Evaluating U.S. Endangered Species Legislation -
The Endangered Species Act as an International Example

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"If our current efforts at dealing with species rarefaction continue on for the next fifty years, there will be few species left to preserve."

I. INTRODUCTION

"From an ethical standpoint, it may be argued that it is our moral responsibility to conserve wildlife. Not only is it cruel to unnecessarily destroy other living organisms, but it also should be our duty to conserve natural resources and wildlife for the benefit of future generations." The Endangered Species Act, with its arms reaching from one United States coast to the other, is the United States’ answer to the problem of protecting endangered species. However, what regulations exist to protect endangered species on an international level? The Convention on the International Trade of Endangered Species (CITES or Convention) answers this question. Signed on March 3, 1973, and entered into force on July 1, 1975, it was created to restrict the trade of endangered species across nations to prevent their rapid and total extinction.

The United States has a great ability to affect endangered species protection on an international level. The United States, as the world’s largest importer of wildlife and wildlife products, is the world’s leading

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5 See id.

6 See Joonmoo Lee, Comment, Poachers, Tigers and Bears . . . Oh My! Asia’s Illegal
consumer of internationally traded wildlife goods, and accounts for one-fifth of trade in the wildlife market. Additionally, the United States contributes twenty percent of CITES' annual funding. These statistics urge exploration of the role that United States' endangered species legislation may play in affecting species protection on an international level. In light of the fact that the United States has one of the most sophisticated CITES implementation programs of all the signatories to the treaty—the Endangered Species Act of 1973—the potential role of the United States is considerable.

There are several reasons why the ESA can serve as an international legislative framework for the protection of species on an international level. First, the United States has “one of the most sophisticated CITES implementation programs.” Second, “analysis of CITES enforcement in this country is likely to be a good indicator of the effectiveness of administratively sophisticated CITES enforcement in general.” Third, although the implementation of CITES in the United States did not begin until after ratification, the United States can legitimately claim to have implemented CITES longer than any of the

8 See Jeffrey C. Melick, Note, Regulation of International Trade in Endangered Wildlife, 1 B.U. INT’L L.J. 249, 250-251 (1982). The Trade Records Analysis of Fauna and Flora in International Commerce (TRAFFIC) revealed that the United States imported over $18.5 million worth of live fish and shellfish, over $5 million worth of live mammals, reptiles, and amphibians, over 750,000 live birds, almost 11 million animal hides and reptile skins, over 700,000 mounted or stuffed animals, and approximately $8 million worth of ivory articles. See id. at 251-52.
10 See Alagappan, supra note 2, at 566.
12 “As the largest single source of CITES’ funding, and the world’s leading consumer of internationally traded wildlife goods, the United States potentially can exercise considerable influence over the implementation of CITES.” Krieps, supra note 9, at 500 (citations omitted).
14 Id.
other member-parties.\textsuperscript{15} Finally, the creation of the ESA established an important precedent for other countries to follow in the implementation of domestic species protection programs.\textsuperscript{16}

The ESA can serve as a legislative example to party members to CITES that have recently acceded to the treaty.\textsuperscript{17} Part II of this note introduces the role that CITES plays as an international instrument and the roles that are assigned to its signatories. Part III discusses Endangered Species Act provisions and the role that it plays in the context of CITES. Part IV suggests statutory limitations that may be placed on particular individuals or syndicates who engage in trading or activity in violation of CITES using the general principles of the ESA as a skeleton. Part V discusses the tiger and the rhinoceros, and the important role that Myanmar and Yemen play in maintaining their existence. Part V also discusses how the ESA can serve as a framework to countries, like Myanmar and Yemen, which have recently acceded to the treaty.\textsuperscript{18} Part VI discusses prospective steps for nations to follow as signatories to CITES, and draws a conclusion in the form of a recommendation for critics of CITES.

II. THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES

Over 135 countries are now signatories\textsuperscript{19} to the Convention on International Trade in Endangered Species of Wild Fauna and Flora.\textsuperscript{20} It was enacted to establish an international forum for cooperation among nations who agree to take part in the regulation of international trade of

\textsuperscript{15} See id.


\textsuperscript{17} This note proposes that the ESA may also serve as a legislative example to both party members who have acceded to the treaty but not enacted the legislation necessary to implementation, and to non-party members to CITES in hopes that they may eventually become signatories to the Convention.


\textsuperscript{19} As of June 24, 1997, there were 136 countries acting as signatories to CITES. See John Crace, Tinkering with the Ivories, THE GUARDIAN, June 24, 1997, available in 1997 WL 2387874. There are approximately fifty countries that are not parties to the Convention.

\textsuperscript{20} See CITES, supra note 4.
endangered species,\textsuperscript{21} and charges each member nation with the responsibility of protecting them.\textsuperscript{22} It has been labeled as “perhaps the most successful of all international treaties concerned with the conservation of wildlife.”\textsuperscript{23}

Listed species are categorized in a hierarchical system premised upon the imminence of extinction.\textsuperscript{24} Each of the three Appendices to the treaty ranks the species according to their rates of extinction. Appendix I species are those which are currently threatened with extinction. They must be subject to “strict regulation in order not to endanger further their survival.”\textsuperscript{25} Appendix II involves the trade of animals that are not yet subject to extinction, but face demise without regulation.\textsuperscript{26} Appendix III species are those species threatened to the least degree, and are regulated within member nations’ jurisdictional limits.\textsuperscript{27}

CITES endorses a permit system in the trade of the species listed in the appendices.\textsuperscript{28} It is the responsibility of each signatory to implement this permit system through the functions of a Management Authority and Scientific Authority.\textsuperscript{29} The Management Authority grants import, export, and re-export permits and certificates, and also generates data on annual trade.\textsuperscript{30} A governmental office or agency oversees these responsibilities.\textsuperscript{31}
The Scientific Authority is charged with the responsibility of determining whether trade is detrimental to the survival of a species. This responsibility is accomplished with a staff of governmental experts, academia, and zoos. In the United States, the functions of the Management Authority and the Scientific Authority are carried out by the Fish and Wildlife Service.

A. Measures to be Taken by Parties

The treaty requires the parties to take measures to enforce the provisions of the Convention as well as to prohibit the trade of species. The provisions of Article VIII impose on each individual party the responsibility of enacting domestic legislation to implement the Convention's terms. Considered "the transition between international obligations of States to the criminal laws and regulations that govern the conduct of individual humans," this provision binds the citizens of each party to the domestic legislation they enact to implement the treaty. Whereas most states do not automatically bind their citizens under a treaty of international jurisdiction, CITES signatories are under the obligation of treaty compliance.

In achieving the goals of preservation of endangered species, the Convention calls for penalties to be imposed upon those who partake in the trade or possession of listed species. This responsibility functions as a deterrent to poachers or syndicates who engage in these unlawful activities. Parties also are responsible for confiscating listed species from those who are found to either trade or be in possession of them. Confiscation may take place in the form of an absolute confiscation to authorities or one that will permit the return of the species (or specimen) back to the country from which it was exported.

31 See id. at 6.
32 See id.
33 See id.
34 See 50 C.F.R. § 402.01(B) (1989).
36 See id. See also, DAVID FAVRE, INTERNATIONAL TRADE IN ENDANGERED SPECIES: A GUIDE TO CITES 214-15 (1989) [hereinafter FAVRE, GUIDE TO CITES].
37 Id. at 214.
38 See id. at 215.
40 See id. art. VIII(1)(b).
41 See id. art. VIII(4), 27 U.S.T. 1102, 993 U.N.T.S. 250.
B. The Implementation Gap

In this day and age, there is a growth of interdependence upon states for environmental issues.\textsuperscript{42} Historically, states were sovereign bodies dependent only upon themselves for the implementation of their laws and regulations.\textsuperscript{43} Becoming a member of any international agreement results in the partial relinquishment of that sovereignty.\textsuperscript{44} The success of CITES depends on the national and political will of each party because the treaty is enforced by its individual members.\textsuperscript{45} Therefore, these measures must not only exist, but they must be effective—effective national legislation is “fundamental to good enforcement.”\textsuperscript{46}

The sovereignty of CITES individual members must be imposed upon to activate implementation success. CITES does not provide its signatories with uniform provisions to adopt, nor does it offer “model legislation” for states to ratify.\textsuperscript{47} Because of the distinct domestic laws of the parties, results vary in the implementation of appropriate measures called for by the Convention.\textsuperscript{48} This note, however, proposes that the ESA has the potential to serve as model legislation to other signatories.\textsuperscript{49}

III. THE ENDANGERED SPECIES ACT

The Endangered Species Act (ESA)\textsuperscript{50} was enacted in 1973 by Congress in response to the CITES.\textsuperscript{51} The ESA has been characterized as one of the most controversial pieces of endangered species legislation, and has been the topic of much criticism.\textsuperscript{52} However, despite criticism, it is

\textsuperscript{42} See David Favre, Debate Within the CITES Community: What Direction for the Future?, 33 NAT. RESOURCES J. 875, 899 (1993) [hereinafter Favre, Debate].
\textsuperscript{43} See id.
\textsuperscript{44} Parties are governed by the provisions they sign.
\textsuperscript{45} See CITES SOURCEBOOK, supra note 30, at 5 (1994).
\textsuperscript{46} See Patel, supra note 24, at 186.
\textsuperscript{47} See FAVRE, GUIDE TO CITES, supra note 36, at 215.
\textsuperscript{48} See supra notes 35-37 and accompanying text.
\textsuperscript{49} The ESA is considered “one of the more sophisticated CITES implementation programs.” See Kosloff & Trexler, supra note 13, at 343. See also, supra notes 13-16 and accompanying text.
\textsuperscript{51} The legislation implementing CITES is found in 16 U.S.C. §§ 1531(4)(F), 1532(4), 1537(a), and 1538(c). See Alagappan, supra note 2, at 549 n.47.
\textsuperscript{52} See generally, Davina Kari Kaile, Note, Evolution of Wildlife Legislation in the United
Congress' attempt to play an affirmative role in regulating the use and trade of endangered species.

The ESA represents the "most comprehensive legislation for the preservation of endangered species ever enacted by any nation." It was implemented to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species." Used to protect over 1000 species nationwide, the purpose of the Endangered Species Act has been to protect endangered species "whatever the cost." It also announces the policy of all federal agencies and departments to progress in efforts towards the conservation of endangered species.

Pertinent to the implementation of the ESA is the determination of endangered and threatened species. Endangered species are defined as species that are in danger of immediate extinction. Species in this category are consistent with those found in Appendix I of the CITES. Threatened species are those with a less immediate risk of extinction, and are only "likely" to become endangered in the future. The determination of whether a species is endangered or threatened is not arbitrary. Section 4 of the ESA provides guidelines in the evaluation of the status of a species: "(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; (E) other natural or

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54 16 U.S.C. § 1531(b).
56 Tennessee Valley Authority, 437 U.S. at 184.
57 See 16 U.S.C. § 1531(c).
58 See id. § 1532(6).
61 See id.
manmade factors affecting its continued existence.\textsuperscript{62}

The Secretary of the Interior\textsuperscript{63} is bound by the ESA to determine how, or if, a species fits into one of the five criteria.\textsuperscript{64} In making the determination, the Secretary is to rely "solely on the basis of the best scientific and commercial data available to him."\textsuperscript{65} Interestingly, the Secretary is not bound to the jurisdictional boundaries of the United States, and may rely upon the data of any foreign nation or any subdivision or locality of a foreign state—or any area under its jurisdiction—or upon the seas.\textsuperscript{66} This information need not be limited to one type of protection effort.\textsuperscript{67} The Secretary shall also consider any international agreements or agency of any foreign nation.\textsuperscript{68}

In evaluating the status of a species, the sole issue at hand is the conservation of global ecosystems.\textsuperscript{69} Therefore, the ESA endorses the prohibition of certain activities in its efforts toward conservation.\textsuperscript{70} These include the importation or exportation of any species into or from the United States; the taking\textsuperscript{71} of such species, whether it is located within the United States or its territorial limits, or the high seas surrounding it; the possession, sale, delivery, carry, transportation, or shipping of a species; or the sale or offer for sale in interstate or foreign commerce of any such species.\textsuperscript{72}

In setting regulatory prohibitions, Congress sought to limit the activities of any persons who would be in the possession of endangered species or their parts. Because hunting has been identified as a leading

\textsuperscript{62} 16 U.S.C. § 1533(a)(1).
\textsuperscript{63} The Secretary of the Interior has been designated by Congress as both the Scientific Authority and Management Authority. See LitteLL, supra note 16, at 102.
\textsuperscript{64} The functions of the Management Authority and Scientific Authority are to be carried out through the United States Fish and Wildlife Service (FWS). See 50 C.F.R. § 402.01(b) (1989). The FWS consists of two offices: the Wildlife Permit Office and the Office of the Scientific Authority. See Alagappan, supra note 2, at 550.
\textsuperscript{65} 16 U.S.C. § 1533(b)(1)(A) (emphasis added).
\textsuperscript{66} See id.
\textsuperscript{67} See id. The Secretary may rely upon how such foreign nation has elected to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices. See id.
\textsuperscript{68} See id. § 1533(b)(1)(B).
\textsuperscript{69} See id. § 1532(3).
\textsuperscript{70} See id. § 1538.
\textsuperscript{71} See id. § 1532(19). "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Id.
\textsuperscript{72} See id. § 1538(a)(1).
cause in species extinction, Congress’ goal was to enact prohibitions primarily against hunters. Hunting regulations were considered to be an important weapon in the protection of disappearing species. “Casual” hunters were also targeted by Congress because endangered species cannot lawfully be imported into the United States although they may have been lawfully acquired. Tourists can also be prosecuted under the provisions of the ESA for unlawfully importing a species into the United States.

Civil and criminal penalties, ordered based on the severity of a violation, are used to prohibit unlawful violations. The ESA allows a maximum civil penalty of $25,000 to be imposed for knowing violators of the acts prohibited in section 9, a maximum of $12,000 for violations of other sections, and $500 for any other violation. Each violator is given a right of vindication through a hearing. If shown by a preponderance of the evidence that the violator committed an act based on self-defense, no civil penalty will be imposed. However, a good faith belief of protecting oneself, or one’s family, or any other individual from bodily harm done by an endangered species must exist.

Criminal violations have a monetary sanction as well as a term of imprisonment. The monetary penalties imposed are stiffer than those of a civil nature. Criminal penalties have a maximum penalty of $50,000, a term of imprisonment up to one year, or both. Where a criminal conviction is obtained, the ESA also allows for governmental confiscation of the species.

73 See LitteLL, supra note 16, at 32.
74 See id.
76 See LitteLL, supra note 16, at 42.
77 See generally, U.S. Fish and Wildlife Serv. v. Goel, DOI Dkt No. Boston 79-7 (ALJ ID, June 13, 1979) (holding that inquiries into the Customs Service office was not enough effort in the determination of a wildlife product’s suitability for import).
79 See id. § 1540 (a)(1).
80 See id.
81 See id. § 1540(a)(3).
82 See id.
83 See id. § 1540.
84 See id. § 1540(b)(1).
85 See id. § 1540(e)(4)(A), (B).
IV. Heading Toward the Solution

In becoming a member to the Convention, countries will not only need to adopt legislation to comply with the provisions of CITES, but will also need their own strong legislation. There can no longer exist the exploiter rationale of thinking: "Wildlife are a resource for economic gain. Exploitation should occur now while I can make the money, before anyone else can use the wildlife. The future will take care of itself. My personal interests exceed any interests of the species or individual animals that I will kill or capture." Ways of thinking need to change to that of an environmentalist where the existence of all species should be assured, "notwithstanding the interests of humans in preserving species." Why the discussion of the importance of the ESA and its provisions? In reaching the environmentalist way of thinking, the ESA can provide a structure for newly acceded countries to follow in resolving two issues that create problems in CITES implementation—poaching and smuggling.

A. Poaching

Poaching is a major problem for most endangered species. The ESA contains a provision that will bring any form of poacher to justice by defining the term "person" without ambiguity. Under the ESA, a

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87 Favre, Debate, supra note 42, at 878.
88 Id. at 880.
89 When applying a statute from one country to another sociopolitical forces need to be taken into account (e.g., infrastructure, cultural differences). See John Turner & Jason C. Rylander, Conserving Endangered Species on Private Lands, 32 Land & Water L. Rev. 571, 574 (1997) (quoting Steven L. Yaffee, The Northern Spotted Owl: An Indicator of the Importance of Sociopolitical Context, in ENDANGERED SPECIES RECOVERY: FINDING THE LESSONS, IMPROVING THE PROCESS 70-71 (Tim W. Clark et al., eds., 1994)).
91 Poachers are known to hunt both individually and in syndicates. See Julie Cheung,
"person" may include "an individual, corporation, partnership, trust, association, or any other private entity."^{92} It includes government employees, agents, departments, and instrumentalities of the federal government, of any state—or a part of that state—or any foreign government.^{93} The language of this section also includes a residual clause for any entities that are subject to the jurisdiction of the United States.^{94} By adopting similar language into their endangered species legislation, newly acceded states will be able to prosecute or hold liable any person or entity for poaching. This all-inclusive language will bring to justice many that may be excluded if the language applied only to individuals.

The illegal pursuits of poachers can also be stopped with manpower and equipment.^{95} Specifically, an "intelligence service" that can enforce the provisions of domestic regulations within a country and at its borders is necessary to bring poachers to justice and monitor the numbers of species.^{96} Such a system may result in the capture and prosecution of nearly all poachers. The encouraged use of substitute materials on the common market is another way to stop poachers.^{97} If there is a decline in demand for endangered species and their parts as more nations move toward species conservation, the role that poachers play in contributing to the depletion of these species may become non-existent.

**B. Prohibitions and Enforcement on Smuggling**

Despite the large numbers of parties to CITES, there is still a significant amount of illegal wildlife smuggling^{98} that occurs between parties and non-parties to the Convention.^{99} What can be done to eradicate illegal smuggling? CITES relies on the active efforts of its signatories to

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^{93} See id.
^{94} See id.
^{96} See id.
^{97} See id.
^{98} See Illegal Wildlife Trade Flourishing, says CITES, DEUTSCHE PRESSE-AGENTUR, June 12, 1997 [hereinafter Illegal Trade].
enforce its resolutions. The key to the problem, therefore, is to enact efficient and effective legislation to accomplish this end.

As enacted, the ESA prohibits the importation and exportation of endangered or threatened species, and enforces CITES where illegal importation of endangered species take place. In prohibiting certain acts involving an endangered or threatened species, the ESA does more than sanction illegal imports and exports. The actual possession of an animal or any of its subsequent parts is a direct violation of ESA and is subject to severe penalties. Thus, those who are involved in illegal possession will be subject to penalties that are imposed by either the law, or by legislation.

Any taking of a species falls under this prohibition. For a nation to implement a strict prohibition, it must broadly define the term taking. The definition of taking established in the ESA accomplishes just that. The ESA defines a taking of a species to mean to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” Using this definition from the ESA as a skeletal model, an implementing state may infer that any person who is found in possession of any parts of a listed species for sale, delivery, or transport, will be subject to the highest penalty allowed. Therefore, the act of obtaining such parts is implicitly a part of a taking of a species, and the purpose of the taking is irrelevant.

V. THE NEXT STEP

The next step in ensuring global protection of endangered species is to ensure that the CITES itself is being implemented in all respects. Therefore, countries must conduct an analysis of the types of species that they may have an interest in trading. The individual Management Authorities and Scientific Authorities of each nation must implement permit offices and develop data on the numbers of species in the trade market, as well as in the wild. Communication between the authorities and the Secretariat to CITES must occur on a regular basis to ensure that

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100 See Lee, supra note 6, at 504.
102 See id. § 1538(d).
103 See id. § 1538.
104 Id. § 1532(19).
105 See id. § 1538.
106 The Secretariat consists of a Secretary General, professional officers, and support staff. See Daniel Vice, Implementation of Biodiversity Treaties: Monitoring, Fact-Finding,
compliance with the treaty takes priority over the interests of wealthy consumers.\textsuperscript{107}

Wildlife inspectors must be employed to conduct searches at the designated ports of entry of traded species.\textsuperscript{108} The number of these inspectors required can be determined by the Authorities and need not be based upon the amount of imported specimens. For example, in the United States only fifty-five wildlife inspectors search the nine designated ports of entry.\textsuperscript{109} These inspectors historically have been effective in cracking down on trade, with the seizure of millions of dollars of illegal specimens.\textsuperscript{110}

Parties to the Convention must continue the global communication efforts that take place in meetings and conferences. The ultimate goal of these meetings should be uniformity in the implementation of the Convention. To illustrate, Article VIII(1)(a) of the Convention authorizes party members to take steps in assessing penalties on those who engage in trade that violates CITES provisions, but provides no specifics on how to implement such as an enforcement program.\textsuperscript{111} With no specific penalty endorsed by the Convention, inconsistent sentences and minimal fines have been imposed by individual nations interpreting this provision.\textsuperscript{112} Generally speaking, criminal sentences and civil fines have been small in comparison with the value of the endangered species on the black market.\textsuperscript{113} Steps should be taken to ensure that the same violation results in the same penalty regardless of where the violation occurs.

The Convention provides for the resolution of disputes before the Permanent Court of Arbitration.\textsuperscript{114} One scholar suggests that this clause

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\textsuperscript{107} Poaching and smuggling occurs as a result of the demands of wealthy consumers. See infra note 137 and accompanying text.
\textsuperscript{108} "Wildlife laundering" occurs where "animals or plants are exported to a non-CITES state with weak border controls, and then re-exported back to a CITES state with forged documents from the country with weaker controls." Vice, supra note 106, at 608.
\textsuperscript{109} See Kosloff & Trexler, supra note 13, at 344.
\textsuperscript{110} See id.
\textsuperscript{111} See CITES, supra note 4, art. VIII(1)(a), 27 U.S.T. 1101, 993 U.N.T.S. 250.
\textsuperscript{113} See Vice, supra note 106, at 604; FITZGERALD, supra note 99, at 326.
\textsuperscript{114} See CITES, supra note 4, art. XVIII, 27 U.S.T. 1114-15, 993 U.N.T.S. 256.
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was added as a formality, comparable to formal clauses added in a contract. However, due to the ever-changing nature of the international court justice systems, this viewpoint may not be entirely true. The language of the Convention reads that when a dispute between two or more members of the Convention arises, negotiation techniques should be utilized in reaching a solution. However, with non-party nations becoming parties to the Convention, this forum for arbitration may become obsolete as fewer issues not governed by CITES will be presented to the Court. Even now, the Permanent Court of Arbitration has not heard any disputes between member parties to CITES.

The Permanent Court can, however, be used as a forum to implement uniformity where the Secretariat may make claims of non-compliance for reporting requirements. The judges, who serve as a panel of individual jurists, are selected by each of the party-members to the arbitration and may be able to bring the Secretariat some relief. Serving in this function, the Court can bring parties to the Convention to justice at a forum where the arbitration award would be binding.

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(1) Any dispute which may arise between two or more Parties with respect to the interpretation or application of the provisions of the present Convention shall be subject to negotiation between the Parties involved in the dispute.

(2) If the dispute cannot be resolved in accordance with paragraph 1 of this Article, the Parties may, by mutual consent, submit the dispute to arbitration, in particular that of the Permanent Court of Arbitration at The Hague, and the Parties submitting the dispute shall be bound by the arbitral decision.

Id.

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115 See Favre, Guide to CITES, supra note 36, at 318.

116 The International Court of Justice is another international forum for parties to seek relief. See generally, Shabtai Rosenne, The World Court: What It Is and How It Works (1995). However, due to the fact that the Convention specifically lists the Permanent Court of Arbitration as a forum in reaching dispute resolution, ICJ jurisdiction over Convention issues is unlikely.

117 See CITES, supra note 4, art. XVIII(1), 27 U.S.T. 1114, 993 U.N.T.S. 256.


119 See Michla Pomerance, The United States and the World Court as a 'Supreme Court of the Nations': Dreams, Illusions and Disillusion 34 (1996).

120 In order for this to be effective, the Permanent Court of Arbitration must be granted more than compulsory jurisdiction status—it should be the forum for the Secretariat to obtain relief.
conferences are forums that should not be eliminated, but their power as an enforcement body is very weak. The Secretariat passes compliance resolutions that are not being enforced by the parties. In a court of arbitration, the parties would be bound to the findings of the judges.

In striving for uniformity in Convention compliance and implementation, the Court may also be able to use examples of efficient legislation as a backdrop for countries that have problems with their domestic legislation.

The signatories to the Convention have set the goal of protecting species for this generation and the generations to come. The ultimate next step is making sure that that purpose is achieved—"whatever the cost."

VI. THE NEED FOR CHANGE: THE CASES OF THE RHINOCEROS AND THE TIGER

The tiger and the rhinoceros are two examples of animals that are currently on the endangered species list of CITES. Acting in compliance with CITES, the United States included both the tiger and the rhinoceros as species to be protected under the ESA. As a result, the United States has generally prohibited all trade in wild rhinos and rhino products, and all trade in tigers and tiger products. The ESA allows for the imposition of monetary fines as well as terms of imprisonment for knowing violations of ESA regulations.

This section discusses the plight of the tiger and rhino, and illustrates how the ESA can serve to narrow the gap in CITES implementation to help diminish the decline of tiger and rhino

121 See Illegal Trade, supra note 98.
122 See SURVEY, supra note 118, at 82-83.
124 See id. pmbl., 27 U.S.T. 1090, 993 U.N.T.S. 244-45.
125 See id.
128 See 50 C.F.R. § 17.11.
129 See FitzGerald, supra note 99, at 107-09. The only exception is the Southern White Rhinoceros. This subspecies can be legally imported into this country as a non-commercial hunting trophy, subject to certain conditions. See id.
populations. Specifically, this section addresses the role that the ESA can play in providing a structure for countries that need to adopt the requisite legislation as signatories to the Convention.

A. The Tiger

"The tiger, *Panthera tigris*, the largest and most awesome of the big cats, exudes grace, beauty and an uncanny ability to disappear and re-emerge from the shadowy outlines of its forest habitat. Tragically, unless immediate measures are taken to save the tiger, it will disappear and never re-emerge again!"\(^{131}\)

Such pleas are common among those who are trying to save the endangered tiger. As an Appendix I species, the tiger has been subject to strict regulations in trade and is rarely authorized in trade save in extraordinary circumstances.\(^{132}\) Unfortunately, having the tiger listed as an Appendix I endangered species does not completely protect the tiger from harm. Without the requisite legislation to protect this species, parties to CITES are actually inflicting harm upon it.

This century has marked a dramatic change for the tiger. Ninety-five percent of the tiger population has been extinguished since the turn of the century.\(^{133}\) Statistics taken on the tiger show that in the early twentieth century, approximately 100,000 tigers roamed India, Indochina, and other parts of Asia.\(^{134}\) However, the count is now down to less than 6,000 tigers with that number decreasing each day.\(^{135}\)

Studies examining the rapid extinction rates point to the medicinal practices of Asian cultures as a culprit.\(^{136}\) The tiger and its parts are alleged to have healing and rejuvenating properties.\(^{137}\) Asian folklore prescribes the use of tigers and their parts for the following reasons: tiger brain to cure laziness and pimples; tiger blood for strengthening the


\(^{134}\) See *id.*

\(^{135}\) See *id.*


\(^{137}\) See Cheung, *supra* note 91, at 132.
constitution and willpower; tiger testes for tuberculosis of the lymph nodes; tiger teeth for rabies, asthma and sores on the penis; and tiger nose for epilepsy and children's convulsions.¹³⁸

Major market forces affect the demand for tigers and their parts. One significant market force is the sheer volume of poaching and illegal trade. Where the demand for tigers and their parts is high, poachers are readily available. Poachers have wealthy Asian customers who are able to pay top dollar for these parts.¹³⁹ In fact, poachers can make one year's salary in trading one tiger on the black market.¹⁴⁰ Another problem is a result of the depletion of tiger bone stockpiles in China.¹⁴¹ An increase in demand for tiger bone has resulted in wealthy consumers turning towards other Asian nations for relief.¹⁴² One other source of the continuing depletion of tigers is due to the destruction of the forest habitats where they reside.¹⁴³

Prior to its accession to CITES on September 11, 1997,¹⁴⁴ Myanmar posed a severe risk to the survival of the tiger in the wild. In 1994, Myanmar did not have any laws enacted designed to promote the conservation of the tiger.¹⁴⁵ In fact, the military junta ruling Myanmar, the State Law and Order Restoration Council (SLORC), had authorized the Thailand lumber industry to cut timber in Myanmar.¹⁴⁶ These rights were purchased from the SLORC as a result of the ban placed on the cutting of Thai timber by the Thai government because of the near depletion of the

¹³⁸ See Hoong, supra note 131. See also, Crawford, supra note 112, at 561 ("Tiger bone is said to be effective in treating ulcers and burns, rheumatism, heart ailments, liver disorders, and for alleviating fever and fortifying the bones.").
¹³⁹ See Cheung, supra note 91, at 132. "Although synthetic substitutes have been found, consumers are not likely to settle for such a different alternative to the traditional means by which they satisfy their traditional tastes as long as there are still tigers in existence." Lee, supra note 6, at 511.
¹⁴⁰ See Asian Countries Move to Protect Tigers, AGENCE FRANCE PRESSE, Nov. 14, 1994, available in LEXIS, ASIAPC Library, AFP File.
¹⁴² See China Purrs, 327 ECON. 36, 36 (1993). The demand for tiger has increased asking prices and the incentive to hunt.
¹⁴³ See Cheung, supra note 91, at 133. See infra notes 145-148 and accompanying text.
¹⁴⁴ See CITES ONLINE, supra note 18.
¹⁴⁵ See Cheung, supra note 91, at 159 n.190.
Tigers were, therefore, rejected from their habitats due to the reduction of Burmese forests. The tigers that were hunted within Myanmar’s borders were smuggled across the border for sale in Thailand, where the sale of tigers and tiger parts occurred in a thriving and demanding open market. Consequently, Thailand was a party member to the CITES. The importance of Myanmar becoming a party to CITES is crucial not only for the protection of tigers located within its borders, but for other members of CITES to comply with the treaty that they have signed. Perhaps with Myanmar stepping toward conservation by acceding to CITES, other members will become more conscious of the importance of species protection and take their positions as signatories more seriously. Additionally, perhaps a decline in the demand of tiger parts will result as more substitutes are used and the CITES parties impose more restrictions on poaching, smuggling, and the roles of wealthy consumers.

The feasibility of the SLORC implementing domestic regulations to protect tigers is not known. In 1990, multiparty elections were held by the SLORC where eighty percent of the population voted for a democratic form of government. Since the elections, the SLORC has not surrendered governmental control to the elected party, but has arrested, tortured or executed almost all of the elected representatives, and has embarked on a mission to destroy any opposition to its rule, including its citizens who rally for democracy.

As Myanmar makes its transition into democratic rule, the role of the ESA will become more important. To illustrate, the ESA is designed to allow individuals and environmental groups to sue for an injunction against any violator of ESA regulations. With its military regime suppressing the political freedom of its citizens, major changes within Myanmar’s political structure must occur for the full protection of any endangered species within its borders.

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147 See Fahn, supra note 146.
148 See Cheung, supra note 91, at 133.
149 See Fitzgerald, supra note 99, at 39.
150 See id.
151 See CITES ONLINE, supra note 18. Thailand ratified the CITES on January 21, 1983.
152 See id.
153 See Ragland, supra note 146, at 303.
B. The Rhinoceros

The rhinoceros is also on the Appendix I endangered species list of the Convention. In late 1970, the statistics reported approximately 73,000 rhinos in the entire world, but today fewer than 11,000 are reported to exist. The bulk of the loss of this species is reported as occurring between 1970 and 1987, where 85 percent of the entire rhino population disappeared.

"Uncontrolled poaching by well-armed, organized poaching syndicates has severely affected all five species of [the] rhinoceros." Of the 11,000 rhinos that exist today, one-fifth of them are found in Asia. The demand for the rhinoceros stems from the value that has been placed upon its horn. A two-pound rhino horn can bring in as much as $45,000. The horns themselves are made up of the same types of fibers that are found in the hooves of horses and in human fingernails, and can easily be shaved, carved, slivered, or ground.

The horn and its powder allegedly have the same types of rejuvenating and healing powers as that of the tiger. It has been used for the healing of a wide variety of ailments from high blood pressure to impotence. Specifically, it has been prescribed for rheumatism, hemiplegia, paralysis, convulsion, epilepsy, influenza, fever, rashes, ulcers, nosebleeds, insomnia, and eye diseases. "Cures" have also been

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156 See FITZGERALD, supra note 99, at 105.
158 See Cheung, supra note 91, at 134.
159 See Patel, supra note 24, at 200.
160 See Cheung, supra note 91, at 134; Bod Drogin, Zimbabwe is Losing Rhino War, L.A. TIMES, Sept. 22, 1994, at I.
162 See FITZGERALD, supra note 99, at 105.
163 See Esmond Bradley Martin & Chrysee Bradley Martin, Horns of a Dilemma, 3 BBC WILDLIFE 127-131 (1985); Fitzgerald, supra note 99, at 105-06.
reported from other rhino parts including the hide, bones, meat, penis, blood and, shockingly, urine.\textsuperscript{165}

Rhino horns have also been used as a type of adornment for Yemeni men. These men use rhino horns for the sheaths, or handles, of daggers,\textsuperscript{166} and hand carve them into attractive designs.\textsuperscript{167}

The primary cause of the severe decline in the population of rhinoceros is the demand for their horn in medicinal practices and ornamentation.\textsuperscript{168} However, the reduction in its habitat, due to depletion of the rain forest and the rhino flood plain, has also contributed to the decline in numbers.\textsuperscript{169}

Yemeni men use the horns of rhinoceroses as sheaths for daggers.\textsuperscript{170} Traditionally, it was a status symbol of for the wealthy, but eventually became affordable to others due to high wages earned in the Saudi Arabian oil fields.\textsuperscript{171} To satisfy the demand for rhino horn, approximately four tons of rhinoceros horn were shipped into Yemen in the 1970s.\textsuperscript{172} This number declined in the early 1980s to 1.5 tons, until 1982 when Yemen outlawed the importation of the horn.\textsuperscript{173} To adapt to the ban on the imported horn, substituted products have been used in the construction of the sheaths. For example, antelope horn can be used,\textsuperscript{174} water buffalo horn, or even wood.\textsuperscript{175} Plastic and semi-precious stones, such as agate, are also reported as substitutes for sheaths.\textsuperscript{176}

Although Yemen has created laws to outlaw the importation of rhino horn prior to its accession to CITES, it still needs to adopt legislation provided for in Article VIII.\textsuperscript{177} In creating this legislation, the former political instability of Yemen between its two republics needs to be considered. It has scars from battles of both socialist and military

\textsuperscript{165} See FITZGERALD, supra note 99, at 105-06.
\textsuperscript{166} See Weinberg, supra note 90, at 98.
\textsuperscript{167} See FITZGERALD, supra note 99, at 111.
\textsuperscript{168} See Cheung, supra note 91, at 135.
\textsuperscript{169} See id.
\textsuperscript{170} See Weinberg, supra note 90, at 98.
\textsuperscript{172} See id.
\textsuperscript{173} See id.
\textsuperscript{174} See Weinberg, supra note 90, at 98.
\textsuperscript{175} See Davies, supra note 171.
\textsuperscript{176} See id.
\textsuperscript{177} See CITES, supra note 4, art. VIII, 27 U.S.T. 1101-03, 993 U.N.T.S. 250-51.
In 1990, the two republics of Yemen united resulting in the formation of a coalition government. In 1994, a civil war ensued between bureaucracies, armies, and rulers where the socialist order was driven from power. As a result of the war, Yemeni society has reembraced Islam and tribalism as part of its political and social ideology. In addition, the Yemeni constitution has been amended and parliamentary elections have taken place.

With the political shift from socialism to a more democratic form of government, incorporating legislation such as the ESA seems to be more possible. Although Yemen has prohibited the importation of rhino horn, strict prohibition of poaching or smuggling within its borders is necessary to provide an increase in the number of rhinos in the wild.

In its recognition of the importance of the preservation of the rhino, the accession of Yemen to CITES will demonstrate to other party-members that substitutes can be used to continue cultural practices without jeopardizing the existence of the rhino, while still in compliance with the provisions of CITES. This will narrow the gap between CITES implementation and cultural distinctions.

VII. CONCLUSION

The Convention on International Trade in Endangered Species has played a significant role in achieving world conservation and preservation efforts of species that are listed on an endangered species list. However, one of the major problems is a lack of legislative participation of its members. Academics have commented on the problems of international agreements, and even the problems that occur as a result of a nation being

178 See SHEILA CARAPICO, CIVIL SOCIETY IN YEMEN: THE POLITICAL ECONOMY OF ACTIVISM IN MODERN ARABIA 20 tbl. 2.1 (1998). Yemen was divided between the Yemen Arab Republic and the People’s Democratic Republic of Yemen. See id.

179 See id.

180 See id. at 56.

181 See id. at 59.

182 See id. at 20 tbl. 2.1, 191. The elections were held in 1997. See id. at 194-98.

183 A majority of the parties have not even enacted legislation in compliance with the Convention. See CYRILLE DE KLEMM, GUIDELINES FOR LEGISLATION TO IMPLEMENT CITES 5 (1993). As of 1993, Australia, Austria, Belgium, Denmark, France, Germany, Hong Kong, Malta, the Netherlands, New Zealand, Switzerland, the United Kingdom, the United States, and Zimbabwe were the only parties that had enacted the legislation required to effectively implement CITES. See id.
a signatory party to an agreement; but no solutions have been provided. This note proposes that the Endangered Species Act, despite criticism, can function as model legislation to narrow the gap of CITES implementation.

In achieving this end, international attempts to make a worldwide change in environmental species protection issues need to have a strong backing by individual nations.

Although the international community can do much to facilitate and streamline its own processes that impact or affect the potential for countries to achieve international environmental goals, it is also necessary to pay close attention to strategies that individual countries and their domestic environmental bodies can command to increase their capacity and ability. Implementation success rests on a series of domestic efforts. It is here that international and domestic environmental goals intersect because the achievement of both rest on the same foundation.

It is only through “collective enterprise and mutual sacrifice” that CITES’ goals in international protection can be realized. Overexploitation is inevitable without legislation to enhance the effectiveness of conservation efforts and to control the levels of trade and consumption of endangered species.

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185 See id. at 10,410.