

# *Fordham Environmental Law Review*

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*Volume 14, Number 2*

2002

*Article 3*

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## CITIES at the Crossroad: New Ivory Sales and Sleeping Giants

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# CITES AT THE CROSSROAD: NEW IVORY SALES AND SLEEPING GIANTS

*Mario Del Baglivo*\*

## I. INTRODUCTION

Since it went into force in 1975, the Convention on International Trade in Endangered Species of Flora and Fauna<sup>1</sup> ("CITES" or "Convention"), has protected tens of thousands of species of endangered and threatened plants and animals from exploitation and extinction. In 1989, in response to the wholesale slaughter of African elephants by poachers primarily for their tusks, the Convention placed the elephant in its most protected category, Appendix I.

The effect of this Appendix I listing, which generally prohibits any commercial exports or imports of living specimens or products of the listed species, was dramatic. The price for ivory dropped throughout the world, taking with it the lure of potential profits from sales of elephant ivory. With the disappearance of a profit motive, poaching of the elephant in Africa and Asia became a sporadic event in the 1990's. For nearly a decade, while the elephant remained cloaked in CITES's highest level of protection, this "Ivory Ban," as it would come to be known, was credited with a resurgence of elephant herds throughout Africa.

However, in a very controversial move, the Convention voted in 1997 to allow Zimbabwe, Namibia, and Botswana to conduct a "one time" sale of stockpiled ivory to Japan. Reports of increases in ivory prices and elephant poaching following this sale led the Parties to CITES to reinstitute the Ivory Ban in 2000 while implementing stud-

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1. International Trade in Endangered Species of Wild Fauna and Flora, Mar. 1, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES or Convention].

ies to try to establish any nexus linking the 1999 sale with increased poaching. At the next Convention of the Parties to CITES (COP 12) held in Santiago, Chile in November 2002, Zimbabwe, Namibia, Botswana and South Africa sought authorization for annual quotas of elephant ivory. Although the Convention denied the request for quotas, Namibia, Botswana and South Africa received permission to conduct another one-time sale of their stockpiled ivory. The ultimate survival of the elephant may well rest upon the final outcome of this debate over future authorized sales of ivory; it is feared the weave of CITES's 1989 cloak of protection of the species will loosen with each successive sale. However, CITES's own existence as an effective treaty also may be threatened by a decision to allow future sales of ivory.

## II. THE ELEPHANT

Elephants belong to the Order Proboscidea and Family Elephantidae.<sup>2</sup> There are two genera of the mammal, the African elephant (*Loxodonta africana*) and the Asian (or Indian) elephant (*Elaphas maximus*).<sup>3</sup>

### A. *The Asian Elephant*

The Asian elephant (*Elaphas maximus*) is the smallest of all elephant species, with each animal weighing on average two to three tons.<sup>4</sup> One may live as long as seventy years without interference from man.<sup>5</sup> Asian elephants currently inhabit India, Sri Lanka, Myanmar (Burma), Indonesia, Thailand, Cambodia, Vietnam, Laos, Malaysia, Nepal, Bangladesh and southern China.<sup>6</sup> There are three subspecies of Asian elephant: *E. m. maximus*, *E. m. indicus*, and *E.*

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2. See LAROUSSE ENCYCLOPEDIA OF ANIMAL LIFE 579-80 (The Hamlyn Publishing Group Ltd. 5<sup>th</sup> ed. 1971) [hereinafter LAROUSSE].

3. See *id.* at 581.

4. See FRIENDS OF THE NATIONAL ZOO, *Asian Elephant*, at <http://www.fonz.org/animals/sppfactsheets/asian-elephant-fact.htm> (last visited Mar. 13, 2003).

5. See LAROUSSE, *supra* note 2, at 580.

6. See FRIENDS OF THE NATIONAL ZOO, *supra* note 4.

*m. sumatranus*.<sup>7</sup> The International Union for Conservation of Nature and Natural Resources (“IUCN”) Species Survival Commission’s Asian Elephant Specialist Group<sup>8</sup> estimates that, at present, there are approximately 38,000 to 51,000 Asian elephants living in the wild.<sup>9</sup>

### B. *The African Elephant*

There are two species of the African elephant, the forest elephant (*Loxodonta africana cyclotis*) and the savannah elephant (*Loxodonta africana africana*).<sup>10</sup> The African savannah elephant is the largest of all land animals, weighing up to six tons.<sup>11</sup> The savannah elephant is found in the grassy plains and bushlands of sub-Saharan Africa<sup>12</sup>, while the smaller African forest elephant lives in the equatorial forests of central and western Africa.<sup>13</sup> The average lifespan of an Afri-

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7. See THE WILD ONES ANIMAL INDEX, *Asian Elephants*, at <http://www.thewildones.org/Animals/elephant.html> (last visited Mar. 13, 2003).

8. See IUCN SPECIES SURVIVAL COMMISSION, *AFRICAN ELEPHANT SPECIALIST GROUP: AFRICAN ELEPHANT DATABASE*, at <http://iucn.org/themes/ssc/sgs/afesg/aed/index.html> (last visited Mar. 13, 2003).

9. See THE WILD ONES ANIMAL INDEX, *supra* note 7.

10. See Hillary Mayell, *DNA Tests Show African Elephants are Two Species*, National Geographic News, Aug. 24, 2001, at [http://news.nationalgeographic.com/news/2001/08/0824\\_twoelephants.html](http://news.nationalgeographic.com/news/2001/08/0824_twoelephants.html) (last visited Mar. 13, 2003). Recent DNA analysis revealing that the forest and savannah African elephant are two separate species has repercussions beyond zoological taxonomy. *Id.* First, the discovery means there are fewer members of each species and, therefore, both are more endangered than once thought. *Id.* Second, only the species *Loxodonta africana africana* is protected by CITES; there is some concern that under current treaty regulations, recognition of a second species could open a loophole that would allow poachers to decimate the *Loxodonta africana cyclotis* population. *Id.*

11. See LAROUSSE, *supra* note 2, at 581.

12. See WORLD WILDLIFE FEDERATION, *African Elephant*, at [http://www.panda.org/resources/publications/species/cites/fs\\_afeleph.html](http://www.panda.org/resources/publications/species/cites/fs_afeleph.html) (last visited Mar. 13, 2003).

13. See *id.*

can elephant, without interference from man, is fifty years.<sup>14</sup> The IUCN Species Survival Commission's African Elephant Specialist Group<sup>15</sup> estimated that, in 1998, there were between 301,773 and 487,345 African elephants alive on the continent.<sup>16</sup>

### *C. Threats From Man*

Elephants are social animals that live in matriarchal groups.<sup>17</sup> Elephants communicate within the group and with other groups by using low frequency calls that carry for six miles.<sup>18</sup> Fighting between elephants is rare.<sup>19</sup> Humans are the only natural enemy of elephants.<sup>20</sup>

#### 1. Loss of Habitat

Habitat destruction by humans poses the greatest risk to the survival of all elephant species in Africa<sup>21</sup> and Asia.<sup>22</sup> Man competes for food and habitat with the elephant.<sup>23</sup> In Africa, the two species of elephant face different threats from habitat destruction.<sup>24</sup> While for-

14. See LAROUSSE, *supra* note 2, at 580.

15. See IUCN SPECIES SURVIVAL COMMISSION, *AFRICAN ELEPHANT SPECIALIST GROUP: AFRICAN ELEPHANT DATABASE 1998*, at <http://www.iucn.org/themes/ssc/sgs/afesg/aed/aed98.html> (last visited Mar. 13, 2003).

16. See World Wildlife Federation, *African Elephant*, at <http://www.panda.org/resources/publications/species/threatened/downloads/AFRICAN4.DOC> (last visited Mar. 13, 2003).

17. See Michael J. Glennon, *Has International Law Failed the Elephant?* 84 *Am. J. Int'l L.* 1 (Jan., 1990.) The African Savannah elephant travels in groups of about ten members. *Id.*

18. Glennon reports that on the same day culling of elephants began in a national park in Zimbabwe, elephants located some ninety miles away began to flee to an opposite corner of the reserve. *Id.*

19. *Id.*

20. *Id.* at 2.

21. See WORLD WILDLIFE FEDERATION, *supra* note 12.

22. See WILD ONES ANIMAL INDEX, *supra* note 7.

23. Scott Hitch, *Losing the Elephant Wars: CITES and the "Ivory Ban,"* 27 *Ga. J. Int'l & Comp. L.* 167, 171 (1998).

24. See Mayell, *supra* note 10.

est elephants are threatened primarily by commercial logging, it is agricultural expansion that poses the greatest loss of habitat threat to African elephants of the savanna.<sup>25</sup> Logging and agricultural development have also significantly decreased the habitat of the Asian elephant.<sup>26</sup> Since approximately 20% of the human population of the earth lives in its range, human settlement is a particularly serious threat to the Asian elephant.<sup>27</sup>

## 2. The Bushmeat Crisis

For centuries Africans have hunted wildlife of all varieties as food for local consumption.<sup>28</sup> In particular, meat from primates has served as a staple of native diets in Africa.<sup>29</sup> However, elephants, antelopes, and many other species have been hunted in Africa for their meat.<sup>30</sup> Once considered a sustainable use of wildlife,<sup>31</sup> the hunting of African fauna for bushmeat has reached levels that threaten to push some endangered species to the brink of extinction.<sup>32</sup> The plentiful supply of firearms throughout war-ravaged areas of Africa has fueled the

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25. *Id.*

26. See IUCN Species Survival Commission, *supra* note 8.

27. See *id.*

28. See CNN, *Rein in Bushmeat Trade, Experts Say* (Apr. 6, 1999), at <http://www.cnn.com/NATURE/9904/06/bushmeat.enn/index.html> (last visited Mar. 13, 2003).

29. See *id.*

30. CNN, *Bushmeat: Logging's Deadly Second Harvest* (Apr. 23, 1999), at <http://www.cnn.com/NATURE/9904/23/bushmeat.enn/index.html> (last visited Mar. 13, 2003). The bushmeat trade flourishes in areas adjacent to logging roads. *Id.* See also Simon Robinson, *The Next Threat: Out of the Jungle and into the Pot* (Apr. 17, 2000), at <http://www.time.com/time/europe/magazine/2000/0417/bushmeat.html> (last visited Mar. 13, 2003). These roads now penetrate forests that were once too dense for easy access by bushmeat hunters. *Id.*

31. See Robinson, *supra* note 30. CITES defines bushmeat as meat for human consumption derived from wild animals. For many Africans living in isolated regions, bushmeat has often served as the only source of animal protein in their diets. Until recently, however, the numbers of wild animals taken for their meat did not pose a risk to the survival of any particular species. *Id.*

32. See *id.*

bushmeat crisis.<sup>33</sup> To make matters worse, meat taken from endangered and non-endangered species has been exported to Europe for retail sale.<sup>34</sup>

### 3. Poaching and The Ivory Trade

In Africa, the elephant is considered a pest because it is a competitor of humans for habitat and food.<sup>35</sup> However, Africans also recognize this “pest” as a potential source of great wealth for their impoverished nations. For one thing, elephants bring tourists and tourists bring much needed foreign currency to struggling African nations. But the greatest potential for turning elephants into revenue in Africa comes from the animal’s ability to produce ivory tusks.<sup>36</sup> At the height of the pre-1990’s popularity of ivory (for use in Asian medicines and aphrodisiacs, as well as for carved crafts and trinkets), as much as 1,000 tons of ivory were exported annually from Africa.<sup>37</sup> Only 10% of that ivory came from “legal” sources, that is, from legal hunting and government culling campaigns.<sup>38</sup> The remainder of this ivory was the product of poaching.

Without doubt, poaching was the greatest immediate threat to the survival of the African elephant as a species during the decade end-

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33. *See id*; *see also*, Gary Strieker, *Wildlife Casualties Add to Death Toll in Congo* (July 24, 2000), at <http://www.cnn.com/2000/NATURE/07/24/congo.wildlife/index.html> (last visited Mar. 13, 2003). During the conflict in the Democratic Republic of Congo in 2000, an estimated force of 35,000 heavily armed soldiers used bushmeat from gorillas, chimpanzees, elephants, and rare okapis as their major food source. Wildlife official reported that ten elephants were killed in one week during this time. Wildlife rangers also reported that in the Kahuzi-Biega National Park, bushmeat poachers had nearly wiped out all the gorillas, elephants, and antelopes that were thriving in the Park immediately before the incursion of the troops into the remote area. *Id.*

34. *See* Robinson, *supra* note 30. In 2000, Germany and Belgium authorities seized bushmeat shipments destined for restaurants popular among African migrants. *Id.*

35. *See* Hitch, *supra* note 23, at 171.

36. *Id.*

37. *Id.*

38. Glennon, *supra* note 17, at 1.

ing in 1989.<sup>39</sup> Between 1979 and 1989, the elephant population in Africa fell from 1,300,000 to 609,000.<sup>40</sup> Just prior to the imposition of the CITES Ivory Ban in 1989, the death toll for African elephants reached 200 animals per day.<sup>41</sup> In fact, the African savannah elephant became extinct in many parts of its range during the 1980's.<sup>42</sup>

During these years of unbridled poaching of African elephants, the price for raw or "unworked" ivory skyrocketed. The 1960's price of five U.S. dollars<sup>43</sup> per pound of ivory rose to 50 dollars in the 1970's and increased to 125 dollars by 1987.<sup>44</sup> Some estimates set the zenith in prices for ivory during this period at 300 dollars per pound.<sup>45</sup> At these prices, the tusks from an older bull African elephant could garner 5,000 dollars in the black market for ivory.<sup>46</sup>

### III. THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF FLORA AND FAUNA

#### A. History

In response to the alarming global decline in both the population and varieties of endangered species of wild animals and plants, the World Conservation Union<sup>47</sup> ("IUCN") drafted the Convention on International Trade in Endangered Species of Flora and Fauna during the late 1960's and early 1970's.<sup>48</sup>

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39. See *id.* at 3. The CITES Ivory Ban went into effect in 1989.

40. Hitch, *supra* note 23, at 172.

41. See *id.*

42. See Joseph R. Berger, *The African Elephant, Human Economies and International Law: Bridging a Great Rift for East and Southern Africa*, 13 GEO. INT'L ENVTL. L. REV. 417, 421 (2001).

43. Hereinafter "dollars."

44. Berger, *supra* note 42, at 423. These prices reflect the major consumer markets for raw ivory in Japan, Hong Kong and parts of Europe.

45. *Id.*

46. *Id.* at 424. This would be the middleman's take. The poachers who killed the elephant would receive about one-tenth of this amount. *Id.*

47. Hereinafter IUCN.

48. Hitch, *supra* note 23, at 175.



CITES was originally developed to meet the urgent challenge of halting the loss of the unique endangered flora and fauna of the Earth. The Preamble to the Convention states simply-but eloquently, the intentions of the Parties and their call to action:

- *Recognizing* that wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come;
- *Conscious* of the ever-growing value of wild fauna and flora from aesthetic, scientific, cultural, recreational and economic points of view;
- *Recognizing* that peoples and States are and should be the best protectors of their own wild fauna and flora;
- *Recognizing*, in addition, that international co-operation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade;
- *Convinced* of the urgency of taking appropriate measures to this end<sup>49</sup>

CITES was initially signed by twenty-one nations in 1973<sup>50</sup> and ratified by ten nations.<sup>51</sup> The Convention entered into force on July 1, 1975.<sup>52</sup> Currently, there are 158 Parties to CITES.<sup>53</sup>

Unlike the Convention on Biodiversity,<sup>54</sup> CITES does not regulate the efforts of Parties to avoid habitat destruction or modification.<sup>55</sup>

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49. CITES, Preamble, 27 U.S.T. 1087, 993 U.N.T.S. 243.

50. Note, *The CITES Fort Lauderdale Criteria: The Uses and Limits of Science in International Conservation Decisionmaking*, 114 Harv. L. Rev. 1769, 1773 (2000); see also CITES, What is CITES?, at <http://www.cites.org/eng/disc/what.shtml> (last visited Mar. 13, 2003). Work on drafting CITES began as the result of a resolution passed at a 1963 IUCN meeting. *Id.*

51. Hitch, *supra* note 23, at 175.

52. *Id.* See also What is CITES? *supra* note 50.

53. See CITES, *The Syrian Arab Republic joins CITES*, at <http://www.cites.org/eng/news/party/syria.shtml> (last visited May 11, 2003). On July 29, 2003, CITES will enter into force for the Syrian Arab Republic making it the 162nd Party to the Convention. *Id.*

54. Convention on Biodiversity, June 5, 1992, 31 I.L.M. 818.

55. See DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 937 (2002). The Convention on Biodiversity re-

Nor does CITES directly or indirectly control the takings of any species of plant or animal. CITES was drafted to provide a regulatory framework to limit world-wide trade in endangered and threatened species and to control trade in other species on a sustainable basis.<sup>56</sup> Regulation of trade in endangered species under CITES is accomplished through a system of permits for the importation and exportation of living specimens of these species and any products derived from them.<sup>57</sup> Currently, some 34,000 species of plants and animals are protected to some extent by the Convention.<sup>58</sup>

Parties join CITES voluntarily.<sup>59</sup> However, Parties to the Convention are legally bound to implement the treaty; each member nation must adopt domestic legislation that implements the rules of CITES.<sup>60</sup>

### B. Regulatory Structure

The trade permit system which serves as the regulatory backbone of CITES is tied to the placement of a particular species on one of three Appendices that list all plants and animals protected by CITES.<sup>61</sup> Placement of a species on a CITES Appendix is, in turn, dependent on the overall viability of the species in its native range.<sup>62</sup>

CITES requires Parties to the Convention to meet every two years.<sup>63</sup> At each biennial meeting, the Parties review the three Appendices to determine whether to add, delete, or move a species from one listing to another.<sup>64</sup> Any amendments to Appendix I or II must be approved by a two-thirds majority of Parties in attendance and

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quires Parties to develop and implement strategies for conserving biodiversity and to integrate these programs into economic planning.  
*Id.*

56. Hitch, *supra* note 23, at 176.

57. *Id.*

58. HUNTER ET AL., *supra* note 55, at 1005.

59. *See id.*

60. *See id.*

61. *See* Hitch, *supra* note 23, at 176.

62. *See id.*

63. *See* Glennon, *supra* note 17, at 12.

64. *Id.*

voting at the meeting.<sup>65</sup> Changes to the Appendices enter into force ninety days after the meeting closes.<sup>66</sup>

Appendix I contains those species of flora and fauna for which the limitations on trade are the strictest.<sup>67</sup> Trade in Appendix I species requires an import permit from the recipient nation, as well as an export permit from the country of origin (trade in Appendix II or III species requires only a permit from the exporting nation.)<sup>68</sup> Under CITES, a species can only be placed on Appendix I if it is “threatened with extinction.”<sup>69</sup> Trade between nations in these species may only take place under circumstances deemed exceptional<sup>70</sup> and only for non-commercial purposes.<sup>71</sup> Any potential threat to the viability of an Appendix I species of plant or animal from trade activity requires Parties to CITES to halt such trade.<sup>72</sup> It is widely accepted that an Appendix I listing serves as a *de facto* ban on all international trade in living specimens or products of a species.<sup>73</sup>

Plant and animal species listed in Appendix II of CITES are those deemed to be less in danger of extinction than Appendix I species.<sup>74</sup> Commercial trade in Appendix II species is allowed by CITES and regulated under the permit system.<sup>75</sup> Parties must closely monitor the effect of trade on these plants and animal species to assess the impact on their viability within the exporting country.<sup>76</sup> Any trade in

65. *Id.*

66. *Id.*

67. *See* Note, *supra* note 50, at 1773.

68. *See How CITES Works*, at <http://www.cites.org/eng/disc/how.shtml> (last visited Mar. 13, 2003).

69. *See* Note, *supra* note 50, at 1773 (quoting CITES art. II, para. 1, 27 U.S.T. at 1092, 993 U.N.T.S. at 245).

70. *See* Note, *supra* note 50, at 1774.

71. *See id.*; *see also* CITES, *supra* note 68. Additionally, in the case of a live animal or plant, it must be prepared and shipped to minimize any risk of injury, damage to health or cruel treatment. *Id.* Also, “the proposed recipient must be suitably equipped to house and care for it.” *Id.*

72. *See* Note, *supra* note 50, at 1774.

73. *See id.*

74. *See id.*

75. *See* CITES, *supra* note 69.

76. *See* Note, *supra* note 50, at 1774; *see generally* *How CITES Works*, *supra* note 68. Under CITES, the goal of controlling trade in

species listed in Appendix II requires accompanying permits stating that the scientific authority of the exporting nation has determined that trade will not be detrimental to the survival of the species.<sup>77</sup>

Appendix III contains species that are protected by at least one member nation.<sup>78</sup> It is the country of origin that primarily controls export of an Appendix III species, i.e. the member nation itself decides what level of trade of an Appendix III species or its products is appropriate, if any.<sup>79</sup> The CITES permit system<sup>80</sup> operates to regulate international trade in Appendix III species by mandating that, upon request by a fellow Party to the Convention, other Parties must monitor importation of the species<sup>81</sup> to assist the requesting exporting nation in controlling illegal trade exports of the species.<sup>82</sup>

CITES does not provide a direct mechanism for global enforcement of Convention rules.<sup>83</sup> Instead, CITES primarily relies on each Party to implement the Convention by adopting national legislation regulating trade in endangered species with other nations.<sup>84</sup> Within

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Appendix II species is to halt utilization incompatible with their survival. *Id.*

77. See Note, *supra* note 50, at 1774; see also *How CITES Works*, *supra* note 68. Again, in the case of a live Appendix II animal or plant, it must be prepared and shipped to minimize any risk of injury, damage to health or cruel treatment. *Id.*

78. See CITES, *supra* note 69.

79. See Note, *supra* note 50, at 1774.

80. See CITES, *supra* note 69.

81. See *The CITES Appendices I, II and III*, at [www.cites.org/eng/append/index.shtml](http://www.cites.org/eng/append/index.shtml) (last visited Mar. 13, 2003).

82. See *id.*; see also *How CITES Works*, *supra* note 68.

83. See Ruth A. Braun, *Lions, Tigers and Bears: [Oh My] How to Stop Endangered Species Crime*, 11 *FORDHAM ENVTL. L.J.* 545, 557 (2000).

84. See *id.*; see also Glennon, *supra* note 17, at 13-4. CITES allows any Party to adopt stricter domestic controls on trade in endangered and threatened species than those required by the Convention, for example the U. S. Endangered Species Act, 16 U.S.C. §§ 1531-1541 (1982). Glennon, *supra* note 17, at 13-4. Under the Act, importation into the United States of any endangered species or their products is prohibited. *Id.* In addition to controls required by participation in CITES, the U. S. Fish and Wildlife Service is authorized to impose additional restrictions on ivory when necessary. *Id.* The De-

their own borders, Parties are required to penalize illegal traffickers and confiscate live specimens and/or products of a species protected under CITES.<sup>85</sup> The Convention, therefore, relies on the internal police powers of each member nation to impose criminal and/or monetary sanctions on persons convicted of illegally exporting or importing living specimens of a protected endangered species or products of the species.<sup>86</sup>

To implement CITES outside their borders, Parties must refrain from trade in endangered species or their products with non-member nations unless the latter uses trade permits comparable to those used by member nations.<sup>87</sup> However, there is no provision in the Convention requiring Parties to sanction offending nations.<sup>88</sup> Rather, CITES merely recommends that Parties penalize<sup>89</sup> countries that engage in trade that violates the Convention.<sup>90</sup>

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partment of the Interior stated in 1988 that, under the Endangered Species Act, the Secretary was permitted to ban the importation of ivory. *Id.* At the time, a complete importation ban of this type far surpassed the CITES restrictions on ivory. *Id.* at 13. The African elephant was moved from Appendix II to Appendix I one year later effectively banning the global ivory trade. *Id.* at 17.

85. See Glennon, *supra* note 17, at 13.

86. See Braun, *supra* note 83, at 558.

87. See Glennon, *supra* note 17, at 12.

88. See Braun, *supra* note 83, at 558.

89. See CITES, *United Arab Emirates: Recommendation to Suspend Trade*, at <http://www.cites.org/eng/notifs/2001/079.shtml> (last visited Mar. 13, 2003). For example, on November 20, 2001, the Secretariat to CITES conveyed its recommendation that "all Parties should refuse any import of specimens of CITES-listed species from and any export or re-export of such specimens to the United Arab Emirates until further notice, because it was evident that the Convention was not adequately implemented there." *Id.*; see also CITES, *List of Contracting Parties* at <http://www.cites.org/eng/parties/alphabet.shtml> (last visited Mar. 13, 2003). CITES went into force in the United Arab Emirates on September 5, 1990 (making it the 104<sup>th</sup> Party to CITES); see also CITES, *Partial Withdrawal of Recommendation To Suspend Trade With The United Arab Emirates* at [http://www.cites.org/eng/news/sundry/uae\\_suspension\\_partial\\_withdrawal.shtml](http://www.cites.org/eng/news/sundry/uae_suspension_partial_withdrawal.shtml) (last visited Mar. 13, 2003). Because "the United Arab Emirates has made great progress towards putting into place the leg-

Critics who charge that CITES is ineffective in stopping illegal trade in endangered and threatened species (and their products) often point out that “regulation” of the trade too often falls far short of “prohibiting” the trade.<sup>91</sup>

One controversial feature of CITES makes total prohibition of trade in an endangered or threatened species virtually impossible. Any member State may make a unilateral statement, or reservation, that it will not be bound by the provisions of the Convention regulating trade in a particular species or product of a species.<sup>92</sup> Once a Party “takes” a reservation on a particular species, it is not considered a Party to the Convention for that species<sup>93</sup> and may engage in exports and imports of the species.

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islative and operational measures necessary to ensure correct implementation of CITES,” the Secretariat announced the decision to lift the trade sanctions in a three phase process was made in March 2002.

90. See Braun, *supra* note 83, at 557; see also Amy E. Vulpio, *From the Forests of Asia to the Pharmacies of New York City: Searching for A Safe Haven for Rhinos and Tigers*, 11 GEO. INT’L ENVTL. L. REV. 463, 479-80 (1999). To date, the United States is the only country that has used trade sanctions against another nation to protect endangered species. *Id.* In 1994, in response to a burgeoning “illegal trade in rhinoceros and tiger products traceable to China and Taiwan, the CITES Standing Committee” suggested that Parties to the Convention consider strict measures, including trade sanctions, against those two nations to persuade them to halt the illegal importation of the products. *Id.* at 479. After giving both nations notice that trade measures might be imposed against them if they did not improve enforcement of existing importation bans, the Clinton Administration imposed trade sanctions on Taiwan effective April 11, 1994. *Id.* at 479-80. China managed to avoid trade sanctions against it by taking specific and effective actions to control the illegal trade. *Id.* at 480. These actions were verified by the United States and acknowledged by the Standing Committee of CITES in March 1994. *Id.*

91. See Braun, *supra* note 83, at 558.

92. CITES, *Reservations*, at [http://www.cites.org/eng/append/reserve\\_index.shtml](http://www.cites.org/eng/append/reserve_index.shtml) (last visited Mar. 13, 2003).

93. LAWRENCE E. SUSSKIND, ENVIRONMENTAL DIPLOMACY; NEGOTIATING MORE EFFECTIVE GLOBAL AGREEMENTS 102 (1994).

## IV. THE IVORY BAN UNDER CITES

Against this backdrop of heavy poaching and the near extinction of the African elephant, the Parties to CITES kept the elephant listed on Appendix II from 1977 to 1990.<sup>94</sup> During that time, CITES' protection of the elephant was limited to a complex registration system that is now recognized as a failure.<sup>95</sup> About half of the African Parties to the Convention ignored the CITES rules governing ivory trading and, in those nations that observed the restrictions, ivory traders used various methods to escape prosecution for illegally exporting ivory.<sup>96</sup>

As the toll of African elephants killed each day for their ivory rose into the hundreds in the mid-1980s, some nations acted on their own to ban the importation of any ivory past their borders.<sup>97</sup> Japan, the nation that imported more ivory than any other, banned ivory imports in 1985.<sup>98</sup> Recognizing that CITES was failing to protect the African elephant from impending extinction within the decade, the United States Congress passed the African Elephant Conservation Act<sup>99</sup> in 1988.<sup>100</sup> The Act halted importation of all raw and worked ivory into the U.S.<sup>101</sup> The European Union passed similar legislation in 1989.<sup>102</sup> These unilateral actions by the United States and Euro-

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94. See Sam B. Edwards, III, *Legal Trade in African Elephant Ivory: Buy Ivory to Save the Elephant?* 7 *ANIMAL L.* 119, 125 (2001).

95. *Id.*; see also, Berger, *supra* note 42, at 423. As much as 75% of the legal trade quota allowed under the registration system in its first year (1986) was thought to be from illegal poaching. *Id.*

96. Edwards, *supra* note 94, at 125.

97. See *id.* at 125.

98. See *id.* at 121. The Japanese imported 32% of the global supply of ivory available between 1979 and 1988. *Id.* Obviously, the Japanese ban (1985) was far from effective in halting black market activity. *Id.*

99. 16 U.S.C. § 4201 (2000).

100. See Edwards, *supra* note 94, at 126.

101. See *id.*

102. See *id.*; see also Commission Regulation 2496/89, 1989 O.J. (L240).

pean nations were credited with significantly decreasing the worldwide demand for ivory.<sup>103</sup>

At the same time that nations were unilaterally acting to halt the ivory trade to slow the massive slaughter of African elephants, some Parties to CITES, including several African nations, were agitating to have the elephant designated an endangered species by moving it from Appendix II to Appendix I.<sup>104</sup> Kenya and Tanzania, which sought a complete ban on ivory trade, were the most vocal of the African nations supporting this amendment.<sup>105</sup> Southern African nations, including South Africa, Zimbabwe, and Botswana, argued against changing the status of the elephant to endangered by moving it to Appendix I.<sup>106</sup> However, at the 1990 Seventh Conference of the Parties (COP 7), the voting members moved the African elephant to Appendix I, thereby banning all elephant products (including ivory) from international trade.<sup>107</sup>

Most observers credit the CITES Ivory Ban with virtually ending the poaching crisis throughout Africa.<sup>108</sup> Moving the African elephant from Appendix II to Appendix I had a dramatic effect on worldwide ivory prices and, in turn, the intensity of poaching of elephants in Africa.<sup>109</sup> For example, in Kenya, where as many as 3,500 elephants were killed by poachers each year during the crisis, the numbers of elephants poached per year dropped to 50 by 1993.<sup>110</sup>

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103. See Edwards, *supra* note 94, at 126. When compared to the Japanese ban announced in 1985, the U.S. and European Union actions of 1988-89 were highly successful. *Id.*

104. See *id.* A move from Appendix II to Appendix I would impose a *de facto* ban on all international trade in ivory.

105. See Berger, *supra* note 42, at 424-27. Kenya and Tanzania, and other East African nations, had suffered the greatest losses in elephant population due to poaching during the previous two decades. *Id.*

106. See Edwards, *supra* note 94, at 126. Some Persian Gulf states, Hong Kong, and Japan opposed the Ivory Ban. *Id.* It is interesting to note that Japan, which had announced an importation ban on ivory in 1985, now opposed an international trade ban. *Id.*

107. See *id.*

108. See Berger, *supra* note 42, at 427-28.

109. See *id.*

110. See Edwards, *supra* note 94, at 126.



Widely accepted as the only means to saving the African elephant from extinction, the 1989 Ivory Ban worked well at achieving this end at two important levels. As already stated, the Ban dramatically reduced the poaching of elephants for their tusks because the profit motive at the critical supplier (poacher) end of the ivory market was greatly diminished. But the Ban, and the global publicity surrounding it, also succeeded in raising the consciousness of buyers of ivory. Some ten years after imposition of the Ivory Ban, jewelers reported that the international demand for ivory was “dead.”<sup>111</sup> A Johannesburg, South Africa, jewelry wholesaler described the dramatic effect of the Ban on the perception of ivory as a commodity among the public – even in Africa – when he stated “People are too embarrassed or ashamed to ask about ivory.”<sup>112</sup> The 1989 Ivory Ban, therefore, was highly successful both in halting the mass slaughter of elephants for their tusks and in publicizing the issue to the point that many found it unconscionable to purchase any ivory, even that stockpiled from elephants that died from natural causes.<sup>113</sup>

With pressure from intense poaching eliminated, the elephant population of Africa stabilized and underwent a recovery throughout the continent unmatched by any species in the history of CITES.<sup>114</sup> In Kenya alone, the elephant population grew by 13,300 in the decade following the imposition of the ivory ban in 1989.<sup>115</sup>

## V. THE 1999 IVORY SALE

### A. *CITES Approval and Conditions to the Sale*

As a result of moving the African elephant to Appendix I and the *de facto* Ivory Ban implemented by this action, the population of African elephants rose dramatically, particularly in southern Af-

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111. See Kate Dunn, *Elephants, Rejoice! Ivory Ban May Bend, But Nobody's Buying*, Dec. 15, 1998, at <http://csmweb2.emcweb.com/durable/1998/12/15/p152.htm>.

112. *Id.* (explaining why, contrary to the accepted laws of supply and demand, the price of ivory fell rather than rise in the face of a dwindling supply following imposition of the Ban.)

113. *Id.*

114. See Edwards, *supra* note 94, at 126.

115. See Berger, *supra* note 42, at 427.

rica.<sup>116</sup> The increasing size of the elephant herds put pressure on humans who shared the same range with the elephant and who competed with the species for habitat, i.e. food, water, and shelter.<sup>117</sup> With African elephants protected from slaughter by poachers solely for their tusks, elephant range states spent increasingly large sums to manage elephant herds.<sup>118</sup> At the same time, ivory from “legal” sources, including the natural death and culling of elephants, was being added to the supply of stockpiled ivory that African nations already had on hand from the interdiction of poachers.<sup>119</sup> With the Ivory Ban in place, these nations now had to pay to protect the stockpiled ivory from theft and to keep it stored in humidified conditions.<sup>120</sup> As one commentator noted, the stockpiles of “legal” ivory went from “financial assets to liabilities overnight.”<sup>121</sup>

As the elephant population grew throughout its range, southern African nations managing elephants became increasingly resentful of the CITES ban on the ivory trade.<sup>122</sup> Several sought some relief to the absolute ban on the sale of ivory from elephants.<sup>123</sup> In particular, Zimbabwe, Namibia, and Botswana (countries in which the elephant population staged a significant population growth) mounted a campaign to move the African elephant back to Appendix II so that they could once again use the species as a source of much needed foreign currency.<sup>124</sup> These southern African nations were aided in this effort

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116. See Edwards, *supra* note 94, at 127.

117. *Id.* at 126. The elephant is considered a pest by many Africans who point to its reputation for destroying crops and injuring people and livestock. *Id.*

118. *Id.* at 127. The cost to protect and preserve endangered wildlife in Africa was estimated to be \$305 million dollars in 1995. In that same year, habitat preservation costs were estimated to be \$200 per square kilometer. *Id.*

119. See *id.* African nations had become dependent on the sales of legally obtained ivory and the \$100,000 to \$200,000 per ton price traders paid for it while the African elephant was on Appendix II. *Id.*

120. See *id.* Ivory must be stored under controlled conditions because it gradually dries out. The required level of security and environmental controls make ivory very expensive to store. *Id.*

121. Edwards, *supra* note 94, at 127.

122. See *id.*

123. See *id.*

124. See *id.*

by a handful of non-African Parties to CITES who also sought a resumption of the ivory trade at some level under the close supervision of the Convention.<sup>125</sup> The southern African nations gained additional support for their proposal to move the elephant back to Appendix II when the CITES Panel of Experts, appointed at the last Conference of the Parties, reported that the African elephant population in Zimbabwe, Namibia, and Botswana no longer met the biological criteria for an Appendix I listing.<sup>126</sup>

Although the proposal to move the elephant from Appendix I to Appendix II in Zimbabwe, Namibia, and Botswana met with strong opposition from many nations outside the continent, as well as several eastern and central African Parties, the measure passed by the required two-thirds vote at the 1997 COP 10 in Harare, Zimbabwe.<sup>127</sup> Additionally, the Parties voted to allow these three nations to conduct a one-time sale of stockpiled ivory<sup>128</sup> to Japan to be concluded eighteen months after COP 10 ended.<sup>129</sup> One important requirement for the sale to occur was that all proceeds were to be earmarked for elephant conservation in Zimbabwe, Namibia, and Botswana.<sup>130</sup> Once the sale to Japan was completed in 1999, no further

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125. *See id.*

126. *See id.*; *see also* Berger, *supra* note 42, at 428 n.63.

127. *See* Edwards, *supra* note 94, at 127; *see also*, Berger, *supra* note 42, at 428 and n.63. When the Parties moved the African elephant to Appendix I at the 1989 COP, they also established a special procedure for future downlisting of any species within a particular nation. That procedure included the use of a Panel of Experts to study the proposed downlisting using scientific criteria to assess the impact on the species. Although future downlisting would depend on the recommendation of the Panel of Experts, the Parties reserved unto themselves the power to control conditions of sales and quotas of a downlisted species. *Id.*

128. *See* Berger, *supra* note 42, at 428.

129. *Id.* The eighteen month waiting period was required by the Parties to verify the adequacy of conservation efforts in the three nations and to assess their regulatory controls on ivory stockpiles. *Id.*

130. *See id.* at 429. Other conditions of the sale included that (1) Zimbabwe, Namibia, and Botswana each withdraw their reservations to an Appendix I listing of the elephant; (2) stronger legal enforcement, reporting, and monitoring of anti-poaching measures within each nation; and (3) development of a mechanism that would halt the

sales were allowed without the approval of a two-thirds majority of the Parties to the Convention.<sup>131</sup>

After the eighteen month waiting period had elapsed, the CITES Standing Committee announced in February 1999 that Zimbabwe, Namibia, Botswana, and Japan<sup>132</sup> had met the preconditions imposed on the sale and authorized that it proceed.<sup>133</sup> The sale to Japan took place in April 1999 and raised \$5,000,000.<sup>134</sup>

### B. *The Post-Sale Period*

At the April 2000 Convention of the Parties (COP 10) in Nairobi, the CITES Standing Committee reported that Zimbabwe, Namibia, and Botswana had not manipulated "legal" sources of ivory to increase government stockpiles prior to the sale and that the sale had not served as an opportunity for the laundering of poached ivory.<sup>135</sup> The Committee also stated there was no significant increase in the poaching of elephants in the three nations attributed to the one-time sale to Japan<sup>136</sup> and that the sale was a complete success in that it had not prompted any significant increase in illegal elephant deaths on the African continent.<sup>137</sup>

However, critics of the 1999 sale paint a very different picture of the effects of the sale on poaching and, ultimately, the threat it posed to the survival of the African elephant as a species. The International Fund for Animal Welfare (IFAW) reported that elephant poaching in

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trade in stockpiled ivory by the three nations if renewed poaching or noncompliance with conditions for the sale occurred. Berger, *supra* note 42, at 429.

131. *See id.* at 428-29.

132. *See id.* at 430. The Standing Committee also determined that Japan had put into place effective controls on its domestic ivory trade. *Id.*

133. *See id.* at 430.

134. *Id.*

135. *See id.* at 431.

136. *Id.* The Standing Committee refused to link the authorized sale with several large illegal shipments of tusks intercepted in Kenya after the sale. The Committee also stated that reports of increased poaching in India and Chad following the sale were unfounded. *Id.*

137. *See id.* at 431-32.

Zimbabwe, Zambia, the Democratic Republic of Congo, the Central African Republic, Ghana and other African countries began to escalate as early as 1997, when the decision to allow the sale was announced.<sup>138</sup> IFAW reported a 50% increase in elephant poaching in Zimbabwe alone in 1997 and 1998.<sup>139</sup> Numerous studies conducted by other international nongovernmental (environmental) organizations<sup>140</sup> documented increased elephant poaching and ivory smuggling across the African continent after the 1999 sale.<sup>141</sup>

According to the International Fund for Animal Welfare, poachers believed the ban had been lifted throughout Africa and were building up stockpiles of poached ivory in anticipation of renewed trade.<sup>142</sup> These reports were attacked as unreliable by organizations representing the sustainable-use position of several African nations.<sup>143</sup> Vendors and craftsmen in West and Central Africa, upon hearing of the ivory sales in southern Africa, prepared for what they believed would be the beginning of the end for the Ivory Ban throughout Africa.<sup>144</sup>

After the approval of the sale of stockpiled ivory, a significant increase in poaching was reported in Kenya's Tsavo and Damburu wildlife reserves; recorded ivory seizures also increased 400% in

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138. See Eddie Koch, *The Great Pachyderm Debate*, OutThere (Jan.), at <http://www.outthere.co.za/98/0129/displ1jan.html> (last visited Mar. 13, 2003).

139. See *id.*

140. Hereinafter "NGO's." Examples of these international organizations are Greenpeace, The World Wildlife Organization, The Fund for Animals, and The International Fund for Animal Welfare.

141. See Sustainable Development International, *African Nations Sustain Ban on Ivory Trade*, at <http://www.sustdev.org/industry.news/042000/0149.shtml> (last visited Mar. 13, 2003). These same groups also documented increased activity by elephant poachers and ivory smugglers in Southeast Asia after the sale. *Id.*

142. Koch, *supra* note 138.

143. See *id.*

144. See Esmond Martin & Daniel Stiles, *The Ivory Markets of Africa*, at <http://wildafrica.net/cites/messages/3.html> (last visited Mar. 13, 2003).

Kenya during 1999.<sup>145</sup> Poachers in Kenya's Tsavo National Park killed 29 elephants in 1999, five times the average annual total during the CITES Ivory Ban.<sup>146</sup> It is estimated that the price for ivory rose from \$22 before the 1999 sale to approximately \$300 in the year following the sale.<sup>147</sup> International NGO's reported the results of studies showing that the demand for ivory stimulated by the "one-time" sale to Japan also led to increased poaching of elephants in Southeast Asia.<sup>148</sup> One report credited the sale for the illegal killing of over 6,000 elephants in Africa and Asia during 1998 and 1999.<sup>149</sup>

### C. Reinstitution of the Ivory Ban

At the Convention of the Parties to CITES in Nairobi in 2000 (COP 11), Zimbabwe, Namibia, and Botswana proposed maintaining the elephant on Appendix II in their nations and requested further CITES-approved sales of stockpiled "legal" ivory.<sup>150</sup> South Africa joined the three nations in proposing future sales of stockpiled ivory, with the proceeds of the sales to be used for elephant conservation

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145. See *id.*; see also Farah Srockman, *Tusks on Trial, Ivory Battle Heats up in Nairobi*, THE CHRISTIAN SCIENCE MONITOR (Apr. 10, 2000), available at <http://abcnews.go.com/sections/science/DailyNews/Ivorytrade0000410.html> (last visited Mar. 13, 2003). (Where the Kenyan Wildlife Service reported that 67 elephants were poached in the year following the "Ivory Sale." In prior years, that number was averaged at 15.) *Id.*

146. See Simon Robinson, *Dying for Ivory*, TIME EUROPE, Vol.155 No.15,(Apr. 17, 2000), available at <http://www.time.com/time/europe/magazine/2000/0417/ivory.html> (last visited Mar. 13, 2003).

147. See Ivory Safaris, *Only Elephants Should Wear Ivory: Arguments-Pros/Cons*, at <http://www.ivorynet.com/banivorytrade/arguments.htm> (last visited Mar. 13, 2003).

148. See *Stop the Clock Report 4<sup>th</sup> April 2000: Executive Summary* at <http://www.bornfree.org.uk/stoptheclock/poaching2.htm> (last visited Mar. 13, 2003).

149. See *id.*

150. See *Compromise on Ivory Ban Lift Reached*, COSMIVERSE, (Apr. 18, 2000), at <http://www.cosmiverse.com/science041801.html> (last visited Mar. 13, 2003).

programs in southern Africa.<sup>151</sup> At the same time, Kenya and India, fearful that further sales would lead to increased elephant poaching (as occurred after the 1999 sale), proposed returning the African elephant to Appendix I in all Party nations, thereby resuming a total global ban on ivory sales.<sup>152</sup>

A compromise was reached whereby the four southern African nations requesting further sales withdrew the proposal for two years and Kenya and India in turn withdrew their proposal to return the African elephant to Appendix I in all range states.<sup>153</sup> As part of the compromise, Parties agreed to delay any ivory sales until an effective system was in place to prevent the widespread poaching of elephants.<sup>154</sup> Pending scientific study of elephant population statistics and the potential impacts of future limited ivory trade<sup>155</sup> the compromise agreement stayed any further discussion of additional ivory sales until the next Convention of the Parties (COP 12) in November 2002.<sup>156</sup>

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151. *See id.*; *see also* Srockman, *supra* note 145. South Africa sought permission to sell a fifteen-year stockpile of ivory worth \$12 million dollars. *Id.*

152. *See Compromise On Ivory Ban Lift Reached, supra* note 150.

153. *Compromise Reached on Ivory Trade*, BBC NEWS, (Apr. 17, 2000) at [http://news.bbc.co.uk/1/hi/english/world/africa/newsid\\_716000/716726.stm](http://news.bbc.co.uk/1/hi/english/world/africa/newsid_716000/716726.stm) (last visited Mar. 13, 2003); *see also* HUNTER ET AL., *supra* note 56, at 1018. The elephant remained on Appendix II in Zimbabwe, Namibia, and Botswana, and was downlisted to Appendix II in South Africa. *Id.* However, the compromise agreement included a zero quota of exports of ivory for the four nations for two years, i.e. until the next COP. *Id.*

154. *See Compromise Reached on Ivory Trade, supra* note 153.

155. *See* HUNTER ET AL., *supra* note 56, at 1018. The Parties attending COP 11 unanimously approved the creation of two monitoring systems for this purpose. They are the Monitoring Illegal Killing of Elephants System (MIKE) and the Elephant Trade Information System (ETIS). *Id.*

156. Santiago, Chile.

## VI. DISCUSSION

A. *The Elephant at the Hands of Man: An Implied Legal Duty of African Nations to Protect Elephants Under CITES*

The Principle of Preservation states that environmental protection is maximized when the individual or the state acts to initially prevent harm rather than deal with the consequences of damage to the environment once it has occurred.<sup>157</sup> It has been stated that international customary law includes the Principle of Preservation.<sup>158</sup> Furthermore, one commentator has suggested that the Principle, as an element of international customary law, requires nations to adopt laws and policies that work to preserve endangered species.<sup>159</sup> The Principle of Preservation is often associated with the Precautionary Principle since both concepts recognize the importance of taking preemptory steps to avoid environmental harm before it occurs.<sup>160</sup> The Precautionary Principle is invoked when action is taken to prevent harm where the scientific understanding of a specific environmental threat is incomplete.<sup>161</sup>

As stated in its Preamble,<sup>162</sup> CITES acknowledges that all Parties to the Convention share a legal duty to place the protection of endangered species above pure mercantile interests. In other words, CITES prohibits a ratifying state from taking a position that risks the ultimate survival of any endangered or threatened species within its borders.

The legal duty to preserve endangered species under CITES reflects the belief that the unique flora and fauna of the Earth belong to all inhabitants of the planet. The Common Concern of Mankind Principle recognizes that the condition of the global environment is a matter of concern for all humans.<sup>163</sup> The Principle also views protec-

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157. See HUNTER ET AL., *supra* note 55, at 404.

158. See P. VAN HEIJNSBERGEN, INTERNATIONAL LEGAL PROTECTION OF WILD FAUNA AND FLORA 68 (1997).

159. See *id.* (citing Glennon, *supra* note 17, at 30).

160. See HUNTER ET AL., *supra* note 55, at 405-06.

161. See *id.* at 406.

162. See CITES, *supra* note 50.

163. See HUNTER ET AL., *supra* note 55, at 397. The Principle of Common Concern forms the basis of all modern international environmental treaties. The Biodiversity and Climate Change Conven-



tion of the environment as an area of law within both the jurisdiction of a particular nation and that of the international community of nations, all acting in the best interests of mankind as a whole under international law.<sup>164</sup>

The debate over future ivory sales, therefore, takes place within the bounds of a treaty (CITES) founded on the idea that unified global regulation is required to save endangered species from exploitation and eventual extinction. Cooperation and enforcement in this unified approach is key to the future of CITES and of species listed in its three Appendices. Proposals for future authorized sales of ivory, by weakening protection of the elephant, in fact may weaken CITES's ability to protect all endangered species.

### B. *CITES at the Crossroads*

#### 1. The Argument for New Sales: Sustainable Use of the Elephant

At the core of the CITES debate over future ivory sales is the long-argued conflict between the strict preservationist view and the sustainable use view of environmental protection in Africa.<sup>165</sup> Preservationists believe that African elephants are entitled to full protection; being maintained in select ranges or preserves with their products never entering the stream of domestic or international trade for any reason. Furthermore, preservationists argue that elephants should be protected using resources not connected with trade of the species, i.e. elephants should not have to pay their way in their struggle to survive as a species.

Conservationists, on the other hand, argue that efforts to protect elephants can, and should, be funded through trade in elephant products whenever possible. This is not to say that the sustainable use conservationists do not recognize the need to protect the African elephant. Rather, the fundamental difference between the two theories of protection of wildlife rests on the means and goals of protection. The preservationist seeks full protection from a "top to bottom" approach, placing government and private funds at the disposal of

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tions of 1992 were the first environmental treaties to expressly include the Principle in their rationale for action. *Id.*

164. *See id.*

165. *See* Edwards, *supra* note 94, at 128; *see also* HUNTER ET AL., *supra* note 55, at 1024.

those entrusted to protect both species of African elephant. Sustainable use advocates also seek a substantial level of protection of the elephant, but believe that the species itself, through trade of its products, should provide the funding for protection efforts. This “bottom to top” approach embraces the strategy of having indigenous people view the elephant as a resource to be protected for both its commercial value to consumers, as well as for its inherent uniqueness as a species.<sup>166</sup>

Not all African states agree with Zimbabwe, Namibia, Botswana, and South Africa (hereinafter “Southern States”) that the only way to save the elephant is through sustainable use. A great rift has occurred between eastern and central African nations, such as Kenya, and southern Africa, concerning the future of the elephant.<sup>167</sup> Kenya, a nation in which the African elephant nearly went extinct prior to the Ivory Ban, prefers a continued total ban on any trade in elephant products, fearing that any limited resumption of ivory trade will once again lead to poaching on a massive scale. The Southern States, however, claim that Kenya’s loss of so many elephants prior to the imposition of the 1989 ban resulted from its failure to stop poaching within its borders.<sup>168</sup> The Southern States argue that they have managed elephants more successfully than the eastern and central African states, both prior to and after the elephant was moved to Appendix I in 1989, and that they therefore should not be penalized by a strict ban on the ivory trade. As one wildlife manager in Zimbabwe put it:

Wildlife is a renewable resource. If utilized properly and in a sustainable manner, it will go a long way towards

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166. See Berger, *supra* note 42, at 454-55; see also Jose Roberto Perez-Salom, *Sustainable Tourism: Emerging Global and Regional Regulation*, 13 GEO. INT’L ENVTL. L. REV. 801, 806-7 (2001). Tourism related to wildlife and scenery can also serve as an important method of sustainable use of resources by local communities. *Id.* at 807.

167. See Berger, *supra* note 42, at 424.

168. See *id.* at 427.

169. See Nuftali Mungai, *Zimbabwe Demands Legal Ivory Sales*, at <http://www.save-the-elephants.org/El%20News%20Archive%202001.htm> (last visited Mar. 13, 2003.) (quoting Brigadier E.W. Kanhanga, Acting Director [retired], Zimbabwe Department of National Parks and Wildlife Management).

improving our people's life as a country and a continent. We want to make use of this resource which we have in abundance. The fact that our elephant population is increasing should mean that we have put in place proper and working protection systems. We believe this is something good ... a plus, which those opposed to our call should reward us for.<sup>169</sup>

In particular, the Southern States complain that effective elephant management is expensive and that the sale of ivory, taken from culling and natural deaths of their burgeoning elephant populations, can aid them in conserving the elephant for future generations in keeping with the Sustainable Development Principle of Intergenerational Equity.<sup>170</sup>

Many Parties to CITES outside Africa disagree with the Southern States' argument that sustainable use, i.e. a limited, authorized trade in ivory, is the only way to save the elephant from extinction. For example, India, a range state of the Asian elephant, fears that any legalized trade in elephant parts will lead to the "dirty ivory" scenario in which approved ivory auctions include ivory taken by poachers in Asia as well as Africa.<sup>171</sup> The United States and the European Union also fear that approved ivory sales will lead to widespread poaching that will once again push the elephant to extinction in many parts of its range. As Greenpeace spokesperson Craig Culp put it, "We have been down this road before. The minute you remove the outright ban, all control is gone."<sup>172</sup>

The Southern States view these objections to their plans for sustainable use of the elephant as interference with their right, as sovereign nations, to use their natural resources as they see fit.<sup>173</sup> The Southern States challenge these objections as inappropriate meddling by Western states and international NGO's in their internal policies

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170. See HUNTER ET AL., *supra* note 55, at 398-99. One goal of sustainable development is conservation of natural resources for future generations. *Id.*

171. See Berger, *supra* note 42, at 431.

172. Srockman, *supra* note 145.

173. See Berger, *supra* note 42, at 418.

and suggest that such attempted controls on their export of ivory amount to neo-imperialism.<sup>174</sup>

## 2. The Argument Against New Sales: Let Sleeping Giants Lie

Ironically, both African and non-African Parties supporting a permanent ban on ivory sales find their most persuasive support for the ban in CITES's sensitivity towards the sovereignty, internal legislative processes, and police powers of African member states. They argue that, since the international community at large supported the 1989 Ban, any resumption of ivory trade – no matter how small – weakens that commitment and threatens the ultimate survival of the elephant. The 1997 decision to allow Zimbabwe, Namibia, and Botswana to sell stockpiled ivory to Japan has been described by one NGO as “the biggest conservation blunder of the 1990’s.”<sup>175</sup> Referring to the mixed message the 1999 “one-time” sale sent to Africans and the rest of the world, the U.S. based NGO Fund for Animals stated:

It is sad that thousands of elephants had to die over the last three years to highlight the negative effects of the

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174. See Thaddeus McBride, *The Dangers of Liberal Neo-Colonialism: Elephants, Ivory and the CITES Treaty: The Dilemmas of Africanization: Choices and Dangers for Sub-Saharan Africa* 19 B.C. THIRD WORLD L.J. 733, 744 (1999). The reviewer suggests that the elephant was moved to Appendix I in 1989 over the objection of the Southern States without due regard for their sovereignty because Western nations easily met the two-thirds majority required for such action. He states that the elephant controversy “serves as a strong reminder that Africa is not far removed from the imperial era.” *Id.* at 734. However, his argument that the actions of CITES to fully protect the elephant evokes images of the neo-colonial period in Africa fails to explain why other African states, also once ruled by Europeans, supported the initial 1989 Ivory Ban. Furthermore, it fails to explain why these same eastern and central African states want no future sales of ivory.

175. Margot Higgins, *Elephants Face Killing Fields Again*, ENN, Jan. 24, 2000, at [http://www.enn.com/enn-news-archive/2000/01/01242000/ivoryanniv\\_9314.asp](http://www.enn.com/enn-news-archive/2000/01/01242000/ivoryanniv_9314.asp) (last visited Mar. 4, 2003) (quoting Allan Thornton, chairman of Britain's Environmental Investigation Agency).

1997 CITES decision. The greed of poachers knows no bounds and any ivory trade sanctioned by CITES parties would only cause more elephant carcasses to pile up and more wildlife department budgets to be exhausted.<sup>176</sup>

The 1997 decision to allow the “one-time” sale of stockpiled ivory to Japan by the Southern States infuriated environmental activists around the world who feared the sale would “blow the lid off the global ban” by stimulating consumer demand for ivory.<sup>177</sup> Many believed that once the “sleeping giant of demand” for ivory was awakened by the CITES-authorized sale, the Convention would be unsuccessful in any future attempts to protect the African elephant from poachers.<sup>178</sup>

The 1999 sale places CITES at a crossroads: a retreat from the total Ivory Ban raises familiar questions about the Convention’s ability to protect endangered species in the future. In particular, the sale reignited the debate as to whether CITES can ever be ultimately effective in protecting endangered species because it defers to, and relies heavily upon, the Principles of Sovereignty and Subsidiarity.

#### a. *The Sovereignty Principle*

CITES has been criticized as the quintessential example of how the Principle of Sovereignty generally weakens global environmental treaties.<sup>179</sup> In particular, the Convention’s monitoring and enforcement provisions have been labeled as ineffective in that Parties, on one hand, voluntarily agree to submit to the treaty, but on the other hand, may take reservations at will.<sup>180</sup> Furthermore, when a Party

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176. See Sustainable Development International, *supra* note 141 (quoting Christine Wolf, Director of Gov’t and Int’l Affairs for Fund for Animals).

177. *Id.*

178. Berger, *supra* note 42, at 419 n.3 (quoting Iain Douglas-Hamilton, *An East African Perspective*) “We are convinced in conservation circles in East Africa that the CITES decision of 1997 to allow limited trade risks a resumption of the uncontrolled illegal trading of then past. Tinkering with limited sales will lend legitimacy to the purchasing of ivory and might well wake up a sleeping giant of demand.” *Id.*

179. See SUSSKIND, *supra* note 93, at 102.

180. See *id.*

violates an applicable provision of the Convention, CITES provides no sanctions or mechanisms to enforce compliance.<sup>181</sup>

The moving of the elephant to Appendix I in 1989 demonstrated how the treaty could then overcome the defense of national sovereignty so as to protect an endangered species. The massive scale of the slaughter of African elephants by poachers for their tusks had pushed the species to the brink of extinction within many parts of their respective ranges. The Parties to CITES found it necessary to act and, in doing so, informed African nations that they could no longer allow the demand for ivory to destroy an endangered species. The decision to move the African elephant to Appendix I in the face of strong opposition by southern African states transcended notions of national sovereignty. While it is true that these African states could take a reservation to the transfer of the elephant to Appendix I, that listing in fact stopped them from legally placing elephant products into the stream of international trade since an import permit as well as an export permit are required for Appendix I species. Import permits would not be forthcoming from an overwhelming majority of Parties to CITES, both in the West and Asia. The effect of the Appendix I listing was obvious and dramatic; demand for ivory disappeared, prices sank, and the massive poaching of elephants stopped.

At the Convention of the Parties to CITES (COP 12) held in Santiago, Chile, in November 2002, Zimbabwe, Namibia, Botswana and South Africa sought authorization for annual sales quotas of elephant ivory.<sup>182</sup> Although the Convention denied the request for quotas, Namibia, Botswana and South Africa received permission to conduct another one-time sale of stockpiled ivory.<sup>183</sup> If these new authorized sales are a response to the argument that nations have the right to manage the elephant as a natural resource with resale value, the Convention faces an unraveling of its power to ultimately protect the elephant and other marketable endangered or threatened species. A

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181. *See id.*

182. AFRICAN ELEPHANT CONSERVATION, *Report on CITES Meeting, Santiago, Chile*, at [http://www.panda.org/resources/publications/species/cites/fs\\_afeleph.html](http://www.panda.org/resources/publications/species/cites/fs_afeleph.html) (last visited May 12, 2003).

183. Melissa Groo, ELEPHANT INFORMATION REPOSITORY, *CITES 2002 Report*, at [http://elephant.elehost.com/News/Current\\_Situations/CITES\\_2002\\_Report/cites\\_2002\\_report.html](http://elephant.elehost.com/News/Current_Situations/CITES_2002_Report/cites_2002_report.html) (last visited May 21, 2003).

handful of nations selling ivory, rushing to use the elephant as a “quick fix” for failed economies, risks causing a dramatic increase in poaching of elephants in both Africa and Asia. If CITES allows the poaching of elephants to increase significantly, CITES may seriously damage its authority to regulate trade in endangered species in the face of future claims of interference with national sovereignty. The firm resolve to protect the elephant – and derivatively, all endangered species – demonstrated in the 1989 resolution to move the elephant to full protection under Appendix I evaporates with each additional sale of ivory authorized by CITES.

b. *The Subsidiarity Principle*

CITES does not contain any provisions for enforcing a ratifying nation’s obligations under the Convention. Instead, the treaty relies on each Party to enact and enforce national legislation that conforms its domestic endangered species protection and trade laws to the provision of CITES. By relying on national governments to carry out its provisions, CITES invokes the Principle of Subsidiarity. Under this Principle there is a preference that decision-making take place at the lowest level of government at which an issue or policy can be effectively managed.<sup>184</sup> Under CITES, Parties are required to enact domestic laws that protect endangered flora and fauna by the interdiction of illegal shipments and prosecution and punishment of poachers and other illegal traffickers of wildlife.

CITES’s reliance on domestic legislative and police powers to enforce the provisions of the Convention defers to the sovereign rights of a Party to govern its citizens and regulate the use and protection of its natural resources. However, particularly in Africa, CITES’s deference to local government action is overly optimistic.

Protection of endangered species under CITES requires stable governments with adequate financial resources to implement its provisions. During the past decade, the world has watched as many African nations suffered chronic political instability as a result of civil

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184. HUNTER ET. AL, *supra* note 55, at 416.

wars,<sup>185</sup> mass genocide,<sup>186</sup> famine,<sup>187</sup> an AIDS epidemic of devastating proportions,<sup>188</sup> and sporadic Ebola outbreaks.<sup>189</sup>

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185. See Anup Shah, *Conflicts in Africa* (Oct. 4, 2001), at <http://www.globalissues.org/Geopolitics/Africa.asp> (last visited Mar. 4, 2003). Recently, civil wars raged in a multitude of African nations including Angola, Algeria, Burundi, Ivory Coast, Ethiopia, Liberia, Nigeria, Congo, Sierra Leone, Sudan, Uganda, Angola and Congo. Some 9.5 million refugees were displaced by war in Africa. *Id.*; see also generally *Human Rights Watch: Africa*, at <http://www.hrw.org/africa/index.php> (last visited Mar. 4, 2003). Currently, civil war rages in Sudan, Angola, Uganda, and Congo. The Sudanese civil war has continued unabated for nineteen years. *Id.*

186. See *Rwandans Relive Horror of Genocide*, *The Washington Post*, at <http://www.washingtonpost.com/wp-dyn/articles/A11149-2002Mar24.html>. A half-million Tutsi and Hutu were killed in ethnic genocide during a 100 day period of the 1994 Rwandan civil war. *Id.*; see also *Eyewitness: UN in Rwanda 1994*, *The Washington Post*, Sept. 6, 2000, at [http://news.bbc.co.uk/hi/english/world/africa/newsid\\_911000/911232.stm](http://news.bbc.co.uk/hi/english/world/africa/newsid_911000/911232.stm) (last visited Mar. 4, 2003). Some estimates of the Tutsi and Hutu death toll reach 800,000. *Id.*

187. See *Famine in Africa: 2.6 Million Go Hungry* (Mar. 28, 2002) at <http://archive.mg.co.za/NXT/gateway.dll?f=templates&fn=default.htm&vid=MailGuard:MailGuardView&npusername=clot&nppassword=clot> (last visited Mar. 4, 2003). The UN World Food Program, seeking 69 million dollars in aid, estimates that 2.6 million Africans are starving in the half of the continent. WFP also warns the food crisis is worsening. *Id.*

188. See John Christensen, *AIDS in Africa: Dying by the Numbers* at <http://www.cnn.com/SPECIALS/2000/aids/stories/overview/> (last visited Mar. 4, 2003). Of the 34.3 million people worldwide infected with AIDS in 1999, 24.5 million lived in sub-Saharan Africa. *Id.* By 1999, the death toll due to AIDS in Africa stood at 19 million, of which 3.8 million were children under 15 years of age. *Id.* The bubonic plague, at its peak in medieval Europe, killed 30 million. *Id.* The U.S. Census Bureau projects AIDS deaths and loss of population due to premature death of women of child-bearing age will reduce the population growth of Africa by 71 million by 2010. *Id.* AIDS will reduce the life expectancy in sub-Saharan Africa from 59 to 45 years of age between 2005 and 2010. *Id.* In Zimbabwe, the life expectancy will drop from 61 to 33 due to AIDS during that same



The current bushmeat crisis is the direct result of chaos in many parts of Africa. If the native people of Africa find it necessary to slaughter native fauna, endangered or not, for mere subsistence purposes, how likely is it that African states will have, or use, the necessary resources to protect the elephant? Although the CITES Conference of Parties may condition future authorized ivory sales on using the proceeds for elephant conservation efforts, how likely is it that these funds will be used for that purpose? The fact remains that the "one time" ivory sale in 1999 renewed interest in ivory as a commodity and led to increased poaching of elephants, both in Africa and Asia. Waking this sleeping giant of demand, and then relying on African nations to control poaching in the present political and economic atmosphere on the continent, is a recipe for disaster for the elephant.

## VII. CONCLUSION

CITES is the embodiment of international environmental law regulating trade in endangered and threatened species. However, the Convention also represents the frontline in the war to protect the flora and fauna of the Earth from extinction due to non-sustainable use and exploitation by man. Founded on the Principles of Preservation, Precaution, and the Common Concern of Mankind, the treaty places a legal duty on nations to protect species found within their borders from utilization incompatible with the survival of the species.

The 1989 Ivory Ban stands as a model for international action to save an endangered species facing extinction within a decade or two. The Ivory Ban allowed the Convention to avoid claims of direct interference in African national affairs and effectively stopped the

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time period. *Id.* The World Bank reported to the U.N. Security Council in January 2000 that an effective and comprehensive AIDS prevention program for sub-Saharan Africa would cost \$2.3 billion a year. *Id.* It is estimated that the per capita income in most sub-Saharan countries has declined by 20% due to the AIDS crisis. *Id.*

189. See *Disease Information: Ebola Hemorrhagic Fever*, Jan. 18, 2001, [http://www.hc-sc.gc.ca/pphb-dgspsp/tmp-pmv/info/ebola\\_e.html](http://www.hc-sc.gc.ca/pphb-dgspsp/tmp-pmv/info/ebola_e.html) (last visited Mar. 4, 2003). Since 1994, Ebola outbreaks occurred in the Democratic Republic of Congo, Ivory Coast, Gabon, South Africa, and Uganda. *Id.*

massive poaching of elephants in Africa by united action that destroyed the market for illegal trade in ivory. The 1989 Ivory Ban also represented a method by which the international community could enforce CITES's protection of the elephant. This protection occurred through united action to dry up the market for illegal elephant products, rather than reliance on the domestic legislation and law enforcement efforts of African nations.

In short, the 1989 Ivory Ban represented the best of CITES. In imposing the Ban, the Parties refused to allow theories of national sovereignty and subsidiarity to prevent unified action in order to save the elephant from extinction by poachers before the arrival of the new millennium. Southern African states, however, reject this view of the 1989 Ivory Ban and regard it as an unjustified interference in their internal affairs. They demand that the Convention authorize new sales in exchange for their commitment to support CITES's protection for elephants. However, if the critics of the authorized 1999 sale of ivory to Japan are correct, new ivory sales will weaken global efforts to save the elephant by waking the sleeping giant of demand for ivory.

As a growing list of African states agitate for future authorized sales of ivory, the world fears that the pressure from southern range states will eventually lead the CITES Convention of Parties to downlist the elephant to Appendix II throughout Africa. As the Convention wrestles with each new proposal for authorized ivory sales, the question must be asked whether the decision reached by the Parties at COP 12 in November 2002 determined not only the future survival of the elephant in Africa and Asia, but of the ultimate future effectiveness of CITES as well. Many environmentalists believe approval of future ivory sales will ultimately lead to a world devoid of the unique and wonderful animal we call the elephant. If the Convention of Parties continues in this direction, CITES may render a blow against endangered species that ultimately will lead to the Convention's own extinction.

