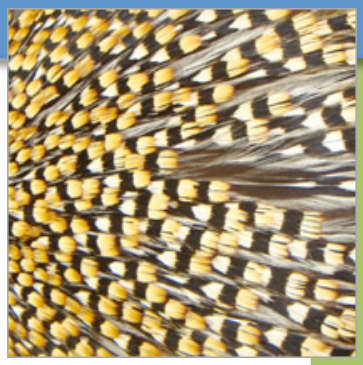
Back to Basics: An Analysis of the Object and Purpose of CITES and a Blueprint for Implementation



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Back to Basics: An Analysis of the Object and Purpose of the CITES and a Blueprint for Implementation

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Executive Summary

With an increasingly small budget relative to the growing work programme, the Parties and the Secretariat to the Convention on International Trade in Endangered Species of Fauna and Flora (CITES) must prioritize objectives strategically such that the fundamental goals of CITES remain intact and of utmost importance. As such, the Parties, when setting out the Strategic Vision for CITES, must look to the object and purpose of the Convention to guide their objectives and priorities. The object and purpose of the Convention is clear from the plain language of the Convention, the drafters' intent, and the general structure of the permit regime: the fundamental and exclusive goal of CITES is to prevent the over-exploitation of any species due to international trade.

Over the years, however, as more developing countries have joined CITES, fissures have arisen among Parties and advocates over the best lens through which to implement CITES' technical provisions and over setting CITES' strategic vision. Some Parties argue that CITES, which limits trade in valuable parts and derivatives of listed species, including commercially valuable species, must evolve to recognize the role that international markets can play in conservation by ensuring that wildlife has economic value. These Parties believe that effective conservation depends on increasing the value of wildlife to make wildlife conservation economically competitive with other uses of habitat. Trade in specimens of wildlife may increase the value of wildlife and incentivize community-based conservation. These Parties and other advocates insist that conservation thus requires the development of international markets for wildlife products and that CITES Parties must collectively facilitate and promote legal, sustainable wildlife trade.

Others have these criticized these views as straying beyond the core mission of CITES. These Parties and advocates claim that policies concerning land tenure, socio-economic development, and poverty reduction are of obvious importance, but perhaps not critical to the operation of CITES and its goal to prevent over-exploitation due to trade. They argue that CITES is a narrow treaty and that it is clear about the means through which it intends to ensure conservation—that is, strict regulation of international trade—and that developing markets for wildlife or facilitate trade in wildlife runs counter to the very nature of CITES. They argue that many species are at risk due to international trade and that short-term monetary gains too often jeopardize the long-term objectives of the Convention.

This paper reviews the many ways that this "sustainable use debate" has manifested itself within CITES with a goal of determining on what activities the Parties should spend organize their CITES work programme. This paper reviews the history of CITES, including the Convention's *travaux preparatoire*, resolutions, and decisions, to identify the Convention's core mission and determine what it means for CITES to get "Back to Basics." The paper reviews this history and the sustainable use debate through the lens of the major policy debates the Parties have had over the years concerning the critical permit findings, the exemptions from the Convention's permit requirements, special measures designed to allow certain trade in a controlled manner, the Convention's applicability to marine species, compliance, and the use of stricter domestic measures.

Permits

The object and purpose must guide implementation of the core provisions of the permit regime—namely, the non-detriment finding and the primarily commercial purposes finding, in the case of Appendix I species. Although the Convention does not define the criteria for making these findings, the Parties have adopted resolutions setting out the Parties' basic understanding of the terms. In the case of the non-detriment finding, the guidance is insufficient. In order to better support the goal of preventing over-exploitation of species from international trade, this Paper recommends that Parties adopt a specific resolution that identifies the specific criteria that constitute an adequately robust non-detriment finding. In addition, this paper draws attention to the distinct finding that the purpose of the import must be non-detrimental to the survival of the species for trade in Appendix I specimens; the Parties must accurately and adequately implement this finding in order to specifically ensure that commercial or primarily commercial markets for Appendix I specimens do not stimulate demand for species taken from the wild.

Efforts to reshape implementation of the non-detriment finding and the primarily commercial purposes finding by Parties that want to see the Convention's goals move toward facilitating legal trade have failed, but the efforts have nonetheless had a lasting impact on the CITES agenda. Through the Wildlife Trade Policy Reviews and the Livelihoods discussion, the Parties have explored both the beneficial and detrimental impacts of trade. These are useful endeavors and may be helpful to Parties, but concern exists that these are ultimately avenues for facilitating trade and moving CITES away from preventing unsustainable trade. This paper proposes that certain reforms may move these agenda items more in line with the Convention's object and purpose, but it also suggests that these efforts must come second to strong implementation and enforcement of the Convention's core provisions.

Exemptions, Export Quotas, and Other Trade Allowance Provisions

While the Convention's premise is preventing the over-exploitation of species due to international trade, the Convention specifically recognizes a number of exemptions, including designed to reduce pressure on wild populations, the captive breeding exemption, or recognize circumstances in which international trade may not be detrimental, the personal and household effects exemption, among other specific exemptions. In addition, the Parties have adopted a number of measures to allow trade that they determine is non-detrimental, including export quotas, "annotations" to the Appendices, such as those that permit one-off sales of ivory, and split-listings that allow more trade in specimens from the more robust populations of a species.

The Convention's exemptions and other strategies for allowing trade under controlled circumstances are all useful means of allowing trade that might otherwise unnecessarily restrict access to valuable natural resources. They may also ease administrative burdens, as with export quotas approved by the Conference of the Parties as a whole or the personal and household effects exemption. However, unless strictly construed and well-managed, the exemptions and special mechanisms could become dangerous loopholes. The Parties must ensure that they employ these provisions and special mechanisms in a manner that takes into account a precautionary approach, transparency, and strict adherence to the drafters' intent.

Marine Species

Despite ongoing debates, the core provisions of CITES contemplate that marine species may be listed in the Appendices and that international trade in such species would be regulated in much the same way that the Parties manage trade in terrestrial species. The Convention provides for a certificate system for trade in marine species taken in the high seas called "introduction from the sea." The Parties have worked for years to adopt a common understanding of the certificate process, including which State, the port State or the flag State, issues the introduction from the sea certificate. Regarding marine species more generally, the Parties have also asked what the appropriate role is for the Food and Agriculture Organization (FAO) and other fishery management bodies.

Regarding introduction from the sea, this Paper explains that the port State is the proper State for issuing introduction from the sea certificates from both legal and policy perspectives. Moreover, this paper views the FAO's role in CITES as constructive. FAO provides valuable advice concerning the biological and trade status of marine species proposed for inclusion in the Appendices. The Memorandum of Understanding between FAO and the CITES Secretariat enshrines a formal mechanism for FAO to provide that advice. At the same time, FAO's role is advisory;—the Parties retain the ultimate responsibility to list, de-list, and manage trade in marine species.

Implementation and Compliance

The permit regime, the exemptions and special mechanisms, and the extensive inclusion of all types of species under the Convention mean that compliance is essential to effectively preventing the over-exploitation of species due to international trade. The Parties have undertaken a number of multilateral compliance efforts, such as the Review of Significant Trade (RST), but the effectiveness of these compliance mechanisms is under threat. The success of these mechanisms depends on a balanced mix of carrots and sticks—in other words, of capacity-building and outreach as well as trade suspensions—in order to function most effectively. However, the Secretariat, in the context of the RST, has recommended the lifting of trade suspensions even when clearly contrary to the resolution outlining the RST process. Because of the importance of RST to the pursuit of the Convention's object and purpose, these recommendations undermine the Convention's core objectives.

Multilateralism and Unilateralism

Finally, this paper examines the tension between multilateralism and unilateralism within the Convention. While the Convention plainly contemplates that the Parties may adopt stricter, unilateral measures, the Secretariat and certain Parties believe that this right undermines the common framework for regulating trade under CITES. In many ways, the claims are unfounded and misguided, primarily because of the clear language of Article XIV(1) of the Convention and because of the reliance on stricter domestic measures to enforce compliance with the provisions of the Convention through mechanisms, such as RST.

I. Introduction

Since its entry into force in 1975, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[1] has set out to accomplish a single goal: to protect species of conservation concern from over-exploitation due to international trade.[2] To fulfill that goal, CITES takes a precautionary approach by protecting species even if trade is not currently threatening them; Appendix I includes species "threatened with extinction which are *or may be* affected by trade." The Convention further protects species that are not yet threatened but may become so unless trade is strictly regulated by placing them in Appendix II. Once listed in the Appendices, CITES fulfills its goal of avoiding over-exploitation due to trade by directing the Parties to issue permits before trade in listed species may occur. The key to the permit system lies in the findings that CITES authorities must make prior to issuing permits for trade. For specimens of Appendix I species, importing States must prohibit trade for primarily commercial purposes.[3] In addition, trade is prohibited for Appendix I and II species, unless the exporting State determines that the export will not be detrimental to the survival of the species—in other words, makes a non-detriment finding.[4]

While no one ever believed that implementing these permit obligations would be easy, CITES has grown in complexity over its 35 years in force. CITES now has 175 Parties representing the richest and poorest States with widely varying degrees of financial and institutional capacity. The CITES Appendices have also grown to more than 34,000 species, including approximately 5,000 species of animals and 28,000 species of plants.[5] Implementing CITES is challenging, even with abundant resources. In addition to making the important primarily commercial purposes and non-detriment findings, the Parties must devote resources to enforcement. Adequate enforcement includes the capacity to uncover illegal trade, confiscate illegally traded specimens, arrest illegal traders and bring them to court, and impose penalties for that trade. It also requires training to identify the many products entering trade each day. Parties must also compile and submit trade statistics to allow verification of imports from and exports to other countries.[6] Uniform and effective implementation of these obligations is key, and the collective pursuit of this constitutes a significant program of work.

Over the years, as more developing countries joined CITES, fissures have arisen among Parties and advocates over the best lens through which to implement CITES technical provisions and over setting CITES' strategic vision. Some Parties argue that CITES, which limits trade in valuable parts and derivatives of listed species, including commercially valuable species, must evolve to recognize the role that international markets can play in conservation by ensuring that wildlife has economic value.[7] These Parties believe that effective conservation depends on increasing the value of wildlife to wildlife conservation economically competitive with other

[1] International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, 27 U.N.T.S. 243 [hereinafter CITES].

[2] *Id.* at Preamble, ¶ 4.

[3] *Id.* at art. III(3)(c).

[4] *Id.* at arts. III(2)(a), IV(2)(a).

[5] CITES, The CITES Species, http://www.cites.org/eng/disc/species.shtml (last visited Mar. 9, 2010).

[6] CITES, *supra* note 1, at art. VIII(7)(a).

[7] *See infra* pt. IV.

uses of habitat. Trade in specimens of wildlife may increase the value of wildlife and incentivize community-based conservation. These Parties and other advocates insist that conservation thus requires the development of international markets for wildlife products and that CITES Parties must collectively facilitate and promote legal, sustainable wildlife trade.

To accommodate these views, the Convention's program of work now includes a number of issues that draw from larger debates concerning conservation of species and sustainable use. Because CITES may limit trade in valuable parts and derivatives of CITES-protected species, some Parties have asked that CITES place more emphasis on considering the potential benefits of wildlife trade. For example, they have asked how the livelihoods of rural poor might be taken into account in various CITES processes, and the Wildlife Trade Policy Review appears aimed at finding ways to market wildlife. In addition, current proposals to limit the use of stricter domestic measures appear drawn from efforts to facilitate trade rather than efforts designed to allow importing countries to control their consumption of wildlife.

Many have criticized these efforts, such as the Wildlife Trade Policy Reviews, for straying beyond the core mission of CITES by exploring policies that may impact wildlife trade, such as biodiversity protection, land tenure, socio-economic development, and poverty reduction, but are not explicitly focused on wildlife trade.[8] They argue that CITES is a narrow treaty and that it is clear about the means through which it intends to ensure conservation—that is, strict regulation of international trade.[9] To develop markets for wildlife or facilitate trade in wildlife runs counter to the very nature of CITES. They argue that many species are at risk due to international trade and that short-term monetary gains too often jeopardize the long-term objectives of the Convention.

The expansion of the CITES agenda coupled with the Convention's limited budget of about US$5 million annually[10] has initiated a discussion about the necessity of focusing the activities of the Parties and Secretariat on the Convention's central role in preventing over-exploitation of species due to trade. But what is the "core mission" of CITES? If it is true that CITES has strayed from its mandate, what does it mean for CITES to get "back to basics"? By reviewing and analyzing the history of CITES, including the Convention's *travaux preparatoire*, resolutions, and decisions, as well as floor debates and the evolution of important CITES mechanisms, this Paper seeks a deeper understanding of the object and purpose of CITES—the "basics" of CITES. Understanding the object and purpose of the Convention will provide important context for examining how CITES has historically and more recently dealt with the relationships among trade, conservation, and use of listed species.

This Paper explores how the "sustainable use debate," with its tensions and philosophical disagreements, has influenced key technical provisions that guide CITES implementation, the scope of CITES and its relationship to marine species that may be threatened by trade, the role of

[8] *See* Convention on International Trade in Endangered Species of Wild Fauna and Flora [CITES], *Draft Framework for Reviewing National Wildlife Trade Policies*, pt. 1.3, CoP14 Inf. 17 (2007) (describing the policies that may be reviewed as part of a Wildlife Trade Policy Review).

[9] *See infra* pt. III.

[10] CITES, *Financing and the Costed Programme of Work for the Secretariat for the Triennium 2009–2011*, ¶ 10, Res. Conf. 14.1 (2007). This budget is supplemented by voluntary contributions for specific programs or meetings.

trade suspensions as an effective compliance tool, and the balance between multilateralism and unilateralism. In general, CITES is at loggerheads over the future direction of the treaty. As the "facilitation-of-trade" camp and "facilitation-of-conservation" camp have squared off in this debate for almost twenty years and as the Parties gear up to draft a new Strategic Vision, this Paper represents an attempt to identify interpretive differences and disagreements regarding the value of certain CITES undertakings and an attempt to put these agendas in the context of the object and purpose of CITES so that a path forward becomes clear, especially in light of budget restrictions.

In particular, this Paper proposes that the Parties stay true to the basic principle of CITES: international trade must be regulated to ensure it does not cause the over-exploitation of species.[11] This means that trade must be ecologically sustainable,[12] and in specific instances for specific species, commercial trade must be prohibited. To do this, Parties must interpret and implement the Convention so as to eliminate any detrimental trade and to regulate commercial markets effectively, including ensuring that exemptions provided for in the Convention do not become unintended loopholes. Additionally, Parties must accept that marine species fall within the scope of CITES jurisdiction and that CITES is, in fact, an appropriate body to manage international trade in marine species. Moreover, Parties must continue to use effectively both carrots, such as capacity building, and sticks, such as trade suspensions, through compliance programs, such as the Review of Significant Trade. Finally, Parties must not diminish the right of Parties to undertake unilateral action, including stricter domestic measures.

II. The Basics: The Object and Purpose of CITES

Any consideration of what it means to get "back to basics" of CITES demands a deep exploration of the fundamental objectives of the Convention. In treaty analysis terms, this is the "object and purpose" of the Convention.[13] Article 31 of the Vienna Convention on the Law of Treaties[14] states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[15] As such, defining the overarching object and purpose of a treaty is key to interpreting and thus implementing a Convention. In the CITES context, philosophical differences exist concerning the connection between CITES and the potential economic value of wildlife in commercial markets.[16] On one hand, some Parties and the Secretariat suggest that CITES should be interpreted and implemented in a way that facilitates and promotes legal trade. On the other hand, some Parties argue that CITES should be interpreted and implemented in a way that

[11] CITES, *supra* note 1, at Preamble ¶ 4.

[12] Article IV(3) requires that the Scientific Authorities of each Party limit exports of Appendix II specimens "in order to maintain that species throughout its range *at a level consistent with its role in the ecosystems* in which it occurs and well above the level at which that species might become eligible for inclusion in Appendix I." *Id.* at art. IV(3) (emphasis added).

[13] SIR IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 114–15, Manchester University Press (2nd ed. 1984) ("[T]he main task of any tribunal which is called upon to construe or apply or interpret a treaty is to give effect to the expressed intention of the parties, that is 'their intention as expressed in the words used by them in the light of the surrounding circumstances.'") (citing ARNOLD D. MCNAIR, THE LAW OF TREATIES 365 (1961)).

[14] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S 331.

[15] *Id.* at art. 31(1).

[16] *See infra* pt. IV.

strictly manages and polices international trade in order to prevent the over-exploitation of species.

This section demonstrates that the object and purpose of CITES, and thus the framework for interpreting the provisions of the Convention, is to manage trade to prevent over-exploitation of wildlife. The clear identification of the object and purpose of CITES—deduced by an extensive examination of the plain language of the treaty, of intentions of the drafters, and of the overall design of the treaty—provides a framework for thinking about the work of CITES. In fact, the object and purpose of CITES should inform all CITES debates. If interpretation and implementation deviates from the object and purpose, CITES stands to lose its place as one of the most progressive and effective wildlife treaties.[17]

A. Plain Language and Drafters' Intent

The starting point of any analysis of the object and purpose of a treaty must be the preamble.[18] In the preamble, the drafters identify a convention's objectives and generally the means by which the convention implements those objectives. A preamble also typically provides a basis for understanding the conditions that brought the drafters together to share in the pursuit of common goals.

The preamble to CITES is relatively short and the intention of the Convention is clear: The goal of CITES is the protection of wildlife. The first paragraph recognizes that wild flora and fauna "must be protected" because they are an "irreplaceable part of the natural systems of the earth," and the third paragraph casts peoples and States in the role of "protectors" of wildlife.[19] Finally, the fourth paragraph highlights that the protection of species is an international responsibility, stating that "international co-operation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade."[20]

Although the fourth paragraph of the preamble is most often cited as the object and purpose of the Convention, people disagree whether the object and purpose is to control trade or facilitate trade. Some view the paragraph's call to protect species from trade together with the requirement to ensure that trade will not be detrimental to the survival of the species as indicating that CITES is fundamentally a conservation treaty to protect species from the harmful effects of trade. Others, meanwhile, view the preamble and permit system as more akin to a trade treaty.[21] However, they misinterpret the Convention in fundamental ways; the plain language of the preamble, the drafters' intentions, and the overall structure of the CITES regime emphasize that CITES is first and foremost a wildlife protection treaty.

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[17] SIMON LYSTER, INTERNATIONAL WILDLIFE LAW 240, (Grotius Publications 1985).

[18] *See* Chris Wold, *Implementation of Reservations Law in International Environmental Treaties*, 14 COLO. J. INT'L. ENVTL. L. & POL'Y 53, 82 n.108 (2003) (explaining that the ordinary meaning of the preamble establishes the object and purpose of a treaty) (citing IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 613 (5th ed. 1998)).

[19] CITES, *supra* note 1, at Preamble.

[20] *Id.* at Preamble.

[21] *See* Michael J. Hickey, Note, *Acceptance of Sustainable Use Within the CITES Community*, 23 VT. L. REV. 861, 863 (1999) (describing the environmental versus trade treaty debate).

The Convention eventually known as CITES had a long history before its adoption. In 1961, the World Conservation Union (IUCN) first called for an international convention on trade in endangered species, and IUCN subsequently circulated drafts of its proposed treaty.[22] In 1972, the Stockholm Conference renewed the call for international effort to protect endangered species, and in 1973, the United States convened a plenipotentiary conference (Washington Conference)[23] in order to finish treaty negotiations.[24] Throughout the decade-long negotiations, negotiations never deviated from the Convention's basic premise—species protection. The history and development of the negotiations support this, and the opening remarks of the head of the U.S. delegation, Russell Train, further endorse this basic premise. Chairman Train noted that the

> "basic objective of this proposed convention is conservation—to help assure that presently endangered species do not become extinct, and that species presently safe do not become endangered."[25]

To suggest that CITES' only goal is to protect wildlife is not to say that trade is not one of the most significant aspects of the Convention. In fact, the drafters specifically recognized that international trade was a key factor leading to the endangerment of species. Thus, they designed CITES to manage international trade when that trade is detrimental to conservation objectives.[26] The fourth paragraph of the preamble makes this absolutely clear by stating that the goal of the treaty is to prevent the "over-exploitation of species through international trade."[27]

In order to give effect to this goal, CITES Parties must regulate international trade to varying degrees, depending on the biological status of the species.[28] For species that are not necessarily threatened with extinction but may become so—Appendix II species—trade is managed to avoid "utilization incompatible with their survival" and ensure that the species does not become threatened with extinction.[29] The Convention describes this as "strict regulation."[30] Species that are threatened with extinction—Appendix I species—are subject to "particularly strict regulation," meaning that almost all commercial international trade in those species is prohibited.[31] By regulating international trade, CITES expresses clear intent to prevent demand for wildlife products in the international marketplace to occur at rates that threaten a species' survival. In fact, the U.S. Secretary of the Interior, Rogers C.B. Morton, acting as Temporary Chairman of the Washington Conference at the commencement of the first plenary session, drew the connection explicitly for delegates, stating that "[w]hile many individual nations are diligently striving to protect their wildlife, the temptation of rich markets abroad continues to

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[22] LYSTER, *supra* note 17, at 239.

[23] International Plenipotentiary Conference to Conclude an International Convention on Trade in Certain Species of Wildlife, Washington (on file with authors) [hereinafter Washington Conference].

[24] WILLEM WIJNSTEKERS, THE EVOLUTION OF CITES 15, CITES Secretariat (7th ed. 2003).

[25] Washington Conference, *supra* note 23, Remarks by the Honorable Russell E. Train Chairman, Council on Environmental Quality, as Chairman of the U.S. Delegation, at the opening of the Plenipotentiary Conference, Feb. 12, 1973, PR/3, 2 ¶ 4 (Feb. 24, 1973).

[26] *Id.* ¶ 2 (noting Secretary Morton's opening remarks stating the need for international control of trade to protect endangered species).

[27] CITES, *supra* note 1, at Preamble ¶ 4.

[28] *See infra* pt. III(B)(1).

[29] CITES, *supra* note 1, at art. II(2)(a).

[30] *Id.*

[31] *Id.* at art. II(1).

invite evasion of this protection."[32]

B. An Overview of the CITES Permit Regime

As explained below, the permit regime devised by the drafters and adopted as the final text of CITES supports the notion that the object and purpose of CITES is to protect wildlife through the management of international trade. The permit regime also supports the notion that CITES employs two primary tools for managing international trade: science and market control.

The application of these tools is based on whether a species is listed in one of the three CITES Appendices. Appendix I species are those presently "threatened with extinction and which are or may be affected by trade." Trade in Appendix I species is "subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances." Appendix II species are those "not necessarily now threatened with extinction," but which "may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival."[33] Appendix II also includes so-called "look-alike species," those species that so closely resemble Appendix I or Appendix II species that they must also be protected "in order that trade in . . . specimens may be brought under effective control."[34] CITES also allows a Party to list species unilaterally in Appendix III. These are species subject to domestic regulation that a Party identifies as requiring "the cooperation of other Parties in the control of trade."[35] An Appendix III listing does not require biological findings as a precondition for trade.

The structure of the permit regime makes clear that the drafters intended that science would be a fundamental management tool for preventing over-exploitation. Before a Party's Management Authority may issue a permit for the export of specimens of an Appendix I[36] or II[37] species, the Party's Scientific Authority must determine that such export will "not be detrimental to the survival of that species."[38] This determination is known as a non-detriment finding (NDF). The Secretary-General has called the issuance of adequate NDFs "obviously essential for achieving the aims of the Convention" and has said, "It is also obvious that this advice requires sufficient knowledge of the conservation status of the species and that a positive advice should not be given in the absence thereof."[39] The Secretary-General's statements confirm the link

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[32] Washington Conference, *supra* note 23, Summary Record – First Plenary Session, Feb. 12, 1973, SR/1 (Final), 1 ¶ 2.

[33] CITES, *supra* note 1, at art. II(2)(a).

[34] *Id.* at art. II(2)(b). The treaty provides for Appendix II listings when the species looks like a species already listed on Appendix II. Resolution Conference 9.24 allows "look-alike" listings for species that look like Appendix I species. CITES, *Criteria for Amendment of Appendices I and II*, Res. Conf. 9.24 (Rev. CoP14) (1994) [hereinafter Res. Conf. 9.24]. The Parties realized that it would not make sense to allow look-alike listings only if a species looked like an Appendix II species.

[35] CITES, *supra* note 1, at art. II(3).

[36] *Id.* at art. II(1).

[37] *Id.* at art. II(2)(b).

[38] This language appears in Article III(2)(a), which pertains to Appendix I exports, and Article IV(2)(a), which pertains to Appendix II exports. *Id.* at arts. III(2)(a), IV(2)(a). Article III(3)(a), which pertains to Appendix I imports, uses slightly different language, as non-detriment finding requirements for Appendix I imports are different from those of Appendix I and II exports. *Id.* at art. III(3)(a).

[39] WIJNSTEKERS, *supra* note 24, at 67.

between the scientific basis of the permitting scheme and the object and purpose of CITES: before any specimen of a listed species may be exported, the exporting country must ensure that the export will not be detrimental to the species.[40]

While the Convention clearly sets a baseline of non-detriment to the species, it also makes clear that control of commercial markets is necessary for species threatened with a higher degree of risk—that is, those species listed in Appendix I. Before issuing an import permit, the State of import must determine that import under review will be for purposes that are not detrimental to the survival of the species involved. This provision requires an analysis of whether the purpose will increase demand for and trade in specimens of the species at issue. The State of import also must be "satisfied that the specimen is not to be used for primarily commercial purposes."[41] These provisions clearly support the intention to regulate commercial markets for Appendix I specimens. In fact, the drafters of CITES banned trade for primarily commercial purposes because they viewed it as inherently harmful to these species.

The export and import permit findings, and the overall permit regime, represents the drafters' efforts to devise a scheme to protect species from over-exploitation due to trade based on sound science and market control. The Convention clearly contemplates that commercial demand for Appendix I species in the international marketplace is such an inherent risk to the survival of the species that such trade is presumed to be detrimental to the survival of the species. In fact, at the Washington Conference, the delegate from Tanzania noted that "[t]he treaty should be flexible enough to deal with the whole range of commercial threats."[42] As such, the permit regime explicitly gives effect to the Convention's object and purpose by strictly managing trade in wildlife.

III. The Permit Regime and the Sustainable Use Debate

The non-detriment and primarily commercial purposes findings are the heart of the CITES regime. They represent the fundamental means by which Parties are to prevent the over-exploitation of species in international trade. Yet, despite the fundamental nature of these provisions, the Convention fails to define either term. As a result, much debate has ensued over the implementation of these findings, and they became the early focal point of the debate between the "facilitation of trade" and "facilitation of conservation" camps. This section begins by describing the conditions that gave rise to what has been termed the "sustainable use debate." It then identifies how early proponents of sustainable use attempted to reshape implementation of CITES' core provisions and why the Parties largely rejected these attempts. This section describes not only these failed attempts and the Parties' current understandings of the provisions but also ways that the Parties could improve implementation of the non-detriment and primarily commercial purposes findings to better support the object and purpose of the Convention. Finally, this section describes the latest attempts to ensure that trade facilitation and sustainable

[40] Beyond the initial NDF, a Scientific Authority from each Party must monitor both the export permits granted and the actual number of exports to ensure that trade in the species remains non-detrimental. CITES, *supra* note 1, at art. IV(3). In addition to monitoring, each Party must maintain records of its trade in listed species and submit annual reports to the Secretariat. *Id.* at arts. VIII(6), VIII(7)(a).

[41] CITES, *supra* note 1, at art. III(3)(c).

[42] Washington Conference, *supra* note 23, at Opening Statement by the Delegate of Tanzania, at Summary Record – Sixth Plenary Session, Feb. 28, 1973, SR/6 (Final).

use remain on the CITES agenda.

A. The Rise of the Sustainable Use Debate

Over time, the clear focus of CITES on protecting species from over-exploitation due to trade has shifted due to discussions over sustainable use and facilitating trade. This shift has several principle causes, including debates over the status of minke whales (*Balaenoptera acutorostrata*), the status of African elephants (*Loxodonta Africana*) and the viability of ivory trade, and the establishment of the principles of "sustainable development" and "sustainable use" in the United Nations Conference on Environment and Development and the Convention on Biological Diversity (CBD).[43]

Within CITES, Japan, Norway, and their allies have consistently regarded CITES trade bans on all whale products as inconsistent with the sound management of these species. In particular, these countries have insisted that certain populations of the minke whale, both off the coast of Norway and in the Southern Ocean, are capable of some harvest and commercial trade. However, the CITES Parties chose to support the moratorium on commercial whaling under the International Convention for the Regulation of Whaling and rules of the International Whaling Commission (IWC)[44] by retaining minke whales and other whales subject to the moratorium in Appendix I.[45]

While decisions concerning whales have generated claims from whaling countries of unwise management of trade by CITES (and the IWC), "the African elephant debate" sparked a much broader discussion within CITES over sustainable use and the use of trade to benefit conservation and local people. After failed attempts to manage the ivory trade with African elephants in Appendix II, the Parties finally placed all African elephants in Appendix I in 1989 at the Seventh meeting of the Conference of the Parties (COP).[46] In so doing, however, southern African countries, such as Zimbabwe, Botswana, and South Africa, with large and relatively stable populations of African elephants insisted that their populations did not meet the criteria for inclusion in Appendix I.[47] During COP7, the southern African countries argued to "split-list" the African elephant to allow their populations to remain in Appendix II.[48] On conservation and enforcement grounds, the Parties rejected the split-listing proposal, but acknowledged in Resolution Conf. 7.9 that the elephant populations of certain African States may not meet the criteria for transfer to Appendix I.[49] Unsatisfied, South Africa, Zimbabwe, Zambia, Botswana and Malawi entered reservations to the Appendix I listing and continued trading in ivory.[50]

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[43] United Nations Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 [hereinafter CBD].

[44] International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S 72.

[45] *See* CITES, *Conservation of Cetaceans, Trade in Cetacean Specimens and the Relationship with the International Whaling Commission*, Res. Conf. 11.4 (Rev. CoP12) (2000).

[46] WIJNSTEKERS, *supra* note 24, at 406.

[47] John L. Garrison, *The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate over Sustainable Use*, 12 PACE ENVTL. L. REV. 301, 340 (1994) (citing Michael J. Glennon, *Has International Law Failed the Elephant?*, 84 AM. J. INT'L L. 1, 17 (1990)).

[48] *Id*.

[49] WIJNSTEKERS, *supra* note 24, at 406–07.

[50] Garrison, *supra* note 47, at 342.

In 1992 at COP9, Botswana, Malawi, Namibia, Zambia and Zimbabwe, and South Africa sought the transfer of their populations of African elephants to Appendix II.[51] Additionally, Zimbabwe, Zambia,[52] Botswana, Namibia and Malawi further responded to Appendix I elephant listings by submitting five resolutions, collectively referred to as the "Zimbabwe Resolutions," in 1992.[53] These draft resolutions brought the issues of sustainable use to the forefront of the CITES agenda by seeking to reshape CITES from a Convention that regulates trade to conserve species to a Convention that facilitates trade, even in specimens of Appendix I species, as a means to conserve species and benefit local people. These draft resolutions proposed to:

- rewrite the listing criteria to eliminate the precautionary principle from decisions to transfer species from Appendix I to Appendix II, among other things;[54]
- consider a transaction as "beneficial" if the monetary benefits accrue to conservation or local people;[55]
- redefine "primarily commercial purposes" as "applicable only to those cases of commercial trade which are clearly non-beneficial to the species concerned;"[56] and
- restrict the right of Parties to take stricter domestic measures.[57]

In short, the proposed resolutions sought nothing less than a fundamental change in the philosophy of CITES.[58] In the view of the proponents, trade based on sustainable use can have important conservation benefits, and therefore CITES should facilitate such trade.

The proposals to transfer the African elephant to Appendix II failed as did most of the Zimbabwe Resolutions.[59] However, the Resolutions did reset the CITES agenda. Although the Parties rejected the proposed changes to the listing criteria, they agreed to reconsider the listing criteria, which ultimately led to the adoption of new criteria at COP9.[60] The proposal to define trade as "beneficial" when based on sustainable use and when the financial benefits are reserved for conservation, local people, or developing countries generally evolved to the adoption of a resolution stating a simple truism that trade in wildlife and wildlife products can be beneficial to the conservation of species.[61]

This activity, occurring in March 1992, was a mere prelude to the broader discussions of sustainable use that took place in Rio de Janeiro at the United Nations Conference on

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[51] *Id.* at 342–43.

[52] *Id.* at 343 n.172 (Zambia withdrew its co-sponsorship of all Zimbabwe Resolutions except Doc. 8.50, Criteria for Amendments to the Appendices) (citing to CITES, *Summary Report of the Plenary Meeting, Fourth Session: 3 March 1992*, Plen. 8.4, XIII (1992)).

[53] CITES, *Support of Range States for Amendments to Appendices I and II*, Doc. 8.51 (Rev.) (1992).

[54] CITES, *Criteria for Amendments to the Appendices*, Doc 8.50 (1992).

[55] CITES, *Recognition of the Benefits of Trade in Wildlife*, Doc. 8.48 (Rev.) (1992) [hereinafter Doc. 8.48].

[56] CITES, *Reconsideration of "Primarily Commercial Purposes*," Doc. 8.49 (Rev.) (1992) [hereinafter Doc. 8.49].

[57] CITES, *"Stricter Domestic Measures*," Doc. 8.52 (Rev.) (1992).

[58] Garrison, *supra* note 47, at 343.

[59] *Id.* at 344.

[60] CITES, *Consultation with Range States on Proposals to Amend Appendices I and II*, Res. Conf. 8.21 (1992) (leading to adoption of Resolution Conf. 9.24, which was later revised at CoP14 in 2007).

[61] CITES, *Recognition of the Benefits of Trade in Wildlife*, Res, Conf. 8.3 (Rev. CoP13) (1992 rev. 2004) [hereinafter Res. Conf. 8.3].

Environment and Development in June 1992. There, sustainable use became entwined with conservation as the twin goals for managing species and habitats under the framework of the CBD.[62] Fearing that conservation had become inextricably associated with protected areas, developing countries successfully advocated for making sustainable use an obligation distinct from conservation.[63] Thus, when CBD Parties have an obligation to identify components of biological diversity important for conservation, they must also identify components of biological diversity important for sustainable use.[64] The CBD Parties later adopted principles for sustainable use.[65] Like sustainable development, the CBD's "sustainable use" principles expressly incorporate a larger socio-economic context. For example, Principle 12 of the CBD's sustainable use principles provides that sustainability of use will be enhanced if "[t]he needs of indigenous and local communities who live with and are affected by the use and conservation of biological diversity, along with their contributions to its conservation and sustainable use, should be reflected in the equitable distribution of the benefits from the use of those resources."[66]

As in the CBD, "sustainable use" within CITES represents not only the application of biological principles to wildlife management, but also social and economic concerns—it is a multi-disciplinary concept. While many Parties supported the concepts and theory behind the Zimbabwe Resolutions and sustainable use generally—namely that wildlife conservation may be supported by recognition of the value of wildlife and that giving wildlife economic value makes other uses of a species' habitat less viable—many Parties believed that these proposals were an end-run around the core requirements of CITES. In other words, opponents of the proposals agreed that sustainable use is a useful concept, noting that CITES, in general, is about biologically sustainable use. In fact, regulation of Appendix II listings is based almost solely on ecologically and biologically sustainable use—if trade is not detrimental to the survival of the species, then use is permissible.[67] While sharing this fundamental view, some Parties disagreed that these social and economic issues are core issues for CITES; they argued instead that they are management issues outside the purview of CITES.

While this "debate" simmers, proponents of sustainable use have successfully infused the CITES agenda and the work programme of the Secretariat with mechanisms to endorse and facilitate legal trade in wildlife. Rather than making broadside attacks on fundamental definitions, such as "primarily commercial purposes," proponents now advocate for national wildlife trade policy reviews, promotion of multilateral measures, and economic incentives, among other things. None of these initiatives are inherently "bad" ideas; all have their place. The

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[62] CBD, *supra* note 43; *see* Magen Griffiths, *Biosafety Protocol*, 10 COLO. J. INT'L ENVTL. L. & POL'Y Y.B. 113, 114 (1999) (noting that the CBD has multiple purposes including conserving biodiversity and promoting sustainable use).

[63] Dominic Keating, *Access to Genetic Resources and Equitable Benefit Sharing Through a New Disclosure Requirement in the Patent System: An Issue in Search of a Forum*, 87 J. PAT. & TRADEMARK OFF. SOC'Y 525, 528–29 (2005) (noting that developing countries advocated for a sustainable use obligation because of fears that "conservation" would limit future utilization of genetic resources).

[64] CBD, *supra* note 43, at art. 7(a).

[65] Convention on Biological Diversity, *Sustainable Use*, UNEP/CBD/COP/DEC/VII/12 (Apr. 13, 2004) [hereinafter CBD Sustainable Use]. The CITES Parties later adopted the CBD's sustainable use principles. CITES, *Sustainable Use of Biodiversity: Addis Abada Principles and Guidelines*, Res. Conf. 13.2 (Rev. CoP14) (2004 rev. 2007).

[66] CBD Sustainable Use, *supra* note 65, at Practical Principle 12.

[67] CITES, *supra* note 1, at art. IV(2)(a).

question, however, is whether they are the right initiatives in light of the object and purpose of CITES.

The following sections explore more specifically this "sustainable use debate" in the context of Parties' implementation of the non-detriment and primarily commercial purposes findings and conclude that in order to give full effect to the object and purpose of CITES, the Parties must continue to reject attempts to undermine the nature of CITES as grounded in science and market control. In addition, this section reflects on the growing "sustainable use agenda," as reflected in a number of resolutions and decisions of the Parties. It suggests that, given the limited resources to implement the Convention, the "sustainable use agenda" is a distraction from full and effective implementation of CITES' object and purpose.

B. Non-Detriment Findings

CITES requires that Scientific Authorities make non-detriment findings (NDFs) before allowing the import, export, or introduction from the sea of specimens of Appendix I or Appendix II species.[68] If a Scientific Authority finds that trade in a specimen of a species could be detrimental, or has insufficient information to conclude that the trade will not be detrimental to the species, that Party may not issue a permit for import, export, or introduction from the sea. In addition, a Scientific Authority from each Party must monitor both the export permits granted and the actual number of exports to ensure that trade in the species remains non-detrimental.[69]

Despite being of obvious importance, neither the Convention nor any resolution defines what "not detrimental" means or provides clear guidelines for making an NDF. Additionally, the Parties have not clarified the differences between when the purposes of an import might be detrimental and when an export might be detrimental. The lack of Party-driven guidance, as well as the lack of transparency in making NDFs, has lead to inadequate implementation of the non-detriment finding provisions and has allowed the non-detriment finding—in particular the export finding—to be fodder for the "sustainable use" debate. This section documents the lack of concrete guidance for Parties and proposes substantive changes to the existing guidance in order for Parties to clearly understand the NDF process based on the true purpose of both the export and import findings.

1. The Export Non-Detriment Finding

The export NDF is a pillar of the Convention, but because the Convention does not define the term "detrimental," the Parties have long struggled to agree on what an adequate NDF entails. In part due to this lack of agreement, the NDF is a flashpoint in the sustainable use debate and is inextricably tied to the Parties' diverging interpretations of CITES. Those Parties and other advocates of using CITES as a means to facilitate trade have argued that a non-detriment finding should assess the economic and other co-benefits of species exploitation, including supporting livelihoods and funding for conservation efforts. Under this theory, a Scientific Authority must consider the possible benefits of the exporting Party's conservation programs when making an NDF. For example, beneficial trade may occur when a community

[68] *Id.* at arts. III(2)(a), III(5)(a), IV(2)(a), IV(6)(a).

[69] *Id.* at art. IV(3). In addition to monitoring, each Party must maintain records of its trade in listed species and submit annual reports to the Secretariat. *Id*. at arts. VIII(6), VIII(7)(a).

learns to value a species because the Scientific Authority allows the community to trade in the by-products of natural mortality, or grants a quota for hunting trophies.[70] Moreover, they argue that any trade in specimens deriving from the by-products of natural mortality or wildlife management is *per se* non-detrimental.[71]

However, this misconstrues the nature of the export NDF. The export NDF provides the scientific basis for ensuring a species is not over-exploited for trade. More fundamentally, it also recognizes that the survival of species in the wild is contingent on maintaining a biologically meaningful number of individuals in the wild and meaningful diversity within the population, including age structure, gene pool, and sex ratio, among other characteristics. The NDF reflects the drafters' concern that the demand for species in trade may have deleterious effects on populations if not maintained at scientifically sound levels, and it is the primary tool through which the drafters intended to give effect to the object and purpose of the Convention. The Parties have made clear that the NDF is a scientific finding and have routinely recognized that it is a scientific standard.[72]

Many key CITES players have made clear that additional guidance is needed. The Secretary-General has called the issuance of adequate NDFs "obviously essential for achieving the aims of the Convention" and has said, "It is also obvious that this advice requires sufficient knowledge of the conservation status of the species and that a positive advice should not be given in the absence thereof."[73] Nonetheless, many Parties lack the technical expertise, financial resources, or political will to make appropriate NDFs—problems that have been widely acknowledged.[74] The IUCN, for example, reported that "many species continue to be traded in the absence of information about the impact of such exploitation on the wild population."[75]

a. Existing Guidelines and Need for Resolution

Resolution Conf. 10.3 recommends that export NDFs be "based on the scientific review of available information" regarding population status; distribution; population trends; harvest; other biological and ecological factors, as appropriate; and trade information relating to the species concerned.[76] However, while Resolution Conf. 10.3 provides guidance on the type of information that should be assessed, it fails to provide other guidance concerning the adequacy of the data supporting NDFs. For example, Resolution Conf. 10.3 does not require Parties to develop new information—it provides that the review should be based on "available

[70] "[M]any of the most valuable wildlife products . . . result from natural mortality or they may arise as a by-product of management . . . ." Doc. 8.48, *supra* note 55 (emphasis removed).

[71] *Id.* at Annex (b).

[72] *See* CITES, *Designation and Role of Scientific Authorities*, Res. Conf. 10.3 (1997) [hereinafter Res. Conf. 10.3].

[73] WIJNSTEKERS, *supra* note 24, at 67.

[74] "Clearly, action is needed to improve the situation and to assist Scientific Authorities in making non-detriment findings." CITES, *CITES Scientific Authorities Checklist to Assist in Making Non-Detriment Findings for Appendix II Exports*, at 1, Inf. 11.3 (2000) [hereinafter Inf. 11.3].

[75] ALISON ROSSER, *IUCN Assistance to Develop Guidance for CITES Scientific Authorities on th Making of Non-Detriment Findings*, *in* GUIDANCE FOR CITES SCIENTIFIC AUTHORITIES: CHECKLIST TO ASSIST IN MAKING NON-DETRIMENT FINDINGS FOR APPENDIX II EXPORTS 3, 3 (A. Rosser & M. Haywood eds., 2002).

[76] Res. Conf. 10.3, *supra* note 72, ¶ 13(h). Note that Res. Conf. 10.3 was adopted from Res. Conf. 8.6, which contained substantially the same admonishment to use scientific criteria, and which was a more immediate response to Doc. 8.48 (Rev.).

information." How much information is needed to make an NDF? What if the available information has not been peer reviewed? Must a Party evaluate the effect of an export on the species throughout the species' range, or only within a sub-population or within the borders of the exporting Party? Resolution Conf. 10.3 does not answer these questions.

In addition to the limited guidance provided by Resolution Conf. 10.3, the IUCN Species Survival Commission has conducted workshops to identify challenges, requirements, and methods for making NDFs for Appendix II specimens. These workshops culminated with the development of a checklist (hereinafter "NDF Checklist").[77] A basic summary of the Checklist is included in CITES Information Doc. 11.3. In addition, the 2000 Strategic Plan for the Convention, includes as a major focus "strengthening the scientific basis of the decision-making processes"[78] and specifically categorizes "life history, ecological adaptability, distribution, abundance, population trends, and management programme" as "necessary scientific information" for making NDFs.[79] Following the NDF Checklist and Strategic Plan, IUCN published a compilation of articles (IUCN Guidelines) offering further guidance on making NDFs.[80] The IUCN Guidelines include presentations on NDF issues made by the CITES Secretariat and representatives from ten Parties.[81] The IUCN Guidelines also address technical considerations, such as methods for evaluating harvest sustainability, possible management frameworks, assistance to Parties in developing database and trade monitoring systems, and whether the Significant Trade Process can be helpful as a guide in making better NDFs.[82]

Although the IUCN Guidelines are widely available and the "checklist" has been incorporated into Inf. Doc. 11.3, the Parties and the Secretariat have continued to express the need to further clarify the parameters of adequate NDFs. For example, the Animals Committee included in its working program for 2003-2004 the development of "a programme to assist Scientific Authorities in making NDFs in accordance with the provisions of Article IV of the Convention."[83] At its May 2005 meeting, the Animals Committee increased the priority from low to medium for developing "practical guidance for making non-detriment findings, including a manual and checklist, and samples of non-detriment findings and case studies; and support to the Secretariat in its work on the development and implementation of a programme to assist Scientific Authorities in making non-detriment findings in accordance with the provisions of Article IV of the Convention."[84]

The existing CITES and IUCN information on NDFs, while helpful, is scattered throughout multiple documents, nearly all of which provide little persuasive authority. The Strategic Plan provides a course of action for the Parties but does not provide specific technical advice for implementing the Convention. Similarly, Information Documents, such as CITES

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[77] Inf. 11.3, *supra* note 74, at 5, 7.

[78] CITES, *Strategic Plan for the Convention, Annex 2: Action Plan*, Goal 2, Doc. 11.12.2 (2000).

[79] *Id.* at Objective 2.3.3.

[80] ROSSER, *supra* note 75, at 3–4.

[81] IUCN SPECIES SURVIVAL COMMISSION, GUIDANCE FOR CITES SCIENTIFIC AUTHORITIES: CHECKLIST TO ASSIST IN MAKING NON-DETRIMENT FINDINGS FOR APPENDIX II EXPORTS at Part II: Presentations Made by Scientific Authority Staff from Producer and Consumer Parties (A. Rosser & M. Haywood eds, 2002).

[82] *Id*. at Part III: Technical Considerations in Making Non-Detriment Findings.

[83] CITES, *Establishment of the Animals Committee's Priorities*, ¶ 4(h), AC19 Doc. 6.3 (2003).

[84] CITES, *Summary Record*, ¶ 6.3(b), AC21 Summary Record (2005).

Information Doc. 11.3, are provided as information only and not as technical advice. The IUCN Guidelines, of course, are not Convention documents. Only Resolution Conf. 10.3 constitutes persuasive authority vis-à-vis implementation of the Convention. The best elements of these documents should be compiled, expanded upon, and placed in a resolution. Additionally, Parties should adopt a new resolution that takes into consideration the need for technical support and collaboration to ensure robust non-detriment findings.

A new resolution on NDF criteria could vastly improve the information contained in existing CITES and IUCN documents. For example, offering the most comprehensive guidance currently available, the NDF Checklist evaluates key biological information, such as reproduction and population data, on a scale of one to five, using imprecise indicators, such as high/low, common/rare, effective/ineffective, fast/slow, and beneficial/harmful.[85] The NDF Checklist's inquiry on threats to a species extends only to overuse, habitat loss, invasive species, or "other," with no option to fill in what the "other" threat might be, followed by a generic five-scale assessment of the severity of the threat.[86] A new resolution could advise the Parties more specifically than Resolution Conf. 10.3 on the type of information an adequate non-detriment finding might be based on. Further, a new resolution could be broader than the IUCN Checklist by providing guidance on NDFs for the import of Appendix I species. Additionally, a new resolution would be different than the IUCN Checklist because it would provide guidance on the types of information that should Parties should consider when making an adequate NDF rather than a methodology for using that information to determine whether detriment is likely to occur. In this way, a new resolution would be less outcome-determinative and offer more flexibility for species- and country-specific concerns than the Checklist.

b. A Proposal for Export Non-Detriment Finding Criteria

To clarify the characteristics of an adequate NDF, the Parties should adopt a resolution outlining that an adequate NDF considers the biological factors discussed below. The export NDF focuses on the removal of a specimen of a species from the country of export. As such, this finding requires solid knowledge of the conservation status of the species, including extensive biological data and information regarding the legal and illegal killing of individuals and management of the species as a whole. Without a sound understanding of the conservation status of a species, especially an Appendix II species, the Parties risk unsustainable trade that increases the chances that the Parties will transfer the species to Appendix I.

Sound and extensive biological data is especially important for specimens removed from the wild. The types of biological data that may be necessary for an adequate export NDF include: the age and sex of each specimen removed from a wild population; the current size and recruitment rate of the wild population; the general biological characteristics of the species; the national status of the species, including data on distribution and fragmentation, population abundance, trends in population status, impacts and threats to the survival of the population; and the status of the species within its range.

Information regarding legal and illegal killing of individuals is also important because different types of takes may not be as detrimental as others. Maintaining ecologically

[85] Inf. 11.3, *supra* note 74, at Table 2: Factors Affecting Management of the Harvesting Regime.
[86] *Id*. at Table 2: Factors Affecting Management of the Harvesting Regime, Question 2.9.

sustainable takes depends on an understanding of illegal and unmanaged harvest trends. For these reasons, an adequate NDF may entail inclusion of information on the type of harvest, the degree of control over the harvest, and the reason for the harvest. In addition, an adequate NDF may also include information on the storage and domestic transport methods, since these could have either a direct or indirect effect on rates of morbidity and mortality.

Finally, an adequate export NDF may depend on management data. Management data is important because it indicates the likelihood of ecologically sustainable and controlled taking and the likelihood of harvest trends reflecting market and consumer demand trends. This type of information includes: the management history of the species; the existence and past success or failure of a management plan; the purpose of any management plan for that species; confidence in the effectiveness of monitoring; an assessment of human use compared with other threats; and an assessment of the portion of the population strictly prohibited from takes.

Resolution Conf. 10.3 recommends that export NDFs "be based on the scientific review of *available* information."[87] This leaves open the possibility that a Party may base an NDF on available, yet insufficient or out-dated information. However, the permit requirements make clear that an NDF should not be made in such circumstances: a permit "shall only be granted" if, among other things, the Scientific Authority "has advised that such [trade] will not be detrimental to the survival of the species." In this sense, CITES is precautionary. The Convention does not require an affirmative finding that trade will be detrimental; it requires an affirmative finding that trade will *not* be detrimental. In addition, the Secretary-General recognized this precautionary approach when he stated that a positive advice should not be given in the absence of sufficient knowledge of a species' conservation status.[88] As such, the Parties would benefit by clarifying that an NDF is invalid without sufficient data. When there are little or no data, or the data are out of date, the Scientific Authority, perhaps with support from the Secretariat, non-governmental organizations, or others must gather sufficient quality data before making an NDF. Moreover, it should be clear that when a sufficient NDF is made, but certain relevant data may be missing, any data gaps should be explained and justified. In some cases, this may mean simply that certain information is inapplicable; in others, for example, it may mean that studies are ongoing but unfinished.

2. The Import Non-Detriment Finding

With respect to imports of Appendix I specimens, the State of import must determine that the *purpose* of the import, such as captive breeding, display, or scientific research, is not detrimental to the survival of the species. The Parties have not provided any guidance on the import NDF, but the provision suggests an inquiry into the effects on the species of a particular type of trade. For example, imports for basic scientific research may have fewer effects on trade than display, because display might make a species more appealing to the public and stimulate demand for specimens of that species. Whether an importing Party looks at the same type of information as the exporting country or reviews an entirely distinct set of factors is left for each Party to decide for itself and little is known about how Parties make this finding. By focusing on the purpose of the import, however, the drafters signaled their intent to evaluate the effects of individual market types on the species and to provide an important safety-check on trade in

[87] Res. Conf. 10.3, *supra* note 72.
[88] WIJNSTEKERS, *supra* note 24, at 67.

Appendix I species that differs from the export NDF.

Although the drafters of CITES clearly considered the NDF for imports qualitatively different than the NDF for exports, the absence of guidance creates several interpretative questions for Parties. The first question is whether the Scientific Authority of the importing country may or should review population data and other information that the exporting country relied upon to determine whether the export or removal from the wild is detrimental to the survival of the species. Depending on how the importing Party uses that information, the importing Party may duplicate the NDF of the exporting Party. While there may be some benefit to duplicating efforts, the text of CITES clearly conveys that the NDF inquiry for imports differs from the export NDF.

Thus, information on population status and trends and other information useful for determining whether removal from the wild is detrimental to the survival of the species will be useful to the importing State, but the importing State should put that information to a different use. For example, presumably an assessment of whether the purpose of the import is detrimental to the survival of the species requires an analysis of whether the purpose will increase demand for and trade in specimens of the species at issue or whether it might stimulate poaching and illegal trade. Whether trade may increase enough to be detrimental to the survival of the species would require reference to population data and trends.

A second interpretive question is whether the importing Party should assess the potential detriment to the same taxonomic level that the exporting country assessed. For example, if Bhutan proposes to export ten Appendix I Asiatic black bears (*Ursus thibetanus*) to zoos in the United States, should the United States determine whether the importation for exhibition in a zoo is detrimental to the survival of the Bhutan population of the Asiatic black bears only or should it assess the impact on all populations of the bear? Should it assess the impact of that trade on all *Ursus* species? The answer, perhaps, may depend on the specific purpose of the import or the characteristics of the specimen being imported. In the example given, it is unlikely that exhibition of bears in a zoo will lead to increased trade in bears only from Bhutan, unless such bears exhibit unique behavioral or physical characteristics that are particularly attractive. In the absence of such characteristics, future demand for zoos is likely to be for bears generally, not for bears from Bhutan. Consequently, the importing country should probably assess the impact of the import on the species as a whole. On the other hand, the purpose of the import or the unique characteristics of a species may suggest that the non-detriment analysis focus on the potential impact to the specific population from which the specimens derive. For example, only certain populations of bottlenose dolphins have learned to use tools.[89] If such dolphins are imported for exhibition, and prove to be especially popular exhibits, future demand for bottlenose dolphins may focus on those populations that use tools.

A third question is whether the importing country should assess the impact of only the one import for a specific purpose to a specific site or whether it should expand its inquiry to all similar imports. For example, assume that Captive Breeding Facility X, a facility with

[89] Michael Krützen et al., *Cultural Transmission of Tool Use in Bottlenose Dolphins*, 102 PROCEEDINGS OF THE NAT'L ACAD. OF SCIENCES 8939, 8939 (Jul. 21, 2005), *available at* http://www.pnas.org/content/102/25/8939.full.pdf.

particularly good captive breeding results, wishes to import a male and female bird for its captive breeding program. Should the importing Party assess the potential impact of this one shipment to this particularly successful captive breeding facility? Or should it also take into account the impact of similar requests to facilities that are less successful and thus will request additional imports to replace or supplement breeding stock? Should the importing country be restricted to captive breeding facilities in its own country or can it look beyond its borders to total imports of these birds to captive breeding facilities worldwide?

Because the import NDF focuses on the purpose of the import, the importing country should, at a minimum, take into account the impact of similar requests to facilities that are less successful and thus will request additional imports to replace or supplement breeding stock. Notably, Article III does not require the Scientific Authority in the importing State to determine that the "import will not be detrimental to the survival of the species"—an inquiry more clearly focused on the impact of a single, specific transaction. Instead, the negotiators drafted language asking whether the *purpose* of the import is detrimental to the survival of the species, which is a larger question that requires an assessment of additional imports for the same or similar purposes.

3. Technical and Other Support for Non-Detriment Findings

Even if CITES provided unmistakable criteria and requirements for adequate NDFs, many Parties would still find themselves unable to comply due to a lack of resources, both financial and human. Madagascar, for example, has just two part-time volunteers responsible for making all NDFs and in 2005, exported over 150 different species.[90] Even the best-funded Scientific Authorities, however, are frequently under-staffed—the U.S. Scientific Authority employed only five people in 2006 who made NDFs.[91] Under-resourced Scientific Authorities, particularly in developing countries, struggle without equipment or with out-of-date equipment, and they frequently lack access to computer and Internet technology, which results in poor communication between CITES' committees and the Parties' Management and Scientific Authorities. An inability to provide reasonable compensation and training often results in under-qualified and/or over-worked staff, which perpetuates the inability of Scientific Authorities to design and implement proper NDF monitoring schemes. Furthermore, much relevant information is available only in English in costly scientific journals, which likely precludes many Scientific Authorities from real access to scientific data because resources may not exist to obtain the journals or to translate relevant scientific studies. Even a Party's good intentions are unable to overcome the problems associated with Scientific Authorities with limited or no capacity to make adequate NDFs.

Thus, although Resolution Conf. 10.3 recommends that Parties and the Secretariat consult and collaborate regarding the making of NDFs, any new resolution on NDF criteria should remind Parties, the Secretariat, and other relevant bodies of these opportunities.[92] Further, it

[90] *See* CITES, Species Trade Database, Gross Exports for Madagascar, 2005 (tabulation on file with author).

[91] Telephone Interview with Dr. Javier Alvarez (2006). A fully staffed U.S. Scientific Authority would employ approximately ten people, a number which seems meager given that the United States is the world's largest importer and exporter of wildlife. *Id.*

[92] Res. Conf. 10.3, *supra* note 72.

should encourage Parties that may think they need support to make adequate NDFs to proactively seek such support from the Secretariat, other Parties, and relevant non-governmental organizations. To facilitate the fulfillment of the responsibility to make adequate NDFs, the proposed resolution should recommend that Parties designate a contact person in their Scientific Authority who would be responsible for ensuring that non-detriment findings are made and made adequately.[93]

Moreover, transparency and precaution are necessary for sustainable trade. However, the Secretariat and other CITES subsidiary bodies usually are involved only in a Party's non-detriment finding process once an export permit has been issued and someone challenges the permit's NDF as flawed. This approach is contrary to the precautionary principle and could potentially result in the transfer of species from Appendix II to Appendix I due to high levels of unsustainable trade. As such, a new resolution should recommend that the contact person in each Scientific Authority regularly share his or her information and data supporting each NDF with the Secretariat. The Secretariat should establish and regularly update both a register of contact persons for non-detriment findings and a database of information and data used to support non-detriment findings. Both should be available to the public on the CITES website. A centralized information database may be necessary for adequate NDFs from developing countries. Many developing countries seek scientific information from the Secretariat. To facilitate responses to these requests, the Secretariat should add a section to the CITES website devoted to compiling the scientific information and studies available and listing various specialists and their contact information. Because of its tremendous potential to improve the making of NDFs, the Parties should affirmatively endorse and fund the Secretariat's activity in this regard.

C. The Primarily Commercial Purposes Finding

Whereas the NDF is CITES' fundamental conservation tool for avoiding adverse biological consequences to the survival of species in the wild, the primarily commercial purposes finding represents the drafters' recognition that commercial trade is *per se* detrimental to Appendix I species because commercial markets stimulate demand and encourage black market trading. The primarily commercial purposes finding is the drafters' attempt to strictly control markets for Appendix I specimens: The Management Authority of the State of import or State of introduction, in the case of marine species taken on the high seas, must be "satisfied that the specimen is not to be used for primarily commercial purposes."[94]

Because the primarily commercial purposes finding represents essentially a blanket prohibition of commercial international trade, interpretation of it has fueled significant debates among the Parties. From the perspective of the proponents of sustainable use, a blanket prohibition against commercial uses of Appendix I specimen does not give sufficient weight to the potential beneficial impacts on conservation and on the livelihoods of the rural poor, especially when the specimens in trade derive from natural mortality or government management programs. The Zimbabwe Resolutions, as well as later proposals, have attempted to relax the meaning of "primarily commercial" to allow some commercial trade in Appendix I specimens.

[93] *Id.*
[94] CITES, *supra* note 1, at arts. III(3)(c), III(5)(c).

This section examines how the Parties have defined "primarily commercial purposes" and the attempts to redefine the term.

1. Defining "Primarily Commercial Purposes": A Presumption of Strict Control

Eventually, the Parties recognized that interpretation of the term "primarily commercial purposes" varied among Parties and that trade would involve a variety of fact-specific transactions.[95] As a result, the Parties adopted Resolution Conf. 5.10 in 1985 to help the Parties determine whether an import should be considered as for "primarily commercial purposes." Resolution Conf. 5.10 defines an activity as "commercial" if its purpose is to "gain economic benefit, including profit (whether in cash or in kind) . . . [when it] is directed towards resale, exchange, provision of a service or other form of economic benefit."[96] Importing countries are to interpret the term as "broadly as possible so that any transaction which is not wholly 'non-commercial' will be regarded as 'commercial.'"[97] The resolution addresses the intended scope of "primarily" when it says that any use whose non-commercial aspects "do not clearly predominate shall be considered to be primarily commercial in nature."[98] The burden of proving whether or not the intended use is primarily commercial lies with the entity seeking to import the specimen. The overall effect of these general principles is to categorize a large category of activities as for "primarily commercial purposes," thus strictly limiting the commercial marketplace for Appendix I species.

The drafting history of the Convention supports a strict reading of "primarily commercial purposes." By the time the drafters gathered for the Washington Conference in 1973, the working draft of the Convention contemplated two options for restricting trade in Appendix I specimens.[99] The first option contemplated a complete ban on trade in some Appendix I specimens, whether commercial or not. The second option considered restricting trade in Appendix I specimens to a narrow list of purposes, limited exclusively to human health research or the restoration of species.[100] Both options are strict trade prohibitions and neither option contemplates commercial trade of Appendix I specimens. Thus, while the final text of the Convention does not adopt either of these options, instead including a more flexible approach to limiting commercial trade in Appendix I specimens, the intent of the drafters to require strict trade control for Appendix I specimens remains clear.

2. "Primarily Commercial Purposes" and the Sustainable Use Debate

Despite the clear intent of the Convention to strictly regulate trade in Appendix I specimens and cut off commercial markets for wild-caught Appendix I specimens, the Zimbabwe Resolutions, and later a resolution proposed by Namibia, attempted to reshape implementation of the primarily commercial purposes finding to facilitate "beneficial" trade and sustainable use. The proponents of these resolutions, cut off from commercial markets for wild-

[95] *See* CITES, *Definition of "Primarily Commercial Purposes,"* at Preamble ¶ 3, 4, Res. Conf. 5.10 (1985) [hereinafter Res. Conf. 5.10].

[96] *Id*. at ¶ 2.

[97] *Id*. at ¶ 3.

[98] *Id.*

[99] *See* Washington Conference, *supra* note 23, at Working Paper Doc. 3, arts. II, III (Nov. 21, 1972).

[100] *Id.*

caught Appendix I specimens, ivory in particular, argued that banning commercial trade when an exporting State certifies that the export will be beneficial to the survival of the species raises issues of equity, creates a prejudice against trade, and attaches undue stigmas to trade.[101]

As discussed above, the Zimbabwe Resolutions also attempted to infuse the NDF with considerations of the "benefits" of wildlife trade, including the possibility that trade could reap financial benefits for conservation and for the rural poor. However, even if such considerations led to the issuance of a positive NDF, the Convention still prohibits trade in Appendix I specimens for primarily commercial purposes. As such, the Zimbabwe Resolutions sought to redefine the trigger for making the primarily commercial purposes finding by proposing to apply the term only "to those cases of commercial trade which are clearly non-beneficial to the species concerned."[102] According to the proposal, trade would be viewed as beneficial "wherever the returns so derived are reinvested to maintain or increase wild populations."[103] Under these circumstances, trade could occur even if the purpose of the import was commercial.

The proposals to redefine the primarily commercial purposes restriction was withdrawn, but at COP10, Namibia again proposed to redefine "primarily commercial purposes." Namibia proposed to amend Resolution Conf. 5.10 to allow any conservation benefits in the country of origin resulting from trade to be considered in the determination of "primarily commercial purposes."[104] Before the proposal was withdrawn, a large number of Parties objected to the proposal, emphasizing that Article III(3)(c) clearly asks whether the purpose of the import is commercial. Resolution Conf. 5.10 further clarifies that the nature of the transaction between the owner of the specimen in the exporting country and the recipient in the importing country is irrelevant.[105]

Moreover, this interpretation is consistent with the drafters' intent. As the drafters crafted language to provide some flexibility to the working draft's total trade prohibition while retaining the underlying assumption that commercial trade is inherently detrimental to Appendix I species, Australia proposed an amendment that became the basis for the Convention's current language. Australia proposed that the importing country must find that the "recipient does not engage in commercial transactions involving Appendix I and II species."[106] The focus on the recipient's

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[101] *See* Doc. 8.49, *supra* note 56, at ¶ 10(c) ("The Convention tends to prejudice those successful examples of conservation based on small-scale commercial trade arising from sustainable use."); *Id*. at ¶ 12 ("[T]he draft resolution seeks to mitigate the prejudicial nature of the [primarily commercial purposes] clause . . ."); CITES, *Revision of the Definition of "Primarily Commercial Purposes,"* Doc. 10.38 (Rev.) (1997) [hereinafter Doc. 10.38]; CITES, *Notes in Support of Amending Resolution Conf. 5.10 Definition of "Primarily Commercial Purposes,"* at ¶ 3, Doc. 10.38.1 (Rev.) ("Having accepted that trade can be beneficial to conservation, the retention of the phrase 'primarily commercial purposes' indicates that there still remains a prejudice against trade and a stigma attached to trade."); *Id*. at ¶ (2) ("Trade may not take place even if the range State has certified that the export will be beneficial to the survival of the species. This is one of the equity issues that concern Parties . . . . It is difficult to accept that, notwithstanding competent rulings by the Authorities in the producer State, the final decision lies with the importing country.").

[102] Doc. 8.49, *supra* note 56.

[103] *Id.* at ¶ 8.

[104] Doc. 10.38, *supra* note 101.

[105] *See* Res. Conf. 5.10, *supra* note 95, at ¶ 4.

[106] *See* Washington Conference, *supra* note 23, at Proposed Amendments to Article III, PA/III/10 (proposed by Australia) (Feb. 15, 1973).

activities makes clear that from early drafts of the "primarily commercial purposes" provision the drafters intended the provision to apply to the end use of the specimen in the importing country. Even though the drafters modified the focus of the amendment from the recipient to the purpose of the specific import, this history reflects a clear intent to eliminate commercial markets for Appendix I species.

IV. The Current Sustainable Use Agenda

While the Zimbabwe Resolutions failed to achieve a broad reshaping of CITES, they triggered a long-term shift in the CITES agenda, starting with the adoption of Resolution Conf. 8.3 on *The Recognition of the Benefits of Wildlife Trade*. This resolution recognized 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."[107] Although not a substantive mandate to implement CITES in any particular way, adoption of Resolution Conf. 8.3 put "sustainable use" squarely on the CITES agenda and provided a platform for further discussions about CITES processes, the economic benefits of trade, and impacts of wildlife trade and trade restrictions on livelihoods of the rural poor.

The sustainable use debate and the issue of livelihoods now represent a significant discussion during CITES meetings and in the context of CITES implementation. In this way, the proponents of the sustainable use debate have made headway in reshaping CITES implementation, even if not through direct substantive changes to the Parties' understanding of key technical provisions. This section describes the emergence of the sustainable use agenda and the livelihoods debate following the submission of the Zimbabwe Resolutions in 1992. It discusses the adoption of the Wildlife Trade Policy Review process, and revisions to Resolution Conf. 8.3 dealing with livelihoods, as well as subsequent efforts to give these revisions some effect. While the Parties do not implement CITES in a vacuum, the limitations of both staff and financial resources both within the Secretariat and within individual Parties' CITES offices suggests that this agenda may distract from the central object and purpose of the Convention.

A. Wildlife Trade Policy Reviews

At COP12 in 2002, the Secretariat proposed to undertake a review of Parties' use of economic incentives to support conservation and support livelihoods.[108] This effort is largely aimed at promoting the understanding that "economic incentives could make an important contribution to achieving the goals of the Convention."[109] The proposal defines economic incentives as "any measure that creates or improves upon the available markets and price signals for CITES-listed species to encourage the conservation or sustainable use of wild fauna and flora."[110] At its core, the review process adopted by a decision of the Parties, sets out to "compile and synthesize . . . information . . . [about] the impacts of national policies on trade in CITES-

[107] Res. Conf. 8.3, *supra* note 61.
[108] *See generally* CITES, *Economic Incentives and Trade Policy*, CoP12 Doc. 18 (2002).
[109] *See id.* at ¶ 3.
[110] *Id.* at ¶ 6.

listed species in terms of socio-economic and conservation benefits and costs."[111] Ultimately, the review process examines CITES implementation at the national level in terms of both the costs and benefits of the CITES regulatory regime on conservation and livelihoods.

On one hand, the Wildlife Trade Policy Review process could have a significant and positive influence on the way governments manage species in relation to international trade; on the other hand, the review process may be a backdoor attempt to undermine the CITES regulatory regime. To date, the study has resulted in four pilot reviews of the legislation and practices of Madagascar, Nicaragua, Uganda, and Vietnam. These reviews each comprise a country profile, a history of domestic trade policy, the Party's CITES involvement, and an analysis of policy impacts. The reviews are useful as a comprehensive list of resource management-related laws in each country and as a history of how each country has implemented CITES at the national level. In addition, the identification of common themes throughout the reviews, such as insufficient funding for controlling and managing trade, lack of political will to control trade, and lack of awareness within domestic governments and in the general population is useful because such information aids in understanding shortcomings of CITES implementation and management.

However, the most apparent theme appears to be the desire to encourage trade in wildlife as a potential revenue stream for the country. The reviews tend to promote an increase in wildlife trade rather than prioritize conservation though efforts to manage legal trade and halt illegal trade in CITES-listed species. Each review in the pilot study highlights a need for better collaboration and implementation between domestic agencies, ministries, and government sectors, as well as a need to include all stakeholders in these processes. In addition, all of the reports mention legislation or aspects of policies that the Party must rewrite or update to adequately implement international obligations. Thus, while it is encouraging that the reviews draw attention to these weaknesses, the reviews fail to describe how the Party might begin to bridge the formidable gap between the desire to increase trade and the lack of capacity and will to achieve conservation goals.

The Uganda review highlights this problem. It explains the relevant law and policy, management authorities, and trends in wildlife trade, and it also notes that "[t]here is no coherent documentation of illegal wildlife trade in Uganda"[112] and that "widespread illegal trade . . . is unregulated and is not monitored."[113] However, rather than focusing on controlling illegal trade, the review finds "that wildlife trade in Uganda has potential for growth and can yield substantial economic, social and conservation gains for the country."[114] The tone of this review is skewed toward the goal of increasing the potential for a successful market in wildlife trade and ignores the need to control illegal trade; the review also fails to describe or analyze any controls currently in place.

If these reviews are going to be a better reflection of what is needed to ensure that trade is

[111] CITES, *Economic Incentives and Trade Policy*, Decision 12.22 (2002).

[112] REPUBLIC OF UGANDA, BUILDING A FOUNDATION FOR SUSTAINABLE WILDLIFE TRADE IN UGANDA 47, (2008), *available at* http://www.cites.org/common/prog/policy/UGReportAug2008.pdf.

[113] *Id.* at 34.

[114] *Id.* at iii.

ecologically sustainable, the review process must comprise certain key elements. First, the reviews should assess a Party's customs laws, penalties, and tariffs. While the adequacy of customs laws and penalties for violations are assessed in the National Legislation Project, the assessment here would focus on whether Parties have tailored such laws toward the wildlife the country is most likely to export. Moreover, an assessment of tariffs would indicate whether a country is properly valuing its wildlife. These assessments would also determine whether penalties and tariffs pay the cost of CITES implementation, including funding the making of adequate NDFs. Second, clear property rights and land title are vital to conservation efforts. Yet, the National Wildlife Trade Policy reviews do not consider in any meaningful way whether Parties have clearly delineated property rights. Not only is this critical for conservation, but it is also critical for determining whether local people will actually benefit in an meaningful way from their efforts to manage species in an ecologically sustainable manner.

Third, the documents of the National Wildlife Trade Policy Reviews all suggest that more wildlife could be traded while simultaneously highlighting the need for better collaboration and implementation between domestic agencies, ministries, and governmental sectors, and a need to include all stakeholders in the process. All of the reports mention legislation or aspects of policies that should be updated or rewritten. It is encouraging that the reviews understand these weaknesses, but any future reviews must pay far more attention to this issue. If countries are unable to manage trade at current volumes, the likelihood that they will be able to manage trade in an ecologically sustainable manner at increased volumes is low, and such trade would be in contravention of CITES.

While the gathering and sharing of information is almost always positive, the information in these reviews serves to encourage trade in wildlife rather than to promote the protection and survival of wildlife. For that reason, the focus of the reviews is not conducive to the goals of CITES. The aim of CITES is to ensure that international trade in specimens of wild animals and plants does not threaten their survival; the aim is not to encourage trade or to aid Parties in developing a profitable wildlife trade sector. Moreover, while the Secretariat notes that the work related to this project is externally funded, the workload undertaken is quite large and it certainly redirects staff time if not financial resources. In light of the Wildlife Trade Policy Review's current focus on encouraging what might be unsustainable or illegal trade and in light of the staffing and budgetary constraints of the Secretariat, the time and effort would be better spent on working with Parties to implement the core provisions of the Convention.

B. Livelihoods and the Listing Process

The livelihoods debate, while in some ways distinct, is really part and parcel of the broader sustainable use debate. The "livelihoods" issue centers on recognition of the detrimental impacts of CITES trade regulation on local populations. While the emergence of the issue is buttressed by the United Nations' Millennium Development Goals, the issue arose for CITES Parties in 2000 at COP11 when the Parties considered a proposal to list Devil's claw (*Harpagophytum procumbens and Harpagophytum zeyheri*) in Appendix II.[115] Many Parties and

[115] *See* CITES. *Inclusion of* Harpagophytum procumbens *in Appendix II in Accordance with Article II 2(a), Inclusion of* Harpagophytum zeyheri *in Appendix II in Accordance with Article II 2(b) for Reasons of Look-Alike Problems*, Prop. 11.60 (2000).

advocates objected to the listing because of the perceived negative impact that the listing would have on the livelihoods of local people, especially in Namibia, who harvest the fruit of the plant for its medicinal applications.[116]

The objections eventually led to withdrawal of the proposal, but they also led to the amendment of Resolution Conf. 8.3 on the benefits of wildlife trade, recognizing that "implementation of CITES-listing decisions should take into account potential impacts on the livelihoods of the poor."[117] This paragraph is the first formal recognition of livelihoods concerns within CITES, but the paragraph makes clear that any consideration of livelihoods is a national-level decision and that CITES-listing decisions should not be made on the basis of any perceived impact on livelihoods.

A workshop following COP13 to discuss how to operationalize the livelihoods paragraph in Resolution Conf. 8.3 (Rev.) led to a COP14 proposal to develop guidelines for the "rapid assessment" of the potential impacts of CITES listing decisions and guidelines for Parties to address any impacts, positive or negative, of listing decisions.[118] This work is currently ongoing. Like the Wildlife Trade Policy Reviews, this work is externally funded, but nonetheless absorbs limited staff time and generally redirects resources. While the livelihoods of the poor is a singularly important topic, consideration of the issue does not fall within the remit of CITES. While the Parties might deem it worthwhile to consider the impacts of listing decisions on livelihoods, establishing and adopting guidelines and tools for Parties to respond to these effects generally deviates from the core objectives of CITES, including the development, implementation, and enforcement of the permit regime for the purpose of preventing the over-exploitation of species.

V. Easing the Trade Restrictions: Export Quotas, Split-Listings, and the Exemptions

While it is clear that the object and purpose of the Convention is the strict management and control of international trade in listed species in order to ensure that they do not suffer over-exploitation, the Convention is not anti-trade. To that end, the Convention facilitates trade that either provides conservation or eases administrative burdens through a number of exemptions to the permit regime. Other Convention-based mechanisms, such as split-listings permit trade in those populations that can sustain trade while limiting trade in other populations. In addition, the Parties have developed mechanisms, such as export quotas of Appendix I species, annotations, and ranching that create essentially an Appendix II-plus listing, allowing more trade than allowed by an Appendix I listing but less than allowable if the species were simply listed in Appendix II without caveat. In each of these cases, the mechanisms find some middle ground between strictly limiting trade and facilitating trade. However, these provisions and mechanisms must be constructed and construed narrowly so that they do not undermine the object and purpose of the Convention.

A. Export Quotas for Appendix I Species

[116] Aradhna Mathur, *CITES and Livelihood: Converting Words into Action*, 18 J. ENV'T & DEV. 291, 297 (2009).

[117] Res. Conf. 8.3, *supra* note 61.

[118] CITES, *CITES and Livelihoods*, Decisions 14.13, 14.14 (2007).

Although the text of CITES describes neither the establishment nor the implementation of export quotas, the Parties have adopted their use as an important operational mechanism. According to a number of Parties, export quotas represent "one of the most effective tools for the regulation of international trade in wild fauna and flora."[119] The use of export quotas in compliance with CITES can be a useful tool for sustainable wildlife management and for detecting and halting illegal trade.[120] Export quotas, however, can only be an effective tool for implementing the Convention if the Parties clearly define the relationship between export quotas and the requirement to make NDFs for exports of specimens of species in Appendix I or II and imports of Appendix I species. The Secretary General has recognized the importance of quota systems but has also made clear that "[t]here are . . . many limitations to quota systems, which are mainly related to the lack of scientific data on which to base safe quota levels."[121] Because the Convention text requires NDFs, it is important that the Parties clarify the relationship between export quotas and NDFs.

1. COP-Approved Export Quotas for Appendix I Species

Resolution Conf. 9.21 (Rev. CoP13) provides general guidelines for the establishment and application of export quotas for species included in Appendix I. According to Resolution Conf. 9.21 (Rev. CoP13), the Parties agree that a quota established by the Conference of the Parties "satisfies" the requirements that the export of the specimen will not be detrimental to the survival of the species. Such an export quota also satisfies the requirement that the purposes of the import will not be detrimental to the survival of the species, provided that the quota is not exceeded and "no new scientific or management data have emerged to indicate that the species population in the range State concerned can no longer sustain the agreed quota."[122]

While Resolution Conf. 9.21 (Rev. CoP13) declares that a COP-established export quota effectively substitutes for the NDF, it does not require that the information presented to the COP be the same type of information that would typically support an NDF.[123] Although a Party must

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[119] *See* CITES, *Improving the Management of Annual Export Quotas and Amendment of Resolution Conf. 10.2 (Rev.) Annex 1 on Permits and Certificates*, ¶ 2, CoP12 Doc. 50.1 (2002).

[120] *See* CITES, *Implementation and Monitoring of Nationally Established Export Quotas for Species Listed in Appendix II of the Convention*, ¶ 13(a), CoP12 Doc. 50.2 (2002) (quoting CITES, *Enforcement Matters* ¶ 16, SC45 Doc. 11.2 (2001)); *see also* CITES, *Nationally Established Export Quotas for Appendix-II Species: The Scientific Basis for Quota Establishment and Implementation*, ¶ 4, CoP12 Doc. 49 (2002). As described by the United States, export quotas "can serve as the framework for monitoring and limiting trade within the goals of managed and sustainable off-take from wild populations, and they can serve as deterrent and preventative measure [sic] against the improper issuance of CITES export permits." *Id.* But, the United States also recognized that "[i]n order to receive the greatest benefits from a quota system, Parties should develop scientifically-based methods for establishing appropriate quotas . . . ." *Id.*

[121] WIJNSTEKERS, *supra* note 24, at 391.

[122] CITES, *The Interpretation and Application of Quotas for Species Included in Appendix I*, ¶ 9(b)(ii), Res. Conf. 9.21 (Rev. CoP13) (1994 revised 2004) [hereinafter Res. Conf. 9.21].

[123] *See* CITES, *Establishment of Export Quotas for Black Rhinoceros Hunting Trophies*, Res. Conf. 13.5 (2004) ("[W]ith Resolution Conf. 9.21 . . . the Conference of the Parties agreed that the establishment of an export quota by the Conference of the Parties for a species included in Appendix I satisfies the requirements of Article III, paragraphs 2(a) and 3(a), of the Convention that the export and the purpose of the import will not be detrimental to the survival of the species provided that the quota is not exceeded and that no new scientific or management data have emerged to indicate that the species population in the range State concerned can no longer sustain the agreed quota[.]") [hereinafter Res. Conf. 13.5].

submit a proposal for export quotas for Appendix I species "with supporting information including details of the scientific basis for the proposed quota" at least 150 days prior to the meeting of the Conference of the Parties,[124] Resolution 9.21 (Rev. CoP13) does not indicate that this information should actually satisfy the NDF requirements. Presumably some Parties' Scientific Authorities review the information presented in a proposal for such an export quota to determine whether the information does in fact "satisfy" the requirements for making NDF. At minimum, Resolution Conf. 9.21 (Rev. CoP13) should clearly require that information equivalent to support an NDF be included in a proposal for an export quota for an Appendix I species and direct the Conference of the Parties to approve such quotas only when such information is provided.

These small but significant changes should help Parties understand their obligations with respect to several high profile species because other resolutions relating to export quotas for hunting trophies of Appendix I species reflect the presumptions and information requirements of Resolution Conf. 9.21 (Rev. CoP13). For example, Resolution Conf. 10.14 (Rev. CoP13) on exports of leopard trophies and skins recommends that the importing country approve an import permit and consider the NDF to have been made if the trophy or skin is from a country with a quota approved by the Parties.[125] A Party that seeks the approval of the COP to increase a quota or to add a new quota (i.e. for a State not previously having one) must submit a proposal in accordance with Resolution Conf. 9.21 (Rev. CoP13).[126] The quota systems for markhor[127] and black rhinos[128] are identical to that of the leopard quota system with respect to NDFs and the information necessary for approving increases in a quota or a new quota. By clarifying the scientific requirements for establishing quotas under Resolution Conf. 9.21 (Rev. CoP13), as recommended above, the Parties will make clear that an NDF has been made for these species. Moreover, because any proposal for an export quota would include such information, the basis for the NDF would be public ly available.

2. Transferring Species from Appendix I to Appendix II, Resolution Conf. 9.24

Resolution Conf. 9.24 (Rev. CoP13) describes the criteria for amending Appendices I and II and articulates precautionary measures that the Parties must respect when considering proposals to amend Appendix I and II. Export quotas are one of the precautionary measures available for transferring a species from Appendix I to Appendix II.[129] Resolution Conf. 9.24

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[124] Res. Conf. 9.21, *supra* note 122, at ¶ 9(a) ("[A] Party wishing the Conference of the Parties to establish a quota for a species included in Appendix I, or to amend an existing quota, should submit to the Secretariat its proposal, with supporting information including details of the scientific basis for the proposed quota, at least 150 days before a meeting of the Conference of the Parties[.]").

[125] The following countries have quotas for leopard skins and trophies (quota in parentheses): Botswana (130), Central African Republic (40), Ethiopia (500), Kenya (80), Malawi (50), Mozambique (60), Namibia (250), South Africa (150), United Republic of Tanzania (500), Zambia (300), Zimbabwe (500). CITES, *Quotas for Leopard Hunting Trophies and Skins for Personal Use*, Res. Conf. 10.14 (Rev. CoP13) (1997).

[126] *Id.* at ¶ 11(e).

[127] CITES, *Establishment of Quotas for Markhor Hunting Trophies*, Res. Conf. 10.15 (Rev. CoP12) (1997). Only Pakistan maintains a quota (12 hunting trophies) for markhor. *See id.*

[128] Res. Conf. 13.5, *supra* note 123.

[129] *See* Res. Conf. 9.24, *supra* note 34, at Annex 4, ¶ (A)(2)(c) ("Species included in Appendix I should only be transferred to Appendix II if they do not satisfy the relevant criteria in Annex I and . . . an integral part of the amendment proposal is an export quota . . . .").

(Rev. CoP13) lists only two criteria for establishing this type of export quota: (1) a Party must submit a proposal to the Conference of the Parties to renew, amend, or deactivate a quota, and (2) a quota applicable for a specified period of time becomes zero at the end of the period unless the relevant Party establishes a new one.[130]

Resolution Conf. 9.24 (Rev. CoP13), however, does not explain the relationship between these quotas and the NDF required under Article IV of the Convention. Because Resolution Conf. 9.21 and other export quota resolutions specifically include language concerning NDFs, the absence of such language in Resolution Conf. 9.24 (Rev. CoP13) suggests that the exporting Party must make individual NDFs for all trade in specimens of species subject to quotas established under Resolution Conf. 9.24 (Rev. CoP13).

Clarification of this issue is important, especially in light of the Parties' intent to incorporate the Precautionary Principle when transferring species from Appendix I to Appendix II. While the Precautionary Principle does not prevent the adoption of a quota, it does suggest that safeguards should be in place to ensure that any trade is in fact ecologically sustainable and not detrimental to the survival of the species. A requirement to make an NDF for an export quota approved pursuant to Resolution Conf. 9.24 (Rev. CoP13) provides that safeguard. In this way, the NDF confirms that the export quota and transfer from Appendix I to Appendix II is biologically justified and that the species is appropriately managed.

3. Annotations

Resolution Conf. 11.21 (Rev. CoP13) recognizes the use of annotations as a means of establishing export quotas for listed species. When the Parties approve an annotation that transfers a species from Appendix I to Appendix II and that annotation sets an export quota, it must be established in accordance with Resolution Conf. 9.24 (Rev. CoP14). Whether Resolution Conf. 11.21 (Rev. CoP13) establishes a separate means to establish quotas is unclear, but it is silent on the question of whether NDFs must be made when an annotation establishes an export quota.

Thus, Resolution Conf. 11.21 (Rev. CoP13) needs clarification. The Parties should ensure that any proposed annotation for an export quota includes information equivalent to that needed to make an adequate NDF. Moreover, like transferring species from Appendix I to Appendix II, annotations substantively alter a species' listing and must be biologically justified. Thus, Resolution Conf. 11.21 (Rev. CoP13) should be amended to clarify that annotations for export quotas that apply to Appendix I species must also comply with the provisions of Resolution Conf. 9.24 (Rev. CoP14) that apply when the Parties transfer a species from Appendix I to Appendix II—this ensures that all annotations are set in accordance with precautionary measures.

An export quota can be a valuable implementation tool because it may obviate the need to make individual NDFs for each shipment of specimens of an Appendix I or II species. However, it must be clear to all Parties that the quota was set based on an adequate NDF. Without a valid NDF, trade in specimens subject to an export quota contravenes the Convention,

[130] *Id.* at Annex 4, ¶¶ (C)(1), (C)(2).

unless it falls under one of the limited exemptions identified in Article VII.[131] For Appendix I species, an export quota established based on sound science will have the effect of facilitating trade that the Parties have collectively agreed is non-detrimental to the survival of the species.

B. Split Listings

Split-listing refers to the listing certain populations or subspecies of a species in one Appendix and others in a different Appendix, thereby allowing for trade restrictions consistent with the populations' biological status. While the Convention does not explicitly recognize split-listings as a conservation tool, it implicitly allows them by defining the "species" that may be included in the Appendices as "any species, subspecies, or geographically separate population thereof."[132]

While split-listings for managing trade in specimens from certain populations are based on a species' biological status, the Parties must take measures to ensure that split-listings are effectively enforced and do not become an avenue for illegal trade or abuse and misuse. In fact, split-listings can cause enforcement problems as unscrupulous traders attempt to launder specimens from an Appendix I population through a country with an Appendix II listing for that species. As such, Parties should adopt split-listings only on rare occasions when trade can be effectively monitored through marking and coding systems. In recognition of the enforcement problems associated with split-listings, Resolution Conf. 9.24 (Rev. CoP14) makes clear that "[l]isting of a species in more than one Appendix should be avoided in general." Resolution Conf. 9.24 (Rev. CoP14) also suggests when split-listings are advisable and when they are not. For instance, it states that Parties should split-list species based on geographic populations and not on the basis of subspecies, with the idea that Parties may be better equipped to enforce differences in trade regulations on a country-by-country basis rather than a population-by-population basis.[133] Moreover, Resolution 9.24 (Rev. CoP14) provides that the Parties should generally not adopt split-listings that include some populations of a species on the Appendices and others not on the Appendices.[134]

C. The Exemptions

Like most conventions, CITES establishes a number of exemptions to its permitting rules. These exemptions serve a number of purposes. The exemption for trade in specimens obtained before the Convention applied to the relevant species is designed to promote fairness since the seller did not have notice of any trade restrictions when he acquired the specimen. The exemption for trading in certain captive-bred specimens is thought to promote conservation by relieving pressure on wild populations. The exemption for shipments in customs control and

[131] The Article VII exemptions include when a specimen is under the control of Customs officials, when a specimen was acquired before CITES took effect, when a specimen is personal or household effects, when a specimen was either bred in captivity or artificially propagated, when a specimen is non-commercially loaned, donated, or exchanged between scientists, and, finally, when the Management Authority of State waives the requirements to allow the movements of a traveling zoo, a circus, a menagerie, or plant exhibition. CITES, *supra* note 1, at art. VII.

[132] *Id.* at art. I(a).

[133] Res. Conf. 9.24, *supra* note 34.

[134] *Id.*

destined for other countries is designed to promote efficiency. This section reviews arguably the three of the most challenging and vexing exemptions, the personal and household effects exemption and the two captive breeding exemptions.

1. Personal and Household Effects

While exemptions always increase complexity by making enforcement more difficult, the "personal and household effects" exemption has proven to be one of the more difficult exemptions for the Parties to administer, primarily because the language is convoluted.[135] Moreover, it is a broad exemption that excludes from the CITES permitting requirements many specimens of listed species, including all tourist souvenirs made from Appendix II species, except in certain circumstances. Although the Parties have variously interpreted the exemption more or less narrowly in the past, currently Resolution Conf. 13.7 (Rev. CoP14) broadens the exemption in important ways.[136]

The Parties have convened a working group to further clarify the exemption and to consider, among other things, the relationship between the exemption and tourist souvenirs.[137] This working group should propose revisions to Resolution Conf. 13.7 (Rev. CoP14) that support a narrower reading of the exemption, including reversing the presumption that exporting countries do not require export permits and clarifying the definition of "personal and household effects." Clear definitions and precautionary presumptions strike the appropriate balance between allowing trade, as the exemptions are designed to do, and ensuring that the provisions are interpreted in light of the object and purpose of the Convention.

a. Applying the Terms of the Convention

Article VII(3) provides that the permit requirements "shall not apply to specimens that are personal or household effects."[138] Thus, the basic exemption is broad. However, the very next sentence states that the exemption shall not apply in certain circumstances.[139] The drafters crafted limitations on the application of the exemption—in other words, exceptions to the exemption.

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[135] CITES, *supra* note 1, at art. VII(3) ("The provisions of Articles III, IV and V shall not apply to specimens that are personal or household effects. This exemption shall not apply where: (a) in the case of specimens of a species included in Appendix I, they were acquired by the owner outside his State of usual residence, and are being imported into that State; or (b) in the case of specimens of species included in Appendix II: (i) they were acquired by the owner outside his State of usual residence and in a State where removal from the wild occurred; (ii) they are being imported into the owner's State of usual residence; and (iii) the State where removal from the wild occurred requires the prior grant of export permits before any export of such specimens; unless a Management Authority is satisfied that the specimens were acquired before the provisions of the present Convention applied to such specimens.").

[136] CITES, *Control of Trade in Personal and Household Effects*, Res. Conf. 13.7 (Rev. CoP14) (2004) [hereinafter Res. Conf. 13.7 (Rev. CoP14)].

[137] CITES, *Interpretation and Implementation of the Convention, Exemptions and Special Trade Provisions, Personal and Household Effects*, SC54 Doc. 33 (2006) (noting that a working group was established at the 53rd Standing Committee in 2005); CITES, *Interpretation and Implementation of the Convention, Exemptions and Special Trade Provisions, Personal and Household Effects*, SC57 Doc. 28 (2008) (directing the working group to study the relationship between tourist souvenirs and personal and household effects, following decision 14.64. CITES, *Personal and Household Effects*, Decision 14.64 (2007).).

[138] CITES, *supra* note 1, at art. VII(3).

[139] *Id.*

In the case of Appendix I specimens, the exemption does not apply if a person acquires an Appendix I specimen outside his State of usual residence and attempts to import it into that State.[140] Thus, if a U.S. citizen who lives in Florida travels to Cameroon and buys earrings made from African elephant ivory or the hairs of a lowland gorilla, the exemption does not apply because the U.S. citizen is outside her place of usual residence and returning with these Appendix I specimens to her place of usual residence. To return home with these specimens, she must first obtain an import permit from the State of import and then obtain an export permit from the State of export. Thus, the personal and household effects exemption applies only in limited circumstances for Appendix I specimens, such as when a person is moving to another country as part of his or her job. In this case, the person would be moving from her place of usual residence to another State, and therefore the exemption would apply.

The language is more complicated for Appendix II specimens. The exemption does not apply if

(i) a person acquires an Appendix II specimen outside his or her State of usual residence;
(ii) the person acquires the specimen in a State where removal from the wild occurred;
(iii) the person attempts to import it into his State of usual residence; and
(iv) the State where removal occurred requires the prior grant of an export permit.[141]

Thus, if a British citizen travels to Brazil and buys a desk sourced from Brazilian mahogany and wants to return to London with it, he must first obtain an export permit if Brazil requires an export permit for such an export, even if he is outside his State of usual residence and in the country where removal from the wild occurred. However, should any one of the criteria not be met, no export permit is required because the specimen would meet the personal and household effects exemption of Article VII. For example, if a British citizen travels to Brazil and buys a desk sourced from Peruvian mahogany, the exemption applies because the traveler bought the Peruvian mahogany in Brazil. In this case, the specimen does not meet criterion (ii)—that the specimen was acquired in the State where removal from the wild occurred.

b. Reversing the Presumption

For international trade in Appendix II specimens under the personal and household effects exemption, the most significant potential limitation is the requirement for an export permit by the State of export. When a State requires an export permit for an Appendix II species, that State is essentially prohibiting the application of the personal and household effects exemption for exports of specimens of that species from that country. Thus, communication of export permit requirements is imperative to ensure that importing States apply the personal and household effects exemption according to the exporting State's regulations because the Parties have failed, on the whole, to communicate their export permit requirements.

Currently, Resolution Conf. 13.7 (Rev. CoP14) advises that the Parties shall

[140] *Id.* at art. VII(3)(a).
[141] *Id.* at art. VII(3)(b).

> not require export permits or re-export certificates, for personal and household effects which are dead specimens, parts or derivatives of Appendix-II species except . . . where they have been advised through a Notification from the Secretariat or on the CITES website that the other Party involved in the trade requires such documents.[142]

Thus, the current system provides that the Parties presume that no export permit is required. However, throughout the history of CITES, the Parties have used three different methods to communicate whether international trade in personal and household effects requires an export permit: the case-by-case method, the presumption a permit is not required, and the presumption that an export permit is required.[143] The first system is a case-by-case method, which requires importing States to contact the exporting Party to determine whether an export permit is required. Because a Party is required to contact another Party every time a person seeks to use the personal and household effects exemption, the case-by-case method is impractical and the administrative burden likely weighs too greatly on the Parties to make it a plausible approach.

Unlike the case-by-case method, the other two methods are based on a basic presumption, either that the exporting Party requires an export permit or that it is does not. Under both methods, the Parties must report their specific requirements to the Secretariat if their requirements conflict with the presumption.[144] For example, if the Parties establish a presumption that exporting Parties require export permits, a Party must notify the Secretariat if it does not require an export permit for exports of Appendix II personal and household effects.

Establishing a presumption is administratively efficient. First, it streamlines the case-by-case method by creating a standard by which Parties may follow each time a person attempts to trade under the personal and household effects exemption. Second, by using the Secretariat as a clearing-house for information, Parties need only communicate to only one entity, the Secretariat. Conversely, an importing Party need only check with the Secretariat, either directly or via its website, to know whether a permit is required or not.

Although either presumption is efficient, the system that requires Parties to presume an export permit is required better supports the goal of the Convention to prevent the overexploitation of listed species by strictly regulating international trade. Historically, the Parties have tended not to report their export permit requirements.[145] If Parties assume the exporting Party does not require an export permit and if Parties tend not to report permit requirements, unintentional overuse and misapplication of the exemption is likely. The Convention is based on the basic premise that trade in listed species requires a permit unless an exemption applies.[146] By establishing a presumption that a permit is not required, regulation of

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[142] *Id*. at ¶ 22(b)(i).

[143] WIJNSTEKERS, *supra* note 24, 144–45.

[144] Resolution Conf. 13.7 creates a presumption that export permits are not required under the personal and household effects (PHE) exemption. Res. Conf. 13.7 (Rev. CoP14), *supra* note 136.

[145] WIJNSTEKERS, *supra* note 24, at 146 ("Practically, the Secretariat has found that Parties rarely report their domestic requirements for permits or lack of requirements for permits.").

[146] ROSALIND REEVE, POLICING INTERNATIONAL TRADE IN ENDANGERED SPECIES: THE CITES TREATY AND COMPLIANCE 28 (2002).

personal and household effects becomes the exception, not the norm. On the other hand, a presumption that an export permit is required better comports with the object and purpose of the Convention and better facilitates the sort of trade that both the drafters and the Parties intend to exempt from the permit requirements.

c. Tourist Souvenirs as Personal and Household Effects

Given the difficulty of interpreting and implementing the terms of the Convention, it is easy to understand why some Parties and non-governmental organizations want to clarify the application of the personal and household effects exemption to "tourist souvenirs."[147] As written, Article VII provides a large exemption for trade in tourist souvenirs of Appendix II specimens. The drafters clearly intended the provision to apply to tourist souvenirs—essentially deeming trade in such specimens per se non-commercial and non-detrimental, probably given the lower levels of tourist souvenir exports at that time. However, the Parties must ensure that the provision is not interpreted so broadly as to exclude from the permit regime any quantity of specimens that accompany an individual in her luggage. In other words, the exemption should not become a means to export quantities of tourist souvenirs that suggest the exporter's intent to sell the specimens commercially or to export raw or unworked specimens that a dealer could later sell as trinkets or other such worked specimens without the permits and NDFs otherwise required.

Resolution Conf. 13.7 (Rev. CoP14) does not currently avoid this result. It states that a "tourist souvenir specimen" is a personal and household effect acquired outside the owner's State of usual residence and is not a live specimen. While the Parties helpfully exclude live specimens from the meaning of "tourist souvenir specimen," the definition does not provide other qualitative or quantitative restrictions, unless the Parties adopt one with a two-thirds majority vote for a specific species—for example, the Parties have adopted a restriction of up to four specimens of crocodilian species per person as qualifying for the personal and household effects exemption.

To avoid misuse of the exception, the Parties should add two new criteria to the definition of "personal and household effects" to help ensure that trade under the exemption is truly personal and non-commercial. First, personal and household effects should be limited to specimens that are finished products.[148] Most personal items and tourist souvenirs are finished

[147] The 15th Conference of the Parties will consider amending the terms of reference for the working group to also consider the relationship between personal and household effects and hunting trophies. *See* CITES, *Personal and Household Effects*, CoP15 Doc. 40 (2009).

[148] David Favre, in his book *International Trade in Endangered Species: A Guide to CITES*, created a set of five parameters to help define "personal and household effects." First, the PHE exemption cannot be used as a pretense for commercial activities. Second, the specimens cannot be sold or exchanged after importation. Third, in most cases, the product should be a finished product. Fourth, personal ownership should not be a cover for illegal activity; therefore, the specimens must have been acquired legally. Last, the specimens must be goods that are worn or used in personal settings rather than in business situations. DAVID S. FAVRE, INTERNATIONAL TRADE IN ENDANGERED SPECIES: A GUIDE TO CITES 184 (1989). Currently the definition of "personal and household effects" limits personal and household effects to personal or non-commercial specimens. Res. Conf. 13.7, *supra* note 136. Practically, the current definition does not create guidelines that help limit the application of the PHE exemption to personal and non-commercial goods. To ensure the specimens exported under the PHE exemption are used for non-commercial or personal purposes, Favre suggests that the specimens should not be sold or exchanged after importation, should be finished products, and should be personal items (i.e. not ones used in business settings). *Id.*

products. In comparison, most raw materials or unfinished goods will undergo additional processing to become either a usable or a saleable good. Therefore, any specimen, which is a raw material rather than a finished good, is most likely not a personal or a household effect. For example, if a person attempts to export raw mahogany, it is less likely to be a personal item or part of a household move, than a finished mahogany table.[149] Defining "personal and household effects" as finished goods may not be precise in all instances, but limiting the definition in this way does not have the effect of prohibiting the export of any particular specimen. In fact, the individual would simply need an export permit. This revision recognizes both the intention to allow trade through the application of certain exemptions and the intention to manage trade such that demand for wildlife products is not detrimental.

Second, the Parties should establish a general quantitative restriction for exports of "personal and household effects" to complement the species-specific limits in Resolution Conf. 13.7 (Rev. CoP14). This general quantitative restriction would limit exports of other "personal and household effects" to quantities suggestive of personal use. This definition would reasonably limit the exemption to quantities indicative of non-commercial intent, while allowing the type of trade that the drafters envisaged under the exemption. A general quantitative limit would also help ensure that any trade in Appendix II specimens under the personal and household effects exemption is not detrimental to the survival of the relevant species.

Lastly, the Parties should also assess the impact of trade in tourist souvenirs on the population or species to ensure that such trade is not detrimental to the survival of the species. The Parties could do this in a way similar to the approval of export quotas. While recognizing that such trade is exempt from the requirement to make an NDF, Article IV(3) of CITES requires the Scientific Authority in each Party to "monitor . . . actual exports of [Appendix II] specimens." The Scientific Authority must also advise the Management Authority of "suitable measures" to be taken to limit the grant of export permits for specimens of that species whenever the export of specimens of any Appendix II species "should be limited in order to maintain that species throughout its range at a level consistent with its role in the ecosystems in which it occurs and well above the level at which that species might become eligible for inclusion in Appendix I." While the provision speaks to limiting export permits, the same justification could be used to limit the use of the personal and household effects exemption for tourist souvenirs. If trade in tourist souvenirs may become detrimental to the survival of a species, then a State of export could limit or eliminate the use of the exemption for that species and allow trade only upon issuance of an export permit.

2. Captive Breeding of Appendix I Specimens

The application of CITES to captive bred specimens has long been a contentious issue for the Parties. In fact, the drafters of the treaty also struggled with the relationship between the Convention's species protection goals and trade in captive bred specimens.[150] The relationship is

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However, to require importing Parties to ensure that goods are not actually sold or exchanged after importation is logistically impractical. In addition, limiting the PHE exemption to goods that are objectively used in personal settings does not provide any further guidance beyond requiring that the goods be non-commercial. However, Favre's last suggestion that the definition should be changed to specify that "personal and household effects" are limited to finished products creates a clear guideline.

[149] Three species of mahogany are listed in Appendix II. CITES, *supra* note 1, at Appendix II.

[150] Washington Conference, *supra* note 23, Summary Record — Third Plenary Session, S/R3 (Final) (Feb. 24, 1973).

difficult to define for a number of reasons. For example, captive bred specimens, traded as live animals or as parts or derivatives, are not taken from the wild, suggesting that the trade would have no impact on the survival of the species in the wild.[151] In addition, breeding facilities may have conservation goals and may sustain a species in the wild or re-introduce a species in an area of extinction.[152] On the other hand, traders may capitalize on the market for captive bred specimens and trade wild caught specimens, possibly labeled as specimens bred in captivity.[153] In addition, specimens must sometimes be taken from the wild to supply the breeding stock of a particular captive bred specimen.

The drafters' and later the Parties' attempts to weigh the various cost and benefits of captive breeding is evident in the plain language of the Convention and in the many resolutions that have tried to further define the Convention's captive breeding provisions. As in the case of personal and household effects, the drafters understood that certain trade in captive bred specimens would not impede conservation efforts, and they even understood that captive breeding could reduce exploitation of wild populations.[154] However, the exemptions are poorly drafted and ambiguous. Because of this, and as described below, the Parties have struggled to define the scope and relationship between the two exemptions.

a. Two Paragraphs, Two Exemptions[155]

The drafters clearly contemplated that trade in captive bred specimens was unlikely to cause over-exploitation of wild species as long as some control over the trade was in place. For that reason, the drafters created the following two exemptions from the permit requirements of Article III, IV, and V for captive bred specimens. Article VII(4) states that "specimens of an animal species included in Appendix I bred in captivity for commercial purposes . . . shall be deemed to be specimens of species included in Appendix II." This means that a trader may trade captive-bred Appendix I specimens for commercial purposes as long as she obtains an Appendix II export permit. Article VII(5) provides that "[w]here a Management Authority of the State of export is satisfied that any specimen of an animal species was bred in captivity . . . a certificate by the Management Authority to that effect shall be accepted in lieu of any of the permits or certificates required under the provisions of Article III, IV or V." The plain language of Article VII(5) suggests that a Party may trade in captive-bred specimens of any CITES-listed species as long as the Management Authority in the State of export issues a "certificate." In other words, all captive-bred specimens are exempt from permit requirements.

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[151] CITES, *Relationship Between* ex situ *Production and* in situ *Conservation*, ¶ 2, AC19 Inf. 5 (2003) (noting that with proper regulations, captive breeding would not cause detriment to wild populations) [hereinafter AC19 Inf. 5].

[152] Craig R. Enochs, Note, *Gone Today, Here Tomorrow: Policies and Issues Surrounding Wildlife Reintroduction*, 4 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 91, 94 (1997) (noting that captive breeding operations helped recover the whooping crane and the black-footed ferret populations).

[153] Garrison, *supra* note 47, at 327.

[154] Washington Conference, *supra* note 23, Summary Record — Third Plenary Session, S/R6 (Final) (Feb. 28, 1973); AC 19 Inf. 5, *supra* note 152; *see also* CITES, *Resolution*, ¶ 5, Res. Conf. 1.6 (Rev.) (1976) (encouraging captive breeding in relation to the pet trade) [hereinafter Res. Conf. 1.6 (Rev.)].

[155] The following discussion of Article VII, paragraphs 4 & 5, applies equally to artificially propagated plant species included in Appendix I as it does to captive-bred animal species. For simplicity, this section refers only to captive breeding and not also to artificial propagation.

The language of the Convention is facially ambiguous because Article VII(5) is not limited in scope and by its plain language covers all captive-bred specimens, presumably even those covered by Article VII(4). If Article VII(5) is interpreted as broadly as the plain language suggests, Article VII(4) becomes superfluous. Given that the drafters took care to include two exemptions and that treaties should not be interpreted so as to render provisions superfluous or meaningless, the Parties must give effect to both provisions.[156] The Parties have long struggled to best give effect to the distinction between the two exemptions, especially as it pertains to Appendix I captive-bred specimens.

The Parties' current interpretations have the effect of reducing the scope of Article VII(4) and broadening the scope of Article VII(5) for Appendix I specimens, as follows:

- Article VII(4) deals with the import of specimens of Appendix-I species that have been bred in captivity for <u>commercial</u> purposes (sale in pet stores or for pets). These facilities must be registered before they can begin selling their offspring. Once registered, these specimens bred in captivity may be traded for commercial purposes, provided that an export permit is issued consistent with Article IV.

- Article VII(5) deals only with the import of specimens of Appendix-I species bred in captivity for <u>noncommercial</u> purposes (reintroduction to the wild, such as gold lion tamarins at the National Zoo in the United States for reintroduction in Brazil). These need only a certificate of captive breeding; they do not require the issuance of any import or export permits. Significantly, these specimens may be traded for <u>commercial or non-commercial purposes.</u> [157]

Thus, the Parties interpret each paragraph as a distinct exemption, but the basis for the distinction is the nature of the breeding facility—registered commercial breeding facilities may trade pursuant to Article VII(4) and only non-commercial breeding facilities may trade pursuant to Article VII(5), but "non-commercial" facilities may export specimens for commercial purposes. By emphasizing the nature of the facility as the distinction between paragraphs (4) and (5), as opposed to the nature of the trade, the Parties may have read the application of paragraph (5) to Appendix I specimens more broadly than the drafters' intended.

Certainly, it would have been equally plausible to interpret paragraph (4) as applying to trade in Appendix I specimens bred in captivity for commercial purposes and paragraph (5) as applying to trade in Appendix I specimens bred in captivity for non-commercial purposes and trade in all captive-bred Appendix II specimens. In this way, commercial trade under paragraph (4), regardless of the nature of the facility, would require an export permit and an NDF. Trade for non-commercial purposes, with a presumption of less harmful impacts, would need only a certificate, regardless of the nature of the facility. Given the overall distinction in CITES between commercial trade and non-commercial trade, this interpretation would seem more consistent with the structure of CITES.

The potential for the exemptions to be loopholes for trade in wild-caught specimens

[156] *See* SINCLAIR, *supra* note 13, at 114–15.
[157] CITES, *Specimens of Animal Species Bred in Captivity*, at Preamble ¶ 4, Res. Conf. 10.16 (Rev.) (1997).

further supports a narrow reading of Article VII(5). The Parties acknowledge that captive breeding programs may have conservation benefits by reducing poaching of wild species through supplying captive specimens to meet consumer demands.[158] Even though this potential exists, high levels of wild Appendix I specimens continue to be declared as captive-bred and traded contrary to CITES.[159] In fact, some Parties have expressed concern that the commercial trade allowed under paragraphs (4) and (5) of Article VII actually stimulates poaching of many Appendix I species.[160] Oftentimes, wild specimens are easier to obtain, less expensive to produce and preferred by consumers over captive bred specimens. While Parties require captive-bred specimens to be marked in a manner clearly distinguishable from wild specimens, reliable mechanisms to verify claimed origins do not exist.[161] Consequently, the only readily available way to combat elevated levels of Appendix I poaching is through adequate enforcement from all Parties on the national level,[162] and this would only be possible to accomplish if the Parties construed the captive breeding exemptions narrowly.

b. The Role of the Captive Breeding Registry

In order to give full effect to the early understanding of the distinction between Article VII, paragraphs (4) and (5), the Parties adopted a registration process for breeding facilities commercially trading Appendix I specimens under Article VII(4).[163] Parties intended that such a registry would reduce the high volumes of wild Appendix I specimens laundered under the exemption.[164]

Over time, the registration procedure has become overly complex as both the Secretariat and the Parties have become more active in reviewing applications to determine whether specimens produced by a facility qualify as "bred in captivity."[165] Consequently, many Parties

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[158] Res. Conf. 1.6 (Rev.), *supra* note 155, at (b) (identifying benefits of captive breeding in relation to the pet trade); Res. Conf. 8.3, *supra* note 61, at Preamble ¶ 6 (recognizing legal trade of wildlife can provide incentives to reduce poaching).

[159] CITES, *Review of Alleged Infractions and Other Problems of Implementation of the Convention*, ¶ 22, Doc. 9.22 (Rev.) (1994); *see generally id.* at Annex (summarizing alleged infractions, some of which include fraudulent use of the captive breeding exemption).

[160] CITES, *Interpretations and Implementation of the Convention, Exemptions and Special Trade Provisions, Operations that Breed Appendix-I Species in Captivity for Commercial Purposes, Evaluation of the Process for Registration*, at Annex point 6, CoP13 Doc. 56.1 (2004) [hereinafter Report of the Animals Committee].

[161] CITES, *Guidelines for a Procedure to Register and Monitor Operations that Breed Appendix-I Animal Species for Commercial Purposes*, ¶ 11(f), Res. Conf. 12.10 (Rev. CoP14) (2002).

[162] Report of the Animals Committee, *supra* note 160, at Annex point 6.

[163] CITES, *Control of Captive Breeding Operations in Appendix I Species*, at Recommends (a) and (c), Res. Conf. 4.15 (1983) (repealed by Resolution Conf. 8.15 (Rev.), later repealed by Resolution Conf. 12.10 (Rev. CoP14)).

[164] William C. Burns & C. Thomas Duncan Mosedale, *European Implementation of CITES and the Proposal for a Council Regulation (EC) on the Protection of Species of Wild Fauna and Flora*, 9 GEO. INT'L ENVTL. L. REV. 389, 410 & n.153 (1997).

[165] The Secretariat cannot list a breeding facility until evidence is submitted to show compliance with "bred in captivity." The first commercial breeding operation for an Appendix I species must receive a two-thirds majority vote from the Parties to be included in the registry. CITES, *Control Procedures for Commercial Captive Breeding Operations*, Res. Conf. 6.21 (1987). At COP7, the Parties adopted specific procedures and scientific standards for approval by the Parties for first time species listed in the registry. CITES, *Format and Criteria for Proposals to Register the First Commercial Captive-Breeding Operation for an Appendix I Animal Species*, Res. Conf. 7.10 (1989). Parties may object to proposed listing, automatically triggering a review by the Animal Committee. CITES, *Guidelines for a Procedure to Register and Monitor Operations Breeding Appendix-I Animal Species for*

ignore the registry and continue to trade Appendix I specimens from unregistered facilities for commercial purposes.[166] Some unregistered facilities continue to trade under Article VII(4) while others trade high volumes of specimens under Article VII(5).[167]

The Secretariat has long opposed the required registration for commercial breeding facilities and believes that individual Management Authorities should determine a breeding facility's eligibility to trade under Article VII(4).[168] On the one hand, the Secretariat may be right: if Parties continue to blur the application of Article VII, paragraphs (4) and (5), the mandatory requirement for facilities to register seems less useful and the resources invested in maintaining the registration process may no longer be justifiable.[169] However, if the Parties reinterpret paragraph (4) as applying to imports for commercial purposes and paragraph (5) as applying only to imports for non-commercial purposes, then the registry would be a useful compliance and enforcement tool.

VI. The Debate over the Scope of CITES and Marine Species

As the Parties prepare for CoP15, they must contemplate whether to list Atlantic bluefin tuna (*Thunnus thynnus*)[170] and eight shark species[171] in the Appendices and whether to adopt other proposals on marine issues. These proposals are likely to generate great interest because a longstanding dispute exists as to the appropriateness of CITES for regulating trade in marine species. This dispute surfaces whenever the Parties discuss proposals to list marine species on the Appendices or interpret, define, and implement the provisions of the Convention as they apply to marine species. The following section discusses the drafters' clear intent to include marine species within the scope of CITES. It also examines the special provisions of the Convention that apply to certain trade in marine species, offering legal arguments for interpreting these provisions in line with drafters' intent.

A. CITES is a Tool for Managing Trade in Marine Species

CITES regulatory authority over marine species was a contentious issue during the negotiations and many of the same arguments surfaced then as they do now; whereas some

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Commerical Purposes, Res. Conf. 8.15 (Rev.) (1992) (clarifying the roles of the Secretariat, Management Authority submitting the application, and other Parties). Unresolved objections are determined at the next Conference of the Parties by a two-thirds vote. *Id.*

[166] CITES, *Interpretation and Implementation of the Convention, Trade Control, Trade in Appendix-I Species*, at Annex 2 pt. 2, SC54 Doc. 20 (2006).

[167] *Id.* at 21.

[168] CITES, *Review of Resolutions, Annex 12: Resolution Conf. 12.10 (Rev. CoP14), Guidelines for a Procedure to Register and Monitor Operations that Breed Appendix-I Animal Species for Commercial Purposes*, ¶ 7, CoP15 Doc. 18 (2009) ("The Secretariat is of the long-standing opinion that the registration programme for animals is unnecessarily complicated.").

[169] *Id.* (estimating the breeding registry costs $65,000 per year to maintain).

[170] *See* CITES, *Proposal to Include Atlantic Bluefin Tuna (*Thunnus *thynnus (Linnaeus 1758)) on Appendix I of CITES in Accordance with Article II 1 of the Convention*, CoP15 Prop. 19 (2010).

[171] *See* CITES, *Consideration of Proposals for Amendment of Appendices I and II*, CoP15 Prop. 15 (2010); CITES, *Consideration of Proposals for Amendment of Appendices I and II*, CoP15 Prop. 16 (2010); CITES, *Consideration of Proposals for Amendment of Appendices I and II*, CoP15 Prop. 17 (2010); CITES, *Consideration of Proposals for Amendment of Appendices I and II*, CoP15 Prop. 18 (2010).

question whether CITES is the appropriate body to manage trade in marine species, others believe that all species must be protected from over-exploitation due to trade. During the negotiation of CITES, the chairman of the meeting noted that introduction from the sea was "highly controversial,"[172] and it was not until late in the negotiations that an ad hoc committee agreed to the definition of "introduction from the sea" now found in the Convention.[173]

Despite the controversy, the drafters included provisions that specifically apply to the regulation of marine species in international trade, thus evincing clearly the intent for CITES to apply to marine species, whether commercially valuable or not. Because CITES provides for trade concepts, such as "introduction from the sea," which specifically apply to marine species, the argument that CITES is not an "appropriate" fisheries management body is specious and distracting. To be sure, CITES does not intend to manage fisheries; it only intends to regulate trade in those marine species listed on the Appendices, whether another body manages that fishery or not. In fact, the drafters were well aware that the International Whaling Commission and other regional fisheries bodies[174] had jurisdiction to manage the harvest of marine species, yet they agreed to apply CITES to such species anyway.

The definition of "trade" reinforces the view that marine species unequivocally fall within the scope of the Convention. Article I(c) of CITES defines "trade" as import, export, re-export and introduction from the sea. In fact, the drafters specifically included the concept of "introduction from the sea" to control trade in species caught "in the marine environment not under the jurisdiction of any State."

Thus, while CITES clearly covers marine species, it does so with specific accommodations. Although Parties are likely to continue debating the scope of CITES, important, unresolved issues remain and these should be the focus of Parties' efforts. These issues include clarifying the definition of "introduction from the sea"; defining "State of introduction" in order to clarify which State makes the relevant certificate findings; and establishing the relationship between CITES and FAO.

B. The Introduction from the Sea Certificate Process

CITES defines "introduction from the sea" (IFS) as "transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State." Introduction from the sea does not require import or export permits, but rather the issuance of an introduction from the sea certificate by the Management Authority of the State of introduction.[175] A number of issues have been debated over the years, including the definitions

[172] Washington Conference, *supra* note 23, Summary Record — Third Plenary Session, SR/3 (Final), at 3 (Feb. 24, 1973). Japan and the United Kingdom both argued that CITES should not cover marine species. *See id.*; Washington Conference, *supra* note 23, Summary Record — Fifth Plenary Session, SR/5 (Final), at 3 (Feb. 27, 1973) (referencing doc. PA/I/2).

[173] Washington Conference, *supra* note 23, Summary Record — Eighteenth Plenary Session (Feb. 27, 1973), SR/18 (Final), at 1 (Mar. 6, 1973).

[174] Washington Conference, *supra* note 23, PA/XII/3 (Feb. 16, 1973) (statement of Australia); Washington Conference, *supra* note 23, PA/XII/4 (Feb. 16, 1973) (statement of Japan).

[175] CITES, *supra* note 1, at arts. III(5), IV(6).

of: (1) "marine environment not under the jurisdiction of any State," and (2) "State of introduction."

1. "The Marine Environment Not Under the Jurisdiction of any State"

The phrase "the marine environment not under the jurisdiction of any State" is key to interpreting the introduction from the sea provisions of CITES; it ultimately determines where the provisions apply. The Convention does not provide any clear guidance, largely because the drafters did not want to take action inconsistent with ongoing negotiations over the UN Convention on the Law of the Sea. After several years and meetings of the Conference of the Parties, the Parties agreed at COP14 that the phrase means "those marine areas beyond the areas subject to the sovereignty or sovereign rights of a State consistent with international law, as reflected in the United Nations Convention on the Law of the Sea."[176] In adopting this definition, the Parties equated sovereignty and sovereign rights with jurisdiction, and as a consequence, the only areas "not under the jurisdiction of any State" are those where coastal States do not have sovereignty or sovereign rights—in other words, the "high seas."[177]

2. "State of Introduction": Flag States versus Port States

While the adoption of a definition for "outside the marine environment of any State" facilitates implementation of the IFS regime, significant aspects remain unclear or undefined, in part because they directly affect decision-making authority. Article III(5) and Article IV(6) require the Management Authority of the State of introduction to issue the IFS certificate. However, because CITES leaves the term "State of introduction" undefined, the Parties have long been at odds over whether the port State or the flag State is the State of introduction. The tension arises primarily because the State of introduction will have control over the permitting process for marine species taken in the high seas, including many commercially valuable species, such as tunas and sharks. Moreover, many Parties are concerned that if the flag State is the State of introduction, then States with "flags of convenience"[178]—in general States that do not effectively enforce fisheries regulations or that do not implement relevant fisheries agreements—would be making the NDFs and, in the case of Appendix I specimens, the primarily commercial purposes finding.

Although the phrase "State of introduction" is undefined, the definition of "introduction from the sea" offers guidance. The definition uses the phrase "transportation into a State," which clearly describes travel from a place outside of a nation-State into a nation-State. Thus, the "State" for purposes of the introduction from the sea definition is the State into which a specimen is first landed and is cleared through customs. The overall construction of the definition of

[176] CITES, *Introduction from the Sea*, Res. Conf. 14.6 (2007).

[177] The language of the definition derives from the U.N. Convention on the Law of the Sea (UNCLOS). Under UNCLOS, coastal States have sovereignty over their territorial seas—the marine area extending up to 12 nautical miles from their coastlines. United Nations Convention on the Law of the Sea art. 3, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. They also have "sovereign rights" to manage living and non-living resources in their exclusive economic zone (EEZ), an area up to 200 nautical miles from the coastline but excluding the territorial sea. They also have "sovereign rights" to living and non-living resources on the continental shelf—the sea-bed and subsoil of the sub-marine areas that extend beyond the territorial sea.

[178] Black's Law Dictionary defines "flag of convenience" as a "national flag flown by a ship not because the ship or its crew has an affiliation with the nation, but because the lax controls and modest fees and taxes imposed by that nation have attracted the owners to register it there." BLACK'S LAW DICTIONARY 714 (9th ed. 2009).

"introduction from the sea" supports this conclusion. The definition contemplates two distinct stages. The first stage occurs when a specimen is "taken from the marine environment not under the jurisdiction of any State." This part of the definition clearly refers to harvesting a specimen on the high seas and taking it aboard a fishing vessel. The second stage that the definition contemplates is the "transportation into a State" of the specimen. If the drafters intended "State of introduction" to mean the flag State, then they would not have needed to add the phrase "transport[ed] into a State": introduction from the sea would occur as soon as the specimen is "taken from the marine environment not under the jurisdiction of any State."[179] In addition, if "transportation into a State" means transport from the marine environment onto a fishing vessel, then the first element of the definition of "introduction from the sea" is redundant.

Thus, the definition of "introduction from sea" makes clear that the port State, the State into which the marine species is landed and clears customs, is the "State of introduction." For both Appendix I and II specimens, "[t]he introduction from the sea of any specimen … require[s] the prior grant of a certificate from a Management Authority of the State of introduction."[180] The drafters clearly linked "State of introduction" to "introduction from the sea" in the same way that they linked import permits to the State of import, export permits to the State of export, and re-export permits to the State of re-export. Thus, because the definition of "introduction from the sea" includes the phrase "transportation into a State," the State of introduction is the same State into which the specimen is transported—namely, the port State.

As the International Court of Justice has said, "When the Court can give effect to a provision of a treaty by giving the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning."[181] Others have phrased the rule as a prohibition against seeking alternative meanings where the ordinary meaning does not lead to absurd conclusions: "When a deed is worded in clear and precise terms—when the meaning is evident, and leads to no absurd conclusion—there can be no reason for refusing to admit the meaning which such deed naturally presents."[182] Because the drafters could have easily characterized the "State" for IFS purposes as the flag State or some other State, the suggestion that the State of introduction is the flag State is legally unfounded.

Despite this clear link between the port State and the State of introduction, some Parties—even a few of those that agree that "transportation into a State" refers to the port State—nonetheless argue that the term "State of Introduction" is sufficiently ambiguous and that the Convention provides sufficient flexibility to define "State of introduction" as the flag State. Supporters of this view believe that the flag State is more likely to have biological information to make an appropriate NDF. However, a determination that the flag State is the State of introduction would require the vessel to somehow be part of the territory of the flag State, but

[179] Wm. Carroll Muffett, "Trade in Humpback Whales as an Introduction from the Sea Under CITES" (undated) (on file with author).

[180] CITES, *supra* note 1, at art. III(5).

[181] Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 4, 8 (Mar. 3).

[182] EMER DE VATTEL, THE LAW OF NATIONS, VOL. II, § 263 (C.G. Fenwick trans., Carnegie Institution of Washington 1916); *see also* Shabtai Rosenne, Note, *The Election of Five Members of the International Court of Justice in 1981*, 76 AM. J. INT'L L. 364, 365 (1982) ("It is a cardinal principle of interpretation that a treaty should be interpreted in good faith and not lead to a result that would be manifestly absurd or unreasonable.").

this conclusion is inconsistent with international law. Customary international law has never treated a vessel flagged by a State as an extension of the flag State's territory. To the contrary, international law provides that a vessel has only the nationality of the flag State. Moreover, a flag State's jurisdiction over a vessel does not confer territoriality, contrary to what some Parties suggest.[183] Additionally, while the United Nations Convention on the Law of the Sea refers to flag States' "exclusive jurisdiction on the high seas,"[184] flag States have never actually had complete or exclusive jurisdiction over vessels. Rather, flag States have, in effect, primary jurisdiction.[185] As such, defining the port State as the State of introduction is the only possible legal conclusion, and such a conclusion does not offend notions of flag State jurisdiction.[186]

C. CITES and the Food and Agriculture Organization

Even if CITES clearly applies to marine species and the Parties define the key terms relevant to trade in marine species, some Parties continue to argue that CITES should not manage trade in marine species. These Parties claim that CITES does not have the requisite expertise to regulate trade in marine species and that fisheries bodies are better placed to manage marine species. To coordinate policy and to manage trade in species more efficiently, CITES has entered into a Memorandum of Understanding (MoU) with the Food and Agriculture Organization (FAO).[187]

The MoU helps implement Article XV(2)(b), which directs the Secretariat, upon receiving proposals to list species in the appendices, to consult with relevant inter-governmental bodies with a view to obtaining scientific data these bodies may be able to provide.[188] The CITES-FAO MoU provides that:

> "[t]he FAO will work together with CITES to ensure adequate consultations in the scientific and technical evaluation of proposals for including, transferring or

[183] The idea that a ship constitutes the "floating territory" of a flag State is a fiction that has never been accepted in international law; in fact, legal scholars have referred to this idea as a "fiction" that has been "exploded" long ago. *See e.g.*, Sompong Sucharitkul, *Liability and Responsibility of the State of Registration or the Flag State in Respect of Sea-Going Vessels, Aircraft and Spacecraft Registered by National Registration Authorities*, 54 AM. J. COMP. L. 409, 416 (2006). In fact, "the flag State confers *nationality* on a ship, not territoriality." International Environmental Law Project, *Understanding Introduction from the Sea* 12 (May 18, 2009) (unpublished manuscript, on file with authors).

[184] UNCLOS, *supra* note 177, at art. 92.

[185] "Exclusive jurisdiction" is another legal fiction, one used to allow the flag State an enforcement capacity over ships flying its flag on the high seas, where no other authority exists. In practice, international law has recognized numerous instances in which non-flag States may exercise their authority on foreign ships, as in "instituting blockades and seizing contraband during times of war, verifying the flag of a suspicious ship, exercising the right of pursuit for violation of law within its territorial waters, or preventing the abuse of its flag without authority." International Environmental Law Project, *supra* note 183, at 14–15.

[186] The conclusion in no way upsets flag State control over its vessels. Flag States are free to impose whatever restrictions they wish on vessels flying their flag. Flag States may wish to pursue whatever enforcement actions concerning violations of fisheries law they want. Issuance of IFS certificates, as with sanitary and phytosanitary requirements that confirm a product is pest or disease free, is only about trade and the entry of goods into the port State.

[187] Memorandum of Understanding between the Food and Agriculture Organization of the United Nations (FAO) and the CITES Secretariat (2006), *available at* http://www.cites.org/eng/disc/sec/FAO-CITES-e.pdf.

[188] *Id.* ¶ 1, 4.

> deleting commercially-exploited aquatic species in the CITES Appendices based on the criteria agreed by the Parties to CITES, and both signatories will address technical and legal issues relating to the listing and implementation of such listings."[189]

FAO has embraced its role and provides thorough reviews of species proposals. Nonetheless, FAO's scientific and technical evaluation provides just one source of information for the Parties to evaluate when deciding whether to list a species in the CITES Appendices. The CITES Parties, at the end of the day, must evaluate for themselves whether they believe a species meets the criteria for inclusion in the Appendices.

VII. Carrots and Sticks: The Review of Significant Trade

Compliance with the monitoring and documentation requirements of Article IV lies at the very heart of the Convention's effectiveness. Even though Appendix II species, unlike those of Appendix I, are not threatened with extinction, the danger that Appendix II species may become threatened if their trade is not regulated appropriately is the driving force behind their listing in the first place.[190] The Secretariat itself has acknowledged that "[e]very transfer of a species from Appendix II to Appendix I can . . . be considered as an example of the failure of the Parties to fulfill their obligations under the Convention."[191] As early as 1979, many Parties expressed concern that certain Appendix II species were traded at unsustainable levels.[192] Australia voiced even stronger unease at COP3 when it stated its fear that "the Convention is simply documenting the decline of Appendix II species in spite of the fact that Article IV, paragraph 3 . . . should prevent any decline once a species is listed in Appendix II."[193]

The Review of Significant Trade (RST) emerged as the principal means of ensuring the Parties complied with Article IV requirements, thus mitigating the danger that trade in Appendix II species would endanger their status in the wild. Although not contemplated explicitly by the Convention, the Parties developed the RST to facilitate compliance with the non-detriment finding requirement for Appendix II specimens. The Parties have discussed the problem of significant trade in Appendix II specimens since COP2 in 1979.[194] By COP8, the Parties established a formal process for reviewing the biological and trade status of Appendix II animals. The RST, now implemented through Resolution Conf. 12.8 (Rev. CoP13), "is the guiding mechanism for remedial action when there is reason to believe that Appendix II species are being traded at significant levels without adequate implementation of Article IV."[195]

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[189] *Id.* ¶ 4.

[190] *See* CITES, *supra* note 1, at art. II(2).

[191] WIJNSTEKERS, *supra* note 24, at 80.

[192] CITES, *Review of Recommendations to Suspend Trade and Implementation of Related Measures by Range States*, at iii, SC57 Doc. 29.2, Annex 2 (2008).

[193] REEVE, *supra* note 146, at 159 (quoting CITES, *Regulation of Trade in Wildlife Listed on Appendix II*, Doc. 3.25 (1981)).

[194] CITES, *Trade in Appendix II and III Species*, ¶ (a), Res. Conf. 2.6 (1979) (allowing individual Parties to ask the Secretariat for assistance if they deemed that an Appendix II or III was "being traded in a manner detrimental to the survival of that species.").

[195] CITES, *Introduction to Resolution Conf. 12.8*, at 1, AC19 Doc. 8.1 (2003).

The RST is structured around two key principles. First, the Parties have long recognized the value of Appendix II species and the benefits of managing these species sustainably.[196] Second, the Parties have recognized that continued lack of compliance with Article IV contributes to the decline of Appendix II species in the wild[197] and that encouraging compliance may require strong incentives.

To support these principles, the RST includes both "carrots" and "sticks." After review of selected species of concern, the Animals Committee and the Standing Committee make recommendations to facilitate compliance with Article IV's requirements by struggling Parties.[198] These recommendations often include offers to encourage compliance, such as technical assistance. If these efforts to facilitate compliance fail, then the RST process allows the Parties to suspend trade in Appendix II species of concern with non-compliant Parties.[199] Ultimately, the review of significant trade in Appendix II species seeks to achieve Article IV compliance by judicious application of both carrot and stick.

In large part the success of CITES has depended on the Parties' willingness to impose trade suspensions on recalcitrant Parties. However, there is growing concern that the Secretariat and some Parties and interest groups have successfully generated an aversion to the use of "sticks," even in the face of persistent non-compliance. In particular, at the 57th meeting of the Standing Committee (SC57), the Secretariat recommended dropping trade suspensions for a number of countries, even though they had not complied with the Animals Committee recommendations for implementing Article IV.[200] These proposals present a shift from the historical purpose of RST—namely, to ensure that Parties engaging in trade in Appendix II species do not do so in disregard of the NDF.

A. Balancing Carrots and Sticks: An Overview of Review of Significant Trade

The initial stages of the review process focus on consultation, capacity-building, and oversight. Species enter the RST process if trade data indicates that they are traded at levels that are of concern to the Animals or Plants Committee.[201] After an initial consultation with the relevant Party to determine any potential non-compliance, the Secretariat proposes to categorize the species into one of three categories: species of urgent concern, species of possible concern, and species of least concern.[202] The Animals or Plants Committee finalizes the categorizations

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[196] CITES, *Regulation of Trade in Appendix II Wildlife and Implementation of Article IV*, ¶ 3, Res. Conf. 4.7 (1983).

[197] CITES, *Interpretation and Implementation of the Convention, The Trade in Wild-Caught Specimens*, at 1, Doc. 8.35 (1992).

[198] CITES, *Trade in Specimens of Appendix-II Species Taken from the Wild*, Resolution Conf. 8.9 (Rev.) at Directs to the Animals Committee and the Plants Committee, (b) and (c) (2000) [hereinafter Res. Conf. 8.9 (Rev.)]; CITES, *Review of Significant Trade in Specimens of Appendix-II Species*, Resolution Conf. 12.8 (Rev. CoP13), at (m)-(p) (2004) [hereinafter Res. Conf. 12.8 (Rev. CoP13)].

[199] Res. Conf. 8.9 (Rev.), *supra* note 198, ¶ 11(f); Res. Conf. 12.8 (Rev. COP13), *supra* note 198, ¶ 7(s).

[200] *See* CITES, *Interpretation and Implementation of the Convention, Species Trade and Conservation, Review of Significant Trade, Review of Recommendations to Suspend Trade More than Two Years Ago*, SC57 Doc. 29.2 (Rev. 1) (2008) [hereinafter SC57 Doc. 29.2 (Rev. 1)].

[201] Res. Conf. 12.8 (Rev. CoP13), *supra* note 198, ¶¶ 7(a)–(c).

[202] "Species of urgent concern" include those species "for which the available information indicates that the provisions of Article IV, paragraph 2(a), 3 or 6(a), are not being implemented." *Id.* ¶ 7(i)(i). "Species of possible

and drops the species of least concern from the review process.[203] Eventually, the Animals or Plants Committee, in consultation with and based on the recommendations of the Secretariat, makes recommendations to the Parties in the RST process and imposes timelines for demonstrating compliance.[204] The goal at this stage is to help a Party collect the necessary biological information and implement any necessary trade restrictions, such as export quotas. This effort is a manifestation of the "carrot" approach to non-compliance; it involves capacity-building, expert consultation, and other supportive measures to encourage compliance with Article IV.[205]

If Parties have implemented the recommendations to the satisfaction of the Secretariat and the Chair of the Animals or Plants Committee, the Secretariat, in consultation with the Chairman of the Standing Committee, removes the species from the RST.[206] If a Party has not implemented the recommendations, however, the Standing Committee, based on recommendations from the Secretariat, may recommend "appropriate action," including "as a last resort" suspending trade in the species of concern from the non-compliant State.[207] This applies to species categorized as either "species of urgent of concern" or "species of possible concern."[208]

Thus, if a Party is unwilling or unable to demonstrate sufficient capacity to make meaningful NDFs, it may face a suspension of all trade in that species. This is the stick; the threat of trade suspensions is intended to incentivize compliance. Once the Parties impose a trade suspension, the lack of willing importers for species should pressure the country to comply with the RST recommendations. If the State demonstrates compliance with the recommendations and the capacity to implement the NDF requirement, the Standing Committee then withdraws the recommendation to suspend trade.

B. The Importance of the "Stick": Trade Suspensions in Place for Longer than Two Years

Trade suspensions are the most severe penalty that the Parties may impose, and they have proven to be extraordinarily effective at encouraging compliance with the Convention. Most Parties want to avoid trade suspensions because they diminish the economic value of CITES-listed species in international trade. They also stigmatize a country. However, in certain instances, even the imposition of a trade suspension may not lead to compliance. Resolution Conf. 12.8 (Rev. CoP13) specifically contemplates this. The Standing Committee, based on the recommendations and advice of the Secretariat, must review trade suspensions that have been in effect for more than two years and "take measures to address the situation."[209]

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concern" include those species "for which it is not clear whether or not these provisions are being implemented." *Id.* ¶ 7(i)(ii). "Species of least concern" include those species "for which the available information appears to indicate that these provisions are being met." *Id.* ¶ 7(i)(iii).

[203] *Id.* ¶ 7(k)–(l).
[204] *Id.* ¶ 7(m)–(p).
[205] *Id.* ¶ 7(n)–(o).
[206] *Id.* ¶ 7(q)–(r).
[207] *Id.* ¶ 7(s).
[208] *Id.*
[209] *Id.* ¶ 7(v).

The resolution clearly contemplates prolonged non-compliance, and it recognizes that in these special cases, the Standing Committee may have to reengage with a Party to encourage and facilitate implementation of the RST recommendations. The plain language of the resolution states this: the Standing Committee must "take measures to address the situation." At the Standing Committee meeting in 2008, the Secretariat reviewed trade suspensions that had been in place for longer than two years and in some cases, simply proposed that the Standing Committee recommend the lifting of the suspension without any prior-existing evidence of compliance.[210] In some instances, the Secretariat recommended lifting the trade suspension despite a lack of compliance with the Animals or Plants Committee recommendations because the affected State had implemented protective measures. Examples include categorizing the species as "vulnerable" under domestic endangered species law and instituting capture and export bans, as in the case of the red-masked parakeet (*Aratinga erythrogenys*) in Peru,[211] or allowing the harvesting of wool only from live animals, as in the case of guanacos (*Lama glama guanicoe*) in Argentina.[212]

For a few other cases, however, such as the hippopotamus (*Hippopotamus amphibius*) or the leopard tortoise (*Stigmochelys pardalis*) in the Democratic Republic of Congo (DRC), the Secretariat recommended lifting the trade ban despite declining populations and a complete lack of response from the Management Authority, as long as the Management Authority agrees not to issue export permits until it has established an NDF process that satisfies the Secretariat and the Chairman of the Animals Committee.[213] In other words, the Secretariat recommended lifting the trade suspension on a condition, but the conditions were such that they could not be met or reviewed at the Standing Committee meeting. In effect, the Party, after years of being in the RST process, left it without having changed its practices. This is not only likely to be detrimental to the survival of the species but also leaves the impression that Parties must simply wait out the process.

Many advocates charged that these recommendations violated the process set out in Resolution Conf. 12.8. Moreover, they expressed concern that the Secretariat viewed its role as relieving a Party of a trade suspension merely because the suspension was burdensome and that the Secretariat intended to facilitate rather than control trade.[214] In this case, the Secretariat recommended that the Parties resume trade that would likely contravene the non-detriment finding obligations. Finally, the Secretariat's recommendations set dangerous precedent and undermine more than two decades of efforts to place compliance with the non-detriment finding requirement at the forefront of ensuring the effectiveness of Appendix II listings. The Secretariat's approach not only disproportionately favors the use of carrots over sticks, it is manifestly contrary to the Parties' intent in devising RST because it is likely detrimental to the survival of the species.

VIII. Multilateralism vs. Unilateralism: Stricter Domestic Measures

[210] SC57 Doc. 29.2 (Rev. 1), *supra* note 200.
[211] *Id.* at 10.
[212] *Id.* at 3.
[213] *Id.* at 3–4.
[214] Rosalind Reeve et al., *Legal Analysis Interpreting Paragraph (v) of Res. Conf. 12.8 (Rev. CoP13)* (2008) (unpublished manuscript, on file with the authors).

While CITES establishes a common framework for protecting listed species from over-exploitation due to trade, the treaty also specifically provides that Parties may deviate from this framework.[215] Article XIV(1) states that Parties may adopt "stricter domestic measures regarding the conditions for trade, taking possession or transport of specimens of species . . . or the complete prohibition thereof."[216] The effect of this provision is indisputable: the Parties retain their sovereign rights to adopt national legislation that is stricter than required by CITES. Nonetheless, those Parties that view the objective of CITES as facilitating legal trade, as well as the Secretariat, have catalyzed a debate about the Parties' implementation of this provision. Although the debate over stricter domestic measures originates in the sustainable use debate and southern African discontent with CITES, the issue now has been framed as pitting CITES' multilateral cooperative framework against unilateral, domestic action.

Treaty provisions that protect the sovereign rights of States to enact domestic measures that are stricter than the relevant treaty are common because international agreements generally set minimum, not maximum, standards. In other words, multilateral agreements set floors not ceilings against which to compare domestic actions.[217] In the CITES context, developed and developing countries alike have adopted a wide range of stricter domestic measures for imports[218] and exports.[219] For much of CITES' history, the only issue that has arisen regarding

[215] *See* CITES, *supra* note 1, at art. XV(3) (Parties may make reservations with respect to amendments).

[216] *Id.* at art. XIV(1)(a). While this provision specifically applies to species listed in the CITES Appendices, paragraph (1)(b) provides that Parties may also adopt "domestic measures restricting or prohibiting trade, taking possession, or transport of species not included in Appendices I, II, or III." *Id.* at art. XIV(1)(b).

[217] In the words of Professor David Favre, "CITES provides a floor or minimum level of protection for the species listed." FAVRE, *supra* note 148, at 302. When international agreements establish maximum standards, they do so expressly. *See e.g.*, UNCLOS, *supra* note 177, at art. 211(6)(c) (prohibiting States from adopting laws and regulations relating to design, construction, manning, or equipment standards "other than generally accepted international rules and standards").

[218] Japan and Australia require import permits for trade in some Appendix-II species. CITES, *Stricter Domestic Measures*, ¶ 8, SC54 Doc. 37 (Rev. 1) (2006) [hereinafter SC54 Doc. 37 (Rev. 1)]. Australia, for example, has declared that it currently treats all populations of African elephants (*Loxodonta africana*) and all species of the order *Cetacea* (whales, dolphins, and porpoises) as Appendix I specimens, even though some populations of African elephant and some cetacean species are included in Appendix II. David Kemp, Minister for the Environment and Heritage, "Declaration of stricter domestic measure," (Nov. 29, 2001); Ian Gordon Campbell, Australian Minister for the Environment and Heritage, "Declaration of stricter domestic measure," (Jan. 25, 2007). These declarations were made pursuant to subsection 303 of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act). *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) s 303; *Cf.* U.S. Wild Bird Conservation Act of 1992, §§ 101–117, Pub. L. No. 102-440, 106 Stat. 2224 (1992) (codified as amended 16 U.S.C. §§ 4901–16 (2000)) (barring imports of CITES-listed birds until a sustainable management plan has been approved). The EU also maintains a number of stricter domestic measures. *See* Council Regulation (EC) No. 338/97 of 9 December 1996 on the protection of wild fauna and flora by regulating trade therein, Official Journal L 061, 03/03/1997 P. 0001–0069.

[219] *See e.g.*, CITES, Notification to the Parties, No. 2009/053 (Dec. 22, 2009) (notifying the Parties that Peru has banned "the export of specimens of all species of wild orchids and cacti is prohibited, except for cut flowers, specimens intended for scientific research and artificially-propagated specimens."). Brazil and Kenya have banned "the export of wild animals for commercial purposes." SC54 Doc. 37 (Rev. 1), *supra* note 218, ¶ 8. Papua New Guinea has banned export of orchids. CITES, *Notification to the Parties*, No. 629 (1991). Egypt has banned the export of certain reptiles and mammals. CITES, *Notification to the Parties*, No. 662 (1992); CITES, *Notification to the Parties*, No. 707 (1992). Indonesia has banned the export of any Ramin wood unless it is from a specific company that utilizes sustainable harvest mechanisms. CITES, *Notification to the Parties*, No. 2005/007 (2005). The Dominican Republic has notified the CITES parties that it bans the export of any Queen Conch meat during a

the implementation of this provision is transparency. To address this concern, the Parties adopted a resolution advising that the Secretariat receive copies of stricter domestic laws.[220]

Despite little controversy in 35 years of CITES implementation, the Secretariat reported in 2006 that "some [CITES] exporting countries believe that importing countries should not establish stricter domestic measures."[221] In outlining the problem, the Secretariat explained that the use of stricter domestic measures has caused confusion for Parties seeking to conduct trade under CITES; that stricter domestic measures have raised "concerns about transparency, necessity, equity, coherence and proportionality"; and that they have raised questions about the "compatibility of [SDMs] with the rules of the World Trade Organization (WTO)."[222] Further, the Secretariat expressed concern that such measures may be broader than necessary to achieve their goals.[223]

The Secretariat, as well as some exporting countries and activists, complain that the use of stricter domestic measures in particular ignores the multilateral, cooperative process established by CITES[224] and the opinions of the other Parties.[225] They also claim that import-related stricter domestic measures devalue a species and thus destroy incentives for conserving the species and the habitat on which it depends. For example, they have suggested that "import bans . . . remove the option for countries to invest in developing well-managed programmes in which sustainable trade in wild birds provides economic incentives to counter the threats of conversion of wild lands to intensive uses such as agriculture."[226]

These statements may be legitimate complaints about specific domestic actions, but they are inadequate to prevail over the plain meaning of Article XIV(1). History supports this conclusion: all six drafts of the treaty maintained the Parties' right to enact stricter domestic measures.[227] In fact, the changes the drafters did make to the provision support the conclusion that this provision should be read broadly. While the first four drafts specified that Parties may take stricter domestic measures for "import and export," the final two drafts, and indeed the final text, expand that to "trade," suggesting that drafters intended for Parties to have broad authority

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specific closed season. CITES, *Notification to the Parties*, No. 1999/50 (1999).

[220] CITES, *Proof of Foreign Law*, Res. Conf. 4.22 (1983) ("RECOMMENDS that: a) Parties informing the Secretariat of the existence, adoption or amendment of stricter domestic measures provide the Secretariat with a copy of the laws, regulations, decrees, and other documents establishing such measures, any interpretation and other information which may be of assistance in understanding such measures, citations to such laws, regulations, decrees, and other documents, and the name, address, telephone and fax numbers, and email address of the government organization and official responsible for implementing such measures; and b) Parties informing the Secretariat of the invalidity, deficiency or special requirements of permits and certificates do so in a signed statement containing the name, address, telephone and fax numbers, and email address of the government agency and official responsible for granting the relevant permits and certificates; and REQUESTS that the Secretariat attach copies of the information submitted by the Parties mentioned in paragraphs a) and b) to the relevant notifications it circulates to the Parties.").

[221] SC54 Doc. 37 (Rev. 1), *supra* note 218, ¶ 7.

[222] *Id.* ¶ 9.

[223] *Id.* ¶ 10.

[224] Jon Hutton, *CITES: The Issue of Endangered Species*, *in* TRADE, ENVIRONMENT AND SUSTAINABLE DEVELOPMENT 143 (Peider Könz ed., 2000).

[225] Rosie Cooney & Paul Jepson, *The International Wild Bird Trade: What's Wrong with Blanket Bans?*, 40 ORYX 18, 20 (2006).

[226] *Id.*

[227] Heather Mitchell, History of CITES (1977) (unpublished manuscript, on file with author).

under this provision.[228]

Moreover, stricter domestic measures are an important means for furthering the objectives of CITES. Stricter domestic measures enhance efforts to protect species from over-exploitation, both through unilateral action and through unilateral support of multilateral decision-making. During the 1980s, the United States, Japan, and the European Union banned imports of African elephant ivory, which helped stem the rapid decline of African elephants and catalyzed efforts to include them in Appendix I of CITES. [229] Additionally, stricter domestic measures support the Standing Committee's recommendations to implement compliance measures, including trade suspensions, when a Party is failing to meet its treaty obligations.[230]

Finally, import-related stricter domestic measures do not encroach on another State's right to exploit its natural resources. An import restriction, even one conditioning access to the importer's market on meeting certain environmental standards, neither restricts the exporting State's right to exploit its resources nor its ability to trade with any other State. The importing State is merely exercising its own sovereign right to regulate trade into its own territory. Moreover, the importing State may want to ensure that it is not the cause of detrimental exploitation. With respect to the EU's bird ban, for example, EU consumers constituted at least 92 percent[231] of a vast global market in CITES-listed, wild caught birds.[232] With its bird ban, the EU opted out of the market without infringing on whatever management practices, including exports, range States consider appropriate.[233] The import ban acted as notice that "the EU would simply no longer be party to driving their bird populations to the brink of extinction."[234] Moreover, as several exporting countries had banned the export of their wild birds, the EU ban could also be considered as a cooperative action to support those export bans.[235]

The vast majority of Parties agree that stricter domestic measures are an integral and useful part of CITES. In fact, Botswana withdrew its proposal at COP8 after it "acknowledged the right of Parties to take stricter domestic measures."[236] When the Secretariat recommended at COP12 that Parties avoid the application of stricter domestic measures, the proposal failed by an 18-44 vote.[237] Perhaps sensing that the Parties would continue to resist close scrutiny of stricter

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[228] *Id.*

[229] *See* Peter H. Sand, *Whither CITES? The Evolution of a Treaty Regime in the Borderland of Trade and Environment*, 8 EUR. J. INT'L L. 29, 44 (1997) (asserting that the combination of successive unilateral import bans by ivory consuming nations and strong lobbying by non-governmental organizations led to the listing of the African Elephant as an Appendix I species in 1989).

[230] *Id*. at 38–39.

[231] Species Survival Network, *Fast Facts on the Wild Bird Trade and the European Union: 2000–2003*, Mar. 30, 2005, http://www.ssn.org/Documents/news_articles_EUbirdtrade_EN.htm (last visited Mar. 9, 2010).

[232] "Over one million exotic birds of [over] 1,000 species are legally traded around the world on an annual basis. If trade in non-CITES birds and post-capture mortality are included the number is many times that figure: 5–10 million birds per year are captured from the wild, primarily for the commercial pet trade." James D. Gilardi, *Captured for Conservation: Will Cages Save Wild Birds? A Response to Cooney & Jepson*, 40 ORYX 24, 24 (2006).

[233] *Id.*

[234] *Id.*

[235] *Id.* (stating that "many exporting countries have prohibited the export and commercial exploitation of their wild birds, notably Brazil, Argentina and, recently, Indonesia").

[236] CITES, *Summary Report of the Committee II Meeting*, Com. II 8.11 (1992).

[237] CITES, *Committee II Meeting*, CoP12 Com.II Rep. 2 (2002) (reporting on the discussion and vote on document CoP12 Doc. 18, which proposed a draft resolution to control the use of stricter domestic measures).

domestic measures, the Secretariat expanded the scope of the paper to focus on the "promotion of multilateral measures."[238] In addition to stricter domestic measures, the Parties have charged the Secretariat with reviewing reservations and implementation of resolutions. The Secretariat seeks to continue the operation of the Working Group on Multilateral Measures, which to date has failed to meet for lack of a chair.[239] The Working Group would be tasked with reviewing an externally-funded paper, to be prepared by a consultant, that assesses "the scope for multilateral processes that reduce the need by Parties for resource to stricter domestic measures and reservations."[240]

Despite its inherent multilateral nature, CITES explicitly establishes a common baseline for managing international wildlife trade, and it explicitly recognizes that Parties may want to regulate trade more strictly for either the purpose of furthering the objective of preventing over-exploitation of wildlife or for any other purpose.[241] The Secretariat's push for Parties to limit their use of stricter domestic measures is fundamentally misguided, and it potentially distracts and even detracts from programs, such as Review of Significant Trade, that Parties have time and time again agreed are important multilateral efforts in support of the object and purpose of CITES.

That said, if the Secretariat's work moves forward and a majority of Parties desire a policy statement on the use of stricter domestic measures, they might consider a few general guidelines that may assist Parties in avoiding criticism of unilateral measures. First, Parties should design their stricter domestic measures and reservations to promote conservation rather than to protect domestic industries. Second, if a Party applies an import-related stricter domestic measure to a specific species, it should ensure that the same species is regulated similarly within its own jurisdiction. If a Party applies import-related stricter domestic measures to specific populations of a species, it should ensure that those populations have similar biological, management, or trade concerns. Countries affected by stricter domestic measures should be provided opportunities for consultation. Overall, however, the use of stricter domestic measures is plainly contemplated by the treaty and any attempt to further clarify the provision should be of low priority.

IX. Back to Basics: A Path Forward

This paper proposes both a framework and blueprint for resolving the tensions miring implementation of CITES. It provides a clear understanding of the object and purpose of the Convention: CITES is fundamentally and exclusively aimed at preventing the over-exploitation of species in international trade—the plain language of the treaty, the drafters' intent, and the general structure of the permit regime support this conclusion. The Parties must implement CITES' technical provisions based on this understanding of the object and purpose in order to give effect to the Convention. In this vein, the Parties should eliminate agenda items and programs of work that detract from and divert resources from the core mission of CITES and

[238] CITES, *Cooperation Between Parties and Promotion of Multilateral Measures*, CoP14 Doc. 17 (2007).

[239] CITES, *Cooperation between Parties and Promotion of Multilateral Measures*, at 3, CoP15 Doc. 13 (2010).

[240] *Id.* at Annex.

[241] CITES, *supra* note 1, at arts. XIV(1)(a), XIV(1)(b).

refocus energy on the basics: strict implementation of the CITES provisions, coverage of marine species, meaningful compliance, and recognition that these aspects of CITES represent merely a floor for Parties to control and regulate international trade in flora and fauna.