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# COMMENT

## The United States' Enforcement of the Convention on International Trade in Endangered Species of Wild Fauna and Flora

### I. INTRODUCTION

Species loss is an extremely serious, continuing problem. While habitat destruction poses one of the most imminent threats to the survival of wild animals and plants, international trade in wildlife is also a major cause of diminishing biological diversity worldwide. The global market for wildlife is very large, and the goods involved are usually luxury items, such as fur coats and ivory carvings. When this trade is not harnessed, it often tips the balance toward extinction for various forms of wildlife.

It has been estimated that international wildlife trade is responsible for the endangerment of 40% of the vertebrate species now facing extinction.<sup>1</sup> Numerous plants and animals have been affected. For example, 70,000 elephants have been disappearing annually.<sup>2</sup> In 1979, a continental survey showed the population of elephants in Africa to be over one million.<sup>3</sup> Today, the number has declined to approximately 750,000.<sup>4</sup> The number of rhinoceroses has also decreased dramatically from 60,000

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<sup>1</sup> S. FITZGERALD, *THE INTERNATIONAL WILDLIFE TRADE: WHOSE BUSINESS IS IT?* 4 (1989) [hereinafter S. FITZGERALD].

<sup>2</sup> Letter from Paul T. Schindler, President of the African Wildlife Foundation, New York, NY (1989).

<sup>3</sup> *Every Year, 70,000 Dead Elephants*, N.Y. Times, May 16, 1989, at A22, col. 1.

<sup>4</sup> *Harare Journal: Where Elephants Roam, a Plea for Understanding*, N.Y. Times, Aug. 9, 1989, at A4, col. 3.

in 1970 to a mere 3,800 in 1988.<sup>5</sup>

Some may ask why diminishing biological diversity is a concern, and, similarly, why the level of international wildlife trade even matters. 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. Natural ecosystems consist of delicate and complicated networks of interdependent relationships. The loss of one species may initiate a vicious cycle resulting in irreparable damage to the environment. For example, in Bangladesh, India, and Indonesia, the bullfrog is the natural predator of the mosquito. Experts attribute malarial mosquito infestation in these countries partly to the yearly harvests of 250 million wild frogs for the frog-leg trade.<sup>6</sup>

From a utilitarian perspective, other practical problems result from species loss. First, as increasing numbers of species disappear, the opportunities for human beings to conduct basic scientific research on those lost species also disappear. Such research can generate helpful information on biological systems and evolutionary processes. Biomedical research involving apes and monkeys has resulted in the production of various vaccines and has shed light on the etiology of diseases such as cancer and hepatitis. Second, since many species of plants and animals provide essential medicinal sources for human beings, the loss of numerous species may have critical consequences. For example, alkaloid extracts from the periwinkle, a flowering plant in Madagascar, have been used to treat illnesses such as Hodgkins disease and leukemia. In fact, approximately 25% of prescriptions in the United States call for an ingredient derived primarily from tropical plants.<sup>7</sup> Finally, certain species of wildlife are important potential nutritional sources for humans. Marine fishes, for example, are a very valuable source of protein, with various ocean fishes providing 14% of the world's protein.<sup>8</sup> For these reasons, among others, it is vital that human beings try to ensure the survival of wildlife.

International cooperation is essential to the protection of wild fauna

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<sup>5</sup> *Conservationists Worldwide are Determined to Save the Elephant*, N.Y. Times, June 26, 1989, at A18, col. 4.

<sup>6</sup> S. FITZGERALD, *supra* note 1, at 5.

<sup>7</sup> *Id.* See also Smith, *The Endangered Species Act and Biological Conservation*, 57 S. CAL. L. REV. 361 (1984) [hereinafter Smith].

<sup>8</sup> Smith, *supra* note 7, at 374-75. See also P. EHRLICH & A. EHRLICH, *EXTINCTION: THE CAUSES AND CONSEQUENCES OF THE DISAPPEARANCE OF SPECIES* 67 (1981); R. PRESCOTT-ALLEN & C. PRESCOTT-ALLEN, *WHAT'S WILDLIFE WORTH?* (1982).

and flora from over-exploitation resulting from international trade. The Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") is one mechanism for controlling the trade that is partially responsible for the endangerment of various plants and animals worldwide.<sup>9</sup>

Most recently, CITES was employed to put a stop to the killing of African elephants, which were estimated to become extinct by the year 2000 if no action were taken to manage the ivory trade. In June of 1989, the United States declared a complete ban on ivory imports in order to help ensure the survival of the elephant. Subsequently, the European Community and Japan, the other major consumers of ivory, halted imports as well.<sup>10</sup> By the October 1989 meeting of the CITES members in Switzerland, most of the parties to the treaty had agreed to a complete global ban on trade in ivory. This ban became effective on January 18, 1990.<sup>11</sup>

As for the United States, the potential effectiveness of CITES has not yet been fully realized for three main reasons.<sup>12</sup> First, there are deficiencies in the language of the CITES and its statutory correlate,<sup>13</sup> the Endangered Species Act ("ESA").<sup>14</sup> Second, the administrative bodies that implement the treaty in the United States have been reluctant to strictly enforce the Convention.<sup>15</sup> Third, the courts have improperly lim-

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<sup>9</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, *opened for signature* Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249 [hereinafter CITES].

<sup>10</sup> *U.S., the E.C., and Japan Halt Ivory Imports*, Focus-World Wildlife Fund Newsletter, Summer 1989, at 1 (Vol. 11, No. 4).

<sup>11</sup> *CITES Bans All Trade in Elephant Ivory*, Focus-World Wildlife Fund Newsletter, Special Report 1990, at 1 (Vol. 12, No. 1); *Global Trade in Ivory is Banned to Protect the African Elephant*, N.Y. Times, Oct. 17, 1989, at A1, col. 2. As anticipated, China and five ivory-exporting countries—Botswana, Malawi, South Africa, Zambia, and Zimbabwe, took exception to the ban. Unfortunately, and quite unexpectedly, the United Kingdom decided that pursuant to the CITES reservation clause, it would reserve the right to continue the ivory trade in Hong Kong for six months. Permitting Hong Kong to trade 670 tons of its stockpiled ivory could give rise to a great deal of ivory smuggling. *Ivory Trade Continues in Hong Kong*, Focus-World Wildlife Fund Newsletter, Spring 1990, at 1 (Vol. 12, No. 2).

<sup>12</sup> The United States may legitimately claim to have one of the most sophisticated CITES enforcement programs of all the signatories to the treaty. However, even the United States has much room to improve in its implementation of the Convention. For discussion of CITES enforcement in Europe, Latin America, and Asia, see Thomsen and Brautigam, *CITES in the European Economic Community: Who Benefits?*, 5 B.U. INT'L L.J. 269 (1987); Fitzgerald, Fuller & Hemley, *Wildlife Trade Law Implementation in Developing Countries: The Experience of Latin America*, 5 B.U. INT'L L.J. 289 (1987); McFadden, *Asian Compliance with CITES: Problems and Prospects*, 5 B.U. INT'L L.J. 311 (1987).

<sup>13</sup> See *infra* text accompanying notes 61-78. The Convention requires that the member nations promulgate laws to enforce the treaty since CITES is not self-effectuating.

<sup>14</sup> 16 U.S.C. §§ 1531-1543 (1982) [hereinafter ESA].

<sup>15</sup> See *infra* text accompanying notes 82-106. The ESA designates the Secretary of the Interior

ited their own power to review agency determinations involving the Convention.<sup>16</sup> Since administrative action enforcing CITES has been ineffective, it is both possible and desirable for the judiciary to play a larger role in enforcing the Convention.

Section II of this Comment provides a factual background on international trade in endangered species. Section III sets forth the statutory framework of CITES, describes the pertinent sections of the ESA, and explains the deficiencies in CITES and the ESA which hinder law enforcement. The last section of this Comment, which is divided into three parts, evaluates the United States' efforts to execute the Convention. The first part assesses the effectiveness of administrative action by analyzing prior administrative hearings and appeals involving the Convention. The second part discusses the availability and scope of judicial review of administrative actions under the ESA. The third part briefly examines cases involving the forfeiture provisions of the ESA, which seem to reflect rigid enforcement of the treaty. An overall consideration of the cases involving CITES implementation, however, leads to the conclusion that administrative enforcement should be more rigorous. As long as it is not, the judiciary should assume a more active role in ensuring that the United States achieves the objectives of the Convention.<sup>17</sup>

## II. INTERNATIONAL TRADE IN ENDANGERED SPECIES AND ATTEMPTS AT PROTECTION

Wildlife usually is exported from Africa, Asia, and Latin America, and is imported into North America, Europe, and Japan.<sup>18</sup> The group of purchasers of wildlife is quite diverse and includes zoos, art dealers, private collectors, museum directors, and researchers.<sup>19</sup> Trade in wildlife has become a very lucrative business.<sup>20</sup> Thousands of species of wild

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as the authority responsible for implementing the Convention. The United States Fish and Wildlife Service is the administrative agency that executes the functions of the Secretary of the Interior.

<sup>16</sup> See *infra* text accompanying notes 118-150. Even though the courts have great latitude in reviewing administrative enforcement of CITES, the judiciary has generally veered away from conducting such review.

<sup>17</sup> If courts are careful not to let inadequately supported agency decisions stand, judicial review may serve as an effective system of checks and balances to ensure strict compliance with CITES.

<sup>18</sup> Comment, *Regulation of International Trade in Wildlife*, 1 B.U. INT'L L.J. 249, 250-251 (1982) [hereinafter *Regulation of International Trade*]. Southeast Asia is one of the world's major wildlife-exporting regions. Singapore, Hong Kong, Indonesia, and Thailand are all notorious for their illegal activity in wildlife trade. Letter from Russell E. Train, Chairman of the Board, World Wildlife Fund, Washington, D.C. (Dec. 1988) [hereinafter *Train Letter*].

<sup>19</sup> *Regulation of International Trade*, *supra* note 18, at 250-251.

<sup>20</sup> T. INSKIPP & S. WELLS, *INTERNATIONAL TRADE IN WILDLIFE*, 27-28 (1979). The path to extinction begins when poachers kill animals that are highly sought after on the black market. Dealers are willing to pay high prices for such animals since they can be resold for much more on the

fauna and flora are entangled in international trade, with the total volume amounting to a declared value of over \$5 billion annually.<sup>21</sup> The United States is the largest trader of wildlife, accounting for an estimated one-fifth of this reported world market.<sup>22</sup> The value of illegal trade in wildlife is more difficult to assess, but in the late 1970s it was estimated to be between \$50 and \$100 million, or even more, annually.<sup>23</sup>

Efforts to extend protection to wildlife in commerce began in the early 1900s when Congress passed the Lacey Act.<sup>24</sup> The amended version of the Act provides that "it is unlawful for any person . . . to import,

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illegal trade market. The profits are extraordinarily high for poachers and dealers in this billion-dollar-a-year business. Train Letter, *supra* note 18.

<sup>21</sup> 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, 328-329 (1987) (citing World Wildlife Fund, Factsheet: World Trade in Wildlife (Dec. 1986)) [hereinafter Kosloff & Trexler].

<sup>22</sup> *New Lab Takes Aim at Illegal Animal Trade*, L.A. Times, July 30, 1989, § 1, at 1, col. 2. The Trade Records Analysis of Fauna and Flora in International Commerce ("TRAFFIC"), a program of the World Wildlife Fund, monitors international trade in wild plants and animals. TRAFFIC revealed that in one year 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 700,000 live birds, almost 11 million animal and reptile skins, over 700,000 mounted or stuffed animals, and approximately \$8 million worth of ivory articles. *Regulation of International Trade*, *supra* note 18, at 251-252 (citing telephone interview with David Mack, Assistant Director, TRAFFIC).

TRAFFIC is a major leader of the effort to terminate illegal trade in endangered wildlife. One recent well-publicized goal of the organization is to protect the bright plumed parrots that inhabit the South American rain forests, such as the endangered Spix's Macaws. The United States receives 30,000-50,000 birds annually, a significant number of which are endangered species. *TRAFFIC (South America) Makes a Difference*, Focus-World Wildlife Fund Newsletter, Sept./Oct. 1988, at 2 (Vol. 10, No. 4).

The World Wildlife Fund ("WWF") has also helped to save endangered species by signing major debt-for-nature swaps with countries that traditionally export endangered wildlife. In addition to supporting successful debt for nature deals in Ecuador, the Philippines, and Costa Rica, its latest swap was with Madagascar. The proceeds from a \$3 billion debt-for-nature agreement will be used over a three-year period to benefit Madagascar's varied wildlife, which includes 45 lemur species, 150 endemic frog species, and large rain forests. *WWF and Madagascar Swap Debt for Nature*, Focus-World Wildlife Fund Newsletter, Fall 1989, at 1 (Vol. 11, No. 5).

The WWF signed Ecuador's largest debt-for-nature deal, agreeing to buy \$5.4 million of the country's outstanding commercial debt at highly discounted rates to assist in Ecuador's conservation efforts. Ecuador's habitats, ranging from the Galapagos Islands to the Amazon, support over 1,400 species of birds, about 20,000 species of plants, and South America's only native bear. *WWF Signs Ecuador's Largest Debt-For-Nature Agreement*, Focus-World Wildlife Fund Newsletter, May/June 1989, at 1 (Vol. 11, No. 3).

The WWF's swap with the Philippines was the first such deal in Asia. The Philippines has over 8,000 species of plants, 557 species of birds, and 165 species of mammals, many of which are threatened with extinction. The WWF will purchase up to \$2 million of the face amount of the Philippines' external debt to benefit the Philippines' efforts to prevent both trade in threatened or endangered wildlife and the destruction of their habitats. *WWF Signs Major Debt-for-Nature Deal with the Philippines*, Focus-World Wildlife Fund Newsletter, Sept./Oct. 1988, at 4 (Vol. 10, No. 4).

<sup>23</sup> Moorman, *To Amend the Law on Illegal Trade in Wildlife*, 93 L.A. DAILY J. 529 (1980).

<sup>24</sup> 16 U.S.C. § 3372 (1981).

export, transport, sell, receive, acquire or purchase in interstate or foreign commerce . . . any fish or wildlife taken, possessed, transported or sold in violation of any state or foreign law."<sup>25</sup> The primary shortcoming of this law is that its usefulness hinges upon the existence of satisfactory state and foreign laws.<sup>26</sup> Another problem with the Act is that it does not take into account the fact that wildlife trade tends to involve uncommon species. Thus, even after the Lacey Act, wildlife trade has placed numerous species of plants and animals in danger of extinction.<sup>27</sup>

In 1967, the Eighth General Assembly of the International Union for Conservation of Nature and Natural Resources ("IUCN") resolved to draft a treaty to combat the problem of decreasing biological diversity through regulation of international trade.<sup>28</sup> In March 1973, the IUCN document formed the basis for CITES, which entered into force in July 1975. Currently, 102 countries are parties to this agreement.<sup>29</sup>

### III. THE CONVENTION AND ITS IMPLEMENTING LEGISLATION

#### A. The Framework of CITES

CITES creates a system of permit requirements designed to obstruct international trade in endangered species.<sup>30</sup> The drafters of the Convention chose to protect over 1,500 species of fauna and flora, and the signatories have listed more protected species by amendment since the drafting.<sup>31</sup> The most important qualification of the treaty was its ac-

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<sup>25</sup> 16 U.S.C. § 3372(a)(2)(A) (1981). The Lacey Act Amendments thus restrict trade in wildlife only if a state or foreign law prohibits such trade. The legislative history of the Lacey Act amendments makes clear that the Act applies to fish or wildlife introduced to or removed from any state or foreign country in violation of its laws. 1981 U.S. CODE CONG. & ADMIN. NEWS 1755.

<sup>26</sup> Palmer, *Endangered Species Protection: A History of Congressional Action*, 4 ENVTL. AFF. 255, 264 (1975) [hereinafter Palmer].

<sup>27</sup> According to the U.S. Department of the Interior, approximately 300 species are in danger of extinction every decade. H.R. REP. NO. 167, 96th Cong., 2d Sess. 3 (1979).

<sup>28</sup> Comment, *Enforcement Problems in the Endangered Species Convention: Reservations Regarding the Reservation Clauses*, 14 CORNELL INT'L L.J. 429, 430 (1981). CITES deals solely with wildlife that crosses national borders and does not address the need to protect the species' habitats. Habitat destruction is perhaps the most serious danger to wildlife species.

<sup>29</sup> *CITES Bans All Trade in Elephant Ivory*, Focus-World Wildlife Fund Newsletter, Special Report 1990, at 1 (Vol. 12, No. 1).

<sup>30</sup> CITES, *supra* note 9; S. EXEC. REP. NO. 14, 93d Cong., 1st Sess. (1973); Kosloff & Trexler, *supra* note 21, at 330.

<sup>31</sup> Secretariat of the Convention [on International Trade in Endangered Species], Proceedings of the Third Meeting of the Conference of the Parties, Doc. 3.31 (New Delhi, India, Feb. 25 - Mar. 8, 1981). Article XI of CITES provides that the parties should convene at least once every two years, unless they decide otherwise. At the conferences, the signatories are required to review the implementation of the Convention. The members may consider reports made by any party, review the progress made toward preserving listed species, and make recommendations for ameliorating the Convention's effectiveness, such as by listing more species.

knowledge of the differing degrees of vulnerability of various species to endangerment.<sup>32</sup> Each species is listed under one of three "appendices" depending on its vulnerability to extinction.<sup>33</sup> The restrictions on trade consequently differ for each appendix.<sup>34</sup>

Appendix I species are those "threatened with extinction which are or may be affected by trade."<sup>35</sup> International trade in specimens of these species is subject to especially strict regulation.<sup>36</sup> Appendix II lists all wildlife whose survival may be endangered unless trade is subject to strict regulation.<sup>37</sup> Appendix III contains species that have been identified by any member country as subject to protective regulation within its jurisdiction for the purpose of preventing exploitation.<sup>38</sup> Although the conditions for trade set forth for Appendices II and III species are less stringent than those for Appendix I species, these species are still subject to rigid control.<sup>39</sup>

For all three categories, the export, import, and re-export of any specimen of a listed species requires the prior grant and presentation of a permit or a certificate of origin.<sup>40</sup> The conditions are most rigorous for the export of specimens of species listed in Appendix I. In order to export Appendix I species, a Scientific Authority of the exporting state must determine that the export will not be detrimental to the survival of the species, and a Management Authority of the same state must find that the specimen was not acquired in violation of the laws of that state.

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<sup>32</sup> M. Bean, *The Evolution of National Wildlife Law* 325 (1983).

<sup>33</sup> CITES, *supra* note 9, art. II.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* Appendix I species face extinction and their survival is, or may be, further jeopardized by the international wildlife trade.

<sup>36</sup> For the purposes of the treaty, "trade" means export, import, re-export, or introduction from the sea. Re-export of a species means that the species has previously been imported. *Id.*, art. I. For example, if otter skins are exported from Alaska to Canada, and subsequently exported from Canada to the United States or any other country, the export from Canada is a "re-export" since the skins had previously been imported to Canada. *U.S. Fish & Wildlife Service v. Kingery*, 4 O.R.W. 239 (1985) (Ocean Resources & Wildlife Reports). "Introduction from the sea" refers to the transportation of species or specimens of species (live or dead plants or animals) which were taken in the marine environment and not under the jurisdiction of any state. CITES, *supra*, note 9, art. I.

<sup>37</sup> CITES, *supra* note 9, art. II. Appendix II species presently do not face extinction, but the exploitation likely to result from flexible trade regulations would probably place them in danger of extinction.

<sup>38</sup> *Id.* Appendix III species are protected by at least one of the Convention's signatories. The long-term survival of these species, however, is not ensured by a single member's protective regulations. These species also need all the members to cooperate to restrict their exploitation.

<sup>39</sup> *Id.*, arts. III, IV, & V. See *infra* text accompanying notes 40-46.

<sup>40</sup> A certificate of origin, granted by a Management Authority, states the country from which the wildlife was originally exported. Each certificate contains the title of the Convention, the name and stamp of the Management Authority issuing it, and a control number assigned by that authority. CITES, *supra* note 9, art. VI.



Additionally, any living specimen must be transported in a manner minimizing the possible risk of injury to the specimen. Finally, there must be evidence that an import permit has been issued for the specimen.<sup>41</sup> The requirements for an Appendix II export permit are similar to those for an Appendix I permit, except that the Convention does not require an import permit for the acquisition of an export permit.<sup>42</sup>

The import of an Appendix I species requires the prior grant of an import permit and either an export or re-export certificate. An importing state must reach three findings before issuing an import permit to the trader: (1) a Scientific Authority of the importing state must determine that the import will not be detrimental to the survival of the species; (2) the Scientific Authority must also conclude that the recipient is adequately equipped to care for the specimen; and, most importantly, (3) a Management Authority of the importing state must be satisfied that the specimen is not to be used primarily for commercial purposes.<sup>43</sup> In order to import an Appendix II species, the Convention only requires the prior grant of an export or re-export certificate.<sup>44</sup>

Regulations involving the re-export of Appendix I species require that a Management Authority of the state of re-export finds that the specimen was imported into that state in compliance with CITES, that any living specimen will be shipped in a manner minimizing the risk of injury to the living specimen, and that an import permit be issued.<sup>45</sup> Re-export of species listed in Appendix II has the same requirements as Ap-

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<sup>41</sup> *Id.*, art. III; *United States v. 3,210 Crusted Sides of Caimun Crocodilus Yacare*, 636 F. Supp. 1281, 1296 (S.D. Fla. 1986) (if hides were Appendix I species, their export would require a "no-detriment" finding, minimal injury during transport, and grant of an import permit).

<sup>42</sup> CITES, *supra* note 9, art. IV; *Defenders of Wildlife v. Endangered Species Scientific Authority*, 725 F.2d 726, 728 (D.C. Cir. 1984) (without a valid "no detriment" finding, bobcats, an Appendix II species, may not be exported legally); *United States v. 2,507 Live Canary Winged Parakeets*, 689 F. Supp. 1106, 1114 (S.D. Fla. 1988) (export of Appendix II birds from Peru required that the Management Authority in Peru be satisfied that the birds were not obtained in contravention of Peruvian law). In order to obtain an export permit for an Appendix III species, a Management Authority of the state of export must be satisfied that the specimen was obtained in compliance with the laws of the state and that any living specimen will be handled in a humane manner. CITES, *supra* note 9, art. V.

<sup>43</sup> CITES, *supra* note 9, art. III; *World Wildlife Fund v. Hodel*, WL 66193 (D.D.C. 1988) (import of Appendix I giant pandas must not be for primarily commercial purposes).

<sup>44</sup> CITES, *supra* note 9, art. IV; *U.S. Fish & Wildlife Service v. Kingery*, 4 O.R.W. 239 (1985) (trader is liable for import of Appendix II river otter skins from Canada without valid re-export permit from Canada); *Rittenberry v. U.S. Fish & Wildlife Service*, 2 O.R.W. 2089 (1980) (it is unlawful to import into the United States Appendix II polar bear skins unless a valid foreign export permit or valid foreign re-export certificate was obtained prior to such importation). The import of Appendix III species requires a certificate of origin, and if the state of origin has included the species in Appendix III, an export permit is also necessary. CITES, *supra* note 9, art. V.

<sup>45</sup> CITES, *supra* note 9, art. III.

pendix I species with the exception that no import permit is necessary.<sup>46</sup>

### B. The Endangered Species Act of 1973

In 1973, in response to CITES, Congress enacted the ESA, which places restrictions on the importation and exportation of endangered wildlife and its products.<sup>47</sup> Compared to prior federal legislation relating to endangered species conservation, the ESA substantially broadened the scope of protection for endangered wildlife. For example, the ESA strengthened civil and criminal penalties for offenders.<sup>48</sup> In addition, the Act accorded protection to plants for the first time.<sup>49</sup>

The ESA designates the Secretary of the Interior as the Management Authority and the Scientific Authority responsible for the Convention's implementation.<sup>50</sup> The primary responsibility of the Management Authority is to grant and authenticate permits for wildlife trade on behalf of the United States in compliance with the articles in the Convention.<sup>51</sup> The Scientific Authority is responsible for investigating wildlife shipments and making the technical determinations necessary to ensure compliance with the Convention.<sup>52</sup> The Scientific Authority's obligations include overseeing applications for the import and export of listed species, evaluating the status of wildlife by trade, and making determinations regarding the adequacy of the housing and care of protected species.<sup>53</sup>

The ESA also states that the respective functions of each authority

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<sup>46</sup> *Id.*, art. IV. Re-export of Appendix III species mandates that a Management Authority of the state of re-export issue a re-export certificate as proof to the state of import of compliance with the Convention. *Id.*, art. V.

<sup>47</sup> ESA, *supra* note 14, § 1538. According to CITES, art. VIII, the Convention's signatories must promulgate laws to enforce the treaty provisions. The ESA is more broadly defined than CITES since the treaty is limited by its terms to international trade. The legislation implementing CITES comprises only a small portion of the ESA (*i.e.*, 16 U.S.C. §§ 1531(4)(F), 1532(4), 1537(a) and 1538(c)). The stated purposes of the ESA are to conserve ecosystems, provide a program to conserve threatened or endangered species, and to achieve the purposes of treaties, including CITES.

<sup>48</sup> Under the Endangered Species Conservation Act, 16 U.S.C. § 688 (1969), *repealed by* the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543, the maximum monetary criminal penalty that could be imposed was \$10,000, and civil liability ran up to \$5,000. The ESA doubled these figures, so that criminal penalties now run up to \$20,000, and the maximum civil liability is \$10,000. ESA, *supra* note 14, §§ 1540(a)-(b); Coggins, *Federal Wildlife Law Achieves Adolescence: Developments in the 1970s*, 1978 DUKE L.J. 753, 805.

<sup>49</sup> ESA, *supra* note 14, § 1531.

<sup>50</sup> *Id.* § 1537a(a).

<sup>51</sup> CITES, *supra* note 9, art. IX; Coggins & Harris, *The Greening of American Law?: The Recent Evolution of Federal Law for Preserving Floral Diversity*, 27 NAT. RESOURCES J. 246, 275 (1987) (citing 10 ENDANGERED SPECIES TECH. BULL. 11 (Jan. 1985)) [hereinafter Coggins & Harris].

<sup>52</sup> CITES, *supra* note 9, arts. III, IV.

<sup>53</sup> Coggins & Harris, *supra* note 51, at 276.

are to be executed by the U.S. Fish and Wildlife Service ("FWS").<sup>54</sup> Both the FWS and the National Marine Fisheries Service are responsible for administering the ESA,<sup>55</sup> but the FWS is the agency responsible for the Convention's implementation.<sup>56</sup> The two arms of the FWS are the Wildlife Permit Office ("WPO") and the Office of the Scientific Authority ("OSA"). The WPO acts as the CITES Management Authority, while the OSA acts as the Scientific Authority.

When the WPO and the OSA conclude that an importer or exporter subject to the jurisdiction of the United States has violated the Convention, the FWS usually institutes a penalty proceeding against that person. These proceedings take place in the Interior Department's Office of Hearings and Appeals. An administrative law judge ("ALJ") presides at these hearings and acts as an impartial examiner.<sup>57</sup> The ALJ essentially plays the role of a trial judge in the administrative adjudication process.<sup>58</sup> The decisions of the ALJs in assessing penalties constitute final administrative action on a particular matter, but a dissatisfied party may appeal the decision of the ALJ to the Appeals Board of the Interior Department.<sup>59</sup> The final agency decision is then subject to judicial review upon the demand of a party with standing.<sup>60</sup>

### C. Structural Problems in the ESA and CITES Which Hinder Law Enforcement

Despite the enactment of the ESA and CITES, illegal trade in wildlife persists. This problem is partly attributable to inefficient enforcement of the ESA. For instance, the extremely inadequate staffing of the FWS prevents the agency from conducting inspections on a vast number of undeclared shipments.<sup>61</sup> This deficiency may encourage illegal trade in wildlife.

A second problem is that ESA regulations permit customs officers to

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<sup>54</sup> ESA, *supra* note 14, § 1537a(a). The regulations promulgated under the ESA and CITES are at 50 C.F.R. §§ 14.1-14.204 (1988) and 50 C.F.R. §§ 23.1-23.257 (1988), respectively.

<sup>55</sup> 50 C.F.R. § 402.01(b) (1989).

<sup>56</sup> ESA, *supra* note 14, § 1537a(a).

<sup>57</sup> W. GELLHORN, C. BYSE, P. STRAUSS, T. RAKOFF, & R. SCHOTLAND, *ADMINISTRATIVE LAW, CASES AND COMMENTS* 862 (1987).

<sup>58</sup> The ALJ is entirely a creation of the Administrative Procedure Act, 5 U.S.C. § 556 (1976). Pursuant to this Act, the ALJ may administer oaths, rule on offers of proof, take testimony, and make or recommend decisions.

<sup>59</sup> *Rittenberry v. U.S. Fish & Wildlife Service*, 2 O.R.W. 2089 (1980). The Appeals Board is composed of ALJs as well.

<sup>60</sup> *Association of Data Processing Services Organization v. Camp*, 397 U.S. 150 (1970).

<sup>61</sup> *Regulation of International Trade*, *supra* note 18, at 269. Approximately 85,000 shipments of wildlife and wildlife products enter the United States annually, and there are only about 70 wildlife inspectors spread over nine ports of entry. Telephone interview with Tom Strigler, Agent, Law

clear wildlife shipments if an FWS agent<sup>62</sup> does not appear "within a reasonable time."<sup>63</sup> The term "reasonable time" has not been defined by the courts, leaving customs agents with much discretion to determine when a shipment may clear customs without investigation by an FWS agent.

An additional deficiency in the ESA regulations is that FWS agents and customs officers who are responsible for clearing wildlife are not *obligated* to refuse clearance of shipments, even if there are reasonable grounds to believe that CITES has been violated.<sup>64</sup> The regulations simply provide that the officers "may" (not "shall") refuse clearance if it is reasonable to conclude that the conditions of the Convention have not been satisfied.<sup>65</sup>

Moreover, a number of flexible exceptions to the Convention's requirements create defects in the statutory regime which impede the enforcement efforts of the FWS. For example, the ESA contains an "undue economic hardship" exemption which provides a serious loophole in the statute that dealers exploit.<sup>66</sup> This provision enables the FWS to exempt dealers from trade restrictions based on the private economic interests of the trader. Other ESA exemptions make interpretation and enforcement of the Convention even more perplexing. For instance, trade restrictions are not supposed to apply to wildlife transshipped within the United States.<sup>67</sup> In addition, specimens are not subject to the import and export requirements if they: (1) were acquired prior to the date the Convention applied to them;<sup>68</sup> (2) are for personal or household use;<sup>69</sup> (3) are bred in

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Enforcement Division, U.S. Fish & Wildlife Service, Washington, D.C. (Jan. 24, 1989) [hereinafter Strigler interview].

Nine customs ports of entry are designated for the importation or exportation of wildlife listed under CITES appendices: (1) Los Angeles, California; (2) San Francisco, California; (3) Miami, Florida; (4) Honolulu, Hawaii; (5) Chicago, Illinois; (6) New Orleans, Louisiana; (7) New York, New York; (8) Seattle, Washington; and ((9) Dallas/Fort Worth, Texas. 50 C.F.R. § 14.12 (1988). Section 14.11 states that no person may import or export any wildlife at any place other than a designated customs port of entry listed in § 14.12. For exceptions to this requirement, see regulations on border ports and special ports. 50 C.F.R. §§ 14.16, 14.19 (1988). In addition, fourteen U.S. Department of Agriculture ports are designated for the importation, exportation, and re-exportation of plants. 50 C.F.R. § 24.12 (1988).

<sup>62</sup> FWS agents are trained in inspection of wildlife, while customs officials are not.

<sup>63</sup> 50 C.F.R. § 14.54 (1988).

<sup>64</sup> 50 C.F.R. § 14.53 (1988); *Regulation of International Trade*, *supra* note 18, at 271.

<sup>65</sup> 50 C.F.R. § 14.53 (1988). Instead of having discretion, service officers should be required to refuse clearance of all shipments until they are sure the shipment is legal. *Regulation of International Trade*, *supra* note 18, at 271.

<sup>66</sup> ESA, *supra* note 14, § 1539(b)(1).

<sup>67</sup> 50 C.F.R. § 23.13(b) (1988). To qualify, wildlife or plants must remain in customs custody.

<sup>68</sup> *Id.* § 23.13(c).

<sup>69</sup> *Id.* § 23.13(d).

captivity or are artificially propagated;<sup>70</sup> or (4) are noncommercial loans, donations, or exchanges between scientists or scientific institutions.<sup>71</sup>

The continued existence of rampant illegal trade in wildlife may also be partly attributable to inadequacies in the language of the Convention itself. Ambiguous and undefined phrases, such as "species threatened with extinction," "affected by trade," "primarily commercial purposes," and "detrimental to the survival of the species" pervade CITES.<sup>72</sup> Such language makes it difficult for the FWS to construe and apply the law. According to one source in the office of the Management Authority of the FWS, one of the most pressing problems in international wildlife trade is the failure of the member nations to jointly determine which Appendix II species are in fact "affected by trade" or "threatened with extinction."<sup>73</sup> The majority of wildlife trade involves Appendix II species.<sup>74</sup> Because the Convention's phrases are vague and the signatories have not yet convened to review the status of Appendix II species, it is highly probable that there are many endangered species involved in foreign commerce of which the parties are unaware.<sup>75</sup>

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<sup>70</sup> *Id.* § 23.13(f).

<sup>71</sup> *Id.* § 23.13(g).

<sup>72</sup> Favre, *Tension Points Within the Language of the CITES Treaty*, 5 B.U. INT'L L.J. 247, 252 (1987).

<sup>73</sup> Telephone interview with Dick Robinson, Wildlife Permit Office, U.S. Fish & Wildlife Service, Washington, D.C. (Jan. 24, 1989) [hereinafter Robinson interview].

<sup>74</sup> *Id.*

<sup>75</sup> The WPO proposes as a solution that the members meet and exchange their records of trade in the species listed in the three appendices. This will enable the signatories to accurately transfer Appendix II species to Appendix I if they identify the species as in danger of becoming extinct. *Id.*

Pursuant to CITES, *supra* note 9, art. VIII, signatories are expected to submit annual reports on their trade in CITES species. However, the World Trade Monitoring Unit in Cambridge, England has found that in the early 1980s, approximately 70% of legal shipments of plants and animals went unreported, and that the reporting which did take place was inaccurate. *Report on National Reports Under Article VIII, Paragraph 7 of the Convention*, Docs. 5, 17 in Proceedings of the Fifth Meeting of the Conference of the Parties (1987).

It is unlikely that exchanging incomplete records would help mitigate the harm confronting numerous Appendix II species. However, the United States made an advancement when the U.S. Fish & Wildlife Service reclassified African chimpanzees as an endangered species, granting them more protection under the Convention and the ESA. *U.S. Seeks to List African Chimpanzees as Endangered*, N.Y. Times, Mar. 7, 1989, at C4, col. 3. In addition, in October of 1989, the CITES members decided to upgrade the status of the African elephant to Appendix I in order to lessen the illegal trade in ivory. Letter from David Western, Director, Wildlife Conservation International Nairobi (Nov. 1989) (In the United States, Wildlife Conservation International is located in the Bronx, NY).

Another alternative would be to impose quotas on the import and export of certain species. The Convention currently does not have a quota system, but it may prove useful in preventing the loss of countless Appendix II species. Robinson interview, *supra* note 73. The United States, for example, presently has a quota on the import of leopard skins. It is likely that soon it will impose a second quota on trade in reptile skins, another commonly traded Appendix II species. *Id.*

From the perspective of the FWS Scientific Authority, the most serious difficulty arising from ambiguous language in the Convention is the problem of identifying unlawfully traded wildlife.<sup>76</sup> Article I defines specimens of protected species as including any "readily recognizable part or derivative of an animal listed on Appendix I or II. . . ." No guidelines are provided for determining whether a specimen is "readily recognizable as a protected species."<sup>77</sup>

Another defect in the language of the Convention is its reservation clauses, which permit any member nation to enter a reservation at the time a species is listed on an appendix, making the country a non-party to the agreement insofar as that species is concerned.<sup>78</sup> While reservation provisions may be valuable in international protocols to ensure that no country is coerced into taking specific action, these clauses in CITES are partly responsible for the continued commercial exploitation that threatens endangered wildlife. In sum, the numerous structural deficiencies in the statutory framework of the Convention seem to inhibit strict CITES enforcement and do not paint a promising picture of administrative success in enforcing the Convention.

#### IV. ENFORCEMENT OF CITES

##### A. The Effectiveness of Administrative Action

Under the amendments to the ESA, "any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife or plants who violates any provision of this chapter . . . may be assessed a civil penalty. . . ."<sup>79</sup> The language of this provision suggests that importers and exporters of wildlife are strictly liable for violations of the ESA since they need not intentionally or "knowingly" violate the Act as other people must do in order to be fined.

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<sup>76</sup> Strigler interview, *supra* note 61.

<sup>77</sup> The OSA suggests that comprehensive coverage of the protected species, with photographs, be added to CITES to facilitate the identification process. *Id.*

Coggins and Harris, *supra* note 51, at 276, argue that identifying plant protected species is the most difficult aspect of implementing CITES. Like the OSA, they propose that identification manuals be added to the treaty to facilitate the inspectors' responsibilities. Coggins and Harris also argue that CITES enforcement for plants is very much complicated by the distinction in trade regulations for artificially propagated plants as opposed to field collected plants, since it is difficult to distinguish them. Because the former are exempt from CITES regulations, it is likely that dealers will intentionally mislabel field collected specimens as artificially propagated plants. *Id.* at 276-77.

<sup>78</sup> CITES, *supra* note 9, arts. XV(3), XVI(2), and XXIII. The United States, however, has not yet entered a single reservation. Robinson interview, *supra* note 73. For a detailed discussion of difficulties arising from the reservation provision, see *Enforcement Problems in the Endangered Species Convention: Reservations Regarding the Reservation Clauses*, 14 CORNELL INT'L L.J. 429 (1981).

<sup>79</sup> ESA, *supra* note 14, § 1540(a)(1).

The legislative history of the ESA confirms this interpretation. In 1973, the ESA stated that "any person who *knowingly* violates, or who *knowingly* commits an act in the course of commercial activity which violates any provision of this chapter . . . may be assessed a civil penalty. . . ."<sup>80</sup> The later removal of the word "knowingly" in the description of the penalties imposable on commercial operators elucidates that Congress intended to hold importers and exporters strictly liable under the Act.<sup>81</sup> Given the penalty provision of the ESA, it seems as though the United States has the requisite legislation to enforce the Convention rigorously and to deter offenders. An examination of the administrative process, however, reflects administrative reluctance to strictly enforce CITES and the ESA.

### 1. *The ALJ*

On the whole, the decisions of the ALJs in the U.S. Department of the Interior's Office of Hearings and Appeals are unduly lenient toward offenders.<sup>82</sup> The orders by the ALJs inappropriately excuse offenders, for they fail to impose significant penalties, when they impose penalties at all, on violators of the Convention and the ESA, even under the strict liability provisions of the ESA.<sup>83</sup>

For example, in *Rittenberry v. U.S. Fish & Wildlife Service*,<sup>84</sup> a tourist imported a polar bear skin rug and a gray wolf skin rug (both Appendix II species) from Canada to the United States without the requisite export permits. The ALJ imposed a \$200 penalty, and the respondent appealed. The salient section of the ESA applied a strict liability standard to the violation since Congress did not intend to make knowledge of the law a prerequisite to imposition of a civil penalty.<sup>85</sup> Nonetheless, the Appeals Board focused exclusively on the intent of the importer in reaching its order, which imposed only a \$2 penalty, \$1 for each violation of the ESA.<sup>86</sup> The Board's decision ignored critical factors, such as the seri-

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<sup>80</sup> *Id.* § 1540(a)(1) (amended 1978).

<sup>81</sup> The legislative history states as follows:

The amendment reduces the strict liability penalty for others than importers and exporters to \$500 . . . and subjects importers and exporters of fish and wildlife and plants to strict liability penalties of up to \$10,000. . . .

*Newell v. Baldrige*, 548 F. Supp. 39, 43 (W.D. Wa. 1982) (quoting H.R. REP. NO. 95-1804, 95th Cong., 2d Sess. 26 (1978), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 9453, 9493. A civil penalty may be imposed for an act which violates the ESA of 1973 without a showing of intent to violate the law. *U.S. Fish & Wildlife Service v. Swyke*, 3 O.R.W. 522 (1984).

<sup>82</sup> See *infra* text accompanying notes 84-95.

<sup>83</sup> *Id.*

<sup>84</sup> *Rittenberry v. U.S. Fish & Wildlife Service*, 2 O.R.W. 2089 (1980).

<sup>85</sup> See *supra* text accompanying notes 79-81.

<sup>86</sup> *Rittenberry*, 2 O.R.W. 2089.

ousness of the offense, the ensuing harm to wildlife resources, the possible deterrent effect upon other violators, as well as the implementation of congressional intent in promulgation of the statute.<sup>87</sup>

The ALJ decisions revolve around the offender's intentions when violating the law, even when the violation is a blatant mistake of which the offender should have been aware. In *U.S. Fish & Wildlife Service v. Kingery*,<sup>88</sup> a fur dealer imported 39 river otter skins (Appendix II species) into the United States from Canada. The trader failed to obtain a valid re-export certificate from the country of re-export prior to the importation.<sup>89</sup> Unlike the tourist in *Rittenberry*, the respondent in *Kingery* was a professional trader who should have been attentive to the CITES permit requirements.

The ESA provides that any violation of the Convention is punishable by a maximum civil penalty of \$500 on a strict liability basis.<sup>90</sup> Ignoring the strict liability standard, the ALJ assessed a nominal \$1 penalty, reasoning that the importer's reliance on other people to obtain proper documentation suggested that the trader did not intentionally evade the CITES regulations, and since the purpose of a civil penalty is deterrence, there was no need to impose a fine.<sup>91</sup> This decision is fraught with problems. First, the ALJ's determination hinged on the dealer's intent when violating the Act, even though as an importer, the dealer should have been strictly liable for breaking the law. In addition, the ALJ's conclusion that the importer was an "innocent offender" is perturbing, for unlike a tourist, a professional trader should have taken steps to obtain essential permits.

Where the law has been violated intentionally, the Department of the Interior has still been reluctant to impose the maximum penalty. For example, in *U.S. Fish & Wildlife Service v. Sissoko*,<sup>92</sup> an importer of African objects imported wildlife items that he knew were on the threatened or endangered species list (Appendix II elephant ivory and teeth, and an Appendix I primate skull) without adequate documentation. The proposed assessment of \$2,500 was reduced to a mere \$200, despite the fact that the ESA allows maximum fines of \$10,000 for unlawful trade in endangered species and \$500 for illegal trade in threatened species. Although intent is irrelevant for commercial importers or exporters under the applicable strict liability provisions of the ESA, the ALJ deci-

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<sup>87</sup> *Id.*

<sup>88</sup> *U.S. Fish & Wildlife Service v. Kingery*, 4 O.R.W. 239 (1985).

<sup>89</sup> *Id.* See *supra* text accompanying notes 43-44 on the import of Appendix II species.

<sup>90</sup> ESA, *supra* note 14, § 1540(a)(1); see *supra* text accompanying notes 79-81.

<sup>91</sup> *Kingery*, 4 O.R.W. 239.

<sup>92</sup> *U.S. Fish & Wildlife Service v. Sissoko*, 2 O.R.W. 507 (1981).



sions show that the existence of good faith is an important mitigating circumstance in determining the severity of the penalty imposed. Even taking this into account, it is unclear how the ALJ in *Sissoko* could have reduced the penalty to \$200 when the importer was not an innocent bystander.

More disturbing than the lenience displayed in violations involving CITES Appendix II species is the lenience exhibited in offenses involving Appendix I species, which should be subject to the strictest regulations under the Convention. In *U.S. Fish & Wildlife Service v. Starr*,<sup>93</sup> the respondent imported 20 green sea turtles (Appendix I species) from the Philippines to the United States. The importer did not possess the import permit required by the Convention. Under the ESA, this offense is punishable by up to \$10,000 on a strict liability basis.<sup>94</sup> Moreover, the box holding the turtles was labeled "pantherfish," an unlisted species, suggesting that the importer attempted to circumvent the laws. The ALJ, however, held that since no definitive evidence established that the importer intended to violate the ESA, the appropriate fine was \$50. Once again, the civil penalty imposed was negligible, although the species involved was endangered, and the mislabeling was not demonstrated to be an innocent error.<sup>95</sup>

## 2. *The FWS*

Under the ESA and CITES, the FWS is empowered to fine offenders of the Convention in civil penalty proceedings. To date, however, the FWS has not fully exercised this authority.<sup>96</sup> The Secretary of the Interior, acting through the FWS, may impose civil penalties of up to \$10,000 on persons who intentionally violate the Convention, and for importers and exporters who violate the Convention, the Secretary may impose such penalties whether the violations were knowing or not.<sup>97</sup> Nevertheless, the FWS seldom seeks to assess a penalty harsh enough to comport with the severity of the offense committed. It appears that the agency, like the ALJs, inappropriately allows the good faith element to

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<sup>93</sup> *U.S. Fish & Wildlife Service v. Starr*, 2 O.R.W. 1 (1979).

<sup>94</sup> ESA, *supra* note 14, § 1540(a)(1); see *supra* text accompanying notes 79-81.

<sup>95</sup> *Starr*, 2 O.R.W. 507. Rather than considering the frame of mind of the offender in assessing the penalties, it may be more appropriate to consider the harm likely to result from removing the species from their habitats. See also *U.S. Fish & Wildlife Service v. Cherry*, 3 O.R.W. 320 (1983) (no penalty imposed on importer of Appendix I rhinoceros trophies because of good faith effort to procure necessary permits).

<sup>96</sup> It may be problematic to separate the ALJs from the agency implementing the treaty because the ALJs are often under subtle pressures to encourage rulings that do not displease agency officials. *Are Judge and Agency Too Close for Justice?*, N.Y. Times, Feb. 5, 1989, sec. 4, at 2, col. 4.

<sup>97</sup> ESA, *supra* note 14, § 3540(a)(1).

water down penalties. The ALJ rarely imposes higher sanctions than those sought by the FWS, and often chooses to reduce the penalty assessment.<sup>98</sup> If the FWS were to seek higher fines in complaints against the Convention's violators, there would be a better chance that the offenders would be more strictly penalized by the ALJs.<sup>99</sup>

In Appendix I cases, the FWS has repeatedly imposed small penalties on importers and exporters. For example, in *U.S. Fish & Wildlife Service v. Cherry*, the FWS sought only a \$500 fine for the importation of rhinoceros trophies in contravention of CITES.<sup>100</sup> In *Starr*, a mere \$50 penalty was imposed for the importation of endangered green sea turtles without valid permits.<sup>101</sup> In *Sissoko*, the respondent's effort to import an endangered gorilla's skull clearly could have been penalized by up to a \$10,000 fine, especially since it was a willful violation of the law. The FWS imposed only \$1,500, however, which was reduced to an insignificant \$200 in the civil penalty proceedings.<sup>102</sup>

In one proceeding brought under the Lacey Act, the FWS did seek to assess the maximum penalty, and the proceeding ended in a strict penalty assessment, even after the ALJ decided the case.<sup>103</sup> The ALJ did not sustain the FWS' \$20,000 charge, but it ordered a \$10,000 penalty.<sup>104</sup> Although this case involved the Lacey Act, the same administrative bodies were involved as would be in CITES cases. If the FWS becomes more rigorous in its enforcement of CITES, perhaps it will improve the deterrent effect of the ESA in preventing violators from over-exploiting endangered or threatened species through international trade.

Minimal plant protection also points to the FWS' weak enforcement of CITES. Over 10 million CITES species plants enter the United States per year,<sup>105</sup> but the FWS' first enforcement action for wild flora occurred 11 years after the United States ratified the treaty.<sup>106</sup> It is likely that many of the millions of plants brought into this country prior to 1986 were transported contrary to the rules of the Convention; however, it

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<sup>98</sup> See *infra* text accompanying notes 100-102.

<sup>99</sup> See *infra* text accompanying notes 103-104.

<sup>100</sup> *Cherry*, 3 O.R.W. 320. This assessment was eventually vacated by the ALJ.

<sup>101</sup> *Starr*, 2 O.R.W. 1. The ALJ sustained the assessment which may well have been higher had the FWS made it so in the complaint.

<sup>102</sup> *Sissoko*, 2 O.R.W. 507.

<sup>103</sup> *U.S. Fish & Wildlife Service v. Jacobson*, 4 O.R.W. 754 (1986). The FWS is responsible for administering the Lacey Act.

<sup>104</sup> *Id.*

<sup>105</sup> Kosloff & Trexler, *supra* note 21, at 329.

<sup>106</sup> Nine people were charged with illegal importation of Appendix I cacti from Mexico. Memorandum from Faith T. Campbell to ESA Contacts (June 20, 1986) (available from Natural Resources Defense Council, Washington, D.C.); Coggins & Harris, *supra* note 51, at 276-77.

took the FWS over a decade to institute proceedings for the illegal trade of CITES species plants.

## B. Judicial Review

As long as administrative enforcement of CITES is weak, the role of the judiciary in reviewing administrative action remains a serious consideration. The courts may act as valuable checks on agency decisions, strengthening sanctions when appropriate, to ensure that the United States meets the goals of the Convention.

### 1. Availability of Review

According to the Administrative Procedure Act ("APA"),<sup>107</sup> the APA provisions for judicial review apply "except to the extent that: (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."<sup>108</sup> Thus, the APA does not have all or nothing consequences. Where statutory preclusion or agency discretion is partial, as is most often the case, the APA law on judicial review would also apply in part. Although the ESA contains a provision authorizing judicial review under only one subsection of the statute,<sup>109</sup> the ESA does not preclude review in any way.<sup>110</sup> Thus, only the extent of matters wholly within agency discretion is of concern in considering whether judicial review is available in CITES enforcement cases. It is common for the Secretary, acting through the FWS, to employ a discretionary standard in making relevant determinations.<sup>111</sup> It would be a rare occurrence, however, for the Secretary to have complete discretion in enforcing CITES.<sup>112</sup>

An example of this uncommon situation, where agency action was deemed by the Supreme Court to fall within the narrow area completely committed to agency discretion, is found in *Heckler v. Chaney*.<sup>113</sup> The question presented in *Heckler* was whether the Food and Drug Administration's ("FDA") decision not to enforce the approval requirements of the Food, Drug and Cosmetics Act was judicially reviewable. Analogiz-

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<sup>107</sup> The APA is the law governing practice and proceedings before administrative agencies.

<sup>108</sup> Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1976) [hereinafter APA].

<sup>109</sup> ESA, *supra* note 14, § 1536(n) permits judicial review of any administrative decision under ESA § 1536(h), which is entitled "grant of exemption." Only upon the submission of an application for exemption to the ESA requirements will there be an express authorization of judicial review.

<sup>110</sup> "Only upon clear and convincing evidence of contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967).

<sup>111</sup> *American Cetacean Soc'y v. Baldrige*, 768 F.2d 426 (D.C. Cir. 1985), *rev'd on other grounds sub. nom.*, *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221 (1986).

<sup>112</sup> See *infra* text accompanying notes 113-117.

<sup>113</sup> *Heckler v. Chaney*, 470 U.S. 821 (1985).

ing the case to one of prosecutorial discretion, the Court held that the FDA's decision on whether or not to enforce a statute was completely within its discretion, and thus was judicially unreviewable under the APA.<sup>114</sup>

The rule enunciated in *Heckler* does not limit the availability of judicial review in CITES enforcement cases unless the FWS has chosen to be "inactive" or not to enforce the ESA penalties. In cases of lenient agency decisions, however, *Heckler* would not restrict access to judicial review since the court would be reviewing a decision under a statute that the agency has already chosen to enforce.

Another situation where judicial review is unavailable because administrative action is completely committed to agency discretion is when there is "no law to apply."<sup>115</sup> The legislative history of the APA indicates that the exception is applicable in those unusual instances where statutes are drawn in such extremely broad terms that in a given case there is no standard to apply.<sup>116</sup>

In the ESA and CITES enforcement context, the language of the Convention and its statutory correlate is not so wide-ranging that it provides no guidelines or rules to apply in enforcement decisions. In *Citizens to Preserve Overton Park v. Volpe*,<sup>117</sup> the Supreme Court held that a statute prohibiting the Secretary of Transportation from approving any project requiring "use of any publicly owned land . . . unless *there is no feasible and prudent alternative*" was not too broad to provide standards to apply, despite the fact that the language granted the Secretary much discretion in determining what constituted "feasible" and "prudent" alternatives. Similarly, typical phrases in CITES and ESA provisions, such as "affected by trade" and "threatened with extinction," may be deemed ambiguous, but they nonetheless furnish a workable standard to apply. In sum, judicial review of administrative enforcement of CITES is usually available. It is only when the FWS fails to institute a proceeding that such "inaction" raises a presumption of nonreviewability.

## 2. "Arbitrary or Capricious" Standard

Although case law involving CITES and the ESA is not expansive, existing cases on the subject reflect a discernible tendency for courts to defer to lenient administrative decisions, even though judicial review is

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<sup>114</sup> *Id.*

<sup>115</sup> *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

<sup>116</sup> *Id.* at 410 (citing S. REP. NO. 752, 79th Cong., 1st Sess. 26 (1945)).

<sup>117</sup> *Id.* at 411.

available.<sup>118</sup> The ESA does not contain any provision defining or circumscribing the standard of review applicable under the statute.<sup>119</sup> However, cases from various jurisdictions establish that the appropriate standard of review under the ESA is the "arbitrary or capricious" standard.<sup>120</sup> Under this standard, a court "must consider whether the agency's decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."<sup>121</sup>

Although this standard seems relatively straightforward, it is susceptible to differing constructions. For example, both *Motor Vehicles Manufacturer's Association v. State Farm Mutual Automobile Insurance Co.*<sup>122</sup> and *Baltimore Gas & Electric Co. v. NRDC*<sup>123</sup> purport to employ the arbitrary or capricious standard; yet, both decisions do not accord the courts the same degree of freedom in reviewing agency determina-

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<sup>118</sup> See *supra* notes 79-95 and accompanying text for discussion establishing that administrative enforcement of the Convention in fact has been lax. See *infra* notes 128-146 and accompanying text for discussion of *WWF v. Hodel* and *Cayman Turtle Farm, Ltd. v. Andrus*, cases illustrating judicial deference to agencies.

One case where the court carefully reviewed the administrative record is *Defenders of Wildlife, Inc. v. Endangered Species Scientific Auth.*, 659 F.2d 168 (D.C. Cir. 1984). *Wildlife, Inc.*, an environmental organization, alleged that the Scientific Authority's guidelines were invalid since they allowed the agency to conclude that the exportation of bobcats would not be detrimental to the survival of the species without using dependable data. The reviewing court concluded that absent adequate information on total bobcat population and the number to be killed in any particular season, there was no valid basis on which to conclude that there was "no detriment." *Id.* at 177.

*Defenders of Wildlife* has been criticized on the ground that the court was inappropriately reviewing a technical agency decision. Note, *Defenders of Wildlife v. Endangered Species Scientific Authority: The Court as Biologist*, 12 ENV. LAW 773 (1982). Agreeing with this view, Congress amended the ESA in 1982 to provide that the Secretary of the Interior is not required to make estimations on population size to reach a no-detriment determination.

<sup>119</sup> The "substantial evidence" standard is most frequently used. Section 706(2)(e) of the APA provides that the reviewing court shall set aside all agency determinations that it finds to be unsupported by substantial evidence on the whole record. "Substantial evidence" refers to relevant evidence that reasonably leads to a certain conclusion. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 223 (1938). The "whole record" means that the court must look at both sides of the record. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

<sup>120</sup> *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982); *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980); *Sierra Club v. Froehke*, 534 F.2d 1289 (8th Cir. 1976); *National Wildlife Fed'n v. Coleman*, 529 F.2d 359 (5th Cir. 1976); *Roosevelt Campobello Int'l Park Comm'n v. U.S. E.P.A.*, 684 F.2d 1041 (1st Cir. 1982).

Although the substantial evidence test is traditionally viewed as the more rigorous test, the decision in *Camp v. Pitts*, 411 U.S. 138, 141-142 (1973) indicates that the difference lies in whether the agency's conclusions are made on the record. If so, the determinations must be supported by substantial evidence. Thus, the distinction between the two is merely procedural. As Justice Scalia noted in *ADAPSO v. Board of Governors of the Federal Reserve System*, 745 F.2d 677, 683-84 (D.C. Cir. 1984), the substantial evidence standard does not connote a substantive standard of review any different from the arbitrary and capricious standard.

<sup>121</sup> *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

<sup>122</sup> *Motor Vehicles Mfr.'s Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983).

<sup>123</sup> *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87 (1983).

tions.<sup>124</sup> While *State Farm* adopted an expansive view of the standard, *Baltimore Gas* adopted a restrictive construction. Under the broad construction, if an agency relies on improper factors, fails to consider important aspects of the problem, or renders a decision that runs contrary to the evidence or is so implausible that it cannot be considered a product of agency expertise, its decision may be considered arbitrary or capricious.<sup>125</sup> This interpretation enables the reviewing court to take a "hard look"<sup>126</sup> at the factual underpinnings of the agency's decision. On the other hand, the narrow construction is more deferential, for it merely requires that the agency be capable of rationally connecting the finding of fact to the decision made.<sup>127</sup>

Thus, the extent to which a court may review agency decisions in CITES enforcement cases varies dramatically depending on which precedent the reviewing court chooses to follow. The most recent CITES enforcement case discussing the judicial review issue suggests that the courts are adopting a deferential approach and are veering away from conducting judicial review of agency decisions. In *World Wildlife Fund v. Hodel*,<sup>128</sup> the World Wildlife Fund ("WWF"), a non-profit conservation group, sought to enjoin the importation of two giant pandas (Appendix I species) from China to the Toledo Zoo.<sup>129</sup> These animals were loaned to the zoo for purposes of being placed on non-breeding exhibition for 200 days.<sup>130</sup>

Agreeing with the FWS, the *WWF* Court decided that the ESA requirement of enhancement of the survival of the species had been met, and that the CITES criterion of a "no-detriment" finding had also been satisfied. A closer look reveals, however, that the FWS may have had insufficient evidence to arrive at the conclusion that the importation of the pandas would enhance the survival of the species. The pandas were placed on non-breeding public exhibition, and it was unclear whether they were of breeding capability. If they were of breeding capability, it was also unclear whether the 200-day loan extended into the next breeding season. In effect, the FWS failed to consider these issues and as-

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<sup>124</sup> Comment, *Deference to Discretion: Scalia's Impact on Judicial Review of Agency Action in an Era of Deregulation*, 38 HASTINGS L.J. 1223 (1987).

<sup>125</sup> *Motor Vehicles*, 463 U.S. at 43.

<sup>126</sup> *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1975), cert. denied, 426 U.S. 941 (1976).

<sup>127</sup> *Baltimore Gas*, 462 U.S. at 105.

<sup>128</sup> *WWF v. Hodel*, WL 66193 (D.D.C. 1988).

<sup>129</sup> The importation requirements are as follows: (1) the specimen will not be used for primarily commercial purposes; (2) the importation will not be detrimental to the survival of the species; (3) the importation is for scientific purposes or will enhance the survival of the species. CITES, *supra* note 9, art. III; ESA, *supra* note 14, § 1539(1)(A).

<sup>130</sup> *Hodel*, WL 66193.

sumed that the pandas were non-reproductive without definitive evidence. Based on the information that was available on the breeding potential of the pandas, the FWS' determination that the ESA and CITES requirements had been met reflects the agency's poor assessment of the situation. If the reviewing Court in *WWF* had adopted the *State Farm* approach, which states that an agency's implausible conclusion or its failure to consider important aspects of a problem may render its decision arbitrary or capricious, perhaps *WWF* would have resulted in a significantly harsher order.<sup>131</sup>

3. *Judicial Reluctance to Broadly Review Administrative Action  
Involving Statutory Interpretation: An Emerging Trend in  
CITES cases?*

Although case law enforcing the Convention is sparse, it is a growing body of law with some predictable patterns. Given the statutory regime of the Convention and the numerous equivocal phrases in the treaty and the ESA, it would seem that the most common enforcement problems would stem from difficulties in statutory construction and in applying the laws of the Convention to the facts of particular cases.<sup>132</sup> The Convention is laden with ambiguous, poorly defined phrases. For example, in Appendix I importation cases, it is necessary to make an assessment of whether or not the import was for "primarily commercial purposes."<sup>133</sup> Under Appendix II, it is always necessary in export and import cases to determine whether trade will be "detrimental to the survival of the species."<sup>134</sup> In order to export or import Appendix III specimens, it is necessary to determine whether the specimen was transported in a manner "minimizing the risk of injury or damage to health."<sup>135</sup>

The *WWF* case illustrates the role statutory interpretation can play in affecting decisions in CITES enforcement cases. In *WWF*, the Court enjoined the zoo from collecting additional fees to view the panda exhibit on the grounds that compliance with the Convention requires that the import not be for primarily commercial purposes. While the decision in *WWF* is in favor of the conservationist plaintiff, the Court failed to con-

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<sup>131</sup> The court permitted the pandas to stay for the time agreed upon; however, the zoo was not allowed to collect additional entry fees.

<sup>132</sup> Under the ESA § 1538(c)(1), it is unlawful for any person subject to the jurisdiction of the United States to engage in any trade contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention, including the definitions of terms in Article I. Thus, although CITES is not self-executing, it has been incorporated by reference into the ESA and is consequently the law of the land.

<sup>133</sup> CITES, *supra* note 9, art. III.

<sup>134</sup> *Id.* art. IV.

<sup>135</sup> *Id.* art. V.

sider important elements of the case. The commercial aspects of the case extend beyond the issue of whether or not the zoo raised its entrance fees. For example, the Court ignored the fact that the zoo still profited from the increased visitation, regardless of the higher admission fees. In addition, the zoo profited from the sudden and dramatic increase in the sale of panda paraphernalia.

The difficulty in construction of the phrase "primarily for commercial purposes," which could possibly refer to monetary transactions, displays, or entertainment for profit,<sup>136</sup> raises the question of the proper scope of judicial review in *WWF*. The extent to which a reviewing court can set aside agency decisions and findings depends upon whether the issue involves a question of law or a question of fact.<sup>137</sup> In some situations, the issue involves the application of law to fact.<sup>138</sup> For judicial review purposes, sometimes such issues are treated as questions of law and sometimes as questions of fact.<sup>139</sup> If the question requires statutory interpretation in applying the law to the facts, it is viewed as a question of law.<sup>140</sup> Courts have held that for questions of law, the reviewing court is empowered to substitute its interpretation for that of the agency.<sup>141</sup>

In the CITES enforcement cases involving statutory interpretation, however, courts are unwilling to review agency action aggressively and extensively, even though they may be authorized to do so. For example, in *WWF*, the Court noted that it was conducting a review of administrative action under the arbitrary and capricious standard, but that it "may

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<sup>136</sup> Palmer, *supra* note 26, at 264.

<sup>137</sup> *Dobson v. Comm'r*, 320 U.S. 489 (1943); *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504 (1951) (whether a particular act is within the scope of an injured party's employment is a question of fact); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947) (whether foremen were "employees" within the meaning of National Labor Relations Act was a question of law).

<sup>138</sup> *Packard*, 330 U.S. 485.

<sup>139</sup> *O'Leary*, 340 U.S. 504; *Packard*, 330 U.S. 485.

<sup>140</sup> *Packard*, 330 U.S. 485; *Office Employees v. NLRB*, 353 U.S. 313 (1957) (question whether with respect to an employee, labor organizations are "employers" within the meaning of NLRA was issue of statutory construction that was question of law for courts); *Railroad Retirement Board v. Duquesne Warehouse Co.*, 326 U.S. 446 (1946) (eligibility of an employee for benefits under Retirement Act was based on service to those included in Act's definition of "employer." Whether Warehouse Company was employer was statutory construction issue for court); *Otis & Co. v. SEC*, 323 U.S. 624 (1945) (whether a plan under the Public Utility Holding Company Act may be "fair and equitable" to preferred stockholders within the meaning of those words as used by the Act was question of law for court); *SEC v. Central-Illinois Securities Corp.*, 338 U.S. 96 (1949) (whether the SEC's revised plan correctly applied the "fair and equitable" standard of the Public Utility Holding Act was statutory construction matter for court); *Davies Warehouse Co. v. Bowles*, 321 U.S. 1244 (1944) (undefined term "public utility" under Public Utility Holding Act presented statutory interpretation question for court).

<sup>141</sup> In all of these cases, the reviewing court substituted its own judgment of the meaning of the statutory term for that of the agency involved.



not . . . substitute its own judgment for that of the agency."<sup>142</sup>

A series of cases from the 1940s, however, would enable the *WWF* Court to assume a more aggressive role in judicial review. For example, in *Packard Motor Car Co. v. NLRB*,<sup>143</sup> the question presented to the Supreme Court was whether foremen and other supervisory employees were entitled to certain rights assured to employees by the National Labor Relations Act ("NLRA"). This issue required the application of law (the NLRA) to specific facts in order to determine whether foremen fell within the meaning of the word "employees" under the NLRA. The Court stated that this statutory interpretation problem presented a naked question of law that fell within its own authority to decide.<sup>144</sup>

Applying the Supreme Court's opinion in *Packard* to *WWF* would require the *WWF* Court to play a more active role in judicial review. Like *Packard*, *WWF* involved the application of law (providing that "the import [of pandas] not be for primarily commercial purposes") to a set of facts. The meaning of "primarily commercial purposes" is unclear and is susceptible to many interpretations. Under *Packard*, this statutory construction issue is a question of law within the province of the courts to handle. Thus, the *WWF* Court could have chosen to substitute its own judgment for that of the FWS.<sup>145</sup> Analyzing *WWF* in this manner permits the Court to adopt a more rigid interpretation of the law, resulting in a significantly harsher order.<sup>146</sup>

On the other hand, cases such as *NLRB v. Hearst Publications*<sup>147</sup> provide that agency constructions of broad statutory terms must be accepted if they are reasonable. According to these cases, the *WWF* Court was not wrong in stating that it was not able to substitute its own judgment for that of the agency. However, the critical point is that courts reviewing CITES enforcement actions are, in fact, empowered to replace agency interpretations with their own interpretations.

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<sup>142</sup> *WWF v. Hodel*, WL 66193 (D.D.C. 1988).

<sup>143</sup> *Packard*, 330 U.S. 485. See also K. DAVIS, ADMINISTRATIVE LAW TREATISE 370-81 (1984).

<sup>144</sup> *Id.*

<sup>145</sup> A similar type of analysis may be applied to *Caymun Turtle Farm v. Andrus*, 478 F. Supp. 125 (D.D.C. 1979). The reviewing court did not substitute its own interpretation of the statutory phrase "bred in captivity" in deciding whether Appendix I green sea turtles were exempted from CITES.

<sup>146</sup> If the *WWF* court wished to construe the phrase "not primarily for commercial purposes" as encompassing a disapproval of not only special increased admission fees but also of profit reaped from sales and greater visitation, perhaps the court would have more appropriately granted the plaintiff's request of returning the giant pandas to their reserve in China. There are any possible interpretations of the term "commercial," each with differing policy implications as to how the court should have decided *WWF*.

<sup>147</sup> *NLRB v. Hearst Publications*, 322 U.S. 111 (1944) (whether or not newsboys were employees within the meaning of the National Labor Relations Act was a question of fact).

Unfortunately, more contemporary judicial review cases merely continue the *Hearst* line of reasoning. For example, in *Immigration and Naturalization Service v. Wang*,<sup>148</sup> the meaning of the statutory term "extreme hardship" was at issue. The Court failed to mention anything about legislative history, however, and left the entire job of statutory interpretation to the administrators. In one of the most prominent deference cases, *Chevron v. NRDC*,<sup>149</sup> the Supreme Court plainly enunciated the rule that, unless there is clear legislative intent on a statutory construction, the judicial review of an agency's interpretation of a statute is limited to a determination of whether it is a permissible construction of the statute.

Nonetheless, *Chevron* and *Wang* do not overrule the *Packard* line of cases, and there is currently a glaring inconsistency in the law. Just as courts may choose between *State Farm* and *Baltimore Electric & Gas*,<sup>150</sup> they may also choose between *Packard* and the *Hearst* line of cases. In enforcing CITES and reviewing administrative action, courts must resist deferring to agencies when they are not compelled to do so. Since administrative enforcement of the Convention is weak, the judiciary is integral to ensuring that the purposes of CITES are met.

### C. Forfeiture Under the ESA

Cases involving the forfeiture provisions of the ESA have cast a different light on the rigidity of enforcement of CITES.<sup>151</sup> Perhaps this difference exists because no element of intent need be proven for any reason in forfeiture cases, and no resort to the courts is necessary for wildlife valued at \$100,000 or less.<sup>152</sup> Forfeiture actions have been less problematic in the courts than have the imposition of civil and criminal penalties.

For example, in *United States v. 3,210 Crusted Sides of Caimun Crocodilus Yacare*,<sup>153</sup> the claimants entered into a joint venture for the purpose of purchasing and shipping hides. The hides, imported in contravention of CITES and the ESA, were classified as Appendix II species

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<sup>148</sup> *Immigration and Naturalization Service v. Wang*, 450 U.S. 139 (1981).

<sup>149</sup> *Chevron v. NRDC*, 467 U.S. 837 (1984).

<sup>150</sup> See *supra* text accompanying notes 122-127.

<sup>151</sup> ESA, *supra* note 14, § 1540(e)(4)(A) provides:

All fish or wildlife or plants taken, possessed, sold, purchased, offered for sale or purchase, transported, delivered, received, carried, shipped, exported or imported contrary to the provisions of this Chapter, any regulation made pursuant thereto, or any permit or certificate issued hereunder shall be subject to forfeiture to the United States.

<sup>152</sup> *Kosloff & Trexler*, *supra* note 21, at 356.

<sup>153</sup> *United States v. 3,210 Crusted Sides of Caimun Crocodilus Yacare*, 636 F. Supp. 1281 (S.D. Fla. 1986). Forfeiture actions are proceedings *in rem* in which the property is considered to be the offender.

subject to strict regulation. While CITES requires that permits be originals or endorsed copies, the permit in this case was an unendorsed, xeroxed copy. In addition, CITES requires separate permits for each group of specimens exported and that the correct number of hides be included in the permit. In *Caimun*, since the bulk of the hides did not have appropriate documentation, the Court ruled that *all* of the hides were forfeitable. The Court reasoned that forfeiting only the offending portion of the hides would function to thwart the purposes of, and undermine the effectiveness of, CITES and the ESA.<sup>154</sup> Quoting *Tennessee Valley Authority v. Hill*,<sup>155</sup> the Court stated that in enacting the ESA, Congress intended to halt and reverse the trend toward species extinction, whatever the cost.<sup>156</sup>

Another case illustrating the ease with which the courts have enforced the forfeiture provision of the ESA is *United States v. 2507 Live Canary Winged Parakeets*.<sup>157</sup> In this case, the claimant was Pet Farm, a major importer of wildlife. The United States brought a successful forfeiture action against the birds obtained in Peru for export to Pet Farm. The Court found that CITES was violated because the Peruvian official that authorized the exportation of the parakeets did so contrary to Peruvian law.<sup>158</sup>

In any event, the forfeiture actions by themselves are unlikely to function as effective deterrents with respect to import and export violations under CITES and the ESA because forfeitures may simply be viewed by dealers in the business of illegal wildlife trade as a cost of doing business.<sup>159</sup> It is only when there is a consistent and rigid enforcement of civil and criminal sanctions that CITES will have an impact on the behavior of illegal wildlife traders.

#### D. Summary

Although the United States has one of the most sophisticated CITES implementation programs of all the signatories to the treaty, it still has much room to improve. Administrative enforcement of the Convention is very weak. The sanctions imposed on offenders by the ALJs

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<sup>154</sup> *Id.* at 1287.

<sup>155</sup> *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). In *Tennessee Valley Authority*, the Court held that despite the fact that millions of dollars had been expended on a big dam project, the project would have to cease if the snail darter, an endangered species, would suffer the risk of extinction as a result of the completion of the dam project.

<sup>156</sup> 3,210 Crusted Sides, 636 F. Supp. at 1287.

<sup>157</sup> *United States v. 2,507 Live Canary Winged Parakeets*, 689 F. Supp. 1106 (S.D. Fla. 1988).

<sup>158</sup> *Id.* at 1114-15.

<sup>159</sup> Kosloff & Trexler, *supra* note 21, at 356.

and the FWS are unduly low, even under the strict liability provisions of the ESA. Unlike the imposition of civil penalties, the one area of CITES enforcement that has met with some success is in forfeiture proceedings. However, since deterrence is a major objective of the Convention and the ESA, the successful forfeiture actions are not of much import.

Given the lenient administrative enforcement of the Convention, the judiciary is critical to ensuring that the United States meets the objectives of CITES. Judicial review is usually available under the ESA, except in those instances where agencies fail to institute proceedings. Case law establishes that the applicable standard of review under the ESA is the "arbitrary or capricious" standard. The effectiveness of this standard depends on how broadly it is interpreted. Courts should adopt a broad construction because, in so doing, they can play an integral role in CITES enforcement by taking a "hard look" at the factual underpinnings of the agency's decision. Unfortunately, courts usually adopt the narrow interpretation, which requires only a rational connection between the facts and the agency's decision. This construction usually results in deference to the agency's findings.

Although case law involving CITES and the ESA is not extensive, existing cases and the nature of the statutory regime suggest that CITES enforcement cases are most likely to arise from statutory interpretation problems. The Convention is filled with ambiguous phrases that make enforcement extremely complex. In cases involving statutory interpretation, the courts seem to defer to agency interpretations. Although contemporary cases are deferential to the agencies, there is precedent authorizing courts to substitute their judgment for that of the agency when an issue of statutory construction arises. It is essential that the courts exercise this authority in order to strictly enforce the Convention.

### CONCLUSION

Although CITES has been in effect for approximately 15 years, illegal trade in wildlife is still rampant. Smugglers take advantage of the tenuous connections between trading countries, and tourists continue to buy items made from endangered species. Nevertheless, there is some hope in this crisis. CITES has 102 members and is the most accepted conservation agreement in the world. Furthermore, the major consumers and producers of wildlife are now parties to the treaty.<sup>160</sup>

The role the ESA will play in deterring the Convention's violators depends on the degree to which the implementing legislation is used. To

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<sup>160</sup> S. FITZGERALD, *supra* note 1, at 315.

alleviate the serious problem of diminishing biological diversity world-wide, it is necessary to adhere more closely to CITES and the ESA.<sup>161</sup> Administrative enforcement of CITES is overly flexible, and thus, a greater judicial role is desirable. Given the volume of international trade in wildlife, stricter regulation is necessary to deter the commercial exploiters of endangered species. The administrative agencies responsible for implementing the ESA and CITES must be more rigid in their enforcement efforts by showing less sympathy for "innocent offenders" under strict liability provisions and by imposing higher sanctions on the violators. Further, the judiciary must play a more active role in providing a viable system of checks and balances, and not simply act as a rubber stamp on agency action. When the courts improperly limit the scope of their own review, they create a harmful barrier to determining cases on their merits. Until the executive and judicial branches demonstrate through their decisions a commitment to CITES and the ESA, we cannot be sure that the full effectiveness of the Convention will be realized.

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<sup>161</sup> There are, of course, other ways of mitigating the problem. First, in addition to CITES, saving of wildlife requires that nations do not ignore the existence of black markets. *Hope in the Elephant Graveyard*, N.Y. Times, Oct. 18, 1989, at A22, col. 1. Recently, the WWF has been attempting to convince the United States and the European Community to give substantial sums of money to support anti-poaching efforts. Second, enforcement of the Convention has been weak partly because of the insufficient number of wildlife inspectors at the ports of entry. The WWF's Wildlife Rescue Campaign involves, among other things, the training of additional FWS staff to examine shipments. *WWF Launches Wildlife Rescue Campaign*, Focus-World Wildlife Fund Newsletter, Fall 1989, at 1 (Vol. 11, No. 5). Finally, another way of helping to prevent the extinction of certain species of fauna and flora is to breed Appendix I species in captivity, as has most recently been done with the Siberian tiger and the gold monkey. *For Threatened Species, a Desperate Hope*, N.Y. Times, Jan. 2, 1990, at C4, col. 1; *Gold Monkeys Learn How to Live in Wild in Brazilian Preserve*, N.Y. Times, Oct. 17, 1989, at C21, col. 1.