THE DEVOLUTION OF CONSERVATION: WHY CITES MUST EMBRACE COMMUNITY-BASED RESOURCE MANAGEMENT

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The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) seeks to conserve plant and animal species through the regulation of international trade. CITES has traditionally encouraged its members to enforce its trade restrictions through the adoption of strict legislation and the nationalization of lands for use as protected areas. This "classical" approach to conservation, however, is ineffective in many developing countries, since they often lack the resources or political will necessary to enforce these measures. Additionally, by removing local communities' ability to use, and therefore benefit from, the protected species, the classical approach can actually promote the communities to undermine the developing countries' conservation efforts. This Article examines community-based natural resource management as a means of avoiding many of the problems associated with classical conservation efforts in developing countries. It analyzes the CITES Parties' historical refusal to embrace a community-based approach to conservation and contends that CITES must encourage such an approach in order to ensure its future effectiveness and relevancy.

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> *There are tens of millions of species of plants and animals that merit survival. Can we imagine that the 150 or so governments on this planet—many of which do poorly with their human charges—will succeed in so massive a stewardship task? Yet, there are in the world today over five billion people. Freed to engage in private stewardship, the challenge before them becomes commensurable.*[1]
>
> Fred L. Smith Jr.
> (2005)

INTRODUCTION

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is an international treaty designed to ensure the sustainability of plant and animal species through the regulation of international trade.[2] CITES entered into force in 1975, and currently has a membership of 175 nations (collectively, the "Parties").[3] CITES seeks to regulate the trade of roughly 33,000 listed plant and animal species.[4] It regulates trade by assigning species in need of protection to one of three Appendices.[5] Species listed in Appendices II and III are subject to varying degrees of trade limitations, and trade is generally prohibited for all species listed in Appendix I.[6]

While CITES is one of the world's largest conservation treaties, it is questionable whether its trade restrictions are actually effective.[7] Supporters of CITES argue that its

1. Fred L. Smith, Jr., *The Market and Nature*, *in* TERRACOTTA READER: A MARKET APPROACH TO THE ENVIRONMENT 77, 79 (Parth J. Shah & Vidisha Maitra, eds., 2005). Today, the world's population is roughly 6.9 billion people. *See World POPClock Projection*, U.S. CENSUS BUREAU, http://www.census.gov/population/popclockworld.html (last visited Aug. 11, 2011).

2. *What is CITES?*, CITES: THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA [hereinafter CITES], http://www.cites.org/eng/disc/what.shtml (last visited Mar. 2, 2011).

3. *Id.*

4. *The CITES Species*, CITES, http://www.cites.org/eng/disc/species.shtml (last visited Mar. 2, 2011).

5. *Id.*

6. *How CITES Works*, CITES, http://www.cites.org/eng/disc/how.shtml (last visited Mar. 2, 2011).

7. *See* Rowan B. Martin, *When CITES Works and When It Does Not*, *in* ENDANGERED SPECIES THREATENED CONVENTION: THE PAST, PRESENT AND FUTURE OF CITES, THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA 19, 19 (Jon Hutton & Barnabas Dickson eds., 2000).

effectiveness is evidenced by the fact that no species listed has ever become extinct.[8] Critics, however, contend that being listed on the CITES appendices usually has little impact on an endangered species' recovery.[9] In fact, a 1996 study commissioned by CITES determined that only two species appeared to have improved as a result of their listing in CITES Appendices.[10] Also, in many instances where CITES has banned trade in a species, the ban is accompanied by a corresponding increase in illegal trade of the species.[11] For example, in the 1970s, the illegal international trade in endangered species was estimated to be worth $50 million–$100 million annually.[12] Today, illegal trade in endangered species is believed to be valued at $20 billion or more annually.[13] Further, critics argue that trade bans implemented through CITES can actually contribute to habitat loss by limiting the economic benefits that

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8. *See, e.g.*, Ken Stansell, Chairman of the CITES Standing Comm., Address at the Thirteenth Meeting of the Conference of the Parties [hereinafter CoP13] (Oct. 2, 2004), *available at* http://www.cites.org/eng/news/meetings/cop13/ken_openstatmt; Jaime Campos Quiroga, Minister of Agriculture of Chile, Address at the Opening Ceremony of the Twelfth Meeting of the Conference of the Parties (Nov. 3, 2002), *available at* http://www.cites.org/eng/cop/12/Chile_openstatmt.

9. *See* Martin, *supra* note 7, at 19 ("There are no species whose numbers have increased so dramatically after being listed on the CITES appendices that the improvement is obvious."). *See also* Max Abensperg-Traun, *CITES, Sustainable Use of Wild Species and Incentive-Driven Conservation in Developing Countries, with an Emphasis on Southern Africa*, 142 BIOLOGICAL CONSERVATION 948, 950 (2009) (noting that when species lose value because of a CITES trade ban, investments in the species and their habitats is stifled, and the species are viewed as competitors with other uses "with obvious impacts on wildlife populations"); Julian Morris, *Reconstructing Sustainable Development*, *in* TERRAGNOSIA READER, *supra* note 1, at 113, 115 ("[T]he ban on trade in elephant ivory, enacted under the Convention on International Trade in Endangered Species, probably does more harm than good by undermining incentives to conserve elephants locally.").

10. Martin, *supra* note 7, at 20 (citing UNEP, WCMC, STEPS ON HOW TO IMPROVE THE EFFECTIVENESS OF THE CONVENTION: FINAL REPORT TO THE CITES STANDING COMMITTEE (1996)). *See also* SUMMARY REPORT, THIRTY-SEVENTH MEETING OF THE STANDING COMMITTEE 11 (CITES 1996) (reporting that an observer from Environmental Resources Management informed CITES' Standing Committee that "it had been difficult to find conclusive evidence of the impact of trade on the conservation status of the species reviewed"), *available at* http://www.cites.org/eng/com/sc/37/E37-Sumrep.pdf.

11. *See* Jonathan Lilyblad, *Finding Another Look in the Cracks: International Treaties and Domestic Legislation to Level Law Enforcement in the Case of the Convention on the International Trade in Endangered Species*, 18 S. CAL. INTERDISC. L.J. 527, 529 (2008–09); Jon Hutton & Barnabas Dickson, *Introduction*, *in* ENDANGERED SPECIES, THREATENED CONVENTIONS, *supra* note 7, at xi.

12. *See* Lilyblad, *supra* note 11, at 529. Accounting for inflation, this total would be roughly $200 million–$400 million in today's dollars. *See, e.g.*, THE INFLATION CALCULATOR, http://www.westegg.com/inflation/ (last visited July 1, 2011) (calculated based on a start date of 1976 and an end date of 2010).

13. *See* LANA WYLER & PERVAZE SHEIKH, CONG. RESEARCH SERV., RL 34395, INTERNATIONAL ILLEGAL TRADE IN WILDLIFE: THREATS AND U.S. POLICY 7 (updated Aug. 27, 2008) (stating that global trade in illegal wildlife is worth at least $5 billion and potentially in excess of $20 billion annually); Lilyblad, *supra* note 11, at 529 ("As of 2007, the value became approximately $15 [billion–$]25 billion per year.").

purple can derive from utilization of wild species.[14] Habitat loss is one of the primary factors in species loss.[15]

This Article will argue that one of the primary reasons for CITES' limited efficacy is its historical emphasis on the conservation of species primarily through the adoption and enforcement of strict national legislation. This Article will first describe this "classical" top-down approach to conservation. It will then examine the classical approach's limitations in many developing countries, which arise in large part because those countries often lack the economic or political capital to implement or enforce classical legislation. Next, this Article will argue that community based conservation is an approach that avoids many of the problems experienced by developing countries utilizing the classical approach. In discussing the limitations of the classical approach and the potential advantages of the community based approach, this Article will use Namibia as a case study to examine the outcomes of both approaches in that country. This Article will then analyze the Parties' refusal, despite ample opportunity, to embrace community based conservation as a tool in the protection of listed species. Finally, this Article will conclude that, in order to prevent discord among the Parties and to ensure CITES' future global relevance, the Parties should encourage the adoption of community based conservation as a complement to CITES' customary classical conservation approach.

I. THE CLASSICAL APPROACH TO CONSERVATION AND ITS LIMITATIONS

Until the last several decades, the classical approach to conservation was the primary state-sponsored conservation approach used by developing countries,[16] and it remains the approach espoused by many of the Parties to CITES.

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14. *See* Dutton & Dickson, *supra* note 11, at 61.

15. *See* Abensperg-Traun, *supra* note 9, at 953 (noting that habitat loss usually has a greater impact on CITES listed species than does international trade); Barnabas Dickson, *International Conservation Treaties, Poverty and Development: The Case of CITES*, 74 NAT. RESOURCES FORUM (Overseas Dev. Inst., London, U.K.), Jan. 2007, at 2 ("In many cases degradation or loss of habitat is a much more significant threat than international trade"); Monné A. du Plessis, *CITES and the Causes of Extinction*, *in* ENDANGERED SPECIES, UNILATERAL CONVENTION, *supra* note 4, at 9 ("There is agreement that the greatest threat to both animal and plant species lies in the loss of habitat."); John L. Garrison, *The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate over Sustainable Use*, 121 PACE ENVTL. L. REV. 301, 304 (1994) (stating that species are diminishing due to human consumption and habitat loss).

16. *See* Abensperg-Traun, *supra* note 9, at 948; Arun Agrawal & Sanjay Nepal, *Incentive Based Conservation Programs in Developing Countries: A Review of Some Key Issues and Suggestions for Improvement*, 37 ENVTL. MGMT. 1, 1 (2006). *See also* Gregory Maggio, *Recognizing the Vital Role of Local Communities in International Legal Instruments for Customary Biodiversity*, 16 U.C.L.A. J. ENVTL. L. & POL'Y 179, 183–86 (describing the "classical state approach" to conservation).

A. The Classical Approach

Legislation enacted under a classical approach to conservation traditionally emphasizes the formation of "off-limits" protected areas, nationalization of ownership of wildlife, and institution of bans on the hunting or utilization of the protected species.[17] The classical approach to conservation, however, often proves to be ineffective in developing countries.[18] First, in many developing countries, conservation legislation is poorly enforced, if it is enforced at all.[19] The countries may simply lack the will to enforce their own legislation.[20] Even if the developing country possesses the requisite will, the management and policing costs of maintaining large areas of "off-limits" wildlife sanctuaries often outstrip the state's available resources.[21] Therefore, classical legislation is only effective in those places where the developing country is able to muster and focus sufficient resources on regulation and enforcement.[22]

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17. *See* Barnabas Dickson, *Global Regulation and Communal Management*, *in* ENDANGERED SPECIES, THREATENED CONVENTION, *supra* note 7, at 103, 106 (noting that CITES was an effort to strengthen the existing colonial system, "with its protected areas, state ownership of wildlife and bans on most forms of hunting and trade" from above).

18. *See* Martin, *supra* note 7, at 19 (noting that the CITES approach "suits Parties where wildlife control is strongly centralized and efficiently managed, where citizens have legal rights to use wildlife only as permitted by government agencies and where this central control is popularly accepted. In such systems the national bureaucracy will be well placed to implement CITES controls effectively. . . . Where these conditions are not satisfied, however, CITES is unlikely to work. This will be the case where control of wildlife is not centralized or not popularly accepted or where the state bureaucracy is weak and inefficient").

19. *See* Abensperg-Traun, *supra* note 9, at 950 (noting that the functionality of protected areas in many developing countries is preserved only on paper).

20. *See id.* at 952; NORMAN DUBOIS, COMMUNITY BASED NATURAL RESOURCE MANAGEMENT: CONNECTING MICRO AND MACRO PROCESSES, AND PEOPLE WITH THEIR ENVIRONMENTS 4 (1998).

21. *See* Abensperg-Traun, *supra* note 9, at 950; Marshall W. Murphree, *The Strategic Pillars of Communal Natural Resource Management: Benefit, Empowerment and Conservation*, 18 BIODIVERSITY & CONSERVATION 2551, 2553 (2009) (discussing the fact that the colonial "fortress conservation" approach caused the governments to designate protected areas that they lack the resources to effectively manage).

22. *See, e.g.*, CITES, FIFTEENTH MEETING OF THE CONFERENCE OF THE PARTIES [hereinafter CoP15]: DOC. 44.5 (REV. 1): INTERPRETATION AND IMPLEMENTATION OF THE CONVENTION: SPECIES TRADE AND CONSERVATION ISSUE: ELEPHANTS: MONITORING OF ILLEGAL KILLING IN ELEPHANT RANGE STATES 10-11, *available at* http://www.cites.org/eng/cop/15/doc/E15-44-05.pdf (noting a correlation between governance and the poaching of elephants). *See also* Timothy Swanson, *Developing CITES: Modeling the Convention Work for all of the Parties*, *in* ENDANGERED SPECIES, THREATENED CONVENTION, *supra* note 7, at 36, 90 ("It has been found that the level of poaching in African game parks is directly related to the level of expenditure on the parks.").

Second, the classical approach increases the likelihood that the communities located near the protected species ("local communities") will undermine the developing countries' conservation efforts.[20] By designating the wildlife and habitat as property of the state, the government removes from the communities any sense of ownership over—and thus any sense of responsibility for maintaining—those resources.[21] The combination of lack of ownership and responsibility means that, in many cases, the areas "protected" by the developing country become little more than "open access" areas.[22] With no sense of individual ownership, and with violators facing little or no risk of punishment by the state, these areas run the risk of suffering from a "tragedy of the commons."[23]

The theory of the tragedy of the commons "maintains that people will inevitably overexploit a freely accessible resource over which they exert no ownership or control."[24] The area's externalities, such as watershed protection, carbon sequestration, or biodiversity,[25] are shared by all users of the resource, such that any diminution of those externalities is spread out across all of the users.[26] In other words, an individual whose actions diminish an open access area's externalities gains all of the benefit from the activity that caused the harm.

20. *See* Abensperg-Traun, *supra* note 9, at 956 (arguing that protected areas in developing countries have little functionality because they are under pressure from populations that have little incentive in their maintenance).

21. *See* Murphree, *supra* note 21, at 2633; Alexander N. Songorwa, Tom Bührs & Kent H.D. Hughey, *Community-Based Wildlife Management in Tanzania: A Critical Assessment of the Literature*, 10 NAT. RESOURCES J. 603, 606–04 (2000); Richard Summers, *Legal and Institutional Aspects of Community-Based Wildlife Conservation in South Africa, Zimbabwe and Namibia*, 1999 ACTA JURIDICA 188, 188–89 (noting that the protectionist colonial system, which attempted to preserve wildlife and its habitat through the creation of exclusive wildlife sanctuaries, was counterproductive because it caused the rural communities to either ignore or to illegally exploit the protected wildlife); Katherine L. Babcock, Note, *Reform it Local: Improving the Incentive Structure in Community-Based Natural Resource Management Programs*, 21 GEO. INT'L ENVTL. L. & POL'Y 201, 204 (2008) (quoting Marcus Colchester, *Indigenous Peoples and Protected Areas: Rights, Principles and Practice*, 7(1) NATURE & PEOPLES 33, 35 (June 2003)).

25. An "open-access" resource has been defined as a resource "lacking property rights so all producers can use the resource 'freely' and do not face the full cost of stock depletion." James A. Brander & M. Scott Taylor, *Open Access Renewable Resources: Trade and Trade Policy in a Two Country Model*, 44 J. INT'L ECON. 181, 183 (1998).

26. Garrett Hardin most famously articulated the "tragedy of the commons" in Science Magazine in 1968. To illustrate the theory, Hardin used hypothetical herdsmen grazing their herds on a freely accessible resource. *See* Garrett Hardin, *The Tragedy of the Commons: The Population Has No Technical Solution; It Requires a Fundamental Extension in Morality*, 162 SCIENCE 1243, 1244 (1968). Hardin wrote that once the pasture had reached its carrying capacity, "as a rational being, each herdsman seeks to maximize his gain. . . . Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited. . . . Freedom in a commons brings ruin to all." *Id.* More recent theorists argue that Hardin actually describes problems relating to open access lands, rather than common property regimes. *See, e.g.*, Dickson, *supra* note 17, at 111.

27. Elinor Ostrom, *Self-Governance and Forest Resources*, *in* TRENDS OF THE RESOURCE, *supra* note 1, at 131.

28. Hardin, *supra* note 26, at 1244.

but suffers only a fraction of the harm caused.[29] Thus, each user of an open access resource has a rational incentive to overexploit the resource—otherwise, that person runs the risk that someone else will overexploit it instead, and he or she will have suffered a percentage of the harm without realizing any of the gain.[30] Each user will presumably make the rational decision to act in his or her own best interest and choose to maximally exploit the resource.[31]

B. CITES' Historical Reliance on the Classical Approach

CITES relies on each of the Parties to adopt and enforce its own domestic legislation to ensure that CITES' trade restrictions are implemented at the national level.[32] It has generally encouraged the Parties to implement the restrictions through a top-down approach of creating and enforcing comprehensive environmental legislation.[33] For example, the CITES Strategic Vision for 2008–2013 stresses the need for the Parties to enact appropriate legislation, procedures, and enforcement to restrict trade of endangered species at the national level.[34] Similarly, the Secretariat of CITES has urged that "[o]nly through adequate legislation which is permanently up to date and efficiently enforced—both at the borders and within countries—can CITES really work."[35] CITES also proposes the classical approach in many of the Resolutions adopted by the Parties. For example, in Resolution 13.4, CITES advises the Parties to conserve the great apes by adopting and implementing

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29. *See* Hardin, *supra* note 26, at 1244; Scott T. McAllister, Note, *Community-Based Conservation: Restructuring Institutions to Involve Local Communities in a Meaningful Way*, 10 COLO. J. INT'L ENVTL. L. & POL'Y 195, 197–98 (1999).

30. *See* Hardin, *supra* note 26, at 1244. *See also, e.g.*, SAMUEL MULENGA BWALYA, CRITICAL ANALYSIS OF COMMUNITY BASED WILDLIFE RESOURCE MANAGEMENT IN SOUTHERN AFRICA: CASE STUDY FROM ZAMBIA 6, *available at* http://www.[illegible].pdf ("the private property rights school argues that open access and unregulated common property regimes are inherently inefficient because they fail to produce incentives for individuals to harvest the resources in a socially optimal way"); BHIM ADHIKARI, LITERATURE REVIEW ON THE ECONOMICS OF COMMON PROPERTY RESOURCES: REVIEW OF COMMON POOL RESOURCE MANAGEMENT IN TANZANIA 3 (2001) (describing the "prisoner's dilemma" in regard to open access resources), *available at* http://www.dfid.gov.uk/r4d/PDF/Outputs/NatResSys/R7857Rev.pdf.

31. *See* Hardin, *supra* note 26, at 1244.

32. *What is CITES?*, *supra* note 2.

33. *See* Martin, *supra* note 7, at 20–21 (discussing how the command and control structure of CITES is focused on law enforcement).

34. CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FLORA AND FAUNA, FOURTEENTH MEETING OF THE CONFERENCE OF THE PARTIES: RESOLUTION 14.2: CITES STRATEGIC VISION: 2008–2013 3–4 (2007), *available at* http://www.cites.org/eng/res/all/14/E14-02.pdf.

35. Willem Wijnstekers, *National Legislation Gives CITES Its Teeth: From the Secretary-General*, CITES WORLD: OFFICIAL NEWSLETTER OF THE PARTIES (CITES Secretariat, Geneva, Switzerland), July 2005, at 19, *available at* http://www.cites.org/eng/news/world/15.pdf.

comprehensive legislation that includes prohibitions and donations, strengthening enforcement controls, and protecting area habitats.[36]

CITES' traditional use of the classical approach therefore risks setting developing countries up to fail. It encourages them to focus on an approach that often requires greater resources than the countries can allocate. When countries lack the resources to police the protected areas they create, it can end up as a *de facto* open access resource. At the same time, local communities, who no longer possess any ownership in the protected areas, are incentivized to actively undermine conservation efforts. The result of these factors is that the classical approach's use of "fines and fences" can actually have the unintended effect of contributing to exploitation of the protected species.

C. The Failure of the Classical Approach in Namibia

Namibia[37] is an arid country located in Southern Africa. It is bordered on the west by the South Atlantic Ocean, and on its remaining sides by the nations of Angola, Botswana, Zambia, Zimbabwe, and South Africa.[38] Namibia is divided into thirteen administrative regions.[39] It is the second least densely populated nation on earth, with only 2.1 million people.[40] Between 25% and 40% of Namibia's population depends on subsistence agriculture and herding.[41] Today, over 17% of the country is designated as protected land.[42]

Roughly the size of Texas and Louisiana combined,[43] Namibia contains the Namib Desert and parts of the Kalahari Desert.[44] The inhospitality of the Namib Desert largely shielded Namibia from European exploration until the late eighteenth century.[45] By the early 1800s, however, trade with colonial South Africa began to have a profoundly destructive

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36. CITES, 13TH CONT. MEETING OF THE CONFERENCE OF THE PARTIES RESOLUTION 13.4: CONSERVATION OF AND TRADE IN GREAT APES 2 (2004) [hereinafter CITES RESOLUTION 13.4], *available at* http://www.cites.org/eng/res/all/13/E13-04.pdf.

37. Prior to its independence, Namibia was also known as German South West Africa and then South West Africa. For the sake of consistency, this Article will refer to the country as Namibia regardless of the time period discussed.

38. A map of Namibia is provided in Appendix 1.

39. A map of Namibia's administrative regions is provided in Appendix 2.

40. *Background Note: Namibia*, U.S. DEP'T OF STATE, http://www.state.gov/r/pa/ei/bgn/5172.htm#econ (last visited Mar. 2, 2011).

41. *Id.*

42. *Directorate of Parks and Wildlife Management*, REPUBLIC OF NAMIBIA MINISTRY OF ENVIRONMENT AND TOURISM [hereinafter MET NAMIBIA], http://www.met.gov.na/Directorates/Parks/Pages/DPWM.aspx (last visited Mar. 2, 2011).

43. *Background Note: Namibia*, *supra* note 40.

44. Karol Boudreaux, *A New Call for Wide Community-Based Natural Resource Management in Namibia*, 20 GEO. INT'L ENVTL. L. REV. 297, 301 (2007–08).

45. *Background Note: Namibia*, *supra* note 40.

impact on wildlife in southern and central Namibia.[46] At that time, there was high international demand for ivory and ostrich feathers.[47] This demand led to the formation of large-scale hunting parties, either in concert with European traders or by the local tribes themselves.[48] Consequently, by the 1880s, wildlife in southern and central Namibia had been "driven to the edge of extinction."[49]

1. German Control (1884–1915)

Germany declared current-day Namibia a protectorate in 1884.[50] The German government recognized that Namibia's primary resource was its wildlife, since much of the country was not suited for commercial agriculture.[51] The government, therefore, sought to control the hunting of Namibia's wildlife through the introduction of a regulatory system of temporary hunting bans and hunting licenses.[52] In 1892, it granted protected status to ostriches and other game.[53] As part of this protection, the government banned the sale of female ostrich feathers.[54] This ban had little effect, however, since traders instead smuggled the feathers to Portuguese and British ports.[55]

The failure of this ban, and of similar bans in other African colonies,[56] prompted Germany and Britain to sponsor the Convention for the Preservation of Wild Animals, Birds, and Fish in Africa ("1900 London Convention"),[57] with the goal of establishing a

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46. *See* Christo Botha, *People and the Environment in Colonial Namibia*, 52 S. Afr. Hist. J. 170, 172 (2005).
47. *Id.*
48. *Id.*
49. *Id. See also* Moritz Wenning, *The Evolution of the NNP*, 4(1) Gobabeb Times (Gobabeb Training & Research Center, Namibia), June 2008, at 7, *available at* http://www.gobabebtrc.org/index.php?option=com_docman&task=doc_view&gid=13&tmpl=component&format=raw&Itemid=107.
50. *Background Note: Namibia*, *supra* note 40.
51. *See* Wenning, *supra* note 49, at 7.
52. *Id.*
53. *See* Mark Cioc, The Game of Conservation: International Treaties to Protect the World's Migratory Animals 33 (2009).
54. *Id.*
55. *Id.*
56. For example, customs authorities in Uganda and Kenya mandated the confiscation of elephant tusks under 5 kilograms. *Id.* The traders bypassed this regulation by smuggling the tusks to neighboring German and Italian ports. *Id.*
57. The full title for the 1900 London Convention is also provided as the "Convention Designed to Ensure the Conservation of Various Species of Wild Animals in Africa Which Are Useful to Man or Inoffensive." *See, e.g.*, P. van Heijnsbergen, International Legal Protection of Wild Fauna and Flora 13 (1997).

coherent regulatory system.[58] The 1900 London Convention contained much of the language and employed many of the methods adopted by CITES seventy-five years later. It was the first multilateral convention to introduce protected areas and trade restrictions.[59] Also, similar to CITES' classification system, the 1900 London Convention classified protected species on five lists.[60] The first list completely prohibited the hunting or killing of eight listed species because of their utility, rarity, and danger of extinction.[61] The second and third lists prohibited the killing of specific species' young, and females accompanied by their young, respectively.[62] The fourth list set limits on the number of certain animals that could be hunted each year.[63] The fifth list designated certain species as being vermin, and therefore encouraged their eradication.[64] Ultimately, the 1900 London Convention never entered into force, since it was not ratified by most of its signatories.[65]

58. *See* CIOC, *supra* note 53; HEIJNSBERGEN, *supra* note 57, at 13. Heijnsbergen notes that the 1900 London Convention was motivated by the extinction of the blackbuck in 1799, the cape lion shortly thereafter, and the quagga (a sub species of zebra) in 1883. *Id.* The countries attending the 1900 London Convention were the United Kingdom, Germany, Spain, Belgium, France, Italy, and Portugal. *Id.*

59. *See* HEIJNSBERGEN, *supra* note 57, at 13. CIOC also notes the way in which the 1900 London Convention was designed to preserve desirable species for hunting by Europeans at the expense of indigenous populations. Specifically, species protected under the Convention could only be hunted by license holders (which most indigenous peoples could not afford), and therefore indigenous populations were unable to legally engage in traditional subsistence hunting. *See* CIOC, *supra* note 53, at 35. The Convention also forbade the hunting of listed species through the use of nets or pitfalls. *Id.* This prohibition was doubly problematic. Not only were these two methods of hunting traditionally used by indigenous populations, but the populations were also left with few other alternatives, as the parties to the Convention simultaneously reaffirmed the Brussels Conference, which prohibited the sale of modern arms and ammunition to African black peoples. *Id.*

60. *See* HEIJNSBERGEN, *supra* note 57, at 13; CIOC, *supra* note 53, at 36.

61. CIOC, *supra* note 53, at 35. The species were gnatte, gorilla, chimpanzee, mountain zebra, wild ass, white-tailed gnu, eland, and the Liberian (pygmy) hippo. Interestingly, Heijnsbergen writes that the first list included only five species, and made no mention of the mountain zebra, wild ass, or white-tailed gnu. HEIJNSBERGEN, *supra* note 57, at 13.

62. HEIJNSBERGEN, *supra* note 57, at 13. Each list contained the same species: elephant, rhino, hippo, zebras, buffalo, ibex, chevrotain, and various antelope and gazelle species. *See* CIOC, *supra* note 53, at 35.

63. HEIJNSBERGEN, *supra* note 57, at 13. *See also* CIOC, *supra* note 53, at 35–36. This list included the animals listed in the second and third lists, along with cheetah, pig, monkeys, and jackals, and also a number of birds: ostrich, marabou stork, egret, bustard, francolin, guinea-fowl, and "other 'Game' birds." *Id.*

64. *See* CIOC, *supra* note 53, at 36. These species were lions, leopards, hyenas, wild dogs, otters, baboons and other "carnivorous" monkeys, large birds of prey, crocodiles, poisonous snakes, and pythons. *Id.*

65. IUCN ENVIRONMENTAL LAW PROGRAMME, AN INTRODUCTION TO THE AFRICAN CONVENTION ON THE CONSERVATION OF NATURE AND NATURAL RESOURCES 3 (2d ed. 2006), *available at* http://data.iucn.org/dbtw-wpd/edocs/EPLP-056.pdf.

In 1907, the German government established three expansive game reserves. The largest of those reserves, which encompassed modern-day Etosha National Park, covered an area of approximately 80,000 square kilometers.[66] At the time of its creation, this reserve was the largest game reserve in the world.[67] The other game reserves encompassed 10,000 square kilometers of the Namib Desert and an area in the northeast of the country, respectively.[68] Hunting was prohibited in these reserves, and all vehicle traffic required written government permission.[69] Violation of either of these prohibitions was punishable by a fine of up to 5,000 marks.[70]

2. South African Occupation (1915–1989)

After the First World War, South Africa governed Namibia as a League of Nations mandate.[71] It generally continued to apply the environmental laws enacted by Germany,[72] but repealed Germany's proclamation banning all hunting in nature reserves.[73] Instead, for £20, hunters could obtain a special license to kill two females and three males of any game species, up to a total of twenty animals.[74] Certain animals, however, were considered to be "royal game" and could only be hunted for scientific purposes.[75] During the 1930s, South Africa also expanded the scope of the existing regulations to include import and export

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66. *See* H.H. Berry, *Historical Review of the Etosha Region and its Subsequent Administration As a National Park*, 20(1) MADOQUA 3–12, at 2 (1997) (original pagination unknown), *available at* http://www.namibia-holistic-experience.com/uploads/media/Etosha_history_02.pdf. Over the next sixty-three years, the size of Etosha National Park was reduced to its current area of 22,270 square kilometers. *Id.* After the final de-proclamation of protected land, the then-Director of Nature Conservation and Tourism complained that "Etosha resembled a plucked fowl!" *Id.*

67. *Id.*

68. *See* Wenning, *supra* note 49, at 7.

69. *See* Arthur Hoole, Community-Based Conservation and Protected Areas in Namibia: Social-Ecological Linkages for Biodiversity 103 (Mar. 2008) (unpublished Ph.D. thesis, University of Manitoba), *available at* http://ill.lib.umanitoba.ca/dspace/bitstream/1993/3001/1/Hoole_thesis.pdf.

70. *Id.* 5000 marks would be roughly equivalent to $27,500 today. *See Historical U.S. Dollar to German Marks Currency Conversion*, http://www.history.ucsb.edu/faculty/marcuse/projects/currency.htm (last visited July 2, 2011) (showing a pre-World War I conversion rate of 4.198 marks to U.S. dollar); THE INFLATION CALCULATOR, *supra* note 12 (using 1910 and 2010 as the respective start and end dates).

71. *See* Bondeaux, *supra* note 44, at 307.

72. *See* MET NAMIBIA, BRIEFING NOTES: HISTORY OF CONSERVATION IN NAMIBIA 2, *available at* http://www.met.gov.na/Documents/Briefing%20Notes%20-%20History%20of%20Conservation.pdf.

73. *See* Hoole, *supra* note 69, at 103.

74. *Id.*

75. *Id.* These animals included elephant, hippopotamus, rhino, buffalo, giraffe, zebra, eland and certain types of birds. *Id.*

regulations on certain birds, and placed protections on pythons, tortoises, and the Welwitschia plant.[76]

In 1933, South Africa participated in the Convention Relative to the Preservation of Fauna and Flora in Their Natural State ("1933 London Convention").[77] The 1933 London Convention was similar to the 1900 London Convention, but no longer differentiated between useful animals and vermin.[78] Additionally, the 1933 London Convention included the Welwitschia plant on its "List A," which provided full protection to the listed species.[79] The 1933 London Convention entered into effect in 1936, and South Africa formally remained a party to it throughout the time that South Africa governed Namibia.[80]

In addition to entering into a similar international conservation treaty, South Africa also mirrored its predecessor's racist policies. Like Germany before it, South Africa removed indigenous residents from their land and allocated it to white settlers.[81] Further, South Africa continued Germany's policy of relocating ethnic groups within Namibia to reservations (which, ironically, South Africa called "homelands").[82] These policies resulted in a grossly inequitable land distribution. In the middle of the twentieth century, white farmers in Namibia possessed roughly 50% of all agricultural land, while black farmers (who made up the vast majority of Namibia's population) were allotted only 25%.[83] At the time of Namibia's independence in 1990, white commercial farmers—who made up 6% of Namibia's population at that time—held 52% of all agricultural farmland, while black farmers held the remaining 48%.[84] In total, an estimated 4,203 mostly white-owned southern freehold estates held 44% of all available land in Namibia.[85] In contrast, roughly 160,000 northern black households occupied the majority of the communal farmland, which represented 43% of all available land in Namibia.[86]

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76. *See* BRIEFING NOTES, *supra* note 72, at 2; Botha, *supra* note 46, at 179.

77. *See* DEJENNETT, *supra* note 37, at 16.

78. *Id.*

79. *Id.*

80. *See id.* at 17 (noting that South Africa still remains a party to the 1933 London Convention).

81. *See* THE UN AND ITS PRESS, RACISM AND APARTHEID IN SOUTHERN AFRICA: SOUTH AFRICA AND NAMIBIA 108 (1974), *available at* http://unesdoc.unesco.org/images/0001/000127/012280eo.pdf.

82. *See* André du Pisani, *State and Society Under South African Rule*, *in* STATE, SOCIETY AND DEMOCRACY: A READER IN NAMIBIAN POLITICS 49, 55 (Christian Keulder ed. 2000, 2000); Jeanne Hunter, *Who Should Own the Land? An Introduction*, *in* WHO SHOULD OWN THE LAND? ANALYSES AND VIEWS ON LAND REFORM AND THE LAND QUESTION IN NAMIBIA AND SOUTHERN AFRICA 1, 1 (Jeanne Hunter ed., 2004), *available at* http://www.nid.org.na/pub_docs/land_reform_namibia.pdf.

83. *See* Lloyd Matsiko Sachikonye, *Land Reform in Namibia and Zimbabwe: A Comparative Perspective*, *in* WHO SHOULD OWN THE LAND?, *supra* note 82, at 64–5.

84. *See* Hunter, *supra* note 82, at 1.

85. *See* Sachikonye, *supra* note 83, at 66.

86. *Id.*

The disparate treatment of non-white Namibians was also evidenced in South Africa's conservation efforts. In 1962, the South African government declared all wild game to be protected, state-owned assets.[87] However, in 1968, the government granted white commercial farmers the right to sustainably utilize the wildlife on their properties for tourism, meat, and trophy hunting,[88] formalizing these rights in the Nature Conservation Ordinance (No. 4 of 1975).[89] Additionally, the government sold permits for Etosha hunting in parts of a game reserve covering much of the Namibia's northern Kunene region.[90]

3. *Namibia's Liberation Resistance and the South African Military's Stamping Operations (1958-1986)*

In 1958, migrant Namibian workers in Cape Town, South Africa, formed the Ovamboland People's Congress (OPC), which aimed to improve the working conditions of its members.[91] The next year, the OPC moved to Windhoek, Namibia's capital city, and was renamed the Ovamboland People's Organization (OPO).[92] Though its primary focus was on improving the welfare of contract workers from northern Namibia, it also specifically listed Namibian independence as an objective.[93] In June 1960, OPO renamed itself the South West Africa People's Organization (SWAPO) as part of an effort to gain more of a national character.[94]

Initially, SWAPO attempted to achieve Namibia's independence through peaceful means.[95] By the mid-1960s, however, SWAPO had determined that peaceful processes alone could not work, and it began conducting guerilla warfare in Namibia's north.[96] SWAPO fighters—who were trained abroad before gathering in Tanzania—first entered into Namibia through the Caprivi Strip, and later through more-western parts of Namibia's northern

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87. *See* B. Libanda & J.N. Blignaut, *Tourism's Local Benefits for Namibia's Community Based Natural Resource Management Areas*, 16 INT. J. INNOVATION & SUSTAINABLE DEV. 10, 11 (2008); Summers, *supra* note 24, at 201.

88. *See* Boudreaux, *supra* note 44, at 307; Summers, *supra* note 24, at 201.

89. Boudreaux, *supra* note 44, at 307.

90. Peter Alpert, *Integrated Conservation and Development Projects: Examples from Africa*, 46(11) BIOSCIENCE 845, 850 (1996). Alpert notes that the cost of the permits "exceeded local means and effectively prohibited the residents from their contingent hunting." *Id.* Alpert writes that this "injury," along with the "insult" of outsiders visiting the region for the purpose of sport hunting, persuaded local residents to cooperate with outside commercial poachers. *Id.* at 850-51.

91. *See* PETER H. KATJAVIVI, A HISTORY OF RESISTANCE IN NAMIBIA 20 (1988). This party is also referred to as the Ovamboland People's Congress. *See* LIONEL CLIFFORD ET AL., THE TRANSITION TO INDEPENDENCE IN NAMIBIA 17-26 (1994).

92. *See* CLIFFORD ET AL., *supra* note 91, at 18; KATJAVIVI, *supra* note 91, at 22.

93. *See* CLIFFORD ET AL., *supra* note 91, at 18; KATJAVIVI, *supra* note 91, at 23.

94. *See* KATJAVIVI, *supra* note 91, at 44-45.

95. *Id.* at 55.

96. *Id.* at 59-60.

border.[97] These routes required that the SWAPO fighters travel through Angola before they could gain access to Namibia.[98]

At that time, Angola was itself in the throes of a war for independence, with three rival groups—the National Front for the Liberation of Angola (FNLA), the National Union for Total Independence of Angola (UNITA), and the Popular Movement for the Liberation of Angola (MPLA)—simultaneously fighting the Portuguese colonial government while jockeying for control of an independent Angola.[99] The MPLA supported SWAPO's revolt against South Africa, and this support meant that SWAPO, in turn, earned the enmity of UNITA and the FNLA.[100]

After Angola gained its independence in 1975, South African troops intervened in Angola's subsequent civil war to support UNITA and the FNLA against the MPLA.[101] In 1978, as part of this support, the South African Defense Force (SADF) began providing for the transport and sale of ivory belonging to UNITA civilian refugees in Namibia as a form of payment for SADF's provision of supplies.[102] This initial, relatively limited transaction soon grew into a large scale, clandestine commercial enterprise. By the end of 1979, the SADF had formed a commercial company, Frama Inter-trading Pty. Ltd. (Frama), that it ostensibly used for the purpose of purchasing and delivering supplies to UNITA's fighters.[103] However, the SADF also used Frama for the purpose of smuggling ivory and rhino horn acquired by UNITA into South Africa.[104] The SADF's involvement in smuggling lasted until roughly 1986.[105]

It is unclear to what extent the ivory and horn smuggled by Frama originated from Namibia. In 1994, South Africa commissioned an inquiry into the SADF's involvement in smuggling. The inquiry determined that Frama acquired the ivory and rhino horn through the "large-scale" destruction of wildlife in Angola and northeastern Namibia that resulted from the "civil strife and [a] 'Border War'" between Angola and Namibia.[106] Nevertheless, the commission only identified a few incidents of elephant poaching within Namibia, all of which occurred in the Caprivi Strip.[107] Still, animals do not honor national boundaries, so it

97. *Id.* at 84–85.
98. *Id.* at 85.
99. *See* WILLIAM MINTER, APARTHEID'S CONTRAS: AN INQUIRY INTO THE ROOTS OF WAR IN ANGOLA AND MOZAMBIQUE 19–29 (1994).
100. *See* KATJAVIVI, *supra* note [illegible], at 85–87.
101. *Id.* at 87.
102. *See* JUSTICE M.E. KUMLEBEN, COMMISSION OF INQUIRY INTO THE ALLEGED SMUGGLING OF AND ILLEGAL TRADE IN IVORY AND RHINOCEROS HORN IN SOUTH AFRICA 101 (Jan. 1996), *available at* http://www.rhinoresourcecenter.com/pdf_files/131/1311074532.pdf.
103. *Id.* at 91.
104. *Id.* at 43. Namibian wildlife officials were under orders not to search Frama vehicles. *Id.* at 112.
105. *Id.* at 44.
106. *Id.* at 15.
107. *Id.* at 15.

is likely that large-scale poaching in southern Angola would impact wildlife in some areas of Namibia. Further, it is possible that the large-scale smuggling operations of the SADF encouraged copy-cat operations elsewhere in Namibia. The South African commission recognized this possibility in its final report, writing:

> The SADF must take vicarious responsibility for other acts of smuggling which would appear to have been rife during the time of its military presence in Namibia. The poor example set by the SADF directly, and later by Pretoria as sanctioned by the SADF, must inevitably have served as an invitation to others, both servicemen and civilians, to climb on this lucrative "bandwagon."[107]

4. Analysis of the Failure of the Classical Approach in Namibia

The utilization of the classical approach as a means of wildlife conservation in Namibia was a near total failure. By the end of German control, Namibia was in much the same position as many developing countries today under CITES. In an attempt to ensure the sustainability of valuable wildlife stocks, Namibia's German and South African governments entered into two international conservation treaties, nationalized Namibia's wildlife, and set aside large expanses of territory as off-limits to its people.

While South Africa did allow limited utilization of species on public and private lands, these reforms excluded Namibia's black majority, who were the residents of the communal lands.[108] The nationalization of ownership and application of disparate racial policies resulted in a "binary system" of conservation, where whites could realize benefits from the conservation of wildlife that blacks could not.[109] Furthermore, Namibia's enforcement of conservation laws was likely undermined, at least in its Caprivi Strip region, by the SADF's smuggling operations.

Not surprisingly, this dichotomy of ownership rights, combined with insufficient enforcement of Namibia's hunting prohibitions, led to a prototypical tragedy-of-the-commons scenario, where Namibia's black residents were incentivized to exploit the wildlife on the communal lands.[110] They often cooperated with commercial poachers, resulting in a decimation of the populations of a number of species in northern Namibia, with elephants, black rhinos, zebras, lions, springbok, and oryx being the hardest hit.[111] In total, wildlife populations in Northern Namibia may have been reduced by up to 90%.[112] Namibia's precipitous decline in wildlife then represents the negative potential of the classical approach imprudently applied.

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106. *Id.* at 42.

107. *See* Boudreaux, *supra* note 4, at 307; Summers, *supra* note 24, at 201.

108. Boudreaux, *supra* note 44, at 307.

109. *Id.*

110. *Id.*; WORLD RES. INST., WORLD RESOURCES 2005: THE WEALTH OF THE POOR: MANAGING ECOSYSTEMS TO FIGHT POVERTY 115 (2005).

111. *See* Boudreaux, *supra* note 4, at 307.

II. COMMUNITY-BASED NATURAL RESOURCE MANAGEMENT: A BETTER APPROACH TO CONSERVATION IN THE DEVELOPING WORLD

Generally speaking, Community Based Natural Resource Management (CBNRM) refers to the devolution of control and management over a communal resource from a central authority to the local community.[114] CBNRM is a reaction to the failings of the classical approach to conservation in many developing countries.[115] Rather than viewing local communities as enemies of conservation, CBNRM theory proposes that conservation efforts are more effective when local communities have the ability and the incentive to control natural resources for their own benefit,[116] so that the community perceives more value in the conservation of a natural resource than it does in its exploitation.[117]

114. *See* Murphree, *supra* note 21, at 2553 (suggesting that CBNRM is the "communal management of natural resource commonages where the grasp of direct state management does not reach"); McAllister, *supra* note 29, at 202 ("Community based conservation reverses top-down, center-driven conservation by focusing on the people who bear the costs of conservation. In the broadest sense, then, community-based conservation includes natural resources or biological diversity protection by, for, and with the local community.") (quoting David Western & R. Michael Wright, *The Background to Community-Based Conservation*, *in* NATURAL CONNECTIONS: PERSPECTIVES IN COMMUNITY-BASED CONSERVATION 1, 1–4 (David Western & R. Michael Wright eds., 1994)); Summers, *supra* note 24, at 193 (noting that CBNRM is "essentially a bottom-up conservation approach"); JAMES C. MUROMBEDZI, THE EVOLVING CONTEXT OF COMMUNITY-BASED NATURAL RESOURCE MANAGEMENT IN SUB-SAHARAN AFRICA IN HISTORICAL PERSPECTIVE (1998), *available at* http://[illegible]/html/murombedzi paper.htm (stating that CBNRM "is taken to refer to the devolution of control and management authority over communally held resources").

115. Songorwa, *supra* note 24, at 603–04 (noting the "growing consensus" that the protectionist approach installed by colonial governments has failed to protect the wildlife in Africa). *See also* McAllister, *supra* note 29, at 195 (arguing that the "fencing model" of conservation is counterproductive in preserving biodiversity in developing countries).

116. *See* Murphree, *supra* note 21, at 2553 ("[CBNRM] is the only viable option for an effective human stewardship of most of Africa's landscape"); Songorwa, *supra* note 21, at 606; McAllister, *supra* note 29, at 198 (noting that the reluctance of local communities to accept traditional "fencing" conservation programs in developing countries results in a "strong theoretical justification for turning away from this model"); Summers, *supra* note 24, at 189 ("The best means of conserving habitats and species entails the realisation that the success of any modern natural resource management project entails providing benefits to and securing the cooperation of rural communities").

117. *See* Garrison, *supra* note 13, at 318 ("[U]nless wildlife has some use to people, then wildlife will not be valued by people. If wildlife has no value, then wildlife and its habitat will be destroyed to make way for other land uses.") (quoting John G. Robinson & Kent H. Redford, *The Use and Conservation of Wildlife*, *in* NEOTROPICAL WILDLIFE USE AND CONSERVATION 3 (John G. Robinson & Kent H. Redford eds., 1991)); Songorwa, *supra* note 24, at 603 ("[CBNRM] is for the protection of biodiversity but through the economic incentives or profit making. It is about managing wildlife for an external market—tourists and sport hunters from affluent countries—because,

A. *Elements Required for a Successful CBNRM Program*

In practice, CBNRM programs vary widely and can be implemented in many ways.[118] Nevertheless, in addition to other potential factors, a CBNRM program is most effective when it is designed to involve: (1) a well delineated community; (2) clearly defined property interests and tenure; (3) the ability for the community to see and retain benefits from conservation; and (4) sufficient external support.[119]

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according to its proponents, '*wildlife must pay its way*.'") (quoting David Western, *Ecosystem Conservation and Rural Development: The Case of Amboseli*, *in* NATURAL CONNECTIONS: PERSPECTIVES IN COMMUNITY-BASED CONSERVATION 15, 28 (David Western & R. Michael Wright eds., 1994)) (emphasis in original).

118. *See* Murphree, *supra* note [illegible], at 2559 ("There is no single CBNRM profile and no single blueprint exists for its myriad formations."); McAllister, *supra* note 29, at 196 ("[Community-based conservation] is the umbrella term for a variety of efforts that seek to balance the needs of people and nature in sustainable ways."); WORKSHOP REPORT, THE INTERNATIONAL WORKSHOP ON COMMUNITY-BASED NATURAL RESOURCE MANAGEMENT (CBNRM) 1 (1998), *available at* http://info.worldbank.org/etools/docs/library/97605/conatrem/conatrem/report.html ("It is not possible to determine beforehand a detailed course of action at the local level. The starting point, as well as the hoped-for goal, will be known; while, in comparison, how to get there – and when – is to a large extent will be unknown.").

119. A number of different authors have proposed factors necessary for or facilitating the success of a CBNRM program. See, for example:

> Seven issues should be considered in the institutional design of [Community Based Conservation] programs: (1) **determining the composition of community** participants; (2) determining the appropriate level of involvement; (3) fostering and respecting local institutions; (4) clearly **demarcating rights and responsibilities**; (5) closely **connecting the costs and benefits** of a CBC program; (6) establishing legally sanctioned community-rights regimes; and (7) **maintaining steady funding for CBC programs.**

McAllister, *supra* note 29, at 20[illegible] (emphasis added). See, also:

> People will undertake natural resource management only when:
> - **They see clear tangible benefits** (products, services, or income).
> - They have necessary competency (knowledge, technology).
> - It is based on local indigenous knowledge.
> - **There is a guarantee of using products and services.**
> - There is unobstructed access, and **property rights** over resources.
> - Individuals' interests are backed by strong local organizations.
> - Increase people's decision [sic] making capacities towards GOs and NGOs.

Jay Ram Adhikari, *Community Based Natural Resource Management in Nepal with Reference to Community Forestry: A Gender Perspective*, 6 J. OF ENV'T, 11 (2001) (emphasis added). Lastly, see:

1. *Community*

In order for a communal resource to be managed effectively, the community must be a well-delineated group of users who are distinct from persons excluded from resource use.[120] For purposes of CBNRM, it is necessary to determine both (1) who defines the community, and (2) the criteria by which community membership is to be determined.[121] For the first of these questions, the most common and successful approach is to allow communities to define themselves within an externally conceived framework.[122] As to membership criteria, the best approach is to determine membership based on a combination of proximity, resource dependence, and level of interest for the resource.[123] Additionally, whatever the criteria used to determine membership, it is necessary that the community be able to effectively engage in collective action.

While their importance likely varies depending on the particulars of a community's circumstances, several factors can impact the community's ability to act effectively. First, the

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Experience has shown that a CBNRM program is more likely to be successful where enabling conditions are in place. Among the most critical of these are:

- **Clarified and improved land tenure;**
- Local community commitment and strengthened capacity, strong local institution with adequate skills,
- **Experienced NGO partners** and the critical government bureaucracies;
- **Target technical assistance;**
- Regional resource management plans with set "limits of acceptable use" or "carrying capacity";
- A workable environmental mitigation and monitoring program;
- Access to markets and credit;
- **Social cohesion within and across communities adopting CBNRM practices in a region;**
- Effective resource monitoring and policing;
- **Above all, genuine economic benefits.**

Chapter 2: Community-Based Natural Resource Management (CBNRM), ENVIRONMENTAL GUIDELINES FOR SMALL SCALE ACTIVITIES IN AFRICA (EGSSAA) 5 (USAID from the American People 2007), *available at* http://www.encapafrica.org/EGSSAA/chapter.pdf (emphasis added).

120. See ADHIKARI, *supra* note 30, at 7.

121. *See* McAllister, *supra* note 29, at 203.

122. *Id.* at 205, 206. The other methods mentioned by McAllister are (1) the self definition of a group in response to environmental concerns, and (2) the external definition of a community by the national government. *Id.* at 203–05. The author proposes that the former is only likely to occur in countries with effective, strict command and control regulations, and that the latter is often criticized as being incompatible with the basic concept of community based conservation. *See id.*

123. *Id.* at 207.

size of a community can affect its ability to engage in collective action.[124] As the size of the community decreases, opportunities for frequent interaction among its members correspondingly increase.[125] These frequent interactions create opportunities to build reputations, and the expectation of future interactions creates a need for the community members to develop expectations for cooperative behavior.[126] Also, frequent interaction among the community members facilitates mutual monitoring.[127] The reputation-building incentives and the mutual monitoring associated with smaller groups should foster higher levels of trust than in larger groups.[128] In turn, this increased trust should correlate with an increased effectiveness.[129]

Even absent trust issues, however, there are other reasons why larger groups should result in less collective action. As long as individuals feel that they can make a perceptible contribution to the collective action, they have an incentive to act accordingly.[130] When a group grows too large, the individual is less able to ascertain the impact of his or her contribution, and the incentive to contribute is diminished.[131] Finally, as a group grows larger, the ability to effectively sanction offenders diminishes, also corroding the incentive for compliance with the collective action.[132]

However, a 2001 study of community forest groups in the Kumaon Himalaya, India, undermines, at least to some degree, the theory that smaller groups should always be more effective at conserving communal areas.[133] The study examined the ability of local councils to monitor the forest by examining the number of meetings held by the councils, the size of the protection budget councils spent on paying guards, and the councils' per-capita contributions toward monitoring and enforcement.[134] The study found that the most effective groups in the study were the "medium sized" councils.[135] The smallest councils simply did not possess the requisite resources because of their size. Because they would have to contribute at a significantly higher level in order to achieve the same type of protection of

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124. *See* Arun Agrawal & Sanjeev Goyal, *Group Size and Collective Action: Third-Party Monitoring in Common-Pool Resources*, 49 COMP. POL. S. 63, 66 (2001) (stating that some research has noticed an inverse correlation between the size of a group and its ability to perform collectively).

125. *See* Amy R. Poteete & Elinor Ostrom, *Heterogeneity, Group Size and Collective Action: The Role of Institutions in Forest Management*, 35 DEV. & CHANGE 3, 435, 439 (2004).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *See* Agrawal & Goyal, *supra* note 124, at 83–86.

134. *Id.* at 83.

135. *Id.* at 85.

their forest as members of a large council, the members of the smallest councils realized that it was in their individual best interests not to contribute financially.[136]

Likewise, the constituents of the largest councils realized that the sheer numbers within the community meant that the ability of the council to punish violators was diminished.[137] Monitoring was less likely to be effective because of the greater numbers of potential violators.[138] Therefore, the members of the largest councils also had an incentive not to pay.[139] The medium-sized councils had the right number of people to avoid both of the above problems—enough people to adequately fund patrolling of the forest but few enough not to be able to escape punishment should they break the rules. For this reason, some theorize that medium-sized groups may generally succeed more than very small or very large groups.[140]

Second, the composition of the group is likely of equal or greater importance than the size of the group. It has been theorized that small groups are more effective at organizing because they are relatively homogeneous; an increase in group size often corresponds with increased heterogeneity.[141] The more community members share important social, cultural, or economic characteristics, the more predictable their interactions become.[142] The predictability can, in turn, provide a basis for the development of trust among the members of the community.[143] Additionally, homogeneity of a group can also lead to an increased effectiveness because, if nothing else, homogeneity suggests that the community members possess common interests.[144]

For example, the heterogeneity of a CBNRM regime is thought to be one of the factors behind regional differences in the success of Nepal's CBNRM projects. Nepal has implemented CBNRM programs in two distinct regions: the Middle Hills and the Terai lowlands.[145] The CBNRM projects have been relatively successful in the Middle Hills, where, prior to the nationalization of all forest land, the land was traditionally managed at the

136. *Id.* at 85.
137. *Id.*
138. *Id.*
139. *Id.*
140. *See* Ostrom, *supra* note 27, at 147.
141. *See* Poteete & Ostrom, *supra* note 135, at 441.
142. *Id.*
143. *Id.*
144. *Id.* ("Even if trust does not arise from predictability (for instance if members of a homogenous group consider themselves to be predictably opportunistic), common ends suggest common interests.").
145. *See* Harini Nagendra, Mukunda Karmacharya & Birendra Karna, *Evaluating Forest Management in Nepal: Views Across Space and Time*, 10 Ecology & Soc'y 24, 25 (2005).

community level.[146] CBNRM programs have been less successful in the Terai, where many of the residents are recent transplants from other regions.[147]

2. Defined Property Interests and Tenure

Once a community is defined, it must be given clear and lasting rights over the land on which the resource is located.[148] Without clear ownership of the land, or an enduring sense of entitlement to the benefits conferred by the resource, the community has less incentive to conserve that resource.[149] Conversely, it has been found that when the community has the ability to continually use and benefit from a resource, it can actually be more conservative than the national government in allowing the utilization of that resource.[150] Also, the definition of who has rights to use a resource, and the delineation of the boundaries of that resource, allows users to clearly identify anyone who does not have the right to use the resource and take action against that person.[151] Otherwise, those who undervalue the use of the resource can exploit it without compensating anyone else.[152]

3. Benefits

Even if a community has enduring ownership over a resource, it only has the incentive to sustainably manage the resource if it perceives a benefit by doing so.[153] Rural communities must be able to make a living from their natural surroundings. The more that the community associates the costs of implementing a CBNRM program with its benefits, the more aggressively the community will work to ensure the program's success.[154] This association between implementation and benefit is all the more important where, as in many developing countries, the increase in wildlife numbers resulting from conservation programs

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146. *See* Richard Mahapatra, *Community Forest Management: The Nepalese Experience*, 8 DOWN TO EARTH 50, 55 (2000) (noting an increase in forestation and forest income in certain districts); Ostrom, *supra* note 27, at 134 ("forest users in many locations have organised themselves to vigorously protect, and in some cases, enhance local forests").

147. *See* Nagendra et al., *supra* note 145, at 27–28.

148. *See* McAllister, *supra* note 29, at 221; Summers, *supra* note 24, at 191.

149. *See* Boudreaux, *supra* note 4, at 350; Summers, *supra* note 24, at 191–92.

150. *See* Murphree, *supra* note 21, at 2555 (noting that in Southern Africa, "[w]here perceptions of enduring entitlement are strong, local regimes are often more conservative in the setting of quotas than national authorities").

151. *See* Ostrom, *supra* note 27, at 14[illegible].

152. *See* James Shikwati, *How to Protect Kenya's People and Wildlife*, *in* TERRACOTTA READER 249, 251 (2003), *available at* http://www.[illegible].org/articles/article23[illegible].php.

153. *See* Murphree, *supra* note 21, at 2551; Summers, *supra* note 24, at 195.

154. McAllister, *supra* note 29, at 217.

inevitably leads to a corresponding increase in human-animal conflicts.[155] As wildlife density increases, rural communities suffer correspondingly higher losses of crops, livestock, and human life.[156] These conflicts can cause local communities to have negative attitudes toward wildlife.[157] To overcome this inherent antipathy toward wildlife, the benefits of conservation must be able to be perceived by the individual members of the community in an easily understood and straightforward manner.[158] In short, the community must be able to perceive that the losses its members suffer from increased wildlife numbers will likely be outweighed by economic benefits resulting from the increase, such as from eco-tourism, trophy hunting, or commercial trade.

4. External Support

Finally, CBNRM programs, at least initially, require reliable external support. Starting a CBNRM program can require large amounts of initial capital and expertise, as is the case when a community constructs the infrastructure needed to attract eco-tourism.[159] These resources are often provided by national or foreign governments, non-profit organizations, or private investors.[160] Without this initial funding, many CBNRM programs would not be attempted in the first place.[161]

B. Namibia's Successful Implementation of CBNRM

1. Namibia's Decision to Adopt a CBNRM *Approach*

In 1992, having achieved independence from South Africa, the newly formed Namibian government identified the need to diversify economic activities in its rural areas.[162] The government recognized that wildlife-based tourism had advantages over other land-use options because of Namibia's arid conditions.[163] However, the South African government's wildlife policies had largely excluded the local communities from participating in and benefiting from tourism.[164] Therefore, in 1995, the Ministry of Environment and Tourism

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155. In Kenya, for example, an average of fifteen people are killed by wildlife each year, and in 2002, lions killed fifty-four sheep in the Voi region. *See* Shikwati, *supra* note 152, at 230. In 2008, there were 9033 recorded incidents of human-wildlife conflicts in Namibia, including 1387 attacks on livestock, and 29 attacks on humans. NASCO: NAMIBIAN ASS'N OF CBNRM SUPPORT ORGS. [hereinafter NASCO], NAMIBIA'S COMMUNAL CONSERVANCIES: A REVIEW OF PROGRESS IN 2008 21 (2009) [hereinafter NAMIBIA'S COMMUNAL CONSERVANCIES 2008], *available at* http://www.nacso.org.na/NCC_2008/2008_Conservancies_chapter_A.pdf.

156. *See* Sorgenfrei, *supra* note 27, at 625.

157. *Id.* at 631.

158. *Id.* at 625.

159. *See* McAllister, *supra* note 29, at 221.

160. *Id.* at 223–24.

161. *Id.* at 224.

162. *See* Libanda & Blignaut, *supra* note 87, at 4.

163. *Id.*

164. *Id.*

(MET) issued a policy entitled "Promotion of Community Based Tourism" (Policy).[165] The Policy's stated goal is to provide "a framework for ensuring that local communities have access to opportunities in tourism development and are able to share in the benefits of tourism activities that take place on their land."[166] In particular, the Policy notes the need to enhance the rights enjoyed by communities over tourism resources.[167] The Policy proposes that conservancies are the key to redressing past inequalities, viewing conservancies as a key tool by which communal residents could gain rights over environmental resources, in particular wildlife rights, and therefore attract tourism-related income.[168] The Policy states that the MET will support communities' establishment of conservancies and tourism ventures.[169] The Policy also provides for the channeling of a "substantial share" of funds for investment in Namibian tourism to communal areas.[170]

A year later, the Namibian government enacted the Nature Conservation Amendment Act of 1996 ("Amendment Act"), which amended the inequitable Nature Conservation Ordinance of 1975.[171] With a stated goal of "provid[ing] for an economically based system of sustainable management and utilization of game in communal areas,"[172] the Amendment Act grants conservancies the same rights enjoyed by the freehold commercial farmers.[173] It provides that any group of people residing on communal land can apply for conservancy status.[174] The applicants are responsible for proposing a representative committee, drafting a constitution governing the committee, and defining boundaries of the proposed conservancy.[175] The Minister of Environment and Tourism is given the discretion to recognize the conservancy, subject to any conditions that he or she may determine, and to also withdraw or amend at his or her discretion the conservancy's recognition at any time.[176] Once a community is granted conservancy status, it possesses the same rights as commercial farmers to hunt, capture, cull, and sell huntable game (oryx, springbok, kudu, warthog,

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165. MET NAMIBIA, POLICY DOC. NO. 9: PROMOTION OF COMMUNITY BASED TOURISM (1995), *available at* http://www.met.gov.na/downloads/MET_policy_on_CBT_development.pdf.

166. *Id.* at 2.

167. *Id.* at 7.

168. *Id.*

169. *Id.* The policy states that "MET will give recognised conservancies (with a legal Trust fund or other mechanism for administering and sharing revenues) the conservancy rights for edge development (which they can utilise themselves or lease to others) within the conservancy boundaries, according to the same principles by which all tourism applications will be considered, as listed above: i.e. local involvement, environmental impact, conformity with regional and national strategy etc." *Id.*

170. *Id.*

171. NATURE CONSERVATION AMENDMENT ACT, GOV'T NOTICE NO. 151, at 7 (1996), *printed in* GOV'T GAZETTE OF THE REPUBLIC OF NAMIBIA 1332, *available at* http://www.met.gov.na/downloads/Nature_Conservation_Amendment_Act.pdf.

172. *Id.* at 2.

173. *See* Boudreaux, *supra* note 44, at 305.

174. NATURE CONSERVATION AMENDMENT ACT, *supra* note 171, at 4.

175. *Id.*

176. *Id.* at 5–6.

buffalo, and bushpig).[177] Furthermore, the community has the right to apply to the MET for permits to use quotas of protected game for trophy hunting.[178]

Namibia recognized its first four conservancies in 1998.[179] Currently, there are sixty-four registered conservancies,[180] with over 230,000 members.[181] Approximately twenty-five additional communities have applied for conservancy status.[182] In total, nearly a quarter of all rural Namibians reside within a conservancy.[183]

2. *Analysis of Namibia's Conservancy Program*

a. The Communities Are Well-Defined and Able to Engage in Collective Action

The combination of Namibia's legislation and its demographics allows for the creation of well-defined communities. The Amendment Act allows a community to define the boundaries of its proposed conservancy, and to choose its own representative committee.[184] However, the Amendment Act also requires that the Minister of Environment and Tourism determine the appropriateness of the proposed boundaries, and also whether the proposed committee is truly representative of the proposed conservancy's population.[185] Thus, in effect, the law is designed to ensure that the community consists of sufficiently like-minded individuals, and that each group within the community is proportionately represented.

Interestingly, the lingering effects of South Africa's reprehensible apartheid regime may assist Namibia's communities in developing cohesive, well-functioning conservancies. As a result of South Africa's assignment of Namibia's tribes to "homelands," conservancies tend to be relatively homogenous entities. For example, the Nyae Nyae conservancy is composed entirely of the Ju/'hoan San.[186] Similarly, all 2,500 or so members of the

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177. *A New Idea for Wildlife Management*, WORLD RES. INST., http://www.wri.org/publication/content/7603 (last visited Mar. 2, 2011).

178. *Id.*

179. *Id.*

180. *NACSO Conservancies Summary*, NACSO: NAMIBIAN ASS'N OF CBNRM SUPPORT ORGS., http://www.nacso.org.na/SOC_profiles/conservancysummary.php (last visited July 14, 2011).

181. A map of Namibia's conservancies is provided in Appendix 3.

182. In April 2010, thirty communities had applied for conservancy status. *See* Hon. Netumbo Nandi-Ndaitwah, MP Minister, Statement Regarding Namibia's Communal Conservancy Tourism Sector Nomination for Top International Award on 24–26 May 2010, Beijing, China 2–3 (Apr. 15, 2010), *available at* http://www.met.gov.na/Documents/Speech%20for%20the%20Hon%20Minister%20PRESS%20CONFERENCE%20Beijing%2019%20APRIL.pdf. In March 2011, five communities were granted conservancy status. *See NACSO Conservancies Summary*, *supra* note 180.

183. Nandi-Ndaitwah, *supra* note 182, at 3.

184. *See* NATURE CONSERVATION AMENDMENT ACT, *supra* note 171, at 1.

185. *Id.* at 5–6.

186. *See, e.g.*, USAID *Telling Our Story: Namibia – The Business of Protecting Wildlife in Namibia*, USAID FROM THE AMERICAN PEOPLE, http://www.usaid.gov/stories/namibia/cs_namibia_business.html (last visited Mar. 2, 2011).

Ehi-Rovipuka Conservancy and Torra.[187] The Torra conservancy is one of the more heterogeneous conservancies in Namibia, composed of four ethnicities: the Nama-Damara, Herero, Owambo, and Riemvasmakers.[188] The forced homogeneity resulting from Namibia's past means that its conservancies may now be inherently positioned to avoid some of the potential trust problems or differences in objectives that might be found in more-diverse community groups, particularly in groups this size.

b. The Communities Possess Well Defined, Albeit Limited, Property Interests

Namibia's conservancies generally possess certain well-defined property rights and interests. They possess the right to hunt, capture, cull, and sell huntable game.[189] Additionally, the conservancies have the ability, subject to the government's approval, to engage in limited hunting of trophy animals.[190] However, the conservancies' control over property interests on their land is limited in several important respects. The MET has the discretion to de-classify conservancies,[191] and as a result, the conservancies cannot be assured of perpetual ownership and benefit from the land. Also, the rights and interests of the conservancies are limited by the Communal Land Reform Act of 2002 ("CLRA" or "Act").[192] The Act provides that all communal land areas vested in Namibia to be held in trust for the benefit of the traditional communities residing in the communal lands, and for the purpose of promoting the economic and social development of Namibians—especially those who are "landless and those with insufficient access to land who are not in formal employment or engaged in non agricultural business activities."[193]

Thus, under the CLRA, the conservancy land is still owned by the government rather than being fully devolved to the community level. Such lack of ownership is potentially problematic because conservancy members ultimately lack the right to exclude outsiders from entering onto the conservancy land.[194] The Act also places restrictions on the ability of chiefs and other traditional authorities to allocate land for use by community members. In Namibia, customary laws are enforced to the extent that they are compatible with constitutional and statutory rules.[195] Hence, prior to the enactment of the CLRA, Namibia enforced the practice of traditional authorities or chiefs allocating the use of

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187. *See* Arthur Frederick Hoole, *Place-Power-Prognosis: Community-Based Conservation, Partnerships, and Ecotourism Enterprise in Namibia*, 4(1) INT'L J. OF THE COMMONS (2010), *available at* http://www.thecommonsjournal.org/index.php/ijc/article/viewArticle/112/96.

188. *Id.*

189. *See A New Idea for Wildlife Management*, *supra* note 177.

190. *Id.*

191. NATURE CONSERVATION AMENDMENT ACT, *supra* note 171, at 6.

192. Communal Land Reform Act of 2002, 2787 GOV'T GAZETTE OF THE REPUBLIC OF NAMIB. 2 (2002), *available at* http://www.lac.org.na/laws/pdf/communallandreformact.pdf.

193. *Id.* at 10.

194. *See* Bourbeau, *supra* note 41, at 522.

195. *Id.* at 523.

communal land.[195] The CLRA, however, undermined the power of the chiefs and traditional authorities. For example, while the Act codifies the chiefs' and traditional authorities' power to allocate or cancel a land right, it also requires that any allocation or cancellation be approved by a Communal Land Board.[197] The board can grant leaseholds on that same communal land.[198] The bureaucracy instituted by the Communal Land Board causes confusion, and potentially leads to conflicts between the traditional authorities and chiefs, and the overseeing board.[199]

The fact that conservancy land is owned by the government, but under the proprietorship of the local communities, results in a system of conflicting incentives.[200] In short, "[t]he CBNRM program creates positive incentives to preserve and maintain resources, but the current land-tenure arrangement creates incentives for people to view communal land as open access."[201] Nevertheless, despite this flaw, Namibia's conservancy program has so far avoided significant problems arising out of this potential internal conflict.

c. The Communities Realize Tangible Benefits

On the whole, the communities realize tangible benefits from their status as conservancies. Total income from the CBNRM program in Namibia increased from N$150,000 in 1995 to over N$41 million in 2008.[202] The majority of that income comes from tourism lodges and camps, which are the result of joint ventures between the conservancies and private investors, as well as direct wildlife utilization in the form of trophy hunting and wildlife harvesting.[203] In 2008, private sector investment in the conservancies resulted in a total of 605 full-time and 2,267 part-time jobs.[204]

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196. *Id.* at 322.
197. Communal Land Reform Act, *supra* note 192, at 11–13.
198. *Id.* at 18–19.
199. *See* Boudreaux, *supra* note 44, at 375.
200. *Id.*
201. *Id.* at 323–24.
202. NAMIBIA'S COMMUNAL CONSERVANCIES 2008, *supra* note 155, at 10, *available at* http://www.nacso.org.na/SOC_2009/2008_Conservancies_chapter_7.pdf. In U.S. Dollars, and accounting for inflation between 1995 and 2008, these values reflect an increase from roughly $38,000 to $4,264,000. *See, e.g.*, Klaus Schade & Mourice Matomola, *Deepening Integration in SADC Namibia on Track to Meet SADC Targets*, 7 REGIONAL INTEGRATION IN SOUTHERN AFRICA 87 (Oct. 2006), *available at* http://library.fes.de/pdf-files/bueros/sotswana/04924.pdf (showing the exchange rate for 1995 as 3.63 Namibian Dollars per U.S. Dollar); *Official Exchange Rate (LCU per US Dollar, Period Average) in Namibia*, TRADINGECONOMICS.COM, http://www.tradingeconomics.com/namibia/official-exchange-rate-lcu-per-us-dollar-period-average-wb-data.html (last visited July 5, 2011) (citing 2008 exchange rate as 8.26 Namibian Dollars per U.S. Dollar); THE INFLATION CALCULATOR, *supra* note 12 (stating that $41,322.31 in 1995 was equal to $57,840.30 in 2008).
203. NAMIBIA'S COMMUNAL CONSERVANCIES 2008, *supra* note 155, at 25.
204. *Id.* at 32.

As of 2008, fourteen conservancies had sufficient income to entirely cover all of their operational costs, while another twenty conservancies obtained sufficient income to cover a portion of their costs.[205] These operational costs include the salaries of 154 full-time conservancy employees.[206] Additionally, twelve of the fourteen self-sufficient conservancies generated enough income that, after covering their costs, they had the ability to make cash payments to individual members or villages.[207] However, Namibia's conservancies are increasingly choosing to use their excess income for communal purposes.[208] For example, since 2005, conservancies have used their excess income to fund capital improvements, such as developing water points for livestock, purchasing water pumps for boreholes, building offices, and purchasing conservancy vehicles and field equipment.[209] Over the same time period, conservancies have also used their income for social development, and to provide services within the conservancies, such as the purchase of computers, the support of HIV- and AIDS-affected orphans, and the funding of conservancy schools, soup kitchens, youth development programs, and sporting teams and events.[210] Certain conservancies have used their income to reimburse community members for economic losses resulting from wildlife, such as elephants and predators.[211] Finally, some conservancies began investing their income in annuities, while others set up micro loan programs for their members.[212]

In addition to economic and infrastructure benefits, conservancy members may also benefit from enhanced social capital. Participation in conservancy activities can help to strengthen and expand conservancy members' ties with social networks within the greater conservancy community.[213] The conservancies' committee members have the opportunity to gain leadership experience and skills through their involvement in conservancy management.[214] In fact, some non-governmental organizations (NGOs) have programs that are specifically designed to provide leadership training to these committee members.[215]

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205. *Id.*

206. *Id.*

207. *Id.*

208. *Id. See also* NASCO, NAMIBIA'S COMMUNAL CONSERVANCIES: A REVIEW OF PROGRESS AND CHALLENGES IN 2007 34–58 (2008), *available at* http://www.nacso.org.na/SOC_2007/chapter1.php; NASCO, NAMIBIA'S COMMUNAL CONSERVANCIES: A REVIEW OF PROGRESS IN 2006 7 (2007) [hereinafter NAMIBIA'S COMMUNAL CONSERVANCIES 2006], *available at* http://www.nacso.org.na/SOC_2006/chapter4.php; NASCO, NAMIBIA'S COMMUNAL CONSERVANCIES: A REVIEW OF PROGRESS AND CHALLENGES IN 2005 4 (2006) [hereinafter NAMIBIA'S COMMUNAL CONSERVANCIES 2005], *available at* http://www.nacso.org.na/SOC_2005/chapter1.php.

209. *See* NAMIBIA'S COMMUNAL CONSERVANCIES 2005, *supra* note 208, at 4; NAMIBIA'S COMMUNAL CONSERVANCIES 2006, *supra* note 208, at 4.

210. *See* NAMIBIA'S COMMUNAL CONSERVANCIES 2005, *supra* note 208, at 7.

211. *Id.*

212. *Id.*; NAMIBIA'S COMMUNAL CONSERVANCIES 2006, *supra* note 208, at 4.

213. *See* Boudreaux, *supra* note 44, at 310.

214. *Id.*

215. *Id.*

Finally, the conservancies provide their members with the opportunity to learn from, and to interact and negotiate with a number of national and international entities.[216] These are opportunities that the members would likely not have were it not for their participation in the conservancies.

d. The Communities Receive Strong External Support

The Namibian conservancies are generally well funded. For example, the Living in a Finite Environment Plus (LIFE Plus) program is designed to facilitate the success of Namibia's CBNRM program, and is supported primarily by the United States Agency for International Development (USAID) and the World Wildlife Fund (WWF).[217] Between 1993 and 2008, the LIFE Plus program received $12,649,262 in funding.[218] From this funding, the LIFE Plus program provided grants to conservancies and CBNRM service organizations in the amount of $1,3[illegible]2,017.[219]

In addition to the LIFE Plus program, USAID and WWF have their own independent projects, and a number of other organizations, such as the World Bank, the Namibia Nature Foundation, and the Rössing Foundation, also contribute to Namibia's CBNRM program. Including the LIFE Plus program, by mid-2008 USAID and the WWF combined had invested $39,934,006 in Namibia's CBNRM program.[220] In total, between 1990 and 2008 the Namibian government and other donors contributed a total of N$802 million (approximately $112.2 million) to Namibia's CBNRM program.[221]

3. *Namibia's CBNRM Positively Impacts Wildlife Conservation*

The growth in conservancies appears to have had a tangible, positive impact on wildlife conservation. Specifically, the elephant population in Namibia increased from approximately 5,000 in 1984 to more than 15,000 in 2008.[222] Between 1990 and 2006, oryx populations in Namibia increased eightfold.[223] Namibia has the world's largest population of

216. *Id.*

217. Living in a Finite Environment Plus (LIFE Plus), Integrated Community Based Natural Resource Management (CBNRM) for Economic Impact, Local Governance and Environmental Sustainability: End of Project Report the Period: September 1, 2004 to June 30, 2008 iv (2008), *available at* http://www.usaid.gov/na/pdfdocs/LIFEPlusEOPReport_Final.pdf.

218. *Id.*

219. *Id.*

220. *Id.* at vii.

221. *Id.* at viii.

222. *See* Boudreaux, *supra* note 41, at 305; L. Chris Weaver, Theunis Petersen, Richard Diggle, & Greenwell Matongo, Achievements and Practical Lessons Learned from a Decade of Wildlife Utilization in Namibia's Communal Area Conservancies 7 (2009), *available at* http://www.conservationforce.org/pdf/CIC%20%20paper_09_correct.doc.

223. *Strategic Objectives: Natural Resource Development*, USAID Namibia, http://www.usaid.gov/na/so5.htm (last visited Mar. 2, 2011).

cheetahs,[224] and its cheetahs have recently experienced an increase in range and density on communal lands—areas where their numbers were previously decimated by residents seeking to protect their livestock.[225] Namibia's population of black rhino increased from 750 in 2002 to 1,677 in 2009, and it currently possesses the world's largest free-roaming black rhino population.[226] Notably, Namibia is now relocating black rhinos from its nationalized protected areas to its communal lands—the only country in Africa currently doing so.[227] This action, part of a larger effort to improve community based and conservancy based tourism in remote areas of Namibia in order to provide additional incentives for the conservation of wildlife,[228] reflects a growing confidence by the Namibian government and national and international NGOs in the ability of Namibia's conservancies to protect wildlife.

The recovery of wildlife has been particularly dramatic in the North, where much of the communal land is located. In 2005, seasonal game migrations between the Caprivi Strip region's eastern floodplains and Botswana resumed for the first time since the early 1970s.[229] A recent survey in the Caprivi Strip region found that total assessed wildlife increased from 8,843 animals in 2001 to 19,213 in 2009.[230] Most notably, buffalo in that region increased in number from 3,262 to 9,633; elephant from 860 to 3,450; impala from 742 to 1,457; and zebra from 1,081 to 1,689.[231] Other species in the Caprivi Strip experienced less dramatic increases in numbers, but all but four of the species counted in the region increased in numbers since 2004.[232] The survey noted that the majority of wildlife was found within protected areas, but that more wildlife had been spotted on conservancy land than in previous surveys.[233] Interestingly, wildlife in the Caprivi Strip increased at the same time that

224. *See* NAMIBIAN MINISTRY OF ENVIRONMENT AND TOURISM, NAMIBIA'S DRAFT FOURTH NATIONAL REPORT TO THE UNITED NATIONS CONVENTION ON BIOLOGICAL DIVERSITY (UNCBD) 1 (Aug. 2010), *available at* http://www.cbd.int/doc/world/na/na-nr-04-en.pdf.

225. *See* Laurie Marker, Amy Dickman, Clare Wilkinson, Bonnie Schumann & Ezekial Fabiano, *The Namibian Cheetah Status Report*, CAT NEWS SPECIAL ISSUE 3 – CHEETAHS IN S. AFR. (Cheetah Conservation Fund, Namibia), 2007, at 5, *available at* http://catsg.org/catnews/03_specialissue/cheetah-s-africa/Marker_et_al_2007_Cheetah_in_Namibia.pdf.

226. *See* NAMIBIA'S DRAFT FOURTH NATIONAL REPORT TO THE UNCBD, *supra* note 224, at 1, 6.

227. *See* Nanci Ndairwah, *supra* note 182, at 3.

228. *See, e.g.*, *Namibia: MCA Spearheads Rhino Translocation*, ACF: AFRICAN CONSERVATION FOUNDATION (July 27, 2010), http://africanconservation.org/201008211519/conservation-news-section/namibia-mca-spearheads-rhino-translocation.html (last visited July 5, 2011).

229. *See* WORLD RES. INST., *Nature in Local Hands: The Case for Namibia's Conservancies* [hereinafter *Nature in Local Hands*], *in* WORLD RESOURCES 2005: THE WEALTH OF THE POOR: MANAGING ECOSYSTEMS TO FIGHT POVERTY 21 (Sept. 2005), *available at* http://pdf.wri.org/wri2005_guide_case_study.pdf (last visited Mar. 2, 2011).

230. *See Wildlife Census of Namibia's North East Rivers 2009*, NAMIB. NAT. FOUND., http://www.nnf.org.na/NNF_docs/wetland_count_poster09_A3.pdf.

231. *Id.*

232. *Id.*

233. *Id.*

human utilization of the land in the region also increased—as evidenced by a threefold increase in the number of cattle since 2007, and a moderate increase in number of Mokoros (traditional canoes).[234]

Other areas in Namibia's North experienced a similar rebound in wildlife population. The overall game population in the Nyae Nyae Conservancy increased sixfold between 1995 and 2004.[235] The Conservancy began reintroducing springbok in 1998, and by 2003, their numbers increased from zero to eighty eight.[236] At the same time, the population of oryx in the Conservancy rose from 430 to 1,170, and kudu from 280 to 950.[237] In the Kunene region, the black rhino and lion populations have experienced notable increases. Heavy poaching in the region meant that, by 1982, there were fewer than seventy black rhinos remaining.[238] Between 1993 and 2005, however, the black rhino population in the region doubled.[239] The lion population once numbered approximately 20 in the entire Kunene region, but that area now has around 125 lions, and the range of the lion population has expanded by several thousand square kilometers in the region.[240] The recovery of the lion population in the Kunene is of particular significance because it "could only have been possible if accompanied by a massive recovery of the plains game prey base and increased tolerance of the resident communities."[241]

In sum, the recovery of wildlife under CBNRM in Namibia is as dramatic as was the decline under the classical approach. Namibia's conservancy program incentivizes local communities to participate in the conservation of wildlife. They perceive an immediate benefit in the conservation of wildlife, and also have a sense of future entitlement to this benefit. The result is that Namibia has realized more conservation success in the past two decades than it did in more than a century of colonial rule.

III. THE PARTIES' REPEATED REFUSAL TO FULLY EMBRACE CBNRM

In light of the CBNRM approach's potential for success in conservation, as illustrated by Namibia's conservancy program, one would expect the Parties to be a natural proponent of the CBNRM approach as a supplement to CITES' trade restrictions. CITES

234. *Id.*

235. *See Nature in Local Hands*, *supra* note 229.

236. *Id.*

237. *See USAID Telling Our Story*, *supra* note 186.

238. *See IUCN: Recovery of the Kunene Rhinos – Knights of the Namibian Desert*, INT'L UNION FOR CONSERVATION OF NATURE (Nov. [illegible], 2010), http://www.iucn.org/about/work/programmes/species/news_events/?6605/Recovery-of-the-Kunene-rhinos---Knights-of-the-Namibian-desert.

239. *See* Kristina Stefanova, *Protecting Namibia's Natural Resources*, EJOURNAL USA: ECON. PERSP., 43, 44 (Aug. 2005), *available at* http://photos.state.gov/libraries/korea/49271/dwoa_122709/ijee0805.pdf.

240. *See* WEAVER ET AL., *supra* note 222, at 6.

241. *Id.*

was, after all, formed on the recognition that people "are and should be the best protectors of their own wild fauna and flora."[242] The natural extension of this philosophy would seem to be the encouragement of local peoples to spearhead conservation efforts. Nevertheless, and despite ample opportunity to do so, the Parties have so far refused to embrace the CBNRM approach.[243]

A. The Parties Hear Repeated Calls for a Broader Approach

Speakers at the CITES conferences have repeatedly urged the Parties to incentivize local communities to participate in conservation efforts. At the 1979 Conference of the Parties, a mere four years after CITES' formation, the Director General of the International Union for Conservation of Nature and Natural Resources passed upon the parties the fact that conservation efforts could not succeed without the local communities gaining some benefit from it. He emphasized that:

> there is obviously more to [conservation] than export/import restrictions . . . . [F]or certain countries and social groups the utilization of these resources is more closely related to their own economic survival today than to the distant goals of nature preservation in the future. In these circumstances, *no trade controls will ever be effective unless we can find alternative ways of survival for these people most directly affected, and unless we can thus persuade them that conservation is not a "zero sum" game which is bound to leave some partners worse off*, but rather a common cause with the assurance of common and enduring benefits for all.[244]

In 1987, the Deputy Director of the UN Environment Programme (UNEP) delivered a similar message, stating the importance of adopting flexible approaches that take into account identified needs and values of the people favoring rational utilization of the protected resources.[245]

At the 1992 Convention, two different speakers emphasized the need to ensure that the local users of the protected resources perceive value in conservation. The Executive Director of UNEP, while discussing ongoing efforts to conserve wild elephant populations, urged that countries must provide local communities with the economic incentive and ability

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242. CITES, TEXT OF THE CONVENTION: PREAMBLE (Mar. 3, 1973), *available at* http://www.cites.org/eng/disc/text.shtml#preamb.

243. A timeline of the events discussed in this section is provided in Appendix A.

244. Dr. David A. Munro, Director General of the International Union for Conservation of Nature and Natural Resources, Opening Speech at the Second Meeting of the Conference of the Parties 1, 2b (Mar. 19, 1979), *available at* http://www.cites.org/eng/cop/02/E02 Opening speeches.pdf (emphasis added).

245. William H. Mansfield III, Deputy Executive Director of the United Nations Environment Programme, Remarks at the Sixth Meeting of the Conference of the Parties: CITES: The MOST Endangered Species 19, 21 (July 12, 1987), *available at* http://www.cites.org/eng/cop/06/E06 Opening speeches.pdf.

to contribute to conservation efforts.[246] The International President of the World Wide Fund for Nature expressed similar sentiments, saying:

> It is also worth bearing in mind that resolutions, be they ever so pious, if they are significantly against the economic self-interest of the people most directly affected, have never been known to have much effect in practice. Indeed the wrong sort of legislation can easily become counter-productive by forcing people to turn to clandestine methods of earning a living. It can also remove significant economic incentives to conserve species. To adopt what Aristotle pointed out many centuries ago: that which has value to nobody is of no interest to anybody.[247]

Two years later, at the 1994 meeting of the parties, the UNEP again urged CITES to address the needs of the local communities. In her opening remarks, UNEP's Executive Director stated that, unless local communities were more involved in, and benefitted from, the management of resources, CITES ran the risk of "los[ing] the support of those who inhabit the poor and developing countries, which are also the home of the majority of the CITES listed species."[248] Thus, she urged, "We must look beyond regulatory measures."[249]

At the 1997 Conference, Zimbabwe's president, Robert Mugabe, emphasized the need for a community-based conservation approach. He touted the successes of Zimbabwe's

246. Dr. Mostafa K. Tolba, Executive Director of the United Nations Environment Programme, Statement at the Eighth Meeting of the Conference of the Parties [hereinafter CoP8]: Counting the Cost 10, 11 (Mar. 2, 1992), *available at* http://www.cites.org/eng/cop/08/E-speeches.pdf. Dr. Tolba said:

> Banning trade alone is not going to resolve this issue. One way or another we have to find an economic incentive to preserve the habitat . . . [A] large number of people – thousands of millions of them . . . are asking for [] a fair compensation by the world community for the non-use of their natural patrimony. Their conservation of the endangered species is to host them. But they need to be made able to do that. . . . This, our thesis is important if we are to get the support of the majority of the people, the poor people, especially in developing countries, for the protection of the endangered species – all the endangered species.

Id.

247. His Royal Highness Prince Philip, Duke of Edinburgh, Speech by the International President of WWF – World Wide Fund for Nature at CoP8 11, 15 (Mar. 2, 1992), *available at* http://www.cites.org/eng/cop/08/E-Speeches.pdf.

248. Elizabeth Dowdeswell, Executive Director of the United Nations Environment Programme, Welcoming Address at the Ninth Meeting of the Conference of the Parties 9 (Nov. 7, 1994), *available at* http://www.cites.org/eng/cop/09/E0-mcop.pdf.

249. *Id.*

CAMPFIRE program[250] in the conservation of wildlife, stressing the need for public support and participation in any conservation program.[251] Finally, in 2004, the CITES Secretary-General himself noted the need to involve local communities in conservation efforts. In his opening remarks that year, the Secretary General stated:

> For wild animals and plants to have a chance of survival, it is necessary to involve the people in their range States, to involve the people, mostly in rural areas of developing countries, who share their environment with wildlife and who in many cases compete with wildlife for survival. Such involvement can only be positive if there are clear benefits, economic or otherwise, that compensate sacrifices resulting from conflicts between man and wildlife.[252]

B. The Parties Recognize the Need for Incentives, but Provide No Guidance As to How to Obtain Them

In 1992, the Parties, for the first time, considered a proposed resolution that discussed the need to incentivize participation in conservation at the community level. The draft resolution, the purpose of which was to declare certain Asian species as beneficial, stated "unless conservation programmes take into account the needs of local people and provide incentives for sustainable management of wildlife, alien land uses are likely to replace the use of land to support wild fauna and flora."[253] A document accompanying the draft resolution proposed that the solution to preservation of wildlife was coupling a high economic value for wildlife with policies that allowed rural peoples to realize that value.[254]

The 1992 draft resolution contained the recommendation that trade should be considered to be beneficial to a species when it is based upon sustainable use, and the

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250. Zimbabwe's CAMPFIRE program was one of the first national CBNRM programs in Africa, and served as a model for successive programs in the region, including Namibia's Conservancy program. *See* Summers, *supra* note 21, at 191 (stating that the CAMPFIRE program was a pioneer in the combination of conservation and sustainable use); Boudreaux, *supra* note 14, at 306 (stating that the Namibian government looked at the CAMPFIRE program as a reason for optimism when initiating the conservancy program). Unfortunately, the crippling political situation in Zimbabwe has also had a significant impact on the CAMPFIRE program's effectiveness. *See id.* at 321 ("The current political instability that now wracks Zimbabwe compounds the problem of the weakened CBNRM's incentive structure. A recent report on the state of wildlife in the country finds that wildlife losses in the country are 'severe.'").

251. *See* CoP8: Robert G. Mugabe, President of the Republic of Zimbabwe, Opening Address at the Tenth Meeting of the Conference of the Parties 1 (June 9, 1997), *available at* http://www.cites.org/eng/cop/10/P_Speech.pdf.

252. Willem Wijnstekers, CITES Secretary-General, Opening Remarks at CoP13 (Oct. 2, 2004), *available at* http://www.cites.org/eng/news/meeting/cop13/sg/ww.shtml.

253. CITES, EIGHTH MEETING OF THE CONFERENCE OF THE PARTIES [hereinafter COP8]: DOC. 8.48: INTERPRETATION AND IMPLEMENTATION OF THE CONVENTION: RECOGNITION OF THE BENEFITS ARISING FROM TRADE IN WILDLIFE 853 (Mar. 1992), *available at* http://www.cites.org/eng/cop/08/doc/E_WL3-18.pdf.

254. *Id.* at 852.

financial returns from the trade are used to provide income to the local rural communities.[255] It further recommended that whenever sustainable uses of wildlife by local communities lead to international trade, CITES should not be used to prevent such positive rural development.[256] The Parties adopted the draft resolution, but only after they first stripped the resolution of almost all of its substance. The accepted version of the 1992 resolution retained only the draft resolution's introduction, and otherwise consisted of a single statement that CITES recognized "that commercial trade may be beneficial to the conservation of species and ecosystems and/or to the development of local people when carried out at levels that are not detrimental to the survival of the species in question."[257]

In 1994, the Parties finally promulgated a resolution that attempted to address the need to incentivize the cooperation of local communities. That resolution, Resolution 9.8, stated that the Parties recognized that further efforts were needed to combat illegal trade in wild species.[258] Among other approaches, Resolution 9.8 promoted, as one method for reducing illegal trade, the use of incentives to secure the support and cooperation of local and rural communities in the management of wildlife resources.[259] The Parties' recognition of the need for incentives was significant, but Resolution 9.8 did not provide the Parties with guidance regarding how the incentives could be generated. Resolution 9.8 encouraged the use of any unspecified incentive that could have the effect of reducing illegal trade, regardless of the incentive's sustainability. In other words, although the term "incentive" might be interpreted to include the provision of communities with enduring rights and interests in the conserved species, Resolution 9.8 could also be read to encourage a myriad of other, less sustainable approaches. An example of the types of incentives potentially embraced by the Parties in Resolution 9.8 would be the hiring of local communities to perform anti-poaching patrols.[260] Similarly, governments could also reimburse local communities for losses suffered from conflicts with the protected species.[261]

The local communities would undoubtedly view these other approaches as being improvements over an approach that completely ignores their needs, but the approaches nevertheless fail to provide the communities with the ownership interests necessary to foster

255. *Id.* at 853–64.

256. *Id.*

257. CITES, CoP5 Resolution 5.5: Recognition of the Benefits of Trade in Wildlife 10 (Mar. 1992), *available at* http://www.cites.org/eng/cop/05/r-5-Resolutions.pdf.

258. CITES, NINTH MEETING OF THE CONFERENCE OF THE PARTIES: RESOLUTION 9.8: ENFORCEMENT 57 (Nov. 1994), *available at* http://www.cites.org/eng/cop/09/9-Res.pdf.

259. *Id.*

260. An NGO called the Namibian Wildlife Trust used this approach in Namibia in the early 1980s, prior to Namibia's adoption of the Conservancy program. See Boudreaux, *supra* note 44, at 307.

261. *See, e.g.*, CITES, SEVENTEENTH MEETING OF THE CONFERENCE OF THE PARTIES [hereinafter CoP 14]: Doc. 32: Implementation and Implementation of the Convention: Compliance Issues: Incentives for Implementation of the Convention 3–4 (Mar. 2007), *available at* http://www.cites.org/eng/cop/14/doc/E14-32.pdf.

a lasting commitment to conservation.[262] It is only when they are secure in their future entitlement to the benefits of conservation that local communities will participate in conservation efforts in which the short-term benefits of conservation are outweighed by the short-term incentives of exploiting the protected resource.[263]

C. Local Communities Criticize CITES' Methodology

A week before the 1997 Convention began, representatives for CITES attended a workshop at the Global BioDiversity Forum Number Seven.[264] The workshop focused on five different topics: (1) whether linkages between the Convention on Biological Diversity (CBD), CITES, and community conservation were positive; (2) the implications of conservation, sustainable use, and equitable sharing of benefits through community conservation for CBD and CITES; (3) methods of measuring and monitoring the success of community conservation and equitable sharing; (4) the implications of identifying key institutional arrangements needed to bring about equitable sharing of benefits for CITES and CBD; and (5) recommendations for ensuring that CITES and CBD synergies work effectively for community conservation.[265]

The attendees at the workshop, which primarily included community representatives and natural resource managers, along with NGOs and government representatives, criticized CITES for not having a feedback process regarding the impact of its decisions on local communities.[266] Significantly, the majority of the participants in the workshop asserted that CITES' trade restrictions actually deterred their participation in conservation of protected species.[267] It was their opinion that CITES' trade restrictions prevented local communities

262. *See, e.g.*, 3 ECOSYSTEMS AND HUMAN WELL-BEING: POLICY RESPONSES 132 (Kanchan Rarya Chopra ed., 2005) (stating that weak property rights undermine conservation investment in the protection of biodiversity because the community has little incentive to adopt long-term management strategies, and instead uses short-term, opportunistic decision making).

263. *See, e.g.*, PRIYA SHYAMSUNDAR, LEONARDO ARAUJO & SURANJAN WEERATANE, DEVOLUTION OF RESOURCE RIGHTS, POVERTY, AND NATURAL RESOURCE MANAGEMENT – A REVIEW 32 (May 2005), *available at* http://www.ibcperu.org/doc/isis/5896.pdf (noting that studies have found that community based forest management can still be effective in the absence of short-term benefits if the communities are convinced about the long-term viability and profitability of the program).

264. *See* CITES, TENTH MEETING OF THE CONFERENCE OF THE PARTIES [hereinafter COP10: DOC. 10.22: EVOLUTION OF THE CONVENTION: HOW TO IMPROVE THE EFFECTIVENESS OF THE CONVENTION: COOPERATIONS/SYNERGY WITH OTHER CONSERVATION CONVENTIONS AND AGENCIES 4?? (June 1997), *available at* http://www.cites.org/eng/cop/10/doc/E10-20co22.pdf); Edmund Barrow & Joanna Elliott, IUCN-WILDLIFE FOUND., COMMUNITY CONSERVATION – MYTH OR REALITY? SUMMARY OF DISCUSSIONS FOR THE WORKSHOP HELD AT THE GLOBAL BIODIVERSITY FORUM 7 MEETING 4 (June 1997), *available at* http://www.iucn.org/content/document/%20detail/3363.

265. Barrow & Elliott, *supra* note 264, at 5.

266. *Id.* at 5–6.

267. *Id.* at 7.

from earning benefits from the resources they manage, and that CITES lacked any mechanism by which local communities could defray the costs of conservation.[268] The participants stressed that one of the primary obstacles to realizing local communities' support of CITES was the unwillingness or inability of the Parties to adopt internal mechanisms that involved local participation in the design and implementation of conservation strategies.[269]

The workshop participants drafted a number of recommendations for CITES including:

- Developing mechanisms for participation by local people in national and international processes;
- Recognizing that local communities bear the primary cost of conservation, and therefore local communities should have input into management of the protected resources;
- Reducing CITES' "top down" approach by better understanding local communities and encouraging their self-sustaining support; and
- Using existing local institutions, such as government sponsored, community initiated, and traditional institutions, in conservation efforts.[270]

A condensed version of the CBD workshop's recommendations was circulated to all participants at the 1997 Conference,[271] but the Parties did not take any further action regarding the involvement of communities in conservation.

D. The Parties Recognize Land Tenure As a Potentially Significant Tool

In 2000, CITES adopted its "2000 Strategic Plan." The 2000 Strategic Plan recognized that trade mechanisms require strong national capacity, backed by "good cooperation at national, regional and global levels."[272] The 2000 Strategic Plan set out seven goals to be achieved by 2005. The first goal, to "Increase the Ability of Each Party to Implement the Convention," "recognized that for trade to be responsible and based on sustainable use, social and economic incentives are needed to bring local communities and local authorities into partnership with government under an appropriate legislative, policy and financial framework."[273] Similarly, the fourth goal, to "Promote Greater Understanding of the Convention," listed strengthening the Parties' alliances with relevant local communities as an objective.[274]

268. *Id.*
269. *Id.* at 6.
270. *Id.* at 8–9.
271. *Id.* at 10 (containing the summary circulated to the Parties).
272. CITES, ELEVENTH MEETING OF THE CONFERENCE OF THE PARTIES 2000, 11.22: STRATEGIC AND ADMINISTRATIVE MATTERS: EVOLUTION OF THE CONVENTION: STRATEGIC PLAN FOR THE CONVENTION 3 (Apr. 2000), *available at* http://www.cites.org/eng/cop/11/doc/12_2.pdf.
273. *Id.* at 1.
274. *Id.* at 7.

The 2000 Strategic Plan was an improvement over previously adopted resolutions in that it better explored social and economic incentives that could be used to earn the assistance of the local communities. Objective 1.1 of the Plan provided the most concrete goal relating to CBNRM. It states that the CITES Secretariat should assist in the development of "appropriate domestic legislation and policies that encourage the adoption and implementation of social and economic incentives allied to legal instruments."[275] The "Action Plan" for Objective 1.1 (attached as an annex to the 2000 Strategic Plan) included sub-Objective 1.1.4, stating that the Parties, the Secretariat, and the Animals Committee should ensure adequate review and adoption of policies and legislation, and provided land tenure as one of a number of potential approaches.[276] In the 2000 Strategic Plan, the Parties finally recognized that land tenure – one of the key focuses of the CBNRM approach – is a factor that could have a significant impact on the effectiveness of the CITES approach.[277] However, land tenure was not provided very much import, instead being listed as one of several potential approaches in an attached document's sub-objective. In short, the 2000 Strategic Plan stumped well short of providing the type of guidance needed by a country seeking to develop any sort of CBNRM program.

E. The Parties Balk at Embracing CBNRM

At the 2002 Conference of the Parties, the Parties considered a working paper prepared by the CITES Secretariat entitled "Economic Incentives and Trade Policy" ("2002 Working Paper"). The 2002 Working Paper noted that the 2000 Strategic Plan aimed at assisting Parties in developing domestic legislation and policies that encourage the adoption and implementation of social and economic incentives.[278] Critically, the 2002 Working Paper pointed out that command and control regulations allow little flexibility in the ways that nations can achieve conservation goals.[279] Instead, such regulations rely heavily on the nations' ability to engage in the monitoring and management of complex administrative systems, in addition to requiring that the nations possess high capacities for enforcement of the regulations.[280] For this reason, the Secretariat wrote that combining regulations with incentive measures means a greater likelihood that CITES' objectives would be achieved in a cost-effective manner.[281]

Unlike earlier documents considered by the Parties, the 2002 Working Paper analyzed a number of incentives available to the Parties—two of which are hallmarks of the CBNRM approach. The Secretariat listed the removal of "perverse incentives" such as

275. *Id.* at 5.
276. *Id.* at 11.
277. *Id.*
278. CITES, THE 12TH MEETING OF THE CONFERENCE OF THE PARTIES [hereinafter COP12 DOC. 18] STRATEGIC AND ADMINISTRATIVE MATTERS: ECONOMIC INCENTIVES AND TRADE POLICIES (Nov. 2002), *available at* http://www.cites.org/eng/cop/12/doc/E12-18.pdf.
279. *Id.* at 2.
280. *Id.*
281. *Id.*

open access resource exploitation as one approach, and "the assignment of well defined property rights to the local communities . . . . including the right to use a particular species, to permit or exclude its use by others, to collect the income generated by the species, and to sell or otherwise dispose of the species"[282] as another. Regarding the latter incentive, the Secretariat wrote:

> Property rights include the right to use a particular species, to permit or exclude its use by others, to collect the income generated by the species, and to sell or otherwise dispose of the species. It is well known that poachers harvesting specimens of wild species under open access conditions often enjoy profit margins that make any effort to elude enforcement controls worthwhile. *The assignment of property rights to local communities can help to reduce enforcement costs by providing resource owners with an incentive to protect the species. These rights could include self-determination of resource use* and the right to sell hunting licenses.[283]

The Secretariat allowed the Parties the prerogative to use any incentive, but it urged the Parties to use economic incentives, and remove perverse incentives, when developing their conservation strategies.[284] The Secretariat wrote that such an integrated approach "will often be key for achieving the goals of the Convention."[285] The accompanying draft resolution ("2002 Draft Resolution") incorporated much of the language of the working paper, repeating that the Parties should consider the use of economic incentives as part of their national policies.[286] Importantly, the 2002 Draft Resolution urged the Parties to "avoid where possible, the application of strictly domestic measures."[287]

It was at this point, twenty-seven years after its inception and twenty-three years after they first heard the call for the inclusion of communities in its conservations efforts, that the Parties had their best opportunity to embrace CBNRM as a supplement to CITES' regulatory approach. The Parties considered a resolution, drafted by the CITES' Secretariat, which stressed that such an integrated approach would be more effective, both in costs and in results, than CITES' traditional classic approach to conservation.

When the 2002 Draft Resolution was presented to CITES' Committee II, the Parties' reaction was mixed.[288] Chile, Colombia, Indonesia, the Philippines, Japan, and

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282. *Id.*
283. *Id.* (emphasis added).
284. *Id.* (urging the Parties to avoid implementing strictly domestic measures).
285. *Id.*
286. *Id.*
287. *Id.* at 10.
288. Committee II is responsible for debating and deciding whether CITES should adopt the resolutions and decisions proposed at the Conference of the Parties. *See What Is the Structure That Governs CITES?*, CITES, http://www.cites.org/what structure governs cites (last visited Mar. 2, 2011).

Norway all generally supported it.[289] India complimented the Secretariat for introducing an "innovative document," but it, along with Australia, the member states of the European Union, the United States, Kenya, Zambia, Tanzania, and Brazil objected to, among other things, the portion of the 2002 Draft Resolution urging the Parties to avoid implementing stricter domestic measures.[290] Ultimately, Committee II overwhelmingly rejected the draft proposal. Two countries supported the 2002 Draft Resolution, while twenty-six countries opposed it, and the remaining twenty two countries abstained.[291] The Parties did, however, approve a decision directing the Secretariat to further investigate potentially applicable economic incentives, and to report back to the Parties at the 2004 Convention.[292]

CITES' records do not indicate which of the Parties supported or opposed the 2002 Draft Resolution, or their reasons for doing so. However, based on the records of the debate on the draft amendment, it does not appear that the Parties disputed the potential efficacy of an integrated approach to conservation. Rather, the Parties appeared most concerned with the 2002 Resolution's attempt to move away from the classical approach to conservation. For example, before calling the 2002 Draft Resolution to a formal "roll call" vote, the Parties on Committee II agreed by a "show-of-hands" vote to delete the portion that urged the Parties to avoid implementing stricter domestic measures.[293] The Parties also added a preambular paragraph that "reaffirm[ed]" the "importance of fully respecting the provisions of Article XIV of the Convention"[294] (which provides that CITES' provisions will not affect the right of the Parties to adopt stricter domestic policies). Thus, it is likely that rejection of the 2002 Draft Resolution indicates an enduring allegiance by many Parties to the classical approach to conservation.

The Parties did not consider a similar draft resolution in 2001. Instead, the Parties adopted Resolution 13.2, which calls for CITES Parties to make use of the *Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity* when adopting

289. *See* CITES, Conf 12: COMMITTEE I & II MEETING: SECOND SESSION 2 (Nov. 2002), *available at* http://www.cites.org/eng/cop/12/doc/Com1I_2.PDF.

290. *Id.* The report on Committee II's debate notes that India "had doubts about some aspects" of the proposed resolution, but does not provide any specificity as to which provisions caused India concern. *Id.*

291. *See* CITES, COP12: COMMITTEE II MEETING: FOURTH SESSION 5 (Nov. 17, 2002), *available at* http://www.cites.org/eng/cop/12/rep/ComII_8.PDF.

292. *See Economic Incentives and Trade Policy: Decision No. 12.22*, CITES (Nov. 11, 2002), http://www.cites.org/eng/dec/valid12/12-22.shtml.

293. *See* CITES, CoP12: COMMITTEE II MEETING: THIRD SESSION 3 (Nov. 6, 2002), *available at* http://www.cites.org/eng/cop/12/rep/ComII_3.PDF.

294. *See* CITES, CoP12: COMMITTEE II Meeting: SIXTH SESSION 2 (Nov. 8, 2002), *available at* http://www.cites.org/eng/cop/12/rep/ComII_7.PDF.

non-detriment-making processes and making non-detriment findings.[295] Among other things, the *Addis Ababa Principles* provide that "local users of biodiversity components should be sufficiently empowered and supported by rights to be responsible and accountable for use of the resources concerned."[296] The fundamental shortcoming of Resolution 13.3, however, is that it does not address the involvement of local users of a resource when the resource is subject to Appendix II's wholesale trade ban. The support of local communities is most critical to the conservation of the species when international trade in a species is banned entirely, because it is at that point that governments are most likely to lack the will or means to undertake sufficient conservation efforts.[297]

In 2007, the Secretariat again argued for the incentivization of local communities in the implementation of CITES' trade restrictions. It presented the Parties with a working paper that expanded upon the language contained in the 2002 Draft Resolution.[298] As before, the Secretariat stated that incentive measures, such as the granting of property rights, are more flexible and low-cost methods by which to achieve government policy objectives.[299] The Secretariat also urged that, through the use of incentives, the Parties could increase the policy options available to them, thereby encouraging positive behavior by their constituents more effectively and efficiently.[300]

The Secretariat provided a lengthy analysis of the benefits of granting communal property rights:

> If Parties want to ensure that wildlife trade generates revenues for conservation and contributes to poverty alleviation in some particular way, then

295. CITES, THIRTEENTH MEETING OF THE CONFERENCE OF THE PARTIES [hereinafter CoP13]: RESOLUTION NO. 13.3: SUSTAINABLE USE OF BIODIVERSITY: ADDIS ABABA PRINCIPLES AND GUIDELINES (2004), *available at* http://www.cites.org/eng/res/all/13/E13-223-4.pdf. Non-detriment findings and processes arise when specimens are included in CITES' Appendix II. *See* CITES, TEXT OF THE CONVENTION ARTICLE IV(2), *available at* http://cites.org/eng/disc/text.shtml#AIV. Any species so listed in Appendix II cannot be exported without the prior grant and presentation of an export permit. *Id.* Export permits will only be granted if, among other things, a Scientific Authority of the exporting country determines that the export will not be detrimental to the survival of the species. *Id.*

296. CITES, CoP13: RESOLUTION NO. 13.2, *supra* note 295.

297. *See, e.g.*, Michael T. Sas-Rolfes, *Banning CITES: Two Case Studies*, *in* ENDANGERED SPECIES, THREATENED CONVENTION 41, 49 (2000) (noting that the ban on the trade of ivory has resulted in some countries possessing hundreds of tons of ivory that they are unable to sell while their "conservation departments are desperate for funds for field protection"); Simon Mercalfe, *Disenfranchising Users and Sustainable Use*, ENDANGERED SPECIES, THREATENED CONVENTION 88, 100 (2000) (stating that international trade controls provide an incentive for nations to conserve wildlife habitat, and arguing that the elephant trade ban "seriously undermined good management practices" in Southern Africa).

298. *See* CITES, CoP14 Doc. 32, *supra* note 261.

299. *Id.* at 2.

300. *Id.*

> securing communal property rights is a key element to meet that goal. Communal property rights include the right to use a particular species, to permit or exclude its use by others, to collect the income generated by the use of the species, and to sell or otherwise dispose of specimens of the species.
>
> In the absence of secure property rights, such as under "open access" conditions, it is well documented that poachers harvesting valuable specimens of wild species can enjoy profit margins that make any effort to evade enforcement controls worthwhile.
>
> The assignment of property rights to local communities can help to reduce enforcement costs by providing resource owners with an incentive to protect the species. These rights could include self-administration of resource use and the right to sell hunting licenses.
>
> When markets exist, but do not succeed in conserving a valuable resource, poorly defined, weak or missing property rights can be to blame. Indeed, it is very important to determine which characteristics of secure property rights are missing or weak and explore ways to restore or substitute the missing elements.[301]

Despite the Secretariat's articulation of the potential benefits of what is, essentially, a CBNRM approach, the Secretariat did not suggest the adoption of a resolution promoting such an approach. Instead, the Secretariat presented several draft decisions for the Parties' consideration. These decisions (which the Parties adopted) mainly encouraged Parties to report details of their incentive measures in their biannual reports, and directed the Parties to consider practical ways to enhance stakeholder engagement in the implementation of CITES.[302]

The Parties took no further steps regarding the use of incentives in conservation at the 2010 Conference. They did consider a draft resolution that urged the recognition of resource tenure for local communities as a means of poverty reduction,[303] but rejected it with little discussion.[304] Instead, the Parties enacted several decisions that directed the Standing Committee to continue considering the impact of CITES listing decisions on the livelihoods of the poor, and to present its findings at the 2013 Conference.

IV. THE NEED FOR CITES TO EMBRACE CBNRM

The Parties must overcome their reluctance to embrace CBNRM if CITES is to retain its status as one of the world's most important conservation treaties. Simply put,

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301. *Id.* at 4–5.

302. *Id.* at 11.

303. *See* CITES, RESOLUTION OF THE CONFERENCE OF THE PARTIES 10.12 (REV. COP15): TRADE IN ELEPHANT SPECIMENS 4 (Mar. 13–15, 2010) [hereinafter CITES RESOLUTION 10.12], *available at* http://www.cites.org/eng/cop/15/doc/E15-14.pdf.

304. *See* CITES, COP15: SUMMARY RECORDS OF THE SECOND SESSION OF COMMITTEE II 2–3 (Mar. 15, 2010), *available at* http://www.cites.org/eng/cop/15/sum/E15-Com-II-Rec02.pdf.

CITES' current approach to conservation is not effective. With perhaps a few exceptions, CITES' classical approach to conservation only works in those countries that possess sufficient resources to rigorously enforce strict legislation.[305] Attempts by developing countries to rely solely on a classical approach in effectuating CITES' trade restrictions often result in a burgeoning illegal trade of the protected species.[306] Further, without some other competing incentive, CITES trade restrictions have the perverse impact of incentivizing the developing countries' local communities to engage in behavior antithetical to conservation of the protected species.[307]

The Parties' collective failure to support CBNRM does not, of course, prevent individual Parties from adopting such an approach on their own. However, adopting a successful CBNRM approach requires a country to have both the will and means to draft appropriate legislation and policy, and to provide the program with ongoing assistance. It is likely that many Parties lack sufficient will to begin a CBNRM program absent external encouragement and financial and logistical support.[308] CITES' promotion of CBNRM as a means of complementing its use of trade controls would help these governments muster the necessary political will to develop their own CBNRM programs.[309] CITES can also provide resources that might be otherwise unavailable to the governments. For example, CITES has historically adopted resolutions that provide for the building of Parties' capacities to conserve protected species,[310] and it could do the same for countries attempting to adopt CBNRM programs. Additionally, CITES possesses the ability to facilitate the funding by

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305. *See, e.g.*, Martin, *supra* note 7, at 20–21.

306. *See* Lilljeblad, *supra* note 11, at 529.

307. *See* Abensperg-Traun, *supra* note 9, at 935–36.

308. *See* Songorwa, *supra* note 21, at 616 (noting that, in practice, many governments in Africa have been reluctant to adopt community-based conservation programs); Maggio, *supra* note 16, at 206 ("[M]any governments are suspicious of devolution of resource management authority schemes, particularly where they involve indigenous communities that might also be seeking greater autonomy over their internal affairs.").

309. *See, e.g.*, Marshall W. Murphree, *The Lesson from Mahenye*, *in* ENDANGERED SPECIES, THREATENED CONVENTION, *supra* note 21, at 115, 122 ("the decisions of CITES can have an influence on the policies of its member states regarding the locus of efficient regulation").

310. For example, Resolution 10.10 empowers CITES' Monitoring of Illegal Killing of Elephants (MIKE) program to assist in building the conservation capacity in elephant range states. *See* CITES RESOLUTION 10.10, *supra* 293, at 2. Resolution 10.10 further directs the Secretariat to provide technical assistance to Parties. CITES also provides for capacity building in its resolution concerning the conservation and trade of great apes. *See* CITES RESOLUTION 13.4, *supra* note 36, at 2.

other Parties and international organizations of countries' relevant CBNRM programs.[311] Absent this support, many Parties will struggle to adopt viable CBNRM programs.[312]

The stubborn refusal by the majority of the Parties to embrace the adoption of CBNRM programs, despite the classical approach's limited efficacy in many developing countries, risks alienating the remainder. CITES' Appendix I trade bans prevent trade in protected species by any country, regardless of how well a particular country manages those species. Thus, the inability of some Parties to effectively enforce CITES' trade restrictions has the unfortunate effect of harming those that can, because the latter continue to be prevented from benefitting from trade in the protected species. This, in turn, fortifies discord between those Parties with well-managed conservation programs and those without.

For example, African elephants are listed on Appendix I, and are therefore subject to a complete ban on international trade. However, some southern African countries, namely Namibia, Botswana, South Africa, and (until recently) Zimbabwe, actually possess healthy, well-managed elephant populations.[313] Nevertheless, they are subject to the same trade bans as are those countries that are unable to successfully conserve elephant populations.[314] On several occasions, these southern African countries have sought to resume trade in ivory, but their proposed resumption of trade has been opposed by other Parties, including those from other regions in Africa.[315] The end result of this disparity in the Parties' abilities to conserve their elephant populations is over a decade of infighting among CITES' ranks.[316]

CITES' rigid adherence to the classical approach also risks making it appear out-of-date compared to more-recent conservation treaties. The CBD, for example, embraces a much more comprehensive approach to conservation, including the promotion

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311. *See, e.g.*, CITES RESOLUTION 13.4, *supra* note 36, at 7 (calling upon governments, intergovernmental organizations and aid agencies, and non-governmental organizations to assist range states with funding for conservation measures); CITES, CONF'N DOC. 10.10 ANNEX 1 (91), *available at* http://www.cites.org/eng/cop/10/doc/10-10E.pdf (discussing the role of CITES' Capacity Building Unit in obtaining funding for the Parties).

312. *See, e.g.*, Metcalfe, *supra* note 297, at 100 (stating that most southern African states are struggling to implement effective devolution of wildlife use rights).

313. *See* Abensperg-Traun, *supra* note 9, at 953.

314. *See* Swanson, *supra* note 72, at 96 (pointing out that Zimbabwe (whose elephant population increased by 10,000 animals in the 1980s) was subject to the same trade restrictions as Tanzania, the Central African Republic, Zambia, and Sudan (whose joint elephant population suffered roughly 500,000 in losses over the same period)).

315. *See* Sas-Rolfes, *supra* note 297, at 48–49.

316. *See, e.g.*, Virginia Morell, *Elephants Take Center Ivory at CITES*, 316 SCIENCE 1678, 1679 (June 2007) (discussing the contentious debate over the proposal to allow a one-time sale of ivory by South Africa, Namibia, Botswana, and Zimbabwe).

of participation by local communities in conservation efforts.[317] The CBD has already exceeded CITES in its number of signatories;[318] one member attributes this high participation because the CBD's approach "far exceeds 'classic' nature conservation agreements in its objectives and scope."[319] Indeed, this disparity in the flexibility and comprehensiveness of the approaches utilized by the two conventions has caused some to propose subsuming CITES under the CBD.[320] While this Article does not suggest that CITES is in any real danger of being subsumed out of existence, comments such as these reflect a viewpoint that CITES is too limited in scope in comparison to its newer cousins.

CONCLUSION

The classical approach to conservation emphasizes reliance on the adoption of strict legislation and the designation of protected areas for conservation, but this approach has limited efficacy in many developing countries. Developing countries often lack sufficient resources to effectively enforce such strict legislation and adequately police designated protected areas. These shortcomings are exacerbated by the fact that the countries' efforts, by removing the ability of local communities to benefit from the utilization of species, can actually have the perverse effect of incentivizing local communities to over-exploit protected species. This combination—inadequate enforcement of protectionist measures and the perverse incentivization of local communities—can lead to the type of dramatic decline in wildlife populations that Namibia experienced during its period of colonial rule.

CBNRM can, if properly designed and supported, afford a means for developing countries to more effectively conserve protected species. It provides local communities with a sense of ownership over, and responsibility for, protected species. Hence, instead of

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317. *See* CONVENTION ON BIOLOGICAL DIVERSITY art. 8(j) ("Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.").

318. One hundred ninety-three parties have ratified the CBD since its inception in 1992. *See List of Parties*, CONVENTION ON BIOLOGICAL DIVERSITY, http://www.cbd.int/convention/parties/list/ (last visited Mar. 2, 2011).

319. *See* Press Background Paper on the 9th Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity (COP 9) from 19 to 30 May 2008 in Bonn, Ger. Ministry for the Env't, Nature Conservation and Nuclear Safety (2008), *available at* http://www.bmu.de/files/english/pdf/application/pdf/press_hintergrund_cop9_en.pdf (last visited Mar. 2, 2011).

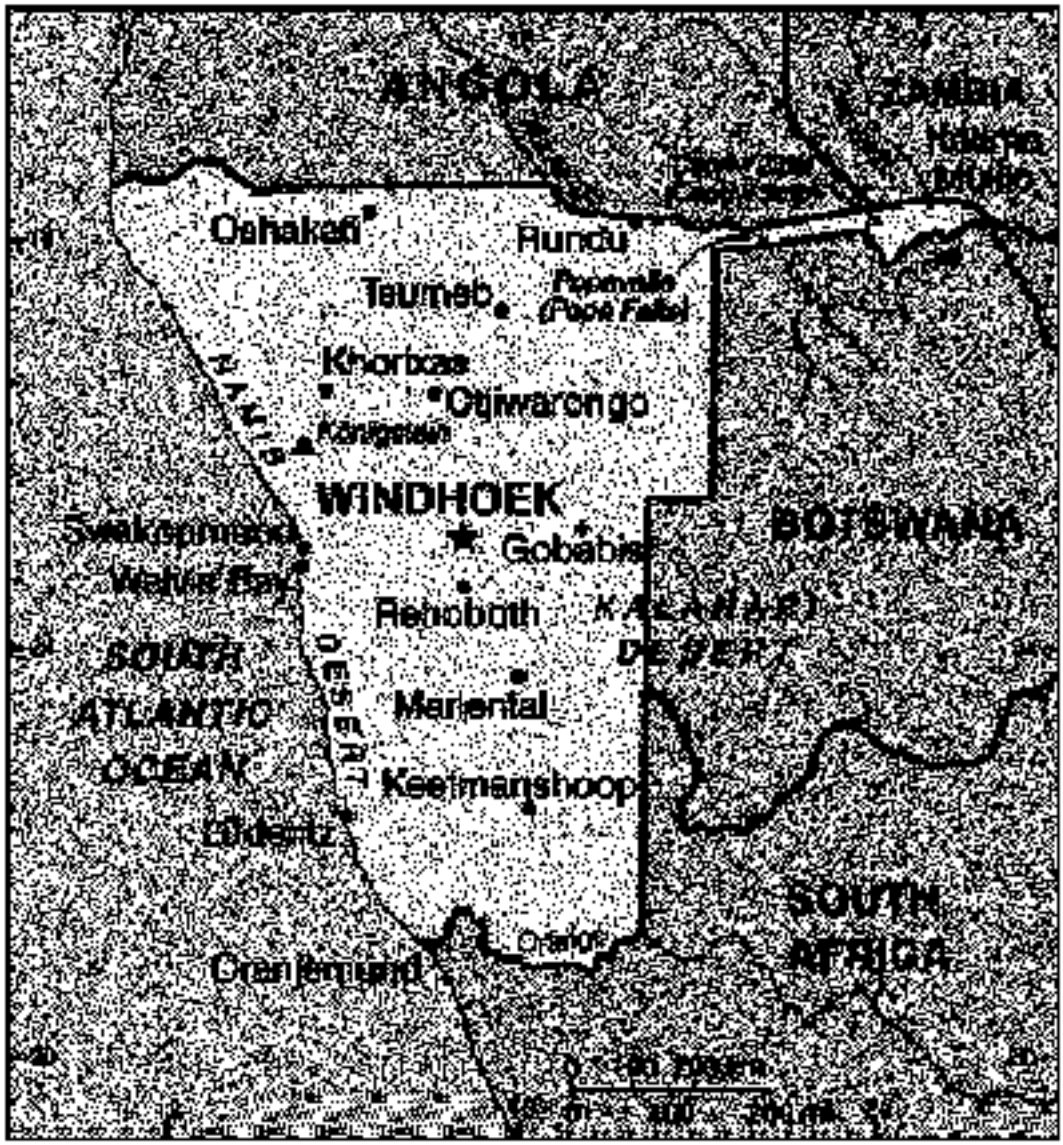
320. *See, e.g.*, Rowan B. Martin, *CITES and the CBD*, *in* ENDANGERED SPECIES, THREATENED CONVENTION, *supra* note 7, at 80, 84–85. Martin argues that CITES and the CBD have coinciding goals, but that the CBD provides a better framework for conservation for two reasons: (1) the CBD offers greater flexibility in the methods used for conservation; and (2) the CBD addresses social, economic, and political factors that impact the success of conservation efforts. *Id.*

seeking to exploit the protected species in order to realize short term gains, local communities are more likely to sacrifice these immediate gains in order to generate sustained long-term benefits from the species' sustainable utilization. CBNRM's potential as a conservation tool is evidenced by the tangible successes of Namibia's conservancy program.

Despite CBNRM's promise, the Parties to CITES have nevertheless refused to embrace it as a viable approach to effectuating CITES' trade restrictions. Absent CITES' express approval of a CBNRM approach, developing countries may lack the desire or capacity to successfully implement their own CBNRM programs. Consequently, those countries will likely continue to have little or no success in conserving species protected under CITES. This competing ineffectiveness, in turn, will provide fodder and ammunition to CITES' critics, and can lead to increased discord among the Parties. If the Parties continue to rely on an ineffective "classical" approach to conservation, CITES risks eventually becoming little more than a "bureaucratic shell."[321]

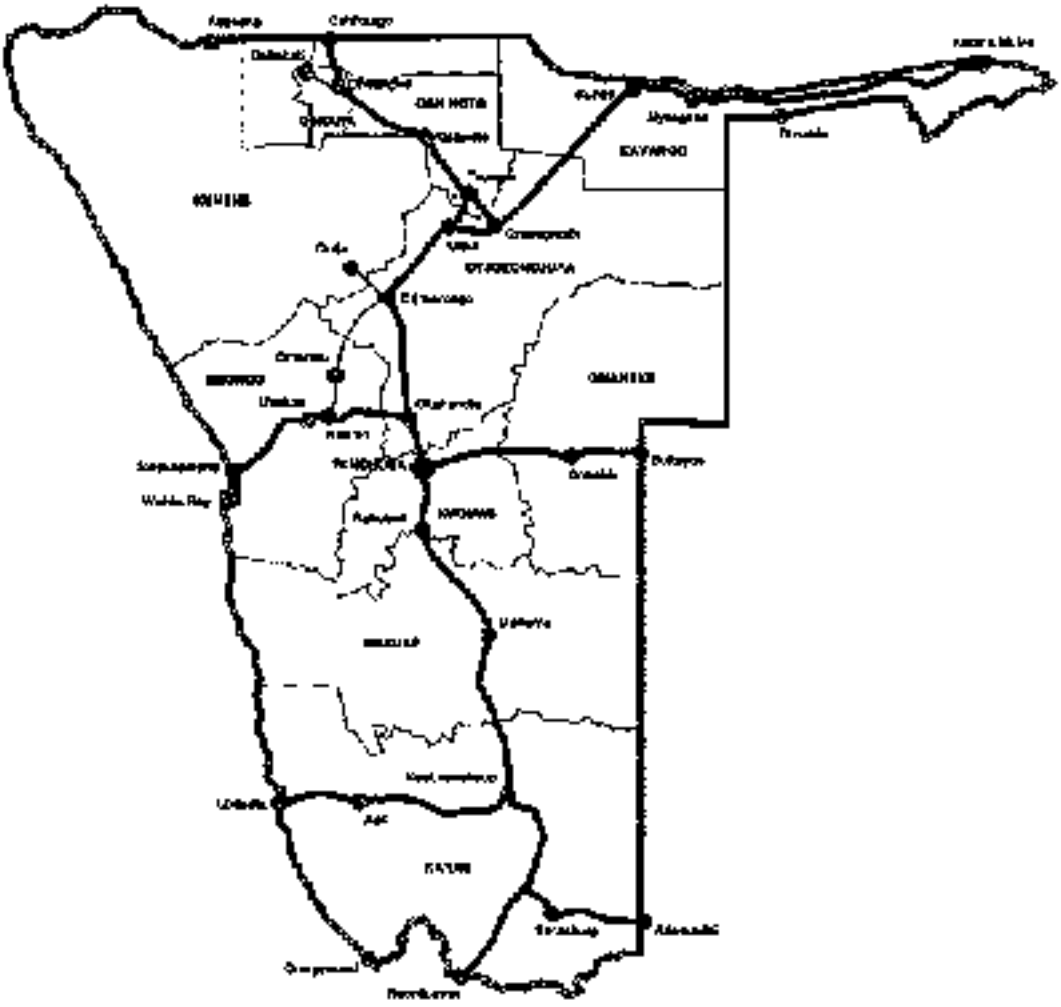
321. Murphree, *supra* note 306, at 121.

APPENDIX 1: MAP OF NAMIBIA[322]



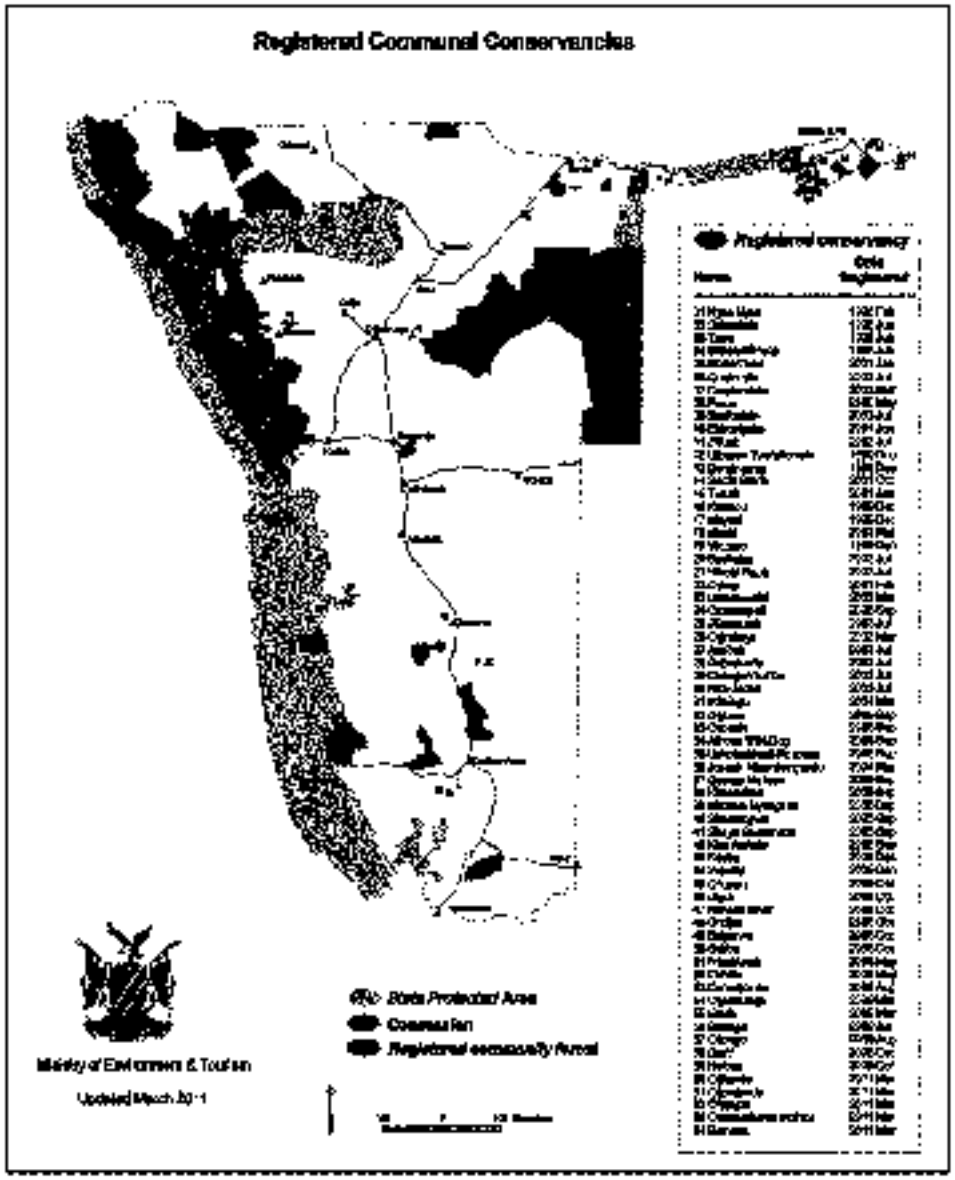
322. Map obtained from *CIA – The World Factbook*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/wa.html (last visited July 14, 2011).

APPENDIX 2: MAP OF NAMIBIA'S ADMINISTRATIVE REGIONS[323]



323. Map obtained at *About Namibia: Geography*, EMBASSY OF THE REPUBLIC OF NAMIBIA, http://www.namibianembassyusa.org/index.php?option=com_content&view=article&id=16&Itemid=91 (last visited July 14, 2011).

APPENDIX 3: MAP OF NAMIBIAN CONSERVANCIES AND PROTECTED AREAS[324]



324. Map obtained from *Conservancies*, NAMIBIA, http://www.met.gov.na/Documents/Parks/Pages/Conservancies.aspx (last visited July 17, 2011).

APPENDIX 4: CITES TIMELINE

Calls for Community Involvement and Benefit	Year	Actions Taken by the Parties
Director General of the International Union for Conservation of Nature and Natural Resources stresses need for community benefit.	1979	
[illegible]	[illegible]	[illegible]
Executive Director of UNEP and International President of WWF discuss need to provide local communities with economic incentives.	1982	Parties consider a proposed resolution discussing the need to incentivize local participation in conservation. Parties remove language connecting trade and sustainable use by local communities.
[illegible]	[illegible]	[illegible]
Participants in the Global Diversity Forum criticize CITES trade restrictions and lack of feedback mechanisms. At the Conference of the Parties, Zimbabwe's President urges a community based approach and touts success of Zimbabwe's CAMPFIRE program.	1997	
[illegible]	[illegible]	[illegible]

CITES Secretary General presents working paper calling for the Parties to combine regulations with incentive measures, including land rights and the ability to profit from the use of species. Working paper is accompanied by a draft resolution incorporating much of the paper's language.	2002	CITES' Committee II rejects the draft resolution by a vote of 26-2, with 22 abstentions. Secretariat directed to further investigate incentives and report back in 2004.
[illegible]	[illegible]	[illegible]
CITES Secretary General presents working paper urging the incentivizing of local communities in implementation of trade restrictions. The paper again addressed property rights, but no draft resolution presented.	2007	Decisions adopted (a) encouraging Parties to report details of their incentive measures in their biannual reports, and (b) directing Parties to consider practical ways to encourage stakeholder involvement.
[illegible]	[illegible]	[illegible]