ACCEPTANCE OF SUSTAINABLE USE WITHIN THE CITES COMMUNITY

INTRODUCTION

In 1973, twenty-one countries met in Washington, D.C., to sign the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).[1] Since then, CITES has proved to be one of the most successful wildlife conservation treaties in the international arena.[2] The original intent of CITES was to prevent additional extinctions of wild animals and plants by regulating international trade in wild species.[3] In its early years, an underlying philosophy of CITES was the preservation of species by limiting trade of species threatened with extinction.[4] Some twenty-six years later, an apparent shift has taken place, away from this preservation-oriented philosophy, to a sustainable use-based conservation philosophy. The many sustainable use-based proposals brought before the CITES membership and the support garnered for these proposals help illustrate this shift.[5] Perhaps the most significant of these proposals was the overwhelming decision in June 1997 to a limited downlisting[6] of the African elephant from Appendix I to Appendix II.[7] The downlisting of the elephant and the emergence of

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

2. *See* SIMON LYSTER, INTERNATIONAL WILDLIFE LAW 240 (1985).

3. *See id.* at 239-40.

4. *See id.* at 240. Preservation is defined as:

> [a] land-use designation that signifies little or no human activity or use within the designated area. A somewhat dated term, as it is now generally realized that nothing can be preserved since natural forces are constantly prevailing, and all systems change over time, the main variable being the rate of change.

JULIAN A. DUNSTER, DICTIONARY OF NATURAL RESOURCE MANAGEMENT 250 (1996).

5. *See infra* Part III.D.

6. Downlisting occurs when "moving a species from Appendix I to Appendix II or off either list." DAVID S. FAVRE, INTERNATIONAL TRADE IN ENDANGERED SPECIES: A GUIDE TO CITES 45 (1989) [hereinafter FAVRE, A GUIDE TO CITES]. When a species is downlisted from Appendix I to Appendix II this is generally an indication that the species' survival is no longer in immediate danger. However, a move from Appendix II to Appendix I, or an uplisting would indicate just the opposite and that strict trade measures are to be adopted to prevent further decline of the species. *See id.* This mechanism was specifically approved in Conf. 5.21 at the fifth CITES Conference of the Parties held in Buenos Aires, Argentina, in 1985. *See* AMIE BRÄUTIGAM, CITES: A CONSERVATION TOOL 10, 78-80 (IUCN/SSC Trade Specialist Group, 1987). Reporting of CITES documents in this Note follows the numbering system used in the CITES Conference of Parties Proceedings. Thus, Conf. 5.21 is the twenty-first resolution adopted by the fifth meeting of the Conference of the Parties. *See* FAVRE, A GUIDE TO CITES, *supra* at xx (explaining numbering system used in CITES Proceedings).

7. *See* Stephanie Pendry, *CITES Meeting Reflects Shift Towards Sustainable Use*, 31 ORYX 226, 227 (1997). On February 11, 1999, CITES granted permission for Zimbabwe to sell 20 tons of ivory and Namibia 13.8 tons of ivory to Japan in a one-off shipment to take place after March 18, 1999. *See Zimbabwe and Namibia Allowed Single Ivory Shipment to Japan*, AGENCE FR.-PRESSE, Feb.11, 1994, *available in* 1999 WL 2544715. Botswana did not meet all of the requirements necessary to participate but

sustainable use in the criteria used to decide the CITES level of trade demonstrate the shift of the underlying philosophy of CITES from preservation to sustainable use[8] and conservation.[9]

This Note analyzes the shift within the CITES community from a preservationist philosophy to one of conservation and sustainable use. Specifically, this Note will examine key biennial CITES meetings and the growing acceptance of sustainable use as a sound legal and wildlife management tool, concept, and philosophy for facilitating legal international trade in endangered species. Part I reviews the background and purpose of CITES. Part II examines the principles of sustainable development and sustainable use to clarify the terminology within the scope of this Note and CITES. Part III then analyzes the CITES community's shift from a preservationist philosophy to a conservation and sustainable use philosophy. Part IV examines this changing climate by looking at the number and type of species recommended for downlisting over the years and the subsequent result of these recommendations. The Note concludes that CITES has evolved from being a preservationist treaty into a conservationist treaty that accepts the emerging international environmental legal principle of sustainable use.

I. A CITES PRIMER

A. History and Purpose

CITES' success over the past twenty-five years is attributable to its laudable overall purpose of protecting wild plants and animals through measures generally accepted by most countries. CITES was created to help curb and regulate the ever increasing international trade in wild plants and animals, originally the work of the International Union for the Conservation

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can participate if the requirements are met. *See id.*

8. Sustainable use is defined as "use of an organism, ecosystem, or other renewable resource at a rate within its capacity for renewal." WORLD CONSERVATION UNION ET AL., CARING FOR THE EARTH: A STRATEGY FOR SUSTAINABLE LIVING 211 (1991) [hereinafter CARING FOR THE EARTH]; *see infra* Part II.B.

9. Conservation is defined as:

> the process through which natural resources are managed to allow partial or total exploitation, for individual, community or commercial use, without in any way jeopardizing the long-term viability of the resource base or inflicting undue or excessive environmental damage. It is held to encompass full consideration of the varying requirements of the local human population, together with those of the wildlife species or habitat to be conserved, including an appreciation of the ability of each to adapt to any changes. It is distinguished from 'preservation', which is considered to be the maintaining of the pristine state of nature as it is or might have been before the intervention of either anthropogenic or natural forces.

ANDY CRUMP, DICTIONARY OF ENVIRONMENT AND DEVELOPMENT: PEOPLE, PLACES, IDEAS AND ORGANIZATIONS 61 (1993).

of Nature (IUCN).[10] CITES' purpose is the "protection [through international cooperation] of certain species of wild fauna and flora against over exploitation through international trade."[11] Because CITES involves both animal and plant species and international trade, some view the treaty as strictly an environmental treaty while others see it primarily as a trade treaty.[12] In actuality it is both. Although the distinction of how the treaty is viewed will affect the way a country manages its resources, the primary objective of protecting wild species from extinction is attainable whether it is viewed as a trade or an environmental treaty because of the flexibility and acceptability of the treaty.

B. Membership and Enforcement

CITES was initially signed by twenty-one countries in 1973, but it did not enter into force until July 1, 1975.[13] Since that time the signatory roll has increased to 145 member Parties.[14] The ever increasing number of parties is evidence that the treaty's objective to protect wild species from extinction while at the same time permitting country-regulated trade in other species appeals to a wide variety of politically, economically, and religiously diverse countries.[15] The Treaty's popularity is based on the fact that it allows each country to preserve its sovereignty over plants and animals within its borders. The preamble of CITES recognizes that the "people and States are . . . the best protectors of their own wild fauna and flora."[16] This recognition is reinforced by charging the individual countries with enacting laws and regulations to

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10. *See* LYSTER, *supra* note 2, at 239.

11. CITES, *supra* note 1, pmbl.

12. *See* INTERNATIONAL WILDLIFE TRADE -A CITES SOURCEBOOK vii (Ginette Hemley ed., 1994) ("CITES is in many ways the benchmark international conservation agreement . . . .") [hereinafter A CITES SOURCEBOOK]; Lluís Colom, *Illegal Wildlife Traffic*, 12 ALL OF US (Centre UNESCO de Catalunya, Barcelona, Spain), Sept., 1994, at 1 ("CITES, in fact, is a Trade Agreement whose prime objective is to protect wildlife."); Robin Sharp, *The African Elephant: Conservation and CITES*, 31 ORYX 111, 114 (1997) ("CITES is an international trade instrument . . . .").

13. *See* A CITES SOURCEBOOK, *supra* note 12, at ix. The treaty did not come into effect until July 1, 1975, as that was "ninety days after the tenth signatory had deposited an instrument of ratification" as required by Article XXII (1) of the Convention. *Id. See also* LYSTER, *supra* note 2, at 240; CITES, *supra* note 1, art. XXII, para. 1. The original 21 signatories included Argentina, Belgium, Brazil, Costa Rica, Cyprus, Denmark, France, West Germany, Guatemala, Iran, Italy, Luxembourg, Mauritius, Panama, Philippines, the Socialist Republic of Vietnam, South Africa, Thailand, the United Kingdom, the United States, and Venezuela. *See* A CITES SOURCEBOOK, *supra* note 12, at 1.

14. *See Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES): List of Parties/Lista de las Partes/Liste des Parties* (visited March 6, 1999) <http://www.wcmc.org.uk/CITES/english/parties2.htm>. CITES' newest members include Uzbekistan (October 8, 1997), Fiji (December 29, 1997), Mauritania (June 11, 1998), and Azerbaijan (February 21, 1999). *See id.*

15. *See* LYSTER, *supra* note 2, at 241.

16. CITES, *supra* note 1, pmbl.

implement and enforce the CITES provisions.[17] In effect, CITES has no regulatory powers of its own to ensure that its purpose of regulating trade to prevent species extinction is fulfilled. Rather, CITES places this responsibility in the hands of the individual signatories to honor their obligations to regulate and monitor trade in threatened and endangered species within the CITES guidelines and appendices.

C. The CITES Permit System

In CITES the primary means of preventing species extinction is through a trade permit system. At the heart of the CITES trade permit system are three appendices to the CITES treaty. The appendices determine the level of international trade of threatened and endangered species based on an individual species' proximity to extinction and the potential impact such trade will have on the species' survival.[18] Appendix I offers the greatest protection and prohibits most commercial international trade of species threatened with extinction.[19] Appendix II regulates trade through a permit system of species which could become threatened with extinction if trade was not regulated as such.[20] Appendix III allows individual states to control international trade of species found and protected within their sovereign borders.[21]

The permit system is regulated by the individual CITES members. Signatories are obliged to establish a "Management Authority" and a "Scientific Authority" that are "responsible for ensuring that the conditions [for granting a CITES permit] have been satisfied" before a country grants a trade permit under CITES.[22] These unilateral trade permits, issued by the exporting country's Management Authority, must be obtained and presented to customs officials prior to exporting an individual of a listed species or products derived from a listed species.[23] In addition, Parties are obligated to

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17. *See* CITES, *supra* note 1, art. VIII, para. 1. In the United States, the Endangered Species Act, as well as the Lacey Act to a lesser extent, are the primary laws used to implement and enforce CITES. *See* Shennie Patel, Comment, *The Convention on International Trade in Endangered Species: Enforcement and the Last Unicorn*, 18 HOUS. J. INT'L L. 157, 167-68 (1995).

18. *See* LYSTER, *supra* note 2, at 240.

19. *See* CITES, *supra* note 1, art. II, para. 1.

20. *See id.* art. II, para. 2.

21. *See id.* art. II, para. 3. In addition to the first three appendices dealing with trade of species, a fourth, Appendix IV, is a model export permit. *See id.* art. IV.

22. LYSTER, *supra* note 2, at 239-40. *See also* FAVRE, A GUIDE TO CITES, *supra* note 6, at 59 ("In the U.S., the Fish and Wildlife Service of the Department of Interior i[s] the designated Management Authority.").

23. *See* FAVRE, A GUIDE TO CITES, *supra* note 6, at 59. Prior to the issuance of an export permit for trade in species found in Appendix I or II the following conditions must be met. Briefly, "the export is not detrimental to the survival of the species . . . ; the specimen was not obtained illegally in the country of export . . . ; shipments of live specimens will be under humane conditions . . . ; and an import permit has

enact local legislation to reflect the limits on trade associated with the CITES appendices.[24] While the key to CITES is its appendices, the success of the treaty is attributable to the individual Parties and the management tools they use to enforce those appendices.

II. SUSTAINABLE DEVELOPMENT AND SUSTAINABLE USE

Conservation programs applying the concept of sustainable use are one tool that the CITES members have at their disposal. Sustainable use is one of the underlying principles of the controversial concept of sustainable development; and while neither has been universally accepted as customary international law, both are well on their way to realizing such recognition.[25] International environmental law has developed along two paths. The first path is comprised of international treaties and customary international law,[26] while the second is known as "soft law."[27] Soft law is the term used to describe forms of international cooperation that are not legally binding.[28] The second path is less binding than the first, and is the center of much debate.[29] The debate focuses on three principles that have been at the forefront of this second path: the precautionary principle,[30] the principle of common but differentiated responsibility,[31] and the principle of sustainable development.[32] While the precautionary principle has been, as of late, formally incorporated into CITES,[33] this Note deals specifically with the integration of sustainable development, and more particularly one of its components—sustainable use—

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been granted by the destination state [for Appendix I species only]." *Id.* at 59-60.

24. *See* A CITES SOURCEBOOK, *supra* note 12, at 5.

25. *See* Donald A. Brown & John Lemons, *Introduction*, *in* SUSTAINABLE DEVELOPMENT: SCIENCE, ETHICS, AND PUBLIC POLICY 1, 1-3 (John Lemons & Donald A. Brown eds., 1995).

26. *See* DAVID B. FIRESTONE & FRANK C. REED, ENVIRONMENTAL LAW FOR NON-LAWYERS 249 (2d ed. 1993); *see also* Jutta Brunnée, *Beyond Rio? The Evolution of International Environmental Law*, 20 ALTERNATIVES 16 (1993).

27. Brunnée, *supra* note 26, at 16-23.

28. *See id.*

29. *See id.*

30. The precautionary principle was adopted at the Earth Summit in 1992 and established the principle that a precautionary approach should be applied in order to protect the environment even if there is not scientific certainty of a serious or irreversible threat to the environment. *See* ALAN GILPIN, DICTIONARY OF ENVIRONMENT AND SUSTAINABLE DEVELOPMENT 178 (1996). The "essential aspect of [the precautionary principle] is the taking of remedial action even in the absence of provable environmental harm, simply upon evidence of a significant risk thereof." Günther Handl, *Environmental Security and Global Change: The Challenge to International Law*, 1 Y.B. INT'L ENVTL. L. 20, 21 (1990).

31. Common but differential responsibility "provides a flexible formula encompassing both the need for common action and a recognition of differing contributions to a problem and differing economic and technical capabilities." Brunnée, *supra* note 26, at 16.

32. *See infra* Part II.A.

33. The precautionary principle was recently incorporated into CITES in Conf. 9.24.

within CITES. The acceptance of sustainable use under CITES as well as in other international agreements may help to move the principle from the realm of "soft law" into the customary law realm.

The starting point to examining the shift that has taken place in the CITES community towards a sustainable use conservation philosophy is to define sustainable development and sustainable use in general.

A. Sustainable Development

Like a chameleon changing its color to fit its environment, the term sustainable development seems to have an ever-changing definition depending upon where it appears.[34] Fortunately, like the chameleon that returns to its dominant shade in its usual surroundings, one definition has generally been looked at as the starting point for discussion.[35] The 1987 World Commission on Environment and Development, the Brundtland Commission, is credited with providing one of the first acceptable definitions of sustainable development: "development that meets the needs of the present without compromising the ability of the future generations to meet their own needs."[36] Sustainable development also embraces the need to ensure the survival of all living things and not solely the survival of human life.[37] Criticism and confusion with this definition led to a more refined definition in *Caring for the Earth*: "improving the quality of human life while living within the carrying capacity of supporting ecosystems."[38] While this second definition is also not free from vagueness or criticism, it is representative of the general concept and interpretations found throughout the legal and development literature.[39] Therefore, it is the definition which will be applied in this Note.

Sustainable development, while often thought to be a new approach to international environmental legal issues, is actually not a new idea. At the

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34. *See generally* CARING FOR THE EARTH, *supra* note 8, at 10 (explaining that "sustainable development," "sustainable growth," and "sustainable use" have incorrectly been used interchangeably). *See also* Ben Boer, *Implementation of International Sustainability Imperatives at a National Level*, *in* SUSTAINABLE DEVELOPMENT AND GOOD GOVERNANCE 111, 112 (Konrad Ginther et al eds., 1995) (tracing the evolution of the term sustainable development).

35. *See* Boer, *supra* note 34, at 113.

36. WORLD COMM'N ON ENV'T & DEV., OUR COMMON FUTURE 43 (Oxford Univ. Press 1987) [hereinafter OUR COMMON FUTURE]. The President's Council on Sustainable Development has used this same definition. *See* THE PRESIDENT'S COUNCIL ON SUSTAINABLE DEV., SUSTAINABLE AMERICA 3 (1996). One of the monumental sustainable development documents coming out of the Earth Summit, Agenda 21, defined sustainable development as "socially responsible economic development . . . [that protects] the resource base and the environment for the benefit of future generations." United Nations Conference on Environment and Development, Agenda 21, § 8.7 (1992).

37. *See* OUR COMMON FUTURE, *supra* note 36, at 43.

38. CARING FOR THE EARTH, *supra* note 8, at 10.

39. *See* Boer, *supra* note 34, at 113.

nucleus of this definition of sustainable development is the concept of sustainability, which in regards to resource use, is not a new concept at all.[40] Furthermore, the age-old concept of sustainability has been in the international legal environmental arena for over a century.[41] For example, in 1893, during the Behring Sea Fur Seals Arbitration (*Great Britain v. United States*) the Arbitral Tribunal rejected the United States' argument that it had a right to ensure the legitimate and proper use of seals and to provide protection from unrestrained destruction for the good of mankind.[42] The tribunal did, however, adopt "[r]egulations for the conduct of sealing which incorporate some of the elements of what is now recognized as a 'sustainable' approach to the use of natural resources."[43] A vigorous resurrection of the sustainability concept has occurred in a number of environmental areas under the auspices of sustainable development.[44] Yet, despite a long historical relationship with the concept of sustainability, until recently members of the environmental community have been slow to adopt the concept of "sustainable development" because of the lack of a universally acceptable definition.

Sustainable development as a broad concept, has, however, gradually worked its way into the international environmental legal arena.[45] Relatively

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40. *See id.* at 111; *see also* Celia Campbell-Mohn, *Objectives and Tools of Environmental Law*, *in* SUSTAINABLE ENVIRONMENTAL LAW 143, 159-60 (Celia Campbell-Mohn et al. eds., 1993).

41. *See* Philippe Sands, *International Law in the Field of Sustainable Development: Emerging Legal Principles*, *in* SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW 53, 58 (Winfried Lang ed., 1995).

42. *See id.* at n.18.

43. *Id.*

44. *See* Thomas C. Jackson, *Lessons from the Endangered Species Wars*, 12 NAT. RESOURCES & ENV'T 105 (1997); *see also* Lawrence J. MacDonnell, *Sustainable Use of Water Resources*, 12 NAT. RESOURCES & ENV'T 97 (1997) (discussing sustainability in regards to water resources and water policy); Robert Myers et al., *Developing an Enduring American Agriculture*, 12 NAT. RESOURCES & ENV'T 110 (1997) (discussing sustainability within an agricultural context). The "three main components of sustainability [include]: (1) stewardship of the natural resource base, (2) economic profitability, and (3) social equity and quality of life concerns." *See id.*

45. In addition to appearing in international environmental documents, such as Agenda 21 and the Biodiversity Convention, sustainable development has also been included in international agreements in trade such as The North American Free Trade Agreement and the World Trade Organization. *See generally* Wolfgang Benedek, *Implications of the Principle of Sustainable Development, Human Rights and Good Governance for the GATT/WTO*, *in* SUSTAINABLE DEVELOPMENT AND GOOD GOVERNANCE 274-88 (Konrad Ginther et al eds., 1995); Noemi Gal-Or, *Multilateral Trade and Supranational Environmental Protection: The Grace Period of the CEC, or a Well-Defined Role?*, 9 GEO. INT'L ENVTL. L. REV. 61 (1996). It is also important to note at this juncture that sustainable development is not based on customary international law, i.e., law derived from international neighborhood law and legal maxim *sic utere tuo et alienum non laedas* (use your property in such a manner as not to injure that of another) and is generally considered "soft" law or "forms of international co-operation that are not legally binding." Brunnée, *supra* note 26, at 19. However, with the incorporation of sustainable development in the Rio Declaration, the Climate Convention, and the Biodiversity Convention the concept of sustainable development is slowly becoming customary law. *See id.* at 22.

recent widespread acceptance of the concept of sustainable development, despite disagreements on its definition, has led to new international environmental rights and duties, and is now a key factor of modern international environmental law.[46] Specifically, five documents were produced at the United Nations Conference on Environment and Development (the Earth Summit) which incorporated or were based on the concept of sustainable development.[47] These documents included (1) the United Nations Framework Convention on Climate Change; (2) the Convention on Biological Diversity; (3) the Authoritative Statement of Forest Principles; (4) the Rio Declaration on Environment and Development; and (5) Agenda 21.[48] These documents will be the driving instruments behind sustainable development in the international and national environmental legal fields for years to come.[49]

While the term sustainable development is vague and may have different meanings in diverse contexts, four underlying principles have been identified: intergenerational equity, sustainable use, equitable use, and integration.[50] These principles are surely part of the reason that sustainable development has been gradually gaining momentum and acceptance since the Brundtland Report was published in 1987.[51] One of these principles—sustainable use—has become the center of attention in the sustainable development versus preservation of species debate among CITES members.

B. Sustainable Use

Sustainable use was analogized to "spending the interest while keeping the capital" in the International Union for the Conservation of Nature's World Conservation Strategy.[52] While numerous individuals, organizations, and treaties have tried to define the term explicitly or implicitly,[53] a simple

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46. *See* A. Dan Tarlock, *Exclusive Sovereignty Versus Sustainable Development of a Shared Resource: The Dilemma of Latin American Rainforest Management*, 32 TEX. INT'L L.J. 37, 52 (1997).

47. *See* Brown & Lemons, *supra* note 25, at 2-3.

48. *See id.*

49. *See id.*

50. *See* Sands, *supra* note 41, at 58-61. The principle of intergenerational equity focuses on the "preservation of natural resources for the benefit of present and future generations;" the principle of sustainable use involves exploitation of resources; the principle of equitable use requires states to use resources equitably in regards to the needs of other states; and the principle of integration "requires that environmental considerations should be integrated into economic and other development plans, programmes, and projects, and that development needs are taken into account in applying environmental objectives." *Id.*

51. *See* Tarlock, *supra* note 40, at 52.

52. World Conservation Strategy, 1980 (Excerpts), *in* 1 BASIC DOCUMENTS OF INTERNATIONAL ENVIRONMENTAL LAW 79, 93 (Harold Hohmann ed., 1992). The International Union for the Conservation of Nature (IUCN) is now known as the World Conservation Union.

53. *See, e.g.*, Handl, *supra* note 30, at 22-23.

working definition of sustainable use which can be applied in the context of this Note is the use of an organism, ecosystem or other renewable resource "at rates within their capacity for renewal."[54] While resources such as wildlife have been protected by international agreements for over one hundred years,[55] the emphasis on sustainable use programs and policies for managing and protecting wildlife is relatively recent.[56] When looking at a wildlife population as a renewable resource, sustainable use can be seen as removing and using some of the individuals, the "interest," within a particular population so you can preserve the species, the "capital," indefinitely. This idea of spending the interest in order to preserve an animal species has not won favor with all environmentalists.[57]

Some environmentalists do not believe that sustainable use is the key to preventing species from extinction.[58] Wayne Pacelle, Vice President of Government Affairs and Media for the Humane Society of the United States identified four reasons why sustainable use is "fundamentally flawed" as a conservation strategy: (1) limitations of science, (2) creation and spiraling out of control of markets, (3) only considers the part of the biota which has value, and (4) the interest of animals in general are ignored.[59]

Mr. Pacelle claims that because of the ambiguity and conflicting nature of the science used by proponents of sustainable use that the principle should not be used as a conservation tool.[60] While ambiguity and controversy can rarely be eliminated completely when dealing with science, the science behind sustainable use in the CITES context tries to address the ambiguity through the careful examination of the individual populations and the affected area.[61] Unfortunately, controversy will always exist when environmentalists disagree over whether it is proper to kill individual animals for the sake of saving a species. For example, in Kenya, the former head of the Kenya Wildlife Service, Richard Leaky, adamantly rejects community-based, sustainable use conservation efforts; whereas his successor, David Western, has gone to great lengths to get humans involved in the management of the parks, including

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54. CARING FOR THE EARTH, *supra* note 8, at 10.

55. *See* LYSTER, *supra* note 2, at 299.

56. *See generally The 17 Lessons for CITES from Crocodilian Conservation Worldwide* (James Perran Ross ed.) (visited Oct. 8, 1997) <http://wildnetafrica.co.za/cites/info iss_005_croclessons.html> (discussing sustainable use of crocodile populations).

57. *See* Chris Styles & David Barritt, *African Elephants Under the Gun*, 17 ANIMALS' AGENDA 26, 26-27 (1997); *see also* Ben White, *Threatened Species Lose to Trade*, 12 EARTH ISLAND J.L. 32, 32-33 (1997); Victoria Butler, *Unquiet on the Western Front*, 28 INT'L WILDLIFE 12 (1998).

58. *See* White, *supra* note 57, at 33.

59. Wayne Pacelle, Address at Third Annual International Wildlife Law Conference (March 31, 1998)(transcript on file with author).

60. *See id.*

61. *See infra* Part III.C.5

using community-based programs.[62] Markets undoubtedly are created or supported as a result of sustainable use programs. However, spiraling out of control, an aspect Mr. Pacelle is concerned about, does not necessarily have to follow. Poaching is the main concern for many, as is the case with the recent downlisting of the African elephant.[63] As with all market systems, proper (and well funded) control and enforcement mechanisms are necessary to regulate legal trade and suppress illegal trade.[64] Sustainable use programs generally focus on specific populations or species but not at the expense of the rest of the biota. In fact, by maintaining species within their carrying capacity the remainder of the biota are able to survive and flourish absent increased competition from species who would exceed their carrying capacity. In regards to Pacelle's final concern that the interests of animals in general are ignored, many of the sustainable use proponents would contend that sustainable use programs do consider the interests of animals but on the species or population level and not necessarily at the individual level.

Despite the ongoing controversies and disagreements of whether sustainable use is a sound tool for the conservation of species, the international legal community has accepted the principle of sustainable use.[65] This acceptance has been demonstrated by the incorporation of sustainable use in numerous treaties and agreements, including the 1968 African Nature Convention, the 1983 International Tropical Timber Agreement, the 1985 ASEAN Agreement, and the Biodiversity Convention.[66] Thus, despite criticism from some environmentalists, the principle of sustainable use has become integrated into the international environmental legal world.

III. A SHIFT IN PHILOSOPHIES

A shift has taken place among the CITES members away from a philosophy of preservation to one of conservation-based sustainable use. Historically, preservation was the environmental philosophy underlying

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62. *See* Butler, *supra* note 57, at 14.

63. *See* Chenge Mbitiru, *Kenya Fears Renewed Threat to Elephant Herds, Relaxation of Ivory Sale Ban Could Spark New Slaughters*, CHI. TRIB., Mar. 1, 1999, at 8.

64. *See id.*

65. *See* David Favre, *Debate Within the CITES Community: What Direction for the Future?*, 33 NAT. RESOURCES J. 875, 882 (1993) [hereinafter Favre, *Debate*].

66. *See* Sands, *supra* note 41, at 59-60. Additionally, the 1948 International Whaling Convention, which has failed to protect whale populations, was based on an early application of sustainable utilization. *See Id.* at 59. Caughley and Gunn point out that some whale species, such as the minke whale, *Balaenoptera acutorostrata*, in theory, can be sustainably harvested. Yet, the problem lies in whether, in practice, they would be harvested for sustained yield. *See* GRAEME CAUGHLEY & ANNE GUNN, CONSERVATION BIOLOGY IN THEORY AND PRACTICE 350 (1996).

CITES.[67] However, because of the economic realities of living with wildlife in some countries;[68] the detrimental impacts on other species as a result of one species being protected; and the high number of species becoming extinct, or on their way to extinction, sustainable use based conservation has become the front runner offering a change.

The shift towards acceptance of sustainable use as a viable conservation tool is best seen by looking at the problems that existed under the preservationist approach originally adopted by the CITES members and, then, how sustainable use addresses these issues. After examining the problems of a preservationist CITES, a review of key portions of CITES reveals that there is no inherent problem in applying sustainable use principles to achieve the CITES' purpose. Next, an examination of the criteria and their exceptions that have evolved for listing, delisting, uplisting, and downlisting species over the past twenty-six years shows that the CITES community has adopted sustainable use. Finally, a review of the CITES proposals and resolutions downlisting species and supporting sustainable uses of species over the past twenty-six years demonstrates the growing acceptance of the sustainable use principle by Parties to CITES.

A. The Undoing of the Preservationist Philosophy

As mentioned above, CITES was originally designed with the idea of preserving plant and wildlife species by regulating trade in these species.[69] Regulating trade from a preservationist point of view did little to help the local human communities living with and sharing the environment and resources with the protected species, especially in developing countries.[70] In developing countries, little incentive was offered to local communities to preserve listed species.[71] In some cases, local villagers would help poachers find and kill listed species, such as elephants. When communities are involved in sustainable use programs. where they receive more than a token amount of the proceeds, both the human and animal communities benefit. In the elephant example above, once the villagers were provided with the incentives of

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67. *See infra* Part I.

68. *See* HOLLY T. DUBLIN ET AL., *Conservation Outside Protected Areas, in* CONSERVING AFRICA'S ELEPHANTS: CURRENT ISSUES & PRIORITIES FOR ACTION 1, 2 (World Wide Fund for Nature 1997) [hereinafter *Conservation Outside Protected Areas*] (visited Oct 8, 1997) <http://www.panda.org/resources/publications/species/elephant/elephant4.html>.

69. *See infra* Part I.

70. *See* J. I. Barnes, *Changes in Economic Use Value of Elephant in Botswana: The Effect of International Trade Prohibition*, 18 ECOLOGICAL ECON. 215, 222-23 (1996).

71. *See* Martin Wolf, *The Price of Elephants, Comment and Analysis*, FIN. TIMES (London), June 24, 1997, at 22 (discussing how the effort to preserve the African elephant through the Ivory ban "reduced the incentive to preserve elephants in unprotected" areas).

community based sustainable use programs, poachers were reported by the villagers to authorities.[72] Thus, the community benefitted from those elephants that were legally taken and the elephant population was further protected from being decimated by poachers. Programs such as the Communal Areas Management Programme for Indigenous Resources (CAMPFIRE) project in Zimbabwe, have demonstrated that local communities can be empowered to protect wild species through sustainable use.[73] By placing a value on the species and providing that sizeable returns from the sustainable off-take are returned to the community for community projects the hardship of living with wildlife is offset, the species is maintained at a sustainable level, and a sense of ownership is instilled in the community members such that illegal off-take is reduced.[74] Thus, under the preservationist scheme poachers and local communities contributed to the demise of listed species, whereas under the sustainable use based conservation scheme, the species are offered increased protection by the communities who realize poaching only takes away benefits that may otherwise come to their village.

In addition to conflicts with human communities, a preservationist approach causes detrimental impacts to other species. For example, because trade in the African elephant was banned in 1989, some elephant communities grew too large for the land they inhabited.[75] The result was destruction of the habitat shared by the elephants and other species.[76] Sustainable use of a species, rather than species preservation, could prevent these conflicts by keeping the number of individuals of a protected species within the carrying capacity of the available land. Limiting the species to the carrying capacity will greatly reduce interspecies conflicts due to competition for resources.

Regulation of trade under CITES itself has not proven overwhelmingly successful in preventing species from becoming extinct. While actual rates of extinction are not known, natural "background" or historical extinction rates are estimated at one to three species a year.[77] Current rates, however, are

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72. *See* HOLLY T. DUBLIN ET AL., *Controlling Illegal Trade in Elephant Products*, *in* CONSERVING AFRICA'S ELEPHANTS: CURRENT ISSUES & PRIORITIES FOR ACTION 1, 9 (World Wide Fund for Nature 1997)[hereinafter *Controlling Illegal Trade*] (visited Oct. 8, 1998) <http://www.panda.org/resources/publications/species/elephant/elephant5.html)>.

73. *See generally* Simon Metcalfe, *The Zimbabwe Communal Areas Management Programme for Indigenous Resources (CAMPFIRE)*, *in* NATURAL CONNECTIONS 161 (David Western et al. eds., 1994).

74. *See generally Conservation Outside Protected Areas*, *supra* note 68, at 2 (discussing various consumptive and non-consumptive uses of elephants that encourage conservation).

75. *See generally* Caroline Taylor, *The Challenge of African Elephant Conservation*, 4 CONSERVATION ISSUES 1, 4 (1997).

76. *See id.* at 4.

77. *See* John Tuxill & Chris Bright, *Protecting Nature's Diversity: Mending Strands in the Web of Life*, FUTURIST, June 1, 1998, *available in* 1998 WL 15658086.

almost 1,000 species a year according to Stuart Pimm, one of the leading biologists studying extinction rates.[78] In light of this dramatic increase in extinction rates despite the preservation-oriented CITES, sustainable use of plants and wildlife has emerged as an alternative to strict regulation.

B. The Flexible Language of CITES: The Open Door for Sustainable Use Based Conservation

The CITES treaty was written with preservation[79] in mind; however, the language of CITES itself, while not specifically using the term "sustainable use," leaves open the possibility of applying the principle of sustainable use as a means of conserving and protecting species from becoming extinct. As mentioned above, Appendix I is based on the idea of preserving the species by eliminating all legal commercial trade.[80] Appendix II, on the other hand, uses broader language which speaks of regulating trade "in order to avoid utilization incompatible with [the species'] survival."[81] This specific language in Appendix II delivers the same idea inherent to the definition of sustainable use—that trade must not result in a species becoming threatened with extinction.[82] The Appendix II language is also remarkably different than the prohibitory language found in the preservation-oriented Appendix I.

Both Appendix I and Appendix II base the issuance of permits on the advice of the Scientific Authority of the exporting state that the removal of a particular animal will not be "detrimental to the survival of that species."[83] By definition, sustainable use allows for the taking of individual specimens only if it is within the species' capacity for renewal. Provided the capacity for renewal is maintained, the off-take would not be detrimental. Therefore, the

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78. *See* William Allen, *Biologists Sound Alarm on Perils of Extinction, Forum Examines Global Loss of Plants and Animals*, ST. LOUIS POST-DISPATCH, Nov. 2, 1997, at 01G, *available in* 1997 WL 3375779.

79. One international wildlife authority noted that CITES "is a protectionist treaty in the sense that it prohibits, with few exceptions, international commercial trade in species that are threatened with extinction (they are listed in Appendix I)." *See* LYSTER, *supra* note 2, at 240.

80. Article II, paragraph 1 of CITES states that:

> [a]ppendix I shall include all species threatened with extinctions which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances.

CITES, *supra* note 1, art. II, para. 1.

81. *Id.* art. II, para. 2(a).

82. *See* CARING FOR THE EARTH, *supra* note 8, at 211 (defining sustainable use as "use of an organism, ecosystem, or other renewable resource at a rate within its capacity for renewal"); *see also supra* Part II.B.

83. CITES, *supra* note 1, art. III, para. 2(a) (for Appendix I species), art. IV, para. 2(a) (for Appendix II species).

language of the CITES treaty is flexible enough to allow sustainable use to play a part in conserving species while maintaining the ultimate goal of preventing the extinction of species.

C. The Evolution of the Shift: The CITES Listing Criteria

1. The Berne Criteria

The selection criteria that determines if a species is in need of protection under CITES has evolved from an inflexible standard based on preservation, to one that embraces the concept of sustainable use. When CITES was signed in 1973, the treaty did not include criterion to determine if a species was threatened with extinction.[84] CITES remained without a standard until 1977 when the members first met.[85] At this meeting in Berne, Switzerland, the members established a criterion to determine when to list a species on the Appendices, commonly referred to as the Berne Criteria.[86] The Berne Criteria

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84. *See* FAVRE, A GUIDE TO CITES, *supra* note 6, at 32.

85. *See id.*

86. *See* BRÄUTIGAM, *supra* note 6, at 24. The Berne Criteria (Conf. 1.1) is as follows:

For Appendix I

Biological status. To qualify for inclusion in Appendix I, a species must be currently threatened with extinction. Information pointing to this should be of any of the following types, in order of preference: a) scientific reports on the population size or geographic range of the species over a number of years; b) scientific reports on population size or geographic range of species based on single surveys; c) reports by reliable observers other than scientists on population size or geographic range of species over a number of years; or d) reports from various sources on habitat destruction, heavy trade or other potential causes of extinction.

Trade status. Species meeting the biological criteria should be listed in Appendix I if they are or may be affected by international trade. This should include any species that might be expected to be traded for any purpose, scientific or otherwise. Particular attention should be given to any species for which such trade might, over a period of time, involve numbers of specimens constituting a significant portion of the total population size necessary for the continued survival of the species. The biological status and trade status of a species are obviously related. When biological data show a species to be declining seriously, there need be only a probability of trade. When trade is known to occur, information on the biological status need not be as complete. This principle especially applies to groups of related species, where trade can readily shift from one species that is well known to another for which there is little biological information.

For Appendix II

Biological status. To qualify for Appendix II, species need not currently be threatened with extinction, but there should be some indication that they might become so. Such an indication might be a decreasing or very limited population size or geographic range of distribution. Information on biological status should be one of the types required for Appendix I species. Genera should be listed if some of their species are threatened and identification of individual species within the genus is difficult. The same should apply to listing any smaller taxa within larger ones.

provided a tool to list species and to transfer them from Appendix II to Appendix I (uplist) and from Appendix I to Appendix II (downlist).[87] However, the inflexibility of the preservation-oriented Berne Criteria made it difficult to remove (delist) or transfer a species from either of the Appendices.[88] This inflexibility was the source of much criticism and controversy and led to exceptions for which the Berne Criteria was not to be applied.[89] The concerns raised by the members and the uncertainty related to the criteria's inflexibility in part led to the gradual evolution to the criteria we have today which incorporates the principle of sustainable use.

2. Exceptions to the Berne Criteria: Ranching and Quotas

The evolution of the CITES criterion towards sustainable use was a long transition beginning at the third Conference of the Parties (COP-3) in 1981.[90] At COP-3 an important resolution, Conf. 3.15,[91] was passed that permitted the "ranching"[92] of Appendix I species which were no longer considered endangered.[93] While ranching is different than management of wild species, Conf. 3.15 was instrumental in the evolution of the listing criteria towards sustainable use as it required that "the taking from the wild shall have no significant detrimental impact on wild populations,"[94] and that "the operation

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Trade Status. Species meeting the biological criteria should be listed if they presently are subject to trade or are likely to become subject to trade. The latter situation can arise where heavy trade in one species is extended to include similar species if the demand grows or if supplies of the one species are depleted. The amount of trade that a species can sustain without threat of extinction generally will be greater for species in Appendix II than for those in Appendix I, so there should be evidence of actual or expected trade in such a volume as to constitute a potential threat to survival of the species. Appendix II serves in part as a monitoring tool (Article IV.3) to gather such trade data. *Id.*

87. *See* LYSTER, *supra* note 2, at 241.

88. *See id.*

89. *See id.*

90. CITES requires biennial meetings of the signatories where amendments to the Appendices take place and progress related to "restoration and conservation" of species is reviewed. CITES, *supra* note 1, art. XI. These meetings are referred to as the Conference of the Parties (COP). COP-3 was held in New Delhi, India, from 25 February to 8 March, 1981. *See* BRÄUTIGAM, *supra* note 6, at 57. Ten COPs have taken place since CITES' formation. Testimony of Donald Barry, Deputy Assistant Secretary of Fish and Wildlife and Parks, Department of the Interior, Before the House Committee on Resources, Subcommittee on Fisheries, Wildlife, and Oceans, Regarding the Results of the Tenth Conference of the Parties of the Convention on International Trade in Endangered Species (CITES) (visited Aug. 11, 1997) <http://www.fws.gov/~r9dia/dbtestim.html> [hereinafter Testimony of Donald Barry]. The next COP will be held in Indonesia in 1999. *See id.*

91. *See* BRÄUTIGAM, *supra* note 6, at 57-58.

92. Ranching is rearing specimens taken from the wild in a controlled environment. *See id.* at 11.

93. *See id.* at 57-58.

94. *See* FAVRE, A GUIDE TO CITES, *supra* note 6, at 399; *see also* BRÄUTIGAM, *supra* note 6, at 58.

must be primarily beneficial to the conservation of the local population."[95] While the ranching resolution did not change the Berne Criteria per se, it di provide an exception which supported the principle of sustainable use.

At the fifth Conference of the Parties in 1995,[96] sustainable use wa couched in a resolution that permitted the downlisting of a species for trad purposes if the survival of the species was not jeopardized by the trade.[97] Conference Resolution 5.21 permitted the downlisting of species which ha previously been placed on Appendix I without the application of the Bern Criteria.[98] Specifically, this resolution stated that if a country established a acceptable quota system,[99] a species which could "withstand a certain level o exploitation for commercial trade" could be downlisted provided that th species would not be endangered.[100] Without specifically stating "sustainabl use," this resolution adopted the philosophy of sustainable use by permittin trade conditioned upon quotas that would support the species' survival. Onc again, while the Berne Criteria was not replaced, an exception had been mad which seemed to favor sustainable use.

3. The Ivory Ban and the Somalia Amendment

A third exception to the Berne Criteria emerged in conjunction with th listing of the African elephant on Appendix I in 1988. While the seven Conference of the Parties is best remembered for the "Ivory Ban," what generally not remembered is that the ban was not immediate.[101] Because th elephant populations in the southern African range states were we

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95. *See* FAVRE, A GUIDE TO CITES, *supra* note 6, at 399.

96. The Fifth Meeting of the Conference of the Parties was held from 22 April to 3 May, 19 in Buenos Aires, Argentina. *See id.* at 78.

97. *Special Criteria for the Transfer of Taxa from Appendix I to Appendix II*, CITES, 5th mt Conf. 5.21, (Buenos Aires, 1985) [*hereinafter* Conf. 5.21]. Conf. 5.21 stated that

> where it is virtually impossible to supply the data required by Conf. 1.2 [the Berne Criteria] within reasonable time or with reasonable effort, but where the populations of such species can withstand a certain level of exploitation for commercial trade, the criteria of Conf. 1.2 be not applied to the transfer from Appendix I to appendix II if the countries of origin agree to introduce a quota system which is . . . sufficiently safe so as not to endanger the survival of the species in the wild.

Id. at 79.; *see also* John L. Garrison, *The Convention on International Trade in Endangered Species Wild Fauna and Flora (CITES) and the Debate Over Sustainable Use*, 12 PACE ENVTL. L. REV. 301, 3: 34, nn.122-28 (1994) (discussing Conf. 5.21 and its successor Conf. 7.14).

98. *See* Conf. *5.21*, *supra* note 97, at 79.

99. The quota system has to be approved by the Conference of the Parties per Conf. 5.21. *See* at 79.

100. *See id.*

101. *See* Sharp, *supra* note 12, at 115; *Controlling Illegal Trade*, *supra* note 72, at 2.

managed,[102] not under serious attack from poachers,[103] and did not meet the Berne Criteria to be moved to Appendix I,[104] the ban was instituted only upon the acceptance of the "Somalia Amendment."[105] The Somalia Amendment (Conf. 7.9), in addition to admitting that African elephant populations existed in member states that did not meet the Berne Criteria, provided a new criteria for the future downlisting of the species.[106] The Somalia Amendment required future down listing proposals for the African elephant to be reviewed by a specially created "Panel of Experts."[107] For the African elephant to be downlisted, this Panel of Experts had to evaluate all relevant proposals by applying the following criteria: "(1) there is a viable and sustainable population with an effective management program in place for the elephant, and (2) [that] the controls in the country are sufficient to prevent the mixing of legal and illegal trade at the sales level."[108] The CITES Standing Committee modified the Panel's examination to include trade and control of ivory and other elephant products.[109] Furthermore, the Standing Committee's modifications required the Panel's examination to look at "whether implementation of the proposal is likely to have a positive or negative impact on the conservation status of the elephant population and its environment in the range state."[110] The Somalia Amendment, while important for the successful passage of the Ivory Ban, was also the first real modification, as opposed to an exception, to the Berne Criteria, although it only applied to one species. The Somalia Amendment was an indication that the CITES members were warming up to the idea of using sustainable use to prevent extinction.

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102. *See* Sharp, *supra* note 12, at 115.

103. *See* Kevin A. Hill, *Conflicts over Development and Environmental Values: The International Ivory Trade in Zimbabwe's Historical Context* (last visited Oct. 8, 1997) <http://www.fiu.edu/~khill/elephant.htm>.

104. *See* Garrison, *supra* note 97, at 340 (1994).

105. *See Controlling Illegal Trade*, *supra* note 72, at 2; *see also* Philippe J. Sans & Albert P. Bedecarre, *Convention on International Trade in Endangered Species: The Role of Public Interest Non-Governmental Organizations in Ensuring Effective Enforcement of the Ivory Trade Ban*, 17 ENVTL. AFF. 799, 800 (1990).

106. *See* Conf. *5.21*, *supra* note 97, at 79.; *see* Garrison, *supra* note 97, at 340 (1994).

107. *Controlling Illegal Trade*, *supra* note 72, at 2.

108. David Favre, *Trade in Endangered Species*, *in* 2 Y.B. INT'L ENVTL. L. 205, 205 (Günther Handl et al. eds., Graham & Trotman 1991) [hereinafter Favre, *Trade*].

109. *See Terms of Reference of the Panel*, *in* 1997 Report of the Panel of Experts to CITES Secretariat, Feb. 7, 1997 [hereinafter *Reference Panel*] (on file with author, but also available at http://wildnetafrica.co.za/cites/info/iss_002_01.html); *see also* Sustainable Use: A Prescription for the Rationalized Exploitation of Wildlife (visited on Oct. 8, 1997) <http://www.unep.ch/cites/cop-10.html>. Comments from the CITES Secretariat which noted the items to take into account were: "i) the status of the elephant population; ii) the State's ability to manage and conserve its population effectively; and iii) the State's ability to control trade in elephant ivory." *Id.*

110. *See Reference Panel*, *supra* note 109.

4. The Failed Kyoto Criteria

In 1992, at the eighth Conference of the Parties in Kyoto, Japan, a number of proposals to further modify CITES to make it more sustainable use-friendly were defeated. However, the discussions stimulated by these proposals succeeded in bringing the issue to the forefront of the meeting. In Kyoto, the southern African block countries, led by Zimbabwe, submitted a number of proposals, the most important being a proposed new listing criteria.[111] The proposed new criteria, commonly referred to as the Kyoto Criteria,[112] would replace the Berne Criteria and focus on making the treaty more "scientifically objective" in determining the biological status of a species.[113] The Kyoto Criteria was considered more scientifically objective because it used a scientifically quantified number of specimens to determine the renewal capacity rate of a species. Replacing the Berne Criteria with the Kyoto Criteria would have made the listing process more scientifically objective and favored sustainable use.

The Kyoto Criteria, found in Document 8.50, also sought to substitute the sustainable use concept in place of the prohibition against the sale of Appendix I species."[114] Additionally, the proposal recommended that "split listings"[115] should be avoided, but if they were necessary then the split listing species should be listed on Appendix II.[116] Additionally, it placed "look alike" species on Appendix II.[117] Document 8.50 further specified that the same standard be used to list, delist, uplist, or downlist a species.[118] Finally, the proposed Kyoto Criteria recommended placing a species on Appendix II if there was a doubt as to whether it should be on Appendix I or II; however, an Appendix I listing would occur if there was a showing of at least a twenty percent chance that the species would become extinct within ten years or ten generations.[119] While many of the CITES members were beginning to accept

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111. The Kyoto Criteria is found in Document 8.50. *See* Criteria for Amendments to the Appendices, CITES, 8th mtg., Doc. 8.50 (Kyoto, 1992) [*hereinafter* Doc. 8.50]. Other proposals put forth by the pro-sustainable use parties included 8.48 and 8.49. *See* Criteria for Amendments to the Appendices, CITES, 8th mtg., Doc. 8.48 (Kyoto, 1992); Criteria for Amendments to the Appendices, CITES, 8th mtg., Doc. 8.49 (Kyoto, 1992). The principles found in these latter two proposals were essentially encompassed within 8.50. All three of the proposals were defeated.

112. *See* Favre, *Debate*, *supra* note 65, at 899.

113. *See* Favre, *Trade*, *supra* note 108, at 318-20; *see also* Favre, *Debate*, *supra* note 65, at 901.

114. *See* Favre, *Trade*, *supra* note 108, at 319; *see also* Favre, *Debate*, *supra* note 65, at 899-903.

115. A split listing is where different populations of the same species are placed on different appendices.

116. *See* Garrison, *supra* note 97, at 353-54.

117. *See id.*

118. *See* Favre, *Debate*, *supra* note 65, at 899. This is called symmetrical listing criteria. *Id.*

119. *See* Doc. 8.50, supra note 111.

sustainable use, the concept was still too controversial to become the driving force behind CITES. Additionally, the CITES members rejected the Kyoto Criteria.[120]

One of the key sustainable use provisions of the Kyoto Criteria included a recommendation to change the words in CITES from "non-detrimental" to "beneficial use" when considering the export of a specimen.[121] Substantial disagreement existed over the actual "benefits" that trade would provide in protecting a species and its habitat. This disagreement contributed to the failure of the Kyoto Criteria.[122] Nevertheless, resolutions were passed that incorporated some of the sustainable use ideas from the Kyoto Criteria. Resolution 8.3, for example, stated, "[t]he Conference of the Parties to CITES recognizes that commercial trade may be beneficial to the conservation of species and ecosystems and/or to the development of local people when carried out at levels that are not detrimental to the survival of the species in question."[123] Acknowledgment that conservation of species and habitats can be realized through trade which is not "detrimental to the survival of the species" speaks directly to the use of an organism or ecosystem at a rate within its capacity for renewal, i.e. sustainable use.

The acceptance of the Kyoto Criteria would have drastically changed the listing criteria used by CITES members and promoted sustainable use. Instead, there were heated exchanges and debates which led to the proposals being withdrawn for lack of support.[124] Nevertheless, by bringing the sustainable use issues to the forefront of the CITES conference, many more Parties became familiar with the principle and how it could be used to meet the CITES objective of conserving species. This expanded understanding of sustainable use and the discomfort with the outdated Berne Criteria led to the adoption of Conf. 8.20.[125] This resolution directed the Standing Committee and the Plants and Animals Committee to work with the Secretariat, IUCN, and others to develop a new listing criteria.[126] While the specific sustainable use proposals put forth at Kyoto did not succeed, the discussion that took

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120. *See* Favre, *Debate*, *supra* note 65, at 902.

121. *See id.* at 903.

122. *See* Garrison, *supra* note 97, at 344-48. This change was essentially what was proposed in Document 8.48 which also failed. *See id.* Additionally, Document 8.48 recommended that "products of natural mortality or by-products of wildlife management" other than for financial gain should be exempt from the "non-detrimental" category. *See id.* at 345. This change would have further incorporated sustainable use programs which are generally developed to protect the species and not solely for financia gain. *See id.* at 346. Despite the rejection of Document 8.48, Conf. 8.3 was adopted which incorporated some of the sustainable use ideas of Document 8.48. *See id.* at 348.

123. Favre, *Debate*, *supra* note 65, at 904 (quoting CITES, 8th mtg., Conf. 8.3 (Kyoto, 1992)).

124. *See Controlling Illegal Trade*, *supra* note 72, at 3.

125. *See* Garrison, *supra* note 97, at 352-53.

126. *See id.* at 356.

place and the recommendation to develop a new listing criteria were critical in the evolution and shift towards the acceptance of the principle of sustainable use within the CITES community.

5. The New Criteria: The Everglades Criteria

After almost twenty years in place with only slight modification, the preservationist-oriented Berne Criteria was unanimously replaced by numerically-based criteria. New listing criteria that permits sustainable use conservation efforts were adopted in 1994, in Fort Lauderdale, Florida, at the ninth Conference of the Parties.[127] The new listing criteria for Appendices I and II,[128] which were unanimously adopted and known as the "Everglades Criteria,"[129] include biological and trade criteria for inclusion on Appendices I and II.[130] These criteria guidelines were tested, revised, and retested by IUCN to ensure scientific credibility.[131] The Everglades Criteria determines a population is *not* viable and sustainable and should be listed in Appendix I if: 1) the wild population is small;[132] 2) the wild population has a restricted area of distribution;[133] 3) there has been a reduction in the number of individuals or the range, which is either observed or predicted; or 4) or the status of the species is such that it is likely to satisfy one or more of the above criteria within five years if not included on Appendix I.[134] Thus, if none of these conditions are met, the species may be transferred to Appendix II from Appendix I in accordance with the relevant "precautionary measures" found in a Annex 4 to Conf. 9.24.[135] This new criteria establishes that trade under Appendix II can take place in limited circumstances which are amenable to sustainable use programs. The new Everglades Criteria were successfully used to downlist the African elephant populations of Botswana, Zimbabwe,

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127. *See* CITES, 9th mtg., Conf. 9.24 [hereinafter Conf. 9.24] (visited Jan. 24, 1997) <http://www.wcmc.org.uk/CITES/english/eresol921.htm>

128. *See CITES: Where Did It All Start*, HUMAN NATURE (IUCN Regional Office for Southern Africa), No. 2, 1995, at 4 [hereinafter *CITES: Where Did It All Start*]; *see also General Preamble, in* 1997 Report of the Panel of Experts to the CITES Secretariat, at 1 [hereinafter *General Preamble*] (visited Oct.8, 1997) <http://wildnetafrica.co.za/cites/info/iss_002_04.html>.

129. *See CITES: Where Did It All Start*, *supra* note 128, at 4. The Everglades Criteria, the biological and trade criteria established in Conf. 9.24, is also known as the Fort Lauderdale Criteria. *See* Kevin Eldridge, *Whale for Sale?: New Developments in the Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 24 GA. J. INT'L & COMP. L. 549, 560 & n.7 (1995).

130. *See* Conf. 9.20, *supra* note 127.

131. *See* CITES: Where Did It All Start, *supra* note 128, at 4.

132. Conf. 9.24 sets a guideline for a small population as a population of less than 5,000. *See* Conf. 9.24, *supra* note 127.

133. Conf. 9.24 sets as a guideline for a restricted area as 10,000 sq. km. *See id.*

134. *See General Preamble*, *supra* note 128, at 1.

135. Conf. 9.24, *supra* note 127.

and Namibia at the most recent Conference of the Parties in Zimbabwe in 1997.[136] Short of using the actual words "sustainable use," the replacement of the Berne Criteria with the Everglades Criteria completes the evolution to a sustainable use listing criteria.

D. COP-10: The Shift is Confirmed

The notion that sustainable use has become an acceptable principle under CITES is also apparent by examining the number of proposals to downlist species based on sustainable use, the results of these proposals, and the particular species involved. Generally speaking, uplisting species from Appendix II to Appendix I, indicates that conservation efforts, and CITES, have failed to protect that species from the threat of extinction.[137] Downlisting a species, on the other hand, is usually an indication that conservation efforts have helped to save a species from the immediate threat of extinction.[138] At the most recent Conference of the Parties, COP-10, held in Harare, Zimbabwe, in 1997, application of the sustainable use-oriented Everglades Criteria, created more proposals to downlist species from Appendix I to Appendix II than ever before.[139] The number of proposals is a clear indication that the members believe that the sustainable use oriented criteria will aid conservation efforts to prevent threats of extinction.

Additionally, the proposals to downlist species from Appendix I to Appendix II outnumbered those proposals to uplist species from Appendix II to Appendix I.[140] Not surprisingly, more of the uplisting proposals were met with defeat or withdrawn in the face of defeat than were downlisting proposals.[141] Most of the proposals to downlist were based on sustainable use. The shear numbers of downlisting proposals and the ratio of downlisting proposals to uplisting proposals illustrates a shift by the Parties to adopt the conservation philosophy based on sustainable use over the traditional preservationist philosophy of not allowing trade by listing a species under Appendix I.

The actual number of proposals to downlist species brought before the Committee can not be viewed as indicative of CITES' acceptance of sustainable use alone. Rather, an examination of the results of these proposals

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136. *See generally* Stephen L. Kass, *The Economic Impact of Wildlife Protection Measures was a Prevailing Theme at the Most Recent Biennial Conference on Endangered Species Worldwide*, NAT'L L.J., Aug. 11, 1997, at B4.

137. *See* Pendry, *supra* note 7, at 226.

138. *See id.*

139. *See id.*

140. *See id.*

141. *See id.*

helps shed further light on the shift.[142] While the Everglades Criteria helps to guide whether a species or a specific population may be downlisted, the decision to approve the downlisting still remains with the Parties.[143] All proposals to downlist a species or population must be affirmatively passed by a two-thirds majority vote.[144] A review of the recent COP-10 results indicates that many of the sustainable use proposals either gained this required two-thirds approval or won a simple majority.[145]

International politics inevitably played a part in the voting at COP-10 and should not be ignored. However, many votes, such as the controversial African elephant votes, were taken by secret ballot in order to eliminate some of the political influences. Under new rules adopted just prior to COP-9, it is much easier for Parties to request secret ballot votes.[146] Parties capitalized on the easing of the procedure to have a secret ballot and took numerous secret ballots at COP-10.[147] By utilizing the secret ballot, many countries susceptible to political influence were able to vote freely without fear of reprisal by donor countries. Thus, while international politics and economics certainly play a part in the voting of various CITES Parties, the number of proposals promoting sustainable use, and the support received for these proposals, show that a majority of the international community is accepting sustainable use within the confines of conserving species.

Finally, looking at the particular species downlisted or proposed to be downlisted helps one to comprehend the shift to sustainable use. Trade of any kind for some species, such as the elephant and whale, has been met with an enormous amount of resistance.[148] Trade in other species, such as the crocodile, has not experienced this high level of resistance.[149] This discriminatory preservation attitude has been blamed on numerous things including claims that only "keystone" species or species that attract the public's attention and bring in dollars for environmental organizations receive

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142. *See generally Reference Panel*, *supra* note 109.

143. It is important to remember that the numerical amounts outlined in Annex 5 of Conf. 9.24, the Everglades Criteria, are only guidelines. Additionally, even if the Everglades Criteria is met, a two-thirds majority vote at a COP is necessary for a downlisting to occur.

144. *See* CITES, *supra* note 1, art. XV, para. 1(b).

145. *See* Pendry, *supra* note 7, at 228.

146. *See* Testimony of Donald Barry, *supra* note 92.

147. *See id.*

148. *See* Ike C. Sugg & Urs P. Kreuter, *Elephants and Whales as Resources from the Noosphere*, *in* ELEPHANTS AND WHALES: RESOURCES FOR WHOM? 17, 23, 25 (Milton M.R. Freeman & Urs P. Kreuter eds., 1994) (discussing briefly the elephant ban and the whaling moratorium). *See generally* Ben White, *Threatened Species Lose to Trade*, EARTH ISLAND J., Fall 1997, at 32 (discussing animal rights groups' views on trade in elephants and whales and outcome of COP-10 relating to elephants and whales).

149. *See generally* Garrison, *supra* note 97, at 379-80 (discussing the success of sustainable use of crocodilians, their delisting, and ranching).

high levels of attention. Whether or not these are the true reasons for the disparity, this discriminatory attitude has allowed sustainable programs for some of the not so picturesque species to exist.[150] However, the downlisting of the African elephant, a "flagship"[151] or keystone species, and the simple majority vote in favor of downlisting the minke whale are indications that such barriers are falling. The demise of these discriminatory preservationist attitudes demonstrates that sustainable use is becoming the principle of choice in the conservation field. The sheer number of proposals put before the CITES Parties at COP-10 calling for sustainable use programs or a downlisting (and their success) and the favorable responses to downlisting keystone species demonstrate a shift from a preservation driven CITES to a sustainable use driven CITES.

Since its inception, CITES has undergone a shift from embracing an underlying philosophy of the preservation of species to one of conservation of species through sustainable use. The overall goal of CITES—to prevent the extinction of species—can be accomplished under both philosophies, but some contend that the sustainable use conservation position is a more realistic, practical, and modern way of thinking about and managing conservation efforts.[152] This shift towards a sustainable use conservation philosophy is visible by looking at the flexibility built into the CITES treaty originally, the new CITES listing criteria, and the outcome of the various proposals at the most recent Conference of the Parties.

CONCLUSION

CITES, one of the most successful international treaties in protecting species from extinction, has undergone an evolution from being primarily preservationist to conservationist based on sustainable use. The previous preservationist philosophy proved to be inadequate to address the CITES members' concerns. Sustainable use, while difficult to define, has slowly become one of the operating principles of CITES. However, sustainable use promises to address those concerns more efficiently by promising to proactively manage populations, as with the southern African elephants, rather than approach issues reactively, as was the case with the ivory ban designed to halt poaching.

Fortunately, the language of CITES has permitted sustainable use to be incorporated into the CITES framework. Within this framework the criteria

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150. Successful sustainable use campaigns within CITES have included crocodile ranching and sale of vicuna wool. *See* Favre, *Debate*, *supra* note 65, at 906.

151. *See Conservation Outside Protected Areas*, *supra* note 68.

152. *See generally* Pendry, *supra* note 7, at 226.

used by the CITES members to determine if a species is to be uplisted or downlisted has evolved from the inflexible Berne Criteria to the sustainable use-friendly Everglades Criteria. The new Everglades Criteria was used at the most recent Conference of the Parties for evaluating the numerous downlisting proposals put forward that were based upon sustainable use. While not all of the proposals were successful, the number of proposals based on sustainable use, and the overwhelming support for these proposals, verifies that sustainable use has become an important part of CITES. The next meeting of the CITES Parties, COP-11, originally scheduled to be held in Indonesia, will be held at the United Nations Environmental Program's Headquarters in Nairobi, Kenya, from April 10-20, 2000.[153] The sustainability of the sustainable use shift itself will face its first test at this meeting. Regardless of what happens at COP-11, only time will tell if the shift towards sustainable use will change CITES into a more practical and useable environmental trade agreement while allowing it to fight extinctions, as promised by the pro-sustainable use coalition.[154]

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153. *See Convention on International Trade in Endangered Species of Wild Fauna and Flora: Notification Concerning Eleventh Meeting of the Conference of the Parties* (visited Mar. 6, 1998) <http://www.wcmc.org.uk/CITES/english/e1988-55.htm>.

154. *See supra* Part III. The sustainable use coalition includes Botswana, Japan, Namibia, Norway, Zambia, and Zimbabwe.