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Governmental Organizations in Ensuring the
Effective Enforcement of the Ivory Trade Ban**

by

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CONVENTION ON INTERNATIONAL TRADE IN
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THE IVORY TRADE BAN

Philippe J. Sands *
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I. INTRODUCTION

Since the signing of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES or the Convention),¹ many factors have inhibited its effective operation. Two particularly problematic issues arise due to the Parties' ability to take reservations from the Convention regarding individual species and from uncertainties in determining what constitutes a "pre-Convention specimen." The controversial movement to prohibit trade in the ivory of the African elephants (*Loxodonta africana*) highlighted the problems associated with these elements of CITES' application.

After a rancorous debate before and during the Seventh Meeting of the Conference of the Parties to CITES in October 1989, an overwhelming majority of the Parties present at the Conference voted to provide the African elephant with the greatest protections available under the treaty.² The Conference intended to impose a

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¹ Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243 [hereinafter CITES].

² Doc. Plen. 7.4, at 1, in PROCEEDINGS OF THE SEVENTH CONFERENCE OF THE PARTIES (1989). The vote was 76 in favor, 11 against, with 4 abstaining. *Id.*

worldwide ban on trade in African elephant ivory, but this important protectionist measure may be defeated by the operation of the two thorns in the side of the treaty mentioned above.

Prior to the effective date of the ivory ban, a number of Parties actively involved in the ivory trade entered reservations as to the listing of the African elephant on Appendix I of CITES. Their continuation of the trade already has undermined the absolute ban.³ Disagreements about the meaning of the term "pre-Convention" brought about some of the controversy leading up to the Seventh Meeting of the Conference. A previous decision of the Conference of the Parties has removed at least some of the uncertainty over the meaning of the term, but Singapore is utilizing an exemption for pre-Convention specimens to limit the ivory affected by the ban to that which it acquired after joining CITES in 1986.⁴ This episode has demonstrated the difficulties and pinpointed further complexities in the operation of CITES.

With respect to both of these problematic issues, public interest non-governmental organizations (PINGOs) have played, and continue to play, a critical role in the decision-making process of CITES. After calling for the establishment of such a Convention in the first place,⁵ PINGOs have now taken on the role of guardians of the spirit and purpose of CITES by monitoring both compliance and enforcement. As this Article outlines, they ensured that specious legal arguments against the ivory ban were not allowed to take root and responded to Party reservations both legally and publicly.

II. THE CITES REGULATORY FRAMEWORK

The International Union for the Conservation of Nature (IUCN) called in 1963 for an international convention to regulate trade in threatened species.⁶ After ten years of work toward this goal by the IUCN and the United Nations Environment Programme (UNEP), twenty-one countries signed CITES on March 3, 1973.⁷ There are

³ See, e.g., McCarthy, *Britain Accused of 'Stab in the Back' Over Ivory*, *The Times* (London), Feb. 22, 1990, Home News, at 1, col. 3.

⁴ See *Singapore to Ban Ivory Trade*, Reuters wire, Jan. 16, 1990 (available on Lexis); *Ivory Import, Export to be Banned in Singapore*, Xinhua General Overseas News Service wire, Jan. 16, 1990 (available on Lexis); see *infra* note 136 and accompanying text.

⁵ See *infra* notes 6-7 and accompanying text.

⁶ S. Lyster, *INTERNATIONAL WILDLIFE LAW* 239 (1985).

⁷ *Id.* CITES entered into force on July 1, 1975, after the requisite tenth signatory deposited an instrument of ratification. *Id.* at 240.

now 103 Parties to CITES⁸ and tens of thousands of species of plants and animals subject to its regulations.⁹ The regime that CITES established serves both a controlling or limiting function as to trade of endangered species, and an informational function to keep track of their status.

A. *The CITES Secretariat and NGO Participation*

A permanent Secretariat located in Lausanne, Switzerland oversees the CITES system.¹⁰ In addition to its general regulatory duties,¹¹ the Secretariat convenes regular and extraordinary meetings of the "Conference of the Parties."¹² The Conference of the Parties meets every two years to consider and adopt amendments to Appendices I and II, to review the progress of restoration and conservation of listed species, and to make recommendations for improving the effectiveness of the Convention.¹³

At the discretion of the CITES Secretary General, the Secretariat may seek assistance from "suitable inter-governmental or non-governmental international or national agencies and bodies technically qualified in protection, conservation and management of wild fauna and flora."¹⁴ Non-governmental organizations (NGOs) with such qualifications also may participate as observers in the meetings of the Conference, although they cannot cast votes.¹⁵ As this Article suggests, NGOs have made significant contributions to the operation of CITES in both contexts.¹⁶

⁸ United Nations Environment Programme, REGISTER OF INTERNATIONAL TREATIES AND OTHER AGREEMENTS IN THE FIELD OF ENVIRONMENT, UNEP/GC.15/Inf. 2, at 117-19 (1989).

⁹ See S. LYSTER, *supra* note 6, at 244-46 (Appendix I contains approximately 900 species, Appendix III contains only 150, and Appendix II contains the bulk of listed species).

¹⁰ CITES, *supra* note 1, art. XII. The Secretariat was originally funded by the United Nations Environment Programme (UNEP), but the Parties themselves now contribute to its budget. See S. LYSTER, *supra* note 6, at 270, 273 & n.110. It consists of a Secretary General, three full-time conservation professionals, and three full-time secretaries, as well as part-time staff and consultants. *Id.* at 270.

¹¹ The Secretariat's duties are set out in Article XII(2)(a)-(i).

¹² See CITES, *supra* note 1, art. XI(2).

¹³ *Id.* art. XI(3)(b)-(c), (e). The Conference also approves the CITES Secretariat's budget and considers any reports presented by the Secretariat or any Party. *Id.* art. XI(3)(a), (d).

¹⁴ *Id.* art. XII(1).

¹⁵ *Id.* art. XI(7) (NGOs may be refused admittance, however, upon the objection of at least one-third of the Parties present).

¹⁶ See Kosloff & Trexler, *The Convention on International Trade in Endangered Species: Enforcement Theory and Practice in the United States*, 5 B.U. INT'L L.J. 327, 335-36 (1987) (discussing the extensive participation and contributions of NGOs in CITES implementation).

B. Operative Provisions

CITES regulation stems from listing a species within one of its three appendices, and the level of protection afforded depends upon the appendix.¹⁷ Appendix I includes "all species threatened with extinction which are or may be affected by trade."¹⁸ Except in very limited circumstances, CITES prohibits all trade in Appendix I species.¹⁹ Any trade that occurs cannot be "detrimental to the survival of the species,"²⁰ and must not be for "primarily commercial purposes."²¹ Dependent upon these and other inquiries, CITES Article III requires both the exporting and importing Parties to issue permits for proposed trade in Appendix I specimens.²²

Appendix II lists "all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival."²³ CITES allows commercial trade in Appendix II specimens if it is not "detrimental to the survival of the species."²⁴ No import permit is required, but the importer must present an export permit or re-export certificate before entry is allowed.²⁵ Otherwise, the conditions on trade in Appendix II specimens are similar to those for Appendix I specimens.²⁶

Appendix III includes "all species which any Party identifies as being subject to regulation within its jurisdiction for the purposes of preventing or restricting exploitation, and as needing the cooperation of other Parties in the control of trade."²⁷ This last appendix provides an opportunity for Parties to assist each other in enforcing their domestic wildlife legislation.²⁸ The management authority of

¹⁷ See S. Lyster, *supra* note 1, at 240-41.

¹⁸ CITES, *supra* note 1, art. II(1).

¹⁹ *Id.* art. III.

²⁰ *Id.* art. III(2)(a). This determination is made by a scientific authority in the State of export. *Id.* According to CITES Article IX, each Party must designate one or more "Scientific Authorities" to determine the consequences of import/export transactions and one or more "Management Authorities" to grant trade permits.

²¹ *Id.* art. III(3)(c) (determination made by the management authority of the importing State).

²² *Id.* art. III(2)-(3).

²³ *Id.* art. II(2). Article II(2)(b) provides that species similar in appearance to Appendix II species also must be subject to regulation if necessary to effectively regulate an Appendix II species. See S. Lyster, *supra* note 6, at 244.

²⁴ CITES, *supra* note 1, art. IV(2)(a).

²⁵ See *id.* art. IV(4).

²⁶ See *id.* art. IV(2)-(7).

²⁷ *Id.* art. II(3).

²⁸ *Id.* art. V; see also Chopra, *Introduction: Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 5 B.U. INT'L L.J. 225, 226 (1987).

the exporting state must issue an export permit for Appendix III specimens based upon somewhat less stringent standards than those for Appendix I and II species.²⁹

Perhaps the most important duty of the Conference of the Parties is to consider and adopt amendments to Appendices I and II.³⁰ Article XV sets out the basic principles for amending these appendices to include or remove species and to move species from one appendix to the other. At the First Meeting of the Conference of the Parties held in Berne, Switzerland, however, the Parties developed and adopted more detailed criteria for listing and de-listing species.³¹ The so-called "Berne criteria" continue to dictate the standards for judging amendment proposals.³² These criteria most often are thought to be controversial because of their rather protectionist requirements for removing or downlisting species,³³ although opponents to the uplisting of the African elephant to Appendix I argued that it did not meet the Berne criteria for threatened extinction "at the species level."³⁴ Amendments are adopted by a two-thirds majority vote of the Parties present and voting,³⁵ and enter into force ninety days after the meeting where a vote takes place.³⁶

C. Exemption Provisions

CITES incorporates two provisions that allow Parties to bypass the regulations applicable to particular species listed in the appendices. First, Article VII(2) of CITES provides that, when a management authority of a State of export or re-export determines that a

²⁹ See CITES, *supra* note 1, art. V(2).

³⁰ See *id.* art. XI(3).

³¹ See Conf. 1.1, at 31, in PROCEEDINGS OF THE FIRST MEETING OF THE CONFERENCE OF THE PARTIES (1976); see also S. LYSTER, *supra* note 6, at 243.

³² *Id.*

³³ See S. LYSTER, *supra* note 6, at 243.

³⁴ See CITES Secretariat, *Views of the CITES Secretariat on Potential Problems Raised by the Inclusion of the African Elephant on Appendix I*, in PROCEEDINGS OF THE SEVENTH MEETING OF THE CONFERENCE OF THE PARTIES (1989) [hereinafter CITES Secretariat, *Views of the CITES Secretariat*]; D. Harland, *Jumping on the 'Ban-Wagon': Efforts to Save the African Elephant* (Feb. 1990) (unpublished manuscript). This argument seems to rely on the existence of large, well-managed stocks of elephants in several southern African nations. Given the fact that healthy herds of elephants exist in some places, so the argument goes, it does not matter that the species may be extinguished elsewhere. The Conference of the Parties rejected this argument upon its vote to move the African elephant from Appendix II to Appendix I by a vote of 76 to 11, with 4 abstentions. Doc. Plen. 7.4, in PROCEEDINGS OF THE SEVENTH MEETING OF THE CONFERENCE OF THE PARTIES (1989).

³⁵ CITES, *supra* note 1, art. XV(1)(b). The term "Parties present and voting" is defined as those Parties at the meeting who cast an affirmative or negative vote, and abstaining Parties are not counted in the two-thirds necessary for adoption. *Id.*

³⁶ *Id.* art. XV(1)(c).

specimen "was acquired before the provisions of the present Convention applied to that specimen," the provisions of Articles III, IV, and V do not apply.³⁷ The exporting State's Management Authority issues a "pre-Convention specimen" certificate upon making such a determination so that the specimen may be traded.³⁸

This section effectively exempts "pre-Convention specimens" from the restrictions relating to a listing on Appendix I, II, or III, notably regarding permits. One of the objectives of Article VII(2) was to allow stockholders to trade their existing stocks before the Convention originally entered into force,³⁹ as well as permitting stockholders to trade in old or antique specimens other than personal effects.⁴⁰ In practice, however, traders have abused this provision by stockpiling large quantities of specimens that soon may be listed in the appendices or uplisted to a higher level of protections.⁴¹

Second, CITES permits Parties to take reservations from the Convention as to particular listed species either at the time of that Party's ratification⁴² or upon amendment to an appendix.⁴³ In the case of additions to Appendices I and II, a reserving Party has ninety days after the amendment to register its reservation with Switzerland, the "Depositary Government,"⁴⁴ whereas reservations to Appendix III listings may be taken at any time.⁴⁵ Reserving Parties are treated as non-Parties with regard to trade in the designated species or its parts or derivatives,⁴⁶ which allows them to trade with actual non-Parties and other Parties taking matching reservations unfettered by CITES requirements.⁴⁷

³⁷ *Id.* art. VII(2).

³⁸ *See id.*

³⁹ *See* S. LYSTER, *supra* note 6, at 257.

⁴⁰ As to "personal effects" see CITES, *supra* note 1, art. VII(3); S. LYSTER, *supra* note 6, at 258-59.

⁴¹ *See* T. INSKIPP & S. WELLS, *INTERNATIONAL TRADE IN WILDLIFE* 23 (1979); Note, *Regulation of International Trade in Endangered Wildlife*, 1 B.U. INT'L L.J. 249, 257-58 (1982) (suggesting eliminating the Article VII(2) exemption because of abuses even though traders will suffer some economic harm).

⁴² CITES, *supra* note 1, art. XXIII(2).

⁴³ *Id.* arts. XV(3) (Appendix I and II species); XVI(2) (Appendix III species).

⁴⁴ *Id.* art. XV(3).

⁴⁵ *Id.* art. XVI(2).

⁴⁶ *Id.* arts. XV(3); XVI(2); and XXIII(3).

⁴⁷ *See* Note, *Enforcement Problems in the Endangered Species Convention: Reservations Regarding the Reservations Clauses*, 14 CORNELL INT'L L.J. 429, 438 (1981). Article X of CITES imposes requirements on trade between Parties and non-Parties such as "comparable documentation issued by the competent authorities" in the non-Party state, which "substantially conforms" with CITES requirements. This provision also applies to trade between reserving Parties and non-reserving Parties for trade in Appendices II and III specimens,

The reservation clauses seem contradictory to the general goals of CITES and their operation can cause seriously detrimental effects on listed endangered species.⁴⁸ While noting that the drafters of CITES probably included the reservation clauses to encourage greater State participation, one commentator suggests that the drafters envisioned that the reservations would be used infrequently.⁴⁹ Neither the number of Parties utilizing the clauses nor the quantity of reservations taken have proven to be small.⁵⁰

Determining the effect of a reservation to an amendment uplisting a species from Appendix II to Appendix I has presented a persistent problem in CITES enforcement.⁵¹ According to a literal reading of the Convention, a reserving Party that was following the strict requirements applicable to trade of Appendix II specimens prior to an uplisting becomes almost completely unregulated after amendment.⁵² France embraced this interpretation in 1979 when it took reservations to the uplisting of most populations of saltwater crocodiles and stated that its trade in such specimens thereafter would be outside the scope of the Convention.⁵³ In response to this flaw in CITES regulation, the Fourth Meeting of the Conference of the Parties recommended that Parties taking reservations on transfers from Appendix II to Appendix I should continue to follow the requirements for trade in Appendix II specimens.⁵⁴

but, at the Third Meeting of the Conference, the Parties banned all commercial trade in Appendix I specimens between reserving and non-reserving Parties. *Id.* at 437 & n.66 (citing Doc. 3.22, at 7, in PROCEEDINGS OF THE THIRD MEETING OF THE CONFERENCE OF THE PARTIES (1981)).

⁴⁸ See McFadden, *Asian Compliance with CITES: Problems and Prospects*, 5 B.U. INT'L L.J. 311, 321 (1987).

⁴⁹ See Note, *supra* note 47, at 436-37. The author refers to a very early commentator who believed that the public nature of the reservations and the "weight of international opinion" would limit their use. *Id.* at 437 (quoting *Legislative Development: Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 6 L. & POL'Y BUS. 1211, 1227 (1974)).

⁵⁰ See, e.g., S. LYSTER, *supra* note 6, at 262-64 (discussing French, Italian, Japanese, and Indonesian reservations); McFadden, *supra* note 48, at 314, 321 (noting that as of 1987, Japan had entered 14 reservations just on Appendix I species).

⁵¹ See S. LYSTER, *supra* note 6, at 263-64; Note, *supra* note 47, at 435-36.

⁵² See S. LYSTER, *supra* note 6, at 263-64.

⁵³ *Id.* at 264. Lyster points out that a less-endangered population of the crocodiles remained on Appendix II and France continued to follow those procedures. The "absurd" result was that the more endangered crocodiles were not protected while the safer population was. *Id.* Fortunately, effective January 1, 1984, all members of the European Economic Community (EEC) were required to withdraw all CITES reservations pursuant to the European Commission Regulation implementing CITES in the EEC. See Commission Regulation No. 3626/82, O.J. L 384/31 (1982).

⁵⁴ See Conf. 4.25, at 81, in PROCEEDINGS OF THE FOURTH MEETING OF THE CONFERENCE

It is in the context of this background to CITES that we consider its application regarding the African elephant and the uplisting of that species from Appendix II to Appendix I. First, however, it is informative to review the status of the elephant in Africa and the depredations it has suffered.

III. THE DECLINE OF THE AFRICAN ELEPHANT

Elephants have been hunted for thousands of years to obtain their prized ivory tusks, but the last decade alone saw a halving of the African elephant population.⁵⁵ Approximately 675,000 African elephants died during the 1980s, killed primarily by poachers who use assault rifles to gun down whole families of elephants often from jeeps and helicopters.⁵⁶ Soaring ivory prices and consistent demand urged on this illegal trade,⁵⁷ which constituted up to eighty percent of the overall world ivory trade in the last ten to fifteen years.⁵⁸

The poachers and their dealers have developed elaborate smuggling routes through willing African nations like Burundi, which has no elephant population of its own but still traded hundreds of tons of raw ivory a year.⁵⁹ From Africa, the ivory makes its way into the Far East through Singapore or Japan.⁶⁰ Hong Kong was the largest importer of raw ivory, and one commentator has suggested that its customs officials have routinely allowed shipments based on forged or incomplete documentation.⁶¹

OF THE PARTIES (1983). The Gaborone, Botswana Conference also requested that all types of reserving Parties keep and report trading statistics for species under reservations so that the monitoring function of CITES at least could be maintained. *Id.*

⁵⁵ See Gup, *Trail of Shame*, TIME, Oct. 16, 1989, at 66.

⁵⁶ See *id.* at 68; Netter, *Ivory Quotas Reduce Poaching of Elephants*, N.Y. Times, May 27, 1986, at C4, col. 5.

⁵⁷ Open Letter from Conservation, Environment, and Animal Protection NGOs to the Executive Director of the United Nations Environment Programme (Oct. 16, 1989) (rising demand has increased ivory prices by up to 300% in various markets).

⁵⁸ See Gup, *supra* note 55, at 68 ("In the 1970s ivory was a hedge against inflation, stockpiled and traded like bullion."); Note, *Wildlife in the Third World: Current Efforts to Integrate Conservation with Development*, 5 B.C. THIRD WORLD L.J. 83, 94 (1984) (ivory price in 1970 was US \$2.30/lb., and in 1984 it was US \$34.00/lb.).

⁵⁹ See Gup, *supra* note 55, at 68-69.

⁶⁰ See generally S. Lyster, *supra* note 6, at 271 (noting that in 1979 the Secretariat discovered that South Africa reported exporting a total of 300 kilograms of elephant ivory to Hong Kong during a six-month period, while Hong Kong reported imports of 16,300 kilograms from that country for the same period, suggesting that South Africa was being used to "launder" ivory poached in other countries); McFadden, *supra* note 48, at 313-19 (describing illegal trade in the Far East); Note, *Regulation of International Trade in Endangered Wildlife*, 1 B.U. INT'L L.J. 249, 261 (1982) (explaining smuggling operations between Africa and Singapore).

⁶¹ McFadden, *supra* note 48, at 318.

Ghana listed the African elephant on Appendix III on February 26, 1976⁶² and the Conference uplisted the species to Appendix II in 1978.⁶³ At the request of several African nations, the Parties established a system of export quotas in 1985⁶⁴ and importing Parties tightened controls in conjunction with that move.⁶⁵ The export quotas were set too high to provide the elephants significant protection, however.⁶⁶ Also in 1985, the CITES Secretariat agreed to register undocumented and probably illegal stockpiles held in countries such as Singapore and Burundi as a precondition for their joining the Convention and following its trade requirements.⁶⁷ By this act, the Secretariat legitimized a vast quantity of suspect raw ivory, which then quadrupled in price and was traded free of any stigma.⁶⁸ The Appendix II listing and the additional step of establishing quotas did little damage to the widespread illicit trade,⁶⁹ and the registration of poached stockpiles only escalated its profit.

Central African nations, the countries affected most severely by poaching,⁷⁰ virtually declared war on poachers in 1989 and committed greater resources to range and wildlife management.⁷¹ Their extreme measures began to have positive results, but could not stem the tide. By the summer of 1989, the ivory trade had so decimated the African elephant populations⁷² that the largest importing countries succumbed to public pressure and adopted domestic import moratoria or at least harsh restrictions. The United States, the

⁶² CITES Secretariat, *Proposals for Amendment of Resolution Conf. 5.11*, Doc. 7.43.2, at para. 2, in PROCEEDINGS OF THE SEVENTH MEETING OF THE CONFERENCE OF THE PARTIES (1989) [hereinafter CITES Secretariat, *Proposals for Amendment*].

⁶³ Interview with James Martin-Jones, Conservation Officer (International), World Wide Fund for Nature, United Kingdom, in London, England (Apr. 2, 1990).

⁶⁴ See CITES, *supra* note 1, art. IV(3). This section provides that Management Authorities may set limits on export permits when a Scientific Authority determines that such measures are necessary "to maintain that species throughout its range at a level consistent with its role in the ecosystems in which it occurs and well above the level at which that species might become eligible for inclusion in Appendix I." *Id.*

⁶⁵ See Netter, *supra* note 56, at C4, col. 5.

⁶⁶ *Id.* (the export quota for all of Africa was set at 90,000 tusks or 45,000 elephants).

⁶⁷ See *id.* at C4, col. 6; Gup, *supra* note 37, at 69.

⁶⁸ Gup, *supra* note 55, at 69.

⁶⁹ See *Amendments to Appendices I and II of the Convention: Proposal of the Government of Kenya*, at 29a, in PROCEEDINGS OF THE SEVENTH MEETING OF THE CONFERENCE OF THE PARTIES (1989).

⁷⁰ See Gup, *supra* note 55, at 69 (Between 1979 and 1987 Tanzania's elephant population plummeted from nearly 316,000 to 85,000); Perlez, *Can He Save the Elephants?*, N.Y. Times, Jan. 7, 1990, Magazine, at 29, col. 3 (Kenya's elephant population dropped from 65,000 in 1980 to 18,000 in 1990 even though all ivory trade was outlawed in Kenya in 1978).

⁷¹ See generally Gup, *supra* note 55, at 67; Perlez, *supra* note 47, at 29, col. 3.

⁷² United Nations Environment Programme, THE AFRICAN ELEPHANT 9 (1989).

European Community, Japan, and Hong Kong each adopted some form of import moratorium.⁷³ To culminate the activities of the summer of 1989, President Daniel arap Moi of Kenya held a public burning of twelve tons of confiscated tusks⁷⁴ to demonstrate his country's commitment to banning all trade in ivory.

IV. THE SEVENTH CONFERENCE OF THE PARTIES—OCTOBER 1989

The Seventh Meeting of the Conference of the Parties to CITES was held in Lausanne, Switzerland, in October, 1989. One of the major tasks for the Conference was to decide whether to move the African elephant from Appendix II to Appendix I because of the downward spiral of the species' numbers.⁷⁵

The elephant issue was particularly controversial for at least two reasons. First, a number of Southern African countries took the view that uplisting the African elephant to Appendix I, thereby establishing a ban on any international trade, would remove a major incentive to the effective management of their own healthy elephant populations.⁷⁶ Moreover, it would deprive them of much needed foreign currency from the sale of ivory produced by their well-managed stocks.⁷⁷ Second, a number of countries in which large, unsold stockpiles of ivory were held attacked the legality of the proposed ban.⁷⁸ They claimed that a ban on international trade in ivory that prohibited the sale of such stockpiles would amount to the retroactive application of law, or alternately an interference with the legitimate expectations of stockpile holders to be able to trade their stocks.⁷⁹

It is with the second argument that this Article is concerned. The claims as to "retroactivity" or "legitimate expectation," at least on

⁷³ See *European Community Bans Imports of Ivory*, N.Y. Times, June 11, 1989, at 3, col. 4; *Japan Bans Some Ivory Imports*, Christian Sci. Monitor, June 18, 1989, at 4, col. 1.; *U.S. Trying to Protect Elephants, Declares Ban on All Ivory Imports*, N.Y. Times, June 7, 1989, at A18, col. 1.

⁷⁴ Perlez, *Kenya, Pressing for World Ban, Burns Its Stockpile of Ivory to Protect the Elephant*, N.Y. Times, July 19, 1989, at A4, col. 1.

⁷⁵ See *supra* notes 30–36 and accompanying text.

⁷⁶ See *Elephants and Ivory Trade in Southern Africa*, Doc. 7.43.4, at 7, in PROCEEDINGS OF THE SEVENTH MEETING OF THE CONFERENCE OF THE PARTIES (1989); Embassy of South Africa, *ELEPHANT CONSERVATION AND THE PROPOSED BAN ON IVORY TRADE 2* (1989); Perlez, *supra* note 70, at 30, col. 2.

⁷⁷ See Perlez, *supra* note 47, at 30, col. 2; *Ban on Ivory Takes Effect; Some Nations to Defy It*, L.A. Times, Jan. 19, 1990, at A11, col. 6.

⁷⁸ Interview with James Martin-Jones, Conservation Officer (International), World Wide Fund for Nature, United Kingdom, in London, England (Apr. 2, 1990).

⁷⁹ *Id.*

their face, raised important and perhaps complex issues of international law with which CITES did not, and still does not, expressly deal. The arguments brought up questions about the content and effect of general principles of law⁸⁰ and demonstrated the crucial role of public interest non-governmental organizations (PINGOs) both in decision making by the Conference and in the application of CITES.⁸¹

A. Stockpiles

As has been suggested above, the question of stockpiles has long haunted the effective application of CITES.⁸² The wording of Article VII(2), which was intended in part to deal with such stockpiles, does not provide clear guidance as to the meaning of "pre-Convention specimens" or when a specimen is "acquired" for purposes of the Convention.⁸³ As one commentator has written: "If X species was listed in Appendix I in 1977 and Y State acceded to CITES in 1982, does the Convention apply to a specimen of X species which was acquired in Y State in 1980?"⁸⁴ Moreover, Article VII(2) does not answer definitively the question of when the Convention applies to a given specimen, and how that issue is influenced by the transfer of a species from one appendix to another, or by the deletion of a species from the appendices. The interpretation of Article VII(2) has caused difficulties for the Conference of the Parties for many years.

In 1983, the Fourth Conference of the Parties, in Gaborone, Botswana, recommended that each Party to the Convention determine for itself the proper interpretation of Article VII(2).⁸⁵ This unsatisfactory recommendation did not assist in providing a uniform interpretation, and created the potential for further misunderstandings and abuses. Accordingly, in 1985, in the light of "serious difficulties" concerning the varying interpretation of Article VII(2), the Fifth Conference of the Parties revoked Conference Resolution 4.11 and adopted Conference Resolution 5.11 on the "Definition of the Term 'Pre-Convention Specimen.'"⁸⁶

⁸⁰ See Statute of the International Court of Justice, June 26, 1945, art. 38(1)(c), 59 Stat. 1031, 39 AJIL Supp. 215n.

⁸¹ See *supra* notes 14-15 and accompanying text.

⁸² See *supra* notes 39-41 and accompanying text.

⁸³ See *supra* notes 37 and accompanying text.

⁸⁴ S. LYSTER, *supra* note 6, at 257.

⁸⁵ See Conf. Res. 4.11, at 55-56, in PROCEEDINGS OF THE FOURTH MEETING OF THE CONFERENCE OF THE PARTIES (1983).

⁸⁶ Conf. Res. 5.11, in PROCEEDINGS OF THE FIFTH MEETING OF THE CONFERENCE OF THE PARTIES (1985) [hereinafter Conf. Res. 5.11].

Conference Resolution 5.11 attempts to address three issues. First, it establishes how and when a specimen is acquired.⁸⁷ Second, Resolution 5.11 determines when the Convention applies to a given specimen and how that will be influenced by the transfer of a species from one appendix to another or by the deletion of a species from an appendix.⁸⁸ Third, it prescribes how to address the failure of Article VII(2) to provide responsibilities for importing countries in its implementation.⁸⁹

As to the first issue, Conference Resolution 5.11 provides that the date on which a specimen is acquired is:

- i.) for live and dead animals or plants taken from the wild: the date of their initial removal from this habitat; or
- ii.) for parts and derivatives: the date of their introduction to personal possession, whichever date is earliest.⁹⁰

As to the second and third issues, Conference Resolution 5.11 provides in relevant part:

- b) that the certificate referred to in Article VII, paragraph 2, only be issued by a Management Authority of an exporting country where it is satisfied that at the date on which a specimen was acquired:
 - the species involved was not listed in one of the Convention appendices; or
 - its country was not a Party to the Convention; or
 - the specimen concerned was subject to a reservation entered by its country with regard to the species involved;
-
- h) that in the case of a species uplisted, i.e. from Appendix III to II or I, or downlisted from Appendix I to II or III specimens concerned shall be subject to the provisions applicable to them at the time of export, re-export or import⁹¹

Paragraph (d) of Conference Resolution 5.11 is also important to the application of the Resolution. It provides that an importing Party may only accept a pre-Convention certificate issued by another Party if the specimen was acquired prior to the date upon which the Convention entered into force regarding that specimen in the country of import.⁹² The combined effects of paragraphs (a), (b), (d), and (h) is to prohibit trade in *existing* stocks of specimens uplisted from

⁸⁷ *Id.* at 52, para. (a).

⁸⁸ *Id.* at 53, para. (b).

⁸⁹ *Id.* para. (h).

⁹⁰ *Id.* at 52, para. (a).

⁹¹ *Id.* at 53, paras. (a), (h).

⁹² *Id.* para. (d); *see also supra* note 38 and accompanying text.

Appendix II or III to Appendix I from the date upon which the Appendix I listing comes into force.

Conference Resolution 5.11 as a whole was adopted by fifty votes in favor to one against after extensive discussions regarding recommendation (h).⁹³ The United States delegation proposed the final wording of 5.11(h), which was supported by thirty-seven votes in favor with three against.⁹⁴ These high margins in favor of the Resolution can be seen as a sign of the Parties' strong commitment to their interpretation of Article VII(2).

During 1988 and 1989 there was increased pressure to uplist the African elephant from Appendix II to Appendix I. The document prepared by the CITES Secretariat and submitted to the Seventh Meeting of the Conference⁹⁵ noted that the CITES African Elephant Working Group (AEWG) held its second meeting in Gaborone in July 1989.⁹⁶ The AEWG carried on substantial discussions regarding the sale of existing ivory stocks, either in Africa or consumer countries, in the event of such an uplisting to Appendix I.⁹⁷

The AEWG took the view that the effect of applying Conference Resolution 5.11(h) to the African elephant once listed on Appendix I would be to restrict legal trade in ivory to pre-Convention specimens.⁹⁸ In this case, such specimens would be those acquired before the African elephant was listed for the first time in the CITES appendices on February 26, 1976, when it was listed by Ghana on Appendix III.⁹⁹ Within the AEWG, a dispute arose as to the effectiveness of such an application of Conference Resolution 5.11(h):

While some considered that the implementation of Resolution Conf. 5.11, recommendation (h), would prevent the accumulation of new ivory stocks between the time of discussions and the date of entry into force of the listing in Appendix I, some others considered such an implementation unfair because stocks had already been established of ivory acquired in full compliance with CITES regulations.¹⁰⁰

⁹³ Doc. Plen. 5.7, section XIII 11, at 115-16, in PROCEEDINGS OF THE FIFTH MEETING OF THE CONFERENCE OF THE PARTIES (1985).

⁹⁴ *Id.* at 116. Prior to the vote, the observer from the IUCN stated that the resolution as it was later adopted would have considerable conservation benefits. *Id.*

⁹⁵ CITES Secretariat, *Proposals for Amendment*, *supra* note 62.

⁹⁶ *Id.* at 1, para. 1.

⁹⁷ *Id.*

⁹⁸ *Id.*, para. 2.

⁹⁹ *Id.*

¹⁰⁰ *Id.*, para. 3.

It is in this context that the claims as to "retroactivity" and, implicitly, breach of "legitimate expectation" were made in respect of Conference Resolution 5.11(h).¹⁰¹ The CITES Secretariat document states:

The legality of Resolution Conf. 5.11, recommendation (h), was also contested by some speakers as it implies a retroactive implementation of a legal text.

Although no review of the situation has been made, it does not seem likely that many Parties are in a position to implement this particular recommendation.¹⁰²

By noting the unlikelihood of the implementation of 5.11(h) by many Parties immediately after mentioning the implied retroactivity of the provision, the CITES Secretariat seemed tacitly to fuel, and support, the retroactivity argument.

This view was supported further by the Secretariat document's suggestion of two ways in which Conference Resolution 5.11(h) could be amended. The Secretariat's first option was to revert to an earlier draft of 5.11(h).¹⁰³ A second option proffered was to amend paragraph (h) to exclude ivory, "taking into consideration the large volume of stockpiled ivory in producer and consumer countries."¹⁰⁴

B. *The Legal Issues*

The Secretariat's move to rewrite Conference Resolution 5.11(h) or to exclude ivory was countered, in part, by a group of public interest non-governmental organizations, using both political and legal approaches. With regard to legal mechanisms, the World Wide Fund for Nature (WWF) obtained and circulated an independent

¹⁰¹ *Id.*, para. 4.

¹⁰² *Id.*

¹⁰³ *Id.* at 2, para. 6. The alternative draft of Conf. Res. 5.11(h) read as follows:

[The Conference of the Parties recommends] that specimens which were acquired in compliance with the laws on the protection of fauna and flora and before the date of entry into force of the transfer of the species involved from one appendix to another be treated as follows:

- in the case of a species uplisted, i.e. from Appendix III to II or I, or from Appendix II to I, the specimens concerned shall remain subject to the provisions applicable to them at the date of acquisition;
- in the case of a species downlisted, i.e. from Appendix I to II or III, or where the species is deleted from the appendices, the specimens concerned shall be subject to the provisions applicable to them at the time of export, re-export or import.

Id. The Conference of the Parties rejected the position taken in this alternative draft when the U.S. draft of Conf. Res. 5.11 was adopted. See *supra* notes 93-94 and accompanying text.

¹⁰⁴ CITES Secretariat, *Proposals for Amendment*, *supra* note 62, at 2, para. 7.

formal legal opinion (WWF Legal Opinion) that dealt with the issues of retroactivity and legitimate expectations, as well as the ability of the Fifth Conference to interpret Article VII(2) as it had done in Conference Resolution 5.11, especially at paragraph (h).¹⁰⁵ This was not the first time that an independent legal opinion written by a PINGO had been used in the CITES context. Opinions of the IUCN's environmental law center have regularly been sought by the CITES Secretariat,¹⁰⁶ and in 1986 several countries made use of an independent legal interpretation in a dispute relating to Article XIV of CITES.¹⁰⁷

1. Retroactivity

Prior to and during the Seventh Meeting of the Conference of the Parties, ivory stockholders and some governments claimed that the uplisting of African elephants to Appendix I together with the application of Conference Resolution 5.11 would amount to a retroactive application of law. The argument, which again appeared to be supported by the CITES Secretariat,¹⁰⁸ seems to run as follows. The uplisting of the African elephant to Appendix I on October 18, 1989 would result in a prohibition in the trade of all African elephant products ninety days later¹⁰⁹ and would apply to specimens acquired on or after February 26, 1976 when the African elephant was first listed by Ghana on Appendix III. Accordingly, specimens acquired between February 26, 1976 and January 17, 1990 could no longer be traded, even though they had been "acquired in full compliance with CITES regulations."¹¹⁰ The argument concludes that a retroactive application of the ban in trade would occur in respect of these specimens.

The argument as to retroactivity was intellectually incoherent and seriously flawed. It is not to the Secretariat's credit that it supported the argument, albeit implicitly. It fails to distinguish, as is necessary

¹⁰⁵ The legal opinion was drafted by James Cameron and Philippe Sands, who are both barristers and Directors of the Centre for International Environmental Law (CIEL), Kings College London, London University. This opinion is on file with the *Boston College Environmental Affairs Law Review*.

¹⁰⁶ See, e.g., Doc. Plen. 5.7, *supra* note 93, at 115, para. 11.

¹⁰⁷ See CITES Secretariat, *The Opinion of the IUCN Environmental Law Center*, Doc. TEC 2.5, in PROCEEDINGS OF THE SECOND MEETING OF THE TECHNICAL COMMITTEE (June 23, 1986), cited in Thomsen & Brautigam, *CITES in the European Economic Community: Who Benefits?*, 5 B.U. INT'L L.J. 269, 277 n.41 (1987).

¹⁰⁸ See CITES Secretariat, *Proposals for Amendment*, *supra* note 62, at 1, para. 4.

¹⁰⁹ See CITES, *supra* note 1, art. XV(3); see also *supra* notes 30-36 and accompanying text.

¹¹⁰ See CITES Secretariat, *Proposals for Amendment*, *supra* note 62, at 1, para. 3.

for an understanding of the scheme and practice of CITES, between the lawfulness of acquisition, the lawfulness of possession, and the lawfulness of trade.¹¹¹ To make trade unlawful is not to make a prior acquisition or existing possession unlawful: uplisting the African elephant to Appendix I and prohibiting trade has no effect on the legality of a prior acquisition or indeed of a prior trade.¹¹² Uplisting to Appendix I would amount to a retroactive application of a prohibition only if the effect was to make *prior* trade unlawful. Instead, the ban created a prospective prohibition to trading African elephant specimens after January 18, 1990.¹¹³

2. Legitimate expectation

The argument as to legitimate expectation certainly has more substance than the retroactivity argument, but it too was considered in the WWF Legal Opinion to be ill-founded in the context of the debate relating to stockpiles of African elephant ivory. Essentially, traders, certain countries, and apparently the CITES Secretariat¹¹⁴ took the view that ivory traders had stockpiled ivory in the legitimate expectation that they could trade legally in those stocks. The central issue was whether stockpile holders and those who supported their argument were aware of the CITES regime: an expectation to trade in the future will only be legitimate if it is reasonable. The reasonableness of such a position is dubious because those seeking to rely on it had, or should have had, knowledge of the African elephant's listing in Appendix III or Appendix II at the time of their acquisitions of ivory.

Analogies may be drawn from other areas of international legal practice to determine if stockpilers' expectations were legitimate. For example, in an analogous context, European Community law frequently has dealt with claims against the Commission of the Eu-

¹¹¹ "Trade" is defined in CITES as "export, re-export or import and introduction from the sea." CITES, *supra* note 1, art. I(c).

¹¹² CITES' application is limited to international trade, so the ban does not prohibit selling ivory products domestically in Parties currently holding stocks. See CITES, *supra* note 1, art. I(c).

¹¹³ A related question concerns the legal effect of Conf. Res. 5.11 itself. Conf. Res. 5.11 is an attempt to authoritatively interpret Article VII(2) to give effect to the "aims and spirit of the Convention." See Conf. Res. 5.11, *supra* note 86, Preamble. Article XI(3)(e) provides that the Conference may "make recommendations for improving the effectiveness of the present Convention." It is an interesting question, however, whether a resolution of the Conference of the Parties containing an authoritative interpretation of a provision of CITES can be applied to specimens acquired prior to its adoption. Determining the legal status of a Conference resolution lies beyond the scope of this Article.

¹¹⁴ See CITES Secretariat, *Views of the CITES Secretariat*, *supra* note 34.

ropean Communities on the basis that its imposition of sudden changes in the law have breached the principle of legitimate expectation. One commentator on European Community law has reviewed a series of decisions by the European Court of Justice relating to Community laws that have caused bans on trade in particular products.¹¹⁵ This commentator has suggested that the rule is that "one must ask whether a prudent dealer of reasonable knowledge and experience would have relied on the expectation; if he would not, the expectation is not legitimate."¹¹⁶

In the case of the ban on African elephant ivory, it would seem to be manifestly apparent that the whole scheme of CITES empowers the Conference of the Parties to move species from one appendix to another¹¹⁷ with the effect that lawful trade may, after the Conference has taken the necessary decision, quite swiftly become unlawful trade. The CITES regime incorporates permit and other requirements for listed species,¹¹⁸ so that any person trading lawfully in a product that is then listed on Appendix II or Appendix III is presumably on notice that CITES regulates its trade. Traders also should be held to know that the conservation status of the specimens they trade may change, and that a Conference decision to uplist a species to Appendix I would prohibit all trade. Supporters of the legitimate expectation argument were relying on one aspect of CITES without regard for other provisions or the overall operation of the treaty.

The legal opinion circulated by the WWF during the debate on the African elephant at the Seventh Conference of the Parties stated that there was "no force in the argument that traders that have stockpiled ivory have a legitimate expectation to trade in ivory following the uplifting of a species from Appendix II to Appendix I."¹¹⁹ The record of the debate on Conference Resolution 5.11 strengthened the WWF Legal Opinion. During the debate, the United States delegation expressed its opinion that an interpretation of the Convention like that subsequently adopted by the ivory ban opponents would "encourage excessive taking and stockpiling of species for which there are uplisting proposals."¹²⁰ Moreover, Confer-

¹¹⁵ See T. HARTLEY, *FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 143 (2d ed. 1988).

¹¹⁶ *Id.* See, e.g., *Unions Nationales des Cooperatives Agricoles de Cereales*, Cases 95-98/74, 15, 100/75, [1975] ECR 1615.

¹¹⁷ See *supra* notes 30-36 and accompanying text.

¹¹⁸ See *supra* notes 17-29 and accompanying text.

¹¹⁹ World Wide Fund for Nature, *Opinion of Law Regarding CITES Article VII paragraph 2 and Resolution 5.11 of the Conference of the Parties*, at 5 (Oct. 10, 1989).

¹²⁰ *Id.* (quoting Doc. Com. 5.25, at 116, in *PROCEEDINGS OF THE FIFTH MEETING OF THE CONFERENCE OF THE PARTIES* (1985)).

ence Resolution 5.11(h) was supported by thirty-seven votes in favor with only three votes against.¹²¹

It seems clear, therefore, that in respect of ivory acquired after the first listing of the African elephant on Appendix III, in 1976,¹²² the best that can be said for the legitimate expectation argument is that, while it might be of general relevance, it cannot be effective on the specific facts. Additionally, even if a legitimate expectation argument could be said to exist, a strong and effective counter-argument could be made that the public interest of the international community of preserving the African elephant would outweigh the interest of a tiny group of stockpile holders.

All Parties present at the Seventh Meeting of the Conference received a copy of the WWF Legal Opinion. As it turned out, there was no debate as to the retroactivity and legitimate expectation arguments on the floor of Committee I, which was the primary committee on the ivory ban, or at the Plenary session. When the vote was taken on the uplisting of the African elephant at the Plenary, there were seventy-six Parties in favor of the Somalia draft amendment¹²³ and eleven against, with four Parties abstaining.¹²⁴ Ninety days later, on January 18, 1990, the amendment would enter into force.

The effect of the WWF action of obtaining and circulating an independent legal opinion cannot be stated with certainty. It may be sufficient, however, to observe that following the circulation of the opinion the matter of retroactivity did not reappear as a significant issue.

V. AFTER THE BAN—THE PRESENT SITUATION

Upon news of the impending trade ban, ivory prices dropped dramatically around the world.¹²⁵ Dealers in Hong Kong and Burundi

¹²¹ Doc. Plen. 5.7, *supra* note 93, at section XIII 11, at 116.

¹²² See *supra* note 62.

¹²³ See *Somalia Amendment*, Doc. 7.43.8, in PROCEEDINGS OF THE SEVENTH MEETING OF THE CONFERENCE OF THE PARTIES (1989). The Somalia draft amendment was a slight variation of the United States of America's proposal, which incorporated a provision that the Conference would create a panel of experts "to advise the Parties on requests for transfer of particular elephant populations back to Appendix II." *Id.*; see also *Amendments to Appendices I and II of the Convention: Proposal of the Government of the United States of America*, PROCEEDINGS OF THE SEVENTH MEETING OF THE CONFERENCE OF THE PARTIES (1989).

¹²⁴ Doc. Plen. 7.4, at 1, in PROCEEDINGS OF THE SEVENTH MEETING OF THE CONFERENCE OF THE PARTIES (1989).

¹²⁵ See Jones, *Hong Kong Ivory Industry Seeks Buyers as International Ban on Trade Nears*, Wall St. J., Dec. 22, 1989, at B4A, col. 2 (dealers cutting prices by 30% to 40%);

desperately sought buyers for their huge stockpiles of raw ivory in an attempt to sell it before the CITES import ban took effect in countries accepting the amendment.¹²⁶ Hong Kong officials visited several consumer nations such as Japan seeking to convince them to make an exception to their domestic import bans for ivory from Hong Kong,¹²⁷ and presumably to lobby them to enter reservations on the uplisting. Demand for ivory allegedly is falling off as fast as its prices,¹²⁸ and as conservation groups are stepping up anti-ivory publicity and education campaigns worldwide.

A. Reservations

The legal saga of the attempt to save the African elephant by uplisting it to CITES Appendix I, however, did not end with counting the overwhelming vote of the Conference to do so. On January 17, 1990, shortly before the ninety-day period for entering reservations to the amendment had expired,¹²⁹ the Government of the United Kingdom notified the Depository Government that:

In accordance with the provisions of paragraph 3 of Article XV of the Convention, the Government of the United Kingdom of Great Britain and Northern Ireland hereby enter a reservation, on behalf of Hong Kong, with respect to the amendment of the Convention providing for the listing of the African elephant, *Loxodonta Africana*, on Appendix I of the Convention.

The Government of the United Kingdom of Great Britain and North Ireland wish to make clear to the Government of the Swiss Confederation that this reservation will remain in force for a period of six months only from 18 January 1990, and that they will apply the Convention to the United Kingdom of Great Britain and Northern Ireland and to the British Dependent Territories with the sole exception of Hong Kong. The Government of the United Kingdom of Great Britain and Northern Ireland also wish to make it clear that imports of ivory into Hong Kong have been, and will continue to be, prohibited and that only ivory currently held legally in Hong Kong will be permitted to be re-exported during the period of the reservation.¹³⁰

Perlez, *Devaluing the Tusk*, N.Y. Times, Jan. 7, 1990, at 29, col. 1 ("dramatic drop in the world price of ivory").

¹²⁶ See Jones, *supra* note 125, at B4A, col. 2; Perlez, *Devaluing the Tusk*, *supra* note 125, at 29, col. 1.

¹²⁷ See Jones, *supra* note 125, at B4A, col. 2.

¹²⁸ See *Reprieve for the Giant of Beasts*, TIME, Oct. 30, 1989, at 77.

¹²⁹ CITES, *supra* note 1, art. XV(3); see *supra* notes 35-36 and accompanying text.

¹³⁰ It should be noted that a literal reading of Article XV(3) suggests that, having entered a reservation in respect of Hong Kong, the United Kingdom is a Party that "shall be treated

The United Kingdom's reservation for Hong Kong was widely condemned¹³¹ as being likely to make effective enforcement of the prohibition on trade in African elephant ivory considerably more difficult.¹³² Mainland China, which is already one of Hong Kong's ivory trading partners and likely to become its biggest market, was the only ivory-consuming Party to take a reservation.¹³³ The five ivory-producing southern African nations that opposed the ban all entered reservations with the Depository Government.¹³⁴ Japan and the United States, previously the largest consumers of ivory, had unilaterally banned imports of ivory prior to the Seventh Conference and supported the uplisting amendment at Lausanne.¹³⁵ The Government of Singapore, however, has stated that it will apply the ban only to ivory acquired after 1986 when Singapore became a Party.¹³⁶

B. PINGO Responses to the United Kingdom Reservation

Given the makeup of potential trading partners, the Hong Kong reservation constitutes a significant blow to the effectiveness of the ban.¹³⁷ Although the reservation did not provoke widespread con-

as a State not a Party to the present Convention with respect to the species concerned." See *supra* notes 43-55 and accompanying text. Notwithstanding its stated intention to limit the reservation to Hong Kong, it would appear therefore that buyers in the United Kingdom could as a matter of CITES law import ivory from States not a Party or States taking matching reservations. This unhappy result clearly was not intended by the Government of the United Kingdom.

¹³¹ See, e.g., McCarthy, *Britain Accused of 'Stab in the Back' Over Ivory*, *The Times* (London), Feb. 22, 1990, Home News, at 1, col. 3; *French Animal Rights Campaigners Protest HK Reservation at British Embassy in Paris*, *Financial Times*, Jan. 25, 1990, at 1, col. 1; *Hong Kong Defends Ivory Ban Exception*, UPI wire, Jan. 19, 1990 (available on Lexis).

¹³² See S. LYSTER, *supra* note 6, at 263 ("In practice, . . . reservations can be very damaging. Not only can reserving Parties trade freely with non-Parties, but reservations sometimes encourage trade to continue, albeit illegally, with other Parties.").

¹³³ Stevens, *Britain Exempts Hong Kong from Ivory Ban*, *N.Y. Times*, Jan. 23, 1990, at C5, col. 1.

¹³⁴ *Id.*

¹³⁵ *Id.*; see also *supra* notes 72-74 and accompanying text

¹³⁶ See *Singapore to Ban Ivory Trade*, Reuters wire, Jan. 16, 1990 (available on Lexis); *Ivory Import, Export to be Banned in Singapore*, Xinhua General Overseas News Service wire, Jan. 16, 1990 (available on Lexis).

¹³⁷ Hong Kong was the world's largest importer of ivory, but most of the end products were exported to ivory-consuming nations. See McFadden, *supra* note 48, at 318. Thus, with China and several other countries maintaining some level of demand for ivory products, the goal of the ivory ban to eliminate profitable trade will be undermined and poaching and smuggling will continue. See McCarthy, *supra* note 90, at 1, col. 3. Noted anthropologist Richard Leakey, now the Director of the Kenyan Wildlife Service, claimed that there was a direct link between the Hong Kong reservation and an upsurge in elephant killings between mid-January and mid-February, 1990. Thirty to forty elephants died at the hands of poachers in Kenya alone during that period compared to a total of 60 for the previous six months. *Id.*, col. 5.

demnation among the Parties to CITES, public interest non-governmental organizations reacted strongly. For example, two leading PINGOs took different approaches to attacking the reservation in the media and legally. Once again, it appeared that PINGOs alone were prepared to act as guardians of the international environment by invoking and applying legal arguments and public discourse.¹³⁸

In March 1990, the World Wide Fund for Nature announced its finding that approximately one-half of the 670 tons of raw ivory in Hong Kong is illegal or simply cannot be accounted for.¹³⁹ According to the WWF, the United Kingdom based the reservation on Hong Kong trade officials' assurances that they would impose strict controls on ivory trade.¹⁴⁰ The WWF called for the United Kingdom to withdraw the reservation because its findings showed that Hong Kong was not meeting these standards.¹⁴¹

Greenpeace, another leading PINGO, has considered challenging the legality of the United Kingdom reservation for Hong Kong. The legality of the reservation can be considered according to English law, the law of the European Communities, general public international law, and the law governing CITES. With regard to English law, the constitutional position is that Hong Kong is an overseas territory for whose international relations the United Kingdom is responsible.¹⁴² Accordingly, when the United Kingdom ratified CITES on January 1, 1976,¹⁴³ it entered a declaration that CITES was to apply to the Territory of Hong Kong as well.¹⁴⁴ The reservation of January 17, 1990, therefore, can be considered according to English law.

Under English administrative law, the question is whether entering the reservation in respect of Hong Kong amounted to a "manifestly unreasonable" exercise of administrative discretion.¹⁴⁵ Because

¹³⁸ See Sands, *The Environment, Community and International Law*, 30 HARV. INT'L L.J. 393 (1989). For a discussion of environmental guardianship, see *id.* at 396-401; for a discussion of the role of NGOs in international law and expansion of that role by giving NGOs standing under general international law, see *id.* at 412-17.

¹³⁹ PR Newswire, Mar. 7, 1990 (available on Lexis). Only 53% of the 670 tons of ivory in Hong Kong has permits and can be traced to its point of origin. *Id.* The WWF was not the first to point out the inadequacies and corruption of Hong Kong's regulation of ivory trade. See, e.g., Gup, *supra* note 55, at 68; McFadden, *supra* note 48, at 318-19; *Tightening Controls on the Ivory Trade in Japan*, 19 ORYX No. 2, at 3 (1985).

¹⁴⁰ PR Newswire, *supra* note 139.

¹⁴¹ *Id.*

¹⁴² See 6 HALSBURY'S LAWS OF ENGLAND Paras. 1027-29, 1163, 1200 (4th ed. 1974).

¹⁴³ See Note, *supra* note 41, at 257.

¹⁴⁴ McFadden, *supra* note 48, at 313.

¹⁴⁵ See 1 HALSBURY'S LAWS OF ENGLAND Para. 62 (4th ed. 1973) (citing Associated Provin-

the English courts always have taken a narrow view of what constitutes an "unreasonable" administrative act,¹⁴⁶ it is difficult to imagine how this argument could succeed before them. Specifically, it would be necessary not only to argue that the reservation would establish a large gap in the enforcement of the CITES ban on international ivory trade, but also that this cost would be disproportionate to the benefit of protecting the Hong Kong stockpile holders from economic loss. In the context of the present difficulties in Hong Kong stemming from the transfer of control to the People's Republic of China in 1997,¹⁴⁷ it is even less likely that an English court would consider the reservation unreasonable and strike it down.

As to public international law, CITES expressly provides for reservations apparently without limitations.¹⁴⁸ It seems difficult, therefore, to conceive how the United Kingdom reservation could be said to go beyond the permissible scope of Article XV(3), or the general rules of international law governing the permissibility of reservations.¹⁴⁹

It is in the context of the European Communities' legal framework that the reservation might be in some difficulty. The Council of the European Communities adopted a regulation on the implementation of CITES in the Communities.¹⁵⁰ The operational articles of the Council Regulation entered into force on January 1, 1984.¹⁵¹ Accordingly, CITES is part of Community law and thereby binding on the United Kingdom, whose practices must comply with Community law at all times.¹⁵²

In order to insure uniform protection of CITES protected species in the Community, the Council Regulation required the Member States to withdraw their existing reservations.¹⁵³ The Regulation

cial Picture Houses Ltd. v. Wednesbury Corp., [1948] 1 K.B. 223, [1947] 2 All E.R. 680 (C.A.)

¹⁴⁶ See *id.*

¹⁴⁷ See Stephens, *Tories to Seek Delay on Ivory Ban for HK*, Financial Times, Jan. 17, 1990, at 8, col. 2.

¹⁴⁸ See CITES, *supra* note 1, art. XV(3).

¹⁴⁹ See Vienna Convention on the Law of Treaties, May 23, 1969, art. 19, UN Doc. A/Conf. 39/27; 63 AJIL 875 (1969). Article 19 of the Vienna Convention provides that reservations may be formulated unless they are incompatible with the purpose of the treaty. *Id.* art. 19(c).

¹⁵⁰ Commission Regulation No. 3626/82, O.J. L 384/31 (1982) [hereinafter Commission Regulation].

¹⁵¹ *Id.*

¹⁵² On the relationship between European Community law and English law, see HARTLEY, *supra* note 115; WYATT & DASHWOOD, *THE SUBSTANTIVE LAW OF THE EEC* 25-50 (2d ed. 1987).

¹⁵³ See Commission Regulation, *supra* note 150.

did not specifically order withdrawal, but the Commission of the European Communities twice has stated that "no reservations shall be entered with regard to any species included in the Convention's Appendices, and existing reservations by Member States shall be withdrawn before entry into force of the Regulation."¹⁵⁴ Because the African elephant already was listed in 1984 it is arguable that the United Kingdom reservation might be considered to fall within the Commission's statement prohibiting reservations.

Additionally, Articles 19 and 20 of the Council Regulation provide that any question relating to the application of the Regulation shall be examined by a Committee consisting of Representatives of the Member States.¹⁵⁵ The implication of this provision is that such a Committee would have the final word, subject to review by the Commission and, ultimately, by the European Court of Justice, on matters of compatibility of reservations with the Regulation. Faced with this argument, the Government of the United Kingdom likely would argue that because the European Economic Community Treaty¹⁵⁶ does not apply to the colony of Hong Kong, the Regulation does not apply to it and therefore a Committee thereunder would not have jurisdiction over Hong Kong.

It should be pointed out, however, that the United Kingdom reservation could have the effect of making the United Kingdom as a whole, as well as Hong Kong specifically, a "State not a Party" to CITES with respect to ivory.¹⁵⁷ If the Committee were to review the reservation pursuant to the Council Regulation, then it arguably might find jurisdiction according to such a literal reading of the Regulation, the Commission's statements, and Article XV(3) of CITES.

The United Kingdom reservation opened a regrettable technical loophole in the operation of the ban on trade in ivory. Inevitably, it was left to a PINGO to scrutinize the legality of a Party's actions because the other Parties apparently did nothing to respond formally to the United Kingdom reservation. Whatever the result of possible legal challenges by Greenpeace or others may be, the attention focused on the United Kingdom's conduct may cause significant

¹⁵⁴ See Commission of the European Communities, INF. DOC. FROM THE COMMISSION: THE IMPLEMENTATION OF CITES IN THE EUROPEAN COMMUNITIES, at 1, cited in Thomsen & Brautigam, *supra* note 107, at 275 n.34.

¹⁵⁵ See Commission Regulation, *supra* note 150, arts. 19-20.

¹⁵⁶ Treaty on the Establishment of a European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3.

¹⁵⁷ See *supra* note 130.

enough public pressure to guarantee that the reservation will not be extended beyond the initial six-month duration.

VI. CONCLUSION

The highly contested decision to ban international trade of the African elephant and the reservations subsequently taken exemplify the difficulties of constructing an effective international regime to conserve and protect endangered species, especially if the species also has commercial value. More significantly, perhaps, the entire episode highlights the increasing and crucial role played by the non-governmental actor in the international arena: participating in the decision-making process, monitoring and implementing the Convention, and, where possible, enforcing an effective interpretation of the law.