

University of Cape Town

Faculty of Law

Department of Public Law

LL.M - INTERNATIONAL LAW

**CITES AND THE AFRICAN ELEPHANT: EXAMINING DOMESTIC
IMPLEMENTATION IN TANZANIA AND SOUTH AFRICA**



Dissertation submitted for the approval of Senate in partial fulfilment for the requirements of Masters Degree in International Law in approved courses and Minor dissertation at the University of Cape Town.

by

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Declaration

I, Seraphina Msengi Bakta do hereby declare that this minor dissertation is my own work and has not been submitted at the University of Cape Town or any other University. All reference materials have been dully acknowledged

Signed at University of Cape Town, South Africa

by

Signed by candidate

Seraphina Bakta

Date...15/2/2010.....

Dedication

To my late Parents
Mwalimu Naonawelu Msengi and Salome Nehemiah
The ones who first sent me to school

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List of abbreviations and acronyms

AC	Animals' Committee
AE	African Elephant
Art	Article
c/s	contrary to section
Cap	Chapter
CBD	Convention on Biological Diversity
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CoPs	Conference of the Parties
IUCN	International Union for the Conservation of Nature
MA	Management Authority
MEC	Members of the Executive Committee (Provincial, South Africa)
NEMA	National Environmental Management Act
NEMBA	National Environmental Management: Biodiversity Act (South Africa)
Para	Paragraph
RE	Revised edition
Reg.	Regulation (s)
RMs'	Resident Magistrates'
Rev.	Reviewed
s.	Section
SA	Scientific Authority
SADC	Southern African Development Community
SANBI	South African National Biodiversity Institute
TANAPA	Tanzania National Parks
TAWIRI	Tanzania Wildlife Research Institute
TRAFFIC	Trade Records Analysis of Fauna and Flora in Commerce
UN	United Nations
UNFCCC	United Nations Framework Convention on Climate Change
v.	Versus
WWF	World Wildlife Fund

'The survival of our wildlife is a matter of grave concern to all of us in Africa. These wild creatures amid the wild places they inhabit are not only important as a source of wonder and inspiration, but are an integral part of our natural resources and of our future livelihood and well being'

J.K Nyerere, 1961

Abstract

This dissertation examines the regulation of the international trade in the African elephant (AE) with a view to assessing the manner and extent to which domestic legislation in the selected countries is consistent or at variance with the Convention on International Trade in Endangered Species of wild Fauna and Flora (CITES). The study seeks to assess the listing criteria and other mechanisms for regulating such trade by examining the international regime under CITES. Furthermore, by focusing on administrative and legislative measures, it also analyses the extent to which such measures are relevant in addressing pertinent issues concerning the African elephant. These issues include the efficacy of administrative and legislative measures in regulating international trade in the AE, the effect of CITES in the domestic regime and challenges facing effective domestic implementation in as far as the AE is concerned.

The study argues that the efficacy of CITES cannot fully be realised in the absence of workable domestic regimes among member states. Both Tanzania and South Africa have made attempts to implement CITES, yet such attempts fall short of CITES and the guidelines (Annex 'D') produced by the CITES Secretariat.

The study found that domestic implementation of CITES in the two countries is insufficient (and in some aspects weak) owing to various challenges. These challenges include (but are not limited to) the conflicting interests of parties, inherent weaknesses under CITES, the lack of sufficient resources, including financial constraints and technological barriers. In addition, the administrative and legislative measures adopted by the Conference of the Parties (CoPs) have not been meaningfully complied with by the two countries.

The study concludes that, adequate domestic legislation should be put in place in Tanzania and South Africa in order to realise the present and future benefits of the African Elephant. To be effective however, efficacy of such legislation is whittled down in the absence of a political will.

CHAPTER ONE

INTRODUCTION TO THE STUDY

1.1 Introduction

The importance of the African elephant (AE) both in international trade and domestically cannot be sufficiently emphasised. The AE is useful for tourism and other purposes. In addition, it is regarded as a unique 'keystone', a flagship and an 'umbrella' species.¹ Moreover, endangered species, including the AE, are migratory and, hence, traverse various jurisdictions for different purposes, including searching for new habitats, food and water. Further, the AE is one of the species threatened with extinction on account of threats such as habitat loss, climate change and the trade in ivory. A combination of these and other factors has given rise to a dilemma embedded in preservation as against the sustainable use of endangered species. This dilemma has attracted immense interest internationally, giving rise to competing imperatives among states and thereby complicating its regulation (along with other endangered species) under the Convention on International Trade in Engendered Species of Wild Fauna and Flora (CITES /the Convention).²

In the light of this controversy this study examines the regulation of international trade in the AE with a view to assessing the manner and extent to which domestic legislation in particular in Tanzania and South Africa is consistent or at variance with CITES.

The Convention's governing body, the Conference of the Parties (CoPs), has adopted various mechanisms for the regulation of international trade in endangered species key of which is the listing criteria. In accordance with the listing criteria, endangered species are listed or de-listed commensurate with the threats to their extinction. In relation to the AE however, attempts to meaningfully implement the administrative and legislative measures adopted by the CoPs have been particularly problematic for African countries, including Tanzania and South Africa both of which have large numbers of the AE. This study examines the manner and extent to which Tanzania and South Africa implements CITES with specific

¹ IUCN – The Central African Elephant Conservation Strategy – 2005 Available at www.iucn.org/themes/ssc/ at 6 [accessed 24/08/2009].(hereinafter the elephant strategy).

² Adopted at Washington DC 3rd March 1973 entered into force 1975 amended at Bonn June 1979. (In this thesis CITES and Convention are used interchangeably).

reference to the AE and its products, and the challenges the two countries face in their attempts to implement CITES.

The study argues that efforts by the two countries to implement CITES in their domestic regimes appear largely piecemeal and are essentially lacking in compliance with the Convention

1.1.1 Threats to endangered species

While it is accepted that international wildlife trade is one of the causes of species extinction,³ it is also undisputable that commercial exploitation for trade is not the only cause of wildlife depletion.⁴ Human activity, in its attempts to utilise the world's ecosystem, causes many threats to wildlife.⁵ The most recognised threat to wildlife is the destruction of natural habitat. This is followed by the introduction of alien species, climate change, inadequate methods of harvesting or processing that may render utilisation unsustainable, poaching, and human -animal conflict. These and other factors all play a key role in species extinction.⁶ In addition, international trade in wildlife is expanding due to international consumer demand that adversely affects many wildlife species, including the AE.⁷ It is against this background that CITES was adopted in 1973 to regulate international trade on animal and plant species threatened with extinction , or those which are likely to become extinct.

However, despite the fact that wildlife trade involves live animals and plants as well as their by-products such as hides, furs, ivory, timber, bark, fish products and others,⁸ yet not all wildlife species are subject to regulation by CITES.⁹ The Convention regulates trade only on species listed in its three appendices. While currently CITES regulates international trade in more than 30, 000 plant and animal species,¹⁰ issues concerning the AE , exceptionally, have been hotly contested in the CoPs as well as attracting extensive media attention.¹¹ This

³ Rosalind Reeve 'Wildlife trade, sanctions and compliance' (2006) 82 (5) *International Affairs* 881 at 881.

⁴ Edward B Barbier et al *Elephants, economics and ivory* (1990).

⁵ Rosalind Reeve *Policing international trade in endangered species: the CITES Treaty and compliance* (2002) at 8.

⁶ Barbier et al (note 4).

⁷ Reeve (note 5).

⁸ *Ibid* at 8.

⁹ *Ibid*.

¹⁰ Reeve (note 3).

¹¹ Barbier et al (note 4).

is mainly due to an attempt to find solutions to controversy surrounding sustainable use through the regulation of the international trade as against preservation. Such controversy results mainly from the fact that African states view elephants as source of income to address poverty problems and generate income for conservation and, therefore they need to use them in a sustainable way. This is supported by ivory importing states such as Japan and China.¹² This approach seems to conflict with preservationists who favour trade bans as a means to regulate international trade. African range states are therefore are confronted with the challenges of sustainable use against preservation (among others) of its elephants which are listed in appendix I of CITES, excepting the AE population in a few Southern African countries.¹³

1.2 Background

Man's exploitation of wildlife for profit and the international trade in wildlife has been in existence for many centuries.¹⁴ Such exploitation can be attributed to many factors. For example, during the European Renaissance, man became increasingly convinced that nature was indifferent and mindless with no direction and thus it could not be granted sympathy.¹⁵ This belief had serious impact on other species including animals that man seems to have exploited with a vengeance.

Additionally, from a biblical point of view man was given a dominion over all species in the world.¹⁶ This was however not subject to regulation on how to exploit these species, leaving man as the sole 'owner' of the earth's resources. By nature, man's unlimited freedom or power is subject to abuse.¹⁷ For example, first, among the reasons for the rapid growth of administrative law in the 19th and 20th centuries was the need to limit the powers of the rulers.¹⁸ Second, fundamental rights in various international and national instruments are

¹²TRAFFIC 'African Elephant and the 14th Meeting of the Conference of the Parties to CITES The Hague Netherlands 03-15 June 2007' A TRAFFIC Briefing Document 2007(hereinafter TRAFFIC Report 2007).

¹³ See chapter 3 on status of the African elephant.

¹⁴ Chris Huxley 'CITES: The Vision' in John Hutton and Barnabas Dickson *Endangered species threatened Convention: the pas, present and future of CITES* (2002) 3.

¹⁵ John Opie 'Renaissance origins of the environmental crisis' (1987) 11 *1 Environmental Review* 2at 15.

¹⁶ Genesis 1:28 'Then God blessed them and said to them...have dominion over the fish of the sea, over the birds of the air, and on every living thing that moves on the earth.'

¹⁷ Michael T Molan *Administrative law* 2nd ed (1999).

¹⁸ *Ibid.*

coupled with duties so as to remove the notion of absolute rights.¹⁹ The freedom and power of man over all natural resources has inevitably led to overexploitation.

Further, for a long time including prior to the colonisation of Africa, animal hunting was engaged in mainly for subsistence. Of course, hunting was also done for security purposes, especially when an animal threatened human lives. Weapons used for hunting, such as swords, knives, and clubs, were unsophisticated. Given these factors - limited use of natural resources and poor hunting tools - overexploitation was never an issue. In addition, hunting in traditional societies was regulated by rules and taboos imposed by elders. For instance, the hunting of certain animals was forbidden or strictly controlled.²⁰ Glazewski stresses this point by arguing that 'it may be a customary practise that certain animals are slaughtered on special ceremonial occasions.'²¹ For example, among the Muzey ethnic group of Cameroon the hunting of elephants is restricted because they are considered to be like human beings with a soul. Thus the killing of an elephant will cause a specific sickness - *tokora* - and impede future success in hunting.²² Indeed, African customary law, which may also be termed as 'African indigenous law',²³ though not dedicated to the regulation of trade had, and still has, a role to play in the protection of species.

However, with the advent of colonialism beginning in the mid-19th century, wild animals increasingly became objects of international trade.²⁴ Advancements in technology of hunting tools and the means of transport and communication, an increase for demand in animals and their derivatives, together increased the man's rate of exploitation. Other factors such as climate change have also contributed to the decline of species. Thus regulating trade in endangered species at international level and national level has become imperative, mainly for two broad reasons: Firstly that, multiple factors threatens species, and secondly, unregulated international trade.²⁵ Importantly, the regulation of international trade is

¹⁹ See The Universal Declaration on Human Right 1948, The African Charter on Peoples Right adopted in 1981 in force 1986, the Convention on the Rights of the Child adopted by UN General Assembly 1989, in force 1990

²⁰ Hamoud I Majamba 'Regulating the Hunting Industry in Tanzania: reflections on the legislative, institutional and policy-making frameworks' (2001) available at http://www.lead.or.tz/publications/regulating_hunting/regulating_hunting.pdf [accessed 20/8/ 2009].

²¹ Jan Glazewski *Environmental Law in South Africa* 2nd ed (2005) 12.

²² Igor de Garine 'Meat: Between ritual and Gastronomy' *ESTUDIOS DEL HOMBRE* 74 at 79 available at <http://www.publicaciones.cucsh.udg.mx/ppperiod/esthom/esthompdf/esthom19/73-89.pdf> [accessed 20/12/2009]

²³ Glazewski (note 21) at 12.

²⁴ Majamba (note 20).

²⁵ Huxley (note 14).

imperative because species other than humanity are not aware of political boundaries. Hence, they cross various jurisdictions for various purposes. Arguably, the rate of extinction of species gives no alternative but the regulation of such trade.

Although local and national efforts to conserve wildlife can be traced back many centuries, it is only recently that they have received the attention of the international community.²⁶ An increase in the human population and other factors has resulted in a wide range of uses of wild species and their derivatives. This has culminated in an increase in both legal and illegal commercial trade in wild species in order to meet the market demand. Illegal hunting and trade in the African elephant, mainly for its ivory, has dominated media reports.²⁷ Undeniably, ivory demand and trade (discussed in chapter three) have a close connection with illegal trade, something that has negatively affected the AE population.

1.2.1 The importance of the African elephant

The AE is regarded as a unique and by many people as an attractive species.²⁸ It is the world's largest terrestrial mammal and is a remarkable species with extraordinary intelligence, a complex social organisation and an astounding ability to adapt its behaviour.²⁹ It was not only a symbol of strength and power in traditional African society³⁰, but it is now also important in economics, art, ecology, land use³¹ and tourism. Thus, it has convincingly been argued that its conservation requires the careful consideration of biological, social, political and economic factors.³²

The AE occurs in 37 range states across sub-Saharan Africa, with a total estimated range of over 3.3 million km², 31% of which is thought to occur within protected areas.³³ In the Eastern African region, the largest population occurs in Tanzania which has 80 % of the

²⁶ Huxley (note 14).

²⁷ Media report *Save the Elephant Organization* Reporting on 3 December 2009 that the accused Mark Golberg was arrested and charged for unlawful possession of ivory worth R 32 m at Sea Point CapeTown.

²⁸ The Elephant Strategy (note 1).

²⁹ Ibid.

³⁰ Ibid at 6.

³¹ Ibid.

³² IUCN/SSC African elephant specialist group *Review of African elephants priorities* 2nd ed (1999) available at http://www.african-elephant.org/tools/pdfs/rvw_cnspr9904_en.pdf [accessed 25/08/2009].

³³ Report of the Fifty-eighth Meeting of the CITES Standing Committee Geneva Switzerland June 2009 on conservation status of and trade in elephants CS 58 DOC 36.1 annex 2 June 2009.

regional population.³⁴ Southern Africa has the largest population on the continent, with the greatest number occurring in Botswana and Zimbabwe.³⁵

The AE is important for tourism and commercial trade in their products - ivory and hide. In Tanzania, for example, the GDP income from tourism (other than trade and hunting) accounts for over 17%, which is 40% of the total of the country's export earnings. It creates over 700,000 employment opportunities.³⁶

In the 1980s the population of AE declined drastically. For example, in 1979 the population of AE was estimated to be 1.5m.³⁷ This number dropped to roughly 632,000 in 1989.³⁸ The main cause for this decline has been poaching for ivory³⁹ thereby giving rise to a dilemma as to what extent international trade may be regulated so as to reduce any illegal trade.

In seeking to appreciate the importance of regulating international trade in the AE, one needs to ask the question as to whether elephants are worth more dead than alive.⁴⁰ While it is true that ivory harvested from elephant has a commercial value, there are values from the elephant other than its ivory. These include their role as a tourist attraction and in opening areas for livestock and ensuring ecological balance.⁴¹ However, Parties to CITES have different motivations for protecting AE.⁴² These include preservation and sustainable use. The regulation of international trade particularly in the use of trade bans arguably seeks to reconcile these two views.

The preservationist takes an ecocentric approach towards animals. Two theories exist as to this approach, namely, 'animals welfare' and 'animals rights'. Animal welfare

³⁴ Ibid.

³⁵ Ibid.

³⁶ Donald Liya 'How tourism can benefit the poor: case studies around Serengeti National Park in Tanzania'. Available at <http://www.tnrf.org> [visited on 28/09/2009].

³⁷ Allan Thornton and Dave Currey *To save an elephant: the undercover investigation into the illegal ivory trade* (1991).

³⁸ Michael't Sas-Rolfes 'Assessing CITES: Four case studies' in Jon Hutton and Barnabas Dickson (eds) *Endangered species threatened Convention: the past, present and future of CITES* (2000) at 69.

³⁹ Ibid.

⁴⁰ Barbier et al (note4).

⁴¹ Timothy Swanson 'Developing CITES: making the convention work for all of the parties' in Jon Hutton and Barnabas Dickson (eds) *Endangered species threatened Convention: the past, present and future of CITES* (2000) 134 at 196.

⁴² Randi E Alarcon 'The Convention on International Trade in Endangered Species: the difficulty in enforcing CITES and the United States solution to hindering the illegal trade of endangered species' (2001) 14 *N.Y.Int'l.L Rev.* 105 at 109.

advocates argue for stronger laws preventing cruelty and requiring humane treatment.⁴³ These include, for example, the American Society for the Prevention of Cruelty to Animals. Animal rights advocates oppose any and all human use of animals. These include use of animals in zoos, agriculture, hunting and scientific experimentation.⁴⁴ The former approach is enshrined under CITES as far as transporting, shipping and handling live species provisions.⁴⁵ Thus, regulating international trade in the AE must be understood in the context of these competing imperatives.

1.2.2 Competing interests

In its efforts to regulate international trade in endangered species, especially the AE in which African states have keen interest, CITES have encountered two divergent and, at times, irreconcilable views. On one hand, there is the preservationist view which focuses on the inherent aesthetic value and the right of life of the non-human species.⁴⁶ On the other, is the conservation for sustainable use view, led by Zimbabwe,⁴⁷ which stresses the economic value of species being conserved⁴⁸ Interestingly, each of the two groups strives to achieve its goal and, in the process, conflict is inevitable. Within CITES CoPs, division arises from the differences in opinion as to the relative merits of trade bans and trade regulation. These competing interests have given rise to a dilemma as to whether CITES should retain its existing traditional approach, manifested in regulating international trade in endangered species, or embrace the emerging notion of sustainable use of such species.

This dilemma however, needs to be addressed as a matter of great urgency, because international trade should not be a source of extinction. Similarly, the rate of extinction of species, including the AE, does not necessarily require an additional protocol to CITES but rather mandatory enforcement and effective domestic implementation of the Convention.

⁴³ Cass Sunstein 'What are animal rights?' in Cass Sunstein and Martha C Nussbaum (eds) *Animal rights* (2006) at 4.

⁴⁴ Ibid.

⁴⁵ Article VIII (3).

⁴⁶ The Note 'The CITES Fort Lauderdale criteria: The uses and limits of science in international conservation decision making' (2000-2001) 114 *Harvard Law Review* 1769 at 1772. (hereinafter *Harvard L.R*)

⁴⁷ Mofson Phyllis 'Zimbabwe and CITES: Influencing the international regime' in Jon Hutton and Barnabas Dickson (eds) *Endangered species threatened Convention: the past, present and future of CITES* (2002)107 at 107.

⁴⁸ Note 46 *Harvard L.R* at 1772.

Currently it is estimated that there are 1,599,361 known species of plants and animals,⁴⁹ 44,838 are listed species of which 868(2%) are extinct, 16,928(38%) are threatened with extinction (with 3,246 of these critically endangered), 4,770 are endangered, and there are no data sufficient to determine the threat status of 8,912(12%) species.⁵⁰ It is estimated that species will decline between 20% to 30% due to climate change only if the global temperature exceeds 1.5% by 2030.⁵¹ The AE population is now less than 470,000 compared with the one million in the 1980s.⁵² At this rate of extinction, arising from trade and other factors, appropriate measures to protect endangered species have not only become imperative but also desirable if further extinction is to be minimised globally.

1.3 Statement of the problem

Attempts to control trade in AE and its products have been and remain problematic. A lack of effective legislation to regulate such trade has led to increased threats of extinction of the AE. Inadequate legislation and poor enforcement mechanisms are among factors that have substantially contributed to illegal trade in the AE in particular. Various factors are associated with inadequate implementation. These include the lack of financial resources, technical and technological ability, and inherent weaknesses, for example, of the CITES provisions on reservation and exemptions.

Further, varying interests and priorities of the Parties has given rise to a dilemma, namely, preservation against the sustainable use of endangered species-the AE in particular. Other factors include lack of political will in implementing CITES and regulating trade in the AE in particular, thereby hindering the meaningful implementation of CITES. Consequently, this adversely affects the regulation of international trade in the AE. The governments of Tanzania and South Africa have ratified CITES, but have taken different approaches in implementing the Convention. Although these approaches seek to comply with the countries' obligations under CITES and the decisions of the CoPs, not all these obligations and decisions have been adequately implemented in domestic legislation. It is for this reason that

⁴⁹ <http://www.currentresults.com/Environment-Facts/Plants-Animals/number-species.php> [accessed 16 September 2009].

⁵⁰ IUCN Red List 2008 updates available at <http://www.iucn.org/> [accessed 20/09/2009].

⁵¹ Intergovernmental Panel on Climate Change (IPCC) *Climate change synthesis report 2007* available at http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf [accessed on 10/07/2009].

⁵² *The Telegraph* United Kingdom, 07 January 2010 available at <http://www.telegraph.co.uk/> [accessed 07 January 2010].

Tanzania and South Africa are categorised under the National Legislation Project initiated by the eighth CoPs as Parties with inadequate domestic legislation for purposes of implementing CITES.

In both countries the reconciliation of the challenges as regards the regulation of international trade in species threatened with extinction with compliance in respect of their international obligations is among the critical issues the two states are grappling with. It is against this backdrop that this comparative study examines the domestic implementation of CITES in the selected countries, with special reference to the AE.

1.4 Key research question

In what manner and to what extent have Tanzania and South Africa sought to implement CITES in their domestic legislation for purposes of regulating trade in the African elephant?

1.5 Objective

The main objective of this study is to examine domestic implementation of CITES in Tanzania and South Africa, focusing on the challenges that would be minimised or altogether alleviated by implementing CITES. To achieve this, the following issues that form an integral part of the study are discussed.

- (a) What conceptual issues make regulation of international trade in AE imperative?
- (b) What is the relevance of CITES in its attempts to regulate international trade in endangered species?
- (c) Whether, and to what extent has the implementation of CITES in Tanzania and South Africa enhanced regulation of international on AE in each of the two countries?
- (d) What is the way forward in relation to regulation of international trade on the AE?

1.6 Significance of the study

This study emphasises the need for Tanzania and South Africa to comply with CITES in regulating trade in the AE, consistent with their international law and treaty obligations. In particular, the international law principle of *pacta sunt servanda* requires every state to

perform its obligations in good faith.⁵³ Moreover, failure to implement international instruments may not only amount to a breach of such obligations but also frustrates efforts of the adoption of other related instruments by other states.⁵⁴ The study makes reference to the AE owing to its value in terms of tourism and the ivory trade which is important for economic development in Africa.

This study, thus, serves as a guideline to policy and ultimately law in assessing and effecting changes in domestic legislation. Such changes are relevant to the implementation of CITES in both Tanzania and South Africa for purposes of regulating trade in the AE. Additionally, the study will contribute to the existing knowledge about international environmental law in Tanzania and South Africa and will be useful to academicians, lawyers, law students, conservationist, and the society at large.

1.7 Research design and methodology

1.7.1 Research design

The research is a desktop study. The researcher used the University of Cape Town Libraries and online sources to access primary and secondary sources. Primary sources refer to all international instruments and domestic legislation, while secondary sources refers to books, article journals, unpublished papers, newsletters, newspapers and internet sources.

1.7.2 Scope

The study focuses on Tanzania mainland (as its legislation on CITES does not apply to Zanzibar) and South Africa for three main reasons. One is the extent of biodiversity found in two countries. Tanzania and South Africa share a common feature of in that both countries provide the habitat of one of the African big five - the African elephant .Thus they have a common interest in regulating the trade in the African elephant and their products. Two is economic development, as both Tanzania and South Africa are developing countries but to different degrees, as Tanzania is less developed. Thus, an assessment to ascertain whether this may be a reason for variation in implementation is required. Three, considering that

⁵³ Article 26 of the Vienna Convention on the Law of Treaties 1969.

⁵⁴ GeirUlfstein et al (eds) *Making treaties work: human rights, environment and arms control* (2007).

South Africa has a rich environmental law regime, jurisprudence forms the basis for Tanzania to draw lessons from South Africa.

1.7.3 Data analysis and presentation

Data are analysed and presented using simple analysis tools. An accurate statement of the law, based on conventional legal principles, is provided in this work. This is, as far as possible, free of the researcher's personal opinions or analyses except where this is required by the context. Where reference is made to a legal text, the wording of the provision of the law or court decision is used. Abbreviations and acronyms are accompanied by the full citation and are also provided for in a table of acronyms and abbreviations. The researcher provides a conclusion and an analysis of the law in so far as it relates to a comparative analysis of implementation of CITES in Tanzania and South Africa.

1.8 Chapter synopsis

Chapter One covers the introduction and background. Information covered under this chapter includes statement of the problem, objectives of the study, the significance of the study, key research questions and methodology.

Chapter Two discusses the international regime on the regulation of international trade in endangered species. Special attention is given to objectives, scope and mechanism. Critical analysis and the strengths and weaknesses of the Convention form an integral part of the assessment.

Chapter Three discusses CITES and the African elephant. It examines administrative and legislative measures adopted by CITES CoPs to regulate trade in the African elephant. Various decisions relating to criteria and the listing of the African elephant are discussed as components of administrative measures. Legislative measures are also examined in terms of CoPs decision relating to domestic implementation consistent with CITES.

Chapter Four provides a critical comparative analysis of domestic legislation implementing CITES in Tanzania and South Africa. The two legal regimes are examined with a view to ascertaining the manner and extent of their consistency or variance with CITES. Existing barriers to implementation are examined with a view of assessing how and

to what extent implementation of CITES may enhance regulation on international trade in the AE. This chapter concludes with an examination of the various challenges facing the selected countries that have been identified in the study as a whole.

Based on the overall analysis of the issues at hand, a conclusion is drawn and recommendations are made in Chapter Five

CHAPTER TWO

INTERNATIONAL REGIME FOR REGULATING TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA: CITES

2.1 Introduction

This chapter examines the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) with a view to assessing its efficacy. Special attention is given to the objective, scope and mechanisms the Convention adopts in seeking to achieve its objective. An analysis of the strengths and weaknesses of CITES forms an integral part of the assessment.

2.1.1 CITES and World Trade Organization (WTO)

CITES, in regulating international trade, is both an environmental and international trade convention. Thus CITES has to reconcile conflicting interests that exist between trade rules under the World Trade Organization (WTO)⁵⁵ and the environment. The WTO (a legal entity vested with the functions among others of overseeing the implementation, administration of the multilateral trade agreements which are binding on its members),⁵⁶ came into existence in 1995 as a successor of General Agreements on Tariffs and Trade (GATT).⁵⁷ It has 153 members including Tanzania and South Africa as well as developed countries such as Japan, China, USA and the European Community.⁵⁸

A members of both CITES and WTO, the selected countries are placed in a delicate position of complying with two different obligations under the Convention and trade rules under WTO. Although CITES regulates international trade, it is an environmental law convention. Environmentalists argue that trade regulations and policy may be an impediment in implementing environmental agreement such as CITES.⁵⁹ The rules of the multilateral trading system frustrate attempts to protect the environment beyond a national jurisdiction;

⁵⁵ Marrakesh Agreement establishing the WTO.

⁵⁶ Patricia Birnie et al *International Law and the Environment* 3rd Ed (2009) at 756.

⁵⁷ Ibid

⁵⁸ See <http://www.wto.org> [accessed 1/2/2910].

⁵⁹ Birnie et al (note 56) at 754.

they bar states from enacting strict domestic legislation that sets environmental standards on products such as labeling, packing and recycling.⁶⁰ WTO also encounters challenges on how to accommodate Multilateral Environmental Agreements (MEAs) such as CITES which impose punitive trade restrictions on non-complying Parties.⁶¹

However, trade rules are required to take into account environmental considerations. It is for this and other reasons that the WTO⁶² requires that '[t]he expansion of production and trade must allow for the optimal use of the worlds' resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment'.⁶³ This seeks to ensure that trade rules do not compromise environmental standards. In this respect both CITES and WTO are concerned with trade and environment but with different approaches and goals. However, how the Parties to CITES and WTO reconcile their obligation under the Convention and the Organisation, remain to be a challenge that requires a separate discussion falling out of the scope of this study.

2.2 Background information

Neither man's exploitation of wildlife nor international trade are recent phenomena.⁶⁴ Huxley argues that although exploitation caused decline, no serious consequences were felt.⁶⁵ The huge expansion of human population and modern system of transport and communication, have led to increased awareness and increase international trade.⁶⁶ By 1991 international efforts to regulate wildlife trade resulted in the adoption of the Fur Seals Convention which sought to address the problem of over-exploitation of the fur seals of the Probilof Islands.⁶⁷ It has been observed that, such efforts were either illusory or, at best, minimally stopgap measures.⁶⁸ Consequently, international trade in endangered species continued unabated.

A strong case for regulating wildlife trade is founded on an increased environmental awareness and scientific sophistication. 'Public opinion continues to support the historically

⁶⁰ Ibid.

⁶¹ Ibid at 766.

⁶² 1994.

⁶³ Preamble to Marakesh Agreement.

⁶⁴ Huxley (note 14) at 4.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid at 5.

⁶⁸ Alan Schonfeld International Trade in wildlife: how effective is the endangered species treaty?' (1985) 15*California West Int'l LJ* 111.

offered contention that, aesthetic, ethical and cultural arguments alone justify efforts to protect the earth's wildlife.⁶⁹ Scientists have demonstrated that there is a relationship between the planet's ecological stability and the high diversity of species. The commercial enterprises have also realised that generic resources of species serve many purposes which bring various benefits to society, such as modernised agriculture (for example, new food types, genetically modified foods, etc.) and modernised medicine and pharmaceuticals.⁷⁰ These considerations, among others, prompted several nations to adopt measures including enacting legislation to protect species.⁷¹ For example, The United State (U.S.) Congress passed legislation to protect species including the Endangered Species Act 1966.⁷²

However, a species-based regime introduced in the 1900s and domestic measures enacted in this century were not sufficiently satisfactory to regulate over- exploitative international trade, hence the need for international measures. Schonfeld argues that economic and conservation oriented-states were to address this common problem, though with different motives.⁷³ This is mainly because over-exploitation of species had, and still has, a negative impact on species both from trade and preservation perspective.

2.2.1 Negotiations prior to the adoption of CITES

By the 1950s the escalating international trade in live animals and their products worried conservationists.⁷⁴ In 1963 at its General Assembly held in Nairobi, the International Union for the Conservation of Nature (IUCN) called for an international convention to address the issue.⁷⁵ In 1969 the IUCN made recommendations which were adopted by the United Nations (UN) Conference on the Human Environment at Stockholm in 1972. Recommendation 99 of the Stockholm Action Plan called for a 'plenipotentiary to be convened to adopt convention on export, import, and transit of certain species of wild animal and wild plants'.⁷⁶ This was

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid at 6.

⁷⁵ Ibid.

⁷⁶ Reeve (note 5) at 27 -28. See also Philip Sands *Principles of international environmental law* 2nd ed (2003) at 506.

necessary as negotiations on CITES were not completed in time and therefore CITES was not adopted at the Stockholm Conference.⁷⁷

The initiatives culminated on 3 March 1973 where a conference of 80 plenipotentiaries was held in Washington DC.⁷⁸ A proposal was put forward by Kenya during negotiations that each range state should be given a right to determine its own list of tradable species. This proposal was objected to by other developing countries and the final document based on the IUCN proposal, provides for the global listing of threatened species to be drawn up and updated on the advice by an international expert committee.⁷⁹ Thus CITES was adopted on 3 March 1973 and came into force on 1 July 1975.

2.3 The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

The Convention regulates international trade in species, both animals and plants, threatened with extinction.⁸⁰ The Convention recognises that ‘...wild fauna and flora are an irreplaceable part of the natural systems of the earth which must be protected for this and generation to come’.⁸¹ This has been cemented by literature produced by the CITES Secretariat to the effect that ‘the primary objective of CITES is to ensure the international cooperation of the parties to prevent the international trade in specimens of wild animals and plants from threatening their survival’.⁸²

2.3.1 Objectives and scope

The Convention seeks to save wildlife and plant from extinction by regulating and restricting international trade in them.⁸³ The Convention has the power to ban any international trade in

⁷⁷ Reeve (note 5) at 28.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ David Ong ‘The Convention on International Trade in Endangered Species (CITES, 1973): implications of recent developments in international and EC environmental law’ (1998) 10 (2) *Journal of Environmental Law* at 292.

⁸¹ Preamble to CITES.

⁸² Reeve (note 5) at 28.

⁸³ Jon Hutton and Barnabas Dickson (eds) *Endangered species threatened Convention : the past, present and future of CITES* (2000) at xv.

species that are threatened with extinction. Thus in regulating trade, CITES ensures that trade does not in itself threaten the survival of wild species. With a current membership of 175 states, the Convention is among the most highly accepted instruments internationally.⁸⁴

Article I of CITES define species as ‘any species, subspecies or geographically separated population thereof.’ This definition appears to be vague, and in a real sense is that it is only a description and not definition within the proper meaning of the word ‘definition’.⁸⁵ Further, the definition does not take into account the fact that species may be populous in one country but near extinction in another.⁸⁶

Article I goes further to define ‘specimen’:

(b) ‘Specimen’ means:

(i) any animal or plant whether alive or dead

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

(iii) in the case of plant: for species included in appendix I and II, any readily recognizable part of derivative thereof; and for species included in appendix III, any readily recognizable part of derivative thereof specified in appendix III in relation to the species....

The use of phrase ‘readily recognizable’ may also create a problem. The fact that the phrase is not independently defined means that the trade in certain parts of a derivative is regulated by some parties to CITES while it is not regulated by others.⁸⁷ Moreover, it is relatively impossible even for trained zoologists or botanists to identify live specimens, let alone its parts and derivatives.⁸⁸

2.3.2 Governing principles

CITES regulates international trade in endangered species by employing a permit system.⁸⁹ This system is administered by the Management and the Scientific Authority (MA and SA),

⁸⁴ www.cites.org [accessed 20/08/2009].

⁸⁵ According Angus Stevenson (ed) *Oxford English Dictionary* 6th ed 1 (2007). ‘Definition’ means: ‘a precise statement of the nature, properties, scope or essential qualities of a thing; an explanation of a concept’.

⁸⁶ Karl Jonathan Liwo ‘ Note, The continuing significance of the Convention on International Trade in endangered species of wild fauna and flora during the 1990s.(1991) *Suffolk Transnat’l L.J* 124at 125.

⁸⁷ Elizabeth M McOmber ‘Problems in the enforcement of the Convention in International Trade in Endangered Species (2002) 27 *Brooklyn Journal of International Environmental Law* 673 at 691.

⁸⁸ Schonfeld(note 68) at 141.

⁸⁹ Ong (note 80).

designated by a state party⁹⁰ (see s. 2.3.3.3) Species are categorised and grouped into three appendices.

Appendix I lists species which are threatened with extinction, and trade on them is subject to strict regulation except in few circumstances.⁹¹ Such regulations include non-detrimental and other findings made by a SA in the state of export.⁹²

A party may trade in an appendix I species after satisfying several conditions, for example the import permit must be valid,⁹³ the export must not be detrimental to the survival of the species; the species must not have been obtained in contravention of the exporting country's wildlife protection laws and the living specimens must be transported in such a way as to minimise the risk of injury, damage to health or cruel treatment.⁹⁴ The legal institution in domestic law, MA and SA, has a role to play in enforcing the provisions of the Convention, particularly in ensuring that conditions for issuing permit are met.

The importing state will grant an import permit after it has been advised by its SA that conditions under article III, including that the specimen may not be used for commercial purposes,⁹⁵ have been complied with. Trade in species in this category require prior issue and presentation of an export and import permit issued after the fulfilment of conditions in article III.⁹⁶ Prior permit is also required in case of re-export.

Appendix II includes species which, though not now threatened, may become so if trade in them is not strictly regulated.⁹⁷ Appendix II also includes species which are similar in appearance.⁹⁸ The permit requirement for species in this category is similar to those in appendix I, except that import permit is not required for species in this category.⁹⁹

⁹⁰ Article IX 1 (a) (b).

⁹¹ Article II(1) CITES.

⁹² Scientific Authority designated in terms of art IX of CITES. In case of art III (3) (c) determination is made by SA or MA of the importing state.

⁹³ CITES art III (2) (d).

⁹⁴ CITES art III(2) (a) –(c).

⁹⁵ Article III(3) (c).

⁹⁶ CITES art III see also Birnie et al (note 56).

⁹⁷ Article II (2) (a).

⁹⁸ Article II (2) (b). See also Ong (note 80) at 292.

⁹⁹ Article IV see also Shennie Patel 'The Convention on International Trade in Endangered Species: enforcement and the last UNICORN' (1995-1996) 189 *Hous. J.Int'l. L.* at 157.

Appendix III includes species that a party identifies as being subject to regulation in its jurisdiction for purpose of preventing or restricting exploitation and as well for the need of cooperation of other parties.¹⁰⁰ The trade in species in this category requires an export permit only.¹⁰¹ The appendix and permit system complement each other in regulating international trade under CITES. This is mainly because restrictions on trade reflects the status of species listed under CITES appendices, whereby strict regulation is placed on species in appendix I and II.

2.3.3 Administration and workings

Administrative bodies under CITES are: the Conference of the Parties (CoPs), the Secretariat, the MA and SA of each country, the Executive Standing Committee and two functional or technical committees, namely, the animals and the plants committee. While the CoPs and Secretariat are provided for under the Convention, the other committees have been established by resolution of the CoPs.¹⁰² All these institutions, including those at international level, such as CoPs, and at national level, such as MA and SA, work together to ensure that the objectives of the Convention are realised.

2.3.3.1 Conference of the Parties (CoPs)

The CoPs is the highest decision-making body entrusted with the powers to amend and foresee the implementation of the Convention through recommendations and resolutions.¹⁰³ These recommendations and resolutions are 'criteria and standards' that operate as guidelines to the parties and Secretariat administrative duties in implementing the Convention.¹⁰⁴ The powers of the CoPs make it capable of transforming CITES into an even more viable Convention.

¹⁰⁰ Article II (III).

¹⁰¹ CITES art V.(3).

¹⁰² Conf 11.1 (Rev CoP 14). See also Christine Fuchs 'Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES): conservation efforts undermine legality principle' (2008) 09 (11) *German Law Journal* 1565.

¹⁰³ Article XI.

¹⁰⁴ Schonfeld (note 68).

The CoPs is convened every two years unless the Parties decide otherwise.¹⁰⁵ The latest (fourteenth) CoPs was held in the Hague, Netherlands in June 2007. The fifteenth CoPs is scheduled to meet in Doha (Qatar) in March 2010. An extra-ordinary meeting may be held at the request of at least one-third of the Parties.¹⁰⁶ The short interval of two years gives the CoPs an early opportunity to review progress on international trade and take appropriate steps as the need arises. Despite the crucial role they play in the workings of the treaty, CoPs' resolutions are not binding.

2.3.3.2 Secretariat

The Secretariat is established under article XII of the Convention. It is administered by United Nations Environmental Programme (UNEP) and is located in Geneva, Switzerland.¹⁰⁷ The Secretariat is headed by a Secretary-General, whose tenure of office is subject to the agreement of the parties.¹⁰⁸ The Secretariat is charged with the functions listed under article XII, which include: playing an advisory, coordinating and servicing role in the working of the Convention; assisting with communication and monitoring the implementation; arranging and service meetings of the Parties and of permanent committees, providing assistance in the field of legislation and enforcement and preparing annual reports.¹⁰⁹

2.3.3.3 Management and Scientific Authorities

Parties are required to designate the MA and SA.¹¹⁰ The function of the MA is the granting or denying of CITES permits, while the SA provides advice on the trade in species listed in appendix I and II. Trading permits are the basic control mechanisms that are used under the Convention to regulate international trade. These permits operate like passports.¹¹¹ Permits are to be presented at customs control before the entrance or exit of a species into or from a party state.¹¹² Thus the regulation of international trade at domestic level is vested in the two

¹⁰⁵ Article XI .

¹⁰⁶ Article XI (1) and (2).

¹⁰⁷ <http://www.cites.org> [accessed 30/07/2009].

¹⁰⁸ Mome A. du Plessis 'CITES and the causes of extinction' in Jon Hutton and Barnabas Dickson *Endangered species threatened Convention: the past present and future of CITES*(2002) 13 at 16.

¹⁰⁹ <http://www.cites.org> [accessed 30/07/2009].

¹¹⁰ Article IX .

¹¹¹ Res Conf 12. 3 (CoPs 14). See also Wijnstekers Willem (2003) 3rded *The evolution of CITES* at 107 .

¹¹² Schonfeld (note 68).

institutions that work together in order to verify and satisfy various conditions before issuing permit: MA and SA.

The general requirements to be determined in granting or denying a permit are laid down under article III and IV. These include non-detrimental findings by the SA. Specific requirements vary according to the relevant appendix.¹¹³ For example, trading species in appendix I is more restricted, as species in this category are threatened with extinction and therefore requires strict regulation.

2.3.3.4 Standing Committee

The Standing Committee came into being as a predecessor of the Steering Committee established at CoPs I in 1976. It is vested with the function of coordinating a special session of the CoPs and assist in organising second CoPs.¹¹⁴ In 1979, on the Secretariat's recommendation, the Steering Committee was re-established by resolution as the Executive Standing Committee.¹¹⁵ Its functions are related to general policy and general operational directions as well as overseeing the operation of the Convention between meetings of the CoPs.¹¹⁶ These include providing guidance and advice to the Secretariat, overseeing the Secretariat's budget and other finance-related matters, and performing any other related functions that are entrusted to it by the CoPs¹¹⁷

The election of members of the Standing Committee is done by the CoPs. This currently comprises fifteen regional party representatives, plus Switzerland, the depositary government,¹¹⁸ and the previous and the next host country.¹¹⁹ These, with the number of regional representatives in brackets, are Africa (4), Asia(3) Central and South America and the Caribbean (3),Europe(3), North America(1) Oceania(1) and Switzerland the depositary government, the Netherlands (previous host country) and Qatar, the next host country.(1).¹²⁰

¹¹³ Du Plessis (note 108) at 16.

¹¹⁴ Reeve (note 5) at 47.

¹¹⁵ Ibid.

¹¹⁶ Conf 11.1(Rev.CoPs14) annex 1 (a).

¹¹⁷ Ibid annex 1 (b) –(d).

¹¹⁸ Ibid annex 1 (a) (i) (B).

¹¹⁹ Ibid annex 1 (a) (i) (C).

¹²⁰ <http://www.cites.org/eng/com/SC/member.shtml> [accessed on 19/11/2009].

Africa, the region with the most parties has four representatives.¹²¹ The current African members are Kenya, Zambia, Ghana and the Democratic Republic of the Congo.¹²² This seems to reflect the geographical distribution of the Africa Region elephant range states covering, East, Southern, West and Central Africa.

2.3.3.5 Technical committees

There are two technical committees under the Convention: the Animal and the Plant Committee.¹²³ The members of the two Committees are chosen by regions. North America and Oceania each elect one member and the remaining four regions each elect two members.¹²⁴ The functions of the committees are: to provide advise and guidance to all other bodies, including any proposal to amend the appendices;¹²⁵ cooperate with the Secretariat to assist the SA;¹²⁶ review and assess the species that are significantly affected by trade;¹²⁷ review species included in the appendices and perform any other functions assigned to them by the CoPs or the Standing Committee.¹²⁸ These Committees are relevant in dealing with technical matters relating to animal and plant species and therefore their composition must reflect expertise in their respective field.

2.4 Obligation of the Parties

The parties shall take appropriate measures to enforce the provisions of CITES and prohibit trade in violation of the Convention.¹²⁹ These measures include penalising illegal trade, confiscating species obtained or traded in contravention of CITES,¹³⁰ and also provide for internal arrangements regarding re-imburement for expenses incurred as a result of confiscation of species traded in violation of CITES.¹³¹ In order to achieve the implementation of their obligations, Parties may adopt stricter domestic measures relating to

¹²¹ Conf 11.1 (Rev COP 14) annex 1 (a) (i) (A).

¹²² http://www.cites.org/common/com/SC/58/SC58_Participants [accessed on 14/08/2009]

¹²³ <http://www.cites.org/eng/com/SC/index.shtml> [accessed 19/11/2009].

¹²⁴ Fuchs (note 102).

¹²⁵ Conf 11.1 (Rev CoP 14) annex 2 (a).

¹²⁶ Conf 11.1 (Rev CoP 14) annex 2(d).

¹²⁷ Conf 11.1 (Rev CoP 14) annex 2(f) (g) see also Fuchs (note 102).

¹²⁸ Conf 11.1 (Rev CoP 14) annex 2(h) (i) (j) respectively.

¹²⁹ Article VIII.

¹³⁰ Article VIII (1) (a) (b).

¹³¹ Article VIII(2).

trade, tracking and possession, restricting or prohibiting trade on species listed in appendices I, II and III.¹³² Arguably, the success of the regulation of international trade is dependent upon effective domestic measures. This is achievable, especially since Parties retain their sovereignty to adopt higher thresholds than those provided for by the Convention.¹³³

Parties are also required to designate MA and SA responsible for issuing of import and export permits.¹³⁴ Any changes relating to designation or authorisation are to be communicated to the Secretariat.¹³⁵ This seeks to ensure that the Secretariat keeps informed on the MA and SA of each Party.

Further, Parties are required to maintain records of trade in specimen of species and to transmit periodic report to the Secretariat on implementation of CITES.¹³⁶ The annual report on legislative, administrative and regulatory measures taken by a state to enforce provisions of CITES should be made available to the public provided such requirement is not in contravention of the law of the state concerned.¹³⁷ These comprehensive requirement for the implementation of CITES ensures not only compliance with the obligation under the treaty, but also with the international obligation as stipulated under the Vienna Convention.¹³⁸

In order to achieve domestic implementation, the fourteenth CoPs adopted a guide to CITES compliance procedures which requires the Parties among other things, to designate relevant MAs and SAs,¹³⁹ permit trade in CITES listed specimens only to the extent consistent with the procedure laid down in the convention,¹⁴⁰ take appropriate domestic measures to enforce the provisions of the Convention and prohibit trade in violation thereof,¹⁴¹ maintain records and submit periodic reports,¹⁴² and respond as soon as possible to communications of Secretariat related to information that a species included in appendix I or II is being adversely affected by trade.¹⁴³

¹³² Article XIV (1) (a) (b).

¹³³ CITES article XIV (1) (a)

¹³⁴ Article IX.

¹³⁵ Article IX (3).

¹³⁶ Article VIII(6) and (7).

¹³⁷ Article VIII (8).

¹³⁸ Vienna Convention (note53) article26.

¹³⁹ Res Conf 14.3 as required under article IX (Conf.14.3).

¹⁴⁰ Article II,IV ,V VI, VII ,and XV.

¹⁴¹ Article VIII para 1.

¹⁴² Article VIII para 7 and 8.

¹⁴³ Article XIII.

The guidelines which are not binding and are implemented in a non-adversarial manner require the Secretariat to assist parties on implementation of these guidelines.¹⁴⁴ The CoPs and the Standing Committee are also vested with tasks to monitor compliance.¹⁴⁵ Thus, these guidelines are intended to be applied by states as 'a self assessment package' and minimum standards in their implementation of CITES. Arguably, domestic legislation falling short of the threshold of these guidelines is to be considered inadequate.

2.5 Relationship with other treaties and organizations

CITES is not 'a standalone' Convention. It is closely related to other Conventions relating to either conservation or regulation of international trade on other species. In respect of conservation CITES is related to the Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar)¹⁴⁶, and the Convention Concerning the Protection of the World Cultural and Natural Heritage,¹⁴⁷ which seeks to protect natural and cultural heritage.¹⁴⁸ Others are the Convention on the Conservation of Migratory Species of Wild Animals¹⁴⁹ and the Convention on Biological Diversity (CBD).¹⁵⁰ It cooperates with the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) regarding trade in toothfish.¹⁵¹ These Conventions, though, are not related to trade regulations; they deal with protection and conservation of species that are subject to CITES regulation through international trade.

CITES also works closely with various organisations such as WTO (discussed at 2.1.1), the specialist group of International Union for Conservation of Nature (IUCN), United Nations Environmental Program (UNEP) and Trade Records Analysis of Fauna and Flora in Commerce (TRAFFIC). Other non-governmental organisations may be contracted by secretariat for special tasks.¹⁵²

¹⁴⁴ Conf 14.3.

¹⁴⁵ Ibid.

¹⁴⁶ Adopted 1971 in force 21/12/1975. The Convention recognises that a wetland is a regulator of water regimes and habitat and support of flora and fauna.

¹⁴⁷ Adopted 1972 entered in force 17/12/1975.

¹⁴⁸ Preamble to the Convention.

¹⁴⁹ Adopted 1979 entered in force 01/11/1983. The Convention recognises the relevance of international cooperation in protecting species that migrate across or outside national jurisdiction boundaries.

¹⁵⁰ Adopted 1992 entered into force 29/12/1993.

¹⁵¹ Agreed in CoPs 12 Res 12.4 Santiago, Chile, 2002..

¹⁵² Reeve (note 3).

2.6 Weaknesses of CITES

CITES is considered to be the most viable instrument in regulation of international trade, yet is one of the most controversial conventions.¹⁵³ These controversies relate to interpretation and the assumptions in which CITES operates, particularly as to whether it is a conservation treaty or trade regulation, or both.¹⁵⁴ At successive meetings Parties have strongly debated and are sharply divided over the basic assumption of the treaty, particularly when it comes to the AE. Indeed the elephant has consumed a huge amount of CITES time and resources.¹⁵⁵ The problem is exacerbated by weaknesses textual loopholes of the Convention such as exemptions, trading with non-Parties and varying Parties' interests.

2.6.1 Scope

It has been argued that the CITES objectives is narrow in a way that it intends to control excessive commercial exploitation, thus its scope and potential effectiveness as a conservation tool is very limited.¹⁵⁶ However, CITES was intended to regulate international trade in species threatened with extinction and those which are likely to become extinct and not function as a conservation instrument. The limitation of its scope may be that in order for a species to acquire protection under CITES it must be or likely to be threatened with extinction.

2.6.2 CITES listing criteria

The CITES appendices are the key tools and mechanisms used by the Convention to regulate and control international trade. Various criteria have been used to achieve its objectives. In relation to the elephant, the Convention applies both the Berne¹⁵⁷ and Fort Lauderdale¹⁵⁸

¹⁵³Hutton and Dickson (note 83).

¹⁵⁴ Ibid at xv.

¹⁵⁵ Ibid.

¹⁵⁶ Sas-Rolfes (note 38) at 69.

¹⁵⁷ Adopted at Berne, Switzerland, by the 1st CoP, in 1976; Nov.2002 CoP 12, Namibia, Botswana and

Criteria (discussed at 2.6.2.1 and 2.6.2.2). The management quota system (MQS) has also been used.

Parties to CITES are the ones who makes proposal for listing and delisting, add or remove of species. Decisions to list or delist are reached at the Conference of the parties (CoPs) and passed by two-thirds majority of the parties present at voting.¹⁵⁹ CoPs has adopted various criteria for listing species in either appendix. These include the Berne Criteria (1976) and Fort Lauderdale Criteria (1994). With regard to the AE, these criteria have been adopted following hot debates in the CoPs. While in general terms one may be persuaded to believe that states are driven by common interest, namely to regulate international trade in endangered species, the truth may be different. In most cases, states pursue individual interest backed up with economic or political needs of individual states as reflected in the listing and delisting criteria discussed below.

2.6.2.1 The Berne Criteria

The Convention does not contain criteria to be used in listing species. The Berne Criteria, also referred to as the 'biological criteria', were established at the first CoPs in 1976.¹⁶⁰ Parties agreed that the listing decisions were to take into account biological and trade status of species, namely: the biological evidence suggested that currently the species was threatened with extinction, taking into account its population size and geographical range.¹⁶¹ The biological evidence had to satisfy the test or lead to an irreversible presumption that the species was threatened with extinction for appendix I species, and might become threatened with extinction for appendix II species, in conformity with the fundamental principles of the convention.

When biological data indicated a serious threat to the species only a probability of trade was required. Conversely, when trade was known to occur, information on the biological status need not be complete for appendix I species.¹⁶² For appendix II species, it has been argued that there had to stronger evidence of trade than that required for the

South Africa allowed trading in ivory stockpiles in quotas. Zambia and Zimbabwe's proposals rejected. www.wwf.org.uk/filelibrary/pdf/africanelephant [accessed 16/10/2009].

¹⁵⁸ Established at Fort Lauderdale, Florida by the 9th CoP, in 1994.

¹⁵⁹ Article XV (1) (b).

¹⁶⁰ Resolution Conf 1.1.

¹⁶¹ Note 46 *Harvard L.R.* at 1775.

¹⁶² *Ibid.*

appendix I listing. Trade had to be either underway or likely to occur and had to be in such a volume as to constitute a potential threat to the survival of the species.¹⁶³

Although the Berne Criteria gave guidelines which hitherto did not exist, they were not readily accepted by the conservation community for sustainable use proponents. They interpreted it as a means of making it 'virtually impossible' to transfer species from appendix I to appendix II.¹⁶⁴ The criteria were viewed as targeting the developing range states which had large stocks of elephants already listed in appendix I, yet the endangered species such as the Atlantic bluefin tuna and Brazilian Mahogany remained in appendix II.¹⁶⁵ Their argument was valid to the extent that the initial listing was not based on any specified or known criteria. The requirement to use the Berne Criteria to downlist appendix I species was not tenable as some species which did not qualify for appendix I listing could not be down-listed to appendix II. It was largely felt that the Berne Criteria were politically instigated since they frustrated rather than furthered the objectives and principles of the Convention. At the fifth CoPs held in Buenos Aires in 1985, Parties acknowledged and agreed¹⁶⁶ that the conditions under the Berne Criteria were difficult to fulfil.¹⁶⁷ This gave rise to the need for more scientific criteria.

In 1989 meeting in Lausanne, Switzerland, the question of whether or not to place the African elephant in appendix I was hotly debated.¹⁶⁸ Many concerns were raised that the trade in elephant products will lead to the extinction of population. In proposing the trade ban, Kenya, Gambia and Somalia submitted that upwards of 100,000 elephants were killed in Africa each year. 'Kenya and Uganda had lost 85 percent of their native elephant population between 1973 and 1987. The Sudan, with a 30 percent annual decline, and Tanzania (16 percent decline per year), also experienced major deficits in their elephant populations.'¹⁶⁹ The Southern African countries of Zimbabwe, Botswana and South Africa, wanted to maintain the legal trade in elephant products in countries with flourishing elephant populations and which

¹⁶³ Ibid.

¹⁶⁴ Ibid at 1776.

¹⁶⁵ Ibid.

¹⁶⁶ Res 5.21.

¹⁶⁷ Henriette Kievit 'Conservation of the Nile crocodile: has CITES helped or hindered?' In Hutton and Dickson (eds) *Endangered species threatened Convention: the past, present and future of CITES* (2002) 88 at 95.

¹⁶⁸ American University 'TED case studies: Elephant Ivory Trade ban' available at <http://www1.american.edu/ted/elephant.htm> [accessed on 16/11/2009].

¹⁶⁹ Ibid.

manage them sustainably.¹⁷⁰ They would use the funds from ivory sales for wildlife management. This approach was supported by several Hong Kong business syndicates involved in the ivory and rhino horn trade.¹⁷¹

The appendix I listing was accepted by the majority of the Parties, and the total ban on the ivory trade came into effect on 18 January, 1990. Zimbabwe, South Africa, Botswana, Zambia and Malawi voted against the resolution on the ban, and with Hong Kong (the major ivory importer) expressed formal 'reservations' to it.¹⁷²

In 1992 at the eighth CoPs in Kyoto Japan, Parties decided that the Berne Criteria were no longer satisfactory hence it was decided to amend the Criteria for listing and delisting species in appendix I and II. At the eighth CoPs the division among the Parties was conspicuous. Zimbabwe, Botswana, Zambia and Malawi under the, Southern African Centre for Ivory Marketing (SACIM) submitted a joint proposal to downlist their elephant herds to appendix II.¹⁷³ This proposal was objected by other states and consequently withdrawn by SACIM countries. They further stated ambiguously that southern Africa would leave CITES 'if no attempts were made to accommodate their conservation policies'.¹⁷⁴ These are policies based on sustainable use. However the threat to leave CITES was not effective as the ban was maintained.¹⁷⁵ The Kyoto conference was notable for the extent to which politics outweighed science. Many observers felt that more scientific criteria were required to remove politics.¹⁷⁶

Interestingly, SACIM countries decided to abandon their threat to withdraw and alternatively they brought influence to bear on changes in the interpretation and implementation of CITES in order to accommodate Southern Africa's proposed management approaches.¹⁷⁷ With the support of other developing countries around the world, SACIM achieved to secure an agreed approach towards the move into sustainable use.¹⁷⁸

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Mofson (note 47).

¹⁷³ Ibid.

¹⁷⁴ Mafaniso Hara *International trade from the African elephant: issues surrounding the CITES ban and SACWM's chances of overturning it* (1997) Centre for Southern African Studies, University of Western Cape.

¹⁷⁵ Ibid.

¹⁷⁶ Note 46 *Harvard L.R.*

¹⁷⁷ Hara (note 174).

¹⁷⁸ Ibid.

2.6.2.2 Fort Lauderdale Criteria

The 1994 CoPs adopted new criteria also referred to as 'the scientific' criteria. This changed the Berne Criteria in four main ways. It provided specific quantitative guidelines for placing species in each appendix; emphasised biological rather than trade considerations; provided for down listing of appendix I species that failed to meet the new quantitative criteria and it allowed split listing.¹⁷⁹ Under the Fort Lauderdale Criteria (FLC), a species qualified to be listed in appendix I on fulfilment of two conditions. These were that species is, or may be, affected by trade, and meets one of the four broad biological criteria; namely, the wild population is small, the population has a restricted area of distribution, the population is declining and the species was to satisfy one of the previous criteria within the next five years.¹⁸⁰

The FLC required that range states were consulted and that details of management, monitoring and conservation programmes be taken into account before listing is considered.¹⁸¹ Consultation with the range state was initially Zimbabwe's proposal at the Kyoto Conference entitled 'Kyoto Criteria', though it was not accepted. It has been argued that the FLC scientific data enabled the Parties to sit together and discuss, and that way made the CoPs more productive and minimised reservations.¹⁸²

In 1997, the Southern Africa states of Zimbabwe, Botswana and Namibia were conditionally allowed to downlist their stocks of the elephant to appendix II¹⁸³, presumably, using the FLC. Apparently, the FLC quelled the political crisis that had threatened the break-up of the Convention from 1989 when the elephant was listed in appendix I and efforts to down-list it to appendix II failed. Many observers contend that the new criteria made it more difficult to list species in appendix I and easier to down-list them from appendix I, which is of benefit to pro-trade countries.¹⁸⁴ The panel of experts advised that the elephant population in Namibia, Zimbabwe and Botswana no longer met the new objective criteria in appendix I,

¹⁷⁹ Note 46 *Harvard L.R* at 1780.

¹⁸⁰ *Ibid* at 1781.

¹⁸¹ Mofson (note 47) at 116.

¹⁸² Note 46 *Harvard L.R* at 1785.

¹⁸³ *Ibid*.

¹⁸⁴ Mofson (note 47) at 116.

hence they should be moved to appendix II.¹⁸⁵ The Parties agreed to transfer population from these countries to appendix II for the purposes of the export of hunting trophies for non-commercial purpose; export of live animals to appropriate and acceptable destinations (Namibia for non-commercial purpose only); export of hides (Zimbabwe only) and the export of leather goods and ivory carving for non-commercial purposes only (Zimbabwe only)¹⁸⁶

Despite providing clear listing criteria which exclude political influence to a great extent, the criteria still left much to be desired. To a large extent this decision reflects that regarding sustainable use in conservation which was led by Zimbabwe and other SACIM countries. The objective listing criteria, nevertheless, seem to give control to Southern African states where the source of many species is. The criteria, however, are still questionable as to their objectivity.

The political and economic needs of individual states are still influential in the listing and delisting of species. That a decision to list and delist a species on appendix I or list a species from appendix I and II is put to the vote at the biennial meetings of the parties, gives room for subjective consideration as some parties may affiliate with others either on economic or political grounds.¹⁸⁷ The influence of Zimbabwe, for instance, in stressing sustainable use at the eighth and ninth CoPs resulted in the down listing of the elephants in Southern Africa from appendix I to II, therefore allowing trade in African elephant from the four countries. As one of Zimbabwe's government officials observed '[we have discovered that it is] better to work on CITES from within. It doesn't end with elephant: once you are an outsider you have no input or involvement'.¹⁸⁸ Arguably, states have realised that the better approach is lobbying within the CoPs rather than other approaches such as entering a reservation or being a non-Party.

Sustainable use has been an approach favourable to Southern Africa states, yet Eastern Africa states have affiliated themselves with the conservation approach. For example, at the eleventh CoPs in 2000 Zimbabwe, Zambia and Namibia submitted a proposal to retain their elephant population in appendix II and sought approval for the sale of stockpiled 'legal'

¹⁸⁵ Shawn Dansky 'The CITES "objective" listing criteria: are they "objective" enough to protect the African Elephant?' (1998-1999) *Tul.L.Rev* 961 at 972.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ Mofson (note 47) at 114.

ivory.¹⁸⁹ While South Africa supported this proposal, Kenya continued its strong opposition to any approval of an international ivory trade.¹⁹⁰ Kenya's argument was based on elephant protection for tourism, South Africa wanted the sale of ivory to be sanctioned, and strongly insisted that it was not prepared to accept a trade ban because of those states that have failed to manage their elephant population as it (South Africa) has one of the best elephant management programmes on the continent.¹⁹¹ Seemingly the argument was based on conservation versus sustainable use. Thus controversies within CITES is not only along north/south divide but as well among AE range states.

In 2002 at the twelfth CoPs in Santiago, Chile, Namibia, Botswana, and South Africa were allowed to conduct a further one-off sale of their ivory stockpile.¹⁹² In 2004, the thirteenth CoPs allowed South Africa to trade in hide and leather goods without restriction to commercial purposes; this permission was granted mainly due to the minimum chances of any negative effect on elephant conservation.¹⁹³ The CoPs also approved decision 13.26, which establishes an Action Plan for the control of trade in African elephant ivory.¹⁹⁴

The fourteenth CoPs followed with the establishment of an annual quota for the sale of raw ivory¹⁹⁵ from elephant range states.¹⁹⁶ Trade in raw ivory requires both an export and an import permit.¹⁹⁷ It was further agreed that no proposal should be submitted in relation to the elephant ivory trade in the nine years from the fourteenth CoPs. Tanzania, proposes at the next CoPs (the fifteenth) to downlist its population from appendix I to II for the exclusive purposes of hunting trophies for non-commercial purposes. It further proposes trade in registered raw ivory at a one-off sale of 89,848.74 kg from registered government-owned stocks, originating in Tanzania, to trading partners already designated by the Standing

¹⁸⁹ Mario Del Baglivo 'CITES at crossroads: new ivory sales and sleeping giants' (2002-2003)14 *Fordham Env't'l. L. J* 279 at 280-281.

¹⁹⁰ Joseph Berger 'The African elephant: human economics and international law: bridging a great rift for East and Southern Africa' (2000-2001)13 *Geo.Int'l. L. Rev* at 430.

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*; see also Jan Glazewski 'Environmental law' *Annual Survey of South African Law* (2006) at 428.

¹⁹³ TRAFFIC Report (note 12).

¹⁹⁴ *Ibid.*

¹⁹⁵ Conf 10.10 (Rev CoP 14) defines raw ivory to include: 'all whole elephant tusks, polished or unpolished and in any form whatsoever, and all elephant ivory in cut pieces'

¹⁹⁶ Con 10.10 (Rev CoP 14).

¹⁹⁷ *Ibid.*

Committee.¹⁹⁸ Whether this proposal will be accepted in the next CoPs is the matter still to be seen. The proposal, however, is strongly objected to by Kenya, Congo, Ghana, Liberia, Mali and Sierra Leone. These states have raised concerns to the effect that, ivory trade and the down listing of the African elephant should not be allowed for twenty years from the fourteenth CoPs.¹⁹⁹

Zimbabwe intends to counter the objection raised by Kenya and other states to the effect that, such proposal is against the agreement on a management strategy and the Action Plan for the AE, as agreed at the last CoPs to which all AE range states are supposed to adhere.²⁰⁰ Zimbabwe's bid seem to reflect its stand on the sustainable use of elephants. However, any limitation on proposals by the Parties seem to conflict with the provisions of art. XV of CITES, which allows any party to propose amendments to appendix I or II.²⁰¹

2.6.3 The quota system

There is no specific requirement under CITES to establish a quota to limit trade on listed species.²⁰² Quotas were founded at the Fifth CoPs (Buenos Aires) upon the ideas of management-based controls with consumer-based enforcement.²⁰³ CoPs establishes quotas in various circumstances. The quotas may be specified in the appendices, for example in case of the AE, or in a resolution of CoPs (for example Conf 10.14 Rev CoPs 14).²⁰⁴ The quota specified in the appendices are normally established when there are concerns to move species from the appendix I to II, whereby annotation are specified to appendix I and II.²⁰⁵ The CoPs has been providing guidance on criteria for amendment²⁰⁶ and use of annotation of species in appendix I and II.²⁰⁷

¹⁹⁸ Fifteenth Meeting of the Conference of the Parties to be held in Doha (Qatar), March 2010. Document available at http://www.cites.org/eng/cop/15/raw_props.shtml [accessed on 22/11/2009]. (hereinafter CoPs fifteenth document).

¹⁹⁹ Ibid.

²⁰⁰ Moris Mutsambiwa- Zimbabwe's Director General of Wildlife in conversation with Radio Voice of the People (VOP) Harare 26 November 2009 available at <http://www.radiovop.com> [accessed 27/11/2009].

²⁰¹ TRAFFIC Report (note 12).

²⁰² <http://www.cites.org/eng/resources/quotas/index.shtml> [accessed 22/11/2009].

²⁰³ Swanson (note 41).

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Resolution Conf 9.24 (Rev CoP 14) annex 4.

²⁰⁷ Resolution conf 11.21 Rev Cop 14.

Although MQS regulated trade in the African elephant between 1985 and 1987,²⁰⁸ it has been rated as a failure and as much as three-quarters of the first year's legal quota trade in 1996 was believed to have been illegally poached.²⁰⁹ Some of the elephant range states requested ivory quotas exceeding their corresponding elephant populations and others were not signatories to the treaty.²¹⁰ Swanson attributes the failure to lack of external checks on the discretion of the producer states. He contends that the determination of the quotas and issuance of MQS permits was within the states unsupervised discretion. He further observes that Burundi with only one elephant surprisingly became the largest exporter of ivory during the MQS period.²¹¹

There is no serious dispute that the MQS failed. However, the contention by Swanson attributing the failure to lack of external supervision is not tenable. The failure goes to the root of non-compliance with international treaties by states. This can only be explained in terms of the sovereign powers states exercise within their own territories. Hence, the author's contention leaves unanswered the question as to by whom and how a sovereign state can be supervised.

Conf 9.21 (Rev CoPs 13) required that Parties wishing the CoPs to establish quota system in appendix I species should submit their proposal to the Secretariat at least 150 days before the meeting of the CoPs. The twelfth CoPs adopted a resolution for an amendment to improve the quota system. It requires the submission of a quota to the Secretariat after a non-detrimental decision has been taken by the country concerned.²¹²

On account that the quota system is among the most effective tools for regulation of trade, the CoPs invited parties to establish national export quota. In relation to AE CoPs 10.10 (Rev CoPs 14) requires elephant range states wishing the CoPs to establish Quota system for sale of raw ivory as part of their management strategy to communicate to the Secretariat for the next calendar year before 31 December. In 2007 the fourteenth CoPs adopted a resolution providing for guidelines for implementation of MQS.²¹³ These guidelines apply for MQS established at international or national level.²¹⁴ However, as

²⁰⁸ Swanson (note 41) at 175.

²⁰⁹ Berger (note 190) at 423.

²¹⁰ Ibid.

²¹¹ Swanson (note 41) at 145.

²¹² Res Conf 10.2 (Rev CoP 12) Doc 50.1 annex at 3

²¹³ Res 14.7.

²¹⁴ Res 12.3 (Rev CoP 14).

indicated by the twelfth CoPs, MQS requires effective implementation and enforcement without which loopholes for illegal trade are created.²¹⁵ Thus far, it not clear whether the improvements proposed at CoPs twelve will achieve the regulation of trade using MQS which had failed in the early 1980s.

2.6.4 Trading with non-Parties and reservations

The provisions allowing trading with non-parties under CITES is the most controversial aspect of the Convention.²¹⁶ In some cases, illegal trade is facilitated by cooperation of non-Parties.²¹⁷ The problem is made more complicated by provisions on reservation.²¹⁸ Thus technically the number of non-Parties is not limited only to non-signatories since parties to CITES may enter trade reservations and become a 'non party', free of CITES regulations on specific species.²¹⁹ By the same token, reservations are subject to criticism in that they tend to defeat the purpose for which the treaty was established.²²⁰

Reservations should be allowed, among other reasons, only if they are compatible with the object of the treaty.²²¹ In most cases reservations are entered by the major importers of wildlife such as Japan and others.²²² Regrettably, however, objections on reservation are countered by those who favour 'sustainable use' of wild species. Sustainable use advocates assert that, since the object of CITES is to control rather than do away with trade in endangered species, by allowing reservations the treaty recognises the 'legitimate' trading in wild species.²²³ Arguably, reservations, if properly used are useful for instance where Parties' economy depends largely upon trade on protected species.²²⁴ This, however, has not been the case, and provisions on reservations have been misused.²²⁵ For instance, reservation by southern Africa states and major ivory consumers such as China against the decision to uplift

²¹⁵ Res Conf 10.2 (Rev CoP 12) Doc 50.1 annex at 3.

²¹⁶ Schonfeld (note 68).

²¹⁷ Ibid.

²¹⁸ CITES art XXIII.

²¹⁹ Schonfeld (note 68).

²²⁰ Patel (note 99) at 190.

²²¹ Vienna Convention (note 52) Article 19 (c).

²²² Saskia Young 'Contemporary issues of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the debate over sustainable use' 14 (2003) *Colo. J. Int'l. Envtl. L. & Pol'y* 167 at 178.

²²³ Patel (note 99) 190.

²²⁴ Gwyeth Stewart 'Enforcement problems in the endangered species Convention: eeservations regarding the reservation clauses' (1981) 14 *Cornell Intr'l L.J* 429.

²²⁵ Ong (note 80).

the AE at the seventh CoPs, were not well founded.²²⁶ In addition, because there is no limit on number of reservations a Party can make, this makes the Convention ineffective, especially when a Party enters too many reservations.²²⁷ This is mainly because the reserving Party is able to conduct unlimited trade in a certain species.²²⁸

2.6.5 Exemptions

There are several exemptions for trade protection under CITES. In case one or more of these exemptions apply, import or export permits are not required.²²⁹ First article VII provides that if a species has been acquired 'before the provisions of present treaty applied to that specimen' then there is no permit required. The provision is intended to allow stockholders to trade stocks in existence before the treaty went into force. In essence, article VII exempts traders from permit requirements if the species: were acquired before it was listed in one of the appendices;²³⁰ are personal or household effect;²³¹ are animal specimens bred in captivity;²³² are non-commercial loans or exchanges between scientific establishments;²³³ or are part of travelling circuses and exhibitions.²³⁴

The CoPs has been attempting to define and give scope to these exemptions so that they may not be misused. In any event, there is a possibility of misuse of the exemptions due to the fact that it involves a chain of authority including MA and SA, as well as customs officials in the process of issuing permits. In case of any event to block such a chain, such as corruption which exists in many countries including South Africa and Tanzania,²³⁵ illegal trade may be easy by means of these exemptions. The exemptions have also complicated the domestic implementation of CITES (discussed at 2.6.5) However, these weaknesses should not in any way suggest that CITES has no strengths.

²²⁶ Ibid.

²²⁷ Patel (note 99) at 167.

²²⁸ Ibid.

²²⁹ CITES art VII provides that the 'provisions of Articles III, IV and V shall not apply to the transit or transshipment of specimens through or in the territory of a Party while the specimens remain in Customs control'

²³⁰ Article VII (2).

²³¹ Article VII (3) and Res 13.7 (Rev CoP 14).

²³² Article VII (4).

²³³ Article VII (6).

²³⁴ Article VII (7).

²³⁵ Transparency International 2009 Report indicates perceived level of public sector corruption to be 4.7 in South Africa and 2.6 in Tanzania which is high compared for instance to Guinea and Burundi each having 1.8 Report available at http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table [accessed 30/11/2009]

2.7 Strengths

CITES has been commended for its effectiveness in regulating the international trade in endangered species.²³⁶ It is one of the Conventions that had been ratified by a large number of states. Currently it has 175 members. CITES has led to many states strengthening their domestic legislation in wildlife conservation.²³⁷ The main reason for its effectiveness is that '[i]t has an elaborate but workable operational system in which a national export/import permit system is combined with a national institutional system'.²³⁸ These institutions are the MA and SA (discussed at 2.3.3.3) established by Parties and responsible for issuing import/export permits.

Further, CITES is one of the most viable and potentially workable international treaties. It has a highly practical mechanism incorporating a structure designed to deal with a complex international situation.²³⁹ The trade permit system is an efficient mechanism towards ensuring that states parties trade according to CITES regulations.²⁴⁰

Having examined the international regime, it is appropriate to examine the Africa region approach in relation to the regulation of trade in endangered species of plants and animals.

2.8 Africa region approach

The colonial regime on the African continent sought to protect African fauna and flora. Various treaties including the London Convention for the Protection of Wild animals, Birds and Fish in Africa²⁴¹ (later replaced by the 1933 London Convention Relative to the

²³⁶Huxley (note 14) at 11.

²³⁷ Martin R.B 'CITES and the CBD' in Hutton Jon and Dickson Barnabas (eds) *Endangered species threatened Convention: the past, present and future of CITES (2000)* 29 at 30.

²³⁸ Ibid.

²³⁹ Schonfeld (note 68).

²⁴⁰ Schonfeld (note 68).

²⁴¹ London 19 May 1900.

Preservation of Flora and Fauna in their Natural State)²⁴² were adopted.²⁴³ Both the treaties used the system of annexes to list protected species and trade regulation as an instrument of environmental protection.²⁴⁴ The AE was listed in class A as completely protected. Hunting required special permission of the higher authority.²⁴⁵ Additionally, prior permit by competent authority was required before trading trophies.²⁴⁶ In 1968, after most of the African states had gained their independence from colonial regimes, they adopted the African Convention on the Conservation of Nature and Natural Resources which replaced the 1933 Convention.

As the name suggests, this Convention was negotiated at the initiatives of Organization of African Unity (OAU). It used a system of annexes to regulate trade. Class A species (totally protected); and class B (may be hunted). However, it regulated trade on both listed and unlisted species, in particular by making export of species in class A subject to authorisation, and import and transit subject to presentation of the export authorisation.²⁴⁷

The 1968 Convention was replaced by the 2003 African Convention on the Conservation of Nature and Natural Resources.²⁴⁸ The treaty has very important features of CITES in it which categorise species according to the protection required. The Convention imposes obligations on the parties to designate a national authority to deal with matters covered under the Convention.²⁴⁹ However, it lists the AE in class B which implies that less protection is given to it. This is mainly because, although species in class A and B are totally protected, hunting is allowed by permission of higher authority in the case of class A and competent authority in class B.²⁵⁰ This is inconsistent with CITES which lists the AE in appendix I, subject to few exceptions. The treaty is not yet in force,²⁵¹ it will come into force

²⁴² Sands (note 76) at 524.

²⁴³ London November 1933 in force January 1936.

²⁴⁴ Ibid.

²⁴⁵ Article 8 (1).

²⁴⁶ Article 9.

²⁴⁷ Article IX see also Sands (note 76) at 525.

²⁴⁸ Glazewski (note 21) at 58.

²⁴⁹ Ibid.

²⁵⁰ Article VIII (1) (a) (b).

²⁵¹ Revised African Convention on the Conservation of Nature and Natural Resources adopted 11 July 2003. Tanzania ratified the 1968 Convention on 9/07/1974, South Africa was not a party, Tanzania signed the 2003 treaty on 05/11/2004 but not yet ratified, and South Africa has not signed/ratified. Available at <http://www.africaunion.org/root/AU/Documents/Treaties/List/African> [accessed 24/09/2009].

thirty days after the deposit of the fifteenth ratification. Currently it has only eight members Tanzania and South Africa have not yet ratified it.²⁵²

In 1994, the governments of seven African states, including Tanzania and South Africa, adopted the Lusaka Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora (the Lusaka Agreement).²⁵³ The objective of this Agreement 'is to reduce and ultimately eliminate illegal trade in wild fauna and flora'.²⁵⁴ Whether this objective has been realised in African states is questionable. However, at the regional level the Lusaka Agreement is important, taking into account that the illegal trade in the AE is a threat to international trade in elephants and their products, especially ivory.

2.9 Conclusion

The Convention employs the permit as its mechanism in achieving its objective. In addition, it incorporates national and international institutions in one system for the purpose of regulating international trade. This approach is commendable especially since although CITES regulates international trade, the species that are subject to its regulation are within the jurisdiction of individual states and therefore cooperation and integration of institutions is imperative for achieving its goals.

While CITES has some weaknesses, but on the whole it is the acceptable treaty in regulating international trade in wildlife species. The trade permit requirement ensures that states parties will not trade species acquired illegally. Further, the listing in the appendices ensures that species that are more threatened are given more protection. The main weaknesses of the Convention include listing criteria, reservation, and exemptions and trading with non-parties. The next chapter discusses CITES and the AE.

²⁵² See <http://www.africa-union.org/root/AU/Documents/Treaties/List/African> [accessed 24/09/2009].

²⁵³ Lusaka 8 September 1994 entered in force, 10 December 1996. see Sands (note 76) at 525.

²⁵⁴ Para 2 Preamble Lusaka Agreement.

CHAPTER THREE

CITES AND THE AFRICAN ELEPHANT

3.1 Introduction

This chapter discusses CITES and the African elephant (AE) by examining administrative and legislative measures that have been put in place at international level to regulate international trade in the AE. As to administrative measures, it examines the efficacy of various criteria adopted for listing species in appendix I and II, focusing especially on the listing of the AE in either one or other of the appendices. In terms of the legislative measures, it evaluates various measures adopted in the resolutions of the Conference of the Parties (CoPs) with a view to ensuring that domestic implementation of CITES is consistent with the Convention.

However, the ivory trade is among the challenges surrounding listing and delisting of the AE as well as domestic implementation particularly prohibiting illegal trade.

3.2 The African elephant and ivory trade

In recent years poaching and the decline of elephant populations have become synonymous in the public mind.²⁵⁵ This is mainly because the ivory trade - the main cause for elephant poaching - is a highly lucrative business.²⁵⁶ The price of ivory has been increasing dramatically. In 1987 one kilogram was \$120, in early 1989 it rose towards \$300²⁵⁷ and currently one kilogram is worth between \$763 and \$1760 in the US.²⁵⁸

For many years elephant ivory has been widely used for ornamental purposes and making piano keys. In Japan, for instance, ivory is used for making traditional personal seals

²⁵⁵ Barbier et al (note 4) at 4.

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ Daniel Stiles and Esmond Martin 'The USA ivory market: how much a threat to elephants' *Pachydem* No 45 July 2008-June 2009.

called 'hankos'.²⁵⁹ Japan, Singapore and Hong Kong are major centres for working ivory to make ornaments.²⁶⁰ In Vietnam the ivory has been used to cure terminal diseases.²⁶¹

The case of the AE has presented CITES with various challenges , particularly as regards the positions held by developed and developing countries.²⁶² While the former favour a total ban, the latter favour sustainable use. In many ways the dilemma of the AE which is hunted in great numbers for its ivory is a symbolic of the conflicting interests that are the subject of much controversy in the meeting of the parties.²⁶³

The decline of the elephant population in the 1970s and 1980s was mainly due to the unregulated international trade. The registration system to regulate trade under CITES that existed between 1977 through 1990 was largely unsuccessful.²⁶⁴ This was the period when the AE was listed in appendix II, allowing for restricted international trade. From 1979 to 1989 more than half of the AE population was killed by poachers.²⁶⁵ Elephant numbers from Tanzania dropped from 316,300 to 80,000, in Zaire from 377,700 to 80,000.²⁶⁶ In 1990 at the seventh CoPs in Lausanne, Switzerland, Parties voted to place AE on appendix I, thus banning all trade in it except for non- commercial purposes.²⁶⁷ This upgrading of the AE lead to a recovery of the population and the dramatic decrease of legal trade, though not necessarily reflected in a decline in illegal trade.²⁶⁸ The recovery of the elephant population gave rise to other problems, including human/wildlife conflict, as elephants were a threat to human life and crops. The African states began to argue for the sustainable use of elephants, putting the relevance of CITES in regulating international trade in a serious doubt.

For these and other reasons, at the tenth CoPs in 1997 in Harare Parties agreed to transfer the AE population (elephants from Zimbabwe, Botswana and Namibia) to Appendix II for limited purposes.²⁶⁹

²⁵⁹ Sas-Rolfes (note 38) at 69.

²⁶⁰ Ibid.

²⁶¹ Media Report, *Cape Times*, Thursday August 6, 2009.

²⁶² Sas-Rolfes (note 38) at 77.

²⁶³ Ong(note 80) at 291.

²⁶⁴ Dansky(note 185) at 969

²⁶⁵ Ibid.

²⁶⁶ Ibid.

²⁶⁷ Ibid.

²⁶⁸ Ong (note 80).

²⁶⁹ Dansky(note 185).

In 2000 the eleventh CoPs reinstated a ban on trade in the AE by listing it in appendix I until an effective system was in place to overcome poaching of elephant. The CoPs also accepted South Africa's proposal to downlist its elephant population to appendix II.²⁷⁰ However, in 2002 the twelfth CoPs in Santiago (Chile), allowed limited trade in ivory stockpiles from southern Africa states. Arguably regulation of international trade in the AE by either banning or removing the ban to a large extent is a compromise between preservation and sustainable use.

The CoPs have made efforts to regulate the ivory trade by adopting various measures. However, various challenges still exist, including poaching and illegal trade resulting mainly from poor domestic implementation of CITES and an unregulated domestic market.

3.3 Measures adopted to regulate trade in the African elephant

In order to ensure that the objectives of CITES to regulate trade in endangered species including the AE is realised, CoPs have adopted resolutions and developed various mechanisms for that purpose.

3.3.1 Administrative measures

Since the first CoPs, various criteria and decision to list species in either appendix I or II have been adopted to facilitate the regulation of trade. In relation to the AE, important decisions include the first CoPs of 1976, the seventh of 1989, the eighth of 1992, the ninth of 1994, the tenth of 1997, the eleventh of 2000, the twelfth of 2002, the thirteenth of 2004 and the fourteenth CoPs of 2007 (Discussed at Chapter 2)

3.3.1.1 The efficacy of administrative measures

Between 1977 and 1990, when AE was listed in appendix II, strictly controlled commercial trade was allowed in ivory. All whole tusk and large pieces were required to be registered in a system administered by the Secretariat.²⁷¹ Worked ivory, which include items made of ivory

²⁷⁰ Berger (note 190) at 417.

²⁷¹ Dansky (note 185).

for jewellery, adornment, art, utility and musical instruments,²⁷² purchased after 1972 for resale was subject to a permit in terms of article IV of CITES.²⁷³ This provision was intended to cover worked ivory purchased after the CITES had come into being and excluded pre-convention items.

In order to implement this system effectively the third CoPs²⁷⁴ adopted methods to facilitate the registration system which required that each piece be marked with punch-dies with the country of origin's ISO code of two letters, the serial number of that year, followed by the last two digits of the year and the piece's weight in kilograms.²⁷⁵ This information was to be placed at the lip-mark of the tusk, and marked with 'flash color'.

The exporting state was supposed to send an identification number to the Secretariat.²⁷⁶ The system was, to a large extent, unsuccessful mainly due to Parties' non-compliance with the required procedures. Elephant poaching increased during this period.²⁷⁷ It is for this and other reasons that parties sought measures to address the problem of illegal trade. Thus, in 1989 at the seventh CoPs, Parties placed AE in appendix I as a result of which all commercial trade in ivory was banned. The ban was successful as it reduced illegal trade and the demand for ivory.²⁷⁸

However, such a trade ban was against most the African states spirit of sustainable use that they had been advocating. Thus, controversies as to the trade ban and free trade was to be addressed by the Parties. Consequently, in 1997 AE from Zimbabwe, Botswana and Namibia were downlisted to appendix II for limited purposes. The question is whether that trade ban has been an effective means to regulate international trade in the AE.

As to the efficacy of the ban, when viewed against the decrease of demand during the ban, trade bans may still not be an effective way to regulate trade. This is mainly because the conservation of the AE is costly, especially for developing states. The claim of African states that the 'elephant population must economically justify the allocation of land and resources

²⁷² Res 10.10 (Rev CoP 12) see also Wijnstekers (note 101) at 22.

²⁷³ Dansky (note 185).

²⁷⁴ Resolution Conf 3.12.

²⁷⁵ Dansky (note 185) at 968.

²⁷⁶ Ibid.

²⁷⁷ Ibid.

²⁷⁸ Berger (note 190) at 427.

necessary for their protection²⁷⁹ may be justified. Thus the sustainable use of the AE gives African range states 'a way of achieving economic returns for expensive conservation efforts'.²⁸⁰ These economic returns are necessary for creating jobs related to conservation and, at the same time, maintaining the elephant population.²⁸¹

The trade ban is also said to be successful in combating illegal trade and poaching.²⁸² However, this may not be conclusive. For example, the current situation is that, where trade is banned and allowed only in a few Southern African states, poaching is still on the increase. Ivory seized in a year has doubled to reach fifteen tons in 2009; and its market value has become around \$750 per kilogram.²⁸³ Arguably, the trade ban may limit the legal trade but not necessarily the illegal trade. This may be inferred from the fact that data available through state reporting relates to the legal trade. Since data on the illegal trade are not required, it is relatively impossible to compare with any accuracy the rates on the legal and the illegal trade. Apparently, the illegal trade may be higher than the legal trade, implying that illegal traders and poachers benefit at the expense of governments.

Currently the Elephant Trade Information System (ETIS) Report shows that, there is an increase of illegal trade and is 'correlated with the presence of large, inadequately regulated domestic ivory markets'.²⁸⁴ This is attributable to the involvement of Asian crime syndicates in the illicit trade in Africa. Cameroon, the Democratic Republic of the Congo and Nigeria in Africa and Thailand and China in Asia are major countries implicated in the illegal trade.²⁸⁵ The current rate of poaching at 104 elephants killed globally per day will lead to the extinction of the AE in fifteen years to come.²⁸⁶ While regulation of international trade in the AE is accepted by both developed and developing states, the issue of a ban as a means of regulation of such trade is contentious, even among developing countries themselves.

²⁷⁹ Dansky (note 185) at 974.

²⁸⁰ Young (note 222) at 183.

²⁸¹ Ibid.

²⁸² Ibid at 183-184.

²⁸³ <http://technology.iafrica.com/news/science/2126864.htm> dated 22 December 2009 [accessed 23 December 2009].

²⁸⁴ TRAFFIC Report 2007 (note 12).

²⁸⁵ Ibid.

²⁸⁶ Mathew Mc Dermott ' "Crazy" African Elephant Extinct by 2025 at the Present Poaching Rate' *The Telegraph* New York 20/10/2009 available at <http://www.treehugger.com/files/2009/10/african-elephants> [accessed 21/10/2009].

Tanzania, for instance, has submitted a proposal to downlist its population to appendix II to the next CoPs at Doha (Qatar) in March 2010.²⁸⁷

Likewise, removing the bans without effective domestic control of such trade may not be an effective means of regulating trade. For example, ban removal in the 1980s increased poaching.²⁸⁸ From the economic point of view, a trade ban increases the equilibrium price and thereby creates pressure for an illegal market.²⁸⁹ Arguably, if on one hand trade ban gives rise to increased prices and thus illegal trade and on the other that its removal will increase the ivory market and the illegal trade, then its efficacy is doubtful.

Imposing a ban normally conflicts with the notion of sustainable use advocated by southern African elephant range states. Thus, the ban is not an effective and unilaterally acceptable means to combat poaching. Taking into account the objectives of CITES, it is appropriate to argue that building the capacity of domestic laws of member states and institutions is the best way to regulate trade in the AE, including combating the illegal trade.

Importantly, a trade ban should not be taken as the only and unilaterally acceptable means to regulate trade. Rather a holistic approach is required. Such an approach should take into account the listing criteria developed by CoPs, the needs of developing and developed countries as well as issues and goals under the CITES strategic vision 2008-2013 that include contributing to the UN Millennium Development Goals.²⁹⁰ This is mainly because CITES was initially drafted solely with the developed states' perspective in mind,²⁹¹ yet international regulations work properly if they are drawn up for both developed and developing countries. This approach and the listing criteria, will arguably lead to an objective decision as whether or not to ban trade in the AE.

In addition, Parties should adhere to the requirement of CoPs' decisions regardless of the legal status of such decisions. Although Parties enter CITES voluntarily, each party,

²⁸⁷ Fifteenth CoPs 2010 available at www.cites.org [accessed 21/11/2009].

²⁸⁸ Dansky (note 185) at 974.

²⁸⁹ A Report by the IUCN-The World Conservation Union on the effectiveness of trade measures contained in The Convention on International Trade in Endangered Species of Wild Fauna and Flora (2007) (hereinafter IUCN Report).

²⁹⁰ See <http://www.cites.org/eng/res/14/14-02.shtm> [accessed 20/12/2009].

²⁹¹ Swanson (note 41) at 150.

including Tanzania and South Africa, remains legally bound under international law.²⁹² For example, African range states are required to prohibit the unregulated domestic sale of ivory.²⁹³ The unregulated internal trade of ivory may lead to the suspension of all international trade in CITES-listed species.²⁹⁴ If this is implemented successfully, it may reduce illegal trade and possibly enhance the objectivity of decisions to impose trade bans.

3.4.2 Legislative measures

Many parties to CITES have either not enacted specific domestic legislation to implement it or have inadequate legislation.²⁹⁵ Thus they rely on their general wildlife law or custom and foreign trade legislation to control trade in CITES specimens.²⁹⁶ The CoPs had taken various initiatives to ensure that domestic legislation is consistent with CITES, these include national legislation project initiated after recognition that, as at 2000 more than 51 % of states had either inadequate or no legislation implementing CITES.²⁹⁷

3.4.2.1 National legislation project

In 1992 the eighth CoPs adopted a resolution²⁹⁸ to initiate a national legislation project with a view to identifying parties whose domestic legislation did not enable them to designate Management and Scientific Authorities (MA and SA) or prohibit trade in specimens in violation of the Convention, penalise such trade, or confiscate specimens illegally traded.²⁹⁹ The parties were to be identified by the Secretariat and report on the status of their legislation be submitted to the Standing Committee at the ninth CoPs.

Compliance with these legislative measures entail three alternatives in domestic laws, namely, any amendment of existing provisions of the laws relating to wildlife, natural

²⁹² Del Baglivo (note 189) at 287.

²⁹³ CoPs 13 Res 13.26 establishing an Action Plan for the Control of Trade in African Elephant Ivory.(it targets parties with unregulated ivory market.

²⁹⁴ TRAFFIC Report 2007 (note 12).

²⁹⁵ Reeves(note 5).

²⁹⁶ Cyrille de Klemm 'Guidelines for legislation to implement CITES' *IUCN Environmental law policy paper* 26.

²⁹⁷ Reeve (note 5) at 139.

²⁹⁸ Conf 8.4(Rev CoP 14).

²⁹⁹ Reeve (note 5) at 135 the requirements are also laid down under art VIII and IX CITES.

resources and customs, including a CITES chapter or provision in comprehensive wildlife, biodiversity or environmental legislation or enacting CITES specific legislation.³⁰⁰

It appears that, Tanzania and South Africa had opted for the second alternative by including provisions of CITES in their wildlife and biodiversity legislations elaborated in the next chapter.

Following the 1992 resolution, IUCN and TRAFFIC USA analysed national legislation from 81 countries by dividing them into three categories, namely, those with legislation believed to meet requirements of the CITES implementation; legislation believed generally not to meet all the requirements; and legislation believed generally not to meet the requirements³⁰¹

In 1994 the ninth CoPs adopted measures recommended by the Secretariat in relation to parties falling under category two and three to the effect that, these parties should submit implementing legislation by the tenth CoPs and report to the Secretariat before the meeting.³⁰² As at 2000, three African states had legislation in category one, twenty in category two, twenty three in category three and in two countries analysis were still ongoing.³⁰³ Tanzania and South Africa legislation were in category two.

With respect to Parties that had not taken positive steps to implement this, appropriate measures were to be considered by the tenth CoPs, including restrictions on the commercial trade in specimens of CITES-listed species to or from such parties.³⁰⁴ The CoPs approved a decision recommending measures to category two and three parties similar to those agreed in the ninth CoPs. The report as to implementation was to be submitted at the eleventh CoPs.

However, in 2000 at the eleventh CoPs no sanction was recommended in relation to category two and three Parties who had not complied with the tenth CoPs decisions.³⁰⁵ In 2001, in its report to the Standing Committee(SC 46), the Secretariat recommended that

³⁰⁰ TRAFFIC Report to European Commission 'Study of the effectiveness of the EC Wildlife Trade Regulations' Final Report December 2007 at 164. (Hereinafter TRAFFIC Report to EC).

³⁰¹ CITES Doc 10.31 (Rev) National laws for implementation of the Convention' prepared for the Secretariat for CoP 10 (June 1997) see also Reeves (note 5) at 135.

³⁰² Ibid at 136-137.

³⁰³ Reeve (note 5).

³⁰⁴ Ibid.

³⁰⁵ Ibid.

countries with a high volume of trade whose legislation were still in category two and three, including South Africa, had to adopt adequate legislation by 31 January 2003 short of which notification to recommend the suspension of trade would be issued.³⁰⁶ No measures, however, were recommended for failure to comply in respect of those states, including Tanzania, which have a low volume of trade. Reeve argues that the criteria for categorising states with high or low volume of trade was unfair, giving an example of Tanzania, China and the Comoros Islands being placed in category I while they had a high volume of trade.³⁰⁷

In 2007 Parties with legislation in category two and three were urged to submit to the Secretariat newly enacted legislation implementing CITES or provide justification for failure to do so.³⁰⁸ Furthermore, the Secretariat was asked to provide technical assistance for implementation and report in the fifteenth CoPs on the progress of such implementation. Tanzanian and South African legislation was, and is still, in category two.³⁰⁹ In 2009 the Secretariat, on behalf of the Committee, issued a caution to South Africa and other countries, advising them of the need to accelerate their efforts to enact the CITES implementing legislation.

In 2009 the Secretariat held consultations with Tanzania and South Africa. The Secretariat supplied to the MA a written comment on the countries' draft CITES-implementing legislation.³¹⁰ In response to this South Africa in its letter to the Secretariat, indicated that,

... [n]ational and provincial elections were held on 22 April 2009, which meant that a new cabinet would be appointed during the second week of May 2009. The draft regulations would be discussed on 25 May 2009 by the heads of the provincial departments and the Director General of the Department of Environmental Affairs and Tourism. If approved, they would be published in early June 2009 for public comment and by December 2009 for implementation.

The regulations (discussed in the next chapter) were published under section 97(1) (b) (iv) of the National Environmental Management: Biodiversity Act (NEMBA),³¹¹ and the National Environmental Laws Amendment Act of 2009 for public comment on 28 August 2009. South Africa will possibly have adequate legislation at the next CoPs.

For its part, Tanzania responded that, the CITES MA had met with government colleagues in Zanzibar and that an agreement had been reached on the steps and timetable for

³⁰⁶ Ibid at 144-145.

³⁰⁷ Ibid.

³⁰⁸ Res 14.25 CoPs 14.

³⁰⁹ See (note 33).

³¹⁰ Ibid.

³¹¹ 2004 (Act No. 10 of 2004).

ensuring that Zanzibar had adequate legislation for implementation of the Convention. Amendments to address identified weaknesses or gaps in existing CITES-implementing legislation were under development.³¹² This is somewhat misleading as the new legislation had been enacted and was passed in July 2009 and it will come into force on the date to be published by the Minister. Tanzania's statement implies that there could be amendments in a new legislation before it comes into force which is not likely to happen.³¹³

Meanwhile, South Africa and Tanzania are still on the list of countries whose legislation requires priority under the national legislation project as previously identified by SC 58.³¹⁴ The inference is that legislation in Tanzania and South Africa is inadequate for the purposes of implementing CITES.

3.4.2.2 Action Plan for the Control of Ivory Trade

The Action Plan for the Control of Ivory Trade in African Elephant³¹⁵ is an innovation under the CITES adopted in 2004 at thirteenth CoPs (in Bangkok Thailand) to eradicate illegal trade in ivory within Africa and other markets worldwide.³¹⁶ It requires AE range states and non-Party states with an ivory carving industry, among other things, to prohibit the unregulated domestic sale of ivory.³¹⁷

Though in strict sense the Action Plan is a policy measure, it has legal bearing relevant for domestic implementation. For example, it requires elephant range states to enact legislation that provides for the onus of proof of lawful possession upon any person found in possession of ivory.³¹⁸ Legislation and law enforcement action to enforce such legislation is assessed and countries which allow the ivory market to remain poorly regulated can be penalised by the suspension of trade in the CITES-listed species.³¹⁹

³¹² Note 46 *Harvard L.R.*

³¹³ See the proposal to the 15 CoPs for Tanzania to downlist its elephant population providing that they have enacted new legislation in terms of Act no 5 of 2009 at www.cites.org which is awaiting a date to come into force [accessed 19/11/2009].

³¹⁴ CoPs 15 Doc 20 at 3.

³¹⁵ Decision 13.26 (Rev CoPs 14) and 14.75.

³¹⁶ (note 265).

³¹⁷ Decision Conf 13.26 (Rev CoPs 14) Conf 14.75 Annex 2. See also *Earth Negotiations Bulletin* Vol 21 No 61 June 2007 at 15.

³¹⁸ Decision Conf 13 Rev CoPs 14.

³¹⁹ *Earth Negotiation Bulletin* (October 2004) 21 (45) at 9.

In addition, the CoPs asked the Secretariat to establish the AE fund for implementation of the Action Plan.³²⁰ The fund is relevant for the AE range states to implement the Action Plan. However, the commitment of various intergovernmental organizations, parties, carving industries and other donors to contribute to the fund is required.³²¹

3.4.2.1 The efficacy of legislative measures

Legislative measures with regard to trade suspension adopted by CoPs are not taken seriously by the Parties mainly due to the fact that, the decisions are only recommendations.³²² Recommendations to suspend trade are made by CoPs and the Standing Committee with a view to providing a time frame within which a Party may move from non-compliance to compliance by enacting adequate legislation. Thus trade suspensions are not imposed immediately.

In addition inadequate legislation has not been considered both by CoPs and the Parties as a serious ground for trade suspension. For example, while currently only 81 states have adequate legislation,³²³ only four (Rwanda Somalia, Mauritania and Djibouti) are subject to the recommendation to suspend trade because of inadequate legislation.³²⁴ A comparison of the number of Parties recommended for suspension with that of Parties who have inadequate legislation indicates how failure to implement CITES is not taken seriously by the Standing Committee and the CoPs, as well as by the Parties. Argentina and other developing countries, for example, submitted an unsupported and unsuccessful proposal at the fourteenth CoPs to delete trade suspension as a means to improve the domestic implementation of the CITES.³²⁵

Furthermore, developing countries have been the target of trade suspension recommendations, while non-compliant parties from developing countries such as Japan and

³²⁰ Decision Conf 13.26 (Rev. CoPs 14) Conf 14.79.

³²¹ Decision 13.26 Rev CoPs 14 (14.76).

³²² See http://www.cites.org/eng/news/sundry/trade_suspension.shtml (accessed 30/11/2009)

³²³ CoP 15 Doc 20 at 3.

³²⁴ CITES website (note 313).

³²⁵ *Earth Negotiations Bulletin* (June 2007) 21 No (61) at 8-9.

European Union (EU) members are not recommended.³²⁶ This discrimination among the Parties is likely to create blocs and, consequently, hinder the object of the Convention.

3.5 Conclusion

Various administrative measures have been adopted to regulate trade in the AE and their products. These include permit-based trade (appendix II), the management quota system, and the appendix I ban and, recently, the regime developed by CoPs is 'split-listing in which southern Africa countries have been allowed to resume appendix II trade for limited purposes.'³²⁷ These measures have not provided a viable solution for regulating international trade in the AE.

Upon realising that Parties fail to implement for various reasons including inadequate financial means, CITES provides technical and financial assistance through the Secretariat to the Parties for effective domestic implementation.³²⁸

The response of some of the member states, including the selected countries, in seeking to implement CITES appears unsatisfactory, yet the success of the Convention and hence the regulation of the international trade in the AE is arguably dependant upon effective domestic implementation. Against this background the next chapter makes a comparative analysis of domestic implementation of CITES in Tanzania and South Africa with special reference to the AE.

³²⁶ Reeve (note 5) at 324.

³²⁷ Swanson (note 41) at 148.

³²⁸ CoPs 14 Res 14.27.

CHAPTER FOUR

DOMESTIC IMPLEMENTATION OF CITES IN TANZANIA AND SOUTH AFRICA WITH SPECIAL REFERENCE TO THE AFRICAN ELEPHANT

4.1 Introduction

This chapter compares the domestic implementation of CITES in Tanzania with that of South Africa, with special reference to the AE from two dimensions, namely, the manner and extent to which both Tanzania and South Africa implement CITES and the challenges the two countries face in implementing CITES and decisions of the CoPs. The following discussion focuses on the selected themes that will be discussed after an overview of legislation implementing CITES in the two countries.

4.4.1 An overview of the legislation implementing CITES

Tanzania

Prior to 1974 wildlife in Tanzania was governed by the Fauna Conservation Ordinance.³²⁹ The Ordinance was repealed by the Wildlife Conservation Act No 12 of 1974 (the current Act). On 29 November 1979 Tanzania ratified CITES and consequently the 2005 regulations were made under s. 84 of the current Act whose regulations are specifically intended to implement CITES.³³⁰ This was relevant particularly because the current Act has no provisions on regulation of international trade as it was enacted before Tanzania had become a Party to CITES.³³¹ Recently, however, Tanzania enacted Wildlife Act No 5 of 2009 (the new Act) that seeks to repeal the current law in its entirety.

The new Act has formally been assented to but will only come into force on a date yet to be published by the Minister for Natural Resources and Tourism. Moreover, even if it comes into force, regulations are yet to be promulgated. Thus, as long as the new Tanzania

³²⁹ 1951 Cap 302 Laws of Tanganyika.

³³⁰ Regulation 1(1) of the 2005 regulations which states thus 'These regulations may be cited as the Convention on International Trade in Endangered Species of Fauna and Flora (CITES) (Implementation) Regulations, 2005.' (hereinafter 2005 regulations)

³³¹ Tanzania ratified CITES in 1979.

legislation has not come into force, regulation of international trade in the AE in Tanzania is governed by the 2005 subsidiary legislation made pursuant to s 84 of the current Act. Even if the Act comes into force, s. 92(9) provides that the 'Minister may make regulations in the *Gazette* with respect to CITES matters'. Considering that the regulations under the current 1974 Act were made in 2005 after a period of approximately twenty-five years upon ratification of CITES, one wonders whether the Minister will be in any hurry to make new regulations once the new Act comes into force. Such a delay may have serious implications for the CoPs decisions concerning the AE.

While the discussion in this study refers to the current Act – the 2005 regulations in particular - reference is made to the new Act as and when appropriate.

South Africa

On 15 July 1975 pre-democratic South Africa ratified CITES. A democratic South Africa implemented the Convention through the National Environmental Management: Biodiversity Act of 2004 (NEMBA)³³² and its regulations³³³ (hereinafter the 2007 regulations). NEMBA was enacted in 2004 and most of its provisions came into force in 2005.³³⁴ Recently South Africa promulgated specific regulations to implement CITES under s 97(1) (b) (iv) of NEMBA.³³⁵ The regulations were available for public comment in August 2009 and are not yet in force.

A comparative analysis examines NEMBA and the 2007 regulations and reference to the 2009 regulations is made where appropriate.

4.2 Selected key features for comparative analysis

The key themes under discussion are the objectives, the designation of Management and Scientific Authorities (MA and SA), the prohibition of trade in violation of the Convention, penalising illegal trade, confiscating illegally obtained specimens and maintaining records and submitting reports. The study examines the key themes as implemented in Tanzania

³³² Act no 10 of 2004.

³³³ National Environmental Management : Biodiversity Act 2004 (Act No 10 of 2004)Threatened or Protected Species Regulations (Regulations 157 GN 29657 dated 23/2/ 2007) (hereinafter 2007 regulations).

³³⁴ Glazewski (note 21) at 268.

³³⁵ Government *Gazette* No 32515 Notice No 1165 of 2009 dated 28 August 2009.

through the Wildlife Management Act ³³⁶ (current Act) and its 2005³³⁷ regulations and the South African National Management Biodiversity Act (NEMBA) ³³⁸ and its 2007 regulations.³³⁹

4.2.1 Objectives

As already discussed at 2.3.1 the objective of CITES is to regulate and control trade in endangered species. The manner and extent to which the CITES objective has been implemented in the domestic legislation of the selected countries is material in determining the scope of such legislation.

Tanzania

The current Act seeks to achieve ‘protection, conservation, development, regulations and control of fauna and fauna products’³⁴⁰ The new Act focuses on ‘the conservation, management, protection and sustainable utilisation of wildlife products’.³⁴¹ A central feature of the new Act that relates to the African elephant is the concept of sustainable utilisation of wildlife and its products. In addition, the new Act has specific objectives. Those that relate to the AE include the promotion and enhancement of the contribution of the wildlife sector to the sustainable development of Tanzania,³⁴² the prevention of the illegal use of wildlife,³⁴³ and to enable Tanzania to participate in relevant international agreements.³⁴⁴

South Africa

The objectives of NEMBA include the management and conservation of biological diversity in South Africa and a commitment to give effect to the ratified international agreements relating to biodiversity which are binding on the Republic.³⁴⁵ These objectives are to be

³³⁶ Act No 12 of 1974.

³³⁷ 2005 regulations (note 330).

³³⁸ Act No 10 of 2004.

³³⁹ 2007 regulations (note 333).

³⁴⁰ Preamble to Act No 12 of 1974.

³⁴¹ Preamble to Act No 5 of 2009.

³⁴² Wildlife Act s 5 (1) (a).

³⁴³ Ibid s 5 (g).

³⁴⁴ Ibid s 5 (1) (k).

³⁴⁵ Section 2.

construed within the framework of the National Environmental Management Act (NEMA).³⁴⁶ Though the Act does not state categorically that it seeks to implement CITES, the statement ‘to give effect to the ratified international agreements’ should be interpreted to include the implementation of CITES.³⁴⁷

The objectives of NEMBA are broad and the law is intended for general purposes of biodiversity management, conservation and sustainable use. The 2007 regulations made pursuant to s 97 of NEMBA have a primary objective of ‘regulating the permit system in relation to threatened or protected species.

Comparative analysis

Tanzania’s current Act has no provisions implementing CITES. However, 2005 regulations made under it have been useful for implementing CITES. Under its new Act, objectives are provided though in broad terms. The new Act also makes two provisions implementing CITES.³⁴⁸

By requiring that the objectives of South Africa’s NEMBA be construed in the context of NEMA , it may be argued that South Africa’s legislation is more comprehensive than Tanzania’s in so far as endangered species (and hence the AE) are concerned. The legislation implies that any decisions made relating to international trade in the AE in terms of NEMBA must take into account the relevant provisions of NEMA. In addition, the 2009 regulations which seek to specifically implement CITES as opposed to the 2007 regulations that were intended to regulate the issuing of a permit, will ultimately enhance domestic implementation of CITES.

Both countries have adopted a somewhat similar approach in relation to the regulation of international trade in endangered species by adopting broad- conservation based legislation as opposed to specific legislation implementing CITES. The Tanzanian newly enacted law of 2009 is not substantially different from the current Act that seeks to regulate wildlife management and conservation. Both make regulations that are also inadequate for implementing CITES.

³⁴⁶ Act no 107 of 1998.

³⁴⁷ Glazewski (note 21) at 268.

³⁴⁸ S 91 and 92 of Act No 5 of 2009.

Ultimately, regulation of international trade as far as the AE is concerned in the two countries is to be governed by subsidiary legislation, meaning that the Minister can amend such regulations at will.

4.2.2 Designating Management and Scientific Authorities

4.2.2.1 Management Authority

Parties are required to designate Scientific and Management Authorities.³⁴⁹ (SA and MA) The Authorities designated must be capable of performing as well as competent to performing the duties under articles III and IV of CITES, such as ensuring that the species were not obtained illegally and that an import permit had been granted for appendix I species.³⁵⁰ In addition, domestic legislation must expressly give power to the designated authority to perform its functions such as issuing permits and certificates and as well as to establish export quotas.³⁵¹ It must also provide mechanisms for coordination and communication between MA/SA and other government agencies or authorities relevant in their duties such as customs, police and ministry responsible for foreign trade. Such coordination is important because all these institutions are involved in as far as international trade in the AE is concerned.

Tanzania

The Director of Game is the MA for purposes of CITES.³⁵² The appointment of the Director of Game as the MA seems to be for the purpose of complying with requirement of CITES after it was adopted in 1979. This is mainly because the Act was initially intended for protection and conservation of wildlife and not for regulation of international trade, and management was not part of the functions of a game officer. The Director, in conjunction with the SA, is vested with the powers, among others, to be the lead agency in the implementation of CITES and, in particular, grant export and import permits and re-export certificates on behalf of the government.³⁵³

³⁴⁹ Article IX.

³⁵⁰ Article. III (2) (b) and III (3) (c)

³⁵¹ TRAFFIC Report to the EC (note 302) at 164.

³⁵² CITES Regulation 3 and 4;S 4 Act no 12 of 1974.

³⁵³ Regulation 4.

The new Act provides for the Director of Wildlife in Tanzania to be someone whose qualifications include that of being a civil servant with proven academic and professional knowledge in wildlife science.³⁵⁴

The new Act allows for the delegation of the Director's duty to other officials including an Assistant Director, wardens and any other authorised officer. However the term 'authorised officer' is not defined. In addition, no qualifications are stated for the person on whom such delegation is to be conferred.³⁵⁵

South Africa

The South Africa MA is the Minister and Members of the Executive Committee (MEC) in the respective Provinces appointed in terms of regulations made under NEMBA.³⁵⁶ The law refers to the two Authorities each as permit 'issuing authority.' An 'issuing authority' is defined as 'the Minister or organ of state in the national, provincial or local sphere government designated as issuing Authority'.³⁵⁷ The functions of issuing authorities include 'issuing permit relating to carrying out of restricted activities involving any listed threatened or protected species'.³⁵⁸

Comparative analysis

The Tanzanian 2005 regulations make provision for the appointment of the Director of Game as MA and provides for its functions. The new Act however offers a broader definition by providing for the Director of Wildlife to be a MA and stating his/her qualifications. The requirement of professional knowledge in wildlife science is crucial and is likely to enhance the performance of the Director's duty. The Act, however, is silent on the qualifications of the persons to whom the Director may delegate his/her functions. Delegation of functions 'to any other' officer whose qualifications are not stated is a gap under the new Act. The vital role played by the MA in the regulation of international trade requires qualified personnel and not just 'any other officer'.

³⁵⁴ S 92(4) of the Wildlife Act No 5 of 2009.

³⁵⁵ S 7 (6) of the Wildlife Act.

³⁵⁶ Regulation GN 152 of 23 February 2007 Reg. 3(2) and reg. 3(3) as amended by Regulation GN 69 of 2008. of 28 January 2008 Reg. 3 (2) and (3) and regulations 209 of 2009.

³⁵⁷ S 1 NEMBA.

³⁵⁸ Regulation 3.

NEMBA uses the term 'issuing authority' instead of the MA as required under CITES³⁵⁹ which may be subject to interpretation since 'management' and 'issuing' are not synonymous. Management is a process that encompasses a broader range of activities³⁶⁰ which may include ensuring that species were not illegally obtained.³⁶¹ Further, the Director is required to ensure that conditions, such as that the species are not to be used primarily for commercial purposes, are to be fulfilled.³⁶² On the contrary, issuing may imply one function - to issue a certificate without necessarily fulfilling any conditions. Similarly, issuing a permit is the end and not the means. Here the term 'issuing permit' instead of MA seems to be inappropriate. However, this is addressed under the 2009 regulations³⁶³ which provide that the 'Minister is the National Management Authority for CITES related activities'.³⁶⁴

Similarly, the powers of the Minister are too wide and therefore need to be exercised judiciously. The Minister is a Presidential appointee and represents the Government, including at the CoPs. He is also the MA (for South Africa). He appoints members of the SA and makes regulations. For example, currently it is largely acceptable that African states favour sustainable use of its AE as against a total ban, (for example Tanzania's proposal to down list its elephant population from appendix I to II). It is inappropriate and inadequate that the same Minister who submits such proposals will in turn be responsible for the stringent regulation of international trade in the AE. These powers arguably remove impartiality, as it is widely believed that power corrupts, and absolute power corrupts absolutely. In this respect, regulation of trade in the AE is influenced (or even dictated) by political interests.

4.2.2.2 Scientific Authority

The national SA play a vital role in the implementation of CITES through monitoring export permits,³⁶⁵ carrying out non-detrimental findings and limiting exports in order to maintain a

³⁵⁹ Article IX.

³⁶⁰ Development of Management Thought available at <http://choo.fis.utoronto.ca/fis/courses/LIS1230/LIS1230sharma/history4.htm> [accessed 2/12/2009].

³⁶¹ Article III (2) (a).

³⁶² Article III (2) (b).

³⁶³ Regulations made under NEMBA published on 28 August 2009 for public comment.(hereinafter 2009 regulations).

³⁶⁴ Regulation 3.

³⁶⁵ Reeve (note 5).

species throughout its range.³⁶⁶ Parties are required to designate one or more SA independent from MA.³⁶⁷ In addition, Parties should not accept export permits from countries that have not informed the Secretariat of their SA for more than one interval between regular meetings of the CoPs.³⁶⁸ This seeks to ensure that Parties comply with the obligation to designate SA.

Tanzania

The 2005 regulations provide that the Minister shall designate one or more SA.³⁶⁹ Tanzania Wildlife Research Institute (TAWIRI) is the CITES SA in Tanzania.³⁷⁰ Its functions include monitoring export permits issued for specimens that are threatened with extinction.³⁷¹ Under the new Act, the Minister is also required to designate SA.³⁷² While the new Act establishes the MA under the parent Act, the SA will be established by the Minister. It is expected that the Minister will comply with this requirement in time, taking into account that the SA performs important functions in regulating international trade in the AE.

South Africa

The NEMBA requires the Minister for Environmental Affairs to establish the SA for the purpose of assisting in regulating and restricting trade in listed, threatened or protected species.³⁷³ The South African National Biodiversity Institute (SANBI) is the SA.³⁷⁴ The members of the SA are appointed by the Minister³⁷⁵ and its functions include advising the Minister on matters relating to international agreements affecting biodiversity which are binding on the Republic,³⁷⁶ monitoring illegal trade, making recommendation on applications for permits, and making non-detrimental findings on the impact of action relating to the international trade in specimens listed or threatened.³⁷⁷ The SA in South Africa seems to have broader functions that extend to monitoring illegal trade.

³⁶⁶ Article III(2) (a) III 3 (a) IV 2 (a) and IV (6) (a).

³⁶⁷ Conf 10.3.

³⁶⁸ Conf 10.3.

³⁶⁹ Regulation 4 (2).

³⁷⁰ <http://www.tawiri.org/> [accessed 20/9/2009].

³⁷¹ Regulation 4(2) (c).

³⁷² S 92(5) of the wildlife Act.

³⁷³ S 60 NEMBA.

³⁷⁴ S 10 NEMBA.

³⁷⁵ Chapter 7 Regulation 60 (2) of 2007 regulations.

³⁷⁶ S11 (p).

³⁷⁷ S 61 NEMBA.

Comparative analysis

The legislation of the two countries gives power to the respective Minister to establish the SA. By placing emphasis on subsidiary law, one wonders what level of regulation of international trade is intended to be achieved, because by vesting power in the Minister to designate the SA the whole process of a monitoring permit is a matter within the competence of the Minister. Additionally, the appointment of members of the SA by the Minister makes the SA accountable to the MA and therefore subordinate to the MA. Moreover, discretion is power, and power is amenable to abuse. The substantive emphasis on legislation would arguably provide effective regulation of international trade in the AE. This is mainly because such legislation can only be amended by Parliament.

While designation of the MA and the SA has been achieved in both Tanzania and South Africa, effective functioning of the two institutions is undermined by inadequate funding and varying priorities given to the two institutions, both at international and domestic level.³⁷⁸ Thus, the selected countries should allocate financial resources to the two institutions proportionally.

4.2.3 Prohibiting trade in violation of CITES

This encompasses various requirements laid down under article II,³⁷⁹ III³⁸⁰, IV³⁸¹, V³⁸², VI³⁸³ and VII³⁸⁴ of CITES which constitutes the core of CITES regime.³⁸⁵ In order to meet the threshold for adequate implementation, domestic legislation should cover all specimens of species (animal and plant, live and dead) and parts and derivatives included in their appendices to CITES. In addition, the legislation should provide for appendices or schedules to be amended as necessary.³⁸⁶ It should further cover all types of transactions including export, imports and re-export, introduction from the sea, and transshipment between parties and non-parties. Other determining factors include provisions on standardised permits and

³⁷⁸ Reeve (note 5) at 252.

³⁷⁹ Appendices of listed Species.

³⁸⁰ Regulation of trade in species listed in appendix I.

³⁸¹ Regulation of trade in species listed in appendix II.

³⁸² Regulation of trade on species listed in appendix III.

³⁸³ Permits and certificates.

³⁸⁴ Exemptions and other provisions relating to trade.

³⁸⁵ TRAFFIC Report to the EC Commission (note 300) at 165

³⁸⁶ Ibid.

certificates and exemptions or special procedures allowed by the treaty.³⁸⁷ These ensure that species are listed according to the level of protection accorded to them and trade on them is subject to the required relevant type of permit.

In regulating trade consistent with CITES, the MA must also be satisfied that species will be shipped in a manner that is not detrimental to its health or welfare.³⁸⁸ This requires domestic legislation to incorporate IATA, the International Air Transport Association's Live Animals Regulations (for animals) and Perishable Cargo Regulations (for plants).³⁸⁹ These regulations include compliance with, among other things, marking and labelling, acceptance and handling of shipments (for example, loading, feeding and watering) and logistics for laboratory animals. Additionally, the laws should make penal provisions for any violation of these regulations.³⁹⁰

Further, national legislation should designate the port of entry and exit; legislation should cross-reference other legislation relevant to the transport of living specimen; and should authorise the shipment of live specimens to be examined and necessary action taken to ensure the well-being of specimens.³⁹¹

Tanzania

The 2005 regulations define species as 'any species, subspecies, or geographically separate population thereof' and 'specimen' is defined as an 'animal or plant whether alive or dead'.³⁹² The regulations do not provide for a schedule of species but makes reference to CITES appendices.³⁹³ This is not addressed in the new Act as it provides schedules for purposes of regulating hunting rather than regulating international trade. The 2005 regulations makes provision for export, import and export certificates.³⁹⁴ Importantly, 'no export permit shall be issued if the Director is satisfied that 'the specimen was obtained in

³⁸⁷ Ibid.

³⁸⁸ Article III,IV (6) VII (7)VIII (3).

³⁸⁹ Resolution Conf 10.21 (RevCoP 14).

³⁹⁰ AC24 Doc 15.2 at 11.

³⁹¹ AC24 Doc 15.2 at 11.

³⁹² Regulation 3.

³⁹³ Regulation 5 (1).

³⁹⁴ Regulation 5-8.

contravention of the laws of any jurisdiction relating to conservation, protection and Management of Fauna and Flora'.³⁹⁵

In addition, these regulations govern trade with regards to species that are identified as protected or restricted in other jurisdiction and requires cooperation.³⁹⁶ The regulations make provision for the handling of specimens,³⁹⁷ including examination and vaccination or treatment of all species by a veterinary officer before export.³⁹⁸ It also provides for exemptions, such as in pre-Convention and household species,³⁹⁹ and designates port of entry and exit.⁴⁰⁰

The new Act makes provision for import, export and re-export permit⁴⁰¹ and requires the MA to be satisfied that the species was not obtained through the violation of any domestic laws.⁴⁰² In addition, the new Act requires provisions relating to CITES export and import of wildlife or products as well as regional agreements to be complied with.⁴⁰³ Thus, trade in the AE and their products such as ivory will require compliance with CITES, the Lusaka Agreement and any other international and regional agreements. While this seems to be 'catch all' provision, its implementation is not elaborated and gives an impression that, it is a mere paper work.

Under the Lusaka Agreement, however, to which Tanzania has acceded and South Africa is a signatory, parties have agreed to cooperate in, among other things, investigating cases on illegal trade and providing technical assistance through the Lusaka Agreement Task Force (LATF).⁴⁰⁴ In Tanzania, for instance, this will be done by National Bureau designated under article 6 to work with LATF.⁴⁰⁵

³⁹⁵ Regulation 5(2) (a)

³⁹⁶ Regulation 10.

³⁹⁷ Regulation 33-46.

³⁹⁸ Regulation 38-39.

³⁹⁹ Regulation 21-22.

⁴⁰⁰ Regulation 26.

⁴⁰¹ S 92 (3).

⁴⁰² S 92(3) (a)-(c).

⁴⁰³ S 92(3).

⁴⁰⁴ Article 4 Lusaka Agreement.

⁴⁰⁵ Elizabeth Mrema 'Lusaka Agreement as a mechanism for enforcement of CITES', paper presented at the Seventh International Conference on Environmental compliance and enforcement. available at http://www.inece.org/conference/7/vol1/38_Mrema.pdf [accessed on 30/11/2009] at 233

South Africa

The National Environmental Management: Biodiversity Act (NEMBA) defines specimen as 'any living or dead animal plant or other organism, seed, egg...and any other derivative of animal, plant or organism'.⁴⁰⁶ There is no schedule of listed protected species either under NEMBA or the 2007 regulations. NEMBA requires the Minister by notice published in the *Gazette* to publish a list of critically endangered, endangered, vulnerable and protected species.⁴⁰⁷ The 2009 regulation provides that the regulation applies to animals and plants and make provision for a schedule of listed species according to CITES three appendices.⁴⁰⁸ These appendices are automatically amended whenever CITES appendices are amended.⁴⁰⁹

While NEMBA and the 2007 regulations are silent on exemptions, shipment and designating port of entry and exit, the 2009 regulation has made provisions that the MA should to designate the port of entry and exit.⁴¹⁰ Additionally, the MA must ensure that all living specimens during the period of transit or shipment are properly cared for so as to minimise the risk of injury, damage or cruel treatment.⁴¹¹ Further, the regulations provides for conditions for trading species in the three appendices, including introduction from the sea⁴¹² and exemptions and special procedures.⁴¹³ It exempts requirements of permit in pre-Convention species,⁴¹⁴ personal effects⁴¹⁵ and scientific exchange.⁴¹⁶

The National Environmental Management Biodiversity Act (NEMBA) requires critically endangered species facing an extremely high risk of extinction in the near future and species facing high risk of extinction although they are not critically endangered species be listed.⁴¹⁷ This list is provided for under the 2007 regulations promulgated in terms of s. 56 (1).⁴¹⁸ NEMBA further requires vulnerable indigenous species facing risk of extinction in the medium-term future be listed.⁴¹⁹ In addition, protected species of high conservation value or

⁴⁰⁶ S 1.

⁴⁰⁷ S 57.

⁴⁰⁸ Regulation 2 (1) –(2).

⁴⁰⁹ Regulation 2 (3).

⁴¹⁰ Regulation 5 (2).

⁴¹¹ Regulation 5 (3).

⁴¹² Part 4 Reg 5-10.

⁴¹³ Part 6 Reg 12-15

⁴¹⁴ Regulation 13.

⁴¹⁵ Regulation 14.

⁴¹⁶ Regulation 15.

⁴¹⁷ S 56(1) (a)(b).

⁴¹⁸ N A Strydom and N D King (eds) *Environmental management in South Africa* 2nd ed (2009).

⁴¹⁹ S 56(1) (c).

national importance that require national protection are also to be listed.⁴²⁰ The listing requirement in the latter category does not require that species should be critically endangered, endangered or vulnerable. The list of species is to be reviewed by the Minister at least every five years.⁴²¹

Comparative analysis

Definition of specimen under the 2005 Tanzanian regulations, the new Act , and NEMBA, and the 2009 regulations include animals and plants, live and dead , and their products consistent with the requirements of CITES.

The extension of violated laws to other jurisdictions as constituting an offence in Tanzania under the 2005 regulations - other than Tanzania's laws - as well as the inclusion of cooperation is important, taking into account the migratory habits of the elephant and the increase of elephant poaching.

The 2005 regulations make provisions for handling and transporting trophy.⁴²² The term 'trophy' is not defined either under the 1974 Act or the 2005 regulations. However a definition is found in the new Act - which defines trophy as any animal whether alive or dead, and any horn, ivory, tooth bone, hair, meat⁴²³ which by necessary implication should be used. Provisions for violation of shipment regulations and the designation of ports of entry and exit are not specifically designated under the 2005 regulations. The law requires the Director after consultation with MA and SA to designate such ports.

The legislation in the selected countries have no schedule for protected species as required under CITES. The 2005 Tanzanian regulations for instance, makes reference to the CITES appendices and NEMBA requires the Minister to declare/publish in the *Gazette* a list of threatened species or in need of national protection. These are addressed under the 2009 regulations. One should have expected to see this list include the AE in schedules of substantive legislations. Both countries, however, provide for standardised permits consistent with CITES (annex 'A', 'B' and 'C' respectively).

⁴²⁰ S 56 (1) (d).

⁴²¹ S 56 (2).

⁴²² Regulation 34-43.

⁴²³ S 3 Wildlife Act 2009.

Many states, including the selected countries, tend to include provisions that are not elaborate and restate, more or less verbatim, the conditions for implementation provided under CITES.⁴²⁴ For instance, the 2005 regulations makes a general and progressive provision that the Director may designate port of entry or exit⁴²⁵ instead of actual designation of such ports. This is also the same under the 2009 regulations. Thus the powers conferred by the Convention are introduced into the nation's principal legislation, and then to its subsidiary legislation, with the subsidiary legislation giving power to another organ. This chain of authority is unnecessarily too long.

In addition, no legislation or its regulations define the term 'non-commercial use.' Among the difficulties parties, including the selected countries face, in implementing the Convention include requirement for non-commercial use. The Convention requires that the MA of the state of import must be satisfied that the specimen is not to be used for primarily commercial purposes.⁴²⁶ However, the mix of activities to which a specimen is subjected may be complex. For example, a zoo may have a degree of education and entertainment and other commercial purposes. Thus complying with this requirement may be difficult as the term 'primarily commercial purposes' can be subjected to interpretation.

4.2.4 Penalising illegal trade

Parties are obligated to take measures to prohibit trade that contravenes CITES and impose appropriate penalties that include the confiscation of illegally-obtained species. Such species are to be returned to the country of export.⁴²⁷ Provisions on the regulation of trade consistent with CITES that include penalising illegal trade are relevant to the AE mainly because such illegal trade threatens the AE population. Thus enacting legislation that ensures effective regulation of international trade in the AE, particularly in the selected countries, has become imperative.

In addition, domestic penal law should provide for strict liability for a person being found in possession of wild species.⁴²⁸ This requires domestic legislation to list the prohibited activities and breaches of such provision should constitute an offence. Such activities include

⁴²⁴ Animals' Committee 24 Doc 15.2 at 8.

⁴²⁵ Article 26.

⁴²⁶ Article III (3) (c).

⁴²⁷ Article VIII(1) (a) (b).

⁴²⁸ Resolution CoP 14.

the import or export of a CITES specimen without a permit or trade in specimens that were illegally imported or acquired.⁴²⁹

Moreover, departments and agents responsible for enforcing such laws such as police officers, for example, the Endangered Species Protection Unit(ESPU), now defunct,⁴³⁰ of the South African Police Service must be designated and given express powers to carry out activities including the power to search persons, baggage and other properties, vehicles and premises.⁴³¹

CITES specimens may be sanctioned by different laws such as the penal code, customs legislation or foreign trade laws. It is, therefore, important for domestic legislation to specify which specific legal provisions apply to CITES-related offences.⁴³² Additionally, the regulation of trade in the AE involves a number of institutions such as the MA, the South African Police Service and customs authorities. Although no role is specified for customs authorities in the Convention, the Convention provides that trade requires presentation of valid permits or certificates which usually involves customs.

A customs officer, or others involved in border inspection is usually the first and sometimes the only level of inspection of a shipment of specimens.⁴³³ This places a burden on the customs officer to verify that trade is in accordance with CITES provisions to detect fraud, and illegal trade when it occurs, and inform the MA. This implies that, the regulation of trade, especially of the AE which is hunted for its ivory, requires integration of various domestic laws and the coordination of institutions at the domestic level. These institutions must collaborate and exchange information at the right time.

Tanzania

The 2005 regulations makes provisions for the 'control of trade on species listed under CITES appendices'.⁴³⁴ The provision is too general, especially to the effect that the regulations seem not to adopt stricter measures than CITES and protect species only to the

⁴²⁹ TRAFFIC Report to the EC (note 300) at 165.

⁴³⁰ Reeve (note 5) at 214- 215.

⁴³¹ TRAFFIC Report to the EC(note 300).

⁴³² Ibid at 165.

⁴³³ Ibid.

⁴³⁴ Part III of the Regulations.

extent of their protection under CITES. Arguably, this implies a lack of commitment in implementing the Convention and in regulating trade in the AE.

To contravene provisions of regulations constitutes an offence punishable by a fine of ten million shillings (\$7693) and to imprisonment for ten years.⁴³⁵ By making a provision for 'an "offence" for contravention of the regulations', the law is too general and, to some extent, vague. This is mainly because it implies that contravention of any provisions of the regulation constitutes the same offence carrying the same punishment. In addition, the use of the conjunction 'and' in relation to the fine and imprisonment implies that a person convicted will be liable to both fine and imprisonment which is likely to be unworkable in so far as the criminal law principle of double jeopardy is concerned.⁴³⁶

The new Act makes elaborate provisions regarding offences. Being in possession of weapons used or intended to be used for the commission of the offence specified under the Act constitutes an offence. The specified offences include forged documents such as certificates and permits or possession of trophies.⁴³⁷ The burden of proof lies on the accused.⁴³⁸ The law imposes a fine of not less than five million shillings (\$3850) or imprisonment for terms of not less than one year but not exceeding five years or both in case of conviction.⁴³⁹

South Africa

NEMBA prohibits the execution of any restricted activity involving a specimen of a listed threatened or protected species without permit.⁴⁴⁰ A restricted activity is defined to include hunting, gathering, having in possession, conveying or selling a specimen of a listed, threatened or protected species.⁴⁴¹ Such activity constitutes an offence punishable by a term of imprisonment of not more than five years, or a fine or both. The fine imposed may not exceed an amount in terms of the adjustment of Fines Act 101 of 1991 or three times the commercial value of the specimen in respect of which the offence was committed, whichever

⁴³⁵ Regulation 47.

⁴³⁶ The rule prohibits double punishment for the same offence.

⁴³⁷ S 101 and 102 Act no 5 of 2009.

⁴³⁸ S 97 (1).

⁴³⁹ S 102 Wildlife Act no 5 of 2009.

⁴⁴⁰ S 57(1) permit issued in terms of chapter 7 which regulate issuing permits.

⁴⁴¹ S 1 NEMBA. See also Glazewski (note 21) at 273.

is the greater.⁴⁴² There is no requirement that the burden of proof as to lawful possession lies with the accused.

It constitutes an offence under the 2009 regulations to import, export re-export or introduce from the sea any specimen listed under schedules without a valid permit or certificate.⁴⁴³ It is also an offence to sell illegally obtained species. This is punishable by imprisonment not exceeding ten years or a fine not exceeding R 10m (\$12,500), or both.⁴⁴⁴

Comparative analysis

The 2005 Tanzanian regulations do not specify or list species in appendices according to the status and protection to be given to such species, instead it relies on the CITES appendices. However, the list of CITES may not cater adequately for domestic purposes, as other species though not listed under CITES need to be given protection under domestic legislation.

Provisions under both the Tanzanian 2005 regulations and NEMBA stipulate fines according to the value of species at the market price at a particular time. This is important mainly because the fixed amount may easily be affected by inflation. The new Tanzanian Act, further, makes provisions for the reward for a person who provides information that leads to a conviction. This provision is consistent with CITES⁴⁴⁵ and it becomes relevant as it may be used as incentive to combat poaching of the AE.

In addition, strict liability under the 2005 regulations in which the intention to commit an offence is immaterial is relevant in wildlife trade for two reasons. One, there is likelihood of being in possession of wild species for various purposes without any intention to commit an offence and, two, it is difficult to prove *mens rea* particularly in a mere possession.

However, strict liability provision has been subject to challenge in as far as the right to a fair trial and the presumption of innocence is concerned. For example in *The Matter of Lodi v. MEC for Nature Conservation and Tourism, Gauteng and another*,⁴⁴⁶ the applicant challenged the constitutionality of the Nature Conservation Ordinance s 37 (1) (c) which places the burden of proof on any person charged with the offence of acquiring, receiving or

⁴⁴² S 102 NEMBA.

⁴⁴³ Regulation 16 (1) (a).

⁴⁴⁴ Regulation 16 (2).

⁴⁴⁵ Article VIII (2).

⁴⁴⁶ (2005)(3) SA 381 (T) in Jan Glazewski and Emma Witbooi *Annual Survey of South African law* (2005) 416 at 427-428.

handling dead game. He alleged that the said provision contravenes s 35 (3) (h) of the Constitution of South Africa as regards the presumption of innocence. The court held that s 37 (1) was inconsistent with the Constitution. Arguably, in interpreting rules that regulate international trade versus protection of human rights, courts will uphold the later as it is a constitutional right.

Similarly, although domestic legislation may provide offences and penalties, the lack of judicial awareness and imposition of non-deterrent fines is a challenge to the effective regulation of international trade.⁴⁴⁷ This may be inferred both from a variation on the poaching incidents reported in the media and cases instituted in courts and fines imposed. In Tanzania, for instance, in the Dodoma Region where more than 50 poaching incidents are reported in a year, only 4 poaching cases were filed at the Resident Magistrate Court in 2008.⁴⁴⁸ Two cases were pending as of July 2009. In the third case the accused was discharged. In the fourth case in which the accused⁴⁴⁹ was charged for being in unlawful possession of government trophies c/s 67 (4) (2) of the Wildlife Conservation Act no 12 of 1974 and GN 676/1995, a fine of 50,000(\$40) or 6 months imprisonment was imposed.⁴⁵⁰ The 2005 regulations provides for a fine of ten million shillings (\$7,700) and imprisonment for ten years⁴⁵¹ and the new Act provides for fine not less than 5mTsh (\$ 3850) or five years imprisonment, or both.

4.2.5 Confiscation of illegally traded species

Domestic legislation must make provisions for the confiscation and return of specimen illegally traded or possessed.⁴⁵² It must also elaborate which authority must confiscate, the extent of their confiscation powers, for example, specimens, containers, equipment and vehicles involved in an offence and the procedures to be followed as well as the final disposal

⁴⁴⁷ Reeves (note 5) at 255.

⁴⁴⁸ *Republic v Thadei Mlyambago* Criminal case no 611/2008; *Republic versus Joshua Mathayo* 612/2008; *Republic versus Monas Senyagwa* Criminal case no 614/2008; *Republic versus Christopher John* the first three accused were charged with unlawful possession of Government trophy c/s 67(1) and (2) (iii) and section 78 of the wildlife conservation Act Cap 283 (RE 2002) read together with s 56(i) and paragraph 16(D) of the first schedule of the Economic and Organised Crime Control Act Cap 200 of (RE 2002) and the fourth for being in unlawful possession of Government trophies c/s 67 (4) (2) of the Wildlife Conservation Act no 12 of 1974 and GN 676/1995.

⁴⁴⁹ *Republic v Christopher John* Criminal case no 717/2008 (unreported).

⁴⁵⁰ Information obtained from the Dodoma Resident Magistrate Court Registry which the researcher visited in July 2009.

⁴⁵¹ Regulation 47.

⁴⁵² Article VIII (1) (b).

of confiscated specimens.⁴⁵³ The law must state which legal provisions apply to the confiscation of specimens of CITES listed species.⁴⁵⁴

Tanzania

The 2005 regulations require that any specimen which is confiscated in the process of enforcing the regulations, 'be entrusted to The Director and placed in a rescue centre'.⁴⁵⁵ Though the law does not state what activities will warrant the confiscation of species, impliedly these include any prohibited under the Act, such as illegal trade. However, the regulations are silent on the return of such species but require the Director to obtain advice from the SA and consult the Secretariat before making decision on confiscated species. It is not clear whether this process is for the purpose of returning such species, or otherwise.

The new Act makes provision for the confiscation of illegally traded specimens.⁴⁵⁶ However, the law does not provide for the return of specimens obtained, traded or possessed illegally. The law requires an authorised officer as defined to include the Director of Wildlife and employees of the National Parks and Forest Division,⁴⁵⁷ to inspect and search any person where there is a reasonable ground to believe that such a person has committed or is about to commit an offence under the Act.⁴⁵⁸ These offences include being in possession of trophy, a permit or other documents under the Act.⁴⁵⁹

The new Act makes comprehensive provision as to the process of confiscation, including powers and places to be searched, but fails to complete the link as it does not say what should be done after the confiscation of illegally traded species. In addition, confiscation is limited only to illegal trade and does not extend to the illegal possession or the obtaining of these species.

South Africa

NEMBA, apart from making provision restricting activities on threatened protected species⁴⁶⁰ has no provision concerning the confiscation of illegal trade. This is a gap which raises

⁴⁵³ TRAFFIC Report to the EC (note 300)168.

⁴⁵⁴ Ibid at 166.

⁴⁵⁵ Regulation 27(1) (a).

⁴⁵⁶ S 92(1).

⁴⁵⁷ S 1.

⁴⁵⁸ S103 (1).

⁴⁵⁹ S 103.

⁴⁶⁰ S57 specifies restricted activities and s 3 defines restricted activities.

serious questions as to what measures are taken in respect of illegally traded or possessed ivory and other AE products. The 2009 new regulations addresses this by providing that the MA, in consultation with the SA, may decide on the disposal of confiscated specimens in accordance with the appropriate CoPs resolution and not according to the Convention which requires return to the country of origin. Reference to a CoPs decision on confiscated species seems to be intentionally technical, for example by avoiding the requirement of return.

Comparative analysis

The 2005 Tanzanian regulations make provision for the confiscation of species illegally obtained. Confiscation of illegal trade as one of the requirements is important in view of an increase in illegal trade in the AE. While the Tanzanian new Act makes provision for confiscation of illegally traded species, it does not extend to illegally possessed or obtained species. The law is also silent on the requirement of return of the confiscated species. NEMBA makes no provision on confiscation of species. This gap has been addressed under the 2009 regulations.

4.2.6 Periodic reports

The Convention requires all parties to submit reports on CITES trading.⁴⁶¹ These are Annual and biennial reports which are compiled and submitted by member states to the Secretariat.

Annual reports are a summary of information on, among other things, number and type of permit and certificates granted, the states traded with, the quantity and type of specimens, and the names of species as included in appendix I, II and III.⁴⁶² They serve two purposes. One is for monitoring trade in listed species and, two, to provide information on implementation.⁴⁶³

Biennial reports contain information on administrative, regulatory and legislative measures taken by the Parties to enforce the Convention.⁴⁶⁴ The report may contain information on compliance and enforcement initiatives such as inspection, investigations,

⁴⁶¹ Article VII (7).

⁴⁶² <http://www.cites.org/eng/resources/reports.shtml> [accessed 15 October 2009].

⁴⁶³ Reeve (note 5).

⁴⁶⁴ <http://www.cites.org/eng/resources/reports.shtml> [accessed 15 October 2009].

penalties, seizure, convictions and court decisions.⁴⁶⁵ At a national level the report serves as a self assessment tool.

Tanzania

The 2005 regulations require the MA to prepare periodic and annual reports and submit them to the Secretariat.⁴⁶⁶ These reports are also to be published in the *Government Gazette*.⁴⁶⁷ Tanzania submitted its annual reports from 2002 to 2006 but did not submit from 2007-2009. Biennial reports were not submitted from 2003-2004, 2005-2006 and 2007-2008.⁴⁶⁸

South Africa

NEMBA imposes an obligation on the Minister to prepare and submit reports and documents in compliance with South Africa's international agreement⁴⁶⁹ and in compliance with CITES in terms of article VIII (6) and (7). South Africa submitted annual reports for six years between 2002 and 2007 and annual reports from 2002 to 2007 but did not submit its biennial report from 2003-2004, 2005-2006 and 2007- 2008.⁴⁷⁰

Comparative analysis

The selected countries make provision in their domestic laws for reporting and have been submitting annual reports but failed to submit biennial reports. This study argues that the absence of adequate legislation is largely responsible for such failure which is, in itself, due to many challenges, including financial constraints.

4.3 Barriers to effective domestic implementation of CITES

In the course of analysing the domestic implementation of CITES this study has identified a number of challenges that include the varying interests of the parties, exemptions and lack of uniformity. These are briefly examined below.

⁴⁶⁵ Ibid.

⁴⁶⁶ Regulation 4(1) (g) and 29.

⁴⁶⁷ Regulation 30.

⁴⁶⁸ <http://www.cites.org/eng/resources/report>. [accessed 15 October 2009].

⁴⁶⁹ S 62 NEMBA.

⁴⁷⁰ <http://www.cites.org/eng/resources/report>. [accessed 15 October 2009]

While effective implementation is a *conditio sine qua non* for the effective regulation of international trade, the same has not been achieved in the selected countries owing to various challenges. Such challenges include different means adopted by Tanzania and South Africa to implement the regulations, divergent Parties' interests and textual loopholes within the Convention giving rise either to contradictions, ambiguities or adoption in 'wholesale' by the selected countries. In addition lack of political will and the competing interest between conservation and sustainable use hinders meaningful implementation of the treaty.

4.3.1 Varying Parties' interests

Arguments and counter-arguments on sustainable use and preservation (discussed at 1.2.1) have, for instance, been the driving force in listing AE on each of the appendices. Preservationists often cite the trade ban to support arguments on sustainable use.⁴⁷¹ In addition, preservationists assert that the uncertainty on sustainable use owing to the difficult and costly nature of gathering scientific data especially for developing countries, may cause what is intended to be sustainable use unsustainable all together.⁴⁷² Thus in the absence of timely and reliable studies species may be overexploited due to unsustainable use.⁴⁷³ Furthermore, the whole idea of 'sustainable user' disagrees sharply with trade bans. To the AE range states sustainable use is viewed to the extent that economic return is achieved as compensation for the expensive conservation efforts.⁴⁷⁴ Thus income derived from elephants should outweigh conservation expenses.

In addition, sustainable use is also a compromise between elephant protection and human needs in a particular area.⁴⁷⁵ For instance, most of the people in Africa view elephant as destructive animals,⁴⁷⁶ and therefore allowing them to benefit from elephant protection gives them a good reason to protect them. It is for these and other reasons that Tanzania has submitted proposal in the next CoPs to downlist its elephant population from appendix I to II.

⁴⁷¹ 'Call of the wild: trade bans and conservation; wildlife trade' *The Economist* (March 8 2008).

⁴⁷² Young (note 222) at 185.

⁴⁷³ Ibid.

⁴⁷⁴ Ibid at 183.

⁴⁷⁵ Ibid at 184.

⁴⁷⁶ Ibid.

4.3.2 Lack of uniformity

Lack of uniformity in domestic implementation is also another barrier. Parties to CITES have discretion to implement by either amending laws relating to wildlife management, making provisions for implementing CITES in such legislation, or enacting new legislation. In Tanzania, for instance, despite what is seen as a new legislation to implement CITES, the law regulates wildlife management and makes only two provisions to implement CITES. The Secretariat prepared a model law in the 1990s to be adhered to by the Parties in their implementation,⁴⁷⁷ but since this is not binding, the selected countries have opted to make provisions in existing legislation. The South African 2009 regulations, however, seem to reflect the said model (annex 'D').

In addition, the lack of enforcement mechanism at an international level surrenders control and enforcement powers to the individual states.⁴⁷⁸ Importantly, states are grappling to reconcile their sovereignty - which has been an impediment towards implementation of international environmental agreements -⁴⁷⁹ with complying with their international law obligations.

4.3.3 Weaknesses under the Convention

Inadequate implementation is also caused by the textual loopholes within the treaty itself. Provisions relating to reservations, exemptions and trading with non-parties are barriers to effective domestic implementation. CoPs decisions have attempted some definition aspects, for example, exemptions for non-commercial or personal household use. However, the legal effect of the CoPs decisions is questionable as they are not binding, hence any non-adherence by Parties may not be said with any clarity to be a breach of an international law obligation.

A provision which is complex – though the selected countries have included it in their domestic laws – is the one that applies to pre-Convention species.⁴⁸⁰ This was intended to ensure that CITES does not apply retrospectively.⁴⁸¹ Provisions as to pre-Convention species have been problematic and since the inception of the Convention they were differently

⁴⁷⁷ TRAFFIC Report to the EC (note 300) at 168.

⁴⁷⁸ Young (note 222) at 174.

⁴⁷⁹ Alacorn (note 42) at 115-116.

⁴⁸⁰ Article VII (2).

⁴⁸¹ Winjstekers (note 111) at 14.

interpreted and applied by the Parties. While some applied the date of entry into force of the Convention, others applied the date of entry into force of CITES in their own countries.⁴⁸²

In recognising this problem, Res 5.11 decided, among other things, that the certificate referred in article VII.2 be issued by the MA of a re-exporting country where it is satisfied that at the date on which the specimen was acquired the specimen was not listed in the appendices or the country of origin was not a party to the Convention. In addition - and of more relevance to the AE - it was decided that, in the case of species uplisted or downlisted from appendix I, II and III they shall be subject to conditions applicable to them at the time of export, re-export or import. This provision seem to be inconsistent with the basic idea behind exemptions of art VII 2 as it recommends that specimens acquired as appendix II or III be treated as appendix I specimens after the species had been uplisted.⁴⁸³

It is for this reason that in 1989, in anticipation of the transfer of AE from appendix II to appendix I it was recommended that all Parties should take stricter domestic control on trade in AE ivory under appendix I, pending entry into force of resolution 7.8.⁴⁸⁴ Currently, even though the population of AE from Southern African states is listed in appendix II and trade is allowed for limited purposes, generally AE are listed in appendix I and therefore strict measures are necessary.

The status of AE was elaborated by the South African Constitutional Court in *Vorster v Department of Economic Development, Environment and Tourism, Limpopo Province and others*.⁴⁸⁵ The applicant applied for a hunting permit in terms of s 69 of the Limpopo Environmental Management Act no 7 of 2003 to shoot damage-causing elephant. The application further requested permission be issued in the form of a CITES permit which may be used by foreigners wishing to export trophy from South Africa. The respondent issued the permit in terms of s 60 of the Act and imposed a condition that the hunter must be a local hunter. The applicant challenged this, claiming the requirement of 'local hunter' was *ultra vires* in terms of s. 69 of the Limpopo Act.

⁴⁸² Ibid.

⁴⁸³ Ibid at 142-143.

⁴⁸⁴ Ibid.

⁴⁸⁵ 2006(5) SA 291 (T).

In deciding the matter, the Court clarified the status of the AE that, 'CITES subjects trade in certain listed species and their product to certain control.[AE] are generally listed in appendix I of the Convention meaning that they are threatened with extinction and there may be no trade on such species at all'.⁴⁸⁶

The Court further stated that in respect of elephants in four Southern African countries, namely, Botswana, South Africa, Namibia and Zimbabwe, an exception has been made to list in appendix II and this means that they may become threatened with extinction and trade is permitted subject to conditions including annual country quotas.⁴⁸⁷

Another exemption is species for non-commercial loan, donation or exchange between scientists or scientific institutions.⁴⁸⁸ The purpose of excluding the exchange of species for a scientific institution is to facilitate the normal transfer of dead specimens among *bona fide* museums and other scientific collections.⁴⁸⁹ However, there is no definition as to scientific institutions either under the treaty or legislation of the two countries.⁴⁹⁰ CITES resolution Conf 11.15 (pertaining to non-commercial loan, donation and exchange of museum and herbarium specimens) only offers standards for scientific institutions, but no definition. This discrepancy is likely to result in different implementation as species may be exempted in one country while not in another.

4.4 Conclusion

Tanzania and South Africa implement CITES in varying ways. However, what is common to them is that they both implement CITES through subsidiary legislation while making few provisions relevant for the implementation of CITES. For example, the objectives of the legislation are broad and are meant for wildlife and biodiversity management and conservation. One wonders as to the seriousness of Tanzania and South Africa in regulating international trade in one of their 'precious' mammals. For instance, if the United States has specific legislation on the AE why does not the selected countries - the habitat of AE and, the countries (together with other AE range states) that most need elephant for economic purposes?

⁴⁸⁶ Glazewski (note192).

⁴⁸⁷ Ibid.

⁴⁸⁸ Article VII (6).

⁴⁸⁹ TRAFFIC Report to the EC (note 300) at 52.

⁴⁹⁰ Ibid.

Implementation of CITES is not only inadequate by reason of weak regulations but also due to non-compliance with the obligations under the Convention and CoPs decisions. This is mainly due to factors that include financial, technical, technological constraints and lack of political will.

In addition, Ministers in the two countries have a huge role to play pertaining to institutions and legislation so much so that his or her impartiality could be compromised. Legislation in the two countries is wanting in areas such as provisions for the exemptions, confiscation of illegal traded species and the small fines imposed by courts.

Based on these findings this study, draws conclusion and makes recommendations in the next and last chapter.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The importance of the African elephant cannot be sufficiently stressed (by reason of its being a 'keystone', 'flagship' and 'umbrella' species, as well as other factors). However, the regulation of international trade in such species has been, and remains problematic due to conflicting interests between preservation as against sustainable use of endangered species - the AE in particular. The adoption of CITES in 1973 sought to create binding obligations, with a view to putting in place acceptable mechanisms to enhance such regulation. On one hand, however, CITES has inherent weaknesses such as exemptions, reservations and trading with non-parties. On the other, individual states such as Tanzania and South Africa seem to have failed largely to implement meaningfully the Convention in their domestic legal regimes due to financial constraints and lack of political will among other factors.

Since the AE is exposed to various threats, including loss of habitat and climate change, Tanzania and South Africa need effective domestic legislation which should ensure that international trade in the AE achieves sustainable use, rather than being a cause of extinction. Currently, however, the legislation that seeks to implement CITES in both countries is inadequate for purposes of regulating international trade in the AE. For instance, neither of the two countries have adequately complied with their obligations under CITES and the decisions of the CoPs as introduced into the domestic regimes appear largely piecemeal and essentially lacking in compliance with the Convention. Thus, attempts at the domestic implementation of CITES have hardly enhanced regulation of international trade in the AE.

Challenges such as varying interests and priorities of Parties, the conflict between sustainable uses as against preservation exist. All need to be addressed by the Parties in order to effectively implement CITES in their domestic legislation. Political will, increased resource allocation, subordination of state sovereignty and taking stricter domestic measures for regulating international trade in the AE are among the measures needed. It is mainly by so

doing that the two countries may be able to adequately implement CITES, thereby effectively regulating international trade in the AE.

Having analysed CITES, including the administrative and legislative measures adopted by the CoPs, and having considered attempts at domestic implementation in the selected countries, it is tenable to conclude that international trade in the AE requires effective implementation of CITES in Tanzania and South Africa. In this regard, the following recommendations are considered to be a good starting point.

5.2 Recommendations

Inadequate domestic implementation exacerbates the weaknesses of the international regime as does the lack of the Parties' political will to adhere to their international obligations, including CITES. These, however, are insufficient grounds for Tanzania and South Africa not to effectively implement CITES for the purposes of the regulation of international trade in AE, and thus the study tenders the following recommendation.

CITES should continue its efforts and enhance financial, technical and technological assistance to the Parties for effective domestic implementation. This should include training in, for instance, the current means of trade (e-commerce and internet trade) which South Africa is already using but Tanzania is not. This is relevant, mainly because where different systems are used by Parties, the possibility of fraud and illegal trade may be prevalent, especially on the part of Parties where e-commerce is not used. In addition, designation and operating institutions at domestic level are costly and therefore financial assistance is imperative.

Tanzania

Tanzania's 2005 regulations implementing CITES are inadequate and it is for this reason that the new Act was adopted. Since the Act has been passed and is waiting the date of entry into force, the following recommendations are based on the new Act.

The new Act does not seem to contain any substantial changes, especially in comparison with the 2005 regulations promulgated in terms of Act no 12 of 1974. It is possible that regulations to be made by the Minister will make provisions which are not reflected under the Act. However, the Act itself is wanting. For example, it should make specific provision for the implementation of CITES. Such provisions should include

implementation of CITES as one of its objectives, appendices listing species according to the extent they are threatened with extinction and comprehensive provisions addressing illegal trade.

Further, the law should provide for the implementation of articles II, III, IV, V and VI of CITES. These relate to the regulation of species in its substantive provisions instead of delegating to the Minister's discretionary powers 'to make regulations in relation to CITES matters.'

South Africa

South Africa's 2009 regulations implementing CITES have been made and will enter into force on a date to be published by the Minister for Environmental Affairs. These regulations address many weaknesses under the 2007 regulations, for example, designating MA as 'issuing authority', annex schedules of listed species and a sample of the CITES trade permit. The regulations are, to a large extent, consistent with CITES and the annex 'D' model law.

A general recommendation is the need for coordination of practices in the provinces which at present enjoy autonomy in environmental matters including issuing permits according to CITES criteria. For instance, the internet permit system used in some of the provinces has been said to create loopholes for illegal trade, particularly in areas where the system is not employed. Coordination is therefore required during the interim period until the implementation of the national strategy to use internet permit system national-wide takes effect - at least by the end of 2009 - so that it will be applicable all over the country.⁴⁹¹ Unfortunately, by the year 2010 has already started and the Minister's promise is yet to be fulfilled for unknown reasons.

Further, the powers of the Minister in terms of making appointment, making regulations and as the MA are too broad and need to be reviewed.

Tanzania and South Africa

In order to appreciate the role of CITES in regulating international trade in endangered species, including the AE, parties should take a liberal approach in listing and delisting

⁴⁹¹ JP Louw- Environmental Affairs Department spokesman: *The Citizen* 27 September 2009 available at <http://www.citizen.co.za/index/article.aspx?pDesc=16229,1,22> [accessed 28 September 2009].

species. Economic and political influences are likely to weaken and hinder the purpose for which CITES was adopted. Importantly, parties should implement CITES in their domestic substantive legislation. In this regard, Tanzania and South Africa need to implement CITES consistent with the Convention and various decisions and resolutions adopted for purposes of domestic implementation generally, and the regulation of international trade in the African elephant in particular.

Additionally, there is a need to provide technical, technological and financial assistance to Tanzania and South Africa for meaningful implementation of CITES. For example, while South Africa is currently issuing permits through the internet, Tanzania is not. This is mainly due to financial and technological constraints. Financial constraints are also a limitation for appointing experts within the SA and the MA of the two countries. The SA staffs, for instance, is required to be a professional trained in animal sciences.

The implementation of CITES requires financial resources in terms of establishing SA and MA in domestic laws. In addition, it requires trained personnel and technology especially in the field of science for example making non-detrimental findings. The process of issuing permit is complex in view of the documents required, time and process all of which are said to be cumbersome. There is also a need to assist parties in formulating uniform rules concerning permits.

Further, there is a need for cooperation among institutions responsible for the control of international trade in the AE. These include SA, MA and others which work together in controlling and monitoring the illegal trade in AE such as the police, customs and civil society. Such cooperation should include the exchange of information at national, regional and international level. At regional level, for example, parties need to strengthen cooperation under the Lusaka Agreement with the view of combating the illegal trade in the AE, particularly the ivory trade.

Meaningful implementation of CITES requires political will among other factors. Whether, how and when such political will may be present and be exercised is a matter to be seen.

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Plant and Animals Committee: <http://www.currentresults.com>.

Tanzania Natural Resources Forum: <http://www.tnrf.org>.

Trade Records Analysis of Fauna and Flora in
Commerce (TRAFFIC): www.traffic.org .

United Nations: <http://www.un.org>.

Wildlife Extra: www.wildlifeextra.com.

World Newspapers and Magazines: <http://www.world-newspapers.com>.

World Wildlife Organization: <http://www.worldwildlife.org>.

Annexes

Annex 'A' CITES permit

Annex 'B' Tanzania CITES permit

Annex 'C' South Africa CITES permit

Annex 'D' Model law for domestic implementation

Standard permit/certificate form

CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA		PERMIT/CERTIFICATE No. <input type="checkbox"/> EXPORT <input type="checkbox"/> RE-EXPORT <input type="checkbox"/> IMPORT <input type="checkbox"/> OTHER:			Original
					2. Valid until
3. Importer (name and address)		4. Exporter/re-exporter (name, address and country)			
3a. Country of import		_____ Signature of the applicant			
5. Special conditions		6. Name, address, national seal/stamp and country of Management Authority			
<i>For live animals, this permit or certificate is only valid if the transport conditions conform to the CITES Guidelines for transport or, in the case of air transport, to the IATA Live Animals Regulations</i>					
5a. Purpose of the transaction (see reverse)	5b. Security stamp no.				
7./8. Scientific name (genus and species) and common name of animal or plant	9. Description of specimens, including identifying marks or numbers (age/sex if live)	10. Appendix no. and source (see reverse)	11. Quantity (including unit)	11a. Total exported/Quota	
A	7./8. _____	9. _____	10. _____	11. _____	11a. _____
	12. Country of origin * Permit no. _____ Date _____	12a. Country of last re-export _____ Certificate no. _____ Date _____			12b. No. of the operation ** or date of acquisition ***
B	7./8. _____	9. _____	10. _____	11. _____	11a. _____
	12. Country of origin * Permit no. _____ Date _____	12a. Country of last re-export _____ Certificate no. _____ Date _____			12b. No. of the operation ** or date of acquisition ***
C	7./8. _____	9. _____	10. _____	11. _____	11a. _____
	12. Country of origin * Permit no. _____ Date _____	12a. Country of last re-export _____ Certificate no. _____ Date _____			12b. No. of the operation ** or date of acquisition ***
D	7./8. _____	9. _____	10. _____	11. _____	11a. _____
	12. Country of origin * Permit no. _____ Date _____	12a. Country of last re-export _____ Certificate no. _____ Date _____			12b. No. of the operation ** or date of acquisition ***
* Country in which the specimens were taken from the wild, bred in captivity or artificially propagated (only in case of re-export) ** Only for specimens of Appendix I species bred in captivity or artificially propagated for commercial purposes *** For pre-Convention specimens					
13. This permit/certificate is issued by:					
_____		_____		_____	
Place		Date		Security stamp, signature and official seal	
14. Export endorsement:		15. Bill of Lading/Air waybill number:			
Block	Quantity				
A					
B					
C					
D					
_____		_____		_____	
Port of export		Date		Signature	

		Official stamp and title			

CITES PERMIT/CERTIFICATE No.

(as amended at CoP14)

Instructions and explanations

(These correspond to block numbers on the form)

1. Tick the square which corresponds to the type of document issued (export permit, re-export certificate, import permit or other). If the box "other" has been ticked, the type of document must be indicated. The original number is a unique number allocated to each document by the Management Authority.
2. For export permits and re-export certificates, the date of expiry of the document may not be more than six months after the date of issuance (one year for import permits).
3. Complete name and address of the importer.
- 4a. The name of the country must be written in full.
5. Complete name and address of the exporter/re-exporter. The name of the country must be stated. The absence of the signature of the applicant renders the permit or certificate invalid.
6. Special conditions may refer to national legislation or special conditions placed on the shipment by the issuing Management Authority. This block can also be used to justify the omission of certain information.
- 7a. The following codes should be used: T for commercial, Z for zoos, G for botanical gardens, Q for circuses and travelling exhibitions, S for scientific purposes, H for hunting trophies, P for personal, M for medical, E for education, N for reintroduction or introduction into the wild, and B for breeding in captivity or artificial propagation, L for law enforcement / judicial / forensic.
- 7b. Indicate the number of the security stamp affixed in block 13.
8. The name, address and country of the issuing Management Authority should already be printed on the form.
8. Indicate the scientific name (genus and species, where appropriate subspecies) of the animal or plant as it appears in the Convention Appendices or the reference lists approved by the Conference of the Parties, and the common name of the animal or plant as known in the country issuing the permit.
9. Describe, as precisely as possible, the specimens entering trade (live animals, skins, flanks, wallets, shoes, etc.). If a specimen is marked (tags, identifying marks, rings, etc.), whether or not this is required by a Resolution of the Conference of the Parties (specimens originating in a ranching operation, specimens subject to quotas approved by the Conference of the Parties, specimens of Appendix-I species bred in captivity for commercial purposes, etc.), indicate the number and type of mark. The sex and age of the live animals should be recorded, if possible.
10. Enter the number of the Appendix of the Convention (I, II or III) in which the species is listed.
Use the following codes to indicate the source:
 - W Specimens taken from the wild
 - R Specimens originating from a ranching operation
 - D Appendix-I animals bred in captivity for commercial purposes and Appendix-I plants artificially propagated for commercial purposes, as well as parts and derivatives thereof, exported under the provisions of Article VII, paragraph 4, of the Convention
 - A Plants that are artificially propagated in accordance with Resolution Conf. 11.11 (Rev. CoP14), paragraph a), as well as parts and derivatives thereof, exported under the provisions of Article VII, paragraph 5 (specimens of species included in Appendix I that have been propagated artificially for non-commercial purposes and specimens of species included in Appendices II and III)
 - C Animals bred in captivity in accordance with Resolution Conf. 10.16 (Rev.), as well as parts and derivatives thereof, exported under the provisions of Article VII, paragraph 5 (specimens of species included in Appendix I that have been bred in captivity for non-commercial purposes and specimens of species included in Appendices II and III)
 - F Animals born in captivity (F1 or subsequent generations) that do not fulfil the definition of 'bred in captivity' in Resolution Conf. 10.16 (Rev.), as well as parts and derivatives thereof
 - U Source unknown (must be justified)
 - I Confiscated or seized specimens
 - O Pre-Convention (may be used with other source codes).
11. The quantity and units indicated should conform to the most recent version of the *Guidelines for the preparation and submission of CITES annual reports*.
- 12a. Indicate the total number of specimens exported in the current calendar year (1 January to 31 December) (including those covered by the present permit) and the current annual quota for the species concerned (for example 500/1000). This should be done for the national quotas as well as for those determined by the Conference of the Parties.
- 12b. The country of origin is the country in which the specimens were taken from the wild, bred in captivity or artificially propagated, except in the case of plant specimens that cease to qualify for an exemption from the provisions of CITES. In such instances, the country of origin is deemed to be the country in which the specimens ceased to qualify for the exemption. Indicate the number of the permit or certificate of the exporting country and the date of issuance. If all or part of the information is not known, this should be justified in block 5. This block must only be completed in case of re-exports;
- 13a. The country of last re-export is the country from which the specimens were re-exported before entering the country in which the present document is issued. Enter the number of the re-export certificate of the country of last re-export and its date of issuance. If all or part of the information is not known, this should be justified in block 5. This block must only be completed in case of re-export of specimens previously re-exported.
- 13b. The "No. of the operation" is the number of the registered captive-breeding or artificial propagation operation. The "date of acquisition" is defined in Resolution Conf. 13.6 and is required only for pre-Convention specimens.
14. To be completed by the official who issues the permit. The name of the official must be written in full. The security stamp must be affixed in this block and must be cancelled by the signature of the issuing official and a stamp or seal. The seal, signature and security-stamp number should be clearly legible.
15. To be completed by the official who inspects the shipment at the time of export or re-export. Enter the quantities of specimens actually exported or re-exported. Strike out the unused blocks.
16. Enter the number of the bill of lading or air way-bill if the method of transport used requires the use of such a document.
17. The document must be written in one of the three working languages of the Convention (English, Spanish or French) or must include a full translation into one of these three languages. Exported and re-exported specimens should not appear on the same document unless it is clearly indicated which specimens are being exported and which re-exported.

AFTER USE THIS DOCUMENT MUST BE RETURNED TO A MANAGEMENT AUTHORITY OF THE IMPORTING COUNTRY.

Convention on International Trade in Endangered Species of Wild Fauna and Flora (Cites) Implementations)

G. N. No. 225 (contd.)



CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA

PERMIT/CERTIFICATE No....

EXPORT
 RE-EXPORT Original
 IMPORT
 OTHER: 2. Valid until

3. Importer (name and address)			4. Export / Re-exporter (name and address, country)		
3a. Country of import			Signature of the applicant		
5. Special conditions <small>For live animals, this permit or certificate is only valid if the transport conditions conform to the Guidelines for Transport of Live Animals or, in the case of air transport, to the IATA Live Animals Regulations.</small>			6. Name, address, national seal/stamp and country of Management Authority The Director of Wildlife Wildlife Division P.O. Box 1994 DAR ES SALAAM TANZANIA		
5a. Purpose of the transaction (see Reverse) 5b. Security stamp No.					
7.8 SCIENTIFIC NAME (genus and species) AND COMMON NAME OF ANIMAL OR PLANT	9. Description of specimens, including identifying marks or numbers (age/sex if live)	10. Appendix No. and source (see reverse)	11. Quantity (including unit)	11a. Total exported/Quota	
7.8	9	10	11	11a	
12. Country of origin * Permit No. Date		12.a Country of last re-export Certificate No. Date.		12b. No. of operation ** or date of acquisition ***	
7.8		9.		10.	
12. Country of origin * Permit No. Date		12.a Country of last re-export Certificate No. Date.		12b. No. of operation ** or date of acquisition ***	
7.8		9.		10.	
12. Country of origin * Permit No. Date		12.a Country of last re-export Certificate No. Date.		12b. No. of operation ** or date of acquisition ***	
7.8		9.		10.	
12. Country of origin * Permit No. Date		12.a Country of last re-export Certificate No. Date.		12b. No. of operation ** or date of acquisition ***	
* Country in which the specimens were taken from the wild, bred in captivity or artificially propagated (only in case of re-export) ** Only for specimens of Appendix- I species bred in captivity or artificially propagated for commercial purposes *** For pre-Convention specimens					
13 THIS PERMIT/CERTIFICATE IS ISSUED BY:					
Place		Date		Security stamp, signature and official seal	
14. EXPORT ENDORSEMENT			15. Bill of Lading/Air Way-bill Number		
Block	Quality				
A					
B					
C					
D					
Port of Export		Date		Signature	
				Official stamp and title	

Act Number XX of 200X

International Trade in Wild Fauna and Flora Act

An Act to implement the detailed provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) with a view to ensure that no species of wild fauna and flora becomes or remains subject to unsustainable exploitation because of international trade.

**PART 1
Preliminary**

This Act may be cited as the **International Trade in Wild Fauna and Flora Act**.

(1) *Definitions*. In this Act:

Appendices": The species covered by CITES are listed in three Appendices, according to the degree of protection they need. Appendix I includes species threatened with extinction. Trade in specimens of these species is permitted only in exceptional circumstances. Appendix II includes species not necessarily threatened with extinction, but in which trade must be controlled in order to avoid utilization incompatible with their survival. Appendix III contains species that are protected in at least one country, which has asked other CITES Parties for assistance in controlling the trade. Changes to Appendix III follow a distinct procedure from changes to Appendices I and II, as each Party's is entitled to make unilateral amendments to it.

Artificially propagated": refers only to plants grown under controlled conditions from seeds, cuttings, divisions, callus tissues or other plant tissues, spores or other propagules that either are exempt or have been derived from cultivated parental stock;

Bred in captivity": refers only to offspring, including eggs, born or otherwise produced in a controlled environment of parents that mated or otherwise transmitted their gametes in a controlled environment, as defined in Resolutions of the Conference of the Parties;

Certificate of origin": These documents allow the export of specimens of species listed in Appendix III when the specimens originated in a non-listing country.

CITES": is the Convention on International Trade in Endangered Species of Wild Fauna and Flora, concluded in Washington, D.C. on 3rd March 1973, as amended in Bonn on 22 June 1979.

CITES Secretariat": the Secretariat of CITES as referred to in Article XII of CITES;

Conference of the Parties": the Conference of the Parties as referred to in Article XI of CITES;

Controlled environment": environment that is manipulated for the purpose of producing animals of a particular species, that has boundaries designed to prevent animals, eggs or gametes of the species from entering or leaving the controlled environment, and the general characteristics of which may include but are not limited

op: artificial housing; waste removal; health care; protection from predators; and artificially supplied food;

"Country of origin": the country in which a specimen has been taken in the wild or born or bred in captivity or artificially propagated, or introduced from the sea;

"Court": means the Magistrate Court or Summary Jurisdiction;

"Cultivated parental stock": means the ensemble of plants grown under controlled conditions that are used for reproduction, and which must have been, to the satisfaction of the designated CITES authorities of the exporting country established in accordance with the provisions of CITES and relevant national laws and in a manner not detrimental to the survival of the species in the wild and maintained in sufficient quantities for propagation so as to minimize or eliminate the need for augmentation from the wild, with such augmentation occurring only as an exception and limited to the amount necessary to maintain the vigour and productivity of the cultivated parental stock;

"Derivative"; in relation to an animal, plant or other organism, means any part, tissue or extract, of an animal, plant or other organism, whether fresh, preserved or processed, and includes any chemical compound derived from such part, tissue or extract;

"Domestic trade": any commercial activity, including, but not limited to, sale, purchase and manufacture, within territory under the jurisdiction of (name of the country)

"Enforcement Officer": means a police officer, or customs officer or any person appointed by the Minister with authorization to enforce this Act;

"Export": means the act of taking any specimen out of any place under the jurisdiction of (name of the country);

"Hunting trophy": means any horn, ivory, tooth, tusk, claw, hoof, hide, skin, hair, feather, egg or other durable portion whatsoever of any animal, whether processed or not, which is recognizable as a durable portion of such animal;

"Import": means to land on or attempt to land on, bring into or introduce into, any place subject to the jurisdiction of (name of the country) other than transit and transshipment any specimen of species included in the Appendices of CITES;

"Introduction from the sea" means transportation into (name of the country) of specimens of any species which were taken from the marine environment not under the jurisdiction of any State, including the air space above the sea and the sea-bed and subsoil beneath the sea;

"International trade": any export, re-export, or import covered by the Customs regulations and introduction from the sea;

"Invasive alien species": species introduced deliberately or unintentionally outside their natural habitats where they have the ability to establish themselves, invade, outcompete natives and take over the new environments;

"Label": piece of paper, card, or other material bearing the acronym 'CITES' and issued or approved by a Management Authority for the identification of contents as

herbarium specimens, preserved, dried or embedded museum specimens or live plant material for scientific study. They shall include the name and address of the sending institution and the codes of the exporting and importing institutions over the signature of a responsible officer of that registered scientific institution;

Legal acquisition finding": A finding by the Management Authority of the State of import determining whether specimens were acquired consistent with national laws. The applicant is responsible for providing sufficient information to show that specimen was legally acquired.

Management Authority": a national administrative body designated in accordance with Article IX, paragraph 1(a), of CITES;

Non-detriment finding": A finding by the Scientific Authority advising that a proposed export or introduction from the sea of Appendix I or II specimens will not be detrimental to the survival of the species and that a proposed import of an Appendix I specimen is not for purposes that would be detrimental to the survival of the species;

Offering for sale": offering for sale or any action that may reasonably be interpreted as such, including advertising or causing to be advertised for sale and invitation to negotiate;

Permit or Certificate": the official document used to authorize import, export, re-export, or introduction from the sea of specimens of species listed in any of the Appendices of CITES. It shall conform to the requirements of CITES and Resolutions of the Conference of the Parties or otherwise shall be considered invalid;

Personal or household effects": dead specimens, parts and derivatives that are the belongings of a private individual and that form or are intended to form part of his normal possessions;

Pre-convention Certificate": The pre-convention date for a specimen may vary depending on when a Party joined CITES or on a country's stricter national legislation.

Primarily commercial purposes": means all purposes whose non-commercial aspects do not clearly predominate;

Quota": Prescribed number or quantity of specimens that can be harvested, exported or otherwise used over a specific period of time ;

Easily recognizable part or derivative" include any specimen which appears from an accompanying document, the packaging or a mark or label, or from any other circumstances, to be a part or derivative of an animal or plant of a species included in the Appendices, unless such part or derivative is specifically exempted from the provisions of the Convention;

Re-export": the export of any specimen that has previously been imported;

Rescue Centre": a centre as defined in Article VIII, paragraph 5, of CITES;

Sale": any form of sale. For the purposes of this Act, hire, barter or exchange shall be regarded as sale; related expressions shall be similarly interpreted;

"Scientific Authority": a national scientific body designated in accordance with Article IX of CITES;

"Species": includes any species, subspecies, or geographically separate population thereof;

"Specimen":

(i) any animal or plant, whether alive or dead of specimens of a species included in Appendices I, II and III of CITES.

(ii) Any part or derivative which appears from an accompanying document, the packaging or a mark or label or from any other circumstances to be a part or derivative of an animal or plant of species included in the in Appendices I, II and III, unless such part or derivative is specifically exempted from the provisions of CITES.

"Tags": Piece of material for the identification of raw, tanned, and/or finished crocodilian skins entering international trade from the countries of origin;

"Transit": the transit procedures as defined by the customs regulations of (name of the country);

"Transshipment": the transshipment procedures as defined by the Customs regulations of (name of the country);

"The Minister": the Minister responsible for matters relating to wild fauna and flora;

"Under controlled conditions": means in a non-natural environment that is intensively manipulated by human intervention for the purpose of plant production. General characteristics of controlled conditions may include but are not limited to tillage, fertilization, weed and pest control, irrigation, or nursery operations such as potting, bedding or protection from weather; and

3. The export, re-export, import, introduction from the sea, transit and transshipment of specimens of species listed in the Schedules of this Act, other than in accordance with the provisions of CITES and this Act is prohibited.

4. Recommendations included in Resolutions and Decisions of the Conference of the Parties to CITES shall serve as source of interpretation of the provisions of the Convention and this Act.

5. The burden of proof of the legal possession of any specimen of a species included in the CITES appendices attached to this Act lies with the possessor of that specimen.

PART 2

Field of Application

6. This Act applies to all animal and plant species listed in the Appendices of CITES.

7. (1) Option 1: The following Schedules are attached to this Act:

- (a) Schedule 1, which lists all species included in Appendix I of CITES;
- (b) Schedule 2, which lists all species included in Appendix II of CITES;
- (c) Schedule 3, which lists all species included in Appendix III of CITES;

7. (1) Option 2: The following Schedule is attached to this Act:

(a) Schedule 1, which lists all species included in Appendices I, II and III of CITES;

Option 3: The Minister shall by order publish the Schedules to this Act.

(2) Schedule (s) to this Act are automatically amended when amendments to Appendices I, II or III of CITES enter into force. These amendments shall be published in the Gazette as soon as possible after their adoption by the Conference of the Parties. The official website of the Convention is the official reference for the Appendices.

Note: *In order to be legally binding, the lists of species covered by CITES must usually be published in the Government Gazette or equivalent official publication of the Party concerned. Because the CITES Appendices are regularly amended, however, Parties should develop a procedure to ensure that subsequent amendments are formally published. Countries might add other schedules with native species at the condition they make the difference with the CITES documents.*

(3) The Management Authority has the right to add or delete any species from Appendix III when the species occurs within the national jurisdiction of the country.

PART 3 Authorities

8. (1) Option A: The [name of the agency] is designated as the CITES Management Authority for [name of the country].

Option B: The Minister shall by order designate a CITES Management Authority.

Note: *More than one Management Authority may be designated, in which case a lead Management Authority should be identified.*

(2) The specific duties of the Management Authority shall include, but are not limited to the following:

- a) to grant permits and certificates in accordance with the provisions of CITES and to attach to any permit or certificate any condition that it may judge necessary;
- b) to communicate with the Secretariat and other countries on scientific, administrative, enforcement and other issues related to implementation of the Convention;
- c) to maintain records of international trade in specimens and prepare an annual report concerning such trade, and submit this report to the CITES Secretariat by 31 October of the year following the year to which the report refers;
- d) to prepare a biennial report on legislative, regulatory and administrative measures taken to enforce the Convention, and to submit this report to the CITES Secretariat by 31 October of the year following the two-year period to which the report refers;
- e) to coordinate national implementation and enforcement of the Convention and this Act and to co-operate with other relevant authorities in this regard;

- f) to consult with the Scientific Authority on the issuance and acceptance of CITES documents, the nature and level of trade in CITES-listed species, the setting and management of quotas, the registration of traders and production operations, the establishment of Rescue Centres and the preparation of proposals to amend the CITES Appendices;
- g) to represent [name of the country] at national and international meetings related to CITES;
- h) to provide awareness-raising, training, education and information related to the Convention;
- i) to advise the Minister on action to be taken for the implementation and enforcement of CITES;
- j) to designate one or more Rescue Centres for seized and confiscated living specimens
- k) to intervene in litigation before a court in any matter under this Act.

9. (1) Option A: The [name of the agency] is designated as the CITES Scientific Authority for [name of the country].

Option B: The Minister shall by order designate a CITES Scientific Authority.

Note: *More than one Scientific Authority may be designated, in which case a lead Scientific Authority should be identified.*

(2) The specific duties of the Scientific Authority shall include, but are not limited to the following:

- a) advise the Management Authority on whether or not a proposed export of a specimen of species listed in Appendix I or II will be detrimental to the survival of the species involved;
- b) in the case of a proposed import of a specimen of a species in Appendix I, advise the Management Authority on whether or not the purposes of the import are detrimental to the survival of the species involved;
- c) in the case of a proposed import of a live specimen of a species listed in Appendix I, advise the Management Authority whether or not it is satisfied that the proposed recipient of the specimen is suitably equipped to house and care for it;
- d) monitor the export permits granted for specimens of species listed in Appendix II, as well as the actual exports of such specimens, and advise the Management Authority of suitable measures to be taken to limit the issue of export permits when the population status of a species so requires;
- e) advise the Management Authority on the disposal of confiscated or forfeited specimens;
- f) advise the Management Authority on any matter the Scientific Authority considers relevant in the sphere of species protection;

g) perform any tasks foreseen in the Resolutions of the Conference of the Parties to CITES.

10. (1) Option A: The [name of the agency] is designated as the agency with authorization to enforce this Act.

Option B: The Minister shall by order designate the agency authorized to enforce this act.

Note: More than one Enforcement Agency may be designated, in which case a lead Enforcement Agency should be identified. The functions and powers of the Enforcement Agencies are stipulated in the Part regarding Infractions and Penalties.

(2) It shall be the duty of all public authorities to co-operate fully with the Management Authority in enforcing the provisions of this Act.

PART 4

Conditions for international trade

As far as possible, the Management Authority and enforcement authorities shall ensure that specimens of CITES-listed species pass through any formalities required for trade with a minimum of delay. To facilitate such passage, the Management Authority may designate ports of entry and ports of exit at which specimens must be presented for clearance.

The Management Authority shall ensure that all living specimens, during any period of transit, holding or shipment, are properly cared for so as to minimize the risk of injury, damage to health or cruel treatment.

Export

11. The export of any specimen of species included in Appendices I and II requires the prior grant and presentation of an export permit.

The export of any specimen of species included in Appendix III requires the prior grant and presentation of an export permit, if [name of country or dependent territory] listed the species in Appendix III, or a certificate of origin.

An export permit shall only be granted if the following conditions are met:

(a) the Management Authority must be satisfied that the specimen concerned has been legally acquired;

(b) the Management Authority is satisfied that any living specimen will be prepared and shipped in accordance with the most recent edition of the Live Animals Regulations of the International Air Transport Association, regardless of the mode of transport, so as to minimize the risk of injury, damage to health or cruel treatment;

(c) in the case of a specimen of a species listed in Appendices I and II, the Scientific Authority has made a non-detriment finding and advised the Management Authority accordingly.

Note: *Non-detriment findings should generally be made on a shipment-by-shipment basis, unless the Scientific Authority has set an annual export quota for a particular species which is based on a broader non-detriment finding.*

(d) in the case of specimens of species listed in Appendix I, an import permit has been granted by the competent authority of the country of destination

Import

12. The import of any specimen of species included in Appendix I requires the prior grant and presentation of an import permit and either an export permit or a re-export certificate.

An import permit should only be granted if the following conditions are met:

(a) the Scientific Authority has advised that the import will be for purposes which are not detrimental to the survival of the species and is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it;

(b) the Management Authority is satisfied that the specimen concerned is not to be used primarily for commercial purposes;

(c) the import of any specimen of species included in Appendix II requires the prior presentation of either an export permit or a re-export certificate.

(d) the import of any specimen of species included in Appendix III requires the prior presentation of a certificate of origin or an export permit, where the import is from a State which has included the species in Appendix III or a certificate granted by the State of re-export that the specimen was processed or is being re-exported to.

Re-export

13. The re-export of any specimen of species included in Appendices I and II requires the prior grant and presentation of a re-export certificate.

A re-export certificate shall only be granted when the following conditions are met:

(a) the Management Authority is satisfied that any specimen to be re-exported was imported in accordance with the provisions of this Act and of CITES;

(b) the Management Authority is satisfied that any living specimen will be prepared and shipped in conformity with the most recent edition of the Live Animals Regulations of the International Air Transport Association, regardless of the mode of transport, so as to minimize the risk of injury, damage to health or cruel treatment;

(c) in the case of any living specimen of species listed in Appendix I, the Management Authority is satisfied that an import permit has been granted

Introduction from the sea

14. The introduction from the sea of a specimen of a species included in Appendices I and II requires the prior grant and presentation of a certificate of introduction from the sea.

A certificate of introduction from the sea shall only be granted when the following conditions have been met:

- (a) the Scientific Authority advises that the introduction of any specimen will not be detrimental to the survival of the species;
- (b) the Management Authority is satisfied that any specimen of a species listed in Appendix I is not to be used for primarily commercial purposes and that the proposed recipient of any living specimen is suitably equipped to house and care for it;
- (c) the Management Authority is satisfied that any living specimen of a species listed in Appendix II will be so handled as to minimize the risk of injury, damage to health or cruel treatment.

Permits and certificates

15. To be valid, all permits and certificates must be in a form prescribed by the Management Authority and which is in conformity with the provisions of CITES and Resolutions of the Conference of the Parties to CITES. A sample permit/certificate format is attached as Schedule 4.

- (a) Export permits and re-export certificates are valid for a period of six months from their date of issue.
- (b) Import permits for specimens of species included in Appendix I are valid for a period of twelve months from their date of issue.
- (c) A separate permit or certificate is required for each consignment of specimens.
- (d) The Management Authority shall cancel and retain used export permits and re-export certificates issued by authorities of foreign States and any corresponding import permits.
- (e) Permits and certificates may not be transferred to a person other than the one named on the document.
- (f) The Management Authority may require applicants for permits or certificates to provide any additional information that it may need to decide whether to issue a permit or certificate.
- (g) The Management Authority may, at its discretion, grant or refuse to grant a permit or certificate, or grant a permit or certificate subject to certain conditions.
- (h) The Management Authority may at any time revoke or modify any permit or certificate it has issued if it deems it necessary to do so, and shall do so when the permit or certificate has been issued as the result of false or misleading statements by the applicant.
- (i) Only valid export permits, re-export certificates and certificates of origin from exporting countries shall be accepted to authorize the import of specimens of species included in Appendices I, II and III.

16. (1) A permit or a certificate issued in violation of the law of a foreign country or in violation of the Convention or contrary to the Resolutions of the Conference of the Parties to CITES shall be considered invalid.

(2) If any condition attached to a permit or certificate has not been complied with, it shall be considered as invalid.

PART 5 Registration and Marking

17. (1) All persons wishing to trade in specimens of any species listed in Appendix I must be registered with the Management Authority. *[Countries should register traders in specimens of species listed in Appendix II and III if it is recommended under a Resolution (e.g. sturgeon specimens). Otherwise, countries may choose whether to require such registration.]*

Note: *If deemed necessary, legislation may also require the registration of traders and production operations dealing in specimens of Appendix II and III listed species. The potential administrative burden of such registration, however, should be carefully considered.*

(2) All persons wishing to produce captive-bred animals and artificially propagated plants for commercial trade purposes of any species listed in Appendix I must be registered with the Management Authority. *[Countries should require the registration of producers of species listed in Appendices II and III if it is recommended under a Resolution. Otherwise, countries may choose whether to require such registration.]*

(3) All persons registered with the Management Authority for captive breeding of animals or artificial propagation of plants must keep records of their stocks and of any transactions. The Management Authority may inspect the premises and records of persons registered with the Management Authority at any time.

[addressed in enforcement section]

18. (1) The Minister shall determine by Order:

a. the Appendix II or III-listed species that are subject to special registration [e.g. sturgeon]

a. the format of the application for registration foreseen in section 17;

b. the conditions that shall be met in order to be registered;

c. the format and contents of the registers that contain the records foreseen in section 17.

(2) If the conditions for registration are not complied with, the registration must be withdrawn.

(3) Specimens of animal species listed in Appendix I that have been bred in captivity may not be traded unless they originate from a breeding operation registered by the Management Authority, and have been individually and permanently marked in a manner so as to render alteration or modification by unauthorized persons as difficult as possible. The conditions for registration are determined by the Management Authority.

Additional text on marking (e.g. crocodile tagging and universal sturgeon label) should be added here.]

Note: Registration may be required for the possession, trade, production and/or processing of species that are commercially valuable and subject to illegal trade (e.g. ivory, caviar and other sturgeon products, queen conch, etc.) Management plans may also be required. Some countries require the possession of all specimens of Appendix I-listed species, or all pre-Convention specimens, to be registered.

PART 6 Exemptions and Special Procedures

9. (1) *Transit and transshipment.* Where a specimen is in transit or transshipment through (name of the country), no additional CITES permits and certificates shall be required. In all cases, the transit or transshipment must be in accordance with the conditions of transport lay down in this act and the custom laws of (name of the country). Enforcement authorities shall have the power to inspect a specimen in transit or transshipment to ensure that it is accompanied by the appropriate CITES documents and to seize such a specimen if that is not the case.

(2) *Pre-Convention.* Where the Management Authority is satisfied that a specimen of a CITES-listed species was acquired before the provisions of the Convention became applicable to that species, it shall issue a pre-Convention certificate upon request. No other CITES document is required to trade in the specimen.

(3) *Personal and household effects.* Provisions foreseen in Part 4 shall not apply to dead specimens, parts and derivatives of species listed in Schedules 1 to 2 which are personal or household effects being introduced into the (name of the country), or exported or re-exported therefrom, in compliance with rules specified by the Management Authority in accordance with the text of the Convention and the Resolutions of the Conference of the Parties. [need to align this with Resolution Conf. 13.7 and to explain some more about tourist specimens, hunting trophies and personal pets.]

(4) *Specimens born and bred in captivity or artificially propagated.* Specimens of species listed in schedule 1 that have been born and bred in captivity or artificially propagated shall be treated in accordance with the provisions applicable to specimens of species listed in Schedule 2. [need to mention ranching and other production systems]

(5) *Scientific exchange.* The documents referred in Part 4 of this act, shall not be required in the case of non-commercial loans, donations and exchanges between scientific institutions, registered by the Management Authority, of herbarium specimens, other preserved or dried or embedded museum specimens, and live plant material which carry a label issued or approved by the Management Authority.

(6) *Travelling exhibitions.* The Management Authority may waive the requirement of an import or export permit or re-export certificate and allow the movement of specimens which form part of a traveling zoo, circus, menagerie, plant exhibition or other traveling exhibition, provided that the exporter or importer registers full details of such specimens with the Management Authority, the specimens are covered by a pre-Convention certificate or a certificate showing that they were bred in captivity or artificially propagated and the Management Authority is satisfied that any living specimen will be so transported and cared for as to minimize the risk of injury,

damage to health or cruel treatment. [check this against Resolution Conf. 12.3 (Rev. CoP13)]

Note: Countries may provide for simplified procedures to issue permits and certificates pursuant to Part XII of Resolution Conf. 12.3 (Rev. CoP13) and Annex 4. There are also more flexible procedures for trading coral and timber and certain plants covered by a phytosanitary certificate.

PART 7 Offences and Penalties

The offences below do not contain any intent requirement, but this may need further consideration in some jurisdictions if criminal penalties are involved. In general, such offences can result in administrative, civil or criminal liability and punishment. 'Person' could be defined somewhere in the Act to include both natural and legal persons.]

20. (1) It is an offence under this Act to import, export, re-export, or introduce from the sea, or attempt to import, export, re-export or introduce from the sea, any specimen of a species listed in the Schedules without a valid permit or certificate.

Note: This should cover circumstances involving a forged or invalid document or one that has been modified by anyone other than the Management Authority. Separate offences could be provided for misuse of a document or failure to comply with the conditions of a permit or certificate. There could also be offences for shipments in violation of IATA live animal regulations.

(2) A person who is found guilty of the offence under subsection (1) above shall be liable on summary conviction to a fine not exceeding [a multiple of the value of the specimens or a monthly or daily salary level] and to imprisonment for a term not exceeding five years? ... months (years).

21. (1) It is an offence under this Act for any person to have in his or her possession or under his or her control, or to offer or expose for sale or display to the public, any specimen of a species listed in the Appendices which was not legally acquired.

(2) A person who without reasonable excuse fails to comply with the requirements of subsection (1) shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding.... and to imprisonment for a term not exceeding.... months (years).

22. (1) It is an offence under this Act to make or attempt to make either oral or written false or misleading statements in, or in connection with, an application for a permit or certificate or registration. [Note: There may also be a general criminal offence for false statement. Additional general crimes that could be considered in prosecution include fraud, conspiracy, smuggling, money laundering and racketeering or organized crime.]

(2) A person who is found guilty of an offence under subsection (1) above shall be liable on summary conviction to a fine not exceeding.... and to imprisonment for a term not exceeding.... months (years).

23. (1) It is an offence under this Act to obstruct or otherwise hinder an Officer in the performance of his or her duties.

person who is found guilty of the offence under subsection (1) above shall be on summary conviction to a fine not exceeding.... and to imprisonment for a term exceeding.... months (years).

an offence under this Act for an enforcement officer to accept any unauthorized personal payment or other form of personal compensation in order to see to the enforcement of any provisions under this Act.]

1) It is an offence under this Act for any unauthorised person to alter, deface or remove a mark used by the Management Authority to individually and permanently identify specimens.

person who is found guilty of the offence under subsection (1) above shall be on summary conviction to a fine not exceeding.... and to imprisonment for a term exceeding.... months (years).

the maximum fine and duration of imprisonment are doubled in the case of offence involving species included in Appendix I .

the maximum fine and duration of imprisonment are doubled for subsequent offences specified in sections 24,25,26,27,28

1) Where an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director, manager, secretary or other officer of the body corporate, or any person who was purporting to act in any capacity, he, as well as the body corporate, shall be guilty of that offence and be liable to be proceeded against and punished accordingly. [fine levels for corporate offenders should generally be higher]

in this section "director", in relation to a body corporate established by or under any Act for the purpose of carrying on under public ownership any industry or part of an industry or undertaking, being a body corporate whose affairs are managed by its members, means a member of that body corporate.

person convicted of an offence under this Act, or any regulations promulgated under this Act, for which no penalty is expressly provided is liable to a fine not exceeding \$ ____ or to imprisonment for a term not exceeding ____ months.

expenses incurred as a result of seizure, including custody costs, the costs of transporting and disposing of specimens or of maintaining live animals and plants from the time of seizure shall be recoverable from the offender if known.

In addition to any other penalty imposed, a court may require compensation from a convicted offender or bar a convicted offender from possessing certain species or from buying or producing such species for a certain period of time.]

provision could be added on calculating the value of certain species or the amount of environmental harm done.]

Enforcement Powers

section should provide for entry, evidence collection, interview/interrogation, sampling, seizure, arrest and confiscation – generally in that order.]

30. (1) If an Officer is satisfied that there is reasonable evidence of an offence, he or she may detain the person suspected and seize any items related to the suspected offence.

(2) An Officer may:

- (a) Seize anything which he or she reasonably suspects is the object of or evidence of an offence.
- (b) Enter premises or a vehicle he or she reasonably suspects contain a specimen in violation of the provisions of this Act [includes seaports, airports and free ports – should be possible at any time and not just during daylight hours];
- (c) Examine what he reasonably suspects to be a specimen transported, acquired or traded in violation of the provisions of this Act;
- (d) Examine any records held apparently relating to specimens referred to in paragraphs (a) and (b) of this subsection.
- (e) Take photos or samples

31. (1) In all cases, the specimens that are the subject of an offence shall be confiscated. [Note: Some countries provide for administrative as well as judicial confiscation. Not all countries allow mandatory confiscation. Some countries provide a process under which an individual may seek the return of a specimen or item.]

(2) When a person is convicted of an offence against this Act, any cage, container, boat, aeroplane, vehicle, or other article and equipment in respect of or by means of which the offence was committed is forfeited to the State. Such forfeiture may be in addition to any other penalty to which such contravention applies.

(3) If a person prosecuted for an offence is acquitted, the court may nonetheless order the specimens concerned to be confiscated.

32. The specimens confiscated according to the provisions of this Act, remain the property of the Management Authority, which in consultation with the Scientific Authority, will decide upon their final disposal.

[Note: The term 'seizure' generally refers to the temporary taking of a specimen by a law enforcement officer whereas the terms 'confiscation' and 'forfeiture' generally refer to the permanent taking of a specimen pursuant to a court order.]

Disposal of confiscated specimens

[This section needs elaboration. Rescue centers could be mentioned here.]

PART 8 Incentives and Financial Provisions

33. (1) Any expenses incurred by any Government department in connection with this Act shall be defrayed out of money provided by Parliament.

(2) There shall be paid out of money provided by Parliament any increase attributable to this Act in the sums so payable under any other Act.

34. The Management Authority may charge a fee, at a rate set by the Government, for the processing of applications for permits and certificates and for the issue of permits and certificates.

35. The Minister shall establish a special fund to be used only for the conservation of wildlife and the implementation and enforcement of CITES and of this Act, including the establishment and management of Rescue Centres referred to in section 8 (e). Any fee charged under Part 4, as well as any voluntary contribution by individuals or organizations, shall be paid to the fund.

PART 9 General

36. Nothing in the present Act shall restrict the provisions of any other Act. [but its effect on other legislation (e.g. amendment or repeal) should be indicated.]

37. (1) This Act is applicable within the claimed jurisdiction of the courts of (name of the country)

(2) Anyone may take appropriate action in the courts to enforce the provisions of this Act. [is this a citizen suit provision?]

38. The Minister may by Statutory Instrument make additional orders or regulations to provide for improved application of the provisions of this Act.

SCHEDULE 1

Schedule 1 shall list all animal and plant species listed in Appendix I of CITES.

SCHEDULE 2

Schedule 2 shall list all animal and plant species listed in Appendix II of CITES.

SCHEDULE 3

Schedule 3 shall list all animal and plant species listed in Appendix III of CITES.

SCHEDULE 4

Sample permit format and instructions

SCHEDULE 5

Fee schedule for permits/certificates, registration and other administrative tasks