JUMPING ON THE "BAN" WAGON: EFFORTS TO SAVE THE AFRICAN ELEPHANT

DAVID HARLAND[1]

According to Rudyard Kipling, the original home of the elephant was the country around the "great grey-green, greasy Limpopo River."[2] Some conservationists are now arguing that the Limpopo River, which marks the border between Zimbabwe and South Africa, may also turn out to be the *last* home of the African elephant. They argue that attempts to save the elephant by banning the ivory trade are counter-productive, and that a wiser course of action would be to ignore the ban and instead adopt a policy of economic management.[3]

The Convention on International Trade of Endangered Species of Flora and Fauna (CITES) has played a vital role in the controversy unfolding over the fate of the elephant, which may ultimately rest on the legal question of whether the elephant should be listed on "Appendix I" of CITES, labeling it as an endangered species. Ironically, the attempt to ensure the African elephant's survival may have permanently damaged CITES' ability to protect the earth's most endangered species.

NATURAL HISTORY OF THE ELEPHANT

There are two types of elephant, the African (*Loxodonta africana*) and the Indian (*Elephas maximus*). The Indian elephant bears only a small amount of ivory and is well protected. In certain parts of Africa, however, the elephant population has fallen at a very high rate. This paper, therefore, focuses exclusively on the problems of the African elephant.

Originally elephants roamed the entire African continent, from the Cape of Good Hope to the shores of the Mediterranean. About 5,000 years ago those in the north became separated from those in the south by the expansion of the Sahara desert.[4] During the period of separation the groups appear to have diverged somewhat, with the northern group becoming at least partially domesticated. Roman historians of the Punic Wars record that the armies of Carthage rode war-elephants into battle. During the Second Punic War Han-

---

David Harland is a candidate for the M.A.L.D. at The Fletcher School of Law and Diplomacy. Recently he served as editorial assistant to the Executive Director of the United Nations Environment Programme.

1. The author wishes to thank George Furness, Senior Advisor to CITES, for his generous assistance in preparing materials for this article.

2. Rudyard Kipling, *Just So Stories* (Garden City, N.Y.: The Country Life Press, 1912), 65.

3. Richard Garstang, "The Ivory Ban Issue," Report for the Congressional Sportsmen's Caucus, September 1989, 7.

4. Convention on International Trade of Endangered Species of Flora and Fauna (CITES), "Amendments to Appendices I and II of the Convention," Seventh Meeting of the Conference of the Parties, Lausanne, October 1989, Proposal of the Government of Kenya (Hereinafter "Kenya Proposal"), 25a.

nibal brought thirty-seven of the animals with him on his expedition through Spain, France and Italy—even crossing the Alps in snow.[5] It is doubtful, however, that domestication ever advanced very far, and it seems likely that the military impact of the Carthaginian elephants was more psychological than physical. Ultimately, the African soldiers were trampled by their own rampaging elephants at the Battle of Zama in 202 B.C.[6]

From the 3rd century B.C. to the 2nd century A.D. two factors worked against the survival of the North African elephant: Roman agriculture pushed southward, and the Sahara desert (perhaps for related reasons) pushed northward. Hunters exterminated the remaining herds of North African elephants sometime in the 3rd century A.D.[7]

In contrast, elephant populations south of the Sahara seem to have remained relatively stable, declining rapidly only after the European expansion of the 18th century. European settlement started in the far south of the continent, and elephant herds in that part diminished roughly in inverse proportion to immigration. The South African elephant population is still relatively small. Although elephants were close to extinction by the turn of the century in the area of what is now Zimbabwe, herd numbers there have grown again. In fact, Zimbabwe, with approximately 70,000 elephants, now is closer to its natural carrying capacity than almost any country on the continent.[8]

The African elephants that survive are the largest land animals in the world. An adult male can weigh as much as six tons and stand up to four meters tall at the shoulder. Mature females grow to somewhat over half the size of the bulls.[9] In normal circumstances an African elephant could live to seventy years, but given the premium poachers put on killing older and larger animals, it is unlikely that more than a small percentage of the elephants alive today are much over half that age. Furthermore, population growth is relatively slow, even in ideal conditions, partly due to the female gestation period of twenty-two months. There is some dispute as to exactly how fast elephant populations could grow if they were fully protected and able to live in a favorable environment. Data from Zimbabwe suggest that 5-6 percent might be the natural maximum rate of population increase.[10]

Biologists believe that the African environment in its current condition should be able to carry a population of about two million elephants. An additional factor, however, is that in the long term there is a strong negative correlation between human population density and elephant numbers. Thus, given the very rapid rate of human population growth in Africa, it can be predicted, *ceteris paribus*, that elephant numbers will decline dramatically over the next several decades.[11]

5. Montgomery of Alamein, *A History of Warfare* (New York: The World Publishing Company, 1968), 90.
6. Ibid., 94.
7. CITES, "Kenya Proposal," 25a.
8. CITES, "Elephants and Ivory Trade in Southern Africa," Seventh Meeting of the Conference of the Parties, Lausanne, October 1989, Doc. 7.43.4., Annex 5.
9. L. Laursen and M. Bekoff, "Loxodonta africana," *Mammalian Species* No. 92 (1978): 1-8.
10. CITES, "Elephants and Ivory trade in Southern Africa," Annex 1.
11. United Nations Environment Programme (UNEP), *The African Elephant* (Nairobi: UNEP, 1989), 27.

In fact, population surveys show that elephant populations are already falling extremely rapidly. Based on Kenyan statistics, "estimates of the population trends suggest that the African elephant may have lost between 42.3 percent and 73.1 percent of its population during the past decade. In some regions, loss rates of 90 percent have been recorded."[12] This decline is so precipitous that some scholars are predicting that if the trend is not reversed immediately the elephant will be extinct everywhere in Africa, except, perhaps, in the Limpopo region. The government of Kenya claims that "the most optimistic predictions calculate that the elephant may survive in nature another ten or twelve years. More pessimistic projections predict the loss of viable populations within three or four years."[13]

While growth of the human population has contributed to this decline, poaching for ivory is believed to be the main cause.[14] There is a strong and increasing demand for ivory on the world market, and killing elephants is the easiest way to profit from that market.

Ivory

Unfortunately, perhaps, all elephants bear ivory. Two thousand years ago, Pliny the Elder remarked on the insatiable demand for ivory throughout the Roman Empire, and wondered whether that demand might not drive elephants to extinction in the near future. While ivory continued to be prized as a luxury good, Pliny's predictions proved to be premature. Indeed opponents of the ban on the ivory trade sometimes claim that, like Pliny, modern conservationists are worrying needlessly about the fate of the elephant.[15]

Artificial substitutes for ivory do exist, and are available at relatively low prices. To the trained eye, however, the real product is readily distinguishable from the human-made one. It is unlikely that even higher quality artificial ivory products could ever be promoted as market substitutes for real ivory, partly because ivory's value—as with gemstones—comes from the very fact that it is natural and rare. Its market price, in other words, is largely an expression of its scarcity value.

Some natural substitutes for ivory exist, such as hippopotamus teeth and walrus tusks. Indeed, with the recent decline in elephant populations, poachers have already begun to turn their attention to these other species, particularly the hippopotamus.[16] In the long run they do not provide a promising alternative, however, as they themselves are vulnerable to over-exploitation and extinction.

---

12. CITES, "Kenya Proposal," 26a.
13. Ibid., 27a.
14. UNEP, *The African Elephant*, 9.
15. Ian Parker, *Ivory Crisis* (London: Chatto and Windus, 1983), 11.
16. CITES, "Views of the CITES Secretariat on Potential Problems Raised by the Inclusion of the African Elephant on Appendix I," Lausanne, 1989.

ELEPHANT ECONOMICS

The purpose of an international agreement concerning the African elephant, whether it be a ban or an ivory quota system, is to preserve the elephant through economic levers. A ban seeks to close down demand for ivory. A quota system seeks to regulate supply at a sustainable level. Neither solution is entirely straightforward.

Live Elephants

Unlike the Indian elephant it appears that the African elephant cannot be domesticated easily. Thus, the value of live elephants is not as beasts of burden, but rather i) as a source of tourist revenue; ii) as a "keystone species" in the African ecosystem and iii) in terms of "option value", or "existence value."

Of these values, tourist revenues are the easiest to quantify, although even here the matter is not simple. Tourists (mainly Westerners) visit Africa every year to see the wilderness and the wildlife. Although tourists rarely go to Africa specifically to view elephants, the elephant is an important element of the experience they are paying for. How important? Initial surveys conducted in Kenya estimate that the Kenyan tourist industry could bear an "elephant preservation tax" of up to 3 percent of the total cost of an average tourist's itinerary. A group of British economists has concluded from this that in Kenya approximately US$25 million per annum could be levied on the elephant's behalf.[17]

. . . surveys conducted in Kenya estimate that the Kenyan tourist industry could bear an "elephant preservation tax" of up to 3 percent . . .

These results, however, should be treated with caution. First, "willingness to pay" surveys are not generally believed to be particularly accurate. Second, Kenya is something of a special case, in that it already has a highly developed tourist industry. Thus, all that can be said with any certainty, is that live elephants have some value as a tourist attraction, ranging from millions of dollars per annum, in such areas as Kenya, to somewhat less in other areas.

The second major value that economists ascribe to the African elephant, is that of a "keystone species." A keystone species is one which is so important

17. Ivory Trade Review Group (ITRG), "The Ivory Trade and the Future of the African Elephant: Volume 1" (Oxford: International Development Center, 1989), 24.

that its disappearance would massively disrupt the ecosystem in which it had lived, damaging the flow of revenues from that ecosystem. The keystone hypothesis revives Aldo Leopold's view that "a system of conservation based solely on economic self-interest is hopelessly lop-sided. It tends to ignore, and thus eventually to eliminate, many elements in the land community that lack commercial value, but that are (as far as we know) essential to its healthy functioning."[18]

The concept of "option value" or "existence value" assumes that there is a value in protecting now what might be useful later, or what we would not want to be without later.[19] Thus, the African elephant should be ascribed an economic value at least equal to the sum of what people are willing to pay to protect it, regardless of whether or not they intend to "consume" the product, for example, through tourism.

Because no attempt has been made to quantify these values, and doing so may prove impossible, they are difficult to account for in any legal arrangement to protect the elephant.

Dead Elephants

Dead elephants yield ivory. Thus, the value of dead elephants is to be found in the high price ivory commands on the world market. From 1953 to 1983 the known annual volume of ivory traded on the world market rose steadily from about 200 tons to about 1,000 tons. Since 1983 it has fallen again to about 200 tons per annum for reasons that are unclear. During the same period, however, ivory demand has continued to rise, and just in the last few years prices in some markets have increased by up to 300 percent.[20] The average gross annual market value of raw ivory on the world market over the 1980s has fluctuated considerably, but has averaged between $50-60 million.[21]

After the tusks are removed from the elephants, they are shipped as "raw ivory" to a number of entrepots for carving and transshipment. The United Arab Emirates, Hong Kong, Macao and China have all played a prominent role in this respect in recent years, though the pattern changes somewhat from year to year as one country after another accedes to the CITES treaty.[22]

The "worked ivory" then is released again onto the world market. Japan takes about 40 percent, using it mainly in the production of small signature seals, or "chops." About 20 percent ends up in the European Community where it is turned into piano keys, chess sets and various other luxury goods. Another 15 percent finds its way to the United States for similar uses. Much of the rest is scattered throughout Asia, where there is a strong latent demand that approximately parallels income levels. A few states in southern Africa

18. Aldo Leopold, *A Sand County Almanac* (New York: Oxford University Press, 1966), 225-226.
19. B. Weisbrod, "Collective-Consumption Services of Individual-Consumption Goods," *Quarterly Journal of Economics* Vol. 78 (1964): 206.
20. Conservation, Environment and Animal Protection NGOs, "Open Letter to the Executive Director of the United Nations Environment Program," 16 October 1989, 2.
21. ITRG, 22.
22. David Harland, "The Ivory Trade," *New Scientist* (7 January 1988): 30.

have ivory carving industries, but these are minor, consuming about 30 tons of ivory per annum.[23] It is believed that about 80 percent of the total revenue from ivory is earned outside of Africa.

In addition, dead elephants yield hides, meat and other incidental products. These command more modest prices than ivory on the international market, but are viewed as important by some African countries (notably Zimbabwe) for the role they play in the local economy.

A Theoretical Framework for Regulation

The ideal system of international regulation would maximize revenues from elephants—both living and dead—while minimizing the incentive to reduce the elephant populations.

In theory there is no reason why these goals should be antagonistic. It makes sense that if one has a high-yield resource, then one would want to preserve that resource, so as to secure an indefinite stream of revenues. Furthermore, there is no theoretical reason why an efficient management system could not secure the maximum possible yield from living elephants *and* the maximum possible yield from dead elephants. Managers who wanted to maximize revenues from live elephants would presumably do so by keeping herd sizes close to their natural maximum levels. This would offer the greatest satisfaction to tourists, and would provide the greatest demographic stability for the elephant population as a whole. Managers who wanted to maximize revenues from dead elephants would *also* want herd numbers to be kept high (so that there are more elephants to cull), and would want to discourage any killing of elephants that caused the population to fall below maximum sustainable yield.

In specific terms managers should allow elephant numbers to grow to the natural carrying capacity of the available land, and then cull the animals at the margin of increase, that is, at 5-6 percent per annum. Such calculations have been completed for several states in southern Africa. The results show that South Africa could be taking a sustainable annual ivory harvest of about four tons. Zimbabwe could take up to twenty-five tons, and Botswana could take over thirty tons.[24] Even if there were objections to killing elephants, it would seem rational to have a system for collecting ivory from elephants that die naturally.

However, as with golden egg-laying geese, the system does not always work the way it should. This is explained easily by an analysis of who reaps the benefits compared with who pays for the elephant.

Who benefits from the elephant? The first and most obvious beneficiaries are poachers. For them the elephant is common property. They have no incentive to spare elephants, because if they do not kill elephants when they can, their rivals will. The poachers operate in what economists refer to as "open access equilibrium," that is, they have maximum incentive to destroy

23. CITES, "Kenya Proposal," 29a.

24. CITES, "Elephants and Ivory Trade in Southern Africa," Annexes 1 and 2.

in the short term, and minimum incentive to preserve.[25] They have an effective discount rate of infinity: and this is a normal recipe for ecological disaster.

The second major group of beneficiaries are the processing industries which buy raw ivory and sell worked ivory. In part because ivory is readily transportable, because Africa's borders are notoriously porous, and because few Africans have developed their own ivory carving, most of these industries are outside of the African continent. Therefore the value that is added to ivory by carving very rarely returns to the African governments which own the elephants.[26]

The third major group of beneficiaries is the Western public. The Western public gains satisfaction from knowing that there are African elephants in the world, but they do not have to pay for this unless they join a safari. They are, in economic terms, "free riders."

. . . elephant benefits accrue to the Western world, Japan, China, Hong Kong and the United Arab Emirates. The costs, on the other hand, fall on each African country . . .

Benefit is, of course, only one side of the equation. It is also necessary to ask who pays the costs associated with the African elephant. Ultimately, the answer is the African public, though in different ways. First, there are the costs that fall directly onto members of the African public. These consist mainly of the damage done to farmland by elephants that have strayed out of their home ranges. In some countries this is so severe that it is a major cause of illegal elephant killing. Second, there are the costs that fall onto African governments (and indirectly onto the tax-paying public). These are two-fold. There is one set of costs associated with keeping up the park system, trying to control poaching and generally managing a difficult public asset. The other cost borne by the government is the opportunity cost of the land on which the elephants live. This can range from negligible, as in much of the Kalahari desert, to very high, as in parts of Zimbabwe where elephants compete directly for access to pasture land.

The vast majority of elephant benefits thus accrue to the Western world, Japan, China, Hong Kong and the United Arab Emirates. The costs, on the other hand, fall on each African country that hosts elephant populations.

25. Theodore Panayotou, *Natural Resources and Development: Economics Policy and Management* (forthcoming), 6.
26. Harland, 30.

The main reason the African elephant population is declining is that the revenues that accrue from elephants do not go to the people who have to protect the resource—the owners. Naturally, therefore, the owners underinvest in elephant protection.[27] An international agreement should address this by making it difficult for non-owners to capture the revenues, and making it more profitable for owners to invest in protection. Viable approaches might include the control of poaching, the encouragement of ivory carving in Africa, and the discovery of ways for tourists to pay for the elephant as a factor of their African experience.

Given the difficulties many African nations have had in controlling poaching, attention must shift to demand management, that is, controlling the amount of ivory that is bought by Western and Japanese consumers. The three principal options that emerge are: i) ban the import of ivory altogether; ii) put quotas on the amount of ivory allowed to enter the countries of final consumption, or, iii) try to work out some combination of the above.

An Ivory Trade Ban

The rationale behind a ban is as follows: there is elephant poaching because there is a market for ivory. Therefore, if one were to ban the trade in ivory, the ivory market would collapse and the pressure on the elephant would be reduced.

Proponents of this approach argue that banning trade in endangered species is easier than banning other forms of undesirable trade, such as narcotics or weapons, because demand is highly elastic (i.e. people do not really mind whether they buy ivory or some other luxury item, and they are not willing to break the law to get ivory). This argument is reinforced by the fact that public concern about the African elephant is presently very high, and that the Western ivory-consuming public would be receptive to a ban.

Supporters of the ban argue that a ban, particularly at the import end, is relatively easy to enforce at the national level. This is an important consideration for an international agreement that will have to operate without large-scale backing from international organizations.

Opponents of the ban argue that "an international ban on the ivory trade will force the legal trade underground and endanger the species' long-term survival."[28] As evidence, they point to the 1974 ban on the international trade in rhinoceros horn. "Although rhinoceros horn was banned fifteen years ago, their numbers have dwindled from 15,000 to 3,000."[29]

Even the United Nations Environment Programme (UNEP), which has a long history of supporting international environmental law and which now supports a ban, argued in mid-1989 that "a complete ban on the ivory trade

27. ITRG, 32.

28. Embassy of South Africa, "Elephant Conservation and the Proposed International Ban on Ivory Trade" 1989, 2.

29. Interview with Anthony Hall-Martin, *The New York Times*, 23 January 1990, C5.

is unlikely ever to be successful,"[30] a gloomy prediction from one of the major sponsors of the ban.

Opponents of the ban also point out that elephant poaching is most severe in countries which have already banned killing elephants. They point to Kenya which banned hunting in the 1970s, only to watch its elephant population plunge by 85 percent from the time of the ban to the present.[31] The countries in southern Africa which have resisted a ban, in contrast, have been able to turn the elephants to a rational economic use and thus produce an incentive for elephant protection. One prominent wildlife specialist has called this "a new post-colonial conservation ethic."[32]

A Quota System

Such a system would ban all ivory that was not certified as coming from approved government sources. Supporters claim that a quota system fulfills two of the requirements mentioned above: it provides a mechanism for thwarting poachers, and, it provides an incentive to manage the herds well. The governments of Botswana, South Africa and Zimbabwe have been tireless in arguing the merits of the quota system, claiming that an ivory quota system is not only a viable economic system, but that, given the sanction of international law, it even takes on a moral aspect: offering a way for African countries to show that they can stand on their own feet. Yet quota systems are difficult to enforce, and may be beyond the institutional management capacity of the international community.

Hybrid Systems

More dubious are systems which would ban ivory from those countries which want to ban it, and legalize it for those countries which want to develop a legal trade. Hybrid systems fail almost all of the criteria listed above. They provide no incentive to reduce poaching because there is still a market on which to sell poached ivory. They provide no mechanism for ensuring that revenues from elephants are brought back to the African continent. They are immensely unwieldy and almost certainly beyond the enforcement, and even the monitoring, capacity of the international bodies that would serve as a secretariat to any legal instrument to protect the elephant.

CITES

The Convention on International Trade of Endangered Species of Flora and Fauna (CITES) has been, and remains, the only international framework within which meaningful steps have been taken to provide legal protection for the elephant. It is through CITES that future initiatives will havce to be chan-

30. UNEP, *The African Elephant*, 37.
31. Maria Battiata, "Poaching of Wildlife Out of Control," *The Washington Post*, 3 November 1988, 13.
32. Garstang, 6.

neled, and to understand the limits of these, it is necessary to examine CITES itself.

CITES is a creation of the International Union for the Conservation of Nature (IUCN). The Convention (adopted in Washington, March 3, 1973, and entered into force July 1, 1975), has 104 Parties, and is administered by a permanent secretariat provided by UNEP.[33] The objective of the Convention is to identify endangered species of flora and fauna, and to regulate trade in those species in such a way as to ensure their survival. It regulates the trade by requiring the issuance of import/export permits without which customs authorities will not allow animals or animal parts to pass. At CITES meetings the State Parties decide which species are worth saving, and which are not. CITES places all the species with which it is concerned on one of three Appendices, each of which affords a different level of protection.[34]

Appendix I includes

> all species that are threatened with extinction and that are, or may be, affected by trade. No permits are issued for international trade in these species except in very exceptional circumstances.[35]

An Appendix I listing bans the commercial trade in a particular species. It is the highest level of protection offered to a species under the CITES convention. An Appendix I listing can mean the difference between survival and extinction. Appendix II includes

> species which might become endangered if trade were not controlled and monitored. Trade is permitted in these species providing the proper permits are obtained from the appropriate national body of the exporting country . . . .National authorities limit the number of permits issued—thus effectively establishing export quotas for each species.[36]

Thus, Appendix II offers a more limited protection than Appendix I. It allows trade to be monitored, it puts some limits on the trade, but it stops well short of a total ban. Appendix III provides a still lower level of protection.

Every two years there is a Meeting of the Conference of the Parties at which Parties may, *inter alia*, propose an amendment that particular species be moved from one Appendix to another. At the first Meeting of the Conference of the Parties, held in Berne in 1976, it was agreed that certain criteria would be applied in determining whether or not a species could be moved from Appendix II to Appendix I and vice versa. Article 1 of the relevant decision

---

33. UNEP, "Register of International Treaties and Other Agreements in the Field of Environment," UNEP/GC.15/Inf.2, 1989, 117-119; and CITES, Doc. 7.43.1, Annex (Prepared by Simon Lyster of the World Wildlife Fund).
34. CITES, Arts. III, IV, V.
35. UNEP, "CITES," UNEP Environment Brief Number 8, 1989, 2.
36. Ibid.

states that "to qualify for Appendix I, a species must be currently threatened with extinction."[37]

In the dispute over the status of the African elephant at the Seventh Meeting of the Conference of the Parties, the Berne Criteria took on considerable importance. Zimbabwe and others argued that the African elephant, *as a species*, "does not qualify for inclusion in Appendix I since it is not currently threatened with extinction."[38] In other words, just because *some* populations in *some* countries are threatened with extinction, does not qualify a species for an Appendix I listing under the Berne Criteria. This does seem to be the correct reading of Article 1 of Conference 1.1. Kenya, Tanzania and others disputed this narrow interpretation, arguing that "the Berne Criteria provide a flexible approach for listing species in Appendix I."[39] On what legal basis they decided the Berne Criteria were "flexible" is not clear.

If two-thirds of the Parties present and voting agree, and the Berne Criteria have been met, then, after ninety days, proposed amendments will come into force, and regulations will be applied according to the new status of the species concerned. Parties may take reservations with respect to amendments to the Appendices, provided that they formally notify the Depository Government (Switzerland) in writing before the amendment comes into force.[40]

The Status of the Elephant Under CITES

Until the Seventh Meeting of the Conference of the Parties in October of 1989, the African elephant was listed on Appendix II of CITES; i.e. trade was controlled, but not banned.

Certain additional measures were adopted in 1985 under Article IV of the Convention at the request of a number of African governments. These put in place a controversial system of ivory export quotas, which each state was to establish on its own annually. Quotas were monitored by an elaborate system of marks, codes and permits, overseen by the CITES secretariat.[41]

The African Elephant and Rhino Specialist Group (AERSG) reported to CITES in 1987 that the success of the export quota system "was more apparent than real."[42] The export quota system failed the criteria elaborated above in several ways. First, and perhaps most important, it was an exercise in supply management. As stated above, supply management is unrealistic when the municipal legal orders of the supplier nations are so weak. For example, Kenya announced in September 1988 that it had passed laws to "shoot poachers on sight." The immediate effect was negligible.[43] International law could be very much more effective if it could bring to bear the enforcement mechanisms of

37. CITES, "The Berne Criteria," First Meeting of the Conference of the Parties, Conf. 1.1, 1976.
38. CITES, "Elephants and Ivory Trade in Southern Africa," 7.1., 7.
39. CITES, "Kenya Proposal," 27a.
40. CITES, Art.XV.
41. UNEP, *The African Elephant*, 33-37.
42. African Elephant and Rhino Specialist Group (AERSG), "Elephant Population Estimates, Trends, Ivory Quotas and Harvests," Report to CITES Secretariat, Doc. 6.21, Annex 2, 1987, 38.
43. Battiata, 13.

the developed countries by controlling the trade on the demand side. Second, the quota system supported the existence of an ivory market and thus encouraged poaching, without providing adequate measures to combat poaching. And third, the quota arrangement provided no mechanism for returning elephant revenues to the countries of origin.

The 1985 measures led to widespread disillusionment. The Ivory Trade Review Group (ITRG) declared that "the CITES Ivory Control Procedures are utterly unequal to their task."[44]

. . . a total ban . . . left lingering doubts as to whether it will help or hinder efforts to save the elephant.

In mid-1989 several African governments, led by Kenya, announced that under Article XV of the Convention they were going to seek a CITES amendment moving the African elephant onto Appendix I. Kenya argued in its submission to CITES that "after four years of experience, it is evident that the Quota System does not work." [45]To reinforce that point, and to signal his intention to end the ivory trade once and for all, Kenyan President Daniel arap Moi publicly burned that nation's stock of confiscated ivory.

Both Japan and the United States, the world's largest consumers of ivory, announced that they, too, would support a total ban on ivory imports. Japan complied grudgingly, but the United States banned ivory imports unilaterally, and then went even further by announcing that it would propose an amendment to move the African elephant onto Appendix I of CITES.[46]

The Solution Adopted at "Cites Seven"

The Seventh Meeting of the Conference of the Parties to the Convention (CITES Seven) was held in Lausanne, Switzerland from October 9 to October 20, 1989. At that meeting the Parties opted for a total ban, voting to move *Loxodonta africana* onto Appendix I of the Convention.[47] It was one of the most controversial decisions ever taken by the Parties, and has left lingering doubts as to whether it will help or hinder efforts to save the elephant.[48]

44. ITRG, 12.
45. CITES, "Kenya Proposal," 29a.
46. CITES, USA Proposal.
47. CITES, Plen. 7.4, 1.
48. UNEP, "Results of the 1989 CITES Conference," 89/4, 1.

Earlier in 1989 it was already clear that CITES Seven would involve a major split in the conservation community. The pro-ban lobby was headed by Kenya, and actively supported by Tanzania, the United States and others: a total of seven nations lodged proposals for an Appendix I listing. The anti-ban lobby was led by Zimbabwe, with active support from Botswana, Malawi, Mozambique, South Africa and Zambia.[49]

Prior to the Meeting of the Conference of the Parties the CITES Secretariat circulated a number of documents indicating that it would prefer to improve the existing quota system rather than to scrap it all together. It pointed out that

> although many well-intentioned individuals, organizations and governments believe that the highest-protection status that CITES can provide would improve the situation of the African elephant, the Secretariat feels obliged to call attention to the potential drawbacks of such a proposal . . . .the transfer to Appendix I would not contribute to the conservation of the African elephant, and may in fact be counter-productive.[50]

In the same paper the CITES Secretariat also stressed legal procedure, noting that "the so-called Berne Criteria for the transfer of species from Appendix II to Appendix I have not been met by the African elephant at the species level."[51]

The pro-ban community was outraged by the CITES papers. In a public denunciation they referred to the publications as "an unprecedented breach of diplomatic protocol."[52] The CITES Secretariat was unrepentant, however, insisting that Article XV of the Convention required the Secretariat to formulate its own recommendations and to circulate these to the Parties.[53]

The CITES Secretariat was also opposed by non-governmental conservation organizations and much of the scientific community. Perhaps the most influential of the scientific studies prepared prior to CITES Seven was the 700-page report of the Oxford-based Ivory Trade Review Group. They argued that "the Berne Criteria are met . . . the danger to the elephant is real, continental and therefore justifies the transfer of the elephant to Appendix I."[54] South Africa countered that "the credentials of the ITRG have been challenged, and their competence to evaluate the continental African elephant issue have been questioned."[55] But it was too late: the pro-ban lobbyists had the initiative, and were ready with their amendments when the Meeting of the Conference of the Parties convened on October 9.

---

49. Paul Brown, "The African Elephant Wins a Reprieve," *The Guardian Weekly*, 22 October 1989.
50. CITES, "Views of the CITES Secretariat on Potential Problems Raised by the Inclusion of the African Elephant on Appendix I," Lausanne, 1989.
51. Ibid.
52. Conservation, Environment and Animal Protection NGOs, 1.
53. CITES, Art. XV.2.c.
54. ITRG, 34.
55. Garstang, 5.

From the ensuing debate it emerged that the pro-ban forces would be able to muster the two-thirds majority required to put in place a total ban on the ivory trade. Efforts by Botswana, Malawi, Mozambique, Zambia and Zimbabwe to come up with alternative solutions were rejected, despite considerable prodding from the CITES Secretariat, which had published guidelines for no fewer than five alternatives to a total ban in a document entitled "Options for Conserving the African Elephant Within the Framework of CITES."[56] Efforts to make exceptions for the trade in hunting trophies, sponsored, ironically, by the United States, were also defeated.[57]

The deliberations reached a level of bitterness spectacular even in the conservationists' long tradition of internecine conflict. This culminated in pro-ban partisans implying that the Secretary-General of CITES had been taking bribes from ivory dealers, by publicly expressing their "concern" at the "lack of control of the receipt of funds from ivory traders and other wildlife trade interests."[58]

Committee I, which was the major forum for substantive debate, rejected various compromise solutions, including the "split-listing" proposal of the International Union for the Conservation of Nature. This proposal would have offered full Appendix I protection to the northern herds, while allowing the southern herds to be managed according to a somewhat more liberal regime. The Committee also rejected proposals by Cameroon, Congo and Gabon that those countries be allowed to opt out of a total ban.[59]

Finally, the Committee adopted an amendment of the Somalia proposal that called for the

> . . . transfer of all populations of *Loxodonta africana* from Appendix II to Appendix I, with the provision that the Seventh Meeting of the Conference of the Parties shall establish a panel of experts . . . to advise the Parties on requests for transfer of particular elephant populations back to Appendix II.[60]

Aside from the "Panel of Experts" clause, the efforts of South Africa and Zimbabwe had been totally defeated. The radical proposals of Kenya and the United States had passed with only the most minor concessions.

If the southern Africans hoped for a more sympathetic hearing in the full Plenary, they were to be disappointed. Zimbabwe argued cogently that the worst of all possible results would be an ineffective or incomplete ban; that given that the southern African states had no intention of complying with a ban, an incomplete ban was all the Meeting could hope for; and thus that the Parties might as well work together to put in place a more effective quota

56. CITES, "Options for Conserving the African Elephant within the Framework of CITES," Lausanne, June 1989, Appendix to IVORY/22/DH/eg.

57. CITES, "Draft Resolution of the Conference of the Parties: Quotas for Export of Hunting Trophies of African Elephants," Com. 7.19.

58. Conservation, Environment and Animal Protection NGOs.

59. CITES, Doc. 7.43.7.

60. CITES, Somalia Amendment, Doc. 7.43.8.

system. The arguments were rejected. The legal question of the Berne Criteria was finessed. The Plenary passed the Somali proposal by a vote of seventy-six in favor, eleven against, and four abstentions.[61]

Under Article XV.2.1 of the Convention, the amendment came into force on 18 January 1990, with the African elephant joining its Indian cousin on Appendix I. Of the eleven countries that had opposed the ban, only Zimbabwe took immediate advantage of its rights under Article XV.3 to enter a formal reservation. Botswana, Malawi and Mozambique publicly announced that they would defy the ban, though they did not enter formal reservations until some time later. When the amendment came into force, Botswana, China, Hong Kong, Malawi, South Africa, Zambia and Zimbabwe had opted out. India was wavering.

CITES Seven has left a disturbing legacy . . .

Japan, the world's largest importer of ivory, announced that it would accept the terms of the ban.[62] South Africa, somewhat to the surprise of the international community, expressed willingness to comply with the general terms of the amendment—despite having taken a reservation.[63] On 30 October 1989, G. J. Kotze, Minister of Environmental Affairs announced that "in a spirit of good will and in the considered best interests of the elephant, despite the future loss of revenue for nature conservation, a voluntary moratorium on trade in ivory will be observed at least until the end of 1990."[64]

The world's non-Party states (there are fifty-seven of them) are not bound by the amendment, and some of them, such as the United Arab Emirates, are likely to continue to trade in poached and smuggled ivory.

CONCLUSION

The resolution to move *Loxodonta africana* onto Appendix I of the Convention was an ambiguous achievement. The international ivory trade is now banned by CITES; yet some major ivory processing nations—notably Hong Kong and China—have signaled their contempt for the ban by announcing business as usual.[65] They obviously believe that the ban will not stop the

61. CITES, Plen. 7.4.

62. Brown, "The African Elephant Wins a Reprieve."

63. Embassy of South Africa, 2.

64. South Africa, Government Press Release 26/89.

65. William K. Stevens, "Britain Exempts Hong Kong from Ivory Ban," *The New York Times*, 23 January 1990, C5. Hong Kong is represented by the United Kingdom at CITES Meetings. The reservation entered on Hong Kong's behalf is limited to six months and to existing stockpiles of ivory.

ivory trade, and they intend to channel ivory onto the rump market. Continued supplies of raw ivory from Zimbabwe and elsewhere seem assured.

On the other hand, all the major ivory-consuming countries have accepted the ban mandated by the Appendix I listing. They are hoping, no doubt, that their resolve will be enough to kill the ivory trade by strangling demand. They may be right, though it still remains to be seen whether killing the ivory trade is an intelligent way to save the elephant.

Whichever way it turns out, CITES Seven has left a disturbing legacy which may make it more difficult to save species in the future. First, the Appendix I listing encourages countries with elephants to trade with non-Parties. The amendment adopted effectively prohibits any *imports* of elephant products for commercial purposes, but it does not prohibit the *export* of these products, provided that export permits have been legally issued under Article III.2 of the Convention.[66] The result of this is that smugglers' entrepots such as the United Arab Emirates will remain viable, and will be able legally to purchase ivory which they will then try to resell in Asia and the West. A little more legal homework could have eliminated this loophole.

A second point of concern involves the allegations that the Secretary-General of CITES wrongfully collaborated with ivory smugglers.[67] Those allegations were made in the most public and political of fora, and undoubtedly did great damage not only to the individuals concerned, but to the CITES system as a whole. The Deputy Executive Director of UNEP remarked that he was "concerned at the manner in which the NGOs chose to make such serious accusations against the CITES Secretariat in public."[68] A total of twenty-eight organizations signed an open letter implying that members of the CITES Secretariat were taking bribes, misusing funds, and exceeding their authority. So far the accusers have produced no evidence to support their claims, and have taken no steps to pursue their charges through legal channels. It may be that by making these allegations, pro-ban lobbyists succeeded in convincing Parties to vote in favor of a ban, but one is compelled to ask, at what cost?

CITES would not function without a credible Secretariat. If members of the public have evidence that the Secretariat has been corrupted, then there are fora in which they can make their cases. And if their allegations are found to be fair, then the relevant officials can be replaced, and the work of the Secretariat can continue. By leveling unsubstantiated allegations in full public view, however, the pro-ban partisans did a disservice to themselves, and profoundly damaged the credibility of the Convention and its Secretariat. It was an expensive way to score points.

Third, the Parties demonstrated their willingness to violate international law by setting aside the Berne Criteria. Whatever the merits of the other anti-ban arguments, it cannot be denied that the elephants in southern Africa are *not* threatened with extinction, and are *not* threatened by the ivory trade.

---

66. CITES, Doc. 7.43.1, Annex, 12, 6.

67. Conservation, Environment and Animal Protection NGOs, 1.

68. UNEP, "CITES Meeting—UNEP Responds to 'Open Letter' from NGOs," Press 89/50.

Indeed, the elephant populations in southern Africa are growing, and the profits from the ivory trade are recycled directly back into efforts to offer even higher levels of protection for those herds.[69] This being the case, *Loxodonta africana* did *not* qualify for upgrading under the Berne Criteria. Arguments that "the Berne Criteria are flexible" misrepresent the facts.

It is tempting to argue that the Parties were simply unaware that they were contravening the Berne Criteria.[70] This argument, unfortunately, is not borne out by investigation. In its resolution on "Terms of Reference for the Panel of Experts on the African Elephant and Criteria for the Transfer of Certain African Elephant Populations from Appendix I to Appendix II," the Parties stated that they were "aware that . . . populations of elephants in certain African states which may not meet the criteria provided for in Resolution Conf. 1.1, adopted at the 1st Meeting of the Conference of the Parties (Berne, 1976), were transferred to Appendix I."[71] Thus, the Parties willfully violated the Berne Criteria, and so denied Zimbabwe and other southern African states the protection of the very legal instrument they had undertaken not only to uphold but to strengthen. This is a disturbing precedent, for if the Parties cannot find remedies within the framework of the Convention, they will seek remedies *outside* the framework of the law.

Finally, whatever its short-term merits, the ban is an undesirable longterm solution. Economic viability should be the strongest weapon in the protection of a resource. The role of international law should be to make sure that economic viability is a realistic option for the owners of that resource. By rejecting the views of Botswana, South Africa and Zimbabwe so flatly, the Parties turned their backs on just such a realistic option. By rejecting petitions that would have allowed for even a limited trade in hunting trophies, the Parties demonstrated shortsightedness: undermining licensed hunting in southern Africa in this way did nothing to protect the elephant, but did cut off park revenues that have been used traditionally to stop poaching.

The "Panel of Experts" to consider downgrading certain populations is clearly inadequate, not only because its existence implies the mistaken belief that a mixed solution is viable, but also because there is little faith among anti-ban countries that the panel will make any progress at all towards setting aside groups of elephants for rational economic management.

By being overzealous to jump on the ivory "ban" wagon, Parties did damage to an industry that may be the only real mechanism for saving the elephant. The CITES Convention was damaged by the same enthusiasm, as was the CITES Secretariat. Although it is unclear whether the elephant is any safer now than it was in 1989, it is very clear that cleaning up the mess left behind by CITES Seven will be a mammoth problem.

---

69. CITES, 7.43.4.; 7.5; 7.

70. This is what happened at the Sixth Meeting of the Parties when the *Pteropus* species received a "split-listing" in direct contravention of Article I of the Convention.

71. CITES, Conf. 7.9.