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## **The Efficacy of down-listing the African Elephant under CITES: A Critical Assessment**

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I hereby declare that I have read and understood the regulations governing the submission of *Postgraduate Diploma in Law in Environmental Law* dissertations, including those relating to the length and plagiarism, as contained in the rules of this University, and that this dissertation conforms with those regulations.

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## CHAPTER 1: INTRODUCTION

### 1.1. Background

International trade in wildlife and endangered species is an extremely lucrative business, bringing in an estimated five billion US dollars annually.<sup>1</sup> This makes it one of the world's largest industries.<sup>2</sup> Nearly one third of this trade is illegal.<sup>3</sup> Millions of animals suffer and die each year at the hands of man, often due to human greed and vanity.<sup>4</sup> This international market for animals has led to drastic declines in the populations of many species, including such exotic animals as the rhino, leopard, tiger, and the African elephant.<sup>5</sup> The African elephant's plight has arguably been the most popular. Due to trade in its ivory, African elephant populations declined so dramatically that experts claimed the elephant would be extinct by 2010.<sup>6</sup> This paper examines the steps taken by international law to protect the African elephant, and specifically looks at the two strategies adopted by the African countries to ensure this protection.

### 1.2. The African Elephant

In 1979, 1.5 million elephants populated the African countryside.<sup>7</sup> A decade later this number dropped to less than 600 000.<sup>8</sup> This decline was mainly due to the ivory trade which will be discussed below.<sup>9</sup> Today elephants roam over 3.1 million square miles,

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<sup>1</sup> M Hara 'International Trade in Ivory from the African Elephant: Issues surrounding the CITES Ban and SAWCM's chances of overturning it' 1997 *South African Perspectives* Centre for South African Studies 1 at 1

<sup>2</sup> Rea 'The Fortune Directory of the largest U.S. Industrial Corporation' 1983 *Fortune* at 228

<sup>3</sup> Porter and Brown 'The trade in ivory from African elephants' *Environmental Global Politics* Colorado HarperCollins

<sup>4</sup> B Padgett 'The African Elephant, Africa, and CITES: The Next Step' (1994-1995) 2 *Ind. J. Global Legal Stud.* 529 at 529

<sup>5</sup> *Ibid*

<sup>6</sup> I and O Douglas-Hamilton 'Battle for the Elephants' 1992 Transworld Publishers Ltd London

<sup>7</sup> A Thornton and D Currey 'To Save an Elephant: The undercover investigation into the Illegal Ivory Trade' 1991 Transworld Publishers Ltd London

<sup>8</sup> Douglas-Hamilton (note 6)

<sup>9</sup> See Chapter 1.3.

through 31 countries.<sup>10</sup> The IUCN estimated that, in 1998 there were between 300 000 and 480 000 elephants alive on the continent.<sup>11</sup>

The world's largest land mammal, the elephant can live up to seventy years with a life cycle similar to that of humans.<sup>12</sup> They are highly intelligent and social and live in matriarchal groups.<sup>13</sup> Elephants communicate by emitting low frequency calls that are inaudible to the human ear.<sup>14</sup> Elephants are quite affectionate, often touching each other with their trunks, leaning on or rubbing each other with their bodies.<sup>15</sup> After being apart for a while, they greet each other by intertwining trunks, clashing trunks and flapping ears, exhibiting great excitement even if the separation has lasted for only a few days.<sup>16</sup> They help other members of the group that are threatened or disabled, and also become quite depressed when members of the group die.<sup>17</sup> They tend to touch the carcass lightly with their trunks and feet, and cover it with loose dirt and branches.<sup>18</sup>

Humans are the only natural enemy of elephants.<sup>19</sup> Elephant populations have declined due to anthropogenic actions. Human populations, however, continue to increase exponentially, especially in Africa.<sup>20</sup> This increased population of humans creates a struggle for space and resources, and thus causes tension as humans settle in the elephants' natural habitat. In some places, the elephant is viewed as a magnificent creature, in others it is seen as a pest which ruins crops and causes danger to human life.<sup>21</sup>

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<sup>10</sup> S Hitch 'Losing the elephant wars: CITES and the "Ivory Ban"' (1999) 27 *Ga. J. Int'l. & Comp. L.* 167 at 168

<sup>11</sup> M Del Baglivo 'CITES at crossroads: New Ivory Sales and Sleeping Giants' (2002) 14 *Fordham Envtl. L. J.* 279 at 281

<sup>12</sup> D Harland 'Killing Game: International Law and the African Elephant' 1994 Praeger

<sup>13</sup> M J Glennon 'Has International Law failed the elephant?' (1990) 84 *Am. J. Int'l. L.* 1 at 1

<sup>14</sup> *Ibid* (Glennon reports that on the same day culling of elephants began in the Hwange National Park in Zimbabwe, elephants located some 90 miles away began to flee in the opposite corner of the reserve)

<sup>15</sup> Glennon (Note 13) at 2

<sup>16</sup> *Ibid*

<sup>17</sup> *Ibid*

<sup>18</sup> *Ibid*

<sup>19</sup> T McBride 'The Dangers of Liberal Neo-Colonialism and the CITES Treaty' (1998-1999) 19 *B. C. Third World L. J.* 733 at 733

<sup>20</sup> See *World Populations Index and Growth*

<http://geography.about.com/od/obtainpopulationdata/a/worldpopulation.htm>

<sup>21</sup> P F Storey 'Development vs. Conservation: The Future of the African elephant' (1993) 18 *Wm. & Mary Journal of Environmental Law* 375 at 377

In a continent largely plagued by civil unrest, corruption, poverty, and starvation, the preservation of the African elephant remains of little priority.<sup>22</sup> The African elephant is among the many species that live and die on an Earth shared with a population of one specific species, humans, which have taken it up as their property and are reluctant to share unless paid to do so. It is humans alone, therefore, who will decide the fate of these remarkable creatures.<sup>23</sup>

### 1.3. International Law and the Ivory Trade

Ivory has been prized by humans for many generations.<sup>24</sup> The main uses of ivory are making dagger handles in Yemen, *hanko* in Japan, piano keys and curios around the world, and aphrodisiac medicines in Asia.<sup>25</sup> In the late 1970s the market for ivory reached massive proportions and resulted in heavy poaching of elephants.<sup>26</sup> The formulation of the Convention on International Trade in Endangered Fauna and Flora (CITES) was due to the illegal killing of animals to feed trade like ivory. The Convention came into force in 1975.<sup>27</sup> At this time the African elephant was placed on Appendix II which allows limited trade. The Appendix II listing was insufficient to protect the elephant from being overexploited. The demand for ivory steadily increased to the point where and estimated one thousand tons of ivory were exported from Africa every year.<sup>28</sup>

In 1989 the market for ivory was estimated to have been worth U\$50- 60 million annually, and ivory was worth U\$140 a pound.<sup>29</sup> As a result, poaching caused the elephant population to decline by two thirds between 1979 and 1989.<sup>30</sup> In some African countries the elephant went extinct altogether.<sup>31</sup> The Largest consumers of raw ivory

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<sup>22</sup> Hitch (Note 10) at 169

<sup>23</sup> McBride (Note 19) at 733

<sup>24</sup> Harland (Note 12)

<sup>25</sup> Glennon (Note 13) at 122

<sup>26</sup> Ibid

<sup>27</sup> Convention on International Trade in Endangered Fauna and Flora, March 3, 1973, 27 U.S.T. 1087, 12 I.L.M. 1085 (entered into force 1 July 1975)

<sup>28</sup> Hitch (Note10) at 172

<sup>29</sup> R Leakey 'A perspective from Kenya: Elephants today and tomorrow' 1993 *Wildlife Conservation* at 58

<sup>30</sup> Declined from and estimated 1.5 million in 1979 to less than 600 000 in 1989, *see first paragraph (1.1. Background)*

<sup>31</sup> Douglas-Hamilton (Note 6)

were Asian nations, with Japan importing more than any other country.<sup>32</sup> In addition to the legal worldwide trade, some estimate that illegally obtained ivory comprised 90% of the world ivory trade.<sup>33</sup> At the peak of trading, elephants were being killed at a rate of 200 per day.<sup>34</sup>

In a controversial meeting of the CITES Parties in Lausanne, Switzerland (COP-7) in 1989, the decision was made to up-list the African elephant to Appendix I and thus ban all international trade in ivory. This caused the ivory market to plummet. The price of ivory fell from U\$140 per pound to a mere U\$5 per pound.<sup>35</sup> However, because of economic strife and antagonism towards western ideals, pressure to end the ivory ban prevails. Some southern African countries claim that their populations have increased to such numbers that they have to cull some elephants in order to provide sufficient habitat and protection for the remaining ones.<sup>36</sup> In recent years, much of the debate over the elephant has focused on the level of protection international law will extend to the species.<sup>37</sup>

Political pressure to end the Ban has been partly successful. In 1997, at the tenth meeting of the CITES Parties at Harare, a few southern African countries (Namibia, Botswana and Zimbabwe) were allowed to trade a limited amount of ivory to Japan under strict controls.<sup>38</sup> In Nairobi, at COP-11, the Ban was reinstated until an effective system was in place to prevent the widespread poaching of elephants.<sup>39</sup> At COP-12, in 2002, the decision was made again to allow limited stockpiles of ivory to be traded from the southern states. Since then a ban has been put in place again and in 2005 even domestic

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<sup>32</sup> H Kiyono 'Still in Business: The Ivory Trade in Asia, Seven Years after the CITES Ban' 1997 *Traffic International* at 6, 7

<sup>33</sup> M Sajbel 'The Agony and the Ivory: The Ban Hasn't Been lifted, but some think the Rumors are enough to restart slaughtering. Will Ivory be Salable again?' *LA Times* E1 (10 July 1997) (quoting Ginette Hemley, Director of International Wildlife Policy at World Wildlife Fund)

<sup>34</sup> Hitch (Note 10) at 172

<sup>35</sup> Leakey (Note 28)

<sup>36</sup> A J Heimert 'How the Elephant Lost His Tusks' (1994-1995) 104 *Yale L. J.* 1473 at 1473

<sup>37</sup> *Ibid*

<sup>38</sup> Del Baglivo (Note 11) at 300

<sup>39</sup> J R Berger 'The African Elephant, Human Economics, and International Law: Bridging a Great Rift for East and Southern Africa' (2000-2001) 13 *Geo. Int'l. Envtl. L. Rev.* 417 at 433

trade in ivory was banned.<sup>40</sup> However, there remains extreme political pressure to end this ban and allow limited trade in those countries claiming to have healthy elephant populations. This pressure is led by southern African states and backed by many ivory market countries, such as Japan and China. On the other end of the spectrum, the east African countries are fighting to continue to continue to ban all trade in ivory.

#### 1.4. Research Methodology

This paper essentially comprises a desk top study on the ivory issue. Research was mostly done at various libraries and research centers at the University of Cape Town (UCT). A common search was conducted using *Hein Online*, *Butterworths NexisLexis*, and the main library catalogue on the UCT Law Library Website. Once all journals, books and magazines containing articles relevant to the topic were located, thorough reading was conducted of all the relevant research material. In addition to this, key words such as “Ivory trade”, “Poaching”, and “CITES” were searched on Google. Here various news articles were collected from around the world. Various television programmes relevant to the topic were downloaded from the internet. The April 2006 edition of *Africa Geographic* (bought at Exclusive Books) focused primarily on the “Elephant Problem” and dealt with issues such as poaching and elephant management strategies. The magazine also included various names of people and non-governmental organizations which dealt with these issues. Some of the organizations were contacted and information was received from them, such as data reports regarding ivory seizures and number of elephants poached (specifically Born Free Foundation). The Environmental Investigation Agency provided detailed information regarding regulatory structures and the flaws herein (of CITES) before the Ban (pre-1989). All journal, magazine and newspaper articles and information from books and other sources were collected and studied.

#### 1.5. Structure of the Paper

This paper aims at critically analyzing the recent decisions of CITES regarding the ivory trade. Chapter 2 will unfold the CITES structure and its provisions in force relevant to the control of the trade in ivory. The third chapter of the paper will discuss the history of

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<sup>40</sup> ‘Elephants Up and Down’ Upfront (9 July 2005) 187 *New Scientist* No 2507 at 7

CITES and the African elephant, specifically why the ivory trade flourished during the 1980s and will also discuss the events leading up to the ban. The third chapter will discuss the post-ban events as well as the recent decisions made by CITES regarding the African elephant and its ivory. It will also describe and analyze the reasons behind, and implications of these decisions. The fourth chapter, the most essential part of the paper, will investigate the two opposing strategies adopted by African countries regarding the protection of their elephant populations. Sustainable Management, led by southern African nations; and the protection approach led by the east African nations will be discussed and critiqued.

## CHAPTER 2: The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES, 1973)

### 2.1. Background

With the rising concern for the environment came the 1972 Stockholm United Nations Conference on the Human Environment.<sup>41</sup> This helped create the political context for the formation of CITES in 1973. The CITES Treaty was signed on March 3, 1973 after being drafted by the World Conservation Union (IUCN).<sup>42</sup> It was initially ratified by only ten nations,<sup>43</sup> the only African country among them being Nigeria, and it entered into force July 1, 1975. Today there are 142 Parties to the Convention, and it regulates around 34 000 species of plants and animals.

The CITES Secretariat is administered by UNEP and is located at Geneva, Switzerland. It has an essential role, fundamental to the Convention and its functions are laid down in Article XII of the text of the Convention.

### 2.1. Aims and Objectives

CITES was originally developed to meet the urgent challenge of discontinuing the loss of endangered plant and animal species.<sup>44</sup> One can see the intentions of the Parties reflected in the Preamble of the Convention, which states:

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

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

*Recognizing* that peoples and States are and should be the best protectors of their own wild fauna and flora;

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<sup>41</sup> P Stoett 'To trade or not to trade? The African elephant and CITES' (1997) 52 *Int'l. J.* 567 at 568

<sup>42</sup> Hitch (Note 10) at 175

<sup>43</sup> Ibid

<sup>44</sup> Del Baglivo (Note 11) at 286

*Recognizing*, in addition, that international co-operation is essential for the protection of certain species of their own wild fauna and flora against over-exploitation through international trade;

*Convinced* of the urgency of taking appropriate measures to this end,<sup>45</sup>

CITES does not regulate the efforts of Parties to avoid habitat destruction or modification.<sup>46</sup> It also does not control the killing or taking of any species.<sup>47</sup> The Convention seeks to reduce the adverse effects of commercial trade on endangered and threatened species and ensure that the trade in other species is conducted on a sustainable basis.<sup>48</sup>

This said, CITES is known to be one of the most successful conventions concerned with wildlife conservation.<sup>49</sup> Its success is mainly due to the basic principles it sets down, which most states have proved willing to accept, and by the way it operates, which ensures that on the whole it is better enforced than many other treaties.<sup>50</sup>

### 2.3. Structure and Purpose

CITES regulates international trade through a permit system which is based on whether the species concerned is listed in either of the three Appendices to the Treaty.<sup>51</sup> The issue of permits is done through a Scientific Authority and a Management Authority in each signatory state. Their tasks will be elaborated in the provisions quoted below.

For those species in Appendix III, most of the burden for the regulation falls to the signatories and is voluntary.<sup>52</sup> This section is outlined by the Convention in Article V and states:

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<sup>45</sup> CITES, Preamble (Note 27)

<sup>46</sup> Unlike the Convention on Biodiversity (June 5, 1992, 31 I.L.M. 818)

<sup>47</sup> DeI Baglivo (Note 11) at 287

<sup>48</sup> Hitch (Note 10) at 176

<sup>49</sup> D M Ong 'The Convention on International Trade in Endangered Species (CITES, 1973): Implications of recent developments in international and EC environmental law' (1998) 2 *B. U. Int'l. L. J.* 291 at 292

<sup>50</sup> S Lyster *International Wildlife Law* Cambridge: Crotius Publications 1985 240

<sup>51</sup> Ong (Note 49) at 292

<sup>52</sup> Stoett (Note 41) at 569

‘1. All trade in specimens of species included in Appendix III shall be in accordance with the provisions of this Article.

2. The export of any specimen of a species included in Appendix III from any State which has included that species in Appendix III 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 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

(b) 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.

3. The import of any specimen of a species included in Appendix III shall require, except in circumstances to which paragraph 4 of this Article applies, the prior presentation of a certificate of origin and, where the import is from a State which has included that species in Appendix III, an export permit.

4. In the case of re-export, a certificate granted by the Management Authority of the State of re-export that the specimen was processed in that State or is being re-exported shall be accepted by the State of import as evidence that the provisions of the present Convention have been complied with in respect of the specimen concerned.’<sup>53</sup>

Appendix II species are defined in the realm of Article II (2)(a) as ‘...*all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation...*’.<sup>54</sup> Limited trade is allowed in Appendix II species, and the regulation of this trade is set out in Article IV, which states:

‘2. 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

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<sup>53</sup> CITES, Article V (Note 27)

<sup>54</sup> CITES, Article II(2)(a) (Note 27)

(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.’

Here it is important to note that there is no requirement to present an import permit, as one does for Appendix III species. This may be the reason why illegal trade in Appendix II species is easier. Article IV further states:

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

4. The import of any specimen of a species included in Appendix II shall require the prior presentation of either an export permit or a re-export certificate.

5. The re-export of any specimen of a species included in Appendix II shall require the prior grant and presentation of a re-export certificate. A re-export certificate shall only be granted when the following conditions have been met:

(a) a Management Authority of the State of re-export is satisfied that the specimen was imported into that State in accordance with the provisions of the present Convention; and

(b) a Management Authority of the State of re-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.

6. The introduction from the sea of any specimen of a species included in Appendix II shall require the prior grant of a certificate from a Management Authority of the State of introduction. A certificate shall only be granted when the following conditions have been met:

(a) a Scientific Authority of the State of introduction advises that the introduction will not be detrimental to the survival of the species involved; and

(b) a Management Authority of the State of introduction is satisfied that any living specimen will be so handled as to minimize the risk of injury, damage to health or cruel treatment.<sup>55</sup>

The regulation of trade in Appendix II species has to some extent been criticized in the past,<sup>56</sup> mainly due to the exemptions and the fact that the enforcement of the provision relies on the internal police powers and is subject to each country's capabilities. The exemptions are set out in Article VII of the Convention. The exemptions include species in transit or transshipment,<sup>57</sup> and specimens that are "personal items or household effects" among others.<sup>58</sup> Exemptions like these create loopholes for traders to exploit.

Appendix I species include all species threatened with extinction. Trade in such species may only be authorized in exceptional circumstances as stated in Article II(1), and not for primarily commercial purposes (Article III(3)(c)). Appendix I regulations are very stringent and strict. Export in Appendix I requires a prior grant and presentation of an export permit which is only supplied once four stringent conditions have been met.<sup>59</sup> In order to complete a trade, an import permit, with additional restrictions, is also required. Trade of Appendix II, as already stated above, requires only export permits to be issued.<sup>60</sup> The responsibility of issuing these permits belongs to the Management Authority and Scientific Authority of each state. It is imperative to add that these authorities are self-regulating and their smooth operation depends on the discretion of that country.

The Conference of the Parties (Article XI), which take place twice a year and are usually well-attended, review CITES progress and discuss interpretation and operational problems, as well as possible changes to the lists. A proactive Secretariat (Article XII) is responsible for monitoring violations of CITES provisions effectively by relaying information on lack of implementation to the states parties concerned. Non-governmental organizations supply information to the CITES Secretariat to identify problems.<sup>61</sup> However, along with many other treaties that require states to report on their

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<sup>55</sup> CITES, Article IV(2-6) (Note 27)

<sup>56</sup> Hitch (Note 10) at 175

<sup>57</sup> CITES, Article VII(1) (Note 27)

<sup>58</sup> CITES, Article VII(2) (Note 27)

<sup>59</sup> Hitch (Note 10) at 175

<sup>60</sup> CITES, Article IV(2) (Note 27)

<sup>61</sup> Ong (Note 49) at 293

implementation of treaty obligations, CITES has experienced difficulties in respect of their compliance with this requirement.<sup>62</sup> The percentage of CITES' parties that have failed to submit their reports in time range between 30% and 50%, and many developing parties in particular have failed to do so.<sup>63</sup>

#### 2.4. Reservations

CITES is most probably one of the few environmental treaties that allow reservations. It seems that allowing a provision for reservations into an environmental treaty is going against the whole aim of the treaty itself. However, in CITES one can clearly see that many countries may not have joined without this provision.<sup>64</sup> The provision states:

'1. The provisions of the present Convention shall not be subject to general reservations. Specific reservations may be entered in accordance with the provisions of this Article and Articles XV and XVI.

2. Any State may, on depositing its instrument of ratification, acceptance, approval or accession, enter a specific reservation with regard to:

(a) any species included in Appendix I, II or III; or

(b) any parts or derivatives specified in relation to a species included in Appendix III.

3. Until a Party withdraws its reservation entered under the provisions of this Article, it shall be treated as a State not a Party to the present Convention with respect to trade in the particular species or parts or derivatives specified in such reservation.'<sup>65</sup>

China, Japan, and even Britain entered reservations along with the southern African states when the African elephant was up-listed to Appendix I in 1989. This is mainly due to the fact that these countries were both reluctant to believe that illegal trade in ivory was forcing the elephant to the brink of extinction and were one of the biggest money-earners in this field (consumer and demand based). However, as the ivory market plummeted the

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<sup>62</sup> Ibid at 294

<sup>63</sup> M Koskenniemi 'New Institutions and Procedures for Implementation Control and Reaction' in J Werksman (ed) *Greening International Institutions* London: Earthscan 1996 236 at 240

<sup>64</sup> Zimbabwe may have withdrawn from CITES if it had not the opportunity to enter a reservation against the Ivory Ban. See P Mofson 'Zimbabwe and CITES: Influencing the International Regime' in Hutton and Dickinson (ed) *CITES: Endangered Species Threatened Convention: The Past, Present and Future of CITES* (London: Earthscan, 2000)

<sup>65</sup> CITES, Article XXIII (Note 27)

reservations were not all that helpful to these nations. Although reservations could benefit those countries choosing to enter into them, they are contradictory to the aims of the Convention. And as with the African elephant reservations, they often fall flat when other Parties abide strictly to their obligations under CITES.

## 2.5. The Listing Criteria

Imperative to the debate about ivory sales is the Appendix listing of the African elephant. The language of the Treaty offers no specific guidelines for the listing of species; therefore, there has been an ongoing debate over the listing criteria since the first Conference of the Parties.<sup>66</sup> At the first COP, the Parties adopted the Berne Criteria for the listing of the species. The Berne Criteria did not require the country proposing the listing to present specific population data to list the species. It only stated that a species has to be currently threatened with extinction.<sup>67</sup> In addition, it was very difficult to remove the species from this list. This process caused controversy, as a Party was not required to present concrete biological data to list the species, but if nay party later wanted to remove that species from the list, or at least transfer it, biological data was needed.<sup>68</sup>

In 1992, at the Eighth Conference of the Parties in Kyoto, Japan, the Parties determined that the Berne Criteria was inadequate and directed the Standing Committee to develop new criteria.<sup>69</sup> At the Ninth Conference of the Parties, which was held in Fort Lauderdale, the Committee presented the new standards.<sup>70</sup> These revised criteria represented the first attempt by any governing body to engage in the listing of endangered species based on objective, scientific criteria.<sup>71</sup> It is, however, imperative to add that although Resolution 9.24 states the essence of the Precautionary Principle, this provision seems largely

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<sup>66</sup> Hitch (Note 10) at 176

<sup>67</sup> S M Dansky 'The CITES Listing Criteria: Are They "Objective" Enough to Protect the African Elephant?' (1998-1999) 73 *Tulane Law Review* 961 at 964

<sup>68</sup> Ibid

<sup>69</sup> Ibid

<sup>70</sup> Dansky (Note 67) at 964

<sup>71</sup> Ibid

overlooked.<sup>72</sup> The new criteria state that in order for a species to be placed on Appendix I, it should meet the following criteria:

- ‘A. The wild population is small, and is characterized by *at least one* of the following:
  - i) an observed, inferred or projected decline in the number of individuals or the area and quality of habitat; or
  - ii) each sub-population being very small; or
  - iii) a majority of individuals, during one or more life-history phases, being concentrated in one sub-population; or
  - iv) large short-term fluctuations in the number of individuals; or
  - v) a high vulnerability due to species’ biology or behaviour (including migration).
  
- B. The wild population has a restricted area of distribution and is characterized by *at least one* of the following:
  - i) fragmentation or occurrence at very few locations; or
  - ii) large fluctuations in the area of distribution or the number of sub-populations; or a high vulnerability due to species’ biology or behaviour (including migration); or
  - iii) an observed, inferred or projected decrease in any of the following:
    - area of distribution; or
    - the number of sub-populations; or
    - the number of individuals; or
    - the area or quality of habitat; or
    - reproductive potential.
  
- C. A decline in the number of individuals in the wild, which has been *either*:
  - i) observed as ongoing or as having occurred in the past (but with potential to resume); or
  - ii) inferred or projected on the basis of any of the following:
    - a decrease in area or quality of habitat; or
    - levels or patterns of exploitation; or
    - threats from extrinsic factors such as effects of pathogens, competitors, parasites, predators, hybridization, introduced species and the effects of toxins and pollutants; or
    - decreased reproductive potential.

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<sup>72</sup> Ibid

D. The status of the species is such that if the species is not included in Appendix I, it is likely to satisfy one or more of the above criteria within a period of five years.<sup>73</sup>

The definition section, Annex 5, realizes the objective nature of the listing criteria. The section has definitions which are definitive and leave very little open for argument.

The Resolution also has sections relating to when a species can be delisted. It states that any species currently listed in Appendix I which does not meet the criteria of Annex 1 should be moved to Appendix II if it meets the criteria Annex 4.<sup>74</sup> Annex 4 has an extra provision that states that even if a species does not meet the criteria in Annex 1 for an endangered species, it should not be transferred to Appendix II unless:

- 'a) the species is not in demand for international trade, nor is its transfer to Appendix II likely to stimulate trade in, or cause enforcement problems for, any other species included in Appendix I; or
- b) the species is likely to be in demand for trade, but its management is such that the Conference of the Parties is satisfied with:
  - i) implementation by range States of the requirements of the Convention, in particular Article IV; and
  - ii) appropriate enforcement controls and compliance with the requirements of the Convention; or
- c) an integral part of the amendment proposal is an export quota approved by the Conference of the Parties, based on management measures described in the supporting statement of the amendment proposal, provided that effective enforcement controls are in place; or
- d) an integral part of the amendment proposal is an export quota approved by the Conference of the Parties for a specified period of time....; or
- e) a ranching proposal is submitted consistent with the applicable Resolutions of the Conference of the Parties and is approved.<sup>75</sup>

While the objective criteria specifically listed in the Resolution are merely “guidelines”, one can see that the criteria clearly require a country to present some type of data.

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<sup>73</sup> CITES, Ninth meeting of the Conference of the Parties, Conf Res 9.24 [www.wcmc.org.uk/CITES/english/eresol921.htm](http://www.wcmc.org.uk/CITES/english/eresol921.htm) at Annex 1

<sup>74</sup> Dansky (Note 67) at 967

<sup>75</sup> Annex 4(B)(2)(a)-(e) (Note 73)

However, one can see that the provisions may be open to political and economic influence. After the Conference in Harare, which will be discussed in detail in a later Chapter, watchers began to question whether the changes made to the listing criteria at the Ninth Conference are truly objective.

As long as the decision to list a species on Appendix I or delist a species from Appendix I to II is subject to a two/third majority vote at the biennial meetings of the Parties, there is no way to take the subjective considerations out of the listing process.<sup>76</sup> So although the listing criteria may be the most objective in history, in the case of the African elephant there is a lot of room for improvement. When the economic, political, and social problems of the range states are exposed, it is easy to see how Parties allowed subjective considerations into the listing process.<sup>77</sup> However, the goal of CITES was not to alleviate the social problems of those countries that house endangered species.<sup>78</sup> Instead it was intended to protect endangered species that were being exploited by international commercial trade.<sup>79</sup> Thus, if the criteria are meant to be completely objective, social considerations should be completely removed from the listing process. Only then will endangered species, like the African elephant, be adequately protected.<sup>80</sup>

## 2.6. Conclusion

CITES is not a general wildlife management treaty, it says nothing about protecting habitat and does not make killing an endangered species illegal, but it is an important component of a network of global and regional wildlife regimes, albeit narrowly focusing on the international trade aspect of wildlife protection. An imperative consideration to make at this juncture relates to the utility of this Convention with respect to the sustainable development objective in international law generally.<sup>81</sup> Wildlife conservationists have long held that the only way of securing what little we have left of endangered fauna and flora populations is by implementing a complete prohibition of all

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<sup>76</sup> Dansky (Note 67) at 979

<sup>77</sup> Ibid

<sup>78</sup> Ibid

<sup>79</sup> Ibid

<sup>80</sup> Ibid

<sup>81</sup> Ong (Note 49) at 294

forms of trade in these species and their derivative products. This view clashes with that held by many developing governments in which these endangered species are actually found. These governments are of the opinion that a trade ban would be an infringement of their sovereign right to exploit their natural resources. However, if one investigates the trend in environmental treaties, many vulnerable species and ecosystems are seen as a “common heritage of mankind”<sup>82</sup> and thus must be protected and not exploited. In this light, CITES is a protectionist treaty in species that are threatened with extinction (Appendix I), and a trading treaty in the sense that it allows trade in species whose survival is not threatened but may become so (Appendix II).<sup>83</sup> Thus one can see how political pressure may influence the listing regime of CITES species. The CITES regime and structure will be reviewed in the next Chapter.

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<sup>82</sup> Convention on Biological Diversity (CBD) (June 5, 1992, 31 I.L.M. 818)

<sup>83</sup> Lyster (Note 50) at 240

### CHAPTER 3: The History of CITES and the African Elephant (1979-1989)

#### 3.1. Introduction

Between 1979 and 1989 the African elephant population was completely decimated.<sup>84</sup> The Appendix II status of the African elephant under CITES created a requirement for export permits.<sup>85</sup> This process was clearly inadequate and in 1985 the Parties adopted a special permit process called the Ivory Export Quota System (IEQS).<sup>86</sup> Under the CITES Ivory Control System ivory could be imported only from the producer countries which submitted a quota to the Secretariat of CITES. The CITES Ivory Control System generally failed because the nations with the elephant herd ignored their ivory quotas and exported as much ivory as they could produce.<sup>87</sup> Falsified export documents were discovered in many nations, and corrupt officials in collusion with traders found ways to avoid this Ivory Control System.<sup>88</sup>

It was known that the elephant populations were decreasing, but many believed this was just a result of human encroachment on elephant habitat.<sup>89</sup> Ivory trade was also worth a lot of money and many trusted that a substantial portion of this money went to the poor African nations. Even the World Wildlife Fund (WWF) did not support a ban and believed that the only way African nations would be persuaded to maintain their elephant populations was by the commercial use on a sustainable basis.<sup>90</sup> CITES, during the 1980s, was believed to be controlling trade effectively. The loopholes in the CITES control system were discovered during the late eighties and opened the window to the fact that it was the ivory trade, not habitat loss, that was causing the rapid movement towards extinction of the African elephant. These loopholes and other weaknesses of the CITES system will now be discussed.

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<sup>84</sup> Thornton (Note 7)

<sup>85</sup> CITES, Article IV (Note 27)

<sup>86</sup> Stoett (Note 41) at 570

<sup>87</sup> S Landy 'CITES: Banning the Ivory Trade- And Attempt to save the African elephant from extinction' (1989-1990) 5 *Int'l. L. J.* 111 at 115

<sup>88</sup> Landy (Note 87) at 116

<sup>89</sup> Thornton (Note 7)

<sup>90</sup> *Ibid*

### 3.2. Weaknesses of the CITES Control System

The CITES system of controls was so riddled with loopholes that they were easily circumvented by the major poached ivory syndicates.<sup>91</sup> To mention all detailed loopholes would go beyond the ambit of this paper, but a few examples will be mentioned to strengthen the justification of the total ivory trade ban.

CITES did not impose any control system over worked or carved ivory, thus poached ivory could fairly easily get smuggled out of Africa and taken into a non-CITES country such as Dubai, which had no entry restrictions, even on whole uncertified tusks. From there, once they were chopped up and roughly carved, it would be possible to export the tusks legally to many ivory trading countries in the Far-East.<sup>92</sup>

When the CITES Ivory Control System came into force in 1986, several stockpiles of confiscated ivory had been given an amnesty and legitimized.<sup>93</sup> One of them had been Burundi. This is extremely disconcerting as Burundi had no elephant populations left. The agreement here was that Burundi would join CITES and respect its controls.<sup>94</sup> In return the Secretariat was persuaded to legalize 89 tons of illegal ivory.<sup>95</sup> This amnesty would be great for Burundi as legal ivory was worth twice as much as illegal ivory.<sup>96</sup> Burundi sold the stockpile, did not join CITES and carried on importing poached ivory.<sup>97</sup> A few years later Burundi had another stockpile without permits, 90 tons of ivory and worth US\$20 million on the legitimate market.<sup>98</sup> The Burundi government, a new one by now, assured that if CITES were to legalize this stockpile they would join CITES. After much controversial discussion, one third of the 90 tons was legitimized. A decision on the remaining two thirds was deferred until the main CITES COP in 1989.<sup>99</sup> To allow a

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<sup>91</sup> A Thornton (ed) 'A System of Extinction: The African Elephant Disaster' (1989) *A report handed out to CITES Parties at COP-7 1989* at 6

<sup>92</sup> *Ibid* at 7

<sup>93</sup> Thornton (Note 91) at 31

<sup>94</sup> Thornton (Note 7)

<sup>95</sup> *Ibid*

<sup>96</sup> *Ibid*

<sup>97</sup> *Ibid*

<sup>98</sup> *Ibid*

<sup>99</sup> *Ibid*

country to continue to export ivory seemed to be actively encouraging smuggling from neighbouring countries.

Another country with huge stockpiles of ivory (270 tons) was Singapore. This amount was given CITES permits in an amnesty in 1986. Traders bought some of this stockpile, which came with the legal paperwork. Then they had it carved in Singapore and sent it to Hong Kong without using the documents, because permits were not required for carved ivory. This left them with the Singapore permits but no ivory. Then they got raw poached ivory, usually from Dubai, and imported them using the spare permits.<sup>100</sup>

These are just a few loopholes that traders used to weasel their way around the CITES controls. Consultants hired by CITES to complete reports on elephant populations and the ivory market were reportedly paid by traders on the side.<sup>101</sup> Many influential people in Africa had vested interests in preserving poaching. Foreign diplomats would have loads of ivory in their luggage and claim diplomatic immunity.<sup>102</sup> When moving ivory from e.g. Tanzania to Burundi, it was kept in secret chambers in trucks, and even in petrol tanks.<sup>103</sup> Additional stumbling blocks to conservation efforts included bribery of officials and funding shortages for government protection efforts.<sup>104</sup> Bribery and corruption even made it as high up as government ministers.<sup>105</sup> Eugene Lapointe, the Secretary-General of CITES during the eighties, even admitted to the press in May 1989 that the Ivory Control Unit In Lausanne had received a contribution of US\$200 000 from ivory dealers in Hong Kong and Japan.<sup>106</sup>

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<sup>100</sup> Thornton (Note 91) at 42

<sup>101</sup> Ian Parker, in one of his consultant positions to CITES, worked for a major Burundi dealer to help get CITES to legalise 60 tons of ivory in 1986. His story provides a fascinating insight into the way that ivory traders and their paid agents achieved powerful influence over the CITES Secretariat. *See* Thornton (Note 91) at 11

<sup>102</sup> In Jan 1989 the Indonesian Ambassador to Tanzania was caught with a container of poached ivory, 184 raw tusks, 24 partly worked tusks, and 82 figurines. He claimed diplomatic immunity and when this did not work, he tried to bribe the customs officials. *See* Thornton (Note 7)

<sup>103</sup> Thornton (Note 7)

<sup>104</sup> Storey (Note 21) at 378

<sup>105</sup> The names of several ministers (in Zimbabwe) were mentioned in connection with elephant poaching. *See* Thornton (Note 91) at 21

<sup>106</sup> Thornton (Note 91) at 3

### 3.3. Towards Lausanne and the Ban on Trade in Ivory

Growing awareness of the origins of ivory in consumer nations as well as the ever-growing struggle against poaching in African nations caused the global outcry in support for the ban in all trade in ivory. Mainly due to the Environmental Investigation Agency's undercover work on both the ivory market and the poaching in Africa, a proposal was put forward to up-list the African elephant to Appendix I. Tanzania, Kenya, Gambia, and Somalia were the leading countries seeking a ban on the international trade in ivory as an essential step towards saving Africa's remaining elephants.<sup>107</sup> Chad, Niger and Zambia also announced their support for the ban.<sup>108</sup>

Some countries in southern Africa, including Zimbabwe, South Africa and Botswana, strongly opposed a ban. These countries claimed that they had excellent management strategies and even had to cull their populations to keep numbers at an ecologically healthier level. Zimbabwe put forward their argument that they were overstocked, however refused to release their raw data to allow outsiders to confirm Zimbabwe's estimates.<sup>109</sup> The estimating of populations requires tremendous precision in sampling and extrapolations, and is a very skilled science. Publishing the raw data would have allowed objective statisticians to confirm Zimbabwe's estimates if they were correct. Their refusal to release the figures and their insistence that despite culling their elephant population continued to increase seemed suspicious.<sup>110</sup> The largest population, in the north-east of Zimbabwe in Hwange National Park, was claimed by Zimbabwe to have increased by 8 000 elephants between 1987 and 1989. But the data was based on a survey conducted in 1988 when thousands of elephants had migrated across the border from neighbouring Botswana. Sever drought had plagued its northern territory for years, and elephants travelled to Zimbabwe to drink from artificial watering points in the parks. Botswana counted its elephants in early 1989 when the migrating elephants returned to their territories.<sup>111</sup>

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<sup>107</sup> Unknown 'Africanscall for end to the ivory trade' *New Scientist* (10 June 1989) 122(1668) at 22

<sup>108</sup> *Ibid*

<sup>109</sup> Thornton (Note 7)

<sup>110</sup> *Ibid*

<sup>111</sup> Thornton (Note 91) at 23

The Government of Zimbabwe, in September 1989, made a formal request to the US Agency for International Development for additional funding for anti poaching because they claimed not to be keeping pace with the poaching.<sup>112</sup> At the same time Zimbabwe was leading efforts to oppose an international trade ban in ivory. Poaching in Zimbabwe, however, had followed the classic patterns displayed in the north.<sup>113</sup> Gonarezhou National Park had 1000 poached elephant carcasses scattered across its area in 1989, which made up a quarter of the whole populations.<sup>114</sup>

South Africa, at this time, was reputed to be the centre of the continent's largest illegal trade in ivory and rhino horn.<sup>115</sup> Hong Kong was the distribution centre for the world's poached ivory, and much of Hong Kong's supply came through a major South African network made up of South African nationals and middlemen in Angola, Mozambique and Namibia.<sup>116</sup> It was also testified by a respected American environmentalist, that South African Defence Force personnel were involved in the smuggling of ivory and rhino horn.<sup>117</sup>

During this same time the CITES Secretariat was under suspicion due to its blatant opposition to the ban.<sup>118</sup> The Secretariat was supposed to be neutral.<sup>119</sup> Notwithstanding the suspicions that arose when Ian Parker, a consultant paid both by CITES and by ivory traders, had gone to Burundi to legalize their poached stockpile.<sup>120</sup> Shortly after this Chris Huxley visited Singapore and legalized 270 tons of ivory.<sup>121</sup> The Secretary General and a number of his staff were claimed to be guilty of gross incompetence regarding the control

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<sup>112</sup> Ibid at 21

<sup>113</sup> Ibid

<sup>114</sup> Ibid at 22

<sup>115</sup> Ibid at 27

<sup>116</sup> Thornton (Note 91) at 27

<sup>117</sup> Ibid

<sup>118</sup> Thornton (Note 91) at 3

<sup>119</sup> The Secretariat's activities contravened with a resolution proposed by Canada and agreed by the Parties in 1985, 'Guidelines for the Secretariat when making recommendations in accordance with Article XV', which states in the background to the document that "At no time...should the Secretariat be perceived as being biased for or against any Party..."

<sup>120</sup> Thornton (Note 91) at 11

<sup>121</sup> Ibid at 8

of the ivory trade.<sup>122</sup> The Secretariat had attempted to dissuade major US groups from promoting a boycott on buying ivory; pressed for the legalization of 90 tons of poached ivory in Burundi; dismissed the return of these Burundi stocks to the countries of origin; sought agreements with the Burundi Government that part of the proceeds from the sale of the stock would go to the Secretariat; received substantial funding from traders who benefited from the 1986 Secretariat legalization of poached ivory- and continue to trade in ivory; and publicly opposed the Appendix I listing through public campaigning including TV, radio, newspaper and magazine interviews.<sup>123</sup> These are just a few actions which proved the Secretariat's contravention of its role under CITES.

Eventually, at COP-7 in Lausanne, the total up-listing and ivory trade ban proposed by Tanzania, was rejected in favour of a proposal which sought a ban, but under special conditions.<sup>124</sup> These conditions were that new criteria be developed which allowed countries to down-list species more easily than under the old Berne Criteria. Many of the southern African nations entered reservations against the Appendix I proposal of the African elephant. However, many countries saw the decision to up-list the African elephant as a hail-Mary for international environmental law.

#### 3.4. Post-Ban Events

Since October 1989 the demand for ivory products declined dramatically.<sup>125</sup> Elephant populations started to recover. For instance, in Kenya, populations grew from 16 000 in 1989 to 26 000 in 1993.<sup>126</sup> Although the populations of African elephants have still been declining, they are doing so at a much slower rate. These recoveries of population numbers have been welcomed by environmentalists and highly publicized.<sup>127</sup> To western countries, the elephant's comeback is proof of their governments' commitment to the environment. To the African people, however, the benefit of this recovery is questionable. Some African states threatened to undermine the CITES ban by their intent

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<sup>122</sup> Ibid

<sup>123</sup> Ibid at 9

<sup>124</sup> Thornton (Note 7)

<sup>125</sup> The price of ivory fell from US\$140 per pound to a mere US\$5 per pound. *See* Leakey (Note 28)

<sup>126</sup> Storey (Note 21) at 380

<sup>127</sup> Ibid

to auction their ivory stocks to Asian dealers in countries not signatory to CITES like Taiwan or Korea.<sup>128</sup> And Zimbabwe and Botswana threatened to kill thousands of elephants in a political move apparently aimed at pressuring the world to reopen the ivory trade.<sup>129</sup>

The ivory ban has been claimed to have been, in many ways, a quick fix.<sup>130</sup> The long-term problems such as resentment by humans, animal containment and habitat destruction caused by growing elephant populations still exist.<sup>131</sup> Human problems such as poverty and hunger lead to the destruction of elephant habitat and the resistance of the African populations towards parks.<sup>132</sup> Elephants are also hard to contain and often roam outside parks boundaries in search of food, often destroying crops and even killing people.<sup>133</sup>

Many Africans view western concerns for the elephant as a colonial design to keep African people in poverty.<sup>134</sup> Southern nations have continued to pressure CITES to lower restrictions on the ban. While many African elephants have been adequately protected from poachers since the ban, at the same time, 'legal' ivory obtained from culling and natural deaths have been piling up in stock rooms in countries like South Africa and Zimbabwe. These countries, among others, mounted a campaign to move the African elephant back to Appendix II so that they could once again use the species as a source of much needed foreign currency.<sup>135</sup> Claiming that elephant populations must economically justify the allocation of land and resources necessary for their protection (from humans), African citizens and officials began to argue for a new 'sustainable use' strategy to manage elephant populations.<sup>136</sup> The pressure from this campaign has influenced the recent CITES decisions which will be discussed in the next chapter.

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<sup>128</sup> Thornton (Note 7)

<sup>129</sup> *ibid*

<sup>130</sup> Storey (Note 21) at 380

<sup>131</sup> *Ibid*

<sup>132</sup> *ibid*

<sup>133</sup> B Child 'A perspective from Zimbabwe: The Elephant as a Natural Resource' *Wildlife Conservation* March/April 1993, at 60

<sup>134</sup> Child (Note 133) at 60

<sup>135</sup> Del Baglivo (Note 11) at 295

<sup>136</sup> Dansky (Note 67) at 971

## CHAPTER 4: Pertinent CITES Decisions over the Last Decade

### 4.1. COP-10 Ivory Decisions

The tenth meeting of the Conference of the Parties of CITES was held in Harare, Zimbabwe in June 1997. Robert Mugabe, President of Zimbabwe, opened the meeting by saying, “We believe a species must pay its own way to survive.”<sup>137</sup> Three southern African countries, Zimbabwe, Namibia, and Botswana, proposed to transfer their elephant populations from Appendix I to Appendix II.<sup>138</sup> The African elephant in these regions was claimed not to be an endangered species,<sup>139</sup> and the CITES Panel of Experts announced therefore that the elephant populations of these three states no longer met the biological criteria for Appendix I.<sup>140</sup> The populations did not meet the new objective criteria in Annex 1, and should therefore be delisted under the requirements of Annex 4(b).<sup>141</sup>

The Parties agreed to transfer these populations to Appendix II for only the following purposes:

1. export of hunting trophies for non-commercial purposes,
2. export of live animals to appropriate and acceptable destinations (Namibia-for non-commercial purposes only),
3. export of hides (Zimbabwe only), and
4. export of leather goods and ivory carvings for non-commercial purposes only (Zimbabwe only).<sup>142</sup>

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<sup>137</sup> Dansky (Note 67) at 971

<sup>138</sup> Ibid at 972

<sup>139</sup> G Hertzler & M Gomera ‘Are African elephants an endangered species?’ (2004) *IUCN Regional Office for Southern Africa* 2004

<sup>140</sup> Dansky (Note 67) at 972

<sup>141</sup> Res 9.24, CITES COP-9, Annex 4(b) states that even if ivory will be in demand the countries will have proper management regimes in place to protect animals from being poached.

<sup>142</sup> Dansky (Note 67) at 972

The Parties also, eventually, after much controversial discussion, agreed to allow the three countries to export their raw stockpiled ivory to Japan after March 19, 1999.<sup>143</sup> This would only be allowed if the following nine conditions were satisfied:

1. the ivory control deficiencies identified in the Panel of Experts evaluations are remedied;
2. the CITES Secretariat verifies that all conditions have been fulfilled;
3. the CITES Standing Committee agrees that all conditions are met;
4. the three proponent countries withdraw their reservations to the elephant listing before the new listing takes effect (September 18, 1997);
5. there is a renewed commitment to regional law enforcement cooperation through such mechanisms as the Lusaka agreement;
6. mechanisms are established or strengthened to reinvest ivory trade revenue into elephant conservation;
7. a mechanism is developed by the Standing Committee for automatic re-transfer of downlisted populations to Appendix I (i.e. halting trade) if conditions are violated or if there is an escalation of illegal hunting or trade;
8. there is compliance with all other precautionary measures in the original proposals;
9. agreement is reached on an international reporting and monitoring system for poaching and illegal trade.<sup>144</sup>

The CITES decision required that all money the three countries would receive from the 1999 ivory sale would go into conservation efforts.<sup>145</sup>

Many countries opposed the decision, claiming that this limited opening of trade corridors may be detrimental to elephant populations in other African countries as poaching may reach a point of escalation again.<sup>146</sup>

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<sup>143</sup> Quotas were set for the amount each country would sell. Botswana was allowed to sell 25.3 tons, Namibia 13.8 tons, and Zimbabwe 20 tons. *See* Dansky (Note 67) at 972 footnote 79.

<sup>144</sup> CITES, *Trade in Endangered Fauna & Flora Oversight Hearing: The CITES Conference of the Parties, July 17, 1997*, available in 1997 WL 11234968 (summary report of the tenth meeting of the CITES Conference of the Parties)

<sup>145</sup> Dansky (Note 67) at 973

<sup>146</sup> The United States of America was one of the opposing countries, along with the leading opposition, Kenya. *See* Dansky (Note 67) at 973

#### *4.1.1. Japan as a trading partner*

Japan was chosen as a trading partner to these countries regarding the once-off sale in 1999 for two main reasons. It is the largest consumer of ivory in the world, having imported the equivalent of 120 000 pairs of tusks in the ten years before the ban as introduced in 1989, and it is reputed to have the most effective system for regulating its ivory industry.<sup>147</sup> In addition to this, finished ivory products made in Japan are intended solely for the Japanese market and not susceptible to export.<sup>148</sup> The re-export of worked ivory to other destinations can thus be prevented, which simplifies trade monitoring and eliminates a potential avenue for illegal trade to develop.<sup>149</sup>

However, some conservationists feel that protecting elephants by attaching an economic value to them and managing them commercially will only lead to further illegal trading system as long as a legal trading system is in place.<sup>150</sup> Moreover, wildlife conservationists, such as WWF and the Environmental Investigation Agency (EIA), agree that not only is there some doubt in the effectiveness of the anti-poaching measures in the three African countries that sponsored the proposal but also that Japan, as the world's leading ivory consumer, is not a suitable trading partner.<sup>151</sup> The success of the arrangement made by CITES and the countries in question depends on the assurances made by the Japanese authorities on their ability to track the ivory once it arrives in Japan and before it is processed.<sup>152</sup> In this respect, Japan's legislation against the illegal trade in ivory is acknowledged to be extremely complicated and difficult to understand.<sup>153</sup> By law, all ivory sales in Japan must be registered but it appears that only whole tusks need to be registered and the requirements to register these tusks as being of legal origin are so weak to be meaningless.<sup>154</sup> Although this internal ivory control law was enacted in 1996 only one case went to trial in the two years after.<sup>155</sup> Domestic regulations also stipulate

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<sup>147</sup> Ong (Note 49) at 304

<sup>148</sup> Ibid

<sup>149</sup> Ibid

<sup>150</sup> Ibid

<sup>151</sup> Ong (Note 49) at 304

<sup>152</sup> Ibid

<sup>153</sup> Ibid

<sup>154</sup> Ibid

<sup>155</sup> Ibid

that all ivory products should carry a CITES tag of authorisation. In practice though, unscrupulous traders who sell untagged items are rarely penalised.<sup>156</sup> Despite acknowledgement that the present enforcement regulations are inadequate, there are no plans to tighten these regulations.<sup>157</sup> In addition to these problems, concern is expressed by various NGOs that there are no simple means of determining between illegally and legally-imported ivory once these are in the form of finished ivory products.<sup>158</sup> Thus it appears that it may have been slightly premature to allow Japan to be a trading partner of these stockpiles. However, it may have been difficult to choose another country in the circumstances.

#### *4.1.2. Effects of the Ban Removal*

Some conservationists claimed that the removal of the ban had already led to increased poaching just months after COP-10.<sup>159</sup> Five months before the meeting in Harare, in anticipation of the removal of the ban, poachers machine-gunned down hundreds of elephants.<sup>160</sup> The International Fund for Animal Welfare (IFAW) reported that elephant poaching in Zimbabwe, Zambia, the Democratic Republic of Congo, the Central African Republic, Ghana and other African countries began to escalate as early as 1997, when the decision to allow the sale was announced.<sup>161</sup> IFAW reported a 50% increase in elephant poaching in Zimbabwe alone in 1997 and 1998.<sup>162</sup> Even a Zimbabwe newspaper claimed an increase in poaching activities between 1996 and 2000 with the Parks and Wildlife Management Authority having experienced high incidence of scourge (this was heard in the House of Assembly).<sup>163</sup> Numerous studies conducted by other international NGOs documented increased elephant poaching and ivory smuggling across the African continent after the 1999 sale.<sup>164</sup> After the approval of the sale of stockpiled ivory, a

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<sup>156</sup> Ibid at 305

<sup>157</sup> Ibid

<sup>158</sup> Ibid

<sup>159</sup> Dansky (Note 67) at 974

<sup>160</sup> Ibid

<sup>161</sup> Del Baglivo (Note 11) at 298

<sup>162</sup> Ibid

<sup>163</sup> AHI News 'Zimbabwe: Poachers Kill 209 Jumbos in 4 Years' April, 7, 2006 *The Herald (Harare, Zimbabwe)*

<sup>164</sup> 'Sustainable Development International' *African Nations Sustain Ban on Ivory Trade*, at <http://www.sustdev.org/industry.news/042000/0149.html>

significant increase in poaching was reported in Kenya's Tsavo and Damburu wildlife reserves; recorded ivory seizures also increased 400% in Kenya during 1999.<sup>165</sup> Poachers in Kenya's Tsavo National Park killed 29 elephants in 1999, five times the average annual total during the CITES Ivory Ban.<sup>166</sup> It is estimated that the price of ivory rose from \$22 before the 1999 sale to approximately \$400 in the year following the sale.<sup>167</sup>

However, at the April 2000 Convention of the Parties in Nairobi, the CITES Standing Committee stated that there was no significant increase in the poaching of elephants attributed to the one-time sale to Japan and that the sale was a complete success in that it had not prompted any significant deaths on the African continent.<sup>168</sup> So it remains questionable who to believe when one finds a great rift in the argument between the 'selling' nations and the international NGOs. However, one might find it necessary to add that NGOs rarely have anything (especially monetary) to gain from their investigations.

#### 4.2. The Reinstitution of the Ivory Ban (COP-11)

The eleventh meeting of the Conference of the Parties was held in 2000 in Nairobi. Zimbabwe, Namibia, and Botswana proposed maintaining the elephant on Appendix II in their nations and requested further CITES-approved sales of stockpiled "legal" ivory.<sup>169</sup> South Africa joined the three nations in proposing further sales. Kenya and India<sup>170</sup>, fearful that further sales would lead to increased elephant poaching (as it did after the 1999 sale), proposed returning the African elephant to Appendix I in all party nations, thereby resuming a total ban on all ivory sales.<sup>171</sup>

A compromise was reached whereby the four southern African nations requesting further sales withdrew the proposal for two years and Kenya and India withdrew their proposal

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<sup>165</sup> Del Baglivo (Note 11) at 299

<sup>166</sup> Ibid at 299

<sup>167</sup> Ibid

<sup>168</sup> Del Baglivo (Note 11) at 297

<sup>169</sup> Ibid at 299

<sup>170</sup> Asian elephants' survival is also dependant on the African elephant Appendix listing, as Asia experienced higher levels of poaching when the African elephant was transferred to Appendix II. See C Tudge 'Asia's elephants: no place to hide' January, 15, 1994 Vol 141, No 1908 *New Scientist* at 34

<sup>171</sup> Del Baglivo (Note 11) at 300

to return all elephants to Appendix I.<sup>172</sup> Parties agreed to delay any ivory sales until an effective system was in place to prevent the widespread poaching of elephants.<sup>173</sup> A study was to be conducted on elephant population statistics and the potential impacts of future limited ivory trade<sup>174</sup> the compromise agreement stayed any further discussion of additional ivory sales until next Convention of the Parties (COP-12) in November of 2002.<sup>175</sup>

#### 4.3. COP-12 Decision

At the twelfth meeting of the Conference of the Parties, held in Santiago, Chile, in November 2002, proposals for a further one-off trade in ivory were submitted by Botswana, Namibia, South Africa, Zimbabwe and Zambia. Kenya and India both proposed to transfer all African elephant populations to Appendix I, but later withdrew.

The proposals from Zimbabwe and Zambia were rejected as these countries failed to prove that their management regimes were sufficient to protect their elephant populations from being overexploited. Botswana, Namibia and South Africa' proposals were all approved but under certain conditions. The sale would only commence in 2004 and the selling of the stockpiles was to go to conservation efforts. The conditions which had to be met read as follows:

'a) The African elephant range States recognize:

iii) that various funding commitments were made by donor countries and agencies to offset the loss of assets in the interest of unifying these States regarding the inclusion of African elephant populations in Appendix I;

iv) the significance of channeling such assets from ivory into improving conservation and community-based conservation and development programmes;

b) Accordingly, the African elephant range States agree that all revenues from any purchase of stockpiles by donor countries and organizations will be deposited in and managed through conservation trust funds, and that:

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<sup>172</sup> Ibid

<sup>173</sup> Ibid

<sup>174</sup> Hence the formation of the Monitoring Illegal killing of Elephants System (MIKE) and the Ivory Trade Information System (ETIS)

<sup>175</sup> Santiago, Chile.

i) such funds shall be managed by Boards of Trustees (such as representatives of governments, donors, the CITES Secretariat, etc.) set up, as appropriate, in each range State, which would direct the proceeds into enhanced conservation, monitoring, capacity building and local community-based programmes; and

ii) these funds must have a positive rather than harmful influence on elephant conservation.

c) It is understood that this decision provides for a one-off purchase for non-commercial purposes of government stocks declared by African elephant range States to the CITES Secretariat within the 90-day period before the transfer to Appendix II of certain populations of the African elephant takes effect...

d) The African elephant range States that have not yet been able to register their ivory stocks and develop adequate controls over ivory stocks require priority assistance from donor countries to establish a level of conservation management conducive to the long-term survival of the African elephant.

e) The African elephant range States therefore urge that this matter be acted upon urgently since any delays will result in illegal trade and the premature opening of ivory trade in non-proponent range States.<sup>176</sup>

Onlookers of the meeting claimed the debate (between the “pro-traders” and those countries against the opening of trade corridors) was bitterly divided, and the three countries had to make heavy concessions to narrowly win the two-thirds majority vote.<sup>177</sup>

The delay of sales until monitoring can be assured was a significant breakdown from the original proposals to sell both the stockpiles and the annual quotas.<sup>178</sup> South Africa’s Environmental Minister, Vallie Moosa, called the vote an ‘enormous victory for South Africa’s sustainable use policies in the international arena’.<sup>179</sup> However, other African countries, like Eritrea<sup>180</sup> were of the opposite opinion. The delegate of Eritrea claimed that ‘One thing...sure of is that we have sent a message around the world that the African elephant is less safe than it was a day ago.’<sup>181</sup>

### *3.3.1. Implications of this decision*

In 2002, the Environmental Investigation Agency uncovered a huge poaching network running out of Zambia.<sup>182</sup> Six and a half tons of ivory was intercepted on its way to Singapore from Zambia. When Singapore authorities opened the containers, they had

<sup>176</sup> Conf No 10.2 (Rev. COP-11), *Decisions in Effect after COP-12*, at <http://www.cites.org/eng/dec/valid12/10-02.shtml> (last viewed on 5th December 2006)

<sup>177</sup> Science/Nature ‘African ivory sales get go-ahead’ November 13, 2002 *BBC News Online*, at <http://news.bbc.co.uk/1/hi/sci/tech/2454249.stm>

<sup>178</sup> Ibid Were only allowed to sell 30 tons altogether- The Guardian J Vidal November 13, 2002 – delay until 2004 sell in April

<sup>179</sup> Ibid

<sup>180</sup> Who only have 28 elephants left in the entire country.

<sup>181</sup> BBC News (Note 177)

<sup>182</sup> Ibid

lifted the lid on a network which investigators believed may have transported up to 200 tons of poached ivory, roughly the equivalent of 20 000 elephants.<sup>183</sup> A month later Zambia's proposal to sell a stockpile of ivory was rejected, for obvious reasons. However, this investigation in which a huge poaching network was uncovered unravels a suspicion of how many more networks and poaching syndicates there may be. To allow the three countries to sell could therefore only be done through stringent conditions. Reports from all over central Africa were of an increase in poaching.<sup>184</sup> Congo's police and army were accused in the involvement of rampant elephant poaching.<sup>185</sup> One year after the ivory trade was relaxed, there was claimed to be a massive upsurge in smuggling, with China being the largest importer of illegal ivory.<sup>186</sup>

#### 4.4. The thirteenth meeting of the Conference of the Parties

In 2004 it became clear that Africa, rather than Asia (as in the past), had become the heart of illegal ivory trade.<sup>187</sup> Much of the manufacturing was now done in Africa.<sup>188</sup> Nigeria, Cameroon, the Democratic Republic of Congo and Ethiopia were the main importing manufacturing suppliers of illegal ivory.<sup>189</sup> Nigeria was found to be the worst regarding corruption and the increasing involvement in illicit ivory trade. In addition, it had the weakest police enforcement.<sup>190</sup> On the 18<sup>th</sup> March 2004, CITES banned all domestic trade in ivory. The decision to allow a once-off sale (at COP-12) of stockpiled ivory from the three southern African states was put off.<sup>191</sup> Trade was considered not to be safe while uncontrolled domestic trade continued.

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<sup>183</sup> Ibid – this is a frightening figure as Zambia only has 25 000 elephants- must have come from elsewhere.

<sup>184</sup> Brazzaville, Sapa, AFP October 22, 2002; Kinshasa D Lewis 'Congo Police, Army accused of Elephant poaching' Reuters January 20, 2005

<sup>185</sup> D Lewis (Note 184)

<sup>186</sup> 'Ivory Smuggling' letter regarding James Randerson's Report pg 32 November 15, 2003 no 2421 Vol 180 Winni Kiirn Species Survival Network Africa Pureau

<sup>187</sup> Ivory Plunder Upfront pg 7 September, 25, 2004 no 2466 vol 183

<sup>188</sup> Ibid

<sup>189</sup> Ibid

<sup>190</sup> Ibid

<sup>191</sup> Ivory Crackdown Upfront pg 4 March, 27, 2004 Vol 181 No 2440

#### 4.5. Conclusion

It remains unclear what the future decisions of CITES will be regarding the limited trade in ivory. It is, however, very clear that illegal trade increases with legal trade, and many African countries suffer when these trade corridors are opened. As far as the stockpiles waiting to be sold by the three African nations who received the go-ahead in 2002 are concerned, the Secretariat of CITES claims that the network CITES set up in 1998 to monitor poaching and elephant demographics has not yet gathered enough statistics through the reporting systems of the nations involved.<sup>192</sup> Kenya also claimed that South Africa had failed to prove that none of its stockpiled tusks came from poaching, and that very few African states are supplying up-to-date mortality data for elephants, which CITES would need to spot upsurges in poaching.<sup>193</sup> With a rising illegal domestic trade in ivory in countries so close to the southern states requesting to sell stocks (Angola and Mozambique are heavily involved)<sup>194</sup> it seems that it will be a while before this sale will be allowed by the CITES Parties.

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<sup>192</sup> F Pearce 'Ivory sale fuels illegal trade fears' March, 20, 2004 (181, 2439) *New Scientist* at 10

<sup>193</sup> *Ibid*

<sup>194</sup> *AFRICA'S BACKDOOR FOR IVORY.*, *New Scientist*, 02624079, 4/15/2006, Vol. 189, Issue 2547 **and** Elephants up and down Up and Down. Upfront pg 7 July, 9, 2005 Vol 187 No 2507

## CHAPTER 5: Sustainable use versus Protection

### 5.1. Introduction

It was at the seventh meeting of Conference of the Parties in Lausanne in 1989 when it became clear that a clear rift in attitude and ideals was forming between the east African nations and the southern African nations regarding the protection of the African elephant. Two primary theories of wildlife management have developed. Pure protectionism, lead by east African countries like Kenya, appose any trade in ivory.<sup>195</sup> Advocates of sustainable use, lead by southern countries like Zimbabwe, applaud the decision to allow ivory sales to continue.<sup>196</sup> Competition for land between people and elephants is severe in these countries. As both these countries encourage that wildlife is also found outside parks, this often causes tension as the overpopulation of people creates more habitat loss for elephants. As elephants are forced to now live in the vicinity of humans, it becomes obvious that dangerous encounters will occur. After the ivory ban, both countries turned their attention to human needs while forming and implementing their elephant management strategies.<sup>197</sup> Tourism remains more vital than ever in both Zimbabwe and Kenya's economies.<sup>198</sup> However, while Kenya has gained much financial revenue from tourism and remains a popular tourism destinations, Zimbabwe's recent political strife and increased costs of travelling has rendered is almost "dangerous" to visit. The Kenyan authorities have long opposed both hunting and culling, while both are supported in Zimbabwe.<sup>199</sup> While most of the wildlife is under state control in Kenya, a significant proportion of Zimbabwe's wildlife has been transferred to District Councils. The idea here is that the people living on the land must reap the benefits of the wildlife found on that particular piece of land. Wildlife is in turn viewed as a resource. In Kenya wildlife is protected and only dangerous animals are eliminated. Both these ideals will now be discussed in more detail.

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<sup>195</sup> Heimert (Note 36) at 1480

<sup>196</sup> Ibid

<sup>197</sup> Ibid

<sup>198</sup> Berger (Note 39) at 441

<sup>199</sup> Ibid

## 5.2. Protection Approach led by Kenya

Kenya, along with some of the other east African countries, took the brunt of the ivory trade. Poaching almost decimated elephant populations in these areas. Anti-poaching units lost their lives defending elephant herds from poachers. These countries lobbied so strongly for the ban because their elephants were literally on the brink of extinction. The ivory trade was responsible for this.

Protectionism derived from the practical impossibility inherent in distinguishing illegal ivory from legal ivory.<sup>200</sup> Its Proponents reasoned that the more legal ivory traded, the easier it will be for poachers to place illegal ivory into the trade stream.<sup>201</sup> This is reflected in the events preceding the Ivory Ban. Kenyan President, Daniel Arap Moi, publicly set fire to 2 500 tusks, in an attempt to create awareness that selling ivory represents the murder of elephants. Rather than focus on the sale of ivory for income, Kenya has developed a very robust tourism industry.<sup>202</sup> Wildlife tourism in Africa provides more than \$4 billion annually to urban and rural communities, reflecting tourists' desire to see elephants and other African wildlife in their natural habitats.<sup>203</sup> The method used to eliminate human-elephant confrontations is fencing areas containing elephants.

### 5.2.1. *Separating humans and elephants through fencing*

Richard Leakey maintains that the only way to keep the conflict between humans and elephants at bay is to fence the elephants away from human habitations.<sup>204</sup> Fencing is relatively easy to construct, does not directly harm elephants, helps keep poachers out, and has political support.<sup>205</sup> The electrical fences are designed to keep large avifauna

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<sup>200</sup> Glennon (Note 13) at 23

<sup>201</sup> Ibid

<sup>202</sup> S B Edwards 'Legal trade in African elephant ivory: Buy ivory to save the elephant?' (2001) 7 *Animal Law Journal* 119 at 129

<sup>203</sup> Ibid

<sup>204</sup> Storey (Note 21) at 383

<sup>205</sup> Ibid

inside but allow other animals to move across the borders and roam in “non-park” territories.<sup>206</sup>

However, elephants are highly nomadic and often travel long distances in search of food and water. An inability to disperse can lead to the sort of deforestation experienced in Kenyan parks.<sup>207</sup> Artificial boundaries cause inbreeding and negatively affect natural selection. The only way around this would be to allow parks to be constructed along “ecological boundaries” or let elephants roam from one park to another. The latter of this is undesirable as it creates tension between humans and elephants. Conservationists from southern African states claim that enclosed elephants will multiply and destroy their own habitat, killing themselves and other species. However, one would think natural species would reach a carrying capacity capable by the area the elephants are enclosed in.

### 5.2.2. *Killing dangerous animals*

It is inevitable that elephants will become dangerous when in contact with humans. In the first four years after the ivory ban 108 people were killed by elephants in Kenya.<sup>208</sup> This caused an uproar among local communities such as the Masai Mara. KWS Director Richard Leakey authorised the killing of dangerous elephants in 1990.<sup>209</sup> Almost 200 elephants were killed by field wardens from 1990 to 1994 in response to angry citizens. After an accusation that KWS cared more for elephants than it did for humans, more aggressive policy towards killing dangerous elephants was developed.<sup>210</sup>

While problem animal control usually involves killing one or a few dangerous animals, culling for ecological purposes requires the killing of large family groups, and the practice has not been supported by Kenya.<sup>211</sup> While KWS is eager to kill dangerous elephants before they cause harm, it has always been opposed to culling. The reason for this will be discussed in a later section.

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<sup>206</sup> This allows for a better ecological standard, as most African animals are nomadic. It also allows for a greater chance of genetic diversity.

<sup>207</sup> Storey (Note 21) at 383

<sup>208</sup> Berger (Note 39) at 443

<sup>209</sup> Ibid

<sup>210</sup> Ibid

<sup>211</sup> Ibid

### 5.3. Sustainable Use led by Zimbabwe

Zimbabwe is the leader in putting conservation in the hands of rural communities and tribes rather than leaving this responsibility to the state.<sup>212</sup> Its vision of sustainable use is based on consumptive use.<sup>213</sup> Zimbabwe's approach to elephant management is vastly different to Kenya's. While Kenya allows only the killing of dangerous animals, Zimbabwe actively culls herds, promotes hunting, and lobbies for the legalization of the ivory trade. Conservationists here argue that efforts to protect elephants, can, and should, be funded through trade in elephant products.<sup>214</sup> Zimbabwe along with the other southern states argues that they have managed their populations more successfully than the eastern countries and therefore should not be penalised.<sup>215</sup> The southern states also argue that effective elephant management is expensive, and that the sale in ivory, taken from culling and natural deaths, can aid them in conserving the elephant for future generations.<sup>216</sup> However, in the past, the monetary benefits from selling ivory have rarely gone back into the protection of the elephant.<sup>217</sup>

Many Parties, along with the east African nations, disagree with the southern states' argument that sustainable use is the only way to save the elephant from extinction. India, a range state of the Asian elephant, fears that any legalized trade in elephant parts will lead to the "dirty ivory" scenario in which approved ivory auctions include ivory taken by poachers in Asia as well as Africa.<sup>218</sup> Other countries, like the United States of America, believe that approved ivory sales will once again push the elephant to the brink of extinction.<sup>219</sup>

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<sup>212</sup> Berger (Note 39) at 453

<sup>213</sup> Ibid

<sup>214</sup> Del Baglivo (Note 11) at 302

<sup>215</sup> Ibid at 303

<sup>216</sup> Ibid

<sup>217</sup> Thornton (Note 91)

<sup>218</sup> Del Baglivo (Note 11) at 303

<sup>219</sup> Ibid

The southern states view these objections to their plans for sustainable use of the elephant as interference of their sovereign right to use their natural resources as they see fit.<sup>220</sup>

They see this interference as an example of neo-colonialism, where Western states and international NGO's meddle in their plans in an attempt to keep their countries in poverty.<sup>221</sup>

### *5.3.1. Culling as a management objective*

Zimbabwe, along with South Africa, is one of the few countries that use culling. This is done for the following reasons; to reduce numbers of elephants down to maintain maximum diversity, and to bring in revenue for the parks.<sup>222</sup> The latter, they claim, is necessary as elephants are capable of causing the localised extinction of animals and can damage the vegetation.

Other countries, such as Kenya, strongly oppose culling as morally wrong.<sup>223</sup> Richard Leakey, former Director of Wildlife in Kenya, says: "There is plenty of evidence that elephants are intelligent, social animals. Can we morally justify killing these creatures? I think not."<sup>224</sup> Cynthia Moss, a well-known elephant researcher, agrees.<sup>225</sup> She has spent decades with the elephants in Amboseli Park in Kenya, documenting familial interactions and responses to death, and this has given her a strong feeling of opposition towards culling.<sup>226</sup>

Most officials and conservationists agree that elephant populations in Zimbabwe are not currently endangered.<sup>227</sup> Elephant populations are claimed to be rising and officials claim there are too many elephants for the habitat allocated to them.<sup>228</sup> Despite international scepticism, southern African states have been culling for years with no significant

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<sup>220</sup> Ibid

<sup>221</sup> Ibid

<sup>222</sup> Storey (Note 21) at 381

<sup>223</sup> Ibid

<sup>224</sup> Leakey (Note 29) at 89

<sup>225</sup> Storey (Note 21) at 381

<sup>226</sup> Ibid

<sup>227</sup> Ibid at 382

<sup>228</sup> Ibid

pressure from outside groups. Culling seems an acceptable solution for Zimbabwe in the short term, and many of its ecologists accept it as an unhappy necessity.<sup>229</sup>

Culling is popular with the local populations because they benefit directly or indirectly from the cull. In addition to this, local communities have resentment toward elephants and are happy to have them killed.<sup>230</sup> In the long term, however, as more is known about the elephant, culling may become increasingly under fire.<sup>231</sup> Until then the nations that use culling will increase their pressure on the international community to allow a return to ivory trading.<sup>232</sup>

### 5.3.2. *CAMPFIRE*

The Communal Areas Management Program for Indigenous Resources (CAMPFIRE) was launched in Zimbabwe in 1989.<sup>233</sup> The program puts the responsibility of conservation into the hands of local communities. The idea here is that if the communities will financially benefit from the wildlife in their area they will be more inclined to use it sustainably. Revenue is earned through the sale of hunting permits.<sup>234</sup> This money is then injected back into the community to build schools and roads, among other things.<sup>235</sup>

The launch of CAMPFIRE was to decrease the communities' hostility to elephant preservation by turning the elephant into income.<sup>236</sup> Under CAMPFIRE, local governments are given control over, and profit from, natural resources as an incentive to maintain them.<sup>237</sup> Profits can come from various sources, such as eco-tourism and photo-safaris. However, the main source of income comes from hunting.

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<sup>229</sup> Ibid

<sup>230</sup> This resentment stems from the danger they face living with elephants.

<sup>231</sup> Storey (Note 21) at 383

<sup>232</sup> Ibid

<sup>233</sup> McBride (Note 19) at 750

<sup>234</sup> Ibid

<sup>235</sup> Ibid

<sup>236</sup> Hitch (Note 10) at 193

<sup>237</sup> Ibid

Campfire's immediate roots trace back to Rhodesia's 1975 Parks and Wildlife Act, which first allowed area landowners to use wildlife.<sup>238</sup> In 1999, twenty-seven of the fifty-six communal areas utilized CAMPFIRE.<sup>239</sup> It is hard to say now, after the country has had much political turmoil in recent years, how much influence CAMPFIRE still has.

CAMPFIRE is able to utilize trophy hunting as a source of revenue because CITES only prohibits the trade of elephant products.<sup>240</sup> Hunting for sport is not regulated by CITES. The cost of a hunt is high, and an elephant can bring around U\$ 10 000.<sup>241</sup> By engaging people in the management of their own environment, CAMPFIRE has provided new economic and ecological stability. Most important to Campfire's success is the fact that many communities have seen a greater return from utilizing wildlife than through other land uses.<sup>242</sup>

CAMPFIRE has been seen in much positive light regarding the elephant. However, it has been criticised because of its reliance on hunting as well as its inability to become self-sufficient.<sup>243</sup> The program has been funded since its inception by donor nations.<sup>244</sup> Through USAID, the United States has pledged over U\$28 million to CAMPFIRE for operating years 1996-1999.<sup>245</sup>

#### 5.4. Conclusion

In considering the next step, the CITES Parties should consider what the elephant management approaches in the east African countries (Kenya) and the southern African countries (Zimbabwe) have in common, instead of dwelling on the differences.<sup>246</sup>

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<sup>238</sup> Hitch (Note 10) at 194

<sup>239</sup> Ibid

<sup>240</sup> Ibid

<sup>241</sup> Ibid at 195

<sup>242</sup> Ibid

<sup>243</sup> Ibid at 193

<sup>244</sup> Ibid

<sup>245</sup> Ibid

<sup>246</sup> Berger (Note 39) at 440

In both Kenya and Zimbabwe, competition for land between elephants and humans is high. Both wildlife authorities in both countries want to keep wildlife alive on lands outside parks and reserves. Both wildlife authorities, while acknowledging failures and problems, are proud of their history of responsible management of wilderness areas.<sup>247</sup> It is important to remember that both countries claim to promote the survival of the species. Zimbabwe, however, sees the survival of the elephant viable only if it can bring in profits.

While Kenya opposes the hunting and culling of wildlife, Zimbabwe supports it. In Kenya the national government retains most control over wildlife, while in Zimbabwe wildlife is predominantly owned by District Councils.<sup>248</sup>

Kenya opposes the ivory trade and claims that as long as African governments are corrupt there will be an opening for illegal trade when legal ivory trade is allowed. The approach led by Kenya stems from frustration over corruption, greed and ‘unsustainable sustainability’. It has been proven in the past that advocates of sustainable use, such as Zimbabwe, have claimed that poaching is no problem- while poaching in 1989 was just as problematic as in Kenya- and that they should be allowed to continue trading in ivory.

Zimbabwe argues that it has a sovereign right to exploit its resources as long as it is done sustainably. There are arguments to this and the sustainability principle regarding the protection of elephants. First, its program, CAMPFIRE, has failed to become self-sufficient. Second, the opening of trade corridors, as Zimbabwe is proposing, would almost certainly lead to the overexploitation of elephants across the African continent, albeit not in Zimbabwe.

Both management schemes are, in principle, excellent. However, in practice they are problematic, as funds are never sufficient and corruption is inevitable.

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<sup>247</sup> Ibid

<sup>248</sup> Ibid at 441

## CHAPTER 6: Conclusion and Recommendations

### 6.1. Conclusion

CITES is the embodiment of international environmental law regulating trade in endangered and threatened species.<sup>249</sup> The Convention also represents the frontline in the war to protect animals and plants from extinction due to unsustainable use and exploitation by man.<sup>250</sup> Founded on the Principles of Preservation, Precaution, and Common Concern for Humankind, the Convention places the protection of species in the range states. One of Zimbabwe's CITES delegates wrote, in answering a questionnaire in 1992, that there are no monetary benefits from joining CITES.<sup>251</sup> It seems that some states have forgotten the purpose of environmental treaties like CITES. Countries all over the world came together for once not in their own interests, but in the interests in the survival of species other than human beings. Once all countries realize that this is the purpose and that preserving species like the elephants for purposes of both moral obligation and even human survival in some cases, then only can a treaty like CITES operate successfully.

The 1989 Ivory Ban stands as a model for international action to save an endangered species facing extinction.<sup>252</sup> In imposing the Ban, the Parties refused to allow theories of national sovereignty and subsidiarity to prevent unified action in order to save the elephant from extinction.<sup>253</sup> Southern African states, however, reject this view of the Ivory Ban and have since pressured CITES to reopen trade corridors. This pressure has been partly successful. However, due to the limited sales of ivory in 1999, illegal trade increased. This in turn has affected decisions made by CITES to put a ban in place again in 2004. This ban will not last long, and pressure is continuing to mount to reopen trade in ivory.

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<sup>249</sup> Del Baglivo (Note 11) at 310

<sup>250</sup> Ibid

<sup>251</sup> P Mofson 'Zimbabwe and CITES: Influencing the International Regime' CITES book Chapter 10 at 113

<sup>252</sup> Del Baglivo (Note 11) 310

<sup>253</sup> Ibid

In theory, limited trade in African elephant ivory is possible and even advantageous for the states facing overpopulation in African elephants. However, in practice, the management controls on the supply side in Africa and the demand side in Japan are insufficient to prevent poaching and the eventual decimation of the species.<sup>254</sup> The sustainable use system used by Zimbabwe will be an eventuality that all countries will have to employ in the long-term. Sustainable development is, after all, the goal of all human development concerning the environment. In the case of the protection of the elephant, however, it is necessary to include our moral obligations. Buck de Vries of the Gwayi Conservancy in Zimbabwe once said:

‘We want the elephant to be a commodity, because if it isn’t it might as well be dead.’<sup>255</sup>

This embodies the point of sustainability. However, there must be a move towards a less anthropogenic way of thinking. After all, humans may be the most successful members of all living beings, but our intelligence should teach us that sharing the world instead of exploiting it for our own economic benefit may bring more in the way of fulfilment than any artificial gain we may get from all other species.

## 6.2. Recommendations

Unless the elephant is to be subjected to the same horror it faced in the 1980s, a number of steps must be taken. First, the ivory trade must not continue until both the supply side and the demand side are dried up. In other words, as the President of Kenya, Daniel Arap Moi put it, “To stop the poacher, the trader must be stopped and to stop the trader, the final buyer must be convinced not to buy ivory.”<sup>256</sup> States that do not comply with the international ban must be pressured to do so until the elephant (all over Africa) is safe and an international controlled ivory-marketing system is in place.<sup>257</sup> It will take time for the monitoring systems (like MIKE and ETIS) to gather enough information in order to

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<sup>254</sup> Edwards (202) at 119

<sup>255</sup> Buck DeVries of the Gwayi Conservancy in Zimbabwe, Quote of the day, GREENWIRE, 3 December 2006, available in LEXIS, News Library, GRNWE File

<sup>256</sup> N.Y. Times, July 19, 1989, at A4

<sup>257</sup> Glennon (Note 13) at 37

gain control over elephant numbers, poaching syndicates and the ivory market. It is important to mention here that the latest technology should be used when operating the ivory-market system. Recent advances in science and forensics have been impressive.<sup>258</sup> International control through the use of tagging technology should be implemented.

Domestic enforcement is also weak in range countries and corruption among law enforcement authorities is not unknown. Antipoaching squads and other enforcement units need to be strengthened.<sup>259</sup> This can only be done if funds for these efforts are increased. Here, as Western nations adamantly claim that the protection of the African elephant is crucial, as well as that species like the elephants are a 'common heritage of mankind', developing nations struggling for conservation funds should be guided and funded by wealthier Western nations.<sup>260</sup> Here funds should also be allocated to public awareness and education so that the resentment many rural people feel towards the elephant can be changed, albeit slowly, towards the understanding of the need to protect species like the elephant.

Ultimately, environmental sustainable development must be supported as an essential prerequisite to elephant protection.<sup>261</sup> The elephant will not be safe as long as unlawful conduct pays more than lawful conduct. Most people believe that development is directed at the preservation and enrichment of *human life*.<sup>262</sup> Thus sustainable economic growth will be, in the long-term, the elephant's best insurance, particularly growth that gives the local populace a stake in the elephant's survival.<sup>263</sup> Until public awareness campaigns can teach people otherwise, it is an unhappy eventuality that the only way to protect a species is by receiving a profit from it.

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<sup>258</sup> Del Baglivo (Note 11) at 39

<sup>259</sup> Del Baglivo (Note 11) at 37

<sup>260</sup> If CITES Parties which are not range states pressure range countries to protect their species, they should also alleviate the burden of conservation/ protection costs.

<sup>261</sup> Del Baglivo (Note 11) at 39

<sup>262</sup> Ibid

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