding such harm. The Parties shall co-operate with each other in taking the appropriate measures to implement the precautionary principle to pollution prevention through the application of clean production methods, rather than the pursuit of a permissible emissions approach based on assimilative capacity assumptions;"

Art. 4(3)(f), Bamako Convention, 30 I.L.M. 773 (1991).

76. The preamble states, in part: "Noting also that where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat." Biological Diversity *supra* note 22.

The phrase "precautionary principle" was not in use at the time of CITES' drafting, and therefore the phrase will not be found in the document. Nevertheless, the principle is part of the foundation of the treaty. Article II(1) states that trade in Appendix I species should be allowed only in "exceptional circumstances." This language is certainly precautionary in tone. The clearest example is also the most important, for it arises within the permit granting process, for both Appendix I and II species. The language of the treaty places a burden upon the Scientific Authority of the permit-granting country to make an affirmative determination that the specifically proposed export will "not be detrimental to the survival of the species."<sup>77</sup> Indeed, this is stronger than the precautionary principle, for not only must there be caution in the absence of information, but permits can not be granted until there is an affirmative showing of non-harm. The principle is also reflected in the resolution of the Parties dealing with the removal of a species from the protection of an appendix.<sup>78</sup>

## CITES ISSUES

### A. The Listing of Species

The international legal obligations or limitations of CITES apply only to "trade" (the international movement of specimens of species) in listed plants and animals. Species may be listed by the Conference of the Parties in either Appendix I (threatened with extinction - no commercial trade allowed) or Appendix II (likely to become threatened with extinction if trade is not regulated-commercial trade allowed so long as the remove of the individual animals or plants will not be detrimental to the species).<sup>79</sup> The issues surrounding this threshold step of listing a species fall into two categories: the process for making the decision; and the criteria used in making the decision. At the Kyoto Conference significant concerns were raised about both.

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77. See *supra* note 2, at Art. III(2)(a) & (3)(a), Art. IV(2)(a). See *infra* text accompanying notes 106-07.

78. At the First Conference of the Parties the following language was adopted:

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.

CITES note 2, at Conf. 1.2 (1976).

79. See Favre, *supra* note 4, at 309-16. There is also an Appendix III in which species may be listed unilaterally by states.

Those who are "exploiters" seek to limit the number of species that qualify for listing, assuring continued uncontrolled economic exploitation. Those "conservationists" who seek to conserve by economic unitization are wary of listing species on Appendix I, as no commercial trade is allowed under this listing. Thus, they may seek either to raise the burden of proof for listing or encumber the process of listing a species. "Environmentalists" and "animal protectionists," tending to wish for more rather than less species protection, desire a low burden of proof for placing a species in the appendices, a higher burden of proof to remove a specimen from an Appendix, and maximum flexibility in the process of listing a species in either appendix.

### (1) The process of listing a species

The Consumptive Use Block, with the submission of Doc. 8.51 at the Kyoto Conference, sought to establish a new procedure for listing Appendix I species.<sup>80</sup> Under the proposed resolution contained in the document, the range States of any species proposed for listing on Appendix I could hold a preliminary vote at the Conference of the Parties. If two thirds of the range States voted against the proposal then it would have to be withdrawn. In effect it would give veto power to the range States. As this proposed resolution clearly did not conform to existing treaty language, it was ultimately withdrawn without a vote. The importance of the proposal is not in the legal merits of the resolution as much as it is an expression of frustration by the Consumptive Use Block that their views and interests are being ignored. This resolution reflects their consistent position that the range State, not the broader CITES community, is best able to judge whether a species needs protection.

The process of listing a species should always seek to maximize the information available for decisionmaking. Perhaps a more formal consultation with range States would be appropriate, but they should not receive any veto rights over the process. Species are a global resource, within the concept of Common Heritage of Humankind, and no one country should have the right to allow species to go extinct within their borders. The forces of economics and politics often work together so that individuals presently exploiting wild species are able to neutralize the government concern and bar protective actions.<sup>81</sup>

80. For the procedure of listing a species on an appendix, see *supra* note 2, at Art. XV.

81. Within the U.S., corporations and politicians who seek short term vote support would readily support the destruction of the old growth forest in the Northwestern U.S. and with it the endangered spotted owl and other species. The protection of the species and its habitat only occurred because the U.S. has an independent court system which allows citizens to seek enforcement of the law even over the express political positions of the President of the U.S. See *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479 (W.D. Wash. 1988); *Northern Spotted Owl v. Lujan*, 758 F. Supp. 621 (W.D. Wash. 1991). In

There is a high risk that those range States with vested economic interests in exploitation of a species will be politically unable to provide the protection that a species needs. The effect of giving control of the process to range States would be to allow them to do the balancing of the risk and benefits of listing. The tragedy of the commons suggests that often such unilateral decisions will be to the detriment of the long term needs of the species.

There is another side to the claim of the broader CITES community to control the use of species within a country, that of the obligation of supporting the effort. CITES seeks to stop trade which is harmful to species' survival but does not impose any burden on the broader community. While the whole of the world receives the benefits of a species' continued existence, others do not share in the cost of protecting the species or the cost of economic opportunity lost. Because the concept of sovereignty does not allow for such a thing as international taxation, even when countries agree that range States should receive financial support, they seldom do.

## (2) The criteria used for listing a species

Since the 1st Conference of the Parties, a continuing issue has been the criteria under which Party States decide which species of plant or animal to list in Appendix I or II. The language of the treaty in Article II is not very helpful when specific decisions must be made about listing a species.<sup>82</sup> It is also no help in deciding whether to delist a species. Recognizing its importance, the first resolution adopted the Party States at the 1st Conference of the Parties addressed this issue. Conf. 1.1, known as the Berne Criteria, is set out below.<sup>83</sup>

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September of 1992 President Bush proposed a major revamping of the Endangered Species Act to give more weight to "jobs, families and communities' . . . 'It is time we worried not only about the endangered species, but about endangered jobs . . . ' Bush told cheering sawmill workers." C. Green, *Bush: Save jobs, not just nature*, DETROIT FREE PRESS, Sept. 15, 1992, at 1A.

82. CITES Article II(1) states: "Appendix I shall include all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances." For Appendix II, species the criteria are: "(a) 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; and (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." *see supra* note 2, at Art. II(2).

83. "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" (1976):

DECIDED that in determining the appropriate appendix into which a species or other taxon should be placed the biological and trade status of the taxon should be evaluated together.

*Appendix I*



Given the vagueness of the application of the two factors, biological status and trade status, when Party States have to make a decision about listing a species there is considerable room for other factors to come into play. An additional element of the listing puzzle is that the representatives for each Party State at a Conference of the Parties are seldom qualified to make an independent scientific evaluation of whatever population data does exist.<sup>84</sup> Most delegates, being from the management authority of the country, must look to other sources for an opinion on the science of the proposals. Even if a delegate is a scientist, it is doubtful he or she could make an equally well informed decision about mammals, reptiles and insects. Each country's ethical position, as well as economic and political self-interest will shape its view of whether a species should be listed. At the Kyoto Conference the withdrawal of the proposal for listing of the bluefin tuna seem to be based more on the self-interest of the politically powerful than on the scientific merits of the proposal.<sup>85</sup>

Because of their strong belief that the initial listing of the elephant on Appendix I in 1989 under the existing Berne Criteria was an

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1. *Biological status.* To qualify for Appendix I, a species must be currently threatened with extinction. 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 the species based on single surveys, (c) reports by reliable observers other than scientists on the 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 . . . .

2. *Trade status.* Species meeting the biological criteria should be listed in Appendix I if they are or may be affected by international trade. This should include any species that might be expected to be traded for any purpose, scientific or otherwise. 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 be only 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.

CITES note 2, at Conf. 1.1

84. A number of NGOs, including the IUCN and TRAFFIC, expend considerable effort evaluating listing proposals and presenting written evaluations at the Conferences. CITES Doc. 8.30 (1992). The Secretariat of CITES also publishes an evaluation of listing proposals before each Conference of the Parties, *id.* at 8.46 Annex 3 (1992).

85. [O]fficial discussion over the merits of a proposal to list the western Atlantic population of the northern bluefin tuna on Appendix I never even took place, due to backroom politicking and deal-cutting dominated by the powerful tuna industry and the three countries trading in the endangered western Atlantic tuna: Canada, Japan, and the United States. In a well-

unjustified action by the Parties, the Consumptive Use Block at the 1992 Conference focused much of their energies on changing the Berne Criteria. The most detailed of all their proposals was the resolution attached to Doc. 8.50 with the proposed "Kyoto Criteria" for the amending Appendix I and Appendix II of CITES. The functional part of the resolution contains over 50 paragraphs. While presented as new listing criteria, Doc. 8.50 would have had broader impact, in effect reordering and amending the basic approach of CITES. Some of the most important concepts contained in the proposal include:

- (1) "Split listings" should be avoided, a global view of populations levels should be taken.<sup>86</sup>
- (2) Commercial trade would be allowed in Appendix I species under a quota system when it is shown that such trade is beneficial.<sup>87</sup>
- (3) The same standards should be used to remove a species from an appendix as are used to place a species in an appendix.<sup>88</sup> This is referred to as symmetrical listing criteria.
- (4) Species found in only one State should not normally be listed in either Appendix I or II, but rather Appendix III.<sup>89</sup>
- (5) A presumption that when in doubt a species should be listed on Appendix II rather than Appendix I.<sup>90</sup>

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orchestrated presentation designed to foreclose any open debate, proponent country Sweden, under extreme pressure from the three detracting countries, withdrew its proposal before any views could be heard. A loose pledge made by Canada, Japan, Morocco, and the United States during the session to seek a 50 percent reduction in catch of western Atlantic bluefin tuna under another treaty, the International Commission for the Conservation of Atlantic Tunas (ICCAT), was all but denied during a press conference held by these countries only minutes after the CITES staging. Hemley, *supra* note 9, at 2.

86. CITES Doc. 8.50 Res. in Annex (1)(d)(1992). "If the global population of a species is not threatened with extinction, the problem . . . should be tackled through national legislation or through listing on Appendix III." See Favre, *supra* note 4, at 3-7.

87. *Id.* at Annex (1)(l)-(n). "Paragraph 1 m) identifies conditions under which trade can be beneficial, even for Appendix-I species. Under such conditions, such species should remain in Appendix I to reflect their biological status but limited trade should be permitted under a quota system according to the conditions outlined in Annex 2 of these criteria. This quota system will be extended to include sport hunting trophies and existing quota systems for species in Appendix I (African leopard). These provisions would not apply to species which satisfy the "Critical" condition in paragraph 2A. c) of these criteria." *Id.* Annex (2)(B)(c).

88. *Id.* at Annex (1)(o). "This section covers addition, deletion and transfer of species with respect to Appendices I and II. Except where otherwise indicated, the criteria are completely "symmetrical"; i.e. the conditions for addition of a species or other taxon to a higher appendix are simply reversed when deletion or transfer to a lower appendix is considered." *Id.* Annex (2).

89. *Id.* at Annex (1)(f). See also Favre, *supra* note 4, at 139-46.

90. *Id.* at Annex (1)(c).

- (6) Listing on Appendix I would occur when there was a showing of at least a 20 percent probability of extinction within 10 years (or 10 generations).<sup>91</sup>

The first two propositions are in direct contravention of the language and spirit of the treaty. The definition of species specifically includes "geographically separate populations" of a species as qualifying for listing.<sup>92</sup> Clearly, if the Conference of the Parties had to wait until a species was endangered everywhere in the world, then it would already be ecologically extinct in a number of geographic areas.<sup>93</sup> Under this proposal the total elimination of a species in some countries would not trigger listing of a species, so long as it remained viable in other countries. As one of the purposes of the treaty is to preserve the ecological functioning of species in all of its range, this proposal is contrary to the spirit of the treaty.<sup>94</sup> Likewise, the second concept, allowing commercial trade in Appendix I species, is specifically disallowed by the treaty.<sup>95</sup>

Points three, four and five are not specifically covered in the treaty, but are potential policy positions. Contrary to point three, the Parties have previously decided, in furtherance of the precautionary principle, that the standards for downlisting a species should be more demanding than the standards for listing a species.<sup>96</sup> The use of equal standards for listing and delisting a species would represent a significant policy shift. This is a critical point where burden of proof comes into play. What level of proof should be required before reducing the level of protection a species receives? If there is not at least a full population survey available, it will be difficult to ascertain that a species has sufficiently recovered to sustain increased trade pressures.

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91. *Id.* at Annex (2)(A)(c).

92. *See supra* note 2, at Art. 1 (a).

93. *See Favre, supra* note 4, at 5-7.

94. Article IV (3) of the Convention on International Trade in Endangered Species of Fauna and Flora requires the denial or limited approval of permits for Appendix II species if the population of a species is below that needed "to maintain that species throughout its range at a level consistent with its role in the ecosystem in which it occurs."

95. *Id.* at Article III (3)(c) requires the importing country to certify that the specimen to be imported will not "be used for primarily commercial purposes" before granting an importing license. *See infra* text accompanying note 108-16.

96. CITES Conf. 1.2 (1976):

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 or population.

*Also see Favre, supra* note 4, at 46-53.

As for point four, if a species needs protection from international trade, as judged by the CITES community, the fact that a species is found only within one country is of no particular relevance under existing treaty language and policy. Point four is apparently raised in furtherance of the Consumptive Use Block's policy position that sovereign decision making is to be preferred over community decision-making. It should also be noted that an Appendix III listing proves little, if any, protection for species, since most domestic legislation implementing CITES does not cover trade in species on this list.

Point five is an example of trying to establish a policy position that is contrary to the precautionary principle. At the moment the Parties have no stated position on this point. The Consumptive Use Block would place the burden of proof upon a proponent of an Appendix I listing to clearly show that the listing is required by the circumstances. The precautionary principle would suggest that it is better to overprotect a species in the short term than to risk permanent extinction. The proposal would reduce the number of additions to the Appendix I list, thus increasing the species available for commercial trade.

The primary thrust of Doc. 8.50, as suggested by point six, is the creation of a new set of listing criteria which are more "scientifically objective." In evaluating this point, it should be remembered that it was not proposed in a vacuum. The proponents were seeking to downlist the elephant and the rhino for commercial sale of their animal products. Doc. 8.50 presumably would have aided them in attaining this objective.

Whether the biological criteria proposed in Doc. 8.50<sup>97</sup> are appropriate, is beyond the expertise of this author and the scope of this article. While this author is unable to assess which formula may be most appropriate for judging the risk of extinction, it is important to discuss what role, if any, a scientific formula should play in the listing process. Those that seek the certainty of a "scientific answer" to a policy question will soon be disillusioned. While the best possible science should always be pursued, and all available information should be provided to decision makers, the listing decision is ultimately an issue of international policy and is not delegatable to scientists.<sup>98</sup>

The decision to list a species is more in the nature of a risk management decision than the risk assessment undertaken by scientists. A scientist may make his or her best estimate as to the risk that a species will become extinct. For example, scientist A may project a 30 percent likelihood of the X becoming extinct in ten years. Other scientists, using the same base information, may make their protection at 10 percent or

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97. See *supra* note 2, at Doc. 8.50 Annex (2)(A) (1992).

98. See *supra* science discussion in text accompanying notes 56-7.

50 percent depending on how they weigh the different factors. But even the initial population numbers upon which each projection is based have a margin of error. The cumulative effect of such margins of error and confidence factors over the entire process of calculations make the end number nothing more than an educated guess. Given the difficulty in developing a computer model reflective of reality, the difficulty of obtaining reliable information for any model developed, and the limitations suggested by the Chaos theory,<sup>99</sup> there is no reason to have great confidence in the ability of scientists to predict species' future population levels.

In order to make a useful prediction about future population levels scientists would have to deal with the uncertain impacts of international trade. How is a scientist to take into account the ever-changing market demand, legal and illegal, of rare species? What of the changing levels of enforcement efforts or new domestic legislation? Ultimately, the decision of whether to place or remove a species from Appendix I or II must be considered a public policy decision. It is a holistic judgment of many factors, including scientific information, as well as the experiences of the decision makers about the risk that the species may face.

The proposals of Doc. 8.50 were too extensive and controversial for the Party States to resolve in the two-week meeting. However, many Party States did agree that it would be appropriate to reexamine the existing Berne criteria. Therefore, Conf. 8.20 was adopted which directed the Standing Committee<sup>100</sup> to develop terms of reference under which the issue could be studied and recommendations made for the consideration of the proposals by the next Conference of the Parties. This issue was given high priority by the Standing Committee when it met in July of 1992. Terms of reference and a schedule of events were adopted.<sup>101</sup> Some NGOs have expressed concern over the terms of reference and the process that was followed.<sup>102</sup>

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99. Limitations on the ability to model and predict the future in a fundamental way are addressed under the Chaos theory. This suggests that for complex systems, such as real world ecology, small differences in initial conditions of a math model of real events can lead to chaos and unpredictability of future events such as population levels. J. Gleick, *CHAOS* 59-80 (1987).

100. The Standing Committee does not appear within the language of the treaty but was created by resolution of the parties, *see* CITES Conf. 6.1 (1989). It is composed of six regional representatives and the past and future host governments of the Conference of the Parties. The Standing Committee has evolved into a policy and supervising committee for the party states during the period between Conferences. *See Favre, supra* note 4, at 278-79.

101. *See* CITES, at SC/28 "Summary Report of the Meeting" (June 1992). At the March 1993 meeting of the Standing Committee a proposal from the IUCN was considered. It was expected that a redraft of this document would be sent to all party states and that the issue would be reconsidered at joint meeting of the Animal and Plant Committees in the fall of 1993.

102. This concern has been expressed by a number of NGOs. The following is from a briefing paper attached to a letter from Ronald Orenstein of the International Wildlife

## B. Granting of a Permit

Once a species is listed in an appendix, CITES provides protection by requiring that permits for international trade in the species will be granted only if certain conditions are found to exist.<sup>103</sup> The focus of this discussion will be on two of the requirements, a non-detriment finding required of a Scientific Authority and the "no commercial use" limitation for Appendix I imports. Before a Management Authority of a Party State can issue export or import permits the Scientific Authority of the issuing country must make a finding that the "export will not be detrimental to the survival of the species."<sup>104</sup> The Party States have never adopted a resolution which defines the phrase "not detrimental." Additionally, prior to the granting of an import permit for an Appendix I specimen, the Management Authority of the importing state must determine "that the specimen is not to be used for commercial purposes."<sup>105</sup>

### (1) Beneficial versus Non-detrimental

To refocus the permit-granting process the Sustainable Use Group sought to establish "beneficial use," rather than "non-detrimental," as the operative concept for allowing export. Doc. 8.48, in seeking to define and establish the concept of beneficial use, raises several points of concern. First, trade ought to be considered beneficial, and therefore allowable, when it encourages the protection of the species and its habitat. As the term "beneficial" was defined, this would be limited to certain situations when unstated portions of the proceeds of the sale of specimens are utilized in certain ways.<sup>106</sup> At the Kyoto Con-

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Coalition on behalf of the NGO Working Group on CITES Revision Criteria to John Robinson (Oct. 2, 1992) as a member of the drafting committee established by the CITES Standing Committee: "With Switzerland, . . . as an influential permanent member of the Standing Committee, and with current members including such noted abusers of the wildlife trade as Senegal, Japan and Thailand, it is not surprising that the terms of reference drawn up by the SC are geared towards Zimbabwe's concerns as set out in the Kyoto Criteria. We are seriously concerned that the motivation behind the drive to rewrite the Berne Criteria stems less from a real concern for the workings of CITES as from the agendas of certain parties like Zimbabwe who, unable to secure downlisting decisions they want on the basis of the factual arguments they have presented, now seek to rewrite the CITES rules in their own favor." Letter *Id.*, attachment "CITES and the Revision of the Berne Criteria," at 8.

103. For Appendix I species see *supra* note 2, at Art. III requirements, for Appendix II species see Art. IV.

104. *Id.* at Art. III(2)(a) & Art. IV (2)(a). See Favre, *supra* note 4, at 61-73.

105. *Id.* at Art. III (3)(C).

106. CITES Doc. 8.48 Annex (1992):

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

ference of the Parties there was considerable disagreement as to whether satisfying these conditions would necessarily be beneficial to a species. As this definition was not adopted by the Party States, a detailed analysis of the proposed language is not justified.

Doc. 8.48 also sought to establish a specific fact pattern that, as a matter of policy, would satisfy the non-detriment requirement for granting permits: "B) that trade should also be viewed as *non-detrimental* when it is not based upon the direct harvesting of wild resources for financial gain but rather on products of natural mortality or on by-products of wildlife management for other legitimate objectives."<sup>107</sup> This would clearly allow the sale of elephant ivory obtained through culling operations and perhaps of ivory confiscated from illegal operations. This proposal was also rejected by the Parties. This seems to make an issue of something that is a non-problem. Any specimen of a species listed in Appendix II, which comes into the possession of a government because of its management practice, can be sold and an export permit granted, so long as the management practice is non-detrimental to the species. It would certainly be unwise to suggest that just because a state management practice produced a tradable specimen that it is automatically to be considered non-detrimental to the species. The CITES language provides the appropriate test and substitute criteria do not advance the goals of the treaty.

The Kyoto Conference did adopt a controversial resolution dealing with beneficial use. While many wished to support the idea that beneficial wildlife use is important for the protection of species, others were equally concerned that consumptive sustainable use not become the underlying policy of CITES. Among the Party States at the Kyoto Conference there was considerable sentiment for allowing some modified resolution to be passed, so that the Consumptive Use Block would not be rebuffed in all of its proposed resolutions. After four official revisions, Conf. 8.3 was adopted. The operative language of the defanged resolution simply states, "The Conference of the Parties to the Convention recognizes that commercial 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." From a legal and policy perspective, this language adds nothing new.

## (2) Primarily Commercial Purpose

The Consumptive Use Block sought to replace one of the key limitations on the granting of permits with an entirely different ap-

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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;

107. See CITES Doc. 8.48 Annex (b) (1992).

proach. Art.III(3)(c) requires the Management Authority of the importing country for an Appendix I trade to make a finding that the "specimen is not to be used for a primarily commercial purpose." Thus a leopard (Appendix I) may not be exported from Africa to Italy for the purpose of making a commercial fur coat. On the other hand, exportation of hunting trophies have always been considered for personal, not commercial purposes. Therefore, the export of a leopard trophy by a sportsman to Italy is allowable (the fact that the trophy has market value once imported is ignored). While this example is relatively straightforward, there are many situations that are not.<sup>108</sup> The Parties sought to address this important question in Conf. 5.10, but many issues nevertheless remain unclear.<sup>109</sup> For purposes of this article, it is not the uncertainty of the edges of the definition that are important, but the requirement itself.

In Doc. 8.49 the Consumptive Use Block sought to replace the limitation of no commercial purpose with the concept of sustainable use. "Instead of focusing on 'commercial trade,' it is necessary to begin by considering *sustainable use*."<sup>110</sup> As argued in Doc. 8.49, inherent in the concept of sustainable use is commercial trade. (It is doubtful all would agree with this premise.) The goal of management practices is to make available plants and animals for commercial trade.<sup>111</sup> The Consumptive Use Block concludes that as long as the results of the commercial trade are judged beneficial, as defined in Doc. 8.48, then there should be no objection to commercial trade, even for Appendix I species.<sup>112</sup> In Annex II of Doc. 8.50 some thirteen preconditions are listed for the beneficial sale of Appendix I species, in effect suggesting an alternative to the no commercial use prohibition of the existing treaty language.

In the proposed resolution attached to Doc. 8.49 the Consumptive Use Block proposed the following operative language: "RECOMMENDS that a 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." Whatever the definitional problems

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108. Is importation of a panda bear from China by a U.S. zoo considered commercial? The importing entity is nonprofit, but considerable money would exchange hands and clearly the presence of the panda would increase the income of the zoo from visitors. In 1992, the World Wildlife Fund-US opposed the importation of two giant panda (Appendix I) as a loan to the Columbus Zoo (Columbus, Ohio, USA). As part of a lawsuit settlement allowing the importation, the zoo agreed to donate 90 percent of its net profits from the exhibit toward the conservation of panda. *TRAFFIC USA*, *supra* note 9, at 3.

109. See Favre, *supra* note 4, at 82-86.

110. CITES Doc. 8.49 Background (6)(1992).

111. *Id.* at 8.49 (8) (1992).

112. *Id.* at (9)-(12).



with the treaty terms, this resolution would not further define the term "commercial" but would substitute an entirely different concept from that provided in the treaty. In addition, no commercial use is a fundamental policy point around which the treaty was built. The existing language is reflective of the precautionary principle. The proposed resolution was clearly seeking to amend the treaty, not define a term.<sup>113</sup> This was recognized by many of the Parties at the time, and after discussion the resolution was withdrawn by its sponsors. Even though withdrawn, it is still very important to focus upon the resolution as it does represent the goals which the Consumptive Use Block seek to impose upon CITES and therefore must be expected to be recast in other forms as the debate continues.

To say that the proposal is inappropriate under the present language of the treaty is of course not to address the merits of the proposal. Should CITES be amended so as to substitute the concept of beneficial use within a sustainable context, for that of non-detrimental findings and the no commercial trade limitation on Appendix I species? We must recognize that the idea of beneficial use was defined in terms of where the money went, not in terms of any scientifically defensible, sustainable use program. But perhaps even more fundamental, the proposal would seem to abandon the precautionary principle, and adopt as a substitute the lure of the economic marketplace with all of its inherent risk. The "no commercial trade" limitation is precautionary in the sense that the Parties have prejudged that there is a high risk of economic and political pressures overwhelming and corrupting the safeguarding of the permit system if economic trade is allowed. Therefore, rather waiting for proof of harm before stopping commercial trade, there will not be any trade to stop. Besides the need to be cautious about changing a fundamental policy of CITES, it must be recognized that the Party States have often been willing to show flexibility when specific fact patterns arose in which it could be shown with some confidence that economic benefits could be realized without further endangering the species. Sport hunting of leopards,<sup>114</sup> sale of vicuna wool,<sup>115</sup> and ranching of crocodiles<sup>116</sup> are all representative of different solutions the Party States have been willing to adopt. If a species qualifies as Appendix I, then, given the lack of scientific information,

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113. The treaty itself in Article XVII provides the appropriate, if cumbersome, method for amending the treaty. See Favre, *supra* note 4, at 315-16.

114. See Favre, *supra* note 4, at 95-98; CITES Conf. 8.10, "Quotas for Leopard Hunting Trophies and Skins for Personal Use" (1992).

115. See Favre, *supra* note 4, at 93-95; CITES Conf. 8.11, "Stocks of Hair and Cloth of Vicuna" (1992).

116. See Favre, *supra* note 4, at 205-10; CITES Conf. 8.22, "Additional Criteria for the Establishment of Captive-Breeding Operations and for the Assessment of Ranching Proposals for Crocodilians."

the pressures of illegal trade, the risk of corruption of government officials and the willingness of the Parties to consider species-specific solutions, the continued application of the precautionary principle through the general limitation on commercial trade for Appendix I species is justified.

### (3) Scientific Authorities

A critical component in the decision of whether to grant a permit is the role of the Scientific Authority. This or an equivalent body would also be critical to any implementation of a sustainable use program that a state might wish to create. From a pragmatic, real world implementation perspective, this is also one of the weakest links in CITES. One of the reasons that environmentalists and animal protectionists show such skepticism toward those that urge movement toward sustainable use principles is that many countries have not yet implemented the Scientific Authority requirement of CITES. Unless this has been institutionalized within a state, any implementation of the scientific underpinnings of the sustainable use doctrine is impossible.

The problem has a number of different aspects. First, not all Party States have even designated a Scientific Authority.<sup>117</sup> While a Management Authority must be designated in advance to become a functional Party State,<sup>118</sup> such creation or designation is not required for the Scientific Authority. Secondly, even if designated, in many countries Scientific Authorities are often impotent to effect decisions. Many Party States, because of lack of resources, do not have full-time scientists on staff, but designate institutes of higher education or museums as Scientific Authorities.<sup>119</sup> Individuals at these institutions always have other responsibilities, limited resources of their own, and little political clout within the government. Once designated, they may or may not be consulted about individual permits as required by CITES.<sup>120</sup> Fi-

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117. At the Kyoto Conference, one party state suggested they would withdraw from the Convention if they were forced to implement this requirement of the Convention, as they did not have the resources for carrying out the provision.

118. See *supra* note 2, at Art. IX (2): "A State depositing an instrument of ratification, acceptance, approval or accession shall at the time inform the Depositary Government of the name and address of the Management Authority authorized to communicate with other Parties and with the Secretariat."

119. As of 1990, Cameroon had the Ministry of Tourism as the Management Authority and the Wildlife College as the Scientific Authority. Costa Rica designated the Colegio de Biologos de Costa Rica as Scientific Authority. Argentina designated the same agency to be both Management Authority and well as Scientific Authority: the Direccion Nacional de Recursos Naturales. BIRD TRADE *supra* note 42, at 62. As of 1990, Australia also had the same agency doing both functions.

120. In personal conversation with the author, the head of the Scientific Authority for a major developing country admitted that the people in the Management Authority seldom ask his professional opinion, particularly if it is a politically sensitive issue.

nally, even if consulted, few Scientific Authorities possess scientific expertise or sufficient population information to give expert advice for all the native species listed by CITES.

Given all these potential and real failings, the question is how often the requirement for a non-detriment finding is made before a CITES permit is issued. A hint of this can be obtained in a study on bird trade done by the TRAFFIC organization.<sup>121</sup> The report found a significant lack of information available for making non-detriment findings for bird exports.<sup>122</sup> When population baseline data was absent, the usual basis for setting export quotas for wild bird trade was prior export levels.<sup>123</sup> This is hardly the level of science to assure the sustainability of the trade.

This lack of implementation of basic requirements of CITES has been raised a number of times, but at the Kyoto Conference it received particular attention. Document 8.37 from the Animals Committee, drafted by the United States, sought to clarify all the different function of a Scientific Authority. A modified version of this was adopted as Conf. 8.6, "Role of Scientific Authority." While it does direct the Secretariat to report those Parties without Scientific Authorities to the Conference of the Parties, there is no proposed sanction in the resolution for those Party States that do not have or properly use a Scientific Authority. It is ironic that at the Conference which most clearly showed

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121. In one country an author noted, "Very little is known about the status of the wild populations of any native species of parrots. No formal procedures exist at this time to provide 'non-detriment' findings' as required under Article IV of CITES." BIRD TRADE *supra* note 42, at 63.

122. It is well understood that most species can withstand at least some change in their natural environment, including increased predation by humans such as trapping for export, without suffering long-term declines. However, too little is known about the biological requirements, reproductive strategies and niches occupied by many species to determine whether current levels of human utilization are detrimental to wild populations. To compound this problem, at present the number of birds removed from the wild for trade or other purposes is unknown: trade data are based on the number of birds exported, and do not reflect pre-export mortality. No records are kept of the number of birds harvested for food, feathers, etc. Lacking this basis information, it is difficult if not impossible to accurately determine sustainable harvest levels.

The problem of assessing whether current trade levels are sustainable is exacerbated by the lack of information regarding the age of birds in trade, a factor which may be critical with respect to the effects of trapping on wild populations. . . . *Id.* at 10.

The same lack of baseline data was found in several other countries surveyed. *Id.* at 79, 129, and 147.

123. "Exporter quotas were based on 1987 calculations of exporter's previous trade levels," and "capture quotas are based on an evaluation of prior capture records." *Id.* at 80, 97. This approach was also used in the U.S. when export permits were required for bobcat pelts. See, *Defenders of Wildlife v. Endangered Species Scientific Authority*, 659 F.2d 168 (1981); Favre, *supra* note 4, at 63-67.

the failure of many countries to implement the CITES "non-detrimental" finding requirement, that sustainable use, requiring nearly the identical scientific capabilities, would be idealized as the way to save species.

### C. Enforcement

Another concern of the Consumptive Use Block is the provision of the treaty that allows Party States to adopt stricter domestic measures.<sup>124</sup> Under this provision even though a lawful CITES permit may be issued by an exporting country, an importing country may block potential transactions by the unilateral adoption of stricter domestic measures. For example, the United States has adopted the African Elephant Conservation Act, which in 1989 allowed the president to impose a ban on the importation of ivory, even though it was permitted under CITES at that time. The position of the Consumptive Use Block is supported by Principle 12 of the Rio Declaration which states in part: "States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, . . . Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided."

To control this problem, the Consumptive Use Block proposed a resolution in Doc. 8.52 which limited the application of this unilateral power. "[I]mporting Parties should adopt only those stricter domestic measures which producer states believe will give greater effect to their conservation measures."<sup>125</sup> Again, as in the case of the procedure for listing species, the Consumptive Use Block sought to provide veto power for the producing (range) nations over the limiting actions of importing (developed) countries. As this approach is in clear contradiction to the provisions of the treaty, it was not seriously pursued at the Conference of the Parties. Ultimately, it was withdrawn. In addition, the Kyoto Conference did acknowledge again the ability of States to adopt stricter domestic measures, in this case upon a showing of significant mortality of birds.<sup>126</sup>

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124. See *supra* note 2, at Art. XIV(1) states, "The provisions of the present Convention shall in no way affect the right of Parties to adopt: (a) stricter domestic measures regarding the condition for trade, taking, possession or transportation of specimens of species included in Appendices I, II, III or the complete prohibition thereof."

125. CITES Doc. 8.52 Annex (1992).

126. See CITES Conf. 8.12, "Trade in Live Birds Experiencing High Mortalities in Transport" (1992): "(b) that Parties take appropriate measures, including temporary suspension of trade for commercial purposes between Parties when appropriate, regarding trade in species of birds that have significant high mortality rates in transport, based on their own data or data supplied by the Working Group on Transport of Live Specimens."

One of the primary reasons that countries adopt stricter domestic measures is the failure of CITES to adequately deal with a problem. For example, at the Kyoto Conference the United States supported a proposed resolution that would have banned the international live shipment of species of birds for which there is insufficient scientific information to support a non-detriment finding. In other words, there was concern that permits were being issued by some Party States without the non-detriment finding being made, or that the finding was being made without adequate scientific information. The exporting countries generally opposed this measure at the meeting. As a result the resolution was defeated by vote in Committee II.

Upon return to the United States, with the vigorous support of the environmental NGOs, stricter domestic legislation was drafted and passed in the fall of 1992 by the United States Congress. The Wild Bird Conservation Act establishes an immediate moratorium on the importation of ten species of exotic birds listed in Appendix II and will ban the importation of *all* such birds at the end of one year (October 1993) unless it can be shown that the country of export has implemented the CITES standards.<sup>127</sup> This law represents a whole new level of "stricter domestic law." It is not stricter in the normal sense, as it is tied directly to the standards contained within CITES. In this case the non-detrimental finding must be made to the satisfaction of the United States Secretary of the Interior. This law reaffirms the CITES standard, while providing a strict enforcement mechanism, at least for the trade into the United States. The big difference from the past is that the

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127. The Wild Bird Conservation Act, 16 U.S.C.A. §4901, §106(c) (1992) states:

The Secretary shall include in the list under subsection (a) a species of exotic bird that is listed in an Appendix to the Convention if the Secretary finds the Convention is being effectively implemented with respect to that species because of each of the following:

- (1) Each country of origin for which the species is listed is effectively implementing the Convention, particularly with respect to—
  - (A) the establishment of a scientific authority or other equivalent authority;
  - (B) the requirements of Article IV of the Convention with respect to that species; and
  - (C) remedial measures recommended by the Parties to the Convention with respect to that species.
- (2) A scientifically-based management plan for the species has been developed which—
  - (A) provides for the conservation of the species and its habitat and includes incentives for conservation;
  - (B) ensures that the use of the species is biologically sustainable and maintained throughout the range of the species in the country to which the plan applies at a level that is consistent with the role of the species in the ecosystem and is well above the level at which the species might become threatened with extinction; and
  - (C) addresses factors relevant to the conservation of the species, including illegal trade, domestic trade, subsistence use, disease, and habitat loss.
- (3) The management plan is implemented and enforced.
- (4) The methods of capture, transport, and maintenance of the species minimizes the risk of injury or damage to health, including inhumane treatment.

United States will be the sole judge of whether the burden of proof has been met for imports into the United States. Without doubt a number of exporting countries will find this offensive to their concept of sovereignty. Other exporting countries, making a good faith effort to enforce CITES, ought to appreciate the law since it will primarily impact nations not living up to their CITES responsibilities.

Another use of stricter domestic measures is as a substitute for the lack of any effective enforcement mechanism within CITES itself. There is no provision within the treaty for what should be done with Party States that do not fulfill their obligations under CITES. Yet trade import bans have been recently adopted against certain target countries. A pattern and practice is developing within the CITES community: Upon recommendation of the Secretariat to the Standing Committee, a resolution is adopted by the Standing Committee whereby Party States are urged to disallow any wildlife trade with the identified offending country. On 22 April 1991, the Secretariat notified the Parties of the recommendation of the Standing Committee that all wildlife trade with Thailand be banned because of CITES violations and lack of adequate domestic legislation.<sup>128</sup> Based upon this request the United States adopted a stricter domestic measure, which was a regulation prohibiting importation of wildlife from Thailand, regardless of the existence of any CITES permit.<sup>129</sup> At the Kyoto Conference the Standing Committee reviewed the efforts of Thailand and noted the adoption of new legislation. On 2 April 1992, after Thailand's adoption of legislation for the protection of plants and animals, a new notification was issued by the Secretariat recommending the trade ban be lifted.<sup>130</sup> The same pattern is occurring with Italy.<sup>131</sup>

### THE DIFFICULTIES OF CONSUMPTIVE ECONOMIC UTILIZATION

There is one key difficulty in analyzing the Consumptive Use Block's position. While each of their proposals is premised upon the concept of sustainable use, in none of the documents and at no time

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128. See CITES Secretariat Notification No. 636 (22 April 1991).

129. For details see Fed Reg. 32206 July 1, 1991.

130. CITES Secretariat Notification No. 673. See *TRAFFIC BULLETIN*, *supra* note 4.

131. The Secretariat brought to the attention of the Standing Committee the lack of domestic legislation which contained any penalties for CITES infractions, the lack of adequate inspection at the time of importation and exportation, and the issuance of permits in violation of CITES. *Id.* at 7. The Standing Committee adopted a resolution urging the adoption of stricter domestic measures by Party States. See CITES Secretariat Notification to the Parties No. 675, 30 June 1992, See *TRAFFIC BULLETIN*, *supra* note 4, at 48. Upon adoption of new domestic law by Italy, the Standing Committee reversed its recommendation. See CITES Secretariat Notification No. 722, 19 February 1993.

during the meeting in Kyoto was this term ever defined by its proponents. What is missing until the term is defined is the appropriate context in which to judge whether an action is sustainable. It is the same problem that is faced in defining non-detrimental,<sup>132</sup> which the Party States have not yet done. Removal of wildlife may be sustainable at a number of different levels of population in the wild. If there are only one hundred of a species remaining, annual removal of two may be biologically sustainable. But from an ecological context, the species may be entirely under-populated and growth of the population the desired goal not removal.

In addition, CITES has no authority over the adoption of management plans for wild species within a country. Any Party State can establish any variety and number of sustainable use projects within their country without any CITES limitation. If international trade is part of the sustainable use management program, then the trade can occur so long as it can be shown as non-detrimental.<sup>133</sup> Given that CITES does not limit the ability of States to create sustainable use management plans, it is not difficult to understand why many environmentalists and animal protectionists greeted the claim that CITES needs to be changed with skepticism and a sense that unstated economic motives were the real driving force behind the substantial efforts of the Consumptive Use Block.

As a final general point, it must be decided how deceptive the Consumptive Use Block is being in trying to hide behind the universally acceptable concept of sustainable use. This broadly accepted, if poorly defined, concept addresses the issue of how to utilize a resource such as wildlife. It does not attempt to address the issue of when, if ever, it is appropriate to remove wildlife from their natural habitat. One is initially left with the impression that the Consumptive Use Block position is but an implementation of sustainable use, but it is not. Their position presumes that wildlife must be consumptively used.

As discussed throughout the above material while the CITES community may well accept sustainable utilization of wildlife as an appropriate management goal of a Party State, there is considerable skepticism about using consumptive economics as the primary method of implementing a sustainable use policy. The following points are a summary of the concerns about proclaiming consumptive economic utilization of wildlife as the salvation of endangered species.

## A. Science

Good scientific information about wildlife is difficult and expensive to obtain. Without good information, the risk of being wrong

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132. See Favre, *supra* note 4, at 61-73.

133. See *supra* text accompanying notes 106-7.

is placed upon the species' chance of survival rather than upon the exploiter. The history of whaling stands before the international community as an example of scientific and political failure. "Persistent international diplomacy and the evolution of international law failed to accomplish an objective of sustainable whale harvesting during a half century of cooperative management."<sup>134</sup> This occurred notwithstanding the treaty requirement that whale harvesting be set according to "scientific considerations."<sup>135</sup> Whales are difficult to count in the open ocean, and the secondary methods of assessing population, such as number of whales killed per amount of effort used, were inadequate to the task.<sup>136</sup> Within the whaling community, sustainability was allowed to be determined by the users as the killing of the whales continued. In nearly every case they were wrong; whale populations could not sustain the level of killing demanded by the Parties. This is an example of the risk of proceeding with an action without strong scientific information being obtained before the decisions are made. It also is a clear example of how short-term economic pressures will overwhelm weak science.

In addition, the lack of existing scientific infrastructure within countries makes the implementation of sustainable use in the near term questionable. Any consumptive sustainable use program which is allowed to proceed without prior scientific proof of sustainability, or which suggests that sustainability can be shown as the use continues, has inappropriately placed the burden of proof upon the species.

## B. Ethics

That a particular use of wildlife may be biologically and ecologically sustainable, does not mean that it is ethically acceptable. Elephants are not turnips. The suitability of a policy cannot be judged solely on its economic efficiency or even ecological sustainability. Human slavery was often considered economically efficient. Nevertheless, it has been judged to be an unacceptable policy on moral grounds.<sup>137</sup> Likewise, some animal protectionists would say that even if a policy is ecologically sustainable, it may be immoral. To kill elephants for the sole purpose of selling body parts like ivory is unacceptable.

An additional ethical perspective, with an even broader base of support, would not allow the killing of wildlife in a wasteful or cruel manner. This view accepts the use of wildlife by humans, but only when it is carried out in the most humane manner possible. Under existing

134. B. van Drimmelen, *The International Mismanagement of Whaling*, 10 Pac. Basis L. J. 240, 241 (1991).

135. See *supra* note 49, at Art. V(2)(b).

136. Van Drimmelen, *supra* note 134, at 245-49.

137. *Universal Declaration of Human Rights*, Art. IV, U.N. General Assembly, G.A. Res. 217 A (III), at 71, U.N. Doc. A/810 (1948) states, "No one shall be held in slavery or servitude; slavery and slave trade shall be prohibited in all their forms."



economic forces, the economic rewards to the local collectors of wildlife do not support humane housing and transportation of wildlife.<sup>138</sup> To the extent that a program of consumptive utilization is fostered, then under existing market pressures, increased pain and suffering to a larger number of wildlife is a predictable result. Until these issues are addressed, consumptive sustainable use will not be acceptable to many with ethical concerns.

### C. Availability of Alternatives

Nonconsumptive use of wildlife is proving an important alternative for species preservation. It must be remembered that the issue of consumptive use of wildlife is but a small part of the larger issue of conserving species. This desire to promote economic exploitation seems to set aside all experience about conservation through education, land preservation and nonconsumptive uses. The growing market for ecotourism is one alternative which provides economic incentives for ecosystem conservation.<sup>139</sup> Private organizations and the scientific community can also use their resources to support species and their habitat.<sup>140</sup> Park and wildlife preserves have been created through "debt-for-nature" swaps.<sup>141</sup>

### D. The Precautionary Principle

One of the most effective standards by which to judge any proposed sustainable use program is the degree to which it implements the precautionary principle. As discussed above, neither the proposals from the Consumptive Use Block at Kyoto, nor the efforts of the IUCN Committee, to date, have integrated this concept into their pro-

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138. See *supra* discussion of economics in text accompanying notes 54-55.

139. For example, in the highlands of Mexico 300 million monarch butterflies winter over after migrating south from all over North America. When the habitat was threatened in the 1980s, private organizations sought alternatives to cutting the timber which formed the winter habitat for the butterflies. As part of that program private land owners were convinced to sell land to sanctuaries which were administered as part of a landowner co-op which employs local people. In 1991, 100,000 people visited the two major sanctuaries, spending millions of pesos for food, lodging, souvenirs and guide services. D. Matthews, *Mountain Monarchs*, WILDLIFE CONSERVATION, Sept/Oct 1992, at 27, 29.

140. In the Manu region of southeastern Peru the Wildlife Conservation International (WCI) organization in 1992 negotiated an agreement with a local community of indigenous people which helped scientists, protected local birds and provided economic incentives to local people. The village of Tayakome agreed to provide WCI's scientists with information about the location of the nest of macaws and Amazon parrots, "of trees and lianas that produce foods for the 23 species of parrots of Manu lowland and of clay licks used by parrots in Manu. In return, WCI has agreed to pay the Community the sum of \$500 a year, in either cash or goods." *Native Peruvian Community Signs Parrot Agreement*, WILDLIFE CONSERVATION INTERNATIONAL BULLETIN, summer 1992, at 15.

141. See generally Priya Alagiri, Comment: Give Us Sovereignty or Give Us Debt: Debtor Countries' Perspective on Debt-for-Nature Swaps, 41 A. U.L. Rev. 485 (1992).

posals. It is a fundamental policy of CITES. Given that the risk of being wrong is extinction for a species, it is a necessary policy. Attempts to create sustainable use programs that do not implement this principle should not be supported. A primary concern, indeed fear, of many environmentalists and animal protectionists is that like the wolf in sheep's clothing, the concept of sustainable use will be but a ruse to continue exploitation of wildlife and that by the time it becomes clear that the wildlife are not being protected, it may be too late for many species.

## RECOMMENDATIONS AND CONCLUSIONS

### A. Listing Criteria

While the Consumptive Use Block proposal for changing the listing criteria was not adopted at Kyoto, without doubt another new proposal will be considered at the next Conference of the Parties in the United States in the fall of 1994. Therefore, in addition to the caveats raised above about the use of science, the following questions and comments are given as a framework of analysis for any proposed modification of the Berne Criteria. Is the proposal made or supported by exploiters whose primary motivation is to continue valuable economic trade? Is there any change in the burden of proof for a listing proposal? Is the proposed standard one that can be realistically applied given the lack of hard scientific information available about many species? Who are the final decision makers? Is the precautionary principle preserved?

### B. Ethics

The participants must learn to accept the diversity of views and work within this diversity toward consensus of outcomes on specific issues. The balance of power in the decision making will often rest with a number of Party States who hold neither of the extreme views and move more pragmatically from one specific decision to the next. At the moment the economic users are putting on a "full court press," but it is doubtful they will succeed in converting the treaty into an economic consumptive use body. Given the diversity of views that have existed among various world religions for the past thousand years,<sup>142</sup> world-wide consensus on the appropriate ethical view toward wildlife seems improbable in the near future. Acceptable compromise needs to be found. Compromise on the specifics is inevitable and appropriate as the debate on the merits of the various ethical positions continues. The central organizing principle-avoidance of species extinction - ought to be acceptable to all within the CITES community.

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142 See L. Regenstein, *REPLENISH THE EARTH* (1991).

### C. Species Recovery

It is the goal of the treaty to stop international trade that is detrimental to the survival of a species. However, CITES does not have any provision requiring a Party State to support positive recovery programs for a listed species. In contrast, the United States Endangered Species Act<sup>143</sup> both prohibits negative actions<sup>144</sup> and requires the government to take affirmative actions to ensure that a species recovers to a population level that will allow its removal from the protected list.<sup>145</sup>

The promotion of the concept of sustainable use of wildlife is in part an attempt to create an affirmative frame of reference for species recovery within the CITES process. The Consumptive Use Block seeks to turn CITES into a structure that supports the positive approach, as well as the negative prohibitions, through the substitution of the "beneficial use" criteria instead of the "non-detriment finding" and through the elimination of the ban on commercial international trade for some Appendix I species. While the goal is appropriate and needs to be addressed by the Party States, the proposals at the Kyoto Conference were not a productive approach.

### D. Sovereignty

The wildlife of the world are a common resource. The world community does have the right/obligation to control the flora and fauna within the border of a sovereign country. As a matter of principle, we are citizens of our nations, but we are also citizens of the world, with rights and obligations stretching beyond our individual countries. But what must be remembered is that if we seek to assert our rights for the protection of wildlife in other states, then there must also be an acceptance of the obligations to help the states who bear the short-term burdens of economic restraint and wildlife management.

To have signed CITES is, in theory, to have accepted a limitation of sovereignty, but many still resist the consequences. Only through collective enterprise and mutual sacrifice will the goal of preservation of species be realized. This clearly requires some modification of the concepts of sovereignty. Community-wide decisions about listing species

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143. Endangered Species Act, 16 U.S.C. §§1531-1544.

144. *Id.* at §1538(a). This section makes illegal the taking of a specimen of a species or the importation or exportation of a species without a permit.

145. *Id.* at § 7(a)(1). This section requires all federal agencies to carry out programs for the conservation of endangered and threatened species. The term "conservation" is as using "all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer needed." *Id.* National Wildlife Federation v. Hodel, 23 E.R.C. 1089 (U.S. D.C., E.D. Cal. 1985) (under the above quoted language, the Dept. of Interior has a duty to phase out the use of lead shot as soon as possible because of its threats to bald eagles).

must be accepted as the method most likely to provide the necessary protection. Some form of enforcement is also necessary as an outside inducement for states to conform to the international legal norms developed within CITES.

### **E. Burden of Proof**

In the absence of full scientific capabilities the system must give the benefit of the doubt to the continued existence of the species. CITES presently sets the burden of proof for showing that a particular action is not detrimental and therefore sustainable upon those who seek to use a species within international trade. Given the economic and political pressures for short-term exploitation, this critical part of CITES must remain as a fundamental concept. In this and other areas CITES must continue to use the precautionary principle. No case has been made to suggest that species will benefit if the fundamental principles of CITES are set aside. The existing burdens of proof are appropriate and adequate to the task.

### **F. General Conclusions**

CITES must be judged in the context of its stated goals and the overriding shortcoming of international law generally. The goal is to control international trade of species so as to prevent extinction because of the trade. Has the goal been met? Certainly not. Does this mean there is something wrong with CITES? No. There is an additional process goal of CITES which is a preliminary goal to meeting the substantive goal. For Party States to fulfill obligations under CITES, they must adopt domestic law and create and empower an administrative agency which can collect the necessary information and make the appropriate decisions. The quest of the 1980s and 1990s is creation of supportive administrative structures within each Party State for the implementation of CITES goals. This necessarily includes supporting the process of science. Everyone agrees good science is necessary; perhaps it was not foreseen how difficult it would be to obtain good science.

Over the next decade there are a number of problems that will need to be addressed:

- (1) How to obtain the scientific information required to make decisions under CITES;
- (2) How to reach a consensus on the standards for listing a species;
- (3) How to provide the financial resources needed by developing countries for the management of species and to overcome the economic incentives of unsustainable utilization of wildlife;
- (4) How to force Party States to fulfill their international legal obligations under CITES;

- (5) How to create an information network that will increase the trust in the CITES permit system and decrease the likelihood of illegal trade being protected by the legal market;
- (6) How to create an affirmative context for the recovery of species?

Does CITES need a new conceptual basis such as the promotion of consumptive use of wildlife? No. As presently drafted, CITES allows countries to adopt sustainable use as a management approach. As an overarching, organizing principle, consumptive use is too limiting. The CITES community needs to foster all the values that humans find in wildlife, as no one value will succeed in preserving wildlife. There is inadequate scientific information and inadequate resources to adopt this approach as an organizing principle.

Within another decade it may be appropriate to consider the redrafting of the treaty itself to provide more sophisticated tools to deal with all these issues, but this should not be done until there is more discussion and consensus on the fundamental points of analysis as discussed above. The discussion cannot be "is CITES working," but must be "how can we make CITES work better?"