

INTERNATIONAL PROTECTION OF ENDANGERED SPECIES: THE STEPS THAT SHOULD BE TAKEN

Philip Weinberg*

Whether or not we can save endangered species depends upon what the great conservationist writer, Aldo Leopold, termed our "ecological conscience."¹

Other environmental issues, such as water and air pollution, the disposal of solid waste, and toxic chemicals have much more of an immediate effect on our lives, and, if these problems were solved, society would reap direct health and economic benefits. But that is not the case with endangered species, where the short-term economic considerations unfortunately militate against the conservation of such species. After all, the skins, tusks and horns of many endangered species can be sold for considerable amounts of money.

In Third World countries with rapidly growing populations, economic considerations also militate against the preservation of the habitats of endangered species. This has created a greater problem than the actual hunting of these species. For these reasons, there is clearly an urgent need for international control of these environmentally threatened areas.²

Both the habitat countries and the consuming countries benefit economically from the killing and sale of endangered animals and the resultant sales of various articles made from the skins and horns. But before I address this matter any further, I would like to give you a brief overview of the kinds of national and local statutes that existed prior to the adoption in 1973 of the Convention on International Trade in Endangered Species of

* Professor of Law, St. John's School of Law, St. John's University; A.B., 1955, University of Pennsylvania; J.D., 1958, Columbia University.

1. See Holly Doremus, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 *ECOLOGY L.Q.* 265, 272 n.48.

2. The issue of endangered species was one of the first major environmental concerns to draw international attention, and some species have already received meaningful international protection. See *infra* note 4.

Wild Fauna and Flora (CITES)³ which is the major international treaty currently in force.

Before CITES, some countries had enacted statutes which imposed a limited control over the killing of certain species. In the United States, for example, a federal statute called the Lacey Act⁴ was passed in the early decades of this century. Soon after it was passed, however, it became evident that the Secretary of the Interior, who was responsible for designating which animals could be classified as "endangered,"⁵ frequently listed species that were already beyond the point at which they could survive in the wild. Some complained that the Secretary's list was more commemorative than protective.

The New York state legislature, in 1970, enacted the Mason Law,⁶ which is now part of the Environmental Conservation Law.⁷ The Mason Law provided disincentives for the taking and killing of endangered animals in their habitat by prohibiting the sale in New York of various endangered animals as well as any articles containing their skins.⁸ This statute was able to go further than the very limited federal protection offered by the Lacey Act since it protected entire species of tiger, alligator, and crocodile, to name a few, as well as several others. In *A.E. Nettleton Co. v. Diamond*,⁹ the New York Court of Appeals pointed out that, since wildlife was a legitimate concern of the people of the state of New York, the state could, under its police power, legislate to bar the sale of these animal hides.¹⁰

Shortly thereafter, similar laws were enacted in other states, and Congress amended the Lacey Act, transforming it into what

3. Mar. 6, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES].

4. 16 U.S.C. §§ 3371-3378 (1982).

5. See *infra* note 11, § 1533(1).

6. N.Y. AGRIC. & MKTS. LAW § 358-a (McKinney 1970) (transferred to N.Y. ENVTL. CONSERV. LAW § 11-0536 (McKinney 1976)).

7. *Id.*

8. See *id.* para. 3.

9. 27 N.Y.2d 182, 264 N.E.2d 118, 315 N.Y.S.2d 625 (1970), *appeal dismissed sub nom.* Reptile Products Ass'n Inc. v. Diamond, 401 U.S. 969.

10. *Id.* at 633.

is now the Endangered Species Act of 1973¹¹ (the Act). The Act, in addition, continues to restrict killing, imports, and sales and furnishes legal protection to the habitats of some species in the United States by requiring federal agencies to take into account the destruction of the critical habitat of an endangered species caused by federal activity.¹² This provision of the Act received widespread recognition in the famous "snail darter" case¹³ which involved the building of a dam on the Tennessee River. The United States Supreme Court, in an eloquent decision, held that it was not the Court's role to balance the equities in deciding whether or not the dam should be enjoined, as Congress had already spoken on the issue.¹⁴ In fact, Congress had gone as far as to say that the critical habitat of an endangered species may not be injured by federal activity.¹⁵ This case led to subsequent Congressional attempts to override the Act, but none was successful.

One other important change that has occurred under the Act has been the expansion of the Secretary of the Interior's list of animals that are to receive federal protection.

Now I would like to focus on the main event, which is the international protection of endangered species. The main source of international protection is CITES.¹⁶ Since this treaty was adopted, over 100 countries have signed it, including most of the major countries of the world.¹⁷ CITES was drafted at the request of the International Union for the Conservation of Nature and Natural Resources¹⁸ as it was recognized early on that the statutes of individual nations were ineffective in that they failed

11. 16 U.S.C. §§ 1531-1543 (1973).

12. *See e.g., id.* § 1531(c)(1).

13. *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

14. *Id.* at 194.

15. *Id.* at 184-85.

16. *See supra* note 3.

17. *See* Michael J. Glennon, *Has International Law Failed the Elephant?*, 84 AM. J. INT'L L. 1, 10 (1990). As of the time that the article was written in 1989, 103 states were parties.

18. *See* Sudhir K. Chopra, *Introduction: The Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 5 B.U. INT'L L.J. 225, 226 (1987).

to afford endangered species the basic protection they needed to survive.

Many Third World countries have laws which protect endangered species from local poachers, but they are difficult to enforce because of the economic considerations previously mentioned. The central idea behind CITES, therefore, was to finally put an end to poaching by providing some kind of international protection to those animals whose numbers had been systematically declining.¹⁹

The drafters of CITES sought to prevent the international shipment of endangered species and their skins or articles made from such species.²⁰ Under CITES, animals are listed either in Appendix 1, as animals threatened by extinction, or in Appendix 2, which means that they are likely to face extinction unless certain limits are placed on the killing of these animals.²¹ To give you some perspective on the numbers involved, there are approximately 300 species that face extinction each decade.²² International trade in wildlife, especially exotic kinds, amounts to a declared value of five billion dollars annually.²³ The American market alone accounts for as much as one third of that value.²⁴ So there are obviously big business interests looking to use all of their economic clout to prevent the enforcement of CITES.

CITES requires each subscribing country to have a wildlife management authority as well as a scientific authority.²⁵ In order to ship goods made from endangered species in international

19. *Id.*

20. See generally John B. Heppes & Eric J. McFadden, *Convention on International Trade in Endangered Species of Wild Fauna and Flora: Improving the Prospects for Preserving Our Biological Heritage*, 5 B.U. INT'L L.J. 229 (1987).

21. See generally Favre, *Tension Points Within the Language of the CITES Treaty*, 5 B.U. INT'L L.J. 247, 249-52 (1987).

22. See Heppes, *supra* note 20 (citing to H.R. REP. NO. 167, 96th Cong., 2d Sess. 3 (1979)).

23. See Kosloff & Trexler, *The Convention on International Trade in Endangered Species of Wild Fauna and Flora: Enforcement Theory and Practice in the United States*, 5 B.U. INT'L L.J. 327, 328-29 (1987).

24. *Id.*

25. CITES, *supra* note 3, art. IX(1)(a)-(b).

commerce, the management authority must first certify that the animal has been legally taken.²⁶ The scientific authority has to then certify that the taking of that animal is not going to lead to its endangerment.²⁷

In 1984, however, the World Wildlife Fund did a close study of how well the treaty was working and found that there were widespread violations.²⁸ Many countries, including both the habitat and consuming countries, were simply failing to report animals that had been taken in violation of the treaty. There was also a great deal of laundering. This could be done, for example, by killing an animal in one country and shipping it, or pretending to ship it, to another country, and then having a false bill of lading issued from that third country where the animal does not exist and calling it something else. This was one way to circumvent the prohibition on the killing of animals on the endangered list. Countries like Paraguay, which contain almost no endangered species, became prime export centers. Burundi, which does not have any elephants, became a prime location for the shipment of ivory to the rest of the world. The laundering continues to take place.

Another problem is that in many countries, including the United States, there are too few customs officials with sufficient training in this area. The United States, for instance, even with its huge federal budget, only has a total of fifty-five customs inspectors at the nine ports of entry through which endangered species and their articles can be brought. This problem is compounded by the fact that not all fifty-five inspectors are working on any one given day. These numbers are grossly inadequate for combatting a problem of such magnitude.

The sanctions that can be imposed under CITES are also inadequate. There need to be sanctions that would allow countries to effectively cut off all trade in wildlife or wildlife products with proven violators of the treaty. Even more drastic actions should be allowed to be taken against those countries that engage in re-

26. *Id.* art. III(2)(b).

27. *Id.* art. III(3)(a).

28. See Heppes, *supra* note 20, at 233.

peated charges. Currently, a signatory state can still deal in endangered species with a non-signatory state, and these dealings constitute as much as thirty percent of all such trade. To trade with a non-signatory state, the treaty simply states that the non-signatory has to have "comparable documentation" that "substantially conforms" to CITES.²⁹ These terms are quite vague, however, so there is ample opportunity for slippery conduct on the part of the individuals who make out bills of lading and others who merely wink at these vague requirements and then go on to violate the spirit of the treaty.

Even in the European Community (EC) there are problems with the enforcement of CITES.³⁰ It has been pointed out that there is a built-in tension between the EC itself and CITES. The EC is supposed to be designed so that all trade restrictions among the member nations are eliminated. The problem arises because of the differing statutes on endangered species that existed in countries, such as France, England, and Germany, prior to the formation of the EC and which are still in effect. No decision has yet been made as to which country's laws should be used or whether each country should continue to use its own laws, but it is something that the EC is going to have to address soon.

One other factor that greatly diminishes the effectiveness of CITES is that signatory states are permitted to adopt reservations.³¹ This means that the reserving state can basically suspend its obligations under the treaty with regard to a particular species whenever it so desires. Japan, for example, although a signatory from early on, continues to import the olive ridley turtle and the green sea turtle, both of which are known to be endangered species. Japan is not technically in violation of CITES since it has exercised its right of reservation pursuant to Article XXIII of the treaty.

29. CITES, *supra* note 3, art. X.

30. See generally Thomsen & Brautigan, *CITES in the European Economic Community: Who Benefits?*, 5 B.U. INT'L L.J. 269-87 (1987); Anthony D'Amato & Sudhir Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21, 46 (1991).

31. See CITES, *supra* note 3, art. XXIII.

CITES contains two other significant flaws. It says nothing on the trade in endangered species which takes place within a particular country's own borders,³² and, as mentioned earlier, it does not address the issue of the protection of the various habitats themselves.

There has been a serious question in the United States as to how much extraterritorial effect our own Endangered Species Act³³ has had to Section 7 of the Act.³⁴ Section 7 provides that federal agencies are to consult with the Department of the Interior on any project that is likely to affect the critical habitat of an endangered or threatened species.³⁵ One question that arises, however, is whether Section 7 applies if, for example, the Army Corps of Engineers were planning to build a dam in a foreign country.³⁶ Under the Carter Administration, soon after the adoption and ratification of CITES, the Department of the Interior correctly stated that Section 7 would apply in such a scenario.³⁷

However, during the Reagan Administration, the Department of the Interior, under the ineffable James Watt, took a different stance. It implemented changes limiting Section 7 of the Act to activities only within the country.³⁸ When Mr. Watt was asked to rationalize his department's position, his lawyers stated that the department did not want to interfere with the sovereignty of other countries.³⁹

In actuality, however, the United States would only be directing the actions of its own federal agencies within another country's borders. Clearly, there is no valid argument that we would

32. *See id.* art. VII(1) for the precise language used.

33. *See* 16 U.S.C. §§ 1531-1543.

34. *Id.* § 1536.

35. *Id.* § 1536(a)(4).

36. *See* Henry J. Blum, Note, *The Extraterritorial Application of Section 7 of the Endangered Species Act*, 13 COLUM. J. ENVTL. L. 129, 131 (1987).

37. The entire Endangered Species Act by its very nature applies to the protection of species from other nations. Most of the animals on the endangered list are not native to the United States at all (*i.e.*, the tiger, the elephant, etc.).

38. 51 Fed. Reg. 19,926 (1986) (codified at 50 C.F.R. §402).

39. Blum, *supra* note 36, at 131-32.

be interfering with another country's sovereignty. Nonetheless, the view of the Reagan Administration has yet to be reversed under our current "environmentalist president" George Bush.

At this point, I would like to talk about two species that are particularly threatened right now—the elephant and the rhinoceros—and the steps that have been taken to try and revive their numbers. Fortunately, for the elephant at least, there are signs of a happy ending. Ivory is the main reason elephants are hunted and killed. At one point, the price and international demand for ivory were such that people were going to the rain forests of Africa and, to a lesser extent Asia, with Uzi machine guns—not content to use rifles—to kill as many elephants as possible.⁴⁰ Armed with a machine gun, the "hunter's" task of removing tusks and selling them in international commerce is not one of great bravery, especially since elephants travel in herds.

The United States, along with most of the other developed countries, has finally agreed that the elephant is in fact an endangered species.⁴¹ Even Hong Kong and Japan—where a large proportion of the ivory ultimately wound up and got worked into fine carvings to be sold elsewhere—have recently agreed that the elephant is in need of protection.⁴² Under CITES⁴³, the elephant is now designated as an Appendix 1 species, which means that it is recognized as being formally threatened with extinction.⁴⁴ As a result, international trade in ivory has greatly diminished.

There are still three countries in southern Africa, however, which continue to trade in ivory.⁴⁵ South Africa, Zimbabwe, and Botswana claim that they are able to cull existing herds of elephants by simply waiting for them to die or by taking just a

40. See Glennon, *supra* note 17, at 4.

41. See *id.* at 10. But see Schneider, *Bush May Back Renewed Elephant Hunting*, N.Y. TIMES, Feb. 27, 1992, at A11 ("[T]he Bush Administration said . . . it was sympathetic to a proposal by South Africa and other African nations to relax protections and open international trading in elephant hides and meat.").

42. But see Glennon, *supra* note 17, at 16-17.

43. See CITES, *supra* note 3.

44. *Id.* art. II(1).

45. Glennon, *supra* note 17, at 17.

few.⁴⁶ They further claim that there is no problem with the elimination of the species within their borders, as their approach is a kind of sustainable growth.⁴⁷ Some have criticized their approach as cynical, but the jury is still out on who is right about that. It is clear that, at least in Zimbabwe, great steps have been taken to involve local populations so that they may reap some economic benefits. For example, that country's approach has fostered a need for game wardens which has promoted local employment, so perhaps the system will work.

With regard to ensuring the continued existence of the elephant and the rhinoceros, among other endangered species, there are essentially two views: the "management view" espoused by the aforementioned three countries and the "embargo view."⁴⁸ Those that have adopted the management view believe that the traffick- ing in articles made from endangered species will never com- pletely cease, so it should only be limited and controlled. Using this approach, countries would strive for sustainable growth with periodic harvesting, as opposed to outright "clear-cutting."

Those that subscribe to the embargo view call for a total ban on the trade of endangered species, the rationale being that, even if there is heavily regulated trade, there will inevitably still be poaching. The economic forces that motivate poachers are simply too great. Poachers outnumber the game wardens and are armed with Uzi sub-machine guns while the wardens carry 22 millimeter rifles. The management view, therefore, may be unworkable—a view I share.

There are those who say that there are many similarities be- tween drug trafficking and trafficking in endangered species.⁴⁹ I submit that they are quite different, however, because, unlike certain narcotic substances which are bountiful, an endangered species is a commodity with a very limited supply. Furthermore, with rigorous enforcement, I believe that poaching can be stopped.

46. *See id.* at 17 n.147.

47. *Id.*

48. *See generally id.* at 22-28.

49. *See id.* at 23-25.

It is unreasonable, however, to expect countries like Kenya, Tanzania, and India with their limited resources and rapidly increasing populations to overcome the problem on their own. The obligation, rather, rests on the entire world, especially the more developed countries, such as the United States, Canada, Japan and Western European countries. The solution would not require an extremely large amount of money. Some have estimated that one hundred million dollars a year given to a country like Kenya would provide the funds necessary to hire enough wardens and supply them with the vehicles, weapons, radios and other equipment that they would need. Such an amount would not be a difficult sum to raise among the major industrial nations, yet it is not forthcoming. If this cannot be done, sustainable development for at least certain animals, like the elephant, seems to make the most sense.

For the rhinoceros, unfortunately, sustainable development does not seem to be possible, and the story of the rhinoceros is a sad one. In some East Asian countries, the horn is regarded as a valuable aphrodisiac.⁵⁰ East Asian peoples also grind the horn into powder and use it for medicinal purposes.⁵¹ In other countries such as Yemen on the Arabian Peninsula, the rhino horn is carved into a sheath for daggers.

Scientists are eagerly trying to convince people in these countries that there are substitutes available, such as the antelope horn or plastic materials, that can be used as a dagger sheath. They are also attempting to show that the alleged aphrodisiac properties of the rhino horn have never been scientifically proved.⁵² But despite this urging by the scientific community, rhino horns continue to be removed and grinded, and the rhino population in Africa has been sharply reduced.⁵³ Removing the horn from the rhino without first killing it is simply not a viable alternative.⁵⁴

50. See M. PENNY, RHINOS ENDANGERED SPECIES 69 (1988) (this belief is most likely due to the imagined sexual prowess of the rhinoceros).

51. See generally *id.* at 69-79.

52. See Glennon, *supra* note 17, at 16.

53. See generally PENNY, *supra* note 50.

54. It is possible to surgically remove the horn of a rhino adult without killing it, but such surgery cannot for practical reasons be routinely performed

The future of the rhino therefore is bleak, and there does not seem to be much hope at this time for any sudden turnaround.

In closing, we should address the question of how it might be possible to control the habitats of endangered species. In countries with rapidly increasing populations, where it seems to be necessary to turn rain forest into farm land and cut down trees for fuel, there are certain measures that can be taken. Population control is one such measure.

Another possibility is to come up with devices to reduce the need for wood, and such devices are in fact currently on the market. There are stoves being sold in underdeveloped countries, for example, that eliminate the need to chop down great amounts of wood to prepare daily meals.

One other alternative is the use of solar energy, which is a great potential asset available to these countries. The sun's rays can be pinpointed through magnification, decreasing the need for much fuel.

Finally, there is the possibility of harvesting at least some of these animals for sustained yield, using as a model the Zimbabwe approach toward its elephants. This approach might be applicable to alligators, turtles and certain other kinds of animals as well.

The problem is that these alternatives need to be subsidized by either the United Nations or by the developed nations. With the cold war ended, we may be able to expect more cooperation.

We are talking about a fundamental part of the world's heritage, and it has been wisely said by the naturalist William Beebe that one must create another heaven and earth before an extinct species can be recreated.⁵⁵ The moa and the passenger

in the rain forest. Nonetheless, research is being done on rhinos in Wangie National Park in Northern Zimbabwe where the horns of fairly mature rhinos are being removed to see what effect this will have. In addition to the research on the removal of rhino horns, "cropping procedures" are also being studied in Zimbabwe. Experiments have also been performed on young rhinos whereby the horn is removed and replaced with a red plastic horn which will in theory deter poachers from killing them, but it is too soon to judge the efficacy of this method.

55. See Wm. Robert Irvin, *When Survival is at Stake: A Proposal for Expanding the Emergency Exception to the Sixty-Day Notice Requirement of*

pigeon, and many other species, have already become extinct due to man. The rhino and the condor, as well as others, are in extreme danger of following in their footsteps. If the international community fails to act, I do not believe posterity will ever forgive us.