

# PROBLEMS IN ENFORCEMENT OF THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES

“Good laws, if they are not obeyed, do not constitute good government.”<sup>†</sup>

## I. INTRODUCTION

A vast number of species in the world are currently experiencing a very serious threat of extinction that, to a large extent, has been brought about by human activity.<sup>1</sup> As a result, species are being brought to the brink of extinction at an alarming rate. In 1994, available figures indicated that there were thirty million or more species in the world, and that 20% could be extinct by the year 2000.<sup>2</sup> In 1996, the International Union for the Conservation of Nature (“IUCN”) estimated that a total of 11,046 species of plants and animals were facing a high risk of extinction in the near future, a figure that included 24% of mammal species and 12% of bird species.<sup>3</sup> In 2000, the IUCN enumerated 18,276 species and subspecies on its list of endangered species, including a total of 520 species of mammals and 503 species of birds.<sup>4</sup> While habitat destruction is arguably the most serious threat to endangered species,<sup>5</sup> the

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† ARISTOTLE, POLITICS (Ernest Barker trans., Oxford University Press 1995).

1. See Jay E. Carey, Note, *Improving the Efficacy of CITES by Providing Proper Incentives to Protect Endangered Species*, 77 WASH. U. L.Q. 1291, 1291 (1999).

2. Rodger Schlickeisen, *Protecting Biodiversity for Future Generations: An Argument for a Constitutional Amendment*, 8 TUL. ENVTL. L.J. 181, 185 (1994) (“New data suggest that there may be 30 million or more species in the world of which perhaps twenty percent may be lost by the year 2,000 [sic]. Losses will continue to accelerate thereafter.”).

3. Press Release, International Union for the Conservation of Nature, *Confirming the Global Extinction Crisis*, (Sept. 28, 2000), available at <http://www.iucn.org/redlist/2000/news.html> [hereinafter *Confirming the Global Extinction Crisis*].

4. *Id.*

5. See Karl Jonathan Liwo, Note, *The Continuing Significance of the Convention on International Trade in Endangered Species of Wild Fauna and Flora During the 1990's*, 15 SUFFOLK TRANSNAT'L L.J. 122, 124 (1991); *Confirming the Global Extinction Crisis*, supra note 3 (In 2000, “[h]abitat loss

global trade in such species and in products derived from them is clearly the next most crucial factor in the decline of species.<sup>6</sup>

The global illegal wildlife trade generates an estimated \$5 to 10 billion each year,<sup>7</sup> making it the third largest illegal trade worldwide (after drugs and arms).<sup>8</sup> The U.S. is the world's largest importer of wildlife and wildlife products, accounting for 20% of the trade in the international wildlife market.<sup>9</sup> Illegal wildlife products are second only to drugs in illegal items entering the United States.<sup>10</sup>

In 1973, twenty-one nations convened to address the growing problem of the effect of international trade on endangered species.<sup>11</sup> The result was the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES" or "Treaty"),<sup>12</sup> which entered into force on July 1, 1975 and currently has 157 member nations.<sup>13</sup> The treaty has been widely hailed as one of the most comprehensive and successful international environmental treaties in existence.<sup>14</sup> The primary goal of the treaty was to provide a mechanism to control inter-

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and degradation affect 89 percent of all threatened birds, 83 percent of mammals, and 91 percent of threatened plants assessed.").

6. Meena Alagappan, Comment, *The United States' Enforcement of the Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 10 NW. J. INT'L L. & BUS. 541, 541 (1990).

7. Joonmoo Lee, Comment, *Poachers, Tigers and Bears. . . Oh, My! Asia's Illegal Wildlife Trade*, 16 NW. J. INT'L L. & BUS. 497, 497 (1996). See also Carey, *supra* note 1, at 1291.

8. See Lee, *supra* note 7, at 497; Carey *supra* note 1, at 1291.

9. See Charlene D. Daniel, *Evaluating U.S. Endangered Species Legislation-The Endangered Species Act as an International Example: Can this Be Pulled Off? The Case of the Rhinoceros and Tiger*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 683, 684 (1999). See also Lee, *supra* note 7, at 497.

10. Lee, *supra* note 7, at 497.

11. Michael J. Hickey, *Acceptance of Sustainable Use Within the CITES Community*, 23 VT. L. REV. 861, 861 (1999).

12. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES].

13. U.S. Fish and Wildlife Service, *CITES List of Party Countries*, available at <http://international.fws.gov/cites/citeslop.html> (last visited Mar. 22, 2002).

14. See Hickey, *supra* note 11, at 861; Carey, *supra* note 1, at 1291; Laura H. Kosloff & Mark C. Trexler, *The Convention on International Trade in Endangered Species of Wild Fauna and Flora: No Carrot, But Where's the Stick?*, 17 ENVTL. L. REP. 10,222 (1987).

national trade in various species in order to prevent them from becoming endangered, or if they already were endangered, to prevent their further decline.<sup>15</sup> The treaty specifies that individual nations bear the responsibility of its enforcement and requires that member countries implement the treaty domestically.<sup>16</sup>

CITES was implemented in the United States with the enactment of the Endangered Species Act of 1973 ("ESA" or "Act").<sup>17</sup> The ESA specifically prohibits trade of wildlife in contravention of CITES<sup>18</sup> and provides for civil and criminal penalties for offenders.<sup>19</sup> However, the ESA uses different mechanisms than CITES for the listing of species and significantly broadens the scope of protection by including preservation of habitat in its provisions.<sup>20</sup> Many environmental groups consider the ESA to be the finest wildlife legislation currently in effect,<sup>21</sup> and the United States Supreme Court has called it the "most comprehensive legislation for preservation of endangered species ever enacted by any nation."<sup>22</sup> Yet, despite both CITES and the ESA, illegal trade in endangered wildlife continues, both globally and domestically.

This Note examines problems in the enforcement of CITES both internationally and in the United States, actions that have been taken to correct some of these problems, and several areas in which there is more work to be done. Section II of this Note provides pertinent background information on both CITES and the ESA. Section III outlines particular historical problems with enforcement of CITES and the measures that have recently been taken to cure them. The author will specifically address issues surrounding the vagueness of the language of CITES and changes in the scientific requirements for the

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15. CITES, *supra* note 12, pmb1.

16. *Id.* art. VIII(1).

17. The Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2000) [hereinafter ESA].

18. *Id.* § 1538(c).

19. *Id.* § 1540(a)-(b).

20. Shennie Patel, Comment, *The Convention on Trade in Endangered Species: Enforcement and the Last Unicorn*, 18 HOUS. J. INT'L L. 157, 174-76 (1995).

21. *Id.* at 174.

22. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978).

listing of species. Section IV explores the fact that while many positive developments have been made by the CITES parties and incorporated by the U.S., serious problems in enforcing the treaty provisions remain. Section IV first looks at recent efforts to encourage enforcement undertaken through CITES. It then discusses enforcement measures in the U.S., including detection and apprehension of wildlife traffickers as well as their prosecution. Section V concludes that, while much has been done to improve the enforcement of CITES in the U.S., as the largest importer of illegal wildlife and wildlife products it is vital that the U.S. take a leadership role in closing up loopholes that allow violators of both CITES and the ESA to escape appropriate punishment.

## II. BACKGROUND

### A. *Purposes of CITES and the ESA*

Both CITES and the ESA have protection of endangered species as their overarching goal, and both propose to provide this protection through the restriction of trade in such species and in products derived from them.

The Preamble to CITES states:

The Contracting States,

*Recognizing* that wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come;

*Conscious* of the ever-growing value of wild fauna and flora from aesthetic, scientific, cultural, recreational and economic point 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;

*Have agreed* as follows . . . .<sup>23</sup>

While the Findings, Purposes and Policy section of the ESA states:

(a) Findings

The Congress finds and declares that--

- (1) various species of fish, wildlife and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;
- (2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;
- (3) these species of fish, wildlife, and plants are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

(b) Purposes

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) Policy

- (1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.
- (2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.<sup>24</sup>

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23. CITES, *supra* note 12, pmb1.

24. 16 U.S.C. § 1531.

CITES requires that parties take appropriate measures to enforce its provisions and to prohibit trade in violation of the treaty.<sup>25</sup> It also requires that parties establish a domestic Management Authority and Scientific Authority.<sup>26</sup> Because CITES is not a self-executing treaty it requires that enforcement measures be provided by its members.<sup>27</sup> CITES does establish that a Secretariat ("the Secretariat") responsible for overseeing the various actions taken by the parties under the Treaty's auspices be provided by the Executive Director of the United Nations Environment Programme.<sup>28</sup> The enactment of

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25. CITES, *supra* note 12, art. VIII(1). The provision states:

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

These shall include measures:

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

*Id.*

26. *See id.* art. IX(1). Article IX(1) states: "Each Party shall designate for the purposes of the present Convention: (a) one or more Management Authorities competent to grant permits or certificates on behalf of that Party; and (b) one or more Scientific Authorities." *Id.*

27. Patel, *supra* note 20, at 168.

28. CITES, *supra* note 12, art. XII(1)-(2). Article XII(2) specifically states:

2. The functions of the Secretariat shall be:

- (a) to arrange for and service meetings of the Parties;
- (b) to perform the functions entrusted to it under the provisions of Articles XV and XVI of the present Convention;
- (c) to undertake scientific and technical studies in accordance with programmes authorized by the Conference of the Parties as will contribute to the implementation of the present Convention, including studies concerning the standards for appropriate preparation and shipment of living specimens and the means of identifying specimens;
- (d) to study the reports of the Parties and to request from Parties such further information with respect thereto as it deems necessary to ensure implementation of the present Convention;
- (e) to invite the attention of the Parties to any matter pertaining to the aims of the present Convention;
- (f) to publish periodically and distribute to the Parties current editions of Appendices I, II and III together with any information

the ESA in 1973 served to implement CITES in the United States,<sup>29</sup> and the U.S. Fish and Wildlife Service ("FWS") was designated under the Department of the Interior to act as both the Management and Scientific Authority.<sup>30</sup> The FWS is also responsible for the administration of the ESA in conjunction with the National Marine Fisheries Service, which is responsible for species living in marine environments.<sup>31</sup>

In order to evaluate both instruments, it is necessary to look carefully at the difference in the language of CITES and the ESA. One important distinction is the fact that while both measures recognize the inherent value of endangered species and the necessity of protecting them, CITES specifically addresses only the threat imposed by trade whereas the ESA extends its purpose to include active conservation of both species and the ecosystems upon which they depend. This naturally leads to different approaches in the assessment and listing of species under CITES and the ESA.

### *B. Classification of Species under CITES and the ESA*

Both CITES and the ESA contain provisions for categorizing the various species they desire to protect. CITES uses a three-tiered system of appendices, while the ESA simply contains two designations: endangered and threatened.

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which will facilitate identification of specimens of species included in those Appendices;

(g) to prepare annual reports to the Parties on its work and on the implementation of the present Convention and such other reports as meetings of the Parties may request;

(h) to make recommendations for the implementation of the aims and provisions of the present Convention, including the exchange of information of a scientific or technical nature;

(i) to perform any other function as may be entrusted to it by the Parties.

*Id.* art. XII(2).

29. U.S. Fish and Wildlife Service, *ESA Basics*, at <http://endangered.fws.gov/pubs/esa%20basics.pdf> (last visited Mar. 22, 2002).

30. The actual text of the Act states: "The Secretary of the Interior . . . is designated as the Management Authority and the Scientific Authority for the purposes of the Convention and the respective functions of each such Authority shall be carried out through the United States Fish and Wildlife Service." ESA, 16 U.S.C. § 1537a(a) (2000).

31. *Basics ESA*, *supra* note 29.

## 1. CITES

Under CITES species are categorized within one of three Appendices. Appendix I contains the most stringent provisions, applying to all species "threatened with extinction which are or may be affected by trade."<sup>32</sup> CITES goes on to provide that "trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances."<sup>33</sup> Species listed in Appendix I cannot be exported unless: (1) the export will not be detrimental to survival of the species; (2) the specimen was not obtained in violation of the exporting country's laws for protection of wildlife; (3) living specimens are prepared and shipped to minimize the risk of injury, adverse health effects or cruel treatment; and (4) the exporting state is satisfied that an import permit has been granted by the destination state.<sup>34</sup> Furthermore, in order to import an Appendix I species the importing country must: (1) be advised by its Scientific Authority that the import will not be detrimental to the survival of the species; (2) be assured by the Scientific Authority that any recipient of a living specimen is able to properly care for it; and (3) be satisfied that the species will not be used for primarily commercial purposes.<sup>35</sup>

Appendix II allows for trade in a species, but recognizes that such trade must be strictly controlled to prevent the species from becoming threatened with extinction. This provision also acknowledges that trade in other species may need to be regulated in order to allow effective control of a species that has the potential for becoming endangered.<sup>36</sup> The provisions for export

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32. CITES, *supra* note 12, art. II(1).

33. *Id.*

34. *Id.* art. III(2)(a)-(d).

35. *Id.* art. III(3)(a)-(c).

36. The actual text is as follows:

2. Appendix II shall include:

- (a) all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival; and
- (b) other species which must be subject to regulation in order that trade in specimens of certain species referred to in sub-

are the same as those for Appendix I species, but there is no import permit requirement.<sup>37</sup> The Scientific Authority of each party is charged with monitoring both the export permit process and actual export of Appendix II species. If a Scientific Authority determines that the export of the species should be limited in order to support its preservation, it is required to advise the proper Management Authority of a course of action that will confine the number of export permits granted for that species.<sup>38</sup>

The final category for species under CITES is Appendix III. This provision includes "all species which any Party identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the co-operation of other Parties in the control of trade."<sup>39</sup> Appendix III does not contain the provision found in the other two appendices requiring that the export of the species not be detrimental to the survival of the species. It does require that an export permit be issued if the exporting country has listed the species in Appendix III and that, in all other cases, a certificate of origin be presented prior to importation.<sup>40</sup>

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paragraph (a) of this paragraph may be brought under effective control.

*Id.*

37. *Id.* art. IV(4).

38. CITES states that:

3. A Scientific Authority in each Party shall monitor both the export permits granted by that State for specimens of species included in Appendix II and the actual exports of such specimens. Whenever a Scientific Authority determines that the export of specimens of any such 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, the Scientific Authority shall advise the appropriate Management Authority of suitable measures to be taken to limit the grant of export permit for specimens of that species.

CITES, *supra* note 12, art. IV(3).

39. *Id.* art. II(3).

40. Article V(3) of CITES provides that: "The import of any specimen of a species included in Appendix III shall require . . . the prior presentation of a certificate of origin and, where the import is from a State which has included that species in Appendix III, an export permit." *Id.* art. V(3).

## 2. The ESA

The ESA designates two categories in which species may be listed: endangered and threatened. The Act defines the term endangered species to mean “any species which is in danger of extinction throughout all or a significant portion of its range . . . .”<sup>41</sup> A threatened species is defined as “any species which is likely to become an endangered species with in the foreseeable future throughout all or a significant portion of its range.”<sup>42</sup>

The Secretary of the Interior (“the Secretary”), in charge of administering the Act, considers five factors in promulgating regulations designating a species as either threatened or endangered: (1) present or threatened eradication or alteration of its habitat; (2) overuse for commercial, recreational, scientific or educational purposes; (3) disease or predation; (4) inadequacy of current regulations; and (5) other natural or manmade factors affecting its continued existence.<sup>43</sup> The Act does not list separate factors that apply specifically to the listing of a species as either threatened or endangered.

### *C. Listing Criteria under CITES and the ESA*

Both CITES and the ESA specify the grounds upon which each should base decisions about the category in which to place a species, either initially or on a recommendation for a change in status. CITES has gone through a number of revisions in this area.

## 1. CITES

The criteria for listing a species under CITES have undergone a series of changes, particularly with regard to the procedures for making amendments to Appendices I and II.<sup>44</sup> The crux of the debate has been whether the standards used are specific enough and require appropriate scientific input.<sup>45</sup>

The text of the convention provides three general guidelines for making an amendment to Appendix I and II at a meeting of

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41. ESA, 16 U.S.C. § 1532(6) (2000).

42. *Id.* § 1532(20).

43. *Id.* § 1533(a)(1)(A)-(E).

44. *See* Patel, *supra* note 20, at 182.

45. *Id.*

the parties: (1) that any party to the treaty may propose an amendment for consideration; (2) that a two-thirds majority of parties that are both present and voting (not abstaining) is required for adoption of an amendment; and (3) that amendments shall enter into force ninety days after adoption except with regard to parties that make a reservation.<sup>46</sup> These provisions still apply to amendments proposed for Appendix I and II. What has changed is the methodology employed by the Secretariat in making recommendations, and the specific requirements for changing the status of a species by either downlisting it from Appendix I to Appendix II, or removing it from Appendix II entirely.

At the First Meeting of the Conference of the Parties, a set of criteria were adopted outlining the methodology for listing species and for transferring a species from Appendix I to Appendix II, or vice versa.<sup>47</sup> These are known as the "Berne criteria."<sup>48</sup> In making assessments as to whether a species should be listed under Appendix I to protect it from extinction, data regarding population, habitat, trade and other similar factors could be used.<sup>49</sup> The concept behind use of these criteria rather than precise biological data was that the effect of trade on a species was too complex to allow precise data to be defined.<sup>50</sup> More general guidelines were particularly necessary to extend protection to species for which it was impossible to determine the exact survival status, due to either a lack of scientific knowledge or to a country's financial means of obtaining such information.<sup>51</sup> These criteria were criticized, in particular by several African nations, for their overall vagueness and lack of clear scientific justifications for the making of listing determinations.<sup>52</sup> Several provisions that eroded the Berne criteria were subsequently passed. For example, at the Third Meeting of the

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46. CITES, *supra* note 12, art. XV(1)(a)-(c).

47. Hickey, *supra* note 11, at 874.

48. Carey, *supra* note 1, at 1296.

49. David S. Favre, *Tension Points Within the Language of the CITES Treaty*, 5 B.U. INT'L L. J. 247, 249 (1987).

50. See *CITES Comes to Florida*, HSUS NEWS, Fall 1993, at 13.

51. *Id.* at 14.

52. See Kevin Eldridge, *Whale for Sale?: New Developments in the Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 24 GA. J. INT'L & COMP. L. 549, 559 (1995).

Conference of the Parties in 1981, a resolution was passed permitting the ranching of Appendix I species that were no longer considered endangered, provided that the ranching operation was "primarily beneficial to the conservation of the local population."<sup>53</sup>

In 1992, at the Eighth Meeting of the Conference of the Parties in Kyoto, Japan, the Berne criteria were finally deemed to "not provide an adequate basis for amending the appendices" and it was directed that a revision of the criteria be undertaken.<sup>54</sup> This was done, and at the 1994 Conference a new resolution regarding the criteria for the amendment of Appendices I and II was adopted.<sup>55</sup> These criteria establish more specific provisions for the listing of both Appendix I and II species, addressing both what is necessary for a species to be listed in either appendix, and in what particular way such determinations are to be made with regard to each appendix.<sup>56</sup> Two major ar-

53. Hickey, *supra* note 11, at 876-77.

54. The actual text states:

RECALLING that the Conference of the Parties at its eighth meeting, held in Kyoto, Japan, in March 1992, was convinced that the criteria adopted at the first meeting of the Conference of the Parties (Berne 1976) (Resolutions Conf. 1.1 and Conf. 1.2) did not provide an adequate basis for amending the Appendices, and directed the Standing Committee to undertake, with the assistance of the Secretariat, a revision of the criteria for amending the Appendices (Resolution Conf. 8.20) . . . .

*Resolution of the Conference of the Parties*, Ninth Meeting of the Conference of the Parties, Conf. 9.24 (Nov. 7-18, 1994), available at <http://www.cites.org/CITES/eng/resols/index.shtml> (last visited Mar. 22, 2002) [hereinafter *Resolution 1994*].

55. *Id.*

56. For example, with regard to Appendix I species the resolution states:

a) any species that is or may be affected by trade should be included in Appendix I if it meets at least one of the biological criteria listed in Annex I;

b) a species "is or may be affected by trade" if:

i) it is known to be in trade; or

ii) it is probably in trade, but conclusive evidence is lacking; or

iii) there is potential international demand for specimens; or

iv) it would probably enter trade were it not subject to Appendix I controls . . . .

*Id.* The biological criteria listed in Annex I states:

eas of change include the request for input from inter-governmental organizations for all species, and the inclusion of habitat provisions in the biological criteria for Appendix I spe-

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A species is considered to be threatened with extinction if it meets, or is likely to meet, at least one of the following criteria.

A. The wild population is small, and is characterized by at least one of the following:

- i) an observed, inferred or projected decline in the number of individuals or the area and quality of habitat; or
- ii) each sub-population being very small; or
- iii) a majority of individuals, during one or more life-history phases, being concentrated in one sub-population; or
- iv) large short-term fluctuations in the number of individuals; or
- v) a high vulnerability due to the species' biology or behaviour (including migration).

B. The wild population has a restricted area of distribution and is characterized by at least one of the following:

- i) fragmentation or occurrence at very few locations; or
- ii) large fluctuations in the area of distribution or the number of sub-populations; or
- iii) an observed, inferred or projected decrease in any one of the following:
  - the area of distribution; or
  - the number of sub-populations; or
  - the number of individuals; or
  - the area or quality of habitat; or
  - reproductive potential.

C. A decline in the number of individuals in the wild, which has been either:

- i) observed as ongoing or as having occurred in the past (but with a potential to resume); or
- ii) inferred or projected on the basis of any one of the following:
  - a decrease in area or quality of habitat; or
  - levels or patterns of exploitation; or
  - threats from extrinsic factors such as the effects of pathogens, competitors, parasites, predators, hybridization, introduced species and the effects of toxins and pollutants; or
  - decreasing reproductive potential.

D. The status of the species is such that if the species is not included in Appendix I, it is likely to satisfy one or more of the above criteria within a period of five years.

*Id.*

cies.<sup>57</sup> These new criteria also contain explicit provisions and recommendations for the split-listing of species, the transfer of species from one designation to another and the removal of a species from Appendix II.<sup>58</sup> In particular, any transfer or deletion shall be subject to precautionary measures. These measures provide in general that: "When considering proposals to the appendices, the Parties shall, in the case of uncertainty, either as regards the status of a species or as regards the impact of trade on the conservation of a species, act in the best interest of the conservation of the species."<sup>59</sup> It is significant to note that these changes serve to bring CITES much more in line with the requirements for determinations as outlined in the ESA, which also require a scientific basis and consideration of habitat protection.<sup>60</sup>

## 2. The ESA

Section 4(b) of the Act provides that the Secretary shall base decisions:

[S]olely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction . . . .<sup>61</sup>

Species that have been identified as requiring trade protection by a foreign nation or by an international agreement will be considered in making such decisions.<sup>62</sup> The Act also contains a specific provision allowing the Secretary to designate critical habitat for a species as protected on the basis of the best scientific data available, after taking into consideration any economic impact in doing so.<sup>63</sup>

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57. *Id.*

58. *Id.* at Annexes III-IV.

59. *Resolution 1994*, *supra* note 54, at Annex IV.

60. ESA, 16 U.S.C. § 1533 (2000).

61. *Id.* § 1533(b)(1)(A).

62. *Id.* § 1533(b)(1)(B)(i).

63. The Act states:

With regard to the addition of species or to a change in the designation of a particular species, the Act requires that the Secretary review the list of protected species at least once every five years to determine whether species should be removed from the list, moved from a threatened designation to an endangered designation, or from endangered to threatened.<sup>64</sup> In so doing the Secretary must comply with the general requirements stated above.<sup>65</sup> Furthermore, the Secretary may treat non-listed species as though they are an endangered or threatened species if: (1) it is found that they so closely resemble in appearance a listed species that enforcement personnel would find it difficult to differentiate between the two; (2) that such difficulty is likely to allow an additional threat to an endangered or threatened species; and (3) that treating the unlisted species in this manner will facilitate the enforcement of and further the policies of the Act.<sup>66</sup>

#### *D. Enforcement*

As stated above, CITES is not a self-executing treaty and therefore relies on the domestic enforcement measures undertaken by its member parties. CITES does contain different permit requirements for each of the three appendices.<sup>67</sup> These permit requirements are intended to allow monitoring of trade in CITES species in order to aid domestic enforcement. They also provide a method for tracking the efficacy of the domestic measures implemented by CITES member countries. The ESA, on the other hand, contains specific procedures for violations of

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(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

*Id.* § 1533(b)(2).

64. *Id.* § 1533(c)(2)(A)-(B).

65. *Id.* § 1533(c)(2).

66. ESA, 16 U.S.C. § 1533(e)(A)-(C) (2000).

67. CITES, *supra* note 12, art. VI.

CITES, as well as provisions for civil and criminal penalties for violation of the Act itself.<sup>68</sup>

### 1. CITES

The permitting requirements of CITES differ with regard to each Appendix. Any shipment of an Appendix I species requires an initial permit obtained from the importing country in addition to one obtained from the exporting country.<sup>69</sup> In order for an import permit to be granted, the purpose of the import must not be detrimental to the species' survival, must not be for primarily commercial purposes and the importer must be equipped to properly provide for the care of live animals and plants.<sup>70</sup> An export permit will only be granted where the export will not be detrimental to the species' survival and the specimens have been legally acquired.<sup>71</sup>

Appendix II species do not require import permits, but any shipment must be accompanied by a permit from the exporting country's Management Authority.<sup>72</sup> Export permit requirements are the same as those for Appendix I species.<sup>73</sup> Appendix III species require an export permit if the shipment originates from any country that has listed such a species, otherwise a certificate of origin is required.<sup>74</sup> There are exceptions for species that were obtained prior to the listing date for that particular species, for species that are bred in captivity or artificially propagated, and for personal and household effects intended solely for personal use.<sup>75</sup> The first two exceptions require that certificates be granted prior to export.<sup>76</sup>

### 2. The ESA

In the United States, the enforcement provisions of the ESA apply to CITES violations as well as to violations of the Act

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68. 16 U.S.C. §§ 1540(a)-(b), 1538(c)(1)-(2).

69. CITES, *supra* note 12, art. IV(4)-(5).

70. U.S. Fish & Wildlife Service, *CITES Permits and Certificates*, at <http://www.international.fws.gov/pdf/cpc.pdf> (last visited Mar. 22, 2002).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *CITES Permits and Certificates*, *supra* note 70.

itself.<sup>77</sup> As stated earlier, the FWS acts as both the Management and Scientific Authority for the United States.<sup>78</sup> The Management Authority oversees the granting and authenticating of permits under CITES, while the Scientific Authority is responsible for investigating shipments and making determinations to ensure compliance with the treaty.<sup>79</sup> When the FWS determines that a party has violated CITES, it can institute a penalty proceeding.<sup>80</sup> These take place in the Interior Department's Office of Hearings and Appeals, and are presided over by an administrative law judge.<sup>81</sup> The decisions of the judge constitute final administrative action on the particular matter, but may be appealed to the Appeals Board of the Interior Department.<sup>82</sup> The decision of the Appeals Board is the final agency ruling and is subject to judicial review upon demand by a party with standing.<sup>83</sup>

The ESA itself contains provisions for both civil and criminal penalties.<sup>84</sup> The criminal penalties in the ESA are misdemeanors and the maximum penalty under the Act is \$20,000 in fines, a year in jail, or both.<sup>85</sup> However, greater penalties may be assessed because the Omnibus Crime Control Act of 1984 increased the possible fines for all crimes.<sup>86</sup> Under this act, misdemeanors punishable by more than six months imprisonment carry a maximum fine of \$100,000 for an organization and \$25,000 for an individual.<sup>87</sup>

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77. ESA, 16 U.S.C. § 1538(c)(1)-(2).

78. See *ESA Basics*, *supra* note 29.

79. Alagappan, *supra* note 6, at 549.

80. *Id.* at 550.

81. *Id.*

82. *Id.*

83. *Id.*

84. ESA, 16 U.S.C. § 1540(a)-(b) (2000).

85. *Id.* § 1540(b)(1).

86. Pub. L. No. 98-473, 98 Stat. 1987, as amended by Pub. L. No. 99-217, 99 Stat. 1728 (codified as amended in scattered sections of 18 U.S.C.).

87. *Id.* See also Alagappan, *supra* note 6, at 550.

### III. HISTORICAL PROBLEMS WITH CITES AND RECENT SOLUTIONS

#### A. *Vagueness of Terms*

Along with the fact that there are no actual enforcement provisions included in CITES, perhaps the most criticized aspect of the Treaty is the vagueness of its language.<sup>88</sup> This not only makes it difficult to interpret on an international plane, but also causes problems with its implementation and enforcement domestically. Several terms and phrases are particularly problematic, including the term "species," the phrase "readily recognizable part or derivative" within the definition of the term "specimen," and the phrase "for primarily commercial purposes."<sup>89</sup> Of these, only the terms species and specimen are specifically defined by the original text of CITES.<sup>90</sup>

Article I of CITES states that "[s]pecies' means any species, subspecies, or geographically separate population thereof . . . ."<sup>91</sup> Although it appears that the goal of such language was to make sure that the definition was as inclusive as possible, it is problematic because it does not address the fact that a species may be populous in one country but near extinction in another.<sup>92</sup> An example of this can be found in the brown bear, a species that includes the North American Grizzly Bear, the Asian Brown Bear and the European Brown Bear.<sup>93</sup> All three of these are geographically isolated populations of the same species, yet while the population in Russian is plentiful, populations in the lower U.S. and Asia are seriously imperiled.<sup>94</sup> Fortunately, a remedy for this problem can be found within the text of the treaty itself. Appendix II allows for the listing of "look-alike species" specifically for the purpose of preventing traffickers from trading in endangered species by identifying them in documents as a similar but non-endangered species.<sup>95</sup>

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88. Liwo, *supra* note 5, at 141-43.

89. CITES, *supra* note 12, art. I(a)-(b).

90. *Id.*

91. *Id.* art. I(a).

92. See Liwo, *supra* note 3, at 141.

93. See Favre, *supra* note 49, at 249.

94. *Id.*

95. CITES, *supra* note 12, art. II(b). See also Paul C. Lin-Easton, Comment, *Ending the Siege on America's Bears: Implementing GATT-Consistent*

This at least provides some protection for species in this situation, even if it is not the highest level of protection found in Appendix I.

Article I goes on to state that:

(b) "Specimen" means:

(i) any animal or plant, whether alive or dead;

(ii) in the case of an animal: for species included in Appendices I and II, any readily recognizable part or derivative thereof; and for species included in Appendix III, any readily recognizable part or derivative thereof specified in Appendix II in relation to the species; and

(iii) in the case of a plant: for species included in Appendices I and II, any readily recognizable part or derivative thereof; and for species included in Appendix III, any readily recognizable part or derivative thereof specified in Appendix III in relation to the species . . . .<sup>96</sup>

The problematic language here is the use of the phrase "readily recognizable part or derivative" in the definition itself. Because this phrase is not separately defined, trade in certain parts and derivatives is regulated by some parties to CITES but not by others.<sup>97</sup> For example, historically CITES was interpreted as governing trade in raw ivory, but not in worked ivory.<sup>98</sup> Furthermore, there was no provision in CITES requiring that country of origin be declared when a party imported worked ivory, nor did the FWS have such a requirement for worked ivory imported into the United States.<sup>99</sup> As a result, it was impossible to know whether the ivory came from a country

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*Pelly Sanctions Against Bear-Trading Nations*, 2 ASIAN-PAC. L. & POL'Y J. 7, 207 (2001) (noting that the various species of American bears that are not listed in Appendix I have now been listed in Appendix II).

96. CITES, *supra* note 12, art. I (b).

97. SIMON Lyster, INTERNATIONAL WILDLIFE LAW 239, 242 (1985).

98. Michael J. Glennon, *Has International Wildlife Law Failed the Elephant?*, 84 AM. J. INT'L L. 1, 12 (1990).

99. *Id.* at 22.

that, at the time, was legally exporting the ivory, or whether the ivory was from an illegal source.<sup>100</sup>

The problem of trade in illegal ivory continues, but many positive measures have been taken to address the problem. In June 1989, following calls from several nations and many non-governmental wildlife conservation organizations, the U.S. announced a total ban on the importation of ivory.<sup>101</sup> Secretary of the Interior Manuel Lujan, Jr. stated, "[w]e believe the current international system for controlling ivory trade has failed to protect the elephant, and we have no choice but to halt commercial ivory shipments into the United States."<sup>102</sup> The U.S. continues to enforce the commercial ban on ivory, and has proposed revision of the regulations relating to CITES to include a requirement that residents who wish to depart and then return to the U.S. with worked ivory as a personal or household effect would have to show records proving previous ownership of the ivory prior to leaving the U.S.<sup>103</sup>

On the international front, at the Ninth Meeting of the Conference of the Parties to CITES, held in Fort Lauderdale, Florida in November 1994, the parties agreed to a resolution that:

[T]he term "readily recognizable part or derivative," as used in the Convention, shall be interpreted to include any specimen which appears from an accompanying document, the packaging or a mark or label, or from any other circumstances, to be a part or derivative of an animal or plant of a species included in the Appendices, unless such part or derivative is specifically exempted from the provisions of the Convention.<sup>104</sup>

The resolution acknowledged the difficulties that had arisen due to a lack of definition for the phrase "readily recognizable part or derivative," and particularly noted that differing inter-

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100. *Id.* at 16.

101. *Id.*

102. *Id.*

103. Revision of Regulations for the Convention on Trade in Endangered Species of Wild Fauna and Flora, 65 Fed. Reg. 26,664 (proposed May 8, 2000) (to be codified at C.F.R. pts. 10, 13, 17 & 23).

104. *Resolution of the Conference of the Parties - Trade in readily recognizable parts and derivatives*, Ninth Meeting of the Conference of the Parties, Conf. 9.6 (Nov. 7-18, 1994), available at <http://www.cites.org/CITES/eng/resols/index.shtml> (last visited Mar. 22, 2002).

pretations by the parties had led to different regulations among various parties to the Treaty.<sup>105</sup> This definition is scheduled to be included in the U.S.'s regulations regarding CITES.<sup>106</sup> The parties had previously agreed to include a clearer definition of the term "for primarily commercial purposes" at the Fifth Meeting of the Conference of the Parties held in Buenos Aires in 1985, again citing vagueness and lack of consistent standards as their primary motivation for doing so.<sup>107</sup> The relevant portions are as follows:

OBSERVING that under Article III, paragraphs 3 (c) and 5 (c), of the Convention, a permit for the import or a certificate for the introduction from the sea of specimens of Appendix-I species may be issued only if certain conditions are met, including that the Management Authority of the State of import (or introduction from the sea) is satisfied that the specimens are not to be used for primarily commercial purposes;

RECOGNIZING that because the Convention does not define the terms "primarily commercial purposes", "commercial purposes" in paragraph 4 of Article VII, or "non-commercial" in paragraph 6 of Article VII, the term "primarily commercial purposes" (as well as the other terms mentioned above) may be interpreted by the Parties in different ways;

ACKNOWLEDGING that the Parties' differing internal legislation and legal traditions will make it difficult to reach agreement on a simple "objective" interpretation of the term and that the facts concerning each importation will determine whether a proposed use would be for "primarily commercial purposes";

RECOGNIZING that lack of specific definitions for terms involving "commercial" and the importance of the facts con-

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105. *Id.*

106. Revision of Regulations on Trade in Endangered Species, 65 Fed. Reg. at 26,664.

107. *Resolution of the Conference of the Parties - Definition of 'primarily commercial purposes'*, Fifth Meeting of the Conference of the Parties, Conf. 5.10 (Apr. 22-May 3, 1985), available at <http://www.cites.org/CITES/eng/resol/index.shtml> (last visited Mar. 22, 2002).

cerning each proposed transaction create a need for consensus by the Parties regarding general principles and examples to guide the Parties in assessing the commerciality of the intended use of those specimens of Appendix-I species to be imported;

AWARE that agreement on interpreting the term “primarily commercial purposes” is important because of the fundamental principle in Article II, paragraph 1, of the Convention that trade in specimens of Appendix-I species must be subject to particularly strict regulation and only authorized in exceptional circumstances;

RECOMMENDS that for the purposes of Article III, paragraphs 3 (c) and 5 (c), of the Convention, the following general principles and the examples in the Annex attached to the present Resolution be used by the Parties in assessing whether the importation of a specimen of an Appendix-I species would result in its use for “primarily commercial purposes”:

General principles:

1. Trade in Appendix-I species must be subject to particularly strict regulation and authorized only in exceptional circumstances.
2. An activity can generally be described as “commercial” if its purpose is to obtain economic benefit, including profit (whether in cash or in kind) and is directed toward resale, exchange, provision of a service or other form of economic use or benefit.
3. The term “commercial purposes” should be defined by the country of import as broadly as possible so that any transaction which is not wholly “non-commercial” will be regarded as “commercial”. In transposing this principle to the term “primarily commercial purposes”, it is agreed that all uses whose non-commercial aspects do not clearly predominate shall be considered to be primarily commercial in nature with the result that the importation of specimens of Appendix-I species should not be permitted. The burden of proof for showing that the intended use of specimens of Appendix-I species is

clearly non-commercial shall rest with the person or entity seeking to import such specimens.<sup>108</sup>

### *B. Split-Listing of Species*

Another area of controversy has been the criteria used to determine the appropriate appendix of CITES in which to list a species, and the proper method to use for changing the status of a species by either upgrading or downgrading it. One of the most contested provisions has been whether to allow a species to be split-listed.<sup>109</sup>

Split-listing permits different populations of the same species to be placed in different appendices depending on the status of the relevant population in a given country.<sup>110</sup> This was of particular concern to African nations who were engaged in elephant conservation programs that involved allowing a certain number of elephants to be killed each year, then using the resulting profits to promote elephant conservation and community development.<sup>111</sup> These nations opposed the 1989 listing of the elephant only in Appendix I, and supported instead a proposal to split-list the elephant by allowing its inclusion on Appendix II for those countries with less threatened elephant populations and strict regulations on trade.<sup>112</sup>

Beginning in 1989, the issue of split-listing was advocated by a number of these nations at every meeting of the CITES parties. In 1997, the parties finally agreed to allow the elephant to be split-listed such that populations that were highly threatened, such as those in East Africa, would remain on Appendix I, while those in states with successful management programs, such as Zimbabwe, would be listed on Appendix II.<sup>113</sup> Allowing the elephant to be downlisted in certain countries came in conjunction with the adoption of the new general listing criteria adopted by the parties, which included both precautionary measures<sup>114</sup> and specific provisions on the split-listing of spe-

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108. *Id.*

109. *See Resolution 1994, supra note 54.*

110. *Id.*

111. Carey, *supra note 1*, at 1310.

112. Glennon, *supra note 89*, at 17.

113. Hickey, *supra note 11*, at 880-81.

114. *Id.* *See also supra*, Section II.C.1.

cies.<sup>115</sup> It is also important to note that all proposals to downlist a species must be passed by a two-thirds majority vote of the parties.<sup>116</sup> Allowing split-listing is an important indication of the ability of the parties to successfully reach positive compromises within the context of the treaty.

#### IV. PROBLEMS IN PRACTICAL ENFORCEMENT

##### A. *Recent Efforts under CITES*

At the most recent Conference of the Parties, held in Kenya in April 2000, enforcement was addressed in detail and the participants resolved that the Conference:

URGES the Parties, inter-governmental and non-governmental organizations to provide additional financial support for the enforcement of the Convention, by providing funds to the enforcement assistance work of the Secretariat;

DIRECTS the Secretariat to utilize such funds towards the following priorities:

- a) the appointment of additional officers to the Secretariat to work on enforcement-related matters;
- b) assistance in the development and implementation of regional law-enforcement agreements; and
- c) training and technical assistance to the Parties;

URGES the Parties to offer secondment of enforcement officers to assist the Secretariat in addressing law enforcement issues;

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115. See Ninth Meeting of the Conference of the Parties, *supra* note 104. In relevant part:

Listing of a species in more than one appendix should be avoided in general in view of the enforcement problems it creates. When split-listing does occur, this should generally be on the basis of national or continental populations, rather than subspecies. Split-listings that place some populations of a species in the appendices, and the rest outside the appendices, should normally not be permitted.

*Id.*

116. Hickey, *supra* note 11, at 880-81.

DIRECTS the Secretariat to pursue closer international liaison between the Convention's institutions, national enforcement agencies, and existing intergovernmental bodies, particularly the World Customs Organization and ICPO-Interpol.<sup>117</sup>

While this is encouraging in that it signals that there is awareness of the enforcement problems, the reality of implementing these measures remains daunting.

Other methods of aiding enforcement have been promoted through the Secretariat. For example, in August 2001, a Notification to the Parties was issued regarding the issue of implementation of national legislation.<sup>118</sup> The notification identified seventy-six member countries that had yet to implement appropriate domestic provisions as called for by CITES.<sup>119</sup> The notification stated that "[a] clear and strong legislative basis is essential for Parties to implement the Convention," and that at a minimum such legislation must include measures to designate Management and Scientific Authorities, to prohibit trade in violation of CITES, to penalize such trade, and to confiscate specimens illegally traded or possessed.<sup>120</sup> The notification went on to emphasize that a failure to implement such legislation was a violation of the Treaty, and that if the specified nations continued this violation appropriate measures would be considered including "the recommendation of restrictions on the commercial trade in specimens of CITES-listed species to or from Parties with inadequate legislation."<sup>121</sup> In fact, recommendations to suspend trade were recently issued by the Secretariat for Fiji, Yemen and Vietnam.<sup>122</sup> In each case the notification stated that the member nation had failed to meet the deadline set for implementation of domestic legislation, and

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117. *Resolution of the Conference of the Parties, Eleventh Meeting of the Conference of the Parties, Conf. 11.3 (Apr. 10-20, 2000), available at <http://www.cites.org/CITES/eng/index.shtml> (last visited Mar. 22, 2002).*

118. Notification to the Parties No. 2001/059, (Aug. 10, 2001), *available at <http://www.cites.org/eng/notifs/2001/059.shtml> (last visited Mar. 22, 2002).*

119. *Id.*

120. *Id.* at ¶¶ 11-12.

121. *Id.* at ¶¶ 13-15.

122. Notification to the Parties No. 2002/003, No. 2002/004 and No. 2002/005 (Jan. 14, 2002), *available at <http://www.cites.org/eng/notifs/valid02.shtml> (last visited Mar. 22, 2002).*

that "from the date of this Notification, all Parties should refuse any import from and export or re-export to [the member nation] of CITES-listed species, until further notice."<sup>123</sup> On March 11, 2002, the Secretariat withdrew the recommendation for Vietnam because, on January 22, 2002, the Vietnamese government effected legislation that included the four requirements for implementation of CITES.<sup>124</sup> Again, these efforts are encouraging but carry little practical weight, as there is nothing in the Treaty that requires member countries to take positive action with regard to recommendations by the Secretariat.

### *B. Enforcement in the United States*

At least 50,000 shipments of wildlife products enter the United States each year.<sup>125</sup> Some of these are large and others may be only a single item, but in total over 800,000 containers go through U.S. ports every year.<sup>126</sup> Currently, fourteen ports are designated as legal entry and exit points for wildlife, including major ones such as Los Angeles, New York, Miami and Honolulu.<sup>127</sup> There are fewer than 100 wildlife inspectors spread among the designated ports.<sup>128</sup> Clearly, it is not possible for this limited number of inspectors to check every shipment. Furthermore, the general practice is to inspect only those containers that are designated as wildlife, but, as the majority of the trade in wildlife is illegal, this does little in the way of discovering it.<sup>129</sup>

An example of the potential magnitude of this problem was provided in 1983, when the FWS randomly inspected fifty containerized shipments for the first time. Illegal wildlife was found in thirty of these containers and one shipment was worth \$700,000 by itself.<sup>130</sup> Compounding the problem is the fact that

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123. *Id.*

124. Notification to the Parties No. 2002/016 (Mar. 11, 2002), available at <http://www.wto.org/eng/notifs/valid02.shtml> (last visited Mar. 22, 2002).

125. Kosloff & Trexler, *supra* note 14, at 10,222.

126. *Id.*

127. 50 C.F.R. § 14.12 (2000); 65 Fed. Reg. 11,260-01 (Mar. 13, 2002) (to be codified at 50 C.F.R. § 14.12) (conferring designated port status on Anchorage, Alaska).

128. Kosloff & Trexler, *supra* note 14, at 10,222.

129. *Id.*

130. *Id.*

the process of opening up containers is both labor and time intensive,<sup>131</sup> and proper identification of endangered species requires training in the ability to both recognize specific species and identify their parts.<sup>132</sup> Furthermore, while the difficulties in inspection of imports are vast, there is almost no way to inspect shipments leaving the country.<sup>133</sup>

Once traffickers are actually apprehended, they face a broad array of potential charges. Traffickers can be charged with a violation of CITES, in which they face the administrative proceedings outlined in section II.D.2. above. However, traffickers may also be charged under the Lacey Act, which prohibits both domestic and international trafficking in wild animals.<sup>134</sup> The Lacey Act creates both misdemeanor and felony offenses, with the felony offense requiring a greater knowledge on the part of the defendant.<sup>135</sup> A felony violation carries a potential sentence of five years imprisonment, a \$250,000 fine and forfeiture of any equipment involved in the offense.<sup>136</sup> A misdemeanor can result in one year imprisonment and a \$100,000 fine.<sup>137</sup> The Lacey Act also makes it a crime to falsely label shipments of wildlife traveling in interstate or foreign commerce.<sup>138</sup>

Traffickers can also be prosecuted under the ESA. Violations under the ESA are primarily Class A misdemeanors with penalties up to one year imprisonment and a total available fine of \$100,000.<sup>139</sup> Some violations involving threatened species are designated as Class B misdemeanors with a maximum penalty of six months imprisonment and a \$25,000 fine.<sup>140</sup> All traffickers charged under the ESA are subject to forfeiture on a strict liability basis, which means that seizure can occur without re-

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131. *Id.*

132. David S. Favre, *The Risk of Extinction: A Risk Analysis of the Endangered Species Act as Compared to CITES*, 6 N.Y.U. ENVTL. L.J. 341, 349-50 (1998).

133. Kosloff & Trexler, *supra* note 14, at 10,222.

134. Lacey Act Amendments of 1981, 16 U.S.C. §§ 3371-3378 (2000). See also John T. Webb, *Prosecuting Wildlife Traffickers: Important Cases, Many Tools, Good Results*, 2 RES COMMUNES 1, 7 (2001).

135. 16 U.S.C. § 3373(d)(1)-(3) (2000).

136. *Id.* §§ 3373(d), 3374(a)(1). See also 18 U.S.C. § 3571 (2000).

137. 16 U.S.C. §§ 3373(d), 3374(a)(1). See also 18 U.S.C. § 3571.

138. 16 U.S.C. §§ 3372(b), 3372(d).

139. 16 U.S.C. § 1540(b)(1).

140. *Id.*

gard to fault and without being subject to an "innocent owner" defense.<sup>141</sup> Defendants need only satisfy a general intent standard to be convicted of a criminal violation under the ESA, thus they may be convicted even if they did not intend to violate the law or know that a species was protected.<sup>142</sup>

Several other options exist for prosecution. For example, traffickers may be prosecuted under Title 18 for violation of smuggling laws.<sup>143</sup> 18 U.S.C. § 545 makes it an offense to knowingly import merchandise in violation of U.S. law.<sup>144</sup> The statute carries a felony charge that attaches even though the underlying law only carries misdemeanor penalties.<sup>145</sup> A violation of CITES would constitute a breach of underlying law that could be brought under the statute.<sup>146</sup>

Once apprehended, traffickers can face numerous violations with severe penalties. Indeed, there are a number of cases where traffickers have been convicted of multiple violations.<sup>147</sup> However, although it is certainly useful to have an array of possible methods for charging traffickers, it can also allow for vastly different treatment under the law.

## V. CONCLUSION

The positive changes made with respect to clarifying language and developing compromises on the international level clearly indicate an interest and commitment to protecting endangered species that should be continued. However, practical enforcement is undoubtedly the most serious problem facing the trade in endangered species, and it is evident that even in the U.S. the enforcement mechanisms are lacking. This is par-

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141. *United States v. One Handbag of Crocodilius Species*, 856 F. Supp. 128, 134 (E.D.N.Y. 1994).

142. *United States v. McKittrick*, 142 F.3d 1170, 1177 (9th Cir. 1998).

143. 18 U.S.C. § 545 (2000).

144. *Id.*

145. *Webb*, *supra* note 132, at 22.

146. *Id.* at 25.

147. *See, e.g.*, *United States v. Silva*, 122 F.3d 412, 413-14 (7th Cir. 1997) (defendant convicted under Lacey Act and smuggling statute of conspiring to smuggle exotic birds into the U.S., and for failing to report taxable income, sentenced to 82 months imprisonment and fined \$100,000); *United States v. Lee*, 937 F.2d 1388, 1396-97 (1991) (ring leader of conspiracy to smuggle 500 metric tons of salmon into the U.S. convicted of conspiracy and money laundering charges, and sentence to seventy months imprisonment).

ticularly poignant given that the U.S. has considerably greater financial resources than many other countries and has still been unsuccessful in curbing the trade in illegal wildlife. It is simply impossible for the small number of inspectors to check each shipment designated as containing wildlife, much less for them to randomly check other shipments for illegal species. One proposed solution to this problem is to cross-designate customs officials to allow them to seize shipments that are suspicious, and then have the shipments inspected at a later time by properly trained wildlife inspectors.<sup>148</sup> However, for a true impact to be made, much more comprehensive measures are necessary, including increasing the number of officially trained inspectors and training customs agents to identify potentially illegal shipments. In order to be effective, inspection must be consistent and thorough.

Furthermore, although there are adequate laws in place in the U.S. to allow traffickers to be prosecuted and severely sentenced, serious issues exist as to how these laws are applied, and the severity of the sentences actually imposed. It is important to recall that the tragic loss of endangered species is not the only issue in these cases. Wildlife trafficking involves large-scale criminal organizations, often the same organizations that are involved in trafficking drugs and weapons into this country, and therefore represents a very serious criminal threat. As the largest importer of illegal wildlife and wildlife products, it is imperative that the U.S. take a leadership role in zealously enforcing the provisions of both CITES and the ESA to prevent traffickers from escaping appropriate punishment.

*Elisabeth M. McOmber\**

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148. See Favre, *supra* note 109.

\* The author will be receiving her J.D. from Brooklyn Law School in June 2002. She would like to thank her fiancé, Basil Katsaounis, and her parents, Sandy and Ginny McOmber, for their unending love and support.



# THE PRIVACY AMENDMENT (PRIVATE SECTOR) BILL 2000: THE AUSTRALIAN GOVERNMENT'S SUBSTANDARD ATTEMPT TO ALLAY PRIVACY CONCERNS AND REGULATE INTERNET PRIVACY IN THE PRIVATE SECTOR

## I. INTRODUCTION

In many nations the individual's right to privacy is recognized as a fundamental human right.<sup>1</sup> Although Australia does not have a constitutionally guaranteed right to privacy, and it is not a member of the European Union ("EU"), the individual's right to privacy is nonetheless accepted as being fundamental.<sup>2</sup> In 1984, Australia adopted the principles embodied in the Organization for Economic Cooperation and Development's ("OECD") Guidelines on the Protection of Privacy and Transborder Flows of Personal Data ("Guidelines"), which were incorporated into the federal Privacy Act 1988 ("Privacy Act").<sup>3</sup> The Guidelines regulate the collection, use, and transfer of personal data in the public and private sector, where the handling of such data may create dangers to privacy and individual liberty.<sup>4</sup> The Privacy Act was Australia's attempt to regulate how

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1. In the United States the right to privacy is a constitutionally recognized right. In Europe, privacy protection laws have been introduced, or will be introduced in many countries to "prevent what are considered to be violations of fundamental human rights." *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, Organization for Economic Cooperation and Development (OECD), 20 I.L.M. 422 (1980) [hereinafter *Guidelines*].

2. ANTHONY BENDALL, OFFICE OF THE NEW S. WALES PRIVACY COMM'R, INQUIRY INTO E-PRIVACY: SUBMISSION TO THE SENATE SELECT COMMITTEE ON INFORMATION TECHNOLOGIES 3 (2000), available at [http://www.aph.gov.au/senate/committee/it\\_ctte/e\\_privacy/submissions/sub26-NSWPrivacyCommissioner.doc](http://www.aph.gov.au/senate/committee/it_ctte/e_privacy/submissions/sub26-NSWPrivacyCommissioner.doc) (last visited Feb. 23, 2002) [hereinafter INQUIRY I].

3. Privacy Act, 1988 (Austl.).

4. See *Guidelines*, *supra* note 1.