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Tension Points Within the Language of the CITES Treaty

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INTRODUCTION

This paper provides an in-depth analysis of several select phrases from the language of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).[1] These phrases represent "tension points" within the Convention in that, due to their inherent vagueness, they have become a focal point for disagreement between the parties. Four tension points will be discussed in this paper. Two areas examined, the listing and delisting of species, represent bilateral decisions which the parties must make during the biennial Conference of the Parties. The other two areas examined, the criteria for what constitutes a "readily recognizable" species and the permit-granting process, represent the numerous unilateral decisions which individual parties to the Convention must make in implementing its requirements.

The tension points of CITES become apparent when specific implementing decisions must be made by different parties to the Convention. Such decisions emphasize the broad range of attitudes toward the Treaty possessed by its member countries. Some parties display an extremely protectionist attitude toward the killing or selling of endangered species. Other parties may seek to further their economic self-interest by minimizing the protection that an endangered species might receive under the Treaty.

The tension points discussed in this paper are representative of a large number of difficulties which have become visible as the different parties confront "real world" economic and political conflicts. As the parties grapple with these difficulties, a large body of "soft" international law is being developed and adopted by the parties through the resolution process.

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[1] CITES is an acronym for the Convention on Internatonal Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243, ELR STAT. 40336 [hereinafter CITES]. It is also known as the Washington Convention since it was signed in Washington, D.C. For a full discussion of all the elements of the treaty see S. LYSTER, INTERNATIONAL WILDLIFE LAW 239-77 (1985).

I. CONFLICTING VALUES

CITES is an exceptionally dynamic treaty in that it represents a classic confrontation between pragmatic economic interests and ethical protectionist concerns. The ramifications of CITES are not theoretical; they have immediate economic consequences. More and more countries have ratified CITES.[2] World trade in live or dead animals and plants has an international forum and even if a state is not part of the deliberation, its interests may be adversely affected.[3]

Living resources on a planet of constantly changing ecological conditions are the subject matter of CITES. The drafters of the Treaty, therefore, foresaw that, while the structure of the debate would remain the same as time passes, the specific species debated would change. CITES created a structure allowing for continuous negotiations between parties. Which species should receive protection, what level of protection is necessary, and whether protection of a species could be maintained with some level of economic exploitation are some of the factors subject to constant review.

Another aspect of CITES which adds to its vitality is the degree to which non-governmental organizations (N.G.O.s) are involved in the process.[4] Under the terms of the Treaty, N.G.O.s are allowed to attend and participate, but not to vote.[5] Organizations such as the International Union for the

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[2] The Treaty came into force July 1, 1975 when it was ratified by the tenth state. By March, 1979, 51 states ratified the Convention. By October 3, 1983 Belgium became the 82nd Party to the Convention. On November 30, 1986 Singapore joined as the 94th Party to the Convention. M. BOWMAN AND D. HARRIS, MULTILATERAL TREATIES, INDEX AND CURRENT STATUS 370-71 (1984 and Supp. 1987).

[3] CITES, *supra*, note 1, art. X requires parties to demand that "comparable documentation" be issued from non-parties as if they were bound by the requirement of the treaty. Thus, prior to importation of an Appendix II species from Mexico (a non-party state) custom officials of the United States (a party state) should demand the presentation of an export permit "which substantially conforms with the requirements of the present Convention for permits. . . ."

[4] At the Fifth Meeting of the Conference of the Parties in Buenos Aires (1985), there were over one hundred non-governmental organizations present. *CITES Conference in Argentina*, 7 TRAFFIC BULL. No. 2, at 1 (July 31, 1985). Included among the attendees were such diverse organizations as Greenpeace International, International Exotic Leather Council, World Wildlife Fund, International Fur Trade Federation, International Pet Trade Organizations, Sierra Club, Canadian Sealers Association and Defenders of Wildlife. *Id.*

[5] CITES, *supra* note 1, art. XI(7) provides:

> Any body or agency technically qualified in protection, conservation or management of wild fauna and flora, in the following categories, which has informed the Secretariat of its desire to be represented at meetings of the Conference by observers, shall be admitted unless at least one-third of the Parties present object:
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> (a) international agencies or bodies, either governmental, and national governmental agencies and bodies; and

Conservation of Nature, which initiated the drafting of CITES, have provided substantial scientific support on an informal basis. Other organizations have helped to sharpen the debate by urging the parties to adopt different perspectives. As might be expected, the interests of Greenpeace and the Fur Institute are often diametrically opposed, yet both organizations are present and lobbying for their positions at the biennial CITES Conferences.

II. Bilateral Tension Points

A. *Listing a Species*

The first issue to be addressed in discussing tension points within the language of the CITES Treaty is whether or not a species should be listed, and under what criteria. However, there is a preliminary battle which must be fought. What exact group of animals or plants should be focused upon?

As a general rule, the broader and larger the category of plants or animals is, the less likely it is to qualify as being endangered or threatened with extinction. The inverse of this rule is that the smaller and more localized the population, the greater the chance of qualifying for endangered status. The promoters of economic utilization, therefore, may try to define the group at issue in very broad terms, while the protectionists will seek a narrow group definition.

Article II of CITES uses "species" as the appropriate level of grouping,[6] but the definition of the term "species" provided in Article I makes it clear that subgrouping of species may also be considered.[7] The problem presented is that a species may exist across one continent or across several continents, and even within that range a species may be stable in one country while at serious risk in another. For example, the worldwide population of brown bears may not be at risk of extinction, but if the brown bear population of the U.S.S.R. is removed from consideration, or if specific subspecies, such as the Mexican brown bear or the Tibetan brown bear are considered, then a much higher risk of extinction may exist. As a matter of policy, the drafters of CITES determined that the smaller subspecies or geographically isolated groups of plants or animals should receive the protection of CITES. Ecological stability and complexity is promoted by preserving diversity of species on as localized a level as possible.

(b) national non-governmental agencies or bodies which have been approved for this purpose by the State in which they are located.

Once admitted, these observers shall have the right to participate but not to vote.

[6] CITES, *supra* note 1, art. II(4) states:

"[t]he Parties shall not allow trade in specimens of species included in Appendices I, II and III except in accordance with the provisions of the present Convention."

[7] In CITES, *supra* note 1, art. I(a) "species" is defined to include "any species, subspecies, or geographically separate population thereof."

Assuming that the species of animals or plants can be appropriately defined, the more substantial debate is whether or not the species qualifies for the trade protection of the Treaty. A listing under Appendix I prohibits normal commercial trade.[8] An Appendix II listing limits commerce in a listed species and may require wildlife management programs in the countries where the species occurs.[9] Given the significant potential consequences of listing a species, it might be presumed that very specific guidelines are established to determine whether and when to list a species. Such guidelines do not exist, and, as a result, there are legitimate disputes between the parties as to the prerequisites for listing a species under the Treaty.

CITES provides that "Appendix I shall include all species threatened with extinction which are or may be affected by trade."[10] A number of terms in this provision provide legal tension points for discussion. "Species," for example, may actually be subspecies or geographic populations, as the brown bear example illustrates. While the term "extinction" is fairly clear, the phrase "threatened with" is the subject of differing interpretations. A concrete test or standard of reference to justify a determination that a species is in fact "threatened with" extinction is missing; no threshold for inclusion exists.

At the First Conference of the Parties to CITES in Berne, Switzerland in 1976, this problem was tentatively addressed. The parties did not adopt a standard *per se;* rather, they adopted a list of preferred evidence concerning the threat of extinction.[11] The most preferred evidence is a series of scientific population surveys showing a reduction of numbers over several years. This test does not suggest a threshold rate of decline in a specific number of years. The least preferred, but still acceptable, evidence of a threat of extinction is non-scientific reporting of "habitat destruction, heavy trade or other potential causes of extinction."[12] Conference Resolution 1.1 focuses on declining population levels, but does not set forth any specific level of population decline which threatens the existence of a species or subspecies.[13]

An additional problem exists when there is indirect evidence of a threat, such as through trade information, but there is no prior survey of population

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[8] CITES, *supra* note 1, Appendix I.

[9] CITES, *supra* note 1, Appendix II.

[10] CITES, *supra* note 1, art. II(1).

[11] CITES Secretariat, *Resolution of the Conference of the Parties,* Conf. 1.1, in PROCEEDINGS OF THE FIRST MEETING OF THE CONFERENCE OF THE PARTIES (1976) [hereinafter PROCEEDINGS OF THE FIRST MEETING]. (The first digit referring to the conference number, the second digit to the resolution at that conference.) All resolutions, documents and minutes can be found in the Proceeding of the respective meeting as published by the secretariat of the Convention, Lausanne, Switzerland.

[12] *Id.*

[13] *Id.*

levels to use as a basis from which to determine whether or not a threatening decline has in fact occurred. A good example of this problem arose at the 1985 meeting of CITES in Buenos Aires when the Federal Republic of Germany proposed the listing of two species of frog (*Rana hexadactyla* and *Rana tigerina).* Over the previous few years there had been a dramatic increase in the export of frozen frog legs from India, Bangladesh, Indonesia and Pakistan. The high trade numbers suggest that a population decline may have been imminent, but there were no pre-existing population surveys to determine what the prior undisturbed population size was, or even what the present population level was. Nevertheless, the frogs were listed on Appendix II.[14]

The final prerequisite for listing required by the language of the Treaty is that the species is either affected by, or may be affected by, trade. The term "trade" is defined in Article I to include commercial and non-commercial transportation of specimens cross national boundaries.[15] Since the protection provided by CITES consists of trade restrictions, if trade is absent, the provisions of the Treaty would not provide the species any protection. This reasoning is set forth in the Berne criteria, adopted at the First Conference and expanded upon in Conference Resolution 1.1, which provides in part:

> *Trade status.* Species meeting the biological criteria should be listed in Appendix I if they are or may be affected by international trade. This should include any species that might be expected to be traded for any purpose, scientific or otherwise.[16]

Thus, trade would exist even if the only existing or potential markets for a species are zoos or research centers, and the listing of the species would be justified.

Ignoring some other issues involving the listing process,[17] imprecise use of language in the Treaty emphasizes the overwhelming problem of how to balance trade demand for a species with information concerning its population level. As the previous frog example suggests, the parties display a willingness to list when strong information on trade is present, even if

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[14] CITES Secretariat, *Summary Report of the Plenary Session,* Plen. 5.12, in PROCEEDINGS OF THE FIFTH MEETING OF THE CONFERENCE OF THE PARTIES at 145 (1985) [hereinafter PROCEEDINGS OF THE FIFTH MEETING].

[15] CITES, *supra* note 1, art. I(c) defines trade as "export, re-export, import and introduction from the sea."

[16] *Resolution of the Conference of the Parties,* Conf. 1.1, in PROCEEDINGS OF THE FIRST MEETING, *supra* note 11.

[17] There is another problem with the listing process under Appendix II. The listing of a species on Appendix II is for the purpose of protecting species which, if not threatened now with extinction, may become so unless trade is controlled. This requires good predictions. The lack of a standard to make Appendix II decisions is even more pronounced than under the Appendix I decisions.

information as to population levels is inadequate.[18] Likewise, the parties generally show a willingness to list a species when there is adequate information showing critical population levels, even with no evidence of international trade. For example, the California Condor is listed on Appendix I even though there is no evidence of trade in the birds. While the Treaty is silent on this balancing of information, the Berne criteria provides the following policy for the parties:

> The biological status and trade status of a species are obviously related. When biological data show a species to be declining seriously, there need be only a probability of trade. When trade is known to occur, information on the biological status need not be as complete. This principle especially applies to groups of related species, where trade can readily shift from one species that is well-known to another for which there is little biological information.[19]

Based on the proceedings of the biennial CITES conferences, there appears to be a willingness among the parties to list under Appendix I, and even more so under Appendix II, if some information on either population or trade is available. Occasionally the parties act to protect species without thorough evidence of either trade or declining population levels. For example, at the 1985 meeting of the parties, Denmark and Norway proposed the listing of the gyr falcon of North America (*Falco rusticolus*). Canada argued that trade did not affect the population of this species, since it was presently carried out under a quota system. The United States argued that the gyr falcon population was stable. Thus, both major countries of origin objected and argued that the prerequisite conditions for listing were not present. Yet on a vote of 28 to 13, the bird was listed on Appendix I.[20]

In sum, the vagueness of the terms "species," "threatened with extinction" and "affected by trade," each an important aspect of the listing criteria in Article II creates tension and uncertainty in the decision-making process. Each country's self-interest, as shaped by economics, politics and public policy, will in turn shape its view of how these terms should be defined in any given circumstance.

B. *Delisting*

At the 1985 Conference of the Parties there were twenty-seven proposed new listings for Appendix I species. Thirty-five proposals before the parties involved the downlisting or delisting of a species.[21] Delisting is the transfer

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[18] *See supra* note 14 and accompanying text.

[19] *Resolution of the Conference of the Parties,* Conf. 1.1, in PROCEEDINGS OF THE FIRST MEETING, *supra* note 11.

[20] PROCEEDINGS OF THE FIFTH MEETING, *supra* note 14, at 142.

[21] *Report of the Secretariat,* Doc. 5.45, Annex 2, in PROCEEDINGS OF THE FIFTH MEETING, *supra* note 14, at 566-73.

of a species from Appendix I to Appendix II or the simple removal of a species from Appendix II. While the language of the Treaty provides some minimal guidance for the process of listing a species, the process of delisting is not even mentioned in CITES. Although Article XV specifies the procedure for "an amendment to Appendix I or II," which could entail delisting, the Treaty does not provide any other guidelines or policies to be followed in the delisting of a species.[22]

Since the Treaty fails to explicitly address this issue, it is possible to argue that delisting should occur when a species no longer qualifies for listing. In principle, a species should no longer qualify for listing when it is no longer threatened with extinction through international trade. However, if this procedure were followed, all the uncertainties of the listing process would then have to be reconsidered in contemplation of delisting. If a species is removed from Appendix I prematurely, the risk is the loss of the species itself. If a species remains on the list through an overabundance of caution, trade may be unnecessarily limited. The necessity of weighing the consequences of delisting was recognized and addressed at the Berne Conference of the Parties.[23] Resolution 1.2 requires a high level of scientific evidence that the species could withstand expected exploitation, including a population survey showing recovery.[24] The parties have thus created a higher burden of proof for the delisting than for the listing of a species.

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[22] CITES, *supra* note 1, art. XV.

[23] Conf. 1.2 states in part;

> Criteria for deletion, or transfer from Appendix I to Appendix II, should require positive scientific evidence that the plant or animal can withstand the exploitation resulting from the removal of protection. This evidence must transcend informal or lay evidence of changing biological status and any evidence of commercial trade which may have been sufficient to require the animal or plant to be placed on an appendix initially. Such evidence should include at least a well-documented population survey, an indication of the population trend of the species, showing recovery sufficient to justify deletion, and an analysis of the potential for commercial trade in the species or population.
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> In addition to the need for sufficient evidence prior to any action by the Conference to reduce protection for plants or animals presently listed, it is advisable to contact the country or countries of origin prior to this action. Many of the species or taxa on the present lists were placed there at the request of countries which may not be represented at the Conference. The information from countries of origin and from the Secretariat should be made available to the Parties for examination in a written form prior to action by the Conference. *Resolution of the Conference of the Parties,* Conf. 1.2, in PROCCEDINGS OF THE FIRST MEETING, *supra* note 11, at 33-34.

[24] Examples of soft law within CITES includes the language of art. I concerning "readily recognizable," modified by Conf. 2.18 (1980). *See infra* notes 38-51 and accompanying text. The rules for ranching were extensively set out and the guidelines for artificially propagated plants were adopted in *Resolution of the Conference of the Parties,* Conf. 5.15, in PROCEEDINGS OF THE FIFTH MEETING, *supra* note 14.

The issue of delisting has been a major focus of the biennial Conferences of the Parties and a major legal tension point for several reasons. Since an Appendix I listing precludes commercial trade in specimens of that species,[25] and some species listed represent a significant natural economic resource for various countries, tensions have developed between the parties over whether or not specific species should be protected on Appendix I or listed on Appendix II, allowing controlled trade.

There are additional facts which make delisting a significant tension point between the parties. First, the initial listing on Appendix I and additions from the First and Second Conferences of the Parties included species which, in light of more complete scientific information, should not have been listed.[26] It is not the case that false information was used; rather, decisions were made in the absence of complete information. This situation is a lingering problem. A strong proponent with no organized opposition at a conference may achieve the listing of a species without presenting complete scientific studies. For example, at the Fifth Conference of the Parties, Costa Rica proposed the listing of the *Ara maco* bird. Switzerland noted that while the species exists in fifteen countries, population data was available from only two countries of origin. The Appendix I listing was nevertheless approved on a 28 to 4 vote.[27] Future population studies of this bird may reveal that an Appendix I listing was unnecessary. Nevertheless, before anyone can engage in the trade of this species, it will first have to be delisted to Appendix II. Delisting will then require the development of scientific information unavailable and apparently unnecessary for the initial listing process.

Second, substantial investments of time and money are necessary to satisfy the criteria for delisting. Often, third world countries do not have the resources to undertake the studies which would delist a species from Appendix I and make it available for controlled commerce under Appendix II.

Third, a factor recognized from experience is that the listing of a species alone will not assure protection or recovery of that species. Most species face pressures of habitat loss which can only be addressed by the country of origin. Therefore, a critical factor in the survival of a species will be the priority which habitat protection and reconstruction receive in a country. In many underdeveloped countries facing human problems of overwhelming

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[25] CITES, *supra* note 1, art. II(1) states that "[t]rade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances." Additionally, under the language of CITES art. III(3)(c), prior to the granting of an import permit the management authority of the importing country must be "satisfied that the specimen is not to be imported for primarily commercial purposes."

[26] *Resolution of the Conference of the Paties,* Conf. 1.1, in PROCEEDINGS OF THE FIRST MEETING, *supra* note 11.

[27] *Summary Report of the Plenary Session,* Plen. 5.12, in PROCEEDINGS OF THE FIFTH MEETING, *supra* note 14, at 143.

proportions, plant and animal protection does not obtain high priority, particularly where it requires protecting land and water which might otherwise be used for economic development or food production. However, if the endangered species is of economic value, then the protection of the habitat will become important. Is it appropriate to sacrifice some individuals of the species to economic exploitation in order to improve the chances of the species' recovery? One of the darker sides to this problem is the risk of international extortion by a country that demands trade in a species, the alternative being that the country will let the habitat of the species disappear.

Due to the problems inherent in the delisting process and the pragmatic pressures existing in many countries, the parties have created two hybrid categories of animal use which seek to protect the species while allowing some level of economic exploitation. The first such category is the use of intentionally-recognized quotas for the killing of Appendix I species. The second category is commerce in ranch-bred specimens of animals listed on Appendix I. The use of quotas is not contemplated by the Treaty, and commerce in ranch-bred species is only briefly mentioned.[28] Both require joint decisions by the Conference of the Parties and constitute additional tension points between the parties.

An early situation where the parties sought to balance competing interests through hybrid use involved leopards (*Panthera pardus*) at the 1983 Botswana Conference. Under the provisions of Conference Resolution 4.13, seven African countries were allowed to export a quota of between twenty and eighty leopard skins per year. The parties, however, feared the adverse consequences of the recreation of a commercial market and the enforcement problem that would follow. Therefore, the resolution specified that the animals killed could only be exported or imported as personal trophies.[29] In this particular case, the economic benefit to the countries of origin is not the value of the skin, but the money expended by the trophy hunter in pursuit of the animal. This policy was re-examined in 1985 and 1987 with new quotas established.[30] Because a relatively small number of whole skins is exported or imported, and due to the availability of self-locking, individually numbered identification tags, enforcement problems are kept to a minimum.

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[28] CITES Secretariat, *Resolution of the Conference of the Parties,* Conf. 3.15, in PROCEEDINGS OF THE THIRD MEETING OF THE CONFERENCE OF THE PARTIES (1981) [hereinafter PROCEEDINGS OF THE THIRD MEETING]; *see* notes 33-37 and accompanying text.

[29] CITES Secretariat, *Resolution of the Conference of the Parties,* Conf. 4.13, in PROCEEDINGS OF THE FOURTH MEETING OF THE CONFERENCE OF THE PARTIES (1983) [hereinafter PROCEEDINGS OF THE FOURTH MEETING].

[30] *Resolution of the Conference of the Parties,* Conf. 5.13, in PROCEEDINGS OF THE FIFTH MEETING, *supra* note 14; CITES Secretariat, *Resolution of the Conference of the Parties,* Conf. 6.9 in PROCEEDINGS OF THE SIXTH MEETING OF THE PARTIES (1987).

Another quota system, set out in Conference Resolution 5.21, provides for the downlisting of a species from Appendix I to Appendix II, allowing for the commercial sale of the species and its products if a series of prerequisites is met.[31] The first proposal considered under this concept was a downlisting of the Nile crocodile, *Crocodylus niloticus,* found in Africa. After presenting documentation showing the ability of the species to withstand limited commercial exploitation,[32] the parties, by a vote of 40 to 2, permitted the downlisting.

While the quota system allows for the direct exploitation of animals from the wild, a second mechanism, ranching of wild animals, is more indirect. Captured wild animals are used as breeding stock and their offspring are made available for commercial sale.[33] There are two central problems with

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[31] CITES, Conf. 5.21 states in part:

RECOMMENDS that in the case where Resolution Conf. 1.1 has not been applied to the inclusion of a species in Appendix I of the Convention and where it is virtually impossible to supply the data required by Resolution Conf. 1.2 within reasonable time or with reasonable effort, but where the populations of such species can withstand a certain level of exploitation for commercial trade, the criteria of Resolution Conf. 1.2 be not applied to the transfer from Appendix I to Appendix II if the countries of origin agree to introduce a quota system which is deemed by the Conference of the Parties to be sufficiently safe so as not to endanger the survival of the species in the wild;

RECOMMENDS further that this approach be taken only when:

a) there is sufficient basis to establish that the species should be included in Appendix II, rather than Appendix I, under the terms of Resolution Conf. 1.1;

b) there is assurance from the Parties concerned that the entry into trade of specimens of the species in question will be so controlled as not to lead to a reduction in CITES controls on trade in other species;

c) it is established that range states seeking to export specimens of the species are capable of fulfilling their obligations under Article IV, paragraphs 2(b) and 3, of the Convention; and

d) the Parties that are range states for the species must have met, and continue to meet, their annual reporting requirements under Article VIII, paragraph 7, in a timely fashion, and that this include complete data on trade in the species in question.

Resolution of the Conference of the Parties, Conf. 5.21, in PROCEEDINGS OF THE FIFTH MEETING, *supra* note 14.

[32] *Id.; Report of the Secretariat,* Doc. 5.45.1, in PROCEEDINGS OF THE FIFTH MEETING, *supra* note 14, at 591; *Summary Report of the Plenary Session,* Plen. 5.12, in PROCEEDINGS OF THE FIFTH MEETING, *supra* note 14.

[33] CITES Conf. 3.15 states in part:

b) that, in order to be considered by the Parties, any proposal to transfer a population to Appendix II in order to conduct a ranching operation satisfy the following general criteria:

i) the operation must be primarily beneficial to the conservation of the local population (i.e., where applicable, contribute to its increase in the wild); and

ii) the products of the operation must be adequately identified and documented to ensure that they can be readily distinguished from products of Appendix I populations;

ranching.[34] First, it is uncertain whether there will be a benefit to the wild stock of animals once the breeding stock has been removed. Will the country take economic advantage of the species without providing protection to its habitat? Second, there is a potential enforcement problem in being able to distinguish the parts and derivatives of illegally captured wild animals from those produced through the ranching operation. Conference Resolution 3.15 attempts to meet these problems by requiring a showing that (1) the operation is primarily beneficial to the conservation of the local species and (2) the products of the operation are adequately identified and documented.[35]

Zimbabwe's proposal for the ranching of the Nile crocodile, *Crocodylus niloticus,* was approved at the Fourth Conference, as discussed above, upon presentation of a full supporting document.[36] At the Fifth Conference, there were a number of proposals for the ranching of sea turtles, *Chelonia nydas.* However, for reasons not clearly stated, these proposals were not adopted.[37]

III. UNILATERAL ACTIONS

The prior discussion focused on the tension points in the language of the Treaty where there were multiple party, joint decisions to be made. Some of

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c) that for obtaining approval for transfer to Appendix II of the country's population, or a smaller geographically separate population of the species involved, in order to conduct a ranching operation, the Management Authority submit a proposal to the Secretariat, such a proposal containing the following:

i) evidence that the taking from the wild shall have no significant detrimental impact on wild populations;

ii) an assessment of the likelihood of the biological and economic success of the ranching operation;

iii) assurance that the operation shall be carried out at all stages in a humane (non-cruel) manner;

iv) assurance that the operation will be beneficial to the wild population through reintroduction or in other ways;

v) a description of the methods to be used to identify the products through marking and/or documentation; and

vi) assurance that the criteria continue to be met, with records open to scrutiny by the Secretariat, and that the Management Authority shall include in its reports to the Secretariat sufficient detail concerning the status of its population and concerning the performance of any ranching operation to satisfy the Parties that these criteria continue to be met;

Resolution of the Conference of the Parties, Conf. 3.15, in PROCEEDINGS OF THE THIRD MEETING, *supra* note 28, at 65.

[34] *Id.*

[35] *Id.*, at §§ (b)(i) and (ii).

[36] *Summary Report of the Plenary Session,* Plen. 4.10, in PROCEEDINGS OF THE FOURTH MEETING, *supra* note 29, at 128.

[37] *Summary Report of the Plenary Session,* Plen. 5.10, in PROCEEDINGS OF THE FIFTH MEETING, *supra* note 14, at 129.

the tension points in the language of the Treaty involve unilateral decisions by the various parties in implementing the policy of the Treaty at the domestic level. Given the lack of any specific enforcement mechanisms other than the good faith of the parties and the prospect of international embarrassment when illegal or inappropriate activities are revealed, these unilateral actions are critical to the implementation of CITES provisions. The two major points of dissension are the definition of the term "readily recognizable," as applied to species, and the permit-granting process within each country.

A. *"Readily Recognizable"*

The formal listing of a species on one of the Appendices is only the first step in providing any protection for that species. The Treaty is actually implemented at the customs control points of each country. The provisions and restrictions of CITES are effective only to the degree that customs officials require compliance with the Treaty.[38] Since small civil fines are readily absorbed by importers and exporters as a cost of doing business due to the high profit margins involved, more stringent action, such as seizure of goods and criminal prosecution, is the only hope of deterrence. However, before enforcement is a possibility, a particular item must first be recognized as a listed species.

While the jurisdiction of CITES extends to all live animals and whole plants listed on the Appendix, not all parts of listed animals or plants are within the jurisdiction and protection of CITES. Article II states:

> The Parties shall not allow trade in specimens of species included in Appendices I, II and III except in accordance with the provisions of the present Convention.[39]

The key term for this analysis is "specimens of species." This phrase is in turn defined in Article I(b) to consist of three categories:

> (1) live or dead animal and plants (whole);
> (2) any readily recognizable part or derivative of an animal listed on Appendix I or II or a plant listed on Appendix I;
> (3) specified parts and derivatives of an animal listed on Appendix III or a plant listed on Appendix II or III.[40]

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[38] In the late 1970s some individuals sought to test the awareness level of CITES among custom officials by importing items that were covered by CITES (i.e. cacti, orchids and whale meat). With few exceptions there was no issue raised by custom officials about the imported items. T. INSKIPP AND S. WELLS, INTERNATIONAL TRADE IN WILDLIFE, 19 (1979). Hopefully, things have improved as a number of efforts have been undertaken to train custom inspectors and provide them with adequate identification manuals. *Id.*

[39] CITES, *supra* note 1, art. II(4).

[40] The full language of the definition in CITES art. 1(b) is:

This language represents a considerable tension point for the parties. It should first be noted that the requirement of category three, that parts and derivatives be specified, was nullified by a resolution of the parties which reversed the presumption of the Treaty. This resolution stated that all parts and derivatives would be within the protection of the Treaty unless specifically listed otherwise.[41] This type of resolution should require a formal amendment to the Treaty; however, no such amendment took place. Yet, the parties have apparently accepted the resolution as a valid modification of the language of the Treaty.

The obvious problem with the definition language is the absence of a suggested standard by which to determine whether a substance is "readily recognizable" pursuant to category two. A factor which compounds the problem is that decisions about what is "readily recognizable" are taken by countries unilaterally; there is no process of group evaluation and contemplation. Which plants and animals are "threatened with extinction," by comparison, is a group decision, allowing some level of consistency and uniformity. At the First Special Session of the Parties in Geneva, a resolution was passed which would have created a minimum list of readily recognizable parts and derivatives.[42] Because of the concern that this list would become a "maximum" list rather than a "minimum" list, it has never been produced or adopted by the parties. As a result, each party individually determines whether or not a particular item of trade is within the protection of CITES and requires export and import permits.[43]

There are two levels of concern for each country in making this decision. The first concern is whether or not something is in fact identifiable by customs officials at the points of export and import. The second concern is whether, as a matter of state policy, particular items of trade are to be acknowledged as "readily recognizable" parts and derivatives. To grasp the

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(b) "Specimen" means:

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

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

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

CITES, *supra* note 1, art. 1(b).

[41] *See* CITES Secretariat, *Resolution of the Conference of the Parties,* Conf. 2.18, in PROCEEDINGS OF THE SECOND MEETING (1979).

[42] *Special Working Session of the Conference of the Parties,* Conf. S.S. 1.4, in PROCEEDINGS OF THE FIRST MEETING, *supra* note 11, at 23-24.

[43] *Resolution of the Conference of the Parties,* Conf. 5.9 in PROCEEDINGS OF THE FIFTH MEETING, *supra* note 14, at 47.

significance of these concerns, the diverse forms in which animals and plants may be involved in trade must be considered. Powdered gall bladders of black bears, for instance, sell for as much as $330 per ounce and are in demand in oriental medicinal markets.[44] If a customs agent saw a glass jar full of powder, how would he know it was a part of a black bear? Similarly, if turtle meat is mislabeled, it is apparently impossible by visual inspection to distinguish from other legally-traded packed fish.

In Rio de Janeiro, it has been possible to purchase amulets made from the eyeballs of the Amazon River Dolphin, *Inia geoffrensis*. This species is listed on Appendix II.[45] While a customs officer examining such an object would be able to determine that a part of an animal was involved, how could he identify it with certainty as being from a listed species?[46] Perhaps one of the most serious problems is the importation of leather goods such as shoes, luggage, handbags, or keychains. The skins of various crocodiles, alligators and lizards are difficult enough to distinguish at the raw skin stage. Once they have been worked into their final consumer products, detection of their origin becomes very difficult.[47]

It is possible that an unintended economic consequence will arise from the trade restrictions of CITES. If a company manufactures a product made of protected animal or plant parts, there may be an incentive to move the production facilities to the animals' or plants' country of origin. Specific animals and plants can be obtained by internal sale, which is beyond the scope of the Treaty. The final product could then be exported to the consumer countries and not be within the control of CITES so long as the protected species and derivatives are no longer "readily recognizable." Many underdeveloped countries might support the shift of production facilities from the country of consumption to the country of origin because of the positive economic effects of such a shift. CITES policy should be to discourage this practice, so that the spirit of the Convention can be fulfilled.

A number of years ago, some individuals from TRAFFIC[48] tested customs officials by attempting to bring various controlled items into several countries. In the majority of instances, these individuals were not questioned.[49] It is unclear whether these shortcomings were a result of uncaring or untrained officials or a result of state policy. In order to have effective customs control

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[44] *News and Notes,* 6 TRAFFIC (U.S.A.) No. 4, at 18 (Feb. 1986).

[45] *Publications Available,* 8 TRAFFIC BULL. No. 1, at 22 (April 30, 1986).

[46] *Id.*

[47] *News and Notes, supra* note 44, at 18. Fine International Footwear Co. illegally imported 752 pairs of shoes. The shipment included 166 pairs of caiman crocodile, 478 pairs of tegu lizard and 108 pairs of monitor lizard shoes. *Id.*

[48] TRAFFIC is a program of the World Wildlife Fund which monitors the international trade in wild plants and animals.

[49] T. INSKIPP AND S. WELLS, *supra* note 38, at 19.

for parts and derivatives of controlled species, a comprehensive and complex training program with significant support materials in the form of identification manuals must be created.[50] While many developed countries have the resources and capabilities to properly monitor trade, many of the lesser-developed countries may not possess the resources to carry out a full program.

The above discussion presumes that countries voluntarily seek full enforcement of CITES. However, there may be economic incentives for a country to curtail the list of controlled "readily recognizable parts and derivatives." Strictly enforcing CITES will curtail economic activity, which creates political and economic pressures in favor of lax enforcement. Different countries have struck the balance at various points on the spectrum of strictness of enforcement.

Differing enforcement levels have resulted in a delicate problem. Assume, for example, that country A exported a specimen of a listed species without any CITES documentation, but when the goods arrive at country Y, they are judged to contain "readily recognizable" parts and country Y demands a CITES export document before allowing the goods to be imported. Country A may consider this request an affront to its sovereign right to make determinations under the provisions of CITES. The effect of this situation would be to force exporting country A to accept importing country Y's standards for what constitutes a "readily recognizable" specimen or part. On the other hand, if Y accepts A's position, then it has in effect given up its unilateral right under CITES to formulate its own standards.

This problem was addressed by the parties at the Fourth Conference in Botswana. Conference Resolution 4.8 recommended that parties should *not* waive the requirement of CITES permits for importation simply because the exporting country does not consider a specimen or part as "readily recognizable."[51] Thus, the parties have taken the position which provides the

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[50] *Resolution of the Conference of the Parties,* Conf. 5.17, in PROCEEDINGS OF THE FIFTH MEETING, *supra* note 14, at 70.

[51] CITES Conf. 4.8 states in part that:

> [The Conference of the Parties] RECOMMENDS
> a) that those importing Parties requiring that CITES export permits or re-export certificates accompany imports of parts and derivatives do not waive that requirement because such parts and derivatives are not considered to be readily recognizable by the exporting or re-exporting Party, and
> b) that all Parties notify the Secretariat of the Convention of the controls on parts and derivatives operative under implementing legislation in their countries;
> ACKNOWLEDGES the right under Articles III, IV and V of the Convention of those importing Parties who wish to do so only to permit import from a Party state on presentation of CITES documentation; and
> REQUESTS the Secretariat to distribute to Parties a summary of such controls.

Resolution of the Conference of the Parties, Conf. 4.8 in PROCEEDINGS OF THE FOURTH MEETING, *supra* note 29, at 51.

most protection for the listed species. In effect, this recommendation allows the importing countries to provide some level of policing of the Treaty provisions against those countries less inclined to enforce CITES trade restrictions.

B. *The Granting of Permits*

The remaining important area of tension to be discussed in this paper concerns the language of the Treaty which allows parties to grant export and import permits. Under Article IV, a species on Appendix II may not enter international trade unless the country of origin grants an export permit.[52] The granting of a permit is a unilateral act by a sovereign state and not reviewable by any other authority. Since Appendix II species are listed because of potential *future* threats to the species, it is realistic to allow some commerce to take place. The purpose of the permit requirement is to assure that population levels of these species do not become dangerously low. Indeed, the language of CITES suggests, somewhat awkwardly, that a permit should not be granted unless population levels are "well above the level at which that species might become eligible for inclusion in Appendix I."[53]

While the Treaty language of this section suggests a duty to restore and protect population levels, CITES does not require any specific internal wildlife management policy. The Treaty requires the parties to deny export

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[52] CITES, art. IV(2) gives the requirements for granting an export permit:

> The export of any specimen of a species included in Appendix II shall require the prior grant and presentation of an export permit. An export permit shall only be granted when the following conditions have been met:
>
> (a) a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species;
>
> (b) a Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora; and
>
> (c) a Management Authority of the State of export is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment.

CITES, *supra* note 1, art. IV(2).

[53] The full language of CITES, art. III is:

> A Scientific Authority in each Party shall monitor both the export permits by that State for specimens of species included in Appendix II and the actual exports of such specimens. Whenever a Scientific Authority determines that the export of specimens of any such species should be limited in order to maintain that species throughout its range at a level consistent with its role in the ecosystems in which it occurs and well above the level at which that species might become eligible for inclusion in Appendix I, the Scientific Authority shall advise the appropriate Management Authority of suitable measures to be taken to limit the grant of export permits for specimens of that species.

CITES, *supra* note 1, art. III.

permits for endangered species, but it does not require the restoration of wildlife populations. However, given the economic benefits of trade which arise with the granting of permits, the Treaty's limitations indirectly create internal pressures to properly manage domestic wildlife populations. The other side to this problem is that if a protected species does not have commercial value, then little internal political or economic pressure will be present to support habitat protection and restoration.

Under CITES, a country can grant an export permit only if the scientific authority of that country determines that "such export will not be detrimental to the survival of that species."[54] As with all the tension points in the Treaty, there is dispute as to exactly what this phrase means. Each country unilaterally defines and implements this very important provision. There are two perspectives from which to judge whether export will be detrimental to the survival of the species. First, will the number of plants or animals removed reduce the population and gene pool so as to lessen the chances of survival of the species? Second, will the export of one group of a species result in the creation of more market demand, particularly black market demand, which, in turn, may be detrimental to the species? Since the detriment to the species may be in the future, the permitting of one export may well be the catalyst for future risk. Of course, the more basic issue of what constitutes a "detriment" is difficult to define, but at a minimum, reduction of population levels must be considered detrimental.

Two examples should provide some insight into potential problems in this area. All of the big cats of the world, for instance, are protected under Appendix II of CITES, with some specific species protected under Appendix I. A cat of the United States is the bobcat (*Felis nufa),* which has been trapped and killed for commercial purposes for a number of years. Bobcats are not listed as a threatened or endangered species under the Endangered Species Act[55] of U.S. domestic law. The only legal obligation of the U.S. government to control trade in bobcats, therefore, arises out of CITES. In the late 1970s, the U.S. Scientific Authority, without possession of detailed information as to existing population levels of bobcats, sought to satisfy its obligation under CITES by granting permits for export only where the killing was in conformity with state law. While there was no mechanism available under international law to challenge this action, Defenders of Wildlife, a private, non-governmental organization, challenged the action under U.S. domestic law.[56] The District of Columbia Circuit Court of Appeals agreed with Defenders of Wildlife that this action was inappropriate under the language of the Treaty:

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[54] CITES, *supra* note 1, art. IV(2), *supra* note 50.

[55] 16 U.S.C. §§ 1531-1543 (1983 & Supp. III 1985); a copy of the U.S. list of endangered and threatened animals can be found at 48 Fed. Reg. 34,183 (July 27, 1983).

[56] Defenders of Wildlife v. Endangered Species Scientific Authority, 659 F.2d 168 (D.C. Cir. 1981).

> We hold . . . that the Scientific Authority cannot make a valid no-detriment finding without (1) a reliable estimate of the number of bobcats and (2) information concerning the number of animals to be killed in the particular season. If that material is not presently available, the Scientific Authority must await its development before it authorizes the export of bobcats.[57]

The Court thus established, for the United States, the prerequisite for the permit-granting process of information based on present population levels of a species.

Government corruption is representative of different problems, which do not arise from the language of the Treaty, but which pertain to the ability of countries to implement the Treaty within their own political systems.[58] A recent report suggests the scope of the problem.

> Ineffective bureaucracies, lack of law enforcement, poor communication, and a decentralized system for collection of trade information, confuse and frustrate the efforts of well-meaning wildlife authorities. Perhaps most disturbing are hints that political corruption facilitates the large-scale trade in both reptile skins and other wildlife. One example recounted by several sources which may suggest improper access to government officials involved the transfer of a single lot of 350,000 *Tupinambis* skins from the city of Mar del Plata to Buenos Aires for export.[59]

Obviously, the ability to carry out the requirements of CITES is limited in each participating country by domestic monetary and human influences. The efforts of a country's scientific community ultimately cannot rise above the economic and political structure in which it is located.

In addition to the export permit previously discussed, the drafters of the Treaty had the foresight to require an additional import permit for Appendix I species. Article III of CITES contains the specific provisions for such a permit. The importing country must assure itself that:

> (1) importation will be for purposes not detrimental to survival of the species;
> (2) the recipient of a living specimen is able to house and care for it;
> (3) the species is not to be used for primarily commercial purposes.[60]

A number of levels of complexity reveal themselves in the third requirement, which may seem relatively straightforward. What are "commercial purposes"? Does the fact that someone in the exporting country will receive

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[57] *Id.* at 178.

[58] *See* Hemley, *Tracking Argentina's Wildlife Trade,* 7 TRAFFIC (U.S.A.) No. 1, at 1, 7 (June 1986).

[59] *Id.* at 8.

[60] CITES *supra* note 1, art. III(3):

money in return for the animal make it a commercial enterprise? Is the importation of primates for drug research a "commercial purpose?" What if a zoo desires to improve its collection by importing an Appendix I animal where a foreseeable result will be an increase in revenues for the facility from sales of general admission tickets?

In 1983, three zoos in the United States wanted to purchase a total of seven gorillas from sources in Cameroun.[61] The value of the transaction was approximately $72,000 for each animal.[62] Apparently, export permits from Cameroun were available and the zoos applied to the U.S. Fish and Wildlife Service for import permits.[63] Should these transactions have been considered "for primarily commercial purposes?" Ultimately, these applications were denied, but on different grounds.[64]

Most of the other tension points discussed in this article operate within a scientific context; in other words, science and scientists can be expected to provide significant information to help resolve problems of interpretation. The decision to grant permits, however, is a policy position which cannot be resolved by scientific experts. Yet, how the term "commercial purposes" is defined is critical to Appendix I species, as it is one of the last barriers protecting the species from exploitation. If a country adopts a narrow definition where only sales to the public-at-large or to wholesale dealers is considered commercial, then Appendix I species are at a higher risk of exploitation. For instance, the cumulative effect of the needs of hundreds of zoos world-wide creates the equivalent of a market for wild animals.

The import of any specimen of a species included in Appendix I shall require the prior grant and presentation of an import permit and either an export permit or a re-export certificate. An import permit shall only be granted when the following conditions have been met:

(a) a Scientific Authority of the State of Import has advised that the import will be for purposes which are not detrimental to the survival of the species involved;

(b) a Scientific Authority of the State of Import is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it; and

(c) a Management Authority of the State of Import is satisfied that the specimen is not to be used for primarily commercial purposes.

[61] *U.S. Zoos Apply to Import Gorillas,* 11 NEWSLETTER, INTERNATIONAL PRIMATE PROTECTION LEAGUE No. 1 at 2 (April 1984).

[62] *Gorillas Leave Africa for Netherlands,* 11 NEWSLETTER, INTERNATIONAL PRIMATE PROTECTION LEAGUE No. 2 at 5 (Aug. 1984). The U.S. zoos involved were the North Carolina Zoo of Asheboro, the Overton Park Zoo of Memphis, Tennessee, and the Columbus Zoo of Columbus, Ohio.

[63] *U.S. Zoos Apply to Import Gorillas, supra* note 61, at 2.

[64] *Gorillas Leave Africa for Netherlands, supra* note 62, at 5-6. The permits were denied because the activity of the animal dealer was considered detrimental to wild gorillas, several African nations opposed the permit and there was fear that this would not be a "one shot deal." *Id.*

At the Fifth Conference, the parties adopted a resolution to provide guidance to the member states when making a decision to issue permits for Appendix I species.[65] This resolution establishes a context for decision-making by providing a policy perspective and certain presumptions. Some of the general principles include:

(1) trade in Appendix I species should be allowed only in exceptional circumstances;
(2) the term "commercial purposes" should be defined as broadly as possible;
(3) the exchange of money for an Appendix I animal does not automatically make it for "primarily commercial purposes."[66]

In an annex to the resolution, several explanatory examples are given. The examples convey the position that importation for purely private use should not be considered commercial, while importation by the biomedical industry should be presumed to be a commercial purpose. The difficult subject of importation by zoos is not addressed in the adopted resolution. Under the first draft of the resolution, importation to public zoos would have been presumed not to be for "primarily commercial purposes."[67] A number of

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[65] Conf. 5.10 states in part:
General Principles
1. Trade in Appendix I species must be subject to particularly strict regulation and authorized only in exceptional circumstances.
2. An activity can generally be described as "commercial" if its purpose is to obtain economic benefit, including profit (whether in cash or in kind) and is directed toward resale, exchange, provision of a service or other form of economic use or benefit.
3. The term "commercial purposes" should be defined by the country of import as broadly as possible so that any transaction which is not wholly "non-commercial" will be regarded as "commercial." In transposing this principle to the term "primarily commercial purposes," it is agreed that all uses whose non-commercial aspects do not clearly predominate shall be considered to be primarily commercial in nature with the result that the importation of Appendix I specimens should not be permitted. The burden of proof for showing that the intended use of specimens of Appendix I species is clearly non-commercial shall rest with the person or entity seeking to import such specimens.
4. Article III, paragraphs 3(c) and 5(c), of the Convention concern the intended use of the Appendix I specimen in the country of importation, not the nature of the transaction between the owner of the specimen in the country of export and the recipient in the country of import. It can be assumed that a commercial transaction underlies many of the transfers of Appendix I specimens from the country of export to the country of import. This does not automatically mean, however, that the specimen is to be used for "primarily commercial purposes."
Resolution of the Conference of the Parties, Conf. 5.10, in PROCEEDINGS OF THE FIFTH MEETING, *supra* note 14, at 49.

[66] *Id.*

[67] *Id.; Interpretation and Implementation of the Convention,* Doc. 5.28, in PROCEEDINGS OF THE FIFTH MEETING, *supra* note 14, at 460.

parties objected to this provision and the whole provision pertaining to zoos was consequently deleted.[68] Thus, while Resolution 5.10 provides substantial guidelines for granting Appendix I permits, many difficult issues remain to be resolved on a unilateral basis by individual countries.

V. CONCLUSION

This Article has discussed several tension points within the CITES Treaty. Three substantive phrases within the language of CITES were analyzed, as well as one policy problem not addressed within the specific Treaty language. While all treaties, due to the process of negotiated drafting, contain uncertain phrases, the severity of the problem in CITES is repeatedly visible at the biennial conferences of the parties. The positions of the various parties reflect vastly different perceptions of the importance of wildlife. Some consider flora and fauna to be simple economic resources, like oil or coal, while others consider them to be important components of our ecological system, which must be preserved and protected.

The positive effect of the presence of vague language within the CITES Treaty is that it allows for the future growth of international law as new consensus develops. Conference Resolution 1.2[69] is representative of a number of situations which have led to the creation of substitute provisions under CITES without the use of the formal amendment process.[70] The complexity and rapid growth of issues seem to preclude the ponderous amendment process. Rather, international law is being created by a majority vote of the parties, a situation significantly at odds with the normal position of sovereign states that they are bound only by that to which they specifically agree.

This development within the CITES context is a pragmatic consequence of the cumbersome legalities of formal negotiations, given that the number of member nations is currently approaching one hundred.[71] In effect, we have witnessed the creation of a world legislature to grapple with the issue of international trade in endangered species, living and dead—a rough-and-tumble democracy of nations for the animals and plants of this earth, perhaps.

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[68] *Id.; Summary of the Report of the Technical Committee,* Com. 5.16, in PROCEEDINGS OF THE FIFTH MEETING, *supra* note 14, at 190.

[69] *Resolution of the Conference of the Parties,* Conf. 1.1, in PROCEEDINGS OF THE FIRST MEETING, *supra* note 11 and accompanying text.

[70] For example, the language of Article I concerning "readily recognizable" species was modified by Conf. Res. 2.18 (1980). *See* discussion *supra* note 24 and accompanying text.

[71] *See supra* note 2.

What does this state of affairs suggest for the future development of international law? Has the pragmatic drive of economic reality produced a vital new mechanism for the creation of international law? A few more years of development will be necessary to fully answer this question. CITES, for all of its problems, is a vital document and represents an area of considerable potential growth within the international legal community.